Chapter 37

Postverdict Proceedings

§ 37.01 SCHEDULING THE DISPOSITION DATE; RESPONDENT'S DETENTION STATUS PENDING DISPOSITION

If the respondent is convicted, ordinarily the court will schedule a date for a dispositional hearing and will order the probation department to investigate the respondent's background and prepare a report for the court's consideration at the hearing. (This is usually called a "pre-sentence report," "investigation and report," or "social study.") If the respondent is not detained pending disposition, the disposition date will be scheduled so as to give the probation department the amount of time it needs for preparation of its report – four to eight weeks in most jurisdictions. If the respondent is detained, most jurisdictions provide (by statute, court rule, or custom) for an accelerated probation investigation, and the disposition date is usually within two or three weeks. *See, e.g.,* N.Y. FAM. CT. ACT § 350.1 (2023) (disposition within 10 days if respondent is detained; within 50 days if not detained).

When the offense was relatively minor and the respondent's prior record is not very bad, the prosecutor will often be willing to join in – or at least not oppose – a defense request to waive preparation of a pre-sentence report and for entry of an immediate disposition (see § 14.06(c)(1) *supra*) of probation or perhaps even a "conditional discharge" (see § 38.03(c) *infra*). Usually, it is in the respondent's interest to seize the opportunity for an immediate disposition rather than take the risk that the pre-sentence report will turn up some unfavorable aspect of the respondent's background (such as school problems that defense counsel does not know about) or indications of the respondent's bad character (which might be simply the respondent's "bad attitude" during the pre-sentence interview) that might lead the judge to order incarceration. The exception to this general rule is the case in which counsel's own investigation of the child's background and school records leaves counsel confident that the pre-sentence report will be exemplary *and* the juvenile code provides a basis for dismissing a Petition after conviction on the ground that the respondent is not in need of supervision, treatment, or confinement. See §§ 37.02(e), 38.17(a), 38.19 *infra.*

Occasionally it will be the prosecutor who requests an immediate disposition when counsel wants time to prepare for the dispositional hearing. In this situation counsel should invoke the respondent's federal and state constitutional rights to due process and effective assistance of counsel. See § 15.02 *supra.*

In cases in which the disposition is not immediate, the judge ordinarily has discretion to reconsider the respondent's detention status pending disposition. Nonetheless, in most locales it is customary simply to continue the respondent's pretrial detention status until disposition. In jurisdictions in which reconsideration of detention is commonplace, counsel will need to be prepared to argue against detaining a previously released respondent during the pre-disposition

period. The arguments are generally the same as those that would be made at a pretrial detention hearing (see §§ 4.17, 4.20-4.21 *supra*) with three exceptions: Counsel can obviously no longer insist that the respondent be presumed innocent of the pending charge; both the prosecutor and defense counsel will be able to draw upon the evidence that emerged at trial to support their respective positions; and defense counsel can cite the respondent's favorable community adjustment during the pretrial period as a powerful argument against detention pending disposition.

In the case of a respondent who was detained pending trial, counsel should be alert to the possibility of seeking a reduced detention status (detention in a group home or outright release) if the respondent was convicted of a less serious offense than the Petition charged (in which case counsel can argue that the original order of detention was based on the seriousness of the top count of the Petition, of which the respondent has now been acquitted) or if the evidence that emerged at trial was not as egregious as the prosecutor claimed in seeking pretrial detention of the respondent.

§ 37.02 POST-TRIAL MOTIONS TO FILE IN CASES IN WHICH THE RESPONDENT WAS CONVICTED

Practice on post-trial motions is generally regulated by statutes or court rules, and these should be consulted. Some States have modeled their post-trial motions process upon the procedure in adult criminal cases, providing for motions for a new trial and requiring that such motions be filed within a specified time period after the finding of guilt. *See, e.g.,* D.C. SUPER. CT. JUV. RULE 33 (2023) (motion for a new factfinding hearing within 7 days after finding of guilt except when the motion is based on newly discovered evidence, in which case the deadline is two years after judgment); FLA. RULE JUV. PROC. 8.130 (2023) (motion for rehearing within 10 days of entry of order); MINN. RULE JUV. DELINQUENCY PROC. 16.01 (2023) (motion for a new trial within 15 days after a finding that the allegations in the Petition are proved). Other jurisdictions provide in general terms for motions to modify or set aside an order of the court, *see, e.g.,* CAL. WELF. & INST. CODE § 778 (2023); N.Y. FAM. CT. ACT § 355.1(1)(a) (2023); TENN. RULE JUV. PROC. 213 (2023), and these provisions are viewed as a substitute for the traditional remedy of moving for a new trial in an adult criminal case. *See, e.g., In re Steven S.,* 91 Cal. App. 3d 604, 154 Cal. Rptr. 196 (1979) (trial court erred in denying defense counsel's motion for a new trial because, although the juvenile code does not provide for new trial motions, counsel correctly invoked the respondent's statutory right to modify or set aside an order of delinquency on the grounds of newly discovered evidence); *cf. In re P.S.C.,* 143 Ga. App. 887, 240 S.E.2d 165 (1977) (juvenile code's modification provision gave the trial judge authority to order rehearing in a proceeding to terminate parental rights).

Post-trial motions are usually required to be in writing. Even when they can be made orally, it is best to file them in writing to protect the record.

The most common grounds for moving for a new trial (or for moving to modify or set

aside the order of delinquency) are (a) erroneous legal rulings in the pretrial proceedings or at trial; (b) lack of jurisdiction or other fundamental defects in the proceedings; (c) newly discovered evidence; and (d) insufficiency of the evidence or a verdict that is "against the weight of the evidence." *See, e.g.,* FLA. RULE JUV. PROC. 8.130(a) (2023). If, as in most jurisdictions, there is no juvenile caselaw on these grounds for a new trial, counsel will usually be able to find adult criminal caselaw that can be cited by analogy.

§ 37.02(a) Errors in the Pretrial Proceedings or the Trial

A new trial (or modification of the order of delinquency) can be requested on the grounds of legal errors in the pretrial proceedings or at trial.

