CONTINUING LEGAL EDUCATION

ALBANY LAW SCHOOL

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2024 CAASNY Winter Meeting

and

2024 Juvenile Delinquency Meeting

December 9, 2024

80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494
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CAASNY

2024 CAASNY Winter Meeting

December 9, 2024
9:00am – 1:00pm

The Saratoga Hilton, 534 Broadway, Saratoga, NY

8:30am – 8:55am	**Registration**
8:55am – 9:00am	**Welcoming Remarks** Clinton Johnson, Esq. Ulster County
9:00am – 9:50am (1 Professional Practice CLE Credit)	**Cybersecurity for County Attorneys: Legal Implications and Best Practices** Tina Wayland-Smith, Esq., Madison County Attorney Paul Lutwak, Director of IT, Madison County
9:50am – 10:00am	**Break**
10:00am – 10:50am (1 DEI CLE Credit)	**Justice and Gender: The Convergence of Dead-Naming, Mis-Gendering, and the Law and Impact on Inmate Belonging, Safety & Security** Jermaine Cruz, Assistant Dean for Diversity & Inclusion Albany Law School
11:50am – 11:00am	**Break**
11:00am – 11:50am (1 Professional Practice CLE Credit)	**Legislative Update** Stephen J. Acquario, Esq., Executive Director New York State Association of Counties Patrick R. Cummings, Esq., Counsel New York State Association of Counties
11:50am – 12:00pm	**Break**
12:00pm – 12:50pm (1 Professional Practice CLE Credit)	**Decisions of Interest to County Attorneys from the U.S. Supreme Court, The U.S. Court of Appeals for the Second Circuit, and the New York State Court of Appeals** Brian D. Ginsberg, Esq., Partner H. Todd Bullard, Esq., Member Harris Beach PLLC
12:50pm – 1:55pm	**Lunch**

CAASNY

2024 Juvenile Delinquency Meeting

December 9, 2024
2:00pm – 5:00pm

The Saratoga Hilton, 534 Broadway, Saratoga Springs, NY

1:30pm – 1:55pm	**Registration**
1:55pm – 2:00pm	**Welcoming Remarks** Clinton Johnson, Esq. Ulster County
2:00pm – 2:50pm (1 Professional Practice CLE Credit)	**Youth Part Removals, including AO's and JO's** David Meffert Orange County Attorney's Office Faith Lovell Suffolk County Department of Law
2:50pm – 3:00pm	**Break**
3:00pm – 3:50pm (1 Professional Practice CLE Credit)	**Prosecuting a Juvenile Delinquency Rape Case under Recent Amendments to PL 130** Linda Fakhoury, Esq. Victor A. Civitillo, Esq. Dutchess County Attorney's Office
3:50pm – 4:00pm	**Break**
4:00pm – 4:50pm (1 Professional Practice CLE Credit)	**Secure Detention Beds and Mental Health Services, or Lack Thereof** Claire Pulver, Esq. Robert Fisher, Esq. Ulster County Attorney's Office

2024 CAASNY Winter and JD Meeting

December 9, 2024

Speaker Biographies

STEPHEN J. ACQUARIO, ESQ., is Executive Director and General Counsel of the New York State Association of Counties (NYSAC). In this capacity, Mr. Acquario presents a single voice for the county governments of New York State. He is responsible for the overall direction of the association, and oversees the association's agendas to ensure a cohesive and coherent legal and legislative strategy on behalf of New York State's 62 county governments. Mr. Acquario graduated *magna cum laude* from Albany Law School. He holds a B.A. in Industrial and Labor Relations from the State University of New York at Potsdam. In addition, he earned a graduate certificate in Industrial and Labor Relations from Cornell University. He is admitted to practice law in New York.

H. TODD BULLARD, ESQ. represents counties, cities, legislatures, school districts, local development corporations and public authorities in litigation defense both in federal as well as state courts on a range of issues such as Article 78 proceedings, constitutional challenges and municipal agreements. Mr. Bullard also provides outside general counsel services related to operational matters. In addition, he advises organizations on commercial contracts and procurements related to public and private projects.

As a result of the recent US Supreme Court decision rendered in Tyler v. Hennepin County, 598 U.S. 631 (2023), plaintiffs, as former owners of foreclosed real property, filed legal action asserting constitutional challenges to state real property tax law seeking the return of surplus funds and other damages resulting from municipal governments' in rem tax sales. The number of claims is increasing statewide.
Mr. Bullard is the lead counsel in defending these actions both non-class actions and class actions. The firm has been retained by twenty (20) Counties to defend against these claims.

In addition, Mr. Bullard provides practical financial and compliance counsel to municipalities such as cities and local governments, and housing authorities and to contractors conducting business with state agencies and local municipalities. He has served as issuers counsel to one of the largest public housing authorities outside of New York City in Rental Assistance Demonstration ("RAD") deals.

VICTOR A. CIVITILLO, ESQ. is a Senior Assistant County Attorney in the Dutchess County Attorney's Office. He has been prosecuting Juvenile Delinquency (JD) and Persons in Need of Supervision (PINS) cases since starting at the County Attorney's Office in 1992 and represents the County in appeals in such cases. He reviews all Dutchess DSS contracts and handles certain other legal matters. Mr. Civitillo conducts training for police officers in Dutchess County, including school resource officers. He has been teaching classes for the State of New York Police Juvenile Officers' Association for at least the twenty-five years. He conducts trainings for police officers on the "Raise the

Age" law in various locations in New York State. He has taught continuing legal education for the County Attorney's Association of the State of New York, the Dutchess County Bar Association, the Albany County Bar Association, the New York State Office of Court Administration, and the New York State Prosecutor's Training Institute. He is the author of the original PINS chapter in the LexisNexis Answer Guide of New York Family Court Proceedings. He is a graduate of Albany Law School and the State University of New York at Albany.

DEAN JERMAINE CRUZ joined Albany Law School in 2021 as the Assistant Dean for Diversity and Inclusion. Previously, Dean Cruz has served as the Director of Admissions at University of the Pacific McGeorge School of Law in Sacramento, California. Before that he was Assistant Director of Admissions of The Catholic University of America's Columbus School of Law, in Washington, DC, where he directed the law school's admissions-related diversity initiatives. Before working in higher education, he was in private practice at Hannon Law Group, LLP, in Washington, D.C., where he focused primarily on complex commercial litigation and employment law. While an evening law student, he worked at Georgetown University Law Center, where he managed the administration and recruitment efforts of the school's clinical legal education program. He also served as a law clerk with Bread for the City, where he worked on domestic relations cases, and as a student-attorney in Columbus' Families and the Law Clinic. Prior to his work in law, Dean Cruz worked in communications as an alumnus of the National Journalism Center in Washington, D.C. He has worked with Black Entertainment Television, the New York State Senate, and at Bread for the World, Inc., where he focused on international anti-hunger campaigns with a strong focus on Africa and Latin America. In addition to his law degree, Dean Cruz holds a Bachelor of Arts in Journalism from Ithaca College and a Master of Arts in African & African-American Studies from the State University of New York at Albany. He is a 2005 graduate of the Columbus School of Law.

PATRICK R. CUMMINGS, ESQ., is Counsel for the New York State Association of Counties (NYSAC). In this capacity, he works with the New York State legislature regarding pending legislation in order to help county governments run more efficiently. Mr. Cummings also provides support, when requested, to county attorneys regarding laws, policies, and cases that impact counties. Prior to joining NYSAC in 2011, he was an Assistant County Attorney for Schenectady County. He is admitted to practice law in New York.

LINDA D. FAKHOURY, ESQ. is a Senior Assistant County Attorney for Dutchess County and has been with them since 2005. Her primary responsibilities include prosecution of juvenile delinquency and persons in need of supervision (P.I.N.S) cases, as well as handling contracts, municipal issues, and a variety of other legal matters for the County. Ms. Fakhoury has done numerous trainings across the state involving juvenile delinquency, PINS, and Raise the Age matters, for police agencies, police academies, schools, and CAASNY. Ms. Fakhoury continues to be a go to resource for information under the juvenile justice system. She played a vital role in creating the Juvenile Fire-Setters Intervention Response and Education Program (JFIRE) for Dutchess County, and continues to serve on the Steering Committee, the Full Committee, and is trained as an

Intervention Specialist through the National Fire Academy to address juvenile fire-setting behaviors in the County. Ms. Fakhoury has also been an Adjunct Instructor at Marist College since 2011, teaching Criminal Law as part of the Paralegal Certification program. She is an active member of her Community and is an active member of the Junior League of Poughkeepsie. She graduated from Marist College in 2001, with her B.S. in Criminal Justice, and her Paralegal Certification. She graduated from Western New England University School of Law with her J.D. in 2004. In 2017, Ms. Fakhoury was one of the recipients of the Dutchess County Chamber of Commerce 40 under 40 Movers and Shakers Award for her commitment to the Hudson Valley.

ROBERT J. FISHER, ESQ. has been practicing law since 1996. He is a graduate of Nova University School of Law in Florida. Mr. Fisher is currently an Assistant County Attorney in Ulster County, and has a private practice in general law. He has also been employed as an Assistant District Attorney, Assistant Public Defender, and Staff Attorney at the Department of Social Services, all in Ulster County. He is a member of the State of New York Appellate Division Third Department Committee on Character and Fitness, and is a past Secretary and Board member of the Ulster County Bar Association. He is admitted to practice law in New York.

BRIAN D. GINSBERG, ESQ. is a partner at Harris Beach PLLC, resident in the firm's White Plains office, and chair of the firm's Appellate Practice Group. He leads appeals in courts across New York and across the country, representing businesses, individuals, governments, and other parties in cases spanning a broad spectrum of industries and legal issues. Before joining Harris Beach, Mr. Ginsberg served in the New York State Solicitor General's Office as Assistant New York State Solicitor General, representing the state in some of its most important appeals, including appeals in the U.S. Supreme Court. Mr. Ginsberg has litigated hundreds of appeals and critical motions over the course of his career and has personally presented more than 100 appellate oral arguments, including 23 in the U.S. Court of Appeals for the Second Circuit and eight in the New York State Court of Appeals. Earlier in his career, he served as a law clerk for Chief Judge Michael A. Chagares of the U.S. Court of Appeals for the Third Circuit. He is an honors graduate of Columbia Law School and Yale University.

FAITH LOVELL, ESQ. obtained a Bachelor of Arts degree from The George Washington University in 2003. After college, she attended The St. John's University School of Law, graduating with a Juris Doctorate in 2006. Ms. Lovell began her legal career working as an Assistant Corporation Counsel for the New York City Law Department's Family Court Division. While there, she was a member of both the Major Case and Special Victims Unit. Ms. Lovell was an Assistant Borough Chief in both the Queens and Brooklyn Borough Offices before ascending to the title of Director of Raise the Age Strategy and Planning. In that role, Ms. Lovell played a prominent role in the implementation of the Raise the Age legislation for the city of New York and created and managed a citywide unit of cross-designated attorneys working in collaboration with the District Attorney's offices in the five boroughs to handle adolescent and juvenile offender removal matters. Ms. Lovell joined Suffolk County in January of this year where she is currently the Bureau

Chief for the Family Court and Social Services Bureau of the Suffolk County Attorney's Office.

PAUL LUTWAK has spent over 30 years in information technology, starting as a systems analyst at Cornell University. Before moving to county government, he spent 14 years in K-12 IT, as Director of Instructional and Informational Technology for a public school district. After several years as the Director of Technology for Schuyler County in upstate New York, he took the Director of Technology position in Madison County. He currently oversees IT operations, planning, and security for 26 diverse departments in that county's government. In addition, he has implemented shared IT services for many of the towns and villages in Madison County to help them economize while maximizing efficiency. He serves as president of New York State Local Government Information Technology Directors Association and is Chairman of the New York State Association of Counties' IT Task Force.

DAVID S. MEFFERT, ESQ. is a Senior Assistant County Attorney serving in Family Court Unit of the Orange County Department of Law, where he handles J.D. and PINS cases. He received his B.S. from the University of Texas at Austin, his J.D. from St. Mary's University School of Law in San Antonio, Texas, and was admitted to the Texas bar in 1995. Mr. Meffert was a solo practitioner in San Antonio, practicing in the areas of adult and juvenile criminal defense, divorce, custody and child support. In 1999 Mr. Meffert became a prosecutor for the Office of the City Attorney for the City of San Antonio, initially in their domestic violence unit, and eventually taking over the prosecution of environmental and quality of life cases for the city. In 2001 he and his wife relocated to Orange County. Mr. Meffert joined the Orange County District Attorney's Office as an Assistant District Attorney where he worked in their Local Court Unit, Grand Jury Unit and Investigations Unit, where he handled various white-collar crimes. In 2006 Mr. Meffert moved to the Orange County Department of Law. In addition to his duties with the Department of Law, has also serves as the Special District Attorney for Orange County, handling cases that the District Attorney's Office was unable to prosecute due to conflicts. Mr. Meffert is certified by the DCJS Municipal Police Training Council as a General Topics Instructor and has spoken on various topics relating to juvenile delinquency and PINS law at the Orange County Police Academy and various police departments within the County.

CLAIRE L. PULVER, ESQ. is an Assistant County Attorney in Ulster County, New York. Her primary area of practice is in Family Court, where she handles Juvenile Delinquency (JD) and Persons in Need of Supervision (PINS) proceedings. In this capacity, she has handled a variety of cases and has worked closely with law enforcement and local school districts to address the behavioral needs of Respondents. She also assists in litigating Extreme Risk Protection Order (Red Flag Law) matters before Ulster County Supreme Court on behalf of the Ulster County Sheriff's Office. Ms. Pulver earned her B.A. in Italian and History at Mount Holyoke College in South Hadley, Massachusetts, and her J.D. at Albany Law School. She is admitted to practice law in New York.

TINA M. WAYLAND-SMITH, ESQ. is the Madison County Attorney, a position she has held with distinction after beginning her career in the office as an intern in the summer of 1988. She was appointed Assistant County Attorney in 1990 and has over 30 years of experience in municipal law. In addition to her role with the county, Ms. Wayland-Smith is a member of the law firm Campanie & Wayland-Smith PLLC, where she specializes in matrimonial and family law, as well as litigation. She is actively involved in several professional organizations, including NACO, NYSAC, and CAASNY.

Cybersecurity for County Attorneys: Legal Implications and Best Practices

Tina Wayland-Smith, Esq.
Paul Lutwak

McKinney's Consolidated Laws of New York Annotated
General Business Law (Refs & Annos)
Chapter 20. Of the Consolidated Laws
Article 39-F. Notification of Unauthorized Acquisition of Private Information; Data Security Protections (Refs & Annos)

McKinney's General Business Law § 899-bb

§ 899-bb. Data security protections

Effective: March 21, 2020

Currentness

1. Definitions. (a) "Compliant regulated entity" shall mean any person or business that is subject to, and in compliance with, any of the following data security requirements:

(i) regulations promulgated pursuant to Title V of the federal Gramm-Leach-Bliley **Act** (15 U.S.C. 6801 to 6809), as amended from time to time;

(ii) regulations implementing the Health Insurance Portability and Accountability **Act** of 1996 (45 C.F.R. parts 160 and 164), as amended from time to time, and the Health Information Technology for Economic and Clinical Health **Act**, as amended from time to time;

(iii) part five hundred of title twenty-three of the official compilation of codes, rules and regulations of the state of New York, as amended from time to time; or

(iv) any other data security rules and regulations of, and the statutes administered by, any official department, division, commission or agency of the federal or New York state government as such rules, regulations or statutes are interpreted by such department, division, commission or agency or by the federal or New York state courts.

(b) "Private information" shall have the same meaning as defined in section eight hundred ninety-nine-aa of this article.

(c) "Small business" shall mean any person or business with (i) fewer than fifty employees; (ii) less than three million dollars in gross annual revenue in each of the last three fiscal years; or (iii) less than five million dollars in year-end total assets, calculated in accordance with generally accepted accounting principles.

2. Reasonable security requirement. (a) Any person or business that owns or licenses computerized data which includes private information of a resident of New York shall develop, implement and maintain reasonable safeguards to protect the security, confidentiality and integrity of the private information including, but not limited to, disposal of data.

(b) A person or business shall be deemed to be in compliance with paragraph (a) of this subdivision if it either:

(i) is a compliant regulated entity as defined in subdivision one of this section; or

(ii) implements a data security program that includes the following:

(A) reasonable administrative safeguards such as the following, in which the person or business:

(1) designates one or more employees to coordinate the security program;

(2) identifies reasonably foreseeable internal and external risks;

(3) assesses the sufficiency of safeguards in place to control the identified risks;

(4) trains and manages employees in the security program practices and procedures;

(5) selects service providers capable of maintaining appropriate safeguards, and requires those safeguards by contract; and

(6) adjusts the security program in light of business changes or new circumstances; and

(B) reasonable technical safeguards such as the following, in which the person or business:

(1) assesses risks in network and software design;

(2) assesses risks in information processing, transmission and storage;

(3) detects, prevents and responds to attacks or system failures; and

(4) regularly tests and monitors the effectiveness of key controls, systems and procedures; and

(C) reasonable physical safeguards such as the following, in which the person or business:

(1) assesses risks of information storage and disposal;

(2) detects, prevents and responds to intrusions;

(3) protects against unauthorized access to or use of private information during or after the collection, transportation and destruction or disposal of the information; and

(4) disposes of private information within a reasonable amount of time after it is no longer needed for business purposes by erasing electronic media so that the information cannot be read or reconstructed.

(c) A small business as defined in paragraph (c) of subdivision one of this section complies with subparagraph (ii) of paragraph (b) of subdivision two of this section if the small business's security program contains reasonable administrative, technical and physical safeguards that are appropriate for the size and complexity of the small business, the nature and scope of the small business's activities, and the sensitivity of the personal information the small business collects from or about consumers.

(d) Any person or business that fails to comply with this subdivision shall be deemed to have violated section three hundred forty-nine of this chapter, and the attorney general may bring an action in the name and on behalf of the people of the state of New York to enjoin such violations and to obtain civil penalties under section three hundred fifty-d of this chapter.

(e) Nothing in this section shall create a private right of action.

Credits

(Added L.**2019**, c. 117, § 4, eff. March 21, 2020.)

Editors' Notes

Relevant Additional Resources
Additional Resources listed below contain your search terms.

HISTORICAL AND STATUTORY NOTES

L.2019, c. 117 legislation

L.**2019**, c. 117, § 1, provides:

"Section 1. This **act** shall be known and may be cited as the 'Stop Hacks and Improve Electronic Data Security **Act** (**SHIELD Act**)'."

LAW REVIEW AND JOURNAL COMMENTARIES

Defensible data disposal: Once a risk mitigation strategy, now a compliance requirement. Gail Gottehrer, 91-OCT N.Y. St. B.J. 8 (Oct. **2019**).

RESEARCH REFERENCES

Treatises and Practice Aids

13A New York Practice Employment Law in New York § 6:89 (3d ed.), Safely Disposing of Employee Records (**Shield Act**).

McKinney's General Business Law § 899-bb, NY GEN BUS § 899-bb
Current through L.2024, chapters 1 to 443. Some statute sections may be more current, see credits for details.

End of Document

Report On The 2021-2022 Cyber-Attack On Suffolk County

Suffolk County Legislature's
Special Cyber Intrusion Investigation Committee

September 12, 2024

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Suffolk County Legislature's
Special Cyber Intrusion Investigation Committee

Report On The 2021-2022 Cyber-Attack On Suffolk County[1]

EXECUTIVE SUMMARY

On September 8, 2022, cyber criminals using a ransomware strain known as Blackcat (also known as "ALPHV" or "Noberus," but hereinafter "Blackcat")[2] launched a ransomware attack against Suffolk County's information technology ("IT") system. Forensic reports prepared in the aftermath of the attack indicate that the cyber criminals gained access to Suffolk County's technology infrastructure months prior to the ransomware attack. In the course of the attack, the perpetrators accessed, encrypted, and stole a significant amount of Suffolk County data, including network maps, budgets, credentials, passwords, and other government information. The perpetrators also stole data containing Personally Identifiable Information ("PII")[3] of County residents, employees and retirees, such as Social Security numbers and driver's license numbers, and made that data available on the Dark Web[4]. Non-PII County data, such as contracts with New York State and Suffolk County Court records, were also made available on the Dark Web.

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[1] On December 28, 2023, a report titled "Suffolk County Cyberattack: Final Investigative Report" was issued by a law firm hired by the former County Executive. That report was not produced by this bipartisan committee and it does not reflect the findings of our investigation.

[2] According to the Federal Bureau of Investigation, "Blackcat uses a RaaS [Ransomware as a Service] model featuring developers and affiliates (collectively, the 'Blackcat Ransomware Group') and is among the most active ransomware organizations worldwide. . . . Blackcat attacks usually involve encryption of victim data, which makes that data inaccessible to the victim; theft of victim data; and a ransom demand. If a victim does not pay a ransom, the attackers typically publish the stolen data. . . . Consequently, Blackcat victims have paid hundreds of millions of dollars in ransoms and have lost hundreds of millions more in operational and remediation expenses." Affidavit In Support of Application for Search Warrant, 23-MJ-6595 (SDFL) (Dec. 11, 2023).

[3] The National Institute of Standards and Technology ("NIST") defines PII as "information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual." NIST Special Publication 800-63-3, Digital Identity Guidelines (Jun. 2017), at 50, available at: www.https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-63-3.pdf.

[4] According to the United States Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA"), the Dark Web is a branch of the internet that can only be accessed using a Tor Browser and is often associated with cyber-crime due to the anonymity it provides. See https://www.cisa.gov/sites/default/files/publications/202007231300_Dark_Web_Cybercrime_TLP_White.pdf.

The criminal perpetrators initially demanded a $2.5 million ransom to restore Suffolk County's access to its data, later reducing that demand to $650,000. County officials refused to pay the ransom. Beginning on September 8, 2022, and continuing for well over a year, Suffolk County officials carried out the arduous task of responding to and recovering from the cyber-attack. Testimony from the former Department of Information Technology ("DoIT") Commissioner in October 2023 revealed that Suffolk County has spent more than $16 million on response and remediation efforts.[5] Since that time, estimates of the costs of response and remediation have increased to $25 million.[6]

On October 21, 2022, Suffolk County Legislature Presiding Officer Kevin McCaffrey announced the formation of a bipartisan Special Legislative Committee to investigate the cyber-attack on Suffolk County.[7] Over the last twenty-one months, the Suffolk County Legislature's Special Cyber Intrusion Investigation Committee (the "Special Committee") has retained a Special Counsel,[8] hired forensic and cyber security professionals[9] to provide independent expert review and advice, gathered extensive documentary evidence, and held seven public hearings.[10] The Special Committee and its Special Counsel have conducted more than twenty non-public witness

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[5] Testimony of Commissioner Scott Mastellon before the Special Committee on October 20, 2023, at 92. See also Mark Harrington, Suffolk Cyberattack Anniversary: Many Fixes Made, But Not Everything Is Back, Newsday (September 10, 2023) available at: https://www.newsday.com/long-island/suffolk/suffolk-county-cyberattack-anniversary-aa9bxqte.

[6] See Mark Harrington, Cyberattack Cost Suffolk $25M+, Newsday (July 27, 2024) available at: https://www.newsday.com/long-island/suffolk/suffolk-cyberattack-costs-romaine-bellone-ulul94lm.

[7] See https://www.scnylegislature.us/civicalerts.aspx?aid=2577.

[8] On January 23, 2023, the Special Committee retained Richard P. Donoghue, a partner in the international law firm Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury"), to serve as its Special Counsel. Mr. Donoghue has more than three decades of relevant experience. His background includes 23 years of service in the U.S. government, where he held key positions including the U.S. Justice Department's Principal Associate Deputy Attorney General and the U.S. Attorney for the Eastern District of New York, as well as six years of experience working in a Fortune 500 software company.

[9] In July 2023, the Special Committee retained FTI Consulting to provide forensic review, advice and assistance.

[10] See https://www.scnylegislature.us/1561/Cyber-Intrusion-Investigation---2023.

interviews, reviewed more than 35,000 documents produced primarily by the County Executive's Office, and reviewed reports provided by five different cybersecurity companies.[11]

The Special Committee recognizes that Suffolk County's information technology system is complex and challenging, that cyber-attacks against municipalities and other targets are pervasive, and that no IT team can completely shield their environment from intrusion and exploitation. That said, based on its exhaustive investigation, the Special Committee concludes that the scale, significance, and duration of the damage inflicted on Suffolk County was largely attributable to inadequate planning, preparation, coordination, and training by and of Suffolk County personnel. In sum, the damage sustained by Suffolk County was largely attributable to a failure of leadership.

I. KEY FINDINGS

The Special Committee makes the following key findings:

1. Insufficient coordination between different IT teams within Suffolk County adversely impacted the County's cybersecurity posture and readiness.
2. The absence of a Suffolk County cyber-attack response and recovery plan significantly hindered the County's ability to respond to the September 2022 ransomware attack, increasing both the time it took to resume operations and the overall costs of recovery.

[11] The Special Committee understands that the Suffolk County District Attorney's Office has made a public statement confirming that it is investigating allegations that members of the former County Executive's administration improperly deleted Suffolk County data on the eve of leaving office. It is understood that witnesses who testified as part of the Special Committee's investigation into the cyber-attack may be implicated in the District Attorney's investigation. On June 26, 2024, the Special Committee held a hearing with former Chief Deputy County Executive Lisa Black. During the hearing, Ms. Black was questioned about her knowledge of possible data destruction. On advice of counsel, Ms. Black refused to answer most of those questions. See Testimony of former Chief Deputy County Executive Lisa Black before the Special Committee on June 26, 2024, at 63-64, 74. The Special Committee recognizes that it is possible that relevant evidence was deleted and not provided to this committee. If so, the denial of such evidence may have impacted the conclusions and recommendations of this investigation.

3. The creation of a "pass-through" in Suffolk County's perimeter firewalls for data traffic destined for the Suffolk County Clerk's Office prior to the attack created a significant vulnerability that put the entire County at risk.
4. Prior to the September 2022 ransomware attack, Suffolk County's overall cybersecurity posture was not sufficiently robust or sufficiently resilient to adequately guard against the attack.
5. The continued use of firewalls that had reached end-of-life and, in some instances, end-of-support created significant vulnerabilities that put the County at risk.
6. The lack of a Chief Information Security Officer ("CISO") hindered Suffolk County's ability to prepare for, guard against, and respond to the September 2022 ransomware attack.
7. Insufficient staffing and training adversely impacted Suffolk County's cybersecurity posture.
8. Suffolk County personnel failed to sufficiently heed significant warning signs of an impending cyber-attack in the weeks leading up to the September 8, 2022 ransomware attack.
9. Suffolk County's Department of Information Technology Commissioner failed to report on cybersecurity risks to the Suffolk County Legislature as required by Suffolk County law.
10. Department of Information Technology personnel were aware of Bitcoin mining activities in the Clerk's Office prior to August 2021. However, it is unclear whether Bitcoin mining in the Clerk's Office contributed to the September 2022 ransomware attack.

II. BACKGROUND

A. Segmented Information Technology Infrastructure

As with most municipalities across the United States, Suffolk County's linked but fragmented IT infrastructure system reflects the different authorities and departments that constitute the County government. The different missions, operational needs, and technology

histories of the various departments that make up the County's overall IT environment have contributed to the adoption and deployment of a wide assortment of technology products, techniques, and approaches. Suffolk County currently has more than a dozen different domains that make up the overall County environment. It also has a complex mix of modern and legacy technology systems, several different departmental IT teams, numerous technology vendors, and inconsistent approaches to data storage and cybersecurity. This combination of domains, hardware, software, systems, and personnel has allowed County government to meet the needs and requirements of its residents but, in doing so, it has divided authority and responsibility across different IT teams and left Suffolk County vulnerable to precisely the type of cyber-attack it suffered in 2022.

Over the last three decades, County departments have consistently sought to employ new technologies to enhance their operations. Those efforts required the departments to hire, train and retain personnel with the skills to operate those systems. As a result, there are several independent IT teams within the Suffolk County government. Elected Officials – including the County Executive, County Clerk, Comptroller, District Attorney, Sheriff, and the Legislature – all have their own unique technology needs and their own technology teams, which range from two individuals to well over 100. In addition, in some instances, different departments and agencies that fall under the same Elected Official have their own IT teams. Certain departments and agencies, such as the Police Department, District Attorney's Office, Health Department, Social Services, Board of Elections, and Board of Ethics, hold particularly sensitive information that warrants special handling and security.

In 2006, the Suffolk County Charter was amended to establish DoIT as a stand-alone Department headed by a Commissioner appointed by the County Executive subject to the approval of the County Legislature. The amendment specified that DoIT would be responsible for, among other things, "[m]anagement information systems and services and office systems and services

[and] . . . maintenance of County websites for all County offices, departments, and agencies except for the County Legislature." Suffolk County Charter, Article XX, § C20-2(C)(1) and (2). DoIT was directed by the amended charter to, among other things, "[m]ake recommendations to the County Legislature and County Executive as to measures that should be taken to maintain an adequate flow of information within the County." Suffolk County Charter, Article XX, § C20-3(B). Furthermore, the amended charter empowered DoIT to "require any office, division, department, or agency of County government to provide it with relevant data in reports concerning their operations as they involve the policies of this article." Suffolk County Charter, Article XX, § C20-3(D). Thus, under the County Charter, the DoIT Commissioner has the authority to require IT teams throughout the County to provide information about their operations in order to ensure that DoIT can accomplish its mission.

Suffolk County's DoIT has more than 100 employees, has the broadest responsibilities and visibility of any of the County's IT teams, and is generally tasked with centrally-controlled infrastructure, oversight, and cybersecurity. According to testimony from DoIT employees and other County employees, DoIT maintains three data centers, more than 700 servers, firewalls, a vast array of switches and other hardware, and thousands of PCs. The relationship between DoIT and the various department IT teams has been described as a "hub and spoke" relationship, with DoIT acting as the hub and the various departments IT teams acting as the spokes. Commissioner Scott Mastellon served as the DoIT Commissioner from 2016 through December 2023. Commissioner Mastellon reported to a Deputy County Executive, the Chief Deputy County Executive and, ultimately, to the County Executive. The IT teams outside the County Executive's authority coordinate with, but are not supervised by, the DoIT leadership team. Instead, those teams are supervised by the separate Elected Officials they work for, such as the County Clerk or the Comptroller. In his capacity as DoIT Commissioner, Commissioner Mastellon also served as the Chairman of the County's IT Steering Committee. Most significant technology procurement

decisions in the County must be routed through and approved by the County's IT Steering Committee, even when those procurements are sought by IT teams not supervised by DoIT and are funded by budgets outside the control of the County Executive.

While significantly smaller than the DoIT Team, other IT teams within the County play important roles in the operation and security of the different domains that exist within Suffolk County's overall IT environment. Those teams include the Police/Probation IT Team, the Department of Social Services IT Team, the Clerk/Comptroller IT Team and others. Each of those teams has responsibilities unique to their own domains and areas of operations. Interviews of County employees across these different IT teams and reviews of thousands of emails throughout 2021 and 2022 revealed that the different IT teams regularly interacted, sought guidance and assistance from one another, and generally worked well together. However, interviews and emails also revealed that, on occasion, disagreements clearly existed between the teams, particularly between DoIT leadership and the Clerk/Comptroller IT Team. The Clerk's Office IT Team is comprised of approximately ten members and its responsibilities prior to the cyber-attack included supporting the County Clerk's Office and, beginning in 2019, the Comptroller's Office. Disagreements between IT teams arose from, among other things, a desire by DoIT leaders to exercise centralized authority over technology issues and a countervailing desire by other IT teams to maintain responsibility and control over their own domains. The division of authority and responsibility across IT teams is, in part, a reflection of the separation of powers that appropriately and necessarily exists in Suffolk County government.[12] That division, however, creates challenges that must be addressed through the cooperation and coordination of the different IT teams and the Elected Officials who supervise them.

[12] For example, the impropriety of granting DoIT personnel (who are part of the County Executive's Office) unfettered access to data held by the District Attorney's Office when a District Attorney may be investigating officials in the County Executive's Office is obvious.

B. 2018 Legislative Action

Years prior to the 2021-2022 cyber-attack, the Suffolk County Legislature was focused on the County's cyber-preparedness and the risks of a cyber-attack. On March 13, 2018, Suffolk County Resolution No. 94-2018 To Coordinate Cybersecurity Initiatives, introduced by Suffolk County Legislators Sara Anker and Robert Calarco and passed by the legislature, was signed into law by County Executive Steven Bellone. That law noted and required, among other things:

> (1) "the Information Technology Security Coordinator in the Department of Information Technology ('DoIT') has overall responsibility for protecting the information technology infrastructure of the County and providing direction and leadership to all departments through education and awareness programs and the implementation of security policies, standards and processes;"[13]
>
> (2) "the Department of Information Technology and the information technology personnel assigned to other County departments and agencies are hereby authorized, empowered and directed to meet quarterly to discuss issues and technology related to cybersecurity;"
>
> (3) "DoIT and all departmental information technology units shall work collaboratively to develop cybersecurity strategies to mitigate risks and potential breaches;" and
>
> (4) "DoIT and all department information technology units shall also jointly draft an IT Risk Assessment Report, to be provided to the County Executive, Commissioner of County departments and each County

[13] The DoIT Security Coordinator's overall responsibility for the County's cybersecurity defense was understood and acknowledged by the witnesses interviewed. For example, former Chief Deputy County Executive Lisa Black testified: "Q: . . . we agree that DoIT was responsible for the overall security posture of the County? A: Correct." See Testimony of former Chief Deputy County Executive Lisa Black before the Special Committee on June 26, 2024, at 28.

> Legislator by [September][14] 1 of each year outlining the County's current cybersecurity policies and protocols, and noting any changes that have been made in the preceding year, with the first report to be submitted in 2019."

In January 2020, DoIT provided (albeit belatedly) an IT Risk Assessment Report as required by that law. As discussed further below, that report failed to alert the County Executive, Legislature, and County Commissioners to significant issues that called into question the County's cybersecurity posture. DoIT failed to file any subsequent IT Risk Assessment Reports as required by County law.[15] Commissioner Mastellon cited the challenges of dealing with the COVID-19 pandemic as the reason for that failure. When interviewed on October 20, 2023, Commissioner Mastellon could not provide an estimate for when DoIT would be able to provide the next IT Risk Assessment Report to County leaders.

C. Cybersecurity Efforts, Reviews And Reports Preceding the 2021-2022 Cyber-Attack

From 2017 through 2022, several cybersecurity assessments and other steps were undertaken in an effort to strengthen the County's cyber-defenses. While County leaders are to be commended for undertaking such measures, those efforts clearly failed to protect the County from the devastating cyber-attack that commenced in 2021 and became evident in September 2022.

1. The 2017 Microsoft Assessment for Active Directory Security

In 2017, shortly after Commissioner Mastellon was appointed to head DoIT, Microsoft conducted an assessment of the security of the County's Active Directory environment (the "2017 Microsoft Assessment for Active Directory Security"). An Active Directory is a database that

[14] Resolution No. 572-2019, signed into law on June 10, 2019, changed the reporting date from March to September of each year.

[15] In July 2022, Commissioner Mastellon emailed a draft report to the office of Legislator Anker. However, that report was never finalized or provided to other County leaders as required by law.

holds essential information, such as lists of authorized users and access permission, and plays a key role in operating and securing cyber systems. Vulnerabilities in Active Directory security significantly increase the chances of a successful cyber-attack.

Following a detailed analysis, the Microsoft Assessment concluded, "[b]ased on analysis of the technical and operational findings, Microsoft has determined that the Suffolk County Department of ITS's [Department of IT Services, also known as DoIT] Active Directory environment is at critical risk of compromise." 2017 Microsoft Assessment for Active Directory Security at 6. The report noted numerous deficiencies, including:

> **Minimal protection against lateral movement** - once an attacker has access to an end user's machine (via phishing attack, malicious code on a web site, or other means), that attacker then attempts to move from machine to machine, seeking out high-value credentials. Suffolk County Department of IT has minimal protection in place to prevent this type of lateral movement.

2017 Microsoft Assessment for Active Directory Security at 6. The report went on to note that, "[w]hile each of these issues is, on its own, a critical risk, collectively these risks mean that an attacker has multiple avenues to compromise the directory and gain access to every resource in the Suffolk County Department of IT environment." 2017 Microsoft Assessment for Active Directory Security at 7. Finally, Microsoft provided the following overall risk scorecard:

Overall Risk Scorecard

This scorecard illustrates the overall risk severity levels for each major and minor category of analysis. The result is determined using the highest severity issue found per category, per risk.

