THE LEGAL AID SOCIETY
JUVENILE RIGHTS PRACTICE
MANUAL FOR CHILDREN'S LAWYERS
Representing Children In Juvenile Delinquency Proceedings: Legal Sufficiency Of Petition

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CHAPTER FIVE

LEGAL SUFFICIENCY OF PETITION

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I. Contents Of Petition

The accusatory instrument which originates a juvenile delinquency proceeding is called a "petition." FCA §311.1(1). The petition is entitled "In the Matter of [name of respondent]." FCA §311.1(6).

The petition must contain:

(a) the name of the family court in which it is filed;
(b) the title of the action;
(c) the fact that the respondent is a person of the necessary age to be a juvenile delinquent at the time of the alleged act or acts;
(d) a separate accusation or count addressed to each crime charged, if there be more than one;
(e) the precise crime or crimes charged;
(f) a statement in each count that the crime charged was committed in a designated county;
(g) 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;
(h) a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the crime charged and the respondent's commission thereof with sufficient precision to clearly apprise the respondent of the conduct which is the

subject of the accusation;

(i) the name or names, if known, of other persons who are charged as co-respondents in the family court or as adults in a criminal court proceeding in the commission of the crime or crimes charged;

(j) a statement that the respondent requires supervision, treatment or confinement; and

(k) the signature of the appropriate presentment attorney.

FCA §311.1(3). See In re Collie W., 309 A.D.2d 611, 765 N.Y.S.2d 611 (1st Dept. 2003), lv denied 1 N.Y.3d 506 (2004) (signature of prosecutor who was awaiting admission was sufficient); People v. Parrilla, 145 A.D.3d 629 (1st Dept. 2016), lv denied 29 N.Y.3d 951 (indictment not jurisdictionally defective where it incorporated statutory definition of crime but did not identify crime by Penal Law section number).

The petition must be verified in accordance with the CPLR. FCA §311.1(4). The presentment agency attorney who signs the petition ordinarily does so in the presence of a notary public. See CPLR §§ 2309(a), 3020(a).

A petition that alleges the commission of a designated felony act must be prominently marked with the term "designated felony act petition." If the charge is based upon predicate felony findings, certified copies of the findings constitute adequate proof for filing purposes. FCA §311.1(5).

When an order of removal is filed after a juvenile offender case has been removed to the family court pursuant to CPL article 725, the order, along with those "pleadings and proceedings" that must be transferred with the order, is deemed to be a petition "containing all of the allegations required by [FCA §311.1] notwithstanding that such allegations may not be set forth in the manner therein prescribed." If a designated felony act is alleged, the family court clerk must annex to the removal order a statement and marking sufficient to make the order a designated felony act petition. The "pleadings and proceedings" that must be transferred do not include the untranscribed minutes of a hearing inquiry, trial, grand jury proceeding, or plea. However, untranscribed minutes must be forwarded to the family court within thirty days after the removal order is filed. The date the removal order is filed is deemed to be the filing date of the petition. FCA §311.1(7).

Also, "the allegations of the factual part of the petition, together with those of any

supporting depositions which may accompany it, [must] provide reasonable cause to believe that 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 depositions [must] establish, if true, every element of each crime charged and the respondent 's commission thereof." FCA §311.2(3).

II. Service Of Petition

A. Respondent Is Present On Filing Date

If the respondent is present in court on the date the petition is filed, both the respondent and the attorney for the child must be provided with a copy of the petition. FCA §320.4(1); but see Matter of Bobby Jo F., 2 A.D.3d 1472, 770 N.Y.S.2d 522 (4th Dept. 2003) (petition not facially defective where depositions were filed but were not attached to petition).

B. Respondent Is Not Present On Filing Date

If the respondent is not present on the filing date, and a warrant is not issued pursuant to FCA §312.2, the court must cause a copy of the petition and a summons to be issued requiring the appearance of both the respondent, and a parent or other person legally responsible for the respondent's care, or, if such legally responsible person is not available, the person with whom the respondent resides. FCA §312.1(1). Personal service must be attempted, but, if personal service cannot be made after a reasonable effort, the court may order service in any manner. FCA §312.1(3). Personal service must be made at least twenty-four hours before the time scheduled for the initial appearance. FCA §312.1(2).

If, at the initial appearance, it appears that service was not properly made, the child’s attorney should consider stating for the record that the respondent does not concede the existence of personal jurisdiction. Thereafter, a written motion to dismiss could be made pursuant to CPLR §3211(a)(8).

After delinquency charges have been dismissed under circumstances that do not preclude the filing of a new petition, the presentment agency may ask the child’s attorney whether the respondent is willing to waive personal service of the new petition and appear voluntarily for the initial appearance on a specified date. The attorney may choose to insist upon personal service, but should first consider whether any strategic advantage

can be gained.

III. Motions To Dismiss Defective Petitions

A. Sufficiency Of Nonhearsay Allegations

1. Generally

As already noted, the "non-hearsay allegations of the factual part of the petition or of any supporting depositions [must] establish, if true, every element of each crime charged and the respondent's commission thereof." FCA §311.2(3). Since the counts of the petition resemble the counts of an indictment, allege little more than the language of the applicable Penal Law provision, and are not subscribed, the requirements of FCA §311.2(3) are addressed in supporting depositions signed by police officers, complainants and other witnesses, and other individuals who have personal knowledge concerning the allegations.

