FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK: COUNTY OF

In the Matter of	:	Hon.
	:	Return Date //0
	:	Docket No.: D
A Person Alleged to be a Juvenile Delinquent,	:	NOTICE OF MOTION
Respondent.	:	

PLEASE TAKE NOTICE that upon the annexed affirmation of , ESQ., Attorney for the Respondent, dated the day of , 200 , and upon all papers and proceedings heretofore filed and had herein, a motion will be made to this Court, in Part thereof, the Honorable presiding, at , New York, on the day of , 200 , at 9:30 a.m. or as soon thereafter as counsel may be heard, for an order:

SUPPRESSING [specify: a statement made by respondent, or identification testimony, or other non-physical evidence] on the grounds that said evidence is the tainted fruit of an arrest or seizure of respondent, or other police intrusion in violation of [his/her] rights under the New York State and United States Constitutions, or alternatively, **DIRECTING** that a pretrial *Dunaway* hearing be held;

PRECLUDING [specify: identification evidence, physical evidence, or evidence of a statement made by respondent] due to the presentment agency's failure to provide timely and adequate Notice of Intent pursuant to FCA §330.2(2) and CPL §§ 710.20 and/or 710.30(1);

Or alternatively, and only if preclusion is denied and respondent decides to litigate

a suppression motion, **SUPPRESSING [specify: a statement made by respondent to law enforcement officials, identification testimony, physical evidence]** on the grounds that said evidence was obtained in violation of respondent's rights under the New York State and United States Constitutions and/or statutory rights, or alternatively, **DIRECTING** that a pretrial suppression hearing be held;

SUPPRESSING evidence of an out-of-court identification of respondent, and any in-court identification, on the grounds that said evidence is the product of an unduly suggestive out-of-court procedure conducted by non-law enforcement personnel and was obtained in violation of respondent's rights under the New York State and United States Constitutions, or alternatively, **DIRECTING** that a pretrial *Blackman* hearing be held;

SUPPRESSING physical evidence recovered by a School Safety Agent or other school official on the grounds that said evidence was obtained in violation of respondent's rights under the New York State and United States Constitutions, or alternatively, **DIRECTING** that a pretrial suppression hearing be held;

SUPPRESSING evidence of a statement made by respondent to a School Safety Agent or other school official on the grounds that said evidence was obtained in violation of respondent's rights under the New York State and United States Constitutions, or alternatively, **DIRECTING** that a pretrial suppression hearing be held;

PRECLUDING introduction of evidence regarding stolen property returned to the owner without compliance with Penal Law §450.10;

DISMISSING the petition, or alternatively, **PRECLUDING** testimony regarding property

(to wit:), that was **[lost or destroyed]** by the **[police or presentment agency]**;

PRECLUDING introduction of evidence relating to certain undisclosed items requested in respondent's Demand for Discovery, due to the presentment agency's default;

or alternatively, **DIRECTING** the presentment agency to provide discovery of undisclosed items requested in respondent's Demand for Discovery (attached as "Exhibit A"), due to the presentment agency's default;

DIRECTING the presentment agency to provide discovery as follows:

[Cite to items in Demand for Discovery, including information related to a suppression motion, required to be disclosed under FCA §331.2(1) but not provided in presentment agency's answer];

Serve upon respondent a Bill of Particulars **[cite to items in Demand for Discovery]**;

Make available to respondent for purposes of inspection and photography property that will be introduced at trial, to wit: **[describe evidence]**;

Provide to respondent copies of all reports, memoranda and other documents, now in the possession of the presentment agency, that were prepared by law enforcement, school, or other government officials in connection with this case;

Disclose the names, addresses and birth dates of testifying presentment agency witnesses;

Disclose the names, addresses and birth dates of non-testifying witnesses;

Disclose to respondent any prior uncharged criminal, vicious or immoral acts regarding which the presentment agency intends to cross-examine respondent should **[he/she]** testify;

Disclose to respondent with specificity the exact location of the police observation post from which police observations were made in this case;

Disclose to respondent the identity of the informant who provided information which led to the arrest of respondent, or produce said informant for a *Darden* hearing;

_____ Disclose to respondent the identity of the informant who witnessed the alleged events in whole or in part, or produce the informant/witness for a *Goggins* hearing;

ISSUING a subpoena duces tecum directing production of the employment/personnel file for **[name of officer]**, for *in camera* inspection by the Court;

DIRECTING that **[name of prosecution witness]** undergo a mental health examination

DIRECTING that a pretrial *Sandoval* hearing be conducted to determine what, if any, alleged prior bad acts committed by respondent may be raised during cross-examination if respondent testifies, and further **DIRECTING** that said *Sandoval* hearing be assigned to a judge other than **[name of trial judge]**, who will maintain a file kept separate from the main court file in this case and unavailable to the trial judge;

Note: This application should be made before the county Administrative Judge, or another judge if the Administrative Judge is the trial judge.

DIRECTING that a pretrial *Ventimiglia* hearing be conducted to determine what, if any,

uncharged crimes evidence may be introduced by the presentment agency during its direct case, and further **DIRECTING** that said *Ventimiglia* hearing be assigned to a judge other than **[name of trial judge]**, who will maintain a file kept separate from the main court file in this case and unavailable to the trial judge;

SEVERING respondent's case and granting a separate fact-finding hearing pursuant to FCA §§ 311.6 and 332.1(3), and **DIRECTING** that **[name of co-respondent]**'s case be tried first;

DIRECTING that the **[age]**-year-old complainant be produced in court for a pretrial taint ("*Hudy*") hearing;

DISMISSING the petition in furtherance of justice pursuant to FCA §315.2;

[When a *Clayton* hearing is desired] or alternatively, **DIRECTING** that a *Clayton* hearing be held;

DISMISSING the petition on the ground that respondent's constitutional Due Process right to a speedy trial has been violated;

DISMISSING the petition **[or, specify counts]** on the ground that the nonhearsay allegations are insufficient;

DISMISSING the petition **[or, specify counts]** on the ground that the count(s) **[is/are]** duplicitous;

DISMISSING the petition **[or, specify counts]** on the ground that the time period covered by the allegations is excessive;

GRANTING any other relief the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to Section 2214(b) of the New York

Civil Practice Law and Rules, answering affidavits, if any, are required to be served upon the undersigned at least days prior to the return date of this Motion.

Dated: , New York
, 200

Yours, etc.

Tamara Steckler, Esq.
THE LEGAL AID SOCIETY
Juvenile Rights Division

, New York
, of Counsel
Attorney for Respondent
( )

TO:

, ESQ.
Assistant Corporation Counsel
of the City of New York

, New York

CLERK OF THE FAMILY COURT

, New York

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK: COUNTY OF

In the Matter of	:	Hon.
	:	Return Date
	:	Docket No.: D
A Person Alleged to be a Juvenile Delinquent,	:	AFFIRMATION
Respondent.	:	

, ESQ., an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms, under penalty of perjury, that the following, upon information and belief, is true:

1. I am of counsel to TAMARA STECKLER, ESQ., attorney of record for the Respondent herein, and as Respondent's Law Guardian I am fully familiar with the facts and circumstances of this case.

2. This affirmation is submitted in support of Respondent's attached Notice of Motion for various relief.

3. This affirmation is made upon personal knowledge and upon information and belief, the sources of which include [state sources generally without attributing specific facts to specific source].

FACTUAL BACKGROUND

[Outline events such as filing of petition, initial appearance, service of VDF, service of discovery Demand, etc.]

LEGAL ARGUMENT

Standing

Respondent had a legitimate expectation of privacy that was violated by the police conduct in this case, and thus respondent has standing.

Overnight guest in premises entered by police: *Minnesota v. Olsen*, 495 US 91 (1990).

Passenger in vehicle stopped by police: *People v. Millan*, 69 NY2d 514 (1987).

Respondent has been charged with possession based entirely on a statutory presumption: *People v. Wesley*, 73 NY2d 351 (1989); *People v. Millan*, 69 NY2d 514.

Respondent has not admitted possession of the property allegedly recovered from his/her person by the police: *People v. Burton*, 6 NY3d 584 (2006).

Personal property respondent has placed at a distance: *People v. Ramirez-Portoreal*, 88 NY2d 99 (1996) (individual who boards bus and places closed bag or piece of luggage in luggage rack has requisite privacy interest even if individual is seated at distance from bag).

Motion to Suppress Evidence as Fruit of Unlawful Police Intrusion (Dunaway Motion/Hearing)

In a Voluntary Disclosure Form served on the law guardian on , 200 , the presentment agency provided Notice [that (name of witness) made an out-of-court identification of respondent, or that it intends introduce at the fact-finding hearing statements allegedly made by respondent to (name of officer)]. Respondent asserts that this evidence must be suppressed as the fruit of police conduct that violated the Fourth Amendment of the United States Constitution and/or Article I, §6 of the New York State Constitution.

[Make factual allegations and/or legal arguments supporting suppression, as required by CPL §710.60(1). Note that you must allege that the identification or statement was obtained *after and as*

the fruit of the alleged unlawful police conduct (i.e., the illegal seizure, or arrest), and that the factual pleading requirements are the same as when suppression of *physical* evidence is sought. If you are alleging that you do not have sufficient information for a *Mapp* or *Dunaway* motion, include a reference to the section of the Affirmation in which you are asking for disclosure of information essential to the suppression motion.]

Motion to Preclude Evidence Pursuant to FCA §330.2(2), and CPL §§ 710.20 and/or 710.30(1)

According to FCA §330.2(2):

> Whenever the presentment agency intends to offer at a fact-finding hearing evidence described in [CPL §710.20 or CPL §710.30(1)], such agency must serve upon respondent notice of such intention. Such notice must be served within fifteen days after the conclusion of the initial appearance or before the fact-finding hearing, whichever occurs first, unless the court, for good cause shown, permits later service and accords the respondent a reasonable opportunity to make a suppression motion thereafter. If the respondent is detained, the court shall direct that such notice be served on an expedited basis.

According to CPL §710.30(3):

> In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of section 710.70.

[for confession cases] In the case of "a statement made by a [respondent] to a public servant" [see CPL §710.30(1)], the notice must contain "the time and place the oral or written statements were made and [] the sum and substance of those statements." *People v. Lopez*, 84 NY2d 425, 428 (1994). A violation of this notice requirement results in preclusion of testimony regarding any un-noticed statement. *People v. O'Doherty*, 70 NY2d 479 (1987).

[for identification cases involving non-photographic out-of-court identification] Criminal Procedure Law § 710.30(1) states, in pertinent part, as follows: "Whenever the people intend to offer at a trial. . . (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered." CPL § 710.30(3) states: "In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of section 710.70." The required notice must contain "the time, place and manner in which the [previous] identification was made." *People v. Lopez*, 84 NY2d 425, 428 (1994). A violation of this notice requirement results in preclusion of testimony regarding any un-noticed out-of-court identification, and any in-court identification by the witness. *People v Newball*, 76 NY2d 587 (1990); *People v McMullin*, 70 NY2d 855 (1987).

The presentment agency cannot avoid preclusion by disavowing any intention to offer evidence of the out-of-court identification. Although the Court of Appeals held in *People v. Grajales*, _NY3d_, 2007 WL 505446 (2007) that photo identifications are not covered by the notice requirement, and that CPL §710.30(1)(b) only mandates preclusion in the absence of timely notice specifying pretrial identification evidence "intended to be offered" at trial, that statute makes reference to out-of-court *and* in-court identifications, and thus the "evidence" that must be specified in the notice includes a witness's in-court identification. In other words, when a witness has made an out-of-court identification, the prosecution need not provide notice if it does not intend to offer

that evidence, but still must provide notice that the witness will be making an in-court identification. If notice is not provided, preclusion of the in-court identification is required under § 710.30(3).

Moreover, under FCA §330.2(2), §710.30 notice must be provided "[w]henever the presentment agency intends to offer at a fact-finding hearing evidence described in section 710.20 or subdivision one of section 710.30 of the criminal procedure law. . . ." CPL §710.20 includes a reference to "potential testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, which potential testimony would not be admissible upon the prospective trial of such charge owing to an improperly made previous identification of the defendant by the prospective witness." Thus, even if there is doubt with respect to what §710.30(1) requires in criminal proceedings, it is clear that notice of a witness's in-court identification is required in juvenile delinquency proceedings, and that preclusion of the in-court identification is the remedy for the lack of such notice. FCA § 330.2(8).

[for identification cases involving photographic out-of-court identification] Criminal Procedure Law § 710.30(1) states, in pertinent part, as follows: "Whenever the people intend to offer at a trial. . . (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered." CPL § 710.30(3) states: "In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of section 710.70." The required notice must

contain “the time, place and manner in which the [previous] identification was made.” *People v. Lopez*, 84 NY2d 425, 428 (1994). A violation of this notice requirement results in preclusion of testimony regarding any un-noticed out-of-court identification, and any in-court identification by the witness. *People v Newball*, 76 NY2d 587 (1990); *People v McMullin*, 70 NY2d 855 (1987).

Although the Court of Appeals held in *People v. Grajales*, 8 NY3d 861 (2007) that photo identifications are not covered by the notice requirement, and that CPL §710.30(1)(b) only mandates preclusion in the absence of timely notice specifying pretrial identification evidence “intended to be offered” at trial, that statute makes reference to out-of-court *and* in-court identifications, and thus the "evidence" that must be specified in the notice includes a witness's in-court identification. In other words, when a witness has made an out-of-court identification, the prosecution need not provide notice if it does not intend to offer that evidence, but still must provide notice that the witness will be making an in-court identification. If notice is not provided, preclusion of the in-court identification is required under §710.30(3).

