THE LEGAL AID SOCIETY
JUVENILE RIGHTS PRACTICE
MANUAL FOR CHILDREN'S LAWYERS
Representing Children In Juvenile Delinquency Proceedings: Evidence

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EVIDENCE

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I. Hearsay Exceptions And Related Issues

Although some states permit the admission of hearsay when the declarant is available and subject to cross-examination, the Court of Appeals has rejected that approach and requires a showing of sufficient indicia of reliability before evidence may be admitted under a hearsay exception. Nucci v. Proper, 95 N.Y.2d 597, 721 N.Y.S.2d 593 (2001).

The proponent has the burden of establishing the applicability of a hearsay exception. Tyrrell v. Wal-Mart Stores, Inc., 97 N.Y.2d 650, 737 N.Y.S.2d 43 (2001); People v. Nieves, 67 N.Y.2d 125, 131, 501 N.Y.S.2d 1 (1986).

A prosecutor should not attempt to camouflage hearsay by phrasing questions to a witness in a particular manner. United States v. Johnson, 529 F.3d 493 (2d Cir. 2008) ("it is unacceptable for representatives of the government to present their case with abusive disregard for the rules of law," and that "there was no warning from the form of the AUSA's questions that [the witness's] answers would include inadmissible prejudicial matter").

A. Right Of Confrontation - The constitutional right of confrontation must be taken into account whenever the prosecution offers hearsay evidence containing the statements of a witness who is not available for cross-examination. This is particularly true after the United States ground-breaking decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), written by Justice Scalia.

After a lengthy discussion of the history and evolution of the right of confrontation, the Supreme Court noted that the principal evil at which the Confrontation Clause was directed was the use of ex parte witness examinations as evidence against the accused. The Court once again rejected the view that the Confrontation Clause applies only to in-court testimony, but noted that the Confrontation Clause focuses on “testimonial” evidence, which is, generally speaking, a statement that the declarant would reasonably expect to be used prosecutorially. This includes prior testimony at a court hearing, formalized materials such as affidavits and depositions, and statements taken by police officers.

With respect to testimonial evidence, the Court asserted that the Framers would

not have allowed admission of the statements of a witness who did not appear at trial unless he was unavailable, and the defendant had a prior opportunity for cross-examination. While the Court held in Ohio v. Roberts that the admissibility of hearsay evidence is conditioned on whether it bears adequate "indicia of reliability" -- to meet that test, evidence must either fall under a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness" -- the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement.

Thus, where testimonial evidence is at issue, the Sixth Amendment requires unavailability and a prior opportunity for cross-examination.

In Crawford, the Supreme Court held that the Confrontation Clause was violated because the trial court admitted, as a declaration against interest, a statement that was made by the defendant's wife despite the fact that the defendant had no opportunity to cross-examine her. See also Davis v. Washington and Hammon v. Indiana, 547 U.S. 813, 126 S.Ct. 2266 (2006) (Confrontation Clause provides protection against only testimonial hearsay).

B. Admissions

1. Definition - In the context of a criminal or juvenile delinquency proceeding, an admission is a statement or act of the accused, or his or her representative, which is inconsistent with or otherwise undermines the accused's position. Richardson On Evidence, §8-201. See People v. Palacios-Correa, 166 A.D.3d 657 (2d Dept. 2018) (no error in admission of testimony that, when confronted with allegations of sexual abuse, defendant responded, "I'm sorry, but it's not like [the complainant] says[,] … she knows a lot about sex"); People v. Brockington, 147 A.D.3d 460 (1st Dept. 2017) (defendant's Facebook post, made one hour after murder, could be reasonably interpreted as at least indirectly boasting about crime by announcing that defendant's group had scored victory over rival group); People v. Ramlall, 99 A.D.3d 815 (2d Dept. 2012) (defendant's statement to officer that he had "dispute" with complainant too ambiguous to be against penal interest or be judged trustworthy or reliable); People v. Pierre, 41 A.D.3d 289, 838 N.Y.S.2d 546 (1st Dept. 2007), lv denied 9 N.Y.3d 880 (trial court properly received, as admission, testimony regarding Internet

instant message in which defendant told victim's cousin that he did not want victim's baby); People v. Leslie, 41 A.D.3d 510, 837 N.Y.S.2d 304 (2d Dept. 2007), lv denied 9 N.Y.3d 923 (defendant's statement -- "this is a bad situation that got out of hand. I'm sorry" -- constituted admission); People v. Jackson, 29 A.D.3d 409, 814 N.Y.S.2d 627 (1st Dept. 2006) (no error in admission of statement made by rape defendant, during prior rape of complainant's babysitter, to effect that if babysitter were not there, it would have been complainant), aff'd 8 N.Y.3d 869, 832 N.Y.S.2d 477 (2007) (majority assumes, arguendo, there was error, but finds it harmless); People v. K.S., 44 Misc.3d 545 (Sup. Ct., Bronx Co., 2014) (in child sex crime prosecution, defendant's letters to wife from jail admitted as admissions where defendant expressed sorrow and apologized and referred to infidelity and alcoholism, and, although defendant argued that he could have been apologizing for reasons unrelated to case, his statements, which also referred to complainant, permitted reasonable inference of guilt); People v. Ballinger, 176 Misc.2d 803, 675 N.Y.S.2d 494 (Sup. Ct., Kings Co., 1998) (defendant's statements that "he could not do the time" were too ambiguous to permit jury to infer guilt).

An admission may take the form of a judicial admission, such as adverse testimony, a stipulation (see CPLR §2104), a statement in pleadings, or a plea of guilty, or an extrajudicial admission. Richardson, §§ 8-214-219; see People v. Byfield, 15 A.D.3d 262, 790 N.Y.S.2d 434 (1st Dept. 2005), lv denied 4 N.Y.3d 884 (alibi notice properly admitted as admission that was contrary to defendant's position at trial); but see People v. Hills, 140 A.D.2d 71, 532 N.Y.S.2d 269 (2d Dept. 1988) (respondent may not compel presentment agency to stipulate to element of crime, since prosecutor is entitled to prove case in any legally proper manner).

2. Admissions vs. Confessions - A confession is an acknowledgment of guilt, and, therefore, constitutes direct evidence. An admission, which includes facts which tend to prove guilt, is circumstantial evidence. Richardson, §8-251. This distinction is important when the defense argues that the prosecution's evidence is wholly circumstantial and must meet the "moral certainty" standard. See, e.g., People v. Hardy, 26 N.Y.3d 245 (2015) (statement that defendant did not have stolen purse but

could get it was circumstantial evidence); People v. Burke, 62 N.Y.2d 860, 477 N.Y.S.2d 618 (1984) (evidence circumstantial where, in response to question concerning whether he had covered his tracks, defendant stated "yes, there was nothing to worry about, [defendant] had left nothing behind, no one would find anything"); People v. Sanchez, 61 N.Y.2d 1022, 475 N.Y.S.2d 376 (1984) (defendant made admission when he conceded being with victim on night of murder, and hitting her twice); People v. Rumble, 45 N.Y.2d 879, 410 N.Y.S.2d 806 (1978) ("I'm not responsible for what I did" was confession); People v. Powell, 153 A.D.3d 1034 (3d Dept. 2017) (circumstantial evidence charge appropriate where defendant stated he was following victims and "had an extension cord in the car and he could kill them both"); People v. McPhillips, 133 A.D.3d 785 (2d Dept. 2015) (defendant's post-assault statement to victim that he had to kill her because he feared she would report incident, and that "I'm not going back to prison," was admission); People v. Pagan, 159 A.D.2d 6, 559 N.Y.S.2d 286 (1st Dept. 1990), lv denied 76 N.Y.2d 895, 561 N.Y.S.2d 558 ("I didn't mean it" was "confession").

3. Adoptive Admission - Testimony concerning an accusation made in a party's presence, combined with evidence that the party did not respond or made an evasive or equivocal reply, is admissible as a tacit admission of the truth of the accusation if the person fully heard and comprehended and was at liberty to answer, and the circumstances were such that the party would naturally be expected to deny the accusation if it were not true. Richardson, §8-223. Since the evidence is not admissible if the party addressed may have been incapable of hearing the accusation or was unable to understand the language used, Richardson, §8-223, the proponent should establish the listener's physical proximity to the speaker, that the speaker spoke English or another language understood by the listener, and the speaker's tone of voice. See, e.g., People v. Vining, 28 N.Y.3d 686 (2017) (recorded phone call made by incarcerated defendant to complainant in effort to manipulate her into dropping charges properly admitted where complainant accused defendant of breaking her ribs and defendant did not deny allegations and gave non-responsive and evasive answers, and they discussed potential jail sentence and defendant accused her of "not caring" if he got "a year"; statements were not product of interrogation or functional equivalent); State v.

Schiller-Munneman, 377 P.3d 554 (Oregon 2016) (evidence of defendant's failure to respond to accusatory text messages sent from victim's phone not admissible since State failed to show defendant intended to adopt or approve statements); People v. Noel, 207 A.D.3d 661 (2d Dept. 2022) (People failed to establish that defendant actually heard mother-in-law's accusations or that defendant had opportunity to respond prior to mother-in-law disconnecting phone call); People v. Portis, 61 Misc.3d 133(A) (App. Term, 1st Dept., 2018) (defendant made adoptive admission where, during phone call, defendant's mother stated what victim had told her - that defendant "tried to kill her" and "had her on the bed, you was choking her, you was hitting her" - and defendant merely responded "yeah, alright, whatever"); People v. Rogers, 94 A.D.3d 1246 (3d Dept. 2012) (no error in admission of testimony regarding defendant's failure to respond when victim's sister, seeing victim with icepack on her head, accused defendant of injuring victim, and failure to respond when victim stated to defendant that, when she had two black eyes, she had to lie about being in car accident to prevent others from knowing she was in abusive relationship); People v. Frias, 250 A.D.2d 495, 673 N.Y.S.2d 416 (1st Dept. 1998), lv denied 92 N.Y.2d 982, 683 N.Y.S.2d 763 (defendant's fear of accuser only affects weight of evidence); People v. Benanti, 158 A.D.2d 698, 551 N.Y.S.2d 963 (2d Dept. 1990), lv denied 76 N.Y.2d 731, 558 N.Y.S.2d 892 (defendant failed to respond to co-defendant's statement, "come on, let's go. We have three other people we have to kill"); People v. Adams, 154 A.D.2d 606, 546 N.Y.S.2d 433 (2d Dept. 1989) (defendant failed to deny having sex with complainant); People v. Husband, 135 A.D.2d 406, 522 N.Y.S.2d 132 (1st Dept. 1987); People v. Harold, 125 A.D.2d 491, 509 N.Y.S.2d 409 (2d Dept. 1986); see also State v. Rutherford, 214 A.3d 27 (Me. 2019) (for statement to be admissible, defendant must undertake observable action; although statement may be admissible in civil case if statement would, in context, call for reply, in criminal case, where defendant has right to remain silent, mere silence when third party made statement in defendant's presence is not enough).

An individual can also adopt a statement through affirmative behavior. See People v. Campney, 94 N.Y.2d 307, 704 N.Y.S.2d 916 (1999) (defendant met privately with brother for 10-15 minutes after brother confessed, was then seen holding the

confession, and told brother that he "might as well sign" the confession because he had already told the police what happened).

A right of confrontation problem may arise when the prosecution introduces statements made to the accused by a cooperating accomplice as the accused's admissions by adoption. See State v. Hernandez, 875 So.2d 1271 (Florida Dist. Ct. App., 3rd Dist. 2004), appeal dism'd 911 So.2d 95 (statements made by co-defendant's during taped phone conversation he had with defendant at request of police were properly excluded); but see People v. Zavala, 168 Cal.App.4th 772 (Cal. Ct. App., 5th Dist., 2008) (since adoptive admissions are in effect defendant's own admissions, no Confrontation Clause issue raised by their introduction into evidence); People v. Combs, 101 P.3d 1007 (CA 2004) (no right of confrontation violation where statements incriminating defendant were admitted not for purposes of establishing truth of matter asserted, but as defendant's adoptive admissions).

4. Pre- Or Post-Arrest Silence - Evidence of the respondent's failure to deny an accusation while under arrest, or the respondent's invocation of the right to counsel, is not admissible on the prosecution's direct case or as impeachment evidence. The respondent's right to remain silent outweighs the limited probative value of the evidence. See People v. Pavone, 26 N.Y.3d 629 (2015) (People may not use defendant's post-arrest silence before or after Miranda warnings for impeachment purposes); People v. Conyers, 52 N.Y.2d 454, 438 N.Y.S.2d 741 (1981); People v. Theodore, 113 A.D.3d 703 (2d Dept. 2014) (court improperly permitted prosecutor to question defendant about post-arrest silence where defendant initially responded to certain questions, but then invoked right to remain silent); People v. McArthur, 101 A.D.3d 752 (2d Dept. 2012), lv denied 20 N.Y.3d 1101 (reversible error where prosecutor stated in summation that at time of arrest, defendant looked "[d]isappointed," which is "not how an innocent person is going to react being told he's being charged with murder," commented on defendant's failure to question charges, stated that defendant looked "distracted" during a car ride to the police station, which is "the reaction of a guilty man who knows he's been caught," and stated that when questioned in police station, defendant "smile[d]"; defendant's denial of involvement in shooting did

not open door to comments by the prosecutor); People v. Slishevsky, 97 A.D.3d 1148 (4th Dept. 2012), lv denied 20 N.Y.3d 1015 (court erred in admitting testimony of detective to effect that defendant never asked for details of allegations); People v. Whitley, 78 A.D.3d 1084, 912 N.Y.S.2d 257 (2d Dept. 2010) (silence or invocation of right against self-incrimination inadmissible even where defendant initially responds to questioning but then declines to answer additional questions); People v. Goldston, 6 A.D.3d 736, 776 N.Y.S.2d 102 (3rd Dept. 2004) (rule applies where defendant responds to questioning but declines to answer certain questions); People v. Carter, 149 A.D.2d 83, 545 N.Y.S.2d 125 (1st Dept. 1989), appeal withdrawn 75 N.Y.2d 916, 555 N.Y.S.2d 34 (1990); but see People v. Rodriguez, 195 A.D.3d 491 (1st Dept. 2021), lv denied 37 N.Y.3d 995 (no violation of any constitutional right where People elicited and commented on defendant's refusal to give police certain clothing he was wearing at time of arrest); People v. Lopez, 61 Misc.3d 127(A) (App. Term, 1st Dept., 2018), lv denied 32 N.Y.3d 1174 (no error where court allowed loss prevention officer to testify that defendant did not say "anything" when stopped; admission was not made to law enforcement).

In Salinas v. Texas, 133 S.Ct. 2174 (2013), the Supreme Court found no Fifth Amendment violation where the prosecutor argued that defendant's pre-custodial refusal to answer the officer's question suggested that he was guilty. Defendant, who had not received the Miranda warnings, voluntarily answered a police officer's questions, but then balked when the officer asked whether a ballistics test would show that the shell casings found at the murder scene would match defendant's shotgun. However, defendant did not expressly invoke the privilege against self-incrimination in response to the officer's question. The court observed that defendant was not subjected to the inherently compelling pressures of a pre-Miranda custodial interrogation, or subjected to threats to withdraw a governmental benefit, and thus was not deprived of a free choice to admit, deny, or refuse to answer. See also Jenkins v. Anderson, 447 U.S. 231 (1980) (pre-arrest silence may be used for impeachment).

Like other states [see Commonwealth v. Molina, 104 A.3d 430 (Pa. 2014) (defendant's state constitutional right against self-incrimination violated by use of pre-

arrest silence as evidence of guilt)], New York is free to find protection for the accused in the State Constitution that goes beyond that found in the Federal Constitution. Pre-Salinas, the Court of Appeals found reversible error in the admission of evidence of pre-arrest silence as direct evidence of guilt and for impeachment purposes. People v. DeGeorge, 73 N.Y.2d 614 (1989). See also United States v. Okatan, 728 F.3d 111 (2d Cir. 2013) (noting that the Salinas decision did not decide the issue, Second Circuit holds that a suspect's pre-arrest invocation of the Fifth Amendment privilege and subsequent silence cannot be used by the government in its case in chief as substantive evidence of guilt).

The accused can open the door to otherwise inadmissible evidence. People v. Hill, 24 N.Y.3d 1007 (2014) (defendant did not open door to evidence of post-Miranda silence), rev'g 105 A.D.3d 472 (1st Dept. 2013) (defendant opened door to testimony that he declined to make statement by creating misleading impressions about post-arrest interactions with police).

5. Admission By Conduct - A nonverbal reaction to a statement, or conduct inconsistent with the defense at trial, may also be admissible. This includes conduct that evidences a consciousness of guilt. Richardson, §§ 8-220-222. See, e.g., People v. Lourido, 70 N.Y.2d 428, 522 N.Y.S.2d 98 (1987) (testimony that defendant shrugged shoulders in response to accusation not admissible in absence of evidence that he understood English); People v. Morgan, 66 N.Y.2d 255, 496 N.Y.S.2d 401 (1985) (prosecutor improperly commented on defendant's calm denial of guilt to police, and suggested that a person who was innocent would have been more upset); People v. Pabon, 14 Misc.3d 140(A), 836 N.Y.S.2d 502 (App. Term, 1st Dept., 2007) (trial court improperly admitted testimonial evidence that non-testifying accomplice handed over contraband when after being asked by police to produce what defendant had given him); People v. Graziosa, 10 Misc.3d 128(A), 809 N.Y.S.2d 483 (App. Term, 1st Dept. 2005) (evidence that defendant was smiling and appeared "happy" at time of and after arrest contradicted justification defense); People v. Robinson, 140 A.D.2d 644, 528 N.Y.S.2d 676 (2d Dept. 1988) (no proof defendant's nod in response to accomplice's statement reflected agreement); People v. Borcsok, 107 A.D.2d 42, 485 N.Y.S.2d 766

(2d Dept. 1985); People v. Pena, 23 Misc.3d 1105(A), 881 N.Y.S.2d 366 (Crim. Ct., N.Y. Co., 2009) ("nod" when complainant asked about theft was incriminating).

6. Plea-Related Statements - A guilty plea, once withdrawn, is out of the case forever and for all purposes. People v. Droz, 39 N.Y.2d 457 (1976); People v. Spitaleri, 9 N.Y.2d 168 (1961). Thus, statements made during the plea negotiations can be used against the accused at trial only if the prosecution specifically bargained for use of the statements. People v. Curdgel, 83 N.Y.2d 862, 611 N.Y.S.2d 827 (1994); People v. Evans, 58 N.Y.2d 14, 457 N.Y.S.2d 757 (1982); People v. Thompson, 108 A.D.3d 732 (2d Dept. 2013). See also Daniel N. Arshack and Matthew Reisman, Discoverability of Proffer Interview Notes, NYLJ, 2/14/19 (Statements made by a defendant to a prosecutor during a "proffer" interview are discoverable in New York, and defendants should demand the notes that prosecutors take during these interviews in order to gauge their accuracy and properly anticipate their use at trial.); United States v. Mezzanatto, 513 U.S. 196, 115 S.Ct. 797 (1995) (voluntary and knowing agreement to waive Federal Rules' exclusionary provisions is enforceable); United States v. Velez, 354 F.3d 190 (2d Cir. 2004) (proffer agreement in which defendant agreed to Government's use of statements in rebuttal was not unconstitutional); People v. Forbes-Haas, 32 Misc.3d 685 (County Ct., Onondaga Co., 2011) (CPLR §4547, which bars use of statements made during settlement negotiations, does not apply in criminal prosecution since public interest in prosecuting crime outweighs interest in settlement of civil claims).

7. Bruton Rule - At a joint jury trial, a non-testifying defendant's statement incriminating himself and a co-defendant is inadmissible unless redacted so that the co-defendant is not implicated; if effective redaction is not possible, separate trials are required because the jury may not follow an instruction not to consider one defendant's statement as evidence against another defendant. See Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968); see also Samia v. United States, 143 S.Ct. 2004 (2023) (although certain obviously redacted confessions might be directly accusatory and implicate Bruton even if they do not specifically use defendant's name, Confrontation Clause does not bar admission of non-testifying co-defendant's

confession where it has been modified to avoid directly identifying non-confessing co-defendant, and court instructs jurors to consider confession only with respect to confessing co-defendant); Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714 (1987); People v. Cedeno, 27 N.Y.3d 110 (2016) (court must examine whether redacted statement inculpates specific person and, even if it is first item introduced at trial, would immediately inculpate defendant, and redactions replacing defendant's name with blank space or word "deleted" are more likely to emphasize than to conceal fact that declarant has specifically inculpated someone); State v. Gurule, 303 P.3d 838 (N.M. 2013) (Crawford line of cases has modified Bruton rule, so that rule applies only to testimonial statements by co-conspirator); People v. Lockley, 200 A.D.3d 117 (2d Dept. 2021) (reversible error where officer testified to statement made by accomplice with which officer confronted defendant during interrogation); People v. Stone, 179 A.D.3d 1287 (3d Dept. 2020) (co-defendant's statement with blacked out portions focused upon defendant's arrest and incriminating physical evidence, and suggested that defendant had information and know-how regarding drug trafficking that his girlfriend, the co-defendant, lacked); United States v. Van Praagh, 919 716 (2d Cir. 2019), cert denied 140 S.Ct. 846 (where government introduced evidence of methamphetamine dealing by several people, substituted language alone did not necessarily identify defendant); People v. Villanueva, 168 A.D.3d 769 (2d Dept. 2019), lv denied 33 N.Y.3d 955 (Bruton does not apply when co-defendant's statement does not incriminate defendant on its face and becomes incriminating only when linked with other evidence introduced at trial).

The Bruton rule applies to the admission of an accomplice's confession at a separate trial. Orlando v. Nassau County District Attorney's Office, 915 F.3d 113 (2d Cir. 2019) (Bruton applied to admission of accomplice's confession at separate trial, where it could not be presumed that jury would disregard statement for its truth, even with limiting instruction).

Arguably, this rule does not apply in a bench trial. See People v. Jenkins, 115 A.D.2d 562, 496 N.Y.S.2d 83 (2d Dept. 1985).

8. Corroboration Of Confession - To support a finding, a confession or

admission must be corroborated by evidence that the crime charged has been committed. FCA §344.2(3).

9. Statements Made By Counsel Or Other Agent - Admissions and other statements made by an agent who is acting within the scope of authority are admissible. CPLR 4549 (statement offered against opposing party shall not be excluded from evidence as hearsay if made by person whom opposing party authorized to make statement on subject or by opposing party's agent or employee on matter within scope of and during existence of that relationship); Richardson, §8-208. Compare People v. Brown, 98 N.Y.2d 226, 746 N.Y.S.2d 422 (2002) (statements made by counsel at Sandoval hearing regarding defendant's proposed trial testimony could be used to impeach defendant at trial); People v. Silva, 204 A.D.3d 450 (1st Dept. 2022), lv denied 38 N.Y.3d 1074 (court properly permitted People to impeach defendant with statements made in his presence by his counsel at arraignment where it was reasonable to infer that defendant was source of statements regarding his actions before and during stabbing); People v. Gonsalves, 170 A.D.3d 886 (2d Dept. 2019) (error to admit complainant's testimony that, several days after robbery, defendant's stepfather said he was "sorry" for what defendant had done, returned complainant's keys, and offered complainant a replacement cell phone, where there was no showing that defendant was connected to stepfather's actions); People v. Ortiz, 114 A.D.3d 430 (1st Dept. 2014) (no error where defendant's trial testimony was impeached with statement made by defense counsel at arraignment where counsel stated that defendant was source of information and counsel was acting as defendant's authorized agent, even though counsel asserted that she had inaccurately conveyed defendant's version of incident), rev'd on other grounds 26 N.Y.3d 430 (2015) (reversal based on advocate-witness rule violation); People v. Davis, 103 A.D.3d 810 (2d Dept. 2013), lv denied 21 N.Y.3d 1003 (defense witness impeached with statement made by witness's former counsel at witness's plea proceeding); People v. Quan Hong Ye, 67 A.D.3d 473, 889 N.Y.S.2d 556 (1st Dept. 2009), lv denied 14 N.Y.3d 807 (defendant's admissions, which were translated to officer by another officer who was acting as interpreter, were properly admitted; although defendant did not choose interpreter, he accepted him as agent); People v.

Moye, 11 A.D.3d 212, 782 N.Y.S.2d 257 (1st Dept. 2004), lv denied 4 N.Y.3d 765 (trial court properly permitted use on cross examination of defendant of statements counsel made at arraignment); People v. Harvey, 309 A.D.2d 713, 766 N.Y.S.2d 194 (1st Dept. 2003) (false alibi notice admissible as judicial admission where defendant did not attempt to disavow notice until late in the trial) and People v. Russo, 210 A.D.2d 128, 621 N.Y.S.2d 844 (1st Dept. 1994) (counsel's statements at arraignment admissible despite use of phrase "on information and belief") with People v. Burgos-Santos, 98 N.Y.2d 226, 746 N.Y.S.2d 422 (2002) (statements in notice of alibi could not be used to impeach defendant who presented non-alibi defense at trial); People v. Cassas, 84 N.Y.2d 718, 622 N.Y.S.2d 228 (1995) (defense attorney's statement -- "I brought my client in to surrender. I believe he shot his wife. You'll find the gun in the room. It will have my client's prints on it" -- was not admissible in absence of evidence that counsel had authority to speak for defendant or that defendant waived attorney-client privilege); United States v. Jung, 473 F.3d 837 (7th Cir. 2007), cert denied 128 S.Ct. 326 (statements not admissible where counsel was speaking to victims as part of strategy to be cooperative, not attempting to develop criminal defense strategy); United States v. Valencia, 826 F.2d 169 (2d Cir. 1987) (admission of statements made at informal meeting with prosecutors would interfere with plea bargaining and pretrial dialogue); People v. L.D., 60 Misc.3d 729 (Sup. Ct., Bronx Co., 2018) (court denies People's application to introduce statements by counsel during arraignment, noting, inter alia, that a defense generally is not proffered at arraignment, that pre-arraignment meetings with counsel are notoriously brief, and that counsel had spoken at some length to another individual and there was no telling how much information came from that witness; "Arraignment comments of defense counsel should be permitted rarely and on occasions when the defendant testifies or otherwise opens the door through an obvious and targeted defense") and United States v. Camacho, 2004 WL 1367457 (S.D.N.Y. 2004) (privilege not waived where counsel spoke hypothetically and at no time quoted or paraphrased defendant's statements, and, in any event, defendant did not authorize counsel to make statements).

In Bellamy v. State, 941 A.3d 1107 (Md. 2008), the court held that the statement

of a non-testifying witness, made in connection with a plea bargain, that he saw a person other than the defendant shoot the victim, was found admissible as a party admission by the prosecutors since they unequivocally manifested a belief in the witness's statement and were acting as agents of the State.

10. Interpreters - An interpreter may become an agent when translating the respondent's statements. But see People v. Romero, 78 N.Y.2d 355, 575 N.Y.S.2d 802 (1991) (paid police informant was not defendant's agent).

11. Non-Inculpatory Portion Or Explanation Of Statement - The respondent is entitled to have the exculpatory portion of an admission admitted along with the inculpatory portion. People v. Robinson, 17 N.Y.3d 868 (2011) (reversible error found where testifying defendant not permitted to offer explanation for statements to police); People v. Dlugash, 41 N.Y.2d 725, 395 N.Y.S.2d 419 (1977) (defendant entitled to have entirety of admissions -- inculpatory and exculpatory facts -- considered by fact-finder); People v. Pitt, 84 A.D.3d 1275 (2d Dept. 2011) (defendant entitled to have complete statements, rather than only inculpatory portions, introduced into evidence); People v. Rodriguez, 188 A.D.2d 566, 591 N.Y.S.2d 463 (2d Dept. 1992) (exculpatory statement made 10 minutes after admission was part of continuous interrogation); People v. Saintilima, 173 A.D.2d 496, 570 N.Y.S.2d 113 (2d Dept. 1991); United States v. Cooper, 2019 WL 5394622 (EDNY 2019) (where government offered defendant's confession to fleeing scene and knowing that person in front of his car was law enforcement officer, government could not omit statements indicating that defendant fled because he feared for his life after officer banged on his car and drew firearm, and denying that he hit, or knew that he hit, officer with car); People v. Freeman, 145 Misc.2d 590, 547 N.Y.S.2d 534 (Sup. Ct. Monroe Co., 1989) (rule applies when defendant offers statement); but see United States v. Williams, 930 F.3d 44 (2d Cir. 2019), cert denied 141 S.Ct. 2816 (defendant's statements that he did not know anything about gun found in car and was just bringing car back to his "girl" did not "explain" subsequent confession and were not necessary to correct misleading impression); People v. Hubrecht, 2 A.D.2d 289, 769 N.Y.S.2d 36 (1st Dept. 2003), lv denied 2 N.Y.3d 741 (statements not admissible as continuous narrative).

C. Business Records

1. Statutory Foundation - "Any writing or record, whether in the form of an entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." The circumstances of the making of the record, including the maker's lack of personal knowledge, may be proved to affect the weight, but shall not affect the admissibility, of the record. CPLR §4518(a). See People v. Fisher, 201 A.D.2d 193, 615 N.Y.S.2d 374 (1st Dept. 1994), appeal dism'd 84 N.Y.2d 935, 621 N.Y.S.2d 532 (police report not prepared by officer who signed it was admissible). Copies of certain writings are admissible without foundation testimony if certified as correct in "a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician." See CPLR §§4518(c) (also provides for admission of hospital records in custody of warehouse), 2306(a), 2307. See also People v. Bodendorf, 52 Misc.3d 551 (Justice Ct., Dutchess Co., 2016) (certification must bear original signature); People v. Husted, 179 Misc.2d 606, 686 N.Y.S.2d 544 (App. Term, 9th & 10th Jud. Dist., 1998) (certification was adequate despite mistake as to date breathalyzer test was performed). Although CPLR §§2306(a) and 2307 refer to subpoenaed records, voluntarily produced records are also admissible if they have been properly certified. See Joyce v. Kowalcewski, 80 A.D.2d 27, 437 N.Y.S.2d 809 (4th Dept. 1981). But see People v. D'Agostino, 120 Misc.2d 437, 465 N.Y.S.2d 834 (County Ct. Monroe Co., 1983). The certification must set forth the business record foundation. See People v. Mertz, 68 N.Y.2d 136, 506 N.Y.S.2d 290 (1986); Matter of Gregory M., 184 A.D.2d 252, 585 N.Y.S.2d 193 (1st Dept. 1992), aff'd 82 N.Y.2d 588, 606 N.Y.S.2d 579 (1993) (certification undated).

The mere filing of papers received from other entities, even if retained in the regular course of business, is insufficient to qualify the papers as business records.

People v. Cratsley, 86 N.Y.2d 81, 629 N.Y.S.2d 992 (1995). See also People v. Burdick, 72 A.D.3d 1399, 900 N.Y.S.2d 195 (3rd Dept. 2010) (mere filing of documents received from other entities, even if retained in regular course of business, does not qualify documents as business records, and witness did not have knowledge of business practices and record-keeping procedures of entity that produced records); People v. Rogers, 8 A.D.2d 888, 780 N.Y.S.2d 393 (3rd Dept. 2004) (report of drug tests performed by private lab used by State Police did not qualify as business record); People v. Surdis, 275 A.D.2d 553, 711 N.Y.S.2d 875 (3rd Dept. 2000), lv denied 95 N.Y.2d 908, 716 N.Y.S.2d 649; Standard Textile Company, Inc. v. National Equipment Rental, Ltd., 80 A.D.2d 911, 437 N.Y.S.2d 398 (2d Dept. 1981). However, the necessary foundation may be established in the absence of testimony from an actual employee of the business which sent the documents. People v. Cratsley, supra; People v. DiSalvo, 284 A.D.2d 547, 727 N.Y.S.2d 146 (2d Dept. 2001) (County routinely relied on records of private business entity, and County employee gave foundation testimony); Elkaim v. Elkaim, 176 A.D.2d 116, 574 N.Y.S.2d 2 (1st Dept. 1991) (judicial notice can provide foundation for admitting records when the records are so trustworthy as to be self-authenticating); People v. Markowitz, 187 Misc.2d 266, 721 N.Y.S.2d 758 (Sup. Ct., Richmond Co., 2001) (employee of business whose records were admitted was familiar with procedures of bank whose records were included).

2. Authentication - Records not self-authenticated under CPLR §4518 must be authenticated via the testimony of someone with personal knowledge of the business's practices and procedures. Richardson, §8-306. See also CPLR §2105 (attorney may certify that copy is true and complete); People v. Ramos, 13 N.Y.3d 914, 895 N.Y.S.2d 294 (2010) (where Appellate Division had held that judicial notice may provide basis for admitting business records when records are so patently trustworthy as to be self-authenticating, Court of Appeals holds that trial court erred when it admitted record without proper foundation; even assuming some documents may be admitted as business records without foundation testimony, this record was not such a document since nothing on face indicated that it was made in regular course of business and that it was regular course of business to make it); People v. Brown, 13

N.Y.3d 332, 890 N.Y.S.2d 415 (2009) (Office of Chief Medical Examiner witness's testimony provided sufficient foundation for introduction of subcontractor laboratory's report where witness testified that she relied on documents as matter of practice and reviewed them and used them in conducting her own DNA analysis; testified that she was familiar with procedures and protocols used by laboratory and that such procedures were up to standard; testified as to reliability of testing procedures laboratory used to generate report and as to laboratory's duty to create such records; and testified that report was made contemporaneously and in regular course of business).

3. "Reasonable Time" Requirement - This aspect of the foundation has been liberally interpreted. See, e.g., People ex rel. McGee v. Walters, 62 N.Y.2d 317, 476 N.Y.S.2d 803 (1984) (report prepared after defendant failed to report to parole officer during previous 5 months was admissible); Toll v. State of New York, 32 A.D.2d 47, 299 N.Y.S.2d 589 (3rd Dept. 1969) (report made 15 days after events was admissible). But see Standard Textile Company, Inc. v. National Equipment Rental, Ltd., supra, 80 A.D.2d 911 (document made 8 months after event not admissible).

4. Maker's Lack Of Personal Knowledge; Admissibility Of Statements Made By Other Persons To Maker Of Record - Although CPLR §4518(a) provides that the maker's lack of personal knowledge affects the weight of the evidence, not its admissibility, entries based upon statements made by others to the maker of the record are inadmissible unless the proponent establishes that the statements were made pursuant to a business duty, see Johnson v. Lutz, 253 N.Y. 124 (1930); People v. Smith, 122 A.D.3d 446 (1st Dept. 2014) (foster care agency reports containing statements by foster mothers regarding victim's alleged untruthfulness regarding unrelated matters in past not admissible; although foster mothers were expected to report on child's relevant conduct and, under state regulation, "inform the agency of any incident or event that affects or may affect the child's adjustment, health, safety or well-being and/or may have some bearing upon the current service plan," evidence consisted of opinions, conclusions, second-hand accounts and anecdotal evidence); People v. Facciarossa, 66 Misc.3d 133(A) (App. Term, 9th & 10th Jud. Dist., 2019), lv denied 35 N.Y.3d 941 (photographs improperly admitted where People failed to show

they were taken by person under business duty to report); United States v. Bortnovsky, 879 F.2d 30 (2d Cir. 1989); People v. Canty, 153 A.D.2d 640, 544 N.Y.S.2d 857 (2d Dept. 1989) (no evidence of duty to report stolen car); People v. Dyer, 128 A.D.2d 719, 513 N.Y.S.2d 211 (2d Dept. 1987); People v. Wilson, 123 A.D.2d 457, 506 N.Y.S.2d 760 (2d Dept. 1986) (defendant's 911 call inadmissible), or that the statements are admissible under a recognized exception to the hearsay rule. See Matter of Leon RR., 48 N.Y.2d 117, 421 N.Y.S.2d 863 (1979); Kelly v. Wasserman, 5 N.Y.2d 425, 185 N.Y.S.2d 538 (1959); Ferrara v. Pranski, 88 A.D.2d 904, 450 N.Y.S.2d 596 (2d Dept. 1982) (defendant's admission recorded in police report); People v. Swinger, 180 Misc.2d 344, 689 N.Y.S.2d 336 (Crim. Ct., N.Y. Co., 1998) (excited utterances in hospital record); but see Yassin v. Blackman, 188 A.D.3d 62 (2d Dept. 2020) (party's admission in uncertified police report may not be bootstrapped into evidence if proper foundation for admissibility of report itself has not been laid).

Inconsistent statements contained in a record, which are not being offered for the truth, also may be admitted. People v. Ainsley, 132 A.D.3d 1007 (2d Dept. 2015) (court erred in excluding police report in which detective recorded complainant's description of shooter, which was inconsistent with complainant's testimony at trial); People v. Mullings, 83 A.D.3d 871, 921 N.Y.S.2d 152 (2d Dept. 2011) (police report should be admitted where it indicates that source of information was complaining witness, and information is inconsistent with testimony of the complaining witness).

5. Specific Types Of Records

a. Ballistics Reports - A report confirming the operability of a weapon is admissible, since it "further[s] the business of the police department" and is not prepared solely for litigation; expert testimony concerning the scientific principles underlying the test is not required. See Matter of Ronald B., 61 A.D.2d 204, 401 N.Y.S.2d 544, 547 (2d Dept. 1978).

b. Criminal Enterprises - The records of a criminal enterprise are admissible if the usual business record foundation is laid. See People v. Kennedy, 68 N.Y.2d 569, 510 N.Y.S.2d 853 (1987) (loan shark's diaries).

c. Court Transcript - See People v. Henry, 167 Misc.2d 1027,

641 N.Y.S.2d 1003 (Dist. Ct., Nassau Co., 1996) (transcript was admissible under business record and public record rules, and, therefore, could be used to support accusatory instrument); Kearney v. City Of New York, 144 Misc.2d 201, 543 N.Y.S.2d 879 (Sup. Ct. Kings Co., 1989) (court stenographer was under duty to take notes, and ADA was under duty to reveal exculpatory material).

d. Drug Testing/Lab Reports - A chemist's report identifying drugs is inadmissible in the absence of a foundation showing the nature of the tests and procedures employed. See Matter of Lopez v. Kramer, 118 A.D.2d 572, 499 N.Y.S.2d 183 (2d Dept. 1986); Matter of Selena B., 102 A.D.2d 724, 477 N.Y.S.2d 5 (1st Dept. 1984). But see People v. Atkins, 273 A.D.2d 11, 709 N.Y.S.2d 39 (1st Dept. 2000) (report properly admitted through testimony of chemist who did not personally test drugs recovered from defendant); People v. Torres, 213 A.D.2d 797, 623 N.Y.S.2d 645 (3rd Dept. 1995), lv denied 86 N.Y.2d 784, 631 N.Y.S.2d 630 (laboratory notes were properly admitted as business records, and supervisor of chemist who performed tests testified concerning lab procedures). In any event, the report should contain the date of the analyses, the name of the chemist, the materials that were analyzed, and the results of the tests. Cf. People v. Farrell, 58 N.Y.2d 637, 458 N.Y.S.2d 514 (1982).

e. Medical Records

i. Hospital Records - Entries in a hospital record regarding the treatment or diagnosis of a patient are admissible, since it is the business of the hospital to treat patients. Richardson, §301. Certain hospital records may be introduced if written certification or authentication is presented. See CPLR §4518(c). See also People v. Kinne, 71 N.Y.2d 879, 527 N.Y.S.2d 754 (1988) (certificate of authentication itself need not be made at or near time of act, transaction, occurrence or event recorded). But see People v. Gaess, N.Y.L.J., 5/4/88, p. 13, col. 2 (App. Term, 9th and 10th Jud. Dist.) (facility not shown to be a "hospital" within purview of CPLR §4518[c], as opposed to a mere doctor's office).

ii. Private Physicians' Records - A private physician's office records are admissible if the usual foundation is presented. See Wilson v. Bodian, 130 A.D.2d 221, 519 N.Y.S.2d 126 (2d Dept. 1987) (physicians' "reports" not

admissible, since they are prepared for litigation).

iii. Statements Relevant To Treatment Or Diagnosis – Entries in a record -- or testimony -- containing statements relevant to diagnosis and treatment are admissible. Historical information that has no bearing on diagnosis or treatment is not admissible. For instance, although a patient's general explanation identifying the source of an injury might be admissible, factual details and the name of the person who caused the injury may not. See Richardson, §8-610; People v. Spicola, 16 N.Y.3d 441 (2011) (boy's responses to nurse practitioner about why he was at Child Advocacy Center were germane to diagnosis and treatment; without boy's allegations regarding what happened and when, nurse would not have known where to begin examination, and, when testifying, she did not identify who the boy said touched him and acknowledged she did not know whether boy was being truthful); People v. Duhs, 16 N.Y.3d 405 (2011) (in case in which defendant allegedly placed child's feet and lower legs into tub filled with scalding hot water, pediatrician was properly permitted to testify that child, when asked why he did not get out of tub, responded, "he wouldn't let me out"; pediatrician wanted to determine time and mechanism of injury so she could properly administer treatment, and to ascertain whether child had predisposing condition, such as a neurological disorder, that may have prevented him from getting out of bathtub); People v. Nelson, 201 A.D.3d 413 (1st Dept. 2022) (portion of victim's statement regarding how he was stabbed in head through bedroom door was admissible, but it was error to admit portion of statement indicating that defendant was stabber and that victim was pressing his body against door to keep defendant out of bedroom); People v. Dickinson, 182 A.D.3d 783 (3d Dept. 2020), lv denied 35 N.Y.3d 1065 (victim's description to sexual assault nurse examiner of what she was wearing at time of incident admissible where SANE's question had dual purpose of assisting in investigation of crime and care and treatment of victim's injuries); People v. Cosme, 173 A.D.3d 445 (1st Dept. 2019), lv denied 33 N.Y.3d 1103 (no error in admission of portions of medical records containing complainant's allegation that he had been struck with handgun); People v. Hansson, 162 A.D.3d 1234 (3d Dept. 2018) (child abuse victim's statements implicating defendant admissible where inquiries were made for

purpose of determining mechanism of injury); People v. Cantave, 93 A.D.3d 677 (2d Dept. 2012) (court properly redacted defendant's medical records to omit statement that he had been hit in nose with gun, which was not relevant to defendant's diagnosis or treatment for thumb injury and hand laceration); People v. Parada, 67 A.D.3d 581, 889 N.Y.S.2d 159 (1st Dept. 2009) (dissenting judge rejects majority's conclusion that prior consistent statements to pediatric nurse in course of forensic examination conducted at Children's Advocacy Center were sufficiently related to diagnosis and treatment to be admissible, since nurse's examination was arranged by law enforcement and was conducted over a year after alleged abuse had ended, it was for purpose of criminal investigation); People v. Ballerstein, 52 A.D.3d 1192, 860 N.Y.S.2d 718 (4th Dept. 2008) (victim's statements at Child Advocacy Center not admissible because they were made during forensic examination and were not relevant to diagnosis and treatment); Matter of Kimaya Mc., 51 A.D.3d 671, 858 N.Y.S.2d 237 (2d Dept. 2008) (complainant's statements that she was hit with brick properly admitted); People v. Dagoberto, 16 A.D.3d 595, 792 N.Y.S.2d 143 (2d Dept. 2005), lv denied 5 N.Y.3d 761 (statement that complainant "turned while man tried to stab him in the back" was relevant to treatment and diagnosis); People v. Thomas, 282 A.D.2d 827, 725 N.Y.S.2d 102 (3rd Dept. 2001), lv denied 96 N.Y.2d 925, 732 N.Y.S.2d 642 (victim's statement that she had been punched and choked was admissible, but not identification of defendant); People v. Pitti, 262 A.D.2d 503, 692 N.Y.S.2d 166 (2d Dept. 1999), lv denied 94 N.Y.2d 865, 704 N.Y.S.2d 541 (statement made by victim about smoking marijuana before his lung collapsed was not admissible, since expert testified that cause of collapsed lung was not relevant to treatment); People v. Bailey, 252 A.D.2d 815, 675 N.Y.S.2d 706 (3rd Dept. 1998), lv denied 92 N.Y.2d 922, 680 N.Y.S.2d 463 (patient's statement that a person "kissed and sucked on her neck and placed his penis between her legs" was admissible since it prompted doctor to conduct further examination); People v. Goode, 179 A.D.2d 676, 578 N.Y.S.2d 611 (2d Dept. 1992) (complainant's claim that he was hit with fist containing a metal object was properly admitted); People v. Riggsbee, 159 A.D.2d 1018, 552 N.Y.S.2d 466 (4th Dept. 1990) (statement that officer's injuries occurred at work was inadmissible); People v. Matthews, 148 A.D.2d 272, 544 N.Y.S.2d

398 (4th Dept. 1989) (statements by defendant's mother inadmissible, because they were not relied upon by doctor in making diagnosis); People v. Harris, 132 A.D.2d 940, 518 N.Y.S.2d 269 (4th Dept. 1987) (physician improperly permitted to testify to victim's statements concerning location of attack and name of perpetrator); People v. Conde, 16 A.D.2d 327, 288 N.Y.S.2d 69 (3rd Dept. 1962), aff'd 13 N.Y.2d 939, 244 N.Y.S.2d 314 (1963) (decedent's statement that she fell from a ladder admitted). See also People v. Baltimore, 301 A.D.2d 610, 754 N.Y.S.2d 650 (2d Dept. 2003), lv denied 100 N.Y.2d 592, 766 N.Y.S.2d 167 (2003) (complainant's statements that she was "kicked, slapped, pulled by her hair and had a knife to her neck" were admissible); State v. Payne, 694 S.E.2d 935 (W. Va. 2010) (hearsay testimony by forensic nurse trained in sexual assault examination properly admitted under diagnosis or treatment exception; such evidence admissible when gathered for dual medical and forensic purpose, but inadmissible when gathered strictly for investigative or forensic purposes).

Under this hearsay exception, courts now admit statements that pertain not directly to diagnosis and treatment of the patient's physical condition, but rather to the patient's need for follow-up mental health treatment and for discharge and safety planning. People v. Ortega, 15 N.Y.3d 610, 917 N.Y.S.2d 1 (2010) (in Benston, references to "old boyfriend" as perpetrator, description of case as involving "domestic violence," and references to "safety plan" for complainant were admissible since domestic violence differs materially from other types of assault in effect on victim and resulting treatment, but concurring judge notes that "[a] blanket rule allowing statements made by the complainant at the time of admission to the hospital can be just as harmful to a complainant's interests in some cases as its application here was to the defendant"; in Ortega, statement that complainant was "forced to" smoke white, powdery substance was admissible since treatment of victim of coercion may differ from treatment of patient who has intentionally taken drugs); People v. Van Alphen, 195 A.D.3d 1307 (3d Dept. 2021), lv denied 37 N.Y.3d 1061 (statements by foster mother indicating that four-year-old child was victim of sexual abuse were relevant to diagnosis and treatment); People v. Dawson, 195 A.D.3d 1157 (3d Dept. 2021), aff'd 38 N.Y.3d 1055 (no error in admission of victim's medical records without redaction of references to "sexual

assault"); People v. Wright, 81 A.D.3d 1161, 918 N.Y.S.2d 598 (3d Dept. 2011) (child complainant's statements admissible where hospital needed to create discharge plan to provide for her safety rather than send her home with defendant, and to refer her to counseling services; although police personnel were present and may have asked question that elicited statements, the information was included in medical records by hospital personnel who were also present); People v. Hansson, 162 A.D.3d 1234 (child abuse victim's statements implicating defendant admissible where hospital needed to create discharge plan that would ensure child's safety and provide for any psychological and counseling services he might require); People v. Greenlee, 70 A.D.3d 966, 897 N.Y.S.2d 132 (2d Dept. 2010), lv denied 14 N.Y.3d 888 (portion of complainant's medical records stating that her attackers were friends of former boyfriend who were attempting to prevent her from testifying against boyfriend in domestic violence proceeding was likely relied on by hospital personnel in developing discharge plan to ensure complainant's safety); Taylor v. State, 268 S.W.3d 571 (Tex. Ct. of Crim. App., 2008) (statement made to non-medical professional in expectation or hope it will be relayed to medical professional is admissible, and rule extends to statements made for purpose of facilitating mental health treatment by psychiatrist or other trained mental health professional; courts also notes that it must be shown that declarant was aware that statements were made for purposes of diagnosis or treatment and that proper diagnosis or treatment depends upon veracity of statements, that motive for self-preservation does not necessarily disappear once course of treatment has been determined and has commenced, that presumption that person understands that veracity will serve his/her interest does not arise when person is being treated for mental illness, and that in order to bring identity of perpetrator within rule, proponent must show that it was important to efficacy of treatment that professional know identity of perpetrator); People v. Anonymous, 192 Misc.2d 570, 746 N.Y.S.2d 894 (Sup. Ct., Bronx Co., 2002) (diagrams on which child's respective injuries were delineated next to note as to how injury was sustained, and who inflicted it, were admissible since identity of abuser affects nature of psychological problems in child abuse cases); People v. Swinger, supra, 180 Misc.2d 344 (statements regarding domestic violence were

admissible, since identifying patient as domestic violence victim is relevant to diagnosis and treatment).

Arguably, statements made by a third person are admissible under this exception. Compare People v. Van Alphen, supra, 195 A.D.3d 1307 (statements by foster mother indicating that four-year-old child was victim of sexual abuse were relevant to diagnosis and treatment); People v. Skeen, 139 A.D.3d 1179 (3d Dept. 2016), lv denied 27 N.Y.3d 1155 (statements by victim's mother and grandmother were germane to diagnosis and treatment); Matter of Raheem D., 54 Misc.3d 1225(A) (Fam. Ct., Bronx Co., 2017) (entries in complainant's medical records memorializing statements made by complainant's mother admissible; mother stated that she observed respondent and her daughter in bed together with their pants down, which was relevant to physical treatment of complainant, safety planning for her and family, and ongoing treatment of her mental health, and mother's motive to provide correct and relevant information was strong); Matter of A.M., 44 Misc.3d 514 (Fam. Ct., Bronx Co., 2014) (statements made by third person providing health-related information for purpose of treatment are intrinsically reliable and may fall within exception) and In re Dolan, 35 Misc.3d 781 (Sup. Ct., Nassau Co., 2012) (exception may be applied to statements made by persons other than patient, such as relatives or law enforcement personnel) with People v. Matthews, 148 A.D.2d 272 (4th Dept. 1989) (statements by defendant's mother inadmissible, because they were not relied upon by doctor in making diagnosis) and Matter of M.S., 49 Misc.3d 1214(A) (Fam. Ct., Kings Co., 2015) (mother's statements to pediatricians not admissible under exception for statements made for purposes of diagnosis and treatment; third party statements do not carry same indicia of reliability).

Of course, even when not admissible as a statement made for purposes of treatment or diagnosis, a patient's statements might be admissible as an admission or a prior inconsistent statement.

The illegibility of part of a record does not require the exclusion of relevant and legible portions. See Joyce v. Kowalcewski, supra, 80 A.D.2d 27.

Whether contained in a record or in testimony, this type of hearsay evidence

usually will not be testimonial under right of confrontation rules. See People v. Duhs, 16 N.Y.3d 405 (child's statement to emergency room pediatrician not testimonial since primary purpose was to determine mechanism of injury so she could render diagnosis and administer treatment; it did not matter that pediatrician may also have been motivated to fulfill ethical and legal duty as mandatory reporter of child abuse) (habeas relief denied in Duhs v. Capra, 639 Fed.Appx. 691 (2d Cir. 2016)); People v. Murphy, 168 A.D.3d 632 (1st Dept. 2019), lv denied 33 N.Y.3d 952 (victim's statements to nurse not testimonial because nurse elicited statements primarily to treat victim and role in preparing rape kit for police was secondary); People v. Shaw, 80 A.D.3d 465, 914 N.Y.S.2d 155 (1st Dept. 2011) (declaration made to gynecologist at hospital was not testimonial where doctor acted primarily as treating physician and role in gathering evidence for police by way of rape kit was secondary); see also State v. Koederitz, 166 So.3d 981 (La. 2015) (although victim's initial statements were made in furtherance of medical diagnosis and treatment and were not testimonial, statements to psychiatrist at follow-up visit were testimonial since visit appeared to have been conducted for primary purpose of persuading victim to report incident to police and medical personnel were under legal obligation to report incident to police); State v. Bennington, 264 P.3d 440 (Kan. 2011) (victim's statements to sexual assault nurse examiner, which were made in presence of law enforcement officer who asked questions, and which reported past events rather than information regarding ongoing public safety or medical emergency, were testimonial; statements made during questioning by SANE also were testimonial since source of questions was officer and SANE followed statutory procedures for gathering evidence for prosecution, and thus acted as agent of law enforcement); State v. Miller, 264 P.3d 461 (Kan. 2011) (statements made to sexual assault nurse examiner not testimonial where there was no law enforcement officer present, victim complained she was "hurting," her mother decided to seek medical treatment without request to do so by law enforcement officers, SANE asked questions common to all medical examinations, and SANE did provide medical treatment); State v. Mendez, 242 P.3d 328 (N.M. 2010) (statements made to sexual assault nurse examiner during examination of victim of alleged sexual abuse may be admissible under hearsay

exception even though there is a criminal investigation; however, goals of SANE nurses, when compared with goals of other medical providers, can be more closely aligned with law enforcement, and thus courts must be aware of potential that SANE nurses will be used in end run around hearsay rule); United States v. Barker, 820 F.3d 167 (5th Cir. 2016), cert denied 137 S.Ct. 209 (statements made by child to Sexual Assault Nurse Examiner conducting exam at request of law enforcement not testimonial where primary purpose was to medically evaluate and treat child).

iv. Opinions - There is conflicting case law with respect to whether, in the absence of proof of the procedures employed or the qualifications of the doctors or other individuals involved, test results and medical opinions expressed in a record are admissible; a distinction may have been drawn between opinions in hospital or agency records, which are considered sufficiently reliable, and opinions in the records of a private medical office. Compare In re Anthony C., 59 A.D.3d 166, 873 N.Y.S.2d 33 (1st Dept. 2009) (no error where court admitted psychiatric reports that were prepared and certified by the Human Resources Administration and contained doctors' opinions and expert proof); Rodriguez v. Triborough Bridge and Tunnel Authority, 276 A.D.2d 769, 716 N.Y.S.2d 24 (2d Dept. 2000), appeal dism'd 96 N.Y.2d 814, 727 N.Y.S.2d 694 (2001) (entry regarding result of blood alcohol test result was admissible where doctor testified regarding hospital procedures for trauma patients); Matter of Harvey U., 116 A.D.2d 351, 501 N.Y.S.2d 920 (3rd Dept. 1986), rev'd on other grounds 68 N.Y.2d 624, 505 N.Y.S.2d 70 (prevailing weight of authority supports admissibility of hospital records containing diagnoses and assessments of patient's mental or physical condition by apparently qualified professionals when records otherwise meet requirements of business entry rule); People v. Davis, 95 A.D.2d 837, 463 N.Y.S.2d 876 (2d Dept. 1983) (hospital record entry reading "gunshot wound of chest [and left] upper arm" properly admitted); People v. Richardson, 38 A.D.2d 990, 329 N.Y.S.2d 425 (3rd Dept. 1972) (hospital report containing diagnosis of gunshot wound used to prove serious physical injury) and Lichtenstein v. Montefiore Hospital and Medical Center, 56 A.D.2d 281, 392 N.Y.S.2d 18 (1st Dept. 1977) (suicide diagnosis in hospital record admissible) with Matter of Fortunato v. Murray, 72 A.D.3d

817, 899 N.Y.S.2d 283 (2d Dept. 2010) (medical reports of treating physician not admissible where they contain opinions and expert proof); Wilson v. Bodian, supra, 130 A.D.2d 221 (notation in office record inadmissible where source of notation was undisclosed, and there was no evidence as to who performed test, when test was performed or results of test, or procedures used to perform test and make diagnosis; scientific reliability of alleged biopsy could not be explored) and Carter v. Rivera, 24 Misc.3d 920 (Sup. Ct., Kings Co., 2009) (court observes that First Department has not allowed admission of opinions contained in private doctor's records, as opposed to hospital records). See also Matter of E.T. and B.T., 808 N.E.2d 639 (Indiana, 2004) (opinions in medical or hospital records are admissible only if the expertise of the opinion giver is established); Matter of M.S., 49 Misc.3d 1214(A) (Fam. Ct., Kings Co., 2015) (opinions from doctor and social worker about mother's cognitive abilities not admissible since professionals were not qualified as experts).

The Court of Appeals has suggested that the facts underlying the opinion should appear in the record. People v. Kohlmeyer, 284 N.Y. 366 (1961) ("It is always competent for physicians to state their scientific opinions as to the nature of illnesses, their causes and probable results, founded upon the facts disclosed in the evidence").

v. X-Rays And Other Medical Information In Medical Record - An x-ray is admissible as proof of a person's condition if it is authenticated by proof that it is a photograph of the person whose injury is at issue, and expert testimony is offered to interpret it. See CPLR §4532-a (admissibility of x-rays in personal injury actions); Galuska v. Arbaiza, 106 A.D.2d 543, 482 N.Y.S.2d 846 (2d Dept. 1984) (x-ray improperly admitted where requirements of §4532-a were not satisfied). When a medical record is admitted pursuant to CPLR §4518, an x-ray or other medical information germane to diagnosis or treatment that is properly included in the record arguably also is admissible. Compare Freeman v. Shotogaj, 174 A.D.3d 448 (1st Dep't 2019); Freeman v. Kirkland, 184 A.D.2d 331, 584 N.Y.S.2d 828 (1st Dept. 1992) (records, reports and correspondence generated by other medical specialists and laboratories properly admitted as part of plaintiff's medical file); Stein v. Lebowitz-Pine View Hotel, Inc., 111 A.D.2d 572, 489 N.Y.S.2d 635 (3rd Dept. 1985), lv denied 65

N.Y.2d 611, 494 N.Y.S.2d 1026 with Wagman v. Bradshaw, 292 A.D.2d 84 (2d Dept. 2002) (report prepared by a non-testifying consulting physician does not become admissible just because treating physician properly relies on results in providing expert opinion); Serra v. City of New York, 215 A.D.2d 643, 627 N.Y.S.2d 699 (2d Dept. 1995) (MRI report not admissible without foundation for hearsay exception); Borden v. Brady, 92 A.D.3d 983 (3d Dept. 1982) (consulting physician's report maintained in file of treating physician could be part of basis for treating physician's opinion, but was not admissible). In People v. Cratsley, 86 N.Y.2d 81 (1995), the Court of Appeals held that, generally, the mere filing of documents and reports received from other entities which are then retained in the ordinary course of the business of the receiving entity is insufficient to qualify the documents and reports as part of the receiving entity's otherwise admissible business records.

The best evidence rule applies, and permits the introduction of secondary evidence, such as an x-ray report, where the proponent explains the absence of the primary evidence. See Schozer v. Penn Life Insurance Company, 84 N.Y.2d 639, 620 N.Y.S.2d 797 (1994).

f. Store Receipts And Price Lists - A store receipt is not admissible to prove the value of the property purchased in the absence of the usual business record foundation. See People v. Teague, 145 A.D.2d 911, 536 N.Y.S.2d 293 (4th Dept. 1988); see also People v. Ortiz, 139 A.D.3d 592 (1st Dept. 2016), lv denied 28 N.Y.3d 935 (value of stolen merchandise established via business record/printout displaying electronically stored price information); People v. Nashal, 130 A.D.3d 480 (1st Dept. 2015), lv denied 26 N.Y.3d 1010 (receipt prepared after each shoplifting incident not prepared for purpose of litigation since receipt was printout of existing electronically stored information, and, in any event, records prepared for litigation are admissible if there are other business reasons requiring that records be made); People v. King, 102 A.D.3d 434 (1st Dept. 2013), lv denied 20 N.Y.3d 1100 (same as Nashal).

In United States v. Tin Yat Chin, 371 F.3d 31 (2d Cir. 2004), the court held that copies of credit card receipts purportedly signed by defendant were admissible as non-hearsay where they tended to show that someone referring to himself by defendant's

name signed receipts on the dates and times in question and laid a foundation for other alibi testimony.

In People v. Giordano, 50 A.D.3d 467, 856 N.Y.S.2d 568 (1st Dept. 2008), the court held that the stolen jackets' price tags, and testimony by security guards as to the selling price of the jackets on the price tags, did not constitute inadmissible hearsay, since the tags were not offered as an assertion of value as distinct from the selling price, and constituted circumstantial evidence of the price a shopper would have been expected to pay, and thus were essentially verbal acts by the store stating an offer to sell at a particular price. See also People v. Cui, 52 Misc.3d 129(A) (App. Term, 1st Dept., 2016) (price tags not hearsay, but rather were verbal acts by store stating offer to sell at particular price).

g. Computer Printouts - "An electronic record, as defined in [State Technology Law §102], used or stored as [a business] memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The Court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record." CPLR §4518(a). An "'[e]lectronic record' shall mean information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities." State Technology Law §102(2). "In anticipation of the court's potential demand for extrinsic evidence on this point, the proponent should be prepared to offer foundation testimony concerning the particular business's data entry and storage system as well as the method by which the derivative forms of the data are produced." Vincent C. Alexander, Practice Commentary, CPLR 4518. See People v. Kangas, 28 N.Y.3d 984 (2016) (4518(a), and not 4539(b), applies to documents that were originally created in electronic form; 4539(b) applies only when document that originally existed in hard copy form was scanned to store digital image and reproduction of digital image was printed in ordinary course of business); Ed Guth Realty, Inc. v. Gingold, 34 N.Y.2d 440, 358 N.Y.S.2d 367 (1978); Federal Express Corporation v. Federal Jeans, Inc., 14

A.D.3d 424, 788 N.Y.S.2d 113 (1st Dept. 2005); People v. McFarlan, 191 Misc.2d 531, 744 N.Y.S.2d 287 (Sup. Ct., N.Y. Co., 2002) (given growth in electronic storage of information, new rules must be articulated with respect to what is a writing and what is an original document); People v. Wray, 183 Misc.2d 444, 704 N.Y.S.2d 787 (Sup. Ct., Kings Co., 2000) (printouts of DMV driving records admissible); see also State v. Kandutsch, 799 N.W.2d 865 (Wis. 2011) (while computer-stored records are hearsay, computer-generated record is not hearsay when it is result of automated process free from human input or intervention); People v. Zavala, 216 Cal.App.4th 242 (Cal. Ct. App., 4th Dist., 2013) (printed compilation of cell phone data retrieved from computer via human query for purposes of trial is admissible where underlying data was automatically recorded and stored by reliable computer program in regular course of business).

6. Copies - Aside from those copies which are admissible under CPLR §§2306(a) and 2307, documents "recorded, copied, or reproduced ... by any process, including reproduction" in the regular course of business are admissible if they are "satisfactorily identified." See, e.g., People v. Rosa, 156 A.D.2d 733, 549 N.Y.S.2d 487 (2d Dept. 1990). An enlargement or facsimile of the reproduction is admissible if the original is in existence and available for inspection. CPLR §4539(a). Reproductions created by image-storing processes are admissible in lieu of an original if the process does not permit additions, deletions or changes without leaving a record, and are authenticated through testimony establishing the manner in which tampering or degradation of the reproduction is prevented. CPLR §4539(b); see People v. Kangas, 28 N.Y.3d 984 (4539(b) does not apply to documents that were originally created in electronic form, and applies only when document that originally existed in hard copy form was scanned to store digital image and reproduction of digital image was printed in ordinary course of business); People v. Gunther, 172 A.D.3d 1403 (2d Dept. 2019), lv denied 34 N.Y.3d 951 (computer reproductions of bank withdrawal slips properly admitted where original slips were scanned to store digital image of hard copy document, and evidence was authenticated via testimony that included information about manner or method by which tampering or degradation of reproduction was

prevented).

7. Transcription Of Original Record Into Permanent Form - When information in a writing is transferred in the ordinary course of business into a permanent record, and the original is destroyed, the permanent record is admissible even though it was not made at the time of the events recorded. See People v. Klein, 105 A.D.2d 805, 481 N.Y.S.2d 743 (2d Dept. 1984), aff'd 65 N.Y.2d 613, 491 N.Y.S.2d 155 (1985).

8. Right Of Confrontation – In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), a five-Justice Supreme Court majority held that sworn "certificates of analysis" showing the results of forensic analysis, and stating that the seized substance was found to contain cocaine, were testimonial. The majority noted that it has previously included affidavits within the "core class of testimonial statements"; that an objective witness reasonably would have believed that the statement would be available for use at trial; that although the certificates are inculpatory only when taken together with other evidence linking petitioner to the contraband, it is often true that a witness's testimony, taken alone, will not suffice to convict, but no case has been cited in which such testimony was admitted absent an opportunity to cross-examine; that while the dissent contends that a "conventional witness recalls events observed in the past, while an analyst's report contains near-contemporaneous observations of the test," these affidavits were completed almost a week after the tests were performed, and, in Davis v. Washington, the victim's statements to police officers were sufficiently close in time to the alleged assault that the trial court admitted her affidavit as a "present sense impression"; that a person who volunteers testimony is no less a witness than one who responds to interrogation, and, in any event, the affidavits were presented in response to a police request; that although respondent claims that there is a difference between testimony recounting historical events, which is prone to distortion or manipulation, and testimony which is the result of neutral, scientific testing, dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because the defendant is obviously guilty, and, in any event, forensic evidence is not immune from the risk of manipulation; that business and public records are

generally admissible absent confrontation because they are created for the administration of an entity's affairs and not for the purpose of establishing or proving a fact at trial, while the analysts' statements were prepared specifically for use at trial; that the power to subpoena is no substitute for the right of confrontation, since the witness could be unavailable or refuse to appear, and, in any event, the Confrontation Clause imposes a burden on the prosecution to present witnesses, not on the defendant to bring an adverse witnesses into court; and that the Confrontation Clause may make prosecution more burdensome, but "the sky will not fall after today's decision" since many states have adopted confrontation requirements and there is no evidence that the criminal justice system has ground to halt.

In Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011), a five-Justice majority found a Confrontation Clause violation where the prosecution introduced a forensic laboratory report, which contained a testimonial certification that defendant's blood-alcohol concentration was above the threshold for aggravated DWI, through the testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. The majority noted, inter alia, that surrogate testimony of the kind the witness was equipped to give could not convey what the analyst knew or observed about the events his certification concerned or expose any lapses or lies on the certifying analyst's part; that the Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination; that despite the absence of notarization, the formalities attending the report are more than adequate to qualify the analyst's assertions as testimonial; and that application of the Confrontation Clause in these circumstances would not impose an undue burden on the prosecution.

In Williams v. Illinois, 132 S.Ct. 2221 (2012), an expert, who had not participated in the analyses, testified at defendant's nonjury rape trial that a DNA profile produced by an outside laboratory (Cellmark) matched a profile produced by the state police lab using a sample of defendant's blood. The expert explained the notations on documents admitted as business records, stating that, according to the records, vaginal swabs

taken from the victim were sent to and received back from Cellmark. Defendant argued that the expert went astray when she testified that the DNA profile provided by Cellmark was produced from semen found on the victim's vaginal swabs, but the Illinois courts found that this statement was not admitted for the truth of the matter asserted. Five Justices found no Confrontation Clause violation. In one opinion, four Justices noted that the Confrontation Clause has no application to out-of-court statements that are not offered to prove the truth of the matter asserted; that out-of-court statements related by an expert solely for the purpose of explaining the assumptions on which the opinion rests are not offered for their truth; that if this had been a jury trial, the out-of-court statements could not have gone to the jury without careful jury instructions and an evaluation of the risk of juror confusion; that the Cellmark report was not testimonial since it was very different from statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach, and was produced before any suspect was identified for the purpose of finding a rapist who was on the loose and was not inherently inculpatory; that the ruling will not prejudice a defendant who really wishes to probe the reliability of DNA testing, because those who participated in the testing may be subpoenaed by the defense and questioned at trial; and that if DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. Justice Thomas concurred in the result, concluding that the Cellmark report lacked the solemnity of an affidavit or deposition and was not testimonial. However, Justice Thomas in other respects sided with the dissent, rejecting the plurality's conclusion that the out-of-court statements were not offered for their truth and were not testimonial in nature. See People v. Tsintzelis, 35 N.Y.3d 925 (2020) (records did not establish that nontestifying DNA analyst used independent analysis on raw data to arrive at conclusions); People v. John, 27 N.Y.3d 294 (2016) (DNA reports were procured with primary purpose of creating out-of-court substitute for trial testimony, and were thus testimonial, where DNA profiles were generated during police investigation of defendant

charged by accusatory instrument, and were created for purpose of proving defendant's guilt in pending criminal action, and although DNA profiles were not provided under oath, they were sufficiently formal to be considered testimonial; analyst who witnessed, performed or supervised generation of defendant's DNA profile, or who used his or her independent analysis on raw data - not analyst functioning as conduit for conclusions of others - must be available to testify, but not every person who comes in contact with evidence must be produced, and, if testing analysts are unavailable, qualified OCME expert may be able to testify after analyzing necessary data); People v. Pealer, 20 N.Y.3d 447 (2013) (introduction of records pertaining to routine inspection, maintenance and calibration of breathalyzer machines, without producing persons who created records, does not violate Confrontation Clause; testing performed by employees of Division of Criminal Justice Services, an executive agency, whose primary motivation was to advise police that machine was adequately calibrated and operating properly and not to secure evidence for use in particular criminal proceeding, and testing certificates did not directly inculpate defendant or prove essential element of charges); People v. Brown, 13 N.Y.3d 332, 890 N.Y.S.2d 415 (2009) (DNA report, prepared by Office of the Chief Medical Examiner's subcontractor laboratory, not "testimonial" where OCME witness had conducted analysis linking defendant's DNA to profile found in victim's rape kit, had personally examined laboratory's file, interpreted profile of data represented in machine-generated graphs, made critical determination linking defendant to crime, and stated that she was familiar with procedures and protocols used by laboratory, and report consisted of machine-generated graphs, charts and numerical data and no conclusions, interpretations or comparisons); People v. Pacer, 6 N.Y.3d 504, 814 N.Y.S.2d 575 (2006) (DMV affidavit admitted to show that defendant's driving privileges had properly been revoked was testimonial; court rejects People's argument that affidavit was more like non-accusatory business or public record); see also State v. Staudenmayer, 523 P.3d 29 (Montana 2023) (clerk of court's minute entries stating defendant was present at arraignment but absent from hearing were not testimonial; although statements were introduced as evidence of bail-jumping, primary purpose of statements was to aid administration of court by memorializing who was present and not

to prosecute defendant); State v. Brewer, 882 S.E.2d 156 (S.C. 2022), cert denied 143 S.Ct. 2649 (Confrontation Clause violation where State introduced contents of toxicology report from out-of-state lab through pathologist who did not perform testing); People v. Wakefield, 38 N.Y.3d 367 (2022), cert denied 143 S.Ct. 1799 (no error in denial of defendant's request for discovery of TrueAllele software source code in connection with Frye hearing; denial of disclosure did not deprive defendant of Sixth Amendment right to confront witness against him since source code was not a declarant that could be cross-examined, and analyst who performed electrophoresis on DNA samples, and expert who fully understood parameters and methodology of TrueAllele software's DNA interpretation processes, testified); State v. Carrion, 265 A.3d 115 (N.J. 2021) (right of confrontation violated where court admitted affidavit from non-testifying law enforcement officer attesting that search of firearm registry revealed no lawful permit for possession of handgun); People v. Austin, 30 N.Y.3d 98 (2017) (right to confrontation violated by introduction of DNA evidence through "surrogate" testimony of witness who had not performed, witnessed or supervised generation of DNA profiles); People v. Lin, 28 N.Y.3d 701 (2017) (no Confrontation Clause violation where officer who testified regarding breath test observed test, but did not personally administer it, and no hearsay statements by non-testifying officer were admitted; testifying officer was certified and experienced machine operator, could determine whether it was successfully self-calibrating by observing testing officer input information and listening to sounds made by machine, and saw machine print out test results and was capable of reading printout); People v. Wald, 215 A.D.3d 497 (1st Dept. 2023) (factual statements in autopsy report are nontestimonial); Garlick v. Lee, 1 F.4th 122 (2d Cir. 2021), cert denied 142 S.Ct. 1189 (habeas relief granted where autopsy report admitted through witness who had not participated in autopsy or in preparation of report; court notes that autopsy was performed in aid of active police investigation and upon detective's request, and was performed in presence of medical examiner and two detectives, that doctor promptly notified law enforcement of findings, that there were indications of report's solemnity; and that Supreme Court has rejected argument that forensic reports that do not directly accuse the defendant of wrongdoing, or include only observations of

an independent scientist made according to a non-adversarial public duty, are not testimonial); People v. Vandenburg, 189 A.D.3d 1772 (3d Dept. 2020), lv denied 36 N.Y.3d 1054 (no violation of right of confrontation where testifying expert prepared buccal swabs and nearly 90 items of evidence for preliminary testing performed by laboratory technicians; after that testing, witness received data files from genetic analyzer and imported them into software program; and witness formulated comparisons and wrote reports based on interpretation of DNA profiles generated from samples she prepared); People v. Pascall, 164 A.D.3d 1265 (2d Dept. 2018), lv denied 35 N.Y.3d 1029 (expert independently analyzed raw data and was not functioning as conduit for conclusions of others, and original criminalists had resigned and thus were unavailable); People v. Rodriguez, 153 A.D.3d 235 (1st Dept. 2017), aff'd 31 N.Y.3d 1067 (no right of confrontation violation where report on DNA profile created from DNA recovered at scene and report on possible match of that profile with profile in CODIS database were prepared before defendant was a suspect, and third report was testimonial but reflected testifying analyst's independent review of raw data); People v. Aponte, 149 A.D.3d 1096 (2d Dept. 2017) (OCME reports not testimonial where neither DNA profile derived from getaway vehicle's steering wheel, nor known DNA profile generated from swab of defendant's cheek, standing alone, shed any light on issue of guilt in absence of expert's testimony that profiles matched); People v. Alcivar, 140 A.D.3d 425 (1st Dept. 2016), lv denied 28 N.Y.3d 1070 (no Confrontation Clause violation where court admitted report stating that defendant tested positive for STD contracted by complainant without giving defendant opportunity to cross-examine technician who operated machine that performed testing and automatically generated report); People v. Acevedo, 112 A.D.3d 454 (1st Dept. 2013) (no right of confrontation violation where autopsy report prepared by non-testifying medical examiner was introduced through testimony of another medical examiner since report was not testimonial); United States v. James, 712 F.3d 79 (2d Cir. 2013) (no Confrontation Clause violation where experts who did not participate in autopsies testified based on records that were not prepared primarily to create record for use at criminal trial); People v. Castor, 99 A.D.3d 1177 (4th Dept. 2012), lv denied 20 N.Y.3d 1010 (no

violation of right of confrontation where People failed to call technicians at independent laboratories who performed toxicology tests; reports were contemporaneous record of objective facts and results did not directly link defendant to crime and concerned only substances ingested by victim, and thus it was not likely that content of reports was influenced by pro-law enforcement bias); People v. Hall, 84 A.D.3d 79 (1st Dept. 2011), lv denied 18 N.Y.3d 924 (concluding that autopsy report was not testimonial, court notes that Melendez-Diaz did not explicitly hold that autopsy reports are testimonial and that Justice Thomas continued to adhere to position that Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions; that mandate of OCME is to provide impartial determination of cause of death and it is not law enforcement agency and is independent of prosecutor; and that there was testimony by medical examiner from same office as medical examiner who performed autopsy); People v. Hamilton, 66 A.D.3d 921, 887 N.Y.S.2d 261 (2d Dept. 2009), lv denied 13 N.Y.3d 907 (no right of confrontation violation where defendant's fingerprint and palm print cards were admitted into evidence without testimony by detective who took the prints; print cards themselves were not directly accusatory and were properly admitted through testimony of print examiner, who compared latent palm print found at scene with defendant's palm print and concluded that they matched); People v. Graves, 171 A.D.3d 674 (1st Dept. 2019), lv denied 33 N.Y.3d 1069 (trespass notices barring defendant from entering store were non-testimonial business records); People v. H.K., 69 Misc.3d 774 (Crim. Ct., Bronx Co., 2020) (analyst would not be serving as mere conduit where STRmix was used as tool to assist her in interpretation of data, and was not "expert system" that relied on artificial intelligence); People v. Umpierre, 37 Misc.3d 775 (Sup. Ct., Bronx Co., 2012) (blood alcohol test results were testimonial evidence and could not be introduced via testimony of officer who recorded administration of tests since officer who recorded tests did not hear part of other officer's interaction with defendant and could not convey what other officer knew or observed or expose any lapses or inaccuracies on that officer's part).

D. Public Records

1. Generally - Under CPLR §4520, "[w]here a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated." The official need not be called as a witness. Richardson, §8-1101.

Where the law does not require that the official duty be performed by the officer personally, the record is admissible if a subordinate had personal knowledge. Richardson, §8-1101.

2. Statutory Authentication Rule - A copy of an official record is prima facie evidence of the original if the copy is attested as correct by an officer, or a deputy of an officer, who has legal custody of the record. CPLR §4540(a). See People v. Michaels, 174 Misc.2d 982, 667 N.Y.S.2d 646 (Crim. Ct., Richmond Co., 1997). A copy of court records must be accompanied by a certificate signed by or containing a facsimile of the signature of the clerk of the court having legal custody of the record, and, unless the copy is used in the same court, containing the court seal. CPLR §4540(b). See People v. Smith, 258 A.D.2d 245, 697 N.Y.S.2d 783 (4th Dept. 1999), lv denied 94 N.Y.2d 829, 702 N.Y.S.2d 600 (DMV driving record abstract inadmissible where attestation of correctness and State seal were preprinted on blank forms before data was placed on document); People v. Azpuru, 2002 WL 31015575 (Crim. Ct., N.Y. Co., 2002) (Smith not applicable since, under new policy, seal and certification are electronically placed on each page contemporaneously with driver's identification and record). Other records are admissible if the certificate contains the signature or a facsimile of the signature of the officer having custody of the original or his or her deputy or clerk, and his or her official seal. The county seal must be affixed to a county clerk's certificate. CPLR §4540(b). The proponent should ask the court to take judicial notice of the authority of the officer and his or her official signature and seal. Richardson, §§ 2-204(m), 9-201.

Authentication of records from other jurisdictions is governed by CPLR §4540(c). See, e.g., People v. Ricks, 90 A.D.3d 1562 (4th Dept. 2011) (record was properly

authenticated by agent in charge of identification unit for Colorado government agency, but document certifying that agent had legal custody of record was signed by that agent rather than by separate authority; strict compliance with §4540(c) is necessary).

Certain public records also qualify as business records, and thus may be authenticated pursuant to CPLR §4518(c). Richardson, §8-1101.

3. Birth And Death Certificates - The admission of certified copies of death and birth records to prove the facts stated therein is permitted by Public Health Law §4103(3). See also PHL §4100-a(1) ("certified copy" means photocopy or microfilm print certified by commissioner or another individual specified in §4100-a[1]).

E. Best Evidence Rule - Under the best evidence rule, a party seeking to prove the contents of a writing must produce the original or satisfactorily account for its absence. But see United States v. Diaz-Lopez, 625 F.3d 1198 (9th Cir. 2010), cert denied 131 S.Ct. 2918 (best evidence rule not violated where evidence was offered to prove there was no record, not contents of database). The impact of this rule has been reduced by CPLR provisions making photocopies admissible (see, e.g., CPLR §§4539, 4540[a]). When a fact, such as a person's date of birth, exists independently, the rule does not apply. Richardson, §§ 10-101-105. See People v. Torres, 118 A.D.2d 821, 500 N.Y.S.2d 178 (2d Dept. 1986) (rule not violated where officer testified to conversations which had already been admitted as part of tape recording).

Secondary evidence of a writing's contents, such as a photocopy or testimony by a witness who is familiar with the writing, is admissible if it is shown that the writing had been in existence and was genuine (if authenticity is at issue), and that there is an adequate excuse for its absence, such as diligent efforts to locate it, an adversary's destruction of, or refusal to produce upon formal demand, a document in his or her possession or control, or a party's admission to the contents of the writing or the accuracy of a copy. Richardson, §§ 10-201-219. See, e.g., People v. Javier, 154 A.D.3d 445 (1st Dept. 2017), lv denied 30 N.Y.3d 1106 (no error in admission of email created by copying text message and pasting it into email, which officer sent to his personal account and then printed out; best evidence rule did not apply because there was no genuine dispute about contents of underlying text messages, and, in any event, officer

adequately explained unavailability of original by stating that it was his routine practice to erase original text messages from phone, particularly since phone automatically deleted messages once memory became full); People v. McCargo, 144 A.D.2d 496, 534 N.Y.S.2d 195 (2d Dept. 1988) (photocopy of confession admitted where original was mislaid at pretrial hearing and defendant acknowledged that copy was fair representation of original).

Testimony regarding the contents of a missing recording raise best evidence rule issues. See People v. Jackson, 192 A.D.3d 15 (4th Dept. 2020), lv denied 36 N.Y.3d 1098 (unpreserved surveillance footage fell under best evidence rule, but absence was sufficiently explained where store's customary practice was to delete footage after certain amount of time, and security professional who knew store and surveillance system and had observed footage recounted contents with reasonable accuracy); United States v. Chavez, 976 F.3d 1178 (10th Cir. 2020) (admission of transcript of drug buy with translations of Spanish portion into English, without admitting recording from which it was made, violated best evidence rule); People v. Watson, 183 A.D.3d 1191 (3d Dept. 2020), lv denied 35 N.Y.3d 1049 (cell phone video recording of surveillance video depicting exterior of bar, observations of detective who viewed and recorded cell phone video, and detective's observations of surveillance video showing bar's interior, should have been precluded); People v. Valdiviezo, 162 A.D.3d 800 (2d Dept. 2018) (admission, in violation of best evidence rule, of authenticated copy of original DVD on which defendant had recorded videos of victim, himself, and other men engaging in sexual acts did not deprive defendant of fair trial); People v. Wright, 160 A.D.3d 667 (2d Dept. 2018) (where surveillance tape was inadvertently lost, complainant's testimony as to what tape showed did not violate best evidence rule); People v. Pham, 118 A.D.3d 1159 (3d Dept. 2014), lv denied 24 N.Y.3d 1087 (no best evidence rule problem where victim's sister testified regarding excited utterances contained in voicemail message left by victim and stated that she listened to and saved message several times, but that it was automatically deleted after certain period of time and she was unaware deletion would occur); People v. Cyrus, 48 A.D.3d 150 (1st Dept. 2007) (officers' testimony concerning observations of poor quality videotape, depicting crime they did not witness,

apparently violated best evidence rule); People v. Butler, 50 Misc.3d 333 (Sup. Ct., Kings Co., 2015) (best evidence rule not violated when People offered cell phone recording of original surveillance video recording, which had been deleted by drug treatment facility where incident occurred); Ware v. Atlantic Towers Apt. Corp., 40 Misc.3d 1213(A) (Sup. Ct., Kings Co., 2013) (testimony regarding contents of unavailable surveillance videotape must meet usual best evidence rule requirements that proponent sufficiently explain unavailability, and meet a heavy burden in establishing that testimony is reliable and accurate portrayal of original evidence); People v. Jimenez, 8 Misc.3d 803, 796 N.Y.S.2d 232 (Sup. Ct., Bronx Co., 2005) (People failed to establish that witness was able to testify with reasonable accuracy regarding all the contents of the tape); see also State v. Miranda, 465 P.3d 618 (Hawaii 2020) (case remanded for court to determine whether officer could testify about contents of four-minute video he viewed once two years earlier where officer was rushed when he was watching and not in control of playback functions; testimony had probative value, but it served as eyewitness account of the incident, and defendant appeared to have been hampered in cross-examining officer about video's contents).

Testimony regarding a live feed from a video camera is treated as a direct observation, not as testimony derived from a recording. See In re L.S., 11 N.E.3d 349 (Ill. Ct. App., 4th Dist., 2014); People v. Tharpe-Williams, 676 N.E.2d 717 (Ill. Ct. App., 2d Dist., 1997) (evidence did not implicate hearsay or best evidence rule); Matter of Jayshawn B., 42 Misc.3d 492 (Fam. Ct., N.Y. Co., 2013) (no best evidence problem presented by testimony from store Asset Protection Investigator about alleged larceny based on observation of live feed from surveillance camera where tape of incident has been destroyed; just as witness can testify to what is observed while looking through binoculars, store employee should be permitted to testify about what was witnessed through live video feed).

There is also a "voluminous writings" exception to the rule, see, e.g., People v. Case, 114 A.D.3d 1308 (4th Dept. 2014) (summaries improperly admitted where defendant not provided with underlying data before trial and exhibits were not based solely upon information in evidence); People v. Weinberg, 183 A.D.2d 932, 586

N.Y.S.2d 132 (2d Dept. 1992) (summary of computer entries), and a "collateral writings" exception); Richardson, §10-106.

F. Declarations Against Penal Interest

1. Foundation - Before a statement may be admitted as a declaration against penal interest, the following foundation must be laid: 1) the declarant must be unavailable to testify; 2) the declarant must have been aware when making the statement that it was contrary to his or her penal interest; 3) the declarant must have had competent knowledge of the underlying facts; 4) there must be sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability. See People v. Brensic, 70 N.Y.2d 9, 517 N.Y.S.2d 120 (1987); Richardson, §8-403; but see Letendre v. Hartford Accident and Indemnity Company, 21 N.Y.2d 518, 289 N.Y.S.2d 183 (1968) (while upholding admission of testifying declarant's reliable hearsay statements even though they did not qualify under traditional hearsay exception, court notes that had declarant died or disappeared, his statements would have been admissible as declaration against interest).

2. Offers By Prosecution vs. Offers By Defense - When the prosecution offers the statement, a separate hearing should be held to determine its admissibility. In view of due process protections afforded the respondent, the court must also find that the interest compromised by the declaration is of sufficient magnitude to all but rule out any motive to falsify. If the declaration is the product of custodial questioning, there is a rebuttable presumption of unreliability. See People v. Brensic, supra, 70 N.Y.2d 9. An accomplice's declaration against penal interest must be corroborated in order to support a finding of guilt. People v. Picard, 32 A.D.3d 317, 819 N.Y.S.2d 760 (1st Dept. 2006).

Declarations that exculpate the accused are subject to a more lenient standard, and will be admitted if there is a reasonable possibility that the statement might be true; depriving the accused of an opportunity to offer another person's hearsay admission may constitute a denial of the fundamental right to present a defense. See People v. Thibodeau, 31 N.Y.3d 1155 (2018) (in CPL Article 440 proceeding, court finds hearsay evidence of third-party culpability inadmissible in absence of independent evidence

connecting declarants to kidnapping); People v. Soto, 26 N.Y.3d 455 (2015) (admission to driving car involved in accident corroborated by disinterested witness who saw young woman driving defendant's car shortly before accident); People v. Shabazz, 22 N.Y.3d 896 (2013) (female co-defendant's statement to other defendant's attorney, which conflicted with her denial of guilt at her own trial, improperly excluded; courts below erred by focusing on inconsistency between co-defendant's trial testimony and pretrial statement, since knowledge that declaration is against penal interests must be assessed at time it was made and subsequent recantations generally affect weight and credibility); People v. McFarland, 148 A.D.3d 1556 (4th Dept. 2017), lv denied 29 N.Y.3d 1083 (post-conviction statement of third party that he shot and killed victim qualified for admission where there was evidence that third party was present and had dispute with victim, and he wrote letters to defendant's former attorney); People v. Sheppard, 119 A.D.3d 986 (3d Dept. 2014) (fact that declarant made statement in presence of his counsel was compelling consideration in assessing reliability); People v. McArthur, 113 A.D.3d 1088, 977 N.Y.S.2d 545 (4th Dept. 2014) (accomplice's plea colloquy properly excluded where he made contradictory statements and sought to alter account out of desire to avoid entering prison as a "snitch"); People v. McFarland, 108 A.D.3d 1121 (4th Dept. 2013); People v. Walls, 45 Misc.3d 1212(A) (Sup. Ct., Bronx Co., 2014) (upon showing of co-defendant's unavailability, defendant allowed to introduce co-defendant's post-arrest statement implicating only himself in robbery); see also United States v. Ocasio-Ruiz, 779 F.3d 43 (1st Cir. 2015) (declaration corroborated where it was made to close relation - mother).

3. Unavailability; Declarant's Invocation Of Fifth Amendment - Unavailability has been defined generally as including death, an inability to secure the presence of a person who is outside the jurisdiction, and the witness' invocation of a privilege. See People v. Brown, 26 N.Y.2d 88, 308 N.Y.S.2d 825 (1970); see also People v. Shabazz, 22 N.Y.3d 896 (2013) (female co-defendant's statement to other defendant's attorney, which conflicted with her denial of guilt at her own trial, improperly excluded); but see People v. Coleman, 69 A.D.3d 430, 893 N.Y.S.2d 23 (1st Dept. 2010), lv denied 15 N.Y.3d 748 (witness not shown by defendant to be unavailable

where prosecutor conceded that if witness appeared in court and Fifth Amendment problem could not be avoided, he would dismiss case against her). When ruling as to the "unavailability" of the declarant, the court may not assume that a declarant who has an open case will become unavailable by invoking the Fifth Amendment; the declarant must appear in court and take the stand in order to invoke the privilege. See People v. Anderson, 153 A.D.2d 893, 545 N.Y.S.2d 604 (2d Dept. 1989).

The prosecutor's refusal to offer immunity (see CPL article 50) to a proposed defense witness may, in some circumstances, violate the defendant's right to a fair trial. See, e.g., People v. Shapiro, 50 N.Y.2d 747, 431 N.Y.S.2d 422 (1981); United States v. Stewart, 907 F.3d 677 (2d Cir. 2018) (court did not discriminate by conferring immunity on prosecution witness but not on proposed defense witness where witnesses were not similarly situated from law enforcement perspective and government did not overreach through use of threats, harassment, or other forms of intimidation). However, FCA article 3 contains no provision allowing a family court judge to grant immunity to a witness in a delinquency proceeding. Although it was held in Matter of Barry M., 93 Misc.2d 882, 403 N.Y.S.2d 979 (Fam. Ct. Queens Co., 1978) that a family court judge may grant immunity pursuant to CPL §50.30, that decision pre-dates article 3, which, in §303.1(1), precludes application of CPL provisions which article 3 does not specifically incorporate.

The admission of declarations against penal interest offered by the prosecution may constitute a denial of due process where the prosecutor has selectively granted immunity only to witnesses who help the prosecution. United States v. Dolah, 245 F.3d 98 (2d Cir. 2001).

4. Motive To Falsify - When the declarant is an alleged accomplice, or has some other incentive to falsify, the statement must be scrutinized carefully. Richardson, §§ 8-403, 410. Compare People v. Burns, 6 N.Y.3d 793, 811 N.Y.S.2d 297 (2006) (trial court properly refused to admit signed statement by declarant who alleged that group of men, and not defendant, were involved in shooting; only portion of statement that was against penal interest was admission to possession of heroin, which was not relevant to issues at trial); People v. Blades, 93 N.Y.2d 166, 689 N.Y.S.2d 1

(1999) (co-defendant's statement during plea allocution that a second person was armed was not relevant to charge that defendant committed burglary individually; in addition, sufficient indicia of reliability were not present since co-defendant was required to implicate defendant as part of plea bargain and his penal interest was not impaired by identifying defendant); People v. Morgan, 76 N.Y.2d 493, 561 N.Y.S.2d 408 (1990) (accomplice had motive to minimize role), People v. Brensic, supra, 70 N.Y.2d 9 (accomplice had hope of leniency); People v. Shortridge, 65 N.Y.2d 309, 491 N.Y.S.2d 298 (1985) (defendant's father had incentive to exculpate son); People v. Coleman, 69 A.D.3d 430 (hearsay statement offered by defendant as declaration against penal interest made by girlfriend properly excluded where girlfriend contradicted herself and statement was contradicted by other evidence, she appeared to be under influence of drugs, and she admitted that critical portions of statement were not based on personal knowledge) and United States v. Jackson, 335 F.3d 170 (2d Cir. 2003) (co-conspirator had motive to avoid testifying against defendant and statements were inconsistent) with People v. Clinkscaleas, 78 A.D.3d 1069, 912 N.Y.S.2d 260 (2d Dept. 2010) (defendant deprived of fair trial when court refused to admit evidence where declarant was unavailable because of refusal to testify on constitutional grounds, statement was clearly and unambiguously against penal interest, and there was reasonable possibility that statement might be true); People v. Darrisaw, 206 A.D.2d 661, 614 N.Y.S.2d 622 (3rd Dept. 1994) (statement offered by defendant was sufficiently reliable despite declarant's retraction); People v. Fonfrias, 204 A.D.2d 736, 612 N.Y.S.2d 421 (2d Dept. 1994) (declaration offered by defendant improperly excluded) and People v. Smith, 195 A.D.2d 112, 606 N.Y.S.2d 656 (1st Dept. 1994), lv denied 83 N.Y.2d 876, 613 N.Y.S.2d 137 (when defendant makes offer, evidence need only establish reasonable possibility statement might be true). See also Lunbery v. Hornbeak, 605 F.3d 754 (9th Cir. 2010), cert denied 131 S.Ct. 798 (although trial court dismissed corroborative evidence as providing only motive and opportunity because there was no evidence that third party had committed murder, hearsay statement would have provided missing element).

Arguably, statements made during a plea allocution are more reliable. See People v. Thomas, 68 N.Y.2d 194, 507 N.Y.S.2d 973 (1986).

5. Declarant's Awareness That Statement Is Against Interest - Compare People v. Soto, 26 N.Y.3d 455 (2015) (statement to defense investigator that declarant, not defendant, was driver at time of accident and that she fled scene, was admissible; court notes that although leaving scene of accident that caused property damage constitutes mere traffic violation, there is no requirement that statement against penal interest involve particularly serious crime, and declarant verbalized concern that she would get in "trouble, repeatedly requested legal advice and worried how parents would react); People v. Fields, 66 N.Y.2d 876, 498 N.Y.S.2d 759 (1985) (declarant reluctant to sign statement and indicated he wanted to keep out of trouble) and People v. Soto, 113 A.D.3d 153, 976 N.Y.S.2d 87 (1st Dept. 2013), appeal dism'd 24 N.Y.3d 958 (in DWI prosecution in which defendant claimed he was passenger, court erred in excluding statement made to defense investigator by woman who admitted that she, not defendant, was driving car but refused to testify on Fifth Amendment grounds; although exposure to criminal liability was relatively minor and she may or may not have known that her conduct in causing property damage and leaving scene violated Vehicle and Traffic Law, she expressed apprehension that she could get in trouble and made repeated inquiries about consulting with lawyer, and it can be inferred that she had apprehensions when she arrived for interview with investigator) with People v. Ennis, 11 N.Y.3d 403, 872 N.Y.S.2d 364 (2008) (questionable whether declarant viewed statements as against penal interest since they were made during session with prosecution regarding possible cooperation agreement); People v. Simmons, 84 A.D.3d 1120 (2d Dept. 2011), lv denied 18 N.Y.3d 928 (statement that declarant "did what he had to do" too ambiguous to be against penal interest or be deemed trustworthy or reliable).

6. Basis Of Declarant's Knowledge - The declarant must have had the same knowledge of the facts contained in the declaration as a witness who would be permitted to testify to those facts. Richardson, §8-409. See, e.g., People v. Campney, 252 A.D.2d 734, 677 N.Y.S.2d 393 (3rd Dept. 1998) (statements by defendant's brother improperly admitted where there was evidence that he was not present during events; "exacting standard" of reliability applies when prosecution offers statement); People v.

Cassella, 143 A.D.2d 192, 531 N.Y.S.2d 639 (2d Dept. 1988).

7. Non-Inculpatory Portion Of Statement - In criminal proceedings, the non-inculpatory portion of the statement is generally not admissible. See People v. Brensic, supra, 70 N.Y.2d 9; People v. Maerling, 46 N.Y.2d 289, 413 N.Y.S.2d 316 (1978); People v. Nicholson, 108 A.D.2d 929, 485 N.Y.S.2d 821 (2d Dept. 1985). See also Williamson v. United States, 512 U.S. 594, 114 S.Ct. 2431 (1994); United States v. Ojudun, 915 F.3d 875 (2d Cir. 2019) (court erred in admitting entire set of statements without making particularized assessment of individual assertions); but see Richardson, §8-413 (collateral facts are admissible); but see Matter of Marvin D., 262 A.D.2d 481, 692 N.Y.S.2d 124 (2d Dept. 1999) (court erred in refusing to admit statement by driver that the rifle in the car belonged to her friend).

8. Right Of Confrontation - Although admissibility used to be governed by Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980) (prosecution must establish that declarant is unavailable and that there are adequate indicia of reliability), the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) now bars admission of an unavailable declarant's "testimonial" statements to the police; incriminating statements made by an accomplice during police questioning clearly come within the definition of "testimonial" evidence. See also Matter of Ashanti A., 71 A.D.3d 1139, 898 N.Y.S.2d 198 (2d Dept. 2010) (court is presumed in nonjury trial to have considered only competent evidence, and thus no reversible error where non-testifying accomplice's plea allocution was admitted but later withdrawn by presentment agency); United States v. Harper, 514 F.3d 456 (5th Cir. 2008) (court rejects Government's argument that Crawford did not apply because testimony was not offered against defendant); People v. Woods, 9 A.D.3d 293, 779 N.Y.S.2d 494 (1st Dept. 2004) (co-defendant's plea allocution improperly admitted); United States v. Summers, 414 F.3d 1287 (10th Cir. 2005) (key to determining whether out-of-court statement is testimonial is whether "a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime;" evidence that co-defendant asked officer who was arresting him, "How did you guys find us so fast?," should not have been admitted, and was hearsay since it was an assertion

by the declarant of his wonderment at the ability of the police to apprehend him and the other perpetrators so quickly); United States v. Saner, 313 F.Supp.2d 896 (S.D. Indiana, 2004) (non-custodial statement made by accomplice was inadmissible); but see People v. Reynoso, 2 N.Y.3d 820, 781 N.Y.S.2d 284 (2004) (statement of non-testifying co-defendant offered not for truth, but to show detective's state of mind); United States v. Saget, 377 F.3d 223 (2d Cir. 2004) (statements made by co-conspirator to government informant were not testimonial where true status of informant was not known to declarant); People v. Torres, 2004 WL 575205 (Calif. Ct. App., 5th Dist., 2004) (statements made by defendant and co-defendant while they were alone in back of police car were not testimonial); People v. Soto, 8 Misc.3d 350, 795 N.Y.S.2d 429 (Sup. Ct., Bronx Co., 2005) (pedigree statement not testimonial).