Consolidated Scorecard	Risk Severity
Active Directory Security Assessment Key Findings	High
[redacted]	High
	High
	High
	Critical
	High
	High
	High
	No Issues
	High

2017 Microsoft Assessment for Active Directory Security at 7.

While the 2017 Microsoft Assessment provided only a limited view into Suffolk County's cyber-security posture and while some, but not all, of the remediation steps set out in the Microsoft Assessment were subsequently implemented, the assessment made DoIT leaders aware that the County had significant cybersecurity deficits that needed to be remedied.

2. The 2019 Cybersecurity Assessment

On February 25, 2019, County Executive Bellone announced that the County would conduct a "cyber checkup" to "determine any existing vulnerabilities to cyber-attacks, as well as what recommendations should be implemented to protect its physical and digital infrastructure."[16] In making the announcement, the County Executive noted that:

> Municipalities operate many crucial cyber control systems that are vital to the function of government, affecting everything from the water we drink, to traffic signals to power plants, and more. This thorough

[16] Available at: https://www.suffolkcountyny.gov/News/ArtMID/583/ArticleID/2601/Suffolk-County-Executive-Bellone-Announces-Cybersecurity-Project-to-Safeguard-Public-Safety-Infrastructure.

> security assessment of our current network will serve as a "cyber checkup," helping us understand our current abilities and identifying areas that could use improvement.

The announcement itself further noted that:

> Cyber threats and attacks are a real, significant threat to governments, organizations and businesses and often happen without warning. Cyber-related attacks have occurred in government organizations across the country. . . . The impact of a data breach on an organization averages $3.86 million, with more serious "mega breaches" costing hundreds of millions of dollars, according to a recent IBM Institute study from 2018.

The announcement indicated that the County had awarded a Cyber Security and Response Strategy Service contract to RedLand Strategies Inc. ("Red Land") to conduct the "cyber checkup" and that Palo Alto Networks ("Palo Alto"), a leading cybersecurity vendor, would be working with Red Land on the project. The 2019 contract required that Red Land (1) conduct a cybersecurity risk assessment, (2) review existing response plans, (3) design and implement a cybersecurity tabletop exercise, and (4) develop recommendations. However, the contract limited the assessment to "the Suffolk County Police Department, Fire, Rescue and Emergency Services and the Department of Information Technology."[17] Limiting the assessment in this way meant that large swaths of the County's IT environment – such as the domains maintained by non-DoIT IT teams – were not included in the assessment. When asked why the assessment was limited in that way, Commissioner Mastellon stated:

> the idea here was to effectively bring forth together a group from a public safety standpoint to mission a tabletop exercise, you know,

[17] Testimony of Commissioner Mastellon before the Special Committee on October 20, 2023, at 16.

> revolving around public safety. Given the fact that, you know, tabletop exercises traditionally have been more aligned with the public safety and the law enforcement side of the house. So, I think the idea here was that that made the most sense, is to bring forth the public safety entities to the table here and to allow us the ability to work with this.[18]

Red Land and Palo Alto completed the cybersecurity risk assessment, conducted a tabletop exercise[19] with County officials, and made various recommendations in an After-Action Report ("AAR") dated September 23, 2019. Those AAR recommendations included:

> (1) **formalizing a cybersecurity response plan**;
>
> (2) creating a cyber annex to the County Emergency Management Plan;
>
> (3) establishing a County-wide technology governance structure;
>
> (4) reviewing the status of all data backups; and
>
> (5) continuing user training and awareness.

AAR at 9 (emphasis added). Furthermore, the report suggested that the County formalize communication policies between departments and incident escalation procedures within and between departments and develop a standard operating procedure for when it would be appropriate to seek outside assistance in a crisis.

In the first recommendation relating to the creation of a cybersecurity response plan, the AAR noted:

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[18] Testimony of Commissioner Mastellon before the Special Committee on October 20, 2023, at 17.

[19] Notably, the tabletop scenario involved hackers accessing devices in multiple departments, locking devices and encrypting files, and demanding a ransom. The exercise involved members of DoIT, Fire Rescue and Emergency Services, Police, Parks and the Department of Public Works. There were also observers from Office of Aging, Civil Service, Labor, Licensing and Consumer Affairs, County Attorney, Economic Development and Planning, Health, Medical Examiner's office, Minority Affairs & Youth, Office for People with Disabilities, Probation, Real Property, Social Services, Soil & Water, Traffic and Parking Violation Agency, and Veterans. None of the witnesses interviewed could explain why the Clerk's Office and other departments were not involved in the tabletop exercise.

> There are currently no formal plans to respond to a cybersecurity incident. Right now, each response by various departments is ad-hoc and based on trusted relationships. DoIT indicated that they would follow the Disaster Recovery Plan, although that document is intended for responding to a physical disaster. During a crisis[,] personnel in every agency and department should know what to do during a cyberattack, including who to communicate with, when to communicate with them, what actions need to be taken to mitigate the damages and what are the recovery options. A unified cybersecurity response plan would allow all agencies and departments to sync their messaging and know what step comes next.

AAR at 9 (emphasis added). Despite this 2019 finding and recommendation, DoIT made no effort to draft a cyber-attack response and recovery plan for the County.

3. The January 2020 DoIT IT Risk Assessment Report

Following the 2019 "cyber checkup," DoIT prepared the January 2020 Information Technology Risk Assessment Report (the "Risk Report") and provided it to the County Executive, County Legislators, District Attorney, County Clerk, County Comptroller, Sheriff, and various Commissioners and other County leaders. That report indicated that it was based on "analysis that was conducted across the entire County technology Environment to allow us to properly evaluate our overall security posture as it relates to technology, governance and resources." Risk Report at 2.

The Risk Report identified various key cybersecurity threats to the County, including: (1) "Cybersecurity attackers targeting governments have increased significantly over the past few years;" and (2) "91% of cybersecurity attacks start with a phishing email whereas the County receives approximately 250 million emails on an annual basis." Risk Report at 4.

The Risk Report concluded, "Overall, the County's security posture is good, but [it] requires improvements to certain areas to minimize vulnerabilities. The County currently has dedicated resources responsible for managing the overall security posture, however, their ability to properly coordinate activities across the County are limited, which has resulted in a disconnected approach." Risk Report at 2. Noting the 2019 Red Land and Palo Alto assessment, the Risk Report stated:

> The most significant conclusion [of the 2019 assessment] was that the County does not have a formal plan to respond to a cybersecurity incident. . . . a unified cybersecurity response plan is recommended for the County. During a crisis, personnel in every agency and department should know what to do during a cyberattack. . . . The Cybersecurity working group [led by DoIT] will develop the unified cybersecurity response plan with input from all departments.

Risk Report at 7-8 (emphasis added). Despite this commitment in 2020, DoIT again failed to draft a cyber breach response and recovery plan.

Additionally, the Risk Report indicated that the 2019 assessment included a "Security Lifecycle Review (SLR) – the SLR focused on various types of network activity across the Suffolk County network perimeter, located at [the three County data centers]. . . . After the review was conducted[,] a summary was provided on the operational risks facing the County and steps were taken to mitigate those risks." Risk Report at 4 (emphasis added).

The Report also noted that "[t]he County's decentralized technology organization structure has resulted in a distributed technology security infrastructure environment" (Risk Report at 4) and that a "holistic, enterprise-wide, cost effective and more efficient security architecture …[with a] 'single pane of glass' [is] needed to properly evaluate and respond to threats" (Report at 7). The Risk Report stated, "we have recently purchased and will be in the process of upgrading our entire

security technology architecture over the course of the next 9-12 months." Risk Report at 7. In an effort to create this "holistic, enterprise-wide," "single pane of glass" cybersecurity approach, DoIT made major investments by purchasing and deploying new firewalls, end-point-detection software, and other security technology from Palo Alto. Those efforts are discussed in more detail below.

Finally, although it did not specifically use the term Chief Information Security Officer (CISO), the Risk Report recommended the hiring of a "strategic leader [who] is more focused on policy, strategy and collaboration than [ ] day-to-day operations [as the County's DoIT Security Coordinator is] [and can provide] additional dedicated leadership in support of cybersecurity." Risk Report at 5. Although the Risk Report indicated that DoIT was "pursuing additional staff from candidates outside the County to support this executive leadership role" (Risk Report at 5), no such executive leader was hired until May 1, 2023, almost nine months after the ransomware attack.[20]

4. Bitcoin Mining and The February 2022 CyberDefenses Report

In August 2021, investigators in the Suffolk County District Attorney's Office developed evidence establishing that a Suffolk County Clerk's Office IT employee, Christopher Naples, was using the Riverhead data center to host Bitcoin mining[21] machines. In the course of the investigation, dozens of Bitcoin mining machines were found in the Clerk's Office section of the Riverhead data center. Our investigation has not uncovered evidence that the 2021-2022 cyber-attack was linked to Bitcoin mining in the Clerk's Office and most of the IT personnel interviewed

[20] See Vera Chinese, Suffolk, Without a Cyberattack Recovery Plan, Hires Chief to Create One, Newsday (May 1, 2023), available at: https://www.newsday.com/long-island/suffolk/suffolk-cyberattack-legislative-committee-kenneth-brancik-qpb375ri.

[21] According to CISA, crypto-miners, including Bitcoin miners, leverage "crypto mining software to solve complex mathematical problems involved in validating transactions. Each solved equation verifies a transaction and eams a reward paid out in the cryptocurrency." See https://www.cisa.gov/news-events/news/defending-against-illicit-cryptocurrency-mining-activity. To run this type of software, Bitcoin miners use highly powered machines that must be kept in a climate-controlled environment to avoid overheating.

as part of this investigation stated that they do not believe that the two events were related. However, it has been plausibly suggested that Mr. Naples was distracted from his work by the Bitcoin mining and, thus, may not have been taking appropriate steps to maintain and upgrade the County Clerk's IT environment prior to his September 2021 arrest, which may have contributed to the threat actors gaining access to the County's environment.

In an internal DoIT memorandum produced in July 2022, Commissioner Mastellon wrote:

> After an extensive analysis and investigation performed by the Suffolk County District Attorney's Office, the Suffolk County Department of Information Technology and a cybersecurity expert consultant [CyberDefenses], it was determined that this [Bitcoin mining] incident did NOT result in a data breach and/or any compromised systems. While the illegal crypto-mining operation did negatively affect operations (i.e., Internet speed, data center heating) within the Riverhead facility while it was operational, as soon as the illegal equipment was seized and decommissioned, operations within the Riverhead facility returned to normal.

Mastellon Memorandum, July 26, 2022 (emphasis in original). Thus, despite subsequent speculation to the contrary, it appears that DoIT itself concluded that the Bitcoin mining operation in the Clerk's Office did not contribute to the 2021-2022 cyber-attack.

When interviewed, DoIT's Information Technology Security Coordinator, Brian Bartholomew,[22] reported that he had become aware of Bitcoin mining activity in the Clerk's Office back in 2017 or 2018 and that he had instructed Mr. Naples and another Clerk's Office IT employee

[22] As the County's Information Technology Security Coordinator, Mr. Bartholomew was in charge of the DoIT Security Team and had responsibility for the "day-to-day activities required to protect the County's infrastructure." Risk Report at 5.

to stop that activity. When asked if he alerted any of his superiors to that activity in 2017 or 2018, Mr. Bartholomew testified:

> A: Yes, I mean, I identified management at the time and told them what we were seeing. . . . I believe it was just management that I had told that we'd seen what was going on, you know, showed them the alerts [that revealed Bitcoin mining activity].
>
> Q: OK, so who in management did you notify back in 2018 about the Bitcoin mining?
>
> A: I believe at the time it was the, the Commissioner.
>
> Q: Who was the Commissioner then?
>
> A: I believe it was Commissioner Mastellon.

When interviewed, Commissioner Mastellon denied ever having been advised of Bitcoin mining in the Clerk's Office by DoIT Security Coordinator Bartholomew back in 2017 or 2018.

Even if Commissioner Mastellon did not know about Bitcoin mining in the Clerk's Office in 2017 or 2018, it is clear that several DoIT employees were aware of the Bitcoin mining underway in the Clerk's Office no later than February 2021, more than six months before Mr. Naples' arrest in September 2021. When interviewed, two DoIT employees admitted having such prior knowledge. One of those employees reported the activity to his DoIT supervisor. That supervisor, according to his own testimony, did not relay that information further up the DoIT chain of command or otherwise report it to County officials.

After the Bitcoin mining operation was exposed in August 2021 and Christopher Naples was suspended from his position, DoIT and Clerk's Office personnel worked collaboratively to help the Clerk's Office better understand and address the challenges in their IT environment. As part of that process, the Clerk's Office IT Team granted administrator access rights to certain DoIT personnel.

Also in response to the discovery of the Bitcoin mining operation, DoIT leadership decided to use a current DoIT cybersecurity vendor, Presidio, to retain another cybersecurity vendor, CyberDefenses, to "provide cyber security threat investigations, cyber security incident response, and/or computer forensic investigation, consulting and/or data recovery and retrieval services" for a period of one year, starting August 24, 2021.[23] The CyberDefenses engagement included "assessing potential vulnerabilities or flaws that could expose the County to a cybersecurity assault." CyberDefenses conducted that assessment and issued a report dated February 24, 2022 (the "CyberDefenses Report"). That report revealed that Suffolk County was extremely vulnerable to precisely the type of cyber-attack the County experienced six months later.

The CyberDefenses Report, released six months prior to the cyber-attack, catalogued scores of serious deficiencies in the County's cybersecurity posture.[24] As revealed in the table below, the report rated nearly every County domain at a risk level of 100 – the highest possible risk level.

[23] Presidio Compromise Assessment Statement of Work at 3, Aug. 20, 2021, SOW#1003721005811 SOW-1.

[24] Given the nature of the CyberDefenses Report and the specificity of many of the identified vulnerabilities, we are summarizing the report's findings only in general terms even though DoIT leadership claimed in 2023 that most of the vulnerabilities identified in the CyberDefenses Report have now been remediated.

This table summarizes the risk score for each domain evaluated.

Domain	Risk Level	Maturity	Stale Objects	Privileged Accounts	Trusts	Anomalies
[redacted]	100	1	92	100	55	100
	95	1	56	90	0	95
	100	1	100	91	0	88
	100	1	100	100	70	100
	100	1	72	100	50	90
	60	1	30	60	0	45
	100	1	100	100	60	100
	100	1	21	100	0	87
	100	1	100	100	50	100
	100	1	100	100	20	100
	100	1	100	100	0	100
	100	1	100	100	0	80
	100	1	100	100	0	100
	100	1	100	96	20	100
	90	1	36	75	0	90

The CyberDefenses Report noted:

(1) "The goal of the assessment was to find vulnerabilities that attackers may exploit to conduct a successful cyberattack." CyberDefenses Report at 4.

(2) The assessment covered "included all aspects of the County's networked systems." CyberDefenses Report at 4.

(3) Numerous County departmental firewalls had reached end-of-life on September 30, 2017, and end-of-support in 2018.[25] CyberDefenses Report at 9-10.

(4) County IT vulnerabilities included "Ineffective Network Segmentation," "End of Life Firewall Systems," "Branch Office and Vendor Remote Access" issues, "Overly Broad Access to Non-County Networks," and "Unsanctioned Internet Connections." CyberDefenses Report at 6.

(5) "The County has implemented essential protective technologies and established an external perimeter at the network outermost edge. Efforts overall are focused on holding out potential attacks at the perimeter boundary. The internal network has firewalls installed in front of each major department network, but these security measures are not configured to achieve the level of protection required to significantly limit internal navigation of the County's internal network. . . . Other aspects of a comprehensive security program have received less attention, and include: • identification of assets, threats, and risks • monitoring and detection capable of discovering the onset of potential attacks • response and recovery strategies for containing and mitigating attacks should they occur." CyberDefenses Report at 33 (emphasis added).

(6) "Assessment scans were able to access numerous department-level resources without impediment. Firewalls exist at the network entry to

[25] In his interview and subsequent public testimony, Commissioner Mastellon indicated that he believed the CyberDefenses Report was incorrect in concluding that all of the departmental firewalls had reached end-of-life and/or end-of-support but acknowledged that several of the departmental firewalls had reached end-of-life and that two had even reached end-of-support. In any event, critical infrastructure such as firewalls should be replaced before they reach end-of-life and no firewall that had reached end-of-support should have been in use in the County.

various departments, and it was anticipated that they would prevent access to a greater degree. . . . The goal of evaluating these [firewall] rules was to determine why the scans were able to discover so many internal department systems." CyberDefenses Report at 9 (emphasis added).

(7) "Internal departmental firewall rulesets will not provide an effective barrier or limit threat actors attempting to move laterally within the network and obtain access to other systems. A compromised host in an internal department segment can be exploited to bypass the departmental firewall and gain access to other systems on the County network and in other departments." CyberDefenses Report at 10 (emphasis added).

(8) "[R]emote access tunnels that in some cases terminate at internal [departmental] firewalls rather than at the [ ] perimeter [firewalls] add to the hazards associated with the ability to roam the network in a relatively unobstructed manner mentioned above. A security event that results in a network compromise at one of the departments can be leveraged to gain access to the County's networks and systems and potentially spread undetected." CyberDefenses Report at 10 (emphasis added).

(9) "[D]evice discovery scanning revealed a very large number of systems that were not anticipated, with IP address ranges on networks that were not associated with the County." CyberDefenses Report at 11.

(10) "Unsanctioned Internet Connections . . . pose threats to the entire County, allowing activities to take place that circumvent the current architecture's protection and detection capabilities." CyberDefenses Report at 11.

(11) "Unpatched Operating Systems." CyberDefenses Report at 24.

(12) "Obsolete Operating Systems and Applications." CyberDefenses Report at 24.

(13) "Attackers that gain access to the network can use these insecure protocols to obtain login credentials to further gain access and move about the network." CyberDefenses Report at 27 (emphasis added).

(14) "[F]orty-two (42) instances of [equipment provided by a prohibited foreign vendor] were found on the network." CyberDefenses Report at 28.

(15) "Recommendations" included:

a. "The County should ensure that an incident response plan is in place and that staff are familiar with the actions that need to be taken to contain and address an attack. An exercise of the plan should be conducted regularly while corrective actions addressing the issues are planned and executed." CyberDefenses Report at 32 (emphasis added).

b. "The County needs a Chief Information Security Officer role with sufficient organizational influence to help guide the program from its current state to a more evolved level of maturity to establish cybersecurity requirements and institute accountability. . . . It is rare for an organization the size of the county to lack this degree of strategic cybersecurity leadership, which is required for an organization of the relative risk category." CyberDefenses Report at 33 (emphasis added).

c. "Threat Monitoring – A threat monitoring program that provides 24x7 alert detection and analysis for suspicious and potentially malicious activity is needed. Threat intelligence to help connect

advancing and evolving threats and the effect on potential vulnerabilities should additionally be included." CyberDefenses Report at 33.

d. "Remove Obsolete Systems." CyberDefenses Report at 29.

Once again, despite the clear call for DoIT to draft a cyber-attack response and recovery plan, this time in 2022, DoIT failed to draft such a plan. Similarly, the recommendation that the County hire a CISO to provide appropriate cybersecurity supervision and oversight was not implemented until months after the September 2022 ransomware attack and months after this committee's investigation was underway.

Given the content of the CyberDefenses Report, it should have immediately been made available to the County Executive, the County Legislature, other County leaders and non-DoIT Information Technology teams so that the vulnerabilities identified could be urgently addressed. Instead, aside from some possible knowledge by a single Deputy County Executive,[26] interviews with Commissioner Mastellon, Deputy Commissioner Ari McKenzie, and former Chief Deputy County Executive Black indicated that the report's contents were never revealed to County leaders above Commissioner Mastellon. Perhaps more concerning, former Chief Deputy County Executive Black (who first reviewed the CyberDefenses Report when it was requested by the Special Committee in 2023) testified that, "the report did not reveal anything new, anything that we were not already aware of . . . The report did not reveal anything new that we had to learn from this report . . . [Commissioner Mastellon] relayed that up his chain of command and I was made aware that there was a report that identified everything that we already knew." Testimony of former Chief Deputy County Executive Lisa Black before the Special Committee on June 26, 2024,

[26] Commissioner Mastellon stated during his testimony on October 20, 2023, that he "believe[d] there was a County Executive representative. There was a Deputy County Executive that was represented in that meeting, yes." Testimony at 22. However, Commissioner Mastellon was unable to provide the name of that Deputy County Executive.

at 18-19, 35. If, in fact, the deficiencies noted in the CyberDefenses Report were actually known to the DoIT leadership team prior to the issuance of that report, that only makes their failure to alert County leadership to the situation even more troubling.

Days after the CyberDefenses Report was issued, on March 2, 2022, Commissioner Mastellon was questioned by the Legislature's Government Operations, Personnel, Information Tech & Diversity Committee on the County's cybersecurity posture. At the committee meeting, Commissioner Mastellon did not mention the CyberDefenses Report or its findings and, instead, claimed that the County had "significant safeguards in place that has positioned us well against any potential attack."[27] As a result, the Legislature was unaware of the need to urgently address the weaknesses CyberDefenses had identified in the County's cybersecurity system.

5. The Draft July 2022 DoIT IT Risk Assessment Report

Although never finalized, DoIT prepared a draft annual IT Risk Assessment Report (the "2022 Draft Report") and forwarded that draft to a single legislator in July 2022, approximately seven months after the threat actors first infiltrated Suffolk County's IT environment[28] and two months prior to the overt ransomware attack. That draft report contended that "[o]verall, the County's security posture is good, but cyber threats have significantly increased." 2022 Draft Report at 2. In an apparent reference to the CyberDefenses engagement,[29] the report noted that:

> In 2021, the Department of Information Technology contracted with a leading cybersecurity firm to conduct a cybersecurity assessment. The assessment evaluated network configurations and cybersecurity technologies in place within the County with the goal of finding

[27] See Minutes from March 2, 2022 Committee Meeting at 5.

[28] As noted further below, the Special Committee has considered and relied on Palo Alto Unit 42 reports dated December 20, 2022, and April 3, 2023, including their conclusion that the initial breach occurred on or about December 19, 2021.

[29] During his testimony on November 10, 2023, Deputy Commissioner McKenzie confirmed that this was, in fact, a reference to the CyberDefenses engagement. McKenzie Testimony at 39.

> vulnerabilities that attackers may exploit to conduct a successful cyberattack. In addition, the assessment provided a foundation for the cybersecurity firm to provide recommendations to help the County prevent such an attack or reduce the damage of an actual attack. This assessment identified a number of improvement opportunities that were presented to the County for implementation. Many of the improvement [sic] were implemented, however, some of the recommendations, due to legacy application requirements, have led to an extended phase-out approach to ensure business continuity with the legacy solutions.

2022 Draft Report at 3. Nothing more was said about the CyberDefenses Report.

The 2022 Draft Report also noted that, back in 2019, as a result of the Red Land / Palo Alto tabletop exercise, DoIT had "identified the need for a cybersecurity response plan to support our efforts in the event of a cybersecurity incident." 2022 Draft Report at 5. Such a plan was being "discussed" according to the 2022 Draft Report. 2022 Draft Report at 5. In our interviews, Commissioner Mastellon, Deputy Commissioner McKenzie, DoIT Security Coordinator Bartholomew and other witnesses all confirmed that no written cyber-attack response and recovery plan was ever produced for the County prior to the attack or, for that matter, after the attack. Furthermore, the County Executive's outside counsel explained that no drafts of such a plan could be produced because no such drafts exist. In her June 26, 2024 testimony before the Special Committee, former Chief Deputy County Executive, Lisa Black, reported that the County added a "Cyber Annex" to the Suffolk County Comprehensive Emergency Management Plan in November 2023. See Testimony of former Deputy County Executive Lisa Black before the Special Committee on June 26, 2024, at 15, 38. A review of emails indicates that a "Cyber Annex" dated December 5, 2023 was forwarded to the Fire, Rescue and Emergency Services Commissioner by the former CISO on December 6, 2023. That "Cyber Annex," however, is generic, rudimentary

and it does not instruct County personnel what should actually be done in the event of another cyber-attack.[30] It is not specific to Suffolk County or its IT environments, and it is more accurately described as a plan to have a plan. While its collection of various cyber best practices from various government websites is helpful, it is not a cyber response and recovery plan that would meaningfully assist the County in the event of another cyber-attack.

Finally, to illustrate increasing cybersecurity threats, the 2022 Draft Report noted that:

> [O]n December 9, 2021, a newly discovered computer bug was identified in a hugely popular piece of computer code, referred to as the Log4j vulnerability. . . . [The CISA] Director, indicated "the Log4j vulnerability is the most serious vulnerability I have see[n] in my decades-long career." Many threat actors leveraged this bug to exploit vulnerabilities throughout the world. Suffolk County took extraordinary steps to address this issue within our technology environment and established a standing meeting with all county IT departmental representatives to take the necessary actions to mitigate this risk. To date, the County has not been negatively affected by the Log4j vulnerability, however, we continually monitor our network for this and other known vulnerabilities.

2022 Draft Report at 2.

In fact, according to reports later issued by Palo Alto as part of the County's remediation efforts,[31] the Blackcat cyber criminals who carried out the September 8, 2022 ransomware attack against Suffolk County had infiltrated Suffolk County's IT environment some seven months prior

[30] Given that the "Cyber Annex" is not public, the Special Committee will not further describe its contents in this report.

[31] See Palo Alto Unit 42 reports dated December 20, 2022, and April 3, 2023.

using the Log4j vulnerability and had been conducting reconnaissance on the County's IT systems since that time. Furthermore, although multiple witnesses confirmed that many meetings of County IT professionals were held to address the Log4j vulnerability, and although that vulnerability was largely remediated within the County IT environment, instances of un-remediated Log4j files were still being found across the County after the September 2022 ransomware attack.

D. Basic IT Infrastructure and Security Prior To The 2021-2022 Cyber-Attack

1. Basic Security Architecture

Just as we do not provide all the vulnerability details described in the CyberDefenses Report in this public report, we will not provide a detailed description of Suffolk County's IT infrastructure here. However, it is necessary to have a basic understanding of the County's IT architecture to appreciate what left Suffolk County particularly susceptible to a cyber-attack. Firewalls are a critical part of any sound cyber-defense system. As part of the 2019 Red Land / Palo Alto assessment, if not before, DoIT and other County IT personnel recognized that Suffolk County was using a series of firewalls, some of which had reached end-of-life and even end-of-support, provided by different software companies. Some of those firewalls were "perimeter" (or "edge") firewalls that protected the entire County by erecting a firewall around the outer edge of the County's IT environment. Other firewalls were "departmental" firewalls, meaning that they were erected within the perimeter firewalls around certain County departments (e.g., Department of Health, Department of Social Services). The "perimeter" firewalls were at all times controlled only by the DoIT Security Team. DoIT Security Team personnel also controlled most, but not all, departmental firewalls. For instance, the firewalls that surrounded the Clerk/Comptroller and BOE domains were not controlled by DoIT. The IT team that controls a particular firewall writes (and, thus, can change) the rules that control how the firewall operates (for instance, what types of data will be permitted to pass through the firewall), and has greater insight into whatever technical

reporting the firewall may provide. Several of the County firewalls in use had reached "end-of-life," meaning that the vendor that provided that firewall would no longer sell that version of the product, while others had gone beyond "end-of-life" and reached "end-of-support," meaning that the vendor would no longer provide patches, upgrades and (in some instances) technical support for those models.

In his public appearance before the Special Committee on October 20, 2023, Commissioner Mastellon testified as follows:

> Q. The departmental firewalls that were in existence at that time in February of 2022 [the time of the CyberDefenses Report], ha[d] they reached end of life?
>
> A. There were two that were effectively end of life…at that point in time.
>
> Q. And had they reached end of support?
>
> A. Um...I'm not -- I do believe that the two themselves had reached end of support, yes.
>
> Q. Okay. So, assuming with that modification, since our discussion on Tuesday, two of the [County's] departmental firewalls were both end of life and end of support; correct?
>
> A. Correct.
>
> * * *
>
> Q. The best practice is to replace technology, whether it's a firewall or anything else, prior to it reaching end of life; right?

> A. Oh, absolutely. If you have the opportunity. In this scenario we had a number of [firewalls] that needed to be taken care of and we were working towards that, sure.[32]

Additionally, end-point detection software is an integral part of a modern cybersecurity defense system. End-point detection software is computer code that is installed on end-user hardware devices, such as desktops or laptops, and actively monitors for malware, suspicious activity and other threats. Typically, end-point detection software will isolate and/or neutralize malware it detects and report the detection to a centralized security system. End-point detection systems may also log, block and/or report on suspicious activity within an IT environment. Like the firewalls, in 2019, the County's end-point detection software was a patchwork of different products, some of which were no longer updated or even supported, provided by different software companies.

2. The Palo Alto Upgrades

As noted above, Palo Alto was a key vendor involved in the 2019 "cyber checkup" announced by the County Executive and carried out by DoIT. As a result of the 2019 cybersecurity assessment, DoIT decided to replace the DoIT-controlled Cisco firewalls with Palo Alto firewalls. This included the perimeter firewalls that provided protection to the entire County. The replacement of firewalls is a major technical undertaking that requires extensive planning, effort and expenditures. According to the interviews of all of the witnesses involved in that project, the replacement of the Cisco firewalls with Palo Alto firewalls took months and was only ultimately accomplished after numerous attempts. The need for numerous attempts to erect such a firewall is not unusual in the context of a complex, high-volume data environment such as that maintained by Suffolk County. In conjunction with the new Palo Alto firewalls, a Palo Alto end-point

[32] Testimony of Commissioner Mastellon before the Special Committee on October 20, 2023, at 47-48.

detection product, known as Cortex, was deployed across Suffolk County, including in departments that were not surrounded by a Palo Alto departmental firewall. Cortex monitored devices across the County and reported directly to the DoIT Security Team by sending email alerts to a particular email address. As a result, the DoIT Security Team was immediately and directly alerted when Cortex detected what it perceived to be malware, suspicious activity, or a similar threat anywhere in the County. This monitoring and reporting from all corners of the County environment meant that the DoIT Security Team had unique insight into what was being detected across the County.[33] In fact, as interviews of members of the DoIT Security Team revealed, there were so many Cortex alerts being sent to the DoIT Security Team (sometime hundreds per day) that the team felt, in the words of one member, "completely overwhelmed" by them and the alert emails overcrowded their email inboxes. The volume of alerts in the spring and summer of 2022 was so high that the DoIT Security Team re-routed those alerts from their email accounts to a Slack Channel so the alerts would no longer make their email inboxes unusable. While some DoIT Security Team Members reported that they checked the alerts in the Slack Channel at least daily, when asked how often they checked the alerts in the Slack Channel, one Security Team member responded, "not often enough."

3. The "Pass Through" Rule

One of the most significant revelations of the Special Committee's investigation has been that, in the course of erecting the new Palo Alto perimeter firewalls, DoIT personnel created a "pass through" so that internet traffic destined for the Clerk's Office would traverse the perimeter firewall without inspection. There is bitter disagreement between DoIT personnel and the Clerk's

[33] The former County Executive repeatedly and publicly stated, "County IT leadership had no eyes on and no ability to monitor the Clerk IT environment." That statement was incorrect. Although DoIT's insight into the Clerk/Comptroller domains was more limited than in other areas of the County, it was still significant given that Cortex was deployed in the Clerk/Comptroller domains and was reporting to the DoIT Security Team, DoIT was running scans in the Clerk/Comptroller domains for Log4j vulnerabilities, and assessments such as one conducted by CyberDefenses in 2022 provided critical information about the Clerk/Comptroller domains.

Office IT personnel about who is responsible for this "pass through." Our investigation did not determine whether Clerk's Office personnel requested the "pass through" as the DoIT Commissioner later alleged, but only DoIT personnel had the ability to create the "pass through" because only DoIT personnel had control over the County's perimeter firewall.[34] The interviews of DoIT and Clerk's Office IT personnel and reviews of contemporaneous communications reveal that both teams were well aware that the Clerk's Office departmental firewall was a Dell SonicWall firewall that had reached end-of-life in 2019. Clerk's Office personnel described that firewall as "passive" and "primarily worked by blocking suspect actors."[35] The status of that departmental firewall was a significant part of what led to the discussions relating to a proposed upgrade of the Clerk's firewall described in more detail below. Knowing that the Clerk's Office was protected only by an end-of-life departmental firewall, no IT professional should have sought, or agreed to, the creation of a "pass through" in the County's perimeter firewall for traffic destined for the Clerk's Office firewall. This is especially true given that the February 2022 CyberDefenses Report specifically noted that:

> Internal departmental firewall rulesets will <u>not provide an effective barrier or limit threat actors attempting to move laterally within the network and obtain access to other systems. A compromised host in an internal department segment can be exploited to bypass the departmental firewall and gain access to other systems on the County network and in other departments</u>. . . . <u>remote access tunnels that in some cases terminate at internal [departmental] firewalls rather than at the [ ] perimeter [firewalls] add to the hazards associated with the ability to</u>

[34] In fact, in regard to the pass through, DoIT Security Coordinator Bartholomew testified "I would have had to put a rule in [ ] to allow it, yes." September 25, 2023 Brian Bartholomew testimony.

[35] February 10, 2023 interview of Peter Schlussler.

> roam the network in a relatively unobstructed manner mentioned above. A security event that results in a network compromise at one of the departments can be leveraged to gain access to the County's networks and systems and potentially spread undetected.

CyberDefenses Report at 10 (emphasis added).

Mr. Peter Schlussler, the head of the Clerk's Office IT Team, testified as follows on the "pass through" issue:[36]

> Q. On page six of your report, you wrote, "I was also informed by the DoIT Deputy Commissioner Ari McKenzie in June 2022 that the Suffolk County's Clerk's Office Sonic firewall was a passthrough of the Suffolk County's Palo Alto edge firewall. Being very alarmed to hear such, I asked for how long or why was this the case with the response from Ari [-] ["]I do not know the reason or when,["] which meant that there was no adequate Suffolk County level protection at the Suffolk County Clerk's Office network and was basically not protected at all." Please explain why you were so concerned about this issue.
>
> A. What he was saying or inferring, because I never did get a final answer, it's that perimeter firewall that I spoke of earlier that's covering the whole county, he was suggesting there was a hole poked through that perimeter firewall [and] that the County Clerk was not protected with that firewall, that the only firewall that was going to be protecting the County Clerk was this local firewall, the SonicWall, and that that is going to be protecting ourselves against the World Wide Web. What I

[36] Testimony of Peter Schlussler before the Special Committee on June 16, 2023, at 13-14 (emphasis added).

found very alarming honestly, one, [Deputy Commissioner McKenzie's statement], but, two, is that in the same breath, you're saying it's a pass-through. I don't know why or how. I certainly didn't authorize it - Pete Schlussler – which makes no sense for many reasons, but why wouldn't you know that at that point in time, recognizing the fact that we were looking for an additional firewall, a Palo Alto firewall to replace the SonicWall, why would you not treat the urgency immediately that moment in time recognizing we had no protection? Instead, he said, Well, okay, I see this happening. We'll do you right after we're finished with [another department] as far as giving you an alternate solution for a firewall. And I go, Okay, I guess you're the guy in charge, you know what you're doing. Okay. But in hindsight, if that is true, it was a passthrough, an unauthorized passthrough, I can't emphasize that enough, for the life of me, I cannot understand why the urgency of having that Palo Alto firewall [requested by the Clerk's Office] rejected by the Commissioner at that time - why that wasn't put front and center as a priority? I don't know why that would have been the case other than, as I mentioned before, the lack of technical understanding by the leadership in DoIT because anybody that had any degree of understanding of the technology, especially cyber security -- and again, I am not a cyber security expert. I'm a functionality expert. I can build systems until the cows come home, but as far as cyber security, I'm not the guy. I wasn't hired to be that guy. Ari was supposed to be hired to be that guy, and he said that, so I have to defer. So that's where my alarm went off saying there's something not good here.