Moreover, under FCA §330.2(2), §710.30 notice must be provided "[w]henever the presentment agency intends to offer at a fact-finding hearing evidence described in section 710.20 or subdivision one of section 710.30 of the criminal procedure law. . . ." CPL §710.20 includes a reference to "potential testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, which potential testimony would not be admissible upon the prospective trial of such charge owing to an improperly made previous identification of the defendant by the prospective witness." Thus, even if there is doubt with respect to what §710.30(1) requires in criminal proceedings, it is clear that notice of a witness's in-court identification is required in juvenile delinquency proceedings, and that preclusion

of the in-court identification is the remedy for the lack of such notice. FCA § 330.2(8).

In this case, [describe nature of notice violation; e.g., late notice, inadequate information in notice, no notice at all].

Accordingly, the court must preclude introduction of [describe evidence].

Motion to Suppress Evidence [If preclusion also has been requested]

According to CPL §710.30(3), evidence is admissible where, "despite the lack of such notice, [the respondent] moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in [CPL §710.70(2)]." In *People v. Merrill*, 87 NY2d 998 (1996), the Court of Appeals adopted the view of the Appellate Division dissenting judges, who concluded that the defendant, who had moved to preclude or, in the alternative, to suppress, and then received a suppression hearing after denial of the motion to preclude, waived any notice violation. The Court of Appeals has not yet ruled on the question of whether the accused waives a notice violation if he/she files papers asking for preclusion, or alternatively, suppression, but, after preclusion is denied, withdraws the suppression motion. It would appear that, if the accused withdraws the suppression motion without litigating it, the waiver scenario contemplated by CPL §710.30(3) does not exist; that is, while the accused has "moved to suppress," the motion "has [not] been denied and the evidence thereby rendered admissible. . . ." *People v. Heller*, 180 Misc2d 160 (Crim. Ct., N.Y. Co., 1998); *see also People v. Iavarone*, 12 Misc3d 1158(A) (Crim. Ct., N.Y. Co., 2006).

In any event, being cognizant of CPL §710.30(3) and the holding in *Merrill*, respondent wishes to indicate clearly for the record that he/she has included a motion to suppress in these papers because of the statutory requirement that such a motion be filed within 30 days after the initial

appearance (FCA §332.2[1]), because of the requirement that all motions be "included within the same set of motion papers wherever practicable" (FCA §332.2[2]), and because respondent does not wish to inconvenience the court and the presentment agency by filing an additional motion. *However*, respondent does not believe that the mere filing of the suppression motion can be deemed a waiver of any notice violation, and certainly does not intend to waive any preclusion claim at this time; respondent will determine, if and when preclusion is denied, whether he/she should withdraw the suppression motion rather than waive any preclusion issue for appeal.

[Make factual allegations and/or legal arguments supporting suppression, as required by CPL §710.60(1)]

Sample Reply To Prosecutor's Mendoza Allegations

In response to respondent's allegation that he/she was merely standing on the street, [repeat description of what respondent was doing], and doing nothing indicative of criminal activity when the police [repeat what they did to respondent that allegedly constituted arrest, stop, etc.], the presentment agency has alleged that the basis for the arrest [or stop, etc.] was not the officer's observations of respondent's behavior at the time of the arrest [or stop, etc.], but rather a report of [describe the criminal activity alleged] committed by an individual described as [state description].

[In any case, when applicable] These allegations by the presentment agency do not establish probable cause. [Explain why: *e.g.*, description too vague or did not match respondent, or information comes from insufficiently reliable or unknown source.] Any lack of precision or additional factual detail in respondent's allegations is due to the fact that the relevant information is in the possession of the police and is not available to respondent. Given these facts, respondent

is entitled to a hearing. *People v. Jones*, 95 NY2d 721 (2001); *People v. Hightower*, 85 NY2d 988 (1995); *People v. Mendoza*, 82 NY2d 415 (1993).

[In "buy and bust" case, when applicable] Respondent denies the allegation that he sold drugs to the undercover officer. He was not with the undercover officer at the time of the sale or at any other time on the day in question. Consequently, he is entitled to a hearing. *People v. Jones*, 95 NY2d 721 (2001) (defendant can raise factual challenge to legality of arrest and seizure by denying participation in transaction); *People v. Mendoza*, 82 NY2d 415 (1993).

Motion to Suppress Identification Evidence and for Blackman Hearing

In a Voluntary Disclosure Form served on the law guardian on , 200 , the presentment agency provided Notice that [name of witness] made an out-of-court identification of respondent during a procedure conducted by [identify who conducted procedure; e.g., school principal]. The procedure was a [corporeal showup, photo showup, etc.].

[If no Notice given, state above facts and that law guardian learned facts through investigation]

Respondent moves to suppress [name of witness]'s out-of-court and in-court identification on the grounds that said evidence was obtained in violation of respondent's rights under the New York State and United States Constitutions.

In *People v. Blackman*, 110 AD2d 596 (1st Dept. 1985), the First Department held that a defendant is not constitutionally entitled to a pretrial suppression hearing to challenge an identification made during a procedure conducted by a private individual rather than a law enforcement official. However, because the risk of misidentification created by an unduly suggestive identification procedure is the same regardless of whether the procedure is conducted by law enforcement personnel or some other individual, the First Department found no abuse of discretion

in the lower court's decision to hold a pretrial hearing to determine whether certain identification testimony was reliable enough to submit to the jury. The First Department stated:

> As pointed out by the Court of Appeals: "The rule excluding improper showups and evidence derived therefrom is different in both purpose and effect from the exclusionary rule applicable to confessions and the fruits of searches and seizures. In the latter cases generally reliable evidence of guilt is suppressed because it was obtained illegally. Although this serves to deter future violations, it is collateral and essentially at variance with the truth- finding process (see, e.g., People v. McGrath, 46 NY2d 12). But the rule excluding improper pretrial identifications bears directly on guilt or innocence. It is designed to reduce the risk that the wrong person will be convicted as a result of suggestive identification procedures employed by the police." (People v. Adams, 53 NY2d 241, 250-251.)
>
> We can see that the court has succinctly recognized the difference between suppressions designed to deter police misconduct and those designed to insure a fair trial. Although the court uses the phrase "employed by the police", this language is not essential to its analysis. Regardless of whether official or private action results in an improper or suggestive "showup", there remains the risk that the wrong person will be convicted as a result of such a showup.
>
> Thus, the Supreme Court, in holding that the presentation of a single suspect to a critically ill witness in her hospital bed did not deny him due process, nevertheless said: "A conviction which rests on a mistaken identification is a gross miscarriage of justice. The Wade and Gilbert rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial" (Stovall v. Denno, 388 US 293, 297) and, as it further elaborated in Manson v. Brathwaite (432 US 98, 114): "We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony in both pre- and post-Stovall confrontations".

110 AD2d at 597-98. *See also State v. Pailon*, 590 A2d 858, 863 (RI 1991).

Other courts have gone further and held categorically that unreliable identifications should not be admitted regardless of who conducted the out-of-court procedure. In *Commonwealth v. Jones*,

666 NE2d 994 (Mass. 1996), the Supreme Judicial Court of Massachusetts, relying on "[c]ommon law principles of fairness," held that an unreliable identification should be excluded even in the absence of any state action. The court stated:

> If a witness is involved in a highly suggestive confrontation with a defendant and that witness's in-court identification of the defendant is not shown to have a basis independent of that confrontation, the admissibility of the witness's proposed testimony identifying the defendant should not turn on whether government agents had a hand in causing the confrontation. The evidence would be equally unreliable in each instance.
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> * * *
>
> Eyewitness identification of a person whom the witness had never seen before the crime or other incident presents a substantial risk of misidentification and increases the chance of a conviction of an innocent defendant. . . . The Supreme Court has deemphasized the role of deterring police misconduct in the analysis of suggestive confrontations to focus more on nonreliability as the justification for the exclusion of an identification that may have been influenced by a suggestive confrontation. [citations omitted.]

666 NE2d at 1000-1001. *See also State v. Holliman,* 570 A2d 680, 684 (Conn. 1990) ("even if the defendant's claim has no constitutional underpinning, the criteria established for determining the admissibility of identifications in the due process context are appropriate guidelines by which to determine the admissibility of identifications that result from procedures conducted by civilians"); *State v. McCord*, 611 A2d 1160 (N.J. Super. Ct., 1992); *People v. Walker*, 97 Misc2d 171 (County Ct., West. Co., 1978); *cf. People v. Eybergen*, 130 Misc2d 1 (Sup. Ct., Bronx Co., 1985), *aff'd* 131 AD2d 981 (1st Dept. 1987).

[Include where school officials or private security personnel conducted procedure] Finally, the demarcation between private and state action becomes completely blurred in the identification context when, from the point of view of the witness, the individual conducting the identification

procedure is someone whose authority and/or law enforcement role carries the same persuasive force as that of a police officer. In any case involving a showup procedure conducted by such an individual, the court ordinarily should conduct a pretrial hearing to determine the admissibility of the identification evidence.

Motion to Suppress Physical Evidence Recovered by [School Safety Officer, or Other School Official]

In a Voluntary Disclosure Form served on the law guardian on , 200 , the presentment agency provided notice of its intent to introduce at the fact-finding hearing certain physical evidence (to wit:) allegedly recovered from respondent by [name and job title of School Safety Agent or other official].

[If no Notice given, state above facts and that law guardian learned facts through investigation]

Respondent moves to suppress said evidence on the grounds that it was obtained in violation of respondent's rights under the New York State and United States Constitutions.

[When respondent argues that the evidence was recovered pursuant to an arrest made by a School Safety Agent without probable cause] The arrest of a student by a School Safety Agent employed by the Police Department requires probable cause. *See Matter of William J.*, 203 AD2d 144 (1st Dept. 1994).

[State facts, and argument as to why there was no probable cause and physical evidence is tainted fruit]

[When respondent argues that full constitutional protections apply because School Safety Agent must be treated like other police officers.] Although searches conducted by school officials ordinarily are governed by the standard established by the United States Supreme Court in *New*

Jersey v. T.L.O., 469 US 325 (1985), *T.L.O.* does not apply, and full constitutional protections must be provided to the respondent, where, as here, a search is conducted by a School Safety Agent who is an employee of the New York City Police Department. *People v. Bowers*, 77 Misc2d 697 (App. Term, 2d Dept. 1974) (school security officer appointed by Police Commissioner held to standards governing police); *State v. Tywayne H.*, 933 P2d 251 (N.M. App., 1997) (officers providing security for after-prom dance were governed by probable cause standard); *People v. Butler*, 188 Misc2d 48 (Sup. Ct., Kings Co., 2001) (School Safety Officer employed by police improperly questioned defendant in absence of *Miranda* warnings).

[State facts, and argument as to why search was unconstitutional]

[When respondent argues that full statutory and constitutional protections apply because School Safety Agent or other school official acted as agent of police] Although searches conducted by school personnel ordinarily are governed by the standard established by the United States Supreme Court in *New Jersey v. T.L.O.*, 469 US 325 (1985), *T.L.O.* does not apply, and full constitutional protections must be provided to the respondent, when a school official has acted as an agent of the Police Department. *See People v. Ray*, 65 NY2d 282 (1985) (Bloomingdale's course of conduct in employing special police officer on premises to process arrests did not constitute government involvement requiring that store detective provide *Miranda* warnings before turning suspect over to authorities because "[t]he private surveillance, apprehension and questioning of defendant was in no way instigated by the special police officer or undertaken upon the official behest of a law enforcement agency" and "[d]efendant was neither identified as a suspect by the police nor questioned in the furtherance of a police-designated objective"); *People v. Wilhelm*, 34 AD3d 40 (3rd Dept. 2006) child protective caseworkers were agents of law enforcement where they

were members of a county-wide, multidisciplinary team comprised of members of the District Attorney's office, and police and social service agencies; the team met regularly and its purpose was to enhance the prosecutorial process in criminal proceedings involving child abuse; and the caseworkers cooperated with the District Attorney's office by providing information when requested); *People v. Greene*, 306 AD2d 639 (3rd Dept. 2003), *lv denied* 100 NY2d 594 (2003) (CPS caseworker had agency relationship with law enforcement authorities given the common purpose of Family Violence Response Team, the cooperative working arrangement through the structure of the FVRT, and the understanding that incriminating statements obtained by CPS caseworker would be communicated to police agency); *Commonwealth v. J.B.*, 719 A2d 1058 (Pa. Super. Ct. 1999) (school security officers governed by reasonable suspicion standard unless acting at behest of law enforcement); *People v. Mooney*, NYLJ, 10/29/02, p. 19, col. 6 (Sup. Ct., Bronx Co.) (although ACS child protective specialist was not, strictly speaking, a police agent, she questioned defendant after arrest and police interrogation, and would not have been at the precinct if not for the actions of the police); *People v. Moss*, NYLJ, 2/24/86, p. 15, col. 6 (County Ct. Suffolk Co.) (given the "ongoing cooperative information-sharing relationship" between the child protective service and the police sex crimes unit, defendant's un-Mirandized confession to caseworker must be suppressed; "[t]o hold otherwise, might very well invite imaginative methods to procure confessions from criminal defendants by members of state agencies that otherwise are not solely mandated to enforce the criminal law of this State").

