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# CAASNY

# *Virtual* Juvenile Delinquency Training

December 7, 2021

80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494
TEL: 518-472-5888 FAX: 518-445-2303
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CAASNY
***Virtual*** Juvenile Delinquency Training
Tuesday, December 7, 2021

**AGENDA**

| | |
|---|---|
| **9:00am - 9:50am** | **Raise the Age Statutes/Legislation**<br>Linda Fakhoury, Esq.<br>Assistant Dutchess County Attorney<br><br>Victor A. Civitillo, Esq.<br>Assistant Dutchess County Attorney |
| **9:50am – 10:00am** | **Break** |
| **10:00am – 10:50am** | **Detentions: No Vacancies**<br>David Meffert, Esq.<br>Assistant Orange County Attorney |
| **10:50am – 11:00am** | **Break** |
| **11:00am – 11:50am** | **PINS: Procedures, Problems, and Solutions**<br>Christopher J. Muller, Esq.<br>Assistant Columbia County Attorney |
| **11:50am – 12:00pm** | **Break** |
| **12:00pm – 1:00pm** | **2021 JD/PINS Caselaw Year in Review**<br>Kristin A. Gumaer, Esq.<br>First Assistant Ulster County Attorney<br><br>Robert Fisher, Esq.<br>Assistant Ulster County Attorney |

# CAASNY
# *Virtual* Juvenile Delinquency Training

## December 7, 2021

**Speaker Biographies**

**VICTOR A. CIVITILLO, ESQ.** is a Senior Assistant County Attorney in the Dutchess County Attorney's Office. Mr. Civitillo has been prosecuting juvenile delinquency and Persons In Need of Supervision (P.I.N.S.) cases since starting at the County Attorney's Office in 1992, and represents the County in appeals in such cases. He also handles other legal matters for the office, including reviewing Dutchess DSS contracts and Dutchess Office for the Aging contracts. He previously represented DSS in certain Medicaid fair hearings for ten years. Mr. Civitillo conducts training for police officers in Dutchess County, including school resource officers. He has been teaching classes for the State of New York Police Juvenile Officers' Association for more than twenty years. He has conducted trainings for police officers on the "Raise the Age" law in various locations in New York State. He has taught continuing legal education for the County Attorney's Association of the State of New York, the Dutchess County Bar Association, the Albany County Bar Association, the New York State Office of Court Administration, and the New York State Prosecutor's Training Institute. He is the author of the original P.I.N.S. chapter in the LexisNexis Answer Guide of New York Family Court Proceedings. He is a graduate of Albany Law School and the State University of New York at Albany.

**LINDA D. FAKHOURY, ESQ.** has been a Senior Assistant County Attorney for Dutchess County since 2005. Her primary responsibilities include prosecution of juvenile delinquency and persons in need of supervision (P.I.N.S) cases, as well as handling contracts, municipal issues, and a variety of other legal matters for the County. Linda has done numerous trainings involving juvenile delinquency, PINS, and Raise the Age matters, for police agencies, police academies, and CAASNY. Linda played a vital role in creating the Juvenile Fire-Setters Intervention Response and Education Program (JFIRE) for Dutchess County, and continues to serve on the Steering Committee, the Full Committee, and is trained as an Intervention Specialist through the National Fire Academy to address juvenile fire-setting behaviors in the County. Linda has also been an Adjunct Instructor at Marist College since 2011, teaching Criminal Law as part of the Paralegal Certification program. She is an active member of her Community and is an active member of the Junior League of Poughkeepsie. Linda graduated from Marist College in 2001, with her B.S. in Criminal Justice, and her Paralegal Certification. Linda graduated from Western New England University School of Law in 2004. In 2017, Linda was one of the recipients of the Dutchess County Chamber of Commerce 40 under 40 Movers and Shakers Award for her commitment to the Hudson Valley.

**ROBERT J. FISHER, ESQ.** has been practicing law since 1996. He is a graduate of Nova University School of Law in Florida. He is currently an Assistant County Attorney in Ulster County, and he has a private practice in general law. Mr. Fisher has also been

employed as an assistant district attorney, an assistant public defender, and a staff attorney at the Department of Social Services in Ulster County. He is a member of the State of New York Appellate Division Third Department Committee on Character and Fitness, and is a past Secretary and Board member of the Ulster County Bar Association. Mr. Fisher is admitted to practice in New York.

**KRISTIN A. GUMAER, ESQ.** is a First Assistant County Attorney in Ulster County. Her practice is focused mostly on Juvenile Delinquency and Family Court, but varies based on the needs of the County. Ms. Gumaer graduated from the State University at New Paltz in 2003 and from Albany Law School in 2009. She worked briefly and part-time in bankruptcy law prior to joining the Ulster county Attorney's Office. Ms. Gumaer serves on the board of the Ulster County Bar Association, as an ex-officio member of the Ulster County Youth Board, and as a member of the advisory board for the YWCA Children's Center at the Ulster County Family Court. Ms. Gumaer is admitted to practice in New York.

**DAVID MEFFERT, ESQ.** is a Senior Assistant County Attorney serving in Family Court Unit of the Orange County Department of Law, where he handles J.D. and P.I.N.S. cases. He received his B.S. from the University of Texas at Austin, his J.D. from St. Mary's University School of Law in San Antonio, Texas, and was admitted to the Texas bar in 1995. Mr. Meffert was a solo practitioner in San Antonio, practicing in the areas of adult and juvenile criminal defense, divorce, custody and child support. In 1999 Mr. Meffert became a prosecutor for the Office of the City Attorney for the City of San Antonio, initially in their domestic violence unit, and eventually taking over the prosecution of environmental and quality of life cases for the city. In 2001 he and his wife relocated to Orange County. Mr. Meffert joined the Orange County District Attorney's Office as an Assistant District Attorney where he worked in their Local Court Unit, Grand Jury Unit and Investigations Unit, where he handled various white-collar crimes. In 2006 Mr. Meffert moved to the Orange County Department of Law. In addition to his duties with the Department of Law, has also serves as the Special District Attorney for Orange County, handling cases that the District Attorney's Office was unable to prosecute due to conflicts. Mr. Meffert is certified by the DCJS Municipal Police Training Council as a General Topics Instructor and has spoken on various topics relating to juvenile delinquency and P.I.N.S. law at the Orange County Police Academy and various police departments within the County.

**CHRISTOPHER J. MULLER, ESQ.** serves as the Deputy County Attorney in Columbia County and has been a member of the office since 2014. In addition to supervision and administrative duties, he handles the prosecution of juvenile delinquency and persons in need of supervision cases along with providing counsel to the Columbia County Sheriff Department, the County Treasurer, Department of Health, and the Emergency Operations Center of Columbia County. Christopher serves as the office liaison to the Child Advocacy Center of Columbia-Greene County and is a member of the Columbia County Covid-19 Response Team. Prior to working for the Columbia County Attorney, Christopher served as Counsel to the Commissioner of the Columbia County Department of Social Services in Hudson, NY. Having been appointed Counsel to the

Commissioner, in 2010, he supervised the Department's legal staff and represented the agency in New York State Family Court Act Article 10 Child Protective proceedings, New York State Mental Hygiene Law Article 81 Guardianship proceedings, as well as various matters related to Medicaid and Temporary Assistance. After graduating from Touro Law School in 1997, Christopher worked in the New York City Law Department's Family Court Division from 1997-2010. During his time with the Law Department, Christopher prosecuted felony and misdemeanor juvenile delinquency petitions that included acts of homicide, drug and firearm possession, sexual offenses, robbery, and assault. Christopher worked in the Department's Bronx office for eleven years including serving as Borough Chief of the Bronx Family Court office prior to transferring to Family Court Administration in Manhattan where he served as the Department's liaison to the New York City Police Department on juvenile crime issues. During his tenure at the New York City Law Department Christopher chaired the Law Enforcement Outreach Committee, conducted trainings for the American Prosecutors Research Institute on juvenile gangs and for the New York City Police Department on Constitutional and family court issues related to juvenile crime.

# Raise the Age 2.0 Update

Victor Civitillo, Esq.
Linda Fakhoury, Esq.

# RAISE THE AGE 2.0 UPDATE

- <u>Dutchess County Department of Law:</u>

Senior Assistant County Attorney Victor Civitillo

Senior Assistant County Attorney Linda Fakhoury

# RTA STATUTES/LEGISLATION

- **CPL SECTION 510.15 COMMITMENT OF PRINCIPALS UNDER AGE 18**

- When a principal who is under the age of sixteen is committed to the custody of the sheriff the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services as a juvenile detention facility for the reception of children. When a principal who (a) commencing October first, two thousand eighteen, is sixteen years of age; or (b) commencing October first, two thousand nineteen, is sixteen or seventeen years of age, is committed to the custody of the sheriff, the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services in conjunction with the state commission of correction as a specialized secure juvenile detention facility for older youth. Where such a direction is made the sheriff shall deliver the principal in accordance therewith and such person shall although lodged and cared for in a juvenile detention facility continue to be deemed to be in the custody of the sheriff. No principal under the age specified to whom the provisions of this section may apply shall be detained in any prison, jail, lockup, or other place used for adults convicted of a crime or under arrest and charged with the commission of a crime without the approval of the office of children and family services which shall consult with the commission of correction if the principal is sixteen years of age or older in the case of each principal and the statement of its reasons therefor. The sheriff shall not be liable for any acts done to or by such principal resulting from negligence in the detention of and care for such principal, when the principal is not in the actual custody of the sheriff.

## NEW FCA 312.2(3) ISSUANCE OF A WARRANT (EFFECTIVE DECEMBER 7, 2021)

## ADDING IN SUBSECTION (3) TO READ AS FOLLOWS:

- A juvenile who is arrested pursuant to a warrant issued under this section must forthwith and with all reasonable speed be taken directly to the family court located in the county in which the warrant had been issued, or, when the family court is not in session, to the most accessible magistrate, if any, designated by the appellate division of the supreme court in the applicable department. If a juvenile is brought before an accessible magistrate, the magistrate shall set a date for the juvenile to appear in the family court in the county in which the warrant had been issued, which shall be no later than the next day the court is in session if the magistrate orders the juvenile to be detained and within ten court days if the magistrate orders the juvenile to be released. In determining whether the juvenile should be released, with or without conditions, or detained, the magistrate shall apply the criterion and issue the findings required by section 320.5 of this article. The magistrate shall transmit its order to the family court forthwith.

- The legislative memo note that a “failure to include a provision in the current statute directing juvenile delinquents returned on warrants to be brought before accessible magistrates when Family Courts are not in session violates the fundamental value of fairness permeating the RTA implementation efforts, i.e., that outcomes for the 16-year olds and 17-year olds who are prosecuted in Family Court should not be worse off after the effective date of the RTA statute than prior to its enactment. This measure is essential to remedy that failure.

- **EXTENSION OF PLACEMENT TIME-FRAMES FOR RTA YOUTH**
- **FCA SECTION 355.3 AND FCA 353.5**

## FCA 355.3

- **(Subsection 6)** Successive extensions of placement under this section may be granted, but no placement may be made or continued beyond the respondent's eighteenth birthday without the child's consent for acts committed before the respondent's sixteenth birthday and in no event past the child's twenty-first birthday except as provided for in subdivision four of section 353.5 of this part.

## FCA 353.5

- **(Subsection D)** Upon the expiration of the initial period of placement, or any extension thereof, the placement may be extended in accordance with section 355.3 on a petition of any party or the office of children and family services after a dispositional hearing, for an additional period not to exceed twelve months, but no initial placement or extension of placement under this section may continue beyond the respondent's twenty-first birthday, or, for an act that was committed when the respondent was sixteen years of age or older, the respondent's twenty-third birthday.

## FCA SECTION 162-A (NEW, EFFECTIVE AS OF OCTOBER 8, 2021):

## USE OF RESTRAINTS ON CHILDREN IN COURTROOMS

- (a) Use of restraints. Except as otherwise provided in subdivision (b) of this section, restraints on children under the age of twenty-one, including, but not limited to, handcuffs, chains, shackles, irons or straitjackets, are prohibited in the courtroom.

- (b) Exception. Permissible physical restraint consisting of handcuffs or footcuffs that shall not be joined to each other may be used in the courtroom during a proceeding before the court only if the court determines on the record, after providing the child with an opportunity to be heard, why such restraint is the least restrictive alternative necessary to prevent:
  - (1) physical injury to the child or another person by the child;
  - (2) physically disruptive courtroom behavior by the child, as evidenced by a recent history of behavior that presented a substantial risk of physical harm to the child or another person, where such behavior indicates a substantial likelihood of current physically disruptive courtroom behavior by the child; or
  - (3) flight from the courtroom by the child, as evidenced by a recent history of absconding from the court.

# ADDITIONAL STATUTES/LEGISLATION FOR DISCUSSION (ATTACHED)

- CPL SECTION 722.21 PROCEEDINGS UPON FELONY COMPLAINT; ADOLESCENT OFFENDER
- CPL SECTION 722.23 REMOVAL OF ADOLESCENT OFFENDERS TO FAMILY COURT
- CPL SECTION 60.10-A AUTHORIZED DISPOSITION; ADOLESCENT OFFENDER
- CPL SECTION 70.02 SENTENCE OF IMPRISONMENT FOR A VIOLENT FELONY OFFENSE

# RTA CASE LAW UPDATES

- Note: Even though some of the following cases originated in the Youth Part and deal with Adolescent Offenders, we are looking at them from the perspective of the County Attorney's Office and how it applies to our world.

- When looking at some of these cases, we focus on the criteria of those cases that *should* not be removed because they fall under CPL Section 722.23 (2). To retain case in Youth Part and not have case transferred to Family Court, DA must prove one of the following by a preponderance of the evidence:
  1) the defendant caused significant physical injury to a person other than a participant in the offense; or
  2) the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense; or
  3) the defendant unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact as defined in section 130.00 of the penal law."

- The test for these cases is NOT extraordinary circumstances. Instead, the test is whether the crime falls under the specific categories listed to keep it in the Youth Part.

## PEOPLE V. E.H., 71 MISC 3D 1222(A) (NASSAU COUNTY CT 2021)

- In Murder Second Degree and Criminal Possession of Stolen Property case, DA proved at sixth-day retention hearing that defendant "caused" significant physical injury to victim (under CPL 722.23[2][c][i]) even without evidence that defendant was the shooter, based on allegations in the felony complaint and other hearsay information. Proof that defendant "caused" the victim's death included that defendant drove other people to the park where victim was murdered, conducted internet searches about parks in the area, drove himself and others away from the murder scene after the murder, and evidence was presented of the defendant's relationship with the head of the gang that there was a gang-related dispute with the victim. The Court declined to decide whether accomplice liability principles should determine the definition of "caused physical injury" issue at retention hearing.

# PEOPLE V. COLON AND J.T., 72 MISC 3D 785 (ORANGE COUNTY CT 2021)

- In Burglary Second Degree and other related charges case, at sixth day retention hearing, DA proved that defendant caused significant physical injury to a victim even though defendant was not the driver of the vehicle that caused the victim's injuries. Court applies accomplice liability principles. Defendant threw large motorsports vehicles out of the back of a moving getaway van at police vehicles while telling driver to "go, go, go," and vehicle was travelling over 100 mph in 30 mph zones. Getaway vehicle struck victim's vehicle when co-defendant driver ran a red light while traveling at high speed. "Significant physical injury" proven where injuries included meniscus tear to knee, and back, shoulder and head injuries, and victim was unable to return to work. Court says that it could have transferred related non-VFO lesser charges to Family Court, but declined to do so to avoid inconsistent results and loss of faith in criminal justice system. Court finds "extraordinary circumstances" to retain lesser charges in Youth Part based on defendant's prior criminal history and to preserve public confidence in justice system.

# PEOPLE V. M.S., 73 MISC 3D 405 (NASSAU COUNTY CT 2021)

- In gun possession case, DA proved by preponderance of evidence at sixth day retention hearing that defendant “displayed” loaded gun in furtherance of the offense to deny removal to Family Court under CPL 722.23[2][c][ii]. Court credited hearsay, including victim’s deposition, and credited defendant’s deposition admitting to police he pulled gun out of his backpack.

# MATTER OF ISAIAH D., 72 MISC 3D 1120 (NY COUNTY FAM. CT. 2021)

- In juvenile delinquency Assault First Degree case, after DA failed to prove significant physical injury to retain case in Youth Part, Family Court declined to hold that collateral estoppel ("issue preclusion") barred Presentment Agency from charging respondent with causing victim serious physical injury. Collateral estoppel requires identity of parties, identity of issues, final and valid prior judgment, and a full and fair opportunity to litigate the issue. Identity of parties (DA v. Defendant is equivalent to Presentment Agency v. Respondent) and identity of issue (significant physical injury) were established, however, there was no final and valid judgment in Youth Part on physical injury issue because case was transferred to Family Court. Prosecution did not have a full and fair opportunity in Youth Part to litigate question of serious physical injury because sixth day retention hearing is abbreviated, it was held only six days after arraignment, no witnesses were called, prosecution presented no documentary evidence, and "permanent scarring" or "protracted disfigurement" could not yet be determined to exist. Policy considerations prohibit applying collateral estoppel because prosecution's incentive to litigate physical injury at fact-finding hearing is stronger than at retention hearing. Juvenile delinquency petition was legally sufficient to charge serious physical injury and the identification of the respondent in the petition was legally sufficient.

# PEOPLE V. V.A.M., 73 MISC 3D 923 (NASSAU COUNTY CT 2021)

- In this domestic violence case, DA failed to prove “significant physical injury” at sixth day retention hearing where proof was that victim needed seven sutures to close multiple knife wounds, but no evidence was presented that victim needed additional treatment or hospitalization after the day of the assault. Legislature intended “significant physical injury” to fall in between “physical injury” and “serious physical injury” as those terms are well-defined in the Penal Law. Court notes that DA could file motion opposing removal based on extraordinary circumstances due to defendant’s attack on girlfriend, who is the mother of his child, that occurred in front of their infant and defendant’s child siblings.

## PEOPLE V. C.S., 68 MISC 3D 1208(A) (ONONDAGA COUNTY CT 2020)

- In Assault Second Degree case in which defendant allegedly assaulted another youth while both were in secure detention, Court grants DA's motion to retain case based on extraordinary circumstances. Extraordinary circumstances found where video showed attack was well-coordinated with a co-defendant, attack was brutal with defendants continuing to kick and stomp the victim while unconscious, and defendant's actions display a "lack of moral conscience." Court notes that at previous sixth-day retention hearing, DA had not proven that victim suffered significant physical injury.

# PEOPLE V. Y.R., 70 MISC 3D 1213(A) (NASSAU COUNTY CT 2020)

- Extraordinary circumstances not found to retain Attempted Grand Larceny/Attempted Scheme to Defraud case where despite allegations that defendant victimized senior citizens, she had a relatively minor role in the scheme, she had a history of serious mental health problems, and she would benefit from services in Family Court.

# PEOPLE V. S.J., 72 MISC 3D 196 (ERIE COUNTY CT 2021)

Extraordinary circumstances not found to retain Escape First case. DA concedes that defendant's act of escaping itself does not constitute extraordinary circumstances. Although court has the right to consider prior criminal history and pending felony charges in its court or another court, CPL 722.23(1)(b) prohibits hearsay evidence of other charges in extraordinary circumstances motion/hearing. Court refuses to consider hearsay evidence that defendant was charged with a series of crimes over a series of series of days, even though DA proved with non-hearsay that defendant was already charged with Murder in adjoining county prior to his committing Escape. Also, legislative intent of RTA does not support imputing cruel and heinous nature of Murder case to "non-violent" Escape case before the court.

# PEOPLE V. M.R.,72 MISC 3D 791 (NASSAU COUNTY CT 2021)

- Family Court Act 302.2 statute of limitations bar to prosecution of eighteen-year-old defendant as a juvenile delinquent does not constitute extraordinary circumstances to retain Rape Third case in Youth Part. Court notes that Rape Third does not qualify for retention at a sixth day hearing under CPL 722.23(2) because it is not defined as a violent felony under Penal Law 70.02.

- Special note: Unlike a “sixth day retention hearing”, hearsay is not admissible at an “extraordinary” circumstances hearing.

# RAISE THE AGE
# ADDITIONAL MATERIALS ATTACHED

- JUVENILE OFFENDER OFFENSES AND DESIGNATED FELONIES CHART
- DUTCHESS COUNTY RAISE THE AGE COURT CHART SUMMARY

# RTA DISCUSSION TOPICS AND ISSUES TO THINK ABOUT

- Appearance tickets being issued incorrectly
- Effects of Orders of Protection issued in the Youth Part, and then case transferred to Family Court
- Presentment Agency filing their own JD petition, instead of using felony complain
- Charging a felony not alleged in the original felony complaint
- Statute of Limitations requiring dismissal of charges
- Transfer of Youth Part case to Family Court post indictment
- Sealing requirements for Youth Part once case is transferred to Family Court
- Problems caused by cases split between local justice court and Family Court
- Case transferred directly to Family Court from the Youth Part v. Necessity for probation intake/diversion
- Prior JD history to be used as bail argument under CPL 510.30
- Once case transferred to Family Court, are they entitled to a second probable cause hearing?

# QUESTIONS, COMMENTS?

**THANK YOU!**

**DUTCHESS COUNTY DEPARTMENT OF LAW**


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# 2021 CAASNY JD TRAINING

# RAISE THE AGE UPDATE

# STATUTES/ LEGISLATION

Dutchess County Department of Law
Victor Civitillo: Senior Assistant County Attorney
Linda Fakhoury: Senior Assistant County Attorney

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title P. Procedures for Securing Attendance at Criminal Actions and Proceedings of Defendants and Witnesses Under Control of Court--Recognizance, Bail and Commitment (Refs & Annos)
Article 510. Recognizance, Bail and Commitment--Determination of Application for Recognizance or Bail, Issuance of Securing Orders, and Related Matters (Refs & Annos)

McKinney's CPL § 510.15

# § 510.15 Commitment of principal under seventeen or eighteen

Effective: October 1, 2019
Currentness

1. When a principal who is under the age of sixteen is committed to the custody of the sheriff the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services as a juvenile detention facility for the reception of children. When a principal who (a) commencing October first, two thousand eighteen, is sixteen years of age; or (b) commencing October first, two thousand nineteen, is sixteen or seventeen years of age, is committed to the custody of the sheriff, the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services in conjunction with the state commission of correction as a specialized secure juvenile detention facility for older youth. Where such a direction is made the sheriff shall deliver the principal in accordance therewith and such person shall although lodged and cared for in a juvenile detention facility continue to be deemed to be in the custody of the sheriff. No principal under the age specified to whom the provisions of this section may apply shall be detained in any prison, jail, lockup, or other place used for adults convicted of a crime or under arrest and charged with the commission of a crime without the approval of the office of children and family services which shall consult with the commission of correction if the principal is sixteen years of age or older in the case of each principal and the statement of its reasons therefor. The sheriff shall not be liable for any acts done to or by such principal resulting from negligence in the detention of and care for such principal, when the principal is not in the actual custody of the sheriff.

2. Except upon consent of the defendant or for good cause shown, in any case in which a new securing order is issued for a principal previously committed to the custody of the sheriff pursuant to this section, such order shall further direct the sheriff to deliver the principal from a juvenile detention facility to the person or place specified in the order.

**Credits**
(Added L.1978, c. 481, § 43. Amended L.1979, c. 411, § 12; L.1980, c. 359, § 1; L.2017, c. 59, pt. WWW, § 36.)

McKinney's CPL § 510.15, NY CRIM PRO § 510.15
Current through L.2021, chapters 1 to 440. Some statute sections may be more current, see credits for details.

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2021 New York Assembly Bill No. 7601, New York Two Hundred Forty-Fourth Legislative Session

NEW YORK BILL TEXT

**TITLE: Relates to the execution of warrants in juvenile delinquency cases when family courts are closed.**

VERSION: Adopted
October 08, 2021
Darling, Taylor
Image 1 within document in PDF format.
SUMMARY: Relates to the execution of warrants in juvenile delinquency cases when family courts are closed.

**TEXT:**

LAWS OF NEW YORK, 2021

CHAPTER 456

AN ACT to amend the family court act, in relation to execution of warrants in juvenile delinquency cases when family courts are closed

Became a law October 8, 2021, with the approval of the Governor.

Passed by a majority vote, three-fifths being present.

**The People of the State of New York, represented in Senate and Assembly, do enact as follows:**

Section 1. Section 312.2 of the family court act is amended by adding a new subdivision 3 to read as follows:

**3. A juvenile who is arrested pursuant to a warrant issued under this section must forthwith and with all reasonable speed be taken directly to the family court located in the county in which the warrant had been issued, or, when the family court is not in session, to the most accessible magistrate, if any, designated by the appellate division of the supreme court in the applicable department. If a juvenile is brought before an accessible magistrate, the magistrate shall set a date for the juvenile to appear in the family court in the county in which the warrant had been issued, which shall be no later than the next day the court is in session if the magistrate orders the juvenile to be detained and within ten court days if the magistrate orders the juvenile to be released. In determining whether the juvenile should be released, with or without conditions, or detained, the magistrate shall apply the criterion and issue the findings required by section 320.5 of this article. The magistrate shall transmit its order to the family court forthwith.**

§ 2. This act shall take effect on the sixtieth day after it shall have become a law.

The Legislature of the STATE OF NEW YORK **ss:**

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

ANDREA STEWART-COUSINS CARL E. HEASTIE Temporary President of the Senate Speaker of the Assembly

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 3. Juvenile Delinquency
Part 5. The Dispositional Hearing (Refs & Annos)

McKinney's Family Court Act § 355.3

# § 355.3 Extension of placement

Effective: October 1, 2019
Currentness

1. In any case in which the respondent has been placed pursuant to section 353.3 the respondent, the person with whom the respondent has been placed, the commissioner of social services, or the division for youth may petition the court to extend such placement. Such petition shall be filed at least sixty days prior to the expiration of the period of placement, except for good cause shown but in no event shall such petition be filed after the original expiration date.

2. The court shall conduct a hearing concerning the need for continuing the placement. The respondent, the presentment agency and the agency with whom the respondent has been placed shall be notified of such hearing and shall have the opportunity to be heard thereat. If the petition is filed within sixty days prior to the expiration of the period of placement, the court shall first determine at such hearing whether good cause has been shown. If good cause is not shown, the court shall dismiss the petition.

3. The provisions of sections 350.3 and 350.4 shall apply at such hearing.

4. At the conclusion of the hearing the court may, in its discretion, order an extension of the placement for not more than one year. The court must consider and determine in its order:

(i) that where appropriate, and where consistent with the need for the protection of the community, reasonable efforts were made to make it possible for the respondent to safely return to his or her home;

(ii) in the case of a respondent who has attained the age of sixteen, the services needed, if any, to assist the child to make the transition from foster care to independent living; and

(iii) in the case of a child placed outside New York state, whether the out-of-state placement continues to be appropriate and in the best interests of the child.

5. Pending final determination of a petition to extend such placement filed in accordance with the provisions of this section, the court may, on its own motion or at the request of the petitioner or respondent, enter one or more temporary orders extending a period of placement for a period not to exceed thirty days upon satisfactory proof showing probable cause for continuing such placement and that each temporary order is necessary. The court may order additional temporary extensions, not to exceed a total of fifteen days, if the court is unable to conclude the hearing within the thirty day temporary extension period. In no event

shall the aggregate number of days in extentions[1] granted or ordered under this subdivision total more than forty-five days. The petition shall be dismissed if a decision is not rendered within the period of placement or any temporary extension thereof.

6. Successive extensions of placement under this section may be granted, but no placement may be made or continued beyond the respondent's eighteenth birthday without the child's consent for acts committed before the respondent's sixteenth birthday and in no event past the child's twenty-first birthday except as provided for in subdivision four of section 353.5 of this part.

**Credits**

(Added L.1982, c. 920, § 1, eff. July 1, 1983. Amended L.1983, c. 398, § 46; L.1985, c. 663, §§ 9, 10; L.1991, c. 198, § 2; L.1992, c. 363, § 1; L.1993, c. 687, § 12; L.1995, c. 454, § 1; L.2000, c. 145, § 11, eff. July 1, 2000; L.2017, c. 59, pt. WWW, § 75.)

Footnotes

1 So in original.

McKinney's Family Court Act § 355.3, NY FAM CT § 355.3

Current through L.2021, chapters 1 to 440. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 3. Juvenile Delinquency
Part 5. The Dispositional Hearing (Refs & Annos)

McKinney's Family Court Act § 353.5

# § 353.5. Designated felony acts; restrictive placement

Effective: October 1, 2019
Currentness

1. Where the respondent is found to have committed a designated felony act, the order of disposition shall be made within twenty days of the conclusion of the dispositional hearing and shall include a finding based on a preponderance of the evidence as to whether, for the purposes of this article, the respondent does or does not require a restrictive placement under this section, in connection with which the court shall make specific written findings of fact as to each of the elements set forth in paragraphs (a) through (e) in subdivision two as related to the particular respondent. If the court finds that a restrictive placement under this section is not required, the court shall enter any other order of disposition provided in section 352.2. If the court finds that a restrictive placement is required, it shall continue the proceeding and enter an order of disposition for a restrictive placement. Every order under this section shall be a dispositional order, shall be made after a dispositional hearing and shall state the grounds for the order.

2. In determining whether a restrictive placement is required, the court shall consider:

(a) the needs and best interests of the respondent;

(b) the record and background of the respondent, including but not limited to information disclosed in the probation investigation and diagnostic assessment;

(c) the nature and circumstances of the offense, including whether any injury was inflicted by the respondent or another participant;

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

(e) the age and physical condition of the victim.

3. Notwithstanding the provisions of subdivision two, the court shall order a restrictive placement in any case where the respondent is found to have committed a designated felony act in which the respondent inflicted serious physical injury, as that term is defined in subdivision ten of section 10.00 of the penal law, upon another person who is sixty-two years of age or more.

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4. [Eff. until March 31, 2023, pursuant to L.2012, c. 57, pt. G, subpt. A, § 11. See, also, subd. 4 below.] When the order is for a restrictive placement in the case of a youth found to have committed a designated class A felony act,

(a) the order shall provide that:

(i) the respondent shall be placed with the office of children and family services for an initial period of five years. If the respondent has been in detention pending disposition, the initial period of placement ordered under this section shall be credited with and diminished by the amount of time spent by the respondent in detention prior to the commencement of the placement unless the court finds that all or part of such credit would not serve the needs and best interests of the respondent or the need for protection of the community.

(ii) the respondent shall initially be confined in a secure facility for a period set by the order, to be not less than twelve nor more than eighteen months provided, however, where the order of the court is made in compliance with subdivision five of this section, the respondent shall initially be confined in a secure facility for eighteen months.

(iii) after the period set under subparagraph (ii) of this paragraph, the respondent shall be placed in a residential facility for a period of twelve months; provided, however, that if the respondent has been placed from a family court in a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law for an act committed when the respondent was under sixteen years of age, once the time frames in subparagraph (ii) of this paragraph are met:

(A) beginning on the effective date of such a social services district's plan that only covers juvenile delinquents placed in non-secure settings, if the office of children and family services concludes, based on the needs and best interests of the respondent and the need for protection for the community, that a non-secure level of care is appropriate for the respondent, such office shall file a petition pursuant to paragraph (b) or (c) of subdivision two of section 355.1 of this part to have the respondent placed with the applicable local commissioner of social services; and

(B) beginning on the effective date of such a social services district's plan that covers juvenile delinquents placed in limited secure settings, if the office of children and family services concludes, based on the needs and best interests of the respondent and the need for protection for the community, that a non-secure or limited secure level of care is appropriate for the respondent, such office shall file a petition pursuant to paragraph (b) or (c) of subdivision two of section 355.1 of this part to have the respondent placed with the applicable local commissioner of social services.

(C) If the respondent is placed with the local commissioner of social services in accordance with clause (A) or (B) of this subparagraph, the remainder of the provisions of this section shall continue to apply to the respondent's placement.

(iv) the respondent may not be released from a secure facility or transferred to a facility other than a secure facility during the period provided in subparagraph (ii) of this paragraph, nor may the respondent be released from a residential facility during the period provided in subparagraph (iii) of this paragraph. No home visits shall be permitted during the period of secure confinement set by the court order or one year, whichever is less, except for emergency visits for medical treatment or severe illness or death in the family. All home visits must be accompanied home visits: (A) while a youth is confined in a secure facility, whether such confinement is pursuant to a court order or otherwise; (B) while a youth is confined in a residential facility other than a secure facility within six months after confinement in a secure facility; and (C) while a youth is confined

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in a residential facility other than a secure facility in excess of six months after confinement in a secure facility unless two accompanied home visits have already occurred. An "accompanied home visit" shall mean a home visit during which the youth shall be accompanied at all times while outside the secure or residential facility by appropriate personnel of the office of children and family services or, if applicable, a local social services district which operates an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law.

(b) Notwithstanding any other provision of law, during the first twelve months of the respondent's placement, no motion, hearing or order may be made, held or granted pursuant to section 355.1; provided, however, that during such period a motion to vacate the order may be made pursuant to such section, but only upon grounds set forth in section 440.10 of the criminal procedure law.

(c) During the placement or any extension thereof:

(i) after the expiration of the period provided in subparagraph (iii) of paragraph (a) of this subdivision, the respondent shall not be released from a residential facility without the written approval of the office of children and family services or, if applicable, a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law.

(ii) the respondent shall be subject to intensive supervision whenever not in a secure or residential facility.

(iii) the respondent shall not be discharged from the custody of the office of children and family services or, if applicable, a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law, unless a motion therefor under section 355.1 is granted by the court, which motion shall not be made prior to the expiration of three years of the placement.

(iv) unless otherwise specified in the order, the office of children and family services or, if applicable, a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law shall report in writing to the court not less than once every six months during the placement on the status, adjustment and progress of the respondent.

(d) Upon the expiration of the initial period of placement, or any extension thereof, the placement may be extended in accordance with section 355.3 on a petition of any party or the office of children and family services, or, if applicable, a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law, after a dispositional hearing, for an additional period not to exceed twelve months, but no initial placement or extension of placement under this section may continue beyond the respondent's twenty-first birthday, or, for an act that was committed when the respondent was sixteen years of age or older, the respondent's twenty-third birthday.

(e) The court may also make an order pursuant to subdivision two of section 353.4.

4. [Eff. March 31, 2023, pursuant to L.2012, c. 57, pt. G, subpt. A, § 11. See, also, subd. 4 above.] When the order is for a restrictive placement in the case of a youth found to have committed a designated class A felony act,

(a) the order shall provide that:

(i) the respondent shall be placed with the division for youth for an initial period of five years. If the respondent has been in detention pending disposition, the initial period of placement ordered under this section shall be credited with and diminished by the amount of time spent by the respondent in detention prior to the commencement of the placement unless the court finds that all or part of such credit would not serve the needs and best interests of the respondent or the need for protection of the community.

(ii) the respondent shall initially be confined in a secure facility for a period set by the order, to be not less than twelve nor more than eighteen months provided, however, where the order of the court is made in compliance with subdivision five the respondent shall initially be confined in a secure facility for eighteen months.

(iii) after the period set under clause (ii), the respondent shall be placed in a residential facility for a period of twelve months.

(iv) the respondent may not be released from a secure facility or transferred to a facility other than a secure facility during the period provided in clause (ii) of this paragraph, nor may the respondent be released from a residential facility during the period provided in clause (iii). No home visits shall be permitted during the period of secure confinement set by the court order or one year, whichever is less, except for emergency visits for medical treatment or severe illness or death in the family. All home visits must be accompanied home visits: (A) while a youth is confined in a secure facility, whether such confinement is pursuant to a court order or otherwise; (B) while a youth is confined in a residential facility other than a secure facility within six months after confinement in a secure facility; and (C) while a youth is confined in a residential facility other than a secure facility in excess of six months after confinement in a secure facility unless two accompanied home visits have already occurred. An "accompanied home visit" shall mean a home visit during which the youth shall be accompanied at all times while outside the secure or residential facility by appropriate personnel of the division for youth designated pursuant to regulations of the director of the division.

(b) Notwithstanding any other provision of law, during the first twelve months of the respondent's placement, no motion, hearing or order may be made, held or granted pursuant to section 355.1; provided, however, that during such period a motion to vacate the order may be made pursuant to 355.1, but only upon grounds set forth in section 440.10 of the criminal procedure law.

(c) During the placement or any extension thereof:

(i) after the expiration of the period provided in clause (iii) of paragraph (a), the respondent shall not be released from a residential facility without the written approval of the director of the division for youth or his designated deputy director.

(ii) the respondent shall be subject to intensive supervision whenever not in a secure or residential facility.

(iii) the respondent shall not be discharged from the custody of the division for youth, unless a motion therefor under section 355.1 is granted by the court, which motion shall not be made prior to the expiration of three years of the placement.

(iv) unless otherwise specified in the order, the division shall report in writing to the court not less than once every six months during the placement on the status, adjustment and progress of the respondent.

(d) Upon the expiration of the initial period of placement, or any extension thereof, the placement may be extended in accordance with section 355.3 on a petition of any party or the office of children and family services after a dispositional hearing, for an additional period not to exceed twelve months, but no initial placement or extension of placement under this section may continue beyond the respondent's twenty-first birthday, or, for an act that was committed when the respondent was sixteen years of age or older, the respondent's twenty-third birthday.

(e) The court may also make an order pursuant to subdivision two of section 353.4.

5. [Eff. until March 31, 2023, pursuant to L.2012, c. 57, pt. G, subpt. A, § 11. See, also, subd. 5 below.] When the order is for a restrictive placement in the case of a youth found to have committed a designated felony act, other than a designated class A felony act,

(a) the order shall provide that:

(i) the respondent shall be placed with the office of children and family services for an initial period of three years. If the respondent has been in detention pending disposition, the initial period of placement ordered under this section shall be credited with and diminished by the amount of time spent by the respondent in detention prior to the commencement of the placement unless the court finds that all or part of such credit would not serve the needs and best interests of the respondent or the need for protection of the community.

(ii) the respondent shall initially be confined in a secure facility for a period set by the order, to be not less than six nor more than twelve months.

(iii) after the period set under subparagraph (ii) of this paragraph, the respondent shall be placed in a residential facility for a period set by the order, to be not less than six nor more than twelve months; provided, however, that if the respondent has been placed from a family court in a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law, once the time frames in subparagraph (ii) of this paragraph are met:

(A) beginning on the effective date of such a social services district's plan that only covers juvenile delinquents placed in non-secure settings, if the office of children and family services concludes, based on the needs and best interests of the respondent and the need for protection for the community, that a non-secure level of care is appropriate for the respondent, such office shall file a petition pursuant to paragraph (b) or (c) of subdivision two of section 355.1 of this part to have the respondent placed with the applicable local commissioner of social services; and

(B) beginning on the effective date of such a social services district's plan to implement programs for youth placed in limited secure settings, if the office of children and family services concludes, based on the needs and best interests of the respondent and the need for protection for the community, that a non-secure or limited secure level of care is appropriate for the respondent, such office shall file a petition pursuant to paragraph (b) or (c) of subdivision two of section 355.1 of this part to have the respondent placed with the applicable local commissioner of social services.

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(C) If the respondent is placed with a local commissioner of social services in accordance with clause (A) or (B) of this subparagraph, the remainder of the provisions of this section shall continue to apply to the respondent's placement.

(iv) the respondent may not be released from a secure facility or transferred to a facility other than a secure facility during the period provided by the court pursuant to subparagraph (ii) of this paragraph, nor may the respondent be released from a residential facility during the period provided by the court pursuant to subparagraph (iii) of this paragraph. No home visits shall be permitted during the period of secure confinement set by the court order or one year, whichever is less, except for emergency visits for medical treatment or severe illness or death in the family. All home visits must be accompanied home visits: (A) while a youth is confined in a secure facility, whether such confinement is pursuant to a court order or otherwise; (B) while a youth is confined in a residential facility other than a secure facility within six months after confinement in a secure facility; and (C) while a youth is confined in a residential facility other than a secure facility in excess of six months after confinement in a secure facility unless two accompanied home visits have already occurred. An "accompanied home visit" shall mean a home visit during which the youth shall be accompanied at all times while outside the secure or residential facility by appropriate personnel of the office of children and family services or, if applicable, a social services district operating an approved juvenile justice close to home initiative pursuant to section four hundred four of the social services law.

(b) Notwithstanding any other provision of law, during the first six months of the respondent's placement, no motion, hearing or order may be made, held or granted pursuant to section 355.1; provided, however, that during such period a motion to vacate the order may be made pursuant to such section, but only upon grounds set forth in section 440.10 of the criminal procedure law.

(c) During the placement or any extension thereof:

(i) after the expiration of the period provided in subparagraph (iii) of paragraph (a) of this subdivision, the respondent shall not be released from a residential facility without the written approval of the office of children and family services or, if applicable, a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law.

(ii) the respondent shall be subject to intensive supervision whenever not in a secure or residential facility.

(iii) the respondent shall not be discharged from the custody of the office of children and family services, or, if applicable, a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law.

(iv) unless otherwise specified in the order, the office of children and family services or, if applicable, a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law, shall report in writing to the court not less than once every six months during the placement on the status, adjustment and progress of the respondent.

(d) Upon the expiration of the initial period of placement or any extension thereof, the placement may be extended in accordance with section 355.3 upon petition of any party or the office of children and family services or, if applicable, a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law, after a dispositional hearing, for an additional period not to exceed twelve months, but no initial placement or extension of placement under this section may continue beyond the respondent's twenty-first birthday.

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(e) The court may also make an order pursuant to subdivision two of section 353.4.

5. [Eff. March 31, 2023, pursuant to L.2012, c. 57, pt. G, subpt. A, § 11. See, also, subd. 5 above.] When the order is for a restrictive placement in the case of a youth found to have committed a designated felony act, other than a designated class A felony act,

(a) the order shall provide that:

(i) the respondent shall be placed with the division for youth for an initial period of three years. If the respondent has been in detention pending disposition, the initial period of placement ordered under this section shall be credited with and diminished by the amount of time spent by the respondent in detention prior to the commencement of the placement unless the court finds that all or part of such credit would not serve the needs and best interests of the respondent or the need for protection of the community.

(ii) the respondent shall initially be confined in a secure facility for a period set by the order, to be not less than six nor more than twelve months.

(iii) after the period set under clause (ii), the respondent shall be placed in a residential facility for a period set by the order, to be not less than six nor more than twelve months.

(iv) the respondent may not be released from a secure facility or transferred to a facility other than a secure facility during the period provided by the court pursuant to clause (ii), nor may the respondent be released from a residential facility during the period provided by the court pursuant to clause (iii). No home visits shall be permitted during the period of secure confinement set by the court order or one year, whichever is less, except for emergency visits for medical treatment or severe illness or death in the family. All home visits must be accompanied home visits: (A) while a youth is confined in a secure facility, whether such confinement is pursuant to a court order or otherwise; (B) while a youth is confined in a residential facility other than a secure facility within six months after confinement in a secure facility; and (C) while a youth is confined in a residential facility other than a secure facility in excess of six months after confinement in a secure facility unless two accompanied home visits have already occurred. An "accompanied home visit" shall mean a home visit during which the youth shall be accompanied at all times while outside the secure or residential facility by appropriate personnel of the division for youth designated pursuant to regulations of the director of the division.

(b) Notwithstanding any other provision of law, during the first six months of the respondent's placement, no motion, hearing or order may be made, held or granted pursuant to section 355.1; provided, however, that during such period a motion to vacate the order may be made pursuant to such section, but only upon grounds set forth in section 440.10 of the criminal procedure law.

(c) During the placement or any extension thereof:

(i) after the expiration of the period provided in clause (iii) of paragraph (a), the respondent shall not be released from a residential facility without the written approval of the director of the division for youth or his designated deputy director.

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(ii) the respondent shall be subject to intensive supervision whenever not in a secure or residential facility.

(iii) the respondent shall not be discharged from the custody of the division for youth.

(iv) unless otherwise specified in the order, the division shall report in writing to the court not less than once every six months during the placement on the status, adjustment and progress of the respondent.

(d) Upon the expiration of the initial period of placement or any extension thereof, the placement may be extended in accordance with section 355.3 upon petition of any party or the division for youth, after a dispositional hearing, for an additional period not to exceed twelve months, but no initial placement or extension of placement under this section may continue beyond the respondent's twenty-first birthday.

(e) The court may also make an order pursuant to subdivision two of section 353.4.

6. When the order is for a restrictive placement in the case of a youth found to have committed any designated felony act and such youth has been found by a court to have committed a designated felony act on a prior occasion, regardless of the age of such youth at the time of commission of such prior act, the order of the court shall be made pursuant to subdivision four.

7. If the dispositional hearing has been adjourned on a finding of specific circumstances pursuant to subdivision six of section 350.1 while the respondent is in detention, where a restrictive placement is subsequently ordered, time spent by the respondent in detention during such additional adjournment shall be credited and applied against any term of secure confinement ordered by the court pursuant to subdivision four or five.

8. [Eff. until March 31, 2023, pursuant to L.2012, c. 57, pt. G, subpt. A, § 11. See, also, subd. 8 below.] The office of children and family services or, if applicable, the social services district operating an approved close to home initiative pursuant to section four hundred four of the social services law, shall retain the power to continue the confinement of the youth in a secure or other residential facility, as applicable, beyond the periods specified by the court, within the term of the placement.

8. [Eff. March 31, 2023, pursuant to L.2012, c. 57, pt. G, subpt. A, § 11. See, also, subd. 8 above.] The division for youth shall retain the power to continue the confinement of the youth in a secure or other residential facility beyond the periods specified by the court, within the term of the placement.

**Credits**

(Added L.1982, c. 920, § 1, eff. July 1, 1983. Amended L.1983, c. 398, §§ 38 to 42; L.1987, c. 419, §§ 13, 14; L.1993, c. 687, §§ 10, 11; L.2012, c. 57, pt. G, subpt. A, §§ 6, 7, eff. April 1, 2012; L.2017, c. 59, pt. WWW, § 72; L.2017, c. 59, pt. WWW, § 73, eff. April 10, 2017.)

McKinney's Family Court Act § 353.5, NY FAM CT § 353.5
Current through L.2021, chapters 1 to 440. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 1. Family Court Established (Refs & Annos)
Part 6. General Provisions Concerning Hearings

McKinney's Family Court Act § 162-a

# § 162-a. Use of restraints on children in courtrooms

Effective: October 8, 2021
Currentness

(a) Use of restraints. Except as otherwise provided in subdivision (b) of this section, restraints on children under the age of twenty-one, including, but not limited to, handcuffs, chains, shackles, irons or straitjackets, are prohibited in the courtroom.

(b) Exception. Permissible physical restraint consisting of handcuffs or footcuffs that shall not be joined to each other may be used in the courtroom during a proceeding before the court only if the court determines on the record, after providing the child with an opportunity to be heard, why such restraint is the least restrictive alternative necessary to prevent:

(1) physical injury to the child or another person by the child;

(2) physically disruptive courtroom behavior by the child, as evidenced by a recent history of behavior that presented a substantial risk of physical harm to the child or another person, where such behavior indicates a substantial likelihood of current physically disruptive courtroom behavior by the child; or

(3) flight from the courtroom by the child, as evidenced by a recent history of absconding from the court.

**Credits**
(Added L.2021, c. 474, § 1, eff. Oct. 8, 2021.)

McKinney's Family Court Act § 162-a, NY FAM CT § 162-a
Current through L.2021, chapters 1 to 440. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title U. Special Proceedings Which Replace, Suspend or Abate Criminal Actions
Article 722. Proceedings Against Juvenile Offenders and Adolescent Offenders; Establishment of Youth Part and Related Procedures

McKinney's CPL § 722.21

# § 722.21 Proceedings upon felony complaint; adolescent offender

Effective: October 1, 2019
Currentness

1. When an adolescent offender is arraigned before a youth part, the provisions of this section shall apply. If the youth part is not in session, the defendant shall be brought before the most accessible magistrate designated by the appellate division of the supreme court to act as a youth part for the purpose of making a determination whether such adolescent offender shall be detained or, with the consent of the district attorney, immediately removed to family court. If the defendant is ordered to be detained, he or she shall be brought before the next session of the youth part. If the defendant is not detained, he or she shall be ordered to appear at the next session of the youth part, family court or the local probation department.

2. If the defendant waives a hearing upon the felony complaint, the court must order that the defendant be held for the action of the grand jury with respect to the charge or charges contained in the felony complaint.

3. If there be a hearing, then at the conclusion of the hearing, the youth part court must dispose of the felony complaint as follows:

(a) If there is reasonable cause to believe that the defendant committed a felony, the court must order that the defendant be held for the action of a grand jury; or

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(b) If there is not reasonable cause to believe that the defendant committed a felony but there is reasonable cause to believe that the defendant is a "juvenile delinquent" as defined in subdivision one of section 301.2 of the family court act, the court must specify the act or acts it found reasonable cause to believe the defendant did and direct that the action be transferred to the family court in accordance with the provisions of article seven hundred twenty-five of this title, provided, however, notwithstanding any other provision of law, section 308.1 of the family court act shall apply to actions transferred pursuant to this subdivision and such actions shall not be considered removals subject to subdivision thirteen of such section 308.1; or

(c) If there is not reasonable cause to believe that the defendant committed any criminal act, the court must dismiss the felony complaint and discharge the defendant from custody if he is in custody, or if he is at liberty on bail, it must exonerate the bail.

4. Notwithstanding the provisions of subdivisions two and three of this section, where the defendant is charged with a felony, other than a class A felony defined outside article two hundred twenty of the penal law, a violent felony defined in section 70.02 of the penal law or a felony listed in paragraph one or two of subdivision forty-two of section 1.20 of this chapter, except as provided in paragraph (c) of subdivision two of section 722.23 of this article, the court shall, upon notice from the district attorney that he or she will not file a motion to prevent removal pursuant to section 722.23 of this article, order transfer of an action against an adolescent offender to the family court pursuant to the provisions of article seven hundred twenty-five of this title, provided, however, notwithstanding any other provision of law, section 308.1 of the family court act shall apply to actions transferred pursuant to this subdivision and such actions shall not be considered removals subject to subdivision thirteen of such section 308.1.

5. Notwithstanding subdivisions two and three of this section, at the request of the district attorney, the court shall order removal of an action against an adolescent offender charged with an offense listed in paragraph (a) of subdivision two of section 722.23 of this article, to the family court pursuant to the provisions of article seven hundred twenty-five of this title and upon consideration of the criteria specified in subdivision two of section 722.22 of this article, it is determined that to do so would be in the interests of justice. Where, however, the felony complaint charges the adolescent offender with murder in the second degree as defined in section 125.25 of the penal law, rape in the first degree as defined in subdivision one of section 130.35 of the penal law, criminal sexual act in the first degree as defined in subdivision one of section 130.50 of the penal law, or an armed felony as defined in paragraph (a) of subdivision forty-one of section 1.20 of this chapter, a determination that such action be removed to the family court shall, in addition, be based upon

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a finding of one or more of the following factors: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the crime.

6. (a) If the court orders removal of the action to family court pursuant to subdivision five of this section, it shall state on the record the factor or factors upon which its determination is based, and the court shall give its reasons for removal in detail and not in conclusory terms.

(b) The district attorney shall state upon the record the reasons for his consent to removal of the action to the family court where such consent is required. The reasons shall be stated in detail and not in conclusory terms.

(c) For the purpose of making a determination pursuant to subdivision five the court may make such inquiry as it deems necessary. Any evidence which is not legally privileged may be introduced. If the defendant testifies, his testimony may not be introduced against him in any future proceeding, except to impeach his testimony at such future proceeding as inconsistent prior testimony.

(d) Except as provided by paragraph (e), this section shall not be construed to limit the powers of the grand jury.

(e) Where an action against a defendant has been removed to the family court pursuant to this section, there shall be no further proceedings against the adolescent offender in any local or superior criminal court including the youth part of the superior court for the offense or offenses which were the subject of the removal order.

**Credits**
(Added L.2017, c. 59, pt. WWW, § 1-a. Amended L.2019, c. 240, § 2.)

**Editors' Notes**

**PRACTICE COMMENTARIES**

by William C. Donnino

*See* Practice Commentary to CPL 722.10.

McKinney's CPL § 722.21, NY CRIM PRO § 722.21
Current through L.2021, chapters 1 to 555. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title U. Special Proceedings Which Replace, Suspend or Abate Criminal Actions
Article 722. Proceedings Against Juvenile Offenders and Adolescent Offenders; Establishment of Youth Part and Related Procedures

McKinney's CPL § 722.23

# § 722.23 Removal of adolescent offenders to family court

Effective: October 1, 2019
Currentness

1. (a) Following the arraignment of a defendant charged with a crime committed when he or she was sixteen, or commencing October first, two thousand nineteen, seventeen years of age, other than any class A felony except for those defined in article two hundred twenty of the penal law, a violent felony defined in section 70.02 of the penal law or a felony listed in paragraph one or two of subdivision forty-two of section 1.20 of this chapter, or an offense set forth in the vehicle and traffic law, the court shall order the removal of the action to the family court in accordance with the applicable provisions of article seven hundred twenty-five of this title unless, within thirty calendar days of such arraignment, the district attorney makes a motion to prevent removal of the action pursuant to this subdivision. If the defendant fails to report to the probation department as directed, the thirty day time period shall be tolled until such time as he or she reports to the probation department.

(b) A motion to prevent removal of an action in youth part shall be made in writing and upon prompt notice to the defendant. The motion shall contain allegations of sworn fact based upon personal knowledge of the affiant, and shall indicate if the district attorney is requesting a hearing. The motion shall be noticed to be heard promptly.

(c) The defendant shall be given an opportunity to reply. The defendant shall be granted any reasonable request for a delay. Either party may request a hearing on the facts alleged in the motion to prevent removal of the action. The hearing shall be held expeditiously.

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(d) The court shall deny the motion to prevent removal of the action in youth part unless the court makes a determination upon such motion by the district attorney that extraordinary circumstances exist that should prevent the transfer of the action to family court.

(e) The court shall make a determination in writing or on the record within five days of the conclusion of the hearing or submission by the defense, whichever is later. Such determination shall include findings of fact and to the extent practicable conclusions of law.

(f) For the purposes of this section, there shall be a presumption against custody and case planning services shall be made available to the defendant.

(g) Notwithstanding any other provision of law, section 308.1 of the family court act shall apply to all actions transferred pursuant to this section provided, however, such cases shall not be considered removals subject to subdivision thirteen of such section 308.1.

(h) Nothing in this subdivision shall preclude, and a court may order, the removal of an action to family court where all parties agree or pursuant to this chapter.

2. (a) Upon the arraignment of a defendant charged with a crime committed when he or she was sixteen or, commencing October first, two thousand nineteen, seventeen years of age on a class A felony, other than those defined in article 220 of the penal law, or a violent felony defined in section 70.02 of the penal law, the court shall schedule an appearance no later than six calendar days from such arraignment for the purpose of reviewing the accusatory instrument pursuant to this subdivision. The court shall notify the district attorney and defendant regarding the purpose of such appearance.

(b) Upon such appearance, the court shall review the accusatory instrument and any other relevant facts for the purpose of making a determination pursuant to paragraph (c) of this subdivision. Both parties may be heard and submit information relevant to the determination.

(c) The court shall order the action to proceed in accordance with subdivision one of this section unless, after reviewing the papers and hearing from the parties, the court determines in writing that the district attorney proved by a preponderance of the evidence one or more of the following as set forth in the accusatory instrument:

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(i) the defendant caused significant physical injury to a person other than a participant in the offense; or

(ii) the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense; or

(iii) the defendant unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact as defined in section 130.00 of the penal law.

(d) Where the court makes a determination that the action shall not proceed in accordance with subdivision one of this section, such determination shall be made in writing or on the record and shall include findings of fact and to the extent practicable conclusions of law.

(e) Nothing in this subdivision shall preclude, and the court may order, the removal of an action to family court where all parties agree or pursuant to this chapter.

3. Notwithstanding the provisions of any other law, if at any time one or more charges in the accusatory instrument are reduced, such that the elements of the highest remaining charge would be removable pursuant to subdivisions one or two of this section, then the court, sua sponte or in response to a motion pursuant to subdivisions one or two of this section by the defendant, shall promptly notify the parties and direct that the matter proceed in accordance with subdivision one of this section, provided, however, that in such instance, the district attorney must file any motion to prevent removal within thirty days of effecting or receiving notice of such reduction.

4. A defendant may waive review of the accusatory instrument by the court and the opportunity for removal in accordance with this section, provided that such waiver is made by the defendant knowingly, voluntarily and in open court, in the presence of and with the approval of his or her counsel and the court. An earlier waiver shall not constitute a waiver of review and the opportunity for removal under this section.

**Credits**

(Added L.2017, c. 59, pt. WWW, § 1-a.)

**Editors' Notes**

## PRACTICE COMMENTARIES

by William C. Donnino

*See* Practice Commentary to CPL 722.10.

Notes of Decisions (41)

McKinney's CPL § 722.23, NY CRIM PRO § 722.23
Current through L.2021, chapters 1 to 555. Some statute sections may be more current, see credits for details.

**End of Document**

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McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Two. Sentences
Title E. Sentences
Article 60. Authorized Dispositions of Offenders (Refs & Annos)

McKinney's Penal Law § **60.10-a**

# § **60.10-a** Authorized disposition; adolescent offender

Effective: October 1, 2019
Currentness

When an adolescent offender is convicted of an offense, the court shall sentence the defendant to any sentence authorized to be imposed on a person who committed such offense at age eighteen or older. When a sentence is imposed, the court shall consider the age of the defendant in exercising its discretion at sentencing.

**Credits**
(Added L.2017, c. 59, pt. WWW, § 41.)

McKinney's Penal Law § **60.10-a**, NY PENAL § **60.10-a**
Current through L.2021, chapters 1 to 555. Some statute sections may be more current, see credits for details.

**End of Document**

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Two. Sentences
Title E. Sentences
Article 70. Sentences of Imprisonment (Refs & Annos)

McKinney's Penal Law § 70.02

# § 70.02 Sentence of imprisonment for a violent felony offense

Effective: June 12, 2020
Currentness

1. Definition of a violent felony offense. A violent felony offense is a class B violent felony offense, a class C violent felony offense, a class D violent felony offense, or a class E violent felony offense, defined as follows:

(a) Class B violent felony offenses: an attempt to commit the class A-I felonies of murder in the second degree as defined in section 125.25, kidnapping in the first degree as defined in section 135.25, and arson in the first degree as defined in section 150.20; manslaughter in the first degree as defined in section 125.20, aggravated manslaughter in the first degree as defined in section 125.22, rape in the first degree as defined in section 130.35, criminal sexual act in the first degree as defined in section 130.50, aggravated sexual abuse in the first degree as defined in section 130.70, course of sexual conduct against a child in the first degree as defined in section 130.75; assault in the first degree as defined in section 120.10, kidnapping in the second degree as defined in section 135.20, burglary in the first degree as defined in section 140.30, arson in the second degree as defined in section 150.15, robbery in the first degree as defined in section 160.15, sex trafficking as defined in paragraphs (a) and (b) of subdivision five of section 230.34, sex trafficking of a child as defined in section 230.34-a, incest in the first degree as defined in section 255.27, criminal possession of a weapon in the first degree as defined in section 265.04, criminal use of a firearm in the first degree as defined in section 265.09, criminal sale of a firearm in the first degree as defined in section 265.13, aggravated assault upon a police officer or a peace officer as defined in section 120.11, gang assault in the first degree as defined in section 120.07, intimidating a victim or witness in the first degree as defined in section 215.17, hindering prosecution of terrorism in the first degree as defined in section 490.35, criminal possession of a chemical weapon or biological


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weapon in the second degree as defined in section 490.40, and criminal use of a chemical weapon or biological weapon in the third degree as defined in section 490.47.

(b) Class C violent felony offenses: an attempt to commit any of the class B felonies set forth in paragraph (a) of this subdivision; aggravated criminally negligent homicide as defined in section 125.11, aggravated manslaughter in the second degree as defined in section 125.21, aggravated sexual abuse in the second degree as defined in section 130.67, assault on a peace officer, police officer, firefighter or emergency medical services professional as defined in section 120.08, assault on a judge as defined in section 120.09, gang assault in the second degree as defined in section 120.06, strangulation in the first degree as defined in section 121.13, aggravated strangulation as defined in section 121.13-a, burglary in the second degree as defined in section 140.25, robbery in the second degree as defined in section 160.10, criminal possession of a weapon in the second degree as defined in section 265.03, criminal use of a firearm in the second degree as defined in section 265.08, criminal sale of a firearm in the second degree as defined in section 265.12, criminal sale of a firearm with the aid of a minor as defined in section 265.14, aggravated criminal possession of a weapon as defined in section 265.19, soliciting or providing support for an act of terrorism in the first degree as defined in section 490.15, hindering prosecution of terrorism in the second degree as defined in section 490.30, and criminal possession of a chemical weapon or biological weapon in the third degree as defined in section 490.37.

(c) Class D violent felony offenses: an attempt to commit any of the class C felonies set forth in paragraph (b); reckless assault of a child as defined in section 120.02, assault in the second degree as defined in section 120.05, menacing a police officer or peace officer as defined in section 120.18, stalking in the first degree, as defined in subdivision one of section 120.60, strangulation in the second degree as defined in section 121.12, rape in the second degree as defined in section 130.30, criminal sexual act in the second degree as defined in section 130.45, sexual abuse in the first degree as defined in section 130.65, course of sexual conduct against a child in the second degree as defined in section 130.80, aggravated sexual abuse in the third degree as defined in section 130.66, facilitating a sex offense with a controlled substance as defined in section 130.90, labor trafficking as defined in paragraphs (a) and (b) of subdivision three of section 135.35, criminal possession of a weapon in the third degree as defined in subdivision five, six, seven, eight, nine or ten of section 265.02, criminal sale of a firearm in the third degree as defined in section 265.11, intimidating a victim or witness in the second degree as defined in section 215.16, soliciting or providing support for an act of terrorism in the second degree as defined in section 490.10, and making a terroristic threat as defined in section 490.20, falsely reporting an incident in the first degree as defined in section 240.60, placing a false bomb or hazardous substance in the first degree as defined in section 240.62, placing a false bomb or hazardous substance in a sports stadium or arena, mass transportation facility or enclosed shopping mall as defined in section 240.63, aggravated unpermitted use of indoor pyrotechnics in the first degree as defined in section 405.18,



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and criminal manufacture, sale, or transport of an undetectable firearm, rifle or shotgun as defined in section 265.50.

(d) Class E violent felony offenses: an attempt to commit any of the felonies of criminal possession of a weapon in the third degree as defined in subdivision five, six, seven or eight of section 265.02 as a lesser included offense of that section as defined in section 220.20 of the criminal procedure law, persistent sexual abuse as defined in section 130.53, aggravated sexual abuse in the fourth degree as defined in section 130.65-a, falsely reporting an incident in the second degree as defined in section 240.55 and placing a false bomb or hazardous substance in the second degree as defined in section 240.61.

2. Authorized sentence.

(a) [Eff. until Sept. 1, 2023, pursuant to L.1995, c. 3, § 74, par. d. See, also, par. (a) below.] Except as provided in subdivision six of section 60.05, the sentence imposed upon a person who stands convicted of a class B or class C violent felony offense must be a determinate sentence of imprisonment which shall be in whole or half years. The term of such sentence must be in accordance with the provisions of subdivision three of this section.

(a) [Eff. Sept. 1, 2023. See, also, par. (a) above.] The sentence imposed upon a person who stands convicted of a class B or class C violent felony offense must be an indeterminate sentence of imprisonment. Except as provided in subdivision five[1] of section 60.05, the maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section.

(b) Except as provided in paragraph (b-1) of this subdivision, subdivision six of section 60.05 and subdivision four of this section, the sentence imposed upon a person who stands convicted of a class D violent felony offense, other than the offense of criminal possession of a weapon in the third degree as defined in subdivision five, seven or eight of section 265.02 or criminal sale of a firearm in the third degree as defined in section 265.11, must be in accordance with the applicable provisions of this chapter relating to sentencing for class D felonies provided, however, that where a sentence of imprisonment is imposed which requires a commitment to the state department of corrections and community supervision, such sentence shall be a determinate sentence in accordance with paragraph (c) of subdivision three of this section.



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(b-1) Except as provided in subdivision six of section 60.05, the sentence imposed upon a person who stands convicted of the class D violent felony offense of menacing a police officer or peace officer as defined in section 120.18 of this chapter must be a determinate sentence of imprisonment.

c. Except as provided in subdivision six of section 60.05, the sentence imposed upon a person who stands convicted of the class D violent felony offenses of criminal possession of a weapon in the third degree as defined in subdivision five, seven, eight or nine of section 265.02, criminal sale of a firearm in the third degree as defined in section 265.11, the class E violent felonies of attempted criminal possession of a weapon in the third degree as defined in subdivision five, seven, eight or nine of section 265.02, or criminal manufacture, sale, or transport of an undetectable firearm, rifle or shotgun as defined in section 265.50 must be a sentence to a determinate period of imprisonment, or, in the alternative, a definite sentence of imprisonment for a period of no less than one year, except that:

(i) the court may impose any other sentence authorized by law upon a person who has not been previously convicted in the five years immediately preceding the commission of the offense for a class A misdemeanor defined in this chapter, if the court having regard to the nature and circumstances of the crime and to the history and character of the defendant, finds on the record that such sentence would be unduly harsh and that the alternative sentence would be consistent with public safety and does not deprecate the seriousness of the crime; and

(ii) the court may apply the provisions of paragraphs (b) and (c) of subdivision four of this section when imposing a sentence upon a person who has previously been convicted of a class A misdemeanor defined in this chapter in the five years immediately preceding the commission of the offense.

3. Term of sentence. The term of a determinate sentence for a violent felony offense must be fixed by the court as follows:

(a) For a class B felony, the term must be at least five years and must not exceed twenty-five years, provided, however, that the term must be: (i) at least ten years and must not exceed thirty years where the sentence is for the crime of aggravated assault upon a police officer or peace officer as defined in section 120.11 of this chapter; and (ii) at least ten years and must not exceed thirty years where the sentence is for the crime of aggravated manslaughter in the first degree as defined in section 125.22 of this chapter;



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(b) For a class C felony, the term must be at least three and one-half years and must not exceed fifteen years, provided, however, that the term must be: (i) at least seven years and must not exceed twenty years where the sentence is for the crime of aggravated manslaughter in the second degree as defined in section 125.21 of this chapter; (ii) at least seven years and must not exceed twenty years where the sentence is for the crime of attempted aggravated assault upon a police officer or peace officer as defined in section 120.11 of this chapter; (iii) at least three and one-half years and must not exceed twenty years where the sentence is for the crime of aggravated criminally negligent homicide as defined in section 125.11 of this chapter; and (iv) at least five years and must not exceed fifteen years where the sentence is imposed for the crime of aggravated criminal possession of a weapon as defined in section 265.19 of this chapter;

(c) For a class D felony, the term must be at least two years and must not exceed seven years, provided, however, that the term must be: (i) at least two years and must not exceed eight years where the sentence is for the crime of menacing a police officer or peace officer as defined in section 120.18 of this chapter; and (ii) at least three and one-half years and must not exceed seven years where the sentence is imposed for the crime of criminal possession of a weapon in the third degree as defined in subdivision ten of section 265.02 of this chapter;

(d) For a class E felony, the term must be at least one and one-half years and must not exceed four years.

4. (a) Except as provided in paragraph (b) of this subdivision, where a plea of guilty to a class D violent felony offense is entered pursuant to section 220.10 or 220.30 of the criminal procedure law in satisfaction of an indictment charging the defendant with an armed felony, as defined in subdivision forty-one of section 1.20 of the criminal procedure law, the court must impose a determinate sentence of imprisonment.

(b) In any case in which the provisions of paragraph (a) of this subdivision or the provisions of subparagraph (ii) of paragraph (c) of subdivision two of this section apply, the court may impose a sentence other than a determinate sentence of imprisonment, or a definite sentence of imprisonment for a period of no less than one year, if it finds that the alternate sentence is consistent with public safety and does not deprecate the seriousness of the crime and that one or more of the following factors exist:

(i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or


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(ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or

(iii) possible deficiencies in proof of the defendant's commission of an armed felony.

(c) The defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b) of this subdivision, and the court may, in its discretion, conduct a hearing with respect to any issue bearing upon such determination. If the court determines that a determinate sentence of imprisonment should not be imposed pursuant to the provisions of such paragraph (b), it shall make a statement on the record of the facts and circumstances upon which such determination is based. A transcript of the court's statement, which shall set forth the recommendation of the district attorney, shall be forwarded to the state division of criminal justice services along with a copy of the accusatory instrument.

5. *Renumbered.*

**Credits**

(Added L.1978, c. 481, § 3. Amended L.1980, c. 233, § 2; L.1980, c. 234, §§ 1, 2; L.1980, c. 583, § 1; L.1981, c. 175, § 1; L.1986, c. 124, § 1; L.1988, c. 450, § 3; L.1991, c. 496, § 4; L.1991, c. 521, § 1; L.1993, c. 291, §§ 1, 2; L.1995, c. 3, § 4; L.1996, c. 122, § 2; L.1996, c. 181, § 1; L.1996, c. 632, § 1; L.1996, c. 646, § 1; L.1996, c. 647, § 1; L.1998, c. 1, §§ 5 to 9, eff. Aug. 6, 1998; L.1998, c. 378, § 2, eff. Nov. 1, 1998; L.1999, c. 33, §§ 1 to 4, eff. Nov. 1, 1999; L.1999, c. 635, § 10, eff. Dec. 1, 1999; L.2000, c. 189, §§ 6, 7, eff. Nov. 1, 2000; L.2001, c. 300, § 2, eff. Sept. 17, 2001; L.2001, c. 301, § 8, eff. Sept. 17, 2001; L.2003, c. 264, § 6, eff. Nov. 1, 2003; L.2003, c. 584, § 3, eff. Nov. 1, 2003; L.2004, c. 1, pt. A, § 6, eff. July 23, 2004; L.2005, c. 764, § 1, eff. Dec. 21, 2005; L.2005, c. 765, §§ 4 to 6, eff. Dec. 21, 2005; L.2006, c. 110, § 2, eff. Nov. 1, 2006; L.2006, c. 320, § 5, eff. Nov. 1, 2006; L.2007, c. 7, § 32, eff. April 13, 2007; L.2010, c. 405, § 1, eff. Nov. 11, 2010; L.2011, c. 62, pt. C, subpt. B, § 122, eff. March 31, 2011; L.2011, c. 148, § 2, eff. Nov. 17, 2011; L.2013, c. 1, §§ 27 to 30, eff. March 16, 2013; L.2015, c. 368, § 3, eff. Jan. 19, 2016; L.2018, c. 189, § 3, eff. Nov. 13, 2018; L.2018, c. 476, § 239, eff. Dec. 28, 2018; L.2019, c. 134, §§ 4, 5, eff. Jan. 26, 2020; L.2020, c. 94, § 4, eff. June 12, 2020.)



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# 2021 CAASNY JD TRAINING

# RAISE THE AGE UPDATE

# CASE LAW


Dutchess County Department of Law
Victor Civitillo: Senior Assistant County Attorney
Linda Fakhoury: Senior Assistant County Attorney

Unreported Disposition
71 Misc.3d 1222(A), 145 N.Y.S.3d 325 (Table), 2021 WL 2020623 (N.Y.Co.Ct.), 2021 N.Y. Slip Op. 50460(U)

**This opinion is uncorrected and will not be published in the printed Official Reports.**

*1 The People of the State of New York,

v.

E.H., Adolescent Offender.

County Court, Nassau County
FYC-00000-00/000
Decided on April 22, 2021

CITE TITLE AS: People v E.H.

**ABSTRACT**

Infants
Adolescent Offenders
Removal to Family Court—Caused Significant Injury

*People v E.H.*, 2021 NY Slip Op 50460(U). Infants—Adolescent Offenders—Removal to Family Court—Caused Significant Injury. (Nassau County Ct, Apr. 22, 2021, Singer, J.)

**APPEARANCES OF COUNSEL**

Mindy Plotkin, Esq.
Counsel for Adolescent Offender E.H.
Hon. Madeline Singas, Nassau County District Attorney,
Nicole Aloise, Esq.

**OPINION OF THE COURT**

Conrad D. Singer, J.

The defendant in this matter, E.H. (D.O.B. 00/00//0000), is charged as an Adolescent Offender ("AO") in the Youth Part of the County Court in Nassau County. He is charged by way of a felony complaint with one count of Murder in the Second Degree [Penal Law § 125.25(1)], a class A-1 felony, and by way of a second felony complaint with one count of Criminal Possession of Stolen Property in the Fourth Degree [Penal Law § 165.45(5)], a class E felony. The within Decision and Order is issued after the Court's review of the accusatory instrument, arguments by counsel and other "relevant facts" pursuant to CPL § 722.23(2)(b).

The charge against the AO of Murder in the Second Degree arises from an incident alleged to have occurred on or about March 1, 2021, at approximately 3:10 PM at a location in F., Nassau County, New York. The charge against the AO of Criminal Possession of Stolen Property in the Fourth Degree arises from an incident alleged to have occurred on or about March 6, 2021, at about 10:56 PM, at a location in U., Nassau County, New York. The AO was arraigned by an Accessible Magistrate on April 10, 2021, at which time he was remanded without bail. He first appeared in the Youth Part on April 12, 2021; at which time the Court scheduled the statutory "sixth-day appearance" in this matter for April 14, 2021. (CPL § 722.23[2]).

CPL § 722.23(2) requires that the AO's case proceed towards removal to the Family Court unless the Court finds during the "sixth-day appearance" that the People prove, by a preponderance of the evidence, the existence of one or more statutory aggravating factors. Such factors include, as relevant in this case, that: "[i] the defendant caused significant physical injury to a person other than *2 a participant in the offense"; and/or that "[ii] the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense". (CPL § 722.23 [2][c][i] and [ii]).

*SIXTH-DAY APPEARANCE FOR REVIEW OF ACCUSATORY INSTRUMENT*

At the "sixth-day appearance", the People argued that the AO's case should be disqualified from removal to the Family Court due to the presence of two statutory aggravating factors. First, that the AO "caused significant physical injury" in that the victim in this case is dead; and second, that this AO "displayed a firearm ", in that the victim in this case was shot. In so arguing, the People relied upon the allegations set forth in the Felony Complaint, which they further developed with argument and additional hearsay-based facts.

The AO, through counsel, opposed the People's presentation and argued that they failed to meet their burden for retaining the case in the Youth Part. The AO's counsel noted that she

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was constrained by the limited discovery she had received prior to the "sixth-day appearance" and argued that, relying solely on the Felony Complaint, which is the focus of the Court's "sixth-day appearance" review, the AO did not personally shoot the victim; it is alleged only that he was present at the time of the shooting.

*FACTUAL ALLEGATIONS*

It is alleged in the Felony Complaint that on March 1, 2021, at 3:10 PM, at 701 S M.S. in F., Nassau County, New York, the AO, while acting in concert with others not yet arrested, including an individual referred to as "Unapprehended 1", did intentionally cause the death of the victim, D.G.-C., by shooting him in the head.

It is further alleged in the Felony Complaint that the AO knows "Unapprehended 1" to be an MS-13 gang member and has seen him with a gun on multiple occasions. It is further alleged that "Unapprehended 1" is known to Nassau County Police Department and Nassau County District Attorney as an MS-13 gang member, and that the AO was present and observed "Unapprehended 1" shoot a rival gang member approximately 3 months earlier. It is further alleged that the AO knew that "Unapprehended 1" was having a gang-related dispute with a person by the name of D. The AO allegedly drove one of two vehicles to the subject location, "Unapprehended 1" was an occupant in the AO's vehicle, and the victim was an occupant in the other vehicle.

It is further alleged that, before arriving at the scene of the incident both vehicles stopped, all of the occupants exited the vehicles and conversed, and then returned to their respective vehicles. The AO then allegedly drove one of the vehicles directly to the scene and all of the occupants of his vehicle exited and walked into the woods. It is alleged that the AO was then a few feet away from the group before he heard a gunshot, afterward the AO and all occupants, with the exception of the victim, rushed to their cars. The AO then allegedly drove one of the vehicles with several occupants from the park and then allegedly left the vehicle parked on a side street in U. It is further alleged that the following day, the AO met "Unapprehended 1", who referenced the prior day and said, "it had to be done".

The People further contended at the "sixth-day appearance" that on the date of the incident, the AO, along with approximately eight other males, murdered the victim in C.M. Park in F., Nassau County. (Transcript, April 14, 2021 ["TR"], 3:4). They further alleged that there were two carloads of MS-13 members that day: some drove in an Infiniti, which picked up the victim, and others were in the Impala, which was driven by the AO. (TR, 3:7). They further alleged that an individual named "M.M." was one of the MS-13 members who was in the vehicle driven by the AO, that Mr. M. is the *3 leader of the H. sect of MS-13, that the AO associates with Mr. M. and knows that Mr. M. carries a gun. (TR, 3:11). They further alleged that the AO knew that Mr. M. had a gang-related issue with D., the victim in this case. (TR, 3:14).

The People further alleged at the "sixth-day appearance" that on the day of the incident, the AO drove in the Impala to a gas station in W.H., where he met up with occupants of the second vehicle, the Infinity. (TR, 4:8). The AO then allegedly drove the Impala to U. where, again, he met up with all the occupants of the second car, and then all of the occupants of both vehicles, including the victim, exited the cars and converged on the sidewalk of S. Street before returning to their respective cars. (TR, 4:13). The People further alleged that the AO was shown surveillance video from S. Street, and that he identified himself and other people, including M.M., in that surveillance video.

They further alleged that around 2:30 PM on the day of the incident, the AO used his cell phone to search the internet for "parks in F., parks in F. by the water". (TR, 4:17). The AO then allegedly drove the Impala, which was followed by the Infiniti, to C.M. Park in F., and pulled into the park at 2:55 PM. (TR, 4:23). At the park, the occupants of both vehicles allegedly exited the vehicles, walked into the park, through the woods, and into a clearing on the beach, where the victim was killed with one gunshot to his head. (TR, 4:25). The AO then allegedly rushed back to the car with all of the other occupants (with the exception of the victim), and he drove the Impala away from the scene. (TR, 5:3). The People further alleged that, on the day after the incident, the AO used his phone to conduct an internet search for "Surenos 13", "Surenos 13 rivals", "body found, Long Island, F., C.M. Park, shot dead, F.". (TR, 5:10).

The People further contended that the charge against the AO for Criminal Possession of Stolen Property in the Fourth Degree, which was charged by separate Felony Complaint, was based on the allegation that the Impala which the AO drove to and from the alleged murder was a stolen vehicle. (Tr, 17:3).

*CONCLUSIONS OF LAW*

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The purpose of the sixth-day appearance under CPL 722.23[2] is for the Court to review the accusatory instrument and "other relevant facts" to determine whether the People proved, by a preponderance of the evidence[1] as set forth in the accusatory instrument, the presence of one or more of three statutory factors that will disqualify the AO's case from proceeding toward removal to the Family Court. The statutory factors include, as relevant here: 1) the AO "caused significant physical injury to a person other than a participant in the offense"; and/or 2) the AO "displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense". (CPL § 722.23[2][c][i] and [ii]).

Under CPL § 722.23(2)(b), "[b]oth parties may be heard and submit information relevant to the [Court's] determination" at the "sixth-day appearance". (CPL § 722.23[2][b]). In conducting the "sixth-day appearance", it has been this Court's practice, and the apparent practice of Youth Part courts in other jurisdictions, to consider the accusatory instruments, any supporting depositions, and to also consider hearsay evidence and arguments orally relayed by the attorneys. (*People v. B.H.*, 62 Misc 3d 735, 739-740 [Nassau County Ct 2018]; *People v. J.W.*, 63 Misc 3d 1210[A] [Sup Ct, Kings County 2019]; *People v. Y.L.*, 64 Misc 3d 664 [Monroe County Ct 2019]).

The People's first argument for retaining this AO's case in the Youth Part is based on the *4 statutory aggravating factor that this AO "caused significant physical injury to a person other than a participant in the offense". (CPL § 722.232[2][c][i]). The Court finds, and the parties do not dispute, that the victim's death qualifies as "significant physical injury"[2].

Accordingly, the determinative issue in this case is whether the AO "caused" the victim's "significant physical injury", i.e., whether the AO "caused" the victim's death. The People argued extensively at the "sixth-day appearance" that the AO "caused" the victim's death under a theory of accessorial liability. The People argued that they could not "definitively" say that the AO was not the individual who pulled the trigger and shot the victim in the head, but, even assuming that he did not personally shoot the victim, his actions in connection with the murder rose to the level of "causing" his death. Defense counsel argued in opposition that the People failed to establish the AO's culpability under a theory of accessorial liability and cited to the definition of "Criminal Liability for Conduct of Another" as set forth under Penal Law § 20.00[3].

As the parties disagree about whether the AO "caused" the victim's death, the Court is therefore tasked with determining the meaning of "cause" as set forth in CPL § 722.232[2][c][i]. Accordingly, as "in every case involving statutory interpretation", the Court must ascertain the legislative intent and construe the pertinent statutes to effectuate that intent". (*People v. Roberts*, 31 NY3d 406, 418 [2018]). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof". (*People v. Roberts*, 31 NY3d at 418]). "If the words chosen have a 'definite meaning, which involves no absurdity or contradiction, then there is no room for construction and courts have no right to add or take away from that meaning". (*People v. Roberts*, 31 NY3d at 418).

The Court has referenced several dictionaries to ascertain the "plain and ordinary meaning" of the word "cause". (*People v. Andujar*, 30 NY3d 160, 163 [2017] [dictionary definitions are regarded as "useful guideposts" to determine the meaning of statutory language]; *see also, People v. Roberts*, 31 NY3d at 424). Having done so, the Court finds that the "plain and ordinary meaning" of the word "cause" is "to make something happen"[4], or to "bring about an effect or a result"[5]. As the word "cause" has a "definite meaning " involving "no absurdity or contradiction", the Court will not at this time determine whether "accessorial liability" principles apply when determining whether an AO has "caused significant physical injury" for the purposes of the "sixth-day appearance". (*See, People v. Roberts*, 31 NY3d at 418).

For the purpose of the "sixth-day appearance" inquiry, the Court is proceeding on the assumption of the veracity and accuracy of the factual allegations contained in the Felony Complaint and those additional hearsay-based facts as offered by the People at the "sixth-day appearance". *5 (*See, e.g., People v. Meggie*, 184 Misc 2d 883, 887 [Nassau Dist Ct 2000]). The Court has considered the factual allegations in the Felony Complaint, including, *inter alia*, that this AO drove one of two vehicles to the location where the murder occurred, as well as the additional factual allegations orally relayed by the People at the "sixth-day appearance", including the internet searches that the AO allegedly conducted prior to and after the alleged murder; the AO's relationship with M.M., an individual whom the People allege is the head of the H. sect of MS-13; the AO's alleged knowledge that Mr. M. had a gang-related dispute with the victim and the AO's alleged knowledge that Mr. M. carries a gun; the AO having allegedly

identified himself and others involved in the murder from surveillance footage the day of the murder; and the AO not only driving multiple individuals to the scene of the alleged murder, but then also driving himself and others away from the scene after the murder.

In consideration of the foregoing, the Court finds that the People have satisfied their burden of proving the presence of the aggravating factor that this AO "caused significant physical injury to a person other than a participant in the offense". (CPL § 722.232[2][c][i]). Accordingly, the case will not proceed towards automatic removal to the Family Court. Additionally, while the People also argued that the case should be retained in the Youth Part due to the presence of a second statutory aggravating factor, i.e., that the AO "displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense", CPL § 722.23(2)(c) only requires the presence of one aggravating factor for the case to be retained in the Youth Part. Therefore, the Court need not address the "display of a firearm" factor at this time. (*See*, CPL § 722.23[2]).

As the People have satisfied their burden under CPL § 722.23(2)(c), their application to disqualify the AO's case from removal to the Family Court is granted and the case will remain in the Youth Part for all future proceedings.

This constitutes the opinion, decision and order of this Court.

Westbury, New York

April 22, 2021

HON. CONRAD D. SINGER, A.J.S.C.

Nassau County Court, Youth Part

**FOOTNOTES**

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Footnotes

1 "To establish a fact by a preponderance of the evidence means to prove that the fact is more likely than not to have occurred". (*Matter of Beautisha B. [Racquirine A.]*, 115 AD3d 854 [2d Dept 2014]).

2 *See* Assembly, Record of Proceedings, dated April 8, 2017 ["Assembly Record"], in which legislators stated that "significant physical injury" is intended to fall somewhere between "physical injury" and "serious physical injury"; and see Penal Law § 10.00(10), defining "serious physical injury" to include "physical injury which cause death".

3 Penal Law § 20.00 provides that "[w]hen one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct".

4 *See*, Merriam Webster Dictionary definition of "cause", available at https://www.merriam-webster.com/dictionary/cause, and Collins Dictionary definition of "cause", available at https://www.collinsdictionary.com/us/dictionary/english/cause.

5 *See*, Oxford American English Dictionary definition of "cause ", available at, https://www.oxfordlearnersdictionaries.com/us/definition/english/cause_2.

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New York
Official Reports

72 Misc.3d 785, 150 N.Y.S.3d 226, 2021 N.Y. Slip Op. 21167

**1 The People of the State of New York, Plaintiff,

v

Luis Colon and J.T., Defendants.

County Court, Orange County
2020-287
June 21, 2021

CITE TITLE AS: People v Colon

**HEADNOTE**

Infants
Adolescent Offenders
Prevention of Removal to Family Court

In a prosecution arising out of the commercial theft by the 17-year-old defendant and his codefendants of various motorsport vehicles and the ensuing high-speed chase, the People's application to prevent removal of the matter to Family Court pursuant to CPL 722.23 was granted. With regard to the violent felony count charging defendant with second-degree burglary in violation of Penal Law § 140.25 (1) (b), the People established that defendant caused significant physical injury to an unrelated motorist (CPL 722.23 [2] [c] [i]), and extraordinary circumstances otherwise existed to prevent transfer of the entire criminal action to Family Court, including the lesser charges (CPL 722.23 [1] [d]). The extreme and excessive nature of defendant's words and actions during the flight from the burglary, including throwing multiple large motorsport vehicles out the back of the getaway van while directing his driver codefendant to "go, go, go" at a time when the vehicle was being operated at speeds in excess of 100 mph in 30 mph zones, clearly established that defendant was acting with the state of mind required for, and played a pivotal role in, the commission of that offense, and the unrelated motorist sustained significant physical injury when the getaway vehicle ran a steady red light and struck the motorist's vehicle. Moreover, under the extraordinary circumstances presented, removal of the lesser charges to Family Court would erode public confidence in the criminal justice system. Defendant demonstrated a reckless and depraved indifference to human life by repeatedly opening the rear doors of the getaway van and throwing large motorsport vehicles directly at marked police cars simply to avoid arrest for a commercial burglary.

**RESEARCH REFERENCES**

Am Jur 2d Juvenile Courts and Delinquent and Dependent Children §§ 10, 53, 54, 110.

Carmody-Wait 2d Juvenile, Adolescent, and Youthful Offenders §§ 206:37, 206:69.90.

McKinney's, CPL 722.23; Penal Law § 140.25 (1) (b).

NY Jur 2d Criminal Law: Procedure §§ 48.60, 48.90.

**ANNOTATION REFERENCE**

See ALR Index under Juvenile Courts and Delinquent Children.

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*786 Query: adolescent /2 offender & extraordinary /2 circumstance & prevent! /s removal /s "Family Court" & dangerous

**APPEARANCES OF COUNSEL**

*David M. Hoovler, District Attorney*, Goshen, for plaintiff.
*Natasha M. Turner*, Newburgh, for J.T., defendant.

**OPINION OF THE COURT**

Craig Stephen Brown, J.

The People move for an order preventing removal of the above captioned criminal action against defendant J.T. to the Family Court pursuant to CPL 722.23.

It is hereby ordered that the People's motion to prevent the removal of the instant criminal action against defendant J.T. to Family Court is granted.

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The court makes the following findings of fact and conclusions of law.

On December 23, 2020, the defendant J.T. was indicted on the violent felony charge of **2 burglary in the second degree in violation of Penal Law § 140.25 (1) (b), burglary in the third degree in violation of Penal Law § 140.20, grand larceny in the third degree in violation of Penal Law § 155.35 (1), criminal possession of stolen property in the third degree in violation of Penal Law § 165.50, and tampering with physical evidence in violation of Penal Law § 215.40 (2). The aforesaid felonies were allegedly committed on December 6, 2020, when the defendant was 17 years old.

The evidence submitted to the court reveals the following summary of events:

The indictment stems from an incident that occurred on December 6, 2020, in the early morning hours at Big Boyz Toys, 5512 Route 9W, Town of Newburgh, Orange County, New York. Big Boyz Toys is a business that sells powersport/motorsport products such as dirt bikes, go-karts, and various all-terrain vehicles. On December 6, 2020, the Town of Newburgh police responded to the location as a result of a call from the owner, Anthony Galimberti. Galimberti stated that he was alerted by his security system to motion at the business at a time when it was closed and when no persons had permission or authority to be there. Through remote access to his security cameras, Galimberti observed three individuals loading *787 various motorsport vehicles into a white van. When police responded to the business they observed the white van, and upon making the observation, the officer positioned his marked police vehicle perpendicular across the exit to the business in an effort to block the van's path of travel. The van promptly went around the police vehicle, over the grass, and onto Route 9W where a high-speed chase ensued. The pursuit lasted approximately eight miles and ended with a massive multiple vehicle collision in the City of Newburgh.

During the course of the pursuit, the white van traveled at speeds in excess of 100 mph in 30 mph speed zones, passed other vehicles unsafely and at high rates of speed, and disobeyed numerous traffic control devices. On multiple occasions, large motorsport vehicles were thrown from the rear doors of the van directly into the path of travel of multiple police vehicles, apparently in an effort to strike the police vehicles and allow the van to get away. The motorsport vehicles that were thrown out of the back of the van included two dirt bikes and a go-kart. One State Police vehicle was unable to avoid one of the thrown vehicles and struck the same, causing an accident and property damage. Once in the City of Newburgh, the white van ran a steady red light and struck a Jeep being operated by Brian Pajilla, causing him significant physical injury and totaling his vehicle. The white van then lost control as a result of the initial collision with the Jeep, rolled over several times, and then struck multiple parked vehicles in the lot of an auto repair shop. The van was traveling at such a high rate of speed that the force of the impact split a telephone pole in half and demolished multiple parked vehicles. As a result of the collision, Eric Ocasio (an accomplice who was a passenger in the van), DOB X/XX/97, died from the injuries he sustained. The police investigation revealed that codefendant Luis Colon was the operator of the vehicle, and defendant J.T. and Ocasio were passengers who assisted in throwing the motorsport vehicles from the rear of the van. They encouraged, solicited, requested, commanded and intentionally aided Colon to engage in the high-speed flight from police. Colon stated that defendant J.T. and Ocasio kept yelling "go, go, go" during the pursuit and both participated in throwing the motorsport vehicles from the rear of the van. Colon stated that defendant J.T. attempted to throw the vehicles out of the van alone at first, but due to his size and the size of the machines, he requested the assistance *788 of Ocasio (affirmation of Chief Trial **3 Assistant District Attorney Jason S. Rosenwasser para 3).[1]

Pursuant to CPL 722.23 (2),

> "Upon the arraignment of a defendant charged with a crime committed when he or she was sixteen or, commencing October first, two thousand nineteen, seventeen years of age on a . . . violent felony defined in section 70.02 of the penal law . . .
>
> "the court shall review the accusatory instrument and any other relevant facts for the purpose of making a determination pursuant to paragraph (c) of this subdivision." (CPL 722.23 [2] [a], [b].)

Essentially, the court must remove the case to the family court unless the prosecutor can demonstrate a basis for not doing so, as enumerated in paragraph (c). Both parties may be heard and submit information relevant to the court's determination. There is a clear presumption of removal to family court for adolescent offenders. The court is required to order the action be removed to family court in accordance with subdivision (1) unless, after reviewing the papers and hearing from the parties, the court determines in writing that the district attorney proved by a preponderance of the evidence one or more of the following: "(i) the defendant caused significant physical injury to a person other than a participant in the

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offense . . . ." (CPL 722.23 [2] [c] [i].) The indictment charges the defendant J.T. with burglary in the second degree, in violation of the provisions of section 140.25, subdivision (1) (b), of the Penal Law of the State of New York.

The indictment specifically alleges:

> "The said defendants, acting individually and in concert with each other and another, on or about the 6th day of December 2020, in the County of Orange, State of New York, did knowingly enter or remain unlawfully in a building, to wit: a structure located at 512 Route 9W, Town of Newburgh, with intent to commit a crime therein, and when effecting entry or while in the building or in immediate flight therefrom, did cause physical injury to a ***789** person who was not a participant in the crime, to wit: Brian P."[2]

This court has determined that the People have established, by a preponderance of the evidence, that the defendant J.T. "caused significant physical injury to a person other than a participant in the offense" (CPL 722.23 [2] [c] [i]). This court finds that based upon the totality of the circumstances regarding his accessorial conduct, J.T., through his actions, did cause significant physical injury to Brian Pajilla. The extreme and excessive nature of J.T.'s words and actions during the immediate flight, including throwing multiple large motorsport vehicles out the back of the van at police vehicles (striking one), while yelling at the operator of the getaway vehicle and directing him to "go, go, go" at a time when the vehicle was being operated at speeds in excess of 100 mph in 30 mph zones clearly establish that J.T. was acting with the state of mind required for the commission of that offense and that he played a pivotal role in the commission of that offense. J.T. solicited, requested, commanded, importuned, and intentionally aided Colon to commit the violent felony offense of burglary in the second degree, and a significant physical injury ****4** was caused to Brian Pajilla during the immediate flight therefrom.