On the "pass through" issue, Deputy Commissioner McKenzie testified as follows:[37]

> Pete [Schlussler] gave me a call and basically said that, you know, you guys can't -- you can't filter any of my traffic, you know. We do billions of dollars of transactions, you can't filter any traffic. I found that odd because at that point I didn't fully understand or have any context. I mean, I'm like I don't understand what you're talking about. I went back to the team and [DoIT IT Security Coordinator] Brian [Bartholomew], and pretty much everyone in the team educated me to let me know that the way that the clerk's environment was designed at their request was that the perimeter firewalls didn't do any of what we call stateful packet inspection, deep inspection, deep SSL decryption of traffic, secure socket layer. So, everything that would normally be filtered, I guess you can think of it as the perimeter is a screen door. Right? So, basically, every other department used our screen door and they had their door, solid wood door, on the inside. So, the analogy is I don't want any screen door.
>
> * * *
>
> Q. Thank you. Got it. That's helpful. Just to recap where we were before the break, if I understood your explanation correctly, the perimeter firewalls that were maintained by DoIT had a passthrough for the clerk's office at the request of the clerk's office, right?
>
> A. That is -- that was the conversation I had with Mr. Schlussler. And I went back to the team to confirm that because I found that – I guess

[37] November 10, 2023 interview of Deputy Commissioner McKenzie at 43-46 (emphasis added).

> the best word I can think of was preposterous. I thought I was mishearing because I've never heard in my years anything like that. They -- I guess, for the lack of better term, they schooled me. They educated me on that. And as time has progressed, I've come to understand that was back before Scott [Mastellon] was there and prior commissioners.
>
> Q. And so data flowing ultimately to the clerk's office was essentially just passing through those perimeter firewalls without scrutiny?
>
> A. That is correct.

Commissioner Mastellon and former Chief Deputy County Executive Black testified that they were not aware of the "pass through" in the perimeter firewall until Palo Alto's Unit 42 personnel discovered it as part of the post-attack remediation efforts and asked about it. Commissioner Mastellon insisted that, even though he did not know when that "pass through" rule was put in place, it was done at the behest of the Clerk's Office. He testified that he attempted to uncover evidence to this effect by having DoIT employees search emails looking for requests from the Clerk's Office.[38] He further testified[39] that:

> Q. . . . [quoting the CyberDefenses Report]. And that means that there were tunnels that would allow outside parties to bypass those Palo Alto [perimeter] Firewalls and connect directly to the internal Cisco departmental firewalls; right?
>
> A. That was the way it was configured; there were configurations that allowed for that.

[38] The former County Executive's outside counsel has provided emails that purportedly support a conclusion that the Clerk's Office requested the creation of the "pass through." However, those emails do not correspond to the forensic evidence that reveals when the "pass through" was actually created in the Palo Alto perimeter firewall by DoIT.

[39] October 17, 2023 interview of Commissioner Mastellon transcript excerpts at 29 (emphasis added).

Q. Okay. So although the Palo Alto Firewalls are current and very good, they can be bypassed given the configuration that's set up in some instances in the County.

A. And again, the number of instances I can't speak to, but they have identified as part of this report [that] there were a few of them.

* * *

Q. And what were you asking him to look for in Brian Bartholomew's e-mail?[40]

A. Firewall rules.

Q. Why did you need that?

A. Because there was an identification of a rule as it relates to the Clerk's environment that allowed for certain traffic to go through [the perimeter firewall], and we were looking -- we were asking Brian [Bartholomew] -- number one, I asked him whether or not he was aware of the rule and he said he was and that's the way it's always been, but then I asked him specifically for, you know, at what point in time was that requested, do you have any documentation on that, do you have any e-mails relating to this. So that was the extent of the [email] searching that was requested at that point in time. . . . in November of 2022 I requested -- I asked Brian [Bartholomew] if he had knowledge or documentation relative to a particular firewall rule that was implemented in Palo Alto,

[40] October 17, 2023 interview of Commissioner Mastellon transcript excerpts at 112-121. Interviews of Commissioner Mastellon, Deputy Commissioner McKenzie and other DoIT personnel revealed that DoIT employees were repeatedly instructed to search the emails of Suffolk County employees during the remediation period that followed the September 2022 ransomware attack. In this instance, the employees were searching for evidence of who requested and/or authorized the "pass through" in the perimeter firewall. In another instance employees searched emails to determine who may have known about Bitcoin mining in the Clerk's Office prior to the arrest of Christopher Naples in September 2021. That search was prompted by reporting in a *Newsday* article.

and obviously subsequently potentially implemented in the Cisco firewall, at which point in time he had indicated in November of 2022 he tried, he could not -- he couldn't effectively do the search given everything else he was working on. So we engaged [another DoIT employee] at that point in time . . .

Q. So this firewall rule that you were concerned about, you just said it was implemented [in] the Palo Alto firewall. So, if I understand correctly, only DoIT had control over the Palo Alto firewall rules; right?

A. DoIT and Security Operations Center, correct.

Q. Okay, the Presidio vendor.

A. Correct.

Q. So whatever this rule was that caused concern would have had to have been a rule that originated with DoIT and its vendor; right?

A. Yes. However, while there are rules that were executed by Brian [Bartholomew] and/or the security team, and furthermore by the SOC, they do tend to come at the behest of a particular department. And if, in fact, it's determined that department is going to -- that we're going to honor that particular request, it can be implemented as such. So just because Brian himself and/or Presidio executed on the rule doesn't necessarily mean that it was originated from a particular department at the request of the department, or at the demand of a department. In many cases it's a demand. . . . So there was a rule here that suggested that traffic be allowed through the perimeter firewall directly to the Clerk's Office without any filtering, which I thought was odd. And it

was uncovered by the Palo, Unit 42 folks incident response team. So I wanted to understand the origins of this.

Q. Okay. I understand why you would think that's odd. But back in that Cyber Defenses Report a few months earlier, they said explicitly that there were multiple firewall rules and tunnels that allowed access to the departmental firewalls without going through Palo Alto.

A. Yeah, but this is going through the -- this is why -- it was through the perimeter, that's the difference here. That's a -- that's a big -- that was concerning. You know, that we needed to understand why, in fact, that was the case.

Q. So how was -- educate me how that's -- what you're describing here, going through the firewall is different from what is put in the Cyber Defenses Report when they

A. They're talking more on the departmental level. This is -- you know, at the … at the departmental level.

Q. All right, we'll back it up and I'll point to the part of the report that says that your firewalls are constructed in such a way that that is passing through your Palo Alto firewalls and getting directly to system firewall.

A. They were -- they were bypassing in such a way that they were direct connections, what appeared to be direct connections from outside agencies, typically law enforcement agencies, into a departmental firewall that existed within. Bypassing the actual Palo Alto firewall itself on the perimeter side. This was a rule that went through the Palo Alto perimeter firewall.

Q. So the difference is -- what you're describing here and what caused you concern is that this rule allowed access through the Palo Alto firewall in a way that's different from what's described in the Cyber Defenses Report.

A. Correct.

Q. Okay. And how did you become aware of this rule?

A. Through the [Palo Alto Unit 42] Incident Response Team providing this information to us in such a way that they asked a question –

Q. Okay.

A. – as part of their response efforts. The forensics, I should say.

Q. All right, so [Palo Alto Unit 42 personnel] raised a question and in an attempt to get the answers to that question did you talk to Brian and ask him about this rule?

A. Yep.

Q. And Brian recollected something about the rule.

A. He said this is the way it's always been. This is what The Clerk has always asked for.

* * *

So furthermore, Brian goes ahead and implements that, even though, obviously, you know, he was instructed to do so and he felt compelled to do so. …. That's because -- and I go back to -- we talk about the fact that the Clerk fashioned their SonicWall as their edge and they were handling all capabilities through that edge and ultimately saying we don't need anything to do with the perimeter, just bring it to us and we'll take care of it.

* * *

Q. Okay. So, I'm sorry, I'm not totally following this. There was a rule in place in the firewall, correct; or no?

A. This was a rule that was in place in the firewall, that is correct.

Q. Presidio put that rule in place?

A. I don't know who put that rule in place. They – it jumps back -- in all likelihood -- I don't know how long. Nobody could tell me how long ago this was put in play.

[Commissioner Mastellon's outside counsel]:

I want to be clear on which rule this was that we're talking about.

A. The rule was to allow traffic through the perimeter directly into the Clerk's environments without being --

(Examination Continued by Mr. Donoghue)

Q. And is it your understanding that that rule was in place when the Cisco firewall was the perimeter firewall?

A. I believe that to be the case, yes.

Q. And now in time the Cisco firewall is replaced by the Palo Alto firewall; correct?

A. Yes.

Q. Which has rules of its own.

A. Correct.

Q. Would that old rule that was in the Cisco firewall simply have been carried forward, or would they actually have to write it in for the Palo Alto firewall?

A. You know, it appears that they got carried forward. I don't know too specifically how that got carried forward. However, I'm sure it was a conversation that said, yes, this is exactly how we need to have it.

Whatever the truth behind this conflicting testimony between DoIT and Clerk's Office personnel about whether the Clerk's Office requested the "pass through," DoIT personnel responsible for the perimeter firewall should not have permitted the creation of a "pass through" in the perimeter firewall. Requests for such an accommodation, if any were made, should have been elevated to the highest levels of County government and denied. No matter who requested the "pass through," its implementation posed a significant security risk to the entire County, and it likely allowed malware to enter the Clerk's Office environment undetected.

4. Clerk's Office Requests for a Firewall Upgrade

Driven, at least in part, by concern about the status of their end-of-life departmental firewall, the Clerk's Office repeatedly requested permission from DoIT and the IT Steering Committee to purchase and deploy a new Palo Alto departmental firewall around the Clerk/Comptroller environment in 2022.[41] These requests led to a series of discussions involving, among others, County Clerk Pascale, Commissioner Mastellon, and former Chief Deputy County Executive Black. In an email from June 3, 2022, Clerk Pascal wrote, "Cyber security is a real threat and the fragile and antiquated nature of the existing system is causing sleepless nights. Please let me know what I need to do to move this along." Testimony of former Chief Deputy County Executive Lisa Black before the Special Committee on June 26, 2024, at 23 (citing to June 3, 2022 Pascale email).

Witness interviews and contemporaneous communications reveal that the Clerk's Office wanted a "physical" Palo Alto firewall, meaning that hardware necessary to operate the firewall

[41] It is of note that this request came after the Clerk's Office's firewall had been operating at end-of-life status for over two years.

would be located in the Clerk's Office section of the Riverhead data center.[42] According to several Clerk's Office and DoIT witnesses, one advantage of having a "physical" firewall is that the operator of that firewall would have greater insight into the firewall's data. In contrast to a "physical" firewall, DoIT personnel and the IT Steering Committee wanted the Clerk's Office to deploy a "virtual" (or "zone") Palo Alto firewall. DoIT leaders explained that, because the County had already invested in licenses for Palo Alto firewalls, it would be significantly cheaper for the County overall for the Clerk's Office (and all other departments) to operate a virtual Palo Alto firewall running on Palo Alto hardware controlled by DoIT. Furthermore, DoIT had other reasons to insist that the Clerk's Office replace their outdated SonicWall firewall with a virtual, as opposed to physical, Palo Alto firewall as explained by Deputy Commissioner McKenzie:

> That [zone firewalls] was the design -- from day one, the design. One of the reasons why we picked the Palo Alto stack [following the 2019 cyber assessment] -- The desire upon which the Palo Alto stack chosen, once again, that decision was made before I got [to DoIT in January 2020]. . . . As I learned, you know, kind of got acclimated and became -- understanding the decision made picking the Palo Alto stack, they're one of the only vendors out there that gave the capability of zoning which minimized hardware costs, maintenance costs. It minimized costs of -- just those soft costs from, okay, a piece of hardware died, I need to have something in the high availability. So, there were cost savings associated with it, sure, but I don't think that was the main

[42] In fact, the Clerk's Office had a physical Palo Alto firewall installed in the Riverhead data center for a 90-day proof-of-concept test in 2022. While that firewall reportedly worked well, the Clerk's Office could not purchase the hardware without the approval of the IT Steering Committee and, as a result, the hardware was returned to Palo Alto at the end of the 90-day test.

impetus, but it was part of the calculation. I just want to state that was the plan.

Q. So in DoIT's mind, [by insisting that the Clerk's Office use a zone firewall] you all were just executing on the plan that had been put in place before you even arrived [at DoIT]?

A. That is correct.

Q. And if the Clerk's Office had the actual [Palo Alto firewall] hardware sitting in their data center, would they have greater ability to control that firewall around their department?

A. If the clerk had a physical firewall regardless of Palo Alto or not, yeah, they would be able to manage it and control it just like they did with the SonicWall, once again, without any visibility from [DoIT or] anyone else. But it would have been no different.

Q. So you explained some of the advantages of the zone. There were financial advantages and others. With that zone plan, DoIT would be in charge of all the firewalls in the county, right?

A. That is correct.

Q. Perimeter as well as the internals, right?

A. Correct.

Ultimately, in the Spring of 2022, the Clerk's Office agreed to use a "virtual" Palo Alto departmental firewall. DoIT then advised the Clerk's Office that it would erect a virtual/zone Palo Alto departmental firewall around the Clerk/Comptroller environment once it was done erecting such a departmental firewall for another County agency. However, the September 2022 ransomware attack was carried out before the new departmental firewall was erected around the

Clerk/Comptroller domains. After the ransomware attack, a virtual/zone Palo Alto firewall was erected around the Clerk/Comptroller's domains.

III. THE 2021-2022 CYBER-ATTACK

A. Initial Breach

As noted above, Palo Alto participated in the 2019 Suffolk County "cyber checkup" and, as a result of that assessment, became the vendor chosen by DoIT to provide new firewalls and associated cybersecurity products, such as Cortex end-point detection, to the entire County. Following the September 2022 ransomware attack, Palo Alto's Unit 42 was one of several vendors hired to help the County respond to and recover from the attack. As part of the remediation efforts, Palo Alto's Unit 42 issued several reports, which the Special Committee has reviewed and considered as part of its investigation. The Special Committee also retained FTI Consulting to review the Palo Alto Unit 42 Reports as well as a report issued by Booz Allen Hamilton's Tracepoint, which had been retained by the Clerk's Office in the wake of the September 2022 ransomware attack. The Special Committee also considered the Tracepoint report, as well as reports of other cyber vendors, in conducting its investigation. In sum, based on their limited review, FTI found that both the Unit 42 reports and the Tracepoint report followed cybersecurity industry best practices, appropriately analyzed the forensic evidence available to them, and reached appropriate conclusions based on the data available.

Apache Software Foundation's Log4j is an open-source logging software that collects and manages information about system activity. Log4j is a popular and widely-used software due to its simplicity and the fact that it is free to download and use. It is embedded in vast numbers of software packages.[43]

[43] For additional information on Log4j, see the Cyber Safety Review Board's July 11, 2022, public report, available at: https://www.cisa.gov/sites/default/files/publications/CSRB-Report-on-Log4-July-11-2022_508.pdf.

On December 9, 2021, Apache released a security advisory alerting users to a vulnerability in its Log4j library files. When announced, the Log4j vulnerability was considered particularly concerning due to the widespread use of the Log4j library, and the number of publicly exposed devices that would be vulnerable to attack in Suffolk County and elsewhere. Forensic review following the September 8, 2022 ransomware attack in Suffolk County indicated that the initial entry point for the criminal perpetrators was through a Log4j vulnerability on a server in the Clerk's Office domain on or about December 19, 2021. Given that FTI found that the remediation cyber vendors who conducted those forensic reviews appropriately analyzed the forensic evidence available to them, the Special Committee has no reason to question that finding. The Special Committee did not ask FTI Consulting to do a full forensic analysis of all evidence relating to the initial entry as the initial entry for a cyber-attack, while always of significance, is not as important as the vulnerabilities in the environment that allow cyber criminals to exploit that initial breach.

In the months following December 2021, DoIT and other IT professionals throughout Suffolk County undertook extensive efforts to patch the Log4j vulnerabilities across County domains. Among other things, DoIT personnel conducted scans of the domains across the entire Suffolk County environment, including the Clerk's Office, to identify Log4J vulnerabilities so those files could be deleted or patched. Reviews following the September 2022 ransomware attack indicated that those efforts, while largely successful, did not fully eradicate all Log4j vulnerabilities across the County. Furthermore, given that the criminal perpetrators had already gained a foothold in the County Clerk's domain as of December 19, 2021, it is not clear whether Log4J remediation after that date would have limited their access to the County IT system in the Clerk's Office and well beyond.

In 2022, Suffolk County's cybersecurity system was not sufficiently robust to detect the presence of cyber criminals in, and their movement across, different domains within the overall Suffolk County environment. Many of the existing vulnerabilities were made known to County

IT leadership no later than the time of the February 2022 CyberDefenses Report. Furthermore, substandard security practices likely made it easier for the perpetrators to move within and gain access to data within Suffolk's various IT systems. For instance, interviews revealed that DoIT personnel left default passwords in place on at least one key piece of infrastructure hardware. This was apparently done to make it easier for authorized vendors to access that hardware. Whatever the motivation, that practice left a key part of the County's IT infrastructure vulnerable to exploitation. When asked if leaving default passwords in place was an acceptable cybersecurity practice, DoIT Security Coordinator Bartholomew responded, "No, absolutely not. The default password needs to be changed immediately."[44] Similarly, forensic investigation indicates that Clerk's Office personnel stored user credentials in an "IronKey" folder that was available to and accessed by the malicious actors that ultimately carried out the ransomware attack.

B. The FBI's June 21, 2022 Warning

On June 21, 2022, an FBI Special Agent spoke directly to DoIT Security Coordinator Bartholomew about evidence suggesting that malware may be operating in the Suffolk County environment. According to Mr. Bartholomew's testimony, the agent alerted Mr. Bartholomew to suspicious traffic involving the New York State Court system. Mr. Bartholomew reported that the agent believed the suspicious traffic may be linked to the Clerk's Office domain. DoIT Security Coordinator Bartholomew sent an email to Mr. Schlussler alerting him of this potential threat and asked him to either "confirm or deny this." In response, Mr. Schlussler stated that there was "[n]othing on our side…wouldn't [a notification] like this come directly from the State Cyber team?" Mr. Bartholomew responded, stating "I would have to agree, do you have any IT contacts with the County Courts Systems? Thank you for reporting no issues within the Clerk's Office." Mr. Schlussler responded by providing an IT contact at the State Courts Systems and copied that

[44] September 25, 2023 interview of DoITBartholomew.

individual on the email chain. According to Mr. Schlussler, he did not observe any suspicious activity and never received any subsequent follow-up after this exchange.[45] Officials of the Bellone administration have alleged that on June 22, 2022, Mr. Schlussler sent an internal email to users of the Clerk Office's virtual desktop infrastructure ("VDI") system, stating that the VDI system will no longer be able to be used remotely due to a security flaw.[46] The Bellone administration has alleged that this email indicates that Mr. Schlussler was aware that the Clerk's Office was suffering an intrusion event.[47] Mr. Schlussler testified that this email was unrelated to the FBI alert and he was not aware at the time that the Clerk's Office was suffering an intrusion event.[48]

DoIT Security Coordinator Bartholomew received the first email relating to the FBI warning at 4:52 p.m. on June 21, 2022. In a 4:58 p.m. response, Mr. Bartholomew responded "I am not aware of any Ransomware Attack that is going on in the County, none of my security equipment is lighting up." He then requested additional information. After additional information was provided, he forwarded the email chain to Deputy Commissioner McKenzie at 5:19 p.m. with a notation that read, "FYI. Please see the below string. It could be a long evening." When asked what, if anything, he did about this report, Deputy Commissioner McKenzie testified as follows[49]:

> Q. So did you notify Commissioner Mastellon when you received this email?
>
> A. No. I think I mentioned before that's not our governance.
>
> * * *

[45] Testimony of Peter Schlussler before the Special Committee on June 16, 2023, at 11-12.

[46] Testimony of former Chief Deputy County Executive Lisa Black before the Special Committee on June 26, 2024, at 6; see also January 11, 2023 press conference with former County Executive Steve Bellone.

[47] Testimony of former Chief Deputy County Executive Lisa Black before the Special Committee on June 26, 2024, at 6; see also January 11, 2023 press conference with former County Executive Steve Bellone.

[48] Testimony of Peter Schlussler before the Special Committee on June 26, 2024.

[49] November 10, 2023 interview of Deputy Commissioner McKenzie at 104-110.

Q. I sort of understand your governance and procedures, but this is a little unusual, right? This is an FBI agent literally on the phone with the head of DoIT Security saying we have information that there is ransomware operational in the county environment. Do you think a report like that would warrant it?

A. No. Once again, because remember Brian [Bartholomew] investigated the county environment and he said no, we don't have an issue in the county environment, this looks like the Clerk. There wasn't an issue in the county environment.

* * *

Q. . . . However, when I say the county environment, at least for purposes of this part of the query here, the fact that there was potentially ransomware active in the Clerk's Office meant that there was a risk to the county as a whole, right?

A. Sure, sure.

Q. Especially in light of the [February 2022] CyberDefenses report . . . here on [page] 32, it says, "Because issues are present across every tactic, there is a heightened concern that should a threat actor achieve success through recognizance or through initial access, that the damage that could occur would be significant." That's talking about if a threat actor had initial success anywhere in the county, that damage that could occur to the county as a whole would be significant; is that right?

A. Sure, yeah.

* * *

Q. So this [CyberDefenses] report in February [2022] makes that point that the county is so intertwined, of course, that if there's a risk in any department, that creates a risk for the entire county environment.

A. Yes, it does.

Q. So that's why I'm kind of curious as to when this email happens on June 21st and the FBI is saying we think there's actually threat actors in your environment who are operational, why there wasn't a greater level of concern on your part about the risk to the county overall?

A. You know what, Mr. Donoghue? It's fair, it's fair, right, to say, hey, Ari, this kind of came out of band. Do you know what? Sure. This was not -- this was not a -- this was not the in band like MS-ISAC or CISA, but it was also not completely out of band given our time of communication with DHSES and New York State and different authorities in regards to tips and different things that they see on the state network. So, it wasn't completely also like, wow, never seen any kind of direct communication before. It wasn't that.

* * *

A. So, if you want to say to me, Ari, this one is from the FBI, do you think it could have? Sure. But all I did was follow the governance that we always followed. Maybe that's open to being updated if you want to -- as far as your directive from the legislature, maybe that's a thing. If it comes from the FBI, maybe it goes right up somewhere. I would be open to updating conversations or having conversations with the Security Team so we know that going forward that is something we will do.

> Q. For all these reasons you explained, you did not report [the FBI warning] up to Commissioner Mastellon?
>
> A. I did not.
>
> Q. And to your knowledge, was anyone else above your level in the county government advised about this FBI contact?
>
> A. No, I'm not aware of that at all.

In the Special Committee's view, the June 21, 2022 FBI report alerting that there was reason to believe that ransomware threat actors were active in the Suffolk County environment warranted more attention and response from the DoIT Security Team, the DoIT leadership team, and the Clerk's Office. Had significant detection efforts been made across the Suffolk County environment at that time, the ransomware attack that took place three months later may have been averted.

C. Summer 2022 Cortex Alerts

As part of the Palo Alto cybersecurity suite deployed after the County's 2019 assessment, the DoIT Security Team received Cortex alerts that identified malware, suspicious activity, and intrusion events. Each member of the DoIT Security Team was interviewed as part of the Special Committee's investigation.

Members of the DoIT Security Team reported that they were receiving, in some instances, hundreds of alerts per day in the weeks leading up to the September 8, 2022 ransomware attack. The crushing number of alerts led the DoIT Security Team to re-direct the alerts to a Slack Channel several months prior to the attack. The size of the DoIT Security Team – never more than four members prior to the cyber-attack – made it impossible for them to check each alert. Team members reported both an increase in the number of Cortex alerts and an increase in the severity of the alerts leading up to September 8, 2022. Interviews revealed that DoIT Security Team

members lacked sufficient training in Cortex, that the team was heavily reliant on vendors, and several DoIT personnel even questioned the competence of the DoIT Security Team.[50]

In February 2022, the Cortex alert reporting system was, at the request of Mr. Schlussler, reconfigured so that the Cortex alerts from the Clerk/Comptroller environment would be routed to both the DoIT Security Team and Clerk IT Team personnel. After that point, Mr. Schlussler and his team could also see the Cortex alerts.

In the view of some DoIT leaders, the fact that Clerk's Office was now also receiving the Cortex alerts from the Clerk/Comptroller domains meant that DoIT was somehow largely relieved of the responsibility to respond to Cortex alerts from those domains. For instance, Deputy Commissioner McKenzie testified,

> But Pete [Schlussler] knew that once he got that [direct Cortex alerts], that was on him, right? Once again, don't ask for the thing [access to Cortex alerts] and then tell me I'm still in charge of the thing [Cortex alerts] I gave you. So, once he had that access and he got that feed, he was responsible for anything that came out of that.[51]

However, the Clerk's Office IT Team had neither the training nor the access to Palo Alto and Presidio (the cyber vendor who ran the County's Security Operations Center) necessary to make full use of the data they were receiving from the Cortex alerts. The Clerk's Office consultations with Palo Alto and Presidio all had to be coordinated through DoIT. And, as with the members of

[50] In his September 25, 2023 interview, DoIT Security Coordinator Bartholomew acknowledged that the Security Team was receiving "hundreds of [Cortex] alerts" on some days, but attributed the volume, at least in part, to Cortex over-alerting to benign issues in the County environment. Mr. Bartholomew stated, "That's why we've been going through a tuning process for [Cortex] alerts and they're still going through the tuning process right now for alerts that - OK, we know what this is. It's legit." Even if that view is correct, it would mean that the truly urgent Cortex alerts were buried within a blizzard of emails, leaving the Security Team unable to appropriately identify and respond to the threats Cortex was identifying.

[51] November 10, 2023 interview of Deputy Commissioner McKenzie at 59.

the DoIT Security Team, the Clerk's Office personnel had difficulty interpreting the Cortex alerts and fully understanding their importance.

Furthermore, although both the Clerk's Office and the DoIT Security Team received the alerts, only the DoIT Team had access to the Cortex Management Console, a dashboard that provided greater insight into the alerts and related data. In September 2022, DoIT leadership denied the Clerk's Office's requests for independent access to the Cortex Management Console because DoIT could not limit the data displayed on the console to just the Clerk/Comptroller environment and DoIT did not want to make alert data for other agencies and departments available to the Clerk's Office. For instance, in an email exchange on September 7, 2022, Mr. Schlussler wrote to DoIT Security Coordinator Bartholomew:

> Please offer status of me seeing the same traffic from the Palo [Alto firewall]. I can't emphasize [enough] this is extremely time sensitive. We just received another cortex alert a couple of hours ago and I need the tools to diagnose. If access [to the console] is not going to be given to me, please let me know so I can take the appropriate next steps.

Mr. Bartholomew responded, "We can do a Zoom meeting and get your people access to Cortex XDR console, firewalls, but because we cannot limit you to just seeing your traffic then we cannot give you individual access [to the Cortex console]. Take that up with management." When later interviewed in the course of this investigation, Mr. Bartholomew explained:[52]

> Look, I -- there's a reason why we can't give [the Clerk's Office] access to the whole console, right? And it's- it's purely bureaucratic. It's not- nothing technical, it's just people don't want other people seeing their data because then it becomes a, it turns into, unfortunately, in a

[52] September 25, 2023 interview of DoIT Security Coordinator Bartholomew.

politically charged environment, what happens is that information turns into -- people using it as pokers and they'll poke the other departments.

The September 7, 2022 email quoted above is but one in a series of emails from the last week of August 2022 and first week of September 2022 that should have made Suffolk County IT personnel in DoIT and the Clerk's Office recognize that there was a high probability that the County was already under cyber-attack. Other such email exchanges from that time period include:

- 8/22/22 – Email from member of the DoIT Security Team: "I got a Cortex alert as well from my own machine. It looks like it was a remote connection attempt from [Clerk's Office SonicWall firewall]. Cortex took prevention action of blocking the IP. . . . According to MITRE, it was an attempt to steal account names and passwords. Attempt to extract credential material from the Security Account Manager (SAM) database." (emphasis added)
- 8/31/22 – Email from Mr. Schlussler to DoIT Security Team forwarding a Cortex alert: "Please offer some background I have no insight to what this is about."
- 9/1/22 – Email from Clerk's Office IT personnel to DoIT Security Coordinator Bartholomew: "Can you look into the firewall in Hauppauge to see if anything accessed our [redacted] server yesterday afternoon? We found a file on the server in the downloads folder that none of us downloaded." (emphasis added)
- 9/7/22 -Email from Mr. Schlussler to Deputy Commissioner McKenzie: "The IP address for the compromised server was [redacted] the server is locked to account named [redacted]. The cnaples (lower case "L" replaced with a capital "I") account was created on 7/12/2022. No AD Audit logs on the creation of the account are available." (emphasis added)

- 9/7/22 – Email from Mr. Schlussler to DoIT Security Coordinator Bartholomew: "Brian. we need to deal with this asap. 3rd cortex today. with the last two being malicious." (emphasis added)

Hours after the September 7, 2022 email exchanges, the cyber-criminal perpetrators began encrypting data on Suffolk County servers across the County environment and posting ransom demands. Had the red flag warnings in late August and early September 2022 been recognized and acted upon, the September 8, 2022 ransomware attack may have been averted.

IV. RECOVERY AND REMEDIATION

Following the September 8, 2022 ransomware attack, Suffolk County undertook a lengthy, arduous, and expensive recovery and remediation effort. The former County Executive declared and extended a County State of Emergency from September 2022 through December 2023. The state of emergency allowed the County Executive to, among other things, issue no-bid contracts without endorsement from the Legislature.

The remediation included extensive replacement and upgrading of IT hardware and software across the entire County environment. Suffolk County IT systems remained unavailable to County employees and the public alike. The County's main website was unavailable for over five months. Vendors who provide essential services, such as child care, could not submit vouchers and receive payments. Emergency 911 operations were affected and County residents were unable to pay outstanding tickets at the County's Traffic Agency. County residents whose PII was stolen and made available on the Dark Web received credit monitoring services at County expense. Since the County's email systems were shutdown, County employees began communicating through personal email addresses, cell phones, and cloud-based channels, such as Slack. A number of County employees involved in the remediation efforts complained that they were obligated to work long and often unreasonable hours, that DoIT and County leadership deferred to outside vendors rather than the County IT professionals who were more familiar with

the County's systems, that County data was unnecessarily destroyed by outside vendors, and that the remediation efforts were otherwise not well coordinated. Some County employees also complained that there was a lack of coordination between departments during the remediation process. For instance, the Special Committee received conflicting testimony about whether Clerk's Office personnel hindered access to their domain during the remediation process.[53]

V. THE SPECIAL COMMITTEE'S INVESTIGATION

As noted above, this bipartisan Special Committee commenced its work shortly after the September 2022 ransomware attack against Suffolk County. With the assistance of an outside counsel, the Special Committee's investigation involved interviews of more than 20 witnesses, including Suffolk County IT professionals and Elected Officials. Some of those Suffolk County IT employees refused to be interviewed until served with subpoenas, and at least three DoIT employees claimed whistleblower status. The Special Committee has collected and reviewed more than 35,000 documents, including email correspondence between County employees; data maps; data logs; Cortex alerts; forensic reports from FTI Consulting, CGI, Tracepoint, Dell, Red Land, Palo Alto Unit 42 and other vendors; contracts between Suffolk County and vendors; and myriad of other internal documents. The Special Committee conducted seven public hearings where witnesses were questioned by members of the Special Committee and their outside counsel, Mr. Donoghue. Given the volume of evidence and the significance of the issues involved, the Special Committee could continue its investigation for months more and would likely uncover more relevant information. That said, the Special Committee believes its extensive investigation to date has sufficiently identified the major contributing factors that left Suffolk County vulnerable to the cyber-attack it suffered in 2021-2022.

[53] Testimony of former Chief Deputy County Executive Lisa Black before the Special Committee on June 26, 2024 at 46-48; Testimony of Commissioner Scott Mastellon before the Special Committee on October 20, 2023, at 82-84; Testimony of Peter Schlussler before the Special Committee on June 16, 2023, at 24.

VI. KEY FINDINGS EXPLAINED

1. Insufficient coordination between different Information Technology teams within Suffolk County adversely impacted the County's cybersecurity posture and readiness.[54]

The segregated nature of the County's IT departments and lack of a CISO stymied communication and coordination between different IT teams within the County and adversely impacted the County's security posture. It is imperative for large organizations to have channels for communicating and escalating IT concerns to avoid threats that infiltrate one department and expand into others. Witnesses from DoIT have testified that the Clerk's Office did not give them access to their firewall and data center area, which prevented them from being able to take action in response to the Clerk Office's concerns and "left them in the dark."[55] Conversely, witnesses from the Clerk's Office have testified that they were denied access to logs from the perimeter Palo Alto firewall, the Cortex Management Console and felt as though their security concerns were often dismissed or ignored by DoIT personnel.[56] This lack of coordination meant that alerts notifying Suffolk County of a possible cyber-attack were not being appropriately addressed across the County.

2. The absence of a cyber-attack response and recovery plan significantly hindered Suffolk County's ability to respond to the September 2022 ransomware attack, increasing both the time it took to resume operations and the overall recovery costs.[57]

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[54] See Testimony of Commissioner Mastellon before the Special Committee on October 20, 2023; testimony of DoIT personnel Vicent Cordiale before the Special Committee on August 23, 2023; testimony of Peter Schlussler before the Special Committee on June 16, 2023; and November 10, 2023 interview of Deputy Commissioner McKenzie.

[55] Testimony of Commissioner Mastellon before the Special Committee on October 20, 2023, at 7; November 10, 2023 interview of Deputy Commissioner McKenzie at 8; testimony of Vincent Cordiale before the Special Committee on August 23, 2023, at 10.

[56] Testimony of Peter Schlussler before the Special Committee on June 16, 2023, at 13; February 24, 2023 interview of Clerk's Office personnel Christopher Rizopoulos; March 9, 2023 interview of Clerk's Office personnel Robert Church; August 8, 2023 interview with Clerk's Office personnel Jason Bruno.

[57] The majority of witnesses testified that they believe that a response and recovery plan would have improved the County's recovery time and allowed the County to properly address threat alerts before the attack. The failure to implement a plan prior to the attack likely contributed greatly to the County's failure to properly address threats when

A cyber-attack response and recovery plan is indisputably an essential part of a sound cybersecurity program.[58] Witnesses uniformly testified that Suffolk County had no cyber-attack response and recovery plan in place prior to the September 2022 ransomware attack,[59] despite repeated prior calls for DoIT to issue such a plan.[60] The failure to implement a plan prior to the attack contributed to the County's failure to properly address threats when they were first identified. Furthermore, without a response and recovery plan, there was no coordinated strategy for departments and vendors to follow. The absence of a response and recovery plan significantly hindered the County's response to the attack.

3. The creation of a "pass through" in Suffolk County's perimeter firewalls for data traffic destined for the Suffolk County Clerk's Office prior to the attack created a significant vulnerability that put the entire County at risk.[61]

Based on forensic analysis and interviews with DoIT personnel and Clerk's Office IT personnel, it is clear that a "pass through" was created in the County's perimeter firewall that allowed internet traffic destined for the Clerk/Comptroller's end-of-life firewall[62] to pass through the County's perimeter firewall without scrutiny. Creating such a "pass through" exposed the

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they were first identified. See, e.g., September 25, 2023 interview of DoIt Security Coordinator Bartholomew; November 10, 2023 interview of Deputy Commissioner McKenzie; the Red Land After-Action Report; 2020 IT Risk Assessment Report at 7-8; October 20, 2023 testimony of Commissioner Mastellon; and the CyberDefenses Report.

[58] See, e.g., NIST Special Publication 800-61: "Computer Security Incident Handling Guide" at Section 2.3.2 ("Organizations should have a formal, focused, and coordinated approach to responding to incidents, including an incident response plan that provides the roadmap for implementing the incident response capability) available at: https://csrc.nist.gov/pubs/sp/800/61/r2/final. Additionally, in his September 25, 2023 interview, Mr. Bartholomew testified that "there should always be a plan to follow."

[59] See, e.g., September 25, 2023 interview of DoIt Security Coordinator Bartholomew; November 10, 2023 interview of Deputy Commissioner McKenzie at 35; Testimony of Commissioner Mastellon before the Special Committee on October 20, 2023, at 104; Testimony of Vincent Cordiale before the Special Committee on August 23, 2023, at 21.

[60] See, e.g., Red Land AAR at 9; CyberDefenses Report; and Risk Report at 7-8.

[61] See Testimony of Commissioner Mastellon before the Special Committee on October 20, 2023, at 51; November 10, 2023 interview of Deputy Commissioner McKenzie at 42-44; Testimony of Peter Schlussler before the Special Committee on June 16, 2023, at 14; September 25, 2023 interview of DoIt Security Coordinator Bartholomew; CyberDefenses Report.

