THE LEGAL AID SOCIETY
JUVENILE RIGHTS PRACTICE
MANUAL FOR CHILDREN'S LAWYERS

Volume Two: Representing Children In Juvenile Delinquency Proceedings Part One: Preliminary Proceedings, Competency, Pleas, Petitions, Speedy Trial, Discovery, And Privacy Issues

Gary Solomon
October, 2018

Copyright c The Legal Aid Society, New York, N.Y. 2018. All Rights Reserved. No part of this work may be reproduced or transmitted without the prior written permission of The Legal Aid Society.

Table Of Contents

Chapter One: **Privacy Of Records And Proceedings** 1

Chapter Two: **Procedures From Arrest Through Probable Cause Hearing** 28
.
Chapter Three: **Competency To Stand Trial** 93

Chapter Four: **Admissions And Plea Bargaining** 111

Chapter Five: **Legal Sufficiency Of Petition** 177

Chapter Six: **Statutory Speedy Trial** 248

Chapter Seven: **Discovery And Subpoenas** 294

CHAPTER ONE

PRIVACY OF PROCEEDINGS AND RECORDS

By: Gary Solomon

Table Of Contents

I. First Amendment Right Of Access To Court Proceedings

II New York Law On Access To Court Proceedings

- A. Family Court Rules
- B. Family Court Act
- C. Case Law

III. Prior Restraints And Sanctions For Disclosure

- A. First Amendment Limitations
- B. Conditional Admission
  - 1. Selective Exclusion
  - 2. Order/Promise Not To Disclose
- C. "Gag" Orders Directed At Parties

IV Access To Records

- A. First Amendment Right Of Access
- B. Common Law Right Of Access
- C. General Family Court Act Rule
- D. Access By Parties
- E. Limitations On Re-Disclosure
- F. Article Three Provisions
  - 1. Sealing
  - 2. Unsealing
  - 3. Expungement
  - 4. Use Of Records In Other Courts
  - 5. Police Records
  - 6. Fingerprints, Palmprints And Photographs

7. Protection From Adverse Consequences

G. Removal Cases

I. First Amendment Right Of Access To Court Proceedings

In criminal cases, the general public and press have a qualified First Amendment right of access to trial. Given the presumption in favor of access, which is based on a long history of open trials and the First Amendment's role in ensuring an unfettered debate and flow of information, closure must be supported by a showing of a compelling governmental interest and must be narrowly tailored to serve that interest. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (Massachusetts statute under which press and public were excluded in all cases during testimony of minor sex offense victim violated First Amendment; protection of victims is a compelling interest, but does not justify closure in all cases); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

This presumption has been extended to phases of a criminal proceeding other than trial. *Press-Enterprise Co. v. Superior Court (Enterprise II),* 478 U.S. 1 (1986) (right of access to preliminary hearings as conducted in California); *Press-Enterprise Co. v. Superior Court (Enterprise I)*, 464 U.S. 501 (1984) (jury voir dire); *Associated Press v. Bell*, 70 N.Y.2d 32 (1987) (public and press may have First Amendment right of access to suppression hearings, and defendant bears the burden of showing that the right to a fair trial would be jeopardized by publicity; court notes that "suppression hearings pose a peculiar risk in that adverse pretrial publicity could inflame public opinion and taint potential jurors by exposing them to inadmissible but highly prejudicial evidence," but "it is apparent that a hypothetical risk of prejudice or taint cannot justify categorical denial of public access ..."); *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430 (1979) (defendant failed to show sufficient basis for excluding public and press from pretrial mental competency hearing in rape case; court notes that motion to exclude must be made in open court and reasons for closure must be given in open court, but defense may ask that certain portions of argument be held *in camera* if the very information which is deemed prejudicial will be disclosed during argument); *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988) (right of access to plea hearings). *But see Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979), *aff'g* 43 N.Y.2d 370 (1977) (court upholds exclusion of press from suppression hearing and temporary denial of access to transcript).

Consistent with these principles, some controversy has developed as to whether Civil Rights Law §52, which prohibits the broadcasting of court proceedings and became relevant again after statutory authorization (*see* Judiciary Law §218) for audio and video coverage of court proceedings was allowed to lapse, is unconstitutional. Thus far, however, the courts have upheld the constitutionality of the statute. *See Courtroom Television Network LLC v. The State of New York*, 5 N.Y.3d 222 (2005) (Court of Appeals notes, inter alia, that press has no right of access superior to that of general public; that §52 does not prevent press from attending trials and reporting on the proceedings; and that the Court has not explicitly recognized a State constitutional right to public and press access to trial court proceedings, and now declines to interpret Article I, §8 more broadly than its Federal counterpart); *Matter of Santiago v. Bristol*, 273 A.D.2d 813 (4th Dept. 2000), *lv denied* 95 N.Y.2d 848 (right of public access does not include right to broadcast, and trial court had no authority to allow media to intervene for purpose of broadcasting proceedings); *People v. Kopp*, 195 Misc.2d 475 (County Ct., Erie Co., 2003) (§52 not unconstitutional); *see also Heckstall v. McGrath,* 15 A.D.3d 824 (3rd Dept. 2005) (judge erred in permitting presence of television and still cameras while interpreting §52 as precluding audiovisual coverage only during testimony of subpoenaed witnesses); *People v. Hernandez*, 2002 WL 31885498 (County Ct., West. Co., 2002) (still photography not permitted); *People v. Boss*, 182 Misc.2d 700 (Sup. Ct., Albany Co., 2000) (absolute ban is unconstitutional).

Despite the absence of a long tradition of public access, two Family Court judges have found a presumption of openness in juvenile delinquency proceedings. *Matter of M.S.*, 173 Misc.2d 656 (Fam. Ct., West. Co., 1997); *Matter of Chase*, 112 Misc.2d 436 (Fam. Ct., N.Y. Co., 1982). However, there is good reason to believe that there is no such presumption. *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995) (across-the-board closure would violate First Amendment, but court opines in dicta that an assumption that delinquency proceedings are open is a dubious one); *United States v. A.D.*, 28 F.3d 1353 (3rd Cir. 1994) (same holding as in *Three Juveniles*, and court notes that *Globe* is not controlling as to closure in federal delinquency proceedings and that no "centuries-old tradition of openness exists for juvenile proceedings"); *State ex rel.*

Plain Dealer Publishing Co. v. Geauga County Court of Common Pleas, 734 N.E.2d 1214 (Ohio 2000) (while finding that closure was an abuse of discretion, court concludes that news media did not have qualified constitutional right of access, including at proceedings on motion to transfer case to adult court; juvenile court may restrict public access if, after hearing argument, court finds that there is a reasonable and substantial basis for believing that child could be harmed or fairness of adjudication could be endangered, that the potential for harm outweighs the benefits of public access, and that there are no reasonable alternatives to closure); *see also Herald Co. v. Mariani*, 67 N.Y.2d 668 (1986) (after removal of juvenile offender case, Family Court standard governed release of transcript); *State v. James*, 902 S.W.2d 911 (Tenn. 1995) (court sets out rules, including: party seeking to close hearing has burden of proof; court shall not close proceedings to any extent unless it determines that failure to do so would result in particularized prejudice to party seeking closure that would override public's compelling interest in open proceedings; order of closure must be no broader than necessary to protect determined interests of party seeking closure; court must consider reasonable alternatives to closure).

II. New York Law On Access To Court Proceedings

A. Family Court Rules - In 1997, amidst substantial publicity advertising a new openness in the Family Court, the Rules of the Family Court were amended to provide that "[t]he Family Court is open to the public. Members of the public, including the news media, shall have access to all courtrooms, lobbies, public waiting areas and other common areas of the Family Court otherwise open to individuals having business before the court."22 NYCRR §205.4(a). The court may exclude the general public or any person from a courtroom on a case-by-case basis, and the court may consider, among other factors, whether (1) the person is causing or is likely to cause a disruption in the proceedings; (2) the presence of the person is objected to by one of the parties, including the child's attorney, for a compelling reason; (3) the orderly and sound administration of justice, including the nature of the proceeding, the privacy interests of individuals before the court, and the need for protection of the litigants, in particular, children, from harm requires that some or all observers be excluded from the courtroom;

(4) less restrictive alternatives to exclusion are unavailable or inappropriate to the circumstances of the particular case. 22 NYCRR §205.4(b). In addition, "[w]hen necessary to preserve the decorum of the proceedings," the court shall instruct admitted persons regarding the permissible use of the courtroom and other court facilities, assignment of seats to media personnel on an equitable basis, and any other matters that may affect the conduct of the proceedings and the well-being and safety of litigants. §205.4(c).

B. Family Court Act - Although the public and many Family Court practitioners and professionals had always had a general sense that Family Court proceedings were confidential, that was not really the case even prior to the 1997 amendment of the Family Court Rules. The former §205.4 granted the court discretion without any presumption in either direction. In addition, FCA §341.1 merely provides that the court *may* exclude the general public and admit only such persons and representatives of authorized agencies as have a direct interest in the case.

C. Case Law - It is probably true that, after amendment of the Family Court Rules and the attendant publicity, courts will be somewhat more willing to admit the public. What is certainly true is that general and unspecified concerns about the risks of publicity will not be persuasive; the case law makes it clear that the party seeking to exclude the public should be prepared to present supporting evidence, such as affidavits from mental health professionals concerning potential harm to the children, or allegations regarding the likelihood that new and sensitive details will be disclosed in court. *Compare Matter of Ruben R.*, 219 A.D.2d 117 (1st Dept. 1996), *lv denied* 88 N.Y.2d 806 (child's attorney presented affidavits regarding a negative impact on the children; court excludes press "[i]n light of the extraordinarily sensitive and personal nature of the information ... coupled with the strong evidence presented that publication of this information would be harmful to the children and the impossibility of protecting the children's right to privacy due to the previous disclosure of the children's identities ...") and *Matter of Katherine B.*, 189 A.D.2d 443 (2d Dept. 1993) (affidavit provided by psychologist) *with Matter of M.F.,* 12 Misc.3d 1164(A) (Fam. Ct., Bronx Co., 2006) (affidavits of treating psychiatrist and therapist alleged that publicity was likely to

exacerbate respondent's suicidal condition due to facility's inability to control families of other residents, but court notes, *inter alia*, that respondent's condition deteriorated even after initial press coverage ceased, and that less restrictive alternatives were available, including directing press not to print names). *See also In re T.R.*, 556 N.E.2d 439 (Ohio 1990), *cert denied* 498 U.S. 958 (social worker asserted that continued publicity would increase risk of harm).

The courts have recognized that the child's attorney, in particular, is placed in an awkward position when the court admits the media. In *In re T.R.*, 556 N.E.2d 439, the court noted that "the presence of the media would place [the child's counsel] in 'an untenable position' when deciding what evidence to present," and would force counsel to "weigh the psychological harm to [the child] posed by the disclosure of evidence against the value of evidence needed to support her case."

III. Prior Restraints And Sanctions For Disclosure

A. First Amendment Limitations - In *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), the media attended a juvenile delinquency detention hearing with the knowledge of counsel and the court and without objection. The media learned the 11-year-old juvenile's name, and also photographed him as he left the courthouse. The court later enjoined the media from disclosing the juvenile's name or his photo. The Supreme Court held that the court's order constituted a prior restraint which violated the First Amendment. Similarly, in *Smith v. Daily Mail Publishing*, 443 U.S. 97 (1979), the Supreme Court held that the media could not be punished for disclosing a name which was lawfully obtained from a source such as the police, the prosecutor, or a witness. In a footnote in *Smith*, the Supreme Court expressed the hope that, if the courts make their purposes and methods clear, the media will police themselves when deciding whether to release information. *See also Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (First Amendment violated where damages were imposed on newspaper which published name of rape victim, which had been obtained from publically released police report; although it was unlawful for officials to disclose report, it was not unlawful for newspaper to receive it); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (First Amendment violated where civil damages award was entered against television station

for broadcasting name of rape-murder victim, which was obtained from courthouse records).

The First Amendment might not act as a bar to prior restraint or to post-disclosure punishment where there has been some impropriety in the acquisition of information. In *Florida Star*, the Supreme Court did not reach the question of whether unlawful acquisition of information and subsequent disclosure may be punished consistent with the First Amendment. 491 U.S. at 535, n. 8. *See also Bowley v. City of Uniontown Police Department*, 404 F.3d 783 (3rd Cir. 2005) (First Amendment barred imposition of liability on newspaper that published juvenile arrest information that was released unlawfully by police); *Hays v. Marano*, 114 A.D.2d 387 (2d Dept. 1985) (reporter could not be precluded from publishing information gleaned from public court file in which Grand Jury testimony had inadvertently been placed); *Natoli v. Sullivan*, 159 Misc.2d 681 (Sup. Ct., Oswego Co., 1993) (media could be held liable for publishing information from illegal wiretap which was given to media by private individuals who made the recording).

B. Conditional Admission - Under the Supreme Court cases, and 22 NYCRR §205.4(b)(4), the court is required to consider less restrictive measures than complete closure.

1. Selective Exclusion - A possible solution when the court wishes to admit media representatives, but is concerned about disclosure of the information acquired, is to close the courtroom during those portions of the proceeding during which sensitive information will be aired. *But see Matter of Ruben R.*, 219 A.D.2d 117 (partial closure procedure rejected because it would cause too much disruption and there was no way to know in advance when it would be necessary; court also notes that presence of press can cause party to alter presentation). Of course, additional problems will develop when the media asks to be present during argument regarding which portions of the proceeding should be confidential. Arguably, so that the parties may freely argue the closure issue without being concerned about publicity, the court may limit press access to oral argument and to the papers submitted. In *Ruben R.*, the child's attorney refrained from discussing the details during oral argument in Family Court, and instead

submitted materials under seal.

2. Order/Promise Not To Disclose - The Supreme Court First Amendment decisions have the effect of limiting the court's power to admit the public and thereafter prohibit or punish the disclosure of information acquired while a person was lawfully inside the courtroom.

However, it is far from clear that these rules apply when a court order admitting the media contains a condition of entry requiring the media not to disclose certain information acquired in court. In *Matter of S. Children*, 140 Misc.2d 980 (Fam. Ct., Orange Co., 1988), the court, while noting that opening the Family Court will help the public understand the seriousness of the system's problems, decided to admit the press. At the same time, the court directed the press not to publish certain information until the parent could attempt to obtain a stay of the court's order admitting the press, but the press published information anyway. Although the press cited the Supreme Court's First Amendment prior restraint cases, the court held that it could set, and punish the violation of, conditions, and noted that the Supreme Court decisions did not involve conditions imposed by a court sitting in a closed proceeding. The court stated: "It is clear that this court which is obligated to restrict public access, including the press, can set conditions and restrictions when permitting access to its proceeding [citation omitted]." 140 Misc.2d at 986. *See also Matter of Jane*, 163 Misc.2d 373 (Fam. Ct., Ulster Co., 1993) (court admits reporter and directs that he be given transcripts, but precludes disclosure of name, residence and other identifying information other than age, sex and interrelationships of parties and witnesses, and disclosure of names of people who reported possible abuse or neglect to the hotline or in confidence, and also precludes coverage *outside* the Family Court building of persons whose identities are confidential; court specifically notes that it has a duty under the Civil Rights Law to restrict the use of the name of an alleged child sex abuse victim, and orders that the child's name not be published even if the reporter has independent knowledge of the child's identity).

C. "Gag" Orders Directed At Parties - The court does have some authority to issue a "gag" order directing the parties and counsel not to communicate information to

the media. *Compare In re T.R.,* 556 N.E.2d 439 (trial court did not abuse discretion in imposing gag order in consolidated custody and abuse/neglect litigation, but the order, which enjoined the adult parties and their counsel from communicating any information about the child or the custody litigation, was overbroad since, taken literally, it prohibited parties and their counsel from discussing the case with one another) and *In re J.S.*, 640 N.E.2d 1379 (Ill. App. Ct., 2d Dist., 1994) (gag order prohibiting parties and attorneys from discussing facts of underlying custody and dependency actions with members of news media was not unconstitutionally overbroad) *with Anonymous v. Anonymous*, 203 A.D.2d 283 (2d Dept. 1994) (insufficient evidence to justify gag order which prohibited father or any person acting in his behalf from discussing his petition to impose certain conditions on mother's custody of child).

IV. Access To Records

A. First Amendment Right Of Access - There is a qualified First Amendment right of access to the records of a criminal proceeding. However, although documents submitted in connection with hearings which were or would be open to the public can be obtained, other documents, such as discovery documents, are not related to matters subject to the First Amendment right of access and are covered only by the common-law right of access to court records. *People v. Burton*, 189 A.D.2d 532 (3rd Dept. 1993) (newspaper was entitled to access to court file in rape/murder case; court notes that Civil Rights Law §50-b does not preclude disclosure of identity of deceased sex crime victim, and a broader construction of §50-b mandating denial of public access to court documents in all sex offense cases would raise serious First Amendment questions). *See also People v. Garlick*, 144 A.D.3d 605 (1st Dept. 2016), *lv denied* 29 N.Y.3d 948 (no bar to public disclosure of surveillance videotape of incident); *The Hartford Courant v. Pellegrino*, 371 F.3d 49 (2d Cir. 2004) (public and press had qualified right of access to docket sheets); *In re Newsday, Inc.*, 4 A.D.3d 162 (1st Dept. 2004), *appeal dism'd* 3 N.Y.3d 651 (access denied as to materials submitted in support of search warrant, since application process has historically not been open to public); *United States v. Haller*, 837 F.2d 84 (access to plea agreements); *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987) (qualified right of access to documents filed in connection with pretrial motion

to suppress); *Dorsett v. Nassau County*, 800 F.Supp.2d 453 (EDNY 2011) (court leaves in place protective order prohibiting plaintiff from publishing outside of the litigation a police Internal Affairs Unit Report obtained during discovery; plaintiff is not precluded from discussing case in public, or discussing contents of IAU Report if she obtains information from source other than discovery); *People v. Williams*, 29 Misc.3d 1222(A), 2010 WL 4608687 (Sup. Ct., Nassau Co., 2010) (press entitled to videotapes allegedly depicting defendant engaged in conversations with undercover officer, and other related materials, where videotapes were admitted into evidence without objection and played for jury, and defendant asserted in conclusory fashion that release of evidence and media coverage may prejudice right to fair trial); *People v. DeBeers*, 3 Misc.3d 315 (County Ct., Ontario Co., 2004) (court refuses to seal People's CPL §710.30 Notice containing reference to confession); *People v. Hodges*, 172 Misc.2d 112 (Sup. Ct., Kings Co., 1997) (press given access to defendant's written confession, but could not photocopy it).

B. Common Law Right Of Access - There is also a common law presumption in favor of access to court records. *Nixon v. Warner Communications*, 435 U.S. 589 (1978); *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 153, n. 4 (1987) (newspaper not entitled to jurors' names and addresses; right applies to documents which have been entered into evidence or filed in court). In *United States v. Amodeo*, 71 F.3d 1044 (2d Cir. 1995), the court concluded that the presumption of access is strongest when the material plays a role in the judge's determination, somewhat weaker when the filing is unusual or under seal, and non-existent when documents, such as discovery documents passed between the parties, play no role in the court's adjudicative function. *See also Kaczynski v. San Francisco Examiner,* 154 F.3d 930 (9th Cir. 1998) (court upholds order releasing to media and public portions of defendant's psychiatric competency report); *In re Newsday, Inc.*, *supra,* 4 A.D.3d 162 (no access to search warrant materials given need to protect identity of confidential informant and avoid compromising ongoing investigation); *People v. Burton*, 189 A.D.2d 532 (newspaper entitled to access to court file in rape/murder case).

C. General Family Court Act Rule - "The records of any proceeding in the family

court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records." FCA §166; *Matter of Demesyeux*, 39 Misc.3d 1209(A) (Surrogate's Ct., Nassau Co., 2013) (application under §166, which does not render family court records confidential and merely provides that they are not open to indiscriminate public inspection, must be made in family court). *Compare People v. Steven Santos*, 1 Misc.3d 909 (Sup. Ct., N.Y. Co., 2002) (People not entitled to disclosure to assist them in deciding whether to seek death penalty) *with People v. Malaty*, 4 Misc.3d 525 (Sup. Ct., Kings Co., 2004) (People granted access to records of defendant's custody proceeding where they asserted that statements made by defendant during proceeding would rebut his defense in forgery prosecution).

D. Access By Parties - Subject to limitations and procedures set by statute and case law, the following individuals/entities shall be permitted access to the pleadings, legal papers formally filed in a proceeding, findings, decisions and orders and, subject to the provisions of CPLR 8002, transcribed minutes of any hearing held in the proceeding: (1) the petitioner, presentment agency and adult respondent and their attorneys; (2) when a child is a party to, or the child's custody may be affected by, the proceedings, the parents or persons legally responsible and their attorneys; the guardian, guardian ad litem and the attorney for the child; an authorized representative of the child protective agency involved in the proceeding or the probation service; an agency to which custody has been granted by court order and its attorney; and (3) when a temporary or final order of protection has been issued in a support, paternity, custody/visitation or family offense proceeding, a prosecutor where a related criminal action may be commenced; and, when a criminal action has been commenced, the prosecutor or defense attorney in accordance with Criminal Procedure Law procedures. 22 NYCRR §205.5(a), (b), (d).

E. Limitations On Re-Disclosure - Family Court Rule 205.5 does not indicate whether a person/entity may re-disclose documents acquired lawfully pursuant to the Rule. In *Matter of Jane*, 163 Misc.2d 373, the court held that, in the absence of a statute or rule preventing it, the respondent mother in a neglect proceeding was entitled to turn

over transcripts and pleadings to a reporter, and the court refused to restrain publication of information contained in the documents. On the other hand, even if §205.5 does not itself preclude re-disclosure, it appears that, while First Amendment scrutiny is required, the court does have some power to prohibit the dissemination of information in certain circumstances. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the court upheld a protective order which prohibited the defendant in a defamation case from disclosing certain information obtained during the discovery process, concluding that a litigant's freedom to disseminate information obtained during discovery is not absolute under the First Amendment, and that an order prohibiting dissemination before trial is not the type of prior restraint that requires exacting First Amendment scrutiny.

In addition, there are several statutory provisions which characterize certain types of records as confidential, and therefore, could be read to preclude re-disclosure without the permission of the court. One example is Family Court Act provisions providing for the parties' access to mental health evaluations and probation reports and records. *See* FCA §351.1(5)(a) ("[a]ll diagnostic assessments and probation investigation reports shall be submitted to the court and made available by the court for inspection and copying by the presentment agency and the respondent ..."); FCA §351.1(6) ("[a]ll reports or memoranda prepared or obtained by the probation service for the purpose of a dispositional hearing shall be deemed confidential information furnished to the court and shall be subject to disclosure solely in accordance with this section or as otherwise provided for by law").

F. Article Three Provisions

1. Sealing - Upon termination of a delinquency proceeding in the respondent's favor, the clerk of court is required to immediately notify the child's attorney, the director of the presentment agency, and the heads of the probation department and police department or other law enforcement agency, that the proceeding has terminated in favor of the respondent. See *Matter of Barnett v. David M. W.*, 22 A.D.3d 575 (2d Dept. 2005) (sealing order in youthful offender case covered official documents, including results of breathalyzer and blood alcohol tests administered by law enforcement personnel as integral part of proceeding, *and*

information contained therein, but accused can be forced to answer questions about facts underlying the incident); *People v. Bundy*, 60 Misc.3d 518 (Justice Ct. of Town of Penfield, Monroe Co., 2018) (People could use documents from sealed case involving same charges that was dismissed for facial insufficiency where People filed within 30-day window within which the People could appeal and case was not yet sealed); *Matter of Carolina K.*, 55 Misc.3d 352 (Fam. Ct., Kings Co., 2016) (recording of 911 call covered by sealing statute); *People v. Cordeiro*, 24 Misc.3d 526, 876 N.Y.S.2d 636 (Town of Webster Justice Ct., Monroe Co., 2009) (People could not use deposition filed with previous accusatory instrument that was dismissed for facial insufficiency); *see also Lino v. The City of New York*, 101 A.D.3d 552 (1st Dept. 2012) (in class action challenging inclusion of sealed records in “stop and frisk” database, court holds that CPL §§ 160.50 and 160.55 create private rights of action which allow plaintiffs to seek enforcement of statute).

More importantly, the clerk shall also provide notification that any records of the proceeding must be sealed, unless the court has directed otherwise in the interest of justice upon the presentment agency’s motion to prevent sealing. FCA §375.1(1). *See Matter of Dashawn Q.*, 112 A.D.3d 1250 (3d Dept. 2013) (court declines to seal psychiatric and sex offender records which were relevant to neglect case pending against respondent’s mother that involved respondent and eight siblings, and "numerous acts of sexual abuse [alleged to have occurred] between siblings in the [mother's] household and the [mother's corresponding] failure … to protect the children from [such] abuse”); *People v. Nicholas*, 19 Misc.3d 1144(A), 2008 WL 2369755 (Watertown City Ct., 2008) (court grants People’s motion to bar sealing in child endangerment prosecution in which defendant left 18-month-old child alone in vehicle strapped into car seat in public parking lot for over 25 minutes with motor running while she had tanning session; in analysis, court borrows factors found in CPL §170.40, the dismissal in the interest of justice statute); *People v. Tyre*, 19 Misc.3d 1144(A), 2008 WL 2369753 (Watertown City Ct., 2008) (court bars sealing in 3 child endangerment cases in which defendant left children alone in vehicle); *People v. Nicholas*, 19 Misc.3d 322 (Watertown City Ct., 2008) (because People may exercise right to oppose sealing

unless they have waived that right as part of a plea bargain, defendant, before entering plea, is entitled to notice of possibility that sealing will not be ordered; "public stigma" that remains if sealing is not ordered would be "direct consequence" of plea); *People v. I.S.*, 4 Misc.3d 984 (Tuckahoe Village Ct., West. Co., 2004) (record is not deemed sealed on day of acquittal, since People must have opportunity to make motion); *see also* CPL §160.60 (arrest and prosecution of matter terminated in favor of defendant ”shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution”).

It is not clear that the respondent may bargain away the opportunity to obtain sealing of a case that is dismissed in exchange for an admission in another case. *See*, *e.g.*, *Matter of Alexis W.*, D-9981/14, NYLJ 1202717065446, at *1 (Fam., BX, Decided January 13, 2015) (where respondent made admission on one docket to cover two, with understanding that second docket would be dismissed but “remain unsealed,” and plea case was later adjourned in contemplation of dismissal, court grants motion to seal at end of ACD period, concluding that unsealing agreement meant that docket would remain unsealed during pendency of disposition in plea case and respondent did not permanently give up right to move for sealing; “The only reason to keep a dismissed case on the record of this young woman would be to persistently stigmatize her beyond her diligent and laudable efforts to elevate her behavior and ameliorate her situation”).

The sealing requirement does not apply to “public court decisions or opinions or records and briefs on appeal ....” Also, it has been held that the accused has no standing to object to the use of sealed records from a proceeding involving a third party. *People v. Encarnacion*, 29 Misc.3d 490 (Sup. Ct., Bronx Co., 2010) (defendant lacked standing to object to use of sealed records of prosecution of third party).

A delinquency proceeding shall be considered terminated in favor of the respondent when: the petition is withdrawn; the petition is dismissed as defective or in furtherance of justice; the petition is dismissed after an adjournment in contemplation of dismissal; the petition is dismissed after a probable cause hearing; the petition is dismissed after trial; the petition is dismissed after a fact-finding because of insufficient proof that the respondent requires supervision, treatment or confinement; the probation

department adjusts the case or terminates the case without adjustment prior to the filing of a petition; the presentment declines to file a petition; or the petition is dismissed on speedy trial, double jeopardy or statute of limitations grounds. FCA §375.1(2). *See also Matter of Demesyeux*, 39 Misc.3d 1209(A) (Surrogate's Ct., Nassau Co., 2013) (insanity acquittees not entitled to sealing); *People v. O'Brien*, 193 Misc.2d 500 (Sup. Ct., Richmond Co., 2002) (defendant not entitled to sealing of charges that were dismissed prior to entry of guilty plea); *People v. Schleyer*, 192 Misc.2d 113 (Rochester City Ct., 2002) (same as *Tucker*). Probation when it adjusts a case, and the presentment agency when it declines to prosecute, must notify the other record-keeping agencies, which are then required to seal the records. FCA §375.1(4), (5).

In some instances, the proceeding has not yet been "terminated" in favor of the respondent if the presentment agency has taken an appeal. FCA §375.1(2)(b), (c), (d). *See, e.g., People v. Sanchez*, 8 Misc.3d 900 (Crim. Ct., N.Y. Co., 2005).

These sealing requirements have been strictly enforced. In *Matter of Alonzo M.*, 72 N.Y.2d 662 (1988), Probation violated the statute when it included, in a dispositional report, information concerning sealed cases. The court noted that Probation's maintenance of separate records was an "audacious" violation of the respondent's rights, but allowed that "background facts" from sealed matters may be revealed if derived from independent sources. *See also Matter of Mi-Kell "V"*, 226 A.D.2d 810 (3rd Dept. 1996) (respondent failed to support contention that proceedings referred to in probation report were, in fact, terminated in respondent's favor; court also holds that prior PINS petitions could be cited since FCA Article Seven contains no sealing requirement). In *People v. Ellis*, 184 A.D.2d 307 (1st Dept. 1992), *lv denied* 80 N.Y.2d 929, the court held that a prosecution witness properly denied the existence of prior arrests and that the prosecution was not obliged to disclose the sealed information.

Evidence flowing indirectly from a violation of sealing rules is not suppressible unless a constitutionally-protected right is implicated. *People v. Patterson*, 78 N.Y.2d 711 (1991); *People v. Stewart*, 161 A.D.3d 1108 (2d Dept. 2018) (no error in admission of audio recording of telephone conversation defendant had with victim, and transcript of conversation); *People v. Capers*, 129 A.D.3d 1313 (3d Dept. 2015) (no suppression

where photograph of juvenile that should have been destroyed pursuant to FCA §354.1 was used in photo array); *People v. Vega*, 116 A.D.3d 454 (1st Dept. 2014), *lv denied* 24 N.Y.3d 965 (even if sealed, defendant's prior inconsistent statements would not necessarily have been inadmissible); *Matter of Quadon H.*, 55 A.D.3d 834 (2d Dept. 2008); *People v. Torres*, 291 A.D.2d 273 (1st Dept. 2002), *lv denied* 98 N.Y.2d 681 (2002); *see also People v. Saqline K.*, _A.D.3d_, 2018 WL 4472902 (2d Dept. 2018) (court lacked power to suppress confidential presentence report in immigration proceedings). Arguably, however, sealed information itself may not be used at trial. *Matter of Dashawn Q.*, 112 A.D.3d 1250 (3d Dept. 2013) (in neglect proceeding, court discounts testimony of psychologist who reviewed sealed materials since "there is no meaningful way to gauge the impact of those materials upon the opinion he ultimately rendered"); *Matter of T.P.*, 51 Misc.3d 738 (Fam. Ct., Kings Co., 2016) (court strikes testimony of officer who, before testifying, reviewed records of dismissed criminal proceeding that were covered by sealing statute).

Sealed records shall be made available to the respondent or his designated agent [*see Matter of Elijah P.*, 128 A.D.3d 830 (2d Dept. 2015) (court erred in preventing respondent from introducing criminal complaint from sealed case allegedly containing prior inconsistent statements made by child to detective; Second Department cites CPL § 160.50(1)(d), under which records shall be made available to, among others, person accused or such person's designated agent)], and probation's records and papers shall be available to probation for the purpose of complying with statutory provisions governing adjustment. FCA §375.1(3). *See also* FCA §308.1(6) (probation may provide relevant record of adjustments to presentment agency).

After a respondent's sixteenth birthday, or, commencing October 1, 2018, after a respondent turns 17,or, commencing October 1, 2019, after a respondent turns 18, he/she may file a *post-adjudication* motion to seal. The court may grant the motion in the interest of justice. FCA §375.2. *See In re Giovanni G.*, 152 A.D.3d 419 (1st Dept. 2017) (no error in denial of motion to vacate adjudication and seal records where respondent's interests were adequately protected by "automatic confidentiality" of family court records and fact that adjudications do not entail civil disabilities; respondent failed

to substantiated claim that adjudication might subject him to sex offender registration if he relocates to another state; and sealing records could impede use by law enforcement agencies for legitimate purposes if respondent engaged in further criminal activity); *In re Rosa R.*, 68 A.D.3d 407 (1st Dept. 2009) (sealing of record of assault adjudication and conditional discharge denied given serious nature of assault; respondent's interests are adequately protected by general confidentiality of Family Court records and fact that juvenile delinquency adjudications do not entail civil disabilities, and sealing records could impede their use by law enforcement agencies for legitimate purposes if respondent engages in further criminal activity); *In re Carlton B.*, 268 A.D.2d 368 (1st Dept. 2000) (motion denied given serious nature of assault, and relevance of case to upcoming Parole Board determination); *Matter of M.S.*, 37 Misc.3d 1223(A) (Fam. Ct., West. Co., 2012) (court grants sixteen-year-old respondent's motion for order sealing records and destroying fingerprints in arson case in which respondent entered admission to misdemeanor criminal mischief and was placed on probation for one year, where respondent had successfully completed probation and done well in school, and seemed to be on road to becoming productive member of society); *Matter of Kiara C.*, 31 Misc.3d 1245(A), 2011 WL 2477541 (Fam. Ct., Queens Co., 2011) (court grants motion to seal records of manslaughter case involving death of infant to whom respondent gave birth in bathtub where unfortunate events were result of sex offense perpetrated against respondent when she was impregnated by 18-year-old boyfriend, separation and divorce of parents led to emotional distress and feelings of isolation and psychological damage before respondent became pregnant, and respondent complied with probation conditions, was 19 years old, intended to pursue career as professional in field of automotive technology, and had no further involvement with criminal justice system; "The adjudication of juvenile delinquency in this case was never intended to constitute a Scarlet Letter which must be forever displayed to the public at large, and the notion of imposing punishment is contrary to the purposes underlying the juvenile delinquency statute"); *Matter of Donald R.*, 26 Misc.3d 1239(A), 2010 WL 1006696 (Fam. Ct., Queens Co., 2010) (21-year-old respondent's motion for sealing of record of burglary charges granted where respondent had successfully completed the period of

probation, there was no evidence that he had subsequent contact with juvenile or adult criminal justice systems, he had completed High School and enrolled in college and would receive his Bachelor of Arts degree, he had enlisted in Army National Guard and achieved rank of Specialist and was a member of the United States Air Force, and wished to pursue career in law enforcement and should be permitted to pursue that objective without possible stigmatizing effects caused by juvenile delinquency adjudication); *Matter of A.B.*, 13 Misc.3d 1242(A) (Fam. Ct., Nassau Co., 2006) (sealing ordered after respondent earned early discharge from probation); *Matter of K.B.*, 10 Misc.3d 1063(A) (Fam. Ct., Nassau Co., 2005) (motion not barred as premature where respondent was still on probation, but motion denied since court would need access to file if violation of probation were filed); *Matter of Hiram G.,* 123 Misc.2d 911 (Fam. Ct., Bronx Co., 1984) (in deciding to seal records, court identified and considered the following factors: the nature of the charge; the history of the respondent and the composition, structure and characteristics of his family; the respondent's revealed characteristics and behavioral patterns and inclinations; the likelihood that the respondent will continue his behavior; the community's interest in the respondent and his development and the probability of future need for access to information; the value, importance and meaningfulness of the information and history to agencies likely to be involved with the respondent); *see also In re Darwin P.*, 146 A.D.3d 682 (1st Dept. 2017) (while finding no error in denial of ACD in sex crime prosecution, court notes that statutory remedies such as sealing would minimize likelihood that adjudication would subject respondent to sex offender registration in another jurisdiction); *People v. Pettinato*, 22 Misc.3d 140(A), 2009 WL 596556 (App. Term, 9th & 10th Jud. Dist., 2009) (courts have inherent power to seal their own records, but power, exercised rarely, has been wielded when there has been showing of need to protect individual who might unjustly be injured by indiscriminate availability of records); *People v. Siddons*, 34 Misc.3d 1240(A) (Dist. Ct., Nassau Co., 2012) (sealing ordered where 1995 guilty plea was conditioned upon defendant waiving sealing rights, and existence of record was adversely affecting defendant's ability to pursue career).

2. <u>Unsealing</u> - There is no authority in FCA Article Three for the

unsealing of records except for the statement in FCA §375.1(3) that sealed records shall be made available to the respondent or his designated agent and that probation's records and papers shall be available to probation for the purpose of complying with statutory provisions governing adjustment. There are more exceptions in CPL §160.50(1)(d), which presumably do not apply in juvenile delinquency proceedings.

A court may not grant an application to unseal a record unless there is specific statutory authorization or some other grant of power, or unsealing is required under right of confrontation rules. *Matter of Joseph M.*, 82 N.Y.2d 128 (1993); *Matter of Dondi*, 63 N.Y.2d 331 (1984); *Matter of Hynes v. Karassik*, 47 N.Y.2d 659 (1979); *Matter of John S.*, 23 N.Y.3d 326 (2014), *reargument den'd* 24 N.Y.3d 933 (Mental Hygiene Law §10.08(c) supersedes sealing provisions in CPL §160.50); *People v. Anonymous*,

(1st Dept. 2018) ("law enforcement agency" exception did not authorize unsealing for purpose of People's sentencing recommendation; however, because violations of sealing statute do not activate exclusionary rule in unrelated criminal proceedings, defendant was not entitled to a new sentencing proceeding or reduced sentence); *People v. F.B.,* 155 A.D.3d 1 (1st Dept. 2017), *lv denied* 30 N.Y.3d 911 (People not "law enforcement agency" able to seek access when they act as agency authorized pursuant to RPAPL 715(1) to demand that an eviction proceeding be commenced against a defendant); *Matter of Albany County District Attorney's Office v. William T.*, 88 A.D.3d 1133 (3d Dept. 2011) (unsealing not allowed where purpose was to facilitate Pennsylvania prosecution); *Matter of Akieba Mc. v. Nassau County District Attorney*, 72 A.D.3d 689 (2d Dept. 2010) (no unsealing where District Attorney alleged that there were criminal matters pending against two other individuals arising out of same incident, and that unsealing was necessary so that District Attorney could obtain testimony or statements of respondent in event that she testified in trials of charges against other individuals and to prevent perjury; request did not fall under "law enforcement agency" exception in CPL §160.50[1][d][ii]); *People v. Anonymous*, 7 A.D.3d 309 (1st Dept. 2004) (unsealing denied where Office of Professional Medical Misconduct had other sources of information); *In re Police Commissioner of the City of New York*, 44 Misc.3d 1205(A) (Sup. Ct., Bronx Co., 2014) (police request for

unsealing for purposes of employee disciplinary proceeding brought against defendant denied where police department was acting as public employer rather than "law enforcement agency"; court declines to invoke inherent authority to unseal based on extraordinary circumstances since petitioner failed to demonstrate that information could not be obtained from other source); *Matter of Demesyeux*, 39 Misc.3d 1209(A) (Surrogate's Ct., Nassau Co., 2013) (application for unsealing must be made in criminal court); *Ligon v. City of New York*, 2012 WL 2125989 (SDNY 2012) (in action challenging police implementation of a program pursuant to which officers patrol inside and around private residential apartment buildings and alleging that plaintiffs and their minor children had been unlawfully stopped, questioned, frisked, and/or arrested, court orders unsealing of any records of plaintiffs' prior arrests for charges of trespass or related crimes covering past ten years); *People v. Stephen C.*, 33 Misc.3d 1223(A) (County Ct., Suffolk Co., 2011) (People not acting as "law enforcement agency" for which order to unseal is available where People wanted to obtain certified copy of temporary order of protection to use in prosecuting subsequent criminal action); *In re Stanley*, 32 Misc.3d 897, 926 N.Y.S.2d 886 (Sup. Ct., Kings Co., 2011) (where defendant was charged in Georgia with murder of common law husband and was raising battered woman's defense, court agreed to unseal records of victim's domestic violence cases and provide records to defense counsel); *Matter of the Application of the Central Screening Committee*, 28 Misc.3d 726 (Sup. Ct., Bronx Co., 2010) (unsealing ordered in connection with disciplinary matter involving defense counsel; statute was enacted to protect rights of accused, not to protect lawyers from scrutiny in disciplinary matters); *People v. Marcus A.*, 28 Misc.3d 667 (Sup. Ct., N.Y. Co., 2010) (where prosecutor filed new charge of criminal contempt prior to seeking unsealing order to obtain original temporary order of protection, prosecutor was not acting as law enforcement agency investigating crime; amendment to statute is necessitated by *Katherine B. v. Cataldo,* 5 N.Y.3d 196); *People v. Diaz*, 15 Misc.3d 410 (Sup. Ct., N.Y. Co., 2007) (court vacates unsealing order issued upon request of District Attorney, noting that DA is not a "law enforcement agency," and that, in any event, DA failed to justify unsealing to enable eviction proceeding to go forward); *People v. Joseph W.F.*, 111 Misc.2d 752 (Sup. Ct.,

N.Y. Co., 1981) (court denies complainant's motion where she sought records to assist her in civil action against acquitted defendant); *but see People v. Scott*, 134 Misc.2d 224 (Sup. Ct., Kings Co., 1986) (while granting defendant's motion to unseal youthful offender file of complaining witness, court notes that youthful offender is not entitled to same protection as one whose case has been terminated in his favor).

Of course, it is possible for the respondent to waive the protection of the sealing requirements by, for example, raising issues in litigation that are related to the contents of a sealed file. *See Matter of Scott D.*, 13 A.D.3d 622 (2d Dept. 2004) (filing of civil action against City and arresting officer did not result in waiver in disciplinary proceeding commenced by Department of Education since plaintiff did not seek to use privilege as sword to gain advantage); *Matter of Barnett v. David M. W.*, 22 A.D.3d 575 (2d Dept. 2005) (defendant waived Youthful Offender confidentiality by answering questions at deposition in civil proceeding); *Kalogris v. Roberts*, 185 A.D.2d 335, 586 N.Y.S.2d 806 (2d Dept. 1992) (filing of malicious prosecution action based on same proceeding resulted in waiver); *People v. Destine*, 187 Misc.2d 702 (Dist. Ct., Nassau Co., 2001) (sealed record does not become public merely because some contents are recited at trial, but should defendant use portion of testimony of witness who testified at trial of sealed matter, defendant must turn over to People entire transcript of witness' testimony, and, in discretion of trial court, may be required to turn over any items contained in sealed file which were put in issue by witness' testimony).

3. <u>Expungement</u> - The court has inherent power to order the expungement of court records, FCA §375.3, and, in cases in which the record destruction requirement in FCA §354.1 is not activated because fingerprints were not taken pursuant to FCA §306.1, the court arguably has some authority to order the expungement of police records. Generally, this power is designed to be exercised in cases where the charges prove to be unfounded. *See Matter of Todd H.,* 49 N.Y.2d 1022 (1980), *aff'g Matter of Anthony P. v. City of New York*, 65 A.D.2d 294 (2d Dept. 1978); *Matter of Dorothy D.*, 49 N.Y.2d 212 (1980); *People v. Stamos*, 31 Misc.3d 130(A), 2011 WL 1440315 (App. Term, 9th & 10th Jud. Dist., 2011) (motion to seal and expunge records, made 14 years after plea of guilty to sexual abuse in the third degree,

was properly denied; courts' inherent power to seal their own records has been wielded only when there is need to protect individual who has been or might unjustly be injured by indiscriminate availability of records); *Matter of Bryant W.*, 114 A.D.2d 962 (2d Dept. 1985); *United States v. Hasan*, 2002 WL 31946712 (E.D.N.Y., 2002); *but see Matter of Ejiro A.,* 268 A.D.2d 428 (2d Dept. 2000) (expungement appropriate where case was dismissed after fact-finding due to absence of evidence that respondent was in need of treatment, supervision or confinement; however, court cited FCA §375.1, and thus it appears court meant to say sealing); *Matter of Dennis B.*, 104 Misc.2d 166 (Fam. Ct., Kings Co., 1980) (records expunged where designated felony petition was dismissed because of complainant's unwillingness to cooperate).

4. Use Of Records In Other Courts - "Except where specifically required by statute, no person shall be required to divulge information pertaining to the arrest of the respondent or any subsequent proceeding under this article." FCA §380.1. In addition, "[n]either the fact that a person was before the family court under this article for a hearing nor any confession, admission or statement made by him to the court or to any officer thereof in any stage of the proceeding is admissible as evidence against him or his interests in any other court." FCA §381.2(1). *See Green v. Montgomery*, 95 N.Y.2d 693 (2001) (statutory privilege applied despite supreme court's technical failure to send case to family court for final disposition; however, plaintiff waived the privilege by commencing a civil suit alleging that the police had used excessive force in apprehending him and placing at issue the very conduct for which he had been adjudicated a juvenile delinquent); *People v. Campbell*, 98 A.D.3d 5, 946 N.Y.S.2d 587 (2d Dept. 2012), *lv denied* 20 N.Y.3d 853 (use of juvenile delinquency adjudication for upward departure under Sex Offender Registration Act prohibited by FCA §381.2); *Holyoke Mutual Insurance Co. v. Jason B.*, 184 A.D.2d 550 (2d Dept. 1992) (while citing §§ 380.1 and 381.2, court refuses to admit delinquency records in insurance company's action seeking to deny coverage on grounds that juvenile's actions were intentional); *People v. Evans*, 20 Misc.3d 1112(A), 867 N.Y.S.2d 19 (Sup. Ct., Kings Co., 2008) (prosecutor improperly questioned defendant in grand jury about juvenile delinquency adjudication in violation of §381.2(1); even if defendant opened door to questioning,

prosecutor was required to limit impeachment to underlying facts of adjudication and could not ask about adjudication itself); *but see People v. Brailsford*, 106 A.D.2d 648 (2d Dept. 1985) (prosecutor could not inquire as to existence of family court record or fact that defendant had been declared a juvenile delinquent and had been the subject of a PINS proceeding, but was entitled to cross-examine defendant regarding the underlying facts and circumstances which led to defendant's involvement with the Family Court).

However, when imposing sentence upon an adult, the court "may receive and consider the records and information on file with the family court, unless such records and information have been sealed pursuant to section 375.1. FCA §381.2(2).

5. Police Records - "All police records relating to the arrest and disposition of any person under this article shall be kept in files separate and apart from the arrests of adults and shall be withheld from public inspection." FCA §381.3(1). Upon motion and for good cause shown, the court may open such records for the respondent or his parent, or a judge of a court in which the respondent has subsequently been convicted of a crime, unless the record has been sealed pursuant to FCA §375.1. FCA §381.3(2).

6. Fingerprints, Palmprints, And Photographs - The police may take fingerprints, palmprints and photographs under certain specified circumstances when a child has been charged with a felony. FCA §306.1(1), (2). The police are required to forward the records to the State Division of Criminal Justice Services; the police shall not retain any fingerprints, and must keep copies of palmprints and photographs confidential and in the exclusive possession of the police and separate and apart from files of adults. FCA §306.1(4). Upon receipt of the records, DCJS must, *inter alia*, retain them "distinctly identifiable from adult criminal records," and, after conducting a search, shall transmit information to the police regarding any adjudications or pending matters. FCA §306.2(1), (2). The police shall then transmit two copies of the DCJS report to the Family Court, and two copies to the presentment agency, which shall furnish a copy to the child's attorney. FCA §306.2(3). When DCJS has not received disposition information regarding a case within two years of an arrest, it shall, until information is received, withhold the record of that arrest when disseminating criminal history

information. FCA §306.2(2).

However, whenever an arrest does not eventually result in a felony adjudication in Family Court (or, in the case of an eleven or twelve-year-old child, a class A or B felony adjudication), all records and information generated pursuant to FCA §306.1 must be destroyed by DCJS and the police. FCA §354.1(2), (3), (4), (5). *See People v. Capers*, 129 A.D.3d 1313 (3d Dept. 2015) (suppression not required where photograph taken during juvenile delinquency proceeding that should have been destroyed pursuant to FCA §354.1 was used in photo array); *Matter of Quadon H.*, 55 A.D.3d 834, 866 N.Y.S.2d 693 (2d Dept. 2008) (in absence of additional circumstances justifying suppression, family court erred in ordering suppression where basis for arrest was match between fingerprints recovered at scene and respondent's fingerprints, which were taken in connection with previous arrest but should have been destroyed pursuant to FCA §354.1). The clerk of the family court - or, when the matter is terminated prior to filing, the police, probation or the presentment agency - is responsible for sending notification to DCJS and/or the police. If the child is subsequently convicted of a crime, any records not already destroyed shall become part of DCJS's permanent adult criminal record for that person. FCA §354.1(6). When the child reaches the age of twenty-one or has been discharged from placement for at least three years, whichever occurs later, and has had no criminal convictions, the records shall be destroyed. FCA §354.1(7).

7. <u>Protection From Adverse Consequences</u>

"No adjudication under [FCA Article Three] may be denominated a conviction and no person adjudicated a juvenile delinquent shall be denominated a criminal by reason of such adjudication." FCA §380.1(1). "No adjudication under this article shall operate as a forfeiture of any right or privilege or disqualify any person from holding any public office or receiving any license granted by public authority. Such adjudication shall not operate as a disqualification of any person to pursue or engage in any lawful activity, occupation, profession or calling." FCA §380.1(2). "Except where specifically required by statute, no person shall be required to divulge information pertaining to the arrest of the respondent or any subsequent proceeding under this article; provided, however,

whenever a person adjudicated a juvenile delinquent has been placed with the office of children and family services pursuant to [FCA §353.3], and is thereafter enrolled as a student in a public or private elementary or secondary school, the court that has adjudicated such person shall provide notification of such adjudication to the designated educational official of the school in which such person is enrolled as a student. Such notification shall be used by the designated educational official only for purposes related to the execution of the student's educational plan, where applicable, successful school adjustment and reentry into the community. Such notification shall be kept separate and apart from such student's school records and shall be accessible only by the designated educational official. Such notification shall not be part of such student's permanent school record and shall not be appended to or included in any documentation regarding such student and shall be destroyed at such time as such student is no longer enrolled in the school district. At no time shall such notification be used for any purpose other than those specified in this subdivision. FCA §380.1(3). "Notwithstanding any other provision of law, where a finding of juvenile delinquency has been entered, upon request, the records pertaining to such case shall be made available to the commissioner of mental health or the commissioner of developmental disabilities, as appropriate; the case review panel; and the attorney general pursuant to section 10.05 of the mental hygiene law." FCA §380.1(4).

With certain exceptions, Executive Law §296(16) defines as an unlawful discriminatory practice any inquiry (not specifically required or permitted by statute) by a person, agency, bureau, corporation or association about an arrest or criminal accusation which was followed by termination of a criminal action or proceeding in favor of the individual (*see* CPL §160.50), a youthful offender adjudication, or a conviction for a violation sealed pursuant to CPL §160.55, and any adverse action taken as a result of such an arrest or accusation, in connection with the licensing, employment or providing of credit or insurance to such individual. Under §296(16), an inquiry regarding whether the individual has ever been arrested is unlawful. *New York State Department of Mental Hygiene v. State Division of Human Rights*, 66 N.Y.2d 752, 754 (1985).

There is no mention of juvenile delinquency proceedings in §296(16). However,

when read in the light of Executive Law §296(16), FCA §380.1(3) arguably precludes a prospective employer from asking an individual about prior juvenile arrests, proceedings or adjudications. *See New York State Department of Mental Hygiene v. State Division of Human Rights*, 66 N.Y.2d 752, 754.

G. Removal Cases

Under Criminal Procedure Law §725.15, "[e]xcept where specifically required or permitted by statute or upon specific authorization of the court that directed removal of an action to the family court," all records on file with the court, a police agency or the Division of Criminal Justice Services "are confidential and must not be made available to any person or public or private agency ...." The availability of records on file with the family court is governed by provisions applicable to family court records.

CHAPTER TWO

PROCEDURES FROM ARREST THROUGH PROBABLE CAUSE HEARING

By: Gary Solomon

Table Of Contents

I. Juvenile Delinquency Proceedings; Generally
- A. Definitions
- B. Jurisdiction
- C. Venue
- D. Statute Of Limitations
- E. Application Of Criminal Procedure Law
- F. Application Of Civil Practice Law And Rules

II. Warrantless Arrest Of Juveniles
- A. Generally
- B. Warrantless Arrest In Child's Home
- C. Custody By A Private Person
- D. Release Or Detention
  - 1. Family Court Is In Session
  - 2. Family Court Is Not In Session
  - 3. Weekend And Holiday Court In New York City
  - 4. Intentional Delay In Filing Of Petition
- E. Fingerprinting, Palmprints, And Photographs
  - 1. FCA Authorization
  - 2. Suppression Issues

III. Procedures At Family Court Prior To Filing Of Petition
- A. Adjustment
- B. Presentment Agency Determination

C. Pre-Petition Hearing
D. Detention
IV. Originating A Juvenile Delinquency Proceeding
A. Filing Of Petition
B. Service Of Petition And Summons
C. Warrants
V. The Initial Appearance
A. Timing
B. Assignment And Appearance Of Child's Attorney
C. Waiver Of Counsel
D. Procedures At Initial Appearance
E. Referral To The Probation Service And Adjournment In Contemplation Of Dismissal
. F. Pretrial Detention
1. Generally
2. Release Of Respondent
3. Grounds For Remand
4. Reasonable Efforts Determination
5. Preparing For The Detention Hearing
6. Detention Hearing Strategy
7. Remand To Hospital
G. Selection Of Trial Date
1. Respondent Is Remanded
2. Respondent Is Released
H. Interviewing The Respondent
VI. The Probable Cause Hearing
A. Timing
B. Computation Of Three-Day Period
C. Respondent's Right To A Hearing
D. Procedure At Hearing

E. Strategies And Goals At Hearing

F. Orders Upon A Hearing

I. Juvenile Delinquency Proceedings; Generally

A. Definitions

Family Court Act §301.2 defines various terms used in article three. Although some of these definitions will be referred to in other sections, a few should be noted at the outset.

"Juvenile delinquent" means a person over seven and less than sixteen years of age, or commencing on October 1, 2018 a person over seven and less than seventeen years of age, and commencing October 1, 2019 a person over seven and less than eighteen years of age, who, having committed an act that would constitute a crime, or a violation, where such violation is alleged to have occurred in the same transaction or occurrence of the alleged criminal act, if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to CPL Article 725. FCA §301.2(1). This definition must be read together with FCA §352.1, which requires that the court find that the respondent requires supervision, treatment or confinement before adjudicating the respondent a juvenile delinquent.

Certain delinquency charges, which have been classified as "Designated felony" acts and are separately listed in FCA §301.2(8), may result in dispositions more restrictive than those available in other cases. See FCA §353.5. The statute subdivides designated felonies into four groups: specified felonies committed by a child who is thirteen, fourteen, fifteen or sixteen (or, commencing 10/1/18, seventeen) years of age [see FCA §301.2(8)(i) (first and second degree murder, first degree arson and kidnapping); §301.2(8)(ii) (first degree assault, rape, sodomy, manslaughter and robbery, second degree arson, aggravated sexual abuse, second degree kidnapping where deadly force is used or threatened); §301.2(8)(iii) (attempted first and second degree murder, attempted first degree kidnapping)]; specified felonies committed by a child who is fourteen, fifteen, or sixteen (or, commencing 10/1/18, seventeen) years of age [see FCA §301.2(8)(iv) (first degree burglary, second degree burglary and robbery where physical injury is caused or a firearm, dangerous instrument, etc. is involved, third degree criminal possession of a weapon where a loaded firearm is possessed on

school grounds, and second degree criminal possession of a weapon where possession is on school grounds)]; specified felonies committed by a child who is fourteen, fifteen, sixteen (or, commencing 10/1/18, seventeen) years of age if there is one prior finding that the child committed a designated felony or a specified predicate felony act [see FCA §301.2(8)(v) (second degree assault and robbery)]; and any felony committed by a child older than seven and younger than seventeen (or, commencing 10/1/18, eighteen) years of age if there are two prior felony findings of any type [see FCA §301.2(8)(vi)]. The two prior findings can serve as predicates even if they were consolidated into a single dispositional order, and it also appears that a finding may be a predicate even if it has not yet resulted in a disposition. Matter of Manuel R., 89 N.Y.2d 1043, 659 N.Y.S.2d 825 (1997). However, findings under multiple felony counts of one petition involving a single incident count as one “finding” for predicate felony purposes. In re Jason B., 258 A.D.2d 298, 685 N.Y.S.2d 197 (1st Dept. 1999). And, arguably, this is true as well when two petitions are consolidated into one for purposes of fact-finding. Matter of Christian M., 54 Misc.3d 737 (Fam. Ct., Kings Co., 2016).

The person "against whom a juvenile delinquency petition is filed" is called the "respondent." FCA §301.2(2). However, "any act of the respondent required or authorized under [article three] may be performed by his attorney … unless expressly provided otherwise." Id. This is obviously a reference to article three provisions concerning motion practice, the presentation of evidence, the giving of consent, etc., by "the respondent."

The prosecuting "agency or authority which...is responsible for presenting a juvenile delinquency petition" is called the "presentment agency." FCA §301.2(12). In fact, only a presentment agency may initiate a juvenile delinquency proceeding. FCA §310.1(2). Ordinarily, the corporation counsel of the city of New York, or, outside of New York City, the county attorney, is the prosecutor in a delinquency proceeding. See FCA §254(a). However, the corporation counsel or county attorney may enter into an agreement under which the district attorney is responsible for presenting any petition in which a designated felony act is alleged. FCA §254-a. See Matter of Gregory R., 128 Misc.2d 171, 488 N.Y.S.2d 990 (Fam. Ct. Kings Co., 1985) (corporation counsel may

not prosecute designated felony charge after district attorney has refused to prosecute). But see Matter of Samuel P., 102 Misc.2d 875, 424 N.Y.S.2d 837 (Fam. Ct. Kings Co., 1980) (court assigns corporation counsel, and deletes designated felony marking, so hearing judge will not be aware that respondent has prior findings). In addition, the district attorney may elect to present the petition when the proceeding has been commenced as a result of an order of removal issued pursuant to CPL Article 725. FCA §254-a(6). See Matter of Williams, 120 Misc.2d 269, 465 N.Y.S.2d 956 (Fam. Ct. Onondaga Co., 1983) (when district attorney elects not to appear at outset, he may not appear thereafter unless county attorney withdraws).

When the presentment agency has a conflict of interest, the court arguably has inherent power to appoint a special prosecutor to present the petition. Cf. County Law §701 (appointment of special district attorney by superior criminal court); but see People v. Balcacer, 6 Misc.3d 1032(A), 800 N.Y.S.2d 352 (Crim. Ct., N.Y. Co., 2005) (under County Law §701, only superior criminal court may appoint special prosecutor).

Appointment of a special prosecutor may be appropriate when a particular prosecutor or the presentment agency has a close relationship to a witness [see, e.g., People v. Gentile, 127 A.D.2d 686, 511 N.Y.S.2d 901 (2d Dept. 1987) (ADA had close relationship with complainants); but see People v. Gonzalez, 30 Misc.3d 1221(A), 2011-08-1 WL 505024 (Sup. Ct., Kings Co., 2011) (no appointment of special district attorney where complainant was sister of “high ranking deputy” in District Attorney’s office)], or where there are cross-complaints. See, e.g., People v. Keeton, 74 N.Y.2d 903, 549 N.Y.S.2d 647 (1989) (defendant failed to show how he was prejudiced by DA's simultaneous prosecution of combatants); People v. O’Connell, 8 Misc.3d 1009(A), 801 N.Y.S.2d 780 (Crim. Ct., Kings Co., 2005) (appearance of impropriety, standing alone, does not require disqualification, but court directs DA to appoint 2 different ADAs, and the ADA who initially interviewed defendants may not be involved); People v. Wyatt, 140 Misc.2d 69, 530 N.Y.S.2d 460 (Crim. Ct. Bronx Co., 1988) (criminal court has authority to prohibit prosecution of cross-complaints); People v. Dial, 132 Misc.2d 5, 502 N.Y.S.2d 930 (Crim. Ct. N.Y. Co., 1986) (court declines to refer case for assignment of special prosecutor).

In relation to the presentment agency's prosecution of cross complaints, it can be argued that the use of two conflicting theories of prosecution to convict two individuals constitutes a due process violation. Stumpf v. Mitchell, 367 F.3d 594 (6th Cir., 2004).

B. Jurisdiction

The family court has exclusive original jurisdiction over juvenile delinquency proceedings. FCA §302.1(1). In determining jurisdiction, the age of the child at the time the delinquent acts allegedly were committed is controlling. FCA §301.1(2). Whenever a crime and a violation arise out of the same transaction or occurrence, a charge alleging both offenses shall be made returnable before the court having jurisdiction over the crime. Nothing herein provided shall be construed to prevent a court, having jurisdiction over a violation relating to a criminal act from lawfully entering an order in accordance with FCA §345.1 where such order is not based upon the count or counts of the petition alleging such criminal act. FCA § 302.1(3).

There is conflicting authority regarding whether, in the absence of a specific challenge by the respondent, the presentment agency must prove the respondent's age at trial. Compare Greller v. Shandell B., 157 A.D.2d 840, 550 N.Y.S.2d 423 (2d Dept. 1990) (general denial of allegations in petition activates requirement that PINS petitioner prove age at fact-finding hearing) with Matter of Anthony J., 143 A.D.2d 668, 532 N.Y.S.2d 924 (2d Dept. 1988) (petition alleged age, and respondent never alleged that he was outside court's jurisdiction) and Matter of Donald F., 97 A.D.2d 980, 468 N.Y.S.2d 784 (4th Dept. 1983) (petition alleged age, and jurisdiction need not be established at fact-finding hearing). See also People v. Alouisa, 120 Misc.2d 968, 466 N.Y.S.2d 1007 (County Ct. Suffolk Co., 1983) (criminal court has jurisdiction over defendant on his sixteenth birthday despite fact that crime was allegedly committed a half hour before exact time of birth).

Although the family court has jurisdiction over all children who fall within the statutory age limits, it has been held that the common-law presumption of lack of capacity due to infancy may still be asserted. See Matter of Andrew M., 91 Misc.2d 813, 398 N.Y.S.2d 824 (Fam. Ct. Kings Co., 1977). See also In re William A., 548 A.2d 130 (Md., 1988). But see In re Tyvonne, 558 A.2d 661 (Conn. 1989) (infancy defense not

available); State v. Wright, 2007 WL 1557128 (Delaware Fam. Ct., 2007) (defense not available); Matter of Robert M., 110 Misc.2d 113, 441 N.Y.S.2d 860 (Fam. Ct. N.Y. Co., 1981) (requirement that prosecution prove intent beyond a reasonable doubt adequately protects against unjust punishment of those incapable of forming criminal intent).

When a child thirteen, fourteen or fifteen years of age is alleged to have committed an act for which he or she may be held criminally responsible [see CPL §1.20(42) (sets forth crimes for which child may be prosecuted in criminal court as a "juvenile offender")], the criminal courts have exclusive original jurisdiction. Thus, except by way of a properly issued removal order (see CPL article 725), a charge for which a particular child may be prosecuted as a juvenile offender may not be brought in family court. See Matter of Raymond G., 93 N.Y.2d 531, 693 N.Y.S.2d 482 (1999); see also Matter of Trevon Y., 81 A.D.3d 841, 917 N.Y.S.2d 644 (2d Dept. 2011) (whether family court has original jurisdiction depends on charges set forth in petition, not crimes for which juvenile could have been charged; where District Attorney declined to prosecute in criminal court, dismissal of petition in family court would effectively relieve respondent of accountability for alleged serious misconduct).

C. Venue

Delinquency proceedings must be commenced in the county in which the acts charged allegedly occurred. The provisions of CPL article 20, which govern geographical jurisdiction of offenses, apply to delinquency proceedings. FCA §302.3(1). See, e.g., Matter of Charles B., 196 Misc.2d 374, 765 N.Y.S.2d 191 (Fam. Ct., Orange Co., 2004) (family court has jurisdiction over acts allegedly committed on federal military reservation).navy

Upon the motion of the respondent or the presentment agency, the court may, for good cause shown, transfer proceedings to another county. FCA §302.3(2). If brought by the respondent, the motion must be made within thirty days after the conclusion of the initial appearance, see FCA §§ 302.3(3), 332.2(1), unless the court entertains a late motion pursuant to FCA §332.2(3). If brought by the presentment agency, the motion must be made within thirty days after the proceeding was originated, unless the time is extended for good cause shown. FCA §302.3(3). Except when a designated felony is

charged, any court outside New York City may, for good cause shown, and after providing the respondent and the presentment agency with an opportunity to be heard, transfer a proceeding to the respondent's county of residence for disposition after a fact-finding order has been made pursuant to FCA §345.1(1). FCA §302.3(4). But see Matter of Adrian R., 43 Misc.3d 874 (Fam. Ct., Bronx Co., 2014) (motion to dismiss petition as facially defective transferred to county where fact-finding occurred since court could not review determination made by fellow family court judge and provision providing for transfer to county where respondent resides for disposition is unique and limited exception to usual venue rules). However, in determining whether to transfer a case, the court must "take into consideration" both FCA §340.2(2), which provides that a judge who presides at a fact-finding hearing or accepts an admission shall preside at any subsequent hearing, and FCA §340.2(3), which permits assignment of a proceeding to another judge after fact-finding when the original judge cannot preside for certain enumerated reasons. FCA §302.3(4). In cases heard within the city of New York, the continuity requirements in FCA §340.2 "shall not be waived." FCA §340.2(4).

D. Statute Of Limitations

Delinquency proceedings must ordinarily be commenced within the periods specified in CPL §30.10. However, designated felony charges may never be brought after the child's twentieth birthday, and other proceedings may not be commenced after the child's eighteenth birthday. FCA §302.2. See also Matter of Robert J., 2 N.Y.3d 339, 778 N.Y.S.2d 763 (2004) (family court may order initial placement of respondent beyond 18th birthday).

E. Application Of Criminal Procedure Law

Prior to the enactment of article three, provisions of the Criminal Procedure Law were applied to juvenile delinquency proceedings on an ad hoc basis. Courts held that, given the quasi-criminal nature of delinquency proceedings, juveniles are entitled to many of the due process and statutory rights enjoyed by adults. See, e.g., Matter of Edward S., 80 A.D.2d 585, 435 N.Y.S.2d 771 (2d Dept. 1981).

Many provisions in article three are directly derived from the CPL. See, e.g., FCA §343.1 (testimony given by children); FCA §343.2 (corroboration of accomplice

testimony). Other CPL provisions are incorporated by reference. See, e.g., FCA §303.2 (Double jeopardy); FCA §302.2 (Statute of limitations); FCA §330.2 (Suppression of evidence). When CPL provisions are not expressly referred to, they do not apply. FCA §303.1(1). However, "[a] court may ... consider judicial interpretations of appropriate provisions of the [CPL] to the extent that such interpretations may assist the court in interpreting similar provisions of [article three]." FCA §303.1(2).

When it appears that the CPL provides broader rights for adults than those provided to juveniles in article three, the child's attorney should consider arguing that application of the CPL is required by principles of constitutional due process and equal protection.

F. Application Of Civil Practice Law And Rules

Where neither article three nor the applicable rules of court prescribe the procedure to be followed in a delinquency proceeding, the provisions of the CPLR shall apply "to the extent that they are appropriate to the proceedings involved." FCA §165(a). Certain matters are widely acknowledged to be governed by the CPLR, such as the service of motion papers (see CPLR article 22), and the admissibility of various types of evidence, including confidential communications (see CPLR §§ 4502-4505, 4507, 4508, 4510), business records (see CPL §§ 4518, 4539), and public records (see CPLR §§ 4520, 4540).

II. Warrantless Arrest Of Juveniles

A. Generally

A peace or police officer may take a child who may be subject to FCA Article Three into custody without a warrant in cases in which the officer may arrest a person for a crime under CPL Article 140. FCA §305.2(2). When, prior to the "Raise the Age" legislation, the statute provided that an officer could take a child under the age of sixteen into custody without a warrant, courts held that the special protections in §305.2 applied only to the interrogation of persons who are under the age of 16 at the time of questioning. Now, it is now clear that the statute's special protections apply to a child of any age who is arrested on juvenile delinquency charges.

Under CPL §140.10(1)(b), a police officer may arrest a person for "[a] crime

when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise." A peace officer may arrest a person for a crime under like circumstances when acting "pursuant to his special duties." CPL §140.25(1)(b). See also CPL 140.25(3),(4) (other powers of peace officers); CPL §1.20(34) (definition of police officer); CPL §2.10 (persons designated as peace officers); CPL §140.50 (temporary questioning of persons in public places; search for weapons).

Although FCA §305.2(2) authorizes the arrest of a child for a "crime," i.e., for the commission of acts which would constitute a misdemeanor or felony [see PL §10.00(6)], it has been held that a child under sixteen may properly be arrested for a violation if it reasonably appears to the arresting officer that the child is over sixteen. See Matter of Jamal S., 28 N.Y.3d 92 (2016) (based on respondent's representation that he was 16 years old and conduct in street, officers had probable cause to arrest for disorderly conduct); In re Michael W., 295 A.D.2d 134, 742 N.Y.S.2d 828 (1st Dept. 2002), lv denied 98 N.Y.2d 614, 751 N.Y.S.2d 169 (2002); Matter of Charles M., 143 A.D.2d 96, 531 N.Y.S.2d 346 (2d Dept. 1988); Matter of Christopher B., 122 Misc.2d 377, 471 N.Y.S.2d 228 (Fam. Ct. N.Y. Co., 1984); cf. Matter of Victor M., 9 N.Y.3d 84, 845 N.Y.S.2d 771 (2007). Thus, when the charge against the respondent requires proof that an officer was performing a "lawful" duty [see PL §195.05 (obstructing governmental administration in the second degree); PL §120.05(3) (assault in the second degree)], or that an arrest was "authorized" [see PL §205.30 (resisting arrest)], the case may turn on evidence concerning the physical appearance of the respondent at the time of arrest. The holdings in Michael W. and Matter of Charles M., supra, 143 A.D.2d 96 could also be applied when a respondent moves to suppress physical evidence, since the existence of probable cause to arrest a child under sixteen for a "violation," such as disorderly conduct (PL §240.20) or second degree harassment (PL §240.26), will also depend upon the apparent age of the child. What the case law does not address is whether, in order to protect children from being arrested and detained for significant periods of time for offenses over which the family court has no jurisdiction, the police should be required to conduct whatever inquiry is appropriate and practicable under the

circumstances in an effort to ascertain the child's true age. Even assuming, arguendo, that a child's statement of his or her age would not preclude a lawful arrest if the officer reasonably believes the child may not be telling the truth, there is no principled reason not to require the police to provide the child with an opportunity to produce identification or other documents that buttress the child's claim, or provide contact information for a parent or other relative, or a responsible adult such as a teacher, who could be contacted quickly. In the absence of such a requirement, the police are left with unfettered discretion to make age-related judgment calls for which they may have no particular expertise or training.

B. Warrantless Arrest In Child's Home

In Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980), it was held that the police may not enter a suspect's home to make a warrantless arrest in the absence of consent or exigent circumstances. This rule has been applied in juvenile delinquency proceedings. See Matter of Demetrius W., 126 Misc.2d 440, 481 N.Y.S.2d 955 (Fam. Ct. Kings Co., 1984); Matter of Lynell H., 121 Misc.2d 1005, 469 N.Y.S.2d 883 (Fam. Ct. Kings Co., 1984). In Matter of Lynell H., supra, 121 Misc.2d 1005, the court noted that, although CPL §120.20(1) contains blanket authorization for the issuance of an arrest warrant upon the filing of an accusatory instrument, the Family Court Act requires a showing that the respondent is likely to leave the jurisdiction or disregard a summons. See FCA §312.2. Nevertheless, the court held that "so vital a constitutional protection now afforded adults" must also apply to children. 121 Misc.2d at 1007.

When a warrantless arrest was made at the respondent's home, the presence or absence of consent may be at issue. Since children generally reside with parents or other adults who have legal authority over the premises, it is often the case that an adult has consented to the police entry. As long as such adult had, or reasonably appeared to have, authority to consent, a police entry will be upheld. See Ilinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793 (1990); People v. Adams, 53 N.Y.2d 1, 439 N.Y.S.2d 877 (1981), cert denied 454 U.S. 854, 102 S.Ct. 301. Thus, in order to challenge a warrantless home arrest on Payton grounds where the consent of an authorized or apparently authorized person has been given, the respondent must show that the

consent was not voluntarily given, see People v. Gonzalez, 39 N.Y.2d 122, 383 N.Y.S.2d 215 (1976), that the "consent" was equivocal, see People v. Love, 152 A.D.2d 925, 543 N.Y.S.2d 833 (4th Dept. 1989) (no valid consent where mother agreed to search but stated that she did not want her son to be hurt), or that the arrest was effectuated in an area of the home where the respondent had an expectation of privacy which narrowed the authority of the person giving consent. Compare People v. D.C., 188 Cal.App.4th 978 (Ct. App., 1st Dist., 2011) (proper exercise of parental duties demands that parents have joint access to and control of minor child's bedroom); People v. Satornino, 153 A.D.2d 595, 544 N.Y.S.2d 224 (2d Dept. 1989) (mother consented to police entry to arrest defendant in bedroom) and People v. Keenan, 91 A.D.2d 1049, 458 N.Y.S.2d 648 (2d Dept. 1983) (no Payton violation where brother had authority to permit entry and defendant was arrested in living room) with State v. Colvard, 768 S.E.2d 473 (Ga. 2015) (defendant's uncle had no apparent authority to consent to search of defendant's locked bedroom where uncle had no key and could not enter when it was locked); United States v. Peyton, 745 F.3d 546 (D.C. Cir. 2014) (great-grandmother lacked apparent authority to consent to search of closed shoebox containing defendant's possession, even though it was in living room over which great-grandmother had common authority, where shoebox was located next to bed where defendant slept) and People v. Petrie, 89 A.D.2d 910, 453 N.Y.S.2d 725 (2d Dept. 1982) (brother could not consent because searched area was specifically set aside for defendant and his wife).

C. Custody By A Private Person

A private person may take a child who may be subject to the provisions of this article for committing an act that would be a crime if committed by an adult into custody in cases in which such private person may arrest an adult for a crime under CPL § 140.30. FCA §305.1(1). Under CPL §140.30(1), a person may arrest another person when the other person "has in fact committed [a] felony," and may make an arrest for other offenses when the other person "has in fact committed such offense in his presence." Presumably, an arrest for a violation is authorized only when there is a reasonable belief that the child is over sixteen. See Matter of Charles M., supra, 143

A.D.2d 96.

Before taking a child into custody, a private person must inform the child of the reason for such action, and require the child to submit, unless the child has been apprehended upon pursuit immediately after the commission of a crime. FCA §305.1(2). The person must, "without unnecessary delay," take the child home, to family court, or to a police or peace officer. FCA §305.1(3). See Matter of Jennifer M., 125 A.D.2d 830, 509 N.Y.S.2d 935 (3rd Dept. 1986).

D. Release Or Detention

1. Family Court Is In Session

When a police officer takes a child into custody at a time when family court is in session, the officer may either "release the child to the custody of his parents or other person legally responsible for his care," FCA §305.2(4)(a), or forthwith and with all reasonable speed take the child directly, and without his first being taken to the police station house, to the family court located in the county in which the act occasioning the taking into custody allegedly was committed, unless the officer determines that it is necessary to question the child, in which case he or she may take the child to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of the child, to the child's residence and there question him or her for a reasonable period of time. FCA §305.2(4)(b); see United States v. Pimental, 755 F.3d 1095 (9th Cir. 2014) (confession suppressed due to improper delay in presentment to magistrate; there was ample time between morning arrest and conclusion of magistrate judge's calendar to conduct interviews, prepare complaint, and transport defendant to courthouse seventeen miles away, and agent knew there was three-day weekend looming and that, if defendant was not presented to judge on Friday, he would be imprisoned without benefit of court-appointed attorney until Tuesday); Matter of Martin S., 104 Misc.2d 1036, 429 N.Y.S.2d 1009 (Fam. Ct. Richmond Co., 1980) (under former FCA §724, police acted improperly when they took child to complainant's home for showup). But see Matter of Jerold Jabbar L., 147 A.D.2d 928, 537 N.Y.S.2d 398 (4th Dept. 1989), aff'd 76 N.Y.2d 721, 557 N.Y.S.2d 876 (prompt

return of child to crime scene after arrest for possible identification was permissible). If the child is charged with a designated felony offense, the police must take the child directly to family court unless the child is first questioned. FCA §305.2(5).

When choosing between a release to the parent or immediate production at family court, the police are governed by a statutory preference that the child be released. See FCA §305.2(6) ("in the absence of special circumstances, the officer shall release the child in accordance with [§305.2(4)(a)]").

Since arrangements for the release of the child ordinarily take place at the police station after the arrest process is completed, the child is often taken first to the police station, and, when it develops that there is no one to whom the child can be released, is then taken to the family court. Of course, if questioning is deemed necessary, the child will be brought to the police station in any event.

Upon the release of the child, the police must issue an appearance ticket to both the child and the parent. FCA §305.2(4)(a). The appearance ticket "is a written notice issued and subscribed by a peace officer or police officer...directing a child and his parent or other person legally responsible for his care to appear, without security, at a designated probation service on a specified return date in connection with the child's alleged commission of the crime or crimes specified on such appearance ticket." FCA §307.1(1). If a designated felony act is charged, the return date must be no later than seventy-two hours after the ticket is issued, excluding weekends and public holidays. In all other cases the return date must be no later than fourteen days after the ticket is issued. FCA §307.1(2). A copy of the appearance ticket must be forwarded to the complainant, the child, the parent, and the appropriate family court probation service (hereinafter, "probation") within twenty-four hours after the ticket is issued. FCA §307.1(3). This is the means by which probation is made aware that the child is scheduled to appear on a certain date, at which time the adjustment process will be commenced.

When the family court is in session, the police do not have the option to take the child to a detention facility, presumably because the legislature has decided that the police should not have the discretion to cause a child to be detained overnight when

such a determination can be made by a family court judge. If the police nonetheless do bring the child to a detention facility, the agency operating the facility may, when practicable, release the child prior to the filing of a petition. FCA §307.3(2). In such cases, both the child and the parent or guardian must be given an appearance ticket. FCA §307.3(3). The child must be released to the parent or guardian when it does not appear that the allegations involve an act of delinquency. FCA §307.3(1). If the agency does not release the child, the child shall be brought before the appropriate family court. FCA §307.3(4).

2. Family Court Is Not In Session

When the family court is not in session, the statutory preference for release to the parent still applies. FCA §305.2(6). If, however, the parent is not available to appear at the police station, the police shall take the child to the most accessible magistrate, if any, designated by the appellate division to conduct a hearing under FCA §307.4, unless the officer determines that it is necessary to question the child, in which case he or she may take the child to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of the child, to the child's residence and there question him or her for a reasonable period of time. FCA §305.2(4)(b).

If the child is not released and no magistrate is available, the police may take the child to a detention facility certified by the Office of Children and Family Services. FCA §305.2(4)(c). See also 9 NYCRR §180.7(b), (c) (require that officer provide certain information to facility). In New York City, the Department of Juvenile Justice operates the certified facilities. The child “shall be placed in a non-secure detention facility, unless a determination is made by the division that secure detention is needed.” 9 NYCRR §180.7(e). The officer also may take a child the officer has decided to take into custody for violating Penal Law § 230.00 to an available short-term safe house as defined in SSL § 447-a(2), FCA §305.2(4)(d), or take the child, if it appears that the child is a sexually exploited child as defined in SSL § 447-a(1)(a), (c) or (d), to an available short-term safe house, but only if the child consents to be taken. FCA §305.2(4)(e).

When a child is taken to a detention facility, the agency operating the facility may,

when practicable, release the child prior to the filing of a petition. FCA §307.3(2). See Uniform Rules For The Family Court, 22 NYCRR §205.21 (guidelines governing decision whether to release child; release is authorized unless "special circumstances" exist); 9 NYCRR §180.7(d). In such cases, both the child and the parent or guardian must be given an appearance ticket. FCA §307.3(3). The child must be released to the parent or guardian when it does not appear that the allegations involve an act of delinquency. FCA §307.3(1).

If the agency does not release the child, the child shall be brought to the most accessible magistrate, if any, designated by the appellate division; provided, however, that if a magistrate is not available, the youth shall be brought before the family court within seventy-two hours or the next day the court is in session, whichever is sooner. The agency shall then file an application for an order pursuant FCA §307.4 and shall forthwith serve a copy of the application upon the presentment agency. However, suitable cases may still be adjusted pursuant to FCA §308.1. FCA §307.3(4).

Since §307.3(4) authorizes detention over the weekend for more than forty-eight hours in the absence of a judicial finding of probable cause, it arguably violates the Fourth Amendment and/or Equal Protection requirements. See County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct 1661 (1991); Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct 854 (1975); People ex rel. Maxian v. Brown, 77 N.Y.2d 422, 568 N.Y.S.2d 575 (1991) (when arrested pursuant to CPL §140.20, suspect must be brought before judge within twenty-four hours); JV-111701 v. Superior Court, 786 P.2d 998 (Ariz. Ct. App., Dis. 1, 1989) (Juvenile Rule allowing exclusion of weekends and holidays before juvenile must be brought to court after warrantless arrest violated Equal Protection requirements where adult arrestees had to be taken “before a magistrate without unnecessary delay,” and, if not brought before magistrate within 24 hours after arrest, be immediately released); but see Alfredo A. v. Superior Court, 6 Cal.4th 1212, 865 P.2d 56 (1994) (forty-eight-hour rule in McLaughlin not applicable to juveniles, but Constitution requires probable cause determination within seventy-two hours). Under New York law, a child is arguably entitled to appear before a judge within twenty-four hours after a warrantless arrest. Of course, the appropriate remedy for a violation is

another matter. See, e.g., People v. Martin, 132 A.D.3d 909 (2d Dept. 2015), lv denied 26 N.Y.3d 1110 (proper remedy for unnecessary delay in arraignment in violation of CPL §140.20 is release from custody at time of violation, not dismissal); Anderson v. Calderon, 232 F.3d 1053 (9th Cir. 2000), cert denied 122 S.Ct. 580 (2001) (statement is not fruit of poisonous tree merely because it occurred during illegal detention; court must determine whether the statement was voluntary, and whether it was either the product of the violation or sufficiently an act of free will to purge the taint); Matter of Louis D., 34 Misc.3d 427 (Fam. Ct., Kings Co., 2011) (upon pre-petition hearing, court releases respondents as remedy for statutory violations committed by police, who arrested respondents at about 7:00 p.m. on Sunday night and did not bring them to detention center until Monday night, and they were not produced before judge until next morning, approximately 39 hours after arrest; statutory justification to detain respondents was exhausted as of Monday morning and they should have been produced in court at that time).

3. Weekend And Holiday Court In New York City

In 2008, various State and City governmental entities, working together with The Legal Aid Society, struck a ground-breaking agreement under which juveniles arrested without a warrant appear with counsel before a judge on Saturdays, Sundays and court holidays no later than the day after they are arrested.

4. Intentional Delay In Filing Of Petition

Upon the filing of a petition, the respondent's right to counsel attaches, and may not be waived in the absence of counsel. See People v. Samuels, 49 N.Y.2d 218, 424 N.Y.S.2d 892 (1980). In People v. Blake, 35 N.Y.2d 331, 361 N.Y.S.2d 881 (1974), the Court of Appeals, while holding that the accused has a right to counsel at a post-filing, police-arranged identification procedure, noted that "such a rule offers opportunity for delay between arrest and the filing of an accusatory instrument ...." Consequently, "an undue delay is prima facie a suspect circumstance suggesting that the delay may have been for the purpose of depriving the accused of counsel at a viewing. In that event, the prosecution would have the burden to explain and offer proof at the pretrial identification hearing, if one is had, why the opportunity to so have counsel at the

viewing was not afforded." Id. at 340.

Any undue delay in the filing of an accusatory instrument, and attachment of the right to counsel, in order to elicit a confession, does not constitute a right to counsel violation, but does bear on the voluntariness of the statement. People v. Ramos, 99 N.Y.2d 27, 750 N.Y.S.2d 821 (2002). For instance, when a child has been arrested while the family court is in session, the arresting officer's decision to take the child to the police station for processing, instead of taking the child directly to family court, will cause a delay in the attachment of the right to counsel. Consequently, if the police had reason to believe at the time of arrest that a parent would not be available, and there was no exigency requiring immediate questioning, the child's attorney should consider raising a claim that the police failure to take the child directly to family court for the appointment of an attorney should result in a finding of involuntariness. The same argument should be made when a statement was elicited by the police or a prosecutor from a child who was being detained in the courthouse while awaiting the filing of the petition or an application for a pre-petition detention order (see FCA §307.4), or when a statement was made to the police or a prosecutor during an undue delay between probation's referral of the case to the presentment agency and the filing of the petition.

E. Fingerprinting, Palmprints, And Photographs

1. FCA Authorization

After a child has been arrested, or a petition has been filed against a child who was not arrested, fingerprints shall be taken when "the child is eleven years of age or older and the crime which is the subject of the arrest or which is charged in the petition constitutes a class A or B felony," FCA §306.1(1)(a), or where "the child is thirteen years of age or older and the crime which is the subject of the arrest or which is charged in the petition constitutes a class C, D or E felony." FCA §306.1(1)(b). See Matter of Maurice C., 134 Misc.2d 354, 511 N.Y.S.2d 201 (Fam. Ct. Kings Co., 1986) (fingerprinting authorized where arrest is for one of the specified offenses, even if prosecution charges child with lesser offense). When fingerprints are required, a photograph and palmprints may also be taken. FCA §306.1(2). The taking of prints, photographs and related information "shall be in accordance with standards established

by the commissioner of the division of criminal justice services [hereinafter, "DCJS"] and by [FCA article three]." FCA §306.1(3).

The statute does not limit the taking of fingerprints as part of an investigation to identify the perpetrator of a crime. Matter of Leandre C., 32 A.D.3d 1062, 2006 WL 2972610 (3rd Dept. 2006).

Upon taking a child's fingerprints, the officer or agency must promptly forward them to DCJS without retaining such prints or a copy thereof. Copies of photographs and palmprints may be retained, but must be kept confidential and apart from adult files, and in the exclusive possession of the law enforcement agency. FCA §306.1(4).

Upon receipt of fingerprints, DCJS must retain them apart from adult records except as provided in FCA §354.1, may not release them except as authorized by article three, and must promulgate regulations to protect the confidentiality of the records. FCA §306.2(1). After classifying the fingerprints, DCJS must search its records for information concerning the child's criminal history. Such information, or a report that there is no previous history, must be sent to the officer or agency which forwarded the prints. FCA §306.2(2). Such officer or agency must promptly forward two copies of this information to the family court, and two copies to the presentment agency, which shall provide a copy to the respondent's counsel. FCA §306.2(3).

2. Suppression Issues

Fingerprints or other evidence obtained pursuant to FCA §306.1 may be suppressible as the tainted fruit of an illegal arrest. See Hayes v. Florida, 470 U.S. 811, 105 S.Ct. 1643 (1985) (defendant illegally taken to station house for taking of fingerprints, which matched those recovered at crime scene); see also United States v. Oscar-Torres, 507 F.3d 224 (4th Cir. 2007) (after discussing controversy among the courts as to whether Supreme Court's decision in INS v. Lopez-Mendoza, 468 U.S. 1032 stands for the proposition that identity evidence can never be suppressed, Fourth Circuit concludes that Supreme Court did not prohibit suppression, and merely relied on well-established bar on suppression of the defendant's body and the fact of his identity).

In contrast, it appears that suppression would not be required when the statute has been violated because fingerprints or other evidence was taken after an arrest that

was not for a crime enumerated in FCA 306.1. See People v. Patterson, 78 N.Y.2d 711, 579 N.Y.S.2d 617 (1991) (suppression not required where defendant was identified from photo which should have been returned to defendant pursuant to a sealing order); People v. Capers, 129 A.D.3d 1313 (3d Dept. 2015) (suppression not required where photograph taken during juvenile delinquency proceeding that should have been destroyed pursuant to FCA §354.1 was used in photo array); Matter of Quadon H., 55 A.D.3d 834, 866 N.Y.S.2d 693 (2d Dept. 2008) (suppression of respondent's statements not required where arrest of respondent was based on match between fingerprint found at scene and fingerprints that should have been destroyed pursuant to FCA §354.1 after previous arrest that resulted in no charges being brought); see also People v. Wilkins, 10 A.D.3d 666, 781 N.Y.S.2d 702 (2d Dept. 2004) (nothing prevents police from asking individual for permission to photograph him).

III. Procedures At Family Court Prior To Filing Of Petition

A. Adjustment

Except in certain enumerated cases, probation "may confer with any person seeking to have a juvenile delinquency petition filed, the potential respondent and other interested persons concerning the advisability of requesting that a petition be filed." FCA §308.1(1). Generally, probation has the power to resolve, or "adjust," proceedings in favor of a child before the matter is referred to a presentment agency for the filing of a petition. FCA §308.1(2). This power exists whether the child has appeared at court pursuant to an appearance ticket or is in detention. FCA §§307.3(4), 308.1(5). Probation may not prevent a person who wishes to request that a petition be filed "from having access to the appropriate agency," FCA §308.1(8); 9 NYCRR §356.6(b)(1) (case not eligible for adjustment services if complainant seeks access to presentment agency for purpose of having petition filed), but may make a recommendation regarding adjustment. FCA §308.1(6). Once a case has been adjusted with the consent of the complainant, a petition may not subsequently be filed. See Matter of Kendra C., 133 Misc.2d 673, 507 N.Y.S.2d 801 (Fam. Ct. Richmond Co., 1986).

In determining whether to adjust a case, probation may consider such factors as the use or threatened use of violence, the use or knowing possession of a dangerous

instrument or weapon, the likelihood that the child will cooperate with the adjustment process, and the existence of prior juvenile delinquency adjustments, adjournments in contemplation of dismissal or adjudications or pending juvenile delinquency, juvenile offender or PINS cases. 22 NYCRR §205.23(c). Probation may direct the child to obtain employment and make restitution from the earnings, but may not consider the inability of a family to make restitution when deciding whether to adjust a case. FCA §308.1(2). See also Matter of Shabar W., 14 Misc.3d 1218(A), 836 N.Y.S.2d 489 (Fam. Ct., Queens Co., 2007) (probation may adopt policy barring adjustment when child denies culpability).

Probation may not adjust, without written court approval, a case involving designated felony allegations. FCA §308.1(3). When a child has been arrested and charged with an offense enumerated in FCA §308.1(4), and has had a prior adjustment of a case in which an enumerated offense was charged, the new case may not be adjusted without written approval from the court and the presentment agency. Article Three adjustment provisions do not apply when a case has been removed to family court pursuant to CPL Article 725. FCA §308.1(13). In the "Raise the Age" legislation, the legislature specified that in certain instances when an adolescent offender proceeding is transferred to family court, the action shall not be considered a "removal" subject to FCA §308.1(13) and thus the adjustment provisions in §308.1 shall apply. See CPL §722.21(3)(b) (upon felony hearing, court finds reasonable cause to believe defendant committed only juvenile delinquency act other than felony); CPL §722.21(4) (court receives notice that DA will not file motion to prevent removal); CPL § 722.23(1)(g) (DA fails to file motion to prevent removal or court denies such a motion). The legislature has not expressly provided for (or expressly precluded) pre-filing adjustment when an exceptional felony charge (class A felony defined outside Penal Law Article 220, violent felony defined in PL §70.02, or juvenile offender-level charge listed in CPL §1.20(42)[1] or [2]) is removed, and, in any event, has not barred court-ordered, post-filing adjustment in such cases.

If a child fails to appear on the return date specified on the appearance ticket, probation may immediately refer the matter to the presentment agency, or attempt to

secure the voluntary presence of the child by way of written or telephonic notification. FCA §307.2(1). However, probation may not issue a subpoena or otherwise "compel any person to appear at any conference, produce any papers, or visit any place." FCA §308.1(11). Probation also may attempt to secure the voluntary appearance of a complainant who has failed to appear. FCA §307.2(2). If efforts at securing the attendance of either the child or the complainant are unsuccessful for seven days, the matter must be referred to the presentment agency, which may file a petition or issue a subpoena for the complainant. FCA §307.2(1),(2); Matter of Jose E., 100 A.D.3d 629 (2d Dept. 2012) (presentment agency had authority issue subpoena directing complainant to appear at its offices pursuant to § 307.2[2]).

When the necessary parties have appeared, efforts at adjustment may be made for a period of two months, see Matter of Joseph S., 102 Misc.2d 913, 424 N.Y.S.2d 681 (Fam. Ct. Suffolk Co., 1980) (period begins to run at initial interview of complainant), and, with leave of the court, for an additional two months. FCA §308.1(9). See Matter of Edwin R., 31 Misc.3d 1214(A), 2011 WL 1467639 (Fam. Ct., Queens Co., 2011) (court denies probation application where youth was charged with criminal possession of weapon for allegedly possessing switchblade knife, substance abuse program had not had success in curbing youth's abuse of marijuana, and alleged criminal act appeared to be part of larger pattern of maladaptive behavior that included truancy and problems in school); Matter of Edward W., 89 Misc.2d 570, 392 N.Y.S.2d 208 (Fam. Ct. Onondaga Co., 1977) (failure to file petition within allotted adjustment period divests court of jurisdiction). But see Matter of Claude E., 124 Misc.2d 261, 476 N.Y.S.2d 462 (Fam. Ct. Onondaga Co., 1984) (failure to refer to court within allowed time does not require dismissal unless respondent was prejudiced); Matter of Patrick G., 92 Misc.2d 126, 399 N.Y.S.2d 862 (Fam. Ct. Suffolk Co., 1977).

Although the child has no right to appointed counsel during the adjustment process, see Matter of David J., 70 A.D.2d 276, 421 N.Y.S.2d 411 (3rd Dept. 1979), the child does have the right to be accompanied by retained counsel. Uniform Rules, 22 NYCRR §205.23(a). If the 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). If the case is adjusted, probation must notify DCJS and the appropriate police department or law enforcement agency in cases where fingerprints were taken. FCA §301.8(12).

Additional, and comprehensive, guidelines for adjustment appear in Uniform Rules For The Family Court, 22 NYCRR §§205.22 and 205.23, in 9 NYCRR §354.5, and in 9 NYCRR Part 356 [see 22 NYCRR §§ 356.1(definitions); 356.4 (transfer to child's county of residence); 356.5 (general requirements for preliminary procedure); 356.6 (probation intake); 356.7 (adjustment services); 356.8 (assessment, case planning and reassessment); 356.9 (referral to presentment agency); 356.11 (case closing requirements); 356.12 (case record keeping requirements)].

"No statement made to the probation service prior to the filing of a petition may be admitted into evidence at a fact-finding hearing," FCA §308.1(7), nor may any statement made by the child be communicated to the presentment agency. FCA §308.1(6). See Matter of Luis R., 92 Misc.2d 55, 399 N.Y.S.2d 847 (Fam. Ct. Kings Co., 1977) (fruit of improperly disclosed statements may be suppressible); but cf. United States v. Griffith, 385 F.3d 124 (2d Cir. 2004) (confidential information provided for purpose of bail determination could be used to impeach defendant at trial). However, probation may provide other relevant information to the presentment agency, such as reports made by the arresting officer and a record of previous adjustments and arrests. FCA §308.1(6). And, since the statute only prohibits the use of the statements "at a fact-finding hearing," a respondent may be entitled to obtain such statements in order to prepare an adequate defense. Cf. Matter of Hawk, 128 Misc.2d 931, 491 N.Y.S.2d 912 (Fam. Ct. Queens Co., 1985) (witness' statements to probation are not confidential); 9 NYCRR §348.4 (records shall be accessible to those authorized by court order); but see Matter of Hawk, supra, 128 Misc.2d 931 (noting that probation refuses access to records to prosecution and defense, court holds that witness' prior statements are not discoverable pursuant to People v. Rosario, 9 N.Y.2d 286 or FCA §331.4); Matter of Richard J., 122 Misc.2d 839, 472 N.Y.S.2d 264 (Fam. Ct. N.Y. Co., 1984). Even if certain information is confidential, the respondent is entitled to an in camera review by the court to determine whether records contain information favorable to the defense.

See Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989 (1987) (defendant entitled to have court conduct in camera review of confidential child welfare agency file). Arguably, probation should bring exculpatory information to the court's attention.

B. Presentment Agency Determination

It appears that the presentment agency's determination not to prosecute terminates the case and may not be revisited. See FCA §375.1(2)(h).

Although there is no statutory time period within which the presentment agency must file a petition, a speedy trial claim based on constitutional due process principles could 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) (juveniles have due process right to speedy trial; Court of Appeals adopts balancing test used in criminal cases but notes that special characteristics of juveniles and juvenile delinquency proceedings must be taken into account). In support of such a claim, the child's attorney should also 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. People v. Stirrup, 91 N.Y.2d 434, 671 N.Y.S.2d 433 (1998).

C. Pre-Petition Hearing

When a child has not been released by the police, the matter has not been adjusted, and the child remains in detention at the family court, the agency operating the detention facility must file an application for a hearing and order pursuant to FCA §307.4, and serve a copy of such application on the presentment agency. FCA §307.3(4). The presentment agency is then responsible for presenting the application at the hearing. FCA §307.4(6). If the presentment agency is able to file a legally sufficient petition, there will be no need for a hearing under §307.4.

A child must be produced in family court by a detention facility within seventy-two hours after detention begins, or the next day court is in session, whichever is sooner. FCA §307.3(4). See also Matter of Louis D., 34 Misc.3d 427 (Fam. Ct., Kings Co., 2011) (upon pre-petition hearing, court releases respondents as remedy for statutory violations committed by police, who arrested respondents at about 7:00 p.m. on Sunday night and did not bring them to detention center until Monday night, and they were not

produced before judge until next morning, approximately 39 hours after arrest; statutory justification to detain respondents was exhausted as of Monday morning and they should have been produced in court at that time). Since a pre-petition hearing must be held within an identical time period, see FCA §307.4(5), the hearing will ordinarily occur the same day the child is arrested or first brought to family court. The court must appoint an attorney to represent the child at the hearing if independent legal representation is not available. FCA §307.4(2); see also Rothgery v. Gillespie, 554 U.S. 191, 128 S.Ct. 2578 (2008) (criminal defendant's initial appearance before judicial officer, where he learns charge and liberty is subject to restriction, marks start of adversary judicial proceedings that trigger attachment of Sixth Amendment right to counsel). Since the reason a child is in detention at this stage is, in most cases, the parent's failure to appear, it is unlikely that private counsel will be present. The child and his or her counsel must be personally present at the hearing. FCA §341.2(1). The absence of a parent or guardian does not prevent the court from proceeding "if reasonable and substantial effort has been made to notify such parent or other [legally responsible] person" of the hearing. FCA §341.2(3). The child, and the parent, if present, must be advised of the child's right to remain silent, and to be represented by chosen counsel. FCA §320.3.

The court must make an initial determination as to whether it appears to have jurisdiction over the child. FCA §307.4(1). Although "jurisdiction" will ordinarily be found when the child was between the ages of seven and sixteen when the acts were allegedly committed [see FCA §§301.2(1), 302.1(2)], the child's attorney could presumably raise objections concerning geographical jurisdiction or venue (see FCA §302.3; CPL article 20), or the statute of limitations (see FCA §302.2; CPL §30.10).

Upon a hearing, the court must release the child to the custody of the parent or guardian if "the court does not appear to have jurisdiction," or "the events occasioning the taking into custody do not appear to involve allegations that the child committed a delinquent act ...." FCA §307.4(4)(a), (b). Since this standard seems to require less than probable cause, it may be unconstitutional. Cf. County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661 (1991); Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975).

See also Alfredo A. v. Superior Court, 6 Cal.4th 1212, 865 P.2d 56 (1994), cert denied 513 U.S. 822, 115 S.Ct. 86 (core principles established in Gerstein are applicable to juveniles). Even if the events leading to arrest do appear to involve delinquent acts, the child must be released "unless the court finds and states facts and reasons which would support a [post-petition] detention order pursuant to section 320.5." FCA §307.4(4)(c). Sections 320.5(3)(a) and (b) authorize detention when there is a "substantial probability that [the child] will not appear in court on the return date," or "there is a serious risk that [the child] may before the return date commit an act which if committed by an adult would constitute a crime."

There is no prescription in FCA §307.4 concerning the type and quality of evidence which can be admitted at the hearing. Since a child detained under FCA §307.4 is also entitled to a probable cause hearing [see FCA §307.4(7)], at which most forms of hearsay are inadmissible [see FCA §325.2(3)], it may be difficult to argue that hearsay is generally excludable. On the other hand, if there is no testimony at the hearing by a witness with personal knowledge of the charges, the child should not be detained. See People ex rel. Guggenheim v. Mucci, 46 A.D.2d 683, 360 N.Y.S.2d 71 (2d Dept. 1974) (although hearsay is admissible, "due process requires that something more than uncorroborated hearsay be presented before a finding of probable cause may be made"). The jurisdictional requirement that a delinquency petition be supported by nonhearsay allegations establishing, if true, every element of each crime charged and the respondent's commission of those crimes [see FCA §311.2(3)] provides further support for an argument that the child should not be held upon mere hearsay allegations.

Upon determining that detention is justified, the court “shall also determine and state in any order directing detention: (a) whether the continuation of the child in the child’s home would be contrary to the best interests of the child based upon, and limited to, the facts and circumstances available to the court at the time of the hearing ...; and (b) where appropriate and consistent with the need for protection of the community, whether reasonable efforts were made prior to the date of the court hearing that resulted in the detention order ... to prevent or eliminate the need for removal of the

child from his or her home or, if the child had been removed from his or her home prior to the [court] appearance, where appropriate and consistent with the need for protection of the community, whether reasonable efforts were made to make it possible for the child to safely return home." FCA §307.4(8); see also 22 NYCRR §205.28(a) (court may request presentment agency and local probation department to provide information to court to aid in determinations and may also consider information provided by child's attorney).

If the court orders that the child be detained, a petition must be filed, and a probable cause hearing held, within four days of the pre-petition hearing, or the child must be released. FCA §307.4(7). See Matter of Kevin M., 85 A.D.3d 920, 925 N.Y.S.2d 194 (2d Dept. 2011) (General Construction Law §25-a(1), which allows time within which act is required to be done to be extended to next business day when deadline falls on Saturday, Sunday or public holiday, not applicable to four-day deadline; court notes that different time limitations for detained and non-detained children reflect long-held legislative recognition that detention is drastic measure that may cause lasting damage in children who are needlessly detained, and application of §25-a would be inconsistent with statute's general object of swift adjudication and Legislature's concern regarding needless detention of children). Presumably, if a petition is filed within four days, but a probable cause hearing is not held, the court may dismiss the petition without prejudice or, for good cause shown, adjourn the hearing and release the child. See FCA §325.3(4). It is important to recognize that the four-day rule in FCA §307.4(7) may, in some cases, require that a probable cause hearing be held prior to the time specified in FCA §325.1(2) (probable cause hearing must be held within three days of the respondent's post-petition initial appearance, or within four days of the filing of the petition, whichever occurs sooner).

D. Detention

A child may be held in a detention facility certified by the New York State Office of Children and Family Services (OCFS) pursuant to Executive Law §503(5). FCA §301.2(3). OCFS may establish or contract for secure and non-secure detention facilities. EL §503(2). See also FCA §301.2(4) (secure detention facility is "a facility

characterized by physically restricting construction, hardware and procedures"); FCA §301.2(5) (non-secure facility is "characterized by the absence of physically restricting construction," etc.); Matter of Tyreck B., 2 Misc.3d 717, 774 N.Y.S.2d 275 (Fam. Ct., N,Y. Co., 2003) (probation-run Alternative to Detention facility is not a “detention” facility).

A child may not be detained in any facility used for adults charged with or convicted of a crime without OCFS approval as to the particular child involved. FCA §304.1(2). The court may not order that a child under ten years of age be detained in a secure facility. FCA §304.1(3).

IV. Originating A Juvenile Delinquency Proceeding

A. Filing Of Petition

A delinquency proceeding is initiated by the filing of a petition. FCA §310.1(1). Upon receipt of notice from probation that a case has not been adjusted, the presentment agency determines whether it will file a petition. If a proceeding is not initiated within thirty days, the presentment agency must notify the complainant in writing. FCA §310.1(3).

B. Service Of Petition And Summons

In many cases, the respondent and the parent are present in court on the day the petition is filed, either because the respondent is in detention, or because the petition has been filed on the return date of an appearance ticket or a subsequent date on which the respondent has been directed to appear. Consequently, at least in New York City family courts, it is common for a petition to be served for the first time in court [see FCA §320.4(1)]. But see In re Jonathan G., 51 A.D.3d 403, 857 N.Y.S.2d 535 1st Dept. 2008) (dismissal not required where respondent was not served with copy of removal order on first post-verdict appearance in family court, and respondent received proper notice of charges by way of verdict itself, rendered in open court in his presence, and same information was repeated in his presence following removal to family court and order of removal was served on him in family court a few days after initial appearance).