Mr. Pajilla sustained significant physical injury when the getaway vehicle, traveling at a high rate of speed, ran a steady red light and struck Mr. Pajilla's Jeep. Mr. Pajilla's Jeep was totaled and Mr. Pajilla sustained numerous injuries including a meniscus tear in his left knee and injuries to his back, shoulder, and head (*see* grand jury minutes at 61-63). Mr. Pajilla has been unable to return to his job at FedEx since the date of the collision on December 6, 2020. Based upon these findings by the court, pursuant to CPL 722.23 (2) (c), defendant J.T.'s top charge of burglary in the second degree shall not be removed to the Family Court (*see People v A.T.*, 63 Misc 3d 336 [2019]; *People v Y.L.*, 64 Misc 3d 664 [2019]).

The court notes that technically the lesser charges against J.T. could be removed to the Family Court. Removal of such charges would not be in the interest of judicial economy and might result in conflicting outcomes. In addition, pursuant to CPL 722.23 (1) (d), the court finds that extraordinary circumstances exist that prevent the transfer of this criminal action to the Family Court. As stated by the People, J.T. demonstrated ***790** "a reckless and depraved indifference for human life" by opening the rear doors to a van, which was traveling at almost 100 mph, and by throwing large motorsport vehicles directly at marked police cars simply to avoid arrest for a commercial burglary. This conduct happened not once, but in three instances over the course of several miles. Simply put, his wanton behavior could easily have killed someone. That someone could have been a police officer, a passing motorist, or a pedestrian walking on the road. His egregious conduct was exceptional and highly unusual. This is not the type of conduct police encounter regularly, or ever. Moreover, it is of little consequence that this defendant was not the operator of the van. He encouraged the driver to "go, go, go" and he was the one engaged in some of the most egregious conduct by throwing multiple large vehicles containing flammable liquids from the rear of the van onto the roadway into the path of travel of other automobiles (affirmation of Chief Trial Assistant District Attorney Jason S. Rosenwasser para 17).

J.T.'s criminal history includes the following arrests: (1) theft of services and forgery, January 27, 2018, Essex County, N.J.; (2) unlawful possession of a weapon, October 22, 2019, Essex County, N.J.; (3) robbery, inflicts bodily injury and conspiracy, March 10, 2020, Essex County, N.J.; and (4) robbery, inflicts bodily injury and conspiracy, June 17, 2020, Essex County, N.J. In addition, it is uncontroverted that at the time of arraignment for the matter sub judice, the defendant J.T. was under the supervision of probation services out of Newark, New Jersey. Under the extraordinary circumstances presented herein, including the egregious and extremely dangerous conduct of J.T., removal to the Family Court is not appropriate. A transfer of the instant case to Family Court would erode public confidence in the criminal justice system. Accordingly, after considering J.T.'s individual behavior and conduct, the People's motion to prevent removal of the pending criminal action must be granted (*see e.g. People v R.U.*, 70 Misc 3d 540 [2020]).[3]

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Footnotes

1 Chief Trial Assistant District Attorney Jason S. Rosenwasser's affirmation establishes that he personally spoke to Detective John Rader of the Town of Newburgh Police Department, who interviewed the codefendant Luis Colon, and he has personally reviewed body worn camera footage of the interview.

2 While there was a fatality which resulted from defendant's actions, the decedent, Eric Ocasio, was a participant in the crime, so his death cannot and was not considered by the court in deciding the instant motion.

3 The court has considered the cases cited and relied upon by defendant in support of removal, including *People v J.P.* (63 Misc 3d 635 [2019]) and *People v M.R.* (68 Misc 3d 1004 [Sup Ct, Kings County 2020]); and the court finds those cases distinguishable. The defendant's conduct in this case was no less extraordinary or dangerous than the cases where removal has been denied.

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--- N.Y.S.3d ----, 73 Misc.3d 405, 2021 WL 4076230 (N.Y.Co.Ct.), 2021 N.Y. Slip Op. 21234

**1 The People of the State of New York, Plaintiff,
v
M.S., Adolescent Offender.

County Court, Nassau County
FYC-00000-00/000
July 6, 2021

CITE TITLE AS: People v M.S.

### HEADNOTE

Infants
Adolescent Offenders
Prevention of Removal from Youth Part to Family Court—Display of Firearm

In a criminal prosecution arising from a confrontation where the adolescent offender (AO) displayed a handgun and threatened to kill the victim, the People's application to disqualify the AO's case from removal to the Family Court was granted because the People satisfied their burden of proving by a preponderance of the evidence that the AO displayed a firearm or deadly weapon in furtherance of the offenses with which he had been charged. CPL 722.23 (2) (c) requires the court to order that an AO's case proceed towards automatic removal from the Youth Part to the Family Court unless the court finds that during the sixth-day appearance the People proved, by a preponderance of the evidence, the existence of one or more aggravating factors. One of the aggravating factors is that “the defendant displayed a firearm . . . or deadly weapon as defined in the penal law in furtherance of such offense” (CPL 722.23 [2] [c] [ii]). Here, the victim made a sworn statement that the AO pulled out a handgun so that the victim could see it and threatened to shoot the victim and his father. Likewise, the AO's own sworn statement indicated that he “pulled the gun out [from his backpack] a little bit in order to scare” the victim. The operability report entered into evidence indicated that the gun was loaded and operable. The AO's allegations that he never intended to shoot the gun at anyone, but instead just intended to scare the victim, were not germane.

### RESEARCH REFERENCES

Am Jur 2d Juvenile Courts and Delinquent and Dependent Children § 91.

Carmody-Wait 2d Juvenile, Adolescent, and Youthful Offenders § 206:37.

McKinney's, CPL 722.23 (2) (c).

NY Jur 2d Criminal Law: Procedure §§ 48.60, 48.90.

### ANNOTATION REFERENCE

See ALR Index under Juvenile Courts and Delinquent Children.

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### *406 APPEARANCES OF COUNSEL

*Joyce A. Smith, Acting District Attorney* (*Sara Schwartz* of counsel), for plaintiff.
*Jan D. Goldman* for adolescent offender.

### OPINION OF THE COURT

Conrad D. Singer, J.

The defendant in this matter, M.S. (DOB 00/00/0000), is charged as an adolescent offender (AO) in the Youth Part of the County Court in Nassau County. He is charged by court information with one count of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]); one count of criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [1]); and one count of menacing in the second degree (Penal Law § 120.14 [1]). The within decision and order is issued after the court's review of the accusatory instrument, arguments by counsel and “other relevant facts” offered at the statutory “sixth-day appearance” pursuant to CPL 722.23 (2) (b).

CPL 722.23 (2) (c) requires the court to order that an AO's case proceed towards automatic removal from the Youth Part to the Family Court unless the court finds that during the "sixth-day appearance" the People prove, by a preponderance of the evidence, the existence of one or more aggravating factors including, as relevant in this case, that "the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense" (CPL 722.23 [2] [c] [ii]).

The charges against the AO arise from an incident alleged to have occurred on June 21, 2021, at about 11:30 a.m., at a location in H., Nassau County, New York. The AO was arrested on June 21, 2021, and arraigned on June 22, 2021, at which time the court scheduled the statutory "sixth-day appearance" in this matter for June 28, 2021.

**Sixth-Day Appearance for Review of Accusatory Instrument**

At the "sixth-day appearance," the People argued that the AO's case should be disqualified from removal to the Family Court because this AO allegedly displayed a loaded firearm in furtherance of the crimes with which he has been charged. The People did not call any witnesses. Their presentation consisted of reading from the accusatory instrument and reading from the supporting depositions of the complainant, as well as from ***407** the depositions of ****2** the investigating officer and detective. A copy of the operability report (People's exhibit 1) was entered into evidence on consent, as was a copy of the AO's written statement of admission (People's exhibit 2). The People elaborated upon the allegations in the accusatory instrument with argument and additional hearsay-based facts.

The AO, through counsel, opposed the People's presentation and argued that the People failed to meet their burden for retaining the case in the Youth Part. The AO's counsel did not call any witnesses or introduce any documents into evidence. Counsel's opposition consisted primarily of arguments based on the allegations in the accusatory instrument. Counsel also made arguments which related to the AO's custody.

**Factual Allegations**

It is alleged in the accusatory instrument that on or about June 21, 2021, at about 11:30 a.m., in the area of 00 M. Street in H., Nassau County, New York, during a confrontation, the AO displayed a handgun, which is gray in color with a black handle, and threatened to kill the victim, C.P.-S. It is further alleged that the victim flagged down a passing uniformed officer, Police Officer P., who then called for assistance and conducted a small canvass that resulted in the apprehension of the AO and recovery of a fully loaded grey 22 Ruger Wrangler LR serial No. 000-0000 inside of a tan backpack that was on a couch to the left of where the AO was sitting inside of the 00 M. St. Barbershop.

The victim affirmed, in pertinent part, that on the day in question, the victim was with his father in front of a location in H., when the AO approached, pulled out a handgun, and threatened to shoot the victim and his father. Additionally, the supporting depositions of the investigating officer and detective detailed how they allegedly pulled the handgun from the AO's backpack. Pursuant to the operability report offered by the People and entered into evidence on consent (People's exhibit 1), the functionality of the weapon was tested on June 25, 2021, and the weapon was determined to be operable, as was the ammunition that was recovered from the weapon. The AO's written statement of admission that was offered by the People and entered into evidence on consent (People's exhibit 2) included the following statements:

> "I then went back into the barbershop to get my tan backpack which contained a gun that a [sic] ***408** bought for $600.00 . . . I walked out [of] [sic] the barbershop and pulled the gun out a little bit in order to scare him but I never pointed it at him" (People's exhibit 2).

In response to the People's presentation, defense counsel alleged that the victim first struck the AO in the face with brass knuckles, that the AO subsequently pulled out the gun "a little bit" to scare the victim, and that he never intended to hurt anyone.

**Conclusions of Law**

The purpose of the statutory "sixth-day appearance" is for the court to review the accusatory instrument "and any other relevant facts for the purpose of" determining whether the case should be disqualified from automatic removal to the Family Court (CPL 722.23 [2] [b], [c]). Under CPL 722.23 (2) (c), the court is required to order that an AO's case proceed towards automatic removal to the Family Court unless, after reviewing the papers and hearing from the parties at the "sixth-day appearance," the court determines in writing that the People proved, "by a preponderance of the evidence," the existence of one or more aggravating factors including, as relevant in this case, that "the defendant displayed a

firearm . . . or deadly weapon as defined in the penal law in furtherance of such offense" (CPL 722.23 [2] [c] [ii]).

The preponderance of the evidence standard " 'simply requires [that] the trier of fact . . . believe that the existence of a fact is more probable than its nonexistence before [the trier **3 of fact] may find in favor of the party who has the burden to persuade the [trier of fact] of the fact's existence' " (*Cole v Cole*, 35 NY3d 1012, 1020 [2020] [in dissent]; *Matter of Beautisha B. [Racquirine A.]*, 115 AD3d 854, 854 [2d Dept 2014]; *People v Giuca*, 33 NY3d 462, 486 [2019] [in dissent]).

CPL 722.23 (2) (b) provides that "[b]oth parties may be heard and submit information relevant to the [court's] determination." In conducting a "sixth-day appearance" to determine whether a case should be retained in the Youth Part, the court may consider the accusatory instruments, any supporting depositions, and hearsay evidence (*People v B.H.*, 62 Misc 3d 735, 739-740 [Nassau County Ct 2018]; *People v Meggie*, 184 Misc 2d 883, 886 [Nassau Dist Ct 2000]; *People v J.W.*, 63 Misc 3d 1210[A], 2019 NY Slip Op 50458[U] [Sup Ct, Kings County 2019]).

***409** Therefore, this court is tasked with determining whether the People have satisfied their burden in demonstrating, "by a preponderance of the evidence," that the AO "displayed a firearm . . . or deadly weapon as defined in the penal law in furtherance of" the crimes with which he has been charged (CPL 722.23 [2] [c] [ii]). If so, the case is disqualified from being removed to the Family Court and it remains in the Youth Part for all future proceedings.

In this case, the accusatory instrument alleges, and the People confirmed with additional hearsay-based facts and evidence at the "sixth-day appearance," that the AO removed a loaded firearm from his backpack so that the victim could see it, and threatened the victim with said firearm. A "firearm" is defined under the Penal Law to include "any pistol or revolver,"[1] and a "deadly weapon" is defined under the Penal Law to include "any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged."[2]

The term "display" is not statutorily defined. Accordingly, the court must "ascertain the legislative intent and construe the pertinent statutes to effectuate that intent" (*People v Roberts*, 31 NY3d 406, 418 [2018]). Giving effect to the "plain meaning"[3] of the term "display," and having used the "dictionary definition" as a "guidepost" to determine the "ordinary" and "commonly understood meaning" of the word,[4] the court finds that to "display" something means to "put or spread before [one's] view"; to "prominent [ly] exhibit[ ] . . . (something)" where it can easily be seen; and/or "to make evident."[5]

The court has considered the language used in the accusatory instrument, the additional hearsay-based facts asserted by the People at the "sixth-day appearance," and the documents entered into evidence. The court is particularly mindful of the victim's sworn statement that the AO pulled out a ***410** handgun so that the victim could see it and threatened to shoot the victim and ****4** his father. Likewise, the court notes the AO's own sworn statement indicating that he "pulled the gun out [from his backpack] a little bit in order to scare" the victim, and the court notes that the operability report entered into evidence indicates that the subject gun was loaded and operable. For the purpose of the "sixth-day appearance" inquiry, the court is "proceeding upon the assumption of the veracity and accuracy of the factual allegations contained" in the accusatory instrument and the additional hearsay-based facts recited by the People at the "sixth-day appearance," particularly since the AO failed to controvert any such factual allegations (*see e.g. People v Meggie*, 184 Misc 2d at 887).

In consideration of the foregoing, the court finds that the People satisfied their burden for the "sixth-day appearance" of proving, "by a preponderance of the evidence," that for the purposes of retaining this case in the Youth Part for all future proceedings, the AO "displayed a firearm . . . or deadly weapon . . . in furtherance of [the] offenses [with which he has been charged]" (CPL 722.23 [2] [c] [ii]).

The court is not persuaded to find otherwise based on defense counsel's arguments that the AO never "intended" to shoot the gun at anyone, but instead that he just intended to scare the victim. The court finds that such arguments, and the other arguments asserted by the AO's counsel in opposition, are not germane to the issue raised at the "sixth-day appearance" and if anything, may be issues to be considered by the factfinder.

For the foregoing reasons, the People's application to disqualify the AO's case from removal to the Family Court is granted, and the case will remain in the Youth Part for all future proceedings.

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Footnotes

1 Penal Law § 265.00 (3) (a).

2 Penal Law § 10.00 (12).

3 *See People v Roberts*, 31 NY3d at 418 ("As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof").

4 *People v Aleynikov*, 31 NY3d 383, 397 (2018).

5 *See* Merriam-Webster Online Dictionary, display (https://www.merriam-webster.com/dictionary/display); *see also* Oxford English Dictionary, display (https://www.lexico.com/en/definition/display); *see also People v Smith*, 29 NY3d 91, 103 (2017) (in dissent).

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New York Official Reports

72 Misc.3d 1120, 152 N.Y.S.3d 252, 2021 N.Y. Slip Op. 21200

## **1 In the Matter of Isaiah D., a Person Alleged to be a Juvenile Delinquent.

Family Court, New York County
E-00384/21
July 27, 2021

CITE TITLE AS: Matter of Isaiah D.

### HEADNOTES

Crimes
Assault
Serious Physical Injury—Serious and Protracted Disfigurement

(1) The delinquency petition charging respondent with assault and criminal possession of a weapon based on allegations that he used a knife to slash the victim's face, causing a "steady stream of blood gushing out" and a "visibly large scar," was legally sufficient. A person is seriously disfigured within the meaning of the Penal Law's definition of "serious physical injury" when a reasonable observer would find his or her altered appearance distressing or objectionable. The injury must be viewed in context, considering its location on the body and any relevant aspects of the victim's overall physical appearance. The large, prominent, puffy, dark, three-inch scar visible on the victim's face almost five months after the assault constituted "serious and protracted disfigurement" within the meaning of Penal Law § 10.00 (10). Considering the location, length and appearance of the scar, a reasonable observer would have found the scar distressing and objectionable, and since the officer's observation of the scar was made almost five months after the injury, the disfigurement was protracted. Respondent's intent to cause serious physical injury was also established, as protracted disfigurement in the form of a long unsightly scar is the natural and probable consequence of slashing the victim across his or her upper face with a sharp object. Moreover, respondent's possession of a deadly weapon or dangerous instrument could be inferred circumstantially by respondent's slashing motion on the victim's upper face, which was observed in a video, coupled with the resulting profuse bleeding and three-inch scar on the victim's face where he was slashed.

Crimes
Juvenile Offender
Collateral Estoppel—Prior Determination in Youth Part

(2) The doctrine of collateral estoppel did not preclude a Family Court juvenile delinquency proceeding alleging that respondent assaulted the victim with a knife notwithstanding a prior determination of Supreme Court's Youth Part that the prosecution failed to prove that respondent caused "significant physical injury" to the victim, as the Youth Part determination was not a final and valid prior judgment and the prosecution did not have a full and fair opportunity at the retention hearing to litigate the issue of serious physical injury. The matter concluded in the Youth Part not with a dismissal but with an order removing the case to Family Court. The retention hearing which determined whether respondent caused significant injury to the victim was an abbreviated proceeding and was held just six days after arraignment. At the hearing, no accusatory instrument was reviewed, the prosecution presented documentary evidence and no witnesses were called. The issue of "serious and protracted disfigurement" (Penal Law § 10.00 [10]), which was a critical issue in the case, could not be fully litigated at a proceeding that took place just six days after respondent's arrest, since it could not yet be determined if the victim suffered permanent scarring or protracted disfigurement. Moreover, policy considerations militated against giving preclusive effect to a determination made at a retention hearing, as the prosecutor's ***1121** incentive to litigate the issue of serious physical injury is stronger at a fact-finding hearing than at a retention hearing.

### RESEARCH REFERENCES

Am Jur 2d Assault and Battery §§ 31, 34; Am Jur 2d Judgments § 630; Am Jur 2d Juvenile Courts and Delinquent and Dependent Children §§ 53, 54, 110.

Carmody-Wait 2d Judgments §§ 63:475, 63:553; Carmody-Wait 2d Juvenile, Adolescent, and Youthful Offenders §§ 206:69.30, 206:69.90.

McKinney's, Penal Law § 10.00 (10).

NY Jur 2d Criminal Law: Procedure §§ 48.30, 48.90, 1735, 1859, 2035; NY Jur 2d Criminal Law: Substantive Principles and Offenses §§ 14, 376, 403.

**ANNOTATION REFERENCE**

See ALR Index under Assault and Battery; Collateral Estoppel; Juvenile Courts and Delinquent Children.

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**APPEARANCES OF COUNSEL**

*Dawne A. Mitchell, The Legal Aid Society, Juvenile Rights Practice*, New York City (*Israel T. Appel* of counsel), for respondent.
*James E. Johnson, Corporation Counsel*, New York City (*Nicole Atlak* of counsel), for petitioner.

**OPINION OF THE COURT**

Carol Goldstein, J.

In this delinquency matter, which had been removed from the Youth Part, a five-count designated felony petition was filed in Family Court against then 17-year-old respondent Isaiah D. Respondent moved for dismissal, making various arguments regarding the legal sufficiency of the factual allegations in the petition. The court denies the motion. The factual allegations in the petition provide reasonable cause to believe that respondent committed each crime charged (*see* Family Ct Act § 311.2 [2]) and each element of the crimes charged and respondent's ***1122** commission of those crimes were established by nonhearsay allegations (*see* Family Ct Act § 311.2 [3]).

Additionally, respondent claimed that counts 1 and 2, which require proof of serious physical injury, should be dismissed based upon collateral estoppel because at the retention hearing held in the Youth Part, the prosecution failed to prove that respondent caused "significant physical injury" to the victim (*see* CPL 722.23 [2] [c] [i]). The court finds the doctrine of collateral estoppel to be inapplicable. Two of the prerequisites for the application of the doctrine—a final and valid prior judgment and a full and fair opportunity to litigate the issue—were not established. Moreover, policy considerations strongly militate against the application of collateral estoppel giving preclusive effect to a determination made at a retention hearing.

**Initial Proceedings**

On or about July 29, 2020, respondent was arrested and charged as an adolescent ****2** offender in the Youth Part of New York County Supreme Court. The felony complaint filed against respondent alleged that he committed assault in the first degree (Penal Law § 120.10 [1]) and related offenses. On August 7, 2020, following a retention hearing held in the Youth Part pursuant to CPL 722.23 (2), the Youth Part judge found that the prosecution did not establish that the victim suffered "significant physical injury" and the matter was not retained in the Youth Part on this basis. On November 17, 2020, the Youth Part judge denied the prosecution's subsequent motion to prevent the removal of respondent's case to Family Court based upon extraordinary circumstances (*see* CPL 722.23 [1], [2] [c]) and issued an order of removal to the Family Court.

On January 13, 2021, the New York City Corporation Counsel, the presentment agency, filed the instant designated felony petition in New York County Family Court. The five-count petition charged that on July 19, 2020, respondent committed acts constituting: assault in the first degree (Penal Law § 120.10 [1]) (count 1); assault in the second degree (Penal Law § 120.05 [1]) (count 2); assault in the second degree (Penal Law § 120.05 [2]) (count 3); assault in the third degree (Penal Law § 120.00 [1]) (count 4) and criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [2]) (count 5).

Annexed to the petition are two supporting depositions. A deposition by Police Officer Justin Ortiz, shield No. 7862, of the 25th Precinct Detective Squad signed on January 7, 2021, states that on July 19, 2020:

> ***1123** "Pursuant to an investigation of an assault in front of 2258 Third Avenue, New York, I interviewed complainant Rodney White inside of Harlem Hospital Emergency Room. While interviewing Rodney White inside of Harlem Hospital, I observed that his head was bandaged with blood on the right side of his face. Pursuant to my investigation, on July 19, 2020, I went to retrieve video surveillance from the buildings located at 2258 Third Avenue and 2256 Third Avenue, New York, NY[.] I, subsequently, viewed the video surveillance from 2258 Third Avenue and observed

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that the camera captured east side of Third Avenue. On or about July 19, 2020, I made a copy of the video surveillance depicting the above-mentioned date, time, and location. When I made the copy, said surveillance cameras and related computer equipment were in proper working condition. The date and time stamp reflected in the video surveillance from that date and time is accurate. I then downloaded the footage which depicted the events as they occurred on July 19, 2020 at 5:00 PM in front of 2258 Third Avenue, New York, NY onto my USB.

"On the above described video surveillance, I observed complainant Rodney White wearing a red shirt and black shorts approach the entrance door of the store located at 2258 Third Avenue, New York, NY[.] I observed that Rodney White did not enter the store and walked towards the curb. I then observed Respondent Isaiah D. who was wearing a white tank top, red shorts and had a small afro hairstyle approach complainant Rodney White from the complainant's right side with a raised arm. Respondent Isaiah D. made a slashing motion from the top of Rodney White's head to about his eyebrow on the right side of Rodney White's face. I then observed Respondent Isaiah D. walk across the street towards the Taino Towers."

A second supporting deposition by Police Officer Amanda Proietto, shield No. 24791, signed on January 6, 2021, states that on July 19, 2020:

"I was working in my capacity as a Police Officer with the New York City Police Department. Pursuant to an investigation of an assault which occurred at the above date, time, and place [in front of 2258 ***1124** Third Avenue, New York, NY at approximately 5:00 ****3** p.m.], I responded to the vicinity of 121st Street and 3rd Avenue at 5:16 PM. At that location I observed an individual whom I know to be Rodney White. I observed Mr. White was wearing a red T-shirt, grey shorts and white sneakers. When I approached Rodney White, I observed a steady stream of blood gushing out of the right side of Rodney White's forehead. The blood covered his entire face. As a result, Rodney White's T-shirt was also drenched with blood. The bleeding would not stop as I and other officers placed gauze on the wound until EMS arrived.

"On or about December 15, 2020, I visited Rodney White. On December 15, 2020, immediately noticed a large visible scar where I had previously observed Rodney White bleeding from on July 19, 2020. I observed a visibly large scar that was dark in color, raised and puffy, approximately 3 inches in length, which extended vertically on the right side of Rodney White's face from the top of his forehead to his eyebrow."

On April 16, 2021, respondent filed the instant motion seeking dismissal of the delinquency petition, claiming that the petition did not establish reasonable cause to believe respondent committed each crime charged and that each element of the crimes charged and respondent's commission thereof was not established by nonhearsay allegations. Respondent also sought dismissal of counts 1 and 2 of the petition on the grounds that the determination at the retention hearing that the prosecutor did not prove that respondent caused "significant physical injury" to the victim collaterally estopped the presentment agency from proving at trial that the victim suffered "serious physical injury."[1] For the reasons explained below, respondent's motion is denied in all respects.

**Legal Sufficiency of the Petition**

The delinquency petition is "the sole instrument for the commencement, prosecution, and adjudication of the juvenile delinquency proceeding" (*Matter of Jahron S.*, 79 NY2d 632, 636 [1992], citing *Matter of Detrece H.*, 78 NY2d 107, 110 [1991]). A ***1125** petition is legally sufficient on its face when the factual allegations "provide reasonable cause to believe that the respondent committed the crime or crimes charged" (Family Ct Act § 311.2 [2]) and the "non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof" (Family Ct Act § 311.2 [3]). A petition that is legally insufficient is defective and subject to dismissal under Family Court Act § 315.1 (1) (a).

In his motion for dismissal, respondent makes several arguments regarding the legal sufficiency of the instant petition. First, respondent argues that the identity of respondent as the perpetrator was not established by legally sufficient factual allegations. The deposition of Officer Ortiz states that he viewed the surveillance video of the incident and observed "Respondent Isaiah D." approach the victim and make a "slashing motion" from the top of the victim's head to his eyebrow. Respondent claims that this identification of the respondent by Officer Ortiz is merely conclusory because there is no indication in his deposition as to how he

knew that Isaiah D. was the person he observed in the video and furthermore that there were no nonhearsay allegations establishing respondent's identity as the perpetrator.

Pursuant to Court of Appeals precedent, this court must look exclusively at the four corners of a petition to determine its legal sufficiency. If there is merely a latent defect in the petition, i.e., one that is not apparent on its face, the petition is not subject to dismissal under Family Court Act § 315.1 (1) (*Matter of Edward B.*, 80 NY2d 458, 462 [1992]; *see also* ****4** *People v Slade*, 37 NY3d 127 [2021]).

Here, Officer Ortiz's statement that the person he observed in the video slashing the victim's face was Isaiah D. is legally sufficient to establish respondent's identity. While it would have been useful, and even preferable, for the officer to state exactly how he knows respondent's name, a plain reading of the supporting deposition of Officer Ortiz leads to the conclusion that the identification was based upon the officer's personal knowledge of respondent and thus establishes by nonhearsay allegations that respondent is the perpetrator.[2]

***1126** Respondent also argues that the identification of respondent as the perpetrator is legally insufficient because the surveillance video from which the identification was made was not authenticated. The court disagrees. Authentication of a video surveillance camera does not require any special expertise. Officer Ortiz alleges that the surveillance camera and related computer equipment were in proper working order based upon his personal observations: (1) that the camera focused on the east side of Third Avenue, where the incident occurred, and (2) that the time and date stamp on the video were accurate.[3] These two statements are sufficient to demonstrate by nonhearsay allegations that the video surveillance camera was in proper working order.

With respect to the element of serious physical injury, which is an essential element of counts 1 and 2 of the petition, respondent contends that the court cannot consider the delegated and certified hospital records because, while they constitute admissible hearsay, they are unsworn. The court agrees with respondent on this point and is not considering the hospital records in evaluating whether the delinquency petition is legally sufficient as to the element of serious physical injury.

*People v Casey* (95 NY2d 354, 361 [2000]) holds that the nonhearsay requirement is met so long as the hearsay statements contained in the accusatory instrument would be admissible under some hearsay rule exception (*id.* at 360; *see also Matter of Rodney J.*, 108 AD2d 307, 311 [1st Dept 1985] [the term nonhearsay in Family Ct Act § 311.2 refers only to hearsay that is not admissible at trial]). Here, the hospital records fit squarely into the business records exception to the hearsay rule as they were properly certified and delegated and would be admissible at trial (*see* CPLR 4518 [c]; 2306).[4] However, the fact that the records were not sworn runs afoul of the requirement that the nonhearsay allegations in the petition must be sworn (*see Matter of Neftali D.*, 85 NY2d 631, 636 [1995]; *Matter of Nelson R.*, 90 NY2d 359, 362 [1997]).

***1127** The Court of Appeals has not addressed what is required for admissible hearsay contained in a petition to be treated as sworn nonhearsay allegations, which may establish an ****5** element of the crime charged.[5] In *Rodney J.* (at 311), the First Department held that an unsworn signed written confession made by a respondent (which is admissible hearsay) annexed to an officer's deposition that respondent made statements should be treated as sworn allegations. Extrapolating from *Rodney J.*, this court concludes that for an unsworn admissible hearsay statement to be treated as a sworn allegation, it must be annexed to a supporting deposition which attests to the foundational basis of its admissibility. For example, in the instant case, the hospital records could be annexed to supporting depositions provided by appropriate representatives of the hospital swearing to the delegation of authority and the certification of the records.

Respondent argues that with or without the hospital records, the petition does not establish by legally sufficient nonhearsay evidence that the victim suffered serious physical injury. The court disagrees, finding that based upon the nonhearsay supporting deposition of Officer Proietto, without consideration of the hospital records, serious physical injury is established.

"Serious physical injury" is defined in Penal Law § 10.00 (10) as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." Pursuant to *People v McKinnon* (15 NY3d 311, 315 [2010]), a person is seriously disfigured "when a reasonable observer would find her [or his] altered appearance distressing or objectionable." The Court of Appeals added that "the injury must be viewed in context, considering its location on the

body and any relevant aspects of the victim's overall physical appearance" (*id.*).

Officer Proietto swore that on July 19, 2020, the night of the incident, she observed a steady stream of blood "gushing out" ***1128** of the right side of the victim's forehead. She further swore that on or about December 15, 2020, almost five months later, when she visited the victim, she "immediately noticed a large visible scar" where she had previously observed the victim bleeding on July 19, 2020. Officer Proietto stated that she "observed a visibly large scar that was dark in color, raised and puffy, approximately 3 inches in length, which extended vertically on the right side of [the victim's] face from the top of his forehead to his eyebrow."

(1) The court finds that a large, prominent, puffy, dark, three-inch scar visible on the victim's face almost five months after an assault constitutes "serious and protracted disfigurement." In making this determination, the court is considering the location of the scar, on the victim's face; the length of the scar, three inches; and its appearance, "dark in color, raised and puffy." A reasonable observer would find such a scar "distressing and objectionable." Further, this court is considering that the observation of Officer Proietto was made almost five months after the injury, and thus the disfigurement was protracted.

Respondent also argues that the factual allegations in the petition do not establish ****6** respondent's intent to cause serious physical injury to the victim. The court disagrees. The intent of the accused may be established by the "natural and necessary and probable consequences of the act done by him" (*People v Getch*, 50 NY2d 456, 465 [1980]). Here, protracted disfigurement in the form of a long unsightly scar is the natural and probable consequence of slashing the victim across his upper face with a sharp object. Thus, respondent's intent to cause the victim serious physical injury was established by the allegations in the petition.

Finally, respondent is incorrect in his contention that counts 1 and 3 (which require the use of a deadly weapon or a dangerous instrument) and count 5 (which requires the possession of a dangerous or deadly instrument or weapon with intent to use unlawfully) are legally insufficient because there is no allegation either that respondent was observed with a weapon or that a weapon was recovered after the incident. Possession of a deadly weapon or dangerous instrument may be inferred circumstantially by the respondent's slashing motion on the victim's upper face, which was observed in the video, coupled with the resulting profuse bleeding and three-inch scar on the location on the victim's face where he was slashed (*see Matter of Mariela V.*, 23 AD3d 569, 570 [2d Dept 2005] [possession of ***1129** dangerous instrument legally established in petition by nonhearsay allegations that victim sustained "long, thin, curving scar" on forehead and "shorter, straight line scars on each temple"]).

**Collateral Estoppel**

Respondent also argues that the presentment agency is collaterally estopped from charging him with causing serious physical injury, a necessary element of count 1, assault in the first degree (Penal Law § 120.10 [1]), and count 2, assault in the second degree (Penal Law § 120.05 [1]). Respondent's argument is based upon the fact that at the retention hearing held in the Youth Part, the district attorney failed to establish by a preponderance of evidence that respondent caused the victim "significant physical injury" which, according to respondent, is less than serious physical injury. For the reasons discussed below, the court finds that collateral estoppel is inapplicable to the facts and circumstances of this case.

Collateral estoppel, also known as "issue preclusion," is a "common-law doctrine rooted in civil litigation that, when applied, prevents a party from relitigating an issue decided against it in a prior proceeding" (*People v Aguilera*, 82 NY2d 23, 29 [1993] [citations omitted]). In a criminal context, it is not applied in the same manner as in a civil action (*id.*). The formal prerequisites in the criminal context are "identity of the parties; identity of issues; a final and valid prior judgment; and a full and fair opportunity to litigate the prior determination" (*id.* at 29-30).

Additionally, the Court of Appeals emphasized that in the criminal context there may be countervailing policies that may at times outweigh the doctrine (*Aguilera* at 30). As the Court of Appeals stated in *People v Fagan* (66 NY2d 815, 816 [1985]), because the correct determination of guilt or innocence is paramount in criminal cases, "[s]trong policy considerations militate against giving issues determined in prior litigation preclusive effect in a criminal case, and indeed we have never done so." These same policy considerations apply to the fact-finding stage of a delinquency matter, where it is likewise critical for guilt or innocence to be correctly decided.

Looking at the prerequisites for the application of collateral estoppel as well as policy considerations leads this court to conclude that the doctrine is inapplicable here.

In considering the issue of collateral estoppel in the instant case, it is useful to review the relevant procedure for the removal ***1130** of a matter from the Youth Part in the Supreme Court to the Family Court. Where a young person aged 16 or 17 is charged with a felony, he or she is charged as an adolescent offender and the matter is initially heard in the Youth Part. Where the charge is a ****7** nonviolent felony, the matter is removed to the Family Court unless the district attorney files a motion to prevent removal based upon extraordinary circumstances (*see* CPL 722.23 [1] [a]). Where the charge is a violent felony, as was respondent's charge in the instant case, the matter is calendared in the Youth Part within six days of arraignment for a determination as to whether the defendant caused significant physical injury to a person other than a participant; displayed a firearm or other deadly weapon; or engaged in certain unlawful sexual conduct (*see* CPL 722.23 [2]). This calendar appearance is called a retention hearing. The statute provides that at a retention hearing, the court reviews the accusatory instrument and any other relevant facts and that both the prosecution and the defense have the opportunity to submit relevant information (CPL 722.23 [2] [b]). The statute does not preclude hearsay or require witnesses to testify. At the conclusion of the retention hearing, if the court determines that the district attorney has proved one of the above three factors by a preponderance of the evidence, the matter is retained in the Youth Part (CPL 722.23 [2] [c]). If not, the matter will be removed to Family Court, unless the district attorney thereafter files a motion to prevent removal based on extraordinary circumstances and the court makes such a finding (CPL 722.23 [1], [2] [c]).

(2) In the instant case, respondent was charged with a violent felony and the matter was initially heard in the Youth Part. The prosecution contended that respondent caused "significant physical injury" to the victim and the matter was adjourned for six days for a retention hearing. At the retention hearing, held on August 6, 2020, the presiding judge in the Youth Part reviewed the accusatory instrument and the documents submitted by the prosecution, including the victim's hospital records, and heard arguments of counsel. No testimony was taken. The court reserved decision and the next day, on August 7, 2020, determined that the prosecution had not established that respondent caused significant physical injury to the victim because the victim refused medical attention and had not received stitches, and there was no current photograph of the victim's injuries. On November 17, 2020, the Youth Part ***1131** judge denied the prosecution's subsequent motion to prevent removal based upon extraordinary circumstances and issued an order removing the case to Family Court.

While arguably, the first two prerequisites for the application of collateral estoppel—identity of parties and identity of issues—were met,[6] the second two prerequisites—a final and valid prior judgment and a full and fair opportunity to litigate the issue—were not established.

First, the court finds that there was not a final and valid prior judgment in the Youth Part. The matter concluded in the Youth Part, not with a dismissal, but rather with an order removing the case to Family Court.

Moreover, the prosecution did not have a full and fair opportunity to litigate the issue of ****8** serious physical injury. The retention hearing in the Youth Part which determined whether respondent caused significant injury to the victim was an abbreviated proceeding and was held just six days after arraignment. At the hearing, the accusatory instrument was reviewed, and the prosecution presented documentary evidence. No witnesses were called. Significantly, the issue of "serious and protracted disfigurement," which is a critical issue in this case, could not be fully litigated at a proceeding that took place just six days after respondent's arrest. At that date, it could not yet be determined if the victim suffered permanent scarring or protracted disfigurement from being slashed on his forehead. This determination could only be made by observing the victim a number of months after the incident.

Additionally, policy considerations strongly militate against the application of collateral estoppel giving preclusive effect to a determination made at a retention hearing. The determination ***1132** to be made at that hearing was whether respondent's case should be transferred to Family Court, not the paramount determination of respondent's guilt or innocence as to any of the counts charged. The circumstances in the instant case are analogous to those in *People v Fagan* (66 NY2d 815 [1985]) where the Court of Appeals found that the dismissal of charges at a final parole revocation hearing did not bar a subsequent criminal prosecution for the same acts. In so ruling, the *Fagan* Court noted that "the People's incentive to litigate in a felony prosecution would presumably be stronger than in a parole revocation proceeding" (*id.* at 816; *see also People v Hilton*, 95 NY2d 950 [2000] [collateral

estoppel does not bar criminal prosecution after termination of probation violation hearing in favor of the accused]). The same could be said in the instant matter, that the prosecutor's incentive to litigate the issue of serious physical injury is stronger at a fact-finding hearing than at a retention hearing. Thus, even if all prerequisites for invoking the doctrine of collateral estoppel were met, the court would not apply the doctrine in the instant case.

For the reasons stated above, the court denies respondent's motion to dismiss the delinquency petition or any counts therein.

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Footnotes

1 The presentment agency filed response papers in opposition on May 6, 2021. Respondent filed a reply on May 11, 2021, and a supplemental affirmation on May 28, 2021.

2 The court is aware that according to the felony complaint filed in the Youth Part on July 29, 2020, Officer Ortiz initially learned respondent's identity from an unnamed individual who identified respondent from a still photo obtained from the surveillance video. However, assuming, arguendo, that Officer Ortiz based his identification of respondent upon hearsay, which was not laid out in the petition, this would be the type of latent defect which would not render the petition subject to dismissal for legally insufficiency.

3 Officer Ortiz was aware of the date and time of the incident and could readily see if the date and time stamp on the video surveillance matched that date and time of the incident.

4 Contrary to respondent's argument, the hospital records were not redacted in any way which would render them inadmissible.

5 In *Matter of Markim Q.* (7 NY3d 405 [2006]), the Court of Appeals had the opportunity to rule on the issue of whether business records that are certified, and delegated, but unsworn, may support a delinquency petition, but declined to reach this issue. In *Markim Q.*, for the first time on appeal, the juvenile respondent challenged the sufficiency of a violation of probation petition—which is required by Family Court Act § 360.2 (2) to be supported by nonhearsay allegations, but was supported by certified and delegated, but unsworn, school records. The Court of Appeals found that, unlike defects in the delinquency petitions, defects in violation of probation petitions could not be raised for the first time on appeal and thus did not rule on this issue.

6 With respect to the identity of the parties, while acting as the presentment agency in a delinquency matter, the Corporation Counsel of the City of New York might be deemed to be in a sufficient relationship with the district attorney to meet the requirement of identity of parties (*cf. People ex rel. Dowdy v Smith*, 48 NY2d 477 [1979] [for purposes of collateral estoppel, prosecutors found to be in sufficient relationship with the State Division of Parole]).

It also could be argued that there is identity of issues. Although the term "significant physical injury" as used in CPL 722.23 (2) (c) (i) is left undefined, the legislators, who could not agree on a definition, "expected [that] the courts would define [it] as more than 'physical injury' but less than 'serious physical injury' " (William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, CPL 722.10, Removal of "Adolescent Offender"). Therefore, it is arguable that a failure to establish significant physical injury would amount to a failure to establish serious physical injury.

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73 Misc.3d 293
County Court, New York,
Nassau County.

# The **PEOPLE** of the State of New York,
v.
**V.A.M.**, Adolescent Offender.

Decided on August 2, 2021

**Synopsis**

**Background:** Adolescent offender was charged with attempted assault in the first degree, assault in the second degree, criminal mischief in the third degree, criminal possession of a weapon in the fourth degree, and three counts of endangering the welfare of a child. The **People** applied to disqualify the case from removal to family court.

**[Holding:]** The County Court, Conrad D. Singer, J., held that the **People** failed to establish that victim sustained a significant physical injury.

Application denied.

West Headnotes (5)

[1] **Infants**

To establish a fact by a "preponderance of the evidence," as necessary to preclude a criminal proceeding against an adolescent offender from being removed to family court, means to prove that the fact is more likely than not to have occurred. N.Y. CPL § 722.23(2)(c).

[2] **Infants**

In determining whether the **People** have satisfied their burden to prove, by a preponderance of the evidence, one or more aggravating factors that would preclude removing a criminal proceeding against an adolescent offender to family court, County Court may consider the accusatory instrument, any supporting depositions, as well as hearsay evidence. N.Y. CPL § 722.23(2)(c).

[3] **Infants**

The purpose of the sixth-day appearance after arraignment of an adolescent offender charged with a crime is for court to review the accusatory instrument and other relevant facts to determine whether the **People** proved, by a preponderance of the evidence as set forth in the accusatory instrument, the presence of one or more of three aggravating statutory factors which disqualify the case from proceeding toward removal to family court. N.Y. CPL § 722.23(2).

[4] **Infants**

A "significant physical injury," an aggravating factor which would disqualify a criminal case against an adolescent offender from proceeding toward removal to family court, falls somewhere in between a "physical injury" and a "serious physical injury", as defined in the Penal Law. N.Y. CPL § 722.23(2)(c)(i); N.Y. Penal Law §§ 10.00(9), 10.00(10).

[5] **Infants**

The **People** failed to establish that victim sustained a "significant physical injury," an aggravating factor that would disqualify second-degree assault case against accused adolescent offender from proceeding toward removal to family court, even though victim needed seven sutures to close her seven knife-inflicted wounds, victim allegedly suffered substantial pain, and circumstances surrounding the alleged assault were highly concerning; the **People** proffered no evidence that victim required extended treatment or hospitalization beyond the date of the incident, legislators intended "significant physical injury" to have features and results that went significantly beyond the "substantial pain" element of physical injury, and court's inquiry was limited to injuries sustained by victim. N.Y. CPL § 722.23(2)(c)(i); N.Y. Penal Law §§ 10.00(9), 120.05(2).

**Attorneys and Law Firms**

N. Scott Banks, Attorney in Chief, Legal Aid Society of Nassau County, By: Taryn, Shechter, Esq.

Counsel for Adolescent Offender V.M., Hon. Joyce A. Smith, Acting Nassau County District Attorney, By: Joan Owhe, Esq.

**Opinion**

Conrad D. Singer, J.

*1 The Adolescent Offender ("AO") in this matter is charged with one count of Attempted Assault in the First Degree (Penal Law §§ 110.00/120.10[1]); one count of Assault in the Second Degree (Penal Law § 120.05[2]); one count of Criminal Mischief in the Third Degree (Penal Law § 145.05[2]); one count of Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01[2]); and three counts of Endangering the Welfare of a Child (Penal Law § 260.10[1]). The within Decision and Order is issued after the Court's review of the accusatory instrument, arguments by counsel, documents received into evidence and other relevant facts pursuant to CPL § 722.23(2)(b).

The charges against the AO arise from an incident alleged to have occurred on July 18, 2021 at approximately 1:30 AM at a location in H., Nassau County, New York. The AO was arrested on July 18, 2021 and arraigned on July 19, 2021. On July 22, 2021, the Court conducted its statutory review of the accusatory instrument pursuant to CPL § 722.23(2).

[1] Under CPL § 722.23(2)(c), the AO's case must proceed towards being removed to the Family Court unless the Court finds during the sixth-day appearance that the **People** prove, by a preponderance of the evidence, the existence of one or more aggravating factors. Such factors include, as relevant in this case, that: "[i] the defendant caused significant physical injury to a person other than a participant in the offense". (CPL § 722.23[2][c][i]). "To establish a fact by a preponderance of the evidence means to prove that the fact is more likely than not to have occurred". (*Matter of Beautisha B.*, 115 A.D.3d 854, 854, 982 N.Y.S.2d 351 [2d Dept. 2014]; ***People*** *v. Giuca*, 33 N.Y.3d 462, 486, 104 N.Y.S.3d 577, 128 N.E.3d 655 [2019] [*in dissent*]).

[2] In determining whether the **People** have satisfied their burden under CPL § 722.23(2)(c), the Court may consider the accusatory instrument, any supporting depositions, as well as hearsay evidence. (***People*** *v. B.H.*, 62 Misc. 3d 735, 739-740, 89 N.Y.S.3d 855 [Nassau County Ct. 2018]; ***People*** *v. J.W.*, 63 Misc. 3d 1210[A], 114 N.Y.S.3d 584 [Sup. Ct. Kings County 2019]; ***People*** *v. Y.L.*, 64 Misc. 3d 664, 104 N.Y.S.3d 839 [Monroe County Ct. 2019]; *see also*, CPL § 722.23[2][b]).

***SIXTH***

***DAY APPEARANCE FOR REVIEW OF ACCUSATORY INSTRUMENT***

At the sixth-day appearance, the **People** relied upon the allegations set forth in the Felony Complaint, offered into evidence photographs depicting the victim's injuries, and asserted additional hearsay-based information. The **People** contended that this case should be retained in the Youth Part because the AO caused the victim, who is his girlfriend and the mother of his 10-month-old child, to sustain significant physical injury when he slashed/stabbed her with a kitchen knife multiple times in the presence of his child, his 11-year-old sister and his 14-year-old brother.

*2 Defense counsel argued in opposition to the **People's** presentation that the **People** failed to satisfy their burden of proving, by a preponderance of the evidence, that the AO caused the victim to sustain "significant physical injury". Defense counsel argued that "significant physical injury" requires aggravating factors that are not present in this case, such as bone fractures and/or injuries that require surgery. Defense counsel further argued that the **People** did not present any evidence showing that the victim required any after care, further treatment or experienced any impairment past the date that she was injured.

***FINDINGS OF FACT***

It is alleged in the Felony Complaint that at about 1:30 AM on July 18, 2021, the AO was involved in an argument with the 15-year-old victim while they were at his home at 350 Washington St., No. B 14 in H., Nassau County, New York. It is further alleged that the victim is the AO's girlfriend and the mother of his 10-month-old daughter, and that the AO's daughter, as well as his 11-year-old sister and 14-year-old brother, were present during the subject incident. It is further alleged that the AO intentionally broke the victim's phone by forcefully throwing it against his bedroom wall, causing the

screen to shatter. The AO allegedly assaulted the victim by repeatedly slashing her with a large kitchen knife about her left leg, her left arm, and the right side of her chest, causing multiple lacerations and puncture wounds, and that he did this in the presence of his daughter and his two siblings. It is further alleged that the victim's injuries caused her substantial pain and required numerous stitches to control the bleeding.

At the sixth day appearance the **People** further alleged that the AO stabbed/slashed the victim seven times-- five times in her left leg, once in her left arm, and once under her breast-- while the victim was huddled into a ball on the floor to protect herself. The **People** further alleged that the AO's conduct caused the victim to sustain deep gaping wounds, and that seven sutures were required to close the wounds. Five photographs were entered into evidence on consent (**People's** Exhibit No. 1), which depict the victim's injuries while she lay in the hospital following the incident.

### *LEGAL CONCLUSIONS*

[3] As stated above, the purpose of the sixth-day appearance under CPL 722.23[2] is for the Court to review the accusatory instrument and "other relevant facts" to determine whether the **People** proved, by a preponderance of the evidence as set forth in the accusatory instrument, the presence of one or more of three aggravating statutory factors which disqualify the AO's case from proceeding toward removal to the Family Court; including, as relevant here, that: "[i] the defendant caused significant physical injury to a person other than a participant in the offense". (CPL § 722.23[2][c][i]). Both parties may be heard and submit information relevant to the Court's determination. (CPL § 722.23[2][b]).

[4] As the term "significant physical injury" is not statutorily defined under CPL § 722.23, the Court is tasked with ascertaining the "legislative intent" and construing CPL § 722.23 to effectuate that intent. (***People** v. Roberts*, 31 N.Y.3d 406, 418, 79 N.Y.S.3d 597, 104 N.E.3d 701 [2018]). Having referred to the "dictionary definition" of "significant" as a "useful guidepost" for the "ordinary" and "commonly understood"[1] meaning of the phrase "significant physical injury", and having referred to the legislative history for the "Raise the Age" ["RTA"] legislation as a further aid in construing the meaning of the phrase[2], the Court finds that the legislators contemplated that the courts would define the phrase "significant physical injury", and that they intended the definition of the phrase to "fall somewhere in between" a "physical injury" and a "serious physical injury", both of which are phrases defined elsewhere in the Penal Law[3].

*3 Legislators debating the RTA bill indicated that they expected "aggravating factors" to accompany "significant physical injury", including "bone fractures, injuries requiring surgery and injuries that result in disfigurement". (*Assembly Record, dated April 8, 2017* ["Assembly Record"], p. 26). "Significant physical injury" was elsewhere summarized as being "something more serious than a bruise, but less serious than a disfigurement". (*Assembly Record,* p. 27). The legislators further advised that in order to qualify as "significant physical injury", the injury "must have features and results that go[ ] significantly beyond those of physical injury". (*Assembly Record*, p. 49).

[5] This Court has on prior occasions found that a knife-inflicted injury or injuries constituted "significant physical injury" [*see **People** v. K.F.*, 67 Misc. 3d 607, 125 N.Y.S.3d 233 [Nassau County Ct. 2020]; and ***People** v. J.A.*, 66 Misc. 3d 1226[A], 122 N.Y.S.3d 492 [Nassau County Ct. 2020]). Having compared the features of the victim's injury in this case, to the injuries in those previous cases where "significant injury" was found and having also compared the features of the victim's injuries in this case with those of knife wounds in cases decided in other courts[4], the Court is constrained to find that the **People** failed to establish that the victim in this case sustained a "significant physical injury". The victim in this case is reported to have needed seven sutures total to close her multiple wounds. However, the **People** proffered no evidence that the victim required extended treatment or hospitalization beyond the date of the incident. While they allege that the victim sustained "substantial pain", the Court notes that "substantial pain" is an element of "physical injury" and that the legislators intended "significant physical injury" to have features and results that "go significantly beyond those of physical injury". (*Assembly Record*, p. 49).

While the Court finds the circumstances surrounding the AO's alleged assault on the victim to be highly concerning, including that he assaulted his girlfriend and the mother of his child while she huddled on the ground in an effort to protect herself, and that the alleged assault took place in front of the AO's infant child and younger siblings, the Court's inquiry is limited to the injuries sustained by the victim and, in this case, the Court finds that the **People** have failed to establish that the victim sustained a "significant physical injury".

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As the **People** have failed to satisfy their burden under CPL § 722.23(2)(c), their application to disqualify the AO's case from removal to the Family Court is denied at this time, and it is ordered that the action shall proceed toward removal to the Family Court in accordance with subdivision one of CPL § 722.23. Absent the **People** filing a motion opposing removal based on Extraordinary Circumstances, the AO's case must be removed to the Family Court on or before August 18, 2021 (30 days after the AO was arraigned in the Youth Part).

***4** This constitutes the opinion, decision and order of this Court.

**All Citations**

--- N.Y.S.3d ----, 73 Misc.3d 293, 2021 WL 3628890, 2021 N.Y. Slip Op. 21219

Footnotes

1 *See **People** v. Andujar*, 30 N.Y.3d 160, 163, 66 N.Y.S.3d 151, 88 N.E.3d 309 [2017])

2 ***People** v. Andujar*, 30 N.Y.3d at 166, 66 N.Y.S.3d 151, 88 N.E.3d 309.

3 "Physical injury" is defined as "impairment of physical condition or substantial pain" [Penal Law § 10.00(9)]; "Serious physical injury" is defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ".

4 *See **People** v. Brown*, 95 A.D.3d 1229, 945 N.Y.S.2d 334 [2d Dept. 2012] [penetrative wound of approximately one inch caused by stabbing and where victim was required to undergo laparoscopic surgery and reported pain level of "7" on scale of "1 to 10" constituted "physical injury"] and ***People** v. Williams*, 301 A.D.2d 669, 754 N.Y.S.2d 338 [2d Dept. 2003] [victim's hand being cut with knife and requiring victim to receive multiple stitches to close the wound and preventing the victim from using the hand or returning to work for several weeks and causing him to experience pain in his hand for several months thereafter constituted "physical injury"]; *see also **People** v. Rudenko*, 151 A.D.3d 1084, 54 N.Y.S.3d 597 [2d Dept. 2017] [victim sustained "serious physical injury" where he sustained two knife wounds, including a deep stab wound to the left of the anterior chest wall about three inches from his heart, and developed a hematoma in the muscle of his chest, and was required to undergo surgery under general anesthesia and where medical expert testified that, if the hematoma had been left untreated the victim could have died]).

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Unreported Disposition
68 Misc.3d 1208(A), 129 N.Y.S.3d
684 (Table), 2020 WL 4461949
(N.Y.Fam.Ct.), 2020 N.Y. Slip Op. 50889(U)

**This opinion is uncorrected and will not be published in the printed Official Reports.**

*1 People of the State of New York
v.
C. S., Defendant.

Family Court, Onondaga County
FYC-70106-20/001
Decided on July 30, 2020

CITE TITLE AS: People v C.S.

## ABSTRACT

Infants
Adolescent Offenders
Extraordinary circumstances existed to prevent removal of assault matter to Family Court

*People v C.S.*, 2020 NY Slip Op 50889(U). Infants—Adolescent Offenders—Extraordinary circumstances existed to prevent removal of assault matter to Family Court. Criminal Procedure Law § 722.23 (1) (d) (Removal of adolescent offenders to Family Court; extraordinary circumstances preventing removal). (Fam Ct, Onondaga County, July 30, 2020, Bogan, J.)

## APPEARANCES OF COUNSEL

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## OPINION OF THE COURT

Vanessa E. Bogan, J.

The People have moved this Court to find extraordinary circumstances are present and sufficient to prevent the removal of the case under FYC-70106-20/001 (DR NO.: 20-299358) to Family Court. After proper review and due consideration, the Court provides the following written decision:

## DECISION AND ORDER

The defendant C. S. (d.o.b. XX/XX/2003) is an adolescent offender. He was charged with Assault in the Second Degree in violation of Penal Law § 120.05(7) regarding an incident that is alleged to have occurred on June 8, 2020 at the Hillbrook Juvenile Detention Center, 4949 Velasko Road, Town of Onondaga, New York.

*PROCEDURAL HISTORY*

1. The defendant was arrested, while already in custody at the Hillbrook Juvenile Detention Center on an unrelated criminal charge, on June 8, 2020 by the Onondaga County Sheriff's Office.

2. The defendant was arraigned before me in Youth Part on June 12, 2020 and entered a plea of "Not Guilty." The Preliminary Examination and six-day review were scheduled for June 17, 2020 and the defendant's remand to custody was continued.

3. On June 17, 2020, the Preliminary Examination was adjourned to June 24, 2020 upon the consent of counsel. The six-day review was also adjourned upon counsel's consent for purposes of obtaining more detailed medical records pertaining to the victim's injuries.

4. On June 24, 2020, the People advised the Court and defense counsel that they were not going to proceed on the Preliminary Examination. The defendant reserved his rights under CPL § 180.80. Upon counsel's consent, the six-day review was adjourned to June 29, 2020 to allow the People an opportunity to obtain additional medical records.

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5. On June 29, 2020, the six-day review was adjourned upon consent of counsel to July 6, 2020.

6. On July 6, 2020, the Court concluded, pursuant to CPL § 722.23(2)(c), that the People did not prove by a preponderance of the evidence that "the defendant caused significant physical injury to a person other than a participant in the offense," (CPL § 722.23[2][c][i]). The People advised the Court they would file a written motion, pursuant to CPL § 722.23(1) to prevent the removal of the action to Family Court. The Court continued the defendant's remand. The Court thereafter scheduled the Extraordinary Circumstances Hearing for July 13, 2020.

7. The People submitted their written motion, pursuant to CPL § 722.23(1)(d), dated July 7, 2020, requesting the Court determine there were extraordinary circumstances, sufficient to prevent the removal of the assault action to Family Court. Defense counsel submitted their written opposition to the motion, dated July 10, 2020.

8. On July 13, 2020, the Court heard argument from counsel in support of their respective positions on the motion. No witnesses were called to testify on behalf of the People or the defendant. Counsel advised the Court that they would rely upon their respective motion papers, prior documentary submissions to the Court and oral arguments tendered on July 13, 2020. Contained within the People's submissions were several video recordings of the incident that took place in a room at Hillbrook on June 8, 2020. Copies were provided to the defense as well. The Court and defense counsel were able to view the videos prior to the July 13, 2020 Court appearance and were referenced by counsel during oral arguments. At the conclusion of the hearing, the People and defense counsel were afforded an opportunity to present closing remarks and both counsel availed themselves of the opportunity. The Court advised counsel that a written decision would be issued pursuant to CPL § 722.23(1)(e).

*LAW REGARDING EXTRAORDINARY CIRCUMSTANCES AND THE APPLICATON OF THE LAW TO THE FACTS OF THIS CASE*

CPL § 722.23(1)(a) mandates that the Court ". . . shall order the removal of the action to family court . . . unless, within thirty calendar days of such arraignment the district attorney makes a motion to prevent removal of the action pursuant to this subdivision."

CPL § 722.23(1)(b) requires that, "A motion to prevent removal of an action in Youth Part shall be made in writing and upon prompt notice to the defendant. The motion shall contain allegations of sworn fact based upon personal knowledge of the affiant . . ."

The People's submissions, including the videos, contained sufficient facts for the Court to consider and conclude whether or not to grant the motion to prevent removal based upon sufficient extraordinary circumstances.

CPL § 722.23(1)(d) does not specifically define the term "extraordinary circumstances." That section provides the Court with the discretion to grant the motion to prevent removal provided the Court finds: ". . . that extraordinary circumstances exist that should prevent the removal of the action to Family Court." Thus, not only must the Court find the existence of extraordinary circumstances, but the Court must also find that those extraordinary circumstances are sufficient to prevent the removal of the action to Family Court. It is the People's burden to bring the motion requesting the Court make a finding of extraordinary circumstances. Once that motion is brought before the Court, it is the Court that bears the burden of determining if extraordinary circumstances are present, and if those extraordinary circumstances are sufficient to prevent removal to Family Court.

Although there is a presumption against holding a defendant in custody (CPL § 723.23[1][f]), there are no such presumptions or guidance by the statute to assist the Court in its determination of extraordinary circumstances sufficient to prevent removal to Family Court.

This Court relies on the Intranet of the NYS Unified Court System, RTA Decision Bank, and access to several decisions by other Youth Part judges (including this Court) throughout New York State. Furthermore, this Court has reviewed the legislative history and is appreciative of those cases' detailed analysis of the legislative history. Certainly, the legislative history, legislative discussions and the courts' recent decisions provide insight. Nevertheless, the Legislature chose not to provide a specific definition of extraordinary circumstances, instead leaving that task to the courts.

Family Court is civil in nature and FCA § 301.1 mandates that "In any proceeding under this article, the Court shall consider the needs and best interests of the respondent as well as the needs and best interests of the community."

Contrast that with Penal Law § 1.05(5), which provides that the Penal Law is intended "To provide for an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, the victim's family and the community," and Penal Law § 1.05(6), which states that its purpose is "To insure the public safety by preventing the commission of offenses through the deterrent influences of the sentences authorized, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection."

It is axiomatic that all crimes have a negative impact on the public at large. The classification and delineation of all criminal acts into misdemeanors and felonies, and the various degrees of those crimes, is a result of the collaborative attempts by lawmakers and the Courts to frame the criminal justice system. Raise the Age is an attempt to provide a new classification of Adolescent Offenders with an opportunity to have their cases removed from adult court to Family Court.

This Court is the gatekeeper, and when this Court determines there are sufficient extraordinary circumstance sufficient to prevent removal, the defendant's case will stay in the Youth Part. Without such a determination, the defendant's case will be removed to Family Court.

*FINDINGS OF EXTRAORDINARY CIRCUMSTANCES*

The defendant[1] is accused of acting in concert with J. M. (another youth who was being detained and housed at the Hillbrook Juvenile Detention Center regarding an unrelated crime) to assault the victim, J. S. (who was also being detained and housed at the Hillbrook Juvenile Detention Center).

In the June 8, 2020 video recording provided to the Court, the victim,J. S., was present in a lounge type room standing near a window. He did not move from that area during the entire incident. The defendant was seated about 10 to 15 feet away. A staff member was seated at a desk close to the victim. After several minutes the defendant stood up and slowly, and rather innocuously, began walking toward the desk and window area. The staff member arose from his chair and walked around his desk. The scene was set. The co-defendant, J. M., entered the room while the defendant engaged the staff member in a brief, fist bumping type conversation. The victim's head was turned, looking out the window. The defendant and co-defendant established eye contact and, in an almost simultaneous move, the co-defendant punched the victim with a straight right cross to the left side of the victim's face, while the defendant sped past the staff member. As the victim fell to the floor, both J. M. and the defendant commenced, simultaneously, to kick and stomp the victim, who was lying unconscious and not moving, all over the victim's body, including the victim's head and torso. This kicking and stomping continued for a few seconds until the staff member, already present in the room, pulled the defendant away from the victim, while another staff members entered the room and pulled J. M. away from the victim.

After J. M. and the defendant were pulled out of the room, the victim remained on the ground during the next five minutes. The recording provided by the People then ended. The victim did appear to move somewhat, but the records from the ambulance company indicate the victim was moved directly from the ground to the stretcher and thereafter to the ambulance and then taken to the hospital.

The victim has no recollection of the incident except to note he remembers being in the room and then awakening at the hospital. Amazingly, after spending several hours at the hospital and being examined and tested, he was released, and able to go back to the Hillbrook Juvenile Detention Center, apparently suffering no long lasting effects.

The victim was just standing in the room. J. M. and the defendant clearly had planned and coordinated the attack, each playing a pivotal role. The defendant distracted the staff member, while J. M., standing just outside of the camera's view for much of the time before he ***2** threw the punch, waited until the staff member was far enough away from the victim to allow himself (J. M.) to strike the victim. Once the distance was measured, J. M. struck the victim, simultaneous with the defendant rushing past the staff member. The victim never had a chance to escape or defend himself.

The attack was brutal. Not being satisfied with rendering the victim unconscious, the defendant and J.M. proceeded to stomp and kick an unconscious and helpless person. Clearly the defendant and J. M. would not have stopped if not restrained by the staff. There were no signs or movements by the defendant or J. M. to show any intent to discontinue the assault. How many more kicks or stomps would it have taken to seriously injure or kill an unconscious and helpless youth?

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The attack was brutal, unprovoked, planned, coordinated and executed.

Not every misdeed by a youth can be extraordinary by its very nature. However, defendant's actions were not a random, spontaneous, impulsive act. His actions display a current lack of moral conscience, and a violent and mean spiritedness seldom seen by this Court. The defendant is out of control, unable to stop his behavior. Collectively, when all the factors are considered, proof of extraordinary circumstances sufficient to prevent removal were provided.

In mitigation, and in opposition to the People's motion, defense counsel argued that preventing the removal of the defendant's pending charges to Family Court would thwart the very goals of Raise the Age.This Court has made clear, and reiterates now, the extraordinary circumstances determination is not solely limited to an analysis of the severity of the crime. Nor is it solely limited to an analysis of the individual's history, status in the community and other factors unique to every person. It is the combination, analyzing as many factors that are available and can be brought before the Court, that provide the basis for this Court's determination. Collectively, when all the factors are considered, proof of extraordinary circumstances sufficient to prevent removal were provided.

Additionally, the Court is well aware that if the case was removed to Family Court, the Family Court Act provides for the possible placement of juveniles at facilities developed for treatment while protecting the public. Likewise, the Court is well aware that services are available to those individuals incarcerated under the Penal system. Both juvenile and adult probation also have programs available for its population. This is not the time, nor is the Court in any position (there have not been any convictions) to consider Youthful Offender status for the defendant. Finally, under new provisions of State and Federal Law, defendants such as C. S., if sentenced to a period of incarceration, would be segregated from the general adult prison population until their reaching the age of 18.

*CONCLUSION*

The Court concludes that extraordinary circumstances are present, sufficient to prevent the removal of the Assault in the Second Degree charge to Family Court and, therefore, the People's motion to prevent the removal to Family Court is granted and the matters shall proceed in the Youth Court for further action.

ENTER

Dated: July 30, 2020

______________________________

HON. VANESSA E. BOGAN

Onondaga County Youth Part Judge

**FOOTNOTES**

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Footnotes

1 In a separate case, the defendant is charged with an Intentional Murder. The People have asserted the fact that the defendant is charged with Intentional Murder is a relevant factor for the Court to consider in determining the issue of Extraordinary Circumstances. The Court notes the defendant has not been convicted of the crime and that the defendant is presumed not guilty. Accordingly, the Court declines to place any undue significance to the defendant's other pending charge of Intentional Murder in the rendering of this decision.

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Unreported Disposition
70 Misc.3d 1213(A), 137 N.Y.S.3d 677 (Table), 2020 WL 8409995 (N.Y.Co.Ct.), 2020 N.Y. Slip Op. 51601(U)

**This opinion is uncorrected and will not be published in the printed Official Reports.**

*1 The People of the State of New York, Plaintiff,
v.
Y.R., Adolescent Offender.

County Court, Nassau County
FYC-0000-00
Decided on December 22, 2020

CITE TITLE AS: People v Y.R.

## ABSTRACT

Infants
Adolescent Offenders
Transfer from Youth Part to Family Court—Extraordinary Circumstances

*People v Y.R.*, 2020 NY Slip Op 51601(U). Infants—Adolescent Offenders—Transfer from Youth Part to Family Court—Extraordinary Circumstances. (Nassau County Ct, Dec. 22, 2020, Singer, J.)

## APPEARANCES OF COUNSEL

N. Scott Banks, Nassau County Legal Aid Society, by Tatiana Miranda, Esq.,
Counsel for Adolescent Offender, Y.R.
Hon. Madeline Singas, Nassau County District Attorney,
Lauren McDonough, Esq.

## OPINION OF THE COURT

Conrad D. Singer, J.

The following papers were read on this motion:

People's Affirmation and Memorandum of Law Opposing Removal 1

Adolescent Offender's Opposition to People's Motion 2

People's Reply Papers in Further Support of People's Motion 3

The defendant in this matter, Y.R. (D.O.B. 00/00/0000), is charged as an Adolescent Offender ("AO") in the Youth Part of the County Court in Nassau County. She is charged with one count of Attempted Grand Larceny in the Third Degree [Penal Law § 110/155.35(1)]; and one count of Attempted Scheme to Defraud in the Second Degree [Penal Law § 110/190.60(1)].

The People have filed a motion opposing removal of the AO's case to the Family Court based on the existence of "extraordinary circumstances". (CPL § 722.23 [1][b]). The AO has filed an opposition to the People's motion and the People have filed reply papers in further support thereof. The People's Motion Opposing Removal is determined as follows:

The charges against the AO arise from her alleged involvement in a scheme to defraud on or about October 27, 2020, at approximately 5:45 PM in M.P., Nassau County, New York. It is alleged that on that date and at that time, she participated in a scheme in which she and her adult co-defendant attempted to defraud one victim of $8,500.00. The AO also allegedly stated to a member *2 of law enforcement that she had picked up $9,500.00 from a second victim who resides in O., New York.

The AO was arrested on October 27, 2020. She was arraigned in the Youth Part on October 28, 2020. At her arraignment, the People reported that they were not consenting to remove the AO's case to the Family Court, they acknowledged that they were not entitled to a 6-day appearance, and stated that they would be filing a Motion Opposing Removal based on the existence of "extraordinary circumstances". (CPL § 722.23[1][b]).

The People's Motion Opposing Removal consists of the sworn affirmation of Assistant District Attorney Lauren McDonough, Esq. with accompanying Memorandum of Law, and supporting exhibits appended thereto. The People contend that the charges against the AO stem from her involvement in a several-month complex scheme run by

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a Transnational Criminal Organization ("TCO"), which the People refer to as the "Elder Bail Scam". (*Affirmation of Lauren A. McDonough, Esq.*, dated November 17, 2020 ["McDonough Aff. in Support"], ¶¶ 3 through 25; *Memorandum of Law in Support of Motion*, dated November 17, 2020 ["People's Memo of Law in Support"], p. 1).

According to the People, extraordinary circumstances exist which warrant preventing removal of the AO's case to the Family Court and retaining the case in the Youth Part. The alleged extraordinary circumstances include the cruelty involved in targeting elderly victims and defrauding them of significant sums of money during the global coronavirus pandemic [*People's Memo of Law in Support*, pp. 5 and 6]; the AO's knowledge and level of participation in the "Elder Bail Scam" [*People's Memo of Law in Support*, pp. 4 and 5]; and that the removal of the AO's case to the Family Court would "shake the public's confidence in the criminal justice system" [*People's Memo of Law in Support*, pp. 6 and 7]. The People contend that no mitigating circumstances exist but, to the extent that any mitigating circumstances do exist, they are "far outweighed" by the aggravating factors in this case. (*People's Memo of Law in Support*, p. 7).

Defense counsel's opposition to the People's Motion Opposing Removal consists of the sworn affirmation of defense counsel Tatiana Miranda, Esq. and exhibits appended thereto. Defense counsel argues that there is "nothing extraordinary" about the allegations underlying the charges against the AO and that, if the legislature intended for crimes involving elderly victims to be treated differently than other crimes, the statute would have specifically addressed the same. (*Opposition to People's Motion by Tatiana Miranda, Esq.*, dated December 1, 2020 ["*Miranda Opp.*"], pp. 3 and 4).

Counsel for the AO denies that the AO is "integral" to the success of the TCO's scheme; she asserts that the AO's un-apprehended co-defendants threatened the AO's younger sister's life if she did not participate in the scheme, that the un-apprehended co-defendants directed the AO where to go after they selected the location and after they had spoken to the complainants on the phone. (*Miranda Opp.*, p. 4).

Defense counsel opposes the People's assertion that the AO has been participating in the TCO's scheme over the course of four months. She states that the People failed to provide any detailed information concerning the AO's extended involvement and she notes that no criminal charges have been filed in connection with the AO's alleged participation in the same scheme in O., New York. (*Miranda Opp.*, p. 5). Counsel characterizes the People's argument about "shaking the public's confidence" by removing the AO's case to the Family Court as "speculative", "nonspecific" and not an extraordinary circumstance. (*Miranda Opp.*, p. 5).

Additionally, defense counsel contends that mitigating circumstances exist which warrant *3 denying the People's Motion Opposing Removal. According to counsel, the AO has a lengthy history of behavioral problems, mental health conditions and hospitalizations, and was hospitalized as recently as November 16, 2020 for physically harming herself. (*Miranda Opp.*, p. 7).

Counsel asserts that the People are "patently incorrect" in arguing that the AO has a "solid family and home life" and in denying the existence of mitigating circumstances. (*Miranda Opp.*, pp. 6 and 7). She further argues that the premise underlying the RTA legislation supports removing the AO's case to the Family Court, where she can receive the specialized individual care and treatment that she needs. (*Miranda Opp.*, p. 7).

The People argue in their Reply papers that "[t]argeting elderly victims for significant financial fraud cannot be described as anything but cruel" and that, based on the AO's own statements, she has actively participated in targeting and defrauding elderly victims through the downstate area for several months. (*Reply to Defendant's Affirmation in Opposition to People's Motion*, dated December 8, 2020 ["People's Reply"], pp. 1 and 2).

The People assert that the AO's role in obtaining the money from the elderly victims is "integral to the scheme" and that without the AO, "the scheme would fail". (*People's Reply*, p. 2). They further contend that the details known by the AO regarding the overall operation are not details that would be given to someone who was "intimidated" or "threatened" into participating. (*People's Reply*, p. 2). They argue that the mitigating circumstances described by the AO's counsel are outweighed by the aggravating factors set forth by the People. (*People's Reply*, p. 3).

## FINDINGS OF FACT

It is alleged in the felony complaint that on October 27, 2020 at 0000 L. Drive, M.P., Nassau County, New York, the victim in this matter was contacted by an unknown person who advised the victim that his grandson was in jail. It is further alleged in the felony complaint that the victim was instructed

to meet with a courier and instructed to pay $8,500.00 for his grandson's bail.

At approximately 5:45 PM, the AO's co-defendant, W. M. ("M."), was operating a 2002 tan Honda minivan with a New Jersey temporary tag. The AO allegedly exited the passenger side of the minivan and approached 0000 L. Drive, which is the victim's residence. Once at the front door the AO allegedly handed the victim a receipt for $8,500.00. The victim and the AO proceeded to make the exchange when law enforcement intervened. The AO was placed into custody.

It is further alleged in the felony complaint that the AO's co-defendant M. attempted to leave the scene while operating the aforementioned minivan, but was stopped by responding law enforcement members, who were able to then place him into custody. It is further alleged that during the course of the investigation in this case, the AO stated to a Detective T. that she had picked up $9,200.00 from a second victim, who resides in O., New York.

According to the People's motion papers, after the AO and her co-defendant M. were arrested, they were interviewed by Nassau County Police Detectives after being read and waiving their Miranda rights. (*McDonough Aff. in Support*, ¶ 12). The AO and co-defendant M. gave detailed accounts of their roles in the October 27, 2020 "Elder Bail Scam" and they also provided information regarding their involvement in other such Elder Bail Scams. (*McDonough Aff. in Support*, ¶ 12).

The AO explained to law enforcement that beginning in about July 2020, she has been traveling throughout the area and picking up money related to scams. (*McDonough Aff. in Support*, ¶ 13). She explained that the scams are run out of the Dominican Republic and are effectuated by people speaking to elderly victims and convincing them to provide money related to fake arrests and fake accidents. (*McDonough Aff. in Support*, ¶ 13).

The AO reported that individuals named "J." and "B." would provide her with pick-up instructions for her role, including the names and addresses of the elderly victims, as well as the monetary amount that was to be provided by the victim. (*McDonough Aff. in Support*, ¶ 14). The AO reported that if the AO was unable to pick up the proceeds of the scams, then "B." and "J." would threaten her sister's life. (*McDonough Aff. in Support*, ¶ 15).

As to the October 27, 2020 incident, the AO stated that "B." sent her two addresses of elderly victims via WhatsApp messages, and that the AO then had co-defendant M. drive her to the two locations. (*McDonough Aff. in Support*, ¶ 16). She first directed co-defendant M. to an address in O., New York, where the AO took an envelope containing $9,200.00 in cash from the elderly victim. (*McDonough Aff. in Support*, ¶ 16). The AO and co-defendant M. then drove to the address in M.P. where they intended to pick up $8,500.00 from the would-be victim. (*McDonough Aff. in Support*, ¶ 17).Based on the AO's opposition papers, the AO suffers from mental health issues, for which she has been previously hospitalized, and she was identified as a missing child for months. (*Miranda Opp.*, p. 6). Defense counsel cites to a report from the Nassau County Probation Department, and asserts that the AO has a "lengthy history of behavioral problems, mental health conditions, and hospitalizations", and that she has been diagnosed with Borderline Personality Disorder in Adolescence, Oppositional Defiant Disorder, and Major Depressive Disorder. (*Miranda Opp.*, p. 7).

The AO has "been hospitalized at New York P., F.W., and St. D. and was taken by ambulance and hospitalized as recently as November of 2020 for physically harming herself. (*Miranda Opp.*, p. 7). The AO's school attendance records indicate that she has not attended school since the beginning of the school year. (*Miranda Opp.*, p. 7).

*CONCLUSIONS OF LAW*

Pursuant to CPL § 722.23[1][d], this Court is required to deny the People's Motion Opposing Removal unless the Court determines, upon the People's motion, that "extraordinary circumstances exist that should prevent the transfer of the action to family court". (CPL § 722.23[1][d]). The term "extraordinary circumstances" is not defined under CPL § 722.23. Using the statutory text as "the starting point" to "ascertain and give effect to the intention of the Legislature"[1], and using dictionary definitions as a "useful guidepost ", the Court finds that the "plain meaning"[2] of the phrase " extraordinary circumstances" is a set of facts that are "exceptional" and " highly unusual" and which indicate that the case should not be removed to the Family Court. (*see* CPL § 722.23[1][d]).

Consistent with the phrase's "plain meaning", the legislative history of the Raise the Age ["RTA"] legislation reflects that "extraordinary circumstances " is intended to cover "unusual circumstances that would warrant keeping the case in the

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Youth Part." (Assembly Record, April 8, 2017 ["Assembly Record "] pp. 40-41). Assembly member Joseph Lentol, who sponsored the RTA bill in the New York State Assembly, stated that for felony cases outside of the "most serious cases, such as Murder and Assault in the First Degree", the legislators intended that the *4 extraordinary circumstances requirement would "be a high standard for the DA to meet" and that "denials of transfers to the family court should be extremely rare". (*Assembly Record*, p. 39).

Further examination of the legislative history reveals that legislators intended the "extraordinary circumstances" standard "to be determined and shaped by a judge's ruling after the enactment and effectiveness of [the RTA legislation]"; and that the standard "should take into consideration all the circumstances, including the mental capacity of the offending child". (*Assembly Record*, p. 83). Recognizing that "every case is going to be different ", legislators directed that every case would be "looked at by the judge individually, to determine what kind of factors-- both aggravating and mitigating--there are in the case, to determine whether or not" the particular case "passes the exceptional circumstances test". (*Assembly Record*, pp. 83-84).

Consistent therewith, legislators directed that "[e]very case is to be judged on its own merits ", taking into consideration certain "guideposts" such as whether it was a "cruel and heinous manner where the crime was committed, [and/or] where the defendant was a ringleader". (*Assembly Record*, p. 85). The legislators predicted that the cases would be "rare" where the Court would find "extraordinary circumstances" which warrant keeping a case in the Youth Part. (*Assembly Record*, p. 85).

In this case, mindful of the legislative directives discussed above, and after considering the arguments raised by both parties in their motion papers and reviewing and evaluating their respective supporting exhibits, the Court does not find the existence of "extraordinary circumstances" which would warrant keeping this AO's case in the Youth Part.

The Court finds that the AO's months-long involvement in what the People have deemed the "Elder Bail Scheme"[3] is an aggravating factor. Likewise, the Court finds that the targeting of vulnerable and elderly individuals as victims of a defrauding scheme is reprehensible. However, the Court is not persuaded by the People's assertions that the AO is "integral" to the overall success of the scheme. Nor is the Court persuaded that the AO's level of knowledge and understanding as to the workings of the scheme necessarily establish that the higher up individuals in the TCO have a significant level of trust in her. The Court finds after reviewing both parties' motion submissions that the AO's role in the scheme is relatively minor compared to that of others: for instance, she does not select the victim(s) or communicate the fraudulent story to the selected victim or determine how much money to defraud a particular victim.

Furthermore, the Court finds that there are several significant mitigating factors which weigh against finding extraordinary circumstances. The Court finds that the AO's confirmed mental health conditions and her prior institutionalizations, including her recent hospitalization for self-harm, indicate that she would benefit from the level of services and rehabilitative setting available in the Family Court. Of further relevance to the Court's determination is the family's history of contact with NYC Administration for Children Services. While not necessarily indicative of any fault on her parents' part, it indicates that the AO would benefit from the focused services and rehabilitative objectives advanced in the Family Court.

Under the totality of the circumstances, the Court finds, having balanced the aggravating and mitigating factors in this case [*see, e.g.*, *People v. B.H.*, 63 Misc 3d 244, 250 (Sup. Ct. Nassau Cty. 2019)], that there are no extraordinary circumstances preventing the AO's case from being removed *5 to the Family Court and that therefore the AO's case should be removed to the Family Court forthwith.

For the foregoing reasons, the People's Motion Opposing Removal of the AO's case to the Family Court based on extraordinary circumstances is denied.

This constitutes the opinion, decision and order of this Court.

DATED: December 22, 2020

Westbury, New York

HON. CONRAD D. SINGER, A.J.S.C.

Nassau County Court, Youth Part

**FOOTNOTES**

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Footnotes

1 *People v. Thomas*, 33 NY3d 1, *5 [2019]; *see also People v. Roberts*, 31 NY3d 406, 418 [2018]).

2 *see People v. Andujar*, 30 NY3d 160, 163 [2017] and *People v. Ocasio*, 28 NY3d 178, 181 [2016], for the proposition that dictionary definitions may provide "useful guideposts" for ascertaining the "plain meaning" of a statutory phrase; Merriam-Webster Online Dictionary, " *extraordinary* " [https://www.merriam-webster.com/dictionary/extraordinary]; Black's Law Dictionary, "*extraordinary circumstances*", [10th ed. 2014]).

3 By her own apparent admission (*Exhibit A to Miranda Aff. in Opp.*; *Exhibit 2 to McDonough Aff. in Support*)

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New York
Official Reports

72 Misc.3d 196, 146 N.Y.S.3d 736, 2021 N.Y. Slip Op. 21102

**1 The People of the State of New York, Plaintiff,

v

S.J., Adolescent Offender.

County Court, Erie County
FYC-70325-20/001
April 13, 2021

CITE TITLE AS: People v S.J.

**HEADNOTE**

Infants
Adolescent Offenders
Transfer from Youth Part to Family Court—Extraordinary Circumstances—Offense Charged in Other Jurisdiction

In a prosecution of defendant adolescent offender (AO) for escape in the first degree, based on allegations that the AO slipped out of his handcuffs and jumped out of the rear seat of a patrol vehicle while in custody on a murder charge pending in an adjacent county, the matter was removed to family court because the People could not impute the AO's behavior from a charge in another jurisdiction at a different point in time to establish extraordinary circumstances under CPL 722.23 (1) (d). Every motion to prevent removal to family court must be denied unless the district attorney establishes the existence of "extraordinary circumstances" (CPL 722.23 [1] [d]). While the Raise the Age (RTA) legislation did not define extraordinary circumstances, the legislative intent was for a definition to include facts which are unusual and heinous. Aggravating factors the court must consider are whether the AO committed a series of crimes over a series of days, whether the AO acted in an especially cruel and heinous manner, and whether the AO was a leader of criminal activity who had threatened or coerced other reluctant youth in committing the crimes before the court. The AO was alleged to have committed a series of crimes over a series of days, and there was little doubt that the AO's behavior during the commission of the alleged murder in the adjacent county was cruel and heinous since it resulted in someone's death. However, the People conceded that the AO's conduct during the alleged escape did not in itself amount to extraordinary circumstances because it was unlikely that the court could conclude that the AO's behavior was heinous in any way. To superimpose the AO's behavior during the alleged murder and merge or impute it onto the crime of escape to make a finding that the AO's conduct during the escape was heinous was not supported by the RTA.

**RESEARCH REFERENCES**

Am Jur 2d Juvenile Courts and Delinquent and Dependent Children §§ 10, 91.

Carmody-Wait 2d Juvenile, Adolescent, and Youthful Offenders §§ 206:37, 206:69.60, 206:69.90.

McKinney's, CPL 722.23 (1) (d).

NY Jur 2d Criminal Law: Procedure §§ 48.15, 1109, 1858.

**ANNOTATION REFERENCE**

See ALR Index under Juvenile Courts and Delinquent Children.

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*197 Query: "adolescent offender" & extraordinary /2 circumstance /s prevent /s "Family Court" & escape

**APPEARANCES OF COUNSEL**

*John J. Flynn, District Attorney* (*Danielle N. D'Abate* of counsel), for plaintiff.
*Giovanni Genovese* for adolescent offender.

**OPINION OF THE COURT**

Kevin M. Carter, J.

The People having moved pursuant to Criminal Procedure Law article 722, section 722.23 (1) *et seq.*, for an order preventing removal of this action to the Juvenile Delinquency Part of Erie County Family Court, and upon reading the notice of motion and supporting affidavit of Danielle D'Abate, Esq. (Assistant District Attorney), dated March 23, 2021, and the

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affirmation of Giovanni Genovese, Esq., dated March 31, 2021, on behalf of the principal S.J., and oral argument having been held on April 7, 2021, and neither party requesting an evidentiary hearing, and due deliberation having been had, the court finds the following:

**Procedural History**

This action was commenced on December 11, 2020, by way of felony complaint that charged S.J. with escape in the first degree, as defined by Penal Law § 205.15 (2).

S.J. was born on xx xx, 2003. It is alleged that S.J. committed the crime on December 11, 2020. S.J. was 17 years old when the crime was alleged to have been committed. Thus, by law S.J. is considered an adolescent offender (hereinafter, AO). (*See* CPL 1.20 [44].)

AO was arraigned on December 11, 2020. On December 16, 2020, the court determined the People could not meet the requirements of CPL 722.23 (2) (c). Thereafter, the People were ordered to proceed in accordance with CPL 722.23 (1).

The parties consented to extend the deadline for filing of the extraordinary circumstances motion due to Executive Order No. 202 (9 NYCRR 8.202) issued by Governor Andrew Cuomo on March 7, 2020.

On March 23, 2021, the People filed their extraordinary circumstances motion pursuant to CPL 722.23 (1) to prevent removal to family court. Annexed to the People's motion is a supporting ***198** affidavit by Assistant District Attorney Danielle D'Abate (hereinafter, supporting ****2** affidavit). Attached to the supporting affidavit are copies of the felony complaint signed by Detective Scott R. Malec, supporting deposition of Lieutenant Gary May, dated December 11, 2020, certified transcript of felony hearing held on December 16, 2020, and affidavit of First Assistant District Attorney Doreen Hoffmann, Esq., subscribed and sworn to on March 23, 2021.

Defense counsel (hereinafter, counsel) filed an affirmation in opposition to the People's motion to prevent removal on March 31, 2021.

**Extraordinary Circumstances Standards**

Pursuant to CPL 722.23 (1) (a), the court shall order removal of the action to family court unless the district attorney makes a motion to prevent same within 30 calendar days of arraignment. In the event the People apply to prevent removal of the action, CPL 722.23 (1) (b) mandates that the application "contain allegations of sworn fact based upon personal knowledge of the affiant." In addition, every motion to prevent removal to family court must be denied unless the district attorney establishes the existence of "extraordinary circumstances." (*See* CPL 722.23 [1] [d].)

The Raise the Age (RTA) legislation does not define extraordinary circumstances. While there was detailed conversation during the legislative debate in the NYS Assembly, it is clear that extraordinary circumstances must be defined and determined on a case by case basis. One can infer from a review of New York State Assembly Debate at 39 submitted in accordance with NY Assembly Debate on Assembly Bill A03009C (§ 1, part WWW, Apr. 8, 2017 [Assembly tr]) that the legislative intent is for a definition to include facts which are unusual and heinous. The court, in its discretion, should look for circumstances that go beyond what is regular and foreseeable in the normal course of events and there must be proof that the child is not amenable or would not benefit in any way from services. (*Id.* at 39.)

As articulated in *People v J.P.* (63 Misc 3d 635, 647-648 [2019]), it is the legislative intent that the extraordinary circumstances requirement be

> "a high standard for the DA to meet. And under th[is] bill, denials of transfer to the family court should be extremely rare. . . . Transfer to the family ***199** court should be denied only when highly unusual and heinous facts are proven and there is . . . strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court." (*See* Assembly tr at 39.)

The presumption being that "only one out of 1,000 cases" would remain in Youth Part and those would be the "extremely rare and exceptional" ones. (*Id.* at 38.)

The intent of RTA and the legislative discussion of "extraordinary circumstances" directs the court to factors and circumstances which should be considered in its determination. These factors and circumstances are deemed aggravating and mitigating respectively, with the aggravating factors making it more likely that the matter should not be removed and the mitigating circumstances making it more likely that the matter should be removed. Neither list is meant to be exhaustive, but rather to provide guidance as to the intent of the type of analysis the court should engage in when determining the existence of extraordinary circumstances.

The aggravating factors the court must consider are (1) whether the AO committed a series of crimes over a series of days, (2) whether the AO acted in an especially cruel and heinous manner, and (3) whether the AO was a leader of the criminal activity who had threatened or coerced other reluctant youth into committing the crimes before the court. (*Id.* at 40.)

The list of mitigating circumstances that the court should consider that are meant to include a wide range of individual factors are the youth's economic difficulties, substandard housing, poverty, difficulties in learning, educational challenges, lack of insight and **3 susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, and abuse of alcohol or controlled substances by the AO, family or peers. (*Id.* at 40.)

**Facts**

The felony complaint serves as the basis for commencement of this action and charges AO with escape in the first degree, a class D felony. It is alleged that on December 11, 2020, at 9:55 a.m. on Jefferson Avenue and East Ferry Street, in the City of Buffalo, New York, while in the custody of the Niagara County Sheriff's Department, AO was being "transported to a dentist appointment." AO slipped out of his handcuffs and jumped out *200 of the rear seat of the patrol vehicle. AO was later apprehended at 261 East Ferry Street, Buffalo, New York. The factual part of the instrument seems to support the elements of the alleged offense. While signed by Detective Scott R. Malec, it is undated, unsworn and made upon information and belief.

However, the felony complaint is accompanied by the supporting deposition of Lieutenant Gary May, who executed same upon personal knowledge and under penalty of perjury. Lieutenant May states that he was "transporting AO from a dentist appointment" at 1100 Main Street back to the East Ferry Detention Facility. While stopped at the intersection of Jefferson Avenue and East Ferry Street, AO opened the back door of the marked patrol vehicle and ran west on East Ferry Street. A pursuit of AO ensued, and AO was apprehended after a "[G]ood [S]amaritan" held him on the ground.

**Arguments**

The People argue that extraordinary circumstances exist when this case is viewed in the totality of its circumstances. The People believe AO's behavior should be considered highly unusual when viewed in light of the crimes for which he was held in custody. It is alleged that AO was previously charged in Niagara County which is adjacent to Erie County. It is these prior charges that the People believe make this case extraordinary.

The People concede that the AO's conduct during the alleged escape in itself would not amount to extraordinary circumstances because it is unlikely that the court could conclude that AO's behavior was heinous in any way. However, the People opine that the crimes for which AO is charged in the adjacent County of Niagara must be considered and cannot be disregarded when evaluating the application to prevent removal. According to the People the court must consider the previously charged crimes because RTA mandates that the court consider whether the principal committed a series of crimes over a series of days. Moreover, the People believe that the court must consider the crimes for which AO escaped when deciding whether AO engaged in heinous behavior, specifically, the crime of murder for which AO stands accused and from which the People argue he was escaping.

Counsel argues that the court cannot consider any charges filed in the adjacent county because to do so would require consideration of hearsay statements which are not admissible *201 under the statute. Counsel further argues that extraordinary circumstances do not exist because the charge of escape is a non-violent offense and it would be contrary to RTA to grant the People's application. Moreover, counsel asserts the People failed to submit nonhearsay proof that AO has charges pending against him in Niagara County and therefore have failed to show a series of crimes over a series of days.

Counsel did not offer any mitigating circumstances for the court's consideration.

**Analysis**

It can be inferred from a review of New York State Assembly Debate at 20 submitted in accordance with NY Assembly Debate on Assembly Bill A03009C (§ 1, part WWW, Apr. 8, **4 2017) that the legislative intent is for the court to determine first whether the specific charge for which the AO stands accused is a violent or non-violent offense. The legislation contemplates that non-violent charges will be removed long before extraordinary circumstances applications are required to be filed. While it is clear that non-violent charges will not be summarily removed simply

because they are labeled non-violent, it can be inferred that only charges with "the truly violent felons would stay in the criminal part, and those kids who were not violent would be able to find their way to the family court." (*Id.* at 21.)

This court is forever mindful of the foregoing and concludes that it should look at each case in its totality while also considering the aggravating factors and mitigating circumstances. (*Id.* at 39-40.) In every motion to prevent removal the court must look at the case and its own intricacies and nuances.

Here, the People concede that AO's conduct during the alleged escape does not in itself amount to extraordinary circumstances. However, they raise the question whether the court can consider and should consider previously charged crimes from other jurisdictions and the alleged behavior of a principal in committing those crimes when determining whether a principal engaged in heinous conduct. The People rely on *People v M.M.H.* (67 Misc 3d 1216[A], 2020 NY Slip Op 50563[U] [Nassau County Ct 2020]), decided on April 28, 2020, by Judge Conrad D. Singer, in support of their assertion that the court has the authority to do so. In *People v M.M.H.*, the principal was charged with several violent felony offenses involving ***202** weapons possession. Principal was also under the jurisdiction of another court on a pending indictment in which the principal entered a plea of guilty, was released pending sentencing, and was directed to lead a law-abiding life and not get arrested. That did not happen as principal was subsequently arrested and charged with multiple weapons related offenses. Judge Singer held that the pending indicted charges and the judge's directive to the principal to avoid future arrests were aggravating factors to be considered in determining whether extraordinary circumstances existed in the case before him. More specifically, Judge Singer opined that it showed that the principal was not amenable to services.