Every point properly preserved by counsel at the pretrial and trial stages may be made the basis of a new-trial motion. With respect to both pretrial errors and trial errors, the motion for a new trial gives the court an opportunity to reconsider its rulings previously made throughout the proceeding, as may any plain error in the proceedings. *See*, *e.g.*, *State v. Ramoz*, 367 Or. 670, 690-91, 483 P.3d 615, 629-30 (2021) ("Subsection (6) [of the applicable new-trial rule] grants trial courts authority to act when they may not have authority to act under subsection (1). A trial court does not have authority to grant a motion under subsection (1) unless the irregularity on which it relies denied the applicant a fair trial. Subsection (6) does not include that requirement; instead it requires that the applicant have objected or excepted to an 'error in law' during trial. Thus, if an applicant meets the preservation requirement of subsection (6), the trial court has authority to grant a motion for a new trial under that subsection, even if the error did not prevent the applicant from receiving a fair trial as required under subsection (1). So, for instance, if a party were to object to a question posed in an opponent's examination of a witness as seeking irrelevant or otherwise inadmissible evidence, an 'error in law' in that evidentiary ruling could be the basis for a new trial, even if that error did not deny the objecting party a 'fair trial.' Of course, . . . [the rule] generally requires that the moving party show that the cause on which that party relies 'materially affect[ed] the substantial rights' of that party. But . . . the 'fair trial' requirement is not necessarily equivalent to the 'materially affecting the substantial rights' requirement . . . ."); *State v. Johnson*, 305 Ga. 237, 214, 824 S.E.2d 317, 321 (2019) ("[b]ecause the trial court plainly erred when it failed to instruct the jury on the necessity of corroboration regarding . . . accomplice testimony, the trial court did not err in granting the motion for new trial"; defense counsel did not request the required instruction but the trial judge was obliged to give it *sua sponte*); *State v. Herndon*, *supra*, 215 S.W.3d at 907 ("[t]he legal grounds for which a trial court *must* grant a new trial are listed in Rule 21(3)" which provides, *inter alia*, that the defendant must be granted a new trial "when the court has misdirected the jury about the law or has committed some other material error likely to injure the defendant's rights" (TEX. RULE APP. PRO. 21.3(b))); CONN. SUPER. CT. RULE [PRACTICE BOOK 1998] § 42-53 (a new trial motion shall be granted "(1) For an error by reason of which the defendant is constitutionally entitled to a new trial; or (2) For any other error which the defendant can establish was materially injurious to him or her"); *State v. Ginn*, 31 S.W.3d 454, 459 (Mo. App. 2000) (upholding a trial court's order granting the defendant a new trial because of improper questions put to a defense witness by the prosecutor;

"the trial court could, in its discretion, have determined that the prosecutor's . . . question[s], making reference to a 'drug-dealing' partnership between Defendant Ginn and . . . [the witness's nephew were] sufficiently prejudicial . . . to undermine the fundamental fairness of the trial, thereby warranting the grant of a new trial . . . ."); *United States v. Ackerly*, 981 F.3d 70 (1st Cir. 2020) (upholding on plain-error review a district court order granting the defendant a new trial because the prosecution violated her right to confrontation by eliciting from one of her accomplices that another had pleaded guilty). To prevail after verdict, however, the defense must show both that a pretrial or trial ruling was erroneous and that it was prejudicial – that is, that it probably affected the verdict. A less exacting showing of prejudice is required in the case of federal constitutional errors and, in some States, state constitutional errors. For these errors, a new trial must be granted unless the court is convinced beyond a reasonable doubt that the error was harmless. *Chapman v. California*, 386 U.S. 18 (1967); *see, e.g.*, *Yates v. Evatt*, 500 U.S. 391 (1991); *Sochor v. Florida*, 504 U.S. 527, 540-41 (1992); *Satterwhite v. Texas*, 486 U.S. 249, 256-60 (1988). The question whether claims of trial error are preserved for appeal by contemporaneous objection or whether some or all such claims must be renewed in a new-trial motion in order to be considered on appeal is a vexed subject, with differing, often complicated answers in different States. *See*, *e.g.*, *Miranda v. Leibach*, 394 F.3d 984 (7th Cir. 2005). It is crucial that counsel know the local law in this regard because there are dangers both in filing a new trial motion and in failing to file one, and – if a motion is filed – there are dangers both in including and in omitting certain claims. This is so because in some jurisdictions, all or most claims of trial error must be included in a motion for a new trial in order to preserve them for appellate review (*see*, *e.g.*, *People v. Tatum*, 2019 IL App (1st) 162403, 165 N.E.3d 853, 445 Ill. Dec. 1 (2019); *State v. Pennington*, 24 S.W.3d 185, 188-89 (Mo. App. 2000)), whereas in other jurisdictions the rule is that such claims "can be raised on appeal from the judgment without making a motion for a new trial, . . . [but] where . . . a motion for a new trial was made, the issue must be raised in that motion or it will not be considered on appeal" (*State v. Sah*, 2020 ND 38, 938 N.W.2d 912, 914 (N.D. 2020)).

Certain fundamental errors and defects not noticed prior to verdict will also ordinarily be considered and, on these points, evidence outside the record may be received. *See, e.g., In the Matter of Glenn F.,* 117 A.D.2d 1013, 499 N.Y.S.2d 557 (N.Y. App. Div., 4th Dep't 1986) (reversing an adjudication of delinquency and granting a new trial because the trial court failed to inquire whether the co-respondents knowingly and intelligently consented to joint representation by the same attorney; the new trial motion was supported by respondents' demonstration of a significant possibility of conflict of interest). Claims in this category include:

(i) The absence of the respondent at any stage of the proceedings which s/he was entitled to attend (see § 27.01 *supra*).

(ii) The absence of counsel and other violations of the right to counsel at any critical stage of the proceedings (see, *e.g.*, §§ 43.03, 9.09(b)(1), 27.02 *supra*).

(iii) The prosecution's use of perjured testimony, the suppression or nondisclosure of

exculpatory evidence by the prosecutor or law-enforcement agents, intimidation of potential defense witnesses by the prosecutor or law-enforcement agents, and similar Due Process violations (see, *e.g.*, §§ 8.13, 9.09(a), 9.09(b)(5), 9.09(b)(6), 31.03 *supra*). *And see State v. Dean*, 427 S.C. 92, 828 S.E.2d 243 (S.C. App. 2019) (approving a trial court's order granting the defendant a new trial because it appeared that the prosecution had failed to disclose its agreement with a turncoat accomplice to bring his cooperation to the attention of the court in sentencing and because the judge who heard the new trial motion believed that he himself had failed to keep a promise to the defendant's counsel to preside over the proceedings against all of the defendant's accomplices so that he would be in a position to assess whether there were testimonial deals with any of them).

(iv) In a jury trial, a post-trial motion for a new trial motion might be based on – and evidence *dehors* the record could be taken – on a claim that the respondent was denied a fair trial by reason of impermissible influences upon the jury (*see Remmer v. United States*, 347 U.S. 227 (1954); *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (dictum); *Rushen v. Spain*, 464 U.S. 114, 119-21 & n.5 (1983) (per curiam) (dictum); *Tanner v. United States*, 483 U.S. 107, 117-20 (1987) (dictum)(dictum); *Tarango v. McDaniel*, 837 F.3d 936, 939-40 (9th Cir. 2016); *United States v. Johnson*, 954 F.3d 174 (4th Cir. 2020); *Ewing v. Horton*, 914 F.3d 1027, 1030 (6th Cir. 2019); B. Samantha Helgason, *Note: Opening Pandora's Jury Box*, 89 FORDHAM L. REV. 231 (2020); Andrew S. Rumschlag, Note, *Iceberg Ahead: Why Courts Should Presume Bias in Cases of Extraneous Juror Contacts*, 72 Case Western Reserve L. Rev. 463 (2021); *and see Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017) (explaining that although the pervasive evidentiary doctrine illustrated by FED. RULE EVID. 606(b) and cases like *Warger v. Shauers*, 574 U.S. 40 (2014) establishes a general "no-impeachment rule," prohibiting challenges to a jury verdict "based on the comments or conclusions [that jurors] . . . expressed during deliberations" (*Peña-Rodriguez*, 580 U.S. at 211), "the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of . . . [a] juror's statement and any resulting denial of the jury trial guarantee" in a case in which "a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant" (*id*. at 225)); *accord, Tharpe v. Sellers*, 138 S. Ct. 545 (2018); *cf*. *Harden v. Hillman*, 993 F.3d 465 (6th Cir. 2021); *State v. Berhe*, 193 Wash. 2d 647, 665, 444 P.3d 1172, 1181 (2019) ("when it is alleged that implicit racial bias was a factor in the jury's verdict . . . [t]he ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict. If there is a prima facie showing that the answer is yes, then the court must hold an evidentiary hearing.").) *See* Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96

DENVER L. REV. 309 (2019); Richard Lorren Jolly, *The New Impartial Jury Mandat*e, 117 MICH. L. REV. 713 (2019); Daniel S. Harawa, *The False Promise of Peña-Rodriguez*, 109 CAL. L. REV. 2121 (2021).