G. Dying Declarations - Before a statement may be admitted as a dying declaration, it must be established that the declarant was in extremis, spoke under a sense of impending death with no hope of recovery, and would, if alive, be competent to testify. Richardson, §8-702. The declarant's belief that death was possible or probable is not enough; there must have been a hopeless expectation of death. The required state of mind could be inferred from the nature of the wounds, or the deceased's own statements or preparations for death. Richardson, §8-704; People v. Clay, 88 A.D.3d 14 (2d Dept. 2011), lv denied 17 N.Y.3d 952 (statement properly admitted as dying declaration where victim was shot six times; three bullets entered abdomen, and right and left side of back, condition appeared to be declining at time of declarations and he was struggling to breathe and at some point was unable to speak in response to officer's inquiries, and officer informed him that he did not think he would live); People v. Williams, 16 Misc.3d 1104(A), 841 N.Y.S.2d 828 (Sup. Ct., Kings Co., 2007) (victim was under sense of impending death where he was gasping for breath, stated, "Ma, Ma, oh shit, oh shit, oh shit," questioned detective regarding seriousness of injury, and stated to EMS worker, "Am I going to die? I don't want to die. Please don't let me die"). Arguably, a child's statement may qualify under this exception. People v. Stamper, 742 N.W.2d 607 (Mich. 2007) (child may be sufficiently aware of impending death for purposes of dying declaration exception, and, in this case, four-year-old child had such capacity).

The Court of Appeals has refused to loosen these traditional requirements even when there are other indicia of trustworthiness. See People v. Nieves, 67 N.Y.2d 125, 501 N.Y.S.2d 1 (1986). And, this hearsay exception is applicable only in homicide prosecutions involving the death of the declarant, and the statement must relate to the circumstances of the death. Richardson, §8-706. A conclusion regarding the cause of death and/or the identity of the killer that appears to be based on suspicion or surmise is not admissible, but such an opinion is admissible if it is a summary statement of observed facts. Richardson, §8-707.

It has been held that the dying declarations made in response to police questioning are not testimonial for Confrontation Clause purposes. People v. Clay, supra, 88 A.D.3d 14 (dying declaration admissible as exception to Confrontation Clause); see also State v. Jones, 197 P.3d 815 (Kan. 2008) (dying declaration admissible even when testimonial and un-confronted); Harkins v. State, 143 P.3d 706 (Nev. 2006); People v. Monterroso, 101 P.3d 956 (CA 2004).

H. Excited Utterances

1. Foundation - A statement is admissible as an excited utterance (or "spontaneous declaration") when the "declarant was under the stress of excitement caused by an external event sufficient to still his reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful. The court must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth. Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection." People v. Edwards, 47 N.Y.2d 493, 419 N.Y.S.2d 45, 47 (1979). See People v. Cantave, 21 N.Y.3d 374 (2013) (no error in exclusion of defendant's 911 call where defendant's voice was somewhat agitated but did not evidence inability to reflect upon events; it was suspect that defendant failed to report names of alleged assailants and seemed to refer to them as being unknown even though he knew them well; and defendant did not complain of injury or request ambulance until questioned specifically

about injury, pain and need for emergency services by 911 operator and omitted entirely that he had bit off part of victim's ear and injured his finger); People v. Johnson, 1 N.Y.3d 302, 772 N.Y.S.2d 238 (2003) (statement inadmissible where victim had become more relaxed, and, according to officer, had time for reflection); People v. Caviness, 38 N.Y.2d 227, 379 N.Y.S.2d 695 (1975); People v. McGhee, 194 A.D.3d 498 (1st Dept. 2021), lv denied 37 N.Y.3d 973 (court erred in admitting detective's testimony that he overheard eyewitness exclaim, when she saw defendant in video, "that's him. That's him. He shot the boy in the Polo Ground"); People v. Bermudez, 168 A.D.3d 446 (1st Dept. 2019), lv denied 33 N.Y.3d 1102 (although defendant and victim were enemies, victim was in agitated condition that rendered it unlikely he was scheming to falsely accuse defendant of shooting him); In re Odalis F., 85 A.D.3d 441 (1st Dept. 2011) (911 call made by complainant improperly admitted where, in period between alleged threats with knife and call, complainant called mother on phone and waited for her to get home, and, when mother arrived, asked her whether he should call the police; also, other than recording of 911 call, there was no evidence of existence of startling event); People v. Gantt, 48 A.D.3d 59, 848 N.Y.S.2d 156 (1st Dept. 2007), lv denied, 10 N.Y.3d 765 (victim's request that marijuana be removed from sock before police arrived did not show he had opportunity to deliberate and thus deviate from truth since seriously wounded person might reflexively recognize adverse consequences of having police find drugs on him but still be incapable of studied reflection); People v. Pette, 251 A.D.2d 600, 674 N.Y.S.2d 768 (2d Dept. 1998), appeal withdrawn 92 N.Y.2d 951, 681 N.Y.S.2d 481 (decedent who made inconsistent statements before alleged excited utterances possessed reflective capacity); People v. Simpson, 238 A.D.2d 611, 656 N.Y.S.2d 765 (2d Dept. 1997) (dissenting judges note that 911 caller lied to operator about existence of gun in order to secure an immediate response, and, therefore, did not lack reflective capacity); People v. Vasquez, N.Y.L.J., 2/16/96, p. 30, col. 4 (App. Term, 2d and 11th Jud. Dist.) (where patient had had a lobotomy and was schizophrenic, it was not established that incident was sufficiently startling to still the patient's reflective faculties); People v. Balde, 48 Misc.3d 1202(A) (Crim. Ct., Bronx Co., 2015) (statements not excited utterances where at least 20 minutes had elapsed and

complainant's statement, "I want to press charges," showed that she had opportunity to deliberate and was aware that her statements could be used in future prosecution); Richardson, §8-605; see also People v. Barrett, 747 N.W.2d 797 (Mich. 2008) (excited utterance exception does not require proponent to establish exciting event without consideration of hearsay statement itself).

Arguably, the event about which the excited utterance was made does not have to be the same event that caused the declarant's excitement. McCarty v. State, 257 S.W.3d 238 (Tex. Ct. Crim. App., 2008).

It must appear that the declarant had an opportunity to observe the events described. People v. Cummings, 31 N.Y.3d 204 (2018) (statement contained no basis from which personal knowledge of declarant could reasonably be inferred, and video showed that many people ran toward site of shooting and arrived before 911 call); People v. Fratello, 92 N.Y.2d 565, 684 N.Y.S.2d 149 (1998), cert denied 526 U.S. 1068; People v. Hardy, 208 A.D.3d 519 (2d Dept. 2022), lv denied 39 N.Y.3d 962 (error where court admitted statements on 911 recording regarding events caller did not personally observe); People v. Thelismond, 180 A.D.3d 1076 (2d Dept. 2020), lv denied 35 N.Y.3d 1029 (recording of anonymous call made to 911 improperly admitted where caller stated, at least five minutes after shooting, that "[s]omebody just got shot on East 19th and Albemarle" and that it "was a guy with crutches" who "started to shoot"; these statements did not suggest that caller was reporting something he saw, rather than something he was told, and People did not demonstrate that payphone used was situated outdoors or in place where site of shooting would be visible); People v. Carr, 168 A.D.3d 551 (1st Dept. 2019), lv denied 33 N.Y.3d 1103 (surrounding circumstances, including time factors and declarant's direction of travel, justified inference that declarant personally observed incident); People v. Windsor, 2 Misc.3d 130(A), 784 N.Y.S.2d 923 (App. Term, 2d & 11th Jud. Dist., 2004), lv denied 2 N.Y.3d 748 (statements improperly admitted where declarant made no statements that demonstrated that she was personally witnessing occurrence); but see People v. Leak, 129 A.D.3d 745 (2d Dept. 2015), lv denied 26 N.Y.3d 969 (evidence of 911 call properly admitted where mother not present when child was injured but made calls right after

receiving phone call informing her that child was not breathing and then learning that neighbor could not help child).

The Court of Appeals has held that one judge's ruling does not constitute the "law of the case" and bind another judge who is ruling on the question when the accused is re-tried. People v. Cummings, 31 N.Y.3d 204 (no bar to reconsideration at second trial of ruling regarding alleged excited utterance where ruling was reversed before jury was empaneled and no prejudice resulted as it might from mid-trial reversal of evidentiary ruling that impeded defense strategy).

2. Time Between Statement And Event - The passage of time between the event and the statement does not preclude admission, since the psychological and emotional effect may persist for a period of time. The court must consider the nature of the initial trauma and shock, and the activities of the declarant after the event. See, e.g., People v. Cotto, 92 N.Y.2d 68, 677 N.Y.S.2d 35 (1998) (although victim remained lucid for much of trip to hospital, he was in great pain and shock and trauma never subsided); People v. Brown, 70 N.Y.2d 513, 522 N.Y.S.2d 837 (1987) (statement in emergency room 30 minutes after shooting; admissible); People v. Monet Davis, 215 A.D.3d 407 (1st Dept. 2023), lv denied 40 N.Y.3d 927 (statement admissible where it was made by victim over half an hour after shooting, and intervening events - picking up young son and fleeing to mother's house - did not indicate he was no longer under stress of event); Matter of Omar G., 212 A.D.3d 615 (2d Dept. 2023) (court erred in admitting statements by respondent's mother to police after respondent had been handcuffed and removed from scene, where mother, despite raising voice and becoming agitated as she recalled incident, was capable of engaging in reasoned reflection); People v. Wang, 191 A.D.3d 485 (1st Dept. 2021), lv denied 36 N.Y.3d 1124 (court properly admitted victim's 911 call where call was made 20-30 minutes after victim had been raped and assaulted, while she was crying and after she had unsuccessfully tried to find police station to report incident); People v. Firu, 69 Misc.3d 1 (App. Term, 2d Dept. 2020) (complainant's statements to police and in 911 call did not qualify as excited utterances where officer described complainant as speaking "hysterically," but statements to the 911 operator were made at grocery store

away from scene about 10 minutes after event had concluded, and statements to police were made over a half hour after event; where proof of guilt rested entirely on hearsay, indicia of reliability must be more than just sufficient); People v. Carter, 176 A.D.3d 552 (1st Dept. 2019), lv denied 34 N.Y.3d 1157 (no error in admission of 911 call even though victim made two brief intervening phone calls); People v. Auleta, 82 A.D.3d 1417, 919 N.Y.S.2d 222 (3d Dept. 2011) (statements properly admitted where victim testified that she was able to form and execute escape plan and then drive 10-15 minutes in traffic to friends' home and report rape to them, friends testified that victim was hysterical, crying and shaking, could not walk up stairs without stumbling, and collapsed in fetal position on bed before responding to questions by stating that she had been raped); People v. Smith, 49 Misc.3d 130(A) (App. Term, 2d Dept., 2015), lv denied 26 N.Y.3d 1092 (where court admitted only initial 20 seconds of defendant's 911 call, which included defendant's statements regarding need for police assistance, remainder of call, including allegation that defendant had been threatened with knife by cab driver, not admissible under excited utterance or present sense impression exception); People v. Hayes, 21 Misc.3d 131(A), 873 N.Y.S.2d 514 (App. Term, 1st Dept., 2008) (statements properly admitted where declarant cab driver had witnessed hit-and-run accident involving pedestrian and was pursuing fleeing Jeep driven by defendant, and accident had occurred within previous 15 minutes at location approximately 20 blocks away); People v. McMillan, 10 Misc.3d 97, 810 N.Y.S.2d 786 (App. Term, 2d & 11th Jud. Dist., 2005) (trial court erred in admitting statement made by complainant where she appeared upset and shaken, but there was no evidence as to when statement was made in relation to incident, and complainant knew defendant had been arrested); United States v. Tocco, 135 F.3d 116 (2d Cir. 1998) (statement made about 3 hours after fire was set was admissible; declarant was still "all hyped" and "nervous"); People v. Melendez, 296 A.D.2d 424, 744 N.Y.S.2d 485 (2d Dept. 2002), lv denied 98 N.Y.2d 770, 752 N.Y.S.2d 10 (2002) (defendant made 911 call immediately or soon after stabbing); People v. Fenner, 283 A.D.2d 516, 727 N.Y.S.2d 117 (2d Dept. 2001), lv denied 96 N.Y.2d 939, 733 N.Y.S.2d 379 (statements inadmissible where declarant was able to urge his brother to remain calm); People v. Seymour, 183 A.D.2d 35, 588

N.Y.S.2d 551 (1st Dept. 1992), lv denied 81 N.Y.2d 766, 594 N.Y.S.2d 729 (statement admissible even though victim was tied up for 24-48 hours before being found, since he had been unconscious or semi-conscious; however, statement made 20 minutes after first one was not admissible, since victim had received treatment and was reasonably comfortable); People v. Lee, 177 A.D.2d 288, 576 N.Y.S.2d 97 (1st Dept. 1991) (statement made one hour after shooting was improperly admitted, since victim was not in shock, consented to surgery and never lost consciousness); People v. Treat, 167 A.D.2d 110, 561 N.Y.S.2d 198 (1st Dept. 1990), lv denied 77 N.Y.2d 844, 567 N.Y.S.2d 212 (1991) (burn victim showered to ease pain, and then went to hospital; admissible, since victim was still under influence of intense, "unrelenting trauma"); People v. Rowley, 160 A.D.2d 963, 554 N.Y.S.2d 933 (2d Dept. 1990), appeal dism'd 76 N.Y.2d 896, 561 N.Y.S.2d 558 (statement by excited and almost incoherent complainant who identified defendant to police while chasing him; admissible); People v. Wright, 157 A.D.2d 534, 549 N.Y.S.2d 724 (1st Dept. 1990), lv denied 75 N.Y.2d 971, 556 N.Y.S.2d 256 (statement made 3-5 minutes after robbery; admissible); People v. Brooks, 133 A.D.2d 411, 519 N.Y.S.2d 404 (2d Dept. 1987), aff'd 71 N.Y.2d 877, 527 N.Y.S.2d 753 (1988) (statement made 90 minutes after decedent brought to hospital; admissible); People v. Vigilante, 122 A.D.2d 900, 505 N.Y.S.2d 942 (2d Dept. 1986) (statement made 15-20 minutes after crime, and decedent was unconscious for 13 minutes; admissible); People v. Connors, 121 A.D.2d 556, 503 N.Y.S.2d 850 (2d Dept. 1986) (statement made 10 minutes after crime while declarant was still hysterical; admissible). See also Richardson, §8-606.

3. Statement Made In Response To Inquiry - A statement may be admitted even though it was made in response to a question, and, therefore, was not genuinely "spontaneous." Compare People v. Fenner, 283 A.D.2d 516 (statements made in response to suggestive comments and questioning by eyewitness not admissible); People v. Connors, 149 A.D.2d 606, 540 N.Y.S.2d 281 (2d Dept. 1989) (detailed account after repeated questioning not admissible) with People v. Guzman, 195 A.D.3d 543 (1st Dept. 2021), lv denied 37 N.Y.3d 1059 (mere fact that victim at first declined to tell coworkers what had happened did not establish that victim

was no longer under influence of stressful event); People v. Vigilante, supra, 122 A.D.2d 900 (statement made in response to nonsuggestive questions; admissible) and People v. Taylor, 117 A.D.2d 829, 499 N.Y.S.2d 151 (2d Dept. 1986) (decedent wrote defendant's nickname in blood in response to question, "who did this to you?"; admissible). See also Richardson, §8-607.

4. Statements By Bystanders - New York law permits the introduction of statements made by bystanders who were not involved in the startling event. Richardson, §8-608). See, e.g., People v. Wright, supra, 157 A.D.2d 534 (witness to robbery; admissible); People v. Matos, 107 A.D.2d 823, 484 N.Y.S.2d 844 (2d Dept. 1985) (numerous bystanders shouted that defendant was one of the assailants; not admissible, since there was no proof of the declarants' identities or of their opportunity to observe).

5. Recantation - See People v. Gantt, 48 A.D.3d 59 (reliability of victim's statements not fatally undermined by victim's statement to police nine days after shooting that he had been unable to see assailant's face and identified defendant merely because he had heard somebody on street around time of shooting say defendant's name, where victim undoubtedly was convinced that it now was in his interest to deny earlier statements implicating a fellow drug dealer).

6. Right Of Confrontation - If the declarant does testify, it provides added assurance of reliability and supports admission of the out-of-court statement. People v. Ortiz, 198 A.D.3d 924 (2d Dept. 2021), lv denied 37 N.Y.3d 1163 (there was added assurance of reliability where declarant was witness subject to cross-examination).

If an unavailable declarant's statement can be characterized as "testimonial" evidence under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) and Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), it will not be admissible in the absence of a prior opportunity to cross examine the declarant. In Davis, the trial court admitted a recording of an emergency 911 call. In the companion case of Hammon v. Indiana, the trial court admitted, as a present sense impression, an affidavit signed by the complainant, and, as excited utterances, statements made by the complainant to an

officer who arrived at the scene after the incident. The Supreme Court concluded that hearsay statements are nontestimonial when they were "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." The Court "refer[red] to interrogations because ... the statements in the[se] cases ... are the products of interrogations - which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."

Relying on this formulation, the Court concluded in Davis that the statements were nontestimonial, and that, in Hammon, they were testimonial.

Subsequently, in Michigan v. Bryant, 131 S.Ct. 1143 (2011), a majority found no Confrontation Clause violation where police officers, who were dispatched to a gas station parking lot where they found a man who was mortally wounded and who told them that he had been shot by defendant outside defendant's house and had then driven himself to the lot, were allowed to testify at trial about what the murder victim said. The majority noted that the identification and description of the shooter and the location of the shooting were not testimonial statements because they had a primary purpose to enable police assistance to meet an ongoing emergency; that to make the "primary purpose" determination, a court must objectively evaluate the circumstances in which the encounter between the individual and the police occurs and the parties' statements and actions"; that "[t]he existence of an ongoing emergency at the time of the encounter is not determinative, but it is among the most important circumstances informing the interrogation's primary purpose," and that "[a]n emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation"; that "[a]n assessment of whether an emergency

threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized because the threat to the first responders and public may continue"; that "[d]omestic violence cases like Davis v. Washington and Hammon v. Indiana often have a narrower zone of potential victims than cases involving threats to public safety," and "Davis and Hammon involved the use of fists, while this case involved a gun"; that "[a] victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one"; that "[f]ormality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent"; that "the statements and actions of both the declarant and interrogators also provide objective evidence of the interrogation's primary purpose," that "[p]olice officers' dual responsibilities as both first responders and criminal investigators may lead them to act with different motives simultaneously or in quick succession," and that "during an ongoing emergency, victims may want the threat to end, but may not envision prosecution." See also People v. Nieves-Andino, 9 N.Y.3d 12, 840 N.Y.S.2d 882 (2007) (4-judge majority holds that statements made by shooting victim to officers who arrived at scene within minutes were not testimonial, noting that even when assailant has fled, circumstances may objectively indicate that there is ongoing emergency); People v. Bradley, 8 N.Y.3d 124, 830 N.Y.S.2d 1 (2006) (statement at scene by visibly shaken and bleeding complainant not testimonial; although she was describing past events, police were investigating ongoing emergency); People v. Vargas, 211 A.D.3d 1046 (2d Dept. 2022) (excited utterances were testimonial where victim had been removed from scene and taken to hospital; defendant had been taken into custody and transported to police station; witness was not in need of police assistance; officer went beyond asking what happened and requested that witness describe and illustrate how incident happened; and witness's detailed account, with physical re-enactment, did precisely what a witness does on direct examination); People v. McDonald, 66 Misc.3d 150(A) (App. Term, 1st Dept., 2020), lv denied 35 N.Y.3d 1047 (excited utterance properly admitted where

primary purpose was to enable authorities, who had witnessed incident, to inquire about victim's well-being and possible need for further assistance, and statement was not elicited through structured police questioning); People v. Moreno-Grantini, 167 A.D.3d 471 (1st Dept. 2018), lv denied 33 N.Y.3d 951 (even if other officers had already arrested defendant, there was no evidence that officer who questioned declarant was aware of that fact); Andrade v. United States, 106 A.3d 386 (D.C. Ct. App. 2015) (domestic violence complainant's statements to officer improperly admitted where defendant was not in premises and there was no reason to believe complainant was in immediate danger or that weapon had been involved, and complainant had already reported incident to police and given them details); United States v. Polidore, 690 F.3d 705 (5th Cir. 2012), cert denied 133 S.Ct. 1583 (911 caller's statements not testimonial where caller was reporting ongoing street-level drug trafficking but not an emergency, and, although caller appeared to have understood that statements would start investigation that could lead to criminal prosecution, reasonable caller in his position would not have thought statements were creating substitute for trial testimony); People v. Clay, 88 A.D.3d 14 (2d Dept. 2011), lv denied 17 N.Y.3d 952 (statement made by shooting victim shortly before death, in response to officer's inquiry regarding identity of shooter, was testimonial where there were other officers already present who would have already tried to determine nature of any emergency, officer's question was pointed and designed to learn identity of perpetrator, and victim, having been attended to by another officer and advised that he probably was not going to "make it," could only have reasonably expected that his response would be used in prosecution); People v. Legere, 81 A.D.3d 746, 916 N.Y.S.2d 187 (2d Dept. 2011) (no error in admission of tape of 911 call and statements made by detective to another officer at scene where detective's primary purpose was to obtain emergency aid for himself and another detective, and to prevent further harm by perpetrator, who was still at large and armed); People v. Johnson, 189 Cal.App.4th 1216 (Cal. Ct. App., 1st Dist., 2010) (victim's statements to 911 operator while driving away from scene of shooting not testimonial since victim's flight does not establish danger has passed; defendant may still have been angry and able to pursue); People v. Porco, 71 A.D.3d 791, 896 N.Y.S.2d 161 (2d

Dept. 2010), aff'd 17 N.Y.3d 877 (harmless error where court admitted detective's testimony that complainant, while being treated by paramedics at her home after attack, nodded affirmatively in response to detective's question as to whether defendant attacked her); People v. Gantt, 48 A.D.3d 59 (statement to officer in response to single inquiry not testimonial where officer, who was responding to scene of shooting that had just occurred, could not have been certain that assailant posed no further threat to victim or onlookers); People v. Rodriguez, 47 A.D.3d 406, 850 N.Y.S.2d 26 (1st Dept. 2007), lv denied, 10 N.Y.3d 770 (evidence not testimonial where police were involved in ongoing emergency involving presence of loaded firearms at playground, and, even after locating two weapons, officer needed to confirm that no other weapons were present); People v. Mackey, 16 Misc.3d 136(A), 847 N.Y.S.2d 904 (App. Term, 1st Dept., 2007) (statements made by victim immediately after she flagged down police, in response to inquiries as to "what was wrong," were not testimonial); People v. Morton, 15 Misc.3d 141(A), 841 N.Y.S.2d 822 (App. Term, 2d & 11th Jud. Dist., 2007) (statements made by complainant moments after police separated defendant from her were not testimonial); People v. Allen, 63 Misc.3d 969 (Sup. Ct., Queens Co., 2019) (complainant's statements to police at precinct were testimonial where defendant was in handcuffs and surrounded by officers; at that point, complainant wanted officers' help getting his money and chain back and wanted person who robbed him held accountable); People v. Watson, 14 Misc.3d 942, 827 N.Y.S.2d 822 (Sup. Ct., N.Y. Co., 2007) (first statement - made shortly after robbery when witness, bleeding profusely from head, emerged from restaurant and told officer that defendant "just robbed me. He just robbed us at Burger King" - was not testimonial; second statement - elicited moments afterwards when officer asked witness whether any other perpetrators had been involved, and witness responded that defendant had acted alone - was not testimonial; third statement - made approximately two minutes later, when officer asked witness to tell him what had happened, and witness responded with narrative of events - was testimonial); Matter of German F., 13 Misc.3d 642, 821 N.Y.S.2d 410 (Fam. Ct., Queens Co.) (hearsay not testimonial where victim was lying prone on sidewalk moments after officer had seen victim surrounded by crowd and observed blood on

victim's pants and socks and a large cut on the victim's lower leg); People v. Jackson, 12 Misc.3d 1178(A), 824 N.Y.S.2d 765 (Sup. Ct., Queens Co., 2006) (statements not testimonial where primary purpose of 911 interrogation was to enable police to assist in ongoing emergency and not prove past fact).

With respect to whether and when statements made to persons other than law enforcement personnel may be testimonial, see Ohio v. Clark, 135 S.Ct. 2173 (2015) (statements made by physically abused 3-year-old to teachers not testimonial; court notes that statement cannot fall within Confrontation Clause unless primary purpose was testimonial, that statements were made in context of ongoing emergency involving suspected child abuse and teachers needed to know whether it was safe to release child to guardian at end of day, that conversation was informal and spontaneous and few preschool students understand details of criminal justice system, that mandatory reporting statutes alone cannot convert conversation between concerned teacher and student into law enforcement mission aimed primarily at gathering evidence for prosecution, and that, because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, court declines to adopt categorical rule excluding them from Sixth Amendment's reach, but such statements are much less likely to be testimonial than statements to law enforcement officers); State v. Richmond, 935 N.W.2d 792 (S.D. 2019) (child's statements at Advocacy Center regarding sexual abuse were testimonial since objective witness would have reasonably believed statements would be available for use at later trial, copies of recorded interview and a written report were distributed to law enforcement, and prosecution used the evidence to build case against defendant); Commonwealth v. Allshouse, 36 A.3d 163 (Pa. 2012) (4-year-old child's statement to child protective caseworker non-testimonial where primary purpose of interview was not to gather information for criminal prosecution); In re Rolandis G., 902 N.E.2d 600 (Ill., 2008) (statements to child advocate during videotaped interview at child advocacy center were testimonial since advocate was acting as police representative and nothing indicated that interview was, to a substantial degree, for purposes of treatment rather than investigation); State v. Snowden, 867 A.2d 314 (Md., 2005) (child sex abuse victims'

statements to social worker working with police were testimonial); State v. Mack, 101 P.3d 349 (Oregon, 2004) (statements to child welfare caseworker were testimonial where police solicited statements and videotaped the interviews); State v. Contreras, 979 So.2d 896 (Fla., 2008) (videotaped statement to coordinator of Child Protective Team were testimonial where law enforcement officer was not in room but was connected electronically in order to suggest questions); People v. Shaw, 80 A.D.3d 465, 914 N.Y.S.2d 155 (1st Dept. 2009) (no right of confrontation violation in admission of victim's declaration to gynecologist at hospital since doctor acted primarily as treating physician and role in gathering evidence for police by way of rape kit was secondary); Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. 2009), cert denied 130 S.Ct. 1081 (rejecting state court's decision in State v. Bobadilla, 709 N.W.2d 243, Eighth Circuit upholds award of habeas relief where trial court admitted statement made by child complainant to social worker in presence of police officer; social worker was acting as "surrogate interviewer" for police after she was asked to assist with criminal investigation, and state statute required that social workers and police officers coordinate planning and execution of investigation to eliminate need for multiple interviews); see also Miller v. Stovall, 608 F.3d 913 (6th Cir. 2010) (suicide note written by defendant's lover, who allegedly shot defendant's husband and then committed suicide and left behind evidence implicating defendant, was testimonial; question is whether reasonable person in declarant's position would anticipate statement being used against accused in investigating and prosecuting crime).

If the accused had an opportunity at a pretrial hearing to cross-examine the now unavailable declarant regarding the hearsay statements, the statements may be admissible. See People v. Ochoa, 18 Cal.Rptr.3d 365 (Cal. Ct. App., 2004), appeal dism'd 169 P.3d 884 (complainant's hearsay statements, admitted at preliminary hearing, were also admissible at trial when complainant asserted Fifth Amendment privilege; although certain statements were not elicited at hearing, defendant was aware of them and could have cross-examined complainant about them at hearing).

7. Incompetent Declarants - A statement made by an infant or other possibly incompetent declarant may be inadmissible absent an inquiry into the child's

competency. See People v. Cole, 150 A.D.3d 1476 (3d Dept. 2017) (excited utterances properly admitted where victim suffered from dementia and was declared incompetent to testify at trial, and appeared "frazzled" when she made statements, but firefighter testified that such behavior was "typical" of someone who had suffered "[a] traumatic experience," and victim was "[a]lert and oriented," "knew exactly where she was" and "exactly what happened to her," and responded to firefighter's questions appropriately); People v. Wright, 81 A.D.3d 1161, 918 N.Y.S.2d 598 (3d Dept. 2011) (statements admissible where trial court determined after in camera examination that child would be competent to testify as unsworn witness); People v. Sullivan, 117 A.D.2d 476, 504 N.Y.S.2d 788 (3rd Dept. 1986) (statement of 4-year-old improperly admitted); People v. Hamilton, 14 Misc.3d 1203(A), 831 N.Y.S.2d 361 (County Ct., Suffolk Co., 2006); see also Stephan P. v. Cecilia A., 464 P.3d 266 (Alaska 2020) (before issuing protective order, court erred in admitting, as excited utterances, recorded statements by child absent threshold finding as to competency and determination of extent to which child's autism, youth, and other mental health issues affected recording's trustworthiness); but see Ohio v. Clark, 135 S.Ct. 2173 (2015) (statements made by 3-year-old admitted); State v. Silverman, 906 N.E.2d 427 (Ohio 2009) (4-year-old's statements admissible without determination of competency).

I. Former Testimony

1. Foundation - Under CPL article 670, which, along with CPL article 660 (conditional examination of witness), has been incorporated by reference in FCA §370.1(2), testimony given at a trial, a felony hearing, or a conditional examination of a witness [see, e.g., People v. Cristo, 2768-2016, NYLJ 1202783613394, at *1 (Sup., QU, Decided April 3, 2017) (no conditional examination ordered where witnesses were between 62 and 93 years of age and People cited to life expectancy data and relied on "the uncertainty of advanced age," but there was no proof that any witness was in fact physically ill or incapacitated)] may be received into evidence at a subsequent proceeding when the witness is unable to attend by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court. CPL §670.10(1);

Simmons v. United States, 390 U.S. 377 (1968) (prosecution may not introduce accused's suppression hearing testimony in case-in-chief at trial); People v. Ayala, 75 N.Y.2d 422, 554 N.Y.S.2d 412 (1990) (suppression hearing testimony not included in statute); People v. Guzman, 212 A.D.3d 580 (1st Dept. 2023), lv denied 39 N.Y.3d 1141 (evidentiary hearing with sworn testimony not absolute prerequisite to finding that witness is unavailable; statute does not exclude possibility of hearing consisting of factual presentations and arguments by counsel); In re Jaquan A., 45 A.D.3d 305, 846 N.Y.S.2d 88 (1st Dept. 2007), lv denied, 10 N.Y.3d 707 (suppression hearing testimony not admissible at fact-finding hearing); see also People v. Robinson, 89 N.Y.2d 648, 657 N.Y.S.2d 575 (1997) (if evidence is material and bears sufficient indicia or reliability, and witness is unavailable, defendant has due process right to introduce Grand Jury testimony).

Prior testimony is proved by the introduction of an authenticated transcript. CPL §670.20(1). See also CPLR 4517 (if stenographer dies or becomes incompetent before preparing transcript, competent person may read original notes into evidence); Richardson, §§ 8-507, 516 (in civil actions, testimony may be proved by person who heard it); People v. Holiday, 207 A.D.3d 658 (2d Dept. 2022), lv denied 39 N.Y.3d 1073 (no error where lead prosecutor read to jury question portions, and another prosecutor read answers, but better practice would have been for nonjudicial court personnel unaffiliated with prosecutor's office to read answers).

2. Proceedings In Which Testimony May Be Admitted - See CPL §670.10(2) (testimony admissible at "[a]ny proceeding constituting a part of a criminal action based upon the charges which were pending against the defendant at the time of the witness's testimony and to which such testimony related," and at a post-judgment challenge to a conviction upon the charges to which the testimony related).

3. Due Diligence In Locating And Producing Witness - See, e.g., Hardy v. Cross, 132 S.Ct. 490 (2011) (Seventh Circuit erred in holding that State courts unreasonably found that efforts to find witness were inadequate because State failed to contact witness' current boyfriend, whom she was with moments before the assault, or any of her other friends in the area, did not make inquiries at cosmetology school where

witness had once been enrolled, and neglected to serve witness with subpoena after she expressed fear about testifying; "when a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence ... but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising"); People v. Diaz, 97 N.Y.2d 109, 735 N.Y.S.2d 885 (2001) (no due diligence where People failed to establish that witness who had problems with English understood the "subtleties" of a conversation designed to induce him to come from Mexico; People should have addressed witness in his native tongue); People v. Whitley, 78 A.D.3d 1084, 912 N.Y.S.2d 257 (2d Dept. 2010) (due diligence standard requires People to explain to witness, fully and plainly, what they would do to accommodate concerns over issues such as length of travel time, travel arrangements, expenses and potential personal disruption that might accompany trip); People v. Nettles, 118 A.D.2d 875, 500 N.Y.S.2d 361 (2d Dept. 1986); Richardson, §8-514.

4. Illness Or Incapacity Of Witness - See, e.g., People v. Dubarry, 215 A.D.3d 689 (2d Dept. 2023) (witness's persistent refusal to testify, even after being held in contempt, rendered him unavailable); People v. Muccia, 139 A.D.2d 838, 527 N.Y.S.2d 620 (3rd Dept. 1988) (witness who refused to testify was unable to attend due to "incapacity"); People v. Williams, 115 A.D.2d 676, 496 N.Y.S.2d 510 (2d Dept. 1985) (adequate medical testimony presented); see also Turner v. Commonwealth, 726 S.E.2d 325 (Va. 2012) (in determining whether preliminary hearing testimony is admissible because witness is unavailable due to lack of memory, court has obligation to conduct inquiry and observe witness's demeanor to ensure witness has not feigned loss of memory in attempt to avoid testifying).

5. Right Of Confrontation - The admission of former testimony violates the respondent's right of confrontation unless he or she had an adequate opportunity to cross-examine the witness at the prior proceeding. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004); People v. Tapia, 33 N.Y.3d 257 (2019), cert denied 140 S.Ct. 643 (portion of testifying witness's grand jury testimony properly admitted as past recollection recorded; witness's memory failure did not render him unavailable for cross-

examination under Confrontation Clause); People v. Hilts, 13 N.Y.3d 895, 895 N.Y.S.2d 286 (2009) (no error in admission of informant's testimony at first trial where People failed to inform defendant about informant's request for help from prosecutor regarding informant's unrelated case; request and prosecutor's noncommittal response were immaterial where defendant had large quantity of evidence impeaching informant's credibility); State v. Nofoa, 349 P.3d 327 (Hawaii 2015) (motive and purpose of cross-examination at preliminary hearing was sufficiently similar to motive and purpose at trial, and court did not restricted cross-examination at hearing, but because there was limited discovery for hearing, and later discovery contained significant inconsistencies, hearing did not provide meaningful opportunity for cross-examination); People v. Torres, 962 N.E.2d 919 (Ill. 2012) (defense counsel had no fair opportunity at preliminary hearing to effectively inquire into witness's opportunity to observe, interest, bias, prejudice, and motive; although cross-examination at hearing had same "motive" and "focus" as would similar cross-examination at trial, counsel would have done more with witness had court not sustained objections and made it clear that it was not enthusiastic about proceeding with hearing); Commonwealth v. Wholaver, 989 A.2d 883 (Pa. 2010), cert denied 131 S.Ct. 332 (right of confrontation not violated by admission of preliminary hearing testimony since defendant was able to meaningfully cross-examine witnesses at hearing); Chavez v. State, 213 P.3d 476 (Nev., 2009) (defendant had adequate opportunity to confront witness at preliminary hearing where Nevada law did not preclude defendant from questioning witness's credibility or motive and judge allowed unrestricted opportunity to confront complainant on all pertinent issues, nearly all discovery was complete, and most of defendant's extensive cross-examination was based upon statements witness had made to authorities about sexual abuse); State v. Arroyo, 935 A.2d 975 (Conn. 2007) (child victim's videotaped testimony in witness room with one-way mirror not testimonial where defendant had opportunity to cross examine); People v. Fry, 92 P.3d 970 (Colo 2004) (testimony from preliminary hearing inadmissible since there is limited opportunity for cross-examination under Colorado law); People v. Oxley, 64 A.D.3d 1078, 883 N.Y.S.2d 385 (3rd Dept. 2009), lv denied 13 N.Y.3d 941 (preliminary hearing testimony of deceased witness properly admitted

where adequate opportunity for cross-examination was provided at hearing and any limitations were due to defendant's failure to fully avail himself of opportunity); People v. Linton, 21 A.D.3d 909, 800 N.Y.S.2d 627 (2d Dept. 2005) (complainant's Grand Jury testimony properly admitted as past recollection recorded, since complainant testified at trial and was subject to cross-examination); Owens v. Frank, 394 F.3d 490 (7th Cir. 2005), cert denied 125 S.Ct. 2910 (cross examination at preliminary hearing was not so limited as to deny trier of fact a satisfactory basis for evaluating testimony); State v. Noah, 162 P.3d 799 (Kan., 2007) (defendant did not have sufficient opportunity to cross-examine at preliminary hearing after complainant began crying and was unable to continue cross-examination); People v. Wilson, 114 P.3d 758 (CA, 2005) (testimony admissible although, at time of testimony, witness had not yet been granted generous sentence reduction and defendant had not received information about meeting between witness and officers); see also People v. Rahman, 137 A.D.3d 523 (1st Dept. 2016) (witness's grand jury testimony improperly admitted as past recollection recorded where witness extensively invoked privilege and refused to answer questions bearing on truth of grand jury testimony); In re Tayquan T., 91 A.D.3d 518 (1st Dept. 2012) (fact that witness was only subject to type of cross-examination appropriate for probable cause hearing was relevant to weight to be accorded probable cause hearing testimony); People v. Green, 159 A.D.2d 432, 553 N.Y.S.2d 117 (1st Dept. 1990), rev'd on other grounds 78 N.Y.2d 1029, 576 N.Y.S.2d 75 (1991) (after 9-year-old's prior testimony was admitted because child suffered loss of memory, defendant could have cross-examined child but chose not to); United States v. Ciak, 102 F.3d 38 (2d Cir. 1996) (existence of conflict of interest did not establish that defense counsel's examination of witness at prior trial was inadequate per se); United States v. Carneglia, 256 F.R.P. 366 (EDNY, 2009) (neither lower burden of proof, nor less serious nature of charges, affected defense counsel's motive or opportunity to cross-examine at preliminary hearing, and, since witness may be unavailable to testify at trial, preliminary hearing testimony is highly consequential); Richardson, §8-515.

J. Past Recollection Recorded - When a witness has no memory and his/her recollection is not refreshed by a writing containing the facts, the writing is admissible to

prove the witness' prior knowledge if the witness once had personal knowledge of the contents of the writing, the writing was prepared by the witness or at his/her direction, the writing was prepared at or about the time of the events when they were fresh in the witness' mind, and the witness swears that he/she believed the writing was correct when it was made. If the writing was prepared by a third party, the witness must state that he/she examined the writing and verified its accuracy when the events were fresh in the witness' mind. Richardson, §§ 6-216-220. See, e.g., People v. Tapia, 33 N.Y.3d 257 (2019), cert denied 140 S.Ct. 643 (portion of testifying witness's grand jury testimony properly admitted as past recollection recorded; CPL §670.10 is not categorical bar to use of grand jury testimony of testifying witness); People v. DiTommaso, 127 A.D.3d 11 (1st Dept. 2015) (grand jury testimony not admissible as past recollection recorded where People failed to establish that witness's recollection was fairly fresh during grand jury proceeding, and witness could not attest at trial that testimony was accurate when given; assurances of accuracy and trustworthiness were diminished by six-year gap between underlying events and the grand jury testimony); People v. Wilkinson, 120 A.D.3d 521 (2d Dept. 2014) (grand jury testimony improperly admitted as past recollection recorded where there was one-year gap between time when witness allegedly heard defendant's statements and witness's testimony); Matter of Saperston v. Holdaway, 93 A.D.3d 1271 (4th Dept. 2012), appeal dism'd 20 N.Y.3d 1052 (journal entries not admissible where, although father testified that he made entries contemporaneously with events, he later added commentary and/or observations regarding events); People v. Fields, 151 A.D.2d 598, 542 N.Y.S.2d 356 (2d Dept. 1989); People v. Rahman, 137 A.D.3d 523 (1st Dept. 2016) (witness's grand jury testimony improperly admitted as past recollection recorded where witness extensively invoked privilege and refused to answer questions bearing on truth of grand jury testimony); People v. Linton, 21 A.D.3d 909, 800 N.Y.S.2d 627 (2d Dept. 2005) (complainant's Grand Jury testimony properly admitted as past recollection recorded, since complainant testified at trial and was subject to cross-examination).

Sometimes it is sufficient if the witness testifies that he/she gave an accurate oral account, and the recorder testifies that he/she accurately transcribed the account; but

see People v. Taylor, 80 N.Y.2d 1, 586 N.Y.S.2d 545 (1991) (insufficient showing of accuracy where witness testified that she reported accurately, but officer did not recall taking message).

K. Present Sense Impression - A statement made while the declarant was perceiving the event or condition described or immediately thereafter may be admissible. See People v. Deverow, 38 N.Y.3d 157 (2022) (911 calls corroborated by other evidence were admissible as present sense impressions where, during one call, gunshots were still being fired; another caller stated that "somebody just got shot," and was "trying to save someone's life" by making call; and third caller spoke in hushed tones because person caller perceived as gunman had just left scene on foot, and urged officers to be careful); People v. Jones, 28 N.Y.3d 1037 (2016) (unidentified woman's statement to officer, whose view of defendant was impeded, indicating that defendant had been trying to get into back of FedEx truck was properly admitted, and was corroborated by officer's observations of defendant rummaging through front compartment of truck); People v. Buie, 86 N.Y.2d 501, 634 N.Y.S.2d 415 (1995) (showing of declarant's unavailability not required; and, there was no improper bolstering where declarant also testified); People v. Brown, 80 N.Y.2d 729, 594 N.Y.S.2d 696 (1993) (911 tapes properly admitted; declarant may be unidentified and non-participating bystander, but statement must be corroborated by "indicia of reliability"); People v. Thelismond, 180 A.D.3d 1076 (2d Dept. 2020), lv denied 35 N.Y.3d 1029 (recording of anonymous call made to 911 improperly admitted where caller stated, at least five minutes after shooting, that "[s]omebody just got shot on East 19th and Albemarle" and that it "was a guy with crutches" who "started to shoot"; these statements did not suggest that caller was reporting something he saw, rather than something he was told, and People did not demonstrate that payphone used was situated outdoors or in place where site of shooting would be visible); Fischer v. State, 252 S.W.3d 375 (Tex. Ct. Crim. App., 2008) (officer's contemporaneously recorded statements regarding observations of DWI suspect not within present sense impression exception; most of the statements constituted a calculated narrative in an adversarial, investigative setting); Brown v. Keane, 355 F.3d 82 (2d Cir. 2004) (statement made by

non-observer did not qualify as present sense impression); People v. Smith, 267 A.D.2d 407, 700 N.Y.S.2d 227 (2d Dept. 1999) (tape of 911 call admitted even though call was made after robber left gas station); People v. Mieles, 226 A.D.2d 397, 640 N.Y.S.2d 264 (2d Dept. 1996) (tape recording made by undercover as he observed drug transaction was admissible); People v. Brown, 224 A.D.2d 184, 637 N.Y.S.2d 127 (1st Dept. 1996), lv denied 89 N.Y.2d 920, 654 N.Y.S.2d 722 (statement admissible even though declarant did not state that he saw the events, since it was clear that he did); People v. Vasquez, 214 A.D.2d 93, 631 N.Y.S.2d 322 (1st Dept. 1995), lv denied 88 N.Y.2d 943, 647 N.Y.S.2d 177 (1996) (statement need not expressly reflect contemporaneity; here, woman's reference to "the" gun, rather than "a" gun, suggested that she had just seen it). See also Federal Rules of Evidence, Rule 803(1).

In People v. Vasquez, 88 N.Y.2d 561, 647 N.Y.S.2d 697 (1996), the Court of Appeals upheld the exclusion of “911" tape recordings offered by defendants, finding insufficient corroboration in Vasquez because the testimony of a defense witness was inconsistent with the caller’s statements, and concluding in Dalton and Adkinson that the statements were not made contemporaneously with the events. See also People v. Cantave, 21 N.Y.3d 374 (2013) (defendant failed to establish that his 911 call was communicated spontaneously and contemporaneously with events described or that description of events was corroborated by other evidence); People v. Semple, 174 Misc.2d 879, 666 N.Y.S.2d 900 (Sup. Ct., Kings Co., 1997) (court grants defendant's motion to introduce audiotape of radio communications between pursuing police vehicles and precinct).

A statement made within a "marginal time lag" after the event may still be admissible. Compare People v. Kello, 96 N.Y.2d 740, 723 N.Y.S.2d 111 (2001) (statements made more than 2½ hours after incident not admissible); People v. Merritt, 193 A.D.3d 661 (1st Dept. 2021), lv denied 37 N.Y.3d 973 complainant’s 911 call not admissible where complainant walked almost one full block before he thought about incident and decided to return to scene and call 911; and he estimated that it was three to five minutes after incident, but other evidence suggested it was closer to six minutes after incident); People v. Miley, 63 Misc.3d 159(A) (App. Term, 2d Dept., 2d, 11th &

13th Jud. Dist., 2019), lv denied 34 N.Y.3d 934 (error to admit recording of 911 call made about one hour after incident, after caller had filled out report and related incident to someone who suggested 911 call); People v. Smith, 49 Misc.3d 130(A) (App. Term, 2d Dept., 2015) (where court admitted only initial 20 seconds of defendant's 911 call, which included defendant's statements regarding need for police assistance, remainder of call, including allegation that defendant had been threatened with knife by cab driver, not admissible under excited utterance or present sense impression exception); People v. Parchment, 92 A.D.3d 699 (2d Dept. 2012) (element of contemporaneity not satisfied where 911 caller described events using past tense, and People failed to demonstrate that delay between conclusion of events and call was not sufficient to destroy indicia of reliability); United States v. Green, 541 F.3d 176 (3rd Cir. 2008) (error to admit statement made 50 minutes after events, and after declarant had been searched and driven to government offices and been debriefed by agents with respect to events); People v. Ortiz, 33 A.D.3d 1044, 822 N.Y.S.2d 327 (3rd Dept. 2006) (court erred in admitting statement made at least 7 minutes after event) and People v. Robinson, 282 A.D.2d 75, 728 N.Y.S.2d 421 (1st Dept. 2001) (calls made 2 seconds and 15-45 seconds after robbery admissible, but call made 2-4½ minutes later not admissible) with People v. George, 79 A.D.3d 1148, 913 N.Y.S.2d 569 (2d Dept. 2010) (no error in admission of audiotape of 911 call where call was made after perpetrators left complainant's store, but time delay was not sufficient to destroy indicia of reliability); People v. Osbourne, 69 A.D.3d 764, 894 N.Y.S.2d 61 (2d Dept. 2010), lv denied 14 N.Y.3d 843 (911 tape recording admissible where call was made "substantially contemporaneously" with caller's discovery of injured complainant); People v. Neloms, 8 A.D.3d 136, 779 N.Y.S.2d 26 (1st Dept. 2004), lv denied 3 N.Y.3d 710 (victim screamed that robbers were on their way out of the building); People v. Gutierrez, 248 A.D.2d 295, 670 N.Y.S.2d 85 (1st Dept. 1998), lv denied 92 N.Y.2d 925, 680 N.Y.S.2d 467 (statement made 3 minutes after shooting admissible) and People v. Gethers, 34 Misc.3d 1238(A) (Sup. Ct., Richmond Co., 2012) (911 call admissible where there was four-minute delay after end of incident).

If an unavailable declarant's statement can be characterized as "testimonial"

evidence under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) and Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), it will not be admissible in the absence of a prior opportunity to cross examine the declarant. Arguably, with respect to nontestimonial statements, the New York Constitution requires that the prosecution demonstrate the declarant's unavailability by proving a good faith effort to secure the declarant's attendance, and show that the statement bears sufficient indicia of reliability. See People v. Rodriguez, 306 A.D.2d 686, 761 N.Y.S.2d 368 (3rd Dept. 2003); People v. Torres, 196 A.D.2d 758, 601 N.Y.S.2d 919 (1st Dept. 1993), lv denied 82 N.Y.2d 854, 606 N.Y.S.2d 606; People v. Grant, 113 A.D.2d 311, 497 N.Y.S.2d 23 (2d Dept. 1985). But see People v. Cook, 159 Misc.2d 430, 603 N.Y.S.2d 979 (Sup. Ct. Kings Co., 1993) (no showing of unavailability required by Constitution or state evidence law).

L. Prompt Outcry Or Other Complaint By Victim - Evidence that a sexual assault victim made a prompt complaint may be admitted to negate any suggestion that the victim delayed in reporting and thus assist in the fact-finder's evaluation of the victim's credibility. The victim's identification of the accused may be admitted; the details of the crime must be limited, but courts have not always adhered closely to that rule. Richardson, §8-615. See, e.g., People v. Shelton, 1 N.Y.3d 614, 777 N.Y.S.2d 9 (2004) (81-year-old complainant's outcry morning after rape, after she had been warned not to tell anyone, was admissible); People v. McDaniel, 81 N.Y.2d 10, 595 N.Y.S.2d 364 (1993) (no error where mother testified that child reported being bothered, attacked and molested by defendant; "In this State, evidence that a victim of sexual assault promptly complained about the incident is admissible to corroborate the allegation that an assault took place"); People v. Rice, 75 N.Y.2d 929, 555 N.Y.S.2d 677 (1990) (description of suspect not admissible); People v. Gideon, 203 A.D,3d 519 (1st Dept. 2022), lv denied 38 N.Y.3d 1070 (where court properly deemed certain statements prompt outcries, but also deemed them excited utterances and thus considered details in statements, there could be no presumption that court at nonjury trial considered only competent evidence); People v. Gross, 172 A.D.3d 741 (2d Dept. 2019), lv denied 33 N.Y.3d 1105 (report that defendant raped complainant did not exceed allowable level of detail); People v. Hackett, 167 A.D.3d 1090 (3d Dept. 2018) (witnesses properly permitted to

give prompt outcry testimony that victim told them defendant raped her); People v. Vo, 166 A.D.3d 1587 (4th Dept. 2018) (evidence limited to fact of complaint, not accompanying details, including identity of assailant); People v. Demoura, 60 Misc.3d 133(A) (App. Term, 2d Dept., 9th & 10th Jud. Dist., 2018) (testimony regarding complaint that defendant placed hand or hands on complainant's breasts did not exceed permissible detail); People v. Dumancela, 136 A.D.3d 1053 (2d Dept. 2016) (statement by complainant that she had been raped by defendant admissible as prompt outcry as it corroborated complainant's allegation that nonconsensual sex took place); People v. Garrison, 103 A.D.3d 751 (2d Dept. 2013), lv denied 21 N.Y.3d 943 (testimony that complainant reported she was dragged into alley and raped did not exceed allowable level of detail); People v. Rickman, 103 A.D.3d 757 (2d Dept. 2013), lv denied 21 N.Y.3d 946 (only fact of complaint, not accompanying details, may be elicited); People v. Verrilli, 69 A.D.3d 963, 895 N.Y.S.2d 439 (2d Dept. 2010), lv denied 14 N.Y.3d 894 (no error in admission of testimony that victim told sister that defendant had raped her); People v. Molina, 26 Misc.3d 51, 894 N.Y.S.2d 327 (App. Term, 9th & 10th Jud. Dist., 2009), lv denied 14 N.Y.3d 803 (no error in admission of testimony that complainant stated that defendant touched her private parts; only fact of complaint, not details, may be elicited, but witness can go beyond merely acknowledging that complaint was made and provide nature of complaint); People v. Farwell, 26 Misc.3d 26, 893 N.Y.S.2d 421 (App. Term, 9th & 10th Jud. Dist., 2009) (court rejects defendant's claim that testimony went beyond bounds of recent-outcry exception where prosecutor offered it to rebut defendant's theory that complaint was "made up" and corroborate complainant's allegation that offense occurred; also, prompt outcry witness can go beyond merely acknowledging that complaint was made and state nature of the complaint sufficiently to show it concerned offense charged and its essential nature); People v. Bernardez, 63 A.D.3d 1174, 881 N.Y.S.2d 316 (2d Dept. 2009), lv denied 13 N.Y.3d 794 (no error where court allowed witness to disclose nature of complaint, which did not exceed allowable level of detail); People v. Phillips, 55 A.D.3d 1145, 865 N.Y.S.2d 787 (3rd Dept. 2008) (where court admitted, as prompt outcry, detailed statement by victim about alleged sexual acts committed by defendant, Third Department notes that, generally,

testimony regarding outcry is limited to nature of complaint and the fact that complaint was made); People v. Fabre, 16 Misc.3d 134(A), 847 N.Y.S.2d 898 (App. Term, 9th & 10th Jud. Dist., 2007), lv denied 9 N.Y.3d 875 (majority holds that testimony of complainant's sister, who stated that she was told by complainant that defendant touched her inappropriately on calf and breast, did not exceed level of detail permissible under prompt outcry exception); People v. Bott, 234 A.D.2d 625, 651 N.Y.S.2d 207 (3rd Dept. 1996), lv denied 89 N.Y.2d 1009, 658 N.Y.S.2d 247 (1997) (mother testified that child said it hurt to go to the bathroom and related statements as to how child got the "boo-boo," and that child said, "Kurtis won't hurt me anymore, right Mommy?"); People v. Terrence, 205 A.D.2d 301, 612 N.Y.S.2d 571 (1st Dept. 1994) (no error in admission of report of beating and verbal abuse).

Serial outcries may be admissible. See, e.g., People v. Santos, 243 A.D.2d 276, 662 N.Y.S.2d 318 (1st Dept. 1997), lv denied 91 N.Y.2d 880; People v. Fabian, 213 A.D.2d 298, 625 N.Y.S.2d 4 (1st Dept. 1995).

The prompt outcry exception only applies in sex crime cases. People v. Dukes, 30 A.D.3d 682, 817 N.Y.S.2d 683 (3rd Dept. 2006), rev'd on other grounds 8 N.Y.3d 952 (2007); People v. Anthony C., 6 Misc.3d 616, 787 N.Y.S.2d 648 (Sup. Ct., Bronx Co.) (prompt outcry not admissible in a robbery case).

And, one court has held that it is inappropriate to apply the prompt outcry doctrine in a bench trial because a judge, unlike a jury, does not need this type of assistance in evaluating the credibility of sex crime allegations. Matter of Axel O., 53 Misc.3d 1111 (Fam. Ct., Queens Co., 2016); but see Matter of D.R., 54 Misc.3d 581 (Fam. Ct., Bronx Co., 2016) (court declines to follow Axel O. in light of Appellate Division decisions upholding introduction of prompt outcry testimony at bench trials, including juvenile delinquency trials).

A delayed outcry may be admissible if made at the first suitable opportunity. See People v. Parada, 17 N.Y.3d 501 (2011) (complainant's statements to cousin a few weeks after defendant anally sodomized her and before abuse ended admissible under prompt outcry rule; court rejects defendant's contention that disclosure made to child cannot come within prompt outcry rule); People v. Rosario, 17 N.Y.3d 501 (2011) (prior

consistent statements alleging sexual abuse not admissible under prompt outcry rule where as much as five months elapsed between last instance of alleged abuse and note complainant wrote for boyfriend; concept of promptness necessarily suggests immediacy not ordinarily present when months go by, especially when complainant is a teenager, not a child); People v. McDaniel, supra, 81 N.Y.2d 10 (child could not be expected to awaken mother in middle of night); People v. Lides, 200 A.D.3d 990 (2d Dept. 2021) (where defendant was charged with course of abuse beginning in 2009, complainant's outcry when she was 12 years old was prompt); People v. Corrion, 195 A.D.3d 448 (1st Dept. 2021), lv denied 37 N.Y.3d 991 (where defendant raped and sexually abused niece from when she was 8 until she was 14, no error in admission of prompt outcry on weekday when victim was in eighth grade after weekend when defendant had entered her room and inappropriately touched her); People v. Maisonette, 192 A.D.3d 1325 (3d Dept. 2021), lv denied 37 N.Y.3d 966 (outcry evidence admissible where abuse occurred on three different dates between February 2015 and April 2015 and last episode occurred four days prior to disclosure by victim to mother; and defendant was authority figure and victim testified that she was scared of him); People v. Saxe, 174 A.D.3d 958 (3d Dept. 2019) (court erred in admitting evidence of disclosure more than 2½ years after incident, well after defendant moved out of complainant's home); People v. Gross, 172 A.D.3d 74 (2d Dept. 2019), lv denied 33 N.Y.3d 1105 (no error in admission of testimony where complainant was four years old when abuse began and made outcry when she was eight years old and abuse was ongoing); People v. Evangelista, 155 A.D.3d 972 (2d Dept. 2017), lv denied 31 N.Y.3d 1013 (no error in admission of first outcry to parents approximately 4½ years after abuse, which occurred around child's seventh birthday, had ended; court notes victim's age, familial relationship between victim and defendant, defendant's warning not to tell anyone, and victim's fear of making complaint sooner); People v. Ortiz, 135 A.D.3d 649 (1st Dept. 2016) (court erred in admitting evidence that 15-year old complainant sent text message discussing alleged sexual assault to friends two or three months after alleged assault; while significant delay does not necessarily preclude outcry evidence, especially where complainant is a child, and delay of several months may be justified

where complainant was under control or threats of defendant or among strangers in whom complainant could not confide, when complainant is teenager or older concept of promptness necessarily suggests immediacy not ordinarily present when months go by); People v. Stone, 133 A.D.3d 982 (3d Dept. 2015) (prompt outcry evidence improperly admitted where statements were made by complainant four years after abuse had ended, and, although complainant stated that she waited so long because defendant had threatened to kill her if she told anyone, threat was made during supervised visit with defendant and complainant had neither seen nor spoken to defendant for over two years; although research suggests that withholding complaint may not be unusual, to admit prompt outcry would run against purpose of exception, which is to address tendency of some jurors to doubt victim in absence of prompt complaint, and there is no proof that complainant's neurological condition would have compelled her to remain silent for such a long period); People v. Caban, 126 A.D.3d 808 (2d Dept. 2015) (no error in admission of first outcry to friend approximately one year after abuse had ended, given victim's young age and fact that she lived with defendant during relevant period, but statement to mother approximately three years after last alleged incident was improperly admitted); People v. Penefort, 46 Misc.3d 141(A) (App. Term, 1st Dept., 2015) (given 10-year-old victim's age, and expressed fear of not being believed if she disclosed abuse, report to mother, made within one week of second incident, was properly admitted); People v. Lapi, 105 A.D.3d 1084 (3d Dept. 2013), lv denied 21 N.Y.3d 1043 (where sexual contact occurred over weekend during which victim was in care of defendant's mother, and victim returned to his mother's care on Sunday and disclosed events to her on following Friday, and considering victim's young age and familial relationship between victim and defendant, statements fell within prompt outcry rule); People v. Llanos, 26 Misc.3d 131(A), 906 N.Y.S.2d 782 (App. Term, 1st Dept., 2010), lv denied 15 N.Y.3d 753 (infant complainant made statement later on day of incident when, for first time since incident, infant and foster mother were alone); People v. Parada, 67 A.D.3d 581, 889 N.Y.S.2d 159 (1st Dept. 2009) (prompt outcry exception applicable to outcry made at end of course of sexual conduct); People v. Stuckey, 50 A.D.3d 447, 855 N.Y.S.2d 141 (1st Dept. 2008), lv denied, 11 N.Y.3d 742

(given victim's age and expressed fear of retribution if she disclosed abuse, court properly admitted, as prompt outcry, then 9-year-old child's report to mother of defendant's conduct approximately three days following last incident after her teacher taught class on how to deal with inappropriate touching; prompt outcry exception is not inapplicable to outcry made at end of course of sexual conduct); Matter of Gregory AA., 20 A.D.3d 726, 799 N.Y.S.2d 830 (3rd Dept. 2005) (although 7-year-old did not make disclosure for at least two months, delay was adequately explained by child's testimony that he was afraid of getting in trouble and being grounded); People v. Allen, 13 A.D.3d 892, 787 N.Y.S.2d 417 (3rd Dept. 2004), lv denied 4 N.Y.3d 883 (evidence improperly admitted where victim disclosed incident to friends almost 2 months later, and testified that she had delayed reporting because she was afraid of how people would react, including her father who might "go after" defendant, that she feared losing friendship of girlfriend who was dating defendant, and that she did not go to hospital because she was afraid to tell what happened; victim, who was living with parents, had others in whom she could confide; defendant did not "open door" by exploiting delay); People v. Rapp, 2 Misc.3d 130(A), 784 N.Y.S.2d 923 (App. Term, 1st Dept. 2004) (statements made one week after incident admissible given complainant's age and defendant's threat of reprisals).

It has been held that evidence of prompt outcry is admissible even where the declarant may be incompetent to testify. People v. Potter, 1 Misc.3d 495, 765 N.Y.S.2d 236 (County Ct., Ulster Co., 2003) (3-year-old complainant).

Evidence of the complainant's failure to make a prompt outcry was admitted in People v. Zazversky, 193 Misc.2d 347, 750 N.Y.S.2d 493 (County Ct., Ulster Co., 2002) (court also admits testimony that after alleged sexual abuse, there was no change in complainant's demeanor or peer relationships, and her school performance improved).

After the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), a right of confrontation-based objection may be raised where the prompt outcry can be labeled as "testimonial" evidence. Cf. Moody v. State, 594 S.E.2d 350 (Georgia 2004) (statements made by witness to officer conducting "field investigation" were "testimonial"); but see People v. Holland, 11 Misc.3d 141(A), 816

N.Y.S.2d 699 (App. Term, 1st Dept., 2006), lv denied 7 N.Y.3d 757 (prompt outcry not testimonial); People v. Romero, 4 Misc.3d 1013(A), 791 N.Y.S.2d 872 (Crim. Ct., Bronx Co., 2004) (prompt outcry to complainant's mother not testimonial).

The Court of Appeals also has ruled that nonspecific testimony about a child victim's reports of sexual abuse is not improper bolstering when it is offered for the relevant, non-hearsay purpose of explaining the investigative process and completing the narrative of events leading to the accused's arrest. People v. Ludwig, 24 N.Y.3d 221 (2014) (defendant argued that complainant was lying because otherwise she would have reported sexual misconduct right away, and testimony was relevant to jury's assessment of alleged motive to lie, and witnesses merely stated that complainant claimed she had been made to engage in oral sex with defendant); People v. Cullen, 24 N.Y.3d 1014 (2014) (where complainant passed up many opportunities to report sexual misconduct, and defense attributed accusations to wrath of troubled girl trying to get even with defendant for not getting her released from group home and taking her back to live with him, jury could consider evidence of circumstances of complainant's delayed disclosure).

A surprise offer of prompt outcry evidence after the prosecutor has disavowed any intention to introduce such evidence should not be permitted. People v. Shaulov, 25 N.Y.3d 30 (2015) (reversible error where court admitted surprise prompt outcry testimony despite prosecutor's pre-trial representation that no such testimony would be offered, and defense counsel had shaped trial strategy on belief that complainant delayed complaint; complainant's testimony that she told friend "what happened" conveyed to jury that she had engaged in sexual intercourse with defendant).

M. Pedigree - Hearsay evidence, or testimony which is based on hearsay, is admissible to prove pedigree facts which are directly in issue. See People v. Lewis, 69 N.Y.2d 321, 514 N.Y.S.2d 205 (1987) (14-year-old incest victim properly permitted to testify that defendant was her father); People v. Ciancanelli, 175 A.D.3d 1421 (2d Dept. 2019), lv denied 34 N.Y.3d 1076 (sex crime victims' testimony as to their dates of birth and defendant's statement of his date of birth established lack of capacity to consent); Matter of Diamond J., 134 A.D.3d 1117 (2d Dept. 2015) (proposition that age of family

member is common knowledge within family applies only to close family relationships, and not to cousin's statement); People v. Keller, 258 A.D.2d 880, 685 N.Y.S.2d 498 (4th Dept. 1999), rev'g 168 Misc.2d 693, 641 N.Y.S.2d 980 (Sup. Ct., Monroe Co., 1996), lv denied 93 N.Y.2d 973, 695 N.Y.S.2d 59 (statement by owner of getaway vehicle that defendant was her grandson did not come within hearsay exception for pedigree and family history); People v. Lammes, 208 A.D. 533, 203 N.Y.S. 736 (4th Dept. 1924) (exception not applicable to statement regarding age). See also Federal Rules, 804(b)(4) (statement of personal or family history), 803(19) (reputation among family members concerning personal or family history).

N. Inferential Hearsay - When testimony concerning a witness' own conduct implicitly suggests what another person said to the witness, the testimony is objectionable. Often, such testimony concerns incriminating statements made by third party. See, e.g., People v. Holley, 26 N.Y.3d 514 (2015) (detective's testimony regarding conduct of investigation after he obtained descriptions from witnesses did not impermissibly state or imply that anyone made identification); People v. Garcia, 25 N.Y.3d 77 (2015) (Confrontation Clause violation where detective testified regarding statement by victim's sister that there had been "a problem" between defendant and victim); People v. DeJesus, 25 N.Y.3d 77 (2015) (no Confrontation Clause violation where detective agreed that police "beg[a]n specifically looking for [defendant]" without having "spoken to [the eyewitness]"); People v. Richberg, 123 A.D.3d 946 (2d Dept. 2014) (where officer testified that he was approached at hospital by individual who stated that "he had something to tell me," officer relayed information to supervisor, who relayed information to another officer who testified that he canvassed area of crime scene and found serrated kitchen knife covered with blood, there was no direct implication that witness told police defendant possessed knife); People v. Benitez, 120 A.D.3d 705 (2d Dept. 2014) (reversible error where detective's testimony suggested that person who had provided tip to "Crime Tips Office" implicated defendant); People v. DeJesus, 105 A.D.3d 476 (1st Dept. 2013) (no error in admission of detective's brief testimony that defendant was already a suspect at time People's main witness was interviewed, or admission of police testimony about obtaining information from other

persons during investigation, where evidence was offered for non-hearsay purposes); United States v. Gomez, 617 F.3d 88 (2d Cir. 2010) (court erred in admitting testimony by detective regarding phone call made to defendant after detective spoke to co-conspirator and instructed him to call supplier, since jury could infer that detective dialed defendant's number because co-conspirator identified him); People v. Fairweather, 69 A.D.3d 876, 894 N.Y.S.2d 81 (2d Dept. 2010) (right of confrontation violation where detective testified that he determined defendant was suspect after interviewing injured complainant); People v. Tucker, 54 A.D.3d 1065, 866 N.Y.S.2d 209 (2d Dept. 2008) (no error in admission of police testimony that defendant became suspect after detective spoke with non-testifying individuals who did not witness crime; there was no suggestion that individuals implicitly accused or even possessed sufficient information to implicate defendant, and thus no danger that jury would treat evidence as accusation by non-testifying witness); People v. Berry, 49 A.D.3d 888, 854 N.Y.S.2d 507 (2d Dept. 2008) (reversible error where prosecutor elicited testimony from investigating detective that personal telephone/address book was recovered from witness during interview at police station, and that detective photocopied a page from the book, sought subscriber information for a specific entry on that page, and put out "wanted card" for defendant); People v. Ruis, 11 A.D.3d 714, 784 N.Y.S.2d 558 (2d Dept. 2004) (no right of confrontation violation where officer testified that he obtained defendant's photo from eyewitness, and investigated further and apprehended defendant in Costa Rica; testimony was not admitted for truth, but to explain events leading to defendant's apprehension); People v. Johnson, 7 A.D.3d 732, 777 N.Y.S.2d 190 (2d Dept. 2004) (reversible error where court admitted testimony that defendant was arrested following detective's interview with co-defendant); People v. Bacenet, 297 A.D.2d 817, 748 N.Y.S.2d 28 (2d Dept. 2002) (reversible error where detective stated that he completed processing defendant's arrest after asking complainant whether she recognized anyone in lineup); Ryan v. Miller, 303 F.3d 231 (2d Cir. 2002) (right of confrontation violated where court admitted testimony that officers arrested petitioner after speaking to accomplice); United States v. Reyes, 18 F.3d 65 (2d Cir. 1994) (error where, although agent did not reveal what was said, his testimony regarding discussions with co-

conspirators suggested that they had admitted their role and implicated other defendants; such evidence can sometimes be admitted as "background" to explain investigation or agent's state of mind, but non-hearsay purpose must be relevant and probative value of evidence must outweigh danger of unfair prejudice); People v. Baldelli, 152 A.D.2d 741, 544 N.Y.S.2d 193 (2d Dept. 1989) (improper to admit testimony that defendant was arrested as a result of phone call by wife of complainant); People v. Eyre, 138 A.D.2d 397, 525 N.Y.S.2d 681 (2d Dept. 1988). See also People v. Rivera, 96 N.Y.2d 749, 725 N.Y.S.2d 264 (2001) (although introduction of such evidence may be improper in some circumstances - court cites United States v. Reyes, 18 F.3d 65 - defendant opened door in this case); People v. Vadell, 122 A.D.2d 710, 505 N.Y.S.2d 635 (1st Dept. 1986).

O. State Of Mind

1. Intention To Perform Future Act - The trier of fact may infer from a declarant's statement of an intention to perform a future act that the act was, in fact, performed. Richardson, §289. The statement must have been made under circumstances which made it probable that the expressed intent was a serious one, and that the meeting would, in fact, take place. See, e.g., People v. Wright, 17 N.Y.3d 643 (2011) (court erred in excluding evidence that witness told police she had overheard conversation in which attack on victim was being planned, and that co-defendant and other prosecution witness were present but defendant was not; statement by witness that he was going to kill victim may have come within "statement of present intention" exception to hearsay rule, but in any event statements were not offered for truth, only to prove defendant was not part of meeting and witness was); People v. James, 93 N.Y.2d 620, 695 N.Y.S.2d 715 (1999) (statement by person other than defendant could be sued to prove joint cooperative action by declarant and persons mentioned in statement; it must be shown that declarant is unavailable; that the statement unambiguously contemplates future action by the declarant which requires the defendant's cooperation; that any understanding or arrangement referred to in the statement occurred in the recent past and that the declarant was a party to it or had competent knowledge of it; and that there is independent evidence of reliability, i.e., a showing of circumstances

which all but rule out a motive to falsify, and evidence that the future acts were at least likely to have taken place); People v. Hernandez, 186 A.D.3d 1246 (2d Dept. 2020), lv denied 36 N.Y.3d 929 (no error in admission of two text messages sent by murder victim - one stating that she intended to confront defendant about alleged rape of his sister, and the other stating that defendant would be coming back to her apartment that evening); People v. Sorrentino, 93 A.D.3d 450 (1st Dept. 2012) (no error in admission of deceased's statements to friends about deteriorating relationship with defendant, including intention to terminate relationship and stay away from defendant); People v. Borukhova, 89 A.D.3d 194 (2d Dept. 2011), lv denied 18 N.Y.3d 955 (no error in admission of testimony by victim's father that son told him on morning of his death that he was bringing child to park for defendant to pick up because she had asked him to do so; state-of-mind exception permits testimony regarding victim's future intent and prior arrangement with defendant to meet); People v. Kimes, 37 A.D.3d 1, 831 N.Y.S.2d 1 (1st Dept. 2006), lv denied 9 N.Y.3d 846 (missing murder victim's statements showed that she had no plans to travel or sell her townhouse, and was unlikely to transfer ownership of townhouse to defendant and her son); People v. Jackson, 29 A.D.3d 409, 814 N.Y.S.2d 627 (1st Dept. 2006) (no error in admission of statement made by rape defendant, during prior rape of complainant's babysitter, to effect that if babysitter were not there, it would have been complainant), aff'd 8 N.Y.3d 869, 832 N.Y.S.2d 477 (2007) (majority assumes, arguendo, there was error, but finds it harmless; concurring judge and dissenting judge treat statement as admission); People v. Chambers, 125 A.D.2d 88, 512 N.Y.S.2d 89 (1st Dept. 1987), appeal dism'd 70 N.Y.2d 694, 518 N.Y.S.2d 1031 (deceased's double hearsay statement that defendant told her he intended to visit her at her apartment at a particular time on the day she was killed was not admissible); People v. Bongarzone, 116 A.D.2d 164, 500 N.Y.S.2d 532 (2d Dept. 1986), aff'd 69 N.Y.2d 892, 515 N.Y.S.2d 227 (1987) (defendant informed undercover detective that he would call his mother and instruct her to give detective information regarding intended murder victim; admissible); People v. Herrera, 11 Misc.3d 1070(A), 816 N.Y.S.2d 699 (Sup. Ct., Rockland Co., 2006) (court admits victim's statement over phone that she had to go because the man doing the power washing (defendant)

wanted to speak to her); People v. Rivers, 177 Misc.2d 738, 677 N.Y.S.2d 427 (Sup. Ct., Bronx Co., 1998) (court refuses to admit statement of murder victim "that he would break every last one of [the Tower Boys'] asses" to show that victim did some unspecified act of violence against one or more of the Tower Boys, of which defendant was a member).

2. Declaration Of Reason, Motive Or Feeling - Statements regarding, e.g., the declarant's knowledge, purpose, intent, feelings or emotions at the time of the statements may be admitted. People v. Reynoso, 73 N.Y.2d 816, 537 N.Y.S.2d 113 (1988). See also People v. Cartagena, 170 A.D.3d 451 (1st Dept. 2019), lv denied 33 N.Y.3d 1029 (certain Facebook posts and text messages made by co-defendant were relevant to his state of mind and in turn relevant to defendant's guilt given other facts, including evidence of shared motive, but co-defendant's text message announcing that murder was about to be committed, and Facebook post boasting that it had succeeded, exceeded proper bounds of state-of-mind evidence); People v. Matthews, 16 A.D.3d 135, 791 N.Y.S.2d 24 (1st Dept. 2005), lv denied 4 N.Y.3d 888 (documents containing defendant's purported home address admissible to show her intent to make location her residence); Schering v. Pfizer Inc. and UCB Pharma Inc., 189 F.3d 218 (2d Cir. 1999) (survey in which physicians related memories and impressions of communications from sales representatives was admissible to prove what representatives said).

3. Evidence Not Offered For Truth - The mere utterance of a statement may circumstantially show the declarant's or the listener's state of mind - e.g., intent, sanity, knowledge or malice. Fisch, §763; Richardson, §8-106; see also People v. Reed, 169 A.D.3d 573 (1st Dept. 2019), lv denied 33 N.Y.3d 1107 (declarant's statement to victim and others that declarant could make phone call to have them killed admitted to show declarant's anger at victim, which was relevant given evidence supporting inference that declarant conveyed her anger to defendant and supplied possible motive); People v. Kass, 59 A.D.3d 77, 874 N.Y.S.2d 475 (2d Dept. 2008) (defendant's testimony regarding a conversation during which informant described himself as "very big drug dealer in Washington Heights" was admissible since informant's statement may have contributed to defendant's fear of him); People v. Rose,

41 A.D.3d 742, 840 N.Y.S.2d 363 (2d Dept. 2007), lv denied 9 N.Y.2d 926 (no error in admission of testimony to effect that victim told witness to look to defendant if anything happened to her); Matter of Kendall J., 24 A.D.3d 357, 807 N.Y.S.2d 330 (1st Dept. 2005) (defense entitled to question doctor about possible coaching by complainant's mother); People v. Cobenais, 301 A.D.2d 958, 755 N.Y.S.2d 736 (3rd Dept. 2003), lv denied 99 N.Y.2d 653, 760 N.Y.S.2d 117 (2003) (tape of 911 call with complainant sobbing in background was probative of forcible compulsion element of attempted rape); Schering v. Pfizer Inc. and UCB Pharma Inc., supra, 189 F.3d 218 (surveys, in which physicians related memories and impressions of communications from sales representatives, admissible to prove physicians' state of mind, which was evidence of what representatives were implying); People v. Boyd, 256 A.D.2d 350, 683 N.Y.S.2d 271 (2d Dept. 1998) (defendant entitled to testify concerning conversation with person from whom he bought vehicle in attempt to show he believed he had right to possess it); People v. Thompson, 25 Misc.3d 1241(A), 906 N.Y.S.2d 782 (Sup. Ct., Ulster Co., 2009) (nothing in decedent's diary or oral statements was indicative of extreme fear or would logically lead to inference that decedent would have been unwilling to have defendant handle firearm in her presence, as defendant claimed); People v. Morales, 179 Misc.2d 324, 684 N.Y.S.2d 853 (Sup. Ct., Kings Co., 1999) (defendant's spontaneous statement to police -- "I should have killed him. This guy had no business talking to my wife like that. She's my damn woman" -- was not offered for truth; statement such as, "I didn't mean to kill him" would be inadmissible hearsay).

Under this rule, a respondent who is raising a justification defense may present evidence of his or her statements reflecting a belief of danger. Compare People v. Reynoso, 73 N.Y.2d 816, 537 N.Y.S.2d 113 (1988) with People v. Villaneuva, 35 A.D.3d 229, 829 N.Y.S.2d 1 (1st Dept. 2006), lv denied 8 N.Y.3d 885 (defendant's self-exculpatory comment to accomplice at end of incident was inadmissible hearsay) and People v. Starostin, 265 A.D.2d 267, 698 N.Y.S.2d 6 (1st Dept. 1999), lv denied 94 N.Y.2d 885, 705 N.Y.S.2d 17 (2000) (testimony by defendant that his mother told him about complainant's threats was improperly excluded, but testimony that defendant told officer about complainant's threats was inadmissible hearsay offered to prove defendant

believed complainant posed danger).

Such a respondent also may present evidence of threats or other statements by the victim which either affected the respondent's state of mind, see Richardson, §205, or bear on whether the victim was the aggressor. See People v. Miller, 39 N.Y.2d 543, 384 N.Y.S.2d 741 (1976); People v. Owens, 158 A.D.2d 478, 550 N.Y.S.2d 934 (2d Dept. 1990).

P. Trustworthiness Exception

1. Statements Offered By Respondent - Arguably, in view of the respondent's constitutional right to a fair trial, a statement which is not covered by a traditional hearsay exception may be admitted if there are substantial guarantees of trustworthiness and the statement is more probative than other evidence which could be secured through reasonable efforts. See People v. Robinson, supra, 89 N.Y.2d 648 (defendant had due process right to introduce Grand Jury testimony); People v. Burns, 6 N.Y.3d 793, 811 N.Y.S.2d 297 (2006) (trial court properly refused to admit signed statement by declarant who alleged that group of men, and not defendant, were involved in shooting); People v. Johnson, 197 A.D.3d 725 (2d Dept. 2021), lv denied 37 N.Y.3d 1097 (reversible error where defendant was precluded from introducing grand jury testimony of witness who had become unavailable; witness had positively identified co-defendant as one of the shooters, but provided description of the second shooter that was inconsistent with description of defendant); People v. Cook, 173 A.D.3d 633 (1st Dept. 2019), lv denied 34 N.Y.3d 929 (defendant was entitled to present testimony that non-testifying robbery victim failed to identify defendant at lineup; although there were reasons to suspect victim may have falsely claimed to be unable to identify anyone in lineup, non-identification bore sufficient indicia of reliability under applicable standard, which hinges on reliability rather than credibility); People v. Montgomery, 158 A.D.3d 204 (1st Dept. 2018), lv denied 31 N.Y.3d 1015 (detective’s testimony regarding witnesses’ failure to identify defendant at lineups would have been hearsay but defense counsel could have shown evidence was admissible on constitutional grounds because it was reliable); People v. Thompson, 111 A.D.3d 56 (2d Dept. 2013) (reversible error where court precluded defendant from offering evidence that elderly victim, who did not

testify due to mental incapacity, repeatedly and consistently identified another individual as perpetrator; utilization of CPL §660.10, which provides that, under certain circumstances, "a criminal court may, upon application of either the people or a defendant, order that a witness or prospective witness in the action be examined conditionally under oath in order that such testimony may be received into evidence at subsequent proceedings in or related to the action," was not only means of presenting evidence); People v. Bradley, 99 A.D.3d 934 (2d Dept. 2012) (when truth of matter asserted in inconsistent statement is relevant to core factual issue, relevancy is not restricted to issue of credibility and right to present defense may encompass right to place before trier of fact secondary forms of evidence, such as hearsay); People v. Valette, 88 A.D.3d 461 (1st Dept. 2011), lv denied 18 N.Y.3d 887 (since evidence was neither reliable nor critical to establish defendant's defense, defendant not constitutionally entitled to introduce it); People v. Abdul, 76 A.D.3d 563, 906 N.Y.S.2d 594 (2d Dept. 2010), lv denied 15 N.Y.3d 892 (court should have permitted defendant to introduce co-defendant's declaration against interest admitting he killed victim even though defendant could only offer statement as hearsay within hearsay); People v. Gibian, 76 A.D.3d 583, 907 N.Y.S.2d 226 (2d Dept. 2010), lv denied 15 N.Y.3d 920 (court improperly precluded defendant from testifying about mother's statement to him concerning how she killed decedent to show defendant's state of mind where defendant contended that it was only after mother made detailed statement that he confessed in effort to protect her and that testimony would establish motive to protect mother and explain ability to provide accurate details in his confession; court also notes that depriving defendant of opportunity to present hearsay evidence of another person's admission may violate fundamental right to present defense, and where constitutional rights directly affecting issue of guilt are implicated, hearsay rule may not be applied mechanistically to defeat ends of justice); People v. Oxley, 64 A.D.3d 1078, 883 N.Y.S.2d 385 (3rd Dept. 2009), lv denied 13 N.Y.3d 941 (in case involved alleged declarations against penal interest, court notes that less exacting standard for admissibility applies where statements form critical part of defense, and due process concerns may tip scales in favor of admission); People v. Madrigal, 12 A.D.3d 199, 783

N.Y.S.2d 583 (1st Dept. 2004), lv denied 4 N.Y.3d 746 (deceased witness's grand jury testimony properly excluded where it was not critical to defense; witness's daughter gave similar testimony in grand jury and was available to testify); People v. Rosa, 302 A.D.2d 231, 754 N.Y.S.2d 279 (1st Dept. 2003), lv denied 99 N.Y.2d 658, 760 N.Y.S.2d 123 (2003) (suppression hearing testimony of deceased defense witness not admissible where People did not have full and fair opportunity to cross-examine witness regarding underlying charges); People v. Benjamin, 272 A.D.2d 276, 709 N.Y.S.2d 517 (1st Dept. 2000), lv denied 95 N.Y.2d 904, 716 N.Y.S.2d 644 (defendant failed to establish that negative identifications were reliable or that there was any reason to elicit them through hearsay rather than by calling declarants); People v. McKee, 269 A.D.2d 225, 703 N.Y.S.2d 447 (1st Dept. 2000), lv denied 94 N.Y.2d 950, 710 N.Y.S.2d 7 (statement of witness who allegedly made exculpatory statement to police, but who later denied witnessing crime, was not admissible in absence of showing of reliability); People v. Cordon, 261 A.D.2d 278, 691 N.Y.S.2d 390 (1st Dept. 1999), lv denied 93 N.Y.2d 1016, 697 N.Y.S.2d 575 (videotaped Grand Jury testimony not admissible where the witness' testimony from a previous trial was already in evidence, and defendant was merely trying to demonstrate the witness' demeanor); People v. Esteves, 152 A.D.2d 406, 549 N.Y.S.2d 30 (2d Dept. 1990), lv denied 75 N.Y.2d 918, 555 N.Y.S.2d 37; People v. Brunson, 151 A.D.2d 303, 542 N.Y.S.2d 571 (1st Dept. 1989). See also Commonwealth v. Drayton, 38 N.E.3d 247 (Mass. 2015) (constitutional hearsay exception applies whenever hearsay is "critical to the defense and bears persuasive guarantees of trustworthiness"); Federal Rules, 807; but see United States v. Jackson, 335 F.3d 170 (2d Cir. 2003) (co-conspirator had motive to avoid testifying against defendant and statements were inconsistent).

2. Statements Offered By Prosecution - When hearsay has been offered by the prosecution, the Court of Appeals has expressed a reluctance to abandon its reliance on specific categories of exceptions. See People v. Nieves, supra, 67 N.Y.2d 125; People v. Burwell, 159 A.D.2d 407, 553 N.Y.S.2d 105 (1st Dept. 1990); People v. Esteves, supra, 152 A.D.2d 406. After the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), it is clear that

"testimonial" statements made by an unavailable declarant are inadmissible in any event.

Q. Co-Conspirator Statements - Statements made by a co-conspirator in the course and furtherance of a conspiracy are admissible against other co-conspirators as evidence of both the conspiracy and a substantive crime. Richardson, §8-236. See, e.g., People v. Flanagan, 28 N.Y.3d 644 (2017) (when conspirator joins ongoing conspiracy, previous statements made by coconspirators in furtherance of conspiracy are admissible against new recruit, and statements made after conspirator's active involvement has ceased, but while the conspiracy continues, are admissible unless conspirator unequivocally communicates withdrawal from conspiracy to co-conspirators); People v. Sanders, 56 N.Y.2d 51, 451 N.Y.S.2d 30 (1982); People v. Abreu, 89 A.D.3d 412 (1st Dept. 2011), lv denied 18 N.Y.3d 922 (conspiracy still in progress where stolen property had not yet been divided up, and declaration apprised other conspirators of progress or status of conspiracy and it was important for conspirators to know victim had been killed); People v. Canales, 32 Misc.3d 1211(A) (Sup. Ct., Kings Co., 2011) (statements made after all defendants had been arrested were not made within course of and in furtherance of conspiracy; if "cover-up" conspiracy comes into being, admissions made in course of and in furtherance of new conspiracy can be introduced, but there is no presumption that conspirators make agreements to cover up crimes if they should be unexpectedly arrested)

Such statements are admissible only after a prima facie case of conspiracy has been introduced. See People v. Caban, 5 N.Y.3d 143, 800 N.Y.S.2d 70 (2005) (no error where trial court admitted statements subject to later proof of prima facie case); People v. Salko, 47 N.Y.2d 230, 417 N.Y.S.2d 894 (1979); People v. Rossney, 178 A.D.2d 765, 577 N.Y.S.2d 683 (3rd Dept. 1991), lv denied 79 N.Y.2d 1007, 584 N.Y.S.2d 461 (1992) (prima facie case may be established in absence of proof of overt acts in furtherance of conspiracy).

It is possible, albeit unlikely, that such statements will be deemed testimonial under the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) and Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006). See, e.g.,

People v. McBean, 32 A.D.3d 549 819 N.Y.S.2d 368 (3rd Dept. 2006) (statements not testimonial where declarant did not know she was speaking to government agent).

R. Statements Of Witness Who Is Unavailable Due To Respondent's Misconduct - When there is clear and convincing proof that the respondent caused a witness' unavailability by means of threats, murder, etc., a court may admit the witness' Grand Jury testimony. United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982), cert denied 467 U.S. 1204, 104 S.Ct. 2385. See also People v. Dubarry, 25 N.Y.3d 161 (2015) (witness identified "Israelites," a congregation with which defendant was associated, as source of threats, but, even if People may satisfy burden without direct evidence of defendant's involvement, there was no evidence linking defendant to threats or anyone who approached witness; even if defendant was source of Israelites's suspicions about witness, inference that communication was intended and structured to procure witness's unavailability was based on pure speculation); People v. Smart, 23 N.Y.3d 213 (2014) (no error in admission of witness's grand jury testimony where, in recorded telephone conversations, defendant threatened witness when she said she might testify and said it would be a "good idea" for her to leave town; defendant repeatedly urged his mother to remove witness from State so she could not testify and mother was watching over her and giving her drugs at defendant's request to keep her away from court; defendant eventually acknowledged that witness would appear after mother lost track of her, but that was because he recognized that witness was cooperating with police; given defendant's success in keeping complainant out of court until middle of Sirois hearing, it appears he influenced her to come to court and take the Fifth; and forfeiture rule does not depend on whether witness's refusal to testify would be lawful in absence of defendant's illicit influence); People v. Roby, 217 A.D.3d 505 (1st Dept. 2023) (although victim was always reluctant or ambivalent about cooperating, she gave detailed information about attack shortly after crime and evidence does not show firm refusal to testify until after defendant made offending phone calls); People v. Washington, 75 Misc.3d 60 (App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 2022), lv denied 39 N.Y.3d 942 (divided panel finds reversible error in admission of hearsay statements; dissenting judge notes, inter alia, that defendant made approximately 96

phone calls from jail and told complainant that her testimony was only evidence against him, that case would be dropped if she did not appear, that prosecution was lying to her and trying to manipulate her into testifying, that she did not have to comply with subpoena; and that, in phone calls to his mother, defendant stated that complainant "knows what she's supposed to do" and that he had explained the "whole situation to her"); People v. Bryant, 200 A.D.3d 1483 (3d Dept. 2021) (although court deemed defendant's comments to complainant's boyfriend - "yo bro, do the right thing" - to be "direct threat" against complainant, comments did not reference complainant or underlying incident, defendant repeatedly stated that he could not hear boyfriend and asked the individual who made the phone call if boyfriend could hear him, and complainant could not be heard on call); People v. Harris, 159 A.D.3d 538 (1st Dept. 2018) (court properly admitted grand jury testimony where defendant learned identity of witness when his counsel gave him grand jury minutes with witness's name handwritten on first page; shortly thereafter, defendant's brother posted on Facebook a copy of that page, along with denunciations of witness as a "snitch"; and post garnered numerous threatening comments, and witness was assaulted within days of posting by unknown persons, one of whom called witness a "rat"); People v. Vargas, 154 A.D.3d 971 (2d Dept. 2017) (evidence insufficient where witness was approached by man who said defendant's accomplice, who was at Rikers Island, told man he had seen witness's name on paperwork and told man to approach witness and tell him not to come to court or he would get "fucked up" and receive stitches, but man did not mention defendant or indicate what relation defendant had to case); United States v. Stewart, 485 F.3d 666 (2d Cir. 2007) (forfeiture rule applies when defendant's efforts were focused on preventing witness from testifying at different trial); United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001) (federal rule places no limitation on subject matter of declarant's statements that can be offered to prove defendant murdered declarant; court also holds that government need not show that defendant's *sole* motivation was to procure declarant's absence, only that defendant was motivated in part by such a desire); People v. Geraci, 85 N.Y.2d 359, 625 N.Y.S.2d 469 (1995) (although Second Circuit uses preponderance standard, New York law requires clear and convincing evidence

that defendant intimidated the witness); People v. Prochilo, 41 N.Y.2d 759, 395 N.Y.S.2d 635 (1977); People v. Encarnacion, 87 A.D.3d 81 (1st Dept. 2011), lv denied 17 N.Y.3d 952 (evidence sufficient where defendant called witness's home over 1,000 times, and, through friends, told her that if she came in, defendant would "get her"); People v. Steward, 54 A.D.3d 880, 864 N.Y.S.2d 488 (2d Dept. 2008), lv denied, 11 N.Y.3d 858 (People failed to meet burden to connect defendant to threats by young male where there was no evidence of prior history of coercion, defendant was incarcerated during trial, limiting opportunities to orchestrate threats, and fact that defendant made telephone calls to one or possibly two "males" was insufficient); People v. Byrd, 51 A.D.3d 267, 855 N.Y.S.2d 505 (1st Dept. 2008) (complainant's grand jury testimony properly admitted after court determined that complainant was unavailable because of battered person syndrome; history of domestic abuse and testimony about battered person syndrome properly admitted at hearing to show defendant had such a degree of control over complainant that seemingly innocuous calls or hospital visits would have coercive effect on her); People v. Jernigan, 41 A.D.3d 331, 838 N.Y.S.2d 81 (1st Dept. 2007), lv denied 9 N.Y.3d 923 (People established by clear and convincing evidence that defendant caused victim's unavailability where defendant left phone messages on victim's answering machine imploring her not to testify and urging her not to send him to prison and committed several acts of violence against her going back to the 1980s, and, although victim visited defendant in jail while case was pending, that was consistent with defendant's ability to control her); People v. Johns, 297 A.D.2d 645, 746 N.Y.S.2d 907 (2d Dept. 2002), lv denied 99 N.Y.2d 559, 754 N.Y.S.2d 212 (2002) (prosecution failed to establish identity of people who made threats or date, time and place of threats, or that any of the persons who threatened witness ever spoke to defendant or that defendant was aware of threats); People v. Hamilton, 127 A.D.2d 691, 511 N.Y.S.2d 912 (2d Dept. 1987), aff'd 70 N.Y.2d 987, 526 N.Y.S.2d 421 (1988); People v. Neale, NYLJ posted 11/9/18 (Sup. Ct., Queens Co., 2018)
https://www.law.com/newyorklawjournal/almID/1541585054NY20282014/
(in case of apparent first impression, court holds that misconduct of investigator recruited by defendant without knowledge of defense counsel justified admission of

identification witness's grand jury testimony where misconduct confused witness and rendered her unable to confidently identify defendant in court); People v. Copney, 41 Misc.3d 250 (Sup. Ct., Kings Co., 2013) (in domestic violence prosecution, complainant's grand jury testimony found admissible where defendant called complainant over one hundred times and used foul and upsetting language, and stated, inter alia: "If you don't go, they got nothing," and "If you don't come, they have no case. Everything is on you"); People v. Swinson, 38 Misc.3d 1220(A) (Sup. Ct., N.Y. Co., 2013) (People failed to meet burden where defendant, during calls from prison, discussed pending case and his incarceration but without threats or intimidation, and, in conversational tone, pleaded with complainant to drop charges, and complainant, rather than being cowed, challenged defendant, berated him for not taking responsibility for his actions and informed him that she was not afraid of him); People v. Smith, 29 Misc.3d 1056, 907 N.Y.S.2d 860 (Sup. Ct., Kings Co., 2010) (grand jury testimony of domestic violence complainant admissible where defendant placed over 300 telephone calls to her from jail; although defense argues that there were no threats of harm or efforts at intimidation, "[t]he power, control, domination and coercion exercised in abusive relationships can be expressed in terms of violence certainly, but just as real in repeated calls sounding expressions of love and concern," and defendant's "onslaught of attention cannot be viewed in vacuum, but understood in relation to the surrounding circumstances"); see also United States v. Carson, 455 F.3d 336 (D.C. Cir. 2006) (forfeiture can result when co-conspirator renders witness unavailable through misconduct that was within scope of conspiracy).

This rule may be applied to other types of hearsay. See, e.g., People v. Cotto, 92 N.Y.2d 68, 677 N.Y.S.2d 35 (1999) (statements made during preparation session that were not covered by traditional exception to hearsay rule); People v. Taylor, 192 A.D.3d 1144 (2d Dept. 2021) (people met burden, and court properly admitted witness's written statement and text messages, where defendant was one source of threats witness and family received and witness was afraid that testifying would bring more threats); People v. Shelly, 172 A.D.3d 1245 (2d Dept. 2019), lv denied 34 N.Y.3d 954 (court properly allowed People to offer witness's audiotaped statement where witness, along with three

other witnesses and their families, had been threatened; witness disappeared to another state; redacted Rosario material had names of witnesses, including subject witness, inadvertently visible; and People presented audiotapes of prison phone calls from defendant and another alleged gang member discussing plans to distribute Rosario paperwork to others for purpose of intimidating witnesses); Perkins v. Herbert, 596 F.3d 161 (2d Cir. 2010), cert denied 131 S.Ct. 318 (prosecution failed to meet preponderance of the evidence standard where habeas petitioner was incarcerated continuously after date of robbery and prison record logs revealed no contact with witness or man who conveyed threats, and petitioner's motive to silence witness was shared by man who conveyed threats, who, even if aware that witness had failed to identify him, would still have motive to prevent witness from testifying and potentially revealing his involvement); In re Duane F., 309 A.D.2d 265, 764 N.Y.S.2d 434 (1st Dept. 2003) (presentment agency failed to establish that witness was unavailable where, given her past compliance, there was no reason to believe she would not have obeyed a subpoena or a material witness order; while there is no rule dictating that witness testify in person at Sirois hearing, fundamental fairness requires prosecutor to produce the witness or explain why the witness is unavailable, and at the very least, the family court should have interviewed the complainant in camera); In re Juan J., 283 A.D.2d 305, 724 N.Y.S.2d 848 (1st Dept. 2001) (complainant's deposition properly admitted); People v. Mahabub, 38 Misc.3d 554 (Crim. Ct., N.Y. Co., 2012) (statements not admitted where complainant's recantation and refusal to testify coincided with numerous phone calls made by defendant in violation of order of protection, but People failed to show that defendant had coercive control over complainant; charge that defendant punched complainant did not compare to crimes that would cause a complainant to fear the defendant; contents of calls were unknown, nearly half were made while complainant was cooperating with prosecution, fewer were made in month before complainant recanted, and there was no evidence of calls after recantation and before complainant refused to testify; and complainant's expression of position through attorney bolstered conclusion that her actions were voluntary); People v. Kahn, 26 Misc.3d 1211(A), 906 N.Y.S.2d 782 (Sup. Ct., Queens Co., 2010) (victim unavailable

since she avoided People's phone calls, disregarded subpoena, informed People that she would not testify and had no contact with District Attorney's Office, and there was sufficient evidence that defendant caused unavailability where he made at least 100 telephone calls to victim from jail, and, when victim visited him in jail on two occasions, he had opportunity to exert influence in person; defendant's mother made numerous visits to her son in jail; mother brought victim to defendant's attorney's office and asked attorney to counsel victim regarding what to say to make case go away and made phone calls to attorney and put victim on phone for same purpose, and continually made statements to attorney indicating that she would make sure victim did not testify); Matter of Jonathan D., 22 Misc.3d 1126(A), 881 N.Y.S.2d 364 (Fam. Ct., Bronx Co., 2009) (respondent's mother not "unavailable" where she was unable to recall certain details, but answered numerous questions and appeared to have advanced prosecution's theory of case: even assuming, arguendo, that she was unavailable, presentment agency failed to establish by clear and convincing evidence that unavailability was procured by respondent's misconduct and that desire to silence mother motivated him where mother's unavailability may have been result of propensity to enable respondent in his alleged misdeeds, protect herself from incrimination arising from inconsistent testimony, or avoid further ACS involvement and child endangerment charges, or her inability to recall events which occurred approximately twenty months earlier); People v. Santiago, 2003 WL 21507176 (Sup. Ct., N.Y. Co., 2003) (grand jury testimony and other statements admitted where pattern of domestic violence caused complainant's unavailability). But see People v. Joyner, 284 A.D.2d 344, 726 N.Y.S.2d 434 (2d Dept. 2001), lv denied 96 N.Y.2d 940, 733 N.Y.S.2d 380 (despite defendant's misconduct in causing unavailability of witness, lineup identification not admissible where it was the product of unduly suggestive procedure).

