"RAISE THE AGE" LEGISLATION: WHAT A FAMILY COURT PRACTITIONER SHOULD KNOW

GARY SOLOMON
THE LEGAL AID SOCIETY, JUVENILE RIGHTS PRACTICE
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EFFECTIVE DATE

Except for provisions related to identification evidence (took effect on July 1, 2017) and the recording of custodial interrogations (took effect on April 1, 2018 and apply to confessions, admissions or statements made on or after that date), the provisions outlined below take effect October 1, 2018; however, when the applicability of a provision is based on acts committed by a person who was seventeen years of age at the time of the offense, the provision takes effect October 1, 2019.

NEW JURISDICTIONAL LANDSCAPE

The New "Adolescent Offender" Category
An "Adolescent offender" means a person charged with a felony committed on or after October 1, 2018 when he or she was sixteen years of age, or on or after October 1, 2019 when he or she was seventeen years of age. Criminal Procedure Law § 1.20(44).

Where Adolescent Offender And Juvenile Offender Cases Will Be Filed: Youth Parts
Adolescent offender charges, along with juvenile offender charges, will be heard in the first instance by a family court judge presiding in a youth part established in a county superior court. Such judges "shall receive training in specialized areas, including, but not limited to, juvenile justice, adolescent development, custody and care of youths and effective treatment methods for reducing unlawful conduct by youths." CPL § 722.10(1). *See also* CPL § 410.90-a (all proceedings relating to juvenile offender or adolescent offender shall be heard in youth part).

Expansion Of Juvenile Delinquency Jurisdiction: Family Court Filings, And Removals
Beginning October 1, 2018, the definition of "juvenile delinquent" includes a child who was over 16 and less than 17 when he/she allegedly committed acts that would constitute a crime if committed by an adult, including a violation that occurred in the same transaction or occurrence as the alleged criminal acts. Beginning October 1, 2019, the definition will include a child who was over 17 and less than 18 when the acts allegedly were committed. FCA § 301.2(1).
Misdemeanor (and related violation) charges against children who were 16 or 17 when the acts allegedly were committed will be brought in family court, and adolescent offender and juvenile offender charges removed from a youth part also will be heard in family court. *See also* FCA § 302.1(3) (when crime and violation arise out of same transaction or occurrence, charge alleging both offenses shall be made returnable before court having jurisdiction over crime; family court may issue fact-finding order that covers violation and not crime); Penal Law § 30.00(1) (person less than seventeen, or, commencing October 1, 2019, person less than eighteen not criminally responsible for conduct except for juvenile offender offense; felony; traffic infraction; violation;

or misdemeanor, but only misdemeanor charge that is accompanied by felony charge committed as part of same criminal transaction, results from guilty plea in satisfaction of felony charge, or is in Vehicle and Traffic Law).

REMOVAL OF JUVENILE OFFENDERS TO FAMILY COURT

The RTA legislation has re-worked provisions governing the removal of juvenile offender charges to family court.

Removal Of Charges Reduced To Juvenile-Delinquency After Hearing Upon Felony Complaint (CPL § 722.20[3][b])

The court shall order removal in accordance with CPL Article 725 if there is not reasonable cause to believe that the defendant committed a crime for which he/she is criminally responsible but there is reasonable cause to believe he/she is a juvenile delinquent. The court must specify the act or acts it found reasonable cause to believe the defendant did.

Pre-Indictment Request For Removal By District Attorney (CPL § 722.20[4],[6])

At the request of the DA, the court shall order removal in accordance with CPL Article 725 if, upon consideration of the criteria in CPL § 722.22(2), the court determines that removal would be in the interests of justice. CPL § 722.20(4).

The § 722.22(2) criteria are: (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.

However, when there is a charge of murder in the second degree as defined in Penal Law § 125.25, rape in the first degree as defined in PL § 130.35(1), criminal sexual act in the first degree as defined in PL § 130.50(1), or an armed felony as defined in CPL § 1.20(41), removal also must be based upon 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. CPL § 722.20(4).

The court may make such inquiry as it deems necessary for the purpose of making a determination. 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 as inconsistent prior testimony for impeachment purposes. CPL § 722.20(6)(c).