(A) Three common scenarios give rise to cognizable claims of this sort:

(I) The jury was exposed to extraneous influences, contacts, materials or information (see §§ 27.02, 27.05(a)(2), 36.14 fourth paragraph *supra*). *See also State v. Serrano*, 2019 UT App. 32, 440 P.3d 734 (2019) (affirming the order of a trial court which granted a defendant a new trial because a bailiff had given the deliberating jury an audio recording of a witness's testimony without leave of the judge); *Jenkins v. State*, 375 Md. 284, 825 A.2d 1008 (2003) (reversing a conviction because a juror and a detective who was a prosecution witness had extensive conversations at a religious retreat involving 25 or 30 people held during a weekend in mid-trial; "[T]he due process provisions of the United States Constitution and the Maryland Declaration of Rights guarantee that a criminal defendant requesting a trial by jury will be tried fairly by an *impartial* jury." *Id*. at 300, 825 A.2d at 1018. "It has long been held that, in a jury trial, private, intentional communications and/or contacts between jurors and witnesses are generally improper, and convictions in such cases are subject to reversal unless the contacts are proven to be non-prejudicial to the defendant. *Id*. at 301, 825 A.2d at 1018. "Courts in our sister states agree with our view of protecting the judicial system from this type of impropriety." *Id*. at 333, 825 A.2d at 1037 (citing cases).").

(II) There was misconduct on the part of the jurors themselves, either during their deliberations or at some earlier stage of the trial (see § 27.05(a)(2) *supra*). *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017); *Nian v. Warden*, 994 F.3d 746 (6th Cir. 2021); *United States v. Lanier*, 988 F.3d 284 (6th Cir. 2021); *People v. Neulander*, 34 N.Y.3d 110, 112-13, 135 N.E.3d 302, 303-04, 111 N.Y.S.3d 259, 260-61 (2019) (reversing a conviction because throughout trial one of the jurors sent and received hundreds of text messages about the case, disregarding the trial court's instructions not to discuss the case with any person and to report any attempts by anyone to discuss the case; the juror also accessed local media websites that were covering the trial extensively; in attempting to conceal her misconduct, she lied under oath to the court, submitted a false affidavit and tendered doctored text message exchanges, selectively deleted other text messages she deemed "problematic,"

and deleted her internet browsing history.); *United States v. Harris*, 784 Fed. Appx. 704 (11th Cir. 2019) (during deliberations, some jury members saw the defendant and a defense witness wandering around the parking lot where jurors' cars were parked; these jurors spoke with other jurors and raised the question whether the defendant's observation of jurors' license plate numbers would enable him to determine their identities); *Barnes v. Thomas*, 938 F.3d 526 (4th Cir. 2019) (during capital sentencing deliberations, a juror consulted her pastor as to whether she could vote for death consistently with her religious beliefs; he told her that jurors have to live by the law of the land; she relayed this teaching to the other members of the jury); *Harris v. State*, 314 Ga. 51, 875 S.E.2d 649 (2022) (in a homicide-by-vehicle prosecution, two jurors Googled information about the difference between first and second degree; the trial court denied the defendant's motion for a new trial based on this behavior; the Georgia Supreme Court reverses, holding that the trial court applied incorrect legal standards in ruling on the motion: (1)(a) "'To set aside a jury verdict solely because of irregular jury conduct, [a court] must conclude that the conduct was so prejudicial that the verdict is inherently lacking in due process.' . . . We have long held that, in assessing whether juror misconduct meets this standard for prejudice, a court must presume that the misconduct prejudiced the verdict, and the State has a heavy burden to rebut this presumption." *Id*. at 53, 875 S.E.2d at 651. (1)(b) Here the trial court "determined that there was 'no reasonable probability' of harm, invoking the standard typically applicable to nonconstitutional errors, rather than applying the 'beyond a reasonable doubt' standard that applies to most constitutional errors, including errors arising from juror misconduct" (i*d*. at 55, 875 S.E.2d at 652-53). (2) Georgia Evidence Code Rule 606(b) "permitted the jurors to 'testify on the question of whether extraneous prejudicial information was improperly brought to [their] attention' but prohibited them from testifying as to how such information affected their deliberations or the verdict" (i*d*. at 55, 875 S.E.2d at 652). (See § 27.05(a)(2) *supra*.) "[H]owever, Rule 606(b) did not modify our longstanding substantive legal standards for assessing prejudice." *Id*. (3) The information Googled by the jurors was potentially prejudicial in the light of "half a century of Georgia legislation, case law, and practice prohibiting jurors from considering punishment in reaching a verdict" (*id*. at 56, 875 S.E.2d at 653).). *See also Titus v. State*, 963 P.2d 258 (Alaska 1998) ("We conclude that pre-existing juror knowledge about the facts of the alleged crime does

constitute extraneous prejudicial information within the meaning of Rule 606(b)"); *Commonwealth v. Rouse*, 2014 WL 3796242 (Ky. App. 2014) (affirming the trial court's order granting the defendant a new trial on the ground of juror misconduct disclosed after verdict); *State v. Johnson*, 2001 S.D. 80, 630 N.W.2d 79 (2001) (reversing the rape conviction of an African-American defendant when one juror commented to another during a recess, "I've got a rope"; the South Dakota Supreme Court holds that the presumption of prejudice which arises from juror misconduct was not rebutted although the trial judge credited the juror's testimony that his remark was a joke.).

(III) Jurors gave false or misleading information bearing on their qualifications or impartiality during *voir dire* or earlier jury-selection proceedings (*see Sampson v. United States*, 724 F.3d 150 (1st Cir. 2013); *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc); *Green v. White*, 232 F.3d 671 (9th Cir. 2000); *Williams v. True*, 39 Fed. Appx. 830 (4th Cir. 2002); *State v. Dye*, 784 N.E.2d 469 (Ind. 2003); *State v. Ess*, 453 S.W.3d 196 (Mo. 2015)). Cases in which prospective jurors have testified falsely on *voir dire* or have failed to reveal information bearing on their qualifications or their disqualification for bias raise two separate issues: "actual bias and bias based on *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). The two are 'distinct' because 'while a *McDonough* claim requires a showing of juror misconduct, an actual bias claim may succeed "regardless of whether the juror was truthful or deceitful."'" (*Porter v. Zook*, 898 F.3d 408, 422 (4th Cir. 2018) (requiring a postconviction evidentiary hearing on an actual-bias claim where "[prospective j]uror Treakle remained silent regarding the fact that his brother was a law enforcement officer, in the neighboring jurisdiction no less. In addition, Juror Treakle told counsel after the verdict that he felt 'sympathy for law enforcement officers' and found Mrs. Reaves's testimony 'moving' and 'very emotional' *because* of the fact that he had a brother who worked as a law enforcement officer. . . . Mrs. Reaves [the wife of the police-officer for whose murder the defendant was being tried] was the State's first witness. Her testimony set the tone for the entire trial. Moreover, the jury venire was told that the victim was a law enforcement officer and that the case originated in Norfolk. To withhold information that one's brother was an officer in the adjacent jurisdiction certainly 'suggest[s] . . . an unwillingness to be forthcoming,' and at the very least, 'disclose[s] the need for an evidentiary hearing.'" (*Id.* at