If, however, a petition is filed in the absence of the respondent, "the court may cause a copy thereof and a summons to be issued, requiring the respondent personally

and his parent or other person legally responsible for his care, or, if such legally responsible person is not available, a person with whom he resides, to appear for the initial appearance as defined by section 320.1 at a time and place named. The summons shall be signed by a judge or by the clerk of the court." FCA §312.1(1). When a case has been removed from a criminal court, the removal order is deemed to be the petition for purposes of service. FCA §311.1(7).

Service must be personal, and must be made at least twenty-four hours before the time designated for the respondent's appearance. FCA §312.1(2). If personal service cannot be made after "reasonable effort," service may be made "in any manner the court directs." FCA §312.1(3); see Matter of Khymani H., 97 A.D.3d 577, 947 N.Y.S.2d 337 (2d Dept. 2012) (even if court did err in permitting substituted service in absence of reasonable efforts to serve respondent by personal delivery, respondent not entitled to dismissal on ground that court lacked personal jurisdiction over him since personal jurisdiction is obtained by means of initial appearance, not by service of summons and petition). Since the respondent's first appearance before the court after a petition has been filed must, except for good cause shown, be held within ten days after filing when the respondent is not detained [see FCA §320.2(1)], the summons should be returnable no more than ten days after it is issued.

It should be noted that in criminal proceeding, there is no such thing as a limited appearance to contest personal jurisdiction based on a lack of or defective service; any appearance constitutes a concession as to jurisdiction. See, e.g., People v. J & L Landscaping, Inc., 12 Misc.3d 1187(A), 824 N.Y.S.2d 765 (Crim. Ct., N.Y. Co., 2006); People v. Causeway Construction Co., 164 Misc.2d 393, 625 N.Y.S.2d 856 (Crim. Ct., Bronx Co., 1995); People v. Benjamin Development Co., 155 Misc.2d 528, 589 N.Y.S.2d 144 (Crim. Ct., Queens Co., 1992).

C. Warrants

Upon the filing of a petition, the court may issue a warrant for the respondent, or for a person legally responsible for the respondent's care or, if such responsible person is not available, a person with whom the respondent resides, when it appears that:

1. a summons cannot be served; or
2. such person has refused to obey a summons or

family court appearance ticket; or

3. the respondent or other person is likely to leave the jurisdiction; or
4. a summons, in the court's opinion, would be ineffectual; or
5. a respondent has failed to appear.

FCA §312.2.

Subdivisions one through four of §312.2 ordinarily govern the issuance of a warrant on the date the petition is filed, while subdivision five provides general authority for the issuance of a warrant at a later stage of the proceeding.

Ordinarily, when a child has failed to appear on the return date in the appearance ticket, the probation department immediately refers the matter to the presentment agency. A petition is then filed, and a warrant is issued after a copy of the appearance ticket is presented as proof that the respondent has defied legal process. Unfortunately, in the absence of assigned counsel there is little protection against the issuance of a warrant for a respondent who has not been notified of the date to appear. Since a warrant history can be prejudicial at various stages of a proceeding, such as a detention or dispositional hearing, the child's attorney should ask that court and probation files be amended to reflect the absence of fault when the respondent establishes a valid excuse for a failure to appear.

The rules governing the issuance of warrants should be applied when the respondent's appearance is required at any stage of the proceeding. For instance, if the date of trial has been changed, or a case has been advanced because of alleged violations of parole conditions, a warrant should ordinarily not be issued before a summons has been served and disobeyed. See Matter of Hand, 129 Misc.2d 810, 494 N.Y.S.2d 642 (Fam. Ct. Queens Co., 1985).

After issuing a warrant, the court must schedule a warrant report within thirty days. The court may order an appearance by the person legally responsible for the respondent or with whom the respondent resides. The court may order further reports, and appearances by the custodian. After each report, the court must make written findings of fact. FCA §312.2(2).

V. The Initial Appearance

A. Timing

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." 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). 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). In addition, the second petition is not subject to dismissal merely because it is filed beyond the ten-day limit as measured from the filing date of the original petition. See In re Steven S., 238 A.D.2d 226, 657 N.Y.S.2d 10 (1st Dept. 1997)

B. Assignment And Appearance Of Child's Attorney

The court must appoint an attorney in a delinquency proceeding "if independent legal representation is not available to [the] minor." FCA §249(a). In New York City, The Legal Aid Society's Juvenile Rights Practice is under contract to represent indigent respondents. The court may also assign an attorney under article 18-B of the County Law. In a proceeding following an order of removal made pursuant to CPL Article 725, the court must, where practicable, appoint the attorney who represented the child in the criminal proceeding. FCA §249(b). Presumably, this requirement will be adopted in all cases sent to family court under the "Raise the Age" legislation.

If the respondent has already retained counsel or is not financially eligible for assigned counsel, the court may adjourn the initial appearance for seventy-two hours or to the next court day, whichever is sooner, to enable the respondent to arrange for the

appearance of counsel. FCA §320.2(3).

In New York City, there is ordinarily at least one attorney available for immediate assignment pursuant to article 18-B when The Legal Aid Society cannot be assigned because of a conflict of interest. Outside New York City, counsel is often assigned in absentia when the petition is filed. In such cases, counsel, and, when necessary, the presentment agency, must be notified of the initial appearance date. FCA §320.2(4).

C. Waiver Of Counsel

A child is presumed to lack sufficient knowledge and maturity to waive counsel. Thus, counsel may be waived only after the appointment of counsel, and after the court, upon a hearing in which counsel participates, determines upon clear and convincing evidence that "(a) the minor understands the nature of the charges, the possible dispositional alternatives and the possible defenses to the charges, (b) the minor possesses the maturity, knowledge and intelligence necessary to conduct his own defense, and (c) waiver is in the best interest of the minor." FCA §249-a. See Matter of Dillon Z., 44 A.D.3d 1192, 845 N.Y.S.2d 479 (3rd Dept. 2007) (court properly rejected waiver where respondent alleged that attorney was providing false information as "scare tactic" but his only specific complaint was that attorney repeatedly provided him with "worst case scenario[s]" which never occurred, respondent stated that he just wanted "to get this over with," and court determined that respondent did not possess requisite intelligence to waive counsel and put on own defense); Matter of Cheri H., 121 Misc.2d 973, 469 N.Y.S.2d 551 (Fam. Ct. Bronx Co., 1983) (right not waived by parent's refusal to hire counsel; court assigns counsel and directs parent to pay reasonable fee); see also In re C.S., 874 N.E.2d 1177 (Ohio 2007) (juvenile's parent may not represent juvenile in delinquency proceeding; juvenile may waive right to counsel, but only if counseled and advised by parent, custodian or guardian, and, where charges are serious, waiver must be made in open court, recorded, and in writing). It seems unlikely that this test could ever be met, particularly given the admonition in FCA §249(a) that the court may never permit a waiver in certain critical proceedings.

D. Procedures At Initial Appearance

At the initial appearance, the court must cause the respondent and counsel to be

furnished with a copy of the petition. FCA §320.4(1). Although a removal order is deemed to be the petition for purposes of service pursuant to FCA §312.1, there is no such statement in FCA §320.4(1). Thus, in removal cases, the child's attorney should argue that, at the very least, all criminal court accusatory instruments and any accompanying depositions must be served.

If the "initial appearance" is the respondent's first appearance in court, the court must advise the respondent and the parent of the respondent's right to remain silent, and to be represented by chosen counsel or an assigned attorney. FCA §320.3. See Matter of William U., 285 A.D.2d 512, 727 N.Y.S.2d 650 (2d Dept. 2001) (failure to advise of right to remain silent harmless where respondent made no statements); Matter of Timothy B., 114 A.D.2d 336, 494 N.Y.S.2d 325 (1st Dept. 1985) (plea vacated due to court's failure to fully advise respondent); but see Matter of Marquis K.S., 26 A.D.3d 756, 810 N.Y.S.2d 604 (4th Dept. 2006) (neither judge that removed action from adult criminal court upon respondent's guilty plea, nor family court, was required to comply with §320.3). The court must inform the respondent or cause the respondent to be informed of the charge(s) contained in the petition. FCA §320.4(1). When counsel is present, this procedure is often waived in the interest of judicial economy. The respondent must admit or deny each charge, FCA §321.1, and, if the respondent refuses to admit or deny the charge(s) or remains mute, the court must enter a denial. FCA §321.1(2).

The initial appearance may proceed in the absence of the parent or guardian if "reasonable and substantial effort has been made to notify" such person of the commencement of the proceeding and the initial appearance. See Matter of Jason SS., 301 A.D.2d 900, 755 N.Y.S.2d 734 (3rd Dept. 2003) (family court properly proceeded where parent was ill and no request for delay or objection was raised). However, an attorney must be appointed for the child. FCA §320.3.

At the initial appearance, the court must determine:

(a) whether detention is necessary pursuant to section 320.5; and
(b) whether the case should be referred to the probation service pursuant to section 320.6; and
(c) if the child is detained, the date of the probable cause

hearing pursuant to section 325.1 unless such hearing has already been held [during criminal court proceedings prior to removal]; and

(d) the date of the fact-finding hearing; and

(e) such other issues as may be properly before it.

FCA §320.4(2).

E. Referral To The Probation Service And Adjournment In Contemplation Of Dismissal

Many attorneys, particularly those accustomed to the broad powers of the District Attorney in criminal proceedings, negotiate only with the presentment agency and assume that the prosecutor's objection will preclude any settlement proposed by the defense. However, the Family Court Act provides judges with broad discretion to issue orders favorable to the juvenile without the consent of the presentment agency. Indeed, both a referral to the Probation Department for "adjustment" of the case, and an adjournment in contemplation of dismissal, or "ACD," may be ordered by a judge despite the presentment agency's objection. While the child's attorney should avoid approaching the judge with a request that is frivolous, the attorney should never, merely for the sake of avoiding conflict, settle for the best deal offered by the presentment agency when there is a possibility that the judge will agree to something better. Even judges who are reluctant to do anything without the presentment agency's consent should be approached, since a prosecutor taking an unreasonable position may relent when at risk of alienating the judge, and judges do have ways of changing recalcitrant attorneys' positions during a bench/chambers conference.

"At the initial appearance the court may, with the consent of the victim or complainant and the respondent, refer a case to the probation service for adjustment services." FCA §320.6(2). There is no exception in the statute for cases removed or transferred from criminal court. See also 9 NYCRR §356.10(a); Matter Of Qili W., 298 A.D.2d 396, 751 N.Y.S.2d 399 (2d Dept. 2002) (although family court erred in denying application for adjustment solely because presentment agency did not consent, dismissal not required in interest of justice since respondent failed to request adjustment at initial appearance, and did not establish that complainant consented); In

re Deborah C., 261 A.D.2d 138, 689 N.Y.S.2d 485 (1st Dept. 1999) (court erred in refusing to refer case for a second time where adjustment failed the first time the court referred the case because respondent and her mother had moved and could not be contacted by Probation); Matter of Shabar W., 14 Misc.3d 1218(A), 836 N.Y.S.2d 489 (Fam. Ct., Queens Co., 2007) (court may not compel probation to adjust case); Matter of Jermaine K., 11 Misc.3d 1066(A), 816 N.Y.S.2d 696 (Fam. Ct., Queens Co., 2006) (while declining to dismiss in furtherance of justice or order adjustment, court adjourns case in contemplation of dismissal; court also notes that it may order adjustment on a date other than the initial appearance); Matter of Vincent F., 121 Misc.2d 992, 469 N.Y.S.2d 563 (Fam. Ct. Richmond Co., 1983) (complainant waived right to object to referral by failing to appear). But see Matter of Adam "T", 287 A.D.2d 833, 731 N.Y.S.2d 294 (3rd Dept. 2001) (court had no authority to dismiss petition where parties were referred to mediation service, but case was not "adjusted").

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, 590 N.Y.S.2d 843 (1992).

Although it might seem pointless to make such an application, since adjustment has presumably been tried unsuccessfully, that is not the case. First of all, if a child fails to appear on the return date of an appearance ticket, a petition can be filed and a warrant can be issued immediately. Thus, prior to the time when such a child is arrested or voluntarily appears, there has been no attempt made to adjust the case. Indeed, the complainant may be quite willing to participate in the adjustment process. In any event, it should be argued that the respondent's failure to appear does not operate as a waiver of the right to the benefit of intake procedures. See Matter of Charles C., 83 Misc.2d 388, 371 N.Y.S.2d 582 (Fam. Ct. N.Y. Co., 1975).

In addition, probation adjustment often fails the first time around for less-than-compelling reasons. The intake probation officer may have made half-hearted or inadequate efforts to work with the complainant and the child to find common ground for settlement. A child ordinarily participates in the adjustment process without legal representation, and, if the child is detained, he or she may be unaccompanied by an

adult. As a result, most children have no sophisticated guidance concerning the adjustment process or the ways in which certain disputes might be settled, and many, because of youth, immaturity, fear or distrust, or more serious disabilities, are unable to participate openly and in a meaningful way. The juvenile may have remained wedded to a difficult-to-believe version of events and failed to show the remorse or insight into his/her behavior that the probation officer was hoping to see. Indeed, adjustment often fails merely because the child is unwilling to admit guilt, and not because the complainant is unwilling to agree to adjustment or because of the child's legal background or social history. See Kody P. v. Superior Court, 137 Cal.App.4th 1030 (Cal. Ct. App., 3rd Dist. 2006) (probation and court abused discretion in denying juvenile opportunity to participate in program of informal supervision only because he refused to admit the offense). In sum, the door may still be wide open to a quick and favorable resolution.

The child's attorney should always consider applying for probation adjustment when the respondent is charged with shoplifting, graffiti-related offenses, farebeating, and the like. Because the judge and prosecutor are likely to think that probation adjustment is a favor bestowed upon the juvenile, rather than a fair and appropriate resolution, the attorney's strategy and style are critical. Although the presentment agency's consent is not required, the complainant's consent, which is required, could be withheld because of advice or pressure from the presentment agency. Thus, the prosecutor should be approached informally -- as any experienced litigator knows, rhetoric and positions harden when lawyers go on the record -- and negotiate respectfully as if the presentment agency's consent is required. The child's attorney should consider proposing an inducement, such as financial restitution, a commitment to engage in community service, or even -- this is more common and appealing than cynics might think -- an open apology by the juvenile to the complainant. A probation officer who will be present at the initial appearance, whose opinion will also be solicited by the judge, should also be approached, and persuaded to give consent. Ultimately of course -- and this is one of the advantages of pressing for a favorable disposition so early in the proceeding -- the child's attorney can request a conference with the judge at

a time when the presentment agency has not yet had an opportunity to contact the complainant and mold his/her response to the attorney's request. If the judge signals a willingness to approve the request, the presentment agency will be deterred from exerting influence over the complainant.

If the petition alleges a designated felony act or any other act which may not be adjusted without written approval [see FCA §308.1(3),(4)], probation is required to make a recommendation regarding the suitability of adjustment. FCA §320.6(1). The presentment agency's consent is required before the court may refer a designated felony charge back to probation for adjustment services. FCA §320.6(2).

A case referred back to probation is subject to the usual provisions governing adjustment, except for FCA §308.1(13) (prevents adjustment of removal cases prior to initial appearance). FCA §320.6(4). If the case is adjusted, the petition must be dismissed. FCA §320.6(3).

F. Pretrial Detention

1. Generally

One of the most important moments in a delinquency proceeding is when the court decides, at the initial appearance or at a pre-petition hearing, whether to remand the respondent. Some of the consequences of a remand are obvious. The respondent experiences a substantial and possibly traumatic loss of liberty. In addition, the child's attorney's ability to effectively prepare a defense is seriously compromised, both by the respondent's inability to fully participate in the investigation and preparation of the case, including the search for elusive witnesses, and by the time constraints which exist whenever a client is incarcerated.

Perhaps even more compelling is the fact that, once a judicial determination has been made that pretrial detention is appropriate, all the "actors" in the court system, including probation officers, prosecutors, and any judges before whom the respondent will appear, are likely to assume that the respondent is a bad risk. As a result, even if a remand was not supported by the facts, or circumstances have changed, it may be difficult to reverse the momentum and successfully argue for parole at a later stage in the proceeding.

For all of the above reasons, the initial detention hearing should not be undertaken without adequate preparation.

2. Release Of Respondent

At the initial appearance, the court may release the respondent or order that the respondent be held in detention pending trial. FCA §320.5(1). If the respondent is released, the court may impose appropriate terms and conditions (see Uniform Rules, 22 NYCRR §205.25), such as regular school attendance, a specified curfew, or participation in a program authorized as an alternative to detention. FCA §320.5(2). If the respondent may be a sexually exploited child as defined in SSL §447-a(1), the court may direct the respondent to an available short-term safe house as a condition of release. FCA §320.5(3)(d).

The respondent must be given a written copy of the terms and conditions. FCA §320.5(2). If the respondent was not provided with a copy, the child's attorney should oppose any attempt to revoke parole due to a violation of the conditions.

The court may modify or enlarge the terms and conditions of release. FCA §320.5(2). Presumably, the respondent must also receive a written copy of the new or modified conditions.

It is ordinarily not wise to oppose reasonable conditions of release if they are authorized by the Uniform Rules, and there is reliable information concerning the respondent's legal and social history. Indeed, by agreeing to the imposition of certain conditions, such as attendance at a probation-operated alternative to detention program, the child's attorney might induce the court to release a respondent who might otherwise have been remanded.

However, when there is no adverse legal or social history, the child's attorney should consider raising an objection to the gratuitous imposition of restrictive conditions. Otherwise, there will be a risk that the respondent's alleged failure to cooperate will be used as evidence supporting a subsequent request for a remand, or, if there is a fact-finding, a more restrictive disposition.

Obviously, not every violation of a release condition will provide the requisite grounds for detention under FCA §320.5(3) (discussed below) -- i.e., "a substantial

probability that [the respondent] will not appear in court on the return date," or "a serious risk that [the respondent] may before the return date commit an act which if committed by an adult would constitute a crime." The Presentment Agency, and many judges, will argue that the judge has inherent authority to punish violations of court orders, and, more specifically, that the judge's authority to impose release conditions has no teeth unless there is authority to order detention despite the absence of the requisite statutory grounds for detention. They may also argue that the respondent's demonstrated willingness to violate a condition of release is evidence of a lack of self-control and of a risk that the respondent will also, at some point, fail to return to court and/or re-offend. There may be some cases in which evidence of the respondent's recent uncharged misconduct -- e.g., assaultive behavior in school or at home, or apparent use of illicit drugs -- does lend some support to arguments for detention. But when such evidence is not presented, and particularly when the respondent, over a substantial period of time, has not failed to appear or been charged with another offense, these arguments for detention are specious. See State v. Blair, 39 So.3d 1190 (Fla., 2010) (constitutional and statutory criteria governing pretrial detention apply when defendant violates pretrial release condition); State v. Paul, 783 So.2d 1042 (Fla. 2001) (same as Blair).

Moreover, under Equal Protection principles, the judge arguably must look to the Criminal Procedure Law standards. CPL §530.60(1) permits a court to revoke an order of recognizance or bail "for good cause shown." However, "[r]eview and revocation of an order of recognizance or bail under [§520.60(1)] would have to be based upon some factor brought to the attention of the court that has a material bearing upon the probability of defendant's future attendance. . . ." Peter Preiser, Practice Commentaries, CPL §530.60. When a defendant is charged with violating an order of recognizance or bail, and "the defendant is entitled to recognizance or bail as a matter of right" -- i.e., when the defendant is not charged with a felony -- "the court must issue another such order." Revocation of recognizance or bail in felony prosecutions based on criminal conduct/dangerousness -- i.e., preventive detention of the type authorized under FCA §320.5(3)(b) -- is authorized by CPL §530.60(2)(a). Before revoking recognizance or bail, the court must find reasonable cause to believe that the defendant committed one

or more specified class A or violent felony offenses or intimidated a victim or witness in violation of Penal Law §215.15, 215.16, or 215.17 while at liberty. Moreover, "[b]efore revoking an order of recognizance or bail pursuant to this subdivision, the court must hold a hearing and shall receive any relevant, admissible evidence not legally privileged. The defendant may cross-examine witnesses and may present relevant, admissible evidence on his own behalf." In sum, the CPL requires that a violation of release conditions bear directly on the statutory grounds for detention before such violation may lead to detention; the CPL does not permit a judge to order detention simply because the defendant has violated a condition of release. When it is alleged that the defendant committed a crime, an adversarial hearing is required.

In addition, certain language used by the Appellate Division in the dispositional context can be used in an argument that truancy, standing alone, is not a sufficient ground for detention or placement. In Matter of Jeffrey C., 47 A.D.3d 433 (1st Dept. 2008), in which the First Department held that the family court should have substituted a PINS adjudication rather than adjudicate the respondent a juvenile delinquent, the court stated: "While the Probation Department report indicates that appellant did not follow curfew and had several school absences, the court should have required the department to monitor appellant 'to assure that he attends school regularly and obeys a curfew,' without adding the stigma of a juvenile delinquent adjudication (citations omitted)." A similar statement was made in Matter of Anthony M., 47 A.D.3d 434 (1st Dept. 2008), where the First Department reversed an order that adjudicated the respondent a juvenile delinquent and imposed a conditional discharge, and directed entry of an order adjourning the matter in contemplation of dismissal, despite the fact that the respondent had been absent from or late to school on several occasions. Again, a judge might balk at the notion that a respondent effectively has carte blanche to violate at will the conditions of release, but the fact remains that while violations of release conditions that do not establish a need for detention under §320.5(3) can lead to more restrictive release conditions, or, perhaps, to a negative inference against the respondent at the dispositional stage, they cannot lead to detention.

Finally, upon an application by the presentment agency, made either ex parte or with notice, the court may, for good cause shown, issue a temporary order of protection. FCA §304.2(1); see FCA §169 (requires that order of protection or temporary order of protection be translated in writing into appropriate language for party where court has appointed interpreter, and that OCA forms be translated as required by Judiciary Law § 212[2][t] in languages most frequently used in courts of each judicial department; that, upon issuance of order, court shall inquire as to whether translation services are needed and advise party or parties of availability of translation services; that copy of written translation be given to each party, along with original order issued in English, and that copy of written translation be included as part of record of proceeding; and that court shall read essential terms and conditions of order aloud on record and direct interpreter to interpret the same terms and conditions). The order may continue until the entry of an order of disposition. FCA §304.2(4). The order may contain any condition authorized by FCA §352.3(1), such as staying away from, and not harassing or threatening, the complainant. FCA §304.2(2).

3. Grounds For Remand

According to FCA §320.5(3)(a), "[t]he court shall not direct detention unless available alternatives to detention, including conditional release, would not be appropriate, and the court finds that unless the respondent is detained: (i) there is a substantial probability that he will not appear in court on the return date; or (ii) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime." Cf. FCA §720(5)(b) (when PINS is sixteen years of age or older, court cannot order detention unless it determines and states in order that special circumstances exist). The court must make a de novo determination under §320.5(3) when, in a case removed from criminal court, there has been a prior detention order.

Ordinarily, probation or the presentment agency will attempt to establish a "substantial probability" that the respondent will not return to court by presenting information concerning the issuance of warrants in the past due to the respondent's failure to appear. In such cases, the child's attorney should ascertain whether there are

any excuses or explanations that would mitigate the effect of the warrant history. For instance, a warrant is often issued before the respondent appears in court late, or because a phone message regarding the respondent's illness never reached the judge, and not because of any willful defiance of a court order or legal process. When a very young child is involved, the child's attorney should consider arguing that the parents should be faulted for their failure to produce the child, and that the child should not be held accountable. Cf. Matter of David G., 124 Misc.2d 579, 476 N.Y.S.2d 758 (Fam. Ct. Kings Co., 1984) (juveniles are released to custody of parents, and "are not assumed to have the capacity to take care of themselves"). In other cases, probation or the presentment agency will allege that the respondent has a history of truancy, has absconded from home or placement, or has repeatedly stayed out late, and then argue that, because the respondent has not cooperated with other authority figures, he or she is unlikely to obey the judge's direction to return to court. Particularly when the respondent has voluntarily appeared pursuant to an appearance ticket or a summons, such an argument is illogical and should be actively challenged.

A "serious risk" that the respondent will commit another crime is ordinarily established through the presentation of evidence of the respondent's prior court record. Although the statute provides that "the presentment agency may introduce the respondent's previous delinquency findings entered by a family court" [see FCA §320.5(4)], and fails to expressly permit the consideration of arrests, or petitions which did not lead to a fact-finding, most judges believe that it is appropriate to consider any information concerning a respondent's prior criminal acts except for references to sealed records. See Matter of Alonzo M., 72 N.Y.2d 662, 536 N.Y.S.2d 26 (1988) (sealed cases may not be referred to in probation report prepared for disposition). It should be noted that, although records must be sealed after a case is adjusted (see FCA §375.1[2][g]), probation is entitled to maintain records so that it may comply with FCA §308.1(4), which limits the power to adjust cases when there has been a previous adjustment. FCA §375.1(3). However, since the exception in §375.1(3) must be narrowly construed, probation should not be allowed to reveal the contents of such records at the initial appearance. Cf. Matter of Hynes v. Karassik, 47 N.Y.2d 659, 419

N.Y.S.2d 942 (1979).

Once the court has determined that a remand is justified, the child's attorney should consider arguing for non-secure detention. Although some judges will choose not to interfere with the discretion of the agency which has custody of the child, the court does have the power to direct non-secure detention. See Matter of Anthony N., 106 Misc.2d 213, 430 N.Y.S.2d 1012 (Fam. Ct. Richmond Co., 1980). See also Jamie B. v. Hernandez, 274 A.D.2d 335, 712 N.Y.S.2d 91 (1st Dept. 2000) (in litigation alleging that New York City's Department of Juvenile Justice was violating State law by failing to provide adequate non-secure detention facilities and detaining juveniles in secure facilities, First Department reverses trial court's order certifying the class and granting a preliminary injunction directing the City and State to devise a plan for adequate placement of all juveniles in the class). If the court leaves it up to the agency, the child's attorney should prepare the child for any interviews with agency personnel.

Any finding directing detention shall state the facts, the level of risk the youth was assessed pursuant to a detention risk assessment instrument approved by the Office of Children and Family Services, and the reasons for such finding including, if a determination is made to place a youth in detention who was assessed at a low or medium risk on such a risk assessment instrument, the particular reasons why detention was determined to be necessary. FCA §320.5(3)(b).

If the court makes a finding that detention is necessary, the court may consider, where applicable, as a condition of release, electronic monitoring of the respondent, if such electronic monitoring would significantly reduce the substantial probability that the respondent would not return to court on the return date, or the serious risk that the respondent may before the return date commit an act that if committed by an adult would constitute a crime. FCA §320.5(3)(c).

Finally, when there is clearly an inadequate basis for a remand order, or the petition is obviously defective, the child's attorney should consider seeking the respondent's release by way of a writ of habeas corpus. It should be noted that a constitutional challenge to preventive detention of alleged delinquents pursuant to FCA §320.5(3)(b) was rejected in Schall v. Martin, 467 U.S. 253, 104 S.Ct. 2403 (1984).

4. Reasonable Efforts Determination

Upon determining that detention is justified under FCA §320.5(3), the court "shall also determine and state in any order directing detention: (a) whether the continuation of the respondent in the respondent's home would be contrary to the best interests of the respondent based upon, and limited to, the facts and circumstances available to the court at the time of the initial appearance; and (b) where appropriate and consistent with the need for protection of the community, whether reasonable efforts were made prior to the date of the court appearance that resulted in the detention order ... to prevent or eliminate the need for removal of the respondent from his or her home or, if the respondent had been removed from his or her home prior to the initial appearance, where appropriate and consistent with the need for protection of the community, whether reasonable efforts were made to make it possible for the respondent to safely return home." FCA §320.5(5); see also 22 NYCRR §205.28(a) (court may request presentment agency and local probation department to provide information to court to aid in determinations and may also consider information provided by child's attorney).

It should be kept in mind that the best interests/reasonable efforts inquiries do not provide an additional ground for remand; the court engages in these inquiries only after first determining that one or more of the traditional grounds for remand exist. Thus, although the court is not required to release the respondent because of the lack of reasonable efforts, the court should be focusing on the possibility of releasing the respondent if services can be put into place. The remaining question is this: whose reasonable efforts are we talking about?

It is true that in some cases, the lack of sufficient information available to the court at the initial appearance, and the "out clause" which provides that reasonable efforts should be "appropriate" and "consistent with the need for protection of the community," will limit the impact of this requirement. However, particularly when a substantial amount of time has passed between commencement of the adjustment process and the initial appearance, the Probation Department ordinarily should be compelled to address the reasonable efforts issue, and to state what efforts have been made, or why efforts were deemed inappropriate, etc. Moreover, after the respondent

has been remanded for a period of time, both Probation and the detention agency should be required to account for their reasonable efforts. Oddly, the law does not expressly require best interests and reasonable efforts inquiries *after* the initial appearance, at a time when the authorities have had an opportunity to consider what services could be put in place in connection with a release of the respondent. Nevertheless, particularly in light of the fact that there must be a reasonable efforts inquiry at disposition [see FCA §352.2(2)(b)], this requirement should be kept in mind when an order remanding the child is issued at any stage of the proceeding.

5. Preparing For The Detention Hearing

Because Probation has interviewed the respondent and the parent, and the presentment agency has had an opportunity to consult with Probation and perhaps even with the parent, the child's attorney usually is the last one to know what is going on. The attorney should attempt to get information from Probation and the prosecutor and ascertain what their position will be, and must question the parent and the client thoroughly to ascertain what has already been revealed to Probation and/or the presentment agency, and other prejudicial information that might be revealed for the first time in court. The attorney should confront the respondent and the parent with social and legal background information the attorney has learned from the prosecutor or Probation, and check it for accuracy. If the respondent contests any allegations concerning his or her legal history, the attorney should check available court records to determine whether the information is inaccurate. If the information concerns cases in other courts, the attorney could attempt to contact other attorneys who represent the respondent in order to confirm the respondent's factual claims. If it is not possible to investigate, prior to the detention hearing, the respondent's claims regarding inaccurate information provided by the prosecutor or Probation, the attorney should make a judgment regarding the credibility of the respondent's claims, and determine whether it would do more harm than good to repeat them without confirmation.

The child's attorney should fish for useful information about the respondent's school honors, part-time jobs, charitable work, religious exercise, or improvements in behavior since the arrest. The attorney should also look to uncover mitigating facts, but

that information should not be used if it contradicts other facts the judge is sure to credit, or it is likely to be viewed by the judge as excuses and rationalizations from an adolescent who has no remorse or insight into his/her behavior.

It is particularly important that the child's attorney ascertain whether the parent is willing to take the respondent home, and, if the parent is unwilling, ascertain the parent's reasons. The attorney should try to persuade a reluctant parent to agree to a parole, and should inform the parent that short-term secure detention, not long-term treatment, is the likely alternative to a release of the respondent. Even when the parent is agreeing to take the respondent home, the attorney might advise the parent that spontaneously volunteering negative information in court could lead to a remand of the respondent. The attorney should determine whether there are other family members willing to provide a home or additional supervision for the respondent, and consider proposing such a plan to the judge.

Because judges scrutinize behavior and body language displayed by the respondent and the parent, as well as what they say and how they say it, the child's attorney should determine whether either one seems volatile and likely to erupt in court or show disrespect to the judge, and provide appropriate instructions; for instance, to remain silent unless asked a question by the judge or advised by the attorney to speak, to answer only the question that is asked and refrain from volunteering information, or, in the case of the respondent, to stand up straight, speak clearly and look interested in what is happening. The respondent and the parent should be encouraged to show remorse and a commitment to improving the respondent's behavior through participation in therapeutic, educational or other services, and any services already being provided should be trumpeted.

Finally, having acquired as much information as possible, the child's attorney should consider approaching a prosecutor or probation officer who is requesting detention, and attempting to change his/her position by presenting new information and well-reasoned arguments. Once the prosecutor and probation officer go on the record in court, they are unlikely to change their positions no matter what the child's attorney says. The attorney might consider attempting to obtain any risk assessment materials

used by probation officers. See Matter of Jasmine G., 35 A.D.3d 604, 828 N.Y.S.2d 107 (2d Dept. 2006) (FOIL did not preclude discovery of assessment tool used at disposition).

6. Detention Hearing Strategy

In some cases, the evidence of criminal propensity is so persuasive that the child's attorney is best advised to ignore it and focus on corrective measures. Nevertheless, when appropriate the attorney should attempt to challenge arguments that are based on speculation and not on a demonstrated pattern of behavior, while putting a positive (and credible) spin on the facts whenever possible. Obviously, if there has been a favorable risk assessment, the attorney should try to capitalize on that, and, on the flip side, be prepared to challenge an unfavorable assessment.

If the petition is the respondent's first but it contains a very serious charge, and it is suggested that the respondent is unlikely to return to face charges which may lead to placement and/or that the evidence of guilt is so strong that it establishes a risk that the respondent will commit another crime, the child's attorney should point out that the respondent's voluntary appearance on the return date of an appearance ticket negates any claim that the respondent is unlikely to return, and that a remand based solely on the seriousness of the charges does substantial violence to the presumption of innocence. On the other hand, although it may do no harm to remind a judge that the respondent has never before been arrested or found guilty, or that a presumption of innocence attaches to the new case, such arguments in no way address a judge's belief that a respondent who has a pattern of arrests, or who is charged with a serious offense, poses a danger to the community.

If the respondent had been in placement, but was living at home for a considerable period of time prior to the new arrest, the child's attorney should point out that recent history does not include a pattern of misconduct. When there is a recent pattern of criminal conduct, the attorney's goal should be to take the focus away from the sheer number of arrests, and redirect the judge's attention towards some mitigating factor, such as the absence of violent behavior or the respondent's peripheral involvement in the crimes of older associates. The attorney might also consider citing a

defense the respondent has raised, but should refrain from doing so when the defense is not suggested, much less supported by facts in the petition and the judge is likely to find the respondent’s claims to be incredible and indicative of a refusal to accept responsibility and a lack of remorse.

While the statutory standards governing pretrial detention might cause the unwary child’s attorney to assume that the judge will focus exclusively on whether the respondent has in the past committed criminal acts or failed to appear in court when required, that is a flawed and dangerous assumption. The prosecutor and/or Probation often will cite every known negative factor in the respondent’s social history, including violations of curfew at home, truancy, talking back to teachers, even poor academic performance. Sometimes the misconduct cited actually is probative, but more often the presentment agency's strategy is to exploit a particular judge's known inclination to intervene "for the juvenile's own good," or to always err on the side of safeguarding community safety.

In turn, the judge, indulging an irresistible impulse to stretch the statute in order to address immediately a juvenile's non-criminal misbehavior, may look to the respondent's overall behavior at home, at school and elsewhere, and to the willingness and ability of the parent to provide supervision, when determining whether to order detention. Even if the facts arguably do not establish a substantial risk of recidivism or non-appearance, the judge may order detention merely because there is a pattern of defiant behavior. A judge may order detention when a parent refuses to take the juvenile home because of conflict within the family. Such a refusal may be grounds for a charge of neglect, or an indication that a "PINS" (person in need of supervision) proceeding should be initiated under FCA Article Seven, but it is not grounds for a detention order.

It is nearly impossible to challenge illegal detention successfully in a habeas proceeding. Most family court judges are skilled at making a record by issuing a rote statement purporting to satisfy the statute, and judges in habeas corpus proceedings are reluctant to overrule another judge, and often delay the proceeding until the detention issue has become moot.

Accordingly, the child’s attorney must try to prevail at the detention hearing on the judge's own terms, by anticipating and preparing to address whatever grounds for detention the judge might consider, including the respondent’s non-criminal behavior. In court, the attorney should present a client and parent who are respectful and willing to change, and who plan to take steps to prevent any future misconduct. Except when the attorney can mount a credible challenge to the allegations that support detention, it is unwise to claim vociferously that the respondent has done nothing wrong or that there is absolutely no risk of recidivism.

Instead, the child’s attorney needs to stick to a forward-looking script, and move the focus from the respondent’s past behavior to changed circumstances that will minimize the risk of future misconduct. In need of reassurance that it is safe to release the respondent, the judge is looking for signs that the parent is stepping up the level of supervision in response to the respondent’s behavior, or that the respondent has expressed genuine remorse and has already improved his/her behavior, or that necessary services have been or are about to be put in place. If there is a family member who lives in another community and is willing to take care of the respondent, the child’s attorney could argue that a "change of scenery" might help put an end to the respondent's pattern of misconduct.

Conducted by judges with busy calendars, detention hearings are fast-paced and pressurized. The child’s attorney frequently is confronted with adverse information for the first time while the hearing is in progress, and before there has been an opportunity to conduct a full interview of the respondent and the parent. If new facts do surface in court, the attorney should quickly consult with the respondent and the parent. However, faced with a barrage of accusations, the attorney must guard against the temptation to repeat whatever unlikely story the respondent whispers, or ask follow up questions or make requests for clarification that may result in an increased flow of damaging information. Unless it appears that the court is not seriously contemplating a remand, the attorney should consider requesting that the case be recalled so that the attorney can conduct a follow-up interview and otherwise learn more about the charges and the respondent's background. Because of bureaucratic error, and the excessive zeal of

certain prosecutors and probation officers, reports concerning a respondent's criminal or social history are sometimes exaggerated or mistaken, and there is no way to effectively prepare a coherent response if there has been no opportunity to conduct an interview in private. A hurried, pressured and not-so-confidential discussion in the courtroom in the presence of an impatient judge, is not advisable.

Judges learn what they need to know in different ways. Some only want to hear from counsel, while others want to hear from the parent, and even the respondent. When the judge addresses the parent directly, it may be a sign that the judge is struggling with the decision and wants more information, and the child's attorney usually should not interfere. And, although the judge should not address the respondent without the child's attorney's permission, the judge's questioning of a well-prepared client need not be cause for objection; indeed, a remorseful statement by the respondent, particularly one who volunteers to speak, can be highly persuasive. As for those volatile or inarticulate clients and parents the child's attorney has decided should be kept under wraps, the attorney should remember to keep them within sight at all times, since the prosecutor's disparaging remarks, and the heated give and take in the courtroom, may provoke them.

In the end, the child's attorney's goal is to convince the judge, through a well-orchestrated presentation, that a plan has been or will be put in place to insure that the respondent will go to school, behave at home and avoid criminal activity, and that the judge may release the respondent without fear. With the client's permission of course, the attorney can even suggest restrictions that, while allowing for school attendance, doctor visits and other necessary trips, come very close to house arrest.

Whenever the court appears to be leaning towards a remand, the petition and supporting depositions should be carefully scrutinized for jurisdictional defects, such as the absence of nonhearsay allegations establishing a prima facie case. See Matter of Jahron S., 79 N.Y.2d 632, 584 N.Y.S.2d 748 (1992). Although motions to dismiss must ordinarily be made in writing [see FCA §332.2], detention ordered upon a jurisdictionally defective petition is illegal. Therefore, the court should entertain an oral motion, particularly when the defect is obvious. See People v. Martini, 36 Misc.3d 729 (Crim.

Ct., Queens Co., 2012); People v. Machado, 182 Misc.2d 194, 698 N.Y.S.2d 416 (Crim. Ct., Bronx Co., 1999) (court is required to inspect accusatory instrument for facial insufficiency during arraignment following warrantless arrest, and must dismiss even in absence of written motion if accusatory instrument is defective); People v. Torres, 141 Misc.2d 19, 532 N.Y.S.2d 663 (Crim. Ct. Bronx Co., 1988). Moreover, a defective petition may fall short of establishing probable cause to detain the respondent. See County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661 (1991); People v. Machado, supra, 182 Misc.2d 194.

Finally, when the respondent's record of criminal behavior is almost certain to result in a remand, the child's attorney should consider presenting an argument primarily aimed at convincing the judge to order non-secure detention. Indeed, although it is inappropriate for the attorney to communicate skepticism about the respondent's chances for release, it does the respondent no good if the attorney ignores reality and spends all his or her time advocating for extremely unlikely results.

7. Remand To Hospital

According to FCA §251, the court may remand the respondent for a mental health evaluation before a fact-finding order only when the respondent's competency to stand trial is at issue (see FCA §322.1, §322.2). However, as recognized in FCA §251(c), the court may order that the respondent be admitted for emergency hospitalization under §9.43 of the Mental Hygiene Law, which permits the court to remand the respondent to the hospital when "it appears to the court, on the basis of evidence presented to it, that such person has or may have a mental illness which is likely to result in serious harm to himself or others ...." See Morrison v. City of New York, 591 F.3d 109 (2d Cir. 2010) (judge may remand individual only for evaluation and has no authority to order continuing hospital detention in face of hospital determination that patient does not meet statutory criteria). The issue of hospitalization is often raised by a probation officer who requests that an emergency evaluation be done by the court mental health clinic. Such requests are often based on a history of hospitalization or other clear evidence of serious mental health problems, or bizarre behavior reported by the parent or observed by a probation officer during the adjustment process. Other

times, the request is based on the nature of the charges. For instance, allegations of sexual abuse, bizarre violence, or arson, often lead to a request for an emergency mental health evaluation.

When it is known that an evaluation will be requested, or a request appears likely, the child's attorney should discuss the issue with the respondent and the parent before going into court. A recess should be sought if the request comes as a surprise. If the request appears to be frivolous or the parent indicates that the respondent's problems have been exaggerated, the attorney should usually oppose the request, since, even if the facts suggest that hospitalization is inappropriate, the examiner may not see things that way. If the request appears to be legitimate, it is difficult to raise a persuasive objection, since the emergency examination itself is designed to gather information and involves no loss of liberty. Indeed, if it appears that the respondent may need immediate hospitalization, the attorney might want to encourage the respondent to cooperate. If the respondent has expressed an intent to commit suicide, the attorney should consider disclosing that to the court. See State Bar Ethics Opinion 486, 1978 WL 14149 (lawyer may disclose client's expressed intention to commit suicide).

When the examination has been completed, the examiner will ordinarily issue an oral report in court and be made available for cross-examination. When cross-examining the witness in an attempt to prevent hospitalization, the child's attorney should concentrate on challenging the significance of the behavior or statements underlying the diagnosis. Since many judges will, in the rush of a busy day, prefer to keep the hearing short and rely upon short-hand psychiatric conclusions, the attorney should be prepared to meet with some resistance.

When the standards in MHL §9.43 are not met, and the respondent objects to the remand, the child's attorney should argue that any treatment the respondent is in need of can be provided on an outpatient basis. The attorney should argue that the need for hospitalization pursuant to MHL §9.43 must be established by clear and convincing evidence. See In re Ricardo H., 17 A.D.3d 464, 793 N.Y.S.2d 140 (2d Dept. 2005).

G. Selection Of Trial Date

1. Respondent Is Remanded

If the respondent has been remanded, and the petition contains a charge that the respondent committed a class A, B or C felony, the fact-finding hearing must be scheduled to commence no more than fourteen days after the initial appearance. If the highest count is less than a C felony, the hearing must be scheduled to commence no later than three days after the initial appearance. FCA §340.1(1).

2. Respondent Is Released

When the respondent has been released, the fact-finding hearing must commence no later than sixty days after the initial appearance. FCA §340.1(2). See Matter of Frank C., 70 N.Y.2d 408, 522 N.Y.S.2d 89 (1987). Consequently, the trial will ordinarily be scheduled for a date within that sixty-day period.

There will usually be no tactical reason to object to the selection of a particular trial date. However, if it appears that it will be difficult to locate witnesses or otherwise investigate and prepare the case, the child's attorney should consider alerting the court to the problem and asking for more time. Since pretrial motions may be filed up to thirty days after the initial appearance [see FCA §332.2(1)], a judge may not, by arbitrarily selecting a firm trial date, reduce the time for making motions. See Matter of Veloz v. Rothwax, 65 N.Y.2d 902, 493 N.Y.S.2d 452 (1985).

H. Interviewing The Respondent

A comprehensive and thorough interview of the respondent should be conducted by the child's attorney as soon as possible, and certainly before discovery or motion filing deadlines or any pretrial hearing.

Adults who consult an attorney often lie, so it should come as no surprise that children do as well. Indeed, when confronted with a charge of criminal behavior and a potential loss of liberty, it is only natural for a child to seize upon any seemingly viable story, and attempt to convince first the police, and then a parent, of his/her innocence. By the time the child appears in family court, he/she is so wedded to the version of events already told repeatedly that there is no way out; probation authorities, and then the child's attorney, are bound to hear the same thing. Attorneys who believe that their supportive role, and their rote assurances regarding confidentiality and the importance of telling the truth, will cause the client to suddenly shift gears and come clean are

kidding themselves. Off a brief first contact, the client has no reason to place trust in the attorney, or to believe that the story he/she has been telling is only making matters worse.

Although the child's attorney's belief, as opposed to actual knowledge, that a client is lying presents no ethical bar to presenting the client's testimony [New York State Rules of Professional Conduct, Rule 3.3(a)(3)], it is rarely wise to do so. However, many attorneys are reluctant to challenge even a client's most transparent lies, for fear of sowing conflict and undermining the attorney-client relationship. Often that is a crucial mistake. In many cases, the need to gather accurate information for pretrial hearing and trial preparation, and to negotiate advantageous plea bargains, requires the attorney to risk alienating the client by seeking the truth through what could, in some instances, become aggressive questioning. But if the attorney is as tactful as possible and makes clear that his/her intent is to help the respondent, harm to the attorney-client relationship can be minimized. In any event, the attorney's primary duty is to obtain the best possible result for the respondent, not to defer to, and be limited by, the respondent's self-defeating refusal to tell the truth. Indeed, the stakes become highest if and when the judge has found the respondent guilty. Possible lies that may have been no more than an inconvenience for the attorney before trial may, if not abandoned, bury the respondent at disposition. The probation report will highlight the fact that the respondent still refuses to take responsibility for his/her behavior, and a mental health examiner will, reasonably or not, conclude that the unremorseful respondent poses a threat to the community.

The child's attorney should mention during the interview that his/her clients often lie because they believe it is the only way to get out of trouble. On the contrary, the attorney should tell the respondent, his/her lying may prevent the attorney from mounting an effective defense based on accurate information, and from making a deal with the presentment agency that might actually get the respondent out of trouble. In other words, the attorney must make the respondent understand that lying is counterproductive.

Of course, the respondent may not be lying, and should be permitted to give

his/her entire version of events one time before the child's attorney considers testing or challenging the respondent's credibility. Even clients who are, in fact, lying, tend to demand loyalty and expect counsel to accept without question what is said, and become angry if counsel expresses skepticism. So, the attorney should just listen attentively rather than risk alienating the respondent before the full story is told.

Assuming the child's attorney has doubts about the respondent's story, straightforward follow-up questions are fine, but there is no reason to go further at the first interview unless it serves a purpose. For instance, if the presentment agency is proposing an attractive plea bargain at the initial appearance -- particularly one that will be withdrawn if not accepted immediately -- it is appropriate for the attorney to trumpet his/her doubts rather than let the respondent lose a clear benefit by sticking to an unlikely story. (Criminal defendants may enter a nolo contendre, or "Alford," plea without admitting guilt, but few family court judges permit the respondent to enter such a plea.) Similarly, the attorney, sensing that a successful suppression motion may be the respondent's only route to a favorable outcome, realizes that the respondent cannot obtain standing to make the motion unless he/she admits possession of property seized by police. On the other hand, when nothing is lost if the respondent walks out of the initial interview without changing his/her story, the attorney may properly choose to conduct an investigation and develop a well-informed opinion regarding the respondent's credibility before deciding to challenge it. In any event, whether the attorney challenges the respondent's story at the initial interview, or at a follow-up interview when more is known, there are a number of strategies from which to choose.

Sometimes, an experienced child's attorney will state bluntly to the respondent that his/her story is unbelievable. This may throw the respondent off-balance and perhaps shock him/her into the realization that the story just will not fly, but it also could suggest to the respondent that the attorney is disloyal and will mount a half-hearted defense. This approach should be considered only when the attorney has good reason to believe the respondent is mature and sophisticated enough to handle it without becoming upset, and only if the attorney has the interpersonal skills to pull it off.

A more common, and safer approach is to point out problems with the

respondent's story in a less judgmental manner. The child's attorney can point out that one or more witnesses have signed sworn statements, and ask the respondent whether he/she knows of any reason the witnesses would lie. The attorney can conduct an informal cross examination and attempt to lay bare for the respondent the story's inconsistencies and flawed premise. The attorney can suggest that although he/she will fight as hard as possible to convince the judge that the defense version is true, the judge will likely find the presentment agency's witnesses more credible, and so the respondent should abandon the story if it is not true. The attorney can acknowledge the respondent's fear that the parent will be angry to learn that he/she is guilty, but remind the respondent that the witnesses' testimony at trial may establish guilt for the parent, and that the parent's ire is trivial compared to a period of placement in a juvenile institution that might be avoided by telling the truth and displaying remorse. Often, over time, the attorney's use of these strategies will succeed in convincing the respondent of the attorney's sincerity and the wisdom of revealing the truth, or will simply wear down the respondent's resistance.

Finally, if a beneficial plea bargain cannot be negotiated, the child's attorney may properly choose to leave the respondent's story unchallenged and present a defense, including, when it might be believed, the respondent's testimony. However, in weighing strategies, the attorney should keep in mind that some judges will become more punitive at disposition after determining that the respondent lied under oath.

VI. The Probable Cause Hearing

A. Timing

If, at the initial appearance, the court determines that the respondent shall be detained for more than three days pending a fact-finding hearing, the court shall schedule a probable-cause hearing to determine the issues specified in FCA §325.3. FCA §325.1(1); People v. Allen, 21 Misc.3d 1109(A), 2008 WL 4514316 (Justice Ct., West. Co., 2008) (defense does not have to seek felony hearing; it is obligation of People to have hearing or indict defendant before statutory deadline unless defendant waives his rights). Ordinarily, the probable cause hearing must be held within three days following the initial appearance or four days after the petition is filed, whichever is

sooner. FCA §325.1(2). If there has been a pre-petition remand pursuant to FCA §307.4, the probable cause hearing may have to be held even earlier. See FCA §307.4(7). The hearing may be adjourned for no more than three days for good cause shown. FCA §325.1(3). See Matter of Snap, 125 Misc.2d 314, 479 N.Y.S.2d 332 (Fam. Ct. Queens Co., 1984) (police officer's vacation was not good cause where prosecutor failed to make diligent effort to secure officer's appearance). If a hearing is not held within the time limits in FCA §325.1(2), the court may dismiss the petition without prejudice, or adjourn the hearing for good cause shown and release the respondent. FCA §325.3(4).

B. Computation Of Three-Day Period

Although article three itself is silent, it appears that weekends and holidays are included in the 3-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. 1985), 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); see also 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 for purposes of speedy initial appearance deadline). Indeed, FCA §739(b), which used to govern pretrial detention in delinquency proceedings, specifically provides that a case may be adjourned for three days exclusive of weekends and holidays, but does not exclude weekends and holidays from the initial three-day period. See Matter of Kenneth D., 102 Misc.2d 363, 423 N.Y.S.2d 423 (Fam. Ct. Kings Co., 1980). Thus, the legislature's failure to set forth such an exclusion in article three, with respect to either the initial remand period or the three-day adjournment, precludes any argument that an exclusion was intended.

If the three-day period ends on a weekend or holiday, it appears that the respondent may be held until the next court day. GCL §25-a; Matter of Kerry V.M., supra, 267 A.D.2d 1035; see also 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 D.P., 17

Misc.3d 1106(A); 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. In any event, particularly when detention commences on a Wednesday or, for some other reason, the presentment agency has at least two days to prepare, the child's attorney should cite Kevin M. in support of an argument that the hearing must be held before the weekend or holiday.

C. Respondent's Right To A Hearing

Where the petition consists of an order of removal pursuant to CPL Article 725, unless the removal was pre-Grand Jury and the respondent was not afforded a probable cause hearing, the petition shall be deemed to be based upon a determination that probable cause exists to believe the respondent is a juvenile delinquent and the respondent shall not be entitled to any further inquiry on the subject of whether probable cause exists. The court must, however, exercise independent, de novo discretion with respect to release or detention pursuant to FCA §320.5.

In granting all other respondents the right to a probable cause hearing, FCA §325.1 makes no distinction between cases in which the top charge is a class A, B or C felony, and other cases. Nevertheless, since a probable cause hearing is required when the court determines at the initial appearance that the respondent shall be detained for more than three days (see FCA §325.1[1]), and a trial must ordinarily be scheduled to commence within three days after the initial appearance when the top charge is lower than a C felony (see FCA §340.1[1]), it had been argued that a probable cause hearing is not required in such cases. This argument was rejected in Matter of Jeffrey V., 82 N.Y.2d 121, 603 N.Y.S.2d 800 (1993). In Jeffrey V., the family court had denied the child's attorney's request for a separate probable cause hearing, commenced the fact-finding hearing despite the attorney's statement that the defense was not ready to go forward, made a finding of probable cause, and then granted the attorney a continuance after the complainant's direct testimony. While recognizing that the child's attorney's

lack of readiness did not constitute a waiver of a probable cause hearing [see FCA §325.1(4)], the Court of Appeals upheld the procedure used by the family court.

However, when the respondent is remanded for more than three days at the initial appearance, the right to a probable cause hearing is waived if the respondent fails to request one at the initial appearance. Matter of William U., 285 A.D.2d 512, 727 N.Y.S.2d 650 (2d Dept. 2001).

Since the statute uses the initial appearance as a point of reference, it can be argued that a probable cause hearing is not required when the respondent is remanded at a later time because of a violation of the conditions of release. However, statutory speedy trial rules, which also use the initial appearance as a point of reference, have been applied in such circumstances. In re Martin R., 268 A.D.2d 277, 700 N.Y.S.2d 712 (1st Dept. 2000); Matter of Kerry V.M., 267 A.D.2d 1035, 701 N.Y.S.2d 584 (4th Dept. 1999). Thus, it would appear that a probable cause hearing is required when the respondent is detained pre-trial for more than three days at any stage of the proceeding.

D. Procedure At Hearing

The presentment agency is responsible for calling witnesses and offering evidence in support of the petition at the probable cause hearing. FCA §325.2(1)(a). Except for good cause shown, the respondent must be permitted to call witnesses and present evidence. FCA §325.2(1)(c). The respondent may testify in his or her own behalf, and such testimony may not be used at "any future proceeding," except as inconsistent prior testimony. FCA §325.2(1)(b). The respondent may, as a matter of right, waive his or her appearance at the probable cause hearing. People v. Jones, 100 A.D.2d 552, 473 N.Y.S.2d 252 (2d Dept. 1984). Alternatively, the respondent may waive his or her appearance for only a portion of the hearing, such as the testimony of the identifying witness. See People v. Hubener, 133 A.D.2d 233, 518 N.Y.S.2d 849 (2d Dept. 1987); Matter of Elijah W., 13 Misc.3d 382, 822 N.Y.S.2d 412 (Fam. Ct., Bronx Co., 2006).

Each witness must testify under oath unless the witness would be eligible under FCA §343.1(2) to give unsworn testimony at a fact-finding hearing. FCA §325.2(2). Any witness, including the respondent, may be cross-examined. FCA §325.2(2); see People

ex rel. Lauring v. Muccci, 44 A.D.2d 479, 355 N.Y.S.2d 786 (1st Dept. 1974) (family court abused discretion by barring all cross-examination by respondent). Although the CPL apparently requires that the prosecution provide the accused with the previous statements of its witnesses (see CPL §240.44[1]; People v. Diggs, 140 Misc.2d 794, 531 N.Y.S.2d 723 [Dist. Ct. Nassau Co., 1988], aff'd 144 A.D.2d 382, 534 N.Y.S.2d 870 [2d Dept. 1988]), there is no parallel requirement in article three. The child's attorney should consider arguing on constitutional equal protection grounds that a respondent is also entitled to such statements.

Although hearsay evidence is ordinarily inadmissible at the hearing, an exception is created for "reports of experts and technicians in professional and scientific fields and sworn statements of the kinds admissible at a hearing upon a felony complaint in a criminal court ...." FCA §325.2(3). This includes a report or a copy of a report made by a physicist, chemist, coroner or medical examiner, firearms identification expert or fingerprint technician; a sworn statement concerning ownership and lack of consent by the owner of premises, the owner of property that was stolen or damaged, or the owner of a vehicle which was taken, operated, controlled or used without permission; or the sworn statement of an expert on value. CPL §§180.60(8), 190.30(3). But see People v. Landon, 175 Misc.2d 861, 670 N.Y.S.2d 968 (Seneca County Ct., 1998) (scientific report may not be used to prove facts not related to the scientific study performed). However, if the respondent can show that the hearsay evidence is "not sufficiently reliable," the court must require that the witness appear and give testimony. FCA §325.2(3). For instance, if the respondent knew the owner of certain premises or property and claims that he or she had the owner's permission to commit a certain act, it could be argued that the court should require production of the owner.

The function of the court at a probable cause hearing is to determine whether it is reasonable to believe that a crime was committed and that the respondent committed such crime. FCA §325.3(1). See People v. Knapp, 9 Misc.3d 1113(A), 808 N.Y.S.2d 919 (Poughkeepsie City Ct., 2005) (court rejects isolated and erroneous holding by Third Department that People must prove probable cause beyond a reasonable doubt); People v. Gurney, 129 Misc.2d 712, 493 N.Y.S.2d 957 (Crim. Ct. N.Y. Co., 1985);

Matter of Robert G., 121 Misc.2d 680, 468 N.Y.S.2d 422 (Fam. Ct. Queens Co., 1983) (suppression issues may not be raised). However, it can be argued that the presentment agency must provide at least skeletal proof of every element of the crime charged. Compare People v. Hodge, 53 N.Y.2d 313, 441 N.Y.S.2d 231, 234 (1981) ("the preliminary hearing...may serve as a virtual minitrial of the prima facie case") and People v. Searles, 135 Misc.2d 881, 517 N.Y.S.2d 370 (Rochester City Ct., Monroe Co., 1987) (corroboration rules apply at preliminary hearing) with People v. Evans, 185 Misc.2d 85, 712 N.Y.S.2d 846 (Rochester City Ct., 2000) (no requirement that legally sufficient or prima facie case be presented); People v. Rice, 148 Misc.2d 204, 560 N.Y.S.2d 105 (Hornell City Ct., Steuben Co., 1990) (corroboration of confession not required) and People v. Gurney, supra, 129 Misc.2d 712 (defendant's confession to murder need not be corroborated by body or murder weapon).

The hearing "should be completed at one session," and may not in any event be continued for more than one court day. FCA §325.2(4).

E. Strategies And Goals At Hearing

Needless to say, the most desirable result of a probable cause hearing is a finding that there is no reasonable cause and a release of the respondent. If a careful evaluation of the available information reveals that there is a realistic chance of winning the hearing, the child’s attorney should seek the exclusion of incriminating evidence and conduct a narrow and tightly controlled cross-examination of the presentment agency's witnesses. However, except in an unusual case, it will not be difficult for the presentment agency to establish reasonable cause at the hearing as long as the available evidence has been produced in court. Consequently, there are goals other than winning which must be considered.

The probable cause hearing offers the respondent an invaluable opportunity to learn about the presentment agency's case. The discovery function of a probable cause hearing was recognized as a legitimate defense interest by the United States Supreme Court when it held in Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999 (1970) that the hearing is a critical stage requiring the appointment of counsel. See also Adams v. Illinois, 405 U.S. 278, 92 S.Ct. 916 (1972); People v. Hodge, supra, 53 N.Y.2d 313; but

see Galindo v. Superior Court, 235 P.3d 1 (Cal. 2010) (given low standard of proof at hearing, denial of motion for disclosure of prior citizen complaints made against arresting officer did not prevent defense counsel from providing effective assistance). Thus, assuming that the child's attorney has correctly determined that the hearing cannot be won, it is appropriate to withhold certain objections, and to ask open-ended questions and otherwise attempt on cross-examination to learn as much as possible about the prosecution's case.

A probable cause hearing also allows the child's attorney to elicit the testimony of prosecution witnesses for use as impeachment material at trial. Of course, the attorney's success in "nailing down" the witnesses' testimony, and in developing sufficient rapport with the witnesses so that information flows freely, ultimately depends on the artfulness of the cross-examination.

Since the sole issue at a probable cause hearing is whether reasonable cause exists, many judges will attempt to restrict the scope of cross-examination, often at the urging of a prosecutor who wishes to minimize defense discovery. In response, the child's attorney should remind the court that FCA §325.2(2) gives the respondent the right to cross-examine prosecution witnesses, which right necessarily includes an opportunity to explore a witness' direct testimony and impeach the witness by showing inconsistencies, bias, an inability to observe, a failure to recall details, etc. In addition, the attorney should argue that the line of cross-examination being pursued is probative of an element of an offense charged, and, therefore, is relevant to the ultimate issue at the hearing. While it would be impertinent to argue that a particular line of inquiry should be permitted because it constitutes legitimate discovery, the fact remains that even the most discovery-oriented line of questioning may also constitute a bona fide attempt to challenge the foundation of reasonable cause.

If the court unreasonably restricts or cuts off a line of questioning, or attempts to prematurely terminate the entire cross-examination, the child's attorney might ask the court what lines of questioning would be permitted, or state for the record that the court has violated the respondent's statutory right to cross-examine witnesses at the hearing, as well as the respondent's constitutional right to counsel and to confront witnesses.

It is not advisable for the defense to call witnesses at a probable cause hearing unless there is a reasonably good chance of winning. Calling witnesses provides the prosecution with discovery and impeachment material. Before presenting a case, the child's attorney should argue that the presentment agency has failed to make a prima facie showing of reasonable cause. If the court agrees, the attorney will have avoided the risk of fleshing out an inadequate showing by the prosecution.

When it is obvious that reasonable cause will be found, it might be appropriate to call witnesses if there is a genuine possibility that the court will reconsider the remand status of the respondent. The child's attorney could present character testimony, or evidence which mitigates the seriousness of the charges or limits the extent of the respondent's involvement. Such a presentation could even include the respondent's testimony.

When a finding of reasonable cause is a certainty, the child's attorney could also attempt to obtain discovery by calling a prosecution trial witness who has refused to speak to the defense. The attorney could even attempt to have the witness declared hostile for purposes of the examination. Since the purpose of the hearing is limited, the attorney might have to justify such a request by arguing that there are problems surrounding the prosecution's case on which the witness could shed some light.

F. Orders Upon A Hearing

If the court determines that there is reasonable cause, the court must state what sections of the Penal Law the respondent appears to have violated. FCA §325.3(2). The court must then make a de novo determination pursuant to FCA §320.5 concerning the need for continued detention. FCA §325.3(3).

If the court does not find reasonable cause, the case must be adjourned and the respondent must be released. It has been noted that it is illogical, and possibly unconstitutional, to deny to the court the power to dismiss the case, an option which, paradoxically, is available when a timely hearing is not held. See Besharov and Sobie, Practice Commentary, FCA §325.3.

Finally, the respondent has an absolute right to obtain the minutes of a witness' probable cause hearing testimony for use during cross-examination of the witness at

trial. See People v. Montgomery, 18 N.Y.2d 993, 278 N.Y.S.2d 226 (1966). The child's attorney should order the minutes at the conclusion of the probable cause hearing, and ask the judge to direct the court reporter to prepare the transcript prior to the trial date. It should be noted that, unless probable cause hearing testimony is admissible under the rules governing the use of former testimony, the court may not use probable cause hearing testimony at the fact-finding hearing. See Matter of Christopher B., 192 A.D.2d 180, 600 N.Y.S.2d 531 (4th Dept. 1993).

CHAPTER THREE

COMPETENCY TO STAND TRIAL

By: Gary Solomon

Table Of Contents

I. Court-Ordered Examination
- A. Issuance Of Order
- B. Content And Filing Of Reports
- C. Hearing To Determine Competency
- D. Probable Cause Hearing
  - 1. Procedure
  - 2. Orders

II Periodic Review By Commissioner
- A. Timing Of Reviews
- B. Determination Of Future Incapacity
- C. Release From Residential Facility

III. Extensions Of Commitment Order In Felony Cases

IV. Detention Time Credit

V. Release Of Respondent Upon Dismissal

VI. Dismissal In Furtherance Of Justice

VII. Deciding Whether To Inform Court Of Competency Problem Or Otherwise Raise The Issue Of Respondent's Mental Condition

I. Court-Ordered Examination

A. Issuance Of Order

At any proceeding under FCA Article Three, the court must order that the respondent be examined by 2 "qualified psychiatric examiners" [see CPL §730.10] to determine whether the respondent is "mentally ill, mentally retarded or developmentally disabled" when the court "is of the opinion that the respondent may be an incapacitated person." FCA §322.1(1); see People v. Hussari, 5 A.D.3d 697, 774 N.Y.S.2d 725 (2d Dept. 2004) (once court found that defendant's conduct warranted examination, court was required to follow statutory procedure; case remitted for reconstruction hearing to determine whether defendant was competent); see also CPL §730.20(5) (if examiners not in agreement, another qualified examiner must examine defendant). This requirement exists at the dispositional stage. People v. Rojas, 43 A.D.3d 413, 840 N.Y.S.2d 152 (2d Dept. 2007) (court may not sentence defendant who is incompetent).

An "incapacitated person" is "a respondent who, as a result of mental illness, or intellectual or developmental disability as defined in [Mental Hygiene Law §1.03(20) and (22)], lacks capacity to understand the proceedings against him or her or to assist in his or her own defense." FCA §301.2(13). See, e.g., People v. Phillips, 16 N.Y.3d 510, 924 N.Y.S.2d 4 (2011) (defendant found fit to stand trial where trial court found that defendant's experts performed abstract tests that did not properly determine whether defendant was competent for trial purposes, People's experts found that defendant evinced understanding of purpose of trial, actors in trial, their roles, nature of charges, and severity of potential conviction and sentence, and defense counsel's claims that defendant's condition impaired power to communicate with counsel and undermined ability to intelligently assist in defense were merely factors to be considered by court); People v. Francabandera, 33 N.Y.2d 429, 354 N.Y.S.2d 609 (1974) (defendant suffering from retrograde amnesia not incapacitated); People v. John Jackson, 60 A.D.3d 599, 877 N.Y.S.2d 244 (1st Dept. 2009), lv denied 12 N.Y.3d 916 (finding of competency proper despite opinion of two psychiatric examiners that defendant was not competent because he insisted on pursuing defense of posthypnotic suggestion derived from his

delusions; ultimate determination is a judicial, not medical, one); United States v. Schlueter, 276 Fed.Appx. 81 (2d Cir. 2008) (not competent determination proper where court found defendant “highly intelligent" and he sometimes assisted counsel, but schizoaffective disorder significantly impaired ability to assist in defense and court found that at certain points "something cracks in him and he loses that ability to communicate and loses that ability to listen as well"); People v. Reason, 44 A.D.2d 533, 353 N.Y.S.2d 449 (1st Dept. 1974), aff’d 37 N.Y.2d 351, 372 N.Y.S.2d 614 (1975) (court cannot credit its own psychoanalysis rather than unchallenged expert competency findings); United States v. Robinson, 2012 WL 5185538 (SDNY 2012) (defendant competent to stand trial where defense expert found that defendant had IQ of 70 in “borderline range of mental retardation” and “does not understand alternate pleas, for example, insanity, plea bargaining” or “the role of the Judge, prosecutor, defense attorney and jury,” but government’s expert testified that defendant lacked prior education rather than competency to stand trial and assist lawyer); People v. D.X.Z., 33 Misc.3d 1205(A) (Sup. Ct., Queens Co., 2011) (individual can have false beliefs, and/or be suffering from psychiatric illness, and not be incapacitated); People v. D.J.H., 32 Misc.3d 1231(A) (Sup. Ct., Queens Co., 2011) (defendant found competent where expert believed defendant’s ideas regarding pervasive conspiracy against him were so far-fetched they could not be true, but defendant’s belief that State was against him was accurate, and, since defendant alleged that hospital medicated patients against their will and used medication as management tool to handle patients, any belief he had that hospital was against him was not altogether delusional); Matter of Erick B., 4 Misc.3d 202, 777 N.Y.S.2d 253 (Fam. Ct., Kings Co., 2004) (respondent found incompetent where perceptual deficits, cognitive limitations, language comprehension and communication difficulties, limited awareness of social conventions, disorganized thought processes, and difficulty forming social relationships, impaired ability to understand judicial system and adversarial process, including roles of judge, prosecutor and defense attorney, develop working relationship with attorney, know what would be required of him to assist attorney, and comprehend attorney’s advice and process information to make informed choice about plea options and theory of defense); see also In re Timothy J.,

150 Cal.App.4th 847 (Cal. Ct. App., 3rd Dist., 2007) (incompetency finding may be based on developmental immaturity alone in absence of evidence of mental disorder or developmental disability).

A finding of incompetency does not equate to a finding that the respondent could not comprehend Miranda warnings. Matter of Jaime E.S., 134 A.D.3d 1126 (2d Dept. 2015).

The respondent is presumed competent, and has no right to have the capacity issue determined if the court is satisfied that there is no proper basis for questioning the respondent's capacity. A history of psychiatric illness does not in and of itself call into question the respondent's capacity, and the court may consider, inter alia, its own observations of the respondent during the proceeding, as well as the failure the child's attorney to request an examination. See, e.g., People v. Tortorici, 92 N.Y.2d 757, 686 N.Y.S.2d 346 (1999); People v. Morgan, 87 N.Y.2d 878, 638 N.Y.S.2d 942 (1995); People v. Gelikkaya, 84 N.Y.2d 456, 618 N.Y.S.2d 898 (1994); People v. Laudati, 35 N.Y.2d 696 (1974) (test for competency is not same as test for criminal responsibility); People v. Waller, 129 A.D.3d 407 (1st Dept. 2015), lv denied 26 N.Y.3d 972 (court not obligated, sua sponte, to order exam where defendant was examined in anticipation of raising psychiatric defense and was diagnosed with psychiatric illnesses, but neither defense expert expressed concerns about competency and defense counsel did not request examination or indicate any difficulty in communication); People v. Jefferson, 60 A.D.3d 1085, 876 N.Y.S.2d 153 (2d Dept. 2009) (matter remitted for report as to whether defendant was competent at plea allocution and sentencing where, when court asked defendant whether she was under influence of drugs, she responded, "Yeah, I just came from the psychiatric ward," and also stated "I'm confused," and, when court asked defendant what she was confused about, she responded, "I don't know" and "I'm depressed"); People v. Galea, 54 A.D.3d 686, 863 N.Y.S.2d 695 (2d Dept. 2008), lv denied, 11 N.Y.3d 854 (before accepting defendant's plea, court should have sua sponte ordered competency examination where defendant had long history of serious mental illness and numerous, prolonged hospitalizations for psychiatric treatment, including period of hospitalization while incarcerated pending trial, and defendant was

on course of four separate psychiatric medications, including at least one antipsychotic medication); Matter of Carlos S., 194 A.D.2d 436, 599 N.Y.S.2d 257 (1st Dept. 1993) (family court did not abuse discretion in ordering additional competency examination, after finding respondent not competent only months before, where testimony by State psychologist that respondent was competent conflicted with testimony of experts at prior hearing and was rejected by court); Matter of Ardon II, 175 A.D.2d 355, 572 N.Y.S.2d 433 (3rd Dept. 1991) (family court should have sua sponte ordered examination where it appeared that respondent was mentally retarded, brain damaged and unable to understand court proceedings).

Because the court can initiate this process, the child's attorney must be careful about raising issues other than capacity which might suggest to the court that there is a capacity problem. For instance, by making a strong argument at a suppression hearing that the respondent was incapable of understanding Miranda warnings, and presenting expert testimony to that effect, the child's attorney could cause the court to question the respondent's capacity to stand trial as well. In such cases, the attorney should explore the issue of capacity with the expert before calling her to testify, and ascertain whether, and to what extent, the expert's testimony would tend to establish incapacity to stand trial.

The statute appears to contemplate that 2 separate examinations will be conducted rather than one examination by 2 examiners - a practice employed by New York City Family Court Mental Health Services.

The examination may be on an outpatient basis if the respondent is not in custody at the time the examination is ordered. FCA §322.1(1). See also FCA §251 (authorizes remand for evaluation); CPL §730.20(1) (court may authorize psychiatrist or psychologist retained by defendant to be present).

The respondent has a right to have his/her attorney present during any examination. Lee v. County Court of Erie County, 27 N.Y.2d 432, 318 N.Y.S.2d 705 (1971) (defendant has right to counsel at pretrial examination regarding his insanity defense, but defense counsel may not take active role; prosecutor is allowed to be present as well); but see People v. Zhao, 35 Misc.3d 439 (Sup. Ct., Queens Co., 2012)

(no authority to grant People's application for permission to be present at examination).

B. Content And Filing Of Reports

"Each report shall state the examiner's opinion as to whether the respondent is or is not an incapacitated person, the nature and extent of his examination and, if he finds the respondent is an incapacitated person, his diagnosis and prognosis and a detailed statement of the reasons for his opinion by making particular reference to those aspects of the proceedings wherein the respondent lacks capacity to understand or to assist in his own defense." FCA §322.1(3).

Statements made by the respondent to the examiners are inadmissible in the delinquency action on any issue other than that of respondent's mental condition. See CPL §730.20(6); People v. Quijano, 240 A.D.2d 186, 658 N.Y.S.2d 282 (1st Dept. 1997) (defendant waived protection in §730.20(6) by placing into issue his mental and cognitive ability to form criminal intent). See also People v. Pokovich, 141 P.3d 267 (CA 2006) (Fifth Amendment bars impeachment of defendant at trial with statements made to mental health professionals during court-ordered competency examination); Matter of James Q., 154 A.D.3d 58 (3d Dept. 2017) (Mental Hygiene Law §33.13(c) does not apply and require that record of insanity acquitee's retention proceeding be sealed).

The reports shall be filed within 10 days after entry of the order, but the court may extend the time upon a showing of special circumstances and a finding that a longer period is necessary. The proceedings shall be adjourned until the reports have been filed with the court, FCA §322.1(2), at which time the court shall conduct a hearing. FCA §322.2(1); see also Matter of Terrance W., 251 A.D.2d 1004, 674 N.Y.S.2d 529 (4th Dept. 1998), lv denied 92 N.Y.2d 810, 680 N.Y.S.2d 54 (no hearing required where presentment agency conceded incapacity and respondent raised no factual issue to warrant a hearing); cf. CPL §730.20(2), (3), (4) (hearing mandated only when defendant or district attorney moves for one, or when examiners are not unanimous); People v. Pett, 148 A.D.3d 1524 (4th Dept. 2017) (court violated defendant's due process rights by accepting plea without conducting mandated competency hearing after one psychiatrist found defendant competent but the other found him incompetent).

C. Hearing To Determine Competency

The respondent and his attorney, the presentment agency, and the appropriate commissioner (of mental health or of developmental disabilities) shall be notified of the hearing at least 5 days before and be given an opportunity to be heard. FCA §322.2(1); see People v. Rivers, 44 A.D.3d 391, 844 N.Y.S.2d 201 (1st Dept. 2007) (while finding of incompetency may be confirmed on consent without hearing, trial court had no discretion to dispense with competency hearing and find defendant fit to proceed where both psychiatrists found defendant unfit); Lewis v. Zon, 573 F.Supp.2d 804 (SDNY, 2008) (due process violation found where court, not satisfied with evidence at competency hearing, had social worker examine petitioner and relied on social worker's written opinion in determining that petitioner was competent, but petitioner had no opportunity to challenge the social worker's opinion); see also United States v. Gillenwater, 717 F.3d 1070 (9th Cir. 2013) (defendant has constitutional right to testify at pretrial competency hearing and only defendant, not counsel, can waive right).

At the hearing, it is the presentment agency's burden to establish capacity. People v. Christopher, 65 N.Y.2d 417, 492 N.Y.S.2d 566 (1985) (hearing is "empty form" unless it takes place with right to examine and cross-examine witnesses). Given this burden of proof, it appears that the court has authority to order an examination by an expert selected by the presentment agency. See People v. DelRio, 220 A.D.2d 122, 646 N.Y.S.2d 117 (2d Dept. 1996), lv denied 88 N.Y.2d 983, 649 N.Y.S.2d 390.

Testimony given by the respondent at a probable cause hearing, including one held in connection with competency proceedings, cannot be introduced during trial or at any other hearing, but may be used for impeachment purposes should the respondent testify at a subsequent hearing. FCA §325.2(1)(b). It is not clear that the Legislature intended to incorporate this rule into competency hearings, but it appears that the same rule must be applied. Pedrero v. Wainwright, 590 F.2d 1383, 1388, n. 3 (5th Cir. 1979); People v. Angelillo, 105 Misc.2d 338, 432 N.Y.S.2d 127 (County Ct., Suffolk Co., 1980); see Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968).

If the court finds that the respondent is not incapacitated, it shall continue the delinquency proceedings. FCA §322.2(2).

If the court finds that the respondent is an incapacitated person, it shall schedule

a hearing to determine whether there is probable cause to believe that the respondent committed a crime. FCA §322.2(3). But see Matter of P.C., 10 Misc.3d 1073(A), 814 N.Y.S.2d 563 (Fam. Ct., Nassau Co., 2005) (after determining that respondent is incapacitated, court forgoes probable cause hearing and dismisses in furtherance of justice where respondent was receiving treatment, there was risk that removal from the home and placement could cause respondent harm and unravel years of treatment, there was no showing that there was an appropriate residential setting, and the victim and his family would have to relive disturbing events).

In United States v. Gomes, 289 F.3d 71 (2d Cir. 2002), the Second Circuit held that the governmental interest in restoring a pretrial detainee's competence to stand trial could override his liberty interest and justify the forced medication of a non-dangerous criminal defendant with antipsychotic drugs for the purpose of rendering him competent to stand trial. Heightened, but not strict, scrutiny is the appropriate standard for determining when a non-dangerous criminal defendant may be forcibly medicated The court must explicitly find by clear and convincing evidence: (1) that the proposed treatment is medically appropriate; (2) that the treatment is necessary to restore the defendant to trial competence; (3) that the defendant can be fairly tried while under the medication; and (4) that trying the defendant will serve an essential government interest. A court ordering involuntary medication must closely monitor the process to ensure that the dosage is properly individualized to the defendant, that it continues to be medically appropriate, and that it does not deprive him of a fair trial or the effective assistance of counsel. The Second Circuit noted that recent advances in antipsychotic medication reduce concerns that the defendant's health interests and fair trial rights cannot be adequately protected, and that, whatever the risks of side effects may be, they can be dealt with in the context of the individual case.

D. Probable Cause Hearing

1. Procedure

The order of proceeding at the hearing shall be the same as it is at a probable cause hearing conducted pursuant to FCA §325.2 (that is, the presentment agency presents evidence and calls and examines witnesses and the respondent may cross-

examine, and then the respondent may testify in his own behalf and call witnesses and the presentment agency may cross-examine). FCA §322.2(3).

According to FCA §325.2(1)(b), the respondent's testimony may not be introduced at any other hearing except to impeach his own testimony. It is not clear that the Legislature intended to incorporate this rule into competency proceedings, but it appears that the same rule must be applied. Pedrero v. Wainwright, supra, 590 F.2d 1383, 1388, n. 3; People v. Angelillo, supra, 105 Misc.2d 338; see Simmons v. United States, supra, 390 U.S. 377.

2. Orders

If the court finds probable cause to believe that the respondent committed a misdemeanor, it shall commit the respondent to the custody of the appropriate commissioner for a reasonable period not to exceed 90 days, and shall dismiss the petition. FCA §322.2(4). See Matter of Erick B., 4 Misc.3d 202, 777 N.Y.S.2d 253; People v. Fann, 47 Misc.3d 416 (Sup. Ct., Queens Co., 2015) (where finding of unfitness takes place in post-conviction context, usual requirement that misdemeanor charges be dismissed does not apply); see also Ritter v. Surles, 144 Misc.2d 945, 545 N.Y.S.2d 962 (Sup. Ct., West. Co., 1988) (statute allowing commitment for 90 days without proof by clear and convincing evidence, as required for civil commitment, violates equal protection; the statute improperly creates 2 classes of incapacitated people - those who have misdemeanor charges dismissed, and those who are considered dangerous to themselves or others and are committed involuntarily); but see Charles W. v. Maul, 214 F.3d 350 (2d Cir. 2000) (post-Ritter practice of confining incapacitated persons for a 72-hour period to allow State to determine whether to commence civil commitment proceedings does not violate due process).

If the court finds probable cause to believe that the respondent committed a felony, it shall commit the respondent to the custody of the appropriate commissioner for an initial period not to exceed one year. FCA §322.2(5)(a). See also Matter of Matthew P., 161 A.D.2d 1195, 555 N.Y.S.2d 980 (4th Dept. 1990) (finding of probable cause as to offense that was not charged, and was not lesser included offense, was invalid); Matter of Justin L., 56 Misc.3d 1167 (Fam. Ct., Kings Co., 2017) (where respondent was also

involved in child welfare system, court notes that CPL §730.50 allows commitment of incapacitated defendant "for care and treatment on an out-patient basis," an option not available to family court, and expresses desire for more options) and Matter of Justin L., 58 Misc.3d 1220(A) (Fam. Ct., Kings Co., 2018) (after dismissing proceeding in which court had made determination of incapacity, court dismissed three other petitions in furtherance of justice, noting, *inter alia*, that Presentment Agency's intent was to withdraw petitions as soon as appropriate placement was secured and respondent was subject of voluntary placement proceeding and would be placed with ACS, but three pending petitions were hindering placement with ACS).

If the court finds probable cause to believe that the respondent committed a designated felony act, it shall require that treatment be provided in a residential facility within the appropriate office of the department of mental hygiene. FCA §322.2(5)(c).

In a criminal proceeding, the court may, with the consent of the District Attorney, commit the defendant for care and treatment on an out-patient basis. See, e.g., People v. Betty Y., 39 Misc.3d 579 (Sup. Ct., Kings Co., 2013).

II. Periodic Review By Commissoner

A. Timing Of Reviews

The commissioner shall review the respondent's condition within 45 days after commitment. A second review must be made within 90 days. Thereafter, the respondent's condition must be reviewed every 90 days. The respondent and his/her attorney must be notified of any review and be given an opportunity to be heard. FCA §322.2(5)(d).

B. Determination Of Future Incapacity

If and when the commissioner determines that there is a "substantial probability" that the respondent will remain incapacitated for the foreseeable future, the commissioner shall apply to the court, while providing written notice to the respondent, the presentment agency and the mental hygiene legal service if the respondent is in a residential facility, for an order dismissing the petition. The court may on its own motion hold a hearing to determine the "substantial probability" issue, and must conduct such a hearing if it is requested by the respondent or the mental hygiene legal service within 10

days after receipt of notice of the application; the respondent may also apply for dismissal of the petition. FCA §322.2(5)(d).

C. Release From Residential Facility

At any time when the commissioner believes that the respondent may be more appropriately treated in a non-residential facility, he may petition the court for a hearing. The respondent may also apply for such a hearing. If the court finds upon a hearing that the commissioner is correct, the court shall modify the order of commitment to authorize transfer to a non-residential facility. FCA §322.2(7).

In cases in which the commissioner believes at the outset that the respondent is incompetent, but also believes that treatment should be provided on an outpatient basis, the child's attorney should argue that the hearing to which the commissioner or the respondent is entitled be held at the same time that the court is issuing the one-year commitment order mandated by FCA §322.2(5)(a), and that the respondent be released immediately; when it is inappropriate for the respondent to spend any time in confinement, it would be senseless to require the commissioner or the respondent to wait until after the commitment order is issued to make the application for a hearing.

III. Extensions Of Commitment Order In Felony Cases

A commitment may be extended annually upon application by the commissioner. The application must be made no more than 60 days prior to expiration of the commitment, and written notice of the application must be given to the respondent and his/her attorney, and the mental hygiene legal service if the respondent is at a residential facility. FCA §322.2(5)(a).

Upon receipt of the application, the court must hold hearing to determine capacity. Compare CPL §730.50(2) (hearing required when demanded by defendant or mental hygiene legal service). If, upon a hearing, the court finds that the respondent is no longer incapacitated, the respondent shall be returned to family court and delinquency proceedings resume. If the court finds that the respondent is still incapacitated, the commitment shall be extended for up to one year. Extensions shall not continue beyond a reasonable period of time necessary to determine whether the respondent will attain the capacity to proceed to a fact finding hearing in the foreseeable future, but in no

event shall continue beyond the respondent's eighteenth birthday or, if the respondent was at least sixteen years of age when the act was committed, beyond the respondent's twenty-first birthday. FCA §322.2(5)(a). If a respondent is in the custody of the commissioner upon the respondent's eighteenth birthday, or if the respondent was at least sixteen years of age when the act resulting in the respondent's placement was committed, beyond the respondent's twenty-first birthday, the commissioner shall notify the clerk of the court that the respondent was in his custody on such date and the court shall dismiss the petition. FCA §322.2(5)(b). See also Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845 (1972) (defendant cannot be held more than the reasonable time necessary to determine whether there is a substantial probability that he will attain capacity in foreseeable future; after that time, defendant must be released unless State initiates civil commitment proceeding); People v. Schaffer, 86 N.Y.2d 460, 634 N.Y.S.2d 22 (1995) (Jackson does not require automatic dismissal when defendant is released); CPL §730.50(3) (period of confinement cannot exceed 2/3 of authorized maximum term of imprisonment for highest class felony charged in indictment or the highest class felony of which defendant was convicted); CPL §730.50(4) (indictment must be dismissed if defendant remains confined at end of aforementioned period).

IV. Detention Time Credit

Time spent by the respondent in the custody of a commissioner, or in a local hospital or detention facility pending transfer to the custody of a commissioner after a finding of incapacity, “shall be credited and applied towards the period of placement specified in a dispositional order on the original petition.” FCA §322.2(9). See People v. Lewis, 95 N.Y.2d 539, 720 N.Y.S.2d 87 (2000) (no due process violation where defendant was not entitled to credit for time spent in civil commitment).

V. Release Of Respondent Upon Dismissal

When the court dismisses the petition, the respondent shall be released. However, an order dismissing the petition does not preclude an application for voluntary or involuntary commitment pursuant to the provisions of the Mental Hygiene Law. FCA §322.2(6).

VI. Dismissal In Furtherance Of Justice

Finally, in addition to considering appellate remedies after the respondent is committed, the child's attorney should consider filing a motion to dismiss in furtherance of justice. It is true that the court in a criminal proceeding does not have the discretion to order dismissal in the interest of justice, since CPL §730.50(5), which permits the court to order dismissal under certain circumstances with the consent of the district attorney, was intended by the Legislature to be the exclusive remedy for incompetent defendants seeking dismissal for reasons consistent with the ends of justice. People v. Schaffer, supra, 86 N.Y.2d 460. However, FCA Article Three contains no counterpart to §730.50(5), and so there is room to argue for dismissal pursuant to FCA §315.2.

VII. Deciding Whether To Inform Court Of Competency Problem Or Otherwise Raise The Issue Of Respondent's Mental Condition

Given their lack of maturity and experience, children do not have the same capacity as adult criminal defendants to comprehend the nature of the proceeding, or assist in the preparation of a defense and in making crucial litigation decisions. Moreover, many children charged in delinquency proceedings suffer from educational and mental health deficiencies that further hamper their ability to participate effectively in the proceeding. The child's attorney may have difficulty communicating with the respondent, and, when the problems are severe, may be justified in requesting a competency determination.

It has been suggested that defense counsel has an ethical obligation to request a competency determination when it appears that the client is incapable of understanding the proceedings and assisting the lawyer in the preparation of a defense. See People v. Holt, 21 N.E.3d 695 (Ill. 2014) (where evidence clearly indicates defendant is unfit to stand trial, and defendant contends he/she is fit, defense counsel not obligated to adopt defendant's position; in doing so, counsel would be violating duty to client and suborning violation of due process, and it is contradictory to argue that defendant who may be incompetent can knowingly or intelligently direct counsel to waive right to have court determine capacity to stand trial); State v. Johnson, 395 N.W.2d 176 (Wis. 1986) (when defense counsel "has a reason to doubt the competency of his client to stand trial, he must raise the issue with the trial court"); Jones v. District Court, 617 P.2d 803 (Colo. 1980); Blakeney v. United States, 77 A.3d 328 (D.C. Ct. App. 2013) (defense

counsel must raise issue of competency with court if, considering circumstances, objectively reasonable counsel would have reason to doubt defendant's competency; failure to do so is constitutionally deficient performance); People v. Bolden, 99 Cal.App.3d 375 (Cal. Ct. App., 4th Dist., 1979); Informal Opinion No. 93-140, 1993 WL 851242 (Pa. Bar Assoc. Committee on Legal Ethics and Professional Responsibility, 1993) (if client appears to be incompetent, lawyer is obligated to ensure that competency is adequately determined because no plea or verdict could be properly entertained if client is not competent); Formal Ethics Opinion No. 92-F-129, 1992 WL 738911 (Board of Professional Responsibility of the Supreme Court of Tennessee, 1992) (lawyer has independent professional responsibility to court and public and the fair administration of justice as well as an allegiance to client, and should, notwithstanding doubts about what is in client's legal interest, move for independent examination whenever good faith doubt arises as to competency); ABA Criminal Justice Mental Health Standards, 7-4.2(c) (1989) ("Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubts of competence"); see also Lynda E. Frost and Adrienne E. Volenik, The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent, 14 Wash. U. J.L. & Pol'y 327, 346-347 (2004) (because adult cases suggest that failing to raise competency issue constitutes ineffective assistance of counsel, counsel must consider whether she can ethically choose not to raise issue); New York State Rules of Professional Conduct, Rule 1.14(a), (b) (when client's capacity to make adequately considered decisions is diminished because of minority or mental impairment, and client is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in his/her own interest, lawyer may take reasonably necessary protective action); People v. Christopher, supra, 65 N.Y.2d 417 (whatever may be the right of a defendant to make determinations regarding trial strategy, it does not include right to waive competency hearing counsel has requested).

In raising a competency issue, the child's attorney should not reveal any

communications protected by the attorney-client privilege. ABA Criminal Justice Mental Health Standards, 7-4.2(f); but see New York State Rules of Professional Conduct, Rule 1.14(c) (information relating to representation of client with diminished capacity is protected by confidentiality rules, although when taking protective action for client with diminished capacity who cannot adequately act in his own interests and is at risk of substantial physical, financial or other harm, lawyer is impliedly authorized under Rule 1.6(a) to reveal information about client, but only to extent reasonably necessary to protect client's interests).

However, the better view is that the attorney's primary duty is to protect the legal interests of the client while providing loyal and zealous representation, not to act on behalf of the court in order to safeguard the integrity of the judicial process. Prejudicial mental health-related information disclosed during competency proceedings might haunt the juvenile client in pending and future litigation even if he or she is found competent. Moreover, court-ordered mental health evaluations are often conducted in haste and are of low quality, and there is a risk that the respondent will be found incompetent when he or she is not. Thus, before raising a competency issue in court, the better view is that the child's attorney should obtain whatever information and guidance the respondent and his or her family can provide, determine whether a competency problem clearly exists, and then weigh the benefits and risks associated with raising it. See Commentary to Rules of Professional Conduct, Rule 1.14 ("Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information"); Frost and Volenik, The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent, 14 Journal of Law & Policy 327, 344-350 (authors voice concern that raising competency question makes counsel a friend of the court rather than a zealous advocate, discuss degree of certainty regarding competency issue counsel should have before raising issue, and instruct counsel to consider whether decision to raise competency issue rests with client, whether client who clearly and voluntarily wishes to go to trial may waive competence,

and the impact raising issue over client's objection will have on the attorney-client relationship); State Bar Ethics Opinion 746, 2001 WL 901079 (seeking guardian is appropriate only when client's diminished capacity is severe and no other practical method of protecting client's best interests is available).

Ideally, the child's attorney should seek professional assistance in determining whether to request a competency examination. If the respondent already has a relationship with a mental health professional, the attorney should attempt to obtain information regarding the respondent's condition, as well as suggestions as to how the attorney might communicate more effectively with the respondent. If no mental health professional is involved and the respondent's family can afford it, the attorney should discuss with them the possibility of retaining an expert to conduct a confidential evaluation. See generally Frost and Volenik, The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent, 14 Journal of Law & Policy 327, 336-343 (authors discuss process of evaluating client's competency using various sources of information).

When concerned about competency, the child's attorney should consider whether any assistance from the respondent is actually needed given the facts of the case. For instance, when the respondent admits guilt, and potential defense claims, if any, involve purely legal issues, the respondent's lack of capacity may not hamper the attorney at all. Similarly, if there are several strong defense witnesses who can testify to the critical events, the respondent's inability to recall, or to describe events coherently, may not matter.

The child's attorney must also consider the potential consequences of a finding of incompetency. In misdemeanor cases, a finding of incompetency results in a 90-day commitment and dismissal of the petition, and so raising a competency issue might well be advisable when the risk of placement is high. In felony cases, the risk of long-term involuntary commitment -- possibly until the respondent's 18th birthday -- militates against raising a competency issue.

Also to be considered in this regard are the likelihood that, if there is no determination of incompetency, there will be a delinquency finding and the respondent will be placed, and the likelihood that, if the respondent were found incompetent and

committed, the commissioner would apply for release of the respondent pursuant to §322.2(7). Of course, these strategic concerns should not discourage the child's attorney from assisting the respondent and family in obtaining needed mental health services. Indeed, if the respondent is in desperate need of treatment and is open to the possibility of institutional care, the attorney is less constrained when deciding whether to request a competency determination. On the other hand, involuntary commitment may, or may not, result in the necessary treatment.

Expert testimony can also be used to establish a defense of mental disease or defect; to demonstrate that the respondent was incapable of knowingly and intelligently waiving the Miranda rights; to prove that the respondent was unusually susceptible to police pressure; or to provoke sympathy from the judge at disposition. Yet, each time the child's attorney presents mental health evidence, he/she must consider the risk that the judge will use the evidence as grounds for a competency examination, or reason to direct some type of institutional care at disposition.

The inherent risk is greatest with expert testimony presented in support of a defense of mental disease or defect. The same testimony that establishes clearly that the respondent suffered from a mental disability so profound that it precluded the formation of criminal intent, might also suggest to the judge that the respondent is incompetent to stand trial. Presentation of evidence that focuses on less severe and more common problems, such as educational deficiencies, that do not even fall within the realm of mental illness, is far safer. For instance, lay testimony -- from a family member or a school teacher -- can describe routine interaction with the respondent in order to establish the respondent's impaired language skills or limited ability to understand difficult concepts.

If expert testimony must be presented in order to pursue a defense strategy and there is a substantial risk that the judge will become concerned about competency, the child's attorney should consider foregoing the strategy, particularly when the risk of placement is low. Sometimes, the risk can be reduced by structuring the testimony, and coaching the expert, so that the expert avoids making statements that would raise red flags for the judge. The attorney should also consider whether the respondent's serious deficiencies are so apparent that they will inevitably be detected during a mental health

examination ordered at the dispositional stage, in which case presenting the expert testimony at fact-finding may involve no additional risk.

CHAPTER FOUR

ADMISSIONS AND PLEA BARGAINING

By: Gary Solomon

Table of Contents

I. Introduction

II. Admissions In Delinquency Proceedings

- A. Entry Of Admission Or Denial
- B. Scope Of Admission
- C. Notice To And Presence Of Parent
- D. Notice Of Rights
- E. Factual Basis For Admission
- F. Preservation Of Allocution Error For Appeal
- G. Alford Pleas
- H. Voluntariness
- I. Effective Assistance Of Counsel

III. Plea Bargaining Strategies

- A. Goals
  - 1. Generally
  - 2. Potential Length Of Placement Order
  - 3. Designated Felony Cases
  - 4. Felony Cases
  - 5. Misdemeanor Cases
  - 6. Multiple Petitions
  - 7. Negotiating Release Of Respondent
  - 8. Dispositional Promises
    - a. Generally
    - b. Adjournments In Contemplation Of Dismissal
    - c. Conditional Discharge

d. Probation
e. Placement
f. Conditional Dispositional Promises
g. Gaining The Favor Of The Judge And Prosecutor
h. Exclusion Of Inflammatory Facts
9. Conversion To PINS Proceeding
B. Negotiating The Plea Bargain
1. Generally
2. Statutory Limits On Plea Bargaining
3. Negotiating With The Prosecutor
4. Negotiating With The Judge
5. Discussions With The Respondent And Parent
6. Offering Benefits Other Than An Admission
a. Generally
b. Financial Restitution
c. Stipulations
d. Cooperation Agreements
7. Ethical Issues In Plea Bargaining
a. Disclosure Of Facts By Child's Attorney
b. Disclosure Of Facts By Prosecutor
c. Recusal Of Judge
IV. Waiver Of Issues On Appeal

I. Introduction

In criminal proceedings, the plea bargaining process has obvious benefits for the defendant, who, by pleading guilty, can reduce the outer limits of a jail sentence by years, and perhaps secure a promised sentence that is gratefully received in view of the downside risks. Indeed, the stakes are so high, and the benefits of plea bargaining so substantial, that a criminal defense lawyer is hard-pressed to advise a client to reject a generous offer even when a viable defense is available.

It will become apparent in the materials that follow that plea bargaining strategies in delinquency proceedings are very different from those in criminal cases. First of all, in order to measure the outer time limits of a disposition placing the child away from home, delinquency cases can be divided into merely four groups; misdemeanors, felonies, designated felonies that can result in a five-year restrictive placement, and designated felonies that can result in a three-year restrictive placement. The respondent may hope to secure a benefit by plea bargaining from one of the four groups to another, and/or by obtaining some type of dispositional promise. However, such plea bargaining may involve benefits that are only illusory.

In addition, because almost all fact-findings may result in a disposition that does not involve placement out of the home, the plea bargaining process in delinquency cases requires a willingness and ability to thoroughly investigate the respondent's social and legal history, and then predict the most likely disposition. By preparing carefully and thinking through the options, the child's attorney can avoid plea bargaining away a downside risk that does not exist. See Op. 2014-026 (Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., 7/4/14)
http://www.pabar.org/members/catalogs/Ethics%20Opinions/informal/2014-026.pdf
("Early Accountability Program," in which District Attorney offers plea and lenient sentence at preliminary hearing stage and deal must be accepted same day or is withdrawn, precludes lawyer from properly evaluating case and complying with several Pennsylvania Rules of Professional Conduct)

II. Admissions In Delinquency Proceedings

A. Entry Of Admission Or Denial

At the initial appearance, the court must inform the respondent, or cause him to

be informed in the court's presence, of the charges in the petition. FCA §320.4(1). Often, a busy judge will ask the child's attorney to "waive a reading of the charges" on behalf of the respondent. If the attorney has already discussed the charges with the respondent, there will ordinarily be no reason to withhold the waiver, and, perhaps, anger the judge. Even when the attorney and the respondent have not yet discussed the charges, a waiver will still be appropriate in most cases. The charges can be read to and discussed with the respondent after the initial appearance is concluded. In addition, unless the attorney has instructed the respondent not to volunteer information, a refusal to waive a reading creates a risk that the respondent will blurt out incriminating or inflammatory statements in response to the accusations recited by the judge. Of course, if a risk develops that the respondent will be remanded, the attorney must attempt to quickly and quietly speak to the respondent about the instant charges in order to elicit facts that should be raised during a remand argument. If necessary, the attorney should ask that the case be recalled so that a discussion may be held with the respondent in a private setting.

After the reading of the charges, or a waiver thereof, the respondent must admit or deny each charge in the petition. FCA §321.1(1). Ordinarily, the judge will ask the child's attorney whether the respondent "enters a denial." If the respondent is questioned by the judge and either "refuses to admit or deny each such charge or remains mute," the judge must enter a denial. FCA §321.1(2). Obviously, a respondent's "denial" is merely a legal device that preserves the right to put the prosecution to its proof, and does not constitute a factual assertion of innocence with which the respondent can later be impeached. See People v. Garcia, 169 A.D.2d 358, 573 N.Y.S.2d 257 (1st Dept. 1991), lv denied 79 N.Y.2d 857, 580 N.Y.S.2d 729 (1992).

B. Scope Of Admission

The respondent has the right to enter an admission to all the charges in the petition. FCA §321.2(1). Obviously, it would be unwise for the child's attorney to advise the respondent to enter such an admission unless a satisfactory benefit is received in exchange. For instance, the presentment agency may, for statistical or other reasons, want a plea to the entire petition, but will agree to an extremely favorable disposition. Or, if the presentment agency will not agree to the desired disposition, but the judge will,

the respondent might offer the judge an admission to the entire petition in exchange for the promised disposition. But see People v. Mitchell, 39 A.D.3d 375, 833 N.Y.S.2d 504 (1st Dept. 2007), lv denied 9 N.Y.3d 867 (court was not obligated to impose sentence court offered).

When the petition contains more than one count, the respondent may, with the consent of the court and the presentment agency, admit to one count in satisfaction of all charges. Although a plea accepted over the presentment agency's objection would be illegal, there are limitations on the court's power to subsequently vacate the plea. Compare Matter of Campbell v. Pesce, 60 N.Y.2d 165, 468 N.Y.S.2d 865 (1983) (after sentencing, court has no power to vacate illegal plea upon motion by People) with People v. Bartley, 47 N.Y.2d 965, 419 N.Y.S.2d 956 (1979) (court had inherent power to promptly vacate illegal plea) and FCA §355.1(1) (upon showing of substantial change of circumstances, court may vacate any order upon its own motion or motion by respondent or parent). It is important to recognize that there is no inherent advantage in entering an admission to one of several charges. For instance, since the petition ordinarily represents only one criminal transaction, a finding of guilt on several felony counts is the equivalent of only one felony finding for purposes of the predicate felony provisions of the designated felony law [see FCA §301.2(8)(v),(vi)]. In addition, even when two separate offenses are joinable under FCA §311.6 and included in one petition, the court has no power to order consecutive placements. Therefore, the length of placement cannot be reduced merely by making an admission to one of two or more separate offenses charged in one petition.

Finally, whether the petition contains one count or several counts, the respondent may, with the consent of the court and the presentment agency, admit to a lesser included offense. See CPL §1.20(37) ("When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a `lesser included offense'"); People v. Adams, 20 N.Y.3d 608 (2013) (District Attorney disqualified where there was appearance that he refused to accept plea to reduced charge because complainant was sitting judge who demanded that matter go to trial, and did not make disinterested determination that trial was appropriate); Matter of Dwight M., 80 N.Y.2d 792, 587

N.Y.S.2d 275 (1992) (while noting that family court has power to accept admission to lesser included offense, Court of Appeals holds that finding of lesser included offense may also be made after fact-finding hearing); People v. Theodore, 113 A.D.3d 703 (2d Dept. 2014) (upon finding of reversible trial error, matter remitted for new trial before different judge where sentencing judge refused to consider plea agreement based on strict adherence to judge's individual policy, which was unrelated to circumstances of defendant and proposed agreement); Matter of Coty M., 3 Misc.3d 1101(A), 787 N.Y.S.2d 676 (Fam. Ct., Albany Co., 2004); see also People v. Rumble, 39 Misc.3d 136(A) (App. Term, 2d Dept., 2013) (plea invalid where crime was not charged and not a lesser-included offense of a charged crime). Sometimes, the presentment agency will adopt a policy prohibiting the acceptance of an admission to any charge other than the top count in the petition. See People v. Cohen, 186 A.D.2d 843, 588 N.Y.S.2d 211 (3rd Dept. 1992) (no equal protection violation where DA adopted plea policy).

C. Notice To And Presence Of Parent

Before the court may accept an admission, the respondent's "parent or other person responsible for the respondent's care" must be present unless a "reasonable and substantial effort has been made to notify such parent [or guardian]...." FCA §341.2(3). See In re Nikim M., 144 A.D.3d 424 (1st Dept. 2016) (adjudication entered upon admission reversed where defense counsel stated that mother had been informed of court date, but, after counsel telephoned mother at court's request, counsel informed court that she did not know time hearing had been scheduled for and would not be able to attend; there was no indication that mother chose not to attend, and court should have inquired as to nature or degree of effort made to notify her and ascertained whether she had been notified of both date and time); In re Tyrik W., 126 A.D.3d 567 (1st Dept. 2015) (no statutory violation where parent present but not permitted to sit at defense table and sat 7½ feet away and afforded opportunity for consultation, and no prejudice shown); In re Alexander B., 126 A.D.3d 533 (1st Dept. 2015) (uncle present but nothing indicated he was person legally responsible; requirement nonwaivable); In re Deiby C., 73 A.D.3d 602, 906 N.Y.S.2d 4 (1st Dept. 2010) (before proceeding with plea hearing in absence of mother, court did not have to make express finding that reasonable and substantial notification efforts had been made; record reveals that

efforts were adequate where respondent appeared in court two days before entry of admission, when his attorney requested that guardian ad litem be appointed because mother had made it clear that she felt intimidated by son, did not want him in household, and would prefer that he remain in custody, and, on date respondent entered admission, mother was present at courthouse but, after speaking with respondent's attorney, did not attend hearing); Matter of Gerald M., 12 A.D.3d 1192, 785 N.Y.S.2d 256 (4th Dept. 2004) (statute permits presence of parent who is not legally responsible for care); Matter of Roman, 144 A.D.2d 315, 534 N.Y.S.2d 678 (1st Dept. 1988); Matter of Lloyd P., 99 A.D.2d 812, 472 N.Y.S.2d 142 (2d Dept. 1984). Rather than proceed without an adult guardian, the court will often appoint an attorney pursuant to article eighteen-B of the County Law, or assign an interested person, to act in place of the parent as a guardian ad litem.