The DA shall state upon the record the reasons for any required consent to removal, and the reasons shall be stated in detail and not in conclusory terms. CPL § 722.20(6)(b).

If the court orders removal, it shall state on the record the factor or factors upon which its determination is based, and shall give its reasons for removal in detail and not in conclusory terms. CPL § 722.20(6)(a).

Pre-Indictment Motion To Remove By Defendant (CPL § 722.20[5])

If the defendant has not waived a hearing upon the complaint and such a hearing has not commenced, the defendant may move to remove the action to family court pursuant to § 722.22 (see below).

The provisions of § 722.22(1)(b), which require DA consent and special court findings when there is a charge of murder in the second degree as defined in PL § 125.25, rape in the first degree as defined in PL § 130.35(1), criminal sexual act in the first degree as defined in PL § 130.50(1), or an armed felony as defined in CPL § 1.20(41), shall not apply when there is not reasonable cause to believe that the juvenile offender committed one or more of the crimes enumerated therein.

Proceedings Upon Pre-Indictment Motion To Remove By Defendant, Or Post-Indictment Motion To Remove By Party Or Court (CPL § 722.22)

After a pre-indictment motion by a juvenile offender pursuant to § 722.20(5), or after arraignment upon an indictment, the court may, on motion of any party or on its own motion, order removal of the action to the family court pursuant to CPL Article 725, if, after consideration of the specified factors, which shall be examined individually and collectively, the court determines that removal would be in the interests of justice. CPL § 722.22(1)(a).

The factors are: (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).

However, when there is a charge of murder in the second degree as defined in PL § 125.25, rape in the first degree as defined in PL § 130.35(1), criminal sexual act in the first degree as defined in PL § 130.50(1), or an armed felony as defined in CPL § 1.20(41) - except pre-indictment when there is not reasonable cause to believe the juvenile offender committed one or more of the enumerated crimes - the consent of the DA is required, and the court, in addition to considering the specified factors and determining that removal would be in the interests of justice, also must find 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. CPL § 722.22(1)(b).

Upon consideration of the motion papers and any documentary evidence submitted by the parties, the court, if it finds that the motion cannot be determined on papers submitted, may make such inquiry as it deems necessary for the purpose of making a determination. CPL § 722.22(3).

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 as inconsistent prior testimony for impeachment purposes. CPL § 722.22(4).

The DA shall state upon the record the reasons for his consent to removal, and the reasons shall be stated in detail and not in conclusory terms. CPL § 722.22(5)(b).
If the court orders removal, it shall state on the record the factor or factors upon which its determination is based, and shall give its reasons for removal in detail and not in conclusory terms. CPL § 722.22(5)(a).

REMOVAL/TRANSFER OF ADOLESCENT OFFENDERS TO FAMILY COURT

Removal Of Juvenile Delinquency Charges After Hearing Upon Felony Complaint (CPL § 722.21[3][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, 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 CPL Article 725. The probation adjustment provisions in FCA § 308.1 shall apply. Notably, if the individual or institutional defense counsel will follow the case to family court, it will be possible to participate in the adjustment process pursuant to 22 NYCRR § 205.23(a).

Pre-Indictment Removal Of Non-Exceptional Felony Charges Without DA Objection (CPL §§ 722.21[4], 722.23)
Even when the court has ordered upon a felony hearing or a waiver of the hearing that the defendant be held for grand jury action, the court shall, upon notice from the DA that he/she will not file a motion to prevent removal pursuant to § 722.23, order that the action be transferred to the family court pursuant to CPL Article 725 unless the defendant is charged with a class A felony defined outside Penal Law Article 220, a violent felony defined in PL § 70.02, or a felony listed in CPL § 1.20(42)(1) or (2) (juvenile offender charges), and the court determines (as per CPL § 722.23[2][c]) by a preponderance of the evidence one or more of the following as set forth in the accusatory instrument: (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 Penal Law § 130.00. If the case is transferred, the probation adjustment provisions in FCA § 308.1 shall apply. CPL § 722.21(4).
In non-exceptional felony cases in which the DA has not provided up-front notice that he/she will not file a motion to prevent removal, the court shall order removal unless, within thirty calendar days of arraignment, the DA makes a motion to prevent removal. 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. CPL § 722.23(1)(a). In the interim, there shall be a presumption against custody and case planning services shall be made available to the defendant. CPL § 722.23(1)(f). If the DA fails to file a motion and the case is transferred, the probation adjustment provisions in FCA § 308.1 shall apply. CPL § 722.23(1)(g) (this provision states that it applies to all actions transferred pursuant to "this section," which, taken literally, would mean that it applies to the removal of exceptional felonies pursuant to § 722.23; however, it cannot be assumed that this was the legislature's intent given that other Raise the Age provisions do not provide for application of FCA § 308.1 to exceptional felonies).