However, the instant case can be distinguished from *People v M.M.H.* First, AO is charged with a non-violent offense wherein there are no allegations that any harm or injury was perpetrated on anyone. Second, while there is a previously charged crime in another jurisdiction, there are no facts before this court that AO was directed by the Niagara County judge to engage in services or otherwise. Third, AO was remanded to detention pending disposition of the case.

The court agrees that it has the right to consider pending felony charges from another court and/or additional charges pending before it. However, the People argue that the court can and should impute the behavior associated with the pending charges from the other jurisdiction to the current escape charge. By doing so, the People assert that the court could find that AO engaged in a series of heinous crimes over a series of days that would satisfy the requirements of the statute.

Counsel argues that the court cannot consider any of the charges filed in the adjacent county because to do so would require consideration of hearsay statements. The court agrees with counsel that only nonhearsay facts can be considered. As stated previously, that is the law as provided in CPL 722.23 (1) (b). The People rely on an undated and unsworn felony complaint, supporting affidavit, certified transcript of the felony hearing, supporting deposition of Lieutenant Gary May, and affidavit of First Assistant District Attorney Doreen Hoffmann. In reviewing the documents, the court will only consider the nonhearsay content contained in those documents. ****5**

A review of the felony hearing transcript establishes that the court took judicial notice without objection of AO's "criminal history charging him with murder in the second degree." (*See* tr of felony hearing at 18, lines 6-12.) No additional testimony ***203** was offered of other crimes during the felony hearing. Claims relative to other crimes and AO's conduct while committing those offenses were made upon information and belief. Thus, the court will not consider them.

There is no question that AO is alleged to have committed a series of crimes over a series of days. A determination of whether AO committed a series of crimes over a series of days can include criminal activity from multiple counties. The People have satisfactorily shown that AO is accused of committing crimes in Erie and Niagara Counties.

There is little doubt that AO's behavior during the commission of the alleged murder in Niagara County was cruel and heinous since it resulted in someone's death. The question is whether it is the legislative intent to allow courts to impute behavior from one crime to another that occurred on two totally separate occasions, at different times, and in different jurisdictions. For example, whether it is appropriate to superimpose the behavior associated with the murder charge in Niagara County to the subsequent Erie County escape charge in which AO allegedly jumped out of the rear seat of the marked patrol vehicle and ran before being apprehended.

It is the case that RTA requires consideration of certain aggravating factors but also allows contemplation of additional factors that were not discussed during the legislative debate. The People believe this is one of those additional undiscussed factors the court could consider. However, the court finds to superimpose AO's behavior during the alleged murder and merge or impute it onto the crime of escape to make a finding that AO's conduct during the escape was heinous is not supported by the RTA.

In addition to the foregoing, there is nothing in the record to suggest that AO was a leader of the criminal activity who threatened or coerced other reluctant youth into committing the crimes before the court.

Finally, AO did not offer any mitigating circumstances for the court's consideration. However, the submitted aggravating factors are insufficient to make a finding of extraordinary circumstances. Therefore, a review of mitigating circumstances is not necessary here.

The court concludes that extraordinary circumstances do not exist to prevent removal of this action to the family court. ***204** Hence, the matter shall be removed to Erie County Family Court.

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New York Official Reports

72 Misc.3d 791, 150 N.Y.S.3d 548, 2021 N.Y. Slip Op. 21168

**1 The People of the State of New York, Plaintiff,
v
M.R., Adolescent Offender.

County Court, Nassau County
FYC-00000-00
June 15, 2021

CITE TITLE AS: People v M.R.

**HEADNOTE**

Infants
Adolescent Offenders
Removal to Family Court—Extraordinary Circumstances Preventing Removal—Age

Extraordinary circumstances did not exist to prevent removal of adolescent offender's (AO) rape prosecution from Youth Part to Family Court under CPL 722.23 (1) (d) based solely on the fact that the AO turned 18 years old between the time he committed the crime and the time he was arraigned, and would thus likely evade prosecution in Family Court by virtue of a loophole created by the Family Court Act, under which the statutory limits for filing a juvenile delinquency petition require the individual to be within a certain age range when the criminal act is committed and when the petition is filed. Other than briefly mentioning that the victim might be left without an opportunity for a final order of protection, the People failed to address any specific facts or circumstances relating to the particular AO, including whether he acted in a highly unusual and/or heinous manner. Though there appeared to be a conflict between multiple Family Court Act provisions that control and otherwise affect the deadlines for filing a juvenile delinquency petition against an individual, and the practical effect of removing the AO's case to Family Court would likely be tantamount to dismissing the case and barring its prosecution in any court, the People did not refute or otherwise address any of the mitigating circumstances relating to the AO that were proffered by his counsel. The court could not create a judicial exception to the removal of cases as set forth in CPL 722.23 (1) (a), which would disqualify any AO who otherwise would have their case removed to the Family Court, but for their age.

**RESEARCH REFERENCES**

Am Jur 2d Juvenile Courts and Delinquent and Dependent Children §§ 53, 91.

Carmody-Wait 2d Juvenile, Adolescent, and Youthful Offenders §§ 206:37, 206:69.90.

McKinney's, CPL 722.23 (1).

NY Jur 2d Criminal Law: Procedure § 48.90.

**ANNOTATION REFERENCE**

See ALR Index under Juvenile Courts and Delinquent Children.

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*792 Query: “adolescent offender” & extraordinary /s age /p transfer! /s family /2 court

**APPEARANCES OF COUNSEL**

*Joyce A. Smith*, *Acting District Attorney* (*Vincent Bruni* of counsel), for plaintiff.
*George A. Terezakis* for adolescent offender.

**OPINION OF THE COURT**

Conrad D. Singer, J.

The defendant in this matter, M.R. (DOB 00/00/00), is charged as an adolescent offender (AO) in the Youth Part of the County Court in Nassau County. The People have moved for an order pursuant to CPL 722.23 (1) directing that this matter remain in the Youth Part and not be removed to the Family Court in Nassau County due to the existence of “extraordinary circumstances.” (CPL 722.23 [1] [d].) The AO has filed opposition to the People's motion.

The People's motion opposing removal is determined as follows:

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The AO is charged by way of felony complaint with one count of rape in the third degree (Penal Law § 130.25 [3]). The charge filed against the AO arises from an incident alleged to have occurred on July 31, 2020, at approximately 1:00 a.m. in L.B., Nassau County, New York. The AO was arraigned in the Youth Part on May 4, 2021. At that appearance, the **2 People conceded that the case does not qualify for a statutory "sixth-day appearance" under CPL 722.23 (2), because the AO is charged with rape in the third degree, which is not a "violent felony defined in section 70.02 of the penal law." (*See* CPL 722.23 [2] [a].) The court thereafter set down a motion schedule for the People to file their motion opposing removal based on "extraordinary circumstances."[1] (CPL 722.23 [1] [d].)

The People's motion opposing removal consists of the affirmation in support of People's motion to prevent removal to Family Court pursuant to CPL 722.23 by Assistant District Attorney Vincent Bruni, Esq., with exhibits attached thereto *793 (Bruni affirmation in support of mot). The People argue that extraordinary circumstances exist which warrant retaining this case in the Youth Part, in that there is a statute of limitations "loophole" which would prevent the Family Court from having jurisdiction over the case if it were removed from the Youth Part. (Bruni affirmation in support of mot ¶ 11.)

According to the People, the AO is alleged to have committed the criminal act approximately six months before he turned 18 years old, and he was arraigned on this case on May 4, 2021, after he had turned 18. (Bruni affirmation in support of mot ¶¶ 4, 5.) They contend that the Family Court Act places an upward age limit on when a juvenile delinquency petition may be filed against a respondent, and that the statutory limits for filing require that the individual be within a certain age range when the criminal act was committed *and* when the petition is filed. (Bruni affirmation in support of mot ¶¶ 11, 12.) They further contend that these statutory filing limits result in a loophole for a small group of defendants who commit crimes when they are 17 years old. (Bruni affirmation in support of mot ¶ 12.) The People further argue that cases such as this one involving this "loophole" are "extraordinary in and of themselves" because unless the case remains in the Youth Part, the AO cannot be held responsible for his criminal act now that he is 18 years old. (Bruni affirmation in support of mot ¶ 12.)

The AO's counsel argues that the People have failed to establish the existence of any "extraordinary circumstances" which justify retaining the AO's case in the Youth Part. (Corrected affirmation in opp to People's mot to prevent removal to the Family Court by George A. Terezakis, dated June 2, 2021 [Terezakis affirmation in opp to People's mot], ¶ 8.) The AO further argues that the People inappropriately categorize the AO's present age of 18 years old as an "extraordinary circumstance" and have not cited to any other factors related to the AO, or to the circumstances of his alleged commission of the offense, which might truly be said to constitute "extraordinary circumstances." (Terezakis affirmation in opp to People's mot ¶ 10.)

The AO further argues that there are many mitigating factors relating to this AO which outweigh the single claimed "extraordinary circumstance." In support of the same, the AO's counsel attaches an affidavit in support from the AO's mother, with several exhibits attached thereto. (Terezakis affirmation in opp to People's mot ¶ 11.) The AO argues that the People are asking the court to rewrite the Raise the Age (RTA) statute *794 to create a judicial exception that would disqualify an **3 otherwise eligible AO from removal to the Family Court simply because he had turned 18 years old. (Terezakis affirmation in opp to People's mot ¶ 18.)

## Findings of Fact

On May 4, 2021, the AO was charged by way of felony complaint with rape in the third degree (Penal Law § 130.25 [3]). It is alleged in the felony complaint (exhibit 1 to Bruni affirmation in support of mot) that on or about July 21, 2020, at about 1:00 a.m., at the N.B.C., in L.B., Nassau County, the AO engaged in sexual intercourse with the victim (DOB 00/00/00), penis to vagina, despite the victim saying "no" and "stop." It is further alleged that the AO did not have permission or authority to engage in sexual intercourse with the victim. The AO's date of birth is X. 00, 0000. (Bruni affirmation in support of mot ¶ 4.) The AO was 17 years old on the date of the alleged criminal incident and was 18 years old when the case was commenced in the Youth Part of the County Court in Nassau County. (Terezakis affirmation in opp to People's mot ¶ 3.)

## Conclusions of Law

The main issue raised in the parties' respective motion papers is whether the AO's age, i.e., 18 years old, constitutes an "extraordinary circumstance" which warrants retaining his case in the Youth Part. The People's motion opposing removal is filed pursuant to CPL 722.23 (1), which provides, in pertinent part, that within 30 calendar days of an AO's

arraignment, "the court shall order the removal of the action to the family court . . . unless . . . the district attorney makes a motion to prevent removal." CPL 722.23 (1) (d) requires the court to deny the People's motion "unless the court makes a determination upon such motion . . . that extraordinary circumstances exist that should prevent the transfer of the action to family court."

The term "extraordinary circumstances" is not defined under CPL 722.23. Accordingly, this court's "primary consideration is to ascertain and give effect to the intention of the Legislature." (*People v Thomas*, 33 NY3d 1, 5 [2019]; *People v Roberts*, 31 NY3d 406, 418 [2018].) After referring to the common dictionary definition[2] of the term "extraordinary," and having reviewed the legislative history of the RTA legislation as a further statutory ***795** interpretation aid,[3] the court interprets "extraordinary circumstances" to mean that the People's motion opposing removal must be denied unless they establish the existence of an "exceptional" set of facts which "go beyond" that which is "usual, regular or customary"[4] and which warrant retaining the case in the Youth Part instead of removing it to the Family Court. ****4**

Legislators debating the Raise the Age bill contemplated that the "extraordinary circumstances" standard would be satisfied where "highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the Family Court." (NY Assembly Debate on Assembly Bill A03009C, § 1, part WWW, Apr. 8, 2017 [Assembly tr] at 39.) The legislators specifically declined to provide definitive examples of instances where a case would rise to the level of "extraordinary circumstances." (Assembly tr at 39.) They advised, however, that in assessing whether the People have proved "extraordinary circumstances," the judge should consider all the particular circumstances of the youth, including both aggravating and mitigating circumstances. (Assembly tr at 39-40.)

In this case, other than briefly mentioning that the victim in this case may be left without an opportunity for a final order of protection, the People fail to address any specific facts or circumstances relating to this particular AO, including whether this AO acted in a "highly unusual" and/or "heinous" manner. (Assembly tr at 39.) To the contrary, the only specific fact about this AO that the People address is that he is now 18 years old, and the crux of their argument in opposing the removal is that his age constitutes an "extraordinary circumstance." Their argument is based on what appears to be a conflict between multiple Family Court Act provisions which control and ***796** otherwise affect the deadlines for filing a juvenile delinquency petition against an individual.[5]

The People do not refute or otherwise address any of the mitigating circumstances relating to this AO that are proffered by the AO's counsel. They argue that cases involving a "small group of defendants who commit crimes when they are 17 years old" are "extraordinary in and of themselves," because unless their cases are retained in the Youth Part, such a defendant cannot be held responsible for his or her criminal act if a Family Court petition is not filed before he or she is 18 years old. (Bruni affirmation in support of mot ¶ 12.)

The court is mindful of the People's argument that the practical effect of removing this AO's case would likely be "tantamount to dismissing the case and barring its prosecution in any ****5** court"; and that such removal would likely give this AO "a free pass for these actions," and may leave the victim without the opportunity for receiving a final order of protection. (Bruni affirmation in support of mot ¶ 17.) Such anticipated ramifications of removing the AO's case are irrefutably serious and are very concerning to this court.

However, the court finds that if the People's motion opposing removal were granted in this particular case, the court would essentially be creating a judicial exception to the removal of cases as set forth in CPL 722.23 (1) (a), which would disqualify any AO who otherwise would have his or her case removed to the Family Court, but for his or her age. The court finds that it cannot properly do such under well-settled principles of statutory interpretation and construction. (*See* ***797** *People v Buyund*, 179 AD3d 161, 168 [2d Dept 2019] [quoting, "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning"].) If the legislature intended that there be such an exception disqualifying 18-year-old AOs from having their cases removed to the Family Court, it could have clearly said so in the statute. (*See People v Buyund*, 179 AD3d at 169 ["(W)e decline to rewrite the statute to add language that the Legislature did not see fit to include"].)

The People have articulated what appears to be an omission or oversight in the relevant Family Court Act provisions. Such has been recognized by courts in other jurisdictions

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and by respected scholars.[6] However, the court is nonetheless constrained to enforce CPL 722.23 as it is written, even if it leads to potentially undesirable results. "The judicial function is to interpret, declare and enforce the law, not to make it, and it is not for the courts to correct supposed errors, omissions or defects in legislation." (*People v Buyund*, 179 AD3d at 170.) The People are correct that the legislature did not address the apparent statute of limitations "loophole" in the Family Court Act. To the extent, however, that the legislature failed to address the same, it does not mean that this court can or should assume the legislature's role and rewrite the statute.

As the People's motion opposing removal fails to address any specific aggravating or mitigating factors relating to this AO other than his age, and based on the foregoing, the court is constrained to deny the People's motion and the AO's case shall be removed to the Family Court forthwith.

Copr. (C) 2021, Secretary of State, State of New York

Footnotes

1 The motion schedule included a hearing, requested by defense counsel, which was originally scheduled for June 3, 2021. At the People's request, the hearing date was subsequently adjourned to June 9, 2021. At the June 9, 2021 hearing appearance, defense counsel then waived the hearing and all parties waived the statutory timeline for the court's written decision on the People's extraordinary circumstances motion.

2 See *People v Andujar* (30 NY3d 160, 163 [2017]) and *People v Ocasio* (28 NY3d 178, 181 [2016]), wherein the Court of Appeals held that the court can refer to the "dictionary definition" of a statutory term for a "useful guidepost" in construing that term.

3 *People v Roberts*, 31 NY3d at 423; *see also People v Andujar*, 30 NY3d at 166 ("While 'the words of the statute are the best evidence of the Legislature's intent,' legislative history may also be relevant as an aid to construction of the meaning of words").

4 Merriam-Webster defines "extraordinary" as "going beyond what is usual, regular, common, or customary," and "exceptional to a very marked extent." (*See* Merriam-Webster Online Dictionary, extraordinary [https://www.merriam-webster.com/dictionary/extraordinary].) Black's Law Dictionary defines the term "extraordinary circumstances" as "[a] highly unusual set of facts that are not commonly associated with a particular thing or event." (Black's Law Dictionary 296 [10th ed 2014].)

5 See Family Court Act § 301.2 (1), which, following the enactment of the Raise the Age legislation, defines "juvenile delinquent" as, in pertinent part, "a person over seven and less than eighteen years of age, who, having committed an act that would constitute a crime, or a violation, where such violation is alleged to have occurred in the same transaction or occurrence of the alleged criminal act, if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law"; and Family Court Act § 302.1, which states, in pertinent part: "(2) In determining the jurisdiction of the court the age of such person at the time the delinquent act allegedly was committed is controlling"; and Family Court Act § 302.2, which governs the statute of limitations for the filing of a juvenile delinquency proceeding and which states, in pertinent part, that "[a] juvenile delinquency proceeding must be commenced within the period of limitation prescribed in [CPL 30.10] or, unless the alleged act is a designated felony . . . , commenced before the respondent's eighteenth birthday, whichever occurs earlier."

6 See Professor Merril Sobie, Supplementary Practice Commentaries (McKinney's Cons Laws of NY, Family Ct Act § 302.2), in which he notes that the raising of the general Family Court jurisdictional age to 18 years old following the enactment of the Raise the Age legislation "raises significant problems" in applying the as yet unamended Family Ct Act § 302.2 18-years-old age ceiling, and that, in cases such as this one, "filing a timely petition may be impracticable or impossible" and "[i]n that event, the presentment agency loses its authority and the potential respondent cannot be held legally responsible." Professor Sobie submits that "[t]he problem can be resolved only through legislation."

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# 2021 CAASNY JD TRAINING

# RAISE THE AGE UPDATE

# ADDITIONAL MATERIALS


Dutchess County Department of Law
Victor Civitillo: Senior Assistant County Attorney
Linda Fakhoury: Senior Assistant County Attorney

(DUTCHESS COUNTY)

# RAISE THE AGE COURT CHART

| Age at time of Offense | Offense | Court | Legal Designation of Case | After Hours Arraignment Court |
|---|---|---|---|---|
| 16, 17 | Felony (including misdemeanors/violations that are part of the same criminal transaction) | Youth Part of County/Supreme Court | Adolescent Offender ("A.O.") | Designated Magistrate, Local Criminal Court, Times as Listed |
| 13, 14, 15 | "J.O." Felony – listed in PL 10(18) (and any other crimes that are part of the same criminal transaction) | Youth Part of County/Supreme Court | Juvenile Offender ("J.O.") | Designated Magistrate, Local Criminal Court, Times as Listed |
| 16, 17 | NON-Vehicle and Traffic Law Misdemeanor (including violations that are part of the same criminal transaction) | Family Court | Juvenile Delinquent ("J.D.") | Designated Magistrate (C/Beacon Judge, -or- C/Poughkeepsie Judge), Times as Listed for PPD<br>-If none or missed the arraignment times, then police may place respondent in detention overnight and must produce respondent at the next arraignment time or Family Court the next day it is in session, *whichever is first.* |
| At least 7 but less than 16 | • NON-"J.O." felony<br>• Misdemeanor, including VTL<br>• NO violation may be heard | Family Court | Juvenile Delinquent ("J.D.") | Designated Magistrate, (C/Beacon Judge, -or- C/Poughkeepsie Judge), Times as Listed for PPD<br>-If none or missed the arraignment times, then police may place respondent in detention overnight and must produce respondent at the next arraignment time or Family Court the next day it is in session, *whichever is first.* |
| 16, 17 | •Vehicle and Traffic Misdemeanor<br>•Traffic Infraction<br>•Violation | Local Criminal Court | Defendant | Local Criminal Court |

**Appearance Tickets:**

- AO's are returnable to the YOUTH PART (Permissible only for certain E felonies--some E felonies such as Criminal Contempt 1st Degree, Felony DWI, DV Cases, Gun Cases, or others necessitating Judicial Intervention require a consult with the DA's office to determine if arraignment is needed)
- JD's are returnable to PROBATION

**Revised November 1, 2021**

# JUVENILE OFFENDER OFFENSES AND DESIGNATED FELONIES

| PENAL LAW | CHARGE | AGE OF YOUTH | JUVENILE OFFENDER (J.O.) | DESIGNATED FELONY (D.F.) |
|---|---|---|---|---|
| 130.70 | AGGRAVATED SEXUAL ABUSE 1ST DEGREE | 13 | NO | YES |
| 130.70 | AGGRAVATED SEXUAL ABUSE 1ST DEGREE | 14, 15 | YES | YES |
| 130.70 | AGGRAVATED SEXUAL ABUSE 1ST DEGREE | 16, 17 | NO | YES |
| 150.20 | ARSON 1ST DEGREE | 13 | NO | YES |
| 150.20 | ARSON 1ST DEGREE | 14, 15 | YES | YES |
| 150.20 | ARSON 1ST DEGREE | 16, 17 | NO | YES |
| 150.15 | ARSON 2ND DEGREE | 13 | NO | YES |
| 150.15 | ARSON 2ND DEGREE | 14, 15 | YES | YES |
| 150.15 | ARSON 2ND DEGREE | 16, 17 | NO | YES |
| 120.10 | ASSAULT 1ST DEGREE | 13 | NO | YES |
| 120.10 (1), (2) | ASSAULT 1ST DEGREE | 14, 15 | YES | YES |
| 120.10 (1), (2) | ASSAULT 1ST DEGREE | 16, 17 | NO | YES |
| 120.10 (3), (4) | ASSAULT 1ST DEGREE | 14, 15 | NO | YES |
| 120.10 (3), (4) | ASSAULT 1ST DEGREE | 16, 17 | NO | YES |
| 140.30 | BURGLARY 1ST DEGREE | 14, 15 | YES | YES |
| 140.25 (1) | BURGLARY 2ND DEGREE | 14, 15 | YES | YES |
| 130.50 | CRIMINAL SEXUAL ACT 1ST DEGREE | 13 | NO | YES |
| 130.50 (1), (2) | CRIMINAL SEXUAL ACT 1ST DEGREE | 14, 15 | YES | YES |
| 130.50 (1), (2) | CRIMINAL SEXUAL ACT 1ST DEGREE | 16, 17 | NO | YES |
| 130.50 (3) | CRIMINAL SEXUAL ACT 1ST DEGREE | 14, 15 | NO | YES |
| 130.50 (3) | CRIMINAL SEXUAL ACT 1ST DEGREE | 16, 17 | NO | YES |
| 265.03 | CRIMINAL POSSESSION OF A WEAPON 2ND DEGREE (SCHOOL GROUNDS ONLY) | 14, 15 | YES | YES |
| 135.25 | KIDNAPPING 1ST DEGREE | 13 | NO | YES |
| 135.25 | KIDNAPPING 1ST DEGREE | 14, 15 | YES | YES |
| 135.25 | KIDNAPPING 1ST DEGREE | 16, 17 | NO | YES |
| 135.20 | KIDNAPPING 2ND DEGREE (ABDUCTION INVOLVED USE OR THREAT OF USE OF DEADLY PHYSICAL FORCE) | 13, 14, 15 | NO | YES |
| 135.20 | KIDNAPPING 2ND DEGREE (ABDUCTION INVOLVED USE OR THREAT OF USE OF DEADLY PHYSICAL FORCE) | 16, 17 | NO | YES |
| 125.20 | MANSLAUGHTER 1ST DEGREE | 13 | NO | YES |
| 125.20 | MANSLAUGHTER 1ST DEGREE | 14, 15 | YES | YES |
| 125.20 | MANSLAUGHTER 1ST DEGREE | 16, 17 | NO | YES |
| 125.27 | MURDER 1ST DEGREE | 13, 14, 15 | NO | YES |
| 125.27 | MURDER 1ST DEGREE | 16, 17 | NO | YES |
| 125.25 (1), (2) | MURDER 2ND DEGREE | 13 | YES | YES |
| 125.25 (1), (2) | MURDER 2ND DEGREE | 14, 15 | YES | YES |
| 125.25 (3) | MURDER 2ND DEGREE (AS LONG AS UNDERLYING CRIME IS ONE FOR WHICH THEY ARE CRIMINALLY RESPONSIBLE) | 14, 15 | YES | YES |
| 125.25 | MURDER 2ND DEGREE | 16, 17 | NO | YES |

| PENAL LAW | CHARGE | AGE OF YOUTH | JUVENILE OFFENDER (J.O.) | DESIGNATED FELONY (D.F.) |
|---|---|---|---|---|
| 130.35 | RAPE 1ST DEGREE | 13 | NO | YES |
| 130.35 (1), (2) | RAPE 1ST DEGREE | 14, 15 | YES | YES |
| 130.35 (1), (2) | RAPE 1ST DEGREE | 16, 17 | NO | YES |
| 130.35 (3) | RAPE 1ST DEGREE | 14, 15 | NO | YES |
| 130.35 (3) | RAPE 1ST DEGREE | 16, 17 | NO | YES |
| 160.15 | ROBBERY 1ST DEGREE | 13 | NO | YES |
| 160.15 | ROBBERY 1ST DEGREE | 14, 15 | YES | YES |
| 160.15 | ROBBERY 1ST DEGREE | 16, 17 | NO | YES |
| 160.10 (2) | ROBBERY 2ND DEGREE | 14, 15 | YES | YES |
| | | | | |
| 110/135.25 | ATTEMPTED KIDNAPPING 1ST DEGREE | 13 | NO | YES |
| 110/135.25 | ATTEMPTED KIDNAPPING 1ST DEGREE | 14, 15 | YES | YES |
| 110/135.25 | ATTEMPTED KIDNAPPING 1ST DEGREE | 16, 17 | NO | YES |
| 110/125.27 | ATTEMPTED MURDER 1ST DEGREE | 13, 14, 15 | NO | YES |
| 110/125.27 | ATTEMPTED MURDER 1ST DEGREE | 16, 17 | NO | YES |
| 110/125.25 | ATTEMPTED MURDER 2ND DEGREE | 13 | NO | YES |
| 110/125.25 | ATTEMPTED MURDER 2ND DEGREE | 14, 15 | YES | YES |
| 110/125.25 | ATTEMPTED MURDER 2ND DEGREE | 16, 17 | NO | YES |
| | | | | |
| 160.10 | ROBBERY 2ND—PRIOR ROBBERY 2ND OR ASSAULT 2ND OR ANY DESIGNATED FELONY FINDING | 14, 15 | NO | YES |
| 160.10 | ROBBERY 2ND—PRIOR ROBBERY 2ND OR ASSAULT 2ND OR ANY DESIGNATED FELONY FINDING | 16, 17 | NO | YES |
| 120.05 | ASSAULT 2ND—PRIOR ROBBERY 2ND OR ASSAULT 2ND OR ANY DESIGNATED FELONY FINDING | 14, 15 | NO | YES |
| 120.05 | ASSAULT 2ND—PRIOR ROBBERY 2ND OR ASSAULT 2ND OR ANY DESIGNATED FELONY FINDING | 16, 17 | NO | YES |
| | | | | |
| ANY FELONY | YOUTH W/TWO PRIOR FELONY FINDINGS | 7 TO UNDER 18 | NO | YES |

*Felony Murder requires an underlying Juvenile Offender (J.O.) felony offense*
*A Designated Felony (D.F) finding precludes Youthful Offender (Y.O.) status*
*All D.F. and J.O. jurisdictions are both age and charge dependent*
*D.F./J.O. Crimes listed would also be a D.F./J.O. if committed as a sexually motivated felony pursuant to §130.91*

# Detentions: No Vacancies

David Meffert, Esq.

# TO DETAIN, OR NOT DETAIN

(BUT CAN YOU GET A BED, THAT IS THE QUESTION)

STEVEN M. NEUHAUS
ORANGE COUNTY
COUNTY EXECUTIVE

LANGDON C. CHAPMAN
ORANGE COUNTY
COUNTY ATTORNEY

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# PRESENTED BY:


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- KRISTIN GUMAER, ESQ. ULSTER COUNTY ATTORNEY’S OFFICE
- CHRISTOPHER MULLER, ESQ.: COLUMBIA COUNTY ATTORNEY’S OFFICE

TECHNICAL ASSISTANCE PROVIDED BY:

- LARA MORRISON, ESQ.: ORANGE COUNTY ATTORNEY’S OFFICE

# Definitions/Abbreviations

- JD: Juvenile Delinquent
- JO: Juvenile Offender
- AO: Adolescent Offender
- NSD: Non-Secure Detention
- SD: Secure Detention
- SSD: Specialized Secure Detention
- OCFS: Office of Children and Family Services
- FCA: Family Court Act
- CPL: Criminal Procedure Law

# DETENTION UNDER THE FCA & CPL

- Detention under the FCA is governed by FCA 304.1 and 320.5 *(see your materials)*
- Detention of JO & AO youth is governed under CPL 510.15 *(see your materials)*
- Detention for JD youth can be in either a non-secure facility, or a secure facility.
- Detention for a JO youth is in a secure facility.
- Detention for an AO youth is in a Specialized Secure Detention

# NON-SECURE DETENTION

- Non-Secure Detention, or NSD, is a facility without “jail like” features such as locked doors and fences.
- Currently there are nine (9) NSD facilities located throughout the state
- But not really (More on that to come)

# PROS

- There are more NSD facilities than Secure facilities, so better possibilities for beds
- Children under 10 can be kept in an NSD facility -FCA§ 304.1(3)
- NSD is less disruptive than secure for a youth

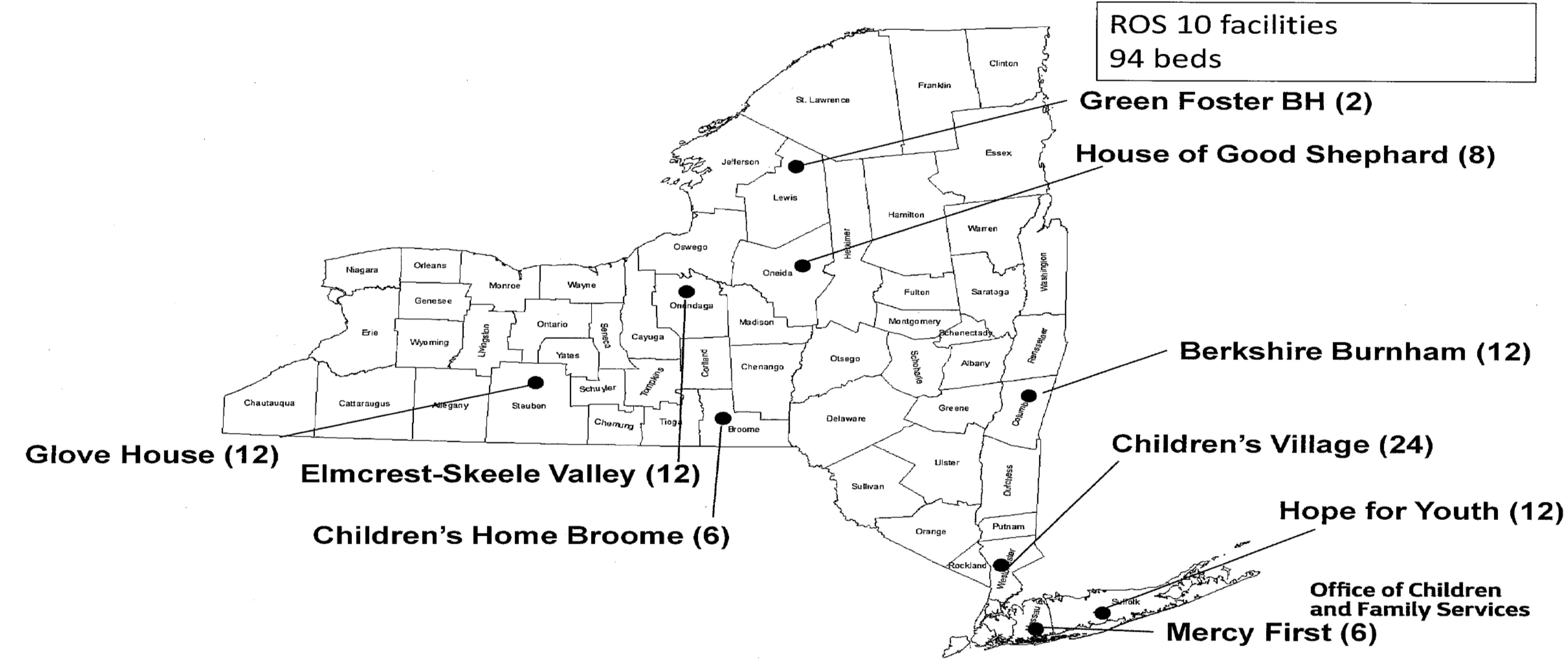
# CONS

- Your Respondent can walk out of the facility.
- Not all NSD facilities will take out-of-county youth.
- Some NSD facilities have contracts with specific counties and will only have bed availability when the beds are not being used by the contracting county.
- If your Respondent is in a facility that has contracts with another county, your youth could get bumped out of the bed if the contracting county needs it.

# NSD FACILITIES IN NEW YORK STATE

- Berkshire Farm’s Burnham Youth Safe Center
- Children’s Home of Broome County NSD
- Children’s Village FCAP
- Elmcrest-Skeele Valley NSD
- Glove House-Stuben NSD
- House of the Good Shepherd
- Larry & Lucy Green NSD-Lewis County
- Mercy First NSD
- Hope For Youth NSD

# February 10, 2021 Non-Secure Detention (NSD) Non-NYC Facilities 



# BERKSHIRE FARMS

- Located in Canaan, New York in Columbia County
- 12 beds (Currently only staffed for 8 but hoping to be back to full capacity January 15, 2022)
- Accepts both males and females
- Berkshire has contracts with four counties for ALL of their beds.
- They take other youth if they have unused beds, but the referring county must have a contract for non-reserved beds.
- Contact: Lucas Jacobs 518-242-0578

# CHILDREN'S HOME OF WYOMING CONFERENCE-BROOME COUNTY

- Located in Binghamton, Broome County New York
- 6 beds
- Accepts male and female youth.
- All beds are contracted to Broome County.
- They can take out of county youth if there are unused beds.
- Contact Mackenzie Quarella- 607-766-8067

# CHILDREN’S VILLAGE FCAP

- Located in Dobbs Ferry, Westchester County, New York
- 24 beds, 12 boys, 12 girls
- Takes out of county youth
- Contact: Robert Douglas: 914-693-0600 ext. 1872 or Lawrence Taylor at ext. 1879

# ELMCREST-SKEELE VALLEY

- Located in Tully, Onondaga County, New York
- 12 beds (Currently only staffed for 8)
- Accepts males and females.
- 4 beds are under contract to various surrounding counties.
- 4 beds available to out-of-county youth, but they will remove a youth if a contracted county needs a bed.
- Contact: Caitlin Lundy: 315-683-5341 or Christa Foley: 315-863-6060

# GLOVE HOUSE- STUBEN COUNTY NSD

- This facility is closed but may reopen in the future.
- Located in Bath, Stuben County, New York
- 12 beds
- Accepts male and female youth
- Accepts out of county youth

# HOUSE OF THE GOOD SHEPHERD

- Located in Utica, Oneida County, New York
- 4 beds
- 3 beds are exclusively for Oneida County use.
- 1 bed is for out of county youth, but it is currently not available due to staffing issues.
- Accepts males and females
- Contact: Shad Czerniak: 315-733-6537

# LARRY AND LUCY GREEN NSD

- Located in Booneville, Oneida County, New York.
- 2 co-ed beds, for Lewis County use only.
- Not on the actual OCFS list on their website.
- Administered by the Lewis County Probation Department
- Contact: 315-376-5358
- More on this facility later

# MERCYFIRST

- Located in East Massapequa, Nassau County, Long Island, New York
- 6 beds, co-ed.
- Nassau County youth only.
- Contact: Victoria Henderson: 631-206-6500 ext. 1901

# Hope For Youth NSD

- Located in Amityville, Suffolk County(Long Island), New York
- 12 Beds, primarily for Suffolk County youth.
- Accepts males and females.
- They can take an out-of-county youth if the requesting county has obtained permission from Suffolk County Probation to place the out-of-county youth in the facility.
- Contact: Cara Cantor: 631-782-6562

# SECURE DETENTION

- Secure Detention is a facility with “jail like” features, such as fences and locked doors.
- Provides a higher level of structure and care for the youth than NSD.
- Currently there are only 8 secure detention facilities.
- Two of the facilities are located in New York City and are primarily for NYC youth.

# PROS

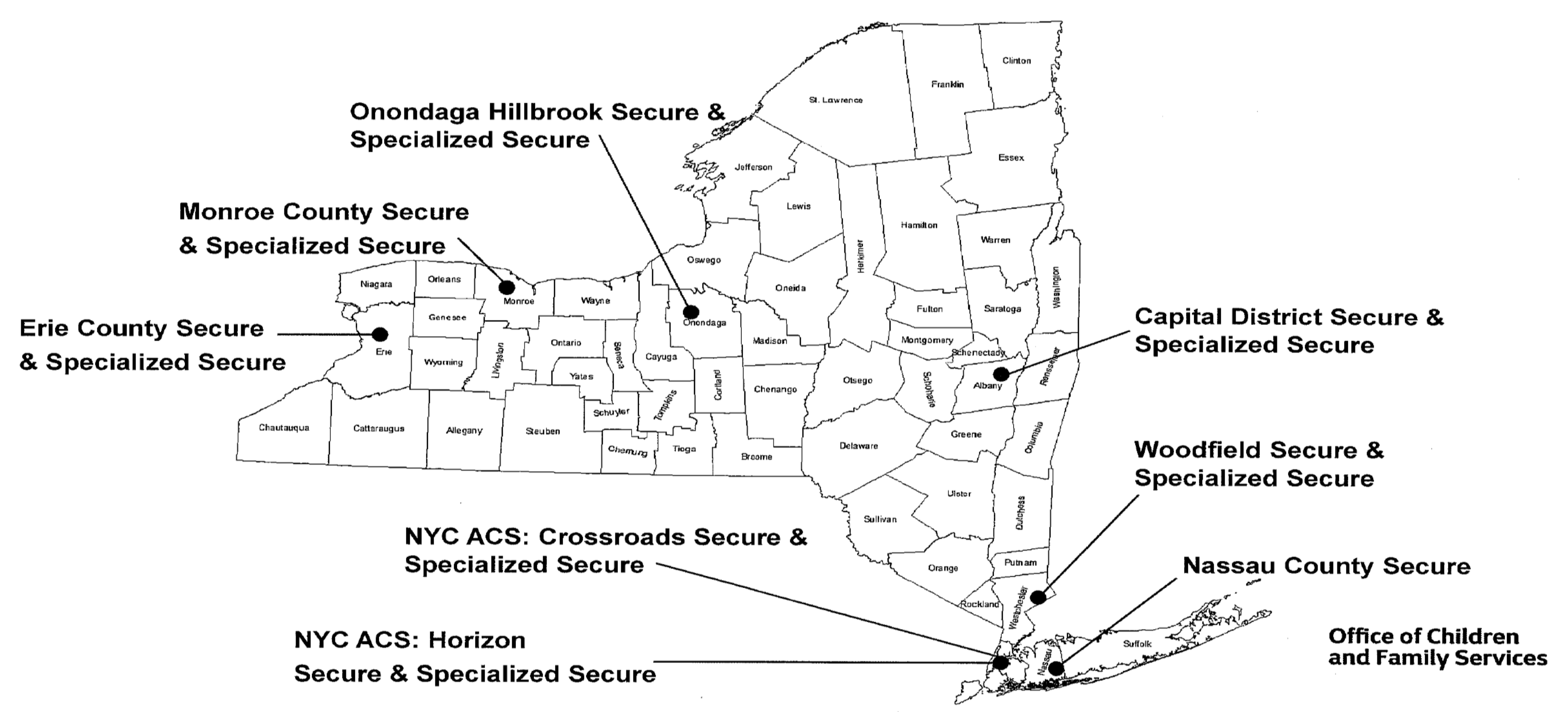
- Locked facility is good for youth who have a history of AWOL behaviors.
- Appropriate for youth with a history of violent behavior.

# CONS

- Limited number of beds available.
- 7 facilities are also Specialized Secure Detentions, so beds may be tied up with AO youth.
- Some facilities only accept youth from law enforcement, so DSS caseworkers can’t deliver a youth to the facility.
- Crossroads is the only NYC facility that can take a youth from another county, and only in urgent circumstances.

July 8, 2021

# Secure Detention (SD) & Specialized Secure (SSD) Facilities 1



# Capital District Youth Detention Center

- Located in Loudonville, Albany County, New York
- 21 male beds, 3 female beds
- Also an SSD.
- Albany, Rensselaer, Saratoga and Schenectady Counties have priority over other referring counties.
- The referring county must have a contract with Capital District.
- 24/7 intake number: 518-456-9399 ext. 234

# Erie County Juvenile Detention

- Located in Buffalo, Erie County, New York
- 40 beds, male and female.
- 8 bed female pod can also be secure detention and SSD at the same time.
- 24/7 intake number 716-923-4062

# Monroe County Juvenile Detention

- Located in Rush, Monroe County, New York
- 21 male beds, 4 female beds.
- Female beds are both SD and SSD.
- 24/7 intake number: 585-753-5940

# Nassau Juvenile Detention

- Located in Westbury, Nassau County (Long Island), New York.
- Secure Detention only, no SSD
- 16 male/female beds
- 24/7 intake number 516-571-9260

# Hillbrook Juvenile Detention

- Located in Syracuse, Onondaga County, New York.
- 32 beds, male/female.
- All beds can either be SD or SSD.
- They only take out-of-county Juvenile Offenders and Adolescent Offenders.
- 24/7 intake number: 315-435-1421

# Woodfield Juvenile Detention

- Located in Valhalla, Westchester County, New York
- 42 male/female beds
- Also an SSD.
- 24/7 intake number: 914-231-1103.

# Crossroads

- Located in Brooklyn.
- 106 male/female beds
- Out-of-county youth are only taken on a case-by-case basis in urgent situations.
- 24/7 intake number: 212-442-7100.

# NO VACANCY?

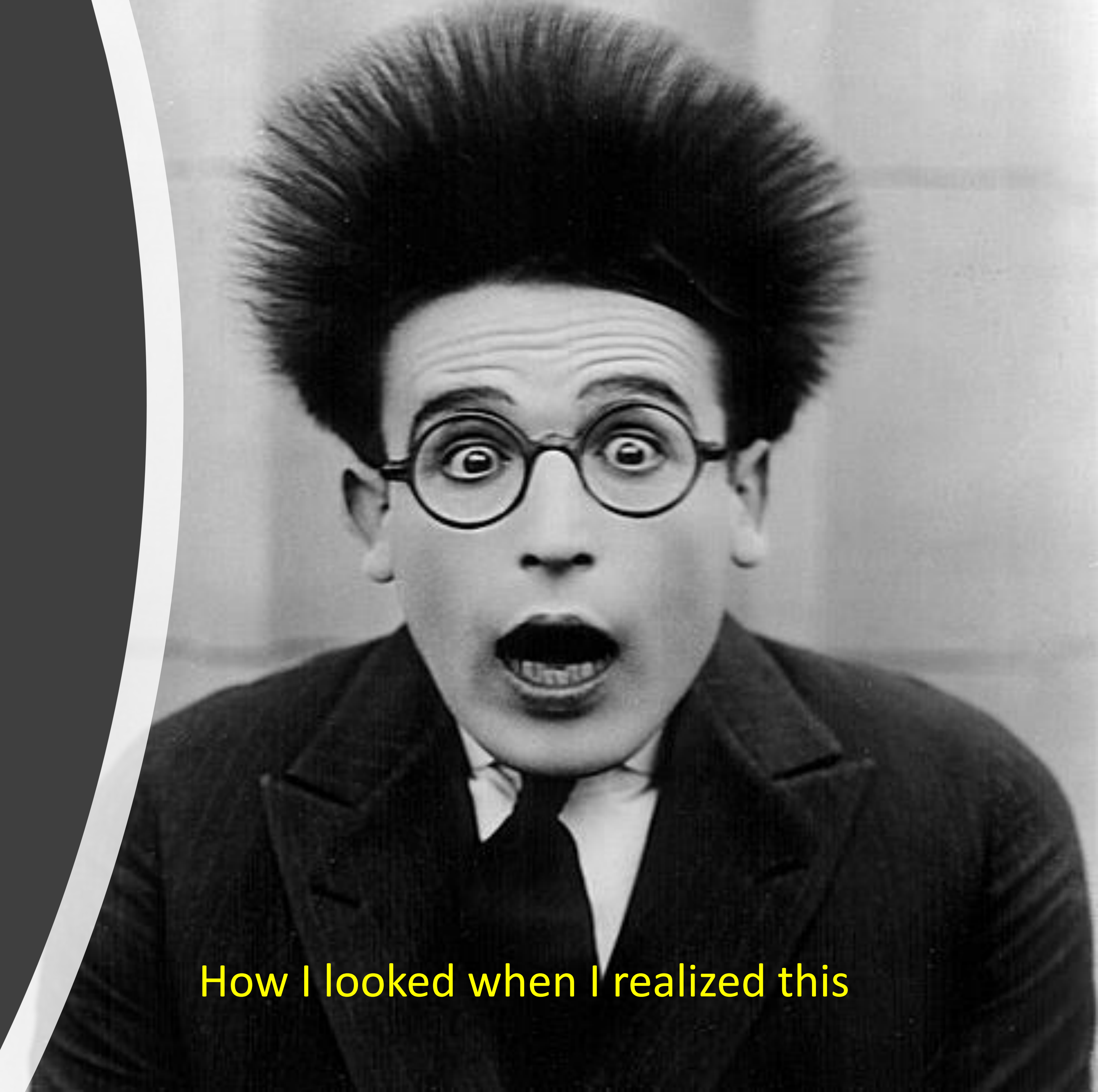
# OCFS Detention Census Information

- Ostensibly updated every Monday
- For Non-Secure Detention

  https://ocfs.ny.gov/programs/youth/detention/census-NS.php
- For Secure or SSD Beds

  https://ocfs.ny.gov/programs/youth/detention/census.php

As of November 30th, 2021, the OCFS Non-Secure Detention Census page hasn't been undated since August 30th, 2021.



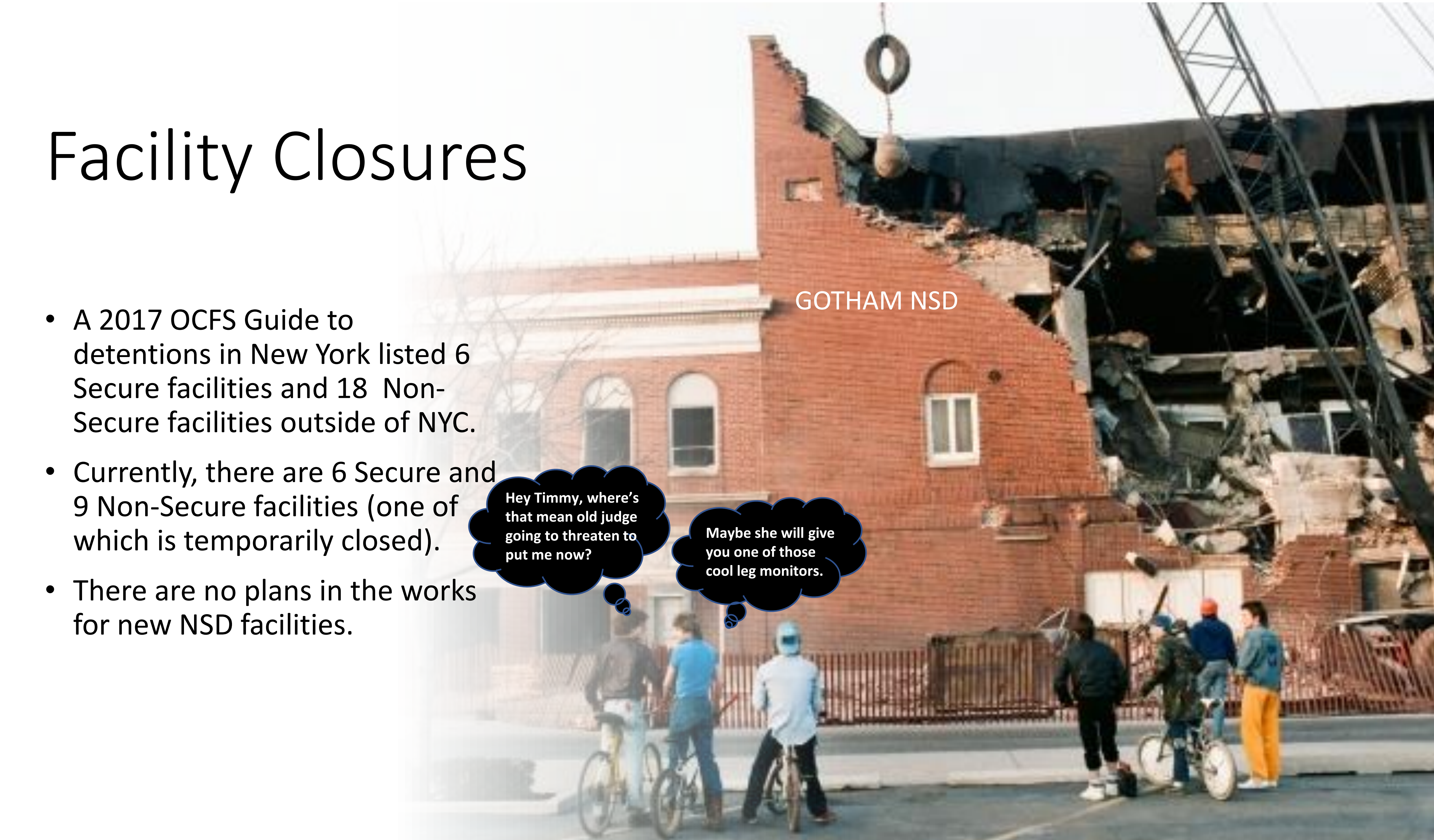
# THE REALITY OF THE NSD BED NUMBERS

- According to the OCFS website, there are 94 NSD beds available statewide in 9 facilities.
- This is not accurate.
- One facility is temporarily closed and may not re-open, leaving 82 beds in 8 facilities.
- Of those, one facility only has 4 beds, not 8, and another only has staff for 8 beds, not 12, dropping the number to 74 beds.
- 2 facilities are exclusively for the use of the counties where they are located, dropping the total beds to 56 in 6 facilities.
- Of those remaining 56 beds, 27 are contracted to specific counties, leaving 29 beds. Of those 29 beds, one is unavailable due to staffing issues, leaving 28.
- Of those 28, 24 are in one facility in Westchester County.
- In reality, the 27 contracted beds are not likely to be full, so you may get one of those beds, but you may have to move your youth on short notice.

# WHY IS THIS HAPPENING?

# Facility Closures

- A 2017 OCFS Guide to detentions in New York listed 6 Secure facilities and 18 Non-Secure facilities outside of NYC.
- Currently, there are 6 Secure and 9 Non-Secure facilities (one of which is temporarily closed).
- There are no plans in the works for new NSD facilities.



# DOLLARS AND SENSE (OR LACK THEREOF)

- NSD's are all run by private entities.
- The costs of running an NSD are very high.
- Insurance, utilities, salaries, benefits and facilities upkeep all add up and may make an NSD unprofitable.
- Cost cutting by counties may make the operation of some NSD facilities unsustainable.
- These costs do not change if the beds are filled or vacant.

# COVID-19 AND OTHER MEDICAL ISSUES

- Active covid cases in the facility causes them to suspend admissions.
- Illness amongst staff members, or quarantines for staff who have been exposed cause staffing shortfalls(especially for female staff).
- Pre-Admission Covid testing?
- One facility is now asking for youths to be seen by a doctor to sign off that the youth is clear to be admitted to the facility.
- Difficult medical conditions that require medications like diabetes may make an NSD deny admittance.
- I recently had a facility deny admission to a youth because he was on crutches, their bedrooms were on the second floor, and there was no elevator.

# STAFFING CONCERNS

- Facilities are having huge issues finding and retaining staff.
- Lack of qualified applicants for new positions.
- Low wages/lack of benefits.
- Time involved with training new hires.
- High rate of turnover with employees.
- One facility that I spoke with told me that they have been losing staff because the staff are afraid of the youth who are being admitted to the facility.

# Limitations On Physical Restraints

- OCFS regulates all detention facilities in New York.
- OCFS banned the use of the prone restraint on July 1st, 2021 in all detention facilities, citing the events of 2020 as well as racial disparity in detention as reasons for the discontinuance of this technique.
- In a letter sent out to all detention facilities, OCFS stated that they want to help detention facilities move away from reliance on physical restraints by supporting "de-escalation techniques, training, programmatic enhancements and physical plant changes".
- This limits staff from being able to deal with violent or out of control youth.

# Contracted Beds

- Many facilities have contracts with specific counties.
- Beds are only available when the counties with contracts aren't using them.
- There is a risk that you may need to scramble to move your youth if the contracting county needs the bed, leaving you with no bed if there are no vacancies in other facilities.

# Specialized Secure Detention (SSD)

- All 6 currently available Secure Detentions now accept Adolescent Offenders into the facilities for SSD.
- This can decreased space available for secure detention for JD youth.
- Theoretically, a sentenced AO can get the equivalent of a county year which is to be served in an SSD facility, tying up the bed.
- Juvenile Delinquents and Juvenile Offenders need to be screened away from the older AO youth.

# No Female Beds

Lately, I have had issues with getting beds for female youth. Facilities are turning down females because of lack of staffing to supervise them.

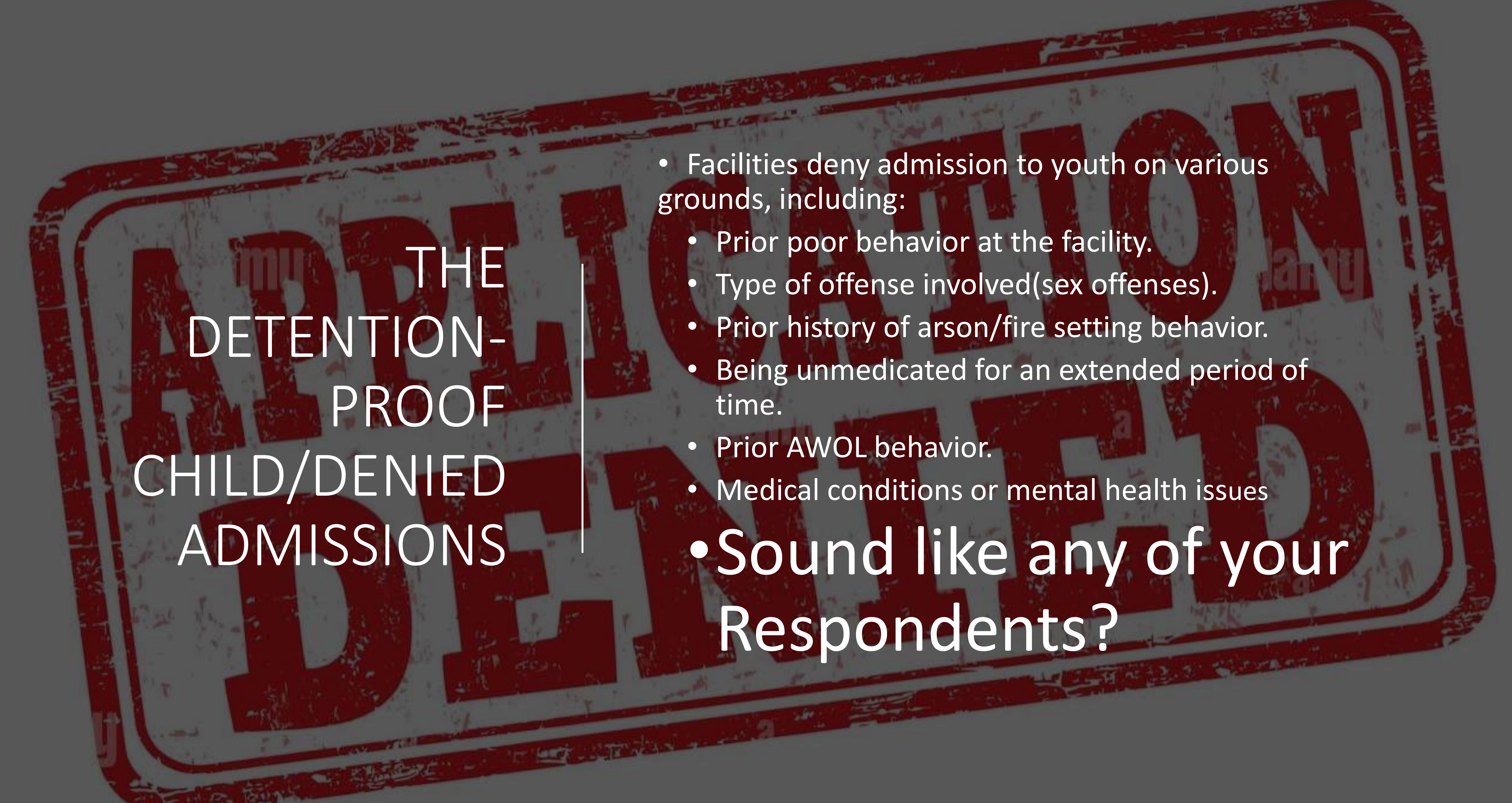
Female youth who should be in secure are being remanded to NSD facilities instead.

I recently had a situation where I had a youth who was ordered into secure detention ended up going to NSD due to lack of secure beds. There were two other female youth in the facility who had also initially been remanded to secure.

This is a serious safety issue.

# Risk of Re-Placement

- Many facilities with contracted beds will take youth from a non-contracted county if they have vacancy.
- If a contracting county needs their bed, you will have to scramble to find another bed.
- This could lead to having to release a youth under less-than-ideal circumstances.




# THE DETENTION-PROOF CHILD/DENIED ADMISSIONS

- Facilities deny admission to youth on various grounds, including:
  - Prior poor behavior at the facility.
  - Type of offense involved(sex offenses).
  - Prior history of arson/fire setting behavior.
  - Being unmedicated for an extended period of time.
  - Prior AWOL behavior.
  - Medical conditions or mental health issues
  - Sound like any of your Respondents?

# SERIOUSLY?

Even Rodney can see the problem with that.

KIDS AREN'T STUPID. THEY FIGURE THIS OUT AND ACT ACCORDINGLY

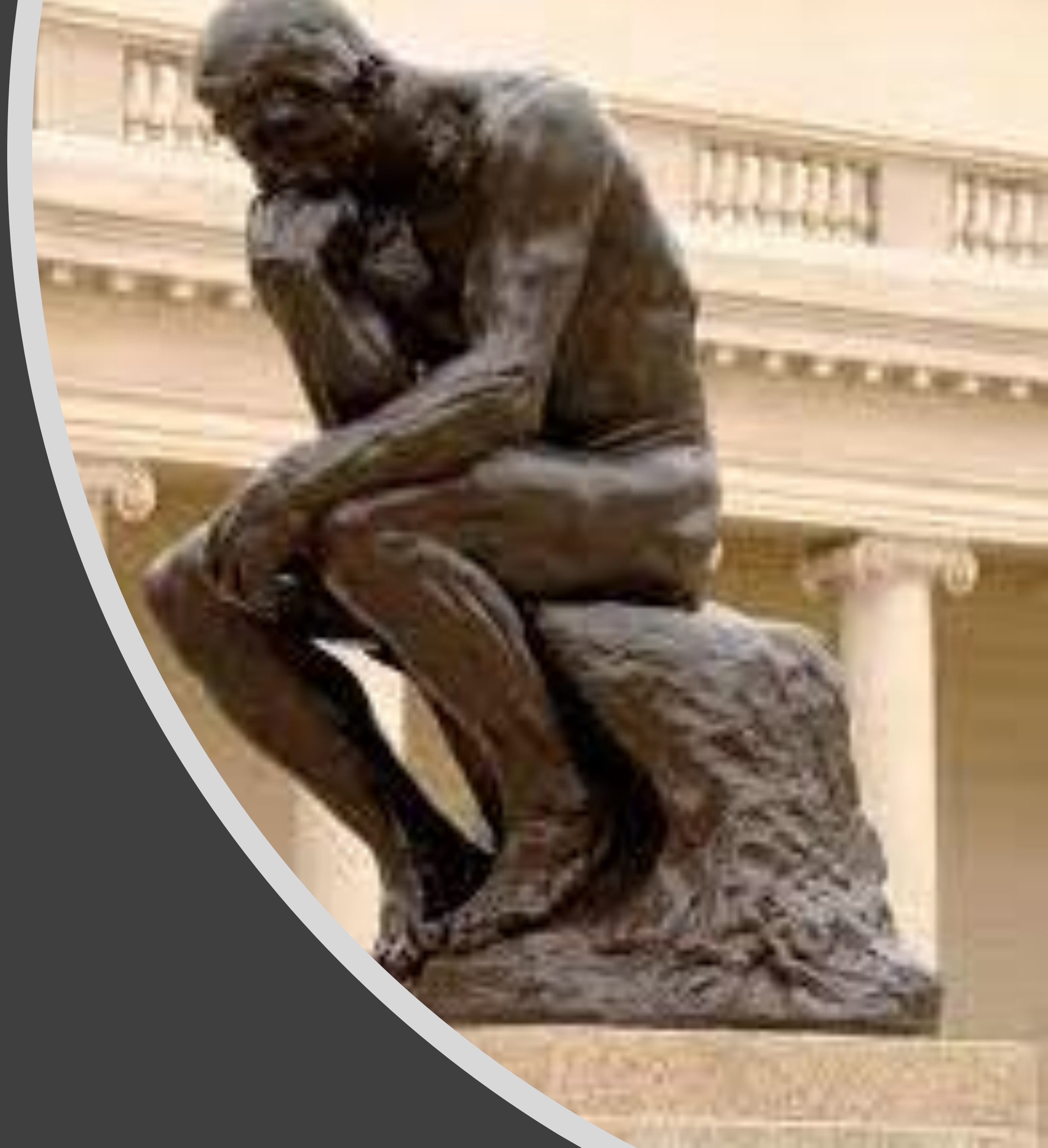
dreamstime
GOT CO-RESPONDENTS?
FUGGEDABOUTIT
Facilities do not want to take co-respondents or youth with gang affiliation to each other.

# BED LIMITS

- One of the facilities I spoke with reported to me that OCFS is contemplating capping the size of NSD facilities at 10 youth.
- Six facilities have capacities of 12 youth.
- This will drop the total NSD bed availability from 94 to 84 beds, if Glove House re-opens, and 74 beds if they do not.

# What Do We Do?

- The Legislature is not going to help us.
- State agencies aren't going to help us.
- We have to help ourselves.
- This situation is going to require all of us to think outside the box.
- We must work collaboratively within our counties to create alternatives to detention.



# Electronic Monitoring

- Can be done through Probation, DSS or an outside agency.
- Costs considerably less than an NSD Bed.
- Tracking reports can be generated for use in court.

# Orange County's Electronic Monitoring Program

- Orange County DSS has electronic monitoring.
- Community Connections, a contract agency, administers the program.
- Once the youth is ordered to participate, the agency representative has the youth and parent signs a contract explaining their obligations to the program and the monitor is affixed to the youth.
- They check in daily at the youth's home to verify compliance.
- They provide tracking reports and testimony regarding the youth's performance (or lack thereof).
- They do not track down a youth when they abscond.

# ELM Issues

- Youth can cut off the monitoring device or remove it in other ways.
- If the device is lost or damaged it can cost several hundred dollars to replace
- Creates additional work for you to file new charges for criminal mischief or petit larceny for damage/loss of the device.

# Alternative to Detention Programs

- There are alternative to detention programs already in place in several counties.
- Berkshire Farm and Children's Village have programs in use in multiple counties.
- Make your own program to suit your needs.

# Two Ready Made Alternative To Detention Programs

- Berkshire Farm “Stepping Stones”
- Contact: Lucas Jacobs 518-242-0578
- Berkshire will meet with you to tailor a program to your specific needs.

- Children’s Village Alternative to Detention Program “ATD”
- Contact: Robert Douglas: 914-693-0600 ext. 1872

# DIY It!

## Make Your Own Alternative To Detention Program.

- Collaboration is the Key
- Identify the stakeholders in your county
  - Probation
  - DSS
  - Contract Agencies
  - Local Police Agencies/Sheriff’s Office.

# Don’t Forget The Court!

- Consult with your Family Court Judges to get their input.
- They may have elements that they want the program to include.
- Their buy-in is critical to get them to use the program.

# Most Importantly, Be Creative.

This situation is not going away.

We all need to adapt.

It is in your best interest, and in the interest of your counties to have a solution in place.

# RETHINKING DETENTION

Can an NSD be done on a smaller, more agile basis?

What can be done to reduce operating costs of an NSD?

# The Larry & Lucy Green NSD

- All of the information I have on this facility was given to me by Lewis County Department of Probation.
- Larry & Lucy Green NSD is run by Larry and Lucy Green at their home.
- They can take 2 youth at once, in individual bedrooms.
- Remotely located in a rural setting, making it hard to abscond.
- Home-like environment.
- Mrs. Green works with the children while they are there.

- CAN THIS MODEL BE REPEATED IN OTHER COUNTIES?

# When All Else Fails, Put the A.O. in Jail

- The CPL allows for Adolescent Offenders to be placed in your county jail if there are no available SSD beds.
- Our Detention Co-Ordinator informed me that he has had several detained A.O.s be moved to county jail if they turn 18 in the SSD in order to make room for younger detainees.
- OCFS must be consulted prior to placing the A.O. in jail and they make the final decision on a case-by-case basis.

# CPL § 510.15

- § 510.15 Commitment of principal under seventeen or eighteen
- 1. When a principal who is under the age of sixteen is committed to the custody of the sheriff the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services as a juvenile detention facility for the reception of children. When a principal who (a) commencing October first, two thousand eighteen, is sixteen years of age; or (b) commencing October first, two thousand nineteen, is sixteen or seventeen years of age, is committed to the custody of the sheriff, the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services in conjunction with the state commission of correction as a specialized secure juvenile detention facility for older youth. Where such a direction is made the sheriff shall deliver the principal in accordance therewith and such person shall although lodged and cared for in a juvenile detention facility continue to be deemed to be in the custody of the sheriff. No principal under the age specified to whom the provisions of this section may apply shall be detained in any prison, jail, lockup, or other place used for adults convicted of a crime or under arrest and charged with the commission of a crime without the approval of the office of children and family services which shall consult with the commission of correction if the principal is sixteen years of age or older in the case of each principal and the statement of its reasons therefor. The sheriff shall not be liable for any acts done to or by such principal resulting from negligence in the detention of and care for such principal, when the principal is not in the actual custody of the sheriff.
- 2. Except upon consent of the defendant or for good cause shown, in any case in which a new securing order is issued for a principal previously committed to the custody of the sheriff pursuant to this section, such order shall further direct the sheriff to deliver the principal from a juvenile detention facility to the person or place specified in the order.

# Calling OCFS For Help

- OCFS can assist with locating an SSD/SD bed for an AO, JO and JD.
- You must exhaust your options before you call OCFS.
- You must call each and every SSD facility and get denials at each one.
- You must write down who you spoke with at each facility, the time, and what you were told
- OCFS will attempt to intervene and locate you a bed.
- THIS DOES NOT GUARANTEE THEY WILL FIND ONE FOR YOUR YOUTH.

## OCFS Numbers for assistance with SSD beds

During regular hours: (518)473-4630

After hours: (518)473-0551

# OCFS’s Perspective

- I had a conversation with Dan Houlihan, Director, Bureau of Detention Services for OCFS.
- Dan informed me that OCFS is aware of the problems with securing a detention bed.
- A combination of adding in the RTA youth, Covid-19, staffing issues and facility closures are contributing factors to the bed shortage.
- He informed me that this situation will not get better any time soon, but
- Capital improvement projects that will add bed capacity to SD/SSD facilities are coming.
- Hopefully this will make room in NSD facilities when the kids that really belong in secure have beds available for them.
- He confirmed the 10 bed limit is on the table.

# FCA § 312.2(3)

REMEMBER,

Starting TODAY, December 7th, 2021, All juvenile delinquents who are arrested on a warrant issued under FCA 312.2(1) from Family Court must appear before a Judge before the child is remanded to detention.

Judges may no longer issue warrants for Juvenile Delinquents mandating that the child be taken directly to detention if an arrest on the warrant is made after hours.

# FCA § 312.2(3), Cont.

Warrants: Post Execution Court Appearance

A juvenile wo is arrested pursuant to a warrant under this section must forthwith and with all reasonable speed be taken directly to the family court located in the county in which the warrant has been issued, or, when the family court is not in session, to the most accessible magistrate, if any, designated by the appellate division in the applicable department.

If a juvenile is brought before an accessible magistrate, the magistrate shall set a date for the juvenile to appear in the family court in the county in which the warrant has been issued, which shall be no later than the next day the court is in session if the magistrate orders the juvenile to be detained and within ten court days if the magistrate orders the juvenile to be released.

In determining whether the juvenile should be released, with or without conditions, or detained, the magistrate shall apply the criterion and issue the findings required by FCA§ 320.5. The Magistrate shall transmit its orders to the family court forthwith.

# FCA § 312.2(3), Cont.

The legislative memo note that a "[f]ailure to include a provision in the current statute directing juvenile delinquents returned on warrants to be brought before accessible magistrates  when Family Courts are not in session violates the fundamental value of fairness permeating the RTA implementation efforts, i.e., that outcomes for the 16-year olds and 17-year olds who are prosecuted in Family Court should not be worse off after the effective date of the RTA statute than prior to its enactment. This measure is essential to remedy that failure. This measure,  which would have no fiscal impact, would take effect 60 days after it becomes a law."

# SERIOUSLY?

- Apparently, the legislature has time to worry about "violating the fundamental value of fairness permeating the RTA implementation efforts" but they can't find the time to protect victims by fixing the statute of limitations issue?

# OCFS BENCH WARRANT FACT SHEET

OCFS issued this letter to the detention facilities on 12/3/21.

They have misinterpreted the law, by including bench warrants for JD youth who have absconded from DSS placement.

They also don't take into consideration the counties that do not have an accessible magistrate.

The language of the statute clearly only includes warrants issued under 312.2(1).

Notice that youth who have fled from OCFS custody ARE NOT included in this.

KATHY HOCHUL
Governor

SHEILA J. POOLE
Commissioner

**Family Court Bench Warrants Fact Sheet**

On October 8, 2021, the Governor signed a bill that requires that **Juvenile Delinquents (JDs)** who are picked up on a warrant be brought before the family court or, if the court is closed, to the most accessible magistrate. This law goes into effect on **December 7, 2021**.

Starting on December 7, 2021, if you are contacted by law enforcement about a JD who is picked up on a warrant, you must take the following steps:

1. Determine if the JD has an outstanding **family court bench warrant**. A bench warrant is issued by a family court judge, most often for an individual who has failed to attend a scheduled court date or who has absconded from local district placement.

2. **If the JD has an outstanding bench warrant** issued by the family court, you cannot take physical custody of the youth.
   - Do not allow law enforcement to drop the youth off at your facility.
   - Instruct law enforcement that they should bring the youth to family court or, if the court is closed, to the most accessible magistrate. It is important that a family court judge discharge an active bench warrant first.
     - If the youth appears before a judge in family court, the judge will issue an order to either release or detain the youth.
     - If the youth appears before a magistrate in family court, the magistrate will transmit an order but set a future date for the youth to appear before a family court judge.
       - If the magistrate orders that the youth shall be detained, the scheduled court date will be no later than the next day that the court is in session.
       - If the magistrate orders that the youth shall be released, the scheduled court date will be within 10 court days.
   - If the judge issues an order that the youth is to be released, you cannot take physical custody.
   - If the judge issues an order that the youth is to be detained, you can take physical custody.

**If the JD does not have an outstanding bench warrant** issued by the family court, you can take physical custody of the youth. If the JD has an **OCFS warrant** (but not a bench warrant), you can take physical custody. OCFS warrants are those issued directly by the agency for youth in its care

Thank You !

# TO DETAIN, OR NOT DETAIN

## (But can you get a bed, that is the question)

## Materials:


FCA 304.1 P. 1

FCA 320.5 P. 1

CPL 510.15 P. 3

NSD Contact Info (from OCFS) P. 5

State map of NSD facilities P. 6

Secure Detention and SSD Contact Info (from OCFS) P. 7
State map of Secure Detention and SSD facilities P. 9

OCFS Detention Information for Counties P. 10

Outside of NYC
OCFS letter regarding the use of prone restraints P. 12

Helpful Websites, Phones and Emails P. 13

# FCA & CPL STATUTES REGARDING DETENTION

## § 304.1. Detention

1. A facility certified by the office of children and family services as a juvenile detention facility must be operated in conformity with the regulations of the office of children and family services.
2. No child to whom the provisions of this article may apply shall be detained in any prison, jail, lockup, or other place used for adults convicted of crime or under arrest and charged with crime without the approval of the office of children and family services in the case of each child and the statement of its reasons therefor. The office of children and family services shall promulgate and publish the rules which it shall apply in determining whether approval should be granted pursuant to this subdivision.
3. The detention of a child under ten years of age in a secure detention facility shall not be directed under any of the provisions of this article.
4. A detention facility which receives a child under subdivision four of section 305.2 of this part shall immediately notify the child's parent or other person legally responsible for his or her care or, if such legally responsible person is unavailable the person with whom the child resides, that he or she has been placed in detention.

## § 320.5. The initial appearance; release or detention

1. At the initial appearance, the court in its discretion may release the respondent or direct his detention.
2. Rules of court shall define permissible terms and conditions of release. The court may in its discretion release the respondent upon such terms and conditions as it deems appropriate. The respondent shall be given a written copy of any such terms and conditions. The court may modify or enlarge such terms and conditions at any time prior to the expiration of the respondent's release.
3. (a) The court shall not direct detention unless available alternatives to detention, including conditional release, would not be appropriate, and the court finds that unless the respondent is detained:

(i) there is a substantial probability that he or she will not appear in court on the return date; or
(ii) there is a serious risk that he or she may before the return date commit an act which if committed by an adult would constitute a crime.
(b) Any finding directing detention pursuant to paragraph (a) of this subdivision made by the court shall state the facts, the level of risk the youth was assessed pursuant to a detention risk assessment instrument approved by the office of children and family services, and the reasons for such finding including, if a determination is made to place a youth in detention who was assessed at a low or medium risk on such a risk assessment instrument, the particular reasons why detention was determined to be necessary.
(c) If the court makes a finding that detention is necessary pursuant to subparagraphs (i) and (ii) of paragraph (a) of this subdivision, the court may consider, where applicable, as a condition of release, electronic monitoring of the respondent, if such electronic monitoring would significantly reduce the substantial probability that the respondent would not return to court on the return date, or the serious risk that the respondent may before the return date commit an act that if committed by an adult would constitute a crime.
(d) If the respondent may be a sexually exploited child as defined in subdivision one of section four hundred forty-seven-a of the social services law, the court may direct the respondent to an available short-term safe house as a condition of release.
4. At the initial appearance the presentment agency may introduce the respondent's previous delinquency findings entered by a family court. If the respondent has been fingerprinted for the current charge pursuant to section 306.1, the presentment agency may also introduce the fingerprint records maintained by the division of criminal justice services. The clerk of court and the probation service shall cooperate with the presentment agency in making available the appropriate records. At the conclusion of the initial appearance such fingerprint records shall be returned to the presentment agency and shall not be made a part of the court record.
5. Upon a finding of facts and reasons which support a detention order pursuant to subdivision three of this section, the court shall also determine and state in any order directing detention:
(a) whether the continuation of the respondent in the respondent's home would be contrary to the best interests of the respondent based upon, and limited to, the facts and circumstances available to the court at the time of the initial appearance; and

(b) where appropriate and consistent with the need for protection of the community, whether reasonable efforts were made prior to the date of the court appearance that resulted in the detention order issued in accordance with this section to prevent or eliminate the need for removal of the respondent from his or her home or, if the respondent had been removed from his or her home prior to the initial appearance, where appropriate and consistent with the need for protection of the community, whether reasonable efforts were made to make it possible for the respondent to safely return home.

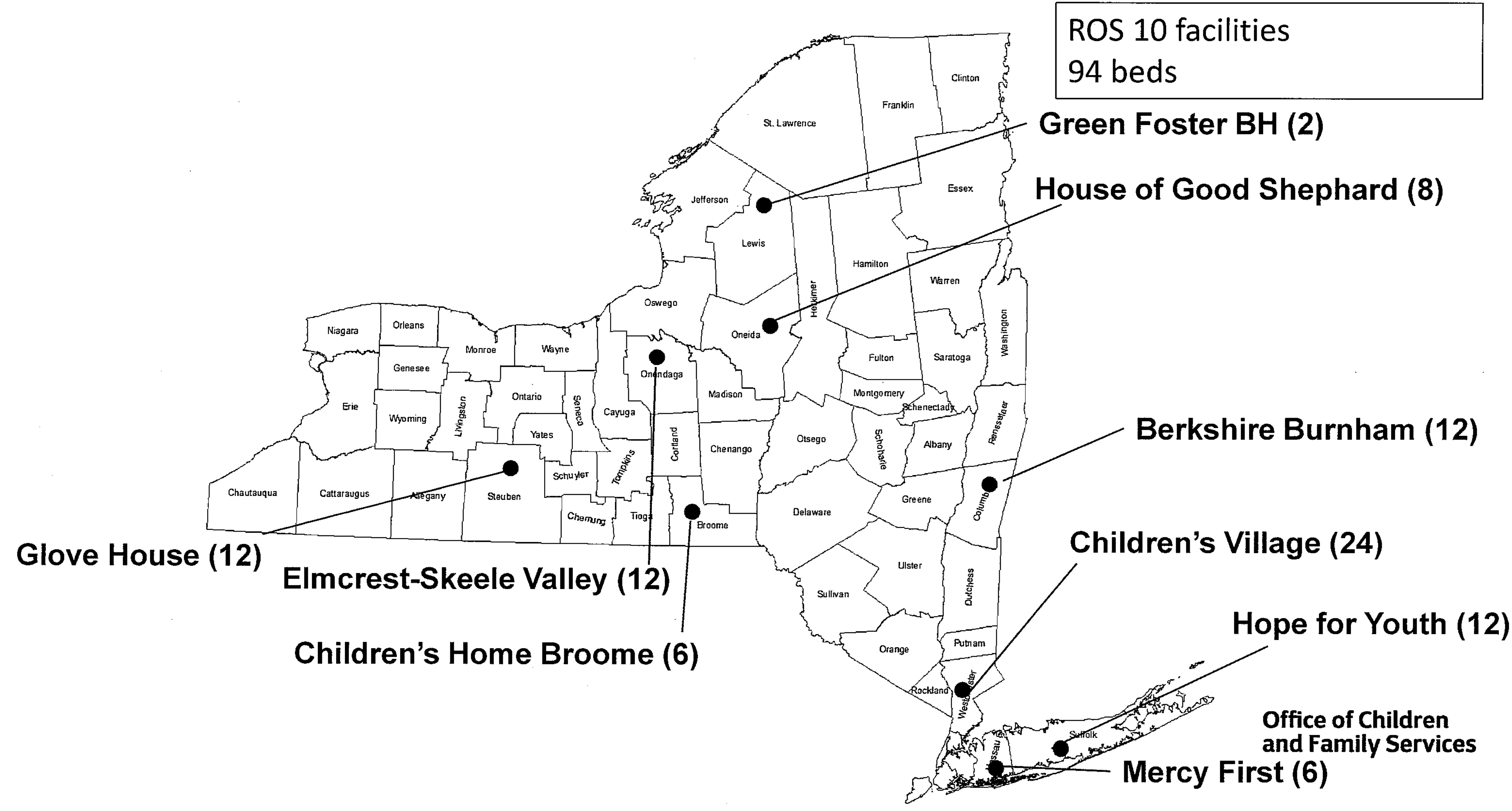
## § 510.15 Commitment of principal under seventeen or eighteen

1. When a principal who is under the age of sixteen is committed to the custody of the sheriff the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services as a juvenile detention facility for the reception of children. When a principal who (a) commencing October first, two thousand eighteen, is sixteen years of age; or (b) commencing October first, two thousand nineteen, is sixteen or seventeen years of age, is committed to the custody of the sheriff, the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services in conjunction with the state commission of correction as a specialized secure juvenile detention facility for older youth. Where such a direction is made the sheriff shall deliver the principal in accordance therewith and such person shall although lodged and cared for in a juvenile detention facility continue to be deemed to be in the custody of the sheriff. No principal under the age specified to whom the provisions of this section may apply shall be detained in any prison, jail, lockup, or other place used for adults convicted of a crime or under arrest and charged with the commission of a crime without the approval of the office of children and family services which shall consult with the commission of correction if the principal is sixteen years of age or older in the case of each principal and the statement of its reasons therefor. The sheriff shall not be liable for any acts done to or by such principal resulting from negligence in the detention of and care for such principal, when the principal is not in the actual custody of the sheriff.
2. Except upon consent of the defendant or for good cause shown, in any case in which a new securing order is issued for a principal previously committed to the custody of the sheriff pursuant to this section, such order shall further direct the

sheriff to deliver the principal from a juvenile detention facility to the person or place specified in the order.

| ROS Non-Secure Facility | Director | Director's # | Director's Email |
|---|---|---|---|
| Berkshire: Burnham NSD | Tiffany Reid<br><br>Lucas Jacobs | 845-421-7780<br><br>518-242-0578 | TiffanyReid@berkshirefarm.org<br><br>ljacobs@berkshirefarm.org |
| Children's Home<br>Broome County. NSD | MacKenzie<br>Quarella | 607-766-0867 | mquarella@chowc.org |
| Children's Village FCAP:<br>Clearview/Scholes NSD | Robert Douglas<br><br>Lawrence Taylor | 914-693-0600 x1872<br><br>914-693-0600 x1879 | rodouglas@childrensvillage.org<br><br>ltaylor@childrensvillage.org |
| Elmcrest-Skeele Valley NSD | Rachel Muntz<br><br>Christa Foley | 315-683-5341<br><br>315-863-6060 | rmuntz@elmcrest.org<br><br>cfoley@elmcrest.org |
| Glove House-Steuben NSD | Lakisha Lewis | 607-483-5370 | llewis@glovehouse.org |
| Hope for Youth NSD | Cara Cantor<br><br>Jamie Burke | 631-782-6562<br><br>631-782-6546 | ccantor@hfyny.org<br><br>jburke@hfyny.org |
| Mercy First NSD | Victoria<br>Henderson | 631-206-6500 x1901 | vhenderson@mercyfirst.org |
| House of Good Shepherd | Shad Czerniak | 315-733-6537 | shadc@hgs-utica.com |

February 10, 2021 **Non-Secure Detention (NSD) Non-NYC Facilities** 



# Secure and Specialized Secure Detention Facilities

UPDATED July 8, 2021

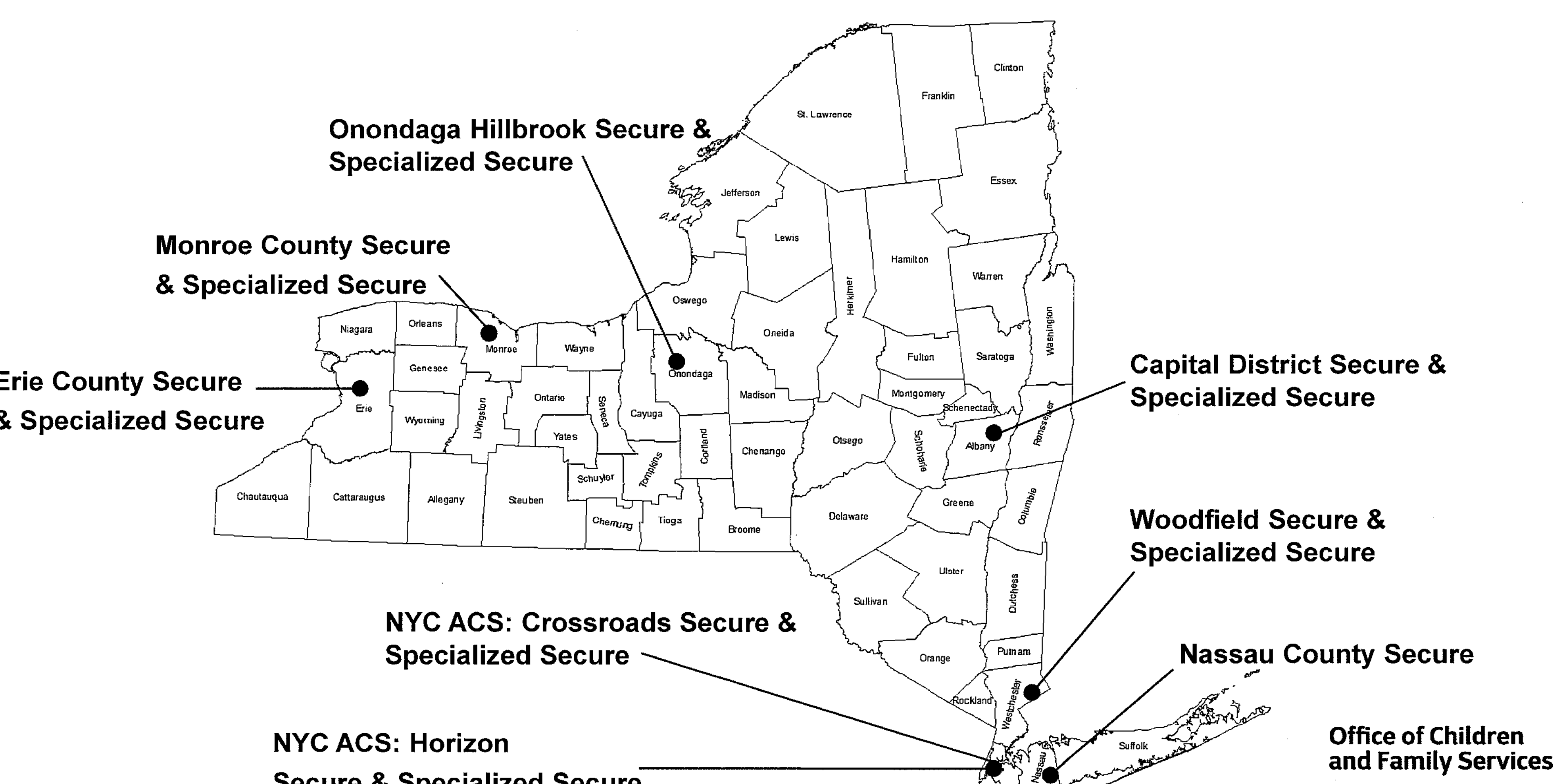
**Will be updated as additional beds come on-line**

| *County* | *Address* | *24-7 Phone Number/ Director Contact* | *Secure Detention Bed Capacity M/F* | *Specialized Secure Bed Capacity M/F* | *Notes* |
|---|---|---|---|---|---|
| Albany | Capital District Youth Detention Center, Inc. (CDYCI)<br><br>838 Albany Shaker Rd Loudonville, NY 12211 | 24/7 intake number 518-456-9399, ext. 234<br><br>Director: Joe Mancini<br>JMancini@berkshirefarm.org | 21 male<br>3 female<br>(SD/SSD) | 21 male<br>3 female<br>(SD/SSD) | Female beds are both SD and SSD-<br>**3** total female beds for facility<br><br>All counties referring youth to the facility must have a signed contract with the Capital District Youth Center, Inc. Contract is available here: https://cdrpcny-my.sharepoint.com/:w:/g/personal/mark_cdrpc_org/EVdJgk5o-1NDjX7QLOcLiVYBQP0FFc2HRPOseljmUuRl0g?e=13Bc4Y<br>Or email Donna@cdrpc.org 518-453-0850<br><br>*Albany, Rensselaer, Saratoga and Schenectady County have priority for beds over all referring counties.* |
| Erie | Erie County Juvenile Detention<br><br>810 E. Ferry St.<br>Buffalo NY 14211 | 24/7 intake number<br>716-923-4062<br><br>Deputy Commissioner: Paul Kubala<br>Paul.Kubala@erie.gov | 40 male/female<br>(SD/SSD) | 40 male/female<br>(SD/SSD) | The 8-bed female SSD pod may at times also be both SD and SSD |
| Monroe | Monroe County Juvenile Detention<br><br>400 Rush- Scottsville Rd. Rush, NY 14543 | 24/7 intake number<br>585-753-5940<br><br>Director: Catherine Thomas<br>Catherine.Thomas@dfa.state.ny.us | 25 male/female<br>(SD/SSD) | 25 male/female<br>(SD/SSD) | Female beds are both SD and SSD- **4** total female beds for facility Additional beds to be added after 10/1/18 |

| | | | | | |
|---|---|---|---|---|---|
| Nassau | Nassau Juvenile Detention<br><br>61 Carman Ave<br>Westbury, NY 11590 | 24/7 intake number<br>516-571-9260<br><br>Director:<br>LaQuetta Robbins- Kennedy<br>lrobbins@nassaucountyny.gov | 16 male/female (SD) | N/A | Additional SD beds may be added post 10/1<br><br>SSD beds pending post 10/1/18 |
| NYC | Crossroads<br><br>17 Bristol St.<br>Brooklyn, NY 11212 | 24/7 intake number<br>212 442-7100<br><br>Director: Darlese Smith<br>Darlese.smith@acs.nyc.gov | 106 male/female (SD/SSD) | 106 male/female (SD/SSD) | Out of county youth are taken only on a case-by-case basis in urgent circumstances |
| NYC | Horizon<br><br>560 Brook Ave<br>Bronx, NY 10038 | 24/7 intake number<br>718-292-0065<br><br>Director: Keith Peterkin<br>keith.peterkin@acs.nyc.gov | 53 male/female (SD/SSD) | 53 male/female (SD/SSD) | |
| Onondaga | Hillbrook Juvenile Detention<br><br>4949 Velasko Rd.<br>Syracuse, NY 13215 | 24/7 intake number<br>315-435-1421<br><br>Director: Omar Osbourne<br>OmarOsbourne@ongov.net | 32 male/female (SD/SSD) | 32 male/female (SD/SSD) | All beds co-certified as SSD/SD<br><br>Only taking out of county JO and AO youth |
| Westchester | Woodfield Juvenile Detention<br><br>20 Hammond House Rd Valhalla, NY 10595 | 24/7 intake number<br>914-231-1103<br><br>Dean DeKranis<br>ddekranis@childrensvillage.org | 42 male/female (SD/SSD) | 42 male/female (SD/SSD) | Beds for females to be added after 11/1/18 |

July 8, 2021

# Secure Detention (SD) & Specialized Secure (SSD) Facilities 1




Office of Children and Family Services

# Office of Children and Family Services
# Juvenile Detention Information for Counties Outside of NYC

| Offense Category | Detention Options | Custody | Notes |
|---|---|---|---|
| Adolescent Offender <18 years old | Specialized Secure Detention | Sheriff | |
| Adolescent Offender 18+ | Specialized Secure Detention or local correctional facility | Sheriff | Young adults over the age of 18 may be committed to a local jail with a securing order from a judge. No youth can be automatically moved at or over age 18. OCFS encourages youth who do not present a safety concern to be held in SSDs for continuity and stability. |
| Juvenile Offender <18 years old | Secure Detention | Sheriff | |
| Juvenile Offender >18 years old | Secure Detention or local correctional facility | Sheriff | Young adults over the age of 18 may be committed to a local jail with a securing order from a judge. No youth can be automatically moved at or over age 18. OCFS encourages youth who do not present a safety concern to be held in SSDs for continuity and stability. |
| Juvenile Delinquent | Non-secure detention facility or secure detention | DSS or direct police admission | Youth who are charged as delinquent should be considered for a non-secure detention as the preferred setting. |

## Secure and Specialized Secure Detention Facilities Rest of State

**Albany** Capital District Secure Juvenile Facility (SSD and SD)
(518) 456-9399 ext. 234

**Erie** Erie County Secure Juvenile Detention (SSD and SD)
(716) 923-4062

**Monroe** Monroe County Children's Secure Detention (SSD and SD)
(585) 753-5940

**Nassau** Nassau County Secure Juvenile Detention (SD ONLY)
(516) 571-9260

**Onondaga** Hillbrook Secure Juvenile Detention (SSD and SD) (MALES ONLY)
(315) 435-1421

**Westchester** Woodfield Secure Juvenile Detention (SSD and SD)
(914) 231-1103

## Rest of State Non-Secure Detention Facilities

A list of upstate Secure/Specialized and Non-Secure Detention facilities and the most current detention census can be viewed at:
https://ocfs.ny.gov/programs/youth/detention/census.php
The webpage includes after-hours contact information.

## Finding an Open Bed

The county's detention administering agency holds the responsibility to seek a bed in a Specialized Secure Detention (SSD) or Secure Detention (SD). The following steps are required:

- Contact all SSD/SD facilities beginning with the facility closest to your jurisdiction
- Document the name of the facility representative spoken with, time and reply
- If after contacting the five Specialized Secure Detention (SSD) facilities for an AO admission or six Secure Detention (SD) facilities for a JO/JD admission you are unable to locate a bed, a detention administering agency can contact OCFS Bureau of Detention Services during business hours at (518) 473-4630 or after hours at (518) 473-0551.
- OCFS cannot guarantee that it can find a bed for any specific youth, and assistance should be sought only after each step above is taken.

