

**THE LEGAL AID SOCIETY
JUVENILE RIGHTS PRACTICE
MANUAL FOR CHILDREN'S LAWYERS**

**Volume Two: Representing Children In
Juvenile Delinquency Proceedings
Part Four: Disposition And Appeals**

**Gary Solomon
August, 2018**

Table Of Contents

Chapter One: **Disposition**.....1

Chapter Two: **Appeals**45

CHAPTER ONE

DISPOSITION

By: Gary Solomon

Table of Contents

Remand/Parole Status Of Respondent
Court-Ordered Reports
Probation Report
Diagnostic Assessment
Access To Reports
Other Discovery
Presiding Judge
Venue
Time Of Dispositional Hearing
Evidence At Dispositional Hearing
Procedure At Dispositional Hearing
Dismissal Of Petition
Adjournment In Contemplation Of Dismissal
PINS Substitution
Fighting Placement Recommendation
Other Defense Arguments At Hearing
Orders Upon Hearing
Order Of Protection
Conditional Discharge
Probation
Placement Upon Misdemeanor Or Felony Adjudication
Transfer For Placement With OMH Or OMRDD
Restrictive Placement Upon Designated Felony Finding
Vindictive Disposition And Due Process
Advocating For Court-Ordered Treatment/Services In Placement

Restitution And Services For The Public Good
HIV-Related Testing In Sex Crime Prosecutions
Special Immigrant Juvenile Status
Extension Of Non-Restrictive Placement
Permanency Hearing
Violations Of Probation/Conditional Discharge
Motion For New Hearing
Motion To Stay, Set Aside, Terminate Or Vacate Order
Motion By Placement Agency To Set Aside, Modify, Vacate Or Terminate Order
Motion Procedures
Petition For Transfer From Close To Home To OCFS
Petition For Transfer From OCFS To Close To Home
Expiration Date Of New Order

REMAND/PAROLE STATUS OF RESPONDENT

Under principles of equal protection, juvenile who has violated condition of release is entitled to be treated no worse than criminal defendant. Under CPL § 530.60, violation cannot lead to detention unless it has material bearing upon probability of defendant's future attendance, or court finds, upon adversarial hearing, that preventive detention based on dangerousness is authorized because defendant has committed another crime.

Argue that non-violent misconduct, such as truancy and even curfew violations, is not sufficient ground for detention even when release conditions have been violated, particularly when respondent has record of timely appearances in court.

Matter of Jeffrey C., 47 A.D.3d 433 (1st Dept. 2008) (family court should have substituted PINS adjudication: "While the Probation Department report indicates that appellant did not follow curfew and had several school absences, the court should have required the department to monitor appellant 'to assure that he attends school regularly and obeys a curfew,' without adding the stigma of a juvenile delinquent adjudication"); *Matter of Anthony M.*, 47 A.D.3d 434 (1st Dept. 2008) (conditional discharge replaced with ACD despite fact that the respondent had been absent from or late to school on several occasions).

If court is hostile to notion that violations will go unpunished, remind court that it can add to or change conditions of release, and/or take respondent's violations into account at disposition.

COURT-ORDERED REPORTS (FCA § 351.1)

Following determination that respondent committed crime and prior to dispositional hearing, **court shall order probation investigation and may order diagnostic assessment.**

No reason to think investigation requirement cannot be waived, or satisfied via presentation of other evidence, where respondent has plea-bargained for immediate disposition:

In re Christopher R., 235 A.D.2d 299 (1st Dept. 1997) (no error where court proceeded to disposition without written probation report, but took testimony from probation officer and admitted extensive mental health study).

Following determination that respondent committed designated felony act and prior to dispositional hearing, court shall order probation investigation and diagnostic assessment.

Child shall not be placed in accord with FCA § 353.3 unless court ordered probation investigation prior to dispositional hearing.

Child shall not be placed in accord with FCA § 353.4 (transfer to OMH or OMRDD) unless court ordered diagnostic assessment prior to hearing.

PROBATION REPORT (FCA § 351.1)

Scope Of Investigation (9 NYCRR § 350.6):

Investigation process shall consist of gathering information provided for in pre-dispositional investigation report worksheet and as deemed relevant by probation that may have bearing upon recommendation or disposition, as well as additional information directed by court.

Includes:

Legal history, including prior contact(s) with courts and probation; detention; previous and present compliance with diversion/supervision plans and conditions; placement and institutional history; current offense/act; NOT matters terminated in favor of respondent pursuant to FCA § 375.1, but probation may gather independent legal information voluntarily received from other sources (such as respondent, family members, victims, schools or police) as to past behavior;

Social circumstances, including community and neighborhood environment; peer/associate relationships, including gang involvement; educational status; violent behavior in home or community; access to weapons; significant patterns such as assaultive behavior, chemical dependency, endangering or other reckless behavior, mental health concerns or sexual offending; history of running away; child neglect/abuse, appropriate use of parental authority and attitudes toward child and behavior, and consistency and appropriateness of caring, rewards, discipline, and supervision in home; positive adult relationships and social support networks; significant family conflict, or safety concerns affecting either respondent or other persons in home (i.e., violence or abuse); school adjustment, academic performance and conduct/special needs; previous social assistance provided by voluntary or public agencies and response of youth to assistance; detention or other residential placement history, and youth's adjustment to placement; *see People v. Jeffery*, 135 A.D.3d 1235 (3d Dept. 2016) (criminal conduct of defendant's brother properly included in presentence investigation report; no indication that court improperly attributed brother's conduct to defendant);

Where out-of-home placement being considered, probation shall consult with social services, as appropriate, and where feasible shall address:

whether continuation in home is contrary to best interest of respondent;

whether efforts were made prior to date of dispositional hearing to prevent or eliminate need for removal of respondent from home; and

whether there is placement within proximity to respondent's family, school, and community;

Communicating with each victim and obtaining victim information;

Interviews with respondent or subject(s) of court order for investigation, which shall be directed toward obtaining and clarifying relevant information and making observations of respondent's behavior, attitudes and character;

Obtaining, during or prior to interview, appropriate consent(s) for release of information, and obtaining relevant information identified by and available through such consent;

Interview with parent(s)/guardian(s) to gather information regarding their perspective of child and family background, important life events, and hardships; medical and

psychological concerns or disabilities, including trauma, treatment, counseling, and suicidal history; school history, including achievements or problems; home environment, including family relationships and conflicts, behavior and discipline issues, and positive or negative neighborhood influences; ability and willingness to provide appropriate supervision, including problems parent is experiencing; identification of other supportive adults available to assist; most appropriate disposition and impacts of disposition on child and family; any other relevant information that may impact court's decision-making; and where probation supervision is being considered, how they will assist in meeting identified goals of supervision plan.

Interviews with complainant, arresting police officer, family members and/or other persons or agencies when deemed necessary for obtaining additional and clarifying information likely to influence recommendation or court disposition.

Risk and needs assessment;

Financial assessment;

Community and institutional supervision and treatment resources available to address specific risks and needs that must be targeted to reduce risk of re-offending.

Documentation of method(s), source(s), and date(s) of receipt of information.

Victim Impact Statement

The report shall afford the victim the right to make a statement, which, subject to the availability of the information, shall include an analysis of the victim's version of the offense; the extent of injury or economic loss and the actual out-of-pocket loss or damage to the victim, including the amount of unreimbursed medical expenses, if any; and the views of the victim relating to disposition, including the amount of restitution sought by the victim.

Where the victim is unable to assist in the preparation of the victim impact statement, the information may be acquired from the victim's family. There is no requirement that a victim or his or her family supply information for the preparation of an investigation report or that the dispositional hearing be delayed in order to obtain such information.

DIAGNOSTIC ASSESSMENT (FCA § 351.1)

Diagnostic assessment shall include, but not be limited to, psychological tests and psychiatric interviews to determine mental capacity and achievement, emotional stability and mental disabilities, and clinical assessment of situational factors that may have contributed to act(s).

When feasible, **expert opinion shall be rendered as to risk** presented by juvenile to others or himself, with recommendation as to need for restrictive placement.

Court also may order mental health or medical examination pursuant to FCA § 251.

See Matter of Jose Luis Q., 64 A.D.2d 600 (1st Dept. 1978) (new dispositional hearing where restrictive placement ordered without neurological exam and encephalogram to aid in determining whether respondent had brain damage and in formulating treatment plan).

Right To Counsel

Matter of Jose D., 66 N.Y.2d 638 (1985) (*Miranda* warnings not required at pre-disposition mental health examination; exam not “critical stage” of proceeding).

In *Jose D.*, court stated that dispositional process satisfies constitutional standards in part because of respondent's “right to cross-examine and submit a counter psychiatric study or other evidence.” When LAS funds are not available for retaining expert, argue that *Jose D.* not applicable and assessment is critical stage.

ACCESS TO REPORTS (FCA § 351.1)

Prior To Dispositional Hearing

Diagnostic assessments and probation investigation reports shall be submitted to court and made available by court for inspection and copying by presentment agency and respondent at least five court days prior to commencement of dispositional hearing.

See Matter of Julio “SS”, 210 A.D.2d 762 (3d Dept. 1994) (reversible error where child's attorney was denied access to probation report prior to dispositional hearing); *see also People v. Ortega*, 148 A.D.3d 467 (1st Dept. 2017) (resentencing ordered where defense was denied 24-hour adjournment to review presentence report, which had not been provided in advance of sentencing date).

Appeal

Reports shall be made available by court for inspection and copying by presentment agency and respondent in connection with any appeal in case.

Confidentiality

Reports or memoranda prepared or obtained by probation service for purpose of dispositional hearing shall be deemed confidential information furnished to court and be subject to disclosure solely in accordance with this section or as otherwise provided for by law.

See People v. Fishel, 128 A.D.3d 15 (3d Dept. 2015) (confidentiality provisions in CPL § 390.50(1) violated by conditions of probation providing that copy of presentence investigation report would be made available upon request to any agency or individual involved in evaluation, treatment or rehabilitation of defendant if request were deemed appropriate by Probation, and requiring defendant to consent to release of PSI to any sex offender treatment provider).

Victim impact statement (*see also* CPL § 380.50) shall be made available to victim or victim's family by presentment agency prior to disposition.

OTHER DISCOVERY

Matter of Jasmine G., 35 A.D.3d 604 (2d Dept. 2006) (no error where court ordered Probation to provide certain materials relating to “Probation Assessment Tool” to counsel for all parties);

Matter of Michael J., 180 Misc.2d 538 (Fam. Ct., Monroe Co., 1999) (given substantial liberty interest, respondent in extension of placement proceeding entitled pursuant to FCA § 165(a) to CPLR discovery as to bases for extension request; citing OCFS failure to respond to demand for bill of particulars, demand to produce and demand for expert witnesses, or seek protective order, court makes conditional orders of preclusion and gives agency 10 days to comply).

PRESIDING JUDGE (FCA § 340.2)

Judge who presides at fact-finding hearing or accepts admission shall preside at any subsequent hearing in proceeding, including but not limited to dispositional hearing.

But: Family Court rules shall provide for assignment of proceeding to another Family Court judge when appropriate judge cannot preside:

(a) by reason of illness, disability, vacation or no longer being judge of Family Court in that county; or

(b) by reason of removal from proceeding due to bias, prejudice or similar grounds; or

(c) not practicable for judge to preside.

Above provisions shall not be waived.

See *Matter of Richard R.*, 123 A.D.3d 1043 (2d Dept. 2014) (court did not err in declaring mistrial and re-commencing hearing when case was reassigned upon retirement of previous judge).

VENUE (FCA § 302.3)

And: except in designated felony proceeding, after entering fact-finding and prior to commencement of dispositional hearing, court may, in its discretion and for good cause shown, order that proceeding be transferred to county in which respondent resides. Court shall not order transfer unless it grants respondent and presentment agency opportunity to state on record whether each approves or disapproves of transfer and reasons therefor.

TIME OF DISPOSITIONAL HEARING (FCA § 350.1)

Respondent Detained Upon Non-Designated Felony Finding

Hearing shall commence not more than ten days after entry of fact-finding order, except as provided below.

Matter of Roshon P., 182 A.D.2d 346 (2d Dept. 1992), *lv denied* 80 N.Y.2d 762 (time starts running upon entry of *written* order).

Respondent Not Detained Or Detained Upon Designated Felony Finding

Hearing shall commence not more than fifty days after entry of fact-finding order, except as provided below.

Hearing need only commence, not conclude, before deadline

Matter of Richard R., 123 A.D.3d 1043 (2d Dept. 2014) (statute sets time limits only for commencement of hearing, not completion);

Adjournments

Court may adjourn hearing:

(a) on own motion or motion of presentment agency for good cause shown for not more than ten days; or

(b) on motion by respondent for good cause shown for not more than thirty days.

In re Malik H., 107 A.D.3d 447 (1st Dept. 2013) (no error in denial of respondent's belated request for adjournment to call psychologist and psychiatrist to testify since testimony would have been cumulative in light of reports admitted into evidence).

Successive motions to adjourn beyond statutory limits shall not be granted in absence of showing, on record, of special circumstances, which shall not include calendar congestion or status of court's docket or backlog.

Court shall state on record reason for adjournment.

Removal Cases (FCA § 350.2)

Date of filing of removal order in family court deemed to be date of entry of fact-finding order.

Clerk of court shall calendar appearance, to be held within seven days from date order of removal filed, at which court shall schedule dispositional hearing in accordance with § 350.1 and determine other issues properly before it.

EVIDENCE AT DISPOSITIONAL HEARING (FCA § 350.3)

Only evidence that is material and relevant may be admitted.

Adjudication must be based on preponderance of evidence.

Victim Impact Statement

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.

Commonwealth v. McGonagle, 88 N.E.3d 1128 (Mass. 2018) (no constitutional infirmity arising from judge's consideration of victim impact statement in non-capital case involving no risk that jury would put statement to improper use, or from victim's statutory right to recommend sentence).

PROCEDURE AT DISPOSITIONAL HEARING (FCA § 350.4)

Presentment agency shall appear.

Order of hearing shall be as follows:

Probation Statement

Court, with consent of parties, may direct probation to summarize investigation report, and, in its discretion, deliver further statement concerning advisability of specific dispositional alternatives.

