

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

**Volume Two: Representing Children In
Juvenile Delinquency Proceedings
Part Two: Motions To Suppress**

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(Randy Hertz, 4/18)**

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CHAPTER ONE: SEARCH AND SEIZURE OF JUVENILES

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I. Notice Of Intent To Offer Physical Evidence

Pursuant to FCA §330.2(2), the presentment agency must serve upon the respondent notice of its intention to offer evidence "described in section 710.20 or subdivision one of section 710.30 of the criminal procedure law Such notice must be served within fifteen days after the conclusion of the initial appearance or before the fact-finding hearing, whichever occurs first, unless the court, for good cause shown, permits later service and accords the respondent a reasonable opportunity to make a suppression motion thereafter. If the respondent is detained, the court shall direct that such notice be served on an expedited basis."

The way in which FCA §330.2(2) was drafted has given rise to a controversy that should be noted. Criminal Procedure Law §710.20, which is referred to in FCA §330.2(2), includes types of evidence which can be the subject of a suppression motion, but are not included in the notice requirement in CPL §710.30. For instance, CPL §710.20 includes tangible evidence, and, through the incorporation by reference of CPL §60.45, involuntary statements made to private individuals.

In Matter of Eddie M., 110 A.D.2d 635, 487 N.Y.S.2d 122 (2d Dept. 1985), the Second Department held that tangible evidence is covered by the notice requirement in FCA §330.2(2), but concluded that since the respondent had knowledge of the presentment agency's intention to introduce a gun that was the subject of a possession charge, there was good cause to dispense with the notice requirement. See also Matter of Alex C., 207 A.D.2d 745, 616 N.Y.S.2d 959 (1st Dept. 1994). But see Matter of Luis M., 83 N.Y.2d 226, 608 N.Y.S.2d 962 (1994) (§330.2(2) does not require presentment agency to serve notice of intent to offer statement made by respondent to person not involved in law enforcement).

II. School Searches And Seizures

A. Constitutional Standard

In New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985), the Supreme Court held that the Fourth Amendment applies to searches conducted by public school officials. The court noted that a child has a legitimate expectation of privacy protecting

the child from a search of the person, or a search of personal property brought into the school:

Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessities of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

469 U.S. at 339. The Fourth Amendment does not apply to searches by private school officials. See, e.g., Limpuangthip v. United States, 932 A.2d 1137 (D.C. Ct. App. 2007) (officers at private university who had been appointed as Special Police Officers by mayor were not state actors when they participated in dormitory search; they did not exercise arrest power, their involvement was peripheral, and University administrator, not SPOs, made decision to conduct search).

However, after weighing students' privacy interests against the substantial interest of school officials in maintaining discipline, the court rejected use of the probable cause standard, and concluded that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." 469 U.S. at 341. "Under ordinary circumstances, a search of a student by a teacher or other school official will be `justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school" [emphasis supplied]. Id. at 341-342. Thus, as was the case in T.L.O., where the search was directed at cigarettes, suspicion of criminal activity is not the only ground for a search. The Supreme Court did not decide whether "individualized suspicion is an essential element

of the reasonableness standard," but hinted that it is not by noting that exceptions are appropriate when privacy interests are minimal or where other safeguards assure that the "official in the field" does not possess too much discretion. Id. at 342, n. 8.

The T.L.O. ruling did not materially change the law in New York. Prior to T.L.O., the New York Court of Appeals had held that, "[g]iven the special responsibility of school teachers in the control of the school precincts and the grave threat, even lethal threat, of drug abuse among school children, the basis for finding sufficient cause for a school search will be less than that required outside the school precincts" [citations omitted]. People v. Scott D., 34 N.Y.2d 483, 488, 358 N.Y.S.2d 403, 408 (1974).

In Matter of Gregory M., 82 N.Y.2d 588, 606 N.Y.S.2d 579 (1993), the Court of Appeals held that the "reasonable suspicion" standard controls under the New York State Constitution. The Court of Appeals did not specifically hold that the "reasonable suspicion" standard includes an "individualized suspicion" element. However, that standard has always included an individualized suspicion component when applied in search and seizure cases, and a "reasonable suspicion" test is distinguishable from the "reasonableness" test articulated in T.L.O. And, in support of its decision to apply a lower standard in cases involving conduct that falls short of a full-blown search (see [C] below), the court noted that the Supreme Court has disclaimed any intent to require individualized suspicion in all school search contexts. Consequently, it appears that the Court of Appeals would require as a matter of State Constitutional law that individualized suspicion be present in any case involving a full search. See also People v. Taylor, 625 N.E.2d 785 (Ill. App. Ct., 4th Dist., 1993); In re William G., 709 P.2d 1287 (Calif. 1985) (individualized suspicion test adopted).

Finally, it should be remembered that generalized searches of numerous students which are based on legitimate security concerns, and are reasonable in scope, may be proper even in the absence of individualized suspicion. See, e.g., Matter of Elvin G., 12 N.Y.3d 834, 882 N.Y.S.2d 671 (2009) (family court erred in failing to order suppression hearing where respondent alleged that school dean ordered students in classroom to stand and empty pockets in attempt to discover cell phone or electronic device that had disrupted class, and presentment agency claimed that dean had asked

students to put bookbags on desks and respondent had voluntarily removed knife from pocket); In re Sean A., 191 Cal.App.4th 182 (Cal. Ct. App., 4th Dist., 2010) (search upheld where it was conducted pursuant to policy under which every student who left campus and then returned was subject to search upon return, students and parents received notice of policy as part of school's behavior code, and search was carried out without touching student, who was required only to empty pockets; purpose was to prevent students who left in violation of school rules from bringing in harmful objects such as weapons or drugs); Matter of Haseen N. 251 A.D.2d 505, 674 N.Y.S.2d 700 (2d Dept. 1998) (court upholds administrative search involving patdown of students on Halloween in effort to prevent recurrence of prior Halloween incidents); Brannum v. Overton County School Board, 516 F.3d 489 (6th Cir. 2008) (plaintiffs adequately alleged Fourth Amendment violation where school authorities installed and operated video surveillance equipment in boys' and girls' locker rooms; students could reasonably expect that no one, including school authorities, would videotape them without their knowledge, in various states of undress, while they changed clothes for athletic activity, and this measure was disproportionate to claimed policy goal of assuring increased school security); In re Lisa G., 23 Cal.Rptr.3d 163 (Cal. Ct. App., 4th Dist., 2005) (mere disruptive behavior did not justify search of purse for identification document so teacher could write referral); Thompson v. Carthage School District, 87 F.3d 979 (8th Cir. 1996) (where school bus driver informed principal that there were fresh cuts on bus seats, and students told principal that there was a gun at school that morning, direction to all male students to take off their shoes and socks and empty their pockets was reasonable, minimally intrusive command).

However, when school officials engage in more intrusive conduct after a student sets off or refuses to pass through a metal detector, or otherwise fails to voluntarily comply with procedures, the constitutional issues become more complex.

B. Application Of Exclusionary Rule

Although the Supreme Court did not decide in New Jersey v. T.L.O. whether the exclusionary rule applies in the school search context, the Court of Appeals held in People v. Scott D. that, "if there is not sufficient cause [for a school search], the

exclusionary rule must be applied in a criminal prosecution to evidence obtained illegally." 34 N.Y.2d at 488. See also In re William G., supra, 709 P.2d 1287. It has also been held that the exclusionary rule applies at school disciplinary proceedings. See Matter of Juan C., 223 A.D.2d 126, 647 N.Y.S.2d 491 (1st Dept. 1996), rev'd on other grounds 89 N.Y.2d 659, 657 N.Y.S.2d 581 (1997). But see Thompson v. Carthage School District, 87 F.3d 979 (8th Cir. 1996) (exclusionary rule does not apply); Gordon v. Santa Ana Unified School District, 162 Cal. App.3d 530 (Ct. App., 4th Dist., 1984) (exclusionary rule not applicable).

C. Intrusions Other Than Full-Blown "Search"

Since police conduct that falls short of a search is governed by lower standards [see People v. DeBour, 40 N.Y.2d 210, 386 N.Y.S.2d 375 (1976)], it appears that similar conduct by school officials will be tested under lower standards.

In Matter of Gregory M., supra, 82 N.Y.2d 588, the respondent, who was required by school policy to leave his book bag with a school security officer before reporting to the Dean's office, tossed the bag on a metal shelf, causing a metallic "thud" that the officer thought was "unusual." The officer ran his finger over the outer surface of the bottom of the bag and felt the outline of a gun. After the officer summoned the Dean, who also felt the shape of a gun, the bag was brought to the Dean's office and opened by the head of school security, who recovered a gun.

While recognizing that "reasonable suspicion" is required for searches such as that conducted in New Jersey v. T.L.O., the Court of Appeals concluded that the investigative touching of Gregory M.'s bag can, like a "Terry" frisk, be categorized as a "limited search." Consequently, a "less strict justification" than reasonable suspicion is required. 82 N.Y.2d at 593. See also Matter of Thomas G., 83 A.D.3d 1065 (2d Dept. 2011) (school safety officer had reasonable grounds to suspect respondent was armed and acted reasonably where, after respondent placed hand down front waistline of pants after twice being told not to and slid hand from pants to inside shoulder of jacket, officer patted down pockets of jacket and did not feel anything but then ran hand along sleeves and felt small, hard object, and then opened zipper of jacket, observed tear in shoulder and turned sleeve up, and small cellophane bag containing white pill later

determined to be Xanax fell from sleeve). Although it was a container that was "frisked" in Gregory M., it should be noted that there is already a line of cases in New York that permits a protective seizure, "frisk" or search by an officer of a container within the suspect's reach when the officer has a reasonable suspicion that the suspect is armed and that the container might contain a weapon. See, e.g., People v. Lewis, 82 N.Y.2d 839, 606 N.Y.S.2d 146 (1993); People v. Brooks, 65 N.Y.2d 1021, 494 N.Y.S.2d 103 (1985); People v. Davis, 64 N.Y.2d 1143, 490 N.Y.S.2d 725 (1985); People v. Tratch, 104 A.D.2d 503, 479 N.Y.S.2d 250 (2d Dept. 1984). Cf. People v. Meachem, 115 A.D.2d 370, 495 N.Y.S.2d 667 (1st Dept. 1985).

Although the Court of Appeals' analysis in Gregory M. is not cause for optimism, it may still be possible to argue that a frisk of the person, which is substantially more intrusive than the touching in Gregory M., requires reasonable suspicion. That standard was used in Matter of Ronald B., 61 A.D.2d 204, 401 N.Y.S.2d 544 (2d Dept. 1978).

However, it appears that the mere detention of a student by school officials, in a manner that would require reasonable suspicion if a police officer were involved, would, given the analysis in Gregory M., require something less than reasonable suspicion. Indeed, it can even be argued that the detention of a student (e.g., removal from a classroom to be held in a school security office) involves no constitutionally cognizable loss of liberty, since a student is already "detained" in school pursuant to the Education Law. See In re Randy G., 28 P.3d 239 (CA 2001) (liberty "is scarcely infringed if a school security guard lead the student into the hall to ask questions about a potential rule violation"; detentions of minor students are not improper as long as they are not arbitrary, capricious or for the purpose of harassment). However, it can also be argued that coercive measures employed by school officials that go beyond the usual restraints associated with school attendance require some justification. See Jones v. Hunt, 410 F.3d 1221 (10th Cir. 2005) (student was in custody when she was questioned by social worker and uniformed officer in small, confined school counselor's office to which student had been sent by school official after threatening suicide, and warned that she would be arrested if she did not agree to live with her father and that her "life would be hell"); Wallace v. Batavia School District, 68 F.3d 1010 (7th Cir. 1995) (while attempting

to maintain order and discipline, a school official violates the Fourth Amendment only when he or she seizes a student in an unreasonable manner). Cf. People v. Alls, 83 N.Y.2d 94, 608 N.Y.S.2d 139 (1994) (Miranda warnings required when prison inmate is subject to restraints beyond those ordinarily involved in prison confinement).

Finally, given the Gregory M. decision, it does not appear that school officials need any justification when they question a student under circumstances that would constitute a request for information or a common law inquiry under People v. DeBour, supra, 40 N.Y.2d 210.

D. Locker Searches

In New Jersey v. T.L.O., the Supreme Court did not decide "whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies." 469 U.S. at 337, n. 5.

Clearly, in most instances there is constitutional protection against a search of a student's locker by the police. In People v. Overton, 20 N.Y.2d 360, 283 N.Y.S.2d 22 (1967), vacated and remanded 395 U.S. 85, 89 S.Ct. 252 (1968), reaffirmed 24 N.Y.2d 522, 301 N.Y.S.2d 479 (1969), three detectives obtained a search warrant directing a search of two students, one of whom was the defendant, and their lockers. A vice-principal consented to a search of the defendant's locker, where the detectives found four marijuana cigarettes. While applying the Fourth Amendment, the Court of Appeals noted that "[a] depository such as a locker or even a desk is safeguarded from unreasonable searches for evidence of a crime" [citation omitted]. 20 N.Y.2d at 361. However, the court held that, since the defendant had, like all students, given the lock combination to his home room teacher for filing, and was aware that he did not have exclusive control over the locker as against school authorities, the vice-principal had authority to consent to the search. See also United States v. Davis, 967 F.2d 84 (2d Cir. 1992) (friend of defendant had authority to consent to search of footlocker shared by defendant and the friend).

It also appears that students have a legitimate expectation of privacy protecting them from unreasonable searches of lockers by school officials. See Commonwealth v. Cass, 666 A.2d 313 (Pa. 1995). However, under circumstances similar to those present

in People v. Overton, supra, 20 N.Y.2d 360, a student might have only a limited privacy interest protecting against such a search. Indeed, in Overton the court noted that "the school issues regulations regarding what may and may not be kept in the lockers and presumably can spot check to insure compliance." 20 N.Y.2d at 363. In any event, it is clear that the existence of school regulations limiting a student's privacy interests, and a student's awareness of those regulations, are important factors in determining whether a search is reasonable. Compare State v. Jones, 666 N.W.2d 142 (Iowa 2003) (students have legitimate expectation of privacy, but school may engage in reasonable searches in furtherance of duty to maintain proper educational environment) and Commonwealth v. Cass, supra, 666 A.2d 313 (Code of Student Conduct required reasonable suspicion that contraband will be found in locker) with In re Patrick Y., 746 A.2d 405 (Md. 2000) (no reasonable expectation of privacy where statute and Board of Education by-law provided that lockers could be searched); Isiah B. v. State, 500 N.W.2d 637 (Wis. 1993) (where school system promulgated, and gave students notice of, a written policy under which the school retained ownership and possessory control of lockers, students had no expectation of privacy and random searches were permissible); Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981) ("Inasmuch as the school had assumed joint control of the locker it cannot be successfully maintained that the school did not have the right to inspect it") and State ex rel. T.L.O., 463 A.2d 934, 943 (N.J. 1983) (this is the New Jersey Supreme Court's opinion in the T.L.O. case; court notes that student is justified in believing that master key to locker will be employed at his or her request, but expectation of privacy might not arise if school carries out policy of regularly inspecting lockers). See also In re Patrick Y., 723 A.2d 523 (Md. Ct. App., 2000), aff'd 746 A.2d 405 (after receiving information from unnamed source that there were drugs and/or weapons in middle school area, school was entitled to conduct generalized search of every locker in middle school).

Of course, even when school officials are justified in opening a student's locker, subsequent intrusions that are broader than necessary should be challenged. For instance, when a search of one locker is conducted because of a specific report concerning a particular student's possession of a gun, or when random searches are

conducted because of more general but well-founded concerns about weapons, the patdown of a bulge in an article of clothing found in a locker might be supportable [see, e.g., Isiah v. State, supra, 500 N.W.2d 637 (after lifting coat that was unusually heavy, security official patted down pocket, felt hard object and recovered gun)], but a full search of all the pockets of a student's clothing might not. In New Jersey v. T.L.O., the court found reasonable the opening of T.L.O.'s purse to look for cigarettes.

E. Desk Searches

Particularly in view of the Court of Appeals' holding in People v. Overton, supra, 20 N.Y.2d 360, it is unlikely that a student would be able to establish more than a very limited expectation of privacy in a desk. Indeed, in any school setting in which a student moves around from classroom to classroom during the course of a day, a particular desk is used by any number of students, each of whom has to expect that other persons will be storing and examining items in the desk. It might be possible to invoke a more substantial privacy interest in a desk (or in a locker, for that matter) if the desk is used by only one student, and its contents are hidden from plain view, and there is no policy putting the student on notice that the contents are subject to inspection. Cf. O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1987) (public employee had reasonable expectation of privacy in his desk and file cabinets where he did not share his desk or file cabinets with any other employees, had occupied the office for 17 years, and kept personal items in the office).

It should be noted that, in a delinquency proceeding in which it is alleged that the respondent possessed contraband recovered from a desk, the access possessed by other students may form the basis for a successful defense. See, e.g., Matter of Melvin V., 165 A.D.2d 662, 560 N.Y.S.2d 39 (1st Dept. 1990).

F. Cell Phones

In G.C. v. Owensboro Public Schools, 711 F.3d 623 (6th Cir. 2013), the court found no reasonable grounds to believe that a search of the student's cell phone would uncover evidence of unlawful activity after a teacher caught him sending text messages. The student's documented drug abuse and suicidal thoughts, without more, did not justify the search. The court refused to adopt a rule under which using a cell

phone on school grounds would automatically trigger an unlimited right to search any content stored on the phone.

In Riley v. California, 134 S.Ct. 2473 (2014), the Supreme Court held that officers must generally secure a warrant before searching a cell phone seized from an individual who has been arrested, and that the search incident to arrest exception does not apply. It is worth wondering whether the Riley decision should extend to cell phone searches by school officials.

G. Informants

It is not uncommon for school authorities to conduct a search after a student or a teacher has reported that a person is in possession of contraband. When a "full-blown" search is conducted, and, therefore, individualized suspicion is required, it appears, for instance, that a face-to-face report by a student who states that he or she has observed a named student in possession of a gun or drugs would be sufficient. See Matter of A.J.C., 355 Or. 552 (Or. 2014) (State constitutional school safety exception to warrant requirement supported principal's reasonable suspicion-based search of parts of juvenile's backpack that could contain a gun where school counselor had passed on to principal another student's report that juvenile had stated to her the night before that he was going to bring gun to school to shoot her and possibly other students); People v. Cartagena, 189 A.D.2d 67, 594 N.Y.S.2d 757 (1st Dept. 1993), lv denied 81 N.Y.2d 1012, 600 N.Y.S.2d 200 (reasonable suspicion justified frisk where man pointed to defendant during face-to-face conversation with officer and stated that he had seen defendant "brandishing" a gun); J.A.R. v. State, 689 So.2d 1242 (Fla. App., 2d Dist., 1997). Even in the absence of an allegation that the informant actually observed contraband, it appears that a face-to-face report by a student who alleges that a named suspect is in possession of contraband would also be sufficient, even if the informant could not later be identified. See Matter of Frankie M., 200 A.D.2d 479, 606 N.Y.S.2d 232 (1st Dept. 1994); People v. Harris, 175 A.D.2d 713, 573 N.Y.S.2d 280 (1st Dept 1991), lv denied 79 N.Y.2d 827, 580 N.Y.S.2d 208. In fact, it has been held that an anonymous tip that names a suspect can, under some circumstances, provide reasonable suspicion. See People v. Harry, 187 A.D.2d 669, 590 N.Y.S.2d 256 (2d

Dept. 1992), lv denied 81 N.Y.2d 789, 594 N.Y.S.2d 736 (1993) (stop and frisk was justified where anonymous tipster named defendant and stated that he was at a specified location with a gun).

Needless to say, a report by a teacher that a particular student has a gun or other contraband will ordinarily provide reasonable suspicion. Cf. Matter of Ronald B., supra, 61 A.D.2d 204. However, when the informant-teacher's source of information is entirely unknown, a challenge should be raised to the reliability of the report, and, as in cases involving the "fellow officer" rule [see, e.g., People v. Lypka, 36 N.Y.2d 210, 366 N.Y.S.2d 622 (1975)], it should be argued that reasonable suspicion cannot be demonstrated unless the informant-teacher or other school official is produced in court and testifies concerning the source of his or her belief that the student was in possession of contraband. See People v. Lee, 193 A.D.2d 529, 598 N.Y.S.2d 456 (1st Dept. 1993) (when issue was raised by defense counsel, People were required to establish source and nature of report from Philadelphia police that led to stop of defendant).

H. Metal Detectors

Although they are conducted in the absence of individualized suspicion, school metal detector searches fall into a general category of regulatory searches that are often upheld as reasonable law enforcement or security measures. In People v. Scott, 63 N.Y.2d 518, 483 N.Y.S.2d 649 (1984), the Court of Appeals, while upholding the use of a drunk driving roadblock, noted that "[t]he permissibility of a particular practice is a function of its 'reasonableness,' which is determined by balancing its intrusion on the Fourth Amendment interests of the individual involved against its promotion of legitimate governmental interests" [citations omitted]. 63 N.Y.2d at 525. Included in an analysis of such a practice is "the degree of discretion in the officials charged with carrying it out." Id.

Particularly in view of the compelling state interest in keeping guns out of the public schools, and the minimal intrusion involved in the mere scanning of a student or his or her possessions, it does not appear that the mere use of metal detectors to screen students entering a public school is vulnerable to constitutional attack. See

People v. Kuhn, 33 N.Y.2d 203, 209, 351 N.Y.S.2d 649, 653 (1973) (court upholds use of airport magnetometers, and notes that use of the device "involves a minimal intrusion requiring the traveler to simply walk through the device without any physical contact"); Bozer v. Higgins, 204 A.D.2d 979, 613 N.Y.S.2d 312 (4th Dept. 1994) (limited physical and electronic searches of persons entering courthouse are reasonable under Federal and State Constitutions); People v. Rincon, 177 A.D.2d 125, 581 N.Y.S.2d 293 (1st Dept. 1992), lv denied 79 N.Y.2d 1053, 584 N.Y.S.2d 1021; In re F.B., 726 A.2d 361 (Pa. 1999), cert denied 528 U.S. 1060, 120 S.Ct. 613 (school-wide metal detector scans and bag searches upheld); State v. J.A., 679 So.2d 316 (Fla. App., 3rd Dist., 1996), appeal denied 689 So.2d 1069 (1997), cert denied 522 U.S.831; People v. Pruitt, 662 N.E.2d 540 (Ill. App., 1st Dist., 1996), appeal denied 667 N.E.2d 1061 (random school metal detector searches upheld); People v. Spalding, 3 Misc.3d 1052, 776 N.Y.S.2d 765 (Crim. Ct., Bronx Co., 2004) (search of defendant's knapsack as he attempted to enter courthouse was proper); cf. Matter of Haseen N. supra, 251 A.D.2d 505 (court upholds administrative search involving patdown of students on Halloween in effort to prevent recurrence of prior Halloween incidents); Thompson v. Carthage School District, 87 F.3d 979 (8th Cir. 1996) (where school bus driver informed principal that there were fresh cuts on bus seats, and students told principal that there was a gun at school that morning, direction to all male students to take off their shoes and socks and empty their pockets was reasonable, minimally intrusive command). But see B.C. v. Plumas Unified School District, 192 F.3d 1260 (9th Cir. 1999) (dog sniff of student's person is search under Fourth Amendment, and, in absence of reason to believe there was drug problem in school, random and suspicionless search of student was unreasonable).

However, when school officials engage in more intrusive conduct after a student sets off or refuses to pass through a metal detector, or otherwise fails to voluntarily comply with procedures, the constitutional issues become more complex.

First of all, it is important to note that a student's awareness that a metal detector search will be done, and his or her conscious choice to bring contraband to school despite the elevated risk of getting caught, do not negate all privacy interests. The

authorities cannot neutralize privacy interests simply by providing notice that searches will be conducted. "The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped or that all homes would be searched." United States v. Davis, 482 F.2d 893, 905 (9th Cir. 1975). However, advance notice may affect the weight of the privacy interest, see In re F.B., supra, 726 A.2d 361 (students and parents were repeatedly warned that students would be arrested if they brought weapons or drugs to school); People v. Waring, 174 A.D.2d 16, 20, 579 N.Y.S.2d 425, 428 (2d Dept. 1992) (given longstanding practice of searching persons and luggage at airports, "it is difficult to see how anyone could assert a reasonable expectation of privacy in a package which is being brought onto an airplane or through an airport sterile area"), or result in a finding that a person impliedly consented to certain intrusions. See People v. Rincon, supra, 177 A.D.2d 125; United States v. Davis, 482 F.2d 893, 913 (9th Cir. 1973); People v. Spalding, supra, 3 Misc.3d 1052 (courthouse search). But see D.I.R. v. State, 683 N.E.2d 251 (Ind. Ct. App., 1997) (although student was aware of routine electronic wand searches, she did not impliedly consent to manual search conducted when she arrived late).

In People v. Dukes, 151 Misc.2d 295, 580 N.Y.S.2d 850 (Crim. Ct. N.Y. Co., 1992), the court upheld the use of a hand-held scanning device, and the subsequent recovery of a knife which was removed by the respondent upon request from a manila folder that was in a bag which had set off the device. The court concluded that the procedure was sustainable as an "administrative search." While recognizing that, unlike a student, an airport passenger who triggers a device remains free to leave and avoid a more intrusive search, the court nevertheless concluded that the governmental interest in school security justifies further intrusions. The court discussed in detail the Board of Education guidelines governing the use of metal detectors and found them "minimally intrusive" despite the fact that a student does not enjoy the right to terminate a search at any stage. While citing Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972), in which the Sixth Circuit upheld a regulation requiring all persons entering a federal courthouse to submit to a search of their briefcases and packages for explosives and other dangerous weapons, the court noted that "[a]n attorney, much like a student, has little

choice in the matter when an appearance in court is required." 151 Misc.2d at 300. However, the court in Dukes failed to mention that although the regulations upheld in Downing v. Kunzig state that those who refuse to permit a search cannot take the articles they carry into the building, those regulations do not prevent such persons from leaving the building without being subjected to a search. Except when the manner and circumstances surrounding a particular student's attempt to leave the school provide grounds to pursue and seize the student and then conduct a forcible patdown or search, it can be argued that a student who is not truant may leave the school without interference. Compare Spear v. Sowders, 71 F.3d 626 (6th Cir. 1995) (prison officials must give visitor option of aborting visit before conducting administrative body cavity search or detaining person while awaiting a warrant); People v. Parker, 672 N.E.2d 813 (Ill. App., 1st Dist., 1996) (defendant was illegally seized when officer stopped him as he was leaving school and told him he had to go through detector); Gadson v. State, 668 A.2d 22 (Md. 1995) (prison visitor had right to depart before detention and canine sniff) and United States v. Davis, *supra*, 482 F.2d 893 (airport screening is reasonable administrative search, but passenger must be allowed to choose not to fly) with United States v. Brugal, 209 F.3d 353 (4th Cir. 2000) (driver's decision, after passing drug checkpoint signs, to leave highway at exit where there was no activity contributed to reasonable suspicion); State v. Mack, 66 S.W.2d 706 (Mo. 2002) (driver's sudden exit at remote off ramp to avoid upcoming drug checkpoint justified stop).

Even assuming that security concerns justify the search of a bag that might contain a weapon, the search of the student's person involves more complex issues. First of all, in many cases it will not be clear that a student's removal of an object at an officer's "request" was genuinely consensual. In those cases, it will be possible to argue that the removal of the object constituted a search. See Doe v. Renfrow, 475 F. Supp. 1012, 1024 (N.D. Ind. 1979), remanded on other grounds 631 F.2d 91 (7th Cir. 1980), cert denied 451 U.S. 1022, 101 S.Ct. 3015 (1981). But see People v. Rincon, *supra*, 177 A.D.2d 125 (since defendant was forewarned by 2 clearly posted signs that he and his possessions would be searched before he could enter courthouse, defendant impliedly consented to search of paper bag removed from his waist pouch

after he initially set off detector and then passed through without his pouch and did not set off detector). It can also be argued that the activation of a metal detector, and the officer's touching of an object that "may have activated the ... device," do not constitute sufficient grounds to believe that a weapon is present. Thus, in view of the fact that the interdiction of weapons is the reason for metal detector scans, a forcible "search" of the student's pocket seems difficult to justify when the officer does not feel the shape of a gun or knife, or some other weapon or item of contraband. Indeed, in Matter of Gregory M. the Court of Appeals conceded that the metallic "thud" caused by the respondent's bag did not provide reasonable suspicion. See also Doe v. Renfrow, *supra*, 475 F. Supp. 1012. Moreover, just as a suspect's lawful refusal to comply with a police request ordinarily does not elevate the level of suspicion, a student's refusal to remove an item should not be viewed as a suspicious circumstance.

I. Random Drug Testing And Drug Dogs

Fourth Amendment analysis of random drug testing of students involves consideration of the privacy interest affected, the character of the intrusion, and the nature of the government's interest and the efficacy of the means chosen to further that interest. See Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 122 S.Ct. 2559 (2002) (random, suspicionless drug testing of all high school students participating in extracurricular activities did not violate Fourth Amendment); Vernonia School District v. Acton, 515 U.S. 646, 115 S.Ct. 2386 (1995) (school district's interest in preventing student athletes from using drugs justified random urinalysis drug testing of student athletes); Doe v. Little Rock School District, 380 F.3d 349 (8th Cir. 2004) (policy of conducting random, suspicionless searches of secondary students' persons and belongings without notice violated Fourth Amendment where fruits were regularly turned over to law enforcement authorities and only generalized concerns were cited); Theodore v. Delaware Valley School District, 836 A.2d 76 (PA, 2003) (policy authorizing random, suspicionless drug and alcohol testing of students seeking parking permits or participating in extracurricular activities satisfies State Constitution only if school district shows specific need); Joye v. Hunterdon Central Regional High School Board of Education, 826 A.2d 624 (N.J. 2003) (using Veronia

“special needs” analysis, court upholds, under State Constitution, high school’s random drug and alcohol testing program for all students who participate in athletic and non-athletic extracurricular activities, or who possess school parking permits).

Regarding drug dogs, see Burlison v. Springfield Public Schools, 708 F.3d 1034 (8th Cir. 2013), cert denied 134 S.Ct. 151 (no constitutional violation where school conducted drug dog exercise in which plaintiff and other students and teacher were instructed to leave room and leave personal items behind; there was proof of immediate need for drug dog procedure due to drug problem, separating students from property avoids potential embarrassment, ensures that students are not targeted by dogs, and decreases possibility of dangerous interactions between dogs and children, and plaintiff normally would not have been able to access or move backpack during class time without permission).

J. Strip Searches

In New Jersey v. T.L.O., the Supreme Court noted that "the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." 469 U.S. at 343. The extreme invasion involved in a strip search raises the bar and requires more justification than a typical search. See Safford v. Redding, 557 U.S. 364, 129 S.Ct. 2633 (2009) (although school officials were acting on reasonable suspicion that child had brought forbidden prescription and over-the-counter drugs to school, and search of backpack in child’s presence and in relative privacy of office was not excessively intrusive, nor was search of child’s outer clothing, Fourth Amendment was violated when child was told to pull bra out and to side and shake it and pull out elastic on her underpants, exposing her breasts and pelvic area; before search can “reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts,” there must be reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing); Byrd v. Maricopa County Sheriff’s Department, 629 F.3d 1135 (9th Cir. 2011) (cross-gender strip search of pretrial detainee unreasonable in absence of emergency or exigent circumstances); Kennedy v. Dexter Consolidated Schools, 955 P.2d 693 (N.M. 1998) (nude search requires at least individualized suspicion, while

requiring student to strip to undergarments does not always require such suspicion); Phaneuf v. Fraikin, 448 F.3d 591 (2d Cir. 2006) (uncorroborated tip from known informant regarding student's possession of marijuana did not justify strip search); State ex rel. Galford v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1992) (strip search was unreasonable where school officials suspected student of stealing \$100 from a teacher's purse). See also People v. Hall, 10 N.Y.3d 303, 856 N.Y.S.2d 540 (2008), cert den'd 129 S.Ct. 159 (strip search may be founded on reasonable suspicion that arrestee is concealing evidence underneath clothing and search must be conducted in reasonable manner; to advance to visual cavity inspection, police must have specific factual basis supporting reasonable suspicion that arrestee secreted evidence inside body cavity, visual inspection must be conducted reasonably, and, if object is visually detected or other information provides probable cause that object is hidden inside arrestee's body, warrant must be obtained before conducting body cavity search unless emergency situation exists).