When an incarcerated respondent first appears in court without a parent, the child's attorney should, when appropriate, ask for a parole of the respondent upon his or her promise to return with a parent. And, if the parent is absent for a compelling reason and is likely to appear in a day or two, the attorney should ask for an adjournment even if the respondent is detained, since the child might be released when the parent appears. However, if the attorney has information which clearly indicates that the parent has no interest in reassuming custody, and the respondent will be detained if the case is adjourned, the attorney should ordinarily not object to the assignment of a guardian ad litem.

In any event, the child's attorney should object to the appointment of a disinterested layperson. See Matter of Tracy B., 80 A.D.2d 792, 437 N.Y.S.2d 90 (1st Dept. 1981) (court improperly appointed judge's secretary, who was "a stranger"). If a relative, a friend, or some other interested person is not available, the attorney should ordinarily ask for the assignment of an "18-B" attorney. While the attorney is unlikely to provide much emotional support to the child, he or she could prove helpful as an unofficial co-counsel.

The assignment of a guardian ad litem is clearly improper not only when an inadequate effort has been made to notify the parent, but when the guardian has a conflict of interest. Matter of John L., 125 A.D.2d 472, 509 N.Y.S.2d 398 (2d Dept.

1986) (representative of group home at which respondent was no longer welcome was not proper guardian); Matter of Lloyd P., supra, 99 A.D.2d 812 (school officials who had custody of respondent were in antagonistic position). In some cases, the parent may have a conflict of interest because he/she or another family member is the alleged victim, or because the parent is seeking supervision or placement of the respondent. Compare People v. Susan H., 124 Misc.2d 341, 477 N.Y.S.2d 550 (Sup. Ct. Bronx Co., 1984) (no conflict) with Matter of Candy M., 142 Misc.2d 718, 538 N.Y.S.2d 143 (Fam. Ct. Ulster Co., 1989) (court "disagrees" with result in Susan H.). However, if the parent's position has not hardened, and a request for assignment of a guardian ad litem might offend the parent, such a request may not be wise. Even if the parent will not take custody, his/her cooperation may be necessary if the child wishes to reside with a relative, or some other person about whom the parent has reservations.

There is no requirement in FCA §341.2(3) that a guardian ad litem be appointed to act in place of the parent. Thus, if the respondent prefers that no guardian ad litem be assigned, the child's attorney may "waive" the assignment.

It has been held that the objection of a parent or other person legally responsible does not prevent the court from accepting the child's counseled admission. Matter of Joseph H., 20 Misc.3d 619 (Fam. Ct., Albany Co., 2008) (parent's objection does not prevent court from accepting admission from child; Legislature did not include a parental consent requirement in §321.3, and "[i]f the parent's objection trumped the wishes of the child, it would require the court to hold a trial unwanted by the juvenile, perhaps exposing the child to a finding on charges more serious than those to which he wished to admit; a patently absurd result").

D. Notice Of Rights

Before accepting an admission, the court must inform the respondent and the parent of the right to a fact-finding hearing, and ascertain that the respondent "is voluntarily waiving his right to a fact-finding hearing" and "is aware of the possible specific dispositional orders." This procedure is commonly referred to as the "allocution." These provisions "shall not be waived." FCA §321.3(1); see People v. Tyrell, 22 N.Y.3d 359 (2013) (plea vacated where right to trial by jury, right to confront accusers, and privilege against self-incrimination were not addressed by court, defense

counsel or defendant); Matter of Kameron VV., 156 A.D.3d 1272 (3d Dept. 2017) (allocution inadequate where court asked respondent whether he “engaged in conduct that was likely to pose a risk of injury to a child,” and specified date and location, but did not mention specific facts establishing commission of crime, and asking mother whether admission was made with her approval not sufficient); In re Fontaine O., 101 A.D.3d 649 (1st Dept. 2012) (no error where court’s factual inquiry preceded advisement of rights, since admission had no incriminating effect until it was accepted by court); In re Sean B., 99 A.D.3d 433 (1st Dept. 2012) (no error where mother’s allocution incorporated respondent’s allocution by reference); Matter of Daquan BB., 83 A.D.3d 1281, 920 N.Y.S.2d 835 (3d Dept. 2011) (adjudication reversed where family court informed respondent of right to a hearing, but not that he had right to remain silent, right to present witnesses on his own behalf and to confront witnesses against him, and right to require presentment agency to prove he committed acts beyond reasonable doubt; also, record silent as to court’s reasons for accepting admission); In re Humberto R., 81 A.D.3d 471, 916 N.Y.S.2d 108 (1st Dept. 2011) (statute satisfied where court, after conducting thorough colloquy with respondent, incorporated colloquy by reference in addressing mother and ascertained that she understood); Matter of Travis TT., 47 A.D.3d 1112, 849 N.Y.S.2d 712 (3rd Dept. 2008) (reversible error where family court asked respondent if he understood he "could be placed for another year” - respondent already was in placement as PINS - but did not discuss specific dispositional alternatives); Matter of Alexis L., 45 A.D.3d 688, 845 N.Y.S.2d 436 (2d Dept. 2007) (respondent not required to preserve claim under this statute by moving to withdraw admission; although presentment agency argues that circumstances, including lengthy discussions among child’s attorney, child and mother, and plea negotiations spanning several adjournments, show that mother was fully aware of facts that allocution would have disclosed, statute specifies that its provisions shall not be waived); In re Leon T., 23 A.D.3d 256, 804 N.Y.S.2d 79 (1st Dept. 2005) (no error where court first asked respondent if he intended to admit to act in question, and then explained rights and elicited respondent’s formal admission); Matter of Eric CC., 298 A.D.2d 632, 748 N.Y.S.2d 186 (3rd Dept. 2002) (allocution adequate where court asked parents whether they “have any objection to the statements in the form of admissions” and parents had

no objection, and court engaged in lengthy colloquy with parents regarding placement); Matter of Brian K.J., 223 A.D.2d 643, 636 N.Y.S.2d 417 (2d Dept. 1996) (plea valid despite lack of respondent's express agreement, since he was advised of rights and knowingly accepted plea agreement). See also People v. Montanez, 287 A.D.2d 407, 731 N.Y.S.2d 721 (1st Dept. 2001), lv denied 97 N.Y.2d 685, 738 N.Y.S.2d 301 (although plea inquiry should be conducted by court, there was no error where prosecutor conducted inquiry under court's supervision); FCA §320.3 (at first appearance of respondent and parent, court must advise them of right to remain silent); Matter of Marquis K.S., 26 A.D.3d 756, 810 N.Y.S.2d 604 (4th Dept. 2006) (compliance with §§ 321.3(1)(c) and 320.3 not required when juvenile offender pleads guilty in contemplation of removal to family court); Matter of Walker, 144 A.D.2d 306, 534 N.Y.S.2d 380 (1st Dept. 1988) (although respondent was told he was forfeiting right to trial, he was not advised of right to remain silent or to testify if he chose, to call witnesses in his own behalf, to confront witnesses against him and to have agency prove guilt beyond a reasonable doubt).

Arguably, the court must provide notice regarding the possibility of extensions of placement. In re Jason C., 767 A.2d 710 (Ct. 2001) (due process requires that court advise juvenile of possible extensions; length of time juvenile might spend in placement is crucial to plea decision).

Most judges conduct a more extensive allocution than that required by the statute. Among the questions ordinarily asked are: 1) do you understand that, if you do not make an admission, the presentment agency would have to prove the case at trial beyond a reasonable doubt, which is a very high standard?; 2) do you understand that, at the trial, you would have the right to have your lawyer cross-examine the witnesses called by the presentment agency, and the right to call your own witnesses to tell your side of the story?; 3) do you understand that you have the right to testify yourself, and the right to refuse to testify or say anything, and that I cannot make any conclusions about your guilt if you choose to remain silent?; 4) do you understand that, if you make an admission, I will have the power to give you a sentence, or what we call a disposition, and that I can place you away from home for up to ___ months, put you on probation, or, if I decide you do not need supervision, treatment or confinement, dismiss

the case and order that the file be sealed?

The court does not have to give the respondent notice of every conceivable legal consequence of an admission, only those “direct” consequences which have a “definite, immediate and largely automatic effect on punishment.” People v. Ford, 86 N.Y.2d 397, 633 N.Y.S.2d 270 (1995). Compare People v. Peque, 22 N.Y.3d 168 (2013) (as a matter of due process, court must apprise defendant that, if defendant is not American citizen, he/she may be deported as consequence of guilty plea to felony; however, deportation is technically on collateral side of direct/collateral divide, and failure to provide required advice does not warrant withdrawal or vacatur of plea unless defendant establishes reasonable probability that, had court properly warned defendant, he or she would have rejected plea and opted to go to trial, and in that regard court should consider favorability of plea, potential consequences defendant might face upon conviction after trial, strength of People's case, defendant's ties to United States, and defendant’s receipt of advice from counsel regarding potential deportation); People v. Alexander, 159 A.D.3d 1019 (2d Dept. 2018), lv denied 31 N.Y.3d 1114 (no Peque violation where court advised defendant that he “could” be deported; even where deportation is legally mandatory, as a practical matter it still requires immigration authorities to take necessary actions); People v. Palmer, 159 A.D.3d 118 (1st Dept. 2018) (defendant’s statement to court that he was citizen did not absolve court of obligations under Peque where defendant did not purposefully misrepresent immigration status and suffered from persistent delusions); People v. Jimenez, 150 A.D.3d 408 (1st Dept. 2017) (no error where court warned defendant that there was “good likelihood” she “could” be deported); People v. Martial, 50 Misc.3d 131(A) (App. Term, 2d Dept., 2015) (Peque applied to misdemeanor plea); People v. Latham, 234 A.D.2d 864, 652 N.Y.S.2d 328 (3rd Dept. 1996), rev’d on other grounds 90 N.Y.2d 795, 666 N.Y.S.2d 557 (1997) (People could not use prior admissions where defendant was never advised that plea allocution could be used in subsequent trial) and People v. Nicholas, 19 Misc.3d 322, 854 N.Y.S.2d 877 (Watertown City Ct., 2008) (because People may exercise right to oppose sealing unless they have waived that right as part of a plea bargain, defendant, before entering plea, is entitled to notice of possibility that sealing will not be ordered; "public stigma" that remains if sealing is not ordered would be

"direct consequence" of plea)

with People v. Harnett, 16 N.Y.3d 200, 920 N.Y.S.2d 246 (2011) (Sex Offender Management and Treatment Act consequences are collateral and need not be included in allocution; court also rejects defendant's argument that SOMTA consequences are too important to be left out of allocution, but SOMTA consequences can include extended confinement, and thus plea made in ignorance of such consequences may be proved involuntary if defendant shows that prospect of SOMTA confinement was realistic enough that he would have rejected otherwise acceptable plea bargain); People v. Gravino, 14 N.Y.3d 546, 902 N.Y.S.2d 851 (2010) (SORA registration and terms and conditions of probation are collateral consequences court need not address during allocution); People v. Balcerak, 161 A.D.3d 764 (2d Dept. 2018) (plea not knowing and voluntary where defendant, who had already been adjudicated level three predicate sex offender pursuant to Sex Offender Registration Act, showed that prospect of SOMTA confinement reasonably could have caused him, and in fact would have caused him, to reject plea bargain); People v. Pugh, 158 A.D.3d 597 (1st Dept. 2018), lv denied 31 N.Y.3d 1086 (court had no obligation to explain that future felony conviction could lead to persistent felony offender status); People v. Rana, 48 Misc.3d 130(A) (App. Term, 2d Dept., 2015) (no error where defendant was not informed that stay-away order of protection would issue, that he would be assessed surcharge, and that he would be required to provide DNA sample); People v. Monk, 83 A.D.3d 35, 920 N.Y.S.2d 97 (2d Dept. 2011) (consequences of violating conditions of post-release supervision are collateral consequences); People v. Carromero, 49 Misc.3d 579 (Sup. Ct., Bronx Co., 2015) (subsequent use of plea allocution is collateral consequence that does not implicate Sixth Amendment right to effective assistance of counsel; court notes that it need not follow People v. Latham, 234 A.D.2d 864 since Third Department's decision was reversed on other grounds in Court of Appeals and ruling thus became dictum); see also CPL §220.50(7) (court must advise defendant that plea could result in deportation, exclusion from admission to United States or denial of naturalization, but failure to warn defendant of potential immigration consequences does not affect voluntariness).

Nevertheless, the case law is more protective of the right to notice in delinquency cases than in criminal cases. Compare People v. Harris, 61 N.Y.2d 9, 471 N.Y.S.2d 61

(1983) (defendant need not receive detailed notice concerning Fifth Amendment privilege, jury trial and right of confrontation) and People v. DeVorce, 115 A.D.2d 553, 496 N.Y.S.2d 233 (2d Dept. 1985) (plea valid despite lack of notice of jury trial and confrontation rights) with Matter of Joseph P., 229 A.D.2d 318, 645 N.Y.S.2d 468 (1st Dept. 1996) (respondent was advised of possibility of placement, but not all dispositional alternatives); Matter of Walker, supra, 144 A.D.2d 306; Matter of Corey L., 140 A.D.2d 609, 528 N.Y.S.2d 1001 (2d Dept. 1988); Matter of Timothy B., 114 A.D.2d 336, 494 N.Y.S.2d 325 (1st Dept. 1985) and Matter of Joseph G., 196 Misc.2d 904, 765 N.Y.S.2d 455 (Fam. Ct., Queens Co., 2003) (motion to withdraw admission granted where court failed to advise respondent that designated felony plea affected youthful offender eligibility).

The receipt of inaccurate information about disposition alternatives can also give rise to a claim that an admission was not knowing and intelligent. See, e.g., People v. Garcia, 92 N.Y.2d 869, 677 N.Y.2d 772 (1998) (receipt of inaccurate information is not dispositive in and of itself); United States v. Harrington, 354 F.3d 178 (2d Cir. 2004).

The child's attorney should conduct a similar inquiry with the respondent and the parent before appearing in court. Although the judge may, because of time constraints, rush through a perfunctory description of the rights that are waived and the possible consequences, the attorney can more carefully explain those rights and consequences in language understandable to the respondent. Indeed, the respondent may not understand terms such as "disposition," "cross-examination," or "beyond a reasonable doubt." In addition, because many judges assume that the child's attorney has conducted an informal allocution, they will preface the allocution by saying "as your attorney has already told you," or attempt to save time by asking the attorney, the respondent and the parent to acknowledge that the admission is being offered with full knowledge of the applicable rights and consequences. Needless to say, it will be very awkward if the respondent and the parent direct confused looks at the judge or otherwise indicate that they have had no such conversation with the attorney.

Sometimes, the judge will turn to the child's attorney after conducting the allocution and ask whether the allocution was adequate, or whether the attorney is "satisfied" with the allocution. Since compliance with the statute may not be waived, the

attorney's acknowledgement that the allocution was proper would arguably not constitute a waiver of any deficiencies. On the other hand, if the attorney believes the allocution was inadequate, it would be dishonest to state otherwise in order to prevent the court from making a record that would withstand an attack on appeal. If the judge does not ask the attorney any questions, there is no reason to alert the judge to any deficiencies in the allocution.

Confusion sometimes arises during an allocution when plea bargaining has yielded a negotiated disposition. Many judges will routinely ask the respondent whether anyone has promised anything as an inducement for the admission. The purpose of this inquiry should be to establish that no person other than the judge has made a promise, since only the judge can provide binding assurances. Consequently, some judges will simply inquire about promises made by anyone else, while other judges will describe the plea bargained arrangement on the record in detail.

Ordinarily, the child's attorney should attempt to have a plea bargain clearly described on the record. First of all, there is nothing improper about plea bargaining; indeed, it is a well-settled and widely accepted procedure designed to relieve the court system of an unmanageable caseload. More importantly, only promises that appear on the record are enforceable. See Matter of Benjamin S. v. Kuriansky, 55 N.Y.2d 116, 447 N.Y.S.2d 905 (1982); People v. Lozovsky, 267 A.D.2d 774, 702 N.Y.S.2d 127 (3rd Dept. 1999), lv denied 95 N.Y.2d 836, 713 N.Y.S.2d 143 (2000) (off-the-record promise too ambiguous and vague to support claim for specific performance); People v. Huertas, 203 A.D.2d 952, 611 N.Y.S.2d 392 (4th Dept. 1994) (off-the-record promise not enforced where existence of promise was referred to but details were not stated). And, if any misstatements are made off the record, they may not be raised on direct appeal. Cf. People v. Ramos, 63 N.Y.2d 640, 479 N.Y.S.2d 510 (1984) (where defense counsel's erroneous advice about "good time" credit was not on record, plea stands). Thus, although the judge and the prosecutor may well be trustworthy, careful lawyering requires that a record be made. It is true that there are some judges who, for idiosyncratic reasons, do not want a promise to appear on the record, and would rather make it appear that the disposition is being granted as a matter of discretion because of information supplied by the presentment agency and probation department after the

admission is accepted. Obviously, if the judge's good faith is assumed, there is no reason to reject an advantageous plea bargain merely because the judge wants to orchestrate the proceeding in his or her own preferred manner.

If it appears that a physical, mental or emotional condition may be preventing the respondent from understanding the nature of the proceedings, the court has a duty to inquire. See United States v. Rossillo, 853 F.2d 1062 (2d Cir. 1988).

E. Factual Basis For Admission

The court must ascertain that the respondent "committed the act or acts to which he is entering an admission...." FCA §321.3(1)(a); see Matter of Theodore N., 1 A.D.3d 828, 767 N.Y.S.2d 500 (3rd Dept. 2003) (statute does not require parent to admit respondent committed acts, only that court confirm that parent does not object to child making admission). This requirement “shall not be waived.” FCA §321.3(1). Again, the requirements are more strict in delinquency cases than in criminal cases.

Although the respondent need not state detailed facts establishing every element of the offense, it must be clear that the respondent is admitting the commission of a crime. Compare People v. Seeber, 4 N.Y.3d 780, 793 N.Y.S.2d 826 (2005) (defendant, entering plea to felony murder where underlying crime was burglary, admitted that she “remained unlawfully” in grandmother’s house; dissenting judges assert that “remains unlawfully” in statute has legal meaning that most lay people would not understand); People v. Moore, 71 N.Y.2d 1002, 530 N.Y.S.2d 94 (1988); In re Michael Joseph C., 111 A.D.3d 565 (1st Dept. 2013) (allocution sufficient where respondent did not make specific factual recitals supporting elements of crime and allocution neither negated element nor cast doubt on guilt); Matter of Orazio A., 81 A.D.3d 1104, 916 N.Y.S.2d 668 (3d Dept. 2011) (admission to reckless criminal mischief upheld where respondent admitted that he and friend lit firecrackers in barn, and acknowledged that he understood conduct constituted reckless action; although respondent did not explicitly state that he knowingly disregarded risk, that could be inferred from admission) and In re Jermaine J., 6 A.D.3d 87, 775 N.Y.S.2d 287 (1st Dept. 2004), lv denied 3 N.Y.3d 606 (while, with some crimes, court would have to ensure that juvenile understands particular elements, respondent’s one-word answers to judge’s questions were sufficient to establish that he understood robbery charge; even if allocution must set forth every

element, court need not elicit a full factual recitation from the juvenile) with Matter of Barry H., 24 A.D.3d 1137, 807 N.Y.S.2d 440 (3rd Dept. 2005) (allocution insufficient where respondent merely acknowledged his intent to admit to allegations set forth by his attorney); Matter of Kim F., 109 A.D.2d 706, 487 N.Y.S.2d 31 (1st Dept. 1985) (admission improperly accepted where respondent admitted starting fire, but did not admit that she intended to damage property) and Matter of Myacatta A., 75 A.D.2d 774, 428 N.Y.S.2d 231 (1st Dept. 1980) (allocution inadequate where respondent, "a 15 year old, in court without her mother or other familiar person to give her support," was "confronted by the court's recitation of the charge stated in the petition," but no attempt was made by court "to explain the charge in nonlegal terms").

Some judges satisfy this requirement by reciting the allegations to which the respondent is offering the admission, and asking the respondent whether he or she did, in fact, commit the acts. However, since a more meticulous judge may insist that the respondent describe what he or she did, the child's attorney should carefully prepare the respondent before appearing in court. Even if the respondent clearly acknowledged guilt during private interviews, he or she may become nervous when facing the judge, or have difficulty admitting guilt in a public forum. Since there are few things that try the patience of a busy judge more than a "botched" allocution, the respondent's statement should be rehearsed beforehand. Indeed, it is not improper for the attorney to help the respondent prepare an admission that establishes the elements of the offense. When the charge to which the respondent is admitting is a lesser included offense, the attorney should prepare the respondent to state only those facts that are necessary for purposes of the admission. Sometimes, it is not entirely clear that the facts which the respondent is prepared to admit establish the elements of the crime to which he or she is pleading guilty. If the attorney believes in good faith that a crime was arguably committed, there is nothing improper about advising the respondent to make an admission, and carefully preparing the respondent so that his or her statements during the allocution will be adequate to establish guilt. However, when the attorney has serious doubts, it may be best to share them with the judge before the allocution rather than provoke the judge's anger with a "botched" allocution. It will then be up to the judge to decide whether or not to accept the admission.

When the respondent admits committing the acts alleged, but he/she or defense counsel volunteers statements that suggest the presence of a defense, the court should not accept the admission without conducting a further inquiry to ascertain that the respondent is knowingly giving up the potential defense. Compare People v. Mox, 20 N.Y.3d 936 (2012) (defendant's plea to manslaughter under theory of extreme emotional disturbance vacated where defendant stated that on day of crime, he was "hearing voices" and feeling painful bodily sensations and was "in a psychotic state" and had not taken prescribed medication for several days, and answered "Yes" when court asked him to confirm that defense counsel had discussed with him "the potential defense of not guilty by reason of mental disease or defect … and that he was willing to forgo that defense in order to accept this plea"); People v. Green, 141 A.D.3d 837 (3d Dept. 2016) (where defense counsel alluded to significant issues regarding defendant's mental state during crime but indicated that defendant had agreed to accept plea bargain because psychiatrist could not testify favorably to a reasonable degree of medical certainty, court was required to conduct inquiry into defendant's understanding of affirmative defense and potential applicability); People v. Dukes, 120 A.D.3d 1597 (4th Dept. 2014) (court erred in accepting plea where defense counsel stated that defendant would waive affirmative defense, but, after defendant raised facts supporting defense during allocution, court failed to inquire further); People v. Jimenez, 110 A.D.3d 740 (2d Dept. 2013) (plea vacated where defense counsel stated that he discussed "a possible intoxication defense" with defendant and that defendant understood it, but court made no inquiry of defendant); United States v. Yang Chia Tien, 720 F.3d 464 (2d Cir. 2013) (plea vacated where defendant stated that he was on medications for blood pressure, diabetes and pain, and that one medication "may have an impact on his nerves," but court failed to inquire into the specific medications and their side effects); People v. Grason, 107 A.D.3d 1015 (2d Dept. 2013), appeal w'drawn 21 N.Y.3d 1042 (guilty plea vacated where court had evidence that defendant was mentally ill at time of offense and failed to inquire as to potential affirmative defense); People v. Benjamin, 24 Misc.3d 103, 885 N.Y.S.2d 141 (App. Term, 1st Dept., 2009), lv denied 13 N.Y.3d 905 (where statements made by defense counsel negated intent element of governmental obstruction charge, court's inquiry, which consisted of eliciting terse affirmative

responses as to whether defendant was "in fact" guilty and whether defendant's plea was voluntary and of his "own free will," was inadequate); People v. Osgood, 254 A.D.2d 571, 681 N.Y.S.2d 365 (3rd Dept. 1998) (plea invalid where defendant stated that he was intoxicated during the incident and that if "she [the victim] said it, I did it"); People v. Davis, 176 A.D.2d 1236, 576 N.Y.S.2d 731 (4th Dept. 1991) (court should have inquired when colloquy revealed possible agency defense); People v. Hladky, 158 A.D.2d 616, 551 N.Y.S.2d 587 (2d Dept. 1990) (court should have inquired further when defendant denied intent to kill); People v. Benton, 143 A.D.2d 526, 533 N.Y.S.2d 32 (4th Dept. 1988) (after defendant indicated he had no recollection of events because he had consumed pills and alcohol, court should have inquired further to ascertain whether defendant was waiving intoxication defense); People v. Wedgewood, 106 A.D.2d 674, 483 N.Y.S.2d 440 (2d Dept. 1985) (court should have inquired further when defendant stated that the gun was unloaded); and People v. Polanco, 96 A.D.2d 910, 466 N.Y.S.2d 92 (2d Dept. 1983) (court should have inquired further when defendant declared his innocence after pleading guilty and the facts supported justification defense) with People v. Lopez, 71 N.Y.2d 662, 529 N.Y.S.2d 465 (1988) (plea properly accepted where court conducted further inquiry after defendant raised possibility of justification defense and ascertained that defendant possessed criminal intent); People v. Vargas, 162 A.D.3d 531 (1st Dept. 2018) (court not required to make sua sponte inquiry into defendant's assertion of justification defense in post-arrest statement to police and presentence interview) and People v. Rhodes, 176 A.D.2d 828, 575 N.Y.S.2d 156 (2d Dept. 1991) (first degree robbery plea properly accepted despite defendant's statement that he had a "clay pistol").

F. Preservation Of Allocution Error For Appeal

There is some controversy with respect to whether the respondent must move to vacate an admission in family court or else waive the issue for appeal. Compare Matter of Celina D., 145 A.D.3d 1634 (4th Dept. 2016) (no preservation required since statutory requirements are mandatory and nonwaivable) with Matter of Ricky A., 11 A.D.3d 532, 782 N.Y.S.2d 855 (2d Dept. 2005) (motion required).

In Matter of Jahmanni A., 76 A.D.3d 1012, 907 N.Y.S.2d 690 (2d Dept. 2010), a request that the Appellate Division modify 18-month placement to a 12-month

placement was denied where the family court mistakenly stated at the time of the felony admission that the most severe disposition was a 12-month placement, but the respondent raised no objection at the time of disposition.

A narrow exception to the preservation requirement applies when the respondent negates an essential element of the crime during the allocution, which triggers the court's duty to inquire further. People v. Worden, 22 N.Y.3d 982 (2013). See also People v. Tyrell, 22 N.Y.3d 359 (2013) (where right to trial by jury, right to confront accusers, and privilege against self-incrimination were not addressed by court, defense counsel or defendant, it was mode of proceedings error for which preservation was not required); People v. Henderson, 162 A.D.3d 517 (1st Dept. 2018) (preservation required where defendant's statement was in presentence report; court had no obligation to inquire about statement).

G. Alford Pleas

In North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970), the Supreme Court held that a criminal defendant may not only plead nolo contendere, but may plead guilty while claiming innocence in order to obtain the benefits of a plea bargain and avoid the apparent certainty of a conviction and lengthy sentence. The Supreme Court noted that an "Alford" plea should not be accepted unless there is evidence of guilt in the record, and the court resolves the apparent conflict by determining on the record that the defendant is knowingly and intelligently waiving the right to a trial despite his or her claim of innocence. In other words, there is a special Alford allocution that must be performed. People v. Serrano, 15 N.Y.2d 304, 258 N.Y.S.2d 386 (1965). See also People v. Couser, 28 N.Y.3d 368 (2016) (plea to attempted murder upheld where factual recitation of evidence by defense counsel and People demonstrated that there was strong evidence of guilt, and court verified that defendant disputed whether he possessed requisite intent but wished to proceed with plea); People v. Hill, 16 N.Y.3d 811, 921 N.Y.S.2d 181 (2011) (record did not establish that defendant was aware of nature and character of Alford plea where he was not, for example, asked if he wished to plead guilty to first-degree manslaughter to avoid risk of conviction upon trial of more serious crime of second-degree murder, and it was not enough that defendant made concessions from which a choice might be inferred); People v. Alexander, 97 N.Y.2d

482, 743 N.Y.S.2d 45 (2002) (defendant's motion to withdraw *Alford* plea properly denied where defendant told court, inter alia, that he was tendering an *Alford* plea because he feared being convicted of a higher charge; although defendant had history of mental illness and claimed he had failed to take his medication on the day in question, he was not so stripped of orientation or cognition that he lacked the capacity to plead guilty; dissenting judge asserts that trial court should not have accepted *Alford* plea without indication from prosecutor of proof against defendant); People v. Parish, 182 A.D.2d 1104, 582 N.Y.S.2d 886 (4th Dept. 1992), lv denied 80 N.Y.2d 836, 587 N.Y.S.2d 920 (although People did not set forth evidence of guilt, defense counsel stated that he and defendant had reviewed the evidence and concluded that a conviction was likely); People v. Hladky, supra, 158 A.D.2d 616; People v. Benton, supra, 143 A.D.2d 526.

There are no appellate decisions in New York indicating whether Alford pleas may be accepted in delinquency cases. For that reason, and because it is ultimately up to the court to accept or reject such a plea, some family court judges will accept an Alford plea, while others will not. Cf. Matter of Tracy B., 94 Misc.2d 827, 405 N.Y.S.2d 609 (Fam. Ct., Onondaga Co., 1978) (court accepts Alford plea in PINS case); see also Matter of Alonzo J., 320 P.3d 1127 (Cal. 2014), cert denied 135 S.Ct. 189 (California law requiring consent of child's attorney for no contest plea did not violate any constitutional right to accept prosecution's plea offer over objection of attorney). In In re Kirby, 804 N.E.2d 476 (Ohio 2004), the Ohio Supreme Court held that Alford pleas are not authorized in juvenile court under Ohio law. Compare State v. Beasley, 97 N.E.3d 474 (Ohio 2018) (court erred by adopting blanket policy of not accepting no-contest pleas).

It is important to remember that, by taking an Alford plea, the respondent will not escape the disposition-related consequences of a future failure to acknowledge guilt and show remorse; in other words, acceptance of the plea does not establish any willingness on the State's part to consider the respondent as innocent. Matter of Silmon v. Travis, 95 N.Y.2d 470, 718 N.Y.S.2d 704 (2000); see also State v. Herndon, 742 S.E.2d 375 (S.C. 2013) (defendant subject to sanctions for failure to comply with probation condition requiring him to accept responsibility for crime). In fact, even though

it does not involve an actual admission of guilt, an Alford plea may have collateral estoppel effect in another proceeding. Merchants Mutual Insurance Company v. Arzillo, 98 A.D.2d 495, 472 N.Y.S.2d 97 (2d Dept. 1984); see also Kaplan v. Sachs, 224 A.D.2d 666, 639 N.Y.S.2d 69 (2d Dept. 1996), lv denied 88 N.Y.2d 952; Kuriansky v. Professional Care, Inc., 158 A.D.2d 897, 551 N.Y.S.2d 695 (3rd Dept. 1990); but see Matter of Howard v. Stature Electric, Inc., 20 N.Y.3d 522 (2013) (Alford plea not given preclusive effect in workers' compensation proceeding where plea colloquy included no reference to facts underlying conviction).

H. Voluntariness

Even if the record makes it appear that the respondent voluntarily admitted guilt, an admission may later be invalidated if it was, in fact, the product of coercion, undue pressure or fraud. Compare People v. Brown, 14 N.Y.3d 113, 897 N.Y.S.2d 674 (2010) (defendant entitled to hearing upon motion to withdraw plea on ground that it was involuntary because it was conditioned on defendant being granted brief release to see his seriously ill child); People v. Wright, 119 A.D.3d 972 (3d Dept. 2014) (coercion claim where People conditioned plea agreement on waiver of pending constitutional speedy trial motion); People v. Kelley, 114 A.D.3d 1229 (4th Dept. 2014 (plea coerced by court's statement concerning terms of incarceration that could be ordered upon conviction after trial); People v. Fisher, 70 A.D.3d 114, 890 N.Y.S.2d 477 (1st Dept. 2009) (undue coercion found where judge threatened to impose maximum sentence, and although judge stated several times that defendant would be tried fairly, judge made these assurances while underscoring fact that he was rarely reversed and had no intention of creating reversible error in this case); People v. Grant, 61 A.D.3d 177, 873 N.Y.S.2d 355 (2d Dept. 2009) (plea vacated where court told defendant that if he did not plead guilty, he would be remanded until next scheduled court appearance; bail status "has no legitimate connection to the mutuality of advantage underlying plea bargaining because it does not relate either to the more lenient sentence for which the defendant is negotiating or to the waiver of trial and the certainty of conviction the prosecution is seeking," and thus "[t]he prospect of an immediate change in bail status … is an inappropriate consideration in plea negotiations," and "threatened change in bail status may not be used by the prosecution or the court as a 'bargaining chip' to persuade a

defendant to plead guilty"); People v. Aleman, 43 A.D.3d 756, 842 N.Y.S.2d 14 (1st Dept. 2007) (conviction reversed where court "relentlessly pursued its efforts to obtain a guilty plea, ultimately succeeding in having defendant admit, by answering 'yes,' that he gave $100 to an undercover officer for the purpose of having the undercover kill" someone, but defendant asserted innocence repeatedly and refused to admit crucial facts when asked, and, on at least three occasions, defense counsel asked that matter proceed to trial); People v. Gonzalez, 171 A.D.2d 413, 566 N.Y.S.2d 639 (1st Dept. 1991) (defense counsel allegedly told defendant he would get life sentence) and People v. Franco, 158 A.D.2d 33, 557 N.Y.S.2d 7 (1st Dept. 1990) (defendant was pressured by family)

with People v. Manor, 27 N.Y.3d 1012 (2016) (no hearing required except in rare instances, and defendant not entitled to hearing where defense counsel claimed defendant had been pressured by family to take plea; Court of Appeals has never recognized "coercion" by family members as reason for withdrawing plea); People v. Baret, 11 N.Y.3d 31, 862 N.Y.S.2d 446 (2008) (no error in denial, without a hearing, of defendant's motion to vacate plea where defendant claimed that plea, which was product of plea offer contingent upon acceptance by both defendants, was result of threats made by co-defendant; defendant's affidavit too vague regarding threats).

Although a generalized and unsubstantiated claim of innocence will not be sufficient, a supportable claim may justify the withdrawal of an admission. See, e.g., People v. DeJesus, 199 A.D.2d 529, 606 N.Y.S.2d 255 (2d Dept. 1994) (plea should have vacated where defendant learned that complainant had told her mother that allegations were untrue).

The proper procedural vehicle is a motion to withdraw the admission, or, if a dispositional order has been entered, a motion to vacate the order and withdraw the admission. But see People v. Wright, 119 A.D.3d 972 (claim that People coerced plea by conditioning plea agreement on waiver of pending constitutional speedy trial motion was mode of proceedings error for which preservation not required).

I. Effective Assistance Of Counsel

The respondent has the right to the effective assistance of counsel during plea bargaining. On the most basic level, counsel has an obligation to inform the respondent

of the terms of any offered plea bargain. Rules of Professional Conduct, Rule 1.4(a)(1)(iii) (lawyer shall promptly inform client of "material developments in the matter including settlement or plea offers"); see also People v. Fernandez, 13 A.D.3d 271, 788 N.Y.S.2d 39 (1st Dept. 2004), aff'd 5 N.Y.3d 813 (2005); Pham v. United States, 317 F.3d 178 (2d Cir. 2003); Cullen v. United States, 194 F.3d 401 (2d Cir. 1999).

In addition, if counsel misrepresents the law, provides erroneous factual information, fails to discuss the advantages and disadvantages of pleading guilty, or is otherwise ineffective, a plea must be invalidated if, but for counsel's errors, the respondent would have gone to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). See also Missouri v. Frye, 132 S.Ct. 1399 (2012) (in case in which defense counsel failed to communicate plea offer to defendant before it lapsed, court holds that right to effective assistance of counsel extends to negotiation and consideration of plea offers that lapse or are rejected; to establish prejudice, defendant must demonstrate reasonable probability that end result would have been more favorable by reason of plea to lesser charge or sentence involving less prison time, and that he/she would have accepted offer had there been effective assistance and that if prosecution had discretion to cancel offer, or if court had discretion to refuse to accept it, plea would have been entered without prosecution or court preventing it); Lafler v. Cooper, 132 S.Ct. 1376 (2012) (when defendant has received inadequate advice regarding plea offer, rejects offer and goes to trial, and sole advantage defendant would have received under plea is lesser sentence, court may conduct evidentiary hearing to determine whether defendant has shown reasonable probability that but for counsel's errors, he would have accepted plea, and if showing is made, court may exercise discretion in determining whether defendant should receive prison term government offered, sentence received after trial, or something in between; when government offered plea to charge less serious than any charge on which defendant was convicted, or when mandatory sentence confined court's discretion, proper course may be to require prosecution to reoffer plea, and then court could exercise discretion in deciding whether to vacate conviction and accept plea, or leave conviction undisturbed); Dasher v. Attorney General, 574 F.3d 1310 (11th Cir. 2009) (although court was not suggesting that there are no circumstances where it would be reasonable for a lawyer to advise the client to plead guilty to the charged

crime without an agreement and throw himself at the mercy of the court, this was not such a case); United States v. Pitcher, 559 F.3d 120 (2d Cir. 2009), cert denied 558 U.S. 1137, 130 S.Ct. 1090 (where error in counsel's advice resulted from petitioner's own dishonesty in dealing with counsel, court notes that it is "wary of endorsing any precedent that could enable a defendant to benefit from lying to his defense counsel or that might suggest a duty on the part of defense counsel to arm-twist a client who maintains his innocence into pleading guilty"); Purdy v. United States, 208 F.3d 41 (2d Cir. 2000) (no right to counsel violation where counsel adequately conveyed the government's position and advised defendant of strengths of government's case, but did not specifically and explicitly tell defendant whether to accept plea offer); Boria v. Keane, 99 F.3d 492 (2d Cir. 1996), decision clarified 90 F.3d 36, cert denied 521 U.S. 1118 (1997) (right to counsel violated where defendant, sentenced to 20 to life as a result of "buy and bust" arrest, rejected 1-3 year plea-bargained sentence without discussions with counsel concerning advisability of plea); Berry v. Ercole, 2009 WL 1321906 (SDNY, 2009) (where defendant maintains innocence, defense counsel must exercise good judgment in steering course between giving inadequate advice regarding advantages of plea, and coercing plea; here, counsel was not required to advise petitioner he should plead guilty); People v. Marrow, 192 Misc.2d 657, 747 N.Y.S.2d 683 (County Ct., Broome Co., 2002), appeal dismissed 301 A.D.2d 673 (no right to counsel violation where counsel failed to advise defendant of mandatory minimum sentence, since defendant was asserting innocence and plea bargain was not going to happen; counsel had no obligation to ask for Alford plea).

Counsel's failure to advise the respondent of the collateral consequences of an admission usually does not constitute ineffective assistance of counsel. See People v. Ford, supra, 86 N.Y.2d 397. However, in Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473 (2010), a Supreme Court majority held that constitutionally competent counsel would have advised the petitioner that his conviction for drug distribution made him subject to automatic deportation. According to the court, where the deportation consequences of a plea are unclear or uncertain, counsel need only advise a non-citizen client that pending criminal charges may carry the risk of adverse immigration consequences, but where the deportation consequences are clear, there is a duty to

give correct advice and not merely avoid giving erroneous advice. See also Lee v. United States, 137 S.Ct. 1958 (2017) (court declines to adopt per se rule that defendant with no viable defense cannot show prejudice since defendant's decision-making may turn not turn not only on likelihood of conviction after trial, but also on respective consequences of conviction after trial and by plea; if deportation is determinative issue, and individual has strong connections to this country and no other, and consequences of taking chance at trial are not markedly harsher than pleading, possibility of prevailing at trial, however slim, could make all the difference); Chaidez v. United States, 568 U.S. 342 (2013) (Padilla does not apply retroactively to defendants whose convictions became final before Padilla decision); People v. Doumbia, 153 A.D.3d 1139 (1st Dept. 2017) (insufficient to advise noncitizen of mere risk or possibility he could be deported when deportation is virtual certainty); People v. Guzman, 150 A.D.3d 1259 (2d Dept. 2017) (ineffective assistance found where People would have accepted plea to crime that would not have subjected defendant to mandatory deportation, but defense counsel did not request it because he was not aware of that possibility); People v. West, 150 A.D.3d 901 (2d Dept. 2017) (since there was issue as to whether crime constituted "crime of violence" and "aggravated felony" that exposed defendant to mandatory deportation, counsel's advice, reiterated by court, that defendant could be subject to deportation, rather than would be deported, was not error); People v. John, 52 Misc.3d 61 (App. Term, 2d Dept., 2016) (Padilla not applicable where deportation consequences of plea were uncertain since conviction for endangering welfare of child may or may not constitute aggravated felony); People v. Pinto, 133 A.D.3d 787 (2d Dept. 2015) (defendant sufficiently alleged right to counsel violation where he allegedly was advised that conviction carried possibility of deportation and that deportation was rare in his circumstances, but deportation was mandatory); People v. Chacko, 99 A.D.3d 527 (1st Dept. 2012), lv denied 20 N.Y.3d 1060 (burden of asking client about citizenship rests on attorney since defendant who is unaware that immigration status is relevant would have no reason to offer such information); People v. Picca, 97 A.D.3d 170, 947 N.Y.S.2d 120 (2d Dept. 2012) (court rejects People's argument that defendant needed to allege that he informed counsel of immigration status; rule People propose "would lead to the absurd result that only defendants who understand that criminal convictions

can affect their immigration status would be advised of that fact"); People v. Carty, 96 A.D.3d 1093 (3d Dept. 2012) (defense counsel has no affirmative duty to determine client's immigration status, although that may be better practice); People v. Glasgow, 95 A.D.3d 1367 (3d Dept. 2012) (no ineffective assistance where defendant was aware that conviction would subject him to removal but counsel suggested that removal proceedings were unlikely); United States v. Couto, 311 F.3d 179 (2d Cir. 2002) (counsel ineffective where he gave erroneous advice regarding immigration consequences); People v. Becker, 9 Misc.3d 720, 800 N.Y.S.2d 499 (Crim. Ct., Queens Co., 2005) (erroneous advice regarding potential housing consequences may constitute ineffective assistance).

III. Plea Bargaining Strategies

A. Goals

1. Generally

Faced with the possibility of placement away from home, the respondent may ultimately choose the certainty of a plea bargain despite the child's attorney's opinion that going to trial would, at worst, yield the same result. However, at the outset, it is obvious that the attorney's goal while plea bargaining is to secure a result for the respondent that is better than the predicted result of a trial.

Towards that end, the child's attorney must first evaluate the chances of winning a dismissal of all charges at trial. In addition to the quality and quantity of evidence available to each side, the attorney must consider the track record of the judge, the skills of the prosecutor, and, when it appears that the litigation will be protracted, the likelihood that necessary prosecution witnesses will appear. Even when a trial loss seems likely, the attorney must consider whether reversible error has already occurred, since an admission results in a forfeiture of most issues on appeal. Ideally, any admission that is offered should be to a charge lower than the charge(s) of which the respondent would have been found guilty after a trial, and the respondent should be promised a particular disposition, or range of dispositions, less restrictive than the likely result of an open-ended dispositional investigation and hearing. As noted earlier, the structuring of dispositional alternatives in FCA article three makes plea bargaining more complex in family court than in criminal court, and requires the attorney to fully

investigate the respondent's social and legal history, and intelligently predict future events, in order to plea bargain effectively.

2. Potential Length Of Placement Order

When the respondent has been found guilty of a designated class A felony act (see FCA §301.2[8][i]), and the court determines at a dispositional hearing that the respondent requires a restrictive placement, the court must place the respondent with the Office of Children and Family Services for an initial period of five years. FCA §353.5(4)(a)(i). If the respondent has been found guilty of a designated felony act other than a class A felony, the initial restrictive placement must be for a period of three years. FCA §353.5(5)(a)(i). If the respondent has previously been found guilty of a designated felony act, any restrictive placement that is ordered must be for an initial period of five years. FCA §353.5(6). If the respondent has been found guilty of a designated felony act during which the respondent inflicted serious physical injury (see PL §10.00[10]) upon a person sixty-two years of age or older, the court must order a restrictive placement. FCA §353.5(3). See Matter of Quinton A., 49 N.Y.2d 328, 425 N.Y.S.2d 788 (1980) (Court of Appeals upholds constitutionality of FCA §753-a[2][a], the predecessor to §353.5[3]).

Any restrictive placement may be followed by successive one-year extensions of placement. Either the initial restrictive placement, or an extension of placement, may run without the respondent's consent until the respondent's twenty-first birthday, and, when the respondent was found guilty of a class A designated felony act committed after the respondent turned sixteen, until the respondent’s twenty-third birthday. FCA §353.5(4)(d), §353.5(5)(d). See Matter of Luis V., 169 Misc.2d 865, 646 N.Y.S.2d 756 (Fam. Ct., Bronx Co., 1996) (court rejects respondent’s argument that placement cannot be extended beyond eighteenth birthday without consent).

Finally, a designated felony act finding prevents a youth from being "eligible" for "youthful offender" treatment under article 720 of the Criminal Procedure Law. CPL §720.10(2)(c).

A respondent who has been found guilty of an "ordinary" felony may be placed for a period of up to eighteen months, FCA §353.3(5). Either the initial placement, or extensions of placement, may run without the respondent's consent until the

respondent's eighteenth birthday, and, when the acts were committed after the respondent turned sixteen, until the respondent's twenty-first birthday. FCA §355.3(6). A misdemeanor finding can result in a placement of up to twelve months, FCA §353.3(5), and either the initial placement, or extensions of placement, may run without the respondent's consent until the respondent's eighteenth birthday. FCA §355.3(6).

3. Designated Felony Cases

Because they can result in restrictive placements that are substantially longer and more onerous than placements in felony or misdemeanor cases, designated felony charges carry plea bargaining incentives which most resemble those existing in criminal cases. If, given his or her legal and social history, the respondent is at risk of receiving a restrictive placement, a plea to an ordinary felony or a misdemeanor substantially reduces the respondent's exposure in family court, and, of course, also preserves the respondent's eligibility for youthful offender treatment. Plea bargaining a designated class A felony charge down to a lower designated felony in order to reduce a restrictive placement from five years to three is less attractive but could be worth discussing with the respondent in certain cases.

However, forgetting for a moment the youthful offender consequences, which are realized only if the child gets re-arrested, the child's attorney should at least consider the possibility that an admission to a felony or misdemeanor will provide no real benefit when there is virtually no possibility of a restrictive placement. In such cases, a plea may be worthwhile only if there is a promise concerning disposition.

4. Felony Cases

When a fourteen, fifteen, sixteen (as of 10/1/18), or seventeen-year-old (as of 10/1/19) respondent, who has previously been found guilty of assault in the second degree, robbery in the second degree or a designated felony act, subsequently commits robbery in the second degree or assault in the second degree, the latter finding is a designated felony act. FCA §301.2(8)(v). If a respondent of any age, who has previously been found guilty of a felony on two separate occasions, subsequently commits any felony, the latter act is a designated felony. FCA §301.2(8)(vi). See Matter of Manuel R., 89 N.Y.2d 1043, 659 N.Y.S.2d 825 (1997) (no requirement that prior findings result in disposition before they can be used as predicates). See also In re Jason B., 254 A.D.2d

298, 685 N.Y.S.2d 197 (1st Dept. 1999) (findings under multiple felony counts of one petition involving a single incident count as one “finding” for predicate felony purposes). Thus, in addition to a reduction of the potential length of an initial placement from eighteen to twelve months, the incentive for plea bargaining from a felony charge to a misdemeanor finding is avoidance of predicate felony findings that might lead to a designated felony charge.

The difference in the potential length of placement is often an illusory benefit. It is true that the agency with which the respondent is placed may view a child who has been found guilty of a felony as more dangerous than a child placed after a misdemeanor finding. The commission of certain crimes may, in fact, reflect a violent nature, and certain crimes simply sound more serious than others. On the other hand, the agency will be in possession of the respondent's court records (see FCA §381.1). Therefore, even though the respondent may have been placed after a misdemeanor finding, the agency will know if the original charges involved violent behavior, and/or whether the respondent has a history of violence. More importantly, the agency has the discretion to release the respondent whenever it wishes (but see FCA §353.3[9], which permits the court to order a six-month minimum placement in felony cases). As a result, a respondent who adapts well in placement is likely to be conditionally released several months before an eighteen-month placement has expired. Conversely, a respondent who is doing poorly will likely be faced with a request for an extension at the end of a twelve-month placement. Thus, the placement period flowing from a felony finding and a misdemeanor finding in a particular case may, for all practical purposes, be the same.

A better argument for a misdemeanor plea can be made where avoidance of a future designated felony act charge is the goal. For instance, if an eleven-year-old respondent is found guilty of a second degree assault, any second degree assault or second degree robbery finding for acts committed before the respondent turns eighteen would constitute a designated felony act. Therefore, a plea to a misdemeanor assault might be advisable. If an eleven-year-old respondent has two felony charges pending, a finding of guilt on both cases would form the predicate for a designated felony act petition if the respondent is charged with any felony committed before he or she turns eighteen. In those circumstances, the child’s attorney might want to advise the

respondent to admit to one misdemeanor charge in satisfaction of both petitions. An admission to a misdemeanor charge on each petition, or to one felony charge, is a less desirable resolution, but one which should seriously be considered if a promise concerning disposition can be secured.

When evaluating a plea bargain, the child's attorney must factor in the likelihood of future felony findings. If a ten-year-old respondent has two felony charges pending, and the attorney's judgment and intuition suggest that future crimes are likely, a plea bargain may be appropriate. On the other hand, if the respondent is nearing the age when juvenile delinquency jurisdiction ends, there may be little or no chance of exposure to a designated felony charge based on predicate felonies. This is particularly true in view of the fact that the purported designated felony act must be committed after the respondent has already been found guilty of committing the predicate felony or felonies. Obviously, the attorney must also consider the likelihood that the trial of a pending felony charge will result in dismissal, or a misdemeanor finding. Finally, even if the respondent will not age out of delinquency jurisdiction in the near future, an evaluation of his or her social and legal history may suggest that the chances of a future designated felony charge based on predicates are remote. In sum, the fact is that the advantages of pleading guilty to a misdemeanor are often minimal, or entirely illusory. In such cases, the attorney should concentrate on the negotiation of some other benefit, such as a dispositional promise.

5. Misdemeanor Cases

With the enactment of the "Raise the Age" legislation in 2017, a violation-level offense can now be charged in a juvenile delinquency petition if the charge arises from the same transaction as a felony or misdemeanor charge. Moreover, if the court adjudicates the respondent a juvenile delinquent, the only dispositions the court may order are conditional discharge or probation. Thus, while it must be kept in mind that the law does not indicate what will happen if the respondent is later found guilty of violating the dispositional order, an incentive has been created for negotiating an admission to a violation.

6. Multiple Petitions

In addition to the dismissal of felony charges, there are other benefits that can

result from making an admission on one petition in satisfaction of all pending charges.

First of all, many probation officers, mental health examiners and judges tend to be more generous in their appraisal of the respondent, and more lenient in their dispositional recommendations, when the respondent has only one finding. Even among the more cynical judges, who understand that the plea bargaining process often whittles several cases down to one, there is often the feeling that a respondent should be placed away from home after the first finding only when the charge is extremely serious, or the respondent's social history suggests that probation is not a viable option.

In addition, if two or more cases are pending before different judges, the child's attorney could negotiate an admission before the judge who would be most sympathetic at disposition. Or, the attorney might want to negotiate an admission in the case that involves the least serious allegations. At the very least, the attorney can reduce to one the number of judges before whom he or she must successfully argue at disposition.

On the other hand, those respondents who have multiple petitions are often the ones for whom placement will inevitably be the disposition. If the child's attorney is certain that placement will be ordered, either because the parent is adamantly in favor of it or the respondent's legal history is simply too lengthy to explain away, an admission may gain nothing, particularly when the respondent's age makes predicate felony considerations inapplicable.

It must also be remembered that the judge at disposition will be aware of the existence of any case dismissed pursuant to the plea bargain. First of all, when the admission is made the judge will routinely note in the court file the docket number(s) of any case(s) that has been dismissed as part of the deal. In addition, the presentment agency will often insist that the right to sealing be waived entirely, or that the dismissed case(s) remain unsealed until disposition. And, even if the other case(s) is sealed, the judge may still be unable to forget it.

7. Negotiating Release Of Respondent

When the respondent has been remanded, the trial judge, the prosecutor and probation may support a continued remand even if circumstances change or the remand was unjustified at the outset. The judge may be unwilling to impliedly question the wisdom of another judge's decision. The prosecutor may be pleased that the case

will proceed quickly, while the evidence is still readily available, and that the child's attorney will have less time in which to inconvenience the prosecutor with motions. Thus, it is often difficult to persuade the judge to release the respondent, or convince the judge at disposition that placement should not be ordered. As a result, another potential goal of plea bargaining is the release of the respondent. In addition, there are many cases in which the respondent has been released because of a sympathetic or unusually indulgent arraignment judge, or because the presentment agency could not be ready for a timely probable cause hearing, but is almost certain to be remanded if a fact-finding is made after trial. In such cases, the child's attorney might negotiate in order to avoid a remand order.

For the child, the nature of the benefit is twofold. First, a release breaks the institutional momentum towards placement that results when a respondent is detained after a fact-finding hearing. In addition, a respondent on parole has an opportunity to demonstrate an ability to refrain from criminal conduct, attend school regularly, follow parental commands, voluntarily appear for probation appointments, and otherwise make a record supporting a dispositional order no more restrictive than probation.

However, an admission in exchange for release is not always a good deal in the long run. The respondent's legal and social history may indicate that a release is a mere reprieve, and that, despite any improvement in behavior, the respondent is likely to be placed away from home. In such cases, the clear and immediate benefits of a parole may not be an adequate quid pro quo for an admission. The respondent, who is experiencing the pressures of involuntary confinement, will invariably be willing to make the admission. Indeed, the child's attorney should never forget that getting out of a place the respondent views as "jail" has enormous "real-life" value to the respondent, and can occasionally result in such a strong sense of relief that the respondent is thereafter able to improve his or her behavior. However, when there are triable issues, and placement seems inevitable, the attorney might suggest that the respondent consider going to trial. But, there is yet another "flip side"; if dismissal is simply inconceivable, even the remote possibility that a release will lead to probation might justify a plea bargain.

In People v. Grant, 61 A.D.3d 177, 873 N.Y.S.2d 355 (2d Dept. 2009),

defendant's guilty plea was vacated where the court told defendant that if he did not plead guilty, he would be remanded until his next scheduled court appearance. The Second Department observed that bail status "has no legitimate connection to the mutuality of advantage underlying plea bargaining because it does not relate either to the more lenient sentence for which the defendant is negotiating or to the waiver of trial and the certainty of conviction the prosecution is seeking," and thus "[t]he prospect of an immediate change in bail status … is an inappropriate consideration in plea negotiations." A "threatened change in bail status may not be used by the prosecution or the court as a 'bargaining chip' to persuade a defendant to plead guilty." It "is hardly befitting a legitimate system of plea bargaining to require a defendant, in effect, to choose between, on the one hand, admitting guilt and remaining free, and, on the other, maintaining innocence and going to jail." If, during plea negotiations, a defendant inquires about bail, the court should "remind the defendant that the parties are engaged in plea bargaining, not 'bail bargaining,' and that the question of bail will be addressed only after plea negotiations are completed."

Finally, if an outright release from secure detention cannot be negotiated, the child's attorney could ask for a transfer to non-secure detention. Although deprived of an opportunity to demonstrate an ability to remain out of trouble while in the community, the respondent can exhibit a willingness to comply with court orders and refrain from going AWOL. Such behavior might later convince a judge to give the respondent a chance at probation, or place the respondent in a non-restrictive setting.

8. Dispositional Promises

a. Generally

The most desirable and tangible benefit of plea bargaining is a promise concerning disposition -- a promise that a particular disposition will immediately follow the admission, or that the disposition ordered on a future date will be no more restrictive than a specified disposition, such as probation.

Only the judge can guarantee a final disposition. But see People v. Whitehead, 167 Misc.2d 49, 638 N.Y.S.2d 856 (County Ct., Greene Co., 1994) (justice court's promise that there would be no violation of probation filed in county court did not bind probation department). Therefore, the child's attorney must, along with the prosecutor,

approach the judge after an arrangement has been negotiated and secure the judge's consent. The parties should never inform the judge of a plea bargain after an admission is made. At best, the judge will summon the attorneys to the bench, pointedly remind them that such arrangements must be cleared with the court, and then order the agreed upon disposition. At worst, the judge will refuse to agree, order a probation investigation, and make a perfunctory concession to the effect that the agreed upon disposition might be ordered if justified by the probation report. The child's attorney may then be left scrambling in an effort to secure a withdrawal of the admission.

b. Adjournments In Contemplation Of Dismissal

Pursuant to FCA §315.3(1), the court may, before or after issuing a fact-finding order, grant an adjournment in contemplation of dismissal (ACD), which is "an adjournment of the proceeding, for a period not to exceed six months, with a view to ultimate dismissal of the petition in furtherance of justice." The court may impose terms and conditions to which the respondent must adhere. FCA §315.3(2). See Uniform Rules For The Family Court, 22 NYCRR §205.24. Such terms and conditions may include supervision by the probation department. An ACD may be issued upon a motion by the presentment agency or the respondent, or upon the court's own motion. There is no requirement that the presentment agency consent. FCA §315.3(3).

If a pre-fact-finding ACD is unavailable, a post-fact-finding ACD is the next best result obtainable through negotiations. If the respondent complies with the terms and conditions, the petition will eventually be dismissed, and, pursuant to FCA §375.1(2)(c), the records of the proceeding will be sealed.

While negotiating for an ACD, the child's attorney should point out that court-ordered conditions can, albeit for only six months, provide the ACD with as much teeth as an order of probation. A violation of either one can lead directly to a new dispositional order placing the child. Consequently, if the respondent's legal history is limited, the judge and the prosecutor may be willing to give the respondent the chance to avoid an adjudication of delinquency.

Sometimes, the prosecutor will ask for a waiver of the respondent's right to sealing in exchange for the ACD. The prosecutor's fear is that, if the respondent is arrested and prosecuted again, the sealed records will not be brought to the attention of

the judge at disposition, or, perhaps, even at the initial appearance. See Matter of Alonzo M., 72 N.Y.2d 662, 536 N.Y.S.2d 26 (1988) (probation report may not include references to sealed cases). As always, the child's attorney must balance all considerations, and determine whether such a demand is acceptable. Since, in many cases, a refusal to agree to such a condition will not be a "deal breaker" for the presentment agency, the respondent's consent should not be offered too quickly.

c. Conditional Discharge

Pursuant to FCA §353.1, the court may conditionally discharge the respondent for a period of up to one year. The order may include any of the conditions specified in FCA §353.2. FCA §353.1(2). Unlike an ACD that eventually results in dismissal, a conditional discharge does constitute an adjudication of delinquency.

As an alternative to an ACD, the prosecutor will frequently offer a conditional discharge in exchange for an admission. To the extent that it signals the prosecutor's lack of interest in a more restrictive disposition, such an offer should encourage the child's attorney to keep negotiating for an ACD. When an ACD is simply not available, and there is a realistic possibility that the respondent will be placed, a conditional discharge must be considered as a plea bargaining objective.

If the possibility of placement is remote, and an order of probation appears to be the downside risk of going to trial, a conditional discharge is not necessarily an attractive alternative. It is true that an order of probation ordinarily requires the respondent to meet with a probation officer on a regular basis, while a conditional discharge does not. Moreover, an order of probation may run for up to two years, and may be extended for one year upon a finding of exceptional circumstances, FCA §353.2(6), while a conditional discharge may not run beyond one year. Consequently, there is usually a greater risk that the respondent will violate an order of probation.

On the other hand, it is also true that probation is most frequently ordered for only one year. And, a respondent who is able to comply with a conditional discharge may also be able to adhere to conditions of probation. Therefore, the child's attorney should not automatically consider a conditional discharge a desirable result merely because it is ordinarily less restrictive than probation.

Finally, whenever a conditional discharge is considered a satisfactory bottom-

line, the child's attorney might initially attempt to secure a promise that, if the respondent complies with the order, the case will be dismissed in furtherance of justice. In effect, this would be equivalent to a one-year ACD.

d. Probation

As noted above, a promise of probation is a plea bargaining goal worth considering whenever placement looms as the likely result of an open-ended dispositional process. The difficulty lies in determining when the risk of placement merits such a strategy.

Stated bluntly, the most difficult hurdle for many lawyers to overcome is the fear of rejecting a promise of probation, and later watching the disappointed respondent be escorted from the courtroom by court officers to be placed away from home. Indeed, no matter how certain the child's attorney is that placement is merely a remote possibility, the fact remains that it is a possibility. Nevertheless, if the attorney has accurately gauged the respondent's chances, the fact is that a promise of probation provides no benefit to a respondent who would, at worst, be put on probation in any event after a probation investigation. On the other hand, few respondents will turn down a promise of probation, and, although the attorney may be skeptical about the respondent's promise not to violate conditions of probation, and should communicate his/her concerns, the respondent's ultimate decision must be respected.

When it is clear that the respondent will receive no worse than probation, it may be appropriate to negotiate the length of probation. Most orders of probation run for a one-year term. Many of those orders are violated towards the end of the term. By negotiating for a six-month term of probation, the child's attorney can reduce substantially the risk of a violation and subsequent order of placement.

Finally, as in other plea bargaining contexts, the child's attorney should always remember to take a far-sighted view. For instance, assuming, arguendo, that the respondent is likely to violate an order of probation almost immediately, an admission in exchange for a promise of probation may carry an order of placement as its real quid pro quo. This is not to suggest that, when the chances of winning at trial are slim, the attorney should rely on clever speculation and reject a generous offer of probation. However, if the chances of winning are extremely good, it is something to think about.

e. Placement

If placement appears to be a certainty, the securing of a promise concerning the nature of the placement will sometimes be a legitimate goal of plea bargaining.

In all felony and misdemeanor cases, and in a designated felony case in which restrictive placement is not ordered, the court has several placement options in a social services district that is not operating an approved “Close to Home” initiative pursuant to SSL §404. In such a district, the court may place the respondent with the commissioner of social services, and may direct the commissioner to place the respondent with an authorized agency or class of authorized agencies. FCA §353.3(2)(ii). Alternatively, the court may place the respondent with the New York State Office of Children and Family Services (OCFS) and do one of the following: 1) authorize OCFS to place the respondent in a secure facility within the first sixty days of residency in an OCFS facility -- OCFS retains discretion to put the respondent in a non-secure facility, in which case the child may be transferred to a secure facility after the initial sixty days upon a hearing pursuant to §504-a of the Executive Law; 2) authorize OCFS to place the respondent in a limited secure facility, in which case OCFS may transfer the respondent to a secure facility after a hearing is held pursuant to EL §504-a -- however, during the first twenty days of residency, the respondent may not be transferred unless he or she has committed an act or acts which are "exceptionally dangerous" to the respondent or others; or 3) place the respondent in a non-secure facility, in which case the respondent may not be transferred to a secure facility. FCA §353.3(3). The court may also order placement with OCFS and direct or authorize OCFS to place the respondent with an authorized private agency or a class of authorized agencies. If OCFS is unable to place the child pursuant to such an order or discontinues the private agency placement, the child is deemed to have been placed, as described above, in a limited secure or non-secure facility. FCA §353.3(4).

In a “Close to Home” district, the court must place the respondent in the custody of the commissioner of social services if the court determines that a non-secure or limited secure level of care is appropriate and the district’s plan covers such a placement, and must place the respondent with OCFS if placement in a secure level of care is appropriate. FCA §353.3(2), (2-a).

As noted earlier, it may, on rare occasions, be appropriate to plea bargain to a non-class A designated felony when a designated class A felony is charged in order to reduce the length of a seemingly unavoidable restrictive placement. When the top designated felony count is lower than a class A felony, and it is impossible to negotiate a plea to a crime outside the designated felony category, the only remaining negotiable item is disposition. Thus, if it appears likely that a restrictive placement will be ordered, a promise that the respondent will receive a routine eighteen-month felony placement might be worth considering. Yet, given the youthful offender consequences of a designated felony finding, and the ever-present risk that the respondent will violate the terms of disposition and be placed restrictively in the future, a plea to a designated felony charge is rarely advisable.

In other cases, negotiations must focus on the placement options open to the court. For instance, a promise of placement with the commissioner of social services might be sought if there is a strong possibility that the court will order a more restrictive placement with OCFS. Similarly, if the court is likely to authorize immediate secure placement or placement of the respondent in a limited secure facility, and the respondent wants a less restrictive placement, a non-secure placement might be sought.

However, any order of placement constitutes a total deprivation of liberty, and exposes the respondent to years of placement in a potentially dangerous environment. Even when a particular type of placement is negotiated, there is always the chance that the respondent will violate the dispositional order and end up in a different place. Consequently, when the chances of winning the case are significant, the often marginal "benefits" flowing from a less restrictive placement may not justify a plea bargain.

When considering any plea bargain which includes placement, the child's attorney must mention to the respondent and his or her parent, the possibility - however remote it may be - that a termination of parental rights proceeding will be filed if the respondent remains in placement for 15 months. See SSL §384-b(3)(l).

Finally, because consecutive placements are not permitted under the Family Court Act, no benefit flows from making an admission in exchange for a placement to run concurrent with that in another case, unless there is a real chance that the new

placement order will alter the conditions of placement to the respondent's disadvantage; for instance, by authorizing placement in a limited secure or secure facility rather than a non-secure facility. It should be noted that a defendant who is convicted and sentenced, and later pleads guilty in another case in exchange for a lesser concurrent sentence, is entitled to have the plea set aside if the first conviction is reversed on appeal. See People v. Pichardo, 1 N.Y.3d 126, 769 N.Y.S.2d 791 (2003).

f. Conditional Dispositional Promises

Many judges and prosecutors simply do not like to formally commit themselves to a dispositional promise. They prefer a negotiated disposition that is conditioned on receipt of a probation report that contains no information that so fundamentally argues against the negotiated disposition that the judge or the prosecutor cannot adhere to it.

It is very common in criminal court plea bargaining for the defendant to negotiate a "plea back" agreement, which allows the defendant to withdraw the plea if, because of new information contained in a presentence report, the judge does not impose the agreed upon sentence. Indeed, unless there are additional conditions attached to the promise, such as a requirement that the defendant appear in court on the sentencing date, the defendant has a right to withdraw the plea if the promise is unfulfilled. See People v. Torres, 45 N.Y.2d 751, 408 N.Y.S.2d 487 (1978).

A "plea back" arrangement may often be desirable in a delinquency proceeding. However, some judges and prosecutors will not accept an admission under such circumstances. Instead, a somewhat more questionable quid pro quo is offered, to wit: even if the probation report contains information that might support a more restrictive disposition, the agreed upon disposition will be ordered unless the adverse information is so compelling that the judge and prosecutor are no longer bound by good faith to adhere to their promise. This type of agreement is often made when the negotiated result is an ACD.

The risks inherent in such an arrangement are apparent. It is true that a prosecutor cannot do or say anything that violates the spirit of a plea bargain. Compare People v. Tindle, 61 N.Y.2d 752, 472 N.Y.S.2d 919 (1984) (despite promise not to recommend a sentence, prosecutor made remarks about seriousness of crime and defendant's flight and perjury) and People v. Jasiewicz, 192 A.D.2d 999, 597 N.Y.S.2d

242 (3rd Dept. 1993) with In re Jamar W., 269 A.D.2d 103, 703 N.Y.S.2d 10 (1st Dept. 1999), lv denied 95 N.Y.2d 752, 711 N.Y.S.2d 154 (2000) (placement order upheld where prosecutor made statements during summation at dispositional hearing which breached plea agreement, but apologized to judge and child's attorney and retracted remarks, and judge stated that he was not biased by statements and would disregard them). However, most probation reports contain negative information that can be seized upon by a judge or prosecutor who wants to effect a principled retreat from a plea bargain agreement. Cf. People v. Howard, 115 A.D.2d 621, 496 N.Y.S.2d 282 (2d Dept. 1985) (DA's decision whether to recommend probation in exchange for defendant's cooperation is unreviewable). Therefore, the child's attorney must have a good idea of what the probation report will say. And, no matter how good the attorney's grasp of the facts may be, an adjournment for a probation investigation creates a risk that the respondent will behave in a way that either violates the plea bargain itself, see, e.g., People v. Outley, 80 N.Y.2d 702, 594 N.Y.S.2d 683 (1993) (defendant violated "no arrest" condition; a defendant is entitled to an inquiry at which a legitimate basis for the arrest must be shown), or undermines the chances for favorable treatment. Of course, if the court improperly orders a disposition more restrictive than the one that was promised, the child's attorney should object and request specific performance of the plea bargain. If that request is denied, and the respondent is not satisfied with the disposition proposed by the court, the appropriate remedy is a withdrawal of the plea. See People v. Ifill, 108 A.D.2d 202, 488 N.Y.S.2d 464 (2d Dept. 1985) (in absence of objection or motion to withdraw plea, claim is not preserved).

On the other hand, an ACD is an extremely desirable result, and, if it can be negotiated in no other way, a conditional promise should not necessarily be rejected. For instance, if, by virtue of personal relationships and a history of good faith negotiations, the child's attorney is confident that the prosecutor and judge will feel bound by their conditional promise despite the presence of negative information in the probation report, the ACD becomes something more than an uncertainty. In addition, in order to reduce the variables, the attorney might attempt to negotiate an agreement specifying the type of adverse information, such as a new arrest or a report of truancy, that would result in a denial of the ACD. Again, however, this type of negotiation calls

upon the attorney to make difficult predictions.

Finally, when the probation report is unexpectedly good, the child's attorney should consider asking the judge to order a disposition less restrictive than that agreed upon. See People v. Farrar, 52 N.Y.2d 302, 437 N.Y.S.2d 961 (1981) (court must exercise discretion at sentencing despite plea bargain; if court decides to impose less severe penalty, People may withdraw consent to plea). However, because such a request may be viewed by the judge and prosecutor as a violation of the unwritten rules governing plea bargaining, a "soft-pedaled" approach is usually advisable.

g. Gaining The Favor Of The Judge And Prosecutor

A prosecutor will often agree to a plea bargain because the case is weak, or the complainant is a reluctant or vulnerable witness, and not because the resulting disposition is all the prosecutor had hoped for. Consequently, if the case goes to trial and there is a fact-finding, it is entirely proper for a prosecutor to seek, and the court to order, a disposition more punitive than that offered during unsuccessful plea bargaining negotiations. See People v. Miller, 65 N.Y.2d 502, 493 N.Y.S.2d 96 (1985); People v. Pena, 50 N.Y.2d 400, 429 N.Y.S.2d 410 (1980). However, according to all accepted standards of fairness, it is inappropriate for a judge or prosecutor to "punish" a respondent who has refused to make an admission by advocating for or ordering a more restrictive disposition than is reasonably justified by the facts. See United States v. Cruz, 977 F.2d 732 (2d Cir. 1992) (judge's pretrial threat to impose maximum sentence if defendant went to trial without a good defense was inappropriate and warranted re-sentencing); People v. Cox, 122 A.D.2d 487, 505 N.Y.S.2d 247 (3rd Dept. 1986). Nevertheless, because they know that the respondent's attorney often controls the respondent's decision-making, some judges and prosecutors will hint at such a possibility in an attempt to intimidate the attorney, and some will actually follow through on their threats. Thus, in acknowledgement of the "real world," some attorney's feel enormous pressure to advise the respondent to make an admission in order to "please" the judge and prosecutor and retain their goodwill during the dispositional process. This pressure is often acute when there are simply no litigable issues, and the attorney does not want to appear to be wasting the court's time pursuing a frivolous defense.

Although it would be easy to say that the child's attorney should be immune to

such bullying, the fact remains that each case must be judged on its own merits. Most judges will not unreasonably punish a respondent for the attorney's stubborn refusal to cooperate. Thus, it is usually wise to ignore a judge's display of annoyance. When a prosecutor openly threatens or slyly hints at an attempt to "get" the respondent, the attorney must decide not only whether the threat is real, but whether there is any chance that the judge will listen. Most judges are painfully aware of prosecutorial posturing, and are not easily persuaded to stray from a fair-minded evaluation of the facts.

If the prosecutor's aggressive pursuit of a more restrictive disposition could be pivotal, the child's attorney must take any threat into account. And, if the judge is genuinely vindictive and capable of seeking revenge, it is obvious that the attorney must take that into account as well. When the respondent is denying guilt, and even has witnesses to present, the attorney should attempt to prevent any recrimination by informing the judge that the respondent is maintaining his or her innocence, and that, as a result, plea bargaining is simply not an option. Although the judge and prosecutor may still assume that a guilty respondent is remorselessly trying to "get off," they will usually be less annoyed by a respondent's attempt to avoid punishment than by the child's attorney's refusal to be "reasonable."

h. Exclusion Of Inflammatory Facts

Another goal often cited in support of plea bargaining is preventing the judge from hearing certain inflammatory evidence that would be fully aired at a trial. While such a benefit may exist in some cases, the fact is that the petition probably contains some of the inflammatory facts, and that the details surrounding the crime will likely come out during the dispositional process and appear in the probation report. Indeed, the respondent will be questioned about what he did, the presentment agency will provide details to the probation officer, a victim impact statement may be submitted (see FCA §351.1[4]), and it is possible that the complainant will testify at a dispositional hearing. Most importantly, no matter what the respondent admits he or she did, the people in the system will usually assume that the respondent is guilty of everything alleged in the petition. Consequently, the child's attorney should consider whether the advantage in avoiding an exploration of the facts at trial is only temporary, or, at best,

illusory.

9. Conversion To PINS Proceeding

Pursuant to FCA §311.4(1), the court may, with the consent of the respondent and the presentment agency, "substitute a petition alleging that the respondent is in need of supervision for a petition alleging that the respondent is a juvenile delinquent." At the conclusion of the dispositional hearing, the court may order a PINS substitution without the consent of the presentment agency. FCA §311.4(2). See, e.g., Matter of Kayla F., 122 A.D.3d 1399 (4th Dept. 2014) (PINS adjudication substituted where respondent, found guilty of third degree assault, demonstrated no danger to community at large and could have received same placement as PINS, and conduct was consistent with PINS behavior, not juvenile delinquency); Matter of Dylan P., 121 A.D.3d 1118 (2d Dept. 2014) (respondent should have been adjudicated PINS in proceeding involving argument between respondent and mother that led to respondent damaging television where respondent had no prior delinquency finding, accepted responsibility for actions, mother played active and positive role in respondent's life, respondent was improving in area of curfew violations and school absences, and court could have required Probation or other agency to monitor school attendance and curfew "without adding the stigma of a juvenile delinquent adjudication"); In re Priscilla V., 99 A.D.3d 414, 952 N.Y.S.2d 6 (1st Dept. 2012) (court properly declined to convert proceeding to PINS proceeding where incident was serious and violent attack on respondent's mother; respondent had committed violent acts and generally misbehaved in home; and respondent lacked remorse and had history of running away from home, truancy and drug use); In re Na'Quana J., 50 A.D.3d 291, 853 N.Y.S.2d 884 (1st Dept. 2008) (family court properly refused to substitute PINS adjudication in view of respondent's serious drug abuse, truancy problems, gang involvement, general misbehavior and history of running away from home and from residential facilities); In re Jeffrey C., 47 A.D.3d 433, 849 N.Y.S.2d 517 (1st Dept. 2008), lv denied, 10 N.Y.3d 707 (adjudication of delinquency reversed, and PINS adjudication substituted, where proceeding involved altercation between respondent and his brother in their home; mother and stepfather intervened to stop brothers from fighting; while respondent may have "overreacted," his outburst appears to have been in response to heat of moment and provocation by older brother;

respondent had no prior delinquency or PINS findings; there were no reports of alcohol or illegal drug use, and while the Probation report indicates that respondent did not follow curfew and had several school absences, family court could have required Probation to monitor respondent's behavior to assure that he attended school regularly and obeyed curfew "without adding the stigma of a juvenile delinquent adjudication"); In re Devon R., 278 A.D.2d 15, 717 N.Y.S.2d 145 (1st Dept. 2000), lv denied 96 N.Y.2d 707, 725 N.Y.S.2d 637 (2001) (family court abused discretion in refusing to substitute PINS finding where 8-year-old sodomy respondent was in need of psychiatric treatment); Matter of Sheifa R., 22 Misc.3d 1106(A), 2008 WL 5484319 (Fam. Ct., Queens Co., 2008), aff'd 57 A.D.3d 678, 868 N.Y.S.2d 540 (2d Dept. 2008) (in juvenile delinquency case where respondent, aged 9½ years, sexually abused 7-year-old complainant, and neglect petition was filed against respondent's father, in whose home respondent's offenses took place, family court denies defense counsel's request for substitution of PINS finding and conversion of PINS finding into neglect finding; court notes that respondent's acts are not less serious or traumatic than maltreatment respondent may have experienced, that PINS substitution would afford court fewer dispositional options and would ignore fact that offense resulted in victimization of another child, and that there does not appear to be causal connection between neglect charges against father and respondent's offenses); Matter of Derrick C., 137 Misc.2d 124, 519 N.Y.S.2d 934 (Fam. Ct. Richmond Co., 1987); see also FCA §311.4(3) (ordinarily requires substitution of PINS when respondent is charged with prostitution).

A PINS substitution order will often be appropriate when the respondent is charged with committing a crime against a parent or other family member, and there is no history of anti-social conduct outside of the home. Ideally, even if dismissal of the charges or an ACD cannot be secured, the presentment agency and the court will agree to an immediate substitution order and a prosecution of the case as a PINS proceeding.

However, whether or not an intrafamilial crime is involved, a PINS substitution order will often be an acceptable quid pro quo for the respondent's admission of guilt. First of all, even assuming that the case results in a PINS adjudication pursuant to FCA §752, the respondent's court record will be less damaging should he or she be re-arrested in the future. Perhaps more importantly, a child may be placed as a PINS only

with a private individual, or with the Commissioner of Social Services for residence in a foster home or a non-secure facility. See §756(a)(i). Unless a new and independent delinquency charge is brought - see, e.g., Matter of Asia H., 184 Misc.2d 27, 705 N.Y.S.2d 871 (Fam. Ct., Suffolk Co., 2000); Matter of Jennifer G., 182 Misc.2d 278, 695 N.Y.S.2d 871 (Fam. Ct., Queens Co., 1999) - there is no possibility of a secure placement should the child violate a dispositional order.

Usually, the respondent will, with the presentment agency's consent, make an admission to one of the allegations in the delinquency petition in exchange for a promise by the court that an order will immediately be issued substituting a PINS petition. Although a PINS case ordinarily must be based upon a pattern of misconduct, it appears that an admission to one criminal act as part of this type of agreement can support a PINS fact-finding. Compare Matter of Theresa C., 222 A.D.2d 1107, 636 N.Y.S.2d 249 (4th Dept. 1995) and Matter of Robert Z., 214 A.D.2d 203, 632 N.Y.S.2d 274 (3rd Dept. 1995), lv denied 87 N.Y.2d 808, 641 N.Y.S.2d 829 (1996) (general rule requiring more than isolated incident was not applicable) with Matter of Bordone v. F., 33 A.D.2d 890, 307 N.Y.S.2d 527 (4th Dept. 1969). Consequently, some judges and prosecutors will ask that the respondent agree to have the substituted PINS petition amended to include allegations of repeated PINS misconduct, and admit to those allegations as well.

Plea bargaining for a PINS substitution order may be unwise if it is very likely that the respondent will engage in misconduct leading to a reinstatement of the initial delinquency fact-finding and an open-ended dispositional process. For instance, the presentment agency or the judge may insist that the respondent agree to a substitution order that is expressly subject to vacatur if the respondent violates one of a specified set of conditions. Since PINS substitution removes the threat of secure detention and a secure placement, the presentment agency or the judge may want a condition requiring that the respondent not go AWOL from a non-secure detention facility, or abscond from home. In addition, even in the absence of an express condition, the court arguably has the power to vacate a substitution order on its own motion pursuant to FCA §355.1(1)(b) if the respondent's violation constitutes "a substantial change of circumstances." Matter of Gerry B., 15 Misc.3d 1134(A), 841 N.Y.S.2d 819 (Fam. Ct., Queens Co., 2007)

(without such authority, judges might be discouraged from ordering substitution); State ex rel. Kloogman v. Schall, 134 Misc.2d 231, 510 N.Y.S.2d 453 (Sup. Ct. N.Y. Co., 1986). However, in Matter of Tiahek Q., 178 A.D.2d 1020, 579 N.Y.S.2d 786 (4th Dept. 1991), the Fourth Department held that the family court had no power to issue an order substituting a delinquency finding for a PINS finding. On the other hand, in the absence of an express condition, it could be argued that the respondent should have the right to withdraw the admission. Cf. People v. Selikoff, 35 N.Y.2d 227, 360 N.Y.S.2d 623 (1974); State ex rel. Kloogman v. Schall, 134 Misc.2d 231, 510 N.Y.S.2d 453 (Sup. Ct., N.Y. Co., 1986).

Finally, it must be remembered that, even if the presentment agency does not consent to PINS substitution, the judge may issue a substitution order after a dispositional hearing. Therefore, a plea bargain could be struck if the judge agrees to substitute a PINS petition at disposition. The presentment agency's only immediate option would be to refuse to accept the admission, in which case the respondent would still have the option of making an admission to the entire petition in exchange for the judge's promise.

B. Negotiating The Plea Bargain

1. Generally

As in any other negotiation process, the goal of each side during plea bargaining is to secure as many concessions as the other side is prepared to make. And, good negotiators never open the discussion with their final offer. Consequently, the child's attorney should not advise the respondent to agree to a plea bargain unless it appears that the prosecutor will, for reasons of personal preference or office policy, not go further. Often, it is not until the moments just before the trial begins that the prosecutor's final position surfaces. Similarly, the attorney should initially ask for a quid pro quo that, although not absurd, is very likely to be rejected. Just as a stubborn prosecutor may withhold acceptance of the attorney's proposal until the trial is about to commence, the attorney should not rush to close the deal by accepting the first reasonable offer. Of course, there is always the risk that the prosecutor will withdraw an offer. See Mabry v. Johnson, 467 U.S. 504, 104 S.Ct. 2543 (1984) (defendant had no right to specific performance of plea bargain that was withdrawn by prosecutor).

Since the result of a trial is rarely guaranteed, the most obvious benefit received by the prosecutor is the admission itself. However, it is also clear that the judicial system avoids a considerable expenditure of time and money when the respondent makes an admission. Although the benefits to the system are more compelling in criminal cases, in which lengthy and expensive jury trials are avoided, the trial of a delinquency case in family court can severely disrupt a judge's calendar, and cause some degree of stress for the judge or the prosecutor. As a result, the negotiating process will often be affected by the child's attorney's reputation. If the attorney is considered to be a diligent and skillful lawyer, who sees more issues, makes more motions, and conducts more complex cross-examinations than most other lawyers, the prosecutor will not only be that much more concerned about losing, he or she will, along with the judge, be concerned that the trial will be a complicated and protracted affair.

2. Statutory Limits On Plea Bargaining

Although the Criminal Procedure Law limits the court's power to accept a plea to a charge lower than the top charge in an indictment (see CPL §220.10), FCA article three contains no such restrictions. However, there are certain provisions affecting the dispositional process.

According to FCA §351.1, the court must order a probation investigation after a finding is made. Strictly interpreted, this provision appears to prohibit plea bargaining that results in the issuance of a dispositional order immediately after an admission.

In practice, §351.l is not a problem. First of all, most judges take the position that the respondent and the presentment agency are entitled to waive a probation investigation. Other judges will simply deem the probation record compiled up to that point to be a probation "investigation" report, and then take some testimony concerning the respondent's present functioning and proceed immediately to disposition. In addition, all judges realize that, if everybody agrees to go immediately to disposition, no one is going to appeal. Finally, since an ACD may be granted "at any time" prior to the issuance of an order adjudicating the respondent a delinquent, it can be argued that §351.1 does not in any event require an investigation when an ACD is ordered pursuant to a plea bargain. See Matter of Dwayne G., 135 Misc.2d 114, 515 N.Y.S.2d 183 (Fam. Ct. Queens Co., 1987).

As noted earlier, a restrictive placement must be ordered when the court finds that the respondent caused serious physical injury to a person sixty-two years of age or older during the commission of a designated felony. Consequently, in such cases, it is not possible for the respondent to offer a plea to a designated felony charge in exchange for a more benign disposition. If the prosecutor will not accept an ordinary felony plea, and the court is willing to make a promise concerning disposition, the child's attorney should move to dismiss all designated felony counts on the ground that a restrictive placement would constitute an injustice, and then, if necessary, offer a plea to the entire petition. Cf. People v. Cruz, 114 A.D.2d 769, 495 N.Y.S.2d 162 (1st Dept. 1985).

The only other limitation on the court's power to issue any one of the available dispositional orders appears in FCA §315.3(1), which prohibits the granting of an ACD when the petition alleges a designated felony act. Obviously, if the respondent is permitted to make an admission to a crime other than a designated felony in satisfaction of all charges, the petition no longer "alleges" a designated felony and an ACD may be ordered. It might also be noted that, when the presentment agency and the judge agree that the respondent should receive a pre-fact-finding ACD, the presentment agency can withdraw the designated felony charge, or the court can dismiss it on consent, so that the ACD may legally be ordered.

3. Negotiating With The Prosecutor

While the general negotiating skills described above are critical, it is also important for the child's attorney to be familiar with the prosecutor's personality and modus operandi. First of all, if the prosecutor is, for some reason, reluctant to try cases in general, or is not in the mood to try a particular case, the attorney might want to wait until just before trial to see if a better offer is forthcoming. If a particular prosecutor is dishonest, the attorney may have to look beyond the prosecutor's claims concerning the availability of witnesses, and determine whether the presentment agency has a genuine ability to proceed to trial and prove the case. Finally, if the prosecutor is incompetent, routinely unprepared, and/or often involved in trials at which legal error occurs, those factors must be weighed in the balance.

While engaged in plea negotiations, the child's attorney should keep in mind that

statements which contain information obtained from the respondent might, under certain circumstances, constitute an admission by an agent. But see People v. Cassas, 84 N.Y.2d 718, 622 N.Y.S.2d 228 (1995) (attorney's statements improperly admitted in absence of evidence that defendant gave him authority to speak, or waived privilege).

The child's attorney also must keep in mind that any bargained-for recommendation by the prosecutor is not binding on the court. Matter of D.V.S., 14 Misc.3d 1216(A), 836 N.Y.S.2d 484 (Fam. Ct., Nassau Co., 2007).

4. Negotiating With The Judge

Although Federal judges may not participate in the plea bargaining process, New York State trial judges are permitted to participate. People v. Scannell, 134 A.D.3d 738 (2d Dept. 2015); Opinion: 17-110, 2017 WL 5632962 (Advisory Committee on Judicial Ethics, 10/19/17) (judge may initiate, suggest, or facilitate plea agreement as alternative to agreement offered by defendant and prosecutor, provided judge does not coerce a disposition or act to further his/her personal convenience or interests, and is careful not to create impression he/she has prejudged case).

What many lawyers forget is that what cannot be obtained from the prosecutor can often be obtained from the judge. If a plea has been agreed upon, but the prosecutor will not agree to the desired disposition, the child's attorney should request a conference and attempt to persuade the judge; indeed, the judge can order any disposition, or an ACD, over the objection of the prosecutor (the attorney should remind the judge of Appellate Division decisions, such as In re Osriel L., 94 A.D.3d 523 [1st Dept. 2012)], that affirm the court's authority to order an ACD when appropriate). When the judge agrees, the only option available to an objecting prosecutor is a refusal to accept an admission to anything other than the entire petition. However, a more likely response will be the prosecutor's pro forma objection "for the record." And, many times the judge will persuade the prosecutor to agree to the bargain, particularly when the child's attorney persuades the judge that it is the presentment agency that is being recalcitrant. Of course, when appropriate, the respondent can also offer an admission to the entire petition (see FCA §321.2[1]) in exchange for a disposition promised by the judge.

Perhaps the most important thing to remember is that, before negotiating in

camera with a judge, the child's attorney must marshal facts and arguments just as carefully as he or she would for an oral presentation in open court. It is no simple matter to persuade a judge to change his or her mind, or to pressure the presentment agency into changing its position or issue an order over the presentment agency's objection. It is generally best to be both forceful and controlled; histrionics should be saved for those infrequent occasions when the attorney's passon is justifiable and will be taken seriously.

5. Discussions With The Respondent And Parent

The child's attorney should discuss the possibility of a plea bargain and secure the respondent's consent to negotiations with the prosecutor. Of course, even when the respondent has denied guilt, it is not improper to merely solicit offers from the prosecution without implying that the respondent has agreed to anything. The attorney should also keep the respondent and the parent advised of plea bargaining developments, discuss the options during each stage, and explain all significant plea proposals made by the presentment agency. See ABA Standards For Criminal Justice, The Defense Function, 4-6.2(a),(b). However, if the respondent and parent disagree, the attorney should follow the wishes of the respondent, who is, after all, the client.

Most respondents and their parents do not enter the system with high expectations. Many of them come from underprivileged backgrounds, and have had unpleasant and unrewarding experiences with the authorities. If they have prior experience with the criminal or juvenile justice system, they may already be convinced that the courts are unfair to poor people, and that relatively lenient treatment should be gratefully accepted. When incarceration is anticipated, an offer of anything better will bring great relief.

Yet, because some plea bargains are not as good as they look, the child's attorney should, after investigating the case, provide a recommendation, or at least disclose the merits and drawbacks of any plea bargain proposal. See ABA Standards, 4-6.1(b); New York State Rules of Professional Conduct, Rule 1.4(a) (lawyer shall promptly inform client of "material developments in the matter including settlement or plea offers," shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and shall "explain a matter to the extent

reasonably necessary to permit the client to make informed decisions regarding the representation"). Although the attorney may fear that such advice will turn out to be wrong, the respondent deserves a lawyer who is more than a mere conduit for plea bargain proposals. See Boria v. Keane, 99 F.3d 492 (2d Cir. 1996), decision clarified 90 F.3d 36, cert denied 521 U.S. 1118, 117 S.Ct. 2508 (1997) (violation of right to counsel occurred where defendant, who is serving 20 to life sentence as a result of "buy and bust" arrest, rejected 1-3 year plea-bargained sentence without discussions with counsel concerning advisability of plea). The child's attorney should never be coercive, since it is the respondent's decision to make, and because the attorney's opinion may have a substantial impact upon a young child whose ability to weigh the options is limited. However, it is not improper for the attorney to advise against acceptance of a plea bargain when it is not a good one.

Often, a favorable plea bargain cannot be accepted because the respondent denies guilt and an Alford plea is not an option. However, an investigation may yield evidence of guilt and suggest that the trial will be lost. The respondent may have become wedded to a story by repeating it and be reluctant to admit guilt to the parent because of embarrassment or a fear of punishment. Therefore, it is also important for the child's attorney to become adept at drawing the truth from the respondent. Obviously, it is inappropriate for the attorney to put undue pressure on the respondent to withdraw a claim of innocence. See People v. Gonzalez, 171 A.D.2d 413, 566 N.Y.S.2d 639 (1st Dept. 1991) (defendant alleged that attorney coerced plea by telling him he would get life sentence). On the other hand, the attorney can explain to the respondent that, if he or she has been hiding the truth, it would be a good time to reveal it rather than lose the benefits of a good plea bargain.

6. Offering Benefits Other Than An Admission

a. Generally

In many cases, an admission of guilt is not the only bargaining chip available to the respondent. Promises or benefits that supplement an admission can often secure a dispositional promise otherwise not obtainable, and offers that replace an admission may help the respondent secure an outright dismissal of the petition, or, at the very least, an ACD. Often, the respondent can even bargain for an adjournment. Effective

use of this type of negotiation requires an ability to first identify the particular benefits that will appeal to the presentment agency in a given case, and then, in a salesmanlike manner, convince the presentment agency that the arrangement is reasonable. Listed below are some of the common tools used in this type of negotiation.

b. Financial Restitution

Although FCA §353.6 permits the court to order at disposition that the respondent pay restitution, such an order is rarely issued in view of the fact that many respondents come from families that are supported by public assistance, or, for other reasons, have limited financial resources. Even when the family has financial resources, the respondent will rarely have any funds of his or her own.

Consequently, when a complainant has suffered financial loss as a result of the respondent's acts, and the respondent personally, or his or her family, is willing to pay restitution, new possibilities for negotiation are presented. Initially, of course, the child's attorney should attempt to determine what promises can be obtained from the presentment agency without offering restitution. Then, the attorney should suggest the possibility of restitution and negotiate an arrangement more advantageous to the respondent. Particularly in cases involving non-violent property crimes such as grand theft auto and criminal mischief, the complainant may be pleased to receive financial compensation and avoid the necessity of appearing in court, perhaps on numerous occasions. The complainant may be an automobile owner whose insurance did not cover all damage to the car, or a governmental agency, such as the Transit Authority, whose property was damaged. Sometimes, the possibility of restitution has already been raised during the pre-petition probation adjustment process, but was then dropped either because the respondent and his or her family were reluctant to pay, or because the respondent denied guilt.

After determining that restitution may be desired by a complainant, the child's attorney should begin the negotiations with a demand that the charges be withdrawn in exchange for restitution. Obviously, the respondent should in the end be content to receive a pre-fact-finding ACD. When, because the evidence of guilt is clear or for other reasons, the presentment agency is adamantly insisting upon an admission, the respondent may be well-advised to settle for a deal involving an admission and a

promised ACD.

Since the presentment agency will ordinarily be loath to agree to let the respondent "buy" his way out of a near-certain disposition of placement, an offer of restitution in exchange for a promise of probation may result in a payment that merely cements a result that would very likely have occurred in any event. And, since a conditional discharge also involves an adjudication of delinquency, and has attached to it a risk of future placement if the respondent violates the order, a prosecutor's offer of a conditional discharge in exchange for restitution should be met with an adamant demand for an ACD. However, when there is a serious risk of placement, and the prosecutor is either unaware of it or chooses to ignore it, the use of restitution to secure a conditional discharge or probation may be appropriate.

A respondent's denial of guilt should not automatically prevent the child's attorney from attempting to negotiate a pre-fact-finding ACD, or a withdrawal or dismissal of the case, in exchange for restitution. Although the respondent and/or his or her parent may bristle at the idea of restitution when the respondent denies responsibility, the attorney could provide an assessment of the respondent's chances at trial, and, when a finding is very likely, suggest that an unfair payment of restitution might be less difficult to bear than an adjudication of delinquency and a risk of probation or placement. As in the case of an Alford plea, the respondent and his or her parent are entitled to make an informed decision to bargain with the prosecution rather than risk the apparent certainty of punishment.

c. Stipulations

In many cases, the presentment agency's most difficult task is not to develop a theory of guilt, but to produce the necessary witnesses in court. Sometimes, a witness is needed merely to give brief and essentially uncontested testimony concerning the ownership of stolen or damaged property, the test-firing of a gun, or the recovery of evidence. When it is clear that the presentment agency is able to produce such a witness, and any potential defenses are unrelated to the witness' testimony, the respondent may choose to agree to a stipulation setting forth what the testimony would have been had the witness appeared and testified in court. Such a stipulation avoids the risk that the judge will grow impatient with zealous, but essentially pointless attacks

on a presumptively credible witness, and also suggests to the judge that there is a legitimate theory of defense in which the child's attorney has some measure of confidence. However, when it would be inconvenient or otherwise difficult for the prosecution to produce a witness to give necessary, albeit pro forma testimony, the respondent's stipulation acquires substantial value, and, therefore, can be used to secure a benefit.

For instance, because the presentment agency is often unwilling to agree to a pre-fact-finding ACD because of the risk that evidence or witnesses will be unavailable in the future if the respondent violates a condition of the ACD, the respondent can offer a stipulation concerning the testimony of a particular witness the presentment agency is at risk of losing. The respondent might stipulate to the owner's testimony in an auto theft case, or the expert's testimony in a drug or weapon possession case, in order to secure the ACD. Generally, the presentment agency will be most concerned about civilian witnesses, who, several months down the line, may lose interest in the case, especially if a court appearance would result in a loss of earnings.

A stipulation can also be offered to secure an adjournment. For instance, if the presentment agency is ready for trial, and, because of the risk that a witness may not return, is opposing the child's attorney's request for an adjournment, a stipulation may satisfy the presentment agency's concerns. Sometimes, when it replaces testimony that might be lengthy and complicated, such as that of a chemist who has tested drugs, a stipulation can be used to secure both an adjournment and the release of a respondent who is on remand. Similarly, the respondent might obtain an adjournment and a release from custody by offering a stipulation concerning the testimony of a witness who is not present, if it is clear that the court would otherwise commence the trial or find good cause for an adjournment, and continue the respondent's detention.

Finally, it is clear that, before advising the respondent to offer a stipulation, the child's attorney must make an informed decision that neither an important defense issue or argument, nor a chance to secure a dismissal of the case on speedy trial grounds, is being tossed away for an inadequate short-term benefit.

d. Cooperation Agreements

Traditionally, when faced with a problematic case and/or a defendant whose

conviction is a high priority, criminal prosecutors often turn to the defendant's charged or uncharged accomplice and negotiate a witness cooperation agreement. Usually, the potential witness agrees to testify on behalf of the prosecution in exchange for a beneficial plea bargain, a dismissal of all charges, an agreement not to prosecute, favorable treatment in another pending case, or some other benefit. There is no reason why the child's attorney should not, in an appropriate case, suggest that the respondent offer to testify as part of such an agreement. Indeed, because respondents are often charged with acting in concert with an adult defendant, who, because of a lengthy criminal history, is a more tempting target, a cooperation agreement may often be available. Obviously, given the harsh reality prevailing in the criminal subculture, a cooperation agreement may expose a respondent to the risk of violent retribution. This is a sensitive and compelling subject for discussions with the respondent and his or her parents.

Cooperation agreements do not always involve testimony. Often, the accused agrees to provide information and otherwise cooperate with a pending investigation. For instance, a respondent charged in a "buy and bust" case may have witnessed a highly publicized murder, or some other crime that is far more important to the authorities than a ten dollar crack sale.

One danger inherent in any cooperation agreement is a prosecutorial claim that the agreement, or the "spirit" of the agreement, has been violated. Particularly when the accused has pleaded guilty as part of the agreement, there is a risk that, if the plea cannot be withdrawn, a harsh result will follow. See, e.g., People v. Reyes, 167 A.D.2d 920, 561 N.Y.S.2d 998 (4th Dept. 1990), lv denied 77 N.Y.2d 842, 567 N.Y.S.2d 211 (1991) (defendant should have been permitted to withdraw plea after prosecutor refused to recommend the plea-bargained sentence; defendant's agreement to cooperate in the co-defendants' trial and be debriefed about drug activity was too vague and ambiguous); People v. Lader, 114 A.D.2d 390, 494 N.Y.S.2d 33 (2d Dept. 1985) (no error where defendant did not receive promised sentence because, among other things, he failed to fully cooperate with law enforcement agencies and provided false, misleading and incomplete information). Consequently, the child's attorney should attempt to obtain an agreement that is as narrow and unambiguous. If possible, there

should be no condition requiring that a finding or conviction result from the information or testimony provided by the respondent, or that the quality or quantity of the information must prove "satisfactory" to law enforcement officials according to vague or nonexistent criteria. Specific performance should be sought where the court is unwilling to go along with the deal notwithstanding the respondent's apparent compliance with the conditions. See People v. Anonymous, 97 A.D.3d 1 (1st Dept. 2012) (specific performance ordered where court failed to go along with People's request for plea-bargained sentence after defendant had, at risk to herself and her children, provided information concerning criminal activity, particularly drug dealing, in area controlled by notorious street gang).

7. Ethical Issues In Plea Bargaining

a. Disclosure Of Facts By Child's Attorney

During the child's attorney's plea bargaining negotiations with the prosecutor and/or the judge, a primary topic of discussion may be the respondent's history of criminal or other acting-out behavior. Usually, the information is contained in the records of the probation department and the presentment agency. However, the attorney often has information that is unavailable to the judge and prosecutor. This information may have been obtained during conversations with the respondent and the parent, or from a review of records containing facts that have, due to clerical error, been omitted from the records that are available. Does the attorney have to reveal these facts, or may he or she allow the judge and the prosecutor to proceed with inaccurate information?

Clearly, if the information was provided to the child's attorney by the client, it is covered by the attorney-client privilege and may not be revealed. Presumably, this is true even if the judge and prosecutor make it clear that they are relying upon their own inaccurate understanding of the extent of the respondent's record. Moreover, even if the information was acquired from other sources, it would arguably constitute confidential information which is protected from disclosure. See New York State Rules of Professional Conduct, Rule 1.6(a). However, if the attorney is specifically asked by the judge or prosecutor whether the respondent has any prior record, a negative response would constitute a misrepresentation. The attorney should either refuse to answer and cite the attorney-client privilege, or, if the information is not likely to derail the plea

bargain, secure the respondent's permission to reveal it.

b. Disclosure Of Facts By Prosecutor

The prosecutor has an obligation to turn over to the defense any information favorable to the respondent. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); FCA §331.2(1)(g). In United States v. Ruiz, 536 U.S. 622, 122 S.Ct. 2450 (2002), the Supreme Court held that the defendant was not entitled to pre-plea disclosure of impeachment information. See also People v. Holloway, 33 A.D.3d 442, 823 N.Y.S.2d 17 (1st Dept. 2006) (People had no duty to disclose that arresting officer was subject of ongoing investigation); but see State v. Heubler, 275 P.3d 91 (Nev. 2012) (State required to disclose material exculpatory evidence within its possession to defense before entry of guilty plea, and materiality standard is based on relevance of withheld evidence to defendant's decision to plead guilty; court distinguishes case from United States v. Ruiz, 536 U.S. 622, which involved impeachment information); People v. Wilson, 159 A.D.3d 1600 (4th Dept. 2018) (where People failed to disclose reports containing evidence of intoxication of motorcycle operator involved in collision with defendant, defendant did not forfeit Brady claim by pleading guilty; it would undermine Brady obligation if defendant forfeits claim by entering plea without knowledge of exculpatory evidence); People v. Kull, 44 Misc.3d 1218(A) (Dist. Ct., Nassau Co., 2014) (plea withdrawn where police and the District Attorney knew prior to plea and failed to disclose contamination issue regarding intoxilyzer).

State ethics rules arguably require disclosure as soon as possible, and may provide other protections. See Rules of Professional Conduct, Rule 3.8(b) ("A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal"); Formal Opinion 2016-3: Prosecutors' Ethical Obligations to Disclose Information Favorable to the Defense, 2016 WL 8997249 (N.Y.C. Bar Ass'n Committee of Professional Ethics, 8/29/16) (Rule 3.8(b) requires disclosure as soon as reasonably practicable of relevant information known to prosecutor that tends to negate guilt or

mitigate charges or sentence regardless of information's significance); People v. Waters, 35 Misc.3d 855 (Sup. Ct., Bronx Co., 2012) (Brady violation found where prosecutor deceived defense by withholding fact that witness's testimony at trial would be inconsistent with multiple previous statements, and Rule 3.8(b) obligated prosecutor to disclose material as soon as possible; People ordered to try to obtain and turn over various documents that are not discoverable under CPL Article 240, and orders hearing to determine, pre-trial, what the witness's testimony will be and the underlying facts surrounding his convictions); People v. Robinson, 34 Misc.3d 1217(A) (Crim. Ct., Queens Co., 2011) (Rule 3.8[b] of Rules of Professional Conduct and Standard 3-3.11 of American Bar Association Standards for Criminal Justice require prosecutor to make disclosure at earliest feasible opportunity; court orders hearing to determine whether prosecutor's actions were willful and motivated by desire to obtain tactical advantage and whether sanction is warranted); see also Opinion 2018-2, 2018 WL 3019993 (N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, 2018) (discusses post-conviction obligations created by Rule 3.8(c) "when a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted"); In re Kline, 113 A.3d 202 (D.C. Ct. App., 2015) (professional conduct rule prohibiting prosecutor from intentionally failing to disclose to defense information prosecutor knows or reasonably should know tends to negate guilt or mitigate offense not limited to information that would be considered material under constitutional Brady rules; prosecutor must disclose all potentially exculpatory information in his/her possession); but see Office of Lawyer Regulation v. Riek, 834 N.W.2d 384 (Wis. 2013) (state rule of professional conduct requiring prosecutors to make timely disclosure of evidence that tends to negate guilt or mitigate offense must be interpreted in manner consistent with scope of Brady; under conflicting standards, prosecutors would face uncertainty and professional discipline even when constitutional law does not require disclosure, and ethics rule could be used as tactical weapon to threaten prosecutor with bar complaint).