Presentation of Witnesses

Court may in its discretion call witnesses, including preparer of probation reports or diagnostic studies, to offer evidence concerning advisability of specific dispositional alternatives. Witnesses may be cross-examined by presentment agency and respondent.

Presentment agency may call witnesses to offer such evidence, including preparer of probation report or diagnostic study.

Respondent may call witnesses to offer such evidence, including preparer of probation report or diagnostic study.

Court may permit presentment agency or respondent to offer **rebuttal or surrebuttal evidence** as court may deem appropriate.

The victim shall be allowed to make an oral or written statement.

Final Statements

Presentment agency may deliver statement concerning advisability of specific dispositional alternatives.

Respondent may deliver such a statement. *See United States v. Moreno*, 809 F.3d 766 (3d Cir. 2016) (prosecutor improperly permitted to cross-examine defendant immediately after defendant exercised right to speak or present information in effort to mitigate sentence);

Court shall permit rebuttal statements by presentment agency and respondent.

Risk Assessment Instrument

Court shall give due consideration to results of risk assessment instrument/process when determining disposition.

Court shall then consider case and enter order.

DISMISSAL OF PETITION

If court determines that respondent does not require supervision, treatment or confinement, petition shall be dismissed [FCA § 352.1(2)]:

Matter of Ejiro A., 268 A.D.2d 428 (2d Dept. 2000) (dismissal where respondent found guilty of criminal possession of weapon in fourth degree);

Matter of Kyung C., 169 A.D.2d 721 (2d Dept. 1991) (only evidence was Probation report stating that assault was isolated event and respondent received adequate supervision from parents);

Matter of Jens P., 159 A.D.2d 707 (2d Dept. 1990);

Matter of Kenroy C., 55 Misc.3d 535 (Fam. Ct., Kings Co., 2017) (court dismissed petition after admission to reckless endangerment where respondent played with illegal fireworks in public and caused injury to complainant; court noted, inter alia, that respondent had no other contacts with juvenile justice system; that respondent had

excellent school attendance and was passing all his classes; that respondent presented no behavioral issues in home; that although respondent had recent school suspension, it was first time being suspended and was for infraction within broad category of “disruptive behaviors”; that use of illegal fireworks around July 4th holiday is quintessential type of “risky” behavior adolescents are known for and consistent with their brain development; that respondent showed remorse; that teenager who lives in poverty and is black or Latino is much more likely to be arrested for these types of incidents than white middle or upper-class counterparts, and adolescents are overrepresented statistically in virtually every category of reckless behavior).

Remember: Written motion to dismiss in furtherance of justice may be made at disposition (FCA § 315.2).

ADJOURNMENT IN CONTEMPLATION OF DISMISSAL (FCA § 315.3)

Where facts are favorable but court will not order dismissal, ACD should be sought. (ACD not authorized if court makes designated felony fact-finding.)

Case law alludes to, *inter alia*, non-violent nature of offense; lack of other arrests; absence of behavioral problems at home or in school or substance abuse history; admission of guilt and show of remorse; extracurricular awards and activities; and availability of probation-supervised ACD).

Useful cases:

Matter of Nigel H., 136 A.D.3d 1033 (2d Dept. 2016) (foster child in arson case was honor student, and had no criminal history and no problems in foster home or at school, notwithstanding prior physical abuse and neglect by biological parents; therapist and fire marshal described him as remorseful and at low risk for reoffending; and he continued to receive services and monitoring in foster care);

In re Clarissa V., 117 A.D.3d 494 (1st Dept. 2014) (admission to menacing in third degree; respondent had truancy issues, but was employed, being treated for depression, and generally making progress);

In re Eric M., 114 A.D.3d 489 (1st Dept. 2014) (admission to unlawful possession of weapon - BB gun - by persons under 16);

In re Juan P., 114 A.D.3d 466 (1st Dept. 2014) (fact-findings of forcible touching and sexual abuse in third degree; if ACD not appropriate for respondent, “one wonders whether there is any juvenile charged with misdemeanor sexual abuse who would qualify for an ACD”);

In re Israel M., 57 A.D.3d 274 (1st Dept. 2008) (fact-findings of assault in second degree and menacing in third degree involving use of knife by accomplice to scare complainant while “play fighting”);

In re Joel J., 33 A.D.3d 344 (1st Dept. 2006) (placement order reversed; child should not be stigmatized as juvenile delinquent because of shortcomings of family, and it “is fairly obvious here that the court placed [respondent] with OCFS on the basis of his family history and living situation. The court’s decision lacked any discussion of the crime”);

In re Justin Charles H., 9 A.D.3d 316 (1st Dept. 2004) (fact-finding of reckless endangerment in second degree; throwing pennies at train and accidentally hitting conductor in face was act of thoughtlessness committed by adolescent fooling around with friends after party on weekend night).

PINS SUBSTITUTION (FCA § 311.4)

Before fact-finding, court may, with consent of presentment agency and respondent, substitute PINS petition for JD petition. (Note: automatic substitution for sex trafficking victims.)

At conclusion of dispositional hearing, court may substitute PINS petition without consent of presentment agency.

Useful cases:

Matter of Kayla F., 122 A.D.3d 1399 (4th Dept. 2014) (respondent, found guilty of third degree assault, demonstrated no danger to community at large and could have received same placement as PINS, and conduct was consistent with PINS behavior, not juvenile delinquency);

Matter of Dylan P., 121 A.D.3d 1118 (2d Dept. 2014) (argument between respondent and mother led to respondent damaging television; respondent had no prior delinquency finding and accepted responsibility, mother played active and positive role in respondent's life, respondent improving in area of curfew violations and school absences, and court could have required Probation or other agency to monitor school attendance and curfew "without adding the stigma of a juvenile delinquent adjudication");

In re Jeffrey C., 47 A.D.3d 433 (1st Dept. 2008), *lv denied* 10 N.Y.3d 707 (respondent may have overreacted in altercation with brother, but outburst appears to have been response to heat of moment and provocation by older brother, respondent had no prior delinquency or PINS findings and no reports of alcohol or illegal drug use, and, while respondent did not follow curfew and had several school absences, court could have required Probation to monitor respondent's behavior without adding stigma of juvenile delinquent adjudication);

In re Devon R., 278 A.D.2d 15 (1st Dept. 2000), *lv denied* 96 N.Y.2d 707 (2001) (PINS substitution warranted where eight-year-old sodomy respondent needed psychiatric treatment).

Judge may substitute PINS even though judge in other county made fact-finding:

Matter of Michael OO., 37 A.D.3d 1002 (3rd Dept. 2007).

FIGHTING PLACEMENT RECOMMENDATION

Least restrictive alternative [FCA § 352.2(2)(a)]:

Court shall consider needs and best interests of respondent as well as need for protection of community. Except where respondent committed designated felony act (governed by FCA § 353.5), court shall order least restrictive available alternative which

is consistent with needs and best interests of respondent and need for protection of community.

Note that PINS who are sixteen years of age or older cannot be placed unless the court determines and states in its order that special circumstances exist to warrant placement. FCA § 754(1)(c).

Argue no valid basis for deviation from risk assessment instrument [FCA § 352.2(2)(f)(2)]:

Residential placement order shall state:

- (i) level of risk youth assessed at pursuant to risk assessment instrument; and
- (ii) if youth placed in higher level of placement than appears warranted based on risk assessment instrument and process, particular reasons why placement was determined to be necessary for protection of community and consistent with needs and best interests of respondent; and
- (iii) that less restrictive alternative consistent with needs and best interests of respondent and need for protection of community not available.

Useful case law:

In re Roemaine Q., 154 A.D.3d 427 (1st Dept. 2017) (placement overturned, and level three probation ordered, where weapon 13-year-old respondent possessed was BB gun and he did not use it to commit act of violence, and probation is what presentment agency recommended at dispositional hearing);

Matter of Jacob A.T., 126 A.D.3d 1550 (4th Dept. 2015) (placement order reversed in three cases where respondent's home environment was "toxic" and he had mental health issues that required treatment, but he had recently been staying with family friend who had known him since birth and had petitioned for custody and there had been no new arrests during that time, and friend was able to devote significant time to supervising respondent and he and woman with whom he lived would help with supervision);

Matter of Tianna W., 108 A.D.3d 948 (3d Dept. 2013) (placement upheld, but admitted act of criminal mischief would not, by itself, warrant placement);

Matter of Genny J., 78 A.D.3d 1181 (2d Dept. 2010) (placement order reversed and probation ordered where Probation and presentment agency recommended probation and background facts were favorable);

Matter of David F., 69 A.D.3d 720 (2d Dept. 2010) (placement order reversed and probation ordered where Probation recommended probation and respondent was accepted into program that offered community-based services, including intensive counseling, and reports from former counselor and detention facility were favorable);

Matter of Shourik D., 65 A.D.3d 1042 (2d Dept. 2009) (where respondent placed with OCFS despite positive psychiatric report that recommended education and outpatient treatment, praised 95 grade-point average in school and noted strong family connections, matter remanded for new dispositional hearing);

In re Joel J., 33 A.D.3d 344 (1st Dept. 2006) (placement order reversed and ACD ordered; child should not be stigmatized as juvenile delinquent because of shortcomings of family and it "is fairly obvious here that the court placed [respondent] with OCFS on

the basis of his family history and living situation. The court's decision lacked any discussion of the crime");

In re Nicolette R., 9 A.D.3d 270 (1st Dept. 2004), *lv denied*, 3 N.Y.3d 610 (in prostitution case, placement in limited secure OCFS facility not least restrictive alternative where respondent in need of specialized services not available at OCFS facility, and, while family court found flight risk, appropriate security measures were provided at available residential facility and transfer to more secure facility was possible);

Matter of Jose B., 71 A.D.2d 551 (1st Dept. 1979) (new hearing ordered where respondent had been treated by psychiatrist who expressed view that respondent had responded positively to treatment and it was better not to separate him from home and concerned and interested mother);

Matter of John H., 48 A.D.2d 879 (2d Dept. 1975) (secure placement inappropriate where Probation failed to make effort to follow psychiatrist's recommendation regarding individual psychotherapy, family counseling, temporary placement with other family member, and nonsecure placement if non-placement plan were not feasible).

Fighting restrictive/secure or limited secure placement:

Matter of Jorge F., 215 A.D.2d 296 (1st Dept. 1995) (restrictive placement changed to limited secure where respondent had "made considerable progress toward rehabilitation in the less constrictive setting where he has been receiving treatment");

Matter of Cecil L., 71 A.D.2d 917 (2d Dept. 1979) (restrictive placement overturned where court psychiatrist testified that if respondent agreed to treatment, court should consider less punitive alternatives recommended by other doctors and that further evaluation of respondent should be conducted to assess alternatives psychiatrist had not considered);

Matter of Jose Luis Q., 64 A.D.2d 600 (1st Dept. 1978) (new dispositional hearing where restrictive placement ordered without neurological exam and encephalogram to aid in determining whether respondent had brain damage and in formulating treatment plan);

Matter of Demetrius A., 58 Misc.3d 682 (Fam. Ct., Kings Co., 2017) (court places respondent, who had previously been placed in non-secure facility and been re-arrested within six months of release, in non-secure facility again, noting lack of evidence that respondent had ever left or attempted to leave facility without permission and respondent's positive behavior while in placement; that rehabilitative services and programming model is same in limited secure as in non-secure; that facility's failure to change youth's behavior does not mean it will not succeed the second time; and that adolescents often require lessons to be repeated multiple times before they are absorbed given continuing development of adolescent brain through teenage years).

OTHER DEFENSE ARGUMENTS AT HEARING

New arrest not probative unless factual details presented:

People v. Kolata, 119 A.D.3d 1376 (4th Dept. 2014) (defendant denied due process when court imposed sentence based on mere fact of post-plea arrest without conducting inquiry to satisfy itself there was legitimate basis for arrest);

United States v. Windless, 719 F.3d 415 (5th Cir. 2013) (court may not rely on bare arrest records that state charge but do not provide details regarding alleged conduct); *United States v. Berry*, 553 F.3d 273 (3rd Cir. 2009) (court violated due process by considering prior arrests where facts were not established by preponderance of evidence).

Charge dismissed at trial on merits may not be considered:

People v. Brown, 113 A.D.3d 785 (2d Dept. 2014), *lv denied*, 23 N.Y.3d 1018 (re-sentencing ordered where remarks made by court demonstrated that it improperly considered crime of which defendant was acquitted);

People v. Sheppard, 107 A.D.3d 1237 (3d Dept. 2013), *lv denied*, 22 N.Y.3d 1203 (judge erred in allowing deceased's mother to give statement describing defendant as "killer" who "got away with murder" where defendant was convicted only on possession of weapon charge supported by evidence not related to homicide charges);

People v. Black, 33 A.D.3d 338 (1st Dept. 2006) (judge erred in relying on counts of which defendant was acquitted; court rejects People's argument that judge properly considered conduct proved by preponderance of evidence since jury found conduct was justified).

Improper opinions regarding likelihood of future criminal conduct:

United States v. Cossey, 632 F.3d 82 (2d Cir. 2011) (court erred in relying on own scientific theories of human nature);

People v. Clarke, 286 A.D.2d 208 (1st Dept. 2001), *lv denied*, 97 N.Y.2d 640, (pre-sentencing report stated defendant was "dangerously aggressive and violent," and that, "[a]s evidenced by his actions herein, the defendant is a dangerously aggressive and violent individual with a callous indifference to human life," but assessment was not substantiated by investigation and was based on appraisal of crime rather than evaluation of defendant);

People v. Irwin, 19 Misc.3d 1118(A) (Onondaga County Ct., 2008) (court strikes from report certain "clinical conclusions," including opinion regarding defendant's "lack of insight and inability to resist the impulse to offend against children," that probation officer lacked qualifications to make);

People v. Boice, 6 Misc.3d 1014(A) (County Ct., Chemung Co., 2004) (court strikes probation officer's conclusion that defendant is sociopath, a diagnosis not generally understood that should be left to qualified professionals).