The absence of sufficient nonhearsay allegations is a nonwaivable jurisdictional defect. Matter of Michael M., 3 N.Y.3d 441, 788 N.Y.S.2d 299 (2004); Matter of David T., 75 N.Y.2d 927, 555 N.Y.S.2d 675 (1990); Matter of Antwaine T., 105 A.D.3d 859 (2d Dept. 2013), rev'd on other grounds 23 N.Y.3d 512 (2014) (defect found nonwaivable despite admission by respondent).

Although the petition itself need not include evidentiary facts, the supporting depositions must establish a prima facie case and contain non-hearsay allegations that establish, if true, every element of the offense charged and the respondent's commission thereof. Matter of Jahron S., 79 N.Y.2d 632, 584 N.Y.S.2d 748 (1992).

2. Hearsay Allegations

If a deposition does not contain language, such as "I saw," which establishes personal knowledge, the deposition should not be treated as "non-hearsay." People v. Scott, 176 Misc.2d 393, 671 N.Y.S.2d 961 (Rochester City Ct., Monroe Co., 1998) (nonhearsay character of allegations not established where it was alleged that defendant "did loiter and wander about" the location "for the purposes of intentionally using and possessing cocaine," but not that defendant committed any acts in the motor vehicle in which she was observed); People v. Moretti, 142 Misc.2d 331, 537 N.Y.S.2d 735 (City Ct., West. Co. 1988) (officer's reference to source as "police investigation" did not establish nonhearsay character of allegations); see also People v. Casey, 95 N.Y.2d 354

(2000) (contempt allegations insufficient where it was not clear whether detective's allegations were based on information from complainant, or upon direct knowledge or some hearsay exception).

An incriminating statement made by the respondent in the presence of the deponent may be treated as a "nonhearsay" allegation for purposes of FCA §311.2(3), since such a statement is admissible under a hearsay exception. See In re Christopher P., 260 A.D.2d 212, 688 N.Y.S.2d 520 (1st Dept. 1999); Matter of Rey R., 188 A.D.2d 473, 591 N.Y.S.2d 55 (2d Dept. 1992); Matter of Rodney J., 108 A.D.2d 307, 489 N.Y.S.2d 160 (1st Dept. 1985).

However, an unsworn written confession may not be used to support a petition. See People v. Lamour, 133 Misc.2d 865, 508 N.Y.S.2d 867 (Dist. Ct. Nassau Co., 1st Dist., 1986); cf. Matter of Rodney J., 108 A.D.2d at 311 ("express incorporation of respondent's statement into [the officer's] sworn deposition mutes any argument that the statement, being unsworn, could not qualify as a supporting deposition"); People v. Anderson, 25 Misc.3d 1207(A), 2009 WL 3130180 (Dist. Ct., Nassau Co., 2009) (defendant's alleged statement, contained in CPL §710.30 notice, could not be considered since it was not sworn to by defendant or individual who allegedly heard admission).

Other types of admissible hearsay, including a business record that is verified and thus the equivalent of a deposition, may also be used to support the petition. Compare In re Christopher P., 260 A.D.2d 212 (accomplice's declaration against penal interest) with Matter of Markim Q., 22 A.D.3d 498, 803 N.Y.S.2d 646 (2d Dept. 2005), rev'd on other grounds 7 N.Y.3d 405, 822 N.Y.S.2d 746 (2006) (violation of probation petition defective where school record was admissible under CPLR 4518, but was not verified or attested to by person with knowledge of the facts) and Matter of Isaiah D., 72 Misc.3d 1120 (Fam. Ct., N.Y. Co., 2021) (court declines to consider authenticated but unsworn hospital records; unsworn but admissible hearsay statement must be annexed to supporting deposition which attests to foundational basis for admissibility).

Allegations based on the deponent's observation of a video recording of events may be treated as non-hearsay. Compare People v. Ogando, 64 Misc.3d 310 (Crim. Ct., N.Y. Co., 2019) (surveillance video content described by detective not hearsay) and

People v. Vranici, 59 Misc.3d 1203(A) (Crim. Ct., N.Y. Co., 2018) (absence of date and time of recording viewed by officer not fatal) with People v. Kelly, 35 Misc.3d 1233(A) (Crim. Ct., Kings Co., 2012) (criminal trespass charge dismissed where defendant was observed on video surveillance, but it was not alleged that video truly and accurately represented defendant's actions, that video had not been altered, and that there was proper chain of custody) and Matter of Tyshawn M. 32 Misc.3d 689 (Fam. Ct., Monroe Co., 2011) (petition dismissed where there was no non-hearsay allegation that incident depicted on video, from which respondent was identified, was incident alleged in petition, nor was there deposition from witness stating that video was viewed and fairly and accurately depicted incident).

3. Latent Defects: Deponent's Failure To Read Deposition

The petition is not defective and subject to dismissal if it is not discovered until after the deponent testifies at trial that the deponent did not read his/her supporting deposition. People v. Slade, 37 N.Y.3d 127 (2021) (participation of translator does not create facial defect that is evident within four corners of accusatory instrument, and even when participation of translator is documented within supporting affidavit, no additional layer of hearsay is created when witness or complainant adopts statement as their own by signing instrument after translation); Matter of Edward B., 80 N.Y.2d 458, 591 N.Y.S.2d 962 (1992) (only facial sufficiency is required, and assurances concerning a sound basis for the prosecution are less important after witnesses have testified)..