**ANDREW M. CUOMO**
Governor

**SHEILA J. POOLE**
Commissioner

**Memorandum**

Date: June 30, 2021

To: Executive Directors and Administering Agencies of Secure, Specialized Secure and Non-Secure Detention Facilities

From: Dr. Nina Aledort, Deputy Commissioner

Re: Ending the Use of Prone Restraints

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This memo is a reminder to all detention facilities that prone restraints will no longer be an approved restraint technique as of July 1, 2021. Official policy will be forthcoming. We have been working collectively to end the use of prone restraints since August 2020. In order to implement this change, all facilities have submitted plans for retraining where required, and updated behavior management and restraint policies to eliminate the use of prone restraints. Any additional policy or protocol updates should be submitted immediately to the detention mailbox at ocfs.sm.detention@ocfs.ny.gov

The Office of Children and Family Services (OCFS) banned the use of prone restraints in state-run juvenile placement facilities over a decade ago, recognizing the potential harmful effects on youth. High profile incidents across the nation in 2020 instilled a sense of urgency for OCFS to eliminate the use of prone restraints in all licensed facilities, including detention. Despite years of progress in reducing the number of youth being held in any detention facilities, New York still struggles to reduce the racial disparities in detention. This policy change not only enhances the safety of the youth but seeks to rectify a policy that negatively impacts the youth who are in our detention facilities, who are disproportionately youth of color.

In addition to the elimination of this specific restraint technique, OCFS is committed to working with all detention facilities to identify effective strategies to reduce overall reliance on physical restraints, and to increase safety for youth and staff. Detention facilities must be environments that not only safely maintain youth throughout their court proceedings, but also provide opportunities for growth.

OCFS will continue to support the implementation of de-escalation techniques, training, programmatic enhancements and physical plant changes to achieve these important goals.

If you have any questions, please do not hesitate to reach out to Dan Hulihan, Director of Detention Services at Daniel.Hulihan@ocfs.ny.gov

# Helpful Websites, Phones and Emails

Non-Secure Census

https://ocfs.ny.gov/programs/youth/detention/census-NS.php

Secure Census

https://ocfs.ny.gov/programs/youth/detention/census.php

## OCFS Numbers for assistance with SSD/SD beds

During regular hours: (518)473-4630

After hours: (518)473-0551


**Dan Hulihan**

Director, Bureau of Detention Services

**Division of Youth Development and Partnerships for Success**

Daniel.Hulihan@ocfs.ny.gov

# PINS: Procedures, Problems and Solutions

Christopher J. Muller, Esq.

# PINS: Procedures, Problems & Solutions

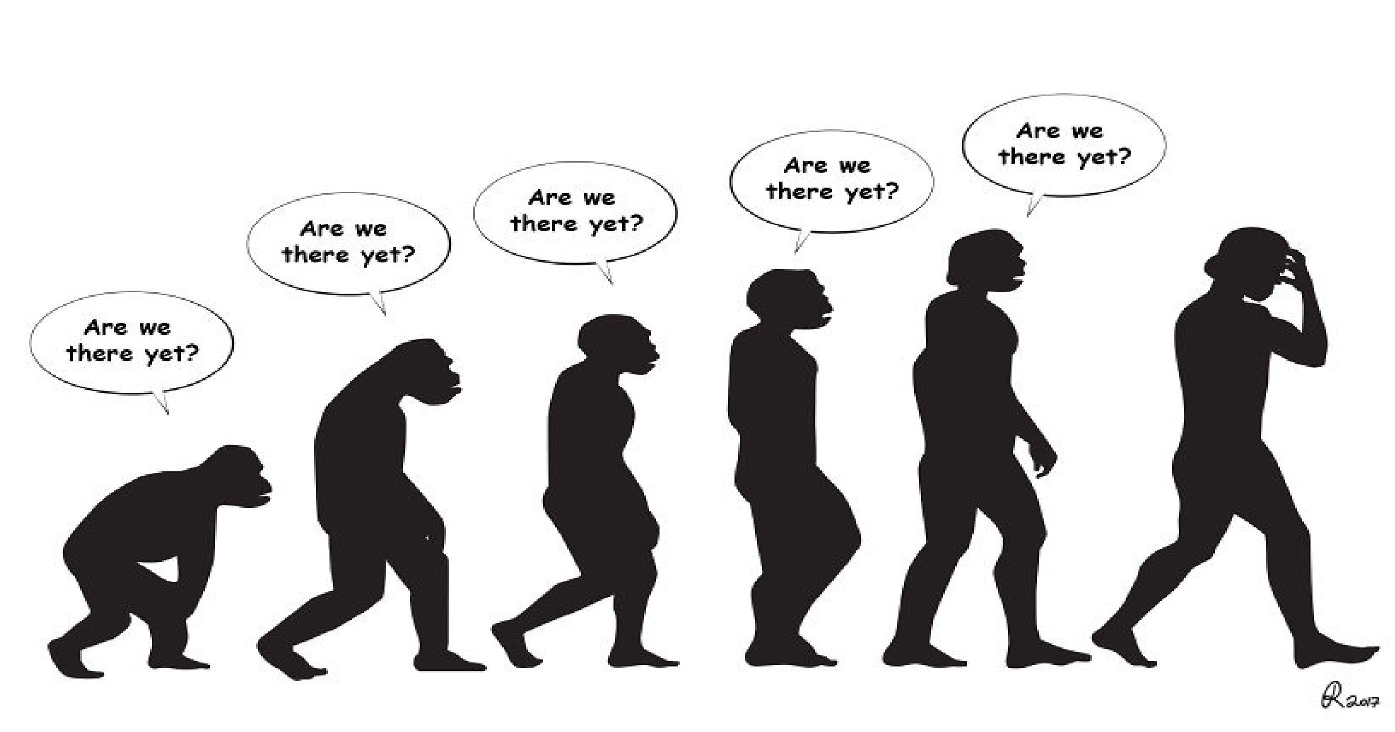
CHRISTOPHER J. MULLER
DEPUTY COUNTY ATTORNEY
COLUMBIA COUNTY

DISLCAIMER

**The views and opinions expressed in this presentation are those of the author and do not necessarily reflect the official policy or position of his affiliates . Assumptions made within the analysis are not reflective of the position of his affiliates.**

- Historical Overview of PINS
- Statistical Analysis of Modern Day PINS
- Legislative Changes & Resulting Challenges
  - Cannabis
  - Truancy
  - Detention
  - Placement
- Solutions
  - Staying Current on the Law
  - Recalibrating view of PINS & its Purpose

# PINS EVOLUTION



# Disorderly Child Act - 1865

- [A]ll children under the age of sixteen … deserting their homes without good and sufficient cause, or keeping company with dissolute or vicious persons against the lawful command of their fathers, mothers, guardians or other persons standing in the place of a parent, shall be deemed disorderly children.

[L.1865, c. 172, § 5]

# Origins of the 1865 Act

- The 1865 Act was similar to Section 712 - ungovernability & children who deserted their homes.
  - Truancy was NOT Included
  - Compulsory Education Started in 1874
  - Disorderly Child Act of 1882 Added Truancy
- Criminalized adolescent misbehavior by incarcerating "disorderly children" with juvenile delinquents.
- Violent felony or disobeyed the parent treated the same.
- Criminal offenses & civil "status offenses" merged for 100+ years.

# NYS Children's Court Act § 2 (1922)

- Formally merged status offenses with juvenile delinquency (formalizing the *de facto* merger dating from 1865)

- The words "delinquent child" shall mean a child under sixteen years of age who:
  - (a) Violates any law;
  - (b) Is incorrigible, ungovernable or habitually disobedient and beyond the control of his parents, guardian, custodians, or other lawful authority;
  - (c) Is habitually truant;
  - (d) Without just cause and without the consent of his parent, parents, guardians or other custodian, repeatedly deserts his home or place of abode;
  - (e) Engages in any occupation which is in violation of law, or who associates with immoral or vicious persons;
  - (f) Frequents any place of existence of which is in violation of law;
  - (g) Habitually uses obscene or profane language;
  - (h) Deports himself as to willfully injure or endanger the morals or health of himself or others.

# Prior to 1962

- Juvenile Court practice extremely informal.
- Hearings conducted without counsel for the respondent or a prosecutor.
- Dispositions rendered following informal conferences with the probation officer, the child, and his parent.
- Appeals were virtually non-existent.

“Juvenile Delinquent” became “a term of disapproval”, synonymous with “juvenile criminal”

[Joint Legislative Committee on Court Reorganization, “The Family Court Act”, Vol. 2, 1962

McKinney's Session Laws, 3428, 3434].

# FAMILY COURT ACT - 1962

# THE BIRTH OF PINS

- Preceded by California (1961)

- Non-criminal acts were deemed Persons In Need of Supervision (PINS), not juvenile delinquents (e.g. truancy or ungovernability).

- Status offense proceedings, renamed PINS, shared F.C.A. Article 7 with juvenile delinquency.
  - Common series of procedural sections & dispositional scheme.
  - PINS child faced the same dispositions as the delinquent child.
  - Secure detention a pre-dispositional option.
  - Secure placement remained a dispositional option.

# FAMILY COURT ACT - 1962

- **Resulting Developments**
  - Assignment of an attorney to represent the child was mandated in the 1962 Act.
  - Led to the formation of the Juvenile Rights Division of Legal Aid Society.
  - Five years prior to *In re Gault* decision.

# In re Gault (1967)

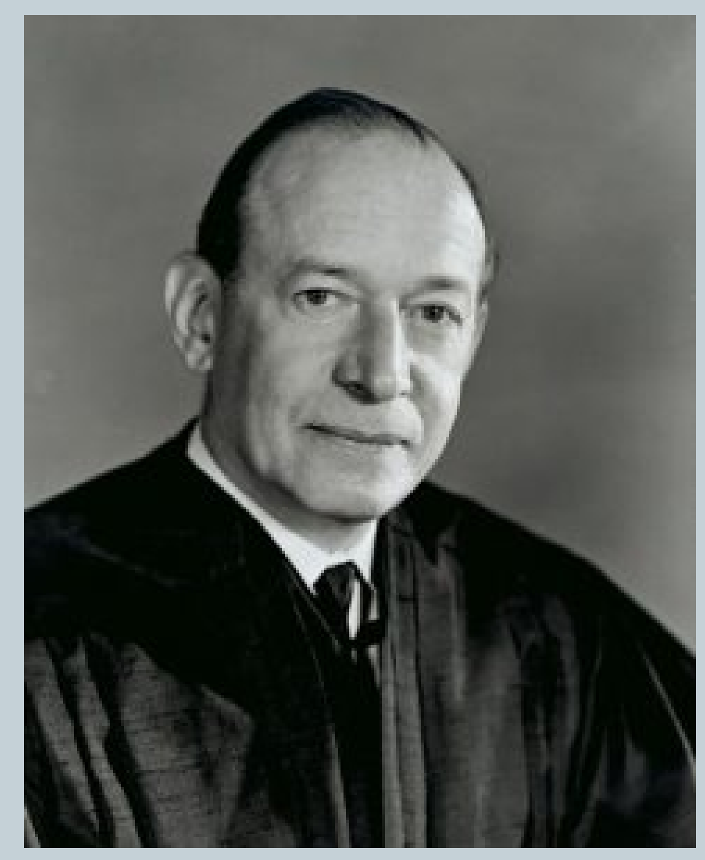
- Gerald Francis Gault, 15, sentenced to up to 6 years in an Arizona youth detention center for making an obscene phone call to a neighbor.

- An adult charged with a similar crime would have received a $50 fine and up to 2 months in jail.

  - On probation at the time for in-concert purse theft.
  - Not advised of his right to a trial for the obscene phone call case.
  - No transcript or record of appearances before Judge Robert E. McGhee.
  - No petition or probation report provided to youth or parents.
  - Judge questioned Gault without telling him he didn’t have to answer.
  - Confessed to making the calls along with a friend of his.
  - Parents not present in court or notified about the charges before he made the confession.

# In re Gault (1967)

- Violation of the 6th & 14th Amendments:
  - Right to an Attorney
  - Right to Trial
  - Right to Notice of the Charges
  - Right Against Self-Incrimination, and;
  - Opportunity to confront accusers.
- Justice Fortas wrote that "being a boy does not justify a kangaroo court."
- Mandated the use of criminal procedural standards to juvenile delinquency proceedings.



# Federal Juvenile Justice & Delinquency Prevention Act

- Congress enacted the Federal Juvenile Justice and Delinquency Prevention Act (JJDPA) of 1974 [42 U.S.C. § 5633(a)(12)(A)].
  - Required states remove status offenders from secure detention & placement facilities, & separate non-criminal juvenile offenders from juvenile delinquents.
  - Article 7 was duly amended to preclude secure detention or placement.
  - Courts could use a non-secure placement with the Division for Youth (now the Office of Family and Children's Services).
  - In 1996, an OFCS placement was barred – placements only through a local DSS.
  - Any responsibility to assist adjudicated PINS children belonged to counties.

# Family Court Act - Article 3

- 1977 – NYS Commission on Child Welfare decided, to draft a new delinquency code.
- Commission consideration and public hearings, produced a "study" bill for the legislature.
- An amended version was filed in early 1981.
- 1982 - Article 3 enacted governing delinquency, leaving Article 7 to govern only PINS proceedings.

Amelia Dietrich Lewis and Gerald Francis Gault

# 2000 & Beyond

- 2000 Article 7 age limitation from sixteen to eighteen
- 2003 Diversion for non-criminal youthful behavior
  - "Aid of the Court"
  - Afford services to children and their families, and *minimize* the need for judicial involvement in PINS matters.
  - The Act is intended to resolve status offense controversies through mediation, family services, and diversion techniques.
  - A petition is a last resort, after *lengthy* comprehensive non-judicial remedies have failed.
  - Affords troubled children a more preferable alternative.
  - Minimize the volume of Article 7 cases for courts.

# Turning Point

- Our juvenile justice laws are outdated. Under New York State law, 16- and 17-year-olds can be tried and charged as adults… It's not right; it's not fair. We must raise the age.

Andrew Cuomo

State of the State Address

January 8, 2014

# Commission on Youth, Public Safety, and Justice

- Andrew Cuomo signed Executive Order 131 on April 9, 2014, establishing the Commission on Youth, Public Safety, and Justice.

- Commission to develop a plan by December 31, 2014:
  - Raise the age of juvenile jurisdiction.
  - Make recommendations how NYS's juvenile & criminal justice systems could better serve youth, improve outcomes, & protect communities.

# 7 Justifications for Reform

- Connecticut & Illinois raised the age of criminal responsibility:
  - Suggested recidivism & juvenile crime rates can be lowered through evidence-based interventions that steer non-violent young offenders out of the justice system & into family mental health or other needed services.
  - Helped reduce opposition to reform in this area by showing that public safety can actually be enhanced by such changes.
  - Implementation of the Commission's recommendations would eliminate between 1,500 - 2,400 crime victimizations every 5 years.

- Significant negative impacts on adolescents of incarceration in adult jails & prisons (ex. Higher Suicide Rates & Increased Recidivism).

- New York State 1 of 2 states in the country that had age of criminal responsibility at age 16.

- The impacts of processing all 16- and 17-year-olds in the criminal justice system fall disproportionately on young men of color.

# 7 Justifications for Reform

- Scientific research into brain development
  - As late as one's early to mid-20s.
  - Adolescents do not have fully developed faculties of judgment or impulse control.
  - Adolescents respond more to rehabilitative efforts.
- U.S. Supreme Court & lower courts restricting the nature & scope of state & local governments' punishment of adolescent offenders on the ground that such offenders are both less culpable criminally & more susceptible to rehabilitation because of still-developing brains.
- Steady & significant decrease in violent crimes committed by young offenders since the 1990s.

# Legislative Basis for Change

- Raise The Age Legislation

  (Part WWW of Chapter 59 of the Laws of 2017)

- Office of Court Administration Departmental Bill of 2018

  (Chapter 363 of the Laws of 2018)
  - Pertains to PINS truancy (educational neglect)

- PINS Reform Legislation 2019-2020 State Budget

  (Part K of Chapter 56 of the Laws of 2019)
  - Eliminated state funding for PINS placement & PINS detention.
  - Did not remove the ability of the Family Courts to order placements.

# PINS Statistics Since 2014

- PINS Filings
  - New York State – 37% ↓
  - New York City – 38% ↓
- Detention Admissions
  - New York State – 41% ↓
  - New York City – 60% ↓
- LDSS Placement Admissions
  - New York State – 45% ↓
  - New York City – 82% ↓

# PINS Statistical Data - 2018

- PINS Filings
  - New York State – 26%
  - New York City – 74%
- Detention Admissions
  - New York State – 95%
  - New York City – 5%
- LDSS Placement Admissions
  - New York State – 99%
  - New York City – 1%

# Code Word - LIGHTS

# § 711. Purpose

- The purpose of this article is to provide a due process of law:
  - (a) for considering a claim that a person is in need of supervision and;
  - (b) for devising an appropriate order of disposition for any person adjudged in need of supervision.

# Article 7

- Article 7 retains several criminal procedure due process elements.
  - Respondent must receive on the record notice of her extensive rights [§ 741], and;
  - PINS allegations must be proven beyond a reasonable doubt [§ 744(b)].
- No "security" criteria compared to Article 3's purpose clause, Section 301.1, stipulating that in juvenile delinquency proceedings "… the court shall consider the needs and best interests of the respondent as well as the need for protection of the community".
- PINS are not intended to protect the community or designed to provide public safety through deterrence or the restriction of liberty.
  - *Matter of Naquan J.*, 284 A.D.2d 1, 727 N.Y.S.2d 124 (2d Dept. 2001), where it was held that a PINS respondent who violated court orders wholesale could not be held in criminal contempt; or
  - *People v. Juarbe*, 194 Misc.2d 77, 749 N.Y.S.2d 665, (Co. Ct. Fulton Co. 2002), based on an escape conviction in which the Court analyzed the significant doctrinal distinctions between juvenile delinquency and person in need of supervision proceedings.

# §712(a) Person in Need of Supervision

- A person less than eighteen years of age:
  - (i) who does not attend school in accordance with the provisions of part one of article sixty-five of the education law;
  - (ii) who is ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care, or other lawful authority;
  - (iii) who violates the provisions of section 230.00 of the penal law;
  - (iv) or who appears to be a sexually exploited child as defined in paragraph (a), (c) or (d) of subdivision one of section four hundred forty-seven-a of the social services law, but only if the child consents to the filing of a petition under this article.

* Repealed the inclusion of marihuana and the 19th century term "incorrigible" *

# Cannabis

# §712(a) Changes

## Narrowed PINS Jurisdiction by:

- Eliminating cannabis possession from definition & basis for petition (L. 2021, c. 92)
  - Part of legalizing basic possession.
  - Evolution: Preceded by the partial decriminalization of marijuana possession earlier this century
  - Previously reduced minor possession from a misdemeanor to a violation.
  - Precluded Art. 3 prosecution, § 712 was previously amended to add the now repealed provision.

# Prior Cannabis Findings

- Criminal Procedure Law §440.46-a, automatically vacates & expunges convictions when the convicted conduct is no longer a crime (e.g., cannabis possession).
- Applicable to Article 3 juvenile delinquency cases.
- Does not apply to Article 7 PINS cases.
- Article 7 does not provide for sealing the records of cases which do not result in a finding (In contrast see FCA § 375.1, provides for the automatic sealing of similar delinquency records).

# Truancy

# Truancy

- Where habitual truancy is alleged or the petitioner is a school district or local educational agency, the petition shall also include the steps taken by the responsible school district or local educational agency to improve the school attendance and/or conduct of the respondent (FCA §732);

- Court may "implead" school district when petition is based on truancy or school behavior, but school is not the petitioner. (FCA §736(4)).

# FCA § 732. Originating proceeding to adjudicate need for supervision

- A proceeding to adjudicate a person to be in need of supervision is originated by the filing of a petition, alleging:

(a) (i) the respondent is an **habitual truant** or is **ungovernable or habitually disobedient** and beyond the lawful control of his or her parents, guardian or lawful custodian, or has been the **victim of sexual exploitation** as defined in subdivision one of section four hundred forty-seven-a of the social services law, and specifying the acts on which the allegations are based and the time and place they allegedly occurred. **Where habitual truancy is alleged or the petitioner is a school district or local educational agency, the petition shall also include the steps taken by the responsible school district or local educational agency to improve the school attendance and/or conduct of the respondent;**

(ii) the respondent was **under 18 y/o** at the time of the specified acts;

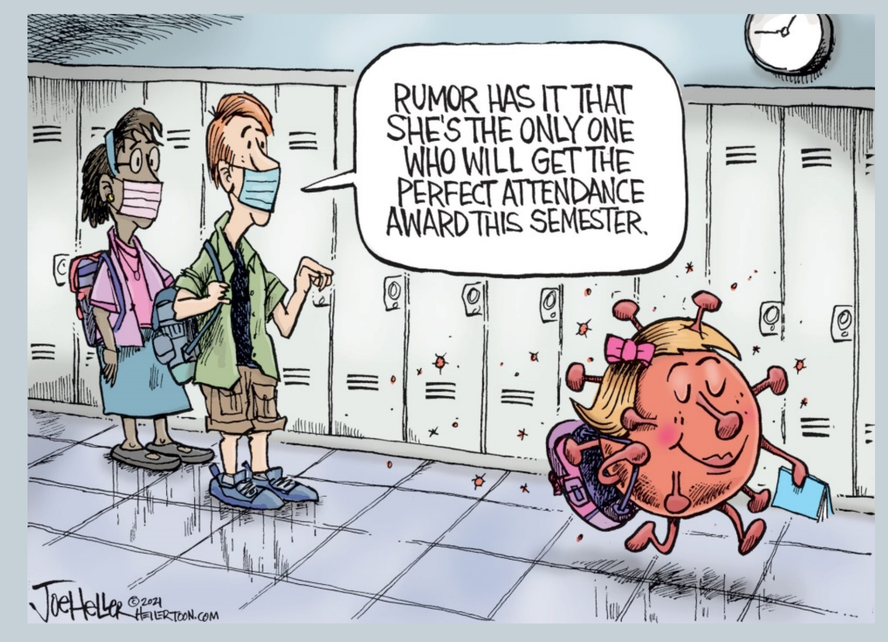
(iii) the respondent requires **supervision or treatment**; and

(iv) the petitioner has **complied with the provisions of FCA §735**; or

(b) the respondent appears to be a **sexually exploited child** as defined in paragraph (a), (c) or (d) SSL §470-a(1) but **only if the child consents** to the filing of a petition under this article.

# Truancy

- If the only allegation made against the youth is for truancy, no pre-dispositional placement shall be ordered. (§720 4(a)(ii)).
- If the only finding made against the youth is that of truancy, no placement shall be ordered. (§756(c)(1)).



# Detention

FCA §720 prohibits the use of detention in Article 7 cases.

"Pre-dispositional placement only in a:

1) Certified foster care program,
2) Certified or approved family boarding home, or
3) Short-term safe house.

# Elimination of Detention

- Court must find:
  - Available alternatives have been exhausted;
  - Pre-dispositional placement is in the best interests of the respondent, and;
  - Contrary to the welfare of the respondent to continue to reside in his or her home.
- 16 or 17 year olds require special circumstances

# Pre-Dispositional Placement

- **Court must take into account:**
  - (a) The proximity to the community in which the person alleged to be or adjudicated as a person in need of supervision lives with such person's parents or to which such person will be discharged; and
  - (b) The existing educational setting of such person and the proximity of such setting to the location of the placement setting.

# FCA §735 Preliminary procedure; diversion services

- Each county and any city having a population of one million or more shall offer diversion services (DSS or Probation)
- Designed to avoid court involvement
- Diversion Services shall:
  - Diligently attempt to prevent the filing of a petition and after the petition is filed, to prevent the placement of the youth into foster care;
  - Consider residential respite services;
  - Assess whether the youth is a sexually exploited child & refer to a safe house if appropriate;
  - Determine whether alternatives to placement or services are appropriate to avoid remand of the youth to placement;
  - Determine whether an assessment of the youth for substance use disorder is necessary when a person seeking to file a petition alleges in such petition that the youth is suffering from a substance use disorder which could make the youth a danger to himself or herself or others.

# Initial Appearance
# Release or Pre-Dispositional Placement - FCA § 739

- (a) After the filing of a petition Court may release the respondent or direct pre-dispositional placement.
  - **Pre-dispositional placement requires a finding of:**
    - Substantial probability that the respondent ***will not appear in court*** on the return date and
    - All available alternatives to placement have been exhausted.
  - If a sexually exploited child the court may direct the respondent to an available short-term safe house
- Court must make a finding of "Best Interests" & Reasonable Efforts"
- Triggers a Right to a Probable Cause Hearing
  - May be waived.
  - Probable cause exists to believe that he is a person in need of supervision.
  - Can't last more than 3 days (i) unless the court finds, pursuant to the evidentiary standards applicable to a hearing on a felony complaint in a criminal court, that such probable cause exists (C.P.L. § 1 90.30), or;
  - Special circumstances exist, may be extended not more than 3 more days excludes weekends and public holidays.

# Fact-Finding Hearing

- A fact-finding hearing shall commence not more than three days after the filing of a petition under this article if the respondent is in pre-dispositional placement. (FCA §747)
- Adjournments (FCA §748)
  - Court or Petitioner = Up to 3 Days
  - Respondent's Motion = Reasonable Period of Time
  - Special Circumstances for Successive Motions

# Time for Disposition

- Not more than 10 days if respondent is in pre-dispositional placement;
  - Not more than a total of two such adjournments may be granted in the absence of special circumstances.
- If respondent is not in pre-dispostional placement, an adjournment may be for a reasonable time, but the total number of adjourned days may not exceed two months. (FCA § 749)

# FCA §754. Disposition

- Options:
  - Discharge with a Warning
  - Suspended Judgment (up to 1 year)
  - Probation (up to 1 year)
  - Placement (up to 1 year total)
    - “Best Interests” & “Reasonable Efforts” Findings
    - Contrary to the Welfare of the Respondent to Continue in Their Own Home.
    - Independent Living Skills for 14 Years Old and Older
    - 16 Years Old or Older Require Special Circumstances

# Placement

# FCA §756 Placement (Post-Dispositional)

- May be Placed:
  - In Own Home (Not Foster Care);
  - Custody of a Suitable Relative or Other Suitable Private Person (Article 6 Direct Placement); or
  - Custody of Commissioner of Social Services
- When Placed with the Commissioner Of Social Services:
  - Foster Boarding Home; or
  - Authorized Agency or Class of Authorized Agencies
  - Long-term Safe House if a Sexually Exploited Child
- No Placements for Truancy Only

# FCA §756-a Extension of Placement

- **Placements with Commissioner of Social Services may be for an Initial Period of NO Greater than 60 Days.**
  - First Extension may be for 6 Months (Filed 15 Days Prior to Expiration)
  - Second Extension for 4 Months (Filed 30 Days Prior to Expiration)
    - Attorney for Child may Request Additional Extension for Programming / Treatment
    - Court Finds Extenuating Circumstances Necessitating Placement Outside Home
  - Extensions Require Permanency Hearings

# Procedures, Problems & Solutions

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  - Diversion – Reduce Court Involvement & the Aid of the Court
  - Elimination of Traditional Detention Option
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- Problems:
  - Article 7 Remains Inconsistent and Incomplete
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# The Future of PINS

- What to Expect:
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# Questions

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# THE GOVERNOR'S COMMISSION ON YOUTH, PUBLIC SAFETY, AND JUSTICE

## Summary of Recommendations for Juvenile Justice Reform in New York State

*Our juvenile justice laws are outdated. Under New York State law, 16- and 17- year- olds can be tried and charged as adults…It's not right; it's not fair. We must raise the age.*[1]

*Governor Cuomo, State of the State Address, January 8, 2014*

Governor Cuomo signed Executive Order 131 on April 9, 2014, to establish the Commission on Youth, Public Safety, and Justice. He instructed this Commission to develop a concrete plan to raise the age of juvenile jurisdiction in the most effective and prudent manner possible, and to make other specific recommendations as to how New York State's juvenile and criminal justice systems could better serve youth, improve outcomes, and protect communities. The Commission was ordered to complete its work by December 31, 2014.

Why "raise the age" now? Numerous developments have converged in recent years to forge a growing consensus for this and related reforms to New York State's juvenile justice system. At least seven key developments have brought us to this point where reform is both necessary and possible.

First, experience in states like Connecticut and Illinois that have raised the age of criminal responsibility recently has demonstrated that recidivism and juvenile crime rates can be lowered through evidence-based interventions that steer non-violent young offenders out of the justice system and into family mental health or other needed services. These experiences have helped to reduce opposition to reform in this area by showing that public safety can actually be enhanced by such changes. In fact, analysis completed in support of this Commission found that implementation of the Commission's recommendations would eliminate *between 1,500 and 2,400 crime victimizations every five years.*

Second, extensive research on the significant negative impacts on adolescents of incarceration in adult jails and prisons has brought a sense of urgency for reform. Higher suicide rates, increased recidivism, and many other measures all suggest that both offenders and their communities are harmed by placing adolescents into adult jails and prisons.

Third, New York's unique history of juvenile justice has created a pressing reason for reform now. Despite a proud early history in this area, New York State now stands as one of only two states in the country that has set the age of criminal responsibility at age 16. That single fact has become a rallying cry for the current reform movement in this State, led the State's Chief Judge to urge legislative action, and inspired the Governor's initiative to appoint this Commission.

Fourth, the impacts of processing all 16- and 17-year-olds in the criminal justice system fall disproportionately on young men of color. Young men of color are substantially overrepresented among youth who are arrested at age 16 and 17 and who end up incarcerated as a result of the offense. Those impacts are felt not only by the young men themselves, but also by communities of color around the State.

Fifth, scientific research into brain development has revealed only very recently that portions of our brains, including that governing impulse control, develop far later than expected – after adolescence and as late as

[1] http://www.governor.ny.gov/news/transcript-governor-cuomos-2014-state-state-address

one's early to mid-20s. This research has demonstrated that adolescents do not have fully developed faculties of judgment or impulse control. It has also shown that adolescents respond more fruitfully to efforts to rehabilitate them and put them on the right track.

Sixth, that research has, in turn, undergirded several opinions from the United States Supreme Court and lower courts restricting the nature and scope of state and local governments' punishment of adolescent offenders on the ground that such offenders are both less culpable criminally and more susceptible to fruitful rehabilitation because of their still-developing brains. Those decisions have both resulted from and encouraged reform efforts across the country to improve the juvenile justice laws to reduce unnecessary incarceration and improve rehabilitative programming.

Finally, this shifting view of adolescent offenders has coincided with, and arguably been facilitated by, a steady and significant decrease in violent crimes committed by young offenders since the 1990s. That reduction in crime has replaced outsized fears of young "super predators" with a more thoughtful focus on targeted criminal justice interventions to reduce recidivism without simply expanding costly incarceration.

For all of these reasons, the Commission has the wind at its back in drafting this plan for raising the age of juvenile jurisdiction and reforming the juvenile justice system in other respects. The Commission's recommendations reflect a balanced approach that incorporates the wisdom and experiences of law enforcement, probation, criminal defense attorneys, policy advocates, service providers, local and State officials, and youth and their parents affected by the current system. Partly as a result of this balanced approach, the Commission's members support these recommendations unanimously and without reservation.

In order to facilitate passage of these recommendations and to ensure effective implementation, the Commission has concluded that the added investments and expenses necessary to implement these reforms should be borne by the State to the extent possible and appropriate.

After a thorough review of current New York State law and practice in both the criminal and juvenile justice systems; analysis of national practice and the raise the age experience in other states; consideration of input from hundreds of stakeholders across the State through focus groups, interviews, and public hearings; and site visits to current adult and juvenile confinement settings, the Commission recommends that New York State phase in an increase in the age of juvenile jurisdiction to age 18.

This one change should trigger a more comprehensive series of reforms in order to place New York as a national leader in youth justice policy. These reforms would ensure that interventions proven to be effective with adolescents are used for 16- and 17-year-olds; reserve confinement only for those who pose a significant risk to public safety; protect young people through the use of juvenile facilities regardless of the court system in which they are sentenced; create capacity for young people to avoid a lifelong criminal record for one adolescent mistake; and provide a rehabilitative response for all minors accused of committing a crime, thereby reducing reoffending and making communities safer.

The Commission recommends the following reforms:

## RAISING THE AGES OF JUVENILE JURISDICTION:

### 1. Raise the age of Juvenile Jurisdiction to 18, consistent with other states.

New York stands as one of only two states that process all 16- and 17-year-olds in the criminal justice system, no matter their offense. Forty states provide juvenile court jurisdiction for youth up to age 18 and eight states draw the line of juvenile jurisdiction at age 17. Exclusion of 16- and 17-year-olds from the juvenile system denies them the rehabilitative interventions of that system – from parental notification at first contact with the police to confinement in facilities for youth instead of jails and prisons, the juvenile system is structured to intervene with adolescents in a manner that supports the adolescent brains' unique capacity for change.

New York's current structure provides some protections from a lifelong criminal record for 16- and 17-year-olds through Youthful Offender status. However, about 1,600 convictions of 16- and 17-year-olds do result in a lifelong criminal record annually. In addition, the protection from a criminal record does not translate into protection from incarceration in jails and prisons. On any given day, there are about 700 16- and 17-year-olds in jails across New York State and about 100 more 16- and 17-year-olds in State prison. Finally, even those 16- and 17-year-olds who are arrested for less serious offenses that do not result in a criminal conviction or incarceration are not provided access to the many community-based interventions proven to reduce reoffending among young people.

Connecting these young people with the evidence-based interventions of the juvenile system will avoid *between 1,500 and 2,400 crime victimizations every five years.* Providing these effective juvenile interventions will make New York's communities safer and support positive outcomes for young people.

Learning from lessons learned in other states that recently raised the age, the Commission supports phasing in the proposed reforms, with enough preparation time to support development of new community-based and residential service capacity. Juvenile jurisdiction should be expanded to include 16-year-olds in 2017 and 17-year-olds in 2018. This phased approach will allow for an initial infusion of the smaller population of 16-year-olds followed by full implementation.

### 2. Raise the lower age of juvenile jurisdiction to twelve, except for homicide offenses, which should be raised to ten.

Children as young as seven are currently arrested and processed as juvenile delinquents in New York. New York is among only three other states that formally set a lower age for juvenile jurisdiction at seven or younger. Most states do not set a formal age of lower jurisdiction. Instead, they rely on the lack of capacity that very young children have to meaningfully participate as a defendant in a trial to govern a practical standard for a lower age of delinquency jurisdiction. Very young children have been found to have impaired reasoning and poor understanding of trial matters. In fact, many states require juvenile competency determinations to try youth as old as 13 in juvenile court.

Very young children do not commit significant levels of crime across New York. Children under 12 account for only four percent of all the delinquency petitions in Family Court. The very young children who are coming into contact with the police should be targeted for intensive service provision within the context of their family and community through the social services system. Juvenile probation, detention and placement are not developmentally appropriate responses for very young children who do not have the capacity to

participate as a defendant in a trial. The lower age of juvenile jurisdiction should therefore be raised to 12, with a lower age of 10 for the extremely rare homicide cases.

### 3. The Governor should appoint one or more individuals with expertise in juvenile justice and a commitment to these reforms to help coordinate their implementation.

The Commission's research into other states' "raise the age" reform initiatives revealed that successful implementation of such reforms depends upon one or more government agencies or officials having clear responsibility for such implementation. In New York State, the Governor's commitment to these reforms provides an auspicious foundation for their success. Various State agencies must be involved in implementation of these proposed reforms, including OCFS, DOCCS, DCJS, and the Governor's Office itself. Services and interventions critical to the reform must be supported at local community-based providers and not-for-profit residential agencies across the State. County executives, district attorneys, county attorneys, and the various courts at issue must also be involved. Finally, the Chief Judge of the Court of Appeals and the Office of Court Administration would play a critical role in the reform process.

Coordination and leadership of efforts across these many entities is critical to successful implementation. Accordingly, the Commission recommends that the Governor appoint one or more individuals with expertise in juvenile justice and a commitment to these reforms to help coordinate their implementation. The responsible official(s) would need the support and cooperation of all of the agencies and entities involved.

## ARREST & POLICE CUSTODY

Whether New York treats a youth as an adult or as a juvenile at the first stages of interaction with the justice system – at and immediately after arrest – has lasting consequences for effective law enforcement and to improve outcomes for the youth who are involved. The Commission analyzed other states' practices, as well as those used in New York State currently for juveniles and adults, to develop the recommendations below.

### 4. Expand to 16- and 17-year-olds the current juvenile practice regarding parental notification of arrest and the use of Office of Court Administration-approved rooms for questioning by police.

Research has shown that adolescents are much more likely to waive their right to remain silent and to confess to crimes quickly than adults during police interrogation. Their increased likelihood to comply with authority figures, to tell police what they think they want to hear, and to succumb to an impulsive decision to make a statement, even a false statement, if it will end an interrogation, places them and law enforcement at great risk for unreliable confessions. Unreliable confessions, in turn, create challenges in prosecution and can result in ongoing crime by the actual offender who remains in the community.

Juveniles have protection against this vulnerability through existing law that requires police to make reasonable efforts to notify a parent at the arrest of a youth age 15 and under and to question those youth only in a room that is specially designed for questioning in an office-like setting. However, 16- and 17-year-olds are not currently afforded these protections. Instead, they are arrested and processed as adults without notice to their parents and alongside other adult arrestees in secure areas of police stations. The protections of parental notification and use of questioning rooms for youth should be extended to 16- and 17-year-olds.

5. **Expand the use of videotaping of custodial interrogations of 16- and 17-year olds for felony offenses.**

Videotaping interrogations is widely viewed as an effective strategy for improving the reliability of interrogations. Broad support for this practice comes from academic and legal experts as well as from across the spectrum of legal practitioners and law enforcement professionals. This broad-based support rests on several benefits that come from the electronic recording of interrogations such as: increased quality of police interviews; reduced litigation regarding suppression of statements and reduced necessity to defend against claims of misconduct; reduced chance of proceeding against the wrong defendant, leaving the real perpetrator at large; and increased public confidence in the fairness and accuracy of the justice process.

Currently, more than one third of states and the District of Columbia have adopted electronic recording of interrogations as a statewide practice for some or all felony offenses. Within New York State, at least 43 counties, cities, or smaller jurisdictions already record police interrogations. By all accounts, the practice has proven valuable not only to protect defendants but also to protect police officers against accusations of coercion or other improper practices. The use of electronic recording should be expanded to all custodial interrogations of 16- and 17-year-olds for felony offenses.

## PRE-TRIAL DIVERSION OF CASES

Research has demonstrated that diversion of appropriate cases before they reach the courts both improves outcomes for the youth involved and better protects public safety. In addition, the cost of diversion is much lower than that of juvenile detention or out-of-home placement. Fiscal modeling performed by the Commission suggests that diversion interventions can be provided for an average cost of $3,000per case while the cost of out-of-home placement can reach over $200,000 per child annually. For these reasons, the Commission analyzed best practices in diversion across the country and the existing barriers within New York to effective diversion in appropriate cases.

The Commission’s research also revealed reason for an important caveat: the current adult court system effectively weeds low-level cases against 16- and 17-year-olds out of the system before conviction and significant intervention, with 59% of such arrests not prosecuted at all or resulting in dismissal. Research has demonstrated that low-risk youth who are drawn into “deep end” interventions (like out-of-home placement or intensive community-based programming) actually are more likely to re-offend than if such interventions are not used. Accordingly, any reforms must not have the unintended consequence of keeping youth who do not commit serious offenses or otherwise present a significant risk to public safety in the “deep end” of the justice system.

The recommendations below arise from the Commission’s comprehensive research and review.

6. **Mandate diversion attempts for low-risk (per risk assessment) misdemeanor cases except where probation finds no substantial likelihood that youth will benefit from diversion in the time remaining for adjustment or if time for diversion has expired and the youth has not benefited from diversion services.**

The opportunity for pre-court diversion through probation is unique to the juvenile system. This “adjustment” process requires use of a risk assessment instrument and provides for evidence-based services to reduce risk of

reoffending. New Adolescent Diversion Parts (ADP) piloted by the Office of Court Administration showed that a probation diversion process at the outset of a case of a 16- or 17-year-old can substantially improve outcomes for youth and for the justice system. The research on Nassau County's ADP demonstrated that, compared to the 2011 reference cohort, providing formal pre-court diversion or dismissal opportunities produced more frequent straight dismissals, reduced numbers of incarcerative sentences, and produced no increase in the rate of re-arrest. In addition, the provision of evidence-based services to youth reduces recidivism and the cost of these programs is likely to be recouped within five years due to the resulting decreases in crime.

**7. Expand categories of cases eligible for adjustment to allow for adjustment in designated felony cases and Juvenile Offender cases removed to Family Court, with a requirement for court approval for all Juvenile Offender cases and if the youth is accused of causing physical injury in a designated felony case. Revise the criteria for determining suitability for adjustment to include risk level and the extent of physical injury to the victim.**

Under current law, probation departments are barred from adjusting cases that have been removed from criminal court. While the universe of designated felony offenses and other offenses removed from criminal court to Family Court are extremely serious in nature, current system processing of 16- and 17-year-old violent felony offense cases shows that many violent felony arrests of 16- and 17-year-olds do not currently result in felony convictions. In fact, 47% of violent felony arrests of 16- and 17-year-olds disposed during 2013 did not result in indictment. Instead, half of those arrests that were not indicted resulted in no conviction at all and the other half resulted in a conviction on a misdemeanor or non-criminal violation. While the Commission expects that most of these cases may not be appropriate for adjustment, in those cases where the offender is determined by the risk assessment tool to have a low risk of re-offending, adjustment may be appropriate. The court and the probation department should have the option of adjustment in these cases.

In addition, the Family Court Act provides that local probation departments may adjust only those cases that are "suitable." Probation is directed to consider a range of factors when making suitability determinations including: age; elements of the offense; likelihood of cooperation and success in timeframe; risk of re-offense or victim harassment during adjustment; history of offending; need for court removal from home; and whether there is an allegation against anyone else for acting jointly with the youth. Reframing the considerations for a youth's suitability for adjustment to reflect objective risk assessment and severity of harm to the victim would shift the use of diversion to an evidence-based framework.

**8. Create the capacity and a process for victims to obtain orders of protection without a delinquency case being filed in court.**

Under current law, no mechanism exists for a victim to obtain an order of protection without a delinquency case proceeding in the Family Court. This means that even where the victim would consent to having a case adjusted without a petition being filed with the court as long as she could obtain an order of protection, the probation department cannot explore adjustment in appropriate cases. Forty-five percent (25 counties) of the 56 counties that responded to a survey conducted in support of the Commission reported the inability to obtain orders of protection was a barrier to adjusting cases. This change would allow a victim to obtain an order of protection without filing a delinquency petition in Family Court. Probation would thus be able to seek adjustment if the victim consents.

### 9. Allow two additional months for probation diversion (beyond 120 days) if a documented barrier to diversion exists or a change in service plan is needed.

If a probation department chooses to attempt adjustment in an eligible case and victim consent is obtained, the department is allowed only an initial two-month period and an additional two months upon judicial approval. Thirty-six out of the 56 local probation departments that responded to the probation survey identified this limited period for adjustment as a barrier to adjustment of eligible cases.

The review of comparable states revealed that many other states currently allow a longer period of time for pre-petition probation diversion in their juvenile justice system. Several states allow six months for diversion attempts with Florida and Illinois allowing a full year. Increasing the time for probation to use diversion services will allow greater opportunities to adjust cases successfully, especially for those cases with more intense service needs or where localities have waiting lists for services.

### 10. Establish a continuum of diversion services that range from minimal intervention for low-risk youth to evidence-based services for high-risk youth.

Use of probation diversion for 16- and 17-year-olds can only reap positive benefits if localities across New York have access to a range of responses proven to be effective with youth. Results from the survey of probation directors showed that, while most of the large counties have access to some evidence-based services at probation diversion, the majority of the smaller counties do not. In addition, while counties generally have access to psychiatric evaluation and psychological assessment, there are consistent waiting lists for those services throughout the state. Survey results also showed that the only restorative justice intervention that is widely available throughout New York State is community service. Given that restorative interventions provide rapid means for direct accountability to the victim or the community at a relatively low cost, expansion of these interventions holds significant promise.

Tremendous regional variation was reported in the survey results. For example, two counties reported fewer than five services available at probation diversion while the City of New York and four other counties reported over 20 different types of available services. All counties should have access to a continuum of intervention that meets their local needs, including low-cost, low-intensity responses such as restorative interventions (including juvenile accountability boards and youth courts), and more intensive services for smaller numbers of youth and families who pose a higher risk and have more intense needs. A comprehensive range of interventions across New York would provide access to services proven to reduce recidivism as well as rapid accountability measures that provide opportunity for youth to repair the harm they have caused without the need for more costly out-of-home placement. Creative solutions must be sought to create service capacity in more rural parts of New York to equalize access to services for youth in all parts of the state.

### 11. Establish family engagement specialists to facilitate adjustment.

Probation departments also identified family engagement as a significant barrier to the successful diversion of appropriate cases. Family engagement is critical in order to obtain the parental consent that is necessary for diversion services and to ensure that youth substantially engage in the services that may be needed. Support for family engagement specialists would strengthen system capacity to engage youth and their families in targeted services and maximize the benefits of adjustment services. Family engagement specialists have proven successful and extremely cost effective in those jurisdictions that have used them.

## COURT PROCESSING OF 16- AND 17-YEAR-OLDS

One of the most significant questions addressed by the Commission is how 16- and 17-year-olds should be handled in the court system once the age of juvenile jurisdiction is raised. If these cases were simply shifted to the current juvenile model, all cases would be handled in Family Court under its juvenile delinquency jurisdiction, except those cases required to be charged in adult criminal courts as Juvenile Offenders. While that default outcome could work well for many cases, it would not take into account the critical public safety concerns that require certain of the most serious violent offenses, committed in more significant volume by those who are 16 and 17 than those 15 and under, to be handled in criminal court, at least in the first instance. The Commission considered this question in detail and recommends reforms to the current system designed to ensure that *every* young offender is handled in the most appropriate manner to improve their prospects for future productivity as well as the safety of their communities.

**12. Expand Family Court jurisdiction to include youth ages 16 and 17 charged with non-violent felonies[2] , misdemeanors, or harassment or disorderly conduct violations. Provide access to bail for 16- and 17-year-olds in Family Court and allow Family Court judges to ride circuit to hear cases, at the discretion of the Office of Court Administration.**

The Commission found that Family Court would be the most appropriate court to handle misdemeanors and non-violent felonies against 16- and 17-year-olds. Family Court provides a range of youth-centered approaches that are not available in the criminal court. Family Court already has a well-developed system for probation departments to attempt to divert appropriate cases before they are filed in court and to provide diversion services designed to improve outcomes for youth. If a case reaches the court, youth are represented by attorneys who are specially trained in the unique role of providing counsel to children, judges are enmeshed in the cases of children full time, probation assessments and reports focus on issues unique to youth (such as academic and family supports and challenges), and dispositional decision making is rooted in the needs and best interest of youth as well and public safety. In addition, Family Courts have the capacity to order a range of services that are part of a larger portfolio of services to prevent out-of-home placement at the local level. None of these structures are currently incorporated into the criminal court context. While not insignificant, the projected additional case volume expected to materialize under this Commission's proposals would be manageable for the Family Courts. The Commission's modeling projects an additional 6,840 delinquency filings annually in Family Court once the new age of juvenile jurisdiction is fully implemented. With 20 new Family Court judgeships being established in January of 2015 and an additional five Family Court judgeships scheduled for January 2016, the Family Court will have adequate capacity to manage the influx of new 16- and 17-year-old misdemeanor and non-violent felony cases.

The Commission recommends providing the additional procedural safeguard of bail for 16- and 17-year-olds for those cases handled in Family Court. It also recommends that OCA be authorized to allow and facilitate Family Court judges in certain counties to "ride circuit" in different parts of the county to address the fact that certain cases that are now handled in towns or villages around the state would, under the Commission's reforms, be handled only in the county seat where the Family Court resides.

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[2] Non-violent felonies would exclude all homicide offenses; class A felonies; Juvenile Offender crimes, Violent Felony Offenses, sexually motivated felonies, crimes of terrorism, felony vehicular assaults, aggravated criminal contempt; and conspiracy to commit or tampering with a witness related to any of the above offenses.

**13. Begin judicial processing in criminal court for current Juvenile Offender crimes as well as all violent felony offenses; all homicide offenses; Class A felonies; sexually motivated felonies; crimes of terrorism; felony vehicular assaults; aggravated criminal contempt; and conspiracy to commit any of these offenses and tampering with a witness related to any of these offenses for 16- and 17-year-old offenders.**

While nearly every state has an older age of juvenile jurisdiction than New York, every state also retains some capacity to try certain of the most serious offenses committed by young people in criminal court. New York has an existing Juvenile Offender structure that currently accomplishes that end for youth of ages 13 through 15. The Commission finds that retaining the initiation of serious crimes of violence in criminal court, with the option for transfer to Family Court as under current law, would best protect public safety. This structure will result in only 14 percent of 16- and 17-year-old arrests originating in criminal court. In addition, the recommendations that follow would substantially reform the criminal court processing of these offenses to address young offenders' specific needs and improve their outcomes through: the use of juvenile probation assessment and intervention while cases are pending, the opportunity for removal of cases to the Family Court (or for processing under the Family Court Act in the criminal court) with a new presumption of removal for violent felonies that are not Juvenile Offender crimes (see below), reduced sentencing for most youth offenses in appropriate circumstances, and use of youth facilities for confinement of minors. In addition, expansion of opportunity for Youthful Offender status and creation of a new capacity to seal one conviction if the young person turns away from crime would reduce any negative collateral consequences of criminal court processing.

**14. Apply current standards for removal from criminal to Family Court of Juvenile Offender cases to those cases against 16- and 17-year-olds that would originate in criminal court, except for subdivision two of second degree robbery (a Juvenile Offender crime) and the Violent Felony Offenses that are not Juvenile Offender crimes. For these latter offenses, create a new rebuttable presumption for removal to Family Court. Such cases would be removed to Family Court unless the prosecutor demonstrates that criminal prosecution is in the interests of justice, considering the current criteria for removing a case to Family Court and whether the youth either played a primary role in commission of the crime or aggravating circumstances, including but not limited to the youth's use or handling of a weapon, are present.**

While the Commission proposes originating the serious crimes of violence outlined above in criminal court, stakeholder feedback and the research into practices in other states support using a presumption for removal to Family Court for the violent felony offenses that are not current Juvenile Offender crimes. In addition, many stakeholders raised significant concern about the current second degree robbery offense that is a Juvenile Offender crime. Youth can find themselves charged with this offense because they were part of a group that committed a robbery that resulted in physical injury or involved use of a weapon even though that youth himself did not cause injury or brandish a weapon. New York should acknowledge that only the most serious crimes for 16- and 17-year-olds should be processed in criminal court by imposing a new presumption for removal to Family Court for the violent felony offenses that are not existing Juvenile Offender crimes and for the Juvenile Offender crime of second degree robbery.

Notably, under existing law approximately one third of all Juvenile Offender cases that are initiated in criminal court are later transferred to Family Court. Contrary to popular conceptions, Family Court is already handling some of the most serious cases against older adolescents. Under the Commission's recommendations, the

criminal court judge would make that transfer determination as it does currently and would retain those cases that are appropriately handled in criminal court.

**15. Create new Youth Parts, with specially trained judges, in criminal court for processing those cases against 16- and 17-year-olds and other Juvenile Offenders who remain in criminal court.**

Many stakeholders emphasized the need to build youth expertise for cases that are processed in criminal court. Consolidation of these cases under one judge with specialized training would build expertise in effective resolution of adolescent cases and reap the crime reduction benefit of this special expertise regarding evidence-based interventions that reduce recidivism among teenagers. While Youth Parts would be housed in the criminal court, they would provide distinct settings to focus on using youth-specific, community-based and residential interventions instead of the existing adult interventions.

**16. Clothe judges in criminal court Youth Parts with concurrent criminal court and Family Court jurisdiction to allow Youth Parts to retain cases removed to Family Court under the new presumption for removal and to handle them under the Family Court Act where appropriate.**

While the capacity for the removal of a case from criminal court to the Family Court building itself would be preserved under the Commission's proposal, court stakeholders and district attorneys emphasized the value of allowing the criminal court Youth Part to function as a Family Court in certain cases that are removed. Clothing the Youth Part criminal court judge with concurrent Family Court and criminal court jurisdiction would allow the Youth Part to retain the case and apply the Family Court Act after deciding to remove the case. In this way, the case could be readily transitioned to a Family Court model, overcrowded Family Court buildings would not be overtaxed, and District Attorneys should grow increasingly comfortable with having appropriate cases handled under the Family Court Act.

**17. Provide juvenile probation case planning and services for cases pending in criminal court.**

Criminal court processing for minors should also be improved by adding juvenile probation assessment and the potential for service intervention pending trial and sentencing for any minors whose case is being processed in criminal court. Provision of juvenile probation assessment and interventions prior to trial could significantly enhance case outcomes for youth cases retained in criminal court through successful intervention prior to sentencing. Youth who successfully engage in these evidence-based services have been shown to be less likely to reoffend.

## REMOVING YOUTH FROM ADULT JAIL & PRISON FACILITIES

The harms to youth detained or incarcerated in adult facilities across the country are well documented. As a result, one of the most critical system changes to accomplish in raising the age of juvenile jurisdiction in New York State will be to remove young people under age 18 from adult facilities, including both local jails and state prisons. The Commission assessed and compared New York's adult and juvenile confinement systems, addressed the fiscal and logistical challenges to shifting minors out of adult jails and prisons, and provided recommendations to reduce unnecessary use of juvenile detention and placement.

### 18. Prohibit confinement of any minor in an adult jail or prison and, to the extent funding and operational considerations allow, permit youth to remain in youth settings until age 21.

Under current law, 16- and 17-year-olds can be held in the custody of either the local county jail or the New York State Department of Corrections and Community Supervision (DOCCS). Young people who are detained while their case is proceeding in court are held in local county jails, as are those who receive custodial sentences less than one year in length. Those who receive sentences greater than one year are committed to the custody of DOCCS and housed in state prison facilities. On any given day in New York State, there are approximately 700 16- and 17-year-olds held in local jails and about 100 more in State prisons.

The impact of incarceration of 16- and 17-year-olds in adult facilities falls primarily on youth of color: Black and Hispanic youth receive 82 percent of sentences to confinement statewide. In New York City, Black and Hispanic youth account for more than 95 percent of prison sentences for 16- and 17-year-olds.

Research has demonstrated that the use of adult prisons and jails as compared to juvenile facilities results in worse outcomes for juveniles and for community safety. A comprehensive study of youths processed in New York as adults and nearly identical youths processed in New Jersey as juveniles found that the percentage of re-arrest for youth charged with robbery and processed in adult court was 25% higher than those charged with robbery and processed in juvenile court. A follow-up study looking at the same comparison of youth further substantiated this outcome, finding a 26% higher likelihood of re-incarceration for youths adjudicated and sanctioned in the criminal court, including those that spent time in adult facilities.

Research has also shown that incarceration of minors in adult facilities places them at substantial risk of harm. Studies have found that youth under 18 represented 21 percent of all sexual violence victims in jails in 2005 and 13 percent in 2006 despite only making up 1 percent of the entire jail population. Congressional findings have concluded that juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration. Other forms of physical violence are also greater for youth in adult facilities, as they are twice as likely to be beaten by staff and 50 percent more likely to be attacked with a weapon than youth in juvenile facilities.

Current conditions of confinement for minors in New York State jails and prisons are substantially more correctional and less rehabilitative than youth facility settings. While local jails are required to house 16- and 17-year-olds separately from people 18 and older, minors generally have poor access to mental health services, are subject to potentially long periods in solitary confinement, and often do not have access to quality education services in jail. Minors in DOCCS facilities are currently housed together with older inmates, often share group showers, are likewise subject to potentially long periods in solitary confinement, and must often wait long periods of time to access vocational and therapeutic programming.

Removing minors from adult confinement settings presents challenges in terms of cost and capacity. Modeling conducted in support of the Commission suggests that there will be a need for 558 new secure detention beds, an additional 749 voluntary agency placement beds, and an additional 38 OCFS limited secure beds and 192 OCFS secure beds.

However, there is good reason to believe that this new detention and placement need may not materialize as expected. Counter to expectations prior to raising the age in Connecticut and Illinois, neither state experienced

the expansion in detention and placement that was expected. The average daily population in Connecticut's pretrial detention centers fell from 132 in 2006 to 94 in 2011; the year after 16-year-olds entered the juvenile system, allowing the state to close one of its three state-operated detention centers. Illinois likewise saw an 18 percent decline in its juvenile detention system following expansion of juvenile jurisdiction to 17-year-old youth who committed misdemeanors. Placement need also did not expand as predicted in either state. In Connecticut, total commitments to its juvenile placement settings began to decline prior to raise the age and continued to decline even after 16-year-olds were added. Placements in Illinois were down 22.4 percent from the time the age was raised in 2010 and the beginning of 2013. The recommendations below are designed to mitigate the need for new detention and placement capacity by reducing the current unnecessary use of those settings.

**19. Reduce unnecessary use of detention and placement through:**

**a. Prohibition of detention and placement for youth adjudicated for first-time or second-time misdemeanors that do not involve harm to another person, and who are low-risk, except where the court finds a specific imminent threat to public safety.**

Data analyzed by the Commission revealed that custodial interventions are often used for youth who commit low-level, non-violent offenses in New York. For example:

- About 2,200 minors receive sentences to jail or time served following a misdemeanor arrest, and 80% of those involved non-violent arrest charges.
- Last year more than 250 Juvenile Delinquent youth were sent to out of home placement as a result of a case that was initially petitioned as and adjudicated for a nonviolent misdemeanor.
- In New York City, 59 percent of detention admissions are for youth charged with misdemeanor offenses.
- Over half (53%) of youth in OCFS non-secure and limited-secure care were placed as a result of a misdemeanor-level finding.

Commission analysis revealed that several other states have placed restrictions on the use of out-of-home placement for misdemeanors. Specifically, Texas, Ohio, Georgia, Mississippi, Kentucky and Florida, have enacted legislation that bans custodial options for specific categories of youth, particularly misdemeanants. Similar restrictions on the use of juvenile placements for low-risk youth who have not committed significant crimes are warranted in order to reserve confinement for only the most serious young offenders.

This balanced recommendation would prohibit out-of-home detention or placement of youth who (a) screen low risk on a validated risk assessment tool; (b) have been adjudicated for only one or two misdemeanor offenses; (c) have not caused physical harm to another person; and (d) in the court's view, pose no imminent risk to public safety. This approach would protect public safety while avoiding unnecessary, counter-productive, and costly use of confinement.

**b. Prohibition of placement for technical probation violations alone, except where 1) the court finds a specific imminent threat to public safety or 2) the youth is on probation for a violent felony offense and the use of graduated sanctions have been exhausted without successful compliance.**

Technical violations of probation supervision involve breaking rules set as a condition of probation supervision, but not commission of a new crime. For example, a youth may return home after curfew or skip school, violating terms of his probation. The use of out-of-home placement for these kinds of non-criminal rule violations was identified by stakeholders as an area ripe for reduction. Data on the number of New York State youth who are placed solely because of a technical violation of probation are inconsistently kept. However, in a survey administered to probation departments across New York State for this Commission, those that responded estimated that in 2013, 270 youth in the juvenile justice system were sent to placement solely as a result of technical violations of probation. Nationally, OJJDP reports that 16% of youth in juvenile placement had a technical violation of supervision recorded as their most serious offense leading to placement.

Several states have implemented the use of graduated sanctions to reduce the use of placement in response to technical probation violations. Hawaii, Kentucky, Kansas, and Florida all implemented formal sanctions as an alternative to placement to respond to technical probation violations. The Commission's recommendation would reserve placement only for youth who present a risk to public safety by limiting its use in response to technical probation violations. In most cases, graduated sanctions would instead be used to improve compliance with the terms and conditions of probation.

**c. Implementation of weekend arraignment for Family Court cases statewide where adult arraignment already occurs.**

Adult system processing is currently structured to arraign adults over the weekend in courts across the state. However, this kind of court access is not available in cases against juveniles outside of New York City. Instead, youth arrested and detained as juveniles must wait until Monday to see a Family Court judge if they are arrested after the Family Court closes on Friday afternoon. Shifting 16- and 17-year-olds to Family Court without implementing weekend arraignment for Family Court cases would therefore leave these youth more subject to incarceration than they currently are. Twenty-three percent of youth detained outside of New York City spend one to three days in detention, many of them waiting over the weekend in detention only to be released as soon as they are before a judge. Weekend arraignment for juveniles was implemented in New York City in 2008, using the existing adult weekend arraignment structure to hear juvenile cases. This form of weekend arraignment for juveniles should be implemented statewide where ever adult weekend arraignment already occurs.

**20. Establish family Support Centers in high-PINS referral localities to provide more robust community-based PINS services, and then eliminate detention and placement of PINS.**

PINS are youth ages 17 and under who have engaged in non-criminal "status offenses" such as truancy and running away. While these young people do not stand accused of any crime, they can be confined in non-secure detention and placement settings. In 2013, there were 1,574 PINS detention admissions and 627 admissions to out-of-home placement. The bulk of detention and placement for PINS occurs outside of New York City: in 2013, 89 percent of PINs placements and 83 percent of PINS detention admissions were ordered in counties outside of New York City.

Analysis completed by the Office of Children and Family Services in support of the Commission's work showed that New York State spends over $100 million annually to hold PINS youth in detention and placement. This expensive practice is contrary to best practice standards for these youth who have not committed any offense. The most effective interventions for PINS youth have been shown to include: diversion from court, immediate response, a triage process, accessible services that engage the entire family, and ongoing quality assurance of program effectiveness.

Connecticut has developed a promising model that reflects these best practices to respond to the needs of families of status-offending youth who were previously served through the courts. In October, 2007, Family Support Centers (FSCs) opened in the four jurisdictions with the highest numbers of status offense complaints. In lieu of court referrals, those status-offending youth who are in crisis or deemed high-risk after being screened by a probation officer are referred to a FSC. The FSC multiservice model requires caseworkers to contact families within three hours of receiving a referral. They conduct an initial screening to determine the appropriate next step for families, including a comprehensive assessment and planning of services that can be offered within the center. FSC officials work to strengthen families, provide treatment services, reconnect youth with family and schools (in cases of truancy), and increase the skills of youth and family in managing status offense behavior. Services provided to youths and families diverted to FSC include counseling, mediation, mental health, and respite care.

During the first six months after the 2007 implementation of FSCs, the number of status offense court referrals fell by 41%, and more than one year later no youth charged with a status offense had been securely detained. From 2007 to 2009, 81% of youths who successfully completed an FSC program had no further involvement in the juvenile justice system.

The Commission recommends that New York reinvest some of the resources currently used for PINS out-of-home detention and placement to support this robust model of effective community-based intervention. As this service capacity is developed, the detention and placement of PINS youth should be prohibited, reserving these costly settings only for youth who present a significant risk to public safety.

## EFFECTIVE SENTENCING, PLACEMENT, & PROBATION SERVICES

Providing access to effective interventions for 16- and 17-year-olds whose cases result in either an adjudication of delinquency or a criminal finding is critical to successfully raising the age of juvenile jurisdiction. The Commission's recommendations below address the need to shift to a determinate sentencing structure for minors who are sentenced in the criminal courts, recommend community-based supervision and custodial settings that would provide the most effective interventions for 16- and 17-year-olds, and identifies a continuum of effective interventions for those youth who may age into the DOCCS system.

**21. Use statutory Juvenile Offender and Youthful Offender sentences for offenses committed at ages 16 and 17 that are sentenced in criminal court, except for Class A felony offenses that are not Juvenile Offender crimes. For Class B violent felony offenses, the court should have statutory discretion to impose a longer adult sentence if the prosecution shows aggravating circumstances, including severity of injury or gravity of risk to public safety.**

Supreme Court jurisprudence has established that the most extreme adult sentences are rarely, if ever, appropriate for youth under age 18. Through a ban of the juvenile death penalty as well as a ban on automatic

life without parole for minors, the Supreme Court has applied a developmental approach to sentencing of minors for the most egregious offenses. Reform of New York's sentencing structure for 16- and 17-year-olds would enshrine in law the reality that sentences in the upper range of adult sentencing are rarely appropriate for a teenager who retains a real capacity for rehabilitation. In addition, sentences for violent felony offenses that are not Juvenile Offender crimes for 16- and 17-year-olds should not be longer than existing Juvenile Offender sentences that would apply to 16- and 17-year-olds under these reforms.

At the same time, however, stakeholders consulted in support of the Commission's work pointed to those very rare, but egregious cases where a 16- or 17-year-old presented a major, ongoing threat to public safety. To account for those cases, the Commission concluded that it makes sense to retain the current sentencing structure solely for Class A felonies that are not Juvenile Offender crimes and to provide an option for longer sentences if a 16- or 17-year-old commits a Class B violent felony and the prosecution can make a showing of aggravating circumstances, including severity of injury or gravity of risk to public safety.

### 22. Use determinate sentencing for youth sentenced under Juvenile Offender or Youthful Offender statutes, including 16- and 17-year-olds.

Stakeholder interviews and focus groups, as well as extensive discussions with experts in this area, identified serious concerns about the impact of the current ***indeterminate*** Juvenile Offender and Youthful Offender sentences on youth. In particular, stakeholders highlighted the uncertainty that results from indeterminate sentencing and the challenges that such uncertainty creates for effective programming and re-entry planning during placement. Because youth can be released by the Board of Parole at different points over a period of years, or not at all, under the indeterminate sentencing structure, there is no capacity to know when release will occur, to create an institutional case plan structured to complete programming in a timely manner, or to develop a strong plan for re-entry supports.

It is also difficult to help youth serving indeterminate sentences to set personal goals and motivate them to focus on their education and training when the timing of their release is so uncertain. Under the determinate sentencing structure, good behavior is guaranteed to reap the benefit of an early release and therefore provides strong motivation for completing programming and following rules while confined. However, under the indeterminate structure, youth may do everything required of them while confined and still not be released by the Board of Parole. This inability to tie good behavior to certainty of an early release can serve as a disincentive for good behavior and, at times, leave youth feeling that there is no reward for following the rules and completing programs. This is particularly inapt for adolescents who are otherwise often more susceptible to rehabilitation than adults.

Shifting to a determinate structure would facilitate certainty in release planning and create motivation for youth to behave while in custody, as they would know with certainty when they can be released if they follow the rules. The Sentencing Commission recently completed several years of analysis on how to best shift from an indeterminate to a determinate sentencing structure and their recommendations should be considered when developing a determinate range in Juvenile Offender and Youthful Offender sentencing.

### 23. Develop a continuum of effective community-based services at the local level to be used by probation, including expansion of JRISC, to maintain more high-risk youth in the community and reduce recidivism.

Community-based supervision provided to 16- and 17-year-olds, whether adjudicated in Family Court or sentenced in the criminal court, should provide supervision with evidence-based interventions individually

tailored to reduce the risks and address the needs presented by the youth. While some counties have a robust continuum of evidence based interventions for youth on probation, the survey of probation departments conducted for the Commission showed that service capacity varies greatly across county lines, both in terms of range of services and current capacity to expand services to a new population of youth. For example, while all counties that responded to the survey reported access to psychological evaluation, nearly half of them also reported a waiting list to access that service. In addition, while probation departments in larger counties tended to report access to evidence-based therapeutic interventions, over half of the 52 localities that provided information on these services reported fewer than three evidence-based services and six counties reported no evidence-based services for use during probation supervision.

The Juvenile Risk Intervention Services Coordination (JRISC) Program is an existing State initiative that links enhanced probation supervision with evidence-based programs, providing an effective model designed to reduce recidivism among high-risk youth and, in turn, reduce the need for detention, placement, and incarceration. The program began in 2010 and, in its first four years, has served just almost 1,000 youth across the seven participating counties at a total cost of about $3.5 million. Outcomes of the program are promising, with a 71% rate of program completion in 2013, and within those cases, a 74% rate of risk reduction. JRISC has been shown to maintain high-risk youth in the community effectively and the Commission recommends that these services should be expanded beyond the seven participating counties.

Availability of these kinds of evidence-based services is critical to the success of any justice system for youth, as they reduce recidivism, produce better outcomes for youth in terms of education and substance abuse, and even result in a positive preventive impact for other youth in the family. Expanding access to these kinds of effective programs for 16- and 17-year-old youth is necessary to improve outcomes for youth and the community.

**24. Develop residential facilities using best practices models to support the needs of older adolescents, including:**

**a. For newly required placement capacity, establish a network of new, small facilities with staffing and programming consistent with the Missouri approach;**

Development of juvenile residential capacity to meet the new demand that would result from raising the age provides New York a unique opportunity to create new residential programs from the ground up. The Commission's review of the most promising models for residential placement of older adolescents brought focus to the model implemented in Missouri. In 2001, the American Youth Policy Center identified the Missouri approach as a "guiding light" for reform in juvenile justice. Over the past two decades, Missouri's Division of Youth Services (DYS) has developed a model of care deeply rooted in rehabilitation with extraordinary results. Key components of the model include: smaller facilities located near the youths' homes and families; closely supervised small groups and a rigorous group treatment process offering extensive and ongoing individual attention; emphasis on keeping youth safe not only from physical aggression but also from ridicule and emotional abuse through constant staff supervision and supportive peer relationships; development of academic, pre-vocational, and communications skills that improve their ability to succeed following release; involvement of parents and family members as partners in the treatment process and as allies in planning for success in the aftercare transition; and considerable support and supervision for youth transitioning home from a residential facility. Over two-thirds (67.1 percent) of youth discharged from the Missouri facilities remain law-abiding. In addition, an overwhelming majority of youth exiting custody were productively engaged in

school or employment at discharge. New York should replicate this model in developing new placement capacity for 16- and 17-year-olds in different regions across the state.

### b. Expansion of the August Aichhorn RTF model for justice-involved youth with serious mental health disorders; and

The current model of care provided by the August Aichhorn Center for Adolescent Residential Care is a promising model that should be expanded to meet new need for 16- and 17-year-old youth with serious mental health disorders who are sent to juvenile placement. A partnership between the Office of Mental Health (OMH) and the Office of Children and Family Services (OCFS), August Aichhorn operates a Residential Treatment Facility (RTF) for youth in OCFS custody. The RTF provides the highest level of mental health care available in the State system and is reserved for youth with serious mental health disorders. The program provides a kind of care and supervision that is significantly different than traditional correctional settings. The model does not use room seclusion or mechanical restraints, provides full-day education in a classroom setting, engages youth in positive activities in a community room or outdoors when school is not in session, houses youth in rooms that resemble a dormitory setting, offers the constant support of therapists, and operates on the philosophy that the program cannot achieve success by excluding, transferring, or discharging the most troublesome youth on the basis of their special needs. The model has produced promising outcomes in terms of public safety as well as positive outcomes for youth. The recidivism rate for youth who completed the program is only 39 percent compared to a recidivism rate of 60 percent among a control group. The program has accomplished this with no transfers to psychiatric centers or other hospitals, no run-aways from the building, no sexual assaults or deaths and only one serious self-inflicted injury in 23 years.

### c. Programs that meet the specialized needs of LGBTQ youth.

Like all youth, LGBT youth also need access to appropriate programs and services prior to placement through all phases of system involvement. A continuum of appropriate programs and services should be available from initial system contact through re-entry. If justice systems do not simultaneously assure that community-based alternatives and diversion programs are affirming environments, LGBT youth may be set up to fail, leading to placement. The Commission supports careful consideration of the needs of LGBTQ youth in development of community-based and institutional programming to meet the needs of 16- and 17-year-olds.

## 25. Reduce recidivism among the 18 – 24 population in the criminal justice system by:

### a. Using data-driven, risk-based methodology to prioritize DOCCS inmates aged 18-24 for effective programs;

While the Commission recommends use of juvenile facilities for all minors and supports retention of youth in those facilities until the age of 21 to the extent resources allow, some youth would inevitably still shift into the adult prison system as a result of their age at sentencing and their sentence length. In addition, there is currently a substantial population of 18- to 21-year-olds at DOCCS (1,982 inmates as of 8/1/14), the vast majority of whom committed their offenses when they were over 17. These young people screen exceptionally high risk, with the majority of 18- and 19-year-olds at DOCCS scoring at the highest level of risk on the COMPAS risk instrument used in the adult system. However, research has also shown this population to be particularly amenable to intervention. New York State-specific analysis found high-risk offenders and offenders under the age of 25 have larger decreases in recidivism upon receipt of many types of effective programming, and consistently show larger reductions in victimization, than those over 25. DOCCS should therefore prioritize effective interventions for this population.

**b. Using technology to expand educational opportunities for 18-21-year-olds in DOCCS custody; and**

General education and vocational education have been shown to significantly reduce recidivism among the high risk prison population, with general education producing a 13 percent reduction in recidivism and vocational education producing a 12 percent reduction in recidivism. DOCCS should expand capacity to provide the crime-reducing interventions to their youngest population through the use of technology and distance learning.

**c. Considering use of discrete housing units for youth transitioning from juvenile facilities to DOCCS and for older adolescents at DOCCS.**

Because a small subset of youth are likely to transition from a juvenile setting to a prison setting, it is important to draw attention to programmatic continuity that supports this transition. Because DOCCS is currently building discrete units to come into compliance with PREA's separation requirements for 16- and 17-year-olds, unique discrete housing capacity may be available within selected DOCCS facilities after minors are removed as a result of raising the age. These discrete units could provide an opportunity for specialized programming and structure for older adolescents at DOCCS and to target transition services to older adolescents moving from juvenile to adult confinement.

## RE-ENTRY TO THE COMMUNITY

Implementation of the reforms already discussed to raise the age will fail to reach their full potential for crime reduction and youth success if re-entry planning and services are not central to the effort. The Commission focused on reforms to re-entry planning and implementation that would best foster successful returns to the community for 16- and 17-year-olds. The Commission recommends several actions to move New York State practice closer to the best practice model.

**26. Establish and implement new OCFS regulations requiring evidence-based risk-needs-responsivity (RNR) framework for case planning and management in private- and State-operated placement.**

Research has shown that specific practices and interventions designed to address criminogenic risk and needs are highly effective in reducing recidivism among youth after they return to the community. Existing juvenile placement settings do not use the kind of risk assessment and case planning central to targeting and reducing criminogenic risk. Regulations and policies should be changed to require this effective case assessment and intervention model in order to reduce recidivism among youth returning from placement.

**27. Require that youth sentenced in the criminal courts and released from an OCFS facility receive post-release supervision from OCFS, instead of DOCCS, to facilitate better re-entry planning and implementation.**

Continuity of care is critical for effective reentry. However, the current system for Juvenile Offenders bifurcates responsibility for residential care (OCFS) and community supervision (DOCCS), creating enormous challenges for continuity of care. The Commission recommends reform to ensure that planning for and supervision of community-based interventions are provided by the agency responsible for residential care.

### 28. Replicate the Monroe County juvenile reentry task force in counties with highest juvenile case volume.

Best practice in adolescent reentry calls for coordination of reentry supports and services beginning during placement and continuing after youth return home. The Monroe County Reentry Task Force is a promising model for the complex coordination needed for successful reentry and should be replicated. The Task Force has a wide range of reentry services – substance abuse, mental health, housing, literacy, employment skills, education, etc. – as formal members or partners to ensure youth returning to Monroe County get the services they need. Task Force members come together with the family before youth are released to set up a supportive plan for reentry and youth continue to be supported by the Task Force after returning home. In the first 19 months of the initiative, the Task Force served over 90 youth and families, and youth who participated in the program had a recidivism rate of 20%, compared to a norm of 63%.

### 29. Require reasonable efforts to establish at least one connection between placed youth and a supportive adult in the home community before leaving placement.

Providing youth a different set of connections in their home communities than those they left can sometimes be the key to a successful return. Whether it is a relationship with a faith-based community, a neighborhood recreation center, a community garden, a center for the arts, or another positive local resource, supports from peers or adults with positive attitudes who engage in law-abiding activities can provide youth critical support once they are no longer in a program. Placement settings should be working during placement to foster these relationships for youth in order to strengthen their attachment to positive supports at home and increase likelihood that youth will connect with them after they return to the community.

### 30. Expand availability of supportive housing for older youth at release.

Many stakeholders emphasized the unique need that older adolescents have for supportive housing when they return to the community. As 16- and 17-year-olds become 18- and 19-year-olds while in placement, their capacity to return to their family of origin may change. In addition, return to the home they left may not be the best plan to support successful reentry as families may be experiencing housing instability or the youth may need to return to a neighborhood with more positive supports than those he had in the neighborhood he left. Further, some youth do not have a family to whom they can return. Supportive housing is an important resource to provide a community-based residential option for older adolescents who need a housing resource at reentry as it combines permanent, affordable housing with services supports to achieve housing stability and independence in the community.

## ADDRESSING THE COLLATERAL CONSEQUENCES OF A CRIMINAL RECORD

Every society must strike a balance between, on the one hand, affording young people a “second chance” to rebound from transgressions to become productive adults and, on the other hand, ensuring that offenders can be prosecuted and sentenced effectively for their crimes against a community. At present, New York is essentially failing on both counts.

Unlike many states, except for the Youthful Offender statute discussed below, New York has no other meaningful way for someone who committed a non-violent felony or misdemeanor at a young age to have that conviction expunged or sealed even after a lifetime free of any other crimes. The negative collateral consequences that result from a criminal record are serious. From opportunities for education and employment

to barriers in housing and public benefits, people with criminal histories can face a myriad of challenges that compromise their capacity to maintain stability in the community. That is a problem not only for the individual in question, but also for the community itself that suffers mightily when a former offender cannot get an education, serve in the armed forces, or find gainful employment. The Commission found this to be one of the areas in most pressing need for change.

At the same time, the current laws deprive law enforcement officials and judges of the information they need to charge and sentence properly the few repeat violent offenders that can plague a community. In particular, if a minor commits a violent felony offense and receives a Youthful Offender adjudication, that information cannot be used in sentencing if that person commits subsequent violent felony offenses. This information gap undermines capacity to protect public safety by recognizing the significant threat posed by such a rare, persistent violent offender.

The Commission recommends reforms to make New York a leader instead of a laggard in the efforts to reduce collateral consequences of a criminal record while more effectively protecting public safety against persistently violent offenders.

**31. Create a new presumption to grant Youthful Offender status in criminal cases against offenders who are under 21 if the youth has no previous felony finding. Allow the presumption to be rebutted by the district attorney in the interest of justice. While Youthful Offender eligibility should be extended to 19- and 20-year-olds, current adult sentencing should be retained for 19- and 20-year-old Youthful Offenders.**

The Youthful Offender statute provides the opportunity for any youth under the age of 19 to have a criminal conviction substituted with a non-criminal adjudication at sentencing. It allows for reduced sentences and provides confidentiality to the record of adjudication. Youthful Offender status is currently used extensively in cases of 16- and 17-year-olds – converting 75 percent of criminal convictions to Youthful Offender adjudications. There is currently no opportunity for 19- and 20-year-olds to receive Youthful Offender status and Youthful Offender status does not have to be granted on first-time felony cases. This tool should be expanded to all people under age 21 and should be presumptive for all first offenses (other than for Class A felonies, armed felonies, first degree rape, criminal sexual act in the first degree, and aggravated sexual abuse cases – which are currently restricted from Youthful Offender status) in recognition of the solid research showing that people under 21 are all in a developmental stage that makes them amenable to change. In appropriate cases, that new presumption could be rebutted upon a showing by the district attorney.

**32. Require all accusatory instruments in Youthful Offender eligible cases, except sex offenses, to be filed as sealed instruments prior to trial.**

Modern technology has compromised the capacity for Youthful Offender status to provide true confidentiality for youth. The advent of internet search engines has resulted in a functional record of criminal involvement for youth whose names are in the press regardless of the subsequent confidentiality of the official record. While the current Youthful Offender statute provides for sealed accusatory instruments in apparently Youthful Offender-eligible misdemeanor cases, there is no analogous protection for felony level offenses. Therefore, a youth who is ultimately granted confidential Youthful Offender status at sentencing, or whose case ends in dismissal or acquittal, may still be readily connected to the offense through an internet search. Accusatory instruments should be filed as sealed in all Youthful Offender-eligible cases, except for sex offenses, in order

to preserve the intended confidentiality of the Youthful Offender status and protect those defendants whose cases end in dismissal or acquittal.

### 33. Allow youth who receive Youthful Offender status on a drug offense to be eligible for conditional discharge as those adults who are convicted of these offenses are so eligible.

The current Youthful Offender structure prohibits youth who receive Youthful Offender status for drug offenses to receive a conditional discharge while adults convicted of the same offense are eligible for a conditional discharge. Youthful offenders should not be penalized for their status through prohibition of the possibility of a conditional discharge.

### 34. Allow violent felony Youthful Offender adjudication for anyone 16 or over to be used as a predicate in sentencing for subsequent violent felony charging and sentencing only.

As currently structured, the Youthful Offender law can prevent appropriate intervention in the wake of repeated violent crimes committed by an offender. New York State Law allows for enhanced sentencing for repeat violent felony offenders. But because these sentences require a previous conviction for a violent felony offense, a Youthful Offender adjudication for a violent felony offense does not count as a predicate at sentencing on a subsequent violent felony. Analysis of the 10-year reconviction rates for 3,088 youth who received Youthful Offender status for a violent felony offense in 2002 and 2003 showed that 19 percent of those youth were convicted for a new violent felony offense within 10 years. For that small but dangerous group of offenders, the current law prevents law enforcement agencies and courts from protecting public safety by using the knowledge of prior violent felony offenses to inform charging and sentencing decisions.

### 35. Create the capacity to seal one conviction (excluding violent felonies, Class A felonies, homicides, and sex offenses) for crimes committed under age 21.

Youth under 21, convicted in criminal court, who do not get the benefit of a Youthful Offender status at sentencing, have no capacity to get relief from their criminal record for the rest of their lives. Similarly, youth convicted as Juvenile Offenders and those over the age of criminal responsibility with an adult conviction have no capacity to obtain relief from their criminal record, even if they never commit another offense. A criminal record often results in a variety of negative collateral consequences, including detrimental effects on housing, employment, education, public benefits, and family rights. At the same time, research has shown that if a first-time offender goes three to four years without recidivating, the likelihood that he will recidivate in the future is actually lower than the general population.

When compared with national practices on criminal record sealing, New York State's policies appear very restrictive. Thirty-one states provide some capacity to seal misdemeanor records and 27 states provide some capacity to seal felony records. The Commission recommends that New York allow for sealing after two years without a conviction (or after release from probation supervision without a new conviction if the term of probation was beyond two years) for a misdemeanor conviction. The waiting period for a felony conviction should be five years. The nature of the seal would prevent disclosure of the conviction for any civil purpose, but would continue to allow law enforcement and the courts to have access to the record solely for law enforcement purposes.

Significantly, the process for obtaining these seals would be a simple administrative application to the Division of Criminal Justice Services (online or via mail), eliminating the need for people to obtain counsel or engage in a judicial process. If, however, the judge decides at sentencing that it is in the interests of justice to require the

youth to return to court to request the seal, the sentencing judge could mandate use of a judicial process with district attorney notice to request the seal. This comprehensive sealing regime would place New York at the forefront of efforts to help young offenders to get back on the right track while protecting the safety of the community.

**36. Create the capacity to seal one Juvenile Offender conviction (excluding Class A felonies, homicides, and sex offenses) upon application to the court, if the person remains conviction-free for 10 years after release from confinement.**

Record relief should also be available to youth who receive a criminal conviction for a Juvenile Offender crime. However, given the severity of those offenses, a ten-year waiting period should be required. In addition, because of the severity of Juvenile Offender crimes, the Commission concluded that requests for the seal of a Juvenile Offender conviction should be made through the sentencing court. A very small number of youth receive a criminal conviction as Juvenile Offenders (2,992 between 1979 and 2013), and of those youth, only 20% do not reoffend. Therefore, adding capacity to seal Juvenile Offender records through a judicial process would not generate a significant new case load in the criminal courts.

**37. Allow any person whose conviction occurred prior to the effective date of the law passed to implement these reforms, and who would be otherwise eligible for a seal as described above, to apply to the Division of Criminal Justice Services to obtain that seal, with notice of that application to the district attorney and opportunity for the district attorney to require the seal request to be considered by the court in particularly egregious cases.**

The Commission considered carefully the wisdom of applying this new sealing policy retroactively to those who would otherwise be eligible but who committed their offenses prior to the proposed date for raising the age of criminal responsibility (*i.e*., January 1, 2017 or 2018). Data analysis revealed 102,901individuals who received one criminal conviction in New York State for a non-violent felony (excluding Class A felonies, which are not classified as violent felony offenses) or a misdemeanor between the ages of 16 and 20 and who have no subsequent conviction and no arrests that are pending. This number likely overestimates the number of people who would actually apply for a seal as it does not take into account people who have not yet reached the end of the required waiting period as well as those who may no longer reside in New York, aged out of the workforce, or simply do not feel the need to have their conviction sealed.

The Commission concluded that there is no sound reason not to apply the proposed sealing policy to those whose convictions occurred prior to the passage into law of the reforms proposed in this report. Indeed, the same compelling reasons for making the proposed seal available to future offenders apply equally to those whose offenses have occurred already. Nor are there insurmountable barriers to retroactive implementation in this manner. Retroactive application of the opportunity to seal one criminal conviction during adolescence should be an administrative process handled by DCJS that does not require people to obtain counsel or to petition the court. However, it is important to establish an orderly system to notify the applicable district attorney when a request for a retroactive seal is received and to provide the district attorney the opportunity to require particular requests to be made through the court in particularly problematic cases. Implementation of a process to provide this kind of criminal record relief should not await implementation of the other reforms proposed by the Commission and should be put in place as soon as is administratively practicable.

### 38. Automate information exchanges between entities necessary to ensure that juvenile records are destroyed as required by statute

Accuracy of juvenile delinquency records is dependent on many different entities that may dispose of a youth's case timely providing such case processing outcomes to DCJS. Local probation departments, presentment agencies, the courts, OCFS and local departments of social services all play a role in providing the information necessary for destruction of juvenile records in various circumstances. There are currently no automated systems in place to facilitate these notifications. While these processes have been sufficient to maintain the current volume of delinquency records, the Commission's proposed expansion of delinquency case volume will demand an automated delinquency record maintenance process to ensure that juvenile records are destroyed as currently required by the Family Court Act and accurate information is maintained.

87 S.Ct. 1428
Supreme Court of the United States

# Application of Paul L. GAULT and Marjorie Gault, Father and Mother of Gerald Francis Gault, a Minor, Appellants.

No. 116.
|
Argued Dec. 6, 1966.
|
Decided May 15, 1967.

**Synopsis**
Proceeding on appeal from a judgment of the Supreme Court of Arizona, 99 Ariz. 181, 407 P.2d 760, affirming dismissal of petition for writ of habeas corpus filed by parents to secure release of their 15-year-old son who had been committed as juvenile delinquent to state industrial school. The United States Supreme Court, Mr. Justice Fortas, held that juvenile has right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to privilege against self-incrimination.

Judgment reversed and cause remanded with directions.

Mr. Justice Harlan dissented in part; Mr. Justice Stewart dissented.

West Headnotes (37)

**[1]** **Constitutional Law**Children and minors, rights of
**Constitutional Law**Children and the unborn
**Constitutional Law**Children and minors

Neither Fourteenth Amendment nor Bill of Rights is for adults alone. U.S.C.A.Const. Amend. 14.

154 Cases that cite this headnote

**[2]** **Constitutional Law**Due Process

Due process of law is primary and indispensable foundation of individual freedom. U.S.C.A.Const. Amend. 14.

14 Cases that cite this headnote

**[3]** **Infants**Access and dissemination; confidentiality

State may, if it deems it appropriate, provide and improve provision for confidentiality of records of police contacts and court action relating to juveniles.

38 Cases that cite this headnote

**[4]** **Constitutional Law**Juvenile Justice

Due process clause of Fourteenth Amendment requires that juvenile court delinquency hearing measure up to essentials of due process and fair treatment. U.S.C.A.Const. Amend. 14.

201 Cases that cite this headnote

**[5]** **Constitutional Law**Proceedings

Where no notice of delinquency hearing was given to juvenile's parents at time juvenile was taken into custody, juvenile's mother was informed orally on same evening that there would be hearing on next afternoon and was then told reason why juvenile was in custody, and only written notice that parents received at any time was note on plain paper from probation officer that judge had set specified date for further hearing on delinquency, notice of hearing was inadequate to comply with requirements of due process. U.S.C.A.Const.

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Amend. 14; A.R.S. § 8–224.

85 Cases that cite this headnote

**[6]** **Constitutional Law**Proceedings

Notice of juvenile delinquency proceedings to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth alleged misconduct with particularity. U.S.C.A.Const. Amend. 14; A.R.S. § 8–224.

321 Cases that cite this headnote

**[7]** **Infants**Notice and process

Notice at time of hearing on merits in juvenile delinquency proceeding is not timely.

24 Cases that cite this headnote

**[8]** **Infants**Notice and process

Child and his parents or guardian must be notified, in writing, of specific charge or factual allegations to be considered at juvenile delinquency hearing, and such written notice must be given at earliest practicable time, and in any event sufficiently in advance of hearing to permit preparation. U.S.C.A.Const. Amend. 14.

275 Cases that cite this headnote

**[9]** **Constitutional Law**Proceedings

Due process requires that notice of juvenile delinquency proceeding be of type that would be deemed constitutionally adequate in civil or criminal proceeding. U.S.C.A.Const. Amend. 14.

111 Cases that cite this headnote

**[10]** **Constitutional Law**Proceedings

Due process of law does not allow juvenile delinquency hearing to be held, in which youth's freedom and his parents' right to his custody are at stake, without giving them timely notice, in advance of hearing, of specific issues they must meet. U.S.C.A.Const. Amend. 14.

434 Cases that cite this headnote

**[11]** **Infants**Notice and process

Where 15-year-old boy and his parents had no counsel at juvenile delinquency proceedings and were not told of their right to counsel, their failure to object to lack of constitutionally adequate notice of hearing did not constitute waiver of requirement of adequate notice. A.R.S. § 8–224.

61 Cases that cite this headnote

**[12]** **Infants**For defense

Neither probation officer, who was also superintendent of detention home, and whose role in adjudicatory delinquency hearing, by statute and in fact, was arresting officer and witness against child, nor judge presiding over delinquency hearing could represent or act as counsel for child. A.R.S.Const. art. 6, § 15; A.R.S. §§ 8–201, 8–202, 8–204, subsec. C.

12 Cases that cite this headnote

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**[13]** **Infants**🔑Right to Counsel

There is no material difference, with respect to right to counsel, between adult and juvenile proceedings in which adjudication of delinquency is sought.

250 Cases that cite this headnote

**[14]** **Infants**🔑Nature, Form, and Purpose of Proceedings

Proceeding wherein issue is whether child will be found to be delinquent and subjected to loss of his liberty for years is comparable in seriousness to felony prosecution.

53 Cases that cite this headnote

**[15]** **Infants**🔑Right to Counsel

Juvenile charged with delinquency needs assistance of counsel to cope with problems of law, to make skilled inquiry into facts, and to insist upon regularity of proceedings, and to ascertain whether he has defense and to prepare and submit it.

120 Cases that cite this headnote

**[16]** **Infants**🔑Stage or Condition of Cause

Child charged with delinquency requires guiding hand of counsel at every step of delinquency proceedings against him.

19 Cases that cite this headnote

**[17]** **Infants**🔑Right to Counsel

Assistance of counsel is essential for purposes of determination of juvenile delinquency. U.S.C.A.Const. Amend. 14.

34 Cases that cite this headnote

**[18]** **Constitutional Law**🔑Proceedings

As component part of fair hearing required by due process, notice of right to counsel should be required at all juvenile delinquency proceedings and counsel provided on request when family is financially unable to employ counsel. U.S.C.A.Const. Amend. 14.

165 Cases that cite this headnote

**[19]** **Constitutional Law**🔑Proceedings

Due process clause of Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to institution in which juvenile's freedom is curtailed, child and his parents be notified of child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent child. U.S.C.A.Const. Amend. 14.

621 Cases that cite this headnote

**[20]** **Infants**🔑Waiver; self-representation

Knowledge by alleged juvenile delinquent's mother that she could have appeared at delinquency hearing with counsel did not constitute waiver of right to counsel.

13 Cases that cite this headnote

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[21] **Infants**Right to Counsel
**Infants**Indigents and paupers; public defenders

Juvenile charged with delinquency and his parents had right expressly to be advised that they might retain counsel and to be confronted with need for specific consideration of whether they did or did not choose to waive that right, and, if they were unable to afford to employ counsel, they were entitled, in view of seriousness of charge and potential commitment, to appointed counsel unless they chose waiver. U.S.C.A.Const. Amend. 14.

106 Cases that cite this headnote

[22] **Constitutional Law**Fifth Amendment

Privilege against self-incrimination is applicable to state proceedings. U.S.C.A.Const. Amends. 5, 14.

39 Cases that cite this headnote

[23] **Criminal Law**Compelling Self-Incrimination

Privilege against self-incrimination is related to question of safeguards necessary to assure that admissions or confessions are reasonably trustworthy and that they are not mere fruits of fear or coercion but are reliable expressions of the truth. U.S.C.A.Const. Amends. 5, 14.

21 Cases that cite this headnote

[24] **Criminal Law**Compelling Self-Incrimination

Privilege against self-incrimination has broader and deeper thrust than rule preventing use of confessions which are products of coercion because coercion is thought to carry with it danger of unreliability. U.S.C.A.Const. Amends. 5, 14.

4 Cases that cite this headnote

[25] **Criminal Law**Compelling Self-Incrimination

One of purposes of privilege against self-incrimination is to prevent state, whether by force or by psychological domination, from overcoming mind and will of person under investigation and depriving him of freedom to decide whether to assist state in securing his conviction. U.S.C.A.Const. Amends. 5, 14.

20 Cases that cite this headnote

[26] **Criminal Law**Compelling Self-Incrimination

Scope of privilege against self-incrimination is comprehensive. U.S.C.A.Const. Amends. 5, 14.