Improper consideration of lack of remorse:

Compare State v. Willey, 44 A.3d 431 (N.H. 2012) (when defendant maintains innocence throughout criminal process, silence at trial or sentencing may not be considered lack of remorse since defendant risks incriminating himself if he expresses remorse) *with*

People v. Hicks, 98 N.Y.2d 185 (2002) (where defendant agreed in plea bargain that he would "truthfully answer all questions asked of [him] by the Court" and "truthfully answer all questions asked of [him] by the Probation Department," and that if he violated condition, court was not bound by its promises and defendant could not withdraw plea, court properly enhanced sentence after defendant lied to Probation by denying guilt);

United States v. Martinucci, 561 F.3d 533 (2d Cir. 2009) (in child pornography case, court properly cited lack of remorse when defendant denied at sentencing conduct he admitted at guilty plea) and *Matter of Silmon v. Travis*, 95 N.Y.2d 470 (2000) (*Alford* plea did not imply promise by State that petitioner would never have to acknowledge responsibility for crime or that State viewed him as innocent).

Consideration of inaccurate/unreliable Information violates due process:

People v. Hansen, 99 N.Y.2d 339 (2003) (sentencing scheme must ensure that information is “reliable and accurate” and that defendant has opportunity to respond to facts upon which court may base decision);

People v. McKnight, 129 A.D.3d 1459 (4th Dept. 2015), *lv denied*, 26 N.Y.3d 932 (court erred in sentencing defendant on basis of untrue assumptions regarding defendant having been involved in “more than 40 residential burglaries”);

People v. Barnes, 60 A.D.3d 861 (2d Dept. 2009) (re-sentencing ordered where court considered drug sale conviction that did not exist; to establish due process violation, defendant not required to show sentence enhancement was based solely on purported prior conviction);

People v. Orengo, 286 A.D.2d 344 (2d Dept. 2001) (court’s remarks showed sentence was based solely on circumstances of crime and not on incorrect information);

People v. Francis, 100 A.D.3d 1017 (2d Dept. 2012) (re-sentencing ordered where court speculated that robbery defendant attempted to kidnap complainant and intended to burglarize residence).

Overreliance on hearsay evidence violates due process right of confrontation:

United States v. Pimental-Lopez, 859 F.3d 1134 (9th Cir. 2016) (witnesses’ hearsay statements not sufficiently corroborated to provide minimal indicia of reliability and merit consideration by sentencing court);

United States v. Jarvis, 2004 WL 603466 (9th Cir. 2004) (only evidence of supervised release violations was police report).

Protection against self incrimination

State v. Blake, 958 A.2d 1236 (Conn. 2008) (where defendant claimed he could not exercise right to make statement at sentencing upon violation of probation until new charges arising from violation had been resolved, court properly declined to delay proceeding and instead suggested it would order that any statements made by defendant could not be used against him at another trial, and prosecutor agreed not to use any statements made by defendant).

ORDER UPON HEARING (FCA §§ 352.1, 352.2)

Upon conclusion of hearing, if court determines that respondent requires supervision, treatment or confinement, court shall enter finding that respondent is a juvenile delinquent and enter an appropriate dispositional order pursuant to FCA § 352.2:

- (a) conditionally discharging respondent (FCA § 353.1); or
- (b) putting respondent on probation (FCA § 353.2);

- (c) placing respondent in accord with FCA § 353.3; or
- (d) placing respondent in accord with FCA § 353.4; or
- (e) placing respondent under restrictive placement in accord with FCA § 353.5

Order shall state reasons for disposition, including, in case of restrictive placement, specific findings of fact required in § 353.5 (see below).

Findings re Risk Assessment Instrument

Any residential placement order shall state:

- (i) level of risk youth was assessed at pursuant to risk assessment instrument; and
- (ii) if youth placed in higher level of placement than appears warranted based on risk assessment instrument and process, particular reasons why placement was determined to be necessary for protection of community and consistent with needs and best interests of respondent; and
- (iii) that less restrictive alternative consistent with needs and best interests of respondent and need for protection of community is not available.

Designated Felony Cases (FCA § 353.5)

Where court has made designated felony fact-finding, order shall be made within twenty days of conclusion of dispositional hearing and include finding based on preponderance of evidence as to whether respondent does or does not require restrictive placement. Court shall make specific written findings of fact as to each statutory element governing restrictive placement determination.

If restrictive placement not ordered, court shall enter any other order of disposition in FCA § 352.2 and state grounds for order.

Violations

Where the adjudication is for a violation-level offense committed when the youth was age sixteen or older, the court may only issue an order conditionally discharging the respondent or putting the respondent on probation. **The statute does not indicate whether placement is an option if the order is later violated.**

ORDER OF PROTECTION (FCA § 352.3)

Upon issuance of dispositional or ACD order, court may enter order of protection against respondent for good cause shown.

Order may require that respondent:

- (a) stay away from home, school, business or place of employment of victim; or
- (b) refrain from harassing, intimidating, threatening or otherwise interfering with victim and specifically named members of family or household of victim; or
- (c) refrain from intentionally injuring or killing, without justification, companion animal respondent knows to be owned, possessed, leased, kept or held by person protected by order or minor child residing in person's household.

See People v. William Dolan, 140 A.D.3d 1681 (4th Dept. 2016) (order prohibiting sex crime defendant from having “unsupervised contact with any child under the age of 17

years of age," improper to extent it prohibited contact with individuals under age 17 who were not victims or witnesses).

Order also may require that respondent refrain from engaging in conduct, against witness specifically named by court in order, that would constitute intimidation of a witness or attempt thereof, provided that court makes finding that respondent did previously, or is likely to in future, intimidate or attempt to intimidate such witness in such manner.

Order shall remain in effect for period specified by court, but shall not exceed period specified in order of disposition or ACD.

CONDITIONAL DISCHARGE (FCA § 353.1)

Court may conditionally discharge respondent if court, having regard for nature and circumstances of crime and history, character and condition of respondent, is of opinion that, consistent with needs and best interests of respondent and need for protection of community, neither public interest nor ends of justice would be served by placement and that probation supervision is not appropriate.

Maximum period shall not exceed one year.

Respondent shall be released without placement or probation supervision but subject to such conditions as court may determine and specify in order.

Court may modify or enlarge conditions at any time prior to expiration or termination of period of conditional discharge. Such action may not be taken unless respondent is personally present, except that respondent need not be present if modification consists solely of elimination or relaxation of condition.

Court may, as condition of order, require that respondent:

- (a) attend school regularly and obey all rules and regulations of school;
- (b) obey all reasonable commands of parent or other person legally responsible for respondent's care;
- (c) abstain from visiting designated places or associating with named individuals;
- (d) avoid injurious or vicious activities;
- (e) co-operate with mental health, social services or other appropriate community facility or agency to which respondent is referred;
- (f) make restitution or perform services for public good (FCA § 353.6), provided respondent is over ten years of age;
- (g) Except when respondent has been assigned to OCFS facility, in cases wherein the record indicates that consumption of alcohol by respondent may have been contributing factor, attend and complete alcohol awareness program.
- (h) comply with other reasonable conditions as court shall determine to be necessary or appropriate to ameliorate conduct which gave rise to filing of petition or prevent placement with DSS or OCFS.

Where record indicates respondent qualifies as eligible person and has been adjudicated for eligible offense (SSL § 458-i), court may require respondent to attend and complete education reform program.

Respondent must be given written copy of conditions at time order is issued or modified, provided that whenever respondent has not been personally present at time of modification, court shall notify respondent in writing within twenty days after modification, specifying nature of elimination or relaxation of condition and effective date thereof. Copy of conditions must be filed with and become part of record of case.

Finding that respondent committed additional crime while conditional discharge in effect constitutes ground for revocation of order irrespective of whether such fact is condition of order.

PROBATION (FCA § 353.2)

Court may order period of probation if court, having regard for nature and circumstances of crime and history, character and condition of respondent, is of opinion that:

- (a) placement is not or may not be necessary;
- (b) respondent is in need of guidance, training or other assistance which can be effectively administered through probation; and
- (c) such disposition is consistent with needs and best interests of respondent and need for protection of community.

Maximum period shall not exceed two years. If court finds at conclusion of original period and after hearing that exceptional circumstances require additional year of probation, court may continue probation for additional year.

Advocate for shortest possible term of probation, which reduces risk of violation/placement:

In re Ramon B., 83 A.D.3d 623 (1st Dept. 2011) (18 months reduced to 12 months given underlying offense and favorable aspects of respondent's background).

Probation may extend beyond 18th birthday:

Matter of Carliesha C., 17 A.D.3d 1057 (4th Dept. 2005) (probation order may extend beyond respondent's 18th birthday).

Court may, as condition of order, require that respondent:

- (a) attend school regularly and obey all rules and regulations of school;
- (b) obey all reasonable commands of parent or other person legally responsible for respondent's care;
- (c) abstain from visiting designated places or associating with named individuals;
- (d) avoid injurious or vicious activities;
- (e) co-operate with mental health, social services or other appropriate community facility or agency to which respondent is referred;

(f) make restitution or perform services for public good (FCA § 353.6), provided respondent is over ten years of age;

(g) Except when respondent has been assigned to OCFS facility, in cases wherein the record indicates that consumption of alcohol by respondent may have been contributing factor, attend and complete alcohol awareness program.

(h) comply with other reasonable conditions as court shall determine to be necessary or appropriate to ameliorate conduct which gave rise to filing of petition or prevent placement with DSS or OCFS.

Court may further require that respondent:

(a) meet with probation officer when directed to do so by officer and permit officer to visit respondent at home or elsewhere;

(b) permit probation officer to obtain information from any person or agency from whom respondent is receiving or was directed to receive diagnosis, treatment or counseling;

(c) permit probation officer to obtain information from respondent's school;

(d) co-operate with probation officer in seeking to obtain and in accepting employment, and supply records and reports of earnings to officer when requested to do so;

(e) obtain permission from probation officer for any absence from respondent's residence in excess of two weeks; and

(f) with consent of OCFS, spend specified portion of probation period, not exceeding one year, in non-secure OCFS facility.

Respondent must be given written copy of conditions at time of order. Copy of conditions must be filed with and become part of record of case.

Finding that respondent committed additional crime while probation in effect constitutes ground for revocation of order irrespective of whether such fact is condition of order.

But argue that “no-arrest” condition is impermissible as it does not require proof of guilt.

Condition requiring consent to search must be in service of rehabilitation.

Compare People v. Hale, 93 N.Y.2d 454 (1999) (defendant's offense was drug-related and one way to encourage defendant to stay free of drugs was to hold out possibility he would be checked up on) *with People v. Joseph Saraceni*, (4th Dept. 2017)

(conditions requiring defendant to, inter alia, waive Fourth Amendment right protecting him from unreasonable searches and seizures of person, home, and personal property, and submit to chemical tests of breath, blood, or urine, were improper in absence of evidence defendant was under influence of alcohol or drugs when he committed offense or had history of drug or alcohol abuse) and *People v. Mead*, 133 A.D.3d 1257 (4th Dept. 2015) (condition requiring consent to search of home invalid where defendant had no history of drug or alcohol abuse).

Computers: generally, blanket use prohibition not permissible.

People v. Schaffner, 5 Misc.3d 5 (App. Term, 9th & 10th Jud. Dist., 2004); *People v. Rocco*, 309 A.D.3d 882 (2d Dept. 2003).

Gangs:

United States v. Washington, 893 F.3d 1076 (8th Cir. 2018) (condition unconstitutionally vague where it stated that defendant “must not knowingly associate with any member, prospect, or associate member of any gang without the prior approval of the United States Probation Office,” and that if “defendant is found to be in the company of such individuals while wearing the clothing, colors, or insignia of a gang, the Court will presume that this association was for the purpose of participating in gang activities”; prohibition failed to define “gang” or “associate member” of gang, and could apply to “incidental contacts” with gang members);

In re Edward B., 10 Cal.App.5th 1228 (Cal. Ct. App., 1st Dist., 2017) (condition providing that juvenile “shall not knowingly associate with anyone known to the minor to be a gang member or associated with a gang, or anyone who the [probation officer] informs the minor to be, a gang member or associated with a gang,” not related to offense or preventing future criminality);

United States v. Johnson, 626 F.3d 1085 (9th Cir. 2010) (condition prohibiting association with persons associated with gang improperly included not only those involved in gang’s criminal activities, but also those who may have had only social connection to gang member);

United States v. Green, 618 F.3d 120 (2d Cir. 2010) (condition barring defendant from associating with criminal street gang was proper, but condition prohibiting “wearing of colors, insignia, or obtaining tattoos or burn marks (including branding and scars) relative to [criminal street] gangs” was unconstitutionally vague).

School trespass:

In re G.B., 24 Cal.App.5th 464 (Cal. Ct. App., 1st Dist., 2018) (court narrows condition requiring juvenile to stay away from any school campus unless enrolled to be consistent with state law prohibiting persons from visiting school grounds without notifying school authorities).

Respondent must raise challenge to probation condition in appeal from dispositional order; cannot wait until appeal from new disposition resulting from violation.

People v. Brett Limoncelli, 21 Misc.3d 135(A) (App. Term, 9th & 10th Jud. Dist., 2008).

**PLACEMENT UPON MISDEMEANOR OR FELONY ADJUDICATION
(FCA § 353.3)****Federal Title IV-E Funding-Related Determinations (FCA § 352.2)****(1) Reasonable Efforts**

When placing respondent with Commissioner of Social Services, or with OCFS for placement with authorized agency or class of authorized agencies or in OCFS facility eligible for federal Title IV-E reimbursement, court shall determine in order:

That continuation in home would be contrary to best interests of respondent or, if not contrary to best interests, would be contrary to need for protection of community; and

That where appropriate, and where consistent with need for protection of community, reasonable efforts were made prior to date of dispositional hearing to prevent or eliminate need for removal from home, or if child was removed prior to hearing, where appropriate and where consistent with need for safety of community, whether reasonable efforts were made to make it possible for child to safely return home. If court determines that reasonable efforts were not made but lack of such efforts was appropriate, or consistent with need for protection of community, or both, court order shall include such finding; and

(2) Children Over Sixteen

Court shall determine in order, in case of child who has attained age of sixteen, services needed, if any, to assist child to make transition from foster care to independent living.

