

How the Courts are interpreting
the Raise the Age Legislation:
Retention or Removal of
Adolescent Offender Matters
pursuant to the Criminal
Procedure Law

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*How the Courts are interpreting the Raise the Age Legislation:
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In 2017, the New York State Legislature passed and the Governor signed into law Raise-the-Age ("RTA") legislation. The purpose of the RTA is to gradually increase the age of criminal responsibility in New York State. Prior to the passage of RTA, individuals as young as sixteen years old were routinely charged, tried, and punished as adult offenders. The RTA created a new class of offenders, the Adolescent Offender ("AO"). As of October 1, 2018, any sixteen-year-old charged with a crime in New York State is to be prosecuted as an AO. The presumption under the RTA is that most felony and all misdemeanor cases involving AOs will be transferred to Family Court for hearing, fact-finding, and disposition instead of the Criminal Courts (See, CPL §722.23[1]).

Relevant Sections of the Criminal Procedure Law (CPL)

- CPL Section 722.10 Youth part of the superior court established
Judges presiding in the Youth Part shall be Family Court Judges
- CPL Section 722.23 Removal of adolescent offenders to a family court

Removal Non-Violent felony 722.23 (1) (a)

Unless charged with one of the following the action shall be removed to the Family Court within 30 days unless the district attorney makes a motion to prevent the removal.

1. Class A felony Penal law Article 220
2. Felonies not itemized in PL § 70.02
3. Excludes felonies in CPL § 1.20 (42) (1) and (2) Juvenile Offenses
 - The motion shall be in writing **and**,
 - Shall contain sworn allegations of fact based on personal knowledge of the affiant **and**,
 - Indicate the District Attorney is requesting a hearing.

The Court shall deny the motion unless it makes a determination that *extraordinary circumstances* exist that should prevent the transfer to Family Court.

Removal Violent Felonies CPL Section 722.23 (2) (C)

Upon arraignment of defendant the court shall schedule an appearance within 6 days to review the accusatory instrument. Unless the court finds one of the retention factors the case shall be removed to the Family Court.

Retention factors:

1. The defendant caused significant physical injury to a person other than a participant in the crime ;or
2. The defendant displayed a firearm, shotgun, rifle, or deadly weapon in furtherance of the offense; or
3. The defendant unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual conduct defined in penal law section 130.00.

The Case Law

Procedure

1. *People v. J.B., 2019 NY Slip Op 29051* (Cnty. Ct.)

Adolescent Offender (AO) by way of felony complaint was charged with one count of Criminal Possession of a Weapon in the Second Degree, in that he possessed a loaded firearm. The People conceded that none of the retention factors were alleged in the complaint and on the thirtieth day thereafter filed a motion to prevent removal of the matter to the Family Court.

Summary of Decision: The Court denied the motion, finding that the People did not comply with the requirements of CPL 722.23(1) (b). While the motion was filed in a timely manner, the motion did not request a hearing in writing, as required by the statute. The Court further found that the People did not establish extraordinary circumstances by personal knowledge of the affiant. The Court noted the public safety issue posed by AO, but was constrained to follow the letter of the law. The matter was removed to the Family Court.

“Extraordinary Circumstances”

2. *People v. D.L.*, 62 Misc. 3d 900 (Fam. Ct. 2018)

AO was arraigned pursuant to a felony complaint in the Youth Part and charged with a single count of Attempted Arson in the Second Degree, a violent felony. The incident involved AO going to the home of a romantic partner, ringing the doorbell and informing the paramour’s mother that she intended to set the house on fire and thereafter she set a cushion to a piece of porch furniture on fire. The district attorney agreed that the accusatory instrument did not establish by a preponderance of the evidence any of the three retention factors in CPL Section 722.23(2) (c). The People filed a motion to prevent removal on the grounds of extraordinary circumstances.