[62] Testimony of Commissioner Mastellon before the Special Committee on October 20, 2023, at 48, 51; November 10, 2023 interview of Deputy Commissioner Ari McKenzie at 42-44; Testimony of Peter Schlussler before the Special Committee on June 16, 2023, at 13; September 25, 2023 interview of DoIT Security Coordinator Bartholomew.

County to significant risk. This risk level was especially high since, as CyberDefenses had warned in February 2022, the departmental firewall rule sets in the County did not provide effective barriers to limit threat actors from moving laterally within the overall County environment.[63] This meant that cyber criminals who gained a foothold in the Clerk's Office, or any other County domain, could easily navigate between departments and across the entire County IT system.

4. Prior to the September 2022 ransomware attack, Suffolk County's overall cybersecurity posture was not sufficiently robust or sufficiently resilient to adequately guard against the attack.[64]

A robust cybersecurity posture is essential to avoiding cyber-attacks. Based on the evidence reviewed and testimony from witnesses, it is evident that the County's cybersecurity posture was not sufficiently robust or resilient to adequately guard against an attack. The CyberDefenses Report issued in February 2022 – after the initial breach but before the ransomware attack – clearly warned that the County's cybersecurity posture was inadequate and that the County was at serious risk. If, as former Chief Deputy County Executive Black testified, DoIT leaders were already aware of the significant deficiencies prior to receiving that report, that only makes the County's unpreparedness even more inexplicable. While the County was making significant efforts to improve its posture (e.g., upgrading firewalls, deploying Cortex), the DoIT Security Team remained understaffed and undertrained. The County was not making full use of the slew of warnings it was receiving from the Cortex alerts. Further, the County was overly reliant on cyber vendors and some County IT Teams did not have direct access to vendor support.

[63] CyberDefenses Report at 10.

[64] See CyberDefenses Report; October 20, 2023 testimony of Commissioner Mastellon; November 10, 2023 interview of Deputy Commissioner McKenzie; August 23, 2023 interview of DoIT employee Jack Bloom; Testimony of Vincent Cordiale before the Special Committee on August 23, 2023; Testimony of Peter Schlussler before the Special Committee on June 16, 2023.

5. The continued use of firewalls that had reached end-of-life and, in some instances, end-of-support created significant vulnerabilities that put the County at risk.[65]

Prior to the attack, most of the County's departmental firewalls had reached end-of-life and several had even reached end-of-support. Commissioner Mastellon and other DoIT leaders were well aware of that fact, and they recognized that it posed risks for the County. Cyber best practices require the replacement of key equipment prior to it reaching end-of-life. Under no circumstances should end-of-support firewalls have been used to protect County IT systems. The virtual/zone Palo Alto firewall that DoIT intended to erect around the Clerk/Comptroller environment was not put in place prior to the cyber-attack. Additionally, out-of-date servers were still being employed across the County.[66]

6. Lack of a Chief Information Security Officer (CISO) hindered Suffolk County's ability to prepare for, and guard against, the September 2022 ransomware attack.[67]

The appointment of a CISO is a key component of a sound cybersecurity defense.[68] The 2020 Risk Report noted the need to hire a CISO to "provide strategic leadership across such a large enterprise requires a strategic leader that is more focused on policy, strategy and collaboration than that of day-to-day operations. In addition, that strategic leader must be recognized and empowered by the County Executive's Office, the Legislature, all Elected Officials and all Department

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[65] See Testimony of Commissioner Mastellon before the Special Committee on October 20, 2023, at 47-48; November 10, 2023 interview of Deputy Commissioner McKenzie at 28; Testimony of Peter Schlussler before the Special Committee on June 16, 2023, at 17, 21; Testimony of Clerk Office employee Jason Bruno before the Special Committee on August 8, 2023, at 14.

[66] See Testimony of Commissioner Mastellon before the Special Committee on October 20, 2023, at 48; November 10, 2023 interview of Deputy Commissioner McKenzie at 28; Testimony of Peter Schlussler before the Special Committee on June 16, 2023; Testimony of Jason Bruno before the Special Committee on August 8, 2023, at 14.

[67] See Risk Report at 6; 2022 Draft Report at 5; October 2022 Memorandum prepared by CGI; October 20, 2023 interview of Commissioner Mastellon; September 25, 2023 interview of DoIT Security Coordinator Bartholomew; Testimony of Peter Schlussler before the Special Committee on June 16, 2023.

[68] See Risk Report at 6; 2022 Draft Report at 5; October 2022 Memorandum prepared by CGI; Testimony of Commissioner Mastellon before the Special Committee on October 20, 2023; September 25, 2023 interview of DoIT Security Coordinator Bartholomew; and Testimony of Peter Schlussler before the Special Committee on June 16, 2023, at 31.

Heads."[69] DoIT leadership and others in the County were well aware of the need for a CISO.[70] By failing to establish a CISO prior to the attack, Suffolk County's ability to prepare for and guard against a cyber-attack was significantly hindered as no one individual was responsible for cybersecurity for the entire County, which fostered uncertainty in decision making and a lack of accountability within the County.[71]

7. Insufficient staffing and training adversely impacted Suffolk County's cybersecurity posture.[72]

Insufficient training and understaffing were prevalent themes in witness interviews across departments. Commissioner Mastellon and Deputy Commissioner McKenzie were less concerned about the County's IT training and staffing than lower-ranking personnel.[73] Mastellon and McKenzie both testified that they believed the IT training DoIT personnel received was sufficient. Although they acknowledged that there was room for additional staffing, they did not believe that understaffing was a serious concern for the County. Commissioner Mastellon stated that the training that the cybersecurity staff received was predominantly "knowledge transfer" instead of "formal classroom training."[74]

However, according to testimony from DoIT personnel and the Clerk's Office personnel, the security IT teams at both DoIT and the Clerk's Office were understaffed and insufficiently

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[69] Risk Report at 6.

[70] Risk Report at 5.

[71] CGI's Memorandum; September 25, 2023 interview of DoIT Security Coordinator Bartholomew; Testimony of Peter Schlussler before the Special Committee on June 16, 2023, at 31.

[72] A significant number of DoIT employees testified that there was insufficient staffing and training for the DoIT Cyber Security Team, which impacted their performance. See, e.g., Testimony of Commissioner Mastellon before the Special Committee on October 17, 2023; November 10, 2023 interview of Deputy Commissioner McKenzie; Testimony of Vincent Cordiale before the Special Committee on August 23, 2023, at 18; August 23, 2023 interview of DoIT employee Jack Bloom at 31; as well as statements from other DoIT employees.

[73] October 17, 2023 interview of Commissioner Mastellon transcript excerpts at 50; November 10, 2023 interview of Deputy Commissioner McKenzie at 61-62.

[74] October 17, 2023 interview of Commissioner Mastellon transcript excerpts at 50.

trained to handle the tasks they were assigned.[75] Although on-the-job training can be valuable, this cannot substitute for formal training on new technology. As became apparent throughout the investigation, many of the cybersecurity employees, including senior employees, were insufficiently versed in the various cybersecurity applications, such as Cortex. Additionally, due to the high-pressure environment and understaffing, newer employees were left to research and learn on their own.

8. Suffolk County personnel failed to sufficiently heed significant warning signs of an impending cyber-attack in the weeks leading up to the September 8, 2022 ransomware attack.[76]

Suffolk County IT personnel received numerous warning signs in the months leading up to the attack, including an increase in Cortex alerts and a warning from the FBI. Witnesses across departments testified that there were noticeable increases in both the frequency and severity of Cortex malware alerts and behavioral threat alters reported to DoIT and the Suffolk County Clerk's Office in the months leading up to the September 2022 ransomware attack.[77] Despite these consistent warnings, personnel across departments failed to take sufficient action and elevate the warning signs to the County Executive, Legislature, or other leaders. The failure to properly and

[75] Testimony of Vincent Cordiale before the Special Committee on August 23, 2023, at 16-17; August 23, 2023 interview of DoIT personnel Jack Bloom at 25; June 12, 2023 interview of DoIT security personnel Joanne Fisk; August 31, 2023 interview of DoIT personnel Michael Azzara; September 19, 2023 interview of DoIT security personnel Nicholas Spiridon; and interview of Clerk's Office personnel Jason Bruno.

[76] Witnesses have consistently reported that there were noticeable increases in both the frequency and severity of malware alerts and behavioral threat alters reported to DoIT and the Suffolk County Clerk's Office in the months leading up to the September 2022 ransomware attack. The County was receiving a concerning number of Cortex malware alerts that were either ignored or not properly addressed. See November 10, 2023 interview of Deputy Commissioner McKenzie at 65; Testimony of Peter Schlussler before the Special Committee on June 16, 2023, at 22; September 25, 2023 interview of DoIT Security Coordinator Bartholomew; Testimony of Vincent Cordiale before the Special Committee on August 23, 2023, at 17; August 23, 2023 interview of DoIT employee Jack Bloom at 29-30; as well as statements from employees from both the Clerk's Office and DoIT.

[77] November 10, 2023 interview of Deputy Commissioner McKenzie at 64, 108-109; Testimony of Peter Schlussler before the Special Committee on June 16, 2023, at 4-5; September 25, 2023 interview of DoIT Security Coordinator Bartholomew; Testimony of Vincent Cordiale before the Special Committee on August 23, 2023, at 6; August 23, 2023 interview of DoIT employee Jack Bloom at 13-14; as well as statements from employees from both the Clerk's Office and DoIT.

urgently address the alerts allowed the cyber criminals to gain a foothold in the Suffolk County environment and move between departments. Proper response to the Cortex alerts may well have allowed the County to avoid the ransomware attack entirely.

9. Suffolk County Information Technology personnel failed to report on cybersecurity risks to the Suffolk County Legislature as required by Suffolk County law.

DoIT is obligated by law to report annually on Suffolk County's IT posture through an IT Risk Assessment report.[78] This report should address any cybersecurity risks that Suffolk County may be facing so such risks can be adequately addressed by Elected Officials who are accountable to County residents. Since 2019, DoIT has finalized and distributed only one IT Risk Assessment report, in violation of the requirements of County law.[79]

10. Department of Information Technology personnel were aware of Bitcoin mining activities in the Clerk's Office prior to August 2021. However, it is unclear whether Bitcoin mining in the Clerk's Office contributed to the September 2022 ransomware attack.[80]

Numerous County DoIT employees were aware that Bitcoin mining was taking place in the Clerk's Office portion of the Riverhead datacenter prior to the Suffolk County District Attorney's Office investigation. In fact, former DoIT Security Coordinator Bartholomew reported that he learned about Bitcoin mining in 2017 or 2018, that he had advised the DoIT Commissioner, and that he instructed Clerk's Office personnel to cease that activity. This investigation has not uncovered any evidence linking the Bitcoin mining operation to the 2021-2022 Suffolk County

[78] Resolution No. 94-2018.

[79] Testimony of Commissioner Mastellon before the Special Committee on October 20, 2023, at 57-63; see also November 10, 2023 interview of Deputy Commissioner McKenzie at 31.

[80] Numerous County employees from DoIT were aware that Bitcoin mining was taking place in the County, including the former head of DoIT cybersecurity team, Mr. Bartholomew. See September 25, 2023 interview of DoIT Security Coordinator Bartholomew. Members of the Clerk's Office have denied that the attack had anything to do with the 2021 Bitcoin mining incident. See June 16, 2023 interview of Peter Schlussler.

cyber-attack. However, such activity should never have taken place and County employees who were aware of that activity should have immediately reported it to appropriate authorities.

VII. CONCLUSION AND RECOMMENDATIONS

This bipartisan Special Committee was tasked to investigate the factors that contributed to the 2021-2022 cyber-attack against Suffolk County with the expectation that such a review would help ensure that the County will never again have to endure a cyber intrusion of such magnitude. To be clear, cyber criminals will continue to target Suffolk County and, in some instances, will likely be able to breach the County's IT systems, exploit weaknesses, and access data. Such attacks are an unavoidable part of our technology-dependent modern lives. What made the 2021-2022 Suffolk County cyber-attack unusual was not the fact that it happened – but the extended recovery time period and unusually high recovery costs. In conducting this investigation, it is the Special Committee's expectation that the County's upgraded cybersecurity system will be (1) sufficiently robust to prevent the vast majority of intrusion attempts, and swiftly detect and neutralize successful intrusions, and (2) sufficiently resilient so that the County's IT professionals and supporting vendors will complete recoveries in a reasonable time and at reasonable costs. Certain steps are necessary to ensure that those expectations will be met.

First, the different IT teams across Suffolk County and the Elected Officials who supervise them must work closely and collaboratively to ensure the County is protected from cyber-attack. Cybersecurity issues must be elevated to the appropriate levels and addressed. Disagreements between IT teams, if any, should be elevated to the Elected Official level so that those individuals can ensure that the collective best interests of the County are served. Political issues should never be permitted to interfere with the County's cybersecurity defenses.

Second, a County CISO should be appointed for a set term, to be determined by the Legislature. This individual should possess the requisite experience and skills and be dedicated to building relationships between departments. The CISO should ensure that all departments and

environments within the County are protected by current firewalls. Under the supervision and authority of the CISO, the DoIT Security Team should be granted appropriate access to departmental firewalls, while respecting the sensitive data of each Elected Officials' department. Should Elected Officials believe that providing the DoIT Security Team with access to firewall data compromises the security or integrity of their operations, those Elected Officials should discuss this issue directly with the County Executive. All internet traffic destined for domains within the County environment must pass through approved firewalls, and no department should use modems or other devices to circumvent County firewalls. Any request by a department for exceptions to perimeter firewall rules to allow data to flow through the perimeter firewall to their environments with less scrutiny than would otherwise be applied should be in writing and DoIT should maintain records of all such requests and any actions taken in response to such requests. Elected Officials must work cooperatively with the CISO and grant access to additional departmental cybersecurity infrastructure when appropriate.

Third, the County CISO should assemble a cross-department Cyber Incident Response and Recovery Team comprised of specific IT professionals identified by name from every IT team in the County. That team must be well-versed in the County's cyber intrusion response and recovery plan; and that team should train regularly to execute the plan.

Fourth, the County CISO must issue a comprehensive cyber intrusion response and recovery plan for the entire County.[81] The plan must be specific to Suffolk County and its IT environments, all County IT professionals must be trained on the plan, and regular audits should be conducted to ensure that all County departments are prepared to execute that plan on a moment's notice. The DoIT Commissioner should coordinate with the CISO and the Fire, Rescue and

[81] Such a plan should, at a minimum, meet the requirements described by NIST in publications including IR-8: "Incident Response Plan" and SP 800-61 "Computer Security Incident Handling Guide," available at: https://csrc.nist.gov/publications.

Emergency Services Commissioner to ensure that the County's cyber intrusion response and recovery plan is integrated with the County's Comprehensive Emergency Management Plan. Elected Officials should ensure that their department's Continuity of Operations Plan addresses cyber breach response and recovery and integrates with the County's comprehensive cyber intrusion response and recovery plan.

Fifth, the County CISO and DoIT must meet the requirements of Resolution No. 94-2018 and provide an IT Risk Assessment Report to the County Executive, County Legislature, and other County leaders as the law requires. Those reports should identify all significant risks to the County's IT systems, explain how those risks are being addressed, and identify any additional resources needed to appropriately guard against the threat of a cyber intrusion.

Sixth, the County must significantly increase the size of the County's IT Security Team and significantly improve the skillsets of those team members. The County must recruit, hire, and continuously train its own cybersecurity professionals rather than continue its over-reliance on outside vendors.

Seventh, the County should seek to secure Cyber-Breach Insurance. Wholly aside from the financial protection that such a policy would provide, seeking and maintaining such insurance would provide an external impetus for County IT professionals to ensure that our systems and practices are regularly updated.

As the 2021-2022 cyber-attack made painfully clear, a threat to any part of the County IT system is a threat to the entire County. All Suffolk County personnel have a shared responsibility to guard against such threats. Only through better planning, preparation, coordination, and training will we be able to ensure that we meet our obligation to protect Suffolk County, its data, and its residents.

Introduction to Cultural Competency: The Convergence of Dead-Naming and Mis-Gendering and its Impact on Inmate Belonging, Safety and Security

Assistant Dean
Jermaine Cruz

Introduction to Cultural Competency: The Convergence of Dead-Naming and Mis-Gendering and its Impact on Inmate Belonging, Safety and Security

Prepared for: County Attorney's Association of New York

Presented by: Jermaine Cruz
Assistant Dean for Diversity & Inclusion, Albany Law School
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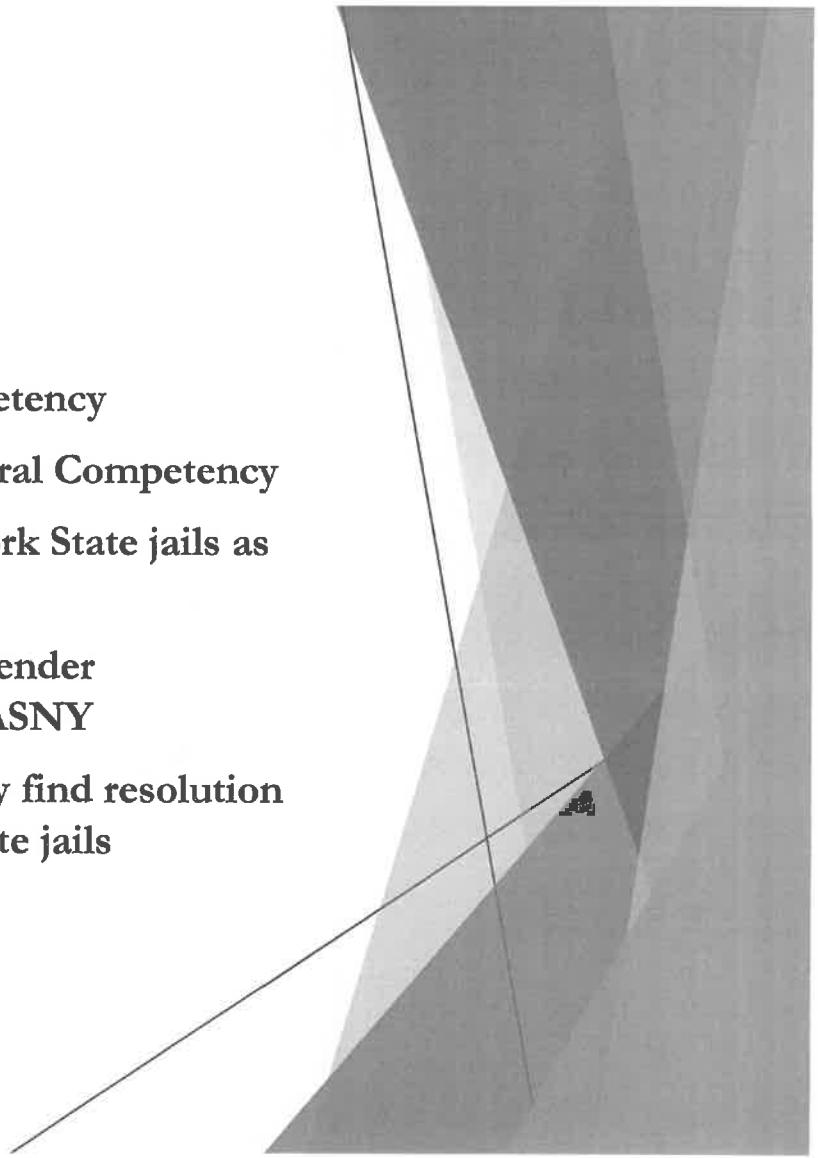
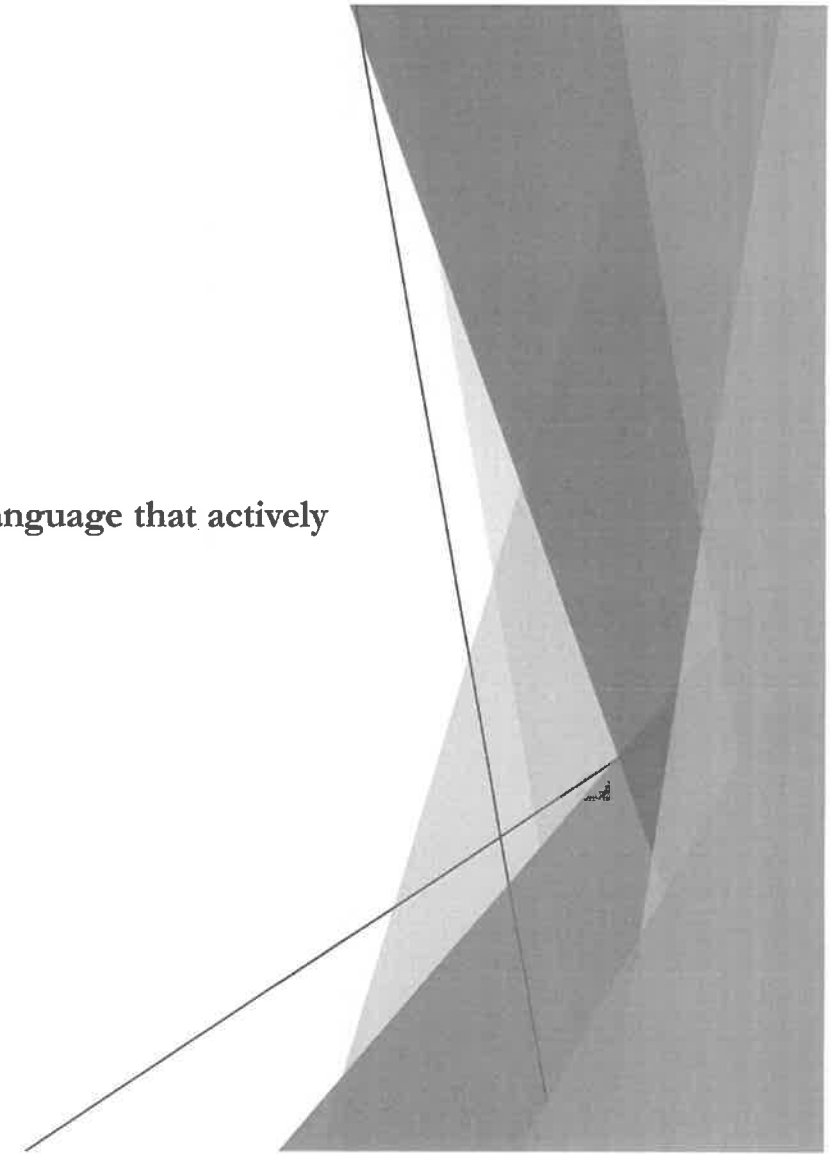
Today's Road Map

- Set ground rules for our conversation today
- Introduce, define and explore the concept of Cultural Competency
- Introduce the Cultural Iceberg as a tool for developing Cultural Competency
- Explore the gender identity/expression challenge in New York State jails as identified by the members of CAASNY
- Identify how Cultural Competency interacts/applies to the gender identity/expression challenge identified by members of CAASNY
- Introduce "Design Systems Thinking" as a tool to potentially find resolution to the gender identity/expression challenge in New York State jails



Ground Rules

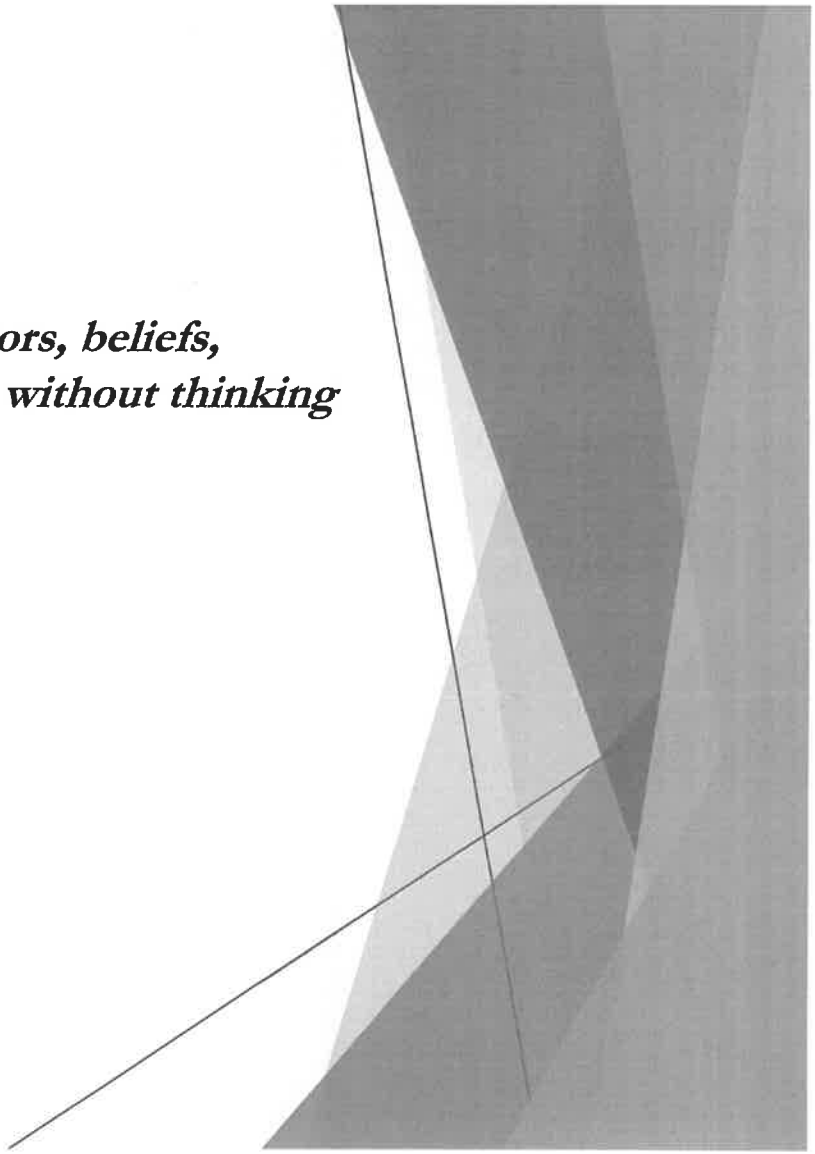
- Listen actively and deeply
- Accept one another's reality
- Ask compassionate questions
- Use "I" statements
- Remember we are talking about people, not objects. Use language that actively humanizes the discussion
- Use the words, do not use code language
- Challenge yourself
- Expect and accept non-closure
- Expect to experience discomfort
- Allow others to learn what you already know
- Confidentiality – take the stories, leave the names
- Take care of yourself



Culture Defined

Culture

- ***Culture is a way of life of a group of people – behaviors, beliefs, values, roles, and symbols that they accept, generally without thinking about them.***

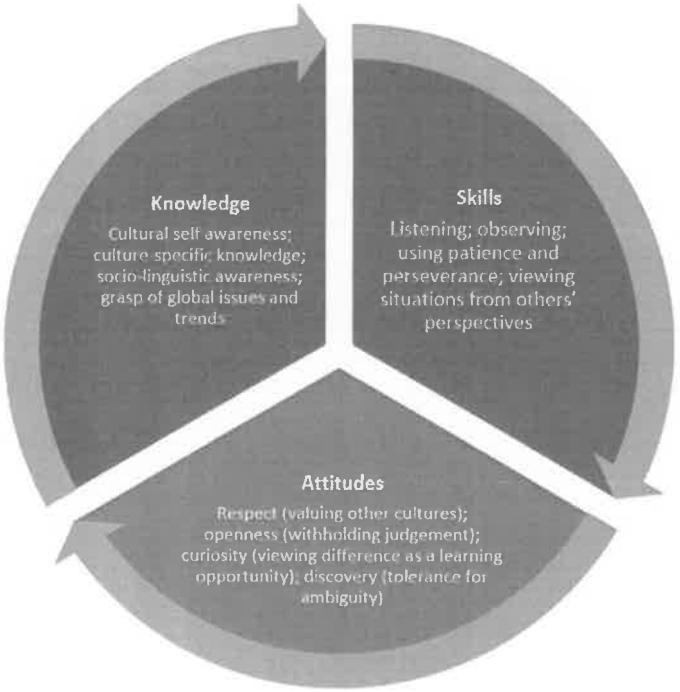


WHAT IS CULTURAL COMPETENCE?

Cultural competence is a continuous journey to increase proficiency in inter- and intracultural knowledge.

Key Components:

- Awareness of your own cultural worldview;
- Awareness of your attitudes towards cultural differences;
- Knowledge of different cultural practices worldwide; and
- Enhancing cross-cultural skills.



Intercultural Competence for Nonprofit Fundraising | CCS Fundraising

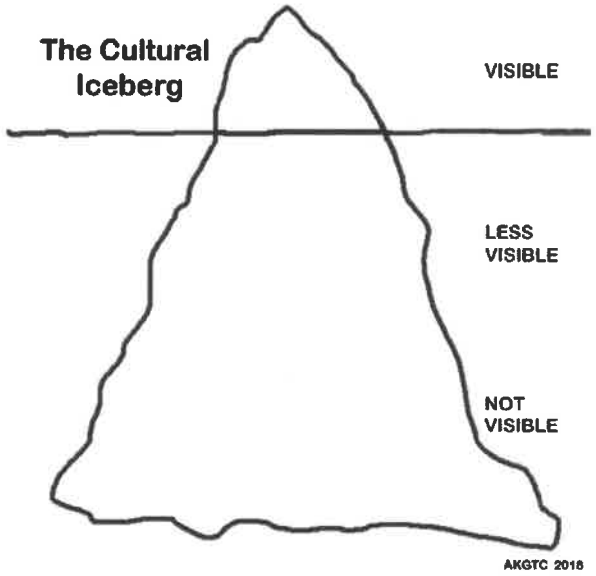
What Factors Influence Cultural Competency?

Loden & Rosener Diversity Wheel (1991)

Culture: What You See and What You Don't!

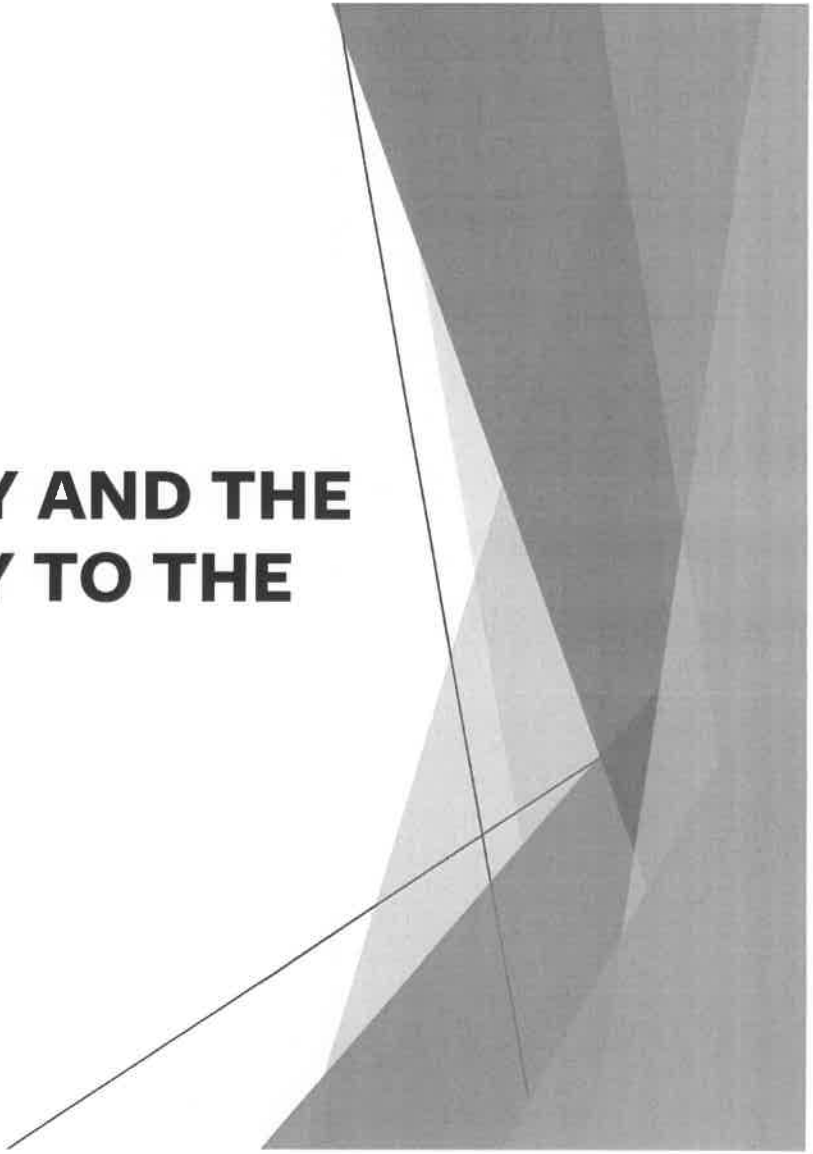
The Cultural Iceberg

https://youtu.be/u37t0u-4BTI?si=SRvDmnKgWt_xCPg-



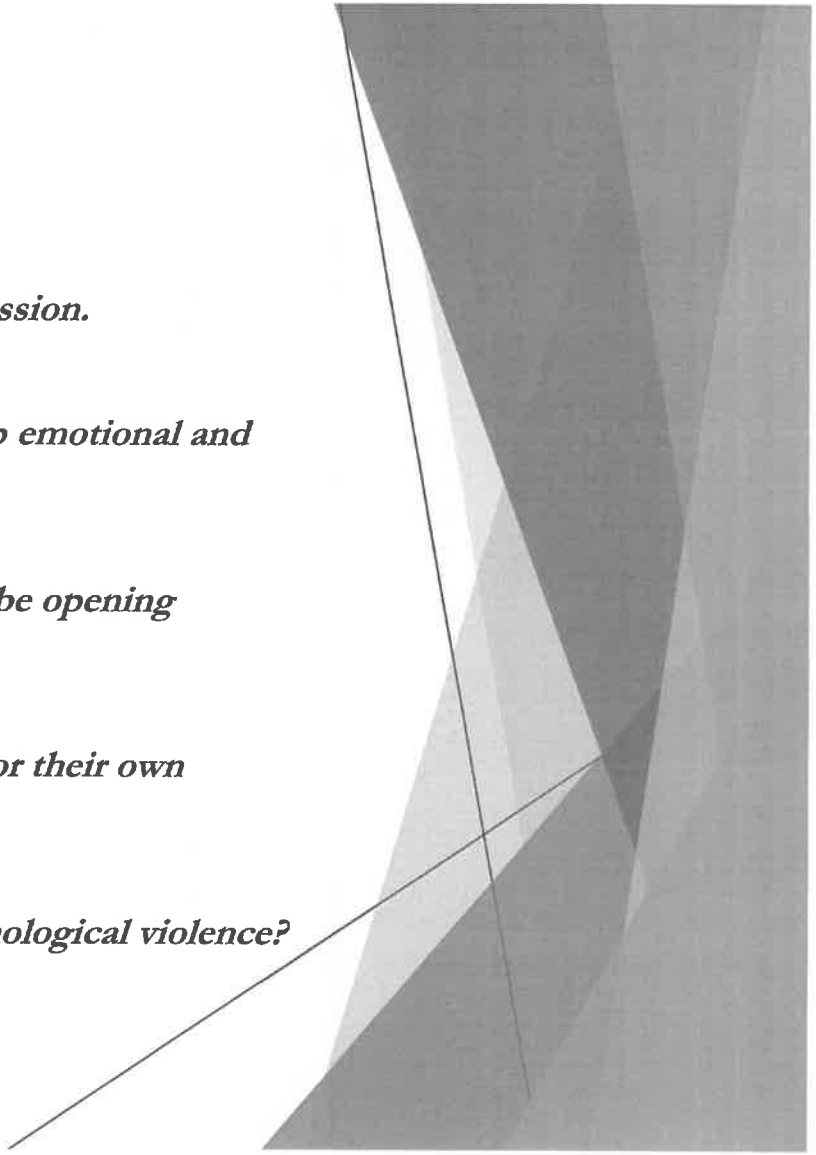
NAME THE CHALLENGE/PROBLEM

HOW DO CULTURAL COMPETENCY AND THE CULTURAL ICEBERG MODEL APPLY TO THE CHALLENGE IN FRONT OF US?