(3) Reasonable efforts not required where court determines (must state findings in order) that:

Parent of respondent has subjected respondent to aggravated circumstances (defined in FCA § 301.2), to wit:

- parent has been convicted of specified homicide crime and victim was another child of parent, provided that parent acted voluntarily in committing crime;
- parent has been convicted of attempt to commit specified homicide, or criminal solicitation, conspiracy or criminal facilitation for conspiring, soliciting or facilitating such homicide, and victim or intended victim was child or another child of parent.
- parent has been convicted of specified assault and commission of crime resulted in serious physical injury to respondent or another child of parent;
- parent has been convicted in other jurisdiction of offense which includes all essential elements of aforementioned crime, and victim was respondent or another child of parent; or
- parental rights of parent to sibling (sibling shall include half-sibling) of respondent have been involuntarily terminated;

unless court determines that providing reasonable efforts would be in best interests of and not contrary to health and safety of child, and would likely result in reunification of parent and child in foreseeable future.

(4) Schedule Permanency Hearing (FCA 352.2)

If court determines that reasonable efforts not required:

Permanency hearing shall be held pursuant to FCA § 355.5 within thirty days of finding that such efforts not required.

Social services official or OCFS shall, subsequent to permanency hearing, make reasonable efforts to place respondent in timely manner and complete steps necessary to finalize permanent placement as set forth in permanency plan approved by court.

Social services official may file petition for termination of parental rights.

In determining and making reasonable efforts, respondent's health and safety shall be paramount concern.

Placement Options

In NYC "Close to Home" district, court may only place respondent:

- (i) in custody of Commissioner of Social Services for placement in non-secure level of care; or placement in limited secure level of care; or placement in either non-secure or limited secure level of care, as determined by Commissioner; or

(ii) in custody of OCFS for placement in secure level of care.

Where respondent placed with Commissioner for Close to Home, court may direct Commissioner to provide services necessary to meet needs of respondent, provided that services are authorized or required to be made available pursuant to approved Close to Home plan.

If court finds respondent is sexually exploited child, court may place respondent in available long-term safe house.

Period of Placement

If respondent has committed felony, initial period of placement shall not exceed eighteen months.

If respondent has committed misdemeanor, initial period of placement shall not exceed twelve months.

Six-Month Minimum in Felony Cases

After finding that respondent committed felony, court may, in its discretion, order that respondent be confined in residential facility for minimum period set by order, not to exceed six months.

Initial placement beginning, or extending beyond, 18th birthday permitted

Matter of Robert J., 2 N.Y.3d 339 (2004); *In re Jude F.*, 291 A.D.2d 165 (2d Dept. 2002).

Provisions for routine medical, dental and mental health services and treatment (FCA § 355.4)

At conclusion of dispositional hearing, court shall inquire as to whether parents or legal guardian of youth, if present, will consent for OCFS or DSS to provide routine medical, dental and mental health services and treatment.

Where no medical consent has been obtained prior to order of disposition, placement order shall be deemed to grant consent for OCFS or DSS to provide for routine medical, dental and mental health services and treatment to the youth.

Routine medical, dental and mental health services and treatment defined to mean any routine diagnosis or treatment, including without limitation the administration of medications or nutrition, extraction of bodily fluids for analysis, and dental care performed with local anesthetic. Routine mental health treatment shall not include psychiatric administration of medication unless it is part of ongoing mental health plan or otherwise authorized by law.

At any time during placement or at extension of placement hearing, parent or legal guardian may make motion objecting to routine medical, dental or mental health services and treatment being provided to youth as authorized under statute. Notice of motion shall be served on youth, presentment agency and OCFS not less than seven days prior to return date. Persons on whom notice of motion is served shall answer not less than two days before return date. On examining motion and answer, and after hearing argument in its discretion, court shall enter order granting or denying motion.

Nothing in statute precludes youth from consenting on his/her behalf to medical, dental or mental health service and treatment where otherwise authorized by law, or precludes OCFS from petitioning court pursuant to FCA § 233 (court-ordered medical services).

Detention Pending Placement in Facility

Court may direct detention for no more than thirty days after order of placement made, or, in city of one million or more, no more than fifteen days after order made. Detention subject to fifteen-day extension pursuant to SSL § 398(3)(c).

Detention Time Credit

If respondent has been in detention pending disposition, initial period of placement shall be credited with and diminished by amount of time spent in detention prior to commencement of placement unless court finds that all or part of credit would not serve needs and best interests of respondent or need for protection of community.

Although criminal defendants automatically receive detention time credit without exception under PL § 70.30(2), and thus automatic credit should be given after a case has been removed to family court, it appears that the court has some discretion to deny credit, although we should argue that discretion is narrower than in non-removal cases. *Compare Matter of Warren F.*, 216 A.D.2d 225 (1st Dept. 1995) (awarding credit while citing Penal Law § 70.30[3]) *with In re William B.*, 247 A.D.2d 340 (1st Dept. 1998) and *Matter of Brian E.*, 242 A.D.2d 720 (2d Dept. 1997).

In any event, argue that equal protection requires application of the PL § 70.30(3) rule in juvenile delinquency proceedings.

Credit must be given for pre-fact-finding detention:

Matter of Wanji W., 305 A.D.2d 690 (2d Dept. 2003).

Credit must be given for time spent in detention prior to probation order, the violation of which led to placement.

Matter of Miranda C., 103 A.D.3d 821 (2d Dept. 2013).

Respondent must preserve via objection contention that court failed to make required findings justifying denial of credit.

In re Michael A., 151 A.D.3d 566 (1st Dept. 2017).

Tolling where respondent AWOL (Exec. Law § 510-b[7])

When child under OCFS jurisdiction is absent from facility or authorized agency without consent of director of facility or authorized agency, absence shall interrupt calculation of time of placement and interruption shall continue until return of child to facility or authorized agency in which child was placed. Time spent by child in custody from date of absence to date placement resumes shall be credited against time of placement if:

(a) Custody due to arrest or surrender based upon absence; or

(b) Custody arose from arrest or surrender on another charge which did not culminate in conviction, adjudication or adjustment.

Same tolling when child is placed with social services district (SSL § 398[3-a][b])

Failure to award proper credit may result in untimely filed extension petition:

Matter of Angel F., 273 A.D.2d 71 (1st Dept. 2000) (although OCFS asserted no knowledge of dismissal, it was aware of open case and tracking matter, and offered no explanation for failure to ascertain disposition and give credit).

Effect Of JO Sentence

Penal Law § 70.05 Sentence of imprisonment for juvenile offender

1. Indeterminate sentence. A sentence of imprisonment for a felony committed by a juvenile offender shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section. **The court shall further provide that where a juvenile offender is under placement pursuant to article three of the family court act, any sentence imposed pursuant to this section which is to be served consecutively with such placement shall be served in a facility designated pursuant to subdivision four of section 70.20 of this article prior to service of the placement in any previously designated facility.**

Motion To Terminate Placement

Court may at any time conduct hearing under FCA § 355.1 concerning need for continuing placement.

Matter of Johnny S., 27 Misc.3d 537 (Fam. Ct., Kings Co., 2010) (given court's finding that treatment was necessary to address respondent's history of trauma, which was significant factor in need for placement, failure to provide appropriate treatment would constitute change of circumstances warranting new dispositional hearing).

Court may extend placement pursuant to FCA § 355.3 (see below).

Agency Report Prior To Release or Extension of Placement

Placement agency shall submit report to court, respondent's attorney of record, and presentment agency at conclusion of placement period. Report shall include recommendations and such supporting data as is appropriate.

Where placement agency not seeking extension of placement, report shall be submitted not later than thirty days prior to conclusion of placement.

Where agency seeking extension of placement and permanency hearing, report shall be submitted not later than sixty days prior to date on which permanency hearing must be held and shall be annexed to petition for permanency hearing and extension of placement.

Report shall contain plan for release, or conditional release, of respondent to custody of parent or other person legally responsible, to independent living or to another permanency alternative.

If respondent subject to Article Sixty-Five of Education Law elects to participate in educational program leading to high school diploma, plan shall include, but not be limited to, steps agency has taken and will be taking to facilitate enrollment of respondent in school or educational program leading to high school diploma following release, or, if release occurs during summer recess, upon commencement of next school term.

If respondent not subject to Article Sixty-Five and does not elect to participate in educational program leading to high school diploma, plan shall include, but not be

limited to, steps agency has taken and will be taking to assist respondent to become gainfully employed or enrolled in vocational program following release.

Restitution/Services For Public Good

In its discretion, court may recommend restitution or require services for public good pursuant to FCA § 353.6 (see below).

TRANSFER FOR PLACEMENT WITH OMH OR OMRDD (FCA § 353.4)

If court finds respondent has mental illness, or intellectual or developmental disability, likely to result in serious harm to himself or others, court may issue order placing respondent with the Commissioner of Social Services or OCFS directing temporary transfer for admission of respondent to custody of either Commissioner of Mental Health or Commissioner of Developmental Disabilities, who shall arrange admission of respondent to appropriate facility of Department of Mental Hygiene.

See *In re Leopoldo Z.*, 78 Misc.2d 866 (Fam. Ct., Kings Co., 1974) (Department of Mental Hygiene ordered to find or create suitable facility for delinquent child who was moderately retarded and had antisocial personality);

In re Graham S., 78 Misc.2d 351, 355 (Fam. Ct., Kings Co., 1974) (Department of Mental Hygiene ordered to provide juvenile with “setting and treatment specifically recommended for his condition”).

Director of hospital operated by OMH may, subject to Mental Hygiene Law § 951, transfer person admitted to hospital pursuant to this subdivision to residential treatment facility for children and youth, if care and treatment in such facility would more appropriately meet needs of respondent.

Respondent may be retained for care and treatment for period of up to one year and, whenever appropriate, shall be transferred back to placement agency. Within thirty days of transfer back, agency shall make application to court to conduct further dispositional hearing at which court may make any order authorized under FCA § 352.2, except that period of further order of disposition shall take into account period of placement hereunder.

“**Likelihood to result in serious harm**” shall mean: (a) substantial risk of physical harm to himself as manifested by threats or attempts at suicide or serious bodily harm or other conduct demonstrating he is dangerous to himself; or (b) substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious bodily harm.

No dispositional hearing at which proof of mental disability is to be offered shall be completed until appropriate Commissioner has been notified and afforded opportunity to be heard at hearing.

Order placing respondent in accordance with this section shall be based upon **clear and convincing evidence, which shall include testimony of two examining physicians** (FCA § 251).

If respondent has been in detention pending disposition, **initial period of placement shall be credited with and diminished by amount of time spent by respondent in detention prior to commencement of placement** unless court finds that all or part of credit would not serve needs and best interests of respondent or need for protection of community (see additional information in section on placements in misdemeanor and felony cases).

Transfer from restrictive placement

If restrictive placement ordered (see below), and court makes required finding, court may direct temporary transfer for period of up to one year. Commissioner shall arrange for admission to appropriate facility within thirty days of order, and Director of facility shall accept respondent for admission.

Respondent shall be retained for period designated by court. At any time prior to expiration of period, if facility director determines that child is no longer mentally ill or no longer in need of active treatment, agency shall make application to court for order transferring child back to OCFS. Not more than thirty days before expiration of period, there shall be hearing, at which time court may:

- extend temporary transfer for additional period of up to one year; or
- continue restrictive placement in custody of OCFS.

During temporary transfer, respondent shall continue to be under restrictive placement with OCFS. When respondent transferred back to OCFS, conditions of placement in FCA § 353.5 apply. Time spent by respondent in custody of Commissioner shall be credited and applied towards period of placement.

RESTRICTIVE PLACEMENT UPON DESIGNATED FELONY FINDING (FCA § 353.5)

In determining whether restrictive placement is required, court shall consider:

- (a) needs and best interests of respondent;
- (b) record and background of respondent, including but not limited to information disclosed in probation investigation and diagnostic assessment;
- (c) nature and circumstances of offense, including whether injury was inflicted by respondent or another participant;
- (d) need for protection of community; and
- (e) age and physical condition of victim.

Court shall order restrictive placement in any case where respondent inflicted serious physical injury (Penal Law § 10.00) upon person sixty-two years of age or more.

Provision does not deny due process or equal protection: *Matter of Quinton A.*, 49 N.Y.2d 328 (1980).

Restrictive placement of youth found to have committed designated class A felony act (under FCA § 301.2[9], “Designated class A felony act” means designated felony act that would constitute class A felony if committed by adult).

Order shall provide that:

- (i) respondent placed with OCFS for initial period of five years;
- (ii) respondent initially confined in secure facility for specified period not less than twelve nor more than eighteen months;
- (iii) after secure confinement, respondent placed in residential facility for period of twelve months; provided, however, that if OCFS concludes, based on needs and best interests of respondent and need for protection for community, that non-secure or limited secure level of care is appropriate for respondent who committed designated felony act when he/she was under sixteen years of age, OCFS shall file petition pursuant to FCA § 355.1 to have respondent placed with local Commissioner of Social Services.

Respondent may not be released from, or transferred to facility other than secure facility, or be released from residential facility, during minimum period.

Motion For Relief From Order

During first twelve months of placement, no motion, hearing or order pursuant to FCA § 355.1 permitted; provided, however, that motion to vacate may be made upon grounds in CPL § 440.10.

Restrictive placement of youth found to have committed designated felony act other than class A felony act

Order shall provide that:

- (i) respondent placed with OCFS for initial period of three years;
- (ii) respondent initially confined in secure facility for specified period not less than six nor more than twelve months;
- (iii) after secure confinement, respondent placed in residential facility for period of not less than six nor more than twelve months; provided, however, that if OCFS concludes, based on needs and best interests of respondent and need for protection for community, that non-secure or limited secure level of care is appropriate, OCFS shall file petition pursuant to FCA § 355.1 to have respondent placed with local Commissioner of Social Services.

However, if youth found to have committed designated felony act on prior occasion, regardless of age at time of commission of prior act, five-year placement scheme and eighteen-month initial secure placement are required (in requiring eighteen months, statute refers to subd. (5) but apparently meant subd. (6)).

See Matter of Dwayne R., 124 Misc.2d 644 (Fam. Ct., Bronx Co., 1984) (prior finding need not be designated felony finding; finding may be of felony act that would have been designated felony had respondent been old enough).