Moreover, in New York, an administrative order requires judges who preside over criminal cases to issue orders to prosecutors requiring them to look through files to find information favorable to the defense. At least 30 days before a felony trial and 15 days

before a misdemeanor trial, a prosecutor must disclose anything that impeaches the credibility of witnesses, exculpates or reduces the degree of the offense, or mitigates the degree of the defendant's culpability or punishment. This includes promises or inducements made in return for giving testimony, a witness' prior convictions and uncharged criminal conduct, any motive that a witness has to lie, and any mental or physical illness or substance abuse that impairs a witness' ability to perceive. It does not matter whether the prosecutor believes the information is credible. Disclosures that pertain to a suppression hearing are presumptively "timely" if they are made no later than 15 days before the scheduled hearing date. Nothing in these requirements shall be understood to diminish a prosecutor's obligation to disclose exculpatory information as soon as reasonably possible. The obligation to disclose is a continuing one. Prosecutors should strive to determine if favorable information exists. See 22 NYCRR § 200.16/200.27.

Even when they are not directly related to the respondent's guilt or innocence, a prosecutor's misrepresentations can result in the invalidation of an admission. For instance, a prosecutor's false claim that a necessary witness is available might render an admission invalid. Compare People v. Rice, 69 N.Y.2d 781, 513 N.Y.S.2d 108 (1987) (prosecutor's conduct -- deliberately misleading defense counsel into believing that potential witness was still alive when prosecutor knew he was dead -- was "reprehensible and cannot be condoned," but no reversal because of overwhelming evidence of guilt and lack of prejudice) and People v. Perez, 193 Misc.2d 169, 749 N.Y.S.2d 850 (Justice Ct., Nassau Co., 2002) (prosecutor had no duty to inform defense that officer had retired since officer was still available, but prosecutor would have had a duty to inform defense if officer had been unavailable) with People v. Jones, 44 N.Y.2d 76, 404 N.Y.S.2d 85 (1978) (defendant not denied due process where prosecution did not disclose during plea negotiations that it had been informed that complainaing witness had died). In People v. Pilotti, 127 A.D.2d 23, 511 N.Y.S.2d 248 (1st Dept. 1987), the prosecutor withheld a police report which indicated that the gun possessed by defendant had been ballistically linked to a murder. The First Department vacated the defendant's plea to possession of the gun, concluding that he had been misled by the prosecutor on an issue crucial to his decision to take the plea.

c. Recusal Of Judge

Prior to participating in plea bargaining negotiations, many judges will insist that the child's attorney agree on behalf of the respondent not to seek recusal on the ground that the judge cannot be impartial after hearing about the respondent's background. Generally, it is not unwise to agree to such a condition, since the denial of a recusal motion would in any event be unlikely to lead to a reversal on appeal. See People v. Latella, 112 A.D.2d 324, 491 N.Y.S.2d 774 (2d Dept. 1985).

IV. Waiver Of Issues On Appeal

The entry of an admission by the respondent acts as a forfeiture of many issues that could ordinarily be raised on appeal. Among them are:

1) Inadequate notice pursuant to CPL §710.30 (see FCA §330.2); People v. Taylor, 65 N.Y.2d 1, 489 N.Y.S.2d 152 (1985).

2) Statutory double jeopardy violation under CPL §40.20 (see FCA §303.2); People v. Prescott, 66 N.Y.2d 216, 495 N.Y.S.2d 955 (1985).

3) Denial of right to effective assistance of counsel (see People v. Soria, 99 A.D.3d 1027 (2d Dept. 2012), lv denied 20 N.Y.3d 1104 (defendant forfeited review of claims of ineffective assistance of counsel that did not directly involve plea bargaining process)

4) Insufficiency of bill of particulars, People v. Ali, 79 A.D.2d 974, 435 N.Y.S.2d 291 (2d Dept. 1981), or failure to provide bill of particulars. People v. Thomas, 74 A.D.2d 317, 428 N.Y.S.2d 20 (2d Dept. 1980), aff'd 53 N.Y.2d 338, 441 N.Y.S.2d 650 (1981).

5) Prosecutorial failure to preserve evidence; People v. Gerber, 182 A.D.2d 252, 589 N.Y.S.2d 171 (2d Dept. 1992), lv denied 80 N.Y.2d 1026, 592 N.Y.S.2d 676; People v. Brian T.G., 110 A.D.2d 907, 488 N.Y.S.2d 456 (2d Dept. 1985).

6) Improper denial of motion to dismiss in furtherance of justice; People v. Vasquez, 97 A.D.2d 524, 467 N.Y.S.2d 892 (2d Dept. 1983).

7) Improper summary denial of untimely-filed suppression motion; People v. Petgen, 55 N.Y.2d 529, 450 N.Y.S.2d 299 (1982); Matter of Angel V., 79 A.D.3d 1137, 913 N.Y.S.2d 572 (2d Dept. 2010) (by making admission, respondent forfeited right to challenge court's denial of application for permission to make late motion to suppress).

8) Improper denial of severance motion; People v. Thomas, supra, 74 A.D.2d 317, aff'd 53 N.Y.2d 338; People v. Smith, 41 A.D.2d 893, 342 N.Y.S.2d 513 (4th Dept. 1973).

9) Improper Sandoval ruling; People v. Zangrillo, 105 A.D.2d 822, 481 N.Y.S.2d 445 (2d Dept. 1984).

10) Statutory speedy trial violation; Matter of Christopher F., 126 A.D.2d 975, 511 N.Y.S.2d 750 (4th Dept. 1987); People v. O'Brien, 56 N.Y.2d 1009, 453 N.Y.S.2d 638 (1982). But see Matter of Melvin A., 216 A.D.2d 227, 628 N.Y.S.2d 698 (1st Dept. 1995) (no waiver where plea was defective due to inadequate allocution).

11) Non-jurisdictional pleading defect; People v. Konieczny, 2 N.Y.3d 569, 780 N.Y.S.2d 546 (2004) (plea to criminal contempt waived claim as to invalidity of underlying order of protection).

12) Statute of limitations; People v. Parilla, 8 N.Y.3d 654, 838 N.Y.S.2d 824 (2007).

13) Brady Violation: People v. Huggins, 105 A.D.3d 760 (2d Dept. 2013), lv denied 21 N.Y.3d 1005; but see People v. Wilson, 159 A.D.3d 1600 (4th Dept. 2018) (Brady premised upon considerations of fairness and due process, and it would undermine prosecutor's Brady obligations if defendant is deemed to have forfeited claim by entering plea without knowledge that People possessed exculpatory evidence).

Moreover, when an admission would ordinarily result in a waiver, the right to appeal cannot be reserved even if the judge and the presentment agency expressly agree. See People v. Di Raffaele, 55 N.Y.2d 234, 448 N.Y.S.2d 448 (1982) (remedy is a withdrawal of the plea on the ground that the defendant's plea was induced by an ineffectual promise); see also People v. Plunkett, 19 N.Y.3d 400 (2012) (claims challenging what is competently and independently established by plea forfeited even where plea was

induced and entered upon assurance that such claims would survive, but not where, as here, plea was subject to vacatur because it was induced by promise of appellate review that was forbidden and defendant's claim could be litigated in new prosecution).

Pursuant to statute, an admission does not result in a forfeiture of suppression issues that were finally decided unless the respondent expressly waives the right to appeal. FCA §330.2(6). However, an admission entered prior to the court's decision on a suppression motion does result in a forfeiture. People v. Fernandez, 67 N.Y.2d 686, 499 N.Y.S.2d 919 (1986).

The following issues are not automatically forfeited by virtue of an admission:

1) Constitutional speedy trial violation; People v. Sutton, 80 N.Y.2d 273, 590 N.Y.S.2d 46 (1992); People v. Blakley, 34 N.Y.2d 311, 357 N.Y.S.2d 459 (1974).

2) Unconstitutionality of Penal Law provision; Class v. United States, 138 S.Ct. 798 (2018) (guilty plea, by itself, does not bar federal criminal defendant from challenging constitutionality of statute of conviction on direct appeal); People v. Lee, 58 N.Y.2d 491, 462 N.Y.S.2d 417 (1983).

3) Noncompliance with statutory provisions concerning examinations to evaluate accused's competency to stand trial; People v. Armlin, 37 N.Y.2d 167, 371 N.Y.S.2d 691 (1975).

4) Jurisdictionally defective accusatory instrument; People v. Case, 42 N.Y.2d 98, 396 N.Y.S.2d 841 (1977); Matter of Todd "D", 288 A.D.2d 740, 732 N.Y.S.2d 488 (3rd Dept. 2001). There was reason to believe this might change as to non-hearsay defects after People v. Keizer, 100 N.Y.2d 114, 760 N.Y.S.2d 720 (2003), in which the Court of Appeals held that a plea in a criminal proceeding results in forfeiture of a claim based on hearsay defects. However, in Matter of Michael M., 3 N.Y.3d 441, 788 N.Y.S.2d 299 (2004), the Court of Appeals made it clear that a defect in the non-hearsay allegations is still a nonwaivable jurisdiction defect in juvenile delinquency proceedings. See also Matter of Brandon A., 105 A.D.3d 1365 (4th Dept. 2013) (claim may be raised on appeal despite respondent's admission); Matter of Antwaine T., 105 A.D.3d 859 (2d Dept. 2013), rev'd on other grounds 23 N.Y.3d 512 (2014) (defect found nonwaivable despite admission by respondent).

5) Constitutional double jeopardy claim; compare Menna v. New York, 423 U.S. 61, 96 S.Ct. 241 (1975) (claim not waived) and People v. Prescott, 66 N.Y.2d 216 (claim not waived) with United States v. Broce, 488 U.S. 563, 109 S.Ct. 757 (1989) (claim waived where defendants pleaded guilty to indictments that, on their face, described separate conspiracies).

6) Interference With Right To Counsel: People v. Griffin, 20 N.Y.3d 626 (2013) (defendant's claim that denial of defense adjournment request and discharge of The Legal Aid Society as counsel was abuse of discretion and interfered with defendant's right to counsel not forfeited by guilty plea; claim that removal of counsel was part of court's disparate, unjustifiable treatment of defense counsel goes to fundamental fairness of system of justice, and defendant's claim implicates plea and plea bargaining process, in which Legal Aid was actively engaged prior to removal).

See also People v. DeAlmeida, 124 A.D.3d 1405 (4th Dept. 2015) (counsel's error in failing to make suppression motion not waived since error infected bargaining process).

As part of a plea bargain, the respondent may agree, on the record, to waive entirely the right to appeal, if the waiver is voluntary, knowing and intelligent. The terms of such an agreement and the respondent's understanding of them should be placed on the record. People v. Seaberg, 74 N.Y.2d 1, 543 N.Y.S.2d 968 (1989). See also People v. Sanders, 25 N.Y.3d 337 (2015) (no need to elaborate upon phrase "right to appeal your conviction and sentence to the Appellate Division Second Department" given whole colloquy and defendant's background, including extensive experience with criminal justice system and multiple prior guilty pleas that resulted in terms of imprisonment); People v. Alexander, 19 N.Y.3d 203 (2012) (no error where trial judge indicated she would accept plea "on the condition" that defendant withdraw "any and all motions that [were] outstanding," since defendant would in any event abandon writs and motions upon guilty plea; court's prior decisions have dealt solely with attempts by prosecutors to manipulate plea bargaining to preclude consideration of constitutional speedy trial claims); People v. Bradshaw, 18 N.Y.3d 257 (2011) (despite execution of written waiver, defendant did not validly waive right to appeal where court questioned

whether defendant comprehended court's remarks about appeal waiver and defendant responded by asking about mandatory fees associated with guilty plea, and defendant had background and history of mental illness and had previously been found unfit to proceed); People v. Moyett, 7 N.Y.3d 892, 826 N.Y.S.2d 597 (2006) (purported waiver invalid where court advised defendant that "by pleading guilty you give up your right to appeal the conviction," and defendant may have believed that right to appeal is automatically extinguished upon entry of plea); People v. Lopez, 6 N.Y.3d 248, 811 N.Y.S.2d 623 (2006) (record must establish that defendant understood that right to appeal is separate and distinct from rights that are automatically forfeited); People v. Kemp, 94 N.Y.2d 831, 703 N.Y.S.2d 59 (1999) (defendant's general waiver of right to appeal encompassed right to appeal suppression ruling); People v. Muniz, 91 N.Y.2d 570, 673 N.Y.S.2d 358 (1998) (double jeopardy claim was waived where defendant knowingly and intelligently provided express waiver of right to appeal from "all waivable aspects of the case"); People v. Bryant, 137 A.D.3d 401 (1st Dept. 2016) (waiver invalid where court stated that "as a part of this" - the guilty plea - defendant was waiving right to appeal; written waiver no substitute, and it was unclear whether waiver was signed before or after inadequate colloquy); People v. Corbin, 121 A.D.3d 803 (2d Dept. 2014) (judge not required to enumerate each and every potential appellate argument defendant might be able to raise despite waiver); People v. Loper, 115 A.D.3d 875 (2d Dept. 2014) (waiver not enforceable where court discussed waiver extensively, but never made clear that it would bar appellate review of defendant's suppression claim, and defendant was adamant about retaining right to appeal suppression ruling); People v. Oquendo, 105 A.D.3d 447 (1st Dept. 2013), lv denied 21 N.Y.3d 1007 (written waiver not full substitute for on-the-record explanation); People v. Charles S., 102 A.D.3d 896 (2d Dept. 2013) (court, taking into consideration defendant's "age, experience and background," finds no valid waiver); People v. Brady-Laffer, 102 A.D.3d 806 (2d Dept. 2013) (waiver unenforceable where there was no bargain or consideration given to defendant in exchange for plea); People v. Keiser, 100 A.D.3d 927 (2d Dept. 2012), lv denied 20 N.Y.3d 1062 (detailed written waiver can supplement court's on-the-record explanation, but written waiver is not, by itself, sufficient); People v. Alexander, 82 A.D.3d 619, 920 N.Y.S.2d 47 (1st Dept. 2011) (plea valid where it was conditioned on

withdrawal of all outstanding motions and writs, including constitutional speedy trial motion; although waiver of appeal is ineffective to extent it precludes appellate review of constitutional speedy trial claims, properly interposed constitutional claim may be deemed abandoned or waived if not pursued); People v. McCaskill, 76 A.D.3d 751, 905 N.Y.S.2d 721 (3rd Dept. 2010) (right waived where court's inquiry, albeit minimal, was coupled with counsel's assurances that he reviewed written waiver with defendant and defendant's execution of written waiver in open court); but see People v. Johnson, 14 N.Y.3d 483, 903 N.Y.S.2d 299 (2010) (waiver became invalid when court decided not to honor two aspects of plea agreement).

However, when sufficiently important public policies or societal interests are implicated, a waiver will not be effective. For instance, the right to a legal sentence [see People v. Campbell, 97 N.Y.2d 532, 743 N.Y.S.2d 396 (2002), the constitutionally protected right to a speedy trial [see People v. Callahan, 80 N.Y.2d 273, 590 N.Y.S.2d 46 (1992)], the right to the effective assistance of counsel in connection with the plea [see People v. Ferguson, 192 A.D.2d 800, 596 N.Y.S.2d 533 (3rd Dept. 1993), lv denied 82 N.Y.2d 717, 602 N.Y.S.2d 814], and a claim that a plea was not knowingly, intelligently, and voluntarily entered [see People v. Borges, 103 A.D.3d 747 (2d Dept. 2013), lv denied 21 N.Y.3d 1013], are not waived. In addition, the lack of a jurisdictionally adequate accusatory instrument can still be raised on appeal. See People v. Dunn, 254 A.D.2d 511, 680 N.Y.S.2d 125 (3rd Dept. 1998), lv denied 92 N.Y.2d 1031, 684 N.Y.S.2d 496. See also People v. Cousar, 128 A.D.3d 716 (2d Dept. 2015) (general waiver does not foreclose review of contention that defendant was deprived of right to due process when court failed to hold hearing to determine whether he violated condition of plea agreement requiring that he not violate law or be arrested for violating law); People v. Santiago, 119 A.D.3d 484 (1st Dept. 2014), lv denied 24 N.Y.3d 964 (clause in appeal waiver agreement providing for vacatur of plea and sentence upon People's application if defendant filed notice of appeal with respect to constitutional speedy trial claim or legality of the sentence rejected as unenforceable; language discourages defendants from pursuing, and purports to prevent, appellate claims that have been found by courts to be nonwaivable because of constitutional import); People v. Aponte, 100 A.D.3d 525 (1st Dept. 2012) (defendant cannot validly

waive right to raise double jeopardy violation that renders sentence unlawful); People v. Mattison, 94 A.D.3d 1157 (3rd Dept. 2012) (claims regarding defendant's competency to enter plea related to voluntariness of plea and thus survived waiver of right to appeal); People v. Arrington, 84 A.D.3d 903 (2d Dept. 2012) (waiver of right to appeal did not preclude review of claim that defendant was denied right to due process because court did not hold hearing regarding basis for post-plea arrest before imposing enhanced sentence); People v. Bishop, 8 A.D.3d 691, 777 N.Y.S.2d 785 (3rd Dept. 2004) (broad waiver remains effective as to those issues which can legally be waived).

CHAPTER FIVE

LEGAL SUFFICIENCY OF PETITION

By: Gary Solomon

Table Of Contents

I. Contents Of Petition

II. Service Of Petition

- A. Respondent Is Present On Filing Date
- B. Respondent Is Not Present On Filing Date

III. Motions To Dismiss Defective Petitions

- A. Sufficiency Of Nonhearsay Allegations
  - 1. Generally
  - 2. Identification Of Controlled Substances
  - 3. Inclusion Of Respondent's Statements Or Other Hearsay In Deposition
  - 4. Latent Defects
  - 5. Deponents Under Twelve Years Of Age
  - 6. Factual Allegations Concerning Elements Of Crime
    - a. Possession, Generally
    - b. Accessorial Liability
    - c. Assault
    - d. Auto Theft Cases
    - e. Lack Of Owner's Or Victim's Deposition
    - f. Value
    - g. Operability Of Weapon
    - h. Criminal Trespass
    - i. Respondent’s Age
    - j. Identity Of Perpetrator Or Witness
  - 7. Form Depositions
  - 8. Signature And Identity Of Deponent

9. Copies Of Depositions
10. Verification
11. Reduction Of Charge
12. Retroactivity Of Appellate Rulings

B. Removal Petitions

C. Designated Felony Petitions
1. Predicate Felonies
2. Designated Felony Act Marking

D. Allegation Of Elements Of Offense In Each Count

E. Duplicitous Counts

F. Multiplicitous Counts

F. Date/Time/Location Of Offense

G. Double Jeopardy

H. Speedy Trial

I. PINS Substitution

J. Probation And Conditional Discharge Violations

IV. Amendment Of Petition

A. Generally

B. Curing Legal Insufficiency Of Factual Allegations

C. Addition Of New Offense

D. Changing Date/Time/Location Of Offense

E. Changing Names Or Number Of Respondents

F. Changing Names Or Number Of Victims

G. Verification

H Change In Theory Of Prosecution -- Constructive Amendment

V. Motion To Strike

I. Contents Of Petition

The accusatory instrument which originates a juvenile delinquency proceeding is called a "petition." FCA §311.1(1). The petition is entitled "In the Matter of [name of respondent]." FCA §311.1(6). But see People v. Martinez, 52 A.D.3d 68, 855 N.Y.S.2d 522 (1st Dept. 2008), lv denied 11 N.Y.3d 791 (indictment may identify unapprehended defendant solely by DNA markers, and be amended when defendant is identified).

The petition must contain:

(a) the name of the family court in which it is filed;
(b) the title of the action;
(c) the fact that the respondent is a person of the necessary age to be a juvenile delinquent at the time of the alleged act or acts;
(d) a separate accusation or count addressed to each crime charged, if there be more than one;
(e) the precise crime or crimes charged;
(f) a statement in each count that the crime charged was committed in a designated county;
(g) a statement in each count that the crime charged therein was committed on, or on or about, a designated date, or during a designated period of time;
(h) a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the crime charged and the respondent's commission thereof with sufficient precision to clearly apprise the respondent of the conduct which is the subject of the accusation;
(i) the name or names, if known, of other persons who are charged as co-respondents in the family court or as adults in a criminal court proceeding in the commission of the crime or crimes charged;
(j) a statement that the respondent requires supervision, treatment or confinement; and
(k) the signature of the appropriate presentment attorney.

FCA §311.1(3). See In re Collie W., 309 A.D.2d 611, 765 N.Y.S.2d 611 (1st Dept. 2003), lv denied 1 N.Y.3d 506 (2004) (signature of prosecutor who was awaiting admission was sufficient); People v. Parrilla, 145 A.D.3d 629 (1st Dept. 2016), lv denied 29 N.Y.3d 951 (indictment not jurisdictionally defective where it incorporated statutory definition of crime but did not identifying crime by Penal Law section number); People v. Santos, 21

Misc.3d 360, 865 N.Y.S.2d 479 (Sup. Ct., Nassau Co., 2008) (citing Appellate Division decisions, court holds that count which omits element of offense from factual allegations, but refers to name and statutory citation of offense in accusatory portion, is facially sufficient).

The petition must be verified in accordance with the CPLR. FCA §311.1(4). Thus, the presentment agency attorney who signs the petition ordinarily does so in the presence of a notary public. See CPLR §§2309(a), 3020(a).

A petition that alleges the commission of a designated felony act must be prominently marked with the term "designated felony act petition." If the charge is based upon predicate felony findings, certified copies of the findings constitute adequate proof for filing purposes. FCA §311.1(5).

When an order of removal is filed after a juvenile offender case has been removed to the family court pursuant to CPL article 725, the order, along with those "pleadings and proceedings" that must be transferred with the order, is deemed to be a petition "containing all of the allegations required by [FCA §311.1] notwithstanding that such allegations may not be set forth in the manner therein prescribed." If a designated felony act is alleged, the family court clerk must annex to the removal order a statement and marking sufficient to make the order a designated felony act petition. The "pleadings and proceedings" that must be transferred do not include the untranscribed minutes of a hearing inquiry, trial, grand jury proceeding, or plea. However, untranscribed minutes must be forwarded to the family court within thirty days after the removal order is filed. The date the removal order is filed is deemed to be the filing date of the petition. FCA §311.1(7).

In addition to the requirements set forth in FCA §311.1, a petition must meet two other tests. "[T]he allegations of the factual part of the petition, together with those of any supporting depositions which may accompany it, [must] provide reasonable cause to believe that the respondent committed the crime or crimes charged," FCA §311.2(2), and the "non-hearsay allegations of the factual part of the petition or of any supporting depositions [must] establish, if true, every element of each crime charged and the respondent 's commission thereof." FCA §311.2(3).

II. Service Of Petition

A. Respondent Is Present On Filing Date

If the respondent is present in court on the date the petition is filed, both the respondent and the child's attorney must be provided with a copy of the petition. FCA §320.4(1). See People v. Zeigler, 21 Misc.3d 1142(A), 2008 WL 5169528 (Dist. Ct., Suffolk Co., 2008) (failure to supply defendant with copy of accusatory instrument was not ground for dismissal). Typically, the presentment agency attorney will hand over copies in court during the initial appearance and state for the record that service has been accomplished.

B. Respondent Is Not Present On Filing Date

If the respondent is not present on the filing date, and a warrant is not issued pursuant to FCA §312.2, the court must cause a copy of the petition and a summons to be issued requiring the appearance of both the respondent, and a parent or other person legally responsible for the respondent's care, or, if such legally responsible person is not available, the person with whom the respondent resides. FCA §312.1(1). Personal service must be attempted, but, if personal service cannot be made after a reasonable effort, the court may order service in any manner. FCA §312.1(3). Personal service must be made at least twenty-four hours before the time scheduled for the initial appearance. FCA §312.1(2). Thus, if the court orders another type of service, it should be designed to reach the respondent at least twenty-four hours prior to the return date.

If, at the initial appearance, it appears that service was not properly made, the child's attorney should consider stating for the record that the respondent does not concede the existence of personal jurisdiction. Thereafter, a written motion to dismiss could be made pursuant to CPLR §3211(a)(8).

After delinquency charges have been dismissed under circumstances that do not preclude the filing of a new petition, the presentment agency may ask the child's attorney whether the respondent is willing to waive personal service of the new petition and appear voluntarily for the initial appearance on a specified date. Although the attorney may choose to insist upon personal service and thereby make it as difficult as possible for the presentment agency to re-commence the prosecution, such a strategy usually

antagonizes the judge and the prosecutor, and, more importantly, is unlikely to accomplish anything.

III. Motions To Dismiss Defective Petitions

A. Sufficiency Of Nonhearsay Allegations

1. Generally

The "non-hearsay allegations of the factual part of the petition or of any supporting depositions [must] establish, if true, every element of each crime charged and the respondent's commission thereof." FCA §311.2(3). See Matter of Bobby Jo F., 2 A.D.3d 1472, 770 N.Y.S.2d 522 (4th Dept. 2003) (petition not facially defective where depositions were filed but were not attached to petition). Since the counts of the petition resemble the counts of an indictment, allege little more than the language of the applicable Penal Law provision, and are not subscribed, the requirements of FCA §311.2(3) are addressed in supporting depositions signed by police officers, complainants, witnesses and other individuals who have personal knowledge concerning the allegations. But see Matter of Errol D., 241 A.D.2d 732, 660 N.Y.S.2d 185 (3rd Dept. 1997), lv denied 90 N.Y.2d 810, 665 N.Y.S.2d 401 (respondent's identity as the "Earl" referred to in complainant's deposition was established by petition, which named respondent as Errol "D" and gave same home address that complainant gave).

If a deposition does not contain language, such as "I saw," which establishes personal knowledge, the deposition cannot be treated as "non-hearsay." People v. Scott, 176 Misc.2d 393, 671 N.Y.S.2d 961 (Rochester City Ct., Monroe Co., 1998) (nonhearsay character of allegations not established where it was alleged that defendant "did loiter and wander about" the location "for the purposes of intentionally using and possessing cocaine," but not that defendant committed any acts in the motor vehicle in which she was observed); People v. Moretti, 142 Misc.2d 331, 537 N.Y.S.2d 735 (City Ct., West. Co. 1988) (officer's reference to source as "police investigation" did not establish nonhearsay character of allegations); see also Matter of Todd "D", 288 A.D.2d 740, 732 N.Y.S.2d 488 (3rd Dept. 2001) (violation of probation petition defective where allegations appeared to have been made on personal knowledge but were hearsay); People v. Russo, 24 Misc.3d 655, 877 N.Y.S.2d 676 (Nassau Co. Dist. Ct., 1st Dist., 2009)

(defendant's identity as perpetrator established where complainant stated that individual is "now known" to him as T. J. Russo); People v. Riviere, 21 Misc.3d 847, 864 N.Y.S.2d 904 (Albany County Ct., 2008) (accusatory instrument contained sufficient non-hearsay allegations where source of the allegations was identified as complainant's "own knowledge and observations"); People v. Garcia, 21 Misc.3d 732, 870 N.Y.S.2d 851 (Sup. Ct., Bronx Co., 2008) (in criminal trespass prosecution, court could not consider hearsay allegation that officer could not locate anyone in apartment who could verify defendant's claim that he was visiting there).

It has been held that a deponent may base allegations on a viewing of a tape recording of the relevant events. People v. Henderson, 27 Misc.3d 1232(A), 2010 WL 2305486 (Dist. Ct., Nassau Co., 2010) (drug charges facially sufficient where detective made allegations based on viewing of audio/video recording of sale; this was not hearsay, but rather a review of something admissible into evidence at trial that was impossible to annex to accusatory instrument).

The standard in FCA §311.2(3) is derived from CPL §100.40(1)(c), which contains an identical requirement for criminal court information. In People v. Alejandro, 70 N.Y.2d 133, 517 N.Y.S.2d 927 (1987), the Court of Appeals held that the nonhearsay allegations in an information must establish a prima facie case, and that the insufficiency of the nonhearsay allegations is a nonwaivable jurisdictional defect that can be raised for the first time on appeal. The Court of Appeals noted that, unlike a felony complaint, which is ordinarily followed by a grand jury indictment that is based upon legally sufficient evidence, an information is the instrument upon which the defendant is eventually prosecuted. Therefore, the legislature wrote in special requirements applicable to informations. However, in People v. Casey, 95 N.Y.2d 354, 717 N.Y.S.2d 88 (2000), the Court of Appeals revisited the Alejandro decision. While noting that Alejandro involved the complete absence of any allegations regarding one essential element of a charged offense, which is a nonwaivable jurisdictional defect, the Court characterized as dicta its pronouncement in Alejandro concerning hearsay-related defects, and held that such defects must be preserved.

Since a juvenile delinquency petition is the instrument upon which the respondent

is prosecuted, and is not the product of a grand jury proceeding, the Court of Appeals followed Alejandro in holding that the absence of sufficient nonhearsay allegations is a nonwaivable jurisdictional defect. Matter of David T., 75 N.Y.2d 927, 555 N.Y.S.2d 675 (1990); but see Matter of Jonathan M., 61 A.D.3d 1374, 877 N.Y.S.2d 575 (4th Dept. 2009) (after one judge denied dismissal, another judge violated law of case doctrine by granting leave to renew motions and dismissing charges); Matter of Victor G., 162 Misc.2d 151, 616 N.Y.S.2d 447 (Fam. Ct. Bronx Co., 1994) (court denies respondent's motion to dismiss underlying petition during extension of placement proceeding, refusing to apply Court of Appeals' decision retroactively to final judgment). In People v. Casey, supra, 95 N.Y.2d 354, the Court noted in dicta that it was not changing the rule in juvenile delinquency cases regarding the nonwaivability of hearsay defects, and so held in Matter of Michael M., 3 N.Y.3d 441, 788 N.Y.S.2d 299 (2004); see also Matter of Antwaine T., 105 A.D.3d 859 (2d Dept. 2013), rev'd on other grounds 23 N.Y.3d 512 (2014) (defect found nonwaivable despite admission by respondent).

Although CPL §100.15(3) also requires that the factual part of an information contain "facts of an evidentiary character supporting or tending to support the charges," FCA §311.1(3)(h), which is derived from CPL rules governing indictments (see CPL §200.50[7][a]), requires a factual statement "without allegations of an evidentiary nature...." Relying upon that distinction, the presentment agency argued in Matter of Jahron S., 79 N.Y.2d 632, 584 N.Y.S.2d 748 (1992) that the prima facie requirement established in People v. Alejandro, supra, 70 N.Y.2d 133 is not applicable to a delinquency petition, and that facts of an evidentiary character need not be alleged. The Court of Appeals rejected that argument, and held that, although the petition itself need not include evidentiary facts, the supporting depositions must contain such facts and satisfy the prima facie standard. Citing CPL §100.20, the Court noted that a deposition is "a written instrument ... containing factual allegations of an evidentiary nature ... which supplement those of the accusatory instrument and support or tend to support the charge or charges contained therein." And, "because both informations and petitions are the ultimate instruments of prosecution and because both are required, in identical language, to contain non-hearsay allegations that establish, if true, every element of the

offense charged and the accused's commission of the offense ... a prima facie case standard is applicable to both." 79 N.Y.2d at 639.

The standard adopted in Matter of Jahron S., supra, 79 N.Y.2d 632 creates many avenues for a jurisdictional attack on a petition. Outlined below is the case law in discrete subject areas.

2. Identification Of Controlled Substances

When the respondent is charged with a controlled substance offense, one of the elements that must be established by the prosecution is the identity of the substance that was recovered. What facts must be alleged in order to establish that the substance is, in fact, marijuana, crack cocaine, etc?

In People v. Dumas, 68 N.Y.2d 729, 506 N.Y.S.2d 319 (1986), the Court of Appeals found defective a misdemeanor complaint which alleged that the defendant sold marijuana, but did not include evidentiary facts establishing that the substance was, in fact, marijuana. The Court noted that the complaint did not allege that the officer was an expert in the identification of marijuana, or that the defendant stated that the substance was marijuana.

In Matter of Jahron S., supra, 79 N.Y.2d 632, the police officer alleged in a supporting deposition that he believed the recovered substance to be crack cocaine "based upon [his] training and experience as a police officer assigned to a special narcotics unit with respect to the appearance, handling and packaging of narcotics and other controlled substances...." The Court of Appeals held that the petition was defective, noting that, although such allegations might be sufficient to support a misdemeanor marijuana charge in criminal court, the standard governing a delinquency petition is higher. However, the Court did not establish a per se rule requiring a laboratory report, and any suggestion that a lab report was required was withdrawn in People v. Kalin, 12 N.Y.3d 225, 878 N.Y.S.2d 653 (2009) (four-judge majority holds that by entering guilty plea, defendant forfeited claim that accusatory instrument did not satisfy prima facie case requirement in CPL §100.40 because officer’s reliance on experience and training in determining that defendant possessed illicit drugs was insufficient to support charge; court notes that officer also relied on packaging of substance he determined to be heroin

and recovery of marijuana pipe further supported belief that he had found marijuana, and court will not require "recitation of a mandatory catechism in an information that otherwise adequately identifies the particular drug, alleges that the accused possessed that illegal substance, states the officer's familiarity with and training regarding the identification of the drug, provides some information as to why the officer concluded that the substance was a particular type of illegal drug, and supplies sufficient notice of the charged crime to satisfy the demands of Due Process and Double Jeopardy"); see also People v. Smalls, 26 N.Y.3d 1064 (2015) (allegations sufficient where information alleged that officer had requisite training and experience in identification of controlled substance, and that officer reached conclusion about nature of residue based on its appearance and placement within glass pipe, a favored apparatus of drug users); People v. Thiam, 59 Misc.3d 126(A) (App. Term, 1st Dept., 2018), **lv granted** 2018 WL 3811980 (7/25/18) (charge facially defective where officer failed to allege facts underlying conclusion that pills recovered from defendant were oxycodone); People v. Saveljevs, 56 Misc.3d 130(A) (App. Term, 2d Dept., 2017) (charge facially sufficient where officer alleged that he recognized contents of needle to be heroin based on professional training as police officer in identification of heroin and fact that he had previously seized substances which possessed same physical characteristics and had been chemically identified as heroin, and that he is familiar with common methods of packaging heroin and needle used in this case is a commonly used method); People v. White, 55 Misc.3d 153(A) (App. Term, 1st Dept., 2017) (charge facially sufficient where officer alleged that he believed substance to be crack/cocaine "based on [his] professional training as a police officer in the identification of drugs, [his] prior experience as a police officer making drug arrests and an observation of the packaging, which is characteristic of this type of drug"); People v. Jackson, 53 Misc.3d 151(A) (App. Term, 1st Dept., 2016) (drug possession charge facially sufficient under reasonable cause standard where officer alleged that he observed "tan powdery substance" which, based on training and experience, including training in recognition of controlled substances and packaging, he concluded was heroin); People v. Harris, 50 Misc.3d 133(A) (App. Term, 2d Dept., 2016) (marihuana possession charge sufficient where it was alleged that officer "had

professional training … in the identification of marihuana"; that he "has previously made arrests for the … possession of marihuana"; that he had "previously seized marihuana that was determined to be such by the Police Department Laboratory"; that "the marihuana in this case possesses the same physical characteristics as the previously chemically identified marihuana"; and that substance was recovered from ziplock bag, which, by virtue of "professional training as a police officer," he knows to be "a commonly used method of packaging marihuana"); People v. Churchill, 38 Misc.3d 148(A) (App. Term, 1st Dept., 2013), lv denied 21 N.Y.3d 1002 (allegations sufficient where officer allegedly "recovered a pipe/stem containing crack/cocaine residue" from defendant's right hand and that the officer believed the substance was crack/cocaine "based upon his ... professional training as a police officer in the identification of drugs and his ... prior experience as a police officer in drug arrests"); People v. Jennings, 34 Misc.3d 137(A) (App. Term, 2d, 11th & 13th Jud. Dist., 2011) (drug possession charge sufficient where officer identified substance as crack cocaine residue based upon professional training as police officer in identification of the substance and its packaging and prior experience as police officer in arrests for possession of the substance); People v. Oliver, 31 Misc.3d 130(A), 2011 WL 1441237 (App. Term, 2d, 11th & 13th Jud. Dist., 2011) (charge facially sufficient where officer who alleged substance was heroin alleged that he had "professional training as a police officer in the identification of heroin, had previously made arrests for criminal possession heroin," and through training was "familiar with the common methods of packaging heroin," and that "the glassine envelope used to package the heroin in this case is a commonly used method of packaging heroin"); People v. Bracy, 31 Misc.3d 130(A), 2011 WL 1439866 (App. Term, 2d, 11th & 13th Jud. Dist., 2011) (charge facially sufficient allegation that substance was cocaine was based on officer's "experience as a police officer and … his training in the identification and packaging of controlled substances"); People v. Pearson, 78 A.D.3d 445, 914 N.Y.S.2d 2 (1st Dept. 2010), lv denied 16 N.Y.3d 799 (allegations sufficient where deposition stated that officer observed defendant remove from waistband condom containing eight glassines of beige powdery substance, which officer concluded to be heroin based on training and experience, "includ[ing] training in the recognition of controlled substance,

and its packaging"); People v. Lowe, _Misc.3d_, 2017 WL 10222113 (Crim. Ct., Queens Co., 2017) (marihuana charge dismissed where there was no description of unique characteristics of substance and packaging); People v. Hood, 56 Misc.3d 878 (Crim. Ct., Queens Co., 2017) (bare allegation that aggregate weight of marijuana recovered by detective exceeded twenty-five grams was insufficient; determining weight is specialized skill that officer exercises, and thus accusatory instrument must include explanation concerning basis for allegation); People v. Johnson, 51 Misc.3d 801 (Crim. Ct., N.Y. Co., 2015) (information sufficient where officer alleged: "I believe the substance is marijuana based upon: my professional training as a police officer in the identification of marijuana, my prior experience as a police officer making marijuana arrests, the odor emanating from the substance, an observation of the packaging, which is characteristic of marijuana, and a field test that confirmed that the substance is marijuana"); People v. Donadeo, 44 Misc.3d 1202(A) (Crim. Ct., Queens Co., 2014) (charge facially sufficient where officer alleged that he knew substance to be heroin based on training in identification of drugs, prior experience with drug arrests, and observations of packaging characteristic of heroin); People v. Rivera, 41 Misc.3d 1205(A) (Crim. Ct., Bronx Co., 2013) (charge facially defective where officer alleged that he recovered "clear plastic pipe containing a beige, powdery substance" and that he had received training "in the recognition of controlled substances and its packaging," but plastic pipe is not packaging which, in and of itself, would commonly indicate presence of heroin); People v. Telfair, 35 Misc.3d 1201(A) (Crim. Ct., Kings Co., 2012) (People not required to assert that officer has both training and experience in identification of controlled substances); People v. Portorreal, 28 Misc.3d 388, 901 N.Y.S.2d 804 (Crim. Ct., Queens Co., 2010) (no laboratory report necessary where officer sufficiently described substance and determined it was marihuana with aggregate weight of more than two ounces "based upon [his] specialized training and experience as a police officer in the identification and packaging of controlled substances and marihuana"); but see People v. Nunn, 24 Misc.3d 944, 882 N.Y.S.2d 887 (Crim. Ct., Kings Co., 2009) (if decision in Kalin allows court to permit drug charge to stand based upon officer's assertion regarding training and experience and other allegations but without description of substance, that decision

is inconsistent with constitutional procedural due process requirements).

Statements made by a regular drug user and/or seller, particularly one who has used the substance in question, may suffice. Compare People v. Lane, 47 A.D.3d 1125, 849 N.Y.S.2d 719 (3rd Dept. 2008), lv denied 10 N.Y.3d 866 (testimony of long-term and frequent marihuana users who were present when defendant gave marihuana to victim, and consumed it that night, established that substance was marihuana); People v. Fulton, 28 A.D.3d 1180, 813 N.Y.S.2d 839 (4th Dept. 2006), lv denied 7 N.Y.3d 756 (LSD identified by user); People v. Cruz, 298 A.D.2d 905, 747 N.Y.S.2d 630 (4th Dept. 2002), lv denied 99 N.Y.2d 557 (heroin identified by user); In re Raul P., 292 A.D.2d 245, 739 N.Y.S.2d 678 (1st Dept. 2002), lv denied 98 N.Y.2d 607, 746 N.Y.S.2d 457 (2002) (violation of probation petition sufficient where respondent's father alleged that he observed respondent in possession of what father believed to be marijuana, and respondent made admission); People v. Czarnowski, 268 A.D.2d 701, 702 N.Y.S.2d 398 (3rd Dept. 2000) (Vicodin identified by pharmacist); People v. Jewsbury, 115 A.D.2d 341, 496 N.Y.S.2d 164 (4th Dept. 1985); People v. Lynch, 85 A.D.2d 126, 447 N.Y.S.2d 549 (4th Dept. 1982) and People v. Huhn, 34 Misc.3d 1217(A) (Dist. Ct., Nassau Co., 2012) (charge facially sufficient where it was alleged that defendant admitted to officer that he used and possessed heroin) with People v. Kenny, 30 N.Y.2d 154, 331 N.Y.S.2d 392 (1972) (complainant's identification of substance he smoked as marijuana was insufficient since he had only two or three prior contacts with what he believed to be marijuana). See also People v. Dumas, supra, 68 N.Y.2d 729 (court notes that there was no allegation that the police officer was an expert in identifying marihuana nor any allegation that defendant represented the substance as being marihuana); Matter of Cheyenne C., 173 A.D.2d 399, 571 N.Y.S.2d 890 (1st Dept. 1991) (plea allocution insufficient where petition did not establish that substance was cocaine, and record did not indicate that officer was expert in drug identification or that respondent represented that substance was cocaine).

In People v. Brightman, supra, 150 Misc.2d 60, the court found inadequate an officer's allegation that he obtained a positive result in a field test for cocaine. The court concluded that the field test was not sufficiently reliable. However, under certain

circumstances, allegations concerning an expert's field test can be sufficient. See Matter of Angel A., 92 N.Y.2d 430, 681 N.Y.S.2d 787 (1998) (petition sufficient where officer made allegations regarding his training and experience in the use of the “NIK” field test for heroin); People v. Swamp, 84 N.Y.2d 725, 622 N.Y.S.2d 472 (1995) (prima facie case was established before Grand Jury where officer conducted the "widely-used" Scott Reagent test for cocaine, and had received training and conducted more than 1000 field tests); In re Jayson P., 243 A.D.2d 266, 662 N.Y.S.2d 504 (1st Dept. 1997) (allegations established that field test was a reliable test routinely used to determine the presence of heroin); People v. McIntyre, 185 Misc.2d 58, 711 N.Y.S.2d 317 (Crim. Ct., Bronx Co., 2000) (People presented proof of reliability of Scott-Reagent test for cocaine); People v. Dunkley, 192 Misc.2d 305, 746 N.Y.S.2d 248 (Crim. Ct., N.Y. Co., 2002) (officer who conducted field test also weighed drugs); People v. Escalera, 143 Misc.2d 779, 541 N.Y.S.2d 707 (Crim. Ct. N.Y. Co., 1989) (report alleging that Duquenois-Levine Reagent System field test yielded positive result was adequate).

The sufficiency of a lab report can be challenged. For instance, the report may contain only the name of a co-respondent or an adult defendant, or include the respondent's name among other names without connecting the drugs to anyone in particular. Compare People v. Herbas, 47 Misc.3d 154(A) (App. Term, 1st Dept., 2015) (report failed to connect substance tested to substance recovered from defendant); People v. Zachary, 56 Misc.3d 1207(A) (Dist. Ct., Nassau Co., 2017) (although defendant’s name was in report, no allegations connected substances to charged incident); People v. Crenshaw, 8 Misc.3d 1006(A), 801 N.Y.S.2d 779 (Mount Vernon City Ct., 2005) (charge defective where lab report alleged presence of heroin in glassine envelope, but accusatory instrument alleged that defendant held a straw containing heroin; People could not cure defect by alleging in motion papers that envelope was inside the straw) and People v. Gannaway, 188 Misc.2d 224, 728 N.Y.S.2d 325 (Crim. Ct., N.Y. Co., 2001) (while noting that police reports concerning unapprehended sellers refer to the seller with a John Doe name or as “lost Subject,” and connect the subsequently arrested defendant to the prior sales by including the date and location of the sale and the property voucher number assigned to the drugs, court finds charge

defective because field tests lacked above-mentioned connection to defendant) with Matter of Jonathan T., 247 A.D.2d 482, 668 N.Y.S.2d 682 (2d Dept. 1998) (caption, incident number and description of packaging of drugs in lab report connected substance to respondent); People v. Portorreal, 28 Misc.3d 388 (lab report sufficient where it did not have defendant's name, but contained name of separately charged defendant and name of officer, and description of items submitted for testing that was consistent with evidence officer stated he recovered); People v. Blake, 6 Misc.3d 958, 791 N.Y.S.2d 912 (Crim. Ct., N.Y. Co., 2005) (report included defendant's name, the docket number of the case and the Property Clerk's invoice number, and lack of reference to time, date and location is typical, and arresting officer's erroneous identification of substance was understandable given that it was based on visual inspection) and People v. Hobson, 22 Misc.3d 1111(A), 2009 WL 130137 (Crim. Ct., N.Y. Co., 2009) (drug possession charge sufficient where accusatory instrument alleged that officer recovered five decks of heroin from underneath front passenger seat of motor vehicle in which defendant and two co-defendants were seated, but laboratory report indicated that the packages contained cocaine; officer's mistaken description of substance as heroin did not undercut non-hearsay factual allegation contained in report); see also People v. Davino, 173 Misc.2d 410, 661 N.Y.S.2d 915 (Crim. Ct., Kings Co., 1997) (vehicle owner's deposition alleging lack of permission contained no caption and did not name defendant).

Or, the lab report may not indicate that the person who signed it is the same person who conducted the tests. Compare Matter of Wesley M., 83 N.Y.2d 898, 613 N.Y.S.2d 853 (1994) (certification merely established that report was true copy) and Matter of Kenneth K., 218 A.D.2d 534, 631 N.Y.S.2d 3 (1st Dept. 1995) (signature on report was not that of chemist) and People v. Zachary, 56 Misc.3d 1207(A) (chemist was vague about level of "participation in the determination of the results") with Matter of Deshone C., 207 A.D.2d 756, 616 N.Y.S.2d 727 (1st Dept. 1994), lv denied 85 N.Y.2d 801, 624 N.Y.S.2d 371 (1995) (allegation that original report was "made by" person who signed copy distinguished case from Wesley M., and, under CPLR §3023, allegations in a verified pleading are presumed to be based on personal knowledge unless it is indicated that they are made upon information and belief). See also People v.

Washington, 228 A.D.2d 23, 652 N.Y.S.2d 750 (2d Dept. 1997) (lab report contained “made by me” language).

Finally, because the "legal insufficiency of the factual allegations" cannot be cured by amendment [FCA §311.5(2)(b)], the late filing of a lab report cannot cure an otherwise defective charge. Matter of Detrece H., 78 N.Y.2d 107, 571 N.Y.S.2d 899 (1991).

3. Inclusion Of Respondent's Statements Or Other Hearsay In Deposition

An incriminating statement made by the respondent in the presence of the deponent may be treated as a "nonhearsay" allegation for purposes of FCA §311.2(3), since such a statement is admissible under a hearsay exception. See In re Christopher P., 260 A.D.2d 212, 688 N.Y.S.2d 520 (1st Dept. 1999); Matter of Rey R., 188 A.D.2d 473, 591 N.Y.S.2d 55 (2d Dept. 1992); Matter of Rodney J., 108 A.D.2d 307, 489 N.Y.S.2d 160 (1st Dept. 1985); People v. Polito, 128 Misc.2d 71, 488 N.Y.S.2d 593 (City Ct. of Rochester, 1985); but see People v. Hernandez, 47 Misc.3d 51 (App. Term, 2d Dept., 2015) (certificate of translation required in absence of indication defendant reviewed written English version of his statement for truth and accuracy); People v. Kousar, 21 Misc.3d 1122(A), 2008 WL 4725311 (Crim. Ct., Kings Co., 2008) (accusatory instrument not sufficient where People did not submit proof in form of certificate of translation that defendant's alleged admissions were translated from Urdu to English by someone capable of making translations); However, it can be argued that an unsworn written confession may not be used to support a petition. See People v. Lamour, 133 Misc.2d 865, 508 N.Y.S.2d 867 (Dist. Ct. Nassau Co., 1st Dist., 1986); cf. Matter of Rodney J., supra, 108 A.D.2d at 311 ("express incorporation of respondent's statement into [the officer's] sworn deposition mutes any argument that the statement, being unsworn, could not qualify as a supporting deposition"); People v. Anderson, 25 Misc.3d 1207(A), 2009 WL 3130180 (Dist. Ct., Nassau Co., 2009) (defendant’s alleged statement, contained in CPL §710.30 notice, could not be considered since it was not sworn to by defendant or individual who allegedly heard admission); but see Matter of Gloria F., 127 Misc.2d 653, 486 N.Y.S.2d 867 (Fam. Ct. Kings Co., 1985).

It was noted in Matter of Rodney J. that the possibility of suppression is irrelevant.

Therefore, it does not appear that a petition becomes defective when certain evidence included in the petition has been excluded prior to trial. See People v. Gordon, 88 N.Y.2d 92, 643 N.Y.S.2d 498 (1996) (suppression of identification evidence did not undermine legal sufficiency of Grand Jury evidence).

A finding of guilt may not be based solely upon an uncorroborated confession (see FCA §344.2[3]). However, although the Appellate Division had held repeatedly that the requisite corroboration must appear in the supporting depositions, the Court of Appeals held in People v. Suber, 19 N.Y.3d 247 (2012) that allegations corroborating a defendant's statements are not required in order to satisfy the prima facie case requirement for informations.

Other types of admissible hearsay may also be used to support the petition. Compare In re Christopher P., supra, 260 A.D.2d 212 (accomplice's declaration against penal interest); People v. Varner, 50 Misc.3d 1212(A) (Crim. Ct., N.Y. Co., 2015) (charges based on alleged excited utterance facially sufficient where, within 19 minutes of radio call regarding assault "in progress" and 30 minutes of alleged violent acts, complainant's face appeared swollen with redness and bore laceration and shirt was torn, and she was yelling "in a loud voice" and crying); People v. Martinez, 33 Misc.3d 1216(A) (Crim. Ct., N.Y. Co., 2011) (where it was alleged that complainant was flailing hands and crying while speaking quickly and in elevated tone, had suffered bumps, bruising, swelling, redness, lacerations, scratches and bite marks, was bleeding from back of head and from face, and was moaning, it was reasonable to infer that complainant had recently sustained injuries); People v. Branch, 19 Misc.3d 255, 852 N.Y.S.2d 676 (Crim. Ct., Queens Co., 2007) (bail jumping charge supported by certified copy of "CRIMS" printout showing defendant failed to appear in court on date in question); People v. Leyva, 19 Misc.3d 498, 856 N.Y.S.2d 452 (Crim. Ct., N.Y. Co., 2008) (court finds facially sufficient accusatory instrument supported by separately arrested individual's incriminating statement; defendant has no right of confrontation or cross-examination in relation to accusatory instrument, and thus expansion of Bruton rule to accusatory instruments is not warranted); People v. Vickers, 17 Misc.3d 1113(A), 851 N.Y.S.2d 66 (Crim. Ct., Kings Co., 2007) (assault charge based on excited utterance

sufficient where incident occurred "on or about April 2, 2007, at approximately 6:18 pm"; at approximately that time, officer observed complainant "in an excited state in that she was flagging down deponent for help, screaming, and had watery eyes at that time"; complainant stated to officer that defendant did "strangle [her] around the neck and did punch [her] about the face"; and officer observed complainant "with a swollen neck, red marks to the neck, and a laceration and swelling to [her] lip"); People v. Foster, 190 Misc.2d 625, 740 N.Y.S.2d 567 (Crim. Ct., Kings Co., 2002) (statements constituted excited utterances where arresting officer alleged that complainant was sweating and in an excited state and asserted that defendant had stabbed him with a screwdriver, and officer observed complainant bleeding from a cut above his eyebrow) and People v. Swinger, 180 Misc.2d 344, 689 N.Y.S.2d 336 (Crim. Ct., N.Y. Co., 1998) (hospital record containing statements made for purposes of treatment, which were also excited utterances)

with Matter of Markim Q., 22 A.D.3d 498, 803 N.Y.S.2d 646 (2d Dept. 2005), rev'd on other grounds 7 N.Y.3d 405, 822 N.Y.S.2d 746 (2006) (school record was admissible under CPLR 4518, but was not verified or attested to by person with knowledge of the facts); Matter of Lionel "O", 288 A.D.2d 705, 732 N.Y.S.2d 720 (3rd Dept. 2001) (petition defective where it was supported by numerous unsworn documents, including arrest report and incident report); Matter of Shannon "F", 276 A.D.2d 847, 714 N.Y.S.2d 159 (3rd Dept. 2000) (petition alleging violation of conditional discharge defective where there was no proof that school attendance record was made part of petition or that Probation maintained such records as business records); People v. Abreu-Tejada, 50 Misc.3d 1218(A) (Crim. Ct., Bronx Co., 2016) (statement could not be considered as declaration against penal interest because People did not establish declarant was unavailable); People v. Heinitz, 19 Misc.3d 1107(A), 859 N.Y.S.2d 905 (Crim. Ct., Kings Co., 2008) (People failed to establish that complainant made excited utterance where complaint alleged that officer received radio transmission of assault in progress and, within five minutes, arrived at location and observed complainant crying and sniffling, with a dark mark across the bridge of her nose, that the nose appeared to be crooked, and complainant kept touching her nose and asking the officer to check it because

complainant was concerned it was broken, and that, while in that state, complainant told officer defendant had headbutted her; officer observed only that complainant was crying and sniffling, but not yelling, screaming, or visibly disturbed in any other way); People v. Valentine, 33 Misc.3d 1211(A) (Crim. Ct., Kings Co., 2011) (complainant's statements did not qualify as excited utterances where it was not known how much time passed between 911 call and radio run, or what complainant was doing during that time, and fact that officer saw complainant "crying, upset, afraid and hysterical" did not necessarily mean she had no time to reflect or opportunity to fabricate); People v. Schuler, 23 Misc.3d 1137(A), 2009 WL 1623178 (Crim. Ct., Kings Co., 2009) (complainants' statements did not fall within excited utterance exception where accusatory instrument was silent as to their activities in time interval between startling event; allegations did not establish how much time elapsed between startling event and declarations, and officer's observation of complainants "shaking and upset" did not necessarily mean they had no time to reflect or fabricate story; words "shaking and upset" could describe someone who is merely angry and vengeful; and accusatory instrument lacked direct quotes or paraphrased descriptions of actual utterances, which would have been helpful in determining if utterances were excited ones); People v. Burak, 20 Misc.3d 1145(A), 2008 WL 4256472 (Dist. Ct., Nassau Co., 2008) (attestation about what certain records did not contain was inadmissible hearsay); People v. Brown, 15 Misc.3d 1143(A), 841 N.Y.S.2d 821 (Crim. Ct., N.Y. Co., 2007) (accusatory instrument lacked documentation from DMV satisfying business or public record foundational requirements); People v. Naul, 3 Misc.3d 1101(A), 787 N.Y.S.2d 680 (Crim. Ct., Queens Co., 2004) (People failed to establish that statement was excited utterance where 55 minutes passed after domestic violence incident and court had no knowledge of complainant's actions during that period, and fact that complainant appeared to be scared and upset did not necessarily mean that she had no time to reflect) and People v. Rizzo, 189 Misc.2d 649, 735 N.Y.S.2d 916 (Dist. Ct., Nassau Co., 2001) (complainant's hearsay statements did not come within "prompt outcry" exception). See also People v. Casey, supra, 95 N.Y.2d 354 (contempt allegations were insufficient where it was not clear whether detective's allegations were based on information from the complainant, or upon direct knowledge or

some hearsay exception); People v. Fletcher, 189 Misc.2d 162, 730 N.Y.S.2d 215 (Auburn City Ct., 2001) (court orders hearing to determine whether statements qualified under excited utterance exception).

It has been held that, for pleading purposes, the court may take judicial notice of court documents. People v. Gurnett, 59 Misc.3d 975 (Justice Ct., Town of Webster, Monroe Co., 2018) (in criminal contempt proceeding, court takes judicial notice and finds that defendant was present in court when order of protection was issued, acknowledged receipt by signing order, and was provided copy of order); People v. Perez, 195 Misc.2d 71, 757 N.Y.S.2d 711 (Crim. Ct., N.Y. Co., 2003).

It also has been held that allegations based on the deponent's observation of a video recording of events are not hearsay. People v. Vranici, 59 Misc.3d 1203(A) (Crim. Ct., N.Y. Co., 2018) (absence of date and time of recording viewed by officer not fatal); People v. Clyburn, 56 Misc.3d 1204(A) (Crim. Ct., N.Y. Co., 2017) (allegations drawn from viewing of unauthenticated surveillance footage are not inadmissible hearsay); People v. Miller, 49 Misc.3d 1204(A) (Crim. Ct., Kings Co., 2015); People v. Ham, 43 Misc.3d 1227(A) (Crim. Ct., Kings Co., 2014); People v. West, 41 Misc.3d 542 (Crim. Ct., Bronx Co., 2013); People v. Giarraputo, 37 Misc.3d 486 (Crim. Ct., Richmond Co., 2012); People v. Patten, 32 Misc.3d 440 (City Ct. of Long Beach, 2011) (observations of videotape not hearsay, but officers failed to indicate that video depicted fight they personally observed); People v. Lambert, 2002 WL 1769931 (Crim. Ct., N.Y. Co.) (review of videotape by court not required before trial); Matter of Tyshawn M. 32 Misc.3d 689 (Fam. Ct., Monroe Co., 2011) (petition dismissed where there was no non-hearsay allegation that incident depicted on video, from which respondent was identified, was incident alleged in petition, nor was there deposition from witness stating that video was viewed and fairly and accurately depicted incident); see also People v. Kelly, 35 Misc.3d 1233(A) (Crim. Ct., Kings Co., 2012) (criminal trespass charge dismissed where defendant was observed on video surveillance, but it was not alleged that video truly and accurately represented defendant's actions, that video had not been altered, and that there was proper chain of custody).

4. Latent Defects

The petition is not defective and subject to dismissal if it is not discovered until after the deponent testifies at trial that the deponent did not read his/her supporting deposition. Matter of Edward B., 80 N.Y.2d 458, 591 N.Y.S.2d 962 (1992) (only facial sufficiency is required, and assurances concerning a sound basis for the prosecution are less important after witnesses have testified). See also People v. Sanchez, 54 Misc.3d 139(A) (App. Term, 2d Dept., 9th & 10th Jud. Dist., 2017) (impeachment at pretrial hearing of complainant's statement that allegations were based on personal knowledge revealed latent defect that did not render accusatory instrument defective); People v. Washington, 52 Misc.3d 140(A) (App. Term, 2d Dept. 2016) (latent, non-jurisdictional defect where complainant testified that she had never seen or read criminal complaint); People v. Butler, 45 Misc.3d 134(A) (App. Term, 2d Dept., 2014) (accusatory instrument which contained no certificate of translation not rendered jurisdictionally defective when complainant testified at trial with aid of interpreter); People v. Antonovsky, 31 Misc.3d 1236(A), 2011 WL 2176537 (Crim. Ct., Kings Co., 2011) (under Edward B., latent defect is not jurisdictional and does not require dismissal, but court has power to dismiss in its discretion); People v. Flores, 189 Misc.2d 665, 735 N.Y.S.2d 923 (Crim. Ct., Queens Co., 2001) (dismissal denied where non-English speaking complainant testified at trial that she never read the complaint or supporting deposition); People v. DeLeon, 157 Misc.2d 62, 595 N.Y.S.2d 909 (Crim. Ct., Kings Co. 1993) (court refuses to dismiss after learning that deponent had not read complaint).

However, a pretrial dismissal motion should be made if the face of the accusatory instrument or available extrinsic evidence indicates that the deponent did not read and/or understand the deposition. Compare People v. Edwards, 59 Misc.3d 148(a) (App. Term, 1st Dept., 2018) (certificate of translation was required to convert accusatory instrument into information since People filed translator's statement simultaneously with complainant's supporting deposition and provided indicia of complainant's inability to speak or read English); People v. Hernandez, 47 Misc.3d 51 (App. Term, 2d Dept., 2015) (certificate of translation required in absence of indication defendant reviewed written English version of his statement for truth and accuracy; certificate also necessary as to victim where her assertion that officer had read statement to her in Spanish, and

that what she heard was truth, did not support inference that written English version accurately represented what victim had said in Spanish or that what officer recited to her in Spanish competently communicated content of written English version); People v. Marotta, N.Y.L.J., 11/15/95, p. 35, col. 1 (App. Term, 2d and 11th Jud. Dist.) (information was jurisdictionally defective where deposition failed to indicate whether person who signed it ever read the information and agreed that the hearsay allegations were true); People v. Maslowski, 58 Misc.3d 592 (Crim. Ct., Queens Co., 2017) (when defendant demonstrates People's actual or constructive knowledge that complainant requires interpreter, translation confirmed by supporting deposition is required); People v. Brooks, 55 Misc.3d 177 (Crim. Ct., Bronx Co., 2016) (dismissal ordered where People filed certificate of translation during pretrial stage signifying that informant could not sufficiently read or speak English without assistance of translator); People v. Badalov, 42 Misc.3d 1235(A) (Crim. Ct., Kings Co., 2014) (deposition is sufficient when there is no indication on face of accusatory instrument that complainant could not read or understand deposition, but inquiry must be undertaken when there is evidence sufficient to challenge legitimacy of verification; although interpreter's supporting deposition was not dated, it related back to date on which supporting deposition was signed and translation took place); People v. Kaya, 17 Misc.3d 114(A), 851 N.Y.S.2d 65 (Crim. Ct., Kings Co., 2007) (court orders hearing to determine whether someone other than undercover signed supporting deposition); People v. Wang, 190 Misc2d 815, 741 N.Y.S.2d 646 (Poughkeepsie City Ct., 2002) (accusatory instrument signed in Chinese by complaining witness and containing English translation by witness' daughter dismissed; allegations constitute inadmissible hearsay, and there were no indicia of trustworthiness since there was high degree of animosity between daughter and defendant and daughter was not certified or official translator); People v. Camacho, 185 Misc.2d 31, 711 N.Y.S.2d 283 (Crim. Ct., Kings Co., 2000) (once court has reason to question whether complaint or supporting deposition was adequately translated to non-English speaking complainant, court may require filing of certificate of interpretation) and People v. Banchs, 173 Misc.2d 415 (Crim. Ct., Kings Co. 1997) (same as Camacho) with Matter of Jzamaine E.M., 150 Misc.3d 738 (2d Dept. 2017) (deposition translated for

complainant by Spanish-speaking officer not defective since there was no indication complainant had not read and understood it or was incapable of doing so); People v. George, 37 Misc.3d 1231(A) (Crim. Ct., Queens Co., 2012) (accusatory instrument not facially deficient even if complainant's signature on deposition was forged, and, while signature did not match signature on other deposition, person's signature may vary from one instance to next and thus court cannot find from face of instrument that signature was forged); People v. Guerrero, 36 Misc.3d 1242(A) (Crim. Ct., Queens Co., 2012) (charges facially sufficient where ADA attested that complaint was translated to complainant in ADA's presence via telephone and use of an interpreter) and People v. Benitez, 15 Misc.3d 1122(A), 839 N.Y.S.2d 435 (Crim. Ct., Kings Co., 2007) (dismissal denied in absence of definitive showing that complainant does not understand English).

5. Deponents Under Nine Years Of Age

"A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath." FCA §343.1(2). However, at the pleading stage, any defect as to witness' capacity is a latent one that does not render the petition defective. Matter of Nelson R., 90 N.Y.2d 359, 660 N.Y.S.2d 707 (1997); see also Matter of Christopher W., 96 A.D.3d 1591 (4th Dept. 2012) (petition facially sufficient where non-hearsay allegations established that respondent subjected complainant to sexual contact by touching her vagina when she was three years old, even though court determined that complainant could not understand nature of oath); Matter of Ernst B., 177 Misc.2d 22, 675 N.Y.S.2d 805 (Fam. Ct., Monroe Co., 1998) (petition sufficient where 4-year-old complainant signed sworn statement with "X").

Since unsworn testimony, combined with adequate corroborating evidence, can support a finding, it appears that an unsworn statement by a child, combined with a sworn deposition providing corroborating evidence, can support a petition. Matter of Jermaine G., 38 A.D.3d 105, 828 N.Y.S.2d 160 (2d Dept. 2007) (petition sufficient where unsworn statement of five-year-old complainant was corroborated by deposition of his mother).

6. Factual Allegations Concerning Elements Of Crime

a. Possession, Generally

Bare allegations concerning the respondent's "possession" of certain contraband usually are sufficient, but, when the prosecution relies on a theory of constructive possession, the allegations must be examined to determine whether the respondent has been connected to the contraband. See Matter of James J., 76 N.Y.2d 883, 561 N.Y.S.2d 414 (1990); People v. Medina, 59 Misc.3d 146(A) (App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 2018) (under reasonable cause standard governing misdemeanor complaints, charge facially sufficient where officer alleged that he had “observed the defendant in possession of a quantity of crack cocaine residue” recovered from defendant’s bag); People v. Slocum, 57 Misc.3d 141(A) (App. Term, 1st Dept., 2017) (charge defective where it was alleged that “across from 224 East 47 Street,” police recovered “one loose crack/cocaine rock from the seat where [the officer] observed the defendant sitting”); People v. Cosmos, 49 Misc.3d 134(A) (App. Term, 2d Dept., 2015), lv denied 26 N.Y.3d 1087 (crack cocaine possession charge facially sufficient where it was alleged that bag of crack cocaine was discovered on kitchen countertop, in plain view and “in close proximity” to where defendant and two others stood in living room of apartment, and that bags of marihuana were in plain view on table near where defendant was standing and bag was recovered from defendant’s pants pocket); People v. Pierre, 36 Misc.3d 158(A) (App. Term, 2d Dept., 2012), lv denied 20 N.Y.3d 935 (charge facially sufficient where defendant allegedly was present in room where marihuana, contained in 70 ziplock bags, was found on couch, and another individual allegedly handed someone ziplock bag containing marihuana in exchange for money); People v. Dinardo, 94 A.D.3d 626 (1st Dept. 2012) (charge facially sufficient where defendant allegedly was in hotel room with drugs on night table and in dresser drawer); People v. Souchet, 60 Misc.3d 1218(A) (Crim. Ct., Bronx Co., 2018) (charges dismissed where defendant and two co-defendants were in bedroom where drugs were found inside purse on top of dresser; accusatory instrument did not describe distance between defendant and drugs; there was no indication purse was open; and there were no allegations that defendant had connection to apartment other than mere presence); People v. Wellington, 58 Misc.3d 1221(A) (Crim. Ct., Bronx Co., 2017) (charge facially insufficient where it was alleged that heroin and crack cocaine residue was recovered from nightstand in bedroom and

from kitchen in which defendant was sleeping under table, and complaint did not specify defendant's proximity to contraband or allege that defendant was sole occupant in apartment or that contraband in kitchen was in plain view); People v. Rivera, 2015NY021343, NYLJ 1202759097609, at *1 (Crim., NY, Decided May 23, 2016) (possession charge dismissed where it was alleged that officer "took a burning marijuana cigarette off the windshield wiper of the vehicle upon which the defendant was leaning," that defendant stated in substance that he knew cigarette contained marijuana, and that officer took another marijuana cigarette from inside defendant's right sneaker); People v. Stazzone, 48 Misc.3d 1214(A) (Crim. Ct., Queens Co., 2015) (charges dismissed where it was alleged that defendant was in basement bedroom, and drugs were found in another basement bedroom, basement hallway, living room on first floor, and kitchen area on second floor); People v. Santos, 46 Misc.3d 1217(A) (Crim. Ct., N.Y. Co., 2015) (possession charge sufficient with respect to burnt marijuana cigarette on dresser and dollar bill containing cocaine inside defendant's purse in bedroom where defendant was found, but defective as to drugs found in unlocked drawer in kitchen, where it could be inferred that defendant lived in apartment but not that she was lessee or otherwise had sufficient level of control over kitchen); People v. David, 44 Misc.3d 1212(A) (Crim. Ct., N.Y. Co., 2014) (possession charge facially defective where defendant or other individual dropped bag of cocaine to floor in station house holding room but there was no allegation making it more likely it was defendant, or supporting acting-in-concert theory); People v. Dixon, 42 Misc.3d 1228(A), 2014 WL 702176 (Poughkeepsie City Ct., 2014) (charge dismissed where defendant allegedly possessed bags containing marijuana found in center console of rented vehicle); People v. Ransom, 2013KN042939, NYLJ 1202643818441, at *1 (Crim., KI, Decided February 6, 2014) (charges facially defective where one defendant resided at location but allegations did not indicate whether contraband was recovered from private area or area accessed by other people); People v. Ramos, 39 Misc.3d 1212(A) (Crim. Ct., Kings Co., 2013) (charge facially defective where cocaine allegedly was recovered from ground where co-defendant dropped it); People v. Raydon, 36 Misc.3d 1243(A) (Crim. Ct., N.Y. Co., 2012) (charge facially sufficient where it was alleged that officer recovered marijuana from center console of

vehicle in which defendant was passenger); People v. Torres, 35 Misc.3d 1220(A) (Sup. Ct., Bronx Co., 2012) (charge facially sufficient where it was alleged that gun was found in defendant's daughter's bedroom closet; that defendant admitted knowing about gun but claimed it belonged to daughter's father; and that ammunition was stored under basement stairs and defendant was aware that daughter's father stored items there); People v. Lopez, 29 Misc.3d 1209(A), 2010 WL 4009204 (Crim. Ct., N.Y. Co., 2010) (charge dismissed where it was alleged that pistol was in hatchback area of car in which defendants were seated, and that pistol was within defendants' control and dominion because it was in common area of car); People v. W.J., 27 Misc 3d 1222(A), 2010 WL 1945728 (Crim. Ct., N.Y. Co., 2010) (charge facially insufficient where defendant allegedly exchanged marijuana for money with a buyer and officer recovered marijuana from bag located on window sill, but allegations failed to connection bag to defendant); People v. Rodas, 26 Misc.3d 1241(A), 2010 WL 1136506 (Crim. Ct., N.Y. Co., 2010) (charges of criminal possession of controlled substance and criminally using drug paraphernalia insufficient where it was alleged that officer saw defendant inside vehicle from which 2 glassines of heroin and approximately 100 empty glassines were recovered; there were no allegations that defendant was in vehicle when contraband was found, and defendant exited vehicle and was arrested elsewhere); People v. Salliey, 2001 WL 1607761 (Crim. Ct., Richmond Co., 2001) (drug and weapon possessions charges facially defective where complaint provided no factual support for allegation that contraband was located within defendant's "control and dominion"); People v. Castro, 184 Misc.2d 410, 709 N.Y.S.2d 903 (Crim. Ct., Queens Co., 2000) (allegations insufficient where defendant was observed walking out of a room in which betting slips were in plain view along with tally sheets and a calculator, and no one else was present); People v. Willoughby, 142 Misc.2d 1014, 538 N.Y.S.2d 971 (Crim. Ct. N.Y. Co., 1989) (allegation that three defendants possessed drugs which were thrown from a car by one of them is insufficient as to the two defendants not seen in possession; presumption in PL §220.25[1] does not apply); People v. Torres, 141 Misc.2d 19, 532 N.Y.S.2d 663 (Crim. Ct. Bronx Co., 1988) (charge that defendants "had [two glassines] in their dominion and control" contained legal conclusion and failed to provide facts supporting

conclusion).

b. Accessorial Liability

A person is criminally liable for the conduct of another "when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct." PL §20.00. Consequently, when the respondent is charged with acting in concert, a motion to dismiss should be made whenever the supporting depositions fail to establish accessorial liability by describing acts committed by the respondent personally. See Matter of Christopher M., 94 A.D.3d 1119 (2d Dept. 2012) (charges of riot and unlawful assembly dismissed where petition alleged that respondent was present at scene of specified gang misconduct on street but failed to state any acts engaged in by respondent establishing that he shared community of purpose with others); People v. Torres, supra, 141 Misc.2d 19 (bare allegation that defendants acted in concert not enough to support drug sale and attempted robbery charges); but see Matter of Eric R., 213 A.D.2d 310, 624 N.Y.S.2d 164 (1st Dept. 1995) (allegation that respondent joined in a formation which entrapped complainant while others committed robbery was sufficient).

c. Assault

To prove "physical injury," the prosecution must establish an "impairment of physical condition or substantial pain." PL §10.00(9), while a finding of "serious physical injury" requires evidence of a "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." PL §10.00(10).

In Matter of Jeremy B., 151 A.D.2d 314, 542 N.Y.S.2d 582 (1st Dept. 1989), an allegation that the respondent caused physical injury when he kicked, punched and bit a police officer was found adequate. However, after Matter of Jahron S., supra, 79 N.Y.2d 632, nonhearsay evidentiary allegations establishing an injury are required. See People v. Henderson, 92 N.Y.2d 677, 685 N.Y.S.2d 409 (1999) (information sufficient where it alleged that defendant and another individual kicked complainant about the legs, causing contusions and swelling, and substantial pain, alarm and annoyance; court notes that

depositions are usually secured before a victim knows with certainty what the lasting effects of an attack will be); People v. Swaby, 57 Misc.3d 137(A) (App. Term, 1st Dept., 2017) (charge facially sufficient where it was alleged that defendant, upon refusing to leave restaurant when asked by two security guards, "punch[ed] [the guards] with a closed fist" and "kick[ed] [the guards] with his feet," and that one guard suffered "bruising and substantial pain to his left shin"); People v. Fernandez, 57 Misc.3d 136(A) (App. Term, 1st Dept., 2017) (allegations that defendant used "closed fist" to "strike" 84 year-old grandfather on "side of [the] face," causing "substantial pain, redness and swelling," permitted inference of substantial pain); People v. Mejia, 57 Misc.3d 136(A) (App. Term, 1st Dept., 2017) (charge facially sufficient where it was alleged that defendant "forcefully squeez[ed]" victim's neck and "thr[e]w her onto the floor," causing victim's "face to strike the floor," and that victim suffered "redness to the neck, scratches on her hand, and substantial pain"); People v. Raymond, 51 Misc.3d 149(A) (App. Term, 2d Dept., 2016), lv denied 28 N.Y.3d 973 (charge facially sufficient where it was alleged that defendant "did punch and hit [his wife] about the body with the … defendant's hands and fists," and "that the above described actions caused [the complainant] to suffer bruising to the thigh, to suffer substantial pain, to fear further physical injury and to become alarmed and annoyed"); People v. Allen, 36 Misc.3d 137(A) (App. Term, 2d Dept. 2012), lv denied 20 N.Y.3d 930 (assault charge facially sufficient where it was alleged that defendant "did pull [the victim's hair" and "did punch [the victim] about the head and neck area," which "caused [the victim] to suffer pain to the neck and head areas, to suffer substantial pain, to fear further physical injury and to become alarmed and annoyed"); People v. Mercado, 94 A.D.3d 502 (1st Dept. 2012) (allegations sufficient where information alleged that "defendant struck informant … on his face with a closed fist," and that "as a result of defendant's actions, he suffered swelling and bruising to the left side of his face and bruising and swelling to his left eye as well as experienced annoyance, alarm and fear for his physical safety"); People v. Meachem, 11 Misc.3d 126(A), 815 N.Y.S.2d 495 (App. Term, 2d & 11th Jud. Dist., 2006), lv denied 6 N.Y.3d 778 (allegation that defendant repeatedly punched victim in back of head and caused swelling on back of head, soreness on back of neck, pain and further physical injury, were sufficient); People v.

Caniglia, 2 Misc.3d 134(A), 784 N.Y.S.2d 922 (App. Term, 9th & 10th Jud. Dist., 2004) (allegations that kicks and punches caused redness and swelling to head and legs and substantial pain were sufficient); Matter of Shane E., 255 A.D.2d 674, 679 N.Y.S.2d 209 (3rd Dept. 1998) (petition sufficient where complainant alleged that he had bumps and bruises over entire head and face, was bleeding from inside mouth and from small cut on forehead, and suffered "substantial pain"); Matter of Robert C., 185 A.D.2d 845, 586 N.Y.S.2d 992 (2d Dept. 1992); People v. Ozua, 54 Misc.3d 1205(A) (Crim. Ct., N.Y. Co., 2017) (allegations sufficient despite absence of complainant's description of injuries or degree of pain where officer's allegations established violent attack which would normally be expected to cause more than a little pain, and great discrepancy in size and apparent physical strength between defendant and complainant); People v. Morris, 44 Misc.3d 810 (Crim. Ct., N.Y. Co., 2014) (complainant's report that she experienced substantial pain after deliberate act of violence makes out prima facie case since complainant knows what was done to her, whether it hurt, and how much it hurt, and, moreover, complaint is sufficient if it alleges act of violence sufficiently extreme to permit reasonable inference that more than a little pain would normally result); People v. Singh, 42 Misc.3d 1235(A) (Crim. Ct., Queens Co., 2014) (assault charge defective where it alleged that defendant hit complainant on face with broom, causing broom to break, but it could not be inferred that complainant suffered physical injury); People v. Kersh, 41 Misc.3d 1217(A) (Crim. Ct., N.Y. Co., 2013) (allegations sufficient where it was alleged that defendant approached complainant in threatening manner in elevator, shouted and pointed finger in complainant's face, and then pushed complainant against wall, causing glass mirror to shatter and tear back of complainant's jacket, which caused substantial pain to complainant's back); People v. Coleman, 36 Misc.3d 1242(A) (Crim. Ct., N.Y. Co., 2012) (charge facially sufficient where defendant allegedly grabbed complainant's arm with such force that bruising was already visible when officer arrived on scene); People v. O'Connor, 34 Misc.3d 1231(A) (Dist. Ct., Suffolk Co., 2012) (assault charge facially sufficient where it was alleged that defendant punched complainant in her right arm and it "hurt really bad and [she] started to cry"; that defendant punched her on left side of her body and slapped her face, pushed her against wall, grabbed her by throat

and caused her to have “a hard time swallowing and breathing,” threw her on ground, pulled her hair, kicked and punched her, and “jerked [her] neck around”; and that complainant was “in extreme pain” and had difficulty moving elbow, that it hurt to turn her head, that scalp was sore, and that she intended to see doctor); People v. Oree, 33 Misc.3d 1235(A) (Dist. Ct., Suffolk Co., 2011) (allegations that complainant suffered split lip and bleeding and wanted to go to hospital established impairment of physical condition, and, given prior quarrel with defendant, defendant’s anger, defendant swinging arm and hitting her on lip and splitting it open, and her desire to go to hospital, her statement that lip hurt established substantial pain); People v. McDowell, 32 Misc.3d 1240(A) (Lockport Town Ct., 2011) (charge facially defective where it was alleged that defendant punched victim in face and hit him in face with stick, and that EMTs administered first aid to cut on victim’s face and he did not seek further medical attention); People v. Smith, 32 Misc.3d 1221(A), 2011 WL 3047249 (Albany City Ct., 2011) (allegations sufficient where defendant was eight-year-old complainant’s 6 foot three inch tall, 210 pound father, and complainant alleged that she was “punched in [the] right eye causing me pain and making me cry”); People v. Ingrilli, 31 Misc.3d 1220(A), 2011 WL 1601576 (Dist. Ct., Nassau Co., 2011) (charge facially insufficient where complainant allegedly sustained “lacerations” to right knee and “bruising, swelling and substantial pain” from single punch “about the left side of the face”); People v. Frederique, 31 Misc.3d 1215(A), 2011 WL 1467648 (Dist. Ct., Nassau Co., 2011) (assault charge dismissed where officer allegedly "suffered a severe knee sprain requiring immediate medical attention”); People v. Wong, 29 Misc.3d 1229(A), 2010 WL 4922641 (Dist. Ct., Nassau Co., 1st Dist., 2010) (charge facially sufficient where it was alleged that defendant punched complainant “in the face and surrounding area of the neck and back,” and that complainant “fell to the floor and had substantial pain in the right eye, and a laceration in the back of [his] head”); People v. Calixto, 29 Misc.3d 798, 908 N.Y.S.2d 339 (Crim. Ct., N.Y. Co., 2010) (allegations sufficient where accusatory instrument included no allegations by alleged victim, but witness described assault and stated that defendant was punching victim so hard that witness could hear it over New York City noise, witness heard victim’s cries, and victim, who remained on ground after

assault, had redness on forehead); People v. Smiley, 28 Misc.3d 1229(A), 2010 WL 3430303 (Crim. Ct., Queens Co., 2010) (allegations sufficient where defendant allegedly slapped daughter in face and back and shoved her against wall, causing redness and swelling to her face and substantial pain, annoyance and alarm); People v. Singleton, 25 Misc.3d 1232(A), 2009 WL 4110867 (Dist. Ct., Nassau Co., 2009) (assault charge facially sufficient where it was alleged that defendant head-butted complainant, causing large contusion and swelling to left eye and "a lot of" pain); People v. Cruz, 22 Misc.3d 1110(A), 2009 WL 116957 (Dist. Ct., Nassau Co., 2009) (assault charge sufficient where accusatory instrument alleged that defendants, acting in concert, punched and kicked complainant, causing substantial pain, “dislocation of the left elbow and shoulder,” and “a left arm ... broken in two places/elbow, shoulder”; however, allegations about complainant’s medical diagnosis would have come from medical personnel and thus was hearsay); People v. Strong, 179 Misc.2d 809, 689 N.Y.S.2d 341 (App. Term, 9th & 10th Jud. Dist., 1999), lv denied 94 N.Y.2d 830, 702 N.Y.S.2d 600 (1999) (charge facially insufficient where information alleged that defendant hit and kicked complainant and caused a lot of pain and injury to the victim’s back and side); People v. Abraham, 2002 WL 1821804 (White Plains City Ct., 2002) (assault charge sufficient where defendant allegedly struck child across legs and buttocks with belt, causing welts, bruising and substantial pain); People v. Carlson, 2002 WL 977201 (City Ct., West. Co., 2002) (allegation that complainant lost consciousness, and received 3 staples to close cut, established impairment); People v. Lugo, 181 Misc.2d 811, 695 N.Y.S.2d 685 (Sup. Ct., Kings Co., 1999) (since Grand Jury proceeding is held shortly after incident, victim need not establish permanency of injuries in first degree assault case).

d. Auto Theft Cases

After riding as a passenger in a stolen car, the respondent is usually charged with grand larceny, criminal possession of stolen property, unauthorized use of a vehicle, and, if the car is damaged, criminal mischief. Typically, the petition is supported by two depositions: one signed by the arresting officer, who alleges that the respondent was in the car and describes any damage that was apparent; and one signed by the owner of the vehicle, who alleges, inter alia, that the respondent did not have permission or

consent to take, use or damage the vehicle. The owner's deposition sometimes approximates the time of the theft by stating the time when the owner last saw the car, and the time when the owner returned to find that it was gone.

The mere presence of a person in a stolen car is not sufficient evidence of possession, since a passenger does not ordinarily exercise "dominion or control" (see PL §10.00[8]) over the vehicle. People v. Rivera, 82 N.Y.2d 695, 601 N.Y.S.2d 470 (1993) (there was no evidence establishing when defendant entered and what part, if any, he played in the taking); Matter of Garfield H., 185 A.D.2d 846, 587 N.Y.S.2d 351 (2d Dept. 1992); People v. Wynn, 177 A.D.2d 1016, 578 N.Y.S.2d 36 (4th Dept. 1991), lv denied 79 N.Y.2d 954, 583 N.Y.S.2d 209 (1992). Consequently, a possession charge is defective if the respondent was a passenger and the allegations do not establish that the respondent acted in concert in exercising dominion and control. See People v. Simmons, 139 Misc.2d 859, 528 N.Y.S.2d 984 (Crim. Ct. Bronx Co., 1988); but see People v. Sheldon, 180 Misc.2d 876, 693 N.Y.S.2d 818 (Sup. Ct., Queens Co., 1999) (allegations sufficient where incident took place at 1:00 a.m., the co-defendant was driving with a screwdriver inside the ignition key cylinder, the glove compartment had been broken into, and defendant and the co-defendant were in possession of tools commonly used in the theft of autos). Even when the respondent was driving the vehicle, a grand larceny or a criminal possession charge is arguably defective when the owner's deposition does not establish that the theft was recent. See Matter of James C., 179 A.D.2d 639, 578 N.Y.S.2d 589 (2d Dept. 1992) (allegations insufficient where respondent was arrested in car ten days after theft). In such cases, a motion to dismiss a criminal mischief charge could also be made, since there are usually no facts establishing that the respondent had any part in causing the damage. See Matter of James C., supra, 179 A.D.2d 639.

e. Lack Of Owner's Or Victim's Deposition

When a crime victim fails to appear for trial, the prosecution may have difficulty proving the charges when it relies solely on the testimony of a person who witnessed the respondent's suspicious behavior. But see Matter of Timothy L., 71 N.Y.2d 835, 527 N.Y.S.2d 734 (1988), aff'g 128 A.D.2d 63, 514 N.Y.S.2d 971 (1st Dept. 1987); People v. Nur, 52 A.D.3d 351, 861 N.Y.S.2d 287 (1st Dept. 2008), lv denied 11 N.Y.3d 792

(sufficient evidence of robbery despite lack of testimony by victim where officer saw defendant assault victim and then flee with bag that was subsequently recovered and linked to victim; attack had no apparent motive other than robbery); People v. Stafford, 173 A.D.2d 233, 569 N.Y.S.2d 441 (1st Dept. 1991) (evidence sufficient where police saw defendant snatch money from person's hand, and defendant made incriminating statements); Matter of Carlos M., 131 A.D.2d 367, 516 N.Y.S.2d 673 (1st Dept. 1987), lv denied 70 N.Y.2d 608, 521 N.Y.S.2d 224 (evidence sufficient where witness saw assailants push unknown victim to ground, "stomp and mash" his head against ground, and rip his pocket); Matter of Kevin B., 128 A.D.2d 63, 514 N.Y.S.2d 971 (1st Dept. 1987).

Similarly, if there is no supporting deposition signed by the victim, or by the owner of certain property, the petition may be defective. Compare People v. Hurtado, 116 Misc.2d 897, 456 N.Y.S.2d 660 (Crim. Ct. N.Y. Co., 1982) with People v. Henry O., 47 Misc.3d 136(A) (App. Term, 2d Dept., 2015) (criminal mischief charge facially sufficient in absence of allegations regarding relationship between employer of building's director of security and building owner that established that director of security was building custodian); People v. Lopatin, 6 Misc.3d 131(A), 800 N.Y.S.2d 353 (App. Term, 1st Dept. 2005), lv denied 4 N.Y.3d 888 (harassment charge sufficient where officer alleged that defendant shoved pelvic area into victim's face and pushed her in the chest area and caused her to stagger); Matter of Wilson G., 214 A.D.2d 670, 625 N.Y.S.2d 261 (2d Dept. 1995) (grand larceny and related offenses were adequately alleged where officer stated that respondent was sitting in driver's seat of complainant's car with the engine running, that the steering column and door lock were damaged, that respondent possessed a screwdriver, and that another person was outside car removing hubcaps); People v. Wayne, 161 Misc.2d 996, 615 N.Y.S.2d 826 (Crim. Ct. N.Y. Co., 1993) (allegations sufficient where defendant drove up in a car and parked it, and then popped out another car's trunk lock with a screwdriver and removed a car battery and antenna) and People v. Salomon, 131 Misc.2d 1075, 502 N.Y.S.2d 392 (Crim. Ct. N.Y. Co., 1986) (allegations sufficient where officer saw defendant break into car, crawl in through back and take radio equalizer).

f. Value

A grand larceny, criminal possession of stolen property or criminal mischief charge is defective when an owner alleges value or the amount of damage in conclusory terms, and states no basis of knowledge. See People v. Lopez, 79 N.Y.2d 402, 583 N.Y.S.2d 356 (1992) (owner's affidavit containing conclusory allegations cannot sustain an indictment); see also Matter of Joshua VV., 68 A.D.3d 1172, 889 N.Y.S.2d 754 (3rd Dept. 2009) (grand larceny charge defective where there was no factual support for allegation regarding value of stolen golf cart); Matter of Basille N., 228 A.D.2d 323, 644 N.Y.S.2d 233 (1st Dept. 1996) (although relatively new car must be worth more than $100, petition did not even contain conclusory allegation).

g. Operability Of Weapon

Since operability is a necessary element, a firearm possession charge must be supported by a ballistics report, or other allegations establishing operability, and, where necessary, that ammunition was live. See Matter of Rodney J., 83 N.Y.2d 503, 611 N.Y.S.2d 485 (1994) (no indication that report was signed by person who did test); People v. Rodriguez, 235 A.D.2d 504, 653 N.Y.S.2d 358 (2d Dept. 1997) (report indicating that officer who signed it did the test was sufficient; it can be inferred that he made original report); Matter of Lavar D., 232 A.D.2d 634, 649 N.Y.S.2d 450 (2d Dept. 1996), lv granted 89 N.Y.2d 811, 657 N.Y.S.2d 403 (1997) (no allegation that ammunition was live); People v. Varricchio, 26 Misc.3d 656, 894 N.Y.S.2d 334 (Albany City Ct., 2009) (criminal possession of weapon charge defective where element of operability of rifle was absent from accusatory instrument); People v. Volkes, 1 Misc.3d 829, 771 N.Y.S.2d 797 (Sup. Ct., Richmond Co., 2003) (no evidence that ammunition was live); Matter of Piterson C., 159 Misc.2d 499, 605 N.Y.S.2d 180 (Fam. Ct. Kings Co., 1993) (lab report sufficient where it contained sentence reading "Gun and ammo tested by the undersigned and are operable"); see also People v. McCullum, 184 Misc.2d 70, 706 N.Y.S.2d 616 (Crim. Ct., N.Y. Co., 2000) (mace container); but see People v. Dang, 172 Misc.2d 274, 658 N.Y.S.2d 820 (Crim. Ct., Kings Co., 1997) (basis for officer's identification of stun gun need not be set forth).

Operability can be established circumstantially with evidence that the weapon was

fired. See People v. Wilkerson, 184 Misc.2d 949, 711 N.Y.S.2d 308 (Crim. Ct., N.Y. Co., 2000) (circumstantial evidence established operability of mace where victim suffered swelling and burning).

Regarding gravity knives, see People v. McCain, 30 N.Y.3d 1121 (2018) (factual allegations of misdemeanor complaint established reasonable cause to believe defendant possessed "dangerous knife," triggering statutory presumption of unlawful intent, where it was alleged that "knife was activated by deponent to an open and locked position through the force of gravity"); People v. Sans, 26 N.Y.3d 13 (2015) (reasonable cause standard met where officer stated that he had "observed the defendant remove a knife from the defendant's pocket, . . . recovered said knife from the defendant," and "tested the . . . knife and determined that it was a gravity knife, in that it opens with centrifugal force and locks automatically in place"); People v. Dreyden, 15 N.Y.3d 100 (2010) (complaint defective where it included only conclusory statement that officer observed defendant in possession of gravity knife and recovered one from him; officer should at least explain briefly, with reference to training and experience, how he/she formed belief that object was gravity knife); People v. Deveaux, 50 Misc.3d 133(A) (App. Term, 2d Dept., 2016) (where officer alleged that he opened knife and it locked into place through centrifugal force, failure to specify precise motion used to open knife did not render allegations insufficient).

Regarding switchblade knives, see People v. Berrezueta, 31 N.Y.3d 1091 (2018) (possession of switchblade knife charge not jurisdictionally deficient; dissenting judge notes that while statute refers to spring mechanism in knife handle, it was alleged that mechanism was in blade).

h. Criminal Trespass

While noting that there is "an increasing number of cases charging criminal trespass in the lobbies, hallways, or other common areas of apartment buildings," the court held in People v. Outlar, 177 Misc.2d 620, 677 N.Y.S.2d 430 (Crim. Ct., N.Y. Co., 1998) that an accusatory instrument was defective where it alleged that defendant was inside the hallway of a apartment building, that the location is posted with signs saying "Tenants and their Guests Only," and that defendant gave a residence address different

from the location and stated that he was there to see a girl whose apartment he did not know. The Court noted, inter alia, that there were no allegations establishing that defendant passed through a locked entrance; that the owner's 7-week-old allegation concerning the signs did not establish that they were there when defendant was arrested; that, even assuming the owner's allegations were sufficiently current, there are no allegations establishing that the signs are posted conspicuously enough to afford proper notice and that defendant saw them; and that the allegations did not establish that defendant knew he was acting unlawfully. See also People v. Barnes, 26 N.Y.3d 986 (2015) (information facially sufficient where it alleged that officer observed defendant in lobby of New York City Housing Authority building beyond vestibule and posted "No Trespassing" sign; and that, when asked, defendant stated that he did not reside at building, and was not able to identify resident who had invited him; word "public" in phrase "public housing" refers to ownership, not access, and areas of publicly-owned buildings may be restricted from public use by locked door or front desk); People v. Moore, 48 Misc.3d 143(A) (App. Term, 2d Dept., 2015) (charge facially sufficient where it was alleged that, at about 12:25 a.m., defendant was in courtyard of New York City Housing Authority building where there were "clearly posted signs" stating "no trespass" and "anyone who remains unlawfully upon these premises will be prosecuted," and defendant admitted he did not reside in premises, gave different address as residence, and could provide no legitimate reason for presence); People v. Barnes, 40 Misc.3d 133(A) (App. Term, 1st Dept., 2013) (charge facially sufficient where information alleged that defendant was observed inside lobby of public housing apartment building "beyond the vestibule," beyond posted "No Trespassing" sign; that defendant provided address different from that building; and that defendant was not "an invited guest in that [he] was unable to provide the identity of a resident" in building); People v. Norales, 88 A.D.3d 499 (1st Dept. 2011), lv denied 18 N.Y.3d 960 (charge facially sufficient where it was alleged that defendant entered lobby through locked door notwithstanding conspicuous no-trespassing sign, and, when questioned, did not claim to be resident or invited guest); People v. Livingston-Boyd, 32 Misc.3d 143(A) (App. Term, 1st Dept., 2011), lv denied 18 N.Y.3d 860 (charge facially sufficient where it was alleged that defendant was inside

lobby of public housing project building with “no trespassing” signs, locked entrance door and “buzzer system;” that defendant lived elsewhere; and that although defendant stated he was there to visit unnamed “friend” in specified apartment, officer, upon investigation, could not locate anyone who had given defendant permission to be in building); People v. Flores, 21 Misc.3d 141(A), 2008 WL 5005190 (App. Term, 2d & 11th Jud. Dist., 2008) (charge facially sufficient where information alleged that building was public housing project; that defendant was present in building and was observed leaving building; that defendant's presence in building was in violation of posted rules and regulations; and that defendant did not have permission to enter or remain in building; dissenting judge asserts that information fails to indicate what posted rules and regulations were, and did not describe conspicuous posting or even indicate that posting was, in fact, conspicuous); People v. McCray, 21 Misc.3d 127(A), 2008 WL 4344900 (App. Term, 1st Dept., 2008) (criminal trespass charge facially sufficient where complaint alleged that within space of one hour defendant was twice observed inside lobby of “clean halls” apartment building marked by “no trespassing” signs and equipped with locked entrance door and “intercom/buzzer system”; that defendant initially stated he was on his way to visit unnamed “friend,” who, defendant admitted, lived at different address; and that defendant was otherwise unable to explain presence inside building); People v. Messina, 32 Misc.3d 318, 919 N.Y.S.2d 814 (Crim. Ct., N.Y. Co., 2011) (People not required to negate possibility that defendant had been invited guest of tenant; allegation that defendant admitted he did not reside in building is sufficient); People v. Weatherspoon, 23 Misc.3d 1139(A), 2009 WL 1651507 (Crim. Ct., Kings Co., 2009) (charge facially defective where complaint alleged that defendant was not tenant, and was on first floor of Housing Authority building, a dwelling posted with signs saying, “Loitering and trespassing in lobby roof hallway and stairs is not permitted” and “Violators are subject to arrest and prosecution by the Police Department”; complaint lacked facts regarding where defendant was in building in relation to signs, whether defendant was in or beyond lobby, or how it was determined that defendant was not licensed or privileged to be in building); People v. Bazile, 22 Misc.3d 1102(A), 2008 WL 5435955 (Crim. Ct., Queens Co., 2008) (while noting conflict between Appellate Term in First and Second

Department, court holds that criminal trespass in the third degree allegations is facially sufficient if it is alleged that defendant did not have permission to enter or remain in building; there is no need to allege additional facts regarding defendant's license or privilege); People v. Garcia, 21 Misc.3d 732, 870 N.Y.S.2d 851 (Sup. Ct., Bronx Co., 2008) (charge dismissed as facially insufficient where complaint alleged, inter alia, that in Clean Halls Apartment Building, officer observed defendant exit lobby; that dwelling had conspicuously posted NO TRESPASSING sign indicating that only tenants and their guests were allowed on premises; that defendant's home address was another location; that defendant stated that he was visiting the fifth floor, went with police to fifth floor and pointed to Apartment 5B and indicated that he had just visited that apartment, and officer could not locate anyone in occupied apartment who could verify defendant's claim but court could not consider that hearsay allegation); People v. Johnson, 8 Misc.3d 137(A), 803 N.Y.S.2d 20 (App. Term, 1st Dept., 2005) (complaint charging violation of PL §140.15 sufficient where defendant was observed inside lobby of apartment building with locked entrance door and "buzzer system" and marked by "no trespassing" and other signs restricting access, defendant acknowledged that he lived elsewhere and indicated that he was there to visit individual identified as "Cookie" in apartment 1-G, and "Cookie" was not present in apartment or listed on tenant's roster); People v. Darling, 8 Misc.3d 127(A), 801 N.Y.S.2d 779 (App. Term, 1st Dept., 2005) (very similar to Johnson); People v. Hunter, N.Y.L.J., 6/28/00, at 26, col. 1 (App. Term, 1st Dept.) (complaint sufficient where supporting deposition alleged that defendant was observed inside lobby of public housing apartment building in which “No Trespassing” signs were posted, and that defendant admitted she did not live or know anyone in building); People v. James, 28 Misc.3d 345, 902 N.Y.S.2d 293 (Crim. Ct., N.Y. Co., 2010) (charge of criminal trespass in second degree under P.L. §140.15, which requires that person “knowingly enters or remains unlawfully in a dwelling,” was defective where premises were New York City Housing Authority building since P.L. §140.10[e] specifically addresses trespassing in Housing Authority buildings and thus §140.15 does not apply; also, complaint alleges that defendant was inside lobby, beyond vestibule and posted “No Trespassing” sign, but failed to establish there was a conspicuously posted sign); People v. Spann, 8 Misc.3d

654, 796 N.Y.S.2d 227 (Crim. Ct., N.Y. Co., 2005) (complaint charging violation of PL §140.15 defective where defendants were observed leaving apartment through front door, defendants' home addresses differed from building address, and defendants asserted they were visiting tenant in apartment but could not give tenant's full name; court notes, inter alia, that deliverymen, repairmen, inspectors, and the like often do not know or cannot recall names of persons whose apartments they visit for legitimate reasons); People v. Scott, 8 Misc.3d 428, 797 N.Y.S.2d 847 (Crim. Ct., Queens Co., 2005) (complaint charging violation of PL §140.15 sufficient where officer observed defendant inside lobby beyond vestibule and beyond posted sign saying "No Trespassing," and defendant stated "I don't live here but my girlfriend lives in 3B," but officer determined that defendant was not invited guest by going to 3B, where tenant said that nobody had been there all day).

i. Respondent's Age

When age is an element of the crime, there must be nonhearsay allegations establishing the respondent's age. Matter of Ricki I., 157 A.D.3d 792 (2d Dept. 2018) (nonwaivable jurisdictional defect where there were no sworn, non-hearsay allegations as to respondent's age, which is element of unlawful possession of weapons by persons under 16); In re Brandon P., 106 A.D.3d 653 (1st Dept. 2013) (age element of unlawful possession of weapons by persons under 16 properly alleged where deponent stated she was respondent's sister, and it is generally recognized that ages of family members are common knowledge within family); In re Devon V., 83 A.D.3d 469, 921 N.Y.S.2d 47 (1st Dept. 2011) (failure to include allegations establishing age element of unlawful possession of weapons by persons under 16 is nonwaivable jurisdictional defect; here, officer alleged that he determined respondent was 15 years old but there was no explanation of how officer learned age); People v. Reale, 26 Misc.3d 1208(A), 2010 WL 60139 (Dist. Ct., Nassau Co., 2010) (no non-hearsay supporting officer's conclusion that defendant was "20"). However, it appears that when age is not an element, the bare allegation that the respondent was under sixteen years of age at the time the alleged conduct [as required by FCA §311.1(3)(c)] is sufficient. Matter of Anthony J., 143 A.D.2d 668, 532 N.Y.S.2d 924 (2d Dept. 1988) (jurisdiction established where delinquency

petition alleged age, and respondent never alleged that he was outside court's jurisdiction); Matter of Donald F., 97 A.D.2d 980, 468 N.Y.S.2d 784 (4th Dept. 1983).

j. Identity Of Perpetrator Or Witness - Matter of Jonathan YY., 134 A.D.3d 1344 (3d Dept. 2015) (petit larceny charge dismissed where witness asserted that he observed "youth" take sunglasses and that youth was "later identified as [respondent]" by unspecified person); People v. Santini, 59 Misc.3d 223 (Crim. Ct., N.Y. Co., 2018) (where officer alleged that complainant, while looking at defendant, stated that "he" engaged in charged acts, court declined to infer that complainant intended to communicate identification of defendant as perpetrator); People v. Rumph, 50 Misc.3d 1206(A) (Crim. Ct., N.Y. Co., 2016) (court infers that "the defendant" in statement attributed by officer to complainant is charged defendant where defendant had been charged by time officer swore out information); People v. Gaddy, 51 Misc.3d 1205(A) (Crim. Ct., N.Y. Co., 2016) (allegation that complainant heard "defendant's voice" during threatening telephone call not conclusory since there was reasonable inference that complainant knew it was defendant because she knew voice); People v. Garcia, 48 Misc.3d 1204(A) (Crim. Ct., N.Y. Co., 2015) (allegations insufficient where there was conclusory allegation that defendant made threatening phone call without explanation as to how complainant knew defendant was caller); People v. Richards, 43 Misc.3d 1206(A) (Crim. Ct., Kings Co., 2014) (allegation that complainant "was contacted by [defendant] ... via text message" sufficient to identify defendant); People v. Goris, 39 Misc.3d 1217(A) (Crim. Ct., Kings Co., 2013) (allegations insufficient because term "defendant" was used instead of "complainant" to denote who recognized caller's voice and number, and allegations were not corrected); People v. Thomas, 38 Misc.3d 1212(A) (Dist. Ct., Suffolk Co., 2013) (charges facially defective where allegations refer to "subject" and "driver" but did not name defendant); People v. Maradiaga, 36 Misc.3d 1222(A) (Dist. Ct., Nassau Co., 2012) (identification not established where it appeared that unidentified individual told complainant it was defendant who was driving vehicle and provided defendant's name); Matter of Christopher T., 26 Misc.3d 1213(A), 2010 WL 276711 (Fam. Ct., Queens Co., 2010) (allegations failed to establish that respondent was person who assaulted his mother where 911 caller stated that perpetrator was kicking and

beating his mother, officer was told by Chantilly Jackson that her son hit her and by respondent that "he got into a fight with his mom," but there was no supporting deposition signed by Jackson, there was no evidence that respondent was son of Jackson and was son who assaulted her, and it was possible that Jackson was referring to son other than respondent and that respondent's statement referred to different incident); see also People v. Espinoza, 43 N.E.3d 993 (Ill. 2015) (name of alleged victim is element that must be alleged in charging instrument); People v. Pandiello, 54 Misc.3d 496 (Crim. Ct., N.Y. Co., 2016) (information failed to allege basis for detective's assertion that person with whom defendant was speaking was named J.M. or that person was J.M. protected by order of protection; court rejects People's contention that "basic pedigree information" is sufficiently reliable and refuses to apply pedigree exception to hearsay rule); People v. Gregg, 33 Misc.3d 1223(A) (Crim. Ct., Kings Co., 2011) (charge of criminal possession of controlled substance defective where there were different shield numbers for detective; People must prove correct identity of detective making allegation).

7. Form Depositions

To facilitate the filing of accusatory instruments, law enforcement agencies use form depositions that can be prepared by a prosecutor or police officer and then read and signed by a witness. Sometimes, check marks are placed in appropriate boxes, and there are few facts added by the preparer. The use of such depositions has been upheld. People v. Hohmeyer, 70 N.Y.2d 41, 517 N.Y.S.2d 448 (1987). When a necessary check mark is missing, a motion to dismiss could be made.

