# DEVELOPMENTS IN
# JUVENILE DELINQUENCY LAW AND PROCEDURE
## (January 2016 to mid-September 2017)

**Randy Hertz**
**N.Y.U. School of Law**
**245 Sullivan Street, office 626**
**New York, N.Y. 10012-1301**
**(212) 998-6434**
**randy.hertz@nyu.edu**

**September 15, 2017**

## TABLE OF CONTENTS

*Page*:

**DEVELOPMENTS IN**
**JUVENILE DELINQUENCY LAW AND PROCEDURE**
**(January 2016 to mid-September 2017)**

## *Part One: Recent Amendments of Article 3 of the Family Court Act*

### A. *Amendments to the FCA Provisions on Testimony About an Identification*

**Chapter 59 of the New York State Laws of 2017, which was approved on April 10, 2017, amends F.C.A. §§ 343.3 and 343.4 as follows (new text is underscored), and makes equivalent changes to C.P.L. §§ 710.20 and 710.30. These amendments took effect on July 1, 2017.**

§ 343.3. Rules of evidence; identification by means of previous recognition in absence of present identification

1. In any juvenile delinquency proceeding in which the respondent's commission of a crime is in issue, testimony as provided in subdivision two may be given by a witness when:

(a) such witness testifies that:

(i) he or she observed the person claimed by the presentment agency to be the respondent either at the time and place of the commission of the crime or upon some other occasion relevant to the case; and

(ii) on a subsequent occasion he or she observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person, or, where the observation is made pursuant to a blind or blinded procedure as defined herein, a pictorial, photographic, electronic, filmed or video recorded reproduction of a person whom he or she recognized as the same person whom he or she had observed on the first incriminating occasion; and

(iii) he or she is unable at the proceeding to state, on the basis of present recollection, whether or not the respondent is the person in question; and

(b) it is established that the respondent is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction the witness observed and recognized on the second occasion. Such fact may be established by

testimony of another person or persons to whom the witness promptly declared his or her recognition on such occasion and by such pictorial, photographic, electronic, filmed or video recorded reproduction.

(c) For purposes of this section, a "blind or blinded procedure" is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproductions under circumstances where, at the time the identification is made, the public servant administering such procedure: (i) does not know which person in the array is the suspect, or (ii) does not know where the suspect is in the array viewed by the witness. The failure of a public servant to follow such a procedure shall be assessed solely for purposes of this article and shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not constitute a legal basis to suppress evidence made pursuant to subdivision six of section 710.20 of the criminal procedure law. This article neither limits nor expands subdivision six of section 710.20 of the criminal procedure law.

2. Under circumstances prescribed in subdivision one, such witness may testify at the proceeding that the person whom he or she observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion is the same person whom he or she observed on the first or incriminating occasion. Such testimony, together with the evidence that the respondent is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion, constitutes evidence in chief.

§ 343.4. Rules of evidence; identification by means of previous recognition, in addition to present identification

In any juvenile delinquency proceeding in which the respondent's commission of a crime is in issue, a witness who testifies that: (a) he or she observed the person claimed by the presentment agency to be the respondent either at the time and place of the commission of the crime or upon some other occasion relevant to the case, and (b) on the basis of present recollection, the respondent is the person in question, and (c) on a subsequent occasion he or she observed the respondent, or, where the observation is made pursuant to a blind or blinded procedure, a pictorial, photographic, electronic, filmed or video recorded reproduction of the respondent under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, and then also recognized him or her or the pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as the same person whom he or she had observed on the first or incriminating occasion, may, in addition to making an identification of the respondent at the delinquency proceeding on the basis

of present recollection as the person whom he or she observed on the first or incriminating occasion, also describe his or her previous recognition of the respondent and testify that the person whom he or she observed or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed on such second occasion is the same person whom he or she had observed on the first or incriminating occasion. Such testimony and such pictorial, photographic, electronic, filmed or video recorded reproduction constitutes evidence in chief. For purposes of this section, a "blind or blinded procedure" shall be as defined in paragraph (c) of subdivision one of section 343.3 of this part.

**C.P.L. § 710.20 (which is expressly incorporated by reference in F.C.A. § 330.2(2) and thus applies in Family Court (*see* § 303.1(1) ("The provisions of the criminal procedure law shall not apply to proceedings under this article unless the applicability of such provisions are specifically prescribed by this act.")), and which lists the types of evidence that can be suppressed pursuant to a pretrial suppression motion, has been amended as follows (effective, July 1, 2017):**

§ 710.20. Motion to suppress evidence; in general; grounds for

Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action, or (b) claims that improper identification testimony may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it: . . .

6. Consists of 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 or of a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant by the prospective witness. A claim that the previous identification of the defendant or of a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant by a prospective witness did not comply with paragraph (c) of subdivision one of section 60.25 of this chapter or with the protocol promulgated in accordance with subdivision twenty-one of section eight hundred thirty-seven of the executive law shall not constitute a legal basis to suppress evidence pursuant to this subdivision. A claim that a public servant failed to comply with paragraph (c) of subdivision one of section 60.25 of this chapter or of subdivision twenty-one of section eight hundred thirty-seven of the executive law shall neither expand nor limit the rights an accused person may derive under the constitution of this state or of the United States.

**C.P.L. § 710.30 (which is expressly incorporated by reference in F.C.A. § 330.2(2)) has been amended (effective July 1, 2017) to provide as follows:**

§ 710.30. Motion to suppress evidence; notice to defendant of intention to offer evidence

1. Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20, or (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 or her or a pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.

**New York Executive Law § 837, which sets forth the functions, powers and duties of the New York Division of Criminal Justice Services, was amended to add the following new set of duties for the Division with regard to police identification procedures:**

21. Promulgate a standardized and detailed written protocol that is grounded in evidence-based principles for the administration of photographic array and live lineup identification procedures for police agencies and standardized forms for use by such agencies in the reporting and recording of such identification procedure. The protocol shall address the following topics:

    (a) the selection of photographic array and live lineup filler photographs or participants;

    (b) instructions given to a witness before conducting a photographic array or live lineup identification procedure;

    (c) the documentation and preservation of results of a photographic array or live lineup identification procedure;

    (d) procedures for eliciting and documenting the witness's confidence in his or her identification following a photographic array or live lineup identification procedure, in the event that an identification is made; and

    (e) procedures for administering a photographic array or live lineup identification procedure in a manner designed to prevent opportunities to influence the witness.

In June, the New York State Division of Criminal Justice Services issued the required new protocols for police identification procedures. The protocols, which are available on the Division's website, are titled: "New Protocols on Identification Procedures, issued by the New York State Division of Criminal Justice Services in June 2017 Pursuant to new Executive Law § 837(21)."

**B.** ***Amendment to the FCA's Provision on Police Interrogation of a Juvenile***

Chapter 59 of the New York State Laws of 2017, which was approved on April 10, 2017, and which will take effect on **April 1, 2018**, amends F.C.A. § 344.2 to add the following new subdivision (3) and renumbers existing subdivision (3) as subdivision (4):

> 3. Where a respondent is subject to custodial interrogation by a public servant at a facility specified in subdivision four of section 305.2 of this article, the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded and governed in accordance with the provisions of paragraphs (a), (b), (c), (d) and (e) of subdivision three of section 60.45 of the criminal procedure law.

The above-referenced § 60.45(3) of the C.P.L., which will be binding on the Family Court because it is expressly incorporated by reference in the above provision of the F.C.A., provides as follows (as added by Chapter 59 of New York State Law of 2017, effective **April 1, 2018**):

> 3. (a) Where a person is subject to custodial interrogation by a public servant at a detention facility, the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded by an appropriate video recording device if the interrogation involves a class A-1 felony, except one defined in article two hundred twenty of the penal law; felony offenses defined in section 130.95 and 130.96 of the penal law; or a felony offense defined in article one hundred twenty-five or one hundred thirty of such law that is defined as a class B violent felony offense in section 70.02 of the penal law. For purposes of this paragraph, the term "detention facility" shall mean a police station, correctional facility, holding facility for prisoners, prosecutor's office or other facility where persons are held in detention in connection with criminal charges that have been or may be filed against them.
>
> (b) No confession, admission or other statement shall be subject to a motion to suppress pursuant to subdivision three of section 710.20 of this chapter based solely upon the failure to video record such interrogation in a detention facility as defined in paragraph (a) of this subdivision. However, where the people offer into

evidence a confession, admission or other statement made by a person in custody with respect to his or her participation or lack of participation in an offense specified in paragraph (a) of this subdivision, that has not been video recorded, the court shall consider the failure to record as a factor, but not as the sole factor, in accordance with paragraph (c) of this subdivision in determining whether such confession, admission or other statement shall be admissible.

(c) Notwithstanding the requirement of paragraph (a) of this subdivision, upon a showing of good cause by the prosecutor, the custodial interrogation need not be recorded. Good cause shall include, but not be limited to:

(i) If electronic recording equipment malfunctions.

(ii) If electronic recording equipment is not available because it was otherwise being used.

(iii) If statements are made in response to questions that are routinely asked during arrest processing.

(iv) If the statement is spontaneously made by the suspect and not in response to police questioning.

(v) If the statement is made during an interrogation that is conducted when the interviewer is unaware that a qualifying offense has occurred.

(vi) If the statement is made at a location other than the "interview room" because the suspect cannot be brought to such room, e.g., the suspect is in a hospital or the suspect is out of state and that state is not governed by a law requiring the recordation of an interrogation.

(vii) If the statement is made after a suspect has refused to participate in the interrogation if it is recorded, and appropriate effort to document such refusal is made.

(viii) If such statement is not recorded as a result of an inadvertent error or oversight, not the result of any intentional conduct by law enforcement personnel.

(ix) If it is law enforcement's reasonable belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant.

(x) If such statement is made at a location not equipped with a video recording

device and the reason for using that location is not to subvert the intent of the law. For purposes of this section, the term "location" shall include those locations specified in paragraph (b) of subdivision four of section 305.2 of the family court act.

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

(e) Video recording as required by this section shall be conducted in accordance with standards established by rule of the division of criminal justice services.

## *PART TWO: RECENT CASELAW*

[The following outline covers significant decisions of the U.S. Supreme Court, Court of Appeals, and the Appellate Divisions, and some decisions of the New York Supreme Court and Family Court. Within each subject matter category, the cases are arranged by the level of the court and then by chronological order.]