It appears that pressure tactics short of threats or criminal activity can in some circumstances suffice to justify admission of prior statements. People v. Walton, 168 A.D.3d 1103 (2d Dept. 2019), lv denied 33 N.Y.3d 1036 (statements made to police by defendant's cousin properly admitted where defendant's use of personal relationship with cousin, and/or threats, was established via phone records of calls by cousin and

calls by defendant to individuals believed to be family members, and statement by inmate, who knew defendant and refused to testify out of fear, that defendant admitted to having "put the wolves out" on cousin to keep him from testifying and was confident he would beat charges as a result); People v. Evans, 127 A.D.3d 780 (2d Dept. 2015), lv denied 25 N.Y.3d 1201 (testimony of defendant's sister from first trial admitted where defendant used close relationship with sister to persuade or pressure her into not testifying against him again); People v. Jaudon, 64 Misc.3d 1214(A) (City Ct. of Gloversville, Fulton Co., 2019) (People given permission to offer hearsay where defendant had repeatedly violated order of protection, made twenty-six calls to complainant in which he repeatedly told her that prosecution had no case without her testimony, blamed her for his legal problems, and told her to plead the Fifth); People v. Roby, 58 Misc.3d 1227(A) (Sup. Ct., N.Y. Co., 2018) (statements admissible where complainant was target of repeated phone calls from defendant and others acting on his behalf, and, although there was no "smoking gun" phone call in which defendant threatened violence, there was "steady drip, drip, drip of undue influence that washed over" complainant; clinical social worker testified about dynamic of domestic violence, and defendant "was so desperate to avoid indictment" that he was willing to ignore Rikers' warnings that his calls were being recorded and risk further criminal charges for violating order of protection); People v. Wilkinson, 2015 NY Slip Op 32677(U) (County Ct., West. Co., 2015) (prior testimony admitted where defendant did not overtly threaten victim, but exploited relationship with her - e.g., by repeatedly telling her he loved her and that she could tell judge she did not know anything - in order to pressure and manipulate her, and history of their relationship included acts of violence and overt threats).

It must be established that the accused specifically intended to prevent the victim from testifying. Giles v. California, 554 U.S. 353, 128 S.Ct. 2678 (2008) (forfeiture rule applies only when defendant engaged in conduct designed to prevent witness from testifying; majority refuses to adopt different rule for domestic violence cases, but in such cases evidence may support finding that crime was intended to isolate victim and stop her from reporting abuse or cooperating with criminal prosecution); Michigan v.

Burns, 832 N.W.2d 738 (Mich. 2013) (insufficient proof of specific intent to cause unavailability where defendant instructed complainant not to report abuse; wrongdoing after crime has been reported or discovered is inherently more suspect and can give rise to strong inference of intent to cause unavailability); People v. Maher, 89 N.Y.2d 456, 654 N.Y.S.2d 1004 (1997) (out-of-court statements excluded where there was no evidence that defendant's acts were motivated by desire to prevent the victim from testifying).

A witness is "unavailable" to the prosecution and his/her statements are admissible where, after the witness recants, he/she testifies on the accused's behalf. People v. White, 4 A.D.3d 225, 772 N.Y.S.2d 309 (1st Dept. 2004), lv denied 3 N.Y.3d 650; see also People v. Turnquest, 35 Misc.3d 329 (Sup. Ct., Queens Co., 2012) (ordinarily, forfeiture occurs where misconduct causes witness's physical absence, but forfeiture-by-misconduct rule also applies when defendant causes witness to recant).

Regarding the court's obligation to hold a hearing, see People v. Robinson, 216 A.D.3d 1252 (3d Dept. 2023) (court erred in granting People's application without holding Sirois hearing where, among other issues, defendant's jail calls could support inference of improper influence but evidence was subject to competing inferences, and evidence was not presented indicating that it was, in fact, defendant who placed calls).

In a habeas proceeding brought by a New York defendant, the Second Circuit held that, when the court admits hearsay evidence because a witness has refused while on the stand to testify, the court may not preclude cross examination of the witness. Cotto v. Herbert, 331 F.3d 217 (2d Cir. 2003).

S. Phone Conversations - Before evidence of a named person's statements over the phone may be admitted, a foundation must be laid establishing that the named person was, in fact, the person on the phone. When a witness testifies that he or she is familiar with the voice, authentication is complete whether familiarity was acquired before or after the conversation. Although a mere statement of identity by the caller is not sufficient, a statement of identity by a person who has answered a call to a number listed under his or her name may be sufficient. References to facts that could only be known by the alleged speaker might also be sufficient. See People v. Lynes, 49 N.Y.2d

286, 425 N.Y.S.2d 295 (1980); United States v. Khan, 53 F.3d 507 (2d Cir. 1995) (evidence of identity was sufficient where defendant had provided a number at which she could be reached and the caller returned a message left at that number, and the caller provided defendant's father's address).

T. Impeachment Of Hearsay Declarant - A hearsay declarant is subject to impeachment by any of the means available when a witness gives live testimony. See Rapelje v. Blackston, 136 S.Ct. 388 (2015) (exclusion of recantations by witnesses whose prior testimony was admitted violated Confrontation Clause); People v. Anderson, 114 A.D.3d 1083 (3d Dept. 2014), lv denied 22 N.Y.3d 1196 (prior inconsistent statements may be used to impeach hearsay declarant without establishing usual foundation); People v. DelValle, 248 A.D.2d 126, 670 N.Y.S.2d 827 (1st Dept. 1998) People v. Canady, 186 A.D.2d 749, 589 N.Y.S.2d 184 (2d Dept. 1992), lv denied 81 N.Y.2d 786, 594 N.Y.S.2d 732 (1993); People v. Conde, 16 A.D.2d 327, 228 N.Y.S.2d 69 (3rd Dept. 1962), aff'd 13 N.Y.2d 939, 244 N.Y.S.2d 314 (1963); People v. Jackson, 2002 WL 1798837 (Sup. Ct., Kings Co.); Richardson, §8-111; Federal Rules, 806; but see People v. Bosier, 6 N.Y.3d 523, 814 N.Y.S.2d 584 (2006) (while noting that a defendant who has caused a witness to become unavailable is not in all circumstances barred from impeaching the witness with the witness's out-of-court statements, Court of Appeals upholds exclusion of witness's out-of-court statements where they did not go to heart of prosecution's case and witness might have credibly explained them); People v. Chandler, 30 A.D.3d 161, 815 N.Y.S.2d 567 (1st Dept. 2006), lv denied 7 N.Y.3d 786 (trial court properly precluded defendant from introducing collateral evidence regarding possible crimes committed by witness where defendant's threats caused unavailability of witness).

U. Opening The Door - In Hemphill v. New York, 142 S.Ct. 681 (2022), the State charged Nicholas Morris with murder, but after trial commenced, he agreed to a plea deal. Years later, the State prosecuted petitioner Darrell Hemphill for the same murder. At his trial, Hemphill blamed Morris, and he elicited undisputed testimony from a prosecution witness that police had recovered 9-millimeter ammunition from Morris' nightstand. Morris was outside the United States and not available to testify. The trial

court allowed the State to introduce parts of the transcript of Morris' plea allocution as evidence to rebut Hemphill's theory that Morris committed the murder. The court reasoned that Hemphill's arguments and evidence had "open[ed] the door" to the introduction of these testimonial out-of-court statements because they were reasonably necessary to correct the misleading impression Hemphill had created. The Supreme Court held that the admission of the plea allocution violated Hemphill's Sixth Amendment right to confront the witnesses against him. Hemphill did not forfeit his confrontation right merely by making the plea allocution arguably relevant to his theory of defense. For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the unconfronted plea evidence, nor was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. The Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court. Courts may not overlook the Sixth Amendment's command, no matter how noble the motive. The Court rejected the State's contention that the "opening the door" rule is a mere "procedural rule" that "treats the misleading door-opening actions of counsel as the equivalent of failing to object to the confrontation violation," and that the rule limits only the manner of asserting the confrontation right, not its substantive scope. States do have flexibility to adopt reasonable procedural rules governing the exercise of a defendant's right to confrontation. However, the door-opening principle is not a procedural rule; rather, it is a substantive principle of evidence that dictates what material is relevant and admissible in a case. Moreover, if a court admits evidence before its misleading or unfairly prejudicial nature becomes apparent, it generally retains the authority to strike it, or issue a limiting instruction as appropriate.

V. Interpreters - See, e.g., New Jersey v. Juracan-Juracan, _A.3d_, 2023 WL 5209592 (N.J. 2023) (in criminal jury trial, there is presumption that foreign language interpretation services will be provided in person, rather than via video remote interpreting); United States v. Curbelo, 726 F.3d 1260 (11th Cir. 2013), cert denied 2014 WL 102891 (defendant's inability to cross-examine person who translated recording

does not violate Confrontation Clause when defendant is able to cross-examine participant in recorded conversation who testifies that translation is accurate); People v. Morel, 8 Misc.3d 67, 798 N.Y.S.2d 315 (App. Term, 2d & 11th Jud. Dist., 2005), lv denied 5 N.Y.3d 808 (declarant's statements to unavailable translator who acted as party's agent are admissible if there is no motive to mislead and no reason to believe translation is inaccurate; Confrontation Clause did not guarantee right to scrutinize truth of the contents of statements the translator attributed to the officer in Spanish and to defendant in English where defendant had opportunity to cross-examine investigating officer as to questions he posed to translator and as to responses translator attributed to defendant, and defendant was a witness to translator's Spanish-language rendition of officer's questions and to his own Spanish-language responses); United States v. Hieng, 679 F.3d 1131 (9th Cir. 2012) (Crawford line of Supreme Court decisions did not invalidate Ninth Circuit holding that person may testify regarding statements made by defendant through interpreter); People v. Arroyo, 2005 WL 1315726 (Cal. Ct. App., 5th Dist., 2005) (defendant's right of confrontation was violated when witness was permitted to testify to what translator, who was investigating detective with obvious prosecutorial bias, told witness defendant had said, and defendant had no opportunity to cross-examine translator; however, unbiased and adequately skilled translator simply serves as "language conduit," so that a translated statement will be considered to be the statement of the original declarant and not that of the translator); but see United States v. Charles, 722 F.3d 1319 (11th Cir. 2013) (right of confrontation violated where court admitted officer's testimony regarding interpreter's translation of defendant's statements to officer and defendant had no opportunity to cross-examine interpreter).

W. Internet, Email, GPS, And Text Messages - People v. Rodriguez, 38 N.Y.3d 151 (2022) (screenshots of text messages properly admitted where complainant testified that they fairly and accurately represented messages; her boyfriend identified screenshots as the ones he took from complainant's phone; and telephone records showed that defendant sent complainant numerous text messages during relevant time period); People v. Price, 29 N.Y.3d 472 (2017) (no proper authentication of photograph of defendant obtained from internet profile page where victim could not identify weapon

held by defendant as one used in robbery and no witnesses testified that photograph was fair and accurate representation of scene depicted or was unaltered; even assuming arguendo that authentication by witness with personal knowledge of scene depicted or through expert testimony is unnecessary where circumstantial evidence demonstrates that profile page or social media account belongs to defendant, evidence is not sufficient here, and mere appearance of defendant's surname and picture on profile page is not enough); Cotton v. State, 773 S.E.2d 242 (Ga. 2015) (Facebook messages properly authenticated where victim's mother testified that she knew defendant went by name "Bucky Raw" because she saw videos he had posted and in which he had appeared on YouTube using that alias; she saw that defendant's friends and family were Facebook "friends" with "Bucky Raw;" and she was able to discern defendant's identity through conversations she had with him on accounts she and her friend had set up); People v. Robinson, 187 A.D.3d 1216 (2d Dept. 2020) (photo admissible where Facebook certification indicated that account from which photo came belonged to defendant); People v. Washington, 179 A.D.3d 522 (1st Dept. 2020), lv denied 35 N.Y.3d 975 (text messages exchanged between victim and person purporting to be defendant's mother properly authenticated as defendant's texts where texts reached victim at disguised phone number she had shared with defendant and not anyone else; texts revealed detailed knowledge of incident and relationship between defendant and victim, and discussed the sexual encounter; sender admitted having victim's car, bag and phone, which were taken during incident, and defendant was apprehended a day later driving victim's car; and sender's phone number was registered to former female friend of defendant); People v. Enoksen, 175 A.D.3d 624 (2d Dept. 2019), lv denied 34 N.Y.3d 1016 (no error in admission of document created by complainant reflecting series of text messages where complainant testified that messages were accurately and fairly reproduced); People v. Cotto, 164 A.D.3d 826 (2d Dept. 2018), lv denied 32 N.Y.3d 1110 (photographs of text messages properly admitted where complainant testified that they fairly and accurately depicted conversation with defendant); United States v. Recio, 884 F.3d 230 (4th Cir. 2018) (Facebook post authenticated where Government presented certification by Facebook

records custodian showing that record containing post was made "at or near the time the information was transmitted by the Facebook user," and sufficiently tied post to defendant by showing that: user name associated with account was "Larry Recio," one of four email addresses associated with account was "larryrecio20@yahoo.com," more than one hundred photos of defendant were posted to account, and one of the photos was accompanied by text "Happy Birthday Larry Recio"); People v. Spears, 154 A.D.3d 783 (2d Dept. 2017), lv denied 30 N.Y.3d 1109 (article from Wikipedia improperly admitted where People failed to authenticate document as fair and accurate depiction of content of article on date defendant's cell phone allegedly accessed website); People v. Javier, 154 A.D.3d 445 (1st Dept. 2017), lv denied 30 N.Y.3d 1106 (no error in admission of email created by copying text message and pasting it into email, which officer sent to his personal account and then printed out; email properly authenticated by officer's testimony that he copied and pasted the entirety of the conversation; best evidence rule did not apply because there was no genuine dispute about contents of underlying text messages, and, in any event, officer adequately explained unavailability of original by stating that it was his routine practice to erase original text messages from phone, particularly since phone automatically deleted messages once memory became full); United States v. Browne, 834 F.3d 403 (3d Cir. 2016), cert denied 137 S.Ct. 695 (Facebook "chats" involving defendant and minors properly admitted where testimony of minors regarding exchanges was consistent with chat logs; defendant owned Facebook account and phones, and made admissions, linking him to exchanges; defendant disclosed personal details when he testified that were consistent with exchanges; and Government obtained records directly from Facebook that were not subject to alteration); United States v. Lizarraga-Tirado, 789 F.3d 1107 (9th Cir. 2015) (Google Earth satellite image, and marker automatically added when user clicks any spot on map, were not hearsay); United States v. Vayner, 769 F.3d 125 (2d Cir. 2014) (copy of web page alleged to be defendant's profile page from Russian social networking site improperly admitted where there was information about defendant on page, including details consistent with trial testimony, but insufficient evidence that page was defendant's and not page he did not create or control; information was not so distinctive

that it established circumstantially that it came from defendant); People v. Hughes, 114 A.D.3d 1021 (3d Dept. 2014), lv denied 23 N.Y.3d 1038 (photographs of text messages properly authenticated where Verizon employee testified that messages had been sent between certain phone numbers, and victim identified phone numbers as belonging to her and defendant and identified photographs as depicting text messages she received from him); People v. Green, 107 A.D.3d 915 (2d Dept. 2013) (photographs of text messages properly authenticated where content made no sense unless defendant sent messages, and photographs were authenticated by complainant's testimony that they were "actual photographs of the screen of [her] telephone" and that she saw detective taking photographs); People v. Agudelo, 96 A.D.3d 611 (1st Dept. 2012) (cell phone instant messages admitted where detective testified that he viewed messages on victim's phone and read printout of messages, which victim had cut and pasted into a document, and victim testified that document was accurate and that she knew messages were from defendant because his name appeared on her phone when they were received; authentication from Internet service provider about source of messages not required); People v. Clevenstine, 68 A.D.3d 1448, 891 N.Y.S.2d 51 (3rd Dept. 2009), lv denied 14 N.Y.3d 799 (computer disk containing instant messages properly authenticated where victims testified that they engaged in instant messaging about sexual activities with defendant through MySpace, police investigator testified that he retrieved conversations from hard drive of computer used by victims, legal compliance officer for MySpace explained that messages in question were from users of accounts created by defendant and victims, and defendant's wife recalled sexually explicit conversations she viewed in defendant's MySpace account; although it was possible that someone accessed defendant's account and sent messages under his user name, likelihood of that scenario was factual issue for jury); People v. Pierre, 41 A.D.3d 289, 838 N.Y.S.2d 546 (1st Dept. 2007), lv denied 9 N.Y.3d 880 (although witness did not save or print instant message and there was no Internet service provider or other technical evidence, message was authenticated where close friend testified to defendant's screen name, cousin testified that she sent instant message to that screen name and received reply which made no sense unless it was sent by defendant, and

there was no evidence that anyone had motive or opportunity to impersonate defendant); see also Sublet v. State, 113 A.3d 695 (Md. 2015) (in Sublet, no proper authentication where purported author of posts testified that others had access to her Facebook profile and would regularly write posts under her name; in Harris, direct messages and tweets purportedly authored by defendant were properly authenticated where content established identity and tweets were authored during timeframe covered by messages and bore same online name; in Monge-Martinez, Facebook messages purportedly authored by defendant properly authenticated where witness, who had dated defendant for a year, could attest that he wrote messages, messages were received soon after stabbing at time when few people were aware of incident and were written in Spanish, defendant's mother tongue, and expressed remorse for "getting carried away by the anger," and defendant started calling witness on phone after messages were sent); Butler v. Texas, 459 S.W.3d 595 (Tex. Ct. Crim. App., 2015) (text messages purportedly sent by defendant properly authenticated where witness recognized texts to be coming from defendant because he had called her from number in past, content and context of the messages constituted circumstantial evidence that messages were from defendant, and defendant actually called her from same number during course of text message exchange; court notes that association of phone number with purported sender might not be sufficient, given that cell phones can be stolen, and authentication evidence might include message's appearance, contents, substance, internal patterns, or other distinctive characteristics); Smith v. State, 136 So.3d 424 (Miss. 2014) (Facebook messages purportedly written by defendant and sent to wife were not properly authenticated where messages purported to be from "Scott Smith" but no other identifying information, such as date of birth, interests, hometown, or the like, was provided; defendant's wife did not testify as to how she knew Facebook account was defendant's and that messages were authored by defendant; information in messages was known not only to defendant, but to wife and several of her friends and family members; it did not appear that messages were part of conversation and referred to anything in wife's message to defendant); Rodriguez v. State, 273 P.3d 845 (Nev. 2012) (court erred in admitting text messages where State failed to authenticate

messages by presenting evidence, such as context and content of messages, sufficient to establish that defendant sent or participated in sending them); Griffin v. State, 19 A.3d 415 (Md. 2011) (material printed from MySpace profile of defendant's girlfriend was not adequately authenticated where document contained girlfriend's picture, birth date and location and identified her boyfriend, but she did not give testimony establishing that profile was created by her and that contents were authored by her; authentication of social networking site materials can be accomplished by asking purported author of posting in question whether he or she created profile and authored posting, by searching computer belonging to person who allegedly created profile to determine whether computer was used to originate profile and posting, or by obtaining information from social networking site that links creation of profile and posting to purported creator); Commonwealth v. Purdy, 945 N.E.2d 372 (Mass. 2011) (e-mails purportedly sent by defendant were properly authenticated where they originated from account bearing defendant's name and used by defendant; they were found on hard drive of defendant's computer; and at least one e-mail contained attached photograph of defendant and, in another, author described business that was owned by defendant); United States v. Cameron, 699 F.3d 621 (1st Cir. 2012), cert denied 133 S.Ct. 1845 (Yahoo! and Google records not testimonial under Confrontation Clause where they were unrelated to trial or law enforcement purpose, but records containing information on screen names Yahoo! had associated with potential child pornography, and National Center for Missing and Exploited Children CyberTipline records, were testimonial since primary utility of records was in reporting crimes to law enforcement); United States v. Espinal-Almeida, 699 F.3d 588 (1st Cir. 2012), cert denied 133 S.Ct. 1837 (expert testimony not required to authenticate GPS data and evidence generated by Garmin and Google Earth software); United States v. Fluker, 698 F.3d 988 (7th Cir. 2012) (email messages properly authenticated where contents and context established that identified sender was the actual sender); Matter of R.D., 58 Misc.3d 780 (Fam. Ct., N.Y. Co., 2017) (incriminating text messages from mother's cell phone admitted where father testified that screen shot, which he did not take, was accurate representation of messages he saw, and that he was familiar with make, model and color of phone, had

seen mother use it many times, and once picked up phone after it rang and mother asked him to hand it to her; phone was password protected; and statements in messages were consistent with mother being author).

Under CPLR § 4532-b, an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, is admissible in evidence if such image, map, location, distance, calculation, or other information indicates the date such material was created and subject to a challenge that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove. A party intending to offer such image or information in evidence at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, or later for good cause shown, a party upon whom such notice is served may object to the request to admit into evidence such image or information, stating the grounds for the objection. Unless objection is made, the court shall take judicial notice and admit into evidence such image, map, location, distance, calculation or other information.

The New York County Lawyers' Association has provided guidance to lawyers regarding clients' social media postings. New York County Lawyers' Association Ethics Opinion 745 (NYCLA Prof. Ethics Comm., 7/2/13, http://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf) (in civil matters, attorneys may advise clients as to significance and implications of posts, including what client should/should not post and what client may or may not remove; advise client how posts may be received and/or presented by client's legal adversaries and advise client to consider posts in that light; discuss possibility that legal adversary may obtain access to "private" social media pages through court orders or compulsory process; review how factual context of posts may affect their perception; review posts that may be or already have been published; and discuss possible lines of cross-examination).

II. Presumptions And Inferences

A. Constitutional Considerations - Since the prosecution must prove each element beyond a reasonable doubt, the fact-finder may, but cannot be required to, employ an inference or presumption concerning a material element. See Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979).

In a bench trial, the accused is not entitled to notice of the court's intention to rely upon a presumption. See People v. Snow, 225 A.D.2d 1031, 639 N.Y.S.2d 233 (4th Dept. 1996).

B. Penal Law

1. Possession Of Drugs In Car

a. PL §220.25(1) - "The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found," except a licensed and hired driver or a person authorized to possess the substance, or when the substance "is concealed upon the person of one of the occupants." See People v. Colter, 206 A.D.3d 1371 (3d Dept. 2022), lv denied 38 N.Y.3d 1149 (presumption applied where deputy observed three silhouettes inside vehicle and, shortly after it parked, observed defendant and two others walking away from vehicle; deputy observed defendant throw empty magazine - which fit the handgun found in the vehicle - under nearby vehicle; and police recovered handgun, a loaded magazine, and glove that matched one that was possessed by one of the subjects, from vehicle immediately after defendant and the others began walking away from vehicle).

b. Drugs Not Located In Passenger Compartment - See People v. Warrington, 192 A.D.2d 735, 597 N.Y.S.2d 119 (2d Dept. 1993), lv denied 82 N.Y.2d 760, 603 N.Y.S.2d 1003 (presumption applied to contraband found in speaker in trunk); People v. Glenn, 185 A.D.2d 84, 592 N.Y.S.2d 175 (4th Dept. 1992) (presumption applied to drugs in locked suitcase in trunk).

c. Drugs Concealed Upon Occupant - For this exception to apply, there must be clear-cut evidence of exclusive possession by one individual at or just before the time of arrest. See People v. Verez, 83 N.Y.2d 921, 615 N.Y.S.2d 306

(1994) (use of presumption not precluded where co-defendant possessed and fired gun on street but it was recovered from between bucket seats in vehicle and there was no evidence that co-defendant possessed it just prior to arrest); People v. Lemmons, 40 N.Y.2d 505, 387 N.Y.S.2d 97 (1976) (presumption applied to gun found in handbag that was on floor of vehicle; exception would apply when, for example, gun is secreted on someone's person); People v. Drayton-Archer, 159 A.D.3d 919 (2d Dept. 2018) (presumption not applicable where defendant was driving and officers testified that gun was seen solely in possession of other vehicle occupant who threw it out rear passenger side window); People v. Willingham, 158 A.D.3d 1158 (4th Dept. 2018) evidence legally insufficient where co-defendant was holding weapon while he was observed entering vehicle); People v. Jimenez, 139 A.D.3d 631 (1st Dept. 2016), lv denied 28 N.Y.3d 931 (automobile presumption properly charged where co-defendant threw drugs out window of stopped car defendant was driving and police immediately recovered drugs); In re Mark S., 274 A.D.2d 334, 711 N.Y.S.2d 398 (1st Dept. 2000) (co-respondent's admission that he possessed gun found under his foot did not establish exclusive possession as a matter of law). People v. Williams, 146 A.D.2d 659, 537 N.Y.S.2d 39 (2d Dept. 1989) (no presumption where co-defendant fired gun and threw something out of car that was never recovered); People v. Velez, 100 A.D.2d 603, 473 N.Y.S.2d 556 (2d Dept. 1984) (presumption applied where someone's hand dropped gun); People v. Guest, 142 Misc.2d 1014, 538 N.Y.S.2d 971 (Crim. Ct. N.Y. Co., 1989) (where known person threw drugs from car, presumption not applicable).

2. Possession Of Drugs In Open View In A Room

a. PL §220.25(2) - "The presence of a narcotic drug, narcotic preparation marihuana or phencyclidine in open view in a room, other than in a public place, under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found...." The presumption does not apply when a person is authorized to possess the substance or when the substance is concealed upon the person of an occupant. See also People v.

Rosado, 96 A.D.3d 547 (1st Dept. 2012) (drug factory presumption does not apply to charge of seventh-degree possession of controlled substance).

b. Close Proximity - Depending on the circumstances, the presumption may apply even when the respondent was not in the room where the drugs were found. Compare People v. Kims, 24 N.Y.3d 422 (2014) (defendant not within "close proximity" to drugs in apartment once he exited premises and entered car where no evidence suggested he was in immediate flight from premises in attempt to escape arrest) with People v. Jiminez, 292 A.D.2d 196, 738 N.Y.S.2d 344 (1st Dept. 2002), lv denied 98 N.Y.2d 698, 747 N.Y.S.2d 416 (presumption applied where defendant was walking around the end of a wall, behind which was a hallway leading to the room in which the crack was found); People v. Garcia, 156 A.D.2d 710, 549 N.Y.S.2d 462 (2d Dept. 1989), lv denied 76 N.Y.2d 735, 558 N.Y.S.2d 897 (1990) (defendant in bathroom, and drug paraphernalia, weapons and $50,000 worth of cocaine found in main room); People v. Massene, 137 A.D.2d 624, 524 N.Y.S.2d 512 (2d Dept. 1988) (defendant in living room, and drugs found in kitchen were visible from living room) and People v. McCall, 137 A.D.2d 561, 524 N.Y.S.2d 301 (2d Dept. 1988) (defendant lying behind bar, 40-50 feet from drugs).

c. Circumstances Evincing Intent To Sell - See, e.g., People v. Hogan, 26 N.Y.3d 779 (2016) (not a vast quantity of cocaine found, but evidence of packaged and loose drugs, paraphernalia and razor blade established that drugs were being packaged or otherwise prepared for sale); People v. Tejeda, 73 N.Y.2d 958, 540 N.Y.S.2d 985 (1989) (presumption applied where defendant was walking towards living room, where there was a residue of cocaine in a dish on a coffee table and grains of rice on the floor); People v. Johnson, 160 A.D.3d 573 (1st Dept. 2018) (presumption not applicable where officers recovered approximately one gram of crack cocaine, divided between 26 "twists" that were in larger bag, and untested, white residue on kitchen counter was equally consistent with residue left by household cooking and cleaning products).

d. Open View - See, e.g., People v. Rodriguez, 104 A.D.2d 832, 480 N.Y.S.2d 155 (2d Dept. 1984) (presumption not applicable where cocaine was

in opaque bag on window sill behind curtain).

3. Possession Of Weapon In Car

a. PL §265.15(3) - "The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, defaced rifle or shotgun [or one of a number of other specified weapons] is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found...." The presumption is not applicable to licensed and hired drivers, or when a person is licensed to possess the weapon or the weapon is concealed upon the person of an occupant. PL §265.15(3). These exceptions do not exist when a presumption arises from the presence of a weapon in a stolen car. PL §265.15(2).

b. Weapon Concealed Upon Occupant - See cases cited in II(B)(1)(c), supra.

c. Location Of Weapon In Car - See, e.g., People v. Perrington, 89 A.D.3d 529 (1st Dept. 2011) (automobile presumption not rebutted by fact that pistol was found in woman's purse where pistol's grip was protruding from unfastened purse located in middle of rear seat); People v. Lynch, 116 A.D.2d 56, 500 N.Y.S.2d 236 (1st Dept. 1986) (presumption applied where defendant was in rear seat, and sat facing a gun which was protruding from a tear in the back of the front seat); People v. Davis, 104 A.D.2d 1046, 480 N.Y.S.2d 954 (2d Dept. 1984) (presumption applied where defendant sat behind driver, and weapons were recovered from under driver's seat).

The presumption might apply even if the weapon was not in the passenger compartment. See People v. Garcia, 281 A.D.2d 234, 722 N.Y.S.2d 13 (1st Dept. 2000), lv denied 96 N.Y.2d 862, 730 N.Y.S.2d 36 (2001) (probable cause to arrest existed where defendant was passenger and gun was found under hood); People v. Hicks, supra, 138 A.D.2d 519 (presumption applied where gun was found in carburetor; court notes that driver could "pop" hood lock and gain access to gun). But see People v. Wilt, 105 A.D.2d 1089, 482 N.Y.S.2d 629 (4th Dept. 1984) (no presumption where gun was found in trunk); People v. Nix, 39 Misc.3d 628 (Crim. Ct., Bronx Co., 2013) (possession charge facially defective where it was alleged that defendant was in front passenger

seat of vehicle which had partially open trunk with butt of shotgun exposed); People v. Wade, 122 Misc.2d 50, 469 N.Y.S.2d 571 (Sup. Ct. Kings Co., 1984) (defendant was back seat passenger, and gun was found in glove compartment; presumption not applicable).

d. "Occupant" Of Car - The presumption does not apply to a person who was observed merely sitting or leaning on a car. See People v. Beaudonvine, 136 Misc.2d 179, 518 N.Y.S.2d 342 (Sup. Ct. Kings Co., 1987); see also People v. Maye, 64 A.D.3d 795, 882 N.Y.S.2d 696 (2d Dept. 2009), lv denied 13 N.Y.3d 837 (presumption applied where defendant was in car shortly before gun was discovered under circumstances which made it unlikely that weapon was placed in car after defendant exited); People v. Watts, 215 A.D.3d 1170 (3d Dept. 2023) (presumption where deputy observed three silhouettes inside vehicle, and, after looking away briefly, saw only three people, including defendant, in parking lot where vehicle parked moments before; defendant possessed glove matching glove found in front passenger seat and seat's position allowed inference that defendant, who was very tall, occupied seat moments before; and firearm was located underneath defendant's seat, and ammunition, which matched firearm, was located in duffel bag behind his seat).

4. Unauthorized Use Of A Motor Vehicle - PL §165.05(1) ("person who [takes, operates, exercises control over, rides in or otherwise uses a vehicle] without the consent of the owner is presumed to know that he does not have such consent"). See Matter of Raquel M., 99 N.Y.2d 92, 752 N.Y.S.2d 268 (2002); People v. Roby, 39 N.Y.2d 69, 382 N.Y.S.2d 739 (1976); People v. McCaleb, 25 N.Y.2d 394, 306 N.Y.S.2d 889 (1969); Matter of Stephen R., 182 A.D.2d 92, 586 N.Y.S.2d 794 (1st Dept. 1992) (presumption rebutted by prosecution evidence that vehicle was undamaged and driver produced documents).

5. Criminal Possession Of Stolen Property - PL §165.55(1) ("person who knowingly possesses stolen property is presumed to possess it with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof").

6. Intent To Use Weapon Unlawfully - PL §265.15(4) (unauthorized

possession of explosives, or possession of any "dagger, dirk, stiletto, dangerous knife or any other weapon, instrument, appliance or substance designed, made or adapted for use primarily as a weapon," is presumptive evidence of intent to use the same unlawfully). See People v. Galindo, 23 N.Y.3d 719 (2014) (evidence legally sufficient even though gun went off accidentally when defendant showed it to cousin on public street where defendant disposed of gun after shooting, initially lied about how cousin was shot, and urged cousin not to come to court; People were not required to prove that defendant specifically intended to use gun unlawfully against cousin or any particular person, only that he intended to use it against “another” person).

7. Presumption Of Sanity - The respondent is presumed to have been sane at the time the acts were allegedly committed. Under PL §§25.00(1) and 40.15, the respondent must rebut the presumption by proving insanity by a preponderance of the evidence. See People v. Kohl, 72 N.Y.2d 191, 532 N.Y.S.2d 45 (1988) (constitutionality of burden of proof upheld).

C. Case Law-Created Rules

1. Person Intends The Ordinary Natural Consequences Of His Or Her Acts - There "is a rebuttable presumption that one intends the natural and probable consequences of one’s own act." Richardson, §3-138. See People v. Getch, 50 N.Y.2d 456, 429 N.Y.S.2d 579 (1980). But see People v. Green, 50 N.Y.2d 891, 430 N.Y.S.2d 267 (1980) (courts would be better advised not to charge the inference); People v. Torres, 46 A.D.3d 925, 849 N.Y.S.2d 90 (2d Dept. 2007), lv denied, 10 N.Y.3d 817 (trial courts should use language similar to that recommended by the Committee on Criminal Jury Instructions; in determining whether intent has been established, jury “may consider the person's conduct and all of the circumstances surrounding that conduct, including, but not limited to … was that result the natural, necessary and probable consequence of that conduct”).

2. Recent And Exclusive Possession Of Fruits Of Crime

a. Generally - The court may infer from evidence of the respondent's unexplained or falsely explained possession of recently stolen property that the respondent is guilty either of the theft, or of the knowing receipt and possession

of stolen property. But see State v. James, 315 S.W.3d 440 (Tenn. 2010) (exclusive and unexplained possession of recently stolen property permits jury to infer burglary only when there is rational connection between possession and participation, guilt more likely than not flows from possession, and there is some other evidence corroborating burglary that warrants inference); People v. Moore, 291 A.D.2d 336, 738 N.Y.S.2d 332 (1st Dept. 2002) (grand larceny and possession charges dismissed where complainant's wallet was stolen after he fell asleep in subway station and defendant was found with the wallet and some of its contents 29-49 minutes later outside another subway station); People v. Keelan, 189 A.D.2d 625, 592 N.Y.S.2d 350 (1st Dept. 1993), lv denied 81 N.Y.2d 972, 598 N.Y.S.2d 774 (inference was "deprived of much, if not all, of its force" where complainant may have lost wallet or defendant may have found it after someone else had stolen it). If the evidence forecloses a reasonable conclusion that the respondent acquired possession after the theft, the court need not consider the inference of criminal possession. See People v. Baskerville, 60 N.Y.2d 374, 469 N.Y.S.2d 646 (1983) (where defendant offered explanation for possession of robbery proceeds, jury should have been given choice between robbery and criminal possession inference); People v. Dobbins, 92 A.D.2d 593, 459 N.Y.S.2d 484 (2d Dept. 1983); Richardson, §3-136.

b. "Recent And Exclusive" - There are "cases in which possession is so far removed in time from the taking or the evidence of shared rather than exclusive possession so strong that no inference instruction would be proper." People v. Baskerville, supra, 60 N.Y.2d at 383. See People v. Cole, 162 A.D.3d 1219 (3d Dept. 2018) (jury charge properly given where defendant was found in possession of stolen items several weeks after burglaries occurred, but burglaries occurred in close proximity to each other and to defendant's residence, within less than one month); People v. Grayson, 138 A.D.3d 1250 (3d Dept. 2016) (jury properly charged on permissible inference that defendant committed robbery where defendant possessed stolen money about two weeks after robbery); Matter of Douglas R., 23 A.D.3d 664, 805 N.Y.S.2d 401 (2d Dept. 2005) (finding reversed where respondent was found in possession of stolen license plate 4 months after theft; facts do not appear in decision, but can be found in JRD brief); People v. Schillaci, 68 A.D.2d 124, 416 N.Y.S.2d 300

(2d Dept. 1979); People v. Mobley, 33 A.D.2d 888, 307 N.Y.S.2d 523 (4th Dept. 1969). But see People v. Combo, 275 A.D.2d 936, 713 N.Y.S.2d 414 (4th Dept. 2000), lv denied 95 N.Y.2d 933, 721 N.Y.S.2d 609 (inference properly charged to jury where there was 10-day period between theft and recovery of item from defendant); People v. Mitchell, 176 A.D.2d 897, 575 N.Y.S.2d 361 (2d Dept. 1991) (defendant found in possession 6 weeks after crime; inference applied); People v. Robins, 125 A.D.2d 721, 509 N.Y.S.2d 889 (2d Dept. 1987) (defendant found in possession 2 weeks after theft; inference applied).

It has been held that the inference may apply even when the contraband was possessed by another individual, with whom the accused acted in concert. People v. Harris, 304 A.D.2d 839, 757 N.Y.S.2d 878 (2d Dept. 2003), lv denied 100 N.Y.2d 582, 764 N.Y.S.2d 392 (2003).

3. Missing Witness Inference

a. Defense Witness - When a witness under the respondent's control is not called, is knowledgeable about a material issue, and might be expected to give favorable evidence, the court may "infer that the missing witness would not have supported or corroborated [the respondent's] evidence," but "may not speculate about what the witness would have said," or "assume that the witness could have provided positive evidence corroborating or filling gaps in the [prosecution's] proof." People v. Paylor, 70 N.Y.2d 146, 518 N.Y.S.2d 102, 103 (1987). The court must advise counsel during trial that it may employ such an inference. See People v. Magett, 196 A.D.2d 62, 608 N.Y.S.2d 434 (1st Dept. 1994); see also People v. Manzi, 113 A.D.3d 481, 978 N.Y.S.2d 202 (1st Dept. 2014) (court, apparently believing that defendant should have anticipated missing witness issue, erred in denying defendant one-day adjournment to produce witness before granting People’s request for missing witness charge). However, without laying the foundation required for a formal inference, a prosecutor may in good faith make summation comments concerning the accused's failure to call witnesses. See People v. Tankleff, 84 N.Y.2d 992, 622 N.Y.S.2d 503 (1994).

The highest court in one state has begun to move away from endorsement of missing witness inferences. Harris v. State, 182 A.3d 821 (Md. 2018) (missing witness instruction adverse to defendant, which may conflict with constitutional principles that

forbid comment on failure of defendant to testify and require that prosecution prove each element beyond a reasonable doubt, and may implicate right of confrontation, should rarely, if ever, be given).

b. Prosecution Witness - The court may infer that a missing prosecution witness' testimony would have been unfavorable. See People v. Gonzalez, 68 N.Y.2d 424, 509 N.Y.S.2d 796 (1986).

c. Within "Control" Of Party - An inference may be drawn if the witness is "available" to both sides, but is favorable to or under the influence of one side. Richardson, §3-140; People v. Hall, 18 N.Y.3d 122 (2011) (instruction warranted where victim's cousin and two other witnesses were friendly with victim and could have been expected to support his version; it was irrelevant that they were also available to defense since "inference is not rebutted when the opposing party chooses not to call the same witness — a witness who, by definition, the opposing party would expect to be hostile"); People v. Gonzalez, supra, 68 N.Y.2d 424 (law enforcement officers, informants, and spouse or other close relatives of a complainant are within prosecutor's "control"). See also People v. Savinon, 100 N.Y.2d 192, 761 N.Y.S.2d 144 (2003) (although relationship between defendant and friend had ended after rape allegedly witnessed by friend, and friend had seen complainant socially after the rape, defendant and witness had been friends and business associates and were sufficiently bonded that defendant had sex with witness present; counsel's statement that witness was unavailable was insufficient, since witness met with defendant and counsel during trial and could have been produced had defendant truly wanted him); People v. Keen, 94 N.Y.2d 533, 707 N.Y.S.2d 380 (2000) (missing witness charge proper where defendant failed to call ex-girlfriend, who was mother of his child; termination of intimate relationship did not remove witness from defendant's "control"); People v. Paulin, 70 N.Y.2d 685, 518 N.Y.S.2d 790 (1987) (common law husband of complainant; jury charge was required); People v. Reeves, 208 A.D.3d 687 (2d Dept. 2022) (court erred in charging jury on missing witness inference after denying one-day continuance for defendant's daughter to travel to New York to provide alibi testimony); People v. Smith, 202 A.D.3d 1003 (2d Dept. 2022), lv denied 38 N.Y.3d 1010 (no inference where 12-year-old child's family refused to allow him to speak to prosecution or testify); People

v. Ahmeti, 71 Misc.3d 139(A) (App. Term, 2d, 11th & 13th Jud. Dist., 2021), appeal withdrawn 37 N.Y.3d 970 (insufficient showing of witness's unavailability where prosecutor merely asserted that she had been informed by former assigned prosecutor that complainant moved back to France and that case would be prosecuted without complainant, and trial prosecutor made no effort to confirm information); People v. Sanchez, 186 A.D.3d 626 (2d Dept. 2020), lv denied 36 N.Y.3d 976 (defendant was entitled to missing witness charge with respect to complainant's date, who was also a victim); People v. Davydov, 144 A.D.3d 1170 (2d Dept. 2016) (counsel should have requested missing witness charge where witness was friend and business associate of complainant and had previously stated that it was complainant who threw first punch); People v. Roseboro, 127 A.D.3d 998 (2d Dept. 2015), lv denied 26 N.Y.3d 934 (charge denied as to defendant's roommate; control not established by fact that roommate provided statement to police or from placement of roommate on People's witness list, and there was no evidence that People's relationship with roommate gave them more control than defendant); People v. Williams, 52 Misc.3d 141(A) (App. Term, 2d Dept. 2016), lv denied 28 N.Y.3d 1032 (no error in denial of missing charge as to complainant, who had signed waiver stating that she did not want to pursue matter and did not respond to subpoena); People v. Khan, 31 Misc.3d 130(A) (App. Term, 2d, 11th & 13th Jud. Dist., 2011) (prosecutor asserted that witness could not be located, that he had conducted Lexis locator search, and that he had attempted to call witness's aunt living in Guyana but was unable to contact her, but, although People had been informed by complaining witness's wife that missing witness had indicated he intended to move back to Florida from New York, no search was conducted of criminal, motor vehicles or social services records within New York and Florida); People v. Smith, 71 A.D.3d 1174, 898 N.Y.S.2d 599 (2d Dept. 2010), lv denied 15 N.Y.3d 778 (no charge regarding complainant's boyfriend where, at time of trial, witness and complainant were no longer dating each other, witness had been arrested and spent time in jail for assaulting complainant, order of protection obtained by complainant against witness was in effect, and witness was not in contact with anyone involved in case, and had indicated unwillingness to cooperate and discontinued his phone service); People v. Onyia, 70 A.D.3d 1202, 894 N.Y.S.2d 610 (3rd Dept. 2010) (witness's status as victim's girlfriend,

and as victim of robbery given that she was present while gun-wielding intruders stormed an apartment, rendered her under People's control; unavailability not established where prosecutor did not explain efforts he undertook to locate witness, and no police or investigators were asked to assist); People v. Rawls, 65 A.D.3d 978, 885 N.Y.S.2d 417 (1st Dept. 2009), lv denied 14 N.Y.3d 773 (defendant's request for missing witness charge denied where witness's casual acquaintance with victim did not place him within People's control); People v. Kass, 59 A.D.3d 77, 874 N.Y.S.2d 475 (2d Dept. 2008) (law assumes that confidential informant who plays major role in events leading to defendant's arrest would, if called, testify favorably to prosecution and adversely to defendant); People v. Vanhoesen, 31 A.D.3d 805, 819 N.Y.S.2d 319 (3rd Dept. 2006) (lack of control not established where People merely claimed that informant was "not happy" and "won't cooperate at this point"); People v. Carrington, 30 A.D.3d 175, 815 N.Y.S.2d 560 (1st Dept. 2006) (court properly issued missing witness charge where defense counsel's conclusory statement that defendant's relationship with girlfriend had terminated did not establish that witness should no longer be presumed to be favorable); People v. Marsalis, 22 A.D.3d 866, 803 N.Y.S.2d 152 (2d Dept. 2005) (trial court erred in failing to give a missing witness charge regarding complainant's brother, who allegedly was assaulted by defendant and was favorably disposed to People, and unavailability not established where only effort People made to locate brother was to ask complainant if he knew brother's address and/or telephone number, and complainant testified that, although he did not know where brother lived, he saw him occasionally, including one time during week before trial, and that brother had recently been released from jail); People v. Soto, 297 A.D.2d 567, 747 N.Y.S.2d 160 (1st Dept. 2002), lv denied 99 N.Y.2d 564, 754 N.Y.S.2d 217 (2002) (charge properly given to jury regarding defendant's friend and next door neighbor); People v. Lewis, 294 A.D.2d 376, 741 N.Y.S.2d 705 (2d Dept. 2002), lv denied 98 N.Y.2d 698, 747 N.Y.S.2d 417 (2002) (witness not available to People where he refused to testify at defendant's first trial and had to be produced in handcuffs pursuant to material witness order); People v. Gardine, 293 A.D.2d 287, 740 N.Y.S.2d 52 (1st Dept. 2002), lv denied 98 N.Y.2d 651, 745 N.Y.S.2d 509 (2002) (while concluding that child who may have witnessed murder was not within People's control, court notes that People's ability to

force child to testify over parent's objection may be more theoretical than practical); People v. Chery, 192 Misc.2d 18, 742 N.Y.S.2d 769 (App. Term, 9th & 10th Jud. Dist., 2002), lv denied 98 N.Y.2d 636, 744 N.Y.S.2d 765 (2002) (unavailability not established by statement of prosecutor that, after speaking to officer, he concluded that witness was unable to testify); People v. Neil, 289 A.D.2d 611, 733 N.Y.S.2d 528 (3rd Dept. 2001) (defendant had right to charge as to physician who allegedly examined victim and documented injuries consistent with sexual assault); People v. McKenzie, 281 A.D.2d 236, 721 N.Y.S.2d 649 (1st Dept. 2001), lv denied 97 N.Y.2d 642, 735 N.Y.S.2d 499 (inference appropriate with respect to passenger who was in defendant's car at time of crime where he was defendant's friend, and defense counsel had interviewed him and placed him on witness list); People v. Jefferson, 281 A.D.2d 433, 722 N.Y.S.2d 32 (2d Dept. 2001) (girlfriend of deceased victim was under People's control); People v. Smith, 279 A.D.2d 259, 719 N.Y.S.2d 33 (1st Dept. 2001), lv denied 96 N.Y.2d 835, 729 N.Y.S.2d 456 (victim not within prosecution's control where he was in Texas and ability to subpoena him was questionable); People v. Townley, 245 A.D.2d 322, 667 N.Y.S.2d 261 (2d Dept. 1997), lv denied 91 N.Y.2d 898, 669 N.Y.S.2d 13 (1998) (charge should have been given regarding complainant's neighbor, who testified before Grand Jury that defendant cut screen to gain entry to house); People v. Rodriguez, 191 A.D.2d 654, 595 N.Y.S.2d 785 (2d Dept. 1993) (charge required with respect to prosecution witness' child); People v. Santiago, 187 A.D.2d 255, 589 N.Y.S.2d 422 (1st Dept. 1992), lv denied 81 N.Y.2d 794, 594 N.Y.S.2d 741 (1993) (no showing that friend of defendant's girlfriend was within defendant's control); People v. Skeeters, 180 A.D.2d 834, 580 N.Y.S.2d 451 (2d Dept. 1992), lv denied 79 N.Y.2d 1007, 584 N.Y.S.2d 462 (no showing that fourth victim was unavailable); People v. Mendez, 138 A.D.2d 637, 526 N.Y.S.2d 220 (2d Dept. 1988) (although defendant testified to hostile relationship, there was no evidence that witness was favorable to prosecution); People v. Erts, 138 A.D.2d 506, 525 N.Y.S.2d 899 (2d Dept. 1988) (partner of undercover; charge required); People v. Morales, 126 A.D.2d 575, 510 N.Y.S.2d 693 (2d Dept. 1987) (defendant's girlfriend; charge upheld); People v. Walker, 105 A.D.2d 720, 481 N.Y.S.2d 388 (2d Dept. 1984) (missing third victim lived in Massachusetts; no charge); People v.

Modeste, 1 Misc.3d 315, 764 N.Y.S.2d 561 (Sup. Ct., Kings Co., 2003) (no charge for either party where missing victim, defendant's boyfriend, had immigration concerns).

With respect to accomplices, compare People v. Bisnauth, 149 A.D.3d 860 (2d Dept. 2017) (testimony of co-defendant who has pleaded guilty is presumptively suspect and prosecutor would not normally be expected to call witness at trial) with People v. Ingram, 71 A.D.3d 786, 896 N.Y.S.2d 446 (2d Dept. 2010), lv denied 15 N.Y.3d 751 (court improperly denied defendant's application for charge with respect to co-defendant who had pleaded guilty and initially had identified two people other than defendant as perpetrators before later implicating defendant at plea allocution; prosecutor's suggestion that witness might perjure herself at trial did not establish People's lack of control over witness).

d. Cumulative Testimony - An inference may be inappropriate where testimony and/or other evidence already has been presented.

Compare People v. Rivera, 206 A.D.3d 498 (1st Dept. 2022), lv denied 38 N.Y.3d 1190 (no error in denial of charge regarding person who recorded video admitted into evidence where video depicted same events witness's testimony would have addressed, and events that occurred before videotaping, such as violent behavior by victim, would have had little or no relevance to issue of whether defendant was justified in beating victim with pipe after threat had abated); People v. Valentin, 173 A.D.3d 1436 (3d Dept. 2019), lv denied 34 N.Y.3d 953 (no inference where absent confidential informant was only eyewitness to controlled buys, but officers' collective testimonies were corroborated by multiple video and audio recordings detailing buys); People v. Coger, 63 Misc.3d 136(A) (App. Term, 2d Dept., 2019), lv denied 33 N.Y.3d 1067 (court at nonjury trial did not err in declining to consider inference with respect to testifying officer's partner, who was present for entire incident where nothing in record suggested that partner possessed non-cumulative information); People v. Moore, 171 A.D.3d 406 (1st Dept. 2019), lv denied 33 N.Y. 1071 (no inference as to "ghost" undercover officer who was monitoring and broadcasting purchasing officer's location and movements because testimony by ghost on that subject would have been cumulative, and defendant failed to make prima facie showing that ghost could see or hear drug transaction); People v. Muier, 50 Misc.3d 136(A) (App. Term, 1st Dept., 2016) (in

cabdriver assault prosecution, no inference as to other cab driver present during incident); People v. Days, 131 A.D.3d 972 (2d Dept. 2015), lv denied 26 N.Y.3d 1108 (no error where court gave missing witness charge with respect to defendant's mother after defendant already elicited testimony of three alibi witnesses); People v. Rosario, 191 A.D.2d 243, 595 N.Y.S.2d 5 (1st Dept. 1993), lv denied 81 N.Y.2d 1019, 600 N.Y.S.2d 207 (no inference as to second "ghost" officer in "buy and bust"); People v. Hernandez, 159 A.D.2d 722, 553 N.Y.S.2d 205 (2d Dept. 1990) (charge improper where defendant's relatives lived in Puerto Rico) and People v. Nieves, 124 A.D.2d 603, 507 N.Y.S.2d 747 (2d Dept. 1986) (charge as to defendant's wife improper where defendant and 3 alibi witnesses testified)

with People v. Smith, 33 N.Y.3d 454 (2019) (party requesting missing witness inference need not negate cumulativeness to meet prima facie burden; People's burden to show cumulativeness not met where they asserted, without explanation, that witness's testimony would be cumulative because "there is absolutely no indication that [witness] would be able to provide anything that wasn't provided by [victim]," and issue of identification was in dispute and uncalled witness apparently had better basis for identification); People v. Garcia, 192 A.D.3d 1463 (4th Dept. 2021) (charge should have been issued as to rape complainant's boyfriend where testimony would have added to testimony of complainant's mother, and could have clarified various inconsistencies and discrepancies concerning timeline and events described by complainant, which were critically important to resolution of forcible compulsion issue); People v. Krupnik, 46 Misc.3d 142(A) (App. Term, 2d Dept., 2015) (court erred in failing to grant inference where complainant and defendant testified and were sharply in dispute, and thus testimony of complainant's friend and coworker might have made the difference); People v. Khan, 31 Misc.3d 130(A) (defendant entitled to missing witness charge regarding second witness to incident); People v. Onyia, 70 A.D.3d 1202 (testimony of victim's girlfriend not cumulative where other witnesses' testimony was inconsistent and thus girlfriend's testimony could have been helpful) and People v. Demagall, 63 A.D.3d 34, 876 N.Y.S.2d 541 (3rd Dept. 2009), lv denied 12 N.Y.3d 924 (reversible error where court refused to give charge as to first expert People retained to examine defendant and precluded defense from asking jury to draw inference) and People v. Korostylev, 64

Misc.3d 856 (County Ct., Sullivan Co., 2019) (missing witness charged granted with respect to surgeon who allegedly removed air gun pellet from complainant's finger where no medical records were entered into evidence and no treating physician was called as witness).

e. Knowledge Of Witness - It must be shown that the witness has relevant knowledge. See People v. Kitching, 78 N.Y.2d 532, 577 N.Y.S.2d 231 (1991) (officer could see drug sale); People v. Dianda, 70 N.Y.2d 894, 524 N.Y.S.2d 381 (1987) (no showing that informant was with defendant and undercover); People v. Ortiz, 193 A.D.2d 449, 597 N.Y.S.2d 682 (1st Dept. 1993), aff'd 83 N.Y.2d 989, 616 N.Y.S.2d 333 (1994) (no showing that undercover saw sale). See also People v. Smith, 225 A.D.2d 1030, 639 N.Y.S.2d 232 (4th Dept. 1996) (prosecutor's assertion that witness claimed to have no recollection did not establish lack of knowledge).

f. Unavailability Of Witness Due To Invocation Of Fifth Amendment - If a witness is not called because it is known that the witness intends to invoke the privilege against self incrimination, the fact-finder should not speculate regarding the witness' failure to testify. See People v. Thomas, 51 N.Y.2d 466, 434 N.Y.S.2d 941 (1980). But see People v. Macana, 84 N.Y.2d 173, 615 N.Y.S.2d 656 (1994) (missing witness inference upheld where defendant failed to substantiate his claim that his father would testify if not for risk of self-incrimination); People v. Fuqua, 122 A.D.3d 1249 (4th Dept. 2014) (where witness said he, rather than defendant, brought weapon into room and defendant used it to kill victim, People did not establish that witness was accomplice or faced criminal liability, and prosecutor did not call witness and there was no communication from witness's attorney, and thus no verification of People's claim that witness would plead the Fifth on stand); People v. Doyle, 273 A.D.2d 69, 709 N.Y.S.2d 57 (1st Dept. 2000), lv denied 95 N.Y.2d 889, 715 N.Y.S.2d 381 (no error in missing witness charge where defendant failed to establish that his "life-long" friend would invoke privilege; witness was not involved in crimes charged, and might have incriminated himself only as to possession of a small quantity of unrecovered drugs).

g. Infant Witness - If the missing witness is a child of "tender years," the court may consider that fact when deciding whether to draw an inference.

See People v. Edwards, 161 A.D.2d 151, 554 N.Y.S.2d 553 (1st Dept. 1990). See also People v. Stepney, 42 Misc.3d 139(A) (App. Term, 2d Dept., 2014) (no missing witness charge where parents either did not respond to police requests for interview or refused to permit child to testify); People v. Moore, 41 A.D.3d 737, 839 N.Y.S.2d 767 (2d Dept. 2007), lv denied 9 N.Y.3d 879 (no missing witness charge regarding five-year-old son of complainant, who was presumed to be incapable of being sworn and could not be deemed knowledgeable about material issue); People v. Gardine, supra, 293 A.D.2d 287 (child was unavailable where child and parent refused to cooperate with People).

h. Respondent's Failure To Testify - The judge may not consider the respondent's failure to testify. People v. Ayala, 173 A.D.2d 718, 570 N.Y.S.2d 609 (2d Dept. 1991).

i. Comments During Summation - Even without a missing witness inference, counsel may comment on summation regarding a failure to call a witness if counsel establishes that the witness would have provided material and non-cumulative testimony. See People v. Williams, 5 N.Y.3d 732, 800 N.Y.S.2d 360 (2005); but see State v. Hill, 974 A.2d 403 (N.J. 2009) (inference should generally not operate against defendants since it could improperly assist State in proving elements beyond a reasonable doubt, and prosecutorial comment that relieves State of burden of proof or suggests obligation on part of defendant to prove innocence is improper).

4. Mailing And Delivery - When issuing a warrant for a respondent who has failed to appear in response to a mailed notice, the court ordinarily presumes the notice was delivered. Indeed, under the law, a letter which is shown to have been addressed, stamped and mailed is presumed to have been delivered to the addressee. Even absent proof of delivery to postal authorities, the presumption applies if it is established that the letter was placed in a receptable for outgoing mail, and would have been mailed pursuant to regular office practice. Richardson, §3-128. See Bossuk v. Steinberg, 58 N.Y.2d 916, 460 N.Y.S.2d 509 (1983); Nassau Insurance Company v. Murray, 46 N.Y.2d 828, 414 N.Y.S.2d 47 (1978); People v. Scott, 47 Misc.3d 138(A) (App. Term, 2d Dept., 2015) (although witness testified that she was familiar with DMV's procedures for "alerting motorists regarding suspensions," and that suspension notices are mailed through United States Postal Service by DMV representative in Albany, she

did not adequately describe DMV's standard office mailing practices and procedures for Albany office); People v. Outram, 22 Misc.3d 131(A), 880 N.Y.S.2d 875 (App. Term, 2d & 11th Jud. Dist., 2009) (People could not rely on presumption that defendant received license suspension order since New York City-based DMV employee who testified had no personal knowledge of procedures of Albany DMV office which handled mailing of orders); Krieger v. City of New York, 118 Misc.2d 537, 461 N.Y.S.2d 171 (Sup. Ct. Queens Co., 1983). Although it does not create a presumption, habit evidence can help prove that a mailing occurred. See People v. Johnson, 190 A.D.2d 910, 593 N.Y.S.2d 589 (3rd Dept. 1993) (although evidence of routine transmission of notices of readiness to The Legal Aid Society did not create presumption, it was evidence of transmission).

III. Expert Testimony

Ordinarily, expert testimony may be admitted when the subject of the testimony is beyond the understanding of the fact-finder. See People v. Cronin, 60 N.Y.2d 430, 470 N.Y.S.2d 110 (1983). But see Federal Rules, 702 (expert may testify if it will assist trier of fact). Occasionally, lay testimony will suffice even though a subject appears at first blush to be an appropriate subject for an expert. See People v. Santi, 3 N.Y.3d 234, 785 N.Y.S.2d 405 (2004) (patient-witnesses could testify about effects of anesthesia); see also State v. Galicia, 278 A.3d 131 (Md. 2022), cert denied 143 S.Ct. 491 (user's ability to adjust location tracking feature of smartphone is within understanding of average lay person, and thus witness may refer to that ability without being qualified as expert); People v. Catano-Lezcano, 74 Misc.3d 28 (App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 2021) (expert testimony regarding defendant's intoxication admitted; dissenting judge asserts that it is well within ken of average juror to determine whether individual is intoxicated or not); People v. Abdul, 244 A.D.2d 237, 665 N.Y.S.2d 406 (1st Dept.1997), lv denied 91 N.Y.2d 939, 671 N.Y.S.2d 719 (1998) (shoe print evidence involves a physical comparison, not a novel scientific technique); Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997) (scientific expert is one who relies on the application of scientific principles, rather than on skill-based or experience-based observation).

Also, a lay opinion may be given when the subject matter is not beyond the understanding of the fact-finder but is such that it would be impossible to accurately

describe the facts without stating an opinion or impression. People v. Haynes, 39 A.D.3d 562, 833 N.Y.S.2d 193 (2d Dept. 2007); see also State v. Gerena, 265 A.3d 145 (N.J. 2021) (determination of admissibility may be more easily made where witness is estimating approximate age to be distant from relevant legal threshold age; in contrast, the closer perceived age is to legal threshold age to be proved, the greater the need for precise evidence); People v. Anonymous, 213 A.D.3d 580 (1st Dept. 2023), lv denied _N.Y.3d_ (7/7/23) (no error in redaction from 911 calls of lay witness references to defendant as appearing “crazy” or “mentally ill”); United States v. Kaplan, 490 F.3d 110 (2d Cir. 2007) (lay opinion regarding defendant’s knowledge is admissible only when testimony is rationally based on facts witness himself perceived).

Under the Frye test [Frye v.United States, 293 F. 1013 (D.C. Cir. 1923)], the proponent of novel scientific evidence must establish that the "accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally." People v. Wesley, 83 N.Y.2d 417, 422, 611 N.Y.S.2d 97, 100 (1994); see also People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255 (1983); Lugo v. New York City Health and Hospitals Corporation, 89 A.D.3d 42 (2d Dept. 2011) Frye inquiry is directed at basis for opinion and does not examine whether expert’s conclusion is sound, and court’s job is not to decide who is right and who is wrong, but rather to decide whether or not there is sufficient scientific support for expert's theory; absence of medical literature directly on point pertains to weight to be given to testimony, but does not preclude admissibility of testimony based on reasonable extrapolations from legitimate empirical data).

In federal court, the Frye test has been superseded by the Federal Rules. Daubert v. Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786 (1993) (Frye test has been superseded by Federal Rules, which require showing of relevance and reliability); see also Kumho Tire Company v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999) (Daubert holding applies to testimony by non-scientific experts); New Jersey v. Olenowski, 289 A.3d 456 (N.J. 2023) (court abandons Frye test and adopts principles similar to Daubert standard for criminal and quasi-criminal cases); Parker v. Mobil Oil Corp., 7 N.Y.3d 434, n.4, 824 N.Y.S.2d 584 (2006) (Daubert cases are instructive to the extent that they address reliability of expert’s methodology).

It must also be shown that the specific procedures used were adequate. See People v. Wesley, supra, 83 N.Y.2d 417; see also People v. Brooks, 31 N.Y.3d 939 (2018) (proper procedure for addressing concerns about foundation can include in limine hearing where court determines whether there is too great an analytical gap between data and opinion). On appeal, "abuse of discretion" is the standard of review of a trial court's ruling on the admissibility of expert testimony. See, e.g., General Electric Company v. Joiner, 522 U.S. 136, 118 S.Ct. 512 (1997) (abuse of discretion standard, not a more stringent standard, applies even when exclusion of evidence is outcome-determinative).

An expert may rely on personal knowledge or facts which are in the record. People v. Jones, 73 N.Y.2d 427, 541 N.Y.S.2d 340 (1989).

An expert may also base an opinion on other facts, including out-of-court statements by third party sources, if the facts are of a kind accepted in the profession as a reliable basis for an opinion and there is independent evidence establishing the reliability of the out-of-court material, or the facts come from a witness who is subject to cross-examination. See People v. Sugden, 35 N.Y.2d 453, 363 N.Y.S.2d 923 (1974); see also People v. Goldstein, 6 N.Y.3d 119, 810 N.Y.S.2d 100 (2006), cert denied 547 U.S. 1159, 126 S.Ct. 2293 (psychiatric profession accepts use of hearsay); Tornatore v. Cohen, 162 A.D.3d 1503 (4th Dept. 2018) (expert may rely on hearsay if it is commonly relied on in profession and does not constitute sole or principal basis for opinion; although expert’s discussions with treating physician provided basis for several components of plaintiff’s future medical needs, and expert acknowledged extent of reliance on those hearsay statements, they were only link in chain of data upon which expert relied); People v. Howard, 134 A.D.3d 1153 (3d Dept. 2015) (arson investigator properly relied on consultant who was retired master electrician, had assisted investigator in previous investigations and assisted other companies and investigators, and had previously been qualified as expert in state and federal court, where investigator did not testify as to substance of consultant’s statements and opinions were not principally based upon consultant’s examination; investigator also properly relied on statements of child where investigator testified that interviews with home’s occupants were part of investigation, based conclusions only in part on interview, and did not

describe substance of interview or statements); People v. Demagall, 114 A.D.3d 189, 978 N.Y.S.2d 416 (3d Dept. 2014), lv denied 23 N.Y.3d 1035 (in murder prosecution in which defendant raised insanity defense, new trial ordered where People's expert testified to another expert's statements relating to defendant's malingering and regarding contents of mental health records after People indicated intent to call other expert to testify, but People later decided not to call expert); People v. Assi, 63 A.D.3d 19, 877 N.Y.S.2d 231 (1st Dept. 2009), aff'd 14 N.Y.3d 335 (court recognizes that experts in fracture analysis may rely on photographs rather than examination of broken property); People v. Czarnowski, 268 A.D.2d 701, 702 N.Y.S.2d 398 (3rd Dept. 2000) (pharmacist testifying about chemical composition of pills could rely in part on package inserts and pharmaceutical reference manuals); Matter of Omar B., 175 A.D.2d 834, 573 N.Y.S.2d 301 (2d Dept. 1991) (psychiatrist could rely on records which were not in evidence); In re Colarusso, 7 Misc.3d 1025(A), 801 N.Y.S.2d 231 (Sup. Ct., Franklin Co., 2005) (in civil commitment proceeding, testimony by doctor excluded where conversation with respondent's aunt essentially provided factual predicate for opinion); Federal Rules, 803(18) (to the extent it is called to expert's attention on cross or is relied upon on direct, published treatise, periodical, etc. established as reliable by witness, other expert, or judicial notice may be admitted).

Even when hearsay upon which the expert relied in formulating an opinion is purportedly offered only to show the basis for the opinion and not for its truth, there may still be a right of confrontation violation if there is a risk that the fact-finder will consider the hearsay for its truth. In People v. Goldstein, supra, 6 N.Y.3d 119, the Court of Appeals found reversible error where the prosecutor's expert was permitted to describe facts she had obtained in interviews of third parties; while acknowledging that the prosecution met its burden to show that reliance on this type of hearsay was accepted by the psychiatric profession, the Court concluded that "there should be at least some limit on the right of the proponent of an expert's opinion to put before the fact-finder all the information, not otherwise admissible, on which the opinion is based," or else "a party might effectively nullify the hearsay rule by making that party's expert a 'conduit for hearsay,'" and that in the case at hand the statements were offered for their truth and were testimonial under Crawford v. Washington). See also State v. McLeod, 66 A.3d

1221 (N.H. 2013) (Confrontation Clause not violated when expert testifies regarding independent judgment based upon inadmissible testimonial hearsay about which expert does not testify on direct examination; even though defendant may be "forced" to elicit hearsay in order to cross examine expert, criminal process often involves making of difficult judgments); People v. Jones, 166 A.D.3d 803 (2d Dept. 2018), lv denied 33 N.Y.3d 950, cert denied 140 S.Ct. 435 (information derived by expert police witnesses from debriefing of gang members was testimonial evidence improperly conveyed to jury where there was no indication that officers merely relied on hearsay for purpose of forming opinion); United States v. Johnson, 587 F.3d 625 (4th Cir. 2009), cert denied 130 S.Ct. 2128 (expert witness's reliance on evidence that Crawford v. Washington would bar if offered directly is problem only where witness is used as conduit for testimonial hearsay); People v. Martich, 30 A.D.3d 305, 818 N.Y.S.2d 48 (1st Dept. 2006) (no Confrontation Clause issue where expert's brief narration of history taken from victim was admitted to explain basis of opinion, but victim was subject to cross-examination); Howard v. Walker, 406 F.3d 114 (2d Cir. 2005) (habeas petitioner's right of confrontation was violated where trial court allowed expert to base testimony on statements otherwise inadmissible pursuant to Bruton v. United States); State v. Jones, 603 S.E.2d 168 (N.C. Ct. App., 2004), appeal dism'd, 607 S.E.2d 660 (lab analysis was admitted not for truth, but as basis for expert opinion); cf. State v. John S., 23 N.Y.3d 326 (2014), reargument den'd 24 N.Y.3d 933 (hearsay related to rape and robbery charges that resulted in indictments met minimum due process requirements outlined in Floyd Y. (see below) but uncharged 1978 rape allegations in presentence report, which respondent never admitted, were not sufficiently reliable); Matter of Charada T., 23 N.Y.3d 355 (2014) (trial court erred in permitting expert witness to testify about uncharged rape, which respondent never admitted, where witness based testimony on hearsay information from presentence report); Matter of Floyd Y., 22 N.Y.3d 95 (2013) (in Mental Hygiene Law Article 10 Sex Offender Management and Treatment Act proceeding, court applies Due Process Clauses and Mathews v. Eldridge balancing test, and holds that hearsay basis of expert's opinion is admissible if proponent demonstrates that hearsay is reliable and court determines that probative value in helping fact-finder evaluate expert's opinion substantially outweighs prejudicial effect of

hearsay; court notes that rule excluding all basis hearsay would undermine truth-seeking function by keeping foundation for expert's opinion hidden, that to extent fact-finder's assessment might turn on acceptance of basis evidence as true, respondent has opportunity to present competing view of basis evidence through respondent's expert and court can instruct jury about proper consideration of basis evidence, and criminal charges that resulted in acquittal are more prejudicial than probative and charges that resulted in neither acquittal nor conviction require close scrutiny).

Where a medical expert's conclusions are based on an examination of x-rays, the failure to introduce the x-rays into evidence usually is error. Compare Hambsch v. New York City Transit Authority, 63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984) (error to permit physician to testify based on reading of x-ray which was not in evidence) and Wagman v. Bradshaw, 292 A.D.2d 84 (2d Dept. 2002) with Karayianakis v. L & E. Grommery, Inc., 141 A.D.2d 610, 529 N.Y.S.2d 358 (2d Dept. 1988) (no error in failure to introduce x-rays where medical findings were based on expert's clinical observations and a physical examination, and x-rays, for the most part, served to confirm conclusions). In addition, an expert may not rely primarily on the opinions of other experts who have not been called to testify. See People v. Wlasiuk, 32 A.D.3d 674, 821 N.Y.S.2d 285 (3rd Dept. 2006); O'Shea v. Sarro, 106 A.D.2d 435, 482 N.Y.S.2d 529 (2d Dept. 1984); Borden v. Brady, 92 A.D.2d 983, 461 N.Y.S.2d 497 (3rd Dept. 1983) (non-testifying doctor's report containing opinion relevant to crucial issue was not merely a "link in the chain of data").

"Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion." CPLR §4515. Since the basis of the opinion may or may not be adequate, it is better to have the expert specify the factual basis before eliciting an opinion. Richardson, §7-310, at p. 475. See People v. Jones, supra, 73 N.Y.2d 427 (expert must testify to facts outside record before giving opinion).

Although the witness must be qualified through training, education, knowledge or experience, see, e.g., People v. Morehouse, 5 A.D.3d 925, 774 N.Y.S.2d 100 (3rd Dept.,

2004), lv denied 3 N.Y.3d 644 (sexual assault nurse qualified through training and experience); People v. Munroe, 307 A.D.2d 588, 763 N.Y.S.2d 691 (3rd Dept. 2003) (nurse practitioner was properly qualified to give medical opinion), the court need not formally "certify" the witness as an expert. See People v. Jean-Laurent, 51 A.D.3d 818, 859 N.Y.S.2d 658 (2d Dept. 2008), lv denied, 11 N.Y.3d 737; People v. Lamont, 21 A.D.3d 1129, 800 N.Y.S.2d 480 (3rd Dept. 2005) (there is legitimate criticism of practice of declaring witness an expert since it bolsters the witness and gives the witness the imprimatur of the court in front of the jury); People v. Abrams, 232 A.D.2d 240, 649 N.Y.S.2d 5 (1st Dept. 1996), lv denied 88 N.Y.2d 1066, 651 N.Y.S.2d 410.

Specific Subjects Of Expert Testimony

A. Bite Marks - See Howard v. Mississippi, 300 So.3d 1011 (Miss. 2020) (new scientific understanding is that individual cannot be reliably identified through bite-mark comparison); People v. Middleton, 54 N.Y.2d 42, 444 N.Y.S.2d 581 (1980); People v. Bethune, 105 A.D.2d 262, 484 N.Y.S.2d 577 (2d Dept. 1985) (witness' inability to positively attribute defendant's scar to the victim's bite did not preclude admission of evidence).

B. Blood Stains - See People v. Mountain, 66 N.Y.2d 197, 495 N.Y.S.2d 944 (1985) (evidence of similarity of defendant's blood type to that of assailant is admissible, even if blood type is common, unless potential prejudice outweighs probative value); People v. Crosby, 116 A.D.2d 731, 498 N.Y.S.2d 31 (2d Dept. 1986) (testimony, based on technique called electrophoresis, that victim's blood type occurred in .4% of the population and was consistent with blood found on defendant was admissible).

It might be noted that a lay witness may identify a bloodstain. See People v. Mathews, 176 A.D.2d 1135, 575 N.Y.S.2d 952 (3rd Dept. 1991). See also People v. Whitaker, 289 A.D.2d 84, 734 N.Y.S.2d 149 (1st Dept. 2001) (testimony of blood spatter expert properly admitted).

C. Credibility Of Witnesses - An expert may not testify that a witness is telling the truth, or vouch for a witness' general credibility. See People v. Ciaccio, 47 N.Y.2d 431, 418 N.Y.S.2d 371 (1979) (error where expert testified that witness' version was more credible than defendant's); United States v. Knapp, 73 M.J. 33 (Armed Forces U.S. Ct. App., 2014) (investigator improperly allowed to testify that specialized training

made him able to identify "nonverbal cues during interviews" indicating that defendant had lied during interrogation); People v. Lakhani, 70 Misc.3d 55 (App. Term, 9th & 10th Jud. Dist., 2020) (social worker's testimony improperly bolstered complainant's credibility where witness, in response to defense counsel's questions about outcry and subsequent failure to mention acts again for several years until parent repeatedly inquired, testified that "the original trace memory is the original memory" and that "[e]ven if this person, this adult … is trying to put something else there, is asking about it, it's not going to change … that original trace memory," which is "encoded"); People v. Blond, 96 A.D.3d 1149 (3d Dept. 2012) (court properly precluded defendant from calling social workers to testify that they had conducted statement validity analysis test of victim for use in Family Court, where such testimony is authorized); People v. Major, 154 A.D.2d 225, 545 N.Y.S.2d 923 (1st Dept. 1989) (error where witness testified that sex crime victim did not consent); Matter of Anthony B., 122 A.D.2d 870, 505 N.Y.S.2d 916 (2d Dept. 1986) (doctor improperly testified that victim's personality was one of the reasons he concluded that she had been raped). Cf. Kravitz v. Long Island Medical Center, 113 A.D.2d 577, 581, 497 N.Y.S.2d 51, 54 (2d Dept. 1985) (it "is questionable at best whether the present state of the art is so exact as to allow such testimony in any case"). But see People v. Johnson, 175 A.D.3d 1130 (1st Dept. 2019), lv denied 34 N.Y.3d 1017 (People's expert properly permitted to testify that persons asserting insanity defenses may exaggerate mental illnesses to avoid prison); People v. Jones, 261 A.D.2d 920, 690 N.Y.S.2d 366 (4th Dept. 1999), lv denied 93 N.Y.2d 972, 695 N.Y.S.2d 58 (no error where expert was permitted to testify about his perception of the truthfulness of the information defendant provided, but not defendant's general credibility); People v. Doczy, 210 A.D.2d 425, 620 N.Y.S.2d 408 (2d Dept. 1994), lv denied 85 N.Y.2d 936, 627 N.Y.S.2d 999 (1995) (expert permitted to opine as to truthfulness of defendant's statements during psychiatric interview).

However, expert testimony may be admitted to explain unusual behavior which might undermine a witness' credibility. See People v. Fisher, 53 N.Y.2d 907, 440 N.Y.S.2d 630 (1981) (testimony concerning "repression" offered to explain witness' initial failure to identify killer); People v. Parks, 41 N.Y.2d 36, 390 N.Y.S.2d 848 (1976) (teacher explained complainant's mental deficiency to aid jury in evaluating witness'

behavior and testimony). But see People v. Smith, 127 A.D.2d 864, 512 N.Y.S.2d 244 (2d Dept. 1987) (officer not qualified to testify that victim repressed and blocked out event).

In People v. Washington, 238 A.D.2d 263, 657 N.Y.S.2d 24 (1st Dept. 1997), the court upheld the exclusion of expert testimony regarding the susceptibility of young children to suggestion. See also People v. Johnston, 273 A.D.2d 514, 709 N.Y.S.2d 230 (3rd Dept. 2000), lv denied 95 N.Y.2d 935 (no error in preclusion of the testimony of psychologist concerning children's susceptibility to suggestive interrogation; trial court rationally concluded that subject matter was within jurors' common knowledge and experience, and found that such opinions had not received general acceptance in field of psychology); People v. Kanani, 272 A.D.2d 186, 709 N.Y.S.2d 505 (1st Dept. 2000), lv denied 95 N.Y.2d 935 (People established that expert's theories were highly controversial and had been rejected by other courts and experts); but see Jenkins v. Commonwealth, 308 S.W.3d 704 (Ky. 2010) (expert testimony regarding suggestive interviewing techniques which can affect reliability or accuracy of child witness's memory or recall is admissible); Washington v. Schriver, 255 F.3d 45 (2d Cir. 2001) (rejecting First Department's reasoning in People v. Washington, 238 A.D.2d 263, court notes that sufficient consensus exists to warrant conclusion that use of coercive or highly suggestive interrogation techniques can create significant risk that interrogation will distort child's recollection).

D. Credibility Of Confession - See People v. Powell, 37 N.Y.3d 476 (2021) (testimony meant to be informational tool to educate jury on causal connection between relevant factors and false confessions without opining on facts of case); People v. Bedessie, 19 N.Y.3d 147 (2012) (since false confessions that precipitate wrongful conviction manifestly harm defendant, crime victim, society and criminal justice system, and experts in psychiatry and psychology or social sciences may educate jury about factors of personality and situation that 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 particular defendant's confession was or was not reliable, and expert's proffer must be relevant to the specific defendant and interrogation before the court; in this case, judge properly determined that testimony

would not assist jury in evaluating voluntariness and truthfulness of defendant's confession or in reaching verdict); Miller v. State, 770 N.E.2d 763 (Indiana 2002) (court erred in excluding in its entirety testimony by expert in field of “social psychology of police interrogation and false confessions”; however, such an expert may not opine regarding credibility of particular witness); People v. Caparaz, 80 Cal.App.5th 669 (Cal. Ct. App., 1st Dist., 2022) (court erred in ruling that defendant’s expert could not testify regarding his assessment of defendant’s own suggestibility and susceptibility; it did not matter that there was no coercion since defense theory was that defendant’s psychological makeup made him susceptible); People v. Churaman, 184 A.D.3d 852 (2d Dept. 2020) (court erred in excluding testimony where expert’s report referred to, inter alia, characteristics that heightened defendant’s vulnerability to manipulation, detectives’ interrogation techniques, and improper participation of defendant’s mother during interview); 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 28 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. Krivak, 78 Misc.3d 988 (County Ct., Putnam Co., 2023) (court allows expert to testify regarding "Promises of Leniency," "Minimization" and "Contamination"; error correction technique but only if there is evidence presented that any investigator directed defendant or the other witnesses to strike portions of their statements even though no errors existed; and information provided to defendant which investigators knew was false or had been recanted); People v. Thomas, 68 Misc.3d 542 (Sup. Ct., Kings Co., 2020) (defense expert allowed to testify about background information and studies regarding false confessions, police interrogations and Reid method of interrogation; explanation of how basic principles of decision-making can lead to false confessions when police use Reid method; description of other factors that can contribute to false confessions including lack of sleep and intoxication by drugs or alcohol; and his opinion regarding whether police used Reid method); 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 testimony was not relevant to facts of case and expert's qualifications and claims were suspect; testimony of another expert excluded because testimony offered to demonstrate that defendant's personality traits make him susceptible to confessing falsely was irrelevant, potentially confusing, and lacking in sufficient certainty)

E. Capacity To Waive Miranda Rights

In Matter of Chad L., 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 R., 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. Layboult, 227 A.D.2d 773 (3d Dept. 1996) (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).

F. Respondent's State Of Mind During Crime - See People v. Anderson, 36 N.Y.3d 1109 (2021) (no error in exclusion, without Frye hearing, of testimony by expert concerning science of adolescent brain development and behavior to assist jury in determining whether People had met burden of disproving justification defense), aff'g 180 A.D.3d 923 (2d Dept. 2020) (impulsiveness of adolescents not matter beyond ken of typical juror); People v. Williams, 97 N.Y.2d 735, 742 N.Y.S.2d 597 (2002) (trial court properly excluded testimony offered to support justification defense by showing that defendant demonstrated paranoid delusional thinking and behavior at time of murder and believed victim was going to rob him); People v. Aphaylath, 68 N.Y.2d 945, 510 N.Y.S.2d 83 (1986) (court improperly excluded testimony concerning Laotian culture where defendant's extreme emotional disturbance defense was based on stresses from his refugee status; expert testimony need not be based upon contact with defendant); People v. Cronin, supra, 60 N.Y.2d 430 (court improperly excluded testimony concerning ability to form intent after using alcohol and drugs); People v. Murphy, 79 A.D.3d 1451, 913 N.Y.S.2d 815 (3d Dept. 2010) (testimony excluded where subclinical PTSD was not recognized syndrome, disease or mental defect, and specific symptoms -- hypervigilance, emotional numbing, and sense of helplessness in face of stress -- were within jury's range of knowledge and intelligence); People v. Florestal, 53 A.D.3d 164, 860 N.Y.S.2d 86 (1st Dept. 2008), lv denied, 11 N.Y.3d 788 (trial court erred in refusing to allow defense expert to render opinion as to whether defendant's state of mind was one of "depraved indifference" to plight of her child); People v.Madera, 24 A.D.3d 278, 808 N.Y.S.2d 181 (1st Dept. 2005), lv denied 6 N.Y.3d 815 (reversible error where trial court excluded testimony regarding ability of cocaine to produce psychotic, delusional and paranoid state in which burglary defendant could truly believe his life was in danger when he entered premises); United States v. Mull, 40 Fed. Appx. 300 (8th Cir. 2002) (effects of cocaine use on witness' ability to perceive and recall was within jury's common understanding); People v. Eberle, 265 A.D.2d 881, 697 N.Y.S.2d 218 (3rd Dept. 1999) (expert improperly permitted to testify that infant died from "homicidal" suffocation); People v. Real, 137 A.D.2d 416, 524 N.Y.S.2d 208 (1st Dept. 1988) (court improperly excluded testimony concerning effect of angel dust on ability to form intent); People v. Fish, 235 A.D.2d 578, 652 N.Y.S.2d 124 (3rd Dept. 1997), lv denied 89

N.Y.2d 1092, 660 N.Y.S.2d 386 (court properly excluded testimony by "alcoholism expert" since effect of alcohol on mental state is within ken of juror); People v. Wilson, 133 A.D.2d 179, 518 N.Y.S.2d 690 (2d Dept. 1987) (court improperly admitted testimony from psychologist who merely observed defendant in court and reviewed documents which were not shown to be of a type typically relied on by experts); People v. DeSarno, 121 A.D.2d 651, 503 N.Y.S.2d 877 (2d Dept. 1986) (since expert testified about effect of personality disorder on defendant's state of mind and behavior, court did not err in precluding testimony concerning state of mind just before shooting); People v. Miller, 116 A.D.2d 595, 497 N.Y.S.2d 455 (2d Dept. 1986) (speculative conclusion that it was "possible" defendant was delusional at time of crime was inadmissible). See also Federal Rules, 704(b) (expert may not express opinion as to existence of mental state required for guilt); United States v. DiDomenico, 985 F.2d 1159 (2d Cir. 1993) (evidence of "dependent personality disorder" inadmissible to show lack of guilty knowledge).

G. DNA Tests - See People v. Wakefield, 38 N.Y.3d 367 (2022), cert denied 143 S.Ct. 1799 (no error in admission, following Frye hearing, of DNA mixture interpretation evidence generated by TrueAllele Casework System); People v. Williams, 35 N.Y.3d 24 (2020) (trial court should have held Frye hearing with respect to admissibility of low copy number (LCN) DNA evidence and results of statistical analysis conducted using proprietary forensic statistical tool (FST) and controlled by New York City Office of Chief Medical Examiner); People v. Wesley, supra, 83 N.Y.2d 417 (DNA profiling evidence generally accepted as reliable by scientific community); People v. Patterson, 204 A.D.3d 548 (1st Dept. 2022) (removal of barriers to access FST and FST's use by defense attorneys in criminal cases was not sufficient to meet People's burden to show consensus in scientific community); United States v. Jones, 965 F.3d 149 (2d Cir. 2020) (district court, applying Daubert, did not err in admitting DNA evidence and expert testimony based on Forensic Statistical Tool analysis used by New York City OCME); People v. Foster-Bey, 158 A.D.3d 641 (2d Dept. 2018) (no error in denial of defendant's motion seeking exclusion, or Frye hearing to determine admissibility, of testimony relating to low copy number DNA testing and forensic statistical tool where another lower court had conducted extensive Frye hearing and

determined that LCN DNA testing was admissible and other lower courts had ruled that LCN DNA testing and FST are not novel and are generally accepted by relevant scientific community); People v. Gonzalez, 155 A.D.3d 507 (1st Dept. 2017), lv denied 30 N.Y.3d 1115 (no Frye hearing required regarding expert testimony relating to low copy number DNA testing); People v. Rios, 102 A.D.3d 473 (1st Dept. 2013), lv denied 20 N.Y.3d 1103 (no error in admission of analyst's testimony indicating that no two people can have same DNA profile); People v. Ko, 304 A.D.2d 451, 757 N.Y.S.2d 561 (1st Dept. 2003) (evidence based on mitochondrial analysis is admissible); People v. Morales, 227 A.D.2d 648, 643 N.Y.S.2d 217 (2d Dept. 1996), lv denied 89 N.Y.2d 926, 654 N.Y.S.2d 729 (polymerase-chain-reaction method accepted as reliable); People v. Golub, 196 A.D.2d 637, 601 N.Y.S.2d 502 (2d Dept. 1993), lv denied 82 N.Y.2d 895, 610 N.Y.S.2d 162; State v. Tester, 968 A.2d 895 (Vt., 2009) (error where DNA match evidence admitted without additional evidence of frequency with which matches might occur by chance); United States v. Jakobetz, supra, 955 F.2d 786; People v. Carter, 50 Misc.3d 1210(A) (Sup. Ct., Kings Co., 2016) (Forensic Statistical Tool not new, novel, or experimental, and even if it were, other courts' Frye rulings obviated need for a Frye hearing); People v. Lopez, 50 Misc.3d 632 (Sup. Ct., Bronx Co., 2015) (court refuses to preclude Forensic Statistical Tool-based evidence or order Frye hearing); People v. Debraux, 50 Misc.3d 247 (Sup. Ct., N.Y. Co., 2015) (Forensic Statistical Tool procedure generally accepted as reliable; Frye hearing unnecessary); People v. Collins, 49 Misc.3d 595 (Sup. Ct., Kings Co., 2015) (FST not generally accepted in relevant scientific community); People v. Belle, 47 Misc.3d 1218(A) (Sup. Ct., Bronx Co., 2015) (court determines, without hearing, that mathematics-based FST computer program satisfies Frye); People v. Wakefield, 47 Misc.3d 850 (Sup. Ct., Schenectady Co., 2015) (DNA evidence based on probabilistic genotype analysis generally accepted under Frye standard); People v. Styles, 40 Misc.3d 1205(A) (Sup. Ct., Kings Co., 2013) (evidence based on Forensic Statistical Tool did not require Frye hearing); People v. Owens, 187 Misc.2d 838, 725 N.Y.S.2d 178 (Sup. Ct., Monroe Co., 2001) (without Frye hearing, court finds admissible evidence based on Short Tandem Repeat DNA profiling); People v. Klinger, 185 Misc.2d 574, 713 N.Y.S.2d 823 (County Ct., Nassau Co., 2000) (mitochondrial DNA evidence is admissible); People v. Keene, 156 Misc.2d

108, 591 N.Y.S.2d 733 (Sup. Ct. Queens Co., 1992) (evidence rejected where analysis included method not accepted in scientific community); People v. Huang, 145 Misc.2d 513, 546 N.Y.S.2d 920 (County Ct. Nassau Co., 1989) (evidence admissible); People v. Castro, 144 Misc.2d 956, 545 N.Y.S.2d 985 (Sup. Ct. Bronx Co., 1989); see also People v. Peck, 16 Misc.3d 126(A), 841 N.Y.S.2d 827 (App. Term, 9th & 10th Jud. Dist., 2007) (results of blood test improperly admitted where People did not establish compliance with New York Health Department regulations requiring that blood be drawn into, or subsequently deposited into, container which contains solid anticoagulant).

It has been held that DNA evidence, by itself, can support a conviction. People v. Rush, 242 A.D.2d 108, 672 N.Y.S.2d 362 (2d Dept. 1998); but see People v. Herskovic, 165 A.D.3d 835 (2d Dept. 2018) (verdict against weight of evidence where, inter alia, forensic statistical tool analysis was based upon Caucasian population and failed to take into account genetic history of defendant, a member of Hasidic population, and likelihood ratio result was only 133 - it was 133 times more likely that sample originated from defendant and complainant than from complainant and unknown unrelated person - a relatively insubstantial number).

H. Drug Analysis

1. Use Of Known Standards - See People v. Ramis, 213 A.D.3d 951 (2d Dept. 2023) (testimony should have been stricken where none of the experts could testify to personal knowledge of testing of known standard used); People v. Hushie, 145 A.D.2d 506, 535 N.Y.S.2d 445 (2d Dept. 1988) (chemist's opinion was competent even though some tests involved comparison to known standards whose reliability was not shown, since other tests did not involve use of known standards); People v. Flores, 138 A.D.2d 512, 526 N.Y.S.2d 125 (2d Dept. 1988); People v. Branton, 67 A.D.2d 664, 412 N.Y.S.2d 35 (2d Dept. 1979) (expert opinion improperly accepted where reliability of samples was not established); People v. Miller, 57 A.D.2d 668, 393 N.Y.S.2d 679 (3rd Dept. 1977).

2. Factual Basis For Opinion - See People v. Jones, supra, 73 N.Y.2d 427 (expert failed to state reason for conclusion that tested substance was "controlled substance"); People v. Moon, 256 A.D.2d 24, 682 N.Y.S.2d 133 (1st Dept. 1998), lv denied 93 N.Y.2d 974, 695 N.Y.S.2d 61 (1999) (chemist properly relied on colleague's

test results); People v. Shaw, 176 A.D.2d 832, 574 N.Y.S.2d 1015 (2d Dept. 1991), lv denied 79 N.Y.2d 832, 580 N.Y.S.2d 212 (chemist could rely on mass spectrometry test she did not perform).

3. Conditions At Laboratory - See People v. Conneely, 39 Misc.3d 138(A) (App. Term, 2d Dept., 2012) (order vacating conviction for driving while intoxicated reversed where court relied on "well documented problems with the Nassau County Police Department Laboratory," but maintenance and calibration of breathalyzer machine were not implicated by testing irregularities identified at lab or referenced by statements of public officials regarding lab and its closure); People v. Marino, 99 A.D.3d 726 (2d Dept. 2012) (motion to set aside verdict denied where defendant failed to show that newly discovered evidence of crime lab's violations of professional standards would probably change result at new trial; this case involved blood alcohol testing, but there was no evidence of misconduct or compromised analysis outside of lab's drug chemistry section); People v. Parker, 84 A.D.3d 1508 (3d Dept. 2011), lv denied 18 N.Y.3d 927 (no requirement that prosecution submit calibration records to establish accuracy of scale used to weigh cocaine; forensic scientist testified that balances were tested for accuracy every week using standardized weights, and calibrated every six months by service representative); People v. Dudley, 279 A.D.2d 330, 719 N.Y.S.2d 241 (1st Dept. 2001) (court properly precluded defense questioning regarding police laboratory's receipt of only provisional accreditation); but cf. People v. Baker, 51 A.D.3d 1047, 856 N.Y.S.2d 707 (3rd Dept. 2008) (insufficient foundation for evidence of defendant's blood alcohol where there was no proof that gas chromatograph had been properly calibrated before it was used to test defendant's blood; general statements about what expert typically does with blood sample are insufficient in absence of testimony that he actually took such measures with regard to blood sample at issue); People v. Conneely, 35 Misc.3d 430 (Dist. Ct., Nassau Co., 2011) (DWI conviction vacated due to systemic lab error problems in Nassau County Police Department Laboratory).

4. Scientific Acceptance - See People v. Whalen, 1 A.D.3d 633, 766 N.Y.S.2d 458 (3rd Dept. 2003), lv denied 1 N.Y.3d 603 (2004) (results of "EMIT" test conducted by probation officer properly admitted at violation of probation hearing; given

acceptance of test by courts, no scientific proof of reliability was necessary).

I. Fingerprints - See United States v. Baines, 573 F.3d 979 (10th Cir. 2009) (although there is no evidence that fingerprint analysis has been subject to testing that would meet standards of science, there is little that guides and limits experts' subjective judgments and little evidence of independent peer review, and technique has not been accepted by community of unbiased experts, there is overwhelming acceptance by experts in the same field, fingerprint analysis has been used extensively by law enforcement agencies all over the world for almost a century and analysts have undergone demanding training culminating in proficiency examinations, and there is a low error rate); State v. Langill, 945 A.2d 1 (N.H. 2008) (conclusions of expert who relied on "ACE-V" methodology was sufficiently reliable under Daubert standard despite expert's failure to take notes documenting application of the methodology or failure to employ blind verification by expert who was unaware of her conclusion); People v. Jones, 206 A.D.3d 1566 (4th Dept. 2022) (burglary conviction reversed where expert testified that fingerprint has approximately 80-120 classifiable characteristics and that every characteristic must be identical for two prints to be considered a match, but, because of limited nature of partial print, she could only match 18 characteristics); United States v. Mitchell, 365 F.3d 215 (3rd Cir. 2004) (latent fingerprint evidence sufficiently reliable to satisfy Daubert); United States v. Crisp, 324 F.3d 261 (4th Cir. 2003) (fingerprint evidence satisfies Daubert); United States v. Rogers, 26 Fed. Appx. 171 (4th Cir. 2001) (court notes that many courts have refused to hold evidentiary hearing on admissibility). United States v. Plaza, 188 F.Supp.2d 549 (E.D. Pa., 2002) (upon Government's motion for re-consideration of its earlier ruling (179 F.Supp.2d 492) excluding fingerprint evidence, court concludes that process employed by FBI is sufficiently reliable); People v. Donaldson, 107 A.D.2d 758, 484 N.Y.S.2d 123 (2d Dept. 1985) (police officer's practical experience qualified him to testify as expert); People v. Hyatt, 2001 WL 1750613 (Sup. Ct., Kings Co., 2001) (court rejects as "junk science" testimony of defense expert who was a historian and a social scientist and whose theories regarding the invalidity of latent fingerprint analysis had not been sufficiently tested).

J. Identification - In People v. Lee, 96 N.Y.2d 157, 726 N.Y.S.2d 361 (2001),

the Court of Appeals, while finding that the trial court did not abuse its discretion in excluding the evidence, concluded that psychological studies regarding the accuracy of eyewitness testimony are not within the ken of the typical juror, and that a court may not exclude such evidence as per se inadmissible.