Some Things to Consider

- *Biological "sex" at birth does not always match gender identity.*
- *Misgendering is used as a method of asserting dominance/aggression.*
- *Dead naming is used as a weapon of invalidation and causes deep emotional and psychological harm.*
- *Transgender/Gender non-conforming individuals are deemed to be opening themselves up to violence and unwanted sexual conduct.*
- *Having "chosen" this life, they are considered to be responsible for their own protection.*
- *Being forced to live as gender you do not identify with/as = psychological violence?*



Some Things to Consider

- *Prisons/jails operate on rigid gender binaries. This ignores gender expression/identity.*
- *Transgender/gender non-forming prisoners often housed in dormitories based on their biological "sex" at birth.*
- *High incidence of abuse/mistreatment of transgender and non-gender conforming individuals who are/have been incarcerated (verbal, physical, psychological and sexual abuse).*
- *Transgender/gender non-conforming inmates are often punished for attempting to socially transition through their gender expression.*
- *There is a history in prison/jail systems of indifference to substantial risk of serious harm to transgender/gender non-conforming incarcerated individuals.*
- *"Protection" most often comes in the form of solitary confinement which has significant psychological impact (limited access to prison/jail programs and social interaction).*
- *"Protection" by means of segregation is often counterproductive. Isolation prevents relationship formation and opportunities for solidarity/alliance which may decrease becoming victims of violence.*

External Culture (The Tip)

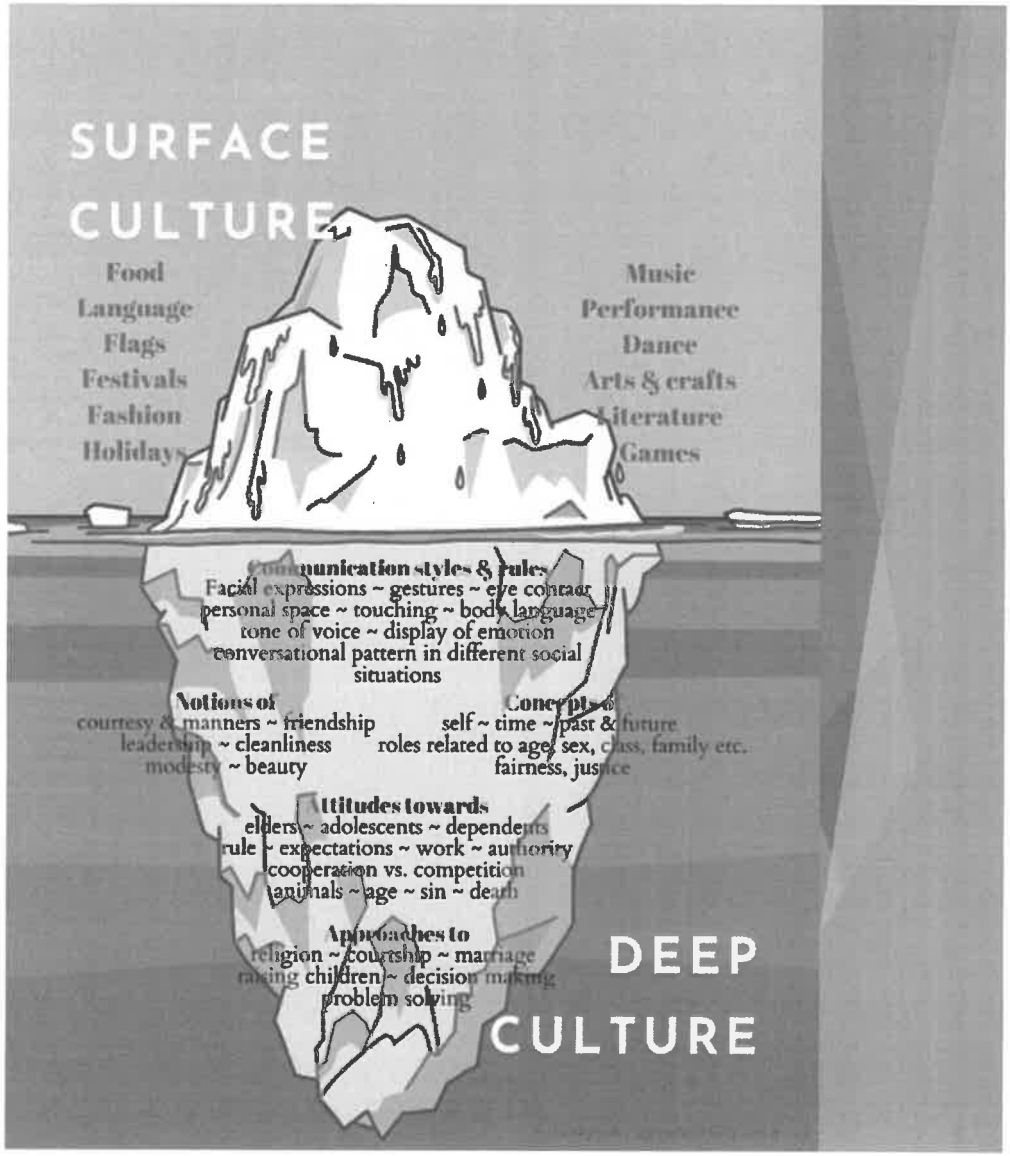
- *Conscious awareness/understanding/compliance*
- *Easily Changed*
- *Based on objective knowledge*
- *Behavior/beliefs*

Internal Culture (Below the Surface)

- *Inherent*
- *Unconscious*
- *Difficult to change (not always known/visible)*

When we focus only on the tip (external culture) we ignore what is below the surface (internal culture).

Our internal culture is the core of who we are as individuals.



How Can We Use Design Systems Thinking to Develop Resolutions to the Challenge?

Systems Thinking Defined:
An approach that focuses on understanding the whole system, rather than individual elements to identify opportunities for change.

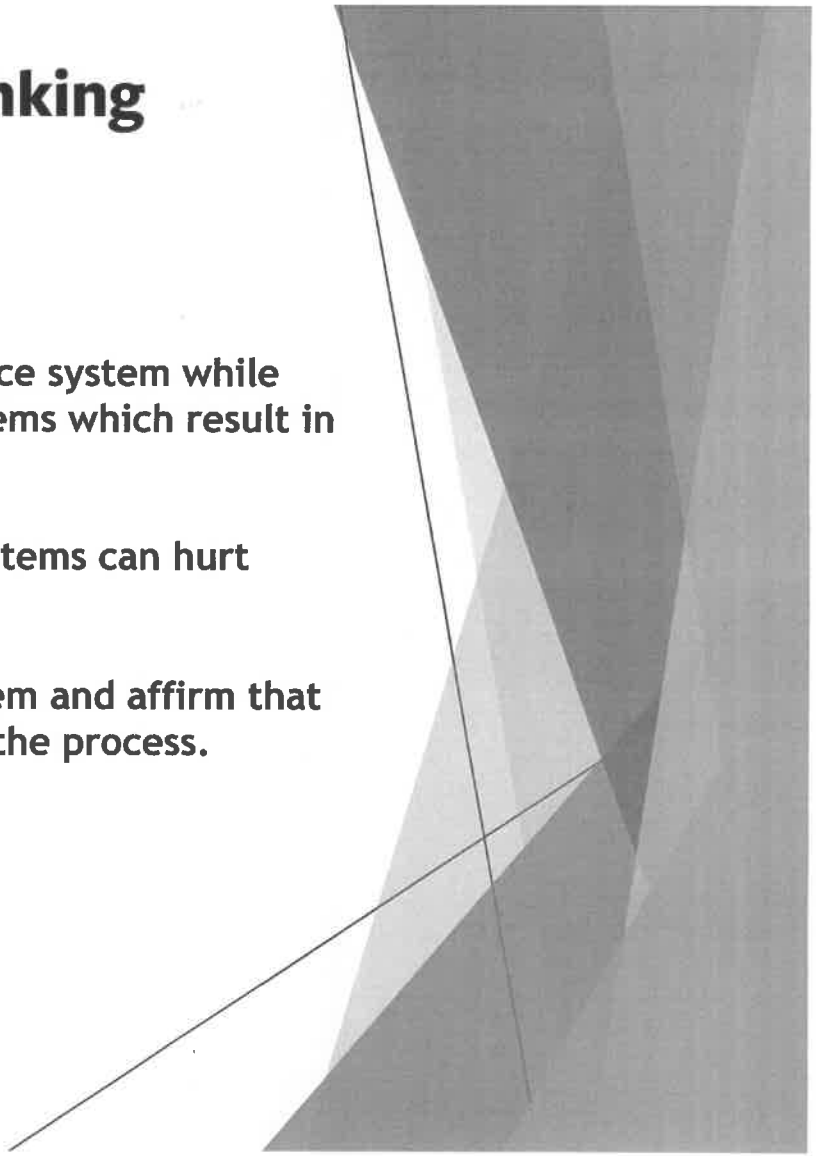
Design Thinking Defined:
A process that focuses on understanding the needs of individuals/people to create products, services and processes.

Design Systems Thinking is:

- *An approach that analyzes problems in a specific and appropriate context apart from the whole system*
- *Holistic (you must understand the whole and its flaws prior to being able to properly address the individual impact)*
- *Analytical*
- *Abstract*
- *Conceptual*
- *Relationship-oriented*
- *Deeply human*
- *Experimental*

Implementation of Design Systems Thinking

- First, we must acknowledge that the rule of law and the justice system while necessary and effective is also complicit in the design of systems which result in oppression.
- Second, we must acknowledge that bad design and flawed systems can hurt people.
- Third, we must identify, with specificity, the challenge/problem and affirm that we are trying to develop positive alternatives and commit to the process.



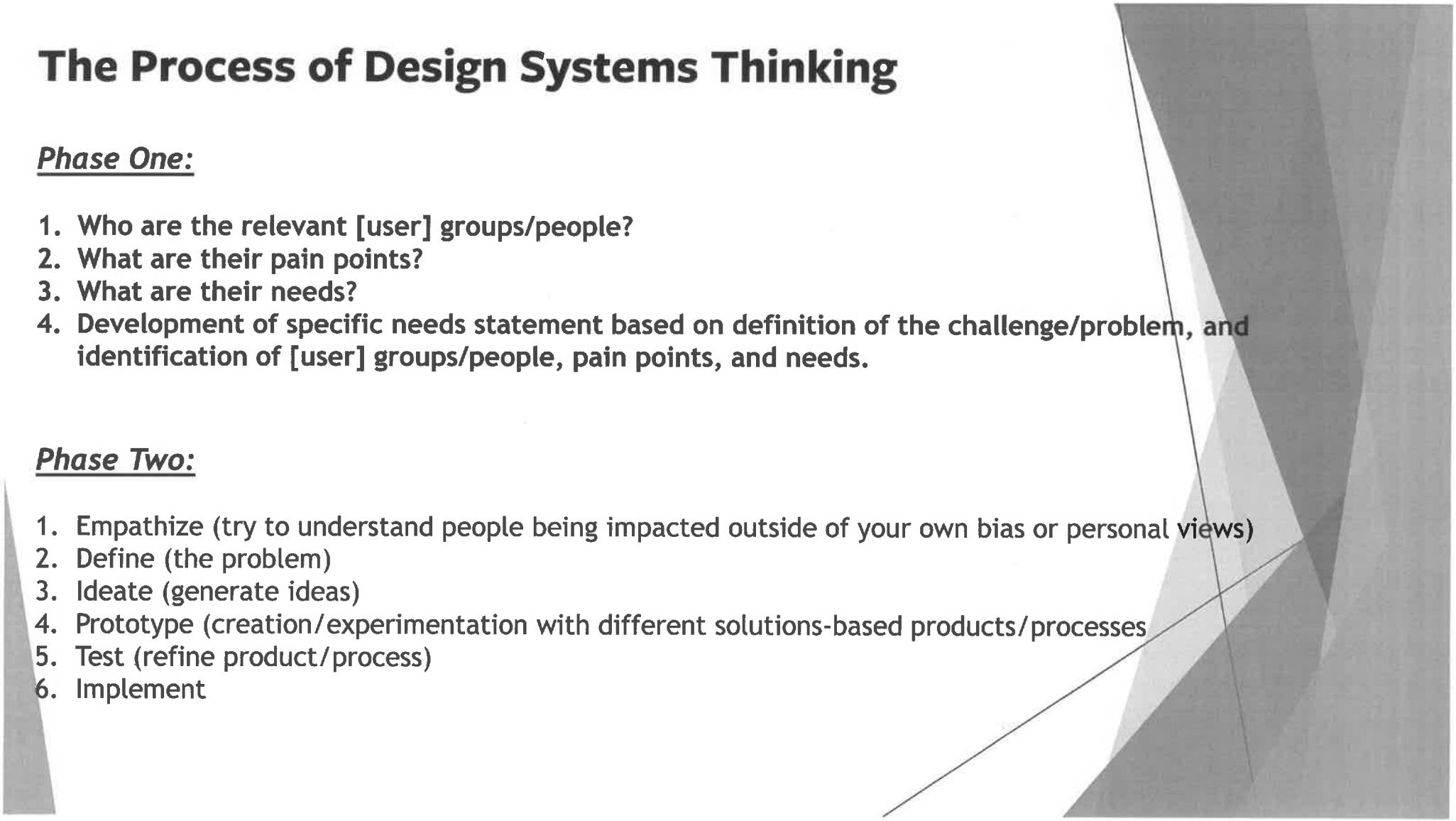
The Process of Design Systems Thinking

Phase One:

1. **Who are the relevant [user] groups/people?**
2. **What are their pain points?**
3. **What are their needs?**
4. **Development of specific needs statement based on definition of the challenge/problem, and identification of [user] groups/people, pain points, and needs.**

Phase Two:

1. Empathize (try to understand people being impacted outside of your own bias or personal views)
2. Define (the problem)
3. Ideate (generate ideas)
4. Prototype (creation/experimentation with different solutions-based products/processes
5. Test (refine product/process)
6. Implement



Sources/Recommended Reading

Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515 (Spring 2009)

Jessica Szuminski, *Behind the Binary Bars: A Critique of Prison Placement Policies for Transgender, Non-Binary, and Gender Non-Conforming Prisoners*, 105 MINN. L. REV. 477 (November 2020)

Richard Saenz, *A Crisis Behind Bars: Legal Issues Impacting Transgender People in Prison*, 38 WTR. CRIM. JUST. 3 (Winter 2024)

Sydney Tarzwell, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoner*, 38 COL. HUM. RTS. L. REV. 167 (Fall 2006)

Chan Tov McNamarah, Misgendering, 109 CAL. L. REV. 2227 (March 2024)

PennState Dickinson Law

ADI ANTIRACIST DEVELOPMENT INSTITUTE

DESIGN THINKING

Empathize
Understanding people

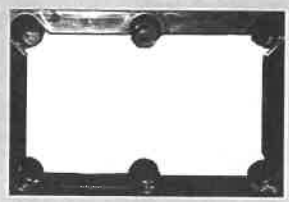
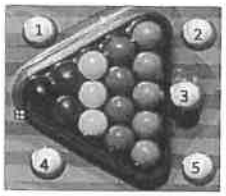
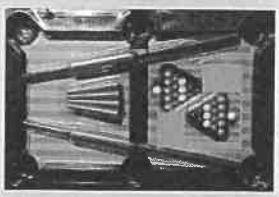
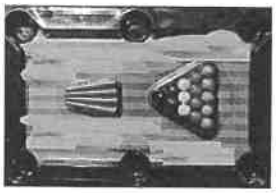
Ideate
Generating your ideas

Define
Figuring out the problem

Test
Refining the product

Prototype
Creation and experimentation

Design Thinking Tools

thinking tool	description	Example	
task unification	reusing part of an object or process to provide new functionality or added value	include a white board overlay, magnets, and markers as an additional play feature	
multiplication	replicating part of an object or process and changing it in a value added (quantitative) way	increase the number of cue balls and number each one to expand the play possibilities	
division	separate and rearrange parts of an object or process in new and unconventional ways	divide the play field into two sections for "head-to-head" play; maybe the center pockets allow balls to travel back and forth?	
subtraction	eliminate components or attributes of an object or process, even ones deemed necessary (or especially!)	remove cue sticks and cue ball; players could use a leg to push balls	
alternative worlds	study similar objects or processes in other industries or disciplines for fresh ideas	add a plastic cover and straps on the back to make it wearable, as runners might with devices To learn more: LUMA Institute. "Alternate Worlds." https://www.luma-institute.com/alternative-worlds/	

attribute dependency	overcome relational fixedness by adding, changing, or removing the attributes that bind object or process components together	• relational fixedness is more abstract, and thus more challenging to address
		• Examples:
		  • airline pilots are men, and flight attendants are women
		  • car transmissions are always automatic or manual
		• To learn more: https://drewboyd.com/the-attribute-dependency-technique-three-ways-to-create-smart-products/	

brainstorming	Consider how pain points can be addressed creatively without use of any framework or thinking tools	• Aggregate and collect as many ideas as possible • Important to establish clear rules for effective coordination • To learn more: https://www.interaction-design.org/literature/topics/brainstorming	

Problem Statement:

	Design Principle #1	*Design Principle #2*	*Design Principle #3*	**Additional Ideas**
Thinking Tool #1				
Thinking Tool #2				
Thinking Tool #3				
Thinking Tool #4				

Additional Reading: LUMA Institute. "Creative Matrix." https://www.luma-institute.com/creative-matrix/

Legislative Update

Stephen J. Acquario, Esq.
Patrick R. Cummings, Esq.

2024 New York State Legislative Session Summary:
The Impact on New York's Counties

A Report on Bills the Legislature Passed
August 15, 2024

NYSAC
NEW YORK STATE
ASSOCIATION OF COUNTIES

Hon. Daniel P. McCoy, NYSAC President
Stephen J. Acquario, Esq., Executive Director

Contents

Executive Summary

The mission of the New York State Association of Counties (NYSAC) is to foster excellence in county government and unite the voice of New York's county leaders. During the 2024 Legislative Session, NYSAC staff, together with our membership, worked with the State Legislature and Governor in support or opposition to numerous legislative and budget items.

So far, the 2024 Legislative Session has consisted of 69 session days beginning on January 3rd. As of publication of this report, the Legislature has passed 805 bills through both houses, which is slightly lower, but consistent with the volume of legislation advanced in recent years. The Legislature also passed the State Budget, which is the primary vehicle for counties to advance their priorities and which contained several wins for counties, including investments in essential county services, local infrastructure, election administration, public health, and renewable energy.

This report provides a snapshot of select legislation that was passed by both the Senate and Assembly during the legislative session. The bills included here will have a direct or indirect impact on counties if they are signed into law (a complete summary of the county impact of the SFY 2024-25 Enacted State Budget can be found at www.nysac.org/nysbudget). Each section provides the bill number (with direct links to the bill text via an electronic document), a brief description, and where it is in the legislative process, including:

- Chapter Number (signed) or Veto Message,
- "Delivered to the Governor" date (the Governor has 10 days to act not including Sundays), and
- "Passed Both Houses" – Passed Assembly and Senate, awaiting the Governor's action.

2024 Legislative Session Overview: Non-Budget Legislative Action

Legislation that Passed Both Houses of the Legislature

NYSAC has identified the following pieces of legislation, categorized by issue area, that have or may have an impact on our county governments. These are bills that have passed both the State Senate and State Assembly.

Agriculture

Extends Eligibility for the Farm Employer Overtime Tax Credit – S.9082 (Hinchey)/A.9824 (Lupardo)
This legislation clarifies that farm employers who choose to dispense wages through a professional employer organization are eligible for the farm employer overtime credit, as was the intention of the original law.
Status: Passed Both Houses

Expands the Definition of Crops to Include Cannabis – S.1752 (Hinchey)/A.1234 (Lupardo)
The purpose of this legislation is to clearly define cannabis as an agricultural product and make it eligible to receive an agricultural assessment along with other protections afforded in the Agricultural Districts Law.
Status: Passed Both Houses

Provides Parity for Alcoholic Beverage Shipments –S.02852-A (Skoufis)/A.3132-A (Lupardo)
This legislation authorizes producers of liquor, cider, mead, and braggot to ship their products directly to interstate and intrastate customers, providing parity to New York's other alcoholic beverage manufacturers and allowing for sales opportunities across new markets.
Status: Signed by the Governor, Chapter 226 of the Laws of 2024

Children with Special Needs

Reserve Funds for Special Education Services – S.9107-A (Mayer)/A.10315-A (Shimsky)
Chapter 56 of the laws of 2021 authorized special act school districts to establish reserve funds. However, special act school districts have been docked for interest earned on those carrying reserve funds when the state calculates future aid disbursements. The state has treated this interest as offsetting revenue for the purposes of calculating their tuition rate for the following year. This legislation would correct this error, allowing districts to keep a modest percentage in reserve year to year and earn interest without jeopardizing their tuition rate.
Status: Passed Both Houses

Reimbursement Rates Study for Early Intervention Services – S.1198-A (Rivera)/A.10175 (Paulin)
This legislation mandates the Department of Health commissioner to conduct a comprehensive study and review the program's models of service delivery and the rates of reimbursement. The review would include: a comprehensive assessment of existing methods to determine

reimbursement rates; analysis of salary levels for individuals within the discipline; analysis of provider cost for the program; analysis by discipline and labor region salary levels; and recommendations for updating or maintaining reimbursement methods.
Status: Passed Both Houses

Economic Development

Exempts Certain Fiber Optic Cable Assessments in Erie County – S.8978-A (Ryan)/A.9964-A (Rivera)
This legislation creates a new section (§ 431) of the real property tax law, which specifies that municipal fiber optic networks in Erie County and municipal fiber optic cable in Erie County is exempt from real property taxes.
Status: Passed Both Houses

Expands the Eligibility for Regional Planning Councils to Apply for Grants – S.8958 (Hinchey)/A.8374 (McDonald)
Regional Planning Commissions, as a rule, work with local governments in a coordinated and cooperative effort. They often coordinate local government projects yet are not able to directly secure funding which can be a barrier to or delay project completion. Allowing RPCs to apply for grants and funding will streamline the process which can help expedite implementation of projects.
Status: Passed Both Houses

Board Requirements for Local Industrial Development Agencies – S.4040-B (Mayer)/A.7532-B (Solages)
This legislation amends the general municipal law to require at least one local labor organization representative and at least one representative of a school board or a superintendent of a school district to be appointed to each IDA. It also allows the size of the IDA to increase above the 7-member limit, if needed, to allow for the addition of the two mandatory members. The IDA must also decrease its size to seven or fewer members as the seats of non-mandatory members are vacated.
Status: Passed Both Houses

Prevailing Wage Requirements for Brownfield Remediation Work – S.5868-B (Harckham)/A.7491-B (Bronson)
This legislation amends the Environmental Conservation Law to stipulate that brownfield sites will not be eligible for tangible property tax credits if the contamination from groundwater or soil vapor is solely emanating from property other than the site subject to the present application, or the site has been previously remediated pursuant to navigation law, or remedial activities are performed by construction workers paid less than the prevailing rate of wages (unless the site is an affordable housing project). It also allows DEC to terminate a brownfield site cleanup agreement if the participant does not comply with prevailing wage requirements.
Status: Passed Both Houses

Elections

Absentee Ballot Dropoff Locations – S.610 (Hoylman-Sigal)/A.7243 (Simone)
This legislation grants county boards of elections the ability to establish absentee ballot drop-off locations with secure ballot drop boxes.
Status: Passed Both Houses

Authorizes Pre-registered Voters to Apply for an Absentee or Early Mail Ballot – S.6735-A (May)/A.3250-A (Epstein)
This legislation would give pre-registered voters who are 18 years old by the time of an election the opportunity to vote absentee provided all other qualifications are met.
Status: Signed by the Governor, Chapter 214 of the Laws of 2024

Environment & Energy

The Climate Superfund Act – S.2129-B (Kreuger)/A.3351-B (Dinowitz)
The purpose of the bill is to establish the climate change adaptation cost recovery program, which would require companies that have contributed significantly to the buildup of greenhouse gases, to bear a share of the costs of infrastructure investments required to adapt to the impacts of climate change in New York State.
Status: Passed Both Houses

New Construction Electric Vehicle Charging Infrastructure Mandate – S.1736-E (Kreuger)/A.3780-E (Fahy)
New residential and commercial buildings will be required to provide electric vehicle charging stations and electric vehicle ready parking spaces when the construction includes dedicated off-street parking.
Status: Passed Both Houses

Requires NYSERDA to Develop Recommendations for Microgrids – S.8841 (Parker)/A.9123 (Cruz)
This legislation requires the New York state energy research and development authority, in consultation with the department of public service and the division of homeland security and emergency services, shall prepare a report including recommendations regarding the establishment of microgrids for protection of critical facilities in the State of New York.

Status: Passed Both Houses

Expands the Food Donation and Food Scraps Recycling Program – S.5331-A (Harckham)/A.5906-A (Shimsky)
This legislation expands the New York State Food Scraps Recycling and Food Donation Program by incrementally reducing the amount of waste an entity must produce to be designated a food scraps generator. Under the legislation, a food scraps generator may average:

- Two tons or more of food per week between January 1, 2022 and December 31, 2023;
- One ton or more of food per week between January 1, 2024 and December 31, 2025; and
- One half ton or more of food per week starting January 1, 2026 and thereafter.

Additionally, the legislation increases the law's distance threshold from 25 miles to 50 miles, requiring generators that are farther from organics recyclers to comply with the law's requirements.
Status: Passed Both Houses

Requires Charging Stations in State-Owned Parking Lots – S.1535-B (Hoylman-Sigal)/A.4871-B (Kelles)
This legislation requires any parking facility owned and operated by the State of New York with more than two hundred parking spaces to install electric charging stations in at least 20% of the parking spaces. If signed, the law will take effect on April 1, 2025.
Status: Passed Both Houses

Bans Foam Coolers – S.4414-A (Krueger)/A.4943-A (Epstein)
Building on previous state and local bans on polystyrene foam food and beverage containers, the legislation prohibits the sale of polystyrene foam coolers, effectively immediately. Polystyrene pollution poses risks to human health and the environment, leaching toxic chemicals that have been linked to cancers and other health conditions.
Status: Passed Both Houses

Establishes the Office of Sustainability – S.2003-A (May)/A.5909-A (Epstein)
This legislation establishes a new Office of Sustainability led by a Chief Sustainability Officer (CSO) appointed by the Governor. The new office would advise and assist state agencies in an ongoing and coordinated response to address climate change and support state agencies' implementation of statutory requirements related to energy and environmental protection.
Status: Passed Both Houses

Requires NYSERDA to Develop an EV Charging Station Implementation Plan – S.489-A (Comrie)/A.8869 (Barrett)
This legislation requires NYSERDA to develop a comprehensive electric vehicle fast charging station implementation plan to facilitate the development of statewide charging infrastructure. The plan will be subject to a 30-day public comment period prior to its adoption and must be updated annually.
Status: Passed Both Houses

Utility Corporation Securitization Act – S.9339-A (Comrie)/A.10346 (Paulin)This legislation would allow Avangrid, the owner of New York State Electric and Gas (NYSEG) and

Rochester Gas and Electric (RG&E), to petition the Public Service Commission (PSC) for the authority to issue storm recovery bonds. If approved, the cost of the bonds would be charged to ratepayers as a separate line item on utility bills.
Status: Signed by the Governor, Chapter 224 of the Laws of 2024

General Government Operations

Authorizes Design-Build Authority for NYC – S.9849 (Comrie)/A.10543 (Braunstein)
This legislation amends the New York City Public Works Investment Act (the "PWIA"), to create new definitions for the terms "alternative project delivery contract" and "construction manager build" to facilitate the PWIA's incorporation of new capital project delivery methods. "Alternative project delivery contracts" would be defined to include design-build and construction manager build ("CM Build") contracts.
Status: Passed Both Houses

Extending NYC's Joint Bidding Authorization – S.9709 (Sepulveda)/A.10401 (Braunstein)
This legislation will extend, for one year, New York City's authorization to use joint bidding for utility interference work involved in public work projects.
Status: Passed Both Houses

Procurement Law Extenders – S.9233 (Cooney)/A.10283 (Conrad)
This legislation extends the authority of local governments to purchase technology products and software, security, law enforcement and disaster relief from the Federal General Service Administration; authorizes local governments to utilize and purchase from county contracts for construction trades/ service-related contracts; and make purchases using the Office of General Services (OGS) contracts.
Status: Signed by the Governor, Chapter 164 of the Laws of 2024

Expansion of the Electronic Open Auction Public Bond Sale Pilot Program – S.9348-A (Martinez)/A.10173-A (Thiele)
This legislation would expand the opportunity for more municipalities to participate in the electronic open auction public bond sale pilot program. This changes the requirement that a municipality must have issued $25 million in bonds within any one of the last three to within any one of the last five years. Further, the 400,000 or more-population restriction for counties is removed. This will allow more municipalities to be eligible to participate.
Status: Passed Both Houses

Municipal Website .GOV Requirement – S.3353-A (Skoufis)/A.2852-A (Zebrowski)
This legislation requires all municipal governments (counties, cities, towns and villages) to maintain a website, and the website must have a .gov address.
Status: Passed Both Houses

Insurance

Copayments on Physical Therapy Services – S.1470 (Breslin)/A.6345 (Weprin)
This prohibits insurance plans from shifting the cost of physical therapy care to consumers by limiting co-payments to no more than 20 percent of the total reimbursement to the provider of care.

Status: Passed Both Houses

Treatment of Workers' Compensation Injuries by OTA's and PTA's – S.9462-A (Ramos)/A.1204-A (Zebrowski)
This bill allows occupational therapist assistants to provide care to workers' compensation patients.
Status: Passed Both Houses

Judiciary

Wrongful Death Expansion – S.8485-B (Hoylman-Sigal)/A.9232-B (Weinstein)
This bill defines and limits the "surviving close family members" who may potentially claim grief and suffering damages as recipients under current law, with the limited exception of where the decedent is survived by a parent or parents, or any person standing in loco parentis to the decedent, and a spouse and no issue, the parent or parents or such person standing in loco parentis is deemed to be a surviving close family member. And importantly, the finder of fact shall determine which close family members are-or are not-entitled to damages based upon the specific circumstances relating to the person's relationship with the decedent. To further address concerns raised by the Governor, this version of the bill has shortened the proposed retroactive effect of the legislation by three years. It now only applies to causes of action that accrue on or after January 1, 2021.
Status: Passed Both Houses

Local Government Finance

Extension of Local Government Debt Issuance and Management Options – S.9417 (Martinez)/A.10282 (Santabarbara)
This legislation would extend the ability for municipalities to voluntarily opt-in to expanded debt issuance and management options until July 15, 2027. This extension includes the ability for local governments to pay the first installment on a bond issuance two years after the first date of issuance. Local governments would also be authorized to issue variable rate bonds and notes, and this legislation suspends the five percent down payment requirements for certain bonds and notes.
Status: Signed by the Governor, Chapter 167 of the Laws of 2024

Grants Municipalities the Authority to Offer Real Property Tax Exemptions to Volunteer EMS and Firefighters Working in Neighboring Communities – S.2862-A (Martinez)/A.2121-A (Stern)
This legislation provides localities with the option of adopting a local law to allow residents who serve in a neighboring municipality the ability to receive a tax exemption they would be entitled to had they served in the municipality in which they reside.
Status: Passed Both Houses

Delinquent Tax Interest Rates – S.967-A (Ryan)/A.1489-A (Thiele)
Section 924-a of the Tax Law currently sets the floor for the lowest rate a municipality may charge at twelve percent. This has been in effect since 1983. This bill would amend section 924-a to cap the delinquent tax interest rate at 16%, reduce the floor to 2% and most importantly, grant the commissioner of NYS Taxation and Finance the ability to maintain the interest rate

ceiling at the prime interest rate. Currently, one measure of the prime interest rate is 8.5%, meaning the ceiling could be 8.5%, or lower, NOT 16%.

NYSAC has vehemently opposed this legislation.
Status: Passed Both Houses

Installment Plans for School District Property Taxes – S.3604-A (Webb)/A.7813-A (Shimsky)
This legislation requires the assessing unit to include the due dates for the payment of taxes in installments. The assessing unit must specify in a notice to the owner of taxable real property without interest or penalties to such owner that has elected to pay such taxes in installments.
Status: Passed Both Houses

Regulation of the Short-Term Rental Industry – S.885-C (Hinchey)/A.4130-C (Fahy)
This legislation would create statewide guidance and regulation on short-term rentals, including a rental registry, and allow for the collection of local and state sales tax. Both the information contained within the registry and the sales tax revenue will assist counties and municipalities with determining the economic impact of these rentals and how they are impacting the housing supply.

The tax collection provisions included in this legislation would apply to short-term rentals statewide, regardless of whether municipalities have their own registration systems. This will level the playing field with the traditional hotel industry and provide municipalities and counties with revenues that can be reinvested in the community to support tourism, local initiatives, and the policy priorities of that community.
Status: Passed Both Houses

Public Employee Relations & Labor

20-Year Retirement Benefit for Certain Law Enforcement Officers – S.8472-A (Jackson)/A.8918-A (Pheffer-Amato)
The retirement and social security law are amended to allow environmental conservation officers, forest rangers, regional state park police, and university police officers to receive a 20-year retirement plan similar to the New York State Troopers and the majority of municipal police officers.
Status: Passed Both Houses

Public & Mental Health

Authorization to Reimburse EMS Providers for Treating in Place & Transporting to Alternative Healthcare Destinations – S.8486-C (Hinchey)/A.9102-C (Kelles)
This bill would authorize Medicaid reimbursement to emergency medical service agencies for:

- providing emergency medical care to Medicaid enrollees without requiring the transportation of these patients from the location where the medical care was administered.
- providing emergency medical care to Medicaid enrollees and transporting them to alternative destinations (i.e. locations other than a hospital), such as an urgent care clinic or mental health or rehabilitation facility

Status: Passed Both Houses

Appointments to County Boards of Health & Health Services Advisory Boards – S.8561 (Rivera)/A.8232-A (Paulin)
Public Health Law stipulates that local boards of health are to have three physicians on the board. Many of the local health departments, especially in rural areas, are having trouble meeting this statutory requirement because there are not enough physicians in certain areas of the State who have the time to add serving on a county health department to their already busy schedules.

This legislation would amend the law to make the requirement for health care providers be at least one physician with the other positions able to be filled by a nurse practitioner or physician assistant. Further, the law would be amended to allow for a board member from a contiguous county to serve on a local board of health as long as they do substantial work in that county and have a healthcare background.
Status: Passed Both Houses

Authority for Ambulances to Store and Distribute Blood & Initiate Blood Transfusions – S.6226-A (Hinchey)/A.5789-A (Woerner)
This legislation amends the public health law to allow for ambulance services and advanced life support first response service to store and distribute blood. Distribution and administration of the blood on an ambulance is limited to only qualified medical and health personnel, such as a registered nurse.

This section also sets forth the standards of care that ambulance services must adhere to when handling, storing and distributing the blood.

Ambulances continue to be prohibited from carrying their own blood products to administer to patients in hemorrhagic shock. This legislation permits all ambulance services to provide the same blood transfusion services to patients as permitted for air transport ambulance services when such ambulance services meet the same standards as currently set forth in the law. Permitting all ambulances to qualify to transfuse blood products to patients to resuscitate them during transport will result in more saved lives.
Status: Passed Both Houses

Creates a Health Emergency Response Data System – S.5732 (Skoufis)/A.5370 (Paulin)
This bill is designed to create in statute the health emergency response data system (HERDS) and bring transparency to information gathered during public health emergencies, including communicable disease outbreaks like COVID-19, by requiring the Department of Health to share aggregate data from HERDS reports with the entities reporting and the public.
Status: Passed Both Houses

Requires Epinephrine Auto-Injector Devices in Places of Public Assembly – S.1078-A (Gounardes)/A.2885-A (Rosenthal)
To prevent deaths from anaphylaxis, this legislation requires places of public assembly to have an epinephrine auto-injector device on hand whenever they are used for public or private

events and at least one person present who is trained to use the device. It also includes liability protections for the good faith use of epinephrine auto injectors.
Status: Passed Both Houses

Enhances the Transparency of Health Emergency Response Data System (HERDS) Data – S.5732 (Skoufis)/A.5370 (Paulin)
This legislation would bring transparency to information gathered during public health emergencies, including communicable disease outbreaks like COVID-19, by requiring the Department of Health to share aggregate data from HERDS reports with the entities reporting and the public as soon and as close to real time as practicable after it is collected but no later than seven days after it is received by the Department.
Status: Passed Both Houses

Requires Public Institutions and Buildings Be Equipped with Opioid Antagonists – S.3112-A (Mannion)/A.1588-A (Buttenschon)
Nicknamed "Erin's Law" after a young woman who lost her life in Rochester to an accidental fentanyl overdose, this legislation amends Public Buildings Law to require that public institutions and buildings be equipped with opioid antagonists, such as naloxone. The legislation would take effect one year after it is signed into law.
Status: Passed Both Houses

Requires Fentanyl Test Strips Be Distributed Alongside Opioid Antagonists – S.4393 (Martinez)/A.5004 (Hyndman)
This legislation requires that fentanyl test strips and informational cards be included in any opioid antagonist distribution as part of NYSDOH's opioid overdose prevention programs. The legislation would take effect on the nineteenth day after it is signed into law.
Status: Passed Both Houses

Public Safety

Reporting Requirements for Extreme Risk Protection Orders – S.3340 (Mayer)/A.5873 (Lavine)
This bill requires that temporary and final extreme risk protection orders be included in the existing statewide computerized registry of orders of protection and warrants of arrest.
Status: Passed Both Houses

Petitioner Reforms to the Extreme Risk Protection Order Law – S.8589-A (Scarcella-Spanton)/A.7717-B (Wallace)
This legislation allows the police agency to be listed as the petitioner in lieu of the police officer's name, alleviating issues for members of law enforcement when civil judgements or lawsuits are searched on behalf of banks, mortgage companies, etc.
Status: Passed Both Houses

Uniform Medical Records System for Correctional Facilities – S.5214 (Harckham)/A.5902 (Kelles)
This legislation amends the correction law by stating that the commissioner, in consultation with the commissioners of health and mental health, shall develop a uniform electronic medical records system to be used by all correctional facilities in the state.