426.) The Fourth Circuit also holds that Porter is entitled to an evidentiary hearing on his *McDonough* claim based on the same failure by Treakle to disclose material background information bearing on his qualification to serve as a juror: "To prove a juror bias claim under *McDonough*, . . . [a litigant] must show: (1) 'a juror failed to answer honestly a material question on voir dire,' and (2) 'a correct response would have provided a valid basis for a challenge for cause.'" *Id*. at 430.). *Cf. English v. Berghuis*, 900 F.3d 804 (6th Cir. 2018) (in a trial for criminal sexual conduct, a juror's failure to disclose on *voir dire* that she had been sexually molested as a child is found to have been deliberate, particularly in view of the fact that the juror had witnessed the excuse for cause of an earlier prospective juror who admitted similar childhood molestation; the "intentional or unintentional nature of a juror's omission has a crucial implication: where the omission was unintentional, the petitioner must show 'actual bias,' but where the omission was intentional, bias may be inferred." (*Id*. at 813.) "English has met the *McDonough* test, showing not only that there was a material omission by Juror A – which the parties do not dispute – but also 'that a correct response would have provided a valid basis for' a for-cause challenge." *Id*. at 818.); *United States v. Gemar*, 65 F.4th 777, 781 (5th Cir. 2023) ("Although not every claim of actual bias on behalf of a juror militates a hearing, the district court here abused its discretion by ruling on the motion for a new trial without holding an evidentiary hearing. Gemar has established that Juror 27 and Gemar's wife were friends in high school, that Juror 27 attended the Gemar's wedding, and that Juror 27 and Gemar's wife communicated over social media up until Gemar was indicted. Juror 27 failed to reveal any of this information during voir dire. We note that the record is silent as to whether Gemar recognized Juror 27 during voir dire or the trial, Gemar's wife recognized Juror 27 during her husband's trial, whether she provided information to Gemar about Juror 27 before the jury reached its verdict, and other, obvious, related questions as to what Gemar knew regarding Juror 27 and when. Nevertheless, Gemar has made a sufficient showing to entitle him to a hearing on his juror bias claim."). *Cf. Barral v. State*, 131 Nev. Adv. Op. 52, 353 P.3d 1197 (2015) (holding that a failure to administer the oath to prospective jurors before *voir dire* constitutes structural error requiring automatic reversal).

(B) In some jurisdictions, counsel and defense investigators must obtain leave of court to interview jurors after a trial in order to develop these grounds

for a new-trial motion. *See*, *e.g.*, *Hall v. State*, 151 Idaho 42, 46-48, 253 P.3d 716, 720-22 (2011) ("[A] district court has the inherent authority to enter an order restricting contact with the jury, including post-verdict contact. . . . ¶ Rules restricting attorneys' post-verdict contacts with jurors are widespread, and in the absence of local rules regulating such contacts the issue of post-verdict juror contact is often left to the discretion of the trial court." . . . ¶ . . . [W]e hold that the district court did not err in using its inherent authority to enter an order prohibiting post-verdict juror contacts absent a showing of good cause to believe that juror misconduct occurred."); UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, LOCAL RULE 47.1 ("No juror shall be contacted without express permission of the Court and under such conditions as the Court may prescribe."); UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, LOCAL RULE 11.1(e) (". . . After the jury has been discharged, a lawyer shall not communicate with a member of the jury about a case with which the lawyer and the juror have been connected without leave of Court granted for good cause shown."); FLA. RULE CRIM. PRO. 3.575; *compare Dowd v. State*, 227 So.3d 194 (Fla. App. 2017), *with Ramirez v. State*, 922 So.2d 386 (Fla. App. 2006), *and Phelps v. State*, 186 So.3d 598 (Fla. App. 2016). In other jurisdictions, counsel and defense investigators are free to conduct such interviews without leave of court. *See*, *e.g.*, MASS. SUPREME JUDICIAL COURT RULE 3.5(c); *Commonwealth v. Moore*, 474 Mass. 541, 52 N.E.3d 126 (2016); *State v. Thornton*, 1986 WL 872, at *8 (Tenn. Crim. App. 1986), *ruling on an unrelated issue rev'd*, 730 S.W.2d 309 (Tenn. 1987); UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, LOCAL RULE 39(b) ("After Trial. After the jury concludes its deliberations and is discharged, . . . [parties, attorneys and other interested persons] may contact or communicate with jurors unless otherwise ordered by the court."). *See generally* Kathryn E. Miller, *The Attorneys are Bound and the Witnesses are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases*, 106 CAL. L. REV. 135 (2018); Benjamin M. Lawsky, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant*, 94 COLUM. L. REV. 1950 (1994). *And cf*. *In re Sittenfeld*, 49 F.4th 1061 (6th Cir. 2022) (courts have no authority to order a juror to submit his or her cellphone or other electronic device for forensic examination in search of evidence that s/he engaged in improper Facebook communications during jury deliberations).

In addition to considering the claims of record error and extra-record defects summarized in the preceding paragraphs, the trial judge commonly has discretion to notice lesser errors not properly preserved. But this discretion is absolute in the sense that if the trial judge declines to notice them, neither the errors nor the judge's refusal to hear them may be made the basis for

appeal (except to the extent that a showing of arbitrary exercise of this discretion may open federal constitutional errors to review).