Then, in People v. LeGrand, 8 N.Y.3d 449, 835 N.Y.S.2d 523 (2007), the court held that "where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror"). In People v. Boone, 30 N.Y.3d 521 (2017), the Court of Appeals held that when a witness's identification is at issue, and the witness and defendant appear to be of different races, the court shall, upon request, give a jury charge on cross-race effect, stating that the jury should consider whether there is a difference in race between the defendant and witness, and, if so, should consider that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race, and whether the difference in race affected the accuracy of the identification. See also People v. Powell, 37 N.Y.3d 476 (2021) (no error in preclusion of evidence where robbery involved single-witness identification made after brief encounter with armed stranger of different race, but identification was corroborated by defendant's statements as well as surveillance footage); People v. McCullough, 27 N.Y.3d 1158 (2016) (expert testimony properly precluded where eyewitness's testimony had been corroborated by getaway driver's testimony, rendering proposed expert testimony unnecessary); People v. Berry, 27 N.Y.3d 10 (2016) (no error in exclusion of testimony about effect of high stress on accuracy of identification where defense failed to submit evidence demonstrating that evidence satisfied Frye, and witness had opportunity to observe defendant for five to ten minutes an hour and a half prior to shooting); People v. Oddone, 22 N.Y.3d 369 (2013) (proposition that eyewitnesses routinely overestimate, by large margin, duration of relatively brief events is generally accepted scientific principle and not within ken of

average juror); People v. Santiago, 17 N.Y.3d 661 (2011) (reversible error in pretrial exclusion of expert testimony on studies showing that eyewitness confidence is poor predictor of identification accuracy and studies regarding confidence malleability, testimony on effects of post-event information on eyewitness memory, and testimony on inaccuracy of identifications of Hispanic people by non-Hispanic Caucasians appears relevant and is beyond ken of average juror and court also should have given more consideration to whether proposed testimony concerning exposure time, lineup fairness, forgetting curve, and simultaneous versus sequential lineups was relevant and beyond ken of average juror, but testimony concerning weapon focus, effects of lineup instructions, wording of questions, and unconscious transference would have been irrelevant since victim was not aware that assailant had weapon and there is no evidence of improper lineup instructions, suggestive wording, or presence of defendant's image in photographs victim saw prior to identifying him in photographic array; court also abused discretion when, after defense had rested, court denied defendant's renewed request to call expert witness where People had introduced corroborative evidence of two other witness's identifications, but one witness saw only part of perpetrator's face and identified defendant with only 80% confidence and identification from photographs of lineup may have been tainted by memory of photograph of defendant he had seen in newspaper, and other witness's identification may have been influenced by memory of police artist's sketch of assailant, which calls into question independence of evidence from victim's identification); People v. Muhammad, 17 N.Y.3d 532 (2011) (no error in exclusion of expert testimony where victim was only witness who implicated defendant and identification was not corroborated, but victim knew defendant for over a decade prior to shooting and spoke to him shortly before altercation and recognized defendant at time of attack); State v. Henderson, 27 A.3d 872 (N.J. 2011) (relying on scientific evidence suggesting that memory is malleable and causes eyewitness misidentifications, court sets out new guidelines for admissibility of identification evidence; first, when defendants can show evidence of suggestiveness, all relevant system and estimator variables should be explored at pretrial hearings, and, second, court system should develop enhanced jury charges on eyewitness identification); People v. Abney, 13 N.Y.3d 251, 889 N.Y.S.2d

890 (2009) (in People v. Abney, court should have admitted testimony regarding witness confidence, and conducted Frye hearing as to testimony regarding effect of event stress, exposure time, event violence and weapon focus, and cross-racial identification, where there was no evidence other than one witness's identification to connect defendant to crime, and she did not describe him as possessing any unusual or distinctive features or physical characteristics; in People v. Allen, no error in exclusion of testimony where case did not depend exclusively on one witness's testimony, another witness identified defendant as knife-wielding robber who searched him and stood nearby throughout course of robbery, and defendant was not a stranger to either witness); People v. Jones, 211 A.D.3d 748 (2d Dept. 2022), lv denied 39 N.Y.3d 1078 (expert testimony with respect to cross-racial identifications excluded where there was, inter alia, no indication that Trinidadian complainant was of different cognizable racial group than defendant, who asked court to take judicial notice of him as "a light skinned Black male," and no studies were shown to have been conducted regarding cross-race effect under those circumstances); People v. McCullough, 126 A.D.3d 1452 (4th Dept. 2015) (court erred in excluding expert testimony where case hinged on accuracy of eyewitness's identification and there was little or no corroborating evidence; fact that the eyewitness viewed perpetrators at relatively close range and in well-lit conditions did not constitute corroborating evidence and only corroborating testimony came from individual whose credibility was suspect); People v. Nazario, 100 A.D.3d 783 (2d Dept. 2012), lv denied 20 N.Y.3d 1063 (fact that victim was confronted by defendant on clear, sunny day, and had unobstructed view of defendant at close range, did not constitute corroborating evidence); Young v. Conway, 698 F.3d 69 (2d Cir. 2012), rehearing en banc denied 715 F.3d 79, cert denied 134 S.Ct. 20 (concluding that State courts erred in finding independent source for in-court identification, Second Circuit relies on and discusses social science research presented by Innocence Project); United States v. Brownlee, 454 F.3d 131 (3rd Cir. 2006) (trial court erred in admitting expert to testify regarding some matters but not others); United States v. Amador-Galvan, 9 F.3d 1414 (9th Cir. 1993) (under Daubert, evidence not per se inadmissible); United States v. Smith, 736 F.2d 1103 (6th Cir. 1984) (expert testimony may now be generally accepted); but see People v. LeGrand, 94 A.D.3d 99 (1st Dept. 2012) (no error where

trial court precluded defense expert from testifying about effect of “weapon focus” on eyewitness identifications; while witnesses did take notice of knife when they saw defendant stab cab driver, none of them were close enough to be threatened by it, and they got clear look at assailant after stabbing, when knife was no longer point of focus); People v. Zohri, 82 A.D.3d 493, 918 N.Y.S.2d 109 (1st Dept. 2011) (no error in denial of request to present expert testimony where police testimony placed defendant very close to scene of crime within 15 minutes after it occurred, and established that he resembled perpetrator the victim described, both in clothing and in physical appearance); People v. Santiago, 75 A.D.3d 163, 900 N.Y.S.2d 273 (1st Dept. 2010) (no error in trial court’s refusal to allow defendant to present expert testimony regarding identifications or order Frye hearing; plurality notes, inter alia, that victim and two other witnesses independently described and identified defendant and all three witnesses had ample opportunity to observe defendant at close quarters in well-lit setting and noticed defendant before any criminality, while concurring judge finds no support for proposition that trial courts properly can exclude expert testimony when identification testimony can be regarded as "reliable" and this court “should not try to read the tea leaves in [the Court of Appeals’ decisions] and determine whether multiple identifications can cross-corroborate each other so as to provide more than a ‘little . . . corroborating evidence connecting the defendant to the crime’”); United States v. Bartlett, 567 F.3d 901 (7th Cir. 2009), cert denied 130 S.Ct. 1137 (court properly excluded testimony about high error rates where two people who identified defendant were strangers to him but four others knew him well; although jurors have beliefs about fallibility of memory, expert evidence still may be vital since jurors’ beliefs may be mistaken, but using expert to explore issue may sidetrack trial); People v. Chisolm, 57 A.D.3d 223, 868 N.Y.S.2d 643 (1st Dept. 2008) (testimony properly excluded where only one of two closely related incidents involved identification issue, videotape and defendant's admission placed him in close spatial and temporal proximity to crime, and witness had good opportunity to view perpetrator, gave detailed description matching defendant soon after incident, and identified defendant from videotape and in lineup); People v. Allen, 53 A.D.3d 582, 861 N.Y.S.2d 775 (2d Dept. 2008), lv denied, 11 N.Y.3d 829 (testimony properly precluded where there was corroborating evidence unrelated to description by eyewitnesses);

People v. Norstrand, 35 Misc.3d 367 (Sup. Ct., Monroe Co., 2011) (defense expert permitted to explain problems associated with: identification of strangers; cross-race effect; exposure duration; other perceptual factors; flashbulb memory; event stress; recovered memories; lineup issues; and confidence malleability); People v. Abney, 31 Misc.3d 1231(A) (Sup. Ct., N.Y. Co., 2011) (expert permitted to testify regarding event stress, weapon focus, event duration, confidence malleability, effect of post-event information on accuracy of identification, and correlation between confidence and accuracy of identification, but not regarding own-race bias); People v. Banks, 16 Misc.3d 929, 842 N.Y.S.2d 313 (County Ct., West. Co., 2007) (expert may testify regarding low correlation between confidence of witness and accuracy of identification, mug-shot bias, relation between exposure time and retention, and weapons focus but may not testify as to phenomena of stress, partial disguise or cross-race bias, and expert is limited to setting forth relevant psychological factors and interpreting research data but may not give opinion as to accuracy of any identification or whether psychological phenomena actually influenced identifications or failures to identify; court rejects People's argument that relevant scientific community should be membership of American Psychological Association or American Psychology Law Society, since appropriate scientific community consists of psychologists who have conducted research in field of eyewitness identification); People v. Williams, 14 Misc.3d 571, 830 N.Y.S.2d 452 (Sup. Ct., Kings Co., 2006) (double-blind lineups, mugshot exposure, confidence malleability, weapon focus, cross-racial identification, exposure duration phenomena); People v. Radcliffe, 196 Misc.2d 381, 764 N.Y.S.2d 773 (Sup. Ct., Bronx Co., 2003) (cross-racial identification); cf. People v. Hernandez, 181 A.D.3d 530 (1st Dept. 2020), lv denied 35 N.Y.3d 1066, cert denied 141 S.Ct. 1691 (testimony on effect on memory of lengthy passage of time excluded because proposed testimony was within jurors' ordinary experience and knowledge).

Regarding the admissibility of expert testimony at a Wade hearing, seeh People v. Chuyn, 33 Misc.3d 1233(A) (Sup. Ct., N.Y. Co., 2011) and 35 Misc.3d 1216(A) (Sup. Ct., N.Y. Co., 2012) (not admissible; in first decision, court notes that expert testimony was admitted in Matter of Kashawn B., NYLJ, 3/18/02 (Fam. Ct., Kings Co.)); see also State v. Henderson, 27 A.3d 872 (N.J. 2011) (courts have discretion to allow expert

testimony).

It is possible that courts will be less likely to admit expert testimony in nonjury proceedings, cf. People v. Fratello, 243 A.D.2d 340, 663 N.Y.S.2d 169 (1st Dept. 1997), aff'd 92 N.Y.2d 565, 684 N.Y.S.2d 149 (1998) (testimony regarding night visibility), cert denied 526 U.S. 1068.

K. Arson - See People v. Rivers, 18 N.Y.3d 222 (2011) (no error in admission of expert testimony ruling out accidental and natural causes of fires and concluding that one fire was intentionally set; previous rule prohibiting expert testimony concerning whether fire was intentionally set appeared as dictum at time when fire investigations involved far less technical expertise than they do today); People v. Jackson, 65 N.Y.2d 265, 491 N.Y.S.2d 138 (1985) (conflicting opinions created credibility question for jury); People v. Howard, 92 A.D.3d 1219 (4th Dept. 2012) (error where fire marshal testified regarding six categories of motivation for setting fire, including revenge and crime concealment, since People failed to demonstrate that categories are generally accepted in scientific community or that subject is beyond ordinary ken of trier of fact); People v. Maxwell, 116 A.D.2d 667, 497 N.Y.S.2d 735 (2d Dept. 1986) (experts allowed to opine that fires were not chemically, mechanically, electrically or naturally caused).

L. Polygraph And Other Credibility Tests - Since the scientific community has not endorsed the reliability of polygraph tests, the results of such tests are usually excluded. See People v. Leone, 25 N.Y.2d 511, 307 N.Y.S.2d 430 (1969). See also Gosciminski v. State, 132 So.3d 678 (Fla. 2013) (upon fresh look at admissibility of polygraph results under Frye v. United States, court concludes that relevant scientific community still considers procedure to be unreliable); People v. Angelo, 88 N.Y.2d 217, 644 N.Y.S.2d 460 (1996) (expert could not testify that opinion was based in part on results of polygraph exam); State v. A.O., 965 A.2d 152 (NJ, 2009) (given continuing doubts about reliability of polygraph evidence, court bars admission of polygraph evidence based on stipulation entered into without counsel); United States v. Cordoba, 194 F.3d 1053 (9th Cir. 1999) (after holding earlier [104 F.3d 225] that evidence is not per se inadmissible, court, relying on Daubert, upholds exclusion of evidence); United States v. Kwong, 69 F.3d 663 (2d Cir. 1995), cert denied 517 U.S. 1115, 116 S.Ct. 1343 (1996); People v. Tarsia, 50 N.Y.2d 1, 427 N.Y.S.2d 944 (1980) (court notes that voice

stress evaluation tests are considered unreliable). In United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261 (1998), the Supreme Court discussed the present state of polygraph evidence while upholding a per se rule against the admission of such evidence in military court martial proceedings. Although four justices expressed strong doubts concerning the validity of polygraph evidence, a dissenting justice found the per se rule unconstitutional, and four concurring justices questioned the wisdom of a per se rule.

Other courts have been more receptive to polygraph evidence. See, e.g., United States v. Gilliard, 133 F.3d 809 (11th Cir. 1998) (evidence not inadmissible per se, but there was insufficient evidence of acceptance in scientific community of technique used); United States v. Posado, 57 F.3d 428 (5th Cir. 1995) (court notes improvement in technique); see also People v. Yavru-Sakuk, N.Y.L.J., 4/2/01, p. 35, col. 1 (App. Term, 2d & 11th Jud. Dist.) (concurring judge notes that issue should be revisited given growing acceptance of tests), rev'd on other grounds 98 N.Y.2d 56, 745 N.Y.S.2d 787 (2002); People v. Kogut, 10 Misc.3d 305, 806 N.Y.S.2d 366 (Sup. Ct., Nassau Co., 2005) (where defendant claimed he confessed after detective's misrepresentation that he had failed polygraph exam, defendant could introduce evidence that he passed exam); People v. Miller, 2 Misc.3d 1006(A), 784 N.Y.S.2d 923 (County Ct., Chemung Co., 2004) (polygraph evidence may be considered for purposes of motion to dismiss in interests of justice).

In United States v. Semrau, 693 F.3d 510 (6th Cir. 2012), the court, citing concerns regarding the reliability of the evidence and the potential for juror confusion, held that results from a functional magnetic resonance imaging lie detection test were not admissible to prove the veracity of the defendant's denials of wrongdoing.

M. Syndrome And Similar Trauma Evidence

1. Rape Trauma Syndrome - Testimony by an expert concerning the symptoms and behavior associated with rape trauma syndrome is admissible to help the fact-finder evaluate unusual behavior, such as delayed reporting, which might otherwise be misunderstood. However, such evidence may not be admitted solely to prove that the victim was raped. See People v. Taylor, 75 N.Y.2d 277, 552 N.Y.S.2d 883 (1990) (evidence admissible to explain behavior jury might find unusual or

inconsistent with charge, but not to show that victim's symptoms are consistent with those exhibited by other victims); People v. Weinstein, 207 A.D.3d 33 (1st Dept. 2022), **lv granted** 38 N.Y.3d 1154 (expert did not usurp jury's role by testifying that in her work she had assessed credibility of alleged victims and perpetrators by considering whether allegations in particular case were consistent with patterns of behavior of victims and perpetrators described in literature, since there was no indication from testimony that she was familiar with allegations facing defendant); People v. Whitehead, 142 A.D.2d 745, 531 N.Y.S.2d 48 (3rd Dept. 1988) (admissible to rebut defendant's evidence that victim told others that she had not been raped); Pulinario v. Goord, 291 F.Supp.2d 154 (E.D.N.Y., 2003) (trial court improperly precluded defendant from offering expert testimony because defendant lied to prosecutor's psychiatrist). But see People v. Harris, 249 A.D.2d 775, 672 N.Y.S.2d 153 (3rd Dept. 1998) (no error in admission of physician's testimony that victim's injuries were consistent with forcible intercourse). It is not yet clear whether rape trauma syndrome testimony is admissible to counter a defense of consent.

It has been held that male rape trauma syndrome evidence is also admissible. See People v. Yates, 168 Misc.2d 101, 637 N.Y.S.2d 625 (Sup. Ct., N.Y. Co. 1995).

2. Child Sexual Abuse Syndrome - See People v. Nicholson, 26 N.Y.3d 813 (2016) (defendant failed to demonstrate that jurors had sufficient understanding of syndrome); People v. Spicola, 16 N.Y.3d 441 (2011) (no error in admission of expert testimony regarding Child Sexual Abuse Accommodation Syndrome where defendant attacked boy's credibility by citing his failure to report alleged abuse promptly and his willingness to continue to associate with defendant, and expert testified that CSAAS was not a diagnosis, that it includes a range of behaviors observed in cases of validated child sexual abuse that seem counterintuitive to a lay person, that the presence or absence of particular behavior was not substantive evidence that sexual abuse had, or had not, occurred, and that he was not venturing an opinion as to whether sexual abuse took place in this case); People v. Cintron, 75 N.Y.2d 249, 552 N.Y.S.2d 68 (1990) (testimony admitted with respect to reactions of child abuse victims to courtroom procedures); People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790 (1986) (where defendant was charged with endangering welfare of minor,

expert testimony was admissible to explain how children abused by step-parents suffer psychologically; in People v. Taylor, supra, 75 N.Y.2d 277, court noted that Keindl involved rebuttal of defense evidence of delayed reporting); People v. Sedano, 88 Cal.App.5th 474 (Cal. Ct. App. 5th Dist., 2023) (no error in admission of testimony that that 94 percent of abusers were uncles or others who had pre-existing relationship with child, and testimony that delayed disclosure was more the rule than the exception based on studies showing that 74 percent of sexually abused children had not disclosed twelve months after molestation, 50 percent had not disclosed five years later, and another group averaged ten to fifteen years before disclosing); People v. Lapenias, 67 Cal.App.5th 162 (Cal. Ct. App., 4th Dist., 2021) (expert improperly permitted to testify that it is "rare" for children to make up stories about sexual abuse); People v. May, 188 A.D.3d 1309 (3d Dept. 2020), lv denied 36 N.Y.3d 974 (no error in admission of expert testimony from nurse practitioner who stated that unremarkable sexual abuse examination was common in cases of child sexual abuse); People v. Shane, 187 A.D.3d 1219 (2d Dept. 2020), lv denied 36 N.Y.3d 1054 (testimony exceeded permissible bounds when prosecutor tailored hypothetical questions to include facts concerning charged abuse); People v. Werkheiser, 171 A.D.3d 1297 (3d Dept. 2019), lv denied 33 N.Y.3d 1109 (no error in admission of expert testimony regarding why victims delay reporting and might not report all details from outset); People v. Ruiz, 159 A.D.3d 1375 (4th Dept. 2018) (expert improperly explained "grooming" and other behaviors associated with perpetrators of child sexual abuse and closely tracked victim's testimony concerning defendant's conduct); People v. Rodriguez, 115 A.D.3d 580 (1st Dept. 2014), lv denied 23 N.Y.3d 967 (no error in admission of expert testimony discussing in general terms how child might react to sexual abuse, and when and to whom child might reveal abuse, where testimony did not include responses to hypotheticals tailored to facts of case or otherwise imply that expert found testimony of complainant to be credible); People v. Gopaul, 112 A.D.3d 966 (2d Dept. 2013) (no error in admission of testimony regarding adolescent sexual abuse to explain issue of delayed disclosure, counter defense claim that complainant fabricated allegations when her parents objected to her having a boyfriend, and explain why complainant did not recall with specificity when certain incidents occurred and why victims of adolescent

sexual abuse may manifest "flat affect" when testifying); People v. Mehmood, 112 A.D.3d 850 (2d Dept. 2013) (expert improperly allowed to testify that truthfulness of child's disclosure of sexual abuse can be analyzed by looking at whether content is specific and not age-appropriate knowledge, and that child's allegations of oral sexual conduct, sexual contact between males, or reciprocal contact would be "rather unique and idiosyncratic," and more believable than "just a global statement that I was touched"); People v. Persaud, 98 A.D.3d 527 (2d Dept. 2012), lv denied 20 N.Y.3d 1014 (no error in admission of testimony about "blending," which occurs when child or adolescent sexual abuse victim and perpetrator perform same acts more than once in same place and makes it difficult for adolescent to sequentially separate distinct elements of what occurred); People v. Ballerstein, 52 A.D.3d 1192, 860 N.Y.S.2d 718 (4th Dept. 2008) (no error in admission of testimony that victim was acting out sexually, and that behavior could be sign of sexual abuse but there could be other explanations); People v. Shay, 210 A.D.2d 735, 620 N.Y.S.2d 189 (3rd Dept. 1994), lv denied 85 N.Y.2d 980 (expert improperly permitted to testify about behavior by victim that was associated with sexual abuse of children rather than just behavior that might be unusual or beyond ken of juror); People v. Gonzalez, 226 A.D.2d 214, 640 N.Y.S.2d 547 (1st Dept. 1996) (testimony admitted to explain why victim did not provide full account each time she was questioned); People v. Singh, 186 A.D.2d 285, 588 N.Y.S.2d 573 (2d Dept. 1992) (expert improperly testified that symptoms were consistent with those exhibited by child sexual abuse victims); People v. Wellman, 166 A.D.2d 302, 560 N.Y.S.2d 643 (1st Dept. 1990), lv denied 78 N.Y.2d 958, 573 N.Y.S.2d 653 (1991) (testimony admitted to explain why 6-year-old victim did not immediately identify defendant); People v. Smith, 153 A.D.2d 995, 545 N.Y.S.2d 616 (3rd Dept. 1989); People v. Coffey, 140 A.D.2d 861, 528 N.Y.S.2d 692 (3rd Dept. 1988); People v. Benjamin R., 103 A.D.2d 663, 481 N.Y.S.2d 827 (4th Dept. 1984) (evidence concerning reluctance of intrafamilial sexual abuse victims to reveal crime was properly admitted after defense counsel cross-examined victim about delay in reporting); United States v. Gillespie, 852 F.2d 475 (9th Cir. 1988) (court properly admitted testimony regarding anatomically correct dolls). Cf. People v. Falzone, 150 A.D.2d 249, 541 N.Y.S.2d 415 (1st Dept. 1989) (court improperly admitted testimony concerning child prostitution

syndrome; testimony conveyed impression that child who was coerced by defendant exhibited same characteristics as other child prostitutes).

It has been held that the accused may not offer expert testimony that the child sexual abuse complainant did not manifest the usual demeanor of a rape victim. People v. Wells, 118 Cal.App.4th 179 (Calif. Ct. App., 1st Dist. 2004).

3. Battered Person Syndrome/Domestic Violence - See People v. Hansson, 162 A.D.3d 1234 (3d Dept. 2018) (in child abuse prosecution, mother who wanted to retain expert witness to testify about theory of coercive control and explain why mother would falsely confess to beating child and/or why she would protect boyfriend, did not present evidence demonstrating that theory of coercive control has gained general acceptance in scientific community, and evidence that being subjected to coercive control would cause individual to falsely confess); People v. Levasseur, 133 A.D.3d 411 (1st Dept. 2015) (no error in admission of expert testimony describing typical features of cycle of domestic violence); People v. Roblee, 83 A.D.3d 1126, 920 N.Y.S.2d 467 (3d Dept. 2011) (no error in admission of expert testimony regarding domestic violence to explain victim's delay in seeking aid or attention immediately following attack); People v. Abdul, 76 A.D.3d 563, 906 N.Y.S.2d 594 (2d Dept. 2010), lv denied 15 N.Y.3d 892 (improper for expert to state that child abuse syndrome was cause of death where prosecution's theory was not that cumulative effect of numerous minor injuries caused death); People v. Franklin, 5 A.D.3d 219, 772 N.Y.S.2d 825 (1st Dept. 2004), lv denied 3 N.Y.3d 640 (expert properly permitted to answer hypothetical question, based on facts in evidence, to explain victim's behavior after assault); People v. Lovelace, 287 A.D.2d 652, 731 N.Y.S.2d 745 (2d Dept. 2001) (trial court erred in refusing to allow expert and social worker to testify that defendant suffered from battered child syndrome); People v. White, 4 Misc.3d 797, 780 N.Y.S.2d 727 (Dist. Ct., Nassau Co., 2004) (testimony not admissible since jury could evaluate complainant's testimony and her minimal delay in reporting); People v. Seeley, 186 Misc.2d 715, 720 N.Y.S.2d 315 (Sup. Ct., Kings Co., 2000) (expert would be allowed to testify that defendant is a battered person); People v. Colberg, 182 Misc.2d 798, 701 N.Y.S.2d 608 (County Ct., Sullivan Co., 1999) (male defendant permitted to present evidence that he suffered from "Battered Syndrome"); People v. Ellis, 170 Misc.2d 945, 650 N.Y.S.2d 503

(Sup. Ct., N.Y. Co., 1996) (expert testimony admissible to aid jury in evaluating complainant's recantation); People v. Torres, 128 Misc.2d 129, 488 N.Y.S.2d 358 (Sup. Ct. Bronx Co., 1985) (admissible in support of justification defense).

4. Shaken Baby Syndrome - See People v. Scoon, 303 A.D.2d 525, 756 N.Y.S.2d 100 (2d Dept. 2003), lv denied 100 N.Y.2d 624, 767 N.Y.S.2d 408 (2003) (no Frye hearing required where testimony concerned amount of time between shaking and onset of symptoms; testimony was supported by medical literature and caselaw); see also Clark v. State, 315 So.3d 987 (Miss. 2021), cert denied 142 S.Ct. 466 (no error in admission of testimony of pediatrician who opined that child's death resulted from Shaken Baby Syndrome (or Abusive Head Trauma) where SBS/AHT diagnosis has been increasingly questioned in recent years, but science by nature is seldom certain, and thus validation of proposed submission need not be universally accepted); People v. Bailey, 144 A.D.3d 1562 (4th Dept. 2016) (judgment of conviction vacated where defendant showed that advances in medicine and science had established that injuries could have been caused by short-distance fall rather than shaken baby or shaken impact syndrome); People v. Flores-Estrada, 55 Misc.3d 1015 (Sup. Ct., Kings Co., 2017) (motion for preclusion of expert testimony on Shaken Baby Syndrome/Abusive Head Trauma or Frye hearing denied; court notes that case law cited by defendant pertained to post-conviction motion practice, where courts have treated recent scrutiny of SBS/AHT, and growing debate surrounding it, as newly discovered evidence).

5. Neonaticide Syndrome - See People v. Wernick, 89 N.Y.2d 111, 651 N.Y.S.2d 392 (1996) (defense failed to establish that defendant's denial of pregnancy and post-birth reactive psychosis is pattern of behavior generally recognized in relevant scientific community).

6. Munchausen Syndrome By Proxy - See People v. Coulter, 2003 WL 22469713 (App. Term, 9th & 10th Jud. Dist., 2003), lv denied 1 N.Y.3d 570 (admission of expert testimony from psychiatrist and pediatrician upheld).

7. Parental Alienation Syndrome - People v. Fortin, 289 A.D.2d 590, 735 N.Y.S.2d 819 (2d Dept. 2002) (trial court, after Frye hearing, properly refused to admit evidence because defendant failed to establish general acceptance).

8. Sex Trafficking Victims - See People v. O'Sullivan, 211 A.D.3d 751 (2d Dept. 2022), lv denied 39 N.Y.3d 1143 (in promoting prostitution prosecution, admission of expert testimony that complainant exhibited signs of being victim of human trafficking was error); People v. Abdur-Razzaq, 60 Misc.3d 631 (Sup. Ct., Bronx Co., 2018) (upon Frye hearing, court finds admissible expert testimony regarding trauma bonding between sex traffickers and their victims, and coercive control techniques utilized by traffickers, to explain paradoxical conduct of victims).

N. Forcible Sexual Assault And Other Injuries - See People v. Oddone, 22 N.Y.3d 369 (2013) (no error where doctor permitted to testify that victim's neck had been compressed for "something in the range of 2, 3, 4 minutes"; court rejects defendant's contention that expert who is scientist can express no opinion based on own experience and must rely only on published studies or texts); People v. Clyde, 18 N.Y.3d 145 (2011) (harmless error in admission of testimony from physicians that injuries met definition of "physical injury" and created risk of "serious physical injury"); Velazquez v. Commonwealth, 557 S.E.2d 213 (Va. 2002) (expert invaded province of jury by testifying that injuries were consistent with non-consensual intercourse); People v. Ramsaran, 154 A.D.3d 1051 (3d Dept. 2017), lv denied 30 N.Y.3d 1063 (no error in admission of medical examiner's opinion that manner of death was homicide where examiner had ruled out all other possible explanations); People v. Charles, 124 A.D.3d 986 (3d Dept. 2015) (no error in admission of testimony as to whether victim had been subjected to forcible rape, which was proper opinion as to how likely it is that consensual intercourse causes injuries such as those suffered by victim); People v. Salce, 124 A.D.3d 923 (3d Dept. 2015) (court erred in refusing to allow defense expert police officer with expertise in assaults and knives to testify that nature of defendant's injuries and complainant's wounds were not inconsistent with defensive action by defendant); People v. Simmons, 93 A.D.3d 739 (2d Dept. 2012) (no error in admission of testimony that lack of physical trauma was not inconsistent with occurrence of forcible sexual assault); People v. Vaello, 91 A.D.3d 548 (1st Dept. 2012) (licensed nurse practitioner who was certified as sexual assault nurse examiner permitted to testify about relationship between victim's genital injury and forcible sexual intercourse); People v. Momplaisir, 84 A.D.3d 437 (1st Dept. 2011), lv denied 17 N.Y.3d 808 (no

error in admission of testimony by certified sexual assault nurse that victim's injuries had been recently acquired and that abrasions on victim's labia were consistent with forcible penetration); People v. Seymore, 79 A.D.3d 477, 912 N.Y.S.2d 51 (1st Dept. 2010) (no error where court permitted eyewitness who happened to be experienced boxer and trainer of boxers to testify that punch delivered while holding heavy object would be more effective than empty-handed punch); People v. Welch, 71 A.D.3d 1329, 897 N.Y.S.2d 546 (3rd Dept. 2010), lv denied 15 N.Y.3d 811 (no error where sexual assault nurse examiner testified that she had never found injuries similar to the victim's in cases of consensual intercourse and that her review of research literature indicated that physical injuries occurred in only 10% of consensual cases); People v. Babb, 68 A.D.3d 887, 890 N.Y.S.2d 610 (2d Dept. 2009), lv denied 14 N.Y.3d 769 (defense counsel erred in failing to object to testimony by expert that some of victim's wounds were defensive); State v. Lenin, 967 A.2d 915 (N.J. Super. Ct., App. Div., 2009) (testimony regarding dynamics between victim, offender and location of incident was not beyond ken of jury); People v. Colon, 61 A.D.3d 772, 876 N.Y.S.2d 525 (2d Dept. 2009), lv denied 13 N.Y.3d 743 (witness was "expert" where she had been midwife for twenty-seven years and trained as sexual assault forensic examiner); People v. Jean-Laurent, 51 A.D.3d 818, 859 N.Y.S.2d 658 (2d Dept. 2008), lv denied, 11 N.Y.3d 737 (emergency medical technician properly allowed to opine that injuries were caused by two blows from blunt instrument; experience may substitute for training); People v. Menendez, 50 A.D.3d 1061, 856 N.Y.S.2d 647 (2d Dept. 2008), lv denied, 10 N.Y.3d 937 (sexual assault nurse properly permitted to testify that large percentage of victims exhibit no injuries to sexual organs); People v. Heath, 49 A.D.3d 970, 853 N.Y.S.2d 400 (3rd Dept. 2008), lv denied, 10 N.Y.3d 959 (no error in admission of testimony that "injuries to the face and head of this victim were a personal attack on the victim" and that injury pattern did not indicate "knockdown drag-out brawl, with arms flinging [but rather] was designed to humiliate and injure the face of the victim in particular," since testimony explained nature of attack, a subject within pathologist's area of competence, and not defendant's state of mind; however, it was error to allow pathologist to opine that death was homicide); People v. Rosario, 34 A.D.3d 370, 824 N.Y.S.2d 296 (1st Dept. 2006), lv denied 8 N.Y.3d 949 (no error where nurse practitioner who had

examined large number of child sex abuse victims was permitted to give expert testimony about matters going beyond her own examination of victim); People v. Morehouse, 5 A.D.3d 925, 774 N.Y.S.2d 100 (3rd Dept., 2004), lv denied 3 N.Y.3d 644 (People established proper foundation for testimony by sexual assault nurse that lacerations in victim's vaginal area and tear in hymenal tissue were consistent with forcible compulsion); People v. Shelton, 307 A.D.2d 370, 763 N.Y.S.2d 79 (3rd Dept. 2003), lv denied 100 N.Y.2d 626, 767 N.Y.S.2d 410 (2003) (no error where emergency room physician testified that lack of physical trauma was not inconsistent with rape); People v. Crandall, 306 A.D.2d 748, 763 N.Y.S.2d 847 (3rd Dept. 2003), lv denied 100 A.D.2d 619, 767 N.Y.S.2d 402 (2003) (court erred in permitting People's expert to opine that cervical abrasion was consistent with forcible insertion of defendant's fingers, while refusing to let defendant present rebuttal testimony that abrasion was consistent with consensual contact); People v. Lin You, 2002 WL 32076964 (App. Term, 2d & 11th Jud. Dist., 2002) (reversible error where court refused to permit defense expert to testify regarding cause of injury to defendant, who was claiming justification; doctor's lack of specific expertise as to blunt trauma injuries went to weight, not admissibility); People v. McKee, 299 A.D.2d 575, 749 N.Y.S.2d 337 (3rd Dept. 2002), lv denied 100 N.Y.2d 596, 766 N.Y.S.2d 172 (2003) (defendant opened door to introduction of normally inadmissible testimony that bruises and abrasions sustained by rape complainant were consistent with the application of force); People v. Albizu, 294 A.D.2d 205, 743 N.Y.S.2d 74 (1st Dept. 2002), lv denied 98 N.Y.2d 708, 749 N.Y.S.2d 5 (2002) (emergency room physician properly permitted to opine that injuries were caused by flat, heavy object with at least one sharp edge, possible a "two-by-four"); People v. Paun, 269 A.D.2d 546, 703 N.Y.S.2d 256 (2d Dept. 2000), lv denied 95 N.Y.2d 801, 711 N.Y.S.2d 169 (emergency room physician, who was engaged in practice that required him to examine and treat rape victims, was properly allowed to testify as to significance of presence or absence of signs of trauma to woman's body following rape).

O. Criminal Modus Operandi - Compare People v. Inoa, 25 N.Y.3d 466 (2015) (in drug gang-related murder prosecution, court erred in admitting detective's testimony regarding not merely meaning of coded expressions in recorded telephone conversations, which was permissible, but also meaning of virtually everything that was

said during recorded conversations, whether coded or not; evidence rules allow receipt of expert opinion evidence to clarify relevant issues not amenable to understanding by jurors of average intelligence and experience, but not when purpose is to provide alternative, purportedly better informed, gloss on facts); People v. Smith, 2 N.Y.3d 8, 776 N.Y.S.2d 209 (2004) (trial court erred in allowing expert testimony as to money handling aspects of drug operations where there was no evidence that defendant acted with others); People v. Manley, 200 A.D.3d 471 (1st Dept. 2021) (no error in admission of testimony on "community guns," a concept involving methods used by gangs to have shared firearms ready to use while avoiding being caught in possession of weapons, including keeping firearms outdoors in closed containers under constant observation but not on anyone's person); United States v. Garcia, 919 F.3d 489 (7th Cir. 2019) (agent offered informed and perhaps accurate speculation about likely meaning of defendant's calls with drug trafficker, but cryptic conversations, filtered through agent's experience with unrelated cases, without corroboration that defendant was actually trafficking in cocaine, were not sufficient to support conviction); People v. Goodwin, 167 A.D.3d 450 (1st Dept. 2018), lv denied 32 N.Y.3d 1172 (expert on presence of weapons in correctional facilities allowed to provide background testimony to help jury understand how defendant was able to have weapon in jail and why it was not recovered); People v. Ruiz, 166 A.D.3d 544 (1st Dept. 2018), lv denied 32 N.Y.3d 1209 (expert testimony regarding meaning of coded language in narcotics world was preferable to information already provided by fact witness); People v. Melendez, 138 A.D.3d 758 (2d Dept. 2016) (error to admit testimony as to roles played by and relationships among individuals involved in case, and meanings of "case-specific" terms detective had discovered in course of investigation; also improper to admit testimony from members of surveillance teams that what they witnessed was consistent with drug transaction); United States v. Mejia, 545 F.3d 179 (2d Cir. 2008) (reversible error in admission of testimony by investigator regarding structure, background and activities of gang where much of the material was within grasp of average juror and Government could have introduced other evidence to establish those facts; when officer strays beyond bounds of proper expert testimony, his purported expertise can narrow from organized crime to the particular gang involved in the case); United States v. Cruz, 363 F.3d 187 (2d Cir. 2004) (what

defendant meant when he said that he was present at the scene to “do a deal,” and was there “to watch somebody’s back while he did a deal,” was not a proper subject of expert testimony); United States v. Dukagjini, 326 F.3d 45 (2d Cir. 2002) (although expert may testify about meaning of coded conversations about drugs, court erred in allowing expert to testify regarding the general meaning of conversations and the facts of the case); United States v. Castillo, 924 F.2d 1227 (2d Cir. 1991) (dealers' use of guns to force customers to sniff cocaine to flush out undercovers not beyond ken of jury); People v. Torres, 49 A.D.3d 326, 853 N.Y.S.2d 73 (1st Dept. 2008), lv denied, 10 N.Y.3d 871 (error to permit detective to testify that "user would never walk around with twelve glassines on them. That's what a seller walks around with or would have in their possession"); People v. Ingram, 2 A.D.3d 211, 770 N.Y.S. 294 (1st Dept. 2003), lv denied 2 N.Y.3d 741 (2004) (opinion regarding whether defendant possessed drugs with intent to sell was not beyond knowledge of typical juror); People v. Johnson, 300 A.D.2d 677, 753 N.Y.S.2d 91 (2d Dept. 2002), lv denied 100 N.Y.2d 562, 763 N.Y.S.2d 820 (2003) (error to admit undercover’s testimony that buy money is recovered in “very small percentage” of cases); People v. Wright, 283 A.D.2d 712, 725 N.Y.S.2d 711 (3rd Dept. 2001), lv denied 96 N.Y.2d 926, 732 N.Y.S.2d 644 (police could testify that only drug sellers secrete cocaine in rectum and that users carry smaller amounts of cocaine than defendant possessed, but could not testify that quantity of drugs found on defendant was indicative of a seller); People v. Reinat, 271 A.D.2d 622, 707 N.Y.S.2d 181 (2d Dept. 2000) (testimony regarding practices of drug selling operations, which was offered to explain failure to recover pre-recorded buy money from defendant, was inadmissible since the mere presence of a woman in the vicinity of the sale did not establish that defendant was part of a drug selling operation); People v. Pratt, 266 A.D.2d 318, 698 N.Y.S.2d 283 (2d Dept. 1999), lv denied 94 N.Y.2d 883, 705 N.Y.S.2d 16 (2000) (court erred in admitting testimony that apartment in which defendant was found was a drug factory); People v. Bethea, 261 A.D.2d 629, 691 N.Y.S.2d 79 (2d Dept. 1999), lv denied 93 N.Y.2d 1014, 697 N.Y.S.2d 572 (expert testimony regarding roles of participants in street-level drug transactions was inadmissible where there was no evidence that anyone other than defendant was involved; also, there was no reason to suppose that the evidence was beyond the grasp of the jury); People v. Colon, 238

A.D.2d 18, 667 N.Y.S.2d 692 (1st Dept. 1997), lv granted 91 N.Y.2d 946, 671 N.Y.S.2d 726 (1998) (expert testimony regarding roles of participants in street-level conspiracy to sell drugs was inadmissible where there was no evidence that defendant was involved in conspiracy); People v. Vizzini, 183 A.D.2d 302, 591 N.Y.S.2d 281 (4th Dept. 1992) (witness not qualified to explain defendants' cryptic language) and People v. Raco, 68 A.D.2d 258, 416 N.Y.S.2d 849 (3rd Dept. 1979) (testimony regarding modus operandi of auto theft rings improperly admitted)

with People v. Hicks, 2 N.Y.3d 750, 778 N.Y.S.2d 745 (2004) (no error where officer testified that packaging of drugs was inconsistent with personal use and was consistent with what officer had encountered in previous drug sale arrests); People v. Gonzalez, 99 N.Y.2d 76, 751 N.Y.S.2d 830 (2002) (testimony admitted for purpose of explaining absence of pre-recorded buy money and sellers' respective roles in street-level drug sales); People v. Brown, 97 N.Y.2d 500, 743 N.Y.S.2d 374 (2002) (testimony regarding roles of individuals involved in street sales of narcotics admissible to help jury understand how it could be that seller is arrested without buy money or additional drugs); People v. Graves, 85 N.Y.2d 1024, 630 N.Y.S.2d 972 (1995) (evidence of habits of drug dealers, which was offered to explain why defendant did not have "buy money" or drugs on him when arrested shortly after sale, was "at least marginally relevant"); Gutierrez v. State, 32 A.3d 2 (Md. 2011) (expert testimony about history, hierarchy, and common practices of street gang admissible as proof of motive where evidence establishes that crime was gang-related and probative value not outweighed by unfair prejudice to defendant); People v. Fernandez, 210 A.D.3d 693 (2d Dept. 2022), lv denied 39 N.Y.3d 1072 (no error in admission of police testimony that way in which individual in video was positioned and walking was suggestive of firearm possession); People v. Williams, 146 A.D.3d 410 (1st Dept. 2017) (expert in "street lingo and terminology" permitted to testify regarding possible meanings of words and phrases used by defendant in recorded call where expert did not state what terms meant in context of case); In re Dysean R., 137 A.D.3d 604 (1st Dept. 2016) (no error at disposition where court qualified officer as expert in identifying and interpreting gang activity through use of social media); People v. Ford, 133 A.D.3d 442 (1st Dept. 2015) (no error in admission of evidence of defendant's gang affiliation, along with expert

testimony that new members of gang commit violent crimes to impress senior members and rise in status, which was probative of defendant's motive to commit otherwise unexplained murder); People v. Quarless, 123 A.D.3d 1060 (2d Dept. 2014) (no error in admission of testimony as to quantity and packaging of crack cocaine carried by someone who sells drugs, as opposed to someone who merely uses them); People v. Bright, 111 A.D.3d 575 (1st Dept. 2013) (no error in admission of background testimony about pickpocketing methods of "lush workers" who target sleeping victims on trains and in train stations); People v. Walters, 103 A.D.3d 557 (1st Dept. 2013), lv denied 21 N.Y.3d 10 (testimony regarding drug sellers' use of nearby hidden stash of drugs); People v. Green, 92 A.D.3d 953 (2d Dept. 2012) (no error in admission of testimony concerning witnesses' understanding of rap lyrics found in defendant's bedroom, which was relevant to consciousness of guilt, knowledge and intent, and testimony concerning structure of defendant's gang and defendant's place in gang hierarchy, which was relevant to context of lyrics and explained relationship between defendant and co-conspirators and their motives and intent); People v. Peguero, 88 A.D.3d 589 (1st Dept. 2011), lv denied 18 N.Y.3d 927 (no error in admission of expert testimony concerning circumstances that indicate intent to sell drugs, including expert's opinion that defendant was drug seller); People v. James, 83 A.D.3d 504, 921 N.Y.S.2d 63 (1st Dept. 2011) (no error in admission of expert testimony about quantities of drugs likely to be possessed by sellers, as opposed to mere buyers, which was relevant to element of intent to sell); People v. Lantigue, 67 A.D.3d 521, 889 N.Y.S.2d 146 (1st Dept. 2009), lv denied 13 N.Y.3d 940 (where stolen car had undamaged ignition contained working key that did not belong to owner and defendant told police car belonged to cousin, court properly admitted expert testimony about how thief could have used code to obtain duplicate key); United States v. Joseph, 542 F.3d 13 (2d Cir. 2008) (trial court instructed to give more thorough consideration to admitting expert testimony regarding role-playing in context of sexually explicit conversations on Internet); People v. Encarnacion, 20 Misc.3d 135(A), 867 N.Y.S.2d 377 (App. Term, 1st Dept., 2008) (trial court did not err in admitting expert testimony concerning typical patterns of behavior exhibited by shoplifters); People v. Hough, 51 A.D.3d 818, 856 N.Y.S.2d 863 (2d Dept. 2008) (court properly admitted expert testimony regarding whether quantity of PCP found in

defendant's possession was consistent with packaging for street sale, as opposed to personal use); People v. Cruz, 46 A.D.3d 567, 846 N.Y.S.2d 376 (2d Dept. 2007), lv denied, 10 N.Y.3d 763 (no error in admission of expert testimony regarding customs and practices of Mexican-American gangs, such as violence at family gatherings when gang members "know the DJ there or . . . will grab the DJ's microphone and . . . shout out their gang" and there is a rival gang member there); People v. Hooper, 48 A.D.3d 292, 852 N.Y.S.2d 78 (1st Dept. 2008), lv denied, 10 N.Y.3d 864 (no error where court permitted arresting officer to testify that in his experience, which encompassed hundreds of buy and bust operations, there were "many times" when prerecorded buy money was not recovered); People v. Andrade, 6 A.D.3d 257, 774 N.Y.S.2d 700 (1st Dept. 2004), lv denied 3 N.Y.3d 670 (court properly admitted testimony as to market value of heroin and opinion that amount of money recovered from defendant was consistent with amount he would have received for drugs recovered from buyers); People v. Berry, 5 A.D.3d 866, 773 N.Y.S.2d 181 (3rd Dept. 2004), lv denied 3 N.Y.3d 637 (no error in admission of police testimony as to whether quantity and packaging of cocaine were consistent with intent to sell); People v. Garcia, 309 A.D.2d 514, 764 N.Y.S.2d 696 (1st Dept. 2003) (evidence that defendants entered and left store in between transaction and arrest was sufficient bases for officer's brief testimony about methods used by dealers to distance themselves from money and drugs); People v. Resek, 307 A.D.2d 804, 763 N.Y.S.2d 282 (1st Dept. 2003) (in 3-2 decision, court upholds admission of testimony that quantity of drugs recovered from defendant was "consistent with selling"); People v. Hicks, 301 A.D.2d 538, 754 N.Y.S.2d 648 (2d Dept. 2003), lv granted 100 N.Y.2d 595, 766 N.Y.S.2d 170 (2002) (no error in admission of testimony that packaging of heroin recovered from defendant was not consistent with personal use); People v. Edwards, 295 A.D.2d 270, 743 N.Y.S.2d 872 (1st Dept. 2002), lv denied 99 N.Y.2d 557, 764 N.Y.S.2d 209 (2002) (evidence that defendant's gang engaged in random ritual slashings to earn advancement within gang established motive for defendant's unprovoked attack on fellow prisoner); People v. Rhodes, 289 A.D.2d 342, 734 N.Y.S.2d 569 (2d Dept. 2001), lv denied 97 N.Y.2d 732, 740 N.Y.S.2d 706 (2002) (police testimony regarding burglars tools properly admitted); People v. Cancer, 249 A.D.2d 696, 671 N.Y.S.2d 775 (3rd Dept. 1998), lv denied 91 N.Y.2d 1005,

676 N.Y.S.2d 133 (no error in admission of testimony that drug dealers use beepers to facilitate transactions); People v. Santiago, 243 A.D.2d 328, 663 N.Y.S.2d 535 (1st Dept. 1997), lv denied 91 N.Y.2d 879, 668 N.Y.S.2d 578 (court properly admitted opinion concerning the likelihood that nonparticipants in a drug operation would be permitted access to the packaging site); People v. Rivera, 236 A.D.2d 428, 654 N.Y.S.2d 147 (2d Dept. 1997) (officer properly permitted to testify concerning use of screwdrivers and vice-grip pliers to gain forcible entry into vehicles); People v. Badia, 232 A.D.2d 241, 649 N.Y.S.2d 2 (1st Dept. 1996), lv denied 89 N.Y.2d 1088, 660 N.Y.S.2d 381 (1997) (detective permitted to testify concerning "body over" process used by car thieves to put illegal identification numbers on stolen vehicles); People v. McDonald, 231 A.D.2d 647, 647 N.Y.S.2d 795 (2d Dept. 1996), lv denied 89 N.Y.2d 926, 654 N.Y.S.2d 728 (detective properly permitted to testify that burglary appeared to be staged); United States v. Tapia-Ortiz, 23 F.3d 738 (2d Cir. 1994) (testimony about weight, purity and price of cocaine was admissible, and, although testimony about traffickers' use of cash, beepers and nicknames to conceal identities had "common sense aspect," expert testimony may explain non-esoteric matters when defense attacks government's version as improbable); People v. Garcia, 196 A.D.2d 433, 601 N.Y.S.2d 482 (1st Dept. 1993), aff'd 83 N.Y.2d 817, 611 N.Y.S.2d 490 (1994) (officer permitted to testify about role of "money man," "hawker" and "hand-to-hand" man in drug sale); People v. Taylor, 18 F.3d 55 (2d Cir. 1994) (testimony that heroin users usually have one glassine admissible as evidence of intent to distribute 237 glassines); People v. Van Huse, 187 A.D.2d 684, 590 N.Y.S.2d 520 (2d Dept. 1992), lv denied 81 N.Y.2d 894, 597 N.Y.S.2d 956 (1993) (practice of placing crack inside rolling paper); People v. Carpenter, 187 A.D.2d 519, 589 N.Y.S.2d 912 (2d Dept. 1992), lv denied 81 N.Y.2d 1012, 595 N.Y.S.2d 737 (1993) (use of beepers in crack trade); People v. Siu Wah Tse, 91 A.D.2d 350, 458 N.Y.S.2d 589 (1st Dept. 1983) (Chinatown youth gangs).

Testimony that does not require expertise may be admissible as lay opinion testimony. See, e.g., United States v. Diaz, 637 F.3d 592 (5th Cir. 2011) (no error in admission of lay opinion testimony by government agent who opined that defendant was at scene of drug transaction acting as "lookout"); United States v. Diaz, 420 Fed.Appx. 456 (5th Cir. 2011) (no error in admission of testimony by member of a drug

trafficking organization regarding meaning and relevance of drug ledgers); United States v. Santiago, 560 F.3d 62 (1st Cir. 2009) (testimony regarding meaning of code words or phrases used by drug defendants admissible where opinion was based on experience with criminal enterprise); but see United States v. Glenn, 312 F.3d 58 (2d Cir. 2002) (drug dealer's opinion testimony regarding manner in which drug dealers carry handguns was inadmissible where witness lacked sufficient first-hand knowledge, and was not offered as an expert).

P. "Profile" Evidence - Either the respondent or the prosecutor may wish to present expert testimony concerning personality traits associated with certain criminal behavior as part of an effort to show that respondent does or does not fit the "profile," but courts generally exclude such evidence. See Commonwealth v. Horne, 66 N.E.3d 633 (Mass. 2017)(reversible error where prosecution permitted to introduce expert "negative profiling" testimony regarding typical physical characteristics of crack cocaine addicts to show that defendant did not look like crack cocaine addict and thus was dealer); People v. Williams, 20 N.Y.3d 579 (2013) (testimony concerning abusers' behavior properly admitted to assist in explaining why victims may accommodate abusers and why they wait before disclosing abuse, but it was error to permit prosecutor to tailor hypothetical questions to include facts of case because it went beyond explaining victim behavior and implied that expert found complainants' testimony to be credible); People v. Diaz, 20 N.Y.3d 569 (2013) (no error in admission of expert testimony regarding behavior of sexual abusers where, although some testimony discussed behavior similar to that alleged by complainant, expert spoke of behavior in general terms and stated that she was not aware of facts of case, did not speak with complainant and was not rendering opinion as to whether sexual abuse took place); United States v. Wells, 879 F.3d 900 (9th Cir. 2017) (reversible error where Government presented expert testimony regarding multiple murders and workplace violence that invited jury to find "fit" between profile and testimony concerning defendant's character traits); United States v. Gillespie, supra, 852 F.2d 475 (trial court improperly admitted expert testimony regarding characteristics of child molesters; such testimony is of low probativity and is inherently prejudicial); People v. Neer, 129 A.D.2d 829, 513 N.Y.S.2d 566 (3rd Dept. 1987), lv denied 70 N.Y.2d 652, 518 N.Y.S.2d 1045

(trial court did not err in refusing to admit testimony of a purported expert through which defendant hoped to establish that he did not fit profile of typical child batterer); People v. Franks, 195 Misc.2d 698, 761 N.Y.S.2d 459 (County Ct., Nassau Co., 2003) (there was no showing that relevant scientific community had accepted test as reliable, and expert relied on polygraph results, which are inadmissible); People v. Berrios, 150 Misc.2d 229, 568 N.Y.S.2d 512 (Sup. Ct. Bronx Co. 1991) (court rejects defendant's offer of evidence that he does not match child abuser profile). But see People v. Riback, 13 N.Y.3d 416, 892 N.Y.S.2d 832 (2009) (no error where court allowed expert to explain what term "sexual fetish" means and give examples, none of which described specific behavior defendant allegedly exhibited, but court erred in allowing expert to define “pedophilia” and “central characteristics” of “pedophile” since, “[u]nfortunately, it is difficult to imagine that this information was unknown to the jurors”); State v. Davis, 645 N.W.2d 913 (Wis. 2002) (evidence that defendant lacks characteristics of sex offender may be introduced in appropriate case).

Q. Accident Reconstruction - A qualified expert may give testimony concerning the point of impact and other circumstances surrounding an automobile accident. See, e.g., People v. Battease, 124 A.D.2d 807, 509 N.Y.S.2d 39 (2d Dept. 1986).

R. Firearm/Other Weapon Identification - See Abruquah v. State, 296 A.3d 961 (Md. 2023) (reports, studies, and testimony demonstrated that methodology could support reliable conclusions that patterns and markings on bullets are consistent or inconsistent with those on bullets fired from particular firearm, but not unqualified conclusion that such bullets were fired from particular firearm); State v. Raynor, 254 A.3d 874 (Conn. 2021) (court erred in denying defendant’s motion for pretrial hearing on reliability and accuracy of methodology used by firearm/toolmark expert without determining whether criticisms of firearm analysis contained in reports cited by defendant cast enough doubt on whether science remained well established; court also discusses permissible limitations on language used by expert in giving opinion); Commonwealth v. Heang, 942 N.E.2d 927 (Mass. 2011) (after discussing recent report issued by National Research Council that raises concerns about validity of forensic ballistics evidence, court finds no error in admission of expert evidence where judge ruled that expert could testify "to a degree of scientific certainty" that recovered

projectiles were fired by gun in question, but also had to admit he could not exclude possibility that projectiles were fired by another nine millimeter firearm); People v. Polansky, 45 Misc.3d 35 (App. Term, 1st Dept., 2014) (reversible error where court denied defendant's request to present expert testimony as to whether knife in question was a "gravity knife"); Jones v. United States, 27 A.3d 1130 (D.C. Ct. App. 2011) (Frye hearing not required since pattern matching is not new and courts have long been admitting such evidence); People v. Ross, 68 Misc.3d 899 (Sup. Ct., Bronx Co., 2020) (People permitted to call expert to testify as to whether there was evidence of class characteristics that would include or exclude firearm at issue, but not to opine on significance of marks other than class characteristics, or give opinion based on subjective terms such as "sufficient agreement" or "consistent with"); United States v. Shipp, 422 F.Supp.3d 762 (EDNY 2019) (expert could testify as to examination of firearm, determination as to operability, test firing, theory of toolmark analysis and how firearms can leave markings on bullets and shell casings, and process of comparing recovered shell casing and bullet fragments to test fires and similarities between them, and could testify that toolmarks on bullet fragment and shell casing were consistent with having been fired from firearm, and that firearm could not be excluded as source of bullet fragment and shell casing, but could not testify, to any degree of certainty, that firearm was source of bullet fragment or shell casing); People v. Givens, 30 Misc.3d 475, 912 N.Y.S.2d 855 (Sup. Ct., Bronx Co., 2010) (court rejects defendant's claim, in support of which he submitted articles, federal court decisions and report issued by National Academy of Sciences, that expert testimony as to firearms and toolmark identification is no longer generally accepted in relevant scientific and legal communities); United States v. Glynn, 578 F.Supp.2d 567 (SDNY, 2008) (since ballistics examination suffers from greater uncertainty than certain other kinds of forensic evidence, Government could introduce opinion testimony by firearms analyst to effect that it was "more likely than not" that bullet recovered from victim's body and shell casings recovered from crime scenes came from firearms linked to defendant, but expert could not employ language "to a reasonable degree of ballistic certainty").

S. Handwriting Comparison - Pettus v. United States, 37 A.3d 213 (D.C. Ct. App., 2012) (forensic handwriting comparison and expert opinions meet Frye

standard; 2009 National Research Council Committee Report suggests need to identify flaws in and improve certain forensic science disciplines, but Report does not imply absence of reliable methodology underlying handwriting comparison); People v. Callicut, 101 A.D.3d 1256 (3d Dept. 2012), lv denied 20 N.Y.3d 1096 (handwriting analysis testimony admissible under CPLR 4536, and no error where witness was permitted to opine that defendant wrote letters rather than just testify as to similarities and differences between disputed and known writings); Almeciga v. Center for Investigative Reporting, Inc., 185 F.Supp.3d 401 (SDNY 2016) (handwriting analysis methodologies not sufficiently reliable under Daubert).

T. Cell Phone Location - See People v. Ortiz, 168 A.D.3d 482 (1st Dept. 2019), lv denied 33 N.Y.3d 979 (T-mobile subpoena compliance agent not qualified, without engineering background, to reach conclusions about why defendant's cell phone hit certain tower); United States v. Natal, 849 F.3d 530 (2d Cir. 2017) (testimony on how cell phone towers operate constitutes expert testimony and may not be introduced through lay witness).

IV. Examination Of Witnesses

A. Order Of Proof - The prosecution ordinarily presents all its evidence before it closes, at which point the defense presents its evidence. See People v. Smith, 183 A.D.2d 653, 584 N.Y.S.2d 795 (1st Dept. 1992), lv denied 80 N.Y.2d 910, 588 N.Y.S.2d 835 (defense evidence may not be considered if court reserves decision on motion to dismiss after People's case); see also Johnson v. State, 969 A.2d 262 (Md., 2009) (prohibition against "anticipatory rehabilitation" and/or "strawman rebuttal" evidence was violated).

Rebuttal evidence may be presented to refute new facts raised by the defense, but may not be presented merely to corroborate what prosecution witnesses have already said. Richardson, §6-504; see United States v. Barrow, 400 F.3d 109 (2d Cir. 2005) (rebuttal is not limited to direct contradiction, but may included any evidence that fairly counters and casts doubt on factual assertions advanced); but see FCA §342.1(4) (in the interest of justice, court may permit rebuttal evidence "which is not technically of a rebuttal nature but more properly a part of the offering party's original case"); People v. Dennis, 55 A.D.3d 385, 866 N.Y.S.2d 28 (1st Dept. 2008) (no error where prosecutor

was permitted to ask questions on re-direct that prosecutor had simply forgotten to ask on direct).

Rebuttal cannot be used to "correct" a witness' testimony in a manner which undercuts a defense strategy undertaken in reliance on earlier testimony. See Matter of Mario F., 216 A.D.2d 213, 629 N.Y.S.2d 229 (1st Dept. 1995) (court erred in permitting officer to change testimony as to where respondent was standing after defense investigator testified that respondent could not have been standing at location originally given by officer). Appropriate surrebuttal may also be permitted. See United States v. Murray, 736 F.3d 652 (2d Cir. 2013) (surrebuttal evidence improperly excluded where, until government offered rebuttal evidence, surrebuttal evidence had no relevance to issue being tried and defendant had no reason to offer evidence earlier); People v. Mancuso, 267 A.D.2d 252, 700 N.Y.S.2d 37 (2d Dept. 1999); FCA §342.1(4).

Although each side is ordinarily required to present all its evidence before it closes, the court has discretion to re-open a trial or hearing to receive further evidence or permit further examination of a witness. Richardson, §6-504. See, e.g., People v. Cook, 34 N.Y.3d 412 (2019) (court declines to extend “one full opportunity” rule from Havelka and Kevin W., and finds substantial discretion to alter order of proof, where hearing court reopened suppression hearing after People had rested and defense had made final argument; risk of improperly tailored testimony is significantly lower where People do not have formal decision from appellate court or hearing court, and hearing court does not tip its hand about perceived weaknesses in People’s proof); People v. Kevin W., 22 N.Y.3d 287 (2013) (court precluded from reopening suppression hearing to give People opportunity to shore up evidentiary or legal position absent showing that People were deprived of full and fair opportunity to be heard); People v. Whipple, 97 N.Y.2d 1, 734 N.Y.S.2d 549 (2001) (trial court may re-open case to allow People to cure omission of element of crime where missing element is simple to prove and not seriously contested, and defense is not unduly prejudiced); People v Havelka, 45 N.Y.2d 636 (1978) (where no contention is made that People did not have full opportunity to present evidence at hearing, appellate court cannot hold appeal in abeyance and remit case for second hearing after finding evidence offered at initial hearing insufficient to justify challenged police action); People v. Dunbar, 178 A.D.3d

948 (2d Dept. 2019) (court should have granted defendant's motion to reopen suppression hearing where prosecutor disclosed prior to second trial that description of livery car stopped by police may have come from anonymous bystander); People v. Robinson, 119 A.D.3d 616 (2d Dept. 2014) (in shaken baby prosecution, court erred in re-opening case to allow People to introduce mens rea evidence of defendant's knowledge of risk); People v. Ynoa, 223 A.D.2d 975, 636 N.Y.S.2d 888 (3rd Dept. 1996), lv denied 87 N.Y.2d 1027, 644 N.Y.S.2d 161 (trial court properly refused to permit People to re-open suppression hearing, since People had had full opportunity to present case); People v. Campbell, 148 A.D.2d 743, 539 N.Y.S.2d 476 (2d Dept. 1989) (court erred in denying defendant's motion to re-open Huntley hearing to introduce proof that interrogating officer knew defendant had counsel on pending case); People v. Washington, 145 A.D.2d 670, 536 N.Y.S.2d 812 (2d Dept. 1989) (reversal ordered where trial court refused to let defendant testify after closing arguments); Matter of Paul R., 131 A.D.2d 764, 516 N.Y.S.2d 790 (2d Dept. 1987) (court improperly re-opened prosecution case sua sponte after respondent's prima facie motion; however, error was harmless because sufficient evidence was presented before case was re-opened); People v. Parker, 125 A.D.2d 504, 509 N.Y.S.2d 586 (2d Dept. 1986) (court improperly refused to re-open larceny and trespass case during jury deliberations when defendant belatedly received evidence that he had rental agreement with owner of premises); People v. Hendricks, 114 A.D.2d 510, 494 N.Y.S.2d 729 (2d Dept. 1985) (court improperly refused to re-open case when defendant asked to testify during and after defense counsel's summation); People v. Cook, 103 A.D.2d 751, 477 N.Y.S.2d 219 (2d Dept. 1984) (error to permit prosecutor to re-open cross-examination after summations to ask defendant about prior convictions). The court also has the discretion to permit the respondent to re-open a pretrial suppression hearing during trial. See, e.g., People v. Corso, 135 A.D.2d 551, 521 N.Y.S.2d 773 (2d Dept. 1987).

The court may provisionally admit evidence which has not yet been shown to be relevant, if the proponent represents in good faith that the evidence will later be connected. This is often called admitting evidence "subject to connection." See, e.g., United States v. Cote, 744 F.2d 913 (2d Cir. 1984) (government improperly offered evidence of other crimes when it knew or should have known that the evidence could

not be connected to defendant).

B. Direct Examination - Leading questions are generally not permitted on direct examination. A leading question is one which suggests the desired answer by, for instance, stating facts which are not yet in the record and requiring a yes or no answer. Leading on direct is permitted during questioning concerning introductory matters, or when counsel seeks to focus the witness' attention on an event, such as a particular conversation, or when a witness, such as a sex crime victim, is hostile or unwilling to testify out of embarrassment, or where, because of infancy, illiteracy, illness, etc., the witness needs assistance in testifying. Richardson, §§ 6-223-232. See, e.g., People v. Dunston, 136 A.D.3d 529 (1st Dept. 2016) (leading questions properly used to direct victim's attention to specific topics); People v. Brizen, 118 A.D.3d 590 (1st Dept. 2014), lv denied 23 N.Y.3d 1060 (under unusual circumstances in sex crime case, court properly allowed prosecutor to clarify testimony via leading questions where victim was unable to speak intelligibly because of physical impairment); In re Christopher T., 71 A.D.3d 464, 894 N.Y.S.2d 877 (1st Dept. 2010) (given age of the victim and sexual nature of charges, presentment agency needed to use leading questions to draw out facts); People v. Cuttler, 270 A.D.2d 654, 705 N.Y.S.2d 416 (3rd Dept. 2000), lv denied 95 N.Y.2d 795, 711 N.Y.S.2d 163 (no error where prosecutor was allowed to lead child victim in sexual abuse case); Matter of Jason FF., 224 A.D.2d 900, 638 N.Y.S.2d 226 (3rd Dept. 1996) (no error where court posed leading questions in attempt to "clarify and expedite" 8-year-old's testimony); People v. Tyrrell, 101 A.D.2d 946, 475 N.Y.S.2d 937 (3rd Dept. 1984) (leading permissible during examination of child sex abuse victim).

Hostility may arise out of a witness' interest in the case, or the witness' demonstrated reluctance to testify on the stand. See, e.g., People v. Collins, 33 A.D.2d 844, 305 N.Y.S.2d 893 (3rd Dept. 1969) (witness, who was living with one of defendant's accomplices, had had the accomplice's child and was pregnant by him again, was a hostile witness; thus, prosecutor was properly allowed to lead). See also Federal Rules, 611(c) (leading permitted when witness is "identified with an adverse party").

If objections to questions are repeatedly sustained, and the reason is unclear, counsel should ask for an explanation and indicate that such guidance might enable

counsel to properly rephrase the question. See People v. Keough, 51 A.D.2d 808, 380 N.Y.S.2d 267 (2d Dept. 1976) (trial court should have explained reason for sustaining prosecutor's objections to testimony by defense witnesses).

C. Cross-Examination

1. Scope - In a delinquency case, a party may prove through cross-examination any relevant proposition, regardless of the scope of direct examination. See People v. Mann, 41 A.D.3d 977, 839 N.Y.S.2d 247 (3rd Dept. 2007), lv denied 9 N.Y.3d 924 (no error in trial court's ruling permitting People's cross-examination to go beyond defendant's "very limited" direct testimony that consisted of denial of allegations and his version of his movements through the house on the night in question; People's questions concerning fact that child's mother had refused to engage in type of conduct defendant was accused of perpetrating upon victim was relevant to defendant's possible motivation for alleged crimes); People v. Casiano, 148 A.D.3d 1044 (2d Dept. 2017) (defense permitted to exceed scope of direct to prove relevant proposition such as justification defense); People v. Gonzalez, 131 A.D.2d 873, 517 N.Y.S.2d 530 (2d Dept. 1987); People v. Kennedy, 70 A.D.2d 181, 420 N.Y.S.2d 23 (2d Dept. 1979).

However, once the parties proceed to redirect and re-cross, inquiry as of right is limited to new material brought out on the preceding examination; other inquiries are governed by the discretion of the trial court. See People v. Melendez, 55 N.Y.2d 445, 449 N.Y.S.2d 946 (1982); People v. Bruno, 111 A.D.3d 488 (1st Dept. 2013) (court erred when it refused to permit defense counsel to conduct re-cross-examination of crime scene detective after co-defendant's counsel inquired into new areas on cross-examination); People v. Gonzalez, supra, 131 A.D.2d 873; People v. Bethune, 105 A.D.2d 262, 484 N.Y.S.2d 577 (2d Dept. 1984).

If the cross-examiner goes beyond the permissible bounds of cross-examination, he or she adopts the witness and is bound by the rules concerning the impeachment of one's own witness. Richardson, §6-427. See, e.g., Tarulli v. Salanitri, 34 A.D.2d 962, 312 N.Y.S.2d 55 (2d Dept. 1970).

2. Right Of Confrontation

a. Inability To Cross-Examine - When adequate cross-examination is precluded by a witness' illness or condition, absence, or refusal to

answer questions, the direct examination is rendered incompetent and must be stricken. Richardson, §6-302. See People v. Hicks, 142 A.D.3d 1333 (4th Dept. 2016) (transcript of testimony from first trial improperly admitted where complainant, who had admitted she lied at first trial, appeared at second trial with attorney and exercised Fifth Amendment right to remain silent); Matter of Leala T., 55 A.D.3d 997 (3d Dept. 2008); People v. Cole, 43 N.Y. 508 (1871); Diocese of Buffalo v. McCarthy, 91 A.D.2d 213, 458 N.Y.S.2d 764 (4th Dept. 1983), lv denied 59 N.Y.2d 605, 466 N.Y.S.2d 1025; 8A Carmody-Wait 2d § 59.41. But see People v. Montes, 16 N.Y.3d 250, 920 N.Y.S.2d 756 (2011) (no Confrontation Clause violation where, after prosecution witness testified inconsistently with another prosecution witness, first witness could not be recalled to testify because she had had breakdown and twice attempted suicide); Randolph v. State, 878 A.2d 461 (Del. 2005) (no violation of the juvenile's right of confrontation under Crawford v. Washington where complainant's out-of-court statements regarding sexual assault were admitted, but complainant, who did testify and was cross-examined, could not acknowledge that defendant had assaulted her or what statements she previously made; the mere fact that the witness had difficulty answering questions and provided nonsensical answers did not make her unavailable for confrontation purposes); Johnson v. State, 878 A.2d 422 (Del., 2005) (defendant's right of confrontation was violated where court admitted out-of-court statements made by declarant who testified, but had limited recollection; witness was not rendered unavailable for right of confrontation purposes); Brown v. McCollum, 696 Fed.Appx. 875 (10th Cir. 2017), cert denied 138 S.Ct. 472 (habeas relief denied where ten-year-old prosecution witness refused to answer some of defense counsel's questions, and petitioner pointed to no facts bearing on reliability of testimony that he was prevented from exposing to jury); People v. Chadick, 122 A.D.3d 1258 (4th Dept. 2014) (court erred in striking all exculpatory testimony of co-defendant after he invoked privilege against self-incrimination; court failed to determine whether less drastic alternatives were available); People v. Carusso, 94 A.D.3d 529 (1st Dept. 2012) (defendant not entitled to mistrial where, after victim testified that defendant demanded money during robbery, People disclosed police report indicating that victim attributed demand for money to co-defendant, but victim had returned to native country and was not available

to be recalled; trial court permitted defendant to elicit prior inconsistent statement through detective and precluded prosecutor from eliciting evidence that report was inaccurate, and thus defendant was in better position than if he had been able to use statement to cross-examine victim because he was able to offer it statement for its truth); Vasquez v. Kirkland, 572 F.3d 1029 (9th Cir. 2009), cert denied 130 S.Ct. 1086 (no Confrontation Clause violation where prosecution's key witness was deaf, could not speak and had never learned sign language, and communicated by using combination of signs, gestures, facial expressions, and lip reading).

On the other hand, the accused can waive the right to cross-examine, and the court may be obligated to let stand the direct testimony of a witness who has become unavailable for cross-examination. See People v. Cummings, 191 A.D.2d 1012, 595 N.Y.S.2d 167 (4th Dept. 1993) (reversible error where court struck testimony damaging to People's case).

b. Memory Lapse Of Witness - See United States v. Owens, 484 U.S. 554, 108 S.Ct. 838 (1988) (no constitutional violation where complainant recalled identifying defendant but had no recollection of the assailant or why he identified defendant); Delaware v. Fensterer, 474 U.S. 15, 106 S.Ct. 292 (1985) (no violation where expert could not recall basis of his opinion); Goforth v. State, 70 So.3d 174 (Miss. 2011) (Confrontation Clause violated where witness whose prior statement was admitted as recorded recollection testified, but had total loss of memory with respect to underlying events); Woodall v. State, 336 S.W.3d 634 (Tex. Ct. of Crim. App., 2011) (memory loss does not render witness "absent" for Confrontation Clause purposes if witness is present in court and testifying); State v. Biggs, 333 S.W.3d 472 (Mo. 2011) (same as Woodall); State v. Delos Santos, 238 P.3d 162 (Hawaii, 2010) (right of confrontation not violated where witness whose hearsay statements are admitted cannot remember subject matter of statements or making statements at all); State v. Legere, 958 A.2d 969 (N.H. 2008) (Confrontation Clause no bar to admission of witness's prior hearsay statement where witness testifies at trial but claims lack of memory); State v. Holliday, 745 N.W.2d 556 (Minn. 2008) (Crawford v. Washington does not bar introduction of hearsay statements when witness is present but cannot recall and be effectively cross-examined regarding statements; Confrontation Clause is

satisfied by declarant's appearance at trial, and it is for fact-finder to evaluate declarant's credibility in light of memory infirmities); see also Turner v. Commonwealth, 726 S.E.2d 325 (Va. 2012) (in determining whether preliminary hearing testimony is admissible because witness is unavailable due to lack of memory, court has obligation to conduct inquiry and observe witness's demeanor to ensure witness has not feigned loss of memory in attempt to avoid testifying).

c. Hypnotically Refreshed Testimony - When a witness' ability to recollect has been enhanced through hypnosis, only the witness' prehypnotic recollections are admissible. The respondent is entitled to notice of the hypnosis and a pretrial hearing to determine what effect the hypnosis may have on the respondent's ability to conduct meaningful cross-examination. See People v. Tunstall, 63 N.Y.2d 1, 479 N.Y.S.2d 192 (1984); People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255 (1983); see also Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704 (1987) (per se exclusion of hypnotically refreshed testimony violated defendant's right to testify); People v. Sutton, 908 N.E.2d 50 (Ill., 2009) (prosecution witness was "available" for cross where there was no evidence that witness could not differentiate between what he was able to recall before hypnosis and that which hypnosis elicited). Statements made under hypnosis that differ from the subject's pre-hypnosis statements are not admissible for impeachment. People v. Hults, 76 N.Y.2d 190, 557 N.Y.S.2d 270 (1990).

d. Right To Face Witness

i. In-Court Testimony - See Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798 (1988) (right of confrontation violated where, in the absence of any individualized finding that the witnesses needed protection, they testified from behind a screen that blocked defendant's sight); State v. Hunt, 293 A.3d 423 (Me. 2023) (no violation of right of confrontation where court required that defendant and witnesses wear masks during trial; jurors were able to see eyes, observe body language, and hear tone of voice); State v. Cuenca, 524 P.3d 882 (Idaho 2023) (no Confrontation Clause violation where, during COVID-19 pandemic, court ordered that everyone in courtroom would wear masks - including witnesses); Finley v. State, 655 S.W.3d 504 (Tex. Ct. App. 2022), **review granted 3/8/23** (court denied defendant right to confrontation by allowing witness to testify wearing mask without finding particular need; particularized

findings were required in COVID-19 context); State v. Farrell-Quigle, 477 P.3d 208 (Idaho 2020) (use of child witness shielding screen deprived defendant of right to fair trial where screen may have been reasonably perceived by jurors as attempt to protect children from guilty or dangerous defendant, and closed-circuit television or alternate form of video conferencing technology was available; court adopts bright-line rule stating that upon showing of compelling state interest, only permissible alternative is one in which child witness testifies from separate location and appears live, on screen in courtroom, via two-way CCTV or through other reliable video conferencing means); People v. Tuck, 75 N.Y.2d 778, 552 N.Y.S.2d 85 (1989) (there was error, albeit harmless, where 7-year-old witness faced away from defendant and towards jury so her testimony would be audible); People v. Wandrey, 80 Cal.App.5th 962 (Cal. Ct. App., 1st Dist.,2022), appeal dism'd 2023 WL 5614630 (COVID-19-related mask requirement for witnesses did not violate right to confrontation; court rejects defendant's contention that masks were not necessary in light of other precautions, including plexiglass partitions and social distancing); People v. Lopez, 75 Cal.App.5th 227 (Cal. Ct. App., 2d Dist., 2022) (right of confrontation not violated by requirement that all persons in courtroom, including witnesses, wear face masks due to COVID-19 pandemic); People v. Alvarez, 75 Cal.App.5th 28 (Cal. Ct. App., 2d Dist., 2022) (face mask requirement upheld; face shields and plexiglass screens alone do not provide reasonable protection); United States v. De Jesus-Casteneda, 705 F.3d 1117 (9th Cir. 2013), rehearing denied 712 F.3d 1283, cert denied 133 S.Ct. 2788 (no Confrontation Clause violation where confidential informant testified in disguise, wearing wig and mustache, which furthered important state interest in preserving witness's safety); Morales v. Artuz, 281 F.3d 55 (2d Cir. 2002) (no right of confrontation violation where witness wore dark sunglasses because of justified fear of defendant; court notes that Supreme Court precedents did not involve this type of slight disguise); United States v. Trimarco, 2020 WL 5211051 (EDNY 2020) (court denies defendant's request that trial be delayed indefinitely until unknown time when trial "can be conducted in a manner that is as close to normal as possible," despite partial closure resulting from courthouse COVID-19-related entrance requirements; possible exclusion of older jurors; inability to see jurors' facial expressions or communicate non-verbally with jurors because of masks; possible

reluctance of some witnesses to meet with defendant's attorneys or investigator; and inability to present evidence through live, in-person testimony); People v. Smith, 11 Misc.3d 1087(A), 819 N.Y.S.2d 850 (Sup. Ct., N.Y. Co., 2006) (witness permitted to wear "Afro" wig and false beard and mustache where, inter alia, eyewitness to a murder had been murdered after telling the victim's father that defendant shot his son).

ii. Closed-Circuit Television - CPL article 65, which has been incorporated by reference in FCA §343.1(4), authorizes the court to permit a "child witness" (under 14 years of age) to testify from a testimonial room over live 2-way closed-circuit television if the child is found to be "vulnerable." A child is "vulnerable" if the court finds by clear and convincing evidence that, as a result of extraordinary circumstances, it is likely that the child will suffer serious mental or emotional harm if required to testify in court, and that the use of closed-circuit television will help prevent, or diminish the likelihood or extent of, harm to the child. CPL §65.10(1)." A child witness should be declared vulnerable when the court, in accordance with the provisions of this section, determines by clear and convincing evidence that the child witness would suffer serious mental or emotional harm that would substantially impair the child witness` ability to communicate with the finder of fact without the use of live, two-way closed-circuit television." CPL §65.20(2); see also Rules of the Chief Judge, §35.1 ("The Chief Administrator of the Courts shall consult with individuals, agencies and groups concerned with child psychology and child welfare and, based upon that consultation, shall develop and implement methods and techniques designed to reduce significantly the trauma to child witnesses likely to be caused by testifying in court proceedings. The Chief Administrator shall periodically review such methods and techniques to ensure their continuing effectiveness.")..

The constitutionality of article 65 was upheld in People v. Cintron, 75 N.Y.2d 249, 552 N.Y.S.2d 68 (1990) (court also notes that, although the statute permits the court to make a "vulnerability" finding during trial after the court observes the child, such a finding must be based on clear and convincing evidence, and may not be based solely on the subjective impressions of the judge). See also People v. Costa, 160 A.D.2d 889, 554 N.Y.S.2d 930 (2d Dept. 1990) (court improperly based vulnerability finding on observations of child, who cried on the witness stand, clung to his grandmother, was

reluctant to answer questions, and stated that he did not like being in court and was frightened); People v. Henderson, 156 A.D.2d 92, 554 N.Y.S.2d 924 (2d Dept. 1990), lv denied 76 N.Y.2d 736, 558 N.Y.S.2d 898 (court improperly found 5 and 6-year-old alleged sex crime victims to be "vulnerable" where expert gave no specific reasons why the children would suffer harm if forced to testify, and videotape indicates that children were not generally reluctant to testify); Matter of Noel O., 19 Misc.3d 418, 855 N.Y.S.2d 318 (Fam. Ct., Queens Co., 2008) (five-year-old complainant found to be "vulnerable witness" where charges were "particularly heinous" in that it was alleged that 14 ½ year-old respondent inserted tongue into mouth of 5 year-old complainant, placed fingers on her vagina and forced her to touch his penis; respondent had family-like relationship with complainant and her family in that her mother is respondent's godmother and he had regular contact with complainant, whom he has known for her entire life; and that according to expert testimony, complainant would be particularly susceptible to psychological harm if she were to testify in respondent's presence in courtroom).

In People v. Wrotten, 14 N.Y.3d 33, 896 N.Y.S.2d 711 (2009), cert denied 130 S.Ct. 2520, a Court of Appeals majority held that the trial court had inherent power, and authority under Judiciary Law § 2-b, to permit an adult complainant who was living in California to testify via real-time, two-way video after the court found that because of age and poor health, the witness was unable to travel to New York. However, the Court noted that because live televised testimony is not the equivalent of in-person testimony, televised testimony requires a case-specific finding of necessity and is an exceptional procedure to be used only in exceptional circumstances. See also State v. Tate, 985 N.W.2d 291 (Minn. 2023) (citing Maryland v. Craig, court concludes that defendant's right to confrontation was not violated when court allowed witness to testify via Zoom because of COVID-19 pandemic, and testimony was sufficiently reliable; witness had been exposed to person who had tested positive and was particularly susceptible to becoming ill, vaccines were not yet available to protect those in courtroom, including jurors who were at high risk if they caught disease, and denying continuance was not error since court did not know when crisis would ameliorate or end); In re C.A.R.A., 637 S.W.3d 50 (Mo. 2022) (court erred in permitting testimony via two-way live video where it was unclear whether COVID-19 pandemic could satisfy "important public policy"

standard under Maryland v. Craig, and, even if it could, court did not find that health or circumstances of witnesses required that they testify remotely; moreover, possibility of postponing hearing, or reducing number of people in courtroom, further cut against finding of necessity); In re J.A.T., 637 S.W.3d 1 (Mo. 2022) (court's general reference to detention facility's COVID-19 pandemic policy to not transport juveniles to and from court "to limit the exposure to germs of that particular juvenile as well as juveniles in detention" did not justify denial of J.A.T.'s right to be present); State v. Martell, 500 P.3d 1233 (Montana 2021) (court erred in allowing witness to appear by two-way video; although it was impractical to transport witness 481 miles in each direction "to talk about whether or not this is a legitimate check written on their account or not," Confrontation Clause applied despite court's characterization of testimony as "more or less" foundational); State v. Comacho, 960 N.W.2d 739 (Neb. 2021) (no violation of right of confrontation where witness, who had tested positive for COVID-19 and was experiencing symptoms, testified via two-way interactive video to translation of portions of phone call in which defendant spoke in Spanish); State v. Mercier, 479 P.3d 967 (Mont. 2021) (defendant denied right to confront witnesses when State elicited testimony laying foundation for admission of photographs from witness via two-way videoconference; merely avoiding added expense or inconvenience was not sufficient, without more, to justify dispensing with preference for face-to-face testimony, and nowhere in Confrontation Clause is there language limiting type of testimonial evidence to which right to physical confrontation applies); Haggard v. Texas, 612 S.W.3d 318 (Tex. Ct. Crim. App. 2020) (Confrontation Clause violated when judge allowed Sexual Assault Nurse Examiner to testify from Montana using two-way video system, where court heard no evidence and made no case-specific finding, and State had sufficient time and ability to subpoena witness and witness was available to appear; cases that have justified remote testimony deal with child victims and child witnesses, witnesses who are too sick to travel and appear in court, witnesses who are overseas on active duty, or witnesses who are outside subpoena power of State); People v. Jemison, 952 N.W.2d 394 (Mich. 2020) (post-Crawford v. Washington, validity of Maryland v. Craig, 497 U.S. 836 in doubt; federal and state constitutional right of confrontation were violated when forensic analyst gave two-way, interactive video testimony); State v.

Rogerson, 855 N.W.2d 495 (Iowa 2014) (Confrontation Clause standard applied by Supreme Court in Maryland v. Craig applies to use of two-way videoconferencing); E.A.C. v. State, 324 So.3d 499 (Fla. Dist. Ct. App.,2021) (no error where court conducted remote juvenile delinquency trial via Zoom during COVID-19 pandemic; concerns raised on appeal related to potential problems in remote proceeding, not problems that actually occurred); United States v. Carter, 907 F.3d 1199 (9th Cir. 2018), cert denied 139 S.Ct. 2743 (right of confrontation violated where there were options other than using two-way video for testimony of pregnant witness; continuance could have been granted since witness was unable to travel only for duration of pregnancy, or court could have severed counts involving witness while maintaining scheduled trial date for remaining counts); People v. Giurdanella, 144 A.D.3d 479 (1st Dept. 2016), lv denied 29 N.Y.3d 948 (People proved it was necessary for complainant to testify via videoconferencing from Egypt, rejecting defendant's contention that full-blown evidentiary hearing, featuring sworn testimony, is prerequisite); People v. Wrotten, 73 A.D.3d 637, 901 N.Y.S.2d 265 (1st Dept. 2010), lv denied 15 N.Y.3d 811, cert denied 131 S.Ct. 1020 (live, two-way video properly used where trial court found by clear and convincing evidence that complainant "would be in serious danger of suffering serious health problems or possibly death by his traveling and testifying"; although medical risk can be "serious" without being more likely than not to come to fruition, defendant never contended that "serious" risk was insufficient to warrant a finding that complainant was unable to travel, and thus court did not decide whether greater degree of risk is required); . United States v. Akhavan, 523 F.Supp.3d 443 (S.D.N.Y. 2021) (testimony from witness in California by two-way video technology admitted where witness's age and preexisting conditions placed him at increased risk of serious illness or death if he were to contract COVID-19).

Confrontation Clause issues do not arise when it is the defendant who wishes to present video testimony. Compare People v. Razzoli, 71 Misc.3d 133(A) (App. Term, 1st Dept., 2021) (court did not err in refusing to permit defense witness to testify by Skype where defendant did not demonstrate that extraordinary procedure was necessary) with People v. Novak, 41 Misc.3d 733 (County Ct., Sullivan Co., 2013) (court permits defense witness who could not travel from Florida to testify via live, two-

way video conference through Skype, noting that Skype communication is reliable, accurate and widely used in society and commerce).

e. Identity Of Witness – A witness' name may be withheld upon a showing that the witness has a justifiable fear for his or her personal safety; the burden shifts to the respondent to establish the materiality of the name. See, e.g., People v. Waver, 3 N.Y.3d 748, 788 N.Y.S.2d 630 (2004) (People failed to satisfy burden of showing need for anonymity); People v. Frost, 100 N.Y.2d 129, 760 N.Y.S.2d 753 (2003) (witness' identity properly withheld due to fear for safety after in camera hearing in absence of defendant and defense counsel; defendant had opportunity to cross examine and prosecutor indicated that witness had no criminal record and that Rosario and Brady material had been disclosed); People v. Stanard, 42 N.Y.2d 74, 396 N.Y.S.2d 825 (1977) (identity of relocated witnesses withheld); People v. Nunez, 155 A.D.3d 444 (1st Dept. 2017), lv denied 30 N.Y.3d 1118 (no error where undercover officer testified anonymously, using shield number, and court refused to use officer's real name to conduct in camera search for impeachment material in databases where defense did not show that records were reasonably likely to be found, especially considering officer's long-time undercover service); People v. Johnson, 116 A.D.3d 501 (1st Dept. 2014), lv denied 23 N.Y.3d 1021 (defendant not constitutionally entitled to learn officer's true name); United States v. Ramos-Cruz, 667 F.3d 487 (4th Cir. 2012) (court did not err in concluding there was danger to El Salvadorian citizens who testify in United States courts against members of the gang); People v. Waite, 52 A.D.3d 237, 859 N.Y.S.2d 162 (1st Dept. 2008) (by agreeing to closure of courtroom to general public for testimony of the undercover officers on condition that defendants' family members be allowed into courtroom, defendants did not concede grounds required for officers to testify anonymously; showing that undercover officer would be endangered by revealing name in open court can establish not only basis for limited closure, but also grounds for anonymous testimony, but no such showing was made); People v. Washington, 40 A.D.3d 228, 835 N.Y.S.2d 142 (1st Dept. 2007), lv denied 9 N.Y.3d 927 (defense counsel's offer to keep officers' true names secret from client and others would not guarantee secrecy); People v. Medina, 288 A.D.2d 61, 732 N.Y.S.2d 411 (1st Dept. 2001) (officer's "unique" name withheld); People v. Remgifo, 150 A.D.2d 736, 541

N.Y.S.2d 605 (2d Dept. 1989) (undercover narcotics officer's name withheld); People v. Presto, 131 A.D.2d 707, 517 N.Y.S.2d 36 (2d Dept. 1987) (same as Remgifo); United States v. Urena, 8 F.Supp.3d 568 (SDNY 2014) (because having undercover testify under transparent code name, such as UC-188, might imply to jury that defendants are dangerous, undercover would testify under alias); see also People v. Griffin, 207 A.D.2d 844, 616 N.Y.S.2d 628 (2d Dept. 1994), lv denied 85 N.Y.2d 909, 627 N.Y.S.2d 332 (1995) (counsel was improperly precluded from asking witness his address).

f. Waiver Of Right - See United States v. Plitman, 194 F.3d 59 (2d Cir. 1999) (no violation of defendant's right of confrontation where defense counsel stipulated to admission of IRS agent's account of conversation with witness who lived in Venezuela).

g. Location Of Police Observation Post – Compare United States v. Harley, 682 F.2d 1018 (D.C. Cir. 1982) (location withheld to protect safety of owner or tenant); In re Tomicko M., 272 A.D.2d 155, 710 N.Y.S.2d 20 (1st Dept. 2000), lv denied 95 N.Y.2d 762, 715 N.Y.S.2d 215 (disclosure properly denied at fact-finding hearing where court permitted extensive cross examination regarding ability to observe) and Matter of Chris C., 172 Misc.2d 416, 658 N.Y.S.2d 929 (Fam. Ct., Bronx Co. 1997) (court finds compelling interest justifying denial of disclosure where cooperative owners and tenants who gave permission will be protected from reprisals; court does allow respondent to cross-examine with respect to distance, height, the use of vision-enhancing articles, and other matters) with United States v. Jimenez, 464 F.3d 555 (5th Cir. 2006) (defendant's right of confrontation violated where court prohibited defense counsel from cross-examining officer as to exact location from which he saw alleged drug sale, which was defendant's only means of testing officer's reliability); State v. Reed, 6 P.3d 43 (Wash. 2000) (defendant had right to confront and cross-examine officer at trial about location of police observation post from which officer observed cocaine sale); In re Darryl G., N.Y.L.J., 8/13/98, p. 23, col. 3 (Fam. Ct., N.Y. Co.), aff'd 264 A.D.2d 690, 695 N.Y.S.2d 355 (1999) (disclosure of observation post location denied for purposes of suppression hearing since court would permit defense counsel to cross-examine officer extensively about ability to observe, distances, etc., but court grants disclosure for purposes of fact-finding hearing since officer's testimony will be

determinative of guilt or innocence) and Matter of James B., 146 Misc.2d 532, 551 N.Y.S.2d 439 (Fam. Ct. N.Y. Co., 1990). See also People v. Wright, 279 A.D.2d 286, 718 N.Y.S.2d 828 (1st Dept. 2001), lv denied 96 N.Y.2d 808, 726 N.Y.S.2d 387 (defendant not entitled to ascertain specific place on undercover's body where he had secreted a radio transmitter).

h. Adequacy Of Police Investigation - People v. Hayes, 17 N.Y.3d 46 (2011) (no error where court precluded defense from challenging thoroughness of police investigation by showing that police failed to interview bystanders who made statements that were helpful to defense; court declines to impose affirmative obligation upon police to obtain exculpatory information for defendants); Alvarez v. Ercole, 763 F.3d 223 (2d Cir. 2014) (court improperly precluded defendant from cross-examining detective to show that police had not investigated leads provided by witness and contradict detective's portrayal of investigation as thorough and reliable); People v. Badia, 94 A.D.3d 622 (1st Dept. 2012) (reversible error where court unduly restricted cross-examination of witness concerning police investigation into another participant in crime and defense theory was that defendant had unwittingly agreed to aid in drug enterprise at other participant's behest); Watson v. Greene, 640 F.3d 501 (2d Cir. 2011) (potential for unfair prejudice to prosecution outweighed probative value, and justified limitation on cross-examination, where defense counsel sought to cross-examine lead detective about hearsay information police had regarding another suspect in effort to show that police prematurely concluded that defendant was shooter and failed to adequately investigate other suspect).

D. Examination Of Witnesses And Other Improper Interference By Judge - A judge may attempt to clarify testimony and expedite proceedings, but may not become excessively involved in examining witnesses, or communicate his or her views to the jury. See, e.g., People v. Yut Wai Tom, 53 N.Y.2d 44, 439 N.Y.S.2d 896 (1982); People v. Pulliam, 217 A.D.3d 968 (2d Dept. 2023) (reversible error where court, inter alia, engaged in lines of inquiry which detailed nature of surveillance equipment tracking defendant and elicited detailed description of perpetrator and bags he was carrying and what he was observed doing on camera; asked leading questions as to what guard saw; repeated perpetrator's allegedly threatening language; and elicited fact that officer

observed duffel bag containing the stolen property on subway platform next to defendant); People v. Martinez, 201 A.D.3d 658 (2d Dept. 2022) (majority finds no violation of defendant's right to fair trial, but dissenting judges assert that extensive questioning of defense expert disrupted defense counsel's direct examination, elicited significant testimony, appeared to display inordinate amount of skepticism in witness' testimony, and usurped role of prosecutor, and that court treated parties' experts differently, made efforts to point out inconsistencies in testimony of defendant's wife, and assisted in eliciting testimony from People's witnesses); People v. Parker, 197 A.D.3d 732 (2d Dept. 2021) (3-judge majority finds no improper interference, noting that court questioned detective to clarify why another occupant of residence was listed as owner of certain items seized and vouchered; that court intervened to facilitate orderly and expeditious progress of trial and assist in posing questions; and that court's posing of more than 200 questions is not dispositive); People v. Mitchell, 184 A.D.3d 875 (2d Dept. 2020) (after robbery complainants were unable to positively identify defendant, court questioned them until it elicited positive in-court identifications of defendant); People v. Hinds, 160 A.D.3d 983 (2d Dept. 2018) (reversible error where court intruded into questioning of witnesses more than 50 times, asking more than 400 questions; elicited step-by-step details from officers regarding observations and actions when they apprehended defendant; elicited and assisted in developing facts damaging to defense on direct examination of People's witnesses; and interrupted cross-examination and created impression that court was advocate on behalf of People); People v. Estevez, 155 A.D.3d 650 (2d Dept. 2017) (reversible error where judge intervened in questioning of prosecution witnesses; took over direct examination of a complaining witness at key moments when she was describing how defendant shot victim; and extensively questioned defendant while repeatedly highlighting apparent inconsistencies in defendant's testimony); People v. Byrd, 152 A.D.3d 984 (3d Dept. 2017) (no error where record was "sprinkled" with questions by court during the People's case and court instructed prosecutor as to types of questions and evidence that could be used to prove intent to sell drugs; court's unnecessary lectures on prosecutor's performance were cause for concern, but it was nonjury trial and most interjections expedited trial and clarified record); People v. Robinson, 151 A.D.3d 758 (2d Dept. 2017) (reversible error

where court engaged in protracted and often unnecessary questioning and at times acted as advocate for People, including when court redirected inquiry and blunted force of defense counsel's attempt to impeach complainant, and, when defense counsel was attempting to impeach witness with grand jury testimony, court made comment that essentially vouched for veracity of witness); People v. Davis, 147 A.D.3d 1077 (2d Dept. 2017) (reversible error where court elicited details regarding recovery of gun from defendant, witness's observation of gun, and 911 call, and extensively questioned defense witness as to his observations and whether he had made false statements to police and grand jury); People v. Kocsis, 137 A.D.3d 1476 (3d Dept. 2016) (reversible error where court provided guidance and instructions to prosecutor relative to rules of evidence; court explained nature of defense counsel's objections, outlined questions ADA needed to ask, and referred ADA to evidentiary treatise and afforded him a recess to review appropriate section); People v. Adams, 117 A.D.3d 104 (1st Dept. 2014), lv denied 24 N.Y.3d 1000 (trial court did not intervene excessively during questioning of the People's gunshot residue experts, FBI analyst and private examiner where certain interventions were attempts to clarify testimony; court did not endorse People's case or infect jury's evaluation of testimony; some questions were designed to expedite matters and ensure that witness understood prosecutor's confusing hypothetical and that jury understood expert's answers, which often employed technical jargon; court did not express skepticism regarding defense theory; and court intervened when defense counsel was attempting to prevent expert from providing complete answers or court was repeating portion of testimony defense counsel appeared not to have heard); People v. Zayas, 88 A.D.3d 918 (2d Dept. 2011) (judge improperly interrupted defense counsel's cross-examination to clarify witness's earlier testimony, and then read to jury from his personal notes concerning what witness had said); People v. Melendez, 31 A.D.3d 186, 815 N.Y.S.2d 551 (1st Dept. 2006) (no reversal where excessive questioning did not make it appear that judge was advocate for People or assist People in proving case); People v. Rodriguez, 22 A.D.3d 412, 802 N.Y.S.2d 358 (1st Dept. 2005), lv denied 6 N.Y.3d 758 (no error where judge, with jury absent, advised prosecutor to ask certain questions of police chemist after determining that prosecutor's inexperience was undermining orderly presentation of evidence); People v. Retamozzo, 25 A.D.3d 73,

802 N.Y.S.2d 426 (1st Dept. 2005) (conviction reversed where judge, inter alia, elicited testimony helpful to prosecution and devalued defense efforts, and, during defense case, repeatedly asked questions communicating skepticism); People v. Chatman, 14 A.D.3d 620, 789 N.Y.S.2d 208 (2d Dept. 2005) (judge improperly elicited testimony regarding defendant's failure to mention alibi to police, and questioned alibi witnesses extensively); People v. Prado, 1 A.D.3d 533, 767 N.Y.S.2d 129 (2d Dept. 2003) (majority concludes that judge's "reassuring" and "cajoling" conduct with reticent 11-year-old witness was not inappropriate); People v. Reid, 296 A.D.2d 335, 744 N.Y.S.2d 405 (1st Dept. 2002), lv denied 98 N.Y.2d 731, 749 N.Y.S.2d 482 (2002) ("better course" would have been for court to restrain itself from trying to clarify ambiguities regarding time between defendant's apprehension and arrest); People v. Brown, 262 A.D.2d 570, 694 N.Y.S.2d 666 (2d Dept. 1999), aff'd 95 N.Y.2d 776, 710 N.Y.S.2d 837 (no error where court accused defense counsel of mischaracterizing testimony, but counsel had been aggressive and confrontational); People v. Melendez, 227 A.D.2d 646, 643 N.Y.S.2d 607 (2d Dept. 1996) (reversible error where court assumed role of prosecutor with prosecution witnesses and asked pointed questions during defense counsel's cross which revealed court's assessment of credibility); Rivas v. Brattesani, 94 F.3d 802 (2d Cir. 1996) (defendants denied fair trial where judge, inter alia, commented on question asked by defense counsel by stating, "Come off it, will you counsel," and then stated to jury, "That, by the way, ladies and gentlemen, is pretty silly"); United States v. Filani, 74 F.3d 378 (2d Cir. 1996) (judge cross-examined defendant "more in the manner of a prosecutor than an impartial judge"); People v. Mendez, 225 A.D.2d 1051, 639 N.Y.S.2d 219 (4th Dept. 1996) (judge questioned defense witnesses, but rarely questioned prosecution witnesses); People v. Grant, 185 A.D.2d 896, 586 N.Y.S.2d 1019 (2d Dept. 1992) (judge developed identification testimony, and appeared to endorse complainant's credibility); People v. Williams, 177 A.D.2d 527, 575 N.Y.S.2d 915 (2d Dept. 1991) (judge encouraged witness to make identification); People v. Eldridge, 151 A.D.2d 966, 542 N.Y.S.2d 65 (4th Dept. 1989) (judge forced defendant to accuse witnesses of lying); People v. Cruz, 100 A.D.2d 518, 473 N.Y.S.2d 21 (2d Dept. 1984) (judge emphasized key elements of People's case); People v. Buckheit, 95 A.D.2d 814, 463 N.Y.S.2d 536 (2d Dept. 1983) (judge elicited incriminating evidence).

Arguably, judges have more discretion at bench trials. Compare Matter of Washington v. Edwards, 137 A.D.3d 1378 (3d Dept. 2016) (Support Magistrate erred in providing evidence to mother and using questions to ensure that she introduced evidence); Matter of Kyle FF., 85 A.D.3d 1463 (3d Dept. 2011) (reversible error where, even though parties agreed with recommendation made by Probation Department, court called and extensively questioned author of pre-dispositional report, secured production of additional documentary evidence, and, according essentially no weight to underlying recommendation and parties' expressed wishes, crafted placement disposition based almost entirely upon proof court elicited; it is function of court to protect record at trial, not make it, and court must take care to avoid assuming function or appearance of advocate); Matter of Jacqulin M., 83 A.D.3d 844 (2d Dept. 2011) (reaching unpreserved issue in interests of justice, court finds reversible error where family court judge extensively participated in direct and cross-examination of prosecution witnesses and elicited testimony which strengthened prosecution's case, and summoned probation officer assigned to respondent's case, and indicated to defense counsel that unless he agreed to stipulate as to what probation records would reflect, records would be admitted through probation officer's testimony even though neither prosecutor nor defense counsel intended to call probation officer as witness or offer records and stipulation had effect of rebutting portion of respondent's testimony; judge assumed parties' traditional role of deciding what evidence to present and offered no explanation on record as to why he felt compelled to do so) and Matter of Yadiel Roque C., 17 A.D.3d 1168, 793 N.Y.S.2d 857 (4th Dept. 2005) (adjudication reversed due to court's extensive examination of witnesses) with Matter of Samantha K., 61 A.D.3d 1322, 877 N.Y.S.2d 517 (3rd Dept. 2009) (in PINS proceeding, court did not err in asking questions related to foundation for admission of attendance record; "In this nonjury setting, the questions merely facilitated the orderly and expeditious progress of the hearing"); Matter of Thomas B., 57 A.D.3d 1455, 870 N.Y.S.2d 688 (4th Dept. 2008) (court erred at probation violation hearing by reminding presentment agency to have witness make in-court identification, but error was harmless) and People v. McRae, 284 A.D.2d 657, 728 N.Y.S.2d 516 (3rd Dept. 2001), lv denied 96 N.Y.2d 921, 732 N.Y.S.2d 638 (People called additional witness after court cited burden at suppression hearing).