8. Signature And Identity Of Deponent

It appears that an undercover officer may sign a deposition with his or her number. Compare People v. Burton, 156 Misc.2d 257, 592 N.Y.S.2d 242 (Crim. Ct. Queens Co., 1992) with People v. Kaya, 17 Misc.3d 1114(A) (Crim. Ct., Kings Co., 2007) (where handwriting in undercover's supporting deposition in instant case was distinctly different from handwriting in three other cases, and thus someone other than officer may have signed supporting deposition, court orders hearing to determine whether signature is authentic); People v. Zavulunov, 165 Misc.2d 205, 629 N.Y.S.2d 934 (Crim. Ct., Kings Co., 1995) (accusatory instrument defective where officer's badge number was redacted

on copy filed with court and copy given to defendant) and People v. Drucker, 159 Misc.2d 205, 603 N.Y.S.2d 651 (Crim. Ct. N.Y. Co., 1993) (although badge number was in deposition, it was not in complaint, and officer did not allege that he was same informant mentioned in complaint).

In Matter of Ernst B., 177 Misc.2d 22, 675 N.Y.S.2d 805 (Fam. Ct., Monroe Co., 1998), the court held that the petition was sufficient where the 4-year-old complainant signed with an "X" and an officer signed as a witness to the child's signature.

In People v. Quinones, 190 Misc.2d 648, 739 N.Y.S.2d 889 (Crim. Ct., Kings Co., 2002), it was held on right of confrontation grounds that an information was defective where it did not include the name of the complainant.

In People v. Johnson, 31 Misc.3d 145(A), 2011 WL 2086372 (App. Term, 9th & 10th Jud. Dist., 2011), it was held that electronic signatures may be used to verify supporting depositions. See also People v. Brothers, 58 Misc.3d 664 (Crim. Ct., Kings Co., 2017) (supporting deposition subscribed and verified through combination of electronic mail and telephone conversations); People v. Rodriguez, 50 Misc.3d 1223(A) (Crim. Ct., Queens Co., 2016) (complaint properly converted into information by electronically signed supporting deposition where ADA submitted affidavit regarding contacts with complainant establishing complainant's awareness of significance of signature); People v. Sanchez, 47 Misc.3d 612 (Crim. Ct., Queens Co., 2015) (similar to Rodriguez); People v. Corletta, 12 Misc.3d 666, 814 N.Y.S.2d 514 (Webster Justice Ct., 2006).

In People v. Jackson, 17 Misc.3d 788, 844 N.Y.S.2d 841 (Crim. Ct., N.Y. Co., 2007), the court found adequate verification where the officer's signature on the supporting deposition was an oval, and noted that under the definition of "signature" in General Construction Law §46, a "mark" is acceptable.

9. Copies Of Deposition

Apparently, a copy of a sworn deposition may be filed in support of the petition. See Matter of Lamont D., 247 A.D.2d 615, 668 N.Y.S.2d 495 (2d Dept. 1998), lv denied 92 N.Y.2d 804, 677 N.Y.S.2d 779 (court cites CPLR §2101[e]); In re Samuel E., 240 A.D.2d 251, 658 N.Y.S.2d 306 (1st Dept. 1997).

10. Verification

Supporting depositions must be verified, and unverified documents are jurisdictionally defective and must be treated as a nullity. See CPLR §§ 2309(a), 3023, 3113; Matter of Neftali D., 85 N.Y.2d 631, 628 N.Y.S.2d 1 (1995) (certified, but unverified, report is not sufficient); Matter of Markim Q., 22 A.D.3d 498, 803 N.Y.S.2d 646 (2d Dept. 2005), rev'd on other grounds 7 N.Y.3d 405, 822 N.Y.S.2d 746 (2006) (school record was admissible under CPLR 4518, but was not verified or attested to by person with knowledge of the facts); Matter of Evan U., 244 A.D.2d 691, 664 N.Y.S.2d 189 (3rd Dept. 1997) (hospital discharge instructions were unsworn and bore no certification as hospital records); People v. Paris, 49 Misc.3d 1212(A) (Crim. Ct., Kings Co., 2015) (Domestic Incident Report signed by complainant in block letter converted complaint to information); People v. Sistrunk, 49 Misc.3d 922 (City Ct., Cayuga Co., 2015) (court accepts practice of using supporting deposition that merely states that affiant has "read the accusatory instrument filed in this action. The facts stated in that instrument to be on information furnished by me are true upon my personal knowledge"); People v. Defreitas, 48 Misc.3d 569 (Crim. Ct., N.Y. Co., 2015) (charge facially insufficient where complainant's sworn allegations appeared only on second page of Domestic Incident Report and did not identify defendant); People v. Richards, 43 Misc.3d 1206(A) (Crim. Ct., Kings Co., 2014) (Domestic Incident Report, a police document signed by complainant subject to penalty of perjury, meets statutory definition of supporting deposition); People v. Concepcion, 36 Misc.3d 551, 945 N.Y.S.2d 543 (Crim. Ct., N.Y. Co., 2012) (supporting deposition need not indicate date affiant subscribed and verified document); People v. Jennifer Elbaz, NYLJ 1202548647508 (Dist. Ct., Nassau Co., 2012) (signature does not have to appear below form notice advising deponent of potential criminal liability); People v. Cordeiro, 18 Misc.3d 1135(A), 859 N.Y.S.2d 897 (Town of Webster Justice Ct., Monroe Co., 2008) (unverified Alcohol Influence Report and Addendum could not be considered in determining sufficiency of officer's supporting deposition); but see Matter of Jermaine G., 38 A.D.3d 105, 828 N.Y.S.2d 160 (2d Dept. 2007) (petition sufficient where unsworn statement of five-year-old complainant was corroborated by deposition of his mother); Matter of Gregory J., 209 A.D.2d 191,

618 N.Y.S.2d 282 (1st Dept. 1994), lv denied 85 N.Y.2d 807, 628 N.Y.S.2d 50 (1995) (by first raising issue on appeal, respondent waived claim that Notary's commission had expired); People v. McMoore, 15 Misc.3d 1117(A), 839 N.Y.S.2d 435 (Crim. Ct., Kings Co., 2007) (incorrect signing date was oversight, and harmless error).

However, the methods of verification prescribed in CPL §100.30(1) may be utilized in lieu of CPLR verification. Matter of Neftali D., supra, 85 N.Y.2d 631. See, e.g., Matter of Tyrone M., 138 A.D.3d 1119 (2d Dept. 2016) (petition not defective where child complainant whose deposition contained recitation that false statements were punishable as misdemeanor could not have been charged criminally or adjudicated a juvenile delinquent for making false statements); People v. Ryan, 185 Misc.2d 477, 713 N.Y.S.2d 447 (Dist. Ct., Suffolk Co., 2000) (information defective where officer filled it out and signed it in one room before it was submitted to desk sergeant in another room, and it was not sworn to before the sergeant).

Statements in a verified pleading are presumed to have been made upon the knowledge of the person verifying the pleading. CPLR 3023. See In re Bernard T., 250 A.D.2d 532, 672 N.Y.S.2d 882 (1st Dept. 1998), lv denied 92 N.Y.2d 808, 678 N.Y.S.2d 594.

The deposition must be filed along with the petition; it may not be incorporated by reference. People v. Grabinski, 189 Misc.2d 307, 731 N.Y.S.2d 583 (App. Term, 2d Dept., 2001), lv denied 96 N.Y.2d 939, 733 N.Y.S.2d 379.

11. Reduction Of Charge

It appears that rather than dismiss a defective charge, the court may reduce it to a lesser included charge that is adequately supported by the allegations and does not change the theory of prosecution. See Matter of Anthony Y., 293 A.D.2d 792, 740 N.Y.S.2d 487 (3d Dept. 2002); People v Ceballos, 98 A.D.2d 475, 471 N.Y.S.2d 860 (2d Dept. 1984).

12. Retroactivity Of Appellate Rulings

Appellate decisions which apply the nonhearsay requirement for the first time to particular fact patterns must be applied retroactively, since those decisions merely elucidate the established rule and do not create a new rule of law. Matter of Miguel R.,

227 A.D.2d 263, 642 N.Y.S.2d 879 (1st Dept. 1996); Matter of Taihem F., 222 A.D.2d 322, 635 N.Y.S.2d 613 (1st Dept. 1995), lv denied 88 N.Y.2d 806, 646 N.Y.S.2d 986 (1996); see also Matter of C.S., 12 Misc.3d 302, 813 N.Y.S.2d 639 (Fam. Ct., Bronx Co.) (using its inherent authority to vacate prior order, court, following recent Second Department decision, vacates placement and dismisses defective violation petition).

B. Removal Petitions

When a removal order is filed pursuant to Article 725 of the Criminal Procedure Law, the removal order must be accompanied by criminal pleadings and proceedings other than untranscribed minutes of any hearing or trial, grand jury proceeding or plea, and those documents are "deemed to be a petition ... containing all of the allegations required by [§311.1] ...." FCA §311.1(7). See Matter of Celeste S., 187 A.D.2d 274, 589 N.Y.S.2d 433 (1st Dept. 1992) (removal "petition" need not be verified pursuant to FCA §311.1[4]). However, removal petitions are not excused from the nonhearsay requirement in FCA §311.2(3). See Matter of Michael M., 3 N.Y.3d 441, 788 N.Y.S.2d 299 (2004) (defect is jurisdictional and nonwaivable); Matter of Desmond J., 93 N.Y.2d 949, 694 N.Y.S.2d 338 (1999) (petition sufficient where felony complaint and other papers transferred from criminal court did not satisfy §311.2, but presentment agency handed up complainant's supporting deposition at initial appearance, since that was the earliest stage at which the deposition could have been filed).

Technical requirements for the removal order itself appear in CPL §725.05. See, e.g., Matter of Steven L., 101 Misc.2d 320, 420 N.Y.S.2d 1011 (Fam. Ct. Monroe Co., 1979); Matter of Eric K., 100 Misc.2d 796, 420 N.Y.S.2d 135 (Fam. Ct. Richmond Co., 1979) (removal order must provide adequate notice of charges, including date, time and place of incident); but see Matter of Juan Q., 248 A.D.2d 998, 670 N.Y.S.2d 137 (4th Dept. 1998) (information required by CPL §725.05 appeared in the order of removal or in the pleadings and proceedings transferred to Family Court).

The respondent is not entitled to be served with any grand jury minutes. Matter of Larry W., 55 N.Y.2d 244, 448 N.Y.S.2d 452 (1982). The papers are arguably defective if criminal "pleadings and proceedings," including transcribed minutes, are not forwarded to the family court along with the removal order. See Matter of Shawn S., 111 Misc.2d

744, 445 N.Y.S.2d 53 (Fam. Ct., Queens Co., 1981); Matter of Martin D., 100 Misc.2d 339, 418 N.Y.S.2d 1003 (Fam. Ct. Kings Co., 1979). However, even if the absence of "pleadings and proceedings" can lead to dismissal, Matter of Desmond J., 93 N.Y.2d 949 would allow for amendment of the petition. See also In re Jonathan G., 51 A.D.3d 403, 857 N.Y.S.2d 435 (1st Dept. 2008) (dismissal not required where respondent was not served with copy of removal order on first post-verdict appearance in family court, and respondent received proper notice of charges by way of verdict itself, rendered in open court in his presence, and same information was repeated in his presence following removal to family court and order of removal was served on him in family court a few days after initial appearance).

C. Designated Felony Petitions

1. Predicate Felonies

When a designated felony charge is based upon the existence of one or two prior felony findings, the presentment agency may properly allege a designated felony act by providing certified copies of the prior findings. See FCA §311.1(5). However, attaching such documents is not the exclusive means of alleging prior findings. See Matter of Robert S., 240 A.D.2d 314, 659 N.Y.S.2d 444 (1st Dept. 1997); Matter of Warren W., 216 A.D.2d 225, 629 N.Y.S.2d 28 (1st Dept. 1995) (removal petition not defective where papers and pleadings from criminal court contained proof of prior findings); Matter of Daniel A., 178 Misc.2d 90, 678 N.Y.S.2d 247 (Fam. Ct., Bronx Co., 1998) (court could take judicial notice of findings listed in petition). But cf. People v. Hussein, 177 Misc.2d 139, 677 N.Y.S.2d 653 (Crim. Ct., Kings Co., 1998) (without documents to inspect, court would not take judicial notice of prior order issued by another judge where People wanted court to "take it on faith" that an order was issued). It is not required that the fact-findings resulted in an adjudication of delinquency, or that the first felony resulted in an adjudication prior to the commission of the second felony. See Matter of Manuel R., 89 N.Y.2d 1043, 659 N.Y.S.2d 825 (1997). See also In re Jason B., 254 A.D.2d 298, 685 N.Y.S.2d 197 (1st Dept. 1999) (findings on multiple felony counts of one petition involving one criminal transaction constitute one predicate). However, a motion to dismiss should be made if the acts alleged were not committed after the prior fact-

findings. See FCA §301.2(8)(v), (vi).

Arguably, the record of the prior findings should be excluded from the court file, and the "designated felony act" marking should be struck from the petition in the court file, so the trial judge will not be aware of the respondent's record. See Matter of Samuel P., 102 Misc.2d 875, 424 N.Y.S.2d 837 (Fam. Ct. Kings Co., 1980); Matter of Luis R., 98 Misc.2d 994, 414 N.Y.S.2d 997 (Fam. Ct. N.Y. Co., 1979). In Matter of Samuel P., supra, 102 Misc.2d 875, the Corporation Counsel was substituted for the District Attorney so that the trial judge would remain ignorant of the prior cases.

2. Designated Felony Act Marking

If the petition charges a crime that falls within the designated felony act definition in FCA §301.2(8), the petition shall so state, and the term “designated felony act petition” shall be prominently marked on the petition. FCA §311.1(5). When a removal petition contains a designated felony charge, the family court shall annex to the removal order a sufficient statement and marking to make it a designated felony act petition. FCA §311.1(7). If the required "designated felony act" marking is missing, the child’s attorney should initially remain silent, since it is not yet clear that the petition cannot be amended to cure this defect. If there is a designated felony finding after trial, the attorney should immediately move to dismiss the designated felony charge on the ground that the absence of the required marking precludes a designated felony finding. See Matter of Stephan F., 274 A.D.2d 584, 712 N.Y.S.2d 49 (2d Dept. 2000) (first degree robbery charge dismissed where marking was absent); In re Jose M., 245 A.D.2d 173, 666 N.Y.S.2d 177 (1st Dept. 1997), appeal dism’d 92 N.Y.2d 845, 677 N.Y.S.2d 75 (1998) (designated felony finding vacated where respondent’s copy of petition did not contain marking due to copying error); Matter of David M., 229 A.D.2d 345, 645 N.Y.S.2d 302 (1st Dept. 1996) (use of prefix “E” in docket number, which has meaning to those privy to court coding system, is not a substitute for marking); Matter of Warren W., supra, 216 A.D.2d 225 (absence of marking is nonwaivable jurisdictional defect); Matter of Andrew D., 99 A.D.2d 510, 470 N.Y.S.2d 683 (2d Dept. 1984). See also Matter of Karriem E., 206 A.D.2d 476, 614 N.Y.S.2d 575 (2d Dept. 1994) (removal order was marked in manner that notified respondent of designated felony charge); Matter of Darryl W., 183

Misc.2d 475, 703 N.Y.S.2d 359 (Fam. Ct., Queens Co., 1999) (dismissal denied where "E" docket number prefix was used and clerk had executed required statement).

D. Allegation Of Elements Of Offense In Each Count

Each count of the petition must "assert facts supporting every element of the crime charged and the respondent's commission thereof with sufficient precision to clearly apprise the respondent of the conduct which is the subject of the accusation...." FCA §311.1(3)(h). See Matter of Shakeim C., 97 A.D.3d 675 (2d Dept. 2012) (court erred in dismissing petition on ground that it did not "specify which complainant is the alleged victim in each count," and "there is no separate accusation or count to address each crime charged"; petition and supporting depositions identified alleged victims, alleged perpetrators, and crimes charged); People v. Rosado, 64 A.D.2d 172, 409 N.Y.S.2d 216 (1st Dept. 1978) (weapons counts were defective where they failed to specify whether possession was during robbery or at time of arrest). Although FCA §311.2(3) is derived from the CPL rule governing informations, §311.1(3)(h) is derived from CPL §200.50(7)(a), which applies to indictments.

In criminal cases, a failure to "clearly apprise" the defendant of the charges is a non-jurisdictional defect which can be cured by a bill of particulars. People v. Iannone, 45 N.Y.2d 589, 412 N.Y.S.2d 110 (1978). Similarly, the counts of a delinquency petition, which do little more than track the language in the Penal Law, are not usually open to attack pursuant to FCA §311.1(3)(h). See People v. Iannone, supra, 45 N.Y.2d at 599 ("it is usually sufficient to charge the language of the statute unless that language is too broad" [citation omitted]); see also People v. Rodriguez, 97 A.D.3d 246, 945 N.Y.S.2d 313 (1st Dept. 2012), lv denied 19 N.Y.3d 1028 (jurisdictional sufficiency determined by reference to underlying factual allegations; failure to properly recite name of crime is irregularity waived by guilty plea). Indeed, it is difficult to argue for a different rule in delinquency cases, since evidentiary facts must be alleged in the supporting depositions.

A failure to allege an essential element of an offense in the count of an indictment is a jurisdictional defect. See People v. Iannone, supra, 45 N.Y.2d at 598-599; People v. Best, 132 A.D.2d 773, 517 N.Y.S.2d 582 (3rd Dept. 1987). But see People v. Ray, 71 N.Y.2d 849, 527 N.Y.S.2d 740 (1988) (indictment sufficient where, although word

unlawfully was absent, indictment incorporated PL §265.03 - criminal possession of a weapon in the second degree - by employing title of statute). However, because the requirements in Article Three are a hybrid derived from rules governing indictments and informations, it is not clear that a delinquency charge would be defective where the count in the petition omits an element, but the depositions contain evidentiary facts establishing a prima facie case. While it is true that a charge in an information is defective if an element is not alleged, it is the information as a whole, including the factual portion, that must be examined. See, e.g., People v. Hall, 48 N.Y.2d 927, 425 N.Y.S.2d 56 (1979); People v. Case, 42 N.Y.2d 98, 396 N.Y.S.2d 841 (1977). And, although the omission of an essential element led to dismissal in Matter of Isaac W., 89 A.D.2d 831, 453 N.Y.S.2d 432 (1st Dept. 1982), the petition in that case pre-dated the enactment of FCA Article Three, and, therefore, was filed pursuant to former FCA §731, which contained no prima facie requirement.

E. Duplicitous Counts

Family Court Act §311.1(2) provides that a petition "shall charge at least one crime and may, in addition, charge in separate counts one or more other crimes..." (emphasis supplied). The same language is found in CPL §200.20(1). See also CPL §100.15(2). In addition, §311.1(3)(d) requires "a separate accusation or count addressed to each crime charged, if there be more than one...." The same language is found in CPL §200.50(3). Although CPL §200.30 is the only CPL provision expressly prohibiting "duplicitous" counts that charge more than one offense, it appears that the bar against duplicitous counts applies to informations. People v. Todd, 119 Misc.2d 488, 463 N.Y.S.2d 729 (Crim. Ct. N.Y. Co., 1983). The bar should also be applied to delinquency petitions. A duplicitous count fails to give the respondent fair notice of the charges and makes it unclear what crime a fact-finding covers. Indeed, for those reasons, a duplicitous count is void. People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790 (1986), reargument denied 69 N.Y.2d 823, 513 N.Y.S.2d 1028 (1987).

The child’s attorney should pay particular attention when a sex crime allegation has been made by a very young child. In such a case, a count that alleges repeated behavior over a period of time may be duplicitous unless the crime as defined is a

continuing offense. See People v. Beauchamp, 74 N.Y.2d 639, 541 N.Y.S.2d 977 (1989); People v. Keindl, supra, 68 N.Y.2d 410; People v. Dalton, 27 A.D.3d 779 (3d Dept. 2006), lv denied 7 N.Y.3d 754; People v. Algarin, 166 A.D.2d 287, 560 N.Y.S.2d 771 (1st Dept. 1990); People v. Jones, 165 A.D.2d 103, 566 N.Y.S.2d 590 (1st Dept. 1991), lv denied 77 N.Y.2d 962, 570 N.Y.S.2d 496; People v. MacAfee, 76 A.D.2d 157, 431 N.Y.S.2d 149 (3rd Dept. 1980).

Below are other examples of duplicitous counts.

> People v. Bauman, 12 N.Y.3d 152, 878 N.Y.S.2d 235 (2009) (counts charging intentional and depraved indifference assault dismissed where defendants allegedly caused injury to victim by means of "a baseball bat[,] and/or a frying pan[,] and/or a vacuum cleaner[,] and/or a hammer[,]," and committed eleven acts over eight month period; depraved indifference assault can be continuing crime and element of depravity can be alleged by establishing course of conduct, but indictment was defectively pleaded).
>
> People v. Villalon, 161 A.D.3d 486 (1st Dept. 2018) (criminal contempt count duplicitous where defendant's alleged violation of order of protection by regularly showing up at complainant's apartment over course of about a month and 20 days constituted distinct crimes).
>
> People v. Montgomery, 104 A.D.3d 1291 (4th Dept. 2013) (count duplicitous where People's theory was that defendant possessed both uncut cocaine and cocaine in sandwich bag that were in jacket).
>
> People v. Jackson, 174 A.D.2d 444, 572 N.Y.S.2d 891 (1st Dept. 1991), appeal dism'd 80 N.Y.2d 112, 589 N.Y.S.2d 300 (1992) (conviction on one count of possession of a weapon reversed where defendant and two co-defendants were charged in four counts with possession of four weapons, but counts did not specify which weapon related to which count).
>
> People v. Stanley, 173 A.D.2d 658, 571 N.Y.S.2d 28 (2d Dept. 1991) (conviction reversed where, although defendant was charged with one count of burglary, evidence showed that he entered the apartment twice).
>
> People v. Rosado, supra 64 A.D.2d 172 (two weapon

possession counts became duplicitous when court interpreted each of them as relating to possession during the robbery and at the time when the defendants were arrested).

People v. Matthew Ongteco, 24 Misc.3d 1201(A), 2009 WL 1675993 (Crim. Ct., Kings Co.) (petit larceny count charging defendant with multiple purchases with complainant's credit card not duplicitous where allegations demonstrated continuous crime and general fraudulent plan)

People v. Battershield, 4 Misc.3d 1015(A), 798 N.Y.S.2d 344 (Sup. Ct., Kings Co., 2004) (counts duplicitous where People failed to separately charge possession of narcotics found in 3 different locations).

In People v. Wells, 7 N.Y.3d 51, 817 N.Y.S.2d 590 (2006), the Court of Appeals held that a count charging defendant with first degree murder for shooting at 2 detectives was not duplicitous where the evidence at trial failed to specify which officer defendant intended to kill, because the officer defendant intended to kill was not an element of the crime. See also People v. Flanders, 25 N.Y.3d 997 (2015) (where counts alleged that defendant used .380 semi-automatic pistol and .22 rifle in crime, counts not duplicitous since charges did not require proof that defendant used both weapons; although defendant used two guns, it was one incident).

A duplicitous count claim on appeal is subject to preservation requirements. People v. Allen, 24 N.Y.3d 441 (2014) (non-facial duplicity, like facial duplicity, must be preserved); People v. Becoats, 17 N.Y.3d 643 (2011) (duplicitous count claim unpreserved; exception to preservation requirement for "mode of proceedings" errors not applicable).

F. Multiplicitous Counts - See People v. Alonzo, 16 N.Y.3d 267, 920 N.Y.S.2d 302 (2011) (where evidence shows single, uninterrupted attack in which attacker gropes several parts of victim's body, attacker may be charged with only one count of sexual abuse).

F. Date/Time/Location Of Offense

Family Court Act §311.1(3)(g) requires that each count contain a statement "that the crime charged therein was committed on, or on or about, a designated date, or

during a designated period of time...." See also CPL §200.50(6); People v. Schell, 300 A.D.2d 1120, 753 N.Y.S.2d 262 (4th Dept. 2002), lv denied 99 N.Y.2d 632, 760 N.Y.S.2d 114 (2003) (phrase "up to" certain age generally refers to period ending on day person reaches that age, but in this case, where accusatory instrument also specified calendar years in which offenses occurred, charges should be read as covering period through child's specified age and through that calendar year).

Regarding allegations of the location of the offenses, see People v. Ramcharran, 2018 NY Slip Op 51146(U) (Crim. Ct., Queens Co., 2018) (accusatory instrument dismissed, and amendment not permitted, where it contained incorrect location and People informed defendant of correct location on eve of trial nearly two years after arraignment; defendant's ability to conduct timely and thorough investigation was compromised, and he was, for example, unable to seek video footage).

Generally, the petition is not rendered defective where there are extrinsic facts demonstrating that the accused could not have committed the charged offense. People v. Peals, 143 A.D.3d 535 (1st Dept. 2016), lv denied 28 N.Y.3d 1149 (indictment not jurisdictionally defective where it incorrectly alleged date on which defendant was apparently incarcerated).

Petition sufficiency issues can arise from discrepancies between dates (or other facts) in the petition and supporting depositions. People v. Warren, 17 Misc.3d 27, 844 N.Y.S.2d 563 (App. Term, 2d & 11th Jud. Dist., 2007) (even assuming information could be amended, there would be fatal inconsistency between information and deposition); People v. Caravousanos, 2 Misc.3d 137(A), 784 N.Y.S.2d 922 (App. Term, 9th & 10th Jud. Dist., 2004) (where record on appeal did not indicate that People moved to amend the accusatory instrument to reflect the correct date, and information was verified on date before alleged date of offense, there was no reasonable cause to believe that defendant committed the offense charged); People v. Parrilla, 285 A.D.2d 157, 730 N.Y.S.2d 301 (1st Dept. 2001), lv denied 97 N.Y.2d 657, 737 N.Y.S.2d 58 (accusatory instrument containing correct time periods and also time periods post-dating filing date not jurisdictionally defective and may be amended); People v. Negron, 49 Misc.3d 392 (Crim. Ct., Kings Co., 2015) (discrepancy between complaint and deposition as to which

officer recovered drugs did not render accusatory instrument invalid; so long as it is clear that deposition refers to same incident as rest of accusatory instrument, mistakes by officer who swore out original complaint may be corrected by deposition based on first-hand knowledge); People v. Walcott, 47 Misc.3d 1217(A) (Crim. Ct., N.Y. Co., 2015) (complainant's supporting deposition converted complaint into information even though it containrf facts - date, time and number of incidents - that varied from those in complaint); People v. Donadeo, 44 Misc.3d 1202(A) (Crim. Ct., Queens Co., 2014) (discrepancy as to time of offense in complaint and deposition - 8:13 p.m. in one and 12:45 p.m. in the other - did not render accusatory instrument defective); People v. Benjamin, 28 Misc.3d 1237(A), 2010 WL 3633873 (Mount Vernon City Ct., 2010) (information dismissed where date of offense was off by a year and officer affirmed information using date that preceded offense itself; People were required to move to correct date); People v. D'Andrea, 35 Misc.3d 1223(A) (Crim. Ct., Richmond Co., 2012) (inconsistency between accusatory instrument and supporting deposition as to place and time of alleged crime did not require dismissal); People v. McMoore, 15 Misc.3d 1117(A), 839 N.Y.S.2d 435 (Crim. Ct., Kings Co., 2007) (1:30 a.m. was same as "approximately" 1:20 a.m. for purposes of corroborating accusatory instrument); People v. Stridiron, 175 Misc.2d 16, 667 N.Y.S.2d 621 (Crim. Ct., Queens Co., 1997) (court finds it unclear whether accusatory instrument and supporting document refer to same incident because one refers to July 29, 1997 and the other to July 30, 1997).

Sometimes, because of an adult witness' faulty memory or a child's inability to specify a time, the presentment agency will not be able to state with specificity the date and/or the approximate time of day the alleged acts occurred. Although an indictment "must provide the accused with fair notice of the nature of the charges against him, and of the manner, time and place of the conduct underlying the accusations, so as to enable him to answer to the charges and to prepare an adequate defense [citations omitted]," the statutory requirement "neither requires the exact date and time, nor does it restrict the length of the designated period of time which may be stated [citation omitted]." People v. Keindl, supra, 68 N.Y.2d at 416-417.

When a child is involved, the reasonableness of the time periods alleged

depends upon the capacity of the child to discern, "if not exact dates, at least seasons, school holidays, birthdays, or other events which could establish a frame of reference to assist [the child] in narrowing the time spans alleged." People v. Keindl, supra, 68 N.Y.2d at 420. Compare People v. Sedlock, 8 N.Y.3d 535, 838 N.Y.S.2d 14 (2007) (seven months was unreasonable where complainant was 16 or 17 at times of offenses and was, by all accounts, intelligent, and she provided some exact dates for prior offenses); People v. Beauchamp, supra, 74 N.Y.2d 639 (nine month period was excessive); People v. Keindl, supra, 68 N.Y.2d 410 (ten to sixteen month periods were excessive where children were eight to sixteen years of age, and, therefore, were capable of establishing a frame of reference to assist them in narrowing the time spans); People v. Atta, 126 A.D.3d 713 (2d Dept. 2015) (counts alleging acts spanning at least four years as to one child, and approximately one year as to other child, dismissed where District Attorney, in effort to specify period that was not unreasonably excessive, drafted indictment to divide time periods mostly into two-month intervals; although the indictment may have been facially sufficient, trial testimony revealed that complainants lacked ability to particularize date and time of alleged offenses); People v. Clevenstine, 68 A.D.3d 1448, 891 N.Y.S.2d 511 (3rd Dept. 2009), lv denied 14 N.Y.3d 799 (count alleging single act of sexual intercourse between April 1, 2006 and January 18, 2007 dismissed where victim was 13 and turned 14 during that time, and her testimony, given when she was 16, did not reveal significant cognitive difficulties or inability to recall events); People v. Kratzert, 24 Misc.3d 130(A), 2009 WL 1886860 (App. Term, 9th & 10th Jud. Dist., 2009) (sexual abuse charge defective where accusatory instrument alleged that acts were committed "on or about and between the 18th day of April, 1998 and the 17th day of April, 2002"); People v. Bennett, 57 A.D.3d 688, 868 N.Y.S.2d 314 (2d Dept. 2008) (sex crime charges dismissed due to unreasonable length of time alleged where indictment stated that crime occurred “on or about and between June of 2001 and December of 2001,” and, in amended bill of particulars, People asserted that crimes occurred on two separate occasions, “while it was warm out and while the victim's mother was at the grocery store,” and "approximately two weeks" later; court notes, inter alia, that victim testified that second

incident occurred when mother took victim's brother to doctor, and thus People should have inquired as to when mother took brother to doctor and/or tried to obtain brother's medical records, that amended bill of particulars stated that incidents occurred when weather was warm but victim testified that incidents occurred in middle of second grade school year, which would have been during winter, and arrest and indictment did not occur until more than two years after latest date specified, and inability of victim, who was 11 years old at time of trial, to further narrow down time frame may be attributable to the delay); People v. LaPage, 53 A.D.3d 693, 860 N.Y.S.2d 329 (3rd Dept. 2008) (charges facially sufficient where incident allegedly took place in "late summer or early fall of 2006, when [14-year-old victim] had begun school classes for the year" and occurred on a weekend shortly after victim had returned to school and at time when defendant's girlfriend had gone on vacation to visit family in Georgia, and complainant recalled that it was first time defendant used condom; however, charge facially insufficient where complainant only alleged that incident occurred on weekend at defendant's home sometime in summer of 2004 despite fact that complainant claimed she spent nearly every weekend at defendant's home during that period and that "some form of sexual abuse occurred almost every weekend that she was there"); People v. Irvine, 52 A.D.3d 866, 859 N.Y.S.2d 264 (3rd Dept. 2008), lv denied 11 N.Y.3d 737 (counts alleging sexual abuse occurring "between 1998 and 1999," and count alleging sexual abuse occurring "on or about 2002," were defective); People v. Aaron V., 48 A.D.3d 1200, 850 N.Y.S.2d 790 (4th Dept. 2008) (count defective where it set forth 12-month period, and complainant was 13 or 14 years old during that time period and thus was capable of discerning at least seasons, school holidays, birthdays, or other events which could establish frame of reference to assist her in narrowing time spans alleged); People v. Pryce, 41 A.D.3d 983, 840 N.Y.S.2d 156 (3rd Dept. 2007), lv denied 9 N.Y.3d 880 (periods "in or around 1993 and 1994" and "in or around September, 1995 to June, 1996" were excessive); People v. Vogt, 172 A.D.2d 864, 569 N.Y.S.2d 461 (2d Dept. 1991) (ten month time period was excessive); People v. Corrado, 161 A.D.2d 658, 556 N.Y.S.2d 95 (2d Dept. 1990) (five month period was excessive "[i]n light of the questionable nature of the investigation"); People v. Romero, 147 A.D.2d 358, 537

N.Y.S.2d 523 (1st Dept. 1989) (five month period was excessive); People v. Mobarhan, 49 Misc.3d 1214(A) (Crim. Ct., Queens Co., 2015) (harassment charges dismissed where it was alleged that on numerous occasions from February 1, 2014 to February 17, 2015, defendant, the 16-year-old complainants' teacher, placed his hand on one complainant's inner thigh, kissed her on cheek and forehead, and called her personal phone and told her he loved her, and kissed second complainant on forehead and repeatedly told her she is beautiful and he loves her) and People v. Evangelista, 1 Misc.3d 873, 771 N.Y.S.2d 791 (Crim. Ct., Bronx Co., 2003) (time span of 6½ months excessive where sex offense complainant was 14 years old)

with People v. Watt, 84 N.Y.2d 948, 620 N.Y.S.2d 817 (1994) (using People v. Morris standard, court holds that five month periods were not excessive); People v. Morris, 61 N.Y.2d 290, 473 N.Y.S.2d 769 (1984) (twenty-four day period not excessive); People v. Sinha, 84 A.D.3d 35, 922 N.Y.S.2d 275 (1st Dept. 2011), aff'd 19 N.Y.3d 932 (no error where indictment charged that sex acts occurred on or about month of June 1996, and, at trial over 10 years later, 13-year-old complainant, who did not report crime for many years, was unable to say whether it was June, July or August 1996, but knew it was after regular school year had ended and he was in summer school); People v. Johnson, 24 A.D.3d 967, 805 N.Y.S.2d 696 (3rd Dept. 2005), lv denied 6 N.Y.3d 814 (allegation that defendant abused 10-year-old complainant on 5 occasions between Christmas 2001 and Easter 2002 was sufficient); People v. Oglesby, 12 A.D.3d 857, 787 N.Y.S.2d 401 (3rd Dept. 2004), lv denied 5 N.Y.3d 792 (defendant had sufficient information where indictment, as amplified by bill of particulars, alleged that acts of rape and sodomy against 13-14-year-old victim occurred "in or about late October or early November, 1991," "March 1-June 30, 1991," and in "June and July or August, 1991"; court notes that victim was initially discouraged from reporting incidents by mother, and crimes were committed while victim and defendant were alone); People v. Rosas, 306 A.D.2d 91, 759 N.Y.S.2d 866 (1st Dept. 2003) (6-week period was reasonable where that was best recollection of defendant's 14-year-old daughter, who was living with him at timer crimes occurred); People v. Latouche, 303 A.D.2d 246, 755 N.Y.S.2d 833 (1st Dept. 2003), lv denied 100 N.Y.2d 595, 766 N.Y.S.2d 171 (2003) (thirty-seven day

period not excessive where sixteen-year-old child first reported rape several years later, and ten-year period not excessive where continuing offense occurred almost daily); People v. Green, 250 A.D.2d 143, 683 N.Y.S.2d 597 (3rd Dept. 1998), lv denied 93 N.Y.2d 873, 689 N.Y.S.2d 435 (1999) (ten-month period not excessive); People v. Gutkaiss, 206 A.D.2d 584, 614 N.Y.S.2d 462 (3rd Dept. 1994) (time periods such as "during the Winter of `87" were not excessive where 4 years had elapsed before victims revealed crimes); People v. Khatib, 166 A.D.2d 668, 561 N.Y.S.2d 88 (2d Dept. 1990) (periods of ten days to one month were not excessive); People v. Barrett, 166 A.D.2d 657, 561 N.Y.S.2d 465 (2d Dept. 1990), lv denied 77 N.Y.2d 875, 568 N.Y.S.2d 918 (1991) (thirty day periods not excessive); People v. Mendoza, 166 A.D.2d 377, 561 N.Y.S.2d 183 (1st Dept. 1990), lv denied 77 N.Y.2d 880, 568 N.Y.S.2d 923 (1991) (periods ranging from one month to three months were not excessive); Matter of Robert H., 152 A.D.2d 572, 543 N.Y.S.2d 498 (2d Dept. 1989) (three month period not excessive); People v. Alston, 31 Misc.3d 1201(A), 2011 WL 1105669 (Crim. Ct., Kings Co., 2011) (time intervals not excessive where it was alleged that acts with 14-year-old complainant occurred “on or about and between October 1, 2010 and November 6, 2010,” and “on or about and between November 6, 2010 and December 31, 2010”) and People v. Kuffuor-Afriyie, 2009 WL 2184367 (Crim. Ct., Kings Co., 2009) (in case in which time periods were not excessive, defendant not entitled to specific dates and times of church attendance and medical appointments, and reasons why complainant was at defendant's residence and why defendant took complainant home; such discovery would “transpose the requirement that defendant receive adequate notice of the charge against him into an opportunity for pre-trial discovery more akin to that afforded in a civil case,” and defense could obtain information as to dates and times of church services and choir practice). See also People v. Watt, 81 N.Y.2d 772, 593 N.Y.S.2d 782 (1993) (Appellate Division failed to consider relevant factors when it held that five month period was a per se unreasonable time span). A time period of several weeks or a couple of months might not be excessive if the allegations involve a continuing course of conduct against a child with whom the respondent has had regular contact. However, such a time frame would substantially impair the respondent's ability

to prepare a defense if all the acts allegedly occurred on the same day, since the possibility of raising an alibi defense would effectively be precluded by the broad time frame.

In People v. Keindl, supra, the Court of Appeals recognized a "continuous crime" theory, which "permit[s] repeated acts of sexual molestation on young children within the family to be treated as one continuous crime' because generally, the offenses are committed within the privacy of the home; the victims are children of tender years who are unable to remember specific dates, and from whom the defendant is able to demand secrecy; there are rarely any adult witnesses; and the abuse emerges as a pattern of conduct over a significant period of time [citations omitted]." 68 N.Y.2d at 420. In 1996, the Legislature added 2 new crimes to the Penal Law in an apparent effort to address the charging problems created by Keindl and its progeny. See PL §130.75 (Course of sexual conduct against a child in the first degree) and PL §130.80 (Course of sexual conduct against a child in the second degree); People v. Palmer, 7 A.D.3d 472, 778 N.Y.S.2d 144 (1st Dept. 2004), lv denied 3 N.Y.3d 710 (3½-year period not excessive).

Of course, when an unimpaired adult is involved, the prosecution is held to a stricter standard when alleging time frames. People v. Park, 41 Misc.3d 1219(A) (Crim. Ct., Queens Co., 2013) (aggravated harassment charges defective where phone calls allegedly were made between November 11, 2011 at 12:00 p.m. and April 3, 2013 at 1:00 p.m., and court infers that complaining witness is neither a minor child nor, for some other reason, incapable of providing more specific information).

With respect to whether a defect of this type is jurisdictional, see People v. Rozario, 20 Misc.3d 76, 864 N.Y.S.2d 674 (App. Term, 9th & 10th Jud. Dist., 2008) (where information alleges time frame that is on its face unreasonable, defect is jurisdictional, but where time frame is only arguably unreasonable, issue is non-jurisdictional and preservation is required).

G. Double Jeopardy

When a defective petition has been dismissed, there is no double jeopardy or statutory bar to a new prosecution even if the dismissal occurred after jeopardy

attached. See CPL §40.30(4); People v. Key, 45 N.Y.2d 111, 408 N.Y.S.2d 16 (1978). Consequently, although it can be argued that the judge must authorize a new prosecution after a mid-trial dismissal order, see CPL §40.30(4); Matter of Sena v. Zittell, 81 A.D.2d 245, 440 N.Y.S.2d 377 (3rd Dept. 1981), the child's attorney cannot automatically preclude further prosecution by withholding a dismissal motion until after the commencement of trial.

However, it can be argued that the prosecution cannot take an appeal from an order dismissing the petition after the trial has commenced. See Matter of Leon H., 83 N.Y.2d 834, 611 N.Y.S.2d 498 (1994); FCA §§ 365.1(2), 365.2.

H. Speedy Trial

When a petition has been dismissed pursuant to FCA §311.2(3), or withdrawn [see CPLR 3217; Matter of Lydia DD., 94 A.D.3d 1385 (3d Dept. 2012)], and a new petition has been filed, the statutory speedy trial period (see FCA §340.1) must be measured from the date of the respondent's initial appearance in the first prosecution. Matter of Tommy C., 182 A.D.2d 312, 588 N.Y.S.2d 916 (2d Dept. 1992). Thus, withholding a dismissal motion until after the initial sixty-day speedy trial limit has expired may be advisable. Arguably, a dismissal order constitutes adequate grounds for a reasonable delay until the presentment agency can file a new petition. However, since it is unfair to penalize the respondent for the presentment agency's failure to file an adequate accusatory instrument, it can also be argued that a dismissal order can never constitute good cause or special circumstances, particularly when the defect should have been obvious in the light of controlling court decisions.

I. PINS Substitution

When a juvenile delinquency petition is converted to a "PINS" petition during the pre-fact-finding stage pursuant to FCA §311.4(1), the requirements of FCA §311.2(3) no longer apply. Matter of Jason O., 197 A.D.2d 784, 602 N.Y.S.2d 952 (3rd Dept. 1993). However, when a PINS adjudication is made pursuant to FCA §311.4(2) after the respondent admits allegations contained in the delinquency petition, the requirements of §311.2(3) still apply. Matter of Na-Towi Z., 199 A.D.2d 937, 606 N.Y.S.2d 98 (3rd Dept. 1993).

J. Probation And Conditional Discharge Violations

A petition alleging that an order of probation or conditional discharge has been violated is filed by the probation service when it has reasonable cause to believe that a violation has occurred. FCA § 360.2(1); see Matter of Joshua M., 59 A.D.3d 1073, 872 N.Y.S.2d 806 (4th Dept. 2009), lv denied 12 N.Y.3d 712 (no error where violation of probation petition stated that it was "being filed at the request of" the court, but petition did not state that court "directed" presentment agency to file petition and there is no proof that it was court alone that prompted filing).

The petition must contain non-hearsay allegations in the factual part of the petition or in supporting depositions that establish, if true, each violation. FCA §360.2(2); see Matter of Markim Q., 22 A.D.3d 498, 803 N.Y.S.2d 646 (2d Dept. 2005), rev'd on other grounds 7 N.Y.3d 405, 822 N.Y.S.2d 746 (2006) (school record admissible under CPLR 4518 but not verified by person with knowledge of facts); Matter of Shannon "F", 276 A.D.2d 847, 714 N.Y.S.2d 159 (3rd Dept. 2000) (petition supported by attendance record defective in absence of proof that record was part of petition or was business record maintained by Probation); Matter of Steven DD., 243 A.D.2d 890, 663 N.Y.S.2d 330 (3rd Dept. 1997) (allegations of truancy and failure to participate in counseling were insufficient in absence of depositions from attendance officer or mental health counselor; even if the probation officer maintained records that would be admissible as business records, no such documents were attached to petition). But see In re Raul P., 292 A.D.2d 245, 739 N.Y.S.2d 678 (1st Dept. 2002), lv denied 98 N.Y.2d 607, 746 N.Y.S.2d 457 (2002) (petition sufficient where respondent's father alleged that he observed respondent in possession of what father believed to be marijuana).

However, the insufficiency of nonhearsay allegations is not a jurisdictional defect, and thus may be cured by amendment and may not be raised for the first time on appeal. Matter of Markim Q., supra, 7 N.Y.3d 405. Although one judge has interpreted the holding in Markim Q. to mean that a violation petition with insufficient nonhearsay allegations need not be dismissed, Matter of Y.E.B., 13 Misc.3d 1242(A), 831 N.Y.S.2d 363 (Fam. Ct., Nassau Co., 2006), the Court of Appeals did not suggest such a rule.

The petition must provide a reasonable description of the time and place and

manner in which the violation occurred. Matter of Jessica N., 264 A.D.2d 778, 695 N.Y.S.2d 379 (2d Dept. 1999).

IV. Amendment Of Petition

A. Generally

Family Court Act §311.5 provides as follows:

> 1. At any time before or during the fact-finding hearing, the court may, upon application of the presentment agency and with notice to the respondent and an opportunity to be heard, order the amendment of a petition with respect to defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like, when such amendment does not tend to prejudice the respondent on the merits. Upon permitting such an amendment, the court must, upon application of the respondent, order any adjournment which may be necessary to accord the respondent an adequate opportunity to prepare his defense.
> 2. A petition may not be amended for the purpose of curing:
> (a) a failure to charge or state a crime; or
> (b) legal insufficiency of the factual allegations; or
> (c) a misjoinder of crimes.

What appears to be a "technical" amendment of the petition may, in a given case, result in prejudice to the respondent. The respondent may have prepared a defense in reliance upon the specific time or location alleged, or the particular theory of prosecution that appears in the petition. The presentment agency's request for an amendment during trial may come at a time when the respondent has already conducted cross-examination or called witnesses in reliance upon the original charges. In such cases, the child's attorney must be prepared to clearly articulate the reasons why an amendment would be prejudicial.

B. Curing Legal Insufficiency Of Factual Allegations

A defect in the nonhearsay allegations may not be cured by amendment. FCA §311.5(2)(b). See Matter of Detrece H., 78 N.Y.2d 107, 571 N.Y.S.2d 899 (1991). But see Matter of Desmond J., 93 N.Y.2d 949, 694 N.Y.S.2d 338 (1999) (removal petition could be amended by submission of deposition at first appearance in family court); Matter of Vincent B., 239 A.D.2d 925, 659 N.Y.S.2d 594 (4th Dept. 1997) (statute

restricting amendment of original petition does not apply to violation petition); but see Matter of Maurice F., 22 Misc.3d 1134(A), 2009 WL 637652 (Fam. Ct., Bronx Co., 2009) (court grants Presentment Agency's motion to amend counts charging grand larceny to add missing statutory language, "from the person of another," where complainant's supporting deposition includes that language, correct Penal Law section is cited in counts, and no actual lack of notice or prejudice, has been established).

C. Addition Of New Offense

The petition may not be amended to include a count charging a new crime even if the allegations already in the supporting depositions establish a prima facie case. See FCA §311.5(2)(a); Matter of Kenneth C., 114 Misc.2d 676, 452 N.Y.S.2d 176 (Fam. Ct. Richmond Co., 1982); but see People v. Husain, 56 Misc.3d 73 (App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 2017) (when information refers to wrong section of statute, error may be disregarded if allegations provide notice of offense charged, and error may be cured by amendment); People v. Davidson, 122 A.D.3d 937 (2d Dept. 2014), lv denied 25 N.Y.3d 950 (amendment via reduction of count from first degree to second degree assault was not nonwaivable defect); Matter of Daniel D., 21 A.D.3d 488, 799 N.Y.S.2d 821 (2d Dept. 2005) (presentment agency could file new petition charging the new offense); In re Jonathan F., 290 A.D.2d 385, 737 N.Y.S.2d 273 (1st Dept. 2002) (petition sufficient where count referred to wrong section of statute but deposition contained correct citation); People v. Guccione, 16 Misc.3d 512, 837 N.Y.S.2d 552 (Sup. Ct., Kings Co., 2007) (amendment changing erroneous statutory citation did not alter theory presented to grand jury).

D. Changing Date/Time/Location Of Offense

In some cases, a change in the date/time/location of the offense is unimportant, and there is no reasonable basis for an objection. However, if the respondent has obtained alibi witnesses, or otherwise structured a defense in reliance upon the time alleged, an amendment may well be objectionable.

Compare People v. Days, 131 A.D.3d 972 (2d Dept. 2015), lv denied 26 N.Y.3d 1108 (reversible error where, after People became aware of time frame covered by defendant's alibi evidence, they served amended bill of particulars extending time

frame); People v. Warren, 17 Misc.3d 27, 844 N.Y.S.2d 563 (App. Term, 2d & 11th Jud. Dist., 2007) (reversible error where court amended information at trial to conform to victim's testimony placing time of offense eleven hours after time alleged in information; court notes that defense counsel asserted that, had he known of correct time, he might have been able to pursue alibi defense); People v. Plaisted, 1 A.D.3d 805, 768 N.Y.S.2d 236 (3rd Dept. 2003) (reversible error where indictment charged rape that occurred on or about August 2000, and court allowed jury to consider whether rape occurred in August 1999); People v. Bigda, 184 A.D.2d 993, 584 N.Y.S.2d 238 (4th Dept. 1992) (where defendant had prepared a defense showing that he was recovering from heart surgery at the time of the offense and that the victim did not visit him at that time, change of time at trial was reversible error); People v. Covington, 86 A.D.2d 877, 447 N.Y.S.2d 292 (2d Dept. 1982) (where People had served bill of particulars specifying the date and defendant had prepared alibi defense, amendment changing date of offense from August 9 to August 10 was reversible error) and People v. Ramcharran, 2018 NY Slip Op 51146(U) (Crim. Ct., Queens Co., 2018) (accusatory instrument dismissed, and amendment not permitted, where it contained incorrect location and People informed defendant of correct location on eve of trial nearly two years after arraignment; defendant's ability to conduct timely and thorough investigation was compromised, and he was, for example, unable to seek video footage)

with People v. Smith, 137 A.D.3d 1323 (3d Dept. 2016) (less than 2-hour discrepancy did not deprive defendant of opportunity to prepare adequate defense); People v. Kent, 71 A.D.3d 1162, 896 N.Y.S.2d 913 (2d Dept. 2010), lv denied 15 N.Y.3d 752 (no error in change of date from on or about May 26, 2005 to on or about May 18, 2005 where date was not material element of crime); People v. Alexander, 37 A.D.3d 908, 829 N.Y.S.2d 275 (3rd Dept. 2007), lv denied 9 N.Y.3d 839 (no error in amendment of indictment to reflect that drug sale occurred at 9:15 a.m. rather than 9:15 p.m. where defendant was not offering alibi defense); People v. Davis, 21 A.D.3d 590, 799 N.Y.S.2d 324 (3rd Dept. 2005) (no error where date of sexual abuse was changed shortly before trial from May 1998 to weekend of August 2, 1997); People v. Grimes, 301 A.D.2d 953, 756 N.Y.S.2d 282 (3rd Dept. 2003), lv denied 99 N.Y.2d 654, 760 N.Y.S.2d 119 (2003)

(amendment changing sex crime dates one year not error where defendant's confession was consistent with amendment, defendant testified that he did not commit any acts at any time in any place, court granted 3-week adjournment, and defendant's alibi notice was served the first day of trial); People v. Harris, 295 A.D.2d 804, 743 N.Y.S.2d 913 (3rd Dept. 2002), lv denied 99 N.Y.2d 536, 752 N.Y.S.2d 596 (2002) (amendment of date of incident from January or February 2000 to first few days of March 2000 did not prejudice defendant); People v. West, 271 A.D.2d 806, 708 N.Y.S.2d 478 (3rd Dept. 2000), lv denied 95 N.Y.2d 893, 715 N.Y.S.2d 386 (no error where date was changed at Huntley hearing from Fall of 1995 to September of 1995, and was later changed again to December); People v. Coston, 151 A.D.2d 595, 542 N.Y.S.2d 353 (2d Dept. 1989) (defendant not denied fair trial where date was changed from June 8 to June 6; since defendant did not call his alibi witness for the amended date because the court ruled that the witness could be cross-examined about his memory of the event after the passage of time, the damage to defendant's case cannot be assessed); People v. Rogers, 141 A.D.2d 870, 530 N.Y.S.2d 834 (2d Dept. 1988) (change in time from 2:30 p.m. to early morning did not prejudice defendant where defense learned of change two weeks before trial and could not prove prejudice); People v. Powell, 137 A.D.2d 730, 524 N.Y.S.2d 815 (2d Dept. 1988) (amendment changing robbery date by one day was proper where defendant had not served alibi notice, and refused offer of adjournment) and People v. Robinson, 119 A.D.2d 598, 500 N.Y.S.2d 768 (2d Dept. 1986) (change of date from June 6 to June 16 was not error where defendant declined offer of three day adjournment to investigate potential alibi witnesses and did not assert that any defense was being prejudiced).

If the evidence at trial places events on a date other than the date cited in the petition, and a motion to amend is not made, it could be argued that, since there is no proof that a crime was committed on the date cited in the petition, the charge must be dismissed. Compare People v. Jones, 37 A.D.3d 1111, 829 N.Y.S.2d 364 (4th Dept. 2007) (no reversal required where there was variance between dates of incidents in indictment and proof at trial; time is not material element and variance was relatively minor) with People v. Roberson, N.Y.L.J., 2/21/91, p. 27, col. 5 (App. Term, 2d and 11th

Jud. Dist.), lv denied 77 N.Y.2d 1000, 571 N.Y.S.2d 925 (1991) (finding of guilt was against the weight of the credible evidence where the offenses were alleged to have taken place in 1987, but, except for one statement made after his recollection had been "refreshed," the complainant only testified concerning events that occurred in 1986).

E. Changing Names Or Number Of Respondents

An amendment to add and/or change a respondent's name is not permissible. People v. Wang, 2003 WL 22718195 (App. Term, 9th & 10th Jud. Dist., 2003); People v. Almendarez, 24 Misc.3d 649, 876 N.Y.S.2d 861 (Dist. Ct., Nassau Co., 2009) (where defendant assumed identity of brother, People could not amend to change defendant's name; courts have permitted amendment where name is misspelled or witness has been incorrectly identified, and when defendant has been indicted under fictitious name, but those cases did not involve assumption of identity of real person); but see People v. Martinez, 52 A.D.3d 68, 855 N.Y.S.2d 522 (1st Dept. 2008), lv denied 11 N.Y.3d 791 (indictment may identify unapprehended defendant solely by DNA markers, and be amended when defendant is identified); Matter of D.P., 17 Misc.3d 1106(A), 851 N.Y.S.2d 57 (Fam. Ct., Nassau Co., 2007) (petition not facially insufficient where victim stated in one deposition that "the male black is unknown to me" and in another deposition that the individual is "Devaun," but respondent's name was spelled "Devon"); People v. Cha Kim Son, 4 Misc.3d 1007(A), 791 N.Y.S.2d 871 (Mt. Vernon City Ct., 2004) (information sufficient where defendant was misidentified in deposition, but facts in deposition were same as those in complaint).

F. Changing Names Or Number Of Victims

It is difficult to establish prejudice where an amendment merely changes the name of the victim or adds the names of new victims. See, e.g., People v. Hartman, 123 A.D.2d 883, 507 N.Y.S.2d 661 (2d Dept. 1986) (no error where amendment changed name of owner of building in which trespass occurred); People v. Barbaran, 118 A.D.2d 578, 499 N.Y.S.2d 186 (2d Dept. 1986) (addition of two victims); People v. Ames, 115 A.D.2d 543, 496 N.Y.S.2d 65 (2d Dept. 1985) (People changed victim from "Amy Vanderpoel, an employee of McDonald's," to "employees of McDonald's"). However, in People v. LaPetina, 34 A.D.3d 836, 828 N.Y.S.2d 72 (2d Dept. 2006), aff'd on other

grounds 9 N.Y.3d 854, 840 N.Y.S.2d 890 (error where name of person injured was changed at trial.

If the petition is confusing with respect to which acts were committed against which victim, and the petition is never amended, dismissal might be appropriate. People v. Van Boom, 14 Misc.3d 1203(A), 831 N.Y.S.2d 361 (Dist. Ct., Nassau Co., 2006).

G. Verification

In Matter of Catrice W., 153 Misc.2d 927, 583 N.Y.S.2d 775 (Fam. Ct. Kings Co., 1992), it was discovered during trial that the presentment agency had not signed the petition (see FCA §311.1[3][k]) and the verification was unsigned (see FCA §311.1[4]). The court allowed the filing of an amended petition bearing the required signature, holding that the absence of a signature is merely a matter of form, and that the respondent waived her right to treat the unverified petition as a nullity by failing to notify the presentment agency with due diligence (see CPLR 3022).

H. Change In Theory Of Prosecution -- Constructive Amendment

An amendment that substantially changes the theory of prosecution is improper since it "tend[s] to prejudice" the respondent. FCA §311.5(1). See, e.g., People v. Barber, 155 A.D.3d 1543 (4th Dept. 2017) (reversible error where defendant was charged with second degree assault on theory that he, inter alia, caused physical injury to victim “by striking her,” but, at trial, victim also testified that she sustained additional injuries when she threw herself from moving vehicle); People v. Cruz, 129 A.D.3d 119 (1st Dept. 2015), lv denied 26 N.Y.3d 971 (court did not err in amending count by changing description of stolen property from “credit card” to “debit card”); People v. Grist, 98 A.D.3d 106 (2d Dept. 2012), lv denied 20 N.Y.3d 1061 (no error in amendment of indictment to change description of property stolen from “credit cards” to “a credit card or debit card”); People v. Levy, 34 Misc.3d 25 (App. Term, 9th & 10th Jud. Dist., 2011) (where People alleged defendant’s reckless “operation” of his vehicle, court erred by permitting People to argue in summation that defendant made reckless “decision” to drive in the first place because he should have known he suffered from epilepsy after previous accident); People v. Ward, 57 A.D.3d 582, 868 N.Y.S.2d 297 (2d Dept. 2008), lv denied 12 N.Y.3d 789 (no error where indictment amended to change description of

weapon allegedly possessed from switchblade knife to gravity knife; People's theory did not change since they still needed to show defendant possessed knife that was per se illegal weapon); People v. Johnson, 227 A.D.2d 927, 643 N.Y.S.2d 260 (4th Dept. 1996) (larceny charge improperly amended to change property from merchandise to cash); People v. Brown, 221 A.D.2d 353, 633 N.Y.S.2d 516 (2d Dept. 1995), lv denied 87 N.Y.2d 919, 641 N.Y.S.2d 601 (1996) (trial court improperly permitted amendment of first degree robbery count to read "used or threatened the immediate use of [a knife]" instead of "displayed what appeared to be [a knife]"); People v. Johnson, 163 A.D.2d 613, 559 N.Y.S.2d 41 (2d Dept. 1990), lv denied 76 N.Y.2d 940, 563 N.Y.S.2d 70 (where defendant was charged with being armed with handgun or revolver, court properly allowed pretrial amendment charging defendant with displaying what appeared to be a pistol or revolver) and People v. Ceballos, 98 A.D.2d 475, 471 N.Y.S.2d 860 (2d Dept. 1984) (no error where, prior to trial, court struck words "and was aided by another person actually present" and reduced charge from second degree robbery to third degree robbery).

Similarly, the court may not, by permitting the introduction of evidence that varies from the allegations in the petition or in a bill of particulars, allow the presentment agency to constructively amend the petition and prove the respondent's guilt under a new theory of prosecution. Compare People v. Roberts, 72 N.Y.2d 489, 534 N.Y.S.2d 647 (1988) (reversal ordered where defendant was charged with striking manslaughter victim in neck area, but proof at trial was that victim was either strangled or hit by extremely accurate karate chop); People v. Grega, 72 N.Y.2d 489, 534 N.Y.S.2d 647 (1988) (where defendant was charged with sex offenses involving physical force, court erred when it charged jury concerning forcible compulsion by express or implied threats; however, since there was clear evidence of physical force, the error was harmless); People v. Bradley, 154 A.D.3d 1279 (4th Dept. 2017) (in manslaughter prosecution, reversible error where, at trial, People pursued theory of recklessness not included in bill of particulars); People v. Graves, 136 A.D.3d 1347 (4th Dept. 2016) (convictions reversed where counts alleged that defendant engaged in oral sexual conduct involving contact between mouth and penis but instruction permitted jury to convict upon finding

that defendant engaged in oral sexual conduct involving contact between mouth and vagina); People v. Martin, 23 Misc.3d 67, 881 N.Y.S.2d 800 (App. Term, 9th & 10th Jud. Dist., 2009) (reversible error where People charged that defendant forcibly touched victim for purpose of “gratifying [his] sexual desire” and did not include alternative theory of “degrading or abusing” victim, but court instructed jury that defendant could be found guilty of forcible touching if he touched sexual or other intimate parts of victim without consent either for purpose of gratifying his sexual desire or for purpose of degrading or abusing victim); People v. Garcia, 29 A.D.3d 255, 812 N.Y.S.2d 66 (1st Dept. 2006), lv denied 7 N.Y.3d 789 (reversible error where People relied on theory that defendant used knife against victim, but court, after summations, indicated that it would consider attempted assault charge based on throwing of milk carton); People v. Ho Chin, 267 A.D.2d 404, 700 N.Y.S.2d 477 (2d Dept. 1999), lv denied 95 N.Y.2d 799, 711 N.Y.S.2d 167 (2000) (reversible error where bill of particulars specified that rape complainant was incapable of consent because she was unconscious after defendant hit her, but People proved at trial that complainant was not unconscious but had instead experienced “dissociative amnesia” and “psychoneurological shock”); United States v. Wozniak, 126 F.3d 105 (2d Cir. 1997) (reversible error where indictment alleged cocaine and methamphetamine transactions, but jury was allowed to convict for marijuana transactions, since defendant might have chosen a different strategy had he been on notice); People v. Fata, 184 A.D.2d 206, 586 N.Y.S.2d 780 (1st Dept. 1992) (reversal where robbery defendant was charged with threatening victim with a knife, but, after defendant testified that she hit victim with a bottle, court allowed jury to consider whether the bottle was a "dangerous instrument"); Matter of James K., 174 A.D.2d 1029, 572 N.Y.S.2d 823 (4th Dept. 1991) (reversal where petition alleged that respondent committed reckless endangerment by putting Drano on playground slide, but court found that respondent recklessly failed to remove Drano from slide); People v. Rodriguez, 164 A.D.2d 832, 559 N.Y.S.2d 725 (1st Dept. 1990) (reversal where defendant was only charged with damaging a car door, but court admitted evidence of damage to ignition); People v. Powell, 153 A.D.2d 54, 549 N.Y.S.2d 276 (4th Dept. 1989) (reversal where defendant was charged with assaulting victim with lamp, but

People presented evidence that defendant also used baseball bat); People v. Davis, 118 A.D.2d 795, 500 N.Y.S.2d 163 (2d Dept. 1986) (where burglary defendant was charged with entering dwelling with intent to steal, court improperly found that defendant entered with intent to commit assault) and People v. Castro, 2002 WL 1899928 (Sup. Ct., Queens Co., 2002) (where People charged reckless endangerment and alleged that defendants threw plexiglass from observation tower, People could not proceed at trial on theory that defendants endangered officers who tried to rescue them from tower) with People v. Dorfeuille, 91 A.D.3d 1023 (3d Dept. 2012) (no error where court constructively amended indictment by clarifying that co-defendants aided each other and not a fourth person); People v. Kozlow, 46 A.D.3d 913, 851 N.Y.S.2d 577 (2d Dept. 2007), lv denied, 10 N.Y.3d 865 (People did not impermissibly change theory of prosecution during summation in nonjury trial since court is presumed to have considered only competent evidence in reaching verdict and court expressly bound itself to the indictment and to evidence relating to the charges); People v. Butler, 191 A.D.2d 503, 594 N.Y.S.2d 338 (2d Dept. 1993), lv denied 82 N.Y.2d 752, 603 N.Y.S.2d 993 (no error where, although defendant was charged with acting in concert in sale of drugs to undercover, People proved that defendant sold drugs to an intermediary who delivered the drugs to the undercover but failed to prove that defendant knew the drugs would go to the undercover) and People v. Osinowo, 28 A.D.3d 1011, 813 N.Y.S.2d 283 (3rd Dept. 2006), lv denied 7 N.Y.3d 792 (no error where indictment alleged that defendant displayed gun, but, at trial, evidence established that a co-defendant had gun).

When the accused is charged as a principal, the prosecution may still proceed at trial on a theory of accessorial liability. See People v. Rivera, 84 N.Y.2d 766, 622 N.Y.S.2d 671 (1995); People v. Alvarez, 158 A.D.3d 587 (1st Dept. 2018); Matter of J.H., 16 Misc.3d 1116(A), 847 N.Y.S.2d 896 (Fam. Ct., Nassau Co., 2007). However, if the prosecution elects to charge the defendant as an accessory, they are limited to that theory. See People v. Boyd, 59 A.D.2d 558, 397 N.Y.S.2d 150 (2d Dept. 1977) (court had no power to delete words, "each aiding the other and being actually present"). Cf. People v. Wilczynski, 97 Misc.2d 307, 412 N.Y.S.2d 239 (Sup. Ct. N.Y. Co., 1977), cert

denied 439 U.S. 1128, 99 S.Ct. 1047 (1979). In delinquency proceedings, the depositions often contain evidentiary facts which provide notice that a theory of accessorial liability will be used at trial, or such a theory is revealed in a bill of particulars. In those cases, a change of theory at trial would be impermissible.

When a mistake in the petition did not mislead the respondent as to the theory of prosecution and could have been cured by amendment during trial, but was not, dismissal may be required. See People v. McKinney, 138 A.D.3d 604 (1st Dept. 2016) (where indictment alleged that defendant possessed cocaine, but drug involved was heroin, proceeding to trial on factually incorrect, non-amended indictment may have raised issues such as variance between indictment and proof); People v. Duell, 124 A.D.3d 1225 (4th Dept. 2015) (preservation not required where evidence at trial varied from limited theories of sexual contact alleged in indictment); People v. Caravousanos, 2 Misc.3d 137(A), 784 N.Y.S.2d 922 (App. Term, 9th & 10th Jud. Dist., 2004) (dismissal ordered where information was verified on a date before the alleged date of the offense, and the People never moved to amend); People v. Rodriguez, 190 A.D.2d 566, 593 N.Y.S.2d 222 (1st Dept. 1993), lv denied 81 N.Y.2d 1019, 600 N.Y.S.2d 207 (conviction reversed where indictment mistakenly charged defendant with possession of heroin, and indictment was never amended to charge defendant with possession of cocaine); see also In re Marvin M., 68 A.D.3d 661, 891 N.Y.S.2d 73 (1st Dept. 2009) (criminal trespass finding reversed where petition limited presentment agency's theory to trespass on school property "in violation of conspicuously posted rules or regulations governing entry and use thereof" and there was no evidence regarding posted rules or regulations; supporting deposition did not cure defect and presentment agency never sought to amend petition).

Finally, when there has been a change in the theory of prosecution at trial, the respondent must object in order to preserve the issue for appeal. See People v. Udzinski, 146 A.D.2d 245, 541 N.Y.S.2d 9 (2d Dept. 1989).

V. Motion To Strike

If the Presentment Agency has included in the petition inadmissible and/or irrelevant material such as allegations regarding an uncharged crime, a motion to strike

could be made pursuant to CPLR 3024(b) (“Scandalous or prejudicial matter. A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading”). Obviously, the attorney for the respondent must consider whether drawing the court’s attention to the extraneous material will do more harm than good in the long run.

CHAPTER SIX

STATUTORY SPEEDY TRIAL

By: Gary Solomon

Table Of Contents

I. Pre-Filing Delay

II. Speedy Initial Appearance

III. Post-Filing Delay When Respondent Is Released

A. The 60-Day Rule

1. Conclusion Of Initial Appearance
2. Removal Cases
3. Effect Of Court-Ordered Probation Adjustment

B. Adjournments

1. Adjournments Within 60-Day Limit
2. Good Cause Finding On Record
3. What Is Good Cause?

C. Successive Adjournments

1. Adjournments Within 90 Days
2. Adjournments Requested By Different Parties
3. Special Circumstances Finding On Record
4. What Are Special Circumstances?

D. "Commencement" Of Trial

1. Prosecutorial Readiness
2. Absence Of Rosario Material
3. Mistrials

E. Superseding Petitions

F. Waiver Of Speedy Trial Rights

G. Effect Of Bench Warrant

1. Background

2. The Due Diligence Requirement
    a. Generally
    b. Adequacy Of Efforts To Determine Respondent's Location
    c. Adequacy Of Efforts To Obtain Respondent's Presence In Court When Location Is Known
    d. Bail Jumping
    e. Post-Return-On-Warrant Delay

IV. Post-Filing Delay When Respondent Is On Remand
    A. A, B and C Felonies
    B. Other Cases
    C. Adjournments
    D. Remedy For Violation
    E. Delays After Hearing Commences
    F. Habeas Relief

V. Motion Practice
    A. Oral Motions
    B. Adequacy Of Motion Papers
        1. Generally
        2. Bench Warrant Cases

VI. "Speedy" Disposition
    A. When Respondent Is Released
    B. When Respondent Is On Remand
    C. Designated Felony Cases
    D. Good Cause And Special Circumstances
    E. Remedy For Violation

VII. Speedy Trial Strategy

VIII. Post-Appeal Delay

I. Pre-Filing Delay

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 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); 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 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 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 - When a proceeding has been removed to the family court pursuant to CPL §725.05, the date of the initial appearance is the date specified in the removal order for the respondent's appearance. FCA §340.1(3). Thus, if administrative errors or delays cause the case to appear on the calendar at a time after the date specified in the order, the child's attorney should argue that the 60 days started running as of the date in the order. 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.

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, 590 N.Y.S.2d 843 (1992).

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. 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).

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. 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. 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); 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; Matter of Kovan Clearance D., 288 A.D.2d 219, 732 N.Y.S.2d 575 (2d Dept. 2001).

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). However, there have been some mixed signals in juvenile delinquency cases. Compare 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. 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. See 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). See also 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. 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.

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 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. 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. 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, _Misc.3d_, 2018 WL 4440632 (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 Disposition

A. When Respondent Is Released - When the respondent is not in detention, the dispositional hearing must commence no later than 50 days after the entry of a fact-finding order. FCA §350.1(2). See Matter of Richard R., 123 A.D.3d 1043 (2d Dept. 2014) (§350.1 sets time limits only for commencement of hearing, not completion); Matter of Frederick Y., 199 A.D.2d 887, 606 N.Y.S.2d 351 (3rd Dept. 1993) (no violation where court rendered fact-finding decision more than 60 days [see CPLR §4213(c)] after hearing, but dispositional hearing was held within 50 days after decision; respondent's remedy was to request a decision from the court after the 60-day delay or commence an article 78 proceeding to compel the issuance of a decision); Matter of Roshon P., 182 A.D.2d 346, 588 N.Y.S.2d 614 (2d Dept. 1992), lv denied 80 N.Y.2d 762, 592 N.Y.S.2d 671 (time starts running upon entry of written order). For good cause shown, the hearing may be adjourned for up to 30 days on the respondent's motion, or up to 10 days on motion of the presentment agency or the court. FCA §350.1(3). Successive adjournments may be granted upon a showing of special circumstances. FCA §350.1(5). The court must justify an adjournment on the record. FCA §350.1(4).

B. When Respondent Is On Remand - When the respondent is detained, the hearing must commence within 10 days after entry of the fact-finding order. FCA §350.1(1). Adjournments may be granted as described in (A) above.

C. Designated Felony Cases - The 10-day remand limit does not apply when the respondent has been found guilty of a designated felony. Thus, the hearing must be commenced within 50 days, and the respondent may be detained during that time.

D. Good Cause And Special Circumstances - Good cause or special circumstances have been found where probation's failure to prepare and obtain

necessary reports was not willful or negligent. Compare Matter of Steven GG., 307 A.D.2d 407, 761 N.Y.S.2d 552 (3rd Dept. 2003) (good cause found where testimony of probation officer was needed); Matter of Douglas L., 232 A.D.2d 489, 648 N.Y.S.2d 165 (2d Dept. 1996), lv denied 89 N.Y.2d 815, 659 N.Y.S.2d 855 (1997) (special circumstances present where court needed mental health evaluation in order to determine least restrictive alternative); Matter of Perry O., 232 A.D.2d 225, 647 N.Y.S.2d 785 (1st Dept. 1996) (first 10-day adjournment justified by need to complete exploration of placement); Matter of Miguel M., 220 A.D.2d 264, 632 N.Y.S.2d 542 (1st Dept. 1995), lv denied 87 N.Y.2d 812, 644 N.Y.S.2d 145 (1996) (court needed probation report in order to determine "least restrictive alternative"); Matter of Jassaan C., 199 A.D.2d 501, 606 N.Y.S.2d 37 (2d Dept. 1994) (special circumstances found where respondent refused to cooperate in completion of psychological evaluation); Matter of Kasheen A., 197 A.D.2d 572, 602 N.Y.S.2d 433 (2d Dept. 1993) (special circumstances found where mental health study was not completed due to respondent's failure to keep appointment); Matter of Eddie M., 196 A.D.2d 25, 607 N.Y.S.2d 682 (2d Dept. 1994), lv denied 83 N.Y.2d 757, 615 N.Y.S.2d 874 (special circumstances found where probation needed more time to find appropriate placement); Matter of David R., 150 A.D.2d 161, 540 N.Y.S.2d 780 (1st Dept. 1989) (probation officer had heavy workload and death in family) and People ex rel. Broomfield v. Schall, 132 Misc.2d 846, 505 N.Y.S.2d 553 (Sup. Ct. Bronx Co., 1986) with Matter of Leon H., 196 A.D.2d 539, 601 N.Y.S.2d 158 (2d Dept. 1993), rev'd on other grounds 83 N.Y.2d 834, 611 N.Y.S.2d 498 (1994) (no special circumstances where probation was not ready due to absence of school records and request for mental health study and exploration of placement); Matter of Lakiesha Y., 195 A.D.2d 821, 600 N.Y.S.2d 361 (3rd Dept. 1993) (no special circumstances where investigation did not commence immediately after respondent failed to appear) and People ex rel. Calvert v. Schall, 137 Misc.2d 331, 518 N.Y.S.2d 925 (Sup. Ct. Bronx Co., 1987) (no special circumstances where respondent's 13-hour absence from detention did not impair ability of agencies to be ready). Good cause may exist where delays result from a transfer of the case for disposition. Compare Matter of Tito D., 153 Misc.2d 259, 581 N.Y.S.2d 273 (Fam. Ct. West. Co., 1992) (no good cause) with Matter

of Eddie M., supra, 196 A.D.2d 25. Special circumstances do not include calendar congestion or the status of the court's docket or backlog. FCA §350.1(5).

E. Remedy For Violation - In Matter of Jose R., 83 N.Y.2d 388, 610 N.Y.S.2d 937 (1994), a bench warrant was outstanding for a 14-month period, during which the case was not calendared so the court could make findings on the record supporting successive adjournments. The First Department concluded that dismissal was required. However, the Court of Appeals reversed, and concluded that dismissal is not a statutorily required remedy for delays in the dispositional process. The court noted that the goal of the dispositional process is to help provide rehabilitative support to the respondent. The court did concede that "[i]n unusual circumstances where the juvenile is not solely responsible for the delay, the Family Court retains the authority to dismiss." 83 N.Y.2d at 394. See also Matter of Joseph H., 39 A.D.3d 896, 834 N.Y.S.2d 344 (3rd Dept. 2007) (no violation of "flexible standard" where dispositional hearing commenced in November and concluded in following February); Matter of Eric CC., 298 A.D.2d 632, 748 N.Y.S.2d 186 (3rd Dept. 2002) (no showing of actual prejudice where hearing was held after 10-day deadline); Matter of Jonathan "D", 297 A.D.2d 400, 746 N.Y.S.2d 206 (3rd Dept. 2002) (dismissal denied where family court issued dispositional order 57 days after close of hearing but did not violate 60-day deadline in CPLR 4213(c), and respondent was not prejudiced since he was at home); Matter of Miguel M., supra, 220 A.D.2d 264 (no speedy disposition violation where hearing was adjourned for 20 days beyond 50-day limit); Matter of Julu LL., 217 A.D.2d 749, 629 N.Y.S.2d 507 (3rd Dept. 1995) (dismissal ordered where court adjourned case for 47 days while respondent was in detention).

If the family court does order dismissal, the presentment agency may not appeal. Matter of Leon H., supra, 83 N.Y.2d 834.

VII. 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.

VIII. 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).

CHAPTER SEVEN

DISCOVERY AND SUBPOENAS

By: Gary Solomon

Table Of Contents

I. Introduction
- A. Generally
- B. The Goals Of Discovery
  - 1. Acquiring Information
  - 2. Narrowing The Prosecution's Theory
  - 3. Impact On Negotiations And Plea Bargaining

II. Demand To Produce
- A. Definition
- B. Procedure And Timing
  - 1. Respondent Is Not In Detention
  - 2. Respondent Is In Detention
- C. Scope Of Disclosure
  - 1. Generally
  - 2. Statements Of The Respondent Or A Co-Respondent
  - 3. Grand Jury Testimony
  - 4. Reports Of Physical Or Mental Examinations And Scientific Tests Or Experiments
  - 5. Photographs And Drawings
  - 6. Property Obtained From Respondent Or A Co-Respondent
  - 7. Tapes Or Other Electronic Recordings
  - 8. Anything Required To Be Disclosed Pursuant To State Or Federal Constitution
    - a. Generally
    - b. General vs. Specific Request

c. Evidence Of Other Perpetrator
d. Impeachment Evidence
i. Prior Inconsistent Statements
ii. Bias Or Interest of Witness
iii. Witness Cooperation Agreement
iv. Witness' Psychiatric History
v. Witness' Criminal History Or Bad Acts Or False Statements
vi. Conflict Between Witnesses
vii. Witness's Status As Informant
viii. Other Constitutionally Required Discovery
9. Approximate Date, Time And Place Of Offense And Arrest
10. Voluntary Disclosure Forms
D. Reciprocal Discovery
E. Motion For Discovery Pursuant To Demand
F. Protective Orders
G. Continuing Duty To Disclose
H. Sanctions
1. Generally
2. Failure To Make Timely Disclosure
3. Failure To Preserve Evidence
4. Destruction Of Dangerous Drugs, And Fireworks
III. Miscellaneous Discovery Material
A. Physical Evidence
1. Property That Will Be Introduced At Trial
2. Stolen Property
a. Generally
b. Motor Vehicles
c. Discovery Of Property
d. Sanctions

B. Names And Addresses Of Prosecution Witnesses
C. Police Records
D. Grand Jury Testimony
E. Informant's Identity
1. Probable Cause Issue
2. Respondent's Guilt Or Innocence
F. Search Warrant Documents
G. CPLR Discovery
H. Mental Health Examination Of Witness
I. Non-Testimonial Evidence
1. Statutory Authorization
2. Physical Samples
a. Generally
b. Surgery
c. Evidence Obtained By Private Individuals
3. Lineups
4. HIV Testing
J. Notice Of Alibi Witnesses
K. Notice Of Defense Of Mental Disease Or Defect
L. Crime Scene Investigation
M. Discovery Ordered Pursuant To Constitution
N. Freedom Of Information Law
O. Post-Judgment Discovery
IV. Bill Of Particulars
A. Generally
B. Procedure And Timing
C. Refusal Of Request
D. Drafting The Request For A Bill Of Particulars
E. Motion For Court-Ordered Bill Of Particulars
F. Protective Orders

G. Sanctions

H. Amendment

V. "Eve Of Trial Discovery: Criminal History Of Witnesses

A. At Trial

B. At Suppression Hearing

C. Respondent's Prior Bad Acts

VI. "Eve Of Trial Discovery: Rosario Material

A. Timing of Disclosure

1. People v. Rosario

2. Statutory Rule

3. Delay In Production

B. Types of Statements Which Must Be Provided

1. People v. Rosario

2. Statements To Persons Involved In Law Enforcement

a. Generally

b. Summary of Witnesses' Statements

3. Statements To Private Persons

a. Possessed By Prosecution

b. Not Possessed By Prosecution

4. Prior Testimony

a. Grand Jury

b. Proceedings At Which Accused Was Not Present

c. Proceedings At Which Accused Was Present

5. Relationship of Prior Statements To Testimony

6. Cumulative Statements; Duplicative Equivalency

7. Ascertaining Existence of Statements

8. Second-Hand Recorded Statements

C. The Burden of Production

1. Generally

2. Statements Accessible To Defense

3. Grand Jury Testimony

D. Remedies For Loss or Destruction of Prior Statements

1. Lost or Destroyed By Prosecution

2. Lost By Court Reporter

E. Hearings Other Than Trial

1. Suppression Hearings

2. Probable Cause Hearings And Other Pre-Trial Hearings

3. Conditional Examination Of Witness

4. Violation Hearings

F. Appellate Remedies

1. Delay In Production

2. Complete Failure To Produce

3. Preservation of Rosario Rights

G. Disclosure Of Rosario Material By Respondent

VII. Informal Discovery

VIII. Subpoena Practice

A. Generally

B. Power To Issue Subpoenas

1. Ordinary Subpoenas

2. Subpoena Duces Tecum

a. Government Records

b. Other Records

C. Service Of Subpoenas

1. Ordinary Subpoenas

2. Subpoena Duces Tecum

3. Fees

a. Under CPLR

b. Under Criminal Procedure Law

D. Where And When Subpoena May Be Made Returnable

E. Disobedience Of Subpoena

F. Motion To Quash

G. Criminal Procedure Law Provisions

H. Police Records

I. Subpoena For Privileged Material

1. Subpoenas Issued On Behalf Of Respondent

a. Child Welfare Agency Records

b. Law Enforcement Personnel Records

c. Psychiatric, Psychological and Counseling Records of Witness

d. Court Records of Witness

e. Rape Crisis Center Records

f. School Records

g. Attorney-Client Communications

h. Statements To Press; Shield Law

i. Internet Materials

2. Subpoenas Issued By Presentment Agency

3. HIPAA

a. Generally

b. Required Elements of Authorization

c. Court Orders and So-Ordered Subpoenas

d. Attorney-Issued Subpoenas and Discovery Requests

e. Unemancipated Minors

f. Disclosure to Law Enforcement Authorities

g. Waiver

J. Respondent's Right To Present Witnesses

I. Introduction

A. Generally

Many lawyers find that the preparation of discovery requests and motions does not yield satisfactory results. That is understandable, since statutory discovery in New York is circumscribed in a way that narrows the ability of a judge to insure that a criminal defendant, or the respondent in a delinquency proceeding, has a clear idea of the evidence that the prosecution will present at trial. Although other states, such as Florida, allow a criminal defendant to take pre-trial depositions from prosecution witnesses, New York lawyers must seek discovery at pre-trial hearings, or, if such hearings do not take place, attempt to interview prosecution witnesses.

Even those limited options are often not available to the respondent's lawyer in a delinquency proceeding. First of all, although a criminal defense lawyer in a felony case will often obtain pre-trial discovery of a prosecution witness' grand jury testimony, only delinquency cases that are removed from criminal court carry even a hope of such discovery. And, although a respondent who is on remand can attempt to secure discovery at a probable cause hearing, the respondent will often be limited by a prosecutor who wishes to restrict disclosure, and by the judge as well.

Although interviewing witnesses can be an effective method of acquiring information, many witnesses, particularly police officers, are mistrustful, and may refuse to talk at all. Of course, it is clearly unethical for a prosecutor to expressly suggest that a witness should not speak to the defense, or even imply that such contacts would be unwise. See ABA Standards Relating to the Administration of Criminal Justice, Standard 3-3.1(d) ("[a] prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel"). If the child’s attorney has reason to believe that such misconduct has occurred, the judge should be informed, and the attorney should ask the judge to order the prosecutor to make the witness available for an interview. However, even when there is no intent to prevent an interview, a prosecutor may unconsciously communicate to a witness the prosecutor's own preference that an interview not take place. In that instance as well, an interview may not be possible, or, if it occurs, very enlightening.

Aside from interviews, the child's attorney is left with these main avenues for formal discovery: 1) discovery devices authorized by the Family Court Act; 2) subpoenas; 3) the discretionary power of the court. Obviously, informal discovery can be obtained during conversations with the prosecutor, and in the course of an investigation of the crime scene.

B. The Goals Of Discovery

1. Acquiring Information

Obviously, the primary goal of discovery is to acquire physical and documentary evidence, and other relevant information, that will support the respondent's theory of defense or otherwise help the respondent undermine and attack the prosecution's case. Since every case is different, the child's attorney must, before serving discovery requests and motions, spend some time deciding what information is needed in light of the facts of the case and the probable defense strategy. Discovery requests and motions should be tailored to the facts of the case at hand, so that the judge knows that the attorney is making requests for a reason, and not as part of a perfunctory exercise in paperwork. While the use of boilerplate, omnibus discovery devices saves time and aggravation when an attorney has a busy practice, and, indeed, may be an intelligent way to insure that the relevant areas of discovery are addressed in each case, they are no substitute for case-specific documents. Even when boilerplate forms are used, it is almost always necessary to fine-tune, redact, or make additions to them. Understandably, judges are "turned off" when they receive a form motion containing requests that have nothing to do with the facts of the case. Those judges may be less inclined to exercise their discretion in the respondent's favor when it comes to those particular items of discovery that the respondent really desires.

2. Narrowing The Prosecution's Theory

Particularly by requesting a bill of particulars, the child's attorney can attempt through discovery to force the presentment agency to memorialize its theory of prosecution and commit itself to proving certain facts. This has two positive effects. First of all, the attorney is better able to research the law and otherwise prepare a defense strategy. In addition, since many prosecutors do not re-interview witnesses or prepare in

any other way before they complete a bill of particulars, the prosecutor may commit to a theory that is neither the best nor the only one available. Since the presentment agency is not allowed to change its theory of prosecution during trial, the bill of particulars can become a useful device for the defense attorney.

Other discovery requests can produce similar benefits. Requests for physical and documentary evidence may yield an assertion that the evidence does not exist, or a promise that the presentment agency will notify the respondent and make the item available if and when it does come to light. The presentment agency's unfulfilled promise to make the evidence available in the future, or its claim that the property does not exist, if that claim is in error, can be used as a shield when there is an attempt to introduce the evidence at trial.

3. Impact On Negotiations And Plea Bargaining

The modest discovery authorized by the Family Court Act and the case law provides the child’s attorney with the ingredients for complex and detailed discovery papers. Generally, a lawyer is in a stronger negotiating position when his or her scholarship and attention to detail require the production of detailed responses.

On the other hand, the attorney must also determine whether extensive motion practice is likely to have adverse consequences. If the respondent is maintaining his or her innocence, or a plea bargain cannot be struck, the case must go to trial and the prosecutor's good will is not a critical concern. However, if the attorney's careful work is likely to yield little in actual discovery, and will merely antagonize the opponent and/or the judge and undermine the chances for a favorable plea bargain, it may be wise to modify discovery requests accordingly, or open plea negotiations before the prosecutor answers the discovery requests or motion.

II. Demand To Produce

A. Definition

A "Demand to produce" is "a written notice served by and on a party, without leave of the court, demanding to inspect property pursuant to section 331.2 or 331.3 and giving reasonable notice of the time at which the demanding party wishes to inspect the property designated." FCA §331.1(1).

B. Procedure And Timing

1. Respondent Is Not In Detention

If the respondent has been released pending trial, the demand to produce (hereinafter, "demand") must be made within 15 days after the conclusion of the initial appearance "unless extended for good cause shown." FCA §331.7(2)(a). But see People v. Smith, 169 Misc.2d 258, 646 N.Y.S.2d 228 (Sup. Ct., Onondaga Co., 1996) (People waived any right to compliance with statute by filing notice offering discovery at arraignment). Presumably, the respondent does not have to formally seek an extension before making late service. If the presentment agency refuses to comply, the court can then excuse the late service upon a showing of good cause. However, in no event may a demand be made after the fact-finding hearing has commenced. FCA §331.7(2)(a).

The presentment agency must comply with the demand within 15 days after service "or as soon thereafter as practicable." FCA §331.7(2)(c). If the presentment agency objects to disclosure, a refusal to comply (hereinafter, "refusal") may be made instead. The refusal must also be made within 15 days after service of the demand, but may be served later for good cause. FCA §331.7(2)(b). The refusal must be in writing, and must be served on the respondent and filed with the court. It must set forth the grounds for a reasonable belief that the property is not discoverable under FCA §331.2, or that a protective order is warranted. Such grounds must be set forth "as fully as possible, consistent with the objective of the refusal." FCA §331.2(6).

2. Respondent Is In Detention

If the respondent has been remanded pending trial, the demand must be made within 7 days after the conclusion of the initial appearance or prior to the commencement of the fact-finding hearing, whichever occurs sooner, unless the court grants an extension for good cause shown. FCA §331.7(1)(a). A refusal must be made within 5 days after service of the demand, but may be made thereafter for good cause. FCA §331.7(1)(b). In the absence of a refusal, compliance must be made within 7 days of service of the demand "or as soon thereafter as practicable." If accelerated discovery is deemed desirable, the respondent can seek a court order directing that the presentment agency comply in less than 7 days. FCA §331.7(1)(c).

C. Scope Of Disclosure

1. Generally

The items that are discoverable pursuant to a demand are set forth in FCA §331.2(1). "Except to the extent protected by court order, upon a demand to produce by a respondent, the presentment agency shall disclose to the respondent and make available for inspection, photography, copying or testing, the following property:

> (a) any written, recorded or oral statement of the respondent, or by a co-respondent, made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him;
> (b) any transcript of testimony relating to the proceeding pending against the respondent, given by the respondent, or by a co-respondent, before any grand jury;
> (c) any written report or document, portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity or which was made by a person whom the presentment agency intends to call as a witness at a hearing, or which the presentment agency intends to introduce at a hearing;
> (d) any photograph or drawing relating to the proceeding made or completed by a public servant engaged in law enforcement activity or which was made by a person whom the presentment agency intends to call as a witness at a hearing, or which the presentment agency intends to introduce at a hearing;
> (e) any other property obtained from the respondent or a co-respondent;
> (f) any tapes or other electronic recordings which the presentment agency intends to introduce at the fact-finding hearing, irrespective of whether such recording was made during the course of the criminal transaction;
> (g) anything required to be disclosed, prior to the fact-finding hearing, to the respondent by the presentment agency, pursuant to the constitution of this state or of the United States; and
> (h) the approximate date, time and place of the offense charged and of respondent's arrest.

Obviously, if the property is already in the possession of the presentment

agency, it must be made available by the presentment agency. With respect to property that is not already in the "possession, custody or control" of the presentment agency, the presentment agency "shall make a diligent, good faith effort to ascertain the existence of property...and to cause such property to be made available for discovery...." However, the presentment agency need not subpoena material which the respondent may obtain by subpoena duces tecum. FCA §331.2(2)(a). Arguably, if the presentment agency can obtain the property and make it available to the respondent without using a subpoena, §331.2(2)(a) would not excuse the presentment agency from doing so. People v. Damon, 57 Misc.3d 891 (City Court of Hudson, Columbia Co., 2017) (People could not satisfy statute by making material available at offices of State Police); but see People v. Wright, 225 A.D.2d 430, 639 N.Y.S.2d 361 (1st Dept. 1996), lv denied 88 N.Y.2d 1026, 651 N.Y.S.2d 25 (People were not obligated to obtain Medical Examiner's records; defendant should obtain them with a subpoena).

2. Statements Of The Respondent Or A Co-Respondent

Statements made by the respondent which the presentment agency intends to offer into evidence at trial during the direct case must be included in a notice of intent served pursuant to FCA §330.2(2) and CPL §710.30. A failure to serve such notice within 15 days after the conclusion of the initial appearance results in preclusion of the statements unless there is good cause for late service. See, e.g., People v. O'Doherty, 70 N.Y.2d 479, 522 N.Y.S.2d 498 (1987).

However, certain statements may be omitted from the notice of intent because it is clear to the presentment agency that they were "involuntarily made" [see FCA §344.2(2)], or are inadmissible for some other reason. Those statements must be disclosed pursuant to FCA §331.2(1)(a). Indeed, an awareness of such statements is clearly important to the respondent. For instance, unless the statements are genuinely "involuntary" because of such factors as threats or undue pressure, the statements can be used to impeach the respondent if he or she testifies. See, e.g., People v. Maerling, 64 N.Y.2d 134, 485 N.Y.S.2d 23 (1984). In the absence of disclosure pursuant to FCA §331.2(1)(a), the child’s attorney should argue that the respondent's statements may not be used as impeachment. See People v. Fields, 258 A.D.2d 809, 687 N.Y.S.2d 184

(3rd Dept. 1999) (statements could not be used on rebuttal where People failed to disclose them as required). At the very least, the respondent would be entitled to challenge the voluntariness of the statements. People v. Ames, 119 A.D.2d 755, 501 N.Y.S.2d 165 (2d Dept. 1986).

Statements made to a person who is neither a law enforcement official nor acting under the direction of or in cooperation with a law enforcement official are not discoverable under FCA §331.2(1)(a); People v. Mitchell, 289 A.D.2d 776, 734 N.Y.S.2d 353 (3rd Dept. 2001), lv denied 98 N.Y.2d 653, 745 N.Y.S.2d 512 (2002). However, the child's attorney might seek an appropriate remedy when the presentment agency has erroneously affirmed that no such statements exist. See People v. Simmons, 173 A.D.2d 875, 571 N.Y.S.2d 80 (2d Dept. 1991). The attorney should also consider whether it can be proved that the person to whom the undisclosed statements were made was, in fact, acting as an agent of the police. See, e.g., People v. Odierno, 121 Misc.2d 330, 467 N.Y.S.2d 968 (Sup. Ct. Bronx Co., 1983) (while noting that informant to whom defendant made statements was not acting as an agent for the government, court concludes that a defendant should be given any statement made to anyone).

As a matter of strategy, it is important to recognize that, if the respondent has made statements of which notice has not been given pursuant to FCA §330.2(2) and CPL §710.30, service of a demand may alert the presentment agency to the problem, and result in the timely service of notice. Consequently, in such a case the child's attorney can, as the statute clearly permits, serve the demand just prior to the end of the 15-day deadline. When appropriate, the attorney could also omit any request for the respondent's statements.

The respondent is also entitled to receive written, recorded or oral statements made by the co-respondent to a law enforcement official or a person working in cooperation with the official. This type of disclosure serves several functions. First of all, since there is no requirement that the presentment agency notify the respondent pursuant to FCA §330.2(2) and CPL §710.30 of its intent to offer a co-respondent's statements at trial, disclosure pursuant to a demand is the only way the respondent can receive formal notice that a "Bruton" problem may exist [see Bruton v. United States,

391 U.S. 123, 88 S.Ct. 1620 (1968). Although it has been held that the Bruton rule does not apply at bench trials [see People v. Jenkins, 115 A.D.2d 562, 496 N.Y.S.2d 83 (2d Dept. 1985)], the respondent should still ask the court to order severance in its discretion so that a co-respondent's confession will not be heard by the trier of fact. In addition, when the child's attorney is unable to ascertain what the co-respondent has said about the charges from the co-respondent's counsel or from other sources, disclosure pursuant to a demand may provide the attorney with some idea of the co-respondent's position and/or defense. And, if the co-respondent testifies in a manner that is adverse to the respondent's interests, the statements could be used as impeachment evidence.

Finally, FCA §331.2(1)(a) does not require disclosure of "res gestae" statements made during a criminal transaction. See People v. McLean, 128 A.D.3d 1094 (2d Dept. 2015) (since defendant was charged with falsely reporting incident, false statement constituted res gestae statement and thus was not discoverable); People v. Wells, 133 A.D.2d 385, 519 N.Y.S.2d 553 (2d Dept. 1987).

3. Grand Jury Testimony

When discoverable grand jury testimony exists, "the presentment agency shall forthwith request that the district attorney provide a transcript of such testimony," and the district attorney is then required to apply for a release of a transcript to the presentment agency pursuant to §325 of the Judiciary Law. FCA §331.2(2)(b).

Except in cases that have been removed from criminal court, the possibility that such grand jury testimony exists will be remote at best. Nevertheless, there is no reason not to include a request for disclosure in the demand to produce.

4. Reports Of Physical Or Mental Examinations And Scientific Tests Or Experiments

A written report of an examination or a scientific test or experiment relating to the proceeding must be made available if the report was made by a law enforcement official or at the request or direction of a law enforcement official, or by a person whom the presentment agency intends to call as a witness. See, e.g., People v. Thompson, 92 A.D.3d 1139 (3d Dept. 2012) (grand jury testimony of ballistics expert not covered by

disclosure requirement); People v. Carter, 50 Misc.3d 1210(A) (Sup. Ct., Queens Co., 2016) (OCME DNA testing materials not discoverable because not within People's control); People v. Elliott, 2012 NY Slip Op 30981(U) (Sup. Ct., Bronx Co., 2012) (disclosure of complainant's psychiatric records denied since they were generated from private appointments made by complainant); People v. Kwang Yul Oh, 141 Misc.2d 496, 533 N.Y.S.2d 369 (Crim. Ct., N.Y. Co., 1988) (defendant's request for medical records denied as outside scope of CPL §240.20[2]); People v. Gaissert, 75 Misc.2d 478, 348 N.Y.S.2d 82 (County Ct., Nassau Co., 1973) (medical records discoverable if and when People acquire possession or control of them). In addition, any report must be made available when the presentment agency intends to introduce it into evidence.

Writings made by or at the request or direction of a law enforcement official that are subject to discovery include, inter alia, drug testing and ballistics reports, as well as the expert's notes. See People v. Sinha, 19 N.Y.3d 932 (2012) (People complied with statute and provided "reports or documents" concerning scientific tests or experiments where they provided defense counsel with copies of forensic reports prepared by investigators who analyzed hard drive of defendant's computer, but not email prosecution used at trial); People v. DaGata, 86 N.Y.2d 40, 629 N.Y.S.2d 186 (1995) (FBI laboratory notes related to one-page DNA testing report were discoverable); People v. Alvarez, 38 A.D.3d 930, 830 N.Y.S.2d 848 (3rd Dept. 2007) (statute requires disclosure of notes or documents that are used in preparation of scientific report or are related to tests, but not generic DNA testing protocols or procedure manuals); People v. Jorgensen, 26 Misc.3d 1232(A), 2010 WL 796830 (Sup. Ct., Suffolk Co., 2010) (in vehicular homicide prosecution, court directs release of Grand Jury testimony of forensic toxicologist and accident reconstruction witness). See also Matter of Singas v. Engel, 155 A.D.3d 877 (2d Dept. 2017) (judge had authority to order People to disclose documents relating to headspace gas chromatography tests of simulator solution used to calibrate breathalyzer instrument with which police tested defendant's blood alcohol content on date of arrest where People indicated that they intended to introduce "certification" of accuracy of simulator solution; to extent that records were not in People's possession, statute required People to make good faith, diligent effort to obtain

them); People v. Robinson, 53 A.D.3d 63, 860 N.Y.S.2d 159 (2d Dept. 2008), lv denied, 11 N.Y.3d 857 (computer source code governing operation of breathalyzer machine subject to disclosure as written document under CPL §240.20[1][c]); People v. English, 103 A.D.2d 979, 480 N.Y.S.2d 56 (3rd Dept. 1984) (material regarding breathalyzer test, including calibration records); United States v. Thomas, 726 F.3d 1086 (9th Cir. 2013) (reversible error where government failed to turn over full complement of dog-history discovery in connection with suppression hearing); People v. S.B., 60 Misc.3d 721 (Crim. Ct., Bronx Co., 2018) (DWI defendant entitled to discovery of simulator solution paperwork and headspace gas chromatography data); People v. Mondon, 129 Misc.2d 13, 492 N.Y.S.2d 344 (Sup. Ct. N.Y. Co., 1985) (polygraph tests are discoverable); People v. Delaney, 125 Misc.2d 928, 481 N.Y.S.2d 229 (County Ct. Suffolk Co., 1984) (transcript of expert's grand jury testimony was discoverable "written report or document"). But see People v. Palumbo, 162 Misc.2d 650, 618 N.Y.S.2d 197 (Sup. Ct. Kings Co., 1994) ("scratch notes" not discoverable).

The requirement that a prospective witness' report be disclosed would include, inter alia, a hospital record made by a doctor who will testify about a complainant's physical injury. Of course, if the presentment agency intends to introduce such a record, it would be discoverable even if the doctor were not going to testify. See People v. Johnstone, 131 A.D.2d 782, 517 N.Y.S.2d 69 (2d Dept. 1987).

The respondent is also entitled to disclosure of the scientific data relied upon by a prosecution expert. See People v. Davis, 196 A.D.2d 597, 601 N.Y.S.2d 174 (2d Dept. 1993), lv denied 82 N.Y.2d 923, 610 N.Y.S.2d 175 (1994) (population data-base and statistical standards used in DNA analysis); People v. Seepersad, 58 Misc.3d 1227(A) (Sup. Ct., N.Y. Co., 2018) (raw data from OCME DNA tests discoverable; OCME acts as agent of prosecution as much as police department does); People v. Jones, 55 Misc.3d 743 (Sup. Ct., Bronx Co., 2017) (defendant entitled to discovery of raw electronic data from which DNA profiles were generated by OCME); People v. Gills, 52 Misc.3d 903 (Sup. Ct., Queens Co., 2016) (electronic raw data which yielded DNA profile was discoverable); People v. Jimenez, 3281/13, NYLJ 1202662723127, at *1 (Sup., BX, Decided June 27, 2014) (defendant entitled to discovery of electronic files

containing raw data underlying DNA testing by Office of Chief Medical Examiner); People v. Cubero, 181 Misc.2d 431, 695 N.Y.S.2d 271 (Sup. Ct., Kings Co., 1999) (defendant entitled to reports and witness statements relied upon by People's psychiatric expert). But see People v. Hough, 297 A.D.2d 575, 747 N.Y.S.2d 168 (1st Dept. 2002), lv denied 99 N.Y.2d 559, 754 N.Y.S.2d 211 (2002) (no error where People revealed for first time during trial that statistical sampling method had been used to test drugs; People were not required to disclose testing methodology); People v. Mohammed, 52 Misc.3d 242 (Sup. Ct., Bronx Co., 2016) (discovery of "electronic raw data" denied where it did not already exist in one easily accessible file).

When medical records covered by the disclosure requirement in FCA §331.2(1)(c) are protected as confidential, the presentment agency will need to obtain the patient's consent to disclosure, or move for a so-ordered subpoena. See Matter of C.D., 6 Misc.3d 1034(A), 800 N.Y.S.2d 343 (Fam. Ct., Orange Co., 2005). Arguably, an individual waives any right to object to disclosure by revealing protected information in a complaint to the police. People v. Pagan, 190 Misc.2d 474, 738 N.Y.S.2d 825 (Sup. Ct., Kings Co., 2002); but see Matter of C.D., supra, 6 Misc.3d 1034(A).

Since Article Three provides for discovery of expert witness-related information, it does not appear that discovery pursuant to CPLR §3101(d) is authorized. See FCA §165(a); People v. Cannon, 9 Misc.3d 136(A), 808 N.Y.S.2d 919 (App. Term, 9th & 10th Jud. Dist., 2005).

The court has no authority to direct the prosecution to perform scientific tests, or provide information that does not pertain to the scientific testing itself. See Matter of Hoovler v. De Rosa, 143 A.D.3d 897 (2d Dept. 2016) (judge had no authority to direct People to provide full names corresponding to initials on DNA testing reports); Matter of Farrell v. LaBuda, 94 A.D.3d 1195 (3d Dept. 2012) (court had no authority to direct prosecution to perform comparison between latent fingerprints collected at scene and those of individual that one defendant claimed had possessed stolen items); People v. Gill, 40 Misc.3d 246 (Crim. Ct., Kings Co., 2013) (court refuses to order People to carry out DNA testing of marihuana cigarette that allegedly was in defendant's mouth and would provide exculpatory evidence if defendant's DNA is not present).

5. Photographs And Drawings

A photograph or drawing relating to the proceeding must be made available if it was made or completed by a law enforcement official or a person whom the presentment agency intends to call as a witness. See, e.g., People v. Javier, 154 A.D.3d 445 (1st Dept. 2017) (to extent that missing photocopy of buy money could be viewed as discoverable photograph, court did not err in refusing to give jury adverse inference instruction since no buy money was recovered from defendant or otherwise at issue); People v. Shcherenkov, 21 A.D.3d 651, 799 N.Y.S.2d 663 (3rd Dept. 2005) (arrest photos of defendant were discoverable); People v. Cobb, 104 A.D.2d 656, 480 N.Y.S.2d 33 (2d Dept. 1984) (mug shot taken at time of defendant's arrest was discoverable); People v. Trudo, 88 A.D.2d 1091, 453 N.Y.S.2d 54 (3rd Dept. 1982) (composite sketch drawn by newspaper artist was not under control of DA or police). In addition, any relevant photograph or drawing must be made available if it will be introduced into evidence at a hearing. See People v. Izydorczak, 107 A.D.2d 1050, 486 N.Y.S.2d 577 (4th Dept. 1985), lv denied 67 N.Y.2d 652, 499 N.Y.S.2d 1048 (1986) (photos of victim's injuries were discoverable). The court does not have the power to order the prosecution to have photographs taken and then provide them to the respondent. See Matter of Johnson v. Brandveen, 160 A.D.2d 668, 559 N.Y.S.2d 516 (1st Dept. 1990).

While citing CPL §240.20, the court held in People v. Gregory, 12 Misc.3d 1054, 820 N.Y.S.2d 716 (Crim. Ct., Richmond Co., 2006) that it had the authority to issue an order permitting the defense to take photographs of the jailed defendant in order to preserve evidence of his injuries.