Motion For Relief From Order

During first six months of placement, no motion, hearing or order pursuant to FCA § 355.1 permitted; provided, however, that motion to vacate may be made upon grounds in CPL § 440.10.

Home Visits

Not permitted during specified period of secure confinement or one year, whichever is less, except for emergency visits for medical treatment or severe illness or death in family.

Accompanied home visit required:

(A) while youth in secure facility;

(B) while youth confined in facility other than secure facility within six months after confinement in secure facility; and

(C) while youth confined in facility other than secure facility in excess of six months after confinement in secure facility unless two accompanied home visits have already occurred.

“Accompanied home visit” shall mean visit during which youth shall be accompanied at all times while outside facility by appropriate placement agency personnel.

Release From Confinement

Respondent may not be released from, or transferred to facility other than secure facility, or be released from residential facility, during minimum period.

After expiration of minimum period, respondent shall not be released from residential facility without written approval of placement agency.

Respondent shall be subject to intensive supervision whenever not in facility.

Respondent shall not be discharged from custody of placement agency during placement period.

Reports By Agency

Unless otherwise specified in order, placement agency shall report in writing to court not less than once every six months on status, adjustment and progress of respondent.

Extension of Placement

Upon expiration of initial period of placement, or any extension thereof, placement may be extended in accordance with FCA § 355.3 on petition of any party or placement agency, after dispositional hearing, for additional period not to exceed twelve months. No initial or extension of placement may continue beyond respondent's twenty-first birthday, or, for a class A designated felony committed when respondent was sixteen years of age or older, respondent's twenty-third birthday.

Detention Time Credit

If respondent in detention pending disposition, initial period shall be credited with and diminished by time in detention prior to commencement of placement unless court finds that all or part of credit would not serve needs and best interests of respondent or need for protection of community.

Under Penal Law § 70.30(3), a defendant receives credit for all time spent in custody in connection with the charge upon which he/she is being sentenced. There are no exceptions. **Argue that equal protection requires the same rule in juvenile delinquency proceedings.**

Credit must be given for pre-fact-finding detention:

Matter of Wanji W., 305 A.D.2d 690 (2d Dept. 2003).

Credit must be given for time spent in detention prior to probation order, the violation of which led to placement.

Matter of Miranda C., 103 A.D.3d 821 (2d Dept. 2013).

Without exception, credit must be given for time spent in detention pre-removal in Juvenile Offender case:

Matter of Warren F., 216 A.D.2d 225 (1st Dept. 1995) (citing Penal Law § 70.30[3]).

If dispositional hearing adjourned on finding of special circumstances (FCA § 350.1), and restrictive placement ordered, additional adjournment shall be credited against term of secure confinement.

Placement agency shall retain power to continue confinement in secure or other residential facility beyond periods specified by court, within term of placement (FCA § 353.5(8)).

VINDICTIVE DISPOSITION AND DUE PROCESS

Under Due Process Clause of State Constitution, **presumption of vindictiveness applies where criminal defendant successfully appeals, and is retried, found guilty, and given harsher sentence than that imposed after initial conviction.** After new trial, court must give affirmative reasons concerning identifiable conduct on part of defendant occurring after time of original sentencing to justify higher sentence.

People v. Immanuel Flowers, 28 N.Y.3d 536 (2016) (presumption of vindictiveness not applicable where defendant got same sentence upon re-conviction after reversal on appeal; no retaliatory conduct by court was apparent, nor was there indication that court relied on dismissed charges).

However, no presumption applies when defendant rejects plea offer, proceeds to trial for first time, and is given harsher sentence than plea offer. Given that *quid pro quo* of bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater, it is anticipated that sentences handed out after trial may be more severe than those proposed in connection with plea.

People v. Martinez, 26 N.Y.3d 196 (2015) (no presumption of vindictive sentencing where defendant rejected plea offer of 10 years' probation for single crime and, after being tried and convicted on multiple charges, was sentenced to 10 to 20 years' imprisonment; court imposed lawful sentence based on defendant's remorseless statement at sentencing hearing, heinous nature of crimes, and victim's sentencing statement, and rejection of plea offer required victim to testify about sexual abuse, which is legitimate basis for imposition of more severe sentence after trial).

Similarly, **a sentence is illegal if it has been enhanced because the accused turned down a plea deal and took the case to trial.**

People v. Hodge, 154 A.D.3d 963 (2d Dept. 2017) (sentence of seven years' imprisonment raised inference of impropriety where defendant, who had no prior felony convictions, rejected plea offer involving one year in prison, and co-defendant, who pleaded guilty to second degree burglary, was sentenced to six years' imprisonment to

run concurrently with four-year sentence in other case, and court admonished defendant for putting elderly complainant through “ordeal” of trial even though defendant was caught “redhanded”).

ADVOCATING FOR COURT-ORDERED TREATMENT/SERVICES IN PLACEMENT

Statutory support:

FCA § 353.3(2) (Where respondent placed with Commissioner for Close to Home, court may direct Commissioner to provide services necessary to meet needs of respondent, provided that services are authorized or required to be made available pursuant to approved Close to Home plan).

FCA § 255 (“It is hereby made the duty of and the family court or judge thereof may order, any agency or other institution to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this act”).

Reasonable Efforts Determination At Permanency/Extension of Placement Hearing: court must make reasonable efforts determinations, and consider and determine, *inter alia*, whether and when respondent will be returned home, placed for adoption, referred for legal guardianship, placed permanently with relative, or placed in another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource if respondent is age sixteen or older, and court must specify “the steps that must be taken by the agency with which the respondent is placed to implement the plan for release or conditional release . . . the adequacy of such plan and any modifications that should be made to such plan.” FCA § 355.5(7).

Court may not specify facility or service provider:

Matter of James A., 50 A.D.3d 787 (2d Dept. 2008) (court exceeded authority under FCA § 255 by directing New York City Department of Education to provide Individualized Education Plan, specifically naming Judge Rotenberg Center as placement, and encroached upon powers granted to DOE by Education Law §§ 4402 and 4404);

Matter of Kyle H., 297 A.D.2d 741 (2d Dept. 2002) (court erred in directing OCFS to place respondent in Tryon facility and provide in-patient substance-abuse treatment and counseling; under Executive Law § 504, OCFS has discretion to determine particular facility and treatment program).

But respondent has constitutional due process right to receive necessary and appropriate treatment and services to prevent serious physical or emotional harm. Thus, argue that court may order generally that respondent receive psychotherapy, substance abuse treatment and counseling, etc.

Useful caselaw:

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) (when State takes person into custody and holds him against his will, Constitution

imposes corresponding duty to assume responsibility for basic human needs such as food, clothing, shelter, medical care, and reasonable safety);

Matter of Lavette M., 35 N.Y.2d 136 (1974) (when State places PINS child in training school, it is for individualized treatment and not mere custodial care, and if proper and necessary treatment is not forthcoming, serious question of due process is raised and failure to provide suitable and adequate treatment cannot be justified by lack of staff or facilities);

Matter of Ellery C., 32 N.Y.2d 588 (1973) (“Proper facilities must be made available to provide adequate supervision and treatment for children found to be persons in need of supervision”);

Usen v. Sipprell, 41 A.D.2d 251 (4th Dept. 1973) (pursuant to FCA § 255, court may solicit and order care, education, and treatment of PINS respondent that appropriately may be afforded by mental health officials);

Matter of Johnny S., 27 Misc.3d 537 (Fam. Ct., Kings Co., 2010) (court notes that conditions of placement may not be punitive or exclusively designed to incapacitate, and that order must include psychiatric or psychological treatment court finds is needed, and, in this case, orders psychiatric evaluation and necessary psychiatric care and psychological counseling by licensed professional on weekly basis at least, that, every 90 days, OCFS provide to court, presentment agency, attorney for child, and foster care agency/legal guardian, report on psychological and psychiatric services, including schedule of therapy sessions, summary of diagnosis and treatment, and schedule of medications with proof of informed consent by agency/guardian, whose representatives shall have access to physician prescribing medication; that OCFS inform agency/guardian of location of placement and provide agency staff access to respondent; and that OCFS provide to court, presentment agency, and attorney for child, monthly reports of disciplinary measures, including use of restraints, so court may assess whether placement continues to be in best interests of respondent given diagnosis of PTSD);

Matter of Nicholas M., 189 Misc.2d 318 (Fam. Ct., Onondaga Co., 2001) (so respondent would receive required special education services, court directs OCFS pursuant to FCA § 255 to have respondent evaluated with respect to need for speech language therapist and teacher of deaf);

Matter of Joseph I., 2001 WL 1328620 (Fam. Ct., Suffolk Co.) (court may direct OCFS to place respondent in certified substance abuse treatment program where he shall also be given psychotherapy, and to provide progress reports to court every 90 days; court may not designate particular facility or program, but may order generally that juvenile receive psychotherapy and substance abuse treatment and counseling).

RESTITUTION AND SERVICES FOR PUBLIC GOOD (FCA § 353.6)

Restitution

At conclusion of dispositional hearing in cases involving respondents over ten years of age, court may recommend as condition of placement, or order as a condition of probation or conditional discharge, restitution in amount representing fair and reasonable cost to replace property, repair damage caused by respondent, or provide

victim with compensation for unreimbursed medical expenses. **Restitution not to exceed one thousand five hundred dollars.**

See *Matter of Kenroy C.*, 55 Misc.3d 535 (Fam. Ct., Kings Co., 2017) (restitution for out-of-pocket medical expenses and clothing damage totaling almost \$2,000 denied; court notes that it would not be consistent with goals of rehabilitation to order restitution).

In case of placement, court may recommend that respondent pay out of his/her own funds or earnings amount of replacement, damage or unreimbursed medical expenses, either in lump sum or in periodic payments in amounts set by agency with which he or she is placed.

In case of probation or conditional discharge, court may require that respondent pay out of his/her own funds or earnings amount of replacement, damage or unreimbursed medical expenses, either in lump sum or in periodic payments in amounts set by court.

Before ordering restitution, court must make finding as to monetary value based on documentary or other reliable evidence already in record or in victim impact statement. If such evidence is insufficient, or if respondent requests it, court must hold separate restitution hearing to determine what amount of restitution, if any, should be ordered.

People v. Lynch, 255 AD2d 1001 (4th Dept. 1998);

People v. Dunn, 224 A.D.2d 708 (2d Dept. 1996);

People v. Monette, 199 A.D.2d 589 (3rd Dept. 1993) (statements made by victim and insurance carrier were insufficient);

Matter of Richard "GG", 187 A.D.2d 846 (3rd Dept. 1992);

People v. Jackson, 180 A.D.2d 755 (2d Dept. 1992) (court's review of repair bill and defendant's reluctant consent to entry of civil judgment were insufficient).

No authority in Family Court Act for restitution order requiring someone other than respondent to pay, so argue that respondent's personal ability to pay must be established:

Term "respondent" "means person against whom juvenile delinquency petition is filed" FCA § 301.2(2). FCA § 353.6 contains no reference to respondent's parents or family, and their "funds or earnings."

In any event, if respondent and/or family denies ability to pay, it must be established on record:

People v. Chiera, 255 A.D.2d 685 (3rd Dept. 1998);

People v. Christman, 265 A.D.2d 856 (4th Dept. 1999);

Matter of Jessie "GG", 190 A.D.2d 916 (3rd Dept. 1993);

People v. Jackson, 180 A.D.2d 755 (2d Dept. 1992) (defendant stated he was unable to make restitution).

Services For Public Good

In addition to or instead of restitution, court may order as condition of placement, probation, or conditional discharge, services for public good. *Matter of Gabriel A.*, 12

A.D.3d 666 (2d Dept. 2004) (court upholds order placing respondent on probation and directing him to perform **400 hours** of community service).

Includes **services for maintenance and repair** in case of crime involving willful, malicious, or unlawful damage or destruction to real or personal property maintained as cemetery plot, grave, burial place, or other place of interment of human remains.

Court must take into consideration age and physical condition of respondent.

Rules and Regulations For Supervision in Placement

If court recommends restitution or requires services for public good in conjunction with order of non-restrictive placement, placement shall be made only to authorized agency, including OCFS, which has adopted rules and regulations for supervision of restitution or services, which rules and regulations, except in case of OCFS, shall be subject to approval of OCFS.

Such rules and regulations shall include, but not be limited to provisions:

Assuring that conditions of work, including wages, meet standards prescribed pursuant to Labor Law; affording coverage to respondent under Workers' Compensation Law as employee of agency, department, division or institution; assuring that entity receiving services shall not utilize same to replace regular employees; and providing for reports to court not less frequently than every six months.

Reports to Court in Probation and Conditional Discharge Cases

If court requires restitution or services for public good as condition of probation or conditional discharge, it shall provide that agency or person supervise restitution or services and that such agency or person report to court not less frequently than every six months.

Upon written notice submitted by school district to court, and to probation or other agency which submits probation recommendations or reports to court, court may provide that school district shall supervise performance of services for public good.

Court, upon receipt of reports, may, on own motion or motion of agency, probation service or presentment agency, hold hearing pursuant to FCA § 355.1 to determine whether dispositional order should be modified.

HIV-RELATED TESTING IN SEX CRIME PROSECUTIONS (FCA § 347.1)

Eligible Cases

Where respondent found to have committed felony offense for which act of "sexual intercourse", "oral sexual conduct" or "anal sexual conduct," is essential element, court must, upon request of victim, order that respondent submit to HIV-related testing to be conducted by state, county, or local public health officer designated by order.

Term "victim" means person with whom respondent engaged in act of "sexual intercourse", "oral sexual conduct" or "anal sexual conduct," where such conduct was basis for finding.

Procedure For Request

Request by victim must be in writing, filed with court and provided by court to respondent and his/her counsel. Request must be filed with court prior to or within ten days after filing of fact-finding order, provided that, for good cause shown, court may permit request to be filed at any time prior to entry of order of disposition.

If victim is infant or incompetent person, application may be made by representative as defined in CPLR 1201. Application must state that: (a) applicant was victim of offense; and (b) applicant has been offered counseling by public health officer and been advised of (i) limitations on information to be obtained through HIV test; (ii) current scientific assessments of risk of transmission of HIV from exposure he/she may have experienced; and (iii) need for applicant to undergo HIV related testing to definitively determine HIV status.