In People v. Arnold, 98 N.Y.2d 63, 745 N.Y.S.2d 782 (2002), the Court of Appeals, while finding reversible error where the court *called its own witness* at a bench trial, concluded that the court's discretion to call a witness should be exercised sparingly, and that the court should explain its reasons for doing so and invite comment from the parties, so that the court can weigh what it aims to accomplish against claims of prejudice and an appellate court will have a basis for review). See also People v. Rodriguez, 211 A.D.3d 1042 (2d Dept. 2022), lv denied 39 N.Y.3d 1143 (court did not err in calling expert witness at CPL Article 440 hearing where court explained that it needed to be educated and obtain help in understanding complex DNA evidence).

The Court has no authority to compel the prosecution to call a witness, even if it means that the proceeding must be dismissed as a result. See Matter of Soares v. Carter, 25 N.Y.3d 1011 (2015) (in case in which People decided not to prosecute, court had no authority to order People to call witnesses at suppression hearing or enforce directive through contempt powers; it is within sole discretion of each district attorney to orchestrate prosecution, and, when court assumes role of district attorney by compelling prosecution, it has acted beyond its jurisdiction).

At the other end of the spectrum is judicial inattentiveness during a proceeding. See, e.g., People v. Degondea, 3 A.D.3d 148, 769 N.Y.S.2d 490 (1st Dept. 2003).

A judge also can improperly interfere in a prosecution by negotiating a plea bargain with a prosecution witness. People v. Greenspan, 186 A.D.3d 505 (2d Dept. 2020), lv denied 35 N.Y.3d 1094 (reversible error where court entered into plea agreement with testifying co-defendant in conjunction with cooperation agreement reached between co-defendant and People; although People had promised to recommend sentence of imprisonment between two and seven years, court promised sentence of probation in exchange for testimony against defendant); People v. Lawhorn, 178 A.D.3d 1466 (4th Dept. 2019) (reversible error where court negotiated and entered into plea agreement that required co-defendant to testify against defendant in exchange for more favorable sentence, which denied defendant due process right to fair trial in fair tribunal).

E. Impeachment

1. Ability Of Witness To Perceive And Recall - The impairment of a witness' ability to perceive and recall events because of drug or alcohol use, mental illness, or some other disability or impediment, may be proved by way of extrinsic evidence. Richardson, §6-418. See, e.g., People v. Freeland, 36 N.Y.2d 518, 369 N.Y.S.2d 649 (1975) (narcotics addiction); People v. Diez, 73 Misc.3d 143(A) (App. Term, 2d Dept., 9th & 10th Jud. Dist., 2021) (court erred in precluding defendant from cross-examining complainant about whether she had been experiencing side effects from medications); People v. Stephens, 61 Misc.3d 130(A) (App. Term, 1st Dept., 2018) (verdict against weight of evidence where officer's observations were made through vents in door); People v. Baranek, 287 A.D.2d 74, 733 N.Y.S.2d 704 (2d Dept. 2001) (mental illness); People v. Davis, 225 A.D.2d 449, 639 N.Y.S.2d 350 (1st Dept. 1996), lv denied 88 N.Y.2d 965, 647 N.Y.S.2d 719 (mental disability, including "confabulatory tendencies"); United States v. Sasso, 59 F.3d 341 (2d Cir. 1995) (no error where trial court refused to permit defendants to cross-examine witness concerning use of antidepressant drugs); People v. Freshley, 87 A.D.2d 104, 451 N.Y.S.2d 73 (1st Dept. 1982) (mental illness); People v. Knatz, 76 A.D.2d 889, 428 N.Y.S.2d 709 (2d Dept. 1980) (drug use on day of incident and day of trial); see also People v. Novak, 41 Misc.3d 737 (County Court, Sullivan Co., 2013) (out of abundance of caution in protecting defendant's Sixth Amendment rights, court ordered that defense expert could observe prosecution witness's testimony; that defendant could consult with expert regarding cross-examination strategies; that expert could not testify regarding observations of witness during testimony, opinion of witness's veracity, or opinion of witness's emotional or mental condition during his testimony or confession; and that defendant could present expert testimony regarding generally accepted opinion as to the ability of persons with same diagnoses as witness to perceive, recall and relate events); but see People v. Ignatyev, 147 A.D.3d 489 (1st Dept. 2017), lv denied 29 N.Y.3d 1033 (expert testimony properly excluded where impact of alcohol on person's memory not beyond ken of jury); People v. Billups, 132 A.D.2d 612, 518 N.Y.S.2d 9 (2d Dept. 1987) (expert had not examined witnesses and could only speculate about effect of methadone); Drake v. Woods, 547 F.Supp.2d 253 (SDNY, 2008) (no error in trial court's refusal to allow defense counsel to cross-examine witness about mental health

history where prosecution represented that witness suffered from no serious psychiatric problems that would affect her perception and consulted therapist on only three occasions to discuss "the general issues of her life").

A witness' failure to recall the reasons for an opinion, an identification, etc., could give rise to a right of confrontation claim. But see United States v. Owens, supra, 484 U.S. 554 (no violation where witness forgot reasons for past belief that defendant was assailant); Delaware v. Fensterer, supra, 474 U.S. 15 (no violation where expert forgot basis of opinion).

In People v. Washington, 238 A.D.2d 263, 657 N.Y.S.2d 24 (1st Dept. 1997), the court upheld the exclusion of expert testimony regarding the susceptibility of young children to suggestion. See also People v. Johnston, 273 A.D.2d 514, 709 N.Y.S.2d 230 (3rd Dept. 2000) (same as Washington); People v. Kanani, 272 A.D.2d 186, 709 N.Y.S.2d 505 (1st Dept. 2000) (same as Washington; defendant failed to meet burden under Frye); but see Washington v. Schriver, 255 F.3d 45 (2d Cir. 2001) (while affirming denial of habeas relief, Second Circuit criticizes First Department's reasoning in People v. Washington, supra).

A related issue is whether the court should conduct a pretrial hearing to determine whether the child's testimony should be suppressed because of unduly suggestive interviewing. See Woyak v. State, 226 P.3d 841 (Wyo. 2010) (court declines to endorse separate pretrial "taint" hearing, since taint issue can be addressed adequately at competency hearing); Commonwealth v. Delbridge, 855 A.2d 27 (PA 2003) (if there is some evidence of suggestiveness, taint may be raised at pretrial competency hearing); State v. Michaels, 642 A.2d 1372 (NJ 1994) (given improper interrogations substantial likelihood that evidence from them was unreliable, State required to prove by clear and convincing evidence at pretrial hearing that evidence retained sufficient reliability to warrant admission); People v. Werkheiser, 171 A.D.3d 1297 (3d Dept. 2019), lv denied 33 N.Y.3d 1109 (no error in denial of taint hearing where defendant made speculative claims that there was manipulation of victims because claims of abuse arose in context of custody dispute between victims' parents and neglect petition filed against defendant that involved her newborn son); People v. Muckey, 158 A.D.3d 954 (3d Dept. 2018), lv denied 31 N.Y.3d 1015 (court may, upon

proper showing, direct that pretrial taint hearing be held, but defendant failed to make non-speculative showing of undue suggestion); People v. Montalvo, 34 A.D.3d 600, 825 N.Y.S.2d 101 (2d Dept. 2006), lv denied 8 N.Y.3d 883 (in absence of non-speculative evidence of undue suggestion, court properly denied defendant's motion to suppress); People v. Wilson, 255 A.D.2d 612, 679 N.Y.S.2d 732 (3rd Dept. 1998), lv denied 93 N.Y.2d 981, 695 N.Y.S.2d 68 (1999) (defendant not entitled to pretrial hearing); People v. Britton, 39 Misc.3d 1225(A) (Sup. Ct., Kings Co., 2013) (in prosecution arising out of defendant's alleged sexual abuse of 11-year-old niece, court denies motion for pre-trial "taint" hearing where defendant alleged that witness was interviewed more than once, did not report abuse immediately, and spoke with adults; court notes that those circumstances are common); People v. Jones, 185 Misc.2d 899, 714 N.Y.S.2d 876 (Sup. Ct., Kings Co., 2000) (court denies defendant's motion for pretrial hearing); People v. Michael M., 162 Misc.2d 803, 618 N.Y.S.2d 171 (Sup. Ct. Kings Co., 1994) (court may hold pretrial hearing).

2. Failure Of Alibi Or Other Witness To Promptly Come Forward - Evidence of an alibi witness' failure to promptly come forward to the authorities is admissible if the prosecutor establishes that the witness was aware of the charges, recognized that he or she had exculpatory information, was familiar with the means of contacting the authorities, and had a relationship with the respondent that would provide a motive to help. See People v. Dawson, 50 N.Y.2d 311, 428 N.Y.S.2d 914 (1980) (court should instruct jury that witness had no duty to volunteer information and that delay can only be considered insofar as it affects witness' credibility, and should call bench conference to ascertain whether witness refrained from speaking on advice of defendant's counsel); People v. Cardillo, 64 Misc.3d 25 (App. Term, 2d Dept., 9th & 10th Jud. Dist., 2019) (permissible negative inference could be drawn where witness failed to come forward until seven months after "good friend" had been charged to state that he, not DWI defendant, had been operator of defendant's vehicle); People v. Shelton, 100 A.D.3d 662 (2d Dept. 2012), lv denied 20 N.Y.3d 1014 (People arguably established that witness was familiar with means to make information available due to community activism and contacts at District Attorney's office, but she testified, in effect, that she did not believe defendant was involved with gunshots and People failed to

establish reasonable motive for acting to exonerate defendant since she testified that she had first met him that evening); People v. Hooks,110 A.D.2d 909, 488 N.Y.S.2d 459 (2d Dept. 1985) (trial court improperly precluded defense counsel from showing that he advised witness not to come forward); see also People v. Jenkins, 88 N.Y.2d 948, 647 N.Y.S.2d 157 (1996) (probative value outweighed potential for prejudice where witness testified that he had known defendant had been in jail since his arrest and had spoken to defendant while he was in jail). If an alibi witness testifies that he or she made a statement to the police at the time of the arrest, the prosecution may elicit rebuttal testimony to show that the witness did not come forward. People v. Knight, 80 N.Y.2d 845, 587 N.Y.S.2d 588 (1992).

The prosecution may not impeach the witness if the witness' attempts to communicate have been thwarted. See People v. Miller, 227 A.D.2d 346, 643 N.Y.S.2d 74 (1st Dept. 1996), aff'd 89 N.Y.2d 1077, 659 N.Y.S.2d 837 (1997) (impeachment permissible where ADA refused to speak to witnesses with defense counsel present but offered to talk alone or after witnesses secured counsel).

It has been held that the Dawson rule does not apply to a witness's contacts with other civilians. People v. Trinidad, 57 A.D.3d 219, 868 N.Y.S.2d 61 (1st Dept. 2008).

3. Bad Acts

a. Nature Of Acts - Immoral, vicious and criminal acts which reflect upon character and show a witness to be unworthy of belief may be used for impeachment.

But it is improper to ask a witness about misconduct which is not relevant to credibility, such as failing to pay rent, gambling, etc., or ask a police officer about a lawsuit without establishing that the allegations in the lawsuit are relevant to the officer's credibility. Richardson, §§ 6-406-407; see People v. Sorge, 301 N.Y. 198 (1950); see also Kazadi v. State, 223 A.3d 554 (Md. 2020) (absent allegations giving rise to motive to testify falsely or bias, State witness's status as undocumented immigrant, or deportation order to which witness may be subject, does not show witness's character for untruthfulness or motive to testify falsely, and thus information need not be disclosed by prosecutor during discovery and is not proper subject of cross-examination); People v. Rouse, 34 N.Y.3d 269 (2019) (reversible error where court refused to allow defendant

to cross examine regarding misstatements one officer made to federal prosecutor in different matter, and prior judicial determinations finding that each officer gave unreliable testimony); People v. Smith, 27 N.Y.3d 652 (2016), reargument den'd 28 N.Y.3d 1112 (federal lawsuit alleging tortious conduct provides good faith basis for raising issue; subject to trial court's discretion, defendants should be permitted to ask questions based on specific allegations of lawsuit if they are relevant to witness's credibility, but where lawsuit has not resulted in adverse finding, defendants should not be permitted to ask witness if he/she has been sued, if case was settled unless there was admission of wrongdoing, or if criminal charges related to plaintiffs in those actions were dismissed); People v. Garrett, 23 N.Y.3d 878 (2014 (civil allegation that officer procured false confession to arson by repeatedly striking handcuffed plaintiff in head with telephone book was favorable impeachment evidence); Matter of Andrew O., 16 N.Y.3d 841 (2011) (reversible error where State's attorney attacked expert's credibility on basis of his religious beliefs and affiliation); People v. Graham, 215 A.D.3d 434 (1st Dept. 2023), lv denied 40 N.Y.3d 928 (no error where court prohibited impeachment through questions regarding witnesses' immigration status); People v. Meredith, 203 A.D.3d 633 (1st Dept. 2022), lv denied 38 N.Y.3d 1072 (court erred in precluding cross-examination of undercover officer about underlying facts of pending lawsuit alleging that officer and other officers falsely claimed that plaintiff had sold drugs); People v. Conner, 184 A.D.3d 431 (1st Dept. 2020) (reversible error where court denied defendant's request to cross-examine officer regarding allegations in civil lawsuit that officer and a detective arrested plaintiff without suspicion of criminality and lodged false charges against him); People v. Brown, 181 A.D.3d 701 (2d Dept. 2020), lv denied 35 N.Y.3d 1064 (defendant failed to demonstrate that allegations of excessive force in pending federal action against detective, and 2010 finding by Civilian Complaint Review Board that detective used excessive force, were relevant to detective's credibility); People v. Burgess, 178 A.D.3d 609 (1st Dept. 2019) (new suppression hearing and trial ordered where defendant was not permitted to cross-examine officer regarding civil lawsuit in which it was claimed that officer arrested plaintiff without suspicion of criminality and lodged false charges against him); People v. Crupi, 172 A.D.3d 898 (2d Dept. 2019), lv denied 34 N.Y.3d 950, cert denied 140 S.Ct. 2815 (false arrest and police brutality

charges in federal lawsuits involved alleged conduct by large groups of officers and not specific allegations against police witness individually); People v. Smith, 171 A.D.3d 523 (1st Dept. 2019), lv denied 33 N.Y.3d 1073 (court erred in refusing to permit defense to cross-examine detective about lawsuit in which it was alleged that he fabricated evidence); People v. Holmes, 170 A.D.3d 532 (1st Dept. 2019) (court improperly precluded cross-examination of officer, who allegedly saw defendant's pistol falling, about allegations in federal civil action which had settled where counsel had good faith basis for asking about allegations that witness and other officers approached and assaulted plaintiff without basis for suspecting him of posing danger and filed baseless criminal charges against him); People v. Moore, 168 A.D.3d 1102 (2d Dept. 2019), lv denied 33 N.Y.3d 979 (court erred in precluding cross-examination of officer about allegations made against him in four federal civil rights lawsuits claiming he was involved in false arrests); People v. Watson, 163 A.D.3d 855 (2d Dept. 2018), lv denied 32 N.Y.3d 1009 (no error in preclusion of cross-examination regarding two settled federal civil rights lawsuits where complaints contained broad conclusory allegations of unlawful police action by large groups of officers, and did not allege specific acts committed by officer in question; however, court erred in precluding cross-examination as to underlying facts of third lawsuit alleging that officer and two fellow officers pulled plaintiffs' vehicle over, ordered plaintiffs out of car, and searched vehicle without probable cause, and that, upon recovering folding knife, officers falsely claimed that it was gravity knife and placed plaintiffs under arrest for its possession); People v. Robinson, 154 A.D.3d 490 (1st Dept. 2017), lv denied 30 N.Y.3d 1108 (drug possession conviction overturned where court precluded defense counsel from questioning arresting detective about factual allegations in pending federal civil lawsuit in which detective was named defendant and counsel intended to ask officer whether he had arrested the plaintiff for drug possession when the plaintiff had no drugs); People v. Enoe, 144 A.D.3d 1052 (2d Dept. 2016) (court erred in prohibiting defendant from cross-examining officer with respect to allegations in federal lawsuit that he falsely arrested individual on weapon possession charge for purpose of securing overtime compensation and "credit" for gun-related arrest where officer testified that he saw defendant possess gun in back seat of livery cab; defendant should have been

permitted to inquire into underlying facts of lawsuit, but not about settlement of lawsuit); People v. Hubbard, 132 A.D.3d 1013 (2d Dept. 2015) (order vacating judgment of conviction affirmed where court, inter alia, properly determined that undisclosed evidence concerning allegations that detective had procured false confession in unrelated matter, which led to federal lawsuit against, among others, the detective, was favorable to defense and material); People v. Ouanes, 123 A.D.3d 480 (1st Dept., 2014) (defendant not prejudiced by preclusion of inquiry into past use of Xanax and cocaine, which had little or no probative value); Longus v. United States, 52 A.3d 836 (D.C. Ct. App. 2012) (right of confrontation violated when court allowed defendant to ask detective whether he was under investigation by the U.S. Attorney for coaching witness to provide untruthful information during homicide investigation, but barred defense counsel from questioning detective about, or introducing evidence of, facts underlying allegations; corrupt behavior could show willingness to thwart discovery of truth); United States v. Alston, 626 F.3d 397 (8th Cir. 2010), cert denied 131 S.Ct. 1842 (defense precluded from inquiring into detective's termination from police department; even if detective lied to superiors, that was isolated event of different character since detective allegedly invented complex confession to secure drug conviction in this case, while he allegedly lied to superiors to protect himself from punishment); People v. White, 41 A.D.3d 1036, 838 N.Y.S.2d 248 (3rd Dept. 2007) (mere act of rapping is not prior bad act); People v. Daley, 9 A.D.3d 601, 780 N.Y.S.2d 423 (3d Dept. 2004) (court improperly precluded defendant from cross-examining correction officer about federal lawsuit brought against officer by inmate who asserted that officer had assaulted him); People v. Love, 307 A.D.2d 528, 762 N.Y.S.2d 162 (3rd Dept. 2003) (defendant allowed to question victim as to whether her children were taken into foster care as a result of her abuse or neglect, but not as to details of conduct); People v. Locicero, 119 A.D.2d 699, 500 N.Y.S.2d 821 (2d Dept. 1986) (prosecutor improperly asked defense witness about membership in motorcycle club); People v. Batista, 113 A.D.2d 890, 493 N.Y.S.2d 608 (2d Dept. 1985) (court improperly prevented defense counsel from cross-examining witness about marijuana possession); People v. Williams, 65 Misc.3d 1153 (Sup. Ct., N.Y. Co., 2019) (sound public policies justified barring cross examination regarding prosecution witness's immigration status; however, such a witness may be questioned

about knowingly making false statements to obtain government benefits, assuming a false identity while in the country, or committing any other transgression that goes directly to credibility); People v. Letang, 63 Misc.3d 1225(A) (Sup. Ct., Bronx Co., 2019) (where defendant challenged search warrant, court rules that defendant may cross-examine about facts underlying certain civil suits involving search warrant and relevant allegations by plaintiff, but not about certain lawsuits that name many officers as defendants while making very few if any allegations of specific actions taken by specific officers); United States v. Krug, 2019 WL 3162091 (WDNY 2019) (defendant not permitted to impeach witness with possession of narcotics with intent to sell, use of alcohol or drugs, or anti-social, unlawful and sometimes violent behavior not involving dishonesty, fraud or false statements); People v. Johnson, 2011 NY Slip Op 34295(U) (County Ct., Suffolk Co., 2011) (defendant entitled to ask detective about allegations in federal court complaint that two months before interrogating defendant, detective participated in coercive interrogation in which plaintiff's right to counsel was violated and tactics employed resulted in false confession); People v. Simmons, 57 Misc.3d 1212(A) (County Ct., Monroe Co., 2017) (defendant permitted to cross-examine officer about excessive force allegations, since defense theory was that officer used excessive and illegal force by firing weapon at defendant for no good reason, and then fabricated allegation that defendant shot at him first); United States v. Polanco, 2011 WL 1795293 (SDNY 2011) (defendant precluded from cross-examining officer about substantiated Civilian Complaint Review Board findings against him regarding the propriety of searches where there was no information suggesting that officer was found to be incredible); Matter of M. v. New York City Transit Authority, 4 Misc.3d 829, 781 N.Y.S.2d 865 (Sup. Ct., Richmond Co., 2004) (as a matter of public policy, court in civil action should exercise discretion to preclude impeachment with evidence of past heroin use and addiction of witness who is participating in chemical dependency treatment program); People v. Gonzalez, 193 Misc.2d 17, 748 N.Y.S.2d 233 (Sup. Ct., Bronx Co., 2002) (defendant entitled to ask prosecution witness about his status as illegal alien).

In addition, a witness may not be asked whether he/she has been arrested, indicted, or charged, or otherwise impeached with the mere fact that an accusation has been made. See, e.g., People v. Miller, 91 N.Y.2d 372 (1998) (fact of arrest or

indictment filed incident to arrest is not permitted area for impeachment; indictment "is a mere accusation and raises no presumption of guilt. It is purely hearsay, for it is the conclusion or opinion of a body of men based on ex parte evidence"); People v. Rodriguez, 28 Misc.3d 129(A), 911 N.Y.S.2d 695 (App. Term, 2d, 11th & 13th Jud. Dist., 2010), lv denied 16 N.Y.3d 745 (no error where court barred inquiries regarding whether complainant had "been under investigation by ACS"; record does not show good faith basis for inquiry, and witness cannot be impeached merely with fact of investigation); People v. Munquia, 23 A.D.3d 583, 806 N.Y.S.2d 595 (2d Dept. 2005), lv denied 6 N.Y.3d 778; People v. Grant, 234 A.D.2d 475, 651 N.Y.S.2d 564 (2d Dept. 1996).

b. Use Of Extrinsic Evidence - A witness' commission of prior bad acts is a collateral issue. Consequently, bad acts may not be proved extrinsically after a witness denies committing them. See Badr v. Hogan, 75 N.Y.2d 629, 555 N.Y.S.2d 249 (1990). However, the examiner is permitted some leeway while pressing the witness to change his or her answer. Richardson, §6-406.

A formal judicial finding that a witness lied can, like a conviction that is relevant to credibility, be proved even when the witness denies having committed the bad act. Compare United States v. Woodard, 699 F.3d 1188 (10th Cir. 2012) (defendant's right of confrontation violated where court refused to allow defendant to cross-examine government inspector about prior judicial determination that witness was not credible); United States v. White, 692 F.3d 235 (2d Cir. 2012) (reversible error in exclusion of evidence of prior judicial finding that detective gave incredible testimony at suppression hearing in another case) and United States v. Cedeno, 644 F.3d 79 (2d Cir. 2011) (trial court erred in limiting cross-examination by barring use of state court's finding that witness had given false testimony in prior proceeding; court only considered whether prior finding addressed witness's veracity in that case or generally and whether the two sets of testimony involved similar subject matter, but court also should have considered whether prior lie was under oath in judicial proceeding or was made in less formal context, whether lie was about matter that was significant, how much time had elapsed since lie was told and whether there had been any intervening credibility determination regarding witness, apparent motive for lie and whether similar motive existed in this

proceeding, and whether witness offered explanation for lie and, if so, whether explanation was plausible) with People v. Parker, 1067-12, NYLJ 1202620087710, at *1 (Co., WE, Decided September 12, 2013) (defendant not permitted to cross-examine officers regarding alleged perjury during federal criminal trial where it was impossible to decipher which witnesses federal judge concluded were lying).

c. Acts Committed By Juveniles Or Youthful Offenders - The acts underlying a delinquency or Youthful Offender adjudication may be explored. See Matter of Roseangela C., 232 A.D.2d 633, 648 N.Y.S.2d 1013 (2d Dept. 1996); People v. Mills, 146 A.D.2d 810, 537 N.Y.S.2d 74 (2d Dept. 1989); People v. Scoon, 130 A.D.2d 597, 515 N.Y.S.2d 306 (2d Dept. 1987); People v. Brailsford, 106 A.D.2d 648, 482 N.Y.S.2d 907 (2d Dept. 1985) (defendant's PINS records could be used as source of questions). But see FCA §380.1(3) ("Except where specifically required by statute, no person shall be required to divulge information pertaining to the arrest of the respondent or any subsequent proceeding under [FCA article 3]"). However, if the basis for impeachment is the illegal inspection of such records, the witness may refuse to answer. See People v. Hunter, 88 A.D.2d 321, 453 N.Y.S.2d 212 (2d Dept. 1982). In addition, a witness may not be asked about the underlying facts where the records have been sealed. See People v. Ellis, 184 A.D.2d 307, 584 N.Y.S.2d 569 (1st Dept. 1992), lv denied 80 N.Y.2d 929, 589 N.Y.S.2d 856; C.P.L. §160.60 (arrest and prosecution of matter terminated in favor of defendant ”shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution”).

d. Good Faith Basis Of Examiner - The examiner must have some reliable information concerning the acts, and may not go on a fishing expedition hoping to hit on something relevant. See, e.g., People v. Ridenhour, 153 A.D.3d 942 (2d Dept. 2017) (where defendant was charged with stabbing victim in throat, court erred in ruling that People could cross-examine defendant regarding prior slashing of victim’s throat with knife where People alleged that in 911 calls, reference was made by unidentified individuals to “second time” defendant had tried to stab victim and that People had recorded conversation in which victim “referenced” prior incident, but victim had never identified attacker and consistently refused to cooperate with law

enforcement); People v. Elliot, 127 A.D.3d 779 (2d Dept. 2015), lv denied 26 N.Y.3d 928 (no good-faith basis for attempting to impeach officer by questioning him about involvement in unrelated police shooting where officer stated that he had not been suspended or reprimanded, that no charges were pending against him, that he still had gun and badge, that there had been no change in duty status, and that police department had deemed incident a "good shoot"); People v. Andrew, 54 A.D.3d 618, 863 N.Y.S.2d 676 (1st Dept. 2008) (no error in trial court's refusal to allow defendant to question arresting detective regarding certain federal lawsuits where detective was one of several officers named as defendants in two actions involving single incident that occurred one year before charged incident and defense failed to establish good faith basis for eliciting underlying facts as prior bad acts); People v. Francis, 15 A.D.3d 318, 790 N.Y.S.2d 103 (1st Dept. 2005), lv denied 4 N.Y.3d 853 (no good faith basis where defendant attempted to cross-examine witness about a fight in which he was involved, but there was no showing that incident involved a "bad act"); People v. Crawford, 256 A.D.2d 141, 683 N.Y.S.2d 216 (1st Dept. 1998) (prosecutor improperly questioned defendant's alibi witness regarding alleged history of prostitution based on hunch that witness had used a name consistent with that on the rap sheet); People v. Colas, 206 A.D.2d 183, 619 N.Y.S.2d 702 (1st Dept. 1994), lv denied 85 N.Y.2d 907, 627 N.Y.S.2d 330 (1995) (inquiry was undertaken in bad faith where prosecutor questioned defendant about school assault that was never reported and did not result in arrest); People v. Morales, 147 A.D.2d 381, 537 N.Y.S.2d 804 (1st Dept. 1989) (no good faith basis for implying that defense witness was involved in the crime charged).

e. Witness' Invocation Of Fifth Amendment - See, e.g., People v. Siegel, 87 N.Y.2d 536, 640 N.Y.S.2d 831 (1995) (no error where court instructed jury that it could consider defense witness' assertion of privilege when evaluating his credibility; in fact, court could have stricken all of witness' direct testimony); People v. Chin, 67 N.Y.2d 22, 499 N.Y.S.2d 638 (1986) (since defendant adequately explored witness' open cases in order to show motive to please prosecutor, there was no right of confrontation violation); People v. Osei, 63 Misc.3d 159(A) (App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 2019), lv denied 34 N.Y.3d 935 (reversible error where complainant used Fifth Amendment as shield to avoid answering questions about

motivation to fabricate testimony; appropriate remedy in such a case is to strike witness's testimony); People v. Thompson, 153 A.D.3d 433 (1st Dept. 2017), lv denied 30 N.Y.3d 984 (court properly declined to strike testimony where defendant had full opportunity to cross-examine witness about charged crime, and, although witness refused to answer questions about cooperation agreement involving unrelated charges, terms of agreement, underlying facts of pending charges and witness's expectation of benefit for testimony were revealed to jury); People v. Roseboro, 151 A.D.3d 526 (1st Dept. 2017) (no error in court's refusal to strike testimony of teenage girl whose prostitution defendant was charged with promoting after she invoked privilege against self-incrimination in response to questions on cross-examination regarding continued prostitution activities after defendant's arrest and ability to post escort ads herself; defendant was able to show witness was self-employed prostitute and that he did not advance or profit from her prostitution, and court instructed jury that it could draw adverse inference); People v. Joaquin, 150 A.D.3d 618 (1st Dept. 2017) (no error where court declined to strike any testimony as remedy for victim's repeated invocation of Fifth, but repeatedly told jury that while victim had right to invoke Fifth, jury could consider invocation in determining credibility and weight of testimony); People v. McLeod, 122 A.D.3d 16 (1st Dept. 2014) (defense counsel improperly precluded from cross-examining accomplice who entered into cooperation agreement with People, admitted to committing and implicated defendant in prior robberies, and intended to invoke privilege against self-incrimination in response to questions about those crimes, where counsel's theory was that witness had implicated defendant in prior robberies to bolster value of cooperation agreement; if witness invoked privilege, trial court should have struck all or some of direct testimony, or at least instruct jury that it could consider witness's invocation of privilege in determining credibility); People v. Visich, 57 A.D.3d 804, 870 N.Y.S.2d 376 (2d Dept. 2008) (no right of confrontation violation where defendant attempted to cross-examine prosecution witnesses regarding uncharged crimes but witnesses invoked privilege against self-incrimination; trial court denied defendant's request to strike witnesses' direct testimony, but charged jury that witnesses' invocation of privilege could be considered in determining credibility, and defendant also was able to explore each witness's bias and motivation to testify falsely

through other evidence).

f. Dismissal Of Charges - The dismissal of formal charges does not necessarily preclude impeachment through questioning concerning the underlying acts. Compare People v. Watson, 111 A.D.2d 888, 491 N.Y.S.2d 24 (2d Dept. 1985) (defense counsel improperly precluded from questioning witness about 2 prior adjournments in contemplation of dismissal) and People v. Vandermeulen, 8 Misc.3d 812, 796 N.Y.S.2d 234 (County Ct., Sullivan Co., 2005) (where grand jury had refused to indict witness, defense precluded from asking witness regarding arrest and prosecution, but could ask witness about job suspension and pending administrative disciplinary proceeding) with People v. Gamble, 179 A.D.3d 580 (1st Dept. 2020), lv denied 35 N.Y.3d 974, cert denied 141 S.Ct. 630 (no error where court precluded defendant from cross-examining witness about arrest that had resulted in dismissal because defense counsel did not demonstrate that charges were not dismissed on merits); People v. Parsons, 6 A.D.3d 364, 775 N.Y.S.2d 523 (1st Dept. 2004), lv denied 3 N.Y.3d 679 (no good faith basis for impeachment inquiry where police witness had been acquitted); People v. Plaisted, 2 A.D.3d 906, 767 N.Y.S.2d 518 (3rd Dept. 2003), lv denied 2 N.Y.3d 744 (2004) (defense counsel properly precluded from questioning witness without first demonstrating that absence of conviction was for reason other than acquittal or dismissal on merits); People v. Ellis, 184 A.D.2d 307, 584 N.Y.S.2d 569 (1st Dept. 1992), lv denied 80 N.Y.2d 929, 589 N.Y.S.2d 856 (prosecution witness properly denied existence of prior sealed arrests) and People v. Booker, 134 A.D.2d 949, 521 N.Y.S.2d 953 (4th Dept. 1987) (improper to ask witness about charges on which he had been acquitted). However, a witness may never be asked whether he or she has been arrested, indicted, or tried for a crime. Richardson, §6-409.

4. Convictions

a. Nature Of Conviction - A witness may be impeached with a prior conviction that is relevant to an evaluation of the witness' credibility. See, e.g., People v. Memminger, 126 A.D.2d 752, 511 N.Y.S.2d 334 (2d Dept. 1987), lv denied 69 N.Y.2d 953, 516 N.Y.S.2d 1036 (defense improperly precluded from cross-examining witness about weapon possession and disorderly conduct charges); People v. Thompson, 120 A.D.2d 627, 502 N.Y.S.2d 232 (2d Dept. 1986) (trial court improperly

precluded cross-examination by defense about witness' 1969 assault conviction). Although the traditional rule has been that the conviction must be for a "crime," i.e., a misdemeanor or felony (see PL §10.00[6]), FCA §344.1(1) permits impeachment with a conviction for an "offense" (see PL §10.00[1]). Thus, a witness can be impeached with a violation. See People v. Vargas, 140 A.D.2d 472 (2d Dept. 1988); People v. Rivera, 101 A.D.2d 981 (3d Dept. 1984). Although an "Alford" plea does not constitute an express admission of guilt, it has been held that it may be used for impeachment. People v. Miller, 91 N.Y.2d 372, 670 N.Y.S.2d 978 (1998).

b. Use Of Extrinsic Evidence - The existence of a witness' criminal conviction(s) is not a collateral matter. Thus, a conviction may be proved extrinsically after the witness denies its existence. Richardson, §6-409; see also People v. Scott, 47 A.D.3d 1016, 849 N.Y.S.2d 335 (3rd Dept. 2008), lv denied, 10 N.Y.3d 870 (court did not err in permitting People to inquire on cross-examination about statements defendant made to newspaper reporter denying involvement in hit-and-run automobile accident that severely injured four-year-old boy since other evidence established that defendant had pleaded guilty to leaving scene of accident as a result of the prior incident).

c. Underlying Facts - Consistent with the rule permitting Impeachment with prior bad acts, the examiner may explore with the witness the criminal acts underlying the conviction. But see People v. Fominas, 111 A.D.2d 868, 490 N.Y.S.2d 268 (2d Dept. 1985) (witness was properly allowed to raise Fifth Amendment, since his appeal from conviction was still pending). Similarly, where the witness pleaded guilty, there is no rule prohibiting questions regarding the original charges. People v. Boone, 304 A.D.2d 976, 759 N.Y.S.2d 778 (3rd Dept. 2003), lv denied 100 N.Y.2d 579, 764 N.Y.S.2d 389 (2003).

d. Delinquency and Youthful Offender Adjudications - Neither a youthful offender adjudication [see People v. Williams, 19 Misc.3d 139(A), 2008 WL 1902453 (App. Term, 2d & 11th Jud. Dist., 2008) (court erred in allowing prosecutor to elicit acknowledgment from defendant that prior case involved "violent felony," which was tantamount to informing jury that defendant had been convicted of violent felony even though YO adjudication is not conviction)], nor an adjudication of juvenile

delinquency is a conviction for purposes of the impeachment rule, and a juvenile delinquency adjudication may be introduced only to counter a delinquency respondent's offer of good character evidence. See FCA §344.1; People v. Jackson, 29 N.Y.3d 18 (2017) (prosecutor correctly informed court that juvenile delinquency adjudication could not be used for impeachment); Matter of Sean R., 145 A.D.2d 637, 536 N.Y.S.2d 162 (2d Dept. 1989). But see People v. Gray, 84 N.Y.2d 709, 622 N.Y.S.2d 223 (1995) (out-of-state conviction of juvenile may be used to impeach); People v. Harris, 901 N.E.2d 367 (Ill. 2008) (when defendant attempted to mislead jury by testifying, "I don't commit crimes," he opened door to introduction of juvenile adjudications for impeachment purposes); Federal Rules, 609(d).

e. Proof Of Conviction

i. Certificate Of Conviction - A properly authenticated (see CPLR 4540] certificate establishing the entry of a judgment of conviction is presumptive evidence of the facts therein. See CPL §60.60(1). But see People v. Van Buren, 82 N.Y.2d 878, 609 N.Y.S.2d 170 (1993) (certificate contained defendant's name but failed to show defendant was the person named); People v. Parrino, 11 Misc.3d 80, 816 N.Y.S.2d 276 (App. Term, 9th & 10th Jud. Dist., 2006) (use of certificate to prove date of crime or some other matter of fact would violate Crawford v. Washington); People v. Vollick, 148 A.D.2d 950, 539 N.Y.S.2d 187 (4th Dept. 1989), aff'd 75 N.Y.2d 877, 554 N.Y.S.2d 473 (1990); People v. Hines, 90 A.D.2d 621, 456 N.Y.S.2d 235 (3rd Dept. 1982).

ii. Adjudicative Facts - The specific acts a person was found guilty of committing may be proved by introduction of the plea and sentencing minutes. See People v. Jacobs, 149 A.D.2d 112, 544 N.Y.S.2d 1011 (3rd Dept. 1989).

iii. Testimony Of Witness To Conviction - Proving a conviction by presenting eyewitness testimony concerning the events in court at the time of conviction "presents hearsay and best evidence problems." See People v. Conklin, 102 A.D.2d 829, 476 N.Y.S.2d 602 (2d Dept. 1984). The same would be true of testimony concerning a witness' out-of-court admission that he or she had a conviction. Richardson, §6-409.

f. Right Of Confrontation - A defendant’s right to cross-

Examination regarding a witness's convictions, and to other types of cross-examination aimed at the witness's credibility, is protected by the Constitution. Vasquez v. Jones, 486 F.3d 135 (6th Cir. 2007).

g. Finality Of Conviction - See United States v. Jackson, 549 F.3d 963 (5th Cir. 2008) (under Federal Rule of Evidence 609(e), defense witness could be impeached with conviction despite pendency of appeal from conviction).

5. Sandoval

a. Pretrial Ruling - The defendant in a criminal case has a right to a pretrial ruling concerning whether the prosecutor may, if the defendant takes the stand, ask questions concerning prior convictions or bad acts. See People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974); People v. Cross, 25 A.D.3d 1020, 807 N.Y.S.2d 711 (3rd Dept. 2006) (court erred in withholding Sandoval determination until after People rested); People v. Webb, 159 A.D.2d 289, 552 N.Y.S.2d 293 (1st Dept. 1990), lv denied 76 N.Y.2d 744, 558 N.Y.S.2d 906 (where court ruled that prosecutor could cross regarding underlying acts, defendant not entitled to ruling concerning extent of cross-examination).

The court engages in a balancing of the probative value of the impeachment evidence and the risk of depriving the accused of a fair trial. See People v. DeJesus, 135 A.D.3d 872 (2d Dept. 2016) (ruling prohibiting inquiry not mandated simply because a defendant is only witness for defense).

Although the prosecution will ordinarily be attempting to use the evidence for impeachment purposes, the accused is entitled to raise a pretrial challenge to use of the evidence for other purposes. Cf. People v. Felix-Torres, 281 A.D.2d 649, 721 N.Y.S.2d 415 (3rd Dept. 2001), appeal dism'd 97 N.Y.2d 681, 738 N.Y.S.2d 296 (trial court erred in ruling at Sandoval hearing that People could ask defendant whether he has a life-threatening disease in order to show that he had nothing to lose by committing murder).

In People v. Jordan, 200 A.D.3d 715 (2d Dept. 2021), the court held that the defendant was not entitled to an advance ruling on what testimony might open the door to questioning.

There is a split of authority concerning the right of the accused to a "Sandoval hearing" prior to a bench trial. Compare Matter of Joshua P., 270 A.D.2d 272, 704

N.Y.S.2d 853 (2d Dept. 2000), lv denied 95 N.Y.2d 757, 713 N.Y.S.2d 1 (family court erred in refusing to hold Sandoval hearing); People v. Black, 183 A.D.2d 969, 583 N.Y.S.2d 799 (3rd Dept. 1992) (same judge may issue Sandoval ruling and hear trial) and People v. Oglesby, 137 A.D.2d 840, 525 N.Y.S.2d 304 (2d Dept. 1988) (defendant entitled to pretrial ruling) with People v. Stevenson, 163 A.D.2d 854, 558 N.Y.S.2d 383 (4th Dept. 1990) (Sandoval not applicable).

The respondent should request that a Sandoval hearing not be held before the trial judge. The respondent might also choose to wait until mid-trial to object to impeachment when there is a strong possibility that the respondent will not testify. Cf. People v. Delgado, 101 A.D.3d 1144 (2d Dept. 2012), lv denied 20 N.Y.3d 1097 (defendant deprived of effective assistance of counsel where, at nonjury trial, prosecutor attempted during People's case to obtain Sandoval ruling but defense counsel asked court not to make ruling until after defendant completed his testimony).

The respondent should insist upon a ruling on a Sandoval application before having to decide whether to testify at a pre-trial suppression hearing. But cf. People v. Thomas, 213 A.D.2d 73, 628 N.Y.S.2d 707 (2d Dept. 1995), aff'd 88 N.Y.2d 821, 644 N.Y.S.2d 491 (1996) (defendants were not entitled to Sandoval ruling prior to testifying before Grand Jury).

The Court of Appeals has held that one judge's Sandoval ruling does not constitute the "law of the case" and bind another judge who is ruling on the question when the accused is re-tried. People v. Evans, 94 N.Y.2d 499, 706 N.Y.S.2d 678 (2000); see also People v. Gomez, 67 A.D.3d 927, 899 N.Y.S.2d 134 (2d Dept., 2009), appeal w'drawn 14 N.Y.3d 800 (successor judge not bound by prior Sandoval ruling in same case).

b. Bad Acts And Convictions

i. Nature And Time Of Acts - The accused should not be questioned about acts which are too remote in time or which do not bear on credibility. See, e.g., State v. Black, 732 S.E.2d 880 (S.C. 2012) (manslaughter convictions, approximately 20 years old, not admissible to impeach witness's credibility; crimes of violence, which may result from myriad of causes, such as short temper, combative nature, or extreme provocation, generally do not relate to credibility); People

v. Williams, 12 N.Y.3d 726, 877 N.Y.S.2d 731 (2009) (while "trial court might have been more discriminating," no error where court permitted People to elicit from defendant that he had one felony conviction and 45 misdemeanor convictions, but not go into underlying facts or circumstances); People v. Anderson, 130 A.D.3d 1055 (2d Dept. 2015) (harmless error where prior possession of guns had little bearing on defendant's credibility), aff'd 29 N.Y.3d 69, reargument den'd 29 N.Y.3d 1074, cert denied 138 S.Ct. 457; People v. Karuzas, 124 A.D.3d 927 (3d Dept. 2015) (in manslaughter prosecution involving argument during which defendant stabbed victim, questions as to defendant's prior assault bore no relation to credibility, but rather illustrated propensity to initiate fights in order to physically attack people); People v. Brothers, 95 A.D.3d 1227 (2d Dept. 2012) (court erred in ruling that defendant, charged with four counts of robbery in first degree, could be asked on cross whether he had been convicted in 1998 of attempted robbery in second degree); People v. Woodard, 93 A.D.3d 944 (3d Dept. 2012) (no error in ruling permitting People to cross-examine defendant regarding 1981 conviction for felony assault); People v. Kevin Anderson, 83 A.D.3d 854, 921 N.Y.S.2d 156 (2d Dept. 2011) (reversible error where Sandoval ruling allowed prosecutor to inquire into underlying facts of defendant's prior narcotics conviction, but court allowed prosecutor to ask irrelevant and prejudicial questions concerning how drugs were packaged, source of drugs, name of defendant's supplier, where supplier lived, what supplier looked like, and what financial arrangements defendant had with supplier); People v. Minus, 38 A.D.3d 353, 833 N.Y.S.2d 16 (1st Dept. 2007), lv denied 9 N.Y.3d 848 (prosecutor properly given permission to question defendant about his lie to Criminal Justice Agency); People v. Morgan, 24 A.D.3d 950, 806 N.Y.S.2d 742 (3rd Dept. 2005), lv denied 6 N.Y.3d 815 (defendant's attempted intimidation of witness via threatening letter signed by "Grim Reaper" was probative of credibility, but probative value was outweighed by prejudice where defendant was compelled to show "Grim Reaper" tattoo to jury); People v. Young, 249 A.D.2d 576, 670 N.Y.S.2d 940 (3rd Dept. 1998), lv denied 92 N.Y.2d 908, 680 N.Y.S.2d 73 (reversible error where trial court permitted questioning regarding defendant's prior convictions dating back 18 years, and the underlying facts); People v. Hawes, 205 A.D.2d 319, 613 N.Y.S.2d 15 (1st Dept. 1994), lv denied 84 N.Y.2d 826, 617 N.Y.S.2d 147 (prosecutor improperly questioned

defendant about poor school attendance and expulsion); People v. Roth, 157 A.D.2d 494, 549 N.Y.S.2d 682 (1st Dept. 1990), lv denied 75 N.Y.2d 924, 555 N.Y.S.2d 42 (improper to permit prosecutor to ask about acts which were remote in time and may have suggested a propensity to commit crime charged); People v. Livingston, 128 A.D.2d 645, 512 N.Y.S.2d 889 (2d Dept. 1987) (improper cross regarding gang membership); People v. Torres, 119 A.D.2d 508, 500 N.Y.S.2d 701 (1st Dept. 1986) (in drug sale case, defendant improperly asked about involvement in drug treatment program). See also People v. Lambert, 59 Misc.3d 1212(A) (County Ct., Sullivan Co., 2018) (where defendant was charged with aggravated harassment of employee by inmate, jury would be aware he had criminal history and thus probative value of impeachment would not outweigh unfair prejudicial effect); Federal Rules, 609(b) (generally, conviction not admissible if more than 10 years have passed since date of conviction).

When the prior acts are very similar to the instant charges, the court must consider the risk of undue prejudice, but the accused is not shielded from impeachment merely because he or she specializes in a certain type of crime. See, e.g., People v. Hayes, 97 N.Y.2d 203, 738 N.Y.S.2d 663 (2002) (neither the similarity of defendant's prior convictions nor the alleged importance of his testimony required that impeachment be limited to the existence of the prior convictions); People v. Cunny, 163 A.D.3d 708 (2d Dept. 2018), lv denied 32 N.Y.3d 1063 (where defendant was charged with striking complainant in back of head with metal, court erred in ruling that People could question defendant about facts underlying 2006 conviction involving threatened use of hammer); People v. Williams, 156 A.D.3d 1224 (3d Dept. 2017), lv denied 31 N.Y.3d 1018 (in burglary-robbery prosecution, court erred in ruling that People could identify conviction as one for burglary); People v. Todd, 57 Misc.3d 157(A) (App. Term, 2d Dept., 9th & 10th Jud. Dist., 2017) (in stalking prosecution, court erred in ruling that prosecution could elicit fact that defendant was convicted of first degree attempted rape); People v. Ridenhour, 153 A.D.3d 942 (2d Dept. 2017) (where defendant was charged with stabbing victim in throat, court erred in ruling that People could cross-examine defendant regarding prior slashing of victim’s throat with knife); People v. Calderon, 146 A.D.3d 967 (2d Dept. 2017) (error where court ruled that People could cross-examine

defendant about facts underlying robbery conviction, including fact that defendant placed knife to complainant's neck, in case involving allegation that defendant placed knife to complainant's neck during rape); People v. Wright, 121 A.D.3d 924 (2d Dept. 2014) (court improperly ruled that defendant could be asked about underlying facts of six crimes similar in nature to charged burglary offense); People v. Smith, 39 Misc.3d 20 (App. Term, 2d, 11th & 13th Dist., 2013), lv denied 21 N.Y.3d 1010 (court erred in allowing People to cross-examine defendant with respect to prior conviction for assault that was like charged offense); People v. Kucmierowski, 103 A.D.3d 755 (2d Dept. 2013), lv denied 21 N.Y.3d 1005 (court erred in ruling that People could question defendant as to prior conviction for driving while intoxicated and precluded prosecutor from questioning defendant about other convictions less similar to charged offense and more probative as to credibility); People v. Brothers, supra, 95 A.D.3d 1227 (court erred in ruling that defendant, charged with four counts of robbery in first degree, could be asked on cross whether he had been convicted in 1998 of attempted robbery in second degree); People v. Brightley, 56 A.D.3d 314, 867 N.Y.S.2d 90 (1st Dept. 2008) (fact that Florida incident had certain similarities to charged crime did not require preclusion of inquiry; concurring judge notes that prosecutor was properly permitted to ask whether defendant had been "convicted of possessing marihuana" and "selling it from such and such a location" despite fact that charged crimes arose out of defendant's involvement in sale of marihuana, but asserts that court abused discretion when it also allowed prosecutor to ask whether defendant participated in torturing someone since the charged offenses also involved acts of violence arising out of defendant's alleged involvement in business of selling marihuana); People v. Marquez, 22 A.D.3d 388, 802 N.Y.S.2d 665 (1st Dept. 2005) (in drug sale prosecution, no error where ruling permitted prosecutor to mention that defendant had drug-related conviction); People v. Long, 269 A.D.2d 694, 703 N.Y.S.2d 316 (3rd Dept. 2000), lv denied 94 N.Y.2d 950, 710 N.Y.S.2d 6 (error, albeit harmless, where court ruled that prosecutor could question defendant about underlying facts of conviction for assault which was similar to the assault charged); People v. Rivera, 216 A.D.2d 221, 629 N.Y.S.2d 228 (1st Dept. 1995) (reversible error where court permitted prosecutor to ask drug sale defendant about prior possession of similarly colored vials at nearby location);

People v. Gottlieb, 130 A.D.2d 202, 517 N.Y.S.2d 978 (1st Dept. 1987) (in case involving assault of 63-year-old woman, prosecutor was improperly allowed to ask about prior assault of 77-year-old woman); People v. Coe, 95 A.D.2d 685, 463 N.Y.S.2d 795 (1st Dept. 1983) (prosecutor permitted to question defendant about burglary close in time and location to burglary charged).

ii. Prosecutorial Misconduct - The prosecutor must have a good faith basis for any questioning, see People v. DePasquale, 54 N.Y.2d 693, 442 N.Y.S.2d 973 (1981) (victim's brother provided information); People v. Simpson, 109 A.D.2d 461, 492 N.Y.S.2d 609 (1st Dept. 1985), and may not repeatedly challenge the respondent's denials in an effort to convince the court that those denials are untrue. See People v. Gottlieb, supra, 130 A.D.2d 202.

iii. Dismissal Of Charges - The respondent may not be impeached with bad acts which led to charges that were dismissed on the merits. See People v. Schwartzman, 24 N.Y.2d 241, 299 N.Y.S.2d 817 (1969) (since defendant had been acquitted, there was no good faith basis for the questioning); People v. Moco, 176 A.D.3d 644 (1st Dept. 2019), lv denied 34 N.Y.3d 1131 (People should not have been permitted to cross-examine defendant about underlying facts of two prior arrests that resulted in dismissals where prosecutor had not ascertained whether charges had been dismissed on merits, which would have negated good faith basis for inquiry); United States v. Schwab, 886 F.2d 509 (2d Cir. 1989) (acquittal normally alters the balance between probative force and prejudice). However, a dismissal of charges in the absence of a determination on the merits does not preclude impeachment. See People v. Boone, 304 A.D.2d 976, 759 N.Y.S.2d 778 (3rd Dept. 2003), lv denied 100 N.Y.2d 579, 764 N.Y.S.2d 389 (2003) (defendant who entered into plea bargain could be questioned regarding original charge); People v. Alberti, 77 A.D.2d 602, 430 N.Y.S.2d 6 (2d Dept. 1980), cert denied 449 U.S. 1018, 101 S.Ct. 581 (same as Boone). See also People v. Strasser, 249 A.D.2d 781, 671 N.Y.S.2d 873 (3rd Dept. 1998), lv denied 91 N.Y.2d 1013, 676 N.Y.S.2d 141 (no error where court permitted impeachment with Utah conviction which had been expunged, since expungement was not dismissal on merits and the fact remained that defendant had committed a criminal act). But see People v. Ellis, 184 A.D.2d 307, 584 N.Y.S.2d 569 (1st Dept. 1992), lv denied 80 N.Y.2d 929, 589

N.Y.S.2d 856 (prosecution witness properly denied existence of prior sealed arrests) .

iv. Pending Cases; Invocation Of Fifth Amendment - The respondent may obtain a pretrial ruling prohibiting the prosecution from conducting cross-examination concerning unrelated charges that are pending. See People v. Cantave, 21 N.Y.3d 374 (2013) (defendant with conviction pending appeal may not be cross-examined in another matter about underlying facts of conviction until pending appeal has been exhausted); People v. Bennett, 79 N.Y.2d 464, 583 N.Y.S.2d 825 (1992); People v. Betts, 70 N.Y.2d 289, 520 N.Y.S.2d 370 (1987); People v. Chambers, 184 A.D.2d 716, 585 N.Y.S.2d 84 (2d Dept. 1992) (since there was the possibility of a new trial, defendant could not be questioned about kidnapping conviction pending on appeal and the facts underlying it); Matter of TM, 26 Misc.3d 823, 894 N.Y.S.2d 831 (Fam. Ct., Kings Co., 2009) (Presentment Agency precluded from cross-examining respondent about pending juvenile delinquency matter; forcing respondent to invoke Fifth Amendment is prejudicial because it allows Presentment Agency to spread facts underlying allegations in the form of questions). But see People v. Brady, 97 N.Y.2d 233, 739 N.Y.S.2d 86 (2002) (defendant, who was awaiting sentence in other case, could be questioned about acts he admitted while pleading guilty); People v. Ablakatov, 194 A.D.3d 617 (1st Dept. 2021), lv denied 37 N.Y.3d 970 (there was no risk that defendant's right against self-incrimination would be violated because court precluded cross-examination about underlying facts of case pending on appeal and only permitted prosecutor to ask if defendant had been convicted of felony); People v. Rivera, 70 A.D.3d 1177, 896 N.Y.S.2d 192 (3rd Dept. 2010), lv denied 15 N.Y.3d 855 (no error where court permitted People to cross-examine defendant about pending matter, but defense counsel indicated that defendant had entered into cooperation agreement and would not be prosecuted); People v. Hanson, 30 A.D.3d 537, 818 N.Y.S.2d 128 (2d Dept. 2006) (questioning regarding conviction pending on appeal may be appropriate where it is limited to fact of conviction and does not include circumstances underlying conviction); People v. Blakeney, 219 A.D.2d 10, 638 N.Y.S.2d 642 (1st Dept. 1996), aff'd 88 N.Y.2d 1011, 648 N.Y.S.2d 872 (defendant opened door to impeachment by testifying and making claim which could be rebutted with facts underlying pending case); People v. Michael, 210 A.D.2d 874, 620 N.Y.S.2d 637 (4th

Dept. 1994), lv denied 84 N.Y.2d 1035, 623 N.Y.S.2d 191 (1995) (defendant could be questioned about homicide charge where prosecutor was attempting to refute defendant's agency defense); People v. Martinez, 177 Misc.2d 67, 675 N.Y.S.2d 825 (Sup. Ct., Kings Co., 1998) (defendant could be questioned at suppression hearing about pending case since his testimony could not be used in subsequent proceedings).

A defendant may also prevent such questioning when testifying before the Grand Jury. People v. Smith, 87 N.Y.2d 715, 642 N.Y.S.2d 568 (1996).

This rule may extend to cross-examination about uncharged crimes. Cf. People v. Williams, 157 A.D.2d 760, 550 N.Y.S.2d 54 (2d Dept. 1990).

c. Use Of Aliases - In People v. Walker, 83 N.Y.2d 455, 611 N.Y.S.2d 118 (1994), the Court of Appeals refused to adopt a rule precluding the prosecution from cross-examining a defendant concerning the prior use of aliases or other false pedigree information. See also People v. Richardson, 17 A.D.3d 196, 795 N.Y.S.2d 181 (1st Dept. 2005), lv denied 5 N.Y.3d 793 (no error where court permitted inquiry into defendant's use of aliases even though subject was not addressed at Sandoval hearing).

d. Advance Notice Of Prosecutor's Intent To Impeach – When appropriate, the respondent should demand that the prosecution provide notification of all prior "uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for purposes of impeaching the credibility of the [respondent]." See CPL §245.20(3); Matter of Jayson C., 200 A.D.3d 447 (1st Dept. 2021). Even when no request is made, the prosecutor should advise the court prior to asking about uncharged bad acts, so that prejudicial facts are not raised prior to an objection. See People v. Roth, supra, 157 A.D.2d 494.

e. Failure Of Respondent To Seek Pretrial Ruling - A failure to make a pretrial motion does not constitute a waiver that prevents the respondent from objecting at trial when a prior conviction or bad act is raised by the prosecutor. See People v. Ortero, 75 A.D.2d 168, 428 N.Y.S.2d 965 (2d Dept. 1980); People v. Alamo, 63 A.D.2d 6, 406 N.Y.S.2d 787 (1st Dept. 1978).

f. Finality Of Pretrial Ruling – Since the respondent has relied on it, a pretrial ruling may not be changed at trial. See People v. Perez, 40 A.D.3d 1131,

837 N.Y.S.2d 275 (2d Dept. 2007) (prejudice was patent whether or not defendant had taken stand before modification of ruling); People v. Powe, 146 A.D.2d 718, 537 N.Y.S.2d 208 (2d Dept. 1989). Of course, the prosecutor must strictly follow the ruling. See People v. Walters, 172 A.D.3d 916 (2d Dept. 2019), lv denied 34 N.Y.3d 939 (if prosecutor believed defendant's testimony on direct opened door, prosecutor could have asked court to expand ruling, but did not); People v. Wright, 260 A.D.2d 935, 690 N.Y.S.2d 286 (3rd Dept. 1999) (reversible error where prosecutor mistakenly asked about murder conviction); People v. Perez, 127 A.D.2d 707, 511 N.Y.S.2d 687 (2d Dept. 1987).

However, the ruling can be changed if the respondent's testimony "opens the door." See, e.g., People v. Moore, 92 N.Y.2d 823, 677 N.Y.S.2d 56 (1998) (ambiguous comments about lack of knowledge about what takes place in Central Park could not be construed as assertions that defendant had not committed any robberies in Central Park; therefore, defendant did not open the door to questioning about prior crimes); People v. Henderson, 211 A.D.3d 490 (1st Dept. 2022) (defendant did not open door to inquiries about underlying facts of felony convictions where court issued pretrial ruling permitting People to ask defendant about three unspecified felony convictions without identifying felonies or eliciting underlying facts, and, on direct examination, defendant referred to "[a]pproximately maybe two or three felonies," and, when prosecutor asked if he had been convicted of three felonies, he replied, "I guess so"); People v. Mohamed, 145 A.D.3d 1038 (2d Dept. 2016), lv denied 29 N.Y.3d 1083 (in attempted home burglary prosecution, defendant did not open door to uestioning about facts underlying prior burglary conviction when he testified that he had passed out in bushes and parks while intoxicated on prior occasions); People v. Fisher, 104 A.D.3d 868 (2d Dept. 2013) (after obtaining ruling that he could ask defendant if he was previously accused of having "inappropriate sexual relationship" with student without opening door to cross-examination concerning certain prior allegations, defense counsel did not open door by asking defendant whether he had "ever been accused of acting inappropriately in a sexual way towards a student"); People v. Snyder, 103 A.D.3d 1143 (4th Dept. 2013) (defendant's testimony that he had been law-abiding citizen for past three years did not open door to questioning about sexual abuse committed approximately nine years

earlier); People v. Marable, 33 A.D.3d 723, 826 N.Y.S.2d 273 (2d Dept. 2006), lv denied, 8 N.Y.3d 882 (defendant opened door to questioning on underlying facts when he testified that he pleaded guilty in prior case because he was, in fact, guilty, thereby implying that his present failure to plead guilty was proof of innocence).

g. Cross-Examination Of Respondent By Attorney For Co-Respondent - A pretrial Sandoval ruling does not prevent counsel for a co-respondent from impeaching the respondent. See People v. McGee, 68 N.Y.2d 328, 508 N.Y.S.2d 927 (1986); but see People v. Williams, 142 A.D.2d 310 (2d Dept. 1988) (court has discretion to limit such cross-examination); People v. Lawson, 37 Misc.3d 1227(A) (Sup. Ct., Queens Co., 2012).

h. Preemptive Presentation Of Evidence By Accused – Compare Ohler v. United States, 529 U.S. 753, 120 S.Ct.185 (2001) (defendant who elects to introduce prior crimes impeachment evidence waives right to object) with State v. Gary M.B., 676 N.W.2d 475 (Wis. 2004) (defendant did not waive objection by preemptively testifying) and State v. Thang, 41 P.3d 1159 (Wash. 2002) (court holds, under State Constitution, that no waiver results since lawyer who introduced other crimes evidence only after losing battle to exclude it was not introducing evidence voluntarily).

i. Prosecution Witnesses – The Sandoval rule does not apply to prosecution witnesses. See People v. Allen, 50 N.Y.2d 898, 430 N.Y.S.2d 588 (1980), aff'g 67 A.D.2d 558, 416 N.Y.S.2d 49 (2d Dept. 1979) (defendant's right of confrontation was violated); People v. Blanchard, 150 A.D.2d 705, 541 N.Y.S.2d 578 (2d Dept. 1989); People v. Memminger, supra, 126 A.D.2d 752; see also People v. Brannon, 199 A.D.3d 826 (2d Dept. 2021) (defendant's ability to impeach prosecution witnesses was not relevant factor in making Sandoval ruling).

6. Motive To Falsify

a. Use Of Extrinsic Evidence - Extrinsic evidence of a witness' motive to lie may be offered. In fact, there is no requirement that the examiner question the witness about the motive to falsify before extrinsically proving it. See People v. Mink, 267 A.D.2d 501, 699 N.Y.S.2d 742 (3rd Dept. 1999), lv denied 94 N.Y.2d 950, 710 N.Y.S.2d 7; Richardson, §§ 6-415, 417.

b. Bias And Hostility - Bias in favor of a party is typically established by way of evidence of a witness' family, business or social relationship to the party. Hostility can be shown through evidence of hostile acts or statements or a history of quarrels. Richardson, §6-415. See, e.g., State v. Naudain, 487 P.3d 32 (Oregon 2021) (court erred in ruling that Black defendant could not cross-examine witness regarding racial bias against Black people where aspects of witness's testimony emphasized defendant's aggression in contrast to that of his white accomplice); State v. Scott, 163 A.3d 325 (N.J. 2017) (evidence that mother had lied to police on two prior occasions to "cover up" for defendant went beyond proper bias inquiry into mother's relationship with defendant); People v. Spencer, 20 N.Y.3d 954 (2012) (court erred in precluding defendant from attempting to establish that complainant had motive to frame him because complainant and third party defendant claimed was the perpetrator were close friends, and that complainant permitted third party to deal drugs and complainant and third party drag raced cars together; provided counsel has good faith basis for eliciting evidence, extrinsic proof tending to establish reason to fabricate is never collateral and may not be excluded on that ground); People v. Halter, 19 N.Y.3d 1046 (2012) (judge gave defendant adequate leeway in portraying nature of material on daughter's MySpace account and conflict that arose between them over postings, and permitted testimony regarding controversy over daughter's attire and defendant's negative reaction to clothing choices); Nappi v. Yelich, 793 F.3d 246 (2d Cir. 2015) (court erred in precluding defendant from cross-examining wife about whether her romantic relationship with another man provided motive to plant gun so defendant would go back to prison); Corby v. Artus, 699 F.3d 159 (2d Cir. 2012), cert denied 133 S.Ct. 1287 (no Confrontation Clause violation when court barred cross-examination of witness as to whether she had accused petitioner of crimes only after being told that petitioner had accused her, since petitioner was able to show that witness had motive to lie to deflect attention from herself and retaliate against petitioner for his accusation); People v. Grant, 60 A.D.3d 865, 875 N.Y.S.2d 532 (2d Dept. 2009) (reversible error where trial court excluded evidence, including testimony as to statements complainant allegedly made threatening to "get" defendant, that went directly to credibility of complainant); United States v. Figueroa, 548 F.3d 222 (2d Cir. 2008) (preclusion of

cross-examination about swastika tattoos violated Confrontation Clause since swastika is commonly associated with white supremacism and neo-Nazi groups harboring extreme forms of racial, religious and ethnic hatred and prejudice against minority groups, including that to which defendant belonged); Brinson v. Walker, 547 F.3d 387 (2d Cir. 2008) (in habeas proceeding challenging decisions in People v. Brinson, 265 A.D.2d 879, 697, Second Circuit concludes that trial court improperly prohibited defendant from cross-examining complainant regarding racial bias; given intensity and extremity of bias alleged, and likelihood that one possessing such bias might distort testimony against object of bias, trial court had no discretion to preclude cross-examination); People v. Brooks, 39 A.D.3d 428, 834 N.Y.S.2d 527 (1st Dept. 2007), lv denied 9 N.Y.3d 873 (People permitted to impeach defendant's wife regarding loyalty to defendant through his long incarceration on rape conviction); People v. Szwec, 271 A.D.2d 322, 707 N.Y.S.2d 157 (1st Dept. 2000) (trial court erred by not allowing defense to introduce specific facts concerning successful civil suit brought by defendant against arresting officers); People v. Green, 156 A.D.2d 465, 548 N.Y.S.2d 752 (2d Dept. 1989) (defendant improperly precluded from calling witness; People's witness did not indicate full extent of bias); Matter of Edward F., 154 A.D.2d 464, 546 N.Y.S.2d 630 (2d Dept. 1989) (evidence that police beat up respondent improperly excluded); People v. Jones, 148 A.D.2d 547, 538 N.Y.S.2d 876 (2d Dept. 1989) (evidence of defendant's injuries from altercation with complainant improperly excluded); State v. Riggs, 942 P.2d 1159 (Ariz. 1997) (witness' refusal to be interviewed may prove hostility). But see People v. Mestres, 41 A.D.3d 618, 838 N.Y.S.2d 164 (2d Dept. 2007), lv denied 9 N.Y.3d 924 (defendant's alleged rejection of complainant's offer to pay $7,000 to defendant in exchange for his marrying her so that she could obtain citizenship was too remote and speculative to establish motive to fabricate); People v. Bailey, 19 A.D.3d 302, 798 N.Y.S.2d 406 (1st Dept. 2005) (no error in exclusion of evidence of civilian complaint filed by defendant against arresting officers where defendant failed to show the character and seriousness of the complaint); People v. Williams, 19 A.D.3d 228, 798 N.Y.S.2d 3 (1st Dept. 2005), aff'd, 7 N.Y.3d 15 (2006) (defendant properly precluded from questioning his police witness regarding witness's suspected perjury in another

case in order to establish testifying officers' motive to support their fellow officer's story; evidence was excessively remote and speculative).

The accused's interest in the result of the proceeding creates a motive to falsify. See also People v. Cuevas, 37 Misc.3d 126(A) (App. Term, 1st Dept., 2012), lv denied 21 N.Y.3d 911 (court properly permitted People to question defendant about his parole status); But see United States v. Gaines, 457 F.3d 238 (2d Cir. 2006) (courts directed not to charge juries that testifying defendant's interest in outcome of case creates motive to falsify, since such an instruction presumes that the defendant is guilty).

c. Financial Or Property Interest - See, e.g., People v. Howard, 158 A.D.3d 455 (1st Dept. 2018), lv denied 31 N.Y.3d 1083 (no error where court precluded defendant from cross-examining police witnesses about defendant's civil lawsuit claiming they used excessive force in making this arrest; defendant did not seek to cross-examine officers about underlying facts of lawsuit, his contention that lawsuit gave officers new motive to fabricate is speculative and unsupported, and jury might have been misled about significance of lawsuit since, for example, jurors might not have been familiar with effect of indemnification under General Municipal Law §50-k on officers' alleged "financial interest"); People v. Townsend, 116 A.D.3d 562 (1st Dept. 2014), lv denied 23 N.Y.3d 1025 (no error in limitation of cross-examination concerning officers' overtime pay and arrest quotas); People v. Antonik, 42 Misc.3d 139(A) (App. Term, 2d Dept., 2014) (no error in limitation on cross-examination as to whether police had financial incentive to testify falsely to earn overtime pay); People v. Belvett, 105 A.D.3d 1040 (1st Dept. 2013), lv denied 21 N.Y.3d 1040 (court erred in refusing to permit cross-examination of witnesses regarding possible loss of apartment due to drug-selling activity); People v. Coakley, 73 A.D.3d 565, 900 N.Y.S.2d 643 (1st Dept. 2010), lv denied 15 N.Y.3d 772 (prosecutor's reference in summation to compensation given to defense expert for testimony, a standard impeachment technique, did not unconstitutionally burden defendant's right to call witnesses); People v. Stein, 10 A.D.3d 406, 781 N.Y.S.2d 654 (2d Dept. 2004) (People improperly failed to disclose complainants' filing of notice of claim with defendant's employer); People v. Newsome, 303 A.D.2d 317, 757 N.Y.S.2d 274 (1st Dept. 2003), lv denied 100 N.Y.2d 564, 763 N.Y.S.2d 822 (2003) (defendant properly denied opportunity to explore expert's

conclusions in unrelated cases after People elicited fact that expert was testifying for fee); People v. Hoover, 298 A.D.2d 599, 750 N.Y.S.2d 304 (2d Dept. 2002), lv denied 99 N.Y.2d 615, 757 N.Y.S.2d 826 (2003) (no error where trial court precluded defendant from cross-examining detectives about unrelated civil suit against police department); People v. Mink, supra, 267 A.D.2d 501 (court erred in excluding evidence that sexual abuse complainant told boyfriend she was looking for financial compensation from defendant and wanted his help in getting the money); People v. Nyemchek, 143 A.D.2d 1057, 533 N.Y.S.2d 770 (2d Dept. 1988) (trial court erred by thwarting cross-examination of officer concerning defendant's civil suit against witness).

d. Witness' Fear Of Prosecution Or Other Harm - See, e.g., People v. Henderson, 13 N.Y.3d 844, 892 N.Y.S.2d 292 (2009) (prosecutor's questions reasonably attacked inmate-victim's truthfulness and explored motives for testimony clearing defendant of participation in fight, including intimidation or fear of reprisal); People v. Brooks, 154 A.D.3d 955 (2d Dept. 2017), lv denied 31 N.Y.3d 1011 (People could cross-examine alibi witness, who was defendant's "common-law" wife, regarding defendant's conviction for assaulting her); People v. Horton, 145 A.D.3d 1575 (4th Dept. 2016) (defendant entitled to cross-examine complainant regarding unlawful transactions involving public benefit card, and illegal drug use, which would have provided reason to possess gun and motive to allege that gun belonged to defendant); Longus v. United States, 52 A.3d 836 (D.C. Ct. App. 2012) (right of confrontation violated when court allowed defendant to ask detective whether he was under investigation by the U.S. Attorney for coaching witness to provide untruthful information during homicide investigation, but barred defense counsel from questioning detective about, or introducing evidence of, facts underlying allegations; facts were relevant to detective's bias and motive to curry favor with government, and corrupt behavior could show willingness to thwart discovery of truth); People v. Garcia, 47 A.D.3d 830, 849 N.Y.S.2d 637 (2d Dept. 2008), lv denied, 10 N.Y.3d 863 (no error in preclusion of defense cross-examination of witnesses as to immigration status, which, defense counsel contended, gave them reason to cooperate with prosecution and fabricate testimony; proposed line of inquiry was too remote and speculative to suggest motive to fabricate); People v. Norcott, 6 N.Y.3d 231, 811 N.Y.S.2d 613 (2005) (no error in

exclusion of testimony from People's primary witness that she implicated defendant and his cohorts only after she was told that defendant had implicated her in another murder; trial court gave defendant wide latitude in eliciting witness's bias and hostility and her fear-based motive to lie, and defense was also permitted to cross-examine her about welfare fraud and her criminal conviction for possession of a weapon, as well as her familiarity with drug trade); People v. Anonymous, 275 A.D.2d 210, 712 N.Y.S.2d 482 (1st Dept. 2000) (prosecutor properly allowed to question defendant's alibi witness concerning fear of defendant); People v. Ashner, 190 A.D.2d 238, 597 N.Y.S.2d 975 (2d Dept. 1993) (court should have allowed counsel to question witness about his motive to commit theft); People v. Wade, 99 A.D.2d 474, 470 N.Y.S.2d 53 (2d Dept. 1984) (defendant improperly precluded from cross-examining rape complainant about boyfriend's temper).

e. Right Of Confrontation - See Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480 (1988) (extreme limitation of examination may violate constitution); Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986); United States v. Figueroa, 548 F.3d 222; Henry v. Speckard, 22 F.3d 1209 (2d Cir. 1994).

f. Witness Cooperation Agreement - A witness' promise to testify in exchange for favorable treatment is exculpatory material, and must be disclosed by the prosecutor. See, e.g., United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); People v. Novoa, 70 N.Y.2d 490, 522 N.Y.S.2d 504 (1987); People v. Conlan, 146 A.D.2d 319, 541 N.Y.S.2d 347 (1st Dept. 1989); see also People v. McLeod, 122 A.D.3d 16 (1st Dept. 2014) (defense counsel improperly precluded from cross-examining accomplice who entered into cooperation agreement with People, admitted to committing and implicated defendant in prior robberies, and intended to invoke privilege against self-incrimination in response to questions about those crimes, where counsel's theory was that witness had implicated defendant in prior robberies to bolster value of cooperation agreement; if witness invoked privilege, trial court should have struck all or some of direct testimony, or at least instruct jury that it could consider witness's invocation of privilege in determining credibility); People v. Rodney, 109 A.D.3d 439 (1st Dept. 2013) (witness's subjective belief as to reason for dismissal would be relevant); Childers v. Floyd, 642 F.3d 953 (11th Cir. 2011) (no habeas relief where

defense counsel cross-examined witness regarding plea agreement and jury knew he pleaded in exchange for testimony and avoided possible sentence of 125 years, and jury learned of each inconsistent statement made by witness, but counsel was not permitted to question witness about acquittal of co-defendant at trial at which witness also testified, which allegedly created incentive to produce better result at defendant's trial, or about Notice of Revocation of Terms of Plea Agreement in which State alleged that witness made incomplete or untruthful statements; questioning about plea agreement exposed bias, and Notice of Revocation and acquittal were merely individual manifestations of that bias); see also People v. King, 59 Misc.3d 334 (County Ct., Monroe Co., 2018) (court violated defendant's right of confrontation when it limited cross examination regarding existence and nature of felony charge pending against witness where defendant wanted to explore motive to construct testimony so as to "curry" favor with prosecution); but see People v. Lopez, 122 A.D.3d 511 (1st Dept. 2014) (no error where court precluded cross-examination of witness about past service as informant which concluded a year before charged crime and did not involve defendant; witness had legitimate safety concerns and there was no reason to suspect that past status contributed to her becoming prosecution witness); People v. Schlau, 117 A.D.3d 461 (1st Dept. 2014), lv denied 23 N.Y.3d 1067 (court did not err in failing to compel People to disclose confidential informant status of victim who became informant six months after she reported sexual assault and identified defendant at lineup, and had no motive to testify to facts she had already related long before becoming informant).

There is a difference of opinion as to whether the prosecution may offer into evidence the text of the agreement prior to a defense attack. Compare United States v. Cosentino, 844 F.2d 30 (2d Cir. 1988) (not admissible) with People v. Rivera, 155 A.D.2d 941, 547 N.Y.S.2d 760 (4th Dept. 1989).

7. Prior Inconsistent Statements - A witness may be impeached with a prior inconsistent statement. See United States v. Stewart, 907 F.3d 677 (2d Cir. 2018) (question is whether there is any variance between impeachment material and hearsay statement that has reasonable bearing on credibility, or whether jury could reasonably find that witness who believed truth of facts asserted in hearsay statement would have been unlikely to make statement of impeachment material's "tenor").

The statement does not constitute proof of the truth of its contents. See FCA §343.5(2). But see People v. Bradley, 99 A.D.3d 934 (2d Dept. 2012) (when truth of matter asserted in inconsistent statement is relevant to core factual issue, relevancy is not restricted to issue of credibility and right to present defense may encompass right to place before trier of fact secondary forms of evidence, such as hearsay); Federal Rules, 801(d)(1)(A) (statement can be admitted as substantive evidence under certain circumstances).

The usual rule is that if the witness admits making the statement, additional, extrinsic evidence of the statement is not admissible. See, e.g., People v. Urena, 183 A.D.3d 534 (1st Dept. 2020), lv denied 35 N.Y.3d 1071 (where prior inconsistent videotaped statement was clearly brought out, and witness admitted having made statement, introduction of video was unnecessary); People v. Person, 26 A.D.3d 292, 810 N.Y.S.2d 68 (1st Dept. 2006), aff'd 8 N.Y.3d 973 (court declines to make exception for videotaped statements).

The court has some discretion to exclude inconsistent statements if they pertain to a collateral issue. People v. Vinson, 199 A.D.3d 942 (2d Dept. 2021), lv denied 37 N.Y.3d 1165 (no error where court denied defendant's request to impeach police witness on issue of whether defendant had made unequivocal request for counsel in North Carolina in connection with extradition proceeding, which did not bear on witness's testimony regarding whether defendant requested counsel in connection with charged crimes); People v. Maxam, 135 A.D.3d 1160 (3d Dept. 2016) (certain inconsistencies had no bearing on complainant's overall credibility); People v. Gomez, 79 A.D.3d 1065, 913 N.Y.S.2d 758 (2d Dept. 2010) (in sex crime prosecution, reversible error where court excluded testimony regarding child's statement that abuse never happened and there were "no problems" in Florida when she lived there with defendant).

a. Foundation

i. Oral Statements – Prior to the introduction of extrinsic evidence of a prior oral statement which is inconsistent with a witness' trial testimony, the witness must be asked whether he or she made the statement. The examiner should specify the name of the person to whom the statement was made, and

the time, place and substance of the statement. People v. Carter, 227 A.D.2d 661, 641 N.Y.S.2d 908 (3rd Dept. 1996), lv denied 88 N.Y.2d 1067, 651 N.Y.S.2d 411; Richardson, §6-411(a)' see also People v. Duncan, 46 N.Y.2d 74, 412 N.Y.S.2d 833 (1978), cert denied 442 U.S. 910, 99 S.Ct. 2823; People v. Collins, 145 A.D.3d 1479 (4th Dept. 2016) (adequate foundation for testimony that victim told witness she did not "think [defendant] did this" where victim stated that she had never discussed matter with witness and had never told witness that the incident "between [her] and [defendant] might not have happened"); People v. Caquias, 127 A.D.3d 487 (1st Dept. 2015), lv denied 26 N.Y.3d 1143 (prosecutor had good faith basis for questioning witness about statement contained in defense counsel's note of interview with witness; prosecutor not required to accept defense counsel's assertion that note was merely reflection of neighborhood gossip); People v. Fiedorczyk, 159 A.D.2d 585, 552 N.Y.S.2d 443 (2d Dept. 1990); People v. Watford, 146 A.D.2d 590, 536 N.Y.S.2d 835 (2d Dept. 1989); but see People v. Butts, 184 A.D.3d 660 (2d Dept. 2020) (court improperly precluded defendant from proving statement where defense counsel had failed to lay proper foundation because he was not aware of evidence while witness testified, and prosecutor initially volunteered to recall witness to enable defense to lay foundation); People v. Bell, 45 A.D.2d 362, 357 N.Y.S.2d 539 (1st Dept. 1974), aff'd 38 N.Y.2d 116, 378 N.Y.S.2d 686 (1975) (foundation adequate where witness claimed that he did not know person to whom he had made prior statement).

In Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337 (1895), where the defendant attempted to impeach statements contained in a witness's prior testimony, a Supreme Court majority held that the traditional foundation requirement applies even when the witness is unavailable and it is impossible to lay a foundation. See also People v. Whitley, 14 A.D.3d 403, 788 N.Y.S.2d 94 (1st Dept. 2005), lv denied 4 N.Y.3d 892. However, in Carver v. United States, 164 U.S. 694, 17 S.Ct. 228 (1897), the Supreme Court limited the holding in Mattox to cases involving the admission of prior testimony; that is, cases in which the defendant had an opportunity to cross-examine the witness. Accordingly, New York courts have held that in other types of cases, the usual foundation is not required before a non-appearing hearsay declarant may be impeached with his/her prior inconsistent statements. See People v. DelValle, 248

A.D.2d 126, 670 N.Y.S.2d 827 (1st Dept. 1998) People v. Canady, 186 A.D.2d 749, 589 N.Y.S.2d 184 (2d Dept. 1992), lv denied 81 N.Y.2d 786, 594 N.Y.S.2d 732 (1993); People v. Conde, 16 A.D.2d 327, 228 N.Y.S.2d 69 (3rd Dept. 1962), aff'd 13 N.Y.2d 939, 244 N.Y.S.2d 314 (1963); People v. Jackson, 2002 WL 1798837 (Sup. Ct., Kings Co.).

Under the so-called Bornholdt rule, a witness may be impeached with an omission of fact in a prior statement if, on the prior occasion, the witness' attention was called to the matter and he was specifically asked about the facts embraced in the question propounded at trial. People v. Bornholdt, 33 N.Y.2d 75, 350 N.Y.S.2d 369 (1973); see People v. Green, 73 Misc.3d 129(A) (App. Term, 1st Dept., 2021), lv denied 37 N.Y.3d 1161 (omission did not qualify as prior inconsistent statement because defendant failed to show that officer's attention was drawn to omitted facts by specific questioning, and evidence did not imply that officer previously indicated he did not remember whether he was on northbound or southbound subway platform); People v. Crumb, 194 A.D.3d 739 (2d Dept. 2021), lv denied 37 N.Y.3d 991 (no error in limitation of cross-examination where statement given to police was not inconsistent with witness's trial testimony; rather, it was less specific and contained fewer details than trial testimony, and defendant failed to show, as to certain matters, that witness's attention was specifically drawn to omitted facts by police); People v. Greene, 110 A.D.3d 827 (2d Dept. 2013) (omission of fact at prior time is insufficient for impeachment purposes unless, on prior occasion, witness' attention was called to matter and he was specifically asked about omitted fact; here, it was error to preclude defendant from questioning witness about previous omission of reference to defendant's "squinting," and "partly closed" left eye, which was significant factor in witness's identification); People v. Selman, 55 A.D.3d 638, 867 N.Y.S.2d 98 (2d Dept. 2008) (omission of fact at prior time may not be used for impeachment unless it is shown that, on previous occasion, witness' attention was called to matter and he was specifically asked about facts embraced in question asked at trial); People v. Broadhead, 36 A.D.3d 423, 827 N.Y.S.2d 138 (1st Dept. 2007), lv denied 8 N.Y.3d 919 (defendant properly precluded from impeaching witness who failed to mention defendant's verbal threat when testifying in grand jury, since grand jury questioning did not call for information

and omission was not unnatural); People v. Montalvo, 285 A.D.2d 384, 728 N.Y.S.2d 448 (1st Dept. 2001), lv denied 96 N.Y.2d 941, 733 N.Y.S.2d 381 (although person may normally omit details unless asked directly about a matter, that rationale has limited applicability to defendant's testimony before grand jury, where defendant is given opportunity to prevent indictment by presenting any exculpatory information); People v. Skinner, 277 A.D.2d 27, 715 N.Y.S.2d 412 (1st Dept. 2000), lv denied 96 N.Y.2d 907, 730 N.Y.S.2d 805 (2001) (defendant, who testified that he had been coerced into making inculpatory statements, was properly impeached with prior testimony in which he denied making the statements and never mentioned that he had been physically abused); People v. Ortiz, 250 A.D.2d 372, 672 N.Y.S.2d 327 (1st Dept. 1998), lv denied 92 N.Y.2d 881, 678 N.Y.S.2d 28 (defendant was properly precluded from impeaching witness where it was not established that witness' attention was called to the omitted facts on the prior occasion); People v. Medina, 249 A.D.2d 166, 672 N.Y.S.2d 53 (1st Dept. 1998), lv denied 92 N.Y.2d 901, 680 N.Y.S.2d 65 (rule requiring that witness' attention was called to specific facts omitted did not apply to buy report prepared by undercover whose credibility was being attacked); People v. Wise, 176 A.D.2d 595, 575 N.Y.S.2d 39 (1st Dept. 1991), lv denied 79 N.Y.2d 866, 580 N.Y.S.2d 738 (1992); People v. Hudson, 147 A.D.2d 710, 538 N.Y.S.2d 321 (2d Dept. 1989); People v. Jones, 136 A.D.2d 740, 524 N.Y.S.2d 79 (2d Dept. 1988).

But there is authority for permitting impeachment by omission where, in the previous statement, it would been natural for the witness to have mentioned the omitted facts. Compare People v. Ramunni, 203 A.D.3d 1076 (2d Dept. 2022) (complainant testified that he told police witness that defendant "[s]plit my head open" with "a big cutting device," but report contained no identification and stated instead that complainant "believes he would be able to identify the persons responsible for attacking him"; reversible error found where court precluded defense counsel from questioning police witness regarding the omission); People v. Jordan, 125 A.D.3d 787 (2d Dept. 2015) (defense witness who testified that defendant was not present at crime scene at time of shooting impeached with omission of that statement during interview with ADA); People v. Edwards, 118 A.D.3d 909 (2d Dept. 2014), lv denied 23 N.Y.3d 1061 (after detective testified at trial that he had read statement aloud before defendant signed it,

court erred in precluding defendant from cross-examining detective regarding failure to mention those facts during suppression hearing); People v. Tinkler, 105 A.D.3d 1140 (3d Dept. 2013), lv denied 21 N.Y.3d 1020 (impeachment permissible where defendant gave detailed statement to police regarding events surrounding victim's death, but did not include account of victim purportedly falling on stairs while coming to eat lunch; it would be reasonable to expect defendant to mention all potential injuries sustained by victim while in his care that day); People v. Bishop, 206 A.D.2d 884, 615 N.Y.S.2d 163 (4th Dept. 1994), lv denied 84 N.Y.2d 933, 621 N.Y.S.2d 530 (while citing People v. Savage, 50 N.Y.2d 673, which permits impeachment when circumstances made it most unnatural for witness to omit certain information from prior statement, Fourth Department notes that court should admit statement even if degree of inconsistency is arguable) and People v. Dismel, 16 Misc.3d 1120(A), 847 N.Y.S.2d 898 (Sup. Ct., Kings Co., 2007) (under Savage, failure of complainant to mention some of the alleged sex offenses during grand jury testimony constitutes prior inconsistent statement; even under more restrictive Bornholdt standard, complainant's failure constitutes prior inconsistent statement since she was asked three open-ended questions regarding whether defendant did "anything else" during relevant time period) with People v. Concepcion, 128 A.D.3d 612 (1st Dept. 2015), lv denied 26 N.Y.3d 927 (defendant properly precluded from impeaching eyewitness with failure to mention, during grand jury testimony, additional person who fled with assailant; witness testified in response to specific questions and attention was not specifically called to the other person, and there was no apparent reason for him to focus on or otherwise volunteer that detail when questions before grand jury were focused on assailant's actions).

If the witness admits having made the statement, the impeachment is complete. People v. Wynn, 67 A.D.3d 423, 888 N.Y.S.2d 38 (1st Dept. 2009), lv denied 15 N.Y.3d 811 (no error where judge precluded defendant from introducing document reflecting prior inconsistent statement after witness had admitted making statement).

If the witness denies or does not recall making the statement, the witness to whom the statement was made may be called to prove that the statement was made. People v. Carter, supra, 227 A.D.2d 661; see also People v. Nunes, 168 A.D.3d 1187 (3d Dept. 2019), lv denied 33 N.Y.3d 979 (witness's answer, "I don't believe so," was

denial, not expression of inability to remember); United States v. Iglesias, 535 F.3d 150 (3rd Cir. 2008) (where witness who had testified frankly under oath two days earlier at suppression hearing stated at trial that he "can't answer the question" and was otherwise evasive and vague, suppression hearing testimony was admissible under prior inconsistent statements rule, since inconsistency is not limited to diametrically opposed answers, and, when witness demonstrates reluctance to testify and forgets certain facts at trial, testimony can be found to be inconsistent).

ii. Written Statements - When impeaching with a written statement, the examiner should ask the witness whether he or she made the writing, and then ask whether the witness made the inconsistent entry. The adversary is entitled to obtain the statement after it is used for impeachment. People v. Hill, 285 A.D.2d 474, 727 N.Y.S.2d 892 (2d Dept. 2001). If the witness denies or does not recall the entry, the writing may be admitted after it is shown to the witness and he or she admits having written it. Irrelevant material in the writing must be redacted. Richardson, §6-411(b); see People v. Maxam, 135 A.D.3d 1160 (3d Dept. 2016) (no proper foundation where complainant, after being shown signed statement trooper had read to her, vaguely recalled statement); People v. Haywood, 124 A.D.3d 798 (2d Dept. 2015) (court properly precluded defendant from cross-examining witness regarding notarized statement she denied signing and for which notary could not be located; defendant not entitled to production of handwriting exemplars from witness); see also Federal Rules, 613 (statement need not be shown nor its contents disclosed to witness, but it must be disclosed upon request by opposing counsel).

iii. Prior Testimony - When the inconsistent statement appears in a transcript, the witness should be asked whether or not he or she recalls both the inconsistent testimony, and the question(s) which preceded it. But see People v. Dachille, 14 A.D.2d 554, 218 N.Y.S.2d 156 (2d Dept. 1961) (foundation was adequate despite failure to ask witness whether he had been asked specific questions and given specific answers, since witness was aware that prior testimony would be used to impeach him). The examiner should read from the transcript and refer opposing counsel to the page(s) on which the testimony appears. If the witness denies or does not recall giving the testimony, the appropriate portion of the transcript should be offered

into evidence.

b. Introduction Of Police Reports And Other Records - Unless opposing counsel stipulates to its admissibility, a police report, or some other record which contains what appears to be a witness' inconsistent statement, will sometimes not be usable as impeachment material in the absence of testimony by the person who heard and recorded the statement, since it may not be clear that the record contains the witness' actual statement, as opposed to the recorder's characterization. See People v. Farrow, 216 A.D.3d 996 (2d Dept. 2023) (police report should be admitted where it indicates that source of inconsistent information was complaining witness); People v. Ortiz, 85 A.D.3d 588 (1st Dept. 2011) (reversible error where, although court concluded that prosecutor's testimony concerning statements made by defendant during jailhouse interview could not be impeached with statements in People's case summary and VDF, inference that witness prepared documents was a reasonable one since prosecutor testified that either she or another prosecutor had prepared documents, that other prosecutor was not present during jailhouse interview, that it was "very possible" she had prepared case summary, and that VDF bore her typewritten name; even assuming she did not personally prepare each document, it is entirely unreasonable to think that she, the lead prosecutor in a serious homicide case, did not know what each document said about a matter of great import); People v. Bernardez, 85 A.D.3d 936 (2d Dept. 2011) (absent proof that complainant signed, prepared, or verified accuracy of police report or portion of it, statements in report attributed to complainant were not admissible as her prior inconsistent statements); People v. White, 272 A.D.2d 239, 707 N.Y.S.2d 456 (1st Dept. 2000), lv denied 95 N.Y.2d 940; United States v. Almonte, 956 F.2d 27 (2d Cir. 1992); People v. Henson, 113 A.D.2d 954, 493 N.Y.S.2d 851 (2d Dept. 1985); People v. Adams, 72 A.D.2d 156, 423 N.Y.S.2d 936 (1st Dept. 1980), aff'd 53 N.Y.2d 1, 439 N.Y.S.2d 877 (1981), cert denied 454 U.S. 854, 102 S.Ct. 301. See also People v. Jones, 190 A.D.2d 31, 596 N.Y.S.2d 811 (1st Dept. 1993) (defense counsel's affirmation improperly used to impeach defendant where several sources were identified). Obviously, if the recorder has an independent recollection of the statement that was transcribed, he or she could provide testimony with respect to the statement and the record need not be offered. On the other hand, if the recorder has no

recollection of the statement, the document could be offered as a past recollection recorded or a business record. If the hearsay informant had a business duty to report to the recorder, the inconsistent statement could be admitted to prove the truth of its contents. See Johnson v. Lutz, 253 N.Y. 124 (1930).

c. Pretrial Silence Of Accused – The respondent's failure to make an exculpatory statement at the time of arrest may not be used to impeach the respondent at trial. See People v. DeGeorge, 73 N.Y.2d 614, 543 N.Y.S.2d 11 (1989); People v. Conyers, 52 N.Y.2d 454, 438 N.Y.S.2d 741 (1981). See also People v. Tucker, 87 A.D.3d 1077 (2d Dept. 2011) (evidence improperly admitted where defendant merely denied role in the incident in general manner, and "maintained an effective silence"); People v. Patterelli, 68 A.D.3d 1151, 889 N.Y.S.2d 748 (3rd Dept. 2009) (rule applies where defendant responds to questioning but declines to answer certain questions or desires to halt questioning); People v. Mejia, 256 A.D.2d 422, 683 N.Y.S.2d 541 (2d Dept. 1998) (after defendant testified that she had attempted to explain her side to the police, prosecutor was improperly permitted to ask her whether she had reiterated her story after she was arrested).

Generally, evidence of selective silence may not be used by the prosecution as part of its case-in-chief, either to allow an inference of the accused's admission of guilt, or to impeach the credibility of the accused's version of events, when the accused has not testified, and may be used only to impeach the accused's trial testimony in limited and unusual circumstances. People v. Chery, 28 N.Y.3d 139 (2016) (no error where People impeached defendant's trial testimony with his selective silence while making pre-Miranda spontaneous statement to police at scene; where defendant stated to officer, "why isn't [the complainant] going to jail, he kicked my bike, he should be going to jail too," in an effort to inform police as they decided whether to arrest defendant or complainant, it was unnatural to have omitted significantly more favorable version to which defendant testified at trial, where he alleged that complainant had assaulted him); People v. Williams, 25 N.Y.3d 185 (2015); People v. Savage, 50 N.Y.2d 673, 431 N.Y.S.2d 382 (1980); People v. Spinelli, 214 A.D.2d 135, 631 N.Y.S.2d 863 (2d Dept. 1995) (since defendant must have chance to explain on cross or re-direct, and court must advise jury that defendant is under no obligation to speak, prosecutor cannot

attack defendant for the first time in summation); People v. Barber, 143 A.D.2d 450, 532 N.Y.S.2d 447 (3rd Dept. 1988) (although defendant withheld name of possible suspect when he spoke to police, he may have done so as a result of fear, loyalty, or advice of counsel); People v. Myrie, 137 A.D.2d 563, 524 N.Y.S.2d 303 (2d Dept. 1988); see also State v. Fisher, 373 P.3d 781 (Kan. 2016) (defendant improperly asked on cross whether he gave police a version that included the same exculpatory details; prosecutor needed to focus on what defendant did say during police interviews rather than on what he did not say).

d. Admission Of "Consistent" Facts - The party who called the witness may introduce portions of a prior statement which explain or clarify the inconsistent portion that was used to impeach the witness. See People v. Keeling, 141 A.D.2d 668, 529 N.Y.S.2d 560 (2d Dept. 1988).

e. Statements Made To Defense Counsel - See, e.g., People v. Caquias, 127 A.D.3d 487 (1st Dept. 2015), lv denied 26 N.Y.3d 1143 (no violation of right to conflict-free representation where prosecutor used defense counsel's note of interview of father; counsel did not effectively become witness against client); People v. Johnson, 46 A.D.3d 276, 847 N.Y.S.2d 74 (1st Dept. 2007), lv denied, 10 N.Y.3d 865 (no error in impeachment of defendant with statements her attorney made at bail application since there was reasonable inference that statements were attributable to defendant).

f. Accused's Testimony At Suppression Hearing - See, e.g., United States v. Navarette, 996 F.3d 870 (8th Cir. 2021), cert denied 142 S.Ct. 475 (no plain error where trial court allowed government to use defendant's testimony from suppression hearing to cross examine him at trial).