Status: Passed Both Houses

Rules & Regulations for Strip Searches in Correctional Facilities – S.9350 (Salazar)/A.4904 (Gibbs)
The State Commission on Corrections (SCOC) will be required to promulgate rules and regulations establishing standard practices and procedures for the use of strip searches in correctional facilities. Such rules and regulations shall at a minimum include a requirement that no fewer than two staff members shall be present for any strip search.
Status: Passed Both Houses

Transportation

Penalty Increase for School Bus Stop Arm Camera Program – S.9504-A (Cooney)/A.3120-A (Magnarelli)
This legislation increases the maximum fine for a third or subsequent conviction within three years from $1000 to $1500.
Status: Passed Both Houses

Social Services

Childcare Assistance – Child Block Grant Reforms – S.8152-A (Brisport)/A.8878-A (Hevesi)
This legislation will require county DSS offices to provide childcare assistance funded under the block grant for additional or different hours than a parent or caretaker spends in work, training, educational activities or other reasons for care designated by the social services district in its consolidated services plan. This may include paying for full-time childcare assistance regardless of the hours of the activity of the parent's or caretaker's reason for care.

In addition, a social services district shall not limit authorized childcare services strictly based on the hours during which the parent or caretaker is engaged in work, education or other activity or the number of hours the parent or caretaker is engaged in any such reasons for care.
Status: Passed Both Houses

Child Support Orders Reform – S.9015 (Persaud)/A.9505 (McMahon)
This bill would update the New York State child support guidelines to conform to the Federal Regulations allowing for discretion to consider specific circumstances. Sections one through four of this bill would amend various sections of the family court act and domestic relations law relating to factors which judges may evaluate when determining the amount of income that may be attributed or imputed for the purposes of determining child support payments.

Sections five through eight would amend the family court and domestic relations law to remove the exceptions allowing for consideration of incarceration to be voluntary in determining child support orders.
Status: Passed Both Houses

CPS Worker Remote Training Option – S.6357-B (Mannion)/A.7341-B (Hevesi)
This bill would amend section 421 of the Social Services Law by allowing the training requirements for persons hired by a local child protective service, excluding the annual in-

service training requirement, to be completed through a distance learning method on or after April 1, 2025, as authorized by an adopted County law, ordinance or resolution.
Status: Passed Both Houses

Presumptive Eligibility Standard for Childcare Assistance – S.4667-A (Brouk)/A.4099-A (Clark)
In New York State, families must meet certain eligibility requirements for the receipt of childcare assistance, and upon application must wait up to 30 days before receiving care. In New York City, this processing time can be as long as 60 days. Administrative delay in the processing of applications for subsidies can often spell the difference between families missing medical appointments, job interviews, and other important life events that can lead to upward economic mobility and growth.

This bill is modeled on the efforts of Monroe County's Department of Human Services to provide timely childcare assistance for families in need. Monroe County DRS issues subsidy certificates to families presumed eligible, allowing them to pursue childcare while their applications are formally processed.

Under a statewide presumptive eligibility standard, all local social services districts will be required to provide childcare assistance under this method. Presumptive eligibility will eliminate unnecessary delays for families to receive childcare assistance and help create a more accessible system for all.
Status: Passed Both Houses

Closure of Nursing Homes (Notice Requirements) – S.2984 (Kavanagh)/A.3703 (Epstein)
The "Rivington Act" would strengthen oversight by creating a transparent process when nursing homes closures are proposed and requiring DOH to ensure the local community and nursing home tenants are notified before approving any closure.

The current closure process does not require engagement of the surrounding community, or an examination of how a facility's closure will impact the broader community before a decision for closure is made. Information on a potential closure cannot even be disclosed to the public prior to a closure being approved by DOH. Communities have no ability to comment on the impact of the proposed closure.
Status: Passed Both Houses

Shelter Reimbursement (Single v. Double Occupancy Rooms) – S.15-A (Gounardes)/A.2583-A (Hevesi)
This bill will provide temporary housing assistance to a single individual who meets the residential program providers' eligibility requirements for victims of domestic violence as defined in section four hundred fifty-nine-a of the social services law, while allowing the program provider to be reimbursed by New York State for any payment differential for housing a single individual in a room intended for double occupancy in order to address the systemwide lack of shelter for single adults.

This legislation will require the State to preserve the full reimbursement to providers who "downsize" a room configured for a family of two to accommodate a single adult victim of violence and will therefore help increase system-wide capacity for single adults who otherwise faced serious obstacles to accessing this shelter system.
Status: Passed Both Houses

Veterans

Expands Eligibility Under the Veterans Tuition Assistance Program (VTAP) – S.8596-A (Scarcella-Spanton)/A.9205-A (Buttenschon)
The State of New York is home to 800,000 military veterans, all of whom deserve an opportunity to achieve a high-quality higher education in our state. Currently, the veteran's tuition awards program is limited only to those veterans who served in active combat roles, therefore, alienating countless service members and women from accessing this vital program.
Status: Passed Both Houses

Veteran Burial Reimbursements – S.2413-C (Bailey)/A.4613-C (Jean-Pierre)
This bill requires the Commissioner of the Department of Veterans' Services to provide a percentage increase in the maximum amount of funeral and burial based on the consumer price index with such percentage rounded up to the next highest one-tenth of one percent and shall not be less than one percent or no more than four percent.
Status: Passed Both Houses

Establishment of a Veteran Resource Database – S.6523-A (Scarcella-Spanton)/A.7701-A (Jean-Pierre)
This legislation directs the Department of Veterans' Services to establish and maintain, in consultation and collaboration with other state agencies, a searchable database of resources available in the state for veterans, members of the uniformed services, and their families.
Status: Passed Both Houses

Non-Wartime Veteran Benefit Access (VTAP Expansion) – S.5195-B (Skoufis)/A.4611-B (Jean-Pierre)
Current law provides certain benefits only to those United States veterans who served during times of war. This bill will ensure all veterans and their family members have access to their entitled benefits regardless of whether the United States was actively participating in a war during their time of service.
Status: Passed Both Houses

NYSAC

NEW YORK STATE

ASSOCIATION OF COUNTIES

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Albany, NY 12207

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www.NYSAC.org

Supreme Court of the United States

No. 23–175

CITY OF GRANTS PASS, OREGON,

Petitioner

v.

GLORIA JOHNSON, ET AL., ON BEHALF OF THEMSELVES

AND ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is reversed with costs, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further proceedings consistent with the opinion of this Court.

IT IS FURTHER ORDERED that the petitioner, City of Grants Pass Oregon, recover from Gloria Johnson, et al., on Behalf of Themselves and All Others Similarly Situated, Three Thousand One Hundred Twelve Dollars ($3,112.00) for costs herein expended.

June 28, 2024

County of Onondaga v State of New York

2024 NY Slip Op 24272

Decided on September 17, 2024

Supreme Court, Onondaga County

Decided on September 17, 2024

Supreme Court, Onondaga County

The County of Onondaga; THE ONONDAGA COUNTY LEGISLATURE; and J. RYAN MCMAHON II, Individually and as a voter and in his capacity as Onondaga County Executive, Plaintiffs,

against

The State of New York; KATHLEEN HOCHUL, in her capacity as Governor of the State of New York; DUSTIN M. CZARNY, in his capacity as Commissioner of the Onondaga County Board of Elections; and MICHELE L. SARDO, in her capacity as Commissioner of the Onondaga County Board of Elections, Defendants.

THE COUNTY OF NASSAU, THE NASSAU COUNTY LEGISLATURE, and BRUCE A. BLAKEMAN, individually and as a voter and in his official capacity as Nassau County Executive, Plaintiffs,

against

THE STATE OF NEW YORK and KATHY HOCHUL, in her capacity as the Governor of the State of New York, Defendants.

THE COUNTY OF ONEIDA; THE ONEIDA COUNTY BOARD OF LEGISLATORS, ANTHONY J. PICENTE, JR., Individually as a voter and in his capacity as Oneida County Executive; and ENESSA CARBONE, Individually and as a voter and in her capacity as Oneida County Comptroller, Plaintiffs,

against

THE STATE OF NEW YORK and KATHLEEN HOCHUL, in her capacity as Governor of the State of New York, Defendants.

COUNTY OF RENSSELAER; STEVEN F. MCLAUGHLIN, Individually as a Voter, and in his Capacity as RENSSELAER COUNTY EXECUTIVE; and the RENSSELAER COUNTY LEGISLATURE, Plaintiffs,

against

THE STATE OF NEW YORK and KATHLEEN HOCHUL, in her capacity as Governor of the State of New York, Defendants.

JASON ASHLAW, JOANN MYERS, TANNER RICHARDS, STEVEN GELLAR, EUGENE CELLA, ROBERT MATARAZZO, ROBERT FISCHER, JAMES JOST, KEVIN JUDGE, THE COUNTY OF SUFFOLK, THE TOWN OF HEMPSTEAD, THE TOWN OF BROOKHAVEN, THE TOWN OF HUNTINGTON, THE TOWN OF ISLIP, THE TOWN OF SMITHTOWN, THE TOWN OF CHAMPION, THE TOWN OF NORTH HEMPSTEAD, and THE TOWN OF NEWBURGH, Plaintiffs,

against

THE STATE OF NEW YORK, KATHLEEN HOCHUL, in her capacity as Governor of the State of New York, MICHELLE LAFAVE, in her capacity as Commissioner of the Jefferson County Board of Elections, JUDE SEYMOUR, in his capacity as Commissioner of the Jefferson County Board of Elections, MARGARET MEIER, in her capacity as Commissioner of the Jefferson County Board of Elections, THE JEFFERSON COUNTY BOARD OF ELECTIONS, JOHN ALBERTS, in his capacity as Commissioner of the Suffolk County Board of Elections, BETTY MANZELLA, in her capacity as Commissioner of the Suffolk County Board of Elections, THE SUFFOLK COUNTY BOARD OF ELECTIONS, JOSEPH KEARNEY, in his capacity as Commissioner of the Nassau County Board of Elections, JAMES SCHEUERMAN, in his capacity as Commissioner of the Nassau County Board of Elections, THE NASSAU COUNTY BOARD OF ELECTIONS, LOUISE VANDEMARK, in her capacity as Commissioner of the Orange County Board of Elections, COURTNEY CANFIELD GREENE, in her capacity as Commissioner of the Orange County Board of Elections, THE ORANGE COUNTY BOARD OF ELECTIONS, Defendants.

COUNTY OF ROCKLAND and EDWIN J. DAY, in his individual and official capacity as Rockland County Executive, Plaintiffs,

against

THE STATE OF NEW YORK, Defendant.

STEVEN M. NEUHAUS, Individually, and as a voter in his capacity as Orange County Executive, THE COUNTY OF ORANGE, THE ORANGE COUNTY LEGISLATURE, ORANGE COUNTY LEGISLATORS, KATHERINE E. BONELLI, THOMAS J. FAGGIONE, JANET SUTHERLAND, PAUL RUSZKIEWICZ, PETER V. TUOHY, BARRY J. CHENEY, RONALD M. FELLER, GLENN R. EHLERS, KATHY STEGENGA, KEVIN W. HINES, JOSEPH J. MINUTA, LEIGH J. BENTON, ROBERT C. SASSI, and JAMES D. O'DONNELL, Individually and as voters, Plaintiffs,

against

KATHLEEN HOCHUL, in her capacity as Governor of the State of New York, THE STATE OF NEW YORK, ORANGE COUNTY REPUBLICAN COMMITTEE, ORANGE COUNTY DEMOCRATIC COMMITTEE, CONSERVATIVE PARTY OF NEW YORK STATE, and NEW YORK WORKING FAMILY PARTY, Defendants.

THE COUNTY OF DUTCHESS, THE DUTCHESS COUNTY LEGISLATURE, and SUSAN J. SERINO, Individually and as a voter and in her capacity as DUTCHESS COUNTY EXECUTIVE, Plaintiffs,

against

THE STATE OF NEW YORK, KATHLEEN HOCHUL, In her capacity as Governor of the State of New York, Defendants.

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: NEW YORK TAX FORECLOSURE SURPLUS LITIGATION

MDL No. _____

SCHEDULE OF ACTIONS

	Plaintiff(s)	Defendant(s)	District	Civil Action No.	Judge
1	Joseph Polizzi; Lisa Todd; Barbara Goodfellow	County of Schoharie	N.D. New York	1:23-cv-01311	David N. Hurd
2	Daniel J. Merckx, personally and as Administrator of the Estate of Ronald P. Merckx; Timothy S. Laraway, Jr.; Barbara Snashell; Chignard Noelizaire; Martine Noelzaire; Arthur R. McDowell; Thomas Sweeney; Dotty Carr	Rennsselaer County; Mark Wojcik; Cattaraugus County; Matthew J. Keller; City of Port Jervis; Laura Quick; State of New York; City of Buffalo; Michael Seaman; Letitia James; Amanda Hiller	N.D. New York	1:23-cv-01354	Lawrence E. Kahn
3	Kenneth D. Anderson; Wendy A. Barton; Andrea Claire Craft; Dondi C. Craft; Michael D. Guiles, II; Jane James; Jeffrey J. James; Beverly L. Morrill; Donald M. Smithers, Jr.; Helen L. Smithers	County of St. Lawrence; Renee Cole	N.D. New York	8:23-cv-01524	Frederick J. Scullin, Jr.
4	Mark B. Plate; Joann O. Chamberlin; Michael R. O'Keefe; Kevin H. Smith; Anthony Carusillo; Anne Wallace	County of Ulster; Roseann Daw; Tracey Williams	N.D. New York	1:23-cv-01539	Glenn T. Suddaby
5	Richard Chmura; Kenneth Bobar; John W. Tooley; Fred Mowers; David Israel; Doug Yauchler	County of Schenectady	N.D. New York	1:23-cv-01574	Glenn T. Suddaby

6	Mary Ellen Cossette; Darren Humble; Donna Marano; Michael Dellacontrada; James Coppolla; Ballakis Family Properties LLC; Wanda Dackowsky; John Dackowsky	County of Oneida; Anthony R. Carvelli	N.D. New York	6:23-cv-01587	Glenn T. Suddaby
7	Terry Ann Woloszyn; Esther Haines; Peggy Hazard; Richard Hayes; Aimee Rice; Seth Grantham; Samuel Cundy, Jr. Mary Altieri; Estate of Maurice Duffy	County of Tioga; James McFadden	N.D. New York	3:23-cv-01585	Glenn T. Suddaby
8	Lisa M. Beutel; Michael Bacon; Alfred Baker; Robert Carl; Melody Chainey; Edith Finley; Sharon D. Fitchette; Jason J. Lacey; Alexander Y. Lock, Jr.; Victoria Smith; David Willis	County of Jefferson; Karen Christie	N.D. New York	5:23-cv-01603	Brenda K. Sannes
9	Clear Lake Land Co.; Gordon Gardner; Victor Pressey	County of St. Lawrence; Renee Cole	N.D. New York	8:23-cv-01606	Frederick J. Scullin, Jr.

10	Alice Steele; Darren West; Bridget Bracken; Caitlin Gamble; Robert Rose; Donnie Emeno; David Gamble; Veronica Carpenter; Larry Barry; Jennifer Ahern; Susan Mazzarelli; Carolyn Brownell; Rodney Green; Bruce Armer	Saratoga County, New York; Andrew Jarosh; State of New York; Broome County, New York; Michael T. Decker; Cayuga County, New York; David J. Dempsey; Cortland County, New York; John T. Banewicz; Essex County, New York; Michael G. Diskin; Jefferson County, New York; David J. Paulsen; Montgomery County, New York; Shawn J. Bowerman; Oswego County, New York; Kevin Gardner; Otsego County, New York; Allen Ruffles; Schenectady County, New York; Jacyln Falotico; St. Lawrence County, New York; Renee Cole; Tompkins County, New York; Lisa Holmes; Ulster County, New York; Roseann Daw	N.D. New York	1:23-cv-01615	Mae A. D'Agostino
11	Roger Sitts; Wayne Roberts; Lisa Santore; Bryan Rosecrans; Steve Conklin	County of Saratoga; Andrew Jarosh	N.D. New York	1:23-cv-01649	Mae A. D'Agostino

12	Paula Stephens; Lori Cordi; Edward Ruland; Patty Lynn Darling-Ruland; Heather Dirienzo; Felice Dirienzo; Jan Dubicki; Linda Botts; Courtney Salmini; John Stark; Victor Majka; Patrick Morris; Ernest Price; James Fletcher; Rebecca Fletcher; Deborah Palmeri; Sandra Tesch; Pamela Gialanella; Frank Gialanella; Aaron Gantz; David Rosado; Kenneth Warren; Barry Felton; Ashley Matias; Neil Matias; Patricia Koban; Terry Yenkevich; Ericka Mae Stark; Jeffrey C. Stillman; Daniel Corkery; Protector of Animal Welfare, Inc.; Darcie Kocan; Estate of Robert R. Kocan	County of Broome; Jane St. Amour	N.D. New York	3:24-cv-00009	Anne M. Nardacci
13	Catherine Rosetti; Lonnie Pittsley; Samantha Boyce; Ted Hunt; William Mooney; Tusef Holding LLC; Janet Romanowicz	County of Cayuga; David Dempsey	N.D. New York	5:24-cv-00015	Glenn T. Suddaby
14	Stephen Blanchard; Sherilyn Blanchard; Kimberly Caneda	County of Essex	N.D. New York	8:24-cv-00250	Glenn T. Suddaby
15	Bruce Armer; Robert Murray; Donna Countryman; Christopher Miers; Michael Peterson; Ian Cary Martin; Selena Reyes	County of Montgomery; Shawn J. Bowerman	N.D. New York	1:24-cv-00259	Mae A. D'Agostino
16	Cynthia Place; Bryan Fiddler	County of Broome; Jane St. Amour	N.D. New York	3:24-cv-00258	Anne M. Nardacci
17	Ronald Feimann; Gary Francis Whitney, Jr.; Tonia Lehoisky; Adirondack Mission Initiative Inc.; Estate of James R. Smith Jr.; John Avenia	County of Clinton; Kimberly Davis	N.D. New York	8:24-cv-00257	Brenda K. Sannes
18	Robert White; Stacey Bishop; Franklin German; Bryan Pello	County of Rensselaer; Mark Wojcik	N.D. New York	1:24-cv-00280	Anne M. Nardacci

19	Randall Vose; William Lander, II; Benjamin Steele; Elizabeth Steele; Gaetano Castellani; Kathleen Rajter; Estate of David Robusto	County of Fulton; Heather A. Scribner	N.D. New York	1:24-cv-00281	Brenda K. Sannes
20	James Deandrea; Jake Hilts; Cheryl Carvin; Francis Moglia; Karen Lottridge; Donna Gorton; Thomas Platt; Timothy Platt; Allen Ruffles; Helene Blatney	County of Otsego; Allen Ruffles	N.D. New York	6:24-cv-00287	Anne M. Nardacci
21	Cynthia Rich; David Dellamonica; Estate of Ann Alice Hennessy	County of Warren; Christine Norton	N.D. New York	1:24-cv-00314	Anne M. Nardacci
22	Michael Vaughn; Kevin Green; Deborah Patterson; EK Equity Inc.; Stacy Brenenstuhl; George Brenenstuhl; Keith Roughgarden; Steve Conklin	County of Washington; Al Nolette	N.D. New York	1:24-cv-00327	Anne M. Nardacci
23	Fred Bush; Perry Hewett; Frank Iuzzolino	County of Schoharie	N.D. New York	1:24-cv-00328	David N. Hurd
24	Marjorie Ramsey	Janice Gaston; Todd Venning; Steven M. Neuhaus	S.D. New York	7:23-cv-08599	Cathy Seibel
25	Timothy Shawn O'Hara; Rodney Fergus	Orange County, New York; Kerry Gallagher; Dutchess County, New York; Heidi Seelbach; State of New York	S.D. New York	7:23-cv-10770	Kenneth M. Karas
26	ARMF Realty LLC; Daniel Rubino; Alexsander Mkrtchyan; Gregory Pasternak; Christopher Bux; Victor Signorini; Timothy Shaun Ohara; Salvatore Brugellis; Frederick Boss	County of Orange; Kerry Gallagher;	S.D. New York	7:23-cv-11034	Nelson Stephen Roman
27	Gloria Cavaluzzi; Lyndon C. Alleyne; Petr Andreenko; Olga Andreenko; Pasquale Coviello; Caterina Coviello; Lisa Demarinis; Harvey Edelglass; Lawrence Eisenberg; Steven Eisenberg; Kenny Emeigh; Roseanne Crumbley; Richard Gorr; Randy Kleingardner;	County of Sullivan;	S.D. New York	1:23-cv-11067	Paul A. Engelmayer

	Elizabeth Kleingardner; Tatiana Kozak; Jeremiah Meachum; Thomas Prendergast; Sharon Seekamp; One Hundred Thirty Five Bowery LLC; Madlill Properties Corp; Joel Needleman; Sherrie Needleman; Estate of Everett Tsoucalas				
28	Randall Lee Bose; Nancy Bose; Darlene Deary; Melinda D. Colon; Velma D. Colon; Estate of Isabelle D. Bartling; DIJO LP	County of Dutchess; Catherine Weisse	S.D. New York	7:24-cv-01333	Kenneth M. Karas
29	Beth Wolpert	Dutchess County; Town of Hyde Park	S.D. New York	7:24-cv-01809	Cathy Seibel
30	Mark Dickens; David Barry; Raymond Chouinard; Richard Harding; Thomas Eckrote; Kathie Rainero; Darci Hoberg; Shane Schroeder	County of Allegany; Terri L. Ross	W.D. New York	1:23-cv-01332	Lawrence J. Vilardo
31	Denise Lawrence; Dennis Allen; Alice Larock; Vivian Matteson; Matthew Murawski; Nancy Potter; Robert Van Slyke	County of Wayne; Patrick J. Schmitt	W.D. New York	6:24-cv-06017	Frank P. Geraci, Jr.
32	Nicholas R. Dowd; Noble Sky Core LLC; Cheryl Bolton	County of Niagara; Kyle R. Andrews	W.D. New York	1:24-cv-00037	John L. Sinatra, Jr.
33	Walter Barnard; Eric Banse Fay; Lori Ann Banse Fay; Barbeau Properties LLC; Christie Miga; WSEJ LLC; Benjamin Osman	County of Chautauqua	W.D. New York	1:24-cv-00154	Lawrence J. Vilardo
34	Laura Williamson; William Neilson; Mark Daw; Katrina Daw; Patricia Hughley; Jacqueline Pruden; John Cooke; Liboria Bustamonte; Martin Ward; Phillip Willis; Jennifer Willis; Christopher Gerow; Estate of David L. Shilberger	County of Steuben; Tammy Hurd-Harvey	W.D. New York	6:24-cv-06129	Charles J. Siragusa
35	Elizabeth Sevinsky; Ryan Brickman; Michelle Tirone Coladangelo; Stephen Tirone	County of Cattaraugus; Matt Keller	W.D. New York	1:24-cv-00186	John L. Sinatra, Jr.

36	WCMCG LLC; Maxim Development Group LLC	County of Seneca; Les Marquart	W.D. New York	6:24-cv-06142	Frank P. Geraci, Jr.
37	Paul Smith	County of Niagara; Kyle R. Andrews	W.D. New York	1:24-cv-00207	Lawrence J. Vilardo

Decisions of Interest to County Attorneys from the U.S. Supreme Court, the U.S. Court of Appeals for the Second Circuit, and the New York State Court of Appeals

Brian D. Ginsberg, Esq.

Brian D. Ginsberg

Decisions of Interest to County Attorneys from the U.S. Supreme Court, the U.S. Court of Appeals for the Second Circuit, and the New York State Court of Appeals

Written Materials

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1. ***NYCLU v City of Rochester*; *NYCLU v City of Syracuse***
   (NYCOA leave granted)

2. ***Muldrow v City of St. Louis***
   (SCOTUS)

3. ***Antonyuk v James***
   (2d Cir)

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

685

CA 21-01191

PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF NEW YORK CIVIL LIBERTIES UNION,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER AND ROCHESTER POLICE DEPARTMENT,
RESPONDENTS-RESPONDENTS.

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CITY (ROBERT J. HODGSON OF COUNSEL), AND SHEARMAN & STERLING LLP, WASHINGTON, DC, FOR PETITIONER-APPELLANT.

LINDA S. KINGSLEY, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 10, 2021 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, denied the petition in part.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting those parts of the petition seeking disclosure of law enforcement disciplinary records dated on or before June 12, 2020 and seeking disclosure of law enforcement disciplinary records containing unsubstantiated claims or complaints, subject to redaction pursuant to particularized and specific justification under Public Officers Law § 87 (2), and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents, City of Rochester (City) and Rochester Police Department (RPD), to disclose, pursuant to the Freedom of Information Law ([FOIL] Public Officers Law § 84 *et seq.*), certain law enforcement disciplinary records. Petitioner appeals from a judgment that granted the petition in part and ordered the City and RPD to produce certain police disciplinary records under FOIL, but denied the petition with respect to the production of records from proceedings conducted on or before June 12, 2020 and with respect to records related to unsubstantiated claims or complaints.

Initially, we agree with petitioner that, as respondents correctly concede, respondents did not deny petitioner's FOIL request on the ground that the legislation repealing former Civil Rights Law § 50-a and amending FOIL concerning disciplinary records of law

enforcement agencies (*see* L 2020, ch 96, §§ 1-4 [effective June 12, 2020]) should not be applied retroactively, and thus Supreme Court erred in relying on that theory as a ground for denying the petition in part (*see Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74-75 [2017]).

We conclude—for the reasons stated in *Matter of New York Civ. Liberties Union v City of Syracuse* (— AD3d —, — [Nov. 10, 2022] [4th Dept 2022] [decided herewith])—that the court erred in concluding that the personal privacy exemption under Public Officers Law § 87 (2) (b) creates a blanket exemption allowing respondents to categorically withhold the law enforcement disciplinary records at issue. Further, for the reasons stated in *New York Civ. Liberties Union* (— AD3d at —), we reject petitioner's contention that it should be awarded attorneys' fees and costs.

We therefore modify the judgment by granting those parts of the petition seeking law enforcement records dated on or before June 12, 2020 and seeking law enforcement disciplinary records concerning unsubstantiated claims of RPD officer misconduct, subject to redaction pursuant to a particularized and specific justification under Public Officers Law § 87 (2). Respondents are directed to review the requested law enforcement disciplinary records, identify those law enforcement disciplinary records or portions thereof that may be redacted or withheld as exempt, and provide the requested law enforcement disciplinary records to petitioner subject to any records or portions thereof that are redactions or exemptions pursuant to a particularized and specific justification for exempting each record or portion thereof. Any claimed redactions and exemptions from disclosure are to be documented in a manner that allows for review by a court (*see Matter of Kirsch v Board of Educ. of Williamsville Cent. Sch. Dist.*, 152 AD3d 1218, 1219-1220 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 21-00796

PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF NEW YORK CIVIL LIBERTIES UNION,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE AND SYRACUSE POLICE DEPARTMENT,
RESPONDENTS-RESPONDENTS.

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CITY (ROBERT HODGSON OF COUNSEL), AND LATHAM & WATKINS LLP, FOR PETITIONER-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (MARY L. D'AGOSTINO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered May 5, 2021 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part, reinstating the petition insofar as it seeks disclosure of law enforcement disciplinary records, subject to redaction pursuant to particularized and specific justification under Public Officers Law § 87 (2), and granting the petition to that extent, and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents, City of Syracuse and Syracuse Police Department (SPD), to disclose, pursuant to the Freedom of Information Law ([FOIL] Public Officers Law § 84 *et seq.*), certain law enforcement disciplinary records. As relevant here, petitioner seeks law enforcement disciplinary records concerning open complaints, i.e., those in which an investigation had commenced but the law enforcement disciplinary proceeding had not yet reached a final disposition, and law enforcement disciplinary records concerning closed but unsubstantiated complaints, i.e., those in which it was determined that the allegations of SPD officer misconduct were unfounded or without merit. In opposition, respondents moved to dismiss the petition on the basis that the records sought were categorically exempt from disclosure pursuant to the "personal privacy" exemption under Public Officers Law § 87 (2) (b). Petitioner now appeals from a judgment granting respondents' motion to

dismiss the petition. We agree with petitioner that Supreme Court erred in determining that the records sought are categorically exempt from disclosure and may be withheld in their entirety.

At the outset, we reject respondents' contention that petitioner failed to exhaust its administrative remedies with respect to its contentions on appeal (*see Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 437 [1st Dept 2014]; *Council of Regulated Adult Liq. Licensees v City of N.Y. Police Dept.*, 300 AD2d 17, 18-19 [1st Dept 2002]).

It is well settled that, under FOIL, "[a]ll government records are . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-275 [1996]; *see Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 225 [2018], *rearg denied* 31 NY3d 1125 [2018]), that exemptions are to be " 'narrowly construed' " (*Gould*, 89 NY2d at 275; *see Matter of Hawley v Village of Penn Yan*, 35 AD3d 1270, 1271 [4th Dept 2006], *amended on rearg* 38 AD3d 1371 [4th Dept 2007]), that government agencies have the burden to demonstrate that " 'the material requested falls squarely within the ambit of [one] of the exemptions' " (*Abdur-Rashid*, 31 NY3d at 225; *see Matter of National Lawyers Guild, Buffalo Ch. v Erie County Sheriff's Off.*, 196 AD3d 1195, 1196 [4th Dept 2021]), and that those agencies "must articulate 'particularized and specific justification' for not disclosing requested documents" (*Gould*, 89 NY2d at 275; *see Matter of Nix v New York State Div. of Criminal Justice Servs.*, 167 AD3d 1524, 1525 [4th Dept 2018], *lv denied* 33 NY3d 908 [2019]).

Under Public Officers Law § 87 (2) (a), agencies shall disclose records unless they are "specifically exempted from disclosure by state or federal statute." For decades, law enforcement personnel records were wholly and categorically exempt from disclosure inasmuch as a state statute provided that such records "[were] considered confidential and not subject to inspection or review without the express written consent of such [law enforcement] officer . . . except as may be mandated by lawful court order" (former Civil Rights Law § 50-a [1]; *see Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 560 [2018]; *Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26, 29 [1988]). Effective June 12, 2020, the New York State Legislature fully repealed former Civil Rights Law § 50-a (*see* L 2020 ch 96, § 1). Thus, the statutory exemption under Public Officers Law § 87 (2) (a) no longer applies to law enforcement personnel records.

The bill repealing former Civil Rights Law § 50-a also made several amendments to FOIL concerning disciplinary records of law enforcement agencies (*see* L 2020, ch 96, §§ 2-4). Of particular relevance here, Public Officers Law § 86 was amended by adding subdivisions (6) and (7), defining " '[l]aw enforcement disciplinary records' " and a " '[l]aw enforcement disciplinary proceeding.' "

We agree with petitioner that the court erred in determining that the personal privacy exemption under Public Officers Law § 87 (2) (b) allows respondents to categorically withhold the law enforcement disciplinary records at issue. Public Officers Law § 87 (2) (b) provides that an "agency may deny access to records or portions thereof that . . . if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of [section 89 (2)]." The personal privacy exemption "allows agencies and their employees to protect sensitive matters in which there is little or no public interest, like personal information or unsubstantiated allegations, from public disclosure" (*Matter of New York Times Co. v City of New York Off. of the Mayor*, 194 AD3d 157, 165 [1st Dept 2021], *lv denied* 37 NY3d 913 [2021]). The personal privacy exemption "is qualified" by Public Officers Law § 89 (2) (c) (i) (*Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 160 [1st Dept 2010]; *see e.g. Matter of Scott, Sardano & Pomeranz v Records Access Officer of City of Syracuse*, 65 NY2d 294, 298 [1985]; *Matter of Police Benevolent Assn. of N.Y. State, Inc. v State of New York*, 145 AD3d 1391, 1392-1393 [3d Dept 2016]; *Matter of Obiajulu v City of Rochester*, 213 AD2d 1055, 1056 [4th Dept 1995]), which provides that "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted" (§ 89 [2] [c] [i]). An agency invoking the personal privacy exemption must "establish that the identifying details [of a record] could not be redacted so as to not constitute an unwarranted invasion of personal privacy" if the record was disclosed (*Matter of Aron Law, PLLC v New York City Fire Dept.*, 191 AD3d 664, 666 [2d Dept 2021]; *see Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1392-1393).

Contrary to respondents' contention, the personal privacy exemption "does not . . . categorically exempt . . . documents from disclosure" (*Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1392; *see Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 497 [1st Dept 2013]; *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 348-349 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]; *see generally Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42, 46 [2011]), even in the case where a FOIL request concerns release of unsubstantiated allegations or complaints of professional misconduct (*see e.g. Matter of Western Suffolk Bd. of Coop. Educ. Servs. v Bay Shore Union Free School Dist.*, 250 AD2d 772, 772-773 [2d Dept 1998]; *Matter of LaRocca v Board of Educ. of Jericho Union Free School Dist.*, 220 AD2d 424, 427 [2d Dept 1995]). In order to invoke the personal privacy exemption here, respondents must review each record responsive to petitioner's FOIL request and determine whether any portion of the specific record is exempt as an invasion of personal privacy and, to the extent that any portion of a law enforcement disciplinary record concerning an open or unsubstantiated complaint of SPD officer misconduct can be disclosed *without* resulting in an unwarranted invasion of personal privacy, respondents must release the non-exempt, i.e., properly redacted, portion of the record to petitioner (*see Matter of Sell v New York City Dept. of Educ.*, 135 AD3d 594, 594 [1st

Dept 2016]; *see generally Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc.*, 18 NY3d at 46; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 464 [2007]).

Inasmuch as respondents withheld the requested law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct in their entirety and did not articulate any particularized and specific justification for withholding any of the records, we conclude that respondents did not meet their burden of establishing that the personal privacy exemption applies (*see Aron Law, PLLC*, 191 AD3d at 666; *Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1393; *Matter of Livson v Town of Greenburgh*, 141 AD3d 658, 661 [2d Dept 2016]). Respondents further failed to establish that "identifying details" in the law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct "could not be redacted so as to not constitute an unwarranted invasion of personal privacy" (*Aron Law, PLLC*, 191 AD3d at 666; *see Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1393). Thus, the court erred in granting that part of respondents' motion seeking to dismiss petitioner's request for law enforcement disciplinary records concerning open or unsubstantiated claims of SPD officer misconduct in reliance on the personal privacy exemption under Public Officers Law § 87 (2) (b).

Further, we agree with petitioner that, in the administrative proceeding, respondents did not invoke the exemption under Public Officers Law § 87 (2) (e), and we therefore conclude the court erred in relying on that subdivision in granting respondents' motion with respect to petitioner's request for law enforcement disciplinary records concerning open claims of SPD officer misconduct (*see Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74-75 [2017]; *Matter of McFadden v McDonald*, 204 AD3d 672, 675 [2d Dept 2022]). "[J]udicial review of an administrative determination is limited to the grounds invoked by the agency and the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis" (*Madeiros*, 30 NY3d at 74 [internal quotation marks omitted]). Consequently, the court erred in relying on Public Officers Law § 87 (2) (e) and we make no determination whether respondents may rely on section 87 (2) (e) to withhold law enforcement disciplinary records.