Pre-Indictment Removal Upon Request Of DA Of Exceptional Felony Charges (CPL §§ 722.21, 722.22)

Even when the court has ordered upon a felony hearing or a waiver of the hearing that the defendant be held for grand jury action, the court shall order removal at the request of the DA if, upon consideration of the criteria specified in § 722.22(2), it is determined that removal would be in the interests of justice. CPL § 722.21(5).

The § 722.22(2) criteria are: (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.

Where, however, the felony complaint charges murder in the second degree as defined in Penal Law § 125.25, rape in the first degree as defined in PL § 130.35(1), criminal sexual act in the first degree as defined in PL § 130.50(1), or an armed felony as defined in CPL § 1.20(41)(a), a determination that such action be removed to the family court shall, in addition, be based upon 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. CPL § 722.21(5).

The court may make such inquiry as it deems necessary for the purpose of making a determination upon the DA's request. 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 as inconsistent prior testimony for impeachment purposes. CPL § 722.21(6)(c).

If the court orders removal, it shall state on the record the factor or factors upon which its determination is based, and shall give its reasons for removal in detail and not in conclusory terms. CPL § 722.21(6)(a). The DA shall state upon the record the reasons for any required consent to removal, and the reasons shall be stated in detail and not in conclusory terms. CPL § 722.21(6)(b).

Pre-Indictment Removal Without Request Of DA Of Exceptional Felony Charges (CPL § 722.23)

Upon arraignment, the court shall schedule an appearance no later than six calendar days from arraignment to review the accusatory instrument. The court shall notify the DA and defendant regarding the purpose of such appearance. CPL § 722.23(2)(a).

At such appearance, the court shall review the accusatory instrument and any other relevant facts for the purpose of determining whether the action shall proceed in accordance with § 722.23(1). Both parties may be heard and submit information relevant to the determination. CPL § 722.23(2)(b).

The court shall order the action to proceed in accordance with § 722.23(1) (putting the case on a removal track unless the DA moves to prevent removal) unless it determines in writing that the

DA proved by a preponderance of the evidence one or more of the following as set forth in the accusatory instrument: (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 PL § 130.00. CPL § 722.23(2)(c).

A determination that the action shall not proceed in accordance with § 722.23(1) (and thus cannot be removed) shall be made in writing or on the record and shall include findings of fact and to the extent practicable conclusions of law. CPL § 722.23(2)(d). However, nothing in § 722.23(2) precludes removal where all the parties agree. CPL § 722.23(2)(e).

If, due to a reduction of one or more charges, the elements of the highest remaining charge would be removable, the court, sua sponte or upon a motion by the defendant pursuant to § 722.23(1) or (2), shall promptly notify the parties and direct that the matter proceed in accordance with § 722.23(1), and the DA must file any motion to prevent removal within thirty days of effecting or receiving notice of such reduction. CPL § 722.23(3).

A defendant may waive review of the accusatory instrument by the court and the opportunity for removal in accordance with § 722.23, if such waiver is made by the defendant knowingly, voluntarily and in open court, in the presence of and with the approval of his/her counsel and the court. An earlier waiver shall not constitute a waiver under this section. CPL § 722.23(4).

DA Motion To Prevent Removal (CPL § 722.23)

The motion to prevent removal 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 DA is requesting a hearing. The motion shall be noticed to be heard promptly. CPL § 722.23(1)(b).

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. The hearing shall be held expeditiously. CPL § 722.23(1)(c).