Summary of Decision: The Court gave great weight to the purpose and intent of the RTA legislation and noted that for most purposes a 16 year-old youth is considered a minor, without the ability to vote or enter into a contract. The Court also gave weight to the fact that AO had only turned 16 three weeks prior, where the case would have automatically gone to the Family Court. Further, the Court found that if retained in the Youth Part, AO was facing a possible sentence of up to three years of incarceration. The Court found that AO’s behavior was exactly the type of impulsive behavior contemplated by the changes in the law and after considering all of the factors concluded, that this case was not of the type case for retention, as contemplated by the legislature, requiring unusual or heinous facts. The Court also found that AO did not pose a public safety risk, deserving of incarceration. The matter was transferred to the Family Court.

3. *People v. T.R.*, 62 Misc. 3d 1219(A) (Fam. Ct.)

AO was arraigned pursuant to a felony complaint in the Youth Part charged with Making a Terroristic Threat, a non-violent felony. The people moved pursuant to CPL 722.23(1) (b) for an order preventing removal of the action to the Erie County Family Court. The facts alleged are that AO delivered a note to the administration of the town high school claiming that he was going to bomb the school that day at noon. The complaint further alleged that AO conspired with other youth to write the note, delivered it knowing the information to be false and as a result the high school went into a state of lockdown where students and teachers were sheltered for nearly two hours until it was determined the threat was not credible.

Summary of Decision: The CPL requires that a motion pursuant to the statute is required to contain sworn allegations of fact based upon personal knowledge of the affiant and that the People must establish extraordinary circumstances to prevent removal from the Youth Part. The motion to prevent removal was denied.

The Court found that as extraordinary circumstances were undefined in the RTA legislation, it must be determined on a case by case basis. The Court looked to the ordinary meaning which refers to that which is “very unusual” or “remarkable.”

The Court considered that AO conspired with others, failed to accept responsibility for his actions and the effect the action had on perhaps thousands of innocent people, causing them emotional harm. The Court concluded that while not taking the actions of the youth lightly and putting a premium on the well-being of society, that these actions did not rise

to level of extraordinary circumstances and denied the motion to prevent removal. The Court also noted that the two co-conspirators were charged as juvenile delinquents and the matters were being handled by the Family Court. The matter was removed to the Family Court.

4. ***People v. A.G.*, 62 Misc. 3d 1210(A) (Sup. Ct. 2018)**

AO was arraigned by felony complaint in the Youth Part charging Robbery in the First Degree. The Court determined that the accusatory instrument did not establish by a preponderance of the evidence any of the three retention factors in CPL Section 722.23(c). The People filed a motion to prevent removal on the grounds of extraordinary circumstances.

Summary of Decision: The Court found that the AO's numerous pending matters, all committed while he was under the supervision of the Department of Probation from a previous finding of juvenile delinquency, and established extraordinary circumstances. The Court further considered that even if this case was removed, there would still be five pending matters in the Youth Part which could lead to different or duplicative judicial outcomes which would not be in the interest of justice and that a global disposition of all matters in the Youth Part would provide for a consistent outcome for AO's potential rehabilitation.

5. ***People v. A.T.*, 2019 NY Slip Op 29107 (Fam. Ct.)**

AO was arraigned by felony complaint and charged with Robbery in the First Degree, a violent felony. The complaint alleged that AO and others did threaten the victim, a cab driver, with a screwdriver and removed a sum of money. The Court determined that the accusatory instrument did not establish by a preponderance of the evidence any of the

three retention factors in CPL Section 722.23(c). The People filed a motion to retain the matter and AO's counsel filed a reply in opposition. A formal hearing was waived. The Court proceeded on the moving papers and supplementary argument.

Summary of Decision: The Court ruled that the factual allegations in the accusatory instrument did not alone satisfy the statute and did not rise to the level of extraordinary circumstances. However, considering the totality of the circumstances the Court found extraordinary circumstances and granted the People's motion. The Court reviewed the recent criminal history of AO, who was arrested and arraigned on three separate felony complaints in a matter of six weeks' time, his failure to appear voluntarily at a court appearance resulting in a warrant being issued for his arrest and that he was the leader or mastermind behind these incidents supported by the sworn deposition of one of the victims.

The Court looked to the legislative intent of RTA which was designed to remove children amenable to the services away from criminal prosecution. The Court concluded that AO demonstrated not only that he was not amenable to services, but that he had thwarted any efforts at rehabilitation.