However, a pretrial dismissal motion should be considered if the face of the accusatory instrument or available extrinsic evidence reveals irregularities that establish insufficiency. People v. Slade, 37 N.Y.3d 127 (nothing precludes defendant who discovers specific translation-related latent hearsay defect before trial from using options available under Criminal Procedure Law to ensure that supporting deposition meets statutory requirements); People v. Kaya, 17 Misc.3d 114(A), 851 N.Y.S.2d 65 (Crim. Ct., Kings Co., 2007) (court orders hearing to determine whether someone other than undercover signed supporting deposition).

4. Latent Defects: Deponents Under Nine Years Of Age

"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." FCA §343.1(2). However, at

the pleading stage, any defect as to witness' capacity is a latent one that does not render the petition defective. Matter of Nelson R., 90 N.Y.2d 359, 660 N.Y.S.2d 707 (1997); see also Matter of Christopher W., 96 A.D.3d 1591 (4th Dept. 2012) (petition facially sufficient where non-hearsay allegations established that respondent subjected complainant to sexual contact by touching her vagina when she was three years old, even though court determined that complainant could not understand nature of oath); Matter of Ernst B., 177 Misc.2d 22, 675 N.Y.S.2d 805 (Fam. Ct., Monroe Co., 1998) (petition sufficient where 4-year-old complainant signed sworn statement with "X").

Since unsworn testimony, combined with adequate corroborating evidence, can support a finding, it appears that an unsworn statement by a child, combined with a sworn deposition providing corroborating evidence, can support a petition. Matter of Jermaine G., 38 A.D.3d 105, 828 N.Y.S.2d 160 (2d Dept. 2007) (petition sufficient where unsworn statement of five-year-old complainant was corroborated by deposition of his mother).

5. Accessorial Liability

A person is criminally liable for the conduct of another "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." PL §20.00. Consequently, when the respondent is charged with acting in concert, a motion to dismiss should be made whenever the supporting depositions fail to establish accessorial liability by describing acts committed by the respondent personally. See Matter of Christopher M., 94 A.D.3d 1119 (2d Dept. 2012) (charges of riot and unlawful assembly dismissed where petition alleged that respondent was present at scene of specified gang misconduct on street but failed to state any acts engaged in by respondent establishing that he shared community of purpose with others); but see Matter of Eric R., 213 A.D.2d 310, 624 N.Y.S.2d 164 (1st Dept. 1995) (allegation that respondent joined in a formation which entrapped complainant while others committed robbery was sufficient).

6. Identification Of Respondent

The non-hearsay allegations must establish that the individual who allegedly committed the acts charged was, in fact, the respondent. See, e.g., Matter of Errol D., 241 A.D.2d 732, 660 N.Y.S.2d 185 (3rd Dept. 1997), lv denied 90 N.Y.2d 810, 665 N.Y.S.2d 401 (respondent's identity as the "Earl" referred to in complainant's deposition

was established by petition, which named respondent as Errol "D" and gave same home address complainant gave).

7. Respondent's Age

When the respondent's age is an element of the crime, there must be non-hearsay allegations establishing the respondent's age. Matter of Ricki I., 157 A.D.3d 792 (2d Dept. 2018) (nonwaivable jurisdictional defect where there were no sworn, non-hearsay allegations as to respondent's age, which is element of unlawful possession of weapons by persons under 16); In re Brandon P., 106 A.D.3d 653 (1st Dept. 2013) (age element of unlawful possession of weapons by persons under 16 properly alleged where deponent stated she was respondent's sister, and it is generally recognized that ages of family members are common knowledge within family); In re Devon V., 83 A.D.3d 469, 921 N.Y.S.2d 47 (1st Dept. 2011) (failure to include allegations establishing age element of unlawful possession of weapons by persons under 16 is nonwaivable jurisdictional defect; here, officer alleged that he determined respondent was 15 years old but there was no explanation of how officer learned age).

When age is not an element, a bare allegation that the respondent was a person of the specified, necessary age to be a juvenile delinquent at the time the alleged conduct [as required by FCA §311.1(3)(c)] is sufficient. Matter of Anthony J., 143 A.D.2d 668, 532 N.Y.S.2d 924 (2d Dept. 1988) (jurisdiction established where delinquency petition alleged age, and respondent never alleged that he was outside court's jurisdiction).

8. Copies Of Deposition

Apparently, a copy of a sworn deposition may be filed in support of the petition. See Matter of Lamont D., 247 A.D.2d 615, 668 N.Y.S.2d 495 (2d Dept. 1998), lv denied 92 N.Y.2d 804, 677 N.Y.S.2d 779 (court cites CPLR §2101[e]); In re Samuel E., 240 A.D.2d 251, 658 N.Y.S.2d 306 (1st Dept. 1997).