6. Property Obtained From Respondent Or A Co-Respondent

In some cases, the nature of the charges and the allegations in the supporting depositions will make it clear that contraband, such as drugs, a weapon, burglar's tools or stolen property, was recovered from the respondent or a co-respondent. However, in some cases the recovery of incriminating evidence is not readily apparent, and in those cases disclosure will be important. For instance, when the respondent is charged with possession of drugs with intent to sell, a large sum of cash may have been recovered

from the respondent. Since the cash may be offered as evidence [see, e.g., People v. Martin, 163 A.D.2d 491, 558 N.Y.S.2d 171 (2d Dept. 1990)], the respondent will want to know about it before trial.

Regrettably, at least from the respondent's point of view, discovery under FCA §331.2(1)(e) is limited to items that were recovered while they were within the respondent's dominion and control. Compare People v. Ordine, 177 A.D.2d 734, 575 N.Y.S.2d 977 (3rd Dept. 1991), lv denied 79 N.Y.2d 951, 583 N.Y.S.2d 205 (1992) (bank signature card and deposit slip were not discoverable, since they were obtained by prosecutor from the bank, not from defendant) and People v. McKay, 101 A.D.2d 960, 479 N.Y.S.2d 87 (3rd Dept. 1984) (jacket found at scene after defendant had left was not discoverable) with People v. Dory, 59 N.Y.2d 121, 463 N.Y.S.2d 753 (1983) (People failed to disclose items of evidence recovered from defendant's basement).

It should be noted that, although CPL §710.30 does not require that the People provide notice of their intent to offer physical evidence at trial in a criminal proceeding, FCA §330.2(2), which requires notice with respect to evidence described in CPL §710.20, seems to include such a requirement. See Matter of Eddie M., 110 A.D.2d 635, 487 N.Y.S.2d 122 (2d Dept. 1985). Although the court held in Eddie M. that constructive notice of intent existed where the property at issue, to wit: a gun, was the subject of a weapon possession charge, the constructive notice ruling does not appear to be good law given the strict rule announced by the Court of Appeals in People v. O'Doherty, supra, 70 N.Y.2d 479. But see Matter of Alex C., 207 A.D.2d 745, 616 N.Y.S.2d 959 (1st Dept. 1994) (constructive notice found adequate in post-O'Doherty case). On the other hand, the existence of any notice requirement has been cast in doubt by the Court of Appeals' decision in Matter of Luis M., 83 N.Y.2d 226, 608 N.Y.S.2d 962 (1994), in which the court held that §330.2(2) does not require service of a notice of intent with respect to statements made to persons not involved in law enforcement. Like physical evidence, such statements are included in CPL §710.20, but not in §710.30. In any event, assuming a notice requirement exists, disclosure pursuant to FCA §331.2(1)(e) concerning the recovery of an incriminating piece of evidence that is not the very subject of a crime charged should not be considered constructive notice

of an intent to offer the item into evidence. And, given the time frame governing discovery by demand, it is unlikely that such disclosure will be made within the 15-day limit prescribed in FCA §330.2(2) unless a Voluntary Disclosure Form is served (see [10] below).

Finally, it must be remembered that there will be cases in which disclosure of the existence of the evidence is not the goal of the demand. In some cases, the respondent will want to "borrow" the evidence for the purpose of conducting independent testing [see, e.g., People v. White, 40 N.Y.2d 797, 390 N.Y.S.2d 405 (1976) (defendant entitled to make independent tests as to weight and composition of narcotics)], or inspecting the property in the hopes of developing a courtroom experiment [cf. People v. Astwood, 113 A.D.2d 946, 493 N.Y.S.2d 842 (2d Dept. 1985) (defendant alleged that destroyed coat might have been exculpatory had it not properly fit co-defendant, who, according to witnesses, had worn it during robbery)].

7. Tapes Or Other Electronic Recordings

Any tapes or other electronic recordings which the presentment agency intends to offer must be made available regardless of whether they were made during the criminal transaction. But see People v. Grant, 152 A.D.3d 792 (2d Dept. 2017) (defense not entitled to listen to recordings before transcripts used to impeach defendant's testimony on cross-examination); People v. Harleston, 139 A.D.3d 412 (1st Dept. 2016), lv denied 28 N.Y.3d 971 (late notice regarding recordings excused where, up until time notice provided, prosecutor intended to use recordings for possible impeachment while statute requires disclosure of recordings intended to be used on direct case); People v. Muller, 72 A.D.3d 1329, 899 N.Y.S.2d 425 (3rd Dept. 2010), lv denied 15 N.Y.3d 776 (prosecution not obligated to provide recordings of taped telephone conversations defendant had with third parties while in jail awaiting trial where prosecution did not seek to introduce recordings as evidence-in-chief and used them to impeach or refresh recollection of witnesses). It is rare that electronic eavesdropping is involved in juvenile delinquency proceedings. However, FCA §331.2(1)(f) would, for instance, require that the presentment agency make available a "911" tape that will be offered into evidence as a present sense impression or an excited utterance, or under some other exception

to the hearsay rule [see, e.g., People v. Brown, 80 N.Y.2d 729, 594 N.Y.S.2d 696 (1993)]. But see People v. Emiliano, 81 A.D.3d 436, 916 N.Y.S.2d 61 (1st Dept. 2011) (no preclusion of 911 tape as sanction for People's allegedly belated disclosure of anonymous caller's phone number, which defendant claimed prevented him from locating caller, where defendant was aware from outset that Sprint report contained redacted number and there was no indication that earlier disclosure would have enabled defendant to locate caller or that she would have provided helpful information). Other "911" recordings may be discoverable pursuant to FCA §331.4(1)(a) as "Rosario" material. See People v. Parker, 157 A.D.2d 519, 549 N.Y.S.2d 710 (1st Dept. 1990), lv denied 76 N.Y.2d 793, 559 N.Y.S.2d 998.

The statute also would require disclosure of tape recordings of an undercover drug sale. See, e.g., People v. Crandall, 14 Misc.3d 1224(A), 836 N.Y.S.2d 494 (County Ct., Essex Co., 2007) (court denies People's motion for protective order delaying disclosure until time of trial). In People v. Kosowski, 55 Misc.3d 841 (City Ct. of Rochester, Monroe Co., 2017), the court provided for discovery of digital recordings from law enforcement body cameras.

It has been held that this discovery requirement does not necessarily include a right to have possession of the recording. People v. Darrosa, 177 Misc.2d 837, 676 N.Y.S.2d 922 (County Ct., Nassau Co., 1998) (protective order preventing defendant from obtaining copy of videotape granted where infant sex crime victim could be harmed if tape got into hands of public, and counsel was permitted to view the recording).

8. Anything Required To Be Disclosed Pursuant To State Or Federal Constitution

a. Generally

At the very least, this requirement codifies the doctrine established in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), where the Supreme Court established, as a matter of federal constitutional law, that the prosecution's failure to disclose to the defense evidence in its possession both favorable and material to the defense entitles the defendant to a new trial. A failure to disclose is constitutional error "if the evidence would `tend to exculpate' the defendant [citation omitted]." People v. Vilardi, 76 N.Y.2d

67, 556 N.Y.S.2d 518, 520 (1990). See People v. Contreras, 12 N.Y.3d 268, 879 N.Y.S.2d 369 (2009) (although ex parte proceedings are undesirable and should be rare, initial inquiry had to be ex parte since court could not disclose document before deciding whether disclosure was appropriate, and CPL §240.90(3) permits papers and testimony to be submitted ex parte in connection with motion for protective order); People v. Ennis, 11 N.Y.3d 403 (2008) (evidence not material since portion of co-defendant's statement that exonerated defendant was not against penal interest); United States v. Mahaffy, 693 F.3d 113 (2d Cir. 2012) (where suppressed evidence is inculpatory as well as exculpatory, and exculpatory character harmonizes with theory of defense, Brady violation has occurred); United States v. Prochilo, 629 F.3d 264 (1st Cir. 2011) (defendants failed to identify materials court should inspect and show them to be favorable and material); Boyd v. United States, 908 A.2d 39 (D.C. Ct. App., 2006) (materiality is at issue when prosecutor is determining whether to disclose, but prosecutor should keep in mind defense counsel's need to explore range of alternatives in developing and shaping defense; in close cases, prosecutor should disclose or make information available to court for in camera materiality determination); United States v. Coppa, 267 F.3d 132 (2d Cir. 2001) (material must be disclosed if lack of disclosure would create reasonable probability of altering outcome).

Arguably, disclosure is not required when the evidence, although exculpatory in substance, is clearly not admissible and would not open a new investigative lead. See People v. Ennis, 11 N.Y.3d 403 (third party who made inculpatory statement could not be compelled to testify, and statement was not admissible under hearsay exception; court contrasts case with one in which withheld information might have opened line of investigation for defense that was not otherwise available).

The obligation to disclose exists regardless of whether the information has been recorded. United States v. Rodriguez, 496 F.3d 221 (2d Cir. 2007) (while finding no statutory requirement that prosecutor take notes, court poses questions in footnote regarding whether there may be situations where "the preservation of exculpatory or impeaching information in a concrete form - such as by note taking - may be necessary to ensure that the information can be relayed accurately to the defense," and "whether

the government, for the purpose of avoiding the disclosure of the initial falsities and inconsistencies of persons who may become government trial witnesses, may permissibly instruct an agent not to follow the customary practice of taking notes of witness interviews").

A violation occurs when the failure to disclose is intentional, or negligent. See People v. Simmons, 36 N.Y.2d 126, 365 N.Y.S.2d 812 (1975); Drake v. Portuondo, 321 F.3d 338 (2d Cir. 2003) (prosecutor failed to make independent inquiry into background of putative expert whose qualifications were largely perjured); United States v. Vozzella, 124 F.3d 389 (2d Cir. 1997) (after becoming aware that portion of loan-sharking records were fictitious, government's ignorance regarding the veracity of the rest of the records was willful). The knowledge of one prosecutor in the office can be imputed to another. State v. Williams, 896 A.2d 973 (Md. 2006); see also People v. Suh, 27 Misc.3d 143(A), 2010 WL 2471157 (App. Term, 9th & 10th Jud. Dist., 2010), lv denied 15 N.Y.3d 896 (reversible error where prosecutor failed to disclose that, two years before trial, principal witness had been convicted, in same jurisdiction; criminal record was readily available to prosecutor).

In In re Chabot, 300 S.W.3d 768 (Tex. Ct. Crim. App., 2009), it was held that the prosecution's unknowing use of perjured testimony, like its knowing use, violates due process.

Even when exculpatory information is not in the prosecution's possession, the prosecution can be held responsible for the failure of a law enforcement agency to disclose exculpatory evidence if the evidence was within the constructive control of the prosecution. See, e.g., People v. Garrett, 23 N.Y.3d 878 (2014) (People had no constructive knowledge of federal civil action brought against homicide detective who interrogated defendant, which included allegations that detective used coercive tactics to extract confession against plaintiff's will; civil allegations were not directly related to instant prosecution, and People were not required to ask detective whether he was being sued for any reason related to conduct as a detective or conduct cursory check in state and federal court to see if detective had any civil rights cases against him); People v. Hayes, 17 N.Y.3d 46, 926 N.Y.S.2d 382 (2011) (no Brady violation where police

failed to interview or acquire contact information for two individuals who made exculpatory statements overheard by officer; police have no affirmative duty to obtain potentially exculpatory evidence for defendant); People v. Santorelli, 95 N.Y.2d 412, 718 N.Y.S.2d 696 (2000) (FBI records were outside People's control); People v. Lanfranco, 124 A.D.3d 1144 (3d Dept. 2015) (any failure by Department of Corrections and Community Supervision to preserve exculpatory evidence not imputed to People); People v. Messina, 43 Misc.3d 78 (App. Term, 2d Dept., 2014), lv denied 23 N.Y.3d 1022 (unavailable DVD footage was prepared after arrival of police and thus footage was theoretically within grasp of police, but evidence produced by private party is not normally considered to be under control of prosecutor or agents and there was no indication that police had any part in filming, initial viewing, and editing of videotapes); Aguilar v. Woodford, 725 F.3d 970 (9th Cir. 2013) (prosecution failed to disclose that dog had history of making mistaken scent identifications); People v. Walloe, 88 AD.3d 544 (1st Dept. 2011), lv denied 18 N.Y.3d 963 (tape recording not Brady material where it was in exclusive possession of bar and never in People's possession or control, and, although officer viewed tape and requested copy, he did not constructively possess it); Arnold v. Secretary, Department of Corrections, 595 F.3d 1324 (11th Cir. 2010) (officer's knowledge of his own criminal conduct, which bore close connection to charges, could properly be imputed to prosecution); United States v. Gil, 297 F.3d 93 (2d Cir. 2002) (Government "is reasonably expected to have possession of evidence in the hands of investigators who are part of the 'prosecution team'"); People v. Hawes, 298 A.D.2d 706, 750 N.Y.S.2d 132 (3rd Dept. 2002), lv denied 99 N.Y.2d 582, 755 N.Y.S.2d 718 (2003) (letter not Brady material where it was in possession of probation officer and City Court); People v. Stern, 270 A.D.2d 118, 704 N.Y.S.2d 569 (1st Dept. 2000), lv denied 95 N.Y.2d 893, 715 N.Y.S.2d 385 (2000) (Medical Examiner's records not in possession of prosecution for Brady purposes); People v. Maldonado, 36 Misc.3d 1224(A) (County Ct., Sullivan Co., 2012) (Brady violation found where People failed to timely disclose Child Protective Services report and Deputy's report containing Brady material; even if reports were not in People's possession at earlier time, there were joint conferences and interviews at District Attorney's office); People v. Jackson, 154 Misc.2d

718, 593 N.Y.S.2d 410 (Sup. Ct., Kings Co., 1992) (detective and Fire Department had duty to disclose exculpatory material regardless of prosecutor's knowledge), aff'd 198 A.D.2d 301, 603 N.Y.S.2d 558 (2d Dept. 1993), lv denied 83 N.Y.2d 806.

After Brady, the Supreme Court distinguished between cases in which the defense specifically requested evidence and cases in which there was no request or only a general request for exculpatory material. See United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976) (evidence specifically requested is "material" if it might have affected the outcome of the trial, but, if no request or a general request was made, evidence is material only if it created a reasonable doubt which did not otherwise exist). However, the Supreme Court later retreated from Agurs and established a single standard, applicable in all cases, in United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985). Under the federal constitution, undisclosed evidence is now considered material if there is a "reasonable probability" that it would have altered the outcome of the trial. See also Smith v. Cain, 132 S.Ct. 627 (2012) (evidence is "material" when there is reasonable probability that, had evidence been disclosed, result would have been different; reasonable probability does not mean that defendant would more likely than not have received different verdict, only that likelihood of different result is great enough to undermine confidence in outcome of trial); Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995) (defendant need not show by a preponderance that disclosure would have led to acquittal, only that the lack of disclosure "undermines confidence in the outcome of the trial"). In the context of an attack on the validity of a plea, evidence is considered material where there is a reasonable probability that the accused would not have entered the plea had the evidence been disclosed. See United States v. Avellino, 136 F.3d 249 (2d Cir. 1998).

In People v. Vilardi, supra, 76 N.Y.2d 67, the Court of Appeals followed Agurs as a matter of state constitutional law, and held that, when a specific request was made, a new trial is required if there is a "reasonable possibility" that the failure to disclose contributed to the verdict. See also People v. Daly, 14 N.Y.3d 848, 902 N.Y.S.2d 499 (2010) (Rosario and/or Brady violations that result in reversal of convictions on certain counts also require reversal on other, jointly tried counts if there is reasonable possibility

that evidence supporting tainted counts influenced guilty verdicts on other counts); People v. Williams, 7 N.Y.3d 15, 816 N.Y.S.2d 739 (2006) (in 4 to 3 decision, court finds no abuse of discretion where trial court ordered new suppression hearing upon discovery at trial that evidence affecting sole police witness's credibility had been withheld at hearing, but then denied suppression again after permitting People to call new witness who had no credibility problem; dissenting judges assert that trial court should have decided suppression motion based upon credible evidence remaining after first suppression hearing).

There is no Brady error as long as disclosure occurs in time to allow its effective use at trial. United States v. Coppa, 267 F.3d 132; compare United States v. Ruiz, 536 U.S. 622, 122 S.Ct. 2450 (2002) (defendant not entitled to pre-plea disclosure of impeachment information); People v. Osborne, 91 N.Y.2d 827, 666 N.Y.S.2d 556 (1997) (defendant had opportunity to use exculpatory material after learning about witness' conviction during cross-examination); People v. Cortijo, 70 N.Y.2d 868, 523 N.Y.S.2d 463 (1987) (defendant discovered existence of 2 eyewitnesses and interviewed them); People v. Brown, 67 N.Y.2d 555, 505 N.Y.S.2d 574 (1986) (defendant had opportunity to cross-examine witness concerning undisclosed photo array photos); People v. Tripp, 162 A.D.3d 691 (2d Dept. 2018), lv denied _N.Y.3d_, 2018 WL 4331467 (no error in denial of sanction where record was turned over during People's case-in-chief, and defense counsel made use of it during cross-examination of detective and did not seek to recall other witnesses); People v. Carter, 128 A.D.3d 580 (1st Dept. 2015) (drastic sanction of dismissal not required where People belatedly disclosed statement by victim's sister, who died during six-month period between Brady request and People's pretrial disclosure, but court received statement in evidence and People lost opportunity for cross-examination); People v. Whitehead, 84 A.D.3d 1128, 923 N.Y.S.2d 212 (2d Dept. 2011) (mistrial properly denied where People failed to disclose that witness failed to identify defendant from photograph, but no reasonable probability that result would have been different if evidence had been disclosed and court required People to recall witness so he could be further cross-examined) and People v. Alvarez, 44 A.D.3d 562, 845 N.Y.S.2d 230 (1st Dept. 2007), lv denied, 9

N.Y.3d 1030 (no Brady violation where defendant received witness contact information when jury selection began, but received police reports with witness information redacted a year and a half before trial, and reports contained sufficient information to allow defense to conduct investigation)

with People v. Wagstaffe, 120 A.D.3d 1361 (2d Dept. 2014) (documents were included within disclosure made during jury selection, but were interspersed throughout voluminous amount of other documentation and were not identified); People v. Carver, 114 A.D.3d 1199, 979 N.Y.S.2d 752 (4th Dept. 2014) (conviction reversed where People delayed disclosure of 911 recording of voice of unidentified person referring to white male suspect, whereas defendant was black male; although defendant received recording on first day of trial, he had no meaningful opportunity to use it because trial was brief and prosecutor did not inform defense counsel that recording contained exculpatory material); People v. Garcia, 46 A.D.3d 461, 848 N.Y.S.2d 137 (1st Dept. 2007) (court rejects People's claim that suppressed evidence was available to defense where People disclosed nothing more than witnesses' names, with no contact information or indication as to what information they possessed, and names were "buried in a voluminous amount of discovery provided shortly before trial, and were not identified as Brady material"); DiSimone v. Phillips, 461 F.3d 181 (2d Cir. 2006) (further fact-finding on Brady claim ordered where habeas petitioner received information about another confessed stabber until near the end of the prosecution's case); Leka v. Portuondo, 257 F.3d 89 (2001) (defense had insufficient time to use information regarding exculpatory witness where his statements were disclosed 9 days before opening arguments and 23 days before defense began its case); People v. Roberts, 203 A.D.2d 600, 611 N.Y.S.2d 214 (2d Dept. 1994) (disclosure on eve of trial was prejudicial since defendant did not have adequate opportunity to locate witness); United States v. Thomas, 2013 WL 5834450 (SDNY 2013) (defense prejudiced where Government disclosed robbery complainant's inconsistent description of robbers at sidebar during defense case; while defendant could have recalled complainant, that ad hoc improvisation involved substantial risks, including reinforcement of complainant's testimony, but uncertain reward, and recalling witness after late Brady disclosure is no

substitute for thoughtful preparation and considered strategy) and People v. Knight, 18 Misc.3d 1129(A), 856 N.Y.S.2d 501 (Sup. Ct., Queens Co., 2007) (defendant denied fair trial where information supporting defense of justification was in prosecution's possession for approximately three and one half years until it was disclosed to defendant approximately four days prior to trial and after opening statements, despite previous demands for Brady material).

In People v. Gutierrez, 214 Cal.App.4th 343 (Cal. Ct. App., 1st Dist., 2013), it was held that the Brady obligation extends to the preliminary hearing stage of a criminal proceeding. See also Bridgeforth v. Superior Court of Los Angeles County, 214 Cal.App.4th 1074 (Cal. Ct. App., 2d Dist., 2013) (agreeing with Gutierrez).

In United States v. Ruiz, 536 U.S. 622, 122 S.Ct. 2450 (2002), the Supreme Court held that the defendant was not entitled to pre-plea disclosure of impeachment information. See also People v. Holloway, 33 A.D.3d 442, 823 N.Y.S.2d 17 (1st Dept. 2006) (People had no duty to disclose that arresting officer was subject of ongoing investigation); but see State v. Heubler, 275 P.3d 91 (Nev. 2012) (State required to disclose material exculpatory evidence within its possession to defense before entry of guilty plea, and materiality standard is based on relevance of withheld evidence to defendant's decision to plead guilty; court distinguishes case from United States v. Ruiz, 536 U.S. 622, which involved impeachment information); People v. Wilson, 159 A.D.3d 1600 (4th Dept. 2018) (where People failed to disclose reports containing evidence of intoxication of motorcycle operator involved in collision with defendant, defendant did not forfeit Brady claim by pleading guilty; it would undermine Brady obligation if defendant forfeits claim by entering plea without knowledge of exculpatory evidence); People v. Kull, 44 Misc.3d 1218(A) (Dist. Ct., Nassau Co., 2014) (plea withdrawn where police and the District Attorney knew prior to plea and failed to disclose contamination issue regarding intoxilyzer).

State ethics rules arguably require disclosure as soon as possible, and may provide other protections. See Rules of Professional Conduct, Rule 3.8(b) ("A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of

evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal"); Formal Opinion 2016-3: Prosecutors' Ethical Obligations to Disclose Information Favorable to the Defense, 2016 WL 8997249 (N.Y.C. Bar Ass'n Committee of Professional Ethics, 8/29/16) (Rule 3.8(b) requires disclosure as soon as reasonably practicable of relevant information known to prosecutor that tends to negate guilt or mitigate charges or sentence regardless of information's significance); People v. Waters, 35 Misc.3d 855 (Sup. Ct., Bronx Co., 2012) (Brady violation found where prosecutor deceived defense by withholding fact that witness's testimony at trial would be inconsistent with multiple previous statements, and Rule 3.8(b) obligated prosecutor to disclose material as soon as possible; People ordered to try to obtain and turn over various documents that are not discoverable under CPL Article 240, and orders hearing to determine, pre-trial, what the witness's testimony will be and the underlying facts surrounding his convictions); People v. Robinson, 34 Misc.3d 1217(A) (Crim. Ct., Queens Co., 2011) (Rule 3.8[b] of Rules of Professional Conduct and Standard 3-3.11 of American Bar Association Standards for Criminal Justice require prosecutor to make disclosure at earliest feasible opportunity; court orders hearing to determine whether prosecutor's actions were willful and motivated by desire to obtain tactical advantage and whether sanction is warranted); see also Opinion 2018-2, 2018 WL 3019993 (N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, 2018) (discusses post-conviction obligations created by Rule 3.8(c) "when a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted"); In re Kline, 113 A.3d 202 (D.C. Ct. App., 2015) (professional conduct rule prohibiting prosecutor from intentionally failing to disclose to defense information prosecutor knows or reasonably should know tends to negate guilt or mitigate offense not limited to information that would be considered material under constitutional Brady rules; prosecutor must disclose all potentially exculpatory information in his/her possession); but see Office of Lawyer Regulation v. Riek, 834 N.W.2d 384 (Wis. 2013) (state rule of professional conduct

requiring prosecutors to make timely disclosure of evidence that tends to negate guilt or mitigate offense must be interpreted in manner consistent with scope of Brady; under conflicting standards, prosecutors would face uncertainty and professional discipline even when constitutional law does not require disclosure, and ethics rule could be used as tactical weapon to threaten prosecutor with bar complaint).

Moreover, in New York, an administrative order requires judges who preside over criminal cases to issue orders to prosecutors requiring them to look through files to find information favorable to the defense. At least 30 days before a felony trial and 15 days before a misdemeanor trial, a prosecutor must disclose anything that impeaches the credibility of witnesses, exculpates or reduces the degree of the offense, or mitigates the degree of the defendant's culpability or punishment. This includes promises or inducements made in return for giving testimony, a witness' prior convictions and uncharged criminal conduct, any motive that a witness has to lie, and any mental or physical illness or substance abuse that impairs a witness' ability to perceive. It does not matter whether the prosecutor believes the information is credible. Disclosures that pertain to a suppression hearing are presumptively "timely" if they are made no later than 15 days before the scheduled hearing date. Nothing in these requirements shall be understood to diminish a prosecutor's obligation to disclose exculpatory information as soon as reasonably possible. The obligation to disclose is a continuing one. Prosecutors should strive to determine if favorable information exists. See 22 NYCRR § 200.16/200.27.

The prosecution is not obligated to provide evidence which, given certain knowledge already possessed by the defense, could be obtained from other sources by exercising due diligence. Compare Pena v. State, 353 S.W.3d 797 (Tex. Ct. of Crim. App., 2011) (state violated Brady when it failed to disclose audio portion of videotape containing exculpatory statements made by defendant to police; although defendant might have known of statements, he was unaware that audio recording existed that captured all his statements, and recording was only evidence that substantiated defense); Lewis v. Connecticut Commissioner of Correction, 790 F.3d 109 (2d Cir. 2015) (defendant reasonably unaware of exculpatory information has no duty to take

affirmative steps to seek out and uncover information) and United States v. Espinal, 96 F.Supp.3d 53 (SDNY 2015) (identifying witness insufficient; government must disclose true extent of exculpatory information) with People v. McClain, 53 A.D.3d 556, 861 N.Y.S.2d 764 (2d Dept. 2008), lv denied, 11 N.Y.3d 791 (no Brady violation where defendant and defense counsel knew of possibility that defendant's arrest was captured by surveillance camera from nearby housing project, and, prosecutor had no obligation to obtain by subpoena duces tecum material defendant could have obtained); Bell. v Bell, 512 F.3d 223 (6th Cir. 2008) (known fact of witness's incarceration strongly suggested that further inquiry was in order whether or not prosecutor represented that he had turned over all discoverable evidence in file); Harris v. Kuba, 486 F.3d 1010 (7th Cir. 2007) (no Brady violation where defense had evidence that weapon used in shooting was used in other crimes, and thus could have discovered that although victim of one of those crimes had identified defendant, another individual had confessed); United States v. Perdomo, 929 F.2d 967 (3rd Cir. 1991) (defense counsel was not chargeable with knowledge of witness' criminal record where another member of Public Defender's office had represented witness) and People v. Encarnacion, 6 Misc.3d 1027(A), 800 N.Y.S.2d 352 (Sup. Ct., N.Y. Co., 2005) (defense counsel could have learned of accomplice's recantation by contacting accomplice's lawyer to ascertain what happened at accomplice's trial).

However, it was held in United States v. Tavera, 719 F.3d 705 (6th Cir. 2013) that, after Banks v. Dretke (540 U.S. 668), the government is not relieved of its duty to disclose when the defense could have discovered the evidence by exercising due diligence.

Brady does not require disclosure of what would constitute opinion work product. Morris v. Yist, 447 F.3d 735 (9th Cir. 2006).

b. General vs. Specific Request

There is, of course, no requirement that the defense request Brady material as a prerequisite to making an issue out of the prosecution's failure to make disclosure. Banks v. Dretke, 540 U.S. 668, 124 S.Ct.1256 (2004).

The language in FCA §331.2(1)(g) clearly constitutes a general, not a specific

request for Brady material. In order to invoke the elevated protection provided by People v. Vilardi, supra, 76 N.Y.2d 67, the child's attorney would have to include a more specific reference to evidence the attorney suspects may be in existence. For instance, if the respondent alleges that an exculpatory witness came forward to the police, a clear request for information concerning that person would presumably constitute a specific request. Cf. People v. Nedrick, 166 A.D.2d 725, 561 N.Y.S.2d 477 (2d Dept. 1990), lv denied 77 N.Y.2d 842, 567 N.Y.S.2d 210 (1991) (request for statement made by anyone "the prosecution ... believe[d] to have relevant knowledge" was general). See also People v. Scott, 88 N.Y.2d 888, 644 N.Y.S.2d 913 (1996) (defendant's request for report of polygraph exam given to informant was specific even though defense did not know precise form of the document); United States v. Joseph, 996 F.2d 36 (3rd Cir. 1993), at 41, n. 5 (if defendant makes enough specific requests, they could be treated as a general request); People v. Petros Bedi, 4107/96, NYLJ 1202592836531, at *1 (Sup., QU, Decided March 13, 2013) (defendant made specific request when he requested "all evidence reflecting adversely on the credibility of prosecution witnesses"); People v. Shakur, 169 Misc.2d 961, 648 N.Y.S.2d 200 (Sup. Ct., N.Y. Co., 1996) (defendant's "boilerplate" demand for information regarding disciplinary actions against officers was a general request).

When the prosecution fails to respond to a demand and it turns out that one of the items requested, such as a scientific report or a photograph, constitutes Brady material, the demand should be treated as a specific request. Cf. People v. Vilardi, supra, 76 N.Y.2d 67 (People failed to disclose Bomb Squad officer's report finding no evidence of an explosion); People v. Brown, supra, 67 N.Y.2d 555 (defendant requested Brady material, including photos used in identification procedure).

c. Evidence Of Other Perpetrator

Evidence tending to show that another person committed the crime charged constitutes exculpatory evidence that must be disclosed. See, e.g., People v. Negron, 26 N.Y.3d 262 (2015) (noting that third-party culpability evidence is evaluated under ordinary evidentiary principles by balancing probative value against potential for undue prejudice, delay and confusion, court concludes that counsel was ineffective for failing

to object to court's use of incorrect standard, and finds Brady violation, where no evidence established that third party committed shooting, but he did bear general resemblance to description of perpetrator, lived in same building as defendant, and was arrested in close proximity to time of offense for possessing weapons and ammunition including type of ammunition used in shooting under circumstances evincing consciousness of guilt); People v. Ennis, 11 N.Y.3d 403 (2008); Harris v. Kuba, 486 F.3d 1010 (undisclosed evidence was not exculpatory since, at best, it established that photograph of defendant looked like person who used same gun in other crime); Trammell v. McKune, 485 F.3d 546 (10th Cir. 2007) (evidence did not directly cast doubt on eyewitness identifications, but would have supported defense theory); Mendez v. Artuz, 303 F.3d 411 (2d Cir. 2002) (prosecution failed to disclose to defense that drug dealer had placed contract on life of victim); People v. Alvarez, 44 A.D.3d 562, 845 N.Y.S.2d 230 (1st Dept. 2007), lv denied, 9 N.Y.3d 1030 (defendant failed to establish that lost witness would have provided material exculpatory testimony where police report contained witness's report of cryptic conversation with person other than defendant who stated that he "took care of" a certain "problem" that, the witness believed, was the charged homicide, and admitted being the perpetrator); People v. Tejada, 143 A.D.2d 51, 531 N.Y.S.2d 565 (1st Dept. 1988); People v. Robinson, 133 A.D.2d 859, 520 N.Y.S.2d 415 (2d Dept. 1987); People v. Porter, 128 A.D.2d 248, 516 N.Y.S.2d 201 (1st Dept. 1987); People v. Davis, 27 Misc.3d 1226(A), 2010 WL 2044497 (Sup. Ct., Bronx Co., 2010) (video footage of prior shooting of defendant was Brady material since shell casings from that shooting matched shell casings from weapon used in instant case and detective viewed footage and saw only one shooter and one gun involved; since diligent efforts were not made to preserve evidence and sanction must be imposed, defendant may call lead detective in prior case and question him about contents of the lost video and certain lost photographs and call another detective to testify regarding viewing of lost file); Boyd v. United States, 2006 WL 929218 (SDNY, 2006) (recovery of someone else's latent fingerprints from bank robbery scene was not Brady material given public, heavily-trafficked nature of location); People v. Stubbs, 154 Misc.2d 792, 585 N.Y.S.2d 687 (City Ct. of Rochester, Monroe Co., 1992).

d. Impeachment Evidence

Although it does not directly tend to prove innocence, impeachment evidence, such as a witness' prior inconsistent or false statement, may constitute Brady material. See Turner v. United States, 137 S.Ct. 1885 (2017) (impeachment evidence could be material as to witness who has already been impeached with other evidence); Wearry v. Cain, 136 S.Ct. 1002 (2016) (prosecution withheld information showing that witness's fellow inmates heard him say he wanted to "make sure [defendant] gets the needle cause he jacked over me"; that inmate who first told investigators he had witnessed the murder recanted the next day and indicated that witness "had told him what to say" and had suggested that lying "would help him get out of jail"; that witness had twice sought deal to reduce existing sentence in exchange for testifying against defendant and police told him they would "talk to the D.A. if he told the truth"; that man's medical condition would have prevented him from doing what witness claimed he had done); People v. Spruill, _A.D.3d_, 2018 WL 4344529 (2d Dept. 2018) (although prosecutor had met with witness "maybe seven or eight times" - not 20 times as witness had testified at trial - and should have corrected testimony, testimony was not material); People v. Wagstaffe, 120 A.D.3d 1361 (2d Dept. 2014) (defendants' convictions vacated where prosecution's case rested almost exclusively on testimony of witness, and Brady material called into question whether witness provided detectives with defendants' identities or detectives identified defendants prior to witness's identification, and would bear negatively upon credibility of witness and detectives); Arnold v. Secretary, Department of Corrections, 595 F.3d 1324 (11th Cir. 2010) (officer's knowledge of his own criminal conduct, which bore close connection to charges, could properly be imputed to prosecution); United States v. Spinelli, 551 F.3d 159 (2d Cir. 2008) (impeachment evidence more likely to be deemed material if witness supplied only evidence linking defendant to crime and less likely to be considered material when it merely furnishes additional basis for impeachment of witness whose credibility has already been shown to be questionable); People v. Williams, 50 A.D.3d 1177, 854 N.Y.S.2d 586 (3rd Dept. 2008) (motion to set aside verdict should have been granted where People failed to disclose certain Rosario and Brady materials until after last witness testified; court notes that materials could

have been used to impeach witness who corroborated testimony of only person who testified that defendant was perpetrator of robbery and defense had accused that person of the robbery, that witness who could have been impeached was not made available for further cross-examination, and that although court instructed jury that it could infer that if witness had been further cross-examined, his credibility would have been "further impeached" and testimony would have contradicted People's other witnesses, jury was not told in what respect witness would have been impeached or how his testimony would have been different than before); United States v. Rodriguez, 496 F.3d 221 (in some circumstances, telling defense that witness lied, but leaving it to defense counsel to cross-examine witness to find out more, could foreclose effective use of the information because witness might give incriminating or prejudicial answers); United States v. Avellino, 136 F.3d 249 (2d Cir. 1998) (government required to disclose evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness); People v. Crandall, 38 A.D.3d 996, 830 N.Y.S.2d 867 (3rd Dept. 2007), lv denied 9 N.Y.3d 842 (evidence that informant did not call defendant on day of controlled buy, as he testified he did, was not Brady material).

i. Prior Inconsistent Statements - See, e.g., Smith v. Cain, 132 S.Ct. 627 (2012) (reversible Brady error where prosecution failed to disclose statements by eyewitness contradicting his testimony, which was only evidence linking defendant to crime; witness told jury he had "[n]o doubt" that defendant was gunman he stood "face to face" with, but witness previously said he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them"); Kyles v. Whitley, supra, 514 U.S. 419; People v. Bond, 95 N.Y.2d 840, 713 N.Y.S.2d 514 (2000) (witness' prior statement that she did not see shooting would have created reasonable possibility of different verdict); United States v. Rivas, 377 F.3d 195 (2d Cir. 2004) (new trial ordered where prosecution failed to disclose witness's admission that he had brought narcotics on board the ship); People v. Lantigua, 228 A.D.2d 213, 643 N.Y.S.2d 963 (1st Dept. 1996) (People failed to disclose evidence which, when viewed with other evidence, indicated that witness was distracted while shooting was in progress); People v. Ramos, 201 A.D.2d 78, 614 N.Y.S.2d 977 (1st Dept. 1994) (People

failed to disclose statements of alleged child sex abuse victim and evidence of child's sexually-oriented behavior); People v. Clausell, 182 A.D.2d 132, 587 N.Y.S.2d 672 (2d Dept. 1992), lv denied 81 N.Y.2d 761, 594 N.Y.S.2d 723 (undisclosed buy report contained description of seller that differed from arresting officer's testimony).

ii. Bias Or Interest Of Witness - See, e.g., People v. Wright, 86 N.Y.2d 591, 635 N.Y.S.2d 136 (1995) (complainant's history as informant should have been disclosed, since it provided motive for police witnesses to support complainant's version of events); People v. Lewis, 125 A.D.3d 1109 (3d Dept. 2015) (hearing ordered upon defendant's motion to vacate judgment based on evidence that witness was subjected to threats or offered promises in exchange for information); People v. Sinha, 84 A.D.3d 35, 922 N.Y.S.2d 275 (1st Dept. 2011), aff'd 19 N.Y.3d 932 (Brady violation where People failed to disclose that witness believed defendant caused him to be charged with violating probation); People v. Simonds, 140 A.D.2d 236, 529 N.Y.S.2d 469 (1st Dept. 1988) (no violation where, although court denied defendant access to documents concerning police relationship with paid informant, defendant was able to elicit significant evidence of informant's "interest"); People v. Smith, 127 A.D.2d 864, 512 N.Y.S.2d 244 (2d Dept. 1987) (Brady violation occurred where People failed to inform defendant of possible conspiracy against him involving officer and 2 persons with suspected ties to organized crime); People v. Velez, 118 A.D.2d 116, 504 N.Y.S.2d 404 (1st Dept. 1986) (Brady violation occurred where People withheld fact that key prosecution witness believed defendant had robbed his wife 2 weeks before trial).

iii. Witness Cooperation Agreement - See, e.g., People v. Colon, 13 N.Y.3d 343, 890 N.Y.S.2d 424 (2009) (reversible error found where prosecutor, inter alia, failed to disclose that People were assisting in relocation of witness's grandparents or that prosecutor had intervened on witness's behalf in connection with previous drug case; "[b]y their very nature, benefits conferred on a witness by a prosecutor provide a basis for the jury to question the veracity of a witness on the theory that the witness may be biased in favor of the People"); People v. Steadman, 82 N.Y.2d 1, 603 N.Y.S.2d 382 (1993) (prosecutor's office as a whole has obligation and may not "shield" witness and trial assistants from knowledge of

agreement); People v. Novoa, 70 N.Y.2d 490, 522 N.Y.S.2d 504 (1987) (prosecutor failed to discover witness' agreement with Special Narcotics Prosecutor's office, and failed to disclose her own promises or correct the witness' misstatements); People v. Giuca, 158 A.D.3d 642 (2d Dept. 2018), **lv granted** 31 N.Y.3d 1117 (Brady violation found where witness's immediate contact with police after leaving drug program, court appearance with detectives and prosecutor, when he was released on own recognizance, and ability to remain out of custody despite poor progress in drug treatment and numerous violations, evidenced tacit understanding with prosecution that witness would receive benefit for testimony); People v. Johnson, 107 A.D.3d 1161 (3d Dept. 2013), lv denied 21 N.Y.3d 1075 (court notes that "convincing argument" could be made that People had Brady obligation to inform defendant of witness's additional obligation to testify in another matter, where there would be similar testimony that inmate had confessed to her); People v. Cwikla, 46 N.Y.2d 434, 414 N.Y.S.2d 102 (1979) (prosecutor failed to disclose correspondence between DA's office and Parole Board); People v. Sinha, 84 A.D.3d 35, 922 N.Y.S.2d 275 (1st Dept. 2011), aff'd 19 N.Y.3d 932 (conviction for bribing witness reversed where People failed to disclose, until after witness testified, e-mails to witness's mother from prosecutors in which prosecutor stated that she would "do everything in [her] power" to make Connecticut prosecutors who were prosecuting witness on probation violation charges "see that [the witness] deserved a break because of what had happened to him when he was younger"; prosecutors told mother they had arranged for witness to receive phone privileges at youth institution where he was incarcerated so he could call her; and prosecutor informed mother that she had arranged to stop witness from being transferred to adult facility); Bell. v Bell, 512 F.3d 223 (6th Cir. 2008) (while prosecution must disclose tacit agreement made with witness prior to witness's testimony, court not required to infer pre-existing arrangement if government chooses to provide assistance to witness following trial); People v. Mickel, 274 A.D.2d 325, 710 N.Y.S.2d 70 (1st Dept. 2000) (People informed defendant regarding witness' prior misbehavior and criminal activity and a cooperation agreement, but failed to inform defendant that a new cooperation agreement had been signed after the witness violated the first one); People

v. Lewis, 174 A.D.2d 294, 580 N.Y.S.2d 6 (1st Dept. 1992); People v. Conlon, 146 A.D.2d 319, 541 N.Y.S.2d 347 (1st Dept. 1989) (trial prosecutor should have known of promise, and, in any event, was chargeable with knowledge of deal made by another prosecutor); Bell v. Bell, 460 F.3d 739 (6th Cir. 2006) (unwritten, tacit agreement constituted Brady material); Su v. Filion, 335 F.3d 119 (2d Cir. 2003) (habeas relief granted where prosecutor knowingly allowed witness to falsely deny existence of cooperation agreement). But see People v. Schlau, 117 A.D.3d 461 (1st Dept. 2014), lv denied 23 N.Y.3d 1067 (court did not err in failing to compel People to disclose confidential informant status of victim who became informant six months after she reported sexual assault and identified defendant at lineup, and had no motive to testify to facts she had already related long before becoming informant); People v. Smith, 85 A.D.3d 1297, 924 N.Y.S.2d 223 (3d Dept. 2011) (defendant should have been informed that prosecution witness had been offered favorable plea bargain, but failure to disclose did not deprive defendant of fair trial since there was no evidence that plea was related to witness's appearance at defendant's trial); People v. Tellier, 272 A.D.2d 347, 707 N.Y.S.2d 469 (2d Dept. 2000) (no violation where, even assuming witness had informal agreement with Federal prosecutors, there was no evidence that witness was promised a benefit based on his testimony in the State case); People v. Sibadan, 240 A.D.2d 30, 671 N.Y.S.2d 1 (1st Dept. 1998), lv denied 92 N.Y.2d 861, 677 N.Y.S.2d 91 (no violation where People failed to disclose that witness had cooperated in past in connection with unrelated matters).

iv. Witness' Psychiatric History - See, e.g., People v. Fuentes, 12 N.Y.3d 259, 879 N.Y.S.2d 373 (2009) (disclosure of "record of consultation" in which psychiatrist noted rape victim's feelings of depression and minimal marijuana use would not have altered outcome of case; Court "do[es] not condone the People's decision to withhold the document from defendant or their failure to, at a minimum, inform the trial judge about it and request an in *camera* inspection to determine its admissibility"; defense counsel "should be able to assume that a medical record is complete in a case, such as this, of open file discovery"), habeas relief granted in Fuentes v. Griffin, 829 F.3d 233 (2d Cir. 2016) (habeas relief granted where petitioner

should have received psychiatric report of sexual assault complainant, which prosecution possessed; petitioner claimed that after encounter, complainant became angry and vindictive when it became clear that petitioner did not want to see her again, and psychiatric record revealed that complainant suffered from chronic disorder characterized by low self-esteem, feelings of inadequacy, and excessive anger); ; People v. Diaz, 134 A.D.2d 445, 521 N.Y.S.2d 69 (2d Dept. 1987) (while noting that impeachment evidence falls within Brady obligation, court finds no error where prosecutor, who had no duty to seek out evidence of witness' psychiatric history, was unaware of evidence and defense counsel was able to extensively cross-examine witness concerning his psychiatric history).

v. Witness' Criminal History Or Bad Acts Or False Statements - See, e.g., People v. Garrett, 23 N.Y.3d 878 (2014) (materiality standard not met where People failed to disclose federal civil action brought against homicide detective who interrogated defendant, which included allegations that detective used coercive tactics to extract confession against plaintiff's will); People v. Hunter, 11 N.Y.3d 1, 862 N.Y.S.2d 301 (2008) (Brady violation found where People withheld evidence that man named Parker had been indicted for raping same complainant some ten months after incident involving defendant, and that Parker admitted to having sex with complainant but said she consented to it; Court of Appeals notes that Parker's guilty plea was irrelevant to what People's duties under Brady were at time of trial and before, and that trial court would have had discretion to admit information about the Parker case and Parker's claim that complainant willingly had sex with him and then lied about it); United States v. Walter, 870 F.3d 622 (7th Cir. 2017) (new trial ordered where prosecution failed to disclose that witness had disclosed that other witness, who had testified that he was no longer dealing drugs while cooperating with government, was in fact dealing drugs); People v. Hubbard, 132 A.D.3d 1013 (2d Dept. 2015) (order vacating judgment of conviction affirmed where court, inter alia, properly determined that undisclosed evidence concerning allegations that detective had procured false confession in unrelated matter, which led to federal lawsuit against, among others, the detective, was favorable to defense and material); United States v. Olsen, 704 F.3d

1172 (9th Cir. 2013), reh'g denied 737 F.3d 625, cert denied 134 S.Sct. 2711 (government violated Brady by failing to disclose results of internal investigation into forensic scientist that called into question his care in laboratory and credibility as witness); People v. Sinha, 84 A.D.3d 35, 922 N.Y.S.2d 275 (1st Dept. 2011), aff'd 19 N.Y.3d 932 (Brady violation where People failed to disclose that witness's prior criminal activities included having acted as courier for someone by transporting guns or drugs); People v. Cerda, 78 A.D.3d 539, 911 N.Y.S.2d 336 (1st Dept. 2010), lv denied 16 N.Y.3d 829 (no reasonable possibility that outcome of trial would have been different if investigation had revealed that, seven years before incidents involving defendant, victim, who was then four or five years old, falsely accused her father of sexual abuse); People v. Suh, 27 Misc.3d 143(A), 2010 WL 2471157 (App. Term, 9th & 10th Jud. Dist., 2010), lv denied 15 N.Y.3d 896 (reversible error where prosecutor failed to disclose that, two years before trial, principal witness had been convicted, in same jurisdiction, of disorderly conduct upon plea entered in satisfaction of petit larceny charge and of unlawful possession of marihuana; "[m]atters of theft have 'very material relevance' for a person's capacity for 'individual dishonesty'"); United States v. Velarde, 485 F.3d 553 (10th Cir. 2007) (trial court directed to determine whether prosecution violated Brady by withholding evidence that complainant had made false allegations of sex abuse against school teacher and vice principal); People v. Monroe, 17 A.D.3d 863, 793 N.Y.S.2d 276 (3rd Dept. 2005) (Brady violation where defendant was charged in connection with a fight with the victim outside a gas station, and People did not disclose that, several months after the incident, the victim was involved in 2 arguments with the attendant at another gas station); People v. Fernandez, 249 A.D.2d 3, 670 N.Y.S.2d 840 (1st Dept. 1998), lv denied 92 N.Y.2d 897, 680 N.Y.S.2d 60 (failure to inform defense that police witness was under investigation for selling drugs was not reversible error since officer's testimony was not pivotal in securing conviction); People v. Santiago, 138 A.D.2d 327, 526 N.Y.S.2d 456 (2d Dept. 1988) (conviction vacated where complainant admitted to trespass conviction, but defendant later learned that conviction was for felony of attempted burglary and that complainant had outstanding probation violation); United States v. Avellino, supra, 136 F.3d 249 (evidence that government witness had perjured

himself at other trials was not material to defendant's decision to plead guilty); Castellanos v. Kirkpatrick, _F.Supp.3d_, 2017 WL 2817048 (EDNY 2017), appeal withdrawn _F.3d_, 2017 WL 7058071 (Brady violation where State withheld documents regarding allegations that detective had coerced suspects into signing false confessions, which supported petitioner's false confession theory); People v. Hubbard, 45 Misc.3d 328 (Sup. Ct., Suffolk Co., 2014) (Brady violation where key evidence was defendant's confession, and People failed to disclose evidence that, in unrelated case, detectives who took confession engaged in misconduct leading to false confession); People v. Ortega, 12 Misc.3d 1182(A), 824 N.Y.S.2d 765 (Sup. Ct., N.Y. Co., 2006) (District Attorney has no duty to disclose allegations of police misconduct until Internal Affairs Bureau has had reasonable time to investigate).

vi. Conflict Between Witnesses - See, e.g., People v. Geaslen, 54 N.Y.2d 510, 446 N.Y.S.2d 227 (1981) (Brady violation occurred at suppression hearing when prosecutor failed to disclose grand jury testimony of police officer whose testimony conflicted with that of parole officer who testified at suppression hearing); People v. Hopper, 87 A.D.2d 193, 450 N.Y.S.2d 798 (1st Dept. 1982) (Brady violation occurred where grand jury testimony of uncalled witness conflicted with trial witness' testimony and indicated that trial witness had been involved in the crime).

vii. Witness's Status As Informant - See, e.g., Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256 (2004).

viii. Other Constitutionally Required Discovery - Arguably, this discovery provision can be read broadly to require any discovery which is necessary to enable defense counsel to provide effective assistance, or which relates to constitutional issues, such as suppression. For instance, pursuant to this provision, courts have ordered discovery of search warrant documents. See People v. Chahine, 150 Misc.2d 242, 568 N.Y.S.2d 526 (Crim. Ct. N.Y. Co., 1991). See also People v. Sweeney, 18 Misc.3d 1134(A), 859 N.Y.S.2d 898 (Albany City Ct., 2008) (while precluding chemical test results as sanction for People's failure to preserve video recording made by police of DWI defendant's conduct after he arrived at police station, court cites CPL § 240.20(1)(h)).

9. Approximate Date, Time And Place Of Offense And Arrest

Even when these facts are clearly stated in supporting depositions or other documents, the child's attorney should make a formal request. It is easier for the presentment agency to obtain an amendment at trial if a mistake appears in documents prepared at the commencement of the prosecution, but not in formal discovery documents.

On the other hand, if the supporting depositions place the crime or arrest at a time or a location that is consistent with the respondent's defense, there may be no reason to request the information. And, if, for example, it turns out that the wrong date was provided in all relevant documents, an amendment just prior to or during trial would be objectionable if the respondent relied upon the alleged date to his or her detriment. See, e.g., People v. Covington, 86 A.D.2d 877, 447 N.Y.S.2d 292 (2d Dept. 1982) (reversible error where amendment changed date by only one day, but defendant had prepared alibi defense).

10. Voluntary Disclosure Forms

As a convenient method of providing statutory notice and discovery material to which the respondent is clearly entitled, and making discovery demands of their own, presentment agencies have developed "Voluntary Disclosure Forms" (hereinafter, "VDF") that are served at the initial appearance or shortly thereafter. Much of the information contained in these forms is included in the demand to produce provisions in FCA §331.2(1). In essence, the presentment agency anticipates the respondent's discovery requests, and provides information in an effort to forestall further discovery activity.

First of all, even if the VDF contains a reference to every type of material made discoverable by FCA §331.2(1), and either indicates how the respondent can gain access to the material or denies that it exists, the VDF never contains all the information which the respondent will want to obtain. It does not include an "anticipatory" bill of particulars, nor does it include information which the respondent arguably needs in order to prepare an adequate defense, but which is not included within the four corners of §331.2(1).

Thus, despite service of a VDF, the respondent will still need to serve discovery requests, and bring a motion if those requests are not satisfied. And, as long as discovery requests are being served, it does no harm to include requests for information that has already been referred to in the VDF. By doing so, the respondent places on record an early interest in the material. That early expression of interest can lend support if, despite the presentment agency's repeated claims that certain material does not exist, it turns out that the material does exist and a motion to preclude is made when the presentment agency makes an offer at trial. In addition, a request creates the possibility that more information will be provided.

On the other hand, if the respondent relies upon representations in the VDF concerning the non-existence of a particular item of discovery material, and makes no further request for the item, there is no reason to believe that the VDF would not be considered a binding legal document that could be cited in a motion for preclusion or some other relief.

Finally, since the VDF often contains evidence that will not be offered at trial and would ordinarily not be available to the court, it can be argued that the VDF should not be placed in the court file. Compare Matter of Michael W., 122 Misc.2d 243, 470 N.Y.S.2d 319 (Fam. Ct. Queens Co., 1984) (court permits filing, and notes that information in form is essentially the same as that placed in court file as a result of other article three discovery procedures, and that judges may rule on the admissibility of evidence before trial without being disqualified) with Matter of Lynette L., 121 Misc.2d 530, 468 N.Y.S.2d 325 (Fam. Ct. Kings Co., 1983) (VDF may not be filed with court, since it contains objectionable material that could "taint" the proceeding).

D. Reciprocal Discovery

Upon service of a demand, the respondent, within the same time frames that apply to the presentment agency (see FCA §311.7), must disclose and make available the following:

> (a) any written report or document, or portion thereof, concerning a physical examination, or scientific test, experiment, or comparison, made by or at the request or direction of, the respondent, if the respondent intends to introduce such report or document at a hearing or if the

> respondent has filed a notice of defense of mental disease or defect pursuant to section 335.1 and such report or document relates thereto, or if such report or document was made by a person, other than respondent, whom respondent intends to call as a witness at a hearing; and
> (b) any photograph, drawing, tape or other electronic recording which the respondent intends to introduce at a hearing.

FCA §331.2(3). See, e.g., People v. O'Brien, 140 A.D.3d 1325 (3d Dept. 2016) (preclusion of defendant's medical records as sanction for late disclosure soon after commencement of trial was error where defense counsel did not intend to utilize records until hearing trooper's suppression hearing testimony, and court could have granted one-day continuance for prosecutor to review records and/or pared down admitted portion, as defense counsel offered); People v. Harris, 109 A.D.2d 351, 491 N.Y.S.2d 678 (2d Dept. 1985), lv denied 66 N.Y.2d 919, 498 N.Y.S.2d 1034 (People entitled to reports concerning defense of extreme emotional disturbance); People v. Cruickshank, 105 A.D.2d 325, 484 N.Y.S.2d 328 (3rd Dept. 1985) (after noting that phrase "mental disease or defect" covers more than the traditional insanity defense, court holds that defendant is required to turn over reports concerning defenses of extreme emotional disturbance and justification); Matter of C.W.J., 16 Misc.3d 1117(A), 847 N.Y.S.2d 895 (Fam. Ct., Nassau Co., 2007) (initial request made during motion practice denied as untimely); People v. Soto, 16 Misc.3d 1115(A), 847 N.Y.S.2d 898 (Sup. Ct., Queens Co., 2007) (defendant not required to disclose recording of complainant's statements to defense investigators; although People argue that it is reasonably predictable that defense will use recording for impeachment, defendant has indicated that he has no present intent to use it); People v. Kemp, 2002 WL 1461776 (Sup. Ct., Kings Co., 2002) (People entitled to notes made by defense psychiatrist regarding defendant's statements); People v. Hoque, 2001 WL 1657270 (Sup. Ct., Queens Co., 2001) (court orders disclosure of documents prepared by defense psychiatrist); People v. Purdon, 175 Misc.2d 775, 669 N.Y.S.2d 777 (County Ct., Sullivan Co., 1997) (court cannot order that psychiatrist prepare report); People v. Perez, 171 Misc.2d 75, 653 N.Y.S.2d 527 (Sup. Ct., Bronx Co., 1996) (court orders defense to turn over tape recordings of

interviews with prosecution witness). Cf. People v. Larkin, 116 Misc.2d 269, 455 N.Y.S.2d 726 (County Ct. Nassau Co., 1982) (defendant directed to produce photos and reports concerning crime scene so court could determine whether they should be turned over).

Upon service of a demand, the respondent is also obligated to disclose and make available "any written report or document, or portion thereof, concerning a mental examination made by or at the request or direction of" the respondent if he or she has served notice of a defense of mental disease or defect. FCA §331.2(4).

Like the presentment agency, the respondent is required to make a "diligent good faith effort" to make the property available when it is not within the respondent's control, but need not obtain by subpoena material that the presentment agency also could obtain by subpoena. FCA §331.2(5).

E. Motion For Discovery Pursuant To Demand

When the presentment agency has refused in writing to disclose and make available discoverable material, the respondent should move for court-ordered discovery pursuant to FCA §331.3. If the court concludes that the presentment agency's refusal to disclose was not justified, it must order discovery. If the presentment agency failed to serve a timely written refusal and simply ignored the respondent's demand, the court must order discovery, or impose a sanction authorized by §331.6, unless the presentment agency shows good cause why such an order should not be issued. FCA §331.3(1). Given the wording of the statute, and the fact that the presentment agency should be in a weaker position when it fails to respond at all to a demand, it appears that, unless the presentment agency shows good cause, the court must at least order discovery even if, technically speaking, the demand includes property that does not come within FCA §331.2(1). See People v. Reynolds, 193 Misc.2d 697, 749 N.Y.S.2d 687 (County Ct., Essex Co., 2002) (in fairness, and because People failed to respond to discovery demand or oppose defendant’s motion for discovery, court orders disclosure of complainant’s entire medical record). In contrast, the statute refers to a respondent's refusal to disclose, but not to a respondent's failure to respond at all, and provides that discovery must be ordered if the respondent's refusal is not justified. FCA §331.3(2)(a).

The motion must be made within 30 days after the conclusion of the initial appearance, and before the commencement of the fact-finding hearing. If the respondent is not represented and the case is adjourned for the appearance of an attorney for the child, the 30 days start running when the attorney appears. FCA §332.2(1). See People v. Sheremet, 41 A.D.3d 1038, 838 N.Y.S.2d 251 (3rd Dept. 2007), lv denied 9 N.Y.3d 881 (omnibus motion rejected as untimely where, after defendant expressed desire to hire different attorney, court informed her that she and attorney needed to be aware of 45-day time limit to file motions, and, while defendant made inquiries regarding retaining new counsel, assigned counsel remained counsel of record).

The court may entertain a motion made after 30 days which is "based upon grounds of which the respondent could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have [been] raised within [30 days]." FCA §332.2(3). This exception would presumably apply where a motion for a bill of particulars is made after 30 days because the request was served more than 15 days after the initial appearance and the respondent had to give the presentment agency 15 days to respond. The court also may entertain the motion "in the interest of justice and for good cause shown...." Id. See People v. Johnson, 60 A.D.3d 484, 874 N.Y.S.2d 471 (1st Dept. 2009), lv denied 12 N.Y.3d 855 (defendant's severance motion, made as jury selection was about to commence, was untimely; although defense counsel claimed to have learned of co-defendant's planned defense at last minute, he offered no explanation for failure to ascertain information earlier and record indicates he was in position to do so well before trial); Matter of C.W.J., 16 Misc.3d 1117(A) (court entertains untimely motion; People v. Coleman, 114 Misc.2d 685, 452 N.Y.S.2d 503 (Sup. Ct. Kings Co., 1982) (court permits late motion for discovery and bill of particulars, since items relate directly to the accuracy of the truth-finding process).

If the respondent is detained, the court must hear and determine the motion on an expedited basis. FCA §332.2(4).

Arguably, court-ordered discovery may not be sought in the absence of service of a demand to produce. See Matter of C.W.J., 16 Misc.3d 1117(A); People v. Keller, 133

Misc.2d 1129, 509 N.Y.S.2d 468 (District Ct. Nassau Co., 1st Dist., 1986); People v. Vaccarielli, 120 Misc.2d 1092, 467 N.Y.S.2d 158 (County Ct. Saratoga Co., 1983). But cf. People v. DaGata, 86 N.Y.2d 40, 629 N.Y.S.2d 186 (1995) (defendant's initial request for materials in omnibus motion and several requests subsequent to motion sufficiently preserved issues).

Finally, it is important to remember that many judges do not want to become involved in the discovery process, and, in order to move the case along, will encourage the child's attorney to "settle" the motion after the presentment agency claims that it has made available all discoverable material. Rather than be bullied or manipulated in this way, the attorney should insist that the court rule upon the discovery motion and delay the commencement of trial until the presentment agency has complied with any resulting discovery order. See, e.g., People v. Keller, 194 A.D.2d 877, 598 N.Y.S.2d 844 (3rd Dept. 1993), lv denied 81 N.Y.2d 1074, 601 N.Y.S.2d 594; People v. Hibbler, 111 A.D.2d 67, 489 N.Y.S.2d 191 (1st Dept. 1985) (defendant is entitled to ruling on pretrial motions before case is sent to trial part).

F. Protective Orders

Upon motion of the respondent, the presentment agency, or any affected person, or upon determination of a motion for court-ordered discovery, or upon its own initiative, the court may issue a protective order "denying, limiting, conditioning, delaying or regulating discovery for good cause, including constitutional limitations, danger to the integrity of physical evidence or a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person or an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants, or any other factor or set of factors which outweighs the usefulness of the discovery." FCA §331.5(1); see People v. Chrysler, 13 A.D.3d 550, 787 N.Y.S.2d 365 (2d Dept. 2004), lv denied 4 N.Y.3d 797 (court properly granted People's motion for protective order relieving it of obligation to search approximately one year of recorded conversations for possible Rosario material, where People were required to, inter alia, search for discoverable material for the 2-month period leading up to defendant's arrest); People v. Blank, _Misc.3d_, 2018 WL 4290569 (Sup. Ct., Bronx

Co., 2018) (court directs that sample be used only for comparison to DNA profile generated from swab of firearm in present case and not be utilized for any other purpose or comparison or be added to state or OCME databases before conviction and sentencing); People v. White, 60 Misc.3d 304 (Sup. Ct., Bronx Co., 2018) (court denies motion for protective order limiting comparison of DNA to this case and prohibiting inclusion in state DNA database); People v. Velez, 54 Misc.3d 1208(A) (Sup. Ct., Bronx Co., 2017) (protective order directed that DNA sample would be used only in connection with instant case and not for any other purpose or comparison and would not be added to databases prior to conviction and sentencing); People v. Rios-Liberato, 50 Misc.3d 737 (Crim. Ct., N.Y. Co., 2015) (in sex offense prosecution, defendant entitled to un-redacted photos that depict how close to complainant's vagina defendant was applying tattoo when alleged crime took place; risk of complainant's embarrassment outweighed by right of confrontation and right to obtain evidence material to guilt or innocence); People v. Freeman, 2014 NY Slip Op 32208(U) (Sup. Ct., Kings Co., 2014) (no error where court granted People's ex parte application for permission not to disclose name of witness until she testified); People v. Lewis, 35 Misc.3d 1216(A) (Crim. Ct., Kings Co., 2012) (court grants defendant's motion for protective order preventing disclosure of DNA to anyone other than parties).

A protective order may require that material be maintained in the exclusive possession of a party's attorney, and be used only for purposes of preparation in the proceeding. FCA §331.5(2).

A motion for a protective order suspends discovery proceedings concerning the material in dispute. FCA §331.5(3).

G. Continuing Duty To Disclose

If additional discoverable material is acquired after initial discovery proceedings have been completed, a party shall promptly comply with the demand or court order, refuse to comply where refusal is authorized, or apply for a protective order. FCA §331.5(4).

H. Sanctions

1. Generally

If the court finds a violation of demand discovery procedures, it may order discovery, grant a continuance, issue a protective order, "prohibit the introduction of certain evidence or the calling of certain witnesses or take any other appropriate action (emphasis added)." FCA §331.6(1); see People v. Alonso, 16 N.Y.3d 581, 925 N.Y.S.2d 380 (2011) (authority to dismiss for Brady violation emanated from CPL §210.20, not §240.70).

As noted earlier, independent authorization for a sanction exists whenever the presentment agency fails entirely to respond to the respondent's demand. See FCA §331.3(1). Particularly in such cases, the child's attorney should consider bringing a motion that has as its primary request the imposition of a sanction, and asks for court-ordered discovery as an alternative remedy.

2. Failure To Make Timely Disclosure

A punitive sanction should be sought aggressively whenever the presentment agency either fails to disclose and make available certain material and then attempts to introduce it at trial, or violates a court order directing that material be disclosed and made available by a certain date. Indeed, unless the undisclosed evidence contains information that genuinely requires a renewed investigation by the respondent, an adjournment will usually do the respondent little good as a remedy.

Dismissal will ordinarily not be obtainable in the absence of irremediable prejudice. See, e.g., People v. Fleishman, 92 Misc.2d 156, 399 N.Y.S.2d 996 (Sup. Ct. Suffolk Co., 1977) (court sets aside verdict and dismisses perjury indictment due to loss of police officer's notes of defendant's statements to prosecutor). However, an order precluding introduction of the undisclosed evidence should routinely be sought as a remedy. The child's attorney should, if possible, articulate some reason why late discovery has prejudiced the respondent, and not rely solely on the possibility that the court will impose a stiff sanction because it is angered by the presentment agency's failure to obey an order or outraged by a flagrant refusal to respond to the respondent's discovery request.

Compare People v. Kelley, 19 N.Y.3d 887 (2012) (defendant's right to fair trial violated where People belatedly requested DNA analysis and disclosed results to defendant

when trial was too far along for defense counsel to present new defense theory); People v. Tuthill, 49 Misc.3d 132(A) (App. Term, 2d Dept., 2015) (defendant's statements precluded where People failed to provide recording until commencement of Huntley hearing hearing); People v. Graham, 48 A.D.3d 265, 856 N.Y.S.2d 7 (1st Dept. 2008) (defendant prejudiced by People's failure to turn over defendant's statements until after verdict where statement contained material he could have used for impeachment purposes in challenging voluntariness of statements at suppression hearing and trial); People v. Crider, 301 A.D.2d 612, 756 N.Y.S.2d 223 (2d Dept. 2003) (reversible error where court allowed People to use defendant's statements on rebuttal despite People's representation during discovery that defendant made only exculpatory statements); People v. Evans, 111 A.D.2d 830, 490 N.Y.S.2d 252 (2d Dept. 1985) (mistrial should have been declared when defendant learned during trial that his palmprint had been found at the scene); People v. Walker, 42 Misc.3d 1201(A) (Crim. Ct., Bronx Co., 2013) (911 recordings precluded where, in response to specific request from defense and direct court order, People unequivocally stated that recordings did not exist and then failed to ascertain their existence until five months later on eve of trial); People v. Morales, 37 Misc.3d 1218(A) (Sup. Ct., Kings Co., 2012) (mistrial declared where People failed to disclose original digital photos [or exact copy] of latent fingerprints and defendant only received thumbnail prints); People v. Archer, 31 Misc.3d 1225(A), 2011 WL 1815641 (Sup. Ct., Bronx Co., 2011) (drug testing results precluded where People failed to provide defendant with lab report for almost ten months after it was demanded and turned it over just as trial was about to begin, and lab report contained information supporting defense claim); United States v. Mason, 2008 WL 281970 (SDNY, 2008) (court precludes introduction of documents and fingerprint evidence where Government delayed about a year or more in disclosing materials, and also precludes certain timely disclosed evidence; "[t]o allow the government to introduce this evidence when it selectively failed to produce the remainder of the seized documents would invite mischief in the discovery process"); People v. O'Farrell, 14 Misc.3d 1222(A), 836 N.Y.S.2d 488 (County Ct., Essex Co., 2007) (preclusion ordered where People failed to disclose tape recordings in response to defendant's demand or court's order); People v.

Morales, 11 Misc.3d 1075(A), 816 N.Y.S.2d 699 (Justice Ct., West Co., 2006) (preclusion of evidence and witness testimony due to lack of discovery of evidence and witness names) and People v. Smith, 169 Misc.2d 258, 646 N.Y.S.2d 228 (Sup. Ct., Onondaga Co., 1996) (preclusion of evidence of tangible personal property)
with People v. Jenkins, 98 N.Y.2d 280, 746 N.Y.S.2d 651 (2002) (preclusion properly denied where late disclosure of ballistics report did not cause undue prejudice); People v. Dory, supra, 59 N.Y.2d 121 (no error where, after late disclosure at commencement of trial, trial court excluded physical evidence but admitted testimony concerning the items; Court of Appeals notes that trial court's original ruling allowing introduction of physical evidence as well was proper); People v. Carter, 131 A.D.3d 717 (3d Dept. 2015), lv denied 26 N.Y.3d 1007 (no error where People failed to preserve original digital recordings of set-up calls and drug transactions but digital information recorded on device worn by informant during sales and audio of the set-up calls were immediately transferred to computer without alteration or deletion and then copied to computer discs which were provided to defense; thus, digital information was never "destroyed"); People v. Smith, 11 A.D.3d 202, 783 N.Y.S.2d 2 (1st Dept. 2004) (mistrial properly denied where People turned over incomplete set of grand jury minutes containing defendant's testimony, but defendant was not surprised or prejudiced); People v. Rodriguez, 5 A.D.3d 331, 773 N.Y.S.2d 556 (1st Dept. 2004), lv denied 3 N.Y.3d 658 (sanction properly denied upon late disclosure of arrest photo of defendant depicting him with distinctive jacket, which became relevant when defendant testified that he was wearing clothes at time of arrest that differed from those in the photo; there was no evidence of bad faith, and defendant would have known that he had been photographed while wearing jacket in question); People v. Nelson, 144 A.D.2d 714, 535 N.Y.S.2d 132 (3rd Dept. 1988) (defendant failed to show that prejudice resulted from late disclosure of crime scene photos); People v. Johnstone, supra, 131 A.D.2d 782 (preclusion of victim's hospital record not justified); People v. Vargulik, 130 A.D.2d 530, 5l5 N.Y.S.2d 111 (2d Dept. 1987) (preclusion not justified where report of breath test was not provided prior to hearing); People v. Rosario, 124 A.D.2d 683, 508 N.Y.S.2d 58 (2d Dept. 1986) (preclusion or mistrial not required where defendant learned at trial

of tire iron he allegedly possessed in complainant's apartment) and People v. McCoy, 105 A.D.2d 851, 481 N.Y.S.2d 767 (2d Dept. 1984) (lack of timely disclosure of place of offense did not prejudice defendant).

3. Failure To Preserve Evidence

Although the police are under no duty to "affirmatively gather evidence" [see People v. Hayes, 17 N.Y.3d 46, 926 N.Y.S.2d 382 (2011) (no Brady violation where police failed to interview or acquire contact information for two individuals who made exculpatory statements overheard by officer; police have no affirmative duty to obtain potentially exculpatory evidence for defendant); People v. Alvarez, 70 N.Y.2d 375, 521 N.Y.S.2d 212 (1987) (police not required to take and preserve breath sample for testing by defendant)], the prosecution has a duty to preserve physical evidence, including, of course, evidence that is subject to disclosure pursuant to FCA §331.2(1). Although the drastic remedy of dismissal is ordinarily frowned upon, preclusion and other remedies are more routinely available. The court must consider the importance of the evidence, and the presence or absence of bad faith or negligence on the part of the prosecution. Unless diligent efforts to preserve the evidence are proved, some sanction should be imposed:

Compare People v Viruet, 29 N.Y.3d 527 (2017) (adverse inference charge required where officer viewed nightclub's surveillance footage and obtained copy of video, but when District Attorney's office requested video from police department, officer could not locate it; trial evidence showed that camera may have captured crucial events); People v. Handy, 20 N.Y.3d 663 (2013) (adverse inference charge should have been given where defendant sought access to surveillance tapes but images had been destroyed because of jail policy to record over images after 30 days; jury should be told it may draw inference in defendant's favor where defendant, using reasonable diligence, requested evidence reasonably likely to be material but evidence has been destroyed by State agents); People v. Kelly, 62 N.Y.2d 516, 478 N.Y.S.2d 834 (1984) (dismissal was inappropriate sanction for loss of wallet and cash recovered from defendant; case remitted for imposition of appropriate sanction); Freeman v. State, 121 So.3d 888 (Miss. 2013) (State's loss of videotape of traffic stop while there was court order to preserve

tape violated defendant's Due Process right to present complete defense); Harness v. State, 2010 WL 2106027 (Miss. 2010) (State constitutional due process violation found where prosecutor, who knew that blood sample tested by crime lab would be destroyed within 6 months unless lab was instructed to preserve it, failed to contact lab about preserving sample); People v. Butler, 140 A.D.3d 1610 (4th Dept. 2016), lv denied 28 N.Y.3d 969 (court erred in refusing to give adverse inference charge based on People's failure to preserve surveillance tapes from cameras operated by police in area where crime occurred where defendant used reasonable diligence in requesting tapes, which had been destroyed pursuant to normal business practices by time defendant requested them; State's duty to preserve is triggered even before request has been made by defendant, or State would have incentive to destroy evidence before defendant has chance to request it); People v. Rowser, 139 A.D.3d 489 (1st Dept. 2016), lv denied 28 N.Y.3d 936 (adverse inference instruction was suitable remedy for detective's inadvertent loss of jacket victim had been wearing when he was shot; no prejudice shown where defendant claimed victim had firearm in jacket pocket, but failed to explain how physical examination or forensic testing of jacket could have corroborated that claim, and emergency medical technician who removed jacket did not notice anything heavy in pocket); Matter of Raiquan M., 136 A.D.3d 1040 (2d Dept. 2016) (no error where court imposed sanction of permissive adverse inference for destruction of evidence from cameras located in area of alleged incident and operated by New York City Police Department; court not required to draw adverse inference); People v. Jackson, 133 A.D.3d 833 (2d Dept. 2015) (adverse inference charge adequate where it permitted jury to consider People's failure to preserve evidence in determining weight to be given to witnesses' testimony); United States v. Zaragoza-Moreira, 780 F.3d 971 (9th Cir. 2015) (bad faith and due process violation found where government agent failed to preserve video footage that may have supported defendant's duress defense); People v. Gomez-Kadawid, 66 A.D.3d 1124, 888 N.Y.S.2d 621 (3rd Dept. 2009) (in promoting prison contraband prosecution, People's failure to preserve pants that contained heroin should have resulted in instruction to jury that, had pants been produced, defendant would have proven they were not assigned to him and he was wearing someone else's

pants); People v. Jones, 47 A.D.3d 446, 849 N.Y.S.2d 244 (1st Dept. 2008), lv denied, 10 N.Y.3d 841 (adverse inference charge, not preclusion of testimony by bank employee, was appropriate where People's inadvertently lost ATM vestibule videotape); People v. Cobb, 198 A.D.2d 128, 604 N.Y.S.2d 54 (1st Dept. 1993) (dismissal of criminal mischief and burglar's tools charges proper where bolt cutter allegedly used by defendant was lost); People v. Torres, 190 A.D.2d 52, 597 N.Y.S.2d 492 (3rd Dept. 1993) (court orders preclusion of testimony regarding defendant's encounter with undercover where People destroyed tape recording, and defendant raised agency defense); People v. Samuels, 185 A.D.2d 903, 587 N.Y.S.2d 7 (2d Dept. 1992), lv denied 81 N.Y.2d 794, 594 N.Y.S.2d 740 (1993) (since police destroyed gun allegedly used in robbery without testing it and foreclosed defendant from proving it was inoperable, court reduces first degree robbery conviction to one for third degree robbery); People v. Terrell, 185 A.D.2d 906, 587 N.Y.S.2d 8 (2d Dept. 1992) (first degree robbery charge dismissed because police destroyed gun); People v. Scalzo, 176 A.D.2d 363, 574 N.Y.S.2d 782 (2d Dept. 1991), order amended 178 A.D.2d 444, appeal withdrawn 79 N.Y.2d 1045, 584 N.Y.S.2d 1012 (1992) (sanction required where People failed to preserve defendant's blood sample); People v. Deresky, 137 A.D.2d 704, 525 N.Y.S.2d 49 (2d Dept. 1988) (preclusion of ballistics reports and expert testimony, resulting in dismissal of one count and acquittal on another, was appropriate sanction for inadvertent destruction of gun); People v. Springer, 122 A.D.2d 87, 504 N.Y.S.2d 232 (2d Dept. 1986) (bank robbery charges dismissed where surveillance photos were discarded by police); People v. Shapiro, 117 A.D.2d 688, 498 N.Y.S.2d 428 (2d Dept. 1986) (preclusion of lab test results was appropriate sanction for People's failure to preserve complainant's blood sample); People v. Saddy, 84 A.D.2d 175, 445 N.Y.S.2d 601 (2d Dept. 1981) (drug sale convictions reversed where police erased recordings of conversations between defendant and undercover officer); People v. Borzon, 45 Misc.3d 1217(A) (Sup. Ct., Bronx Co., 2014) (where People failed to take measures to preserve 911 tape after defendant demanded discovery within thirty days of arrest, minimal prejudice still warranted adverse inference instruction); People v. Camacho, 40 Misc.3d 1211(A) (Crim. Ct., Bronx Co., 2013) (where police destroyed beer can

recovered in connection with DWI arrest, People precluded from introducing photograph of can or defendant's statement about it); People v. Ugarriza, 21 Misc.3d 1137(A), 2008 WL 5056074 (Nassau Co. Dist. Ct., 2008) (where 911 tapes of calls concerning defendant had been destroyed by State Police, Trooper permitted to testify that he received call concerning motor vehicle bearing specific license plate, but not that call alleged erratic driving or stated that operator of vehicle was possibly intoxicated, or that there had been twelve calls regarding vehicle); People v. Hold, 22 Misc.3d 297, 866 N.Y.S.2d 552 (Crim. Ct., Kings Co., 2008) (where defendant was charged with throwing cinder block at complainant, adverse inference was appropriate sanction where, after photographing cinder block, officer discarded it along with cinder block fragment which allegedly struck complainant; however, no sanction in connection with videotape purportedly recorded by complainant's home security system cameras since recording device was never in possession of police or People); People v. Horan, 19 Misc.3d 1145(A), 867 N.Y.S.2d 19 (Ossining Justice Ct., West. Co., 2008) (court, finding due process violation, precludes prosecution from introducing defendant's breath test results as sanction for failure to disclose video recordings of defendant at scene of arrest and at police headquarters where cameras inside police cars had been inoperable since 2006 and had never been repaired due to lack of funds, and video of events inside police headquarters was destroyed pursuant to police policy after 90 days; People received discovery demand for copies of video recordings at time when they had ample opportunity to instruct Police Department to preserve evidence); People v. Sweeney, 18 Misc.3d 1134(A), 859 N.Y.S.2d 898 (Albany City Ct., 2008) (in DWI prosecution, court precludes chemical test results as sanction for People's failure to preserve video recording made by police of defendant's conduct after he arrived at police station, and requested by defendant; because of People's inaction, recording, which would have captured all or virtually all of defendant's movements from time he arrived at police station until time he provided breath sample, was never viewed by anyone and it cannot be known whether or not it was exculpatory); People v. Whitley, 14 Misc.3d 1205(A), 831 N.Y.S.2d 361 (County Ct., Suffolk Co., 2006) (first degree robbery charge reduced to second degree robbery where People failed to preserve pellet gun); People v.

Cannon, 191 Misc.2d 136, 743 N.Y.S.2d 224 (Sup. Ct., Kings Co., 2002) (missing document charge given where police destroyed some photos taken when robbery occurred); People v. Miller, 156 Misc.2d 824, 594 N.Y.S.2d 978 (Sup. Ct. N.Y. Co., 1993) (sanction permissible where hospital was agent of police when it lost "rape kit"); People v. McCann, 115 Misc.2d 1025, 455 N.Y.S.2d 212 (Sup. Ct. Queens Co., 1982) (dismissal ordered where police discarded blood scrapings and blood-stained clothing that could have been used to identify or exclude suspects) and People v. Churba, 76 Misc.2d 1028, 353 N.Y.S.2d 130 (Crim. Ct. N.Y. Co., 1974) (case dismissed where People failed to preserve recordings of defendant and government agents)

with Illinois v. Fisher, 540 U.S. 544, 124 S.Ct. 1200 (2004) (existence of pending discovery request does not eliminate Youngblood requirement that defendant show bad faith); Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988) (defendant must show bad faith to make out due process claim); People v. Haupt, 71 N.Y.2d 929, 528 N.Y.S.2d 808 (1988) (no dismissal where inadvertent loss and destruction of evidence did not prejudice defendant, who raised an insanity defense); People v. Bay, 67 N.Y.2d 787, 501 N.Y.S.2d 19 (1986) (although FBI destroyed pubic hair sample matching defendant, court gave defendant wide latitude during cross-examination of People's expert, and instructed jury to weigh People's expert evidence in the light of defendant's inability to present his own expert evidence); People v. D'Attore, 151 A.D.3d 548 (1st Dept. 2017), lv denied 30 N.Y.3d 948 (no sanction where police inadvertently destroyed pistols recovered from defendant’s house due to clerical error, and despite proper disclosure by People long before pistols were destroyed, defendant never sought to examine or test firearms and expressed interest and moved to dismiss only after destruction was discovered during trial);People v. Thompson, 143 A.D.3d 430 (1st Dept. 2016), lv denied 28 N.Y.3d 1127 (no sanction for loss, due to flooding of police storage facility in Hurricane Sandy, of knife defendant claimed to be Brady material; loss of evidence as result of natural disaster cannot be attributed to People); People v. Yun, 140 A.D.3d 402 (1st Dept. 2016), lv denied 28 N.Y.3d 937 (defendant not entitled to mistrial when it was disclosed that, although victim had provided People with relevant messages on cell phone which were disclosed to defendant, she had deleted other

allegedly relevant messages before meeting with prosecutor and subsequently sold phone with prosecutor's approval); People v. Austin, 134 A.D.3d 559 (1st Dept. 2015) (contrasting case with People v. Handy, 20 N.Y.3d 663, court finds no error in lack of adverse inference charge where DNA testing showed that DNA in blood evidence from crime scene matched defendant's DNA, but blood evidence itself was unavailable because Hurricane Sandy had caused flooding of warehouse in which evidence was stored, and defendant never expressed intent to conduct DNA analysis or explain how blood evidence would have been useful); People v. Johnson, 131 A.D.3d 893 (1st Dept. 2015), lv denied 26 N.Y.3d 1089 (no adverse inference charge where, after detective observed hotel surveillance videotape footage, police obtained only footage beginning about five minutes before incident and defense investigator who later sought earlier portion of video was informed by hotel personnel that it no longer existed; police had no affirmative duty to seek potentially exculpatory evidence earlier in video and evidence was not destroyed by law enforcement); In re Keena H., 100 A.D.3d 414 (1st Dept. 2012) (no adverse inference as to unpreserved surveillance videotape where it was never in presentment agency's possession; agency has no constitutional or statutory duty to acquire or prevent destruction of evidence generated and possessed by private parties); People v. Malone, 88 A.D.3d 586 (1st Dept. 2011), lv denied 18 N.Y.3d 959 (no adverse inference where People failed to preserve cell phone photographs victim took of injuries and showed to prosecutor); People v. Hooks, 71 A.D.3d 1184, 896 N.Y.S.2d 501 (3rd Dept. 2010) (People not required to obtain department store's surveillance videotape and not responsible for store's destruction of tape after 90 days pursuant to usual business policy); People v. Charlton, 69 A.D.3d 647, 899 N.Y.S.2d 133 (2d Dept. 2010), lv denied 14 N.Y.3d 799 (no sanction where private surveillance system video had never been in possession of police or prosecution); United States v. Branch, 537 F.3d 582 (6th Cir. 2008) (no due process violation where, without acting in bad faith, officer arranged for erasure of video recording of police encounter with defendant after learning that microphone unit had not been working and there was no audio track); People v. Figueroa, 53 A.D.3d 779, 861 N.Y.S.2d 216 (3rd Dept. 2008), lv denied, 11 N.Y.3d 832 (no adverse inference charge where People failed to produce prison

surveillance videotape, since all tapes within facility were blank during week of incident due to officer's inadvertent use of wrong button on recording machine, and, in any event, Department of Correctional Services acts as administrative agency when it maintains surveillance cameras and thus tapes were not within control of People); People v. Hamlin, 39 A.D.3d 361, 834 N.Y.S.2d 144 (1st Dept. 2007), lv denied 9 N.Y.3d 876 (no sanction where police destroyed photo of victim because it was too dark to show victim's physical condition); People v. Shcherenkov, 21 A.D.3d 651, 799 N.Y.S.2d 663 (3rd Dept. 2005) (no sanction for People's failure to preserve defendant's arrest photos where discrepancy possibly evidenced by photo would affect only officer's credibility, defendant made no specific demand for preservation, and destruction and cropping of photos was result of routine procedure); People v. Scott, 309 A.D.2d 573, 765 N.Y.S.2d 340 (1st Dept. 2003) (no sanction ordered where police failed to preserve surveillance videotape of Washington Square Park, the scene of the alleged drug transaction; tape was erased pursuant to routine procedure before defendant made discovery request); People v. Rose, 122 A.D.2d 484, 505 N.Y.S.2d 244 (3rd Dept. 1986) (no duty to preserve victim's body in homicide case) and United States v. Codrington, 2009 WL 1766001 (EDNY, 2009) (defendant's due process rights not violated when surveillance video tape of incident was used at trial despite fact that ten to fifteen seconds of tape had been lost).

With respect to missing items that are not automatically discoverable under FCA §331.2(1), the respondent will be in a better position to obtain a sanction if discovery was sought on a timely basis. See, e.g., People v. Allgood, 70 N.Y.2d 812, 523 N.Y.S.2d 431 (1987) (while concluding that inadvertent destruction of "rape kit" did not require reversal, Court of Appeals notes that defendant was aware of existence of rape kit some 8 months before it was destroyed, but did not express an interest in testing it until he learned that it had been destroyed). See also Matter of Catterson v. Jones, 233 A.D.2d 502, 650 N.Y.S.2d 993 (2d Dept. 1996) (writ of prohibition granted where court illegally ordered People not to perform, authorize, direct, or otherwise knowingly permit test that would consume or alter evidence so as to make further testing impossible); People v. Hale, 167 Misc.2d 872, 638 N.Y.S.2d 886 (Sup. Ct., Kings Co. 1996) (court

refuses to order People to preserve evidence, while noting that People already have obligation to do so and defendant can seek sanctions for violations).

4. Destruction Of Dangerous Drugs, And Fireworks

Although a District Attorney may seek the destruction of dangerous drugs in felony sale or possession cases pursuant to CPL article 715, there appears to be no authorization for such an order in a delinquency proceeding.

The destruction of fireworks possessed in violation of PL §270.00 is governed by PL §405.05. See, e.g., People v. Watson, 25 Misc.3d 613, 890 N.Y.S.2d 260 (Sup. Ct., Bronx Co., 2009) (preclusion of evidence ordered where alleged fireworks were intentionally destroyed in violation of PL §405.05 after defendant's arrest and before arraignment; even if no bad faith was involved, there was deprivation of defendant's constitutional right to fair trial because he could not independently analyze evidence); People v. Christopher, 167 Misc.2d 468, 634 N.Y.S.2d 948 (Crim. Ct., Bronx Co. 1995) (adverse inference charge was appropriate remedy for destruction of fireworks in violation of §405.05).

III. Miscellaneous Discovery Material

Outlined below is the statutory and case law authorizing various types of discovery.

A. Physical Evidence

1. Property That Will Be Introduced At Trial

In addition to the items of evidence that are discoverable pursuant to FCA §331.2, the court "may order discovery with respect to any other property which the presentment agency intends to introduce at the fact-finding hearing, upon a showing by the respondent that discovery with respect to such property is material to the preparation of his defense, and that the request is reasonable." FCA §331.3(1)(c).

Upon a similar showing by the presentment agency, the court must, when it has granted the respondent's motion, direct discovery of the same type of property by the presentment agency if the respondent intends to introduce it at the fact-finding hearing. FCA §331.3(1). See People v. Copicotto, 50 N.Y.2d 222, 428 N.Y.S.2d 649 (1980) (while upholding reciprocal discovery order, Court of Appeals notes that People are not

entitled to reciprocal discovery where defendant demands discovery as of right). But see People v. Sirmons, 242 A.D.2d 883, 662 N.Y.S.2d 645 (4th Dept. 1997) (although prosecutor's request for documents related to defendant's alibi defense was not reciprocal to any request by defendant, the materials were discoverable as nontestimonial evidence pursuant to CPL §240.40[2][b]).

Pursuant to FCA §331.3(1)(c), the respondent could seek discovery of items that were recovered at the scene but not from the respondent, narcotics that were sold by the respondent to an undercover officer, or blood or sperm samples that were recovered at the scene and then subjected to testing (of course, the test reports would be discoverable under FCA §331.2[1][c]). See, e.g., People v. Manning, 156 A.D.2d 220, 548 N.Y.S.2d 481 (1st Dept. 1989), lv denied 75 N.Y.2d 921, 555 N.Y.S.2d 40 (1990) (any error in denial of defendant's pretrial motion for production of police "rape kit" for testing was harmless, since, given the facts of the case, semen test results would not have been very probative).

Obviously, in the absence of a court order, the respondent is not entitled to discovery of evidence not covered by FCA §331.2(1). However, a sanction should be requested whenever the respondent is prejudiced by the presentment agency's misrepresentation concerning its intent to offer evidence. Cf. People v. Colavito, 87 N.Y.2d 423, 639 N.Y.S.2d 996 (1996) (although defendant could reasonably rely on People's pretrial representation that they would voluntarily produce evidence to be offered at trial, absent bad faith or undue prejudice defendant was not entitled to preclusion of undisclosed evidence at trial).

2. Stolen Property

a. Generally

In most cases, if property which is alleged to have been stolen is in the custody of a police or peace officer or a district attorney, the property may be released upon the owner's request only after there is compliance with PL §450.10. When a request is made for the return of the property, written notice of the request must be given to the accused or defense counsel as soon as practicable, as well as notice of "the date on which the property will be released and the name and address of a person with whom

arrangements can be made for the examination, testing, photographing, photocopying or other reproduction of said property." PL §450.10(1). See, e.g., People v. Izzatov, 37 Misc.3d 131(A) (App. Term, 2d Dept., 2012), lv denied 20 N.Y.3d 1099 (no adverse inference charge where officers returned property to complainant within several minutes after recovering it from vehicle, without photographing or vouchering it; it was not clear that police ever assumed custody within meaning of §450.10); People v. Chance, 71 A.D.3d 563, 906 N.Y.S.2d 82 (1st Dept. 2010), lv denied 15 N.Y.3d 748 (no error in court's refusal to impose sanction where victim's wallet was never in police "custody" within meaning of statute because police briefly possessed wallet for purpose of confirming victim's identity as owner before returning it to her; statute contemplates removal of property from scene of crime for storage at Property Clerk's office or some other assertion of control over property by police); Matter of Nixon C., 30 Misc.3d 1214(A), 2011 WL 198034 (Fam. Ct., Bronx Co., 2011) (no §450.10 violation where jacket allegedly stolen by respondent and recovered from him was returned to complaining witness but was never vouchered and in police custody). In delinquency proceedings, the respondent is often served with notice during the pre-petition adjustment process, and before the assignment of an attorney who, unlike the respondent, is qualified to determine whether discovery should be sought prior to the release of the property. Nevertheless, although PL §450.10 is applicable in delinquency proceedings [but see Matter of K., 8 Misc.3d 983, 800 N.Y.S.2d 287 (Fam. Ct., West. Co., 2005) (§450.10 not applicable at disposition)], there is no right to counsel violation where the respondent and his or her parent are served with notice before the filing of a petition and assignment of an attorney. See Matter of James C., 179 A.D.2d 639, 578 N.Y.S.2d 589 (2d Dept. 1992); Matter of Nicomedes F., 177 A.D.2d 316, 575 N.Y.S.2d 873 (1st Dept. 1991).

Most property must be retained until 15 days after the receipt of notice by the respondent or his/her attorney, but may be released earlier if discovery has been completed. The parties may agree to a 5-day extension of the 15-day period. PL §450.10(3).

Property that consists of "perishables [any property likely to spoil or decay or

diminish significantly in value within 20 days of the initial retention of the property], fungible retail items, motor vehicles or any other property release of which is necessary for either the operation of a business or the health or welfare of any person" may be released 48 hours after the receipt of notice by the respondent or his/her attorney, or at an earlier time if discovery is completed. The parties may agree to extend the 48-hour period by up to 24 hours. PL §450.10(4)(a). However, when notice is served on the respondent before the assignment of an attorney, notice must be personally delivered, and the property may not be released until 5 days after notice was delivered, or 5 days after a respondent who was served while being detained appears in court, whichever is later. PL §450.10(11). With notice to the respondent or the attorney, the prosecutor may also seek an order permitting the immediate release of property described in §450.10(4)(a). If the court releases the property, it must, if requested by either party, set "any condition appropriate in the furtherance of justice." PL §450.10(4)(b).

Finally, it must be remembered that the provisions of PL §450.10 do not apply where an officer handled property for only a brief time and then returned it to the owner. See Matter of Morgenthau v. Marks, 177 A.D.2d 131, 581 N.Y.S.2d 296 (1st Dept. 1992) (complainant gave wallet to officer, who returned it after observing a union card in the complainant's name).

b. Motor Vehicles

A motor vehicle which is alleged to have been stolen, but is not alleged to have been used in connection with criminal behavior other than the theft or unlawful use of the vehicle, may be released "expeditiously" to the owner or the owner's representative without prior notice to the respondent. However, before such release, "evidentiary photographs" must be taken of the vehicle identification number; the windshield registration; the license plates; each side of the vehicle, including vent windows, door locks and handles; the front and back; the interior, including the ignition lock, seat to floor clearance, center console, radio receptacle and dashboard area; the motor; and any interior or exterior surfaces that reveal damage. Notice of the vehicle's release, and the required photographs, must be provided to the respondent within 15 days after an attorney first appears on behalf of the respondent. PL §450.10(4)(c).

c. Discovery Of Property

The child's attorney and the prosecutor must "make a diligent effort to examine, test and photograph, photocopy or otherwise reproduce the property." Upon an application by either party, the court may extend the time during which discovery may be obtained prior to the release of the property. For good cause shown, the court may order that the property be retained for use as evidence. Unless a court orders otherwise upon an application by either party with notice to the other side, the release of the property in accordance with PL §450.10 is "unconditional." PL §450.10(2).

d. Sanctions

When PL §450.10 has been violated, and the prosecution cannot demonstrate that the violation "has not caused the [respondent] prejudice," the court may "consider such failure in determining the weight to be given" to the improperly released evidence. The court may also impose any sanction set forth in FCA §331.6. However, unless the respondent can demonstrate that "undue prejudice" has occurred, the court may not preclude the introduction of the property, reproductions of the property, or testimony concerning the value and condition of the property, if the evidence is properly authenticated and admissible in accordance with the rules of evidence. And, dismissal may not be ordered solely because of the violation of provisions of PL §450.10. PL §450.10(10). Compare People v. Riley, 19 N.Y.3d 944 (2012), decision upheld upon reargument 20 N.Y.3d 980 (no sanction where, a few months before trial, copper pipes defendant was accused of stealing were returned to owner without required notice; sanction is required only when the People do not demonstrate absence of prejudice, and, here, People advised defense counsel to arrange mutually convenient time to examine pipes about six weeks before they were returned but counsel did not follow up, and police retained representative sample which was admitted into evidence without objection and counsel was provided with nearly 200 photographs of the pipes and the buildings); People v. Gorham, 72 A.D.3d 1108, 900 N.Y.S.2d 141 (2d Dept. 2010), lv denied 15 N.Y.3d 773 (no error where court gave adverse inference charge as sanction for prosecution's release, without notice to defendant, of vehicle in which victim was shot where defense counsel already had inspected vehicle and prosecution provided

defense numerous photographs, a videotape of the vehicle and hundreds of pages of documents detailing crime laboratory's analysis of vehicle); People v. Perkins, 56 A.D.3d 944, 868 N.Y.S.2d 340 (3rd Dept. 2008) (no abuse of discretion where trial court imposed, as sanction for release of cellular phone to victim, jury instruction that People's violation was factor jurors could consider in determining weight of evidence); People v. Pearsall, 20 Misc.3d 127(A), 866 N.Y.S.2d 94 (App. Term, 9th & 10th Jud. Dist., 2008), lv denied, 10 N.Y.3d 868 (no error where court issued adverse inference charge rather than order preclusion after victim's keys, which defendant had thrown at officer, and $20 bill allegedly stolen from victim were returned to victim shortly after incident); Matter of Nicomedes F., supra, 177 A.D.2d 316 (preclusion of evidence concerning value and condition of stolen auto not warranted, since there was non-hearsay evidence from officer concerning the condition of the vehicle and the circumstances of the investigatory stop, as well as testimony from the owner); People v. Ricigliano, 138 A.D.2d 751, 526 N.Y.S.2d 565 (2d Dept. 1988) (no undue prejudice where auto involved in assault incident was destroyed, since defendant made jury aware of events leading to destruction, and photographs and forensic test results were available) and People v. Cruz, 99 A.D.2d 406, 470 N.Y.S.2d 9 (1st Dept. 1984) (no prejudice where vehicle was still "intact" and available for inspection)

with People v. Ruiz, 121 A.D.2d 661, 504 N.Y.S.2d 54 (2d Dept. 1986) (dismissal warranted where People failed to preserve stolen property that formed basis for conviction); People v. Johnson, 114 A.D.2d 515, 494 N.Y.S.2d 733 (2d Dept. 1985) (evidence concerning recovery of money from defendant and accomplice precluded where money was released to complainant); People v. Meyer, 165 Misc.2d 171, 627 N.Y.S.2d 900 (Dist. Ct., Nassau Co. 1995) (in prosecution for theft of and damage to stereo equipment, court orders preclusion of evidence concerning damage, but the trial court will determine whether defendant suffered any undue prejudice with respect to the petit larceny count, which has no value element); People v. White, 159 Misc.2d 381, 604 N.Y.S.2d 688 (Sup. Ct. Bronx Co., 1993) (since People failed to photograph certain parts of car, they must be precluded from offering testimony as to the value of the car or the condition of parts that were not photographed; court will also give adverse inference

charge) and People v. Lopez, 123 Misc.2d 134, 472 N.Y.S.2d 1014 (Sup. Ct. Kings Co., 1984) (preclusion of evidence of damage to car).

B. Names And Addresses Of Prosecution Witnesses

Since one of the most effective ways to prepare for trial is to interview prosecution witnesses, and since it is helpful in planning a defense to know what witnesses are available to the prosecution, discovery of the names and addresses of prosecution witnesses should be sought. The respondent may also want to discover a witness' date of birth in order to conduct an independent inquiry into the witness' criminal history. Although many judges and prosecutors are reluctant to release identifying information, discovery should be ordered unless the prosecution can demonstrate that the witnesses have a well-founded fear of harm.

Compare People v. Rivera, 119 A.D.2d 517, 501 N.Y.S.2d 38 (1st Dept. 1986) (absent compelling circumstances such as danger of intimidation, names should be disclosed); People v. Ragusa, 112 A.D.2d 956, 492 N.Y.S.2d 636 (2d Dept. 1985) (defendant entitled to address of victim for purpose of subpoenaing him as rebuttal witness); People v. Arthur, 175 Misc.2d 742, 673 N.Y.S.2d 486 (Sup. Ct., N.Y. Co., 1997) (information is discoverable subject to People's motion for protective order, but information shall be used solely by counsel and persons working under their direction; in the alternative, People may arrange for witnesses to be interviewed by counsel); People v. Arrellano, 150 Misc.2d 574, 569 N.Y.S.2d 574 (Crim. Ct. Kings Co., 1991) (defendant entitled to disclosure of civilian witnesses' names, addresses and dates of birth; defense counsel will be instructed not to divulge information to client); People v. Leon, 134 Misc.2d 757, 512 N.Y.S.2d 991 (County Ct. West. Co., 1987) (witnesses' general concerns do not justify denial of discovery) and People v. Minor, 118 Misc.2d 351, 460 N.Y.S.2d 452, reargued 463 N.Y.S.2d 142 (County Ct. West Co., 1983)

with People v. Frost, 100 N.Y.2d 129, 760 N.Y.S.2d 753 (2003) (identities of witnesses properly withheld, due to their fear for their safety, after in camera hearing in absence of defendant and defense counsel); People v. Lynch, 23 N.Y.2d 262, 296 N.Y.S.2d 327 (1968) (discovery is in discretion of court); People v. Hashim Kernahan, 117 A.D.3d 619 (1st Dept. 2014), lv denied 23 N.Y.3d 1064 (discovery in criminal case governed by the

Criminal Procedure Law, and, with exceptions not relevant here, there is no provision for disclosure of identities of witnesses); People v. Pacheco, 38 A.D.3d 686, 832 N.Y.S.2d 248 (2d Dept. 2007), lv denied 9 N.Y.3d 849 (no error where prosecutor failed to disclose home addresses of witnesses, since there is no statutory basis for such disclosure); People v. Boyd, 164 A.D.2d 800, 560 N.Y.S.2d 15 (1st Dept. 1990), lv denied 77 N.Y.2d 904, 569 N.Y.S.2d 936 (1991) (disclosure denied due to evidence that defendant's gang had executed a witness); People v. Miller, 106 A.D.2d 787, 484 N.Y.S.2d 183 (3rd Dept. 1984) (defendant must establish need for information); People v. Taylor, 91 A.D.2d 729, 457 N.Y.S.2d 1005 (3rd Dept. 1982) (discovery properly denied where witness was afraid and reluctant to testify because she had been threatened by defendant in the past); United States v. Ojeikere, 299 F.Supp.2d 254 (S.D.N.Y., 2004) (defendant has burden to show disclosure is material and reasonable); Matter of D.P., 17 Misc.3d 1106(A), 851 N.Y.S.2d 57 (Fam. Ct., Nassau Co., 2007) (request for discovery of names and pedigree information of witnesses denied where respondent merely made general assertion that names of witnesses would assist in preparation of case); People v. Bianco, 169 Misc.2d 127, 642 N.Y.S.2d 815 (Crim. Ct., Kings Co., 1996) (discovery denied where defendant failed to establish need for names of witnesses) and People v. Vargas, 118 Misc.2d 477, 461 N.Y.S.2d 678 (Sup. Ct. N.Y. Co., 1983) (although, in many cases, prosecutor would be well advised to disclose names, and court may order disclosure, discovery is not routinely available).

More difficult to obtain is investigative discovery of the names of witnesses the prosecution does not intend to call. See Matter of Terry D., 81 N.Y.2d 1042, 601 N.Y.S.2d 452 (1993) (family court abused discretion by ordering blanket disclosure of names of all eyewitnesses; Court of Appeals notes that a respondent should ordinarily be required to obtain such information through investigation); Matter of Andre W., 44 N.Y.2d 179, 404 N.Y.S.2d 578 (1978) (trial court should have held hearing to determine whether witness was material); People v. Riley, 134 A.D.3d 444 (1st Dept. 2015) (court properly refused to enforce subpoena duces tecum seeking information about alleged eyewitness or eyewitnesses, notwithstanding that subpoena purported to ask for documents); People v. Zganjer, 35 Misc.3d 1208(A) (Rye City Ct., 2012) (defendant not

entitled to disclosure of name and address of potential witness who spoke to police).

Of course, the downside to a successful motion for discovery of witness information is a reciprocal discovery order. See, e.g., People v. Green, 83 Misc.2d 583, 371 N.Y.S.2d 271 (Crim. Ct. N.Y. Co., 1975); People v. Lacey, 83 Misc.2d 69, 368 N.Y.S.2d 655 (County Ct. Suffolk Co., 1975). See also People v. Kelly, 288 A.D.2d 695, 732 N.Y.S.2d 484 (3rd Dept. 2001) (court erred in precluding defendant from offering testimony of DNA expert after defendant gave late notice during jury selection of his intent to offer the evidence, where defense counsel had been retained 2 days before trial and immediately made efforts to locate experts; such a sanction should be ordered only in the most egregious circumstances, such as when omission is motivated by desire to gain tactical advantage); Vasquez v. State, 868 N.E.2d 473 (Ind. 2007) (trial court erred in excluding testimony of witness whose existence was not disclosed by defense until first day of trial; extreme sanction of exclusion should not be employed unless defendant's breach was purposeful or intentional or State would suffer substantial and irreparable prejudice).

In determining whether the prosecution should be permitted to call a witness not included on a witness list, the court should consider, inter alia, whether the respondent, in formulating a strategy, relied to his/her detriment in the expectation that the People would not call the witness. See People v. Kyser, 158 A.D.3d 544 (1st Dept. 2018) (reversible error where People omitted complainant from witness list because they were unable to locate him before trial, but, just before opening arguments, they advised court that they had located complainant and court permitted him to testify the next day; defense had used voir dire to question jurors about ability to evaluate videotape evidence and not about ability to impartially evaluate victim's testimony, and defense had stated during voir dire that no complainant would appear); People v. Stacchini, 108 A.D.3d 866 (3d Dept. 2013) (where People had no statutory obligation to disclose identities of witnesses, court did not abuse discretion when it permitted People to add name to witness list on day witness testified; People had discovered witness just before commencement of trial because he had been included, albeit under partially incorrect name, in defendant's witness list); People v. Bennett, 40 A.D.3d 653, 837 N.Y.S.2d 655

(2d Dept. 2007) (new trial ordered where prosecutor ambushed defense by stating that certain witness would not be called and later calling witness after defense pursued strategy in reliance on initial representation); People v. Pedraza, 25 A.D.3d 394, 808 N.Y.S.2d 58 (1st Dept. 2006).

