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 (2016) (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 (2016) (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 (2016) (motion for rehearing within 10 days of entry of order); MINN. RULE JUV. DELINQUENCY PROC. 16.01 (2016) (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 (2016); N.Y. FAM. CT. ACT § 355.1(1)(a) (2016); TENN. RULE JUV. PROC. 313 (2016), 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) (2016). 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. 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).

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: the absence of the respondent at any stage of the proceedings which s/he was entitled to attend (see § 27.01 *supra*); 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*); and 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*). 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)) because, *e.g.*, the jury was exposed to extraneous influences, contacts, materials or information (see §§ 27.02 second paragraph, 27.05(a)(2), 36.14 fourth paragraph *supra*); 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) first paragraph *supra*); (iii) jurors gave false or misleading information bearing on their qualifications or impartiality during *voir dire* or earlier jury-selection proceedings (*see Williams v. True*, 39 Fed. Appx. 830 (4th Cir. 2002); *State v. Ess*, 453 S.W.3d 196 (Mo. 2015)). In some jurisdictions, counsel and defense investigators are forbidden to interview jurors after a trial in order to develop such grounds for a new-trial motion; in other jurisdictions, counsel and defense investigators are free to conduct such interviews without leave of court; in still other jurisdictions, leave of court must be sought before any juror interviewing.

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.

§ 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); *Durham v. State*, 35 A.3d 418 (Table), 2012 WL 11617 (Del. 2012); *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 other grounds*, 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").

(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.*, *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. *Cf. United States v. Agurs*, 427 U.S. 97, 103-04, 110-13 (1976).

§ 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.)

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). 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. Herndon*, 215 S.W.3d 901, 907 (Tex. Crim. App. 2007) ("[e]ven 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'").

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.").

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 (2016) (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 MOTIONS FOR EXPUNGEMENT IN CASES IN WHICH THE RESPONDENT WAS ACQUITTED

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 (2016) ("[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 (2016). 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 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.