1 Cases that cite this headnote

[27] **Criminal Law**Compelling Self-Incrimination

Privilege against self-incrimination can be claimed in any proceeding, whether criminal or civil, administrative or judicial, investigatory or adjudicatory. U.S.C.A.Const. Amends. 5, 14.

36 Cases that cite this headnote

[28] **Witnesses**Self-Incrimination

Privilege against self-incrimination protects any disclosures which witness may reasonably apprehend could be used in criminal prosecution or which could lead to other evidence that might be so used. U.S.C.A.Const. Amends. 5, 14.

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53 Cases that cite this headnote

[29] **Criminal Law**Compelling Self-Incrimination

Availability of privilege against self-incrimination does not turn upon type of proceeding in which its protection is invoked, but upon nature of statement or admission and exposure which it invites. U.S.C.A.Const. Amends. 5, 14.

102 Cases that cite this headnote

[30] **Criminal Law**Compelling Self-Incrimination

Privilege against self-incrimination may be claimed in civil or administrative proceeding, of statement is or may be inculpatory. U.S.C.A.Const. Amends. 5, 14.

29 Cases that cite this headnote

[31] **Criminal Law**Compelling Self-Incrimination

Juvenile proceedings to determine delinquency, which may lead to commitment to state institution, must be regarded as criminal for purposes of privilege against self-incrimination. U.S.C.A.Const. Amends. 5, 14.

132 Cases that cite this headnote

[32] **Criminal Law**Compelling Self-Incrimination

Constitution guarantees that no person shall be compelled to be a witness against himself when he is threatened with deprivation of his liberty. U.S.C.A.Const. Amends. 5, 14.

21 Cases that cite this headnote

[33] **Criminal Law**Compelling Self-Incrimination

Constitutional privilege against self-incrimination is applicable in case of juveniles as it is with respect to adults. U.S.C.A.Const. Amends. 5, 14.

134 Cases that cite this headnote

[34] **Infants**Warnings and counsel; waivers

If counsel is not present, for some permissible reason, when admission is obtained from juvenile, greatest care must be taken to assure that admission was voluntary, in sense not only that it has not been coerced or suggested, but also that it is not product of ignorance of rights or of adolescent fantasy, fright or despair.

241 Cases that cite this headnote

[35] **Courts**Procedure
**Infants**Reception of evidence; witnesses

Same rule applies with respect to sworn testimony in juvenile courts as applies in adult tribunals.

125 Cases that cite this headnote

[36] **Infants**Effect of confession, admission, or statement

In absence of valid confession adequate to support determination of juvenile court, confrontation and sworn testimony by witnesses available for cross-examination were essential for finding of delinquency and order committing

15-year-old boy to state institution for maximum of six years. A.R.S. § 8–201, subsec. 6(a, d); U.S.C.A.Const. Amends. 6, 14.

343 Cases that cite this headnote

[37] **Infants** Effect of confession, admission, or statement

Absent valid confession, determination of delinquency and order of commitment to state institution cannot be sustained in absence of sworn testimony subjected to opportunity for cross-examination. U.S.C.A.Const. Amends. 6, 14.

20 Cases that cite this headnote

**Attorneys and Law Firms**

****1431 *3** Norman Dorsen, New York City, for appellants.

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Merritt W. Green, Toledo, Ohio, for Ohio Ass'n of Juvenile Court Judges, as amicus curiae.

**Opinion**

Mr. Justice FORTAS delivered the opinion of the Court.

This is an appeal under 28 U.S.C. s 1257 (2) from a judgment of the Supreme Court of Arizona affirming the ***4** dismissal of a petition for a writ of habeas corpus. 99 Ariz. 181, 407 P.2d 760 (1965). The petition sought the release of Gerald Francis **Gault**, appellants' 15-year-old son, who had been committed as a juvenile delinquent to the State Industrial School by the Juvenile Court of Gila County, Arizona. The Supreme Court of Arizona affirmed dismissal of the writ against various arguments which included an attack upon the constitutionality of the Arizona Juvenile Code because of its alleged denial of procedural due process rights to juveniles charged with being 'delinquents.' The court agreed that the constitutional guarantee of due process of law is applicable in such proceedings. It held that Arizona's Juvenile Code is to be read as 'impliedly' implementing the 'due process concept.' It then proceeded to identify and describe 'the particular elements which constitute due process in a juvenile hearing.' It concluded that the proceedings ending in commitment of Gerald **Gault** did not offend those requirements. We do not agree, and we reverse. We begin with a statement of the facts.

I.

On Monday, June 8, 1964, at about 10 a.m., Gerald Francis **Gault** and a friend, Ronald Lewis, were taken into custody by the Sheriff of Gila County. Gerald was then still subject to a six months' probation order which had been entered on February 25, 1964, as a result of his having been in the company of another boy who had stolen a wallet from a lady's purse. The police action on June 8 was taken as the result of a verbal ****1432** complaint by a neighbor of the boys, Mrs. Cook, about a telephone call made to her in which the caller or callers made lewd or indecent remarks. It will suffice for purposes of this opinion to say that the remarks or questions put to her were of the irritatingly offensive, adolescent, sex variety.

***5** At the time Gerald was picked up, his mother and father were both at work. No notice that Gerald was being taken into custody was left at the home. No other steps were taken to advise them that their son had, in effect, been arrested. Gerald was taken to the Children's Detention Home. When his mother arrived home at about 6 o'clock, Gerald was not there. Gerald's older brother was sent to look for him at the trailer home of the Lewis family. He apparently learned then that Gerald was in custody. He so informed his mother. The two of them went to the Detention Home. The deputy probation officer, Flagg, who was also superintendent of the Detention Home, told Mrs. **Gault** 'why Jerry was there' and said that a hearing would be held in Juvenile Court at 3 o'clock the following day, June 9.

Officer Flagg filed a petition with the court on the hearing day, June 9, 1964. It was not served on the **Gaults**. Indeed, none of them saw this petition until the habeas corpus hearing on August 17, 1964. The petition was entirely formal. It made no reference to any factual basis

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for the judicial action which it initiated. It recited only that 'said minor is under the age of eighteen years, and is in need of the protection of this Honorable Court; (and that) said minor is a delinquent minor.' It prayed for a hearing and an order regarding 'the care and custody of said minor.' Officer Flagg executed a formal affidavit in support of the petition.

On June 9, Gerald, his mother, his older brother, and Probation Officers Flagg and Henderson appeared before the Juvenile Judge in chambers. Gerald's father was not there. He was at work out of the city. Mrs. Cook, the complainant, was not there. No one was sworn at this hearing. No transcript or recording was made. No memorandum or record of the substance of the proceedings was prepared. Our information about the proceedings ***6** and the subsequent hearing on June 15, derives entirely from the testimony of the Juvenile Court Judge,[1] Mr. and Mrs. Gault and Officer Flagg at the habeas corpus proceeding conducted two months later. From this, it appears that at the June 9 hearing Gerald was questioned by the judge about the telephone call. There was conflict as to what he said. His mother recalled that Gerald said he only dialed Mrs. Cook's number and handed the telephone to his friend, Ronald. Officer Flagg recalled that Gerald had admitted making the lewd remarks. Judge McGhee testified that Gerald 'admitted making one of these (lewd) statements.' At the conclusion of the hearing, the judge said he would 'think about it.' Gerald was taken back to the Detention Home. He was not sent to his own home with his parents. On June 11 or 12, after having been detained since June 8, Gerald was released and driven home.[2] There is no explanation in the record as to why he was kept in the Detention Home or why he was released. At 5 p.m. on the day of Gerald's release, Mrs. Gault received a note signed by Officer Flagg. It was on ****1433** plain paper, not letterhead. Its entire text was as follows:

'Mrs. Gault:
'Judge McGHEE has set Monday June 15, 1964 at 11:00 A.M. as the date and time for further Hearings on Gerald's delinquency

'/s/ Flagg'

***7** At the appointed time on Monday, June 15, Gerald, his father and mother, Ronald Lewis and his father, and Officers Flagg and Henderson were present before Judge McGhee. Witnesses at the habeas corpus proceeding differed in their recollections of Gerald's testimony at the June 15 hearing. Mr. and Mrs. Gault recalled that Gerald again testified that he had only dialed the number and that the other boy had made the remarks. Officer Flagg agreed that at this hearing Gerald did not admit making the lewd remarks.[3] But Judge McGhee recalled that 'there was some admission again of some of the lewd statements. He—he didn't admit any of the more serious lewd statements.'[4] Again, the complainant, Mrs. Cook, was not present. Mrs. Gault asked that Mrs. Cook be present 'so she could see which boy that done the talking, the dirty talking over the phone.' The Juvenile Judge said 'she didn't have to be present at that hearing.' The judge did not speak to Mrs. Cook or communicate with her at any time. Probation Officer Flagg had talked to her once—over the telephone on June 9.

At this June 15 hearing a 'referral report' made by the probation officers was filed with the court, although not disclosed to Gerald or his parents. This listed the charge as 'Lewd Phone Calls.' At the conclusion of the hearing, the judge committed Gerald as a juvenile delinquent to the State Industrial School 'for the period of his minority (that is, until 21), unless sooner discharged ***8** by due process of law.' An order to that effect was entered. It recites that 'after a full hearing and due deliberation the Court finds that said minor is a delinquent child, and that said minor is of the age of 15 years.'

No appeal is permitted by Arizona law in juvenile cases. On August 3, 1964, a petition for a writ of habeas corpus was filed with the Supreme Court of Arizona and referred by it to the Superior Court for hearing.

At the habeas corpus hearing on August 17, Judge McGhee was vigorously cross-examined as to the basis for his actions. He testified that he had taken into account the fact that Gerald was on probation. He was asked 'under what section of * * * the code you found the boy delinquent?'
His answer is set forth in the margin.[5] In substance, he concluded that Gerald came within ARS s 8—201, subsec. 6(a), which specifies that a 'delinquent child' ****1434** includes one 'who has violated a law of the state or an ordinance or regulation of a political subdivision thereof.' The law which Gerald was found to have violated is ARS s 13—377. This section of the Arizona Criminal Code provides that a person who 'in the presence or hearing of any woman or child * * * uses vulgar, abusive or obscene language, is guilty of a misdemeanor * * *.' The penalty specified in the Criminal Code, which would ***9** apply to an adult, is $5 to $50, or imprisonment for not more than two months. The judge also testified that he acted under ARS s 8—201, subsec. 6(d) which includes in the definition of a 'delinquent child' one who, as the judge phrased it, is 'habitually involved in immoral matters.'[6]

Asked about the basis for his conclusion that Gerald was

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'habitually involved in immoral matters,' the judge testified, somewhat vaguely, that two years earlier, on July 2, 1962, a 'referral' was made concerning Gerald, 'where the boy had stolen a baseball glove from another boy and lied to the Police Department about it.' The judge said there was 'no hearing,' and 'no accusation' relating to this incident, 'because of lack of material foundation.' But it seems to have remained in his mind as a relevant factor. The judge also testified that Gerald had admitted making other nuisance phone calls in the past which, as the judge recalled the boy's testimony, were 'silly calls, or funny calls, or something like that.'

The Superior Court dismissed the writ, and appellants sought review in the Arizona Supreme Court. That court stated that it considered appellants' assignments of error as urging (1) that the Juvenile Code, ARS s 8—201 to s 8—239, is unconstitutional because it does not require that parents and children be apprised of the specific charges, does not require proper notice of a hearing, and does not provide for an appeal; and (2) that the proceedings ***10** and order relating to Gerald constituted a denial of due process of law because of the absence of adequate notice of the charge and the hearing; failure to notify appellants of certain constitutional rights including the rights to counsel and to confrontation, and the privilege against self-incrimination; the use of unsworn hearsay testimony; and the failure to make a record of the proceedings. Appellants further asserted that it was error for the Juvenile Court to remove Gerald from the custody of his parents without a showing and finding of their unsuitability, and alleged a miscellany of other errors under state law.

The Supreme Court handed down an elaborate and wide-ranging opinion affirming dismissal of the writ and stating the court's conclusions as to the issues raised by appellants and other aspects of the juvenile process. In their jurisdictional statement and brief in this Court, appellants do not urge upon us all of the points passed upon by the Supreme Court of Arizona. They urge that we hold the Juvenile Code of Arizona invalid on its face or as applied in this case because, contrary to the Due Process Clause of the Fourteenth Amendment, the juvenile is taken from the custody of his parents and committed to a state institution pursuant to proceedings in which the Juvenile Court has virtually unlimited discretion, and ****1435** in which the following basic rights are denied:

1. Notice of the charges;

2. Right to counsel;

3. Right to confrontation and cross-examination;

4. Privilege against self-incrimination;

5. Right to a transcript of the proceedings; and

6. Right to appellate review.

We shall not consider other issues which were passed upon by the Supreme Court of Arizona. We emphasize ***11** that we indicate no opinion as to whether the decision of that court with respect to such other issues does or does not conflict with requirements of the Federal Constitution.[7]

***12** II.

The Supreme Court of Arizona held that due process of law is requisite to the constitutional validity of proceedings in which a court reaches the conclusion that a juvenile has been at fault, has engaged in conduct prohibited by law, or has otherwise misbehaved with the consequence that he is committed to an institution in which his freedom is curtailed. This conclusion is in accord with the decisions of a number of courts under both federal and state constitutions.[8]

****1436** [1] This Court has not heretofore decided the precise question. In Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), we considered the requirements for a valid waiver of the 'exclusive' jurisdiction of the Juvenile Court of the District of Columbia so that a juvenile could be tried in the adult criminal court of the District. Although our decision turned upon the language of the statute, we emphasized the necessity that 'the basic requirements of due process and fairness' he satisfied in such proceedings.[9] Haley v. State of Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948), involved the admissibility, in a state criminal court of general jurisdiction, of a confession by a 15-year-old boy. The Court held that the Fourteenth Amendment applied to ***13** prohibit the use of the coerced confession. Mr. Justice Douglas said, 'Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.'[10] To the same effect is Gallegos v. State of Colorado, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962). Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.

We do not in this opinion consider the impact of these

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constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile 'delinquents.' For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. See note 48, infra. We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. As to these proceedings, there appears to be little current dissent from the proposition that the Due Process Clause has a role to play.[11] The problem is to ascertain ***14** the precise impact of the due process requirement upon such proceedings.

From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury.[12] It is frequent practice that rules governing the arrest and interrogation of adults ****1437** by the police are not observed in the case of juveniles.[13]

The history and theory underlying this development are well-known, but a recapitulation is necessary for purposes of this opinion. The Juvenile Court movement began in this country at the end of the last century. From the juvenile court statute adopted in Illinois in 1899, the system has spread to every State in the Union, the District of Columbia, and Puerto Rico.[14] The constitutionality ***15** of juvenile court laws has been sustained in over 40 jurisdictions against a variety of attacks.[15]

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'[16] The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude,'[17] not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was ***16** to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.

These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as parens patriae.[18] The Latin phrase proved to be ****1438** a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act in loco parentis for the purpose of protecting the property interests and the person of the child.[19] But there is no trace of the doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders.[20] In these old days, ***17** the state was not deemed to have authority to accord them fewer procedural rights than adults.

The right of the state, as parens patriae, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody.' He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if the child is 'delinquent'—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled.[21] On this basis, proceedings involving juveniles were described as 'civil' not 'criminal' and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.[22]

Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice, as we remarked in the Kent case, supra, the results have ***18** not been entirely satisfactory.[23] Juvenile Court history has again ****1439** demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: 'The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts * * *.'[24] The absence of substantive standards has not necessarily meant that children receive careful, compassionate,

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individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently ***19** resulted not in enlightened procedure, but in arbitrariness. The Chairman of the Pennsylvania Council of Juvenile Court Judges has recently observed: 'Unfortunately, loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process.'[25]

[2] Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate ***20** or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may ****1440** exercise.[26] As Mr. Justice ***21** Frankfurter has said: 'The history of American freedom is, in no small measure, the history of procedure.'[27] But, in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what 'scientific method' is to science.'[28]

It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process. As we shall discuss, the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.[29] But it is important, we think, that the claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes, for example, to such startling findings ***22** as that reported in an exceptionally reliable study of repeaters ****1441** or recidivism conducted by the Standford Research Institute for the President's Commission on Crime in the District of Columbia. This Commission's Report states:

'In fiscal 1966 approximately 66 percent of the 16- and 17-year-old juveniles referred to the court by the Youth Aid Division had been before the court previously. In 1965, 56 percent of those in the Receiving Home were repeaters. The SRI study revealed that 61 percent of the sample Juvenile Court referrals in 1965 had been previously referred at least once and that 42 percent had been referred at least twice before.' Id., at 773.

Certainly, these figures and the high crime rates among juveniles to which we have referred (supra, n. 26), could not lead us to conclude that the absence of constitutional protections reduces crime, or that the juvenile system, functioning free of constitutional inhibitions as it has largely done, is effective to reduce crime or rehabilitate offenders. We do not mean by this to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication. For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion.[30] Further, we are ***23** told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a 'criminal.' The juvenile offender is now classed as a 'delinquent.' There is, of course, no reason why this should not continue. It is disconcerting, ***24** however, that this term has come to involve only slightly less ****1442** stigma than the term 'criminal' applied to adults.[31] It is also emphasized that in practically all jurisdictions, statutes provide that an adjudication of the child as a delinquent shall not operate as a civil disability or disqualify him for civil service appointment.[32] There is no reason why the application of due process requirements should interfere with such provisions.

Beyond this, it is frequently said that juveniles are protected by the process from disclosure of their deviational behavior. As the Supreme Court of Arizona phrased it in the present case, the summary procedures of Juvenile Courts are sometimes defended by a statement that it is the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.' This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers.[33] Of more importance are police records. In most States the police keep a complete file of juvenile 'police contacts' and have complete discretion as to disclosure of ***25** juvenile records. Police departments receive requests for information from the FBI and other law-enforcement agencies, the Armed Forces, and social service agencies, and most of them

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generally comply.[34] Private employers word their application forms to produce information concerning juvenile arrests and court proceedings, and in some jurisdictions information concerning juvenile police contacts is furnished private employers as well as government agencies.[35]

[3] In any event, there is no reason why, consistently with due process, a State cannot continue if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles. It is interesting to note, however, that the Arizona Supreme Court used the confidentiality argument as a justification for the type of notice which is here attacked as inadequate for due process purposes. The parents were given merely general notice that their child was charged with 'delinquency.' No facts were specified. The Arizona court held, however, as we shall discuss, that in addition to this general 'notice,' the child and his parents must be advised 'of the facts involved in the case' no later than the initial hearing by the judge. Obviously, this does not 'bury' the word about the child's transgressions. It merely defers the time of disclosure to a point when it is of limited use to the child or his parents in preparing his defense or explanation.

Further, it is urged that the juvenile benefits from informal proceedings in the court. The early conception ***26** of the ****1443** Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help 'to save him from downward career.'[36] Then, as now, goodwill and compassion were admirably prevalent. But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned. For example, in a recent study, the sociologists Wheeler and Cottrell observe that when the procedural laxness of the 'parens patriae' attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed. They conclude as follows: 'Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel.'[37] Of course, it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they ***27** are confronted. While due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite, nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child.

Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours * * *.'[38] Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness[39] to rape and homicide.

****1444** In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and ***28** the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court. The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it—was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected?[40] Under traditional notions, one would assume that in a case like that of Gerald **Gault**, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions.[41] Indeed, so far as appears in the record before us, except for some conversation with Gerald about his school work and his 'wanting to go to * * * Grand Canyon with his father,' the points to which the judge directed his attention were little different from those that would be involved ***29** in determining any charge of violation of a penal statute.[42] The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults

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were discarded in Gerald's case. The summary procedure as well as the long commitment was possible because Gerald was 15 years of age instead of over 18.

If Gerald had been over 18, he would not have been subject to Juvenile Court proceedings.[43] For the particular offense immediately involved, the maximum punishment would have been a fine of $5 to $50, or imprisonment in jail for not more than two months. Instead, he was committed to custody for a maximum of six years. If he had been over 18 and had committed an offense to which such a sentence might apply, he would have been entitled to substantial rights under the Constitution of the United States as well as under Arizona's laws and constitution. The United States Constitution would guarantee him rights and protections with respect to arrest, search, and seizure, and pretrial interrogation. It would assure him of specific notice of the charges and adequate time to decide his course of action and to prepare his defense. He would be entitled to clear advice that he could be represented by counsel, and, at least if a felony were involved, the State would be required to provide counsel if his parents were unable to afford it. If the court acted on the basis of his confession, careful procedures would be required to assure its voluntariness. If the case went to trial, ****1445** confrontation and opportunity for cross-examination would be guaranteed. So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere ***30** verbiage, and reasons more persuasive than cliche can provide. As Wheeler and Cottrell have put it, 'The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines.'[44]

[4] In Kent v. United States, supra, we stated that the Juvenile Court Judge's exercise of the power of the state as parens patriae was not unlimited. We said that 'the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.'[45] With respect to the waiver by the Juvenile Court to the adult court of jurisdiction over an offense committed by a youth, we said that 'there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.'[46] We announced with respect to such waiver proceedings that while 'We do not mean * * * to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.'[47] We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement ***31** which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.[48]

We now turn to the specific issues which are presented to us in the present case.

III.

NOTICE OF CHARGES.

Appellants allege that the Arizona Juvenile Code is unconstitutional or alternatively that the proceedings before the Juvenile Court were constitutionally defective because of failure to provide adequate notice of the hearings. No notice was given to Gerald's parents when he was taken into custody on Monday, June 8. On that night, when Mrs. Gault went to the Detention Home, she was orally informed that there would be a hearing the next afternoon and was told the reason why Gerald was in custody. The only written notice Gerald's parents received at any time was a note on plain paper from Officer Flagg delivered on Thursday or Friday, June 11 or 12, to the effect that the judge had set Monday, June 15, 'for further Hearings on Gerald's delinquency.'

****1446** A 'petition' was filed with the court on June 9 by Officer Flagg, reciting only that he was informed and believed that 'said minor is a delinquent minor and that it is necessary that some order be made by the Honorable Court for said minor's welfare.' The applicable Arizona ***32** statute provides for a petition to be filed in Juvenile Court, alleging in general terms that the child is 'neglected, dependent or delinquent.' The statute explicitly states that such a general allegation is sufficient, 'without alleging the facts.'[49] There is no requirement that the petition be served and it was not served upon, given to, or shown to Gerald or his parents.[50]

The Supreme Court of Arizona rejected appellants' claim that due process was denied because of inadequate notice. It stated that 'Mrs. Gault knew the exact nature of the charge against Gerald from the day he was taken to the detention home.' The court also pointed out that the Gaults appeared at the two hearings 'without objection.' The court held that because 'the policy of the juvenile law is to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past,' advance notice of the specific charges or basis for taking the juvenile into custody and for the hearing is not

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necessary. It held that the appropriate rule is that 'the infant and his parents or guardian will receive a petition only reciting a conclusion of delinquency.[51] But no later than the initial hearing by the judge, they must be advised of the facts involved in the ***33** case. If the charges are denied, they must be given a reasonable period of time to prepare.'

[5] [6] [7] [8] [9] [10] [11] We cannot agree with the court's conclusion that adequate notice was given in this case. Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'[52] It is obvious, as we have discussed above, that no purpose of shielding the child from the public stigma of knowledge of his having been taken into custody and scheduled for hearing is served by the procedure approved by the court below. The 'initial hearing' in the present case was a hearing on the merits. Notice at that time is not timely; and even if there were a conceivable purpose served by the deferral proposed by the court below, it would have to yield to the requirements that the child and his parents or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation. Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a ****1447** civil or criminal proceeding.[53] It does ***34** not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet. Nor, in the circumstances of this case, can it reasonably be said that the requirement of notice was waived.[54]

IV.

RIGHT TO COUNSEL

[12] [13] [14] [15] [16] [17] Appellants charge that the Juvenile Court proceedings were fatally defective because the court did not advise Gerald or his parents of their right to counsel, and proceeded with the hearing, the adjudication of delinquency and the order of commitment in the absence of counsel for the child and his parents or an express waiver of the right thereto. The Supreme Court of Arizona pointed out that '(t)here is disagreement (among the various jurisdictions) as to whether the court must advise the infant ***35** that he has a right to counsel.'[55] It noted its own decision in Arizona State Dept. of Public Welfare v. Barlow, 80 Ariz. 249, 296 P.2d 298 (1956), to the effect 'that the parents of an infant in a juvenile proceeding cannot be denied representation by counsel of their choosing.' (Emphasis added.) It referred to a provision of the Juvenile Code which it characterized as requiring 'that the probation officer shall look after the interests of neglected, delinquent and dependent children,' including representing their interests in ****1448** court.[56] The court argued that 'The parent and the probation officer may be relied upon to protect the infant's interests.' Accordingly it rejected the proposition that 'due process requires that an infant have a right to counsel.' It said that juvenile courts have the discretion, but not the duty, to allow such representation; it referred specifically to the situation in which the Juvenile Court discerns conflict between the child and his parents as an instance in which this discretion might be exercised. We do not agree. Probation ***36** officers, in the Arizona scheme, are also arresting officers. They initiate proceedings and file petitions which they verify, as here, alleging the delinquency of the child; and they testify, as here, against the child. And here the probation officer was also superintendent of the Detention Home. The probation officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and in fact, is as arresting officer and witness against the child. Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of this Court.[57] A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law,[58] to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'[59] Just as in Kent v. United States, supra, 383 U.S., at 561—562, 86 S.Ct., at 1057—1058, we indicated our agreement with the United States Court of Appeals for the District of Columbia Circuit that the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration ***37** in a state institution until the juvenile reaches the age of 21.[60]

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During the last decade, court decisions,[61] experts,[62] and legislatures[63] ****1449** have demonstrated increasing recognition of this view. In at least one-third of the States, statutes ***38** now provide for the right of representation by retained counsel in juvenile delinquency proceedings, notice of the right, or assignment of counsel, or a combination of these. In other States, court rules have similar provisions.[64]

[18] The President's Crime Commission has recently recommended that in order to assure 'procedural justice for the child,' it is necessary that 'Counsel * * * be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent.'[65] As stated by the authoritative ****1450** 'Standards ***39** for Juvenile and Family Courts,' published by the Children's Bureau of the United States Department of Health, Education, and Welfare:

'As a component part of a fair hearing required by due process guaranteed under the 14th amendment, notice of the right to counsel should be required at all hearings and counsel provided upon request when the family is financially unable to employ counsel.' Standards, p. 57.

***40** This statement was 'reviewed' by the National Council of Juvenile Court Judges at its 1965 Convention and they 'found no fault' with it.[66] The New York Family Court Act contains the following statement:

'This act declares that minors have a right to the assistance of counsel of their own choosing or of law guardians[67] in neglect proceedings under article three and in proceedings to determine juvenile delinquency and whether a person is in need of supervision under article seven. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition.'[68]

The Act provides that 'At the commencement of any hearing' under the ****1451** delinquency article of the statute, the juvenile and his parent shall be advised of the juvenile's ***41** 'right to be represented by counsel chosen by him or his parent * * * or by a law guardian assigned by the court * * *.'[69] The California Act (1961) also requires appointment of counsel.[70]

[19] We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

[20] [21] At the habeas corpus proceeding, Mrs. **Gault** testified that she knew that she could have appeared with counsel ***42** at the juvenile hearing. This knowledge is not a waiver of the right to counsel which she and her juvenile son had, as we have defined it. They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless they chose waiver. Mrs. **Gault's** knowledge that she could employ counsel was not an 'intentional relinquishment or abandonment' of a fully known right.[71]

V.

CONFRONTATION, SELF-INCRIMINATION, CROSS-EXAMINATION

[22] Appellants urge that the writ of habeas corpus should have been granted because of the denial of the rights of confrontation and cross-examination in the Juvenile Court hearings, and because the privilege against self-incrimination was not observed. The Juvenile Court Judge testified at the habeas corpus hearing that he had proceeded on the basis of Gerald's admissions at the two hearings. Appellants attack this on the ground that the admissions were obtained in disregard of the privilege against self-incrimination.[72] ****1452** If the confession is disregarded, appellants argue that the delinquency conclusion, since it was fundamentally based on a finding that Gerald had made lewd remarks during the phone call to Mrs. Cook, is fatally defective for failure to accord the rights of confrontation and cross-examination which the Due Process Clause of the Fourteenth Amendment of the ***43** Federal Constitution guarantees in state proceedings generally.[73]

Our first question, then, is whether Gerald's admission was improperly obtained and relied on as the basis of decision, in conflict with the Federal Constitution. For this purpose, it is necessary briefly to recall the relevant facts.


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Mrs. Cook, the complainant, and the recipient of the alleged telephone call, was not called as a witness. Gerald's mother asked the Juvenile Court Judge why Mrs. Cook was not present and the judge replied that 'she didn't have to be present.' So far as appears, Mrs. Cook was spoken to only once, by Officer Flagg, and this was by telephone. The judge did not speak with her on any occasion. Gerald had been questioned by the probation officer after having been taken into custody. The exact circumstances of this questioning do not appear but any admissions Gerald may have made at this time do not appear in the record.[74] Gerald was also questioned by the Juvenile Court Judge at each of the two hearings. The judge testified in the habeas corpus proceeding that Gerald admitted making 'some of the lewd statements * * * (but not) any of the more serious lewd statements.' There was conflict and uncertainty among the witnesses at the habeas corpus proceeding—the Juvenile Court Judge, Mr. and Mrs. Gault, and the probation officer—as to what Gerald did or did not admit.

We shall assume that Gerald made admissions of the sort described by the Juvenile Court Judge, as quoted avove. Neither Gerald nor his parents were advised that ***44** he did not have to testify or make a statement, or that an incriminating statement might result in his commitment as a 'delinquent.'

The Arizona Supreme Court rejected appellants' contention that Gerald had a right to be advised that he need not incriminate himself. It said: 'We think the necessary flexibility for individualized treatment will be enhanced by a rule which does not require the judge to advise the infant of a privilege against self-incrimination.'

In reviewing this conclusion of Arizona's Supreme Court, we emphasize again that we are here concerned only with a proceeding to determine whether a minor is a 'delinquent' and which may result in commitment to a state institution. Specifically, the question is whether, in such a proceeding, an admission by the juvenile may be used against him in the absence of clear and unequivocal evidence that the admission was made with knowledge that he was not obliged to speak and would not be penalized for remaining silent. In light of Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), we must also consider whether, if the privilege against self-incrimination is available, it can effectively be waived unless counsel is present or the right to counsel has been waived.

****1453** It has long been recognized that the eliciting and use of confessions or admissions require careful scrutiny. Dean Wigmore states:
'The ground of distruct of confessions made in certain situations is, in a rough and indefinite way, judicial experience. There has been no careful collection of statistics of untrue confessions, nor has any great number of instances been even loosely reported * * * but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person, especially one of defective mentality or peculiar ***45** temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.

'The principle, then, upon which a confession may be excluded is that it is, under certain conditions, testimonially untrustworthy * * *. (T)he essential feature is that the principle of exclusion is a testimonial one, analogous to the other principles which exclude narrations as untrustworthy * * *.'[75]

This Court has emphasized that admissions and confessions of juveniles require special caution. In Haley v. State of Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224, where this Court reversed the conviction of a 15-year-old boy for murder, Mr. Justice Douglas said:
'What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man could and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight ***46** to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning.'[76]

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In Haley, as we have discussed, the boy was convicted in an adult court, and not a juvenile court. In notable decisions, the New York Court of Appeals and the Supreme Court of New Jersey have recently considered decisions of Juvenile Courts in which boys have been adjudged 'delinquent' on the basis of confessions obtained in circumstances comparable to those in Haley. In both instances, the **1454 State contended before its highest tribunal that constitutional requirements governing inculpatory statements applicable in adult courts do not apply to juvenile proceedings. In each case, the State's contention was rejected, and the juvenile court's determination of delinquency was set aside on the grounds of inadmissibility of the confession. In Matters of W. and S., 19 N.Y.2d 55, 277 N.Y.S.2d 675, 224 N.E.2d 102 (1966) (opinion by Keating, J.), and In Interests of Carlo and Stasilowicz, 48 N.J. 224, 225 A.2d 110 (1966) (opinion by Proctor, J.).

*47 [23] [24] [25] The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state.[77] In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.[78]

[26] [27] [28] It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive. As Mr. Justice White, concurring, stated in Murphy v. Waterfront Commission, 378 U.S. 52, 94, 84 S.Ct. 1594, 1611, 12 L.Ed.2d 678 (1964):

'The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory. * * * it protects any disclosures *48 which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used.'[79] (Emphasis added.)

With respect to juveniles, both common observation and expert opinion emphasize that the 'distrust of confessions made in certain situations' to which Dean Wigmore referred in the passage quoted supra, at 1453, is imperative in the case of children from an early age through adolescence. In New York, for example, the recently enacted Family Court Act provides that the juvenile and his parents must be advised at the start of the hearing of his right to remain silent.[80] The New York statute also provides that the police must attempt to communicate with the juvenile's parents before questioning him,[81] and that absent **1455 'special circumstances' a confession may not be obtained from a child prior to notifying his parents or relatives and releasing the child either to them or to the Family Court.[82] In In Matters of W. and S., referred to above, the New York Court of Appeals held that the privilege against self-incrimination applies in juvenile delinquency cases and requires the exclusion of involuntary confessions, and that *49 People v. Lewis, 260 N.Y. 171, 183 N.E. 353, 86 A.L.R. 1001 (1932), holding the contrary, had been specifically overruled by statute.

The authoritative 'Standards for Juvenile and Family Courts' concludes that, 'Whether or not transfer to the criminal court is a possibility, certain procedures should always be followed. Before being interviewed (by the police), the child and his parents should be informed of his right to have legal counsel present and to refuse to answer questions or be fingerprinted[83] if he should so decide.'[84]

[29] [30] Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are 'civil' and not 'criminal,' and therefore the privilege should not apply. It is true that the statement of the privilege in the Fifth Amendment, which is applicable to the States by reason of the Fourteenth Amendment, is that no person 'shall be compelled in any criminal case to be a witness against himself.' However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.[85]

[31] [32] It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to 'criminal' involvement. In the first place, juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination. To hold *50 otherwise would be to disregard substance because of the


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feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult 'criminals.' In those States juveniles may be placed in or transferred to adult penal institutions[86] after having been found 'delinquent' by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.' And our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty—a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its ****1456** great office in mankind's battle for freedom.[87]

In addition, apart from the equivalence for this purpose of exposure to commitment as a juvenile delinquent and exposure to imprisonment as an adult offender, the fact of the matter is that there is little or no assurance in Arizona, as in most if not all of the States, that a juvenile apprehended and interrogated by the police or even by the Juvenile Court itself will remain outside of the reach of adult courts as a consequence of the offense for which he has been taken into custody. In Arizona, as in other States, provision is made for Juvenile Courts to relinquish ***51** or waive jurisdiction to the ordinary criminal courts.[88] In the present case, when Gerald **Gault** was interrogated concerning violation of a section of the Arizona Criminal Code, it could not be certain that the Juvenile Court Judge would decide to 'suspend' criminal prosecution in court for adults by proceeding to an adjudication in Juvenile Court.[89]

It is also urged, as the Supreme Court of Arizona here asserted, that the juvenile and presumably his parents should not be advised of the juvenile's right to silence because confession is good for the child as the commencement of the assumed therapy of the juvenile court process, and he should be encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process. This proposition has been subjected to widespread challenge on the basis of current reappraisals of the rhetoric and realities of the handling of juvenile offenders.
In fact, evidence is accumulating that confessions by juveniles do not aid in 'individualized treatment,' as the court below put it, and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose. In light of the observations of Wheeler and Cottrell,[90] and others, it seems probable that where children are induced to confess by 'paternal' urgings on the part of officials and the confession is then followed ***52** by disciplinary action, the child's reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.[91]

Further, authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children. This Court's observations in Haley v. State of Ohio are set forth above. The recent decision of the New York Court of Appeals referred to above, In Matters of W. and S. deals with a dramatic and, it is to be hoped, extreme example. Two 12-year-old Negro boys were ****1457** taken into custody for the brutal assault and rape of two aged domestics, one of whom died as the result of the attack. One of the boys was schizophrenic and had been locked in the security ward of a mental institution at the time of the attacks. By a process that may best be described as bizarre, his confession was obtained by the police. A psychiatrist testified that the boy would admit 'whatever he thought was expected so that he could get out of the immediate situation.' The other 12-year-old also 'confessed.' Both confessions were in specific detail, albeit they contained various inconsistencies. The Court of Appeals, in an opinion by Keating, J., concluded that the confessions were products of the will of the police instead of the boys. The confessions were therefore held involuntary and the order of the Appellate Division affirming the order of the Family Court adjudging the defendants to be juvenile delinquents was reversed.

A similar and equally instructive case has recently been decided by the Supreme Court of New Jersey. In Interests of Carlo and Stasilowicz, supra. The body of a 10-year-old girl was found. She had been strangled. Neighborhood boys who knew the girl were questioned. ***53** The two appellants, aged 13 and 15, confessed to the police, with vivid detail and some inconsistencies. At the Juvenile Court hearing, both denied any complicity in the killing. They testified that their confessions were the product of fear and fatigue due to extensive police grilling. The Juvenile Court Judge found that the confessions were voluntary and admissible. On appeal, in an extensive opinion by Proctor, J., the Supreme Court of New Jersey reversed. It rejected the State's argument that the constitutional safeguard of voluntariness governing the use of confessions does not apply in proceedings before the Juvenile Court. It pointed out that under New Jersey court rules, juveniles under the age of 16 accused of committing a homicide are tried in a proceeding which 'has all of the appurtenances of a criminal trial,' including participation by the county prosecutor, and requirements that the juvenile be provided with counsel, that a stenographic record be made, etc. It also pointed out that under New Jersey law, the confinement of the boys after

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reaching age 21 could be extended until they had served the maximum sentence which could have been imposed on an adult for such a homicide, here found to be second-degree murder carrying up to 30 years' imprisonment.[92] The court concluded that the confessions were involuntary, stressing that the boys, contrary to statute, were placed in the police station and there interrogated;[93] that the parents of both boys were not allowed to see them while they ***54** were being interrogated;[94] that inconsistencies appeared among the various statements of the boys and with the objective evidence of the crime; and that there were protracted periods of questioning. The court noted the State's contention that both boys were advised of their constitutional rights before they made their statements, but it held that this should not be given 'significant weight in our ****1458** determination of voluntariness.'[95] Accordingly, the judgment of the Juvenile Court was reversed.

In a recent case before the Juvenile Court of the District of Columbia, Judge Ketcham rejected the proffer of evidence as to oral statements made at police headquarters by four juveniles who had been taken into custody for alleged involvement in an assault and attempted robbery. In the Matter of Four Youths, Nos. 28—776—J, 28—778—J, 28—783—J, 28—859—J, Juvenile Court of the District of Columbia, April 7, 1961. The court explicitly stated that it did not rest its decision on a showing that ***55** the statements were involuntary, but because they were untrustworthy. Judge Ketcham said:
'Simply stated, the Court's decision in this case rests upon the considered opinion—after nearly four busy years on the Juvenile Court bench during which the testimony of thousands of such juveniles has been heard—that the statements of adolescents under 18 years of age who are arrested and charged with violations of law are frequently untrustworthy and often distort the truth.'

[33] [34] We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.[96]

***56** [35] [36] The 'confession' of Gerald **Gault** was first obtained by Officer Flagg, out of the presence of Gerald's parents, without counsel and without advising him of his right to silence, as far as appears. The judgment of the Juvenile Court was stated by the judge to be based on Gerald's admissions in court. Neither 'admission' was reduced to writing, and, to say the least, the process by which the 'admissions,' were obtained and received must be characterized as lacking the certainty and order which are required of proceedings of such formidable ****1459** consequences.[97] Apart from the 'admission,' there was nothing upon which a judgment or finding might be based. There was no sworn testimony. Mrs. Cook, the complainant, was not present. The Arizona Supreme Court held that 'sworn testimony must be required of all witnesses including police officers, probation officers and others who are part of or officially related to the juvenile court structure.' We hold that this is not enough. No reason is suggested or appears for a different rule in respect of sworn testimony in juvenile courts than in adult tribunals. Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of 'delinquency' and an order committing Gerald to a state institution for a maximum of six years.

The recommendations in the Children's Bureau's 'Standards for Juvenile and Family Courts' are in general accord with our conclusions. They state that testimony should be under oath and that only competent, material and relevant evidence under rules applicable ***57** to civil cases should be admitted in evidence.[98] The New York Family Court Act contains a similar provision.[99]
[37] As we said in Kent v. United States, 383 U.S. 541, 554, 86 S.Ct. 1045, 1053, 16 L.Ed.2d 84 (1966), with respect to waiver proceedings, 'there is no place in our system of law of reaching a result of such tremendous consequences without ceremony * * *.' We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.

VI.

APPELLATE REVIEW AND TRANSCRIPT OF PROCEEDINGS.

Appellants urge that the Arizona statute is unconstitutional under the Due Process Clause because, as construed by its Supreme Court, 'there is no right of appeal ***58** from a juvenile court order * * *.' The court held that there is no right to a transcript because there is no right to appeal and because the proceedings are confidential and any record must be destroyed after a prescribed period of time.[100] Whether a transcript or other recording is made, it held, is a matter for the discretion of the juvenile court.
This Court has not held that a State is required by the Federal Constitution ****1460** 'to provide appellate courts or a right to appellate review at all.'[101] In view of the fact that we must reverse the Supreme Court of Arizona's affirmance of the dismissal of the writ of habeas corpus for other reasons, we need not rule on this question in the present case or upon the failure to provide a transcript or recording of the hearings—or, indeed, the failure of the Juvenile Judge to state the grounds for his conclusion. Cf. Kent v. United States, supra, 383 U.S., at 561, 86 S.Ct., at 1057, where we said, in the context of a decision of the juvenile court waiving jurisdiction to the adult court, which by local law, was permissible: '* * * it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor.' As the present case illustrates, the consequences of failure to provide an appeal, to record the proceedings, or to make findings or state the grounds for the juvenile court's conclusion may be to throw a burden upon the machinery for habeas corpus, to saddle the reviewing process with the burden of attempting to reconstruct a record, and to impose upon the Juvenile Judge the unseemly duty of testifying under cross-examination as to the events that transpired in the hearings before him.[102]

***59** For the reasons stated, the judgment of the Supreme Court of Arizona is reversed and the cause remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Judgment reversed and cause remanded with directions.

Mr. Justice BLACK, concurring.

The juvenile court laws of Arizona and other States, as the Court points out, are the result of plans promoted by humane and forward-looking people to provide a system of courts, procedures, and sanctions deemed to be less harmful and more lenient to children than to adults. For this reason such state laws generally provide less formal and less public methods for the trial of children. In line with this policy, both courts and legislators have shrunk back from labeling these laws as 'criminal' and have preferred to call them 'civil.' This, in part, was to prevent the full application to juvenile court cases of the Bill of Rights safeguards, including notice as provided in the Sixth Amendment,[1] the right to counsel guaranteed by the Sixth,[2] the right against self- ***60** incrimination guaranteed by the Fifth,[3] and the right to confrontation guaranteed ****1461** by the Sixth.[4] The Court here holds, however, that these four Bill of Rights safeguards apply to protect a juvenile accused in a juvenile court on a charge under which he can be imprisoned for a term of years. This holding strikes a well-nigh fatal blow to much that is unique about the juvenile courts in the Nation. For this reason, there is much to be said for the position of my Brother STEWART that we should not pass on all these issues until they are more squarely presented. But since the majority of the Court chooses to decide all of these questions, I must either do the same or leave my views unexpressed on the important issues determined. In these circumstances, I feel impelled to express my views.

The juvenile court planners envisaged a system that would practically immunize juveniles from 'punishment' for 'crimes' in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions. I agree with the Court, however, that this exalted ideal has failed of achievement since the beginning of the system. Indeed, the state laws from the first one on contained provisions, written in emphatic terms, for arresting and charging juveniles with violations of state criminal laws, as well as for taking juveniles by force of law away from their parents and turning them over to different individuals or groups or for confinement within some state school or institution for a number of years. The latter occurred in this case. Young Gault was arrested and detained on a charge of violating an Arizona penal law by using vile and offensive language to a lady on the telephone. If an adult, he ***61** could only have been fined or imprisoned for two months for his conduct. As a juvenile, however, he was put through a more or less secret, informal hearing by the court, after which he was ordered, or more realistically, 'sentenced,' to confinement in Arizona's Industrial School until he reaches 21 years of age. Thus, in a juvenile system designed to lighten or avoid punishment for criminality, he was ordered by the State to six years' confinement in what is in all but name a penitentiary or jail.

Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal

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law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards. I consequently agree with the Court that the Arizona law as applied here denied to the parents and their son the right of notice, right to counsel, right against self-incrimination, and right to confront the witnesses against young **Gault**. Appellants are entitled to these rights, not because 'fairness, impartiality and orderliness—in short, the essentials of due process'—require them and not because they are 'the procedural rules which have been fashioned from the generality of due process,' but because they are specifically and unequivocally granted by provisions of the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States.

A few words should be added because of the opinion of my Brother HARLAN who rests his concurrence and ***62** dissent on the Due Process Clause alone. He reads that clause alone as allowing this ****1462** Court 'to determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings' 'in a fashion consistent with the 'traditions and conscience of our people.'' Cf. Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183. He believes that the Due Process Clause gives this Court the power, upon weighing a 'compelling public interest,' to impose on the States only those specific constitutional rights which the Court deems 'imperative' and 'necessary' to comport with the Court's notions of 'fundamental fairness.'

I cannot subscribe to any such interpretation of the Due Process Clause. Nothing in its words or its history permits it, and 'fair distillations of relevant judicial history' are no substitute for the words and history of the clause itself. The phrase 'due process of law' has through the years evolved as the successor in purpose and meaning to the words 'law of the land' in Magna Charta which more plainly intended to call for a trial according to the existing law of the land in effect at the time an alleged offense had been committed. That provision in Magna Charta was designed to prevent defendants from being tried according to criminal laws or proclamations specifically promulgated to fit particular cases or to attach new consequences to old conduct. Nothing done since Magna Charta can be pointed to as intimating that the Due Process Clause gives courts power to fashion laws in order to meet new conditions, to fit the 'decencies' of changed conditions, or to keep their consciences from being shocked by legislation, state or federal.

And, of course, the existence of such awesome judicial power cannot be buttressed or created by relying on the word 'procedural.' Whether labeled as 'procedural' or 'substantive,' the Bill of Rights safeguards, far from ***63** being mere 'tools with which' other unspecified 'rights could be fully vindicated,' are the very vitals of a sound constitutional legal system designed to protect and safeguard the most cherished liberties of a free people. These safeguards were written into our Constitution not by judges but by Constitution makers. Freedom in this Nation will be far less secure the very moment that it is decided that judges can determine which of these safeguards 'should' or 'should not be imposed' according to their notions of what constitutional provisions are consistent with the 'traditions and conscience of our people.' Judges with such power, even though they profess to 'proceed with restraint,' will be above the Constitution, with power to write it, not merely to interpret it, which I believe to be the only power constitutionally committed to judges.

There is one ominous sentence, if not more, in my Brother HARLAN's opinion which bodes ill, in my judgment, both for legislative programs and constitutional commands. Speaking of procedural safeguards in the Bill of Rights, he says:

'These factors in combination suggest that legislatures may properly expect only a cautious deference for their procedural judgments, but that, conversely, courts must exercise their special responsibility for procedural guarantees with care to permit ample scope for achieving the purposes of legislative programs. * * * (T)he court should necessarily proceed with restraint.'

It is to be noted here that this case concerns Bill of Rights Amendments; that the 'procedure' power my Brother HARLAN claims for the Court here relates solely to Bill of Rights safeguards; and that he is here claiming for the Court a supreme power to fashion new Bill of Rights safeguards according to the Court's notions of ***64** what fits tradition and conscience. I do not believe that the Constitution vests any ****1463** such power in judges, either in the Due Process Clause or anywhere else. Consequently, I do not vote to invalidate this Arizona law on the ground that it is 'unfair' but solely on the ground that it violates the Fifth and Sixth Amendments made obligatory on the States by the Fourteenth Amendment. Cf. Pointer v. State of Texas, 380 U.S. 400, 412, 85 S.Ct. 1065, 1072, 13 L.Ed.2d 923 (Goldberg, J., concurring). It is enough for me that the Arizona law as here applied

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collides head-on with the Fifth and Sixth Amendments in the four respects mentioned. The only relevance to me of the Due Process Clause is that it would, of course, violate due process or the 'law of the land' to enforce a law that collides with the Bill of Rights.

Mr. Justice WHITE, concurring.

I join the Court's opinion except for Part V. I also agree that the privilege against compelled self-incrimination applies at the adjudicatory stage of juvenile court proceedings. I do not, however, find an adequate basis in the record for determination whether that privilege was violated in this case. The Fifth Amendment protects a person from being 'compelled' in any criminal proceeding to be a witness against himself. Compulsion is essential to a violation. It may be that when a judge, armed with the authority he has or which people think he has, asks questions of a party or a witness in an adjudicatory hearing, that person, especially if a minor, would feel compelled to answer, absent a warning to the contrary or similar information from some other source. The difficulty is that the record made at the habeas corpus hearing, which is the only information we have concerning the proceedings in the juvenile court, does not directly inform us whether Gerald Gault or his parents were told of Gerald's right to remain silent; nor does it reveal whether the parties ***65** were aware of the privilege from some other source, just as they were already aware that they had the right to have the help of counsel and to have witnesses on their behalf. The petition for habeas corpus did not raise the Fifth Amendment issue nor did any of the witnesses focus on it.

I have previously recorded my views with respect to what I have deemed unsound applications of the Fifth Amendment. See, for example, Miranda v. State of Arizona, 384 U.S. 436, 526, 86 S.Ct. 1602, 1654, 16 L.Ed.2d 694, and Malloy v. Hogan, 378 U.S. 1, 33, 84 S.Ct. 1489, 1506, 12 L.Ed.2d 653, dissenting opinions. These views, of course, have not prevailed. But I do hope that the Court will proceed with some care in extending the privilege, with all its vigor, to proceedings in juvenile court, particularly the nonadjudicatory stages of those proceedings.

In any event, I would not reach the Fifth Amendment issue here. I think the Court is clearly ill-advised to review this case on the basis of Miranda v. State of Arizona, since the adjudication of delinquency took place in 1964, long before the Miranda decision. See Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882. Under these circumstances, this case is a poor vehicle for resolving a difficult problem. Moreover, no prejudice to appellants is at stake in this regard. The judgment below must be reversed on other grounds and in the event further proceedings are to be had, Gerald Gault will have counsel available to advise him.

For somewhat similar reasons, I would not reach the questions of confrontation and cross-examination which are also dealt with in Part V of the opinion.

Mr. Justice HARLAN, concurring in part and dissenting in part.

Each of the 50 States has created a system of juvenile or family courts, in which distinctive rules are employed and special consequences imposed. The jurisdiction of ***66** these courts commonly extends ****1464** both to cases which the States have withdrawn from the ordinary processes of criminal justice, and to cases which involve acts that, if performed by an adult, would not be penalized as criminal. Such courts are denominated civil, not criminal, and are characteristically said not to administer criminal penalties. One consequence of these systems, at least as Arizona construes its own, is that certain of the rights guaranteed to criminal defendants by the Constitution are withheld from juveniles. This case brings before this Court for the first time the question of what limitations the the Constitution places upon the operation of such tribunals.[1] For reasons which follow, I have concluded that the Court has gone too far in some respects, and fallen short in others, in assessing the procedural requirements demanded by the Fourteenth Amendment.

I.

I must first acknowledge that I am unable to determine with any certainty by what standards the Court decides that Arizona's juvenile courts do not satisfy the obligations of due process. The Court's premise, itself the product of reasoning which is not described, is that the 'constitutional and theoretical basis' of state systems of juvenile and family courts is 'debatable'; it buttresses these doubts by marshaling a body of opinion which suggests that the accomplishments of these courts have often fallen short of expectations.[2] The Court does not ***67**

indicate at what points or for what purposes such views, held either by it or by other observers, might be pertinent to the present issues. Its failure to provide any discernible standard for the measurement of due process in relation to juvenile proceedings unfortunately might be understood to mean that the Court is concerned principally with the wisdom of having such courts at all.

If this is the source of the Court's dissatisfaction, I cannot share it. I should have supposed that the constitutionality of juvenile courts was beyond proper question under the standards now employed to assess the substantive validity of state legislation under the Due Process Clause of the Fourteenth Amendment. It can scarcely be doubted that it is within the State's competence to adopt measures reasonably calculated to meet more effectively the persistent problems of juvenile delinquency; as the opinion for the Court makes abundantly plain, these are among the most vexing and ominous of the concerns which now face communities throughout the country.

The proper issue here is, however, not whether the State may constitutionally treat juvenile offenders through a system of specialized courts, but whether the proceedings in Arizona's juvenile courts include procedural guarantees which satisfy the requirements of the Fourteenth Amendment. Among the first premises of our constitutional system is the obligation to conduct any proceeding in which an individual may be deprived of liberty or property in a fashion consistent with the 'traditions and conscience of our people.' Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674. The importance of these procedural guarantees is doubly intensified here. First, many of the problems with which Arizona is concerned ***68** are among those ****1465** traditionally confined to the processes of criminal justice; their disposition necessarily affects in the most direct and substantial manner the liberty of individual citizens. Quite obviously, systems of specialized penal justice might permit erosion, or even evasion, of the limitations placed by the Constitution upon state criminal proceedings. Second, we must recognize that the character and consequences of many juvenile court proceedings have in fact closely resembled those of ordinary criminal trials. Nothing before us suggests that juvenile courts were intended as a device to escape constitutional constraints, but I entirely agree with the Court that we are nonetheless obliged to examine with circumspection the procedural guarantees the State has provided.

The central issue here, and the principal one upon which I am divided from the Court, is the method by which the procedural requirements of due process should be measured. It must at the outset be emphasized that the protections necessary here cannot be determined by resort to any classification of juvenile proceedings either as criminal or as civil, whether made by the State or by this Court. Both formulae are simply too imprecise to permit reasoned analysis of these difficult constitutional issues. The Court should instead measure the requirements of due process by reference both to the problems which confront the State and to the actual character of the procedural system which the State has created. The Court has for such purposes chiefly examined three connected sources: first, the 'settled usages and modes of proceeding,' Den ex dem. Murray v. Hoboken Land & Improvement Co., 18 How. 272, 277, 15 L.Ed. 372; second, the 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'. Hebert v. State of Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 and third, the character and requirements of the circumstances presented in each situation. FCC v. WJR, The Goodwill Station, 337 U.S. 265, 277, 69 S.Ct. 1097, 1104, 93 L.Ed. 1353; ***69** Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834. See, further, my dissenting opinion in Poe v. Ullman, 367 U.S. 497, 522, 81 S.Ct. 1752, 1765, 6 L.Ed.2d 989, and compare my opinion concurring in the result in Pointer v. State of Texas, 380 U.S. 400, 408, 85 S.Ct. 1065, 1070. Each of these factors is relevant to the issues here, but it is the last which demands particular examination.

The Court has repeatedly emphasized that determination of the constitutionally required procedural safeguards in any situation requires recognition both of the 'interests affected' and of the 'circumstances involved.' FCC v. WJR, The Goodwill Station, supra, 337 U.S. at 277, 69 S.Ct. at 1104. In particular, a 'compelling public interest' must, under our cases, be taken fully into account in assessing the validity under the due process clauses of state or federal legislation and its application. See, e.g., Yakus v. United States, supra, 321 U.S. at 442, 64 S.Ct. at 675; Bowles v. Willingham, 321 U.S. 503, 520, 64 S.Ct. 641, 650, 88 L.Ed. 892; Miller v. Schoene, 276 U.S. 272, 279, 48 S.Ct. 246, 247, 72 L.Ed. 568. Such interests would never warrant arbitrariness or the diminution of any specifically assured constitutional right, Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231, 235, 78 L.Ed. 413, but they are an essential element of the context through which the legislation and proceedings under it must be read and evaluated.

No more evidence of the importance of the public interests at stake here is required than that furnished by the opinion of the Court; it indicates that 'some 601,000 children under 18, or 2% of all children between 10 and 17, came before juvenile courts' in 1965, and that 'about one-fifth of all arrests for serious crimes' in 1965 were of

juveniles. The Court adds that the rate of juvenile ****1466** crime is steadily rising. All this, as the Court suggests, indicates the importance of these due process issues, but it mirrors no less vividly that state authorities are confronted by formidable and immediate problems involving the most fundamental social values. The state legislatures have determined that the most hopeful solution for ***70** these problems is to be found in specialized courts, organized under their own rules and imposing distinctive consequences. The terms and limitations of these systems are not identical, nor are the procedural arrangements which they include, but the States are uniform in their insistence that the ordinary processes of criminal justice are inappropriate, and that relatively informal proceedings, dedicated to premises and purposes only imperfectly reflected in the criminal law, are instead necessary.

It is well settled that the Court must give the widest deference to legislative judgments that concern the character and urgency of the problems with which the State is confronted. Legislatures are, as this Court has often acknowledged, the 'main guardian' of the public interest, and, within their constitutional competence, their understanding of that interest must be accepted as 'wellnigh' conclusive. Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27. This principle does not, however, reach all the questions essential to the resolution of this case. The legislative judgments at issue here embrace assessments of the necessity and wisdom of procedural guarantees; these are questions which the Constitution has entrusted at least in part to courts, and upon which courts have been understood to possess particular competence. The fundamental issue here is, therefore, in what measure and fashion the Court must defer to legislative determinations which encompass constitutional issues of procedural protection.

It suffices for present purposes to summarize the factors which I believe to be pertinent. It must first be emphasized that the deference given to legislators upon substantive issues must realistically extend in part to ancillary procedural questions. Procedure at once reflects and creates substantive rights, and every effort of courts since the beginnings of the common law to separate the two has proved essentially futile. The distinction between them is particularly inadequate here, where the ***71** legislature's substantive preferences directly and unavoidably require judgments about procedural issues. The procedural framework is here a principal element of the substantive legislative system; meaningful deference to the latter must include a portion of deference to the former. The substantive-procedural dichotomy is, nonetheless, an indispensable tool of analysis, for it stems from fundamental limitations upon judicial authority under the Constitution. Its premise is ultimately that courts may not substitute for the judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity under the Constitution of the methods which the legislature has selected. See e.g., McLean v. State of Arkansas, 211 U.S. 539, 547, 29 S.Ct. 206, 208, 53 L.Ed. 315; Olsen v. State of Nebraska, 313 U.S. 236, 246—247, 61 S.Ct. 862, 865, 85 L.Ed. 1305. The Constitution has in this manner created for courts and legislators areas of primary responsibility which are essentially congruent to their areas of special competence. Courts are thus obliged both by constitutional command and by their distinctive functions to bear particular responsibility for the measurement of procedural due process. These factors in combination suggest that legislatures may properly expect only a cautious deference for their procedural judgments, but that, conversely, courts must exercise their special responsibility for procedural guarantees with care to permit ample scope for ****1467** achieving the purposes of legislative programs. Plainly, courts can exercise such care only if they have in each case first studied thoroughly the objectives and implementation of the program at stake; if, upon completion of those studies, the effect of extensive procedural restrictions upon valid legislative purposes cannot be assessed with reasonable certainty, the court should necessarily proceed with restraint.

The foregoing considerations, which I believe to be fair distillations of relevant judicial history, suggest ***72** three criteria by which the procedural requirements of due process should be measured here: first, no more restrictions should be imposed than are imperative to assure the proceedings' fundamental fairness; second, the restrictions which are imposed should be those which preserve, so far as possible, the essential elements of the State's purpose; and finally, restrictions should be chosen which will later permit the orderly selection of any additional protections which may ultimately prove necessary. In this way, the Court may guarantee the fundamental fairness of the proceeding, and yet permit the State to continue development of an effective response to the problems of juvenile crime.

II.

Measured by these criteria, only three procedural requirements should, in my opinion, now be deemed required of state juvenile courts by the Due Process

Clause of the Fourteenth Amendment: first, timely notice must be provided to parents and children of the nature and terms of any juvenile court proceeding in which a determination affecting their rights or interests may be made; second, unequivocal and timely notice must be given that counsel may appear in any such proceeding in behalf of the child and its parents, and that in cases in which the child may be confined in an institution, counsel may, in circumstances of indigency, be appointed for them; and third, the court must maintain a written record, or its equivalent, adequate to permit effective review on appeal or in collateral proceedings. These requirements would guarantee to juveniles the tools with which their rights could be fully vindicated, and yet permit the States to pursue without unnecessary hindrance the purposes which they believe imperative in this field. Further, their imposition now would later ***73** permit more intelligent assessment of the necessity under the Fourteenth Amendment of additional requirements, by creating suitable records from which the character and deficiencies of juvenile proceedings could be accurately judged. I turn to consider each of these three requirements.

The Court has consistently made plain that adequate and timely notice is the fulcrum of due process, whatever the purposes of the proceeding. See, e.g., Roller v. Holly, 176 U.S. 398, 409, 20 S.Ct. 410, 413, 44 L.Ed. 520; Coe v. Armour Fertilizer Works, 237 U.S. 413, 424, 35 S.Ct. 625, 628, 59 L.Ed. 1027. Notice is ordinarily the prerequisite to effective assertion of any constitutional or other rights; without it, vindication of those rights must be essentially fortuitous. So fundamental a protection can neither be spared here nor left to the 'favor or grace' of state authorities. Central of Georgia Ry. v. Wright, 207 U.S. 127, 138, 28 S.Ct. 47, 51, 52 L.Ed. 134; Coe v. Armour Fertilizer Works, supra, 237 U.S. at 425, 35 S.Ct. at 628.

Provision of counsel and of a record, like adequate notice, would permit the juvenile to assert very much more effectively his rights and defenses, both in the juvenile proceedings and upon direct or collateral review. The Court has frequently emphasized their importance in proceedings in which an individual may be deprived of his liberty, see Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, and Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; this reasoning must include with special force those who are ****1468** commonly inexperienced and immature. See Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158. The facts of this case illustrate poignantly the difficulties of review without either an adequate record or the participation of counsel in the proceeding's initial stages. At the same time, these requirements should not cause any substantial modification in the character of juvenile court proceedings: counsel, although now present in only a small percentage of juvenile cases, have apparently already appeared without ***74** incident in virtually all juvenile courts;[3] and the maintenance of a record should not appreciably alter the conduct of these proceedings.

The question remains whether certain additional requirements, among them the privilege against self-incrimination, confrontation, and cross-examination, must now, as the Court holds, also be imposed. I share in part the views expressed in my Brother WHITE'S concurring opinion, but believe that there are other, and more deep-seated, reasons to defer, at least for the present, the imposition of such requirements.

Initially, I must vouchsafe that I cannot determine with certainty the reasoning by which the Court concludes that these further requirements are now imperative. The Court begins from the premise, to which it gives force at several points, that juvenile courts need not satisfy 'all of the requirements of a criminal trial.' It therefore scarcely suffices to explain the selection of these particular procedural requirements for the Court to declare that juvenile court proceedings are essentially criminal, and thereupon to recall that these are requisites for a criminal trial. Nor does the Court's voucher of 'authoritative opinion,' which consists of four extraordinary juvenile cases, contribute materially to the solution of these issues. The Court has, even under its own permises, asked the wrong questions: the problem here is to determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings, and not which of the procedures now employed in criminal trials should be transplanted intact to proceedings in these specialized courts.

***75** In my view, the Court should approach this question in terms of the criteria, described above, which emerge from the history of due process adjudication. Measured by them, there are compelling reasons at least to defer imposition of these additional requirements. First, quite unlike notice, counsel, and a record, these requirements might radically alter the character of juvenile court proceedings. The evidence from which the Court reasons that they would not is inconclusive,[4] and other available evidence suggests that they very likely would.[5] At ****1469** the least, it is plain that these additional requirements would contribute materially to the creation in these proceedings of the atmosphere of an ordinary criminal trial, and would, even if they do no more, thereby largely frustrate a central purpose of these specialized courts. Further, these are restrictions intended to conform to the demands of an intensely adversary system of criminal justice; the broad purposes which they represent might be

served in juvenile courts with equal effectiveness by procedural devices more consistent with the premises of proceedings ***76** in those courts. As the Court apparently acknowledges, the hazards of self-accusation, for example, might be avoided in juvenile proceedings without the imposition of all the requirements and limitations which surround the privilege against self-incrimination. The guarantee of adequate notice, counsel, and a record would create conditions in which suitable alternative procedures could be devised; but, unfortunately, the Court's haste to impose restrictions taken intact from criminal procedure may well seriously hamper the development of such alternatives. Surely this illustrates that prudence and the principles of the Fourteenth Amendment alike require that the Court should now impose no more procedural restrictions than are imperative to assure fundamental fairness, and that the States should instead be permitted additional opportunities to develop without unnecessary hindrance their systems of juvenile courts.

I find confirmation for these views in two ancillary considerations. First, it is clear that an uncertain, but very substantial number of the cases brought to juvenile courts involve children who are not in any sense guilty of criminal misconduct. Many of these children have simply the misfortune to be in some manner distressed; others have engaged in conduct, such as truancy, which is plainly not criminal.[6] Efforts are now being made to develop effective, and entirely noncriminal, methods of treatment for these children.[7] In such cases, the state authorities ***77** are in the most literal sense acting in loco parentis; they are, by any standard, concerned with the child's protection, and not with his punishment. I do not question that the methods employed in such cases must be consistent with the constitutional obligation to act in accordance with due process, but certainly the Fourteenth Amendment does not demand that they be constricted by the procedural guarantees devised for ordinary criminal prosecutions. Cf. State of Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 60 S.Ct. 523, 84 L.Ed. 744. It must be remembered that the various classifications of juvenile court proceedings are, as the vagaries of the available statistics illustrate, often arbitrary or ambiguous; it would therefore be imprudent, at the least, to build upon these classifications rigid systems of procedural requirements which would be applicable, or not, in accordance with the descriptive label given to the particular proceeding. It is better, it seems to me, to begin by now requiring the essential elements of fundamental fairness in juvenile courts, whatever the label given by the State to the proceedings; in this way the Court could avoid imposing unnecessarily rigid restrictions, and yet escape dependence upon classifications which may often prove to be illusory. Further, the provision of notice, counsel, ****1470** and a record would permit orderly efforts to determine later whether more satisfactory classifications can be devised, and if they can, whether additional procedural requirements are necessary for them under the Fourteenth Amendment.

Second, it should not be forgotten that juvenile crime and juvenile courts are both now under earnest study throughout the country. I very much fear that this Court, by imposing these rigid procedural requirements, may inadvertently have served to discourage these efforts to find more satisfactory solutions for the problems of juvenile crime, and may thus now hamper enlightened development of the systems of juvenile courts. It is ***78** appropriate to recall that the Fourteenth Amendment does not compel the law to remain passive in the midst of change; to demand otherwise denies 'every quality of the law but its age'. Hurtado v. People of State of California, 110 U.S. 516, 529, 4 S.Ct. 111, 117, 28 L.Ed. 232.

III.

Finally, I turn to assess the validity of this juvenile court proceeding under the criteria discussed in this opinion. Measured by them, the judgment below must, in my opinion, fall. Gerald Gault and his parents were not provided adequate notice of the terms and purposes of the proceedings in which he was adjudged delinquent; they were not advised of their rights to be represented by counsel; and no record in any form was maintained of the proceedings. It follows, for the reasons given in this opinion, that Gerald Gault was deprived of his liberty without due process of law, and I therefore concur in the judgment of the Court.

Mr. Justice STEWART, dissenting.

The Court today uses an obscure Arizona case as a vehicle to impose upon thousands of juvenile courts throughout the Nation restrictions that the Constitution made applicable to adversary criminal trials.[1] I believe the Court's decision is wholly unsound as a matter of constitutional law, and sadly unwise as a matter of judicial policy.

Juvenile proceedings are not criminal trials. They are not

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civil trials. They are simply not adversary proceedings. Whether treating with a delinquent child, a neglected ***79** child, a defective child, or a dependent child, a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act.

In the last 70 years many dedicated men and women have devoted their professional lives to the enlightened task of bringing us out of the dark world of Charles Dickens in meeting our responsibilities to the child in our society. The result has been the creation in this century of a system of juvenile and family courts in each of the 50 States. There can be no denying that in many areas the performance of these agencies has fallen disappointingly short of the hopes and dreams of the courageous pioneers who first conceived them. For a variety of reasons, the reality has sometimes not even approached the ideal, and much remains to be accomplished in the administration of public juvenile and family agencies—in personnel, in planning, in financing, perhaps in the formulation of wholly new approaches.

****1471** I possess neither the specialized experience nor the expert knowledge to predict with any certainty where may lie the brightest hope for progress in dealing with the serious problems of juvenile delinquency. But I am certain that the answer does not lie in the Court's opinion in this case, which serves to convert a juvenile proceeding into a criminal prosecution.
The inflexible restrictions that the Constitution so wisely made applicable to adversary criminal trials have no inevitable place in the proceedings of those public social agencies known as juvenile or family courts. And to impose the Court's long catalog of requirements upon juvenile proceedings in every area of the country is to invite a long step backwards into the nineteenth century. In that era there were no juvenile proceedings, and a ***80** child was tried in a conventional criminal court will all the trappings of a conventional criminal trial. So it was that a 12-year-old boy named James Guild was tried in New Jersey for killing Catharine Beakes. A jury found him guilty of murder, and he was sentenced to death by hanging. The sentence was executed. It was all very constitutional.[2]

A State in all its dealings must, of course, accord every person due process of law. And due process may require that some of the same restrictions which the Constitution has placed upon criminal trials must be imposed upon juvenile proceedings. For example, I suppose that all would agree that a brutally coerced confession could not constitutionally be considered in a juvenile court hearing. But it surely does not follow that the testimonial privilege against self-incrimination is applicable in all juvenile proceedings.[3] Similarly, due process clearly ***81** requires timely notice of the purpose and scope of any proceedings affecting the relationship of parent and child. Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62. But it certainly does not follow that notice of a juvenile hearing must be framed with all the technical niceties of a criminal indictment. See Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240.

In any event, there is no reason to deal with issues such as these in the present ****1472** case. The Supreme Court of Arizona found that the parents of Gerald **Gault** 'knew of their right to counsel, to subpoena and cross examine witnesses, of the right to confront the witnesses against Gerald and the possible consequences of a finding of delinquency.' 99 Ariz. 181, 185, 407 P.2d 760, 763. It further found that 'Mrs. **Gault** knew the exact nature of the charge against Gerald from the day he was taken to the detention home.' 99 Ariz., at 193, 407 P.2d, at 768. And, as Mr. Justice WHITE correctly points out, p. 1463, ante, no issue of compulsory self-incrimination is presented by this case.

I would dismiss the appeal.

**All Citations**

387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527, 40 O.O.2d 378

Footnotes

1 Under Arizona law, juvenile hearings are conducted by a judge of the Superior Court, designated by his colleagues on the Superior Court to serve as Juvenile Court Judge. Arizona Const., Art. 6, s 15, A.R.S.; Arizona Revised Statutes (hereinafter ARS) ss 8—201, 8—202.

2 There is a conflict between the recollection of Mrs. **Gault** and that of Officer Flagg. Mrs. **Gault** testified that Gerald was released on Friday, June 12, Officer Flagg that it had been on Thursday, June 11. This was from memory; he had no record, and the note hereafter referred to was undated.

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3 Officer Flagg also testified that Gerald had not, when questioned at the Detention Home, admitted having made any of the lewd statements, but that each boy had sought to put the blame on the other. There was conflicting testimony as to whether Ronald had accused Gerald of making the lewd statements during the June 15 hearing.

4 Judge McGhee also testified that Gerald had not denied 'certain statements' made to him at the hearing by Officer Henderson.

5 'Q. All right. Now, Judge, would you tell me under what section of the law or tell me under what section of—of the code you found the boy delinquent?
'A. Well, there is a—I think it amounts to disturbing the peace. I can't give you the section, but I can tell you the law, that when one person uses lewd language in the presence of another person, that it can amount to—and I consider that when a person makes it over the phone, that it is considered in the presence, I might be wrong, that is one section. The other section upon which I consider the boy delinquent is Section 8—201, Subsection (d), habitually involved in immoral matters.'

6 ARS s 8—201, subsec. 6, the section of the Arizona Juvenile Code which defines a delinquent child, reads:
"Delinquent child' includes:
'(a) A child who has violated a law of the state or an ordinance or regulation of a political subdivision thereof.
'(b) A child who, by reason of being incorrigible, wayward or habitually disobedient, is uncontrolled by his parent, guardian or custodian.
'(c) A child who is habitually truant from school or home.
'(d) A child who habitually so deports himself as to injure or endanger the morals or health of himself or others.'

7 For example, the laws of Arizona allow arrest for a misdemeanor only if a warrant is obtained or if it is committed in the presence of the officer. ARS s 13—1403. The Supreme Court of Arizona held that this is inapplicable in the case of juveniles. See ARS s 8—221 which relates specifically to juveniles. But compare Two Brothers and a Case of Liquor, Juv.Ct.D.C., Nos. 66—2652—J, 66—2653—J, December 28, 1966 (opinion of Judge Ketcham); Standards for Juvenile and Family Courts, Children's Bureau Pub. No. 437—1966, p. 47 (hereinafter cited as Standards); New York Family Court Act s 721 (1963) (hereinafter cited as N.Y.Family Court Act).
The court also held that the judge may consider hearsay if it is 'of a kind on which reasonable men are accustomed to rely in serious affairs.' But compare Note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 Harv.L.Rev. 775, 794—795 (1966) (hereinafter cited as Harvard Law Review Note):
'The informality of juvenile court hearings frequently leads to the admission of hearsay and unsworn testimony. It is said that 'close adherence to the strict rules of evidence might prevent the court from obtaining important facts as to the child's character and condition which could only be to the child's detriment.' The assumption is that the judge will give normally inadmissible evidence only its proper weight. It is also declared in support of these evidentiary practices that the juvenile court is not a criminal court, that the importance of the hearsay rule has been overestimated, and that allowing an attorney to make 'technical objections' would disrupt the desired informality of the proceedings. But to the extent that the rules of evidence are not merely technical or historical, but like the hearsay rule have a sound basis in human experience, they should not be rejected in any judicial inquiry. Juvenile court judges in Los Angeles, Tucson, and Wisconsin Rapids, Wisconsin report that they are satisfied with the operation of their courts despite application of unrelaxed rules of evidence.' (Footnote omitted.)
It ruled that the correct burden of proof is that 'the juvenile judge must be persuaded by clear and convincing evidence that the infant has committed the alleged delinquent act.' Compare the 'preponderance of the evidence' test, N.Y.Family Court Act s 744 (where maximum commitment is three years, ss 753, 758). Cf. Harvard Law Review Note, p. 795.

8 See, e.g., In Matters of W. and S., 19 N.Y.2d 55, 277 N.Y.S.2d 675, 224 N.E.2d 102 (1966); In Interests of Carlo and Stasilowicz, 48 N.J. 224, 225 A.2d 110 (1966); People v. Dotson, 46 Cal.2d 891, 299 P.2d 875 (1956); Pee v. United States, 107 U.S.App.D.C., 47, 274 F.2d 556 (1959); Wissenburg v. Bradley, 209 Iowa 813, 229 N.W. 205, 67 A.L.R. 1075 (1930); Bryant v. Brown, 151 Miss. 398, 118 So. 184, 60 A.L.R. 1325 (1928); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269, 151 A.L.R. 1217 (1944); Application of Johnson, 178 F.Supp. 155 (D.C.N.J.1957).

9 383 U.S., at 553, 86 S.Ct., at 1053.

10 332 U.S., at 601, 68 S.Ct., at 304 (opinion for four Justices).

11 See Report by the President's Commission on Law Enforcement and Administration of Justice, 'The Challenge of Crime in a Free Society' (1967) (hereinafter cited as Nat'l Crime Comm'n Report), pp. 81, 85—86; Standards, p. 71; Gardner, The Kent Case and

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the Juvenile Court: A Challenge to Lawyers, 52 A.B.A.J. 923 (1966); Paulsen, Fairness to the Juvenile Offender, 41 Minn.L.Rev. 547 (1957); Ketcham, The Legal Renaissance in the Juvenile Court, 60 Nw.U.L.Rev. 585 (1965); Allen, The Borderland of Criminal Justice (1964), pp. 19—23; Harvard Law Review Note, p. 791; Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281 (1967); Comment, Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal, 114 U.Pa.L.Rev. 1171 (1966).

12 See Kent v. United States, 383 U.S. 541, 555, 86 S.Ct. 1045, 1054 and n. 22 (1966).

13 See n. 7, supra.

14 See National Council of Juvenile Court Judges, Directory and Manual (1964), p. 1. The number of Juvenile Judges as of 1964 is listed as 2,987, of whom 213 are full-time Juvenile Court Judges. Id., at 305. The Nat'l Crime Comm'n Report indicates that half of these judges have no undergraduate degree, a fifth have no college education at all, a fifth are not members of the bar, and three-quarters devote less than one-quarter of their time to juvenile matters. See also McCune, Profile of the Nation's Juvenile Court Judges (monograph, George Washington University, Center for the Behavioral Sciences, 1965), which is a detailed statistical study of Juvenile Court Judges, and indicates additionally that about a quarter of these judges have no law school training at all. About one-third of all judges have no probation and social work staff available to them; between eighty and ninety percent have no available psychologist or psychiatrist. Ibid. It has been observed that while 'good will, compassion, and similar virtues are * * * admirably prevalent throughout the system * * * expertise, the keystone of the whole venture, is lacking.' Harvard Law Review Note, p. 809. In 1965, over 697,000 delinquency cases (excluding traffic) were disposed of in these courts, involving some 601,000 children, or 2% of all children between 10 and 17. Juvenile Court Statistics—1965, Children's Bureau Statistical Series No. 85 (1966), p. 2.

15 See Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 Sup.Ct.Review 167, 174.

16 Julian Mack, The Juvenile Court, 23 Harv.L.Rev. 104, 119—120 (1909).

17 Id., at 120.

18 Id., at 109; Paulsen, op. cit. supra, n. 15, at 173—174. There seems to have been little early constitutional objection to the special procedures of juvenile courts. But see Waite, How Far Can Court Procedure Be Socialized Without Impairing Individual Rights, 12 J.Crim.L. & Criminology 339, 340 (1922): 'The court which must direct its procedure even apparently to do something to a child because of what he has done, is parted from the court which is avowedly concerned only with doing something for a child because of what he is and needs, by a gulf too wide to be bridged by any humanity which the judge may introduce into his hearings, or by the habitual use of corrective rather than punitive methods after conviction.'

19 Paulsen, op. cit. supra, n. 15, at 173; Hurley, Origin of the Illinois Juvenile Court Law, in The Child, The Clinic, and the Court (1925), pp. 320, 328.

20 Julian Mack, The Chancery Procedure in the Juvenile Court, in The Child, The Clinic, and the Court (1925), p. 310.

21 See, e.g., Shears, Legal Problems Peculiar to Children's Courts, 48 A.B.A.J. 719, 720 (1962) ('The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so.'); Ex parte Crouse, 4 Whart. 9, 11 (Sup.Ct.Pa.1839); Petition of Ferrier, 103 Ill. 367, 371—373 (1882).

22 The Appendix to the opinion of Judge Prettyman in Pee v. United States, 107 U.S.App.D.C. 47, 274 F.2d 556 (1959), lists authority in 51 jurisdictions to this effect. Even rules required by due process in civil proceedings, however, have not generally been deemed compulsory as to proceedings affecting juveniles. For example, constitutional requirements as to notice of issues, which would commonly apply in civil cases, are commonly disregarded in juvenile proceedings, as this case illustrates.

23 'There is evidence * * * that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.'

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at 556, 86 S.Ct., at 1054, citing Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis.L.Rev. 7; Harvard Law Review Note; and various congressional materials set forth in 383 U.S., at 546, 86 S.Ct., at 1050, n. 5.
On the other hand, while this opinion and much recent writing concentrate upon the failures of the Juvenile Court system to live up to the expectations of its founders, the observation of the Nat'l Crime Comm'n Report should be kept in mind:
'Although its shortcomings are many and its results too often disappointing, the juvenile justice system in many cities is operated by people who are better educated and more highly skilled, can call on more and better facilities and services, and has more ancillary agencies to which to refer its clientele than its adult counterpart.' Id., at 78.

24 Foreword to Young, Social Treatment in Probation and Delinquency (1937), p. xxvii. The 1965 Report of the United States Commission on Civil Rights, 'Law Enforcement—A Report on Equal Protection in the South,' pp. 80—83, documents numerous instances in which 'local authorities used the broad discretion afforded them by the absence of safeguards (in the juvenile process)' to punish, intimidate, and obstruct youthful participants in civil rights demonstrations. See also Paulsen, Juvenile Courts, Family Courts, and the Poor Man, 54 Calif.L.Rev. 694, 707—709 (1966).

25 Lehman, A Juvenile's Right to Counsel in a Delinquency Hearing, 17 Juvenile Court Judges Journal 53, 54 (1966).
Compare the observation of the late Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, in a foreword to Virtue, Basic Structure for Children's Services in Michigan (1953), p. x:
'In their zeal to care for children neither juvenile judges nor welfare workers can be permitted to violate the Constitution, especially the constitutional provisions as to due process that are involved in moving a child from its home. The indispensable elements of due process are: first, a tribunal with jurisdiction; second, notice of a hearing to the proper parties; and finally, a fair hearing. All three must be present if we are to treat the child as an individual human being and not to revert, in spite of good intentions, to the more primitive days when he was treated as a chattel.'
We are warned that the system must not 'degenerate into a star chamber proceeding with the judge imposing his own particular brand of culture and morals on indigent people * * *.' Judge Marion G. Woodward, letter reproduced in 18 Social Service Review 366, 368 (1944). Doctor Bovet, the Swiss psychiatrist, in his monograph for the World Health Organization, Psychiatric Aspects of Juvenile Delinquency (1951), p. 79, stated that: 'One of the most definite conclusions of this investigation is that few fields exist in which more serious coercive measures are applied, on such flimsy objective evidence, than in that of juvenile delinquency.' We are told that 'The judge as amateur psychologist, experimenting upon the unfortunate children who must appear before him, is neither an attractive nor a convincing figure.' Harvard Law Review Note, at 808.

26 The impact of denying fundamental procedural due process to juveniles involved in 'delinquency' charges is dramatized by the following considerations: (1) In 1965, persons under 18 accounted for about one-fifth of all arrests for serious crimes (Nat'l Crime Comm'n, Report, p. 55) and over half of all arrests for serious property offenses (id., at 56), and in the same year some 601,000 children under 18, or 2% of all children between 10 and 17, came before juvenile courts (Juvenile Court Statistics—1965, Children's Bureau Statistical Series No. 85 (1966) p. 2). About one out of nine youths will be referred to juvenile court in connection with a delinquent act (excluding traffic offenses) before he is 18 (Nat'l Crime Comm'n Report, p. 55). Cf. also Wheeler & Cottrell, Juvenile Delinquency—Its Prevention and Control (Russell Sage Foundation, 1965), p. 2; Report of the President's Commission on Crime in the District of Columbia (1966) (hereinafter cited as D.C.Crime Comm'n Report), p. 773. Furthermore, most juvenile crime apparently goes undetected or not formally punished. Wheeler & Cottrell, supra, observe that '(A)lmost all youngsters have committed at least one of the petty forms of theft and vandalism in the course of their adolescence.' Id., at 28—29. See also Nat'l Crime Comm'n Report, p. 55, where it is stated that 'self-report studies reveal that perhaps 90 percent of all young people have committed at least one act for which they could have been brought to juvenile court.' It seems that the rate of juvenile delinquency is also steadily rising. See Nat'l Crime Comm'n Report, p. 56; Juvenile Court Statistics, supra, pp. 2—3. (2) In New York, where most juveniles are represented by counsel (see n. 69, infra) and substantial procedural rights are afforded (see, e.g., nn. 80, 81, 99, infra), out of a fiscal year 1965—1966 total of 10,755 juvenile proceedings involving boys, 2,242 were dismissed for failure of proof at the fact-finding hearing; for girls, the figures were 306 out of a total of 1,051. New York Judicial Conference, Twelfth Annual Report, pp. 314, 316 (1967). (3) In about one-half of the States, a juvenile may be transferred to an adult penal institution after a juvenile court has found him 'delinquent' (Delinquent Children in Penal Institutions, Children's Bureau Pub. No. 415—1964, p. 1). (4) In some jurisdictions a juvenile may be subjected to criminal prosecution for the same offense for which he has served under a juvenile court commitment. However, the Texas procedure to this effect has recently been held unconstitutional by a federal district court judge, in a habeas corpus action. Sawyer v. Hauck, 245 F.Supp. 55 (D.C.W.D.Tex.1965). (5) In most of the States the juvenile may end in criminal court through waiver (Harvard Law Review Note, p. 793).

27 Malinski v. People of State of New York, 324 U.S. 401, 414, 65 S.Ct. 781, 787, 89 L.Ed. 1029 (1945) (separate opinion).

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28 Foster, Social Work, the Law, and Social Action, in Social Casework, July 1964, pp. 383, 386.

29 See Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281, 321, and passim (1967).

30 Here again, however, there is substantial question as to whether fact and pretension, with respect to the separate handling and treatment of children, coincide. See generally infra.
While we are concerned only with procedure before the juvenile court in this case, it should be noted that to the extent that the special procedures for juveniles are thought to be justified by the special consideration and treatment afforded them, there is reason to doubt that juveniles always receive the benefits of such a quid pro quo. As to the problem and importance of special care at the adjudicatory stage, cf. nn. 14 and 26, supra.
As to treatment, see Nat'l Crime Comm'n Report, pp. 80, 87; D.C.Crime Comm'n Report, pp. 665—676, 686—687 (at p. 687 the Report refers to the District's 'bankruptcy of dispositional resources'), 692—695, 700-718 (at p. 701 the Report observes that 'The Department of Public Welfare currently lacks even the rudiments of essential diagnostic and clinical services'); Wheeler & Cottrell, Juvenile Delinquency—Its Prevention and Control (Russell Sage Foundation, 1965), pp. 32—35; Harvard Law Review Note, p. 809; Paulsen, Juvenile Courts, Family Courts, and the Poor Man, 54 Calif.L.Rev. 694, 709—712 (1966); Polier, A View From the Bench (1964). Cf. Also, In the Matter of the Youth House, Inc., Report of the July 1966 'A' Term of the Bronx County Grand Jury, Supreme Court of New York, County of Bronx, Trial Term, Part XII, March 21, 1967 (cf. New York Times, March 23, 1967, p. 1, col. 8). The high rate of juvenile recidivism casts some doubt upon the adequacy of treatment afforded juveniles. See D.C.Crime Comm'n Report, p. 773; Nat'l Crime Comm'n Report, pp. 55, 78.
In fact, some courts have recently indicated that appropriate treatment is essential to the validity of juvenile custody, and therefore that a juvenile may challenge the validity of his custody on the ground that he is not in fact receiving any special treatment. See Creek v. Stone, 379 F.2d 106 (D.C.Cir. 1967); Kautter v. Reid, 183 F.Supp. 352 (D.C.D.C.1960); White v. Reid, 125 F.Supp. 647 (D.C.D.C.1954). See also Elmore v. Stone, 122 U.S.App.D.C. 416, 355 F.2d 841 (1966) (separate statement of Bazelon, C.J.); Clayton v. Stone, 123 U.S.App.D.C. 181, 358 F.2d 548 (1966) (separate statement of Bazelon, C.J.). Cf. Wheeler & Cottrell, supra, pp. 32, 35; **In re** Rich, 125 Vt. 373, 216 A.2d 266 (1966). Cf. also Rouse v. Cameron, 125 U.S.App.D.C. 366, 373 F.2d 451 (1966); Millard v. Cameron, 125 U.S.App.D.C. 383, 373 F.2d 468 (1966).

31 '(T)he word 'delinquent' has today developed such invidious connotations that the terminology is in the process of being altered; the new descriptive phrase is 'persons in need of supervision,' usually shortened to 'pins." Harvard Law Review Note, p. 799, n. 140. The N.Y. Family Court Act s 712 distinguishes between 'delinquents' and 'persons in need of supervision.'

32 See, e.g., the Arizona provision, ARS s 8—228.

33 Harvard Law Review Note, pp. 784—785, 800. Cf. Nat'l Crime Comm'n Report, pp. 87—88; Ketcham, The Unfulfilled Promise of the Juvenile Court, 7 Crime & Delin. 97, 102—103 (1961).

34 Harvard Law Review Note, pp. 785—787.

35 Id., at 785, 800. See also, with respect to the problem of confidentiality of records, Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281, 286—289 (1967). Even the privacy of the juvenile hearing itself is not always adequately protected. Id., at 285—286.

36 Mack, The Juvenile Court, 23 Harv.L.Rev. 104, 120 (1909).

37 Juvenile Delinquency—Its Prevention and Control (Russell Sage Foundation, 1966), p. 33. The conclusion of the Nat'l Crime Comm'n Report is similar: '(T)here is increasing evidence that the informal procedures, contrary to the original expectation, may themselves constitute a further obstacle to effective treatment of the delinquent to the extent that they engender in the child a sense of injustice provoked by seemingly all-powerful and challengeless exercise of authority by judges and probation officers.' Id., at 85. See also Allen, The Borderland of Criminal Justice (1964), p. 19.

38 Holmes' Appeal, 379 Pa. 599, 616, 109 A.2d 523, 530 (1954) (Musmanno, J., dissenting). See also The State (Sheerin) v. Governor, (1966) I.R. 379 (Supreme Court of Ireland); Trimble v. Stone, 187 F.Supp. 483, 485—486 (D.C.D.C.1960); Allen, The Borderland of Criminal Justice (1964), pp. 18, 52—56.

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39 Cf. the Juvenile Code of Arizona, ARS s 8—201, subsec. 6.

40 Cf., however, the conclusions of the D.C. Crime Comm'n Report, pp. 692—693, concerning the inadequacy of the 'social study records' upon which the Juvenile Court Judge must make this determination and decide on appropriate treatment.

41 The Juvenile Judge's testimony at the habeas corpus proceeding is devoid of any meaningful discussion of this. He appears to have centered his attention upon whethed Gerald made the phone call and used lewd words. He was impressed by the fact that Gerald was on six months' probation because he was with another boy who allegedly stole a purse—a different sort of offense, sharing the feature that Gerald was 'along'. And he even referred to a report which he said was not investigated because 'there was no accusation' 'because of lack of material foundation.'
With respect to the possible duty of a trial court to explore alternatives to involuntary commitment in a civil proceeding, cf. Lake v. Cameron, 124 U.S.App.D.C. 264, 364 F.2d 657 (1966), which arose under statutes relating to treatment of the mentally ill.

42 While appellee's brief suggests that the probation officer made some investigation of Gerald's home life, etc., there is not even a claim that the judge went beyond the point stated in the text.

43 ARS ss 8—201, 8—202.

44 Juvenile Delinquency—Its Prevention and Control (Russell Sage Foundation, 1966), p. 35. The gap between rhetoric and reality is also emphasized in the Nat'l Crime Comm'n Report, pp. 80—81.

45 383 U.S., at 555, 86 S.Ct., at 1054.

46 383 U.S., at 554, 86 S.Ct., at 1053. The Chief Justice stated in a recent speech to a conference of the National Council of Juvenile Court Judges, that a juvenile court 'must function within the framework of law and * * * in the attainment of its objectives it cannot act with unbridled caprice.' Equal Justice for Juveniles, 15 Juvenile Court Judges Journal, No. 3, pp. 14, 15 (1964).

47 383 U.S., at 562, 86 S.Ct., at 1057.

48 The Nat'l Crime Comm'n Report recommends that 'Juvenile courts should make fullest feasible use of preliminary conferences to dispose of cases short of adjudication.' Id., at 84. See also D.C.Crime Comm'n Report, pp. 662—665. Since this 'consent decree' procedure would involve neither adjudication of delinquency nor institutionalization, nothing we say in this opinion should be construed as expressing any views with respect to such procedure. The problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process.

49 ARS s 8—222, subsec. B.

50 Arizona's Juvenile Code does not provide for notice of any sort to be given at the commencement of the proceedings to the child or his parents. Its only notice provision is to the effect that if a person other than the parent or guardian is cited to appear, the parent or guardian shall be notified 'by personal service' of the time and place of hearing. ARS s 8—224. The procedure for initiating a proceeding, as specified by the statute, seems to require that after a preliminary inquiry by the court, a determination may be made 'that formal jurisdiction should be acquired.' Thereupon the court may authorize a petition to be filed. ARS s 8—222. It does not appear that this procedure was followed in the present case.

51 No such petition we served or supplied in the present case.

52 Nat'l Crime Comm'n Report, p. 87. The Commission observed that 'The unfairness of too much informality is * * * reflected in the inadequacy of notice to parents and juveniles about charges and hearings.' Ibid.

53 For application of the due process requirement of adequate notice in a criminal context, see, e.g., Cole v. State of Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948); **In re** Oliver, 333 U.S. 257, 273—278, 68 S.Ct. 499, 507—510, 92 L.Ed. 682 (1948). For application in a civil context, see, e.g., Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); Mullane v. Central

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Hanover Bank & Tr. Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Cf. also Chaloner v. Sherman, 242 U.S. 455, 37 S.Ct. 136, 61 L.Ed. 427 (1917). The Court's discussion in these cases of the right to timely and adequate notice forecloses any contention that the notice approved by the Arizona Supreme Court, or the notice actually given the **Gaults**, was constitutionally adequate. See also Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L.Q. 387, 395 (1961); Paulsen, Fairness to the Juvenile Offender, 41 Minn.L.Rev. 547, 557 (1957). Cf. Standards, pp. 63—65; Procedures and Evidence in the Juvenile Court, A Guidebook for Judges, prepared by the Advisory Council of Judges of the National Council on Crime and Delinquency (1962), pp. 9—23 (and see cases discussed therein).

