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- Accessible Magistrates

Ethics Opinion 18-129, October 18, 2018

The inquiring part-time lawyer judge accepts Family Court appointments as attorney for the child in juvenile delinquency cases. [T]he judge has recently been appointed as "an accessible [m]agistrate with county wide jurisdiction to arraign off hour adolescents" pursuant to new raise-the-age legislation. . . . Accordingly, this judge asks if he/she may accept an attorney for the child assignment in a case where another accessible magistrate served as the arraigning magistrate for the juvenile offender or adolescent offender.

The novel question here is whether the inquiring judge's service as an accessible magistrate in the youth part means that the judge "is, or is entitled to act as a member" of the youth part, for the purposes of Judiciary Law § 16. If so, the judge could not represent clients in *any* cases "originating" in the youth part.

[W]e conclude this judge must not accept appointment as attorney for the child in a case where he/she previously served as the accessible magistrate or arraigning judge but is not ethically barred from accepting appointments as attorney for the child in other cases that originate in the youth part, where he/she had no judicial involvement.

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Three Factors pursuant to CPL 722.23 (2)(c)

- (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.
- If none of these three factors exist, proceed to extraordinary circumstances

- People v A.T., 63 Misc 3d 336, 338 [Fam Ct 2019]
- Here, it is alleged that Defendant placed a black & silver BB gun to the complainant's head and demanded all his money. Thereafter, the black & silver BB gun was recovered where Defendant was alleged to have thrown it. Therefore, the Court determines the People have sufficiently pled facts that would cause a reasonable person to believe the Defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of the offense.

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Extraordinary Circumstances, People v A.T. , March 25, 2019, Erie County, 63 Misc.3d 891

- Court should consider the “ordinary meaning” of “extraordinary circumstances” as referring “to that which is very unusual or remarkable” and as “circumstances that go beyond what is regular in the normal course of events.”
- AO does not appear amenable to services but rather appears to thwart any efforts at rehabilitation.
- “Extraordinary circumstances” exist where the defendant had multiple separate pending cases before the court at one time. Committing a violent felony offense while at liberty on another pending charge, and the subsequent failure to appear although provided notice to do so, is remarkable.

- Removal denied

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Extraordinary Circumstances

People v L.L., 2019 N.Y. Slip Op. 32330[U], 2 [Sup Ct, Queens County 2019]

Although undefined the legislative transcript makes clear that “denials of transfer to family court should be extremely rare....Transfer to family court should be denied only when highly usual 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 heighten services in the family court....[In sum], [o]utside of the most serious felony conduct, all cases will be presumptively transferred.

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Extraordinary Circumstances

People v L.L., 2019 N.Y. Slip Op. 32330[U], 2 [Sup Ct, Queens County 2019]

- While the Penal Law inclusive language allowing prosecution for Robbery in the first degree for *"what appears to be a firearm… or deadly weapon"*, RTA uses unequivocal language requiring an actual "display of a firearm or deadly weapon" to avoid removal.
- The complaint and supporting affidavit do not allege that any weapon or stolen property was recovered from defendant, therefore an analysis of the alleged weapon's ability to cause death is an impossibility.
- The behavior alleged here demonstrates the kind of poor judgment and impetuous conduct that militates in favor of removal to the family court in order to redirect defendant's errant path. Moreover, since this is defendant's first contact with the criminal justice system, this Court does not believe that defendant presents as a danger to public safety such that removal should be denied.

Removal granted

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Extraordinary Circumstances, People v C.M., Onondaga County

- DA argued that the youth "inflicted physical force upon an innocent stranger, all for the purpose of stealing her belongings. He followed behind her, then forced her to the ground and punched her repeatedly, causing her to sustain a laceration to her lip and substantial pain...Defendant ripped the victim's bag from her body and ran off with it, causing her to lose several personal belongings...When Defendant was apprehended the next day, he was found in possession of a revolver that contained six spent shell casings."
- Court found that extraordinary circumstances requires more than an analysis of what the Adolescent Offender did. It requires a look at the AO's actual input and the internal makeup of the individual. An AO that repeatedly is involved in criminal activity; who shows no remorse; who encourages others to do his dirty work, may lead this Court to make a finding that an AOs case should not be removed. "The above is not an attempt to provide an all inclusive list. In some cases it may just be the starting point."

- No evidence was presented that AO could not be rehabilitated
- Punching a victim three times, resulting in a swollen lip in and of itself is not extraordinary circumstances. Taking her tote bag or purse, in and of itself is extraordinary circumstances, nor is following the victim.
- Accessibility and admissibility of AO's Family Court records was discussed, but DA decided not to seek the records.
- Removal granted

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Extraordinary Circumstances, Family Court Records, People v M.M., 64 Misc 3d 259, 262 [NY Co Ct 2019

- DA argues that the extraordinary circumstances requiring the AO's cases to remain in the Youth Part include his “extensive contacts” with the criminal justice system dating back to 2014, which have resulted in one prior felony conviction and four prior misdemeanor convictions as a juvenile delinquent. They argue that prior intervention by the Court, including sentencing the AO to probation and releasing him to the custody of the Office of Children and Family Services, has done nothing to curtail the AO's behaviors.
- The People further argue that the “indicia of premeditation and planning” in the AO's commission of each of the offenses, the seriousness of the crimes with which he has been charged, and his role as the sole participant in the offenses are all additional extraordinary circumstances.
- The final two extraordinary circumstances cited by the People are the impact of a removal to the Family Court on the public's confidence in the criminal justice system, and the impact of removal on the safety and welfare of the community.