### I. Appointment of Counsel and Other Counsel-Related Issues

People v. Watson, 26 N.Y.3d 620, 26 N.Y.S.3d 504 (2016): Revisiting the issue of conflicts of interest in a large public defender's office – which the Court of Appeals previously addressed in *People v. Wilkins*, 28 N.Y.2d 53, 320 N.Y.S.2d 8 (1971), in which the Court held that "unlike private law firms where knowledge of one member of the firm is imputed to all, large public defense organizations are not subject to such imputation" – the Court of Appeals holds that the trial court in this case acted within its discretion in concluding that the New York County Defender Services [NYCDS] attorney's potential conflict of interest impinged on the defendant's right to effective assistance to such an extent that the trial court could override the defendant's right to retain the "counsel of his choosing" and appoint "conflict-free counsel." The conflict here was that another NYCDS attorney had previously represented a potential defense witness, and NYCDS supervisors concluded that Watson's lawyer therefore could not call the former NYCDS client as a witness or even search for him or cross-examine him if the prosecution called him as a witness. In distinguishing *Wilkins*, the Court of Appeals

emphasizes these constraints and states that "even if the institutional representation of [the former NYCDS client] did not, in and of itself, present a conflict, such a conflict was created by the conditions imposed by [counsel's] supervisors, which hampered his ability to zealously and single-mindedly represent defendant." With regard to the possibility of the defendant's waiver of the conflict, the Court explains that "[a]lthough defendant indicated that he would be willing to waive the conflict, almost immediately thereafter he said that he wanted [the former client] to be called as a witness at trial," and "[t]hese competing statements did not clearly demonstrate a knowing waiver, or that defendant would knowingly waive . . . [the] conflict."

People v. Morgan, 149 A.D.3d 1148, 51 N.Y.S.3d 218 (3d Dept. 2017): The defendant's statement to the trial court that he wished to take the witness stand and testify in his own defense, "coupled with his statements that he and defense counsel had disagreed on the issue, gave rise to one of those rare circumstances in which County Court was required to engage in a direct colloquy with defendant so as to discern whether he had been advised that the decision to testify ultimately belonged to him and whether, at the time that the defense rested, defendant's failure to testify had been a knowing, voluntary and intelligent waiver of that right." The trial court's failure to take this step required reversal of the conviction on the ground that the defendant "was denied his due process right to testify in his own criminal defense."

## II. Respondent's Competency to Proceed

In the Matter of Justin L., 2017 WL 3521718 (N.Y. Family Ct., Kings Co., Aug. 15, 2017) (Wan, J.): After finding under F.C.A. § 322.2(3) that "the respondent is an incapacitated person" and that "there is probable cause to believe that the respondent committed robbery in the second degree," the court "finds that Justin's best interests will be served with an order committing him to the custody of the Office of Mental Health." The court explains: "[I]t appears that neither OMH nor OPWDD [Office of People with Developmental Disabilities] is the ideal placement for Justin. The Court is dismayed to hear that neither agency believes that they can provide the services or care that Justin needs, however the Court is constrained by the statute to choose one or the other. . . . Justin is a 14–year–old boy. It is not appropriate for Justin to reside in an OPWDD facility with all adults, or even in a facility with all adults plus one 16–year–old, who may be placed there pursuant to the criminal justice system. Justin has multiple diagnoses, including both developmental disability and mental illness, and OMH is best equipped to provide treatment and services to him." The court observes that "if the Family Court had the same discretion as the Criminal Court, the Court might have been able to entertain other out-patient treatment options for Justin, even while in the care of an ACS operated placement. However, the statute leaves the court with no discretion."

## III. Discovery

### A. Voluntary Disclosure Form

People v. Clay, 147 A.D.3d 1499, 47 N.Y.S.3d 609 (4th Dept. 2017): The trial court should have precluded the identification testimony of a police officer who identified the defendant as the passenger in a car who ran from the vehicle when the police ordered the occupants to exit the vehicle and who was charged with possession of a gun found in the car. The officer identified the defendant from a single photograph shown to him "approximately two hours after the incident." Rejecting the prosecution's argument that this was a "confirmatory identification," the court explains that that category is limited to the "buy-and-bust scenario," where the "face-to-face contact" is far closer and more intensive than "here, [where] the officer was standing by the vehicle for approximately three minutes while he was engaged with all of the occupants of the vehicle."

In the Matter of Deavan W., 145 A.D.3d 569, 43 N.Y.S.3d 329 (1st Dept. 2016): The trial court should have granted the respondent's motion to preclude identification evidence based upon the discrepancy between the version of the identification procedure described in the VDF (and recounted by the detective at the suppression hearing) and the version recounted by the complainant at trial. (The VDF and the detective at the suppression hearing described an identification inside a restaurant that occurred when the complainant entered the restaurant in contravention of the detective's instructions. The complainant testified at trial that he never entered the restaurant, and that the detective brought the respondent out for the complainant to observe.) Although the ACC told the attorney for the child on the day of the suppression hearing that "the arresting detective's partner 'recalled the identification occurring outside of the restaurant,'" this could not constitute the requisite VDF notice because it was an "untimely" disclosure. And, although the defense's filing a suppression motion and participation in a suppression hearing would ordinarily waive the preclusion remedy, it did not do so in this case "because the suppression hearing did not address the factual scenario that emerged at the fact-finding hearing" in the complainant's testimony and that gave rise to the preclusion remedy.

People v. Buza, 144 A.D.3d 1495, 42 N.Y.S.3d 486 (4th Dept. 2016): The trial court improperly denied a motion to preclude a statement that was not included in the VDF. The VDF gave notice of the "defendant's statement to the deputies, during the search, that one of the bedrooms belonged to another person." But, at trial, the judge improperly permitted the prosecution to elicit the investigator's testimony that the defendant "'explained where his [own] room was,' referring to another of the bedrooms," which was a separate statement distinct from the one listed in the VDF and which "permitted the court to conclude that defendant was

an occupant of the residence and, consequently, to find that defendant had constructive possession of the drugs found therein."

**B.** ***Brady***

Wearry v. Cain, 136 S. Ct. 1002 (2016) (per curiam): The Supreme Court summarily reverses the state court's denial of postconviction relief, finding that the prosecution violated *Brady* by failing to turn over (1) police records showing that two of the prosecution witnesses had a bias (one of whom had been overheard to say that he "wanted to '"make sure [Wearry] gets the needle cause he jacked over me,"'" and the other of whom had sought a deal to reduce his existing sentence in exchange for testifying against Wearry); and (2) medical records showing that a co-perpetrator who had allegedly run into the street to flag down the victim had recently had knee surgery that would have prevented him from running.

**C.** ***Rosario***

People v. Farez, 150 A.D.3d 528, 55 N.Y.S.3d 177 (1st Dept. 2017): The conviction is reversed because the trial court denied defense counsel's *Rosario* request for "police documentation of the arrest of a third party" – an individual of the same race as the defendant (Hispanic) who "had been contemporaneously arrested and separately charged with selling drugs to the same undercover officer at approximately the same time and location." The Appellate Division explains that defense counsel could have used the documentation to "establish[ ] a motive to fabricate the evidence due to police confusion between defendant and the third party."

**D.** **Other Discovery Issues**

People v. D'Attore, 151 A.D.3d 548, __ N.Y.S.3d __ (1st Dept. 2017): The trial court did not abuse its discretion by "declining to impose any sanction for the inadvertent destruction by the police of three pistols recovered from defendant's house," given that (1) "[d]ue to a clerical error, the weapons were mischaracterized as unconnected with any pending case and thus subject to being destroyed," and (2) "[d]espite proper disclosure by the People, long before the pistols were destroyed, defendant never availed himself of the opportunity to examine or test the firearms, and it was not until the destruction was discovered during trial that defendant moved to dismiss the charges or expressed an interest in performing independent tests."

People v. O'Brien, 140 A.D.3d 1325, 32 N.Y.S.3d 741 (3d Dept. 2016): The trial court abused its discretion by precluding the defendant's introduction of his

medical records as a sanction for the defense's late disclosure of the records. Explaining that imposition of discovery sanctions against the accused requires a "weigh[ing] [of] the possibility of prejudice to the prosecution against the right of the defendant to present his or her case," and that "[p]reclusion of evidence is a severe sanction, not to be employed unless any potential prejudice arising from the failure to disclose cannot be cured by a lesser sanction," the Appellate Division finds that "any prejudice to the People" could have been "alleviate[d] . . . by offering a one-day continuance to review the medical records and/or to pare down the submissions." Because "a less drastic remedy was readily available," "the outright preclusion of this evidence was an abuse of discretion."

## IV. Suppression Motions: Law and Procedure

### A. Summary Denial of *Mapp* or *Dunaway* Motion for Factual Insufficiency

People v. McUllin, 152 A.D.3d 461, __ N.Y.S.3d __ (1st Dept. 2017): The trial court erred by summarily denying the *Mapp* motion for factual insufficiency. Although the defendant's suppression motion merely alleged in a "conclusory" manner that the defendant "was arrested without probable cause at his home . . ., at which time '[h]e was not acting in an illegal or suspicious manner,'" this was nonetheless "sufficient to entitle him to a hearing on the legality of his arrest and the admissibility of any evidence derived therefrom" because (1) "at a minimum, defendant has raised a factual dispute concerning the time of his arrest," and (2) "[f]urther, the People provided defendant with no information at all as to how, by their account, he came to be at the police station in the first place, nor did they disclose the basis on which he first came to the attention of law enforcement in this investigation."

### B. *Mapp* Motions

#### (1) Standing / Reasonable Expectation of Privacy

People v. Hill, 2017 WL 3253479 (1st Dept. Aug. 1, 2017) (defendant had standing to challenge a police search of his uncle's "apartment and surrounding curtilage" because defendant "had stayed with his [uncle's] family 'on and off' since he was five years old," and, "although defendant did not have his own room in the apartment and slept on the couch, he stored all of his clothes in the living room, and received mail at the apartment").

People v. Chazbani, 144 A.D.3d 836, 40 N.Y.S.3d 513 (2d Dept. 2016): There was sufficient proof of the defendant's standing to challenge a search of a minivan, given that "[t]he police officer testified at the

suppression hearing that the defendant himself asserted that he owned the minivan" and "no contrary proof was presented."

**(2) *DeBour* Levels I and II**

People v. Gates, 152 A.D.3d 1222, __ N.Y.S.3d __ (4th Dept. 2017): When a State Trooper pulled the defendant over for speeding and then asked him about the contents of "several large nylon bags" filling the area behind the driver's seat, this constituted a Level II common-law inquiry, which was not supported by the requisite founded suspicion of criminality. The defendant's "evasive and inconsistent answers" to the officer's questions did not provide a basis for the officer's continued questioning because they "were themselves induced by a[n] [improper] level two inquiry from the Trooper."

People v. Freeman, 144 A.D.3d 1650, 42 N.Y.S.3d 506 (4th Dept. 2016): Although the police properly stopped the defendant for "riding a bicycle at night without a light in violation of [the] Vehicle and Traffic Law," "the officers improperly escalated the encounter to a level two common-law inquiry by asking defendant why he was so nervous and whether he was carrying drugs." "[D]efendant's nervousness upon being confronted by the police did not give rise to a founded suspicion that criminal activity was afoot."

People v. Savage, 137 A.D.3d 1637, 28 N.Y.S.3d 184 (4th Dept. 2016): When the police drove alongside the defendant and his companions on the street, asking "what's up, guys?," this constituted a Level I request for information. Because the police did not have an objective, credible reason for doing this, the trial court should have suppressed the gun holster that the defendant dropped as he walked away from the police as well as the gun that the defendant thereafter discarded into nearby bushes, and also the defendant's subsequent statements.