9. Verification

Supporting depositions must be verified, and unverified documents are jurisdictionally defective and must be treated as a nullity. See CPLR §§ 2309(a), 3023, 3113; Matter of Neftali D., 85 N.Y.2d 631, 628 N.Y.S.2d 1 (1995) (certified, but unverified, report is not sufficient); Matter of Markim Q., 22 A.D.3d 498, 803 N.Y.S.2d 646 (2d Dept. 2005), rev'd on other grounds 7 N.Y.3d 405, 822 N.Y.S.2d 746 (2006) (school record was

admissible under CPLR 4518, but was not verified or attested to by person with knowledge of the facts); Matter of Evan U., 244 A.D.2d 691, 664 N.Y.S.2d 189 (3rd Dept. 1997) (hospital discharge instructions were unsworn and bore no certification as hospital records); but see Matter of Gregory J., 209 A.D.2d 191, 618 N.Y.S.2d 282 (1st Dept. 1994), lv denied 85 N.Y.2d 807, 628 N.Y.S.2d 50 (1995) (by first raising issue on appeal, respondent waived claim that Notary's commission had expired).

The methods of verification prescribed in CPL §100.30(1) may be utilized in lieu of CPLR verification. Matter of Neftali D., 85 N.Y.2d 631. Matter of Tyrone M., 138 A.D.3d 1119 (2d Dept. 2016) (petition not defective where child complainant whose deposition contained recitation that false statements were punishable as misdemeanor could not have been charged criminally or adjudicated a juvenile delinquent for making false statements).

Statements in a verified pleading are presumed to have been made upon the knowledge of the person verifying the pleading. CPLR 3023. See In re Bernard T., 250 A.D.2d 532, 672 N.Y.S.2d 882 (1st Dept. 1998), lv denied 92 N.Y.2d 808, 678 N.Y.S.2d 594.

10. Reduction Of Charge

It appears that rather than dismiss a defective charge, the court may reduce it to a lesser included charge that is adequately supported by the allegations and does not change the theory of prosecution. See Matter of Anthony Y., 293 A.D.2d 792, 740 N.Y.S.2d 487 (3d Dept. 2002).

11. Retroactivity Of Appellate Rulings

Appellate decisions which apply the nonhearsay requirement for the first time to particular fact patterns must be applied retroactively, since those decisions merely elucidate the established rule and do not create a new rule of law. Matter of Miguel R., 227 A.D.2d 263, 642 N.Y.S.2d 879 (1st Dept. 1996).

B. Removal Petitions

When a removal order is filed pursuant to Article 725 of the Criminal Procedure Law, the removal order must be accompanied by criminal pleadings and proceedings other than untranscribed minutes of any hearing or trial, grand jury proceeding or plea, and those documents are "deemed to be a petition ... containing all of the allegations

required by [§311.1] ...." FCA §311.1(7). See Matter of Celeste S., 187 A.D.2d 274, 589 N.Y.S.2d 433 (1st Dept. 1992) (removal "petition" need not be verified pursuant to FCA §311.1[4]); see also In re Jonathan G., 51 A.D.3d 403, 857 N.Y.S.2d 435 (1st Dept. 2008) (dismissal not required where respondent was not served with copy of removal order on first post-verdict appearance in family court, and respondent received proper notice of charges by way of verdict itself, rendered in open court in his presence, and same information was repeated in his presence following removal to family court and order of removal was served on him in family court a few days after initial appearance).

The respondent is not entitled to be served with any grand jury minutes [Matter of Larry W., 55 N.Y.2d 244, 448 N.Y.S.2d 452 (1982)], but the papers are arguably defective if criminal "pleadings and proceedings," including transcribed minutes, are not forwarded to the family court along with the removal order. See Matter of Shawn S., 111 Misc.2d 744, 445 N.Y.S.2d 53 (Fam. Ct., Queens Co., 1981); Matter of Martin D., 100 Misc.2d 339, 418 N.Y.S.2d 1003 (Fam. Ct. Kings Co., 1979). However, even if the absence of “pleadings and proceedings” can lead to dismissal, Matter of Desmond J., 93 N.Y.2d 949 would allow for amendment of the petition.

It should be argued that a petition supported only by indictment documents is defective. See People v. Miller, 91 N.Y.2d 372 (1998) (fact of arrest or indictment filed incident to arrest is not permitted area for impeachment; indictment “is a mere accusation and raises no presumption of guilt. It is purely hearsay, for it is the conclusion or opinion of a body of men based on ex parte evidence”). If the transcribed minutes of grand jury testimony are attached, it still can be argued that the petition is defective because the witnesses have not sworn to the accuracy of the transcript.

Removal petitions are not excused from the non-hearsay requirement in FCA §311.2(3). See Matter of Michael M., 3 N.Y.3d 441, 788 N.Y.S.2d 299 (2004) (defect is jurisdictional and nonwaivable); Matter of Desmond J., 93 N.Y.2d 949, 694 N.Y.S.2d 338 (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). Language in Desmond J. suggests that the addition of

a deposition on a date after the initial appearance would be an improper amendment; whether the presentment agency has any wiggle room at all remains to be seen.

Technical requirements for the removal order itself appear in CPL §725.05. See, e.g., Matter of Juan Q., 248 A.D.2d 998, 670 N.Y.S.2d 137 (4th Dept. 1998) (constitutional due process and CPL §725.05 requirements were satisfied where date, time and place of alleged incident appeared in felony complaint and information, and acts that court found reasonable cause to believe were committed by defendant were set forth in transcript of preliminary hearing).

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. On the other hand, there appears to be nothing that precludes the presentment agency from filing a new petition, and, in fact, statutory requirements regarding adjustment efforts steer the case in that direction.