The court shall deny the motion unless the court determines that extraordinary circumstances exist that should prevent the transfer. CPL § 722.23(1)(d). 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. CPL § 722.23(1)(e).

Nothing in § 722.23(1) precludes removal where all the parties agree. CPL § 722.23(1)(h).

Upon removal, at least in non-exceptional felony cases, the probation adjustment provisions in FCA § 308.1 shall apply. CPL § 722.23(1)(g).

Detention Orders

The court must direct that the defendant be taken to and lodged in a place certified by the OCFS, in conjunction with the Commission of Correction, as a specialized secure juvenile detention facility for older youth. The defendant may not 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 OCFS, which shall consult with the Commission of Correction, and the statement of its reasons therefor. CPL § 510.15(1).

OTHER AUTHORITY FOR REMOVAL

Removal in juvenile offender proceedings, and now in adolescent offender proceedings, also occurs when a grand jury finds only that a juvenile delinquency offense has been established (CPL § 190.71[b]), or when, upon the defendant's motion to dismiss, the court finds that the grand jury evidence established only a juvenile delinquency offense and the court does not authorize the People to resubmit to another grand jury (CPL § 210.30[7]), or when a verdict is set aside and replaced by a guilty plea to a juvenile delinquency offense. CPL § 330.25.

ORDER OF REMOVAL (CPL § 725.05)

When a youth part directs that an action or charge is to be removed to the family court the youth part must issue an order of removal in accordance with this section. Such order must be as follows:

1. The order must provide that the action or charge is to be removed to the family court of the county in which such action or charge was pending, and it must specify the section pursuant to which the removal is authorized.
2. Where the direction is authorized pursuant to CPL § 722.20(3)(b) or § 722.21(3)(b) after the court has determined upon a felony hearing that the defendant committed no acts for which he/she may be held criminally responsible, the order must specify the juvenile delinquency act or acts the court found reasonable cause to believe the defendant did.
3. Where the direction is authorized pursuant to CPL § 722.20(4) or § 722.21(4) because of the DA's consent, the order must specify the act or acts the court found reasonable cause to allege.
4. Where the direction is authorized pursuant to CPL § 190.71, the court shall annex to the order as part thereof a certified copy of the grand jury request.
4-a. Where the direction is authorized pursuant to CPL § 210.30(7) upon the court's determination that the grand jury evidence is insufficient, the order must specify the act or acts for which there was sufficient evidence.
5. Where the direction is authorized pursuant to CPL § 220.10, § 310.85, or § 330.25, the order must specify the act or acts for which a plea or verdict of guilty was rendered or accepted and entered.
6. Where a securing order has not been made, the order of removal must provide that the police officer or peace officer who made the arrest or some other proper officer forthwith and with all reasonable speed take the juvenile to the designated family court or, where that cannot be done, it must provide for release or detention in the same manner as provided for a family court proceeding pursuant to FCA § 320.5.
7. Whether or not a securing order has been made, the order of removal must specify a date certain within ten days from the date of the order of removal for the defendant's appearance in the family court and where the defendant is in detention or in the custody of the sheriff that date must be not later than the next day the family court is in session.
8. The order of removal must direct that all of the pleadings and proceedings in the action, or a certified copy of same be transferred to the designated family court and be delivered to and filed with the clerk of that court. For the purposes of this subdivision the term "pleadings and proceedings" includes the minutes of any hearing inquiry or trial held in the action, the minutes of any grand jury proceeding and the minutes of any plea accepted and entered.
9. The order of removal must be signed by a judge or justice of the court that directed the removal.

For speedy trial purposes, the date specified in the removal order for the juvenile's appearance in the family court shall constitute the date of the initial appearance. FCA § 340.1(3).

IDENTIFICATION EVIDENCE

Hearsay Evidence Of Out-of-Court Identifications

FCA § 343.3, which, in specified circumstances, permits a third party to testify about an out-of-court identification a witness made of the respondent when that witness is unable at trial to state, on the basis of present recollection, whether or not the respondent is the person in question, is amended (as is CPL § 60.25) to permit the third party to testify about an observation/identification of a pictorial, photographic, electronic, filmed or video recorded reproduction made pursuant to a blind or blinded procedure (as defined in the statute).