**(3) *Terry* Pursuit, Stops, and Frisks**

People v. Furrs, 149 A.D.3d 1098, 53 N.Y.S.3d 147 (2d Dept. 2017): The police did not have an adequate *Terry* basis to pursue the defendant, who drove through a stop sign, failed to signal a right turn, and then exited his vehicle, adjusted his waistband, and, in response to an officer's yelling "Police, stop," fled from the police. None of the things observed by the police "constitute[d] specific circumstances indicative of criminal activity so as to establish the reasonable suspicion that was necessary to lawfully pursue the defendant, even when coupled with the defendant's flight from

the police."

People v. Elliott, 140 A.D.3d 1752, 32 N.Y.S.3d 801 (4th Dept. 2016): The police did not have a lawful basis for a *Terry* stop based on a group's dispersing upon the officers' arrival, the defendant's "'quickly grab[bing] near his waistband area,'" and the defendant's entry of "the front passenger seat of a nearby sport utility vehicle, where the sergeant saw defendant bend over, 'as if [defendant] was putting something underneath the seat.'" These actions, "without more, were insufficient to provide the sergeant with the requisite suspicion that defendant committed a crime, and to justify defendant's gunpoint detention."

People v. Coronado, 139 A.D.3d 452, 30 N.Y.S.3d 628 (1st Dept. 2016): The police, who initially thought the defendant was a victim in a robbery, did not have a basis to physically restrain him from walking away by grabbing him by the shoulder. Because the officers only thereafter perceived signs that he was intoxicated and thereby acquired suspicion that he had been operating a motor vehicle under the influence of alcohol, their observations and all subsequent evidence were the fruits of an unlawful stop and had to be suppressed.

**(4) Arrests and Searches Incident to Arrest**

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016):A motorist who has been arrested for drunk driving can be compelled to submit to a warrantless breath test to determine his or her intoxication level but cannot be compelled to submit to a blood draw because "[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test." The Court also holds that such blood tests cannot be "justified based on the driver's legally implied consent to submit to them" under state "implied-consent laws" that "go beyond" the "typical penalty for . . . [refusal to submit to blood testing for sobriety – namely,] suspension or revocation of the motorist's license" – and "make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired."

In the Matter of Jamal S., 28 N.Y.3d 92, 65 N.E.3d 46, 42 N.Y.S.3d 75 (2016): The police had probable cause to arrest the juvenile respondent for disorderly conduct, even though this offense is a violation, because he "initially told police on the street that he was 16 years old"; "he lacked identification"; he did not reveal his actual age of 15 until "nearly an hour later" after "the police [had already] transported him to the precinct"; and

"[t]hereafter, the officers treated respondent as a juvenile" and notified his parents that "he could be picked up from the precinct." The "limited search" that the officers conducted "while he was temporarily detained and awaiting the notification of his parents" – directing the respondent to "remove his belt and shoelaces as a safety precaution" and also "to remove his shoes," which resulted in the discovery of a revolver in one of his shoes – was lawful because it was a "reasonable protective measure employed by police to ensure both the safety of respondent and the officers, and the intrusion was minimal."

People v. Hinton, 148 A.D.3d 545, 49 N.Y.S.3d 675 (1st Dept. 2017): The trial court should have suppressed counterfeit money recovered from the defendant's shoulder bag at the time of his arrest. The search could not be justified as a search incident to arrest because the defendant "was in handcuffs and five police officers were standing close to him," and "[t]he record contains no testimony or other evidence suggesting that defendant was attempting to access, let alone destroy, the contents of his shoulder bag."

People v. Ashford, 142 A.D.3d 1371, 38 N.Y.S.3d 347 (4th Dept. 2016): Although the police had a lawful basis to detain the defendant – who matched the description of a perpetrator and ran from the police – and the police also could lawfully conduct a show-up as part of this detention (which resulted in the complainant's identifying the defendant), the police exceeded the bounds of a *Terry* stop by searching the defendant prior to the show-up, which resulted in the seizure of tangible evidence. The court suppresses the evidence found on defendant because the police lacked probable cause to arrest and search him incident to an arrest. "[A]though the police were permitted at that time to conduct a pat frisk of defendant . . ., they were not permitted to search him."

People v. Houston, 143 A.D.3d 737, 38 N.Y.S.3d 259 (2d Dept. 2016): The search-incident-to-arrest doctrine did not justify the arresting officers' search of the briefcase of the defendant, who was arrested for an armed robbery and found in possession of a loaded gun. The defendant had placed the briefcase on a parked car at the time of his surrender, and "the circumstances did not support a reasonable belief that the briefcase contained a weapon."

People v. Anderson, 142 A.D.3d 713, 37 N.Y.S.3d 151 (2d Dept. 2016): The prosecution failed to show exigent circumstances justifying a search of the defendant's messenger bag incident to the arrest of the defendant for burglary. "[T]he proof adduced at the suppression hearing failed to

establish the presence of exigent circumstances justifying the warrantless search": "At the time that the defendant's bag was searched, there were approximately six police officers present. Moreover, the defendant had been cooperating with the police by responding to a number of their questions and there is no indication that he resisted when his bag was taken off of his body."

**(5) Probable Cause/Articulable Suspicion Based on Information from Others**

People v. Crooks, 27 N.Y.3d 609, 36 N.Y.S.3d 440 (2016): The Court of Appeals holds that a *Darden* hearing was not required because "probable cause for the search warrant was established through independent police observations, even without the CI's [confidential informant's] statements concerning how he or she obtained the drugs."

**(6) Automobile Stops and Searches**

People v. Bushey, 29 N.Y.3d 158, 53 N.Y.S.3d 604 (2017): The police "may run a license plate number through a government database to check for any outstanding violations or suspensions on the registration of the vehicle," "even without any suspicion of wrongdoing," because "the purpose of a license plate is to readily facilitate the identification of the registered owner of the vehicle for the administration of public safety" and therefore "a person has no reasonable expectation of privacy in the information acquired by the State for this purpose and contained in a law enforcement or DMV database," and such a database check of a license plate "does not constitute a search."

People v. Tardi, 28 N.Y.3d 1077, 44 N.Y.S.3d 366 (2016): The Court of Appeals upholds the "towing and inventory search" of the defendant's car "which was parked in the same [private] parking lot in which defendant was arrested," at the request of security personnel. The "officers' decision to tow the vehicle was . . . consistent with a community caretaking function," "was properly made in accordance with 'standard criteria' set forth in the police department's written policy," and "there is no indication that the officers suspected that they would discover evidence of further criminal activity in defendant's vehicle, or that they towed the vehicle for that purpose."

People v. Morris, 2017 WL 3496213 (2d Dept. Aug. 16, 2017): The police unlawfully searched the console of an SUV after stopping it (based on a description of a vehicle involved in a shooting), removing the occupants,

frisking and handcuffing them, and holding them for the arrival of eyewitnesses to the shooting. The court explains that the police did not have probable cause at that time to believe that contraband was in the vehicle and, "'[a]bsent probable cause, it is unlawful for a police officer to invade the interior of a stopped vehicle once the suspects have been removed and patted down without incident, as any immediate threat to the officers' safety has consequently been eliminated.'"

People v. Lopez, 149 A.D.3d 1545, 54 N.Y.S.3d 789 (4th Dept. 2017): The police did not have reasonable suspicion to stop the defendant's car, and therefore the gun recovered from the defendant should have been suppressed. Although the police observed a Hispanic male with tattoos on his neck enter the car, and the police had recently received a 911 call for "shots fired" by a person of that race and gender with tattoos on his neck, the individual who entered the car merely "matched the most general part of the complainant's description, i.e., an Hispanic male, and he also had tattoos on his neck and arms," and "[t]he officer could not tell . . . whether the man had the most distinctive feature in that description, i.e., crossed, 'Asian style' eyes," and "the clothing worn by the man did not in any way match the description of the suspect's clothing provided by the complainant."

People v. Ford, 145 A.D.3d 1454, 45 N.Y.S.3d 720 (4th Dept. 2016): Although the police conducted a valid traffic stop of the defendant's car and could lawfully direct him to exit the car during the traffic stop, the officers' subsequent patdown of the defendant was unlawful. "Defendant's evident nervousness as the officers approached the vehicle was not an indication of criminality or a threat to officer safety"; "the patdown [was not] justified by the fact that the vehicle was in a high crime area . . ., particularly when the stop occurred on a busy street during rush hour"; and "neither defendant's initial refusal to exit the vehicle nor his demand for an explanation why he was being asked to exit the vehicle gave rise to a reasonable suspicion that he posed a threat to the officers' safety."

People v. Driscoll, 145 A.D.3d 1349, 44 N.Y.S.3d 269 (3d Dept. 2016): The court suppresses the fruits of a traffic stop by an officer who stated that he routinely stops vehicles with a temporary inspection sticker in order to check whether the sticker has expired. The Appellate Division explains that "[i]t is entirely proper to operate a motor vehicle with a temporary inspection sticker under certain circumstances and, as a result, the display of one does not constitute grounds for a traffic stop absent a 'specific articulable basis' to believe that illegality is afoot."

People v. Hightower, 136 A.D.3d 1396, 25 N.Y.S.3d 764 (4th Dept. 2016): Even though the police conducted a lawful traffic stop of the car in which the defendant was riding and were entitled to "make level one inquires concerning defendant's identity and destination" and "to direct him to exit the vehicle when the driver admitted that he had no driver's license and defendant was unable to produce identification," the encounter escalated to an unlawful Level II common law inquiry when the officer "ask[ed] defendant whether he had any weapons or drugs." The officer lacked "the requisite founded suspicion of criminality" even though the "defendant appeared fidgety, grabbed at his pants pockets, looked around, and gave illogical and contradictory responses to the officer's questions." When the defendant thereafter said "'you're harassing me,'" and walked away despite the officer's command to stop, the officer's pursuit of him was an unlawful *Terry* pursuit, and the cocaine bags discarded by the defendant during the pursuit had to be suppressed.

People v. Porter, 136 A.D.3d 1344, 24 N.Y.S.3d 470 (4th Dept. 2016): Even though "the initial traffic stop was valid based on the vehicle's suspended registration," the police unlawfully detained the passenger, who had "asked whether he could leave the scene," by telling him that "he must remain present with them until the inventory search [of the car] was complete." The court explains that "the justification for th[e] stop [of the car and for detaining the defendant pursuant to that stop] ended once the driver had been arrested for th[e] [traffic] offense."

**(7) Plain View**

People v. Sanders, 26 N.Y.3d 773, 27 N.Y.S.3d 491 (2016): A police officer's warrantless seizure of the hospitalized defendant's clothes, which "were in a clear plastic bag that rested on the floor of a trauma room a short distance away from the stretcher on which defendant was situated in a hospital hallway," was not justified by the plain view exception because, although the officer "knew defendant to have been shot," the officer did not have "probable cause to believe that defendant's clothes were the instrumentality of a crime" since the officer did not know at that time "that entry and exit wounds were located on an area of defendant's body that would have been covered by the clothes defendant wore at the time of the shooting."

**(8) Consent to Search**

People v. Freeman, 29 N.Y.3d 926, 50 N.Y.S.3d 30 (2017): In a brief memorandum opinion, the Court of Appeals reverses the Appellate

Division and holds that tangible property and statements should have been suppressed based on the lower court dissenting justices' analysis that the defendant did not voluntarily consent to the entry and search of his house. The dissenting justices below concluded that the defendant's ostensible consent "merely facilitated what he must have perceived to be the officers' inevitable entry into his residence." 141 A.D.3d 1164, 1169, 35 N.Y.S.3d 617, 621 (4th Dept. 2016) (Whalen, P.J., & Troutman, J., dissenting).