C. Designated Felony Petitions

1. Predicate Felonies

When a designated felony charge is based upon the existence of one or two prior felony findings, the presentment agency may properly allege a designated felony act by providing certified copies of the prior findings. See FCA §311.1(5). However, attaching such documents is not the exclusive means of alleging prior findings. See Matter of Robert S., 240 A.D.2d 314, 659 N.Y.S.2d 444 (1st Dept. 1997); Matter of Warren W., 216 A.D.2d 225, 629 N.Y.S.2d 28 (1st Dept. 1995) (removal petition not defective where papers and pleadings from criminal court contained proof of prior findings); Matter of Daniel A., 178 Misc.2d 90, 678 N.Y.S.2d 247 (Fam. Ct., Bronx Co., 1998) (court could take judicial notice of findings listed in petition).

It is not required that the fact-findings resulted in an adjudication of delinquency, or that the first felony resulted in an adjudication prior to the commission of the second felony. See Matter of Manuel R., 89 N.Y.2d 1043, 659 N.Y.S.2d 825 (1997). See also In re Jason B., 254 A.D.2d 298, 685 N.Y.S.2d 197 (1st Dept. 1999) (findings on multiple felony counts of one petition involving one criminal transaction constitute one predicate). However, a motion to dismiss should be made if the acts were not allegedly committed after the prior fact-findings. See FCA §301.2(8)(v), (vi).

Arguably, the record of the prior findings should be excluded from the court file, and the "designated felony act" marking should be struck from the petition in the court file, so the trial judge will not be aware of the respondent's record. See Matter of Samuel P., 102 Misc.2d 875, 424 N.Y.S.2d 837 (Fam. Ct. Kings Co., 1980); Matter of Luis R., 98 Misc.2d 994, 414 N.Y.S.2d 997 (Fam. Ct. N.Y. Co., 1979). In Samuel P., the Corporation Counsel was substituted for the District Attorney so that the trial judge would remain ignorant of the prior cases.

2. Designated Felony Act Marking

If the petition charges a crime that falls within the designated felony act definition in FCA §301.2(8), the petition shall so state, and the term “designated felony act petition” shall be prominently marked on the petition. FCA §311.1(5). When a removal petition contains a designated felony charge, the family court shall annex to the removal order a sufficient statement and marking to make it a designated felony act petition. FCA §311.1(7).

If the required "designated felony act" marking is missing, the child’s attorney should initially remain silent, since it is not yet clear that the petition cannot be amended to cure this defect. If there is a designated felony finding after trial, the attorney should immediately move to dismiss the designated felony charge on the ground that the absence of the required marking precludes a designated felony finding. See Matter of Stephan F., 274 A.D.2d 584, 712 N.Y.S.2d 49 (2d Dept. 2000) (first degree robbery charge dismissed where marking was absent); In re Jose M., 245 A.D.2d 173, 666 N.Y.S.2d 177 (1st Dept. 1997), appeal dism’d 92 N.Y.2d 845, 677 N.Y.S.2d 75 (1998) (designated felony finding vacated where respondent’s copy of petition did not contain marking due to copying error); Matter of David M., 229 A.D.2d 345, 645 N.Y.S.2d 302 (1st Dept. 1996) (use of prefix “E” in docket number, which has meaning to those privy to court coding system, is not a substitute for marking); Matter of Warren W., 216 A.D.2d 225 (1st Dept. 1995)(absence of marking is nonwaivable jurisdictional defect); Matter of Karriem E., 206 A.D.2d 476, 614 N.Y.S.2d 575 (2d Dept. 1994) (removal order was marked in manner that notified respondent of designated felony charge); Matter of Darryl W., 183 Misc.2d 475, 703 N.Y.S.2d 359 (Fam. Ct., Queens Co., 1999) (dismissal denied where “E” docket number prefix was used and clerk had executed required statement).

D. Allegation Of Elements Of Offense In Each Count

Each count of the petition must "assert facts supporting every element of the crime charged and the respondent's commission thereof with sufficient precision to clearly apprise the respondent of the conduct which is the subject of the accusation...." FCA §311.1(3)(h). See Matter of Shakeim C., 97 A.D.3d 675 (2d Dept. 2012) (court erred in dismissing petition on ground that it did not "specify which complainant is the alleged victim in each count," and "there is no separate accusation or count to address each crime charged"; petition and supporting depositions identified alleged victims, alleged perpetrators, and crimes charged).

In criminal cases, a failure to "clearly apprise" the defendant of the charges is a non-jurisdictional defect which can be cured by a bill of particulars. People v. Iannone, 45 N.Y.2d 589, 412 N.Y.S.2d 110 (1978). Similarly, the counts of a delinquency petition, which do little more than track the language in the Penal Law, are not usually open to attack pursuant to FCA §311.1(3)(h). See People v. Iannone, 45 N.Y.2d at 599 ("it is usually sufficient to charge the language of the statute unless that language is too broad" [citation omitted]).

A failure to allege an essential element of an offense in the count of an indictment is a jurisdictional defect. See People v. Iannone, 45 N.Y.2d at 598-599; but see People v. Ray, 71 N.Y.2d 849, 527 N.Y.S.2d 740 (1988) (indictment sufficient where, although word unlawfully was absent, indictment incorporated PL §265.03 - criminal possession of a weapon in the second degree - by employing title of statute).