C. Police Records

There is no statutory requirement that the presentment agency turn over all police records concerning the case at hand. Of course, some of the records will be discoverable under FCA §331.2(1), while others will be subject to disclosure as "Rosario" material pursuant to FCA §331.4(1)(a). However, Rosario material need not be provided before the trial date [see Matter of Catterson v. Rohl, 202 A.D.2d 420, 608 N.Y.S.2d 696 (2d Dept. 1994), lv denied 83 N.Y.2d 755, 613 N.Y.S.2d 127 (no early discovery of Rosario material); People v. Huntington, 20 Misc.3d 1114(A), 2008 WL 2661957 (Essex County Ct., 2008)], and thus in the ordinary case counsel is left with no recourse except to ask for time to review the material before commencing cross-examination. But see Verdel v. Cunningham, 2008 WL 2755833 (SDNY, 2008) (court rejects habeas petitioner's claim of error where counsel, who had had five minutes to review Rosario material, was denied additional time to review material before commencing cross-examination, and, after conclusion of brief direct testimony which consumed about seven pages of transcript, trial court offered counsel another five minutes but he refused to cross-examine the witness).

However, the respondent may be entitled to obtain police records when there are unusual circumstances. See, e.g., People v. Campanella, 27 Misc.3d 737, 899 N.Y.S.2d 526 (Dist. Ct., Suffolk Co., 2009) (subpoena duces tecum issued for Global Positioning System tracking records and memo book entries where request constituted narrowly sculpted pursuit of relevant information, not "fishing expedition"; Police Department's intent that records be internal did not obviate potentially exculpatory nature, and there were no privacy laws implicated); People v. Phillips, 14 Misc.3d 1221(A), 836 N.Y.S.2d 488 (Sup. Ct., N.Y. Co., 2007) (disclosure ordered due to defendant's loss of memory); People v. Zacher, 11 Misc.3d 1090(A), 819 N.Y.S.2d 850 (Sup. Ct., Monroe Co., 2006) (disclosure ordered where defendant was suffering from memory loss); People v. Leon,

supra, 134 Misc.2d 757 (court grants discovery of reports upon which People's expert relied); People v. Johnson, 115 Misc.2d 366, 454 N.Y.S.2d 248 (County Ct. West. Co., 1982) (discovery of reports containing witness statements ordered where defendant had no recollection of incident).

D. Grand Jury Testimony

Grand Jury proceedings are confidential. CPL §190.25(4)(a). Consequently, unless grand jury testimony is discoverable under FCA §331.2(1)(b), or under FCA §331.4(1)(a) as "Rosario material," the respondent must demonstrate a compelling need in order to obtain discovery. See Matter of District Attorney of Suffolk County, 58 N.Y.2d 436, 461 N.Y.S.2d 773 (1983); People v. Lindsay, 131 A.D.3d 625 (2d Dept. 2015), lv denied 26 N.Y.3d 1041 (no error in denial of defendant's request for transcript of alibi witness's grand jury testimony before witness testified at trial since defense not entitled to transcript until after prosecutor used it to impeach witness on cross-examination); People v. Parchment, 92 A.D.3d 699 (2d Dept. 2012) (defendant entitled to transcript of own witness's grand jury testimony since prosecutor used it to impeach witness); People v. Gonzalez, 120 A.D.2d 464, 502 N.Y.S.2d 468 (1st Dept. 1986) (reversible error where prosecutor provided his psychiatrist with testimony not provided to defendant); People v. Philip Thomas, 2012 NY Slip Op 33153(U) (Wayne County Ct., 2012) (in reckless endangerment prosecution, court granted discovery of Grand Jury testimony, finding that defendant had particularized need because operation of shotgun was at issue; providing testimony just before witness testifies would not allow defense counsel to properly review testimony and prepare for cross-examination); People v. Singh, 13 Misc.3d 1225(A), 831 N.Y.S.2d 349 (County Ct., Suffolk Co., 2006) (court directs disclosure of Medical Examiner's testimony where autopsy report was single-page document stating cause of death to be Child Abuse Syndrome and manner of death to be homicide); People v. Zacher, 11 Misc.3d 1090(A), 819 N.Y.S.2d 850 (Sup. Ct., Monroe Co., 2006) (disclosure ordered where defendant was suffering from memory loss). See also People v. Baxin, 26 N.Y.3d 6 (2015) (defendant entitled to grand jury minutes in SORA proceeding when unable to formulate meaningful argument against prosecution claim allegedly supported by minutes); Matter of Lungen v. Kane,

88 N.Y.2d 861, 644 N.Y.S.2d 487 (1996) (District Attorney cannot challenge disclosure order via writ of prohibition); In re Grand Jury, 566 F.3d 12 (1st Cir. 2009) (while Grand Jury witness must show particularized need to obtain copy of transcripts of his testimony, that requirement does not apply when witness merely seeks access to transcripts; even witnesses who intend to testify truthfully have interest in avoiding inaccuracies and inconsistencies that could expose them to perjury prosecution).

E. Informant's Identity

1. Probable Cause Issue

In People v. Darden, 34 N.Y.2d 177, 356 N.Y.S.2d 582 (1974), the Court of Appeals held as follows:

> In any event the court regards it as fair and wise, in a case such as this, where there is insufficient evidence to establish probable cause apart from the testimony of the arresting officer as to communications received from an informer, when the issue of identity of the informer is raised at the suppression hearing, for the suppression Judge then to conduct an in camera inquiry. The prosecution should be required to make the informer available for interrogation before the Judge. The prosecutor may be present but not the defendant or his counsel. Opportunity should be afforded counsel for defendant to submit in writing any questions which he may desire the Judge to put to the informer. The Judge should take testimony, with recognition of the special need for protection of the interests of the absent defendant, and make a summary report as to the existence of the informer and with respect to the communications made by the informer to the police to which the police testify. That report should be made available to the defendant and to the People, and the transcript of testimony should be sealed to be available to the appellate courts if the occasion arises. At all stages of the procedure, of course, every reasonable precaution should be taken to assure that the anonymity of the informer is protected to the maximum degree possible.

34 N.Y.2d at 181. See also People v. Crooks, 27 N.Y.3d 609 (2016) (no Darden hearing required where probable cause was established without CI's statements concerning acquisition of drugs; CI was in possession of cocaine after transactions with defendant in controlled circumstances, which were observed by police and monitored by audio

transmission). In People v. Edwards, 95 N.Y.2d 486, 719 N.Y.S.2d 202 (2000), the Court of Appeals held that Darden established a requirement, and not merely a procedure to be allowed in the discretion of the court.

The Darden requirement is triggered when the respondent asks for production of the informant, verification of the informant's reliability, and corroboration of the officer's suppression hearing testimony concerning what the informant said. Although it would be prudent to do so, it is not necessary for the respondent to specifically ask for an in camera hearing. See People v. Fulton, 83 A.D.2d 856, 441 N.Y.S.2d 736 (2d Dept. 1981) (defendant did ask for production of the informant, verification of the informant's reliability, and corroboration of the officer's testimony concerning the informant's statements).

Production of the informant is not excused even when an officer's observations, considered together with the report of an anonymous informant, would establish probable cause. See People v. Adrion, 82 N.Y.2d 628, 606 N.Y.S.2d 893 (1994). However, if an informant is legitimately unavailable, his or her existence may be established through extrinsic evidence. People v. Carpenito, 80 N.Y.2d 65, 587 N.Y.S.2d 264 (1992) (confidential informant feared personal injury); People v. S.I., 21 Misc.3d 1110(A), 2008 WL 453530 (Crim. Ct., Kings Co., 2008) (People failed to demonstrate that informant's unavailability was result of actual fear of death or injury to informant or his family where People claimed that officer was told by informant that he had fear for his safety, but People made no efforts to communicate directly with informant or officer’s supervisors, or subpoena informant).

Under ordinary circumstances, the prosecution is not entitled to re-open the hearing to introduce evidence from the informant after the court has already ruled that other information did not provide the police with probable cause. People v. Campbell, 8 Misc.3d 1007(A), 801 N.Y.S.2d 779 (Sup. Ct., Kings Co., 2005).

2. Respondent's Guilt Or Innocence

In People v. Goggins, 34 N.Y.2d 163, 356 N.Y.S.2d 571 (1974), cert denied 419 U.S. 1012, 95 S.Ct. 332, the Court of Appeals held that, when the accused demands disclosure of the identity of a police informant who allegedly has information relevant to

the issue of guilt or innocence, and can "show a basis in fact to establish that his demand does not have an improper motive and is not merely an angling in desperation for possible weaknesses in the prosecution's investigation [citation omitted]," disclosure should be ordered. 34 N.Y.2d at 169. Although a Darden hearing is conducted in camera, when guilt or innocence is at issue the decision concerning disclosure "must not be resolved in an ex parte proceeding." 34 N.Y.2d at 168.

A strong case for disclosure exists when it appears that the informant witnessed or participated in the offense, or, perhaps, when the informant introduced the accused to the police or otherwise actively participated during a preliminary stage. However, when the informant has played a marginal role by, for instance, providing information to the police, the privilege usually prevails. Compare People v. Stanfield, 7 A.D.3d 918, 777 N.Y.S.2d 546 (3rd Dept., 2004) (court should have ordered disclosure where informant observed transfer of item between defendant and another individual, and then received something from that individual, since defendant's main contention was that there was no proof that the crack cocaine turned over to detectives was the same item allegedly passed by defendant); People v. Estrada, 142 A.D.2d 512, 530 N.Y.S.2d 148 (1st Dept. 1988) (disclosure required where informant told officer that person with same last name as prosecution witness may have shot the deceased); People v. Baez, 103 A.D.2d 746, 477 N.Y.S.2d 651 (2d Dept. 1984) (disclosure required where informant was present during drug sale and identification was live issue); People v. Taylor, 83 A.D.2d 595, 441 N.Y.S.2d 116 (2d Dept. 1981) (production required where informant was eyewitness to sale and defendant had alibi); People v. Canales, 75 A.D.2d 875, 427 N.Y.S.2d 879 (2d Dept. 1980) (disclosure required where informant witnessed weighing of narcotics and counting of money) and People v. Copeland, 70 A.D.2d 884, 417 N.Y.S.2d 103 (2d Dept. 1979) (informant was highly involved in sale negotiations) with People v. Rios, 60 N.Y.2d 764, 469 N.Y.S.2d 670 (1983) (no discovery where informant observed defendant walking with kidnapping victim and gave police defendant's name and address); People v. Martinez, 54 N.Y.2d 723, 442 N.Y.S.2d 994 (1981), aff'g 79 A.D.2d 661, 433 N.Y.S.2d 841 (2d Dept. 1980) (no disclosure required where informant introduced undercover to seller); People v. Wilson, 18 A.D.3d 1070,

795 N.Y.S.2d 416 (3rd Dept. 2005) (no disclosure where informant was present during drug purchase, but identification issue was not closely contested); People v. Amarante, 120 A.D.2d 538, 502 N.Y.S.2d 43 (2d Dept. 1986) (production of informant not required where informant was not eyewitness and defendant raised no defense which made informant relevant); People v. Chavis, 113 A.D.2d 896, 493 N.Y.S.2d 613 (2d Dept. 1985) (disclosure not required where informant merely arranged sale to undercover, and defendant made unsupported and conclusory allegations that informant would testify that defendant was not the seller); People v. Gilmore, 106 A.D.2d 399, 482 N.Y.S.2d 317 (2d Dept. 1984) (disclosure not required where there was no identification issue and informant participated only minimally in drug sale).

If, after exercising diligent efforts, the prosecution is unable to produce a missing informant, the respondent cannot secure a dismissal of charges or a reversal on appeal unless the respondent can demonstrate that the informant's testimony would tend to be exculpatory or create a reasonable doubt as to the reliability of the prosecution's case. People v. Lesiuk, 81 N.Y.2d 485, 600 N.Y.S.2d 931 (1993); People v. Jenkins, 41 N.Y.2d 307, 392 N.Y.S.2d 587 (1977); People v. Miller, 124 A.D.2d 830, 508 N.Y.S.2d 549 (2d Dept. 1986) (production not required where informant was unavailable because he was in Federal custody, and defendant merely alleged that informant was present during sale and "would be" in a position to give exculpatory information).

F. Search Warrant Documents

In the ordinary case, search warrants and search warrant applications are discoverable. See People v. Nottage, 11 Misc.3d 1052(A), 814 N.Y.S.2d 892 (Crim. Ct., Kings Co., 2006); People v. Chahine, 150 Misc.2d 242, 568 N.Y.S.2d 526 (Crim. Ct. N.Y. Co., 1991) (citing CPL §240.20[1][h]); People v. Brown, 104 Misc.2d 157, 427 N.Y.S.2d 722 (Crim. Ct. Queens Co., 1980).

However, just as the court may hold an in camera hearing pursuant to People v. Darden, supra, 34 N.Y.2d 177 without the respondent's participation, the court may, in appropriate circumstances, conduct an ex parte review of search warrant applications and affidavits in order to protect the identity of a confidential informant. In People v. Castillo, 80 N.Y.2d 578, 592 N.Y.S.2d 945 (1992), the Court of Appeals noted that the

hearing court had followed the 4-step procedure set forth in People v. Seychel, 136 Misc.2d 310, 518 N.Y.S.2d 754 (Sup. Ct. N.Y. Co., 1987). In Castillo, the hearing court: 1) reviewed the warrant to determine whether it alleged probable cause on its face or appeared to be perjurious, and, if the affidavit had contained perjury, the court would have given the People a choice between turning over the affidavit or discontinuing the prosecution; 2) finding no problem, the court then conducted an in camera, ex parte inquiry of the informant and examined the People's exhibits to determine whether the informant's life, and/or future investigations, would be jeopardized by disclosure; 3) after finding that confidentiality was required, the court then attempted to redact portions of the affidavit in a way that would conceal the informant's identity but still give the defendant a description of the information that led to his arrest; 4) after finding redaction impossible, the court ordered the People to produce the informant for a Darden - type inquiry during which the court could evaluate the informant's credibility. The court denied disclosure, and was upheld by the Court of Appeals. The Court of Appeals noted that, "[a]lthough a defendant who does not have access to the information purporting to establish probable cause will be unable to suggest reasons why probable cause was lacking," such a procedure is authorized by Darden. 80 N.Y.2d at 585. The Court of Appeals also concluded that there is no reason to believe that, in those extraordinary cases in which safeguards are required, the court cannot do a competent job of insuring that there was a substantial basis for the magistrate's conclusion that probable cause existed. However, the Court of Appeals did pointedly note that, in Castillo, the judge who issued the warrant had personally examined the informant. Therefore, the suppression court was able to review the transcript of the informant's sworn testimony, and did not have to develop a factual record concerning the basis for the search. See also People v. Merejildo, 305 A.D.2d 143, 762 N.Y.S.2d 338 (1st Dept. 2003) (court does not decide whether Castillo applies to warrantless arrests); People v. Nottage, supra, 11 Misc.3d 1052(A) (protective order granted with respect to information that could identify informant).

G. CPLR Discovery

Family Court Act §165(a) provides that "where the method of procedure in any

proceeding in which the family court has jurisdiction is not prescribed, the provisions of the civil practice law and rules shall apply to the extent that they are appropriate to the proceedings involved." Although any respondent would like the opportunity to make use of the discovery devices in CPLR article 31, such as oral depositions, the courts have not been receptive. See, e.g., Matter of Wilfredo G., 154 Misc.2d 979, 586 N.Y.S.2d 725 (Fam. Ct. West. Co., 1992) (court concludes that respondent is not entitled to use interrogatories, and notes that, if they were allowed, the presentment agency would be able to use them too); Matter of Edwin R., 60 Misc.2d 355, 303 N.Y.S.2d 406 (Fam. Ct. N.Y. Co., 1969); Sobie, Practice Commentary, FCA §330.2 ("[s]ince unsupervised civil discovery is overly broad and may continue for months, the discovery sections [in article 3] mostly follow criminal standards, including the requirement of close court supervision"). See also In re Lees, 187 Misc.2d 901, 727 N.Y.S.2d 254 (Sup. Ct., Monroe Co., 2001) (defendant may utilize CPLR 3120 in attempt to obtain order directing rape complainant and third party to produce their computers, which allegedly contain information concerning previous unfounded allegations of rape made by the complainant).

H. Mental Health Examination Of Witness

In People v. Griffin, 138 Misc.2d 279, 524 N.Y.S.2d 153 (Sup. Ct. Kings Co., 1988), the court noted that "[n]o appellate decision in New York has ruled on whether a trial court has the power to order a complainant to submit to ... a psychiatric examination." 138 Misc.2d at 282. Then, citing §2-b(3) of the Judiciary Law, which provides a court with the power "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it," the court held that it has discretion to issue such an order when, in the light of the facts, "compelling reason" exists. The court then denied the defendants' motion, concluding that their allegations failed to show that the complainant was suffering from a mental illness which could affect her ability to testify, or that an examination would aid the fact-finder in assessing her credibility. See also People v. Earel, 89 N.Y.2d 960, 655 N.Y.S.2d 859 (1997) (court assumes without deciding that such power exists, and concludes that defendant failed to show that exam was necessary to ensure a fair trial);

People v. Rensing, 14 N.Y.2d 210, 250 N.Y.S.2d 401 (1964); Perry v. Commonwealth, 390 S.W.3d 122 (Ky. 2012) (court erred in refusing to allow independent psychological evaluation of child sex abuse complainant to determine whether psychological condition might have effect on memory or ability to tell truth); Abbott v. State, 138 P.3d 462 (Nev. 2006) (reversible error in denial of application for psychological examination of sex crime complainant; court abandons restrictive rule and returns to former, more liberal rule); People v. Brown, 7 A.D.3d 726, 777 N.Y.S.2d 508 (2d Dept. 2004), lv denied 3 N.Y.3d 671 (defendant failed to demonstrate that examination was appropriate); People v. Baier, 73 A.D.2d 649, 422 N.Y.S.2d 734 (2d Dept. 1979) (denial of examination upheld); United States v. Benn, 476 F.2d 1127, 1130-1131 (D.C. Cir. 1973) (while rejecting requirement that all sexual assault victims be examined, court notes that, "[t]o assist the court in making its competency decision, to aid the jury in assessing credibility, or to serve both purposes, the trial judge may order a psychiatric examination to obtain expert testimony concerning the degree and effect of a witness' disability"); People v. Brown, 191 Misc.2d 97, 742 N.Y.S.2d 495 (Sup. Ct., Queens Co., 2002) (psychological examination of rape complainant not constitutionally required, limited benefit of examination to defense is outweighed by its intrusiveness, and court is without authority to order discovery not authorized by CPL Article 240); People v. Loomis, 172 Misc.2d 265, 658 N.Y.S.2d 787 (Suffolk County Ct., 1997) (application denied where defendant sought to develop expert testimony concerning “Parental Alienation Syndrome”); People v. Lowe, 96 Misc.2d 33, 408 N.Y.S.2d 873 (Crim. Ct. Bronx Co., 1978) (defendant's motion denied without prejudice to renewal of motion if defendant can make a substantial showing of "need and justification").

I. Non-Testimonial Evidence

1. Statutory Authorization

Pursuant to FCA §331.3(2)(b), the court may order the respondent to:

(i) appear in a line-up;
(ii) speak for identification by witness or potential witness;
(iii) be fingerprinted, provided that the respondent is subject to fingerprinting pursuant to this article;
(iv) pose for photographs not involving reenactment of an

event, provided the respondent is subject to fingerprinting pursuant to this article;

(v) permit the taking of samples of blood, hair or other materials from his body in a manner not involving an unreasonable intrusion thereof or a risk of serious physical injury thereto;

(vi) provide specimens of his handwriting; and

(vii) submit to a reasonable physical or medical inspection of his body.

Section 331.3(2)(b) also provides that "[t]his subdivision shall not be construed to limit, expand, or otherwise affect the issuance of a similar court order, as may be authorized by law, before the filing of a petition consistent with such rights as the respondent may derive from [FCA article 3], the constitution of this state or of the United States." This language has been taken from CPL §240.40(2)(b). In Matter of Abe A., 56 N.Y.2d 288, 452 N.Y.S.2d 6 (1982), the Court of Appeals noted that, in New York, there is no such "animal" as a court order authorizing the detention of a suspect for the purpose of a search. However, the court concluded that a person can be seized and made to supply a blood sample or other physical evidence pursuant to search warrant provisions in CPL article 690. Article 3 of the Family Court Act has not incorporated CPL article 690, and, as a result, a family court judge has no power to issue a search warrant. See FCA §303.1(1) ("[t]he provisions of the criminal procedure law shall not apply to proceedings under this article unless the applicability of such provisions are specifically prescribed by this act"). Therefore, although the Legislature mechanistically employed the language found in CPL §240.40(2)(b), it does not appear that a pre-petition seizure of a potential respondent for discovery purposes is "authorized by law."

In criminal proceedings, the timeliness of a prosecution's motion for discovery of non-testimonial evidence is governed by the 45-day deadline in CPL §240.90(1). People v. Addison, 51 Misc.3d 498 (Sup. Ct., Bronx Co., 2016) (court rejects People's claim that it should excuse late filing because People were seeking important DNA evidence); People v. Acosta, 49 Misc.3d 957 (Crim. Ct., Kings Co., 2015) (court-ordered DNA swab denied where there was no good cause for People's filing of motion after 45-day deadline; in response to People's contention that denying discover was severe sanction

and that delay did not prejudice defendant, court, Fourth Amendment, refuses to carve out new exception to 45-day deadline). In juvenile delinquency proceedings, the 30-day deadline in FCA § 332.2(1) applies to “pre-trial motions” specified in FCA §332.1, which do not include presentment agency motions. Certainly, however, defense counsel should argue that the presentment agency should be bound by the 30-day deadline for discovery motions applicable to respondents under FCA §332.1(6).

2. Physical Samples

a. Generally

An intrusion into the body to obtain physical evidence constitutes a search under the Fourth Amendment. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966). A court order may be issued if the prosecution establishes "(1) probable cause to believe the suspect has committed the crime, (2) a `clear indication' that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable. In addition, the issuing court must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against concerns for the suspect's constitutional right to be free from bodily intrusion on the other." Matter of Abe A., supra, 56 N.Y.2d at 291; but see People v. Roshia, 133 A.D.3d 1029 (3d Dept. 2015) (grand jury indictment provided probable cause for buccal swab, and there was reasoned basis to issue order, where there was sexual evidence assault kit; dissenting judge asserted that People failed to satisfy “clear indication” test), aff’d 28 N.Y.3d 989 (2016).

Compare People v. Cox, 161 A.D.3d 1100 (2d Dept. 2018), lv denied _N.Y.3d_, 2018 WL 4331679 (error in granting People’s untimely motion to compel defendant to submit to buccal swab for DNA testing did not implicate constitutional rights and thus admission of DNA evidence did not require reversal); Matter of Johnson v. Shillingford, 108 A.D.3d 630 (2d Dept. 2013) (buccal swab ordered where defendant offered to stipulate that his DNA matched DNA recovered from firearms and argued that stipulation would be less intrusive method of obtaining evidence); People v. Randt, 142 A.D.2d 611, 530 N.Y.S.2d 266 (2d Dept. 1988) (order for dental examination upheld where victim suffered bite mark and People indicated that expert could determine whether bite had

been inflicted by defendant); People v. Blank, _Misc.3d_, 2018 WL 4290569 (Sup. Ct., Bronx Co., 2018) (court directs that sample be used only for comparison to DNA profile generated from swab of firearm in present case and not be utilized for any other purpose or comparison or be added to state or OCME databases before conviction and sentencing); People v. White, 60 Misc.3d 304 (Sup. Ct., Bronx Co., 2018) (court denies motion for protective order limiting comparison of DNA to this case and prohibiting inclusion in state DNA database); People v. Velez, 54 Misc.3d 1208(A) (Sup. Ct., Bronx Co., 2017) (protective order directed that DNA sample would be used only in connection with instant case and not for any other purpose or comparison and would not be added to databases prior to conviction and sentencing); People v. Lewis, 35 Misc.3d 1216(A) (Crim. Ct., Kings Co., 2012) (People's motion granted despite untimely filing, but court granted defendant's motion for protective order preventing disclosure of DNA to anyone other than parties, and found that People failed to articulate factual basis to support issuance of order permitting use of force); People v. Ramsey, 12 Misc.3d 1114, 817 N.Y.S.2d 489 (Yates County Ct., 2006) (court grants People's motion for order directing taking of photos of defendant's penis and pubic area where sex crime victim allegedly observed unique characteristics); People v. King, 161 Misc.2d 448, 613 N.Y.S.2d 545 (County Ct. West. Co., 1994) (probable cause not required for each subsequent use of legally taken blood sample); People v. Perez, 2016NY072731, NYLJ 1202785992665, at *1 (Crim., NY, Decided May 9, 2017) (Crim. Ct., N.Y. Co., 2017) (buccal swab ordered where People alleged that defendant was recorded on video punching and kicking complainant, that shirt matching one defendant was wearing in video was found at defendant's girlfriend's apartment, that shirt had complainant's blood on it, and that girlfriend informed police that she witnessed defendant fighting; court denies defendant's cross motion for protective order preventing OCME from uploading DNA profile to internal database) and Matter of Jose Antonio R., 130 Misc.2d 508, 496 N.Y.S.2d 683 (Fam. Ct. Bronx Co., 1986) (in sodomy proceeding, respondent required to submit to urethral chlamydia test where throat culture of 4-year-old complainant led to positive test result)

with People v. Fomby, 103 A.D.3d 28 (3d Dept. 2012), lv denied 21 N.Y.3d 1015 (DNA

evidence obtained via buccal swab suppressed where search warrant was issued upon application made without notice to defendant or exigent circumstances that prevented notice); People v. Smith, 95 A.D.3d 21 (4th Dept. 2012) (DNA evidence suppressed where defendant lacked notice of application and police used excessive force to obtain buccal swab; although defendant failed to appear in opposition to People's earlier application for swab, each order constitutes bodily intrusion warranting notice and opportunity to be heard); People v. Oliver, 92 A.D.3d 900 (2d Dept. 2012) (no probable cause for taking of buccal swab sample for DNA analysis where prosecutor asserted only that defendant injured himself during burglary and that blood was recovered at crime scene); Matter of David M. v. Dwyer, 107 A.D.2d 884, 484 N.Y.S.2d 323 (3rd Dept. 1985) (blood and hair samples not obtainable where People failed to establish that blood other than that of decedent was found at crime scene or that blood on defendant's sweatshirt was of decedent's type, and merely alleged that hairs did not appear to belong to the portion of the decedent's body on which they were found); Matter of Brown v. Monserrate, 101 A.D.2d 674, 476 N.Y.S.2d 260 (3rd Dept. 1984) (expert testimony must establish probative value and conclusiveness of human hair and sperm analyses); People v. Washington, 33 Misc.3d 640 (Crim. Ct., Kings Co., 2011) (court denies request for DNA sample where DNA was found on firearms recovered from dwelling, but People did not establish probable cause where defendant grabbed waistband, walked briskly into dwelling, and then exited, returned to group he had been with and dropped bag of marijuana, and gravity knife was recovered from him upon arrest) and People v. Vogt, 26 Misc.3d 1222(A) (Sup. Ct., West. Co., 2010) (motion for order directing defendant to provide buccal cell sample denied where People failed to identify “mixed stain” recovered from scene of alleged assault as one comprised of particular type of DNA-bearing cellular material - i.e. blood, saliva, epithelial cells, semen, etc. - and specify location at “scene” where sample was recovered).

There is no statutory authority for an order directing that a complainant undergo testing. See People v. Neal, 167 Misc.2d 929, 640 N.Y.S.2d 976 (Suffolk County Ct., 1996) (court refuses to compel complainant to submit to blood test and provide hair sample so defendant can attempt to support claim that rape complainant used cocaine

she obtained from defendant on date of offense in exchange for sex).

b. Surgery

A highly invasive surgical procedure may constitute an unreasonable search even though it is likely to produce important evidence. Compare Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611 (1985) (Fourth Amendment violation would occur if State were permitted to place robbery suspect under a general anesthetic and remove a bullet lodged in his chest) and People v. Richard, 145 Misc.2d 755, 548 N.Y.S.2d 369 (County Ct. Albany Co., 1989) (court denies motion to compel defendant to submit to surgical removal of bullet fragments from his shoulder) with United States v. Crowder, 543 F.2d 312 (1976) (.32 caliber slug lay superficially beneath the skin and was extracted by gentle squeezing after a one-inch long incision had been made).

c. Evidence Obtained By Private Individuals

Although a suspect cannot be compelled to provide a blood sample or other specimens without a court order, such evidence could come into the hands of the police without a court order because of action taken by medical personnel while treating a suspect. In such a case, the physician-patient privilege could be invoked. See People v. Petro, 122 A.D.2d 309, 504 N.Y.S.2d 67 (3rd Dept. 1986) (test results must be suppressed).

3. Lineups

The respondent can be ordered to appear in a lineup if there is probable cause to believe he or she committed a crime, and there is a need for the lineup. See, e.g., People v. Sharp, 36 Misc.3d 381 (Sup. Ct., Bronx Co., 2012) (where People requested court-ordered lineup after previous lineup identification was suppressed due to right to counsel violation, court ordered hearing to determine whether previous lineup was unduly suggestive and whether witness has independent source for identification in proposed second lineup; if court determined that prior lineup was not unduly suggestive and that witness has independent source, People's application would be granted); People v. West, 111 Misc.2d 658, 444 N.Y.S.2d 805 (County Ct. Rockland Co., 1981). The respondent may also be compelled to change his or her appearance for the lineup. See Matter of La Placa, 127 A.D.2d 610, 511 N.Y.S.2d 410 (2d Dept. 1987) (order

directing defendant to remove beard did not violate CPL §240.40[2]). But see People v. Vega, 51 A.D.2d 33, 379 N.Y.S.2d 419 (2d Dept. 1976) (suspect who had not yet been charged could not be compelled to shave beard for lineup).

If a lineup is ordered, it is important that the child's attorney attend, and, when appropriate, raise objections and otherwise insure that the lineup is conducted in a manner as favorable to the respondent as possible.

4. HIV Testing

In any proceeding where the respondent is found to have committed a felony offense enumerated in Penal Law Article 130, or an offense enumerated in Penal Law §130.20, for which an act of "sexual intercourse," "oral sexual conduct" or "anal sexual conduct" is required, the court must, upon a request of the victim, order that the respondent submit to human immunodeficiency (HIV) testing. The testing is to be conducted by a state, county, or local public health officer designated by the order. Test results, which shall not be disclosed to the court, shall be communicated to the respondent and the victim named in the order in accordance with the provisions of Public Health Law §2785-a. FCA §347.1(1)(a).

The term "victim" means the person with whom the respondent engaged in an act of "sexual intercourse," "oral sexual conduct" or "anal sexual conduct" where the conduct was the basis for the court's finding. FCA §347.1(1)(b).

Any request made by the victim pursuant to this section must be in writing, filed with the court and provided by the court to the respondent and his or her counsel. The request must be filed with the court prior to or within ten days after the filing of the fact-finding order, provided that, for good cause shown, the court may permit such request to be filed at any time prior to the entry of an order of disposition. FCA §347.1(2).

Any requests, related papers and orders made or filed pursuant to this section, together with any papers or proceedings related thereto, shall be sealed by the court and not made available for any purpose, except as may be necessary for the conduct of judicial proceedings directly related to the provisions of this section. All proceedings on such requests shall be held in camera. FCA §347.1(3).

The application for an order to compel a respondent to undergo an HIV-related

test may be made by the victim but, if the victim is an infant or incompetent person, the application may also be made by a representative as defined in CPLR §1201. The application must state that (a) the applicant was the victim of the offense which the court found the respondent to have committed; and (b) the applicant has been offered counseling by a public health officer and been advised of (i) the limitations on the information to be obtained through an HIV test on the proposed subject; (ii) current scientific assessments of the risk of transmission of HIV from the exposure he or she may have experienced; and (iii) the need for the applicant to undergo HIV related testing to definitively determine his or her HIV status. FCA §347.1(4).

The court shall conduct a hearing only if necessary to determine if the applicant is the victim of the offense the respondent was found to have committed. The court ordered test must be performed within fifteen days of the date on which the court ordered the test, provided however that whenever the respondent is not tested within the period prescribed by the court, the court must again order that the respondent undergo an HIV related test. FCA §347.1(5).

Test results shall be disclosed subject to the following limitations, which shall be specified in any order issued pursuant to this section: (i) disclosure of confidential HIV related information shall be limited to that information which is necessary to fulfill the purpose for which the order is granted; (ii) disclosure of confidential HIV related information shall be limited to the person making the application; redisclosure shall be permitted only to the victim, the victim's immediate family, guardian, physicians, attorneys, medical or mental health providers and to his or her past and future contacts to whom there was or is a reasonable risk of HIV transmission and shall not be permitted to any other person or the court. FCA §347.1(6)(a).

Unless inconsistent with this section, the court's order shall direct compliance with and conform to the provisions of Public Health Law Article 27-F. Such order shall include measures to protect against disclosure to others of the identity and HIV status of the applicant and of the person tested and may include such other measures as the court deems necessary to protect confidential information. FCA §347.1(6)(b).

Any failure to comply with the provisions of this section or Public Health Law

§2785-a shall not impair the validity of any order of disposition entered by the court. FCA §347.1(7).

No information obtained as a result of a consent, hearing or court order for testing issued pursuant to this section nor any information derived therefrom may be used as evidence in any criminal or civil proceeding against the respondent which relates to events that were the basis for the respondent's adjudication, provided however that nothing herein shall prevent prosecution of a witness testifying in any court hearing held pursuant to this section for perjury pursuant to Penal Law Article 210. FCA §347.1(8).

J. Notice Of Alibi Witnesses

If, within 15 days after the conclusion of the initial appearance, the presentment agency serves upon the respondent a demand for information concerning alibi witnesses, the respondent must, within 10 days, serve upon the presentment agency and file with the court a "notice of alibi" that recites: "(a) the place or places where the respondent claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon whom he intends to rely. FCA §335.2(1).

The statute does not authorize preclusion of the respondent's own testimony as a sanction for a failure to provide notice. People v. Dawkins, 289 A.D.2d 589, 735 N.Y.S.2d 818 (2d Dept. 2001); People v. Peace, 256 A.D.2d 1014, 683 N.Y.S.2d 317 (3rd Dept. 1998).

The statute does not apply to testimony that is not true alibi evidence; for example, testimony which places *the victim,* rather than the respondent, at a location other than the scene of the crime. See People v. Nichols, 289 A.D.2d 605, 733 N.Y.S.2d 778 (3rd Dept. 2001). See also State v. Deffebaugh, 89 P.3d 582 (Kansas, 2004) (alibi notice statute does not apply to witness who would testify that he was at scene of crime but defendant was not there); Edwards v. State, 930 N.E.2d 48 (Ind. Ct. App. 2010) (same as Deffebaugh); State v. Volpone, 376 A.2d 199 (N.J. App. Div., 1977) (same as Deffebaugh); People v. Moreno, 139 A.D.3d 401 (1st Dept. 2016), lv denied 28 N.Y.3d 934 (where People's theory was that defendant entered apartment via fire escape,

evidence that defendant was never on fire escape and was nearby on street smoking marijuana was alibi); People v. Hicks, 94 A.D.3d 1483 (4th Dept. 2012) (testimony regarding defendant's activity at least one hour before crimes would not have accounted for defendant's whereabouts during crime or placed him away from crime scene shortly thereafter and thus did not constitute alibi testimony; fact that testimony may be taken as circumstantial alibi evidence does not require that notice be given).

For good cause shown, the court may extend the period for service of the notice." FCA §335.2(1); see, e.g., People v. Parsely, 30 Misc.3d 1237(A), 2011 WL 892738 (Sup. Ct., West. Co., 2011) (defendant granted leave to file untimely notice even though defense previously was given leave to file untimely notice identifying different witnesses and failed to justify additional delay; although it would be reasonable to deny application, People do not allege prejudice and thus application is granted in interest of justice); Matter of J.A., 18 Misc.3d 1101(A), 856 N.Y.S.2d 24 (Fam. Ct., Nassau Co., 2007) (court grants respondent's request for extension of period in which notice of alibi may be filed, noting that late notice would not prejudice Presentment Agency).

Within a reasonable time after service of a "notice of alibi" but no later than 10 days before the fact-finding hearing, the presentment agency must serve upon the respondent and file with the court the same information with respect to any rebuttal witnesses. It should be noted that "[a] witness who will testify that the respondent was at the scene of the crime is not such an alibi rebuttal witness." FCA §335.2(2). For good cause shown, the court may extend the period for service. FCA §335.2(2). See, e.g., People v. Crevelle, 125 A.D.3d 995 (2d Dept. 2015) (good cause required for pretrial or mid-trial extension of time to serve list of alibi rebuttal witnesses); People v. Caserta, 171 A.D.2d 519, 567 N.Y.S.2d 426 (1st Dept. 1991), lv denied 78 N.Y.2d 963, 574 N.Y.S.2d 943; People v. Cade, 138 A.D.2d 388, 525 N.Y.S.2d 672 (2d Dept. 1988); People v. Lenihan, 30 Misc.3d 289, 911 N.Y.S.2d 588 (Sup. Ct., Queens Co., 2010) (People's failure to give reciprocal notice excused where prosecutor could not reasonably have been aware of facts giving rise to opportunity for rebuttal until after defendant's witnesses had testified; court does not abuse discretion in granting

adjournment after People fail to serve notice of rebuttal witness where contradiction goes to defendant's whereabouts at time of crime). There is a continuing duty to promptly disclose information whenever witnesses are found after a witness list has been filed. FCA §335.2(5). See also People v. Sirmons, 242 A.D.2d 883, 662 N.Y.S.2d 645 (4th Dept. 1997) (prosecution entitled to discovery of documents which will be offered at trial in support of alibi defense.

If the respondent fails to serve the demanded timely notice or calls a witness who was not specified in the notice, the court may exclude the testimony. If the testimony is accepted, the court must grant the presentment agency a reasonable adjournment before the witness testifies. FCA §335.2(3). Compare People v. Moreno, 139 A.D.3d 401 (evidence disclosed after People rested properly precluded where defendant's relative belatedly told defense counsel about witness and thus there was recent fabrication and willful conduct on defendant's part); People v. Valdez, 81 A.D.3d 550, 916 N.Y.S.2d 602 (1st Dept. 2011), lv denied 16 N.Y.3d 863 (testimony of three alibi witnesses, who were family members and resided with defendant, properly precluded where defendant offered notice on day of jury selection; failure to provide timely notice was product of willful conduct by defendant that was motivated by desire to obtain tactical advantage after court had rejected another last-minute attempt by defendant to delay trial, and People would have needed substantial adjournment rather than mid-trial investigation and passage of time was likely to have made investigation difficult or futile); People v. Djanie, 31 A.D.3d 887, 817 N.Y.S.2d 783 (3rd Dept.) (evidence precluded where letter allegedly was sent by defendant to prosecution 3 months after notice was due); People v. Whitehead, 305 A.D.2d 286, 760 N.Y.S.2d 35 (1st Dept. 2003), lv denied 100 N.Y.2d 600, 766 N.Y.S.2d 176 (2003) (testimony precluded where defendant presented witness at trial without having served any notice); People v. Walker, 294 A.D.2d 218, 743 N.Y.S.2d 403 (1st Dept. 2002), lv denied 98 N.Y.2d 772, 752 N.Y.S.2d 13 (2002) (alibi evidence precluded where defendant acted willfully in waiting until close of People's case to give alibi notice; since defendant must have known of alibi from time of arrest, it is immaterial when defense counsel learned of witness' whereabouts); People v. Bernard, 210 A.D.2d 419, 620 N.Y.S.2d 414 (2d Dept.

1994), lv denied 85 N.Y.2d 906, 627 N.Y.S.2d 329 (1995) (testimony precluded where defendant revealed intent to call witnesses just before trial and almost 10 months after crime); People v. Corpas, 150 A.D.2d 710, 541 N.Y.S.2d 584 (2d Dept. 1989) (evidence precluded where defense counsel waited until end of People's case to notify court) and People v. Peralta, 127 A.D.2d 803, 512 N.Y.S.2d 201 (2d Dept. 1987) (evidence precluded where defendant gave notice on last day of trial)

with People v. Green, 70 A.D.3d 39, 890 N.Y.S.2d 65 (2d Dept. 2009) (no alibi notice required where defense counsel stated that she was offering testimony solely for purpose of impeaching other witness's account of what happened some 40 minutes before crime, and, even if testimony was alibi evidence, preclusion was inappropriate since there was serious question as to whether witness could be characterized as alibi witness; police and People had been aware early on of witness's existence and connection with defendant; defense counsel's failure to serve notice was not attempt to gain tactical advantage and instead resulted from good faith belief that notice was not required; and there was no showing that there would be irreparable prejudice to People had witness been permitted to testify); People v. Cruz, 50 A.D.3d 490, 855 N.Y.S.2d 144 (1st Dept. 2008) (court should have admitted evidence where counsel's failure to serve alibi notice resulted from good faith belief that no notice was required rather than from desire to obtain tactical advantage); People v. Ashley, 44 A.D.3d 536, 843 N.Y.S.2d 506 (1st Dept. 2007) (preclusion improper where defendant had not acted willfully or prejudiced People, who were already aware of witness's Grand Jury and suppression hearing testimony and her pedigree information); Noble v. Kelly, 246 F.3d 93 (2d Cir. 2001), cert denied 534 U.S. 886, 122 S.Ct. 197 (where less onerous sanctions, such as adjournment, were available, testimony could not be excluded unless defense counsel's failure was willful or designed for tactical advantage); Escalera v. Coombe, 826 F.2d 185 (2d Cir. 1987) (preclusion after defendant gave notice during trial violated Compulsory Process Clause); People v. Peterson, 96 A.D.2d 871, 465 N.Y.S.2d 743 (2d Dept. 1983) (preclusion was error where notice was served 174 days late but 2 weeks before trial); Matter of Kevin B., 20 Misc.3d 1113(A), 867 N.Y.S.2d 375 (Fam. Ct., Queens Co., 2008) (no preclusion of alibi testimony where

respondent served notice the day after trial commenced, since court found no basis for finding that failure to timely serve notice was willful, done in bad faith, or designed to gain strategic advantage, or indication that allowing testimony would unduly prejudice Presentment Agency; court also notes that "[b]ecause the [child's attorney] must rely upon the juvenile client to provide information which would permit the assertion of an alibi defense, counsel may encounter difficulties which might not arise in representing an adult criminal defendant") and Bohan v. Kuhlman, 234 F.Supp.2d 231 (S.D.N.Y. 2002) (testimony of one of 3 witnesses improperly precluded, and error was not harmless since witness was not cumulative). See also Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646 (1988) (Compulsory Process Clause is not absolute bar to preclusion as sanction); People v. Kelly, 288 A.D.2d 695, 732 N.Y.S.2d 484 (3rd Dept. 2001) (court erred in precluding defendant from offering testimony of DNA expert after defendant gave late notice during jury selection of his intent to offer the evidence, where defense counsel had been retained 2 days before trial and immediately made efforts to locate experts; such a sanction should be ordered only in the most egregious circumstances, such as when omission is motivated by desire to gain tactical advantage); Vasquez v. State, 868 N.E.2d 473 (Ind. 2007) (trial court erred in excluding testimony of witness whose existence was not disclosed by defense until first day of trial; extreme sanction of exclusion should not be employed unless defendant's breach was purposeful or intentional or State would suffer substantial and irreparable prejudice).

The provisions of §335.2(3) also apply when the presentment agency fails to serve and file notice of rebuttal witnesses. FCA §335.2(4). See, e.g., People v. Taylor, 114 A.D.3d 886, 2014 WL 626884 (2d Dept. 2014), lv denied 23 N.Y.3d 968 (no error where court permitted People to present testimony of two rebuttal witnesses despite failure to provide notice); Fox v. Mann, 71 F.3d 66 (2d Cir. 1995) (no due process violation where prosecution did not know and could not reasonably have known of need to call rebuttal witnesses until after testimony of defendant's alibi witnesses).

There is conflicting authority regarding whether an alibi notice may be used to impeach witnesses at trial. Compare People v. Shuff, 168 A.D.2d 348, 564 N.Y.S.2d 132 (1st Dept. 1990), lv denied 77 N.Y.2d 967, 570 N.Y.S.2d 501 (1991) (prosecutor

properly allowed to impeach defendant with notice of alibi) with People v. Nelu, 157 A.D.2d 864, 550 N.Y.S.2d 905 (2d Dept. 1990) (notice was merely document prepared by counsel and did not contain prior statements of defendant or witness). See also People v. Rodriguez, 3 N.Y.3d 462, 787 N.Y.S.2d 697 (2004) (alibi notice improperly used by prosecution to discredit testimony of alibi witnesses who made none of the statements contained in notice) and People v. Burgos-Santos, 98 N.Y.2d 226, 746 N.Y.S.2d 422 (2002) (withdrawn notice may not be used).

Finally, the prosecutor cannot respond to alibi notice by attempting to intimidate an alibi witness. See People v. Wei Chen, 256 A.D.2d 75, 682 N.Y.S.2d 145 (1st Dept. 1998), lv denied 93 N.Y.2d 859, 688 N.Y.S.2d 507 (1999).

K. Notice Of Defense Of Mental Disease Or Defect

The respondent may not introduce evidence in support of a defense of mental disease or defect unless written notice of an intention to rely upon such a defense is served upon the presentment agency and filed with the court no more than 30 days after the conclusion of the initial appearance, or before the fact-finding hearing, whichever is sooner. In the interest of justice and for good cause shown, the court may permit late notice before the conclusion of the fact-finding hearing. FCA §335.1; People v. Curran, 139 A.D.3d 1087 (2d Dept. 2016) (court rejects defendant's contention that People had "constructive notice" since statute requires written notice); see also People v. Gonzalez, 22 N.Y.3d 539 (2014) (statute does not apply where defendant offers no evidence at trial but relies solely upon evidence presented by People); People v. Diaz, 15 N.Y.3d 40, 904 N.Y.S.2d 343 (2010) (degree of prejudice to prosecution flowing from late notice may be less significant where defendant plans to rely on lay testimony alone, and trial courts enjoy wide discretion in considering late notice); People v. Hill, 4 N.Y.3d 876, 799 N.Y.S.2d 166 (2005), aff'g 10 A.D.3d 310, 781 N.Y.S.2d 106 (1st Dept. 2004) (defense properly precluded from raising defense where notice was timely but inadequate and for 3 years defendant did not seek psychiatric examination or provide People with particulars of the defense despite repeated requests); People v. Almonor, 93 N.Y.2d 571, 693 N.Y.S.2d 861 (1999) (in People v. Pitts, preclusion upheld where defendant named a disorder but failed to identify which defense would be offered; in

Almonor, preclusion upheld where defense indicated for first time during trial intent to call 3 additional witnesses); People v. Berk, 88 N.Y.2d 257, 644 N.Y.S.2d 658 (1996) (preclusion due to late notice during trial); People v. Curran, 139 A.D.3d 1087 (defendant's claim that jail's failure to administer medication prescribed to treat panic and anxiety disorders caused him to be unable to breathe or engage in rational thought at time of incident was psychiatric defense requiring notice); People v. White, 75 A.D.3d 109, 901 N.Y.S.2d 346 (2d Dept. 2010), lv denied 15 N.Y.3d 758 (preclusion upheld where defendant first provided notice more than a year after indictment and after trial had commenced, and offered no good cause for delay; People were prejudiced because although defense had provided prosecution with copy of psychiatrist's report about eight months prior to commencement of trial; the People's right to demand examination of defendant by psychiatrist or psychologist of their choice was not triggered until after defendant gave notice); People v. Muller, 72 A.D.3d 1329, 899 N.Y.S.2d 425 (3rd Dept. 2010), lv denied 15 N.Y.3d 776 (extreme emotional disturbance defense properly precluded where initial notice failed to specify evidence; defendant failed for five months to provide additional information after prosecution sent letters pointing out that notice was untimely and inadequate; one month prior to trial, defense counsel disclosed that EED defense was based on history of depression, suicidal ideation and prior suicide attempts, and would be established by evidence of suicide attempts; and trial court agreed to allow defendant to assert defense if he satisfied certain conditions, but defendant failed to provide additional information or agree to submit to psychiatric evaluation by prosecution expert); People v. Umali, 37 A.D.3d 164, 830 N.Y.S.2d 51 (1st Dept. 2007), lv denied 9 N.Y.3d 882 (evidence precluded where defendant failed to provide notice of rebuttal evidence and was seeking strategic advantage); People v. Goldstein, 14 A.D.3d 32, 786 N.Y.S.2d 428 (1st Dept. 2004) (testimony properly precluded where defendant initially failed to disclose information, stating that expert would not testify as to extreme emotional disturbance defense, and then served late notice that expert would testify as to EED but failed to produce expert's report), rev'd on other grounds 6 N.Y.3d 119, 810 N.Y.S.2d 100 (2005) (court notes that preclusion ruling was not abuse of discretion); People v. Gracius, 6

A.D.3d 222, 774 N.Y.S.2d 534 (1st Dept. 2004), lv denied 2 N.Y.3d 800 (psychiatric testimony improperly excluded where written notice established relevance of evidence, and People did not claim prejudice); People v. Oakes, 168 A.D.2d 893, 565 N.Y.S.2d 648 (4th Dept. 1990), lv denied 78 N.Y.2d 957, 573 N.Y.S.2d 652 (1991) (good cause found where defendant believed notice was not required); People v. Burton, 156 A.D.2d 945, 549 N.Y.S.2d 242 (4th Dept. 1989), lv denied 75 N.Y.2d 917, 555 N.Y.S.2d 36 (1990) (preclusion was excessive remedy); People v Bernardez, 2008 NY Slip Op 33751(U) (Sup. Ct., West. Co., 2008) (untimely notice permitted where trial was more than a month away and People could have had defendant examined without unduly delaying trial); People v. Carrero, 34 Misc.3d 1222(A) (Sup. Ct., Kings Co., 2012) (notices untimely and insufficient, but court allows defendant to avoid preclusion by providing adequate notice and submitting to examination by professional designated by People; court has responsibility to weigh constitutional right to defense against prejudice to People, and preclusion is reserved for cases in which issue is raised on eve of or during trial); People v. Cunningham, 30 Misc.3d 1211(A), 2010 WL 5584597 (Sup. Ct., West. Co., 2010) (leave to file late notice granted where People were not deprived of opportunity to have sufficiently reliable psychiatric examination of defendant performed in advance of trial; trial date had not been scheduled due to delays caused by examination of defendant concerning competency to stand trial; defendant's proposed psychiatric expert had not yet examined defendant and thus experts for both sides were on equal footing; and potential significance of evidence implicated defendant's constitutional right to present witnesses); People v. Allen, 29 Misc.3d 1231(A), 2010 WL 4942832 (Sup. Ct., Bronx Co., 2010) (preclusion denied where defendant arraigned on April 3, 2008 and served notices on June 2, 2010 and July 30, 2010, but defense counsel was assigned in June 2009 after former counsel resigned, her "direction and focus was toward plea bargaining and the preparation of a thorough and complete pre-pleading report," which "was a time consuming process," and, when plea negotiations were unsuccessful, counsel indicated that defendant would seek defense of extreme emotional disturbance); People v. Caldwell, 29 Misc.3d 1208(A), 2010 WL 3960620 (Sup. Ct., Queens Co., 2010) (good cause for late service on April 7, 2010 where

defense counsel was not assigned until four days prior to notice deadline; examination of defendant commenced on July 31, 2009 and did not conclude until September 1, 2009, and forensic report was not provided to counsel until September 19, 2009; and Huntley/Wade hearing held on January 26, 2010 "further solidified [counsel's] belief that defendant's mental state at the time of the crime prevented him from forming the intent to commit the crime"); People v. Budwick, 20 Misc.3d 1139(A), 2008 WL 4065916 (County Ct., Essex Co., 2008) (defendant directed to serve corrected notice specifying which of various disorders listed in notice form basis or bases for each psychiatric defense, but defendant not required to describe relationship between defense or defenses and each specified disorder); People v. George O., 10 Misc.3d 462, 807 N.Y.S.2d 825 (Crim. Ct., N.Y. Co., 2005) (notice predicated on catch-all in CPL §250.10(1)(c) need not describe particular mental disease or defect); People v. Diaz, 3 Misc.2d 686, 777 N.Y.S.2d 856 (Sup. Ct., Kings Co., 2004) (notice regarding extreme emotional disturbance defense required where defendant intends to present testimony from expert or lay witness); People v. Morgan, 178 Misc.2d 554, 682 N.Y.S.2d 540 (Fulton County Ct., 1998) (defendant obligated to serve notice regarding intoxication defense even though only lay testimony would be offered; since People were not prejudiced and were aware of evidence, court deems defense counsel's affidavit opposing preclusion to be notice of intent; and, since defendant did not intend to offer expert testimony, court denies People's motion to have defendant examined by their expert but will allow testimony by experts who observe defendant in court); People v. Holland, 173 Misc.2d 286, 660 N.Y.S.2d 822 (Westchester County Ct., 1997) (court conditionally denies motion to strike late notice, finding cause for late notice where there was voluminous motion practice previously, and defense counsel was ill and had a fire in his house). See also Pulinario v. Goord, 291 F.Supp.2d 154 (E.D.N.Y., 2003) (court improperly precluded expert testimony because defendant lied to prosecutor's psychiatrist); People v. Chung, 8 Misc.3d 321, 793 N.Y.S.2d 323 (Sup. Ct., West. Co., 2005) (defendant not entitled to have examination of defendant by People's expert audiotaped and videotaped); People v. Hernandez, 5 Misc.3d 1028(A), 799 N.Y.S.2d 162 (Sup. Ct., Kings Co., 2004) (People entitled to have defendant examined where he

planned to testify about extreme emotional disturbance); People v. Torres, 174 Misc.2d 557, 665 N.Y.S.2d 798 (Sup. Ct., Bronx Co., 1997) (defendant ordered to serve amended notice specifying any disease or defect as described in the DSM); People v. Prater, 172 Misc.2d 831, 658 N.Y.S.2d 569 (Sup. Ct., Kings Co., 1997) (statute applicable to psychiatric evidence defendant intended to offer at suppression hearing to show mental state at time of statement).

The statute applies when the respondent is seeking to raise an extreme emotional disturbance defense even if the intent is to rely solely on lay testimony. People v. Diaz, 15 N.Y.3d 40.

L. Crime Scene Investigation - Compare People v. Winters, 132 A.D.3d 407 (1st Dept. 2015), lv denied 26 N.Y.3d 1044 (court lacked authority to grant defendant's request for order permitting access to private premises for investigatory purposes) and People v. Vega, 57 Misc.3d 1012 (Sup. Ct., Bronx Co., 2017) (CPLR 3120 not applicable in criminal action) with In re A.B., 99 A.3d 782 (N.J. 2014) (when accused seeks access to home of alleged victim that is crime scene, he/she must articulate reasonable basis to believe inspection will lead to relevant evidence on material issue, and any discovery is subject to appropriate time, place and manner restrictions intended to protect privacy interests of alleged victim) and CPLR Rule 3120.

M. Discovery Ordered Pursuant To Constitution

Discovery which is not available pursuant to statute cannot be ordered based upon principles of due process since there is no general constitutional right to discovery. See Matter of Doorley v. Castro, 160 A.D.3d 1381 (4th Dept. 2018) (court erred in directing DA to permit defense counsel to inspect video recording of Child Advocacy Center interview of child complainant so counsel could determine whether it constituted exculpatory evidence; court lacked authority to order early disclosure of recording as potential Rosario material, and there was no determination by judge that recording contained exculpatory evidence); Matter of Brown v. Appelman, 241 A.D.2d 279, 672 N.Y.S.2d 373 (2d Dept. 1998) (pre-indictment discovery denied in capital case); Matter of Sacket v. Bartlett, 241 A.D.2d 97, 671 N.Y.S.2d 156 (3rd Dept. 1998), lv denied 92 N.Y.2d 806, 677 N.Y.S.2d 781 (even in capital case, discovery not authorized by statute

may not be ordered); Matter of Pirro v. LaCava, 230 A.D.2d 909, 646 N.Y.S.2d 866 (2d Dept. 1996), lv denied 89 N.Y.3d 813.

N. Freedom Of Information Law

In Matter of Gould v. New York City Police Department, 89 N.Y.2d 267, 653 N.Y.S.2d 54 (1996), the Court of Appeals held that although disclosure in criminal proceedings is governed generally by CPL Article 240, and Brady and Rosario rules, the Freedom of Information Law may be used to obtain discovery except where materials fit within a FOIL exemption. See Matter of Abdur-Rashid v. New York City Police Department, et al., 31 N.Y.3d 217 (2018), reargument den'd 31 N.Y.3d 1125 (agency may decline to acknowledge requested records exist when necessary to safeguard statutorily exempted information); Matter of Friedman v. Rice, 30 N.Y.3d 461 (2017) (exemption for records "compiled for law enforcement purposes and which, if disclosed, would … identify a confidential source or disclose confidential information relating to a criminal investigation" may be used by government agency only if agency establishes: (1) that express promise of confidentiality was made to source, or (2) that circumstances are such that confidentiality of source or information can be reasonably inferred); Matter of Lesher v. Hynes, 19 N.Y.3d 57 (2012) (exemption for records compiled for law enforcement purposes, disclosure of which would interfere with law enforcement investigations or judicial proceedings, applicable to generic types of documents while criminal matter is pending, but agency must identify kinds of documents for which exemption is claimed and generic risks posed by disclosure); Matter of Luongo v. Records Access Officer, Civilian Complaint Review Board, 161 A.D.3d 1079 (2d Dept. 2018) (CCRB records relating to complaints and proceedings against officers exempt from disclosure under Civil Rights Law §50-a); In re Luongo v. Records Access Officer, et al., 150 A.D.3d 13 (1st Dept. 2017), lv denied 30 N.Y.3d 908 (CCRB summary of records fell within "personnel records" protected from disclosure by Civil Rights Law §50-a, and gravity of threats to officer's safety demonstrated that disclosure carried substantial and realistic potential for harm); In re The Exoneration Initiative v. New York City Police Department, 114 A.D.3d 436 (1st Dept. 2014) (public safety exemption does not warrant blanket exception for DD5s that reveal identity of

individuals, but information need not be disclosed simply because it may provide further information that would benefit petitioner's case; here, disclosure of information regarding potential witnesses would create possible threat to their life or safety, and information regarding others who did not provide statements to law enforcement was properly withheld since disclosure would result in unwarranted invasion of personal privacy); Matter of Karimzada v. O'Mara, 111 A.D.3d 1088 (3d Dept. 2013) (raw data, logbook entries, chain of custody forms and other documentation not kept in State's DNA identification index did not fall within definition of protected DNA records); In re Bellamy v. The New York City Police Department, 87 A.D.3d 874 (1st Dept. 2011) (exemption applied where documents reflected identities of persons who spoke with police during course of investigation into gang-related homicide ordered from prison and their lives could be endangered because, after learning names, one could use Internet connection to determine where they live and work; information about persons who did not provide information relied upon during investigation was exempt under privacy exemption); In re Bellamy v. The New York City Police Department, 59 A.D.3d 353, 874 N.Y.S.2d 60 (1st Dept. 2009) (age of information sought to be redacted can be relevant, but age alone is not sufficient basis for finding potential exemptions inapplicable; also, while trial court stated that "despite the limited usefulness of [the redacted] information to the petitioner, he is, after 22 years still fighting for his freedom," access to government records does not depend on purpose for which records are sought); Matter of Edwards v. New York State Police, 44 A.D.3d 1216, 843 N.Y.S.2d 729 (3rd Dept. 2007) (petitioner not entitled to crime-scene photographs showing victim's bloodied, partially clothed body where denial was based on privacy interests of victim's surviving family; in performing balancing test, supreme court mistakenly weighed petitioner's personal need for access rather than public's interest in access); In re Brown v. New York City Police Department, 264 A.D.2d 558, 694 N.Y.S.2d 385 (1st Dept. 1999) (even if related to ongoing investigation or judicial proceeding or if they tended to identify victim of sex crime, police records were no longer exempt after charges were dismissed at trial); Matter of Pittari v. Pirro, 258 A.D.2d 202, 696 N.Y.S.2d 167 (2d Dept. 1999), lv denied 94 N.Y.2d 755, 701 N.Y.S.2d 712 (blanket exemption for documents related to

pending investigation since disclosure could result in destruction of evidence, chilling and intimidation of witnesses, and revelation of scope and nature of investigation); Johnson v. New York City Police Department, 257 A.D.2d 343, 694 N.Y.S.2d 14 (1st Dept. 1999), lv dismissed 94 N.Y.2d 791, 700 N.Y.S.2d 422 (no blanket exemption for police "complaint follow up informational reports," or DD5s, but some information may be protected because of informants' need for privacy); Matter of Loevy v. New York City Police Department, 46 Misc.3d 1214(A) (Sup. Ct., N.Y. Co., 2015) (petitioner not automatically barred from obtaining any part of file under Civil Rights Law § 50-b(1) because file contained records tending to identify victim of sex offense); Matter of Loevy & Loevy v. New York City Police Department, 38 Misc.3d 950 (Sup. Ct., N.Y. Co., 2013), reargument den'd 41 Misc.3d 1216(A) (file not exempt from disclosure where NYPD merely established that homicide was still unsolved and would remain open); Matter of New York Civil Liberties Union v. Kelly, 20 Misc.3d 1108(A), 866 N.Y.S.2d 93 (Sup. Ct., N.Y. Co., 2008) (in Article 78 proceeding involving FOIL request for database containing information about police stops of civilians, court directs respondents to furnish copy of database in electronic form, redacted to exclude names and addresses of persons forcibly stopped and names, addresses and tax ID numbers of officers). See also Legal Aid Society v. New York City Police Department, 274 A.D.2d 207, 713 N.Y.S.2d 3 (1st Dept. 2000) (police assertion that disclosure would interfere with pending prosecution is sufficient without fact-based explanation).

O. Post-Judgment Discovery

There is no statutory authority for discovery specifically in connection with a motion to set aside a judgment. People v. Vasquez, 12 Misc.3d 1163(A), 819 N.Y.S.2d 212 (Sup. Ct., Bronx Co., 2006); People v. Diaz, 195 Misc.2d 337, 756 N.Y.S.2d 838 (Sup. Ct., Bronx Co., 2003) (court refuses to issue subpoena before hearing has been ordered); see also District Attorney's Office for the Third Judicial District et al. v. Osborne, 557 U.S. 52, 129 S.Ct. 2308 (2009) (criminal defendant has no constitutional right to obtain post-conviction access to State's evidence for DNA testing).

However, CPL §440.30(1-a)(a) states as follows: "(a) Where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and

upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant."

In addition, CPL §440.30(1-a)(b) states: "In conjunction with the filing of a motion under this subdivision, the court may direct the people to provide the defendant with information in the possession of the people concerning the current physical location of the specified evidence and if the specified evidence no longer exists or the physical location of the specified evidence is unknown, a representation to that effect and information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence. If there is a finding by the court that the specified evidence no longer exists or the physical location of such specified evidence is unknown, such information in and of itself shall not be a factor from which any inference unfavorable to the people may be drawn by the court in deciding a motion under this section. The court, on motion of the defendant, may issue a subpoena duces tecum directing a public or private hospital, laboratory or other entity to produce such specified evidence in its possession and/or information in its possession concerning the location and status of such specified evidence." See People v. Pitts, 4 N.Y.3d 303, 795 N.Y.S.2d 151 (2005) (statute does not impose due diligence requirement and limit time by which defendant must bring post-conviction motion requesting DNA testing, and "it is the People, as the gatekeeper of the evidence, who must show what evidence exists and whether the evidence is available for testing"); People v. Flax, 117 A.D.3d 1582 (4th Dept. 2014) (DNA testing of semen stain found on crotch of the jumpsuit complainant had been wearing ordered (on condition there was sufficient DNA material) where there was no indication that source of semen could have been anyone but attacker); People v. Concepcion, 104 A.D.3d 442 (1st Dept. 2013), lv denied 21 N.Y.3d 1003 (defendant argued that testing of hair might support third-party culpability defense by leading to

match with someone in DNA database who could provide alternative motive for homicide, but highly speculative theory did not justify testing); People v. Bush, 90 A.D.3d 945 (2d Dept. 2011) (defendant entitled to DNA testing on untested fingernail scrapings of decedent where testing could reveal genetic profile that could matched to some other male suspect); McKithen v. Brown, 626 F.3d 143 (2d Cir. 2010) (prisoner has no due process liberty interest in meaningful access to state clemency mechanisms, but does have state-created liberty interest in demonstrating innocence with newly discovered evidence; however, New York's procedure for post-conviction DNA testing did not facially violate prisoner's due process rights); People v. West, 41 A.D.3d 884, 837 N.Y.S.2d 415 (3rd Dept. 2007) (discovery improperly denied based on conclusory allegation that evidence had been destroyed); People v. Dearstyne, 305 A.D.2d 850, 761 N.Y.S.2d 118 (3rd Dept. 2003), lv denied 100 N.Y.2d 593, 766 N.Y.S.2d 169 (2003) (denial of discovery upheld where there was no allegation that ejaculation or penetration occurred during attempted rape); People v. Chichester, 162 Misc.2d 658, 618 N.Y.S.2d 201 (County Ct. Suffolk Co., 1994) (defendant may arrange for testing at his expense); People v. Callace, 151 Misc.2d 464, 573 N.Y.S.2d 137 (County Ct. Suffolk Co., 1991) (authority for DNA testing provided by Judiciary Law §2-b[3]).

An order denying discovery pursuant to CPL §440.30(1-a) is not appealable. People v. Kellar, 89 N.Y.2d 948, 655 N.Y.S.2d 852 (1997). And, discovery pursuant to §440.30(1-a) is not available where there was a guilty plea. People v. Byrdsong, 33 A.D.3d 175, 820 N.Y.S.2d 296 (2d Dept. 2006).

IV. Bill Of Particulars

A. Generally

A bill of particulars is defined in FCA §330.1(1)(a):

> "Bill of particulars" is a written statement by the presentment agency specifying, as required by this section, items of factual information which are not recited in the petition and which pertain to the offense charged and including the substance of each respondent's conduct encompassed by the charge which the presentment agency intends to prove at a fact-finding hearing on its direct case, and whether the presentment agency intends to prove that

> the respondent acted as principal or accomplice or both. However, the presentment agency shall not be required to include in the bill of particulars matters of evidence relating to how the presentment agency intends to prove the elements of the offense charged or how the presentment agency intends to prove any item of factual information included in the bill of particulars.

A bill of particulars "merely amplifies or enlarges upon the pleadings [citation omitted]," and, therefore, is a much more limited discovery device than a demand to produce or the presentment agency's Voluntary Disclosure Form. Matter of Lynette L., 121 Misc.2d 530, 468 N.Y.S.2d 325, 326 (Fam. Ct. Kings Co., 1983). Nevertheless, in People v. Iannone, 45 N.Y.2d 589, 412 N.Y.S.2d 110 (1978), the Court of Appeals noted that "[i]t is beyond cavil that a defendant has a basic and fundamental right to be informed of the charges against him so that he will be able to prepare a defense." 45 N.Y.2d at 599. See also People v. Villani, 59 N.Y.2d 781, 464 N.Y.S.2d 726 (1983). The need for a bill of particulars is particularly compelling when a criminal defendant is facing an indictment, since the indictment itself usually offers little guidance with respect to the specific acts allegedly committed by the defendant. In delinquency cases, the supporting depositions must contain evidentiary allegations which, if true, establish a prima facie case [see Matter of Jahron S., 79 N.Y.2d 632, 584 N.Y.S.2d 748 (1992)], and, therefore, the respondent is often faced with fairly detailed factual allegations. However, when the depositions are barely adequate, or, for some reason, more specificity is desired, the respondent should seek a bill of particulars. For instance, when the respondent is alleged to have acted in concert with others, the petition may allege conduct establishing the elements of the charged offenses, but fail to specify which respondent performed which acts. Aside from the fact that such allegations are arguably defective [see People v. Torres, 141 Misc.2d 19, 532 N.Y.S.2d 663 (Crim. Ct. Bronx Co., 1988)], the statute makes it clear that a respondent charged under a theory of accessorial liability is entitled to notice of the acts that he or she is alleged to have committed personally. It might be noted that provision of a bill of particulars does not cure a jurisdictional defect in the nonhearsay allegations, and, therefore, the child's attorney need not fear that a request for a detailed bill of particulars will undermine a

planned dismissal motion.

B. Procedure And Timing

A bill of particulars is sought by way of a "Request for a bill of particulars," which "is a written request served by respondent upon the presentment agency, without leave of the court, requesting a bill of particulars, specifying the items of factual information desired, and alleging that respondent cannot adequately prepare or conduct his defense without the information requested." FCA §330.1(1)(b). The request must be made within 30 days after the conclusion of the initial appearance, and, in any event, before the commencement of trial. If there are delays in the appearance of an attorney for the child, the 30 days start running on the date the child's attorney initially appears. If good cause for late service of a request is shown, the court may direct compliance. FCA §330.1(3). It might be noted that, since discovery motions ordinarily must be made within 30 days after the conclusion of the initial appearance [FCA §332.2(1)], and all applications are supposed to be included within the same set of motion papers "wherever practicable" [FCA §332.2(2)], many attorneys choose to serve the request within 15 days after the initial appearance so that the presentment agency's service of a written refusal, or the presentment agency's failure to respond on time, will have occurred prior to the 30-day deadline. However, the fact remains that the statute creates a right to a 30-day period--a right which cannot be abridged by the court without compelling reason [cf. Matter of Veloz v. Rothwax, 65 N.Y.2d 902, 493 N.Y.S.2d 452 (1985) (court improperly ordered that motions be served prior to 45-day CPL deadline)]. Therefore, if a respondent chose to use up the entire 30-day period, and then, as required, gave the presentment agency time to respond, it would appear that one set of motion papers was, in fact, not practicable, and a motion to compel service of a bill of particulars "could not reasonably have [been] raised" within 30 days [see FCA §332.2(3)].

Upon a timely request, the presentment agency must, within 15 days after service, serve upon the respondent or counsel, and file with the court, the bill of particulars. If the respondent is on remand, the child's attorney should ask the court to direct, and the court shall direct, the filing of the bill of particulars on an expedited basis

prior to the commencement of the fact-finding hearing. FCA §330.1(2).

C. Refusal Of Request

"The presentment agency may refuse to comply with the request for a bill of particulars or any portion of the request for a bill of particulars to the extent it reasonably believes that the item of factual information requested is not authorized to be included in a bill of particulars, or that such information is not necessary to enable the respondent adequately to prepare or conduct his defense, or that a protective order would be warranted or that the demand is untimely." FCA §330.1(4). The refusal must be in writing, set forth the grounds for refusing disclosure, and be served upon the respondent and filed with the court within 15 days of the request or "as soon thereafter as practicable." Id. Obviously, when the respondent has been remanded pending trial, the court should require that a refusal be made earlier. See FCA §330.1(2).

D. Drafting The Request For A Bill Of Particulars

While drafting the request, it is important to keep in mind that, in the usual case, the presentment agency does not want to provide any additional information. Almost invariably, the presentment agency's response will be that the item of information requested is "evidentiary," and, therefore, is not subject to disclosure, or that the requested information is already contained in a supporting deposition or another specified document that has already been turned over.

To avoid receiving a response that refers the respondent to other documents, the child's attorney must be careful not to make the request for information too general. For instance, if a supporting deposition merely alleges that the respondent forcibly removed the complainant's handbag from her shoulder without her permission and caused her to fall to the ground and suffer bruises, a request for information concerning "the specific acts committed by the respondent" will no doubt yield the following response: "see supporting deposition of complainant." Therefore, the attorney should use the supporting deposition as a point of departure, and, if more specific facts are desired, ask the presentment agency to elaborate upon language that is already in the deposition. For instance, in the fact pattern described above, the attorney could ask the following questions: describe the force that was allegedly used by the respondent;

describe the location and severity of the bruises allegedly suffered by the complainant; describe how the respondent's conduct caused the complainant to fall to the ground.

Since the statute does not require disclosure of "matters of evidence relating to how the presentment agency intends to prove the elements of the offense charged or ... prove any item of factual information included in the bill of particulars" [FCA §330.1(1)(a)], overcoming the presentment agency's claim that an item of information is "evidentiary" is more difficult. Compare People v. Smith, 103 A.D.2d 859, 477 N.Y.S.2d 917 (3rd Dept. 1984) (defendant's request for details concerning drug transaction was properly denied); Matter of C.W.J., 16 Misc.3d 1117(A), 847 N.Y.S.2d 895 (Fam. Ct., Nassau Co., 2007) (material sought was evidentiary) and Matter of N.D., 12 Misc.3d 1161(A), 819 N.Y.S.2d 211 (Fam. Ct., Nassau Co., 2006) (court finds that petition and supporting depositions provided adequate information) with People v. Palmer, 1 Misc.3d 839, 768 N.Y.S.2d 285 (Sup. Ct., Queens Co., 2003) (court will dismiss firearm possession counts as defective unless People specify, either in a bill of particulars or in a stipulation on the record, which of the 3 firearms is referred to in each of the 4 counts); People v. Wright, 74 Misc.2d 419, 343 N.Y.S.2d 944 (Sup. Ct. N.Y. Co., 1973) (court grants discovery of description of property taken from person of complainant and location from which it was taken, and the specific acts attributable to defendant) and People v. Coletti, 39 Misc.2d 580, 241 N.Y.S.2d 454 (County Ct. West. Co., 1963) (defendant is entitled to know what he allegedly bought or received and the value of the items). Indeed, most judges are not inclined to liberally grant requests for a bill of particulars, since the almost inevitable result is additional delay. And, even worse from the judge's point of view, there may be further motions by the respondent if the presentment agency fails to serve the bill of particulars in a timely fashion. Therefore, in order to obtain a bill of particulars, the child’s attorney will usually have to articulate a reason why disclosure of the requested information is so important to the defense. Otherwise, the judge will assume that the attorney is fishing for details that can be addressed adequately when they are elicited from witnesses at trial.

It is extremely important to remember that the statute clearly requires disclosure of factual allegations concerning acts committed personally by the respondent in the

course of an "in concert" crime. Nevertheless, since many presentment agency attorneys and judges resist disclosure despite this requirement, the child's attorney will often have to press hard for this type of information.

It is also clear that the respondent is entitled to know the time and place of the offense. See People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790 (1986); People v. Cobey, 184 A.D.2d 1002, 584 N.Y.S.2d 244 (4th Dept. 1992); People v. Hiland, 9 Misc.3d 1123(A), 2005 WL 2847268 (New Rochelle City Ct., 2005) (People directed to more fully respond, if able, to defendant's request for dates, places and times regarding alleged sexual abuse of 12-year-old complainant); Matter of Wilhelm, 117 Misc.2d 159, 457 N.Y.S.2d 745 (Fam. Ct. Rensselaer Co., 1983) (case dismissed where date of crime changed at trial). See also FCA §331.2(1)(h). Since the reality is that most judges simply will not help the child's attorney get detailed information about the presentment agency's case, a premium is placed on the attorney's ability to obtain pre-trial interviews of prosecution witnesses. And, so that the witnesses' statements can, like a bill of particulars, be used as impeachment material, the attorney should attempt to have witnesses sign statements, and should not interview witnesses unless there is someone present who could be called to testify if a witness' story changes at trial.

Finally, there is nothing improper, or foolish, about requesting items of information that are already contained in a supporting deposition or another document in the attorney's possession. While a supporting deposition can be used to impeach a witness, a bill of particulars is clearly a formal document that locks the presentment agency into a particular theory.

E. Motion For Court-Ordered Bill Of Particulars

When the presentment agency has timely served a written refusal, the court must, upon the respondent's written motion, order compliance unless a protective order is warranted, the items are not authorized to be included in a bill of particulars, the information is not necessary to enable the respondent to prepare or conduct a defense adequately, or the request was untimely and there was no good cause for the delay. FCA §330.1(5). It has been held that, in the absence of a request for a bill of particulars, court-ordered discovery may not be sought. Matter of C.W.J., 16 Misc.3d 1117(A);

People v. Keller, 133 Misc.2d 1129, 509 N.Y.S.2d 468 (District Ct. Nassau Co., 1st Dist., 1986); People v. Vaccarielli, 120 Misc.2d 1092, 467 N.Y.S.2d 158 (County Ct. Saratoga Co., 1983). But cf. People v. DaGata, 86 N.Y.2d 40, 629 N.Y.S.2d 186 (1995) (defendant's initial request for materials in omnibus motion and several requests subsequent to motion sufficiently preserved issues).

In contrast, when the presentment agency has not made timely service of a written refusal, "the court must, unless it is satisfied that the presentment agency has shown cause why such an order should not be issued, issue an order requiring the presentment agency to comply or providing for any other order authorized by [§331.6(1)]." FCA §330.1(5). Thus, the presentment agency is punished for its default. Arguably, even those items of information that, technically speaking, would not be discoverable by way of a bill of particulars must be provided unless the presentment agency can show good cause. Obviously, since the presentment agency must raise the standard objections (e.g., the item is "evidentiary") in a written refusal, "good cause" should not be found when such objections are raised after a default.

The respondent's motion must be filed within 30 days after the conclusion of the initial appearance. FCA §330.1(6), §332.2(1). As noted earlier, if the request was served more than 15 days after the initial appearance, there would, in view of the presentment agency's 15-day response time, appear to be adequate justification for service after the expiration of 30 days. In the alternative, the respondent could make a motion for a court-ordered bill of particulars within the 30-day deadline, and then withdraw any requests that are satisfied by the presentment agency's response. Notably, information contained in the presentment agency's motion papers can be treated as the equivalent of a bill of particulars. See Matter of Elliton J., 120 Misc.2d 392, 466 N.Y.S.2d 214 (Fam. Ct. Queens Co., 1983).

If the court grants the respondent's motion, "the presentment agency must file with the court a bill of particulars, reciting every item of information designated in the order, and serve a copy thereof upon the respondent." The fact-finding hearing is stayed until the presentment agency complies. FCA §330.1(6).

Finally, it is important to remember that any objection to the sufficiency of a bill of

particulars must be raised in a pre-trial motion, or it is waived. See Matter of Kareem T., 180 A.D.2d 802, 580 N.Y.S.2d 440 (2d Dept. 1992).

F. Protective Orders

Upon a motion brought by the presentment agency or any affected person, upon its own initiative or when it decides the respondent's motion for a court-ordered bill of particulars, the court may "issue a protective order denying, limiting, conditioning, delaying or regulating the bill of particulars for good cause, including constitutional limitations, danger to the integrity of physical evidence or a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person or an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants, or any other factor or set of factors which outweighs the need for the bill of particulars." FCA §330.1(7)(a). The protective order may require that information contained in or derived from the bill of particulars be maintained in the exclusive possession of the respondent's attorney and be used only for preparation of a defense in the delinquency proceeding. FCA §330.1(7)(b).

G. Sanctions

The court may impose any sanction authorized by FCA §331.6 when the presentment agency fails to serve a written refusal in a timely fashion. In such cases, the child’s attorney should consider making a motion in which the primary application is for a sanction, such as an order precluding the introduction of testimony concerning the factual information that was requested, and moving in the alternative for a court-ordered bill of particulars.

Obviously, some sanction should always be sought when the presentment agency has failed to provide a court-ordered bill of particulars, or has served a bill of particulars that is flagrantly inadequate. See, e.g., People v. Thomas, 106 Misc.2d 64, 430 N.Y.S.2d 551 (Crim. Ct. Queens Co., 1980) (preclusion initially granted, but, upon reargument, court stays proceeding pending service of amended bill). And, while the appellate courts have made it clear that dismissal is an extraordinary sanction that should be saved for rare cases, and that preclusion is not warranted absent a showing

of prejudice [see, e.g., People v. Bignall, 195 A.D.2d 997, 600 N.Y.S.2d 560 (4th Dept. 1993), lv denied 82 N.Y.2d 891, 610 N.Y.S.2d 158], the delays caused by the presentment agency's failure to comply could lead to other benefits, such as a speedy trial claim.

H. Amendment

Before the commencement of the fact-finding hearing, the presentment agency may, without leave of court, serve upon the respondent and file with the court an amended bill of particulars. Upon the presentment agency's application, made with notice to the respondent, the court may, after giving the respondent an opportunity to be heard, permit the presentment agency to amend the bill of particulars during the hearing upon a finding that no undue prejudice will result and that the presentment agency has acted in good faith. Regardless of when an amendment is permitted, the court must, upon the respondent's application, adjourn the fact-finding hearing or take any other appropriate action to insure that the respondent has an adequate opportunity to prepare. FCA §330.1(8).

During trial, the court may not permit an amendment to the bill of particulars, or the presentation of evidence that varies from the bill of particulars, where the result is a change in the theory of prosecution. See People v. Howard, 163 A.D.2d 846, 558 N.Y.S.2d 376 (4th Dept. 1990), lv denied 77 N.Y.2d 996, 571 N.Y.S.2d 921 (1991) (at rape trial, People could not employ theory of forcible compulsion that was not advanced in the bill of particulars); Matter of Elliton J., supra, 120 Misc.2d 392 (presentment agency could not proceed at trial under PL §120.05[2] where, in response to dismissal motion, presentment agency attorney specified §120.05[6]); but see People v. Kavvadas, 43 Misc.3d 137(A) (App. Term, 2d Dept., 2014) (where superseding information was filed, People were no longer limited by theory of case as set forth in bill of particulars filed in connection with original information).

V. “Eve Of Trial Discovery; Criminal History Of Witnesses

A. At Trial

Pursuant to FCA §331.4(1)(b) and (c), the presentment agency must, subject to a protective order, make available at the "commencement" of the fact-finding hearing "a

record of judgment of conviction of a witness the presentment agency intends to call at the fact-finding hearing if such record is known by the presentment agency to exist," and must disclose "the existence of any pending criminal action against a witness the presentment agency intends to call at the fact-finding hearing, if the pending criminal action is known by the presentment agency to exist." It does not appear that the statute calls for production of the actual certificate of conviction. See People v. Sheppard, 107 A.D.3d 1237 (3d Dept. 2013) (prosecution not required to disclose disorderly conduct charge where prosecution was unaware of recent charge at time of trial and it was not reasonable to impute knowledge to entire District Attorney's office); People v. Adeyemi, 32 A.D.3d 755, 820 N.Y.S.2d 798 (1st Dept. 2006) (statute satisfied where defendant received Penal Law sections violated and dates of convictions, but not docket numbers); People v. Moore, 244 A.D.2d 776, 666 N.Y.S.2d 231 (3rd Dept. 1997), lv denied 91 N.Y.2d 975, 672 N.Y.S.2d 855 (1998) (no violation where defendant was given tabular list of witness' prior convictions, which set forth in each case the date of conviction, the county and the offense); People v. Clark, 194 A.D.2d 868, 598 N.Y.S.2d 847 (3rd Dept. 1993), lv denied 82 N.Y.2d 752, 603 N.Y.S.2d 994 (technical, but not prejudicial violation of statute found where defendant received criminal history reports). See also People v. Rodriguez, 152 Misc.2d 328, 576 N.Y.S.2d 488 (Sup. Ct. Monroe Co., 1991) (People must disclose existence of sealed record of conviction). The presentment agency is not required to fingerprint a witness or take other steps to secure the issuance of a report by the Division of Criminal Justice Services (DCJS) or another law enforcement agency. People v. Graham, 289 A.D.2d 417, 734 N.Y.S.2d 243 (2d Dept. 2001).

Thus, although the presentment agency must reveal what it knows or has within its own information system [see People v. Suh, 27 Misc.3d 143(A), 2010 WL 2471157 (App. Term, 9th & 10th Jud. Dist., 2010), lv denied 15 N.Y.3d 896 (reversible error where prosecutor failed to disclose that, two years before trial, principal witness had been convicted, in same jurisdiction, of disorderly conduct upon plea entered in satisfaction of petit larceny charge and of unlawful possession of marihuana; criminal record was readily available to prosecutor)], and should be chargeable with knowledge

possessed by the police officers involved in a particular case, it need not initiate an investigation into the criminal history of its witnesses.

It should be remembered that the respondent has an independent right to obtain information concerning the underlying charges in a criminal or delinquency proceeding brought against a prosecution witness, even when the proceeding is not pending and did not result in a finding or a conviction, in order to impeach the witness' credibility. See People v. Mills, 146 A.D.2d 810, 537 N.Y.S.2d 74 (2d Dept. 1989); People v. Scoon, 130 A.D.2d 597, 515 N.Y.S.2d 306 (2d Dept. 1987); People v. Watson, 111 A.D.2d 888, 491 N.Y.S.2d 24 (2d Dept. 1985) (defense counsel was improperly precluded from questioning witness about facts underlying 2 prior adjournments in contemplation of dismissal). But see People v. Booker, 134 A.D.2d 949, 521 N.Y.S.2d 953 (4th Dept. 1987) (improper to ask witness about charges that resulted in acquittal). In addition, if the respondent can obtain a prosecution witness' date of birth, an attempt could be made to subpoena any DCJS records concerning the witness' criminal history.

Unless the respondent has been prejudiced, late disclosure during trial, but before the conclusion of cross-examination, does not require the imposition of a sanction. See People v. Torres, 201 A.D.2d 294, 607 N.Y.S.2d 303 (1st Dept. 1994) (defendant was prejudiced).

Finally, the respondent has a reciprocal obligation to turn over the same information concerning defense witnesses at the conclusion of the presentment agency's direct case and before the respondent's direct case. FCA §331.4(2).

B. At Suppression Hearing

Subject to a protective order, each side must, upon request, turn over the above-described criminal history information at the conclusion of the direct examination of each witness at a suppression hearing. FCA §331.4(3)(b), (c).

C. Respondent’s Prior Bad Acts

In Matter of Daniel C., 29 Misc.3d 548, 906 N.Y.S.2d 885 (Fam. Ct., Queens Co., 2010), the court ordered the Presentment Agency to notify respondent of prior uncharged criminal, vicious or immoral conduct the Presentment Agency intended to use to impeach respondent’s credibility if he testified at trial. The court held that,

although there is no FCA Article Three analogue to CPL §240.43, an accused juvenile delinquent has a right to request a pre-trial Sandoval determination, and, since §240.43 codifies the holding in People v. Sandoval, §240.43 should be applicable to juvenile delinquency proceedings.

VI. "Eve Of Trial Discovery; Rosario Material

In People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961), cert denied 368 U.S. 866, 82 S.Ct. 117, the Court of Appeals held that, when it appears that a prosecution witness has made a statement to the police, the district attorney or the grand jury which "relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential, "the statement must forthwith be delivered to the defense whether or not it varies from the witness' testimony on the stand. The court may not itself decide what statements might be useful, since "omissions, contrasts and even contradictions, vital perhaps, for discrediting a witness, are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused; the latter is in a far better position to appraise the value of a witness' pretrial statements for impeachment purposes." 9 N.Y.2d at 289-290.

A. Timing of Disclosure

1. People v. Rosario

Under Rosario, statements had to be turned over after the witness testified on direct.

2. Statutory Rule

Now, under FCA §331.4(1) (see also CPL §240.45[1] [in bench trial, statements must be made available before submission of evidence]), the statements must be made available "[a]t the commencement of the fact-finding hearing." But see People v. Zacher, 11 Misc.3d 1090(A), 819 N.Y.S.2d 850 (Sup. Ct., Monroe Co., 2006) (early disclosure ordered where defendant was suffering from memory loss). The defense is entitled to sufficient time to review the material when it is, in fact, turned over just before the commencement of trial. See People v. Rodriquez, 247 A.D.2d 841, 668 N.Y.S.2d 429 (4th Dept. 1998), lv denied 91 N.Y.2d 977, 672 N.Y.S.2d 856. Cf. People v. Brown, 175 Misc.2d 376, 668 N.Y.S.2d 877 (Suffolk County Ct., 1998) (while finding no

authority for court-ordered disclosure of the names of the People's witnesses for the next day of trial so defense counsel can focus on their prior statements, the court notes that such disclosure might preclude the need for applications for a break in the proceedings to examine Rosario material).

Although it does not appear that the accused has a burden to formally demand that disclosure be made in order to preserve for appeal a claim concerning undisclosed material, such a claim must be expressly raised when defense counsel is on notice that certain material exists but has not been turned over. See People v. Rogelio, 79 N.Y.2d 843, 580 N.Y.S.2d 185 (1992) (Rosario claim not preserved where, after prosecutor told defense counsel he was "welcome to" Rosario material and both lawyers forgot about the material until defense counsel saw it on the table during jury charge, defense counsel failed to move for a remedy); People v. Rivera, 78 N.Y.2d 901, 573 N.Y.S.2d 453 (1991) (defendant waived claim by not mentioning it after prosecutor was directed by court at suppression hearing to inquire as to existence of material); People v. Feerick, 241 A.D.2d 126, 671 N.Y.S.2d 13 (1st Dept. 1998), aff'd 93 N.Y.2d 433, 692 N.Y.S.2d 638 (1999) (claim unpreserved where defense was in possession of list of available documents but did not raise issue).

There is no requirement in the statute that a prosecutor take notes while interviewing a potential witness. But see United States v. Rodriguez, 496 F.3d 221 (2d Cir. 2007) (while finding no statutory requirement that prosecutor take notes, court poses questions in footnote regarding whether there may be situations where "the preservation of exculpatory or impeaching information in a concrete form - such as by note taking - may be necessary to ensure that the information can be relayed accurately to the defense," and "whether the government, for the purpose of avoiding the disclosure of the initial falsities and inconsistencies of persons who may become government trial witnesses, may permissibly instruct an agent not to follow the customary practice of taking notes of witness interviews"); United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996) ("Still, we do not mean to imply that we endorse the practice. Eschewing tape recordings and ordering law enforcement agents not to take notes during pretrial interviews is risky business-and not guaranteed to redound either to the

sovereign's credit or to its benefit. By adopting a 'what we don't create can't come back to haunt us' approach, prosecutors demean their primary mission: to see that justice is done. In more parochial terms, the government also loses the advantage of records that it may subsequently need to safeguard against witnesses changing their stories or to refresh recollections dimmed by the passage of time. By and large, the legitimate interests of law enforcement will be better served by using recording equipment and/or taking accurate notes than by playing hide-and-seek").

3. Delay In Production

In People v. Perez, 65 N.Y.2d 154, 490 N.Y.S.2d 747 (1985), the court noted that, although a delay in production will generally not be prejudicial, "delay in a particular case may cause substantial prejudice to the defense. An attorney preparing for cross-examination must not only decide what questions to ask, but what questions to avoid asking. The fairness concept embodied in the Rosario rule cannot be said to have been satisfied when pretrial statements revealing a potential trap for the cross-examiner are furnished to defense counsel only after the trap has sprung." 65 N.Y.2d at 159. In addition to the clear mandate of FCA §331.4(1)(a), this statement by the Court of Appeals should be cited whenever defense counsel is directed by the court to begin cross-examination of a witness prior to the receipt of all prior statements. See also People v. Thompson, 71 N.Y.2d 918, 528 N.Y.S.2d 532 (1988) (delay in turning over memo book entry prejudiced defendant); People v. Lebovits, 94 A.D.3d 1146 (2d Dept. 2012) (new trial ordered where prosecutor withheld witness's statements until after witness testified and thereby precluded defense from fully and adequately preparing for cross-examination and set trap which had already sprung at time notes were finally furnished); People v. Williams, 50 A.D.3d 1177, 854 N.Y.S.2d 586 (3rd Dept. 2008) (motion to set aside verdict should have been granted where People failed to disclose certain Rosario and Brady materials until after last witness testified; court notes that materials could have been used to impeach witness who corroborated testimony of only person who testified that defendant was perpetrator of robbery and defense had accused that person of the robbery, that witness who could have been impeached was not made available for further cross-examination, and that although court instructed jury

that it could infer that if witness had been further cross-examined, his credibility would have been "further impeached" and testimony would have contradicted People's other witnesses, jury was not told in what respect witness would have been impeached or how his testimony would have been different than before); People v. Mitchell, 14 A.D.3d 579, 789 N.Y.S.2d 185 (2d Dept. 2005) (defendant prejudiced where he raised identification defense at trial while relying on police reports that contained description of perpetrator that differed markedly from defendant, and People belatedly turned over other reports containing descriptions that were closer to matching defendant); People v. Mackey, 249 A.D.2d 329, 670 N.Y.S.2d 879 (2d Dept. 1998), lv denied 92 N.Y.2d 927, 680 N.Y.S.2d 468 (defendant prejudiced where damaging testimony was unwittingly elicited during cross); People v. Smith, 190 A.D.2d 700, 593 N.Y.S.2d 531 (2d Dept. 1993) (defendant was prejudiced where defense counsel would have altered cross-examination had he known of missing statements); People v. Garrett, 177 A.D.2d 1, 580 N.Y.S.2d 42 (2d Dept. 1992) (dismissal was inappropriate sanction); People v. Forrest, 163 A.D.2d 213, 558 N.Y.S.2d 60 (1st Dept. 1990), aff'd 78 N.Y.2d 886, 573 N.Y.S.2d 458 (1991) (no prejudice where defense counsel re-cross-examined witness and defense strategy did not change); Matter of Omar D., 160 A.D.2d 796, 554 N.Y.S.2d 67 (2d Dept. 1990)(no prejudice where material was received in evidence and counsel did not request further cross-examination); People v. Witherspoon, 156 A.D.2d 306, 549 N.Y.S.2d 6 (1st Dept. 1989) (no prejudice to defendant); People v. Turcios-Umana, 153 A.D.2d 707, 544 N.Y.S.2d 682 (2d Dept. 1989)(delay not prejudicial where defendant did not attempt to recall witness); People v. Vasquez, 143 A.D.2d 161, 532 N.Y.S.2d 8 (2d Dept. 1988) (preclusion of testimony was appropriate sanction for late disclosure); People v. Morales, 37 Misc.3d 1218(A) (Sup. Ct., Kings Co., 2012) (mistrial declared where late disclosure precluded defense counsel from adequately preparing for opening statement and for cross examination of police witnesses regarding evidence recovered at crime scene, and deprived defendant of opportunity to challenge chain of custody; the “trap” had already sprung before notes were furnished and prejudice could not have been obviated by recalling witnesses); People v. Gayle, 193 Misc.2d 556 (Sup. Ct., Kings Co., 2002) (mistrial granted due to late disclosure where defense counsel could

no longer pursue original argument that testimony regarding defendant's incriminating statements should be rejected because of lack of law enforcement documentation).

Whether, when prejudice has been shown, the defense should ask for preclusion, or a mistrial, is a strategic question. If preclusion of a witness' testimony would still leave other evidence, such as the testimony of other eyewitnesses, which is more than sufficient to support a finding, a mistrial may be more desirable, particularly when there is prosecutorial misconduct which might support dismissal of re-filed charges on double jeopardy grounds. See People v. Gayle, 193 Misc.2d 556 (motion to dismiss denied where late disclosure was inadvertent). If preclusion will effectively sabotage the prosecution's case, the defense should push for preclusion while keeping in mind that, since the appellate courts are not particularly fond of extreme sanctions such as preclusion or dismissal, it might be wise to move for a mistrial after preclusion is denied.

It is also important for the defense to be aware of the "real life" implications of a court-ordered sanction for late disclosure. In a bench trial, an adverse inference can be an illusory remedy. In most instances, it is merely a convenient option for a judge who wants to protect the record by imposing some sanction but who, having concluded that the only problem with the case is shabby preparation by the prosecutor, will ignore the inference when deliberating. Thus, because re-opening cross is relatively painless for the judge and, in the vast majority of cases, is no "sanction" at all, and because an adverse inference usually is an illusory remedy in a bench trial, the defense should push hard for a finding of prejudice, and then ask for preclusion or a mistrial as a sanction. Obviously, the timing of the disclosure will be critical; if disclosure occurs prior to any defense cross-examination of the witness, it will be very difficult to establish prejudice.

B. Types of Statements Which Must Be Provided

1. People v. Rosario

In Rosario, the Court of Appeals referred to statements made to the police, the district attorney or the grand jury.

2. Statements To Persons Involved In Law Enforcement

a. Generally

Decisions since Rosario have identified the types of materials covered by the rule. See, e.g., Matter of Rodney B., 69 N.Y.2d 687, 512 N.Y.S.2d 17 (1986) (Transit Authority officer's memo book); Matter of Kelvin D., 40 N.Y.2d 895, 389 N.Y.S.2d 350 (1976) (police interview summaries drawn directly from statements of prosecution witnesses, and police report and arrest forms which were based upon information derived from the witnesses' statements); People v. Consolazio, 40 N.Y.2d 446, 387 N.Y.S.2d 62 (1976) (prosecutor's worksheets containing "abbreviated notes" of witnesses' responses to questions); People v. Gilligan, 39 N.Y.2d 769, 384 N.Y.S.2d 778 (1976) (written notes and reports made by police officers in the course of their investigation); People v. Malone, 88 A.D.3d 586 (1st Dept. 2011), lv denied 18 N.Y.3d 959 (cell phone photographs victim took of injuries and showed to prosecutor were not prior statements of witness); People v. Parker, 157 A.D.2d 519, 549 N.Y.S.2d 710 (1st Dept. 1990) (911 tape); People v. Harris, 130 A.D.2d 939, 516 N.Y.S.2d 554 (4th Dept. 1987) (notes of police chemist); People v. Cavallerio, 71 A.D.2d 338, 422 N.Y.S.2d 691 (1st Dept. 1979) (notes made by prosecutor after interviewing complainant; defendants were entitled to notes, "no matter what the form and no matter when made"); People v. Lumpkins, 141 Misc.2d 581, 533 N.Y.S.2d 792 (Sup. Ct. Kings Co., 1988) (notes concerning police investigation).

Statements made to members of a law enforcement agency which is beyond the prosecution’s control are not covered by the rule. Compare People v. Santorelli, 95 N.Y.2d 412, 718 N.Y.S.2d 696 (2000) (FBI records were outside People’s control) and People v. Kronberg, 243 A.D.2d 132, 672 N.Y.S.2d 63 (1st Dept. 1998), lv denied 92 N.Y.2d 879, 678 N.Y.S.2d 27 (statements in possession of United States Attorney) with People v. Rutter, 202 A.D.2d 123, 616 N.Y.S.2d 598 (1st Dept. 1994) (statements in Philadelphia police files were Rosario material, since DA had access to files); People v. Guido, 186 A.D.2d 757, 588 N.Y.S.2d 908 (2d Dept. 1992) (defendant entitled to statements where Assistant U.S. Attorney was willing to turn them over) and People v. Simmons, 2017 NY Slip Op 27344 (County Ct., Monroe Co., 2017) (although records of disciplinary proceeding were not within custody and control of prosecutor, officer’s testimony and other records were functional equivalent of Rosario material).

b. Summary of Witnesses' Statements

A prosecutor's synopsis of several witnesses' statements is not Rosario material. See People v. Mills, 142 A.D.2d 653, 530 N.Y.S.2d 593 (2d Dept. 1988). But see People v. Adger, 75 N.Y.2d 723, 551 N.Y.S.2d 190 (1989) (Titone, concurring).

It has also been held that direct examination questions drawn generally from witness interviews, but not traceable to particular witnesses, are not Rosario material. See People v. Ezell, 143 A.D.3d 551 (1st Dept. 2016), lv denied 28 N.Y.3d 1144 (prosecutor not required to turn over all direct examination outlines regarding two witnesses, which were prepared, at least in part, during prosecutor's interviews of witnesses; court did not err in reviewing material in camera, identifying questions that might have incorporated parts of witnesses' answers and ordering disclosure of those portions of outline, and giving defense opportunity to recall witnesses); People v. Lorenzo, 272 A.D.2d 184, 708 N.Y.S.2d 859 (1st Dept. 2000), lv denied 95 N.Y.2d 855, 714 N.Y.S.2d 6 (defendant failed to develop record; it could not be determined whether prosecutor's list of questions contained factual statements made by witness); People v. Shaw, 212 A.D.2d 745, 622 N.Y.S.2d 599 (2d Dept. 1995) (list of questions for witnesses not Rosario material, and 3 "extremely brief" factual statements were work product, not statements of witness); People v. Gallardo, 196 A.D.2d 551, 601 N.Y.S.2d 150 (2d Dept. 1993) (list of questions for witness); People v. Roberts, 178 A.D.2d 622, 577 N.Y.S.2d 672 (2d Dept. 1991), lv denied 79 N.Y.2d 952, 583 N.Y.S.2d 206 (1992); People v. Philip, 9 Misc.3d 1117(A), 808 N.Y.S.2d 919 (Dist. Ct., Nassau Co., 2005) (prosecutor's list of questions, and markings underlining certain words based on interview of witness, constituted work product and not Rosario material). Regrettably, this might encourage prosecutors to record statements in a way that precludes disclosure. Cf. People v. Brown, 143 Misc.2d 325, 541 N.Y.S.2d 146 (Sup. Ct. Bronx Co., 1989) (it is "unfair" to circumvent Rosario by not preparing witness statements).

3. Statements To Private Persons

a. Possessed By Prosecution

Any statements actually possessed by the prosecution must be provided. See People v. Yavru-Sakuk, 4 N.Y.3d 814, 797 N.Y.S.2d 19 (2005) (diary kept by

victim's mother); People v. Perez, supra, 65 N.Y.2d 154, 158-159 (transcript of witness' tape-recorded call from prosecutor's office; court notes that the statements were prompted by the prosecutor and that "there is no reason why defense counsel should be deprived of the opportunity to inspect a witness' prior statement...simply because the witness made the statement to a person who is not involved in law enforcement or prosecution," and also observes that CPL §240.45 makes no such distinction); People v. Rothman, 117 A.D.2d 535, 498 N.Y.S.2d 811 (1st Dept. 1986), aff'd 69 N.Y.2d 767, 513 N.Y.S.2d 113 (1987) (tapes of telephone contacts with defendant's mother); People v. Stern, 163 Misc.2d 746, 622 N.Y.S.2d 202 (Sup. Ct., N.Y. Co., 1994) (tapes were Rosario material despite People's belief that listening to them would violate federal law).

Presumably, once the prosecution has been in possession of documents, the obligation to disclose them to the defense attaches and cannot be avoided by returning the documents to their source. Cf. People v. James, 241 A.D.2d 463, 661 N.Y.S.2d 15 (2d Dept. 1997) (Attorney-General's office, which had received Department of Social Services' file, never provided documents to defendant or assisted defense in procuring documents from DSS).

b. Not Possessed By Prosecution

The prosecution need not produce statements to persons not involved in law enforcement which are not in the prosecution's control or possession, or law enforcement agency records to which the prosecution does not have access. See, e.g., People v. Kelly, 88 N.Y.2d 248, 644 N.Y.S.2d 475 (1996) (Division of Parole records are not Rosario material); People v. Howard, 87 N.Y.2d 940, 641 N.Y.S.2d 222 (1996) (Department of Corrections' transcript of statements made by witnesses during defendant's prison disciplinary hearing does not come within Rosario rule); People v. Washington, 86 N.Y.2d 189, 630 N.Y.S.2d 693 (1995) (Medical Examiner's reports and tape recordings); People v. Flynn, 79 N.Y.2d 879, 581 N.Y.S.2d 160 (1992) (records of DMV, or other state administrative agencies); People v. Bailey, 73 N.Y.2d 812, 537 N.Y.S.2d 111 (1988) (private security guard's report); People v. Tissois, 72 N.Y.2d 75, 531 N.Y.S.2d 228 (1988) (victim's statements to social worker); People v. Reedy, 70 N.Y.2d 826, 523 N.Y.S.2d 438 (1987) (victim's "personal version of the attack"); People

v. Robertson, 256 A.D.2d 254, 683 N.Y.S.2d 235 (1st Dept. 1998), lv denied 93 N.Y.2d 978, 695 N.Y.S.2d 64 (1999) (statements to private hospital security personnel); Matter of County of Nassau v. Sullivan, 194 A.D.2d 236, 606 N.Y.S.2d 249 (2d Dept. 1994) (records of County Attorney relating to complainant's civil suit); Matter of Dwayne H., 173 A.D.2d 466, 570 N.Y.S.2d 89 (2d Dept. 1991), lv denied 79 N.Y.2d 752, 580 N.Y.S.2d 199 (Board of Education operations report); People v. Berkley, 157 A.D.2d 463, 549 N.Y.S.2d 392 (1st Dept. 1990), lv denied 75 N.Y.2d 917, 555 N.Y.S.2d 35 (statements to Victim Services Agency rape counselor); People v. Rodriguez, 155 A.D.2d 257, 546 N.Y.S.2d 861 (1st Dept. 1989), lv denied 75 N.Y.2d 923, 555 N.Y.S.2d 42 (1990) (statements to federal DEA); People v. Morris, 153 A.D.2d 984, 545 N.Y.S.2d 427 (3rd Dept. 1989) (confidential presentence report relating to People's witness); People v. Harder, 146 A.D.2d 286, 540 N.Y.S.2d 557 (3rd Dept. 1989) (family court records); Matter of Gina C., 138 A.D.2d 77, 531 N.Y.S.2d 86 (1st Dept. 1988) (reporter's notes of statements made by complainant); People v. Rutledge, 179 Misc.2d 497, 685 N.Y.S.2d 575 (Sup. Ct., Monroe Co., 1998) (911 tape of call to Emergency Communications System); Matter of Jermaine P., 146 Misc.2d 443, 550 N.Y.S.2d 790 (Fam. Ct. Kings Co., 1990) (minutes of Board of Education suspension hearing); Matter of Hawk, 128 Misc.2d 931, 491 N.Y.S.2d 912 (Fam. Ct. Queens Co., 1985) (while holding that statements made at probation intake are not confidential, court refuses to order their production by the prosecution, since probation has made the statements unavailable to both the prosecution and the defense).