8. Prior Sexual Conduct Or False Allegations Of Victim In Sex Offense Case – In a prosecution for a Penal Law Article 130 offense, evidence of a victim's prior sexual conduct is admissible if it: 1) was with the accused; 2) resulted in a conviction for prostitution within 3 years prior to the offense charged; 3) rebuts prosecution evidence of the victim's abstinence from sex; 4) rebuts evidence of the accused's connection to the victim's pregnancy or disease, or to semen that was recovered; or 5) is determined to be relevant and admissible in the interests of justice after an offer of proof or a

hearing. FCA §344.4; see also CPL §60.42 (statute also applicable in sex trafficking prosecution under PL § 230.34). See, e.g., People v. Halter, 19 N.Y.3d 1046 (2012) (evidence regarding sexual nature of daughter's relationship with older teenage boy fell within Rape Shield Law); People v. Scott, 16 N.Y.3d 589 (2011) (no error in exclusion of evidence regarding complainant's sexual conduct at party on night defendant allegedly raped her, but, had People introduced evidence of bruising caused by sexual contact and attributed such evidence to defendant, excluded evidence would have been relevant); People v. Williams, 81 N.Y.2d 303, 598 N.Y.S.2d 167 (1993) (requirement that accused make threshold showing of relevance is not unconstitutional); State v. Lavalleur, 853 N.W.2d 203 (Neb. 2014) (rape shield law did not bar evidence that complainant had intimate relationship that may have provided motive to accuse defendant); State v. Montoya, 333 P.3d 935 (N.M. 2014) (violation of right of confrontation where defendant, charged with trying to rape girlfriend, was not permitted to cross-examine her about couple's history of engaging in "make-up sex"); State v. Bishop, 291 P.3d 538 (Mont. 2012) (conversations of sexual nature between defendant and complainant in days leading up to sexual assault were not "sexual conduct" under exception in rape shield law); State v. J.A.C., 44 A.3d 1085 (N.J. 2012) ("sexual conduct" includes child complainant's sexually explicit instant message correspondence with adult men; sexual conduct that is matter of fantasy rather than fact can be protected under statute); Mayo v. Commonwealth, 322 S.W.3d 41 (Ky. 2010) (rape shield law applicable to evidence of sexual relations between victim and spouse); State v. Alberts, 722 N.W.2d 402 (Iowa 2006) (skinny-dipping incident that was likely precursor to sexual activity was covered by rape shield law); United States v. Zephier, 989 F.3d 629 (8th Cir. 2021) (where expert bolstered complainant's credibility by showing that her reaction to alleged crime was consistent with how rape victims often respond, defendant was improperly precluded from questioning complainant about prior sexual assault; if jury had heard complainant had been sexually assaulted before, even "several years" earlier, it may have concluded that earlier assault, rather than what defendant allegedly did, accounted for "behavioral manifestations" of trauma); People v. Pendell, 164 A.D.3d 1063 (3d Dept. 2018), aff'd 33 N.Y.3d 972 (victim's use of adult website did not trigger protections of Rape Shield Law); People v. Tohom, 109 A.D.3d

253 (2d Dept. 2013) (no error in exclusion of evidence purportedly showing that another man had impregnated victim where offer of proof consisted of fact that man had lived next door to victim, possibly at time of conception, that victim had been seen texting people, and that, at uncertain time, victim had made drawing with picture of heart, baby, and other man's name); People v. Fisher, 104 A.D.3d 868 (2d Dept. 2013) (interests of justice exception applied where inquiries about complainant having sex with defendant's brother were relevant to defense claim that certain phone calls and text messages were made by defendant's brother using defendant's phone); People v. Garrison, 103 A.D.3d 751 (2d Dept. 2013), lv denied 21 N.Y.3d 943 (interests of justice exception not applicable where complainant's 2009 arrest for prostitution about 16 months after charged 2007 assault was not relevant to defendant's allegation that complainant had engaged in prostitution in 2007); Gagne v. Booker, 680 F.3d 493 (6th Cir. 2012) (exclusion of evidence of victim's past willingness to engage in consensual group sex was not objectively unreasonable application of Supreme Court precedent); People v. Simonetta, 94 A.D.3d 1242 (3d Dept. 2012) (interests of justice exception not applied to evidence of victim's sexual behavior towards defendant's friend while at defendant's apartment; person's willingness to engage in sexual conduct with one person around the time of incident in question is not indicative of concomitant desire to consent to such behavior with another); United States v. Ellerbrock, 70 M.J. 314 (Ct. App., U.S. Armed Forces 2011) (court erred by preventing defendant from introducing evidence of complainant's first marital affair to show motive to lie about consensual nature of sex with defendant to protect marriage); Barbe v. McBride, 521 F.3d 443 (4th Cir. 2008) (state court unreasonably applied clearly established federal law by determining that West Virginia's rape shield law was per se exclusionary rule; state court must make case-by-case assessment of whether exclusionary rule is arbitrary or disproportionate to State's legitimate interests); People v. Lane, 47 A.D.3d 1125, 849 N.Y.S.2d 719 (3rd Dept. 2008), lv denied, 10 N.Y.3d 866 (no error in the preclusion of evidence of prosecution witness's sexual misconduct with victim, which was offered by defendant to impeach witness's credibility); People v. Taylor, 40 A.D.3d 782, 835 N.Y.S.2d 442 (3rd Dept. 2007), lv denied 9 N.Y.3d 927 (certain evidence of victim's HIV status was covered by statute); People v. Curry, 11 A.D.3d 150, 782 N.Y.S.2d 66 (1st Dept. 2004)

(defendant properly precluded from exploring complainant's alleged statement that injuries were inflicted by one of her "tricks" where defendant was attributing injuries to known assailant); People v. Loja, 305 A.D.2d 189, 761 N.Y.S.2d 7 (1st Dept. 2003), lv denied 100 N.Y.2d 584, 764 N.Y.S.2d 394 (2003) (court erred in excluding testimony regarding complainant's prior intimate behavior with defendant); People v. Jovanovic, 263 A.D.2d 182, 700 N.Y.S.2d 156 (1st Dept. 1999), appeal dism'd 95 N.Y.2d 846, 713 N.Y.S.2d 519 (e-mail sent to defendant by complainant, exhibiting interest in sadomasochism, not subject to Rape Shield Law; even if it was covered by law, it fell within exception for prior sexual conduct with accused, exception for evidence indicating that someone else was responsible for complainant's injuries, and interests of justice exception); People v. Halbert, 175 A.D.2d 88, 572 N.Y.S.2d 331 (1st Dept. 1991), aff'd 80 N.Y.2d 865, 587 N.Y.S.2d 891 (1992) (evidence properly excluded where defendant claimed victim left home not to escape, but to continue sexual relationship with boyfriend); People v. Halmond, 190 Misc.2d 175, 737 N.Y.S.2d 787 (Sup. Ct., Monroe Co., 2001) (under interests of justice exception, court admits complainant's admission that she had engaged in sexual relations with male other than defendant the day before alleged rape; admits complainant's admission that she had engaged in prior sexual relations with 2 men she refused to identify; admits complainant's statement that she had been raped on 2 prior occasions but was too intoxicated to recall the details; refused to admit the complainant's implied admission that she had previously engaged in sexual relations for alcohol and drugs; and refused to admit the complainant's admission that she had contracted gonorrhea, chlamydia and herpes). See also CPL §60.43 (admissibility of evidence of victim's sexual conduct in non-sex offense cases).

The admission of evidence of prior false or suspiciously similar complaints of sex crimes is not precluded by this rule. See People v. Diaz, 20 N.Y.3d 569 (2013) (reversible error where court excluded testimony by father of complainant's younger brother regarding allegations of sexual abuse made against him by complainant approximately two years before allegations were made against defendant; evidence was relevant to defense claim that complainant had history of making false allegations of sexual abuse by family members and was inconsistent with complainant's testimony that she never made prior allegation and her mother's testimony that she was unaware

of allegation); People v. Hunter, 11 N.Y.3d 1, 862 N.Y.S.2d 301 (2008) (Brady violated where People withheld evidence regarding man who had been indicted for raping complainant some ten months after charged incident and who admitted having sex with complainant but said she consented, and other man's guilty plea was irrelevant to Brady obligation at relevant time; court would have had discretion to admit information about other case and man's claim that complainant willingly had sex with him and then lied about it); Perry v. Commonwealth, 390 S.W.3d 122 (Ky. 2012) (sheer number and variety of allegations created sufficient probability they were false); Pantoja v. State, 59 So.3d 1092 (Fla. 2011) (no error where defendant was not permitted to question complainant about accusation against uncle regarding one-time "over-the-clothes" groping, and accusation against defendant involved "under-the-clothes" sexual acts on multiple occasions and complainant had not recanted accusation against uncle); Dennis v. Commonwealth, 306 S.W.3d 466 (Ky. 2010) (trial court must first determine whether allegations have been shown by defendant to be demonstrably false, and, if so, consider probativeness of evidence; then, if evidence is probative of complainant's credibility, court must determine whether probative value is substantially outweighed by danger of undue prejudice, confusion of issues and other considerations identified in governing evidence rule); Hammer v. State, 296 S.W.3d 555 (Tex. Ct. Crim. App. 2009) (trial court erred in excluding evidence that complainant had previously made false rape accusation where evidence was relevant to her animus toward defendant and her desire to get out of his house); State v. A.O., 965 A.2d 152 (NJ, 2009) (false allegations made after allegations in present case may be relevant); People v. Marquis Andrews, (4th Dept. 2022) (reversible error where court precluded defendant from calling witness who would testify that complainant offered to make false allegation of abuse against witness's boyfriend around time of first incident alleged against defendant and just months before second incident; allegations were sufficiently similar to suggest pattern); People v. Sherwood, 204 A.D.3d 1162 (3d Dept. 2022), lv denied 39 N.Y.3d 964 (defendant properly precluded from cross-examining victim regarding allegations of prior sexual abuse where defendant asserted that one allegation was false because it was reported to police but there was no indictment or conviction, and that other allegation - that victim's brother committed abuse more than ten years prior to trial - was false

because victim later went to live with brother and saw him as "trusted figure"); People v. Werkheiser, 171 A.D.3d 1297 (3d Dept. 2019), lv denied 33 N.Y.3d 1109 (where defendant was victims' dance instructor, testimony by two dance studio students regarding victims' allegedly false accusations that defendant abused students); People v. Shannon, 42 Misc.3d 127(A) (App. Term, 2d Dept., 2013) (no error where court barred defense from introducing evidence to show that complainant had previously made false accusations of domestic violence with respect to other men in her life); People v. McCray, 102 A.D.3d 1000 (3d Dept. 2013) (court did not err in failing to disclose possible false allegation by complainant that her father sexually abused her when she was 13; remote claim of sexual abuse by alcoholic, physically abusive father, when compared to complainant's assertion that she was date-raped by defendant, did not suggest pattern casting substantial doubt on complainant's allegations); United States v. Frederick, 683 F.3d 913 (8th Cir. 2012) (defendant failed to support claim that previous allegations were false); People v. Sanabria, 72 A.D.3d 552, 898 N.Y.S.2d 842 (1st Dept. 2010), lv denied 15 N.Y.3d 756 (reversible error where trial court precluded defense from investigating complainant's prior claims of molestation by doctors); People v. Lackey, 48 A.D.3d 982, 853 N.Y.S.2d 668 (3rd Dept. 2008) (conviction vacated where defendant presented evidence of victim's false report of sexual assault several months after conviction and victim's mental health problems); People v. Gibson, 2 A.D.3d 969, 768 N.Y.S.2d 511 (3rd Dept. 2003), lv denied 1 N.Y.3d 627 (2004) (defendant failed to establish falsity of complaint or that complaint suggested pattern that cast doubt on validity of or bore significant relation to instant charges); People v. Badine, 301 A.D.2d 178, 752 N.Y.S.2d 679 (2d Dept. 2002), appeal withdrawn 99 N.Y.2d 612, 757 N.Y.S.2d 822 (2003); People v. Harris, 151 A.D.2d 981, 541 N.Y.S.2d 660 (4th Dept. 1989); People v. Foulkes, 30 Misc.3d 1222(A) (Sullivan County Ct., 2011) (court denies People's motion to preclude defendant, the 14-year-old complainant's "quasi or de facto brother-in-law," from cross examining her about or making reference to similar allegation against her brother-in-law, the husband of her other sister); see also Holley v. Yarborough, 568 F.3d 1091 (9th Cir. 2009) (trial court improperly precluded cross-examination of child sex crime complainant regarding prior claims of her own sexual appeal; prosecution needed to characterize her as child who

could be relied on to tell truth and not exaggerate or fantasize about sexual issues, and that characterization might have been put into question by evidence that she had highly active sexual imagination or familiarity with sexual activities); United States v. No Neck, 472 F.3d 1048 (8th Cir. 2007) (defendant improperly precluded from questioning victims' mother as to whether she had previously made false allegations against her brother); Fowler v. Sacramento County Sheriff's Department, 421 F.3d 1027 (9th Cir. 2005) (right of confrontation violated where petitioner was denied opportunity to examine complainant and offer evidence regarding 2 prior molestation charges made by complainant in effort to show complainant had tendency to be "supersensitive" to physical contact near sensitive area); Kittelson v. Dretke, 426 F.3d 306 (5th Cir. 2005) (petitioner was entitled to examine complainant about previous allegations of sexual abuse in effort to show motive to make up allegation to gain attention and sympathy); Redmond v. Kingston, 240 F.3d 590 (7th Cir. 2001); State v. Miller, 921 A.2d 942 (N.H. 2007) (defendant did not have to show allegations were demonstrably false if they were probative of credibility and otherwise admissible); Abbott v. State, 138 P.3d 462 (Nev. 2006) (defendant established by preponderance of evidence that prior allegations were false); but see People v. Frary, 29 A.D.3d 1223, 815 N.Y.S.2d 334 (3rd Dept. 2006), lv denied 7 N.Y.3d 788 (impeachment precluded where allegedly false claim did not involve sex crime); People v. Petty, 17 A.D.3d 220, 795 N.Y.S.2d 1 (1st Dept. 2005), lv denied 5 N.Y.3d 793 (no error in preclusion of cross-examination of victim regarding complaint of physical abuse she filed against prior boyfriend, which resulted in adjournment in contemplation of dismissal; prior complaint did not bear significant probative relation to instant charges, and ACD is not an adjudication on the merits); Cookson v. Schwartz, 556 F.3d 647 (7th Cir. 2009) (conclusion by child protective authorities that allegation is "unfounded" does not establish it is false, only that investigator did not locate credible evidence establishing allegation's veracity prior to completion of investigation); Matter of Khamari P., 55 Misc.3d 1209(A) (Fam. Ct., Kings Co., 2017) (where respondent charged with multiple types of forcible sexual contact on multiple occasions with cousin starting when complainant was "5, 6, or 7" years old and continuing until after she turned 10, respondent precluded from eliciting evidence that, six years earlier, complainant made false charge that step-father kissed her); see also

Nevada v. Jackson, 133 S.Ct. 1990 (2013) (state court did not unreasonably apply federal law when it ruled that petitioner was not denied right to present a complete defense when evidence of complainant's prior accusations of sexual assault was precluded as sanction for failure to provide advance notice required by state law).

The rape shield law does not bar the prosecution from offering sexual history evidence. See People v. Wigfall, 253 A.D.2d 80, 690 N.Y.S.2d 2 (1st Dept. 1999), lv denied 93 N.Y.2d 981, 695 N.Y.S.2d 67 (People introduced testimony by complainant that she had not had sexual relations with anyone other than her common-law husband to explain why she did not inform her husband of the rape immediately and was relevant to defendant's consent defense).

9. Reputation For Truthfulness And Veracity - A person who has knowledge of a witness' bad reputation in the community for truthfulness and veracity may be called to testify. See People v. Fernandez, 17 N.Y.3d 70 (2011) (if proper foundation laid, family and family friends may constitute relevant community; in this case, one witness had known complainant since her birth, had overheard discussions concerning complainant among extended family of approximately 25 to 30 people, and was aware of reputation for truthfulness in family, and other witness explained that all family members and family friends often discussed complainant, and she was present during those conversations and was aware of reputation); People v. Hanley, 5 N.Y.3d 108, 800 N.Y.S.2d 105 (2005) (trial court erred in refusing to admit evidence of witnesses' reputation among co-workers; admission of evidence is required, not discretionary, where defendant lays proper foundation); People v. Lisene, 201 A.D.3d 738 (2d Dept. 2022) (court erred in excluding testimony where army sergeant described community of seven or eight friends and acquaintances, predominantly Haitian and living within certain neighborhoods in Brooklyn); People v. Youngs, 175 A.D.3d 1604 (3d Dept. 2019), appeal withdrawn 34 N.Y.3d 985 (court erred in excluding testimony that witness had known complainant since birth; they were members of same large extended family and many members of family knew complainant; and witness was aware of complainant's bad reputation for truthfulness among extended family); People v. McGhee, 82 A.D.3d 1264, 920 N.Y.S.2d 164 (2d Dept. 2011) (no error where court permitted defendant to impeach prosecution witness with testimony by witness's father

as to son's “exceedingly bad” reputation in community for truth and veracity, but did not allow father, who taught at high school son attended and continued to live in community where he had raised son, to testify that he had discussed reputation with son’s “teachers, neighbors, friends, people of that sort”); People v. Hopkins, 56 A.D.3d 820, 866 N.Y.S.2d 819 (3rd Dept. 2008) (in refusing to allow reputation evidence, trial court erred by relying on fact that witness was not employed at facility where victim resided when she first disclosed intimate nature of relationship with defendant; reputation testimony also was admissible to establish victim's reputation at time she testified); People v. Streitferdt, 169 A.D.2d 171, 572 N.Y.S.2d 893 (1st Dept. 1991), lv denied 78 N.Y.2d 1015, 575 N.Y.S.2d 823 (improper exclusion of evidence of complainant's reputation).

The person must reside, work, circulate, etc. in the same community, and have a factual basis for describing the witness' reputation. Although the impeaching witness may not provide an opinion, the examiner may ask the witness whether, given the witness' knowledge of the other witness' reputation, he or she would believe the other witness. Richardson, §6-402. See People v. Pavao, 59 N.Y.2d 282, 464 N.Y.S.2d 458 (1983). But see Federal Rules, 608(a) (opinion permitted).

The reputation witness may not testify regarding specific instances of untruthfulness. People v. Arroyo, 37 A.D.3d 301, 831 N.Y.S.2d 126 (1st Dept. 2007), lv denied 9 N.Y.3d 839.

10. Opportunity To Tailor Testimony - Compare People v. Rosa, 108 A.D.2d 531, 489 N.Y.S.2d 722 (1st Dept. 1985) (prosecutor improperly remarked in summation that defendant testified after other witnesses) and State v. Daniels, 861 A.2d 808 (NJ 2004) (prosecutor may not make generic accusation that defendant tailored testimony to evidence, but may comment on specific evidence going beyond fact that defendant was present and heard testimony) with Portuondo v. Agard, 529 U.S. 61, 120 S.Ct. 1119 (2000) (no Fifth or Sixth Amendment violation where prosecutor was permitted to state on summation that defendant had opportunity to hear witnesses and tailor testimony); People v. King, 293 A.D.2d 815, 740 N.Y.S.2d 500 (3rd Dept. 2002), lv denied 98 N.Y.2d 698, 747 N.Y.S.2d 417 (2002) (court properly permitted questioning by prosecutor suggesting that defendant tailored testimony to conform to People's proof;

since, under Portuondo, such remarks made during summation are permissible, innuendo arising during cross-examination is permissible); People v. Swift, 272 A.D.2d 126, 708 N.Y.S.2d 611 (1st Dept. 2000), lv denied 95 N.Y.2d 871, 715 N.Y.S.2d 226 (court follows Portuondo as matter of State constitutional law); People v. Galloza, 270 A.D.2d 69, 705 N.Y.S.2d 35 (1st Dept. 2000), lv denied 95 N.Y.2d 852, 714 N.Y.S.2d 3 (People properly permitted to prove on cross extent to which defendants conferred with each other about their testimony) and People v. Wirts, 178 A.D.2d 165, N.Y.S.2d (1st Dept. 1991) (defense counsel, by arguing that defendant had opportunity to tailor testimony but did not, opened door to prosecutor's argument on summation that defendant crafted story after hearing People's witnesses). See also People v. Montoya, 63 A.D.3d 961, 882 N.Y.S.2d 429 (2d Dept. 2009) (court erred in not permitting defense counsel's cross-examination of complainant and her mother as to whether they spoke to each other about incidents); People v. Hartman, 4 A.D.3d 22, 772 N.Y.S.2d 396 (3rd Dept. 2004) (defense counsel should have been permitted to comment on fact that 3 People's witnesses met with prosecutor at same time).

11. Collateral Issues - Extrinsic impeachment evidence that purports to contradict or undermine a witness on a collateral point is not admissible. Compare People v. Jordan, 168 A.D.3d 458 (1st Dept. 2019), lv denied 33 N.Y.3d 1032 (no error where court precluded defense witness from testifying, relative to collateral issue of integrity of police search operation, that unidentified officer stole cash from room other than one where contraband was recovered); People v. Stewart, 153 A.D.2d 706, 544 N.Y.S.2d 875 (2d Dept. 1989) (defendant's employment status, his receipt of welfare, and location where he lived were collateral); People v. Johnson, 144 A.D.2d 490, 534 N.Y.S.2d 207 (2d Dept. 1988) (whether defendant ever carried guns was collateral); People v. Gonzalez, 100 A.D.2d 852, 474 N.Y.S.2d 97 (2d Dept. 1984) (defendant's physical appearance 2 weeks after crime was collateral); People v. Rivers, 96 A.D.2d 874, 465 N.Y.S.2d 740 (2d Dept. 1983) (date of defendant's job interview was collateral) with People v. Deverow, 38 N.Y.3d 157 (2022) (proffered testimony of witness's girlfriend was not collateral since it would have contradicted witness's testimony and People's theory that he was with girlfriend on night in question and thus was probative of witness's ability to observe and recall details of shooting); People v. Montgomery,

158 A.D.3d 204 (1st Dept. 2018), lv denied 31 N.Y.3d 1015 (court erred in excluding defendant's arrest fingerprint card which purportedly did not show scar on palm that was included in trial witness's description of assailant); People v. Peguero-Sanchez, 141 A.D.3d 608 (2d Dept. 2016), aff'd 29 N.Y.3d 965 (2017) (where officer testified that defendant told him he was meeting friends and going to Applebee's, but defendant testified that, minutes before arrest, he had been texting girlfriend about meeting her at Applebee's, defendant's contradictory text messages properly admitted since defendant's testimony placed officer's credibility at issue); People v. Celifie, 47 Misc.3d 133(A) (App. Term, 2d Dept., 2015) (after defendant made "global denial" on direct that he used drugs, People permitted to call rebuttal witness to establish that defendant did use drugs) and People v. Ortiz, 133 A.D.2d 853, 520 N.Y.S.2d 215 (2d Dept. 1987) (rape defendant and witness testified that alleged victim had been to defendant's apartment 3 times and spent the night once; it was permissible for victim's mother to testify that there had been more visits).

12. Impeachment Of Own Witness - The traditional rule is that a party may not impeach his or her own witness by offering evidence showing the witness to be unworthy of belief. Richardson, §6-419. But see Federal Rules, 607. However, under FCA §343.5 [see also CPL §60.35(1)], a party may impeach the witness with his or her signed statement or previous testimony under oath when the witness' present testimony upon a material issue is contradictory and "tends to disprove the position of such party." The damaging testimony must have been elicited during direct examination. People v. Rodwell, 246 A.D.2d 916, 667 N.Y.S.2d 839 (3rd Dept. 1998); but see People v. Mitchell, 57 A.D.3d 1308, 871 N.Y.S.2d 445 (3rd Dept. 2008) (People improperly permitted to impeach own witness with prior inconsistent statement where People, who had notified court that witness had unequivocally stated that he would recant prior testimony if forced to take stand, made no attempt to elicit testimony relevant to material issue other than identity of shooter, and thus primary purpose served by calling witness was to place otherwise inadmissible prior inconsistent statement before jury).

Generally speaking, a witness' mere inability to recount or recall the events in question is not sufficient. See, e.g., People v. Berry, 27 N.Y.3d 10 (2016) (impeachment proper where witness had previously signed statement indicating that defendant was

shooter but at trial stated that he did not see defendant at scene, and testimony that he heard only one shot tended to disprove People's theory of multiple shots fired at victims and intent to cause death of both); People v. Sams, 216 A.D.3d 1003 (2d Dept. 2023) (reversible error where court permitted prosecutor to impeach witness with prior statement; witness's testimony that he did not see perpetrator's face and did not see defendant fire gun did not contradict or disprove testimony or other evidence presented by prosecution); People v. Ramos, 211 A.D.3d 1040 (2d Dept. 2022), lv denied 39 N.Y.3d 1112 (testimony by People's witness that, upon seeing defendant, she ran out of bedroom, was affirmatively damaging as it contradicted complainant's testimony that witness was standing next to defendant when he struck complainant with piece of glass); People v. Saez, 69 N.Y.2d 802, 513 N.Y.S.2d 380 (1987) (since People only had to prove that defendant displayed what appeared to be a gun during robbery, complainant's testimony that he did not see what defendant stuck in his side did not tend to disprove an essential element); People v. Nunes, 168 A.D.3d 1187 (3d Dept. 2019), lv denied 33 N.Y.3d 979 (3d Dept. 2019) (People properly allowed to impeach witness who testified at trial that plan was to purchase marihuana if initial attempt to snatch it failed with witness's grand jury testimony that "there was a backup plan, that once they come to the car we were going to hop out and just take the weed"); People v. Grierson, 154 A.D.3d 1071 (3d Dept. 2017) (grand jury testimony regarding conversation with defendant that caused witness to believe defendant might have gun improperly used to impeach where witness's denial that she told officers about conversation did not tend to disprove People's contention that defendant constructively possessed gun); People v. Gaston, 147 A.D.3d 1219 (3d Dept. 2017) (reversible error where People impeached witness with prior statements incriminating defendant after witness testified that he did not know defendant, had never bought drugs from defendant and did not recall having been to defendant's apartment); People v. Thomas, 143 A.D.3d 923 (2d Dept. 2016) (prosecutor improperly allowed to impeach witness, who testified that it was dark at time of shooting and she "couldn't really see" shooter, with grand jury testimony that she recognized shooter as person going by nickname of E-Villain); People v. Ayala, 121 A.D.3d 1124 (2d Dept. 2014) (witness's testimony that she did not remember face of shooter, and could not identify shooter because of

passage of time and her struggles with alcohol and depression, did not tend to disprove or affirmatively damage People's case); People v. Moore, 54 A.D.3d 878, 864 N.Y.S.2d 110 (2d Dept. 2008) (no error where the prosecution impeached witness who, prosecution learned just before he was to testify regarding defendant's shooting of decedent, also intended to testify that about seven hours before shooting, decedent had put gun to defendant's head); People v. Bellamy, 26 A.D.3d 638, 809 N.Y.S.2d 287 (3rd Dept. 2006) (impeachment improper where witness told grand jury that defendant was at site of shooting, but placed him a block away later in the evening during testimony at trial); People v. Rodwell, supra, 246 A.D.2d 916 (although witness was not entirely forthright, People were not entitled to impeach her with Grand Jury testimony concerning defendant's possession of a gun after she testified that she could not recall seeing anything in defendant's hand); People v. Hickman, 148 A.D.2d 937, 539 N.Y.S.2d 176 (4th Dept. 1989), aff'd 75 N.Y.2d 891, 554 N.Y.S.2d 474 (1990) (witnesses' denial that defendant had made admissions to them did not affirmatively damage People's case); People v. Comer, 146 A.D.2d 794, 537 N.Y.S.2d 272 (2d Dept. 1989) (witness' refusal to identify defendant as shooter did not affirmatively damage People's case); People v. Vega, 108 A.D.2d 766, 484 N.Y.S.2d 924 (2d Dept. 1985) (improper use of unsworn oral statements); People v. DeJesus, 101 A.D.2d 111, 475 N.Y.S.2d 19 (1st Dept. 1984), aff'd 64 N.Y.2d 1126, 490 N.Y.S.2d 188 (1985) (after witness testified that defendant was not the killer, prosecutor was properly allowed to use witness' Grand Jury testimony identifying defendant as the killer).

When the prior statement does not tend to disprove the position of the party, and, therefore, is not usable as impeachment material, the party may not attempt to refresh the recollection of the witness in a manner that discloses the contents of the prior statement to the court. FCA §343.5(3). See People v. Nunes, 168 A.D.3d 1187 (3d Dept. 2019), lv denied 33 N.Y.3d 979 (3d Dept. 2019) (People properly allowed to impeach witness who testified at trial that plan was to purchase marihuana if initial attempt to snatch it failed with witness's grand jury testimony that "there was a backup plan, that once they come to the car we were going to hop out and just take the weed"); People v. Navarette, 131 A.D.2d 326, 516 N.Y.S.2d 460 (1st Dept. 1987) (prosecutor badgered witness and improperly made jury aware of witness' previous testimony).

If the prosecutor was aware that the witness might exculpate the respondent, the witness may not be impeached in any event. People v. Sylvester, 188 A.D.3d 1723 (4th Dept. 2020) (prosecutor improperly permitted to impeach witnesses where prosecutor was on notice that one witness would identify someone other than defendant as shooter appearing on video surveillance, and other witness would give qualified answer that shooter on video could be defendant); People v. Vega, supra, 108 A.D.2d 766.

When the respondent is prevented from impeaching a witness under FCA §343.5, it could be argued that the respondent's right of confrontation has been violated. See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 1047 (1973) ("The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State"); People v. Oddone, 22 N.Y.3d 369 (2013) (citing Chambers, court notes that technical limitations on impeachment of witnesses must sometimes give way, in criminal case, to defendant's right to fair trial). But see People v. Coleman, 256 A.D.2d 631, 680 N.Y.S.2d 758 (3rd Dept. 1998), lv denied 92 N.Y.2d 1030, 684 N.Y.S.2d 495 (defendant was not entitled to lead and impeach confidential informant where witness merely failed to further defense theory and was not evasive, obstructionist or openly hostile). In addition, the respondent is entitled to testify on direct concerning his or her prior false or inconsistent statements in order to avoid the more damaging effect impeachment would have on cross-examination. See People v. Guy, 223 A.D.2d 723, 637 N.Y.S.2d 445 (2d Dept. 1996).

This rule is not violated when another witness' testimony, or other evidence offered by the party, contradicts the subject witness' testimony concerning a material fact. See Richardson, § 6-419; People v. Figueroa, 153 A.D.2d 576, 544 N.Y.S.2d 618 (2d Dept. 1989).

13. Prosecutorial Misconduct On Cross-Examination - A prosecutor may not cross-examine the respondent or any other witness in a manner that is mean-spirited or designed to ridicule the witness. See, e.g., People v. Hamilton, 121 A.D.2d 176, 502 N.Y.S.2d 747 (1st Dept. 1986); People v. Rodriguez, 103 A.D.2d 121, 479 N.Y.S.2d 25 (1st Dept. 1984). A prosecutor may not compel defense witnesses to characterize prosecution witnesses as liars. See, e.g., People v. Montgomery, 103

A.D.2d 622, 481 N.Y.S.2d 532 (4th Dept. 1984); People v. Bolden, 82 A.D.2d 757, 440 N.Y.S.2d 202 (1st Dept. 1981). But see People v. Overlee, 236 A.D.2d 133, 666 N.Y.S.2d 572 (1st Dept. 1997), lv denied 91 N.Y.2d 976, 672 N.Y.S.2d 855 (1998) (no error where prosecutor challenged defendant to characterize People's witnesses as liars only after defendant flatly denied charges and excluded possibility that People's witnesses were mistaken). Finally, a prosecutor may not become an unsworn witness by repeatedly asking leading questions which include facts that are inadmissible. See, e.g., People v. Sandy, 115 A.D.2d 27, 499 N.Y.S.2d 75 (1st Dept. 1986); People v. Perez, 90 A.D.2d 468, 455 N.Y.S.2d 89 (1st Dept. 1982). Cf. People v. Blake, 139 A.D.2d 110, 530 N.Y.S.2d 578 (1st Dept. 1988) (improper comments were made by prosecutor during defendant's videotaped confession).

F. Bolstering - Generally, a party may not bolster the testimony of a witness by showing that the witness has previously made statements consistent with his or her present testimony. Richardson, §6-503. However, there are exceptions to this rule.

1. Pretrial Identification Of Respondent

a. Proved By Testimony Of Identifying Witness - Pursuant to FCA §343.4, a witness who has identified the respondent at trial may testify that he or she made an identification before trial and subsequent to the time of the offense. See also People v. Jiminez, 22 A.D.3d 423, 805 N.Y.S.2d 2 (1st Dept. 2005) (photograph of lineup properly admitted to assist jury in assessing complainant's testimony, and there was no error in admission of detective's testimony regarding "objectivity" of lineup). The identification may be corporeal, or from a pictorial, photographic, electronic, filmed or video recorded reproduction made pursuant to a "blind or blinded procedure" (as defined in FCA §343.3).

b. Proved By Testimony Of Police Officer Or Other Third Party - Generally, a witness may not testify that another person identified the respondent, see People v. Trowbridge, 305 N.Y. 471 (1953); People v. Ramirez, 164 A.D.3d 1377 (2d Dept. 2018) (bolstering error may not be overlooked except where evidence of identity is so strong that there is no serious identification issue); People v. Felder, 108 A.D.2d 869, 485 N.Y.S.2d 576 (2d Dept. 1985), or create an inference that such an identification took place. See People v. Fields, 309 A.D.2d 945, 766 N.Y.S.2d 365 (2d

Dept. 2003) (reversible error where detective testified that he arrested defendant after asking complainant whether she recognized anyone in lineup; violation of rule may not be overlooked unless evidence of identification is so strong that there is no serious question about identification); People v. Baldelli, 152 A.D.2d 741, 544 N.Y.S.2d 193 (2d Dept. 1989) (improper to admit testimony that defendant was arrested as a result of phone call by wife of complainant). See also People v. Rivera, 96 N.Y.2d 749, 725 N.Y.S.2d 264 (2001) (although introduction of such evidence may be improper in some circumstances (see United States v. Reyes, 18 F.3d 65), defendant opened door in this case); People v. Fingall, 136 A.D.3d 622 (2d Dept. 2016) (no error where detective testified that he handed identifying witness form to fill out after viewing lineup); People v. Trott, 46 A.D.3d 713, 848 N.Y.S.2d 235 (2d Dept. 2007) (undercover officer's testimony that he was working on date of arrest, which permitted jury to infer that undercover identified defendant on date of arrest, was improper bolstering); People v. Samuels, 22 A.D.3d 507, 802 N.Y.S.2d 458 (2d Dept. 2005) (trial court improperly allowed detective to testify that he arrested defendant and co-defendant as a result of, inter alia, lineup identifications of co-defendant; court notes that witness's identification of co-defendant cannot be used as basis for evaluating accuracy of identification of defendant); People v. Roman, 273 A.D.2d 53, 710 N.Y.S.2d 823 (1st Dept. 2000) (rule against bolstering not applicable to arresting officer's testimony concerning undercover officer's description and confirmatory drive-by identification);

The general rule against third-party bolstering does not apply to a declaration that is admissible under a traditional hearsay exception, such as the one for excited utterances. People v. Everette, 148 A.D.3d 513 (1st Dept. 2017); People v. Robinson, 27 Misc.3d 1216(A), 910 N.Y.S.2d 764 (Dist. Ct., Nassau Co., 2010).

However, pursuant to FCA 343.3, a third party may testify to an identification when the identifying witness is unable because of a failure of memory to identify the respondent at trial, but does recall making an identification of the perpetrator on a prior occasion during a corporeal viewing, or from a pictorial, photographic, electronic, filmed or video recorded reproduction made pursuant to a blind or blinded procedure. A "blind or blinded procedure" is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproductions under

circumstances where, at the time the identification is made, the public servant administering such procedure: (i) does not know which person in the array is the suspect, or (ii) does not know where the suspect is in the array viewed by the witness. The failure of a public servant to follow such a procedure shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not constitute a legal basis to suppress evidence pursuant to CPL §710.20(6). See, e.g., People v. Quevas, 81 N.Y.2d 41, 595 N.Y.S.2d 721 (1993) (People failed to establish absence of present recollection where witness said "[n]ope" when asked whether he saw one of the perpetrators in the courtroom); People v. Jamerson, 68 N.Y.2d 984, 510 N.Y.S.2d 554, 555 (1986) (rule "may require an affirmative statement by an identification witness that he is currently certain of the accuracy of a prior identification of defendant made on an occasion other than at the time and place of the offense"; however, defendant did not preserve issue, and absence of affirmative statement did not make identification legally insufficient to connect defendant to crime); People v. Bayron, 66 N.Y.2d 77, 495 N.Y.S.2d 24 (1985) (identification not admissible where present inability to identify is due to fear); People v. Bryant, 211 A.D.3d 848 (2d Dept. 2022), lv denied 39 N.Y.3d 1077 (court erred in allowing officer to testify regarding lineup identification where witness did not testify at trial that he could not identify defendant on basis of present recollection, and stated instead that he did not see individual he had previously identified in courtroom); People v. Roscher, 114 A.D.3d 812 (2d Dept. 2014), lv denied 22 N.Y.3d 1202 (testimony admissible where complainant acknowledged he did not get good look at perpetrators and claimed that, although defendant looked “a little bit” like assailant, “I really don't remember”); People v. Thomas, 300 A.D.2d 2, 750 N.Y.S.2d 296 (1st Dept. 2002), lv denied 99 N.Y.2d 585, 755 N.Y.S.2d 721 (2003) (prior identification need not be based on defendant’s face); People v. Brown, 60 A.D.2d 890, 401 N.Y.S.2d 290 (2d Dept. 1978) (error where complainant testified that he was "sure" of prior identification; testimony that he was certain at trial that he had previously identified right man would have been proper). The Court of Appeals has held that §60.25 cannot be utilized where the identifying witness has died. People v. Patterson, 93 N.Y.2d 80, 688 N.Y.S.2d 101 (1999).

c. Photo Identifications - The rule in New York has been that

photo identification evidence is not admissible. People v. Caserta, 19 N.Y.2d 18, 277 N.Y.S.2d 647 (1966); see also People v. Mosley, 296 A.D.2d 595, 744 N.Y.S.2d 577 (3rd Dept. 2002) (no "buy and bust" exception for confirmatory identifications); but see People v. Stanislous, 40 Misc.3d 805 (Sup. Ct., Bronx Co., 2013) (court finds evidence admissible, concluding that there is no longer a per se rule barring admission; court noted that photographs were from high school yearbook, were of superior quality, and depicted students dressed in formal attire, and that trial was being held about five years after identification and juror asked how she could properly evaluate in-court identification given gap in time); People v. Woolcock, 7 Misc.3d 203, 792 N.Y.S.2d 804 (Sup. Ct., Kings Co., 2005) (given technological advances, evidence should be admissible).

A photo identification may be admissible if the respondent "opens the door" or otherwise forfeits the protection of the rule. Compare People v. Perkins, 15 N.Y.3d 200, 906 N.Y.S.2d 523 (2010) (by refusing to cooperate with lineup, defendant forfeited protection of rule; although victim eventually identified defendant in lineup, judge reasonably concluded that jurors might be more skeptical about reliability of identification made nine and one-half rather than three months after crime); People v. Adamson, 131 A.D.3d 701 (2d Dept. 2015) (photo identification properly admitted where defendant was restrained during lineup (due to uncooperative behavior), and evidence countered any resulting inference that lineup was suggestive and that lineup identifications were unreliable); People v. Francis, 123 A.D.2d 714, 507 N.Y.S.2d 78 (2d Dept. 1986) (door opened by attempt to create false impression that witness made no identification) and People v. Solivera, 24 Misc.3d 1203, 889 N.Y.S.2d 883 (Sup. Ct., Kings Co., 2009) (identification of absent defendant admissible; defendant should not be permitted to prevent People from proving identity in court by absconding, and, while arrest photos used to indicate that subject had been arrested, photos here had no indicia of criminality) with People v. Lindsay, 42 N.Y.2d 9, 396 N.Y.S.2d 610 (1977) (door not opened by testimony that other witness identified photo of someone other than defendant).

d. "Negative" Identification Evidence - The prosecution may attempt to bolster an identification by showing that before identifying the respondent, the

witness did *not* identify anyone in a procedure which did not include the respondent. See People v. Wilder, 93 N.Y.2d 352, 690 N.Y.S.2d 483 (1999) (court properly admitted evidence that undercover stated that other suspect was not right person); People v. Bolden, 58 N.Y.2d 741, 459 N.Y.S.2d 22 (1982), aff'g 83 A.D.2d 921, 442 N.Y.S.2d 777 (1st Dept. 1981) (defense counsel opened door); People v. Linton, 55 A.D.3d 324, 864 N.Y.S.2d 431 (1st Dept. 2008) (no error in admission of evidence of victim's inability to identify anyone from numerous photographs). See also People v. Shaw, 150 A.D.2d 626, 541 N.Y.S.2d 495 (2d Dept. 1989) (error to admit evidence that undercover had told supervisor on other occasions that the person arrested was not the seller); People v. Rosario, 127 A.D.2d 209, 514 N.Y.S.2d 362 (1st Dept. 1987) (error to admit evidence that witness accurately identified another suspect at a lineup).

e. Description Testimony - A witness may testify to the details of a description he or she provided in order to demonstrate an ability to make observations, and to permit a comparison of the description with the respondent's appearance. In appropriate circumstances, a police officer may testify to the description. See People v. Smith, 22 N.Y.3d 462 (2013) (police officer's testimony regarding victim's description, where it does not tend to mislead jury, may be admissible; however, door is not open to presentation of redundant police testimony that accomplishes no useful purpose); People v. Huertas, 75 N.Y.2d 487, 554 N.Y.S.2d 444 (1990); People v. Ragunauth, 24 A.D.3d 472, 805 N.Y.S.2d 654 (2d Dept. 2005), lv denied 6 N.Y.3d 779 (police officer permitted to repeat complainant's descriptions); People v. Smith, 278 A.D.2d 139, 718 N.Y.S.2d 55 (1st Dept. 2000), lv denied 96 N.Y.2d 868, 730 N.Y.S.2d 43 (2001) (hotel manager permitted to testify as to complainant's description and that defendant was only resident who fit description); see also People v. Castillo, 34 A.D.3d 221, 823 N.Y.S.2d 142 (1st Dept. 2006), lv denied, 8 N.Y.3d 879 (no error in admission of evidence that defendant was native of Mexico where Mexican origin was element of descriptions by victim and 911 caller); but see People v. Fluitt, 80 N.Y.2d 949, 590 N.Y.S.2d 870 (1992) (complainant properly permitted to provide details not gleaned from improper showup, but could not testify to description given after showup without a finding that description was untainted); People v. Moss, 80 N.Y.2d 857, 587 N.Y.S.2d 593 (1992) (witness improperly permitted to testify that person he saw being chased

was involved in robbery in absence of evidence that he had made such a statement prior to potentially tainted photo identification); People v. Williams, 206 A.D.2d 917, 614 N.Y.S.2d 843 (4th Dept. 1994), lv denied 84 N.Y.2d 911, 621 N.Y.S.2d 529 (court erred in permitting officers to testify to victims' descriptions after victims testified to descriptions).

f. Sketch Of Respondent - See State v. Brown, 88 A.3d 1101 (R.I. 2014) (even if sketch itself was not inadmissible hearsay, sketch artist would be unable to authenticate it without relying on hearsay statements of witness); People v. Ross, 186 A.D.2d 1006, 588 N.Y.S.2d 463 (4th Dept. 1992), lv denied 81 N.Y.2d 766, 594 N.Y.S.2d 729 (court properly admitted witness' sketch of suspect to help jury evaluate whether identification of defendant at trial was product of out-of-court identification procedures).

g. Identification Of Accomplice - People v. Thomas, 17 N.Y.3d 923 (2011) (no error in admission of complainant's testimony regarding showup identification of co-defendant who was not on trial, since accuracy in identifying co-defendant was relevant to whether conditions at scene were conducive to observing other attacker and accurately identifying him at trial).

2. Prior Consistent Statements - The hearsay rule applies to out-of-court statements made by a witness who testifies at trial. People v Singer, 300 N.Y. 120 (1949). Thus, generally speaking, prior consistent statements may not be used to bolster testimony. However, such evidence may be admitted for purposes of rehabilitation when testimony is assailed as a recent fabrication. See People v. Rosario, 17 N.Y.3d 501 (2011) (defense counsel's reference in opening statement to "story" that began after police found complainant did not open door); People v. McClean, 69 N.Y.2d 426, 515 N.Y.S.2d 428 (1987); People v. Johnson, 176 A.D.3d 1392 (3d Dept. 2019), lv denied 34 N.Y.3d 1131 (by itself, impeachment with inconsistent statement does not constitute charge that testimony is fabrication); People v. Burton, 159 A.D.3d 550 (1st Dept. 2018) (no requirement that prior consistent statement predate all possible motives to falsify); People v. Shaver, 86 A.D.3d 800 (3d Dept. 2011), lv denied 18 N.Y.3d 962 (no error in admission of a 911 tape as prior consistent statement where there was anticipated defense that victim was fabricating, and, when court offered to exclude tape

if defendant stipulated that he was not going to make claim of recent fabrication, defendant would not stipulate); People v. Williams, 139 A.D.2d 683, 527 N.Y.S.2d 436 (2d Dept. 1988); People v. Jimenez, 102 A.D.2d 439, 477 N.Y.S.2d 170 (1st Dept. 1984); Richardson, §6-503; Federal Rules, 801(d)(1)(B) (statements may be admitted to prove contents); see also People v. Ochoa, 14 N.Y.3d 180, 899 N.Y.S.2d 66 (2010) (majority holds that after prosecution witnesses were impeached with prior inconsistent statements, prosecutor was properly permitted to ask witnesses on re-direct about portions of prior statements that were correct; questions were addressed to matters raised by defense on cross-examination).

In addition, a prior consistent statement is admissible when it qualifies for admission under another hearsay exception, People v. Buie, 86 N.Y.2d 501, 634 N.Y.S.2d 415 (1995), or is being offered after only a portion of a statement has been admitted. People v. Coney, 146 A.D.3d 429 (1st Dept. 2017) (rule against bolstering not applicable to introduction of additional portions of statement that has been elicited in part).

3. Good Character Of Witness - See, e.g., People v. Valdez, 53 A.D.3d 172, 861 N.Y.S.2d 288 (1st Dept. 2008), lv denied, 11 N.Y.3d 836 (unpreserved error where prosecutor elicited testimony that witness had, before joining police force, served as paratrooper in Army, had obtained Bachelor of Science degree in economics and international finance, had risen to level of police lieutenant and been awarded 47 commendations, including Medal of Valor he received for having been shot in line of duty, had been chosen twice as sole annual recipient of “Cop of The Year” award, and had nearly completed Master’s degree in history; court notes that in general, accreditation of witness in advance of impeachment is disallowed, that theory of defense was not that witness was lying, but rather that he was mistaken, and that “while education and experience may ‘affect’ a person’s powers of observation, it is not by any means clear what significance should reasonably attach to such factors” and “there appears no reason to suppose that an accumulation of advanced degrees will render one a more reliable observer or relator of street crime”).

G. Competency To Testify And Be Sworn

1. Generally - FCA §343.1(1) states that "[a]ny person may be a

witness in a delinquency proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify reception of his evidence." See Matter of Brown, 36 N.Y.2d 183, 366 N.Y.S.2d 116 (1975); People v. Lowe, 289 A.D.2d 705, 733 N.Y.S.2d 555 (3rd Dept. 2001) (4-year-old properly permitted to give unsworn testimony); People v. Barksdale, 100 A.D.2d 852, 473 N.Y.S.2d 1006 (2d Dept. 1984) (despite history of mental illness and alcoholism, witness was properly permitted to testify); Walters v. McCormick, 108 F.3d 1165 (9th Cir. 1997) (court rejects defendant's argument that child vacillated so much and was so manipulable that "confrontation" could not be meaningful).

2. Oaths

a. Generally - FCA §343.1(2) provides that "[e]very witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath." See, e.g., People v. Wisdom, 23 N.Y.3d 970 (2014) (indictment not dismissed where prosecutor failed to administer oath to witness before videotaped examination, but witness was examined a second time, under oath, and stated that prior testimony was true); People v. Parks, 41 N.Y.2d 36, 390 N.Y.S.2d 848 (1977); People v. Van Alphen, 195 A.D.3d 1307 (3d Dept. 2021), lv denied 37 N.Y.3d 1061 (where child witnesses were not given formal oath, but court asked them if they promised to tell truth, court did give witnesses oath, modified to their level of understanding); People v. Ward, 175 A.D.3d 722 (2d Dept. 2019) (court erred in admitting testimony of witness who refused to take oath and was not deemed ineligible to take oath); People v. Donato, 34 Misc.3d 66 (App. Term, 9th & 10th Jud. Dist., 2012) (reversible error where court failed to swear in officer); People v. Kwok Chan, 110 A.D.2d 158, 493 N.Y.S.2d 778 (2d Dept. 1985). The court may take unsworn testimony if the witness possesses sufficient intelligence and capacity.

b. Infants - Under FCA §343.1(2), "[a] witness less than nine years old may not testify under oath unless the court is satisfied that he understands the nature of an oath." According to CPL §60.20(2), “[a] witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be

punished." Compare Matter of Alexander CC., 191 A.D.3d 1113 (3d Dept. 2021) (court did not err in admitting sworn testimony from 8-year-old victim where he did not know what oath is, but understood difference between truth and lie, and that he was required to testify truthfully and promised he would so testify, and evinced understanding that if he were to tell lie, he could "get in trouble" and be punished by court); People v. Duarte, 63 Misc.3d 155(A) (App. Term, 2d Dept., 2019), lv denied 34 N.Y.3d 930 (no error in admission of seven-year-old complainant's testimony under oath where court failed to ask complainant about oath or whether she could keep promise to tell truth, but complainant stated that she believed in God, went to church, and knew difference between telling truth and telling lie; stated that truth is something "[t]hat happened," whereas "lie is bad, wrong" and "did not happen"; responded "No" when asked if it was "okay to tell a lie"; stated that mother would scold her when she lied and that she understood she was not allowed to tell lie in court; and replied "yes" when court asked her to "promise me to tell me the truth when you answer questions here in court"); Matter of Lamark H., 170 A.D.3d 724 (2d Dept. 2019) (six-year-old properly sworn where she had "some conception" of obligations of oath and consequences of giving false testimony, understood moral duty to tell truth, knew difference between truth and lie, knew that promise to tell truth must be adhered to, knew she would be punished if she did not tell truth, and stated that she would tell truth in court); In re Dandre H., 89 A.D.3d 553 (1st Dept. 2011) (five-year-old properly sworn where voir dire responses established that he understood difference between truth and falsity, that lying was wrong, and that lying could bring adverse consequences); Matter of Melvin L., 43 A.D.3d 924, 841 N.Y.S.2d 657 (2d Dept. 2007) (eight-year-old properly sworn where understood meaning of word "oath" and that making promise to judge was a bigger promise than an ordinary promise); People v. McIver, 15 A.D.3d 677, 791 N.Y.S.2d 587 (2d Dept. 2005), lv denied 4 N.Y.3d 888 (5-year-old properly sworn where voir dire established that she appreciated difference between truth and falsehood, necessity for telling truth, and fact that witness may be punished for telling lie in court); Matter of David S., 6 A.D.3d 539, 775 N.Y.S.2d 353 (2d Dept. 2004) (complainant properly allowed to testify as a sworn witness where he understood difference between truth and falsity, the legal and moral consequences of lying, and the importance of telling the truth

at the proceeding); People v. Paramore, 288 A.D.2d 53, 732 N.Y.S.2d 410 (1st Dept. 2001) (6-year-old properly sworn where she knew difference between truth and lie and expected divine punishment if she lied); People v. Johnston, 273 A.D.2d 514, 709 N.Y.S.2d 230 (3rd Dept. 2000) (children under 6 years of age were properly sworn); Matter of James B., 262 A.D.2d 480, 692 N.Y.S.2d 417 (2d Dept. 1999) (6-year-old was properly sworn where, although he gave perfunctory answers to sometimes leading questions, his testimony demonstrated that he understood that he had a moral duty to tell the truth); People v. Cordero, 257 A.D.2d 372, 684 N.Y.S.2d 192 (1st Dept. 1999), lv denied 93 N.Y.2d 968, 695 N.Y.S.2d 54 (6-year-old should have been sworn where he indicated that telling the truth was a “good thing” and that it was “important” to tell the truth when he was “talking” in court); Matter of Jason FF., 224 A.D.2d 900, 638 N.Y.S.2d 226 (3rd Dept. 1996) (8-year-old properly sworn where she indicated that she knew difference between truth and lie, understood that she had to promise not to tell lies in court, and recognized that she would get in "big trouble" if she failed to tell truth); Matter of Joseph C., 185 A.D.2d 883, 586 N.Y.S.2d 1009 (2d Dept. 1992) (7-year-old was properly sworn where she said "[t]hat's not true" when told an obvious lie and "[t]hat means to tell the truth and God will not punish you" when asked what it means for something to be true); People v. Hendy, 159 A.D.2d 250, 552 N.Y.S.2d 243 (1st Dept. 1990), lv denied 76 N.Y.2d 893, 561 N.Y.S.2d 556 (7-year-old properly sworn where he indicated that he understood difference between real and pretend and would get a "whipping" if he did not tell the truth); People v. Mercado, 157 A.D.2d 457, 549 N.Y.S.2d 383 (1st Dept. 1990), lv denied 75 N.Y.2d 922, 555 N.Y.S.2d 40 (10-year-old properly sworn where he attended church and had been taught about God, had sworn on the Bible previously and told the truth, understood the importance of telling the truth, and believed that the judge, his parents and God would punish him if he did not tell the truth); People v. Tyler, 154 A.D.2d 490, 546 N.Y.S.2d 113 (2d Dept. 1989), lv denied 75 N.Y.2d 925, 555 N.Y.S.2d 44 (1990) (8-year-old properly sworn where she indicated that she could get punished for telling a lie, and acknowledged that swearing means you cannot lie and that God does not want anyone to lie); People v. Hardie, 144 A.D.2d 484, 533 N.Y.S.2d 984 (2d Dept. 1988) (8-year-old properly sworn where she was not asked about criminal sanctions but understood that she would be "punished" for lying under

oath, and attended church and had received religious training) and Matter of Noel O., 15 Misc.3d 1146(A), 841 N.Y.S.2d 821 (Fam. Ct., Queens Co., 2007) (five-year-old capable of testifying under oath where she knew she was in a courtroom and that there was a judge present whose function "is to listen to people"; when child was asked questions relating to clothing she and prosecutor were wearing, she correctly stated whether proposition was true or false; child stated that a lie is "something that didn't really happen," as opposed to the truth which is "what really happened," that "it is good to tell the truth" as opposed to telling a lie, and that it is "not good to tell a lie because her parents would be mad," and gave examples of what would constitute a lie; child stated that "make believe" was "playing" and that it was not real; that while child was never asked directly whether she understood what term "oath" means, she understood she has obligation to testify truthfully in court; child expressed basic understanding of concept of God as powerful being who watches over people and would be "mad if you lied," and stated that if she told a lie, "God would be mad even if no one knew" and that she would "feel bad" if she told a lie or did something wrong; and child understood that promise meant someone would do what they say, and that if she promised to tell truth and did not, she "could get into trouble")

with In re Nicholas M., 158 A.D.3d 530 (1st Dept. 2018) (four-year-old lacked capacity to give truthful and accurate testimony and was incapable of testifying under oath); People v. Castellanos, 65 A.D.3d 555, 884 N.Y.S.2d 126 (2d Dept. 2009), lv denied 13 N.Y.3d 858 (no error in determination that six-year-old complainant was competent to give unsworn testimony where child knew difference between telling truth and telling lie, promised to tell truth, and indicated that he would be punished by mother and by God if he lied); People v. Batista, 65 A.D.3d 554, 882 N.Y.S.2d 904 (2d Dept. 2009) (four-year-old complainant not competent to give sworn testimony because she did not appreciate nature of oath or consequences of failing to tell truth); People v. Maldonado, 199 A.D.2d 563, 606 N.Y.S.2d 258 (2d Dept. 1994) (9-year-old improperly sworn where she gave "perfunctory, one-word or nonverbal responses to the mostly leading questions"); People v. Mudd, 184 A.D.2d 388, 585 N.Y.S.2d 364 (1st Dept. 1992) (7-year-old improperly sworn where she changed answers after "verbal coaxing" and inquiry was leading); People v. Ranum, 122 A.D.2d 959, 506 N.Y.S.2d 105 (2d Dept. 1986)

(witnesses, one an 11-year-old, were improperly sworn where they paraphrased the judge or gave perfunctory answers in response to leading questions, and were never asked or told about the meaning of the word "oath"); People v. Smith, 104 A.D.2d 160, 481 N.Y.S.2d 879 (2d Dept. 1984) (trial court erred in allowing eight-year-old to give sworn testimony where record failed to show he understood and appreciated nature of oath); People v. Childress, 25 Misc.3d 1244(A), 906 N.Y.S.2d 781 (Crim. Ct., Kings Co., 2009) (seven-year-old complainant not competent to verify complaint where child said that he would get in trouble if he lied but never stated he would not lie; child demonstrated confusion as to birthday and other temporal matters; child, after stating that pinky swear was “like a secret,” indicated he might swear pinky to something that was not true if told to do so by adult; and child constantly put hand in mouth despite being asked not to and repeatedly needed to be reminded to give verbal answers) and People v. Carrington, 18 Misc.3d 1147(A), 859 N.Y.S.2d 897 (County Ct., West. Co., 2008) (insufficient evidence that 7-year-old grand jury witness was capable of giving sworn testimony where he, inter alia, initially stated that it was "truth" that he was wearing skirt when in fact he was not; stated that he did not know what Bible was and that he did not know who God was or where he lived; refused to put hand on Bible, stating that "it's going to make a fire”; and stated "I promise to tell the truth,” but avoided eye contact with prosecutor and put hands on top of head and slightly nodded "yes" and then laughed).

c. Voir Dire - To determine whether a child can properly be sworn, the court should examine the child before taking testimony. Although the court may question the child without the intervention of counsel, see People v. Byrnes, 33 N.Y.2d 343, 352 N.Y.S.2d 913 (1974), it is common for the court to permit counsel to question the child as well. See also People v. Morales, 80 N.Y.2d 450, 591 N.Y.S.2d 825 (1992) (defendant has no statutory or due process right to be present at witness competency hearing). Extrinsic evidence regarding the child’s competency may be introduced. People v. Parks, 41 N.Y.2d 36, 46, 390 N.Y.S.2d 848 (1976) (court may properly consider testimony of physicians or other persons with information that would shed light on the capacity and intelligence of the witness).

3. Corroboration – FCA §343.1(3) provides that "[a] respondent may

not be found to be delinquent solely upon the unsworn evidence given pursuant to [§343.1(2)]." See People v. Groff, 71 N.Y.2d 101, 524 N.Y.S.2d 13 (1987) (corroborative evidence is sufficient if it tends to establish the crime and that defendant committed it; court rejects rule requiring corroborative evidence extending to every material element of the crime).

H. Interpreters - Witnesses who do not speak English adequately may testify through an interpreter, who must be sworn to interpret fully and accurately. The judge may use an official court interpreter, or any other suitable and qualified interpreter. Richardson, §6-212. Compare People v. Lee, 21 N.Y.3d 176 (2013) (no error in court's refusal to replace state-employed court interpreter because he was acquainted with complainants; court questioned interpreter as to whether he knew facts of case and would be uncomfortable translating and received negative response, and there was no evidence of bias and it could be presumed that interpreter, a state employee who had taken an oath to interpret, knew his ethical/professional obligations to translate testimony verbatim) and People v. Catron, 143 A.D.2d 468, 532 N.Y.S.2d 589 (3rd Dept. 1988) (determination of qualifications lies within sound discretion of court) with Matter of James L., 143 A.D.2d 533, 532 N.Y.S.2d 941 (4th Dept. 1988) (court improperly allowed complainant's son to interpret without evaluating his bias or his qualifications, or admonishing him to provide an exact translation).

A failure to appoint an interpreter for a witness who apparently requires one can lead to reversal. See, e.g., People v. Fogel, 97 A.D.2d 445, 467 N.Y.S.2d 411 (2d Dept. 1983). Moreover, a respondent who does not speak English is entitled to the assistance of an interpreter. See People v. Warcha, 17 A.D.3d 491, 792 N.Y.S.2d 627 (2d Dept. 2005), lv denied 5 N.Y.3d 771 (no error where court failed to appoint Quiche interpreter for defendant when defense counsel requested one 10 months after he began to represent defendant, and there was evidence that use of Spanish interpreters was adequate); People v. Pizzali, 159 A.D.2d 652, 552 N.Y.S.2d 961 (2d Dept. 1990).

In Matter of Yovanny L., 33 Misc.3d 894 (Fam. Ct., Bronx Co., 2011), the court held a hearing after the prosecutor alleged errors in a translation by a Mandarin interpreter and made a motion to strike the testimony of the complaining witness. The court noted that the limited case law suggests that interpretation should be word-for-

word rather than summarized, and that there should be no conversation between the witness and the interpreter, no significant differences in the length of dialogue of the witness and the interpreter, and no bias or interest in the proceedings. The court cited the Office of Court Administration Court Interpreter Manual and Code of Ethics, which states that interpreters must faithfully and accurately interpret what is said without embellishment or omission, provide professional services only in areas where they can perform accurately, and inform the court when in doubt or where there has been an error, even if the error is perceived after the proceeding has concluded. The court also cited the OCA "benchcard" for judges working with interpreters advises judges to assess as follows: 1. Are there significant differences in the length of interpretation as compared to the original testimony? 2. Does the individual needing the interpreter appear to be asking questions of the interpreter? 3. Is the interpreter leading the witness, or trying to influence answers through body language or facial expressions? 4. Is the interpreter acting in a professional manner? 5. Is the interpretation being done in the first person? 6. If the interpreter has a question, does he or she address the court in the third-person? The benchcard also suggests that judges swear in court interpreters, which the Court did not do in this case. After the hearing, the court, noting that the respondent, whose constitutional rights were implicated, did not want the testimony stricken, denied the prosecutor's motion. The court concluded that although the interpreter had violated the standards by not interpreting word for word on one or two occasions, engaging in conversations with the witness, and erring in her translation of one or two words, the errors were relatively minor and few and did not affect the main aspects of the witness's testimony.

I. Refreshing Recollection Of Witness - When a witness cannot recall a fact or event, the examiner may proffer a writing or an object, ask the witness to read or examine it, obtain an acknowledgment that the document or object refreshes the witness' memory, and then ask the witness to testify based upon his or her revived memory. A writing used to refresh a witness' recollection need not have been made at the time of the event, and need not have been made by the witness. The examiner may, for instance, use the witness' prior testimony. See Richardson, §6-214; Mauet, Trial Techniques, §5.6; see also People v. Oddone, 23 N.Y.3d 369 (2013) (reversible error

where defense witness testified that duration of part of incident she observed “could have been a minute or so,” and defense counsel was not allowed to refresh her recollection with prior statement that put same interval at “maybe 6 to 10 seconds”; although court ruled that witness had given no indication she needed memory refreshed, inference that recollection could benefit from being refreshed was compelling where witness, describing incident more than a year in the past, said that it “could have” lasted “a minute or so” and added “I don't know,” and it was unfair to let jury hear testimony damaging to defense from defense witness while not allowing defense to make use of earlier, more favorable statement); People v. Rosario, 275 A.D.2d 224, 712 N.Y.S.2d 499 (1st Dept. 2000) (court rejects defendant’s argument that officer’s testimony was incredible as a matter of law because of delay between arrest and testimony and lack of written notation regarding contents of radio transmission; court also notes that there is no rule that recollection can be refreshed only with notes detailing precisely what one is attempting to remember).

Although an adverse party may inspect the document or object, and use it while examining the witness, an objection to disclosure could be raised where, for instance, the document contains notes of a confidential attorney-client communication.

Finally, it should be remembered that the examiner may not surreptitiously "refresh" the witness' recollection by speaking to the witness during a break in the examination. Compare People v. Niver, 41 A.D.3d 961, 839 N.Y.S.2d 252 (3rd Dept. 2007), lv denied 9 N.Y.3d 924 (no prejudice where prosecutor consulted with witness over weekend break in cross-examination, but court precluded prosecution from eliciting information discussed) and People v. Robinson, 190 A.D.2d 697, 593 N.Y.S.2d 279 (2d Dept. 1993) with People v. Branch, 83 N.Y.2d 663, 612 N.Y.S.2d 365 (1994) (no error where court allowed prosecutor to speak to witness during recess because prosecutor was concerned that defendant's family had intimidated witness).

J. Exclusion Of Witness From Courtroom - The court may exclude a witness during the testimony of another witness in order to avoid the possibility that the witness will learn the precise points of difference and thereby gain an unfair advantage in shaping his testimony to his own advantage. Although exclusion should usually be granted, the denial of exclusion will not constitute reversible error unless it was an

abuse of discretion. See, e.g., People v. Williams, 299 A.D.2d 568, 750 N.Y.S.2d 504 (2d Dept. 2002), lv denied 99 N.Y.2d 621, 757 N.Y.S.2d 832 (2003) (defendant's alibi witnesses, one of whom was his mother, properly excluded during defendant's testimony since they were subject to recall); People v. Mitchell, 224 A.D.2d 551, 638 N.Y.S.2d 172 (2d Dept. 1996) (court properly excluded defendant's mother, who was listed as possible prosecution witness and had testified at prior hearings); People v. Felder, 39 A.D.2d 373, 334 N.Y.S.2d 992 (2d Dept. 1972) (defendant not prejudiced by presence of detective in court before his testimony, but court notes that practice of exclusion is strongly recommended); United States v. Olofson, 563 F.3d 652 (7th Cir., 2009) (no error in exclusion of defense firearms expert during testimony of government's firearms expert; expert's presence might have been helpful or desirable, but defendant did not establish it was essential); Jerry Parks Equipment Company v. Southeast Equipment Company, 817 F.2d 340 (5th Cir. 1987) (court properly precluded testimony due to violation of sequestration order). See also Federal Rules, 615(3).

However, FCA §341.2(3) states that "[t]he respondent's parent or other person responsible for his or her care shall be present at any hearing under this article and at the initial appearance." See also Harris v. State, 165 N.E.3d 91 (Ind. 2021) (child in criminal proceeding has right to have parent present during proceedings even when parent is witness subject to witness-separation order, if child can establish under state evidence rule that parent is "essential" to presentation of defense).

When a witness has in fact been in the courtroom, a preclusion sanction may be imposed only in extraordinary circumstances. See People v. Cervera, 40 Misc.3d 89 (App. Term, 2d Dept., 2013) (court erred in precluding testimony of defense witness who was present throughout proceedings prior to being called to testify; in these circumstances, witness's testimony is not rendered incompetent and appropriate remedy is matter generally left to court's discretion, and, in this case, there was no record of instruction by court or request by state trooper that defendant's witnesses be excluded, and ruling also violated defendant's constitutional right to present witnesses); People v. Brown, 274 A.D.2d 609, 710 N.Y.S.2d 194 (3rd Dept. 2000) (preclusion of defense alibi witness' testimony was error; the drastic sanction of preclusion would be appropriate only in the most egregious circumstances - e.g., when defense counsel and

the witness have collaborated to gain some tactical advantage such as an opportunity to tailor the evidence).

A judge may allow a vulnerable witness to testify in the company of a supportive individual he or she knows as long as the person is not a witness, or with a "comfort dog." See State v. Rochelle, 298 P.3d 293 (Kan. 2013), cert denied 134 S.Ct. 270 (when determining whether "comfort person" may accompany witness, court should consider: age of witness; whether defendant has had chance to offer alternatives; choice of comfort person and whether it is someone related to child, which may lessen appearance of prejudice; where in courtroom support person is seated and whether presence is obvious; availability of alternative methods of making child more comfortable, such as child-size witness chair; issuance of instruction telling jury to disregard comfort person and not allow person's presence to influence credibility determinations; and instruction directing comfort person not to speak, gesture, or otherwise indicate approval or disapproval of child's testimony); People v. Tumminello, 53 Misc.3d 34 (App. Term, 2d Dept., 2016), lv denied 28 N.Y.3d 938 (no error where court allowed crime victim advocate to comfort defendant's children outside courtroom and sit in court when they testified; there was no evidence that advocate discussed children's testimony); People v. Tohom, 109 A.D.3d 253 (2d Dept. 2013) (courts should permit presence of therapeutic "comfort dog" pursuant to Executive Law § 642-a when court determines that animal may provide emotional support for child crime victim under age of 16).

V. Privileged Communications

A. Attorney-Client

1. Generally - "Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication ...." CPLR §4503(a).

New York State Rules of Professional Conduct, Rule 1.6, states as follows:

(a) A lawyer shall not knowingly reveal confidential

information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
(1) the client gives informed consent, as defined in Rule 1.0(j);
(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
(3) the disclosure is permitted by paragraph (b).
"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.
(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime;
(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
(ii) to establish or collect a fee; or
(6) when permitted or required under these Rules or to comply with other law.

See also Rule 1.14(c) (information relating to representation of client with diminished capacity is protected by Rule 1.6, although when taking protective action for client with diminished capacity who cannot adequately act in his own interests and is at risk of substantial physical, financial or other harm, lawyer is impliedly authorized under Rule

1.6(a) to reveal information about client, but only to extent reasonably necessary to protect client's interests); Rule 1.0(j) ("Informed consent" denotes agreement by person to proposed course of conduct after lawyer has communicated information adequate for person to make informed decision, and after lawyer has adequately explained material risks of proposed course of conduct and reasonably available alternatives); Commentary to Rules of Professional Conduct, Rule 1.6 ("Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process…. In some situations… a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Implied disclosures are permissible when they (i) advance the best interest of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In addition, lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client's interests…. A tribunal or governmental entity claiming authority pursuant to other law to compel disclosure may order a lawyer to reveal confidential information. Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law. If such review is not sought or is unsuccessful, paragraph (b)(6) permits the lawyer to comply with the order"); NYSBA Ethics Opinion 1059, 2015 WL 4592236 (6/12/15) (minor may consent if capable of understanding risks of disclosure

and of making reasoned judgment; very young children not capable, children ages twelve and older generally are capable, and unaccompanied minor immigrants who were subject of opinion might be less capable than American children, or more capable given experiences in home country and on accompanied trip to United States).

Although the client's name is not, in and of itself, privileged, disclosure might be improper when the client would be exposed to liability in connection with the matter discussed with the attorney. See Matter of D'Alessio v. Gilberg, 205 A.D.2d 8, 617 N.Y.S.2d 484 (2d Dept. 1994). Moreover, a client's location may be privileged information. Compare Matter of Grand Jury of Suffolk County, 117 Misc.2d 197, 456 N.Y.S.2d 312 (County Ct., Suffolk Co., 1982) (disclosure ordered) with Matter of Grand Jury Investigation, 175 Misc.2d 398, 669 N.Y.S.2d 179 (County Ct., Onondaga Co., 1998) and New York County Lawyers' Ethics Opinion 702, 1994 WL 906735.

The attorney-client privilege covers an attorney's advice to the client. See, e.g., Smith v. State, 905 A.2d 315 (Md., 2006) (counsel's expressed opinion that there was no valid basis for invocation of Fifth Amendment privilege was privileged).

2. Existence Of Relationship – "A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a 'prospective client.'" Rules of Professional Conduct, Rule 1.18(a). "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client." Rules of Professional Conduct, Rule 1.18(b). See also People v. Belge, 59 A.D.2d 307, 399 N.Y.S.2d 539 (4th Dept. 1977) (privilege may apply when asserted holder of privilege is or sought to become client); Mixon v. Texas, 224 S.W.3d 206 (Tex. Ct. Crim. App., 2007) (privilege covered statements made during consultation with view to obtaining legal services even though attorney declined to accept case); In re Investigating Grand Jury (Stretton), 887 A.2d 257 (PA Super. Ct., 2005), appeal denied 902 A.2d 1241 (statements from prison protected even though attorney had been relieved a few months earlier; even after formal representation ended, attorney retained professional relationship with defendant).

It has been held that the privilege survives the death of the client. See, e.g., People v. Vespucci, 192 Misc.2d 685, 745 N.Y.S.2d 391 (County Ct., Nassau Co., 2002) (court discusses various approaches, including "absolute privilege" rule under which attorney can never release information, and use of balancing test which weighs, inter alia, need for disclosure); see also Opinion 1084, 2016 WL 922007 (New York State Bar Association, 2016) (information that exonerated co-defendant was confidential, but if client persisted before death in instructing attorney to reveal information after being informed of relevant considerations, attorney could disclose upon informed consent, and consent could be implied if there was reason to believe client would have wanted co-defendant to be exonerated). The right to waive the privilege also survives and may be exercised by the decedent's personal representative. Mayorga v. Tate, 302 A.D.2d 11, 752 N.Y.S.2d 353 (2d Dept. 2002); Opinion 1084, 2016 WL 922007.

3. Employees Of Attorney - Statements made to an attorney's employees or agents are privileged. See, e.g., Elijah W. v. The Superior Court of Los Angeles County, 216 Cal.App.4th 140 (Cal. Ct. App., 2d Dist., 2013) (defense psychologist not required to report child abuse disclosed by juvenile; psychologist also had no duty to warn potential victim of juvenile's threatened violent behavior, and, even if such a duty existed, reasonable care requirement could be achieved by notifying defense counsel and triggering counsel's obligation to consider whether to reveal confidential information to prevent criminal act likely to result in death or great bodily harm); People v. George, 104 Misc.2d 630, 428 N.Y.S.2d 825 (Sup. Ct. Bronx Co., 1980) (statements to polygraphist are privileged; given need to hire experts, privilege covers independent contractors, not just regular employees). But see People v. Edney, 39 N.Y.2d 620, 385 N.Y.S.2d 23 (1976) (defense psychiatrist allowed to testify for People on rebuttal concerning defendant's sanity; court notes that defendant who seeks to introduce psychiatric testimony in support of insanity plea may be required to disclose underlying basis of alleged affliction to prosecution psychiatrist and thus no harm accrues to defense from seeking pretrial psychiatric advice where insanity plea is actually entered, but, conversely, if defendant does not enter insanity plea, no physician-patient waiver would occur and information divulged to psychiatrist would

remain privileged); State v. Jones, 681 S.E.2d 580 (S.C., 2009) (when neither work product doctrine nor attorney-client privilege is implicated, general rule is that in order to compel defense-retained expert to testify, State must prove it has substantial need for expert and that inability to present the testimony will present undue hardship; although court was persuaded by decisions from other jurisdictions finding right to counsel violation in similar circumstances, court concludes that this is rare case in which State's actions were permissible); People v. Greene, 153 A.D.2d 439, 552 N.Y.S.2d 640 (2d Dept. 1990), lv denied 76 N.Y.2d 735, 558 N.Y.S.2d 897 (no error where prosecution called defense expert as witness, since opinion was not based on information from defendant); Pawlyk v. Wood, 237 F.3d 1054 (9th Cir. 2001) (no error where prosecution obtained report of first court-appointed expert who evaluated defendant's mental status, and would not be testifying).

4. Communications Within Privilege

a. Crime-Fraud Exception - See Commentary to Rules of Professional Conduct, Rule 1.6 ("The lawyer's exercise of discretion … requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure. . . the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client…. A lawyer's permissible disclosure … does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about

communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception, has been satisfied by a party to the proceeding…. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat…. The lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts, because refusal to end a continuing crime is equivalent to an intention to commit a new crime. Disclosure is not permitted under paragraph (b)(2), however, when a person who may have committed a crime employs a new lawyer for investigation or defense. Such a lawyer does not have discretion under paragraph (b)(2) to use or disclose the client's past acts that may have continuing criminal consequences. Disclosure is permitted, however, if the client uses the new lawyer's services to commit a further crime, such as obstruction of justice or perjury"); United States v. Zolin, 491 U.S. 554, 109 S.Ct. 2619 (1989) (court may review documents to determine whether exception applies if party seeking disclosure shows review is appropriate); Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988 (1988) (no impropriety where lawyer threatened to inform court and withdraw if defendant perjured himself); In re Grand Jury Investigation, 902 N.E.2d 929 (Mass. 2009) (statement of intention to commit crime is protected if it does not come within exception); United States v, Tirado, 890 F.3d 36 (1st Cir. 2018) (after defendant failed to appear for arraignment, counsel did not err in disclosing to court that defendant had asked counsel prior to arraignment whether court would commit him pending trial, and that counsel had told defendant he could not guarantee otherwise but that proper course would be to appear); In re Grand Jury Matter #3, 847 F.3d 157 (3d Cir. 2017) (exception not applicable to e-mail suggesting that defendant had thought about using attorney's work product to cover up money-laundering scheme where defendant committed no act in furtherance of fraud); In re Grand Jury Proceedings, 417 F.3d 18 (1st Cir. 2005)

(exception applies when there is reasonable basis to believe lawyer's services were used to foster crime or fraud); McClure v. Thompson, 323 F.3d 1233 (9th Cir. 2003) (although consent not valid because attorney did not advise defendant of all possible adverse consequences, attorney could reveal location of bodies where he reasonably believed they might be alive); People v. Kahn, 26 Misc.3d 1211(A), 906 N.Y.S.2d 782 (Sup. Ct., Queens Co., 2010) (defense counsel did not breach ethical duties by revealing that defendant told him he would make sure no witnesses would testify against him at trial); Opinion 1084, 2016 WL 922007 (New York State Bar Association, 1/22/16) (information that could exonerate co-defendant incarcerated as result of fraud conviction not covered by Rule 1.6 exception regarding prevention of "reasonably certain death or substantial bodily harm"); State Bar Ethics Opinion 681, 1996 WL 421808 (lawyer requesting disqualification must preserve confidentiality; lawyer has duty to follow order to disclose but may be obligated to seek appeal); State Bar Opinion No. 562, 1984 WL 50017; ABA Standards For Criminal Justice, The Defense Function, 4-3.8(d) (when counsel anticipates that client may engage in unlawful conduct, counsel should advise client concerning meaning, scope and validity of law and possible consequences of violating law, and advise client to comply with law).

b. Documents - Documents revealed by the client are protected if they were prepared for purposes of litigation or seeking legal advice. See Bekins Record Storage Co. v. Morgenthau, 62 N.Y.2d 324, 476 N.Y.S.2d 806 (1984).

c. Address Of Client - See, e.g., Matter of Jacqueline F., 47 N.Y.2d 215, 417 N.Y.S.2d 884 (1979) (lawyer properly directed to reveal whereabouts of client who had left jurisdiction with infant); R.L.R. v. State, 116 So.3d 570 (Fla. Ct. App., 3d Dist., 2013) (court erred in ordering Attorneys Ad Litem to disclose minor's whereabouts after minor requested information not be disclosed; court's concern that minor might be in danger did not fit within exception recognized by Florida Bar Rule).

d. Stolen Property - See, e.g., City Bar Ethics Opinion 2002-1, 2002 WL 1040180 (client's possession of stolen property not continuing crime that authorizes disclosure by attorney without consent); California State Bar Ethics Opinion 1986-89, 1986 WL 69069 (lawyer may not take possession of and secrete contraband); State Bar Ethics Opinion 530, 1981 WL 27591 (if lawyer has legal obligation to turn over

evidence received from client, lawyer must comply with method provided by law, but, if law does not so provide, should turn over evidence in manner least prejudicial to client); ABA Standard for the Defense Function, Standard 4-4.7 (provides, inter alia, that counsel may assist client in lawfully disclosing physical evidence to law enforcement or advise destruction of item if it would not obstruct justice or otherwise violate law or ethical obligations; counsel should not take possession of physical evidence, personally or through third parties, and should advise client not to give evidence to counsel, except in circumstances in which counsel may lawfully take possession of evidence; if counsel receives physical evidence that might implicate client in criminal conduct, counsel should determine whether there is legal obligation to return evidence to source or owner, or deliver it to law enforcement or court, and comply with any legal obligations, and should, when obligated to turn over evidence, do so in lawful manner that will minimize prejudice to client; if counsel has no legal obligation to disclose, produce, or dispose of physical evidence, counsel may retain evidence for reasonable time for legitimate purpose, including preventing destruction, arranging for production to authorities, arranging for return to source or owner, preventing use to harm others, and examining or testing evidence in order to effectively represent client; counsel should, before voluntarily taking possession from client of physical evidence counsel may have legal obligation to disclose, advise client of potential legal implications of proposed conduct and possible lawful alternatives, and obtain client's informed consent).

5. Waiver

a. Presence Of Third Parties - Statements knowingly made with third parties present generally are not privileged. See People v. Osorio, 75 N.Y.2d 80, 550 N.Y.S.2d 612 (1989) (privilege ordinarily applies when hired interpreter is present, but not where defendant interpreted for co-defendant; 96 A.L.R.2d 125, §13, states that "[i]t is well recognized that an interpreter necessarily present during attorney-client communications is precluded by the attorney-client privilege from testifying to matters disclosed to him so that he could interpret the communications between attorney and client"); People v. Mitchell, 58 N.Y.2d 368, 461 N.Y.S.2d 267 (1983) (although statement made to attorney's secretary, other attorneys' secretaries were present); People v. Harris, 57 N.Y.2d 335, 456 N.Y.S.2d 694 (1982); Prink v. Prink, 48

N.Y.2d 309, 422 N.Y.S.2d 911 (1979) (common-law rule permitting eavesdropper to testify has been modified by CPLR §4503); People v. Henry, 173 A.D.3d 1470 (3d Dept. 2019), lv denied 34 N.Y.3d 932 (where defendant wrote letter to counsel while in jail and sent it to girlfriend with instructions that she forward it to counsel and retain copy, girlfriend was acting as defendant's agent, but because defendant authorized disclosure to girlfriend's mother, he had no reasonable expectation of confidentiality); United States v. Rodriguez, 655 F.3d 126 (2d Cir. 2011) (privilege did not protect phone calls from prison where defendant was aware conversation was being recorded by authorities; however, existence of third party in line of communication does not destroy privilege if purpose of third party's participation is to improve comprehension of communications); ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 21-500: Language Access in the Client-Lawyer Relationship, _WL_, (2021) (when reasonably necessary, lawyer should arrange for communications to take place through impartial interpreter or translator capable of comprehending and accurately explaining legal concepts involved and will assent to and abide by lawyer's duty of confidentiality); Richardson, §§ 5-204.

Regarding the common interest doctrine, see Ambac Assurance Corporation, et al. v. Countrywide Home Loans, Inc., et al., 27 N.Y.3d 616 (2016) (common interest doctrine, under which communication disclosed to third party remains privileged if third party shares common legal interest with client and communication made in furtherance of common legal interest, applies only when communication relates to litigation, either pending or anticipated, and not where clients share common legal interest in commercial transaction or other common problem but do not reasonably anticipate litigation); United States v. Krug, 868 F.3d 82 (2d Cir. 2017) (although defendants had joint defense agreement, common-interest rule not applicable where statements in which one defendant conveyed independent, non-legal research to co-defendant, while noting he had sent research to his attorney, occurred outside presence of lawyer, were not made for purpose of obtaining legal advice from lawyer, did not share advice given by lawyer, and did not seek to facilitate communication with lawyer); People v. Shrier, 190 Cal.App.4th 400 (Cal. Ct. App., 2d Dist., 2010) (because of joint defense agreement, statements made by defendants to attorneys representing other defendants

were privileged); United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979), cert denied 444 U.S. 833 (1979); People v. Pennachio, 167 Misc.2d 114, 637 N.Y.S.2d 633 (Sup. Ct., Kings Co. 1995) (common interest privilege recognized).

b. In-Court Disclosure - Except when elicited on cross-examination, the client's testimony concerning communications waives the privilege. Richardson, §5-209. But see People v. Lynch, 23 N.Y.2d 262, 296 N.Y.S.2d 327 (1968) (no waiver where defendant testifies about events discussed with attorney but does not refer to confidential communications); Blanks v. State, 959 A.2d 1180 (Md., 2008) (defendant's testimony that he told his lawyer "all about it" did not waive privilege).

c. Extrajudicial Disclosure - See Richardson, §5-209; In re Von Bulow v. Von Bulow, 828 F.2d 94 (2d Cir. 1987) (consent by client to disclosure of privileged communications in book written by attorney waived privilege; however, although a client's in-court disclosure of communications with the attorney waives the privilege entirely and precludes the selective disclosure of information in a misleading way, extrajudicial disclosure does not waive the privilege as to undisclosed portion of communications); United States v. Nunez, 2013 WL 4407069 (SDNY 2013) (where Government, pursuant to warrant served on Google, seized emails and online chat records containing communications between defendant and his lawyer, court precluded disclosure of communications protected by attorney-client privilege); Galison v. Greenberg, 5 Misc.3d 1025(A), 799 N.Y.S.2d 160 (Sup. Ct., N.Y. Co., 2004) (no waiver where counsel inadvertently attached protected e-mail to motion papers); People v. Terry, 1 Misc.3d 475, 764 N.Y.S.2d 592 (County Ct., Monroe Co., 2003) (privilege not waived where defendant inadvertently sent to ADA a letter meant for defense counsel). Regarding the issue of selective waiver - e.g., in a confidentiality agreement with the Government - see In re Columbia/HCA Healthcare Corporation Billing Practices Litigation, 293 F.3d 289 (6th Cir. 2002).

Revealing the subject, but not the content, of communications does not constitute a waiver. Matter of Vanderbilt, 57 N.Y.2d 66, 453 N.Y.S.2d 662 (1982). And, under certain conditions, inadvertent disclosure does not constitute a waiver. See New York Times v. Lehrer McGovern Bovis, Inc., 300 A.D.2d 169, 752 N.Y.S.2d 642 (1st Dept. 2002); Long Island Lighting Co. v. Allianz Underwriters Insurance Co., 301 A.D.2d 23,

749 N.Y.S.2d 488 (1st Dept. 2002).

6. Sanction For Violation Of Privilege - See State v. Lenarz, 22 A.3d 536 (Conn. 2011) (dismissal only appropriate remedy where prosecutor improperly acquired privileged attorney-client communications).

7. Electronic Data - See Opinion #220. Cyberattack and Data Breach: The Ethics of Prevention and Response (Maine Professional Ethics Commission, 4/11/19) (addresses lawyer's ethical obligations to understand risks posed by technology, prevent cyberattack or data breach, and respond once one occurs).

B. Clergyman-Penitent - See CPLR §4505; People v. Carmona, 82 N.Y.2d 603, 606 N.Y.S.2d 879 (1993); State v. Mark R., 17 A.3d 1 (Conn. 2011) (statements made by defendant when he met with pastor, wife and step-daughter to discuss allegations of sexual abuse not protected by privilege; although presence of third parties does not necessarily result in abrogation of privilege when such presence is required to achieve purpose of communications, the circumstances here did not suggest confidentiality); State v. J.G., 990 A.2d 1122 (N.J. 2010) (cleric-penitent privilege applies where, under totality of the circumstances, objectively reasonable person would believe communication was made in confidence to cleric acting as spiritual adviser; rule protects not only confidences relayed in confessional, but also confidences relayed during group or family counseling, and is not anchored to religious rules or doctrine); Cox v. Miller, 296 F.3d 89 (2d Cir. 2002) (assuming, arguendo, that Alcoholics Anonymous is a "religion," statements made by defendant to fellow AA members were not made in confidence for purpose of seeking spiritual guidance); People v. Drelich, 123 A.D.2d 441, 506 N.Y.S.2d 746 (2d Dept. 1986) (statements to rabbi were made not for purpose of spiritual assistance, but for purpose of getting help in retaining legal counsel); People v. Harris, 34 Misc.3d 281 (Sup. Ct., Kings Co., 2011) (statements to detective not protected by privilege where third parties were present, and, although detective had title of Deacon, his position in church was not akin to that of minister or clergyman, and it appeared that defendant intended to ask sympathetic member of law enforcement for practical counsel). See also Lightman v. Flaum, 97 N.Y.2d 128, 736 N.Y.S.2d 300 (2001) (CPLR 4505 does not impose a fiduciary duty and create a private cause of action for improper disclosure).

C. Spousal - See CPLR §4502(b); People v. Mills, 1 N.Y.3d 269, 772 N.Y.S.2d 228 (2003) (marital privilege did not apply where defendant made statement while he was choking and threatening wife); People v. Fediuk, 66 N.Y.2d 881, 498 N.Y.S.2d 763 (1985) (communications privileged even though spouses not living together); United States v. White Owl, 39 F.4th 527 (8th Cir. 2022) (court applies exception that vitiates privilege where defendant is charged with crime against a third person committed in course of committing crime against spouse); People v. Pierre, 129 A.D.3d 1490 (4th Dept. 2015) (privilege not applicable to threat made by hearsay declarant against wife); People v. Jacob, 117 A.D.3d 1079 (2d Dept. 2014), lv denied 23 A.D.3d 1063 (privilege not applicable where substance of communication had been revealed by defendant to others, and defendant left notes on kitchen counter and directly addressed children, as well as his wife, in one of the notes); People v. Parker, 49 A.D.3d 974, 854 N.Y.S.2d 233 (3rd Dept. 2008), lv denied, 10 N.Y.3d 868 (testimony of wife did not violate marital privilege where defendant's statements concerning plans and activities on evening of murders were nothing more than daily and ordinary exchanges unprotected by privilege, and defendant's conduct in pulling out gun and simultaneously directing wife "to get down" when she wanted to open door to police were threats, and thus unprotected by privilege); People v. Powers, 42 A.D.3d 816, 839 N.Y.S.2d 865 (3rd Dept. 2007) (privilege not applicable to communication arising out of abuse of spouse's child); People v. Thomas, 288 A.D.2d 405, 733 N.Y.S.2d 231 (2d Dept. 2001), lv denied 97 N.Y.2d 709, 739 N.Y.S.2d 110 (2002) (defendant's letter to wife not covered by privilege where he composed it in presence of step-daughter and left it in plain view on table); People v. Gomez, 112 A.D.2d 445, 492 N.Y.S.2d 415 (2d Dept. 1985) (confession to rape of stepdaughter was not made in reliance on the marital relationship, and privilege not applicable in child abuse prosecutions); United States v. Breton, 740 F.3d 1 (1st Cir. 2014) ("offense against spouse" exception includes offense against child of either spouse); Winstead v. Commonwealth, 327 S.W.3d 386 (Ky. 2010) (request to spouse to communicate false alibi to police covered by spousal privilege where request communicated privately and not intended for disclosure); State v. Rollins, 675 S.E.2d 334 (NC, 2009) (privilege does not protect conversations in public visiting areas of state correctional facilities); see also State v. Serrano, 210 P.3d 892 (Oregon

2009) (communicating spouse's intent governs confidentiality, since that spouse usually initiates communication and is in position to assess nature of communication and control circumstances under which communication is made); United States v. Premises Known As 281 Syosset Woodbury Rd., 71 F.3d 1067 (2d Cir. 1995) (privilege, which is designed to ensure that spouses will not be forced to bear witness against each other, did not bar wife from revealing communications in civil forfeiture proceeding involving her property, not husband's).

It has been held that the privilege may, in some instances, apply to a common-law marriage. People v. Suarez, 148 Misc.2d 95, 560 N.Y.S.2d 68 (Sup. Ct. N.Y. Co., 1990).

D. Parent-Child - See, e.g., People v. Johnson, 84 N.Y.2d 956, 620 N.Y.S.2d 822 (1994) (privilege did not apply); People v. Kemp, 213 A.D.3d 1321 (4th Dept. 2023) (suppression ordered based on existence of parent-child privilege where 15-year-old defendant was left alone with his father in interview room but detectives said nothing about the recording devices, and, when father admonished defendant not to speak because of cameras, defendant moved closer to father, covered face with hands, and continued speak); People v. Stover, 178 A.D.3d 1138 (3d Dept. 2019), lv denied 34 N.Y.3d 1163 (privilege not applicable where defendant was 19 years old at time of conversation); People v. Harrell, 87 A.D.2d 21, 450 N.Y.S.2d 501 (2d Dept. 1982) (privilege applies where minor under arrest seeks assistance from parent); Matter of Mark G., 65 A.D.2d 917, 410 N.Y.S.2d 464 (4th Dept. 1978) (privilege not applicable where it did not appear that statement was made in confidence or that father wished to remain silent); Matter of A&M, 61 A.D.2d 426, 403 N.Y.S.2d 375 (4th Dept. 1978) (communications privileged under constitutional right of privacy); People v. Hilligas, 175 Misc.2d 842, 670 N.Y.S.2d 744 (Sup. Ct., Erie Co., 1998) (privilege not applicable to 28-year-old defendant’s statements to parents). But see People v. Tesh, 124 A.D.2d 843, 508 N.Y.S.2d 560 (2d Dept. 1986) (privilege inapplicable where third parties were present).

E. Physician (and other health care professional)-Patient

1. Generally - See CPLR §4504 (physician, dentist or nurse may not disclose in absence of patient's waiver "any information which he acquired in attending

a patient in a professional capacity, and which was necessary to enable him to act in that capacity"); Matter of the Grand Jury Investigation in New York County, 98 N.Y.2d 525, 749 N.Y.S.2d 462 (2002) (subpoena for records of “any male Caucasian patient” aged 30-45 who was treated or sought treatment for a stab wound during a 2-day period is quashed, since subpoena requires medical determinations, and not mere observations of what would be plainly visible to a lay person); Matter of Grand Jury Investigation Of Onondaga County, 59 N.Y.2d 130, 463 N.Y.S.2d 758 (1983) (since victim may have stabbed assailant, DA subpoenaed all hospital records regarding stab wounds treated since date of crime; finding no public interest exception to rule, court holds that even names and addresses are covered by the privilege); Matter of Camperlango, 56 N.Y.2d 251, 451 N.Y.S.2d 697 (1982); People v. Bowen, 229 A.D.2d 954, 645 N.Y.S.2d 381 (4th Dept. 1996), lv denied 88 N.Y.2d 1019, 651 N.Y.S.2d 18 (defendant’s statements that his blood alcohol content was "way up there," that he had consumed six beers, and that he was "polluted" were made spontaneously, and there was no evidence that statements were necessary for treatment; thus, defendant failed to establish that statements were protected by privilege); People v. Reynolds, 203 A.D.3d 1079 (2d Dept. 2022), lv denied 38 N.Y.3d 1074 (defendant’s disclosure to police of medical record number and name of physician who attended to him at hospital did not violate privilege); People v. Norbert, 30 Misc.3d 1211(A) (Sup. Ct., Kings Co., 2011) (statements to doctor in emergency room admissible where conversation took place in bustling emergency room in manner that rendered it unlikely that defendant expected it to be confidential); People v. Brito, 26 Misc.3d 1097, 892 N.Y.S.2d 752 (Sup. Ct., Bronx Co., 2010) (physician-patient privilege applies to statements made to emergency medical technician when technician acts as agent of physician); People v. Rawley, 16 Misc.3d 1103(A), 2007 WL 1775517 (Sup. Ct., Bronx Co., 2007) (while statute prevents physician or other medical professional from testifying, it does not prevent another person from testifying about statement he or she overheard); People v. Muscarnera, 16 Misc.3d 622, 842 N.Y.S.2d 241 (Dist. Ct., Nassau Co., 2007) (defendant’s consent to taking of blood during treatment following automobile accident did not permit hospital to test blood for non-medical reasons); People v. Bashkatov, 13 Misc.3d 1101, 827 N.Y.S.2d 594 (Crim. Ct., Richmond Co., 2006) (evidence of

defendant's blood samples and chemical tests of samples barred by privilege); People v. Mirque, 195 Misc.2d 375, 758 N.Y.S.2d 471 (Crim. Ct., Bronx Co., 2003) (defendant's statement to Emergency Medical Technician covered by privilege); People v. Doe, 170 Misc.2d 454, 649 N.Y.S.2d 326 (Sup. Ct., Monroe Co., 1996) (privilege did not cover prisoner's request for examinations for Chlamydia); People v. Ackerson, 149 Misc.2d 882, 566 N.Y.S.2d 833 (County Ct. Monroe Co., 1991) (statement to EMT not covered by privilege); People v. Toure, 137 Misc.2d 1066, 523 N.Y.S.2d 746 (Sup. Ct., Richmond Co., 1988), aff'd 180 A.D.2d 1013, 579 N.Y.S.2d 809 (2d Dept. 1992), lv denied 79 N.Y.2d 1008 (generalized screening of prisoners upon entry into prison is not procedure related to treatment that gives rise to privilege); People v. McHugh, 124 Misc.2d 823, 478 N.Y.S.2d 754 (Sup. Ct., Bronx Co., 1984) (defendant has burden to establish privilege).

With respect to blood samples, see People v. Drayton, 56 A.D.3d 1278 (4th Dept. 2008), appeal dism'd 13 N.Y.3d 902 (blood sample not "information" protected by privilege); People v. Elysee, 49 A.D.3d 33, 847 N.Y.S.2d 654 (2d Dept. 2007) (blood specimen taken from patient by medical professional is not "information" protected by physician-patient privilege), aff'd 12 N.Y.3d 100, 876 N.Y.S.2d 677 (2009) (privilege overcome when police officers executed court order); see also State v. Atwood, 925 N.W.2d 626 (Minn. 2019) (blood sample drawn by medical professional during course of emergency medical treatment not "information" within scope of privilege).

Facts which would have been obvious to a layperson are not privileged. People v. Greene, 36 A.D.3d 219, 824 N.Y.S.2d 48 (1st Dept. 2006), aff'd 9 N.Y.3d 277, 849 N.Y.S.2d 461 (2007); People v. Hedges, 98 A.D.2d 950, 470 N.Y.S.2d 61 (4th Dept. 1983) (physician allowed to testify that defendant had strong odor of alcohol on his breath, that his speech was slurred and disjointed, and that he was intoxicated). See also People v. Capra, 17 N.Y.2d 670, 269 N.Y.S.2d 451 (1966) (privilege not applicable where heroin fell out of defendant's sock).

2. Exceptions

a. Public Health Law §3373 – Under Article 33 of the Public Health Law, a practitioner has a duty to make a report concerning a person under treatment who is an addict or habitual narcotics user. Although PHL §3373 creates an

exception to confidentiality, it does so only "[f]or purposes of duties arising out of this article ...." See People v. Sinski, 88 N.Y.2d 487, 646 N.Y.S.2d 651 (1996) (§3373 does not generally abrogate the privilege for purposes of a criminal prosecution, but merely permits practitioners to submit required reports).

b. PL §265.25 - A report must be made of "[e]very case of a bullet wound, gunshot wound, powder burn or any other injury arising from or caused by the discharge of a gun or firearm, and every case of a wound which is likely to or may result in death and is actually or apparently inflicted by a knife, ice pick or other sharp instrument." See also People v. J.R., 65 Misc.3d 754 (County Ct., Nassau Co., 2019) (although there was no mention in records of treatment for firearm-related wounds enumerated in §265.25, all-inclusive "any other injury arising from or caused by" language made medical information subject to reporting requirement); PL §265.26 (requires that report be made of certain burn injuries and wounds).

c. Mandated Reports Of Child Abuse/Maltreatment (Social Services Law §§ 413, 415) - See People v. David Rivera, 25 N.Y.3d 256 (2015) (court erred in permitting psychiatrist to testify about defendant's admission to sexually abusing 11-year-old relative after psychiatrist had notified Administration for Children's Services of admission; no such exception appears in CPLR 4504, and, even if patient is cognizant of psychiatrist's reporting obligations under child protection statutes, it does not mean he should expect that statements made during treatment will be used against him in criminal matter).

d. "Tarasoff" Warnings - See People v. Bierenbaum, 301 A.D.2d 119, 748 N.Y.S.2d 563 (1st Dept. 2002), lv denied 99 N.Y.2d 626, 760 N.Y.S.2d 107 (2003), cert denied 540 U.S. 821, 124 S,Ct. 134 (2003) (letter from psychiatrist to victim was properly admitted where defendant had waived privilege by agreeing that warning could be communicated, and exception to confidentiality applied since psychiatrist was under duty to warn potential victim); People v. Sergio, 21 Misc.3d 451 ("Tarasoff exception" applied where no reasonable woman who had just given birth and whose baby was missing would expect her denial of those facts to people treating her to be kept confidential from public officials responsible for locating and protecting the baby).