54 Mrs. **Gault's** 'knowledge' of the charge against Gerald, and/or the asserted failure to object, does not excuse the lack of adequate notice. Indeed, one of the purposes of notice is to clarify the issues to be considered, and as our discussion of the facts, supra, shows, even the Juvenile Court Judge was uncertain as to the precise issues determined at the two 'hearings.' Since the **Gaults** had no counsel and were not told of their right to counsel, we cannot consider their failure to object to the lack of constitutionally adequate notice as a waiver of their rights. Because of our conclusion that notice given only at the first hearing is inadequate, we need not reach the question whether the **Gaults** ever received adequately specific notice even at the June 9 hearing, in light of the fact they were never apprised of the charge of being habitually involved in immoral matters.

55 For recent cases in the District of Columbia holding that there must be advice of the right to counsel, and to have counsel appointed if necessary, see, e.g., Shioutakon v. District of Columbia, 98 U.S.App.D.C. 371, 236 F.2d 666, 60 A.L.R.2d 686 (1956); Black v. United States, 122 U.S.App.D.C. 393, 355 F.2d 104 (1965); **In re** Poff, 135 F.Supp. 224 (D.C.D.C.1955). Cf. also **In re** Long, 184 So.2d 861, 862 (Sup.Ct.Miss., 1966); People v. Dotson, 46 Cal.2d 891, 299 P.2d 875 (1956).

56 The section cited by the court, ARS s 8—204, subsec. C, reads as follows:
'The probation officer shall have the authority of a peace officer. He shall:
'1. Look after the interests of neglected, delinquent and dependent children of the county.
'2. Make investigations and file petitions.
'3. Be present in court when cases are heard concerning children and represent their interests.
'4. Furnish the court information and assistance as it may require.
'5. Assist in the collection of sums ordered paid for the support of children.
'6. Perform other acts ordered by the court.'

57 Powell v. State of Alabama, 287 U.S. 45, 61, 53 S.Ct. 55, 61, 77 L.Ed. 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

58 In the present proceeding, for example, although the Juvenile Judge believed that Gerald's telephone conversation was within the condemnation of ARS s 13—377, he suggested some uncertainty because the statute prohibits the use of vulgar language 'in the presence or hearing of' a woman or child.

59 Powell v. State of Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64 (1932).

60 This means that the commitment, in virtually all cases, is for a minimum of three years since jurisdiction of juvenile courts is usually limited to age 18 and under.

61 See cases cited in n. 55, supra.

62 See, e.g., Schinitsky, 17 The Record 10 (N.Y. City Bar Assn. 1962); Paulsen, Fairness to the Juvenile Offender, 41 Minn.L.Rev. 547, 568—573 (1957); Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L.Q. 387, 404—407 (1961); Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 Sup.Ct.Rev. 167, 187—189; Ketcham, The Legal Renaissance in the Juvenile Court, 60 Nw.U.L.Rev. 585 (1965); Elson, Juvenile Courts & Due Process, in Justice for the Child (Rosenheim ed.) 95, 103—105 (1962); Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281, 321—327 (1967). See also Nat'l Probation and Parole Assn., Standard Family Court Act (1959) s 19, and Standard Juvenile Court Act (1959) s 19, in 5 NPPA Journal 99, 137, 323, 367 (1959) (hereinafter cited as Standard Family Court Act and Standard Juvenile Court Act, respectively).

63 Only a few state statutes require advice of the right to counsel and to have counsel appointed. See N. Y. Family Court Act ss 241, 249, 728, 741; Calif.Welf. & Inst'ns Code ss 633, 634, 659, 700 (1966) (appointment is mandatory only if conduct would be a felony in the case of an adult); Minn.Stat.Ann. s 260.155(2) (1966 Supp.) (see Comment of Legislative Commission accompanying this section); District of Columbia Legal Aid Act, D.C.Code Ann. s 2—2202 (1961) (Legal Aid Agency 'shall make attorneys available

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to represent indigents * * * in proceedings before the juvenile court * * *.' See Black v. United States, 122 U.S.App.D.C. 393, 395—396, 355 F.2d 104, 106—107 (1965), construing this Act as providing a right to appointed counsel and to be informed of that right). Other state statutes allow appointment on request, or in some classes of cases, or in the discretion of the court, etc. The state statutes are collected and classified in Riederer, The Role of Counsel in the Juvenile Court, 2 J.Fam.Law 16, 19—20 (1962), which, however, does not treat the statutes cited above. See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281, 321—322 (1967).

64 Skoler & Tenney, Attorney Representation in Juvenile Court, 4 J.Fam.Law 77, 95—96 (1964); Riederer, The Role of Counsel in the Juvenile Court, 2 J.Fam.Law 16 (1962).
Recognition of the right to counsel involves no necessary interference with the special purposes of juvenile court procedures; indeed, it seems that counsel can play an important role in the process of rehabilitation. See Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281, 324—327 (1967).

65 Nat'l Crime Comm'n Report, pp. 86—87. The Commission's statement of its position is very forceful:
'The Commission believes that no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively. The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot. Papers are drawn and charges expressed in legal language. Events follow one another in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge. But with lawyers come records of proceedings; records make possible appeals which, even if they do not occur, impart by their possibility a healthy atmosphere of accountability.
'Fears have been expressed that lawyers would make juvenile court proceedings adversary. No doubt this is partly true, but it is partly desirable. Informality is often abused. The juvenile courts deal with cases in which facts are disputed and in which, therefore, rules of evidence, confrontation of witnesses, and other adversary procedures are called for. They deal with many cases involving conduct that can lead to incarceration or close supervision for long periods, and therefore juveniles often need the same safeguards that are granted to adults. And in all cases children need advocates to speak for them and guard their interests, particularly when disposition decisions are made. It is the disposition stage at which the opportunity arises to offer individualized treatment plans and in which the danger inheres that the court's coercive power will be applied without adequate knowledge of the circumstances.
'Fears also have been expressed that the formality lawyers would bring into juvenile court would defeat the therapeutic aims of the court. But informality has no necessary connection with therapy; it is a devide that has been used to approach therapy, and it is not the only possible device. It is quite possible that in many instances lawyers, for all their commitment to formality, could do more to further therapy for their clients than can the small, overworked social staffs of the courts. * * *
'The Commission believes it is essential that counsel be appointed by the juvenile court for those who are unable to provide their own. Experience under the prevailing systems in which children are free to seek counsel of their choice reveals how empty of meaning the right is for those typically the subjects of juvenile court proceedings. Moreover, providing counsel only when the child is sophisticated enough to be aware of his need and to ask for one or when he fails to waive his announced right (is) not enough, as experience in numerous jurisdictions reveals.
'The Commission recommends:
'COUNSEL SHOULD BE APPOINTED AS A MATTER OF COURSE WHEREVER COERCIVE ACTION IS A POSSIBILITY, WITHOUT REQUIRING ANY AFFIRMATIVE CHOICE BY CHILD OR PARENT.'

66 Lehman, A Juvenile's Right to Counsel in A Delinquency Hearing, 17 Juvenile Court Judge's Journal 53 (1966). In an interesting review of the 1966 edition of the Children's Bureau's 'Standards,' Rosenheim, Standards for Juvenile and Family Courts: Old Wine in a New Bottle, 1 Fam.L.Q. 25, 29 (1967), the author observes that 'The 'Standards' of 1966, just like the 'Standards' of 1954, are valuable precisely because they represent a diligent and thoughtful search for an accommodation between the aspirations of the founders of the juvenile court and the grim realities of life against which, in part, the due process of criminal and civil law offers us protection.'

67 These are lawyers designated, as provided by the statute, to represent minors. N.Y.Family Court Act s 242.

68 N.Y.Family Court Act s 241.

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69 N.Y.Family Court Act s 741. For accounts of New York practice under the new procedures, see Isaacs, The Role of the Lawyer in Representing Minors in the New Family Court, 12 Buffalo L.Rev. 501 (1963); Dembitz, Ferment and Experiment in New York: Juvenile Cases in the New Family Court, 48 Cornell L.Q. 499, 508—512 (1963). Since introduction of the law guardian system in September of 1962, it is stated that attorneys are present in the great majority of cases. Harvard Law Review Note, p. 796. See New York Judicial Conference, Twelfth Annual Report, pp. 288—291 (1967), for detailed statistics on representation of juveniles in New York. For the situation before 1962, see Schinitsky, The Role of the Lawyer in Children's Court, 17 The Record 10 (N.Y. City Bar Assn. 1962). In the District of Columbia, where statute and court decisions require that a lawyer be appointed if the family is unable to retain counsel, see n. 63, supra, and where the juvenile and his parents are so informed at the initial hearing, about 85% to 90% do not choose to be represented and sign a written waiver form. D.C. Crime Comm'n Report, p. 646. The Commission recommends adoption in the District of Columbia of a 'law guardian' system similar to that of New York, with more effective notification of the right to appointed counsel, in order to eliminate the problems of procedural fairness, accuracy of factfinding, and appropriateness of disposition which the absence of counsel in so many juvenile court proceedings involves. Id., at 681—685.

70 See n. 63, supra.

71 Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); United States ex rel. Brown v. Fay, 242 F.Supp. 273 (D.C.S.D.N.Y.1965).

72 The privilege is applicable to state proceedings. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

73 Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Douglas v. State of Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

74 For this reason, we cannot consider the status of Gerald's alleged admissions to the probation officers. Cf., however, Comment, Miranda Guarantees in the California Juvenile Court, 7 Santa Clara Lawyer 114 (1966).

75 3 Wigmore, Evidence s 822 (3d ed. 1940).

76 332 U.S., at 599—600, 68 S.Ct., at 303 (opinion of Mr. Justice Douglas, joined by Justices Black, Murphy and Rutledge; Justice Frankfurter concurred in a separate opinion).

77 See Fortas, The Fifth Amendment, 25 Cleveland Bar Assn. Journal 91 (1954).

78 See Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961); Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (opinion of Mr. Justice Frankfurter, joined by Mr. Justice Stewart); Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

79 See also Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); McCarthy v. Arndstein, 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924).

80 N.Y.Family Court Act s 741.

81 N.Y.Family Court Act s 724(a). In In Matter of Williams, 49 Misc.2d 154, 267 N.Y.S.2d 91 (1966), the New York Family Court held that 'The failure of the police to notify this child's parents that he had been taken into custody, if not alone sufficient to render his confession inadmissible, is germane on the issue of its voluntary character * * *.' Id., at 165, 267 N.Y.S.2d, at 106. The confession was held involuntary and therefore inadmissible.

82 N.Y.Family Court Act s 724 (as amended 1963, see Supp.1966). See In Matter of Addison, 20 A.D.2d 90, 245 N.Y.S.2d 243 (1963).

83 The issues relating to fingerprinting of juveniles are not presented here, and we express no opinion concerning them.

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84 Standards, p. 49.

85 See n. 79, supra, and accompanying text.

86 Delinquent Children in Penal Institutions, Children's Bureau Pub. No. 415—1964, p. 1.

87 See, e.g., Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Garrity v. State of New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 636, 17 L.Ed.2d 574 (1967); Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); Culombe v. State of Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961); Rogers v. Richmond, 365 U.S. 534, 84 S.Ct. 735, 5 L.Ed.2d 760 (1961); Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

88 Arizona Constitution, Art. 6. s 15 (as amended 1960); ARS ss 8—223, 8—228, subsec. A; Harvard Law Review Note, p. 793. Because of this possibility that criminal jurisdiction may attach it is urged that '* * * all of the procedural safeguards in the criminal law should be followed.' Standards, p. 49. Cf. Harling v. United States, 111 U.S.App.D.C. 174, 295 F.2d 161 (1961).

89 ARS s 8—228, subsec. A.

90 Juvenile Delinquency—Its Prevention and Control (Russell Sage Foundation, 1966).

91 Id., at 33. See also the other materials cited in n. 37, supra.

92 N.J.Rev.Stat. s 2A:4—37(b)(2), N.J.S.A. (Supp.1966); N.J.Rev.Stat. 2A:113—4, N.J.S.A.

93 N.J.Rev.Stat. s 2A:4—32, 33, N.J.S.A. The court emphasized that the 'frightening atmosphere' of a police station is likely to have 'harmful effects on the mind and will of the boy,' citing In Matter of Rutane, 37 Misc.2d 234, 234 N.Y.S.2d 777 (Fam.Ct.Kings County, 1962).

94 The court held that this alone might be enough to show that the confessions were involuntary 'even though, as the police testified, the boys did not wish to see their parents' (citing Gallegos v. State of Colorado, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962)).

95 The court quoted the following passage from Haley v. State of Ohio, supra, 332 U.S., at 601, 68 S.Ct., at 304:
'But we are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions. Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain.'

96 The N.Y.Family Court Act s 744(b) provides that 'an uncorroborated confession made out of court by a respondent is not sufficient' to constitute the required 'preponderance of the evidence.'
See United States v. Morales, 233 F.Supp. 160 (D.C.Mont.1964), holding a confession inadmissible in proceedings under the Federal Juvenile Delinquency Act (18 U.S.C. s 5031 et seq.) because, in the circumstances in which it was made, the District Court could not conclude that it 'was freely made while Morales was afforded all of the requisites of due process required in the case of a sixteen year old boy of his experience.' Id., at 170.

97 Cf. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966).

98 Standards, pp. 72—73. The Nat'l Crime Comm'n Report concludes that 'the evidence admissible at the adjudicatory hearing should be so limited that findings are not dependent upon or influenced by hearsay, gossip, rumor, and other unreliable types of

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information. To minimize the danger that adjudication will be affected by inappropriate considerations, social investigation reports should not be made known to the judge in advance of adjudication.' Id., at 87 (bold face eliminated). See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281, 336 (1967): 'At the adjudication stage, the use of clearly incompetent evidence in order to prove the youth's involvement in the alleged misconduct * * * is not justifiable. Particularly in delinquency cases, where the issue of fact is the commission of a crime, the introduction of hearsay—such as the report of a policeman who did not witness the events—contravenes the purposes underlying the sixth amendment right of confrontation.' (Footnote omitted.)

99 N.Y.Family Court Act s 744(a). See also Harvard Law Review Note, p. 795. Cf. Willner v. Committee on Character, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963).

100 ARS s 8—238.

101 Griffin v. People of State of Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956).

102 'Standards for Juvenile and Family Courts' recommends 'written findings of fact, some form of record of the hearing' 'and the right to appeal.' Standards, p. 8. It recommends verbatim recording of the hearing by stenotypist or mechanical recording (p. 76) and urges that the judge make clear to the child and family their right to appeal (p. 78). See also, Standard Family Court Act ss 19, 24, 28; Standard Juvenile Court Act ss 19, 24, 28. The Harvard Law Review Note, p. 799, states that 'The result (of the infrequency of appeals due to absence of record, indigency, etc.) is that juvenile court proceedings are largely unsupervised.' The Nat'l Crime Comm'n Report observes, p. 86, that 'records make possible appeals which, even if they do not occur, impart by their possibility a healthy atmosphere of accountability.'

1 'In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * *.' Also requiring notice is the Fifth Amendment's provision that 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.'

2 'In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel in his defence.'

3 'No person * * * shall be compelled in any criminal case to be a witness against himself * * *.'

4 'In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.'

1 Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84, decided at the 1965 Term, did not purport to rest on constitutional grounds.

2 It is appropriate to observe that, whatever the relevance the Court may suppose that this criticism has to present issues, many of the critics have asserted that the deficiencies of juvenile courts have stemmed chiefly from the inadequacy of the personnel and resources available to those courts. See, e.g., Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 Sup.Ct.Rev. 167, 191—192; Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis.L.Rev. 7, 46.

3 The statistical evidence here is incomplete, but see generally Skoler & Tenney, Attorney Representation in Juvenile Court, 4 J. Fam.Law 77. They indicate that some 91% of the juvenile court judges whom they polled favored representation by counsel in their courts. Id., at 88.

4 Indeed, my Brother BLACK candidly recognizes that such is apt to be the effect of today's decision, ante, p. 1460. The Court itself is content merely to rely upon inapposite language from the recommendations of the Children's Bureau, plus the terms of a single statute.

5 The most cogent evidence of course consists of the steady rejection of these requirements by state legislatures and courts. The wide disagreement and uncertainty upon this question are also reflected in Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 Sup.Ct.Rev. 167, 186, 191. See also Paulsen, Fairness to the Juvenile Offender, 41 Minn.L.Rev. 547, 561—562; McLean, An Answer to the Challenge of Kent, 53 A.B.A.J. 456, 457; Alexander, Constitutional Rights in Juvenile

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Court, 46 A.B.A.J. 1206; Shears, Legal Problems Peculiar to Children's Courts, 48 A.B.A.J. 719; Siler, The Need for Defense Counsel in the Juvenile Court, 11 Crime & Delin. 45, 57—58. Compare Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis.L.Rev. 7, 32.

6 Estimates of the number of children in this situation brought before juvenile courts range from 26% to some 48%; variation seems chiefly a product both of the inadequacy of records and of the difficulty of categorizing precisely the conduct with which juveniles are charged. See generally Sheridan, Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System? 31 Fed.Probation 26, 27. By any standard, the number of juveniles involved is 'considerable.' Ibid.

7 Id., at 28—30.

1 I find it strange that a Court so intent upon fastening an absolute right to counsel upon nonadversary juvenile proceedings has not been willing even to consider whether the Constitution requires a lawyer's help in a criminal prosecution upon a misdemeanor charge. See Winters v. Beck, 385 U.S. 907, 87 S.Ct. 207, 17 L.Ed.2d 137; DeJoseph v. Connecticut, 385 U.S. 982, 87 S.Ct. 526, 17 L.Ed.2d 443.

2 State v. Guild, 5 Halst. 163, 10 N.J.L. 163, 18 Am.Dec. 404.
'Thus, also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behavior plain tokens of a mischievous discretion; and as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment.' 4 Blackstone, stone, Commentaries 23 (Wendell ed. 1847).

3 Until June 13, 1966, it was clear that the Fourteenth Amendment's ban upon the use of a coerced confession is constitutionally quite a different thing from the Fifth Amendment's testimonal privilege against self-incrimination. See, for example, the Court's unanimous opinion in Brown v. State of Mississippi, 297 U.S. 278, at 285—286, 56 S.Ct. 461, 464—465, 80 L.Ed. 682, written by Chief Justice Hughes and joined by such distinguished members of this Court as Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo. See also Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453, decided January 19, 1966, where the Court emphasized the 'contrast' between 'the wrongful use of a coerced confession' and 'the Fifth Amendment's privilege against self-incrimination'. 382 U.S., at 416, 86 S.Ct., at 465. The complete confusion of these separate constitutional doctrines in Part V of the Court's opinion today stems, no doubt, from Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, a decision which I continue to believe was constitutionally erroneous.

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McKinney's CPL § 440.46-a

# § 440.46-a. Motion for resentence; persons convicted of certain marihuana offenses

Effective: March 31, 2021

Currentness

1. When a person is serving a sentence for a conviction in this state, whether by trial verdict or guilty plea, under former article two hundred twenty-one of the penal law, and such persons' conduct as alleged in the accusatory instrument and/or shown by the guilty plea or trial verdict would not have been a crime under article two hundred twenty-two of the penal law, had such article two hundred twenty-two rather than former article two hundred twenty-one of the penal law been in effect at the time of such conduct, then the chief administrative judge of the state of New York shall, in accordance with this section, automatically vacate, dismiss and expunge such conviction in accordance with section 160.50 of this chapter, and the office of court administration shall immediately notify the state division of criminal justice services, state department of corrections and community supervision and the appropriate local correctional facility which shall immediately effectuate the appropriate relief. Such notification to the division of criminal justice services shall also direct that such agency notify all relevant police and law enforcement agencies of their duty to destroy and/or mark records related to such case in accordance with section 160.50 of this chapter. Nothing in this section shall prevent a person who believes his or her sentence is required by this section to be vacated, dismissed and/or expunged from filing a petition with the court to effectuate all appropriate relief.

2. (a) When a person is serving or has completed serving a sentence for a conviction in this state, whether by trial verdict or guilty plea, under former article two hundred twenty-one of the penal law, and such person's conduct as alleged in the accusatory instrument and/or shown by the guilty plea or trial verdict, or shown by other information: (i) would not have been a crime under article two hundred twenty-two of the penal law, had such article two hundred twenty-two rather than former article two hundred twenty-one of the penal law been in effect at the time of such conduct; or (ii) under such circumstances such person would have been guilty of a lesser or potentially less onerous offense under such article two hundred twenty-two than such former article two hundred twenty-one of the penal law; then such person may petition the court of conviction pursuant to this article for vacatur of such conviction.

(b)(i) Upon receiving a served and filed motion under paragraph (a) of this subdivision, the court shall presume that any conviction by plea was not knowing, voluntary and intelligent and that any conviction by verdict and any accompanying sentence constitutes cruel and unusual punishment under the state constitution if either has severe or ongoing consequences, including but not limited to potential or actual immigration consequences; and the court shall further presume that the movant satisfies the criteria in such paragraph (a) and thereupon make such finding and grant the motion to vacate such conviction on such grounds in a written order unless the party opposing the motion proves, by clear and convincing evidence, that the movant does not satisfy the criteria to bring such motion. (ii) If the petition meets the criteria in subparagraph (i) of paragraph

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(a) of this subdivision, the court after affording the parties an opportunity to be heard and present evidence, may substitute, unless it is not in the interests of justice to do so, a conviction for an appropriate lesser offense under article two hundred twenty-two of the penal law.

(c) In the event of any vacatur and/or substitution pursuant to this subdivision, the office of court administration shall immediately notify the state division of criminal justice services concerning such determination. Such notification to the division of criminal justice services shall also direct that such agency notify all relevant police and law enforcement agencies of their duty to destroy and/or mark records related to such case in accordance with section 160.50 of this chapter or, where conviction for a crime is substituted pursuant to this subdivision, update such agencies' records accordingly.

3. Under no circumstances may substitution under this section result in the imposition of a term of imprisonment or sentencing term, obligation or condition that is in any way either harsher than the original sentence or harsher than the sentence authorized for any substituted lesser offense.

4. (a) If the judge who originally sentenced the movant for such offense is not reasonably available, then the presiding judge for such court shall designate another judge authorized to act in the appropriate jurisdiction to determine the petition or application.

(b) Unless requested by the movant, no hearing is necessary to grant an application filed under subdivision two of this section.

(c) When a felony conviction is vacated pursuant to this section and a lesser offense that is a misdemeanor or violation is substituted for such conviction, such lesser offense shall be considered a misdemeanor or violation, as the case may be, for all purposes. When a misdemeanor conviction is vacated pursuant to this section and a lesser offense that is a violation is substituted for such conviction, such lesser offense shall be considered a violation for all purposes.

(d) Nothing in this section is intended to or shall diminish or abrogate any rights or remedies otherwise available to a defendant, petitioner or applicant. Relief under this section is available notwithstanding that the judgment was for a violation of former sections 221.05, 221.10, 221.15, 221.20, 221.35 or 221.40 of the penal law in effect prior to the effective date of this paragraph and that the underlying action or proceeding has already been vacated, dismissed and expunged.

(e) Nothing in this and related sections of law is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this section.

(f) The provisions of this section shall be available, used and applied in parallel fashion by the family court and the criminal courts to juvenile delinquency adjudications, adolescent offender adjudications and youthful offender adjudications.

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(g) The chief administrator of the courts shall promulgate all necessary rules and make available all necessary forms to enable the filing of the petitions and applications provided in this section no later than sixty days following the effective date of this section. All sentences eligible for automatic vacatur, dismissal and expungement pursuant to subdivision one of this section shall be identified and the required entities notified within one year of the effective date of this section.

**Credits**

(Added L.2021, c. 92, § 24, eff. March 31, 2021.)

McKinney's **CPL** § **440**.**46**-**a**, NY CRIM PRO § **440**.**46**-**a**
Current through L.2021, chapters 1 to 555. Some statute sections may be more current, see credits for details.

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2018 Sess. Law News of N.Y. Ch. 362 (A. 7557) (McKINNEY'S)

McKINNEY'S 2018 SESSION LAW NEWS OF NEW YORK

241st LEGISLATURE

Additions are indicated by **Text**; deletions by
~~Text~~.
Vetoes are indicated by ~~Text~~;
stricken material by ~~**Text**~~.

# CHAPTER 362
# A. 7557
# TRUANTS AND TRUANCY—PETITIONS

Approved December 7, 2018

**Effective March 7, 2018**

AN ACT to amend the family court act, in relation to truancy allegations in persons in need of supervision and child protective proceedings in family court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (iii) of subdivision (d) and paragraph (ii) of subdivision (g) of section 735 of the family court act, paragraph (iii) of subdivision (d) and paragraph (ii) of subdivision (g) as added by section 7 of part E of chapter 57 of the laws of 2005, are amended to read as follows:

<< NY FAM CT § 735 >>

(iii) where the entity seeking to file a petition is a school district or local educational agency **or where the parent or other potential petitioner indicates that the proposed petition will include truancy and/or conduct in school as an allegation**, the designated lead agency shall review the steps taken by the school district or local educational agency to improve the youth's attendance and/or conduct in school and attempt to engage the school district or local educational agency in further diversion attempts, if it appears from review that such attempts will be beneficial to the youth. **Where the school district or local educational agency is not the potential petitioner, the designated lead agency shall contact such district or agency to resolve the truancy or school behavioral problems of the youth in order to obviate the need to file a petition or, at minimum, to remediate the education-related allegations of the proposed petition.**

(ii) The clerk of the court shall accept a petition for filing only if it has attached thereto the following:

(A) if the potential petitioner is the parent or other person legally responsible for the youth, a notice from the designated lead agency indicating there is no bar to the filing of the petition as the potential petitioner consented to and actively participated in diversion services; and

(B) a notice from the designated lead agency stating that it has terminated diversion services because it has determined that there is no substantial likelihood that the youth and his or her family will benefit from further attempts, and that the case has

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not been successfully diverted**; and**

**(C) where the proposed petition contains allegations of truancy and/or school misbehavior, whether or not the school district or local educational agency is the proposed petitioner, a notice from the designated lead agency regarding the diversion efforts undertaken and/or services provided by the designated lead agency and/or by the school district or local educational agency to the youth and the grounds for concluding that the education-related allegations could not be resolved absent the filing of a petition under this article**.

§ 2. Section 736 of the family court act is amended by adding a new subdivision 4 to read as follows:

<< NY FAM CT § 736 >>

**(4) Where the petition contains allegations of truancy and/or school misbehavior and where the school district or local educational agency is not the petitioner and where, at any stage of the proceeding, the court determines that assistance by the school district or local educational agency may aid in the resolution of the education-related allegations in the petition, the school district or local educational agency may be notified by the court and given an opportunity to be heard.**

§ 3. Subdivision (b) of section 742 of the family court act, as amended by section 9 of part E of chapter 57 of the laws of 2005, is amended to read as follows:

<< NY FAM CT § 742 >>

(b) At the initial appearance of the respondent, the court shall review any termination of diversion services pursuant to such section, and the documentation of diligent attempts to provide appropriate services and determine whether such efforts or services provided are sufficient ~~and~~**. The court** may, **at any time,** subject to the provisions of section seven hundred forty-eight of this article, order that additional diversion attempts be undertaken by the designated lead agency. The court may order the youth and the parent or other person legally responsible for the youth to participate in diversion services. If the designated lead agency thereafter determines that ~~the~~ **a** case **referred for diversion efforts under this section** has been successfully resolved, it shall so notify the court, and the court shall dismiss the petition.

§ 4. Subparagraph (A) of paragraph (i) of subdivision (f) of section 1012 of the family court act, as amended by chapter 469 of the laws of 1971, is amended to read as follows:

<< NY FAM CT § 1012 >>

(A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so**, or, in the case of an alleged failure of the respondent to provide education to the child, notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition**; or

§ 5. Section 1031 of the family court act is amended by adding a new subdivision (g) to read as follows:

<< NY FAM CT § 1031 >>

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**(g) Where a petition under this article contains an allegation of a failure by the respondent to provide education to the child in accordance with article sixty-five of the education law, regardless of whether such allegation is the sole allegation of the petition, the petition shall recite the efforts undertaken by the petitioner and the school district or local educational agency to remediate such alleged failure prior to the filing of the petition and the grounds for concluding that the education-related allegations could not be resolved absent the filing of a petition under this article.**

§ 6. Section 1035 of the family court act is amended by adding a new subdivision (g) to read as follows:

<< NY FAM CT § 1035 >>

**(g) Where the petition filed under this article contains an allegation of a failure by the respondent to provide education to the child in accordance with article sixty-five of the education law, and where at any stage of the proceeding, the court determines that assistance by the school district or local educational agency would aid in the resolution of the education-related allegation, the school district or local educational agency may be notified by the court and given an opportunity to be heard.**

§ 7. This act shall take effect on the ninetieth day after it shall have become a law.

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2019 Sess. Law News of N.Y. Ch. 56 (A. 2006-C) (McKINNEY'S)

McKINNEY'S 2019 SESSION LAW NEWS OF NEW YORK

242nd LEGISLATURE

Additions are indicated by **Text**; deletions by
~~Text~~.
Vetoes are indicated by ~~Text~~;
stricken material by **~~Text~~**.

# CHAPTER 56
# A. 2006–C

Approved and effective April 12, 2019

§ 5. This act shall take effect April 1, 2019.

## PART K

Section 1. Section 712 of the family court act, as amended by chapter 920 of the laws of 1982, subdivision (a) as amended by section 7 of part G of chapter 58 of the laws of 2010, subdivision (b) as amended by chapter 465 of the laws of 1992, subdivision (g) as amended by section 2 of part B of chapter 3 of the laws of 2005, subdivision (h) as added by chapter 7 of the laws of 1999, subdivision (i) as amended and subdivisions (j), (k), (l) and (m) as added by chapter 38 of the laws of 2014, is amended to read as follows:

<< NY FAM CT § 712 >>

### § 712. Definitions

As used in this article, the following terms shall have the following meanings:

(a) "Person in need of supervision". A person less than eighteen years of age**: (i)** who does not attend school in accordance with the provisions of part one of article sixty-five of the education law ~~or~~**; (ii)** who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care, or other lawful authority~~, or~~**; (iii)** who violates the provisions of**: (1)** section 221.05**;** or **(2)** 230.00 of the penal law~~,~~**; (iv)** or who appears to be a sexually exploited child as defined in paragraph (a), (c) or (d) of subdivision one of section four hundred forty-seven-a of the social services law, but only if the child consents to the filing of a petition under this article.

(b) ~~"Detention"~~ **"Pre-dispositional placement"**. The temporary care and maintenance of children away from their own homes ~~as defined in section five hundred two of the executive law~~ **pursuant to section seven hundred twenty of this article**.

~~(c) "Secure detention facility". A facility characterized by physically restricting construction, hardware and procedures.~~

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~~(d) "Non-secure detention facility". A facility characterized by the absence of physically restricting construction, hardware and procedures.~~

~~(e)~~ **(c)** "Fact-finding hearing". A hearing to determine whether the respondent did the acts alleged to show that he **or she** violated a law or is incorrigible, ungovernable or habitually disobedient and beyond the control of his **or her** parents, guardian or legal custodian.

~~(f)~~ **(d)** "Dispositional hearing". A hearing to determine whether the respondent requires supervision or treatment.

~~(g)~~ **(e)** "Aggravated circumstances". Aggravated circumstances shall have the same meaning as the definition of such term in subdivision (j) of section one thousand twelve of this act.

~~(h)~~ **(f)** "Permanency hearing". A hearing held in accordance with paragraph (b) of subdivision two of section seven hundred fifty-four or section seven hundred fifty-six-a of this article for the purpose of reviewing the foster care status of the respondent and the appropriateness of the permanency plan developed by the social services official on behalf of such respondent.

~~(i)~~ **(g)** "Diversion services". Services provided to children and families pursuant to section seven hundred thirty-five of this article for the purpose of avoiding the need to file a petition or direct the ~~detention~~ **pre-dispositional placement** of the child. Diversion services shall include: efforts to adjust cases pursuant to this article before a petition is filed, or by order of the court, after the petition is filed but before fact-finding is commenced; and preventive services provided in accordance with section four hundred nine-a of the social services law to avert the placement of the child ~~into foster care~~, including crisis intervention and respite services. Diversion services may also include, in cases where any person is seeking to file a petition that alleges that the child has a substance use disorder or is in need of immediate detoxification or substance use disorder services, an assessment for substance use disorder; provided, however, that notwithstanding any other provision of law to the contrary, the designated lead agency shall not be required to pay for all or any portion of the costs of such assessment or substance use disorder or detoxification services, except in cases where medical assistance for needy persons may be used to pay for all or any portion of the costs of such assessment or services.

~~(j)~~ **(h)** "Substance use disorder". The misuse of, dependence on, or addiction to alcohol and/or legal or illegal drugs leading to effects that are detrimental to the person's physical and mental health or the welfare of others.

~~(k)~~ **(i)** "Assessment for substance use disorder". Assessment by a provider that has been certified by the office of alcoholism and substance abuse services of a person less than eighteen years of age where it is alleged that the youth is suffering from a substance use disorder which could make a youth a danger to himself or herself or others.

~~(l)~~ **(j)** "A substance use disorder which could make a youth a danger to himself or herself or others". A substance use disorder that is accompanied by the dependence on, or the repeated use or abuse of, drugs or alcohol to the point of intoxication such that the person is in need of immediate detoxification or other substance use disorder services.

~~(m)~~ **(k)** "Substance use disorder services". Substance use disorder services shall have the same meaning as provided for in section 1.03 of the mental hygiene law.

Art. 7, Pt. 2 prec. § 720

§ 2. The part heading of part 2 of article 7 of the family court act is amended to read as follows:

CUSTODY ~~AND DETENTION~~

§ 3. Section 720 of the family court act, as amended by chapter 419 of the laws of 1987, subdivision 3 as amended by section

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9 of subpart B of part Q of chapter 58 of the laws of 2011, subdivision 5 as amended by section 3 of part E of chapter 57 of the laws of 2005, and paragraph (c) of subdivision 5 as added by section 8 of part G of chapter 58 of the laws of 2010, is amended to read as follows:

<< NY FAM CT § 720 >>

**§ 720. ~~Detention~~ Pre-dispositional placement**

1. No child to whom the provisions of this article may apply, shall be detained in any pris-on, jail, lockup, or other place used for adults **or children** convicted of crime or under arrest and charged with a crime.

2. The detention of a child in a secure detention **or non-secure** facility shall not be directed under any of the provisions of this article.

3. ~~Detention~~ **Pre-dispositional placement** of a person alleged to be or adjudicated as a person in need of supervision shall~~, except as provided in subdivision four of this section,~~ be authorized only in a foster care program certified by the office of children and family services **or a short-term safe house in accordance with section seven hundred thirty-nine of this article**, or a certified or approved family boarding home~~, or a non-secure detention facility certified by the office and in accordance with section seven hundred thirty-nine of this article~~ **pursuant to the social services law**. The setting of the ~~detention~~ **placement** shall take into account**:**

(a) ~~the~~ **The** proximity to the community in which the person alleged to be or adjudicated as a person in need of supervision lives with such person's parents or to which such person will be discharged~~,~~**;** and

(b) ~~the~~ **The** existing educational setting of such person and the proximity of such setting to the location of the ~~detention~~ **placement** setting.

4. ~~Whenever detention is authorized and ordered pursuant to this article, for a person alleged to be or adjudicated as a person in need of supervision, a family court in a city having a population of one million or more shall, notwithstanding any other provision of law, direct detention in a foster care facility established and maintained pursuant to the social services law. In all other respects, the detention of such a person in a foster care facility shall be subject to the identical terms and conditions for detention as are set forth in this article and in section two hundred thirty-five of this act.~~

~~5.~~(a) The court shall not order or direct ~~detention~~ **pre-dispositional placement** under this article, **(i)** unless the court determines ~~that~~ **and states in its written order; (1) that** there is no substantial likelihood that the youth and his or her family will continue to benefit from diversion services**, including but not limited to, any available respite services;** and **(2)** that all available alternatives to detention have been exhausted; and **(3) that pre-dispositional placement of the respondent is in the best interest of the respondent; and (4) that it would be contrary to the welfare of the respondent to continue in their own home; or (ii) if the sole basis for the petition is an allegation pursuant to paragraph (i) of subdivision (a) of section seven hundred twelve of this article.**

(b) Where the youth is sixteen years of age or older, the court shall not order or direct ~~detention~~ **pre-dispositional placement** under this article, unless the court determines and states in its order that special circumstances exist to warrant such ~~detention~~ **placement**.

(c) If **in addition to the provisions of this section,** the respondent may be a sexually exploited child as defined in subdivision one of section four hundred forty-seven-a of the social services law, the court may direct the respondent to an available short-term safe house ~~as defined in subdivision two of section four hundred forty-seven-a of the social services law as an alternative to detention~~ **in accordance with section seven hundred thirty-nine of this article**.

<< Repealed: NY FAM CT § 727 >>

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§ 4. Section 727 of the family court act is REPEALED.

§ 5. The section heading and subdivision (d) of section 728 of the family court act, subdivision (d) as added by chapter 145 of the laws of 2000, paragraph (i) as added and paragraph (ii) of subdivision (d) as renumbered by section 5 of part E of chapter 57 of the laws of 2005, and paragraph (iii) as amended and paragraph (iv) of subdivision (d) as added by section 10 of subpart B of part Q of chapter 58 of the laws of 2011, are amended to read as follows:

<< NY FAM CT § 728 >>

**Discharge, release or ~~detention~~ pre-dispositional placement by judge after hearing and before filing of petition in custody cases**

(d) Upon a finding of facts and reasons which support a ~~detention~~ **pre-dispositional placement** order pursuant to this section, the court shall also determine and state in any order directing ~~detention~~ **pre-dispositional placement**:

(i) that there is no substantial likelihood that the youth and his or her family will continue to benefit from diversion services and that all available alternatives to ~~detention~~ **such placement** have been exhausted; and

(ii) whether continuation of the child in the child's home would be contrary to the best interests of the child based upon, and limited to, the facts and circumstances available to the court at the time of the hearing held in accordance with this section; and

(iii) where appropriate, whether reasonable efforts were made prior to the date of the court hearing that resulted in the detention order, to prevent or eliminate the need for removal of the child from his or her home or, if the child had been removed from his or her home prior to the court appearance pursuant to this section, where appropriate, whether reasonable efforts were made to make it possible for the child to safely return home; and

(iv) whether the setting of the ~~detention~~ **pre-dispositional placement** takes into account the proximity to the community in which the person alleged to be or adjudicated as a person in need of supervision lives with such person's parents or to which such person will be discharged, and the existing educational setting of such person and the proximity of such setting to the location of the detention setting.

<< Repealed: NY FAM CT § 729 >>

§ 6. Section 729 of the family court act is REPEALED.

§ 7. Subdivisions (a) and (b) of section 735 of the family court act, subdivision (a) as added by section 7 of part E of chapter 57 of the laws of 2005, subdivision (b) as amended by chapter 38 of the laws of 2014, are amended to read as follows:

<< NY FAM CT § 735 >>

(a) Each county and any city having a population of one million or more shall offer diversion services as defined in section seven hundred twelve of this article to youth who are at risk of being the subject of a person in need of supervision petition. Such services shall be designed to provide an immediate response to families in crisis, to identify and utilize appropriate alternatives to ~~detention~~ **placement** and to divert youth from being the subject of a petition in family court. Each county and such city shall designate either the local social services district or the probation department as lead agency for the purposes of providing diversion services.

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(b) The designated lead agency shall:

(i) confer with any person seeking to file a petition, the youth who may be a potential respondent, his or her family, and other interested persons, concerning the provision of diversion services before any petition may be filed; and

(ii) diligently attempt to prevent the filing of a petition under this article or, after the petition is filed, to prevent the placement of the youth into foster care; and

(iii) assess whether the youth would benefit from residential respite services; and

(iv) **assess whether the youth is a sexually exploited child as defined in section four hundred forty-seven-a of the social services law and, if so, whether such youth should be referred to a safe house in accordance with section seven hundred thirty-nine of this part; and**

**(v)** determine whether alternatives to ~~detention~~ **placement or services provided pursuant to this section** are appropriate to avoid remand of the youth to ~~detention~~ **such placement**; and

~~(v)~~ **(vi)** determine whether an assessment of the youth for substance use disorder by an office of alcoholism and substance abuse services certified provider is necessary when a person seeking to file a petition alleges in such petition that the youth is suffering from a substance use disorder which could make the youth a danger to himself or herself or others. Provided, however, that notwithstanding any other provision of law to the contrary, the designated lead agency shall not be required to pay for all or any portion of the costs of such assessment or for any substance use disorder or detoxification services, except in cases where medical assistance for needy persons may be used to pay for all or any portion of the costs of such assessment or services. The office of alcoholism and substance abuse services shall make a list of its certified providers available to the designated lead agency.

§ 8. Section 739 of the family court act, as amended by chapter 920 of the laws of 1982, subdivision (a) as amended by section 10 of part G of chapter 58 of the laws of 2010, subdivision (c) as added by chapter 145 of the laws of 2000, is amended to read as follows:

<< NY FAM CT § 739 >>

**§ 739. Release, pre-dispositional placement or ~~detention~~ referral after filing of petition and prior to order of disposition**

(a) After the filing of a petition under section seven hundred thirty-two of this part, the court in its discretion may release the respondent or direct his or her ~~detention~~ **pre-dispositional placement**. If the respondent may be a sexually exploited child as defined in subdivision one of section four hundred forty-seven-a of the social services law, the court may direct the respondent to an available short-term safe house as an alternative to ~~detention~~ **placement**. However, the court shall not direct ~~detention~~ **pre-dispositional placement** unless it finds and states the facts and reasons for so finding that unless the respondent is ~~detained~~ **placed** there is a substantial probability that the respondent will not appear in court on the return date and all available alternatives to ~~detention~~ **such placement** have been exhausted.

(b) Unless the respondent waives a determination that probable cause exists to believe that he is a person in need of supervision, no ~~detention~~ **pre-dispositional placement** under this section may last more than three days (i) unless the court finds, pursuant to the evidentiary standards applicable to a hearing on a felony complaint in a criminal court, that such probable cause exists, or (ii) unless special circumstances exist, in which cases such detention may be extended not more than an additional three days exclusive of Saturdays, Sundays and public holidays.

(c) Upon a finding of facts and reasons which support a detention order pursuant to subdivision (a) of this section, the court shall also determine and state in any order directing detention:

(i) whether continuation of the respondent in the respondent's home would be contrary to the best interests of the respondent based upon, and limited to, the facts and circumstance available to the court at the time of the court's determination in accordance with this section; and

(ii) where appropriate, whether reasonable efforts were made prior to the date of the court order directing ~~detention~~ **pre-dispositional placement** in accordance with this section, to prevent or eliminate the need for removal of the respondent from his or her home or, if the respondent had been removed from his or her home prior to the court appearance pursuant to this section, where appropriate, whether reasonable efforts were made to make it possible for the respondent to safely return home.

§ 9. Intentionally omitted.

§ 10. Section 747 of the family court act, as amended by chapter 920 of the laws of 1982, is amended to read as follows:

<< NY FAM CT § 747 >>

**§ 747. Time of fact-finding hearing**

A fact-finding hearing shall commence not more than three days after the filing of a petition under this article if the respondent is in ~~detention~~ **pre-dispositional placement**.

§ 11. Subdivision (a) of section 748 of the family court act, as amended by chapter 920 of the laws of 1982, is amended to read as follows:

<< NY FAM CT § 748 >>

(a) If the respondent is in ~~detention~~ **pre-dispositional placement**, the court may adjourn a fact-finding hearing

(i) on its own motion or on motion of the petitioner for good cause shown for not more than three days;

(ii) on motion on behalf of the respondent or by his **or her** parent or other person legally responsible for his **or her** care for good cause shown, for a reasonable period of time.

§ 12. Subdivision (b) of section 749 of the family court act, as amended by chapter 806 of the laws of 1973, is amended to read as follows:

<< NY FAM CT § 749 >>

(b) On its own motion, the court may adjourn the proceedings on conclusion of a fact-finding hearing or during a dispositional hearing to enable it to make inquiry into the surroundings, conditions and capacities of the respondent. An adjournment on the court's motion may not be for a period of more than ten days if the respondent is ~~detained~~ **in pre-dispositional placement**, in which case not more than a total of two such adjournments may be granted in the absence of special circumstances. If the respondent is not ~~detained~~ **in pre-dispostional placement**, an adjournment may be for a reasonable time, but the total number of adjourned days may not exceed two months.

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§ 13. Paragraph (a) of subdivision 2 of section 754 of the family court act, as amended by chapter 7 of the laws of 1999, subparagraph (ii) of paragraph (a) as amended by section 20 of part L of chapter 56 of the laws of 2015, is amended to read as follows:

<< NY FAM CT § 754 >>

(a) The order shall state the court's reasons for the particular disposition. If the court places the child in accordance with section seven hundred fifty-six of this part, the court in its order shall determine: (i) whether continuation in the child's home would be contrary to the best interest of the child and where appropriate, that reasonable efforts were made prior to the date of the dispositional hearing held pursuant to this article to prevent or eliminate the need for removal of the child from his or her home and, if the child was removed from his or her home prior to the date of such hearing, that such removal was in the child's best interest and, where appropriate, reasonable efforts were made to make it possible for the child to return safely home. If the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that the lack of such efforts was appropriate under the circumstances, the court order shall include such a finding; and (ii) in the case of a child who has attained the age of fourteen, the services needed, if any, to assist the child to make the transition from foster care to independent living. Nothing in this subdivision shall be construed to modify the standards for directing ~~detention~~ **pre-dispositional placement** set forth in section seven hundred thirty-nine of this article.

§ 14. Section 756 of the family court act, as amended by chapter 920 of the laws of 1982, paragraph (i) of subdivision (a) as amended by chapter 309 of the laws of 1996, the opening paragraph of paragraph (ii) of subdivision (a) as amended by section 11 of part G of chapter 58 of the laws of 2010, subdivision (b) as amended by chapter 7 of the laws of 1999, and subdivision (c) as amended by section 10 of part E of chapter 57 of the laws of 2005, is amended to read as follows:

<< NY FAM CT § 756 >>

**§ 756. Placement**

(a)~~(i)~~ For purposes of section seven hundred fifty-four, the court may**: (i)** place the child in its own home ~~or~~**; (ii) order the child be placed** in the custody of a suitable relative or other suitable private person**;** or **(iii) order the child be placed in the custody of** a commissioner of social services~~, subject to the orders of the court~~.

~~(ii)~~ **(b)** Where the child is placed with the commissioner of the local social services district~~,~~**: (i) (A) the child may be placed by the social services district into a foster boarding home; or (B) if the court finds that the respondent is a sexually exploited child as defined in subdivision one of section four hundred forty-seven-a of the social services law, an available long-term safe house; or (ii)** the court may direct the commissioner to: place the child with an authorized agency or class of authorized agencies~~, including, if the court finds that the respondent is a sexually exploited child as defined in subdivision one of section four hundred forty-seven-a of the social services law, an available long-term safe house~~.

**(c) Provided, however, that a placement shall not be ordered pursuant to paragraph (iii) of subdivision (a) of this section:**

**(i) In instances where the only finding made against the respondent is that they meet the definition of a person in need of supervision pursuant to paragraph (i) of subdivision (a) of section seven hundred twelve of this article; or**

**(ii) Unless the court finds and states in its written order that the placement of the respondent is:**

**(1) in the best interest of the respondent; and**

**(2) that it would be contrary to the welfare of the respondent to continue in their own home.**

**(d)** Unless the dispositional order provides otherwise, the court so directing shall include one of the following alternatives to apply in the event that the commissioner is unable to so place the child:

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~~(1)~~ **(i)** the commissioner shall apply to the court for an order to stay, modify, set aside, or vacate such directive pursuant to the provisions of section seven hundred sixty-two or seven hundred sixty-three; or

~~(2)~~ **(ii)** the commissioner shall return the child to the family court for a new dispositional hearing and order.

~~(b)~~ **(e)** Placements under **paragraph (iii) of subdivision (a) of** this section may be for an initial period of ~~twelve months~~ **no greater than sixty days**. The court may extend a placement pursuant to section seven hundred fifty-six-a. In its discretion, the court may recommend restitution or require services for public good pursuant to section seven hundred fifty-eight-a in conjunction with an order of placement. ~~For the purposes of calculating the initial period of placement, such placement shall be deemed to have commenced sixty days after the date the child was removed from his or her home in accordance with the provisions of this article. If the respondent has been in detention pending disposition, the initial period of placement ordered under this section shall be credited with and diminished by the amount of time spent by the respondent in detention prior to the commencement of the placement unless the court finds that all or part of such credit would not serve the best interests of the respondent.~~

~~(c) A placement pursuant to this section with the commissioner of social services shall not be directed in any detention facility, but the court may direct detention pending transfer to a placement authorized and ordered under this section for no more than than fifteen days after such order of placement is made. Such direction shall be subject to extension pursuant to subdivision three of section three hundred ninety-eight of the social services law, upon written documentation to the office of children and family services that the youth is in need of specialized treatment or placement and the diligent efforts by the commissioner of social services to locate an appropriate placement.~~

§ 14–a. Section 756–a of the family court act, as added by chapter 604 of the laws of 1986, subdivision (a) as amended by chapter 309 of the laws of 1996, subdivisions (b) and (d) as amended by section 4 of part B of chapter 327 of the laws of 2007, subdivisions (c) and (e) as amended by chapter 7 of the laws of 1999, paragraph (ii) of subdivision (d) as amended by section 3 of part M of chapter 54 of the laws of 2016, paragraphs (iii), (iv) and (v) of subdivision (d) as amended by section 23 and subdivision (d–1) as amended by section 24 of part L of chapter 56 of the laws of 2015, is amended to read as follows:

<< NY FAM CT § 756–a >>

**§ 756–a. Extension of placement**

(a) In any case in which the child has been placed pursuant to **paragraph (iii) of paragraph (a) of** section seven hundred fifty-six **of this part**, the child, the person with whom the child has been placed or the commissioner of social services may petition the court to extend such placement**, as provided for in this section**. Such petition shall be filed at least ~~sixty~~ **fifteen days prior to the expiration of the initial placement and at least thirty** days prior to the expiration of the period of **any additional** placement **authorized pursuant to this section**, except for good cause shown, but in no event shall such petition be filed after the original expiration date.

(b) The court shall conduct a permanency hearing concerning the need for continuing the placement. The child, the person with whom the child has been placed and the commissioner of social services shall be notified of such hearing and shall have the right to be heard thereat.

(c) The provisions of section seven hundred forty-five shall apply at such permanency hearing. If the petition is filed within ~~sixty~~ **thirty** days prior to the expiration of the period of placement, the court shall first determine at such permanency hearing whether good cause has been shown. If good cause is not shown, the court shall dismiss the petition.

(d)**(i)** At the conclusion of the **first** permanency hearing the court may, in its discretion, order ~~an~~ **one** extension of the placement for not more than ~~one year. The~~ **six months;**

**(ii) At the conclusion of the second permanency hearing, the court may, in its discretion, order one extension of**

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**placement for not more than four months unless:**

**(A) The attorney for the child, at the request of the child, seeks an additional length of stay for the child in such program. If a request is made pursuant to this subparagraph, the court shall determine whether to grant such request based on the best interest of the child; or**

**(B) The court finds that extenuating circumstances exists that necessitate the child be placed out of the home.**

**(d–1) If the court orders an extension of placement pursuant to paragraph (d) of this section, the** court must consider and determine in its order:

(i) where appropriate, that reasonable efforts were made to make it possible for the child to safely return to his or her home, or if the permanency plan for the child is adoption, guardianship or some other permanent living arrangement other than reunification with the parent or parents of the child, reasonable efforts are being made to make and finalize such alternate permanent placement including consideration of appropriate in-state and out-of-state placements;

(ii) in the case of a child who has attained the age of fourteen, (A) the services needed, if any, to assist the child to make the transition from foster care to successful adulthood; and (B)(1) that the permanency plan developed for the child, and any revision or addition to the plan shall be developed in consultation with the child and, at the option of the child, with up to two additional members of the child's permanency planning team who are selected by the child and who are not a foster parent of, or case worker, case planner or case manager for, the child, except that the local commissioner of social services with custody of the child may reject an individual so selected by the child if such commissioner has good cause to believe that the individual would not act in the best interests of the child, and (2) that one individual so selected by the child may be designated to be the child's advisor and, as necessary, advocate with respect to the application of the reasonable and prudent parent standard;

(iii) in the case of a child placed outside New York state, whether the out-of-state placement continues to be appropriate and in the best interests of the child;

(iv) whether and when the child: (A) will be returned to the parent; (B) should be placed for adoption with the social services official filing a petition for termination of parental rights; (C) should be referred for legal guardianship; (D) should be placed permanently with a fit and willing relative; or (E) should be placed in another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource for the child if the child is age sixteen or older and (1) the social services official has documented to the court: (I) intensive, ongoing, and, as of the date of the hearing, unsuccessful efforts made by the social services district to return the child home or secure a placement for the child with a fit and willing relative including adult siblings, a legal guardian, or an adoptive parent, including through efforts that utilize search technology including social media to find biological family members for children, (II) the steps the social services district is taking to ensure that (A) the child's foster family home or child care facility is following the reasonable and prudent parent standard in accordance with guidance provided by the United States department of health and human services, and (B) the child has regular, ongoing opportunities to engage in age or developmentally appropriate activities including by consulting with the child in an age-appropriate manner about the opportunities of the child to participate in activities; and (2) the social services district has documented to the court and the court has determined that there are compelling reasons for determining that it continues to not be in the best interest of the child to return home, be referred for termination of parental rights and placed for adoption, placed with a fit and willing relative, or placed with a legal guardian; and (3) the court has made a determination explaining why, as of the date of the hearing, another planned living arrangement with a significant connection to an adult willing to be a permanency resource for the child is the best permanency plan for the child; and

(v) where the child will not be returned home, consideration of appropriate in-state and out-of-state placements.

~~(d–1)~~ **(e)** At the permanency hearing, the court shall consult with the respondent in an ageappropriate manner regarding the permanency plan; provided, however, that if the respondent is age sixteen or older and the requested permanency plan for the respondent is placement in another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource for the respondent, the court must ask the respondent about the desired permanency outcome for the respondent.

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~~(e)~~ **(f)** Pending final determination of a petition to extend such placement filed in accordance with the provisions of this section, the court may, on its own motion or at the request of the petitioner or respondent, enter one or more temporary orders extending a period of placement ~~not to exceed thirty days upon satisfactory proof showing probable cause for continuing such placement and that each temporary order is necessary~~. The court may order additional temporary extensions~~, not to exceed a total of fifteen days, if the court is unable to conclude the hearing within the thirty day temporary extension period. In no event shall the aggregate number of days in extensions granted or ordered under this subdivision total more than forty-five days. The petition shall be dismissed if a decision is not rendered within the period of placement or any temporary extension thereof. Notwithstanding any provision of law to the contrary, the initial permanency hearing shall be held within twelve months of the date the child was placed into care pursuant to section seven hundred fifty-six of this article and no later than every twelve months thereafter. For the purposes of this section, the date the child was placed into care shall be sixty days after the child was removed from his or her home in accordance with the provisions of this section~~ **only as authorized in this section**.

~~(f)~~ **(g)** Successive extensions of placement under this section may be granted, ~~but~~ **only as authorized in this section, provided, however** no placement may be made or continued beyond the child's eighteenth birth-day without his or her consent and in no event past his or her twenty-first birthday.

§ 15. Subdivisions 1 and 4 of section 758–a of the family court act, as amended by chapter 73 of the laws of 1979, subdivision 1 as amended by chapter 4 of the laws of 1987, paragraph (b) of subdivision 1 as amended by chapter 575 of the laws of 2007, and subdivision 4 as amended by chapter 73 of the laws of 1979, are amended to read as follows:

<< NY FAM CT § 758–a >>

1. In cases involving acts of ~~infants~~ **children** over ~~ten~~ **twelve** and less than ~~sixteen~~ **eighteen** years of age, the court may

(a) recommend as a condition of placement, or order as a condition of probation or suspended judgment, restitution in an amount representing a fair and reasonable cost to replace the property or repair the damage caused by the ~~infant~~ **child**, not, however, to exceed one thousand dollars. ~~In the case of a placement, the court may recommend that the infant pay out of his or her own funds or earnings the amount of replacement or damage, either in a lump sum or in periodic payments in amounts set by the agency with which he is placed, and in the case of probation or suspended judgment, the~~ **The** court may require that the ~~infant~~ **child** pay out of his or her own funds or earnings the amount of replacement or damage, either in a lump sum or in periodic payments in amounts set by the court; and/or

(b) order as a condition of placement, probation, or suspended judgment, services for the public good including in the case of a crime involving willful, malicious, or unlawful damage or destruction to real or personal property maintained as a cemetery plot, grave, burial place, or other place of interment of human remains, services for the maintenance and repair thereof, taking into consideration the age and physical condition of the ~~infant~~ **child**.

4. The court, upon receipt of the reports provided for in subdivision two ~~or three~~ of this section may, on its own motion or the motion of any party or the agency, hold a hearing to determine whether the placement should be altered or modified.

§ 16. Section 774 of the family court act is amended to read as follows:

<< NY FAM CT § 774 >>

**§ 774. Action on petition for transfer**

On receiving a petition under section seven hundred seventy-three **of this part**, the court may proceed under sections seven hundred thirty-seven, seven hundred thirty-eight or seven hundred thirty-nine **of this article** with respect to the issuance of a

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summons or warrant ~~and sections seven hundred twenty-seven and seven hundred twenty-nine govern questions of detention and failure to comply with a promise to appear~~. Due notice of the petition and a copy of the petition shall also be served personally or by mail upon the office of the locality chargeable for the support of the person involved and upon the person involved and his **or her** parents and other persons.

§ 17. Intentionally omitted.

§ 18. Intentionally omitted.

§ 18–a. Intentionally omitted.

Art. 6, Tit. 12, prec. 458–m

§ 18–b. Article 6 of the social services law is amended by adding a new title 12 to read as follows:

**TITLE 12**

**FAMILY SUPPORT SERVICES PROGRAMS**

**Section**
**458–m. Family support services programs.**
**458–n. Funding for family support services programs.**

<< NY FAM CT § 458–m >>

**§ 458–m. Family support services programs**

**1. As used in this title, the term "family support services programs" shall mean a program established pursuant to this title to provide community-based supportive services to children and families with the goal of preventing a child from being adjudicated a person in need of supervision and help prevent the out of home placements of such youth or preventing a petition from being filed under article seven of the family court act.**

**2. Family support services programs shall provide comprehensive services to such children and their families, either directly or through referrals with partner agencies, including, but not limited to:**

**(a) rapid family assessments and screenings;**

**(b) crisis intervention;**

**(c) family mediation and skills building;**

**(d) mental and behavioral health services including cognitive interventions;**

**(e) case management;**

**(f) respite services;**

**(g) education advocacy; and**

**(h) other family support services.**

**3. The services that are provided shall be trauma responsive, family focused, gender-responsive, and evidence based or informed and strengths based and shall be tailored to the individualized needs of the child and family based on the assessments and screenings conducted by such family support services program.**

**4. Family support services programs shall have the capacity to serve families outside of regular business hours including evenings and weekends.**

<< NY FAM CT § 458–n >>

**§ 458–n. Funding for family support services programs**

**1. Notwithstanding any other provision of law to the contrary, to the extent that funds are available for such purpose and specifically appropriated therefor, the office of children and family services shall distribute funding to the highest need municipality which shall mean a county or a city with a population of one million or more to contract with not-for-profit corporations to operate family support services programs in accordance with the provisions of this title and the specific program model requirements issued by the office.**

**2. Notwithstanding any other provision of law to the contrary, when determining the highest need municipality pursuant to this subdivision, the office may consider factors that may include, but are not necessarily limited to:**

**(a) the total amount of available funding and the amount of funding required for family support services programs to meet the objectives outlined in section four hundred fifty-eight-m of this title;**

**(b) relevant, available statistics regarding each municipality, a group of two or more municipalities that jointly seek to fund and administer a family support services program in accordance with subdivision four of this section which may include, but not necessarily be limited to:**

**(i) the availability of services within such municipality to prevent or reduce detention or residential placement of youth pursuant to article seven of the family court act; and**

**(ii) relative to the youth population of such municipality:**

**(1) the number of petitions filed pursuant to article seven of the family court act; or**

**(2) the number of placements of youth into residential care or detention pursuant to article seven of the family court act as applicable, over the last five years;**

**(c) any reported performance outcomes reported to the office pursuant to subdivision three of this section for programs that previously received funding pursuant to this title; or**

**(d) other appropriate factors as determined by the office.**

**3. Municipalities receiving funding under this title shall report to the office of children and family services, in the form and manner and at such times as determined by the office, on the performance outcomes of any family support service program located within such municipalities that receives funding under this title.**

**4. Two or more eligible municipalities within a close geographic within a close geographic proximity to each other may enter into an agreement to jointly seek funding for and jointly administer family support services programs to service eligible youth and families within such municipalities in accordance with this section. Such agreements shall**

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**include provisions for the proportionate cost to be borne by each municipality and for the manner of employment of personnel and may provide that a fiscal officer of one such municipality shall be the custodian of the moneys made available for expenditure for such purposes by all such municipalities and that such fiscal officer may make payments therefrom upon audit of the appropriate auditing body or officer of his or her municipality. In making claims for state aid pursuant to section, each such municipality shall claim for its proportionate share of the total joint expenditures so made. However, where it is provided that there shall be a disbursing municipality, such disbursing municipality shall claim for the total joint program expenditures so made and shall disburse such state aid to each participating municipality based upon the proportionate share of expenditures so made.**

**5. Notwithstanding the provisions of subdivisions two, three and four of this section, a municipality, consistent with its approved plan for supervision and treatment services for juveniles program, may utilize any funding available to such municipality pursuant to section five hundred twenty-nine-b of the executive law to fund family support services programs pursuant to this title.**

§ 19. Subdivision 3 of section 502 of the executive law, as amended by section 79 of part WWW of chapter 59 of the laws of 2017, is amended to read as follows:

<< NY EXEC § 502 >>

3. "Detention" means the temporary care and maintenance of youth held away from their homes pursuant to article three ~~or seven~~ of the family court act, or held pending a hearing for alleged violation of the conditions of release from an office of children and family services facility or authorized agency, or held pending a hearing for alleged violation of the condition of parole as a juvenile offender, youthful offender or adolescent offender or held pending return to a jurisdiction other than the one in which the youth is held, or held pursuant to a securing order of a criminal court if the youth named therein as principal is charged as a juvenile offender, youthful offender or adolescent offender or held pending a hearing on an extension of placement or held pending transfer to a facility upon commitment or placement by a court. Only alleged or convicted juvenile offenders, youthful offenders or adolescent offenders who have not attained their eighteenth or, commencing October first, two thousand eighteen, their twenty-first birthday shall be subject to detention in a detention facility. Commencing October first, two thousand eighteen, a youth who on or after such date committed an offense when the youth was sixteen years of age; or commencing October first, two thousand nineteen, a youth who committed an offense on or after such date when the youth was seventeen years of age held pursuant to a securing order of a criminal court if the youth is charged as an adolescent offender or held pending a hearing for alleged violation of the condition of parole as an adolescent offender, must be held in a specialized secure juvenile detention facility for older youth certified by the state office of children and family services in conjunction with the state commission of correction.

§ 20. Section 529–b of the executive law, as added by section 3 of subpart B of part Q of chapter 58 of the laws of 2011, subdivision 1, the opening paragraph of subdivision 2, subparagraphs (i) and (iii) of paragraph (a) of subdivision 3, as amended by section 99 of part WWW of chapter 59 of the laws of 2017, is amended to read as follows:

<< NY EXEC § 529–b >>

**§ 529–b. Supervision and treatment services for juveniles program**

1. (a) Notwithstanding any provision of law to the contrary, eligible expenditures by an eligible municipality for services to divert **from detention, residential placement or confinement, as applicable,** youth **who are: (i)** at risk of, alleged to be, or adjudicated as juvenile delinquents ~~or~~**; (ii) at risk of, or alleged to be or adjudicated as** persons ~~alleged or adjudicated to be~~ in need of supervision~~, or youth~~**; (iii)** alleged to be or convicted as juvenile offenders~~,~~**; (iv) alleged to be or convicted as** youthful offenders**;** or **(v) alleged to be or convicted as** adolescent offenders ~~from placement in detention or in residential care~~ shall be subject to state reimbursement under the supervision and treatment services for juveniles program for up to sixty-two percent of the municipality's expenditures, subject to available appropriations and exclusive of any federal funds

made available for such purposes, not to exceed the municipality's distribution under the supervision and treatment services for juveniles program.

(b) The state funds appropriated for the supervision and treatment services for juveniles program shall be distributed to eligible municipalities by the office of children and family services based on a plan developed by the office which may consider historical information regarding the number of youth seen at probation intake for an alleged act of delinquency, the number of youth remanded to detention, the number of juvenile delinquents placed with the office, the number of juvenile delinquents and persons in need of supervision placed in residential care with the municipality, the municipality's reduction in the use of detention and residential placements, and other factors as determined by the office. Such plan developed by the office shall be subject to the approval of the director of the budget. The office is authorized, in its discretion, to make advance distributions to a municipality in anticipation of state reimbursement.

2. As used in this section, the term**:**

**(a)** "municipality" shall mean a county, or a city having a population of one million or more~~,~~ and

**(b)** "supervision and treatment services for juveniles" shall mean community-based services or programs designed to safely maintain youth in the community pending a family court disposition or conviction in criminal court and services or programs provided to **eligible** youth ~~adjudicated as juvenile delinquents or persons in need of supervision, or youth alleged to be juvenile offenders, youthful offenders or adolescent offenders to prevent residential placement of such youth or a return to placement where such youth have been released to the community from residential placement~~ **pursuant to this section**.

**3.** Supervision and treatment services for juveniles may include but are not limited to services or programs that:

(a) provide or facilitate support to such youth for mental health disorders, substance abuse problems, or learning disabilities that contribute to such youth being at risk for detention, residential placement, **confinement** or return to detention or residential placement;

**(a–1) provide or facilitate support to youth who are eligible to receive services pursuant to subparagraph (ii) of paragraph (a) of subdivision one of this section, and their families, in family support services programs in accordance with title twelve of article six of the social services law;**

(b) provide temporary respite care**, including, but not limited to, respite provided pursuant to article seven of the family court act**;

(c) provide family therapy or support or explore alternate housing options for youth who are at risk for detention or placement due to the absence of an available home;

(d) provide post-release support within the youth's community**, including, but not limited to aftercare services**; or

(e) reduce arrest rates or recidivism.

~~3.~~ **3–a.** (a) The chief executive officer of the municipality shall designate a lead agency for the purposes of planning and administering the municipality's supervision and treatment services for juveniles program. In order for a municipality to be eligible to receive reimbursement pursuant to this section, such municipality must submit an annual plan to the office of children and family services detailing how the supervision and treatment services for juveniles will be provided within the municipality. **Two or more eligible municipalities within a close geographic proximity to each other may enter into an agreement to jointly seek funding for and jointly administer a supervision and treatment services for juveniles programs to service eligible youth and families within such municipalities in accordance with this section.** The municipality shall develop such plan in cooperation with the applicable local governmental departments responsible for probation, law enforcement, detention, diversion, and social services; and with the courts, service providers, schools and youth development programs. The plan must be approved by the chief executive officer of the municipality, and must include:

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(i) an analysis that identifies the neighborhoods or communities from which the greatest number of juvenile delinquents and persons in need of supervision are remanded to detention or residentially placed;

(ii) where the use of detention or residential placement in the municipality shows a significant racial or ethnic disproportionality, a description of how the services proposed for funding will address such disproportionality;

(iii) a description of how the services and programs proposed for funding will reduce the number of youth from the municipality who are detained and residentially or otherwise placed; how such services and programs are family-focused; and whether such services and programs are capable of being replicated across multiple sites;

(iv) a description of the demonstrated effectiveness of such services and programs or other justification why the services and programs are proposed for funding;

(v) projected performance outcomes for such services and programs, including an estimate of the anticipated reductions in detention utilization and residential placements, and other projected positive outcomes for youth who participate in the services and programs; and

(vi) for each year that the municipality submits a plan as required by this section, the municipality must provide the following information for the most recent preceding year for which such municipality received funding:

(A) the number of youth who participated in the services and programs funded pursuant to this section; and

(B) whether the services and programs achieved the projected reductions in detention utilization and residential placements and other performance outcomes.

(b) A municipality's plan shall be submitted to the office of children and family services for review and approval. The office may approve all or part of the plan based on the potential effectiveness of the plan.

(i) If the office does not approve a plan, the municipality shall have sixty days to submit an amended plan.

(ii) Upon approval of a plan, the office shall notify the municipality and post the approved plan on the office of children and family services website.

(c) ~~Any claims submitted by a municipality for reimbursement for a particular program year for which the municipality does not receive state reimbursement during the applicable program year may not be claimed against that municipality's distribution for any succeeding program year.~~ The office may require that such claims be submitted to the office electronically in the manner and format required by the office.

(d) Any municipality submitting claims for reimbursement shall certify to the office that supervision and treatment services for juveniles program funds were not used to supplant other state and local funds, and such claims for reimbursement are not for the same type and level of services that the municipality provided under any contract in existence on September thirtieth, two thousand ten that was funded other than through the office of children and family services as community optional preventive, alternatives to detention, alternatives to residential placement, preventive, independent living, or after care services.

4. Two or more eligible municipalities may join together to establish, operate and maintain supervision and treatment services for juveniles programs and may make and perform agreements in connection therewith. Such agreements shall include provisions for the proportionate cost to be borne by each municipality and for the manner of employment of personnel and may provide that a fiscal officer of one such municipality shall be the custodian of the moneys made available for expenditure for such purposes by all such municipalities and that such fiscal officer may make payments therefrom upon audit of the appropriate auditing body or officer of his municipality. In making claims for state reimbursement pursuant to this section, each municipality shall claim for its proportionate share of expenditures. However, where the agreement provides for a disbursing municipality, such disbursing municipality shall claim for the total joint program expenditures made and shall disburse the state reimbursement to each participating municipality based upon the proportionate share of each

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participating municipality's expenditures.

5. The office of children and family services shall report to the governor, the speaker of the assembly, the temporary president of the senate, the minority leader of the assembly and the minority leader of the senate no later than July first, two thousand twelve, and each year thereafter, detailing the implementation and progress of the supervision and treatment services for juveniles program, as established by this section. The report shall detail the following information for each municipality, as defined by this section:

(a) the amount of funds disbursed to date for the previous program year of the supervision and treatment services for juveniles program;

(b) the amount of juvenile detention funds distributed by such date in accordance with section five hundred thirty of this title for the previous program year and, if any, the amount of such funds used for supervision and treatment services for juveniles program;

(c) the number of alleged and adjudicated juvenile delinquents and persons in need of supervision and alleged and convicted juvenile offenders being served by such programs; and

(d) each program name and its provider.

§ 21. The opening paragraph and paragraph (a) of subdivision 2, subparagraphs 1 and 4 of paragraph (a) and paragraph (b) of subdivision 5, and subdivision 7 of section 530 of the executive law, the opening paragraph and paragraph (a) of subdivision 2 and subparagraphs 1 and 4 of paragraph (a) and paragraph (b) of subdivision 5 as amended by section 100 of part WWW of chapter 59 of the laws of 2017 and subdivision 7 as amended by section 6 of subpart B of part Q of chapter 58 of the laws of 2011, are amended to read as follows:

<< NY EXEC § 530 >>

Expenditures made by municipalities in providing care, maintenance and supervision to youth in detention facilities designated pursuant to ~~sections seven hundred twenty and~~ section 305.2 of the family court act and certified by office of children and family services, shall be subject to reimbursement by the state, as follows:

(a) Notwithstanding any provision of law to the contrary, eligible expenditures by a municipality during a particular program year for the care, maintenance and supervision ~~in foster care programs certified by the office of children and family services, certified or approved family boarding homes, and non-secure detention facilities certified by the office for those youth alleged to be persons in need of supervision or adjudicated persons in need of supervision held pending transfer to a facility upon placement; and~~ in secure and non-secure detention facilities certified by the office in accordance with section five hundred three of this article for those youth alleged to be juvenile delinquents; adjudicated juvenile delinquents held pending transfer to a facility upon placement, and juvenile delinquents held at the request of the office of children and family services pending extension of placement hearings or release revocation hearings or while awaiting disposition of such hearings; and youth alleged to be or convicted as juvenile offenders, youthful offenders and adolescent offenders **and prior to January first, two thousand twenty, youth alleged to be persons in need of supervision or adjudicated persons in need of supervision held pending transfer to a facility upon placement in foster care programs certified by the office of children and family services, certified or approved foster boarding homes and non-secure detention facilities certified by the office,** shall be subject to state reimbursement for up to fifty percent of the municipality's expenditures, exclusive of any federal funds made available for such purposes, not to exceed the municipality's distribution from funds that have been appropriated specifically therefor for that program year. Municipalities shall implement the use of detention risk assessment instruments in a manner prescribed by the office so as to inform detention decisions. Notwithstanding any other provision of state law to the contrary, data necessary for completion of a detention risk assessment instrument may be shared among law enforcement, probation, courts, detention administrators, detention providers, and the attorney for the child upon retention or appointment; solely for the purpose of accurate completion of such risk assessment instrument, and a copy of the completed detention risk assessment instrument shall be made available to the applicable detention provider, the attorney for the child

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and the court.

(1) temporary care, maintenance and supervision provided to alleged juvenile delinquents ~~and persons in need of supervision~~ in detention facilities certified pursuant to ~~sections seven hundred twenty and~~ **section** 305.2 of the family court act by the office of children and family services, pending adjudication of alleged delinquency ~~or alleged need of supervision~~ by the family court, or pending transfer to institutions to which committed or placed by such court or while awaiting disposition by such court after adjudication or held pursuant to a securing order of a criminal court if the person named therein as principal is under seventeen years of age; or

(4) **prior to January first, two thousand twenty** temporary care, maintenance and supervision provided youth detained in foster care facilities or certified or approved family boarding homes pursuant to article seven of the family court act.

(b) Payments made for reserved accommodations, whether or not in full time use, approved and certified by the office of children and family services and certified pursuant to ~~sections seven hundred twenty and~~ **section** 305.2 of the family court act, in order to assure that adequate accommodations will be available for the immediate reception and proper care therein of youth for which detention costs are reimbursable pursuant to paragraph (a) of this subdivision, shall be reimbursed as expenditures for care, maintenance and supervision under the provisions of this section, provided the office shall have given its prior approval for reserving such accommodations.

7. The agency administering detention for each county and the city of New York shall submit to the office of children and family services, at such times and in such form and manner and containing such information as required by the office of children and family services, an annual report on youth remanded pursuant to article three or seven of the family court act who are detained during each calendar year including, commencing January first, two thousand twelve, the risk level of each detained youth as assessed by a detention risk assessment instrument approved by the office of children and family services **provided, however, that the report due January first, two thousand twenty-one and thereafter shall not be required to contain any information on youth who are subject to article seven of the family court act**. The office may require that such data on detention use be submitted to the office electronically. Such report shall include, but not be limited to, the reason for the court's determination in accordance with section 320.5 or seven hundred thirty-nine of the family court act to detain the youth; the offense or offenses with which the youth is charged; and all other reasons why the youth remains detained. The office shall submit a compilation of all the separate reports to the governor and the legislature.

§ 22. Intentionally omitted.

§ 23. Severability. If any clause, sentence, paragraph, subdivision, section or part contained in any part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part contained in any part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

<< Note: NY FAM CT §§ 712, 720, 727, 728, 729, 735, 739, 747, 748, 749, 754, 756, 756–a, 758–a, 774 >>

<< Note: NY SOC SERV §§ 458–m, 458–n >>

<< Note: NY EXEC §§ 502, 529–b, 530 >>

§ 24. This act shall take effect January 1, 2020 and shall be deemed to be applicable to the pre-dispositional

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placement of youth pursuant to petitions filed pursuant to article seven of the family court act on or after such effective date.

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2021 Sess. Law News of N.Y. Ch. 97 (S. 2737) (McKINNEY'S)

McKINNEY'S 2021 SESSION LAW NEWS OF NEW YORK

244th LEGISLATURE

Additions are indicated by **Text**; deletions by
~~Text~~.
Vetoes are indicated by ~~Text~~;
stricken material by ~~**Text**~~.

# CHAPTER 97
# S. 2737

Approved and effective April 6, 2021

AN ACT to amend the family court act, in relation to eliminating the use of the term incorrigible

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions (a) and (c) of section 712 of the family court act, as amended by section 1 of part K of chapter 56 of the laws of 2019, are amended to read as follows:

<< NY FAM CT § 712 >>

(a) "Person in need of supervision". A person less than eighteen years of age: (i) who does not attend school in accordance with the provisions of part one of article sixty-five of the education law; (ii) who is ~~incorrigible,~~ ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care, or other lawful authority; (iii) who violates the provisions of: (1) section 221.05; or (2) 230.00 of the penal law; (iv) or who appears to be a sexually exploited child as defined in paragraph (a), (c) or (d) of subdivision one of section four hundred forty-seven-a of the social services law, but only if the child consents to the filing of a petition under this article.

(c) "Fact-finding hearing". A hearing to determine whether the respondent did the acts alleged to show that he or she violated a law or is ~~incorrigible,~~ ungovernable or habitually disobedient and beyond the control of his or her parents, guardian or legal custodian.

§ 2. Paragraph (i) of subdivision (a) of section 732 of the family court act, as amended by section 9 of part G of chapter 58 of the laws of 2010, is amended to read as follows:

<< NY FAM CT § 732 >>

(i) the respondent is an habitual truant or is ~~incorrigible,~~ ungovernable~~,~~ or habitually disobedient and beyond the lawful control of his or her parents, guardian or lawful custodian, or has been the victim of sexual exploitation as defined in subdivision one of section four hundred forty-seven-a of the social services law, and specifying the acts on which the

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allegations are based and the time and place they allegedly occurred. Where habitual truancy is alleged or the petitioner is a school district or local educational agency, the petition shall also include the steps taken by the responsible school district or local educational agency to improve the school attendance and/or conduct of the respondent;

§ 3. Section 773 of the family court act, as amended by chapter 920 of the laws of 1982, is amended to read as follows:

<< NY FAM CT § 773 >>

**§ 773. Petition for transfer ~~for incorrigibility~~**

Any institution, society or agency in which a person was placed under section seven hundred fifty-six **of this article** may petition to the court which made the order of placement for transfer of that person to a society or agency, governed or controlled by persons of the same religious faith or persuasion as that of the child, where practicable, or, if not practicable, to some other suitable institution, or to some other suitable institution on the ground that ~~such person~~

(a) ~~is incorrigible and that his or her~~ **the** presence **of such person** is seriously detrimental to the welfare of the applicant institution, society, agency or other persons in its care, or

(b) after placement by the court**, such person** was released on parole or probation from such institution, society or agency and a term or condition of the release was willfully violated. The petition shall be verified by an officer of the applicant institution, society or agency and shall specify the act or acts bringing the person within this section.

§ 4. Subdivision (h) of section 1012 of the family court act, as added by chapter 1015 of the laws of 1972, is amended to read as follows:

<< NY FAM CT § 1012 >>

(h) "Impairment of emotional health" and "impairment of mental or emotional condition" includes a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including ~~incorrigibility,~~ ungovernability or habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.

§ 5. This act shall take effect immediately.

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# 2021 JD/PINS Caselaw Year in Review

Kristin A. Gumaer, Esq.
Robert Fisher, Esq.

# Case Law and Statute Update – 2021

Robert J. Fisher, Esq.
Kristin A. Gumaer, Esq.
Ulster County Attorney's Office

# Statutes

<u>PINS Cause of Action Based on Marihuana Possession</u>:

Amended Family Court Act § 712(a) omits from the definition of "Person in need of supervision" a person who violates Penal Law § 221.05.

# Warrants: Post-Execution Court Appearance

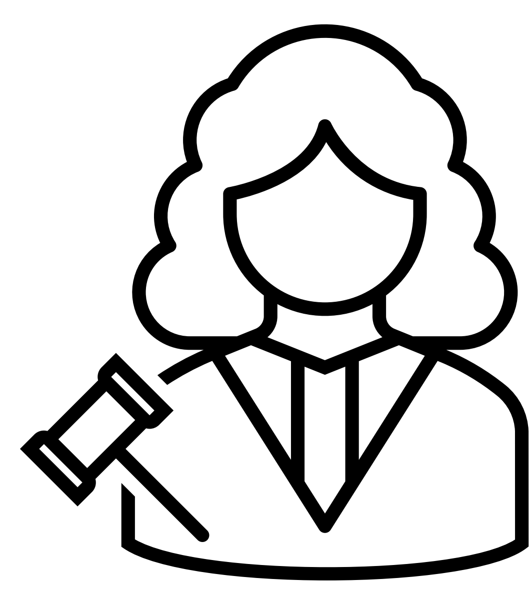
Chapter 456 of the Laws of 2021, which takes effect on December 7, 2021, adds new FCA § 312.2(3) which states:

A juvenile who is arrested pursuant to a warrant issued under this section must forthwith and with all reasonable speed be taken directly to the family court located in the county in which the warrant had been issued, or, when the family court is not in session, to the most accessible magistrate, if any, designated by the appellate division in the applicable department.

If a juvenile is brought before an accessible magistrate, the magistrate shall set a date for the juvenile to appear in the family court in the county in which the warrant had been issued, which shall be no later than the next day the court is in session if the magistrate orders the juvenile to be detained and within ten court days if the magistrate orders the juvenile to be released.

In determining whether the juvenile should be released, with or without conditions, or detained, the magistrate shall apply the criterion and issue the findings required by FCA § 320.5. The magistrate shall transmit its order to the family court forthwith.

The legislative memo note that a "[f]ailure to include a provision in the current statute directing juvenile delinquents returned on warrants to be brought before accessible magistrates when Family Courts are not in session violates the fundamental value of fairness permeating the RTA implementation efforts, i.e., that outcomes for the 16-year olds and 17-year olds who are prosecuted in Family Court should not be worse off after the effective date of the RTA statute than prior to its enactment. This measure is essential to remedy that failure. This measure, which would have no fiscal impact, would take effect 60 days after it becomes a law."



# Use of Restraints on Children in Courtrooms

Chapter 474 of the Laws of 2021, which took effect on October 8, 2021, adds new FCA § 162-a (Use of restraints on children in courtrooms), which states as follows:

(a) Use of restraints. Except as otherwise provided in subdivision (b), restraints on children under the age of twenty-one, including, but not limited to, handcuffs, chains, shackles, irons or straitjackets, are prohibited in the courtroom.

(b) Exception. Permissible physical restraint consisting of handcuffs or footcuffs that shall not be joined to each other may be used in the courtroom during a proceeding before the court only if the court determines on the record, after providing the child with an opportunity to be heard, why such restraint is the least restrictive alternative necessary to prevent:

(1) physical injury to the child or another person by the child;

(2) physically disruptive courtroom behavior by the child, as evidenced by a recent history of behavior that presented a substantial risk of physical harm to the child or another person, where such behavior indicates a substantial likelihood of current physically disruptive courtroom behavior by the child; or

(3) flight from the courtroom by the child, as evidenced by a recent history of absconding from the court.

The legislative memo notes that "The measure solely addresses courtroom appearances. A similar presumption currently applies to use of restraints during transportation of juveniles from New York State Office of Children and Family Services facilities pursuant to an injunction issued in the class action case of MATTER OF JOHN F. V. CARRION, -Misc.3d-, N.Y.L.J., Jan. 27, 2010 (S.Ct., N.Y.Co., 2010)."

## PINS/Abuse and Neglect: “Incorrigibility”

Chapter 97 of the Laws of 2021, which took effect on April 6, 2021, removes from Family Court Act Article Seven (§§ 712, 732, and 773), and Article Ten (§ 1012), references to youth being “incorrigible” and to “incorrigibility.”

The Legislative memo states:

The use of the word “incorrigible” in the context of family or children’s courts dates back to the first juvenile court in Chicago in the late 1800s. It was adopted in New York when the first children's courts were established in the early 20th century and has carried over in each iteration of our juvenile or family court system since that time. Primarily applied to girls and disproportionately to girls of color, the term - in practice - tends to single out girls of color for behaviors that do not match stereotypical feminine behavior.

“Incorrigible” is defined as a person who is “incapable of being corrected, not reformable” (Merriam-Webster) and, thus this term is completely out of line with the current understanding of the goals of our Family Court system.

The approach now in our Family Court system and more generally is to look for what is needed in order to help young people and to provide for the needs of children, a goal that is at odds with defining a young person as “incapable of being corrected.” Eliminating the use of this term would be a step forward for all young people, particularly for girls and girls of color who have disproportionately been the subject of this archaic and harmful label.

Racial justice and gender justice impact: This bill would have a positive impact on racial and gender justice in New York. The use of “incorrigibility” as a basis for Family Court intervention disparately impacts and harms girls and young women of color. Eliminating this term from the Family Court Act will send a positive message and will assist in the efforts to achieve full equality and empowerment for girls, young women, and people of color.

# Adolescent Offender/Youth Part cases

## Extraordinary Circumstances Standard –

People v. J.R. 70 Misc. 1224(A) (Nassau County) 3/1/21

People v. J.A.D. 70 Misc.3d 1222(A) (Nassau County) 3/1/21

*Gang members had loaded pistols, threw into dumpster and ran when police arrived*

*- No extraordinary circumstances, despite criminal history, prior removal of AO matter & prior JO conviction, and public safety concerns.*

*-Decision discusses use of term "extraordinary circumstances" by legislature and relies upon commonly understood meaning of the term*

People v. M.R. 72 Misc.3d 791 (Nassau County) 6/15/2021

*- Charge is Rape 3rd Degree, court notes that People do not allege that AO acted in any "highly unusual" or "heinous" way*

*- "loophole" disallowing filing in Family Court at age 18 does not meet definition of extraordinary circumstances*

People v. Y.R. 70 Misc.3d 1213(A), 137 N.Y.S.3d (Nassau County) 12/20/20

*- Elder Bail Scheme, girl worked with organization for months targeting older adults*

*-Court found no extraordinary circumstances, stating that while scheme was an aggravating factor and reprehensible, AO's role was minor compared to others*

*-Court also noted several mitigating factors, including AO's confirmed mental health diagnoses and institutionalizations*

# Adolescent Offender/Youth Part cases

## Juvenile Offender:

People v. E.S.B. 68 Misc3d 472 (Nassau County) 4/13/2020

*-Gang assault – group of Juvenile/Adolescent Offenders aided and abetted each other, attacking victim, causing him to sustain serious injuries, including by means of deadly weapons.*

*-Removal to Family Court would not be in the interests of justice, court confined to looking only at overall offense, rather than juvenile's specific actions*

# Adolescent Offender/Youth Part cases

## Significant Injury/Display of Firearm, shotgun, rifle or deadly weapon

People v. E.H. 71 Misc.3d 1222(A) Nassau County) 4/22/2021

*- AO, alleged gang member, drove stolen vehicle with other gang members, to location near woods where victim was shot and killed*

*-AO's actions rose to level of "causing" his death, which is a "significant physical injury"*

People v. V.A.M. 73 Misc.3d 293 (Nassau County) 8/2/2021

*-AO slashed/stabbed 15-yr-old girlfriend, who is mother of his baby, in presence of baby, and AO's 11 and 14-year old siblings*

*-Court found no significant physical injury where no evidence showing that victim required any after care, further treatment, or experienced any impairment past the date she was injured, despite needing stitches to control bleeding*

## CLE CODE WORD

# BEAR

# Assault

Matter of Minayla T. 197 AD.3d 1060 First Dept (2021)

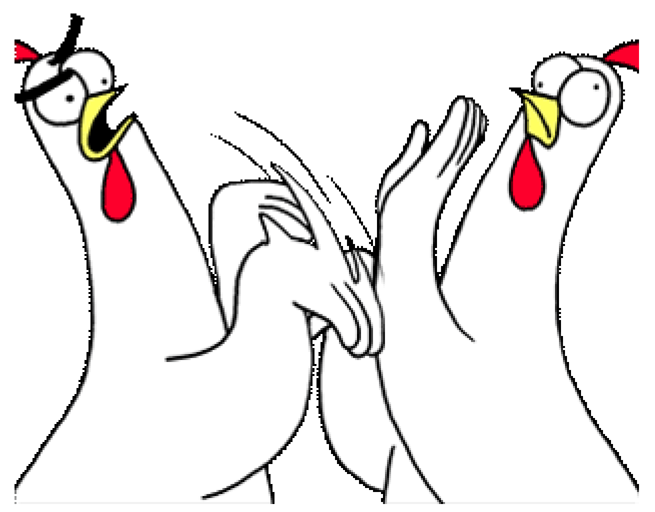
*- Throwing chair at victim allows inference of natural consequence that chair will injure victim*

Matter of Isaiah D. 72 Misc. 3d 1120 (New York County) 2021

*- JD slashed face of victim on street, leaving approximate 3-inch scar from top of forehead to eyebrow that was large prominent, puffy and dark 5 months later, constituting a serious physical injury*

*-"protracted disfigurement in the form of a long unsightly scar is the natural and probable consequence of slashing the victim across his upper face with a sharp object" – establishing intent*

**no collateral estoppel for 1st degree assault where matter is removed from youth part because no significant injury found**



People v. Moore 72 Misc.3d 134(A) SecondDept (2021)

*-Hair pulled out by follicles, causing substantial pain = injury*

# Robbery

People v. Kourouma 191 A.D.3d 542 (First Dept) 2021

*-Defendant's conduct in snatching purse dangling from the victim's arm did not involve physical force required to sustain a conviction of robbery*

# Witness Swearability

Matter of Alexander CC 191 A.D.3d 1113, Third Department February 18, 2021

*-8-year-old victim could testify as a sworn witness despite preliminary questioning indicating his lack of knowledge of an oath*

# Translation of Statements

People v. Slade, 37 N.Y.3d 127, Court of Appeals 2021

*-Hearsay defects were not evident on face of misdemeanor complaint accusing defendant of assault. Simple use of translator in creating document does not cause defect*

*-Hearsay defect not evident on face of complaint accusing defendant of DUI and traffic violations; certificate of translation need not be filed with complaint to make it facially sufficient*

*-Complaint accusing defendant of menacing did not contain hearsay where statement written in English was read in Spanish to defendant at time it was signed, and Officer filed affidavit that statement was accurate translation*

# Speedy Fact-Finding Hearing

Matter of Erika UU 192 A.D.3d 1367 (Third Department) March 18, 2021

*-Respondent waived right to speedy trial at first appearance on April 4, 2019, expressly to complete a diagnostic evaluation, which was cut short due to Respondent's alleged behavior, and she was sent to detention without going to court June 26, 2019. Fact-finding hearing should have commenced within three days, but instead was scheduled for August 15, 2019.*

*Appellate Court found that right to speedy fact-finding was violated.*

# Making a Terroristic Threat

Matter of Jaydin R. 190 A.D.3d 745 (Second Department) 2021

*-Respondent told another student in class during argument that he "[was] going to be 14 years old, chopped up in somebody's backyard, and he's going to get a white person to shoot up the school."*

*Statement made only to other student, and overheard by no one, shows no evidence of requisite intent to "intimidate … a civilian population…"*

*We need a better statute!*

# Voluntariness of Statement

Matter of Tyler L. 197 A.D.3d 645 (Second Department) 2021

*-Statement by Respondent to law enforcement was voluntary, where despite Miranda warnings not being signed, the evidence demonstrated that the interrogation occurred inside of a designated juvenile room after the appellant, in the presence of his grandfather, was given the proper Miranda warnings, and they both indicated on videotape that they understood those rights.*

# Potential New Statute

Discovery in Juvenile Proceedings

A – 4952

<u>PURPOSE OR GENERAL IDEA OF BILL</u>:

The purpose of this bill is to align discovery practices for juvenile delinquents with legislation recently enacted relating to discovery rights for adults charged in criminal court.

# Thank you! Drive safely.


Ulster County Attorney's Office

Clinton Johnson, Esq.

Ulster County Attorney

244 Fair Street

Kingston, New York 12401

70 Misc.3d 1222(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
This opinion is uncorrected and will not be
published in the printed Official Reports.
County Court, New York,
Nassau County.

The PEOPLE of the State of New York,
v.
J.A.D., Adolescent Offender.

XXX-00000-00
|
Decided on March 1, 2021

**Attorneys and Law Firms**

Hon. Madeline Singas, Nassau County District Attorney, Gregory Murphy, Esq., Robert Schalk, Esq., Attorney for the Adolescent Offender

**Opinion**

Conrad D. Singer, J.

***1** The following papers were read on this Motion:

The People's Notice of Motion Opposing Removal and Supporting Papers 1

The Adolescent Offender's Affirmation in Opposition to People's Motion Opposing Removal 2

The defendant in this matter, J.D. (D.O.B. 00/00/0000) is charged as an Adolescent Offender ("AO") in the Youth Part of the County Court in Nassau County. The People have moved, by Notice of Motion dated February 5, 2021, for an Order pursuant to CPL § 722.23(1) directing that this matter remain in and not be removed from the Youth Part to the Family Court in Nassau County due to the existence of "extraordinary circumstances". (CPL § 722.23[1][d]). The AO has filed opposition to the People's motion. The People did not file any Reply papers.

The People's Motion Opposing Removal is determined as follows:

The AO is charged, by way of a felony complaint, with one count of Criminal Possession of a Weapon in the Second Degree [Penal Law § 265.03(3)]. The charges filed against the AO arise from an incident alleged to have occurred on January 19, 2021 at approximately 2:48 PM at a location in H. Nassau County, New York. The AO was arraigned on the Felony Complaint on January 20, 2021, in the Youth Part of the County Court, Nassau County.