The presence of the police when evidence is obtained often establishes an agency relationship. *People v. Miller*, 137 AD2d 626 (2d Dept. 1988) (questioning of defendant by his mother in presence of police was "pervaded by governmental involvement"); *People v. Warren*, 97

AD2d 486 (2d Dept. 1983), *appeal dism'd* 61 NY2d 886 (1984) (chief of bank security was agent of police when he questioned defendant, who was handcuffed and surrounded by detectives); *People v. Crosby*, 180 Misc2d 43 (Dist. Ct., Nassau Co., 1999) (police were present when store detective interrogated defendant); *People v. Aviles*, NYLJ, 7/26/89, p. 25, col. 2 (Crim. Ct. Queens Co.) (defendant's girlfriend recovered gun from defendant's jacket as a result of instigation by police).

[Make factual allegations establishing agent status of official.]

[When respondent charged with possession of a firearm] Respondent asserts that an ongoing agency relationship between the Department of Education and the Police Department has been created by the "Gun Free Schools Act" [*see* Educ. Law §3214(3)(d)], which requires that school officials notify the Family Court presentment agency whenever a student under 16 years of age is found with a firearm. *See State v. Helewa*, 537 A2d 1328 (N.J. Super., App. Div., 1988) (given child protection caseworkers' statutory obligation to report abuse and neglect to county prosecutor, un-Mirandized statement to caseworker during custodial interview is not admissible in criminal proceeding).

[State facts, and argument as to why search was unconstitutional]

Motion to Suppress Statements Obtained by [School Safety Agent or Other School Official]

In a Voluntary Disclosure Form served on the law guardian on , 200 , the presentment agency provided notice of its intent to introduce at the fact-finding hearing statements allegedly made by respondent to [name and job title of School Safety Agent or other official].

[If no Notice given, state above facts and that law guardian learned facts through investigation]

Respondent moves to suppress said evidence on the grounds that it was obtained in violation of respondent's statutory rights and his/her rights under the New York State and United States

Constitutions.

First, respondent alleges that [his/her] statement was "involuntarily made" within the definition in FCA §344.2(2)(a). Thus, respondent is entitled as of right to a *Huntley* hearing. *People v. Rodriguez*, 79 NY2d 445, 452 (1992); *People v. Weaver*, 49 NY2d 1012, 1013 (1980).

[When respondent argues that full statutory and constitutional protections apply because School Safety Agent must be treated like other police officers.] Respondent also alleges that [his/her] statements were "involuntarily made" and unconstitutionally obtained within the meaning of FCA §344.2(2)(b). Full constitutional and statutory protections must be provided to the respondent, where, as here, a search is conducted by a School Safety Agent who is an employee of the New York City Police Department. *People v. Bowers*, 77 Misc2d 697 (App. Term, 2d Dept. 1974) (school security officer appointed by Police Commissioner held to standards governing police); *State v. Tywayne H.*, 933 P2d 251 (N.M. App., 1997) (officers providing security for after-prom dance were governed by probable cause standard); *People v. Butler*, 188 Misc2d 48 (Sup. Ct., Kings Co., 2001) (School Safety Officer employed by police improperly questioned defendant in absence of *Miranda* warnings); *cf. Commonwealth v. J.B.*, 719 A2d 1058 (Pa. Super. Ct. 1999) (school security officers governed by reasonable suspicion standard unless acting at behest of law enforcement).

[When respondent argues that full statutory and constitutional protections apply because School Safety Agent or other school official acted as agent of police] Respondent also alleges that [his/her] statements were "involuntarily made" and unconstitutionally obtained within the meaning of FCA §344.2(2)(b). Full constitutional and statutory protections must be provided to the respondent, where, as here, a search is conducted by a school official who acted as an agent of the Police Department. *See People v. Ray*, 65 NY2d 282 (1985) (Bloomingdale's course of conduct in

employing special police officer on premises to process arrests did not constitute government involvement requiring that store detective provide *Miranda* warnings before turning suspect over to authorities because "[t]he private surveillance, apprehension and questioning of defendant was in no way instigated by the special police officer or undertaken upon the official behest of a law enforcement agency" and "[d]efendant was neither identified as a suspect by the police nor questioned in the furtherance of a police-designated objective"); *People v. Wilhelm*, 34 AD3d 40 (3rd Dept. 2006) child protective caseworkers were agents of law enforcement where they were members of a county-wide, multidisciplinary team comprised of members of the District Attorney's office, and police and social service agencies; the team met regularly and its purpose was to enhance the prosecutorial process in criminal proceedings involving child abuse; and the caseworkers cooperated with the District Attorney's office by providing information when requested); *People v. Greene*, 306 AD2d 639 (3rd Dept. 2003), *lv denied* 100 NY2d 594 (2003) (CPS caseworker had agency relationship with law enforcement authorities given the common purpose of Family Violence Response Team, the cooperative working arrangement through the structure of the FVRT, and the understanding that incriminating statements obtained by CPS caseworker would be communicated to police agency); *Commonwealth v. J.B.*, 719 A2d 1058 (Pa. Super. Ct. 1999) (school security officers governed by reasonable suspicion standard unless acting at behest of law enforcement); *People v. Mooney*, NYLJ, 10/29/02, p. 19, col. 6 (Sup. Ct., Bronx Co.) (although ACS child protective specialist was not, strictly speaking, a police agent, she questioned defendant after arrest and police interrogation, and would not have been at the precinct if not for the actions of the police); *People v. Moss*, NYLJ, 2/24/86, p. 15, col. 6 (County Ct. Suffolk Co.) (given the "ongoing cooperative information-sharing relationship" between the child protective service and the police sex

crimes unit, defendant's un-Mirandized confession to caseworker must be suppressed; "[t]o hold otherwise, might very well invite imaginative methods to procure confessions from criminal defendants by members of state agencies that otherwise are not solely mandated to enforce the criminal law of this State").

The presence of the police when evidence is obtained often establishes an agency relationship. *People v. Miller*, 137 AD2d 626 (2d Dept. 1988) (questioning of defendant by his mother in presence of police was "pervaded by governmental involvement"); *People v. Warren*, 97 AD2d 486 (2d Dept. 1983), *appeal dism'd* 61 NY2d 886 (1984) (chief of bank security was agent of police when he questioned defendant, who was handcuffed and surrounded by detectives); *People v. Crosby*, 180 Misc2d 43 (Dist. Ct., Nassau Co., 1999) (police were present when store detective interrogated defendant); *People v. Aviles*, NYLJ, 7/26/89, p. 25, col. 2 (Crim. Ct. Queens Co.) (defendant's girlfriend recovered gun from defendant's jacket as a result of instigation by police).

[Make factual allegations establishing agent status of official.]

Motion to Preclude Evidence Due to Violation of PL §450.10

[In cases involving stolen motor vehicles] A motor vehicle which is alleged to have been stolen, but is not alleged to have been used in connection with criminal behavior other than the theft or unlawful use of the vehicle, may be released "expeditiously" to the owner or the owner's representative without prior notice to the respondent. However, before such release, "evidentiary photographs" must be taken of the vehicle identification number; the windshield registration; the license plates; each side of the vehicle, including vent windows, door locks and handles; the front and back; the interior, including the ignition lock, seat to floor clearance, center console, radio receptacle and dashboard area; the motor; and any interior or exterior surfaces that reveal damage.

Notice of the vehicle's release, and the required photographs, must be provided to the respondent within 15 days after the law guardian first appears on behalf of the respondent. PL §450.10(4)(c)).

In this case, these requirements were violated. [Describe nature of violation].

Although this violation cannot result in dismissal of the petition, pursuant to PL §450.10(10) the court may preclude the introduction of the property, reproductions of the property, or testimony concerning the value and condition of the property if respondent can demonstrate that "undue prejudice" has occurred, or impose any other sanction set forth in FCA §331.6.

Respondent has suffered "undue prejudice." [Describe why this is so: e.g., the presentment agency will be presenting testimony regarding damage to the vehicle that agency will claim should have signaled to respondent that the vehicle was stolen]

Accordingly, the court should preclude the introduction of the property, reproductions of the property, or testimony concerning the value and condition of the property. *People v. Johnson*, 114 AD2d 515 (2d Dept. 1985) (evidence concerning recovery of money from defendant and accomplice precluded where money was released to complainant); *People v. Capellan*, NYLJ, 3/3/98, p. 27, col. 4 (Sup. Ct., Bronx Co.) (People precluded from introducing evidence of condition of parts of car People failed to photograph); *People v. Meyer*, 165 Misc2d 171 (Dist. Ct., Nassau Co. 1995) (in prosecution for theft of and damage to stereo equipment, court orders preclusion of evidence concerning damage, but the trial court will determine whether defendant suffered any undue prejudice with respect to the petit larceny count, which has no value element); *People v. White*, 159 Misc2d 381 (Sup. Ct., Bronx Co., 1993) (since People failed to photograph certain parts of car, they must be precluded from offering testimony as to the value of the car or the condition of parts that were not photographed; court will also give adverse inference charge); *Matter of Edwin P.*, NYLJ,

3/9/90, p. 24, col. 4 (Fam. Ct., Bronx Co.) (evidence of value or condition of car precluded); *People v. Lopez*, 123 Misc2d 134 (Sup. Ct. Kings Co., 1984) (evidence of damage to car precluded).

[In cases not involving stolen vehicle]. Property which is alleged to have been stolen and is in the custody of a police or peace officer or a prosecutor may be released upon the owner's request only after there is compliance with PL §450.10. When a request is made for the return of the property, written notice of the request must be given to the accused or defense counsel as soon as practicable, as well as notice of "the date on which the property will be released and the name and address of a person with whom arrangements can be made for the examination, testing, photographing, photocopying or other reproduction of said property." PL §450.10(1).

In this case, these requirements were violated. [Describe nature of violation].

Although this violation cannot result in dismissal of the petition [Note: dismissal is a potential sanction when the prosecution has destroyed evidence in its possession - see below.], pursuant to PL §450.10(10) the court may preclude the introduction of the property, reproductions of the property, or testimony concerning the value and condition of the property if respondent can demonstrate that "undue prejudice" has occurred, or impose any other sanction set forth in FCA §331.6.

Respondent has suffered "undue prejudice." [Describe why this is so: e.g., the property is a common article of clothing that does not necessarily belong to the complainant]

Accordingly, the court should preclude the introduction of the property, reproductions of the property, or testimony concerning the value and condition of the property. *People v. Johnson*, 114 AD2d 515 (2d Dept. 1985) (evidence concerning recovery of money from defendant and accomplice precluded where money was released to complainant); *People v. Capellan*, NYLJ, 3/3/98, p. 27, col.

4 (Sup. Ct., Bronx Co.) (People precluded from introducing evidence of condition of parts of car People failed to photograph); *People v. Meyer*, 165 Misc2d 171 (Dist. Ct., Nassau Co. 1995) (in prosecution for theft of and damage to stereo equipment, court orders preclusion of evidence concerning damage, but the trial court will determine whether defendant suffered any undue prejudice with respect to the petit larceny count, which has no value element); *People v. White*, 159 Misc2d 381 (Sup. Ct.,Bronx Co., 1993) (since People failed to photograph certain parts of car, they must be precluded from offering testimony as to the value of the car or the condition of parts that were not photographed; court will also give adverse inference charge); *Matter of Edwin P.*, NYLJ, 3/9/90, p. 24, col. 4 (Fam. Ct., Bronx Co.) (where notice failed to include name or address of person to contact, and it was not clear that respondent's Spanish-speaking mother understood notice written in English, evidence of value or condition of car precluded); *People v. Lopez*, 123 Misc2d 134 (Sup. Ct. Kings Co., 1984) (evidence of damage to car precluded).

Note: If preclusion is denied, the law guardian should argue orally that there has been undue prejudice and that, pursuant to §450.10(10), the court may "consider [the violation of §450.10] in determining the weight to be given" to the improperly released evidence.]

Dismissal of Petition, or Preclusion of Testimony Regarding or Derived from [Lost or Destroyed] Property

Law enforcement authorities and prosecutors have a duty to preserve physical evidence, including evidence that is subject to disclosure pursuant to FCA §331.2(1). When property is intentionally destroyed, or lost, the court may impose an appropriate sanction, such as dismissal or the preclusion of testimony regarding, or derived from, the missing evidence. When determining what, if any, sanction to impose, the court must consider the importance of the evidence, and the

presence or absence of bad faith or negligence on the part of the prosecution.

In this case, evidence has been [lost or destroyed] in violation of this duty to preserve it. [Describe violation of duty to preserve evidence, and why respondent has been prejudiced.]

[When evidence was lost or destroyed after demand served pursuant to FCA §331.2(1)]. The misconduct in this case is particularly egregious given that the evidence was [lost/destroyed] *after* respondent served a Demand for Discovery requesting disclosure of the evidence pursuant to FCA §331.2(1).