3. Waiver/HIPAA - Generally, a waiver results when a litigant discloses information and/or places his or her physical condition at issue in a context in which privileged information will be utilized. See, e.g., Arons v. Jutkowitz, 9 N.Y.3d 393, 850 N.Y.S.2d 345 (2007) (in medical malpractice actions, Court of Appeals holds that attorney may interview adverse party's treating physician privately when adverse party has affirmatively placed his/her medical condition in controversy and thus waived physician-patient privilege; however, while HIPAA does not prevent informal discovery from going forward, it requires that attorney first obtain valid HIPAA authorization or court or administrative order, or issue subpoena, discovery request or other lawful process); People v. Edney, supra, 39 N.Y.2d 620 (raising of insanity defense); Koump v. Smith, 25 N.Y.2d 287, 303 N.Y.S.2d 858 (1969) (commencement of personal injury suit); People v. O'Connor, 156 A.D.3d 442 (1st Dept. 2017), lv denied 31 N.Y.3d 903 (in Sex Offender Registration Act proceeding in which People obtained records of prison sex offender treatment by serving subpoena that was neither court-ordered nor on notice to defendant, defendant waived any HIPAA-based claim when he cited completion of treatment as mitigating factor); Deutsche Bank Trust Co. of America v. Tri-Links Inv. Trust, 43 A.D.3d 56 (1st Dept. 2013) waiver occurs when party asserts a claim of defense that he intends to prove by use of privileged materials); People v. Berlin, 39 A.D.3d 351, 835 N.Y.S.2d 54 (1st Dept. 2007), lv denied 9 N.Y.3d 840 (disclosure to police); People v. Martinez, 22 A.D.3d 318, 804 N.Y.S.2d 293 (1st Dept. 2005), lv denied 6 N.Y.3d 756 (once defendant waived privilege for particular purpose, privilege was destroyed for all purposes regardless of defendant's intent); Matter of Farrow v. Allen, 194 A.D.2d 40, 608 N.Y.S.2d 1 (1st Dept. 1993) (privilege waived where doctor released information with patient's consent, but disclosure outside context of litigation did not result in waiver as to all other communications related to same subject matter); People v. Feldmann, 110 A.D.2d 906, 488 N.Y.S.2d 455 (2d Dept. 1985) (privilege waived when defense counsel cross-examined police about defendant's treatment for injuries); People v. Awoshiley, 20 Misc.3d 1136(A), 867 N.Y.S.2d 377 (Crim. Ct., N.Y. Co., 2008) (defense counsel's assertions at arraignment regarding defendant's condition while in emergency room waived privilege as to medical records for that time period at very least); People v. Pagan, 190 Misc.2d 474, 738 N.Y.S.2d 825

(Sup. Ct., Kings Co., 2002) (assault complainant waived privilege by discussing medical condition during criminal investigation). But see Matter of Antonia E., 16 Misc.3d 637, 838 N.Y.S.2d 872 (Fam. Ct., Queens Co., 2007), (no HIPAA waiver where complainant was refusing to cooperate further in prosecution of his sister, and thus it was prosecution, not complainant, that was placing complainant's physical condition at issue); People v. McHugh, 124 Misc.2d 823, 478 N.Y.S.2d 754 (Sup. Ct. Bronx Co., 1984) (by offering hospital records at Huntley hearing to prove his condition, defendant did not waive privilege with respect to statements made to nurses and social workers).

It has been held that there is no waiver when a prisoner makes statements, in the presence of a police officer who is guarding him, to a doctor in order to secure necessary medical treatment). People v. Sanders, 169 Misc.2d 813, 646 N.Y.S.2d 955 (Sup. Ct., Bronx Co., 1996); see also People v. Jaffarian, 9 Misc.3d 455, 799 N.Y.S.2d 733 (Justice Ct., Monroe Co.) (no waiver where defendant made statements to nurse in front of officer who was required to stay with defendant).

4. Sanctions For Disclosure - In People v. Greene, 9 N.Y.3d 277, the Court of Appeals held that evidence obtained as a result of a violation of the physician-patient privilege need not be suppressed at a criminal trial, since the privilege is statutory and not based on the State or Federal Constitution and an exception has been made only when the principal purpose of a statute is to protect a constitutional right. See also Matter of Miguel M., 17 N.Y.3d 37 (2011) (HIPAA violation does not always require suppression of evidence); People v. Sergio, 21 Misc.3d 451 (no suppression required even if use of defendant's statements in search warrant application violated privilege); People v. Awoshiley, 20 Misc.3d 1136(A) (medical records obtained by People via subpoena in violation of defendant's physician-patient privilege not subject to suppression).

F. Psychologist-Client - See CPLR §4507 ("confidential relations and communications ... are placed on the same basis as those provided by law between attorney and client"); People v. Wilkins, 65 N.Y.2d 172, 490 N.Y.S.2d 759 (1985) (defendant who testifies with respect to justification defense does not waive privilege; although physician-patient privilege is waived when a defendant puts his or her condition at issue, psychologist-client privilege is equivalent in scope to the attorney-

client privilege); People v. Jackson, 103 A.D.2d 849, 478 N.Y.S.2d 367 (2d Dept. 1984) (court did not abuse discretion by refusing to allow defendant to call complainant's school psychologist); United States v. Ray, 585 F.Supp.4th (SDNY 2022) (court concludes that privilege can be applied to non-verbal communications; that privilege extends to communications made to paraprofessionals and staff working under supervision and control of provider; and that privilege is not waived when otherwise confidential statements are made in group therapy sessions where communication by each patient to the others is critical to success of session for all patients); Matter of K.M., 51 Misc.3d 322 (Sup. Ct., N.Y. Co., 2016) (communications between defendant, who had been committed after being found not responsible by reason of mental disease or defect, and his treating psychiatrist or psychologist were confidential); see also State v. Expose, 872 N.W.2d 252 (Minn. 2015) (therapist-client privilege has no exception permitting therapist to disclose statements evidencing imminent threat of harm despite state's "duty to warn" statute creating duty to warn clearly identifiable potential victim Fof specific threat of physical violence); State v. Mark R., 17 A.3d 1 (Conn. 2011) (professional counselor's mandated report abrogates privilege in subsequent criminal prosecution).

G. Social Worker-Client

1. Generally - See CPLR §4508(a) (certified social worker "shall not be required to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person working for the [social worker's] employer"); Matter of Shane"MM", 280 A.D.2d 699, 720 N.Y.S.2d 219 (3rd Dept. 2001) (no privilege where social worker not certified); Matter of Koretta W., 118 Misc.2d 660, 461 N.Y.S. 205 (Fam. Ct., N.Y. Co., 1983) (while ruling that there was compelling need for disclosure in arson prosecution sufficient to overcome any privilege, court questions whether juvenile had expectation of confidentiality as to communications with foster care agency personnel). Although communications to a rape crisis counselor are not covered by the social worker-client privilege [see People v. Bridges, 142 Misc.2d 789, 538 N.Y.S.2d 701 (County Ct. Monroe Co., 1989)], CPLR §4510 contains a confidential privilege protecting communications made to a certified rape crisis counselor.

2. Exceptions

a. CPLR §4508 (includes, inter alia, communications revealing the contemplation of a crime, and statements by a child under 16 who has been the victim of a crime) - See People v. Bass, supra, 140 Misc.2d 57 (defendant's statements concerning sexual abuse of daughter did not reveal the contemplation of a crime, since defendant did not reveal an intent to continue his activity); People v. O'Gorman, 91 Misc.2d 539, 398 N.Y.S.2d 336 (Sup. Ct. Suffolk Co., 1977).

b. Reporting Cases Of Suspected Child Abuse Or Maltreatment - In the course of reporting suspicions concerning child abuse or maltreatment pursuant to SSL §413(1), social workers often will be revealing confidential communications. See State v. Mark R., 17 A.3d 1 (Conn. 2011) (professional counselor's mandated report abrogates privilege in subsequent criminal prosecution).

H. Rape Crisis Counselor/Domestic Violence Advocate.

A rape crisis counselor or domestic violence advocate shall not be required to disclose a communication made by his or her client to him or her, or advice given thereon, in the course of his or her services nor shall any clerk, stenographer or other person working for the same program as the rape crisis counselor or domestic violence advocate or for the rape crisis counselor or domestic violence advocate be allowed to disclose any such communication or advice given thereon nor shall any records made in the course of the services given to the client or recording of any communications made by or to a client be required to be disclosed, nor shall the client be compelled to disclose such communication or records, except: (1) that a rape crisis counselor or domestic violence advocate may disclose such otherwise confidential communication to the extent authorized by the client; (2) that a rape crisis counselor or domestic violence advocate shall not be required to treat as confidential a communication by a client which reveals the intent to commit a crime or harmful act; (3) that a domestic violence advocate shall not be required to treat as confidential a communication by a client which reveals a case of suspected child abuse or maltreatment pursuant to SSL article six, title six; (4) in a case in which the client waives the privilege by instituting charges against the rape crisis counselor or domestic violence advocate or the rape crisis

program or domestic violence program and such action or proceeding involves confidential communications between the client and the rape crisis counselor or domestic violence advocate. CPLR §4510(b).

"Rape crisis program" means any office, institution or center which has been approved pursuant to Public Health Law § 206(15), offering counseling and assistance to clients concerning sexual offenses, sexual abuses or incest. CPLR §4510(a)(1).

"Rape crisis counselor" means any person who has been certified by an approved rape crisis program as having satisfied the training standards specified in Public Health Law §206(15), and who, regardless of compensation, is acting under the direction and supervision of an approved rape crisis program. CPLR §4510(a)(2).

"Client" means any person who is seeking or receiving the services of a rape crisis counselor for the purpose of securing counseling or assistance concerning any sexual offenses, sexual abuse, incest or attempts to commit sexual offenses, sexual abuse, or incest, as defined in the Penal Law; or any victim of domestic violence as defined in SSL §459-a. CPLR §4510(a)(3).

"Domestic violence program" means a residential program for victims of domestic violence or a non-residential program for victims of domestic violence as defined in SSL §459-a or any similar program operated by an Indian tribe, as defined by §2 of the Indian law. CPLR §4510(a)(4).

"Domestic violence advocate" means any person who is acting under the direction and supervision of a licensed and approved domestic violence program and has satisfied the training standards required by the Office of Children and Family Services. CPLR §4510(a)(5).

The privilege may only be waived if the client, the personal representative of a deceased client, or, in the case of a client who has been adjudicated incompetent or for whom a conservator has been appointed, the committee or conservator provides the rape crisis counselor or domestic violence advocate with informed, written and reasonably time-limited consent. CPLR §4510(c).

I. Electronic Communications

According to CPLR §4548, "[n]o communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic

means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication."

VI. Circumstantial Evidence

A. Uncharged Crimes Evidence

1. Generally - Evidence of uncharged crimes committed by the respondent may not be admitted unless the court determines that the probative value of such evidence outweighs its prejudicial tendency to demonstrate the respondent's criminal propensities. People v. Molineux, 168 N.Y. 264 (1901); People v. Damon, 200 A.D.3d 1323 (3d Dept. 2021) ((video of defendant's involvement in shooting but not as the shooter was relevant to issue of defendant's access to the handgun, but probative value did not outweigh potential prejudice where video depicted shooter knocking on door in broad daylight, brandishing handgun and firing it multiple times); People v. Rodriguez, 193 A.D.3d 554 (1st Dept. 2021) (although evidence of prior burglaries was relevant to intent, court allowed People to introduce excessive quantum of evidence); People v. Ward, 141 A.D.3d 853 (3d Dept. 2016) (even if nearly identical uncharged crime fell within one or more Molineux exceptions, prejudicial effect outweighed probative value where issue was whether sex acts were consensual or procured by forcible compulsion); People v. Drake, 94 A.D.3d 1506 (4th Dept. 2012) (reversible error where court refused to preclude uncharged crime evidence of defendant's alleged postmortem sexual assault on victim, which was not relevant to intent to kill; the uncharged crime was particularly heinous, and defendant was required to defend against equivocal evidence that uncharged crime was committed); People v. Westerling, 48 A.D.3d 965, 852 N.Y.S.2d 429 (3rd Dept. 2008) (court erred in permitting victim to testify to non-particularized acts of physical and verbal abuse that occurred over three-year period without weighing probative value against prejudice); People v. Wlasiuk, 32 A.D.3d 674, 821 N.Y.S.2d 285 (3rd Dept. 2006) (reversible error where trial court failed to weight probative value against potential for undue prejudice); People v. Wood, 35 Misc.3d 1219(A) (County Ct., Yates Co., 2012) (use of evidence that is proof in another pending case implicates defendant's Fifth Amendment rights in other case); see also People v. Brewer, 28 N.Y.3d 271 (2016) (where defendant was charged with pulling two minor girls into closet or back bedroom and forcing them to perform oral sex while he

smoked crack with his shirt pulled over his head, no error in admission of evidence that defendant was crack user and had engaged in sexual acts with consenting adult women in same manner, which corroborated testimony of victims; evidence of prior sexual encounters with consenting adult woman was not Molineux evidence of crime or bad act); People v. Cortez, 22 N.Y.3d 1061 (2014) (where entries from defendant's journals in which he ruminated over being spurned by murder victim were properly admitted, court erred in admitting other entries concerning defendant's relationships with and rejections by two other women dating from three to six years before murder; Court of Appeals splits as to whether protective Molineux analysis should apply to prior bad thought evidence); People v. Arafet, 13 N.Y.3d 460, 892 N.Y.S.2d 812 (2009) (evidence relating to other man's fencing operation, which showed that business defendant called in hours immediately after theft was one where stolen goods could be disposed of, and thus supported inference that defendant needed fence's services, was not Molineux evidence since criminal transactions in which defendant was not involved could show nothing about his propensity; court also rejects People's argument that evidence of defendant's experience as trailer thief showed his unusual skills, knowledge and access to means of committing charged crime, since there is no justification for creating "specialized crime" exception to Molineux); People v. Dorm, 12 N.Y.3d 16, 874 N.Y.S.2d 866 (2009) (fact that court at first trial precluded evidence and trial resulted in acquittals and hung jury had no bearing on whether court at the second trial properly exercised discretion in admitting evidence).

Often, the prejudicial effect of the evidence will outweigh its probative value when there is other substantial evidence of whatever it is the prosecution is attempting to prove through introduction of the uncharged crimes evidence. See, e.g., People v. Johnson, 280 A.D.2d 683, 721 N.Y.S.2d 108 (2d Dept. 2001), lv denied 97 N.Y.2d 683, 738 N.Y.S.2d 299 (there was other evidence of force element).

Whether or not uncharged crimes evidence fits squarely within one of the exceptions below, it may be admissible if it counters a claim made by the accused. See People v. Rojas, 97 N.Y.2d 32, 735 N.Y.S.2d 470 (2001); People v. Torres, 145 A.D.3d 442 (1st Dept. 2016), lv denied 29 N.Y.3d 953 (no error in court's ruling that, if defendant claimed he did not understand English and challenged testimony that

Miranda warnings were given in Spanish, People could introduce unrelated videotaped statement which would prove defendant spoke and understood English); but see People v. Allen, 36 Misc.3d 155(A) (App. Term, 1st Dept., 2012) (defendant's mere denial that he engaged in charged conduct did not open door).

Evidence directly related to the crime charged may not be Molineux evidence. People v. Frumusa, 29 N.Y.3d 364 (2017) (evidence of contempt order issued in civil action involving same funds defendant was charged with stealing was not Molineux evidence; when evidence is relevant to same crime; there is no danger that jury will draw improper inference of propensity).

2. Exceptions To Molineux Rule - If it comes within an exception to the general rule, evidence of crimes committed before, or after (see People v. Ingram, 71 N.Y.2d 474, 527 N.Y.S.2d 363 [1988]) the crime charged may be admitted.

a. Amorous Design - In prosecutions involving consensual sex crimes, evidence of prior sexual acts between the 2 accused persons has been admitted to show mutual disposition; any broader use of the exception is ordinarily inappropriate. See, e.g., People v. Lewis, 69 N.Y.2d 321, 514 N.Y.S.2d 205 (1987); People v. Gautier, 148 A.D.2d 280, 544 N.Y.S.2d 821 (1st Dept. 1989).

b. Common Plan Or Scheme - When 2 or more crimes are so related that proof of one tends to establish the other(s), the uncharged crimes evidence may be admissible. See, e.g., People v. Leeson, 12 N.Y.3d 823, 880 N.Y.S.2d 895 (2009) (In sex crime prosecution, no error in admission of testimony regarding uncharged acts of sodomy and sexual abuse during trip defendant took with victim and her brother where uncharged crimes allegedly occurred during same time period as crimes defendant was accused of committing and testimony provided necessary background information regarding relationship between defendant and victim and placed charged conduct in context); People v. DeGerolamo, 118 A.D.3d 23 (1st Dept. 2014) (where defendant was charged with spraying complainant in face with mace and stealing ring he had previously agreed to purchase, majority finds reversible error in admission of evidence of prior theft of rings involving trickery; if jury believed complainant, defendant's intent to steal was obvious and nothing would place intent at issue, and evidence was not admissible under common plan or scheme exception

because uncharged robbery was not committed to effect charged robbery); People v. Buskey, 45 A.D.3d 1170, 846 N.Y.S.2d 701 (3rd Dept. 2007) (where defendant was charged with making sexual advances toward 13-year-old on three occasions, court erred in admitting evidence of sexual advances toward three other teenage girls; evidence established repetitive pattern, not common scheme or plan); People v. Athanasatos, 40 A.D.3d 1263, 836 N.Y.S.2d 343 (3rd Dept. 2007), lv denied 9 N.Y.3d 872 (in each incident, defendants stole items from Staples using 41-quart black wastebasket); People v. Pons, 159 A.D.2d 471, 552 N.Y.S.2d 344 (2d Dept. 1990), lv denied 76 N.Y.2d 741, 558 N.Y.S.2d 902 (evidence of other torchings and demolition jobs ordered by arson defendant in order to destroy gambling competitors' operations was properly admitted); People v. Johnson, 114 A.D.2d 210, 498 N.Y.S.2d 804 (1st Dept. 1986) (evidence of robbery defendant's 10 prior thefts from complainant improperly admitted; there was no evidence of common scheme or similarities linking the crimes); People v. Grant, 104 A.D.2d 674, 479 N.Y.S.2d 914 (3rd Dept. 1984) (evidence that defendant, charged with promoting prostitution, had previously forced witness to engage in prostitution was admissible). See also People v. Jones, 239 A.D.2d 602, 658 N.Y.S.2d 366 (2d Dept. 1997), lv denied 90 N.Y.2d 894, 662 N.Y.S.2d 437 (in 3-2 decision, court upholds exclusion of evidence offered by defendant, who attempted to support his claim that he meant to sell baking soda rather than cocaine by showing that he had previously been arrested for selling baking soda).

c. Defense Of Accident - Uncharged crimes evidence may be admitted to counter a claim that the alleged crime was merely an accident. See, e.g., People v. Henson, 33 N.Y.2d 63, 349 N.Y.S.2d 657 (1973) (evidence of child's previous injuries was properly admitted to counter parents' claim that alleged injuries had been incurred accidentally); People v. Huertas, 186 A.D.3d 731 (2d Dept. 2020) (Molineux ruling did not deprive defendant of due process right to fair trial by deterring him from testifying at trial where court ruled that if defendant were to testify that shooting was accident, People would be permitted to offer evidence, through cross-examination of him, of facts underlying his three prior gun-related convictions); People v. Davis, 149 A.D.3d 451 (1st Dept. 2017) (no error in admission of images and descriptions of pornography websites defendant visited on victim’s computer shortly after murder;

evidence refuted defendant's claim that death was accidental and that he was grieving for loss of grandmother in period following her death); People v. Polomaine, 89 A.D.3d 1215 (3d Dept. 2011), lv denied 18 N.Y.3d 927 (no error in admission of evidence that defendant's daughter previously had suffered skull fracture, and that victim in this case previously had suffered fractured tibia, since defendant disclaimed knowledge of what caused injuries and claimed they were accidental); People v. Barreto, 64 A.D.3d 1046, 882 N.Y.S.2d 594 (3rd Dept. 2009), lv denied 13 N.Y.3d 834 (where defendant testified that child hit her head when they both fell as defendant was removing child from bathtub and contended that his contrary statements to police had been coerced and inaccurately transcribed, no error in admission of evidence of two prior suspicious "accidental" injuries suffered by child while in defendant's care); People v. Sims, 110 A.D.2d 214, 494 N.Y.S.2d 114 (2d Dept. 1985); cf. People v. Riback, 57 A.D.3d 1209, 870 N.Y.S.2d 517 (3rd Dept. 2008) (no error in admission of testimony by expert who defined terms "pedophile" and "sexual fetish" where there was testimony regarding defendant's bizarre behavior and central, disputed question was whether defendant's acts were committed for purpose of sexual gratification or were instead "accidental" or benign); but see People v. Skinner, 298 A.D.2d 625, 747 N.Y.S.2d 857 (3rd Dept. 2002) (defendant's improper disciplining of 5-year-old stepdaughter one year prior to death of infant victim was not sufficiently probative to justify admission); People v. Irby, 79 A.D.2d 713, 434 N.Y.S.2d 252 (2d Dept. 1980) (prior assault of another person did not bear on accident issue).

d. Defense Of Consent - See, e.g., People v. Cook, 93 N.Y.2d 840, 688 N.Y.S.2d 89 (1999) (evidence of rape defendant's prior acts of violence towards paramour were admissible to prove force element even though defendant claimed allegation was a lie, not that complainant consented); People v. Vargas, 88 N.Y.2d 856, 644 N.Y.S.2d 484 (1996) (where defendant raised consent defense in rape case, it was error to admit evidence of 4 prior sex crimes, and cause defendant to abandon consent defense, where case presented two "starkly contrasting scenarios"); People v. Weinstein, 207 A.D.3d 33 (1st Dept. 2022), **lv granted** 38 N.Y.3d 1154 (People were able to counter defendant's lack-of-intent-to-compel narrative by showing that charged offenses were more elaborate manifestations of his practice of baiting

women with opportunities for career advancement, and then taking advantage and being determined to go forward whether or not they welcomed his advances); People v. Reilly, 19 A.D.3d 736, 796 N.Y.S.2d 726 (3rd Dept. 2005) (where defendant charged with entering victim's home when she was asleep and sexually abusing her, evidence regarding incident where defendant was found peering into another woman's bedroom window a few houses away was improperly admitted; defendant claimed consent in main case, but not in the other case); People v. Velez, 159 A.D.2d 665, 553 N.Y.S.2d 429 (2d Dept. 1990), lv denied 76 N.Y.2d 744, 558 N.Y.S.2d 906 (evidence of prior attacks on ex-wife admissible where defendant claimed ex-wife consented to sex).

e. Identity

i. Unique Modus Operandi - When the prior crime(s) and the crime charged are similar in a distinctive way, and the respondent raises the issue of identification, the evidence may be admitted as probative of the respondent's identity as the perpetrator. See, e.g., People v. Agina, 18 N.Y.3d 600 (2012) (defendant's identity not "conclusively established," and thus uncharged crimes testimony by defendant's ex-wife about incident that occurred 15 months earlier might be admissible to prove identity, where only complainant's testimony pointed to defendant and jury might doubt her word, and defendant's testimony did not remove identity as issue since he admitted being present and did not suggest that anyone else inflicted injuries or had opportunity to do so but denied he did it and seemed to suggest that complainant might have deliberately harmed herself); People v. Gillyard, 13 N.Y.3d 351, 892 N.Y.S.2d 288 (2009) (where defendant, charged in two cases with impersonating police officer, allegedly brandished handcuffs and threatened to use them in one case and possessed them in another, trial court erred in admitting testimony regarding defendant's possession of handcuff key while incarcerated several weeks after incidents to show identity and prove he had access to handcuffs; defendant's familiarity with using handcuff keys had little relevance); People v. Beam, 57 N.Y.2d 214, 455 N.Y.S.2d 562 (1982) (4 homosexual assault victims testified to same ruse to lure them to isolated area, and all, except one who fought off attacker, described same pattern of behavior); People v. Allweiss, 48 N.Y.2d 40, 421 N.Y.S.2d 341 (1979) (evidence of 6 rapes properly admitted where they involved odd behavior

similar to charged homicide); People v. Duncan, 188 A.D.3d 1249 (2d Dept. 2020), lv denied 36 N.Y.3d 1050 (similarities between prior robbery and sexual assault and attack on complainant - incidents involved robberies and sexual assaults of unaccompanied Caucasian women, during daytime hours, in lobbies of residential buildings - were not sufficiently unique or unusual); People v. Hayes, 168 A.D.3d 489 (1st Dept. 2019), lv denied 33 N.Y.3d 977 (video of defendant, victim, and three others rapping was not evidence of uncharged crimes or bad acts despite violent or offensive content of lyrics, and, in any event, video was probative as to identification since it showed defendant's use of derogatory phrase used by shooter, and two witnesses were present for video and homicide); People v. Alvarado, 156 A.D.3d 527 (1st Dept. 2017) (evidence admissible on contested issue of identity even though defense claimed there was "intentionally false" identification, not mistaken identification); People v. Littlejohn, 112 A.D.3d 67 (2d Dept. 2013) (sufficiently distinctive modus operandi shown where uncharged offense and charged crime featured attacks on young, unaccompanied women; defendant held himself out as member of law enforcement in apparent attempt to facilitate commission of crimes; hands of victims were bound behind their backs, and each was transported in vehicle; both were attacked during early hours of morning; there was evidence of sexual assault in multiple ways; and they had large amounts of tape wrapped around heads and over faces; however, it was error to admit other uncharged crimes evidence where several key components of charged offense - in particular the wrapping of tape around the head and face of the victim and the commission of a sexual assault against her - did not occur); People v. Agina, 103 A.D.3d 739 (2d Dept. 2013) (crimes sufficiently similar where charged assault against defendant's wife and prior assault against former wife involved, inter alia, accusation that victim was cheating on him, choking or suffocation, and tying up victim; however, evidence was improperly admitted since only credibility was in issue, and probative value of evidence regarding identity was relatively low in comparison to high risk that jury would infer that defendant had propensity to commit violent acts against women with whom he was intimate); People v. Saunders, 71 A.D.3d 1058, 898 N.Y.S.2d 168 (2d Dept. 2010), lv denied 15 N.Y.3d 757 (no error in admission of testimony regarding robbery committed approximately six months before charged murder where, in each

case, victim was person who had been involved in real estate transaction with defendant, perpetrator was assisted by younger man or men armed with weapon. victim was directed to sit in chair brought from another room, and, at gunpoint, to call financial institution to ascertain available balance in account, victims were compelled to write check payable to defendant in rounded amount slightly below available balance in account, and victim was restrained by use of duct tape); People v. Swinton, 87 A.D.3d 491 (1st Dept. 2011), lv denied 18 N.Y.3d 862 (evidence properly admitted where all three incidents occurred within fifteen days of each other and involved assailant who broke into premises through window at night, covered victim's face with pillow or cushion, demanded that victim blindfold herself with her own clothing or clothing found within premises, repeatedly told victim to "relax," demanded money, threatened to kill victim, forced victim to perform oral sex, and either forced or tried to force victim to engage in sexual intercourse); People v. Porco, 71 A.D.3d 791, 896 N.Y.S.2d 161 (2d Dept. 2010), aff'd 17 N.Y.3d 877 (no error in admission of evidence that defendant, who raised identification defense, had engaged in pattern of staging crimes at parents' home to make it appear there had been break-ins); People v. Medina, 66 A.D.3d 555, 887 N.Y.S.2d 527 (1st Dept. 2009), lv denied 13 N.Y.3d 908 (prosecutor properly permitted to argue that similarities among three charged crimes warranted inference they were committed by same person where defendant allegedly committed two robberies and attempted armed robbery within period of a few days and radius of a few blocks, and, in each case, robber talked into cell phone as he followed female victim into her building, apparently to give impression of innocuous behavior); People v. Alston, 62 A.D.3d 806, 880 N.Y.S.2d 649 (2d Dept. 2009), lv denied 13 N.Y.3d 741 (where defendant was charged with seven gunpoint robberies, four of which involved masked perpetrator who placed stolen money into black bag, no error in admission of evidence of incident in which defendant, unmasked, was caught at scene of one of the seven robberies attempting to shoplift by placing items in black bag); United States v. Carlton, 534 F.3d 97 (2d Cir. 2008) (evidence of bank robberies properly admitted where similarities between location, "takeover style," and use of getaway car established pattern); People v. Doyle, 48 A.D.3d 961, 852 N.Y.S.2d 433 (3rd Dept. 2008), lv denied, 10 N.Y.3d 862 (where murder victim was found in chest floating in canal with mouth

gagged with bandana and duct-taped shut while hands and feet were bound with handcuffs and duct tape, no error in admission of evidence that defendant pushed down and choked former girlfriend and duct-taped mouth of another girlfriend and choked and strangled her); People v. Clink, 32 A.D.3d 862, 821 N.Y.S.2d 613 (2d Dept. 2006) (no error in admission of evidence regarding other incident involving possession of black gun, and black Honda Civic with tinted windows); People v. Stevens, 26 A.D.3d 396, 811 N.Y.S.2d 84 (2d Dept. 2006), lv denied 6 N.Y.3d 853 (evidence admissible where defendant approached each victim and offered to make home repairs, asked for a drink of water, and pushed victim down the basement stairs); People v. Latimer, 24 A.D.3d 807, 804 N.Y.S.2d 493 (3rd Dept. 2005), lv denied 6 N.Y.3d 849 (evidence admissible to prove defendant's identity where each robbery occurred in late evening or early morning hours, when one clerk was present and there were no other customers; each time the robber displayed a .22 caliber pistol, the clerk was lured into opening the register before money was demanded and the robber shot the clerk in the legs despite the clerk having complied with all demands; the robberies occurred each month from late fall to early winter and within a 10-15-mile area; and 3 of the 4 clerks appeared to be of Middle Eastern or Indian descent); People v. Daily, 297 A.D.2d 562, 747 N.Y.S.2d 85 (1st Dept. 2002), lv denied 99 N.Y.2d 534, 752 N.Y.S.2d 595 (2002) (evidence properly admitted where defendant and accomplices robbed people in Manhattan's jewelry district during evening rush hour as they carried packages of jewelry for delivery); People v. Alexander, 294 A.D.2d 118, 740 N.Y.S.2d 873 (1st Dept. 2002), lv denied 98 N.Y.2d 694, 747 N.Y.S.2d 412 (2002) (evidence properly admitted where crimes were geographically linked and perpetrator had pattern of requesting that taxi driver stop to permit him to buy marijuana, which perpetrator invariably referred to as "weed"); People v. Toland, 284 A.D.2d 798, 728 N.Y.S.2d 538 (3rd Dept. 2001), lv denied 96 N.Y.2d 942, 733 N.Y.S.2d 383 (defendant had penchant for engaging in bondage with women in particular manner); People v. Balazs, 258 A.D.2d 658, 685 N.Y.S.2d 782 (2d Dept. 1999), lv denied 93 N.Y.2d 1014, 697 N.Y.S.2d 572 (evidence of prior robbery properly admitted where both crimes involved perpetrator who posed as pizza delivery man and used silver colored duct tape to immobilize victims); People v. Daniels, 216 A.D.2d 639, 627 N.Y.S.2d 483 (3rd Dept. 1995) (rapes which occurred on

3 consecutive days, in front seat of dark-colored car with bucket seats on country road, were not sufficiently similar); People v. Sanchez, 154 A.D.2d 15, 551 N.Y.S.2d 206 (1st Dept. 1990) (error to admit evidence where defendant conceded identification issue, and crimes were not sufficiently similar); People v. DeMeo, 139 A.D.2d 758, 527 N.Y.S.2d 507 (2d Dept. 1988) (3 sexual assaults were sufficiently similar to be admitted at separate trial of each one); People v. Rojas, 121 A.D.2d 315, 503 N.Y.S.2d 783 (1st Dept. 1986) ("trademark" on bag of cocaine recovered from defendant was not so unique as to identify defendant as seller of heroin which was in bag with same trademark); People v. Sanza, 121 A.D.2d 89, 509 N.Y.S.2d 311 (1st Dept. 1986) (gunpoint threats and theft or attempted theft of jewelry were not "unique" or "uncommon").

In People v. Montgomery, 158 A.D.3d 204 (1st Dept. 2018), lv denied 31 N.Y.3d 1015, the court found reversible error in the exclusion of “reverse” Molineux evidence showing that another person had committed uncharged robberies similar to the charged robberies.

ii. Prior Crime Committed In Presence Of Witness - Prior contacts may be admitted to help establish a witness' ability to identify the respondent, but, when possible, should be described in a neutral manner without reference to criminal behavior. Compare People v. Patterson, 137 A.D.2d 632, 524 N.Y.S.2d 515 (2d Dept. 1988) (complainant testified about prior robbery while referring to it as an "incident") and People v. Bines, 137 A.D.2d 431, 524 N.Y.S.2d 212 (1st Dept. 1988) (evidence of prior attempts to rob complainant improperly admitted, but court notes People’s "prudent offer" to have witness merely state that he had seen defendant on previous occasions) with People v. Hayes, 168 A.D.3d 489 (1st Dept. 2019), lv denied 33 N.Y.3d 977 (video of defendant, victim, and three others rapping was not evidence of uncharged crimes or bad acts despite violent or offensive content of lyrics, and, in any event, video was probative as to identification since it showed defendant’s use of derogatory phrase used by shooter, and two witnesses were present for video and homicide); People v. Sheehan, 105 A.D.3d 873 (2d Dept. 2013), lv denied 21 N.Y.3d 1020 (no error where People permitted to elicit testimony from complainant that, on prior occasions when complainant saw defendant walking around neighborhood,

defendant appeared to be intoxicated); People v. Cromwell, 71 A.D.3d 414, 897 N.Y.S.2d 35 (1st Dept. 2010), lv denied 15 N.Y.3d 803 (court properly permitted witness to testify that two pistols used in crime, which were recovered from apartment shared by defendant and co-defendant, were similar to weapons he saw in possession of defendant and co-defendant several times in weeks leading up to incident); People v. Walters, 103 A.D.3d 557 (1st Dept. 2013), lv denied 21 N.Y.3d 1011 (evidence that witness had observed defendant conducting hand-to-hand transactions in past was probative of ability to make reliable identification and explained why he focused on defendant); People v. Jameson, 66 A.D.3d 407, 895 N.Y.S.2d 330 (1st Dept. 2009), lv denied 13 N.Y.3d 939 (court properly permitted manager of store to testify that she recognized defendant because of prior shoplifting attempts, which led her to pay close attention to defendant immediately before robbery and to warn another employee to do likewise; value of evidence would have been unduly restricted had it been limited to testimony that manager had simply seen defendant on prior occasions); People v. Sosa, 267 A.D.2d 106, 700 N.Y.S.2d 133 (1st Dept. 1999), lv denied 94 N.Y.2d 953, 710 N.Y.S.2d 9 (2000) (testimony by store employee that he suspected defendant of prior thefts admitted to show why employee focused on defendant at time of robbery). See also People v. Torres, 19 A.D.3d 732, 797 N.Y.S.2d 149 (3rd Dept. 2005), appeal dism'd 5 N.Y.3d 810 (no error in admission of evidence of uncharged second drug sale made by defendant to partner of officer involved in main case).

iii. Other Crime Directly Related to Crime Charged - See People v. Nicholson, 26 N.Y.3d 813 (2016) (defendant's violent actions helped explain child sex crime victim's delayed disclosure); People v. Myers, 22 N.Y.3d 1010 (2013) (reversible error in admission of evidence to establish identity), rev'g 105 A.D.3d 1250 (3d Dept. 2013) (witness testified that he saw defendant wielding .25 caliber handgun about 2½ months before charged shooting); People v. Gamble, 18 N.Y.3d 386 (2012) (witnesses' testimony that defendant assaulted and made threats against them and against victims established perpetrator's identity); People v. Hamilton, 175 A.D.3d 429 (1st Dept. 2019), lv denied 34 N.Y.3d 1016 (no error in admission of evidence concerning closely connected series of crimes that occurred over several days where details such as involvement of certain cars associated with defendant and participation

of same accomplices provided circumstantial evidence of identity); People v. Dunham, 170 A.D.3d 569 (1st Dept. 2019), lv denied 33 N.Y.3d 1068 (where defendant denied gunpoint robbery with silver-colored pistol, witness's testimony that defendant broke car window with silver metal object shortly after robbery tended to prove, circumstantially, that defendant was in continuing possession of pistol); People v. Harwood, 139 A.D.3d 1186 (3d Dept. 2016), lv denied 28 N.Y.3d 1028 (where ballistic evidence tended to suggest that weapons used in charged shooting matched types of weapons stolen in uncharged burglaries, burglary evidence tended to establish defendant's identity as person involved in shooting); People v. Lleshi, 100 A.D.3d 780 (2d Dept. 2012), lv denied 20 N.Y.3d 1012 (facts underlying prior convictions relevant to defendant's motive to commit threatened crimes against judge and to why judge reasonably feared defendant would imminently carry out threat); People v. Winkfield, 98 A.D.3d 923 (1st Dept. 2012), lv denied 20 N.Y.3d 1066 (court properly permitted defendant's former girlfriend to testify that, in months before shooting, she repeatedly saw defendant in possession of pistol resembling the one used in charged crime); People v. Leggett, 76 A.D.3d 860, 908 N.Y.S.2d 172 (1st Dept. 2010) (no error in admission of evidence that co-defendant stole car at gunpoint close in time and distance to attempted carjacking with which defendant was charged; evidence undermined defense theory that defendant had no idea car was stolen); People v. Stephens, 63 A.D.3d 624, 882 N.Y.S.2d 82 (1st Dept. 2009), lv denied 13 N.Y.3d 800 (no error in admission of surveillance tapes depicting man who matched defendant's description using victim's credit card shortly after theft; use of card was closely connected to theft and tapes provided circumstantial evidence of identity even though they did not clearly show defendant's face).

f. "Inextricably Interwoven" With Crime Charged (aka, "completing the narrative" or "background" evidence) - In a line of decisions that has generated substantial controversy, courts have held that, in some instances, the need for a fair narrative of events justifies references to other criminal activity.

Compare People v. Leonard, 29 N.Y.3d 1 (2017) (in prosecution for serving alcohol to underage relative and then sexually abusing her while she was intoxicated, testimony by complainant that defendant had previously sexually assaulted her by getting her drunk was not necessary background information showing nature of relationship, which

complainant explained); People v. Resek, 3 N.Y.3d 385, 787 N.Y.S.2d 683 (2004) (in 4 to 3 decision, Court of Appeals holds that defendant was denied fair trial where trial court allowed prosecution to explain why defendant was arrested by presenting testimony by officers that they monitored the vehicle because of a report that it was stolen); People v. Crandall, 67 N.Y.2d 111, 500 N.Y.S.2d 635 (1986) (court improperly admitted portions of defendant's conversation with undercover which suggested other sales); People v. Ward, 62 N.Y.2d 816, 477 N.Y.S.2d 602 (1984) (portions of defendant's statements which referred to other crimes were inadmissible); United States v. Hamann, 33 F.4th 759 (5th Cir. 2022) (although officers can sometimes provide background information to explain actions, government must advance specific reason why it needs to provide inculpatory "context" for investigation and may not introduce highly inculpatory out-of-court statements whose value pales in comparison to risk that jury will consider them for truth of matters asserted); People v. Grierson, 154 A.D.3d 1071 (3d Dept. 2017) (repetitive and detailed testimony by four officers to hearsay statements regarding defendant's gun possession, which explained reason for police search, exceeded permissible scope of exception for background testimony); People v. Meadow, 140 A.D.3d 1596 (4th Dept. 2016), lv denied 28 N.Y.3d 933, reconsideration den'd 28 N.Y.3d 972 (no generalized "background exception" to hearsay rule in domestic violence cases); People v. Dowdell, 133 A.D.3d 1345 (4th Dept. 2015) (where assault occurred when officer attempted to arrest defendant on parole warrant, court should not have permitted People to prove the crime underlying parole); People v. Beato, 124 A.D.3d 516 (1st Dept. 2015) (Confrontation Clause violation where, in observation sale case, officer testified that persons who made apparent drug purchases told officer they had purchased drugs but swallowed them; jury was aware that police made arrests after observing apparent drug sales, timing of arrests was not at issue, and there was nothing mysterious about events that could have led to speculation by jury); People v. Maier, 77 A.D.3d 681, 908 N.Y.S.2d 711 (2d Dept. 2010) (in drug possession prosecution, evidence regarding the recovery of marijuana and crack pipe not admissible to complete narrative or explain officer's conduct since defendant did not place propriety of police action in issue or dispute that he possessed narcotics); Langham v. State, 305 S.W.3d 568 (Tex. Ct. Crim. App., 2010) (violation of right of

confrontation where detective's testimony regarding informant's statements about defendant's involvement in criminal activities allegedly was offered as "background" information to establish why police decided to investigate, but testimony was more detailed than necessary since bare fact that detective had obtained unspecified information justifying search warrant would have sufficed); People v. Wilkinson, 71 A.D.3d 249, 892 N.Y.S.2d 535 (2d Dept. 2010) (reversible error where court admitted evidence that defendant, on trial for single sale of cocaine, sold drugs to same buyer on several prior occasions; where drug sale case rests on evidence of single observed sale by seller who is quickly arrested, evidence that defendant had made additional drug sales on other occasions is rarely if ever admissible merely to complete narrative, and notion of completing narrative may not be expanded to encompass chapters far removed from charged crime); People v. Sealy, 34 A.D.3d 259, 823 N.Y.S.2d 149 (1st Dept. 2006), lv denied 8 N.Y.3d 884 (court erred in admitting evidence that, while questioning defendant in connection with disorderly conduct charge, police discovered outstanding warrant for his arrest; mention of warrant was not needed to establish propriety of police conduct); People v. Jackson, 29 A.D.3d 409, 814 N.Y.S.2d 627 (1st Dept. 2006) (no error in admission of statement made by rape defendant, during prior rape of complainant's babysitter, to effect that if babysitter were not there, it would have been complainant, since evidence explained why no one was told when complainant reported rape to babysitter), aff'd 8 N.Y.3d 869, 832 N.Y.S.2d 477 (2007) (majority assumes, arguendo, there was error, but finds it harmless); People v. Park, 12 A.D.3d 942, 785 N.Y.S.2d 180 (3rd Dept. 2004) (evidence of assault committed by defendant after charged assault improperly admitted to explain that complainant reported assault only after learning that defendant had been charged with another assault); People v. Foster, 295 A.D.2d 110, 743 N.Y.S.2d 429 (1st Dept. 2002), lv denied 98 N.Y.2d 710, 749 N.Y.S.2d 7 (2002) (evidence that police saw defendant commit uncharged theft was improperly admitted where defense counsel represented that defendant would not challenge officers' credibility or the propriety of their conduct, evidence was neither inextricably interwoven with earlier, charged theft nor necessary to jury's understanding of prosecution's case, and evidence was unduly prejudicial since uncharged theft was similar to charged theft) and People v. Lunsford, 244 A.D.2d 507,

664 N.Y.S.2d 107 (2d Dept. 1997), lv denied 91 N.Y.2d 927, 670 N.Y.S.2d 409 (1998) (harmless error where court admitted audiotape of 911 call regarding shots fired from defendant's vehicle since defendant was only charged with possession of gun recovered after police stopped vehicle)

with People v. Morris, 21 N.Y.3d 588 (2013) (in 4-3 decision, court finds no error in admission of recording of 911 call reporting that person matching defendant's description committed uncharged gunpoint robbery, and police testimony describing radio run about 911 call, as background information to explain aggressive police action toward defendant; although defendant admitted possessing gun and agreed not to challenge propriety of police stop, evidence allowed jury to put aggressive police conduct in proper context and resolve conflict between testimony by officers and defendant, and case law does not require that trial court suppress uncharged crime evidence every time defendant proposes a "less prejudicial" alternative); People v. Gamble, supra, 18 N.Y.3d 386 (witnesses' testimony that defendant assaulted and made threats against them and victims provided necessary background on nature of relationship between defendant and victims); People v. Dorm, 12 N.Y.3d 16, 874 N.Y.S.2d 866 (2009) (evidence of defendant's prior conduct toward domestic violence victim provided necessary background information on nature of relationship and placed charged conduct in context); People v. Tosca, 98 N.Y.2d 660, 746 N.Y.S.2d 276 (2002) (court properly admitted officers' testimony concerning unidentified cab driver's report of recent encounter with armed defendant as background information regarding how and why police pursued and confronted defendant); People v. Till, 87 N.Y.2d 835, 637 N.Y.S.2d 681 (1995) (no error where evidence of robbery was admitted to explain why police were chasing defendant before he fired at officer, and to show defendant's motive for firing); People v. Parker, 195 A.D.3d 493 (1st Dept. 2021), lv denied 37 N.Y.3d 994 (where defendant was charged with possession of credit cards stolen from complainant's car the day before, evidence of car break-in, to which defendant opened door, was not uncharged crime evidence); People v. Blond, 96 A.D.3d 1149 (3d Dept. 2012) (in sex crime prosecution, testimony by defendant's wife regarding domestic violence and abusive behavior provided background information regarding victim's fear of defendant and unwillingness to tell anyone about abuse until after defendant was in

police custody after most recent violent altercation with wife); People v. Morris, 89 A.D.3d 1112 (2d Dept. 2011) (no error in introduction of 911 recording stating that person matching defendant's description committed uncharged robbery to show how and why police pursued and confronted defendant); People v. Devaughn, 84 A.D.3d 1394 (2d Dept. 2011), lv denied 18 N.Y.3d 993 (no error in admission of testimony from two men with whom defendant participated in string of similar robberies before charged robbery, who testified that defendant complained to them that they were unavailable to assist him during charged robbery and told them everything that happened during robbery; evidence helped jury understand why defendant would speak freely to witnesses); People v. Birch, 69 A.D.3d 425, 893 N.Y.S.2d 30 (1st Dept. 2010), lv denied 14 N.Y.3d 797 (no error in admission of evidence that, earlier in evening of charged drug sale, officer saw defendant make what appeared to be drug sale to unapprehended buyer); People v. Vails, 43 N.Y.2d 364, 401 N.Y.S.2d 479 (1977) (defendant's statements concerning bad bargain he had previously made in sale to same officer were admissible since they were part of bargaining); People v. Gilley, 4 A.D.3d 127, 770 N.Y.S.2d 868 (1st Dept. 2003), lv denied 2 N.Y.3d 799 (in sex crime prosecution, defendant's prior acts against victim, his daughter, completed her narrative and assisted jury in comprehending the circumstances and defendant's relationship with victim); People v. Lopez, 272 A.D.2d 109, 709 N.Y.S.2d 17 (1st Dept. 2000) (no error where testimony regarding uncharged drug transaction was offered to explain why defendant was under surveillance); People v. Coleman, 205 A.D.2d 795, 613 N.Y.S.2d 689 (2d Dept. 1994), lv denied 84 N.Y.2d 824, 617 N.Y.S.2d 144 (no error in admission of testimony that defendant exchanged something for money with several people before undercover approached); People v. Bowden, 157 A.D.2d 789, 550 N.Y.S.2d 388 (2d Dept. 1990), lv denied 75 N.Y.2d 964, 556 N.Y.S.2d 249 (bargaining with undercover prior to sale was properly admitted) and People v. Hernandez, 124 A.D.2d 821, 508 N.Y.S.2d 541 (2d Dept. 1986) (defendant's sexual overtures to complainant were properly admitted to show defendant's motive and intent when he shot at complainant); Matter of Jordan J., 75 Misc.3d 1223(A) (Fam. Ct., N.Y. Co.,2022) (where respondent allegedly assaulted girlfriend, assault a few weeks before charged assault was admissible to explain why respondent was behaving in aggressive and violent manner

towards someone with whom he had been having romantic relationship for over nine months, and provided reason why complainant was compliant with respondent's request for her to kneel and place her hands behind her back while he assaulted her).

Arguably, this Molineux exception should be abandoned altogether. Rojas v. People, 504 P.3d 296 (Colo. 2022) (court abandons res gestae rule in criminal cases, noting that when res gestae is applied in connection with "completing the story" rationale, it risks being exception that swallows rule); United States v. Green, 617 F.3d 233 (3rd Cir. 2010), cert denied 131 S.Ct. 363 (court will no longer allow admission of other crimes evidence on ground that evidence is inextricably intertwined with crime charged; the inextricably intertwined test is vague, overbroad, and prone to abuse).

g. Respondent's Mens Rea - See, e.g., People v. Leonard, 29 N.Y.3d 1 (2017) (in prosecution for serving alcohol to underage relative and then sexually abusing her while she was intoxicated, testimony by complainant that defendant had previously sexually assaulted her by getting her drunk was not admissible to show intent to gain sexual gratification, which could be inferred from touching of complainant's vagina); People v. Israel, 26 N.Y.3d 236 (2015) (evidence of violent incident properly admitted to rebut defense claim that defendant, previously nonviolent, was suffering from PTSD due to stabbing incident when he fired into group on street, but court erred in admitting evidence of incident that occurred three years after charged shooting and was not relevant to PTSD claim); People v. Denson, 26 N.Y.3d 179 (2015) (in attempted kidnapping/endangering welfare of child prosecution, evidence of defendant's 20 year-old conviction for sex crime against child was admissible where defendant's intent could not easily be inferred from his conduct and defense expert agreed that repetition of behavior could indicate defendant's intent); People v. Bradley, 20 N.Y.3d 128 (2012) (evidence of defendant's anger at men and violent propensity had no probative value in connection with defendant's justification claim; anger, and fear for one's personal safety, are not mutually exclusive); People v. Cass, 18 N.Y.3d 553 (2012) (evidence of uncharged murder properly admitted during People's case on rebuttal to counter extreme emotional disturbance defense where evidence arguably showed premeditated intent to target gay men for violence); People v. Caban, 14 N.Y.3d 369, 901 N.Y.S.2d 566 (2010) (no error where, in criminally

negligent homicide involving killing of pedestrian while defendant backed her car, court admitted evidence that defendant's license had been suspended after incident with noticeable similarities, but did not admit details of earlier incident; jury could find that suspension should, if it did not keep defendant off road, at least have prompted her to pay more attention to safety while she was driving, and that in failing to do so she deviated grossly from what reasonable person would have done); People v. Giles, 11 N.Y.3d 495, 873 N.Y.S.2d 244 (2008) (where defendant was arrested during a burglary attempt, and also was found in possession of items stolen during 2 uncharged burglaries, jury could consider prior burglaries in connection with knowledge element of possession of stolen property counts, but court erred in permitting jury to consider prior burglaries in connection with attempted burglary and possession of burglar's tools counts); People v. Blair, 90 N.Y.2d 1003, 665 N.Y.S. 629 (1997) (drug possession 8 months earlier not admissible to refute claim that drugs had been placed in defendant's apartment without his knowledge); People v. Hernandez, 71 N.Y.2d 233, 525 N.Y.S.2d 7 (1987) (where defendant testified that drugs were for his own consumption, evidence of prior sales was probative of intent to sell); People v. Schwartzman, 24 N.Y.2d 241, 299 N.Y.S.2d 817 (1969); People v. Telfair, 198 A.D.3d 678 (2d Dept. 2021) (no error in admission of evidence probative of defendant's knowing possession of guns where defendant pursued defense that "[h]e didn't know" guns were in the truck); People v. Alvarez, 190 A.D.3d 462 (1st Dept. 2021) (reversible error in sexual abuse case where court admitted evidence that defendant accessed pornography website on phone shortly before offense; defendant's intent in abusing victim could be readily inferred, and any probative value in proving defendant's intent when he entered victim's apartment was outweighed by prejudice); People v. Badillo, 184 A.D.3d 517 (1st Dept. 2020), lv denied 35 N.Y.3d 1111 (defendant's statement that he had previously shoplifted, and thought he could get away with it, explained expert's opinion that defendant, despite schizophrenia, could form intent to forcibly steal); People v. Pugh, 177 A.D.3d 447 (1st Dept. 2019), lv denied 34 N.Y.3d 1162 (no error in admission of evidence that, within approximately 20 minutes before charged fatal attack, defendant committed three separate uncharged assaults against victims, who, like homicide victim, were strangers attacked apparently at random); People v. Burton, 151 A.D.3d 1073 (2d Dept. 2017)

(surveillance recording of defendant's conduct during shooting nine days before charged shootings was probative of defendant's sanity and relevant to his claim that he suffered from delusional disorder at time of shootings); People v. Hernandez, 103 A.D.3d 433 (1st Dept. 2013) (People permitted to introduce evidence that shanks were recovered from defendant's cell in past incident and subsequent incident where evidence was not received not as proof of propensity to keep shanks in cell, but as evidence that defendant knew shank was in cell, which was contested issue); People v. Gardner, 98 A.D.3d 901 (1st Dept. 2012), lv denied 20 N.Y.3d 932 (no error where People permitted to introduce three trespass notices pertaining to prior shoplifting incidents to establish that defendant knew he was legally prohibited from entering Macy's stores); People v. Drake, 94 A.D.3d 1506 (4th Dept. 2012) (reversible error where court refused to preclude uncharged crime evidence of defendant's alleged postmortem sexual assault on victim, which was not relevant to intent to kill; the uncharged crime was particularly heinous, and defendant was required to defend against equivocal evidence that uncharged crime was committed); People v. Cox, 63 A.D.3d 626, 883 N.Y.S.2d 184 (1st Dept. 2009), lv denied 13 N.Y.3d 859 (seven trespass notices, six of which defendant had signed, properly admitted where defendant contended that notices were never read to him and that he never read them himself, and number of notices tended to reduce likelihood that defendant was unaware of ban); People v. Towndrow, 62 A.D.3d 1028, 879 N.Y.S.2d 223 (3rd Dept. 2009), lv denied 13 N.Y.3d 750 (defendant's involvement in two prior sales of stolen firearms helped establish possession of the rifle found in defendant's residence and his knowledge it was stolen); People v. Heslop, 48 A.D.3d 190, 849 N.Y.S.2d 301 (3rd Dept. 2007), lv denied, 10 N.Y.3d 935 (evidence of his false statement on application for social services benefits countered defendant's claim of mental impairment by establishing ability to undertake act of deception to achieve desirable result); People v. Truesdale, 44 A.D.3d 971, 845 N.Y.S.2d 363 (2d Dept. 2007), lv denied, 9 N.Y.3d 1039 (where defendant allegedly used sweatshirt to cover hand while pickpocketing, evidence that he previously used sweatshirt to cover hand while pickpocketing was probative of intent) People v. Word, 43 A.D.3d 773, 842 N.Y.S.2d 426 (1st Dept. 2007) (in depraved indifference murder/manslaughter prosecution, evidence regarding defendant's

daughter's hospitalization for malnourishment, instructions given to defendant for proper nourishment of daughter, and defendant's failure to comply with instructions; was properly admitted to prove element of recklessness); People v. Jackson, 29 A.D.3d 409, 814 N.Y.S.2d 627 (1st Dept. 2006) (no error in admission of statement made by rape defendant, during prior rape of complainant's babysitter, to effect that if babysitter were not there, it would have been complainant), aff'd 8 N.Y.3d 869, 832 N.Y.S.2d 477 (2007) (majority assumes, arguendo, there was error, but finds it harmless); People v. Crawford, 158 A.D.2d 353, 550 N.Y.S.2d 897 (1st Dept. 1990) (prior burglary not sufficiently probative of intent at burglary trial despite defendant's claim that he had permission to enter); People v. Carr, 157 A.D.2d 794, 550 N.Y.S.2d 394 (2d Dept. 1990), lv denied 76 N.Y.2d 732, 558 N.Y.S.2d 894 (prior violence towards murder victim improperly admitted to counter intoxication claim); People v. Ryklin, 150 A.D.2d 509, 541 N.Y.S.2d 103 (2d Dept. 1989) (evidence properly admitted to disprove insanity defense); People v. Richardson, 148 A.D.2d 476, 538 N.Y.S.2d 625 (2d Dept. 1989) (firing of gun at person's home was probative of intent to unlawfully use other gun defendant possessed near same home).

h. Acting In Concert Charge - When the respondent denies having acted in concert with the main actor(s), evidence of prior crimes committed by the respondent with the same person(s) may be admissible. See People v. Hall, 18 N.Y.3d 122 (2011) (door opened to testimony about previous assault defendants committed together where defendant Freeman tried to minimize connection with defendant Hall); People v. Ingram, 71 N.Y.2d 474, 527 N.Y.S.2d 363 (1988); People v. Jackson, 39 N.Y.2d 64, 382 N.Y.S.2d 736 (1976); People v. Cornelius, 132 A.D.3d 495 (1st Dept. 2015), lv denied 26 N.Y.3d 1087 (no error in admission of evidence that defendant and accomplice had received disorderly conduct summonses together six weeks earlier); United States v. Townsend, 573 F.3d 138 (2d Cir. 2009), cert denied 130 S.Ct. 645 (no error in admission of evidence showing development of relationship between defendant and drug co-conspirator where defendant argued that some of alleged conduct might have been nothing more than innocent acts of friend and not knowing participation in conspiracy, and evidence of prior gun sales suggested that defendant was not innocent pawn taken by surprise by drug transaction); People v.

Witherspoon, 156 A.D.2d 306, 549 N.Y.S.2d 6 1st Dept. 1990), aff'd 77 N.Y.2d 95, 564 N.Y.S.2d 992; People v. DeVecchio, 17 Misc.3d 990, 845 N.Y.S.2d 676 (Sup. Ct., Kings Co., 2007) (when People must prove existence of criminal agency relationship, they may demonstrate past and ongoing relationship between parties in order to establish course of dealing, and right to establish agency relationship is not forfeited when proof includes evidence of other crimes); see also People v. Gholam, 99 A.D.3d 441 (1st Dept. 2012), lv denied 20 N.Y.3d 1061 (evidence of defendant's activities with accomplices was relevant to gang assault charge since People were required to prove defendant was aided by two or more persons).

i. Motive Of Respondent - See, e.g., People v. Leonard, 29 N.Y.3d 1 (2017) (in prosecution for serving alcohol to underage relative and then sexually abusing her while she was intoxicated, testimony by complainant that defendant had previously sexually assaulted her by getting her drunk, even if probative of defendant's motive in getting complainant drunk, caused prejudice that outweighed probative value); People v. Gamble, 18 N.Y.3d 386 (2012) (witnesses' testimony that defendant assaulted and made threats against them and victims established motive for murders); People v. Dorm, 12 N.Y.3d 16, 874 N.Y.S.2d 866 (2009) (evidence of defendant's prior conduct toward domestic violence victim was probative of defendant's motive and intent to assault victim); People v. Till, supra, 87 N.Y.2d 835 (no error in admission of evidence that, prior to firing at off-duty officer during attempted escape, defendant had been involved in uncharged armed robbery); People v. Magee, 135 A.D.3d 1176 (3d Dept. 2016) (reversible error in drug sale prosecution where court admitted evidence suggesting prior illegal drug activity and financial motive for charged sale; seller's motivation is nearly always financial gain); People v. Rodriguez, 48 Misc.3d 88 (App. Term, 1st Dept., 2015) (in resisting arrest prosecution, reversible error where court admitted evidence that, approximately three weeks prior to charged incident, defendant pled guilty to resisting arrest and disorderly conduct in exchange for promised sentence of conditional discharge with a conditions that defendant not be rearrested prior to sentencing; evidence was probative of defendant's motive for resisting arrest, but similarity and temporal proximity of prior conviction raised inference of criminal propensity); People v. Wisdom, 120 A.D.3d 724 (2d Dept. 2014), rev'd on

other grounds 23 N.Y.3d 970 (evidence of defendant's uncharged crimes against complainant's daughter admitted to show that defendant's rage arose from relationship with complainant's daughter and explain depth of anger evinced by brutality of defendant's attacks on complainant and her four-year-old granddaughter); People v. Murray, 116 A.D.3d 1068 (2d Dept. 2014) (no error in admission of evidence of gang membership where defense argued that defendant had no motive to assault corrections officers, and People presented evidence that assaulting police or corrections officers was way to advance status of members within gang); People v. Pagan, 88 A.D.3d 37 (1st Dept. 2011), lv denied 17 N.Y.3d 954 (evidence of defendant's membership in Latin Kings gang improperly admitted where circumstances of crime manifested shooter's motive and intent); People v. Patten, 43 A.D.3d 964, 841 N.Y.S.2d 359 (2d Dept. 2007) (no error in admission of evidence that defendant had been convicted of criminal possession and sale of marijuana in area in which shooting occurred, that this area was location where he sold drugs, and that no other individuals sold drugs in that location out of respect for him, since evidence was relevant to People's theory that shooting was motivated by defendant's desire to protect his "turf"); People v. Latimer, supra, 24 A.D.3d 807 (no error in the admission of evidence of 3 uncharged robberies where People were attempting to show defendant's reason for selecting a store clerk who appeared Indian or Middle Eastern); People v. Cain, 16 A.D.3d 288, 792 N.Y.S.2d 60 (1st Dept. 2005) (evidence regarding defendant's membership in Bloods gang and customs, hierarchies and violent practices of Bloods was relevant to defendant's motive and accessorial liability); People v. Vega, 3 A.D.3d 239, 771 N.Y.S.2d 30 (1st Dept. 2004), lv denied 2 N.Y.3d 766 (defendant's previous acts of domestic violence against victim admissible to show defendant's motive in case where there was no evidence of the perpetrator's identity or a motive for the murder, and defendant attempted to divert attention from himself by falsely stating that he had had sex with victim the evening of the murder and had ejaculated in her); United States v. LaFlam, 369 F.3d 153 (2d Cir. 2004) (evidence of drug use and drug debts was evidence of defendant's motive to pay off debts and purchase drugs with proceeds of robbery); People v. Ko, 304 A.D.2d 451, 757 N.Y.S.2d 561 (1st Dept. 2003) (where People's theory was that defendant murdered former girlfriend to placate and impress new girlfriend, court properly admitted evidence

that defendant and new girlfriend participated in knife attack against another one of his former girlfriends); People v. Bierenbaum, 301 A.D.2d 119, 748 N.Y.S.2d 563 (1st Dept. 2002), lv denied 99 N.Y.2d 626, 760 N.Y.S.2d 107 (2003), cert denied 540 U.S. 821, 124 S,Ct. 134 (2003) (evidence of defendant's marital strife probative of his motive to kill wife); People v. Weir, 120 A.D.2d 554, 502 N.Y.S.2d 49 (2d Dept. 1986) (evidence that victim's brother had robbed cocaine from defendant was relevant to defendant's motive); Matter of Jordan J., 75 Misc.3d 1223(A) (Fam. Ct., N.Y. Co.,2022) (where respondent allegedly assaulted girlfriend, assault four months after charged assault was not admissible where intent to cause physical injury could readily be established by respondent's violent acts, and respondent provided motive, i.e., his belief that complainant was cheating on him).

j. Motive Of Witness To Testify - See, e.g., People v. Harris, 26 N.Y.3d 1 (2015) (where defendant was charged with witness tampering and bribery after allegedly inducing three teenage girls to recant identification of defendant's half-brother in murder case, and murder of other murder witness caused girls to reveal to police their deal with defendant, evidence of murder of witness admissible to show state of mind of girls and provide explanation as to why they abandoned recantations and told police about deal with defendant, and why they were placed in protective custody prior to defendant's trial); People v. Adames, 52 A.D.3d 617, 859 N.Y.S.2d 725 (2d Dept. 2008) (trial court erred in allowing People to cross-examine defense witness regarding two remote domestic violence incidents involving defendant and present evidence of incidents on rebuttal where evidence did not permit non-speculative inference that witness was in fear of defendant and thus had motive to testify falsely); People v. Nurse, 5 A.D.3d 401, 771 N.Y.S.2d 906 (2d Dept. 2004), lv denied 2 N.Y.3d 803 (court properly admitted complainant's testimony that he initially lied to police about identity of assailant because he was aware of defendant's prior criminal history and membership in gang); People v. Anonymous, 275 A.D.2d 210, 712 N.Y.S.2d 482 (1st Dept. 2000) (prosecutor properly allowed to question alibi witness concerning fear of defendant); People v. Rodriguez, 143 A.D.2d 854, 533 N.Y.S.2d 331 (2d Dept. 1988), lv denied 73 N.Y.2d 859, 537 N.Y.S.2d 506 (evidence of threats and violence against witness was probative of motive to testify for defendant); People v. Beckles, 128 A.D.2d 435, 512 N.Y.S.2d

826 (1st Dept. 1987) (evidence improperly admitted to counter defense attempt to show that witness' motive for testifying was defendant's prior physical attacks on her).

k. Possession Of Weapon - Evidence of possession of a weapon connected to the crime may be admitted. See, e.g., People v. Brooks, 62 A.D.3d 511, 878 N.Y.S.2d 730 (1st Dept. 2009), lv denied 12 N.Y.3d 923 (evidence of four incidents involving possession of pistol resembling weapon used in crime linked defendant to crime, and neither number of incidents, nor level of detail elicited, was excessive) ; People v. McCarthy, 293 A.D.2d 490, 740 N.Y.S.2d 381 (2d Dept. 2002), lv denied 98 N.Y.2d 711, 749 N.Y.S.2d 9 (2002); People v. Mercado, 120 A.D.2d 619, 502 N.Y.S.2d 87 (2d Dept. 1986); People v. Dupree, 110 A.D.2d 777, 487 N.Y.S.2d 847 (2d Dept. 1985).

l. Drug Sales - Generally, evidence of other drug sales is inadmissible in a drug sale prosecution where the respondent denies any involvement in the sale. See People v. Crandall, supra, 67 N.Y.2d 111; People v. Rivera, 144 A.D.2d 258, 533 N.Y.S.2d 858 (1st Dept. 1988). However, such evidence may be admitted to counter an agency defense, see People v. Valentin, 29 N.Y.3d 150 (2017) (court may permit People to introduce evidence of prior drug sale conviction on direct case when defendant asserts agency defense supported solely by portions of People's case-in-chief); People v. Lam Lek Chong, 45 N.Y.2d 64, 407 N.Y.S.2d 674 (1978), or an entrapment defense, see People v. Mann, 31 N.Y.2d 253, 336 N.Y.S.2d 633 (1972), when possession with intent to sell is charged, see People v. Hernandez, supra, 71 N.Y.2d 233, or the other sales involved an alleged accomplice in the main case. People v. Witherspoon, supra, 156 A.D.2d 306.

3. Burden Of Proof Concerning Other Crimes - The respondent's identity as the perpetrator of the other crime(s) must be established by clear and convincing evidence. See People v. Robinson, 68 N.Y.2d 541, 510 N.Y.S.2d 837 (1986) (prior crime not adequately proved where handwriting experts disagreed over whether defendant wrote both bank hold-up notes); People v. Wandoloski, 128 A.D.2d 568, 512 N.Y.S.2d 504 (2d Dept. 1987) (defendant's admission to People's witness not sufficient); People v. Vincek, 75 A.D.2d 412, 429 N.Y.S.2d 928 (4th Dept. 1980) (inadequate proof that defendant, charged with burning his insured residence, was

responsible for previous fire in his home); People v. Harrell, 2012 WL 3020189 (Sup. Ct., Kings Co., 2012) (defendant's admission, standing alone, not sufficient); see also Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668 (1990) (acquittal on prior charge does not bar admission when evidence offered under 404(b) of Federal Rules, jury need only "reasonably conclude" that defendant committed prior acts); Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496 (1988) (court need not make preliminary finding that government has proved "other act" by preponderance of evidence before submitting it to jury); People v. Meadow, 140 A.D.3d 1596 (4th Dept. 2016), lv denied 28 N.Y.3d 933, reconsideration den'd 28 N.Y.3d 972 (Molineux evidence must be in admissible, not hearsay, form); People v. Stenson, 68 A.D.3d 419, 890 N.Y.S.2d 40 (1st Dept. 2009), lv denied 14 N.Y.3d 893 (People could use evidence related to counts that had been dismissed by motion court, with leave to re-present, due to technical gaps in proof before grand jury); People v. MacLean, 18 Misc.3d 1145(A), 859 N.Y.S.2d 897 (County Ct., Sullivan Co., 2008) (evidence of uncharged crimes of which defendant was acquitted at previous trial not admissible).

4. "Inferential" Uncharged Crimes Evidence - Defense counsel must be alert to the attempted introduction of evidence which does not on its face include references to criminal activity, but which indirectly suggests that the respondent has a police record, has committed other crimes, or is a bad person. But see People v. Miles, 49 A.D.3d 446, 853 N.Y.S.2d 548 (1st Dept. 2008), lv denied, 10 N.Y.3d 867 (testimony that defendant was arrested while in possession of six ski caps and five scarves with tags on them did not constitute uncharged crimes evidence since there was no evidence that items were stolen, or used or intended to be used for purposes of disguise); People v. Desnoyer, 49 A.D.3d 297, 853 N.Y.S.2d 58 (1st Dept. 2008), lv denied, 10 N.Y.3d 870 (detective's testimony that he observed defendant going into and out of bars and restaurants on night before arrest for jostling, and several weeks after events resulting in grand larceny charges, was not uncharged crimes or bad acts evidence regardless of whether it may have raised suspicion of casing-type behavior).

a. Membership In Gang - Compare People v. Francis, 187 A.D.3d 586 (1st Dept. 2020), lv denied 36 N.Y.3d 1056 (court erred in admitting, on redirect, evidence that witness believed defendant's friends were in Bloods gang;

defense counsel did not open door by asking why, on night of shooting, witness had pointed out defendant to victim); People v. Turner, 46 A.D.3d 847, 848 N.Y.S.2d 275 (2d Dept. 2007), lv denied, 10 N.Y.3d 817 (harmless error found where court admitted evidence that defendant and accomplice were members of "Bloods") and People v. Boxill, 111 A.D.2d 399, 489 N.Y.S.2d 366 (2d Dept. 1985), aff'd 67 N.Y.2d 678, 499 N.Y.S.2d 684 (1986) (admission of evidence was harmless error) with People v. Bailey, 32 N.Y.3d 70 (2018) (no error in admission of testimony about the Bloods gang where it explained why defendant and co-defendant were quick to join in prison fight, gang-related meaning of words co-defendant allegedly used, how members are identified, and how carrying out act of violence on behalf of member might allow another member to rise in gang's hierarchy); People v. Murray, 116 A.D.3d 1068 (2d Dept. 2014) (no error in admission of evidence of gang membership where defense argued that defendant had no motive to assault corrections officers, and People presented evidence that assaulting police or corrections officers was way to advance status of members within gang) and People v. Edwards, 295 A.D.2d 270, 743 N.Y.S.2d 872 (1st Dept. 2002), lv denied 99 N.Y.2d 557, 754 N.Y.S.2d 209 (2002) (evidence that defendant's gang engaged in random ritual slashings to earn advancement within gang established motive for defendant's unprovoked attack on fellow prisoner).

b. Nickname - See People v. Butts, 184 A.D.3d 660 (2d Dept. 2020) (prosecutor improperly referred to defendant's nickname, "Maniac"); People v. Hoffler, 41 A.D.3d 891, 837 N.Y.S.2d 750 (3rd Dept. 2007) (no error in use at trial of defendant's street name, "Murder," where it was probative in identifying defendant as perpetrator); People v. Santiago, 255 A.D.2d 63, 691 N.Y.S.2d 22 (1st Dept. 1999) (error in admission of testimony that defendant's nickname was "Mike Murder").

c. Police Fingerprint Card - See People v. Balone, 52 A.D.2d 216, 383 N.Y.S.2d 726 (4th Dept. 1976) (reversible error).

d. Possession Of Large Amount Of Money Or Drug-Related Items By Respondent Charged With Possessing or Selling Drugs - Evidence that the respondent had a large sum of money or drug-related items when he or she was arrested for drug possession is ordinarily inadmissible. Compare People v. Washington, 5 A.D.3d 703, 774 N.Y.S.2d 87 (2d Dept. 2004) (evidence that defendant possessed

$1137 improperly admitted); People v. Wesley, 154 A.D.2d 880, 546 N.Y.S.2d 46 (4th Dept. 1989) (evidence of money, scales and plastic bags was improperly admitted) and People v. Morales, 133 A.D.2d 90, 518 N.Y.S.2d 437 (2d Dept. 1987) (improper to admit evidence that defendant had "wad of money") with People v. Acevedo, 141 A.D.3d 843 (3d Dept. 2016) (evidence of defendant's possession of $5,000 cash admitted as proof of, inter alia, defendant's financial means to purchase crack).

Such evidence may be admissible when there is a charge of possession with intent to sell, but usually not where a single sale is charged. Compare People v. Ciccarelli, 161 A.D.2d 952, 557 N.Y.S.2d 525 (3rd Dept. 1990) (where single sale was involved, testimony that defendant had $700 was improperly admitted); People v. Valderama, 161 A.D.2d 820, 556 N.Y.S.2d 669 (2d Dept. 1990) (testimony concerning money was inadmissible where defendant was charged with single sale, not with conducting a narcotics business) and People v. Whitfield, 144 A.D.2d 915, 534 N.Y.S.2d 25 (4th Dept. 1988) (where single sale involved, improper to admit evidence that defendant had "wad" of money at time of alleged sale) with People v. Rivera, 157 A.D.3d 545 (1st Dept. 2018) (no error in admission of evidence that $170 in cash was recovered from defendant after alleged drug sale; People were entitled to show defendant possessed at least amount of money consistent with likely proceeds of sale of two bags of heroin, and specifying amount was not significantly more prejudicial than leaving amount unspecified); People v. Brown, 153 A.D.3d 850 (2d Dept. 2017) (no error in admission of evidence that police found $2,120 in cash in defendant's possession); People v. Panchon, 93 A.D.3d 446 (1st Dept. 2012) (in observation drug sale case, no error where court permitted People to establish that police recovered from defendant $207, including 47 single dollar bills; evidence corroborated police testimony about how sales were transacted, amount of money was not unduly prejudicial, and evidence that defendant could make change showed he had equipped himself with means of committing crime); People v. Cartagena, 9 A.D.3d 468, 780 N.Y.S.2d 288 (2d Dept. 2004) (no error in admission of evidence of defendant's possession of beeper and cell phone, and testimony by undercover that he previously used beeper or cell phone to contact drug dealers; evidence probative of defendant's intent to sell); People v. Valentine, 7 A.D.3d 275, 776 N.Y.S.2d 248 (1st Dept. 2004), lv denied 3 N.Y.3d 682

(evidence that defendant had calculator and $205, including $95 in one-dollar bills, admissible as relevant to issue of whether defendant participated in drug selling operation); People v. Carpenter, 187 A.D.2d 519, 589 N.Y.S.2d 912 (2d Dept. 1992), lv denied 81 N.Y.2d 1012, 600 N.Y.S.2d 200 (evidence that defendant wore beeper admissible where defense was that another person was culprit); People v. Calada, 154 A.D.2d 700, 546 N.Y.S.2d 681 (2d Dept. 1989) (evidence that defendant had $281 and a beeper was probative of defendant's intent to sell the drugs that were found in his possession) and People v. Milom, 75 A.D.2d 68, 428 N.Y.S.2d 678 (1st Dept. 1980) (where defendant was charged with engaging in separate transactions with several people, testimony regarding defendant's possession of $1,111 was relevant to defendant's intent to sell).

e. HIV Status - See People v. Felix-Torres, 281 A.D.2d 649, 721 N.Y.S.2d 415 (3rd Dept. 2001), appeal dism'd 97 N.Y.2d 681, 738 N.Y.S.2d 296 (People were improperly allowed to ask defendant whether he has a life-threatening disease in order to show that he had nothing to lose by committing murder).

f. General Suggestion Of Criminality - See People v. Cochrane, 195 A.D.3d 525 (1st Dept. 2021), lv denied 37 N.Y.3d 991 (no error in admission of evidence that following arrest immediately after crime, defendant told police he did not follow "rules" of New York because they did not apply to him; evidence was probative of defendant's intent); People v. Turner, 137 A.D.3d 463 (1st Dept. 2015) (defendant's statement to undercover buyer, "I can't go back to jail," improperly admitted); People v. Martinez, 95 A.D.3d 462 (1st Dept. 2012) (no error where court admitted testimony that police apprehended defendant on subway train after recognizing him from wanted poster); People v. Taylor, 46 A.D.3d 1213, 847 N.Y.S.2d 786 (3rd Dept. 2007), lv denied, 10 N.Y.3d 844 (letter defendant wrote to paramour in which he discussed desire to have her train their infant son to steal and for her to become "a deceitful criminal," and stated that "[t]his is a crime family" and "I'm in the crime lifestyle for life," referred to neither prior bad act nor uncharged crime, and was merely statement of defendant's general beliefs used to infer subjective intent).

5. Advance Ruling On Admissibility - To prevent the prosecutor from eliciting uncharged crimes evidence before the defendant can object, the court should

rule on the admissibility of the evidence out of the hearing of the jury. See People v. Ventimiglia, 52 N.Y.2d 350, 438 N.Y.S.2d 261, 266 (1981) (prior to testimony, "prosecutor should ask for a ruling out of the presence of the jury at which the evidence to be produced can be detailed to the court"); People v. Gaylord, 194 A.D.3d 1189 (3d Dept. 2021), lv denied 37 N.Y.3d 972 (in sex crime prosecution, court erred in admitting uncharged sex crime evidence without defendant having been put on notice and afforded Ventimiglia hearing); People v. Callahan, 186 A.D.3d 943 (3d Dept. 2020) (court's pretrial ruling permitted People to offer proof about instances of verbal and emotional abuse by defendant toward complainant, but court admitted evidence of physical abuse by defendant); People v. Hoey, 145 A.D.3d 118 (1st Dept. 2016), lv denied 28 N.Y.3d 1185 (prior to new trial, record should be made clear as to which Molineux exceptions court is invoking for each uncharged crime and bad act it decides to admit, and whether necessity and probative value of evidence is found to outweigh prejudice to defendant); People v. McCloud, 121 A.D.3d 1286 (3d Dept. 2014) (court may reserve decision, especially as to use of evidence on cross-examination, until court can assess testimony at trial and defenses raised); People v. Powell, 152 A.D.2d 918, 543 N.Y.S.2d 818 (4th Dept. 1989). But see People v. Huertas, 38 N.Y.3d 1129 (2022) (no error where court reserved decision on People's pre-trial request to cross-examine defendant to elicit evidence regarding underlying facts of his prior gun-related convictions, and court could later determine whether, and to what extent, defendant opened door to such inquiry); People v. Small, 12 N.Y.3d 732, 876 N.Y.S.2d 675 (2009) (defendant not entitled as a matter of law to pretrial notice or pretrial hearing; no error found where trial court granted People's mid-trial application to submit Molineux evidence in response to defendant's attempt to establish agency defense, since there is no requirement that court's inquiry or ruling occur before trial commences); People v. Strauss, 155 A.D.3d 1317 (3d Dept. 2017), lv denied 31 N.Y.3d 1122 (court did not err in modifying pretrial ruling after defense counsel's opening statement); People v. McLeod, 279 A.D.2d 372, 719 N.Y.S.2d 557 (1st Dept. 2001), lv denied 96 N.Y.2d 921, 732 N.Y.S.2d 638 (2001) (lack of advance ruling caused no prejudice); People v. Wilcox, 194 A.D.2d 820, 599 N.Y.S.2d 131 (3rd Dept. 1993) (defendant was aware of People's intention before trial). This includes cases in which the prosecutor believes that

the defendant has “opened the door” to the admission of uncharged crimes evidence. People v. Coppolo, 30 A.D.3d 207, 817 N.Y.S.2d 242 (1st Dept. 2006).

Similarly, if the accused obtains a pretrial ruling barring the use of uncharged crimes evidence, but opens the door to such evidence during trial, the prosecutor should ask for a sidebar conference and ask for an amended ruling rather than ask a question that creates risk that the evidence will be disclosed. People v. Rojas, 97 N.Y.2d 32, 735 N.Y.S.2d 470 (2001). However, the accused is not entitled to an advance ruling regarding what would open the door to uncharged crimes evidence, People v. Niver, 41 A.D.3d 961, 839 N.Y.S.2d 252 (3rd Dept. 2007), lv denied 9 N.Y.3d 924 (such a determination must be made on ad hoc basis during trial), or a ruling governing the scope of rebuttal if the accused takes the stand and testifies regarding the uncharged crimes. People v. Ardito, 231 A.D.2d 116, 662 N.Y.S.2d 103 (1st Dept. 1997).

In delinquency proceedings, the prosecution should announce before trial that it plans to offer uncharged crimes evidence. The respondent should then make a motion in limine before another judge seeking exclusion of the evidence. But see People v. Fernandez, 72 A.D.3d 303, 897 N.Y.S.2d 158 (2d Dept. 2010), aff’d 15 N.Y.3d 213 (it is presumed that judge at bench trial did not consider allegation of uncharged crime).

6. Concession Of Element By Defense - Arguably, uncharged crimes evidence should not be admitted when the defense offers to concede an element of the crime and thereby render the evidence unnecessary. See United States v. Scott, 677 F.3d 72 (2d Cir. 2012) (where defendant conceded he was at scene and argued that police had observed him engaging in innocent conduct, court finds reversible error in admission of testimony from detectives that they were familiar with defendant and had spoken to him on numerous occasions prior to arrest in this case; testimony was potentially prejudicial since it was unreasonable to think jury would not have assumed defendant's frequent contacts with police were related to bad character and criminal propensity); People v. Parker, 50 A.D.3d 330, 854 N.Y.S.2d 397 (1st Dept. 2008) (People failed to demonstrate that proffered concession would have failed to conclusively establish defendant's identity, but error was harmless); People v. Sanchez, supra, 154 A.D.2d 15 (error to admit evidence where defendant conceded the

identification issue, and the crimes were not sufficiently similar); see also People v. Hunter, 32 A.D.3d 611, 819 N.Y.S.2d 620 (3rd Dept. 2006) (prior burglary conviction improperly admitted where defense was mistaken identification and perpetrator's intent to commit crime in premises was clear); but see People v. Calderon, 171 A.D.3d 422 (1st Dept. 2019), lv denied 33 N.Y.3d 1102 (where photograph of defendant and another individual with their middle fingers extended in crude gesture was relevant to show that defendant possessed distinctive shoes seen in surveillance video, it did not matter that prosecution declined to accept defense counsel's offer to stipulate to defendant's possession of shoes); People v. Campbell, 7 A.D.3d 409, 777 N.Y.S.2d 435 (1st Dept. 2004), lv denied 3 N.Y.3d 672 (although defendant offered to concede as to certain issues, aspects of recovery of drugs from his apartment would still have been incomprehensible to jury in absence of testimony that defendant was a parolee); People v. Robinson, 251 A.D.2d 602, 674 N.Y.S.2d 767 (2d Dept. 1998), affirmed on other grounds 93 N.Y.2d 986, 695 N.Y.S.2d 49 (1999) (no error where court did not require prosecutor to accept defense concession regarding knowledge of weight of drugs).

7. Redaction Of Evidence To Avoid Prejudice - When particularly prejudicial facts can be redacted without undermining the value of the evidence, the court should grant a defense request for redaction. Compare People v. Hall, 18 N.Y.3d 122 (2011) (door opened to testimony about previous assault defendants committed together where defendant Freeman tried to minimize connection with defendant Hall; to be fair to Hall, who had not opened door, judge did not allow prosecutor to refer to conviction but did allow him to ask whether Freeman remembered "having a fight" along with Hall with another person, and, although Freeman testified that "we all [including Hall] got locked up for so-called assaulting this guy," there was no reason to believe prosecutor or judge saw that response coming, and Hall did not request that Freeman be instructed in advance not to volunteer that information); People v. Gaston, 262 A.D.2d 782, 690 N.Y.S.2d 327 (3rd Dept. 1999), lv denied 93 N.Y.2d 1002, 695 N.Y.S.2d 748 (court could have admitted evidence that defendant had refused to pay money owed to the victim without admitting evidence that drug trafficking was the reason for the loan) and United States v. Nelson, 725 F.3d 615 (6th Cir. 2013) (reversible error where court admitted anonymous 911 call containing description of

perpetrator with pistol; to extent that jury needed to hear about what prompted police action, less detailed statement would have sufficed) with People v. Frankline, 27 N.Y.3d 1113 (2016) (abuse of discretion in failing to limit scope of testimony did not substantially prejudice defendant); People v. De Los Angeles, 270 A.D.2d 196, 707 N.Y.S.2d 16 (1st Dept. 2000), lv denied 95 N.Y.2d 889, 715 N.Y.S.2d 381 (defense counsel opened door to stipulation regarding defendant's incarceration by repeatedly asking detectives whether they had seen defendant at the 2 crucial locations during a period of time when counsel knew defendant was in jail; although court initially asked counsel to agree upon a stipulation which would not mention defendant's jail status, prosecutor was correct in arguing that any stipulation which omitted reference to defendant's jail status would leave the impression that defendant voluntarily withdrew from the conspiracy).

8. Preemptive Presentation Of Evidence By Accused – Compare Ohler v. United States, 529 U.S. 753, 120 S.Ct. 1851 (2001) (defendant who elects to introduce prior crimes impeachment evidence waives right to object) with Cure v. State, 26 A.3d 899 (Md. 2011) (court rejects holding in Ohler and finds no waiver) and State v. Thang, 41 P.3d 1159 (Wash. 2002) (court holds, under State Constitution, that no waiver results since lawyer who introduced other crimes evidence only after losing battle to exclude it was not introducing evidence voluntarily).

9. Opening The Door - See People v. Woody, 214 A.D.3d 157 (1st Dept. 2023) (defense counsel did not open door where he stated he might raise certain argument but did not make affirmative declaration that he would do so regardless of admission of evidence of defendant's prior conviction; to conclude that defendant's criminal history is automatically admissible when officer's knowledge of criminal history plays part in justifying pursuit would vitiate requirement that court determine whether evidence is relevant to material issue and necessary, rather than cumulative and/or prejudicial); People v. Heiserman, 212 A.D.3d 949 (3d Dept. 2023), lv denied 39 N.Y.3d 1141 (when, on cross-examination, defense counsel left jury without context explaining how defendant's call to police about missing son led to his arrest and eventual assault on sergeant at jail, court properly ruled that defendant had opened door to questioning regarding earlier bad acts); People v. Gumbs, 195 A.D.3d 450 (1st Dept. 2021), lv

denied 37 N.Y.3d 1059 (defendant's testimony that he generally supported himself by "legal means" opened door to evidence that he sold marijuana; his testimony that there were 3 bags of marijuana in his apartment that belonged to him and someone else opened door to evidence that police found 136 bags of marijuana, 900 empty ziplock bags, and 3 scales in apartment; and his testimony about relationship with woman who was present in apartment when search warrant was executed opened door to evidence of his violent conduct toward woman); People v. Sylvester, 188 A.D.3d 1723 (4th Dept. 2020) (opening door rule allows party to explain or clarify on redirect matters that have been put in issue for first time on cross-examination, but does not provide independent basis for introducing new evidence on redirect, or afford party opportunity to offer evidence that should have been brought out on direct examination).

10. Nonjury Trial - Error in the admission of uncharged crimes evidence at a nonjury trial is more likely to be found harmless because it is presumed that the judge disregarded prejudicial aspects of the evidence. Compare Matter of Devon B., 1 A.D.3d 432, 766 N.Y.S.2d 692 (2d Dept. 2003) (error not harmless where case was "very close") with People v. Pabon, 28 N.Y.3d 147 (2016) (error in admitting investigator's opinion testimony that defendant lied during interview was harmless; presumption that judge in nonjury trial will disregard improper evidence did not apply because judge admitted testimony over proper objection, but judge's statement that he was "not taking [the investigator's] judgment" provided sufficient assurance that he was not adopting investigator's assessment); People v. Bonilla, 49 Misc.3d 132(A) (App. Term, 2d Dept., 2015); People v. Torres, 1 A.D.3d 621, 767 N.Y.S.2d 640 (2d Dept. 2003), lv denied 1 N.Y.3d 602 (2004) and People v. Khuu, 293 A.D.2d 424, 740 N.Y.S.2d 860 (1st Dept. 2002), lv denied 98 N.Y.2d 714, 749 N.Y.S.2d 11 (2002).

B. Character Evidence

1. Good Character Of Respondent

a. Generally - In order to show that it is unlikely that he or she committed the offense charged, the respondent may introduce evidence concerning his or her general reputation in the community with respect to a character trait relevant to the case. See Richardson, §4-403; People v. Barber, 74 N.Y.2d 653, 543 N.Y.S.2d 818 (1989); People v. Aharonowicz, 71 N.Y.2d 678, 529 N.Y.S.2d 736 (1988) (character

evidence is not sufficient by itself to raise reasonable doubt; it must first be believed, and then, when considered with other evidence, it may be sufficient to raise a reasonable doubt); People v. Catalan, 204 A.D.3d 1240 (3d Dept. 2022), lv denied 38 N.Y.3d 1132 (evidence of reputation for good character in workplace was not relevant to accusations of sexually abusing minors in secret); People v. Chisolm, 7 A.D.3d 728, 777 N.Y.S.2d 502 (2d Dept. 2004) (defendant's reputation for peacefulness in community was relevant to charge of gun possession); United States v. Pujana-Mena, 949 F.2d 24 (2d Cir. 1991).

b. Nature Of Good Character Evidence - The evidence must pertain to the respondent's character at a time sufficiently proximate to the time of the alleged offense. People v. Dinh Pham, 31 A.D.3d 962, 818 N.Y.S.2d 674 (3rd Dept. 2006) (evidence properly excluded where it covered the 4 years before trial but the alleged offense took place 6 years before trial). The respondent may offer testimony concerning his or her general reputation in the community, but not the opinions of those who know the respondent personally. But see Federal Rules, 405(a) (opinion testimony permitted).

The "community" need not be the area where the respondent lives; it could be the respondent's workplace, school, church, etc. See, e.g., People v. Bouton, 50 N.Y.2d 130 (1980); United States v. Parker, 447 F.2d 826 (7th Cir. 1971); but see People v. Durrant, 173 A.D.3d 890 (2d Dept. 2019) (defendant's reputation in workplace for lack of sexual impropriety was not relevant to whether he sexually abused child in secret and outside of workplace).

The respondent must establish that the witness has a basis of knowledge by virtue of the witness' connection to the respondent, the "community," and the respondent's circle of acquaintances. See Richardson, §4-403; People v. Barber, supra, 74 N.Y.2d 653 (in dissenting opinion, Judge Titone argues that the traditional rule excluding opinion testimony is archaic); People v. Ayala, 118 A.D.2d 790, 500 N.Y.S.2d 298 (2d Dept. 1986) (testimony must involve reputation before charges were made, but may be based on discussions the witness had with people after the charges were made). See also People v. Rosa, 153 A.D.2d 257, 550 N.Y.S.2d 886 (1st Dept. 1990), lv denied 75 N.Y.2d 969, 556 N.Y.S.2d 254 (defendant improperly precluded from

testifying that he had never been convicted of a crime).

The character evidence may consist of testimony establishing that the witness has heard nothing bad about the respondent's reputation. Richardson, §151; People v. Bouton, 50 N.Y.2d 130; People v. Durrant, 173 A.D.3d 890. However, an individual's personal opinion of the accused is not admissible character evidence. See, e.g., People v. Jones, 278 A.D.2d 246, 717 N.Y.S.2d 270 (2d Dept. 2000), lv denied 96 N.Y.2d 831, 729 N.Y.S.2d 451 (2001) (by giving opinion in non-responsive answer, witness did not open door to impeachment).

c. Cross-Examination Of Character Witness - The prosecutor may not ask the witness if he or she has personal knowledge of the respondent's prior bad acts. See People v. Kennedy, 47 N.Y.2d 196, 417 N.Y.S.2d 452 (1979). But see Federal Rules, 405(a). However, the witness may be asked whether he or she has heard particular negative reports or rumors that are inconsistent with the reputation described by the witness; the negative information may include specific acts. Richardson, §4-406. See, e.g., People v. Cruz, 147 A.D.2d 584, 537 N.Y.S.2d 878 (2d Dept. 1989) (prosecutor properly allowed to ask witness if he had heard about defendant's possession of marijuana at time of arrest); People v. Wharton, 138 A.D.2d 429, 525 N.Y.S.2d 711 (2d Dept. 1988) (prosecutor properly allowed to ask witnesses whether they had heard about defendant's threats against his landlady's life). The witness may not be asked whether he or she is aware that the respondent is guilty, or whether his or her testimony would change if it became clear that the respondent did, in fact, commit the crime charged. See People v. Lediard, 80 A.D.2d 237, 438 N.Y.S.2d 540 (lst Dept. 1981); People v. Lopez, 67 A.D.2d 624, 411 N.Y.S.2d 627 (1st Dept. 1979), cert denied 444 U.S. 827, 100 S.Ct. 51; United States v. Russo, 110 F.3d 948 (2d Cir. 1997). If the witness denies having heard the rumors, the prosecutor may not repeatedly question the witness in order to prove the truth of the rumors, but may test the witness' credibility with some additional questioning. See, e.g., People v. West, 271 A.D.2d 806, 708 N.Y.S.2d 478 (3rd Dept. 2000), lv denied 95 N.Y.2d 893, 715 N.Y.S.2d 386 (no error where prosecutor did not improperly seek to establish truth of report or contend that report came to People directly from source); People v. Bendell, 111 A.D.2d 87, 489 N.Y.S.2d 81 (1st Dept. 1985), rev'd 67 N.Y.2d 724, 499 N.Y.S.2d 939 (1986).

The prosecutor must have a good faith basis for the inquiries, see People v. Lediard, supra, 80 A.D.2d 237 (no good faith basis where source of information was a crime witness who was a friend of the complainant and did not testify), and may only ask about character traits addressed by defense witnesses. See People v. Lediard, supra, 80 A.D.2d 237.

d. Prosecution Rebuttal Evidence – The prosecutor may present witnesses to testify to a contrary reputation. Richardson, §4-404. See, e.g., People v. Viloria, 160 A.D.2d 499, 554 N.Y.S.2d 163 (1st Dept. 1990) (error to admit testimony that sex crime defendant was "fresh, and...had wandering hands"). The prosecutor may prove any juvenile delinquency finding which tends to negate the character trait or quality attributed to the respondent. See FCA §344.1(2).

2. Character Of Victim Where Justification Defense Is Raised - In connection with a justification defense, the respondent may prove the victim's general reputation for violence, or specific acts against third persons, if the respondent was aware of the reputation or acts prior to the time of the offense charged. Such evidence can help establish the respondent's reasonable fear of being harmed. See People v. Guerra, 39 N.Y.3d 1158 (2023) (court declines to discard rule established by People v. Miller, 39 N.Y.2d 543 that precludes admission of prior violent acts of victims where claim of justification is made unless defendant was aware of specific acts at time of assault); People v. Robert S., 52 N.Y.2d 1046, 438 N.Y.S.2d 509 (1981) (Court of Appeals rejects the prevailing view that facts of which the defendant was unaware may be admitted to show that the victim was the aggressor); People v. Miller, 39 N.Y.2d 543, 384 N.Y.S.2d 741 (1976); People v. Graham, 215 A.D.3d 998 (3d Dept. 2023) (although defendant maintained he had seen video depicting victim rapping about his use of guns two or three months before incident, video was produced approximately seven years prior to incident, was inflammatory and remote in time, posed risk of prejudice to People, and had limited probative value); People v. White, 73 A.D.2d 865, 423 N.Y.S.2d 670 (1st Dept. 1980); Richardson, §4-409. See also People v. Chevalier, 220 A.D.2d 114, 644 N.Y.S.2d 508 (1st Dept. 1996), aff'd 89 N.Y.2d 1050, 659 N.Y.S.2d 846 (1997) (defendant was entitled to introduce evidence that there was cocaine in the victim's body to help establish that defendant felt endangered by victim's "crazy" conduct);

People v. Lopez, 200 A.D.2d 767, 607 N.Y.S.2d 368 (2d Dept. 1994) (evidence of deceased's nonviolent nature admissible only if defendant was aware of it). But see Federal Rules, 404(a)(2) (unlike rule in Robert S., permits evidence of relevant character trait of victim).

C. Consciousness Of Guilt - Although it is considered to be of low probative value, see People v. Moses, 63 N.Y.2d 299, 482 N.Y.S.2d 228 (1984), evidence of behavior reflecting a consciousness of guilt may be admitted.

1. Flight Or Evasive Conduct - See, e.g., State v. Slater, 486 P.3d 873 (Wash. 2021) (missing one court hearing does not rise to level of flight evidence from which one can infer consciousness of guilt; inferring consciousness of guilt fails to consider reasons people miss court, including lack of reliable transportation, competing responsibilities, such as child care or work, disorganization, and forgetting court dates, and disproportionately impacts indigent people and people of color and negatively interprets homelessness); People v. Yazum, 13 N.Y.2d 302, 246 N.Y.S.2d 626 (1963); Decker v. State, 971 A.2d 268 (Md. 2009) (evidence that on previously scheduled trial date, defendant left courthouse before trial commenced was not too ambiguous and equivocal to be admitted as evidence of consciousness of guilt); People v. McDowell, 200 A.D.3d 502 (1st Dept. 2021) (after prosecutor, who believed defendant had come to court wearing what were likely the same sneakers worn by the perpetrator, asked court to sign order allowing prosecutor to photograph sneakers, and defendant changed into different sneakers during luncheon recess, court properly allowed evidence regarding sneakers defendant had initially been wearing); People v. Curran, 139 A.D.3d 1085 (2d Dept. 2016) (flight need not have taken place immediately following misconduct in order to constitute consciousness of guilt evidence); People v. Brown, 138 A.D.3d 1014 (2d Dept. 2016), lv denied 27 N.Y.3d 1129 (jury charge on consciousness of guilt proper where based on evidence that, after robbery, defendant went home and altered appearance by changing clothes before going out again); People v. Wells, 26 Misc.3d 143(A), 907 N.Y.S.2d 440 (App. Term, 1st Dept., 2010), lv denied 14 N.Y.3d 894 (defendant’s conduct in allegedly refusing to accompany injured mother and her hired caregiver to hospital may have been unusual, but did not constitute kind of behavior traditionally associated with consciousness of guilt); People v. Jones, 276 A.D.2d 292,

714 N.Y.S.2d 24 (1st Dept. 2000), lv denied 95 N.Y.2d 965, 722 N.Y.S.2d 482 (court properly admitted testimony that defendant suddenly and without explanation stopped reporting to his parole officer immediately following crime); People v. Baldwin, 170 A.D.2d 687, 567 N.Y.S.2d 100 (2d Dept. 1991), lv denied 77 N.Y.2d 991, 571 N.Y.S.2d 917 (officer testified that he went to places defendant was known to frequent and was told that defendant was not there or had just left); People v. Hoc, 146 A.D.2d 545, 537 N.Y.S.2d 165 (1st Dept. 1989), appeal dism'd 76 N.Y.2d 740, 545 N.Y.S.2d 115; Gilmore v. Henderson, 825 F.2d 663 (2d Cir. 1987) (defendant entitled to present evidence explaining flight); but see State v. Ingram, 951 A.2d 1000 (NJ, 2008) (trial court erred in instructing jury that it could consider defendant's voluntary absence from trial as evidence of flight/consciousness of guilt, since there was no indication defendant was attempting to avoid detection or apprehension, and an unexplained election to waive appearance is "riddled with fatal ambiguity"); People v. Smith, 214 A.D.3d 679 (2d Dept. 2023), lv denied 39 N.Y.3d 1157 (evidence that defendant robbed bank in order to fund evasion of authorities was improperly admitted where People had already established that defendant fled to Florida and Texas after charged murder); United States v. Mundy, 539 F.3d 154 (2d Cir. 2008) (court notes that where party opposing inference of consciousness of guilt objects to jury charge, courts should "think carefully whether the charge serves a useful and proper purpose or whether it simply gives court imprimatur to one side's factual contention"; that inferences to be drawn from evidence are more appropriately communicated to jury by counsel in summation than by judge's instruction on law; that judges wield great influence over juries, and, by instructing jurors about one inference to be drawn from conduct without giving equal prominence to other possible inferences, "the judge risks unwittingly to take sides in the case and to influence the jury on the finding of the verdict"; and that "[e]specially in a criminal trial, in which the defendant often declines to present evidence, the court's marshaling of the evidence often amounts substantially to a repetition of the prosecutor's summation").