**(9) Exigent Circumstances**

In the Matter of Kenneth S., 27 N.Y.3d 926, 28 N.Y.S.3d 677 (2016): The Court of Appeals finds that "there is record support" for the trial court's determination that exigent circumstances justified the officer's warrantless search of the backpack of the respondent, who had been detained for truancy and was being transported in a police car. Respondent's "bag produced a distinctive noise when it came into contact with the police vehicle, which one of the officers recognized as the sound a gun makes when it strikes a motor vehicle," and respondent "gave evasive answers when asked what had caused the sound." When "[t]he officers, who knew that appellant had previously been arrested for robbery, asked appellant to remove the backpack," he "complied, but he appeared nervous after he gave up his bag. Upon taking possession of the backpack, one of the officers felt what seemed to be a gun in an exterior pocket."

**(10) Emergency Exception**

People v. Ringel, 145 A.D.3d 1041, 44 N.Y.S.3d 152 (2d Dept. 2016): The police officers' entry of a home could not be justified by the emergency doctrine even though a silent home alarm had been triggered because "there was no sign of a break-in"; such alarms were known to the police to be "usually a false alarm, not an emergency"; the defendant explained that it was his parents' house and he was able to produce a key to the house; and the circumstances did not "support[ ] an objectively reasonable belief that entry was needed to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."

**(11) Protective Sweep**

People v. Harris, 141 A.D.3d 1024, 34 N.Y.S.3d 798 (3d Dept. 2016): Although "exigent circumstances justified the officers' initial entry into the apartment without a warrant, as they had reasonable grounds to believe that there was an altercation occurring and, thus, an immediate need to render assistance inside the apartment," the officers' subsequent entry of

the defendant's bedroom (where they found a meth lab) was not justifiable under the protective sweep doctrine because the officers had already "subdued and cuffed the aggressor and placed the victim on the couch, bringing the situation under their control," and "no facts were alleged by the officers to support a belief that a third person had been involved or was hiding in the apartment and posed a danger to those present."

**(12) Attenuation of the Taint**

Utah v. Strieff, 136 S. Ct. 2056 (2016): The "attenuation of the taint" doctrine – which the prosecution can invoke to preclude suppression of unconstitutionally obtained evidence when "the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained'" – "applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest." Under these circumstances, "the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest."

## C. *Huntley* Motions

People v. Lin, 26 N.Y.3d 701, 27 N.Y.S.3d 439 (2016): Even though the Court of Appeals finds that "there was unnecessary prearraignment delay" (the defendant was "arraigned more than 28 hours of his arrest, in excess of the 24-hour delay th[e] [Court of Appeals] determined to be presumptively unnecessary in *People ex rel. Maxian*)," and even though the defendant "spent most of the time in a windowless room," the Court of Appeals ultimately concludes that the record contains sufficient support for the Appellate Division's finding that the People met its burden of proving voluntariness of the statement beyond a reasonable doubt. The Court of Appeals notes that, in contrast to cases in which "deprivations and psychological pressure" resulted in findings of involuntariness, the defendant's "basic human needs were provided for because he was able to eat, drink and take bathroom breaks," and "was even allowed to smoke cigarettes"; the "interrogations were not done in continuous rotations, but rather were intermittent, and [the police] provided breaks during which defendant was able to rest and sleep, as well as remain silent and consider his situation"; and " defendant was informed of his rights early during the interrogation process" and "[t]he record establishes defendant confessed only once he was faced with evidence of his guilt, not because he was exhausted and desperate to escape his interrogators."

Although the defendant asserted that "he was unable to understand the meaning of his rights because they were provided only in Engligh" and "he is a Chinese immigrant with severely limited English language skills," the Court of Appeals concludes that the record "does not provide a basis for us to conclude that the lower courts erred as a matter of law" in rejecting the claim, given the detectives' testimony that "they spoke to defendant in English and he responded in kind, that he had no difficulty communicating in English, and never 'articulated an inability to comprehend the nature or substance of what was being said'"; evidence that defendant went to school in the United States for seven years," and "spoke in English after his arraignment [on a prior arrest] with an intake agent from the CJA" and "spoke in English with a Corrections Officer during his detainment at Riker's Island after his [current] arrest"; and the defendant's written statements were "written by his own hand in English, albeit with not insignificant grammatical errors."

People v. Blacks, 2017 WL 3496243 (2d Dept. Aug. 16, 2017): The court rejects the prosecution's argument that *Miranda* warnings were not needed because the police and parole officers – who were in the course of searching the defendant's apartment – did not engage in "interrogation" by asking the defendant for the combination to a safe in the apartment (which the defendant provided, and which led to the seizure of contraband inside the safe). The court explains: "The question – which arose after the parole officers had found counterfeit DVDs, a box filled with daggers, and a .22 caliber revolver-had only one logical purpose: to elicit a response from the defendant disclosing the combination to the safe, which would possibly lead to the discovery of incriminating evidence, and which would link the safe to the defendant." Accordingly, the situation came within the definition of "interrogation" as including "'any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.'"

People v. Silvagnoli, 151 A.D.3d 443, 57 N.Y.S.3d 127 (1st Dept. 2017): The police violated the defendant's right to counsel, which had attached in an unrelated pending case. Although ordinarily the right to counsel would not carry over to a new case, it did so here because the interrogating officer referenced the earlier, still-pending case during questioning. "Although the [officer's] reference to the [pending] drug charges on which defendant was represented was brief and flippant, it was not, in context, innocuous or discrete and fairly separable from the homicide investigation [that gave rise to the new arrest and interrogation]."

People v. Rodas, 145 A.D.3d 1452, 43 N.Y.S.3d 624 (4th Dept. 2016): The court upholds the trial judge's suppression of the defendant's statements and letters because the Department of Social Services child protective caseworker who obtained them violated the defendant's right to counsel by interviewing him in the

county jail where he "was in custody on an unrelated charge on which he was represented by counsel." "[T]here was such a degree of investigatory cooperation between the caseworker and a . . . police investigator that the caseworker acted as the agent of the police in questioning defendant and obtaining the letters from him outside the presence of defense counsel."

People v. Henry, 144 A.D.3d 940, 41 N.Y.S.3d 527 (2d Dept. 2016): The appointment of counsel on one case carried over to a new case and precluded police interrogation because "the robbery and murder cases were [so] interwoven" that "questioning about the gas station shooting 'would all but inevitably elicit incriminating responses' regarding the robbery."

People v. Alfonso, 142 A.D.3d 1180, 38 N.Y.S.3d 566 (2d Dept. 2016): The interrogating detective "undermined the *Miranda* warnings and rendered them ineffective" by saying to the defendant that he had "an opportunity now to tell [his] side of the story, if [he] want[ed] to," and that "'obviously, anything that you say can also help you and benefit you in certain ways, you know what I mean' . . . 'potentially'"; by "indicat[ing] that in his 'younger days,' he [the detective] would have bounced the defendant off 'about ... five walls'"; "reiterat[ing] that he was going to give the defendant an opportunity to give his side of the story, and promis[ing] him that he 'potentially [could] help [himself]'"; and, as "the defendant ultimately began to give a statement," "interrupt[ing] him and, referring to the *Miranda* warnings form, [and] indicat[ing] that it was a 'bullshit form that [he] had to get past.'"

People v. Harris, 141 A.D.3d 1024, 34 N.Y.S.3d 798 (3d Dept. 2016): The unlawful taking of a first statement in violation of *Miranda* in the defendant's apartment required the suppression as well of the defendant's *Mirandized* stationhouse statement because the prosecution did not "establish[ ] at the [suppression] hearing that there was a 'pronounced break in [the] interrogation adequate to justify a finding that the defendant was no longer under the sway of the prior [unwarned] questioning when the warnings were [subsequently] given.'"

People v. Cleverin, 140 A.D.3d 1080, 34 N.Y.S.3d 136 (2d Dept. 2016): The defendant's confession is suppressed because a forensic psychologist presented by defense counsel at the suppression hearing testified to the following: "the defendant's IQ score was 53," placing him in the category of "being mildly retarded or having borderline intellectual functioning"; the defendant "emigrated as a child from Haiti, that English was not his first language, and that he had been placed in special education in this country"; and, in the psychologist's test of "the defendant's understanding of the *Miranda* warnings," the psychologist found that "the defendant did not understand the phrase, 'you have the right to remain silent and to refuse to answer any questions,' and did not understand the phrase 'you

have the right to consult an attorney before speaking to the police and to have an attorney present during any questioning now or in the future.'"

In the Matter of Raquan W., 55 Misc.3d 636, 47 N.Y.S.3d 659 (N.Y. Fam. Court, Kings Co. 2017) (Pitchal, J.): The court denies suppression of a statement even though the room in which the interrogation took place was not a designated juvenile interrogation room (as required by FCA § 305.2(4)) because the room "met the key requirements of a designated juvenile room" – in that it was "separate and apart from areas used, at that time, by adults; it was an office-like and not jail-like setting; and it was clean, well-lit, and well maintained" – and it "had one benefit that the juvenile room did not: a video recording system," and thus permitted recording of the interrogation, which "is the favored, modern practice."

## D. *Wade* Motions

People v. Reeves, 152 A.D.3d 1173, __ N.Y.S.3d __ (4th Dept. 2017): An undercover officer's identification of the defendant is suppressed because (1) the prosecution failed to provide the defense in discovery with a photograph used by the undercover for an out-of-court identification and, in response to the defense's discovery request, "expressly denied the existence of any photographs in the People's possession"; (2) when the prosecution thereafter attempted to introduce the allegedly non-existent photograph into evidence at the suppression hearing, the prior discovery violation required its exclusion, and thus there was no photograph "before the court, and . . . its absence created a presumption of unreliability in the pretrial identification of defendant by the undercover officer"; and (3) the prosecution "failed to rebut the presumption of unreliability."

People v. Perkins, 28 N.Y.3d 432, 45 N.Y.S.3d 860 (2016): The lower courts erred in failing to recognize that a lineup was suggestive due to the defendant's distinctive hairstyle (dreadlocks). The lower courts treated the distinctive hairstyle as immaterial because the eyewitnesses did not "include[ ] dreadlocks as part of their descriptions," but the Court of Appeals explains that "a distinctive feature" can render a lineup suggestive even if that feature did not "figure[ ] prominently in a witness's prior description."

People v. Lombardo, 151 A.D.3d 887, __ N.Y.S.3d __ (2d Dept. 2017): The court holds that a 13-year-old eyewitness who had not "participate[d] in a pretrial identification procedure" could make an in-court identification of the defendant without the prosecution's having to first "establish an independent basis for the admission of her testimony." The Appellate Division states that "there is no colorable claim of suggestiveness," and that "[d]efense counsel was able to explore weaknesses of the identification in front of the jury." (The courts in other

jurisdictions have recognized that such first-time in-court identifications are inherently suggestive and require protective procedures to guard against an unreliable identification. *See, e.g.*, State v. Dickson, 322 Conn. 410, 141 A.3d 810 (2016).)