K. School Official Acting As Police Agent

Although it was held in People v. Bowers, 77 Misc.2d 697, 356 N.Y.S.2d 432 (App. Term, 2d Dept. 1974) that a school security officer appointed by the Police Commissioner must be held to standards governing the police, more recent authority suggests that security officers with the New York City Board of Education's Division of School Safety are considered school employees for the purpose of school search rules. Commonwealth v. J.B., 719 A.2d 1058 (Pa. Super. Ct. 1999) (school security officers governed by reasonable suspicion standard unless acting at behest of law enforcement); cf. 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 (operations report made by security officers was not Rosario material). Indeed, in Matter of Gregory M. the search was conducted by school security officials. See also In re Randy G., 28 P.3d 239 (CA 2001); but see State v. Meneese, 282 P.3d 83 (Wash. 2012) (school search exception to warrant requirement not applicable to search conducted by fully commissioned, uniformed police officer acting as school resource officer; school search exception is designed for school teachers and administrators who have substantial interest in

maintaining discipline and must act swiftly, while SRO is law enforcement officer whose job involves discovery and prevention of crime).

In New York City, the Police Department's assumption of responsibility for school security may, under some circumstances, make it easier to argue for application of traditional search and seizure protections rather than the modified protection provided by New Jersey v. T.L.O. Compare In re Steven A., 308 A.D.2d 359, 764 N.Y.S.2d 99 (1st Dept. 2003) (reasonable suspicion standard applied to search by School Safety Officer, who was civilian employee of Police Department assigned exclusively to school security); Matter of Josue T., 989 P.2d 431 (NM Ct.App. 1999) (reasonableness standard applied to search, conducted upon request of school officials, by police officer assigned full-time to school as resource officer); People v. Dilworth, 661 N.E.2d 310 (Ill. 1996) ("liaison police officer," who worked full-time at a high school for students with behavioral disorders, was governed by T.L.O. standard); Wilcher v. State, 876 S.W.2d 466 (Tex. Ct. App., 1994) (court applies reasonable suspicion standard to search by police officer for school district); In re S.F., 607 A.2d 793 (Pa. Super. Ct., 1992) (court applies reasonable suspicion standard to search by plainclothes police officer for school district) and Matter of Ana E., 2002 WL 264325 (Fam. Ct., N.Y. Co.) (reasonable suspicion standard applied to search by School Safety Officer working under supervision of Police Department) with State v. Tywayne H., 933 P.2d 251 (N.M. App., 1997), cert denied 934 P.2d 277 (officers providing security for after-prom dance were governed by probable cause standard); In re A.J.M., 617 So.2d 1137 (Fla. Dist. Ct. App., 1st Dist., 1993) (probable cause required where it was officer who conducted search, although court notes that State did not argue that school resource officer was not an officer for purposes of the probable cause standard) and People v. Butler, 188 Misc.2d 48, 725 N.Y.S.2d 534 (Sup. Ct., Kings Co., 2001) (School Safety Officer employed by police improperly questioned defendant in absence of Miranda warnings).

However, if school officials conduct a search under circumstances in which it is clear that they were acting as agents of the police, the search must be tested against constitutional rules governing the police, including the warrant requirement and probable cause standard. Such an agency relationship would arguably exist when a

search is conducted pursuant to a policy developed by school authorities in conjunction with the police, or when the police have become actively involved in a particular case. Compare People v. Ray, 65 N.Y.2d 282, 491 N.Y.S.2d 283 (1985) (Bloomingdale's course of conduct in employing special police officer on premises to process arrests did not constitute government involvement requiring that store detective provide Miranda warnings before turning suspect over to authorities; "[t]he private surveillance, apprehension and questioning of defendant was in no way instigated by the special police officer or undertaken upon the official behest of a law enforcement agency" and "[d]efendant was neither identified as a suspect by the police nor questioned in the furtherance of a police-designated objective"); People v. Rodriguez, 135 A.D.3d 1181 (3d Dept. 2016) (child protective services worker not police agent where he was on task force that included law enforcement, but did not consult with law enforcement regarding plans to interview defendant and law enforcement was not present at interview); People v. Cooper, 99 A.D.3d 453 (1st Dept. 2012), lv denied 21 N.Y.3d 1003 (no police-dominated atmosphere where police apprehended defendant and turned him over to store personnel to permit them to perform store's routine administrative procedures, which included giving defendant notice that he was prohibited from entering store again; police had no vested interest in outcome of store's private procedures, which were not designed to elicit potentially inculpatory evidence, and were not involved with, and did not orchestrate or supervise, actions of store employees); In re K.S., 183 Cal.App.4th 72 (Cal. Ct. App., 1st Dist., 2010) (T.L.O. standard governed despite police role in providing information supporting school's search and presence of officers at search; while extent of police role in search will determine whether T.L.O. applies, so long as school official independently decides to search and then invites law enforcement personnel to attend search to help ensure safety and security of school, it would be unwise to discourage school official from doing so at least where it is reasonable to suspect that contraband inimical to secure learning environment is present); In re Tateana R., 64 A.D.3d 459, 883 N.Y.S.2d 476 (1st Dept. 2009), lv denied 13 N.Y.3d 709 (no custodial interrogation where dean's goal was to recover stolen iPod and officer provided minimal input and participation was directed at locating iPod, not obtaining

confession; even if there was state action, respondent was not in custody since dean's office ordinarily is not considered additional restraint for student who is not free to leave school without permission, and being summoned to dean's office is unpleasant but not unusual occurrence for student); In re Angel S., 302 A.D.2d 303 (1st Dept. 2003) (although fire marshals were present when principal conducted questioning, they did not prompt or have any input into the questioning) and People v. Hussain, 167 Misc.2d 146, 638 N.Y.S.2d 285 (Sup. Ct., Queens Co. 1996) (Child Welfare Administration caseworker was not police agent) with State v. Antonio T., 352 P.3d 1172 (N.M. 2015) (presence of law enforcement officer during assistant principal's questioning converted school disciplinary interrogation into criminal investigatory detention and triggered application of the statute requiring knowing, intelligent and voluntary waiver of Miranda rights before statement may be used against child in juvenile delinquency proceeding); N.C. v. Commonwealth, 396 S.W.3d 852 (Ky. 2013), cert denied 134 S.Ct. 303 (court suppresses un-Mirandized custodial statements made by juvenile in response to questions from school assistant principal, in presence of armed deputy sheriff assigned to high school as School Resource Officer, who had been with assistant principal when juvenile was taken out of class); People v. Rodas, 145 A.D.3d 1452 (4th Dept. 2016) (right to counsel violated where there was such a degree of cooperation between caseworker and police that caseworker acted as agent of police); People v. Slocum, 133 A.D.3d 972 (3d Dept. 2015) (child protective services caseworker acted as agent of police when she questioned defendant in jail; caseworker acknowledged that she worked closely with police in certain investigations and that officer was present in room as she was speaking with defendant); People v. Greene, 306 A.D.2d 639, 760 N.Y.S.2d 769 (3rd Dept. 2003), lv denied 100 N.Y.2d 594, 766 N.Y.S.2d 170 (2003) (CPS caseworker had agency relationship with law enforcement authorities given the common purpose of Family Violence Response Team, the cooperative working arrangement through the structure of the FVRT, and the understanding that incriminating statements obtained by CPS caseworker would be communicated to police agency); People v. Miller, 137 A.D.2d 626, 524 N.Y.S.2d 727 (2d Dept. 1988) (questioning of defendant by his mother

in presence of police was "pervaded by governmental involvement"); People v. Warren, 97 A.D.2d 486, 467 N.Y.S.2d 837 (2d Dept. 1983), appeal dismissed 61 N.Y.2d 886, 474 N.Y.S.2d 473 (1984) (chief of bank security was agent of police when he questioned defendant, who was handcuffed and surrounded by detectives) and People v. Crosby, 180 Misc.2d 43, 688 N.Y.S.2d 398 (Dist. Ct., Nassau Co., 1999) (police were present when store detective interrogated defendant).

It is immaterial that the idea for a search originated with school officials if the police subsequently played a role. See United States v. Knoll, 16 F.3d 1313, 1320 (2d Cir. 1994). The physical presence of a police officer during a search would obviously provide a good basis for the use of an agency analysis. Cf. People v. Miller, 137 A.D.2d 626, 524 N.Y.S.2d 727 (2d Dept. 1988) (questioning of defendant by his mother in presence of police was "pervaded by governmental involvement"); People v. Warren, 97 A.D.2d 486, 467 N.Y.S.2d 837 (2d Dept. 1983), appeal dismissed 61 N.Y.2d 886, 474 N.Y.S.2d 473 (1984) (chief of bank security was agent of police when he questioned defendant, who was handcuffed and surrounded by detectives); but see In re K.S., 183 Cal.App.4th 72 (Cal. Ct. App., 1st Dist., 2010) (T.L.O. standard governed despite police role in providing information supporting school's search and presence of officers at search; while extent of police role in search will determine whether T.L.O. applies, so long as school official independently decides to search and then invites law enforcement personnel to attend search to help ensure safety and security of school, it would be unwise to discourage school official from doing so at least where it is reasonable to suspect that contraband inimical to secure learning environment is present).

It can also be argued that an ongoing agency relationship has been created by the "Gun Free Schools Act" [see Educ. Law §3214(3)(d)], which requires that school officials notify the Family Court presentment agency whenever a student under 16 years of age is found with a firearm. Cf. State v. Helewa, 537 A.2d 1328 (N.J. Super., App. Div., 1988) (given child protection caseworkers' statutory obligation to report abuse and neglect to county prosecutor, un-Mirandized statement to caseworker during custodial interview is not admissible in criminal proceeding).

L. Search Outside School Premises

Although a student's flight from school during an investigation by school authorities might eliminate immediate security concerns, it may be that a school official can legally pursue the student and conduct a search outside school premises. See People v. Jackson, 65 Misc.2d 909, 319 N.Y.S.2d 731 (App. Term, 1st Dept. 1971), aff'd 30 N.Y.2d 734, 333 N.Y.S.2d 167 (1972) (where defendant had a bulge in his pocket and continually put his hand in the pocket and took it out, and "bolted" for the door while being escorted to the Coordinator of Discipline's office, the Coordinator was justified in chasing defendant and grabbing defendant's hand, resulting in the recovery of a set of "works"). See also J.P. v. Millard Public Schools, 830 N.W.2d 453 (Neb. 2013) (T.L.O. reasonableness standard not applicable to off-campus search of student's vehicle; T.L.O. standard applies only when search is conducted in furtherance of school's education-related goals while student is on school property or engaged in school-sponsored activities and under control of school); State v. Best, 987 A.2d 605 (NJ, 2010) (school administrators need only satisfy reasonable grounds standard, rather than probable cause standard, to search student's vehicle parked on school property); Commonwealth v. Williams, 749 A.2d 957 (Pa. Super. Ct., 2000), appeal denied 764 A.2d 1069 (2001) (school police officers had no authority to search interior of vehicle parked off of school property).

M. Arrest Of Student

The arrest of a student by a school security officer who has been designated a "special patrolmen" and, therefore, is a peace officer with full arrest powers under CPL §140.25, requires probable cause. In Matter of William J., 203 A.D.2d 144, 610 N.Y.S.2d 234 (1st Dept. 1994), the court found "probable cause" justifying detention of the respondent by security guards, but noted that there is "wider latitude" in the school context.

Moreover, according to CPL §140.30(1), which is made applicable in delinquency cases by FCA §305.1(1), a person who is not a police or peace officer may arrest a juvenile for a felony only when the juvenile "has in fact committed such felony," and for a misdemeanor when the juvenile "has in fact committed such offense in [the arresting

person's] presence." There is no reason why this provision should not apply to any school official when he or she physically restrains a student in a manner that would constitute an "arrest." Although it is true that school officials are labeled state actors when they search a student, that label has been used in a limited manner to justify application of constitutional protections. The fact remains that school officials are private persons to whom CPL §140.30(1) applies.

III. Arrest For Non-Crime

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.

IV. Detention Of Runaways

A. Statutory Authorization

Family Court Act §718 provides as follows:

(a) A peace officer, acting pursuant to his special duties, or a police officer may return to his parent or other person legally responsible for his care any male under the age of sixteen or female under the age of eighteen who has run away from home without just cause or who, in the reasonable opinion of the officer, appears to have run away from home without just cause. For purposes of this action, a police officer or peace officer may reasonably conclude that a child has run away from home when the child refuses to give his name or the name and address of his parent or other person legally responsible for his care or when the officer has reason to doubt that the name or address given are the actual name and address of the parent or other person legally responsible for the child's care.

(b) A peace officer, acting pursuant to the peace officer's special duties, or a police officer is authorized to take a youth who has run away from home or who, in the reasonable opinion of the officer, appears to have run away from home, to a facility certified or approved for such purpose by the office of children and family services, if the peace officer or police officer is unable, or if it is unsafe, to return the youth to his or her home or to the custody of his or her parent or other person legally responsible for his or her

care. Any such facility receiving a youth shall inform a parent or other person responsible for such youth's care.

In Matter of Terrence G., 109 A.D.2d 440, 492 N.Y.S.2d 365 (1st Dept. 1985), the First Department used a probable cause standard while determining whether the police were justified in detaining the respondent by escorting him to a Port Authority police room. The court concluded that the respondent's "presence in an area known to be a national gathering place for runaways, his admission that he was only fifteen years old and that he had come to New York from a distant state, and his inability or refusal to provide the police with a local address" supported a "reasonable opinion" that the respondent was a runaway. See also Matter of Marrhonda G., 81 N.Y.2d 942, 597 N.Y.S.2d 662 (1993) (runaway detention was supported by probable cause where respondent, who was traveling alone and acting nervous, lied about her age, could not produce identification, said her mother could not be contacted, and could not provide an address or phone number for a relative for whom she said she was waiting); In re Giselle F., 272 A.D.2d 83, 707 N.Y.S.2d 103 (1st Dept. 2000) (police had probable cause where respondent was unable to produce identification or recall where she had been recently, lacked familiarity with the area and had an odor of marijuana, her "boyfriend" admitted that they had been smoking marijuana together, and the officer was skeptical about the boyfriend's statement that he was living at respondent's parents' home); In re Shamel C., 254 A.D.2d 87, 678 N.Y.S.2d 619 (1st Dept. 1998) (detention proper where officer received conflicting stories about how respondent and his companion were related and what their destination was, and respondent was unable to produce identification); Matter of Michael J., 233 A.D.2d 198, 650 N.Y.S.2d 6 (1st Dept. 1996) (detention upheld where respondent, who looked about 15 and was alone at Port Authority Bus Terminal at about 10:30 p.m. on a school night, gave evasive answers to questions about name, destination, purpose and traveling companion); Matter of James J., 228 A.D.2d 167, 644 N.Y.S.2d 171 (1st Dept. 1996) (detention upheld given respondent's youthful appearance, confusion about destination, presence alone in Port Authority Bus Terminal, lack of identification and initial lie about being with mother); Matter of Marangeli M., 199 A.D.2d 189, 605 N.Y.S.2d 290 (1st Dept. 1993)

(runaway detention upheld where respondent, who appeared to be very young, was approached at Port Authority Bus Terminal and lied about her age, had no identification, and said she was "hanging out"); Matter of Mark Anthony G., 169 A.D.2d 89, 571 N.Y.S.2d 481 (1st Dept. 1991) (runaway detention upheld where respondent, who appeared youthful, was alone and glancing around in a vacant area of the Port Authority Bus Terminal at 12:30 a.m., had no luggage except a small bag draped over his arm, initially said he was with someone and then said he was traveling alone, said he was fifteen but could not produce identification, and did not respond initially when asked for his destination but then said he was going to Boston); Matter of Doris A., 145 Misc.2d 222, 546 N.Y.S.2d 310 (Fam. Ct. N.Y. Co., 1989), aff'd on other grounds 163 A.D.2d 63, 557 N.Y.S.2d 82 (1st Dept. 1990) (§718 requires some inquiry by officer concerning name, address and age prior to detaining juvenile); Matter of De Crosta, 111 Misc.2d 716, 444 N.Y.S.2d 999 (Fam. Ct., Columbia Co., 1981) (detention proper where respondent was hitchhiking while he was so intoxicated as to be incoherent).

B. Non-Custodial Questioning

By referring only to an officer's authority to "return" a child to his or her parent, and to "take the child . . . to a facility," §718 fails to provide standards governing an officer's authority to merely approach and question a suspected runaway in a manner that would constitute a level one or level two intrusion under the type of analysis applied to police activity in People v. DeBour, 40 N.Y.2d 210, 386 N.Y.S.2d 375 (1976). In Matter of Gisette Angela P., 172 A.D.2d 117, 120, 577 N.Y.S.2d 774, 775 (1st Dept. 1991), aff'd 80 N.Y.2d 863, 587 N.Y.S.2d 596 (1992), the court, while citing DeBour, implied that there are some controls on police behavior when it concluded that a detective at the Port Authority bus terminal "had the statutory authority and even the duty to approach and question an unaccompanied child in a location known to be frequented by truants and runaways and to have a high incidence of drug activity" [citations omitted]. Thus, it should be argued that a DeBour-type analysis must be used when a respondent challenges runaway-related police intrusions that fall short of a custodial detention, and that such lesser intrusions can be challenged when they are not justified by the circumstances.

C. Frisk And Search Of Runaway

In Matter of Terrence G., supra, 109 A.D.2d 440, the First Department held that, "[t]o ensure the safety of respondent, other detained runaways and themselves," the police were justified in conducting a patdown search of the respondent after taking him to a detention area. In Matter of Mark Anthony G., supra, 169 A.D.2d 89, the court held that, for the same reasons, the officers were entitled to "frisk" the respondent's bag by feeling the outside. Then, in Matter of Gisette Angela P., supra, 172 A.D.2d 117, the court, noting that "there is no theoretical distinction to be drawn between criminal and non-criminal detention," concluded that a full search was justified once the respondent was detained under §718. Id. at 120. The correctness of that ruling became unclear given the Court of Appeals' decision in Matter of Marrhonda G., supra, 81 N.Y.2d 942. While rejecting the use of a "plain touch" exception to the warrant requirement to justify the search of a bag after the respondent was taken into custody as a suspected runaway, the court noted that "[t]he officers could have justifiably searched the bag if ... respondent had been placed under arrest and the bag then searched as an incident thereto." 81 N.Y.2d at 945. Thus, although the court did not expressly rule on the propriety of a search conducted incident to a runaway detention, there is reason to believe that the Court of Appeals would not conclude, as did the First Department in Gisette Angela P., that a runaway detention is "theoretically" equivalent to an arrest. See also Matter of Gabriela A., 23 N.Y.3d 155 (2014) (restraint of PINS who has absconded is not same as criminal arrest and PINS who resists is not resisting arrest under Penal Law §205.30). The First Department did an about-face and ruled in Matter of Bernard G., 247 A.D.2d 91, 679 N.Y.S.2d 104 (1st Dept. 1998) that only a patdown may be done, and noted that previously it may have created the misleading impression that a runaway detention has the same Fourth Amendment implications as an arrest and that a full search is justified.

V. Detention Of Truants

A. Authority Of Police Officer

In Matter of Shannon B., 70 N.Y.2d 458, 522 N.Y.S.2d 488 (1987), the

respondent argued that, by granting the authority to detain suspected truants to attendance officers in Education Law §3213, the Legislature intended to withhold such authority from the police. The Court of Appeals rejected that argument and concluded that the police have the authority to detain truants. The court cited the general grant of authority in §435(a) of the New York City Charter.

B. Level Of Suspicion

Although the police must have probable cause to believe that a child is a runaway before detaining the child under FCA §718, there is not yet a clear rule in truancy cases. In Matter of Shannon B., *supra*, 70 N.Y.2d 458, the court rejected the respondent's argument that the person detaining the child must be certain the child is, in fact, a truant. The court found it sufficient that the respondent, an apparently school-age child, was on the street a half-block away from the nearest school during school hours, and was unable to give an explanation for her absence. See also Matter of Darnell C., 305 A.D.2d 405, 759 N.Y.S.2d 739 (2d Dept. 2003) (where officer approached respondent during school hours and respondent then resisted and committed acts constituting obstructing governmental administration, officer reasonably believed that respondent was truant); Matter of Michael C., 264 A.D.2d 842, 695 N.Y.S.2d 423 (2d Dept. 1999) (officer was entitled to approach respondent in order to return him to school when he observed respondent in public during school hours); Matter of D'Angelo H., 184 A.D.2d 1039, 584 N.Y.S.2d 699 (4th Dept. 1992), *lv denied* 80 N.Y.2d 758, 589 N.Y.S.2d 309 (detention upheld where respondent told officer he was late for school); Matter of Devon B., 158 A.D.2d 519, 551 N.Y.S.2d 283 (2d Dept. 1990) (stop justified where respondent was on street at 11:25 a.m.); People v. Garibaldi Fernandez, 2008NY070957, NYLJ, 3/27/09 (Crim. Ct., N.Y. Co.) (youth officer properly attempted to make inquiry under Education Law and common-law right of inquiry as to why defendant was not at school during school hours, and, when defendant failed to respond and ran away, officers had right to pursue and detain him). In Shannon B., the court rejected as unpreserved a claim that probable cause is required.

Given the existence of a probable cause requirement in runaway cases, and the absence of statutory guidelines for police behavior in the truancy context, it can

certainly be argued that probable cause is required. See Colon-Berezin v. Giuliani, 88 F.Supp.2d 272 (S.D.N.Y. 2000) (in §1983 action, court concludes that complaint adequately alleges that plaintiff was arrested for truancy without probable cause and that there exists a discriminatory policy of detaining minority students). In fact, the New York City Police Department's Procedure No. 215-07 provides that "[w]hen a minor, who reasonably appears to be over the age of six and less than eighteen, who is observed outside of school on a day of instruction *and it is ascertained that the minor is truant*" (emphasis supplied), the officer must take the minor into custody and deliver him/her to principal or his or her designee at the school attended, if known, or deliver the minor to the truancy intake site if the minor's school cannot be determined or it is impractical to return the juvenile to that school.

On the other hand, as in runaway cases, it seems clear that the police can approach and question a child based upon a lower level of suspicion. People v. Garibaldi Fernandez, 2008NY070957, NYLJ, 3/27/09 (Crim. Ct., N.Y. Co.); cf. Matter of Devon V., *supra*, 158 A.D.2d 519.

C. Frisk Of Truant

No court has suggested that the police can routinely search suspected truants after they are taken into custody. However, there is authority supporting a right to conduct a protective frisk. See Matter of D'Angelo H., *supra*, 184 A.D.2d 1039; see also NYPD Procedure No. 215-07 ("Truants may be frisked to ensure the uniformed member's safety. An electronic metal detector may be used for this purpose, if available").

VI. Detention Under Child Protection Laws

In Matter of Jose R., 201 A.D.2d 260, 607 N.Y.S.2d 23 (1st Dept. 1994), the First Department held that the police were entitled to take the respondent into protective custody under FCA §1024 after they repeatedly saw him alone during early morning hours on a street corner known for narcotics and weapons-related arrests. See also Matter of Jaime G., 208 A.D.2d 382, 617 N.Y.S.2d 13 (1st Dept. 1994) (officers were entitled to approach after respondent had twice ignored officers' warnings to leave a

dangerous neighborhood late at night). Although the court in Jose R. upheld a stationhouse frisk that was conducted after an officer noticed a bulge in the respondent's pants pocket, the court in no way suggested that a frisk is automatically justified, and, in fact, pointedly noted that prior to that time, the respondent had not been frisked, searched or handcuffed. Certainly, it cannot reasonably be argued that the police should be able to conduct a frisk whenever a child is taken into "protective" custody as a possibly neglected or abused child. But see In re J.O.R., 820 A.2d 546 (D.C. Ct. App., 2003), cert denied 540 U.S. 934, 124 S.Ct. 355 (2003) (officer may conduct full search when taking child into custody pursuant to court order).

The standard governing detentions under FCA §1024 is found in §1024(a)(i): a person must have "reasonable cause to believe that the child is in such circumstance or condition that his continuing in [his or her] place of residence or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health" It should also be noted that the person taking the child into custody must "bring the child immediately to a place approved for such purpose by the local social services department" In Matter of Jose R., supra, 201 A.D.2d 260, the child was taken instead to the precinct, a problem not discussed by the First Department.

VII. Curfews

In Anonymous v. City of Rochester, 13 N.Y.3d 35, 886 N.Y.S.2d 648 (2009), a Court of Appeals majority struck down Rochester's nighttime curfew for juveniles.

The curfew provided: "It is unlawful for minors to be in or upon any public place within the City at any time between 11:00 p.m. of one day and 5:00 a.m. of the immediately following day, except that on Friday and Saturday the hours shall be between 12:00 midnight and 5:00 a.m. of the immediately following day." A minor is defined as "[a] person under the age of 17 [but] [t]he term does not include persons under 17 who are married or have been legally emancipated." The curfew was inapplicable if the minor can prove that he/she "was accompanied by his or her parent, guardian, or other responsible adult"; "was engaged in a lawful employment activity or

was going to or returning home from his or her place of employment"; "was involved in an emergency situation"; "was going to, attending, or returning home from an official school, religious or other recreational activity sponsored and/or supervised by a public entity or a civic organization"; "was in the public place for the specific purpose of exercising fundamental rights such as freedom of speech or religion or the right of assembly protected by the First Amendment of the United States Constitution or Article I of the Constitution of the State of New York, as opposed to generalized social association with others"; or "was engaged in interstate travel." Under the curfew, a police officer "may approach a person who appears to be a minor in a public place during prohibited hours to request information, including the person's name and age and reason for being in the public place" and "may detain a minor or take a minor into custody based on a violation of [the curfew] if the police officer . . . reasonably believes that the [curfew has been violated] and . . . that none of the exceptions . . . apply." A violation of the curfew constituted a violation under the Penal Law.

The Court of Appeals held that the curfew violated the Federal and New York State Constitutions. First, the Court concluded that intermediate scrutiny, rather than strict scrutiny, applies. Although children have rights protected by the Constitution, they can be subject to greater regulation and control by the state than can adults. An unemancipated minor does not have the right to freely come and go at will, and juveniles, unlike adults, are always in some form of custody and their right to free movement is limited by their parents' authority to consent or prohibit such movement. Although parents have a fundamental due process right, in certain situations, to raise their children in a manner as they see fit, the ordinance is not directly aimed at curbing parental control over their children. The purpose of the juvenile curfew is, in part, to prevent victimization of minors during nighttime hours, and thus it easily falls within the realm of the government's legitimate concern.

Under intermediate scrutiny, defendants had to show that the ordinance was "substantially related" to the achievement of "important" government interests. Although City officials perceived a pressing need to respond to the problem of juvenile victimization and crime as a result of the tragic deaths of three minors, those incidents

would not have been prevented by the curfew. Although crime statistics show that minors are suspects and victims in roughly 10% of violent crimes committed between curfew hours, what the statistics really highlight is that minors are far more likely to commit or be victims of crime outside curfew hours and that it is the adults, rather than the minors, who commit and are victims of the vast majority of violent crime during curfew hours. The curfew imposed an unconstitutional burden on a parent's substantive due process rights. It failed to offer parents enough flexibility or autonomy in supervising their children. An exception allowing for parental consent to the activities of minors during curfew hours is of paramount importance to the due process rights of parents.

Judge Graffeo concurred because the law conflicted, in part, with Family Court Act. § 305.2, and the objectionable portion of the law could not be severed from the remainder. Section 305.2(2) specifies that a police officer “may take a child under the age of sixteen into custody without a warrant in cases in which he may arrest a person for a crime under article one hundred forty of the criminal procedure law.” The term “crime” includes only misdemeanors and felonies, not violations. Judge Graffeo rejected the City’s argument that the ordinance merely authorized “temporary detention,” not an arrest. “Semantics aside, the reality is that the ordinance permits a police officer to take custody of a minor, perhaps handcuff the offender, conduct a pat-down search (which could lead to the discovery of illegal contraband or a weapon), place the child in the back of a police car and transport the child to a detention facility. This . . . bears all of the hallmarks of a traditional arrest, not some short-term custodial intervention conducted solely for the safety and welfare of the child detained.”

VIII. Analyzing Law Enforcement-Juvenile Encounters Under DeBour

A. Generally

Charges involving possession of contraband are among the most difficult to defend at trial. Once a police officer testifies that he or she found drugs or a gun in the respondent's pocket, there is little the child's attorney can do. The respondent sometimes contends that the evidence was planted, but while a jury might believe that - - and only one trusting juror is needed for a mistrial -- judges are far more skeptical of

such claims. Thus, a case involving possession of contraband usually is won or lost at a suppression hearing, where the child's attorney at least has a fighting chance to convince the judge that the police violated the respondent's constitutional rights. In New York, the State Constitution, as interpreted by the Court of Appeals in People v. De Bour, 40 N.Y.2d 210 (1976) and later in People v. Hollman, 79 N.Y.2d 181 (1992), requires a 4-tiered analysis of street encounters. In order to provide effective representation when moving to suppress contraband and other fruits of these encounters, the child's attorney must study the DeBour analysis and the case law applying it, and also keep the analysis in mind when preparing for the hearing, cross-examining witnesses at the hearing, and making final argument.

B. Analyzing The Facts

The DeBour analysis divides police conduct into four levels of intrusion: a request for information, a common law inquiry, a stop/seizure, and an arrest. Police conduct at each level of intrusion must be justified by a certain quantum of information, or the conduct becomes illegal. Thus, as the child's attorney prepares for the suppression hearing, and as testimony is elicited at the hearing, the attorney should divide the known or anticipated facts into two categories: those that are relevant to the level of intrusion at each point during the respondent's encounter with police, and those that are relevant to the justification for each intrusion. (It goes without saying that pre-hearing discovery of this information is essential.) The facts relevant to the level of intrusion could include the use of physical force, spoken commands or threats, or the display of guns. The facts relevant to the justification for the intrusion might include the arresting officer's conversation with a witness, the contents of a radio call, the respondent's furtive conduct, flight, or false or evasive answers to inquiries.

The child's attorney next task is to focus on each category of facts, and construct lines of questioning designed to elicit additional facts supporting the defense theory. When considering the level of intrusion reached by police, the attorney should create a mental image of the scene, and of the events as they actually transpired, and, employing logic, common sense and imagination, determine what the officers might have -- or even better, must have -- been doing, and what the surrounding

circumstances and conditions could have been. At the hearing -- using leading questions and other sound cross-examination techniques -- the child's attorney should attempt to elicit only those additional facts that could help convince the judge that the police conduct was more intrusive than it might seem at first blush. For instance, if 3 officers approached the respondent and questioned him, the attorney would like to establish that the officers were close to and surrounding the respondent, that they spoke in a loud and intimidating manner, that they wore uniforms, badges and visible holsters, and that they had their hands on the holsters. If the police pulled up in their vehicle, the attorney would like to show that the vehicle blocked the respondent's path, that the vehicle's siren was on and its headlights flashing, and that several officers immediately and simultaneously exited the vehicle. If the officer claims that the respondent consented to a search of his bag, the attorney would want to demonstrate that the officer reached out his hand toward the bag as he made the request, and that the words he used -- such as "I'd like to look in your bag" or "I need to look in your bag, ok?" -- would not leave a typical juvenile free to refuse.