The sanction of dismissal, or alternatively, preclusion, is warranted. *People v. Cobb*, 198 AD2d 128 (1st Dept. 1993) (dismissal of criminal mischief and burglar's tools charges proper where bolt cutter allegedly used by defendant was lost); *People v. Torres*, 190 AD2d 52 (3rd Dept. 1993) (court orders preclusion of testimony regarding defendant's encounter with undercover where People destroyed tape recording, and defendant raised agency defense); *People v. Samuels*, 185 AD2d 903 (2d Dept. 1992), *lv denied* 81 NY2d 794 (1993) (since police destroyed gun allegedly used in robbery without testing it and foreclosed defendant from proving it was inoperable, court reduces first degree robbery conviction to one for third degree robbery); *People v. Terrell*, 185 AD2d 906 (2d Dept. 1992) (court dismisses first degree robbery charge because police destroyed gun); *People v. Deresky*, 137 AD2d 704 (2d Dept. 1988) (preclusion of ballistics reports and expert testimony, resulting in dismissal of one count and acquittal on another, was appropriate sanction for inadvertent destruction of gun); *People v. Springer*, 122 AD2d 87 (2d Dept. 1986) (bank robbery charges dismissed where surveillance photos were discarded by police); *People v. Shapiro*, 117 AD2d 688 (2d Dept. 1986) (preclusion of lab test results was appropriate sanction for People's failure to preserve complainant's blood sample); *People v. Saddy*, 84 AD2d 175 (2d Dept. 1981) (drug sale

convictions reversed where police erased tape recordings of conversations between defendant and undercover officer); *People v. Newman*, NYLJ, 4/16/02, p. 22, col. 6 (County Ct., Rockland Co.) (dismissal ordered where tape of conversation between defendant and undercover was erased); *People v. Rodriguez*, NYLJ, 6/8/88, p. 29, col. 4 (Sup. Ct., Queens Co.) (court suppresses gun, noting that because of disposal of nylon bag from which gun was recovered, defendant could not thoroughly examine officer concerning "plain view" observation); *People v. McCann*, 115 Misc2d 1025 (Sup. Ct., Queens Co., 1982) (dismissal ordered where police discarded blood scrapings and blood-stained clothing that could have been used to identify or exclude possible suspects); *People v. Churba*, 76 Misc2d 1028 (Crim. Ct., N.Y. Co., 1974) (case dismissed where prosecution failed to preserve television and tape recordings of defendant and Department of Consumer Affairs agents).

[When sanction is sought for failure to preserve surveillance tape of crime scene]. A sanction against the prosecution may be appropriate where the prosecution, aware of the existence of a surveillance tape of the crime scene at a relevant time, failed to take any steps to ensure that the tape is preserved for viewing by the accused. *People v. Vyacheslav*, NYLJ, 5/10/04, p. 20, col. 1 (Dist. Ct., Nassau Co.) (hearing ordered to determine whether prosecution should be sanctioned for failure to ensure that bowling alley surveillance tape would be preserved); *People v. Kidd*, NYLJ, 4/23/04, p. 19, col. 1 (Sup. Ct., Bronx Co.) (adverse inference charge granted where, despite defendant's subpoenas, police and housing authority destroyed security videotapes that defendant claimed would place him at another location at the time of the robbery); *cf. People v. Scott*, 309 AD2d 573 (1st Dept. 2003) (no sanction ordered where police failed to preserve surveillance videotape of Washington Square Park, the scene of the alleged drug transaction; tape was erased pursuant to routine procedure before defendant made discovery request).

Motion for Sanctions or Full Discovery Due to Presentment Agency's Default

On , 200 , respondent served a Demand for Discovery and a Bill of Particulars upon the presentment agency (copy is attached as "Exhibit A") pursuant to FCA §§ 331.2 and 330.1. Pursuant to FCA §§ 331.7(2)(b) and 330.1(4), the presentment agency was required either to comply fully with respondent's discovery requests, or to serve upon respondent a refusal to comply, within 15 days after service of the Demand. As of the date of this affirmation, , 200 , the presentment agency has not responded in any fashion to respondent's Demand.

When the presentment agency timely submits a refusal to comply, the court must order discovery as to any material if the court "finds that the presentment agency's refusal to disclose such material is not justified." However, where, as here, the presentment agency effectively defaults by "fail[ing] to serve a timely written refusal pursuant to [§331.2(6)]," the court "must, unless it is satisfied that the presentment agency has shown good cause why such an order should not be issued, order discovery or any other order [*i.e., sanction*] authorized by [FCA §331.6(1)] as to any material not disclosed upon demand pursuant to section 331.2. . . ." FCA §331.3(1).

Similarly, upon a respondent's motion, the court "must, to the extent a protective order is not warranted, order the presentment agency to comply with the request [for a bill of particulars] if it is satisfied that the items of factual information requested are authorized to be included in a bill of particulars, and that such information is necessary to enable the respondent adequately to prepare or conduct his defense. . . ." However, where the presentment agency effectively defaults by "not timely serv[ing] a written refusal pursuant to [§330.1(4)] the court must, unless it is satisfied that the presentment agency has shown good cause why such an order should not be issued, issue an order requiring the presentment agency to comply or providing for any other order [*i.e., sanction*]

authorized by [FCA §331.6(1)]." FCA §330.1(5).

In other words, when the presentment agency defaults by failing to respond to the respondent's discovery Demand, the court must issue sanctions, and/or direct discovery, regardless of whether the respondent can establish that discovery of the item in question is authorized by statute, unless the presentment agency can establish good cause for the denial of such discovery. Obviously, the presentment agency cannot avoid automatic disclosure pursuant to FCA §331.3(1) or §330.1(5) simply by arguing that discovery is not authorized by statute, since there must be some penalty for the presentment agency's failure to invoke such an objection via a written refusal to comply. Rather, to avoid disclosure, the presentment agency must be required to cite some compelling privacy interest that would be compromised were disclosure ordered.

[To be used only if disclosure *was not* made in VDF] Here, respondent requests that the court sanction the presentment agency by precluding it from introducing any evidence or testimony that is included within respondent's Demand, or alternatively, by directing the presentment agency to provide respondent with all requested documents, and provide in writing all other requested information, no later than , 200 .

[To be used if disclosure *was* made in VDF; in that event, law guardian should also consider leaving the item out of the Demand and the Motion, and focusing attention on other discovery] Accordingly, the court should direct the presentment agency to provide respondent with all requested documents, and provide in writing all other requested information, no later than , 200 .

Disclosure of Information Essential to Suppression Motion

In a voluntary disclosure form dated , 200 , the presentment agency notified respondent of its intent to offer [describe evidence and whatever is known about how it was obtained]. Because

respondent was doing nothing indicative of criminal activity or otherwise suspicious and was merely [describe respondent's behavior] when the police [describe nature of police intrusion], and is unaware of any other basis for the police conduct, respondent is unable to formulate any allegations regarding what, if anything, the police knew at the time they confronted respondent. Accordingly, respondent requested such information in items [cite to items] in the Demand for Discovery, and now asks this court to direct the presentment agency to disclose the requested information.

Although such information is not specifically referenced in the Family Court Act, FCA §331.2(1)(g) requires the presentment agency to disclose "anything required to be disclosed, prior to the fact-finding hearing, to the respondent by the presentment agency, pursuant to the constitution of this state, or of the United States." Whether or not this discovery requirement is aimed primarily at disclosure of exculpatory, or "*Brady*," material, it also requires disclosure of information, such as search warrant documents, without which respondent cannot raise constitutional claims. *People v. Nottage*, 11 Misc3d 1052(A) (Crim. Ct., Kings Co., 2006); *People v. Alvarez*, NYLJ, 5/3/93, p. 29, col. 2 (Sup. Ct. N.Y. Co.) (court cites CPL §240.20[1][h]); *People v. Chahine*, 150 Misc2d 242 (Crim. Ct. N.Y. Co., 1991) (citing CPL §240.20[1][h]). Clearly, information without which respondent would find it impossible to raise a suppression claim comes within this disclosure requirement.

Further support for disclosure can be found in *People v. Mendoza*, 82 NY2d 415 (1993), where the Court of Appeals, while creating strict pleading requirements for motions to suppress physical evidence, stated as follows:

> A third factor in determining the sufficiency of a defendant's factual allegations is the degree to which the pleadings may reasonably be expected to be precise in view of the information available to

> defendant. The CPL expressly relieves defendant of the burden of pleading facts in support of a motion to suppress identification testimony (CPL 710.60[3][b]), likely because in many instances defendant simply does not know the facts surrounding certain pretrial identification procedures, such as photo arrays. [citation omitted]. *It would be unreasonable to construe the CPL to require precise factual averments when, in parallel circumstances, defendant similarly does not have access to or awareness of the facts necessary to support suppression* [citations omitted; emphasis added].

82 NY2d at 429. Similarly, in *People v. Jones*, 95 NY2d 721 (2001), the Court of Appeals noted that although defendant reasonably could be required to allege all those facts he was in a position to know, he could not be required to allege facts about which he had no knowledge, such as the description possessed by the arresting officer *that the People had not disclosed*. While these decisions are concerned with pleading requirements, they also reflect a policy favoring the disclosure by the prosecution of information related to potential suppression claims.

[Note: If you have alleged that you do not have sufficient information for a *Mapp* or *Dunaway* motion, include a reference to this section of the Affirmation in the section related to the *Mapp* or *Dunaway* motion.]

Disclosure of Search Warrant Documents

In the Voluntary Disclosure Form, the presentment agency notified respondent of its intent to offer physical evidence recovered during execution of a search warrant for the premises at [specify address]. Respondent has standing to move to controvert the warrant because [describe basis of standing; e.g., respondent lives in the premises, had dominion and control over the area searched, was an overnight guest, statutory presumption is being used by presentment agency, etc.]. Because respondent is incapable of determining the basis for the warrant, the scope of the search authorized,

and whether there are grounds for suppression, without disclosure of the warrant, the warrant application and any supporting affidavits and documents, respondent is entitled to discovery. *See People v. Hale*, NYLJ, 8/9/99, p. 24, col. 4 (Sup. Ct., N.Y. Co.); *People v. Alvarez*, NYLJ, 5/3/93, p. 29, col. 2 (Sup. Ct. N.Y. Co.) (court cites CPL §240.20[1][h]); *People v. Chahine*, 150 Misc2d 242 (Crim. Ct. N.Y. Co., 1991) (citing CPL §240.20[1][h]); *People v. Brown*, 104 Misc2d 157 (Crim. Ct. Queens Co., 1980).

Bill of Particulars

According to FCA §330.1(1)(a), the presentment agency must provide the respondent with a bill of particulars containing "items of factual information which are not recited in the petition and which pertain to the offense charged and including the substance of each respondent's conduct encompassed by the charge which the presentment agency intends to prove at a fact-finding hearing on its direct case, and whether the presentment agency intends to prove that the respondent acted as principal or accomplice or both." In *People v. Iannone*, 45 NY2d 589, 599 (1978), the Court of Appeals noted that "[i]t is beyond cavil that a defendant has a basic and fundamental right to be informed of the charges against him so that he will be able to prepare a defense." *See also People v. Villani*, 59 NY2d 781 (1983).

[For in-concert case] Here, the petition and supporting depositions describe behavior allegedly committed by respondent and the named accomplices, but, as to the items of information requested by respondent, do not specify which individual committed the acts alleged. Respondent is entitled to that information. *See, e.g., People v. Wright*, 74 Misc2d 419 (Sup. Ct. N.Y. Co., 1973) (court grants discovery of description of property taken from person of complainant and location

from which it was taken, and the specific acts attributable to defendant).

[For request for more specificity as to time of offense] The presentment agency has alleged that respondent committed the offenses[s] sometime within the period from [describe time frame alleged in petition]. This broad time frame does not provide respondent with notice of the time of the offense[s] sufficient to permit him/her to investigate the facts and prepare a defense, such as the defense of alibi. *See People v. Keindl*, 68 NY2d 410 (1986).

Although the presentment agency "shall not be required to include in the bill of particulars matters of evidence relating to how the presentment agency intends to prove the elements of the offense charged or how the presentment agency intends to prove any item of factual information included in the bill of particulars," the information requested by respondent does not fall into either category. [Explain why items relate to elements of offense, and not evidentiary details]. *See People v. Palmer,* 1 Misc3d 839 (Sup. Ct., Queens Co., 2003) (People must specify which of the three firearms involved is referred to in each of the four counts); *People v. Coletti*, 39 Misc2d 580 (County Ct., West. Co., 1963) (defendant is entitled to know what stolen items he allegedly bought or received and the value of the items).

Discovery of Property That Will Be Introduced At Trial

The court "may order discovery with respect to any other property which the presentment agency intends to introduce at the fact-finding hearing, upon a showing by the respondent that discovery with respect to such property is material to the preparation of his defense, and that the request is reasonable." FCA §331.3(1)(c). *See, e.g.*, *People v. Seeley*, N.Y.L.J., 11/18/98, p. 31, col. 5 (Sup. Ct., Kings Co.) (where defendant was raising Battered Woman's Syndrome defense, Court

orders People to turn over for in camera inspection records regarding defendant and victim).

In this case, respondent believes the presentment agency intends to offer into evidence at trial [describe evidence]. The basis for respondent's belief is [describe basis; e.g., the presentment's agency's expressed intent, or respondent's awareness that the evidence is under the presentment agency's control and that the evidence would be probative of a particular element of a charge in the petition]. Discovery is material to the preparation of respondent's defense because [make argument]. Moreover, the request is reasonable, because [make argument].

Disclosure of Reports, Memoranda and other Documents in Possession of Presentment Agency

Respondent concedes that there is no general requirement that the presentment agency disclose to the respondent all relevant documents in its possession that were prepared by law enforcement or other government personnel, and concedes as well that, under FCA §331.4(1), the presentment agency is required to turn over prior written or recorded statements made by witnesses the agency intends to call to testify at trial -- so-called "*Rosario*" material -- "[a]t the commencement of the fact-finding hearing" (or, pursuant to FCA §331.4[3], at the conclusion of each witness's direct examination at a pre-trial suppression hearing). However, while such disclosure may be adequate in the ordinary case, the court does have discretion to order earlier disclosure in an appropriate case. *See, e.g., People v. Zacher*, 11 Misc3d 1090(A) (Sup. Ct., Monroe Co., 2006) (disclosure ordered where defendant was suffering from memory loss); *People v. Leon*, 134 Misc2d 757 (County Ct., West. Co., 1987) (court grants discovery of reports upon which People's expert relied); *People v. Johnson*, 115 Misc2d 366 (County Ct. West. Co., 1982) (discovery of reports containing witness statements ordered where defendant had no recollection of incident). This is such

a case.