§ 37.02(b) Jurisdictional and Other Fundamental Errors

The respondent is clearly entitled to the setting aside of the adjudication if: (i) the court had no jurisdiction, (ii) the charging paper failed to charge an offense, or (iii) the statute on which the prosecution was founded is unconstitutional. In a number of jurisdictions, the procedural vehicle for raising such claims is a "motion in arrest of judgment," sometimes called a "motion in bar of judgment." *See, e.g., People v. Estreich*, 272 A.D. 698, 75 N.Y.S.2d 267 (N.Y. App. Div., 2d Dep't 1947), *aff'd*, 297 N.Y. 910, 79 N.E.2d 742 (1948) (motion in arrest of judgment should have been granted on the ground that the statute underlying the conviction violated the due process clauses of the federal and state constitutions by criminalizing unknowing receipt of stolen property); *State v. McKenzie*, 307 Or. 554, 556, 771 P.2d 264, 265 (1989) ("[a]lthough we agree that a motion for a judgment of acquittal was not the proper method to challenge the constitutionality of the statute, we conclude that a remedy was available in the form of a motion in arrest of judgment"); *United States v. Williams*, 480 F. Supp. 1040 (E.D. La. 1979), *rev'd*, 621 F.2d 123 (5th Cir. 1980) (the district court grants a defendant's motion in arrest of judgment on the ground of unconstitutional vagueness of the statute underlying the conviction; the circuit court upholds the constitutionality of the statute but does not question the propriety of a motion in arrest as a vehicle for presenting a claim that the statute is facially unconstitutional). *But see United States v. Sisson*, 399 U.S. 267 (1970) (implicitly holding that a motion in arrest is not the proper procedure for raising a claim that the statute underlying a conviction is unconstitutionally vague as applied to the defendant's conduct shown by the evidence in the trial record). *Compare State v. Butler*, 331 So.2d 425, 429 (La. 1976) ("Article 859(2) provides that if 'the offense charged is not punishable under a valid statute' the trial court shall arrest the judgment. This subsection permits the unconstitutionality of the statute under which the prosecution was instituted to be raised by a motion in arrest of judgment. . . . However, while article 859(2) authorizes this Court to consider the 'validity' of the statute under which defendant was charged in determining whether the trial court erred in denying the motion in arrest of judgment, it does not authorize this Court to examine the testimony and proof adduced at trial to determine the correctness of the statute's application in a particular case. Therefore, in the instant case, we must limit our inquiry to (1) what was the offense charged and (2) whether that offense is punishable under a valid statute."), *with Robles v. State*, 277 Ga. 415, 421, 589 S.E.2d 566, 572 (2003) ("Robles contends that the felony murder statute . . . and the cruelty to children statute . . . are unconstitutionally vague, facially and as applied to her. However, Robles did not advance any constitutional challenge to these statutes at trial, waiting until after her conviction to raise the matter in a motion to arrest judgment. Such challenges must be raised at the first opportunity, and certainly before the verdicts; Robles's failure to do so waives the issues on appeal."), *and State v. Solomon*, 133 Or. App. 184, 890 P.2d 433 (1995) (affirming a conviction for initiating a false report to the police: "[T]he evidence presented at trial has . . . [no] bearing on defendant's constitutional claim. . . . Defendant's objection to the statute was apparent from the face of the accusatory instrument and should have been raised by demurrer before trial. . . .

Defendant's overbreadth argument cannot be raised by a motion in arrest of judgment." *Id*. at 190, 890 P.2d at 436. However, defendant's "vagueness challenge . . . [contending] that '[i]t is unreasonable to believe that a layperson would be placed on notice by . . . [the false-report statute] that any "knowing" communication of questionable or potentially inaccurate information, causing harm to no one, is a crime'" (*id*.) is cognizable on a motion to arrest judgment, consistently with *State v. McKenzie*, 307 Or. 554, 771 P.2d 264 (1989).)

§ 37.02(c) Newly Discovered Evidence

In many jurisdictions, the time for a motion for a new trial on grounds of newly discovered evidence is longer than that for other new-trial motions. *E.g.*, *compare* FED. RULE CRIM. PRO. 33(b)(1) (three-year deadline for filing a motion for a new trial based on newly discovered evidence) *with id.*, RULE 33(b)(2) (14-day deadline for filing a motion for a new trial on grounds other than newly discovered evidence).

There are two time-honored tests for the sufficiency of a claim of newly discovered evidence:

(i) The first, often quoted from *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928), applies in recantation cases and other cases in which the adult defendant or juvenile respondent contends that a prosecution witness gave false testimony at the trial. The so-called *Larrison* rule requires a new trial if the court is reasonably well satisfied that the testimony given by a material prosecution witness was false, that without it the jury might have reached a different conclusion, and that the defendant or respondent either discovered the falsity of the testimony after trial or was surprised by it and unable to meet it at trial. *See*, *e.g.*, *United States v. Roberts*, 262 F.3d 286, 293-94 (4th Cir. 2001); *Weedon v. State*, 750 A.2d 521 (Del. 2000)*; State v. Ellington*, 151 Idaho 53, 72-73, 253 P.3d 727, 746-47 (2011); *Martin v. State*, 865 N.W.2d 282, 290 (Minn. 2015). *Compare United States v. Mitrione*, 357 F.3d 712, 718 (7th Cir. 2004), *vacated on an unrelated point*, 543 U.S. 1097 (2005) ("Today, we overrule *Larrison* and adopt the reasonable probability test. . . . In order to win a new trial based on a claim that a government witness committed perjury, assuming as in this case that the government did not knowingly present the false testimony, defendants will have to prove the same things they are required to prove when moving for a new trial for other reasons."), *with United States v. Willis*, 257 F.3d 636, 642-43 (6th Cir. 2001) (reaffirming that a circuit rule which was based on *Larrison* is "the appropriate test to apply . . . where a material witness testifying on behalf of the government later recants his trial testimony"); *and cf*. *Ferguson v. State*, 645 N.W.2d 437, 445 (Minn. 2002) ("In cases such as this involving an alleged confession and in situations where eyewitnesses or accomplices allegedly present false testimony, surprise regarding the falsity of the testimony is never a possibility because a defendant would have personal knowledge of the circumstances. As a result, under the traditional *Larrison* test, such defendants would be unable to satisfy the test for a new trial based on a witness's recantation of false testimony. Therefore, we conclude that the third prong of the test, that a petitioner be taken by surprise at trial or not have known of the falsity of the testimony until after trial, is not an absolute condition precedent to a court granting a new trial based on

falsified testimony."); *accord*, *State v. Britt*, 320 N.C. 705, 712-15, 360 S.E.2d 660, 663-65 (1987) (holding on another issue superseded by statute in 2001); *State v. Stone*, 147 Hawai'i 255, 270, 465 P.3d 702, 717 (2020) (alternative ground) (endorsing the test announced in *State v. Teves*, 5 Hawai'i App. 90, 679 P.2d 136 (1984), for cases in which the defendant seeks a new trial on the ground that a prosecution witness gave false testimony at trial: "a new trial must be granted by the trial court when it decides that (1) it is reasonably satisfied that the testimony at trial of a material prosecution witness is false; (2) defendant and his agents did not discover the falseness of the testimony until after the trial; (3) the late discovery is not due to a lack of due diligence by defendant or his agent; and (4) the false testimony is not harmless because there is a reasonable possibility that it contributed to the conviction").