With respect to the justification for the police conduct, the child's attorney goal is to demonstrate that the facts cited by the police either have been fabricated or tailored to nullify constitutional objections, or are not as suspicious or probative as the police believed and/or the presentment agency contends. For instance, if the police claim that they stopped the vehicle because it ran a red light, the attorney should attempt to exploit inconsistencies in police paperwork, especially the absence of any mention of the traffic violation. If an officer claims to have clearly observed a hand-to-hand drug transaction from a distance while riding in a vehicle, the attorney would want to know how fast the vehicle was moving, whether the window through which the officer looked was open or closed, whether the officer had to turn around to observe or was looking past another officer, what the lighting conditions were, whether there was pedestrian or vehicular traffic in the area, and how close the individuals observed were to each other and in which direction they were facing. If an officer claims that he frisked the respondent because of a gun-like bulge in his waistband, the attorney would like to demonstrate that the clothing worn by the respondent did not permit such an

observation. If the police pursued the respondent because they believed he was fleeing from them, it would be relevant that the respondent was carrying a book bag and running toward a bus stop at which a bus was about to pull away.

C. Calling The Respondent And Other Defense Witnesses

It is accepted wisdom among defense attorneys that the client, especially when he or she is a juvenile, is likely to perform poorly on the stand and should not be called to testify unless there is no other way to win. Indeed, judges expect an individual accused of criminal behavior to fabricate an exculpatory story at trial, and know that, even if the story is inherently incredible and will break down under skilled cross-examination, constructing a story is easy to do. But the presumption against calling the client carries less force at a suppression hearing. As the judge well knows, a layperson -- and certainly an unsophisticated juvenile -- is not aware of the legal significance of particular police conduct during a street encounter, or of how to gain strategic advantage by characterizing that conduct in a certain way. More than that, when personal possession of contraband is charged the accused's testimony by necessity will include an admission that he or she possessed the contraband, and, for that reason, becomes more believable.

Because most judges know that police officers occasionally lie or shade the truth and there is a realistic possibility that the judge will credit defense witnesses, and because, under DeBour analysis, a small detail could change the result of the hearing, the child's attorney also should think expansively about calling other witnesses, even if they were not present at scene, to establish important facts. If the police deny "roughing up" the respondent, his mother -- or even better, a doctor or nurse -- could be called to testify about his injuries. An officer's testimony about lighting conditions, distances, and lack of obstructions, sometimes can be contradicted by disinterested witnesses. If the officer claims that he saw a waistband bulge, the respondent's mother -- backed up by the respondent's arrest photo -- could produce the clothing the respondent was wearing and a courtroom demonstration could be performed.

D. Constructing A Legal Argument

Both before and at the hearing, the child's attorney should attempt to predict the

fact-findings the judge will make at the close of the hearing, and then identify every point during the respondent's encounter with the police at which, counsel could argue, the police exceeded the scope of their authority. This analysis is performed most effectively when the attorney contemplates the encounter as though viewing a movie in frame-by-frame fashion. The analysis goes something like this: the attorney begins by identifying the moment when the police first engaged in acts constituting an intrusion under DeBour analysis, and then decides what level(s) of intrusion the judge could find it to be, and prepares an argument designed to persuade the judge that the intrusion was at the most elevated level. At the same time, the attorney examines the information possessed by the police at that moment in time, and determines whether an argument can be made that the police had insufficient grounds for the intrusion. The attorney then moves forward in time with the frame-by-frame, mind's eye viewing of the encounter, and identifies each moment when, it could be argued, the police intrusion graduated to another level. At the same time, the attorney continues to look for reasons why the intrusion should be placed at the most elevated level possible, and to scrutinize the facts known to the police, and then determine what legal arguments can be made.

The key moments identified by the child's attorney before the hearing -- there might be only one, or many -- may become inconsequential by the middle of the hearing as additional facts come to light. Arguments that looked good before the hearing may later become moot. The attorney must be prepared to adjust the analysis several times during the course of the hearing. By the end of hearing, there could be any number of key moments remaining, along with issues regarding witness credibility and the weight to be assigned certain evidence. Often the attorney must prepare a complicated argument, consisting of a series of alternative theories, which might sound something like this: "The accusatory police questioning of my client on the street constituted an illegal level two common law inquiry conducted in the absence of a founded suspicion that criminal activity was afoot, but if the court finds that it was only a level one request for information, suppression is still required since there was no articulable basis for the request. In any event, when the officer grabbed my client's arm as he tried to walk away, there was a level three seizure in the absence of reasonable suspicion. Even if

the court finds that it was not a seizure, or that there was reasonable suspicion, my client was subsequently arrested without probable cause when, after he demanded that the officer let him go, the officer threw him to the ground and handcuffed him."

E. Getting The Most Out Of The Case Law

When the respondent has been found in possession of contraband and the judge has no doubts concerning the respondent's guilt, the judge begins the hearing with a fervent desire not to order suppression. While the few defense-friendly judges are willing to order suppression whenever it is appropriate, most judges will order suppression only when it is clear that the police are lying, or when the risk of reversal on appeal seems especially high. The child's attorney should never assume that seemingly favorable facts and persuasive legal arguments will be enough: whenever possible, the attorney should walk into a suppression hearing with a pile of favorable appellate decisions. But it must be the right kind of case law. Decisions that merely trumpet constitutional principles, or burdens of proof and other legal standards, are of limited value, since the circumstances of each street encounter are different and it is easy for the judge to make factual distinctions. Thus, perhaps more than in any other type of case, the attorney must concentrate on finding cases -- there can never be too many -- with facts as close as possible to the case at hand.

Particularly when the issues are complex and there is a strong argument for suppression, the child's attorney also should consider requesting an opportunity to prepare a memorandum of law. Such a request has several potential advantages. It provides the attorney with an opportunity to research the law and carefully construct a legal argument. Transcripts can be ordered to assist counsel in preparing a statement of facts and in analyzing the testimony. As time goes by, the judge's natural reluctance to grant suppression might ebb, and a judge is always more willing to declare that a police officer, or any other witness, has been less than credible when the witness is not present in court.

CHAPTER TWO: CONFESSIONS BY JUVENILES

By: Gary Solomon

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After taking an alleged juvenile delinquent into custody, the arresting officer must follow certain procedures, the violation of which may require suppression of the child's statements.

I. Notification of Parent

After taking a child into custody, or obtaining custody of a child from a private person, the officer "shall immediately notify [the child's] parent or other person legally responsible for the child's care, or if such legally responsible person is unavailable the person with whom the child resides, that the child has been taken into custody." FCA §305.2(3). See In re Trayvon J., 103 A.D.3d 413 (1st Dept. 2013), lv denied 21 N.Y.3d 862 (no violation of §305.2 where police notified respondent's mother and stepfather and they were present, but detective permitted only mother to enter interview room; statute is satisfied when officer notifies one "parent or other person legally responsible"); People v. Robinson, 70 A.D.3d 728, 892 N.Y.S.2d 882 (2d Dept. 2010), lv denied 14 N.Y.3d 844 (no statutory violation where police immediately notified defendant's foster mother, and she declined to appear and designated someone in her place); Matter of Richard UU., 56 A.D.3d 973, 870 N.Y.S.2d 472 (3rd Dept. 2008) (statutory requirements satisfied when DSS caseworker, the person "legally responsible for respondent's care," was notified and present for administration of Miranda warnings); Matter of Donta J., 35 A.D.3d 740, 826 N.Y.S.2d 693 (2d Dept. 2006) (no error where respondent was questioned in absence of mother, and in presence of brother with whom he lived); Matter of Lawrence W., 77 A.D.2d 570, 429 N.Y.S.2d 731 (2d Dept. 1980) (statement made by respondent in presence of uncle, but before mother arrived, was admissible where respondent had close relationship with uncle and did not reside with mother); Matter of Abraham R., 22 Misc.3d 1138(A), 880 N.Y.S.2d 871 (Fam. Ct., Queens Co., 2009) (award of legal custody to mother in divorce judgment did not render father's presence at interrogation legally ineffective; there is no preference for child's custodial parent where parents do not reside together; however, "were evidence to establish that one parent unequivocally advised the police that the right to counsel was being invoked on the child's behalf and that the police then sought out the child's other parent in order to obtain a waiver of the child's rights, a

Court might very well be disinclined to find that the resulting statement was voluntary”); People v. King, 116 Misc.2d 614, 455 N.Y.S.2d 923 (Sup. Ct., N.Y. Co., 1982) (where defendant refused to see grandmother, aunt could be designated to act as surrogate); see also Miller v. State, 994 S.W.2d 476 (Ark. 1999) (police had no obligation to inform child of statutory right to speak to parent or guardian or have one present). An officer may not cede to other law enforcement officials his responsibility for making notification. See United States v. Juvenile, 229 F.3d 737 (9th Cir. 2000).

Compliance with this requirement may be excused when a juvenile suspect has lied to the police about his or her age. See People v. Salaam, 83 N.Y.2d 51, 607 N.Y.S.2d 899 (1993) (CPL, not FCA, applied where 15-year-old defendant told police he was 16 and showed a transit pass to prove it); People v. Styles, 208 A.D.2d 779, 617 N.Y.S.2d 785 (2d Dept. 1994), lv denied 84 N.Y.2d 1016, 622 N.Y.S.2d 927 (defendant deceived police into believing he was 16). See also People v. King, supra, 116 Misc.2d 614 (police reasonably believed defendant, who was about 6' 4" tall, was about 20 years old until they learned he was 15 when they took his pedigree).

The officer must "mak[e] every reasonable effort to give notice" FCA §305.2(4). Since the statute does not prescribe further action, such as questioning, until after it requires reasonable efforts to notify the parent, it has been held that any statement taken in the absence of reasonable efforts must be suppressed. Matter of Candy M., 142 Misc.2d 718, 538 N.Y.S.2d 143 (Fam. Ct. Ulster Co., 1989); Matter of Albert R., 121 Misc.2d 636, 468 N.Y.S.2d 825 (Fam. Ct. Queens Co., 1983). See also State v. Presha, 748 A.2d 1108 (N.J. 2000) (statements made by juveniles under the age of 14 are inadmissible unless parent was unwilling to be present or was truly unavailable); Matter of Raphael A., 53 A.D.2d 592, 385 N.Y.S.2d 288, 289 (1st Dept. 1976) (former FCA §724 "allows questioning of juveniles after every reasonable effort to notify their parents has been made" [emphasis supplied]); Matter of Williams, 49 Misc.2d 154, 267 N.Y.S.2d 91 (Fam. Ct. Ulster Co., 1966). Cf. Matter of Brian P. T., 58 A.D.2d 868, 396 N.Y.S.2d 873 (2d Dept. 1977) (statement suppressed where uncle was present, but parents were not notified). But see Matter of Stanley C., 116 A.D.2d 209, 500 N.Y.S.2d 445 (4th Dept. 1986), appeal dism'd 70 N.Y.2d 667, 518 N.Y.S.2d

959 (absence of notification is one of several relevant factors).

It appears that the statute has been satisfied when the parent has designated another family member to appear in his or her place. See In re Anthony L., 262 A.D.2d 51, 693 N.Y.S.2d 517 (1st Dept. 1999) (mother directed respondent's 18 and a half year-old sister to appear).

It is not clear what "immediate" notification entails. In People v. Castro, 118 Misc.2d 868, 462 N.Y.S.2d 369 (Sup. Ct., Queens Co., 1983), the court found insufficient the "delayed" attempts to contact the parent, which commenced a half hour after the officer arrived at the precinct with the juvenile). Even if the police need not arrange for notification immediately upon taking a child into custody on the street, see Matter of Emilio M., 37 N.Y.2d 173, 371 N.Y.S.2d 697 (1975) (respondent taken to precinct and mother notified without undue delay); 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 (1990) (child returned to scene for possible identification before arrest and notification), it should be argued that the police should make diligent efforts to insure that a child is alone in custody, particularly at a police station, for as little time as possible. See also United States v. C.M., 485 F.3d 492 (9th Cir. 2007) (federal immediate notification requirement violated where law enforcement waited until juvenile had been in custody for 6 hours); cf. United States v. Juvenile, supra, 229 F.3d 737 (notification statute violated where agents waited 4 hours after arrest before advising juvenile of Miranda rights).

Nor is there much guidance in the case law concerning the nature of the "reasonable effort" that is required. In People v. Coker, 103 Misc.2d 703, 427 N.Y.S.2d 141 (Sup. Ct., Bronx Co., 1980), the court held that the efforts to contact the defendant's mother were insufficient where the police called the number given by the defendant and received no answer, and later received busy signals. See also Matter of Raphael A., supra, 53 A.D.2d 592 (questioning in absence of parent upheld where police left messages for respondent's mother and waited two and a half hours for her to arrive). Given the importance of a child's right to the presence and advice of a parent during custodial interrogation, the "reasonable effort" requirement should be strictly

interpreted, and should include diligent efforts to locate and/or contact a parent who is not immediately available. See United States v. Juvenile, *supra*, 229 F.3d 737 (agents failed to notify Mexican consulate so that contact with parents could be facilitated).

Assuming that the police are able to contact the child's parent or guardian, what information must be provided? Read literally, the statute requires that the police merely give notification "that the child has been taken into custody." It seems appropriate that, if the parent is going to be unable to come to the police station, the parent should be informed that the child will be questioned, and perhaps should also be given Miranda warnings, see United States v. Doe, 170 F.3d 1162 (9th Cir. 1999), cert denied 528 U.S. 978, 120 S.Ct. 429 (agent violated federal statute requiring that parents be notified of rights when he failed to advise mother of son's Miranda rights over the phone), and be advised that she will be given the opportunity to advise and counsel the child before interrogation). United States v. Female Juvenile (Wendy G.), 255 F.3d 761 (9th Cir. 2001). But see People v. Bonaparte, 130 A.D.2d 673, 515 N.Y.S.2d 599 (2d Dept. 1987) (Miranda warnings not required during telephonic notification).

On the other hand, if the police have withheld information, or otherwise been deceitful in their contacts with the child's family, it could be argued that the police have violated the respondent's statutory rights. In Matter of Aaron D., 30 A.D.2d 183, 290 N.Y.S.2d 935 (1st Dept. 1968), the respondent was arrested at his home, and his mother was told that the police were investigating him in connection with a robbery and homicide, and "that she could come down to the station house, if she wished" 30 A.D.2d at 185. Although the mother requested that she be called as soon as the respondent arrived at the police station, she was not called, and the respondent was then interrogated. The court held that the "procedures of the officers, as mere token observance of [due process] requirements, were not reasonably calculated to secure the voluntariness and the validity of the statements." 30 A.D.2d at 186. Cf. Matter of William L., 29 A.D.2d 182, 287 N.Y.S.2d 218 (2d Dept. 1968), appeal dismissed 21 N.Y.2d 1005, 290 N.Y.S.2d 925 (statement suppressed where police arrested respondent at home and told his mother that there was information that her son was involved in a murder, and, when the mother asked if she could go to the police station, told her it was

not a serious matter and that her son would be home in an hour or two).

Without relying on FCA §305.2, it can be argued that a statement is involuntary when the police deliberately isolate a child from his or her family. See People v. Pughe, 163 A.D.2d 334, 557 N.Y.S.2d 167 (2d Dept. 1990) (defendant's mother was erroneously told that defendant was not at precinct, and was then told that he was there but that she did not have to come); People v. Ventiquattro, 138 A.D.2d 925, 527 N.Y.S.2d 137 (4th Dept. 1988) (15-year-old defendant's aunt, who accompanied him to the police station, and defendant's parents, who arrived later, were not allowed in interview room); People v. Hall, 125 A.D.2d 698, 509 N.Y.S.2d 881 (2d Dept. 1987) (father not told that defendant was being questioned, nor was defendant informed of father's phone call); People v. Bentley, 155 Misc.2d 169, 587 N.Y.S.2d 540 (Sup. Ct. Kings Co., 1992) (although mother was present, father, who knew nature of investigation, was falsely told that his wife and son were not at the precinct); People v. Coker, 103 Misc.2d 703, 427 N.Y.S.2d 141 (Sup. Ct. Bronx Co., 1980) (mother was not given true status of case or told that taped statement would be taken). But see People v. Salaam, supra, 83 N.Y.2d 51 (police not required to admit mother to interrogation where 15-year-old defendant claimed he was 16); People v. Insonia, 277 A.D.2d 819, 716 N.Y.S.2d 791 (3rd Dept. 2000), lv denied 96 N.Y.2d 735, 722 N.Y.S.2d 802 (2001) (no evidence that delay in contacting defendant was due to police deceit or trickery). If it appears that it is legal advice from which the police seek to isolate the child, there may be a violation of the child's right to counsel. See People v. Bevilacqua, 45 N.Y.2d 508, 410 N.Y.S.2d 549 (1978).

When notification has been made, and there is reason to believe the parent is coming, the police must postpone any interrogation for a reasonable time. See Matter of Marvin W., 105 Misc.2d 424, 432 N.Y.S.2d 342 (Fam. Ct. N.Y. Co., 1980). Cf. Matter of Raphael A., supra, 53 A.D.2d 592. But, if the parent is unwilling to appear, questioning may be permissible. See People v. Bonaparte, supra, 130 A.D.2d 673; People v. Ward, 95 A.D.2d 351, 466 N.Y.S.2d 686 (2d Dept. 1983); People v. Susan H., 124 Misc.2d 341, 477 N.Y.S.2d 550 (Sup. Ct. Bronx Co., 1984).

In People v. Fuschino, 59 N.Y.2d 91, 463 N.Y.S.2d 394 (1983), the Court of

Appeals held that the 19-year-old defendant did not effectively invoke his right to counsel when he made a request to call his mother. See also United States v. Franzen, 653 F.2d 1153 (7th Cir. 1981) (17-year-old prisoner's request to speak to father was not functional equivalent of request for attorney); but see In re H.V., 252 S.W.3d 319 (Tex. 2008) (sixteen-year-old juvenile invoked right to counsel when he stated to police that he "wanted his mother to ask for an attorney"); E.C. v. State, 623 So.2d 364 (Ala. Ct. Crim. App. 1992) (while juvenile's statement, "[M]y mama got a lawyer," was not, by itself, an invocation of the right to counsel, that statement, considered together with juvenile's immediately preceding answer, necessitated attempt to clarify whether juvenile wished to halt interrogation until his mother, and thereby a lawyer she could provide, was present).

However, a parent's unequivocal request for counsel does constitute an invocation of the juvenile's right to counsel. People v. Mitchell, 2 N.Y.3d 272, 778 N.Y.S.2d 427 (2004); Matter of Abraham R., 22 Misc.3d 1138(A) (any indication by mother that she wanted to speak to lawyer or desired counsel prior to further police contacts with respondent, or that she had a lawyer, was equivocal).

There is no requirement in the statute that the police cease questioning when the juvenile requests the presence of a parent. However, it can still be argued that where a statute provides a right to have a parent present during interrogation, a child's unequivocal request to speak to a parent must result in the cessation of questioning. Weaver v. State, 710 So.2d 480 (Ala. Ct. Crim. App., 1997) (after juvenile invoked right to communicate with parents, interrogation should have ceased until he had opportunity to speak with parents). Moreover, a juvenile may be able to argue that a request to speak with a parent constituted an invocation of the Fifth Amendment right to remain silent. See Draper v. State, 790 A.2d 475 (Del. 2001) (suspect may have invoked right to remain silent when he indicated that he did not wish to speak to police further until he spoke with mother); People v. Castro, supra, 118 Misc.2d 868.

II. Questioning the Child

A. Need for Questioning

An officer may question a child if the officer "determines that it is necessary" FCA §305.2(4)(b). This language, which has no counterpart in the CPL, suggests that children should not be questioned unless there exists a legitimate law enforcement purpose above and beyond the mere desire to buttress the case against the respondent. For instance, interrogation might be justified when another suspect is at large in the community, when a weapon or other contraband is unrecovered, or when the victim cannot be located. However, even assuming that the exigent circumstances need not be as compelling as those required by the public safety exception to the Miranda rule [see New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626 (1984); Matter of John C., 130 A.D.2d 246, 519 N.Y.S.2d 223 (2d Dept. 1987)], the "necessity" requirement is mere surplusage unless it is read to proscribe the routine and gratuitous interrogation of juveniles. Compare Matter of Louis D., 34 Misc.3d 427 (Fam. Ct., Kings Co., 2011) ("[b]y using the word 'necessary' the legislature clearly intended that there be a investigative need to question the juvenile, not that the officer merely finds it useful to do so") with In re Trayvon J., 103 A.D.3d 413 (1st Dept. 2013), lv denied 21 N.Y.3d 862 (interrogation not limited to exigent circumstances); In re Dominique P., 82 A.D.3d 478, 919 N.Y.S.2d 6 (1st Dept. 2011) (given seriousness and complexity of charges, it was "necessary" to take respondent to designated facility for questioning) and Matter of Chaka B., 33 A.D.3d 440, 822 N.Y.S.2d 514 (1st Dept. 2006) (police decision to interrogate was appropriate where there was need to determine whether respondent was engaged in joint criminal activity with armed companion).

B. Suitable Place for Questioning

When it is determined that questioning is "necessary," the officer "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 for a reasonable period of time" FCA §305.2(4)(b).

Each police precinct contains a facility designated as suitable for questioning pursuant to FCA §305.2(4)(b); it is commonly called the "juvenile room." It also appears that the police may question a child in an "annex" to the juvenile room. See Matter of

Bree J., 183 A.D.2d 675, 584 N.Y.S.2d 59 (1st Dept. 1992). Pursuant to the Uniform Rules for the Family Court, §205.20(f), a current list of all designated facilities is maintained by the appropriate administrative judge and is available for inspection. Section 205.20(d) provides that the facility should, inter alia, present an office rather than a jail-like setting; be clean and well-maintained; be well-lit and heated; have separate toilet facilities for children or otherwise insure the privacy and safety of the child; and have a separate entrance for children or otherwise minimize public exposure and mingling with adult detainees. When a female child is being questioned, a policewoman or other qualified female must be present.

The presentment agency has the burden of proving that a designated facility was, in fact, used. See Matter of Matthew M.R., 37 A.D.3d 1133, 830 N.Y.S.2d 420 (4th Dept. 2007) (evidence sufficient where court determined that room was on Office of Court Administration's list). The questioning of a child in a non-designated room may be grounds for suppression, particularly where it appears that the police have willfully or negligently violated the statute. Even where the police have made a good faith attempt to comply with the law, suppression may be appropriate if it appears that the facility actually used does not substantially conform to the prescription in Uniform Rules, §205.20(d). See Matter of Emilio M., supra, 37 N.Y.2d 173; In re Daniel H., 67 A.D.3d 527, 888 N.Y.S.2d 496 (1st Dept. 2009) (fact that respondent was briefly held in adult holding cell, without adult prisoners, and was questioned in room other than designated juvenile interview room, did not warrant suppression where office used for questioning was substantially similar to juvenile room and did not have coercive atmosphere, and respondent was permitted to speak privately with mother); People v. Ellis, 5 A.D.3d 694, 774 N.Y.S.2d 741 (2d Dept. 2004), lv denied 3 N.Y.3d 639, 782 N.Y.S.2d 410 (other room, which was a bright, office-like setting, chosen because juvenile interview room had been sealed off for fumigation to correct lice infestation); Matter of Jennifer M., 125 A.D.2d 830, 509 N.Y.S.2d 935 (3rd Dept. 1986) (no per se rule requiring suppression; statement made in store manager's office not suppressed); Matter of Luis N., 112 A.D.2d 86, 489 N.Y.S.2d 206 (1st Dept. 1985) (officers sought to comply with the law by asking desk sergeant for designated facility; case remitted for inquiry to "ascertain

whether the room contained detention facilities or was otherwise so overpowering in appearance as to make respondent's statement less than voluntary"); Matter of Anthony E., 72 A.D.2d 699, 421 N.Y.S.2d 566 (1st Dept. 1979) (statement made in sex crimes room suppressed); Matter of Abraham R., 22 Misc.3d 1138(A), 880 N.Y.S.2d 871 (Fam. Ct., Queens Co., 2009) (although statement made in place other than designated juvenile room, detective's testimony established that room utilized was non-threatening, office-like setting where there were no detention cells and no adult prisoners came into contact with respondent during interview process); Matter of Kenneth C., 125 Misc.2d 227, 479 N.Y.S.2d 396 (Fam. Ct. Kings Co., 1984) (suppression denied; room used was virtually identical to designated room).

Authorization for questioning at the child's home was added in 1987. Given the statutory scheme safeguarding a child's right to the presence of a parent during questioning, it can be argued that the police should offer transportation to the child's home for questioning whenever the parent or guardian is present at home, but cannot, for practical reasons, appear at the police station.

C. Miranda Warnings

A child "shall not be questioned pursuant to [§305.2] unless he and a person required to be notified pursuant to [§305.2(3)] if present, have been advised:

- (a) of the child's right to remain silent;
- (b) that the statements made by the child may be used in a court of law;
- (c) of the child's right to have an attorney present at such questioning; and
- (d) of the child's right to have an attorney provided for him without charge if he is indigent.

FCA §305.2(7). See Matter of Raphael M., 57 A.D.2d 816, 395 N.Y.S.2d 170 (1st Dept. 1977) (warnings not given to mother in Spanish); State v. Farrell, 766 A.2d 1057 (N.H. 2001) (child must be advised of possibility of prosecution as adult). Of course, prior to any questioning the police must elicit from the child an acknowledgment that he or she understands the Miranda rights and is nevertheless willing to talk. However, under appropriate circumstances an implied waiver can be found. See Berghuis v. Thompkins, 560 U.S. 370, 130 S.Ct. 2250 (2010) (where defendant remained mostly silent during

three-hour interrogation until, at the end, he said "yes" in response to detective's question about whether he prayed to God for forgiveness for shooting victim, there was implicit waiver of right to remain silent); People v. Sirno, 76 N.Y.2d 967 (1990); People v. Smith, 217 A.D.2d 221, 635 N.Y.S.2d 824 (4th Dept. 1995), lv denied 87 N.Y.2d 977, 642 N.Y.S.2d 207 (1996); In re Taariq B., 38 A.D.3d 395, 833 N.Y.S.2d 22 (1st Dept. 2007) (waiver found where respondent gave statement after he and mother initialed warnings card and mother stated that "they" wanted to speak to police).

Since a parent must be Mirandized only "if present," it has been held that warnings need not be given during a telephonic notification. See People v. Bonaparte, supra, 130 A.D.2d 673. The warnings may be given separately to the child and the parent. In re Taariq B., 38 A.D.3d 395 (no violation of statute where respondent received warnings before mother arrived). It does not appear that warnings must be read separately to the child and the parent when they are together. See People v. Richardson, 202 A.D.2d 227, 608 N.Y.S.2d 627 (1st Dept. 1994). It is unclear whether a separate waiver must be secured from the parent. Compare People v. Richardson, supra (parent must waive) with People v. McCray, 198 A.D.2d 200, 604 N.Y.S.2d 93 (1st Dept. 1993), lv denied 82 N.Y.2d 927, 610 N.Y.S.2d 179 (1994) (no waiver required) and People v. Vargas, 169 A.D.2d 746, 564 N.Y.S.2d 486 (2d Dept. 1991), lv denied 77 N.Y.2d 1001, 571 N.Y.S.2d 927.

Statements made by the child during private discussions with the parent prior to or during the interrogation are privileged. See Matter of Michelet P., 70 A.D.2d 68, 419 N.Y.S.2d 704 (2d Dept. 1979) (decided under former FCA §724). Cf. People v. Harrell, 87 A.D.2d 21, 450 N.Y.S.2d 501 (2d Dept. 1982), aff'd 59 N.Y.2d 620, 463 N.Y.S.2d 185 (1983) (parent-child privilege exists when minor in custody seeks guidance and advice of parent). The police must afford the child and parent the opportunity to communicate in private, or warn them that the statements may be repeated by any person who hears them, see People v. Harrell, supra, 87 A.D.2d 21, and the police may not attempt to use the parent to elicit an un-Mirandized statement. See People v. Miller, 137 A.D.2d 626, 524 N.Y.S.2d 727 (2d Dept. 1988) (mother acted as police agent when she questioned child).

In appropriate circumstances, the police may obtain a parent's voluntary consent to be absent from the actual questioning of the child. In Matter of Jimmy D., 15 N.Y.3d 417, 912 N.Y.S.2d 537 (2010), a 4-judge majority upheld the denial of suppression, but stated that special care must be taken to protect the rights of minors in the criminal justice system, and thus New York courts carefully scrutinize confessions by youthful suspects who are separated from their parents while being interviewed; that children may not fully understand the scope of their rights and how to protect their own interests, or appreciate the ramifications of their decisions or realize the importance of counsel, and if the child chooses to waive the Miranda rights, a parent can monitor the interrogation lest the police engage in coercive tactics; that a parent who is present at the location of a custodial interrogation by a police officer has a right to attend the interrogation, and may not be denied an opportunity to do so and should not be discouraged, directly or indirectly, from doing so, and the better practice is to inform the parent that he or she may attend the interview if he or she wishes; that a parent may choose not to be present, but the police should always ensure that the parent is aware of the right of access to the child during questioning; and that if a parent is asked to leave, the parent should be made aware that he or she is not required to leave. However, the majority noted, a confession obtained in the absence of a parent may be voluntary. In this case, the child and his mother had an opportunity to talk there when they were in the closed-door waiting room. The mother was present for the Miranda waiver that followed the reading of a version of the warnings that explains the rights in simple language, both agreed to questioning outside the mother's presence, and there is no evidence that the child asked for his mother during the questioning. See also In re A.W., 51 A.3d 793 (N.J. 2012) (detective's comments did not constitute impermissible suggestion that juvenile should ask father to leave, and father willingly and voluntarily left); State v. Q.N., 843 A.2d 1140 (NJ 2004) (no suppression required where mother voluntarily left room after questioning began); State v. Presha, 748 A.2d 1108 (N.J. 2000) (it is "difficult to envision prosecutors successfully carrying their burdens" when there has been a deliberate exclusion of the parent); In re Trayvon J., 103 A.D.3d 413 (1st Dept. 2013), lv denied 21 N.Y.3d 862 (no violation of §305.2 where detective

permitted mother, but not stepfather, to enter interview room); People v. Vargas, *supra*, 169 A.D.2d 746 (police complied with statute where they translated warnings into Spanish for mother, but did not translate the questioning); Matter of Valerie J., 147 A.D.2d 699, 538 N.Y.S.2d 307 (2d Dept. 1989) (non-custodial statement admitted despite absence of parents at time of questioning); Matter of Edwin S., 42 Misc.3d 595 (Fam. Ct., Queens Co., 2013) (failure of detective to facilitate consultation between respondent and mother prior to mother leaving room did not, by itself, require suppression); Matter of Ronald Y.Z., 10 Misc.3d 1067(A), 814 N.Y.S.2d 564 (Fam. Ct., Chemung Co., 2005) (mother voluntarily chose to be absent); but see Matter of P. G., 36 Misc.3d 463, 945 N.Y.S.2d 532 (Fam. Ct., Queens Co., 2012) (suppression ordered, and Matter of Jimmy D. distinguished, where mother agreed to let officer speak with respondent alone, but Jimmy D. was 13 while respondent was 10; Jimmy D. and mother had opportunity to talk while there was no evidence of conversation between respondent and mother; and Jimmy D. agreed to be questioned alone while respondent was never asked whether he would agree and right to waive presence of parent who is at precinct is personal to juvenile).