Hearing

Court shall conduct hearing only if necessary to determine if applicant is victim. Test must be performed within fifteen days of date on which court ordered test, provided however that whenever respondent not tested within period prescribed by court, court must again order that respondent undergo test.

Confidentiality/Disclosure Of Test Results

Requests, related papers and orders, and papers or proceedings related thereto, shall be sealed by court and not made available for any purpose, except as may be necessary for conduct of judicial proceedings directly related to provisions of this section. All proceedings on such requests shall be held in camera.

Test results, which shall not be disclosed to court, shall be communicated to respondent and victim named in order in accordance with Public Health Law § 2785-a.

Test results shall be disclosed subject to following limitations, which shall be specified in order:

- (i) disclosure of confidential HIV-related information shall be limited to information necessary to fulfill purpose for which order granted;
- (ii) disclosure shall be limited to person making application; redisclosure shall be permitted only to victim, victim's immediate family, guardian, physicians, attorneys, medical or mental health providers, and victim's past and future contacts to whom there was or is reasonable risk of HIV transmission; no disclosure to any other person or court.

Unless inconsistent with this section, order shall direct compliance with and conform to Article Twenty-Seven-F of Public Health Law. Order shall include measures to protect against disclosure to others of identity and HIV status of applicant and of person tested and may include such other measures as court deems necessary to protect confidential information.

Failure to comply with provisions of this section or Public Health Law § 2785-a shall not impair validity of order of disposition.

No information obtained pursuant to section or information derived therefrom may be used as evidence in criminal or civil proceeding against respondent which relates to events that were basis for adjudication, provided that nothing herein shall prevent prosecution of witness testifying in hearing held pursuant to this section for perjury.

SPECIAL IMMIGRANT JUVENILE STATUS

Regarding the court's authority to issue findings to enable the respondent to apply for Special Immigrant Juvenile status, *compare Matter of Mario S.*, 38 Misc.3d 444 (Fam. Ct., Queens Co., 2012) (although juvenile delinquency respondent was residing with mother after being discharged from placement, it appeared she was in United States illegally and at risk of deportation) *with Matter of K.S.*, 56 Misc.3d 938 (Fam. Ct., Queens Co., 2017) (SIJS order may not be issued in juvenile delinquency proceeding).

EXTENSION OF NON-RESTRICTIVE PLACEMENT (FCA § 355.3)

Filing Deadline

Petition shall be filed by placement agency or person with whom respondent placed at least sixty days prior to expiration of period of placement, except for good cause shown, but in no event shall petition be filed after original expiration date.

Good cause need not be alleged in petition:

Matter of Joshua LL., 140 A.D.3d 1279 (3d Dept. 2016).

Examples of good cause:

Matter of Joshua LL., 140 A.D.3d 1279 (respondent experienced "good days" and "bad days" and "was on a streak where he was doing very well" and assumption was he would be discharged, but, within one month of anticipated discharge date, behavior began to unravel and father expressed concerns about readiness to return home);

Matter of Francis H., 253 A.D.2d 691 (1st Dept. 1998) (OCFS needed to await final determination of criminal proceeding which was expected to result in prison time but in fact resulted in probation);

Matter of Donald MM, 241 A.D.2d 634 (3d Dept. 1997) (series of bad acts committed by respondent after deadline for filing);

Matter of Loren S., 220 A.D.2d 857 (3d Dept. 1995) (arrest after deadline for filing).

Examples of no good cause:

Matter of Heriberto A., 198 A.D.2d 191 (1st Dept. 1993) (record did not demonstrate that juvenile's behavioral problems occurred after deadline).

Hearing

Court shall conduct hearing concerning need for continuing placement. Respondent, presentment agency and placement agency shall be notified of hearing and have opportunity to be heard thereat. If petition is untimely filed, court shall first determine at hearing whether good cause has been shown. If good cause not shown, court shall dismiss petition.

Evidence and Procedure At Hearing

Same as at dispositional hearing (FCA §§ 350.3, 350.4).

Pre- and Mid-Hearing Temporary Extensions

Pending final determination, court may, on own motion or at request of petitioner or respondent, enter one or more temporary orders extending placement for period not to exceed thirty days upon satisfactory proof showing probable cause for continuing placement and that temporary order is necessary.

Court may order additional temporary extensions, not to exceed total of fifteen days, if court unable to conclude hearing within thirty day temporary extension period. In no event shall aggregate number of days in extensions total more than forty-five days. Petition shall be dismissed if decision not rendered within period of placement or temporary extension.

Order Upon Hearing

Court may, in its discretion, order extension for not more than one year.

Court must consider and determine in order:

that where appropriate, and where consistent with need for protection of community, **reasonable efforts** were made to make it possible for respondent to safely return to home;

in case of respondent sixteen or older, services needed, if any, to assist child to make transition from foster care to independent living; and

in case of child placed outside state, whether out-of-state placement continues to be appropriate and in best interests of child.

Successive Extensions

May be granted, but no placement may be made or continued beyond eighteenth birthday without respondent's consent for acts committed before sixteenth birthday, and in no event past twenty-first birthday except in case of restrictive placement for class A designated felony (twenty-third birthday).

Matter of Gerry B., 15 Misc.3d 1134(A) (Fam. Ct., Queens Co., 2007) (respondent may revoke consent to extension beyond 18th birthday).

PERMANENCY HEARING (FCA § 355.5)

In Which Cases Required

When respondent placed with agency and resides in foster home or non-secure facility. "Non-secure facility" means facility operated by authorized agency in accordance with operating certificate issued pursuant to Social Services Law, or OCFS facility other than secure or limited secure facility with capacity of twenty-five beds or less operated in accordance with Executive Law § 504, and does not include limited secure facility in Close to Home district.

But see Matter of Donovan Z., 6 Misc.3d 1023(A) (Fam. Ct., Monroe Co., 2005) (although statute does not require permanency hearing when youth placed in limited secure facility, court had authority to conduct hearing).

Timing

Initial hearing held no later than twelve months after respondent entered foster care. Hearing shall be held in conjunction with extension of placement hearing when initial placement was for twelve months or less. Subsequent hearings shall be held no later

than every twelve months following initial twelve months in placement but in no event past respondent's twenty-first birthday, and shall be held in conjunction with extension of placement hearing.

Respondent shall be considered to have entered foster care sixty days after being removed from home pursuant to FCA Article Three.

Filing of Petition

Petition shall be filed by agency no later than sixty days prior to end of month in which hearing must be held.

Notice to Caretaker

Foster parent or pre-adoptive parent or relative providing care shall be provided with notice of hearing by placement agency. Such person shall have right to be heard at hearing; provided, however, no such person shall be construed to be party to hearing solely on basis of notice and right to be heard.

Failure of person to appear at hearing shall constitute waiver of right to be heard and such failure shall not cause delay of hearing or be ground for invalidation of order issued by court.

Order Upon Hearing

Court must consider and determine in order:

Where appropriate, that **reasonable efforts** were made to make it possible for respondent to return safely to home, or if permanency plan is adoption, guardianship or another permanent living arrangement other than reunification with parent or parents, that reasonable efforts were made to make and finalize alternate permanent placement including consideration of appropriate in-state and out-of-state placements;

In case of respondent fourteen or older, services needed, if any, to assist respondent to make transition from foster care to successful adulthood;

That **permanency plan** developed for respondent, and any revision or addition to plan, shall be developed in consultation with respondent and, at option of respondent, with up to two members of respondent's permanency planning team, selected by respondent, who are not foster parent of, or case worker, case planner or case manager for, respondent, except that commissioner of social services or OCFS commissioner with custody of respondent may reject individual selected by respondent if commissioner has good cause to believe individual would not act in best interests of respondent; and that one individual selected by respondent may be designated to be respondent's advisor and, as necessary, advocate, with respect to application of reasonable and prudent parent standard;

In case of respondent placed outside state, whether out-of-state placement continues to be appropriate and in best interests of respondent;

With regard to completion of placement: whether and when respondent:

(1) will be **returned to parent**;

(2) should be **placed for adoption** with local commissioner of social services filing petition for termination of parental rights;

(3) should be **referred for legal guardianship**;

(4) should be **placed permanently with fit and willing relative**; or

(5) should be **placed in another planned permanent living arrangement with significant connection to adult willing to be permanency resource** if respondent is age sixteen or older, and agency has documented to court intensive, ongoing, and, as of date of hearing, unsuccessful efforts made to return respondent home or secure placement with fit and willing relative including adult siblings, legal guardian, or adoptive parent, including through efforts that utilize search technology including social media to find biological family members for children, and steps being taken to ensure that respondent's foster family home or child care facility is following federal reasonable and prudent parent standard and respondent has regular, ongoing opportunities to engage in age or developmentally appropriate activities including by consulting with respondent in age-appropriate manner about opportunities to participate in activities, and agency has documented to court and court has determined that there are compelling reasons for determining that it continues to not be in best interest of respondent to return home, be referred for termination of parental rights and placed for adoption, be placed with fit and willing relative, or be placed with legal guardian, and court has made determination explaining why, as of date of hearing, another planned living arrangement with significant connection to adult willing to be permanency resource is best permanency plan;

With regard to completion of placement, steps that must be taken by placement agency to implement plan for release or conditional release submitted pursuant to FCA § 353.3(7)(c), including consideration of appropriate in-state and out-of-state placements, adequacy of plan and modifications that should be made to plan.

At hearing, court shall consult with respondent in age-appropriate manner regarding permanency plan. If respondent is sixteen or older and requested permanency plan is placement in another planned permanent living arrangement with significant connection to adult willing to be permanency resource, court must ask respondent about desired permanency outcome.

Court shall not reduce or terminate placement prior to completion of period of placement ordered by court.

VIOLATIONS OF PROBATION/CONDITIONAL DISCHARGE (FCA §§ 360.1, 360.2, 360.3)

Probation Supervision

Respondent remains under legal jurisdiction of court during period of order, and probation shall supervise respondent during that period.

Probation Search Order

If during period of probation court has reasonable cause to believe respondent has violated condition of probation order, it may issue search order directed to probation officer authorizing officer to search person of respondent or any personal property he/she owns or which is in his/her possession.

In executing order, probation officer may be assisted by police officer.

Violation Petition

If during period of probation or conditional discharge probation service has reasonable cause to believe respondent has violated condition, it may file petition of violation.

Petition must be verified and subscribed by probation or appropriate presentment agency. Petition must stipulate condition or conditions of order violated and reasonable description of time, place and manner in which violation occurred. Non-hearsay allegations of factual part of petition or of supporting depositions must establish, if true, violation charged. *Matter of Markim Q.*, 22 A.D.3d 498 (2d Dept. 2005), *rev'd on other grounds* 7 N.Y.3d 405 (2006) (petition defective where school record was admissible under CPLR 4518 but not verified by person with knowledge of facts; Court of Appeals holds that insufficiency of nonhearsay allegations is not jurisdictional defect and may be cured by amendment and may not be raised for first time on appeal); *Matter of Jessica N.*, 264 A.D.2d 778 (2d Dept. 1999) (petition must provide reasonable description of time and place and manner in which violation occurred); *see also People v. Kislowksi*, 145 A.D.3d 1197 (3d Dept. 2016) (charge defective where petition failed to provide dates upon which defendant allegedly had contact with individual in violation of probation condition and record does not reflect that People provided defendant with additional details prior to violation hearing), *rev'd in part* 30 N.Y.3d 1006 (2017) (charge not found defective by Third Department, which identified four dates on which defendant allegedly "had contact with" convicted criminal, but did not include additional information, did not satisfy statutory requirement that petition provide time, place, and manner of alleged violation).

Detention In Absence of Violation Petition Is Prohibited

Matter of Jazmin A., 15 N.Y.3d 439 (2010) (Legislature did not empower court to order detention of juvenile probationer before filing of violation of probation petition).

Probation Violation May Not Be Raised Via FCA § 355.1 Motion To Vacate/Modify

Matter of Rayshawn P., 103 A.D.3d 31 (1st Dept. 2012).

Tolling

Period of probation or conditional discharge interrupted as of date of filing. Interruption shall continue until final determination by court upon hearing held in accordance with FCA § 360.3 or until respondent reaches maximum age of acceptance into OCFS facility.

If court determines there was no violation, period of interruption shall be credited to period of probation or conditional discharge.

Securing Respondent's Appearance

Court must promptly take reasonable and appropriate action to cause respondent to appear before it for purpose of enabling court to make determination with respect to alleged violation. Action may include issuance of summons under FCA § 312.1 or warrant under FCA § 312.2.

Presentment agency shall present petition in all stages of proceeding.

Initial Appearance of Respondent

Respondent entitled to counsel at all stages of proceeding and court shall advise him/her of such right at outset.

At respondent's first post-filing appearance, court must:

Advise respondent of contents of petition and furnish him/her with copy thereof;

Determine whether respondent should be released or detained pursuant to FCA § 320.5; and

Ask respondent whether he/she wishes to make statement with respect to violation. If respondent makes statement, court may accept it and base decision thereon.

Allocution provisions of FCA § 321.3 apply in determining whether statement should be accepted.

If court does not accept statement or respondent does not make statement, court shall proceed with hearing.

Upon request, court shall grant reasonable adjournment to respondent to enable him/her to prepare for hearing.

Hearing and Orders

Respondent may raise lack of capacity to proceed: see FCA § 322.1(1); *Matter of Lopez v. Evans*, 25 N.Y.3d 199 (2015) (violation of due process to conduct parole revocation hearing when parolee lacks competency to stand trial).

Respondent entitled to hearing promptly after violation petition filed.

Parker warnings and subsequent finding of deliberate absence required before court may proceed in respondent's absence. *People v. Callahan*, 134 A.D.3d 1432 (4th Dept. 2015).