(ii) The second test, derived from *Berry v. State*, 10 Ga. 511 (1851), applies in all other sorts of cases and requires (i) that the evidence relied on have come to the defendant's or respondent's attention since verdict, (ii) that it was not for want of due diligence that the defendant or respondent did not learn of it earlier, (iii) that it is so material that it would probably produce a different verdict on a new trial, and (iv) that it is not merely cumulative or impeaching (a requirement usually stated as independent of the materiality requirement, for reasons that are not apparent). *See, e.g.*, *State v. Gates*, 308 Ga. 238, 840 S.E.2d 437 (2020) (a particularly thorough-going and useful analysis of the numerous ways in which an item of newly discovered evidence may undermine even a strong prosecution case and thus satisfy the materiality requirement); *Smith v. State*, 315 Ga. 287, at 287, 882 S.E.2d 300, 302 (2022) ("Nineteen years ago, Danyel Smith was convicted of the murder of his infant son based on a theory of "shaken baby syndrome" (SBS). Smith now argues that the science regarding diagnosis of brain injuries in infants has changed so much since his trial that he is entitled to a new trial based on a new expert affidavit ruling out battery or shaking as the cause of the baby's death. The trial court rejected that argument and denied Smith's extraordinary motion for new trial without a hearing. Because Smith's extraordinary motion alleged facts that, if proven, may warrant relief, the trial court was not authorized to deny the motion without a hearing. We therefore vacate the trial court's ruling on the motion and remand for further proceedings."); *United States v. Moore*, 709 F.3d 287, 290-92, 293-94 (4th Cir. 2013) (the trial court abused its discretion in denying a new-trial motion based on newly discovered evidence that arrest photographs of an individual – whom the defense "pointed the finger at . . . as the more likely assailant [in the charged carjacking]" – had been misdated, enabling the prosecution to argue that this individual's hairstyle at the time of the crime differed from the description of the assailant, when in fact they were identical); *People v. Bryant*, 117 A.D.3d 1586, 1586-89, 986 N.Y.S.2d 287, 287-89 (N.Y. App. Div., 4th Dept. 2014) (the trial court erred in denying a new-trial motion based upon newly discovered evidence of "a neighbor [of the defendant] who observed the shooting," and who said that the shooter was "not [the] defendant," and that the defendant "was not present at the scene of the crime"). Local variations of these rules abound, and the case law should be consulted. *See*, *e.g.*, *State v. Clark,* 330 Mont. 8, 18-19, 125 P.3d 1099, 1105 (2005) ("[T]he *Berry* test has seen innumerable alterations over its life, usually with little or no rationale or explanation for the differing versions. We now perceive the Berry test . . . to be antiquated and imprecise. Therefore, in an effort to establish a clearer test with a cogent rationale, we restate the *Berry* test as follows: ¶ To prevail

on a motion for a new trial grounded on newly discovered evidence, the defendant must satisfy a five-part test: ¶ (1) The evidence must have been discovered since the defendant's trial; ¶ (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; ¶ (3) the evidence must be material to the issues at trial; ¶ (4) the evidence must be neither cumulative nor merely impeaching; and ¶ (5) the evidence must indicate that a new trial has a reasonable probability of resulting in a different outcome."); *Howard v. State*, 300 So.3d 1011, 1016 (Miss. 2020) (there must be after-discovered "'evidence [that] is material and is not merely cumulative or impeaching'"; "'[e]vidence is material only if there is a reasonable probability (i.e., "probability sufficient enough to undermine confidence in the outcome") that, had the evidence been disclosed to the defense, the result of the proceeding would have been different'"; the court orders a new trial after finding that the professional standards for bitemark evidence had changed since the defendant's trial at which a forensic odontologist gave testimony which the new standards would prohibit and also finding that after-discovered serology and touch DNA evidence supported the defendant's claim that he was not the perpetrator).

For an argument that a motion for a new trial can be based upon after-discovered evidence of violations of the respondent's procedural rights as well as after-discovered evidence going to the factual issue of guilt or innocence, *see* Paul Mogin, *Grounded on Newly Discovered Evidence*, 56 AM. CRIM. L. REV. 1621 (2019).

§ 37.02(d) Insufficiency of the Evidence or a Verdict "Against the Weight of the Evidence"

When the trial was a jury trial, the defense can move to set aside the verdict on the ground of insufficiency of the evidence. A post-trial motion for a judgment of acquittal on this ground raises the same issue as a pre-verdict motion for acquittal (see §§ 35.03, 36.01 *supra*) – whether a reasonable juror could find that the prosecution has proved its case beyond a reasonable doubt. The motion is seldom granted, for the obvious reason that the judge denied an identical motion before verdict and feels that his or her ruling at that time has been ratified by the jury's verdict finding the accused guilty. In some jurisdictions a post-trial motion for acquittal must nevertheless be made because it is the precondition for challenging the sufficiency of the evidence on appeal. "'When ruling on a motion for judgment of acquittal, a district court should consider not only whether the evidence would be sufficient to sustain a conviction of the offense charged, but also whether it would be sufficient to sustain a conviction on a lesser included offense,' . . . 'A jury's finding of guilt on all elements of the greater offense is necessarily a finding of guilt on all elements of the lesser offense . . . . A trial court therefore has authority to enter a judgment of conviction on a lesser-included offense when it finds that an element exclusive to the greater offense is not supported by evidence sufficient to sustain the jury's finding of guilt on the greater offense.'" *United States v. Cortez-Nieto*, 43 F.4th 1034, 1048-49 (10th Cir. 2022).

Alternatively, the defense can request a new trial on the ground that the jury's verdict is "against the weight of the evidence." (In some jurisdictions the motion is styled a motion for a

new trial "in the interests of justice." In others it is styled a motion for a new trial "on the ground of insufficiency of the evidence." In the latter jurisdictions the respondent may cite "insufficiency of the evidence" as a ground for a postverdict judgment of acquittal *or* as a ground for a new trial; the two kinds of relief are considered alternative remedies for the same defect.) New trials on this ground are far more commonly granted than are postverdict motions for acquittal. In ruling on a motion for a new trial on the ground that the verdict is "against the weight of the evidence," the judge is sometimes said to sit as a "thirteenth juror" – that is, to give expression to his or her own evaluation of the evidence. *See, e.g., Tibbs v. Florida,* 457 U.S. 31, 40-45 (1982); *State v. Moats*, 906 S.W.2d 431 (Tenn. 1995); *Gomillion v. State*, 296 Ga. 678, 769 S.E.2d 914 (2015); *Holmes v. State*, 306 Ga. 524, 832 S.E.2d 392 (2019); *State v. Valdez*, 267 A.3d 638 (R.I. 2022). Matters of credibility and the cogency of inferences from circumstantial evidence are to be appraised by the judge much as the judge would appraise them in a bench trial but with considerable deference to the jury's determination. *See, e.g.*, *United States v. Olazabal*, 610 Fed. Appx. 34, 36 (2d Cir. 2015) (the district court did not abuse its discretion in granting a new trial based upon the court's finding that "the testimony of . . . the government's primary witness[ ] was neither complete nor credible, while Olazabal's testimony was, by contrast, more credible"; "the District Court was fully entitled to independently assess both the credibility of witnesses and other evidence in deciding the [Fed.] Rule [Crim. Pro.] 33 motion."); *United States v. Robinson*, 430 F.3d 537, 543 (2d Cir. 2005) ("Given the numerous circumstances which seriously impeached Dubery's identification of Robinson, particularly his having twice earlier told the police that he did not know who his assailant was and the fact that he never saw Robinson with the gun, together with the paucity of other evidence implicating Robinson in the shooting, we cannot say the court abused its discretion in granting a new trial"). Less deference needs to be given to the jury if some circumstance in the selection of the jurors or in their performance at trial or in the conduct of the trial or in the jury's verdict (such as inconsistency in the disposition of various counts) suggests that the jury may have been affected by passion or prejudice or disabled from giving entirely impartial and dispassionate consideration to the evidence by some occurrence in the course of the proceedings which, although not amounting to legal error, may have prejudiced the respondent's case. In some jurisdictions the "interest of justice" concept gives the trial judge relatively free rein to order a new trial whenever s/he is convinced that the present trial went seriously awry for any reason. *See*, *e.g.*, *Commonwealth v. Powell*, 527 Pa. 288, 293, 590 A.2d 1240, 1242 (1991) ("This concept of 'interest of justice' has . . . been historically recognized as a viable ground for granting a new trial in this Commonwealth. A trial court has an 'immemorial right to grant a new trial, whenever, in its opinion, the justice of the particular case so requires.'"); *State v. Henley*, 2010 WI 97, 328 Wis. 2d 544, 572-73, 787 N.W.2d 350, 364-65 (Wis. 2010) (following statutory amendments which eliminated a provision explicitly authorizing a new trial in the interest of justice, the question arises: "can convicted criminal defendants still seek a new trial in the interest of justice? The answer is certainly yes. The elimination of the specific grounds for relief [in the criminal procedure statutes] . . . did not eliminate the right to seek postconviction relief on those grounds; those grounds are simply not itemized in the statute. Motions for a new trial in the interest of justice are routinely brought during the postconviction motion and appeals process . . . ."); *Croston v. State*, 2021 WL 4901621 (Md. Special App. 2021) ("The court denied the motion because it found that the video [proffered by the defendant and