The law requires that a suspect be specifically told that he or she has a right to counsel during and perhaps even prior to questioning. See People v. Smith, *supra*, 217 A.D.2d 221; People v. DiLucca, 133 A.D.2d 779, 520 N.Y.S.2d 171 (2d Dept. 1987) (defendant not advised of right to attorney during and prior to questioning); Matter of Edwin S., 42 Misc.3d 595 (given respondent's age, and questioning in mother's absence after detective failed to afford them opportunity to consult after Miranda warnings, NYPD simplified juvenile warning was likely to be interpreted by respondent as referring to right to attorney in future where warning stated: "If you cannot afford an attorney, one will be provided for you without cost. Simplified: That means if you want a lawyer but do not have the money to pay for one, the court will give you a lawyer for free"). See also Florida v. Powell, 559 U.S. 50, 130 S.Ct. 1195 (2010) (Miranda requirement that individual be "clearly informed" that he has "the right to consult with a lawyer and to have the lawyer with him during interrogation" was satisfied where defendant was advised that he had "the right to talk to a lawyer before answering any of

[the officers'] questions" and that he could invoke that right "at any time ... during th[e] interview"); Duckworth v. Eagan, 492 U.S. 195, 109 S.Ct. 2875 (1989) (where police told defendant he had right to presence of attorney before and during questioning, warnings were not defective despite additional statement that attorney will be appointed "if and when you go to court").

Moreover, bare warnings may be inadequate in cases involving very young and/or mentally impaired children. In Matter of Chad L., 131 A.D.2d 760, 517 N.Y.S.2d 58 (2d Dept. 1987), the court suppressed a statement made by a ten-year-old child who, according to expert testimony, did not have the capacity to knowingly and intelligently waive his rights. The court noted that the Miranda rights "were read perfunctorily ... from a standard police card," and that, in an appropriate case, the court might "require an extra effort to assure that the rights are explained in language comprehensible" to a child. 131 A.D.2d at 762. See State v. DeAngelo M., 360 P.3d 1151 (N.M. 2015) (under state law, children fifteen and older treated as having intellectual and developmental capacity to waive rights; statements by children younger than thirteen precluded in all circumstances because Legislature decided that such children lack maturity to understand rights and force of will to assert those rights; and statement by child thirteen or fourteen years old presumed to be inadmissible unless State rebuts presumption by clear and convincing evidence which must include evidence that interrogator invited child to explain actual comprehension and appreciation of each Miranda warning); People v. Williams, 62 N.Y.2d 285, 476 N.Y.S.2d 788 (1984) (waiver by 20-year-old functionally illiterate, borderline retarded defendant was valid where detective described rights in more detail and simpler language; but court notes that distinctions in level of comprehension based on intelligence normally are not relevant and that test is whether defendant understands the "immediate meaning" of the warnings); In re Steven F., 127 A.D.3d 536 (1st Dept. 2015) (suppression denied despite evidence of respondent's difficulties with comprehension in school; detective had respondent state and write that he understood each warning before proceeding to next one, failure to read from juvenile version of Miranda warnings containing supplemental explanations did not render waiver

involuntary); Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011), cert denied 132 S.Ct. 414 (Miranda warnings were defective because detective downplayed warnings' significance by emphasizing that juvenile should not "take [the warnings] out of context"; implied that warnings were just formalities; assured juvenile repeatedly that detectives did not necessarily suspect him of wrongdoing; misinformed juvenile about right to counsel by deviating from juvenile Miranda form and ad libbing that juvenile had right to counsel if he was involved in a crime; and stated that warnings were for benefit of juvenile and officers, which carried different connotation than if detective had given juvenile straightforward explanation that warnings were given for juvenile's protection, to preserve valuable constitutional rights); People v. Laybault, 227 A.D.2d 773, 641 N.Y.S.2d 918 (3rd Dept. 1996) (16-year-old defendant, who had IQ of between 55 and 70, did not knowingly waive rights where they were not explained "at a level, due to his limited intelligence, which he could comprehend"); People v. Orlando LL., 188 A.D.2d 685, 591 N.Y.S.2d 211 (3rd Dept. 1992), lv denied 81 N.Y.2d 845, 595 N.Y.S.2d 744 (1993) (waiver valid where handicapped 18-year-old was given rights "in [their] simplest form"); Matter of Julian B., 125 A.D.2d 666, 510 N.Y.S.2d 613, 617 (2d Dept. 1987) (court refuses to hold that a child of tender age is incapable per se of understanding rights); United States v. Male Juvenile, 121 F.3d 34 (2d Cir. 1997) (no proof that 16-year-old defendant, who had host of attentional and learning disabilities, was incapable of knowing waiver); State v. Farrell, supra, 766 A.2d 1057 (rights must be explained to juvenile in simplified fashion); Matter of B.M.B., 955 P.2d 1302 (Kansas 1998) (court establishes per se rule requiring presence of parent, guardian or attorney before juvenile under age of 14 may effectively waive rights); In re W.C., 657 N.E.2d 908 (Ill. 1995) (13-year-old, who was functioning at level of 6 or 7-year-old, had capacity to understand simplified warnings); In re S.H., 293 A.2d 181 (N.J. 1972) (recitation of warnings to 10-year-old "even when they are explained is undoubtedly meaningless"); Matter of Akeem Z., NYLJ 1202479245990 (Fam. Ct., N.Y. Co., 2011) (court rejects twelve-year-old respondent's argument that detective's reading of juvenile Miranda warnings was perfunctory and insufficient); Matter of Abraham R., 22 Misc.3d 1138(A), 880 N.Y.S.2d 871 (Fam. Ct., Queens Co., 2009) (although respondent was only ten,

totality of circumstances established valid waiver); Matter of Ronald Y.Z., *supra*, 10 Misc.3d 1067(A) (8-year-old knowingly and voluntarily waived Miranda rights after officer paraphrased warnings in simplified terms). The court in Matter of Julian B., *supra*, 125 A.D.2d 666 cited a model for simplified warnings found in Nissman, Hagen, Brooks, Law of Confessions, §6:13, at p. 174:

"Table 6-4" Juvenile Miranda Rights

"1. You have the right to remain silent. That means you don't have to say anything.

"2. Anything you say can and will be used against you in a Court of Law. That means what you say or write can be used to prove what you may have done. Do you understand that? Any questions?

"3. You have the right to talk to a lawyer and have the lawyer present with you while you are being questioned. That means that a lawyer can be with you at all times and the lawyer may tell you what the lawyer wants you to do or say. Do you understand that? Any questions?

"4. If you want an attorney, and you cannot afford to hire an attorney, one will be appointed to represent you before any questioning. That means the cost of having an attorney will be paid by someone else if you cannot pay for it. Do you understand this? Any questions?

"5. Without your parents agreement, you cannot give up your right to have a lawyer with you and advise you during questioning. Your parents must agree in writing. Do you understand this? Any questions?

"6. You can refuse to answer any or all questions at any time, or choose at anytime to have a lawyer with you during further questioning. Do you understand that I have to stop talking to you anytime you say you want to stop and wait for a lawyer. Any questions?

"Waiver of Rights

"I have read my rights as listed above. I understand each of them. I have been asked if I have any questions and I do not have any. I am, right now, willing to give a statement and answer questions and give up my right to have a lawyer present. No promises or threats have been made to me to make me give up my rights. I understand I may change my mind at any time and say I want my rights if I choose.

125 A.D.2d at 671-672, n. 3.

In his article, The assessment of competency to waive Miranda rights, 9 Journal

of Psychiatry and Law 209 (1981), Dr. James Wulach notes that, "[i]n the New York version of the Miranda statements, such words as 'right,' 'remain,' 'silent,' 'refuse,' 'consult,' 'attorney,' 'afford,' 'provided,' and 'opportunity' may cause the most difficulty." Id. at 214. And, after discussing research on the subject, Dr. Wulach declared that "[o]ne could reasonably infer from these documented norms that a [juvenile] must, at a minimum, be able to perform at the level of an 11-year-old fifth grader in the area of verbal comprehension in order to understand the Miranda warnings." Id. at 217. See also Thomas Grisso, Juvenile's Capacities to Waive Miranda Rights: An Empirical Analysis, 68 Cal. L.Rev. 1134 (1980).

The New York Police Department now uses a special form, *Miranda Warnings For Juvenile Interrogations*, PD 244-1413 (7-08), which states:

1. You have the right to remain silent and refuse to answer any questions. That means that you don't have to say anything to me. Do you understand?
2. Anything you say may be used against you in a court of law. That means that we can tell the court what you say or write to prove what you may have done. Do you understand?
3. You have the right to consult an attorney before speaking to the police (or the prosecutor) and to have an attorney present during any questioning now or in the future. That means that you can talk to a lawyer before I ask you any questions and your lawyer can be with you when I ask you any questions. Do you understand?
4. If you cannot afford an attorney, one will be provided for you without cost. That means that if you want a lawyer but do not have the money to pay for one, the court will give you a lawyer for free. Do you understand?
5. If you do not have an attorney available, you have the right to remain silent until you have had the opportunity to consult with one. That means that if you want a lawyer but a lawyer is not here right now, we will wait to speak with you until a lawyer can get here. Do you understand?
6. Now that I have advised you of your rights, are you willing to answer questions?

The form includes a space for the juvenile to place his/her initial signifying a response of yes or no to each question, and for the signature of the juvenile and his/her parent.

The problems associated with juveniles' comprehension of Miranda warnings

also are clearly recognized in 18 USC §5033, which provides that, whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer must immediately give the rights “in language comprehensive to a juvenile”

Finally, it should be noted that in Matter of Chad L., *supra*, 131 Misc.2d 965, *aff'd* 131 A.D.2d 760, Dr. Wulach also supported the respondent's claim that his unwarned statement was the product of custodial interrogation. Dr. Wulach "testified that the average 10-year-old child, under the circumstances of the described back-bedroom questioning by police, would be incapable of perceiving that he had a right to leave the presence of the police or that he could refuse to answer the questions. Dr. Wulach explained: `Rather, he would have perceived such a situation as subjectively coercive, one in which adult authority figures with considerable power were demanding answers that he, if he was to be an obedient child, would have to respond to.'" 131 Misc.2d at 967. Thus, the age and maturity of the child are relevant not only when the child's ability to make a knowing and intelligent waiver is at issue, but also when the prosecution claims that Miranda warnings were not required because the respondent was not in custody. Compare Matter of Delroy S., 25 N.Y.3d 1064 (2015) (11-year-old respondent in custody where his sister told police that respondent had been bullied by the complainant and stabbed him; sister took officers to respondent's apartment; and, inside, officer asked respondent "what happened?"); A.M. v. Butler, 360 F.3d 787 (7th Cir. 2004) (juvenile in custody where he was questioned for almost 2 hours in closed room with no parent present and had no way to get home, and detective "was close enough to touch" him and told him he was lying); In re Ricardo S., 297 A.D.2d 255, 746 N.Y.S.2d 707 (1st Dept. 2002) (respondent in custody when questioned by 3 officers, even though it was in respondent's home); People v. Laybault, *supra*, 227 A.D.2d 773 (defendant in custody while questioned after mother honored police request to bring him in); Matter of Robert H., 194 A.D.2d 790, 599 N.Y.S.2d 621 (2d Dept. 1993), *lv denied* 82 N.Y.2d 658, 604 N.Y.S.2d 557 (respondent in custody after he told officer a friend had been shot by accident while respondent and friends were passing gun around, and then took officer to body), Matter of Robert P., 177 A.D.2d 857, 576 N.Y.S.2d 626 (3rd Dept. 1991) (respondent in custody after being awakened and

"asked" to go to precinct), People v. Alaire, 148 A.D.2d 731, 539 N.Y.S.2d 468 (2d Dept. 1989) (sixteen-year-old chronic schizophrenic with borderline-retarded intelligence was in custody); People v. Hall, supra, 125 A.D.2d 698 (fifteen-year-old defendant was in custody during one-hour interrogation in small room at neighbor's home by three officers who made him repeat story and pointed out flaws) and Matter of Vincent R., 14 Misc.3d 760, 831 N.Y.S.2d 853 (Fam. Ct., Richmond Co., 2006) (respondent in custody when questioned in presence of mother by Fire Marshal where he had been detained in police vehicle and separated from mother for at least one hour and 15 minutes)

with In re D.L.H., 32 N.E.3d 1075 (Ill. 2015) (9-year-old respondent who was functioning in borderline mentally retarded range with full scale IQ of 78 and was, prior to suppression hearing, found unfit to stand trial, was not in custody when questioned about death of 14-month-old brother at respondent's home at kitchen table where plainclothes detective was only officer present; respondent's father was present; each interview lasted between 30 and 40 minutes; detective adopted conversational tone and, prior to first interview, asked respondent and father permission to ask questions; and detective knew respondent's age but was unaware of mental deficits); In re Angel S., 302 A.D.2d 303, 758 N.Y.S.2d 606 (1st Dept. 2003) (respondent not in custody when questioned by school principal in presence of fire marshals; office setting did not impose restraint beyond ordinary condition of student who is required to attend school); In re Renette B., 281 A.D.2d 78, 723 N.Y.S.2d 31 (1st Dept. 2001), appeal after remand 309 A.D.2d 568, 765 N.Y.S.2d 507 (1st Dept. 2003), lv denied 1 N.Y.3d 507, 776 N.Y.S.2d 23 (2004) (respondent, whose baby was either born dead or died shortly thereafter, was not in custody where her cousin had called police and her grandaunt invited them in and sat with respondent throughout the inquiry; there was no apparent homicide, and the detective merely asked respondent to explain and clarify the situation as part of initial investigation; respondent chose to be in bedroom and on bed, so presence of baby's body could not have been subtle means of overcoming respondent's will; and, although there was large police presence, the other officers were out of the room, out of sight and possibly even out of hearing); Matter of Philip J., 256

A.D.2d 654, 683 N.Y.S.2d 293 (3rd Dept. 1998) (respondent not in custody when questioned in his home after receiving Miranda warnings); Matter of Joshua L., 220 A.D.2d 256, 632 N.Y.S.2d 77 (1st Dept. 1995) (respondent not in custody after 4 plainclothes officers came to his home, his mother woke him up, his father told him to get dressed to go to the precinct, he rode in the police car with his father, and they were taken to the juvenile room); Matter of Valerie J., supra, 147 A.D.2d 699 (respondent not in custody where she was told that she was free to leave and was allowed to leave after questioning) and Matter of Ojore F., 176 Misc.2d 796, 673 N.Y.S.2d 993 (Fam. Ct., Kings Co., 1998) (respondent not in custody where he and his mother agreed to go to Brooklyn Children's Advocacy Center, which was a child-friendly location, but respondent was in custody after he made inculpatory statement and was then questioned in an accusatory manner); see also J. D. B. v. North Carolina, 131 S.Ct. 2394 (2011) (age of child subjected to police questioning is relevant to determination of whether child is in custody; so long as child's age was known to officer at time of questioning, or would have been objectively apparent to reasonable officer, its inclusion in custody analysis is consistent with objective nature of test); United States v. Ricardo D., 912 F.2d 337 (9th Cir. 1990) (juvenile was under arrest when questioned in patrol car).

D. Voluntariness of Statement or Waiver; Closer Scrutiny of Statement by Juvenile

A statement to a law enforcement officer is "involuntary" if it is obtained "by means of any promise or statement of fact, which ... creates a substantial risk that the respondent might falsely incriminate himself" FCA §344.2(2)(b)(i). But see People v. Thomas, 22 N.Y.3d 629 (2014) (constitution prohibits receipt of coerced confessions that are probably true). A statement to any person is involuntary if it results from the use or threatened use of force or any other improper conduct or undue pressure which overcomes the child's will. FCA §344.2(2)(a). See generally, Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860 (1961); but see Matter of Cy R., 43 A.D.3d 267, 841 N.Y.S.2d 25 (1st Dept. 2007) (no suppression where complainant, who was respondent's cousin and a retired detective, approached respondent along with police

sergeant and threw respondent up against fence and demanded to know location of his guns, yelled, cursed and threatened respondent, and continued to berate respondent and demand whereabouts of guns after respondent was arrested, until respondent stated "Relax, I'll tell you where the guns are"; court notes that, particularly when statements are made to relative, distinction must be drawn between true threat of violence and mere hyperbole).

Coercive or deceptive police behavior [see People v. Thomas, 22 N.Y.3d 629 (noting that constitution prohibits receipt of coerced confessions that are probably true, Court of Appeals suppresses statement where police threatened that if defendant continued to deny responsibility, his wife would be arrested and removed from victimized child's bedside; police stated falsely some 21 times that defendant's disclosures were essential to assist doctors attempting to save child's life; and police told defendant 67 times that what had been done to his son was an accident, told him 14 times that he would not be arrested, and told him 8 times that he would be going home if he told all)], trickery, promises of favorable treatment, and other factors must be scrutinized closely in the case of a child. See Dassey v. Dittman, 860 F.3d 933 (7th Cir. 2017) (state court failed to use "special caution" in assessing voluntariness where it listed age, education and IQ, but never evaluated those factors; never evaluated or assessed how interrogation techniques affected voluntariness of intellectually challenged juvenile's confession; did not consider petitioner's suggestibility or discuss fact that he was unrepresented and without parent's assistance, or consider whether low IQ and learning disabilities may have affected how he interpreted interrogators' statements; never evaluated capacity to understand warnings, nature of Fifth Amendment rights, and consequences of waiving rights; and ignored signs that petitioner was trying to please interrogators and avoid conflict, and pattern of fact-feeding linked to promises).

For instance, although a police promise or suggestive hint that an adult suspect's cooperation will be rewarded is usually not grounds for suppression, see, e.g., People v. Weisbrot, 124 A.D.2d 762, 508 N.Y.S.2d 481 (2d Dept. 1986), the same is not true when children are involved. In People v. Ward, supra, 95 A.D.2d 351, an officer stated

to the 15-year-old defendant that "[t]here is a complainant who is stating the fact that you committed a certain crime, and if you are willing to talk to me about it or tell me your participation ... I will see that it will be handled fairly." Id. at 352. While concluding that this implied promise constituted improper encouragement and inducement, albeit subtly employed, the court noted that a 15-year-old "should not be judged by the more exacting standards of maturity [citations omitted]." Id. at 353. See also In re D.L.H., 32 N.E.3d 1075 (Ill. 2015) (statement by 9-year-old respondent who was not in custody was involuntary where respondent was later found unfit to stand trial and could not possibly have understood Miranda warnings; and detective marginalized respondent's father by moving him away from table, seized on respondent's fear that someone else in family would go to jail, rejected respondent's repeated denials and made it plain that anything less than an admission was unacceptable, and downplayed significance of an admission by stating that whatever happened was an accident or mistake and that everybody makes mistakes, including the detective); but see Matter of Jimmy D., 15 N.Y.3d 417, 912 N.Y.S.2d 537 (2010) (child was doubtless tired but there was no evidence that he asked for food or water and was denied it, and detective's promise of "help" did not give rise to substantial risk that child might falsely incriminate himself; there is no attraction in making false confession and receiving psychiatric assistance relating to crime one did not commit); In re Steven F., 127 A.D.3d 536 (1st Dept. 2015) (detective's interrogation tactics, such as confronting respondent with incriminating evidence and expressing disbelief in respondent's initial account, were not improper); Ortiz v. Uribe, 671 F.3d 863 (9th Cir. 2011), cert denied 132 S.Ct. 1811 (polygrapher's empathic and maternal manner with eighteen-year-old habeas petitioner - she told him she loved him, offered hug, compared him to her sons, and stated, "I can get you through this ... I know what I'm doing" - and statements that may have suggested she was not a law enforcement officer, statements suggesting that if petitioner was telling truth and was in fact innocent, she could help him get cleared, and statements reminding petitioner of his obligation to family to tell the truth and that his children were counting on him to do the right thing, did not render petitioner's confession involuntary); In re Dominique P., 82 A.D.3d 478, 919 N.Y.S.2d 6 (1st Dept. 2011) (delay in

commencing questioning was reasonable in light of time consumed in obtaining presence of Children's Village employees, and length of interrogation was reasonable in light of large number of burglaries and need to conduct canvass in which respondent identified locations he burglarized); United States v. Male Juvenile, *supra*, 121 F.3d 34 (court rejects defendant's claim that statement was not voluntary because agents tricked him by stating that he was not in trouble and could return home that night); Matter of Akeem Z, NYLJ 1202479245990 (Fam. Ct., N.Y. Co., 2011) (detective's offer of mental health or other supportive services did not give rise to substantial risk that respondent might falsely incriminate himself).

Psychological pressures which would not overcome the will of an adult may well render involuntary the statement of a child. In People v. Ward, *supra*, 95 A.D.2d 351, the defendant's mother had advised the officer that she did not want to have anything to do with her son or his problems and hung up the phone. The officer then informed the defendant that it "looks pretty rough for you in the sense that you know your mother doesn't [want to] have anything to do with you." *Id.* at 352. The Second Department concluded that the officer's statements were improper, and, combined with the improper implied promise, constituted grounds for suppression. See also People v. DeGelleke, 144 A.D.2d 978, 534 N.Y.S.2d 51 (4th Dept. 1988) (while suppressing videotaped statement as fruit of prior unwarned statement by 14-year-old defendant, court notes that, prior to first statement, defendant was "promised protection and help" by the police); Matter of Noel M., 45 Misc.3d 1214(A) (Fam. Ct., N.Y. Co., 2014) (statement found involuntary where respondent, who had been in pool when informants alleged that he had gun, was wearing only bathing suit and was not allowed to dry off before being placed in air-conditioned office where he was questioned, and spent about three and one-half hours in police custody without being offered shirt, shoes or towel, and any reasonable fifteen-year-old would have felt intimidated and humiliated; police are charged with exercising greater care to insure that rights of youthful suspects are vigilantly observed).

The statute permits questioning for a "reasonable" period of time. FCA §305.2(4)(b). Since it would have been obvious, even without a statutory requirement,

that a child, like any adult, may not be questioned for an excessive period of time, this express admonition is a clear reminder that stricter scrutiny is required when a child's confession is at issue. See Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011), cert denied 132 S.Ct. 414 (confession involuntary where there was relentless, nearly 13-hour interrogation of sleep-deprived juvenile by tag-team of detectives; during interrogation, there were extended periods when juvenile was unresponsive, his posture "deteriorated," and he looked down at ground; and, by end of interrogation, juvenile was sobbing almost hysterically); Matter of William L., supra, 29 A.D.2d at 184 ("We think it almost self-evident that a boy of 14, aroused from his sleep at 3:00 A.M., taken to a police station and questioned by four or five police officers concerning a homicide, would scarcely be in a frame of mind capable of appreciating the nature and effect of the constitutional warnings ..."); Matter of Noel M., 45 Misc.3d 1214(A) (respondent spent about three and one-half hours in police custody).

In In re Daniel H., 67 A.D.3d 527, 888 N.Y.S.2d 496 (1st Dept. 2009), the First Department held that the issue of whether a statement should be suppressed as the tainted fruit of a prior unlawful statement was not appreciably different for juveniles, and that, in that case, there was no relevance to the detective's failure to abide by Family Court regulations regarding the handling of juveniles in custody.

E. Expert Testimony Regarding Capacity To Waive Miranda Rights

In virtually any case in which a "Mirandized" confession is being offered, the child's lawyer should consider presenting expert testimony at a suppression hearing concerning the respondent's capacity to comprehend the warnings. When the respondent suffers from an educational handicap, consideration must also be given to subpoenaing school records, or calling school personnel as witnesses. In Matter of Chad L., supra, 131 A.D.2d 760, aff'g 131 Misc.2d 965, 502 N.Y.S.2d 910 (Fam. Ct. Kings Co., 1986), the respondent called Dr. Wulach, who "was unequivocal in concluding that Chad did not comprehend [the Miranda] rights at the time they were read to him. Indeed, Dr. Wulach indicated that no average 10 year old could be expected to appreciate Miranda warnings given literally in the manner given to respondent." 131 Misc.2d at 970. See also People v. Cleverin, 140 A.D.3d 1080 (2d

Dept. 2016) (waiver found involuntary where evaluation of defendant between ages of 12 and 14 revealed that he had emigrated from Haiti, spoke only Creole until age 13, and was diagnosed as being moderately mentally retarded; records from residential school for children with cognitive and intellectual deficits revealed IQ score consistently between 40 or 50 and diagnosis of moderate mental retardation or borderline intellectual functioning; expert testified that defendant's IQ score was 53 and score on reading test was at kindergarten level; and defendant did not understand phrase, "you have the right to remain silent and to refuse to answer any questions," or phrase "you have the right to consult an attorney before speaking to the police and to have an attorney present during any questioning now or in the future"); People v. Knapp, 124 A.D.3d 36 (4th Dept. 2014), appeal w'drawn 24 N.Y.3d 1220 (neither knowing, voluntary, and intelligent waiver, nor voluntariness, established where mentally retarded defendant had full-scale IQ of 68 and verbal comprehension IQ score of 63 and was suggestible and overly compliant; most of detective's questions were leading and he repeated question when he was not satisfied with defendant's response and urged defendant to "be honest" with him and to tell the truth; and detective told defendant he had spoken to victim and her mother, that victim was "not lying," and that medical examination would show that "something happened" between defendant and victim, and defense expert testified that, if presented with memory counter to what he believed to be true, defendant would change answer); Matter of Ariel V., 98 A.D.3d 414 (1st Dept. 2012) (reversible error where court refused to allow respondent's treating psychiatrist to render opinion at Huntley hearing as to whether respondent could have understood juvenile Miranda warnings; although psychiatrist did not perform tests specifically addressing this issue, the evidence he had, including his evaluations of respondent's receptive communication skills and IQ, was sufficient to enable him to form opinion as to whether respondent had adequate language and cognitive skills to understand the Miranda warnings, and any deficiencies in the testing went to the weight of the testimony rather than to admissibility); People v. Laybault, supra, 227 A.D.2d 773 (psychologist testified as to IQ and mental age of respondent); People v. Wise, 204 A.D.2d 133, 612 N.Y.S.2d 117 (1st Dept. 1994), lv denied 83 N.Y.2d 973, 616 N.Y.S.2d

26 (defendant failed to prove that his learning disability precluded a valid waiver). Cf. United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001) (defendant should have been permitted to present expert testimony regarding his difficulties with language to help jury understand problems that defendant, a long-time special education student who spoke both English and Spanish, had in communicating in English in high-pressure situations); Matter of Akeem Z., NYLJ 1202479245990 (Fam. Ct., N.Y. Co., 2011) (court finds waiver voluntary where respondent's composite IQ score of 78 placed him above range where individual would be considered mildly mentally retarded and expert testified that respondent's verbal comprehension abilities placed him in low average range; expert indicated only that respondent "would have a problem with some of [the Miranda warnings]" and "did not understand completely"; respondent's responses to certain questions indicated that he was capable of basic reasoning and more abstract thought; and respondent was not incapable of asserting himself in face of authority). But see State v. Griffin, 869 A.2d 640 (Conn., 2005) (defendant failed to establish that expert testimony regarding "Grisso" protocol was sufficiently reliable); People v. Hernandez, 46 A.D.3d 574, 846 N.Y.S.2d 371 (2d Dept. 2007), lv denied 11 N.Y.3d 737 (no error where expert was permitted to testify concerning defendant's mental retardation and studies showing effect retardation has on person's ability to make intelligent waiver of Miranda rights, but court precluded testimony regarding defendant's performance on battery of tests known as "Grisso instrument; tests have not been generally accepted by New York courts and, even if general acceptance among forensic psychologists has been established, defendant failed to demonstrate reliability of procedures followed where validity of test result was undermined by significant differences between vocabulary used in test and that used in actual warnings and expert did not administer other tests normally considered necessary in order to render reliable opinion); People v. Casiano, 40 A.D.3d 528, 837 N.Y.S.2d 76 (1st Dept. 2007) (psychiatric testimony involved no special knowledge or skill outside range of ordinary intelligence or training and was equivalent to opinion that defendant's waiver was not knowing and voluntary); People v. Cole, 24 A.D.3d 1021, 807 N.Y.S.2d 166 (3rd Dept. 2005), lv denied 6 N.Y.3d 832 (trial court did not err in ruling, following Frye hearing, that defendant could not

present expert testimony from forensic psychologist regarding administration and results of "Grisso test" used to measure accused's ability to comprehend Miranda warnings; record supports court's determination that tests had not gained sufficient acceptance for reliability and relevance in the scientific community, and that vocabulary used to gauge defendant's understanding of Miranda warnings differed substantially from warnings defendant received).

It might also be helpful to a parent's testimony concerning the impact the respondent's intellectual limitations has on his or her functioning. Compare People v. Cratsley, 206 A.D.2d 691, 615 N.Y.S.2d 463 (3rd Dept. 1994), aff'd 86 N.Y.2d 81, 629 N.Y.S.2d 992 (1995) (no error where person who was not psychiatrist or psychologist testified concerning victim's retardation) with People v. Koury, 268 A.D.2d 896, 701 N.Y.S.2d 749 (3rd Dept. 2000), lv denied 94 N.Y.2d 949, 710 N.Y.S.2d 6 (lay opinion testimony by mother as to defendant's likely reaction in "pressure-created situation" was not admissible to establish that admissions to police were involuntary).

F. Expert Testimony Regarding Credibility Of Confession

In People v. Bedessie, 19 N.Y.3d 147 (2012), the Court of Appeals held that since false confessions that precipitate a wrongful conviction manifestly harm a defendant, the crime victim, society and the criminal justice system, and experts in psychiatry and psychology or the social sciences may educate a jury about factors of personality and situation that the scientific community considers to be associated with false confessions, expert testimony should be admitted in appropriate case, but may not include testimony as to whether a particular defendant's confession was or was not reliable, and the expert's proffer must be relevant to the defendant and the interrogation before the court. In Bedessie, the judge properly determined that the testimony would not assist the jury in evaluating the voluntariness and truthfulness of defendant's confession or in reaching a verdict. See Miller v. State, 770 N.E.2d 763 (Indiana 2002) (although expert may not opine regarding credibility of particular witness, trial court erred in excluding in its entirety testimony by an expert in the field of "social psychology of police interrogation and false confessions"); People v. Boone, 146 A.D.3d 458 (1st Dept. 2017), lv denied 29 N.Y.3d 1029 (court erroneously believed testimony must

address both personality or psychological makeup that could make defendant particularly susceptible to confessing falsely, and situational factors when the interrogation is conducted in way that might induce defendant to make false confession); People v. Evans, 141 A.D.3d 120 (1st Dept. 2016), appeal dism'd 26 N.Y.3d 1101 (3-2 decision concluding that unlike defendant in Bedessie, defendant established that testimony was relevant to defendant and the interrogation where expert would have testified about mental conditions and personality traits of defendant linked by research studies to false confessions; defense alleged that detectives employed techniques research has shown to be highly correlated with false confessions; defendant was interrogated for more than 12 hours and detectives allegedly used rapport-building techniques to gain trust and posed suggestive or leading questions; lack of videotaping raised significant concerns; and there was no overwhelming corroborating evidence that undermined usefulness of expert testimony); People v. Days, 131 A.D.3d 972 (2d Dept. 2015), lv denied 26 N.Y.3d 1108 (reversible error where court denied defendant's motion for leave to introduce expert testimony on issue of false confessions; court erred in concluding that psychological studies bearing on reliability of confession are within ken of the typical juror, proffered testimony was relevant to defendant and circumstances of case, and defendant's "extensive proffer" included submissions from two experts and defendant's videotaped confession); People v. Oliver, 45 Misc.3d 765 (Sup. Ct., Kings Co., 2014) (proposed expert on police tactics and false confessions not permitted to testify where proposed testimony was not relevant to particular facts of case and expert's qualifications and claims were suspect; testimony of other expert excluded because testimony offered to demonstrate that defendant's personality traits make him susceptible to confessing falsely is irrelevant, potentially confusing, and lacking in sufficient certainty); see also People v. Reyes, 130 A.D.3d 847 (2d Dept. 2015) (no error in preclusion of expert testimony offered in support of defendant's contention that he could not have written alleged handwritten confession because he was illiterate, which was not beyond ken of typical juror).

G. Conflict of Interest Involving Parent or Guardian

In Matter of Michelet P., supra, 70 A.D.2d 68, the respondent was interrogated

about the death of a woman with whom he had resided after arriving from Haiti. Acting as guardian for the respondent, who had no known relatives in this country, was the deceased's son. The Second Department, while suppressing a statement under former FCA §724, noted that "[t]he incapacity of the victim's son to act as guardian for the accused is apparent." Id. at 71.