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Family Court Records, People v M.M. con't

- AO asserted the People improperly obtain his protected family court records without court approval in violation of Family Court Act § 166, and their reliance on such delinquency records violates FCA § 381.2, which specifically prohibits the use of prior delinquency records in other courts.

- Court determined that even assuming, that the People properly gained access to the AO's juvenile delinquency records, FCA § 381.2 requires the Court to nonetheless reject the People's arguments against removal of the AO's case to the extent that they are based on the AO's history of being adjudicated as a juvenile delinquent. Family Court Act § 381.2 expressly prohibits the use of the AO's juvenile delinquency history, including his past adjudications, past admissions and statements to the court, against him or his interests in any other court.

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Family Court Records

People v M.M., 64 Misc 3d 259, 262 [NY Co Ct 2019]

- "If the fact that an individual was previously adjudicated a juvenile delinquent is to be considered in assessing factors against him with respect to the potential removal of a case from the Youth Part to the Family Court, then such consideration must be specifically authorized by the Legislature, not by this Court."

- The Court finds that while the pending offenses are serious and the conduct with which the AO has been charged is highly troublesome and may certainly warrant considerable punishment and rehabilitative services, the conduct alleged does not rise to the level of "highly unusual and heinous facts" warranting the denial of removal to the Family Court.

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Filing Deadlines

People v J.B., 63 Misc 3d 424, 428 [NY Co Ct 2019]

- Before determining whether or not such extraordinary circumstances exist, the court must first determine whether or not the People are entitled to the hearing that they have requested. Although the statute allows either party to request a hearing on the factual allegations contained in the motion, the statute specifies that the motion filed by the People within thirty days of arraignment "shall indicate if the district attorney is requesting a hearing" (CPL § 722.23[1][b]). Here, the People did not make their request for the hearing in their motion, and the request was not made within thirty days of the AO's arraignment. Therefore, given the plain language of the statute and with no existing caselaw to the contrary, the court is constrained to follow the letter of the law and deny the People's request for a hearing.

- Court would only consider "allegations of sworn fact based upon personal knowledge of the affiant" included in the accusatory instrument. "Many, if not all, of the factual allegations relied upon by the People in support of their motion are based upon conversations with and observations of other members of law enforcement. Therefore, the court finds that the People have not met their burden required by CPL § 722.23(1)(b) in establishing extraordinary circumstances based upon the personal knowledge of the affiant."

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Speedy Trial, In re Jeremey Hernandez, Queens County

10/8/18	Arrest and appearance before Accessible Magistrate, released and directed to appear in Youth Part on 10/9
10/9/18	Appearance in Youth Part, removed to Family County, TOP issued, youth directed to report to probation for adjustment on 10/12
10/12/18	Appearance in Family Court, TOP extended
10/16/18	Appearance in Family Court, Probation advises charge will not be adjusted, referred to Presentment Agency that day, JD petition would be filed within 2 weeks, Presentment Agency asks for TOP to continue
11/5/18	No petition filed, case dismissed
12/18/18	JD petition filed, Respondent argues speedy trial violation because clock started to run when matter referred to Presentment Agency for filing of petition

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Speedy Trial

In re Jeremey Hernandez, Queens County

Family Court concludes that the initial appearance did not occur on 10/12 because no petition was filed until 12/18/19.
Legislative intent was that adjustment process could avoid filing of JD petition, “such matters are treated as if they are pre-filing.”
Adjustment process could not occur if pleadings from removal were considered to be petition, as they are in juvenile offender cases.

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Sealing, People v Doe, 62 Misc 3d 574, 585 [Sup Ct 2018]

- RTA legislation included a sealing provision, effective October 2017.It provides a mechanism for defendants to move to seal up to two "eligible offenses" — only one of which can be a felony (*see* CPL 160.59[2][a]).
- The purpose of the statute, as Governor Cuomo indicated at the time of its enactment, is to "eliminate unnecessary barriers to opportunity and employment that form[erly] incarcerated individuals face and to improve the fairness and effectiveness of the state's criminal justice system"
- Defendant, who pleaded guilty to attempted second-degree robbery that took place when she was 16 years old, and was denied youthful offender treatment despite her eligibility, moved to seal her conviction.
- Certain categories of offenses, including violent felony offenses (*see* Penal Law § 70.02), however, may not be sealed (*see* CPL 160.59[1][a]). This is so no matter how much time has passed since the defendant committed the crime and regardless of how compelling a case the applicant can make that sealing would serve the interests of justice and not compromise public safety.

RTA Decision Bank

Sealing, People v Doe, 62 Misc 3d 574, 585 [Sup Ct 2018]

- It is this provision that constrains the Court to deny defendant's motion, even though the attempted robbery here, a violent felony offense, occurred nearly three and a half decades ago, when defendant was what the Criminal Procedure Law now refers to as an “adolescent offender” (CPL 1.20[44]), and even though she has not been convicted of any crimes since.
- A shortcoming of the new sealing statute: its failure to explicitly address criminal records of younger offenders, even though it was enacted as part of the Raise the Age legislation.
- “The Court respectfully suggests that the Legislature consider amending CPL 160.59 to allow for the sealing of convictions of violent felony offenses committed by defendants who were eligible for youthful offender treatment, but did not receive it. “

Trial Manual for Defense Attorneys in Juvenile Delinquency Cases

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