The Court conducted the statutory "sixth-day appearance" in this matter on January 26, 2021, at which time the People acknowledged that they could not meet their burden for the purpose of the "sixth-day appearance". They stated that they would be opposing removal of the AO's case by filing a motion pursuant to CPL § 722.23(1) based on the existence of "extraordinary circumstances". They thereafter filed their Motion Opposing Removal which is the subject of this Decision and Order.

The People's motion consists of an affirmation from Assistant District Attorney Gregory Murphy, Esq. (*Affirmation in Support of Motion Opposing Removal Pursuant to CPL § 722.23*, dated February 4, 2021 ["Murphy Aff. in Support"]). Attached to ADA Murphy's affirmation is a copy of the felony complaint in this matter, as well as a copy of a probation report from Probation Officer Y.F., dated January 26, 2021. (*Murphy Aff. in Support*, Exs. 1 and 2 thereto). ADA Murphy asserts that his supporting affirmation is based upon information and belief, the sources of said information and basis for said belief being his "conversations with witnesses, attorneys, and members of law enforcement, as well as [his] review of the files of the Office of the District Attorney pertaining to this matter and the defendant's prior criminal history". (*Murphy Aff. in Support*, ¶ 2).

The People summarize the allegations against the AO as follows:

> "it is alleged that on January 19, 2021, at approximately 2:48 PM, [the AO], adolescent offender/co-defendant J.R., and not charged other C.N., all of whom are known by law enforcement to be ICG Crip gang members, were walking through the streets of H. During this time both [the AO] and codefendant R. were each carrying their own loaded pistols. When they saw police surveilling and moving towards them, they approached a nearby dumpster and left the loaded firearms abandoned in the dumpster as they attempted to flee". (*Murphy Aff. in Support*, ¶ 3 and Ex. 1 thereto).

***2** The People contend that there are "extraordinary circumstances" which warrant retaining this case in the Youth

Part. First, the People contend that retention of this case in the Youth Part is warranted due to the seriousness of the charge filed against the AO: one count of Criminal Possession of a Weapon in the Second Degree, a C violent felony offense. (*Murphy Aff. in Support*, ¶ 6[a]).

Second, the People contend that retention is warranted due to the AO's criminal history and character. (*Murphy Aff. in Support*, ¶ 6[b]).They contend that the AO is known by law enforcement to be an ICG Crip gang member, and that he was last before this Court on July 11, 2019, under docket number FYC 00000-00, facing one count of Criminal Possession of a Weapon in the Second Degree [Penal Law § 265.03(3)], as well as multiple other possession-related charges. (*Murphy Aff. in Support*, ¶ 6[b]). The People contend that the AO's prior Youth Part case was removed to the Family Court "with the hope that the defendant would take advantage of the available resources and grow into a rehabilitated and productive member of society". (*Murphy Aff. in Support*, ¶ 6[b]). They contend that, "[a]t the time of the commission of the instant offense, the defendant was on aftercare with the Office of Children and Family Services ["OCFS"], following his release from OCFS". (*Murphy Aff. in Support*, ¶ 6[b] and Ex. 2 thereto).

Third, they contend that retention of this case is warranted due to "[t]he impact of removal on the safety and welfare of the community, as well as public confidence in the criminal justice system". (*Murphy Aff. in Support*, ¶ 6[c]). They assert that this AO presents as a serious risk to the safety and welfare of the community and that removal of his case to the Family Court is likely to undermine the public's confidence in the criminal justice system. (*Murphy Aff. in Support*, ¶ 6[c]).

The AO's opposition to the People's Motion Opposing Removal consists of an affirmation from his counsel, with a copy of the crime report from the alleged incident attached thereto. (*Affirmation in Opposition to People's Motion Opposing Removal by Robert Schalk*, *Esq.*, dated February 9, 2021 ["Schalk Aff. in Opp."]). Defense counsel asserts that the portions of his affirmation that are based upon information and belief are premised upon conversations had with the defendant, the prosecution and various caretakers of the defendant, the papers filed in connection with these proceedings, family court records, probation records and independent case investigation. (*Schalk Aff. in Opp.*, ¶ 2).

Defense counsel argues that that the AO's case should be removed because the People's argument opposing removal is premised, first, on the AO's prior contacts with the Family Court and second, on the AO's alleged underlying conduct in this case, neither of which constitutes "extraordinary circumstances" warranting retention of this case in the Youth Part. (*Schalk Aff. in Opp.*, § I). Defense counsel further contends that the People's use of the AO's prior family court records violates FCA § 381.2, which specifically prohibits the use of prior delinquency records in other courts. (*Schalk Aff. in Opp.*, § I[i]). Defense counsel argues that "[t]he Court must disregard the prosecution's entire claim that [the AO's] prior family court delinquency history may serve as an appropriate basis to allege extraordinary circumstances pursuant to CPL § 722.23. (*Schalk Aff. in Opp.*, § I[i]).

***3** Defense counsel further argues that the People have offered no proof that there is no possible benefit to the AO having his case heard in the Family Court, and that the People have failed to offer sufficient proof that he is not amenable to Family Court services. (*Schalk Aff. in Opp.*, § I[ii]). Defense counsel argues that, while not having contact with the criminal justice system again "is certainly a benefit" of family court services, "it is not the sole benefit that [the AO] could receive from successful family court intervention". (*Schalk Aff. in Opp.*, § I[ii]).

Defense counsel contends that a "whole host of mitigating circumstances" surround the AO and his background, in that he has been diagnosed with Attention Deficit Disorder and has been recommended for substance abuse treatment. (*Schalk Aff. in Opp.*, § I[ii]). Defense counsel also disputes the People's contention that the case must be retained in the Youth Part due to the "serious nature of the allegations" against the AO and argues that, if it had been the legislature's intention that a charge of Criminal Possession of a Weapon in the Second Degree would preclude removal of a case to the Family Court, then same would have been explicitly enumerated. (*Schalk Aff. in Opp.*, § I[iii]). Counsel also disputes the assertion that there is anything "extraordinary" about the underlying allegations in this case. Counsel calls into question the manner in which the allegations against the AO are portrayed and cites to the crime report from the alleged incident as providing a different version of the allegations against the AO. (*Schalk Aff. in Opp.*, § I[iii], and Ex. A thereto).

***FACTUAL ALLEGATIONS***

*Based on the allegations in the felony complaint and in ADA Murphy's affirmation in support of the People's Motion Opposing Removal, it is alleged that on or about January 19, 2021, at approximately 2:48 PM, the AO, his co-defendant/ AO J.R., and not charged other C.N. were walking through the streets of H. Nassau County, New York. During this time both the AO and his codefendant/AO J.R. were allegedly each carrying their own loaded pistols. When they saw police surveilling and moving towards them, they allegedly approached a nearby dumpster and left the loaded firearms abandoned in the dumpster as they attempted to flee. The Felony Complaint alleges that the AO was observed dropping an "unknown object" into the dumpster which was located at the rear of 00 J. St. in H. Nassau County, New York. Law enforcement responded to that location after the AO was detained and they allegedly discovered a loaded silver 380 Beretta Gardone Pistol with the serial number X000000 inside of the dumpster.*

***CONCLUSIONS OF LAW***

The People's Motion Opposing Removal is filed pursuant to CPL § 722.23[1], which provides, in pertinent part, that within thirty calendar days of an AO's arraignment, the court *shall* order the removal of the action to the family court "unless the district attorney makes a motion to prevent removal" [CPL § 722.23(1)] and the court determines "upon such motion by the district attorney that extraordinary circumstances exist that should prevent the transfer of the action to the family court". (CPL § 722.23[1(d)]. CPL § 722.23(1) expresses an apparent presumption in favor of removing a case from the Youth Part to the Family Court. (CPL § 722.23[1][d] ["The court *shall* deny the motion to prevent removal"]; William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, 2018 Electronic Update, CPL§ 722.10).

The term "extraordinary circumstances" is not defined under CPL § 722.23. Accordingly, this Court's "primary consideration is to ascertain and give effect to the intention of the Legislature". (*People v. Thomas*, 33 NY3d 1, *5 [2019]; *People v. Roberts*, 31 NY3d 406, 418 [2018]). "Because 'the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof' ". (*People v. Thomas*, 33 NY3d at *5-6; *People v. Roberts*, 31 NY3d at 418).

***4** In doing so, the dictionary definition of "extraordinary" is a "useful guidepost" in determining the "ordinary" and "commonly understood" meaning of "extraordinary circumstances". (*People v. Andujar*, 30 NY3d 160, 163 [2017]; *People v. Ocasio*, 28 NY3d 178, 181 [2016]). The Court has referenced multiple dictionaries for the "ordinary and commonly understood" meaning of the phrase "extraordinary circumstances" [1], and finds that the People's Motion Opposing Removal must be denied unless the People prove the existence of a set of "exceptional" and "highly unusual" facts which warrant retaining the AO's case in the Youth Part. (*See* CPL § 722.23[1][d]).

Additionally, the Court has reviewed the legislative history of the RTA legislation as a further aid in statutory interpretation [2], and finds that it supports an interpretation of "extraordinary circumstances" as being a set of facts that are "highly unusual" and "exceptional". In a legislative debate held in April of 2017 before the RTA legislation was enacted into law, legislators extensively discussed the intended meaning of the "extraordinary circumstances" standard. (*Assembly, Record of Proceedings*, April 8, 2017 ["Assembly Record"], p. 37). Many of the legislators who developed and promoted the RTA bill wanted all cases involving sixteen and seventeen-year-old's to be filed and heard exclusively in the Family Court. The mechanism through which felony cases would start in the Youth Part, subject to removal to Family Court, was part of a compromise to reach agreement on the legislation. (*Assembly Record*, p. 37).

Legislators declined to provide specific instances where the Court should find that "extraordinary circumstances" exist. (*Assembly Record*, p. 39). Instead, they indicated that Judges "must look at all the circumstances of the case, as well as the circumstances of the young person", and that they should consider both "aggravating factors" and "mitigating circumstances" to determine if the People had established extraordinary circumstances. (*Assembly Record*, pp. 39-40). The Court must deny the People's motion unless the People prove the existence of facts that are sufficiently exceptional and unusual to overcome the "presumption where only one out of 1,000 cases" remains in the Youth Part and is not removed to the Family Court. (*Assembly Record*, pp. 37-38).

In this case, after reviewing the People's motion papers opposing removal, and considering defense counsel's arguments in opposition thereto, the Court finds that the People have failed to satisfy the "high standard" embodied in the "extraordinary circumstances" test set forth in CPL § 722.23. Although the Criminal Possession of a Weapon

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charge against the AO is a serious charge, the Family Court is indisputably capable of presiding over cases involving charges that are equally or more serious. Additionally, while the Family Court provides youths with comprehensive rehabilitative services, Family Court Judges can also impose strong and serious sanctions where they deem appropriate.

***5** Furthermore, considering that Legislators intended that the People would face a "very high bar"[3] to prevent a case from being removed, the Court finds that the People's motion papers are insufficient to establish that "extraordinary circumstances" exist in this case. Having reviewed the People's discussion of the allegations underlying this specific incident, which they failed to support with any affidavit(s) from individual(s) with personal knowledge of the circumstances of this case[4], and which they failed to support with any evidence outside of the Felony Complaint which itself consists of vague, hearsay-based allegations as to this AO's actions, the Court finds that the People have failed to establish that the AO's conduct in this case was "cruel and heinous"[5] or otherwise warrants retaining the case in the Youth Part.

The People also oppose removal of the AO's case due to his prior contact with the Criminal Justice system. However, FCA § 381.2 requires the Court to reject those of the People's arguments which rely upon his Family Court history, including their reference to his being on OCFS aftercare following placement as an adjudicated juvenile delinquent. (*Murphy Aff. in Support*, Ex. 2 thereto). FCA § 381.2 expressly prohibits the use of an AO's juvenile delinquency history and records, including any past adjudications, past admissions, and statements to the court, against him or his interests in any other court. (FCA § 381.2[1]; *see also*, *Green v. Montgomery*, 95 NY2d 693, 697 [2001] ["As a rule, a juvenile delinquency adjudication cannot be used against the juvenile in any other court for any other purpose"; *see also* *People v. Campbell*, 98 AD3d 5, 12 [2d Dept 2012], *leave to appeal denied*, 20 NY3d 853 [2012]; *People v. Francis*, 137 AD3d 91, 95 [2d Dept 2016]). As the Second Department has observed, the statutory language in FCA § 381.2[1] is "unambiguous and makes clear 'that the Legislature has sought to protect young persons who have violated the criminal statutes of this State from acquiring the stigma that accompanies a criminal conviction' ". (*Campbell*, 98 AD3d at 10). Under these circumstances, the Court is constrained to disregard those of the People's arguments which are based on his Family Court history as a respondent in a juvenile delinquency proceeding.

The Court has considered the parties' other arguments, including the People's assertion of the aggravating factor that this AO was previously arrested and faced serious weapon possession charges before that case was removed to the Family Court, and the mitigating factors articulated by defense counsel such as the AO being diagnosed with ADHD and his substance abuse problems.

Under the totality of the circumstances, after having balanced the aggravating and mitigating factors concerning this case and concerning this individual youth [*see, e.g.*, *People v. B.H.*, 63 Misc 3d 244, 250 (Sup Ct Nassau County 2019)], the Court finds that the People have failed to meet their burden of establishing that there are "extraordinary circumstances" in this case. The People's Motion Opposing Removal to the Family Court is denied, and this case shall be removed to the Family Court forthwith pursuant to CPL§ 722.23(1).

This constitutes the opinion, decision, and order of this Court.

**All Citations**

Slip Copy, 70 Misc.3d 1222(A), 140 N.Y.S.3d 396 (Table), 2021 WL 923366, 2021 N.Y. Slip Op. 50189(U)

## Footnotes

1 *See*, *e.g.*, Merriam-Webster Online Dictionary, "extraordinary" [https://www.merriam-webster.com/dictionary/extraordinary]; *see also* Black's Law Dictionary defining the term "extraordinary circumstances" as "[a] highly unusual set of facts that are not commonly associated with a particular thing or event" [10th ed. 2014].

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2 *People v. Roberts*, 31 NY3d at 423; *see also People v. Andujar*, 30 NY3d at 166 [“While ‘the words of the statute are the best evidence of the Legislature's intent,’ legislative history may also be relevant as an aid to construction of the meaning of words’ ”]).

3 *Assembly Record*, pp. 38 and 85

4 *See*, CPLR § 722.23[1][b].

5 *Assembly Record*, pp. 40 and 85

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72 Misc.3d 791
County Court, New York,
Nassau County.

The PEOPLE of the State of New York,
v.
M.R., Adolescent Offender.

FYC-00000-00
|
Decided on June 15, 2021

**Synopsis**
**Background:** Juvenile defendant was charged with one count of rape in the third degree. The People filed a motion seeking an order to prevent removal of criminal action to family court.

**Holdings:** The County Court, Conrad D. Singer, J., held that:

as a matter of apparent first impression, extraordinary circumstances, as used in statute governing removal of juvenile defendants to family court, means facts which "go beyond" that which is "usual, regular or customary," and

the People failed to establish existence of extraordinary circumstances as necessary to prevent removal.

Motion denied.

**Procedural Posture(s):** Juvenile Delinquency Proceeding.

**Attorneys and Law Firms**

***549** Hon. Joyce Smith, Acting Nassau County District Attorney, Vincent Bruni, Esq., for Plaintiff

George A. Terezakis, Esq., Attorney for the Adolescent Offender

**Opinion**

Conrad D. Singer, J.

The defendant in this matter, M.R. (D.O.B. XX/XX/XXXX) is charged as an Adolescent Offender ("AO") in the Youth Part of the County Court in Nassau County. The People have moved for an Order pursuant to CPL § 722.23(1) directing that this matter remain in the Youth Part and not be removed to the Family Court in Nassau County due to the existence of "extraordinary circumstances". (CPL § 722.23[1]). The AO has filed opposition to the People's motion.

The People's Motion Opposing Removal is determined as follows:

The AO is charged by way of felony complaint with one count of Rape in the Third Degree [Penal Law § 130.25(03)]. The charge filed against the AO arises from an incident alleged to have occurred on July 31, 2020, at approximately 1:00 AM in L.B., Nassau County, New York. The AO was arraigned in the Youth Part on May 4, 2021. At that appearance, the People conceded that the case does not qualify for a statutory "sixth-day appearance" under CPL § 722.23[2], because the AO is charged with Rape in the Third Degree, which is not a "violent felony as defined in section 70.02 of the penal law". (*See* CPL § 722.23[2][a]). The Court thereafter set down a motion schedule for the People to file their Motion Opposing Removal based on "extraordinary circumstances" [1] . (CPL § 722.23[1]).

The People's Motion Opposing Removal consists of the Affirmation in Support of People's Motion to Prevent Removal to Family Court Pursuant to CPL § 722.23 by Assistant District Attorney Vincent Bruni, Esq., with exhibits attached thereto ***550** ("Bruni Aff. in Support of Motion"). The People argue that extraordinary circumstances exist which warrant retaining this case in the Youth Part, in that there is a Statute of Limitations "loophole" which would prevent the Family Court from having jurisdiction over the case if it were removed from the Youth Part. (*Bruni Aff. in Support of Motion*, ¶ 11).

According to the People, the AO is alleged to have committed the criminal act approximately six months before he turned 18 years old, and he was arraigned on this case on May 4, 2021, after he had turned 18. (*Bruni Aff. in Support of Motion*, ¶¶ 4 and 5). They contend that the Family Court Act places an upward age limit on when a juvenile delinquency petition may be filed against a respondent, and that the statutory limits for filing require that the individual be within a certain age range when the criminal act was committed *and* when the petition is filed. (*Bruni Aff. in Support of Motion*, ¶¶ 11 and 12). They further contend that these statutory filing limits result in a loophole for a small group of defendants who commit crimes when they are 17 years old. (*Bruni Aff. in Support of Motion*, ¶ 12). The People further argue that cases such as this one involving this "loophole" are "extraordinary in and

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of themselves" because unless the case remains in the Youth Part, the AO cannot be held responsible for his criminal act now that he is 18 years old. (*Bruni Aff. in Support of Motion*, ¶ 12).

The AO's counsel argues that the People have failed to establish the existence of any "extraordinary circumstances" which justify retaining the AO's case in the Youth Part. (*Corrected Affirmation in Opposition to People's Motion to Prevent Removal to the Family Court by George A. Terezakis*, dated June 2, 2021 ["Terezakis Aff. in Opp. to People's Motion"], ¶ 8). The AO further argues that the People inappropriately categorize the AO's present age of 18 years old as an "extraordinary circumstance" and have not cited to any other factors related to the AO, or to the circumstances of his alleged commission of the offense, which might truly be said to constitute "extraordinary circumstances". (*Terezakis Aff. in Opp. to People's Motion*, ¶ 10).

The AO further argues that there are many mitigating factors relating to this AO which outweigh the single claimed "extraordinary circumstance". In support of the same, the AO's counsel attaches an affidavit in support from the AO's mother, with several exhibits attached thereto. (*Terezakis Aff. in Opp. to People's Motion*, ¶ 11). The AO argues that the People are asking the Court to rewrite the Raise the Age statute to create a judicial exception that would disqualify an otherwise eligible AO from removal to the Family Court simply because he had turned 18 years old. (*Terezakis Aff. in Opp. to People's Motion*, ¶ 18).

***FINDINGS OF FACT***

On May 4, 2021, the AO was charged by way of felony complaint with Rape in the Third Degree [Penal Law § 130.25(3)]. It is alleged in the felony complaint [Ex. 1 to *Bruni Aff. in Support of Motion*], that on or about July 21, 2020, at about 1:00 AM, at the N.B.C., in L.B., Nassau County, the AO engaged in sexual intercourse with the victim [DOB XX/XX/XX], penis to vagina, despite the victim saying "no" and "stop". It is further alleged that the AO did not have permission or authority to engage in sexual intercourse with the victim. The AO's date of birth is X. 00, 0000. (*Bruni Aff. in Support of Motion*, ¶ 4). The AO was 17 years old on the date of the alleged criminal incident and was 18 years old when the case was commenced in the Youth Part of the County Court in Nassau ***551** County. (*Terezakis Aff. in Opp. to People's Motion*, ¶ 3).

***CONCLUSIONS OF LAW***

The main issue raised in the parties' respective motion papers is whether the AO's age, i.e. 18 years old, constitutes an "extraordinary circumstance" which warrants retaining his case in the Youth Part. The People's Motion Opposing Removal is filed pursuant to CPL § 722.23[1], which provides, in pertinent part, that within thirty calendar days of an AO's arraignment, "the court shall order the removal of the action to the family court unless the district attorney makes a motion to prevent removal" [CPL § 722.23(1)]. CPL § 722.23[1][d] requires the Court to deny the People's motion "unless the Court makes a determination upon such motion that extraordinary circumstances exist that should prevent the transfer of the action to family court". (CPL § 722.23[1][d]).

The term "extraordinary circumstances" is not defined under CPL § 722.23. Accordingly, this Court's "primary consideration is to ascertain and give effect to the intention of the Legislature". (*People v. Thomas*, 33 N.Y.3d 1, 5, 97 N.Y.S.3d 642, 121 N.E.3d 270 [2019]; *People v. Roberts*, 31 N.Y.3d 406, 418, 79 N.Y.S.3d 597, 104 N.E.3d 701 [2018]). After referring to the common dictionary definition [2] of the term "extraordinary", and having reviewed the legislative history of the RTA legislation as a further statutory interpretation aid [3], the Court interprets "extraordinary circumstances" to mean that the People's Motion Opposing Removal must be denied unless they establish the existence of an "exceptional" set of facts which "go beyond" that which is "usual, regular or customary" [4] and which warrant retaining the case in the Youth Part instead of removing it to the Family Court.

Legislators debating the Raise the Age bill contemplated that the "extraordinary circumstances" standard would be satisfied where "highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the Family Court". (*Assembly, Record of Proceedings*, April 8, 2017 ["Assembly Record"], p. 39). The legislators specifically declined to provide definitive examples of instances where a case would rise to the level of "extraordinary circumstances". (*Assembly Record*, p. 39). They advised, however, that in assessing whether the People have proven "extraordinary circumstances", the Judge should consider all the particular circumstances of the youth, including both aggravating and mitigating ***552** circumstances. (*Assembly Record*, pp. 39-40).

In this case, other than briefly mentioning that the victim in this case may be left without an opportunity for a final order of protection, the People fail to address any specific facts or circumstances relating to this particular AO, including whether this AO acted in a "highly unusual" and/or "heinous" manner. (*Assembly Record*, April 8, 2017, p. 39). To the contrary, the only specific fact about this AO that the People address is that he is now 18 years old, and the crux of their argument in opposing the removal is that his age constitutes an "extraordinary circumstance". Their argument is based on what appears to be a conflict between multiple Family Court Act provisions which control and otherwise affect the deadlines for filing a juvenile delinquency petition against an individual [5] .

The People do not refute or otherwise address any of the mitigating circumstances relating to this AO that are proffered by the AO's counsel. They argue that cases involving a "small group of defendants who commit crimes when they are 17 years old" are "extraordinary in and of themselves", because unless their cases are retained in the Youth Part, such a defendant cannot be held responsible for his criminal act if a Family Court petition is not filed before he or she is 18 years old. (*Bruni Aff. in Support of Motion*, ¶ 12).

The Court is mindful of the People's argument that the practical effect of removing this AO's case would likely be "tantamount to dismissing the case and barring its prosecution in any court"; that such removal would likely give this AO "a free pass for these actions", and may leave the victim without the opportunity for receiving a final order of protection. (*Bruni Aff. in Support of Motion*, ¶ 17). Such anticipated ramifications of removing the AO's case are irrefutably serious and are very concerning to this Court.

However, the Court finds that if the People's Motion Opposing Removal were granted in this particular case, the Court would essentially be creating a judicial exception to the removal of cases as set forth in CPL § 722.23(1)(a), which would disqualify any AO who otherwise would have his or her case removed to the Family Court, but for his or her age. The Court finds that it cannot properly do such under well-settled principles of statutory interpretation and construction. (*See*, *People v. Buyund*, 179 A.D.3d 161, 168, 112 N.Y.S.3d 179 [2d Dept. 2019][quoting, "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves ***553** no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning"). If the legislature intended that there be such an exception disqualifying 18-year-old AOs from having their cases removed to the Family Court, it could have clearly said so in the statute. (*See*, *People v. Buyund*, 179 A.D.3d at 169, 112 N.Y.S.3d 179 ["We decline to rewrite the statute to add language that the Legislature did not see fit to include"]).

The People have articulated what appears to be an omission or oversight in the relevant Family Court Act provisions. Such has been recognized by courts in other jurisdictions and by respected scholars [6] . However, the Court is nonetheless constrained to enforce CPL § 722.23 as it is written, even if it leads to potentially undesirable results. "The judicial function is to interpret, declare and enforce the law, not to make it, and it is not for the courts to correct supposed errors, omissions or defects in legislation". (*People v. Buyund*, 179 A.D.3d at 170, 112 N.Y.S.3d 179). The People are correct that the legislature did not address the apparent statute of limitations "loophole" in the Family Court Act. To the extent, however, that the legislature failed to address the same, it does not mean that this Court can or should assume the legislature's role and rewrite the statute.

As the People's Motion Opposing Removal fails to address any specific aggravating or mitigating factors relating to this AO other than his age, and based on the foregoing, the Court is constrained to deny the People's motion and the AO's case shall be removed to the Family Court forthwith.

This constitutes the opinion, decision and order of this Court.

**All Citations**

72 Misc.3d 791, 150 N.Y.S.3d 548, 2021 N.Y. Slip Op. 21168

## Footnotes

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1 The motion schedule included a hearing, requested by defense counsel, which was originally scheduled for June 3, 2021. At the People's request, the hearing date was subsequently adjourned to June 9, 2021. At the June 9, 2021 hearing appearance, defense counsel then waived the hearing and all parties waived the statutory timeline for the Court's written decision on the People's Extraordinary Circumstances motion.

2 *See People v. Andujar*, 30 N.Y.3d 160, 163, 66 N.Y.S.3d 151, 88 N.E.3d 309 [2017]; *People v. Ocasio*, 28 N.Y.3d 178, 181, 43 N.Y.S.3d 228, 65 N.E.3d 1263 [2016], wherein the Court of Appeals held that the Court can refer to the "dictionary definition" of a statutory term for a "useful guidepost" in construing that term.

3 *People v. Roberts*, 31 N.Y.3d at 423, 79 N.Y.S.3d 597, 104 N.E.3d 701; (*see also People v. Andujar*, 30 N.Y.3d at 166, 66 N.Y.S.3d 151, 88 N.E.3d 309 ["While 'the words of the statute are the best evidence of the Legislature's intent,' legislative history may also be relevant as an aid to construction of the meaning of words' "]).

4 Merriam-Webster defines "extraordinary" as "going beyond what is usual, regular, or customary", and "exceptional to a very marked extent". (*see* Merriam-Webster Online Dictionary, display [https://www.merriam-webster.com/dictionary/extraordinary]). Black's Law Dictionary defines the term "extraordinary circumstances" as "[a] highly unusual set of facts that are not commonly associated with a particular thing or event". (10th ed. 2014).

5 *See*, FCA § 301.2(1), which, following the enactment of the Raise the Age legislation, defines "juvenile delinquent" as, in pertinent part, "a person over seven and less than eighteen years of age, who, having committed an act that would constitute a crime, or a violation, where such violation is alleged to have occurred in the same transaction or occurrence of the alleged criminal act, if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law"; and

FCA § 302.1(2), which states, in pertinent part, that: "(2) In determining the jurisdiction of the court the age of such person at the time the delinquent act allegedly was committed is controlling"; and
FCA § 302.2, which governs the statute of limitations for the filing of a juvenile delinquency proceeding and which states, in pertinent part, that "[a] juvenile delinquency proceeding must be commenced within the period of limitation prescribed in [CPL § 30.10] or, unless the alleged act is a designated felony commenced before the respondent's eighteenth birthday, whichever occurs earlier".

6 *See* Professor Merril Sobie's Practice Commentary to FCA § 302.2, in which he notes that the raising of the general Family Court jurisdictional age to 18 years old following the enactment of Raise the Age legislation "raises significant problems" in applying the as yet unamended FCA § 302.2 18-years-old age ceiling, and that, in cases such as this one, "filing a timely petition may be impracticable or impossible" and "[i]n that event, the presentment agency loses its authority and the potential respondent cannot be held legally responsible". Professor Sobie submits that "[t]he problem can be resolved only through legislation".

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Unreported Disposition
70 Misc.3d 1213(A), 137 N.Y.S.3d
677 (Table), 2020 WL 8409995
(N.Y.Co.Ct.), 2020 N.Y. Slip Op. 51601(U)

**This opinion is uncorrected and will not be published in the printed Official Reports.**

*1 The People of the State of New York, Plaintiff,
v.
Y.R., Adolescent Offender.

County Court, Nassau County
FYC-0000-00
Decided on December 22, 2020

CITE TITLE AS: People v Y.R.

**ABSTRACT**

Infants
Adolescent Offenders
Transfer from Youth Part to Family Court—Extraordinary Circumstances

*People v Y.R.*, 2020 NY Slip Op 51601(U). Infants—Adolescent Offenders—Transfer from Youth Part to Family Court—Extraordinary Circumstances. (Nassau County Ct, Dec. 22, 2020, Singer, J.)

**APPEARANCES OF COUNSEL**

N. Scott Banks, Nassau County Legal Aid Society, by Tatiana Miranda, Esq.,
Counsel for Adolescent Offender, Y.R.
Hon. Madeline Singas, Nassau County District Attorney, Lauren McDonough, Esq.

**OPINION OF THE COURT**

Conrad D. Singer, J.

The following papers were read on this motion:

People's Affirmation and Memorandum of Law Opposing Removal 1

Adolescent Offender's Opposition to People's Motion 2

People's Reply Papers in Further Support of People's Motion 3

The defendant in this matter, Y.R. (D.O.B. 00/00/0000), is charged as an Adolescent Offender ("AO") in the Youth Part of the County Court in Nassau County. She is charged with one count of Attempted Grand Larceny in the Third Degree [Penal Law § 110/155.35(1)]; and one count of Attempted Scheme to Defraud in the Second Degree [Penal Law § 110/190.60(1)].

The People have filed a motion opposing removal of the AO's case to the Family Court based on the existence of "extraordinary circumstances". (CPL § 722.23 [1][b]). The AO has filed an opposition to the People's motion and the People have filed reply papers in further support thereof. The People's Motion Opposing Removal is determined as follows:

The charges against the AO arise from her alleged involvement in a scheme to defraud on or about October 27, 2020, at approximately 5:45 PM in M.P., Nassau County, New York. It is alleged that on that date and at that time, she participated in a scheme in which she and her adult co-defendant attempted to defraud one victim of $8,500.00. The AO also allegedly stated to a member *2 of law enforcement that she had picked up $9,500.00 from a second victim who resides in O., New York.

The AO was arrested on October 27, 2020. She was arraigned in the Youth Part on October 28, 2020. At her arraignment, the People reported that they were not consenting to remove the AO's case to the Family Court, they acknowledged that they were not entitled to a 6-day appearance, and stated that they would be filing a Motion Opposing Removal based on the existence of "extraordinary circumstances". (CPL § 722.23[1][b]).

The People's Motion Opposing Removal consists of the sworn affirmation of Assistant District Attorney Lauren McDonough, Esq. with accompanying Memorandum of Law, and supporting exhibits appended thereto. The People contend that the charges against the AO stem from her involvement in a several-month complex scheme run by a Transnational Criminal Organization ("TCO"), which the


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People refer to as the "Elder Bail Scam". (*Affirmation of Lauren A. McDonough*, *Esq.*, dated November 17, 2020 ["McDonough Aff. in Support"], ¶¶ 3 through 25; *Memorandum of Law in Support of Motion*, dated November 17, 2020 ["People's Memo of Law in Support"], p. 1).

According to the People, extraordinary circumstances exist which warrant preventing removal of the AO's case to the Family Court and retaining the case in the Youth Part. The alleged extraordinary circumstances include the cruelty involved in targeting elderly victims and defrauding them of significant sums of money during the global coronavirus pandemic [*People's Memo of Law in Support*, pp. 5 and 6]; the AO's knowledge and level of participation in the "Elder Bail Scam" [*People's Memo of Law in Support*, pp. 4 and 5]; and that the removal of the AO's case to the Family Court would "shake the public's confidence in the criminal justice system" [*People's Memo of Law in Support*, pp. 6 and 7]. The People contend that no mitigating circumstances exist but, to the extent that any mitigating circumstances do exist, they are "far outweighed" by the aggravating factors in this case. (*People's Memo of Law in Support*, p. 7).

Defense counsel's opposition to the People's Motion Opposing Removal consists of the sworn affirmation of defense counsel Tatiana Miranda, Esq. and exhibits appended thereto. Defense counsel argues that there is "nothing extraordinary" about the allegations underlying the charges against the AO and that, if the legislature intended for crimes involving elderly victims to be treated differently than other crimes, the statute would have specifically addressed the same. (*Opposition to People's Motion by Tatiana Miranda, Esq.*, dated December 1, 2020 ["*Miranda Opp.*"], pp. 3 and 4).

Counsel for the AO denies that the AO is "integral" to the success of the TCO's scheme; she asserts that the AO's un-apprehended co-defendants threatened the AO's younger sister's life if she did not participate in the scheme, that the un-apprehended co-defendants directed the AO where to go after they selected the location and after they had spoken to the complainants on the phone. (*Miranda Opp.*, p. 4).

Defense counsel opposes the People's assertion that the AO has been participating in the TCO's scheme over the course of four months. She states that the People failed to provide any detailed information concerning the AO's extended involvement and she notes that no criminal charges have been filed in connection with the AO's alleged participation in the same scheme in O., New York. (*Miranda Opp.*, p. 5). Counsel characterizes the People's argument about "shaking the public's confidence" by removing the AO's case to the Family Court as "speculative", "nonspecific" and not an extraordinary circumstance. (*Miranda Opp.*, p. 5).

Additionally, defense counsel contends that mitigating circumstances exist which warrant ***3** denying the People's Motion Opposing Removal. According to counsel, the AO has a lengthy history of behavioral problems, mental health conditions and hospitalizations, and was hospitalized as recently as November 16, 2020 for physically harming herself. (*Miranda Opp.*, p. 7).

Counsel asserts that the People are "patently incorrect" in arguing that the AO has a "solid family and home life" and in denying the existence of mitigating circumstances. (*Miranda Opp.*, pp. 6 and 7). She further argues that the premise underlying the RTA legislation supports removing the AO's case to the Family Court, where she can receive the specialized individual care and treatment that she needs. (*Miranda Opp.*, p. 7).

The People argue in their Reply papers that "[t]argeting elderly victims for significant financial fraud cannot be described as anything but cruel" and that, based on the AO's own statements, she has actively participated in targeting and defrauding elderly victims through the downstate area for several months. (*Reply to Defendant's Affirmation in Opposition to People's Motion*, dated December 8, 2020 ["People's Reply"], pp. 1 and 2).

The People assert that the AO's role in obtaining the money from the elderly victims is "integral to the scheme" and that without the AO, "the scheme would fail". (*People's Reply*, p. 2). They further contend that the details known by the AO regarding the overall operation are not details that would be given to someone who was "intimidated" or "threatened" into participating. (*People's Reply*, p. 2). They argue that the mitigating circumstances described by the AO's counsel are outweighed by the aggravating factors set forth by the People. (*People's Reply*, p. 3).

**FINDINGS OF FACT**

It is alleged in the felony complaint that on October 27, 2020 at 0000 L. Drive, M.P., Nassau County, New York, the victim in this matter was contacted by an unknown person who advised the victim that his grandson was in jail. It is further alleged in the felony complaint that the victim was instructed

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to meet with a courier and instructed to pay $8,500.00 for his grandson's bail.

At approximately 5:45 PM, the AO's co-defendant, W. M. ("M."), was operating a 2002 tan Honda minivan with a New Jersey temporary tag. The AO allegedly exited the passenger side of the minivan and approached 0000 L. Drive, which is the victim's residence. Once at the front door the AO allegedly handed the victim a receipt for $8,500.00. The victim and the AO proceeded to make the exchange when law enforcement intervened. The AO was placed into custody.

It is further alleged in the felony complaint that the AO's co-defendant M. attempted to leave the scene while operating the aforementioned minivan, but was stopped by responding law enforcement members, who were able to then place him into custody. It is further alleged that during the course of the investigation in this case, the AO stated to a Detective T. that she had picked up $9,200.00 from a second victim, who resides in O., New York.

According to the People's motion papers, after the AO and her co-defendant M. were arrested, they were interviewed by Nassau County Police Detectives after being read and waiving their Miranda rights. (*McDonough Aff. in Support*, ¶ 12). The AO and co-defendant M. gave detailed accounts of their roles in the October 27, 2020 "Elder Bail Scam" and they also provided information regarding their involvement in other such Elder Bail Scams. (*McDonough Aff. in Support*, ¶ 12).

The AO explained to law enforcement that beginning in about July 2020, she has been traveling throughout the area and picking up money related to scams. (*McDonough Aff. in Support*, ¶ 13). She explained that the scams are run out of the Dominican Republic and are effectuated by people speaking to elderly victims and convincing them to provide money related to fake arrests and fake accidents. (*McDonough Aff. in Support*, ¶ 13).

The AO reported that individuals named "J." and "B." would provide her with pick-up instructions for her role, including the names and addresses of the elderly victims, as well as the monetary amount that was to be provided by the victim. (*McDonough Aff. in Support*, ¶ 14). The AO reported that if the AO was unable to pick up the proceeds of the scams, then "B." and "J." would threaten her sister's life. (*McDonough Aff. in Support*, ¶ 15).

As to the October 27, 2020 incident, the AO stated that "B." sent her two addresses of elderly victims via WhatsApp messages, and that the AO then had co-defendant M. drive her to the two locations. (*McDonough Aff. in Support*, ¶ 16). She first directed co-defendant M. to an address in O., New York, where the AO took an envelope containing $9,200.00 in cash from the elderly victim. (*McDonough Aff. in Support*, ¶ 16). The AO and co-defendant M. then drove to the address in M.P. where they intended to pick up $8,500.00 from the would-be victim. (*McDonough Aff. in Support*, ¶ 17).Based on the AO's opposition papers, the AO suffers from mental health issues, for which she has been previously hospitalized, and she was identified as a missing child for months. (*Miranda Opp.*, p. 6). Defense counsel cites to a report from the Nassau County Probation Department, and asserts that the AO has a "lengthy history of behavioral problems, mental health conditions, and hospitalizations", and that she has been diagnosed with Borderline Personality Disorder in Adolescence, Oppositional Defiant Disorder, and Major Depressive Disorder. (*Miranda Opp.*, p. 7).

The AO has "been hospitalized at New York P., F.W., and St. D. and was taken by ambulance and hospitalized as recently as November of 2020 for physically harming herself. (*Miranda Opp.*, p. 7). The AO's school attendance records indicate that she has not attended school since the beginning of the school year. (*Miranda Opp.*, p. 7).

*CONCLUSIONS OF LAW*

Pursuant to CPL § 722.23[1][d], this Court is required to deny the People's Motion Opposing Removal unless the Court determines, upon the People's motion, that "extraordinary circumstances exist that should prevent the transfer of the action to family court". (CPL § 722.23[1][d]). The term "extraordinary circumstances" is not defined under CPL § 722.23. Using the statutory text as "the starting point" to "ascertain and give effect to the intention of the Legislature" [1], and using dictionary definitions as a "useful guidepost ", the Court finds that the "plain meaning" [2] of the phrase " extraordinary circumstances" is a set of facts that are "exceptional" and " highly unusual" and which indicate that the case should not be removed to the Family Court. (*see* CPL § 722.23[1][d]).

Consistent with the phrase's "plain meaning", the legislative history of the Raise the Age ["RTA"] legislation reflects that "extraordinary circumstances " is intended to cover "unusual circumstances that would warrant keeping the case in the

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Youth Part." (Assembly Record, April 8, 2017 ["Assembly Record "] pp. 40-41). Assembly member Joseph Lentol, who sponsored the RTA bill in the New York State Assembly, stated that for felony cases outside of the "most serious cases, such as Murder and Assault in the First Degree", the legislators intended that the ***4** extraordinary circumstances requirement would "be a high standard for the DA to meet" and that "denials of transfers to the family court should be extremely rare". (*Assembly Record*, p. 39).

Further examination of the legislative history reveals that legislators intended the "extraordinary circumstances" standard "to be determined and shaped by a judge's ruling after the enactment and effectiveness of [the RTA legislation]"; and that the standard "should take into consideration all the circumstances, including the mental capacity of the offending child". (*Assembly Record*, p. 83). Recognizing that "every case is going to be different ", legislators directed that every case would be "looked at by the judge individually, to determine what kind of factors-- both aggravating and mitigating--there are in the case, to determine whether or not" the particular case "passes the exceptional circumstances test". (*Assembly Record*, pp. 83-84).

Consistent therewith, legislators directed that "[e]very case is to be judged on its own merits ", taking into consideration certain "guideposts" such as whether it was a "cruel and heinous manner where the crime was committed, [and/or] where the defendant was a ringleader". (*Assembly Record*, p. 85). The legislators predicted that the cases would be "rare" where the Court would find "extraordinary circumstances" which warrant keeping a case in the Youth Part. (*Assembly Record*, p. 85).

In this case, mindful of the legislative directives discussed above, and after considering the arguments raised by both parties in their motion papers and reviewing and evaluating their respective supporting exhibits, the Court does not find the existence of "extraordinary circumstances" which would warrant keeping this AO's case in the Youth Part.

The Court finds that the AO's months-long involvement in what the People have deemed the "Elder Bail Scheme"[3] is an aggravating factor. Likewise, the Court finds that the targeting of vulnerable and elderly individuals as victims of a defrauding scheme is reprehensible. However, the Court is not persuaded by the People's assertions that the AO is "integral" to the overall success of the scheme. Nor is the Court persuaded that the AO's level of knowledge and understanding as to the workings of the scheme necessarily establish that the higher up individuals in the TCO have a significant level of trust in her. The Court finds after reviewing both parties' motion submissions that the AO's role in the scheme is relatively minor compared to that of others: for instance, she does not select the victim(s) or communicate the fraudulent story to the selected victim or determine how much money to defraud a particular victim.

Furthermore, the Court finds that there are several significant mitigating factors which weigh against finding extraordinary circumstances. The Court finds that the AO's confirmed mental health conditions and her prior institutionalizations, including her recent hospitalization for self-harm, indicate that she would benefit from the level of services and rehabilitative setting available in the Family Court. Of further relevance to the Court's determination is the family's history of contact with NYC Administration for Children Services. While not necessarily indicative of any fault on her parents' part, it indicates that the AO would benefit from the focused services and rehabilitative objectives advanced in the Family Court.

Under the totality of the circumstances, the Court finds, having balanced the aggravating and mitigating factors in this case [*see, e.g.*, *People v. B.H.*, 63 Misc 3d 244, 250 (Sup. Ct. Nassau Cty. 2019)], that there are no extraordinary circumstances preventing the AO's case from being removed ***5** to the Family Court and that therefore the AO's case should be removed to the Family Court forthwith.

For the foregoing reasons, the People's Motion Opposing Removal of the AO's case to the Family Court based on extraordinary circumstances is denied.

This constitutes the opinion, decision and order of this Court.

DATED: December 22, 2020

Westbury, New York

HON. CONRAD D. SINGER, A.J.S.C.

Nassau County Court, Youth Part

**FOOTNOTES**

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## Footnotes

1 *People v. Thomas*, 33 NY3d 1, *5 [2019]; *see also People v. Roberts*, 31 NY3d 406, 418 [2018]).

2 *see People v. Andujar*, 30 NY3d 160, 163 [2017] and *People v. Ocasio*, 28 NY3d 178, 181 [2016], for the proposition that dictionary definitions may provide ”useful guideposts“ for ascertaining the ”plain meaning“ of a statutory phrase; Merriam-Webster Online Dictionary, ” *extraordinary* “ [https://www.merriam-webster.com/dictionary/extraordinary]; Black's Law Dictionary, ”*extraordinary circumstances*“, [10th ed. 2014]).

3 By her own apparent admission (*Exhibit A to Miranda Aff. in Opp.*; *Exhibit 2 to McDonough Aff. in Support*)

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68 Misc.3d 472
County Court, New York,
Nassau County.

The PEOPLE of the State of New York,
v.
E.S.B., Juvenile Offender.

Youth Part Ind. IND-00000-00
|
Decided on April 13, 2020

**Synopsis**
**Background:** Juvenile who was charged by indictment with one count of assault in the first degree, one count of gang assault in the first degree, and one count of assault in the second degree filed a motion for an order removing the case to family court.

**Holdings:** The County Court, Singer, J., held that:

statute governing removal of juvenile offender case to family court, rather than statute governing removal of adolescent offenders to family court, was applicable to determination of juvenile's motion;

removal of juvenile's case to family court would not be in the interests of justice, and thus was not warranted; and

in determining juvenile's removal motion, court was statutorily constrained to consider the overall "offense", rather than focus on juvenile's specific actions.

Motion denied.

**Procedural Posture(s):** Juvenile Delinquency Proceeding.

**Attorneys and Law Firms**

Donald Rollock, Esq., Attorney for the Juvenile Offender, Hon. Madeline Singas, Nassau County District Attorney, Tova Simpson, Esq.

**Opinion**

Conrad D. Singer, J.

****616** ***473** The Juvenile Offender ("JO"), E.S.B. (D.O.B. 00/00/2004), is charged by indictment with one count of Assault in the First Degree [Penal Law § 120.10(1)], one count of Gang Assault in the First Degree [Penal Law § 120.07], and one count of Assault in the Second Degree [Penal Law § 120.05(2)]. Defense counsel has moved for an Order removing the JO's case to the Family Court pursuant to CPL §§ 722.20 and 722.22. The People have filed opposition to the JO's Motion for Removal, and the JO has filed a Reply Affirmation. The JO's Motion for Removal is determined as follows:

The charges filed against the JO arise from an incident alleged to have taken place on January 8, 2020, at approximately 2:40 PM in U., Nassau County, New York. It is alleged that on that date and at that time, the JO and his codefendant adolescent offenders/juvenile offenders, individually and aiding and abetting and being aided and abetted by each other and with others, attacked the victim in this case and caused him to sustain serious injuries, including by means of using a deadly weapon/weapons. The JO was arraigned on the indictment on March 11, 2020.

The JO argues that his case should be removed to the Family Court or, in the alternative, requests a hearing to permit the Court to make a factual and legal determination. The JO's counsel argues that the subject incident was a "melee" between two rival gangs. Defense counsel further argues that several factors exist which warrant removal of the JO's case including, *inter alia*, uncertainties as to this JO's actual role and involvement in the fight, as well as the fact that the objective evidence establishes that this JO was not the person who introduced any weapons into the "brawl", which was "ongoing prior to his alleged involvement". (*Affirmation in Support of Defendant's CPL § 722.20 and § 722.22 Motion by Donald Rollock, Esq.*, dated February 11, 2020 ["Rollock Aff. in Support of Motion for Removal"], ¶¶ 4, 6, 8, 9, 12). Defense counsel further argues that this JO's specific role "is more analogous to the conduct" of another individual, in that this JO was "interfering or fighting with the other active participants who were fellow gang members" of the complainant. (*Rollock Aff. In Support of Motion for Removal*, ¶ 13).

***474** In opposition to the JO's motion, the People argue, *inter alia*, that the victim showed up to what he believed was going to be a one-on-one fist fight with no weapons, but the

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subject incident was an assault by four juvenile/adolescent offenders who jointly participated in the assault on the victim with the use of weapons. (*People's Affirmation in Opposition to Defendant's Motion by Tova B. Simpson*, dated February 11, 2020 ["Simpson Aff. in Opp."], ¶ 5). The People further argue that, while this JO did not possess any weapons himself, he did join in on the fight, and once the victim was on the ground (having been hit with baseball bats), the JO repeatedly kicked the victim in and about the head. (*Simpson Aff. In Opp.*, ¶ 5).

The People further argue that although the video does not clearly show the JO's face, and the JO cannot be identified only from the video, the JO has been identified by witnesses, who corroborate the actions of the JO as seen on the video. (*Simpson Aff. In Opp.*, ¶ 14). Such actions, according to the People, include running over to join in on the fight, going straight to where the victim was on the ground from having been beaten by others, and proceeding to ****617** kick the victim in and about the head. (*Simpson Aff. in Opp.*, ¶ 14).

In Reply thereto, the JO's counsel further elaborates upon his prior arguments and purports to further identify weaknesses in the People's underlying case. Such arguments include that the complainant was a "willing combatant" and that the People, in declining to charge the complaint in connection with the subject incident, have "taken sides" as to two rival gangs "based upon who was injured most in this incident". (*Reply Affirmation of Donald Rollock, Esq.*, dated April 9, 2020 ["Rollock Reply Aff."], ¶¶ 6 and 7; 11).

The JO's counsel further criticizes the People's assertion that the Family Court would merely give the JO a "slap on the wrist" if his case were removed from the Youth Part. (*Rollock Reply Aff.*, ¶ 14). Counsel further argues that intervention by the Family Court "at this very early stage in this child's life is what is needed" and asserts that the JO's mother is seeking to move with the child out of the Long Island area and out of New York state after the current pandemic circumstances have settled down. (*Rollock Reply Aff.*, ¶ 15).

### *LEGAL CONCLUSIONS*

The JO's Motion for Removal is filed pursuant to CPL§ 722.22, which provides, in pertinent part, that the Court "may" order ***475** removal of the JO's case to the Family Court if, after consideration of numerous enumerated factors, the Court determines that removal would be in the interests of justice. (CPL § 722.22[1][a]). The Court is to "examine individually and collectively" the following factors:

> "[a] the seriousness and circumstances of the offense;
>
> [b] the extent of harm caused by the offense;
>
> [c] the evidence of guilt, whether admissible or inadmissible at trial;
>
> [d] the history, character and condition of the defendant;
>
> [e] the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
>
> [f] the impact of a removal of the case to the Family Court on the safety or welfare of the community;
>
> [g] the impact of a removal of the case to the Family Court upon the confidence of the public in the criminal justice system;
>
> [h] where the Court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and
>
> [i] any other relevant fact indicating that a judgment of conviction in the criminal court would serve no useful purpose".

(CPL § 722.22[2]).

Preliminarily, the Court finds that the JO's arguments analogizing this case to that of J.H. are misplaced. Mr. H. was charged as an Adolescent Offender ("AO") in this matter [1], and his case was removed to the Family Court under a different statutory provision, CPL § 722.23, which governs the removal of an AO's case to the Family Court. The procedure for removal of an AO's case resulted from the recently enacted "Raise the Age" legislation, which changed the manner in which 16- and 17-year-olds are treated in the criminal justice system. However, the RTA legislation ****618** did not change the law governing juvenile offenders such as the JO in this case [2].

Accordingly, the Court is constrained to apply the rubric applicable to the removal of JOs' cases under CPL § 722.22. ***476** Furthermore, based on the statutory language and the case law (including caselaw involving JOs' motions for removal predating the RTA legislation), it is the JO's

burden to establish that removal is warranted based on the Court's consideration of the enumerated statutory factors. [3]

Considering the first two enumerated factors, [a] the seriousness and circumstances of the offense and [b] the extent of the harm caused by the offense, the Court is not persuaded by arguments from defense counsel relating to the JO's *specific* alleged role in the overall melee. The statutory language clearly requires the Court to consider "*the offense*" and the JO concedes that the subject incident was "serious" and that it resulted in an individual "sustaining serious injuries". (*Affirmation in Support of Defendant's CPL § 722.20 and § 722.22 Motion by Donald Rollock, Esq.*, dated February 11, 2020 ["Rollock Aff. in Support of Motion for Removal"], ¶ 12).

It appears from both parties' motion submissions that the underlying incident was allegedly motivated by gang violence, an issue that is becoming increasingly worrisome within the community at large. Moreover, while the JO's counsel argues that his specific role within the incident was minor when compared to that of his codefendants, the People have persuasively argued that they have evidence indicating that this JO actively participated in violently attacking the victim in this matter. Such alleged conduct is still serious and concerning to this Court, even if it is "lesser" in nature compared to stabbing the complainant or hitting him in the head with a bat.

The Court further notes that, to the extent that the legislature intended for the Court to consider the JO's individual level of participation when making its "interests of justice" determination, it could have specifically stated so in its list of enumerated factors. To that end, the Court finds it relevant that, in a ***477** different subsection of the same statutory provision, the Court is *specifically* directed under different circumstances to consider a JO's level of participation relative to that of other codefendants in the same offense [4]. In contrast, ****619** such a factor is not included in the list of enumerated factors to be considered by the Court when making its "interests of justice" determination.

Bearing in mind the Court's obligation to "interpret a statute to effectuate the intent of the Legislature, and when the statutory 'language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words' used", and further bearing in mind the well-settled "principle that courts are not to legislate under the guise of interpretation" [5], the Court finds that, in this case, the Court is constrained to consider the overall "offense", rather than focus on the JO's specific actions. (CPL § 722.22).

The third relevant factor is the "evidence of guilt, whether admissible or inadmissible at trial". Obviously, it is not the Court's role, particularly at this juncture, to determine the JO's ultimate guilt or innocence with respect to the crimes charged. However, even to the extent that the JO may have raised potential weaknesses in the People's underlying case (including their ability to establish the JO's specific role in the fight/assault [6]), the Court finds that, for the purpose of opposing the JO's motion, the People have asserted several cogent and persuasive arguments regarding evidence of the JO's guilt, including by citing to corroborating testimony from witnesses, and to an alleged "retaliatory" assault of the JO and his father. (*Rollock Aff. in Support of Motion for Removal*, ¶ 14; *Simpson Aff. in Opp.*, ¶¶ 14 and 15).

Regarding the JO's "history, character and condition", defense counsel argues that the JO has no criminal record and/or prior contact with the criminal justice system. (*Rollock Aff. in Support of Motion for Removal*, ¶ 15). In Reply, defense counsel also discusses the plans of the JO's mother to ***478** relocate out of the Long Island/New York area. The People do not specifically address this factor.

The Court finds that both parties assert conclusory and generalized arguments addressing the following additional enumerated factors: "the purpose and effect of imposing upon the defendant a sentence authorized for the offense"; "the impact of a removal of the case to the family court on the safety or welfare of the community"; "the impact of a removal of the case to the family court upon the confidence of the public in the criminal justice system", and, accordingly finds such arguments to be largely unpersuasive. However, the Court does agree with defense counsel's point that the People greatly mischaracterize the role of the Family Court and the potential dispositions available therein when they assert that the JO would receive a "slap on the wrist" if his case was removed to the Family Court. (*Simpson Aff. in Opp.*, ¶ 16).

After considering the enumerated factors discussed above, both individually and in the totality, the Court finds that the JO has failed to establish that removal of this JO's case to the Family Court would be "in the interests of justice", particularly in light of the seriousness of the offenses charged and the extent of harm caused by the offense, and, although denied by defense counsel, the allegations that the

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JO violently kicked the complaining witness in ****620** the head during the subject incident. Moreover, the Court does not find that the JO has established the necessity of a hearing on this matter.

Accordingly, the JO's Motion for Removal is denied in its entirety and the JO's case will remain in the Youth Part for all future proceedings.

This constitutes the opinion, decision and order of this Court.

**All Citations**

68 Misc.3d 472, 126 N.Y.S.3d 615, 2020 N.Y. Slip Op. 20112

## Footnotes

1 "Adolescent offender" is a new category of offenders created under the "Raise the Age" ["RTA"] legislation; an AO is a person charged with a felony committed when he or she was sixteen or seventeen years of age. (CPL § 1.20; CPL § 722.23).

2 (*See, e.g.*, Penal Law § 30.00, "Infancy", pursuant to which 15-year-olds [such as Mr. S.B.] were criminally responsible for certain felonious conduct prior to the enactment of the RTA legislation and continue to be criminally responsible after enactment of RTA; *see also People v. Robert C.*, 46 Misc. 3d 382, 384-85, 998 N.Y.S.2d 761 [Sup. Ct. Queens Cty. 2014], summarizing the history of legislation subjecting juvenile offenders to criminal liability and that of the legislation governing removal of JOs' cases to the Family Court; *see also Assembly Record*, April 8, 2017, p. 179-180].

3 *See*, *People v. Charles M.*, 286 A.D.2d 942, 942-43, 731 N.Y.S.2d 307 [4th Dept. 2001] [holding that the trial court did not err in denying the JO's removal application without a hearing because the People had set forth cogent reasons for withholding consent to removal, including seriousness of the conduct and the potential for harm to other students; *see also People v. Sanchez*, 128 A.D.2 816, 816, 513 N.Y.S.2d 521 [2d Dept. 1987], *lv. denied*, 70 N.Y.2d 655, 518 N.Y.S.2d 1049, 512 N.E.2d 575 [1987] ["While defendant, who was 15 years old at the time of the crime, was eligible for (consideration of removal to the Family Court) it cannot be said that this was an exceptional case where such removal was required"].

4 CPL § 722.22(1)(b), providing that, in cases involving such crimes as Murder in the Second Degree and Rape in the First Degree, after making an "interests of justice" determination, the Court is directed to order removal of the JO's case to the Family Court if it finds one of several mitigating factors, including, as relevant here, that "where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution".

5 *People v. Finnegan*, 85 N.Y.2d 53, 58, 623 N.Y.S.2d 546, 647 N.E.2d 758 [1995]

6 [*Rollock Aff. in Support of Motion for Removal*, ¶¶ 10 and 13].

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71 Misc.3d 1222(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
This opinion is uncorrected and will not be
published in the printed Official Reports.
County Court, New York,
Nassau County.

The PEOPLE of the State of New York,
v.
E.H., Adolescent Offender.

FYC-00000-00/000
|
Decided on April 22, 2021

**Attorneys and Law Firms**

Mindy Plotkin, Esq., Counsel for Adolescent Offender E.H.

Hon. Madeline Singas, Nassau County District Attorney, Nicole Aloise, Esq.

**Opinion**

Conrad D. Singer, J.

***1** The defendant in this matter, E.H. (D.O.B. XX/XX/XXXX), is charged as an Adolescent Offender ("AO") in the Youth Part of the County Court in Nassau County. He is charged by way of a felony complaint with one count of Murder in the Second Degree [Penal Law § 125.25(1)], a class A-1 felony, and by way of a second felony complaint with one count of Criminal Possession of Stolen Property in the Fourth Degree [Penal Law § 165.45(5)], a class E felony. The within Decision and Order is issued after the Court's review of the accusatory instrument, arguments by counsel and other "relevant facts" pursuant to CPL § 722.23(2)(b).

The charge against the AO of Murder in the Second Degree arises from an incident alleged to have occurred on or about March 1, 2021, at approximately 3:10 PM at a location in F., Nassau County, New York. The charge against the AO of Criminal Possession of Stolen Property in the Fourth Degree arises from an incident alleged to have occurred on or about March 6, 2021, at about 10:56 PM, at a location in U., Nassau County, New York. The AO was arraigned by an Accessible Magistrate on April 10, 2021, at which time he was remanded without bail. He first appeared in the Youth Part on April 12, 2021; at which time the Court scheduled the statutory "sixth-day appearance" in this matter for April 14, 2021. (CPL § 722.23[2]).

CPL § 722.23(2) requires that the AO's case proceed towards removal to the Family Court unless the Court finds during the "sixth-day appearance" that the People prove, by a preponderance of the evidence, the existence of one or more statutory aggravating factors. Such factors include, as relevant in this case, that: "[i] the defendant caused significant physical injury to a person other than a participant in the offense"; and/or that "[ii] the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense". (CPL § 722.23 [2][c][i] and [ii]).

***SIXTH-DAY APPEARANCE FOR REVIEW OF ACCUSATORY INSTRUMENT***

At the "sixth-day appearance", the People argued that the AO's case should be disqualified from removal to the Family Court due to the presence of two statutory aggravating factors. First, that the AO "caused significant physical injury" in that the victim in this case is dead; and second, that this AO "displayed a firearm", in that the victim in this case was shot. In so arguing, the People relied upon the allegations set forth in the Felony Complaint, which they further developed with argument and additional hearsay-based facts.

The AO, through counsel, opposed the People's presentation and argued that they failed to meet their burden for retaining the case in the Youth Part. The AO's counsel noted that she was constrained by the limited discovery she had received prior to the "sixth-day appearance" and argued that, relying solely on the Felony Complaint, which is the focus of the Court's "sixth-day appearance" review, the AO did not personally shoot the victim; it is alleged only that he was present at the time of the shooting.

***2** ***FACTUAL ALLEGATIONS***

It is alleged in the Felony Complaint that on March 1, 2021, at 3:10 PM, at 701 S M.S. in F., Nassau County, New York, the AO, while acting in concert with others not yet arrested, including an individual referred to as "Unapprehended 1", did intentionally cause the death of the victim, D.G.-C., by shooting him in the head.

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It is further alleged in the Felony Complaint that the AO knows “Unapprehended 1” to be an MS-13 gang member and has seen him with a gun on multiple occasions. It is further alleged that “Unapprehended 1” is known to Nassau County Police Department and Nassau County District Attorney as an MS-13 gang member, and that the AO was present and observed “Unapprehended 1” shoot a rival gang member approximately 3 months earlier. It is further alleged that the AO knew that “Unapprehended 1” was having a gang-related dispute with a person by the name of D. The AO allegedly drove one of two vehicles to the subject location, “Unapprehended 1” was an occupant in the AO's vehicle, and the victim was an occupant in the other vehicle.

It is further alleged that, before arriving at the scene of the incident both vehicles stopped, all of the occupants exited the vehicles and conversed, and then returned to their respective vehicles. The AO then allegedly drove one of the vehicles directly to the scene and all of the occupants of his vehicle exited and walked into the woods. It is alleged that the AO was then a few feet away from the group before he heard a gunshot, afterward the AO and all occupants, with the exception of the victim, rushed to their cars. The AO then allegedly drove one of the vehicles with several occupants from the park and then allegedly left the vehicle parked on a side street in U. It is further alleged that the following day, the AO met “Unapprehended 1”, who referenced the prior day and said, “it had to be done”.

The People further contended at the “sixth-day appearance” that on the date of the incident, the AO, along with approximately eight other males, murdered the victim in C.M. Park in F., Nassau County. (Transcript, April 14, 2021 [“TR”], 3:4). They further alleged that there were two carloads of MS-13 members that day: some drove in an Infiniti, which picked up the victim, and others were in the Impala, which was driven by the AO. (TR, 3:7). They further alleged that an individual named “M.M.” was one of the MS-13 members who was in the vehicle driven by the AO, that Mr. M. is the leader of the H. sect of MS-13, that the AO associates with Mr. M. and knows that Mr. M. carries a gun. (TR, 3:11). They further alleged that the AO knew that Mr. M. had a gang-related issue with D., the victim in this case. (TR, 3:14).

The People further alleged at the “sixth-day appearance” that on the day of the incident, the AO drove in the Impala to a gas station in W.H., where he met up with occupants of the second vehicle, the Infinity. (TR, 4:8). The AO then allegedly drove the Impala to U. where, again, he met up with all the occupants of the second car, and then all of the occupants of both vehicles, including the victim, exited the cars and converged on the sidewalk of S. Street before returning to their respective cars. (TR, 4:13). The People further alleged that the AO was shown surveillance video from S. Street, and that he identified himself and other people, including M.M., in that surveillance video.

***3** They further alleged that around 2:30 PM on the day of the incident, the AO used his cell phone to search the internet for “parks in F., parks in F. by the water”. (TR, 4:17). The AO then allegedly drove the Impala, which was followed by the Infiniti, to C.M. Park in F., and pulled into the park at 2:55 PM. (TR, 4:23). At the park, the occupants of both vehicles allegedly exited the vehicles, walked into the park, through the woods, and into a clearing on the beach, where the victim was killed with one gunshot to his head. (TR, 4:25). The AO then allegedly rushed back to the car with all of the other occupants (with the exception of the victim), and he drove the Impala away from the scene. (TR, 5:3). The People further alleged that, on the day after the incident, the AO used his phone to conduct an internet search for “Surenos 13”, “Surenos 13 rivals”, “body found, Long Island, F., C.M. Park, shot dead, F.”. (TR, 5:10).

The People further contended that the charge against the AO for Criminal Possession of Stolen Property in the Fourth Degree, which was charged by separate Felony Complaint, was based on the allegation that the Impala which the AO drove to and from the alleged murder was a stolen vehicle. (Tr, 17:3).

***CONCLUSIONS OF LAW***

The purpose of the sixth-day appearance under CPL 722.23[2] is for the Court to review the accusatory instrument and “other relevant facts” to determine whether the People proved, by a preponderance of the evidence [1] as set forth in the accusatory instrument, the presence of one or more of three statutory factors that will disqualify the AO's case from proceeding toward removal to the Family Court. The statutory factors include, as relevant here: 1) the AO “caused significant physical injury to a person other than a participant in the offense”; and/or 2) the AO “displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense”. (CPL § 722.23[2][c][i] and [ii]).

Under CPL § 722.23(2)(b), “[b]oth parties may be heard and submit information relevant to the [Court's] determination”

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at the "sixth-day appearance". (CPL § 722.23[2][b]). In conducting the "sixth-day appearance", it has been this Court's practice, and the apparent practice of Youth Part courts in other jurisdictions, to consider the accusatory instruments, any supporting depositions, and to also consider hearsay evidence and arguments orally relayed by the attorneys. (*People v. B.H.*, 62 Misc 3d 735, 739-740 [Nassau County Ct 2018]; *People v. J.W.*, 63 Misc 3d 1210[A] [Sup Ct, Kings County 2019]; *People v. Y.L.*, 64 Misc 3d 664 [Monroe County Ct 2019]).

The People's first argument for retaining this AO's case in the Youth Part is based on the statutory aggravating factor that this AO "caused significant physical injury to a person other than a participant in the offense". (CPL § 722.232[2][c][i]). The Court finds, and the parties do not dispute, that the victim's death qualifies as "significant physical injury" [2].

Accordingly, the determinative issue in this case is whether the AO "caused" the victim's "significant physical injury", i.e., whether the AO "caused" the victim's death. The People argued extensively at the "sixth-day appearance" that the AO "caused" the victim's death under a theory of accessorial liability. The People argued that they could not "definitively" say that the AO was not the individual who pulled the trigger and shot the victim in the head, but, even assuming that he did not personally shoot the victim, his actions in connection with the murder rose to the level of "causing" his death. Defense counsel argued in opposition that the People failed to establish the AO's culpability under a theory of accessorial liability and cited to the definition of "Criminal Liability for Conduct of Another" as set forth under Penal Law § 20.00 [3].

***4** As the parties disagree about whether the AO "caused" the victim's death, the Court is therefore tasked with determining the meaning of "cause" as set forth in CPL § 722.232[2][c][i]. Accordingly, as "in every case involving statutory interpretation", the Court must ascertain the legislative intent and construe the pertinent statutes to effectuate that intent". (*People v. Roberts*, 31 NY3d 406, 418 [2018]). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof". (*People v. Roberts*, 31 NY3d at 418). "If the words chosen have a 'definite meaning, which involves no absurdity or contradiction, then there is no room for construction and courts have no right to add or take away from that meaning". (*People v. Roberts*, 31 NY3d at 418).

The Court has referenced several dictionaries to ascertain the "plain and ordinary meaning" of the word "cause". (*People v. Andujar*, 30 NY3d 160, 163 [2017] [dictionary definitions are regarded as "useful guideposts" to determine the meaning of statutory language]; *see also, People v. Roberts*, 31 NY3d at 424). Having done so, the Court finds that the "plain and ordinary meaning" of the word "cause" is "to make something happen" [4], or to "bring about an effect or a result" [5]. As the word "cause" has a "definite meaning" involving "no absurdity or contradiction", the Court will not at this time determine whether "accessorial liability" principles apply when determining whether an AO has "caused significant physical injury" for the purposes of the "sixth-day appearance". (*See, People v. Roberts*, 31 NY3d at 418).

For the purpose of the "sixth-day appearance" inquiry, the Court is proceeding on the assumption of the veracity and accuracy of the factual allegations contained in the Felony Complaint and those additional hearsay-based facts as offered by the People at the "sixth-day appearance". (*See, e.g., People v. Meggie*, 184 Misc 2d 883, 887 [Nassau Dist Ct 2000]). The Court has considered the factual allegations in the Felony Complaint, including, *inter alia*, that this AO drove one of two vehicles to the location where the murder occurred, as well as the additional factual allegations orally relayed by the People at the "sixth-day appearance", including the internet searches that the AO allegedly conducted prior to and after the alleged murder; the AO's relationship with M.M., an individual whom the People allege is the head of the H. sect of MS-13; the AO's alleged knowledge that Mr. M. had a gang-related dispute with the victim and the AO's alleged knowledge that Mr. M. carries a gun; the AO having allegedly identified himself and others involved in the murder from surveillance footage the day of the murder; and the AO not only driving multiple individuals to the scene of the alleged murder, but then also driving himself and others away from the scene after the murder.

In consideration of the foregoing, the Court finds that the People have satisfied their burden of proving the presence of the aggravating factor that this AO "caused significant physical injury to a person other than a participant in the offense". (CPL § 722.232[2][c][i]). Accordingly, the case will not proceed towards automatic removal to the Family Court. Additionally, while the People also argued that the case should be retained in the Youth Part due to the presence of a second statutory aggravating factor, i.e., that the AO

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"displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense", CPL § 722.23(2)(c) only requires the presence of one aggravating factor for the case to be retained in the Youth Part. Therefore, the Court need not address the "display of a firearm" factor at this time. (*See*, CPL § 722.23[2]).

***5** As the People have satisfied their burden under CPL § 722.23(2)(c), their application to disqualify the AO's case from removal to the Family Court is granted and the case will remain in the Youth Part for all future proceedings.

This constitutes the opinion, decision and order of this Court.

**All Citations**

Slip Copy, 71 Misc.3d 1222(A), 145 N.Y.S.3d 325 (Table), 2021 WL 2020623, 2021 N.Y. Slip Op. 50460(U)

## Footnotes

1 "To establish a fact by a preponderance of the evidence means to prove that the fact is more likely than not to have occurred". (*Matter of Beautisha B. [Racquirine A.],* 115 AD3d 854 [2d Dept 2014]).

2 *See* Assembly, Record of Proceedings, dated April 8, 2017 ["Assembly Record"], in which legislators stated that "significant physical injury" is intended to fall somewhere between "physical injury" and "serious physical injury"; and see Penal Law § 10.00(10), defining "serious physical injury" to include "physical injury which cause death".

3 Penal Law § 20.00 provides that "[w]hen one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct".

4 *See,* Merriam Webster Dictionary definition of "cause", available at https://www.merriam-webster.com/dictionary/cause, and Collins Dictionary definition of "cause", available at https://www.collinsdictionary.com/us/dictionary/english/cause.

5 *See*, Oxford American English Dictionary definition of "cause", available at, https://www.oxfordlearnersdictionaries.com/us/definition/english/cause_2.

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73 Misc.3d 293
County Court, New York,
Nassau County.

The PEOPLE of the State of New York,
v.
V.A.M., Adolescent Offender.

Decided on August 2, 2021

**Synopsis**
**Background:** Adolescent offender was charged with attempted assault in the first degree, assault in the second degree, criminal mischief in the third degree, criminal possession of a weapon in the fourth degree, and three counts of endangering the welfare of a child. The People applied to disqualify the case from removal to family court.

The County Court, Conrad D. Singer, J., held that the People failed to establish that victim sustained a significant physical injury.

Application denied.

**Procedural Posture(s):** Juvenile Delinquency Proceeding.

**Attorneys and Law Firms**

Counsel for Plaintiff People of the State of New York, N. Scott Banks, Attorney in Chief, Legal Aid Society of Nassau County, By: Taryn, Shechter, Esq.

Counsel for Adolescent Offender V.M., Hon. Joyce A. Smith, Acting Nassau County District Attorney, By: Joan Owhe, Esq.

**Opinion**

Conrad D. Singer, J.

The Adolescent Offender ("AO") in this matter is charged with one count of Attempted Assault in the First Degree (Penal Law §§ 110.00/120.10[1]); one count of Assault in the Second Degree (Penal Law § 120.05[2]); one count of Criminal Mischief in the Third Degree (Penal Law § 145.05[2]); one count of Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01[2]); and three counts of Endangering the Welfare of a Child (Penal Law § 260.10[1]). The within Decision and Order is issued after the Court's review of the accusatory instrument, arguments by counsel, documents received into evidence and other relevant facts pursuant to CPL § 722.23(2)(b).

The charges against the AO arise from an incident alleged to have occurred on July 18, 2021 at approximately 1:30 AM at a location in H., Nassau County, New York. The AO was arrested on July 18, 2021 and arraigned on July 19, 2021. On July 22, 2021, the Court conducted its statutory review of the accusatory instrument pursuant to CPL § 722.23(2).

Under CPL § 722.23(2)(c), the AO's case must proceed towards being removed to the Family Court unless the Court finds during the sixth-day appearance that the People prove, by a preponderance of the evidence, the existence of one or more aggravating factors. Such factors include, as relevant in this case, that: "[i] the defendant caused significant physical injury to a person other than a participant in the offense". (CPL § 722.23[2][c][i]). "To establish a fact by a preponderance of the evidence means to prove that the fact is more likely than not to have occurred". (*Matter of Beautisha B.*, 115 A.D.3d 854, 854, 982 N.Y.S.2d 351 [2d Dept. 2014]; *People v. Giuca*, 33 N.Y.3d 462, 486, 104 N.Y.S.3d 577, 128 N.E.3d 655 [2019] [*in dissent*]).

In determining whether the People have satisfied their burden under CPL § 722.23(2)(c), the Court may consider the accusatory instrument, any supporting depositions, as well as hearsay evidence. (*People v. B.H.*, 62 Misc. 3d 735, 739-740, 89 N.Y.S.3d 855 [Nassau County Ct. 2018]; *People v. J.W.*, 63 Misc. 3d 1210[A], 114 N.Y.S.3d 584 [Sup. Ct. Kings County 2019]; *People v. Y.L.*, 64 Misc. 3d 664, 104 N.Y.S.3d 839 [Monroe County Ct. 2019]; *see also*, CPL § 722.23[2][b]).

***SIXTH***

***DAY APPEARANCE FOR REVIEW OF ACCUSATORY INSTRUMENT***

At the sixth-day appearance, the People relied upon the allegations set forth in the Felony Complaint, offered into evidence photographs depicting the victim's injuries, and asserted additional hearsay-based information. The People contended that this case should be retained in the Youth Part

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because the AO caused the victim, who is his girlfriend and the mother of his 10-month-old child, to sustain significant physical injury when he slashed/stabbed her with a kitchen knife multiple times in the presence of his child, his 11-year-old sister and his 14-year-old brother.

Defense counsel argued in opposition to the People's presentation that the People failed to satisfy their burden of proving, by a preponderance of the evidence, that the AO caused the victim to sustain "significant physical injury". Defense counsel argued that "significant physical injury" requires aggravating factors that are not present in this case, such as bone fractures and/or injuries that require surgery. Defense counsel further argued that the People did not present any evidence showing that the victim required any after care, further treatment or experienced any impairment past the date that she was injured.

***FINDINGS OF FACT***

It is alleged in the Felony Complaint that at about 1:30 AM on July 18, 2021, the AO was involved in an argument with the 15-year-old victim while they were at his home at 350 Washington St., No. B 14 in H., Nassau County, New York. It is further alleged that the victim is the AO's girlfriend and the mother of his 10-month-old daughter, and that the AO's daughter, as well as his 11-year-old sister and 14-year-old brother, were present during the subject incident. It is further alleged that the AO intentionally broke the victim's phone by forcefully throwing it against his bedroom wall, causing the screen to shatter. The AO allegedly assaulted the victim by repeatedly slashing her with a large kitchen knife about her left leg, her left arm, and the right side of her chest, causing multiple lacerations and puncture wounds, and that he did this in the presence of his daughter and his two siblings. It is further alleged that the victim's injuries caused her substantial pain and required numerous stitches to control the bleeding.

At the sixth day appearance the People further alleged that the AO stabbed/slashed the victim seven times--five times in her left leg, once in her left arm, and once under her breast--while the victim was huddled into a ball on the floor to protect herself. The People further alleged that the AO's conduct caused the victim to sustain deep gaping wounds, and that seven sutures were required to close the wounds. Five photographs were entered into evidence on consent (People's Exhibit No. 1), which depict the victim's injuries while she lay in the hospital following the incident.

***LEGAL CONCLUSIONS***

As stated above, the purpose of the sixth-day appearance under CPL 722.23[2] is for the Court to review the accusatory instrument and "other relevant facts" to determine whether the People proved, by a preponderance of the evidence as set forth in the accusatory instrument, the presence of one or more of three aggravating statutory factors which disqualify the AO's case from proceeding toward removal to the Family Court; including, as relevant here, that: "[i] the defendant caused significant physical injury to a person other than a participant in the offense". (CPL § 722.23[2][c][i]). Both parties may be heard and submit information relevant to the Court's determination. (CPL § 722.23[2][b]).

As the term "significant physical injury" is not statutorily defined under CPL § 722.23, the Court is tasked with ascertaining the "legislative intent" and construing CPL § 722.23 to effectuate that intent. (*People v. Roberts*, 31 N.Y.3d 406, 418, 79 N.Y.S.3d 597, 104 N.E.3d 701 [2018]). Having referred to the "dictionary definition" of "significant" as a "useful guidepost" for the "ordinary" and "commonly understood" [1] meaning of the phrase "significant physical injury", and having referred to the legislative history for the "Raise the Age" ["RTA"] legislation as a further aid in construing the meaning of the phrase [2], the Court finds that the legislators contemplated that the courts would define the phrase "significant physical injury", and that they intended the definition of the phrase to "fall somewhere in between" a "physical injury" and a "serious physical injury", both of which are phrases defined elsewhere in the Penal Law [3].

Legislators debating the RTA bill indicated that they expected "aggravating factors" to accompany "significant physical injury", including "bone fractures, injuries requiring surgery and injuries that result in disfigurement". (*Assembly Record, dated April 8, 2017* ["Assembly Record"], p. 26). "Significant physical injury" was elsewhere summarized as being "something more serious than a bruise, but less serious than a disfigurement". (*Assembly Record*, p. 27). The legislators further advised that in order to qualify as "significant physical injury", the injury "must have features and results that go[ ] significantly beyond those of physical injury". (*Assembly Record*, p. 49).

This Court has on prior occasions found that a knife-inflicted injury or injuries constituted "significant physical injury" [*see* *People v. K.F.*, 67 Misc. 3d 607, 125 N.Y.S.3d 233

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[Nassau County Ct. 2020]; and *People v. J.A.*, 66 Misc. 3d 1226[A], 122 N.Y.S.3d 492 [Nassau County Ct. 2020]). Having compared the features of the victim's injury in this case, to the injuries in those previous cases where "significant injury" was found and having also compared the features of the victim's injuries in this case with those of knife wounds in cases decided in other courts[4], the Court is constrained to find that the People failed to establish that the victim in this case sustained a "significant physical injury". The victim in this case is reported to have needed seven sutures total to close her multiple wounds. However, the People proffered no evidence that the victim required extended treatment or hospitalization beyond the date of the incident. While they allege that the victim sustained "substantial pain", the Court notes that "substantial pain" is an element of "physical injury" and that the legislators intended "significant physical injury" to have features and results that "go significantly beyond those of physical injury". (*Assembly Record*, p. 49).

While the Court finds the circumstances surrounding the AO's alleged assault on the victim to be highly concerning, including that he assaulted his girlfriend and the mother of his child while she huddled on the ground in an effort to protect herself, and that the alleged assault took place in front of the AO's infant child and younger siblings, the Court's inquiry is limited to the injuries sustained by the victim and, in this case, the Court finds that the People have failed to establish that the victim sustained a "significant physical injury".

As the People have failed to satisfy their burden under CPL § 722.23(2)(c), their application to disqualify the AO's case from removal to the Family Court is denied at this time, and it is ordered that the action shall proceed toward removal to the Family Court in accordance with subdivision one of CPL § 722.23. Absent the People filing a motion opposing removal based on Extraordinary Circumstances, the AO's case must be removed to the Family Court on or before August 18, 2021 (30 days after the AO was arraigned in the Youth Part).

This constitutes the opinion, decision and order of this Court.

**All Citations**

73 Misc.3d 293, 154 N.Y.S.3d 375, 2021 N.Y. Slip Op. 21219

## Footnotes

1 *See People v. Andujar*, 30 N.Y.3d 160, 163, 66 N.Y.S.3d 151, 88 N.E.3d 309 [2017])

2 *People v. Andujar*, 30 N.Y.3d at 166, 66 N.Y.S.3d 151, 88 N.E.3d 309.

3 "Physical injury" is defined as "impairment of physical condition or substantial pain" [Penal Law § 10.00(9)]; "Serious physical injury" is defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ".

4 *See People v. Brown*, 95 A.D.3d 1229, 945 N.Y.S.2d 334 [2d Dept. 2012] [penetrative wound of approximately one inch caused by stabbing and where victim was required to undergo laparoscopic surgery and reported pain level of "7" on scale of "1 to 10" constituted "physical injury"] and *People v. Williams*, 301 A.D.2d 669, 754 N.Y.S.2d 338 [2d Dept. 2003] [victim's hand being cut with knife and requiring victim to receive multiple stitches to close the wound and preventing the victim from using the hand or returning to work for several weeks and causing him to experience pain in his hand for several months thereafter constituted "physical injury"]; *see also People v. Rudenko*, 151 A.D.3d 1084, 54 N.Y.S.3d 597 [2d Dept. 2017] [victim sustained "serious physical injury" where he sustained two knife wounds, including a deep stab wound to the left of the anterior chest wall about three inches from his heart, and developed a hematoma in the muscle of his chest, and was required to undergo surgery under general anesthesia and where medical expert testified that, if the hematoma had been left untreated the victim could have died]).

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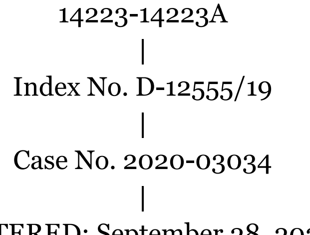
197 A.D.3d 1060
Supreme Court, Appellate Division,
First Department, New York.

In the MATTER OF MINAYLA T., A Person Alleged to be a Juvenile Delinquent, Appellant.
Presentment Agency



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Index No. D-12555/19
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Case No. 2020-03034
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ENTERED: September 28, 2021

**Attorneys and Law Firms**

Larry S. Bachner, New York, for appellant.

Georgia M. Pestana, Corporation Counsel, New York (Jessica Miller of counsel), for presentment agency.

Acosta, P.J., Singh, Kennedy, Mendez, Higgitt, JJ.

**Opinion**

Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about March 11, 2020, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed an act which, if committed by an adult, would constitute the crime of assault in the third degree, and placed her on Level 1 Probation for a period of 12 months, unanimously affirmed, without costs. Appeal from fact-finding order same court and Judge, entered on or about January 29, 2020, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The court's finding was supported by legally sufficient evidence. We find that there is no basis for disturbing the court's credibility determination that appellant intended to hit the victim with the chair. The record establishes that appellant threw a chair in the direction of the victim and it may be inferred "that a person intends that which is the natural and necessary and probable consequence[ ] of the act done by him" (*People v. Getch,* 50 N.Y.2d 456, 465, 429 N.Y.S.2d 579, 407 N.E.2d 425 [1980] [internal quotation marks omitted]). Here, the natural consequence of throwing the chair was the physical injury to the victim, which the record also established (*see* *People v. Chiddick,* 8 N.Y.3d 445, 447, 834 N.Y.S.2d 710, 866 N.E.2d 1039 [2007]; *People v. Guidice,* 83 N.Y.2d 630, 636, 612 N.Y.S.2d 350, 634 N.E.2d 951 [1994]).

The court properly denied appellant's motion to dismiss on speedy trial grounds. Appellant effectively consented to the adjournment to a date beyond the period set forth in Family Ct Act § 340.1 (*see Matter of Joseph CC.,* 234 A.D.2d 852, 853, 651 N.Y.S.2d 697 [3d Dept. 1996]; *Matter of Walter P.,* 203 A.D.2d 213, 213, 612 N.Y.S.2d 856 [1st Dept. 1994], *lv denied* 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216 [1994]; *see also Matter of Traekwon I.,* 152 A.D.3d 431, 432, 59 N.Y.S.3d 19 [1st Dept. 2017]). In any event, there was good cause for the adjournment (*see* Family Ct Act § 340.1[4]).

Appellant concedes that her challenges to the disposition are now academic.

We have considered appellant's remaining contentions and find them unavailing.

**All Citations**

197 A.D.3d 1060, 151 N.Y.S.3d 879 (Mem), 2021 N.Y. Slip Op. 05111

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72 Misc.3d 1120
Family Court, New York,
New York County.

In the MATTER OF ISAIAH D., a Person Alleged to be a Juvenile Delinquent.

E-00384/21
|
Decided on July 27, 2021

**Synopsis**

**Background:** New York City Corporation Counsel filed designated felony petition charging juvenile with assault in the first degree, two counts of assault in the second degree, assault in the third degree, and criminal possession of a weapon in the fourth degree. Juvenile moved to dismiss the petition.

**Holdings:** The Family Court, Carol Goldstein, J., held that:

officer's identification of juvenile as the perpetrator in delinquency petition was legally sufficient to establish juvenile's identity;

surveillance video from which officer identified juvenile was properly authenticated;

delinquency petition charging assault offenses was legally sufficient as to the element of serious physical injury;

delinquency petition charging assault offenses was legally sufficient to establish juvenile's intent to cause serious physical injury to victim;

delinquency petition was legally sufficient to establish that juvenile possessed a weapon, as an element of assault and criminal possession of a weapon offenses; and

collateral estoppel was inapplicable to preclude juvenile from being charged with assault offenses charged in delinquency petition.

Motion denied.

**Procedural Posture(s):** Juvenile Delinquency Proceeding.

**Attorneys and Law Firms**

***255** James E. Johnson, Esq., Corporation Counsel of the City of New York, 60 Lafayette Street, 7th Floor, New York, NY 10013, Nicole Atlak, Of Counsel, for petitioner.

Dawne A. Mitchell, Esq., The Legal Aid Society, Juvenile Rights Practice, Attorney for the Child, 60 Lafayette Street, Room 9A, New York, NY 10013, Israel T. Appel, Of Counsel, for respondent.

**Opinion**

Carol Goldstein, J.

In this delinquency matter, which had been removed from the youth part, a five-count designated felony petition was filed in family court against then 17-year-old respondent Isaiah D. Respondent moved for dismissal, making various arguments regarding the legal sufficiency of the factual allegations in the petition. The court denies the motion. The factual allegations in the petition provide reasonable cause to believe that respondent committed each crime charged (*see* FCA § 311.2[2]) and each element of the crimes charged and respondent's commission of those crimes were established by non-hearsay allegations (*see* FCA § 311.2[3]).

Additionally, respondent claimed that that counts 1 and 2, which require proof of serious physical injury, should be dismissed based upon collateral estoppel because at the retention hearing held in the youth part, the prosecution failed to prove that respondent caused "significant physical injury" to the victim (*see* CPL § 722.23[2]). The court finds the doctrine of collateral estoppel to be inapplicable. Two of the prerequisites for the application of the doctrine—a final and valid prior judgment and a full and fair opportunity to litigate the issue—were not established. Moreover, policy considerations strongly militate against the application of collateral estoppel giving preclusive effect to a determination made at a retention hearing.

**Initial Proceedings**

On or about July 29, 2020, respondent was arrested and charged as an adolescent offender in the youth part of New York County Supreme Court. The felony complaint filed against respondent alleged that he committed assault in the first degree (PL § 120.10[1]) and related offenses. On August 7, 2020, following a retention hearing held in the youth part pursuant to CPL § 722.23(2), the youth part judge found

72 Misc.3d 134(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
This opinion is uncorrected and will not be
published in the printed Official Reports.
Supreme Court, Appellate Term, New York,
Second Dept., 9 & 10 Jud. Dist.

The PEOPLE of the State of New York, Respondent,
v.
Kleo MOORE, Appellant.

2019-1648 S CR
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Decided on July 22, 2021

Appeal from a judgment of the Justice Court of the Town of Riverhead, Suffolk County (Allen M. Smith, J.), rendered September 25, 2019. The judgment convicted defendant, after a nonjury trial, of assault in the third degree, and imposed sentence.

**Attorneys and Law Firms**

Suffolk County Legal Aid Society (Amanda E. Schaefer of counsel), for appellant.

Suffolk County District Attorney (Elena Tomaro and Marion Tang of counsel), for respondent.

PRESENT: ELIZABETH H. EMERSON, J.P., JERRY GARGUILO, HELEN VOUTSINAS, JJ.

**Opinion**

***1** ORDERED that the judgment of conviction is affirmed.

Following a nonjury trial, defendant was convicted of assault in the third degree (Penal Law § 120.00 [1]), and sentence was imposed.

Viewing the evidence in a light most favorable to the prosecution (*see* *People v Contes*, 60 NY2d 620, 621 [1983]), we find that there is a valid line of reasoning and permissible inferences from which a rational person could have found the elements of the crime of assault in the third degree proven beyond a reasonable doubt (*see* *People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Williams*, 84 NY2d 925, 926 [1994]). The element of physical injury (*see* Penal Law § 120.00 [1]) was established by evidence that the complainant experienced substantial pain (*see* Penal Law § 10.00 [9]) when defendant pulled her hair, including the follicles, from her head during the altercation. Further, upon the exercise of our factual review power, we are satisfied that the guilty verdict was not against the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342; *People v Romero*, 7 NY3d 633 [2006]).

We find defendant's remaining contention, that the sentence was harsh and excessive, to be without merit.

Accordingly, the judgment of conviction is affirmed.

EMERSON, J.P., GARGUILO and VOUTSINAS, JJ., concur.

**All Citations**

Slip Copy, 72 Misc.3d 134(A), 148 N.Y.S.3d 823 (Table), 2021 WL 3235344, 2021 N.Y. Slip Op. 50710(U)

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that the prosecution did not establish that the victim suffered "significant physical injury" and the matter was not retained in the youth part on this basis. On November 17, 2020, the youth part judge denied the prosecution's subsequent motion to prevent the removal of respondent's case to family court based upon extraordinary circumstances (*see* CPL §§ 722.23[1] & [2][c]) and issued an order of removal to the family court.

On January 13, 2021, the New York City Corporation Counsel, the presentment agency, filed the instant designated felony petition in New York County Family Court. The five count petition charged that on July 19, 2020, respondent committed acts constituting: assault in the first degree (PL § 120.10[1]) (count 1); assault in the second degree (PL § 120.05[1]) (count 2); assault in the second degree (PL § 120.05[2]) (count 3); assault in the third degree (PL § 120.00[1]) (count 4) and criminal possession of a weapon in the fourth degree (PL § 265.01[2]) (count 5).

Annexed to the petition are two supporting depositions. A deposition signed by Police Officer Justin Ortiz, shield No. 7862, ***256** of the 25th Precinct Detective Squad signed on January 20, 2021, states that on July 19, 2020:

> * * * Pursuant to an investigation of an assault in front of 2258 Third Avenue, New York, I interviewed complainant Rodney White inside of Harlem Hospital Emergency Room. While interviewing Rodney White inside of Harlem Hospital, I observed that his head was bandaged with blood on the right side of his face. Pursuant to my investigation, on July 19, 2020, I went to retrieve video surveillance from the buildings located at 2258 Third Avenue and 2256 Third Avenue, New York, NY I, subsequently, viewed the video surveillance from 2258 Third Avenue and observed that the camera captured east side of Third Avenue. On or about July 19, 2020, I made a copy of the video surveillance depicting the above-mentioned date, time, and location. When I made the copy, said surveillance cameras and related computer equipment were in proper working condition. The date and time stamp reflected in the video surveillance from that date and time is accurate. I then downloaded the footage which depicted the events as they occurred on July 19, 2020 at 5:00 PM in front of 2258 Third Avenue, New York, NY onto my USB.
>
> On the above described video surveillance, I observed complainant Rodney White wearing a red shirt and black shorts approach the entrance door of the store located at 2258 Third Avenue, New York, NY I observed that Rodney White did not enter the store and walked towards the curb. I then observed Respondent Isaiah D. who was wearing a white tank top, red shorts and had a small afro hairstyle approach complainant Rodney White from the complainant's right side with a raised arm. Respondent Isaiah D. made a slashing motion from the top of Rodney White's head to about his eyebrow on the right side of Rodney White's face. I then observed Respondent Isaiah D. walk across the street towards the Taino Towers.

A second supporting deposition by Police Officer Amanda Proietto, shield #24791, signed on January 6, 2021, states that on July 19, 2020:

> I was working in my capacity as a Police Officer with the New York City Police Department. Pursuant to an investigation of an assault which occurred at the above date, time, and place [in front of 2258 Third Avenue, New York, NY at approximately 5:00 p.m.], I responded to the vicinity of 121st Street and 3rd Avenue at 5:16 PM. At that location I observed an individual whom I know to be Rodney White. I observed Mr. White was wearing a red T-shirt, grey shorts and white sneakers. When I approached Rodney White, I observed a steady stream of blood gushing out of the right side of Rodney White's forehead. The blood covered his entire face. As a result, Rodney White's T-shirt was also drenched with blood. The bleeding would not stop as I and other officers placed gauze on the wound until EMS arrived.
>
> On or about December 15, 2020, I visited Rodney White. On December 15, 2020, immediately noticed a large visible scar where I had previously observed Rodney White bleeding from on July 19, 2020. I observed a visibly large scar that was dark in color, raised and puffy, approximately 3 inches in length, which extended vertically on the right side of Rodney White's face from the top of his forehead to his eyebrow.