A "blind or blinded procedure" is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproductions under circumstances where, at the time the identification is made, the public servant administering such procedure: (i) does not know which person in the array is the suspect, or (ii) does not know where the suspect is in the array viewed by the witness. The failure of a public servant to follow such a procedure shall be assessed solely for purposes of this article and shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not constitute a legal basis to suppress evidence pursuant to CPL § 710.20(6). This article neither limits nor expands CPL § 710.20.

FCA § 343.4, which, in specified circumstances, permits a witness to testify about his/her own out-of-court identification of the respondent, is amended (as is CPL § 60.30) in a like manner to permit the witness to testify about an observation/identification of a pictorial, photographic, electronic, filmed or video recorded reproduction made pursuant to a blind or blinded procedure.

Motions To Suppress Identification Evidence

CPL § 710.20(6) is amended to provide for suppression based on an improperly made previous identification of a pictorial, photographic, electronic, filmed or video recorded reproduction of the accused person.

A claim that the previous identification of the accused person or of a pictorial, photographic, electronic, filmed or video recorded reproduction of the accused person by a prospective witness did not comply with CPL § 60.25(1)(c) [or FCA § 343.3(1)(c)] or with the protocol promulgated in accordance with (new) Executive Law § 837(21), shall not constitute a legal basis to suppress evidence pursuant to this subdivision. A claim that a public servant failed to comply with CPL § 60.25(1)(c) or Executive Law § 837(21) shall neither expand nor limit the rights an accused person may derive under the constitution of this state or of the United States.

Notice Of Intent To Offer Identification Evidence

CPL § 710.30(1)(b), which requires pretrial notice to the defense that a witness who will testify at trial regarding an observation of the accused person either at the time or place of the commission of the offense, or upon some other occasion relevant to the case, has previously identified the accused person, is amended (as, in effect, is FCA § 330.2[2]) to include previous identifications of a pictorial, photographic, electronic, filmed or video recorded reproduction of the accused person.

Identification Procedure Protocol

New Executive Law § 837(21) requires that the Division of Criminal Justice Services promulgate a standardized and detailed written protocol that is grounded in evidence-based principles for the administration of photographic array and live lineup identification procedures for police agencies and standardized forms for use by such agencies in the reporting and recording of such procedures. The protocol shall address the following topics: (a) the selection of photographic array and live lineup filler photographs or participants; (b) instructions given to a witness before conducting a photographic array or live lineup identification procedure; (c) the documentation and preservation of results of a photographic array or live lineup identification procedure; (d) procedures for eliciting and documenting the witness's confidence in his or her identification following a photographic array or live lineup identification procedure, in the event that an identification is made; and (e) procedures for administering a photographic array or live lineup identification procedure in a manner designed to prevent opportunities to influence the witness.

DCJS has issued **Identification Procedures: Photo Arrays and Line-ups, Municipal Police Training Council Model Policy and Identification Procedures Protocol and Forms** (June 2017) pursuant to § 837(21). Included in the protocols is, inter alia, a statement that "blind" administration is "preferable" where circumstances allow and it is practicable; a directive that "where practicable" and with the witness's consent, the police should memorialize identification procedures using audio or video recording; an obligation to obtain witness "confidence statements"; and specific instructions that must be given to the witness.

RECORDING OF CUSTODIAL INTERROGATIONS

A new Family Court Act § 344.2(3) provides that where a respondent is subject to custodial interrogation by a public servant at a facility specified in FCA § 305.2(4), the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded and governed in accordance with CPL § 60.45(3)(a)-(e).

New Criminal Procedure Law § 60.45(3) states as follows:

(a) Where a person is subject to custodial interrogation by a public servant at a detention facility, the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded by an appropriate video recording device if the interrogation involves: a class A-1 felony, except one defined in Penal Law Article 220; felony offenses defined in PL §§ 130.95 and 130.96; or a felony offense defined in PL Article 125 or Article 130 that is defined as a class B violent felony offense in PL § 70.02.

The term "detention facility" shall mean a police station, correctional facility, holding facility for prisoners, prosecutor's office or other facility where persons are held in detention in connection with criminal charges that have been or may be filed against them.