[Describe reasons for early disclosure; e.g., respondent has absolutely no idea what the testimony will be because he/she has not been able to obtain an interview with the witnesses and has participated in no pre-trial hearings at which witnesses have testified, and/or respondent is raising an alibi defense so that counsel has no access to facts through contacts with the respondent, and/or the presentment agency has discouraged witnesses from speaking to the law guardian, and/or this is a designated felony case in which respondent faces consequences more dire than in an ordinary juvenile delinquency proceeding, and/or the events in question occurred a long time ago and respondent has no reliable recollection of the events, and/or respondent has made a suppression motion, and police reports may contain important information, etc.]

Because of the circumstances of this case, which have made it impossible for respondent to prepare adequately for trial without this information, discovery is required "pursuant to the constitution of this state [and] of the United States." FCA §331.2(1)(g). Unless the presentment agency can cite some compelling reason why the requested information must be kept confidential, there is no sound reason why the presentment should be privy to more information than the respondent and allowed to conduct litigation "by ambush."

Moreover, the interests of judicial economy will be served, since prompt disclosure may well prevent a mid-trial continuance occasioned by the disclosure of new and material information that would compel respondent to conduct further preparation, investigation or research.

* case to watch out for: *Matter of Catterson v. Rohl*, 202 AD2d 420 (2d Dept. 1994), *lv denied* 83 NY2d 755 (defendant not entitled to early discovery of Rosario material).

Disclosure of Names And Addresses and Birth Dates Of Testifying Prosecution Witnesses

Respondent seeks discovery of the names, addresses and birth dates of the presentment agency's witnesses so that the law guardian can attempt to conduct or arrange for witness interviews, and investigate the witnesses' criminal histories; these are fundamental and important investigative activities designed to protect respondent's right to a fair trial, and a failure to engage in such activities would constitute ineffective assistance of counsel. *Cf. Gregory v. United States*, 369 F2d 185 (D.C. Cir., 1966) (prosecutor's advice to eyewitnesses to refuse to talk to defense counsel denied defendant a fair trial; "A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. The current tendency in the criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial" * * * "The defense could not know what the eye witnesses to the events in suit were to testify to or how firm they were in their testimony unless defense counsel was provided a fair opportunity for interview"). Accordingly, while discovery is in the discretion of the court, this information ordinarily should be disclosed absent compelling circumstances such as danger of intimidation. *See People v. Rivera*, 119 AD2d 517 (1st Dept. 1986); *cf. People v. Frost*, 100 NY2d 129 (2003) (identities of witnesses properly withheld from defendant, due to their fear for their safety, after in camera hearing in absence of defendant and defense counsel); *People v. Boyd*, 164 AD2d 800 (1st Dept. 1990), *lv denied* 77 NY2d 904 (1991) (disclosure properly denied where there was evidence that defendant's gang had executed a witness); *People v. Taylor*, 91 AD2d 729 (3rd Dept. 1982) (defendant properly denied discovery of name of witness who was afraid of defendant and reluctant to testify because she had been threatened by defendant in the past).

[State why disclosure is critical in this case: e.g., it's a one-witness ID case and respondent does not know the witness; or the events occurred a long time ago and respondent's recollection is limited.] Moreover, the law guardian, with respondent's assistance, has made efforts to [locate] the witnesses. The law guardian has [describe efforts].

Moreover, to negate any risk that the information acquired will be misused, respondent agrees that the law guardian and any other Juvenile Rights Division employee involved in the investigation are barred from disclosing the information to respondent or anyone acting in his/her behalf. *See, e.g.*, *People v. Scrimo*, NYLJ, 1/29/02, p. 22, col. 2 (Sup. Ct., Nassau Co.) (defendant entitled to witness' current address where charges were serious and People's case was based on testimony of witness with unsavory background; defense counsel directed not to disclose information to defendant); *People v. Arthur*, 175 Misc2d 742 (Sup. Ct., N.Y. Co., 1997) (information is discoverable subject to People's motion for protective order, but information shall be used solely by counsel and persons working under their direction; in the alternative, People may arrange for witnesses to be interviewed by counsel); *People v. Thomas*, NYLJ, 6/17/93, p. 24, col. 6 (Sup. Ct. N.Y. Co.) (People ordered to disclose witness' name and address or disclose just the name and make witness available; defendant agreed that only defense counsel would receive the information); *People v. Arrellano*, 150 Misc2d 574 (Crim. Ct. Kings Co., 1991) (defendant entitled to disclosure of civilian witnesses' names, addresses and dates of birth; defense counsel will be instructed not to divulge information to client).

It is clear that, if the law guardian maintains the confidentiality of the witness information, any safety concerns will be satisfied. In fact, there are no allegations, and there is no evidence, that any witness has been threatened or for some other reason is at risk.

Disclosure of Names, Addresses and Birth Dates of Non-Testifying Witnesses

Respondent seeks discovery of the names, addresses and birth dates of witnesses to the incident in question who are known to the presentment agency or to law enforcement officials, so that the law guardian can attempt to conduct or arrange for witness interviews. The law guardian has a good faith basis for believing that there are material witnesses who will not be testifying at trial. The good faith basis is [describe basis]. Without any opportunity to interview these witnesses, respondent cannot ascertain whether they can contribute to his/her defense to these charges. The testimony of other witnesses is particularly important in the circumstances of this case, because [describe reason; e.g., this is a one-witness case with an identification defense]. Moreover, the law guardian, with respondent's assistance, has made efforts to identify and locate the witnesses. The law guardian has [describe efforts]. Since there is good reason to believe that material and necessary witnesses exist, and the law guardian has diligently attempted to ascertain the witnesses' identities through investigation, discovery is appropriate. *Cf. Matter of Terry D.*, 81 NY2d 1042 (1993) (family court abused discretion by ordering blanket disclosure of names of all eyewitnesses; Court of Appeals notes that a respondent *should ordinarily be required to obtain such information through investigation*).

Alternatively, the court should hold a hearing to determine whether there are material witnesses whose identities should be disclosed. *See Matter of Andre W.*, 44 NY2d 179 (1978).

Disclosure of Prior Uncharged Criminal, Vicious or Immoral Acts

Respondent requests disclosure of any uncharged criminal, vicious or immoral conduct of respondent of which the presentment agency has knowledge, and which the presentment agency

intends to use at trial for impeachment purposes.

Upon a criminal defendant's request, "the prosecutor shall notify the defendant of all specific instances of a defendant's 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 defendant." CPL §240.43. Since a juvenile delinquency respondent is entitled to a "*Sandoval*" hearing at which he/she may challenge the presentment's agency use of such impeachment evidence [see *Matter of Joshua P.*, 270 AD2d 272 (2d Dept. 2000), *lv denied* 95 NY2d 757 (family court erred in refusing to hold *Sandoval* hearing)], and because juvenile delinquency respondents are entitled to the same Due Process protections as criminal defendants, respondent is entitled to disclosure pursuant to CPL §240.43.

Disclosure of Location of Police Observation Post

From an investigation and a review of documents served in connection with this case, the law guardian has learned that the police officer who observed the alleged drug transaction was positioned at an observation post some distance away from the site of the alleged transaction. Because the officer's ability to make accurate observations will be a critical issue at [the suppression hearing and/or] [trial], and because respondent has no other means of discovering where the officer was located when he made his observations, respondent requests that the court order the presentment agency to disclose the officer's exact location. [Also describe any other factors which make disclosure particularly important in this case].

Even if the presentment agency argues that the location should remain confidential, disclosure is required unless the court concludes that there is a compelling interest which justifies

the maintenance of confidentiality and outweighs the importance of respondent's Sixth Amendment right to confront the witnesses against him. *People v Stanard*, 42 NY2d 74 (1977) (objecting party must show why witness should be excused from answering question; burden then shifts to questioning party to demonstrate materiality of requested information to the issue of guilt or innocence, and court must then weigh the various interests involved); *State v. Reed*, 6 P3d 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); *United States v. Jimenez*, 464 F3d 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); *People v. Broadnax*, NYLJ, 8/18/93, p. 24, col. 4 (Crim. Ct. Queens Co.) (People failed to prove that officer would be in danger or that use of post would be frustrated); *Matter of James B.*, 146 Misc2d 532 (Fam. Ct. N.Y. Co., 1990); *cf. United States v. Harley*, 682 F2d 1018 (D.C. Cir. 1982) (location withheld to protect safety of owner or tenant); *In re Tomicko M.*, 272 AD2d 155 (1st Dept. 2000), lv denied 95 NY2d 762 (disclosure properly denied at fact-finding hearing where confidentiality was required because post was still being used by police officers, and in order to preserve the safety of private citizens who gave the police permission to use their property and to encourage others to do so); *Matter of Chris C.*, 172 Misc2d 416 (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).

Disclosure of Identity of Informant, or Alternatively, a *Darden* Hearing

From an investigation and a review of documents served in connection with this case, the law

guardian has learned that, at a suppression hearing, the presentment agency intends to argue that the police conduct in this case was justified by information provided by a confidential police informant, whose identity the presentment agency intends to keep confidential. In *People v. Darden*, 34 NY2d 177 (1974), the Court of Appeals held that "where there is insufficient evidence to establish probable cause apart from the testimony of the arresting officer as to communications received from an informer," the court should "conduct an in camera inquiry. The prosecution should be required to make the informer available for interrogation before the Judge. The prosecutor may be present but not the defendant or his counsel. Opportunity should be afforded counsel for defendant to submit in writing any questions which he may desire the Judge to put to the informer. The Judge should take testimony, with recognition of the special need for protection of the interests of the absent defendant, and make a summary report as to the existence of the informer and with respect to the communications made by the informer to the police to which the police testify. That report should be made available to the defendant and to the People, and the transcript of testimony should be sealed to be available to the appellate courts if the occasion arises. 34 NY2d at 181. *See also People v. Edwards*, 95 NY2d 486 (2000) (*Darden* established a requirement, not merely a procedure to be allowed in the discretion of the court).

In this case, the presentment agency cannot establish a sufficient basis for the police conduct without reliance on the information provided by the confidential informant. [Describe why that is so.] Accordingly, respondent requests production of the informant for an in camera examination by the court, during which the court should determine the informant's level of reliability, and whether the informant corroborates the officer's suppression hearing testimony concerning what the informant said.

Disclosure of Identity of Informant/Witness, or a *Goggins* Hearing

From an investigation and a review of documents served in connection with this case, the law guardian has learned that the incident in question [and/or other relevant events] was witnessed by a police informant, whose identity the presentment agency has refused to reveal. In *People v. Goggins*, 34 NY2d 163 (1974), cert denied 419 US 1012, the Court of Appeals held that, when the accused demands disclosure of the identity of a police informant who allegedly has information relevant to the issue of guilt or innocence, and can "show a basis in fact to establish that his demand does not have an improper motive and is not merely an angling in desperation for possible weaknesses in the prosecution's investigation [citation omitted]," disclosure should be ordered. 34 NY2d at 169. *See also Abbott v. State*, 138 P3d 462 (Nev. 2006) (reversible error in denial of application for psychological examination of sex crime complainant; court abandons restrictive rule and returns to former, more liberal rule); *People v. Stanfield*, 7 AD3d 918 (3rd Dept., 2004) (court should have ordered disclosure where informant observed transfer of item between defendant and another individual, and then received something from that individual, since defendant's main contention was that there was no proof that the crack cocaine turned over to detectives was the same item allegedly passed by defendant); *People v. Estrada*, 142 AD2d 512 (1st Dept. 1988) (disclosure required where informant told officer that person with same last name as prosecution witness may have shot the deceased); *People v. Baez*, 103 AD2d 746 (2d Dept. 1984) (disclosure required where informant was present during drug sale and identification was live issue); *People v. Taylor*, 83 AD2d 595 (2d Dept. 1981) (production required where informant was eyewitness to sale and defendant had alibi); *People v. Canales*, 75 AD2d 875 (2d Dept. 1980) (disclosure required where informant witnessed weighing of narcotics and counting of money); *People v. Copeland*, 70 AD2d 884 (2d

Dept. 1979) (informant was highly involved in sale negotiations).

Here, the basis upon which the court should conclude that the informant has information relevant to guilt or innocence is [describe information re: informant's connection to incident or other important events].

Alternatively, the court should hold a hearing to determine whether disclosure should be ordered; since guilt or innocence is at issue, respondent has a right to participate in the hearing. *Goggins*, 34 NY2d at 168.

Issuance of Subpoena for Employment/Personnel Records

The respondent in a juvenile delinquency proceeding is entitled to have the court conduct an *in camera* review of a police officers' or other witness's personnel file, and then turn over to the respondent any relevant information found, when the respondent can provide a good faith factual predicate which makes it "reasonably likely that the file will bear [] fruit and that the quest for its contents is not merely a desperate grasping at a straw." *People v. Gissendanner*, 48 NY2d 543, 550 (1979). While, in *Gissendanner*, "no basis was presented, in the form of information from any extraneous source or otherwise, to suggest that either of the officers had ever committed a discreditable act on which one could premise an inference that impeachable material tending to affect their credibility was to be found in their files," *id.*, in this case there is a good faith factual predicate.

[Describe good faith basis]

Order Directing Mental Health Examination of [Name of Witness]

When compelling reason exists, the family court has authority to compel a witness to undergo a mental health examination for the purpose of determining whether a mental disease or defect affects the witness's ability to perceive and recall events. *People v. Griffin*, 138 Misc2d 279 (Sup.