On April 16, 2021, respondent filed the instant motion seeking dismissal of the delinquency petition, claiming that the petition did not establish reasonable cause to ***257** believe respondent committed each crime charged and that each element of the crimes charged and respondent's commission thereof was not established by non-hearsay allegations. Respondent also sought dismissal of counts 1 and 2 of the petition on the grounds that the determination at the retention hearing that the prosecutor did not prove that respondent caused "significant physical injury" to the victim collaterally estopped the presentment agency from proving at

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trial that the victim suffered “serious physical injury.” [1] For the reasons explained below, respondent's motion is denied in all respects.

**Legal Sufficiency of the Petition**

The delinquency petition is “the sole instrument for the commencement, prosecution and adjudication of the juvenile delinquency proceeding” (*Matter of Jahron S.,* 79 N.Y.2d 632, 636, 584 N.Y.S.2d 748, 595 N.E.2d 823 [1992] citing *Matter of Detrece H.*, 78 N.Y.2d 107, 110, 571 N.Y.S.2d 899, 575 N.E.2d 385 [1991]). A petition is legally sufficient on its face when the factual allegations “provide reasonable cause to believe the respondent committed the crime or crimes charged” (FCA § 311.2[2]) and the “non-hearsay allegations of the factual part of the petition or of any supporting deposition establish, if true, every element of each crime charged and the respondent's commission thereof” FCA § 311.2[3]). A petition that is legally insufficient is defective and subject to dismissal under FCA § 315.1[1][a]).

In his motion for dismissal, respondent makes several arguments regarding the legal sufficiency of the instant petition. First, respondent argues that the identity of respondent as the perpetrator was not established by legally sufficient factual allegations. The deposition of Officer Ortiz states that he viewed the surveillance video of the incident and observed “Respondent Isaiah D.” approach the victim and make a “slashing motion” from the top of the victim's head to his eyebrow. Respondent claims that this identification of the respondent by Officer Ortiz is merely conclusory because there is no indication in his deposition as to how he knew that Isaiah D. was the person he observed in the video and furthermore that there were no non-hearsay allegations establishing respondent's identity as the perpetrator.

Pursuant to Court of Appeals precedent, this court must look exclusively at the four corners of a petition to determine its legal sufficiency. If there is merely a latent defect in the petition, *i.e.*, one that is not apparent on its face, the petition is not subject to dismissal under FCA § 315.1(1) (*Matter of Edward B.*, 80 N.Y.2d 458, 462, 591 N.Y.S.2d 962, 606 N.E.2d 1353 [1992]; *see also People v. Slade*, 37 N.Y.3d 127, 148 N.Y.S.3d 413, 170 N.E.3d 1189 [2021]).

Here, Officer Ortiz's statement that the person he observed in the video slashing the victim's face was Isaiah D. is legally sufficient to establish respondent's identity. While it would have been useful, and even preferable, for the officer to state exactly how he knows respondent's name, a plain reading of the supporting deposition of Officer Ortiz leads to the conclusion that the identification was based upon the officer's personal knowledge of respondent and thus establishes by non-hearsay allegations that respondent is the perpetrator [2]

***258** Respondent also argues that the identification of respondent as the perpetrator is legally insufficient because the surveillance video from which the identification was made was not authenticated. The court disagrees. Authentication of a video surveillance camera does not require any special expertise. Officer Ortiz alleges that the surveillance camera and related computer equipment were in proper working order based upon his personal observations: 1) that the camera focused on the East Side of Third Avenue, where the incident occurred, and 2) that the time and date stamp on the video were accurate. [3] These two statements are sufficient to demonstrate by non-hearsay allegations that the video surveillance camera was in proper working order.

With respect to the element of serious physical injury, which is an essential element of counts 1 and 2 of the petition, respondent contends that the court cannot consider the delegated and certified hospital records because, while they constitute admissible hearsay, they are unsworn. The court agrees with respondent on this point and is not considering the hospital records in evaluating whether the delinquency petition is legally sufficient as to the element of serious physical injury.

*People v. Casey,* 95 N.Y.2d 354, 361, 717 N.Y.S.2d 88, 740 N.E.2d 233 (2007) holds that the non-hearsay requirement is met so long as the hearsay statements contained in the accusatory instrument would be admissible under some hearsay rule exception (*id.,* at 360, 717 N.Y.S.2d 88, 740 N.E.2d 233; *see also* *Matter of Rodney J.*, 108 A.D.2d 307, 311, 489 N.Y.S.2d 160 [1st Dept. 1985] [the term nonhearsay in FCA § 311.2 refers only to hearsay that is not admissible at trial]). Here, the hospital records fit squarely into the business records exception to the hearsay rule as they were properly certified and delegated and would be admissible at trial (*see* CPLR §§ 4518[c] & 2306). [4] However, the fact that the records were not sworn runs afoul of the requirement that the non-hearsay allegations in the petition must be sworn (*see* Matter *of Neftali D.*, 85 N.Y.2d 631, 636, 628 N.Y.S.2d 1,

651 N.E.2d 869 [1995]; *Matter of Nelson R.*, 90 N.Y.2d 359, 362, 660 N.Y.S.2d 707, 683 N.E.2d 329 [1997]).

The Court of Appeals has not addressed what is required for admissible hearsay contained in a petition to be treated as sworn non-hearsay allegations, which may establish an element of the crime charged.[5] In *Rodney J.* (311), the First ***259** Department held that an unsworn signed written confession made by a respondent (which is admissible hearsay) annexed to an officer's deposition that respondent made statements should be treated as sworn allegations. Extrapolating from *Rodney J.*, this court concludes that for an unsworn admissible hearsay statement to be treated as a sworn allegation, it must be annexed to a supporting deposition which attests to the foundational basis of its admissibility. For example, in the instant case, the hospital records could be annexed to supporting depositions provided by appropriate representatives of the hospital swearing to the delegation of authority and the certification of the records.

Respondent argues that with or without the hospital records, the petition does not establish by legally sufficient non-hearsay evidence that the victim suffered serious physical injury. The court disagrees, finding that based upon the non-hearsay supporting deposition of Officer Proietto, without consideration of the hospital records, serious physical injury is established.

"Serious physical injury" is defined in PL § 10:00 (10) as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." Pursuant to *People v. McKinnon,* 15 N.Y.3d 311, 315, 910 N.Y.S.2d 767, 937 N.E.2d 524 (2010), a person is seriously disfigured "when a reasonable observer would find her [or his] altered appearance distressing or objectionable." The Court of Appeals added that "the injury must be viewed in context, considering its location on the body and any relevant aspects of the victim's overall physical appearance" (*id.*).

Officer Proietto swore that on July 19, 2020, the night of the incident, he observed a steady stream of blood "gushing out" of the right side of the victim's forehead. He further swore that on or about December 15, 2020, almost five months later, when he visited the victim, he "immediately noticed a large visible scar" where he had previously observed the victim bleeding on July 19, 2020. Officer Proietto stated that he "observed a visibly large scar that was dark in color, raised and puffy, approximately 3 inches in length, which extended vertically on the right side of [the victim's] face from the top of his forehead to his eyebrow."

The court finds that a large, prominent, puffy, dark, three-inch scar visible on the victim's face almost five months after an assault constitutes "serious and protracted disfigurement." In making this determination, the court is considering the location of the scar, on the victim's face; the length of the scar, three inches; and its appearance, "dark in color, raised and puffy." A reasonable observer would find such a scar "distressing and objectionable." Further, this court is considering that the observation of Officer Proietto was made almost five months after the injury, and thus the disfigurement was protracted.

Respondent also argues that the factual allegations in the petition do not establish respondent's intent to cause serious physical injury to the victim. The court disagrees. The intent of the accused may be established by the "natural, necessary and probable consequences of his conduct" (*People v. Getch*, 50 N.Y.2d 456, 465, 429 N.Y.S.2d 579, 407 N.E.2d 425 [1980]). Here, protracted disfigurement in the form of a long unsightly scar is the natural and probable consequence of slashing the victim across his upper face with a sharp ***260** object. Thus, respondent's intent to cause the victim serious physical injury was established by the allegations in the petition.

Finally, respondent is incorrect in his contention that counts 1 and 3 (which require the use of a deadly weapon or a dangerous instrument) and count 5 (which requires the possession of a dangerous or deadly instrument or weapon with intent to use unlawfully) are legally insufficient because there is no allegation either that respondent was observed with a weapon or that a weapon was recovered after the incident. Possession of a deadly weapon or dangerous instrument may be inferred circumstantially by the respondent's slashing motion on the victim's upper face, which was observed in the video, coupled with the resulting profuse bleeding and three-inch scar on the location on the victim's face where he was slashed (*see Matter of Mariela V.*, 23 A.D.3d 569, 806 N.Y.S.2d 641 [2nd Dept. 2005] [possession of dangerous instrument legally established in petition by non-hearsay allegations that victim sustained "long, thin, curving scar" on forehead and "shorter straight line scars on each temple"]).

**Collateral Estoppel**

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Respondent also argues that the presentment agency is collaterally estopped from charging him with causing serious physical injury, a necessary element of count 1, assault in the first degree (PL § 120.10[1]), and count 2, assault in the second degree (PL § 120.05[1]). Respondent's argument is based upon the fact that at the retention hearing held in the youth part, the district attorney failed to establish by a preponderance of evidence that respondent caused the victim "significant physical injury" which, according to respondent, is less than serious physical injury. For the reasons discussed below, the court finds that collateral estoppel is inapplicable to the facts and circumstances of this case.

Collateral estoppel, also known as "issue preclusion," is a "common-law doctrine rooted in civil litigation that, when applied, prevents a party from relitigating an issue decided against it in a prior proceeding" (*People v. Aguilera*, 82 N.Y.2d 23, 29, 603 N.Y.S.2d 392, 623 N.E.2d 519 [1993]) (internal citations omitted). In a criminal context, it is not applied in the same manner as in a civil action (*id.*, at 29, 603 N.Y.S.2d 392, 623 N.E.2d 519). The formal prerequisites in the criminal context are "identity of the parties; identity of issues; a final and valid prior judgment; and a full and fair opportunity to litigate the issues" (*id.*, at 29-30, 603 N.Y.S.2d 392, 623 N.E.2d 519).

Additionally, the Court of Appeals emphasized that in the criminal context there may be countervailing policies that may at times outweigh the doctrine (*Aguilera*, at 30, 603 N.Y.S.2d 392, 623 N.E.2d 519). As the Court of Appeals stated in *People v. Fagan,* 66 N.Y.2d 815, 816, 498 N.Y.S.2d 335, 489 N.E.2d 222 (1985), because the correct determination of guilt or innocence is paramount in criminal cases, "strong policy considerations militate against giving issues determined in prior litigation preclusive effect in a criminal proceeding, and indeed we have never done so." These same policy considerations apply to the fact-finding stage of a delinquency matter, where it is likewise critical for guilt or innocence to be correctly decided.

Looking at the prerequisites for the application of collateral estoppel as well as policy considerations leads this court conclude that the doctrine is inapplicable here.

In considering the issue of collateral estoppel in the instant case, it is useful to ***261** review the relevant procedure for the removal of a matter from the youth part in the supreme court to the family court. Where a young person aged 16 or 17 is charged with a felony, he or she is charged as an adolescent offender and the matter is initially heard in the youth part. Where the charge is a nonviolent felony, the matter is removed to the family court unless the district attorney files a motion to prevent removal based upon extraordinary circumstances (*see* CPL § 722.23[1][a]). Where the charge is a violent felony, as was respondent's charge in the instant case, the matter is calendared in the youth part within six days of arraignment for a determination as to whether the defendant caused significant physical injury to a person other than a participant; displayed a firearm or other deadly weapon; or engaged in certain unlawful sexual conduct (*see* CPL § 722.23[2]). This calendar appearance is called a retention hearing. The statute provides that at a retention hearing, the court reviews the accusatory instrument and any other relevant facts and that both the prosecution and the defense have the opportunity to submit relevant information (CPL § 722.23[2][b]). The statute does not preclude hearsay or require witnesses to testify. At the conclusion of the retention hearing, if the court determines that the district attorney has proven one of the above three factors by a preponderance of the evidence, the matter is retained in the youth part (CPL § 722.23[2][c]). If not, the matter will be removed to family court, unless the district attorney thereafter files a motion to prevent removal based on extraordinary circumstances and the court makes such a finding (CPL §§ 722.23 [1] & [2][c].).

In the instant case, respondent was charged with a violent felony and the matter was initially heard in the youth part. The prosecution contended that respondent caused "significant physical injury" to the victim and the matter was adjourned for six days for a retention hearing. At the retention hearing, held on August 6, 2020, the presiding judge in the youth part reviewed the accusatory instrument and the documents submitted by the prosecution, including the victim's hospital records, and heard arguments of counsel. No testimony was taken. The court reserved decision and the next day, on August 7, 2020, determined that the prosecution had not established that respondent caused significant physical injury to the victim because the victim refused medical attention, had not received stitches, and there was no current photograph of the victim's injuries. On November 17, 2020, the youth part judge denied the prosecution's subsequent motion to prevent removal based upon extraordinary circumstances and issued an order removing the case to family court.

While arguably, the first two prerequisites for the application collateral estoppel--identity of parties and Identity of issues—were met, [6] the second two prerequisites--a ***262** final and

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valid prior judgment and a full and fair opportunity to litigate the issue--were not established.

First, the court finds that there was not a final and valid prior judgement in the youth part. The matter concluded in the youth part, not with a dismissal, but rather with an order removing the case to family court.

Moreover, the prosecution did not have a full and fair opportunity to litigate the issue of serious physical injury. The retention hearing in the youth part which determined whether respondent caused significant injury to the victim was an abbreviated proceeding and was held just six days after arraignment. At the hearing, the accusatory instrument was reviewed, and the prosecution presented documentary evidence. No witnesses were called. Significantly, the issue of “serious and protracted disfigurement,” which is a critical issue in this case, could not be fully litigated at a proceeding that took place just six days after respondent's arrest. At that date, it could not yet be determined if the victim suffered permanent scarring or protracted disfigurement from being slashed on his forehead. This determination could only be made by observing the victim a number of months after the incident.

Additionally, policy considerations strongly militate against the application of collateral estoppel giving preclusive effect to a determination made at a retention hearing. The determination to be made at that hearing was whether respondent's case should be transferred to family court, not the paramount determination of respondent's guilt or innocence as to any of the counts charged. The circumstances in the instant case are analogous to those in *People v. Fagan,* 66 N.Y.2d 815, 498 N.Y.S.2d 335, 489 N.E.2d 222 (1985) where the Court of Appeals found that the dismissal of charges at a final parole revocation hearing did not bar a subsequent criminal prosecution for the same acts. In so ruling, the *Fagan* court noted that “the People's incentive to litigate in a felony prosecution would presumably be stronger than in a parole revocation proceeding” (*id.*; *see also People v. Hilton*, 95 N.Y.2d 950, 722 N.Y.S.2d 461, 745 N.E.2d 381 (2000) [collateral estoppel does not bar criminal prosecution after termination of probation violation hearing in favor of the accused]). The same could be said in the instant matter, that the prosecutor's incentive to litigate the issue of serious physical injury is stronger at a fact-finding hearing than at a retention hearing. Thus, even if all prerequisites for invoking the doctrine of collateral estoppel were met, the court would not apply the doctrine in the instant case.

For the reasons stated above, the court denies respondent's motion to dismiss the delinquency petition or any counts therein.

The above constitutes the decision and order of this court.

**All Citations**

72 Misc.3d 1120, 152 N.Y.S.3d 252, 2021 N.Y. Slip Op. 21200

## Footnotes

1 The presentment agency filed response papers in opposition on May 6, 2021. Respondent filed a reply on May 11, 2021 and a supplemental affirmation on May 28, 2021.

2 The court is aware that according to the felony complaint filed in the youth part on July 29, 2020, Officer Ortiz initially learned respondent's identity from an unnamed individual who identified respondent from a still photo obtained from the surveillance video. However, assuming, *arguendo*, that Officer Ortiz based his identification of respondent upon hearsay, which was not laid out in the petition, this would be the type of latent defect which would not render the petition subject to dismissal for legally insufficiency.

3 Officer Ortiz was aware of the date and time of the incident and could readily see if the date and time stamp on the video surveillance matched that date and time of the incident.

4 Contrary to respondent's argument, the hospital records were not redacted in any way which would render them inadmissible.

5 In *Matter of Markim Q.,* 7 N.Y.3d 405, 822 N.Y.S.2d 746, 855 N.E.2d 1160 (2006), the Court of Appeals had the opportunity to rule on the issue of whether business records that are certified, and delegated, but

unsworn, may support a delinquency petition, but declined to reach this issue. In *Markim Q.*, for the first time on appeal, the juvenile respondent challenged the sufficiency of a violation of probation petition—which is required by FCA § 360.2(2) to be supported by non-hearsay allegations, but was supported by certified and delegated, but unsworn, school records. The Court of Appeals found that, unlike defects in the delinquency petitions, defects in violation of probation petitions could not be raised for the first time on appeal and thus did not rule on this issue.

6 With respect to the identity of the parties, while acting as the presentment agency in a delinquency matter, the Corporation Counsel of the City of New York might be deemed to be in a sufficient relationship with the district attorney to meet the requirement of identity of parties (*cf.* *People ex rel. Dowdy v. Smith*, 48 N.Y.2d 477, 423 N.Y.S.2d 862, 399 N.E.2d 894 [1979] [for purposes of collateral estoppel, prosecutors found to be in sufficient relationship with the State Division of Parole]).

It also could be argued that there is identity of issues. Although the term “significant physical injury” as used in CPL § 722.23(2)(c)(i), is left undefined, the legislators, who could not agree on a definition, “expected [that] the courts would define it as more than ‘physical injury’ but less than ‘serious physical injury’ ” (Donnino, W., Practice Commentaries to CPL § 722.10 “*Removal of Adolescent Offender*.” Therefore, it is arguable that a failure to establish significant physical injury would amount to a failure to establish serious physical injury.

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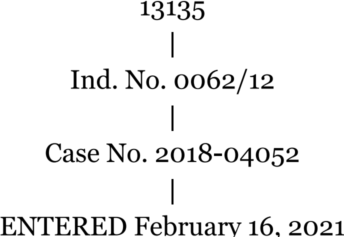
191 A.D.3d 542
Supreme Court, Appellate Division,
First Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Bakary KOUROUMA, Defendant–Appellant.



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Ind. No. 0062/12
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Case No. 2018-04052
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ENTERED February 16, 2021

**Attorneys and Law Firms**

Robert S. Dean, Center for Appellate Litigation, New York (Emilia King–Musza of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Patricia Curran of counsel), for respondent.

Manzanet–Daniels, J.P., Webber, Oing, Kennedy, JJ.

**Opinion**

***332** Judgment, Supreme Court, New York County (Melissa C. Jackson, J., at suppression hearing; Neil E. Ross, J., at jury trial and sentencing), rendered April 2, 2018, convicting defendant of robbery in the third degree, grand larceny in the fourth degree (seven counts) and resisting arrest, and sentencing him, as a second felony offender, to concurrent terms of 3½ to 7 years on the robbery conviction, 1½ to 3 years on each of the grand larceny convictions, and 1 year on the resisting arrest conviction, unanimously modified, on the facts and as a matter of discretion in the interest of justice, to the extent of reducing the robbery conviction to petit larceny and reducing the sentence on that conviction to time served, and otherwise affirmed.

Defendant's conduct in snatching the purse that was dangling from the victim's arm did not involve the physical force required to sustain a conviction of robbery (*see* *People v. Dobbs,* 24 A.D.3d 1043, 805 N.Y.S.2d 734 [3d Dept. 2005]; *People v. Middleton,* 212 A.D.2d 809, 810, 623 N.Y.S.2d 298 [2d Dept. 1995]; *compare* *People v. Santiago,* 62 A.D.2d 572, 579, 405 N.Y.S.2d 752 [2d Dept. 1978], *aff'd* 48 N.Y.2d 1023, 425 N.Y.S.2d 782, 402 N.E.2d 121 [1980]). Accordingly, defendant's conviction of robbery in the third degree was not supported by legally sufficient evidence, and that verdict was against the weight of the evidence (*see* *People v. Danielson,* 9 N.Y.3d 342, 849 N.Y.S.2d 480, 880 N.E.2d 1 [2007]).

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. Given that defendant met a description that was sufficiently specific, the close spatial and temporal proximity of the police encounter to the reported robbery, as well as defendant's furtive behavior and flight, the police had, at least, reasonable suspicion to stop defendant. Under all the circumstances, defendant's relatively brief detention, in handcuffs, following his flight and struggle against being detained, did not elevate the level three stop to an arrest (*see* *People v. Foster,* 85 N.Y.2d 1012, 1014, 630 N.Y.S.2d 968, 654 N.E.2d 1216 [1995]; *People v. Allen,* 73 N.Y.2d 378, 379–80, 540 N.Y.S.2d 971, 538 N.E.2d 323 [1989]). Furthermore, the record also supports the hearing court's alternative finding of probable cause to arrest.

In light of our disposition of this appeal, defendant's argument concerning the sentence imposed on the robbery conviction is academic.

**All Citations**

191 A.D.3d 542, 138 N.Y.S.3d 331 (Mem), 2021 N.Y. Slip Op. 01011

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191 A.D.3d 1113
Supreme Court, Appellate Division,
Third Department, New York.

In the MATTER OF ALEXANDER CC.,
Alleged to be a Juvenile Delinquent.
Tioga County Attorney, Respondent;
v.
Alexander CC., Appellant.

529672
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Calendar Date: January 7, 2021
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Decided and Entered: February 18, 2021

**Synopsis**

**Background:** Juvenile was adjudicated a delinquent in the Family Court, Tioga County, Gerald Keene, J., upon finding that juvenile committed sexual acts which, if committed by an adult, would have constituted crimes of first-degree criminal sexual act and first-degree sexual abuse. Juvenile appealed.

**Holdings:** The Supreme Court, Appellate Division, Egan, Jr., J., held that:

delinquency petition was not facially insufficient as to deprive juvenile of adequate time to prepare a defense;

verdict was supported by the weight of the evidence;

eight-year-old victim could testify as a sworn witness despite preliminary questioning indicating his lack of knowledge of an oath; and

counsel rendered effective assistance both pretrial and during hearing.

Affirmed.

**Procedural Posture(s):** Appellate Review; Juvenile Delinquency Proceeding.

**Attorneys and Law Firms**

***225** Donna Chin, New York City, for appellant.

Peter DeWind, County Attorney, Owego, respondent pro se.

Before: Garry, P.J., Egan Jr., Lynch, Clark and Reynolds Fitzgerald, JJ.

MEMORANDUM AND ORDER

Egan Jr., J.

Appeal from an order of the Family Court of Tioga County (Keene, J.), entered June 21, 2019, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 3, to adjudicate respondent a juvenile delinquent.

In February 2019, petitioner commenced this proceeding seeking to adjudicate respondent (born in 2003) a juvenile delinquent based upon three incidents that allegedly occurred "in or about the [s]ummer of 2018" at the home that respondent shared with, among others, his stepbrother (hereinafter the victim [born in 2011]), when he allegedly engaged in oral and anal sexual conduct with the victim, who was then seven years old. Following a fact-finding hearing, at which the victim provided sworn testimony, Family Court determined that respondent had committed ***226** acts which, if committed by an adult, would have constituted the crimes of criminal sexual act in the first degree and sexual abuse in the first degree. Respondent appeals. [1]

Initially, respondent contends that the juvenile delinquency petition is facially insufficient inasmuch as it failed to set forth a sufficient time frame for when the alleged conduct purportedly occurred such that he was deprived of his ability to prepare a defense. Although not raised before Family Court, the filing of a facially insufficient juvenile delinquency petition is a nonwaivable jurisdictional defect that may be raised for the first time on appeal (*see* *Matter of Neftali, D.,* 85 N.Y.2d 631, 636, 628 N.Y.S.2d 1, 651 N.E.2d 869 [1995]; *Matter of Jonathan YY.,* 134 A.D.3d 1344, 1345, 22 N.Y.S.3d 614 [2015]). The review of such a petition "requires application of a stringent test to assure that there is a valid and documented basis for subjecting the juvenile to prosecution" (*Matter of Lionel O.,* 288 A.D.2d 705, 705–706, 732 N.Y.S.2d 720 [2001] [internal quotation marks and citation omitted]). To be facially sufficient, "[a] juvenile delinquency petition must contain non-hearsay allegations establishing every element of each crime charged and the respondent's commission thereof" (*Matter of Jonathan YY.,*

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134 A.D.3d at 1345, 22 N.Y.S.3d 614 [internal quotation marks, ellipses, brackets and citations omitted]; *see* Family Ct Act § 311.2[3]). Family Ct Act § 311.1(3)(g) further requires that such a petition contain "a statement in each count that the crime charged therein was committed on, or on or about, a designated date, or during a designated period of time."

Here, the subject petition alleged that, "in or about the [s]ummer of 2018 ... respondent did wrongfully, willfully, and knowingly engage in oral sexual conduct or anal sexual conduct with another person less than [11] years of age ... by placing his penis in contact with the victim's mouth and anus" and did so "for the purpose of gratifying his sexual desire." The petition was supported by statements from the victim and the victim's mother. The allegations in the victim's statement demonstrate that, on two separate occasions in the victim's bedroom, respondent had placed his penis into the victim's mouth until he ejaculated and, on a separate occasion, had placed his penis into the victim's anus. The victim recalled in his statement that these incidents had occurred after school, in the daylight when it was still warm outside. The statement of the victim's mother, meanwhile, recounted an incident in July or August 2018 when another one of her children had made a similar allegation with respect to respondent and she further recalled approximately six occasions during the summer of 2018 when respondent and the victim had been alone in the victim's bedroom. We find that the statements by the victim and the victim's mother, if true, establish that respondent subjected the victim to sexual contact that, if committed by an adult, constitute the crimes of criminal sexual act in the first degree and sexual abuse in the first degree (*see Matter of Christopher W. [Erie County Attorney],* 96 A.D.3d 1591, 1592, 946 N.Y.S.2d 767 [2012]) and adequately allege that the subject crimes were committed during the summer of 2018 so as to provide respondent with adequate notice and ***227** information to prepare a defense (*see* Family Ct Act § 311.1[3][g]; *Matter of Ralph D.,* 163 A.D.2d 752, 754, 557 N.Y.S.2d 1003 [1990]; *Matter of Robert H.,* 152 A.D.2d 572, 573, 543 N.Y.S.2d 498 [1989]).

Respondent next contends that Family Court's determination is against the weight of the evidence. "When presented with a weight of the evidence argument in a case, such as this one, where a different determination would not have been unreasonable, we view the evidence in a neutral light while according deference to the credibility determinations of Family Court" (*Matter of Jared WW.,* 56 A.D.3d 1009, 1010, 868 N.Y.S.2d 350 [2008]; *see Matter of Gordon B.,* 83 A.D.3d 1164, 1166, 920 N.Y.S.2d 798 [2011], *lv denied* 17 N.Y.3d 710, 2011 WL 4388258 [2011]). The evidence at the fact-finding hearing established that, on two separate occasions, the victim was alone in his bedroom with respondent when respondent "took his peter out" and "peed in [his] mouth." The victim was sitting on his knees with respondent directly in front of him and respondent rubbed his penis before "[h]e peed in [the victim's] mouth." The "pee" tasted bad and the victim spit it out and saw that the fluid was clear and white. On another occasion, the victim was alone in his room with respondent when respondent inserted something "in [his] butt" that caused the victim to "hurt." When these alleged incidents occurred, the victim's mother and other siblings were at home and the door to the bedroom was open; however, the mother indicated that the area in which this conduct allegedly occurred could not be observed even with the bedroom door open, a fact which was confirmed by photographs of the victim's bedroom. Moreover, although the victim could not specifically recall when these incidents occurred, he knew that they occurred when he was still in first grade but prior to when respondent had moved out of the home in the fall of 2018. Respondent testified on his own behalf and denied all of the allegations against him; however, said denials created a credibility issue for Family Court to resolve (*see Matter of Nevada FF.,* 214 A.D.2d 814, 815, 625 N.Y.S.2d 318 [1995], *lv denied* 86 N.Y.2d 703, 631 N.Y.S.2d 607, 655 N.E.2d 704 [1995]). Having considered the evidence and giving deference to Family Court's credibility determinations, we are satisfied that the verdict is supported by the weight of the evidence (*see Matter of Devin Z.,* 91 A.D.3d 1035, 1036, 937 N.Y.S.2d 358 [2012]; *Matter of Gordon B.,* 83 A.D.3d at 1167, 920 N.Y.S.2d 798; *Matter of Jared WW.,* 56 A.D.3d at 1010, 868 N.Y.S.2d 350).

We reject respondent's assertion that Family Court erred by allowing the eight-year-old victim to give sworn testimony at the fact-finding hearing. Pursuant to Family Ct Act § 343.1, "[a] witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath" (Family Ct Act § 343.1[2]). Here, although preliminary questioning of the victim indicated that he did not know what an oath is, we do not find such fact to be determinative (*see Matter of Frederick QQ.,* 209 A.D.2d 832, 833, 619 N.Y.S.2d 362 [1994], *lv denied* 85 N.Y.2d 802, 624 N.Y.S.2d 372, 648 N.E.2d 792 [1995]) particularly where, as here, subsequent questioning of the victim by petitioner and Family Court established that he understood the difference between the truth and lie, understood that he was required to testify truthfully at the fact-finding hearing and promised that he would so testify (*see Matter of Jeremy R.,* 266 A.D.2d 745,

746, 698 N.Y.S.2d 749 [1999]). The victim also evinced an understanding that, if he were to tell a lie, he could "get in trouble" ***228** and be punished by the court (*see Matter of Jordan E.,* 305 A.D.2d 778, 779, 759 N.Y.S.2d 807 [2003]; *Matter of Jason FF.,* 224 A.D.2d 900, 900–901, 638 N.Y.S.2d 226 [1996]; *Matter of David PP.,* 211 A.D.2d 995, 996, 621 N.Y.S.2d 742 [1995]). Accordingly, we find no abuse of discretion in Family Court's determination to allow the victim to testify as a sworn witness (*see Matter of Ralph D.,* 163 A.D.2d at 753, 557 N.Y.S.2d 1003).

We similarly reject respondent's contention that he received ineffective assistance of counsel. Initially, there was no need for respondent's counsel to make a discovery demand as petitioner specifically indicated at the initial appearance that it would provide full disclosure to respondent without the need for a demand. Moreover, as previously discussed, there was no basis for a motion to dismiss the petition for legal insufficiency since the petition, as supported by the statements of the victim and the victim's mother, adequately set forth a designated period of time for when the alleged conduct occurred (*see Matter of Michael FF.,* 210 A.D.2d 758, 760, 621 N.Y.S.2d 112 [1994]). Further, respondent failed to demonstrate that the choice not to call the victim's father to testify was anything other than a strategic or tactical decision (*see Matter of Michael DD.,* 33 A.D.3d 1185, 1186–1187, 823 N.Y.S.2d 284 [2006]; *Matter of Bernard K.,* 280 A.D.2d 728, 729, 720 N.Y.S.2d 269 [2001]), and his speculative assertion that the objections that were rendered by counsel hindered rather than aided in his defense was insufficient to overcome the presumption that his counsel competently represented him (*see Matter of Jeffrey QQ.,* 37 A.D.3d 986, 987, 830 N.Y.S.2d 798 [2007]). Rather, upon review, we find that respondent's counsel was prepared for the fact-finding hearing, pursued a cogent defense, rendered appropriate objections and effectively cross-examined the victim and the victim's mother such that we are satisfied that respondent was provided with meaningful representation (*see Matter of Jeffrey V.,* 82 N.Y.2d 121, 126–127, 603 N.Y.S.2d 800, 623 N.E.2d 1150 [1993]; *Matter of Jeffrey QQ.,* 37 A.D.3d at 987, 830 N.Y.S.2d 798; *Matter of Dominick H.,* 9 A.D.3d 520, 521–522, 779 N.Y.S.2d 317 [2004]).

Garry, P.J., Lynch, Clark and Reynolds Fitzgerald, JJ., concur. ORDERED that the order is affirmed, without costs.

**All Citations**

191 A.D.3d 1113, 142 N.Y.S.3d 223, 2021 N.Y. Slip Op. 01101

## Footnotes

1 Although respondent filed a notice of appeal from only the fact-finding order, which is not appealable as of right (*see* Family Ct. Act § 1112[a]), we will treat the notice of appeal as an application for leave to appeal and grant said application (*see Matter of Devin Z.,* 91 A.D.3d 1035, 1035, 937 N.Y.S.2d 358 n. [2012]; *Matter of Jared WW.,* 56 A.D.3d 1009, 1010, 868 N.Y.S.2d 350 n. [2008]).

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37 N.Y.3d 127
Court of Appeals of New York.

The PEOPLE of the State of New York, Respondent,
v.
Kenneth SLADE, Appellant.
The People of the State of New York, Appellant,
v.
Kieth Brooks, Also Known as
Keith Brooks, Respondent.
The People of the State of New York, Appellant,
v.
Charo N. Allen, Respondent.

No. 27
|
No. 28, No. 29
|
May 6, 2021

**Synopsis**

**Background:** Following bench trial, defendant was convicted in the Criminal Court of the City of New York, Bronx County, Steven J. Hornstein, J., of attempted assault. Defendant appealed, alleging that the People failed to convert misdemeanor complaint into an information by failing to submit certificate of translation with respect to statement made by his Spanish-speaking wife. The Supreme Court, Appellate Division, N.Y.S.3d 811, affirmed, and defendant was granted leave to appeal. In separate proceeding, the Criminal Court of the City of New York, Bronx County, Armando Montano, J., dismissed instrument accusing second defendant of driving under the influence (DUI) and traffic violations, based on the People's failure to submit certificate of translation converting misdemeanor complaint into an information. The Supreme Court, Appellate Division, 115 N.Y.S.3d 798, affirmed, and the People were granted leave to appeal. In separate proceeding, the District Court of Suffolk County, First District, Toni A. Bean, J., dismissed instrument accusing defendant of menacing, on basis that translation therein created layer of hearsay that the People failed to remedy by failing to submit certificate of translation. The Supreme Court, Appellate Division, 115 N.Y.S.3d 807, affirmed, and the People were granted leave to appeal. The People's appeals and defendant's appeal were consolidated.

**Holdings:** The Court of Appeals, Garcia, J., held that:

hearsay defect stemming from participation of translator was not evident on face of misdemeanor complaint accusing defendant of assault;

hearsay defect was not evident on face of complaint accusing second defendant of DUI and traffic violations;

certificate of translation is not required to create facially sufficient accusatory instrument; and

complaint accusing third defendant of menacing did not contain hearsay defect based on its inclusion of translation.

Affirmed in part and reversed in part.

Rivera, J., filed dissenting opinion in which Wilson, J., concurred in separate dissenting opinion.

**Procedural Posture(s):** Appellate Review; Preliminary Hearing or Grand Jury Proceeding Motion or Objection.

**Attorneys and Law Firms**

****1192 ***416** Robert S. Dean, Center for Appellate Litigation, New York City (John L. Palmer of counsel), for appellant in the first above-entitled action.

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen and Nancy D. Killian of counsel), for respondent in the first above-entitled action.

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen, Nancy D. Killian and Peter D. Coddington of counsel), for appellant in the second above-entitled action.

Janet E. Sabel, The Legal Aid Society, New York City (Elizabeth Isaacs and Jonathan Garelick of counsel), for respondent in the second above-entitled action.

Timothy D. Sini, District Attorney, Riverhead (Lauren Tan of counsel), for appellant in the third above-entitled action.

Laurette D. Mulry, The Legal Aid Society of Suffolk County, Riverhead (Felice Milani and Edward E. Smith of counsel), for respondent in the third above-entitled action.

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**OPINION OF THE COURT**

GARCIA, J.

***132** In these three appeals, defendants challenge the facial sufficiency of the accusatory instrument filed against them, arguing that participation of a translator in the process of documenting the information from first-party witnesses with limited-English proficiency created a hearsay defect requiring dismissal of the instrument. In the first two cases, applying our well-settled precedent, we hold that no facial defect was evident within the four corners of the accusatory instrument. Moreover, even in the third case where the participation of a translator was documented within the witness's supporting affidavit, we conclude that no additional layer of hearsay was created by the use of a translator and therefore that accusatory instrument too was facially sufficient. Defendants have a right to be prosecuted by an information that meets all statutory requirements, as was the case here, but we decline to impose additional barriers to participation in the process for victims with limited-English proficiency.

I.

a. Kenneth Slade

Slade assaulted his wife (the victim) at the home they shared and was charged in a misdemeanor complaint with assault in the third degree, a class A misdemeanor, and harassment in the second degree, a *****417** ****1193** violation. The victim, as the deponent, asserted the following in the complaint:

> "at the above time and place, while she was seated in a chair [Slade] grabbed her by both her arms and lifted her off of the chair then threw her back onto the chair....
>
> [A]s a result of [Slade's] aforementioned actions she experienced bruising, swelling, and substantial pain to both arms and lower back and experienced annoyance, alarm, and fear for her physical safety."

The victim verified the complaint by signing it beneath the ***133** form notice stating that false statements made therein were punishable as a class A misdemeanor (*see*CPL 100.30[1][d]). In a certificate of translation, prepared on the same day as the complaint, a translator stated that she translated the English-language complaint to the victim, including the form notice, in Spanish and that the victim confirmed to the translator that she understood what was translated.

At Slade's arraignment, the People announced that they were ready for trial, relying on the first-party complaint. However, the People did not file or serve the certificate of translation at that time, only doing so more than two years later upon Slade's request for the document. Slade thereafter moved to dismiss the accusatory instrument on statutory speedy trial grounds, arguing that the People's statements of readiness were illusory because the filing of the certificate was necessary to convert the complaint into an information (*see* *People v. Colon,* 110 Misc.2d 917, 920, 443 N.Y.S.2d 305 [Crim. Ct., N.Y. County 1981], *reinstated for the reasons stated in Crim Ct opn* 59 N.Y.2d 921, 466 N.Y.S.2d 319, 453 N.E.2d 548 [1983] ["the People cannot be ready for trial ... if they have not converted the complaint( ) to (a) jurisdictionally sufficient information( )"]). Criminal Court denied the motion and, following a bench trial, found Slade guilty of attempted assault in the third degree and harassment in the second degree and imposed sentence.

The Appellate Term affirmed, concluding, as relevant here, that "the first-party complaint signed by" the victim "needed no certificate of translation for conversion to an information, since there was no indication on the face of the instrument that [she] had not read and understood it or was incapable of doing so" (63 Misc.3d 161[A], 2019 N.Y. Slip Op. 50893[U], *1, 2019 WL 2402155 [App. Term, 1st Dept. 2019]). A Judge of this Court granted Slade leave to appeal (*see*34 N.Y.3d 984, 113 N.Y.S.3d 639, 137 N.E.3d 9 [2019]).

b. Kieth Brooks (a/k/a Keith Brooks)

The People filed an English-language misdemeanor complaint charging Brooks with driving while intoxicated, a misdemeanor, and other Vehicle and Traffic Law offenses. The deponent, a police officer, stated that a witness related the following: that he saw Brooks operating a van, that the van rear-ended the witness's vehicle, and that Brooks fled without providing any identifying information. The deponent police officer claimed, based on his own observation, that Brooks exhibited signs of intoxication and that he was present when Brooks refused a breathalyzer test.

***134** The People were not ready at arraignment because they lacked supporting depositions from the witness and

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another police officer. Later, the People simultaneously filed an off-calendar statement of readiness, the two outstanding supporting depositions, and a certificate of translation. The witness's supporting deposition stated that he had "read the complaint" and that the facts attributed to him in that document pertaining to Brooks's operation of the van and actions after the crash were "true upon [his] personal knowledge." ***418 **1194 The witness signed the deposition under a form notice stating that false statements made therein were punishable as a class A misdemeanor, as required for verification (*see*CPL 100.30[1][d]). In the certificate, a translator said that she translated the English-language "accusatory instrument" to the witness, including the form notice, in Spanish and that the witness confirmed to the translator that he understood what was translated.

At a subsequent calendar call, Criminal Court determined that the certificate of translation was defective because it failed to state the translator's qualifications. As a result, the court concluded that the complaint was not converted to an information and that the People would be charged speedy trial time until they filed a proper affidavit of translation. After the People refused to take any additional steps to convert the complaint on the ground that no further action was required by the CPL to effectuate conversion, the court granted Brooks's motion to dismiss the accusatory instrument on statutory speedy trial grounds.

The Appellate Term affirmed, concluding that Criminal Court "providently exercised its discretion in requiring a proper certificate of translation to be produced in order to convert the complaint into an information" because the People "provided sufficient indicia" of the witness's inability to understand English when they filed the translator's statement with the supporting deposition (63 Misc.3d 158[A], 2019 N.Y. Slip Op. 50859[U], *1, 2019 WL 2347138 [App. Term, 1st Dept. 2019]). The court further determined that the certificate of translation filed by the People failed to convert the complaint within the speedy trial period because the certificate "did not comply with CPLR 2101(b)" (*id.,* citing Uniform Rules for Trial Cts [22 NYCRR] § 200.3). A Judge of this Court granted the People leave to appeal (*see* 34 N.Y.3d 979, 113 N.Y.S.3d 647, 137 N.E.3d 17 [2019]).

***135** c. Charo N. Allen

Allen was charged with menacing in the second degree, a class A misdemeanor, after she allegedly threatened a restaurant worker (the complainant) with a knife. A police officer drafted the English-language misdemeanor information, which stated that the charge was based on the complainant's sworn statement to the effect that Allen, a customer at the restaurant where the complainant was working, became angry because the complainant informed her that she could not leave the establishment with an alcoholic beverage. The situation escalated, and Allen allegedly threatened the complainant with a steak knife. The deposition includes a representation that the complainant "had this statement consisting of [one] page read to [her] in Spanish" by a police officer and that she swore that it was the truth. The complainant verified the deposition by signing it under a form notice stating that false statements made therein were punishable as a class A misdemeanor (*see*CPL 100.30[1][d]).

Allen moved to dismiss the accusatory instrument as facially insufficient, contending that the translation created a layer of hearsay that the People failed to appropriately remedy. In opposition, the People filed an affidavit of translation executed by the officer who translated the deposition. He swore that he understood English and Spanish and that the complainant's statement was a true and accurate translation by him of the complainant's spoken Spanish statement. The officer averred that he translated the written English statement into Spanish for the complainant and she signed the deposition after confirming its accuracy.

***419 **1195 The District Court adjourned Allen's motion and directed the People to file a superseding information that included: (1) a verified affidavit from the complainant "in the language of said individual," including a verification in that language; (2) an English translation of that document; and (3) an affidavit by the translator stating his qualifications and attesting to the accuracy of the translation, as purportedly required by CPLR 2101(b). The People ultimately declined to do so, and the court dismissed the matter on facial sufficiency grounds.

The Appellate Term affirmed (*see* 63 Misc.3d 159[A], 2019 N.Y. Slip Op. 50869[U], *3, 2019 WL 2364339 [App. Term, 2d Dept., 9th & 10th Jud. Dists. 2019]). The court explained that there was no evidence that the complainant "had reviewed her written English statement ***136** for its truth and accuracy" and, therefore, "a certificate of translation

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was required to cure the hearsay defect, since the written English statement was being used to support the accusatory instrument" (*id.* at *2 [internal quotation marks and citation omitted]). A Judge of this Court granted the People leave to appeal (*see*34 N.Y.3d 978, 113 N.Y.S.3d 662, 137 N.E.3d 32 [2019]).

II.

A misdemeanor complaint "serves merely as the basis for commencement of a criminal action, permitting court arraignment and temporary control over the defendant's person where there is as yet no prima facie case" (*People v. Weinberg,* 34 N.Y.2d 429, 431, 358 N.Y.S.2d 357, 315 N.E.2d 434 [1974]). To proceed with a prosecution, however, a misdemeanor complaint must be replaced by an information. Simply stated, the requirements for the factual portion of a local criminal court information are:

> "that it state facts of an evidentiary character supporting or tending to support the charges; that the allegations of the factual part ... together with those of any supporting depositions ... provide reasonable cause to believe that the defendant committed the offense charged; and that the non-hearsay allegations of the information and supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof" (*People v. Casey,* 95 N.Y.2d 354, 360, 717 N.Y.S.2d 88, 740 N.E.2d 233 [2000] [internal quotation marks, citations, and brackets omitted]).

At issue in these appeals is the last of the listed requirements, namely that non-hearsay allegations, if true, support a prima facie case. This requirement is meant to "protect a defendant against groundless criminal proceedings by providing reasonable guarantees against baseless prosecutions not predicated on probable cause" (*id.* at 363, 717 N.Y.S.2d 88, 740 N.E.2d 233 [internal quotation marks and citation omitted]). That protection was amply afforded by the first-person allegations made in each of the accusatory instruments at issue here.

a. Slade and Brooks

We can resolve the challenges to the accusatory instruments in *Slade* and *Brooks* by applying our well-settled rules regarding facial sufficiency. As we recently reiterated, "in evaluating the sufficiency of an accusatory instrument," a court does "not ***137** look beyond its four corners (including supporting declarations appended thereto)" (*People v. Hardy,* 35 N.Y.3d 466, 475, 132 N.Y.S.3d 394, 157 N.E.3d 117 [2020]; *see*CPL 100.15[3]; 100.40[1][c]; *People v. Thomas,* 4 N.Y.3d 143, 146, 791 N.Y.S.2d 68, 824 N.E.2d 499 [2005]). Courts must "not rely on external factors to create jurisdictional defects not evident *****420** ****1196** from the face of the" accusatory instrument (*People v. Konieczny,* 2 N.Y.3d 569, 576, 780 N.Y.S.2d 546, 813 N.E.2d 626 [2004]). Instead, "[w]hether the allegation of an element of an offense is hearsay, rendering the information defective, is to be determined on a facial reading of the accusatory instrument" (*Casey,* 95 N.Y.2d at 361, 717 N.Y.S.2d 88, 740 N.E.2d 233).

Defects that do not appear on the "the face of the" accusatory instrument are "latent deficienc[ies]" that do not require dismissal (*Matter of Edward B.,* 80 N.Y.2d 458, 463, 591 N.Y.S.2d 962, 606 N.E.2d 1353 [1992]; *seeMatter of Nelson R.,* 90 N.Y.2d 359, 363, 660 N.Y.S.2d 707, 683 N.E.2d 329 [1997]). In *Matter of Edward B.,* we considered whether an accusatory instrument that was "supported in relevant part only by hearsay [was] jurisdictionally defective and must be dismissed ... when the hearsay character of the facts alleged in the supporting deposition [was] not facially apparent but [was] discovered at some point in the course of the proceeding" (80 N.Y.2d at 460–461, 591 N.Y.S.2d 962, 606 N.E.2d 1353). The hearsay defect, an assistant corporation counsel's unconfirmed summary of the complainant's statement, was first discovered by the respondent during the fact-finding hearing on the juvenile delinquency petition. We concluded that, although there was indeed a hearsay defect in light of the assistant's actions "in editing and revising the complainant's version of events before transcribing it," the defect was properly classified as a latent deficiency because "the claimed flaw" was "not apparent from the face of the instrument itself" (*id.* at 462–463, 591 N.Y.S.2d 962, 606 N.E.2d 1353). Explaining that the relevant Family Court Act provisions were analogous to the provisions of the CPL governing facial sufficiency, which permit dismissal only if the error is apparent from the face of the accusatory instrument (*see* CPL 100.40),

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we held that "latent deficiencies in the accusatory instrument that are revealed during the trial or hearing do not provide a ground for mandatory dismissal" (*see* *Matter of Edward B.,* 80 N.Y.2d at 465, 591 N.Y.S.2d 962, 606 N.E.2d 1353). *Matter of Edward B.* therefore specifically rejected the notion that a latent deficiency renders a facially sufficient accusatory instrument a nullity. We later made clear that the holding in *Matter of Edward B.* was not limited to latent deficiencies discovered during a trial or fact-finding hearing (*seeMatter of Nelson R.,* 90 N.Y.2d at 361–363, 660 N.Y.S.2d 707, 683 N.E.2d 329 [latent deficiency identified prior to the fact-finding hearing did ***138** not render the petition facially insufficient and, therefore, did not mandate pre-hearing dismissal]), nor was it limited to Family Court proceedings (*see* *Casey,* 95 N.Y.2d at 361, 717 N.Y.S.2d 88, 740 N.E.2d 233 [applying *Matter of Edward B.* to criminal proceedings]).[1] In sum, "[n]either the statutes establishing the criteria for accusatory instruments ... nor the policies underlying those statutes suggest that an inquiry beyond the facial validity" of the accusatory instrument "is necessary or even appropriate" (*Matter of Edward B.,* 80 N.Y.2d at 465, 591 N.Y.S.2d 962, 606 N.E.2d 1353).

Slade argues that the English-language misdemeanor complaint filed against him contained hearsay because the complaint did not set forth the victim's personal knowledge and observations, but rather was merely the translator's interpretation of her statement. Even assuming that an accurate translation creates a layer of *****421 **1197** hearsay for pleading purposes, a contention we reject in the next section, the accusatory instrument here is facially sufficient because, as in *Matter of Edward B.,* there is no hearsay defect apparent on the face of the document. As the Appellate Term concluded, "there was no indication on the face of the" first-party complaint that the victim "had not read and understood it or was incapable of doing so" (2019 N.Y. Slip Op. 50893[U], *1, 2019 WL 2402155; *seeMatter of Shaquana S.,* 9 A.D.3d 466, 466, 780 N.Y.S.2d 179 [2d Dept. 2004]). Although a certificate of translation was created at the same time as the complaint, it was not referenced or incorporated in that document and therefore the certificate cannot be used to create a "facial defect" otherwise undetectable on the face of the accusatory instrument. No inquiry beyond the instrument's face is required or appropriate.

Brooks alleged a latent deficiency—and made his speedy trial motion—earlier in the pretrial proceedings than Slade. Irrespective of the timing of its discovery, however, a latent deficiency in a facially sufficient accusatory instrument does not mandate dismissal (*seeMatter of Nelson R.,* 90 N.Y.2d at 361–363, 660 N.Y.S.2d 707, 683 N.E.2d 329). As in *Slade,* the face of the complaint and the witness's supporting deposition in *Brooks* give no indication that the documents were translated for the witness or that he failed to read, have read to him, or understand the English-language documents. And, as with *Slade,* the four corners of the ***139** complaint, including the witness's accompanying supporting deposition, contain no indication of any translation or other potential hearsay defect.

Although the certificate of translation was filed at the same time as the witness's supporting deposition, it is not part of that document. Nor is it part of the complaint.[2] Brooks's attempt to use an external factor, the certificate, to establish a hearsay defect not evident on the face of the complaint and supporting depositions fails to raise any facial deficiency and must therefore be rejected.

Moreover, the CPL does not require a certificate of translation, let alone a certificate in any particular form, to create a facially sufficient instrument (*see*CPL 100.15; 100.40[1]). The Uniform Rules for Trial Courts generally direct courts exercising criminal jurisdiction to "comply[ ] with the applicable provisions of CPLR 2101" (22 NYCRR 200.3; *see* CPLR 2101[b] ["Where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating (their) qualifications and that the translation is accurate"]). However, the specific rules applicable to facial sufficiency of misdemeanor informations are found in the CPL and the governing provisions do not require a certificate of translation or the affidavit of a translator. CPLR 2101(b) cannot be used to override those specific requirements (*seePeople v. Douglas,* 162 A.D.3d 1212, 1214, 79 N.Y.S.3d 352 [3d Dept. 2018], *lv denied*31 N.Y.3d 1147, 83 N.Y.S.3d 428, 108 N.E.3d 502 [2018]), and we decline to effect that result by judicial fiat (*see* Rivera, J., dissenting op. at 157–158, 148 N.Y.S.3d at 434-35, 170 N.E.3d at 1210-11; *but see* Wilson, J., dissenting op. at 161 n. 2, 148 N.Y.S.3d at 426 n. 2, 170 N.E.3d at 1202 n. 2).[3]

*****422 **1198** As both informations were facially sufficient, we hold that the courts below properly denied

Slade's CPL 30.30 motion, but erroneously granted Brooks's statutory speedy trial motion.

b. Allen

While the accusatory instruments in *Slade* and *Brooks* contain no facial indication that a translation occurred, in ***140** *Allen*, the complainant stated in her supporting deposition that she had the one-page English-language statement read to her in Spanish by a police officer. Allen argues that this creates an additional layer of hearsay, and that the hearsay character of the facts alleged in the supporting deposition is therefore facially apparent. We disagree.

Hearsay, of course, is "an out-of-court statement admitted for the truth of the matter asserted" (*People v. Buie,* 86 N.Y.2d 501, 505, 634 N.Y.S.2d 415, 658 N.E.2d 192 [1995]), and the hearsay rule generally prohibits the introduction of such statements at trial (*see* *People v. Salko,* 47 N.Y.2d 230, 239, 417 N.Y.S.2d 894, 391 N.E.2d 976 [1979]). In the accusatory instrument context, the focus is on whether the person making the statement had first-hand personal knowledge of the events described or whether the third-party statement falls within a hearsay exception (*see* *Casey,* 95 N.Y.2d at 361, 717 N.Y.S.2d 88, 740 N.E.2d 233; *Matter of Edward B.,* 80 N.Y.2d at 462–463, 591 N.Y.S.2d 962, 606 N.E.2d 1353). The issue here is whether a witness's use of a translator creates a layer of hearsay that runs afoul of the CPL's facial sufficiency requirements for misdemeanor informations.

Other courts have grappled with the applicability of the hearsay rule to testimony related through an interpreter. In the context of trial testimony by a witness relating to statements that were interpreted to him, the Second Circuit concluded that, "[e]xcept in unusual circumstances, an interpreter is 'no more than a language conduit and therefore [the interpreter's] translation [does] not create an additional [layer] of hearsay' " (*United States v. Lopez,* 937 F.2d 716, 724 [2d Cir.1991], quoting *United States v. Koskerides,* 877 F.2d 1129, 1135 [2d Cir.1989]; *see* *United States v. Martinez–Gaytan,* 213 F.3d 890, 892 [5th Cir.2000]). Courts have applied this rule to declarants when "[t]here is nothing in the record to suggest that the interpreter had any motive to mislead or distort, and there is no indication that the translation was inaccurate" (*Koskerides,* 877 F.2d at 1135). Put another way, in those circumstances, the interpreter is treated as the declarant's agent (*see* *Lopez,* 937 F.2d at 724; *United States v. Da Silva,* 725 F.2d 828, 831–832 [2d Cir.1983]; *see alsoPeople v. Quan Hong Ye,* 67 A.D.3d 473, 473, 889 N.Y.S.2d 556 [1st Dept. 2009], *lv denied* 14 NY3d 804, 807, 899 N.Y.S.2d 138, 142, 925 N.E.2d 942, 946 [2010]). This Court has signaled that the "agency rationale" is a "tenable theory for admitting interpreted testimony" (*People v. Romero,* 78 N.Y.2d 355, 362, 575 N.Y.S.2d 802, 581 N.E.2d 1048 [1991]).

We conclude that, when evaluating the facial sufficiency of an accusatory instrument, no hearsay defect exists where, as ***141** here, the four corners of the instrument indicate only that an accurate, verbatim translation occurred, and the witness or complainant adopted the statement as their own by signing the instrument after the translation (*see* *****423** ****1199** *Matter of Shaquana S.,* 9 A.D.3d at 466–467, 780 N.Y.S.2d 179; *People v. Ventura,* 250 A.D.2d 403, 404, 673 N.Y.S.2d 106 [1st Dept. 1998], *lv denied*92 N.Y.2d 931, 680 N.Y.S.2d 472, 703 N.E.2d 284 [1998]; *cf.* *Matter of Edward B.,* 80 N.Y.2d at 463, 591 N.Y.S.2d 962, 606 N.E.2d 1353 [supporting deposition contained latent hearsay defect even though the complainant signed the document because the complainant "had never read—nor been read—its contents"]). In *Allen,* the complainant's deposition states facts supporting the information in a first-person narrative and nothing on the face of the deposition provides any reason to doubt that a precise translation occurred. Therefore, the police officer's translation of the complainant's first-hand account did not create a level of hearsay for pleading purposes. Rather, the officer merely acted as a language conduit for the complainant's factual assertions.

In sum, the information in *Allen* contained no hearsay defect for pleading purposes. It was facially sufficient and no further documentation, including a certificate of translation, was necessary for conversion. Allen's motion to dismiss was therefore erroneously granted.

III.

In an effort to make the hearsay rules for misdemeanor informations somehow sacrosanct, the dissents distort the

CPL's statutory framework and ignore the purpose of the procedural requirements for the factual portion of those informations—which is to give a defendant "notice sufficient to prepare a defense" and "to prevent a defendant from being tried twice for the same offense" (*Casey,* 95 N.Y.2d at 360, 717 N.Y.S.2d 88, 740 N.E.2d 233). As an initial matter, an accusatory instrument does not "establish the truth" (Wilson, J., dissenting op. at 161, ––– N.Y.S.3d at ––––, ––– N.E.3d at ––––). Rather, the CPL requires, for a prima facie case, non-hearsay allegations that "establish, *if true,* every element of the offense charged and the defendant's commission thereof" (*Casey,* 95 N.Y.2d at 360, 717 N.Y.S.2d 88, 740 N.E.2d 233 [emphasis added] [internal quotation marks and citation omitted]). The truth-seeking function is for the factfinder at trial. Nor does the non-hearsay pleading requirement protect against arrest (*see* *id.* at 364, 717 N.Y.S.2d 88, 740 N.E.2d 233 ["a misdemeanor complaint, which may include hearsay, (may) serve not only as the basis for initiating a criminal action, but also for issuance of an arrest warrant"]; CPL 120.20[1]; *but see* Wilson, J., dissenting op. at ––––, ––– N.Y.S.3d at ––––, ––– N.E.3d at ––––). Likewise, a violation ***142** of the non-hearsay rule is both curable and waivable (*see* *Casey,* 95 N.Y.2d at 362, 717 N.Y.S.2d 88, 740 N.E.2d 233), yet our dissenting colleagues conclude that a violation somehow rises to the level of rendering a misdemeanor information "a legal nullity" and "void ab initio,"—a drastic remedy[4] *****424** ****1200** that is invoked without any foundation or indeed citation (Rivera, J., dissenting op. at 144, ––– N.Y.S.3d at ––––, ––– N.E.3d at ––––; *seeid.* at 155, ––– N.Y.S.3d at ––––, ––– N.E.3d at ––––; Wilson, J., dissenting op. at 167, ––– N.Y.S.3d at ––––, ––– N.E.3d at –––– [joining Judge Rivera's dissent]).

As we made clear in *Casey,* "[p]leading errors involving omission of elements of the charged crime are fundamental" because they "impair a defendant's basic rights to fair notice sufficient to enable preparation of a defense and to prevent double jeopardy" (95 N.Y.2d at 366, 717 N.Y.S.2d 88, 740 N.E.2d 233). By contrast:

> "Hearsay pleading defects do not implicate any of those basic rights of an accused. Indeed, ... both statutory and decisional law have recognized that a criminal prosecution can validly proceed on a hearsay-based accusatory instrument. We have even held that the statutory right to be prosecuted on a non-hearsay accusatory instrument can be waived by implication" (*id.*).

Proper application of the CPL's non-hearsay pleading requirement simply does not support a conclusion that any involvement by a translator or interpreter to facilitate the recording of a first-party witness statement at the pleading stage mandates some complex authentication method such as the layers of additional steps imposed by the motion court in *Allen* (*see* Rivera, J., dissenting op. at 157–158, ––– N.Y.S.3d at –––– – ––––,, ––– N.E.3d at –––– – ––––; Wilson, J., ***143** dissenting op. at 161 and n. 2, 167, ––– N.Y.S.3d at –––– and n. 2, ––––, ––– N.E.3d at –––– and n. 2, ––––). Although endorsed by the dissents, that process of translating and re-translating the affidavit, and certifying and qualifying the translator (*see id.*), is neither required nor envisioned by the CPL. Instead, the dissents would have the Court graft this impractical procedure onto the statute (*see id.*). In the end, we will have to respectfully disagree with our dissenting colleagues as to what constitutes a "commonsense" and "straightforward" approach to the filing of an affidavit in support of a misdemeanor information (Wilson, J., dissenting op. at 161, ––– N.Y.S.3d at ––––, ––– N.E.3d at ––––; Rivera, J., dissenting op. at 158, ––– N.Y.S.3d at ––––, ––– N.E.3d at ––––).

## IV.

Our holding with respect to translators and interpreters and hearsay, limited to the context of drafting accusatory instruments at the pleading stage, is consistent not only with our precedent but with sound policy. As of 2011, approximately 2.5 million New York residents had limited-English proficiency, "which means they do not speak English as their primary language and have limited ability to read, speak, write[,] or understand English" (Executive Order [A. Cuomo] No. 26 [9 NYCRR 8.26]). Limited–English proficiency presents "potential barriers to accessing important government programs or services" (*id.*), including police protection. As one study noted, limited-English proficiency may "prevent many individuals from approaching police for assistance or to report victimization" or, if they do come forward, those victims "may be turned away when trying to report a crime in a *****425** ****1201** language other than English" (*Translating Justice: A Unified Language Access Blueprint to Accessing Justice,* at 4–5, https://reachingvictims.org/wp-content/uploads/2019/09/

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Translating-Justice-Introduction.pdf [last accessed Apr. 28, 2021]). Moreover, "New York State residents speak 168 distinct languages and countless dialects" (*People v. Aviles,* 28 N.Y.3d 497, 504, 46 N.Y.S.3d 478, 68 N.E.3d 1208 [2016]). New York's language diversity may lead to greater challenges for those who speak a language or dialect for which interpreters are difficult to locate, or who attempt to report a crime in a county without "a professionalized class of interpreters" (Rivera, J., dissenting op. at 148, ––– N.Y.S.3d at ––––, ––– N.E.3d at ––––).

While rejecting judicially-created barriers to reporting crime for persons with limited-English proficiency, our conclusion that a certificate of translation is not required to convert a complaint into an information does not prejudice a defendant's statutory right to be prosecuted by a facially sufficient information that "contains allegations establishing a legally sufficient ***144** case" (*People v. Alejandro,* 70 N.Y.2d 133, 139, 517 N.Y.S.2d 927, 511 N.E.2d 71 [1987]; *see* *Matter of Edward B.,* 80 N.Y.2d at 464, 591 N.Y.S.2d 962, 606 N.E.2d 1353) or to vigorously challenge at trial the allegations asserted in the accusatory instrument. Nor do our holdings addressing an accusatory instrument's facial sufficiency preclude a defendant who discovers such a specific translation-related latent hearsay defect in the accusatory instrument before trial from using other options available under the CPL, if the circumstances warrant, to ensure that the supporting deposition meets statutory requirements (*see e.g.* CPL 170.30). Here, however, no defendant raised credible and particularized allegations of a translation-related latent hearsay defect, whether stemming from an inaccurate translation, a misunderstanding in the verification process, or some other flaw.

Accordingly, in *Slade,* the order of the Appellate Term should be affirmed. In *Brooks* and *Allen,* each order of the Appellate Term should be reversed and the case remitted to the respective motion court for further proceedings in accordance with this opinion.

RIVERA, J. (dissenting).

These appeals present a systemic problem arising in prosecutions where the sufficiency of the accusatory instrument depends on supporting depositions by persons who lack English-language proficiency. In such a case, the prosecution must timely file supporting documentation that the deponent's statement was accurately translated, otherwise the accusatory instrument is based on hearsay in contravention of the Criminal Procedure Law (CPL). The accusatory instrument is a legal nullity without proof that the deponent understood and adopted the allegations ascribed to them. This fundamental flaw is not subject to our prior "latent defects" analysis because the instrument is void ab initio.

There are two ways to ensure proper translation for a complainant or witness who does not understand spoken or written English. Law enforcement officials could follow the approach of the Civil Practice Law and Rules (CPLR) and secure a written verified statement under oath in the complainant's or witness's primary language. That statement would then be translated into a written English version and filed along with the translator's affidavit asserting the translator's qualifications and affirming the accuracy of the translation ( CPLR 2101[b]).

Another method would be for the translator to read the English-language complaint ****1202 ***426** to the deponent in a language ***145** they understand. But this course requires that the interpreter affirm, in writing, their qualifications, as well as affirm that they provided an accurate oral translation and that the deponent confirmed that what the translator read to them truthfully communicated the deponent's version of events. In other words, the deponent must adopt the translated content as their own, which requires a showing that the translator could, and did, accurately convey that content to the deponent.

Law enforcement officials in these appeals followed neither course. Therefore, I would reverse the Appellate Term and grant defendant Kenneth Slade's CPL 30.30 motion to dismiss, as the prosecution's failure to timely file documents adequately setting forth the accuracy of the translation of the complainant's allegations rendered the prosecution's assertion that it was trial-ready illusory. For the same reason, I would affirm the Appellate Term's dismissal of the misdemeanor complaint against defendant Kieth Brooks (aka Keith Brooks). I would also affirm its dismissal of the accusatory instrument charging defendant Charo N. Allen as facially insufficient because the translator's statement failed to set forth his qualifications or affirm that the translation was accurate.

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192 A.D.3d 1367
Supreme Court, Appellate Division,
Third Department, New York.

In the MATTER OF ERIKA UU.,
Alleged to be a Juvenile Delinquent.
Madison County Attorney, Respondent;
v.
Erika UU., Appellant.
(And Four Other Related Proceedings.)

531014
|
Calendar Date: February 10, 2021
|
Decided and Entered: March 18, 2021

**Synopsis**
**Background:** Agency commenced delinquency proceedings alleging that juvenile committed acts which, if committed by an adult, would constitute various misdemeanor crimes. The Family Court, Madison County, Patrick J. O'Sullivan, J. adjudicated juvenile a delinquent. Juvenile appealed.

The Supreme Court, Appellate Division, Clark, J., held that family court violated juvenile's right to speedy fact-finding hearing.

Reversed and remanded.

**Procedural Posture(s):** On Appeal; Juvenile Delinquency Proceeding.

**Attorneys and Law Firms**

***475** William L. Koslosky, Utica, for appellant.

Tina M. Wayland–Smith, County Attorney, Wampsville (Jeffrey A. Aumell of counsel), for respondent.

Before: Lynch, J.P., Clark, Aarons, Reynolds Fitzgerald and Colangelo, JJ.

MEMORANDUM AND ORDER

Clark, J.

Appeal from an amended order of the Family Court of Madison County (O'Sullivan, J.), entered September 17, 2019, which granted petitioner's applications, in five proceedings pursuant to Family Ct Act article 3, to adjudicate respondent a juvenile delinquent.

Petitioner commenced these juvenile delinquency proceedings in April 2019 alleging that respondent (born in 2005) had committed acts which, if committed by an adult, would constitute various misdemeanor crimes. The parties first appeared in Family Court on April 4, 2019, at which time Family Court directed, upon agreement of the parties, that respondent would undergo a diagnostic evaluation and that she would be detained at a certain nonsecure facility – namely, Elmcrest Children's Center – for the purpose of completing that evaluation. Respondent waived her right to a speedy trial for the express purpose of conducting the diagnostic evaluation, and Family Court scheduled the next appearance for July 15, 2019.

By letter dated May 2, 2019, the Madison County Department of Social Services (hereinafter DSS) notified Family Court that respondent had been placed in Elmcrest Children's Center on May 1, 2019 to begin the diagnostic evaluation. DSS requested that the July 15, 2019 appearance be rescheduled, noting that it would take at least 90 days to complete the evaluation and produce a report. Based on this request, Family Court issued a rescheduling notice adjourning the matter to August 7, 2019. Thereafter, in a June 25, 2019 letter to Family Court, DSS requested that respondent be placed in a secure facility because Elmcrest Children's Center was seeking respondent's removal from its program due to her “aggressive behavior.” Without affording respondent an opportunity to be heard on the matter, Family Court, by order entered on June 26, 2019, directed that respondent be placed in a secure detention facility pending further proceedings on August 7, 2019.

The parties appeared in Family Court on August 7, 2019, at which time respondent expressly rescinded her speedy trial waiver, and Family Court scheduled a fact-finding hearing for August 15, 2019. Prior to the scheduled hearing date, respondent moved to dismiss the underlying petitions on the ground that her speedy trial rights had been violated. Family Court denied the motion and the fact-finding hearing commenced as scheduled. At the conclusion ***476** of the fact-finding hearing, Family Court found that respondent

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had committed acts which, if committed by an adult, would constitute the crimes of criminal trespass in the third degree (five counts), resisting arrest (two counts), harassment in the first degree (one count) and assault in the third degree (three counts). Following a dispositional hearing, Family Court adjudicated respondent to be a juvenile delinquent and directed that respondent be placed in the care and custody of the Office of Children and Family Services for a period of up to one year. Respondent appeals.

Respondent argues that her statutory right to a speedy fact-finding hearing was violated (*see* Family Ct Act § 310.2). Where, as here, the respondent is in detention and charged with a class C felony or less, the fact-finding hearing must commence within three days of the initial appearance (*see* Family Ct Act § 340.1[1]; *Matter of George T.,* 99 N.Y.2d 307, 312, 756 N.Y.S.2d 103, 786 N.E.2d 2 [2002]). However, Family Court may, upon good cause shown, adjourn the fact-finding hearing for up to three days upon its own motion or on motion of the petitioner or for up to 30 days upon motion of the respondent (*see* Family Ct Act § 340.1[4]). Family Court is statutorily required to "state on the record the reason for any adjournment of the fact-finding hearing" (Family Ct Act § 340.1[5]). Further, "[s]uccessive three-day adjournments shall not be granted unless there is a showing, on the record, of special circumstances, which shall not include court calendar congestion or backlog" (*Matter of Joseph O.,* 305 A.D.2d 743, 744, 760 N.Y.S.2d 241 [2003]; *see* Family Ct Act § 340.1[6]).

Here, although respondent waived her right to a speedy fact-finding hearing during the first appearance held on April 4, 2019, the waiver was expressly limited to the time necessary to complete the diagnostic evaluation. By entering an order on June 26, 2019 directing respondent's transfer from Elmcrest Children's Center to a secure facility, Family Court knowingly eliminated the possibility that the diagnostic evaluation would be continued and completed. Under such circumstances, respondent's waiver of her speedy trial rights effectively expired on June 26, 2019. Consequently, Family Court should have commenced a fact-finding hearing within three days of June 26, 2019 or, alternatively, brought the parties before it and either obtained a further waiver of respondent's speedy trial rights or set forth on the record its reasons for adjourning the fact-finding hearing beyond the prescribed three-day period (*see* Family Ct Act § 340.1[1], [4], [5]). Inasmuch as Family Court failed to do any of the foregoing and instead did not commence the fact-finding hearing until August 15, 2019, some 50 days after the expiration of respondent's speedy trial waiver, we find that Family Court violated respondent's right to a speedy fact-finding hearing (*see* Family Ct Act §§ 310.2, 340.1[1], [4], [5]). We therefore reverse the amended order appealed from and dismiss the petitions (*see Matter of George T.,* 99 N.Y.2d at 313, 756 N.Y.S.2d 103, 786 N.E.2d 2; *Matter of Joseph O.,* 305 A.D.2d at 745–746, 760 N.Y.S.2d 241).

Respondent's remaining contention has been rendered academic by our determination.

Lynch, J.P., Aarons, Reynolds Fitzgerald and Colangelo, JJ., concur.

ORDERED that the amended order is reversed, on the law, without costs, and petitions dismissed.

**All Citations**

192 A.D.3d 1367, 144 N.Y.S.3d 474, 2021 N.Y. Slip Op. 01543

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190 A.D.3d 745
Supreme Court, Appellate Division,
Second Department, New York.

In the MATTER OF JAYDIN R. (Anonymous), etc., appellant.

2019–03013
|
(Docket No. D–2612–18)
|
Submitted—December 14, 2020
|
January 13, 2021

**Attorneys and Law Firms**

Salihah R. Denman, New York, NY, for appellant.

John M. Nonna, County Attorney, White Plains, N.Y. (Jason S. Whitehead of counsel), for respondent.

MARK C. DILLON, J.P., SYLVIA O. HINDS–RADIX, VALERIE BRATHWAITE NELSON, PAUL WOOTEN, JJ.

DECISION & ORDER

In a juvenile delinquency proceeding pursuant to Family Court Act article 3, Jaydin R. appeals from an order of fact-finding and disposition of the Family Court, Westchester County (Mary Anne Scattaretico–Naber, J.), entered February 20, 2019. The order of fact-finding and disposition, insofar as appealed from, after a fact-finding hearing, found that Jaydin R. committed an act which, if committed by an adult, would have constituted the crime of making a terroristic threat, and, upon his waiving the dispositional hearing, adjudicated him a juvenile delinquent.

ORDERED that the order of fact-finding and disposition is reversed insofar as appealed from, on the law and as a matter of discretion in the interest of justice, without costs or disbursements, the petition is dismissed, and the matter is remitted to the Family Court, Westchester County, for further proceedings in accordance with Family Court Act § 375.1.

The appellant was charged with acts which, if committed by an adult would have constituted, inter alia, the crime of making a terroristic threat (Penal Law § 490.20[1]). The presentment agency's evidence at the fact-finding hearing consisted of two witnesses, a teacher and a student from the appellant's eighth-grade class. The student testified that one morning during class some of the students were joking and talking when the appellant and another student got into "a little argument," and the appellant told that student that he "[was] going to be 14 years old, chopped up in somebody's backyard, and he's going to get a white person to shoot up the school." The teacher testified that she was not present during the incident. The appellant testified at the hearing and denied having made those statements. Based upon the foregoing, the Family Court found that the appellant had committed an act which, if committed by an adult, would have constituted the crime of making a terroristic threat. The court adjudicated the appellant a juvenile delinquent and conditionally discharged him for a period of one year from January 18, 2019, until January 17, 2020. The disposition having expired, the appellant appeals from the determination adjudicating him a juvenile delinquent.

***877** The appellant contends that the evidence was legally insufficient to support the fact-finding determination because the presentment agency did not present any evidence to support the intent element of the crime. The appellant's general motion to dismiss the petition at the close of the presentment agency's case was not specifically directed at the error now being urged, and, therefore, did not preserve the contention for appellate review (*see Matter of Gilberto M.,* 89 A.D.3d 734, 931 N.Y.S.2d 889; *Matter of Marcel F.,* 233 A.D.2d 442, 650 N.Y.S.2d 274; *cf.* *People v. Hawkins,* 11 N.Y.3d 484, 492, 872 N.Y.S.2d 395, 900 N.E.2d 946).

However, in the exercise of our interest of justice jurisdiction (*see* CPL 470.15[6][a]), we agree with the appellant that viewing the evidence in the light most favorable to the presentment agency (*see Matter of David H.,* 69 N.Y.2d 792, 793, 513 N.Y.S.2d 111, 505 N.E.2d 621), it was legally insufficient to establish that he committed an act which, if committed by an adult, would have constituted the crime of making a terroristic threat.

"Penal Law article 490 was enacted shortly after the attacks on September 11, 2001, to ensure that terrorists are prosecuted and punished in state courts with appropriate severity" (*People v. Hulsen,* 150 A.D.3d 1261, 1263, 56 N.Y.S.3d 335; *see* *People v. Morales,* 20 N.Y.3d 240, 244, 958 N.Y.S.2d 660, 982 N.E.2d 580). "In construing the statute, courts must be cognizant that 'the concept of

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terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act' " (*People v. Hulsen,* 150 A.D.3d at 1263, 56 N.Y.S.3d 335 quoting *People v. Morales,* 20 N.Y.3d at 249, 958 N.Y.S.2d 660, 982 N.E.2d 580). As relevant here, Penal Law § 490.20(1) provides that a person is guilty of making a terroristic threat when "with intent to intimidate ... a civilian population ... he or she threatens to commit or cause to be committed a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense." We agree with the appellant that the presentment agency presented no evidence of an intent by the appellant to intimidate a civilian population with his statements (*see* *People v. Morales,* 20 N.Y.3d 240, 958 N.Y.S.2d 660, 982 N.E.2d 580; *People v. Kaplan,* 168 A.D.3d 1229, 1230, 91 N.Y.S.3d 601; *see generally People v. Hulsen,* 150 A.D.3d 1261, 56 N.Y.S.3d 335). We note that the appellant challenges only the intent element of the crime on appeal, and, therefore, we have not considered whether the presentment agency presented evidence satisfying the other elements of making a terroristic threat.

In light of our determination we do not reach the appellant's remaining contentions.

Accordingly, we reverse the Family Court's determination adjudicating the appellant a juvenile delinquent, dismiss the juvenile delinquency petition (*see* CPL 470.20[2]), and remit the matter to the Family Court, Westchester County, for further proceedings in accordance with Family Court Act § 375.1.

DILLON, J.P., HINDS–RADIX, BRATHWAITE NELSON and WOOTEN, JJ., concur.

**All Citations**

190 A.D.3d 745, 135 N.Y.S.3d 876 (Mem), 2021 N.Y. Slip Op. 00176

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197 A.D.3d 645, 150 N.Y.S.3d 747, 2021 N.Y. Slip Op. 04713

**1 In the Matter of Tyler L., a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division, Second Department, New York
2019-10246, D-1582-19
August 18, 2021

CITE TITLE AS: Matter of Tyler L.

**HEADNOTES**

Appeal
Academic and Moot Questions
Expiration of Probationary Period—Collateral Consequences Resulting from Adjudication of Juvenile Delinquency

Infants
Juvenile Delinquents
Videotaped Interview by Law Enforcement Officials Demonstrated Intelligent, Knowing and Voluntary Waiver of Miranda Rights

Janet E. Sabel, New York, NY (Dawne A. Mitchell and Raymond E. Rogers of counsel), for appellant.
Georgia M. Pestana, Corporation Counsel, New York, NY (Ingrid R. Gustafson and Jessica Miller of counsel), for respondent.

In a juvenile delinquency proceeding pursuant to Family Court Act article 3, Tyler L. appeals from an order of disposition of the Family Court, Kings County (Susan Quirk, J.), dated August 5, 2019. The order of disposition, upon an order of fact-finding of the same court also dated August 5, 2019, made upon the admission of Tyler L., finding that he committed acts which, if committed by an adult, would have constituted the crime of endangering the welfare of a child, adjudicated him a juvenile delinquent and placed him on probation for a period of 12 months. The appeal brings up for review the denial, after a hearing, of the motion of Tyler L. to suppress his statements to law enforcement officials.

Ordered that the appeal from so much of the order of disposition as placed Tyler L. on probation for a period of 12 months is dismissed as academic, without costs or disbursements; and it is further,

Ordered that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

The appeal from so much of the order of disposition as placed the appellant on probation for a period of 12 months has been rendered academic, as the period of probation has expired (*see Matter of Connor C.*, 188 AD3d 1040, 1041 [2020]; *Matter of Majesty S.*, 167 AD3d 629, 629 [2018]). However, the appeal from so much of the order of disposition as adjudicated the appellant a juvenile delinquent has not been rendered academic, as there may be collateral consequences resulting from the adjudication of delinquency (*see Matter of Majesty S.*, 167 AD3d at 629; *Matter of Dzahiah W.*, 152 AD3d 612, 613 [2017]).

In this juvenile delinquency proceeding, the Presentment Agency filed a petition alleging that the appellant, who was then 15 years old, committed acts which, if committed by an adult, would have constituted the crimes of attempted sexual abuse in the first degree, two counts of attempted sexual abuse ***646** in the second degree, and endangering the welfare of a minor, with respect to his 11-year-old sister. Upon arrest, the appellant was interviewed by law enforcement officials in the presence of his grandfather. During the 35-minute interview, which was videotaped, the ****2** appellant made certain incriminating statements.

The appellant moved to suppress his statements to law enforcement officials. After a hearing, the Family Court denied the appellant's motion. Thereafter, upon the appellant's admission, the court found that the appellant had committed acts which, if committed by an adult, would have constituted the crime of endangering the welfare of a child. The court thereupon adjudicated the appellant a juvenile delinquent and placed him on probation for a period of 12 months.

The Family Court properly denied the appellant's motion to suppress his statements to law enforcement officials. The Presentment Agency must prove a voluntary, knowing, and intelligent waiver of the privilege against self-incrimination for custodial statements to be admissible (*see People v Cleverin*, 140 AD3d 1080, 1081 [2016]). "Whether a defendant knowingly and intelligently waived his or her rights to remain silent and to an attorney is determined upon an

inquiry into the totality of the circumstances surrounding the interrogation, including the defendant's age, experience, education, background, and intelligence, and . . . whether he [or she] has the capacity to understand the warnings given him [or her], the nature of his [or her] Fifth Amendment rights, and the consequences of waiving those rights" (*id.* at 1081 [citations and internal quotation marks omitted]).

Here, the videotape shows that the appellant and his grandfather were brought into an interview room of a police precinct, where *Miranda* warnings (*see Miranda v Arizona*, 384 US 436 [1966]) for juveniles were read and written copies of the warnings were given to the appellant and his grandfather. The videotape also shows that, while the written *Miranda* form was never signed, both the appellant and his grandfather waived the appellant's *Miranda* rights after the rights had been read. Contrary to the characterization of our dissenting colleagues, the *Miranda* warnings were not read in a "pro forma" manner (dissenting op at 651). The videotape demonstrates that the *Miranda* warnings were read in a manner that was clear and deliberate, and that the appellant and his grandfather understood those rights and voluntarily waived them.

We disagree with our dissenting colleagues' characterization ***647** of the opinion of the appellant's expert as uncontroverted. While the appellant's expert in juvenile forensic psychology noted in his report that the appellant tested as having an IQ of 74 and was in the "borderline range" of certain verbal comprehension, perceptual reasoning, reading comprehension, and expressive vocabulary tests, the appellant's expert also stated that the appellant had a basic comprehension and understanding of *Miranda* rights at the time of his testing consistent with other 15-year-old adolescents of comparable abilities. The conclusion of the appellant's expert that the appellant could not have made an intelligent, knowing, and voluntary waiver of his *Miranda* rights during police questioning was undermined by evidence of the appellant's completion of a test that required answers to 189 written questions in 20 minutes. Additionally, the expert acknowledged that a 2015 individualized education plan document rated the appellant as a "strong reader" and indicated that the appellant could "retell a story and is able to answer questions based on his reading." Thus, the Family Court's determination that the appellant's *Miranda* waiver was voluntary, knowing, and intelligent was supported by the evidence and will not be disturbed (*see Matter of James W.*, 130 AD2d 753, 753 [1987]). The absence of a signed waiver form requires no different result (*see People v Aveni*, 100 AD3d 228, 236 [2012]), particularly as, in this instance, the waiver of *Miranda* rights by the appellant and his grandfather is evidenced by the videotape. Moreover, the *Miranda* waiver is not rendered infirm by virtue of any familial relationship that the grandfather had with the appellant's sister (*see Matter of Kevin R.*, 80 AD3d 439, 439 [2011]; *Matter of James OO.*, 234 AD2d 822, 823 [1996]).

In addition, the hearing evidence demonstrated that the delay in commencing the interrogation was satisfactorily explained as attributable primarily to the transportation of the appellant from his school to the Brooklyn Child Abuse Squad, the delayed appearance of the appellant's guardian, and the efforts made to ensure that the interrogation was recorded by audiovisual equipment (*see Matter of Amber B.*, 76 AD3d 475, 476 [2010]; *Matter of Rafael S.*, 16 AD3d 246, 246-247 [2005]). The hearing evidence also demonstrated that the interrogation occurred inside of a designated juvenile room after the appellant, in the presence of his grandfather, was given the proper ****3** *Miranda* warnings, and they indicated on videotape that they understood those rights (*see Matter of Dashawn R.*, 120 AD3d 1250, 1250-1251 [2014]).

Further, the appellant's statements were not rendered involuntary ***648** by the conduct of law enforcement officials during the interrogation. Under the totality of the circumstances, including the means employed and the vulnerability of the appellant, the hearing evidence demonstrated that the appellant's will was not overborne (*see People v Thomas*, 22 NY3d 629, 642 [2014]; *People v Black*, 172 AD3d 895, 896 [2019]; *People v Gordon*, 74 AD3d 1090 [2010]).

Accordingly, we affirm the order of disposition insofar as reviewed. LaSalle, P.J., Dillon and Austin, JJ., concur.

Barros, J., concurs in part and dissents in part, and votes to dismiss the appeal from so much of the order of disposition as placed Tyler L. on probation for a period of 12 months, reverse the order of disposition insofar as reviewed, on the law and the facts, grant the motion of Tyler L. to suppress his statements to law enforcement officials, vacate the order of fact-finding, dismiss the petition, and remit the matter to the Family Court, Kings County, for the purpose of entering an order pursuant to Family Court Act § 375.1, with the following memorandum, in which Wooten, J., concurs: While I am mindful the issue that divides this panel is whether the Presentment Agency established, beyond a reasonable

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doubt, that the appellant, who was 15 years old with documented subnormal intelligence, voluntarily, knowingly, and intelligently waived his *Miranda* rights (*see* *Miranda v Arizona*, 384 US 436 [1966]) before giving statements to law enforcement officials during a custodial interrogation. Contrary to the majority's determination, I conclude that the Presentment Agency failed to meet its burden, and, therefore, the appellant's motion to suppress his statements should have been granted.

"Whether a [person] knowingly and intelligently waived his or her rights to remain silent and to an attorney is determined upon an inquiry into the totality of the circumstances surrounding the interrogation, including the defendant's age, experience, education, background, and intelligence, and . . . whether he [or she] has the capacity to understand the warnings given him [or her], the nature of his [or her] Fifth Amendment rights, and the consequences of waiving those rights" (*People v Cleverin*, 140 AD3d 1080, 1081 [2016] [citations and internal quotation marks omitted]; *see People v Santos*, 112 AD3d 757, 758 [2013]).

"Where a person of subnormal intelligence is involved, close scrutiny must be made of the circumstances of the asserted waiver" (*People v Cleverin*, 140 AD3d at 1081 [internal quotation marks omitted]; *see* *People v Williams*, 62 NY2d 285, 289 [1984]). Under such circumstances, it must be established that ***649** the person with subnormal intelligence understood the immediate meaning of the warnings, that is, that he or she grasped that he or she did not have to speak to the interrogator; that any statement might be used to his or her disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued (*see* *People v Williams*, 62 NY2d at 289; *People v Cleverin*, 140 AD3d at 1082).

"[O]ver and beyond the ordinary constitutional safeguards provided for adults subjected to questioning, [law enforcement officials] must exercise greater care to insure that the rights of youthful suspects are vigilantly observed" (*People v Hall*, 125 AD2d 698, 701 [1986]; *see* *Matter of Jimmy D.*, 15 NY3d 417, 421 [2010]).

At the suppression hearing, the appellant presented the testimony of a forensic psychologist, who tested the intellectual abilities and functioning of the appellant, evaluated the appellant's understanding of the *Miranda* warnings given to him, and conducted a review of the appellant's educational records. The expert found, inter alia, that the appellant, then 15 years old and in the ninth grade, had a borderline low IQ with overall difficulties in his reading and listening comprehension. The appellant was found to have reading comprehension at a fifth-grade level and listening comprehension at a fourth-grade level. The expert's findings were confirmed by the ****4** appellant's educational records evincing that the appellant was reading at a fourth-grade level. The expert's testing revealed that the appellant had a full scale IQ of 74, correlating with overall intellectual abilities in the *fourth* percentile. The expert related that the appellant's educational records had previously found the appellant to be in the "Extremely Low" range with an even lower full scale IQ of 69.

The expert's uncontradicted opinion was that the appellant had "fundamental problems" in understanding and comprehending *Miranda* rights. Specifically, the appellant believed that he had to waive his right to remain silent in order to find out what the detectives were questioning him about. The appellant did not understand what it meant for a statement to be "used against him." Further, he did not understand the role of an attorney in the context of an interrogation.

Given the appellant's young age, low IQ scores, and limited intellectual functioning, there are serious doubts about the appellant's ability to knowingly and intelligently waive his *Miranda* rights under the circumstances (*see People v Patillo*, 185 AD3d 46 [2020]; *People v Cleverin*, 140 AD3d 1080 [2016]). Notably, ***650** the Presentment Agency did not introduce any expert testimony contradicting the conclusions reached by the appellant's expert forensic psychologist (*cf. People v Cleverin*, 140 AD3d 1080 [2016]). The conclusions of the appellant's expert were confirmed by the appellant's educational records showing that he had been selected for an individualized education plan (hereinafter IEP) and had consistently been evaluated as having intellectual disabilities, including a low IQ with reading, listening, and comprehension difficulties.

The Presentment Agency's reliance upon selected findings in the report of appellant's expert, while ignoring the expert's other findings, analysis, and ultimate conclusions, does not undermine the substance of the expert's opinion. The Presentment Agency never called an expert forensic psychologist to render an opinion as to the significance of those findings that the Presentment Agency relies upon to support its argument that the appellant validly waived his *Miranda* rights. Moreover, it is unclear how the fact that the

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appellant gave unidentified responses to a specific number of unidentified questions within a certain period of time during the forensic examination bears any relevance to the issue of whether the appellant had the ability to comprehend the *Miranda* warnings under the circumstances. The forensic examination itself, including the questions and the appellant's responses, are not even in the record. Further, that the appellant was described as a "strong reader" in a single report from a 2015 IEP has only marginal significance given that the IEP records indicated that the appellant, who was in ninth grade, was reading at a fourth-grade level. Indeed, the fact that the appellant was in an IEP program suggests that he had educational disabilities consistent with the analysis and conclusions of the appellant's expert.

Although the appellant's grandfather, who was his guardian, was present during the interrogation, the grandfather had a conflict of interest since he was also the guardian of the alleged victim, the appellant's sister. Although such a conflict is not disqualifying, it is a factor to be considered in evaluating the totality of the circumstances as to the voluntariness of a waiver (*see Matter of Kevin R.*, 80 AD3d 439 [2011]).

The videotaped interrogation evinces that the appellant's grandfather provided no advice or assistance in any way during the *Miranda* warnings or throughout the interrogation. To the extent the grandfather participated at all during the interrogation, he made a comment that was intended to assist the law enforcement officers' attempts to deceive the appellant into ***651** making a self-incriminating statement, which further highlighted the grandfather's conflict of interest.

Further, it is undisputed that the appellant was arrested at school instead of his home, placed in handcuffs during intervals prior to the interrogation, separated from a guardian for hours between his arrest and the interrogation, and unable to privately consult with his grandfather before the interrogation. At the interrogation, the appellant was seated in the corner of a very small interrogation room next to his grandfather and directly across from two police interrogators.

The videotaped interrogation shows that the juvenile *Miranda* form was verbally ****5** recited in a pro forma manner. Although the law enforcement officials directed the appellant and his grandfather to write "yes" or "no" and add their initials on the *Miranda* form, the unsigned *Miranda* form was pulled away immediately after receiving perfunctory "yes" responses from the appellant and his grandfather. Thus, the appellant's verbal "yes" responses to the *Miranda* warnings in no way demonstrated his comprehension of the *Miranda* rights or a voluntary waiver of them (*see People v Patillo*, 185 AD3d at 50).

Given the totality of the circumstances, including the appellant's young age and subnormal intelligence, as well as the high-pressured atmosphere created by law enforcement officials, the Presentment Agency failed to meet its burden of establishing, beyond a reasonable doubt, that the appellant voluntarily, knowingly, and intelligently waived his *Miranda* rights. Accordingly, the Family Court should have granted the appellant's motion to suppress his statements to law enforcement officials.

Since the appellant has already served his probationary term, no purpose would be served by remitting the matter for a new fact-finding hearing, and, therefore, I vote to dismiss the petition (*see* *People v Hightower*, 18 NY3d 249, 253 [2011]; *People v Dreyden*, 15 NY3d 100, 104 [2010]; *Matter of Peter C.*, 220 AD2d 584, 585 [1995]).

In light of the foregoing, the appellant's remaining contentions need not be reached.

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## A04952 Memo:

**NEW YORK STATE ASSEMBLY**
**MEMORANDUM IN SUPPORT OF LEGISLATION**
**submitted in accordance with Assembly Rule III, Sec 1(f)**

**BILL NUMBER:** A4952

**SPONSOR:** Joyner

**TITLE OF BILL**:

An act to amend the family court act and the judiciary law, in relation to the discovery provisions applicable to juvenile delinquency proceedings in family court; and to repeal certain provisions of the family court act relating thereto

**PURPOSE OR GENERAL IDEA OF BILL**:

The purpose of this bill is to align discovery practices for juvenile delinquents with legislation recently enacted relating to discovery rights for adults charged in criminal court.

**SUMMARY OF PROVISIONS**:

Section 1 of the bill repeals various sections of article 3 of the family court act related to discovery for juvenile delinquents.

Section 2 of the bill adds thirteen new sections to article 3 of the Family Court Act relating to discovery including initial appearance; timing of discovery after the initial appearance; automatic discovery; disclosure prior to an admission by the respondent and waiver of discovery by the respondent; court orders for preservation, access or discovery; court ordered procedures to facilitate compliance and certificates of compliance; non-testimonial evidence from the respondent and DNA comparison order; flow of information; continuing duty to disclose; work product; protective orders; remedies or sanctions for noncompliance; and admissibility of discovery. Section 3 and 4 of the bill would make conforming changes to judiciary law relating to the new discovery provisions. Section 5 provides an effective date.

**JUSTIFICATION**:

This bill is necessary to ensure youth are afforded the same discovery rights as adults.

**PRIOR LEGISLATIVE HISTORY**:

This is new legislation

**FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS**:

To be determined

**EFFECTIVE DATE**:
January 1, 2022