Because the requirements in Article Three are a hybrid derived from rules governing indictments and informations, it is not clear that a delinquency charge would be defective where the count in the petition omits an element, but the depositions contain evidentiary facts establishing a prima facie case. While it is true that a charge in an information is defective if an element is not alleged, it is the information as a whole, including the factual portion, that must be examined. See, e.g., People v. Hall, 48 N.Y.2d 927, 425 N.Y.S.2d 56 (1979); People v. Case, 42 N.Y.2d 98, 396 N.Y.S.2d 841 (1977).

E. Duplicitous Counts

Family Court Act §311.1(2) provides that a petition "shall charge at least one crime and may, in addition, charge in separate counts one or more other crimes..." (emphasis

supplied). In addition, §311.1(3)(d) requires "a separate accusation or count addressed to each crime charged, if there be more than one...." The same language is found in CPL §200.50(3). A ”duplicitous” count which charges more than one crime fails to give the respondent fair notice of the charges and makes it unclear what crime a fact-finding covers. For those reasons, a duplicitous count is void. People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790 (1986), reargument denied 69 N.Y.2d 823, 513 N.Y.S.2d 1028 (1987).

A duplicitous count claim on appeal is subject to preservation requirements. People v. Allen, 24 N.Y.3d 441 (2014) (non-facial duplicity, like facial duplicity, must be preserved); People v. Becoats, 17 N.Y.3d 643 (2011) (duplicitous count claim unpreserved; exception to preservation requirement for “mode of proceedings" errors not applicable).

F. Multiplicitous Counts - See People v. Alonzo, 16 N.Y.3d 267, 920 N.Y.S.2d 302 (2011) (where evidence shows single, uninterrupted attack in which attacker gropes several parts of victim’s body, attacker may be charged with only one count of sexual abuse).

G. Date/Time/Location Of Offense

Family Court Act §311.1(3)(g) requires that each count contain a statement "that the crime charged therein was committed on, or on or about, a designated date, or during a designated period of time...." People v. Schell, 300 A.D.2d 1120, 753 N.Y.S.2d 262 (4th Dept. 2002), lv denied 99 N.Y.2d 632, 760 N.Y.S.2d 114 (2003) (phrase “up to” certain age generally refers to period ending on day person reaches that age, but in this case, where accusatory instrument also specified calendar years in which offenses occurred, charges should be read as covering period through child’s specified age and through that calendar year); People v. Peals, 143 A.D.3d 535 (1st Dept. 2016), lv denied 28 N.Y.3d 1149 (indictment not jurisdictionally defective where it incorrectly alleged date on which defendant was apparently incarcerated).

Petition sufficiency issues can arise from discrepancies between dates (or other facts) in the petition and supporting depositions. People v. Warren, 17 Misc.3d 27, 844 N.Y.S.2d 563 (App. Term, 2d & 11th Jud. Dist., 2007) (even assuming information could be amended, there would be fatal inconsistency between information and deposition);

When a child is involved, the reasonableness of the time periods alleged depends

upon the capacity of the child to discern, "if not exact dates, at least seasons, school holidays, birthdays, or other events which could establish a frame of reference to assist [the child] in narrowing the time spans alleged." People v. Keindl, 68 N.Y.2d 410 (1986). In Keindl, the Court of Appeals recognized a "continuous crime" theory, which "permit[s] repeated acts of sexual molestation on young children within the family to be treated as one continuous crime' because generally, the offenses are committed within the privacy of the home; the victims are children of tender years who are unable to remember specific dates, and from whom the defendant is able to demand secrecy; there are rarely any adult witnesses; and the abuse emerges as a pattern of conduct over a significant period of time [citations omitted]." 68 N.Y.2d at 420. See PL §130.75 (Course of sexual conduct against a child in the first degree) and PL §130.80 (Course of sexual conduct against a child in the second degree); People v. Palmer, 7 A.D.3d 472, 778 N.Y.S.2d 144 (1st Dept. 2004), lv denied 3 N.Y.3d 710 (3½-year period not excessive).

With respect to whether a defect of this type is jurisdictional, see People v. Rozario, 20 Misc.3d 76, 864 N.Y.S.2d 674 (App. Term, 9th & 10th Jud. Dist., 2008) (where information alleges time frame that is on its face unreasonable, defect is jurisdictional, but where time frame is only arguably unreasonable, issue is non-jurisdictional and preservation is required).

H. Double Jeopardy

When a defective petition has been dismissed, there is no double jeopardy or statutory bar to a new prosecution even if the dismissal occurred after jeopardy attached. See CPL §40.30(4); People v. Key, 45 N.Y.2d 111, 408 N.Y.S.2d 16 (1978).

However, the prosecution cannot take an appeal from an order dismissing the petition after the trial has commenced. See Matter of Leon H., 83 N.Y.2d 834, 611 N.Y.S.2d 498 (1994); FCA §§ 365.1(2), 365.2.

I. Speedy Trial

When a petition has been dismissed pursuant to FCA §311.2(3), or withdrawn (see CPLR 3217), and a new petition has been filed, the statutory speedy trial period (see FCA §340.1) must be measured from the date of the respondent's initial appearance in the first prosecution. Matter of Tommy C., 182 A.D.2d 312, 588 N.Y.S.2d 916 (2d Dept. 1992).