showing the incident underlying his convictions for robbery, assault, and theft] was not newly discovered evidence. . . . [The defendant's] claim of error is that the basis for his new trial motion was Rule 4-331(a), a motion filed within ten days of verdict based upon 'the interest of justice,' not Rule 4-331(b), 'newly discovered evidence.' . . . ¶ The trial judge's discretion is broadest when a motion for a new trial is filed under subsection (a), is filed within ten days of the verdict, and is based upon the 'interest of justice.' . . . ¶ . . .To be considered grounds for a new trial under section (a), the basis does not have to satisfy the more stringent requirements for newly discovered evidence. . . . ¶ . . . The circuit court had the power to consider the video and to determine whether a new trial should be granted after viewing and considering that video, even if it was not newly discovered evidence. The circuit court never did so, and in failing to do so and to exercise its discretion under section (a) of Rule 4-331(a), the court abused its discretion."); *cf. State v. Herndon*, 215 S.W.3d 901, 906-07 (Tex. Crim. App. 2007) ("Historically, we have consistently held that a trial judge has the authority to grant a new trial 'in the interest of justice' and that his decision to grant or deny a defendant's motion for new trial is reviewed only for an abuse of discretion. . . .¶ A trial judge does not have authority to grant a new trial unless the first proceeding was not in accordance with the law. He cannot grant a new trial on mere sympathy, an inarticulate hunch, or simply because he personally believes that the defendant is innocent or 'received a raw deal.' . . . Even errors that would not inevitably require reversal on appeal may form the basis for the grant of a new trial, if the trial judge concludes that the proceeding has resulted in 'a miscarriage of justice.'"); *United States v. Ferguson*, 246 F.3d 129, 133-34 (2d Cir. 2001) (Federal Criminal "Rule 33 itself states that 'the court may grant a new trial to [a] defendant if the interests of justice so require.'. . . The rule by its terms gives the trial court 'broad discretion . . . to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice.' . . . The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice. . . . The trial court must be satisfied that 'competent, satisfactory and sufficient evidence' in the record supports the jury verdict. . . . The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. . . . 'There must be a real concern that an innocent person may have been convicted.' . . . Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal . . . , but it nonetheless must exercise the Rule 33 authority 'sparingly' and in 'the most extraordinary circumstances.'"); *compare United States v. Crittenden*, 46 F.4th 292, 296-97 (5th Cir. 2022) (en banc) ("A court's power to grant a new trial has deep roots in our legal system. As early as the fourteenth century, English courts possessed the authority – in both civil and criminal cases – to award a second trial when it was clear that 'justice ha[d] not been done' by the first. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 387-88 (1772); *Bright v. Eynon* (1757) 97 Eng. Rep. 365 (KB). This discretionary power was not meant to supplant the jury right but to 'perfect' it. 3 BLACKSTONE 390–91 (explaining that the new trial was thought to be an essential means of sustaining public confidence in the jury system). It entitled courts to order a second round of jury consideration when the first jury brought in a verdict that was 'contrary to the evidence.' *Id.* at 387. ¶ . . . This . . . [case involves a] clash of deference . . . : The great respect we owe jury verdicts versus the discretion trial judges have when exercising their power [to set aside a jury verdict of conviction and grant a new trial under Federal Criminal Rule 33]. Our caselaw offers the following

guidance. A judge's power to grant a new trial based on a different assessment of the evidence must be 'exercised with caution' and 'invoked only in exceptional cases.' *United States v. Sinclair*, 438 F.2d 50, 51 n.1 (5th Cir. 1971) (Wisdom, J.) . . . . The judge cannot 'entirely usurp the jury's function' and set aside the verdict merely because the court would have ruled the other way."), *and United States v. Archer*, 977 F.3d 181, 188 (2d Cir. 2020) ("a district court may not grant a . . . [new trial] motion based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be 'manifest injustice' to let the verdict stand"), *with United States v. Rafiekian*, 68 F.4th 177 (4th Cir. 2023).

Exculpatory matters not in the trial record that fail to meet the ordinary standards required of newly discovered evidence when a motion for a new trial is made explicitly on the latter ground (see § 37.02(c) *supra*) may sometimes be considered, provided that the motion is filed within the deadline for an "interest of justice" motion rather than within the longer deadline for newly-discovered-evidence motions. *See Brodie v. United States*, 295 F.2d 157, 159-60 (D.C. Cir. 1961) ("[T]he result reached by the Municipal Court [denying a new trial] is perhaps traceable to counsel's misapprehension of the relief available to his client. He moved for a new trial for newly discovered evidence which put on him the burden of showing his own diligence. Under Rule 33 Fed. R. Crim. P. . . . a motion made within five days of final judgment, as distinguished from one made later but within two years, empowers the trial court to 'grant a new trial to a defendant if required in the interest of justice.' As we see it, the trial court's power with respect to a motion within five days is much broader than one made later than five days but within two years relying on newly discovered evidence. . . . Plainly a later motion properly puts the movant under a heavier burden for the passage of time inevitably ripens the finality of the judgment and increases the difficulties of again proving a case. But on a motion for a new trial made within five days 'the court sits as a thirteenth juror,' Barron & Holtzoff, Federal Practice & Procedure § 2281 (Rules ed. 1958), and the trial court has broader powers."); *Geddie v. United States*, 663 A.2d 531 (D.C. 1995); *State v. Keely*, 101 Idaho 711, 620 P.2d 284 (1980); *Croston v. State*, 2021 WL 4901621 (Md. Ct. Special App. 2021).

A showing of previously unpresented exculpatory matter might also be a ground for seeking a new trial following conviction in a bench trial (where judges are unlikely to grant a motion for a new trial based on the insufficiency of the evidence since the judge has already found the evidence not merely technically sufficient but convincing). Other possible grounds for requesting a second look at the prosecution's evidentiary case on a new-trial motion after a bench trial include (i) that the judge applied an erroneous standard in appraising the evidence (*see, e.g., In the Matter of Louis S.,* 68 A.D.2d 854, 414 N.Y.S.2d 555 (N.Y. App. Div., 1st Dep't 1979)), or (ii) that the judge considered evidence that should have been excluded from the determination of guilt (*see, e.g., Lee v. Illinois,* 476 U.S. 530 (1986) (the judge in a bench trial improperly considered a co-defendant's confession as substantive evidence against the defendant); *In the Matter of Jose R.,* 35 A.D.2d 972, 317 N.Y.S.2d 933 (N.Y. App. Div., 2d Dep't 1970) (the judge in a juvenile delinquency bench trial erroneously considered statements of the juvenile respondent that should have been suppressed on *Miranda* grounds)). And in a close case in which the judge who presided over a bench trial is feeling some qualms about his or her decision to

convict, a motion for a new trial will provide the opportunity to reconsider.