The Court went further to rely upon *People v. A.G.*, a decision from the Queens County Criminal Court finding that multiple separate pending matters established extraordinary circumstances.

6. ***People v. K.M.*, 54 Misc. 3d 825 (Sup. Ct. 2016)**

AO by way of Grand Jury indictment was charged with Robbery in the Second Degree, two counts of Grand Larceny and lesser charges stemming from three separate incidents where AO and a group of others stole thousands of dollars of merchandise from two high

end retail stores. The People filed a motion to prevent removal of the matters from the Youth Part.

Summary of Decision: The Court found that despite AO having been previously ordered to participate in two separate community-based programs, and having received youthful offender status on another matter, that the People did not establish extraordinary circumstances to support a clear and compelling basis to overcome the statutory preference, that the case be transferred to Family Court. The Court detailed AO's lengthy family history with the Administration for Services, his poor school attendance and performance and failure to engage in services. However, the Court concluded that there was no basis to deprive AO of the rehabilitative and corrective measures offered in conjunction with a juvenile delinquency matter. The matter was removed to the Family Court.

7. *People v. R.M.*, 2018 NY Slip Op 28429 (Cnty. Ct.)

AO was arraigned by felony complaint and charged with one count of Aggravated Cruelty to Animals, a non-violent felony. The complaint alleges that AO intentionally killed the family cat of a longtime friend with whom AO was living at the time. AO was remanded for a psychiatric evaluation. The court reviewed AO's lengthy history of suffering from depression, involvement with therapy, other hospitalizations and participation as a patient in an out-patient clinic. AO's mother has a history of mental illness and the family has involvement with the Administration for Children's Services. AO attended school as an eleventh grader, with a grade point average in the nineties and was in advanced placement classes. She was responsive to therapy while in the hospital.

The People filed a motion to prevent removal to the Family Court. AO's attorney filed papers in opposition to the motion.

Summary of Decision: The Court considered two major factors in determining if extraordinary circumstances existed to prevent removal. The Court reviewed the criminal history and mental status of AO. The court found that while the actions of AO in killing the animal was of a violent nature, the Court was constrained by the philosophy behind the RTA legislation and did not find that extraordinary circumstances existed. The court found that AO would benefit from a therapeutic setting, not incarceration, and that the Family Court is well equipped to meet her therapeutic and supervisory needs. The matter was removed to the Family Court.

8. ***People v. L.A., No. 70032/18 (Sup. Ct. N.Y. Cnty. November 8, 2018).***

AO by way of Grand Jury indictment was charged with two counts of Robbery in the First Degree and Robbery in the Second Degree, for three separate incidents occurring within five days of each other.

The People filed a motion to prevent removal to the Family Court. The Court was provided with multiple documents detailing AO's criminal, juvenile, educational and family history. The defense filed an affirmation in opposition stating that AO was on the verge of turning his life around.

Summary of Decision: The Court found that AO had a significant criminal history including seven arrests and two juvenile delinquency adjudications, which also lead to three sustained findings that he violated the terms of his probation. AO failed to respond to a multitude of evidence-based interventions along with showing no significant improvement after participating in: anger management, mental health services, special

education, residential placement, conflict resolution and community based interventions. The Court concluded that AO had exhausted the rehabilitative and corrective measures offered in Family Court and that his criminal behavior would be more properly addressed by the structured and consequential system in the Supreme Court. The motion was granted. The matter was retained in the Youth Part.

“Significant Physical Injury”

9. *People v. B.H.*, 62 Misc. 3d 735 (Cnty. Ct. 2018)

Adolescent Offender (AO) and adult co-defendants were charged with multiple counts of Attempted Gang Assault and various other felony charges. The charges stemmed from AO’s participation, along with several others, in assaulting three victims and subsequently intimidating them. During the first incident one victim was stabbed in the back multiple times, the second victim was hit in the arm with a baseball bat, and the third victim had a machete swung at him. On a subsequent date the victims were intimidated and at the time AO and the group possessed a long stick, a metal golf club and a hammer.