Thus, whenever a statement is taken in the presence of a guardian, the child's attorney should examine the circumstances to determine whether the goals and interests of the guardian were in conflict with those of the child. It is clear that the child is entitled to the advice of a guardian who is not guided by his or her own agenda, and who has the child's interests in mind. Compare People v. Legler, 969 P.2d 691 (Colo. 1998) (grandmother was not appropriate guardian where she had made it clear that granddaughter was not welcome to return to her home); In re E.T.C., 449 A.2d 937 (Vt. 1982) (juvenile did not have assistance of independent, impartial, responsible, interested adult where group home director coerced juvenile by implying that it was best to "come clean"); Matter of Noel M., 45 Misc.3d 1214(A) (Fam. Ct., N.Y. Co., 2014) (aunt had conflict where she was respondent's guardian and mother of respondent's cousin, who was also accused of having gun) and Matter of Lance BB., 14 Misc.3d 359, 829 N.Y.S.2d 846 (Fam. Ct., Chemung Co., 2006) (statement suppressed where grandfather-guardian was complainant; police should have made attempt to contact respondent's sister, or, failing that, taken respondent to court) with In re Kevin R., 80 A.D.3d 439, 914 N.Y.S.2d 143 (1st Dept. 2011) (appearance at interrogation by parent who is also parent of complainant not disqualifying, but only factor to be considered in evaluating voluntariness); People v. Gardner, 257 A.D.2d 675, 683 N.Y.S.2d 351 (3rd Dept. 1999) (no violation of notification requirement where person legally responsible was the deceased victim - defendant's paternal grandmother - and defendant's father was notified; court rejects defendant's argument that father was not "supportive" adult in her life); People v. Charles, 243 A.D.2d 285, 663 N.Y.S.2d 965 (1st Dept. 1997), lv denied 91 N.Y.2d 971, 672 N.Y.S.2d 850 (1998) (no conflict where Department of Social Services employees acted as defendant's guardians); Matter of James OO., 234 A.D.2d 822, 652 N.Y.S.2d 783 (3rd Dept. 1996) (respondent's mother, who "just

want[ed] him to have the help that he needs,” played largely passive role during questioning as to sex crime involving respondent’s sister); People v. Barnes, 124 A.D.2d 973, 508 N.Y.S.2d 818 (4th Dept. 1986) (information that defendant’s guardian may have possessed goods stolen by defendant did not disqualify guardian); Matter of Omar L., 192 Misc.2d 519, 748 N.Y.S.2d 209 (Fam. Ct., Kings Co., 2002) (no suppression where mother was present during interrogation regarding respondent’s sexual abuse of his 8-year-old sister, and mother said, *inter alia*, “how could you do something like this to your sister”) and People v. Susan H., *supra*, 124 Misc.2d 341, 348 (the police “had no reason to believe the H.’s were neglectful or unconcerned about their daughter”). See also People v. Benedict V., 85 A.D.2d 747, 445 N.Y.S.2d 798 (2d Dept. 1981) (statement involuntary where school principal, who had assumed role of parental protector during police interrogation, encouraged defendant to make statement); Matter of Steven William T., 499 S.E.2d 876 (W.Va. 1997). When a parent or guardian has indicated to the police, to probation or to the child’s attorney that the respondent has serious behavioral problems, or when a PINS petition is pending or has been filed in the past, the attorney should consider arguing that the guardian’s primary concern at the interrogation may not have been the protection of the child, but the guardian’s own desire to be rid of the child, or, at the very least, secure the assistance of the authorities in controlling the child.

Particular attention should be paid to cases in which a child was arrested while in placement, and a counselor or other representative from the facility acted as guardian at a police interrogation. It has been held that placement agency were properly notified by police because they were the “persons legally responsible for respondent’s care.” In re Dominique P., 82 A.D.3d 478, 919 N.Y.S.2d 6 (1st Dept. 2011) (Children’s Village was entity legally responsible for respondent’s care); Matter of Richard UU., 56 A.D.3d 973, 870 N.Y.S.2d 472 (3rd Dept. 2008) (statutory requirements satisfied when DSS caseworker was notified and present for administration of Miranda warnings); Matter of Arthur O., 55 A.D.3d 1019, 871 N.Y.S.2d 396 (3rd Dept. 2008) (police did not violate statute where they failed to notify respondent’s mother, but she had surrendered custody of respondent to DSS); Matter of Stanley C., *supra*, 116 A.D.2d at 214.

However, the Second Department has indicated that, when there is evidence that the facility no longer desires custody of the child, a counselor or other representative is an inappropriate guardian during court proceedings. Matter of John L., 125 A.D.2d 472, 509 N.Y.S.2d 398 (2d Dept. 1986) (group home representative, who stood in for parent when respondent made admission, "informed the court that [respondent] was no longer welcome at that residence"); Matter of Lloyd P., 99 A.D.2d 812, 472 N.Y.S.2d 142, 143 (2d Dept. 1984) ("[t]he obviously antagonistic position taken by the school in whose custody [respondent] was then placed renders the presence of its officials an inadequate substitute"); see also Matter of Delfin A., 123 A.D.2d 318, 506 N.Y.S.2d 215, 217 (2d Dept. 1986) (while ruling that respondent's counsel had conflict of interest due to his representation of placement facility where crime occurred, court notes that "it is significant that the facility had expressed its disinclination to retain [respondent] as a resident in view of his alleged participation in the incident"); Matter of Candy M., supra, 142 Misc.2d 718. Even in the absence of a desire to expel the child, the representative of a placement facility, whose duties and loyalties are unlikely to spawn any concern for the potential consequences of a child's confession to law enforcement authorities, is not an appropriate guardian. Cf. Matter of Tracy B., 80 A.D.2d 792, 437 N.Y.S.2d 90 (1st Dept. 1979) (court erred in appointing court officer as guardian ad litem). In such cases, it should be required that an attempt be made to notify the child's parent or guardian. If there are no known family resources, the child should not be questioned. See Matter of Michelet P., supra, 70 A.D.2d at 72 (where notice could not be made because no one was legally responsible for child, police should have brought child to Family Court "so that a guardian less interested in the case than [the victim's son] could have been appointed"); Matter of Candy M., supra, 142 Misc.2d 718; but see Matter of Richard UU., 56 A.D.3d 973 (fact that caseworker advised respondent to speak with investigator does not establish that she was not acting in respondent's best interests); Matter of Arthur O., 55 A.D.3d 1019 (although respondent claimed that DSS was ineffective or improper custodian because caseworker had not developed sufficiently protective relationship with respondent and acted in conflict with his interests by advising him to tell police what happened, there was no evidence that DSS acted against respondent's

interests and no requirement that police make subjective determination as to whether relationship between DSS and juvenile is sufficiently supportive).

H. Balancing of Factors in FCA §305.2 vs. Per Se Suppression

In Matter of Stanley C., *supra*, 116 A.D.2d 209, the Fourth Department held in *dicta* that a police failure to notify a parent or guardian does not automatically require suppression of a statement. The court cited FCA §305.2(8), which states that "[i]n determining the suitability of questioning and determining the reasonable period of time for questioning such a child, the child's age, the presence or absence of his parents or other persons legally responsible for his care and notification pursuant to subdivision three shall be included among relevant considerations" (emphasis supplied). Although Matter of Stanley C., *supra*, 116 A.D.2d 209 apparently involved a failure to even attempt notification, it can be argued that, while a failed effort at "notification" may be used in a balancing test, a failure to make any attempt at all must result in suppression. Significantly, FCA §305.2(8) refers to the notification requirement in §305.2(3), not to the "reasonable effort" requirement in §305.2(4). Moreover, a *per se* rule would avoid any conflict between §305.2(8) and prior cases holding that no questioning may take place until after reasonable efforts have been made. See Matter of Brian P.T., *supra*, 58 A.D.2d 868; Matter of Raphael A., *supra*, 53 A.D.2d 592; Matter of Albert R., *supra*, 121 Misc.2d 636; cf. People v. Salaam, *supra*, 83 N.Y.2d 51, 56-57 (a "failure to strictly comply with [FCA §305.2(3)] ... does not necessarily require suppression where a good faith effort at compliance has been made" [emphasis supplied]). In any event, it seems clear that the absence of a parent should be a highly significant factor and be given added weight in any balancing test. Compare State v. Presha, 748 A.2d 1108 (N.J. 2000) with United States v. Guzman, 879 F.Supp.2d 312 (EDNY 2012) (violation of federal Juvenile Delinquency Act's post-arrest parental notification requirement does not *per se* require suppression of juvenile's statements; lack of notification is simply one factor among many).

In addition, neither the requirement that the parent, if present, receive Miranda warnings, nor the requirement that the child be questioned in a properly designated facility, is included in the "balancing" test in FCA §305.2(8). Consequently, there is

nothing in the statute to suggest that a failure to give the Miranda warnings to the parent and secure a voluntary, knowing and intelligent waiver, or the knowing or negligent use of an inappropriate interrogation setting by the police, should not automatically lead to suppression.

III. Questioning Of Children Over 16 Years Of Age

When FCA §305.2(2) authorized an officer to take into custody “a child under the age of sixteen,” 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. See, e.g., In re Eduardo E., 91 A.D.3d 505 (1st Dept. 2012).

However, as part of the 2017 “Raise the Age” legislation, FCA §305.2(2) was amended to refer instead to “a child who may be subject to the provisions of this article,” and thus it is now clear that the statute protects a child of any age who is arrested on juvenile delinquency charges. At the same time CPL §140.20(6) was amended so that children arrested on juvenile offender or adolescent offender charges would have the same protections provided by §305.2, and thus the attorney for the child can cite §140.20(6) when moving to suppress after a case has been transferred to the family court.

IV. Notice Of Intent To Offer Statement

Pursuant to FCA §330.2(2), the presentment agency must serve upon the respondent notice of its intention to offer evidence "described in section 710.20 or subdivision one of section 710.30 of the criminal procedure law Such notice must be served within fifteen days after the conclusion of the initial appearance or before the fact-finding hearing, whichever occurs first, unless the court, for good cause shown, permits later service and accords the respondent a reasonable opportunity to make a suppression motion thereafter. If the respondent is detained, the court shall direct that such notice be served on an expedited basis." When a petition is dismissed after 15 days have passed and no notice has been served, and a superseding petition is then filed, the 15-day period does not begin running again. Matter of Jason R., 174 Misc.2d

920, 666 N.Y.S.2d 903 (Fam. Ct., Kings Co., 1997). In the absence of good cause for untimely notice, preclusion of the statement is required.

The way in which FCA §330.2(2) was drafted has given rise to a controversy that should be noted. Criminal Procedure Law §710.20, which is referred to in FCA §330.2(2), includes types of evidence which can be the subject of a suppression motion, but are not included in the notice requirement in CPL §710.30. For instance, CPL §710.20 includes tangible evidence, and, through the incorporation by reference of CPL §60.45, involuntary statements made to private individuals.

In Matter of Eddie M., 110 A.D.2d 635, 487 N.Y.S.2d 122 (2d Dept. 1985), the Second Department held that tangible evidence is covered by the notice requirement in FCA §330.2(2), but concluded that since the respondent had knowledge of the presentment agency's intention to introduce a gun that was the subject of a possession charge, there was good cause to dispense with the notice requirement.

However, although the Second Department gave FCA §330.2(2) a literal reading in Eddie M., the Court of Appeals held in Matter of Luis M., 83 N.Y.2d 226, 608 N.Y.S.2d 962 (1994) that §330.2(2) does not require the presentment agency to serve notice of its intent to offer a statement made by the respondent to a person not involved in law enforcement. Relying upon a detailed analysis of the legislative history, the Court of Appeals concluded that the Legislature had no intention of expanding the notice requirement in delinquency cases to include such statements.

V. Interrogation By School Officials

Generally speaking, it does not appear that non-law enforcement school officials are required to provide Miranda warnings prior to conducting a "custodial" interrogation of a student. See In re Angel S., *supra*, 302 A.D.2d 303; Matter of L.A., 21 P.3d 952 (Kansas, 2001); Commonwealth v. Snyder, 597 N.E.2d 1363 (Mass., 1992); State v Biancamano, 666 A.2d 199 (N.J. Super. Ct., App. Div., 1995), cert denied 673 A.2d 275 (NJ, 1996).

However, an argument can be made that the FCA §330.2 notice requirement applies. Compare People v. Batista, 277 A.D.2d 141, 717 N.Y.S.2d 113 (1st Dept.

2000), lv denied 96 N.Y.2d 825, 729 N.Y.S.2d (2001) (child protective caseworker not a “public servant”) with People v. James Whitmore, 12 A.D.3d 845, 785 N.Y.S.2d 140 (3rd Dept. 2004) (DSS caseworker is “public servant”).

In any event, it is clear that if school officials conduct custodial questioning while cooperating with, or at the suggestion of, a police officer, or under any circumstances which establish an agency relationship, Miranda warnings must be provided, and the presentment agency must provide notice pursuant to FCA §330.2. The physical presence of a police officer during questioning would obviously provide a good basis for the use of an agency analysis.

Compare People v. Ray, 65 N.Y.2d 282, 491 N.Y.S.2d 283 (1985) (Bloomingdale's course of conduct in employing special police officer on premises to process arrests did not constitute government involvement requiring that store detective provide Miranda warnings before turning suspect over to authorities; “[t]he private surveillance, apprehension and questioning of defendant was in no way instigated by the special police officer or undertaken upon the official behest of a law enforcement agency” and “[d]efendant was neither identified as a suspect by the police nor questioned in the furtherance of a police-designated objective”); People v. Rodriguez, 135 A.D.3d 1181 (3d Dept. 2016) (child protective services worker not police agent where he was on task force that included law enforcement, but did not consult with law enforcement regarding plans to interview defendant and law enforcement was not present at interview); People v. Cooper, 99 A.D.3d 453 (1st Dept. 2012), lv denied 21 N.Y.3d 1003 (no police-dominated atmosphere where police apprehended defendant and turned him over to store personnel to permit them to perform store’s routine administrative procedures, which included giving defendant notice that he was prohibited from entering store again; police had no vested interest in outcome of store’s private procedures, which were not designed to elicit potentially inculpatory evidence, and were not involved with, and did not orchestrate or supervise, actions of store employees); In re K.S., 183 Cal.App.4th 72 (Cal. Ct. App., 1st Dist., 2010) (T.L.O. standard governed despite police role in providing information supporting school's search and presence of officers at search; while extent of police role in search will determine whether T.L.O. applies, so long

as school official independently decides to search and then invites law enforcement personnel to attend search to help ensure safety and security of school, it would be unwise to discourage school official from doing so at least where it is reasonable to suspect that contraband inimical to secure learning environment is present); In re Tateana R., 64 A.D.3d 459, 883 N.Y.S.2d 476 (1st Dept. 2009), lv denied 13 N.Y.3d 709 (no custodial interrogation where dean's goal was to recover stolen iPod and presence, and officer provided minimal input and participation was directed at locating iPod, not obtaining confession; even if there was state action, respondent was not in custody since dean's office ordinarily is not considered additional restraint for student who is not free to leave school without permission, and being summoned to dean's office is unpleasant but not unusual occurrence for student); In re Angel S., supra, 302 A.D.2d 303 (although fire marshals were present when principal conducted questioning, they did not prompt or have any input into the questioning) and People v. Hussain, 167 Misc.2d 146, 638 N.Y.S.2d 285 (Sup. Ct., Queens Co. 1996) (Child Welfare Administration caseworker was not police agent) with State v. Antonio T., 352 P.3d 1172 (N.M. 2015) (presence of law enforcement officer during assistant principal's questioning converted school disciplinary interrogation into criminal investigatory detention and triggered application of the statute requiring knowing, intelligent and voluntary waiver of Miranda rights before statement may be used against child in juvenile delinquency proceeding); N.C. v. Commonwealth, 396 S.W.3d 852 (Ky. 2013), cert denied 134 S.Ct. 303 (court suppresses un-Mirandized custodial statements made by juvenile in response to questions from school assistant principal, in presence of armed deputy sheriff assigned to high school as School Resource Officer, who had been with assistant principal when juvenile was taken out of class); People v. Rodas, 145 A.D.3d 1452 (4th Dept. 2016) (right to counsel violated where there was such a degree of cooperation between caseworker and police that caseworker acted as agent of police); People v. Slocum, 133 A.D.3d 972 (3d Dept. 2015) (child protective services caseworker acted as agent of police when she questioned defendant in jail; caseworker acknowledged that she worked closely with police in certain investigations and that officer was present in room as she was

speaking with defendant); People v. Greene, 306 A.D.2d 639, 760 N.Y.S.2d 769 (3rd Dept. 2003), lv denied 100 N.Y.2d 594, 766 N.Y.S.2d 170 (2003) (CPS caseworker had agency relationship with law enforcement authorities given the common purpose of Family Violence Response Team, the cooperative working arrangement through the structure of the FVRT, and the understanding that incriminating statements obtained by CPS caseworker would be communicated to police agency); People v. Miller, 137 A.D.2d 626, 524 N.Y.S.2d 727 (2d Dept. 1988) (questioning of defendant by his mother in presence of police was "pervaded by governmental involvement"); People v. Warren, 97 A.D.2d 486, 467 N.Y.S.2d 837 (2d Dept. 1983), appeal dismissed 61 N.Y.2d 886, 474 N.Y.S.2d 473 (1984) (chief of bank security was agent of police when he questioned defendant, who was handcuffed and surrounded by detectives) and People v. Crosby, 180 Misc.2d 43, 688 N.Y.S.2d 398 (Dist. Ct., Nassau Co., 1999) (police were present when store detective interrogated defendant).

It is immaterial that the intent to question originated with school officials if the police subsequently played a role. See United States v. Knoll, 16 F.3d 1313, 1320 (2d Cir. 1994).

In New York City, it can now be argued that the Police Department's assumption of responsibility for school security must result in full Miranda protections for students who are interrogated while in custody by security officers who are now employees of the Police Department. See In re R.H., 791 A.2d 331 (Pa. 2002) (Pennsylvania Supreme Court plurality holds that juvenile was entitled to receive Miranda warnings where school police officers were employees of school district, but were also judicially appointed and explicitly authorized to exercise same powers as municipal police on school property, and were wearing uniforms and badges during interrogation); Matter of G.S.P., 610 N.W.2d 651 (Minn. Ct. App., 2000) (Miranda warnings required where school liaison police officer interrogated juvenile); People v. Butler, 188 Misc.2d 48, 725 N.Y.S.2d 534 (Sup. Ct., Kings Co., 2001) (School Safety Officer employed by police improperly questioned defendant in absence of Miranda warnings). It can also be argued that an ongoing agency relationship has been created by the "Gun Free Schools Act" [see Educ. Law §3214(3)(d)], which requires that school officials notify the

Family Court presentment agency whenever a student under 16 years of age is found with a firearm. Cf. State v. Helewa, 537 A.2d 1328 (N.J. Super. Ct., App. Div., 1988) (given child protection caseworkers' statutory obligation to report abuse and neglect to county prosecutor, un-Mirandized statement to caseworker during custodial interview is not admissible in criminal proceeding).

VI. Recording Of Custodial Interrogation (all of the below eff. 4/1/18)

Where a respondent is subject to custodial interrogation by a public servant at a facility specified in FCA §305.2(4), the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded and governed in accordance with CPL §60.45(3)(a)-(e). FCA §344.2(3).

Where a person is subject to custodial interrogation by a public servant at a detention facility, the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded by an appropriate video recording device if the interrogation involves: a class A-1 felony, except one defined in Penal Law Article 220; felony offenses defined in PL §§ 130.95 and 130.96; or a felony offense defined in PL Article 125 or Article 130 that is defined as a class B violent felony offense in PL §70.02. CPL §60.45(3)(a). The term “detention facility” shall mean a police station, correctional facility, holding facility for prisoners, prosecutor’s office or other facility where persons are held in detention in connection with criminal charges that have been or may be filed against them.

No confession, admission or other statement shall be subject to a motion to suppress pursuant to CPL §710.20(3) based solely upon the failure to video record such interrogation in a detention facility. However, where the people offer into evidence a confession, admission or other statement made by a person in custody with respect to his or her participation or lack of participation in an offense specified in §60.45(3)(a), that has not been video recorded, the court shall consider the failure to record as a factor, but not as the sole factor, in accordance with §60.45(3)(c) in determining

whether such confession, admission or other statement shall be admissible. CPL §60.45(3)(b).

Notwithstanding the requirement of §60.45(3)(a), upon a showing of good cause by the prosecutor, the custodial interrogation need not be recorded. Good cause shall include, but not be limited to: (i) If electronic recording equipment malfunctions. (ii) If electronic recording equipment is not available because it was otherwise being used. (iii) If statements are made in response to questions that are routinely asked during arrest processing. (iv) If the statement is spontaneously made by the suspect and not in response to police questioning. (v) If the statement is made during an interrogation that is conducted when the interviewer is unaware that a qualifying offense has occurred. (vi) If the statement is made at a location other than the “interview room” because the suspect cannot be brought to such room, e.g., the suspect is in a hospital or the suspect is out of state and that state is not governed by a law requiring the recordation of an interrogation. (vii) If the statement is made after a suspect has refused to participate in the interrogation if it is recorded, and appropriate effort to document such refusal is made. (viii) If such statement is not recorded as a result of an inadvertent error or oversight, not the result of any intentional conduct by law enforcement personnel. (ix) If it is law enforcement’s reasonable belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant. (x) If such statement is made at a location not equipped with a video recording device and the reason for using that location is not to subvert the intent of the law. For purposes of this section, the term “location” shall include those locations specified in FCA §305.2(4)(b). CPL §60.45(3)(c).

In the event the court finds that the people have not shown good cause for the non-recording of the confession, admission, or other statement, but determines that a non-recorded confession, admission or other statement is nevertheless admissible because it was voluntarily made then, upon request of the defendant, the court must instruct the jury that the people’s failure to record the defendant’s confession, admission or other statement as required by this section may be weighed as a factor,

but not as the sole factor, in determining whether such confession, admission or other statement was voluntarily made, or was made at all. CPL §60.45(3)(d).

Video recording as required by this section shall be conducted in accordance with standards established by rule of the Division of Criminal Justice Services. CPL §60.45(3)(e).

**SUPPRESSION MOTION PRACTICE
IN JUVENILE DELINQUENCY CASES**

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I. Introduction: The Potential Benefits of Suppression Motions Practice

Counsel not only should, but must, file every non-frivolous motion that can aid the respondent's defense. *See* NYS BAR ASS'N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS, Standard C-7 (2009) ("As appropriate, the attorney should move for suppression or preclusion of physical evidence, identification testimony and/or the child's statements"). *See, e.g.,* People v. Velez, 138 A.D.3d 1041, 30 N.Y.S.3d 218 (2d Dept. 2016) (defense counsel committed ineffective assistance of counsel by failing to file a *Mapp* motion to challenge a search of a shed in the defendant's yard which exceeded the scope of the warrant); People v. Barber, 124 A.D.3d 1312, 999 N.Y.S.2d 645 (4th Dept. 2015) (defense counsel committed ineffective assistance of counsel by failing to file a *Mapp* motion to suppress a gun seized from defendant's person); People v. Cyrus, 48 A.D.3d 150, 848 N.Y.S.2d 67 (1st Dept. 2007) (defense counsel was ineffective because, *inter alia*, he failed to file *Huntley* motion despite grounds for doing so); People v. Montgomery, 293 A.D.2d 773, 742 N.Y.S.2d 126 (3d Dept. 2002), *lv. app. denied*, 98 N.Y.2d 699, 747 N.Y.S.2d 418 (2002) (defense counsel was ineffective in failing to file *Mapp/Dunaway* motion despite grounds for doing so and no "legitimate strategic or tactical explanation" for failing to do so); People v. Donovan, 184 A.D.2d 654, 585 N.Y.S.2d 70 (2d Dept. 1992) (defense counsel was ineffective because, *inter alia*, he failed to file *Mapp* motion); People v. Miller, N.Y.L.J., 10/8/96, at 30, col. 3 (App. Term, 9th & 10th Jud. Dist.) (defense counsel's failure to challenge an obvious defect in the search warrant constituted ineffective assistance of counsel); People v. Hoyte, 183 Misc.2d 1, 701 N.Y.S.2d 276 (Sup. Ct., Bronx Co. 1999) (defense counsel was ineffective in failing to file *Mapp* and *Dunaway* motions that were "at, the least, colorable"). *See also* People v. Langlois, 265 A.D.2d 683, 697 N.Y.S.2d 360 (3d Dept. 1999) (counsel was ineffective in failing to file *Sandoval* motion).

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

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

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

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

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

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

II. Filing Deadlines

If the respondent is paroled pending the factfinding hearing, F.C.A. § 332.2(1) requires that suppression motions be filed "within thirty days after the conclusion of the initial appearance." If the respondent is detained and the trial is scheduled for a date earlier than the expiration of the thirty-day filing deadline, motions must be filed "before commencement of the fact-finding hearing." F.C.A. § 332.2(1). A detained respondent is entitled to a "hear[ing] and determin[ation] of pre-trial motions on an expedited basis." F.C.A. § 332.2(4). In remand cases,

counsel should ordinarily raise suppression claims by means of an Order to Show Cause rather than a motion, since the Show Cause procedure avoids the procedural requirement that a Notice of Motion “be served at least eight days before the time at which the motion is noticed to be heard.” C.P.L.R. § 2214(b).

It is essential that counsel comply with the filing deadlines, since an untimely motion “may be summarily denied.” F.C.A. § 332.2(3). See, e.g., People v. Knowles, 112 A.D.2d 321, 491 N.Y.S.2d 770 (2d Dept. 1985), app. denied, 66 N.Y.2d 920, 498 N.Y.S.2d 1035 (1985); In the Matter of TM, 26 Misc.3d 823, 2009 WL 4681262, 2009 N.Y. Slip Op. 29503 (Fam. Ct., Kings Co. Nov. 16, 2009) (Elkins, J.) (precluding *Huntley/Wade* motion that was filed after 30-day deadline of FCA § 322.2; respondent’s application for extension of time is denied because defense counsel’s stated reason for missing the deadline – “law office failure” – does not supply good cause for late-filing and “[n]othing in Respondent’s motion suggests that the interest of justice will be served by permitting late filing”). In cases in which counsel is unable to comply with the deadline for some reason -- such as the prosecution’s failure to provide discovery in a timely fashion -- counsel should take steps prior to the expiration of the filing deadline to guard against later preclusion of the motion. This can be accomplished in various ways. The simplest approach is to speak with the prosecutor assigned to the case and obtain his or her consent to the extension of the 30-day deadline for a specified period of time. Cf. People v. Martinez, 111 A.D.2d 30, 488 N.Y.S.2d 706 (1st Dept. 1985) (recognizing that prosecutor can waive procedural requirements governing defendant’s filing of motion). Alternatively, in cases in which the impediment to timely filing is the lack of certain information that counsel will later obtain through discovery or investigation, counsel can file the motion within the statutory period on the basis of the facts known to counsel, and state in the motion that it will be supplemented later with the missing information. Yet another alternative is to file a motion with the court seeking extension of the filing deadline and stating the basis for the request.

If counsel misses a filing deadline, s/he should seek the prosecutor’s agreement to late-filing the motion. Even in the absence of the prosecutor’s consent, late-filing must be permitted if the motion is “based upon grounds of which the respondent could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have [been] raised within the statutory period.” F.C.A. § 332.2(3). See, e.g., People v. Perrilla, 240 A.D.2d 313, 660 N.Y.S.2d 113 (1st Dept. 1997) (trial court erred in refusing to expand suppression hearing to include *Dunaway* claim that omitted from suppression motion partly because defense counsel was misled by inaccurate Voluntary Disclosure Form); In re Anthony S., 162 A.D.2d 325, 557 N.Y.S.2d 11 (1st Dept. 1990) (Family Court abused its discretion by denying leave to late-file suppression motion which attorney for the child was unable to file prior to fact-finding hearing because she was appointed to case only four days before trial and respondent’s detention status impeded access to client); People v. Loizides, 123 Misc.2d 334, 473 N.Y.S.2d 916 (Suffolk Co. Ct. 1984) (motion to dismiss indictment could be late-filed because it was based upon facts which counsel first learned at trial through examination of Rosario material); People v. DeRuggiero, 96 Misc.2d 458, 409 N.Y.S.2d 88 (Sup. Ct., Westchester Co. 1978) (same); People v. Frigenti, 91 Misc.2d 139, 141, 397 N.Y.S.2d 313 (Sup. Ct., Kings Co. 1977) (court was

obliged to permit late-filing of suppression motion where defense counsel filed timely demand for discovery of facts needed for motion, prosecution failed to comply in a timely manner, and defense counsel filed suppression motion promptly after gaining discovery).

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

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

III. Drafting the Motion

A. General Considerations

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

When drafting suppression motions, counsel generally should present only enough factual information and legal argument to satisfy the requirements for obtaining a suppression hearing and avoid summary dismissal on the pleadings. Excessive detail is of little benefit in winning a motion since in the vast majority of cases, the motion will be won or lost on the basis of the testimony adduced at the hearing and the legal arguments made at the conclusion of the hearing. Furthermore, extensive detail runs the risk of providing the prosecution with discovery of the defense case and ammunition for impeaching defense witnesses at the motions hearing and at trial.

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

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

(2) Identifying Sources of Factual Allegations

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

But, in identifying the sources of information, counsel faces a central dilemma: Attribution of a fact to a specific defense witness may render the witness subject to impeachment with the motion in the event that s/he denies that fact at the suppression hearing or trial. Compare People v. Newman, 216 A.D.2d 151, 628 N.Y.S.2d 649 (1st Dept. 1995), app. denied, 87 N.Y.2d 849, 638 N.Y.S.2d 608 (1995) (trial court did not err in permitting prosecutor to cross-examine defendant about factual recitation in defense counsel’s affirmation in support of suppression motion, which was expressly identified as based on defendant’s statements) and People v. Rivera, 58 A.D.2d 147, 396 N.Y.S.2d 26 (1st Dept 1977), aff’d, 45 N.Y.2d 889, 413 N.Y.2d 146 (1978) (trial court did not err in permitting prosecutor to impeach defendant at trial with incriminating statement which defendant made to his attorney and which counsel set forth in affidavit in support of suppression motion) with People v. Jones, 190 A.D.2d 31, 596 N.Y.S.2d 811 (1st Dept. 1993) (prosecutor should not have been allowed to impeach defendant with his attorney’s affirmation in support of suppression motion because counsel “specifically stated that his information had been gathered from various sources ... [and] none of the specific events described in the suppression motion could fairly be characterized as either an ‘admission’ or a prior inconsistent statement by defendant”) and People v. Raosto, 50 A.D.3d 508, 856 N.Y.S.2d 86 (1st Dept. 2008) (prosecutor should not have been allowed to impeach defendant with “averments by former counsel in motion papers ... [that] were not fairly attributable to defendant, either directly or by inference”). See also People v. Brown, 98 N.Y.2d 226, 746 N.Y.S.2d 422 (2002) (trial court properly allowed the prosecutor to impeach the testifying defendant with his lawyer’s contrary representations during the *Sandoval* hearing, given that the defendant was the “only source of the information” for counsel’s statements, counsel was acting as the defendant’s authorized agent in making the statements, and the statements were made in formal court proceedings, held in defendant’s presence, for the purpose of obtaining a favorable pretrial ruling; but impeachment of testifying defendant with withdrawn alibi notice was impermissible because such a use of a withdrawn alibi notice could inhibit a defendant from abandoning a factually inaccurate alibi defense and could impinge upon the defendant’s right to testify); People v. Johnson, 46 A.D.3d 276, 278, 847 N.Y.S.2d 74, 76 (1st Dept. 2007) (“the trial court properly permitted the prosecutor to impeach defendant by way of statements made by her attorney at the bail hearing as it is a reasonable inference that such statements were attributable to defendant, and they significantly contradicted her trial testimony”); People v. Moye, 11 A.D.3d 212, 212, 782 N.Y.S.2d 257, 258 (1st Dept. 2004), lv. app. denied, 4 N.Y.3d 765, 766 (2005) (trial court did not err in permitting the prosecution to impeach the defendant at trial with

his defense lawyer's statement at arraignment: defendant "was concededly the source of the information" and defense counsel "was acting as [defendant's] agent" at arraignment in "relaying information supplied by the defendant ... for the purpose of obtaining [a] favorable ruling" on bail).