(b) No confession, admission or other statement shall be subject to a motion to suppress pursuant to CPL § 710.20(3) based solely upon the failure to video record such interrogation in a detention facility. However, where the people offer into evidence a confession, admission or other statement made by a person in custody with respect to his or her participation or lack of participation in an offense specified in § 60.45(3)(a), that has not been video recorded, the court shall consider the failure to record as a factor, but not as the sole factor, in accordance with §

60.45(3)(c) in determining whether such confession, admission or other statement shall be admissible.
(c) Notwithstanding the requirement of § 60.45(3)(a), upon a showing of good cause by the prosecutor, the custodial interrogation need not be recorded. Good cause shall include, but not be limited to: (i) If electronic recording equipment malfunctions. (ii) If electronic recording equipment is not available because it was otherwise being used. (iii) If statements are made in response to questions that are routinely asked during arrest processing. (iv) If the statement is spontaneously made by the suspect and not in response to police questioning. (v) If the statement is made during an interrogation that is conducted when the interviewer is unaware that a qualifying offense has occurred. (vi) If the statement is made at a location other than the "interview room" because the suspect cannot be brought to such room, e.g., the suspect is in a hospital or the suspect is out of state and that state is not governed by a law requiring the recordation of an interrogation. (vii) If the statement is made after a suspect has refused to participate in the interrogation if it is recorded, and appropriate effort to document such refusal is made. (viii) If such statement is not recorded as a result of an inadvertent error or oversight, not the result of any intentional conduct by law enforcement personnel. (ix) If it is law enforcement's reasonable belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant. (x) If such statement is made at a location not equipped with a video recording device and the reason for using that location is not to subvert the intent of the law.
For purposes of this section, the term "location" shall include those locations specified in FCA § 305.2(4)(b).
(d) In the event the court finds that the people have not shown good cause for the non-recording of the confession, admission, or other statement, but determines that a non-recorded confession, admission or other statement is nevertheless admissible because it was voluntarily made then, upon request of the defendant, the court must instruct the jury that the people's failure to record the defendant's confession, admission or other statement as required by this section may be weighed as a factor, but not as the sole factor, in determining whether such confession, admission or other statement was voluntarily made, or was made at all.
(e) Video recording as required by this section shall be conducted in accordance with standards established by rule of the Division of Criminal Justice Services.

ARREST PROCEDURES

When litigating suppression issues, the attorney for the child must consider the potential significance of a violation of these procedures.

Arrest On Adolescent Offender And Juvenile Delinquency Charges
Adolescent offenders are now referenced in Criminal Procedure Law provisions that govern the arrest of juvenile offenders, and the Family Court Act counterparts (FCA §§ 305.2[2] and 305.1[1]) now contemplate the arrest of children over sixteen on charges of juvenile delinquency.

Production In Court
New CPL § 140.20(8), which governs arrests by police officers, and new CPL § 140.27(3-a), which governs arrests by peace officers, state that upon the arrest of a juvenile offender, or the

arrest of an adolescent offender other than an arrest for a violation or a traffic infraction, the offender shall be brought before the youth part of the superior court. If the youth part is not in session, the offender shall be brought before the most accessible magistrate designated by the appellate division in the applicable department to act as a youth part.
FCA § 305.2(4)(b) now states that when the family court is not in session, and the officer has not found it necessary to question the child at a designated facility, a detained child must be brought to the most accessible magistrate, if any, designated by the appellate division to conduct a hearing under FCA § 307.4. Note that when an officer is finished questioning the child, there is no reason why he/she should not bring the child before an accessible designated magistrate rather than take the child to a detention facility as permitted under FCA § 305.2(4)(c).
FCA § 307.3(4) now states that when a detention agency does not release the child to a parent or other person legally responsible, and the family court is not in session, the child shall be brought to the most accessible designated magistrate, if any, provided, however, that if the family court is not in session and a magistrate is not available, the child shall be brought before the family court within seventy-two hours or the next day the court is in session, whichever is sooner.