Summary of Decision: At a hearing scheduled for the review of the accusatory instrument the People argued for retention of the matter in the Youth Part. They argued that one of the victim’s suffered *significant physical injury*. The injuries sustained included being treated at a hospital for facial paralysis (Bell’s Palsy). At the hearing the People conceded that AO did not possess the bat or stab the victim. They argued that based on accessorial liability and membership in the MS-13 gang the defendants were “acting as one body, one unit.”

The Court first addressed the “opportunity to be heard,” finding the standard similar to a hearing upon the issuance of a temporary order of protection and that the accusatory instrument and supporting evidence may be considered and that hearsay is admissible. In examining the question of whether or not the victim suffered a significant physical injury the court noted that the term is not well defined in law. The Court contemplated the standard from case law in both the juvenile delinquency and the child protective context and rejected the standard adopted in no-fault insurance matters. The court relied on the Raise the Age (RTA) Assembly record debate, where the discussion on significant physical injury revealed that it would be more serious than a bruise and likely be a bone fracture or injuries requiring surgery, but not to the level of disfigurement of the victim. In using this standard, the Court found that one of the victims had suffered significant physical injury.

However, the Court did not find that the People sustained their burden to retain the case by a preponderance of the evidence, because they did not show that AO was solely responsible for causing the injuries. Again, the Court relied heavily on the legislative history and that the intent of the RTA legislation is not to punish an entire group for “one bad apple.” The court rejected the acting in concert theory for retention, argued by the People. The matter was removed to the Family Court.

10. ***People v. A.S.*, 62 Misc. 3d 1220(A) (Fam. Ct.)**

Following the reasoning of Judge Norman St. George in B.H., (above) the Court concluded that AO, who did strike the complainant in the head four times with a black pistol, causing lacerations to his head requiring staples to close the wound and stop the

bleeding and a broken wrist, each individually, established significant physical injury. The matter was retained in the Youth Part.

11. *People v. E.B.M.*, 2019 NY Slip Op 30459(U) (Cnty. Ct.)

AOs, both 16 years-old and an adult co-defendant are charged in a felony complaint with Gang Assault, and multiple counts of Robbery in the Second degree; all violent felonies for an incident that occurred in Nassau County, New York. It was alleged that during the course of the incident that AOs along with the adult co-defendant punched, kicked and stomped a victim which resulted in the victim suffering a fractured nose and orbital bone, a concussion and swelling to his eyes and face. These injuries required reconstructive surgery and two titanium plates in his face. This victim's wallet was stolen. A second victim also had his wallet and iPhone stolen.

Summary of Decision: As required by CPL Section 722.23(2)(a) the court scheduled an appearance within six days of the arraignment to review the accusatory instrument and any other relevant facts to determine if the matter would be retained in the Youth Part or removed to the Family Court. At this court appearance the burden is on the People to prove by a preponderance of the evidence, one of the three retention factors outlined in the statute. The Court looked at the legislative history to determine the purpose of the sixth day review and found that the legislature, consistent with the intent of the RTA legislation intended that only truly violent felonies remain in the Youth Part and certain sections of the penal law defined as a violent felony do not necessarily involve a violent act. The three retention factors were designed to avoid keeping youth in the criminal court that could benefit from the superior services offered by the family court. In this case, the court evaluated whether the victim suffered a significant physical injury. The

People relied upon the accusatory instrument and the sworn depositions. The People argued that everyone involved in the incident participated in the attack upon the victim and that the sworn statements of the victim and an eyewitness identified the AOs by name as having kicked and stomped him. The defense argued that medical records were a necessity to proving significant physical injury. They also argued that the RTA legislation precluded retention based on in-concert liability, citing to an earlier decision, *People v. B.H.*, in support of their argument.

Looking to the Assembly record of RTA the Court found it supported that bone fractures, as suffered by the victim in this matter, were anticipated as significant physical injury and also rejected the argument that medical records were necessary. The Court cited to the sworn statements of the victim and witness, which specified by name that both AOs stomped and kicked the victim. The Court differentiated B. H because in that matter the People conceded AO was not responsible for the victim's injuries. The Court further concluded that the legislative intent was to disqualify an individual from removal who directly causes significant physical injury. The Court found the people met the burden and established significant physical injury, by a preponderance of the evidence.