People v. Reeves, 140 A.D.3d 1584, 32 N.Y.S.3d 753 (4th Dept. 2016): The "confirmatory identification" exception for buy-and-bust cases did not apply – and the defendant was entitled to both VDF notice of an identification and a *Wade* hearing – even though this was a buy-and-bust case and the witness was an undercover officer. Unlike "the typical situation where an undercover officer identifies the arrestee at the police station contemporaneously with the drug transaction," this officer "did not observe defendant again [after the drug transaction] until the trial, which was approximately a year and a half after the transaction."

People v. McDonald, 138 A.D.3d 1027, 30 N.Y.S.3d 241 (2d Dept. 2016): The prosecution failed to rebut the presumption of prejudice that flowed from the detective's failure to preserve the photo array. The detective "testified that he did not preserve the photo arrays . . . because the computer that displayed those arrays was not attached to a printer," and that he "used another computer to print out a single photograph of the defendant using the defendant's NYSID number, and then showed that photogaph to Seeram," but the detective "did not explain why he did not attach a printer to the computer Seeram was using, or why he did not attempt to reconstruct the photo array."

People v. Haskins, 137 A.D.3d 1298, 29 N.Y.S.3d 409 (2d Dept. 2016): The show-up was unduly suggestive because, while "the complainant was in the presence of the four suspects, the complainant was asked to identify the proceeds of the crime immediately before identifying the defendant."

People v. McGee, 136 A.D.3d 580, 26 N.Y.S.3d 38 (1st Dept. 2016): The trial court erred in denying a *Wade* hearing based on the prosecution's assertion that the identification was "the product of an 'inadvertent observation' that occurred when the victim was waiting in a police car to go into the precinct and defendant was brought to the precinct by officers." "The question whether the coincidence of the victim's presence in a police car outside the precinct and defendant's arrival at the precinct in police custody constituted a police-arranged procedure was a fact question that defendant was entitled to have resolved at a hearing."

## V. Other Motions

### A. Speedy Trial Motion

People v. Barden, 27 N.Y.3d 550, 36 N.Y.S.3d 80 (2016): Addressing the question of what constitutes consent by defense counsel to an adjournment for purposes of exempting a period from the speedy trial clock, the Court of Appeals holds that when the prosecution requests an adjournment to a specific date and defense counsel is unavailable on that date and recommends a somewhat later date and ultimately agrees to an even later "alternate date proposed by the court," defense counsel's agreement to the date proposed by the court "likely signals nothing more than counsel's availability on [the] proposed date after the court has indicated that it could not accommodate the date requested by defense counsel" and cannot be deemed to be consent by defense counsel to the additional period of delay beyond the date requested by defense counsel. The Court of Appeals explains that "'[a]djournments consented to by the defense must be *clearly expressed*'" (emphasis in original).

In re Kaliek G., 137 A.D.3d 570, 27 N.Y.S.3d 154 (1st Dept. 2016): The Appellate Division reverses a speedy trial dismissal, finding that the Family Court should have found special circumstances and granted the Presentment Agency's request for an adjournment to the following morning, given that the court "allotted only two hours to complete the suppression hearing, hold an independent source hearing if needed, and commence fact-finding," and the Presentment Agency could not have "anticipated respondents' attorneys' prior need to cut the proceedings short on [a prior date] . . . due to their hearings in other parts" and also could not have "anticipated that the court, upon granting the motion to suppress, would not allow the independent source hearing to proceed at 4:00 p.m. . . ., where the presentment agency noted that the complainant was available, and that it was ready to proceed with the independent source hearing at that time."

### B. Motion for Joinder/Consolidation of Counts

In the Matter of Christian M., 54 Misc.3d 737, 44 N.Y.S.3d 705 (N.Y. Fam. Ct., Kings Co. 2016) (Beckoff, J.): The court grants the respondent's motion to consolidate "two separate designated felony petitions [which] us[ed] the same supporting depositions by the same two complainants," in each of which the "victim claimed to be the other's eyewitness." The court explains that "all of the charges in both petitions – with the possible exception of . . . one count . . . – could have been joined by the Presentment Agency for any or all of the reasons provided for in F.C.A. § 311.6(1): they are based on the same act or same criminal transaction; even if they weren't, proof of the crimes in one petition is material and admissible as evidence in chief at a fact-finding hearing of the other; and the

crimes are defined under the same or similar statutory provisions." The court rejects the respondent's request for "separate fact-findings as well as separate pre-trial *Huntley* hearings," and rejects the Presentment Agency's argument that the court should deny consolidation while nonetheless holding a combined *Huntley* hearing and a combined fact-finding hearing on all charges.

### C. Motion for Severance of Codefendants/Co-respondents

People v. McGuire, 148 A.D.3d 1578, 51 N.Y.S.3d 726 (4th Dept. 2017): The trial court should have severed the defendant's trial from that of his co-defendants based on irreconcilable trial strategies because "both codefendants denied possessing the gun and testified it was in defendant's possession" and "the codefendants' respective attorneys 'took an aggressive adversarial stance against [defendant at trial], in effect becoming a second [and a third] prosecutor.'"

People v. Lessane, 142 A.D.3d 562, 36 N.Y.S.3d 231 (2d Dept. 2016): The Appellate Division reverses a conviction because the trial judge should have granted the defendant's motion to sever his trial from his co-defendant's based on antagonistic defenses. The defendant, who had confessed to the crime, asserted that his confession was false and extracted by the interrogating officers' promises "that he would be allowed to go home if he admitted to being at the scene when the shooting occurred"; the co-defendant's defense involved asking the jury to credit the defendant's confession, which named other perpetrators but entirely omitted the co-defendant from the account of the crime. This central conflict between the defenses should have resulted in a severance. Moreover, the actions of co-defendant's counsel at trial – "who took an adversarial stance against the defendant and elicited damaging evidence against him" – "creat[ed] the sort of compelling prejudice that could have been avoided by the grant of the requested total severance."

## VI. Admissions

People v. Couser, 28 N.Y.3d 368, 45 N.Y.S.3d 301 (2016): The Court of Appeals upholds an *Alford* plea to attempted murder, holding that it satisfied New York's requirement that "[a]n *Alford* plea . . . 'is the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt.'"

## VII. Fact-Finding Hearing

### A. Generally

#### (1) Accused's Right to Be Present

People v. Hoey, 145 A.D.3d 118, 41 N.Y.S.3d 477 (1st Dept. 2016): The trial court violated the defendant's "right to be present at all material stages of the trial" by conducting *Molineux*/*Ventimiglia* colloquies without the defendant being present. Although the defendant was present when the issue were initially discussed at a suppression hearing, he was not present when the issues were further discussed and resolved by a different judge who presided over the trial.

#### (2) Right to Presence of Parent

In re Nikim M., 144 A.D.3d 424, 41 N.Y.S.3d 474 (1st Dept. 2016): The Appellate Division vacates a delinquency adjudication because "[t]he record does not establish that a 'reasonable and substantial effort was made'" to provide the respondent's mother with notice of the fact-finding hearing date, at which the respondent made an admission. When counsel informed the court that the absent parent "was unaware of the time she needed to come to court," the court "should at least have inquired as to 'the nature or degree of any effort made to notify [her]' . . . and ascertained whether she had been notified of both the date and time, and hence been given a reasonable opportunity to attend."

#### (3) Judge's Intervention In Lawyers' Presentation of Testimony

People v. Robinson, 151 A.D.3d 758, 56 N.Y.S.3d 248 (2d Dept. 2017): The Appellate Division reverses the conviction because the defendant "was deprived of a fair trial by the Supreme Court's excessive and prejudicial interference with the examination of witnesses" during the jury trial. "For example, the Supreme Court effectively took over the direct examination of a complaining witness while the prosecutor was eliciting details related to whether the witness was stabbed during the physical altercations at issue"; and, "during the defendant's cross-examination of a complaining witness, the Supreme Court redirected the inquiry and blunted the force of counsel's attempt to impeach the witness regarding injuries sustained by one of the victims." Although the prosecution argued on appeal that "the issue is unpreserved . . . because defense counsel did not object to the first instances of interference by the Supreme Court," the Appellate Division rejects this contention, saying that it is not the kind of

error that is ripe for objection "at the first sign of court interference," and "[t]he record demonstrates that defense counsel timely and appropriately registered his protest to the claimed error" by "objecting to specific questions" and "unequivocally assert[ing] that the court's extensive questioning of witnesses was intrusive and prejudicial, thus providing an opportunity to correct the error."

People v. Davis, 147 A.D.3d 1077, 47 N.Y.S.3d 455 (2d Dept. 2017): Even though defense counsel failed to preserve the claim, the Appellate Division reverses the conviction and orders a new trial because "the trial judge [in a jury trial] conducted excessive and prejudicial questioning of trial witnesses" by "elicit[ing] step-by-step details regarding the female security guard's recovery of the gun from the defendant," "elicit[ing] details regarding the manager's observation of the defendant's gun," "extensively question[ing] a defense witness as to his observation of events on the night in question," and "further question[ing] that defense witness as to whether he had made false statements to the police and before the grand jury in connection with a prior robbery conviction."

**(4) Substitution of Judge**

People v. Banks, 2017 WL 2870489 (N.Y. App. Div. July 6, 2017): A bench trial conviction by a County Court judge is reversed because the judge – who took over the case after a post-trial reassignment of the case to a judge other than the one who had presided over the trial – convicted the defendant based upon a review of the transcripts of the trial. The Appellate Division explains that Judiciary Law § 21 "prohibits a substitute judge from weighing testimony or making factual and credibility determinations when he or she did not hear the witnesses' testimony firsthand."

## B. Evidentiary Issues

**(1) Confrontation Clause Issues**

People v. Lin, 28 N.Y.3d 701, 49 N.Y.S.3d 353 (2017): In cases involving forensic evidence, "a trained analyst" can provide the requisite prosecutorial testimony about a forensic test even if s/he was not "the primary analyst" who "personally conducted it," as long as s/he "supervised, witnessed or observed the testing" – thus being "able to testify [and to be cross-examined] not only about the typical testing protocol, but also about 'the particular test and testing process' used in that defendant's case" – and as long as "none of the nontestifying officer's

hearsay statements were admitted against defendant").

People v. John, 27 N.Y.3d 294, 33 N.Y.S.3d 88 (2016): The "defendant's Sixth Amendment right to confront the witnesses against him was violated when the People introduced DNA reports into evidence, asserting that defendant's DNA profile was found on the gun that was the subject of the charged possessory weapon offense, without producing a single witness who conducted, witnessed or supervised the laboratory's generation of the DNA profile from the gun or defendant's exemplar." It does not suffice for the prosecution to present merely "a testifying analyst functioning as a conduit for the conclusions of others." "[A]n analyst who witnessed, performed or supervised the generation of defendant's DNA profile, or who used his or her independent analysis on the raw data . . . must be available to testify."

People v. Cedeno, 27 N.Y.3d 110, 31 N.Y.S.3d 434 (2016): The admission, in a joint trial, of the non-testifying co-defendant's statement violated the defendant's Confrontation Clause rights even though the statement was redacted to replace "the identifying descriptors of defendant with blank spaces" because it would have been apparent to the jury "'whose name[ ] had been blacked out.'"