Ct. Kings Co., 1988) (defendants' motion denied, because their allegations failed to show that complainant was suffering from mental illness which could affect ability to testify, or that examination would aid fact-finder in assessing credibility); *see also People v. Earel*, 89 NY2d 960 (1997) (court assumes without deciding that power exists, and concludes that defendant failed to show that exam was necessary to ensure fair trial); *United States v. Benn*, 476 F2d 1127 (D.C. Cir. 1973) ("[t]o assist the court in making its competency decision, to aid the jury in assessing credibility, or to serve both purposes, the trial judge may order a psychiatric examination to obtain expert testimony concerning the degree and effect of a witness' disability"); *People v. Lowe*, 96 Misc2d 33 (Crim. Ct. Bronx Co., 1978) (defendant's motion denied without prejudice to renewal if defendant can make substantial showing of "need and justification").

In this case, there is substantial evidence that [name of witness] suffers from a mental disease or defect, and that a mental health examination will yield important and useful information regarding the credibility and accuracy of [name of witness]'s testimony. [Describe known information and its relevance to witness's testimony.]

Sandoval Hearing

If respondent testifies at the [suppression hearing and/or trial], the presentment agency [is likely to/will] attempt to question respondent regarding alleged prior bad acts.

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. *People v. Sandoval*, 34 NY2d 371 (1974). In *Sandoval*, the Court of Appeals noted that, "with definitive advance knowledge of the scope of cross- examination as to prior conduct to which he will be subjected, [the defendant] can decide whether to take the witness stand. Revelation of the

impeachment testimony and announcement of the trial court's ruling in advance of trial are consistent with the objectives today of broad pretrial discovery and disclosure." 34 NY2d at 375.

Accordingly, the respondent in a juvenile delinquency proceeding also has a right to a pretrial *Sandoval* hearing. *Matter of Joshua P.*, 270 AD2d 272 (2d Dept. 2000), *lv denied* 95 NY2d 757 (family court's refusal to hold *Sandoval* hearing denied respondent right to testify on his own behalf).

Moreover, the *Sandoval* hearing should be held before a judge who will not be conducting the fact-finding hearing. The purpose of the hearing is to give a respondent the opportunity to decide not to testify if the court determines that the presentment agency may cross examine regarding bad acts, and thereby prevent the trier of fact from hearing about the bad acts. That purpose would be defeated were the same judge to conduct both the *Sandoval* hearing and the fact-finding hearing. For this court to direct that a judge other than the trial judge conduct the *Sandoval* hearing would not create any undue burden on the Family Court as a whole. The *Sandoval* hearing will involve only the presentment agency's disclosure to the judge of those bad acts it may wish to raise during cross examination of respondent, and legal argument by counsel. This "hearing" should take 15-30 minutes at the very most.

***Ventimiglia* Hearing**

The presentment agency [may be offering/intends to offer], during its direct case, certain uncharged crimes evidence. {Name of witness] will testify that [describe uncharged crimes evidence].

Generally, evidence of uncharged crimes committed by the respondent may not be admitted unless the probative value of such evidence outweighs its prejudicial tendency to demonstrate the

respondent's criminal propensities. *People v. Molineux*, 168 NY264 (1901). In this case, respondent contends that the probative value of the aforementioned evidence is weak, and that introduction of the evidence will cause undue prejudice by tending to demonstrate criminal propensity. Even in a bench trial, the court may not admit such evidence. *Matter of Devon B.*, 1 AD3d 432 (2d Dept. 2003). In *People v. Ventimiglia*, 52 NY2d 350 (1981), the Court of Appeals stated:

> When a prosecutor, knowing that [uncharged crimes] evidence is to be presented, waits until objection is made when it is offered during trial before informing the court of the basis upon which he considers it to be admissible, there is unfairness to the defendant, even if his objection is sustained, in view of the questionable effectiveness of cautionary instructions in removing prior crime evidence from consideration by the jurors. There is, moreover, a greater probability of error, and consequent waste of scarce judicial resources, when evidentiary rulings are made during trial than in the more relaxed atmosphere of an inquiry out of the presence of the jury. Whether some time prior to trial, just before the trial begins or just before the witness testifies will depend upon the circumstances of the particular case, but at one of those times the 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, either as an offer of proof by counsel or, preferably, by presenting the live testimony of the witness (citations omitted). The court should then assess how the evidence came into the case and the relevance and probativeness of, and necessity for it against its prejudicial effect, and either admit or exclude it in total, or admit it without the prejudicial parts when that can be done without distortion of its meaning (citation omitted).

52 NY2d at .

The *Ventimiglia* hearing should be held before a judge a judge other than the trial judge. The purpose of the hearing is to give a respondent the opportunity to prevent the trier of fact from hearing about certain unduly prejudicial uncharged crimes evidence. That purpose would be defeated were the same judge to conduct both the *Ventimiglia* hearing and the fact-finding hearing. Indeed, since

respondent's commission of a prior uncharged crime must be established by clear and convincing evidence, *People v. Robinson*, 68 NY2d 541 (1986), the *Ventimiglia* hearing will result in findings of fact and witness credibility determinations; an appearance of impropriety would be created were the *Ventimiglia* hearing judge given responsibility for evaluating the credibility of the same witnesses at trial.

Severance

[severance based on antagonistic defenses] The Court should sever respondent's case, and order a separate fact-finding hearing, because respondents' plan to present antagonistic defenses that will preclude the possibility of a fair trial.

In *People v. Mahmoubian*, 74 NY2d 174 (1989), the Court of Appeals set out the test for determining whether severance is required where it is alleged that a defendant's defense is "antagonistic" to the other's:

> Broadly speaking, two tests have emerged for determining when defenses are sufficiently antagonistic to require severance. One, typified by a series of Fifth Circuit cases culminating in *United States v. Romanello*, 726 F.2d 173, looks in large measure to whether the defenses are logically inconsistent--that is, whether the "core" of each defense is rationally irreconcilable with the other. "The essence or core of the defenses must be in conflict, such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other." (Id., at 177.) The second, typified by *Rhone v. United States*, 365 F.2d 980 and subsequent D.C. Circuit cases interpreting *Rhone*, looks to whether there is a danger that the jury will unjustifiably infer defendants' guilt simply from the conflicting and irreconcilable defenses; formal inconsistency in defenses would not necessarily compel severance.
>
> We apply a standard that combines elements of both tests, concluding that severance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant

> danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt.

74 NY2d at 184-85. The Court of Appeals then found undue prejudice, and reversible error in the trial court's denial of severance, where Mahboubian's defense was to deny any participation in the crimes, while his co-defendant's defense was that he and Mahboubian had arranged the theft, but only as a publicity stunt. The court stated:

> These defenses "were not only antagonistic but also mutually exclusive and irreconcilable. The jury could not have credited both defenses. Sakhai conceded the theft. If the jury had believed that Mahboubian persuaded him to arrange the theft as a publicity stunt, they could not have also credited Mahboubian's disclaimer of any involvement. Had the jury credited Mahboubian's disclaimer of any involvement, necessarily they had to reject Sakhai's defense. This was more than complete disagreement on some factual detail, or even some peripheral aspect of the case (citation omitted). The defenses presented here were antagonistic at their crux.

74 NY2d at 185-86.

In *People v. Cardwell*, 78 NY2d 996 (1991), the Court of Appeals, while reversing due to the denial of severance, concluded that the second prong of the *Mahmoubian* test was satisfied where one defendant's attorney "took an aggressive adversarial stance against [the other defendants], in effect becoming a second prosecutor." Counsel for one of the other defendants then responded by attempting to impeach the first defendant's story with evidence of a recantation, which elicited an assertion that the recantation had been induced by the other defendant's threats. This situation "'created the sort of compelling prejudice that could have been avoided by the grant of the requested severance' (citation omitted)." 78 NY2d at 998. *See also People v. McGriff*, 219 AD2d 829 (4th Dept. 1995) (severance should have been ordered where defendant testified that co-defendant possessed

drugs and threw them toward defendant when the police started to pull the vehicle over, while co-defendant testified that defendant removed drugs and threw them at co-defendant, and evidence presented by prosecution supported co-defendant's version); *People v. Forbes*, 203 AD2d 609 (3rd Dept. 1994) (severance should have been ordered where co-defendant sought to prove he was only a broker and that defendant, an experienced dealer, made the sale, while defendant sought to prove that he had been an unwitting pawn in co-defendant's plan, and each defendant vigorously attacked the other defendant and the witnesses, and co-defendant's attorney was aggressively adversarial to defendant); *People v. Figueroa*, 193 AD2d 452 (1st Dept. 1993) (severance should have been ordered where one defendant alleged that he was manipulated by the other into having sexual relations with the complainant and that the complainant was coerced by the other defendant, while the other defendant disclaimed any involvement).

Here, severance is compelled because respondents' defenses are antagonistic, and it is anticipated that each respondent's law guardian will attempt aggressively to discredit the defense of the other respondent. [Describe antagonistic defenses].

It is true that this would be a joint *bench* trial, but the risk of prejudice remains. While a judge may conduct a bench trial after suppressing evidence at a pretrial hearing, in that context the trial itself does not include the potentially prejudicial evidence and the judge has a fighting chance at putting aside the evidence and making a decision based only on the evidence presented. In contrast, at a joint trial the antagonistic defenses will be before this Court, and its ability to put aside the contradictions cannot be presumed.

[severance based in prosecution's offer of co-respondent's statement] In a Voluntary

Disclosure Form dated , 200 , the presentment provided notice of its intent to offer at trial a statement made by the co-respondent [his/her name]. The sum and substance of the statement is as follows: [quote from VDF]. Because the admission of this statement at a joint trial will result in due prejudice to respondent, the Court should sever respondent's case, and order a separate fact-finding hearing.

When an extrajudicial statement by one defendant contains incriminating references to another defendant, admission of that statement upon their joint trial deprives the non-confessing defendant of his right to confront the witness against him unless that witness also testifies at the joint trial, or the confession can be effectively redacted so that the jury would not interpret its admissions as incriminating the non-confessing defendant. *Bruton v. United States*, 391 US 123, 126 (1968) ("because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of [the co-defendant's] confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment"). If neither exception applies, the trial court must sever and order separate trials. *People v. Wheeler*, 62 NY2d 867 (1984) (denial of severance improper where redacted confession could only be read as implicating defendant); *People v. Green*, 225 AD2d 1077 (4th Dept. 1996) (error, albeit harmless, where statements made by co-defendant to police in attempt to exculpate himself clearly referred to other participants, and may have implied that defendant was involved in murder). Neither exception applies in this case.

Upon information and belief, respondent asserts that the co-respondent does not now intend to testify. Moreover, redaction is not an appropriate option where, as here, the Court is already aware of the sum and substance of the co-respondent's statement. In *Bruton*, the Supreme Court rejected

the notion that a jury can be expected to follow instructions to disregard the confessor's extrajudicial statement that his co-defendant participated with him in committing the crime:

> 'The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the "effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.' * * * '*The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction.* * *.' (emphasis added)

391 US at 129.

It is true that this would be a joint *bench* trial, but the risk of prejudice remains. Even if this Court rules that the co-respondent's statement does not constitute evidence against respondent, and promises to disregard it when determining whether respondent has been proven guilty beyond a reasonable doubt, the Court's knowledge of the statement still creates the appearance of an unfair trial, and there remains the possibility that the statement will influence the Court's determination. While a judge may conduct a bench trial after suppressing evidence at a pretrial hearing, in that context the trial itself does not include the improperly obtained evidence and the judge has a fighting chance at putting aside the evidence and making a decision based only on the evidence presented. In contrast, at a joint trial the co-respondent's statement will be before this Court, and its ability to put it aside cannot be presumed. Indeed, while well-crafted jury instructions usually are considered to be adequate to prevent prejudice when the jury hears something it should not have heard, in the *Bruton* scenario the evidence at issue is so devastating, and the risk of undue prejudice so compelling, that the Supreme Court put aside as a matter of law the usual presumption regarding

juror conduct. The result should not change just because a judge is involved; a judge who is, after all, only human.

Although the Second Department declined long ago to extend the rationale of *Bruton* to a nonjury trial in *People v. Jenkins*, 115 AD2d 562 (2d Dept. 1985), the United States Supreme Court, in *Lee v. Illinois*, 476 US 530 (1986), appears to have assumed that *Bruton* applies in a nonjury trial context. *See also Commonwealth v. Gribble*, 703 A2d 426 (Pa.,1997); *People v. Schmitt*, 527 NE2d 384 (Ill. App. Ct., 5th Div., 1988). Moreover, the question here is not whether, on appeal, an appellate court can conclude that respondent was prejudiced by the admission of a co-respondent's statement, but whether this Court should exercise its discretion to order severance.

[severance based in prospective availability of co-respondent as witness at separate trial of respondent] The Court should sever respondent's case, and order a separate fact-finding hearing, because respondent intends to call the co-respondent, [name of co-respondent], as an exculpatory witness at the fact-finding hearing, but cannot do so at a joint trial because [name of co-respondent] will be invoking his Fifth Amendment right not to testify.

Respondent has a constitutional right to present a defense, which, in this case, includes a right to call [name of co-respondent] to testify on his behalf. In *People v. Owens*, 22 NY2d 93 (1968), the Court of Appeals stated:

> Indeed, upon a proper showing of need for the codefendant's testimony, it may be an abuse of discretion to deny severance. But there must be a showing of intention to call the codefendant as a witness and a need to do so; the mere statement of intention is hardly sufficient unless the circumstances indicate sincerity of intention and reasonable need.