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

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

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

In the suppression context, the New York Court of Appeals has issued several decisions construing the state constitution to establish a standard that is more protective than the one adopted by the U.S. Supreme Court. *See, e.g., People v. Harris*, 77 N.Y.2d at 435-41, 568 N.Y.S.2d at 702-06 (*Dunaway* motions; rejecting attenuation-of-taint analysis of *New York v. Harris*, 495 U.S. 14 (1990), and reinstating Court of Appeals' original ruling in *Harris* case on state constitutional grounds); *People v. Torres*, 74 N.Y.2d 224, 544 N.Y.S.2d 796 (1989) (*Mapp* motions; rejecting *Michigan v. Long*, 463 U.S. 1032 (1983) and adopting more protective standard for search of interior of car during brief detention and frisk of occupants); *People v. Griminger*, 71 N.Y.2d 635, 529 N.Y.S.2d 55 (1988) (*Mapp* motions; rejecting standard established in *Illinois v. Gates*, 462 U.S. 213 (1983) for determining sufficiency of search warrant, in favor of more protective *Aguilar-Spinelli* standard); *People v. Bethea*, 67 N.Y.2d 364, 502 N.Y.S.2d 713 (1986) (*Huntley* motions; rejecting *Oregon v. Elstad*, 470 U.S. 298

(1985) and preserving traditional cat-out-of-the-bag doctrine in its entirety); People v. Bigelow, 66 N.Y.2d 417, 497 N.Y.S.2d 630 (1985) (Mapp motions; rejecting “good faith” exception established in United States v. Leon, 468 U.S. 897 (1984)); People v. Adams, 53 N.Y.2d 241, 440 N.Y.S.2d 902 (1981) (Wade motions; rejecting standard for identification suppression established in Manson v. Braithwaite, 432 U.S. 98 (1977) in favor of traditional suggestiveness analysis of United States v. Wade, 388 U.S. 218 (1967) and Stovall v. Denno, 388 U.S. 293 (1967)). See also People v. Diaz, 81 N.Y.2d 106, 112 n.2, 595 N.Y.S.2d 940, 944-45 n.2 (1993) (Mapp motions; after noting that U.S. Supreme Court had granted certiorari to determine viability of “plain touch” exception in Minnesota v. Dickerson, Court of Appeals rejects exception on state as well as federal constitutional grounds).

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

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

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

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

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

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

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

(iv) The existence of a state constitutional rule that, although not directly bearing upon the issue, justifies divergence from federal law because it allows the state court to conclude that the constitutional context for deciding the issue is different from that which the Supreme Court confronted when fashioning the federal rule. See, e.g., People v. Harris, 77 N.Y.2d at 439-41, 568 N.Y.S.2d at 704-06 (although state constitutional caselaw on right to counsel had no direct bearing upon case, Court of Appeals concludes that caselaw gave police an additional motivation for evading search-and-seizure rules at issue and therefore justified divergence from U.S. Supreme Court’s analysis of search-and-seizure law).

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

more protective than Oliver v. United States, 466 U.S. 170 (1984)).

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

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

B. Huntley Motions

The standards for sufficiency of suppression motions in Family Court are identical to those in the Criminal Procedure Law. *See* F.C.A. § 330.2(1) (specifically incorporating the C.P.L. standards). Under these standards, Huntley motions need only "allege a ground constituting [a] legal basis for the motion." C.P.L. § 710.60(3)(a). Such motions are exempt from any requirements of sufficiency of the factual exposition. *See* C.P.L. § 710.60(3)(b); *See also* People v. Burton, 6 N.Y.3d 584, 587 n.1, 815 N.Y.S.2d 7, 10 n.1 (2006) ("The factual allegation requirement does not apply to motions to suppress allegedly involuntary statements made by a defendant or improper identifications"); People v. Jones, 95 N.Y.2d 721, 725 n.2, 723 N.Y.S.2d 761, 765 n.2 (2001) ("Sworn allegations of fact are not required in motions for suppression of either involuntarily made statements or identification testimony resulting from improper procedures."); People v. Mendoza, 82 N.Y.2d 415, 421-22, 604 N.Y.S.2d 922, 924 (1993); People v. Weaver, 49 N.Y.2d 1012, 1013, 429 N.Y.S.2d 399, 399 (1980). Thus, "there

must be a hearing whenever defendant claims his statement was involuntary no matter what facts he puts forth in support of that claim.” People v. Weaver, 49 N.Y.2d at 1013, 429 N.Y.S.2d at 399. Accord People v. Clemons, 166 A.D.2d 363, 561 N.Y.S.2d 425 (1st Dept. 1990); People v. Knight, 124 A.D.2d 935, 508 N.Y.S.2d 679 (3d Dept. 1986). See also People v. Credle, 28 A.D.3d 397, 812 N.Y.S.2d 871 (1st Dept. 2006) (trial court “erred in summarily denying defendant’s motion to suppress statements,” which “asserted that he was questioned and that his statements to a police officer were involuntary”).

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

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

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

C. Wade Motions

(1) Law and Tactics Generally

Wade motions are governed by the same standard applicable to Huntley motions: A Wade motion need only “allege a ground constituting [a] legal basis for the motion,” C.P.L. § 710.60(3)(a), and is exempt from requirements of sufficiency of the factual exposition. See C.P.L. § 710.60(3)(b); People v. Dixon, 85 N.Y.2d 218, 222, 623 N.Y.S.2d 813, 815 (1995) (“Alleging facts to support a motion to suppress testimony concerning an out-of-court identification is a burden that a defendant no longer carries on a motion for a Wade hearing Accordingly, a defendant’s failure to plead sufficient facts in support of the motion to suppress

testimony of a prior identification is not a proper ground to summarily deny a motion for a Wade hearing.”); People v. Mendoza, 82 N.Y.2d 415, 421-22, 604 N.Y.S.2d 922, 924 (1993). See also People v. Burton, 6 N.Y.3d 584, 587 n.1, 815 N.Y.S.2d 7, 10 n.1 (2006) (“The factual allegation requirement does not apply to motions to suppress ... improper identifications”).

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

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

(2) Confirmatory Identifications

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

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

(a) Previous Relationship Between Eyewitness and Accused

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

“The unusual treatment accorded such identifications -- no CPL 710.30 notice or *Wade* hearing is necessary -- requires that the exception be narrowly confined to situations where

“suggestiveness” is not a concern.” Id. at 452, 583 N.Y.S.2d at 818. If there is any question about the applicability of the “confirmatory identification” exception, the trial court must hold a pre-Wade hearing to determine the need for a Wade hearing. See id. at 451, 583 N.Y.S.2d at 818 (trial court should consider “factors such as the number of times ... [the complainant] viewed defendant prior to the crime, the duration and nature of the encounters, the setting, the period of time over which the viewings occurred, the time elapsed between the crime and the previous viewings, and whether the two had any conversations”). At such a hearing, “[t]he People bear the burden ... [to prove their claim] that [the] citizen identification procedure was merely confirmatory.” Id. at 452, 583 N.Y.S.2d at 818. See also, e.g., People v. Coleman, 73 A.D.3d 1200, 903 N.Y.S.2d 431 (2d Dept. 2010) (prosecution failed to meet its burden at a Rodriguez hearing of “establishing that the defendant was so well known to the complaining witness that he was impervious to police suggestion”: Although a detective testified that the identifying witness “viewed the defendant ‘every day’” and “provided the police with an alleged nickname of the defendant,” the detective also acknowledged that “the complaining witness never spoke to, interacted with, or conversed with the defendant” and “[n]o evidence was offered as to the length of the viewings, the distance at which they took place, the time of day, or the lighting conditions.”).

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

(b) Buy-and-Bust Cases

In “buy and bust” cases in which the undercover officer identified the respondent in a pretrial identification procedure, the respondent is not entitled to either 710.30 notice of the identification or a Wade hearing if “the identification was made by a trained undercover officer

who observed [respondent] during the face-to-face drug transaction” and the pretrial identification procedure was conducted “at a place and time sufficiently connected and contemporaneous to the arrest itself as to constitute the ordinary and proper completion of an integral police procedure.” People v. Wharton, 74 N.Y.2d 921, 922-23, 550 N.Y.S.2d 260, 261 (1989). Accord People v. Roberts 79 N.Y.2d 964, 582 N.Y.S.2d 996 (1992); People v. Morales, 37 N.Y.2d 262, 372 N.Y.S.2d 25 (1975).

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

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

- There was a significant lapse in time between the crime and the identification procedure. See, e.g., People v. Boyer, 6 N.Y.3d at 432-33, 813 N.Y.S.2d at 34 (“When there is a risk that the quality of the initial observation has eroded over time, we have consistently held that police identifications do not enjoy any exemption from the statutory notice and hearing requirements”). Compare People v. Williams, 85 N.Y.2d 868, 626 N.Y.S.2d 49 (1995) (undercover officer’s viewing of the defendant’s photograph, two days after the buy-and-bust operation, did not fall within the category of “confirmatory identifications” that are exempt from the requirement of a Wade hearing) and People v. Mato, 83 N.Y.2d at 411, 611 N.Y.S.2d at 94 (defendant entitled to Wade hearing because 3 weeks elapsed between alleged sale and show-up identification) and People v. Gordon, 76 N.Y.2d 595, 599-601, 561 N.Y.S.2d 903, 905-06 (1990) (“the 10-day lapse between the November 27 buy and the December 7 show-up ... heighten[ed] the real danger of calculated or careless misidentification” and defendant therefore was entitled to Wade hearing) and People v. Smith, 203 A.D.2d 495, 610 N.Y.S.2d 594 (2d Dept. 1994), app. dismissed, 85 N.Y.2d 914, 627 N.Y.S.2d 337 (1995) (trial court erred in summarily denying Wade hearing where undercover officer’s identification of defendant’s photograph occurred a week after the second of two drug transactions) and People v. DiGirolamo, 197 A.D.2d 531, 602 N.Y.S.2d 182 (2d Dept. 1993) (undercover officer’s stationhouse show-up identification of defendant 15 days after second drug transaction with defendant was not “confirmatory” and did not justify denial of Wade hearing) with People v.

DeRosario, 81 N.Y.2d 801, 803, 595 N.Y.S.2d 372, 374 (1993) (show-up held 4-5 hours after sale was “confirmatory”) and People v. Roberts, 79 N.Y.2d 964, 582 N.Y.S.2d 996 (1992) (show-up which was held less than 5 hours after second of two drug transactions with defendant within one-week period was “confirmatory”) and People v. Caceres, 187 A.D.2d 440, 589 N.Y.S.2d 902 (2d Dept. 1992) (stationhouse identification 4 hours after sale was “confirmatory”).

- Although nominally a “buy and bust” (in the sense that an undercover officer purchased drugs from the accused), the case does not present the specific factors that led the Court of Appeals to dispense with Wade hearings in buy-and-bust cases. See, e.g., People v. Gordon, 76 N.Y.2d 595, 600-01, 561 N.Y.S.2d 903, 906 (1990) (“The November 27 police operation in this case was not a ‘buy and bust.’ The police chose not to arrest the participants in that buy and the undercover officer radioed no description of defendant to her backup team.... Actually, the only likeness to [buy and bust] cases is that the station house identification was made by the undercover officer who made the original drug buy, and that surely cannot justify dispensing with necessary protections affecting identification procedures.”). See also People v. Boyer, 6 N.Y.3d at 432-33, 813 N.Y.S.2d at 34 (“In Wharton, an experienced undercover officer observed the defendant face-to-face during a planned buy-and-bust operation. The officer then radioed his backup team with a description of the defendant, who was immediately arrested. As planned, within five minutes of the arrest, the purchasing officer drove past the defendant specifically for the purpose of identifying him, and then again identified him a few hours later at the police station. Under such circumstances, we held that the defendant was not entitled to a Wade hearing (and thus would not be entitled to CPL 710.30 notice) to test the officer’s identification We further stated that there is no ‘categorical rule exempting from requested Wade hearings confirmatory identifications by police officers by merely labeling them as such. Where the nature and circumstances of the encounter and identification may warrant, a hearing should and undoubtedly will be held’ Thus, the quality of the officer’s initial viewing must be a critical factor in any Wharton-type analysis. The risk of undue suggestiveness is obviated only when the identifying officer’s observation of the defendant is so clear that the identification could not be mistaken.”).
- Unlike a typical “buy and bust,” the undercover officer did not “observe[] [respondent] ... [in a] face-to-face drug transaction.” People v. Wharton, 74 N.Y.2d 921, 922-23, 550 N.Y.S.2d 260, 261 (1989). Cf. People v. Newball, 76 N.Y.2d 587, 591-92, 561 N.Y.S.2d 898, 901 (1990) (concluding that identification was not “confirmatory” because, inter alia, the officer “observed the person for only a few minutes and from a distance of no closer than 50 feet”). See also People v. Boyer, 6 N.Y.3d at 433, 813 N.Y.S.2d at 34 (“the quality of the officer’s initial viewing must be a critical factor in any Wharton-type analysis.

The risk of undue suggestiveness is obviated only when the identifying officer's observation of the defendant is so clear that the identification could not be mistaken.”).

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

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

D. Mapp and Dunaway Motions

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

(1) Sufficiency of Legal Basis for Motion

With respect to the sufficiency of the legal argument, counsel can satisfy the statutory standard fairly easily by identifying the constitutional, statutory, or common law violations that justify the relief sought. Compare People v. Werner, 55 A.D.2d 317, 390 N.Y.S.2d 711 (4th Dept. 1977) (reversing trial court's summary denial of Mapp motion and holding that the motion

was sufficient in that it asserted that the defendant was unlawfully arrested and that fruits of search incident to that arrest therefore had to be suppressed) with People v. Roberto H. (Anonymous), 67 A.D.2d 549, 552, 416 N.Y.S.2d 305, 307 (2d Dept. 1979) (upholding trial court’s summary denial of a suppression motion whose “affirmation fails even to allege improper conduct on the part of the law enforcement authorities, the very keystone of a suppression motion”).

(2) Sufficiency of Factual Allegations

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

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

In some cases, a factually insufficient motion should be summarily granted rather than summarily denied. These are cases in which there is “no dispute [between the parties] as to the underlying facts, but only as to application of the law to the facts,” and in which the court determines that the applicable law requires suppression. Id. at 427, 604 N.Y.S.2d at 927. See,

e.g., People v. Cardona, N.Y.L.J., 6/24/94, at 27, col. 4 (Sup. Ct., Bronx Co.).

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

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

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

- The court first gave examples of the two “extreme[s]” of “plainly factual” and “clearly legal” allegations:
 - Example of a “plainly factual” allegation: “On June 19, 1993, at 3:00 p.m., I was waiting for a bus on the corner of Broadway and 42nd Street when a uniformed police officer approached me stating “people like you don’t belong in this neighborhood.” She reached into my jacket pocket and removed a one-inch vial of cocaine.” Id. The Court explained that “[t]hese allegations provide sufficient factual information which, if uncontested by the People, would warrant summary suppression and enable the motion court to make the required findings of fact in support of its decision.” Id.
 - Example of “a clearly legal conclusion”: “[O]n June 19, 1993 my Fourth Amendment rights were violated.” Id. As the court noted, this “pleading does not assert sufficient facts from which a court could conclude that suppression is appropriate.” Id.
- With regard to the situations falling between these two extremes, which often involve mixed questions of law and fact, the court gave the following examples of insufficiently factual allegations:
 - “An allegation that ‘I did nothing giving rise to probable cause’ is, without more, plainly insufficient because probable cause is a mixed legal-factual issue and the pleading lacks the factual portion of the equation.” Id. at 427, 604 N.Y.S.2d at 927. See also id. at 430, 604 N.Y.S.2d at 929 (motion in Martinez case insufficient on its face because defendant asserted in conclusory manner that he was “acting in a lawful manner” and “that there was no `reasonable suspicion’ that he committed a crime”).

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

Compare People v. Frank, 65 A.D.3d 461, 884 N.Y.S.2d 718 (1st Dept. 2009) (trial judge erred in summarily dismissing a *Mapp* motion which adequately set forth a claim under *Payton v. New York*, 445 U.S. 573 (1980) by alleging that the defendant “‘was lawfully inside his apartment at the time of the seizure and [d]id not engage in any activity on the date in question that would give [grounds for his arrest]’; and that the items of property, ‘all items enumerated in the v.d.f.,’ were seized illegally at the time of his arrest because ‘the police lacked probable cause to go to his apartment and take him into custody’” and “‘did not have an arrest warrant’”) and People v. Rosario, 264 A.D.2d 369, 693 N.Y.S.2d 152 (1st Dept. 1999), lv. app. denied, 95 N.Y.2d 938, 721 N.Y.S.2d 614 (2000) (trial judge in buy-and-bust case erred in summarily denying *Mapp* motion which “alleged that [defendant] was not involved in any suspicious or criminal activity, that he was legitimately in the area of the arrest since he was standing around with friends, that he had not engaged in any drug sales at any time that day and that he did not fit the description of anyone involved in a drug sale at that location”) and People v. Lopez, 263 A.D.2d 434, 695 N.Y.S.2d 76 (1st Dept. 1999) (trial judge in buy-and-bust case erred in summarily denying *Mapp* motion, in which “defendant explicitly denied selling or possessing drugs, which this court has frequently deemed sufficient to entitle a defendant to a suppression hearing ... [and] additionally raised a question of fact as to probable cause when he challenged a particular aspect of the arrest, namely the arresting officer’s identification of defendant based on the radio transmission”) and People v. Campbell, N.Y.L.J., 3/13/95, at 31, col. 3 (App. Term, 9th & 10th Jud. Dist.) (defendant’s allegation that he did not match the description of a robbery suspect presented issue of fact that could only be resolved at a hearing; trial court erred in summarily denying *Mapp* motion) with People v. Howell, 2 A.D.3d 358, 769 N.Y.S.2d 233 (1st Dept. 2003) (upholding summary denial of defendant’s *Mapp* motion in an undercover drug sale case because the motion papers contained only “vague and generalized assertion[s]” – about the defendant’s “innocuous behavior at the time of his arrest” and that he “‘was never previously observed engaging in any illegal or suspicious activity’” – and neither “den[ie]d participation in the underlying drug

transaction or allege[d] some other basis for suppression,” and when “the People submitted an answering affirmation that set forth, in detail, the predicate for defendant’s arrest, defendant did not reply”) and People v. Davis, 256 A.D.2d 184, 683 N.Y.S.2d 26 (1st Dept. 1998), lv. app. denied, 93 N.Y.2d 968, 695 N.Y.S.2d 54 (1999) (upholding trial judge’s summary denial of Mapp motion because defendant merely “denied, in conclusory fashion, [the People’s claim that he was] selling drugs or acting as a `steerer,” and motion “did not contest any of the facts creating probable cause to believe that defendant was a participant in the transaction”) and In the Matter of Raoul A., 240 A.D.2d 565, 659 N.Y.S.2d 789 (2d Dept. 1997) (trial court properly denied, on the papers, a Mapp motion which “mere[ly] alleg[ed] that [Respondent] was not engaging in any conduct that would justify being stopped and searched”) and People v. Williams, 228 A.D.2d 268, 644 N.Y.S.2d 194 (1st Dept. 1996) (trial court properly denied Mapp hearing and Dunaway hearing to suppress identification testimony because defendant’s motion merely asserted in conclusory terms that the arresting officer did not have “any reasonably trustworthy information which supported the conclusion that the defendant committed a criminal act” and that the undercover officer’s description was too vague to “provide for a valid seizure”).

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

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

- The suppression motion “allege[s] that when the police conducted the search, the defendant was merely standing on the street doing nothing wrong.” Such an allegation would be sufficient if the case involves a police “pat-down or search [of] [a] citizen[] based on perceived suspicious or unlawful behavior,” since the defendant’s allegation “that he or she was standing on the street doing nothing wrong when the police approached and searched” would take issue with the officers’ assertions that “defendant was acting `suspiciously’ or `furtively.” Id. at 428-29, 604 N.Y.S.2d at 928. Accord People v. Burton, 6 N.Y.3d 584, 590, 815 N.Y.S.2d 7, 11-12 (2006) (“where probable cause for a search is premised on the furtive behavior of a person, we have observed that an accused can ‘raise a factual issue simply by alleging that he or she was standing on the street doing nothing wrong when the police approached and searched’ and discovered contraband in the process A claim of this nature questions whether police action was legally authorized at its inception, and in this situation a hearing is required to determine, as a factual matter, whether

the defendant engaged in suspicious or unlawful conduct giving rise to probable cause justifying the search.”).

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

Thus, the central question in applying the second prong of the Mendoza standard is whether the respondent’s allegations refuted, or took issue with, the facts upon which the prosecution relies to justify the search or seizure. See, e.g., People v. Jones, 95 N.Y.2d 721, 726, 723 N.Y.S.2d 761, 765 (2001) (“in a buy and bust situation[,] ... [where] a claim of innocent conduct at the time of the arrest is unavailing, ... a defendant ... [can] raise a factual challenge to the legality of the arrest and seizure of evidence in either of two ways[:] ... [(1)] “deny participating in the transaction or [(2)] suggest some other grounds for suppression.”) (emphasis in original); id. at 727, 723 N.Y.S.2d at 766 (in buy-and-bust case, “[d]eficiencies in the description furnished to an arrest officer may provide the basis for suppression”). Compare In the Matter of Elvin G., 12 N.Y.3d 834, 882 N.Y.S.2d 671 (2009) (trial court erred in summarily denying a *Mapp* motion that challenged a school search: Because the suppression motion presented a “different factual scenario” than the Presentment Agency’s account of the search –

the suppression motion asserted that “the school dean ordered all of the students in the classroom to stand and empty their pockets in an attempt to discover a cell phone or electronic device that had disrupted the class” while [i]n contrast, the presentment agency . . . claim[ed] that the dean had asked the students to put their bookbags on their desks and Elvin had voluntarily removed a knife from his pocket,” thus placing the knife “in ‘plain view’” – a suppression hearing had to be held to “determine whether a search occurred and, if so, whether it was reasonable as a matter of law under the circumstances of this case.”) and People v. Atkinson, 111 A.D.3d 1061, 975 N.Y.S.2d 227 (3d Dept. 2013) (although the trial court acted properly in denying a suppression hearing on the lawfulness of the defendant’s arrest (since the arrest was based on an active parole violation warrant) and the search of the defendant’s pocket (which was incident to arrest) and the search of the car in which he had been riding (since the stop was based on a traffic violation and the defendant had no standing to contest the search of the car), the trial court improperly denied a suppression hearing on whether the police conducted an unlawful search when they recovered cocaine from the defendant’s mouth as a result of tasing him: Defendant’s motion papers “raised a factual dispute concerning the use of a taser and whether it might be considered excessive force, giving rise to a potentially unreasonable search and seizure,” and therefore “a hearing was required”) and People v. Jones, 73 A.D.3d 662, 901 N.Y.S.2d 274 (1st Dept. 2010) (trial court erred in summarily denying a hearing on a *Dunaway* motion that “clearly raised a factual issue as to when and where [defendant] was arrested, or otherwise taken into custody” by asserting that defendant “was arrested on the street approximately eight hours before the lineup took place” and thereby challenging the prosecution’s assertion that “defendant was arrested in a police station, immediately after being identified in a lineup”) and People v. Frank, 65 A.D.3d 461, 884 N.Y.S.2d 718 (1st Dept. 2009) (trial judge erred in summarily dismissing a *Mapp* motion which adequately set forth a claim under *Payton v. New York*, 445 U.S. 573 (1980) by alleging that the defendant ““was lawfully inside his apartment at the time of the seizure and [d]id not engage in any activity on the date in question that would give [grounds for his arrest]”; and that the items of property, ‘all items enumerated in the v.d.f.,’ were seized illegally at the time of his arrest because ‘the police lacked probable cause to go to his apartment and take him into custody’” and ““did not have an arrest warrant’”; Appellate Division points out that the prosecution’s Answering Affirmation did nothing more than to assert that ““[t]he evidence was lawfully obtained’” and to ““deny all allegations to the contrary,’” and did not present specific facts to establish the constitutionality of the police action by saying, for example, “that the police had a warrant or that defendant was outside in the hallway or at his apartment entrance or that defendant consented to have the police enter and search his apartment”) and People v. Joyner, 46 A.D.3d 473, 848 N.Y.S.2d 146 (1st Dept. 2007) (trial court erred in summarily denying a *Mapp* motion in buy-and-bust case in which, although prosecution alleged that the defendant was arrested 5 minutes after the sale to the undercover officer and was promptly identified in a show-up, defendant “denied participation in the transaction alleged in the indictment” and “asserted that he was in the area to visit a friend, that he was approached by a woman who asked to buy drugs, that he refused her overture, and that he walked away”) and People v. Lopez, 263 A.D.2d 434, 695 N.Y.S.2d 76 (1st Dept. 1999) (trial judge in buy-and-bust case erred in summarily denying *Mapp* motion, in which “defendant explicitly denied selling or possessing drugs, which this court has frequently deemed sufficient to entitle a defendant to a suppression hearing ... [and]

additionally raised a question of fact as to probable cause when he challenged a particular aspect of the arrest, namely the arresting officer's identification of defendant based on the radio transmission") and People v. Marquez, 246 A.D.2d 330, 667 N.Y.S.2d 359 (1st Dept. 1998), *withdrawn after remand*, 249 A.D.2d 1012, 679 N.Y.S.2d 784 (1st Dept. 1998) (withdrawn on stipulation of parties) (trial court erred in summarily denying *Mapp* motion which took issue with prosecution's claimed basis for the search by alleging that defendant did not participate in any narcotics transaction and was merely conversing with others in vicinity of alleged sale) and People v. Ayarde, 246 A.D.2d 330, 632 N.Y.S.2d 174 (2d Dept. 1995) (defendant was entitled to *Mapp* hearing because his allegations of fact -- that the police "did not observe the defendant commit a criminal act" and that he "was arrested due to his mere presence" inside a store that was raided by the police -- adequately took issue with the prosecution's theory that the police observed the defendant hand a bag of cocaine to a buyer) and People v. Bailey, 218 A.D.2d 569, 630 N.Y.S.2d 499 (1st Dept. 1995) (trial court erred in denying a *Mapp* hearing to defendant whose motion alleged that he was not involved in criminal activity at the time and place of his alleged purchase of marijuana and that "no illegal contraband was in ... a position ... to be seen by a police officer") and In the Matter of Ashanti L., 205 A.D.2d 539, 613 N.Y.S.2d 45 (2d Dept. 1994) (Family Court erred in summarily denying *Mapp* motion that took issue with arresting officer's allegations by "expressly den[ying] that [respondent] held a controlled substance in plain view or tried to conceal it, thereby raising an issue of fact as to whether the police had probable cause to arrest him") and People v. Fagan, 203 A.D.2d 933, 611 N.Y.S.2d 389 (4th Dept. 1994) (trial court erred in summarily denying defendant's *Mapp* motion that took issue with People's contention of drug sale by affirming, "upon information and belief, [that] no 'controlled buys' of cocaine took place at the time and place referred to in the warrant application") with People v. Scully, 14 N.Y.3d 861, 903 N.Y.S.2d 302 (2010) (trial court did not err in summarily denying a *Mapp* motion that "alleged that the officer searched [defendant] on the basis of a search warrant that had been issued without probable cause" but did not present "factual allegations to support [the] claim that probable cause was lacking" and thus "failed to raise an issue of fact.") and People v. Mattocks, 12 N.Y.3d 326, 880 N.Y.S.2d 888 (2009) (trial court did not err in summarily denying a *Mapp* motion in this bent-MetroCard-forgery case where the prosecution's allegations made out probable cause to arrest (a "police officer averred that he had observed defendant swipe three people into the subway in exchange for money from the riders") and the defendant's suppression motion, although asserting that the defendant was "merely 'speaking with various neighborhood acquaintances,' . . . never challenged the assertion that he had been selling swipes") and People v. France, 12 N.Y.3d 790, 879 N.Y.S.2d 36 (2009) (trial court did not err in summarily denying a *Mapp* motion that failed to challenge the police officers' bases for the arrest and that could not claim lack of access to the requisite information since "the felony complaint and the voluntary disclosure form" provided defense counsel with "sufficient information . . . concerning the factual predicate for the arrest") and People v. McDowell, 30 A.D.3d 160, 815 N.Y.S.2d 570 (1st Dept. 2006) (trial court did not err in summarily denying *Mapp/Dunaway* motion which "failed to raise a factual dispute requiring a hearing" in that "[t]he criminal court complaint and voluntary disclosure form specified that defendant's arrest was based on a robbery that had taken place three days earlier" but suppression motion did nothing more than present "general denial of any criminal activity 'prior

to' [defendant's] arrest" without "address[ing] the People's specific allegations" or "assert[ing] . . . any basis for suppression") and People v. Lopez, 5 N.Y.3d 753, 801 N.Y.S.2d 245 (2005) (trial court did not err in summarily denying Mapp/Dunaway motion because defendant's statement, which was included in VDF, "on its face shows probable cause for defendant's arrest, and defendant failed to controvert it in his motion papers") and In the Matter of Fatia I., 21 A.D.3d 961, 800 N.Y.S.2d 764 (2d Dept. 2005) (trial court did not err in summarily reversing Mapp motion that did not challenge police assertion that respondent was in possession of knife and that "alleged only, and in conclusory fashion, that the police had no probable cause to believe that she intended to use the knife unlawfully") and People v. Howell, 2 A.D.3d 358, 769 N.Y.S.2d 233 (1st Dept. 2003) (upholding summary denial of defendant's Mapp motion in an undercover drug sale case because the motion papers contained only "vague and generalized assertion[s]" – about the defendant's "innocuous behavior at the time of his arrest" and that he "was never previously observed engaging in any illegal or suspicious activity" – and neither "den[ie]d participation in the underlying drug transaction or allege[d] some other basis for suppression," and when "the People submitted an answering affirmation that set forth, in detail, the predicate for defendant's arrest, defendant did not reply") and In the Matter of Joel M., 237 A.D.2d 146, 654 N.Y.S.2d 753 (1st Dept. 1997) (upholding summary denial of Mapp/Dunaway motion which "failed to deny or to controvert" police officer's allegations that he observed Respondent repeatedly exchanging small objects for U.S. currency) and People v. Chavous, 204 A.D.2d 475, 611 N.Y.S.2d 903 (2d Dept. 1994), app. denied, 83 N.Y.2d 1002, 616 N.Y.S.2d 484 (1994) (affirming summary denial of suppression motion that alleged in conclusory fashion that "[t]he arresting officers did not observe the defendant commit any criminal act nor did they have any reasonably trustworthy information which supported the conclusion that the defendant had committed a criminal act," thereby failing to take issue with "the People's "contention that the defendant was arrested because he was sitting in a stolen vehicle and because he could not produce a driver's license, the vehicle's registration card, or the name of the vehicle's owner") and People v. Omaro, 201 A.D.2d 324, 607 N.Y.S.2d 44 (1st Dept. 1994) (affirming summary denial of Mapp motion that failed to take issue with People's contention that "search [was justified] on an abandonment theory" by "plead[ing] facts supporting any expectation of privacy").