The matter was retained in the Youth Part.

12. ***People v. G.C.*, 2019 NY Slip Op 29050 (Cnty. Ct.)**

AO, by way of felony complaint, was charged with one count of Murder in the Second Degree and Attempted Murder in the Second Degree, both violent felonies, arising from an incident where AO discharged a firearm resulting in the death of one victim and injuries to the hip and foot of a second victim as a result of being shot.

The Court scheduled a review within six days of the arraignment to determine if one of the retention factors were demonstrated by a preponderance of the evidence.

The People relied upon the accusatory instrument, part of the autopsy report and a statement relayed by an eyewitness to the assistant district attorney who appeared at the hearing, that he observed the AO fire the gun at the decedent. The defense simply argued that the People failed to meet their burden.

Summary of Decision: The Court found that while significant physical injury has not been defined, it would defy logic to argue that causing the death of another was not the type of serious conduct contemplated by the legislature warranting retention in the Youth Part. The Court also found that based on the fact that the victim died of a gunshot wound and gunshot primer was found on AO's clothing this established that he displayed a firearm in furtherance of the offense. The motion was granted. The matter was retained in the Youth Part.

13. ***People v. L.M.*, 62 Misc. 3d 1227(A) (Cnty. Ct. 2019)**

AO by way of Grand Jury indictment was charged with Attempted Murder in the Second Degree, a violent felony, and multiple other violent felonies including: Criminal Use and Possession of a Firearm and Attempted Assault in the First Degree. The facts alleged are that AO discharged a firearm at least five times and that one of the bullets hit the victim in the abdomen. Upon AO's arraignment the matter was adjourned for a review of the accusatory instrument and other relevant factors in order for the Court to determine if the matter would be retained in the Youth Part or removed to the Family Court.

The People argued that the indictment and information from the victim's medical records established by a preponderance of the evidence, two of the retention factors, disqualifying

AO from the presumption of removal, created by RTA. The defense argued that the matter should be removed because the People relied upon hearsay, they did prove the extent of the victim's injuries and that there was no proof that the firearm had been tested for operability.

Summary of Decision: The Court found that hearsay evidence is admissible at this type of hearing, and that the People established by evidence sufficient to produce a reasonable belief in the truth of the facts asserted. With regard to the weapons charges the Court found that the statements that AO had fired five shots from the weapon and one hitting the victim sustained the weapons charges. The Court found that it need not address the issue of significant physical injury. The matter was retained in the Youth Part.

14. *People v. J.M.*, No. FYC-70023-19 (Sup. Ct. Bronx Cnty. February 13, 2019).

AO, by way of Grand Jury indictment, was arraigned in the Youth Part on three separate counts of Robbery in the First Degree, for incidents that all occurred within a fifteen day time span.

The People sought to prevent removal to the Family Court and filed a written motion for review of the accusatory instrument and for a finding of extraordinary circumstances. The allegations are that during the course of the first two incidents AO caused significant physical injury to each of the complainants and that as a totality of the circumstances, extraordinary circumstances existed to prevent removal from the Youth Part.

Summary of Decision: The Court evaluated the legislative record and found that on the issue of significant physical injury, it was the intent to create a hybrid standard between physical injury and serious physical injury, as defined by the penal law. The guidance provided, was that the injuries would be more than a bruise but not rise to the level of

disfigurement. Following this analysis, the Court found that the injuries suffered by the two complainants satisfied the statute. The first victim lost sight in one eye and the second suffered from fractured facial bones. In evaluating extraordinary circumstances the Court again looked to the legislative record where it referred to committing “cruel” and or “heinous acts” and strong proof that the young person would not be amenable to the heightened services offered by the Family Court. The Court concluded that the commission of significant multiple crimes in a short time period and the level of violence exhibited by AO reflected cruelty, along with an indication that AO would not be amenable to services. The matters were retained in the Youth Part.

15. *People v. M.M.*, 2019 NY Slip Op 29071 (Cnty. Ct.)