Court may not revoke order of probation or conditional discharge unless court has found that respondent violated condition of order and respondent has had opportunity to be heard. *People v. Songa*, 132 A.D.3d 1071 (3d Dept. 2015) (defendant should have been excused for failure to report where probation officer confirmed that probationer could be excused from scheduled meeting if officer spoke with probationer directly and acknowledged that defendant had called and left voice message that officer was unable to understand due to defendant's accent and because phone was "cutting in and out"; defendant acted in good faith in attempt to carry out reporting conditions of probation); *People v. Torres*, 5 A.D.3d 1097 (4th Dept. 2004) (finding at preliminary hearing did not support revocation of probation since standard at preliminary hearing is reasonable cause while standard at violation hearing is preponderance of the evidence).

Court may receive any relevant, competent and material evidence. Respondent may cross-examine witnesses and present evidence.

Unconstitutionally seized evidence may not be used as a basis upon which to revoke probation. *People v. Robinson*, 128 A.D.3d 1464 (4th Dept. 2015).

Given the given different standards of proof, a probation violation charge may be maintained after acquittal at trial as to the same charge. *People v. Thomas*, A.D.3d, 2018 WL 3467185 (3d Dept. 2018).

At conclusion of hearing court may revoke, continue or modify order of probation or conditional discharge. Before revoking the order upon finding that a violation has occurred, the court must make a discretionary determination as to whether the facts warrant revocation. *People v. McCloud*, 205 A.D.2d 1024 (3d Dept. 1994); see also

United States v. Haymond, 869 F.3d 1153 (10th Cir. 2017) (court may consider severity of conduct involved in violation, but must maintain premise that revocation of supervised release is punishment for original conviction; if violation may be basis for separate prosecution, issue of double jeopardy is raised if revocation were punishment for same offense).

If court revokes order, it shall order different disposition pursuant to FCA § 352.2. If court continues order of probation or conditional discharge, it shall dismiss violation petition.

When the respondent has been found guilty only of a violation-level offenses and not a felony or misdemeanor, and thus cannot be placed at the initial disposition, the statute does not indicate whether placement can be ordered after the court finds a violation of the dispositional order.

Violation Of Restitution Order

People v. Griffin, 143 A.D.3d 1000 (2d Dept. 2016), *lv denied* 28 N.Y.3d 1145 (if probationer cannot pay despite sufficient bona fide efforts to acquire resources, court must consider measures other than imprisonment).

MOTION FOR NEW HEARING (FCA § 355.1)

Upon showing of substantial change of circumstances, court may on own motion, or on motion of respondent or his/her parent or person responsible for his/her care, grant new fact-finding or dispositional hearing.

MOTION TO STAY, SET ASIDE, TERMINATE OR VACATE ORDER (FCA § 355.1)

Upon showing of substantial change of circumstances, court may on own motion, or on motion of respondent or his/her parent or person responsible for his/her care, stay execution of, set aside, modify, terminate or vacate order issued in Article Three proceeding.

Presentment agency may not move for relief.

Matter of E.M., 7 Misc.3d 1005(A) (Fam. Ct., Nassau Co., 2005).

Detention While Motion Pending Not Authorized

Matter of Rayshawn P., 103 A.D.3d 31 (1st Dept. 2012); *see Matter of Jazmin A.*, 15 N.Y.3d 439 (2010).

Statute May Be Used to Obtain Early Release From Placement, or Favorable Treatment At Close of Dispositional Period

e.g., Matter of Amber F., 23 Misc.3d 1101(A) (Fam. Ct., Queens Co., 2009) (court vacates probation order and orders ACD where underlying assault was violent but respondent had no prior contacts with juvenile justice system; respondent admitted involvement in incident and expressed remorse and willingness to accept responsibility for actions; respondent's academic performance was above average and she

expressed interest in pursuing medical education and had been volunteering at hospital 3 days a week; and respondent was over 16 and future violations of law would subject her to potential criminal prosecution);

Matter of S.S., 6 Misc.3d 1031(A) (Fam. Ct., Orange Co., 2005) (court terminates placement and directs release to respondent's aunt and uncle, noting that deterioration in respondent's behavior was result of OCFS's failure to effectuate its own plan; that respondent will benefit from counseling in permanent home environment; and that "the purpose of a permanency plan is to find a secure and safe, and hopefully loving, environment outside of agency placement").

Court also has inherent authority to correct mistakes or errors clerical in nature or where correction conforms record to truth.

People v. Richardson, 100 N.Y.2d 847 (2003).

Court may not use § 355.1 to prosecute violation of probation instead of specific statutory rules governing violations, and may not remand respondent.

In re Rayshawn P., 103 A.D.3d 31 (2d Dept. 2012).

MOTION BY PLACEMENT AGENCY TO SET ASIDE, MODIFY, VACATE OR TERMINATE ORDER (FCA § 355.1)

Placement order issued under FCA § 353.3 may, upon showing of substantial change of circumstances, be set aside, modified, vacated or terminated upon motion of Commissioner of Social Services or OCFS.

MOTION PROCEDURES (FCA § 355.2)

Motion must be in writing and state specific relief requested.

If motion based upon existence or occurrence of facts, papers must contain sworn allegations of fact that may be based upon personal knowledge of affiant, or upon information and belief if affidavit states sources of information and grounds of belief.

Notice of motion, including court's own motion, shall be served upon respondent, presentment agency and (as applicable) Commissioner of Social Services or OCFS. Motions shall be noticed in accordance with CPLR.

Each party to motion shall have right to oral argument and court shall conduct hearing to resolve any material question of fact.

Regardless of whether hearing conducted, court, upon determining motion, **must set forth on record** findings of fact, conclusions of law and reasons for determination.

If motion denied, motion requesting same or similar relief cannot be filed for ninety days after denial, unless order permits renewal at earlier time.

PETITION FOR TRANSFER FROM CLOSE TO HOME TO OCFS (FCA § 355.1)

Filing Of Petition

If social services district determines that placement in limited secure (assuming district has no limited secure level of care) or secure facility is appropriate and consistent with need for protection of community and needs and best interests of respondent, district shall file petition to transfer custody of respondent to OCFS, and shall provide copy of petition to OCFS, respondent, attorney for respondent and respondent's parent or legal guardian.

Argue that motion procedures and pleading requirements in FCA § 355.2 apply.

Timing Of Decision

Court shall render decision within 72 hours, excluding weekends and public holidays. Statute does not make clear when clock starts running. Because deadline appears directly after reference to filing and service, **argue that clock starts running upon filing.**

Detention

Court may order that respondent be housed in local secure detention facility on interim basis pending final ruling on petition. **But period of detention limited by 72-hour decision deadline.**

Opportunity To Be Heard and Written Order

Court shall, after allowing OCFS and attorney for respondent opportunity to be heard after notice has been given, grant petition only if court determines, and states in written order, reasons why limited secure or secure placement is necessary and consistent with needs and best interests of respondent and need for protection of community.

In case of secure placement, court must determine and state in order that respondent needs secure level of placement because:

Respondent has been shown to be exceptionally dangerous to him/herself or to other persons. Exceptionally dangerous behavior may include, but is not limited to, one or more serious intentional assaults, sexual assaults or setting fires; or

Respondent has demonstrated by pattern of behavior that he/she needs more structured setting and district has considered appropriateness and availability of transfer to non-secure or limited secure facility. Such behavior may include, but is not limited to: disruptions in facility programs; continuously and maliciously destroying property; or repeatedly committing or inciting other youth to commit assaultive or destructive acts.

Argue that least restrictive alternative requirement applies since statute refers to "needs and best interests of the respondent" and "need for protection of the community," which is language used in connection with least restrictive alternative requirement.

PETITION FOR TRANSFER FROM OCFS TO CLOSE TO HOME

Filing Of Petition

OCFS may file petition to transfer to social services district respondent placed with OCFS pursuant to FCA § 353.3 or § 353.5. OCFS shall provide copy of petition to district, attorney for respondent and presentment agency.

Argue that motion procedures and pleading requirements in FCA § 355.2 apply.

Written Order

Court shall, after allowing district, attorney for respondent and presentment agency opportunity to be heard, grant petition unless court determines, and states in written order, reasons why secure or limited secure placement is necessary and consistent with needs and best interests of respondent and need for protection of community.

EXPIRATION DATE OF NEW ORDER (FCA § 355.1)

Any new order shall not expire later than expiration date of original order.

In re Lorenzo A., 59 A.D.3d 441 (2d Dept. 2009).

CHAPTER TWO

APPEALS

By: Gary Solomon

Table of Contents

- I. Governing Statutes
- II. Appeals To Appellate Division As Of Right
 - A. Respondent
 - B. Presentment Agency
- III. Appeals To Appellate Division By Permission
 - A. Respondent
 - B. Presentment Agency
- IV. Appeals By Other Aggrieved Parties
- V. Procedure
 - A. Notice Of Appeal
 - B. Time Of Appeal
 - 1. Taking Appeal
 - 2. Perfecting An Appeal
 - C. Assignment Of Counsel
 - D. Fees
 - E. Preferences
 - F. Stays
 - G. Applicability Of CPLR
- VI. Duties Of Trial Counsel
 - A. Consultation With Client Regarding Appeal
 - B. Action Required On Behalf Of Client Who Wishes To Appeal
 - C. Reconstruction Of Record
- VII. Dismissal Of Appeal
 - A. Mootness
 - B. Abandonment By Absconding Appellant

- C. Presumption In Appeals From Bench Trials
- VIII. Right To Speedy Appeal

I. Governing Statutes

Appeals in juvenile delinquency proceedings are governed in the first instance by FCA §§ 365.1 - 365.3. As to all matters not covered by those sections, FCA Article Eleven, and, where appropriate, the CPLR, govern. FCA §1118; *Matter of Jose R.*, 83 N.Y.2d 388, 610 N.Y.S.2d 937 (1994) (court rejects juvenile's argument that FCA Article Three does not provide for presentment agency appeal to Court of Appeals, and concludes that the Legislature intended to leave operative earlier court decisions applying CPLR Article 56).

II. Appeals To Appellate Division As Of Right

A. Respondent

The respondent can take an appeal to the Appellate Division as of right from any order of disposition. FCA §§ 365.1(1). See *Matter of Yamoussa M.*, 220 A.D.2d 138, 646 N.Y.S.2d 319 (1st Dept. 1996) (failure to appeal from original dispositional order precluded respondent from challenging original order when appealing from new disposition ordered after he violated probation).

B. Presentment Agency

The presentment agency can take an appeal as of right from:

- an order dismissing the petition *prior to* the commencement of a fact-finding hearing. FCA §§ 365.1(2)(a). See *Matter of Leon H.*, 83 N.Y.2d 834, 601 N.Y.S.2d 158 (1994) (presentment agency could not appeal post-fact-finding dismissal on speedy disposition grounds); *Matter of Devon H.*, 225 A.D.2d 135, 650 N.Y.S.2d 120 (1st Dept. 1996) (presentment agency could appeal dismissal after commencement of fact-finding hearing where family court re-opened suppression hearing during trial and granted suppression); *Matter of Lee M.*, 126 A.D.2d 645, 511 N.Y.S.2d 79 (2d Dept. 1987) (presentment agency could appeal from order dismissing certain counts of the petition since the separate counts could have been presented in separate petitions).

- an order of disposition, but only upon the ground that such order was invalid as a matter of law. FCA §365.1(2)(b). Cf. CPL §440.40 (People may appeal from sentence which is invalid as a matter of law).

Note: The family court has inherent power to correct a mistake or error in a dispositional order which is clerical in nature or results from the court's inadvertent misstatement. See *People v. Wright*, 56 N.Y.2d 613, 450 N.Y.S.2d 473 (1982).

- an order, entered before the commencement of the fact-finding hearing, suppressing evidence pursuant to FCA §330.2, provided that the presentment agency files a statement pursuant to FCA §330.2(9) (*i.e.*, statement alleging that deprivation of use of evidence has rendered available proof insufficient as a matter of law or so weak in its entirety that any reasonable possibility of proving allegations has been effectively destroyed). FCA §365.1(2)(c). See *Matter of Devon H.*, 225 A.D.2d 135. The taking of such an appeal constitutes a bar to prosecution of the case, at least in the absence of extraordinary circumstances, unless and until the order of suppression is overturned. FCA §330.2(10); *People v. McIntosh*, 80 N.Y.2d 87, 587 N.Y.S.2d 568 (1992) (since People withdrew appeal after filing required statement, prosecution was not barred); *Matter of Forte v. Supreme Court of the State of New York*, 48 N.Y.2d 179, 422 N.Y.S.2d 26 (1979) (to allow People to seek superseding indictment would frustrate Legislature's purpose of discouraging frivolous appeals); *Matter of Yarter v. Winn*, 220 A.D.2d 1, 645 N.Y.S.2d 333 (3rd Dept. 1996), *appeal dism'd* 89 N.Y.2d 862, 653 N.Y.S.2d 284 (newly discovered evidence constituted exceptional circumstance permitting re-prosecution).

III. Appeals To Appellate Division By Permission

A. Respondent

The respondent can take an appeal in the discretion of the appropriate Appellate Division from any order. FCA §365.2.

B. Presentment Agency

Article Three contains no provision granting the presentment agency the right to take an appeal by permission. Although FCA §1112(a) provides that an appeal from any order under the Family Court Act may be appealed in the discretion of the Appellate Division, Article Three's appeals provisions supersede their counterparts in FCA Article

Eleven, and, therefore, the presentment agency cannot take an appeal by permission. See *Matter of Leon H.*, 83 N.Y.2d 834. On the other hand, if the presentment agency does appeal from a dispositional order, the appeal brings up for review any nonfinal order which necessarily affects the final judgment. CPLR §5501(a)(1). See *Matter of Dora P.*, 68 A.D.2d 719, 418 N.Y.S.2d 597 (1st Dept. 1979).

IV. Appeals By Other Aggrieved Parties

The Fourth Department held in *Matter of Lavar C.*, 185 A.D.2d 36, 592 N.Y.S.2d 535 (4th Dept. 1992) that FCA §365.1 was designed to limit the presentment agency's ability to appeal, but not that of another aggrieved party to an order who would otherwise have standing to appeal pursuant to CPLR §5511. Since the New York State Division for Youth was a party to the dispositional order, which directed DFY to place the respondent at one of three specified sites, DFY had standing to appeal in *Lavar C.*

V. Procedure

A. Notice Of Appeal

An appeal is taken by filing a written notice of appeal, in duplicate, with the clerk of the family court in which the order was entered. The clerk must endorse upon the notices the filing date and transmit the duplicate notice to the clerk of the appropriate Appellate Division. FCA §365.3(1), (4).