A necessary corollary of Mendoza's second prong is that the prosecution must disclose the facts upon which it intends to rely to justify the search or seizure, for without such a disclosure, the respondent is not in a position to argue for a hearing and the court is not in a position to apply the second prong of Mendoza to assess the sufficiency of the respondent's motion. See People v. Hightower, 85 N.Y.2d 988, 990, 629 N.Y.S.2d 164, 166 (1995) (defendant's factual allegations, although brief, were sufficient to require a hearing "in light of the minimal information available to the defendant at the time of the motion" and in light of prosecution's failure to set forth specific facts in its "largely conclusory" responding papers); People v. Rosario, 264 A.D.2d 369, 369, 693 N.Y.S.2d 152, 153 (1st Dept. 1999), lv. app. denied, 95 N.Y.2d 938, 721 N.Y.S.2d 614 (2000) (defendant was entitled to Mapp hearing, given that defendant "alleged that he was not involved in any suspicious or criminal activity ... [and] that he had not engaged in any drug sales at any time that day and that he did not fit the

description of anyone involved in a drug sale at that location” and “[t]he People’s opposition to a suppression hearing failed to allege what description the arresting officer received and whether defendant fit such description ... [and] [t]he People alleged no facts supporting the lawfulness of the defendant’s arrest”); People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dept. 1994), app. denied, 84 N.Y.2d 873, 618 N.Y.S.2d 18 (1994) (notwithstanding vagueness of motion allegations that “defendant Vasquez was placed under arrest without probable cause” in that he “was not engaged in any illegal activity at the time of his arrest,” trial court erred in summarily denying Mapp/Dunaway motion because the “basis for the arrest was not self-evident and there had been absolutely no disclosure by the People as to the grounds upon which the arresting officers premised the seizure”; “where the claimed predicate for seizure is not self-evident, and the People fail to make even minimal disclosure with respect thereto, the only fair inference is that the legality of the seizure is, at the very least, questionable”).

(c) Third prong (information available to defendant)

The assessment of the sufficiency of the motion also must take into account “the information available to the defendant” at the time of the drafting of the motion. People v. Mendoza, 82 N.Y.2d at 428-29, 604 N.Y.S.2d at 928. If the “facts necessary to support suppression” are in the possession of the police and not reasonably available to the defendant, the court should excuse a motion’s lack of precision or sparseness of facts. Id. See also People v. Bryant, 8 N.Y.3d 530, 838 N.Y.S.2d 7 (2007) (trial court erred in summarily denying a Mapp/Dunaway motion: “defendant’s lack of access to information precluded more specific factual allegations”; “[t]he People could not both refuse to disclose the [information] ... and insist that defendant’s averments in his pleadings were insufficient to obtain a Mapp/Dunaway hearing”); People v. Hightower, 85 N.Y.2d 988, 990, 629 N.Y.S.2d 164, 166 (1995) (defendant’s factual allegations, although brief, were sufficient to require a hearing “in light of the minimal information available to the defendant at the time of the motion” and in light of prosecution’s failure to set forth specific facts in its “largely conclusory” responding papers); People v. McUllin, 152 A.D.3d 461, 59 N.Y.S.3d 329 (1st Dept. 2017) (the trial court erred by summarily denying the Mapp motion for factual insufficiency: Although the defendant’s suppression motion merely alleged in a “conclusory” manner that the defendant “was arrested without probable cause at his home . . . , at which time ‘[h]e was not acting in an illegal or suspicious manner,’” this was nonetheless “sufficient to entitle him to a hearing on the legality of his arrest and the admissibility of any evidence derived therefrom” because “the People provided defendant with no information at all as to how, by their account, he came to be at the police station in the first place, nor did they disclose the basis on which he first came to the attention of law enforcement in this investigation”); People v. Chamlee, 120 A.D.3d 417, 991 N.Y.S.2d 313 (1st Dept. 2014) (“it was incumbent upon the motion court to conduct a hearing,” and trial court’s summary denial of Mapp motion was improper, given that “the information proffered by the People to support the forcible entry was conclusory and defendant did not have access to available information”); People v. Wynn, 117 A.D.3d 487, 985 N.Y.S.2d 77 (1st Dept. 2014) (although defendant’s Mapp/Dunaway motion was “conclusory,” trial court nonetheless should have granted a suppression hearing because prosecution failed to provide defense counsel with “any

explanation for defendant's arrest" and thus the facts were not reasonably knowable by defense counsel: "Although the People provided defendant with extensive information about the facts of the crime and the proof to be offered at trial, they provided no information whatsoever, at any stage of the proceedings, about how defendant came to be a suspect, and the basis for her arrest, made hours after the crime at a different location," and "[t]he People never explained, even by implication, whether defendant met a description, was named by a witness familiar with her, or was connected to the crime in some other way"; moreover, "the People's response to defendant's motion was still silent as to the basis for connecting defendant to the crime."); People v. Acosta, 66 A.D.3d 792, 887 N.Y.S.2d 187 (2d Dept. 2009) (trial court erred in summarily denying a *Mapp* motion that challenged a search and seizure by store security guards: although the search may have been a private search exempt from constitutional requirements, the motion alleged that the store security guards were "'peace officers ... or persons acting as agents of the police,'" and this allegation sufficed to trigger a right to a suppression hearing on the issue, particularly because "a guard's licensing status is not something a defendant could be expected to know and is, therefore, not something a defendant could be expected to allege with particularity"); People v. Mabeus, 47 A.D.3d 1073, 850 N.Y.S.2d 664 (3d Dept. 2008) (trial court erred in summarily denying a *Mapp* motion that, *inter alia*, challenged the reliability of a confidential informant (whose information was the basis for police tracking of the defendant's vehicle with a GPS system), given that "defendant had limited access to information, particularly with respect to the confidential informant"); People v. Rivera, 42 A.D.3d 160, 836 N.Y.S.2d 148 (1st Dept. 2007) (trial court erred in summarily denying a *Mapp* motion: "[i]t is now firmly established that it is unreasonable to construe the Criminal Procedure Law as requiring precise factual averments from the defendant where the defendant does not have access to or awareness of the facts necessary to support suppression"); People v. McNair, 28 A.D.3d 800, 811 N.Y.S.2d 819 (3d Dept. 2006) (trial court erred in summarily denying Dunaway motion that was "somewhat vague due to the fact that defendant did not yet have access to the transcribed 911 call" which defense had requested in demand to produce and which prosecution had not yet produced by time that motion was due); People v. Lopez, 263 A.D.2d 434, 695 N.Y.S.2d 76, 77 (1st Dept. 1999) ("While a defendant is required to raise a factual issue in order to obtain a suppression hearing (CPL 710.60(3)(b)), he need not prove his entire case in the motion papers. The adequacy of the factual allegations must be considered in the context of defendant's case and his accessibility to information at the time of the motion."); People v. Bennett, 240 A.D.2d 292, 659 N.Y.S.2d 260 (1st Dept. 1997) (defendant's minimal *Mapp* motion, which merely denied that defendant engaged in a drug transaction with undercover officer, was sufficient to require hearing, "[g]iven the paucity of information that was available to the defendant at the time of the motion"); People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dept. 1994), app. denied, 84 N.Y.2d 873, 618 N.Y.S.2d 18 (1994). Cf. People v. Long, 8 N.Y.3d 1014, 839 N.Y.S.2d 441 (2007) (trial court "properly denied defendant's motion for a *Mapp/Dunaway* hearing in light of defendant's failure to raise a factual dispute as to reasonable suspicion for her detention and subsequent arrest," given that "defendant had ample access to relevant information regarding the factual predicate for her arrest, including access to the People's 'write-up' of her conduct which the court read to her and her counsel at arraignment" and yet nonetheless "failed to specifically challenge the identified informant's basis of knowledge in her suppression motion").

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

Even in situations in which the respondent does not have access to the facts central to the suppression claim, however, s/he must allege whatever facts are in his or her possession. Thus, for example, in People v. Jones, 95 N.Y.2d 721, 723 N.Y.S.2d 761 (2001), the Court of Appeals agreed that the prosecution's failure to disclose the identification radioed by the undercover officer to the arresting officer excused the defendant's failure to plead any facts about the description itself to support his claim of the vagueness of the description *but* the Court nonetheless found the motion to be insufficient because the defendant failed "to supply the motion court with ... relevant facts he did possess for the court's consideration on the suppression motion once the People disclosed the communicated description.... [I]t was obviously within his ability to provide a description of his own appearance at the time of the arrest.... Similarly with respect to his allegation that the radioed description was perhaps too generalized, and thus would not have excluded others at the scene, defendant should have submitted facts as to the presence and general description of such other persons in the vicinity at the time of the arrest." Id. at 729, 723 N.Y.S.2d at 767.

(3) Alleging Sufficient Facts to Establish Standing

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

Accordingly, in cases in which the respondent's standing to raise a search and seizure claim is in question, the Mapp motion must allege facts showing that the respondent had the privacy interest necessary to challenge the police conduct. See People v. Burton, 6 N.Y.3d 584, 587, 815 N.Y.S.2d 7, 10 (2006) ("There is no legal basis for suppression and, hence, no need for a hearing, unless the accused alleges facts that, if true, demonstrate standing to challenge the search or seizure"). Compare People v. Carter, 86 N.Y.2d 721, 723, 631 N.Y.S.2d 116, 117 (1995) (affirming summary denial of Mapp motion because "[d]efendant made no assertion of standing to challenge the search of the vehicle in his omnibus motion or thereafter, even though

the People consistently contested defendant's standing throughout the proceedings") and People v. Gomez, 67 N.Y.2d 843, 844, 501 N.Y.S.2d 650, 651 (1986) (affirming summary denial of motion challenging police seizure of property from defendant's apartment because the motion failed to allege "present possessory interest in the apartment" or other facts supporting "an expectation of privacy in the area searched") and People v. Browning, 253 A.D.2d 888, 678 N.Y.S.2d 332 (2d Dept. 1998) (upholding summary denial of *Mapp* motion because defendant failed to allege any expectation of privacy in crate on which he was seated (and which was searched) and, in any event, could not reasonably have claimed such an expectation in such a crate in a public area) with People v. Martin, 135 A.D.2d 355, 521 N.Y.S.2d 416 (1st Dept. 1987) (motion papers adequately established taxicab passenger's standing to challenge weapon seized from floor of cab) and People v. Madera, 125 A.D.2d 238, 509 N.Y.S.2d 36 (1st Dept. 1986) (motion papers adequately established automobile passenger's standing to challenge police stop of car) and with People v. Valentin, 27 Misc.3d 19, 898 N.Y.S.2d 755 (N.Y. Sup. Ct., App. Term, 2d, 11th & 13th Dist. Feb. 8, 2010) (prosecution waived challenge to defendant's standing by "orally consent[ing] to a *Mapp* hearing without the necessity of a written motion and "fail[ing] thereafter to raise said issue on any of the adjourned dates of the [suppression] hearing"). But cf. People v. Hunter, 17 N.Y.3d 725, 926 N.Y.S.2d 401 (2011) ("the People must timely object to a defendant's failure to prove standing in order to preserve that issue for appellate review": in order to "bring the claim to the trial court's attention" and alert defense counsel to "the need to develop a record for appeal," the "People are required to alert the suppression court if they believe that the defendant has failed to meet his burden to establish standing"); People v. Ingram, 18 N.Y.3d 948, 944 N.Y.S.2d 470 (2012) (in criminal cases, "CPL § 470.15(1) precludes the Appellate Division from reviewing an issue that was either decided in an appellant's favor or was not decided by the trial court," and, "[i]n an appeal from an Appellate Division affirmance, CPL § 470.35(1) grants [Court of Appeals] no broader review power than that possessed by the Appellate Division"); People v. Concepcion, 17 N.Y.3d 192, 929 N.Y.S.2d 541 (2011) (Appellate Division erred in affirming trial court's denial of suppression (which was based on inevitable discovery) on alternative legal basis on which trial judge had not ruled (consent to the search): "CPL 470.15(1) bars [Appellate Division] from affirming a judgment, sentence or order on a ground not decided adversely to the appellant by the trial court, and CPL 470.35(1) grants [Court of Appeals] no broader review powers in this regard"); People v. Sylvester, 129 A.D.3d 1666, 12 N.Y.S.3d 469 (4th Dept. 2015) ("The People failed to preserve for our review their contention that defendant Sylvester lacked standing to contest the legality of the search of the vehicle" because "[t]he People's challenge to defendant Sylvester's standing, made after the proof at the suppression hearing was closed, was untimely"); People v. Cole, 128 A.D.3d 521, 9 N.Y.S.3d 253 (1st Dept. 2015) (declining to review prosecution's argument on defendant's lack of standing because "the People did not raise this specific claim in their post-hearing argument and submissions before the motion court, nor did the court reach this issue" and "[t]hus, the People's argument is unpreserved and we decline to reach it in the interest of justice").

Until the Court of Appeals's decision in 2006 in People v. Burton, 6 N.Y.3d 584, 815 N.Y.S.2d 7 (2006), some lower courts required defendants in criminal cases and juvenile

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

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

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

defendant has manifested an expectation of privacy that society recognizes as reasonable. Thus, the test has two components. The first is a subjective component --did *defendant* exhibit an expectation of privacy in the place or item

searched, that is, did he seek to preserve something as private. The second component is objective -- does society generally recognize defendant's expectation of privacy as *reasonable*, that is, is his expectation of privacy justifiable under the circumstances.

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

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

- *Searches of the person*: An individual always has standing to contest a search of his or her person. See, e.g., People v. Burton, 6 N.Y.3d 584, 588, 815 N.Y.S.2d 7, 10 (2006) (“individuals possess a legitimate expectation of privacy with regard to their persons”; “defendant undeniably had ‘a reasonable expectation of freedom from governmental intrusion’ ... in the place searched by the police – the pocket of his pants” and “also subjectively manifested such an expectation since anything concealed in the pocket was in his sole possession and hidden from public view”); People v. Hibbler, 111 A.D.2d 67, 489 N.Y.S.2d 191 (1st Dept.), appeal denied, 65 N.Y.2d 981 (1985). See also People v. Jose, 239 A.D.2d 172, 173, 657 N.Y.S.2d 631, 632 (1st Dept. 1997).
- *Searches of premises*: The courts have recognized that an individual clearly has standing to challenge:
 - A search of his or her own home. See, e.g., United States v. Karo, 468 U.S. 705, 714 (1984); People v. Mercado, 68 N.Y.2d 874, 876, 508 N.Y.S.2d 419, 421 (1986), cert. denied, 479 U.S. 1095 (1987).
 - A search of a residence in which s/he regularly stays. See, e.g., People v. Edwards, 124 A.D.3d 988, 1 N.Y.S.3d 523 (3d Dept. 2015) (defendant had standing to “contest the propriety of the warrantless entry into the apartment” because he was “a frequent guest” of the tenant’s); In the Matter of George R., 226 A.D.2d 645, 641 N.Y.S.2d 376 (2d Dept. 1996) (respondent had standing to contest the search of a room in his grandmother’s apartment, even though he did not live there, because he “was a regular overnight guest at her apartment and .. both slept in and kept possessions in the room where the weapon was recovered”). But cf. People v. Leach, 21 N.Y.3d 969, 971 N.Y.S.2d 234 (2013) (there was

sufficient “record support for the lower courts’ findings” that the defendant “had no reasonable expectation of privacy in [and therefore lacked standing to contest the search of] the guest bedroom of his grandmother’s apartment,” even though the “defendant resided in his grandmother’s apartment,” because there was “record support for a finding that defendant’s grandmother did not want defendant to have unfettered access to all areas of the apartment”: “She told the hearing court that defendant had his own bedroom and she reserved the extra or guest bedroom solely for use by other grandchildren when they came to visit,” and “[t]he record was silent as to whether defendant had ever used that bedroom for any purpose”).

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

- Arguably, virtually every “social guest” who has been invited into a dwelling by the owner or a resident has standing to challenge a search of that dwelling if the guest was present at the time of the search. See Minnesota v. Carter, 525 U.S. 83, 109 n.2 (1998) (Ginsburg, J., dissenting) (emphasizing that the inescapable conclusion that emerges by comparing the majority, concurring, and dissenting opinions in the case is “that five Members of the Court would place under the Fourth Amendment’s shield, at least, ‘almost all social guests’”). Defendants who seek to claim standing as mere “social guests” will have to expressly invoke the Supreme Court’s 1998 decision in Carter, because there is prior New York

State caselaw that takes a much more restrictive view of social guests' standing rights. See, e.g., People v. Ortiz, 83 N.Y.2d 840, 611 N.Y.S.2d 500 (1994) (defendant lacked standing to challenge warrantless entry of girlfriend's apartment because he was merely "a casual visitor" with, at best, "relatively tenuous ties to the apartment"); People v. Christian, 248 A.D.2d 960, 670 N.Y.S.2d 957 (4th Dept. 1998), app. denied, 91 N.Y.2d 1006, 676 N.Y.S.2d 134 (1998) (defendant lacked standing to challenge search of apartment because he was merely "a recent and occasional visitor"); People v. Mercica, 170 A.D.2d 181, 565 N.Y.S.2d 85 (1st Dept. 1991), app. denied, 77 N.Y.2d 964, 570 N.Y.S.2d 498 (1991) (defendant lacked standing because "he admitted to residing elsewhere and was merely an invitee in the apartment").

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

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

- *Stops and searches of automobiles:*

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

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

- The automobile belongs to the respondent's family or one of his or her friends and the respondent is driving it with the owner's permission. See, e.g., People v. Lewis, 217 A.D.2d 591, 629 N.Y.S.2d 455 (2d Dept. 1995) (defendant, who was driving his

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

- The respondent rented the car from a car rental agency or, even if s/he "is not listed on the rental agreement," is the driver of the car ("since there may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car and drive it – perhaps the renter is drowsy or inebriated and the two think it safer for the friend to drive them to their destination"). Byrd v. United States, 138 S. Ct. 1518 (2018).
- The respondent is charged with constructive possession of contraband found in the car pursuant to a statutory presumption. See People v. Burton, 6 N.Y.3d 584, 591 n.3, 815 N.Y.S.2d 7, 12 n.3 (2006) ("[i]n cases where a defendant is charged with possession of a gun based on the statutory presumption found in Penal Law section 265.15(3), which attributes possession of a gun to the passengers in an automobile simply by virtue of their presence in the car where the gun is found,' ... [w]e have held that a defendant in such a case 'has a right to challenge the legality of the search regardless of whether he or she is otherwise able to assert a cognizable Fourth Amendment interest'"); People v. Millan, 69 N.Y.2d at 519, 516 N.Y.S.2d at 170. See also, e.g., In the Matter of Terrell W., 301 A.D.2d 536, 753 N.Y.S.2d 529 (2d Dept. 2003) (respondent had standing to challenge seizure and search of knapsack found in parked car in which he had been seated – which resulted in the officers' recovery of a handgun in the knapsack – because "the weapon possession charges were based solely on the statutory presumption which attributes possession of a handgun found in a car to the occupants of the

car”); People v. Hwi Jin An, 253 A.D.2d 657, 679 N.Y.S.2d 94 (1st Dept. 1998), lv. app. denied, 92 N.Y.2d 949, 681 N.Y.S.2d 480 (1998). Cf. People v. Wesley, 73 N.Y.2d at 361, 540 N.Y.S.2d at 763.

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

— But if the police obtain a license plate number lawfully (*i.e.*, not by means of an unlawful stop or search), the police can run the number “through a government database to check for any outstanding violations or suspensions on the registration of the vehicle,” “even without any suspicion of wrongdoing” because “the purpose of a license plate is to readily facilitate the identification of the registered owner of the vehicle for the administration of public safety” and therefore “a person has no reasonable expectation of privacy in the information acquired by the State for this purpose and contained in a law enforcement or DMV database” and such a database check of a license plate “does not constitute a search.” People v. Bushey, 29 N.Y.3d 158, 160, 163, 53 N.Y.S.3d 604, 605, 607 (2017).

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

place:

- An individual who boards a bus and places a closed bag or piece of luggage in the luggage rack has the requisite privacy interest to contest its search or seizure even if the individual “seated himself at a distance from the bag.” People v. Ramirez-Portoreal, 88 N.Y.2d at 111-12, 643 N.Y.S.2d at 509.
- An individual who places a sealed box or package into the mail or a private delivery service has standing to challenge a governmental interception and search of the item. See United States v. Jacobsen, 466 U.S. 109, 120 & nn.17-18 (1984).

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

IV. Return on the Motion

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

If the prosecutor fails to respond to the motion, counsel can request that the court treat the motion as conceded and grant the relief requested in the motion. See People v. Gruden, 42 N.Y.2d 214, 397 N.Y.S.2d 704 (1977) (construing the C.P.L. as authorizing the judge to summarily grant a speedy trial motion when the prosecution fails to submit a response “show[ing] that there is a factual dispute which must be resolved at a hearing” (*id.* at 217, 397 N.Y.S.2d at 706) and indicating that “[t]he same standard applies [to] ... motions to suppress ... [and] nearly every pretrial and posttrial motion made in a criminal action” (*id.* at 216, 397 N.Y.S.2d at 705)); People v. Thurmond, 242 A.D.2d 310, 661 N.Y.S.2d 48 (2d Dept. 1997), app. denied, 90 N.Y.2d 1014, 666 N.Y.S.2d 109 (1997) (trial judge properly “deemed the factual allegations made by the defendant in his motion to be true” on the ground that “the People had twice failed to honor the trial court’s directives to furnish an answer to the defendant’s omnibus motion”); People v. Alston, 126 A.D.2d 731, 731, 511 N.Y.S.2d 133, 134 (2d Dept. 1987), app. denied, 69 N.Y.2d 876, 515 N.Y.S.2d 1093 (1987) (since “[t]he defendant’s moving papers contained sworn allegations of all the facts essential to support ... her motion ..., the People conceded these allegations of fact by totally failing to respond to them ... [and] [t]hus, the court was required to summarily grant ... the defendant’s motion”); People v. Gonzalez, 116 A.D.2d 735, 736, 497 N.Y.S.2d 778, 779 (2d Dept. 1986) (“By failing to contest the allegations made by defendant in his motion, the People conceded [the factual allegations] ... and the motion should have been summarily granted”). See also People v. Ciaccio, 47 N.Y.2d 431, 418 N.Y.S.2d 371

(1979) (prosecution's failure to respond to post-trial motion to set aside a verdict was an implicit concession justifying summary granting of the motion: "[t]he People did not dispute any of the[] facts [in the motion], and although they have not expressly conceded them, they have impliedly done so by failing even to allege their untruthfulness.... Under these circumstances we hold that it is proper for a court to grant the defendant's motion without the necessity of holding a hearing."); People v. Jordan, 149 Misc.2d 332, 333 & n.1, 564 N.Y.S.2d 658, 659 & n.1 (Sup. Ct., N.Y. Co. 1990) (because prosecution failed to respond to and contest allegations in defendant's motion to dismiss charging paper on grounds of excessive delay, "the facts asserted by the defendant are deemed conceded" and "defendant's motion is decided on default"). Cf. In the Matter of Terees O., 307 A.D.2d 1037, 763 N.Y.S.2d 768 (2d Dept. 2003), lv. app. denied, 1 N.Y.3d 502 (2003) (trial court's denial of attorney for child's request for summary granting of suppression motion is upheld on appeal because "the Presentment Agency's answering affidavit sufficiently refuted the allegations in [the] motion to suppress"). But cf. People v. Weaver, 49 N.Y.2d 1012, 1013-14, 429 N.Y.S.2d 399, 400 (1980) (treating the remedy of summary granting of the motion as limited to those cases in which the prosecution wholly fails to controvert the allegations in the motion, and holding that the prosecution's bare-bones written response supplemented by oral allegations were sufficient to preclude summary granting of the motion); People v. Lomax, 50 N.Y.2d 351, 357-58, 428 N.Y.S.2d 937, 939-40 (1980) (prosecution's failure to controvert motion does not mandate summary granting of motion if "the allegations in [the] moving papers did not spell out a legal basis for relief"); People v. Dean, 45 N.Y.2d 651, 656, 412 N.Y.S.2d 353, 356 (1978) (prosecution's oral contesting of the motion is sufficient, at least where the defense motion failed "to show any ground constituting legal basis for the motion"); People v. Ventura-Almonte, 78 A.D.3d 524, 911 N.Y.S.2d 53 (1st Dept. 2010) (prosecution's response "'submitt[ing] that such evidence was lawfully obtained and den[ying] all allegations to the contrary'" was "sufficient to meet their burden of 'refus[ing] to concede the truth of facts alleged by defendant'" and thus defense was not entitled to summary granting of suppression motion).

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

Since most judges will be reluctant to employ the remedy of summary granting of the

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

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

B. Arguing for a Hearing

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

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

In situations in which prosecutors assert that their conflicting version of the facts requires summary denial of the motion, defense counsel should respond by pointing out that the conflict between the defense's and prosecution's versions of the facts actually demonstrates the need for a hearing since such a factual dispute can only be resolved through a hearing. See, e.g., People v. Mosley, 136 A.D.2d 500, 523 N.Y.S.2d 820 (1st Dept. 1988) (trial court erred in summarily denying Wade motion on the basis of the prosecutor's representation that the identification was a "confirmatory identification" by a witness who knew the accused; since defendant claimed that he did not know the witness, there was a factual dispute requiring a hearing); People v. Soriano, 134 A.D.2d 186, 520 N.Y.S.2d 774 (1st Dept. 1987) (where Mapp motion alleged that police had seized challenged property from the defendant, and prosecutor responded by claiming that the

property had actually been seized from a building vestibule where the defendant had no privacy expectation, there was a factual dispute which required a hearing and trial court could not summarily deny the motion); People v. Ramos, 130 A.D.2d 439, 440-41, 515 N.Y.S.2d 472, 473 (1st Dept. 1987) (trial court erred in summarily denying Mapp motion on the basis of prosecutor's facts supporting the police action in stopping the defendant; dispute between defense claim of an unjustified Terry stop and prosecutor's facts "create[d] a factual issue, which required a hearing"); People v. Patterson, 129 A.D.2d 527, 528, 514 N.Y.S.2d 378, 379 (1st Dept. 1987) (where Mapp motion claimed that the police had unlawfully stopped the car in which defendant was a passenger, and prosecution asserted that there had been no stop and that the vehicle actually was stationary, the prosecution's allegations "simply created a factual dispute which could only be resolved at a hearing").

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

V. Procedural Aspects of the Suppression Hearing

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

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

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

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

(1) Right to Rosario Material

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

Unlike the Rosario requirements for a Family Court trial, this provision does not necessitate disclosure at the commencement of the suppression hearing; rather, the prosecution can turn over the material “at the conclusion of the direct examination of each of its witnesses.” F.C.A. § 331.4(3). Nonetheless, counsel should ask the prosecutor at the commencement of the hearing to turn over all of the material immediately in order to avoid delay during the hearing. Cf. People v. Sorbo, 170 Misc.2d 390, 649 N.Y.S.2d 318 (Sup. Ct., N.Y. Co. 1996) (ordering prosecution to provide pretrial disclosure of statements that defendant made to private party because “[d]elayed disclosure creates a substantial risk of unnecessary continuances and adjournments [and] [t]he People have advanced no policy arguments against disclosure”). If the prosecutor refuses, and if the judge later resists counsel’s mid-hearing attempt to take the time to read the Rosario material carefully, counsel can inform the judge that the delay is attributable to the prosecutor since s/he refused to cooperate with counsel’s attempt to avoid such a mid-hearing delay.

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

If the prosecutor informs the court that there is Rosario material relating to a witness but that it need not be disclosed because it does not relate to the subject matter of the hearing, counsel should ask that the court review the material in camera to independently determine the

need for disclosure. Cf. In the Matter of George V., 100 A.D.2d 594, 595, 473 N.Y.S.2d 541, 542 (2d Dept. 1984) (when respondent's counsel asserts Rosario rights at trial and Presentment Agency refuses to turn over certain material, "[t]he court should inspect the [material] ... in camera and relinquish to [respondent's counsel] any material found not to be cumulative or irrelevant"); see also In the Matter of Rodney B., 69 N.Y.2d 687, 689, 512 N.Y.S.2d 17, 19 (1986).

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

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

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

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

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

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

These considerations militate for a waiver not only at a Wade hearing but also at any type of

suppression hearing at which there will be testimony by a witness who will later identify the respondent at trial (except where the witness and respondent are well-known to each other and identification is not an issue).

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

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

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

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

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

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

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

A respondent's right to confrontation under the federal and state constitutions requires that a hearsay statement be excluded if the statement does not bear adequate "indicia of reliability." Mancusi v. Stubbs, 408 U.S. 204, 213 (1972); see also Kentucky v. Stincer, 482 U.S. 730, 737-38 (1987); Lee v. Illinois, 476 U.S. 530, 542-45 (1986). Even though the C.P.L. generally authorizes the use of hearsay at suppression hearings, a particular hearsay statement may be so unreliable that its exclusion is mandated by the paramount constitutional right to confrontation. Cf. Barber v. Page, 390 U.S. 719 (1968) (notwithstanding that the challenged statement was admissible under a standard hearsay exception, its introduction violated the Confrontation Clause). Accordingly, in a suppression hearing, if counsel can show that the out-of-court declarant's bias or lack of knowledge renders the hearsay statement unreliable, it must be excluded. See, e.g., United States v. Matlock, 415 U.S. 164, 176-77 (1974) (in holding that the hearsay statement at issue could be introduced at a suppression hearing, the Court emphasizes that the out-of-court declarant "harbored no hostility or bias against respondent that might call her statements into question" and that the hearsay statements "were also corroborated by other evidence received at the suppression hearing" and bore "indicia of reliability"). The need for exclusion is particularly great when the prosecution relies on a hearsay statement by an out-of-court declarant whom the prosecution will not call as a witness at the hearing and who therefore will not be subject to cross-examination. See id. at 177 (since the out-of-court declarant testified at the suppression hearing and "was available for cross-examination, ... the risk of prejudice, if there was any, from the use of hearsay was reduced").

A hearsay statement by an out-of-court declarant who is biased against the respondent or who lacks personal knowledge of the information contained in the statement is also excludable as "irrelevant" because "its probative value is outweighed by the danger that its admission would ... create substantial danger of prejudice to [the respondent]." People v. Davis, 43 N.Y.2d 17, 27, 400 N.Y.S.2d 735, 740 (1977). A statement by an out-of-court declarant who is biased or

who lacks personal knowledge of the information contained in the statement has almost minimal probative value. Its introduction causes substantial prejudice to the respondent in that it “unduly restrict[s] the [respondent’s] opportunity to test the validity of the [prosecution’s] case through the medium of cross-examination” (People v. Misuis, 47 N.Y.2d 979, 981, 419 N.Y.S.2d 961, 963 (1979)) and permits the resolution of the respondent’s motion to turn upon unreliable evidence.

(2) Challenging Multiple Hearsay

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

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

This argument against introduction of multiple hearsay is particularly strong when the suppression claim at issue necessitates some assessment of the out-of-court declarant’s reliability or demeanor. Thus, for example, in a Mapp hearing on an Aguilar-Spinelli claim, counsel can argue that the determination of the informant’s “veracity” and “basis of knowledge” require testimony by an officer who personally spoke with the informant. See, e.g., People v. Mingo, 117 A.D.2d 353, 502 N.Y.S.2d 558 (4th Dept. 1986), app. denied, 68 N.Y.2d 772, 773, 506 N.Y.S.2d 1056, 1058 (1986) (prosecution failed to satisfy Aguilar-Spinelli standards of reliability and basis of knowledge when it presented solely the arresting officer, who learned of the informant’s tip from another officer: the testifying officer never spoke directly to the informants and therefore “had no way of knowing the basis of the informants’ knowledge” (id. at 356, 502 N.Y.S.2d at 560)). See also People v. Ketcham, 93 N.Y.2d 416, 421, 690 N.Y.S.2d 874, 878 (1999) (although the general rule is that “[t]he prosecution may satisfy its burden even with ‘double hearsay,’ or ‘hearsay-upon-hearsay,’ so long as both prongs of Aguilar-Spinelli are

met at every link in the hearsay chain” – which occurred in the Ketcham case because the testifying witness was the arresting officer, who acted on the basis of the undercover officer’s information, relayed to him by the the “ghost” officer – multiple hearsay would not suffice if “there is no evidence indicating how the informant obtained the information passed from one officer to another, [since then] there is nothing by which to measure the trustworthiness of the information,” and illustrating the latter principle by citing People v. Parris, 83 N.Y.2d 342, 350, 610 N.Y.S.2d 464, 469 (1994), where the “police officer’s conclusory characterization of informant as an ‘eyewitness’ did not satisfy basis of knowledge requirement where there was no further evidence indicating how the informant obtained description of the suspected burglar”).