Id., at 98.

This right is sufficiently compelling that, if the need for the co-respondent's testimony arises during trial, "the trial court must consider the granting of a mistrial, if requested by one or the other of the codefendants. *Id; see also People v. Bornholdt*, 33 NY2d 75, 87 (1973) (denial of severance proper where defendant never offered proof as to what co-defendant's testimony would be except for a conclusory allegation that he would state that defendant had nothing to do with the shooting, and failed to show how the purported testimony would aid his defense).

Here, respondent asserts, upon information and belief, that [name of co-respondent] would testify that [describe expected testimony]. Moreover, [name of co-respondent]'s law guardian has informed me that [name of co-respondent] does not as of this time plan to testify at a joint trial.

This testimony will aid, and is critical to, respondent's defense. [State why this is so; e.g., respondent will not be testifying due to the potential for cross-examination regarding prior bad acts, or the case involves a credibility battle between presentment agency and defense witnesses].

Finally, since "the very purpose of the severance granted by this motion would be frustrated" were the Court to try respondent's case first, the Court should order that [name of co-respondent]'s case be tried first. *Santucci v. Di Tucci*, 124 AD2d 850 (2d Dept. 1986); *People v. Garnes*, 134 Misc2d 39, 43 (Sup. Ct., Queens Co., 1986).

Pretrial Taint (*HUDY*) Hearing

Respondent requests that the Court issue an order directing the presentment agency to produce [age]-year-old [name of complainant/witness] in court for a hearing to determine whether his/her testimony has been tainted by improper questioning by law enforcement officials or other

individuals conducting an investigation, and, if such impropriety is found, that the Court suppress [name of complainant/witness]'s testimony.

A number of courts have recognized that the known susceptibility of young children to suggestive questioning is a proper subject for inquiry in a criminal proceeding. In *People v. Hudy*, 73 NY2d 40 (1988), the Court of Appeals held that the defendant was improperly denied the right to present his case by the trial court's ruling foreclosing examination of two investigating officers about the manner in which the child witnesses were first questioned, where defense counsel had a good-faith basis for the proposed line of questioning. The court noted:

> Both the two children who had made such admissions and the other children who had given a detailed story for the first time after police questioning were potentially subject to impeachment on the theory that their stories had been influenced by what they had heard from the investigators. Although defense counsel attempted to explore the possibility of suggestive police comments during his cross-examination of the child-witnesses, his efforts were met with flat denials. These denials might well have been materially impeached if defense counsel had been permitted to question [the officers] about their comments to these impressionable young boys.

73 NY2d at 57-58.

Although this Court is not *required* to hold a pretrial hearing on this issue, the Court has discretion to do so, and should do so, if respondent makes a good faith showing that improper investigative activity may have tainted [name of complainant/witness]'s testimony. *Commonwealth v. Delbridge*, 855 A2d 27 (PA 2003) (where there is some evidence of suggestiveness, taint is legitimate question at pretrial competency hearing); *State v. Michaels*, 642 A.2d 1372 (NJ 1994) (given improper interrogations of child sex abuse victims and substantial likelihood that evidence from them was unreliable, State required to prove by clear and convincing evidence at pretrial

hearing that statements and testimony retained sufficient degree of reliability to warrant admission); *People v. Michael M.*, 162 Misc2d 803 (Sup. Ct. Kings Co., 1994) (court may hold pretrial hearing to determine whether testimony should be suppressed due to suggestive questioning of child); *cf. People v. Kemp*, 251 AD2d 1072 (4th Dept. 1998); *People v. Jones*, 185 Misc2d 899 (Sup. Ct., Kings Co., 2000).

Respondent contends that there is sufficient cause for a hearing in this case. [Describe basis for believing that complainant/witness may have been exposed to suggestive investigative activity].

Dismissal in Furtherance of Justice

[Note: This case law also can be used to support alternative applications for referral for adjustment by probation pursuant to FCA §320.6, and for an adjournment in contemplation of dismissal pursuant to FCA §315.3.]

According to FCA §315.2(1):

> A petition or any part or count thereof may at any time be dismissed in furtherance of justice when, even though there may be no basis for dismissal as a matter of law, such dismissal is required as a matter of judicial discretion by the existence of some compelling further consideration or circumstances clearly demonstrating that a finding of delinquency or continued proceedings would constitute or result in injustice. In determining whether such compelling further consideration or circumstances exist, the court shall, to the extent applicable, examine and consider, individually and collectively, the following:
>
> (a) the seriousness and circumstances of the crime;
>
> (b) the extent of harm caused by the crime;
>
> (c) any exceptionally serious misconduct of law enforcement personnel in the investigation and arrest of the respondent or in the presentment of the petition;
>
> (d) the history, character and condition of the respondent;

(e) the needs and best interest of the respondent;

(f) the need for protection of the community; and

(g) any other relevant fact indicating that a finding would serve no useful purpose.

This court has broad discretion to order dismissal under FCA §315.2. *See People v. Rickert*, 58 NY2d 122, 131 (1983) ("one of the reforms effected through the years in the procedure to dismiss accusatory instruments in the interest of justice was to remove the power to do so from the offices of the District Attorney and Attorney-General and lodge it, instead, in the courts alone"). Consideration of the statutory factors leads to the conclusion that one or more compelling factors exist that support dismissal. Since the court is required to consider all the factors listed in the stature [*Matter of Holtzman v. Goldman*, 71 NY2d 564 (1988)], respondent will address the statutory factors seriatum.

(a) the seriousness and circumstances of the crime

[Persuade judge that this factor supports motion, and if it does not, that it should not be dispositive or that important]

Supporting case law: *In re Deborah C.*, 261 AD2d 138 (2d Dept. 1999) (referral for probation adjustment appropriate where respondent was charged with scratching brother's name into a subway seat); *People v. Curtis*, 2 Misc2d 1003 (Crim. Ct., N.Y. Co., 2003) (defendant allegedly stole $6.59 bottle of Advil); *People v. Gragert*, 1 Misc3d 646 (Crim. Ct., N.Y. Co., 2003) (defendant, charged with disorderly conduct and obstructing governmental administration, allegedly blocked pedestrian traffic during demonstration); *People v. A.T.*, 155 Misc2d 637 (Crim. Ct., N.Y. Co., 1992) (defendant possessed sterile hypodermic needles); *People v. Cezar*, 149 Misc2d 620 (Crim. Ct., N.Y.

Co., 1991) (possession of hypodermic needles was for purpose of turning therm in to law enforcement authorities); *People v. James*, 98 Misc2d 755 (Crim. Ct., N.Y. Co., 1979) ("the real victim of prostitution is the prostitute herself)

Cases re: consensual sexual contacts between like-aged teenagers: *In re B.A.M.*, 806A2d 893 Super. Ct., 2002); *Matter of Cerino P.*, 296 AD2d 868 (4th Dept. 2002); *Matter of Jessie C.*, 164 AD2d 731 (4th Dept. 1991), *app dism'd* 78 NY2d 907; *Matter of Kevin S.*, 190 Misc2d 80 (Fam. Ct., Clinton Co., 2001); *People v. M.K.R.*, 166 Misc2d 456 (Ct., Co., 1995)

(b) the extent of harm caused by the crime

[Persuade judge that this factor supports motion, and if it does not, that it should not be dispositive or that important]

Supporting case law: *People v. Curtis*, 2 Misc2d 1003 (Crim. Ct., N.Y. Co., 2003) (shoplifting does cause harm, but theft of $6.59 bottle of Advil caused *de minimus* harm); *People v. A.T.*, 155 Misc2d 637 (Crim. Ct., N.Y. Co., 1992) (harm outweighed by benefit of providing clean hypodermic needles to drug users); *People v. James*, 98 Misc2d 755 (Crim. Ct., N.Y. Co., 1979) ("the real victim of prostitution is the prostitute herself)

Cases re: consensual sexual contacts between like-aged teenagers: *In re Z.C.*, 2007 WL 2033744 (Utah, 2007) (where thirteen-year-old was charged with sexual abuse after she engaged in consensual sex with twelve-year-old boy, Legislature could not possibly have intended to punish them under child sexual abuse statute, and thus application of statute would produce absurd result and is prohibited; the crime charged envisions a perpetrator and a victim); *In re B.A.M.*, 806A2d 893 Super. Ct., 2002); *Matter of Cerino P.*, 296 AD2d 868 (4th Dept. 2002); *Matter of Jessie C.*, 164

AD2d 731 (4th Dept. 1991), *app dism'd* 78 NY2d 907; *Matter of Kevin S.*, 190 Misc2d 80 (Fam. Ct., Clinton Co., 2001); *People v. M.K.R.*, 166 Misc2d 456 (Ct., Co., 1995)

(c) any exceptionally serious misconduct of law enforcement personnel in the investigation and arrest of the respondent or in the presentment of the petition

[Persuade judge that this factor supports motion, and if it does not, that it should not be dispositive or that important]

Supporting case law: *People v. Isaacson*, 44 NY2d 511 (1978) (due process principles barred prosecution where police enlisted services of informant they had beaten and deceived into thinking he was facing a stiff prison sentence, and encouraged him to play on defendant's sympathy and entice defendant to come to New York to consummate drug sale); *People v. Arroyo*, 12 Misc3d 1003 (Crim. Ct., Kings Co., 2006) (court dismisses in furtherance of justice charge that defendant took possession of bag placed by police on subway platform as part of sting operation; charges have no useful purpose to society and are inherently unfair, and police "should concentrate their noble efforts on behalf of the city on countering real crimes committed every day. They do not need to manipulate a situation where temptation may overcome even people who would normally never think of committing a crime"); *People v. Terrence Sutton*, NYLJ, 9/20/04, at 20, col. 1 (County Ct., Jefferson Co.) (charges dismissed where "[t]he blatant and overwhelming violations of the applicable federal and state constitutional provisions involved and the misleading and false testimony of the government's witnesses ... are inexcusable," and the unlawful actions of the government agents unnecessarily traumatized defendant's wife and 8 year-old daughter); *People v. Ward*, 2001 WL 1154979 (Sup. Ct., Kings Co., 2001) (prosecution engaged in "attempt to misuse the criminal justice system to force" defendant to furnish information about a police shooting that he may or may not

possess)

(d) the history, character and condition of the respondent

[Persuade judge that this factor supports motion, and if it does not, that it should not be dispositive or that important]

Supporting case law: *Matter of Maria Bruno*, 11 Misc3d 1083(A) (Sup. Ct., N.Y. Co., 2006) (plea to drug charges vacated, and dismissal ordered, where, despite relapses, defendant has continually remained in treatment and worked extremely hard to turn her life around); *Matter of P.C.*, 10 Misc3d 1073(A) (Fam. Ct., Nassau Co., 2005) (respondent, declared incompetent to stand trial, was already receiving treatment and might be harmed by placement); *People v. Curtis*, 2 Misc2d 1003 (Crim. Ct., N.Y. Co., 2003) (shoplifting defendant had no record, and "was engrossed with the care of her gravely ill husband, who subsequently died"); *People v. Gragert*, 1 Misc3d 646 (Crim. Ct., N.Y. Co., 2003) (17-year-old defendant was honor student bound for college and had no record); *People v. Ward*, 2001 WL 1154979 (Sup. Ct., Kings Co., 2001) (drug sale defendant voluntarily underwent alcohol and drug treatment and appears rehabilitated); *People v. A.T.*, 155 Misc2d 637 (Crim. Ct., N.Y. Co., 1992) (defendant, who had history of drug abuse, was associated since release from prison with community service organization that provides food for the needy and needle sterilization kits for drug addicts); *People v. Vecchio*, 139 Misc2d 165 (Sup. Ct., Queens Co., 1987) (dismissal of top counts in drug prosecution would prevent unreasonable mandatory sentence of imprisonment, and enable defendant to complete drug treatment); *People v. James*, 98 Misc2d 755 (Crim. Ct., N.Y. Co., 1979) ("the real victim of prostitution is the prostitute herself); *People v. Clayton*, 76 Misc2d 512 (County Ct., Suffolk Co., 1973) (defendant had already spent many years in jail after being charged

with murder, and testimony of Fortune Society administrator made it clear that public would be harmed should defendant be distracted from assistance he was currently giving the Society)

(e) the needs and best interest of the respondent

[Persuade judge that this factor supports motion, and if it does not, that it should not be dispositive or that important]

Supporting case law: *Matter of P.C.*, 10 Misc3d 1073(A) (Fam. Ct., Nassau Co., 2005) (respondent, declared incompetent to stand trial, was already receiving treatment and might be harmed by placement); *People v. Gragert*, 1 Misc3d 646 (Crim. Ct., N.Y. Co., 2003) (17-year-old defendant was honor student bound for college and had no record); *Matter of Tristan C.*, 156 Misc2d 1007 (Fam. Ct., Kings Co., 1993) (criminally negligent homicide charge dismissed where respondent suffered from extreme guilt, suicidal thoughts, flashbacks and constant nightmares as a result of accidental shooting, and respondent was receiving residential treatment in PINS proceeding); *People v. Brooks*, 142 Misc2d 678 (Sup. Ct., Kings Co., 1988) (court dismisses felony counts so that defendant may be placed on probation and receive needed mental health treatment); *People v. Vecchio*, 139 Misc2d 165 (Sup. Ct., Queens Co., 1987) (dismissal of top counts in drug prosecution would prevent unreasonable mandatory sentence of imprisonment, and enable defendant to complete drug treatment); *People v. James*, 98 Misc2d 755 (Crim. Ct., N.Y. Co., 1979) ("the real victim of prostitution is the prostitute herself)

(f) the need for protection of the community

[Persuade judge that this factor supports motion, and if it does not, that it should not be dispositive or that important]

Supporting case law: *People v. Morrow*, 20 AD3d 682 (3rd Dept. 2005) (drug laws under which defendant was sentenced have been subject of debate and recent reform); *In re Deborah C.*, 261 AD2d 138 (2d Dept. 1999) (referral for probation adjustment appropriate where respondent was charged with scratching brother's name into a subway seat); *People v. Curtis*, 2 Misc2d 1003 (Crim. Ct., N.Y. Co., 2003) (defendant, a 56-year-old teacher with no record, allegedly stole $6.59 bottle of Advil); *People v. Gragert*, 1 Misc3d 646 (Crim. Ct., N.Y. Co., 2003) (defendant, charged with disorderly conduct and obstructing governmental administration, allegedly blocked pedestrian traffic during demonstration); *People v. A.T.*, 155 Misc2d 637 (Crim. Ct., N.Y. Co., 1992) (defendant possessed sterile hypodermic needles); *People v. Cezar*, 149 Misc2d 620 (Crim. Ct., N.Y. Co., 1991) (possession of hypodermic needles was for purpose of turning therm in to law enforcement authorities)

(g) any other relevant fact indicating that a finding would serve no useful purpose.