Although we reject petitioner's contention that in the administrative proceeding respondents failed to invoke the exemption under Public Officers Law § 87 (2) (g) (iii), which applies to inter-agency or intra-agency materials that are not final agency policy or determinations, inasmuch as respondents cited it multiple times in their denial of petitioner's administrative appeal, we nonetheless agree with petitioner that the court erred in relying on that exemption as a categorical basis to grant respondents' motion with respect to petitioner's request for law enforcement disciplinary records concerning open claims of SPD officer misconduct. Respondents failed to meet their burden of establishing that the exemption applies inasmuch as they failed to establish whether law enforcement disciplinary records concerning open claims of SPD officer misconduct

"fall[] wholly or only partially within that exemption" (*Matter of Gedan v Town of Mamaroneck [N.Y.]*, 170 AD3d 833, 834 [2d Dept 2019]; *see Matter of New York 1 News v Office of President of Borough of Staten Is.*, 231 AD2d 524, 525 [2d Dept 1996]; *cf. Matter of Sawma v Collins*, 93 AD3d 1248, 1248-1249 [4th Dept 2012]; *Matter of Miller v New York State Dept. of Transp.*, 58 AD3d 981, 984 [3d Dept 2009], *lv denied* 12 NY3d 712 [2009]).

Further, we agree with petitioner that the court erred in relying upon the statute regarding the confidentiality of materials related to the conduct or discipline of attorneys (*see* Judiciary Law § 90 [10]) and case law regarding the confidentiality of investigations into judicial conduct or discipline (*see Matter of Nichols v Gamso*, 35 NY2d 35, 38 [1974]). Those rules are not applicable to the interpretation of FOIL or its application to disclosure of law enforcement disciplinary records concerning complaints of SPD officer misconduct.

We reject petitioner's contention that the court erred in granting respondents' motion with respect to petitioner's request for attorneys' fees and costs. Inasmuch as this proceeding at this stage concerns a novel interpretation of legislation that both repealed a statute and enacted new provisions to a longstanding statutory scheme, it cannot be said that respondents "had no reasonable basis for denying access" to the records at issue (Public Officers Law § 89 [4] [c]; *cf. New York Times Co.*, 194 AD3d at 166; *see generally Matter of Jewish Press, Inc. v New York City Police Dept.*, 190 AD3d 490, 491 [1st Dept 2021], *lv denied* 37 NY3d 906 [2021]).

We therefore modify the judgment by denying respondents' motion in part, reinstating the petition insofar as it seeks disclosure of law enforcement disciplinary records, subject to redaction pursuant to a particularized and specific justification under Public Officers Law § 87 (2) and granting the petition to that extent. Respondents are directed to review the requested law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct, identify those law enforcement disciplinary records or portions thereof that may be redacted or withheld as exempt, and provide the requested law enforcement disciplinary records to petitioner subject to any redactions or exemptions pursuant to a particularized and specific justification for exempting each record or portion thereof. Any claimed redactions and exemptions from disclosure are to be documented in a manner that allows for review by a court (*see Matter of Kirsch v Board of Educ. of Williamsville Cent. Sch. Dist.*, 152 AD3d 1218, 1219-1220 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MULDROW *v.* CITY OF ST. LOUIS, MISSOURI, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 22–193. Argued December 6, 2023—Decided April 17, 2024

Sergeant Jatonya Clayborn Muldrow maintains that her employer, the St. Louis Police Department, transferred her from one job to another because she is a woman. From 2008 through 2017, Muldrow worked as a plainclothes officer in the Department's specialized Intelligence Division. In 2017, the new Intelligence Division commander asked to transfer Muldrow out of the unit so he could replace her with a male police officer. Against Muldrow's wishes, the Department approved the request and reassigned Muldrow to a uniformed job elsewhere in the Department. While Muldrow's rank and pay remained the same in the new position, her responsibilities, perks, and schedule did not. After the transfer, Muldrow no longer worked with high-ranking officials on the departmental priorities lodged in the Intelligence Division, instead supervising the day-to-day activities of neighborhood patrol officers. She also lost access to an unmarked take-home vehicle and had a less regular schedule involving weekend shifts.

Muldrow brought this Title VII suit to challenge the transfer. She alleged that the City, in ousting her from the Intelligence Division, had "discriminate[d] against" her based on sex "with respect to" the "terms [or] conditions" of her employment. 42 U. S. C. §2000e–2(a)(1). The District Court granted the City summary judgment. The Eighth Circuit affirmed, holding that Muldrow had to—but could not—show that the transfer caused her a "materially significant disadvantage." 30 F. 4th 680, 688. Muldrow's lawsuit could not proceed, the court said, because the transfer "did not result in a diminution to her title, salary, or benefits" and had caused "only minor changes in working conditions."

Held: An employee challenging a job transfer under Title VII must show

Syllabus

that the transfer brought about some harm with respect to an identifiable term or condition of employment, but that harm need not be significant. Pp. 5–11.

(a) Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." §2000e–2(a)(1). Both parties agree that Muldrow's transfer implicated "terms" and "conditions" of Muldrow's employment. The applicable statutory language thus prohibits "discriminat[ing] against" an individual "with respect to" the "terms [or] conditions" of employment because of that individual's sex.

That language requires Muldrow to show that her transfer brought about some "disadvantageous" change in an employment term or condition. *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 80. The words "discriminate against," the Court has explained, refer to "differences in treatment that injure" employees. *Bostock* v. *Clayton County*, 590 U. S. 644, 681. In the typical transfer case, that worse treatment must be "with respect to" employment "terms [or] conditions." §2000e–2(a)(1). The "terms [or] conditions" phrase is not used "in the narrow contractual sense"; it covers more than the "economic or tangible." *Oncale*, 523 U. S., at 78; *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 64. Still, the phrase circumscribes the injuries that can give rise to a suit like this one. To make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of employment.

What the transferee does not have to show is that the harm incurred was "significant" or otherwise exceeded some heightened bar. "Discriminate against" means treat worse, here based on sex. See, *e.g.*, *Bostock*, 590 U. S., at 657. Neither that phrase nor any other establishes an elevated threshold of harm. To demand "significance" is to add words to the statute Congress enacted. It is to impose a new requirement on a Title VII claimant, so that the law as applied demands something more than the law as written. That difference can make a real difference for complaining transferees. By asking whether the harm to the transferee is significant, appellate courts have disregarded varied kinds of disadvantage. Pp. 5–7.

(b) The City's three main arguments—based on statutory text, precedent, and policy—do not justify the use of a "significance" standard.

The Court rejects the City's textual claim, which invokes the *ejusdem generis* canon—the idea that a general phrase following an enumeration of things should be read to encompass only things of the same basic kind. Applying that canon to the text of Title VII's antidiscrimination provision, the City claims that because refusing to hire

or discharging a person causes a significant disadvantage, the "otherwise to discriminate against" phrase can apply only to things causing an equal level of harm. But the statutory text itself provides a different shared trait: Each kind of prohibited discrimination occurs by way of an employment action—whether pertaining to hiring, or firing, or compensating, or (as here) altering terms or conditions through a transfer. That is a more than sufficient basis to unite the provision's several parts and avoid *ejusdem generis* problems.

Contrary to the City's view, there is also no reason to import a significant-harm requirement from this Court's decision in *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53. The Court there held that Title VII's anti-retaliation provision—which prohibits an employer from taking action against an employee for bringing or aiding a Title VII charge—applies only when the retaliatory action is "materially adverse," meaning that it causes "significant" harm. *Id.*, at 68. *White* adopted that standard for reasons peculiar to the retaliation context. The test was meant to capture those employer actions serious enough to "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *Ibid.* An action causing less serious harm will not deter Title VII enforcement and so falls outside the purposes of the ban on retaliation. But that reasoning does not apply to the anti-discrimination provision, which flatly "prevent[s] injury to individuals based on" protected status, *id.,* at 63, without distinguishing between significant and less significant harms.

Finally, there is reason to doubt the City's prediction that employees will flood courts with litigation in the absence of a significant-injury requirement. Courts retain multiple ways to dispose of meritless Title VII claims challenging transfer decisions. But even supposing the City's worst predictions come true, that would be the result of the statute Congress drafted. This Court will not add words to the statute to achieve what the City thinks a desirable result. Pp. 8–10.

(c) The courts below applied the wrong standard to Muldrow's suit. Muldrow need show only some injury respecting her employment terms or conditions. Her allegations, if properly preserved and supported, meet that test with room to spare. The Court recognizes, however, that the decisions below may have rested in part on issues of forfeiture and proof. The Court leaves such matters for the courts below to address on remand under the proper Title VII standard. Pp. 10–11.

30 F. 4th 680, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SOTOMAYOR, GORSUCH, BARRETT, and JACKSON, JJ., joined. THOMAS, J., ALITO, J., and KAVANAUGH, J., each filed an opinion concurring in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 22–193

JATONYA CLAYBORN MULDROW, PETITIONER *v.* CITY OF ST. LOUIS, MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[April 17, 2024]

JUSTICE KAGAN delivered the opinion of the Court.

Sergeant Jatonya Clayborn Muldrow maintains that her employer, the St. Louis Police Department, transferred her from one job to another because she is a woman. She sued the City of St. Louis under Title VII, alleging that she had suffered sex discrimination with respect to the "terms [or] conditions" of her employment. 42 U. S. C. §2000e–2(a)(1). The courts below rejected the claim on the ground that the transfer did not cause Muldrow a "significant" employment disadvantage. Other courts have used similar standards in addressing Title VII suits arising from job transfers.

Today, we disapprove that approach. Although an employee must show some harm from a forced transfer to prevail in a Title VII suit, she need not show that the injury satisfies a significance test. Title VII's text nowhere establishes that high bar.

I

From 2008 through 2017, Sergeant Muldrow worked as a plainclothes officer in the St. Louis Police Department's specialized Intelligence Division. During her tenure there, she investigated public corruption and human trafficking

cases, oversaw the Gang Unit, and served as head of the Gun Crimes Unit. By virtue of her Division position, Muldrow was also deputized as a Task Force Officer with the Federal Bureau of Investigation—a status granting her, among other things, FBI credentials, an unmarked take-home vehicle, and the authority to pursue investigations outside St. Louis. In 2017, the outgoing commander of the Intelligence Division told her newly appointed successor that Muldrow was a "workhorse"—still more, that "if there was one sergeant he could count on in the Division," it was Muldrow. 2020 WL 5505113, *1 (ED Mo., Sept. 11, 2020).

But the new Intelligence Division commander, Captain Michael Deeba, instead asked the Department to transfer Muldrow out of the unit. Deeba wanted to replace Muldrow—whom he sometimes called "Mrs." rather than the customary "Sergeant"—with a male police officer. See *id.,* at *1–*2. That officer, Deeba later testified, seemed a better fit for the Division's "very dangerous" work. *Id*., at *2; App. 139. The Department approved the transfer against Muldrow's wishes. It reassigned her to a uniformed job in the Department's Fifth District.

While Muldrow's rank and pay remained the same in the new position, her responsibilities, perks, and schedule did not. Instead of working with high-ranking officials on the departmental priorities lodged in the Intelligence Division, Muldrow now supervised the day-to-day activities of neighborhood patrol officers. Her new duties included approving their arrests, reviewing their reports, and handling other administrative matters; she also did some patrol work herself. Because she no longer served in the Intelligence Division, she lost her FBI status and the car that came with it. And the change of jobs made Muldrow's workweek less regular. She had worked a traditional Monday-through-Friday week in the Intelligence Division. Now she was placed on a "rotating schedule" that often involved weekend shifts. 2020 WL 5505113, *2.

Muldrow brought this Title VII suit to challenge the transfer. Her complaint alleged that the City, in ousting her from the Intelligence Division, had "discriminate[d] against" her based on sex "with respect to" the "terms [or] conditions" of her employment. §2000e–2(a)(1). In later deposition testimony, Muldrow set out her view of what the transfer had cost her. She had been moved out of a "premier position [in] the Police Department" into a less "prestigious" and more "administrative" uniformed role. App. 105, 114, 120. She had fewer "opportunities" to work on "important investigations," as well as to "network" with commanding officers. *Id.*, at 104. And she lost material benefits—her weekday work schedule and take-home car. Or as she summarized the situation: "I went from straight days, weekends off with a take-home car and more visibility and responsibility within the Department to a rotating schedule with few weekends off, assigned to . . . uniformed patrol," with "responsibilities being limited to that of administrative work" and "supervising officers on patrol." *Id.*, at 120. Title VII, Muldrow asserted in her suit, prevented the City from making those changes to her employment because of her sex.

The District Court, viewing the matter differently, granted the City summary judgment. Under Circuit precedent, the court explained, Muldrow needed to show that her transfer effected a "significant" change in working conditions producing "material employment disadvantage." 2020 WL 5505113, *8–*9. And Muldrow, the court held, could not meet that heightened-injury standard. "[S]he experienced no change in salary or rank." *Id.,* at *9. Her loss of "the networking [opportunities] available in Intelligence" was immaterial because she had not provided evidence that it had harmed her "career prospects." *Id.,* at *8. And given her continued "supervisory role," she had not "suffered a significant alteration to her work responsibilities." *Id.,* at *9. Finally, the District Court concluded that the switch to

a rotating schedule (including weekend work) and the loss of a take-home vehicle could not fill the gap. Although mentioning those changes "in her statement of facts," Muldrow had not relied on them in "her argument against summary judgment." *Ibid.*, n. 20. And anyway, the court stated, they "appear to be minor alterations of employment, rather than material harms." *Ibid.*

The Court of Appeals for the Eighth Circuit affirmed. It agreed that Muldrow had to—but could not—show that the transfer caused a "materially significant disadvantage." 30 F. 4th 680, 688 (2022). Like the District Court, the Eighth Circuit emphasized that the transfer "did not result in a diminution to her title, salary, or benefits." *Id.,* at 688–689. And the Circuit, too, maintained that the change in her job responsibilities was "insufficient" to support a Title VII claim. *Id.,* at 689. In the Fifth District, the court reasoned, Muldrow still had a "supervisory role" and participated in investigating serious crimes. *Id.,* at 688. So the court thought Muldrow's view of the new job—"more administrative and less prestigious"—was unsupported by record evidence and not "persuasive." *Ibid.* The court did not address Muldrow's new schedule or her loss of a car, apparently thinking those matters either forfeited or too slight to mention. Overall, the court held, Muldrow's claim could not proceed because she had experienced "only minor changes in working conditions." *Ibid.*

We granted certiorari, 600 U. S. ___ (2023), to resolve a Circuit split over whether an employee challenging a transfer under Title VII must meet a heightened threshold of harm—be it dubbed significant, serious, or something similar.[1] We now vacate the judgment below because the text

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[1] Compare, *e.g.*, 30 F. 4th 680, 688 (CA8 2022) (case below) ("materially significant disadvantage"); *Caraballo-Caraballo* v. *Correctional Admin.*, 892 F. 3d 53, 61 (CA1 2018) ("materially changes" employment conditions in a manner "more disruptive than a mere inconvenience or an alteration of job responsibilities"); *Williams* v. *R. H. Donnelley, Corp.*, 368

of Title VII imposes no such requirement.

II

A

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." §2000e–2(a)(1). Muldrow's suit, as described above, alleges that she was transferred to a lesser position because she is a woman. That transfer, as both parties agree, implicated "terms" and "conditions" of Muldrow's employment, changing nothing less than the what, where, and when of her police work. See Brief for Muldrow 19; Brief for City 1, 45–46. So the statutory language applicable to this case prohibits "discriminat[ing] against" an individual "with respect to" the "terms [or] conditions" of employment because of that individual's sex.

That language requires Muldrow to show that the transfer brought about some "disadvantageous" change in an employment term or condition. *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 80 (1998). The words "discriminate against," we have explained, refer to "differences in treatment that injure" employees. *Bostock* v. *Clayton County*, 590 U. S. 644, 681 (2020). Or otherwise said, the

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F. 3d 123, 128 (CA2 2004) ("materially significant disadvantage"); *James* v. *Booz-Allen & Hamilton, Inc.*, 368 F. 3d 371, 376 (CA4 2004) ("significant detrimental effect"); *O'Neal* v. *Chicago*, 392 F. 3d 909, 911 (CA7 2004) ("materially adverse"); *Sanchez* v. *Denver Public Schools*, 164 F. 3d 527, 532 (CA10 1998) ("significant change"); and *Webb-Edwards* v. *Orange Cty. Sheriff's Office*, 525 F. 3d 1013, 1033 (CA11 2008) ("serious and material change"), with *Chambers* v. *District of Columbia*, 35 F. 4th 870, 872, 876–877 (CADC 2022) (en banc) (overruling precedent that demanded an "objectively tangible harm" and rejecting a "material adversity" requirement).

statute targets practices that "treat[] a person worse" because of sex or other protected trait. *Id.,* at 658. And in the typical transfer case, that "worse" treatment must pertain to—must be "with respect to"—employment "terms [or] conditions." §2000e–2(a)(1). The "terms [or] conditions" phrase, we have made clear, is not used "in the narrow contractual sense"; it covers more than the "economic or tangible." *Oncale*, 523 U. S., at 78; *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986). Still, the phrase circumscribes the injuries that can give rise to a suit like this one. To make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of employment.

What the transferee does not have to show, according to the relevant text, is that the harm incurred was "significant." 30 F. 4th, at 688. Or serious, or substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar. See *supra,* at 4, and 4–5, n. 1. "Discriminate against" means treat worse, here based on sex. See, *e.g.*, *Bostock*, 590 U. S., at 657–658, 681. But neither that phrase nor any other says anything about how much worse. There is nothing in the provision to distinguish, as the courts below did, between transfers causing significant disadvantages and transfers causing not-so-significant ones. And there is nothing to otherwise establish an elevated threshold of harm. To demand "significance" is to add words—and significant words, as it were—to the statute Congress enacted. It is to impose a new requirement on a Title VII claimant, so that the law as applied demands something more of her than the law as written.

And that difference can make a real difference for complaining transferees. Many forced transfers leave workers worse off respecting employment terms or conditions. (After all, a transfer is not usually forced when it leaves the employee better off.) But now add another question—

whether the harm is significant. As appellate decisions reveal, the answers can lie in the eye of the beholder—and can disregard varied kinds of disadvantage. Take just a few examples from the caselaw. An engineering technician is assigned to work at a new job site—specifically, a 14-by-22-foot wind tunnel; a court rules that the transfer does not have a "significant detrimental effect." *Boone* v. *Goldin*, 178 F. 3d 253, 256 (CA4 1999). A shipping worker is required to take a position involving only nighttime work; a court decides that the assignment does not "constitute a *significant* change in employment." *Daniels* v. *United Parcel Serv., Inc.*, 701 F. 3d 620, 635 (CA10 2012). And a school principal is forced into a non-school-based administrative role supervising fewer employees; a court again finds the change in job duties not "significant." *Cole* v. *Wake Cty. Bd. of Educ.*, 834 Fed. Appx. 820, 821 (CA4 2021) (*per curiam*). All those employees suffered some injury in employment terms or conditions (allegedly because of race or sex). Their claims were rejected solely because courts rewrote Title VII, compelling workers to make a showing that the statutory text does not require.[2]

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[2] JUSTICE THOMAS's concurring opinion appears to disagree in two respects. He initially disputes that courts have applied a heightened-harm requirement in demanding that a plaintiff show something like "materially significant disadvantage." See *post,* at 1 (opinion concurring in judgment). And as a corollary, he denies that courts will have to change their treatment of Title VII claims once they start to apply the simple injury standard set out in this opinion. See *post,* at 2–3. In light of those views, we underscore two points. First, this decision changes the legal standard used in any circuit that has previously required "significant," "material," or "serious" injury. It lowers the bar Title VII plaintiffs must meet. Second, because it does so, many cases will come out differently. The decisions described above are examples, intended to illustrate how claims that failed under a significance standard should now succeed. And as we will discuss, the decision below is another such example, putting to one side case-specific issues of forfeiture and proof. See *infra*, at 10–11.

B

The City, in defense of that added requirement, makes three main arguments—one about the text, one about our precedent, and one about policy. None justifies the use of a "significance" standard.

The textual claim invokes the *ejusdem generis* canon—the idea that a general phrase following an enumeration of things should be read to encompass only things of the same basic kind. Recall the prohibition at issue here: An employer may not, based on sex, "fail or refuse to hire" or "discharge" any person or "otherwise . . . discriminate against [her] with respect to [her] compensation, terms, conditions, or privileges of employment." §2000e–2(a)(1); see *supra*, at 5. Refusing to hire or discharging a person, the City notes, causes a significant disadvantage; so the subsequent "otherwise" phrase, the City claims, can apply only to things causing an equal level of harm. See Brief for City 16, 25–27. But the City fails to explain why the presence of significant disadvantage must be part of the list's common denominator. The text itself provides a different shared trait. Each kind of prohibited discrimination occurs by way of an employment action—whether pertaining to hiring, or firing, or compensating, or (as here) altering terms or conditions through a transfer. That is a more than sufficient basis to unite the provision's several parts and avoid *ejusdem generis* problems. There is no need for courts to introduce a significant-harm requirement.

The City's argument from precedent fares no better. It relies on *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U. S. 53 (2006), which addressed Title VII's separate anti-retaliation provision. Under that section, an employer may not take action against an employee for bringing or aiding a Title VII charge. See §2000e–3(a). The Court held that the provision applies only when the retaliatory action is "materially adverse," meaning that it causes "sig-

nificant" harm. *Id.*, at 68. The City thinks we should import the same standard into the anti-discrimination provision at issue. See Brief for City 18–19. But that would create a mismatch. *White* adopted the standard for reasons peculiar to the retaliation context. The test was meant to capture those (and only those) employer actions serious enough to "dissuade[] a reasonable worker from making or supporting a charge of discrimination." 548 U. S., at 68. If an action causes less serious harm, the Court reasoned, it will not deter Title VII enforcement; and if it will not deter Title VII enforcement, it falls outside the purposes of the ban on retaliation. See *id.*, at 63, 68. But no such (frankly extra-textual) reasoning is applicable to the discrimination bar. Whether an action causes significant enough harm to deter any employee conduct is there beside the point. *White* itself noted the difference: The anti-discrimination provision, we explained, simply "seeks a workplace where individuals are not discriminated against" because of traits like race and sex. *Id.,* at 63. The provision thus flatly "prevent[s] injury to individuals based on" status, *ibid.*, without distinguishing between significant and less significant harms.

Finally, the City's policy objections cannot override Title VII's text. In the City's view, a significant-injury requirement is needed to prevent transferred employees from "swamp[ing] courts and employers" with insubstantial lawsuits requiring "burdensome discovery and trials." Brief for City 45, 49 (capitalization and boldface omitted). But there is reason to doubt that the floodgates will open in the way feared. As we have explained, the anti-discrimination provision at issue requires that the employee show some injury. See *supra*, at 5–6. It requires that the injury asserted concern the terms or conditions of her employment. See *ibid.* Perhaps most notably, it requires that the employer have acted for discriminatory reasons—"because of" sex or

race or other protected trait. §2000e–2(a)(1). And in addressing that issue, a court may consider whether a less harmful act is, in a given context, less suggestive of intentional discrimination. So courts retain multiple ways to dispose of meritless Title VII claims challenging transfer decisions. But even supposing the City's worst predictions come true, that would be the result of the statute Congress drafted. As we noted in another Title VII decision, we will not "add words to the law" to achieve what some employers might think "a desirable result." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U. S. 768, 774 (2015). Had Congress wanted to limit liability for job transfers to those causing a significant disadvantage, it could have done so. By contrast, this Court does not get to make that judgment.

III

In light of everything said above, the Court of Appeals' treatment of Muldrow's suit cannot survive. The court required Muldrow to show that the allegedly discriminatory transfer out of the Intelligence Division produced a significant employment disadvantage. See *supra*, at 4. As we have explained, that is the wrong standard. Muldrow need show only some injury respecting her employment terms or conditions. The transfer must have left her worse off, but need not have left her significantly so. And Muldrow's allegations, if properly preserved and supported, meet that test with room to spare. Recall her principal allegations. She was moved from a plainclothes job in a prestigious specialized division giving her substantial responsibility over priority investigations and frequent opportunity to work with police commanders. She was moved to a uniformed job supervising one district's patrol officers, in which she was less involved in high-visibility matters and primarily performed administrative work. Her schedule became less regular, often requiring her to work weekends; and she lost her take-home car. If those allegations are proved, she was left

worse off several times over. It does not matter, as the courts below thought (and JUSTICE THOMAS echoes), that her rank and pay remained the same, or that she still could advance to other jobs. See *supra,* at 3–4; *post,* at 2. Title VII prohibits making a transfer, based on sex, with the consequences Muldrow described.

We recognize, however, that the decisions below may have rested in part on issues of forfeiture and proof. The District Court noted, for example, that Muldrow had failed to discuss in her argument against summary judgment the changes in her work schedule and vehicle access; and perhaps following that lead, the Court of Appeals did not address those harms. See *supra*, at 3–4. In addition, both courts suggested that some of the allegations Muldrow made about the nature of the work she did in her old and new jobs lacked adequate evidentiary support. See *ibid.* We leave such matters for the courts below to address. All we require is that they use the proper Title VII standard, and not demand that Muldrow demonstrate her transfer caused "significant" harm.

We accordingly vacate the judgment of the Court of Appeals for the Eighth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 22–193

JATONYA CLAYBORN MULDROW, PETITIONER *v.* CITY OF ST. LOUIS, MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[April 17, 2024]

JUSTICE THOMAS, concurring in the judgment.

I agree with JUSTICE ALITO that the Courts of Appeals all appear to articulate the same principle, but with slightly varying verbal formulations: A plaintiff bringing a claim under 42 U. S. C. §2000e–2(a)(1) must show harm that is more than trifling. *Post,* at 1–2 (opinion concurring in judgment). And, there is little practical difference between that principle and the Court's holding. *Ante,* at 1 (holding that an employee "must show some harm").

I am not convinced, however, that the Court accurately characterizes the Eighth Circuit's decision. I do not read the Eighth Circuit to have necessarily imposed a heightened-harm requirement in the form of a "significance" test. The Eighth Circuit defined an adverse employment action as "a tangible change in working conditions that produces a material employment disadvantage." 30 F. 4th 680, 688 (2022) (internal quotation marks omitted). It further explained that "minor changes in duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage, do not rise to the level of an adverse employment action." *Ibid.* (alteration and internal quotation marks omitted). In other words, a plaintiff must have suffered an actual disadvantage as compared to minor changes—*i.e.*, more than a trifling harm. That standard aligns with the Court's observation that a plaintiff must

show "some 'disadvantageous' change in an employment term or condition." *Ante,* at 5 (quoting *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 80 (1998)).

The Court insists that the Eighth Circuit must have demanded more given the weight of Muldrow's allegations. Specifically, the Court underscores Muldrow's claims that the City of St. Louis "moved [her] from a plainclothes job in a prestigious specialized division" with a take-home car and a regular schedule, to a "uniformed job supervising one district's patrol officers," with no take-home car and an irregular schedule. *Ante*, at 10. But, most of those allegations are forfeited or attributable to a nonparty, the Federal Bureau of Investigation. See 2020 WL 5505113, *9, n. 20 (ED Mo., Sept. 11, 2020) (observing that Muldrow did not raise arguments based on "having to return her take-home [car]," "changes to her schedule, including having to work weekends," or "having to work in plain clothes"); 30 F. 4th, at 689 (concluding that "the FBI had the sole authority to revoke" Muldrow's plainclothes and take-home car privileges). Before the Eighth Circuit, Muldrow argued only that the City moved her to a job that was "more administrative and less prestigious." *Id.*, at 688. Her "only evidence" in support of that argument was "her own deposition testimony," which neither the District Court nor the Eighth Circuit found persuasive. *Ibid.* And, Muldrow's testimony certainly did not establish any "proof of harm resulting from [her] reassignment." *Ibid.* After the transfer, Muldrow's "pay and rank remained the same, she was given a supervisory role, and she was responsible for investigating violent crimes, such as homicides and robberies." *Ibid.* Muldrow even conceded that the transfer "did not harm her future career prospects." *Ibid.* At most, then, Muldrow "expresse[d] a mere preference for one position over the other." *Id.*, at 689.

Muldrow failed to prove that there was any nontrifling change in her job's prestige—which was her lone theory of

harm. *Id.*, at 688–689. The Eighth Circuit rejected Muldrow's adverse employment action claim accordingly. I fail to see how the Eighth Circuit's reasoning—that a plaintiff must offer colorable evidence of harm—is equivalent to the heightened-harm requirement the Court concludes the Eighth Circuit applied. *Ante,* at 10 (agreeing that "[t]he transfer must have left [Muldrow] worse off").

All that said, I recognize that the terms "material" and "significant" can (but do not always) imply a heightened-harm requirement. Although I find it unlikely, it is possible that the Eighth Circuit had such a stringent test in mind when it stated that a plaintiff must show a "'materially significant disadvantage.'" 30 F. 4th, at 688. I thus agree to vacate and remand to the extent the Eighth Circuit's analysis is inconsistent with a more-than-trifling-harm requirement.

SUPREME COURT OF THE UNITED STATES

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JATONYA CLAYBORN MULDROW, PETITIONER *v.* CITY OF ST. LOUIS, MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[April 17, 2024]

JUSTICE ALITO, concurring in the judgment.

I agree with the judgment in this case. Assuming without deciding that all the facts mentioned by the Court are relevant and properly presented, petitioner's transfer altered the "terms" or "conditions" of her employment, 42 U. S. C. §2000e–2(a)(1), and therefore she can prevail if she can prove that she was transferred because of her sex.

I do not join the Court's unhelpful opinion. For decades, dozens of lower court judges, with a wealth of experience handling Title VII cases, have held that not every unwanted employment experience affects an employee's "terms" or "conditions" of employment. The lower courts have used various verbal formulations to express this point, and the Court, dubious about the words they had selected, granted review to provide guidance. Now, after briefing and argument, that guidance is as follows: Title VII plaintiffs must show that the event they challenge constituted a "harm" or "injury," but that the event need not be "significant" or "substantial." See *ante*, at 10–11.

I have no idea what this means, and I can just imagine how this guidance will be greeted by lower court judges. The primary definition of "harm" is "physical or mental damage," and an "injury" is defined as "an act that damages, harms, or hurts: an unjust or undeserved infliction of

suffering or harm." Webster's Third International Dictionary 1034, 1164 (1976). These definitions incorporate at least some degree of significance or substantiality. We do not typically say that we were harmed or injured by every unwanted experience. What would we think if a friend said, "I was harmed because the supermarket had run out of my favorite brand of peanut butter," or, "I was injured because I ran into three rather than the usual two red lights on the way home from work"?

I see little if any substantive difference between the terminology the Court approves and the terminology it doesn't like. The predictable result of today's decision is that careful lower court judges will mind the words they use but will continue to do pretty much just what they have done for years.

SUPREME COURT OF THE UNITED STATES

No. 22–193

JATONYA CLAYBORN MULDROW, PETITIONER *v.* CITY OF ST. LOUIS, MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[April 17, 2024]

JUSTICE KAVANAUGH, concurring in the judgment.

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1). The question presented in this case is whether transferring an employee—for example, changing an employee's job responsibilities or job location—on the basis of race, color, religion, sex, or national origin violates Title VII. The answer is yes.

I therefore agree with the straightforward opinion jointly authored by Judge Tatel and Judge Ginsburg for the en banc D. C. Circuit. See *Chambers* v. *District of Columbia*, 35 F. 4th 870 (2022). As that court explained, even when a transfer does not change an employee's compensation, a transfer does change the employee's terms, conditions, or privileges of employment. See *id.*, at 874–879. Therefore, a transfer made on the basis of the employee's race, color, religion, sex, or national origin violates Title VII. See *id.*, at 874–875.

As I see it and as the D. C. Circuit saw it, the issue here is not complicated. Suppose that an employer says to an employee in the Columbus office: "We are transferring you

to the Cincinnati office because you are black. But your compensation will not change." Does that violate Title VII? Of course it does. To begin with, the employer has treated the employee differently because of race. To be sure, the fact that a transfer may not involve a change in compensation can affect the amount of any damages, as Muldrow's attorney acknowledged. See Tr. of Oral Arg. 41–42. But a transfer changes the terms, conditions, or privileges of employment. Therefore, a discriminatory transfer violates the statute. "The plain text of Title VII requires no more." *Chambers*, 35 F. 4th, at 875.[1]

Unlike the D. C. Circuit, some Courts of Appeals have held that discriminatory transfers are not prohibited by Title VII unless the transfer also causes significant employment disadvantage. *Ante*, at 4–5, n. 1. Today, this Court definitively rejects those rulings. *Ante*, at 6, 7, n. 2. I fully agree with the Court on that point.

But the Court's opinion then goes on to require that a plaintiff in a discriminatory-transfer case show at least "some harm" beyond the harm of being transferred on the basis of race, color, religion, sex, or national origin. *Ante*, at 6. I disagree with the Court's new some-harm requirement. No court has adopted a some-harm requirement, and no party or *amicus* advocated that requirement to this Court. More to the point, the text of Title VII does not require a separate showing of some harm. The discrimination is harm. The only question then is whether the relevant employment action changes the

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[1] To be sure, the employment action in a transfer case must actually be a transfer (or denied transfer), which requires a change (or denied change) in the compensation, terms, conditions, or privileges of employment. See Brief for District of Columbia et al. as *Amici Curiae* 17–18. There may be edge cases about what qualifies as a transfer. But as the Solicitor General notes, a change in an employee's job location or job responsibilities readily qualifies. See Brief for United States as *Amicus Curiae* 11, 22.

compensation, terms, conditions, or privileges of employment. A transfer does so. Therefore, as the D. C. Circuit explained, a transfer on the basis of race, color, religion, sex, or national origin is actionable under Title VII. *Chambers*, 35 F. 4th, at 874–879.

All of that said, the Court's new some-harm requirement appears to be a relatively low bar. Importantly, the Court emphasizes that "some harm" is less than significant harm, serious harm, or substantial harm. *Ante*, at 6. Therefore, anyone who has been transferred because of race, color, religion, sex, or national origin should easily be able to show some additional harm—whether in money, time, satisfaction, schedule, convenience, commuting costs or time, prestige, status, career prospects, interest level, perks, professional relationships, networking opportunities, effects on family obligations, or the like. So even though I respectfully disagree with the Court's new some-harm requirement, I expect that the Court's approach and my preferred approach will land in the same place and lead to the same result in 99 out of 100 discriminatory-transfer cases, if not in all 100.

Government | Government | Human Rights | Appellate | Public Policy

New York state can enforce many gun restrictions, US appeals court rules

By **Jonathan Stempel**

October 24, 2024 4:16 PM EDT · Updated 11 days ago

[1/2] A sign informs about the "Gun Free Zone" in the Times Square area of New York City, U.S., March 15, 2024. REUTERS/Shannon Stapleton/File Photo Purchase Licensing Rights

NEW YORK, Oct 24 (Reuters) - A federal appeals court upheld large portions of an expansive New York state gun control law on Thursday, saying the state can ban people from carrying weapons in "sensitive" locations such as schools, parks, theaters, bars and Times Square.

In a 246-page decision, the 2nd U.S. Circuit Court of Appeals in Manhattan also let licensing officials prevent people they consider dangerous from using guns in public, by requiring gun applicants to show they have "good moral character."

But the three-judge panel also rejected parts of the 2022 law, including a gun ban on private properties that are normally open to the public, such as gas stations and supermarkets.

The panel had ruled the same way in December, but revisited the matter after the U.S. Supreme Court - in a different case - clarified the constitutional protections afforded to gun owners.

"The overall message of this case is that the careful, thoughtful, public safety driven law in New York is consistent with the 2nd Amendment," said David Pucino, legal director of the Giffords Law Center to Prevent Gun Violence, in an interview.

Lawyers for gun owners who challenged the law had no immediate comment.

"This decision is another victory in our effort to protect all New Yorkers from the scourge of gun violence," New York Attorney General Letitia James, a Democrat, said in a statement. "Commonsense gun safety legislation helps protect New Yorkers."

Governor Kathy Hochul, a Democrat, signed the law passed by the state's Democratic-controlled legislature on July 1, 2022.

The signing came one week after the Supreme Court struck down a different, more than century-old state law restricting the carrying of guns outside the home.