Thus, withholding a dismissal motion until after the initial sixty-day speedy trial limit

has expired may be advisable. Since it is unfair to penalize the respondent for the presentment agency's failure to file an adequate accusatory instrument, it can also be argued that a dismissal order can never constitute good cause or special circumstances, particularly when the defect should have been obvious in the light of controlling court decisions.

J. PINS Substitution

When a juvenile delinquency petition is converted to a "PINS" petition during the pre-fact-finding stage pursuant to FCA §311.4(1), the requirements of FCA §311.2(3) no longer apply. Matter of Jason O., 197 A.D.2d 784, 602 N.Y.S.2d 952 (3rd Dept. 1993). However, when a PINS adjudication is made pursuant to FCA §311.4(2) after the respondent admits allegations contained in the delinquency petition, the requirements of §311.2(3) still apply. Matter of Na-Towi Z., 199 A.D.2d 937, 606 N.Y.S.2d 98 (3rd Dept. 1993).

K. Probation And Conditional Discharge Violations

A petition alleging that an order of probation or conditional discharge has been violated is filed by the probation service when it has reasonable cause to believe that a violation has occurred. FCA § 360.2(1); see Matter of Joshua M., 59 A.D.3d 1073, 872 N.Y.S.2d 806 (4th Dept. 2009), lv denied 12 N.Y.3d 712 (no error where violation of probation petition stated that it was “being filed at the request of” the court, but petition did not state that court “directed” presentment agency to file petition and there is no proof that it was court alone that prompted filing).

The petition must provide a reasonable description of the time and place and manner in which the violation occurred. Matter of Jessica N., 264 A.D.2d 778, 695 N.Y.S.2d 379 (2d Dept. 1999).

The petition must contain non-hearsay allegations in the factual part of the petition or in supporting depositions that establish, if true, each violation. FCA §360.2(2); see Matter of Markim Q., 22 A.D.3d 498, 803 N.Y.S.2d 646 (2d Dept. 2005), rev’d on other grounds 7 N.Y.3d 405, 822 N.Y.S.2d 746 (2006) (school record admissible under CPLR 4518 but not verified by person with knowledge of facts).

The insufficiency of non-hearsay allegations is not a jurisdictional defect, and thus may be cured by amendment and may not be raised for the first time on appeal. Matter

of Markim Q., 7 N.Y.3d 405. Although one judge has interpreted the holding in Markim Q. to mean that a violation petition with insufficient non-hearsay allegations need not be dismissed, Matter of Y.E.B., 13 Misc.3d 1242(A), 831 N.Y.S.2d 363 (Fam. Ct., Nassau Co., 2006), the Court of Appeals did not suggest such a rule.

IV. Amendment Of Petition

A. Generally

Family Court Act §311.5 provides as follows:

> 1. At any time before or during the fact-finding hearing, the court may, upon application of the presentment agency and with notice to the respondent and an opportunity to be heard, order the amendment of a petition with respect to defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like, when such amendment does not tend to prejudice the respondent on the merits. Upon permitting such an amendment, the court must, upon application of the respondent, order any adjournment which may be necessary to accord the respondent an adequate opportunity to prepare his defense.
> 2. A petition may not be amended for the purpose of curing:
> (a) a failure to charge or state a crime; or
> (b) legal insufficiency of the factual allegations; or
> (c) a misjoinder of crimes.

What appears to be a "technical" amendment of the petition may, in a given case, result in prejudice to the respondent. The respondent may have prepared a defense in reliance upon the specific time or location alleged, or the particular theory of prosecution that appears in the petition. The presentment agency's request for an amendment during trial may come at a time when the respondent has already conducted cross-examination or called witnesses in reliance upon the original charges. In such cases, the child's attorney must be prepared to clearly articulate the reasons why an amendment would be prejudicial.

B. Curing Legal Insufficiency Of Factual Allegations

A defect in the non-hearsay allegations may not be cured by amendment. FCA §311.5(2)(b). See Matter of Detrece H., 78 N.Y.2d 107, 571 N.Y.S.2d 899 (1991); but see Matter of Desmond J., 93 N.Y.2d 949, 694 N.Y.S.2d 338 (1999) (removal petition could be amended by submission of deposition at first appearance in family court).

C. Addition Of New Offense

The petition may not be amended to include a count charging a new crime even if the allegations already in the supporting depositions establish a prima facie case. See FCA §311.5(2)(a); but see Matter of Tashawn MM., _A.D.3d_, 2023 WL 4353583 (3d Dept. 2023) (although possession of stolen property charge was defective because there were no non-hearsay allegations establishing value, plea was to uncharged lesser possession offense unrelated to counts charged, and thus petition was jurisdictionally sufficient and could support plea if it contained at least one facially sufficient higher grade charge); In re Jonathan F., 290 A.D.2d 385, 737 N.Y.S.2d 273 (1st Dept. 2002) (petition sufficient where count referred to wrong section of statute but deposition contained correct citation).