[Persuade judge that this factor supports motion, and if it does not, that it should not be dispositive or that important]

Supporting case law: *People v. Harper*, 186 Misc2d 750 (Rochester City Ct., 2000) (prosecutor withdrew charge, and planned to re-file, to gain strategic advantage); *People v. Abram*, 178 Misc2d 120 (Watertown City Ct., 1998) (District Attorney guilty of selective prosecution); *People v. Clayton*, 76 Misc2d 512 (County Ct., Suffolk Co., 1973) (defendant had already spent many years in jail after being charged with murder, and testimony of Fortune Society administrator made it clear that public would be harmed should defendant be distracted from assistance he was currently giving the Society)

Cases regarding evidence of guilt (CPL factor, but not FCA factor): *People v. Morrow*, 20 AD3d 682 (3rd Dept. 2005) (Third Department affirms an order dismissing felony drug possession charges in furtherance of justice where, among other factors, evidence that defendant knew about alleged larger transactions of co-inhabitant of apartment was circumstantial); *People v. Hammond*, 11 Misc3d 1051(A) (Crim. Ct., Kings Co., 2006) (court dismisses in interest of justice gun possession charge where defendant testified credibly that he took gun from his 97-year-old father, who was suffering from early stages of Alzheimer's disease, with intention of bringing it to police precinct; this explanation "makes sense, and if believed, establishes a viable defense of temporary and lawful possession); *People v. Miller*, 2 Misc3d 1006 (Crim. Ct., N.Y. Co., 2004) (evidence against defendant was circumstantial, and polygraph results suggested innocence); *People v. Cezar*, 149 Misc2d 620 (Crim. Ct., N.Y. Co., 1991) (defendant had valid defense of temporary and innocent possession of contraband)

[When a *Clayton* hearing is desired] Finally, before making a determination, the court should hold a hearing at which respondent and the presentment agency may call witnesses and present additional documentary evidence. *See People v. Kwok Ming Chan*, 45 AD2d 613 (1st Dept. 1974); *People v. Clayton*, 41 AD2d 204 (1st Dept. 1973).

Dismissal Due to Violation of Constitutional Due Process Right to Speedy Trial

Respondent contends that, due to the presentment agency's delay in filing the petition, respondent's constitutional Due Process right to a speedy trial has been violated.

[State procedural history: when arrest took place; when respondent appeared at family court for first time; when presentment agency knew of case; when petition filed; reason for presentment

agency delay, if known.]

In *People v. Taranovich*, 37 NY2d 442 (1975), the Court of Appeals enumerated five factors for a court to consider when a criminal defendant alleges that the prosecution's pre-filing delay has violated his or her constitutional Due Process right to a speedy trial. The factors are: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay." 37 NY2d at 445. The extent or duration of the delay "is important inasmuch as it is likely that, all other factors being equal, the greater the delay the more probable it is that the accused will be harmed thereby." *Id.* With respect to the fifth factor – whether or not there is any indication that the defense has been impaired by reason of the delay – the Court noted that "if the delay precipitated by the prosecution resulted in the defendant's being unable to call certain witnesses, or if the duration of the delay was such that it might be expected that the witnesses would be less able to articulate exactly what had transpired, then the defendant would have a strong argument for dismissal of the indictment [citation omitted]." *Id.* at 447.

Moreover, criminal defendants are protected by a speedy trial statute under which the speedy trial clock starts running on the date the defendant appears in response to a desk appearance ticket. CPL §30.30(5)(b); *People v. Stirrup*, 91 NY2d 434 (1998).

In *Matter of Benjamin L.*, 92 NY2d 660 (1999), the Court of Appeals held that "[a] *Taranovich*-like test is appropriate for determining whether a juvenile has been denied the right to a speedy adjudication following an arrest for both Sixth Amendment and State due process analyses

[citation omitted]." 92 NY2d at 668. However, the Court recognized that, when applying the test, "courts must remain acutely cognizant of the goals, character and unique nature of juvenile proceedings. Indeed, given the differences between juvenile and criminal proceedings, a court's analysis cannot merely mimic that undertaken in criminal cases." *Id.* at 668-69. Specifically:

> . . . two of the *Taranovich* factors-- prejudice and length of delay--may carry different connotations in the context of juvenile proceedings when compared to adult criminal prosecutions.
>
> * * *
>
> Typically, a juvenile released by a court with no direction to reappear is unlikely to appreciate the importance of taking affirmative steps toward the ultimate resolution of the case, and is just as unlikely to possess the means and sophistication to do so. Moreover, many youths in juvenile proceedings suffer from educational handicaps and mental health problems, which undermine their capacity to anticipate a future presentment and to appreciate the need to take self-protective measures. Courts will have to be particularly mindful of these unique circumstances when assessing whether a speedy trial violation occurred.
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> * * *
>
> A juvenile, experiencing the vicissitudes of childhood and adolescence, is more likely to suffer from a lack of memory than an adult [citation omitted]. A juvenile is less likely than an adult to preserve his or her memory concerning the incident in question, his or her whereabouts on relevant dates, the identity of potential witnesses, and various other crucial details. Thus, there is an even greater potential for impairment of a juvenile's defense.
>
> Undue delay especially disrupts the rehabilitative process [citation omitted], a key feature of the juvenile system. While in a criminal prosecution the accepted goals of punishment and deterrence are still served even when a defendant is prosecuted long after the crime was committed, the central goal of any juvenile proceeding--rehabilitation of the juvenile through prompt intervention and treatment--can seem trivialized when a presentment agency delays the filing of a petition. A child who is subjected to a long delay before a proceeding is commenced only to have it dismissed after a court determines at a dispositional hearing that supervision, treatment or confinement are not required (Family Ct. Act § 352.1[2]) is poorly served by our

justice system.

Id. at 669-670.

[Include where there is no adequate explanation for delay; state that delay is unexplained, or explain why explanation is inadequate.]

[Where delay is not adequately explained] Where there has been a prolonged delay, the burden is on the prosecution to establish good cause. *People v. Lesiuk*, 81 NY2d 485, 490 (1993). Given the special nature of juvenile proceedings, which has been recognized by the Court of Appeals in its statutory speedy trial decisions and was highlighted again by the Court in *Benjamin L.*, and the statutory protection afforded criminal defendants under CPL §30.30(5)(b), a delay of [the delay in this case] must be considered prolonged. Since the presentment has failed to provide an adequate explanation for the delay, dismissal is warranted. *In re Jamie D.*, 293 AD2d 278 (1st Dept. 2002) (dismissal warranted where delay – almost six months, according to briefs on appeal – was totally unexplained); *Matter of Steven V.*, NYLJ, 12/4/00, p. 37, col. 3 (Fam. Ct., Orange Co.) (delay of six months presents prima facie grounds for hearing to explore reasons for delay and prejudicial effect, if any); *Matter of Hershel L.*, 182 Misc2d 507 (Fam. Ct., Orange Co., 1999) (dismissal ordered where presentment agency filed charges more than five months after receiving notice that case would not be adjusted; volume of presentment agency's work did not justify delay, and presentment agency did not consider the charges important enough to preclude disposition of probation in respondents' other cases); *Matter of Manon*, 131 Misc2d 749 (Fam. Ct., Delaware Co., 1986) (inadequate excuse for 39-week delay where presentment agency initially took no action because it appeared that incident was typical school fight, and filed petition only after learning that victim's injuries had

resulted in medical costs of about $350).

[Include when prejudice is alleged; explain how defense has been prejudiced]

[When prejudice is alleged] Given that respondent's ability to mount a defense has been undermined as a direct result of the delay, dismissal is warranted. *Matter of Bryan K.*, NYLJ, 9/8/00, p. 32, col. 6 (Fam. Ct., Suffolk Co.) (petition dismissed due to delay of over 1½ years where there was no legitimate reason for delay and none of the people respondent thought were present during incident could remember the incident).

Dismissal Due to Insufficiency of Nonhearsay Allegations

[Note: This is a nonwaivable jurisdictional defect, which can be made at any time. You should consider withholding any motion until after speedy trial time has run, and then, if dismissal is ordered and the presentment agency re-files, that the presentment agency's failure to file a jurisdictionally adequate petition precludes any "good cause" or "special circumstances" finding.]

The "non-hearsay allegations of the factual part of the petition or of any supporting depositions [must] establish, if true, every element of each crime charged and the respondent's commission thereof." FCA §311.2(3). Although the petition itself need not include evidentiary facts, the supporting depositions must contain "factual allegations of an evidentiary nature. . . which supplement those of the accusatory instrument and support or tend to support the charge or charges contained therein." *Matter of Jahron S.*, 79 NY2d 632, 638 (1992) These factual allegations must meet "a prima facie case standard" by "establish[ing], if true, every element of the offense charged and the accused's commission of the offense." *Id.* at 639. The absence of sufficient nonhearsay allegations is a nonwaivable jurisdictional defect. *Matter of David T.*, 75 NY2d 927 (1990).

In this case, count [# of count] of the petition, charging [state charge], must be dismissed due to the insufficiency of the factual allegations in the supporting deposition(s) signed by [name(s) of witness(es)]. [Explain why factual allegations are insufficient].

Areas of attack and favorable case law (*see* JRD Practice Manual for comprehensive information):

Failure of deposition to contain language such as "I saw" which establishes personal knowledge: *e.g., People v. Ruth Todd*, NYLJ, 10/23/06, p. 26, col. 3 (Dist. Ct., Suffolk Co., 2006).

Failure to corroborate respondent's confession: *e.g., Matter of Ethan S.*, 28 AD3d 1165 (4th Dept. 2006).

Failure to establish constructive possession: *e.g., People v. Salliey*, 2001 WL 1607761 (Crim. Ct., Richmond Co., 2001).

Failure to establish accessorial liability: *e.g., People v. Torres*, 141 Misc.2d 19 (Crim. Ct. Bronx Co., 1988).

Failure to establish "physical injury": *e.g., People v. Strong*, 179 Misc2d 809 (App. Term, 9th & 10th Jud. Dist., 1999), *lv denied* 94 NY2d 830).

Failure to establish value of property or damage: *e.g., People v. Lopez*, 79 NY2d 402 (1992).

Dismissal of Duplicitous Count(s)

A petition "shall charge at least one crime and may, in addition, charge in separate counts one or more other crimes. . . ." FCA §311.1(2). Moreover, there must be "a separate accusation or count addressed to each crime charged, if there be more than one. . . ." FCA §311.1(3)(d). A count charging two or more offenses is void and must be dismissed as duplicitous. *People v. Keindl*, 68

NY2d 410 (1986), *reargument denied* 69 NY2d 823 (1987).

In this case, count(s) [identify count(s)] are duplicitous and must be dismissed. [Explain why it is clear that count{s) charge more than one crime].

[Note: continuous crimes -- e.g., PL §§ 130.75 and 130.80 (Course of sexual conduct against a child) -- may be charged in one count.]

Dismissal Due to Excessive Time Period Alleged

The [petition, or specify count(s)] allege(s) that the charged offense(s) occurred sometime within a period of [# of months and/or days]. Because this period of time is excessive, and deprives respondent of an adequate opportunity to prepare a defense, the [petition, or specify count(s)] must be dismissed.

Each count of the petition must contain a statement "that the crime charged therein was committed on, or on or about, a designated date, or during a designated period of time. . . ." FCA §311.1(3)(g). When the allegations are made by a child or another individual with impaired faculties, the reasonableness of the time periods alleged depends upon the capacity of the individual to discern, "if not exact dates, at least seasons, school holidays, birthdays, or other events which could establish a frame of reference to assist [the individual] in narrowing the time spans alleged." *People v. Keindl*, 68 NY2d 410, 420 (1986).

Here, a time period of [# of months and/or days] is clearly excessive. [Explain why: e.g., child is a teenager; events occurred within past 6 months; respondent could have viable alibi defense if he/she had more specific information.]

Favorable cases: *People v. Keindl*, 68 NY2d 410 (1986); *People v. Vogt*, 172 AD2d 864 (2d Dept.

1991); *People v. Corrado*, 161 AD2d 658 (2d Dept. 1990); *People v. Romero*, 147 AD2d 358 (1st Dept. 1989).

WHEREFORE, affirmant respectfully requests that this Court grant the Respondent the relief requested herein and such other relief as this Court deems just and proper.

DATED: New York, New York
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, ESQ.