Questioning Of Arrestees
A police officer (CPL §§ 140.20[6], 140.40[5]) or peace officer (CPL § 140.27[5]) who arrests a juvenile offender or a person who is sixteen (or, commencing October 1, 2019, seventeen) without a warrant shall immediately notify the parent or other person legally responsible for his or her care or the person with whom he or she is domiciled, that such offender or person has been arrested, and the location of the facility where he or she is being detained.
If the officer determines that it is necessary to question the person, the officer must take him/her to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of the juvenile, to his/her residence and there question him/her for a reasonable period of time. A juvenile shall not be questioned unless he/she and a person required to be notified, if present, have been advised:
(a) of the juvenile's right to remain silent;
(b) that the statements made by him/her may be used in a court of law;
(c) of his/her right to have an attorney present at such questioning; and
(d) of his/her right to have an attorney provided for him/her without charge if he/she is unable to afford counsel.
In determining the suitability of questioning and determining the reasonable period of time for questioning the juvenile, his/her age, the presence or absence of his/her parents or other persons legally responsible for his/her care and notification of such persons shall be included among relevant considerations.

MISCELLANEOUS AMENDMENTS/OTHER ISSUES

Adjustment
"The probation service shall permit any participant who is represented by a lawyer to be accompanied by the lawyer at any preliminary conference." 22 NYCRR § 205.22(a). When the attorney or law office that represented the child in the criminal proceeding continues to represent the child after the case has been transferred, accompanying the child through the adjustment process and providing advice and protection may enhance the possibility of adjustment and, in

any event, may provide an opportunity to speak to witnesses and otherwise obtain useful information about the case. It remains to be seen how probation departments, which are not used to having an attorney present, will react, and how that reaction will affect the an attorney's strategic calculations.

FCA § 308.1(13) provides that the adjustment provisions in FCA § 308.1 do not apply in cases removed pursuant to CPL Article 725. Although § 308.1(13) originally addressed only juvenile offender removals, its plain language encompasses adolescent offender removals. While the new legislation specifically states that § 308.1(13) does not preclude adjustment of ordinary adolescent offender felony charges, no such statement has been made with respect to the exceptional, violent felonies. On the other hand, FCA § 308.1(3) permits probation to adjust designated felony charges with the court's permission. So, given the absence of a clear and unequivocal expression of legislative intent to preclude adjustment, there is some room in which to argue that exceptional felonies are eligible for adjustment when probation obtains the court's permission. Defense counsel could ask the court to grant such permission before the case is transferred out of the youth part.

Because, in juvenile delinquency proceedings commenced in family court, probation makes its discretionary adjustment determination on its own *before* the case is referred to the presentment agency, probation should have the same opportunity to adjust a case without interference from the presentment agency or the court when an adolescent offender case has been removed and is eligible for adjustment.

In any event, there appears to be no bar to referral for adjustment of *any* felony charges by the family court pursuant to FCA § 320.6.

Petitions: Allegation Regarding Respondent's Age

The petition must state that the respondent was of the necessary age to be a juvenile delinquent, rather than under sixteen, at the time of the alleged act or acts. FCA § 311.1(3)(c).

Petitions: Form Of Petition

FCA § 311.1(7), which has applied to juvenile offender cases, states that a CPL Article 725 order of removal and those pleadings and proceedings that have been transferred shall be deemed to be a petition containing all of the allegations required notwithstanding that the allegations may not be set forth in the manner prescribed in § 311.1. The statute has not been amended to make it clear that it applies where adolescent offender charges have been removed, but there appears to be no reason why it would not.

That said, the pleadings and other documents upon which the respondent is prosecuted will have to meet the non-waivable, jurisdictional non-hearsay requirement in FCA § 311.2(3). *Matter of Michael M.*, 3 N.Y.3d 441 (2004); *Matter of Desmond J.*, 93 N.Y.2d 949 (1999) (petition sufficient where felony complaint and other papers transferred from criminal court did not satisfy § 311.2, but presentment agency handed up complainant's supporting deposition at initial appearance, since that was the earliest stage at which the deposition could have been filed).