D. Changing Date/Time/Location Of Offense

In some cases, a change in the date/time/location of the offense is unimportant, and there is no reasonable basis for an objection. However, if the respondent has obtained alibi witnesses, or otherwise structured a defense in reliance upon the time alleged, an amendment may well be objectionable. See, e.g., People v. Days, 131 A.D.3d 972 (2d Dept. 2015), lv denied 26 N.Y.3d 1108 (reversible error where, after People became aware of time frame covered by defendant's alibi evidence, they served amended bill of particulars extending time frame); People v. Warren, 17 Misc.3d 27, 844 N.Y.S.2d 563 (App. Term, 2d & 11th Jud. Dist., 2007) (reversible error where court amended information at trial to conform to victim's testimony placing time of offense eleven hours after time alleged in information; court notes that defense counsel asserted that, had he known of correct time, he might have been able to pursue alibi defense); People v. Bigda, 184 A.D.2d 993, 584 N.Y.S.2d 238 (4th Dept. 1992) (where defendant had prepared a defense showing that he was recovering from heart surgery at the time of the offense and that the victim did not visit him at that time, change of time at trial was reversible error); People v. Covington, 86 A.D.2d 877, 447 N.Y.S.2d 292 (2d Dept. 1982) (where People had served bill of particulars specifying the date and defendant had prepared alibi defense, amendment changing date of offense from August 9 to August 10 was reversible error); People v. Ramcharran, 2018 NY Slip Op 51146(U) (Crim. Ct., Queens Co., 2018) (accusatory instrument dismissed, and amendment not permitted, where it contained

incorrect location and People informed defendant of correct location on eve of trial nearly two years after arraignment; defendant's ability to conduct timely and thorough investigation was compromised, and he was, for example, unable to seek video footage).

If the evidence at trial places events on a date other than the date cited in the petition, and a motion to amend is not made, it could be argued that, since there is no proof that a crime was committed on the date cited in the petition, the charge must be dismissed. Compare People v. Jones, 37 A.D.3d 1111, 829 N.Y.S.2d 364 (4th Dept. 2007) (no reversal required where there was variance between dates of incidents in indictment and proof at trial; time is not material element and variance was relatively minor) with People v. Roberson, N.Y.L.J., 2/21/91, p. 27, col. 5 (App. Term, 2d and 11th Jud. Dist.), lv denied 77 N.Y.2d 1000, 571 N.Y.S.2d 925 (1991) (finding of guilt was against the weight of the credible evidence where the offenses were alleged to have taken place in 1987, but, except for one statement made after his recollection had been "refreshed," the complainant only testified concerning events that occurred in 1986).

E. Changing Names Or Number Of Respondents

An amendment to add and/or change a respondent's name is not permissible. People v. Wang, 2003 WL 22718195 (App. Term, 9th & 10th Jud. Dist., 2003); but see Matter of D.P., 17 Misc.3d 1106(A), 851 N.Y.S.2d 57 (Fam. Ct., Nassau Co., 2007) (petition not facially insufficient where victim stated in one deposition that "the male black is unknown to me" and in another deposition that the individual is "Devaun," but respondent's name was spelled "Devon").

F. Verification

In Matter of Catrice W., 153 Misc.2d 927, 583 N.Y.S.2d 775 (Fam. Ct. Kings Co., 1992), it was discovered during trial that the presentment agency had not signed the petition (see FCA §311.1[3][k]) and the verification was unsigned (see FCA §311.1[4]). The court allowed the filing of an amended petition bearing the required signature, holding that the absence of a signature is merely a matter of form, and that the respondent waived her right to treat the unverified petition as a nullity by failing to notify the presentment agency with due diligence (see CPLR 3022).

G. Change In Theory Of Prosecution At Trial: Constructive Amendment

An amendment that substantially changes the theory of prosecution is improper since it "tend[s] to prejudice" the respondent. FCA §311.5(1).

Similarly, the court may not, by permitting the introduction of evidence that varies from the allegations in the petition or in a bill of particulars, allow the presentment agency to constructively amend the petition and prove the respondent's guilt under a new theory of prosecution. See People v. Roberts, 72 N.Y.2d 489, 534 N.Y.S.2d 647 (1988) (reversal ordered where defendant was charged with striking manslaughter victim in neck area, but proof at trial was that victim was either strangled or hit by extremely accurate karate chop); People v. Grega, 72 N.Y.2d 489, 534 N.Y.S.2d 647 (1988) (where defendant was charged with sex offenses involving physical force, court erred when it charged jury concerning forcible compulsion by express or implied threats; however, since there was clear evidence of physical force, the error was harmless).

When the accused is charged as a principal, the prosecution may still proceed at trial on a theory of accessorial liability. See People v. Rivera, 84 N.Y.2d 766, 622 N.Y.S.2d 671 (1995); Matter of J.H., 16 Misc.3d 1116(A), 847 N.Y.S.2d 896 (Fam. Ct., Nassau Co., 2007). However, if the prosecution elects to charge the defendant as an accessory, they are limited to that theory. See People v. Boyd, 59 A.D.2d 558, 397 N.Y.S.2d 150 (2d Dept. 1977) (court had no power to delete words, "each aiding the other and being actually present").

When a mistake in the petition did not mislead the respondent as to the theory of prosecution and could have been cured by amendment during trial, but was not, dismissal may be required due to the legal insufficiency of evidence. See In re Marvin M., 68 A.D.3d 661, 891 N.Y.S.2d 73 (1st Dept. 2009) (criminal trespass finding reversed where petition limited presentment agency’s theory to trespass on school property "in violation of conspicuously posted rules or regulations governing entry and use thereof" and there was no evidence regarding posted rules or regulations; supporting deposition did not cure defect and presentment agency never sought to amend petition).