People v. Johnson, 27 N.Y.3d 60, 29 N.Y.S.3d 851 (2016): The trial court violated the Confrontation Clause by "admit[ting] into evidence, at a joint trial, a non-testifying co-defendant's out-of-court statements" that "incriminate[d] defendant in the underlying criminal conduct." The Court of Appeals rejects the prosecution's argument that "the statements cannot be inculpatory because they are codefendant's exculpatory explanation for his actions – albeit a false one." The Court of Appeals explains: "Like so many other statements that point the finger away from the speaker at someone else, the statements here deflect guilt from codefendant while simultaneously implicating the only other possible culpable person, defendant."

People v. Hicks, 142 A.D.3d 1333, 39 N.Y.S.3d 321 (4th Dept. 2016): The trial court violated the Confrontation Clause in a retrial by admitting the prior trial testimony of the complainant (the defendant's girlfriend), who testified in the first trial that the defendant had assaulted her but then, while that conviction was on appeal, said that she had lied in the first trial. Because the complainant invoked her Fifth Amendment privilege to decline to testify at the retrial, the prosecution sought – and the judge allowed – the introduction of the complainant's testimony at the first trial. The Appellate Division holds that the trial court "failed in its duty '[to]

explore whether [she] ha[d] essentially refused to testify on questions of matters so closely related to the commission of the crime[s] that [some or all of her] testimony . . . [from the first trial] should be stricken.'"

**(2) Hearsay**

People v. Vining, 28 N.Y.3d 686, 49 N.Y.S.3d 72 (2017): The trial court did not abuse its discretion in allowing the prosecution to use the "adoptive admission" doctrine to introduce the contents of a recorded conversation between the incarcerated defendant and his ex-girlfriend, in which she "repeatedly accused defendant of breaking her ribs" and he "never denied the allegations, and instead gave non-responsive and evasive answers." The circumstances satisfied the applicable standard that "[t]o use a defendant's silence or evasive response as evidence against the defendant, the People must demonstrate that the defendant heard and understood the assertion, and reasonably would have been expected to deny it."

People v. Flanagan, 28 N.Y.3d 644, 49 N.Y.S.3d 50 (2017): Addressing issues concerning the co-conspirator exception to the hearsay rule, the Court of Appeals holds that (1) "when a conspirator subsequently joins an ongoing conspiracy, any previous statements made by his or her coconspirators in furtherance of the conspiracy are admissible against the conspirator"; and (2) "statements made after a conspirator's alleged active involvement in the conspiracy has ceased, but the conspiracy continues, are admissible unless this conspirator has unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators." As the Court of Appeals explains, both of these rules are "in line with federal case law."

People v. Patterson, 28 N.Y.3d 544, 46 N.Y.S.3d 511 (2016): The Court of Appeals upholds the trial court's "admission of subscriber information in prepaid cell phone records as nonhearsay evidence located within a business record." Although this information was not "admissible under the business records exception" because "the subscriber was not under a duty to report his or her 'pedigree' information correctly when activating the prepaid cell phone accounts," the information was nonetheless admissible because it was "admitted for a nonhearsay purpose other than simply completing the narrative."

People v. Hernandez, 28 N.Y.3d 1056, 43 N.Y.S.3d 237 (2016): The Court of Appeals upholds a trial court's application of the "excited utterance" exception to admit the child complainant's statements about the incident to her parents at a time when "the child was in a highly emotional state

[immediately after the incident]" and was "cry[ing] inconsolably." In response to the defense's argument that the child's recitation of the statement three hours later at the hospital did not qualify as an "excited utterance." the Court of Appeals holds that, "[e]ven accepting defendant's contention that the stress of excitement had sufficiently abated by the time the child made those later statements, any error in their admission was harmless."

People v. Jones, 28 N.Y.3d 1037, 42 N.Y.S.3d 669 (2016): A hearsay statement by an "unidentified woman" passerby to a police officer – about what she had just observed the defendant do – was admissible under the "present sense impression" exception to the hearsay rule because (1) the "statement was made to the officer immediately after the event she described and before she had an opportunity for studied reflection," and (2) "[t]he officer's own observations sufficiently corroborated her description."

People v. McFarland, 148 A.D.3d 1556, 50 N.Y.S.3d 694 (4th Dept. 2017): The trial court committed reversible error by excluding a hearsay statement "of a third party that it was he, and not defendant, who shot and killed the victim," which should have been deemed a statement against penal interest. The court explains that, as a general matter, "it is well settled that a 'less stringent standard [of admissibility] applies, where, as here, the declaration is offered by defendant to exonerate himself rather than by the People, to inculpate him.'"

People v. Gumbs, 143 A.D.3d 403, 38 N.Y.S.3d 169 (1st Dept. 2016): The trial court improperly relied on the "dying declaration" exception to allow the prosecution to introduce statements by the dying victim that implicated the defendants. The exception was not applicable here because the victim's statements were "'mere[ly] expression[s] of belief and suspici[ons]' that defendants were involved in his shooting rather than 'statements of facts to which a living witness would have been permitted to testify, if placed upon the stand.'" There was no claim that the defendants had shot the victim or had even been "present at the shooting"; "their alleged roles were that of hiring the person who did the shooting, and providing the murder weapon along with other assistance."

**(3) Prompt Outcry by Sexual Assault Victim**

People v. Ortiz, 135 A.D.3d 649, 25 N.Y.S.3d 81 (1st Dept. 2016): The "prompt outcry" exception to the hearsay rule did not apply to the 15-year-old complainant's text message to her friends "two or three months after

the alleged assault occurred." Although "a significant delay in reporting does not necessarily preclude outcry evidence, especially where the victim is a child," even then "'the concept of promptness necessarily suggests an immediacy not ordinarily present when months go by'" unless "there were 'legally sufficient circumstances' that would excuse the victim's delay, such as the victim being 'under the control or threats of the defendant . . . or being among strangers and without others in whom [the victim] could confide.'" "While the evidence indicated that the complainant experienced confusion, shock, embarrassment, and fear of not being believed, as well as concern about her mother and grandmother's reactions, there is no evidence that she was threatened by defendant or was under his control."

In the Matter of D.R., 54 Misc.3d 581, 46 N.Y.S.3d 839 (N.Y. Fam. Ct., Bronx Co. Nov. 15, 2016) (Taylor, J.): The court declines to follow *In the Matter of Axel O.*, *infra*, and applies the "prompt outcry" exception to hold that the child complainant's mother can testify to statements the complainant made to her about the respondent's commission of the charged sexual offenses.

In the Matter of Axel O., 53 Misc.3d 1111, 37 N.Y.S.3d 703 (N.Y. Fam. Ct., Queens Co. 2016) (Caloras, J.): The court holds that the "prompt outcry" exception is inapplicable in a bench trial. Analyzing the origins of and rationales for the rule, the court explains that they do not apply to a bench trial because the underlying concerns about jurors' "arcane and inappropriate perceptions" of a sexual assault victim are not present in "a bench trial in 21st century New York." Accordingly, the court denies the prosecution's motion *in limine* to use the prompt outcry exception to introduce statements made by a complainant in a sexual abuse case on the morning after the alleged incident.

**(4) Other Crimes Evidence**

People v. Valentin, 29 N.Y.3d 150, 53 N.Y.S.3d 592 (2017): If the defendant in a drug sale case "asserts an agency defense" at trial, and does so based entirely on the testimony adduced by the prosecution in its case-in-chief, the trial court "may, in its discretion," apply *Molineux* to allow the prosecution to present evidence in the case-in-chief of the "defendant's previous drug sale conviction on the issue of the intent to sell the drugs."

People v. Leonard, 29 N.Y.3d 1, 51 N.Y.S.3d 4 (2017): In the trial of the defendant for "serving alcohol to an underage relative . . . and then sexually abusing her while she was intoxicated," the trial judge committed reversible error by granting the prosecution's *Molineux* motion to

introduce testimony by the complainant about "a prior incident in which defendant allegedly sexually assaulted her in a similar manner." The Court of Appeals explains that (1) the evidence was not admissible under the *Molineux* category of "intent" because "[t]he intent here – sexual gratification – can be inferred from the act"; (2) ""[t]o the extent the evidence was admissible to show defendant's motive in getting the victim drunk, the evidence was highly prejudicial" and the "prejudicial nature of the *Molineux* evidence far outweighed any probative value"; and (3) the "evidence was not necessary background information."

People v. Smith, 27 N.Y.3d 652, 36 N.Y.S.3d 861 (2016): The trial judges in cases that were joined on appeal abused their discretion by precluding defense counsel from using the "prior bad acts" rule to (in one case) cross-examine a police detective about "a lawsuit in which he and the rest of the narcotics field team involved in this case were sued in federal court for civil rights violations" in an unrelated civil suit alleging false arrest, excessive force, and fabrication of evidence, and (in another case) to cross-examine a police detective about "prior false arrests based upon the specific allegations of . . . [an unrelated] federal lawsuit"; "law enforcement witnesses should be treated in the same manner as any other prosecution witness for purposes of cross-examination."

People v. Ridenhour, 2017 WL 3722946 (2d Dept. Aug. 30, 2017): The trial court erred by ruling in the *Sandoval* hearing that, if the defendant elected to testify at trial, the prosecution would be permitted to cross-examine him about a prior incident in which the complainant in the instant trial for a stabbing in the throat had previously been stabbed in the throat. Although the prosecution asserted that they had a good-faith basis for connecting the crimes, "the victim ha[d] never identified his attacker [in the prior incident] and has consistently refused to cooperate with law enforcement officials." Given these circumstances, "the probative value [of the other crime evidence] was far outweighed by the danger of undue prejudice." Moreover, "[t]here was a strong likelihood that the uncharged crime would be viewed as evidence of propensity, rather than probative on the issue of credibility."

People v. Mohamed, 145 A.D.3d 1038, 46 N.Y.S.3d 111 (2d Dept. 2016): The trial court committed reversible error by changing its *Sandoval* ruling after the defendant had already taken the witness stand and allowing the prosecution to question the defendant about the underlying facts of his prior burglary conviction even though the court had previously limited prosecutorial cross-examination to the fact that defendant had been convicted of a felony and misdemeanor. Although the defendant testified

to facts that minimized and sought to excuse his prior misconduct, the testimony "was not in conflict with the facts of his underlying conviction" and therefore "did not open the door to [prosecutorial] question about his prior burglary conviction."

People v. Ward, 141 A.D.3d 853, 35 N.Y.S.3d 557 (3d Dept. 2016): The trial court committed reversible error by allowing the prosecution to present testimony in its case-in-chief about "a relatively recent prior bad act [of the defendant's] that was nearly identical to the incident underlying the crimes for which defendant was on trial." The court explains that, "[e]ven assuming, without deciding, that the previous victim's testimony at trial and the corresponding photographs fall within one or more of the . . . *Molineux* exceptions, we agree with defendant that the prejudicial effect of such evidence far outweighs its probative value and, therefore, the People should not have been permitted to introduce such evidence on their case-in-chief."