2. False Alibi Or Explanation - See, e.g., People v. Levine, 65 N.Y.2d 845, 493 N.Y.S.2d 290 (1985); People v. Marin, 65 N.Y.2d 741, 492 N.Y.S.2d 16 (1985); People v. Moses, supra, 63 N.Y.2d 299 (false alibi did not adequately corroborate accomplice testimony); People v. Koltun, 163 A.D.3d 720 (2d Dept. 2018),

lv denied 34 N.Y.3d 952 (where defense was that two accomplices killed victims without defendant's authorization, no error in admission of testimony regarding defendant's failure to inform police of participation of two accomplices); People v. Jenkins, 27 A.D.3d 372, 811 N.Y.S.2d 69 (1st Dept. 2006), lv denied 7 N.Y.3d 757.

3. Bribes And Other Attempts To Influence Witness - See, e.g., United States v. Morgan, 786 F.3d 227 (2d Cir. 2015) (court erred in admitting evidence of defendant's death threats against witness since alleged threats bore no relation to charged offenses and no limiting instruction would likely mitigate risk that jury would substitute the evidence for consideration of elements of charged crimes); People v. Christiani, 96 A.D.3d 870 (2d Dept. 2012) (jury could consider, as evidence of consciousness of guilt, evidence that defendant's mother and stepfather visited witness's home after visiting defendant in jail, and that defendant told them to "stop by" and they were "hoping that [the witness] wasn't testifying"); People v. Ya-ko Chi, 72 A.D.3d 709, 898 N.Y.S.2d 619 (2d Dept. 2010) (reversible error where court admitted testimony that relative of defendant gave the witness $5000 not to testify and offered him additional money without showing that defendant was involved, and, although judge in nonjury trial is presumed to have considered only competent evidence, presumption was rebutted when further testimony on subject was permitted and elicited by court); United States v. Perez, 387 F.3d 201 (2d Cir. 2004) (evidence of defendant's attempt to get witness to make false statement to investigators was admissible); People v. Jean-Louis, 272 A.D.2d 626, 709 N.Y.S.2d 101 (2d Dept. 2000), lv denied 95 N.Y.2d 890, 715 N.Y.S.2d 382 (defendant's letters asking accomplice to take Fifth Amendment on stand were properly admitted); People v. Singleton, 121 A.D.2d 752, 504 N.Y.S.2d 167 (2d Dept. 1986); Gilmore v. Henderson, supra, 825 F.2d 663.

4. Threats Against Witness - See, e.g., People v. Rivera, 160 A.D.2d 267, 553 N.Y.S.2d 707 (1st Dept. 1990).

5. Behavior Of Respondent When Arrested - See, e.g., People v. Basora, 75 N.Y.2d 992, 557 N.Y.S.2d 263 (1990) (smiling was too ambiguous to constitute evidence that defendant believed he could beat charge); People v. Rodriguez, 195 A.D.3d 491 (1st Dept. 2021), lv denied 37 N.Y.3d 995 (no violation of any constitutional right where People elicited and commented on defendant's refusal to

give police certain clothing he was wearing at time of arrest); People v. Ramirez, 180 A.D.3d 811 (2d Dept. 2020) (evidence that defendant resisted arrest six months after charged incident, after violating order of protection held by one of the complainants, was too far removed from charged incident to constitute consciousness of guilt evidence); People v. Joe, 146 A.D.3d 587 (1st Dept. 2017), lv denied 29 N.Y.3d 1081 (no error in admission of evidence that, in connection with arrest on unrelated trespass charges, defendant fled from and then struggled with officer, gave false name, and refused to submit to fingerprinting or furnish address; defendant's response was disproportionate and suggested concern that he was going to be arrested for shooting); People v. Cunny, 163 A.D.3d 708 (2d Dept. 2018), lv denied 32 N.Y.3d 1063 (defendant's statements threatening detective were relevant to show why no lineup took place and absence of police wrongdoing in decision not to conduct lineup); People v. Nelson, 133 A.D.3d 536 (1st Dept. 2015) (evidence that defendant refused to give name in response to pedigree questioning, refused to be fingerprinted, and was agitated upon being arrested, was probative of consciousness of guilt); People v. Demagall, 114 A.D.3d 189, 978 N.Y.S.2d 416 (3d Dept. 2014), lv denied 23 N.Y.3d 1035 (People improperly permitted to present testimony regarding defendant's post-arrest request for lawyer to rebut insanity claim); People v. Singleton, 102 A.D.3d 517 (1st Dept. 2013), lv denied 21 N.Y.3d 1020 (no error in admission of consciousness of guilt evidence that, when stopped in Maryland for possession of illegal knife several months after charged shooting, defendant gave false names, fled, and struggled with officer; jury could have reasonably found that defendant was primarily motivated by fear of prosecution for shooting rather than fear of prosecution for possessing knife); People v. Flores, 14 A.D.3d 351, 789 N.Y.S.2d 105 (1st Dept. 2005), lv denied 4 N.Y.3d 830 (charge properly given to jury where drug sale/possession defendant abandoned paper bag containing heroin at approach of police and struggled with police before being handcuffed); People v. Graziosa, 10 Misc.3d 128(A), 809 N.Y.S.2d 483 (App. Term, 1st Dept. 2005) (no error in admission of evidence that defendant was smiling and appeared "happy," at time of and after arrest, to contradict justification defense).

6. Refusal To Appear In Lineup Or Consent To Search - State v. Glover, 89 A.3d 1077 (Me. 2014) (State improperly permitted to introduce purported

consciousness of guilt evidence that defendant exercised his Fourth Amendment right to refuse to voluntarily submit to warrantless collection of a DNA sample); People v. Eberhart, 7 Misc.3d 1027(A), 801 N.Y.S.2d 239 (County Ct., Ulster Co., 2005) (although defendant's refusal to appear in court-ordered lineup may be admitted, court denies People's application where identity was not in issue because defendant admitted presence at crime scene).

7. Apology For Offense - People v. McLaurin, 27 A.D.3d 399, 811 N.Y.S.2d 401 (1st Dept. 2006), lv denied 7 N.Y.3d 815.

8. Consultation With Attorney - State v. Angel T., 973 A.2d 1207 (Conn. 2009) (prosecutor violates federal due process clause by eliciting and arguing about evidence tending to suggest defendant's contact with attorney prior to arrest); People v. James, 173 A.D.3d 1207 (2d Dept. 2019), lv denied 34 N.Y.3d 1017 (court erred in admitting defendant's statement to mother that, with assistance of attorney, he could "get around" incriminating evidence); People v. Suero, 159 A.D.3d 656 (1st Dept. 2018) (admission of text exchange after murder in which defendant indicated he needed money "just in case for a lawyer" was infringement of right to counsel).

9. Conduct Of Others - See, e.g., People v. Council, 52 A.D.3d 222, 859 N.Y.S.2d 152 (1st Dept. 2008), lv denied, 11 N.Y.3d 735 (given defendant's relationship with co-defendants and overlap of evidence, no error in admission against defendant of evidence that witness was threatened only by co-defendants); People v. Almestica, 288 A.D.2d 483, 733 N.Y.S.2d 247 (2d Dept. 2001) (evidence that defendant's sisters harassed prosecution witness admitted); People v. Lessie, 11 Misc.3d 1088(A), 819 N.Y.S.2d 850 (Sup. Ct., Kings Co., 2006) (finding sufficient evidence connecting acts to defendant, court admits evidence that defendant's witnesses threatened police witness).

10. Intent To Plead Guilty - People v. Roberts, 203 A.D.3d 1465 (3d Dept. 2022) (reversible error where court admitted jail phone call in which defendant stated that he might as well "cop out to … the five years or whatever").

D. Consciousness Of Innocence - See People v. Bragg, 161 A.D.3d 998 (2d Dept. 2018) (no error where court precluded defense counsel from arguing in summation that testimony of detective that defendant agreed to provide buccal swab of

DNA for testing demonstrated defendant's consciousness of innocence); United States v. Goffer, 721 F.3d 113 (2d Cir. 2013) (no error in exclusion of evidence of defendant's rejection of plea offer offered to show consciousness of innocence, since discussion at length of collateral consequences of conviction would cause complex trial to gain additional and unnecessary dimensions); People v. Ross, 56 A.D.3d 380, 868 N.Y.S.2d 185 (1st Dept. 2008) (trial court did not err in refusing to allow defendant to offer testimony that, after consultation with his attorney, he agreed to comply with the prosecutor's request for a DNA sample without requiring the prosecutor to make a discovery motion; defendant's consent to discovery authorized by law was devoid of probative value); People v. Torres, 289 A.D.2d 136, 734 N.Y.S.2d 174 (1st Dept. 2001) (trial court properly excluded evidence of defendant's cooperation with the police).

E. Habit - See People v. Megnath, 164 A.D.3d 834 (2d Dept. 2018), lv denied 32 N.Y.3d 1127 (testimony that defendant generally put garbage in front of home in Brooklyn at 8:30 a.m. not admissible as alibi evidence regarding murder that occurred at about 8:00 a.m. in Queens since it did not establish repetitive pattern sufficient to be predictive of defendant's conduct).

VII. Demonstrative Evidence

A. Relevance - Before an item of contraband or other physical evidence may be admitted, the circumstances surrounding the recovery of the evidence must establish a connection to the charges against the respondent. See, e.g., People v. Pauling, 57 A.D.3d 318, 869 N.Y.S.2d 438 (1st Dept. 2008) (in burglary prosecution in which defendant and two others were accused of impersonating police officers and displaying what appeared to be police shields, three purported police shields recovered from car and apartment of separately tried co-defendant approximately six months after crime was properly admitted); People v. Thatch, 1 A.D.3d 213, 767 N.Y.S.2d 223 (1st Dept. 2003), lv denied 1 N.Y.3d 635 (2004) (pistols discovered day after crime in house where crime occurred were properly admitted where jury could readily draw inference that they were the pistols used in the crime); People v. Foss, 267 A.D.2d 505, 700 N.Y.S.2d 499 (3rd Dept. 1999), lv denied 94 N.Y.2d 947, 710 N.Y.S.2d 3 (2000) (court erred in admitting earring recovered from defendant where identifying witness testified that it "looked like" earring owned by victim); People v. Wyman, 136 A.D.2d 755, 524 N.Y.S.2d

90 (2d Dept. 1988) (where victim was acutely aware of denominations of stolen money, currency found on defendant and 2 accomplices was properly admitted); People v. Mooney, 135 A.D.2d 578, 521 N.Y.S.2d 797 (2d Dept. 1987) ($10 bill was properly admitted where robbery complainant was "pretty positive" that he had given defendant a $10 bill, and officer who witnessed crime testified that $10 was separated from the rest of defendant's money); People v. Williams, 124 A.D.2d 616, 507 N.Y.S.2d 760 (2d Dept. 1986) (shotgun thrown from van in which defendant was passenger, and recovered at location where it had been thrown, was properly admitted); People v. Cunningham, 116 A.D.2d 585, 497 N.Y.S.2d 442 (2d Dept. 1986) (gun was properly admitted where complainant testified that it "looks like" the one held by the robber, and, although the gun was found at the arrest scene the morning after defendant was apprehended, the police had seen defendant moving his arms and legs about prior to the arrest); People v. Brown, 115 A.D.2d 610, 496 N.Y.S.2d 272 (2d Dept. 1985) (court improperly admitted piece of rug upon which defendant had allegedly ejaculated in absence of evidence that it was, in fact, the rug involved in the crime); People v. Matias, 112 A.D.2d 897, 493 N.Y.S.2d 318 (1st Dept. 1985), aff'd 67 N.Y.2d 1032, 503 N.Y.S.2d 323 (1986) (knife case recovered from defendant's apartment properly admitted so jury could decide whether knife used in attack could have fit into case; the knife was described by a witness, and other knives found in the apartment did not fit). See also People v. Reid, 298 A.D.2d 191, 748 N.Y.S.2d 20 (1st Dept. 2002), lv denied 99 N.Y.2d 563, 754 N.Y.S.2d 216 (2002) (evidence that pistol used in crime had been purchased by person whose sister lived in building adjacent to defendant’s residence was properly admitted)

B. Chain Of Custody

1. Generally - It must be shown that the evidence is the same item that was involved in the crime and has not been materially altered. Fungible evidence such as drugs or money can be authenticated by way of evidence of a complete chain of custody. However, if there are reasonable assurances of the identity and unchanged condition of the evidence and no evidence of tampering, testimony by certain persons who handled the evidence, such as a property clerk, as well as proof of the day-to-day location of the evidence, may be excused. See People v. Julian, 41 N.Y.2d 340, 392 N.Y.S.2d 610 (1977); People v. Connelly, 35 N.Y.2d 171, 359 N.Y.S.2d 266 (1974);

People v. Newman, 129 A.D.2d 742, 514 N.Y.S.2d 501 (2d Dept. 1987).

2. Drugs And Other Lab-Tested Evidence - See, e.g., People v. Julian, supra, 41 N.Y.2d 340 (since seals on container had not been altered, 3-year period during which the precise whereabouts of the evidence were not known did not ruin chain); People v. Malone, 14 N.Y.2d 8, 247 N.Y.S.2d 641 (1964) (chain adequate where State Trooper took blood sample home and kept it locked up before mailing it to lab the next day); People v. Esposito, 70 Misc.3d 74 (App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 2020), lv denied 36 N.Y.3d 1119 (gap in chain between point where nurse delivered vials to hospital laboratory and when officer obtained vials not fatal where testimony provided reasonable assurances of identity and unchanged condition of vials of defendant's blood); People v. Singletary, 176 A.D.3d 1237 (2d Dept. 2019), lv denied 34 N.Y.3d 1082 (no error in admission of narcotics and drug paraphernalia notwithstanding absence of testimony from evidence clerk from lab who transferred evidence from locker to main vault); People v. Feola, 154 A.D.3d 638 (1st Dept. 2017) (evidence established adequate chain of custody notwithstanding unavoidable destruction of packaging for DNA swabs by time of trial); People v. Gamble, 135 A.D.3d 1078 (3d Dept. 2016) (sufficient chain of custody despite lack of testimony regarding period during which State Police laboratory possessed gun for testing where serial number constituted unique marking that would render material alteration apparent); People v. Alomar, 55 A.D.3d 617, 865 N.Y.S.2d 311 (2d Dept. 2008) (People's failure to call individual or individuals who transported evidence between laboratories was relevant to weight but not admissibility of evidence); People v. Carter, 31 A.D.3d 1056, 818 N.Y.S.2d 854 (3rd Dept. 2006) (no chain of custody problem arose from prosecutor's possession of drugs for 3 days prior to trial); People v. Buckery, 20 A.D.3d 821, 798 N.Y.S.2d 788 (3rd Dept. 2005) (chain of custody sufficient even though drugs recovered at scene were described as "chunky or colored" while drugs tested were described as "powder"); People v. Lanza, 299 A.D.2d 649, 749 N.Y.S.2d 618 (3rd Dept. 2002), lv denied 100 N.Y.2d 563, 763 N.Y.S.2d 820 (2003) (fact that report referred to crack as "powder," while crack is a hard chunky substance, went to weight rather than admissibility); People v. Pacheco, 274 A.D.2d 746, 711 N.Y.S.2d 566 (3rd Dept. 2000) (chain adequate where People failed to elicit testimony from informant regarding receipt

of drugs from defendant and delivery of them to investigator); People v. Matos, 255 A.D.2d 156, 681 N.Y.S.2d 236 (1st Dept.), lv denied 93 N.Y.2d 974, 695 N.Y.S.2d 60 (1999) (chain sufficient despite absence of chemist who first analyzed drugs where officer who vouchered drugs and second chemist testified); People v. Flores-Ossa, 234 A.D.2d 315, 652 N.Y.S.2d 44 (2d Dept. 1996), lv denied 90 N.Y.2d 857, 661 N.Y.S.2d 184 (1997) (chain adequate despite absence of officer who drove evidence from site of seizure to office where it was examined); Matter of Shaheem F., 229 A.D.2d 436, 644 N.Y.S.2d 800 (2d Dept. 1996) (chain adequate despite lack of testimony by officer who recovered the evidence since another officer testified that he was told by the other officer which items were taken from respondent and which were taken from the accomplice, and that he kept the items separate); People v. Espino, 208 A.D.2d 556, 616 N.Y.S.2d 782 (2d Dept. 1994), lv denied 84 N.Y.2d 1031, 623 N.Y.S.2d 187 (1995) (chain inadequate where undercover bought white powdery substance, but brownish-white and hard substance was offered at trial); People v. Rivera, 184 A.D.2d 153, 592 N.Y.S.2d 697 (1st Dept. 1993) (chain inadequate where officer who received drugs from detective may have commingled envelopes before returning drugs to detective); People v. Miller, 174 A.D.2d 901, 571 N.Y.S.2d 597 (3rd Dept. 1991) (chain inadequate where drugs from separate sales may have been commingled in undercover's pocket, and a different officer sealed some of the drugs); People v. Brooks, 172 A.D.2d 549, 568 N.Y.S.2d 137 (2d Dept. 1991) (chain inadequate where neither the undercover who bought the drugs, nor the officer who took them to the precinct, identified the vials at trial); People v. Sarmiento, 168 A.D.2d 328, 565 N.Y.S.2d l (1st Dept. 1990), aff'd 77 N.Y.2d 976, 571 N.Y.S.2d 906 (1991) (although vials did not contain officer's initials, the writing could have been rubbed off in handling); People v. Steiner, 148 A.D.2d 980, 539 N.Y.S.2d 216 (4th Dept. 1989) (chain inadequate where condition of drugs as described by chemists was different from description of police witnesses, and first of 2 chemists who analyzed drugs did not initial bag and was not called as a witness); People v. Ramos, 147 A.D.2d 718, 538 N.Y.S.2d 327 (2d Dept. 1989) (pap smear slides were properly admitted where smear was identified prior to analysis with victim's name and number, and emergency room nurse's initials appeared on slides); People v. Mayas, 137 A.D.2d 836, 525 N.Y.S.2d 298 (2d Dept. 1988) (chain adequate where each officer

who obtained drugs testified that he placed drugs in a numbered envelope that was sealed, signed and delivered to the property clerk, and chemists testified that sealed and signed envelopes were received from clerk); People v. Piazza, 121 A.D.2d 573, 503 N.Y.S.2d 623 (2d Dept. 1986) (chain adequate where chemist and officer who vouchered property testified, but desk sergeant who took property from arresting officer did not); People v. Heiss, 113 A.D.2d 953, 493 N.Y.S.2d 850 (2d Dept. 1985) (chain inadequate where neither the testifying co-defendant who bought the drugs from defendant, nor the People's confidential informant, testified to the unaltered condition of the drugs); People v. Jiminez, 100 A.D.2d 629, 473 N.Y.S.2d 593 (2d Dept. 1984) (chain adequate where the undercover and the officer who took the drugs to the police lab testified, and, although the first chemist did not testify, the second chemist testified along with a lab supervisor who provided a chronology of dates from the lab records and described standard procedures for handling samples); People v. Maring, 54 A.D.2d 1129, 388 N.Y.S.2d 804 (4th Dept. 1976) (change in condition not fatal if People prove that test did not change chemistry of drugs); People v. Bennett, 47 A.D.2d 322, 366 N.Y.S.2d 639 (1st Dept. 1975) (chain broken where People did not call officer who drove defendant's car to precinct prior to the recovery of contraband from the car); Durham v. Melly, 14 A.D.2d 389, 221 N.Y.S.2d 366 (3rd Dept. 1961) (chain inadequate where officer failed to testify where, or with whom, he left blood sample at hospital lab); People v. Levy, 20 MIsc.3d 1145(A), 873 N.Y.S.2d 236 (Dist. Ct., Nassau Co., 2008) (People failed to establish chain of custody with respect to urine sample removed from urine container and tested where People failed to call witnesses to explain what happened with test tube samples after they were placed into refrigerator or testimony regarding testing of samples; People merely called witness who testified how urine tests are generally performed, but had no personal knowledge regarding how tests were actually performed).

3. Other Physical Evidence - See, e.g., People v. Ketteles, 62 A.D.3d 902, 879 N.Y.S.2d 208 (2d Dept. 2009), lv denied 13 N.Y.3d 746 (failure to voucher MetroCard did not prevent People from establishing that MetroCard purchased with complainant's debit card and MetroCard recovered from defendant were one and the same where officer who seized wallet from defendant maintained possession of it until

he turned it over to other officer, who recorded serial number of MetroCard and placed card in case folder); People v. Harris, 195 A.D.2d 479, 599 N.Y.S.2d 862 (2d Dept. 1993), lv denied 82 N.Y.2d 896, 610 N.Y.S.2d 163 (error to admit $1570 where serial numbers were not recorded and money was not in same envelope used for vouchering); People v. Scott, 124 A.D.2d 684, 508 N.Y.S.2d 59 (2d Dept. 1986) (defendant's wallet admissible where it was found, and then identified at trial, by victims; however, there was no testimony showing that certain items were in the wallet when it was recovered); People v. Capers, 105 A.D.2d 842, 482 N.Y.S.2d 37 (2d Dept. 1984) (despite gap in chain, gun was properly admitted where officer initialed it and testified that it was the same gun he recovered); People v. Walker, 64 A.D.2d 540, 406 N.Y.S.2d 811 (1st Dept. 1978) (chain inadequate where officer who seized knife was not called).

C. Photographs And Diagrams - Photographs are admissible when the physical appearance of a person, place or thing is at issue. Proper authentication may be provided by a witness who is familiar with the subject of the photograph, and testifies that the photograph is a fair and accurate representation of the person, place or thing at a time relevant to the case. The photographer need not be called to testify. Richardson, §4-212. See People v. Pendell, 33 N.Y.3d 972 (2019), aff'g 164 A.D.3d 1063 (3d Dept. 2018) (foundation sufficient where victim authenticated, as photographer and subject, photos she took of herself and provided to defendant; victim also confirmed she was depicted in photos taken by defendant; and government agents testified about process utilized to extract photos from defendant's cell phone and computer); People v. Nevado, 22 A.D.3d 383, 802 N.Y.S.2d 171 (1st Dept. 2005) (although photos were taken under different lighting conditions and when there were fewer leaves on trees, differences went to weight rather than admissibility); People v. Whiten, 306 A.D.2d 105, 759 N.Y.S.2d 870 (1st Dept. 2003), lv denied 100 N.Y.2d 600, 766 N.Y.S.2d 176 (2003) (no error in admission of photographs taken with lens replicating degree of magnification provided by officer's binoculars, and taken from a slightly different position); People v. Lenihan, 30 Misc.3d 289, 911 N.Y.S.2d 588 (Sup. Ct., Queens Co., 2010) (given ability to "photo shop" on computer, defendant could not authenticate photographs his mother downloaded from "MySpace"; defendant did not know who took photographs or posted them on "Myspace"); see also People v. McCoy, 89 A.D.3d 1218 (3d Dept. 2011), lv

denied 18 N.Y.3d 960 (photos retrieved from cell phone properly authenticated where evidence established how photos were retrieved from phone and how data in phone could not have been altered after phone was recovered by police).

The admissibility of photographs is commonly placed at issue when particularly graphic and gruesome photographs are offered to show a victim's injuries, and the defense argues that the probative value of the photographs is outweighed by the risk of prejudice to the respondent. Richardson, §4-206. See, e.g., People v. Wood, 79 N.Y.2d 958, 582 N.Y.S.2d 992 (1992) (admission of 44 photos and color slides of murder victim upheld); People v. Bell, 63 N.Y.2d 796, 481 N.Y.S.2d 324 (1984) (no abuse of discretion where court admitted photos depicting victim's wounds and a knife embedded in her back). Obviously, such an argument carries more weight when made by the defendant in a jury trial.

Photographs of the respondent's injuries are sometimes offered to support a justification defense or an argument that a confession was involuntary, or to impeach a police officer or some other witness whose dislike for the respondent, or whose potential civil or criminal liability for the respondent's injuries, provides a motive to lie. See, e.g., Matter of Edward F., 154 A.D.2d 464, 546 N.Y.S.2d 630 (2d Dept. 1989) (photos improperly excluded where defendant claimed officer beat him up); People v. Jones, 148 A.D.2d 547, 538 N.Y.S.2d 876 (2d Dept. 1989) (where prosecution witness assaulted defendant as he fled from scene, defendant was improperly precluded from informing jury of the extent of his injuries).

The prosecution may present an arrest photo where the accused has changed his/her appearance since the time of the crime and arrest. People v. Schultz, 128 A.D.3d 989 (2d Dept. 2015), lv denied 26 N.Y.3d 1011.

Diagrams, apartment and street plans, maps and the like are also admissible when the description of a scene or object is relevant. Richardson, §4-211. A proper foundation can be established through testimony establishing: 1) that the witness is familiar with the scene depicted; 2) that the witness was familiar with the scene on the relevant date; and 3) that the diagram or other exhibit is reasonably accurate. It is also useful to establish that the exhibit will be useful in helping the witness explain his or her testimony. Thomas A. Mauet, Trial Techniques, §6.3(4).

D. Audio and Video Recordings - Recorded conversations and/or events are admissible when there is clear and convincing evidence establishing that the recording is genuine and a complete and accurate reproduction. This foundation may be established through testimony by a participant or witness, or through testimony by such a person, combined with testimony by an expert, establishing that the recording is accurate and has not been altered. Proof of a chain of custody is not required, but can lay a foundation by itself if it includes testimony concerning the making of the recording and the identity of the speakers, and testimony by those who have handled the recording concerning its custody and unchanged condition. People v. Ely, 68 N.Y.2d 520, 510 N.Y.S.2d 532 (1986); Richardson, §4-213; see Grucci v. Grucci, 20 N.Y.3d 893 (2012) (no error in exclusion of tape recording where plaintiff's attorney offered only to have witness identify voices on tape and state "whether or not the tape recording [was] fair and accurate," and nearly nine years had elapsed since conversation allegedly took place; dissenting judges cite People v. Ely); People v. Goldman, 35 N.Y.3d 582 (2020) (YouTube video authenticated where defendant did not deny being in video; video depicted defendant and two others involved in shooting in attire similar to what they were wearing on night of homicide; given background in video, it was evidently filmed in defendant's neighborhood; there was evidence of when video was made, including defendant's admission of future intent to make video the next morning; and video was uploaded to YouTube close in time to homicide); People v. Robinson, 187 A.D.3d 1216 (2d Dept. 2020) (surveillance video and stills properly authenticated where detective testified that he copied video from surveillance system onto discs and verified that cameras and recording equipment were in working order; confirmed that date and time stamp were accurate; and testified as to chain of custody and that he obtained stills from surveillance footage); People v. Mercedes, 172 A.D.3d 599 (1st Dept. 2019), lv denied 33 N.Y.3d 1071 (no error in admission of brief portion of surveillance footage that could not be authenticated where evidence, including relationship of videotapes at issue to admitted videotapes, supported inference that videotapes at issue depicted relevant events; any uncertainty went to weight and not admissibility); People v. Nunez, 63 Misc.3d 150(A) (App. Term, 2d, 11th & 13th Jud. Dist., 2019), lv denied 34 N.Y.3d 935 (proper foundation for admission of 911

recordings not laid where technician who testified that recordings were "fair and accurate" and that she had listened to "original" recordings was not technician who had "made the extractions of the 911 calls," was not "the person who made the e-mail job to the DA's office," and never accessed or listened to calls contained in police database); People v. Franzese, 154 A.D.3d 706 (2d Dept. 2017), lv denied 30 N.Y.3d 1105 (no error in admission of YouTube video where it was authenticated by YouTube certification indicating when video was posted online, by officer who viewed video at or about time it was posted, by defendant's admissions about video, and by appearance, contents, substance, internal patterns, and other distinctive characteristics); People v. Vasser, 97 A.D.3d 767 (2d Dept. 2012), lv denied 19 N.Y.3d 1105 (People established foundation for admission of recordings of defendant's telephone conversations at Rikers Island through testimony of individual familiar with record-keeping practices of Department of Corrections); People v. Collins, 90 A.D.3d 1069 (2d Dept. 2011), lv denied 18 N.Y.3d 993 (recording of telephone call made by defendant while incarcerated properly admitted where senior program specialist for Department of Corrections testified that he was familiar with recording system, that prison routinely recorded inmates' calls, and that recordings were housed in computer system and identified by inmate's unique book and case number); People v. Wemette, 285 A.D.2d 729, 728 N.Y.S.2d 805 (3rd Dept. 2001), lv denied 97 N.Y.2d 689, 738 N.Y.S.2d 305 (testimony by "expert" regarding whether camera had been focused or videotape edited rejected where defendant failed to establish witness' training or experience in determining whether videotapes have been manipulated through focusing or editing); People v. Buchanon, 186 A.D.2d 864, 588 N.Y.S.2d 933 (3rd Dept. 1992), lv denied 81 N.Y.2d 882, 597 N.Y.S.2d 943 (defendant's voice identified by witness who had spoken to him on many occasions); see also Mauet, Trial Techniques, §6.3(8) (operator of device should state experience and qualifications and that device had been tested and was in good working order, and, as appropriate, that after recording was made, he/she replayed tape and can say that it was accurate recording and was labeled and sealed, placed in secure storage to guard against tampering and later removed for trial in same condition, and that device in court is in normal operating condition and capable of accurately reproducing sounds or images on tape).

Regarding technically compromised or partially intelligible recordings, see State v. Nantambu, 113 A.3d 1186 (N.J. 2015) (if recording is partially intelligible and has probative value, and court finds it to be reliable evidence, it is admissible even though substantial portions are inaudible; whether omission renders recording inadmissible depends on extent to which the omission adversely affects evidentiary purpose or purposes for which recording has been offered, and, when probative value is substantially outweighed by risk of undue prejudice, recording should be excluded); People v. Davis, 28 N.Y.3d 294 (2016) (no error in use of DVD of clips culled from building surveillance system despite overlapping images where authenticating witness, who maintained surveillance system, testified about how images may overlap); People v. McCaw, 137 A.D.3d 813 (2d Dept. 2016) (no error in admission of audible portions; no danger jury would be left to speculate as to what transpired); United States v. Mergen, 764 F.3d 199 (2d Cir. 2014) (unless unintelligible portions are so substantial as to render recording as a whole untrustworthy, recording is admissible).

In People v. Joyner, 240 A.D.2d 282, 660 N.Y.S.2d 398 (1st Dept. 1997), the Court held that a tape recording had to be authenticated even though only individual statements were being offered to impeach the defendant. But see People v. Novak, 40 Misc.3d 1239(A) (County Ct., N.Y. Co., 2013) (when participant in tape-recorded conversation testifies that tape fairly and accurately represents portion of conversation, it need not be shown that conversation was entirely recorded if portion of conversation was not taken out of context); People v. Curcio, 169 Misc.2d 276, 645 N.Y.S.2d 750 (Sup. Ct., St. Lawrence Co., 1996) (court agrees to admit edited videotape). However, it has been held that where a tape is being offered because it is relevant to the crime charged, but not to prove the details of the transaction it records, there is no need to establish that the recording is an accurate portrayal of the events. People v. Velez, 190 Misc.2d 206, 737 N.Y.S.2d 819 (Sup. Ct., Queens Co., 2002).

To aid the court, an accurate transcript of a recording may be admitted. See, e.g., People v. Blanco, 162 A.D.2d 540, 556 N.Y.S.2d 735 (2d Dept. 1990), lv denied 76 N.Y.2d 1019, 565 N.Y.S.2d 769 (inadequate foundation where witness to conversation testified that transcriptions were fair and accurate, but did not state that they were true, accurate and complete); People v. Batista, 183 Misc.2d 203, 703 N.Y.S.2d 885 (Sup.

Ct., N.Y. Co., 2000) (court admits transcripts of conversations in Spanish where, although court interpreters could not understand and translate tape, interpreter employed by Office of the Special Prosecutor was able to prepare transcript); but see United States v. Chavez, 976 F.3d 1178 (10th Cir. 2020) (admission of transcript of drug buy with translations of Spanish portion into English, without admitting recording from which it was made, violated best evidence rule). However, any portion of a recording which is substantially inaudible, and the corresponding portion of a transcript, are inadmissible. See, e.g., People v. Carrasco, 125 A.D.2d 695, 509 N.Y.S.2d 879 (2d Dept. 1987) (tape should be sufficiently audible so that independent third party can listen to it and produce a transcript); People v. Brown, 104 A.D.2d 1044, 481 N.Y.S.2d 114 (2d Dept. 1984).

It should be noted that a tape recording may be excludable pursuant to CPLR §4506, which prohibits the admission of the products of unlawful eavesdropping and recordings made without the consent of a party. See, e.g., People v. Bartholomew, 150 A.D.3d 1138 (2d Dept. 2017) (no eavesdropping under Penal Law where defendant's 14-year-old daughter secretly recorded her three short telephone conversations with defendant and their longer conversation in defendant's car, and, in any event, she could consent to recording); People v. Jackson, 125 A.D.3d 1002 (2d Dept. 2015) (defendant's consent to recording by prison authorities of telephone conversations with girlfriend inferred since defendant had been informed that calls would be recorded); Locke v. Aston, 31 A.D.3d 33, 814 N.Y.S.2d 38 (1st Dept. 2006) (New York law governed surreptitious taping of phone conversation by California resident who called New York from California); People v. K.B., 43 Misc.3d 478 (Sup. Ct., Kings Co., 2014) (14-year-old sex crime complainant who recorded conversation with defendant could give effective consent under §4506); Matter of I.K. v. M.K., 194 Misc.2d 608, 753 N.Y.S.2d 828 (Sup. Ct., N.Y. Co., 2003) (court excludes tape recordings father made of conversations between mother and children; father could not consent on behalf of children); People v. Heffner, 187 Misc.2d 617, 726 N.Y.S.2d 211 (County Ct., Renssalaer Co., 2001) (tape suppressed where victim's parents surreptitiously recorded defendant's conversations with victim); People v. Qike, 182 Misc.2d 737, 700 N.Y.S.2d 640 (Sup. Ct., Kings Co., 1999) (court excludes tape offered by defendant); see also

People v. Ogburn, 46 A.D.3d 1018, 846 N.Y.S.2d 818 (3rd Dept. 2007), lv denied, 10 N.Y.3d 769 (recording of defendant's incriminating telephone conversation during call he placed from New York to Vermont raises procedural and evidentiary issues that are governed by laws of forum).

New York courts have held that the parent of a minor may provide "vicarious consent" to recording. People v. Badalamenti, 27 N.Y.3d 423 (2016) (definition of consent, in context of "mechanical overhearing of a conversation" pursuant to PL §250.00(2) and admissibility of evidence under CPLR 4506 includes vicarious consent given on behalf of minor child; "narrowly tailored" test requires court to determine at pretrial hearing that parent or guardian had good faith belief that recording was necessary to serve best interests of child and that there was objectively reasonable basis for belief); People v. Clark, 19 Misc.3d 6, 855 N.Y.S.2d 809 (App. Term, 2d & 11th Jud. Dist., 2008), lv denied, 10 N.Y.3d 861 (decision should not be interpreted as holding that minor alone can never provide requisite consent to record conversation at which he or she is present or as permitting parents to tape any conversation involving their child); D.K. v. A.K., 60 Misc.3d 1219(A) (Fam. Ct., Kings Co., 2016) (mother had no good faith, objectively reasonable basis for believing child's best interest required recording where child had had lengthy conversations on telephone and mother perceived changes in child's behavior, but child said she was speaking with two friends and mother did not confront child with evidence to the contrary).

The court also has authority to admit a videotape of the crime scene if it will assist the fact-finder in considering the issues in the case. See, e.g., People v. Timothy West, 218 A.D.3d 798 (2d Dept. 2023) (court had basis for concluding that defendant's parole officers were more likely than jury to correctly determine whether he was depicted in video); People v. Alston, 169 A.D.3d 1 (1st Dept. 2019), appeal withdrawn 35 N.Y.3d 1110 (no error in admission of cell phone recording of restaurant's surveillance videotape where restaurant manager testified that video was fair and accurate depiction of what he had observed inside restaurant on night of incident); People v. Fraser, 162 A.D.3d 480 (1st Dept. 2018) (court did not err in qualifying detective as expert in digital file analysis and permitting him to authenticate surveillance videotape where he had specialized training and extensive experience regarding such

matters as handling and preserving digital evidence, using different software applications to extract digital information, and identifying files that had been altered or corrupted); People v. Cabrera, 137 A.D.3d 707 (1st Dept. 2016) (People laid sufficient foundation for admission of video disc consisting of compilation of portions of footage drawn from numerous police surveillance cameras where witness testified in detail about videotaping and compilation process); People v. Hardy, 115 A.D.3d 511 (1st Dept. 2014), aff'd 26 N.Y.3d 245 (2015) (First Department finds no error in admission of testimony about meaning of events depicted on surveillance video by witnesses who had personally participated in or observed events; testimony aided jury in making independent assessment of video); People v. Ebron, 90 A.D.3d 1243 (3d Dept. 2011) (officer involved in surveillance and a participant in conversations identified voices on recording, verified it was accurate and explained that "dead air" on recording occurred when no communications among police officers were taking place); People v. Roberts, 66 A.D.3d 1135, 887 N.Y.S.2d 326 (3rd Dept. 2009) (videotape depicting sex crime defendant performing oral sex on victim, who appeared to be asleep or unconscious, improperly admitted where there was no testimony that videotape fairly and accurately represented events, and authenticity and accuracy of videotape was not established by chain of custody testimony that did not address making of videotape, or where it was kept or who had access to it during nearly three-year period from time of its making to discovery by defendant's housemate; because films are so easily altered, there is very real danger that deceptive tapes, inadequately authenticated, could contaminate trial process); People v. Ramirez, 44 A.D.3d 442, 843 N.Y.S.2d 280 (1st Dept. 2007) (videotape offered to show time on clock was not self-authenticating as to accuracy of time depicted); People v. Gil, 251 A.D.2d 121, 674 N.Y.S.2d 651 (1st Dept. 1998), lv denied 92 N.Y.2d 1049, 685 N.Y.S.2d 427 (1999) (tape admissible where court instructed jurors that a zoom lens had been used, that they should disregard the positions of persons and vehicles, and that the tape could not be considered a re-enactment of the crime); see also People v. Taylor, 956 N.E.2d 431 (Ill. 2011) (factors to be used in determining admissibility of surveillance tape include device's capability for recording and general reliability; competency of operator; proper operation of device; manner in which recording was preserved (chain of custody); identification of persons,

locale, or objects depicted; and explanation of any copying or duplication process; because VHS tape was made by copying data stored on hard drive of DVR, it was an "original, and State was not required to establish that no alterations were made in copying process because unimportant, irrelevant, prejudicial, privileged and/or confidential material should be removed); State v. Melendez, 970 A.2d 64 (Conn. 2009) (DVD to which original footage captured on eight millimeter videotape was transferred was not computer-generated evidence and was subject only to foundational requirement that it be fair and accurate representation); People v. McGrier, 205 A.D.3d 431 (1st Dept. 2022), lv denied 38 N.Y.3d 1189 (no error in admission of experiment and expert testimony regarding color distortion in videotapes where videotape of crime showed defendant wearing what appeared to be gray sweatshirt, but he was wearing black sweatshirt when arrested immediately thereafter).

A lay witness may give an opinion that the accused is the person depicted in a surveillance tape or photograph if there is a basis for concluding that the witness is more likely to correctly identify the accused than is the fact-finder. People v. Challenger, 200 A.D.3d 500 (1st Dept. 2021) (reversible error in admission of detective's testimony that defendant was person depicted in surveillance videos where alleged difference in appearance - addition of eyeglasses - was de minimis, and jury had access to photos of defendant without eyeglasses; veteran detective's assertion that perpetrator was defendant carried significant weight in eyes of jury); People v. Hill, 199 A.D.3d 588 (1st Dept. 2021) (opinion testimony by detectives that defendant was person in surveillance video properly admitted where detectives were familiar with defendant's appearance at time video was taken six years before trial, and video was taken with night vision feature which rendered it more difficult to discern physical characteristics); People v. Pinkston, 198 A.D.3d 487 (1st Dept. 2021), lv denied 37 N.Y.3d 1148 (no error where officer who had arrested defendant several months before charged homicide identified defendant in surveillance video since defendant had changed appearance since being taped); People v. Johnson, 197 A.D.3d 725 (2d Dept. 2021), lv denied 37 N.Y.3d 1097 (testimony properly admitted where detective knew defendant from patrols of defendant's neighborhood over course of many years); People v. Franzese, 189 A.D.3d 1068 (2d Dept. 2020), lv denied 36 N.Y.3d 1056 (no error where detectives identified

defendant from surveillance video; there was no evidence defendant had altered his appearance, but some basis for concluding that detectives, who knew defendant from neighborhood patrols, were more likely than jury to correctly determine whether he was depicted in video); People v. Rivera, 170 A.D.3d 566 (1st Dept. 2019), lv denied 33 N.Y.3d 1073 (lay opinion testimony that defendant was person in photos from surveillance videotapes properly admitted where defendant's appearance had changed since crime; witnesses were able to recognize defendant's mannerisms and peculiar way of walking; and record established poor quality of photographs); People v. Pinkston, 169 A.D.3d 520 (1st Dept. 2019), lv denied 33 N.Y.3d 1108 (officer properly allowed to identify defendants where they had not changed appearance after being videotaped, but circumstances suggested that jury would be less able than officer to make identification given poor quality of tapes, which showed groups of young men mostly from a distance); People v. Reddick, 164 A.D.3d 526 (2d Dept. 2018), lv denied 32 N.Y.3d 1114 (detective's opinion that defendant was person depicted in surveillance video footage improperly admitted where detective had arrested defendant and briefly interviewed him more than two weeks after crime, there was no evidence defendant had changed appearance prior to trial, and there was nothing suggesting that jury would be less able than detective to determine whether defendant was depicted in video); People v. Jones, 161 A.D.3d 1103 (2d Dept. 2018) (witness properly allowed to testify that, in his opinion, defendant was person depicted in surveillance video where defendant's appearance had changed between commission of crime and time of trial, and testimony aided jury in making independent evaluation); People v. Jackson, 151 A.D.3d 746 (2d Dept. 2017) (officer who testified that he believed person depicted in surveillance videos was defendant knew defendant from patrols and knew defendant changed his appearance after crimes); People v. Boyd, 151 A.D.3d 641 (1st Dept. 2017) (officers' identification of defendant properly admitted where videos were of marginal quality, defendant had distinctive manner of walking, officers explained "rapid-paced and fleeting images of persons running back and forth in footage drawn from three video cameras depicting three overlapping areas around the scene of the shooting," and there was evidence of change in defendant's appearance); People v. Daniels, 140 A.D.3d 1083 (2d Dept. 2016), lv denied 28 N.Y.3d 970 (there was basis for concluding that

detective, who knew defendant from patrols, was more likely than jury to correctly determine whether defendant was depicted in video); People v. Myrick, 135 A.D.3d 1069 (3d Dept. 2016) (although lay witness may give opinion if there is basis for concluding that witness is more likely to correctly identify defendant than is jury, detective had met with defendant once, and there was no evidence defendant had changed appearance prior to trial and no reason to believe jury would be less able than detective to determine whether defendant was individual in video); People v. Montanez, 135 A.D.3d 528 (1st Dept. 2016) (officer properly permitted to identify defendant where there was basis for concluding that officer was more likely to correctly identify defendant than was jury); People v. Watson, 121 A.D.3d 921 (2d Dept. 2014), lv denied (detective permitted to opine that individual depicted in photos derived from surveillance video was defendant); People v. Ray, 100 A.D.3d 933 (2d Dept. 2012), lv denied 20 N.Y.3d 1103 (no error in admission of testimony by detective that person depicted in surveillance video was defendant where detective had encountered defendant on numerous occasions over more than 15 years and defendant had changed appearance after commission of crime).

In State v. Bruny, 269 A.3d 38 (Conn. 2022), the court held that expert opinion testimony relating to the identification of a defendant in a surveillance video or photographs was admissible under the state Code of Evidence rule if the testimony will assist the trier of fact in understanding the evidence or determining a fact in issue.

E. Demonstrations, Experiments And Displays

1. Display Of Injuries - When the extent of a person's injuries are at issue, the injured body parts may be exhibited to the court. An injured person may also give the court a practical demonstration of the effects of an injury. Richardson, §§ 4-209-210.

2. Display Of Respondent's Physical Characteristics - Since a display of physical characteristics is non-testimonial in nature, the Fifth Amendment privilege against self incrimination is not implicated when the respondent is forced at the request of the prosecutor to display an identifying physical characteristic to the court. See People v. Slavin, 1 N.Y.3d 392, 775 N.Y.S.2d 210 (2004) (no violation of defendant's self incrimination rights where prosecution was permitted to introduce photos of

defendant's provocative tattoos in connection with hate crime charge).

Similarly, the privilege is not waived when the respondent decides to display a physical characteristic. See People v. Allen, 140 A.D.2d 229, 528 N.Y.S.2d 380 (1st Dept. 1988), lv denied 72 N.Y.2d 1043, 534 N.Y.S.2d 942 (defendant should have been permitted to exhibit his teeth without being cross-examined); United States v. Williams, 461 F.3d 441 (4th Cir. 2006), cert denied 549 U.S. 1047, 127 S.Ct. 616 (trial court erred in conditioning defendant's ability to perform demonstration as to the size of his waist on defendant's willingness to be cross-examined); United States v. Bay, 762 F.2d 1314 (9th Cir. 1985) (display of tattoos). The proper time for such a display is during the defense case. People v. Sims, 57 A.D.3d 1106, 868 N.Y.S.2d 832 (3rd Dept. 2008), lv denied 12 N.Y.3d 762 (defense counsel's request that defendant be allowed to stand before jury so they could gauge his height and weight was untimely where it came during cross-examination of People's first witness; defense never renewed request during its case).

If the respondent wants the court to take note of an obvious physical characteristic that a witness failed to observe, the respondent should be prepared to show that the characteristic existed at the time of the crime. See People v. Rodriguez, 64 N.Y.2d 738, 485 N.Y.S.2d 976 (1984) (tattoo); People v. Salem, 175 A.D.3d 1179 (1st Dept. 2019), lv denied 34 N.Y.3d 1081 (no error in court's refusal to allow defendant to show jury teeth where defendant offered no proof that condition of teeth had not changed in 18 months between arrest and trial).

It should also be noted that, when identification is at issue, the accused may be entitled to have a person who is alleged by the accused to be the perpetrator display a physical characteristic cited by a witness. See,e.g., Lyons v. Johnson, 99 F.3d 499 (2d Cir. 1996) (defendant was entitled to exhobit a similar-looking man who was also wearing gold "fronts" on his teeth).

3. Voice Exemplar - The respondent may also be compelled to speak at trial for identification purposes without implicating the privilege against self-incrimination. But see Taylor v. Sabourin, 269 F.Supp.2d 20 (E.D.N.Y., 2003) (Fifth Amendment could be found where defendant is compelled to read statement suggesting guilt). However, because it is so easy to feign, a voice exemplar offered by the

respondent as exculpatory evidence is ordinarily excludable. See People v. Scarola, 71 N.Y.2d 769, 530 N.Y.S.2d 83 (1988) (court notes that foundation did not rule out possibility that defendants could feign speech defects at trial); People v. Webb, 215 A.D.2d 704, 628 N.Y.S.2d 302 (2d Dept. 1995) (no error where defendant was permitted to exhibit gold teeth which complainant had not noted, but was not permitted to speak the words spoken by the robber).

4. Re-enactment Of Crime Or Other Relevant Event - An experimental re-enactment may be presented if conditions are similar to those existing at the time of the incident. Slight variations affect weight, not admissibility. See Andrews v. State, 811 A.2d 282 (Md. 2002) (reversible error where court permitted demonstration of force necessary to cause injury associated with Shaken Baby Syndrome, and expert testimony based on demonstration, but doll did not have same characteristics as victim); People v. McGrier, 205 A.D.3d 431 (1st Dept. 2022), lv denied 38 N.Y.3d 1189 (no error in admission of experiment and expert testimony regarding color distortion in videotapes where videotape of crime showed defendant wearing what appeared to be gray sweatshirt, but he was wearing black sweatshirt when arrested immediately thereafter); People v. McBayne, 204 A.D.3d 549 (1st Dept. 2022), lv denied 38 N.Y.3d 1152 (no error in admission of peephole detached from identifying witness's door, which jury was permitted to look through, where witness testified that peephole was in same condition as it was at time of crime when he looked through it and saw defendant); People v. Parsley, 150 A.D.3d 894 (2d Dept. 2017) (no error in admission of testimony regarding length of time it took officer to drive from crime scene to bridge where issue was whether defendant's vehicle could have traveled from crime scene in time to be recorded by surveillance video at bridge approximately 15 minutes later); People v. Dunaway, 134 A.D.3d 952 (2d Dept. 2015) (probative value of demonstrations related to defendant's identification defense limited in light of evidence of complainant's ability to observe perpetrator during crimes, and conditions surrounding proposed demonstrations were not substantially similar to conditions present when crimes committed); People v. Feuer, 11 A.D.3d 633, 782 N.Y.S.2d 858 (2d Dept. 2004) (court erred in asking defendant to re-enact altercation with victim); People v. Pierce, 270 A.D.2d 94, 705 N.Y.S.2d 333 (1st Dept. 2000), lv denied 95 N.Y.2d 837, 713 N.Y.S.2d

144 (trial court properly admitted testimony of detective who reconstructed incident by dropping weighted bag in order to demonstrate that location where victim was found was not consistent with defendant's claim that victim fell from window); People v. Isaac, 214 A.D.2d 749, 625 N.Y.S.2d 635 (2d Dept. 1995) (trial court properly denied defendant's request that his shorts be admitted so jury could evaluate officers' claim that they could see bulge, since defendant would not be wearing shorts during experiment); People v. Gregg, 203 A.D.2d 188, 611 N.Y.S.2d 151 (1st Dept. 1994), lv denied 83 N.Y.2d 911, 614 N.Y.S.2d 393 (no error where court refused to permit demonstration designed to challenge officer's claim that tin container hitting ground sounded like gun); People v. Mariner, 147 A.D.2d 659, 538 N.Y.S.2d 61 (2d Dept. 1989), lv denied 74 N.Y.2d 666, 543 N.Y.S.2d 409 (no error where court viewed exchange of glassine envelope-sized slips of paper from distance of 40 feet using officer's binoculars); see also State v. Fisher, 805 N.W.2d 571 (S.D. 2011) (in case involving death of 15-month-old child, allegedly due to violent shaking, no error in admission of portion of defendant's videotaped confession showing defendant shaking doll; because defendant was recreating events based on personal knowledge, any dissimilarity between motion defendant used and motion used to shake victim would have been slight, and insufficient to mislead jury or unfairly prejudice defendant); People v. Caldavado, 78 A.D.3d 962, 910 N.Y.S.2d 673 (2d Dept. 2010) (no error in ruling permitting PowerPoint presentation regarding injuries associated with Shaken Baby Syndrome and allowing expert to shake doll to demonstrate force necessary); People v. Mora, 57 A.D.3d 571, 868 N.Y.S.2d 722 (2d Dept. 2008) (similar to Caldavado).

The court may not conduct its own out-of-court re-enactment or other investigation without notice to the parties. People v. Allen, 90 A.D.3d 1082 (3d Dept. 2011) (suppression court erred when it independently tested tail light assembly to determine deputy's credibility and legality of the stop without notice to and outside presence of parties after proof had been closed).

. F. Private Writings - See, e.g., People v. Pearce, 81 A.D.3d 856, 916 N.Y.S.2d 232 (2d Dept. 2011) (no error in admission of anonymous letter sent to complainant with return address listing defendant's jail and inmate number); People v. Jean-Louis, 272 A.D.2d 626, 709 N.Y.S.2d 101 (2d Dept. 2000), lv denied 95 N.Y.2d

890 (defendant's letters asking accomplice to take Fifth Amendment on stand were properly admitted; letters were properly authenticated since they also contained defendant's nickname, referred to another accomplice by his nickname, and were sent in response to letters mailed by the accomplice to defendant).

G. Computer-Generated Exhibits - See People v. Williams, 29 N.Y.3d 84 (2017) (when slides may have misrepresented evidence, court instructed jury that attorneys' arguments were not evidence and that jury was sole judge of facts, and actual exhibits remained pristine); People v. Anderson, 29 N.Y.3d 69 (2017) (finding no error in prosecutor's use of PowerPoint slides during summation, and noting that slides are not evidence, court rejects defendant's contention that trial exhibits in PowerPoint presentation may only be displayed to jury in unaltered, pristine form, and that any written comment or argument superimposed on slides is improper; exhibit and argument may be displayed to jury if there is clear delineation between argument and evidence on face of demonstration, in counsel's argument, or in court's admonitions, and added captions or markings are consistent with evidence and fair inferences to be drawn from evidence); People v. Morency, 93 A.D.3d 736 (2d Dept. 2012) (no error in admission of computer-generated animation of shooting to illustrate expert testimony); Verizon Directories Corp. v. Yellow Book USA Inc., 331 F.Supp.2d 136 (EDNY, 2004) (while granting admission, court discusses developing use of various types of computer-generated exhibits).

VIII. Collateral Estoppel

A. Generally - "The doctrine of collateral estoppel, or issue preclusion, operates in a criminal prosecution to bar re-litigation of issues necessarily resolved in [the accused's] favor at an earlier trial [citations omitted]." People v. Acevedo, 69 N.Y.2d 478, 515 N.Y.S.2d 753, 758 (1987). In People v. Afrika, 189 Misc.2d 821, 738 N.Y.S.2d 159 (Sup. Ct., Monroe Co., 2001), the court, while noting that neither the United States Supreme Court nor the New York Court of Appeals has decided whether collateral estoppel can be applied against a criminal defendant, refused to apply collateral estoppel where another court had previously found probable cause for an order directing that defendant provide a blood sample. See also State v. Allen, 31 A.3d 476 (Md. 2011) (collateral estoppel may not be applied against criminal defendant to

foreclose jury from finding for itself all ultimate facts that make out charged crime; “offensive" collateral estoppel at criminal trial is inimical to Sixth Amendment guarantee of jury trial); People v. Morrison, 156 A.D.3d 126 (3d Dept. 2017), lv denied 30 N.Y.3d 1118 (after defendant was indicted for attempted murder, and victim then died, People not entitled to benefit of collateral estoppel when they presented murder charge to new grand jury; court notes that even if application of doctrine is constitutional, there is critical difference between accused’s defensive use of doctrine and prosecutor’s strategic use of it against accused); People v. Hudson, 65 Misc.3d 958 (County Ct., Dutchess Co., 2019) (People may not utilize collateral estoppel offensively to bar defendant from raising defense that was asserted, and rejected, in prior civil or criminal proceeding).

In People v. Plevy, 52 N.Y.2d 58, 436 N.Y.S.2d 224 (1980), the Court of Appeals stated: “The [collateral estoppel] doctrine, however, is not to be rigidly or mechanically applied and must on occasion, yield to more fundamental concerns [citation omitted]. It serves an important role in civil cases, where it originated and where society’s primary concern is to provide a means of peaceful, swift and impartial resolution of private disputes [citation omitted]. It is less relevant in criminal cases where the pre-eminent concern is to reach a correct result and where other considerations peculiar to criminal prosecutions may outweigh the need to avoid repetitive litigation [citation omitted]. Thus, although it is frequently said that collateral estoppel applies to criminal cases [citation omitted], it cannot be applied in quite the same way as in civil cases [citation omitted].” 52 N.Y.2d at 64-65. In People v. Aguilera, 82 N.Y.2d 23, 603 N.Y.S.2d 392 (1993), the Court of Appeals noted that because liberty interests are at stake in criminal proceedings, the Court has “been generally less receptive to estoppel in criminal cases [citations omitted].” 82 NY2d at 30. See also People v. Hinton, 95 N.Y.2d 950, 952, 722 N.Y.S.2d 461 (2000) (quoting from People v. Fagan, 66 N.Y.2d 815, 498 N.Y.S.2d 335 (1985): “Strong policy considerations militate against giving issues preclusive effect in a criminal case, and indeed we have never done so”); People v. Goodman, 69 N.Y.2d 32, 37, 511 N.Y.S.2d 565 (1986).

The doctrine can be applied against a convicted defendant who is involved in subsequent civil litigation, such as a damages action brought by a victim. See, e.g.,

Pahl v. Grenier, 279 A.D.2d 882, 719 N.Y.S.2d 370 (3rd Dept. 2001); Costello v. Lupinacci, 253 A.D.2d 478, 676 N.Y.S.2d 498 (2d Dept. 1998); but see Launders v. Steinberg, 9 N.Y.3d 930, 845 N.Y.S.2d 215 (2007) (no collateral estoppel in civil action where manslaughter conviction did not necessarily include determination as to whether deceased child was subjected to repeated physical abuse by defendant during months prior to acts resulting in her death). Even though it does not involve an actual admission of guilt, an Alford plea may have collateral estoppel effect in another proceeding. Merchants Mutual Insurance Company v. Arzillo, 98 A.D.2d 495, 472 N.Y.S.2d 97 (2d Dept. 1984); see also Kaplan v. Sachs, 224 A.D.2d 666, 639 N.Y.S.2d 69 (2d Dept. 1996), lv denied 88 N.Y.2d 952; Kuriansky v. Professional Care, Inc., 158 A.D.2d 897, 551 N.Y.S.2d 695 (3rd Dept. 1990).

While a delinquency adjudication may be used against a juvenile when he has brought suit, in other instances an adjudication is confidential pursuant to FCA § 381.2(1). Green v. Montgomery, 95 A.D.2d 693, 723 N.Y.S.2d 744 (2001) (protection of statute waived where juvenile brought §1983 action against officers charging them with use of excessive force).

Before collateral estoppel may be applied, it must be clear that the same parties have been involved in the proceedings, that the issues are the same, that the prior proceeding resulted in a final and valid judgment, and that the party opposing the estoppel had a "full and fair opportunity" to litigate the issues in the prior proceeding. See People v. Goodman, supra, 69 N.Y.2d 32; see also Crosby-Garbotz v. Fell, 434 P.3d 143 (Ariz. 2019) (issue preclusion may apply in criminal proceeding when issue of fact was previously adjudicated in dependency proceeding and other elements of preclusion are met; here, although different agencies prosecuted, there was mutuality of parties because State brought power to bear and was party in both proceedings, and issue in each proceeding was whether defendant abused child by shaking her, causing bleeding in brain and eyes); but see People v. Roselle, 84 N.Y.2d 350, 618 N.Y.S.2d 753 (1994) (issues in criminal proceeding were not the same as issues involved in family court abuse and neglect case).

Collateral estoppel questions typically arise where a total or partial acquittal is followed by the prosecution of charges which arise from the same incident. See, e.g.,

People v. Suarez, 40 A.D.3d 143, 832 N.Y.S.2d 532 (1st Dept. 2007), lv denied 8 N.Y.3d 991 (jury's factual findings when it acquitted defendant of intentional murder lost preclusive effect when depraved indifference murder conviction was reversed on appeal, and intentional manslaughter charge on which People wish to proceed does not have depravity element found lacking when case was before Court of Appeals).

B. Double Jeopardy - When the prosecution seeks to re-litigate issues resolved in a prior prosecution arising from the same alleged criminal transaction, the constitutional guarantee against double jeopardy comes into play. When it appears that an acquittal reflected a decision adverse to the prosecution on a particular factual element, the prosecution may not present evidence relating to that element in any subsequent prosecution of the same person. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970); but see Currier v. Virginia, 138 S.Ct. 2144 (2018) (no double jeopardy violation where defendant agreed to severance, was acquitted at first trial, and was tried on remaining charge and found guilty after he argued that acquittal involved jury fact-findings that precluded the second trial; defendant's consent to severance negates his double jeopardy claim; four Justices conclude that civil issue preclusion principles cannot be imported into the criminal law through the Double Jeopardy Clause).

C. Evidence Excludable Under Doctrine - In Ashe v. Swenson, supra, 397 U.S. 436, the Supreme Court held that estoppel applies to "ultimate" facts. That is, estoppel bars evidence concerning "an issue which is the sine qua non of a conviction in the second trial." People v. Goodman, supra, 69 N.Y.2d at 38; see also People v. O'Toole, 96 A.D.3d 435 (1st Dept. 2012), aff'd 22 N.Y.3d 335 (First Department notes that collateral estoppel does not apply where statutory corroboration requirement governs).

When the respondent was acquitted of some charges and convicted of others at the first trial, a new trial might involve the re-presentation of evidence not for the purpose of proving an "ultimate" fact already decided against the prosecution in the prior proceeding, but to prove "evidentiary" facts establishing the elements of an offense of which the respondent was convicted at the first trial. However, in People v. Acevedo, supra, 69 N.Y.2d 478, the Court of Appeals expanded the collateral estoppel doctrine to include "evidentiary" facts. Thus, if it is clear that the judge in the first case necessarily decided a particular factual issue, evidence offered to prove those facts must be

excluded in the second prosecution. It is the respondent's burden to show that the issue was decided. See People v. O'Toole, 22 N.Y.3d 335 (2013) (acquittal at first trial on charge of first degree robbery that was based on alleged display of firearm barred People from introducing, at retrial on charge of second degree robbery, evidence that firearm was displayed); People v. Williams, 163 A.D.3d 1418 (4th Dept. 2018) (People collaterally estopped from using evidence of forged checks that were subject of counts on which defendant had been acquitted at first trial); People v. Ho Chin, 186 Misc.2d 454, 718 N.Y.S.2d 786 (Sup. Ct., Queens Co., 2000) (People precluded from introducing evidence of forcible compulsion in sex offense prosecution where acquittal in first trial must have resulted from jury's conclusion that defendant did not use force); but see People v. Ortiz, 26 N.Y.3d 430 (2015) (People not barred from introducing at second trial evidence that defendant threatened victim with razor blade where jury had acquitted defendant of charges involving use or threatened use of dangerous instrument at first trial, but prosecution witnesses would have had to materially alter testimony and mislead jury in order to omit reference to razor blade; if it is apparent that collateral estoppel cannot practicably be followed if necessary witness is to give truthful testimony, doctrine should not be applied).

Although "the precise factual issues encompassed by a general verdict and judgment of acquittal [in a criminal jury trial] are most often unknown" (see People v. Acevedo, supra, 69 N.Y.2d at 487), a judge's explicit fact-findings in a prior proceeding could be used to support the respondent's request for application of the collateral estoppel rule.

D. Identity Of Parties - The respondent may not use the acquittal of an alleged co-actor to bar his or her prosecution. See People v. Berkowitz, 50 N.Y.2d 333, 428 N.Y.S.2d 927 (1980); People v. Oleksowicz, 101 A.D.2d 119, 476 N.Y.S.2d 146 (2d Dept. 1984) (defendant could be prosecuted for criminal facilitation even though person allegedly facilitated had been acquitted). However, if resolution of the issues at the prior proceeding could not have been affected by the identity of the accused, collateral estoppel may be applicable. See People v. McGriff, 130 A.D.2d 141, 518 N.Y.S.2d 795 (1st Dept. 1987) (collateral estoppel effect given to prior decision finding no probable cause for a search warrant); but see Commonwealth v. Stephens, 885 N.E.2d 785

(Mass., 2008) (Commonwealth not collaterally estopped from re-litigating suppression issue after issue has been resolved against it in earlier proceeding against different defendant).

However, the accused is not estopped in such cases. See People v. Pettaway, 153 A.D.2d 647, 545 N.Y.S.2d 163 (2d Dept. 1989) (defendant entitled to challenge search warrant although co-defendant lost hearing).

Collateral estoppel may result even when different prosecutors are involved, if they are closely related. Compare People ex rel. Dowdy v. Smith, 48 N.Y.2d 477, 423 N.Y.S.2d 862 (1979) (People and Division of Parole sufficiently related); People v. McGriff, supra, 130 A.D.2d 141 (prosecutors in 2 New York City counties sufficiently related) with Taylor v. Sturgell, 553 U.S. 880, 128 S.Ct. 2161 (2008) (Supreme Court rejects theory of claim preclusion by "virtual representation" of party in previous proceeding); People v. Williams, 263 A.D.2d 772, 695 N.Y.S.2d 150 (3rd Dept. 1999), lv denied 94 N.Y.2d 831, 702 N.Y.S.2d 602 (suppression order in burglary case did not have collateral estoppel effect in murder case, since People did not have same incentive in burglary case); People v. Morgan, 111 A.D.2d 771, 490 N.Y.S.2d 30 (2d Dept. 1985) (not guilty determination at Housing Authority disciplinary hearing did not bar DA); Nelson v. Dufficy, 104 A.D.2d 234, 482 N.Y.S.2d 511 (2d Dept. 1984), lv denied 64 N.Y.2d 610, 490 N.Y.S.2d 1023 (1985) (dismissal in family court child abuse proceeding brought by Queens Society for the Prevention of Cruelty to Children and Corporation Counsel did not bind DA); People v. Batista, 158 Misc.2d 985, 602 N.Y.S.2d 774 (Sup. Ct. N.Y. Co., 1993) (People not estopped by suppression order issued in family court case prosecuted by Corporation Counsel).

E. Finality Of Prior Determination - See, e.g., People v. Sanders, 71 N.Y.2d 946, 528 N.Y.S.2d 819 (1988) (predicate felony determination improperly given collateral estoppel effect where sentence had not been imposed and People had not had opportunity to challenge ruling on appeal); Matter of McGrath v. Gold, 36 N.Y.2d 406, 369 N.Y.S.2d 62 (1975) (where search warrant was held invalid and indictment was dismissed, determination was not sufficiently final); Matter of Clark v. Newbauer, 148 A.D.3d 260 (1st Dept. 2017) (grand jury dismissal of first degree robbery charge involving alleged display of what appeared to be firearm did not preclude People from

introducing evidence about firearm; grand jury lacks finality, and, with different standard of proof, only one side presenting, no presiding judge, and no rights of appeal, is fundamentally different from trial); People v. Howard, 152 A.D.2d 325, 548 N.Y.S.2d 785 (2d Dept. 1989), lv denied 75 N.Y.2d 814, 552 N.Y.S.2d 564 (1990) (where defendant was acquitted after suppression hearing, and, therefore, could not appeal denial of suppression, determination was not sufficiently final); Matter of Isaiah D., 72 Misc.3d 1120 (Fam. Ct., N.Y. Co., 2021) (no collateral estoppel arising from serious physical injury finding made in connection with removal of adolescent offender proceeding since it was not final judgment)..

F. Full And Fair Opportunity To Litigate Issues - See, e.g., People v. Hilton, 95 N.Y.2d 950, 722 N.Y.S.2d 461 (2000) (no collateral estoppel in felony sex abuse prosecution after violation of probation charge had been dismissed, since People did not have same incentive to litigate at violation hearing); Matter of Juan C., 89 N.Y.2d 659, 657 N.Y.S.2d 581 (1997) (Family Court suppression ruling not given collateral estoppel effect in school disciplinary hearing since Board of Education did not participate in Family Court); People v. Aguilera, 82 N.Y.2d 23, 603 N.Y.S.2d 392 (1993) (defendant not estopped at Manhattan Huntley hearing, since he did not testify at Bronx hearing); People v. Fagan, 66 N.Y.2d 815, 498 N.Y.S.2d 335 (1985) (DA not barred by dismissal at parole revocation hearing, since incentive in felony prosecution is stronger); People v. Plevy, 52 N.Y.2d 58, 436 N.Y.S.2d 224 (1980) (defendant not estopped at parole revocation hearing, since he did not testify at trial for legitimate reason); People v. Johnson, 14 A.D.3d 460, 788 N.Y.S.2d 379 (1st Dept. 2005) (where judge at first trial dismissed first degree gang assault charge because conviction on that charge was irreconcilable with acquittal on first degree manslaughter charge, People were precluded from prosecuting defendant on charge of second degree gang assault); People v. Rumph, 267 A.D.2d 1093, 701 N.Y.S.2d 218 (4th Dept. 1999), lv denied 94 N.Y.2d 925, 708 N.Y.S.2d 364 (2000) (defendant not estopped from litigating probable cause issue at suppression hearing after court determined that the arrest had a foundation and constituted violation of sentencing condition); People v. Williams, 263 A.D.2d 772 (suppression order in burglary case did not have collateral estoppel effect in murder case, since People did not have same incentive in burglary case); Matter of

Isaiah D., 72 Misc.3d 1120 (Fam. Ct., N.Y. Co., 2021) (no collateral estoppel arising from serious physical injury finding made in connection with removal of adolescent offender proceeding where People did not have full and fair opportunity to litigate); People v. Hudson, 65 Misc.3d 958 (County Ct., Dutchess Co., 2019) (since defendant not represented by counsel in prior civil proceeding, court questions whether claims were fully and fairly litigated).

It has been held that there was no "full and fair opportunity to litigate" where the previous ruling was plainly wrong. See People v. Lathigee, 159 Misc.2d 1059, 607 N.Y.S.2d 846 (Sup. Ct. Monroe Co., 1993).

G. Differing Standards Of Proof - See People ex rel. Matthews v. New York State Div. of Parole, 58 N.Y.2d 196 (1983) (given different standards of proof, dismissal of charges at trial did not preclude People from prosecuting charges in parole revocation proceeding); People ex rel. Dowdy v. Smith, 48 N.Y.2d 477 (1979) (Parole Board collaterally estopped where defendant had met burden to establish affirmative defense of entrapment at trial).

IX. Preservation Of Issues For Appellate Review

A. Generally - In the absence of a motion or timely objection citing grounds for the exclusion of evidence, an appellate court ordinarily is not obligated to consider a claim of error. See, e.g., People v. Adorno, 210 A.D.3d 113 (2d Dept. 2022) (court splits 3-2 on preservation, with majority noting that objection must be “clear, timely, and specific to the issue complained of … and presented in a manner that enables the court to promptly rule upon them and cure any potential prejudice that might otherwise arise”); People v. Caban, 14 N.Y.3d 369, 901 N.Y.S.2d 566 (2010) (error preserved where attorneys lawyers never said “we object to this evidence,” but objection was clear from prosecutor’s summary of their position); Downs v. Lape, 657 F.3d 97 (2d Cir. 2011) (phrase “on the record" has not been accepted by New York courts signifying objection); People v. Alvarez, 51 A.D.3d 167, 854 N.Y.S.2d 70 (1st Dept. 2008), lv denied, 11 N.Y.3d 785 (prosecutor's agency defense-related request for submission of lesser included drug possession offense did not preserve issue on defendant's behalf); People v. Colon, 46 A.D.3d 260, 847 N.Y.S.2d 44 (1st Dept. 2007) (timely protest is sufficient if, in response to protest by party, court expressly decides question raised on appeal;

here, court expressly decided question in response to jury's inquiry, and during charge conference in response to prosecutor's statement of People's position, but defendant did not object).

One respondent's objection generally does not preserve a claim for other respondents at a joint trial. People v. Gonzalez, 170 A.D.3d 558 (1st Dept. 2019), lv denied 33 N.Y.3d 1031 (defendant did not preserve challenge to prospective juror for cause where counsel did not join in challenge made by another defendant's counsel, who never claimed to be speaking for all defendants, and, when that counsel later stated that he was raising peremptory challenges for all defendants, it did not preserve defendant's challenge for cause); People v. Bailey, 32 N.Y.3d 70 (2018).

A general objection will probably not be sufficient unless the evidence was not admissible for any purpose. See People v. Ross, 21 N.Y.2d 258, 287 N.Y.S.2d 376 (1967). An intermediate appellate court may consider an unpreserved claim pursuant to the court's interest of justice jurisdiction. Cf. CPL §470.15(3)(c). Although an objection should be registered as soon as the grounds become apparent in the question or the witness' response, Horton v. Smith, 51 N.Y.2d 798 (1980), this rule need not be applied when, in a heated trial, an objection is registered a little late. See United States v. Pujana-Mena, 949 F.2d 24 (2d Cir. 1991).

An attorney "may make a concise statement of the particular grounds for an objection or exception, not otherwise apparent, where it is necessary to do so in order to call the court's attention thereto, or to preserve an issue for appellate review. If an attorney believes in good faith that the court has wrongly made an adverse ruling, he may respectfully request reconsideration thereof." 22 NYCRR §604.1(d)(4)(ii); see also 22 NYCRR §700.4(d). See, e.g., United States v. Rodriguez, 627 F.3d 1372 (11th Cir. 2010), cert denied 131 S.Ct. 1840 (disagreeing with Second Circuit decisions in United States v. Kaba, 480 F.3d 152 and United States v. Leung, 40 F.3d 577 holding that defendant would be "understandably reluctant" to suggest that ambiguous remark made by judge reveals bias just as judge is about to select sentence, Eleventh Circuit finds no "vindictive judge or cowardly counsel" exception to contemporaneous objection rule; "To suggest that judges, whose solemn duty it is to apply the law fairly and impartially to all parties before them, would vindictively respond to an attorney's objection by punishing

the client is demeaning to the judiciary"); People v. Escobar, 79 A.D.3d 469, 912 N.Y.S.2d 202 (1st Dept. 2010), lv denied 16 N.Y.3d 797 (no preservation where court prohibited "speaking objections" and required unelaborated objections, but counsel made no effort to make record at any point even though court invited counsel to do so at first recess following objection and offered to reconsider rulings and take curative actions where appropriate); People v. Hancock, 46 A.D.3d 383, 847 N.Y.S.2d 576 (1st Dept. 2007), lv denied, 10 N.Y.3d 766 (defendant's argument that court improperly admitted negative identification evidence unpreserved where court interrupted defendant's objection before he could articulate it but defendant then did nothing to alert court as to why he was objecting and conveyed impression that his only objection was that prosecutor was leading witness). However, "[n]o attorney shall argue in support of or against an objection without permission from the court; nor shall any attorney argue with respect to a ruling of the court on an objection without such permission." 22 NYCRR §604(d)(4)(i); see also 22 NYCRR §700.4(d).

Thus, judges have considerable discretion to cut off argument on evidentiary issues, particularly after they have ruled. So, when a lawyer has a legitimate argument supporting exclusion of important evidence, the proper course is to specify the grounds for an objection, and say all that can be said in support of the objection, right up front when first making the objection. If the lawyer waits until after the judge rules, he/she risks being cut off, and there is a possibility that the appellate court will conclude that the lawyer, and not the judge, was at fault. As a matter of strategy, it sometimes makes sense to lodge a general objection on the off chance that the judge will see an argument for exclusion stronger than anything the lawyer has come up with, but obviously the lawyer must be careful with that strategy,

While the lawyer should try to make a record, he/she should back off when the judge is expressly threatening to impose a contempt sanction. In such circumstances, the appellate court cannot penalize the respondent when it is obvious that the judge cut the lawyer off as he/she attempted to make a record, and where the context makes it reasonably clear that appellate counsel is raising an issue the trial lawyer was trying to raise in a timely fashion. See Jordan v. Lefevre, 206 F.3d 196 (2d Cir. 2000).

B. Preservation Of Specific Issues

1. Bolstering Of Identification ("Trowbridge" error) - See, e.g., People v. Fleming, 70 N.Y.2d 947, 524 N.Y.S.2d 670 (1988) (claim unpreserved where, after court refused to rule prospectively on the issue, defendant raised only general objection when evidence was offered); People v. Love, 57 N.Y.2d 1023, 457 N.Y.S.2d 474 (1982) ("objection" was insufficient); People v. West, 56 N.Y.2d 662, 451 N.Y.S.2d 711 (1982) (same as Love); People v. Smith, 39 A.D.3d 1228, 833 N.Y.S.2d 796 (1st Dept. 2007), lv denied 9 N.Y.3d 881 (claim unpreserved where defendant failed to make specific objection or argue that evidence was precluded by pretrial ruling); People v. Fields, 122 A.D.2d 159, 504 N.Y.S.2d 704 (2d Dept. 1986) (where defense was aware of bolstering evidence because of prior suppression hearing, general objection and mistrial motion after witness testified failed to preserve claim).

2. Change In Theory Of Prosecution At Trial - See, e.g., People v. Mitchell, 10 N.Y.3d 819, 859 N.Y.S.2d 99 (2008) (no jurisdictional infirmity where prosecutor elicited evidence of two distinct burglaries, but each conformed with date, location and elements specified in indictment; thus, defendant was required to object); People v. Barber, 155 A.D.3d 1543 (4th Dept. 2017) (defendant not required to preserve claim that prosecution presented evidence of injuries that were not mentioned in indictment); People v. Udzinski, 146 A.D.2d 245, 541 N.Y.S.2d 9 (2d Dept. 1989), lv denied 74 N.Y.2d 853, 546 N.Y.S.2d 1018 (defendant failed to object to jury charge which included change of theory; court rejects defendant's argument that the right to be tried only on theories stated in the indictment is so fundamental that it must be considered reviewable as a matter of law).

3. Judicial Interference In Trial - See, e.g., People v. Charleston, 56 N.Y.2d 886, 453 N.Y.S.2d 399 (1982) (claim unpreserved where, although defense counsel objected 3 times, the objections were directed to specific questions rather than to the court's general course of action).

4. Improper Ruling On Lesser Included Offense - See, e.g., People v. Ford, 62 N.Y.2d 275, 476 N.Y.S.2d 783 (1984) (by requesting or failing to object to consideration of lesser included offense, a defendant waives any error); People v. Ryan, 55 A.D.3d 960, 865 N.Y.S.2d 146 (3rd Dept. 2008) (requests for submission of lesser included offenses should be made prior to summations, but request for submission of

lesser included offense made before jury retires for deliberations cannot be rejected as untimely).

5. Improper Restriction Of Cross-Examination - See, e.g., People v. George, 67 N.Y.2d 817, 501 N.Y.S.2d 639 (1986) (claim unpreserved where defense counsel proceeded to another subject and failed to state purpose of question or dispute People's claim that it was irrelevant); People v. Radcliffe, 273 A.D.2d 483, 711 N.Y.S.2d 436 (2d Dept. 2000) (claim unpreserved where counsel was not allowed to ask witness about whether defendant's hair samples matched those found at the crime scene, and thereafter failed to inquire further or specifically ask about the forensic test results); People v. Trinidad, 177 A.D.2d 286, 576 N.Y.S.2d 18 (1st Dept. 1991), lv denied 79 N.Y.2d 865, 580 N.Y.S.2d 737 (1992) (defendant failed to explain relevancy of proposed lines of inquiry); People v. Dunbar, 145 A.D.2d 501, 535 N.Y.S.2d 438 (2d Dept. 1988) (constitutional claim unpreserved where defense counsel argued that questioning of witness concerning his parole status was relevant to credibility, but did not refer to defendant's right of confrontation).

6. Repugnant Verdict - See People v. Alfaro, 66 N.Y.2d 985, 499 N.Y.S.2d 378 (1985) (in bench trial, defendant must move to set aside or modify verdict to preserve claim).

7. Right To Counsel

a. State Constitutional Right To Counsel During Interrogation – As long as facts establishing the claim exist in the record, the claim may be raised for the first time on appeal. See, e.g., People v. McLean, 15 N.Y.3d 117, 905 N.Y.S.2d 536 (2010) (lack of adequate record bars review not only where vital evidence is absent, but whenever record falls short of establishing conclusively the merit of the claim); but see People v. Ramos, 99 N.Y.2d 27, 750 N.Y.S.2d 821 (2002) (delay in arraignment for purposes of eliciting statement does not trigger right to counsel, and, therefore, claim must be preserved).

b. Right To Consult With Counsel During Trial - See, e.g., People v. Narayan, 54 N.Y.2d 106, 444 N.Y.S.2d 604 (1981) (claim not preserved where counsel objected to denial of access to defendant after counsel had already failed to object to court's initial direction that he not talk to defendant and defendant had

thereafter continued his direct testimony).

8. Failure To Serve Timely Notice Of Intent To Offer Evidence Under FCA §330.2 - See, e.g., People v. Hunter, 122 A.D.2d 166, 504 N.Y.S.2d 543 (2d Dept. 1986) (general objection not sufficient).

9. Miranda Violation - See, e.g., People v. Winship, 78 A.D.2d 514, 432 N.Y.S.2d 6 (1st Dept. 1980) (claim adequately preserved where defense counsel stated during closing argument at hearing that People had not proven that statements were completely voluntary beyond a reasonable doubt, and court said, "I have that. Go on to your next point").

10. Search and Seizure - See, e.g., People v. Landy, 59 N.Y.2d 369 (1983) (challenge to officers' basis of knowledge preserved where motion did not challenge hearsay information on which officers acted because defendant did not know basis, but, when it became apparent on first day of hearing that officers relied on radio bulletin and information acquired from other officers, defense counsel informed court that she challenged officers' conduct pursuant to People v. Lypka, 36 N.Y.2d 210 and that she sought offer of proof by People to support hearsay information, and thus People had early notice of defendant's claim and opportunity to come forward with necessary evidence; "To require that a *Lypka* claim must be specified in the omnibus motion or lost would only result in unnecessary work for the District Attorney and delay in the hearing while locating witnesses"); People v. Jacobs, 182 A.D.3d 510 (1st Dept. 2020), lv denied 35 N.Y.3d 1095 (defendant failed to preserve contention that, even if stop was lawful, search was not incident to arrest and was without probable cause where defendant did not make arguments challenging admissibility of physical property); People v. Barksdale, 110 A.D.3d 498 (1st Dept. 2013) (defendant did not preserve claim that alleged refusal to provide information when confronted in building did not provide probable cause since People were not on notice of need to develop record as to whether defendant refused to give information, or was incredible when he indicated he was unable to identify host by name or apartment number); People v. Rodriguez, 188 A.D.2d 564, 591 N.Y.S.2d 460 (2d Dept. 1992), lv denied 81 N.Y.2d 892, 597 N.Y.S.2d 953 (1993) (defendant failed to preserve claim that identification was fruit of illegal arrest where he failed to raise the argument until he submitted a post-

hearing memorandum).

11. Sandoval Ruling - See, e.g., People v. Moore, 156 A.D.2d 394, 548 N.Y.S.2d 344 (2d Dept. 1989) (defendant need not testify to preserve claim). But see Luce v. United States, 469 U.S. 38, 105 S.Ct. 460 (1984) (claim not preserved under Federal Rules unless defendant testifies). In Ohler v. United States, 529 U.S. 753, 120 S.Ct. 1851 (2001), the Supreme Court held that a defendant who elects to introduce prior crimes evidence waives the right to object. But see State v. Thang, 41 P.3d 1159 (Wash. 2002) (court holds, under the State Constitution, that no waiver results since lawyer who introduced other crimes evidence only after losing battle to exclude it was not introducing evidence voluntarily).

12. Discovery Violation - See, e.g., People v. Ramon Flores, 19 N.Y.3d 881 (2012) (claim that CPL §240.45 and People v Rosario obligated People to provide counsel with copy of videotape containing witness's prior statement unpreserved where counsel did not object to arrangements made by prosecutor for him to view videotape or request a copy of it); People v. Hall, 133 A.D.2d 845, 520 N.Y.S.2d 409 (2d Dept. 1987) (claim unpreserved where People offered defendant's statement to complainant's husband despite assertion in discovery materials that they did not intend to offer statements made to private individuals, but defendant failed to cite discovery violation when objecting).

13. Missing Witness Inference - See People v. Carr, 14 N.Y.3d 808, 899 N.Y.S.2d 746 (2010) (missing witness claim unpreserved where defendant knew at outset of trial that People did not intend to call three relatives of victim who were present at time of alleged crime, but made request for charge more than a week after People provided witness list and after People had rested case in chief); People v. Vanderpool, 70 Misc.3d 43 (App. Term, 1st Dept. 2020), lv denied 36 N.Y.3d 1101 (request could have been made at outset of trial given information in defendant's possession, including People's witness list); People v. Kass, 59 A.D.3d 77, 874 N.Y.S.2d 475 (2d Dept. 2008) (request made as defense case began was timely; defense was raising questions about the nature of informant's conduct, court had more than enough time to exercise discretion, there was no possibility that prosecutor was surprised by request since informant was at heart of case, and People had lost contact with informant after his

release from prison but failed to establish his unavailability); People v. Arnold, 48 A.D.3d 239, 850 N.Y.S.2d 447 (1st Dept. 2008), lv denied, 10 N.Y.3d 859 (in drug sale prosecution, request for jury charge untimely since it could have been made at outset of trial given the information in defendant's possession); People v. Medina, 35 A.D.3d 163, 826 N.Y.S.2d 26 (1st Dept. 2006), lv denied 8 N.Y.3d 925 (request for charge as to arresting officers, which was made after defendant called three witnesses and both sides had rested, was untimely); People v. Jones, 23 A.D.3d 399, 808 N.Y.S.2d 84 (2d Dept. 2005), lv denied 6 N.Y.3d 754 (People cannot argue for first time on appeal that defendant's request was untimely, that defendant failed to establish that the witness had knowledge of a material issue, or that People established that witness had no non-cumulative evidence to offer).

14. Double Jeopardy - See People v. Gonzalez, 99 N.Y.2d 76, 751 N.Y.S.2d 830 (2002) (while defendant need not preserve double jeopardy claim regarding re-prosecution after acquittal or conviction, claim based on simultaneous convictions based on single act must be preserved); People v. Ferguson, 67 N.Y.2d 383, 502 N.Y.S.2d 972 (1986) ("Where a mistrial is granted without the consent or over the objection of a defendant, retrial is barred by double jeopardy protections unless there was 'manifest necessity' for the mistrial or 'the ends of public justice would otherwise be defeated'); People v. Pearson, 78 A.D.3d 968, 911 N.Y.S.2d 432 (2d Dept. 2010) (where defendant did not object to co-defendant's mistrial motion, consent to mistrial could be implied); In re Marte v. Berkman, 16 N.Y.3d 874 (2011) (defense counsel impliedly consented to mistrial when they failed to object after court provided prior notice of its inclination and opportunity to be heard).

15. Hearsay Offer Or Objection/Right Of Confrontation - See People v. Watson, 163 A.D.3d 855 (2d Dept. 2018), lv denied 32 N.Y.3d 1009 (defense contention that hearsay was admissible under state of mind exception not preserved where counsel asserted only that evidence was admissible nonhearsay); People v. Rios, 102 A.D.3d 473 (1st Dept. 2013), lv denied 20 N.Y.3d 1103 (claim unpreserved where defendant made vague references to confrontation, to information that "someone else has provided" and to possibility of raising objection, but never claimed that testimony should be excluded pursuant to Confrontation Clause); People v. Rodriguez,

92 A.D.3d 586 (1st Dept. 2012) (claim unpreserved where defendant requested remedies associated with Bruton but court was not alerted to issue of whether remark was testimonial); People v. Palmer, 65 A.D.3d 1389, 885 N.Y.S.2d 621 (2d Dept. 2009), lv denied 14 N.Y.3d 891 (defendant waived Confrontation Clause claim by declining People's offer to call laboratory analyst whose report had been admitted); People v. Rodriguez, 47 A.D.3d 406, 850 N.Y.S.2d 26 (1st Dept. 2007), lv denied, 10 N.Y.3d 770 (defendant did not preserve Confrontation Clause claim where he made successful severance motion in which he alleged that admission of co-defendant's statements at joint trial would violate defendant's right of confrontation, but did not raise objection at trial); People v. Lopez, 25 A.D.3d 385, 808 N.Y.S.2d 648 (1st Dept. 2006), lv denied 7 N.Y.3d 758 (objection on state evidentiary law grounds did not preserve Confrontation Clause claim).

16. Disposition – See People v. Martinez, 144 A.D.3d 708 (2d Dept. 2016) (argument that restitution order was not lawfully imposed was not subject to preservation rule); People v. Andreu, 103 A.D.3d 661 (2d Dept. 2013) (excessive sentence claim need not be preserved since court's review power stems from interest of justice jurisdiction).

C. Legal Sufficiency Of Evidence - A general dismissal motion at the end of the prosecution's case does not preserve a claim that the evidence is legally insufficient; a specific objection must be made. See People v. Hawkins, 11 N.Y.3d 484, 872 N.Y.S.2d 395 (2008) (defense counsel failed to preserve issue by arguing that People "failed to prove that Mr. Hawkins acted with Depraved Indifference Murder"); People v Eduardo, 11 N.Y.3d 484, 872 N.Y.S.2d 395 (2008) (accessorial liability issue preserved where defense counsel stated that drug sale case "came down to an officer allegedly observing three people speaking on the street for a few minutes; then the defendant looking up and down the block," and counsel's efforts were frustrated by trial judge, who also referred to what "look-outs" do and plainly was aware of and expressly decided question raised on appeal); People v. Finger, 95 N.Y.2d 894, 716 N.Y.S.2d 34 (2000) (issue unpreserved where defendant alleged "that the prosecution fail[ed] to prove each and every element of both counts of the indictment, beyond a reasonable doubt, as a matter of law"); People v. Santos, 86 N.Y.2d 869, 635 N.Y.S.2d 168 (1995);

People v. Jean-Baptiste, 38 A.D.3d 418, 833 N.Y.S.2d 31 (1st Dept. 2007), lv denied 9 N.Y.3d 877 (claim preserved where defendant, inter alia, argued in motion to dismiss at close of People's case that evidence did not demonstrate that he acted with requisite “callous disregard” or “wanton indifference to human life” necessary to sustain depraved indifference murder); People v. Danielson, 40 A.D.3d 174, 832 N.Y.S.2d 546 (1st Dept. 2007) (defendant cannot obtain review in absence of preservation by disguising legal sufficiency claim as weight of the evidence claim), aff’d, 9 N.Y.3d 342, 849 N.Y.S.2d 480; People v. Palmer, 34 A.D.3d 701, 826 N.Y.S.2d 77 (2d Dept. 2006), lv denied 8 N.Y.3d 848 (defendant’s argument regarding depraved indifference element of murder preserved claim as to charge of depraved indifference assault); People v. Flores, 23 A.D.3d 194, 803 N.Y.S.2d 85 (1st Dept. 2005), lv denied 6 N.Y.3d 775 (issue unpreserved where counsel stated: "I ask for a trial order of dismissal, that the People have not proved that defendant acted under circumstances evincing a depraved indifference to human life"); Matter of Marcel F., 233 A.D.2d 442, 650 N.Y.S.2d 274 (2d Dept. 1996); but see People v. Finch, 23 N.Y.3d 408 (2014) (legal sufficiency challenge to charge of resisting arrest for criminal trespass was preserved even though defendant did not move for dismissal at close of People's case on specific ground raised on appeal, where, at arraignment on previous charge of criminal trespass, court had rejected defendant’s specific claim and held that guest who has been invited by tenant, but whose license has been withdrawn by management, is a trespasser); People v. Prado, 4 N.Y.3d 725, 790 N.Y.S.2d 418 (2004) (issue preserved where general objection was made, but court specifically decided corroboration issue).

However, it has been held that because weight of the evidence review necessarily involves an evaluation of whether all elements of the crime were proven beyond a reasonable doubt, such review may be conducted in the absence of a challenge at trial to the legal sufficiency of the evidence. See, e.g., People v. Nisselbeck, 85 A.D.3d 1206, 923 N.Y.S.2d 801 (3d Dept. 2011).

Presentation of a defense after a dismissal motion has been denied at the close of the prosecution’s case may result in a waiver of that legal insufficiency claim and thus a new motion would have to be made at the close of proof. People v. Lane, 7 N.Y.3d 888, 826 N.Y.S.2d 599 (2006); People v. Hines, 97 N.Y.2d 56, 736 N.Y.S.2d 643

(2001); People v. Ganz, 50 Misc.3d 79 (App. Term, 2d Dept., 2015) (in light of People v. Finch, 23 N.Y.3d 408, no additional motion required where specific ground raised in earlier motion has been decided and nothing new has come out in defendant's case which would implicate propriety of prior ruling). However, if the trial court reserves decision on the legal insufficiency motion and issues no decision before the defense has presented a case, there is no waiver. People v. Payne, 3 N.Y.3d 266, 786 N.Y.S.2d 116 (2004).

D. Offers Of Proof - If a lawyer has a good faith basis for detailing what a witness's testimony would be if the judge were to permit the prohibited line of cross-examination, the lawyer should do so in an effort to convince the trial judge to allow the inquiry, and so an appeals court will know precisely what was excluded. People v. Rojas, 257 A.D.2d 429, 683 N.Y.S.2d 515 (1st Dept. 1999), lv denied 93 N.Y.2d 902 (defendant failed to make offer of proof in connection with attempt to elicit address defendant gave to police witness at time of arrest). This may be done in a narrative or question/answer format. Mauet, Trial Techniques, §10.5 (author also suggests actual examination of witness, using same questions/line of examination to which objections have been sustained). If the court refuses to let counsel make a record, he or she should consider drafting a handwritten offer of proof for submission as an exhibit.

This type of offer of proof -- that is, a clear statement regarding the nature and relevance of the testimony, and, if the lawyer knows, a specific description of what the witness would say -- also must be made when a judge refuses to allow a lawyer to call, or elicit certain testimony from, a defense witness, or denies an adjournment to secure the presence of a witness. See, e.g., People v. Rivera, 281 A.D.2d 155, 721 N.Y.S.2d 54 (1st Dept. 2001), lv denied 96 N.Y.2d 833 (defendant failed to make offer of proof regarding his testimony explaining why he confessed); People v. Frazier, 233 A.D.2d 896, 649 N.Y.S.2d 542 (4th Dept. 1996) (defendant failed to make offer of proof that his expert would testify that complainant had ingested cocaine on night of burglary or that she had history of drug abuse that would have impaired ability to perceive and recall events); People v. Ross, 197 A.D.2d 713, 602 N.Y.S.2d 919 (2d Dept. 1993), lv denied 82 N.Y.2d 902 (no offer of proof regarding defendant's testimony about specific acts of violence previously committed by victim).

When confronted with a judge's request for an offer of proof before an apparently relevant defense witness is allowed to testify, counsel should argue that such a request is inappropriate in light of the accused's constitutional right to present a defense. See People v. Hepburn, 52 A.D.2d 958, 383 N.Y.S.2d 626 (3rd Dept. 1976); but see People v. Watson, 163 A.D.3d 855 (2d Dept. 2018), lv denied 32 N.Y.3d 1009 (court did not err in precluding testimony by defense witness after asking for offer of proof prior to objection or motion in limine by prosecution; court was not required to passively await attempt to elicit inadmissible testimony, and inevitable prosecution objection, before ruling).

Finally, lawyers must be aware of the limits on arguing evidentiary rulings. An attorney "may make a concise statement of the particular grounds for an objection or exception, not otherwise apparent, where it is necessary to do so in order to call the court's attention thereto, or to preserve an issue for appellate review. If an attorney believes in good faith that the court has wrongly made an adverse ruling, he may respectfully request reconsideration thereof." 22 NYCRR § 604.1(d)(4)(ii). However, "[n]o attorney shall argue in support of or against an objection without permission from the court; nor shall any attorney argue with respect to a ruling of the court on an objection without such permission." 22 NYCRR § 604(d)(4)(i). Thus, judges have considerable discretion to cut off argument on evidentiary issues, particularly after they have ruled. So, when a you have a legitimate argument supporting exclusion of important evidence, the proper course is to specify the grounds for an objection, and say all that you intend to say, right up front when you first make the objection. If you wait until after the judge rules, you risk being cut off, and there is a possibility that the appellate court will conclude that you, and not the judge, were at fault. (I do understand that, as a matter of strategy, it sometimes makes sense to lodge a general objection on the off chance that the judge will see an argument for exclusion stronger than anything you have come up with. Just be careful with that.)

Moreover, while you should try to make the record you want, please back off when the judge is expressly threatening you with contempt or otherwise indicating that you must -- absolutely must -- stop talking or else. If you stop talking, you have NOT failed to make an adequate record. The appellate division is not going to penalize the

respondent when it is obvious that the judge cut you off, and where the context makes it reasonably clear that appellate counsel is raising an issue you were trying to raise in a timely fashion. See Jordan v. Lefevre, 206 F.3d 196, 200 (2d Cir. 2000).

E. Preservation By Co-Respondent - A motion or objection by one of several respondents at a joint hearing or trial does not preserve a claim on behalf of other respondents who do not explicitly join in the motion or objection. See, e.g., People v. Foster, 64 N.Y.2d 1144, 490 N.Y.S.2d 726 (195); People v. Burnett, 116 A.D.2d 731, 498 N.Y.S.2d 30 (2d Dept. 1986).

F. Motions In Limine - When it is anticipated that the prosecution will offer certain evidence that is objectionable, the respondent should consider making a motion in limine to obtain a ruling on admissibility before trial. An attempt should be made to have the motion heard by a judge other than the trial judge.

By making a motion in limine, the respondent may be able to prevent the trial court from hearing any portion of the excludable evidence. And, regardless of the outcome of the motion, the defense will be better able to plan for trial.

In the motion, the respondent should specify the nature of the evidence, the grounds for the respondent's belief that the prosecution plans to offer the evidence, the specific grounds for the objection and supporting legal argument, and the reasons why a trial objection would offer inadequate protection. If the motion is denied, the respondent should also raise a specific objection when the evidence is offered at trial. See People v. Fleming, supra, 70 N.Y.2d 947; but see Whitehead v. State, 695 S.E.2d 255 (Ga. 2010) (court abandons repetitive objection rule that requires defendant to repeat at trial any pretrial objection to uncharged crimes evidence; rule was at odds with usual rule that party who loses motion in limine need not renew objection when challenged evidence is offered at trial); People v. Finch, 23 N.Y.3d 408 (2014) (legal sufficiency challenge to charge of resisting arrest for criminal trespass was preserved even though defendant did not move for dismissal at close of People's case on specific ground raised on appeal, where, at arraignment on previous charge of criminal trespass, court had rejected defendant’s specific claim and held that guest who has been invited by tenant, but whose license has been withdrawn by management, is a trespasser); People v. Woody, 214 A.D.3d 157 (1st Dept. 2023) (defendant not required

to object each time prior conviction was mentioned or to court's limiting instructions where defendant made clear objection during pretrial motion in limine; lawyer not required to repeat argument court has definitively rejected); People v. Sheehan, 105 A.D.3d 873 (2d Dept. 2013), lv denied 21 N.Y.3d 1020 (pretrial objection to People's Molineux motion preserved issue).