Although the family court does not have jurisdiction over adolescent offender charges unless an order of removal has been issued, *see Matter of Raymond G.*, 93 N.Y.2d 531 (1999), it could be argued that, rather than use the removal order and related documents as a petition, the presentment agency may choose to file a standard juvenile delinquency petition containing the charges that appear in the removal order.

Designated Felonies

FCA § 301.2(8) has been amended to include adolescent offenders whose cases were removed to family court.

FCA § 301.2(9) has been amended to state that a "Designated class A felony act" means a designated felony act that would constitute a class A felony if committed by an adult.

Plea Bargaining Warning: Under the new law there is the possibility of felony juvenile delinquency findings for offenses committed when a respondent was 16 (or 17) years of age, and thus the attorney for the child can no longer advise the respondent, before he/she enters a plea to a felony, that once he/she turns 16, there is no possibility of felony findings that could lead to a designated felony charge. This may increase the value of a misdemeanor plea.

In cases in which the predicate felony or felonies were committed before the Raise the Age legislation took effect, and the new felony was committed after the child turned 16, the child's attorney could argue that constitutional *ex post facto* or statutory retroactivity principles preclude resurrection of the prior felony or felonies as predicates.

Probable Cause Hearings Post-Removal

FCA § 325.1(5) has been amended to provide that, as in other cases in which no pre-removal probable cause hearing was held, the petition will not be deemed to be based upon a probable cause determination, and the respondent's right to a probable cause hearing is not extinguished, where the respondent waived a pre-removal probable cause hearing.

Commitment Upon Determination Of Incapacity To Proceed

FCA § 322.2(5)(a) and (b) have been amended to provide that if the respondent was at least sixteen years of age when the act was committed, court-ordered extensions of commitment for a still-incapacitated respondent may continue until the respondent's twenty-first birthday (as opposed to eighteen in other cases).

Statements By Victim At Disposition

The victim now has a right to have a victim impact statement included in the probation investigation report, and the statement now includes any actual out-of-pocket loss. FCA § 351.1(4).

At the dispositional hearing, the victim has the right to make a statement with regard to any matter relevant to the question of disposition. If the victim chooses to make a statement, he/she shall notify the court at least ten days prior to the date of the hearing. The court shall notify the respondent no less than seven days prior to the hearing of the victim's intent to make a statement. The victim shall not be made aware of the final disposition of the case. FCA § 350.3(4).

The victim shall be allowed to make the oral or written statement just prior to counsel's statements. FCA § 350.4(5-a).

Disposition Upon Finding Of Violation Only

When a delinquency adjudication arises from a violation, the court shall have the power to enter a dispositional order of conditional discharge or probation only. FCA § 352.2(4).

There is no indication as to whether the court may order placement upon a finding that the respondent has violated the dispositional order. The child's attorney certainly will want to argue that the legislature has made it clear that placement is not permitted, and that upon finding a violation, the court can only issue a new order of conditional discharge or probation with any

lawful and justified new conditions. Notably, FCA Article Three contains no provision indicating how long a placement order may run in violation cases. *See* FCA § 353.3(5).

Restrictive Placement

FCA § 353.5(4)(a)(iii) is amended to provide that when the respondent was found guilty of a class A designated felony, the residential facility component of a restrictive placement may be in a Close to Home facility only when the act was committed when the respondent was under sixteen years of age.

FCA § 353.5(4)(d) is amended to provide that when the respondent was found guilty of a class A designated felony committed when the respondent was sixteen years of age or older, an initial placement or extension of placement may run until the respondent's twenty-third birthday. *See also* Executive Law § 507-a(2)(a-1)(ii).

Extension Of Non-Restrictive Placement

FCA § 355.3(6) is amended to provide that where the acts were committed after the respondent's sixteenth birthday, placement may be extended without the respondent's consent until the respondent's twenty-first birthday.

FCA § 355.5(3)(b) is amended to provide that permanency hearings shall not be held beyond the respondent's twenty-first birthday.

Post-Adjudication Motion To Seal

FCA § 375.2(6) has been amended to provide that a post-adjudication motion to seal, which formerly could be filed after the respondent turns sixteen, cannot, starting October 1, 2018, be filed until the respondent's seventeenth birthday, and, starting October 1, 2019, until the respondent's eighteenth birthday.