People v. Meadow, 140 A.D.3d 1596, 33 N.Y.S.3d 597 (4th Dept. 2016): The trial court committed reversible error by allowing the introduction of *Molineux* evidence that was in hearsay form. The court observes that "there is no *Molineux* exception to the rule against hearsay." Even if the evidence was relevant under *Molineux*, it still had to be "in admissible form." Although the prosecution "contend[ed] that the statements are not hearsay because they were not offered for the truth of the matters asserted," the Appellate Division states that "[w]e reject that contention," and explains that the statements clearly were intended for the truth and were used by the prosecution in that way.

**(5) Social Media Evidence**

People v. Price, 29 N.Y.3d 472, 58 N.Y.S.3d 259 (2017): The prosecution failed to proffer "a sufficient foundation at trial to authenticate a photograph – purportedly of defendant holding a firearm and money – that was obtained from an internet profile page allegedly belonging to defendant." The Court of Appeals explains that even if it were to follow some other jurisdictions by adopting a two-pronged "approach [that] allows for admission of the proffered evidence upon proof that the printout of the web page is an accurate depiction thereof, and that the website is attributable to and controlled by a certain person, often the defendant," the "evidence presented here of defendant's connection to the website or the particular profile was exceedingly sparse. . . . For example, notably absent was any evidence regarding whether defendant was known to use an account on the website in question, whether he had ever communicated

with anyone through the account, or whether the account could be traced to electronic devices owned by him. Nor did the People proffer any evidence indicating whether the account was password protected or accessible by others, whether non-account holders could post pictures to the account, or whether the website permitted defendant to remove pictures from his account if he objected to what was depicted therein. . . . Thus, even if we were to accept that the photograph could be authenticated through proof that the website on which it was found was attributable to defendant, the People's proffered authentication evidence failed to actually demonstrate that defendant was aware of – let alone exercised dominion or control over – the profile page in question."

**(6) Police Officer's Identification of the Accused in a Surveillance Video**

People v. Boyd, 151 A.D.3d 641, 58 N.Y.S.3d 43 (1st Dept. 2017): The trial court did not abuse its discretion by "permitting three officers who were familiar with defendant, but were not eyewitnesses, to give lay opinion testimony, as an aid to the jury's identification process, that defendant was the man depicted in surveillance videotapes firing a handgun." The Appellate Division explains that: (1) "[t]he videos were of marginal quality"; (2) the officers were "familiar with defendant and his personal characteristics, most notably a distinctive manner of walking"; (3) the officers' "narration of the videos" was helpful to the jury "both in identifying him and explaining to the jury the rapid-paced and fleeting images of persons running back and forth in footage drawn from three video cameras depicting three overlapping areas around the scene of the shooting"; and (4) "there was some evidence of a change in defendant's appearance," and the officers could testify based on their having known "'the defendant before that change of appearance.'"

People v. Jackson, 151 A.D.3d 746, 56 N.Y.S.3d 265 (2d Dept. 2017): The trial court did not abuse its discretion by permitting "a police officer who was not a witness to the crime in question . . . to testify that he believed an individual depicted in certain surveillance videos was the defendant." The Appellate Division explains that "[t]he police officer testified that he knew the defendant from his patrols of the defendant's neighborhood, and that the defendant changed his appearance after the subject crimes."

People v. Daniels, 140 A.D.3d 1083, 34 N.Y.S.3d 161 (2d Dept. 2016): The trial court did not abuse its discretion by "allow[ing] a police detective to testify that, in his opinion, the defendant was the individual depicted in the surveillance video." The Appellate Division explains that "there was

some basis for concluding that the police detective, who knew the defendant from his patrols of the defendant's neighborhood, was more likely than the jury to correctly determine whether the defendant was depicted in the video."

People v. Myrick, 135 A.D.3d 1069, 22 N.Y.S.3d 691 (3d Dept. 2016): The trial court erred in allowing a detective to identify the defendant as the individual in the surveillance videotape. Although "'[a] lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury,'" "the record is devoid of any other circumstances suggesting that the jury – which had ample opportunity to view defendant – would be any less able than the detective to determine whether defendant was, in fact, the individual depicted in the video," given that "the detective had met with defendant on a single occasion more than two weeks after the commission of the crime" and "there was no evidence that defendant had changed his appearance prior to trial."

People v. Montanez, 135 A.D.3d 528, 25 N.Y.S.3d 18 (1st Dept. 2016): The trial court "properly exercised its discretion in permitting a police officer to identify defendant as the person depicted in a surveillance videotape" because "there was 'some basis for concluding that the witness [was] more likely to correctly identify the defendant from the [video] than [was] the jury'" (quoting *People v. Sanchez*, 95 A.D.3d 241, 249, 941 N.Y.S.2d 599 (1st Dept 2012), *aff'd* 21 N.Y.3d 216, 969 N.Y.S.2d 840 (2013)).

**(7) Expert Witnesses**

People v. McCullough, 27 N.Y.3d 1158, 37 N.Y.S.3d 214 (2016): The trial court did not abuse its discretion in denying the defense's motion to present an expert witness on identification testimony. Under the standard established by the Court of Appeals, a trial judge's determination whether "to admit or exclude expert testimony concerning factors that affect the reliability of eyewitness identifications" should consider, *inter alia*, "'the centrality of the identification issue and the existence of corroborating evidence.'" In this case, the trial court concluded that "the proposed expert testimony [was] unnecessary" because the eyewitness's identification was corroborated by a participant in the crime who identified the defendant as his co-perpetrator.

People v. Evans, 141 A.D.3d 120, 32 N.Y.S.3d 119 (1st Dept. 2016): The

trial court abused its discretion by prohibiting a defense expert – whom the court had authorized to "testify on certain matters relating to defendant's mental condition and his intellectual capacity – from also giving "expert testimony on the general phenomenon of false confessions" and "how defendant's specific individual personality traits may have contributed to a false confession." Under the Court of Appeals' ruling in *People v. Bedessie*, 19 N.Y.3d 147, 947 N.Y.S.2d 357 (2012), the defense was entitled to present expert testimony on false confessions because the defense had satisfied the "threshold requirement" of establishing that this expert testimony was "'relevant to the defendant and [the] interrogation before the court.'"

**(8) Attorney-Client Privilege**

People v. Loiseau, 140 A.D.3d 1190, 33 N.Y.S.3d 471 (2d Dept. 2016): The trial court committed reversible error by "allow[ing] the prosecutor, on cross-examination, to question [the defendant] . . . as to whether he made a certain admission to his attorney which contradicted his trial testimony." This "violat[ed] . . . the attorney-client privilege."

**(9) Curtailment of Defense Cross-Examination**

People v. Horton, 145 A.D.3d 1575, 43 N.Y.S.3d 654 (4th Dept. 2016): The trial court violated the defendant's "constitutional right to present a defense" by "precluding defendant from adducing evidence or cross-examining the complainant with respect to the complainant's alleged history of engaging in other unlawful transactions involving her public benefit card . . . and of illegal drug use" in a gun possession case in which the complainant claimed that "defendant brought a gun to the complainant's apartment and that the gun discharged during a verbal confrontation and subsequent struggle between the two for the weapon" while "the primary theory of the defense was that the gun belonged to the complainant, who pointed it at defendant during an argument that began over defendant's refusal to engage in an additional illegal transaction with the complainant involving the complainant's '[p]ublic benefit card'" which "would have generated cash for the complainant's purchase of crack cocaine." The Appellate Division explains that the "evidence, if credited by the jury, would demonstrate that the complainant had every reason to fabricate the story that the gun belonged to defendant and not her" and furthermore "the proffered evidence was admissible to complete the narrative of events, i.e., to provide background information as to how and why the complainant allegedly confronted defendant, and to explain the aggressive nature of the confrontation."

People v. Enoe, 144 A.D.3d 1052, 42 N.Y.S.3d 48 (2d Dept. 2016): The trial court improperly precluded defense counsel from cross-examining a police officer about "a federal lawsuit filed against him" that alleged that the officer "had previously falsely arrested an individual on a weapon possession charge for the purpose of securing overtime compensation and a 'credit' for a gun-related arrest." These alleged bad acts "were relevant to the credibility of [the officer] . . . in this case, where he testified that he witnessed the defendant possessing a gun in the back seat of the livery cab," and "there was no danger that such cross-examination would go to anything other than the sergeant's credibility or that it would confuse or mislead the jury."

**(10) Impeachment with Prior Inconsistent Statements**

People v. Collins, 145 A.D.3d 1479, 44 N.Y.S.3d 830 (4th Dept. 2016): The trial court improperly excluded "testimony from a defense witness that the victim had said that she did not 'think [defendant] did this,' meaning that defendant did not commit the alleged crime." During "cross-examination of the victim, defense counsel had laid an adequate foundation for the admission of that prior inconsistent statement by eliciting testimony that the victim had never discussed the matter with the defense witness and had never told the defense witness that the alleged occurrence 'between [her] and [defendant] might not have happened.'"

**(11) Impeachment by Omission**

People v. Chery, 28 N.Y.3d 139, 42 N.Y.S.3d 655 (2016): Although "'[i]t is a well-established principle of state evidentiary law that evidence of a defendant's pretrial silence is generally inadmissible'" – a "rule [that] applies both to the People's direct case and, 'absent unusual circumstances,' to impeachment of defendant's trial testimony" – this case came within the limited exception established in *People v. Savage*, 50 N.Y.2d 673, 431 N.Y.S.2d 382 (1980) for cases in which the prosecution can use a defendant's "selective silence, while making a spontaneous postdetention statement to the police, to impeach his trial testimony . . . [and] to challenge the credibility of defendant's trial testimony as to the events that had transpired at the scene." The *Savage* rule applies "when the defendant has not, in fact, remained silent" and when the omission the prosecution seeks to use occurred under "'circumstances [that] ma[d]e it most unnatural to omit . . . [the] information.'" In this case, in which the police responded to a report of an altercation and initially handcuffed both the defendant and the complainant "but, after speaking with complainant and the witnesses, [and hearing the defendant's spontaneous statement

about the complainant's conduct,] arrested only defendant," *Savage* applied because "defendant elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial – that complainant had assaulted him."

**(12) Demonstrative Evidence – Use of PowerPoint in Summation**

People v. Anderson, 29 N.Y.3d 69, 52 N.Y.S.3d 256 (2017) ***and*** People v. Williams, 29 N.Y.3d 84, 52 N.Y.S.3d 266 (2017): In two decisions issued on the same day, the Court of Appeals clarifies the rules on lawyers' use of PowerPoint slides in summation to a jury:

- In *People v. Anderson*, the Court of Appeals rejects the argument that "trial exhibits in a PowerPoint presentation may only be displayed to the jury in unaltered, pristine form, and that any written comment or argument superimposed on the slides is improper." The Court of Appeals explains that "a visual demonstration during summation is evaluated in the same manner as an oral statement. If an attorney can point to an exhibit in the courtroom and verbally make an argument, that exhibit and argument may also be displayed to the jury, so long as there is a clear delineation between argument and evidence, either on the face of the visual demonstration, in counsel's argument, or in the court's admonitions. . . . PowerPoint slides may properly be used in summation where . . . the added captions or markings are consistent with the trial evidence and the fair inferences to be drawn from that evidence. When the superimposed text is clearly not part of the trial exhibits, and thus could not confuse the jury about what is an exhibit and what is argument or commentary, the added text is not objectionable. The slides, in contrast to the exhibits, are not evidence."