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

In some cases in which the prosecution relies on a police officer whose information about the case comes from another officer or a civilian witness, the testifying officer may be unable to give details that are essential for resolution of the claim that is being litigated. In such cases, it may be possible to argue at the conclusion at the hearing that the witness’s testimony is insufficient to satisfy the prosecution’s burden or production or proof. See, e.g., People v. Ortiz, 90 N.Y.2d 533, 664 N.Y.S.2d 243 (1997) (prosecution failed to meet its burden of production at the *Wade* hearing because the officer who testified at the hearing did not observe the show-up identification of the defendant by two other police officers: the Court of Appeals explains that it is not sufficient for the prosecution merely to establish, as it did in this case, that “the showup was conducted in close geographic and temporal proximity to the crime”; “[t]he People also have the burden of producing some evidence relating to the showup itself, in order to demonstrate that the procedure was not unduly suggestive”); People v. Eastman, 32 A.D.3d 965, 821 N.Y.S.2d 263 (2d Dept. 2006) (prosecution failed to satisfy its burden of production at a *Mapp* hearing by presenting a police officer who arrested the defendant at the direction of a detective but who did not testify about the other officer’s basis for believing that the defendant had committed a crime: although the “fellow officer rule” allows an officer to make “a lawful arrest even without personal knowledge sufficient to establish probable cause, so long as the officer is acting upon the direction of or as a result of communication with a fellow officer ... in possession of information sufficient to constitute probable cause for the arrest,” the “prosecution bears the burden [at a suppression hearing] of establishing that the officer imparting the information had probable cause to act”); People v. Moses, 32 A.D.3d 866, 823 N.Y.S.2d 409 (2d Dept. 2006) (prosecution’s burden of production at a *Mapp* or *Dunaway* hearing to come “forward with evidence to demonstrate the legality of the police conduct in the first instance” was not satisfied by the testimony of a police officer who transported the complainant to the location of the show-up but was not involved in the stop of the defendant, could not testify to the circumstances of the stop, and offered nothing more than a “vague and equivocal hearsay” account of a statement made by the arresting officer which “was inadequate to demonstrate” the validity of the arresting officers’ actions in stopping and detaining the defendant and transporting him to the location of the show-up).

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

Putting on a defense case at a suppression hearing is a very risky proposition if the witnesses whom counsel would call at the suppression hearing are also essential witnesses for the defense at trial. To the extent that a defense witness (including the respondent) testifies differently at trial than s/he did at the suppression hearing, the prosecution is apparently free to impeach the witness with his or her prior inconsistent statements at the suppression hearing. Cf. Harris v. New York, 401 U.S. 222 (1971). The only limitation upon the prosecution's use of suppression hearing testimony at trial is that the prosecutor cannot introduce the suppression hearing testimony of a defense witness in the Presentment Agency's case-in-chief. See Simmons v. United States, 390 U.S. 377 (1968) (barring such introduction of accused's suppression hearing testimony in prosecution's case-in-chief at trial); People v. Ayala, 75 N.Y.2d 422, 554 N.Y.S.2d 412 (1990) (witness's suppression hearing testimony is not admissible at trial under hearsay exception for sworn testimony by unavailable witness who was subject of cross-examination by opposing side at prior hearing); In re Jaquan A., 45 A.D.3d 305, 306, 846 N.Y.S.2d 88, 89 (1st Dept. 2007) (applying, to the delinquency context, the rule of People v. Ayala, that a lawyer cannot introduce, at trial, a witness's suppression hearing testimony over the objection of opposing counsel).

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

statement and coerced him into writing the subsequent inculpatory statement.”).

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

E. The Concluding Argument

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

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

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

There may also be cases in which counsel needs a transcript of the suppression hearing in order to argue effectively, because an issue turns on the precise wording used by a witness and counsel was not able to take accurate notes of that testimony. Judges are ordinarily resistant to defense requests for an adjournment of the legal argument (and, as a consequence the trial as well), for the purpose of acquiring a transcript. Counsel should, whenever possible, attempt to resolve the dilemma informally by consulting the court reporter during a recess and asking him or her to read to counsel the relevant passage of the testimony. If this remedy does not suffice

and counsel needs the transcript, then counsel will have to seek an adjournment. If the court is not willing to exercise its discretion in favor of granting the adjournment, counsel will need to make a particularized showing of prejudice as a predicate to asserting a due process right to an adjournment. See Part VI(B) infra.

If the court denies a defense request to continue the concluding argument (whether for the purpose of additional research or acquisition of a transcript) and, after argument, denies the suppression motion, counsel should thereafter obtain the missing information by doing the additional research or examining the transcript. If the new information provides an argument that counsel did not previously make, counsel should file a motion for reconsideration. Such a pleading can be filed as a motion seeking the court's exercise of its "continuing jurisdiction to reconsider its prior intermediate determinations" (People v. Wheeler, 32 A.D.3d 1107, 822 N.Y.S.2d 160 (3d Dept. 2006)) or as a motion pursuant to F.C.A. § 355.1(1)(b) (with the new information serving as "a substantial change of circumstances" warranting a modification of the previous order denying suppression) or as a motion seeking the judge's exercise of his or her inherent discretion to reconsider a ruling in the interest of justice (cf. In the Matter of Carmen R., 123 Misc.2d 238, 473 N.Y.S.2d 312, 315 (Family Ct., St. Lawrence Co. 1984)).

(2) Using Burdens of Production and Persuasion

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

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

(a) Huntley Motions

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

While the foregoing doctrine is commonly framed in terms of the voluntariness of a statement, it necessarily extends beyond due process claims of involuntariness and encompasses all doctrinal bases for challenging the constitutionality of a statement, including Miranda violations and violations of the right to counsel. Under New York law, the definition of

“involuntary statement” for purposes of a suppression motion includes any statement obtained from the accused “in violation of such rights as the defendant may derive from the constitution of this state or of the United States.” C.P.L. § 60.45(2)(b)(ii); F.C.A. § 344.2(2)(b)(ii); see People v. Graham, 55 N.Y.2d 144, 447 N.Y.S.2d 918 (1982). Accordingly, the prosecution’s burden of proving “voluntariness” necessitates that the prosecution prove beyond a reasonable doubt that the police complied with Miranda requirements (see, e.g., People v. Baggett, 57 A.D.3d 1093, 868 N.Y.S.2d 423 (3d Dept. 2008); People v. Haverman, 119 Misc.2d 980, 982, 464 N.Y.S.2d 981, 982 (Sup. Ct., Queens Co., 1983); see also People v. Campbell, 81 A.D.2d 300, 309, 440 N.Y.S.2d 336, 341 (2d Dept. 1981)), and also that the police complied with federal and state constitutional requirements for honoring the right to counsel (see, e.g., People v. Barnes, 84 A.D.2d 501, 443 N.Y.S.2d 68 (1st Dept. 1981)). Finally, because Family Court Act § 344.2(2)(b)(iii) expands the definition of an “involuntary” statement to encompass statements taken in violation of the statutory protections established in F.C.A. § 305.2 (the requirements of parental notification, parental presence during interrogation, parental receipt of Miranda warnings, and use of a special room for interrogation), the prosecution also must prove beyond a reasonable doubt that the police complied with these statutory requirements.

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

(b) Wade Motions

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

For due process claims of suggestiveness, the defendant has the burden to show suggestiveness by a preponderance of the evidence. However, “[w]hile the defendant bears the ultimate burden of proving that a showup procedure is unduly suggestive and subject to suppression, the burden is on the People first to produce evidence validating the admission of such evidence.... Initially, the People must demonstrate that the showup was reasonable under the circumstances.... The People also have the burden of producing some evidence relating to the showup itself, in order to demonstrate the procedure was not unduly suggestive.” People v. Ortiz, 90 N.Y.2d 533, 536, 664 N.Y.S.2d 243 (1997); In the Matter of Andrew S., 104 A.D.3d 693, 960 N.Y.S.2d 478 (2d Dept. 2013) (prosecution “failed to meet its initial burden of establishing the reasonableness of the identification procedure and the lack of any suggestiveness of that procedure” because prosecution’s evidence “contained inconsistencies as to, *inter alia*, the number of individuals present in a group of persons from which the complainant identified the alleged perpetrator, whether the complainant viewed one or two groups of individuals, and whether the police prompted the complainant to make an identification”); People v. Coleman, 73

A.D.3d 1200, 903 N.Y.S.2d 431 (2d Dept. 2010) (prosecution failed to satisfy its threshold burden of going forward at the suggestiveness prong of the *Wade* hearing by presenting the testimony of a detective who conducted the second of two photographic identification procedures but “did not conduct, and was not present during the prior photographic array identification procedure,” and “could not answer any questions as to what, if anything, was said before or during the identification procedure, or provide any details as to the attendant circumstances”).

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

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

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

court identification. See, e.g., People v. Burwell, 26 N.Y.2d 331, 336, 310 N.Y.S.2d 308, 311 (1970).

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

(c) Mapp Motions

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

In on-the-street encounters between the police and a civilian, the prosecution bears the burden of establishing the lawfulness of the police action in making a “request for information” or engaging in a “common law inquiry,” effecting a Terry stop, or making an arrest. See, e.g., People v. Eastman, 32 A.D.3d 965, 821 N.Y.S.2d 263 (2d Dept. 2006) (prosecution failed to satisfy its burden of production at a Mapp hearing by presenting a police officer who arrested the defendant at the direction of a detective but who did not testify about the other officer’s basis for believing that the defendant had committed a crime: Although the “fellow officer rule” allows an officer to make “a lawful arrest even without personal knowledge sufficient to establish probable cause, so long as the officer is acting upon the direction of or as a result of communication with a fellow officer ... in possession of information sufficient to constitute probable cause for the arrest,” the “prosecution bears the burden [at a suppression hearing] of establishing that the officer imparting the information had probable cause to act.”); People v. Moses, 28 A.D.3d 584, 816 N.Y.S.2d 96 (2d Dept. 2006) (identification is suppressed on Dunaway grounds because “prosecution failed to satisfy its burden [at Dunaway/Wade hearing] by “present[ing] evidence to establish that the defendant was lawfully stopped and detained before the complainant made her identification”: arresting officer testified merely that “he received a radio communication regarding a robbery in progress and responded to the complainant’s location,” spoke with the complainant, and then responded to “second radio communication indicating that there was a person stopped in the vicinity of a nearby intersection” by driving “complainant to that location,” where “complainant identified the defendant as the man who broke into her home”; “prosecution did not call either of the plainclothes officers to testify at the hearing regarding the circumstances by which the defendant came to be in their company near the intersection” and “original radio communication regarding a robbery in progress, assuming that it was heard by the plainclothes

police officers, was insufficient by itself to provide the officers with a legal basis for stopping the defendant”).

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

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

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

the Matter of Kenneth C., 125 Misc.2d 227, 252, 479 N.Y.S.2d 396, 412 (Family Ct., Kings Co. 1984) (in gauging whether juvenile “consented and voluntarily accompanied the police to the station house,” court applies general rule that prosecution’s heavy burden when proving consent must be amplified by the “substantial” “probability ... that the juvenile’s transport was involuntary, rather than consensual”). See also People v. Gonzalez, 39 N.Y.2d at 129, 383 N.Y.S.2d at 220 (in light of the youth of the defendants, who were “under 20 years of age,” and their “limited prior contacts with the police,” the “ineluctable inference ... is that the consents could not be ... the product of a free and unconstrained choice”).

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

(d) Dunaway Motions

The prosecution’s burden at a Dunaway hearing would appear to be identical to its burden at a Mapp hearing: The prosecution bears the burden of going forward to justify the police conduct. See, e.g., People v. Dodt, 61 N.Y.2d 408, 415, 474 N.Y.S.2d 441, 445 (1984) (a “pretrial motion to suppress [an] ... identification as the fruit of an unlawful arrest cast[s] the burden on the prosecution to come forward with evidence establishing probable cause for the arrest.... The analysis required of a hearing Judge faced with deciding whether the People have met their burden is largely the same as that used by a magistrate in passing on an application for an arrest or search warrant.”); People v. Bouton, 50 N.Y.2d 130, 135, 428 N.Y.S.2d 218, 220 (1980) (motion to suppress statements as the fruit of an unlawful arrest “casts upon the prosecution the burden of coming forward with evidence that the arrest met the probable cause standard”); People v. Moses, 28 A.D.3d 584, 816 N.Y.S.2d 96 (2d Dept. 2006) (identification is suppressed on Dunaway grounds because “prosecution failed to satisfy its burden [at Dunaway/Wade hearing] by “present[ing] evidence to establish that the defendant was lawfully stopped and detained before the complainant made her identification”: arresting officer testified merely that “he received a radio communication regarding a robbery in progress and responded to the complainant’s location,” spoke with the complainant, and then responded to “second radio communication indicating that there was a person stopped in the vicinity of a nearby intersection” by driving “complainant to that location,” where “complainant identified the defendant as the man who broke into her home”; “prosecution did not call either of the plainclothes officers to testify at the hearing regarding the circumstances by which the defendant came to be in their company near the intersection” and “original radio communication regarding a robbery in progress, assuming that it was heard by the plainclothes police officers, was

insufficient by itself to provide the officers with a legal basis for stopping the defendant”).

With respect to Dunaway challenges to a statement, counsel can argue that the prosecution not only bears the burden of going forward but also bears the ultimate burden of proving the constitutionality of the police conduct beyond a reasonable doubt. As explained in Part V(E)(2)(a) the rigorous prosecutorial burden of beyond-a-reasonable-doubt applies to all motions to suppress a statement as “involuntary,” and New York law defines an “involuntary statement” as any statement obtained from the accused “in violation of such rights as the defendant may derive from the constitution of this state or of the United States.” C.P.L. § 60.45. Since a statement taken during a period of unconstitutional detention (*i.e.*, a statement taken in violation of Dunaway) is a statement taken in violation of the accused’s constitutional rights, it must be deemed an “involuntary” statement for purposes of New York law. Accordingly, the prosecution must prove beyond a reasonable doubt that the police complied with Dunaway in the course of taking the statement.

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

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

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

there was danger justifying a Terry frisk when car driver, in response to officer's question regarding a nondescript bag protruding from under the seat, pushed bag further underneath seat); People v. Addison, 116 A.D.2d 472, 474, 496 N.Y.S.2d 742, 744 (1st Dept. 1986) (rejecting, as incredible, police testimony that the defendant, although surrounded by police officers, reached for a gun in his waistband).

“In evaluating [police] testimony, [the judge] should not discard common sense and common knowledge.... The rule is that testimony which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory, is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced in the case.” People v. Garafolo, 44 A.D.2d at 88, 353 N.Y.S.2d at 502-03. See, e.g., People v. Rutledge, 21 A.D.3d 1125, 804 N.Y.S.2d 321 (2d Dept. 2005) (officer's “testimony that he could discern, based upon the ‘dim[ness]’ and long duration of the ‘glow’ of the item being smoked, that it was a marijuana cigarette and not a tobacco cigarette, was incredible as a matter of law, and tailored to overcome constitutional objections”); People v. Carmona, 233 A.D.2d 142, 649 N.Y.S.2d 432 (1st Dept. 1996) (rejecting, as incredible, officer's claim that he was able to see crack vial, which was two inches in length, at dusk through binoculars from observation point at least 200 feet above street); People v. Lewis, 195 A.D.2d 523, 524, 600 N.Y.S.2d 272, 273 (2d Dept. 1993), app. denied, 82 N.Y.2d 893, 610 N.Y.S.2d 165 (1993) (“[I]t is unbelievable that the officer was able to observe, in the middle of the night as the vehicles passed in an intersection, that the defendant appeared to be under the legal driving age.... Even assuming, arguendo, that the officer was capable of making such an observation, it makes no sense that he would follow the defendant for about 20 blocks before stopping his vehicle.”); People v. Lastorino, 185 A.D.2d 284, 285, 586 N.Y.S.2d 26, 27 (2d Dept. 1992) (rejecting, as incredible, police officer's testimony “that the defendant, who was aware he was under surveillance for at least several minutes, exited his vehicle and left the driver's door open and a loaded gun visible on the seat, virtually inviting the police to discover the gun”); In the Matter of Carl W., 174 A.D.2d 678, 571 N.Y.S.2d 536 (2d Dept. 1991) (officer's testimony that fleeing suspect “‘threw himself on the floor’ during the ensuing chase is ... implausible under the circumstances”); People v. Void, 170 A.D.2d 239, 241, 567 N.Y.S.2d 216, 217 (1st Dept. 1991) (rejecting, as incredible, police officer's testimony “that the defendant consented to a police search of the apartment, where a substantial amount of cocaine was stored in plain view in the kitchen sink -- a location where the drugs could be readily discovered”); People v. Guzman, 116 A.D.2d 528, 530-31, 497 N.Y.S.2d 675, 678 (1st Dept. 1986) (officer's testimony “that he feared defendant was armed and dangerous ... is belied by the fact that he did not communicate his observation to his sergeant, crossed in front of defendant's potential line of fire, and did not direct the defendant to freeze”); People v. Addison, 116 A.D.2d at 474, 496 N.Y.S.2d at 744 (“we find it incredible that defendant, in the face of such a show of force, would ... reach for his waistband as the arresting officer approached”); People v. Quinones, 61 A.D.2d 765, 766, 402 N.Y.S.2d 196, 197 (1st Dept. 1978) (police officer's testimony that “he did not have his weapon drawn when he approached the building nor ... did the other officers” was inherently incredible in light of testimony that the police had received a radio run reporting armed suspects); People v. Salzman, N.Y.L.J., 10/18/99, at 29, col.

2 (App. Term, 9th & 10th Jud. Dist.) (court rejects, as incredible, officer's testimony that defendant exited automobile with open cigarette box protruding from shirt pocket and that envelopes with white powder were readily visible inside open cigarette box; officer's "testimony would require the finding that defendant was a `moron").

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

- Inconsistencies between the police officer's present testimony and his or her previous statements in police reports or prior testimony. See, e.g., In the Matter of Robert D., 69 A.D.3d 714, 892 N.Y.S.2d 523 (2d Dept. 2010) (police officer's *Mapp* hearing testimony is found on appeal to have been incredible as a matter of law, notwithstanding trial judge's findings that officer "was a credible witness" and "very forthright," because officer's answer on cross-examination that he "saw the drugs prior to the arrest" was "inconsistent with his supporting deposition" – in which the officer said that he observed the respondent place "a canister-like object in his pocket" that was found, after arrest, to contain crack cocaine – and "[it] is impossible for . . . both to be true, and the presentment agency failed to put forth a satisfactory explanation for that contradiction"); In the Matter of Bernice J., 248 A.D.2d 538, 670 N.Y.S.2d 207 (2d Dept. 1998) (rejecting trial judge's finding crediting testimony of police officer whose "patently tailored" testimony was "contradicted by the remainder of the record, including other police testimony and documents"); People v. Miret-Gonzalez, 159 A.D.2d 647, 552 N.Y.S.2d 958 (2d Dept. 1990), app. denied, 76 N.Y.2d 739, 558 N.Y.S.2d 901 (1990) (court finds police officer's testimony incredible, in part because officer's account of car stop and search was contradicted by his incident report); People v. Lebron, 184 A.D.2d 784, 785-87, 585 N.Y.S.2d 498, 550-02 (2d Dept. 1992) (officer's testimony contradicted by statements and omissions in prior police reports); People v. Addison, 116 A.D.2d at 473, 496 N.Y.S.2d at 743 (officer's testimony regarding the description provided by civilian was undermined by the fact that "[t]he arresting officer had made no notation, either in his memo book or any police report, of any conversation with civilians or of having received a description from them," and had also omitted any mention of the civilians in his grand jury testimony).
- Inconsistencies between the testimony or statements of different police officers. See, e.g., People v. Bezares, 103 A.D.2d 717, 717, 478 N.Y.S.2d 16, 17 (1st Dept. 1984) ("the testimony of the arresting officer was, at a minimum, not supported by the testimony of his fellow police officer who was with him throughout, and indeed to some extent, was contradicted by that testimony").
- Inconsistencies between the officer's account and objective evidence. See, e.g., People v. Nunez, 126 A.D.2d 576, 576, 510 N.Y.S.2d 694, 695 (2d Dept. 1987)

(officer's account of "radio run reporting a past robbery upon which he stopped the defendant and his companion was contradicted, in substantial part, by a Sprint report").

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

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

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

In ruling on the suppression motion, the court "must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination." C.P.L. § 710.60(6). See People v. Bonilla, 82 N.Y.2d 825, 827-28, 604 N.Y.S.2d 937, 938 (1993) ("the motion court's decision denying the motion without explanation ... transgresses CPL 710.60(6)"). An oral ruling is appealable; a written opinion is not a prerequisite for appeal. People v. Gates, 31 N.Y.3d 1028, 2018 WL 2009274 (2018).

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

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

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

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

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

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

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

defendant may have been in custody for Miranda purposes earlier than arresting officer had claimed at Huntley hearing); People v. Thornton, 222 A.D.2d 537, 634 N.Y.S.2d 757 (2d Dept. 1995) (trial court should have granted a mid-trial defense request for a Wade hearing when the complainant testified that he had seen the defendant “a couple of times before” and not, as the prosecution had asserted prior to trial, 50-100 times before); People v. Kuberka, 215 A.D.2d 592, 626 N.Y.S.2d 855 (2d Dept. 1995) (defendant, whose pretrial Mapp motion was denied on basis of prosecutor’s representation that evidence was seized pursuant to search warrant, was entitled to mid-trial Mapp hearing when trial testimony revealed that evidence was recovered before search warrant was obtained); People v. Figliolo, 207 A.D.2d 679, 616 N.Y.S.2d 367 (1st Dept. 1994) (defendant, whose Dunaway motion to suppress statement was denied because prosecution asserted that defendant was not arrested until after he made statement, was entitled to mid-trial Dunaway hearing when officer testified at trial that arrest preceded statement). See also People v. Peart, 198 A.D.2d 528, 605 N.Y.S.2d 924 (2d Dept. 1993) (trial court erred in denying defendant’s renewed application for Mapp hearing, which was based on facts that emerged at Wade hearing). Cf. People v. Clark, 88 N.Y.2d 522, 647 N.Y.S.2d 479 (1996) (although Grand Jury transcript that defense counsel received at trial showed that complainant’s Grand Jury testimony about identification procedure differed from arresting officer’s account at Wade hearing, trial court did not abuse discretion in denying mid-trial re-opening of Wade hearing since newly discovered facts were not sufficiently “pertinent to the issue of official suggestiveness ... that they would materially affect or have affected the earlier Wade determination”). Compare People v. Kevin W., 22 N.Y.3d 287, 980 N.Y.S.2d 873 (2013) (a trial judge cannot “reopen[] a suppression hearing to give the People an opportunity to shore up their evidentiary or legal position absent a showing that they were deprived of a full and fair opportunity to be heard”; because “nothing about the initial hearing [in this case] robbed the People of a full and fair opportunity to justify the stop and seizure,” the trial judge acted improperly by re-opening the suppression hearing to allow the prosecution to present the testimony of a second police officer).

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

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

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

Counsel can move for leave to reargue under CPLR § 2221(d) “based upon matters of

fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, [which] ... shall not include any matters of fact not offered on the prior motion.” Id., § 2221(d)(2). The motion “shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.” Id., § 2221(d)(3).

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

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

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

The Family Court Act, like the C.P.L., expressly preserves the respondent’s right to appeal the denial of a suppression motion even after an admission. See § 330.2(6) (patterned after C.P.L. § 710.70). See also, e.g., People v. DiRaffaele, 55 N.Y.2d 234, 239-40, 448 N.Y.S.2d 448, 450 (1982).

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

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

court's attention prior to the defendant's election to enter a plea of guilty").

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

The Family Court Act permits a respondent to waive the statutory remedy as part of an admission. See F.C.A. § 330.2(6) (statutory right to post-admission appeal of suppression ruling is inapplicable when "the respondent, upon an admission, expressly waives his right to appeal"). See also People v. Seaberg, 74 N.Y.2d 1, 543 N.Y.S.2d 968 (1989) (upholding the practice of bargaining away the right to appeal in exchange for a guilty plea). However, before accepting an admission involving such a waiver of the statutory appellate remedy, the trial court must obtain an "express[] waiver" from the respondent (F.C.A. § 330.2(6)) and must ensure that the waiver is "knowingly, intelligently and voluntarily made," taking into account "the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused" (People v. Callahan, 80 N.Y.2d 273, 280, 590 N.Y.S.2d 46, 50 (1992)). The validity of the waiver can be reviewed on appeal, as can any other challenges to the procedures for taking the admission. See id.

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

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

In cases in which a suppression motion is held and the case thereafter proceeds to trial (either because the motion was denied or because the prosecution had enough evidence to proceed to trial despite an order of suppression), defense counsel will often wish to adjourn the

trial in order to obtain a transcript of the suppression hearing for use in impeaching prosecution witnesses who testified at the hearing. In In the Matter of Eric W., 68 N.Y.2d 633, 505 N.Y.S.2d 60 (1986), the Court of Appeals held that such requests for an adjournment for the purpose of obtaining a suppression hearing transcript generally are addressed to the discretion of the trial court. See id. at 636, 505 N.Y.S.2d at 61. The analysis in Eric W. suggests, however, that there may be some circumstances in which a respondent can assert a due process right to adjourn the trial for the purpose of obtaining a suppression hearing transcript.

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

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

If the suppression hearing does not immediately follow the trial as it did in Eric W., counsel can argue that the hiatus renders a transcript necessary. Because there was no lapse in time between the brief pretrial hearing and the trial in Eric W., the court could reasonably assume that defense counsel would remember all of the pretrial hearing testimony. When there is a hiatus, counsel can argue that a transcript is necessary to guard against the constitutionally unacceptable risk of counsel’s forgetting portions of the pretrial testimony and therefore being unable to meaningfully cross-examine a prosecution witness. See, e.g., In the Matter of David

K., 126 Misc.2d 1063, 1064, 485 N.Y.S.2d 183, 184 (Fam. Ct., Bronx Co. 1985) (“[c]learly, when there is a hiatus between the time of the preliminary hearing and the time of trial, ... the necessity of obtaining the minutes of the preliminary hearing is crucial and obvious for purposes of effective cross examination”).

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

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

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

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

In concluding that the trial judges in Eric W. did not abuse their discretion in denying defense requests for adjournments, the court stressed that all of the “witnesses [and] attorneys ...

were present in court and able to proceed without delay.” 68 N.Y.2d at 636, 505 N.Y.S.2d at 62. Of course, Eric W. does not affect the respondent’s due process right to an adjournment for the purpose of obtaining a defense witness whom counsel was unable to bring to court despite reasonable efforts. When the unavailability of a witness or some other factor that prevents counsel from going forward might not otherwise be sufficient to justify an adjournment, counsel can argue that the combination of that factor and the need for a transcript creates a due process right to an adjournment.

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

If the judge rejects the request for the adjournment and if, at trial, a prosecution witness denies an inconsistency in his or her suppression hearing testimony, counsel should renew the request for the transcript. If the court once again denies the request, counsel should ask that the court reporter read back the relevant portion of the prior testimony. A failure on counsel’s part to make use of the read-back remedy may be viewed later as proof that the denial of the transcript was not prejudicial to the respondent’s defense at trial. See, e.g., In the Matter of David K., 126 Misc.2d at 1064, 485 N.Y.S.2d at 184.

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

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

When the prosecution pursues such an interlocutory appeal, a respondent who has been detained pending trial must be “released pending such appeal unless the court, upon conducting a hearing, enters an order continuing detention.” F.C.A. § 330.2(9). Even when the trial judge conducts such a hearing, a respondent should not be detained, except in the rarest of cases. “Since the presentment agency may appeal an order granting suppression only if it

simultaneously files a statement that the suppression has in effect destroyed the case, ... it is unlikely that in most cases sufficient cause remains to justify continued confinement.” Practice Commentary to F.C.A. § 330.2. Cf. People v. Surretsky, 67 Misc.2d 966, 968, 325 N.Y.S.2d 31, 34 (Sup. Ct., N.Y. Co. 1971) (“[w]here possible, a defendant should not be compelled to serve a prison sentence where there is any [possibility that the defendant will prevail on appeal].... It is unnecessary to emphasize the obvious that success on appeal is no recompense to one who has served all or part of his sentence.”).

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

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

VII. Suppression-Related Issues That May Arise At Trial

A. Admissibility of Suppression Hearing Testimony at Trial

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

examine the witness on all matters relevant to the trial (see Crawford, 541 U.S. at 68), which will rarely, if ever be the case.)

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

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

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

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

Counsel can argue that statements suppressed as the fruits of a violation of F.C.A. §

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

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

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

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

voluntariness of his inculpatory statements, defendant opened the door to the introduction of the evidence the police had placed before him to elicit those statements.”).

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

It is important to recognize that this right to litigate issues related to statements and identifications at trial is not a right to relitigate the constitutional issues determined at a pretrial hearing. In In the Matter of Edward H., 129 Misc.2d 180, 492 N.Y.S.2d 900 (Family Ct., Bronx Co., 1985), aff’d, 129 A.D.2d 1017, 514 N.Y.S.2d 897 (1st Dept. 1987), the respondents argued that the Family Court Act should be construed as incorporating the C.P.L. provision that allows adult criminal defendants to relitigate a previously denied Huntley motion at trial (C.P.L. § 710.70(3)). The court in Edward H. concluded, as a matter of statutory analysis, that the F.C.A. should not be construed in this manner and that, in the absence of any “constitutional ... authority requir[ing] two trials on the same issue before the same judge” (id. at 183, 492 N.Y.S.2d at 903), a respondent does not have the right “to relitigate the same issues determined at the preliminary hearing by requiring that the testimony at the Huntley hearing be repeated at the fact-finding hearing.” Id. at 181, 492 N.Y.S.2d at 901.

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

In addition to the above-described cross-examination scenario, these issues also may arise in the defense case at trial. In a case in which the prosecutor does not call the relevant police officer as a witness in the Presentment Agency’s case-in-chief, the respondent is entitled under

Crane v. Kentucky to call the officer as a witness in the defense case and question him or her about the procedures that resulted in the statement or identification. (When calling a police officer as a defense witness, counsel should always request that the court designate the witness a “hostile witness” and permit counsel to ask leading questions. Cf. People v. Walker, 125 A.D.2d 732, 510 N.Y.S.2d 203 (2d Dept. 1986); People v. Collins, 33 A.D.2d 844, 305 N.Y.S.2d 893 (3d Dept. 1969).)

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

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

It is only with respect to Mapp issues that the judge may be able to limit the respondent’s right to present testimony at trial regarding issues resolved in the pretrial suppression hearing. A police officer’s failure to obtain a warrant for a search or seizure will not ordinarily be relevant to the issues at trial. However, defense counsel can invoke Crane v. Kentucky at trial to bring out facts previously elicited at a Mapp hearing whenever the police officer’s credibility is at issue in the trial and defense counsel wishes to cross-examine the officer about the search or seizure for the purpose of impeaching the officer’s credibility. Thus, for example, where the respondent is charged with possession of contraband and the police officer testifies to the possession, the defense is entitled to attack the officer’s credibility by cross-examining about suspicious aspects of the officer’s version of the facts surrounding the search or seizure.