§ 37.02(e) Motion for Dismissal in the Interests of Justice

In some jurisdictions, a statute or rule or the caselaw provides for a defense motion to dismiss a delinquency petition in the "interests of justice" (or some equivalent term like "furtherance of justice" or "social reasons") if the respondent is not in need of court supervision. In some of these jurisdictions, such relief can be sought even after a respondent has been convicted at trial or by means of a guilty plea. *See, e.g.*, N.Y. FAM. CT. ACT § 315.2 (2023) (authorizing dismissal of a delinquency petition "in the furtherance of justice," "at any time subsequent to the filing of the petition," upon the court's finding that "dismissal is required as a matter of judicial discretion" in light of "the circumstances of the crime," "the history, character and condition of the respondent," other statutorily enumerated factors, and any "other relevant fact[s] indicating that a finding would serve no useful purpose"); *State ex rel. Juvenile Department of Multnomah County v. Dreyer*, 328 Or. 332, 334, 338, 341, 976 P.2d 1123, 1125-26, 1128 (1999) (a delinquency petition can be dismissed in the furtherance of justice after adjudication even though the applicable statute "does not itself grant juvenile courts the authority to dismiss a delinquency petition after adjudication, [because] the statute establishes that the legislature contemplated that petitions might be dismissed at that stage"). Often, if the respondent was technically guilty of the offense charged but the offense was very trivial – such as a theft or "robbery" of a bag of potato chips from another child during lunch recess at school – the judge will convict the respondent but then be amenable to an immediate motion to dismiss for social reasons, especially if the child has little or no prior record. *Cf. In re Deborah C.*, 261 A.D.2d 138, 138-39, 689 N.Y.S.2d 485, 486-87 (N.Y. App. Div., 1st Dep't 1999) (on appeal of convictions at trial of criminal mischief, making graffiti and possession of graffiti instruments, and a disposition of probation for a term of 18 months, the appellate court *sua sponte* grants dismissal of the petition in the furtherance of justice because "this matter never should have reached the dispositional stage": the basis for the convictions was the respondent's "scratching her little brother's name into a subway seat with a stone while accompanied by her mother and two other young children"; this was "respondent's first brush with the law," she had an "essentially good school record," and "[t]he nature of the offense, which can be attributed more than anything to the mother's lack of supervision on the subway, is such that respondent should not be stigmatized as a juvenile delinquent because of any shortcomings of her mother and the court's unreasonable refusal to . . . refer this matter for adjustment.").

§ 37.03 REQUESTING THE EXPUNGEMENT OR CORRECTION OF THE RESPONDENT'S RECORD AND THE REFUND OF FEES AND COSTS IN THE EVENT OF ACQUITTAL

In some jurisdictions a statute or court rule specifically provides that in cases in which the respondent is acquitted at trial or the Petition is withdrawn prior to trial, the court's records concerning the case and all law enforcement records (arrest reports, fingerprint records, arrest photographs) compiled in connection with the respondent's arrest shall be expunged, either

automatically or upon the respondent's motion. *See, e.g.,* CONN. GEN. STAT. ANN. § 46b-146 (2023) ("[w]henever a child is dismissed as not delinquent . . ., all police and court records pertaining to such charge shall be ordered erased immediately, without the filing of a petition"); OHIO REV. CODE ANN. § 2151.358 (2023). Even when no statute or court rule of this sort exists, the defense can seek expungement in the exercise of the court's general equitable powers, *see, e.g., St. Louis v. Drolet,* 67 Ill. 2d 43, 364 N.E.2d 61, 7 Ill. Dec. 74 (1977); *In the Matter of Dorothy D. v. New York City Probation Department,* 49 N.Y.2d 212, 400 N.E.2d 1342, 424 N.Y.S.2d 890 (1980), or to vindicate the respondent's due process right to be free of the penalty of an arrest record (with its possibly adverse impact upon the respondent's future opportunities for employment or entry into the military) for an offense which the respondent did not commit, *see, e.g., In re Smith,* 63 Misc. 2d 198, 202-03, 310 N.Y.S.2d 617, 622 (N.Y. Fam. Ct. 1970); *Edward M. v. O'Neill,* 291 Pa. Super. 531, 540-43, 436 A.2d 628, 632-34 (1981). *See generally* RIYA SAHA SHAH, LAUREN FINE & JAMIE GULLEN, JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT (Juvenile Law Center 2014).

Counsel should always request expungement because the veneer of confidentiality cloaking juvenile records is easily pierced. *See In re Smith,* 63 Misc. 2d at 200-02, 310 N.Y.S.2d at 619-22. If the motion for expungement is granted, counsel should ensure that the processes for removing references to expunged cases from court records and law enforcement records result in a complete excision of all information relating to the expunged case and also any indications that a reference to the expunged case previously appeared there. *Cf. All of Us or None – Riverside Chapter v. Hamrick*, 64 Cal. App. 5th 751, 279 Cal. Rptr. 3d 422, 425 n.1, 426, 444, 452-53 (2021) (plaintiffs, which included "'an organization dedicated to protecting and advancing civil and human rights of people who have been formerly incarcerated and convicted,'" were entitled to "judgment as a matter of law" on their claims that the Riverside County Superior Court's practices for implementing a state statutory requirement of "destruction of certain records pertaining to marijuana-related arrests and convictions" failed to satisfy the statutory mandates that the excisions "includ[e] references to plea colloquies, fines, sentences and narratives 'pertaining to' a marijuana-related charge," and that the records "be prepared again so that it appears that the arrest or conviction never occurred": "defendants' practice of using a black marker to cross out eligible references" "reveals the precise location of the redaction," and, "given its placement, a reader of the redacted document can ascertain that the redaction likely pertained to an additional charged offense"). If a motion for expungement is denied, counsel should request that the court at least (1) direct the prosecutor to take all necessary steps to assure that the fact of the respondent's acquittal following this arrest is noted in the records of the police and other law enforcement agencies, and (2) order the clerk of court and the probation department to note the acquittal on all court and probation records relating to the case.

When a respondent has been required to pay court fees and costs, counsel should move that they be refunded following acquittal. *See Nelson v. Colorado*, 581 U.S. 128 (2017) ("When a criminal conviction is invalidated by a reviewing court and no retrial will occur, . . . the State [is] obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction" (*id*. at 130); acquitted respondents "have an obvious interest in

regaining the money" (*id*. at 135), and the state "has no interest in withholding . . . money to which the State . . . has zero claim of right" (*id*. at 139).). Also, if the state has acquired property belonging to the respondent in connection with the prosecution, counsel can file a motion for its return. See *Henderson v. United States*, 575 U.S. 622, 625-26 (2015) ("A federal court has equitable authority, even after a criminal proceeding has ended, to order a law enforcement agency to turn over property it has obtained during the case to the rightful owner or his designee," citing *United States v. Martinez*, 241 F.3d 1329 (11th Cir. 2001)).