- In *People v. Williams*, the Court of Appeals explains that "the long-standing rules governing the bounds of proper conduct in summation apply equally to a PowerPoint presentation. . . . If counsel is going to superimpose commentary to images of trial exhibits, the annotations must, without question, accurately represent the trial evidence. . . . Moreover, any type of blatant appeal to the jury's emotions or egregious proclamation of a defendant's guilt would plainly be unacceptable."

## C. Evidence of Third-Party Culpability

People v. Powell, 27 N.Y.3d 523, 35 N.Y.S.3d 675 (2016): The "trial court did not abuse its discretion by precluding defendant's ill-defined and speculative third-party culpability evidence." Although pointing out that the murder victim's brother stood to gain from the murder because of a life insurance policy, the defense "repeatedly declined to accuse [the brother] of the committing the murder," saying merely that "'someone else [other than the defendant] could have killed" the victim. The Court of Appeals emphasizes that "[t]o be clear, admission of third-party culpability evidence does not necessarily require a specific accusation that an identified individual committed the crime," but the court finds that the "trial court was within its discretion in finding th[e] [defense's] proffer speculative and in determining the evidence to support it would have caused undue delay, prejudice, and confusion."

People v. DiPippo, 27 N.Y.3d 127, 31 N.Y.S.3d 421 (2016): Reaffirming and clarifying the standard adopted in *People v. Primo*, 96 N.Y.2d 351, 728 N.Y.S.2d 735 (2001) for defense presentation of evidence that the crime was committed by a third party, the Court of Appeals holds that "[w]here, as here, the defendant makes an offer of proof to the court explaining the basis for a third-party culpability defense and connecting the third-party to the crime, and the probative value of the evidence 'plainly outweighs the dangers of delay, prejudice and confusion,' then it is 'error as a matter of law' to preclude the defendant from presenting such proof to the jury." In this felony murder/rape case, the defendant's written proffer was sufficient because it "tended to demonstrate" that the third party "knew and had access to the victim; he was familiar with the road near which the victim's remains were found; he had a history of allegedly assaulting other young girls with whom he was familiar in a manner uniquely similar to the prosecution's theory of how the victim was killed; and . . . [the third party] allegedly made statements indicating that he had sexually abused the victim around the time of her disappearance." "Contrary to [the trial court's] determination," "defendant's inability to place [the third party] with the victim on the day, or at the precise location, of her disappearance does not eviscerate the probative value of defendant's third-party culpability evidence or render it speculative."

## D. Presumptions and Inferences

### (1) Statutory Presumptions

People v. Hogan, 26 N.Y.3d 779, 28 N.Y.S.3d 1 (2016): The trial "court properly granted the People's request that it consider the ["drug factory"] presumption" of P.L. § 220.25(2) because "defendant was found in close

proximity to the cocaine and . . . the drugs, baggies and razor blade were in open view," "[d]efendant's former girlfriend admitted that the bagged crack, loose cocaine were in plain view, and that she was in the process of 'moving' the cocaine that she was '[p]robably' going to sell," and "the evidence of packaged and loose drugs, paraphernalia and a razor blade in plain view was sufficient to establish that drugs were being 'package[d] or otherwise prepare[d] for sale' in the apartment, permitting the conclusion that defendant, who was in close proximity to the drugs, knowingly possessed them."

**(2) "Missing Evidence" Inference**

People v. Viruet, 29 N.Y.3d 527, 2017 WL 2427293 (N.Y. Ct. App. June 6, 2017): The Court of Appeals applies *People v. Handy*, 20 N.Y.3d 663, 966 N.Y.S.2d 351 (2013) to hold that the defense was entitled to an adverse inference because "[s]hortly after a fatal shooting took place [at a nightclub], a law enforcement agent collected video surveillance footage of the crime scene [from the nightclub's surveillance system] but that evidence was lost [by the police] prior to trial." ("The arresting officer, Detective Ragab, who just hours after the shooting viewed and obtained a copy of the video taken from a camera located outside the club's front door, could not locate the video. Detective Ragab explained that he did not voucher the video pursuant to police department policy because he 'just did not get to it.' Though he attempted to obtain another copy, the club had shut down and he could not locate the owner.") The defense had made a timely request for discovery of the video and, upon learning of its loss, requested an adverse inference. The trial court denied the request for an adverse inference, and the Appellate Division affirmed on the ground that "'there was no evidence that the video camera recorded anything relevant to the case, and the evidence suggested otherwise.'" The Court of Appeals reverses, holding that the defense was entitled to an adverse inference because "[u]nder these circumstances – where defendant acted with due diligence by requesting the evidence in discovery and the lost evidence was video footage of the murder defendant was charged with committing – it cannot be said that the evidence was not 'reasonably likely to be of material importance.'" The Court of Appeals rejects the prosecution's argument "they were not required to preserve the video because, unlike the prison video in *Handy*, it was created by a third party." The Court of Appeals explains that "[o]nce the police collected the video, the People had an obligation to preserve it."

People v. Rowser, 139 A.D.3d 489, 31 N.Y.S.3d 69 (1st Dept. 2016): The Appellate Division rejects the defendant's argument that the trial court

should have imposed a more substantial sanction than an adverse inference instruction for the police detective's "inadvertent loss of the jacket that the victim had been wearing when he was shot." The Appellate Division finds that the trial court "properly exercised its discretion in declining to dismiss the indictment [or] declare a mistrial" given that "[d]efendant has not established that he was prejudiced by the loss of the jacket."

### E. Insufficiency of the Evidence

#### (1) "Physical injury"

People v. Fews, 148 A.D.3d 1180, 50 N.Y.S.3d 523 (2d Dept. 2017): The "physical injury" element of assault in the third degree was not adequately supported by evidence that "the complainant sustained a one-half inch laceration on one of her toes, which stopped bleeding before an emergency medical technician arrived at the scene." The Appellate Division notes that "[n]o evidence was introduced that the injury sustained by the complainant caused her more than trivial pain,"and "[t]he complainant's vague testimony that she was unable to wear shoes for an unspecified period of time failed to sufficiently demonstrate that the use of her foot was impaired by her injury."

People v. Stokes, 140 A.D.3d 800, 32 N.Y.S.3d 314 (2d Dept. 2016): The "physical injury" element of robbery in the second degree was not adequately made out by evidence that the complainant "sustained a laceration and a welt on the back of her head, scratches and bruises on her elbow, and other bruises"; that "she was given painkillers, ice, and bandages" at the hospital; and that she "was not able to work for the rest of that day" and "was 'sore for several days.'"

People v. Cooney, 137 A.D.3d 1665, 28 N.Y.S.3d 166 (4th Dept. 2016): The "physical injury" element of robbery in the second degree was not adequately established by evidence that a cut on the victim's hand, although "'very painful,'" had completely healed in one week, and was treated with an antibiotic ointment and a bandage for one week, and the victim did not seek medical treatment and did not miss any time from his job as a result of the injury.

## VIII. Sentencing / Disposition

People v. Minemier, 29 N.Y.3d 414, 57 N.Y.S.3d 696 (2017): The trial court "violated CPL § 390.50 and defendant's due process rights" by "refus[ing] to disclose to the defense certain statements that were reviewed and considered by the court for sentencing

purposes." The Court of Appeals explains that, "to comply with due process, the sentencing 'court must assure itself that the information upon which it bases the sentence is reliable and accurate' . . . 'and that the defendant has an opportunity to respond to the facts upon which the court may base its decision.'" "[I]f a court decides that it is essential to keep confidential any portion of a document that might reveal its source, the court should, at the very least, disclose the nature of the document or redacted portion thereof – to the extent possible without intruding on any necessary confidentiality – and should set forth on the record the basis for such determination. Alternatively, where possible, the court may choose not to rely on the document, and clearly so state on the record."

People v. Darius B., 145 A.D.3d 793, 43 N.Y.S.3d 471 (2d Dept. 2016): The trial court should have granted Youthful Offender sentencing, notwithstanding the defendant's failure to complete the "Project Redirect" program, because "there is no indication in the record that he is incapable of rehabilitation" and "the interest of justice would be served by relieving the defendant from the onus of a criminal record."

In the Matter of Nigel H., 136 A.D.3d 1033, 26 N.Y.S.3d 301 (2d Dept. 2016): The Second Department reverses a disposition of probation in an arson case, finding that an ACD would have been the "least restrictive alternative" given that Nigel H. was "[a]n honor student, . . . had no prior criminal history and no problems in his foster home or at school, notwithstanding prior physical abuse and neglect by his biological parents"; "[t]here is no indication that Nigel H. ever used drugs or alcohol, or was affiliated with a gang"; "[b]y all accounts, Nigel H. is a friendly, cooperative young man"; and "[b]oth his therapist and a fire marshal who conducted an intervention after the incident described him as remorseful and at low risk for reoffending, and Nigel H. continues to receive services and monitoring in connection with his foster placement." Although the term of probation had already expired, the Appellate Division finds that the appeal is not academic because "there may be collateral consequences resulting from the adjudication of delinquency."

In the Matter of Kenroy C., 55 Misc.3d 535, 51 N.Y.S.3d 344 (N.Y. Fam. Ct., Kings Co. 2017) (Deane, J.): The court dismisses the petition at disposition because an adjudication of delinquency requires not only "entry of a fact-finding" but also "an additional finding at the dispositional stage, namely that the Respondent 'requires supervision, treatment or confinement,'" (FCA § 352.1(1)), and "there was insufficient evidence adduced at the dispositional hearing to demonstrate by a preponderance of the evidence that the Respondent was in need of supervision, treatment or confinement." The court explains that the present offense of reckless endangerment in the second degree for playing with illegal fireworks and causing injury to another was the 15-year-old respondent's "first contact with the juvenile justice system," occurred "over 8 months ago," and, according to the I&R, "was an isolated event"; the I&R shows that "the Respondent receives adequate supervision by his mother," has "excellent school attendance" and "is passing

all of his classes," and, although he was suspended on one occasion, this too was an isolated event and it was "for a 'B21' infraction which relates to a very broad category of in-school 'disruptive behaviors'"; and "Kenroy has expressed his sincere remorse about this unintended consequence both to the probation officer and in court at the time he made the admission in this case" and "directly to the victim in the letter." The court denies the complainant's request for restitution for medical expenses and clothing damage totaling almost $2,000 because "it would not be consistent with the goals of rehabilitation" given "the limited financial means of the Respondent's family" and that "the Respondent is too young to earn the money himself."

## IX. Post-Dispositional Issues

In the Matter of Arturo R., 52 Misc.3d 496, 31 N.Y.S.3d 799 (N.Y. Fam. Ct., Queens Co., 2016) (Hunt, J.): The court grants the respondent's motion for a sealing order pursuant to F.C.A. § 375.2 in an arson case in which the respondent entered an admission a decade ago when he was 14, successfully completed an 18-month term of probation, and had no prior contact with the juvenile justice system. As the court explains, "the respondent has led a law-abiding life, he appears to have strong family and community ties, and he poses no current threat to public safety"; he "wishes to enter public service and the maintenance of the record in its unsealed state could hamper his future endeavors."