4. Prior Testimony

a. Grand Jury

Family Court Act §331.4(1)(a) specifically includes Grand Jury testimony, and any examination videotaped pursuant to CPL §190.32. The presentment agency is required to request that the District Attorney provide a transcript, and the District Attorney must then promptly apply to the appropriate criminal court, upon written notice to the presentment agency and the respondent, for a written order releasing the transcript. See also Matter of George V., 100 A.D.2d 594, 473 N.Y.S.2d 541 (2d Dept. 1984) (testimony concerning person arrested with respondent was Rosario material);

People v. Gaskins, 171 A.D.2d 272, 575 N.Y.S.2d 564 (2d Dept. 1991) (defendant entitled to videotape of Grand Jury testimony of infant witness); but see People v. West, 283 A.D.2d 721, 725 N.Y.S.2d 704 (3rd Dept. 2001), lv denied 96 N.Y.2d 836, 729 N.Y.S.2d 457 (People not obligated to order transcript where grand jury voted no true bill and there was no need to order transcript for trial). This requirement is broader than that applicable in criminal cases, in which it appears that the District Attorney need not disclose Grand Jury minutes which are under the control of another District Attorney's office. See People v. Rodriguez, 262 A.D.2d 428, 693 N.Y.S.2d 54 (2d Dept. 1999).

b. Proceedings At Which Accused Was Not Present

Unless the minutes of other proceedings are already transcribed and in the possession of the prosecution, they do not constitute Rosario material. People v. Fishman, 72 N.Y.2d 884, 532 N.Y.S.2d 739 (1988).

c. Proceedings At Which Accused Was Present

Although People v. Fishman, supra, 72 N.Y.2d 884 would preclude reliance on the Rosario rule, the Court of Appeals has held repeatedly that principles of constitutional equal protection require that an indigent accused be permitted to obtain, prior to trial, a free transcript of previous proceedings in his or her case. See, e.g., People v. Peacock, 31 N.Y.2d 907, 340 N.Y.S.2d 642 (1972) (a readback of stenographic notes is no substitute for having a transcript in hand); People v. Zabrocky, 26 N.Y.2d 530, 311 N.Y.S.2d 892 (1970)(suppression hearing); People v. Ballott, 20 N.Y.2d 600, 286 N.Y.S.2d 1 (1967) (prior trial); People v. Montgomery, 18 N.Y.2d 993, 278 N.Y.S.2d 226 (1966)(preliminary hearing). But see Matter of Eric W., 68 N.Y.2d 633, 505 N.Y.S.2d 60 (1986) (where trial immediately followed brief suppression hearing, and involved same witnesses, counsel and judge, respondents had no right to transcript, and the denial of an adjournment for production of the transcript was not an abuse of discretion); People v. Forney, 9 Misc.3d 1130(A), 862 N.Y.S.2d 810 (Crim. Ct., Kings Co., 2005) (no error in denial of free transcript of suppression hearing where trial began day of suppression hearing and suppression hearing witness finished trial testimony that day; indigent defendants are not automatically entitled to free daily copy, and, in this case, prospect that daily copy could have helped defendant was almost nonexistent since defendant

had received ample pretrial discovery).

5. Relationship of Prior Statements To Testimony

The prior statement must "relate" to the witness' testimony in order to come within the disclosure rule. See, e.g., People v. Farez, 150 A.D.3d 528 (1st Dept. 2017), lv denied 29 N.Y.3d 1126 (court erred in denying defendant's request for documentation of contemporaneous arrest of another Hispanic male separately charged with selling drugs to same undercover at approximately same time and location; defense counsel might have established motive to fabricate evidence due to police confusion between defendant and other male); People v. Mack, 100 A.D.3d 460 (1st Dept. 2012), lv denied 20 N.Y.3d 1012 (minutes of People's expert witness's testimony in unrelated trials regarding same issue not covered by statute; "relates to the subject matter" requirement refers to charges against particular defendant); People v. Mosby, 78 A.D.3d 1371, 911 N.Y.S.2d 493 (3rd Dept. 2010), lv denied 16 N.Y.3d 834 (tape recording of conversation between defendant and undercover officer that took place prior to transactions in question was Rosario material where conversation set stage for undercover's subsequent dealings with defendant); People v. Polk, 247 A.D.2d 342, 669 N.Y.S.2d 217 (1st Dept. 1998), lv denied 91 N.Y.2d 1011, 676 N.Y.S.2d 139 (no violation where People failed to turn over property release form in which officer listed personal property returned to defendant); People v. LaSalle, 243 A.D.2d 490, 663 N.Y.S.2d 79 (2d Dept. 1997) (since complainant referred to perpetrator's identity during "swearability" hearing, statements did relate to subject matter of trial testimony); People v. Ramos, 206 A.D.2d 260, 613 N.Y.S.2d 870 (1st Dept. 1994) (since prosecution elicited testimony concerning other arrests made at time of defendant's arrest, reports concerning those arrests were Rosario material); People v. Gayle, 168 A.D.2d 201, 562 N.Y.S.2d 86 (1st Dept. 1990), lv denied 80 N.Y.2d 831, 587 N.Y.S.2d 915 (1992); People v. Fridman, 162 A.D.2d 136, 556 N.Y.S.2d 565 (1st Dept. 1990), lv denied 76 N.Y.2d 893, 561 N.Y.S.2d 555; People v. Dahan, 158 A.D.2d 708, 552 N.Y.S.2d 158 (2d Dept. 1990), lv denied 76 N.Y.2d 733, 558 N.Y.S.2d 895; People v. Ross, 147 A.D.2d 954, 537 N.Y.S.2d 405 (4th Dept. 1989) (prosecutor need not anticipate defenses); People v. Petros Bedi, 4107/96, NYLJ 1202592836531, at *1 (Sup., QU, Decided March 13, 2013) (information regarding

payment toward witness's living expenses was evidence of motive to fabricate that related to subject matter of testimony); People v. Malik, 25 Misc.3d 1214(A), 2009 WL 3321436 (Sup. Ct., Kings Co., 2009) (report by witness concerning unrelated incident was related to witness's direct testimony where undisclosed statement alleged that same defendants, on another day, repeated efforts to threaten and intimidate witness into revealing same information allegedly sought during crimes charged; latter incident was arguably part of continuing common scheme or plan); People v. L.G., 18 Misc.3d 243, 844 N.Y.S.2d 846 (Crim. Ct., Kings Co., 2007) (recording of People's voir dire of six-year-old witness, conducted in connection with filing of accusatory instrument, not Rosario material; however, "the People, in their discretion and in the interests of 'a right sense of justice' (citation omitted), might well choose to provide Defendant with a copy of the swearability recording").

6. Cumulative Statements; Duplicative Equivalency

No Rosario violation has occurred when statements which are the "duplicative equivalent" of disclosed statements are not turned over. See, e.g., People v. Consolazio, supra, 40 N.Y.2d 446 (statements in prosecutor's worksheets were same as Grand Jury testimony); People v. Dockery, 293 A.D.2d 487, 740 N.Y.S.2d 106 (2d Dept. 2002), lv denied 98 N.Y.2d 696, 747 N.Y.S.2d 414 (2002) (videotape depicting side view of transaction was duplicative equivalent of videotape depicting transaction from different angle); People v. Hagen, 247 A.D.2d 405, 669 N.Y.S.2d 49 (2d Dept. 1998), lv denied 91 N.Y.2d 1008, 676 N.Y.S.2d 136 ("Sprint" reports were not duplicative equivalents of 911 tapes). It has been held that a computer diskette is not discoverable as Rosario material since the hard copy version is identical. People v. Giraldo, 270 A.D.2d 97, 705 N.Y.S.2d 334 (1st Dept. 2000) (defendant presented no evidence that analysis of the diskette might have revealed prior versions or deleted material).

Duplicative equivalency will not be found merely because the undisclosed statements are harmonious or consistent with statements that were turned over. People v. Ranghelle, 69 N.Y.2d 56, 511 N.Y.S.2d 580 (1986). Therefore, rather than "engaging in a collateral analysis as to whether the defendant would or would not be technically entitled to disclosure," immediate disclosure should be ordered if the missing writings

appear to come within the Rosario rule. People v. Consolazio, supra, 40 N.Y.2d at 455.

Since the court must examine the material before determining whether to apply the duplicative equivalency doctrine, missing documents cannot be considered duplicative. People v. Joseph, 86 N.Y.2d 565, 635 N.Y.S.2d 123 (1995). See also People v. Nesbitt, 230 A.D.2d 755, 646 N.Y.S.2d 522 (2d Dept. 1996), lv denied 89 N.Y.2d 944, 655 N.Y.S.2d 895 (1997)(missing tapes could not be duplicative of reports which were dictated onto tapes); People v. Bortolis, 26 Misc.3d 851, 887 N.Y.S.2d 469 (Crim. Ct., Queens Co., 2009) (officer's missing draft of complaint was Rosario material; court rejects People's claim that they are entitled to work-in-progress exemption, People's work product claim, and claim that draft was duplicative equivalent of actual complaint since court cannot rely on officer's assurances that no changes occurred).

The prosecution must raise at trial a claim that missing material would be duplicative, or the claim is waived if the prosecution later produces the material on appeal. People v. Quinones, 73 N.Y.2d 988, 540 N.Y.S.2d 993 (1989).

In a related context, the court held in Matter of David H., 170 Misc.2d 58, 649 N.Y.S.2d 757 (Fam. Ct., Bronx Co., 1996) that, after a petition is re-filed, the presentment agency ordinarily has no obligation to re-disclose Rosario material to a newly assigned attorney for the child.

7. Ascertaining Existence of Statements

Generally, the accused has no right to peruse the prosecutor's file for statements. People v. Poole, 48 N.Y.2d 144, 422 N.Y.S.2d 5 (1979). And, "the representation of a prosecutor, as an officer of the court, ought...to suffice to determine the threshold issue of whether or not any prior statements of a witness exist." 48 N.Y.2d at 149; see also People v. Pinto, 55 Misc.3d 151(A) (App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 2017), lv denied 29 N.Y.3d 1132 (court not required to review memo where trial ADA stated that memo did not contain "any conversation the DA may have had with the complainant," and, instead, contained prior prosecutor's "assessment of the case;" generally, representation of prosecutor suffices to determine whether or not prior statements exist). However, when the accused can articulate a factual basis establishing the existence of prior statements, or the prosecutor admits that statements exist but

claims they are irrelevant, the court should determine whether relevant statements exist. People v. Poole, supra, 48 N.Y.2d 144. See also People v. Contreras, 12 N.Y.3d 268, 879 N.Y.S.2d 369 (2009) (no error where court conducted in ex parte proceedings with prosecutor and witness to determine whether notes were Rosario or Brady material' although ex parte proceedings are undesirable and should be rare, initial inquiry had to be ex parte since court could not disclose document before deciding whether disclosure was appropriate, and CPL §240.90(3) permits papers and testimony to be submitted ex parte in connection with motion for protective order); People v. Yavru-Sakuk, 4 N.Y.3d 814, 797 N.Y.S.2d 19 (2005) (trial court should have examined entries in diary kept by victim's mother where People had not had them translated and reviewed them); People v. Adger, supra, 75 N.Y.2d 723; People v. Shaw, 196 A.D.2d 558, 601 N.Y.S.2d 151 (2d Dept. 1993) (court erroneously relied on prosecutor's claim that notes contained questions, not statements); People v. Lumpkin, 173 A.D.2d 738, 570 N.Y.S.2d 620 (2d Dept. 1991) (report based on missing "scratch copy of the same thing" should have been disclosed); People v. Gallardo, 173 A.D.2d 636, 570 N.Y.S.2d 222 (2d Dept. 1991) (court should have inquired further when prosecutor stated that he "wrote no notes in front of" witness); People v. Dudley, 147 A.D.2d 655, 538 N.Y.S.2d 57 (2d Dept. 1989) (court should have ordered disclosure after complainant testified that she called police); People v. Phillips, 92 A.D.2d 738, 461 N.Y.S.2d 93 (4th Dept. 1983) (court should have conducted inquiry where officer remembered taking statement from witness, and prosecutor did not know whether statement existed). But see People v. Farrell, 207 A.D.2d 560, 616 N.Y.S.2d 77 (2d Dept. 1994) (no error where defendant declined offer of opportunity to question detective to determine whether Rosario material existed).

8. Second-Hand Recorded Statements

It has been held that, when an intermediary passes on a witness' statement, the intermediary's statement is not Rosario material. People v. Guillaume, 152 A.D.3d 540 (2d Dept. 2017) (document containing statement of social worker indicating that victim's mother had told her that she herself was sexually abused as child was not Rosario material); People v. Miller, 183 A.D.2d 790, 583 N.Y.S.2d 517 (2d Dept. 1992), lv denied 80 N.Y.2d 907, 588 N.Y.S.2d 832 (information could have come from other officers and

memorandum appeared to be synopsis written after all interviews were conducted); Matter of Andrew T., 182 A.D.2d 630, 581 N.Y.S.2d 864 (2d Dept. 1992), lv denied 80 N.Y.2d 757, 589 N.Y.S.2d 308 (statements made by complainant's mother in 911 call not Rosario material); People v. Williams, 165 A.D.2d 839, 560 N.Y.S.2d 220 (2d Dept. 1990) (Sprint report was coded version of message received from Transit Authority employee and was at best a second-hand recording of statement allegedly attributable to prosecution witness, "fraught with all the risks of inaccuracy and unreliability attendant to the relaying of what is essentially hearsay information), aff'd 78 N.Y.2d 1087, 578 N.Y.S.2d 870 (1991).

However, statements made through an interpreter are Rosario material, unless there is no evidence that the interpreter was actually translating the witness' words. See People v. Pabon, 213 A.D.2d 289, 624 N.Y.S.2d 149 (1st Dept. 1995).

C. The Burden of Production

1. Generally

Under FCA §331.4(1), "the presentment agency shall, subject to a protective order, make available...(a) any written or recorded statement, including any testimony before a grand jury...."

Re: protective orders, see People v. McCallum, 159 A.D.3d 1013 (2d Dept. 2018) (no error in issuance of protective order that prohibited defense counsel from providing defendant with copies of Rosario material where defendant, with court oversight, was permitted to review material with counsel over two-day period).

2. Statements Accessible To Defense

Even when the defense has knowledge of and access to prior statements, the prosecution has the burden to produce statements that otherwise fall within the Rosario rule. People v. Ranghelle, supra, 69 N.Y.2d 56.

3. Grand Jury Testimony

Family Court Act §331.4(1)(a) provides that "the presentment agency shall request that the district attorney provide a transcript...prior to the commencement of the fact finding hearing," and that the district attorney shall promptly apply for a court order releasing the transcript to the presentment agency. But see People v. West, 283 A.D.2d

721, 725 N.Y.S.2d 704 (3rd Dept. 2001), lv denied 96 N.Y.2d 836, 729 N.Y.S.2d 457 (People not obligated to order transcript where grand jury voted no true bill and there was no need to order transcript for trial); Matter of Lungen v. Kane, 217 A.D.2d 849 (3rd Dept. 1995) (where grand jury proceeding was in another county, defendant was obligated to seek disclosure in that county under CPL §190.25; although defendant failed to make necessary showing of need, court properly directed delivery of certain portions of grand jury testimony for in camera review).

D. Remedies For Loss or Destruction of Prior Statements

I. Lost or Destroyed By Prosecution

It may be an abuse of discretion for the court to refuse to order some sanction when a law enforcement agency loses or destroys Rosario material. The factors to be considered include the presence or absence of prosecutorial bad faith, and any prejudice resulting from the importance of the missing statements. See, e.g., People v. Martinez, 22 N.Y.3d 551 (2014) (in 4-3 ruling, Court of Appeals finds no showing of prejudice, and thus no error in trial court's refusal to give adverse inference charge regarding loss of handwritten complaint report (or "scratch 61") prepared by officer, where defendants were provided with typewritten report and relied on series of improbable events to create prospect of prejudice; if such conjecture is sufficient to show prejudice, loss or destruction of Rosario material would become per se prejudicial); People v. Asaro, 21 N.Y.3d 677 (2013) (no error where trial court gave adverse inference charge rather than strike testimony of accident reconstruction expert as sanction for loss of notes containing mathematical calculations used in making speed computations); People v. Joseph, supra, 86 N.Y.2d 565 (after holding that destroyed envelopes in which drugs had been placed could not be considered duplicative equivalent of other material, Court of Appeals finds error in trial court's refusal to give adverse inference instruction; court rejects People's claim that defendant's prejudice argument is too speculative, since it was conduct of police which made it impossible to know whether missing information was consistent with People's position at trial); People v. Wallace, 76 N.Y.2d 953, 563 N.Y.S.2d 722 (1990) (where undercover and arresting officer destroyed notes of description of drug seller, sanction should have been ordered); People v. Rice, 75

N.Y.2d 929, 555 N.Y.S.2d 677 (1990) (mistrial motion properly denied where radio transmission of rapist's description was inadvertently destroyed); People v. Martinez, 71 N.Y.2d 937, 528 N.Y.S.2d 813 (1988) (adverse inference charge against People was adequate remedy for lost material); People v. Christopher Lee, 116 A.D.3d 493 (1st Dept. 2014), lv denied 23 N.Y.3d 1064 (no error in court's failure to give adverse inference charge where prosecution failed to produce handwritten notes made by officer who interviewed victim but defense counsel had ample opportunity to show that victim's testimony as to identity of shooter was fabricated); People v. Asaro, 94 A.D.3d 773 (2d Dept. 2012) (adverse inference charge adequate remedy where accident reconstruction expert lost original notes but defense had expert's report, which was based on lost notes); People v. Yung Kim, 17 Misc.3d 135(A), 851 N.Y.S.2d 73 (App. Term, 1st Dept., 2007) (no adverse inference charge as to erased 911 tape where there was no bad faith on part of People, exculpatory value of tape was speculative, and defendant, who received copy of Sprint report, showed no prejudice); People v. Munroe, 307 A.D.2d 588, 763 N.Y.S.2d 691 (3rd Dept. 2003) (preclusion of defendant's statement properly denied where officer failed to save corrected drafts of statement but there was no evidence of bad faith or of meaningful changes in the statement or that defendant was prejudiced); People v. Smith, 266 A.D.2d 639, 698 N.Y.S.2d 343 (3rd Dept. 1999), lv denied 94 N.Y.2d 907, 707 N.Y.S.2d 392 (assuming that eyewitness' sketch of area where witness saw defendant with purse was Rosario material, adverse inference was appropriate sanction where People destroyed or lost sketch); People v. Burch, 247 A.D.2d 546, 669 N.Y.S.2d 299 (2d Dept. 1998), lv denied 92 N.Y.2d 848, 677 N.Y.S.2d 79 (sanction should have been ordered where People made timely request for 911 tape, but had reason to believe tape had been destroyed by the time they made follow-up requests); People v. Bramble, 207 A.D.2d 407, 615 N.Y.S.2d 896 (2d Dept. 1994) (order striking police testimony upheld); People v. Morton, 189 A.D.2d 488, 596 N.Y.S.2d 783 (1st Dept. 1993) (request for adverse inference charge improperly denied; defendant had no way to counter officer's claim that inconsistencies in report were result of clerical errors in transcription of missing notes); People v. Rivas, 184 A.D.2d 794, 585 N.Y.S.2d 506 (2d Dept. 1992) (sanction should have been ordered where undercover destroyed notes

describing seller; court notes possibility that description in buy report was conformed to match defendant's actual appearance); People v. Winthrop, 171 A.D.2d 829, 567 N.Y.S.2d 531 (2d Dept. 1991) (denial of motion to strike testimony upheld where notes destroyed; unlike the notes in People v. Wallace, the notes here contained no evidence of guilt); People v. Earl, 168 A.D.2d 510, 562 N.Y.S.2d 751 (2d Dept. 1990), lv denied 77 N.Y.2d 877, 568 N.Y.S.2d 920 (adverse inference charge adequate where Grand Jury minutes were unintentionally lost and defendant had minutes of witnesses' testimony at second Grand Jury proceeding); People v. Parker, supra, 157 A.D.2d 519 (where defense requested 911 tape prior to destruction by police, appropriate sanction must be fashioned); Matter of Christian M., 155 A.D.2d 305, 547 N.Y.S.2d 277 (1st Dept. 1989), lv denied 75 N.Y.2d 706, 552 N.Y.S.2d 928 (1990) (negative inference was adequate remedy for officer's inadvertent loss of memo book); People v. Best, 145 A.D.2d 499, 535 N.Y.S.2d 108 (2d Dept. 1988) (no bad faith shown where officer discarded notes after information was transferred to written report); People v. Valle, 143 A.D.2d 160, 531 N.Y.S.2d 929 (2d Dept. 1988) (no sanction required where People met burden of showing diligent efforts to prevent loss); People v. Lamb, 59 Misc.3d 699 (City Ct. of Cohoes, 2018) (because case turned upon credibility of expert, and missing file contained information that formed foundational predicate of expert’s opinion, preclusion of expert opinion of vehicle’s speed was most fitting sanction); People v. Carroll, 28 Misc.3d 1211(A), 2010 WL 2837004 (Sup. Ct., Bronx Co., 2010) (Rosario violation found at suppression hearing where officer testified that he read Miranda warnings using Miranda sheet he turned over to People, but sheet was lost; court draws negative inference as to whether and in what manner warnings were given); Matter of Ricardo M., 12 Misc.3d 1187(A), 824 N.Y.S.2d 766 (Fam. Ct., Richmond Co., 2006) (negative inference drawn upon failure to produce handwritten version of complaint and notes of detective’s interview with respondent); People v. Deery, 165 Misc.2d 319, 630 N.Y.S.2d 193 (Crim. Ct., Bronx Co. 1995) (preclusion of sex crime complainant's testimony ordered where People failed to take steps to preserve a tape of her 911 call); People v. Day, 102 Misc.2d 11, 422 N.Y.S.2d 816 (Dist. Ct. Nassau Co., 1st Dist., 1979) (People failed to prove attempts to preserve previous statements; witness' testimony stricken);

People v. Lunney, 84 Misc.2d 1090, 378 N.Y.S.2d 559 (Sup. Ct. N.Y. Co., 1975) (Grand Jury minutes lost when employee of DA left them on train; court excludes testimony of witnesses who testified before first Grand Jury, and notes that "where prior witnesses' statements are unavailable for impeachment purposes, we hold that a fair trial is not possible").

Arguably, the respondent's possession of Rosario material at one point in time does not excuse the prosecution's failure to preserve it. People v. Castro, 29 Misc.3d 1217(A), 2010 WL 4273808 (Sup. Ct., Bronx Co., 2010) (Rosario violation found, and adverse inference drawn, occurred where defendant was given copy of lost summons; People have burden of retaining Rosario material, not defendant).

2. Lost By Court Reporter

With respect to a court reporter's loss of stenographic notes in a case in which statements are obtainable pursuant to People v. Peacock, supra, 31 N.Y.2d 907, and the related line of cases, see, e.g., People v. Sanders, 127 A.D.2d 937, 512 N.Y.S.2d 528 (3rd Dept. 1987), rev'd on other grounds 70 N.Y.2d 837, 523 N.Y.S.2d 444 (reconstruction hearing was appropriate); People v. Pinion, 56 A.D.2d 664, 392 N.Y.S.2d 53 (2d Dept. 1977) (reporter lost notes of preliminary hearing; instead of dismissal, court suggests reconstruction, or, if that is not possible, People should turn over all Grand Jury testimony and nonprivileged police and prosecution records relating to witnesses' statements); People v. Aviles, 89 Misc.2d 1, 391 N.Y.S.2d 303 (Sup. Ct. N.Y. Co., 1977) (reporter lost notes of preliminary hearing; People ordered to turn over all Grand Jury testimony, and police and prosecution records relating to witnesses' statements); People v. Hicks, 85 Misc.2d 649, 381 N.Y.S.2d 794 (Crim. Ct. N.Y. Co., 1976) (reporter lost preliminary hearing minutes; reconstruction ordered); People ex rel. Hairston v. Adult Detention Center, 76 Misc.2d 1010, 352 N.Y.S.2d 326 (Sup. Ct. Bronx Co., 1973) (reporter lost notes of preliminary hearing; case dismissed).

E. Hearings Other Than Trial

1. Suppression Hearings

Under FCA §331.4(3), the presentment agency must, upon request, turn over prior statements at the conclusion of direct examination. People v. Armstrong, 11 A.D.3d

721, 783 N.Y.S.2d 134 (3rd Dept. 2004) (People had no obligation to disclose where defendant made no request); see also People v. Malinsky, 15 N.Y.2d 86, 255 N.Y.S.2d 850 (1965) (police officer's notes in connection with arrest); People v. Manzione, 109 A.D.2d 755, 486 N.Y.S.2d 70 (2d Dept. 1985) (officers' notes of complainant's description of perpetrators, and ADA's notes of interview with complainant). In contrast, §331.4(1) does not require that the respondent request disclosure.

2. Probable Cause Hearings And Other Pre-Trial Hearings

There is no statutory requirement in the FCA regarding the production of prior statements at a probable cause hearing. There is such a requirement in CPL §240.44(1), which requires generally that Rosario material be disclosed at pre-trial hearings. See People v. Feerick, 93 N.Y.2d 433, 692 N.Y.S.2d 638 (1999) ("Kastigar" hearing); People v. Diggs, 140 Misc.2d 794, 531 N.Y.S.2d 723 (Dist. Ct. Nassau Co., 1988) (felony hearing); People v. McPhee, 161 Misc.2d 660, 614 N.Y.S.2d 884 (Sup. Ct. Queens Co., 1994) (competency hearing).

3. Conditional Examination Of Witness

In People v. Coyne, 192 Misc.2d 507, 748 N.Y.S.2d 206 (County Ct., Onondaga Co., 2002), the court held that full CPL §240.45 discovery must be provided to the defendant when the court orders a conditional examination pursuant to CPL Article 660, which is applicable in family court by way of FCA §370.1(2).

4. Violation Hearings

One court has held that a witness' prior statements must be turned over at a probation violation hearing under FCA §360.3. Matter of Alpheaus M., 134 Misc.2d 763, 512 N.Y.S.2d 760 (Fam. Ct. N.Y. Co., 1987); see also People v. Donohue, 283 A.D.2d 586, 727 N.Y.S.2d 442 (2d Dept. 2001) (prior statements of witnesses should be disclosed); People v. Mitchell, 201 A.D.2d 507, 607 N.Y.S.2d 417 (2d Dept. 1994); People v. Adams, 47 A.D.2d 928, 367 N.Y.S.2d 67 (2d Dept. 1975) (denial of access to probation records deprived defendant of meaningful opportunity to cross-examine).

F. Appellate Remedies For Rosario Violations

1. Delay in Production

The reviewing court must determine whether the accused was prejudiced.

People v. Ranghelle, supra, 69 N.Y.2d 56.

2. Complete Failure to Produce

According to a long line of appellate decisions, the prosecution's complete failure to produce existing Rosario material at trial constituted per se reversible error. People v. Young, 79 N.Y.2d 365, 582 N.Y.S.2d 977 (1992) (no "common sense" exception for missing material which is not germane to issue of guilt or innocence); People v. Jones, 70 N.Y.2d 547, 523 N.Y.S.2d 53 (1987); People v. Ranghelle, supra, 69 N.Y.2d 56. Even a good faith effort to locate, identify and discover all statements did not excuse a failure to produce existing material. People v. Ranghelle, supra, 69 N.Y.2d 56; People v. Jennings, 248 A.D.2d 265, 670 N.Y.S.2d 438 (1st Dept. 1998) (prosecution claim that material has been lost or destroyed must be supported by sufficient evidence or absence of material will be treated as complete failure to produce). Although the Court of Appeals held in People v. Banch, 80 N.Y.2d 610, 593 N.Y.S.2d 491 (1992) that a new hearing was required where there was a complete failure to disclose Rosario material at a suppression hearing, in People v. Feerick, supra, 93 N.Y.2d 433 the court suggested that the “new” hearing requirement may be satisfied in some cases by re-opening the hearing to the extent necessary to explore the contents of the Rosario documents.

In 2000, a new CPL §240.75 was added which provides that “[t]he failure of the prosecutor or any agent of the prosecutor to disclose statements that are required to be disclosed under [CPL §240.44(1) or §240.45(1)(a)] shall not constitute grounds for any court to order a new pre-trial hearing or set aside a conviction, or reverse, modify or vacate a judgment of conviction in the absence of a showing by the defendant that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding; provided, however, that nothing in this section shall affect or limit any right the defendant may have to a re-opened pre-trial hearing when such statements were disclosed before the close of evidence at trial.” See People v. Yavru-Sakuk, 4 N.Y.3d 814, 797 N.Y.S.2d 19 (2005) (trial court should have examined entries in diary kept by victim’s mother; case remanded for in camera inspection to determine whether there is relevant material and, if there is, whether there is reasonable possibility that non-disclosure materially contributed to result of trial); People v. Rosas, 297 A.D.2d

390, 746 N.Y.S.2d 610 (2d Dept. 2002), lv denied 99 N.Y.2d 564, 754 N.Y.S.2d 216 (2002) (conviction set aside where undisclosed statements attributable to victim's son may directly relate to identification of defendant); People v. Herrera, 38 Misc.3d 1218(A) (Pleasant Valley Justice Ct., 2013) (where defendant charged with using abusive or obscene language, court declares mistrial where People failed to disclose Rosario material before resting, noting that case involves specifically what defendant said). This amendment has been given retroactive application to all cases being prosecuted or on appeal as of its effective date. People v. Sorbello, 285 A.D.2d 88, 729 N.Y.S.2d 747 (2d Dept. 2001), lv denied 97 N.Y.2d 658, 737 N.Y.S.2d 59; People v. Felix-Torres, 281 A.D.2d 649, N.Y.S.2d (3rd Dept. 2001).

However, the Family Court Act requirements in FCA §§ 331.4(1)(a) and 331.2(3)(a) were not amended in a like manner, and no appellate court has ruled on whether the per se reversal rule has been abrogated in family court as well. However, the court so held in Matter of Barry G., 4 Misc.3d 1015(A), 798 N.Y.S.2d 344 (Fam. Ct., Queens Co.).

The production of Rosario material after the evidence is closed, summations have been given, and deliberations have begun, constitutes a complete failure to provide the material, not a mere delay. See People v. Ranghelle, supra, 69 N.Y.2d 56; People v. Ortiz, 185 A.D.2d 998, 587 N.Y.S.2d 401 (2d Dept. 1992) (prior statements produced during jury deliberations). Consequently, assuming the per se reversal rule still applies, the only available trial remedy is a mistrial. See People v. Ortiz, supra. See also People v. Ariosa, 172 Misc.2d 312, 660 N.Y.S.2d 255 (County Ct., Monroe Co., 1997) (dismissal ordered). However, if the material is produced after both sides have rested, but before summations, a re-opening of cross-examination may be an adequate remedy. Compare People v. Rivera, 183 A.D.2d 674, 584 N.Y.S.2d 551 (1st Dept. 1992), lv denied 80 N.Y.2d 933, 589 N.Y.S.2d 860 (claim waived where material was turned over after both sides had rested, and court offered to re-open the case for further cross-examination) with People v. Goins, 73 N.Y.2d 989, 540 N.Y.S.2d 994 (1989) (where introduction of record produced after both sides had rested would have harmed defendant's case, defense counsel did not waive Rosario issue by refusing offer to re-open case for further

cross-examination).

Assuming the per se reversal rule still applies in juvenile delinquency proceedings, it appears that a prosecutor's open failure or refusal to provide existing Rosario material should, if the defense seeks a remedy at trial, result in the preclusion of the testimony of any witness whose prior statements have not been produced. See People v. Lansdowne, 6 Misc.3d 1002(A), 800 N.Y.S.2d 353 (Justice Ct., Monroe Co. 2004).

Finally, reversal as to all counts is not required when the Rosario violation relates to testimony which is relevant to only certain counts. See People v. Daly, 14 N.Y.3d 848, 902 N.Y.S.2d 499 (2010) (Rosario and/or Brady violations that result in reversal of convictions on certain counts also require reversal on other, jointly tried counts if there is reasonable possibility that evidence supporting tainted counts influenced guilty verdicts on other counts); People v. Baghai-Kermani, 84 N.Y.2d 525, 620 N.Y.S.2d 313 (1994).

3. Preservation of Rosario Rights

When a Rosario violation comes to light during a trial or hearing, defense counsel must clearly raise the issue, and should, if the material is not produced, move for a remedy in order to preserve the issue for appeal. See, e.g., People v. Rogelio, supra, 79 N.Y.2d 843; People v. Rivera, 78 N.Y.2d 901, 573 N.Y.S.2d 453 (1991) (defendant waived claim by not mentioning it after prosecutor was directed by court at suppression hearing to inquire as to existence of material); People v. Martin, 147 A.D.3d 587 (1st Dept. 2017), **lv granted** 30 N.Y.3d 951 (request for “paperwork” concerning unrelated search warrant executed by same team of officers on day they executed warrant in this case did not preserve Rosario claim); Matter of Javier R., 72 A.D.3d 1553, 898 N.Y.S.2d 907 (4th Dept. 2010) (respondent waived claim that presentment agency’s failure to provide transcript of complainant's testimony at co-respondent's hearing constituted Rosario violation where transcript was not prepared because co-respondent's hearing had occurred day before and respondent declined court’s offer of adjournment to allow transcript to be produced); People v. Bailey, 275 A.D.2d 663, 713 N.Y.S.2d 535 (1st Dept. 2000), lv denied 95 N.Y.2d 960, 722 N.Y.S.2d 477 (defense counsel failed to complain of absence of grand jury testimony at trial and must have been aware that one

or both complainants necessarily had to have testified before grand jury); People v. Lorenzo, supra, 272 A.D.2d 184 (claim unpreserved where defendant insisted on drastic and premature remedy of mistrial when absence of material came to light even though prosecutor stated that material could be produced expeditiously, and made no further mention of the issue); People v. Pugh, 258 A.D.2d 674, 686 N.Y.S.2d 764 (2d Dept. 1999), lv denied 93 N.Y.2d 976, 695 N.Y.S.2d 63 (claim preserved where defendant failed to move to re-open suppression hearing after receiving material, but court had already unequivocally ruled that it was not Rosario material); People v. Bell, 256 A.D.2d 154, 683 N.Y.S.2d 422 (1st Dept. 1998), lv denied 93 N.Y.2d 966, 695 N.Y.S.2d 52 (1999) (claim unpreserved where disclosure was denied at first because the material was not considered discoverable, and defendant failed to renew his request when it later appeared that the material was covered by the Rosario rule); People v. Feerick, 241 A.D.2d 126, 671 N.Y.S.2d 13 (1st Dept. 1998) (claim unpreserved where defense was in possession of list of available documents but did not raise issue); People v. Cannon, 171 A.D.2d 752, 567 N.Y.S.2d 484 (2d Dept. 1991), lv denied 78 N.Y.2d 1074, 577 N.Y.S.2d 237 (issue not preserved where defense counsel failed to move to re-open suppression hearing after belated production of statements); People v. Rashid, 164 A.D.2d 951, 560 N.Y.S.2d 58 (2d Dept. 1990), lv denied 76 N.Y.2d 943, 563 N.Y.S.2d 72 (request for material, with no other statement in record, does not preserve issue if material is never produced).

A claim concerning late production of Rosario material at trial may be deemed waived where defense counsel became aware of the existence of the material during a preliminary hearing. See People v. Brill, N.Y.L.J., 6/11/96, p. 33, col. 4 (App. Term, 9th & 10th Jud. Dist.).

G. Disclosure Of Rosario Material By Respondent

After the presentment agency's direct case and prior to the commencement of the respondent's direct case, the respondent must make available any written or recorded statement made by a prospective trial witness other than the respondent that relates to the subject matter of the witness' testimony. FCA §331.4(2); see People v. Irvine, 52 A.D.3d 866, 859 N.Y.S.2d 264 (3rd Dept. 2008), lv denied, 11 N.Y.3d 737 (reversible

error where trial court directed defense counsel to turn over notes protected by attorney-client privilege). At a suppression hearing, the respondent must make the statements available after the witness' direct examination. FCA §331.4(3)(a). See, e.g., People v. Napierala, 90 A.D.2d 689, 455 N.Y.S.2d 863 (4th Dept. 1982) (preclusion of testimony of defendant's witnesses was inappropriate sanction for late disclosure); People v. Allen, 104 Misc.2d 136, 427 N.Y.S.2d 698 (Sup. Ct. West. Co., 1980).

VII. Informal Discovery

It is important to remember that the normal exchange of information with an adversary can be extremely productive. Even if New York criminal discovery rules were less hostile to the accused, and the respondent could routinely obtain useful information in a legally binding document whose contents are indisputable, there would be no reason not to seek informal discovery. Although the precise language used by a prosecutor during a casual discussion may be difficult to prove if a controversy should arise, the information might still be useful.

First of all, when attempting to draft a suppression motion, the child's attorney is often thwarted by a lack of knowledge concerning the information possessed by the police when they took action against the respondent. The respondent may be claiming that he or she was merely walking along the street when the police made an arrest for no apparent reason. Because it may be difficult to draft a legally adequate motion in such cases, and because it is helpful to know as soon as possible what the prosecution will be alleging, the attorney could seek the information during informal discussions. Although statutory discovery provisions do not include such information, it is difficult to see how the prosecutor could justify withholding it. Therefore, a reasonable prosecutor who is concerned about his or her reputation for fairness may well choose to provide the information.

Moreover, although some prosecutors are overly preoccupied with winning and will divulge as little information as possible, there are many prosecutors who, being aware of their special duty to seek justice and not merely convict (see ABA Standards Relating to the Administration of Criminal Justice, Standard 3-1.2[c]), will freely share information. Other times, the prosecutor's evenhandedness is strategic. He or she may

be attempting to coax a plea by demonstrating how strong the prosecution's case is. Or, given the strength of the case, the prosecutor may be completely unconcerned about how much the child's attorney knows, and merely wants to avoid the creation of reversible error during discovery proceedings. Whatever the prosecutor's reason for disclosing information may be, the result is the same.

In sum, given the limited formal discovery available under New York law, and the possibility that important information will be obtained, the attorney must always be ready to take advantage of an opportunity for informal discovery.

VIII. Subpoena Practice

A. Generally

FCA §165(a) makes CPLR provisions applicable "to the extent that they are appropriate to the proceedings involved." It is common practice for courts to apply CPLR rules governing subpoena practice in family court proceedings.

An ordinary "subpoena" (or subpoena ad testificandum) requires that a person appear in court to give testimony. A "subpoena duces tecum" requires the production of "books, papers and other things." CPLR §2301. A subpoena duces tecum may be joined with a subpoena ad testificandum, or may be issued separately. CPLR §2305(b)(1).

A subpoena directs a person to appear on a specified date for purposes of a trial, hearing or examination, and may require the person to attend on any adjourned date. A new subpoena need not be served to compel such subsequent appearances as long as the person receives "reasonable notice" of the new date. CPLR §2305(a). For instance, the party who subpoenaed the witness could ask the judge to direct the witness to reappear.

A subpoena duces tecum "should be sufficiently clear to inform the witness exactly what is being sought...." People v. Doe, 39 A.D.2d 869, 333 N.Y.S.2d 876, 878 (1st Dept. 1972). A person may comply with a subpoena duces tecum by having the materials delivered by a person who is "able to identify them and testify respecting their origin, purpose and custody." CPLR §2305(b)(2). Because the CPLR makes it unnecessary to elicit live testimony establishing a foundation for the admission of certain types of records, compliance with a subpoena duces tecum is routinely effected by

mailing the requested materials.

Any subpoena or subpoena duces tecum issued in connection with a court proceeding, whether by a judge, a court clerk or an attorney, is called a "judicial" subpoena. "Non-judicial" subpoenas are those issued in connection with administrative and other out-of-court proceedings. See Siegel, New York Practice, §385.

B. Power To Issue Subpoenas

1. Ordinary Subpoenas

A subpoena compelling the appearance of a person in court may be issued by, among others, a judge, the clerk of the court, or an attorney of record for a party. CPLR §2302(a). However, a subpoena for production of a person confined in a penitentiary or jail may only be issued by a judge. Unless the court orders otherwise, a motion must be made on at least one day's notice to the prisoner's custodian. CPLR §2302(b).

A family court judge also has broad power under FCA §153 to "issue a subpoena or in a proper case a warrant or other process to secure or compel the attendance of an adult respondent or child or any other person whose testimony or presence at a hearing or proceeding is deemed by the court to be necessary...." The court may release the witness during the proceedings or "admit to, fix or accept bail...."

2. Subpoena Duces Tecum

a. Government Records

A subpoena duces tecum for the records of "a department or bureau of a municipal corporation or of the state, or an officer thereof" must be issued by a judge. CPLR §2307. Cf. CPL §610.20(3); People v. Caban, 118 A.D.2d 957, 500 N.Y.S.2d 183 (3d Dept. 1986). This rule applies to subpoenas for police records, school records, or the records of state or municipal hospitals. Unless the court orders otherwise, a motion for a "so-ordered" subpoena must be made on at least one day's notice to the entity or agency which has custody of the record, and the adverse party. See People v. Henry, 2012 NY Slip Op 31383(U) (Sup. Ct., Bronx Co., 2012) (application for "so ordered" subpoena for New York City Housing Authority materials denied where no notice of motion was filed as required by CPLR 2307); but see People v. Van Dyne, 175 Misc.2d 558, 669 N.Y.S.2d 199 (County Ct., Monroe Co., 1998) (since defendant has right to gather

information without alerting prosecution to defense, court will allow defendant opportunity to present ex parte application for subpoenas and will determine whether notice to the adverse party will be required); People v. Doe, 170 Misc.2d 454, 649 N.Y.S.2d 326 (Sup. Ct., Monroe Co., 1997) (court notes “local custom” under which notice of motion is not used, and will continue to defer to custom and sign subpoenas for confidential governmental records provided records are returnable to court for in camera inspection). Except in the case of an emergency, the subpoena must be served at least 24 hours before the time fixed for production. CPLR §2307. Unless the judge orders otherwise, a "full-sized legible reproduction” of the records may be produced, and is admissible in evidence if accompanied by a certification or authentication by the head of the agency, or an authorized employee, which states that the reproduction is complete and accurate, and sets forth the necessary business record foundation. CPLR §§ 2307, 4518(c). See People v. Mertz, 68 N.Y.2d 136, 506 N.Y.S.2d 290 (1986).

Although the prosecutor in a criminal proceeding may issue a subpoena duces tecum for production of official records, see CPL §610.20(2), there is no parallel provision in article 3 giving the presentment agency such power.

b. Other Records

Other than records covered by CPLR §2307, any records may be subpoenaed by an attorney without judicial authorization, except that a subpoena for a patient’s clinical record maintained pursuant to Mental Hygiene Law §33.13 must be accompanied by a court order. CPLR §2302(a). However, if production of the original record is desired even though a photostatic copy would be admissible, the subpoena may, unless the court orders otherwise, be issued only upon a motion made on at least one day's notice to the record's custodian. CPLR §2302(b).

C. Service Of Subpoenas

1. Ordinary Subpoenas

A subpoena must be served in the same manner as a summons. CPLR §2303. Under CPLR §308(1) and (2), "personal service" may be made upon a "natural person" by delivering process directly to the person, or by delivering process to a person of suitable age and discretion at the home or place of business of the person to be served

and mailing process to the person's last known residence or the person's place of business. If such service cannot be made with due diligence, "nail and mail" service may be made under §308(4). Personal service may also be made by mail pursuant to CPLR §312-a. And, if service under §308(1), (2) and (4) is impracticable, a court may direct that service be made in any manner. CPLR §308(5).

"Where the attendance at trial of a party or person within the party's control can be compelled by a trial subpoena, that subpoena may be served by delivery in accordance with [Rule 2103(b)] to the party's attorney of record." CPLR §2303-a.

Service upon an "infant" witness under the age of eighteen must be made by personal service upon the parent if the child is under fourteen, or by personal service upon the parent and the child if the child is fourteen or older. CPLR §§ 309(a), 105(j).

Except when the witness is imprisoned, the CPLR does not contain any time limits for service of a subpoena ad testificandum. Obviously, if the party issuing the subpoena plans to ask for sanctions upon a witness' failure to appear, or for an adjournment, it would be prudent to give the witness a reasonable amount of notice.

2. Subpoena Duces Tecum

Service of a subpoena duces tecum is also governed by CPLR §2303, and, therefore, by CPLR article 3 as well. Ordinarily, the subpoena should be addressed to and served upon the person who has custody of the records.

Proper service upon the City of New York is made by delivering process to the corporation counsel or a designated agent. CPLR §311(2). Section 311 does not mention government agencies, only corporations, cities, counties, towns and villages, and school, park, sewage and other districts. It appears that individual city agencies should ordinarily be viewed as distinct entities for purposes of service, and, therefore, should be served with subpoenas for their records. See Gold v. City of New York, 80 A.D.2d 138, 437 N.Y.S.2d 973 (1st Dept. 1981); Santiago v. Board of Education, 41 A.D.2d 616, 340 N.Y.S.2d 491 (1st Dept. 1973).

It is also not entirely clear what should be done when the subpoena is for the records of a large entity with a central office, and many branches at which subpoenaed records will ordinarily be located. In Matter of Bott, 125 Misc.2d 1029, 481 N.Y.S.2d 266

(County Ct. Monroe Co., 1984), the court noted that, although article 3 of the CPLR does not clearly provide for service on government agencies, it does "set up a scheme where a summons will be served upon [an official or counsel at] a centralized office." 125 Misc.2d at 1031. Nevertheless, the court concluded that the State Police could be served not only by serving the Superintendent or his counsel at Division headquarters, but by serving any responsible employee at any State Police facility. See also Siegel, New York Practice, supra, §383. While service of a summons upon a central office is certainly appropriate where a lawsuit is being commenced against the government, it is arguably less critical when records are being subpoenaed in other types of litigation. Thus, in the absence of law to the contrary, many judges might well be willing to follow Bott if faced with a motion to quash. Still, it appears that the safer and better course is to make service upon a central authority unless it is impracticable.

In some instances, there are specific rules governing service with which attorneys must be familiar. For instance, a school district may be served by delivering process to a "school officer" as that term is defined in Education Law §2(13). CPLR §311(7). See Matter of Franz v. Board of Education of the Elwood Union Free School District, 112 A.D.2d 934, 492 N.Y.S.2d 452 (2d Dept. 1985), app denied 67 N.Y.2d 603, 499 N.Y.S.2d 1029 (1986) (courts require "strict compliance" with rules governing service on governmental subdivisions).

Service upon the Health and Hospitals Corporation, which is a public benefit corporation independent of the City of New York, must be made pursuant to CPLR §311(1) ("to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service"). See Henderson v. City of New York, 143 A.D.2d 884, 533 N.Y.S.2d 547 (2d Dept. 1988).

The New York City Transit Authority is also a public corporation, and must be served pursuant to CPLR §311(1). See Matter of Ware v. Manhattan and Bronx Surface Transit Operating Authority, 49 Misc.2d 704, 268 N.Y.S.2d 519 (Sup. Ct. N.Y. Co., 1965).

A copy of any subpoena duces tecum shall be served, in the manner set forth in CPLR §2103, on each party who has appeared so that it is received promptly after

service on the witness and before production of the documents. CPLR §2303(a); see also Commonwealth v. Dwyer, 859 N.E.2d 400 (Mass. 2007) (court establishes protocol requiring notice to subject of statutorily privileged records when criminal defendant seeks pretrial disclosure); Matter of C.D., 6 Misc.3d 1034(A), 800 N.Y.S.2d 343 (Fam. Ct., Orange Co., 2005) (although it is not required by statute, court has duty to require notification to person whose medical records are being sought); but see People v. Lomma, 35 Misc.3d 395 (Sup. Ct., N.Y. Co., 2012) (CPLR Rule 2303 service requirement does not apply in criminal proceedings).

. Similarly, when issuing a subpoena duces tecum against a non-party pursuant to CPLR §3120(1), a party must also serve a copy of the subpoena upon all other parties, and, within five days of compliance with the subpoena in whole or in part, must give each party notice that the items produced are available for inspection and copying and specify a time and place. CPLR §3120(3).

3. Fees

a. Under CPLR

Any person subpoenaed to appear is entitled to $15 for each day of attendance. Although 23 cents per mile must also be paid as travel expenses, no such mileage fee exists when travel is "wholly within a city." CPLR §8001(a). The witness is entitled to the payment of fees in advance. CPLR §2303(a). “Whenever the preparation of a transcript of records is required in order to comply with a subpoena, the person subpoenaed shall receive an additional fee of ten cents per folio upon demand.” CPLR §8001(c). In addition, under Public Health Law §18(2)(e), a health care provider generally “may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider,” although “the reasonable charge for paper copies shall not exceed seventy-five cents per page. A qualified person shall not be denied access to patient information solely because of inability to pay.” Under PHL §18(1)(g), a “Qualified person” includes, inter alia, “any properly identified subject; or a guardian appointed under article eighty-one of the mental hygiene law; or a parent of an infant; or a guardian of an infant appointed under article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to

request access to a clinical record under paragraph (c) of subdivision two of this section ....” See also Hayes v. County of Nassau, 127 A.D.2d 742, 512 N.Y.S.2d 134 (2d Dept. 1987) (plaintiff must pay reproduction cost to hospital or do her own photocopying).

Under CPLR §1102(d), a person who has been permitted by the court to proceed as a poor person “shall not be liable for the payment of any costs or fees” unless he later recovers a sum of money in the proceeding out of which the court orders the payment of costs or fees. Also, a poor person may be furnished with a stenographic transcript without fee by order of the court in proceedings other than appeal, the fee therefor to be paid by the county, or the city of New York, or by the state, as the case may be. CPLR §1102(b). “Where a party is represented in a civil action by a legal aid society or a legal services or other nonprofit organization, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society or organization, all fees and costs relating to the filing and service shall be waived without the necessity of a motion … provided that a determination has been made by such society, organization or attorney that such party is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, and that an attorney's certification that such determination has been made is filed with the clerk of the court….” CPLR §1101(e).

In addition, it certainly can be argued that, under FCA §165(a), it is not "appropriate" to require that an indigent respondent pay fees or costs. See Hotel Martha Washington Management Co. v. Swinick, 66 Misc.2d 833, 322 N.Y.S.2d 139 (App. Term, 1st Dept. 1971) (while no provision exempts poor person from paying witness fee, indigent party is constitutionally entitled to payment of fees by city or county). And, presumably, a litigant is not required to pay a fee to any witness who appears pursuant to a subpoena issued by a judge under FCA §153.

b. Under Criminal Procedure Law

Family Court Act §370.1(1) incorporates by reference the provisions of CPL article 620 "concerning the securing of attendance of witnesses by material witness order...." Witness fees in such cases must be paid by the county. CPL §620.80. Article 610 of the CPL, which governs the attendance of witnesses by subpoena, has not been expressly

incorporated by reference in FCA article 3. Section 610.50(2) provides that a witness subpoenaed by the defendant has no right to witness and mileage fees, but may, in the discretion of the court, be reimbursed out of the county treasury. Reading CPL §§620.80 and 610.50(2) together, and keeping in mind an accused's constitutional right to compulsory process and to present a defense, and the respondent's right to equal protection, it seems clear that the respondent should not be required to pay witness fees.

Under CPL §610.25(2), "[t]he cost of reproduction and transportation [of subpoenaed records] shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice." Relying on equal protection principles, an indigent respondent certainly can argue it would be in the interests of justice for the family court to bear these costs.

D. Where And When Subpoena May Be Made Returnable

A witness subpoenaed to testify in connection with an FCA proceeding may only be required to appear in court, to testify on a scheduled court date. Thus, even a government prosecutor may not require a witness to appear for an interview at the prosecutor's office. See People v. Hamlin, 58 A.D.2d 631, 395 N.Y.S.2d 679 (2d Dept. 1977); People v. Marvin Henry, 2012 NY Slip Op 31383(U) (Sup. Ct., Bronx Co., 2012) (application for "so ordered" subpoena for New York City Housing Authority materials denied where subpoena did not direct witness to bring materials on date scheduled for trial); People v. Neptune, 161 Misc.2d 781, 615 N.Y.S.2d 265 (Sup. Ct. Kings Co., 1994) (by sending written request with subpoena, prosecutor improperly led witness to believe that failure to appear could be punished); People v. Boulet, 88 Misc.2d 353, 388 N.Y.S.2d 250 (City Ct. of Rochester, 1976); People v. Arocho, 85 Misc.2d 116, 379 N.Y.S.2d 366 (Sup. Ct. N.Y. Co., 1976).

Certain subpoenas are returnable outside of court, such as a subpoena issued to compel a witness' appearance at a deposition (see CPLR 3106[b]) or in conjunction with an administrative hearing (see CPLR 2302[a]). In other contexts, courts have held that a judicial subpoena duces tecum, whether issued by a court or by an attorney, is a mandate of the court and must be made returnable in a court. People v. Natal, 75 N.Y.2d 379, 553 N.Y.S.2d 650 (1990) (ADA improperly made subpoena returnable to himself);

People v. MacGilfrey, 288 A.D.2d 554, 733 N.Y.S.2d 254 (3rd Dept. 2001) (sanction of suppression of records not appropriate where defendant had no possessory or proprietary interest in them); People v. Currier, 221 A.D.2d 805, 634 N.Y.S.2d 233 (3rd Dept. 1995) (preclusion was appropriate penalty where DA improperly subpoenaed defendant's hospital records to DA's office); People v. C.H., 51 Misc.3d 1230(A) (Sup. Ct., Bronx Co., 2016) (no sanction where People obtained material via "Notice to Appear and Produce" that warned of possible subpoena and was made returnable to District Attorney's office where DOC had initiated contact with District Attorney's office and defendant posed major ongoing security risk); Schwenk v. Kavanaugh, 4 F.Supp.2d 110 (N.D.N.Y. 1998) (prosecutors improperly subpoenaed defendant's confidential hospital records to their office); People v. Riggins, 178 Misc.2d 12, 678 N.Y.S.2d 469 (Sup. Ct., Monroe Co., 1998) (court precludes use of records where District Attorney improperly subpoenaed records to office); People v. Warmus, 148 Misc.2d 374, 561 N.Y.S.2d 111 (County Ct. West. Co., 1990) (prosecutor improperly made subpoena returnable to himself or detective; court suppresses certain records). Even FCA §1038(a), which freely allows attorneys to subpoena records obtainable under the CPLR only by way of a so-ordered subpoena, provides that "[t]he court shall establish procedures for the receipt and safeguarding of [subpoenaed] records." See also CPLR 2301 (subpoena shall state on face that all papers delivered "to the court" shall be accompanied by copy of subpoena); CPL §610.25(1) (court or grand jury has right to possess subpoenaed evidence). If records are mistakenly sent to an attorney, they should be turned over to the court immediately. See People v. Jackson, 103 A.D.2d 849, 478 N.Y.S.2d 367 (2d Dept. 1984) (defense counsel, to whom school officials gave records, should have turned records over to court).

However, in 2018, a new subdivision (d) was added to CPLR 2305 which states that "[w]here a trial subpoena directs service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel and self-represented parties where

applicable, forthwith."

There is nothing in the CPLR which precludes the issuance of a subpoena duces tecum which is returnable prior to the adjourned date of the proceeding. Cf. CPL §610.25(2) ("Nothing in this article shall be deemed to prohibit the designation of a return date for a subpoena duces tecum prior to trial").

E. Disobedience Of Subpoena

Failure to comply with a judicial subpoena is punishable as a contempt of court. See, e.g., People v. Celentano, 36 Misc.3d 1217(A) (Dist. Ct., Nassau Co., 2012) (court orders hearing to determine whether there was willful failure to comply with subpoena for surveillance footage where non-party failed to comply with subpoena before letting footage be deleted)In addition, the court may issue a warrant for the arrest of a witness who has failed to appear, and, if the witness refuses to testify or produce subpoenaed records, the court may imprison the witness until he or she complies or is released pursuant to law. A disobedient witness is also liable to the party on whose behalf the subpoena was issued for a penalty of up to one hundred fifty dollars and damages caused by the witness' failure to comply. CPLR §2308. The court could also dismiss the proceedings as a sanction if a disobedient government agency is in privity with the prosecution. See, e.g., People v. Szychulda, 57 N.Y.2d 719, 454 N.Y.S.2d 705 (1982) (court did not abuse discretion when it dismissed case due to police failure to comply with subpoena for personnel files).

F. Motion To Quash

"A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable." CPLR §2304. A motion to quash is the sole means of challenging a subpoena. Matter of Brunswick Hospital, Inc. v. Hynes, 52 N.Y.2d 333, 438 N.Y.S.2d 253 (1981).

The movant must have standing to challenge the subpoena. For instance, when a subpoena seeks production of records which may contain information protected by a confidential privilege, the custodian of the records and the alleged privilege holder have standing. People v. Crispino, 298 A.D.2d 220, 748 N.Y.S.2d 718 (1st Dept. 2002), lv denied 99 N.Y.2d 627, 760 N.Y.S.2d 108 (2003) (defendant had no standing to

challenge bank's production of its own records, since defendant had no proprietary interest); 38-14 Realty Corp. v. New York City Dept. of Consumer Affairs, 103 A.D.2d 804, 477 N.Y.S.2d 999 (2d Dept. 1984); People v. Owens, 188 Misc.2d 200, 727 N.Y.S.2d 266 (Sup. Ct., Monroe Co., 2001) (subpoena may be challenged only by person to whom it is directed or person whose property rights or privileges may be violated). However, if a witness has been subpoenaed to give oral testimony concerning allegedly privileged communications, the witness must appear and testify, and may raise the privilege only in response to specific questions. See, e.g., People v. Gonzalez, 120 Misc.2d 62, 465 N.Y.S.2d 471 (Sup. Ct. Kings Co., 1983).

In criminal prosecutions, it is the Police Department, joined by the prosecutor, which ordinarily makes a motion to quash a subpoena for police records. When other records are sought, the prosecutor may not have standing. Compare People v. Weiss, 176 Misc.2d 496, 671 N.Y.S.2d 604 (Sup. Ct., N.Y. Co., 1998) (People had no standing to move to quash subpoena for complainant's telephone records, but, unless defendant can show that records are likely to contain relevant information, protective order may be issued to protect privacy of complainant) and People v. Grosuner, 108 Misc.2d 932, 439 N.Y.S.2d 243 (Crim. Ct. Bronx Co., 1981) (Corporation Counsel, not DA, had standing for motion to quash subpoena for DSS records) with People v. Ellman, 137 Misc.2d 946, 523 N.Y.S.2d 13 (Crim. Ct. Bronx Co., 1987) (State Attorney-General could move to quash subpoena for complainants' tax returns, since complainants would otherwise have to retain private counsel). However, one court has held that the prosecution may apply for a protective order in order to limit discovery by way of subpoena. See People v. Weiss, supra, 176 Misc.2d 496.

Although, in the discretion of the appellate division, the respondent may take an appeal from the denial of a motion to quash, it does not appear that the presentment agency can take such an appeal. See FCA §§365.1(2), 365.2. Cf. People v. Santos, 64 N.Y.2d 702, 485 N.Y.S.2d 524 (1984) (absent statutory authority, appeal may not be taken). It appears that a non-party movant may take an appeal. See People v. Marin, 86 A.D.2d 40, 448 N.Y.S.2d 748 (2d Dept. 1982). But see People v. Cabon, 150 Misc.2d 1028, 579 N.Y.S.2d 312 (App. Term, lst Dept. 1991) (since Police Department and

prosecutor are related, there is no reason to provide Police Department with right to appeal that is not given to prosecution).

G. Criminal Procedure Law Provisions

The provisions of CPL Article 620 (securing attendance of witnesses by material witness order; see, e.g., People v. McMath, 54 A.D.3d 566, 863 N.Y.S.2d 650 (1st Dept. 2008) (no error in trial court's refusal to compel attendance of New Jersey man who was also arrested and to whom defendant allegedly sold cocaine, where witness' testimony would have been relevant but defendant did not demonstrate it would have been material to defense since witness communicated to defense counsel that defendant had, in fact, sold him cocaine), CPL Article 660 (securing testimony for use in subsequent proceeding), CPL Article 680 (examination of witness by commission), and CPL Article 640 (Uniform Act to Secure Attendance of Witnesses From Without the State in Criminal Cases), shall apply to juvenile delinquency proceedings. FCA §370.1.

H. Police Records

It is important to remember that subpoenas for police records come within the one-day notice of motion requirement in CPLR §2307. Even when a judge orders the production of records under FCA §153, CPLR provisions govern. See also CPL §610.20(3) (CPLR §2307 applies when court orders production of government records); People v. Bolivar, 121 Misc.2d 229, 467 N.Y.S.2d 525 (Crim. Ct. N.Y. Co., 1983). The court may excuse a failure to comply with the notice rule. See, e.g., People v. Cabon, 148 Misc.2d 260, 560 N.Y.S.2d 370 (Crim. Ct. N.Y. Co., 1990), appeal dism'd 150 Misc.2d 1028, 579 N.Y.S.2d 312 (App. Term, 1st Dept. 1991). Arguably, the court implicitly dispenses with the notice requirement by signing a subpoena.

Substantial controversy has arisen concerning the issuance of a subpoena for police records (and other records) that are not covered by statutory discovery requirements. Prosecutors have argued that, unless the records are made discoverable by statute (e.g., pursuant to a "Demand to produce"), would be admissible in evidence, or are required for adequate preparation, they may not be subpoenaed as part of a "fishing expedition." Compare People v. Swygert, 57 Misc.3d 913 (Crim. Ct., Bronx Co., 2017) (court issues subpoena directing NYPD to produce footage from surveillance

cameras located at and near incident site that were owned and operated by NYPD, noting that footage directly related to guilt or innocence and was potentially case dispositive; footage was subject to imminent destruction and People were unable to provide adequate assurances that evidence had been or would be preserved; sanctions for failure to preserve the footage might be insufficient to remedy loss; and People's ability to seek further relief was safeguarded by court's "for in camera inspection" marking on subpoena); People v. Duran, 32 Misc.3d 225, 921 N.Y.S.2d 826 (Crim. Ct., Kings Co., 2011) (in sex crime prosecution involving incident inside public housing structure, defendant entitled to production of video surveillance images showing individuals entering and exiting building during relevant period, video surveillance images of fifth floor hallway during that period, records, including logbook or sign-in sheet for guests and visitors, for certain apartment on day in question); People v. Giler, 19 Misc.3d 1137(A), 862 N.Y.S.2d 816 (Crim. Ct., N.Y. Co., 2008) (court denies motion to quash judicial subpoena duces tecum seeking "all surveillance tape footage from NYPD security located at the inside and outside entrances" of the precinct covering the relevant time: court notes that while a defendant cannot use subpoena to circumvent discovery statutes or ascertain whether evidence exists, subpoena may be used to obtain known evidence defendant hopes to use, and that defendant wishes to obtain surveillance tapes depicting the very incident giving rise to the charges) with People v. Bagley, 279 A.D.2d 426 (1st Dept. 2001), lv denied 96 N.Y.2d 711 183 (defendant put forth no factual predicate for contention that documents sought would bear relevant and exculpatory evidence, and thus subpoena constituted a discovery demand directed to non-party in contravention of CPL Article 240) and People v. Henry, 2012 NY Slip Op 31383(U) (Sup. Ct., Bronx Co., 2012) (application for "so ordered" subpoena for New York City Housing Authority materials denied where defendant was attempting to obtain discovery outside scope of CPL Article 240 and constitution).

I. Subpoena For Privileged Material

1. Subpoenas Issued On Behalf Of Respondent

The respondent has a constitutional right to confront witnesses and obtain material and relevant evidence. These rights may, in some cases, override a witness'

entitlement to confidentiality. Thus, whenever necessary, the child's attorney should seek a so-ordered subpoena for material such as psychiatric records, the sealed records of delinquency or criminal proceedings, or a police officer's personnel file, for purposes of impeachment. A subpoena must be issued when the respondent can show a reasonable likelihood that the records contain relevant information. The court must then examine the materials in camera, and turn over relevant documents to the defense. Listed below are various types of confidential records that might be subpoenaed.

a. Child Welfare Agency Records

See Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989 (1987) (defendant entitled to in camera review for favorable evidence); Matter of Damien H., 268 A.D.2d 475, 701 N.Y.S.2d 912 (2d Dept. 2000) (in camera review ordered where respondent made particularized showing that unfounded report of child abuse might contain exculpatory material); People v. Salinas, 48 Misc.3d 791 (Sup. Ct., Bronx Co., 2015) (where defense counsel acquired confidential discovery information from law firm colleague who represented defendant in abuse/neglect proceeding (family court subsequently issued protective order barring disclosure to criminal defense counsel), court concluded that attorneys in family court must abide by confidentiality rules even in absence of protective order and thus firm was not entitled to share information among attorneys in different practices; although defense counsel made allegations raising questions about complainant's credibility, court declined to issue subpoena and conduct in camera review of confidential records based solely on improperly acquired information, but did issue subpoena because information had already been disclosed in public abuse/neglect fact-finding hearing); People v. Zacher, 11 Misc.3d 1090(A), 819 N.Y.S.2d 850 (Sup. Ct., Monroe Co., 2006) (disclosure ordered where defendant was suffering from memory loss); People v. LV, 182 Misc.2d 912, 701 N.Y.S.2d 865 (Sup. Ct., Renssalaer Co., 1999) (People not entitled to obtain child abuse report which was sealed as "unfounded" when prosecuting subject of report); People v. Berliner, 179 Misc.2d 844, 686 N.Y.S.2d 673 (Westchester County Ct., 1999) (court agrees to conduct in camera inspection upon People's motion to unseal DSS records regarding unfounded report made against defendant, who is charged with falsely reporting an incident to the

statewide central registry); People v. Doe, 178 Misc.2d 534, 679 N.Y.S.2d 508 (Sup. Ct., Monroe Co., 1998) (where defendant claimed that complainant had history of mental problems and had recanted a prior complaint of sexual abuse, court issued subpoena for DSS records and conducted in camera review; court furnished to defendant impeachment material pertaining to complainant, and provided the People with impeachment material pertaining to potential defense witnesses); People v. Reidout, 140 Misc.2d 632, 530 N.Y.S.2d 938 (Sup. Ct. Bronx Co., 1988) (after in camera review, no exculpatory evidence found); see also Burns v. State, 968 A.2d 1012 (Del. 2009) (decision in Ritchie applies to records of private therapist).

b. Law Enforcement Personnel Records

See Civil Rights Law, §50-a; People v. Gissendanner, 48 N.Y.2d 543, 423 N.Y.S.2d 893 (1979) (no access in absence of reason to believe records contain relevant material); People v. Othman, 52 Misc.3d 126(A) (App. Term, 2d Dept., 2016) (defendant merely alleged that detectives were lying and cited own complaint with Civilian Complaint Review Board and federal civil rights action purportedly against one of the detectives which had been decided in favor of police); People v. Andrew, 54 A.D.3d 618, 863 N.Y.S.2d 676 (1st Dept. 2008) (no error in trial court's refusal to ordered disclosure of, or review in camera, detective's disciplinary file where mere existence of federal lawsuit naming officer as defendant was not proper subject for cross-examination); People v. Cedeno, 4 Misc.3d 134(A), 791 N.Y.S.2d 871 (App. Term, 9th & 10th Jud. Dist., 2004) (defendant's motion should have been denied where speculative assertions regarding possibility of prior complaints against officers were insufficient, and defendant failed to establish likelihood that files contained evidence of unnecessary force involving moral turpitude); Matter of Brown v. Grosso, 285 A.D.2d 642, 729 N.Y.S.2d 492 (2d Dept. 2001) (defendant not entitled to Police Department Internal Affairs Bureau or Civilian Complaint Review Board records; such discovery is not authorized by statute); People v. Irizarry, 2017 NY Slip Op 32769(U) (Crim. Ct., Bronx Co., 2017) (in camera inspection ordered where civil suits alleged that officer made arrest on false pretenses and without justification, and it was likely that viability of charges against defendant would hinge on officer's credibility); People v. Ruiz, 57 Misc.3d 1029 (Crim. Ct., Bronx Co., 2017) (in

camera inspection ordered where defendant presented complaints from three settled or pending civil lawsuits in which officer was accused of either excessive force or false arrest, and defendant alleged that officer used excessive force and falsely accused defendant of possessing gravity knife); People v. Simmons, 57 Misc.3d 990 (County Ct., Monroe Co., 2017) (court agrees to disclose to defendant information relating to "sustained" finding that officer improperly failed to call supervisor as requested by civilian who later filed complaint that included excessive and improper force allegations, but other sustained allegations were unrelated to excessive or improper force and were not probative of truthfulness); People v. Anderson, 55 Misc.3d 511 (Sup. Ct., Bronx Co., 2017) (in camera review granted as to CCRB and NYPD records relating to federal prosecutions in which arresting officer was found to be incredible at suppression hearing in describing actions closely resembling those he allegedly took in instant case); People v. Martin, 53 Misc.3d 1207(A) (Sup. Ct., N.Y. Co., 2015) (no disclosure ordered where alleged inconsistencies in suppression hearing testimony did not indicate that detectives engaged in misconduct warranting unsealing of personnel files; CCRB indicated they had files relating to detectives but no substantiated complaints of misconduct; and fact that City settled multiple lawsuits that included claims against detectives and others warranted scrutiny, but there was no proof of finding of wrongdoing by these particular detectives); Matter of Hughes Hubbard & Reed LLP v. Civilian Complaint Review Board, 53 Misc.3d 947 (Sup. Ct., Kings Co., 2016) (complaints made to CCRB covered by §50-a, and officer's personnel records continue to be exempt from disclosure after he or she departs from public service); People v. Rolon, 2015KN053629, NYLJ 1202757472362, at *1 (Crim., KI, Decided May 3, 2016) (motion for subpoena denied where officers had been subject of lawsuits alleging, inter alia, illegal strip searches, and defendant alleged that he was unlawfully strip-searched; records should not be disclosed upon mere conjecture); People v. Dixon, 51 Misc.3d 1208(A) (Crim. Ct., Kings Co., 2016) (motion for subpoena denied where affidavit of service attached to NYPD's opposition papers indicated that those papers were mailed to detectives, which was not adequate notice of motion for disclosure; all civil suits involving officers were pending or had been settled and officers were named as defendants along with other officers; and there was no

allegation of misconduct in case before court); People v. Vasquez, 3971/2015, NYLJ 1202752092280, at *1 (Sup., NY, Decided March 1, 2016) (motion for subpoena denied where lawsuits were unrelated to case and were pending or settled; being named defendant in civil suit does not establish wrongdoing, stipulation of settlement is not admission, and, without connection to case, finding of misconduct in another matter is general impeachment material whose disclosure is barred by statutory privilege); People v. Smith, 5032/2014, NYLJ 1202751361646, at *1 (Sup., KI, Decided February 18, 2016) (notice to officer sufficient where Legal Aid paralegal got proverbial "run around" at precinct, where no one would touch motion, but in camera review denied where one suit against officer was decided through summary judgment in favor of defendants, another was settled, and another was pending or settled; settlement is not admission of guilt that renders file discoverable); People v. Cook, 51 Misc.3d 188 (Sup. Ct., Kings Co., 2015) (applications denied where defense failed to serve applications and proposed subpoenas upon named detectives; also, beyond indicating that detectives has been accused of serious misconduct, and that defendant was wrongfully arrested and there was police misconduct in this case, defendant failed to indicate what information in personnel files or documents regarding civil lawsuits might be exculpatory or otherwise material and relevant); People v. Williams, 50 Misc.3d 1222(A) (Crim. Ct., Bronx Co., 2016) (motion to quash denied as to DOC security surveillance tapes and still photographs, DOC incident reports concerning alleged incident, documents relating to medical diagnosis, treatment and care of defendant with regard to alleged incident, and paperwork relating to line of duty injury claimed by complainant or other DOC officer in connection with alleged incident; DOC also ordered to produce for in camera review complainant's personnel or disciplinary records); Matter of Ursula G., 50 Misc.3d 1214(A) (Fam. Ct., N.Y. Co., 2015) (NYPD and CCRB directed to produce records for in camera review; in determining whether respondent made required "clear showing of facts," court could not expect respondent to know exactly what would be revealed, and factual predicate was established through allegations that case would hinge on officers' testimony, that officers initiated physical contact, and that respondent had independent witness who would corroborate his assertions); People v. Codrington, 50 Misc.3d 1212(A) (Sup. Ct., Kings

Co., 2016) (court reviewed in camera Civilian Complaint Review Board's final report regarding defendant's complaint alleging he was victim of excessive physical force and unauthorized strip searches); People v. Cintron, 50 Misc.3d 1204(A) (Crim. Ct., Kings Co., 2015) (evidence of four court cases involving allegations of, inter alia, false arrest, excessive force and fabricated charges, which resulted in settlements and payment of money to plaintiff, did not establish reasonable likelihood that files would contain evidence of specific conduct bearing on officer's credibility); People v. Calderon, 48 Misc.3d 1226(A) (Sup. Ct., N.Y. Co., 2015) (court agrees to examine in camera Civilian Complaint Review Board and Police Department records related to alleged misconduct by detective who was charged in federal civil rights action with fabricating testimony regarding another individual he arrested under circumstances similar to those present in defendant's case); People v. Rodriguez, 46 Misc.3d 1220(A) (Sup. Ct., N.Y. Co., 2014) (subpoena quashed where federal lawsuits against officers had not resulted in finding of guilt); People v. James, 46 Misc.3d 1219(A) (Sup. Ct., Kings Co., 2015) (court refused to issue subpoena where defendant failed to establish that prior incidents of misconduct had been verified or documented by NYPD or CCRB or that there had been acknowledgment of fault or liability in settled federal cases); People v. Lawson, N.Y.L.J., 10/18/85, p. 16, col. 3 (App. Term, 2d and 11th Jud. Dists.) (where defendant claimed that officers acted maliciously and without provocation, court should have ordered in camera inspection); People v. Threstan, 2012KN063065, NYLJ 1202618904158, at *1 (Crim., KI, Decided August 12, 2013) (upon NYPD motion to quash subpoena, court, noting that NYPD offered no explanation for failure to respond to defense's Gissendanner motion, concludes that fairness requires that NYPD have opportunity to be heard as required by Civil Rights Law); People v. Peters, 39 Misc.3d 1226(A) (Sup. Ct., Kings Co., 2013) (in case in which defendants challenged validity of consent to search, subpoena not issued where officers were under investigation by Internal Affairs Bureau in connection with arrests involving consent-to-search documents, but status of investigation was not known; a civil lawsuit had been brought against two officers by individual People decided not to prosecute, but suit apparently settled upon undisclosed terms and without acknowledgment of fault or liability; and one officer was involved in

case in which court suppressed physical evidence largely due to lack of police credibility); People v. Alexander, 20 Misc.3d 1109(A), 2008 WL 2552693 (Sup. Ct., N.Y. Co., 2008) (disclosure of police personnel files of arresting officer and other members of arresting unit denied where, after defendant's arrest, reports surfaced of corruption within officers' Narcotics Division, but defendant merely alleged that other officers in Narcotics Division had been exposed as corrupt, and there were no reports of false arrests or falsified testimony); United States v. Nogbou, 2007 WL 4165683 (SDNY, 2007) (although defense offered no basis for belief that complainant actually had been subject of substantiated complaint, court orders in camera review "as a matter of sound case management" to reduce risk that new trial will result from avoidable Brady violation); People v. Magliore, 178 Misc.2d 489, 679 N.Y.S.2d 267 (Crim. Ct., Kings Co., 1998) (motion for subpoena for personnel records of Uniformed Court Officers who were complainants denied where defendant failed to make allegations establishing reasonable likelihood that file contained relevant material); see also People v. Gennimi, 30 Misc.3d 23, 916 N.Y.S.2d 463 (App. Term, 9th & 10th Jud. Dist., 2010) (court properly refused to inspect complaining witness's confidential personnel file where witness had retired as building inspector, and Town had decided to forgo proceedings against inspector and seal records, in absence of grounds for belief that file contained information beyond matters affecting general credibility; dissenting judge notes that defendant's offer of proof included information that inspector had been subject of official reprimands, and of misconduct investigation which was settled by inspector's retirement and dropping of all charges with prejudice).

The affected police officer is a necessary party to the application for disclosure. Telesford v. Patterson, 27 A.D.3d 328, 812 N.Y.S.2d 52 (1st Dept. 2006); see also People v. Cook, 51 Misc.3d 188 (applications denied where defense failed to serve applications and proposed subpoenas upon named detectives); People v. Cintron, 50 Misc.3d 650 (Crim. Ct., Kings Co., 2015) (motion denied where defendant failed to give officers proper notice required by § 50-a; court will more readily find proper notice when applicant adheres closely to CPLR § 308).

California has a statutory procedure governing motions for discovery of personnel

files and in camera review. See People v. Mooc, 36 P.3d 21 (CA, 2001).

c. Psychiatric, Psychological and Counseling Records of Witness

See People v. McCray, 23 N.Y.3d 193 (2014), rearg denied 24 N.Y.3d 947 (where court had measure of discretion in deciding whether rape defendant's interest in obtaining complainant's mental health records was outweighed by complainant's interest in confidentiality, and defendant had made specific Brady request and his interest could be outweighed if there was no reasonable possibility that withheld materials would lead to acquittal, there was no error in court's disclosure of only a few of the records; most of the undisclosed documents were either cumulative or of little if any relevance, proof of some details was prohibited by the Rape Shield Law, and, although there was evidence of what may have been a false report in 2004, when the complainant was 13, regarding sexual assault by her father, that accusation was far removed in time and quite different from accusation made in this case); People v. Kiah, 156 A.D.3d 1054 (3d Dept. 2017) (in rape prosecution, court erred in denying motion for subpoena and in camera review or records where there was history of bipolar disorder and depression, and, at trial, complainant admitted she was taking - at the time of incident and of trial - two medications that could have impaired her thinking, especially when combined with crack cocaine); People v. Ouanes, 123 A.D.3d 480 (1st Dept., 2014) (in camera review of victim's psychiatric records denied where defendant failed to show that records from when victim was teenager would be relevant to incident that occurred six years later); People v. Parker, 307 A.D.2d 538, 762 N.Y.S.2d 172 (3rd Dept. 2003), lv denied 100 N.Y.2d 644 (court properly required defendant to turn over victim's records to People where both parties had right to subpoena records and People were in process of obtaining material); People v. Thurston, 209 A.D.2d 976, 619 N.Y.S.2d 465 (4th Dept. 1994), lv denied 85 N.Y.2d 915, 627 N.Y.S.2d 338 (1995) (defendant was entitled to disclosure of children's center records concerning sex abuse victims); People v. Morris, 153 A.D.2d 984, 545 N.Y.S.2d 427 (3rd Dept. 1989); People v. Rivera, 138 A.D.2d 169, 530 N.Y.S.2d 802 (1st Dept. 1988), lv denied 72 N.Y.2d 923, 532 N.Y.S.2d 857 (court erred in denying defendant access to victim's psychiatric records); People v. Knowell,

127 A.D.2d 794, 512 N.Y.S.2d 190 (2d Dept. 1987) (court should have conducted in camera examination where defendant established reasonable likelihood that records were relevant to witness' credibility); State v. Kemah, 957 A.2d 852 (Conn. 2008) (complainant's execution of releases for mental health records in favor of State did not waive statutory confidentiality protections); People v. Rhee, 54 Misc.3d 1217(A) (Crim. Ct., N.Y. Co., 2017) (defendant's claims regarding witness's history of mental health treatment and diagnosis not sufficient; court notes that post-partum depression and post-traumatic stress disorder are not conditions that bear on reliability or accuracy of testimony); People v. Velasquez, 49 Misc.3d 265 (Crim. Ct., Bronx Co., 2015) (People ordered to investigate whether complainant suffered from psychiatric condition that had impact on reliability, and provide court, for in camera inspection, mental health records People possessed or could obtain, where defendant cited complainant's statement during interview with defense investigator that she "takes medication for bipolar disorder ...[and]... these medications cause both physical and mental side effects, including...the inability to think or remember well"); People v. Elliott, 2012 NY Slip Op 30981(U) (Sup. Ct., Bronx Co., 2012) (no discovery or in camera review where witness's bipolar diagnosis did not establish there would be exculpatory material in records); Drake v. Woods, 547 F.Supp.2d 253 (SDNY, 2008) (in camera inspection properly denied where prosecution represented that witness suffered from no serious psychiatric problems that would affect her perception and consulted therapist on only three occasions to discuss "the general issues of her life"); People v. Cunningham, 7 Misc.3d 1023(A), 801 N.Y.S.2d 239 (Crim. Ct., N.Y. Co., 2005) (People directed to obtain records for in camera inspection; confidentiality under MHL §33.13 must yield to possibility that records contain information relevant to determination of guilt or innocence); People v. Reidout, supra, 140 Misc.2d 632; People v. Acklin, 102 Misc.2d 596, 424 N.Y.S.2d 633 (Sup. Ct. N.Y. Co., 1980), rev'd 87 A.D.2d 104, 451 N.Y.S.2d 73 (1st Dept. 1982).

d. Court Records of Witness

See People v. Harder, 146 A.D.2d 286, 540 N.Y.S.2d 557 (3rd Dept. 1989) (court should have examined family court records of prosecution witness).

e. Rape Crisis Center Records

See CPLR §4510 (confidential privilege protecting communications made to a rape crisis counselor who has been certified by an approved rape crisis program); People v. Pena, 127 Misc.2d 1057, 487 N.Y.S.2d 935 (Sup. Ct. Kings Co., 1985) (court denies discovery where defendant was merely engaged in "fishing expedition").

f. School Records

See Matter of Terry D., 81 N.Y.2d 1042, 601 N.Y.S.2d 452 (1993) (respondent not entitled to names and phone numbers of potential witnesses; court notes that subpoena cannot be used to expand discovery beyond scope of statute); Matter of Javier V., 249 A.D.2d 314, 670 N.Y.S.2d 355 (2d Dept. 1998) (to same effect as Terry D.); People v. Doe, 24 Misc.3d 1203(A), 2009 WL 1708205 (Rochester City Ct., 2009) (where counsel alleged that "[u]pon information and belief [the complainant's] school records will contain records of suspensions and disciplinary measures taken against him," court concludes that request is legitimate, targeted request for relevant information since assault allegedly occurred in school setting and records may contain first person accounts of alleged altercation, and thus meets threshold for in camera review; however, court found no discoverable material, and noted that suspension or expulsion does not mean that school authorities found that student engaged in specific immoral, vicious or criminal acts which have bearing on credibility); People v. Manzanillo, 145 Misc.2d 511, 549 N.Y.S.2d 343, People v. Manzanillo, 145 Misc.2d 504, 546 N.Y.S.2d 954 (Crim. Ct. N.Y. Co., 1989) (although defendant did not show that witness' Special Education records were relevant, court examines them in camera).

The Federal Educational Rights and Privacy Act -- 20 USC §1232g and 34 CFR Part 99 -- contains provisions governing the release by schools of education records. See 34 CFR §99.31(a)(9)(ii) (in response to “judicial order or lawfully issued subpoena” for records, agency or institution “may disclose information only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless” a court has ordered that the existence of the subpoena not be disclosed); 34 CFR §99.30(b) (written consent to disclosure must specify the records to be disclosed and the purpose of the disclosure, and identify the party of class of parties

to whom the disclosure may be made, and under 99.30(c), parent or eligible student is entitled to copy of records upon request); Zaal v. State, 602 A.2d 1247 (Md. Ct. App., 1992) (where defendant shows need for inspection of records, court may review records alone in camera, conduct the review in the presence of counsel, or permit review by counsel alone subject to restrictions; the greater the need to inspect, the more the court should lean towards allowing review by counsel); In re Carolyn Zak, 2004 WL 144110 (Rhode Island Super. Ct., 2004) (court must afford parents and students opportunity to be heard).

g. Attorney-Client Communications

See People v. Gonzalez, 40 Misc.3d 1213(A) (Crim. Ct., Bronx Co., 2013) (although attorney-client privilege may yield where strong public policy requires disclosure, public policy strongly favored protecting communications with not-for-profit organization that provided legal services to indigent domestic violence victims); People v. Brooks, 29 Misc.3d 1203(A), 2010 WL 3785774 (Sup. Ct., Kings Co., 2010) (records of Steps to End Family Violence Program not protected by attorney-client privilege or as work product; opinion of defense counsel would not be found in notes of independent social worker, and agency is not part of defense team); People v. Hunte, 168 Misc.2d 466, 637 N.Y.S.2d 996 (Sup. Ct., N.Y. Co. 1995) (court orders prosecution witness to answer questions about attorney-client communications concerning penalties witness would have faced had he not made plea agreement).

h. Statements To Press And Shield Law

See Civil Rights Law §79-h; People v. Combest, 4 N.Y.3d 341, 795 N.Y.S.2d 481 (2005), reargument denied 4 N.Y.3d 859 (defendant satisfied 3-prong test in Civil Rights Law, and was entitled to disclosure of videotape of a police interrogation, where videotapes were relevant to defendant's claims that he acted in self defense and that his statements were involuntary); People v. Juarez, 143 A.D.3d 589 (1st Dept. 2016), rev'd on other grounds _N.Y.3d_, 2018 WL 3132373 (no disclosure of reporter's notes of interview with defendant regarding charge that he killed four-year-old girl where People had videotaped confession that had been found admissible and was consistent with other evidence, and did not make clear and specific showing that disclosure was critical

or necessary to proof of material issue); United States v. Treacy, 639 F.3d 32 (2d Cir. 2011) (district court erred in treating reporter's interest as competing interest to be balanced against defendant's Confrontation Clause rights, and improperly restricted cross-examination of reporter); People v. Bonie, 141 A.D.3d 401 (1st Dept. 2016), appeal dism'd 28 N.Y.3d 956 (in murder prosecution involving disappearance of defendant's tenant, trial judge directed to disclose to People after in camera review any portions of video in which defendant made statement about killing alleged victim, or discussed their relationship and his impressions and observations of her, including her conduct as tenant; reporter described statements that contradicted defendant's statements to police, and although others heard statements, defendant's actual words and demeanor were available only on video); People v. Novak, 41 Misc.3d 749 (County Ct., Sullivan Co., 2013) (court quashes subpoena for reporter's recordings and notes from interview with murder defendant where People failed to show how recordings could be used to impeach defendant, it was not known whether defendant would testify, and defendant had consistently denied guilt); In re Daily News, L.P., 31 Misc.3d 319, 920 N.Y.S.2d 865 (Sup. Ct., Kings Co., 2011) (court denies motion to quash subpoena seeking identity of police source of report that "according to authorities," co-defendant's mother had shouted "shoot the cop"; defendant's claim that someone else made statement was critical to defense, there was available source other than Daily News, and People's claim that defendant was accomplice was almost completely dependent on statement); People v. Mercereau, 24 Misc.3d 366, 875 N.Y.S.2d 857 (Sup. Ct., Richmond Co., 2009) (People entitled to DVDs and transcripts of defendant's interview where People alleged that certain statements made by defendant in interview were inconsistent with statements she made to police and Emergency Medical Service personnel, and that statements relating to motive, as well as inconsistent statements, may have been discussed in unaired portions of interview; possible problems with admissibility not germane to motion); People v. Hendrix, 12 Misc.3d 447, 820 N.Y.S.2d 411 (Sup. Ct., Kings Co., 2006) (defendants' subpoenas quashed where they did not know what was in the videotapes and were engaged in "fishing expedition"); In re Subpoena Duces Tecum To Ayala, 162 Misc.2d 108, 616 N.Y.S.2d 575 (Sup. Ct.

Queens Co., 1994) (motion to quash granted; qualified privilege protects non-confidential news material); see also Matter of People v. Juarez, _N.Y.3d_, 2018 WL 3132373 (2018) (no authorization for direct appellate review of order determining non-party motion to quash subpoena issued in course of criminal action); People v. Nasser, 15 Misc.3d 499, 830 N.Y.S.2d 892 (Sup. Ct., West. Co., 2007) (court denies motion to quash subpoena for reporter who could testify regarding prior inconsistent statements by witness, which had already been published).

i. Internet Materials

See People v. Harris, 36 Misc.3d 613, 945 N.Y.S.2d 505 (Crim. Ct., N.Y. Co., 2012) (court first denies defendant's motion to quash People's subpoena seeking defendant's Twitter account information since defendant had no proprietary interest in user information and thus lacked standing to challenge subpoena; noting that it still must consider Stored Communications Act, court concludes that subpoena satisfied Act where People offered facts showing reasonable grounds to believe defendant's Tweets were relevant and material to ongoing criminal investigation) and People v. Harris, 36 Misc.3d 868 (Crim. Ct., N.Y. Co., 2012) (court grants Twitter's motion to quash only insofar as subpoena seeks information obtainable under Stored Communications Act only pursuant to search warrant, and otherwise denies motion, noting that disclosure of private conversation conducted via internet would require warrant based on probable cause but there is no reasonable expectation of privacy in tweet sent around the world); see also Facebook, Inc. v. Superior Court of City of S.F. ex rel. Hunter, 417 P.3d 725 (Cal. 2018) (Stored Communications Act generally bars disclosure of communications addressed to specific persons and other communications configured by registered user to be restricted, but SCA's lawful consent exception requires disclosure of communications configured by user to be public); Matter of 381 Search Warrants Directed to Facebook, Inc. v. New York County District Attorney's Office, 29 N.Y.3d 231 (2017) (order denying Facebook, Inc.'s motion to quash warrants issued pursuant to the federal Stored Communications Act mot appealable); Spearin v. Linmar, 129 A.D.3d 528 (1st Dept. 2015) (defendant established factual predicate for discovery of relevant information from private portions of plaintiff's Facebook account by submitting plaintiff's public profile

picture depicting plaintiff sitting in front of piano, which tended to contradict plaintiff's testimony that, after getting hit on head by piece of falling wood, he could longer play piano; however, discovery ordered was overbroad and matter remanded for in camera review of post-accident postings); A.D. v. C.A., 50 Misc.3d 180 (Sup. Ct., West. Co., 2015) (in matrimonial proceeding in which plaintiff alleged that defendant did not spend as much time with child as she alleges, court directs defendant to take steps to produce, for in camera inspection, printouts of Facebook postings regarding her whereabouts with child outside New York City area, and also submit authorization permitting court to have access; person's use of privacy settings on social media, such as Facebook, restricting general public's access to private postings does not, in and of itself, shield information from disclosure if portions of material are material and relevant to issues in action); Matter of D.M. v. J.E.M., 23 Misc.3d 584 (Fam. Ct., Orange Co., 2009) (court directs respondent to authorize Yahoo! to release records of account).

2. Subpoenas Issued By Presentment Agency

Although the CPL does not require the District Attorney to provide notice to the defendant or to any person who is the subject of subpoenaed material, the presentment agency is bound by the one-day notice requirement in CPLR §2307 when it subpoenas confidential official records. Therefore, the presentment agency may not, for instance, obtain a so-ordered subpoena for the respondent's confidential school records (see Sauerhof v. City of New York, 108 Misc.2d 805, 438 N.Y.S.2d 982 [Sup. Ct. Queens Co., 1981]) without moving on notice to the respondent's attorney and the Board of Education. But see People v. Owens, 188 Misc.2d 200, 727 N.Y.S.2d 266 (Sup. Ct., Monroe Co., 2001) (defendant had no privacy interest in records). With respect to school records, it should also be noted that the school should notify the respondent and his or her parents before complying with a subpoena. See Sauerhof v. City of New York, supra, 108 Misc.2d 805; 20 USC §1232g(b)(2)(B). See also In re Marlene D., 285 A.D.2d 462, 727 N.Y.S.2d 338 (2d Dept. 2001), lv denied 97 N.Y.2d 605, 737 N.Y.S.2d 52 (family court did not err in ordering disclosure of respondent's confidential alcohol abuse treatment records); People v. Harris, 36 Misc.3d 613, 945 N.Y.S.2d 505 (Crim. Ct., N.Y. Co., 2012) and People v. Harris, 36 Misc.3d 868 (Crim. Ct., N.Y. Co., 2012) (court first

denies defendant's motion to quash People's subpoena seeking defendant's Twitter account information since defendant had no proprietary interest in user information and thus lacked standing to challenge subpoena, and then denies Twitter's motion to quash, noting that disclosure of private conversation conducted via internet would require warrant based on probable cause but there is no reasonable expectation of privacy in tweet sent around the world); Webb v. Goldstein, 117 F.Supp.2d 289 (E.D.N.Y. 2000) (public interest in disclosure to police and prosecutors, who were investigating series of rapes and had reason to think that defendant had physical conditions that could identify him as the perpetrator, of defendant's confidential prison medical records); Schwenk v. Kavanaugh, 4 F.Supp.2d 110 (N.D.N.Y. 1998) (prosecutors violated defendant's privacy rights under Mental Hygiene Law §33.13 when they subpoenaed hospital records relating to treatment of defendant).

3. HIPAA

When discovery of medical and other health care records is sought, the Health Insurance Portability and Accountability Act ("HIPAA"), a federal privacy law, must be taken into account.

a. Generally

Generally speaking, under HIPAA a "health care provider who transmits any health information in electronic form in connection with a transaction covered by" HIPAA may not use or disclose "individually identifiable health information" except as HIPAA permits, or upon execution of a written release by the protected individual or his/her personal representative. See 45 C.F.R. §§ 160.102, 160.103, 160.502(a), (g)(1). Unless otherwise provided in HIPAA, "[w]hen using or disclosing protected health information or when requesting protected health information from another covered entity, a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request." 45 C.F.R. §164.502(b). Unless otherwise provided in HIPAA -- e.g., a provision of State law that is more stringent may still apply -- New York State laws that are "contrary to"HIPAA are preempted. See 45 C.F.R. §§ 160.202, 160.203(b).

b. Required Elements of Authorization

Under 45 C.F.R. §164.508(c)(1), “[a] valid authorization ... must contain at least the following elements:

(i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.

(ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.

(iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.

(iv) A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.

(v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.

(vi) Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided.”

In addition to these “core” elements, “the authorization must contain statements adequate to place the individual on notice of ... The individual’s right to revoke the authorization in writing, and either: (A) The exceptions to the right to revoke and a description of how the individual may revoke the authorization; or (B) To the extent that the information in paragraph (c)(2)(i)(A) of this section is included in the notice required by § 164.520, a reference to the covered entity’s notice.” 45 C.F.R. §164.508(c)(2).

c. Court Orders and So-Ordered Subpoenas

Under 45 C.F.R. §164.512(e)(1), “[a] covered entity may disclose protected health information in the course of any judicial or administrative proceeding: (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses

only the protected health information expressly authorized by such order." See, e.g., People v. Berotte, 25 Misc.3d 740, 890 N.Y.S.2d 278 (Dist. Ct., Nassau Co., 2009) (defendant denied discovery of additional records where he already has been provided with records showing that complainant had prior neck injury, that he experienced pain from neck injury, and that he received treatment for pain, as well as documents and reports regarding treatment, since, with these materials, defendant could craft cross-examination regarding pain arising out of charged assault as distinguished from pain previously experienced as result of the pre-existing neck condition; to conclude otherwise "would open the floodgates and afford access to private individual medical records where any prior treatment involved pain, regardless of the date and origin of that pain"); Matter of Antonia E., 16 Misc.3d 637, 838 N.Y.S.2d 872 (Fam. Ct., Queens Co., 2007) (court denies Presentment Agency's motion for issuance of judicial subpoena duces tecum directing production of hospital records relating to treatment of assault complainant; although HIPAA anticipates disclosure pursuant to court order, it does not preempt state law when that law is more stringent, and physician-patient privilege in CPLR §4504 is more stringent than HIPAA); see also People v. Olsen, 23 Misc.3d 593, 873 N.Y.S.2d 453 (Dist. Ct., Nassau Co., 2009) (while finding no grounds for recusal, court concludes that where it was concerned that defendant had obtained complainant's HIPAA-protected records with subpoena that was not HIPAA-compliant, court acted properly in suggesting that the prosecution file motion to quash so that matter could be properly briefed).

d. Attorney-Issued Subpoenas and Discovery Requests

"A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: ... In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if: (A) The covered entity receives satisfactory assurance, as described in [45 C.F.R. §164.512(e)(1)(iii)], from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request." 45 C.F.R. §164.512(e)(1)(ii).

Under 45 C.F.R. §164.512(e)(1)(iii), “a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that: (A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address); (B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and (C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and: (1) No objections were filed; or (2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.”

“A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: ... In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if: ... (B) The covered entity receives satisfactory assurance, as described in [§164.512(e)(1)(iv)], from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of [§164.512(e)(1)(v)].” 45 C.F.R. §164.512(e)(1)(ii).

Under 45 C.F.R. §164.512(e)(1)(iv), “a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that: (A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or (B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal. Under 45 C.F.R. §164.512(e)(1)(v), “a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that: (A) Prohibits the parties

from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding."

In addition, "a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv) of this section. 45 C.F.R. §164.512(e)(1)(vi).

e. Unemancipated Minors

"If under applicable law a parent, guardian, or other person acting in loco parentis has authority to act on behalf of an individual who is an unemancipated minor in making decisions related to health care, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation, except that such person may not be a personal representative of an unemancipated minor, and the minor has the authority to act as an individual, with respect to protected health information pertaining to a health care service, if: (A) The minor consents to such health care service; no other consent to such health care service is required by law, regardless of whether the consent of another person has also been obtained; and the minor has not requested that such person be treated as the personal representative; (B) The minor may lawfully obtain such health care service without the consent of a parent, guardian, or other person acting in loco parentis, and the minor, a court, or another person authorized by law consents to such health care service; or (C) A parent, guardian, or other person acting in loco parentis assents to an agreement of confidentiality between a covered health care provider and the minor with respect to such health care service." 45 C.F.R. §164.502(g)(3)(i).

"If, and to the extent, permitted or required by an applicable provision of State or other law, including applicable case law, a covered entity may disclose, or provide

access in accordance with § 164.524 to, protected health information about an unemancipated minor to a parent, guardian, or other person acting in loco parentis." 45 C.F.R. §164.502(g)(3)(ii)(A).

"If, and to the extent, prohibited by an applicable provision of State or other law, including applicable case law, a covered entity may not disclose, or provide access in accordance with § 164.524 to, protected health information about an unemancipated minor to a parent, guardian, or other person acting in loco parentis." 45 C.F.R. §164.502(g)(3)(ii)(B).

"Where the parent, guardian, or other person acting in loco parentis, is not the personal representative ... and where there is no applicable access provision under State or other law, including case law, a covered entity may provide or deny access under § 164.524 to a parent, guardian, or other person acting in loco parentis, if such action is consistent with State or other applicable law, provided that such decision must be made by a licensed health care professional, in the exercise of professional judgment." 45 C.F.R. §164.502(g)(3)(ii)(C).

f. Disclosure to Law Enforcement Authorities

Permitted disclosures for "law enforcement purposes" are set forth in 45 C.F.R. §164.512(f), which refers to, inter alia, laws that require the reporting of certain types of wounds or other physical injuries; a court order, court-ordered warrant, and subpoena or summons issued by a judicial officer; and a grand jury subpoena; requests for information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person; requests for information about an individual who is or is suspected to be a victim of a crime; and information about an individual who has died if the covered entity has a suspicion that such death may have resulted from criminal conduct.

Consistent with HIPAA, CPLR 3122(a) now provides that "[a] medical provider served with a subpoena duces tecum requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is

accompanied by a written authorization by the patient."

g. Waiver

In Holzle v. Healthcare Services Group Inc., 7 Misc.3d 1027(A), 801 N.Y.S.2d 234 (Sup. Ct., Niagra Co., 2005), the court, relying on the rule established in Koump v. Smith (25 NY2d 287), held that by bringing or defending a personal injury action while affirmatively raising his/her mental or physical condition, a party waives any rights or remedies under HIPAA as to the mental or physical conditions asserted. The Court noted that HIPAA did not create a federal physician-patient privilege and the privacy rule is procedural in nature; that even if it were proper to conclude that HIPAA creates rights or remedies for plaintiffs in state litigation, it is proper to apply the Koump waiver rule; and that finding a HIPAA waiver under these circumstances protects defense counsel and treating physicians who participate in post-note of issue interviews without an authorization executed by the plaintiff.

However, in Matter of Antonia E., 16 Misc.3d 637, the court, finding no waiver, concluded that since the complainant was refusing to cooperate further in the prosecution of his sister, it was the prosecution, not the complainant, that was placing the complainant's physical condition at issue in the case.

J. Respondent's Right To Present Witnesses

The denial of the respondent's request for an adjournment in order to subpoena witnesses to give testimony at trial may constitute reversible error. The case law makes it clear, however, that the child's attorney's failure to diligently and expeditiously pursue leads, or the respondent's failure to provide information on a timely basis, will often justify the denial of an adjournment. Compare People v. Foy, 32 N.Y.2d 473, 346 N.Y.S.2d 245 (1973) (reversible error where defendant was denied adjournment to secure attendance of alibi witness; where fundamental right was involved, trial court's discretionary powers must be narrowly construed); United States v. Williams, 576 F.3d 385 (7th Cir. 2009) (trial court abused discretion by denying defendants' request for continuance after prosecution witness's testimony transformed government's case from crime involving two men to crime involving three men, which created new contradictions in evidence and provided alternative defense strategy, and defendants had only one half-

day, two weekdays, and two weekend days to prepare); People v. Hartman, 64 A.D.3d 1002. 883 N.Y.S.2d 36 (3rd Dept. 2009), lv denied 13 N.Y.3d 860 (reversible error where court denied defendant's motion for adjournment for appearance of expert who would provide battered person syndrome testimony relating to justification defense; defense counsel exercised diligence and good faith in attempting to expedite expert's evaluation once she learned that trial date had been advanced from September to June 2008, unexpectedly limiting time available for obtaining and evaluating expert's findings, and denial of adjournment effectively deprived defendant of defense); Matter of John W., 227 A.D.2d 981, 643 N.Y.S.2d 834 (4th Dept. 1996) (Family Court improperly denied request for brief adjournment so the subpoenaed alibi witness could be produced); People v. Inswood, 180 A.D.2d 649, 580 N.Y.S.2d 39 (2d Dept. 1992) (one-day continuance improperly denied where witnesses were identified to court and were not located earlier because of prosecutor's failure to turn over Brady material); People v. Blowe, 130 A.D.2d 668, 515 N.Y.S.2d 812 (2d Dept. 1987) (one-day adjournment improperly denied where defense counsel had made no effort to subpoena officer because of prosecutor's statement of intent to call the officer) and Matter of Freire, 121 A.D.2d 285, 503 N.Y.S.2d 568 (1st Dept. 1986) (continuance improperly denied where defense counsel's failure to discover existence of witnesses was due to prosecutor's failure to respond adequately to discovery demands)

with People v. Jackson, 41 A.D.3d 498, 838 N.Y.S.2d 108 (2d Dept. 2007), lv denied 9 N.Y.3d 876 (no error in denial of continuance where first trial concluded three months before commencement of second trial, and thus defendant had ample time to insure witness' presence at second trial, trial court had already granted prior application for continuance to secure witness' testimony, and defendant adduced alibi testimony from another witness; dissenting judge asserts that testifying alibi witness was defendant's sister, whose family connection to him would naturally suggest bias, while other witness had no apparent tie to defendant, defense produced witness at first trial, and it does not appear that defense counsel had, or should have had, reason to believe or suspect that witness would not appear); People v. White, 40 A.D.3d 535, 836 N.Y.S.2d 601 (1st Dept. 2007), lv denied 9 N.Y.3d 883 (no error in denial of defense request for adjournment

where witness was in Africa and was not expected to return for four months); People v. Adams, 13 A.D.3d 316, 788 N.Y.S.2d 36 (1st Dept. 2004) (order setting aside verdict reversed where trial court denied adjournment because defense witness would be hospitalized for foreseeable future, and witness's stipulated testimony was read to jury); People v. Edwards, 3 A.D.3d 504, 771 N.Y.S.2d 145 (2d Dept. 2004), lv denied 2 N.Y.3d 762 (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 632, 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). It must also appear that the witness would provide material testimony. See People v. Daniels, supra, 128 A.D.2d 632 (there was no indication on record that defendant had personal knowledge regarding actual substance of officer's potential testimony). If a request for an adjournment is denied, the child's attorney should describe on the record the attempts made to obtain the appearance of the witness(es), or the reasons why the witness(es) were not identified or located earlier, and also state the basis for believing that the witness would give material testimony. If the attorney has a good faith belief concerning what the

witness would say, a statement (or "offer of proof") should be made describing the witness' potential testimony.