AO in three separate felony complaints was charged with Robbery in the First Degree. The first complaint alleges that during the course of the incident AO reached into his pocket and stated to the victim “step back or I’ll boom you.” The second complaint alleges AO placed his hand in his pocket as if he had a handgun, and the third alleges AO displayed a black handgun and said “yo I got a glock on me...” The matters were scheduled for an appearance, where the People argued for retention, in that AO displayed a firearm or deadly weapon in furtherance of the offenses. The People argued that the actions of AO met the definition of *display* as defined in the penal law combined with the reasonable belief of the complainants that AO displayed a firearm. Defense argued in opposition, that the penal law definition of deadly weapon requires proof that a loaded weapon is capable of firing a shot and causing death; requiring proof of operability. They further argued that the legislature did not intend for the definition of *display* in the newly created section of the CPL to be the same as that in the penal law.

Summary of Decision: The Court found that statutory definition of display under the penal law does not apply to CPL retention factor. It found that CPL requires that People must prove that AO showed or exhibited an actual firearm or deadly weapon as defined in the penal law. The Court also relied on the legislative history of RTA and the intent to treat 16 and 17 year-old youth, not as adults, but children who are immature and that the vast majority of cases are meant to be removed to the Family Court. The Court found that to interpret display in the CPL consistent with the penal law would defeat this intent and expand the number of youth that would be disqualified from removal.

The motion to retain by the People was denied. Leave to file a motion within thirty days to demonstrate extraordinary circumstances were granted.

However, consider under retention due to string argument based on string of acts close in space and time. (See, *People v. L.A.*, No. 70032/18 (Sup. Ct. N.Y. Cnty. November 8, 2018).

Sentencing

16. *People v. Morales*, 2019 NY Slip Op 50519(U) (Sup. Ct.) Defendant pled guilty in to Manslaughter in 2010 for stabbing the victim and causing his death. At the time he committed the crime he was 16 years-old. The matter went before the court in 2018 upon application by the defendant for re-sentencing, seeking to be granted “youthful offender” (YO) status to allow for a reduction in his sentence of 25 years’ incarceration. If he had been adjudicated a YO at the time of his plea, the maximum sentence would have been four years and sealing of the record.

Summary of Decision: Along with analyzing the intent and purpose of the YO statute, which is to remove the criminal onus for youth ,the Court discussed at length the purpose

and intent of the RTA legislation and the knowledge society has gained in regard to the emotional and intellectual growth of juveniles. The Court cited to various studies which support the current position in the criminal justice arena, that juveniles should not be treated in the same manner as adults. The Court also evaluated the history and character of the defendant. The court granted the defendant YO status and reduced his sentence retroactively, resulting in time served for the defendant.

1. ***People v. A.S.*, 62 Misc. 3d 1220(A) (Fam. Ct.)**
2. ***People v. A.T.*, 2019 NY Slip Op 29107 (Fam. Ct.)**
3. ***People v. B.H.*, 62 Misc. 3d 735 (Cnty. Ct. 2018)**
4. ***People v. D.L.*, 62 Misc. 3d 900 (Fam. Ct. 2018)**
5. ***People v. E.B.M.*, 2019 NY Slip Op 30459(U) (Cnty. Ct.)**
6. ***People v. G.C.*, 2019 NY Slip Op 29050 (Cnty. Ct.)**
7. ***People v. J.B.*, 2019 NY Slip Op 29051 (Cnty. Ct.)**
8. ***People v. J.M.*, No. FYC-70023-19 (Sup. Ct. Bronx Cnty. February 13, 2019)**
9. ***People v. K.M.*, 54 Misc. 3d 825 (Sup. Ct. 2016)**
10. ***People v. L.A.*, No. 70032/18 (Sup. Ct. N.Y. Cnty. November 8, 2018).**
11. ***People v. L.M.*, 62 Misc. 3d 1227(A) (Cnty. Ct. 2019)**
12. ***People v. M.M.*, 2019 NY Slip Op 29071 (Cnty. Ct.)**
13. ***People v Morales* 2019 NY Slip Op 50519(U) (Sup. Ct.)**
14. ***People v. R.M.*, 2018 NY Slip Op 28429 (Cnty. Ct.)**
15. ***People v. T.R.*, 62 Misc. 3d 1219(A) (Fam. Ct.)**