The respondent must also serve copy of notice upon presentment agency. FCA §365.3(2). The Presentment Agency must also serve respondent and the attorney who last appeared for respondent. FCA §365.3(3). *But see Matter of Delila M.*, 238 A.D.2d 342, 656 N.Y.S.2d 306 (2d Dept. 1997) (citing CPLR §5520(a), court holds that failure to serve respondent was not fatal defect); *Matter of Steven S.*, 234 A.D.2d 13, 650 N.Y.S.2d 156 (1st Dept. 1996) (same as *Delila M.*); CPLR §5520(a) (if appellant serves timely notice of appeal but neglects through mistake or excusable neglect to do another required act within time limit, court may grant extension of time to cure omission).

B. Time Of Appeal

1. Taking Appeal

An appeal must be "taken" - that is, the notice of appeal must be filed - by the

earliest of the following dates: no later than thirty days after the adverse party serves the order from which the appeal is taken, **or** thirty days from receipt of the order by the appellant in court, **or** thirty-five days from the mailing of the order to the appellant by the clerk of court. FCA § 1113.

Service of an order by the court does *not* start the clock running unless two conditions are met: the order must contain the following statement: “Pursuant to section 1113 of the family court act, an appeal must be taken within thirty days of receipt of the order by appellant in court, thirty-five days from the mailing of the order to the appellant by the clerk of the court, or thirty days after service by a party or the child’s attorney upon the appellant, whichever is earliest,” **and** there is an official notation in the court record as to the date and manner of service. FCA §1113.

In New York, the statutory deadline for filing a notice of appeal in a civil proceeding (CPLR §5513[a]) has been treated as a “jurisdictional” matter. Thus, while there are statutory rules that extend the filing deadline in specific instances (*see, e.g.*, CPLR §1022), an untimely filing may not otherwise be excused. *Hecht v. City of New York*, 60 N.Y.2d 57, 467 N.Y.S.2d 187 (1983); *Jones Sledzik Garneau & Nardone v. Schloss*, 37 A.D.3d 417, 829 N.Y.S.2d 230 (2d Dept. 2007) (time period for filing notice of appeal is jurisdictional and nonwaivable).

In criminal proceedings, a 30-day deadline applies as well. CPL §460.10. Prior to enactment of the Criminal Procedure Law, the general rule had been that, regardless of the circumstances and equities, courts had no power to extend the time for taking an appeal. *People v. Dimmie*, 15 N.Y.2d 578, 255 N.Y.S.2d 95 (1964); *People v. Stottlemeyer*, 9 A.D.2d 1022, 194 N.Y.S.2d 101 (4th Dept. 1959). Now, however, CPL §460.30 contains an exception to the rule that is broader than any found in the CPLR. Under §460.30(1), a defendant may make a motion in an intermediate appellate court or in the Court of Appeals seeking an extension of time for filing a notice of appeal or application for leave to appeal. The motion must be made with due diligence after the time for the taking of the appeal has expired, and in any case not more than one year thereafter. The court may grant an extension to a date not more than thirty days after determination of the motion, “upon the ground that the failure to so file or make application in timely fashion resulted from (a) improper conduct of a public servant or

improper conduct, death or disability of the defendant's attorney, or (b) inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken, prior to the expiration of the time within which to take an appeal due to defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or defendant." In *People v. Stevenson*, 176 A.D.2d 516, 574 N.Y.S.2d 707 (1st Dept. 1991), *lv denied* 79 N.Y.2d 832, the court, citing "unique circumstances," excused the untimely filing of a notice of appeal even though the defendant had made no motion pursuant to §460.30.

Arguably, the broad exception contained in CPL §460.30, which bears on the fundamental right to appeal, is applicable in juvenile delinquency proceedings on constitutional grounds. See also *People v. Syville*, 15 N.Y.3d 391 (2010) (criminal defendant must be allowed to seek relief by asserting that right to appeal was extinguished due solely to unconstitutionally deficient performance of counsel in failing to file timely notice of appeal).

2. Perfecting An Appeal

According to FCA §1121(7), an appeal must be perfected within 60 days of receipt of the transcript or within any different time prescribed by the Appellate Division. See 22 NYCRR 1250.9(a) ("Except where the court has directed that an appeal be perfected by a particular time, an appellant shall file [required documents] with the clerk within six months of the date of the notice of appeal or order granting leave to appeal") and 1250.9(b) (provides for extensions of up to 60 and 30 days); see also 22 NYCRR 670.3(b) (provides for scheduling orders and active management in Second Department).

C. Assignment Of Counsel

The appointment of the child's attorney pursuant to FCA §249 shall continue without further court order or appointment where the attorney or the presentment agency files a notice of appeal. The attorney may be relieved upon application to the Appellate Division, and another attorney appointed. FCA §1120(b).

D. Fees

The fees required by CPLR §8002 are not required where the appellant or counsel certifies that the appellant has been assigned counsel pursuant to FCA §249 or

is represented by a legal aid society or federally-funded legal services program for indigents. FCA §1118.

E. Preferences

Appeals from orders in Article Three proceedings shall be given preference and may be brought on for argument on such terms and conditions as the Appellate Division may direct. CPLR 5521.

F. Stays

The timely filing of a notice of appeal does not stay the order from which the appeal is taken. FCA §1114(a). A justice of the Appellate Division may stay execution of the order on such conditions, if any, as may be appropriate. FCA §1114(b).

G. Applicability Of CPLR

The provisions of the civil practice law and rules apply where appropriate. FCA §1118.

VI. Duties Of Trial Counsel

A. Consultation With Client Regarding Appeal

Upon the filing of a dispositional order:

- counsel must advise the client in writing of the right to appeal to the appropriate Appellate Division, the time limitations involved, the manner of instituting an appeal and obtaining a transcript of the testimony, and the right to apply for leave to appeal as a poor person if the client is unable to pay the cost of an appeal. FCA §1121(2).

- counsel must explain the procedures for instituting an appeal, the possible reasons upon which an appeal may be based, and the nature and possible consequences of the appellate process. FCA §1121(2). Included in this discussion should be the risks in making an argument that could result in a new trial and a more restrictive dispositional order. *See People v. Esmerlin Meran*,

(1st Dept. 2016) (conviction affirmed where defendant asked court to affirm if error did not result in dismissal).

- counsel must ascertain whether the client wishes to appeal. FCA §1121(3).

B. Action Required On Behalf Of Client Who Wishes To Appeal

- counsel must serve and file the notice of appeal and, when necessary, apply for leave to appeal as a poor person. FCA §1121(3).

- when trial counsel does not intend to represent the client on appeal, counsel must, when appropriate, apply for assignment of appellate counsel for the client. FCA §1121(5).

- so that the client will be presumed eligible for poor person relief and for assignment of counsel on appeal without further motion in the appellate division, counsel also must file a certification of continued indigency and continued eligibility for appointment of counsel pursuant to FCA §1118, and such other documents as may be required by the appropriate appellate division. FCA §1121(3),(5).

- trial (now appellate) counsel must, no later than ten days after filing the notice of appeal, request preparation of the transcript of the proceedings, FCA §1121(6)(a), and counsel assigned or appointed for purposes of appeal must request the transcripts no later than ten days after receipt of notice of appointment. FCA §1121(6)(b).

- the transcript shall be completed within thirty days of receipt of the request, and, if the transcript is not completed within that time, the court reporter or the director of the transcription service must notify the administrative judge of the appropriate judicial district, who shall establish procedures to effectuate the timely preparation of the transcript, and the appellate division may establish additional procedures to effectuate the timely preparation of transcripts. FCA §1121(7).

C. Reconstruction Of Record

After *People v. Parris*, 4 N.Y.3d 41, 790 N.Y.S.2d 421 (2004), it is clear that certain duties arise when counsel learns that transcripts have been lost or for some other reason cannot be obtained. Having held in the past that a loss of reporter's minutes is rarely sufficient reason in itself for reversing a conviction, the Court of Appeals concluded that, "where a significant portion of the minutes has been lost: (1) a reconstruction hearing should normally be available for a defendant appealing his conviction after trial, if the defendant has acted with reasonable diligence to mitigate the

harm done by the mishap; but (2) a defendant who has pleaded guilty is entitled to a reconstruction hearing only where he can identify a ground for appeal that is based on something that occurred during the untranscribed proceeding.” The court noted that, under the reasonable diligence requirement, a defendant should be diligent in maximizing the possibility that a reconstruction hearing can accomplish its purpose. At a minimum, the defendant should move for a reconstruction hearing promptly after learning that the minutes have been lost, and pursue promptly other available means of reconstruction, such as contacting the defendant’s trial counsel, the prosecutor and the judge to jog their recollections and ask that they preserve whatever notes or other records of the proceedings might exist. “A defendant who does not proceed diligently is open to the suspicion that he thinks the likelihood of really finding significant appellate issues remote - and would prefer failure in reconstructing the proceedings to success, hoping to claim prejudice when reconstruction proves impossible.”

VII. Dismissal Of Appeal

A. Mootness

A challenge on appeal to the initial disposition ordered by the family court will be rendered moot when the period covered by the dispositional order has elapsed before the appeal can be decided. *Matter of Shamasia M.*, 4 A.D.3d 359, 771 N.Y.S.2d 541 (2d Dept. 2004) (appeal from dispositional order moot where initial placement period had expired and order extending placement had been entered); *Matter of Leonardo Q.*, 171 A.D.2d 563, 567 N.Y.S.2d 446 (1st Dept. 1991) (challenge to restrictive placement was moot where appellant had already completed the two six-month periods in secure and residential placement which was directed in the order). However, the appeal from the adjudication of delinquency, based on a challenge to the underlying fact-finding (or, it can be argued, based on a claim that the matter should have been dismissed at disposition), is not moot in light of the possible collateral consequences resulting from a delinquency adjudication (e.g., the use of delinquency records in criminal sentencing proceedings pursuant to FCA §381.2[2]). *Matter of Daniel H.*, 236 A.D.2d 874, 653 N.Y.S.2d 756 (4th Dept. 1997); see also *Matter of Brittny MM.*, 51 A.D.3d 1303, 858 N.Y.S.2d 815 (3rd Dept. 2008), *lv denied*, 11 N.Y.3d 713 (although respondent's PINS

placement ended after appeal was filed, appeal not moot because finding that respondent violated probation, and resulting order of placement, may have collateral legal consequences).

B. Abandonment By Absconding Appellant

An appeal brought by a child who has absconded from placement is subject to dismissal as abandoned since the appellant is not available to obey the mandate of the court. This is referred to as the “fugitive disentitlement” doctrine. *Matter of Magdalene N.*, 180 A.D.2d 799, 580 N.Y.S.2d 435 (2d Dept. 1992); *see also People v. Del Rio*, 14 N.Y.2d 165, 250 N.Y.S.2d 257 (1964); *People v. Serrano*, 45 Misc.3d 69 (App. Term, 2d Dept., 2014) (appeal challenging plea dismissed where defendant had been deported, and, although defendant had served sentence, crime was serious case would be remitted if defendant prevailed); *People v. Reyes*, 292 A.D.2d 271, 738 N.Y.S.2d 850 (1st Dept. 2002), lv denied 98 N.Y.2d 701, 747 N.Y.S.2d 420 (2002) (appeal dismissed where defendant had been deported and was not available to obey mandate of court in event of affirmance; regardless of whether defendant was “voluntarily” or “involuntarily” deported, he has become unavailable as a consequence of remaining in the United States for 4 years on a 3-month visa); *but see People v. Ventura*, 17 N.Y.3d 675 (2011) (Appellate Division abused discretion in dismissing appeals after defendant involuntarily deported; dismissals have been predicated on rationale that courts should not aid in deliberate evasion of justice through continued consideration of appeals, but in these cases defendants were involuntarily removed from country, and they have greater need to avail themselves of appellate process in light of tremendous ramifications of deportation; court noted that disposition of the appellate issues would result in either affirmance or outright dismissal, and so continued legal participation of defendants would not be required); *People v. Taveras*, 10 N.Y.3d 227, 855 N.Y.S.2d 417 (2008) (doctrine did not apply where defendants were tried and sentenced in absentia, but were apprehended and returned to court’s jurisdiction before filing appellate brief; whether appeals should be permitted to proceed in such circumstances is subject to broad discretion of Appellate Division, which may consider whether defendant’s flight caused significant interference with operation of appellate process; whether defendant’s absence so delayed appeal that the People would be prejudiced in locating witnesses

and presenting evidence at retrial; length of defendant's absence; whether defendant voluntarily surrendered; importance and novelty of issues raised; and merits of appeal).

C. Presumption In Appeals From Bench Trials

Making it extremely difficult to win a “fair trial” argument upon appeal from a delinquency adjudication is the presumption which appellate courts invoke in favor of the judge at a bench trial. That is, whenever the accused is arguing not that the judge *admitted* evidence illegally - *e.g.*, in a suppression ruling - but rather that the judge’s ability to provide a fair trial was fatally compromised because the judge *heard* unduly prejudicial evidence - *e.g.*, because of a *Sandoval* ruling, or a ruling denying a mistrial motion provoked by a prosecutor’s or a witness’ improper reference to inadmissible evidence - the appellate courts ordinarily presume that the judge did not give the evidence any, or any undue, weight. See *People v. Moreno*, 70 N.Y.2d 403, 521 N.Y.S.2d 663 (1987).

VIII. Right To Speedy Appeal

In *Matter of Jermaine J.*, 6 A.D.3d 87, 775 N.Y.S.2d 287 (1st Dept. 2004), *lv denied* 3 N.Y.3d 606, the First Department rejected an argument that the respondent’s due process rights were violated by delays in the appellate process. The court noted that “[t]he factors considered on a speedy appeal claim are similar to those of a constitutional speedy trial claim, and include the extent of the delay, the reason for the delay, the nature of the underlying charge, and whether or not there is any indication that the defense has been impaired by reason of the delay (citations omitted).” However, “[w]hile the delay. . . was unusually long,” respondent did not establish prejudice based upon a deprivation of his liberty given the negative reports about him and the fact that he threatened another person with a knife.