That decision, New York State Rifle & Pistol Association v Bruen, was a landmark that expanded Americans' 2nd Amendment rights to arm themselves in public. It also required courts to look for historical analogues to justify new gun restrictions.

FRUSTRATION AND PRAISE

In June, however, the Supreme Court limited the Bruen decision by upholding a federal ban on gun ownership by people subject to restraining orders for domestic violence.

The Supreme Court then ordered the Manhattan appeals court to review the 2022 New York law in light of that decision, U.S. v. Rahimi.

In Thursday's decision, the appeals court said the Supreme Court analysis in the Rahimi case "supports our prior conclusions."

Erich Pratt, senior vice president at Gun Owners of America, whose California affiliate was involved in the case, in a statement called the decision "incredibly frustrating" and a "slap in the face" to the Supreme Court and New York gun owners.

"We will continue the fight against Governor Hochul and anti-gun legislators in Albany until New Yorkers can finally carry for self-defense without infringement," he said.

Eric Tirschwell, chief litigation counsel for Everytown for Gun Safety, in a statement said the decision confirms that gun rights' advocates' "reckless efforts to dismantle public safety measures" are inconsistent with Supreme Court precedents.

The appeals court returned the case to U.S. District Judge Glenn Suddaby in Syracuse, New York, who blocked much of the New York law in October 2022.

The case is Antonyuk et al v James et al, 2nd U.S. Circuit Court of Appeals, Nos. 22-2908, 22-2972.

Reporting by Jonathan Stempel in New York Editing by Bill Berkrot, Frances Kerry, Marguerita Choy and Diane Craft

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Tax Foreclosure Surplus Class Action and Related Litigation

H. Todd Bullard, Esq.

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November, 2024

Regarding: Tax Foreclosure Surplus Class Action and Related Litigation

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As a result of the recent US Supreme Court decision rendered in *Tyler v. Hennepin County*, 598 U.S. 631 (2023), plaintiffs, as former owners of foreclosed real property, filed legal action asserting constitutional challenges to state real property tax law seeking the return of surplus funds and other damages resulting from municipal governments' *in rem* tax sales. The number of claims is increasing statewide. Counties are faced with the potential of having to return millions of dollars in surplus sales proceeds resulting from sales occurring many years ago prior to the recent Supreme Court decision.

The Harris Beach team has been retained by twenty (20) Counties to defend against these claims. Todd serves as the lead HB counsel in defending these actions both non-class actions and class actions. The firm believes that it is important for the Counties develop a joint litigation strategy to defend these legal actions to avoid inconsistent and harmful case precedent from individual outlier cases. T

In April 2024, in response to the *Tyler v. Hennepin County* decision, the Governor and the state legislature passed substantive amendments to art. 11 of the New York Real Property Tax Law to allow a foreclosed owner or others with any interest in the property the ability to petition a court for the surplus.

Basically, based on the amendment to RPTL, what each claimant is actually seeking with respect to the surplus is a modification of the Judgment of Foreclosure to restore their interest and other lien holders' interests in the property and their ability to receive surplus. The statute, as discussed, is not clear on the process or implication on the logistics.

Accordingly, the new amendments are presenting challenges both to the state courts and Counties as to each municipality (County, City, Town, or Village) that engages in tax sales to develop a procedure to comply with the new state amended provisions.

In sum, the strategy is to collectively lay the groundwork for a uniform procedure for all Counties. The overall goal is to leverage each of these claims for surplus to support our defense in federal court by developing a record that the real challenge by the plaintiffs is to modify or reverse, in a limited manner, a state court judgment.

We outline below our recommendations for the new procedures to comply with amended provisions to RPTL.

PROPOSED POST-HENNEPIN PROCEDURES

Non-Class

19

Right to surplus funds with auctions held in May 2023 forward.

(1) 2022
2023

Sales – Auction Results

Notice Provisions

Erie County

Sale Auction Report filed with Court

(A) Process to seek funds

Surplus Language in Notice

Notice of Claims have been filed with County

Notice to 50-h

Motions with Attorney Affidavit, Judgment of Foreclosure and Title stub search

Motion Declaratory Judgment hybrid

Mortgage Procedures*

(2) Article 11 – November 2024

Funds paid over to Court

Notice - Notice to Lienholders

(A) Plans – Class Action and Non-Class Actions

Leverage Plaintiffs Factual / Predicate

Pre-Hennepin Auctions	Post =-Hennepin Auctions

Recent Litigation Updates:

By TEXT Order, the Magistrate Judge, *sua sponte*, has consolidated all cases in N.D.N.Y. non-class action and class action. Court has directed newly added actions to join the pending motions to dismiss with a limited ability to expand any issues already asserted and there is a fifteen (15) page limit in any supplemental motion to dismiss brief.

W.D.N.Y. – In the Gwork Class Action: There was a Conferral conference on October 17, 2024 in preparation of the Rule 16 Conference and a Civil Case Management Plan was jointly filed setting forth a discovery and motion practice schedule.

(a) Stipulation of Voluntary Dismissal – Named Plaintiffs was also discussed.

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Tyler v. Hennepin Cnty.

Supreme Court of the United States

April 26, 2023, Argued; May 25, 2023, Decided

No. 22-166.

Reporter

143 S. Ct. 1369 *; 215 L. Ed. 2d 564 **; 2023 U.S. LEXIS 2201 ***; 598 U.S. 631; 29 Fla. L. Weekly Fed. S 851

GERALDINE TYLER, PETITIONER v. HENNEPIN COUNTY, MINNESOTA, ET AL.

Notice: The pagination of this document is subject to change pending release of the final published version.

Prior History: [*1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Tyler v. Hennepin Cty., 26 F.4th 789, 2022 U.S. App. LEXIS 4207 (8th Cir. Minn., Feb. 16, 2022)

Disposition: *26 F. 4th 789*, reversed.

Syllabus

[*1371] Geraldine Tyler owned a condominium in Hennepin County, Minnesota, that accumulated about $15,000 in unpaid real estate taxes along with interest and penalties. The County seized the condo and sold it for $40,000, keeping the $25,000 excess over Tyler's tax debt for itself. *Minn. Stat. §§281.18*, *282.07*, *282.08*. Tyler filed suit, alleging that the County had unconstitutionally retained the excess value of her home above her tax debt in violation of the *Takings Clause of the Fifth Amendment* and the *Excessive Fines Clause of the Eighth Amendment*. The District Court dismissed the suit for failure to state a claim, and the Eighth Circuit affirmed.

Held: Tyler plausibly alleges that Hennepin County's retention of the excess value of her home above her tax debt violated the *Takings Clause*. Pp. 3-14.

(a) Tyler's claim that the County illegally appropriated the $25,000 surplus constitutes a classic pocketbook injury sufficient to give her standing. *TransUnion **[*1372]** LLC v. Ramirez, 594 U. S. ___, ___, 141 S. Ct. 2190, 210 L. Ed. 2d 568*. Even if there are debts on her home, as the County claims, Tyler still plausibly alleges a financial harm, for the County has kept $25,000 that she could have used to reduce her personal liability for those debts. Pp. 3-4.

(b) Tyler has stated a claim under the *Takings Clause*, which provides that **[***2]** "private property [shall not] be taken for public use, without just compensation." Whether remaining value from a tax sale is property protected under the *Takings Clause* depends on state law, "traditional property law principles," historical practice, and the Court's precedents. *Phillips v. Washington Legal Foundation, 524 U. S. 156, 165-168, 118 S. Ct. 1925, 141 L. Ed. 2d 174*. Though state law is an important source of property rights, it cannot be the only one because otherwise a State could "sidestep the *Takings Clause* by disavowing traditional property interests" in assets it wishes to appropriate. *Id., at 167, 118 S. Ct. 1925, 141 L. Ed. 2d 174*. History and precedent dictate that, while the County had the power to sell Tyler's home to recover the unpaid property taxes, it could not use the tax debt to confiscate more property than was due. Doing so effected a "classic taking in which the government directly appropriates private property for its own use." *Tahoe-Sierra*

Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U. S. 302, 324, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (internal quotation marks omitted).

The principle that a government may not take from a taxpayer more than she owes is rooted in English law and can trace its origins at least as far back as the Magna Carta. From the founding, the new Government of the United States could seize and sell only "so much of [a] tract of land . . . as may be necessary to satisfy the taxes due thereon." Act of July 14, 1798, §13, 1 Stat. 601. Ten States adopted **[***3]** similar statutes around the same time, and the consensus that a government could not take more property than it was owed held true through the ratification of the *Fourteenth Amendment*. Today, most States and the Federal Government require excess value to be returned to the taxpayer whose property is sold to satisfy outstanding tax debt.

The Court's precedents have long recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed. See *United States v. Taylor, 104 U. S. 216, 26 L. Ed. 721, 17 Ct. Cl. 427*; *United States v. Lawton, 110 U. S. 146, 3 S. Ct. 545, 28 L. Ed. 100, 19 Ct. Cl. 709*. *Nelson v. City of New York, 352 U. S. 103, 77 S. Ct. 195, 1 L. Ed. 2d 171*, did not change that. The ordinance challenged there did not "absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale," but instead simply defined the process through which the owner could claim the surplus. *Id., at 110, 77 S. Ct. 195, 1 L. Ed. 2d 171*. Minnesota's scheme, in comparison, provides no opportunity for the taxpayer to recover the excess value from the State.

Significantly, Minnesota law itself recognizes in many other contexts that a property owner is entitled to the surplus in excess of her debt. If a bank forecloses on a mortgaged property, state law entitles the homeowner to the surplus from the sale. And in collecting past due taxes on income or personal property, Minnesota protects the taxpayer's right to surplus. Minnesota may not **[***4]** extinguish a property interest that it recognizes everywhere else to avoid paying just compensation when the State does the taking. *Phillips, 524 U. S., at 167, 118 S. Ct. 1925, 141 L. Ed. 2d 174*. Pp. 4-12.

(c) The Court rejects the County's argument that Tyler has no property interest in the surplus because she constructively **[*1373]** abandoned her home by failing to pay her taxes. Abandonment requires the "surrender or relinquishment or disclaimer of" all rights in the property, *Rowe v. Minneapolis, 49 Minn. 148, 51 N. W. 907, 908*. Minnesota's forfeiture law is not concerned about the taxpayer's use or abandonment of the property, only her failure to pay taxes. The County cannot frame that failure as abandonment to avoid the demands of the *Takings Clause*. Pp. 12-14.

26 F. 4th 789, reversed.

Counsel: Christina M. Martin argued the cause for petitioner.

Erica L. Ross argued the cause for United States, as amicus curiae.

Neal K. Katyal argued the cause for respondents.

Judges: Roberts, C. J., delivered the opinion for a unanimous Court. Gorsuch, J., filed a concurring opinion, in which Jackson, J., joined.

Opinion by: ROBERTS

Opinion

[569]** CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Hennepin County, Minnesota, sold Geraldine Tyler's home for $40,000 to satisfy a $15,000 tax bill. Instead of returning the remaining $25,000, the

County kept it for itself. The question presented is whether this constituted a taking of property without just compensation, in violation of the *Fifth Amendment*.

I

Hennepin County imposes an annual tax on real property. *Minn. Stat. §273.01* (2022). **[***5]** The taxpayer has one year to pay before the taxes become delinquent. *§279.02*. If she does not timely pay, the tax accrues interest and penalties, and the County obtains a judgment against the property, transferring limited title to the State. See *§§279.03*, *279.18*, *280.01*. The delinquent taxpayer then has three years to redeem the property and regain title by paying all the taxes and late fees. *§§281.17(a)*, *281.18*. During this time, the taxpayer remains the beneficial owner of the property and can continue to live in her home. See *§281.70*. But if at the end of three years the bill has not been paid, absolute title vests in the State, and the tax debt is extinguished. *§§281.18*, *282.07*. The State may keep the property for public use or sell it to a private party. *§282.01 subds. 1a*, *3*. If the property is sold, any proceeds in excess of the tax debt and the costs of the sale remain with the County, to be split between it, the town, and the school district. *§282.08*. The former owner has no opportunity to recover this surplus.

[*1374] Geraldine Tyler is 94 years old. In 1999, she bought a one-bedroom condominium in Minneapolis and lived alone there for more than a decade. But as Tyler aged, she and her family decided that she would be safer in a senior community, so they moved her to one **[***6]** in 2010. Nobody paid the property taxes on the condo in Tyler's absence and, by 2015, it had accumulated about $2300 in unpaid taxes and $13,000 in interest and penalties. Acting under Minnesota's forfeiture procedures, Hennepin County seized the condo and sold it for $40,000, extinguishing the $15,000 debt. App. 5. The County kept the remaining $25,000 for its own use.

Tyler filed a putative class action against Hennepin County and its officials, asserting that the County had unconstitutionally retained the excess value of her home above her tax debt. As relevant, she brought claims under the *Takings Clause of the Fifth Amendment* and the *Excessive Fines Clause of the Eighth Amendment*.

The District Court dismissed the suit for failure to state a claim. *505 F. Supp. 3d 879, 883 (Minn. 2020)*. The Eighth Circuit affirmed. *26 F. 4th 789, 790 (2022)*. It held that "[w]here state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking." *Id., at 793*. The court also rejected Tyler's claim under the Excessive Fines Clause, adopting the District Court's reasoning that the forfeiture was not a fine because it was intended to remedy the State's tax losses, not to punish delinquent property owners. *Id., at 794* (citing *505 F. Supp. 3d, at 895-899*).

[570]** We granted certiorari. *598 U. S. ___, 143 S. Ct. 644, 214 L. Ed. 2d 382 (2023)*.

II

The County asserts that Tyler **[***7]** does not have standing to bring her takings claim. To bring suit, a plaintiff must plead an injury in fact attributable to the defendant's conduct and redressable by the court. *Lujan v. Defenders of Wildlife, 504 U. S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. This case comes to us on a motion to dismiss for failure to state a claim. At this initial stage, we take the facts in the complaint as true. *Warth v. Seldin, 422 U. S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*. Tyler claims that the County has illegally appropriated the $25,000 surplus beyond her $15,000 tax debt. App. 5. This is a classic pocketbook injury sufficient to give her standing. *TransUnion LLC v. Ramirez, 594 U. S. ___, ___, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021) (slip op., at 9)*.

The County objects that Tyler does not have standing because she did not affirmatively

"disclaim the existence of other debts or encumbrances" on her home worth more than the $25,000 surplus. Brief for Respondents 12-13, and n. 5. According to the County, public records suggest that the condo may be subject to a $49,000 mortgage and a $12,000 lien for unpaid homeowners' association fees. See *ibid.* The County argues that these potential encumbrances exceed the value of any interest Tyler has in the home above her $15,000 tax debt, and that she therefore ultimately suffered no financial harm from the sale of her home. Without such harm she would have no standing.

But the County never entered **[***8]** these records below, nor has it submitted them to this Court. Even if there were encumbrances on the home worth more than the surplus, Tyler still plausibly alleges a financial harm: The County has kept $25,000 that belongs to her. In Minnesota, a tax sale extinguishes all other liens on a property. See *Minn. Stat. §281.18*; *County of Blue Earth v. Turtle, 593 N. W. 2d 258, 261 (Minn. App. 1999)*. That sale does not extinguish **[*1375]** the taxpayer's debts. Instead, the borrower remains personally liable. See *St. Paul v. St. Anthony Flats Ltd. Partnership, 517 N. W. 2d 58, 62 (Minn. App. 1994)*. Had Tyler received the surplus from the tax sale, she could have at the very least used it to reduce any such liability.

At this initial stage of the case, Tyler need not definitively prove her injury or disprove the County's defenses. She has plausibly pleaded on the face of her complaint that she suffered financial harm from the County's action, and that is enough for now. See *Lujan, 504 U. S., at 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351*.

III

A

The *Takings Clause*, applicable to the States through the *Fourteenth Amendment*, provides that "private property [shall not] be taken for public use, without just compensation." *U. S. Const., Amdt. 5*. States have long imposed taxes on property. Such taxes are not themselves a taking, but are a mandated "contribution from individuals . . . for the support of the government . . . for which they receive compensation in the protection which government affords." **[***9]** *County of Mobile v. Kimball, 102 U. S. 691, 703, 26 L. Ed. 238* ***[**571]*** *(1881)*. In collecting these taxes, the State may impose interest and late fees. It may also seize and sell property, including land, to recover the amount owed. See *Jones v. Flowers, 547 U. S. 220, 234, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)*. Here there was money remaining after Tyler's home was seized and sold by the County to satisfy her past due taxes, along with the costs of collecting them. The question is whether that remaining value is property under the *Takings Clause*, protected from uncompensated appropriation by the State.

The *Takings Clause* does not itself define property. *Phillips v. Washington Legal Foundation, 524 U. S. 156, 164, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998)*. For that, the Court draws on "existing rules or understandings" about property rights. *Ibid.* (internal quotation marks omitted). State law is one important source. *Ibid.*; see also *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 560 U. S. 702, 707, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010)*. But state law cannot be the only source. Otherwise, a State could "sidestep the *Takings Clause* by disavowing traditional property interests" in assets it wishes to appropriate. *Phillips, 524 U. S., at 167, 118 S. Ct. 1925, 141 L. Ed. 2d 174*; see also *Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U. S. 155, 164, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980)*; *Hall v. Meisner, 51 F. 4th 185, 190 (CA6 2022)* (Kethledge, J., for the Court) ("[T]he *Takings Clause* would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take."). So we also look to "traditional property law principles," plus historical practice and this Court's precedents. *Phillips, 524 U. S., at 165-168, 118 S. Ct. 1925, 141 L. Ed. 2d 174*; see, *e.g.*, *United States v. Causby, 328 U. S. 256, 260-267, 66 S. Ct. 1062, 90*

L. Ed. 1206, 106 Ct. Cl. 854 (1946); *Ruckelshaus v. Monsanto Co., 467 U. S. 986, 1001-1004, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984)*.

Minnesota recognizes a homeowner's right to real property, **[***10]** like a house, and to financial interests in that property, like home equity. Cf. *Armstrong v. United States, 364 U. S. 40, 44, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)* (lien on boats); *Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 590, 55 S. Ct. 854, 79 L. Ed. 1593 (1935)* (mortgage on farm). Historically, Minnesota also recognized that a homeowner whose property has been sold to satisfy delinquent property taxes had an interest in the excess value of her home **[*1376]** above the debt owed. See *Farnham v. Jones, 32 Minn. 7, 11, 19 N. W. 83, 85 (1884)*. But in 1935, the State purported to extinguish that property interest by enacting a law providing that an owner forfeits her interest in her home when she falls behind on her property taxes. See 1935 Minn. Laws pp. 713-714, §8. This means, the County reasons, that Tyler has no property interest protected by the *Takings Clause*.

History and precedent say otherwise. The County had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due. By doing so, it effected a "classic taking in which the government directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U. S. 302, 324, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)* **[**572]** (internal quotation marks and alteration omitted). Tyler has stated a claim under the *Takings Clause* and is entitled to just compensation.

B

The principle that a government may not take more from a taxpayer than she owes can trace its origins at least as far back as Runnymeade **[***11]** in 1215, where King John swore in the Magna Carta that when his sheriff or bailiff came to collect any debts owed him from a dead man, they could remove property "until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfil the will of the deceased." W. McKechnie, Magna Carta, A Commentary on the Great of King John, ch. 26, p. 322 (rev. 2d ed. 1914) (footnote omitted).

That doctrine became rooted in English law. Parliament gave the Crown the power to seize and sell a taxpayer's property to recover a tax debt, but dictated that any "Overplus" from the sale "be immediately restored to the Owner." 4 W. & M., ch. 1, §12, in 3 Eng. Stat. at Large 488-489 (1692). As Blackstone explained, the common law demanded the same: If a tax collector seized a taxpayer's property, he was "bound by an implied contract in law to restore [the property] on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus." 2 Commentaries on the Laws of England 453 (1771).

This principle made its way across the Atlantic. In collecting taxes, the new Government of the United States could seize and sell only "so much of [a] tract of land . . . as may be necessary to **[***12]** satisfy the taxes due thereon." Act of July 14, 1798, §13, 1 Stat. 601. Ten States adopted similar statutes shortly after the founding.[1] For example, Maryland required that only so much land be sold "as may be sufficient to discharge the taxes thereon due," and provided that if the sale produced more than needed for the taxes, "such overplus of money" shall be paid to the owner. 1797 Md. Laws ch. 90, §§4-5. This Court enforced one such state statute against a Georgia tax collector, reasoning that "if a whole tract of land was sold when a small part of it would have been sufficient for the taxes, which at present appears to be the case, the collector unquestionably

[1] 1796 Conn. Acts p. 356-357, §§32, 36; 1797 Del. Laws p. 1260, §26; 1791 Ga. Laws p. 14; 1801 Ky. Acts pp. 78-79, §4; 1797 Md. Laws ch. 90, §§4-5; 1786 Mass. Acts pp. 360-361; 1792 N. H. Laws p. 194; 1792 N. C. Sess. Laws p. 23, §5; 1801 N. Y. Laws pp. 498-499, §17; 1787 Vt. Acts & Resolves p. 126. Kentucky made an exception for unregistered land, or land that the owner had "fail[ed] to list . . . for taxation," with such land forfeiting to the State. 1801 Ky. Acts p. 80, §5.

exceeded his authority." *Stead's Executors v. [*1377] Course, 8 U.S. 403, 4 Cranch 403, 414, 2 L. Ed. 660 (1808)* (Marshall, C. J., for the Court).

Like its sister States, Virginia originally provided that the Commonwealth could seize and sell "so much" of the delinquent tracts "as shall be sufficient to discharge the said taxes." 1781 Va. Acts p. 153, §4. But about a decade later, Virginia enacted a new scheme, which provided for the forfeiture of any delinquent land to the Commonwealth. Virginia passed this harsh forfeiture regime in response to the "loose, cheap and unguarded system of disposing of her public lands" that the Commonwealth had adopted immediately following statehood. *McClure [**573] v. Matiland, 24 W. Va. 561, 564 (1884)*. To encourage **[***13]** settlement, Virginia permitted "any person [to] acquire title to so much . . . unappropriated lands as he or she shall desire to purchase" at the price of 40 pounds per 100 acres. 1779 Va. Acts p. 95, §2. Within two decades, nearly all of Virginia's land had been claimed, much of it by nonresidents who did not live on or farm the land but instead hoped to sell it for a profit. *McClure, 24 W. Va., at 564*. Many of these nonresidents "wholly neglected to pay the taxes" on the land, *id., at 565*, so Virginia provided that title to any taxpayer's land was completely "lost, forfeited and vested in the Commonwealth" if the taxpayer failed to pay taxes within a set period, 1790 Va. Acts p. 5, §5. This solution was short lived, however; the Commonwealth repealed the forfeiture scheme in 1814 and once again sold "so much only of each tract of land . . . as will be sufficient to discharge the" debt. 1813 Va. Acts p. 21, §27. Virginia's "exceptional" and temporary forfeiture scheme carries little weight against the overwhelming consensus of its sister States. See *Martin v. Snowden, 59 Va. 100, 138 (1868)*.

The consensus that a government could not take more property than it was owed held true through the passage of the *Fourteenth Amendment*. States, including Minnesota, continued to require that no more than the minimum amount of land be sold to satisfy the outstanding **[***14]** tax debt.[2] The County identifies just three States that deemed delinquent property entirely forfeited for failure to pay taxes. See 1836 Me. Laws p. 325, §4; 1869 La. Acts p. 159, §63; 1850 Miss. Laws p. 52, §4.[3] Two of these laws did not last. Maine amended its law a decade later to permit the former owner to recover the surplus. 1848 Me. Laws p. 56, §4. And Mississippi's highest court promptly struck down its law for violating the *Due Process and Takings Clauses of the Mississippi Constitution.* See *Griffin v. Mixon, 38 Miss. 424, 439, 451-452 (Ct. Err. & App. 1860)*. Louisiana's statute remained on the books, but the County cites no case showing that the statute was actually enforced against a taxpayer to take his entire property.

[*1378] The minority rule then remains the minority rule today: Thirty-six States and the Federal Government require that the excess value be returned to the taxpayer.

C

Our precedents have also recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed. In *United States v. Taylor, 104 U. S. 216, 26 L. Ed. 721, 17 Ct. Cl. 427 (1881)*, an **[**574]** Arkansas taxpayer whose property had been sold to satisfy a tax debt sought to recover the surplus from the sale. A nationwide tax had been

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[2] Many of these new States required that the land be sold to whichever buyer would "pay [the tax debt] for the least number of acres" and provided that the land forfeited to the State only if it failed to sell "for want of bidders" because the land was worth less than the taxes owed. 1821 Ohio pp. 27-28, §§7, 10; see also 1837 Ark. Acts pp. 14-17, §§83, 100; 1844 Ill. Laws pp. 13, 18, §§51, 77; 1859 Minn. Laws pp. 58, 61, §§23, 38; 1859 Wis. Laws Ch. 22, pp. 22-23, §§7, 9; cf. Iowa Code pp. 120-121, §§766, 773 (1860) (requiring that property be offered for sale "until all the taxes shall have been paid"); see also *O'Brien v. Coulter, 2 Blackf. 421, 425 (Ind. 1831)* (*per curiam*) ("[S]o much only of the defendant's property shall be sold at one time, as a sound judgment would dictate to be sufficient to pay the debt.").

[3] North Carolina amended its laws in 1842 to permit the forfeiture of unregistered "swamp lands," 1842 N. C. Sess. Laws p. 64, §1, but otherwise continued to follow the majority rule, see 1792 N. C. Sess. Laws p. 23, §5.

imposed by Congress in 1861 to raise funds for the Civil War. Under that statute, if a taxpayer did not pay, his property would be sold and "the surplus of the proceeds of the sale [would] be paid to the owner." Act of Aug. 5, 1861, §36, 12 Stat. 304. The next year, Congress added a 50 percent **[***15]** penalty in the rebelling States, but made no mention of the owner's right to surplus after a tax sale. See *Act of June 7, 1862, §1, 12 Stat. 422*. Taylor's property had been sold for failure to pay taxes under the 1862 Act, but he sought to recover the surplus under the 1861 Act. Though the 1862 Act "ma[de] no mention of the right of the owner of the lands to receive the surplus proceeds of their sale," we held that the taxpayer was entitled to the surplus because nothing in the 1862 Act took "from the owner the right accorded him by the act of 1861, of applying for and receiving from the treasury the surplus proceeds of the sale of his lands." *Taylor, 104 U. S., at 218-219, 26 L. Ed. 721, 17 Ct. Cl. 427*.

We extended a taxpayer's right to surplus even further in *United States v. Lawton, 110 U. S. 146, 3 S. Ct. 545, 28 L. Ed. 100, 19 Ct. Cl. 709 (1884)*. The property owner had an unpaid tax bill under the 1862 Act for $170.50. *Id., at 148, 3 S. Ct. 545, 28 L. Ed. 100, 19 Ct. Cl. 709*. The Federal Government seized the taxpayer's property and, instead of selling it to a private buyer, kept the property for itself at a value of $1100. *Ibid*. The property owner sought to recover the excess value from the Government, but the Government refused. *Ibid*. The 1861 Act explicitly provided that any surplus from tax sales to private parties had to be returned to the owner, but it did not mention paying the property owner the excess value **[***16]** where the Government *kept* the property for its own use instead of selling it. See 12 Stat. 304. We held that the taxpayer was still entitled to the surplus under the statute, just as if the Government had sold the property. *Lawton, 110 U. S., at 149-150, 3 S. Ct. 545, 28 L. Ed. 100, 19 Ct. Cl. 709*. Though the 1861 statute did not explicitly provide the right to the surplus under such circumstances, "[t]o withhold the surplus from the owner would be to violate the *Fifth Amendment to the Constitution* and to deprive him of his property without due process of law, or to take his property for public use without just compensation." *Id., at 150, 3 S. Ct. 545, 28 L. Ed. 100, 19 Ct. Cl. 709*.

The County argues that *Taylor* and *Lawton* were superseded by *Nelson v. City of New York, 352 U. S. 103, 77 S. Ct. 195, 1 L. Ed. 2d 171 (1956)*, but that case is readily distinguished. There New York City foreclosed on properties for unpaid water bills. Under the governing ordinance, a property owner had almost two months after the city filed for foreclosure to pay off the tax debt, and an additional 20 days to ask for the surplus from any tax sale. *Id., at 104-105, n. 1, 77 S. Ct. 195, 1 L. Ed. 2d 171*. No property owner requested his surplus within the required time. The owners later sued the city, claiming that it had denied them due process and equal protection of the laws. *Id., at 109, 77 S. Ct. 195, 1 L. Ed. 2d 171*. In their reply brief before this Court, the owners also argued for the first time that they had been denied just compensation under the **[***17]** *Takings Clause*. *Ibid.*

[*1379] We rejected this belated argument. **[**575]** *Lawton* had suggested that withholding the surplus from a property owner always violated the *Fifth Amendment*, but there was no specific procedure there for recovering the surplus. *Nelson, 352 U. S., at 110, 77 S. Ct. 195, 1 L. Ed. 2d 171*. New York City's ordinance, in comparison, permitted the owner to recover the surplus but required that the owner have "filed a timely answer in [the] foreclosure proceeding, asserting his property had a value substantially exceeding the tax due." *Ibid*. (citing *New York v. Chapman Docks Co., 1 App. Div. 2d 895, 149 N. Y. S. 2d 679 (1956)*). Had the owners challenging the ordinance done so, "a separate sale" could have taken place "so that [they] might receive the surplus." *352 U. S., at 110, 77 S. Ct. 195, 1 L. Ed. 2d 171*. The owners did not take advantage of this procedure, so they forfeited their right to the surplus. Because the New York City ordinance did not "absolutely preclud[e] an owner from obtaining the surplus

proceeds of a judicial sale," but instead simply defined the process through which the owner could claim the surplus, we found no *Takings Clause* violation. *Ibid*.

Unlike in *Nelson*, Minnesota's scheme provides no opportunity for the taxpayer to recover the excess value; once absolute title has transferred to the State, any excess value always remains with the State. The County argues that the delinquent **[***18]** taxpayer could sell her house to pay her tax debt before the County itself seizes and sells the house. But requiring a taxpayer to sell her house to avoid a taking is not the same as providing her an opportunity to recover the excess value of her house once the State has sold it.

D

Finally, Minnesota law itself recognizes that in other contexts a property owner is entitled to the surplus in excess of her debt. Under state law, a private creditor may enforce a judgment against a debtor by selling her real property, but "[n]o more shall be sold than is sufficient to satisfy" the debt, and the creditor may receive only "so much [of the proceeds] as will satisfy" the debt. *Minn. Stat. §§550.20*, *550.08* (2022). Likewise, if a bank forecloses on a home because the homeowner fails to pay the mortgage, the homeowner is entitled to the surplus from the sale. *§580.10*.

In collecting all other taxes, Minnesota protects the taxpayer's right to surplus. If a taxpayer falls behind on her income tax and the State seizes and sells her property, "[a]ny surplus proceeds . . . shall . . . be credited or refunded" to the owner. *§§270C.7101*, *270C.7108, subd. 2*. So too if a taxpayer does not pay taxes on her personal property, like a car. *§277.21, subd. 13*. Until 1935, Minnesota followed **[***19]** the same rule for the sale of real property. The State could sell only the "least quantity" of land sufficient to satisfy the debt, 1859 Minn. Laws p. 58, §23, and "any surplus realized from the sale must revert to the owner," *Farnham, 32 Minn., at 11, 19 N. W., at 85*.

The State now makes an exception only for itself, and only for taxes on real property. But "property rights cannot be so easily manipulated." *Cedar Point Nursery v. Hassid, 594 U. S. ___, ___, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021) (slip op., at 13)* (internal quotation marks omitted). Minnesota may not extinguish a property interest that it recognizes everywhere else to **[**576]** avoid paying just compensation when it is the one doing the taking. *Phillips, 524 U. S., at 167, 118 S. Ct. 1925, 141 L. Ed. 2d 174*.

IV

The County argues that Tyler has no interest in the surplus because she constructively abandoned her home by failing **[*1380]** to pay her taxes. States and localities have long imposed "reasonable conditions" on property ownership. *Texaco, Inc. v. Short, 454 U. S. 516, 526, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982)*. In Minnesota, one of those conditions is paying property taxes. By neglecting this reasonable condition, the County argues, the owner can be considered to have abandoned her property and is therefore not entitled to any compensation for its taking. See *Minn. Stat. §282.08*.

The County portrays this as just another example in the long tradition of States taking title to abandoned property. We upheld one such statutory scheme in *Texaco*. There, Indiana law dictated **[***20]** that a mineral interest automatically reverted to the owner of the land if not used for 20 years. *454 U. S., at 518, 102 S. Ct. 781, 70 L. Ed. 2d 738*. Use included excavating minerals, renting out the right to excavate, paying taxes, or simply filing a "statement of claim with the local recorder of deeds." *Id., at 519, 102 S. Ct. 781, 70 L. Ed. 2d 738*. Owners who lost their mineral interests challenged the statute as unconstitutional. We held that the statute did not violate the *Takings Clause* because the State "has the power to condition the permanent retention of [a] property right on the performance of reasonable conditions that indicate a *present intention to retain the interest*." *Id., at*

526, 102 S. Ct. 781, 70 L. Ed. 2d 738 (emphasis added). Indiana reasonably "treat[ed] a mineral interest that ha[d] not been used for 20 years and for which no statement of claim ha[d] been filed as abandoned." Id., at 530, 102 S. Ct. 781, 70 L. Ed. 2d 738. There was thus no taking, for "after abandonment, the former owner retain[ed] no interest for which he may claim compensation." Ibid.

The County suggests that here, too, Tyler constructively abandoned her property by failing to comply with a reasonable condition imposed by the State. But the County cites no case suggesting that failing to pay property taxes is itself sufficient for abandonment. Cf. Kureger v. Market, 124 Minn. 393, 397, 145 N.W. 30, 32 (1914) (owner did not abandon property despite **[***21]** failing to pay taxes for 30 years). Abandonment requires the "surrender or relinquishment or disclaimer of " all rights in the property. Rowe v. Minneapolis, 49 Minn. 148, 157, 51 N. W. 907, 908 (1892). "It is the owner's failure to make *any* use of the property"—and for a lengthy period of time—"that causes the lapse of the property right." Texaco, 454 U. S., at 530, 102 S. Ct. 781, 70 L. Ed. 2d 738 (emphasis added). In Texaco, the owners lost their property because they made *no* use of their interest for 20 years and then failed to take the simple step of filing paperwork indicating that they still claimed ownership over the interest. In comparison, Minnesota's forfeiture scheme is not about abandonment at all. It gives no weight to the taxpayer's use of the property. Indeed, the delinquent taxpayer can continue to live in her house for years after falling behind in taxes, up until the government sells it. See §281.70. Minnesota cares only about the taxpayer's failure to contribute **[**577]** her share to the public fisc. The County cannot frame that failure as abandonment to avoid the demands of the Takings Clause.

***

The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong, 364 U. S., at 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554*. A taxpayer who loses her $40,000 house to the State to **[***22]** fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she owed. The taxpayer must render unto Caesar what is Caesar's, but no more.

[*1381] Because we find that Tyler has plausibly alleged a taking under the Fifth Amendment, and she agrees that relief under "the Takings Clause would fully remedy [her] harm," we need not decide whether she has also alleged an excessive fine under the Eighth Amendment. Tr. of Oral Arg. 27. The judgment of the Court of Appeals for the Eighth Circuit is reversed.

It is so ordered.

Concur by: GORSUCH

Concur

JUSTICE GORSUCH, with whom JUSTICE JACKSON joins, concurring.

The Court reverses the Eighth Circuit's dismissal of Geraldine Tyler's suit and holds that she has plausibly alleged a violation of the Fifth Amendment's Takings Clause. I agree. Given its Takings Clause holding, the Court understandably declines to pass on the question whether the Eighth Circuit committed a further error when it dismissed Ms. Tyler's claim under the Eighth Amendment's Excessive Fines Clause. *Ante*, at 14. But even a cursory review of the District Court's excessive-fines analysis—which the Eighth Circuit adopted as "well-reasoned," 26 F. 4th 789, 794 (2022)—reveals that it too contains mistakes future lower courts should not be quick to emulate.

First, the District Court concluded that the Minnesota tax-forfeiture scheme is not **[***23]** punitive because "its primary purpose" is "remedial"—aimed, in other words, at "compensat[ing] the government for lost revenues

due to the non-payment of taxes." *505 F. Supp. 3d 879, 896 (Minn. 2020)*. That primary-purpose test finds no support in our law. Because "sanctions frequently serve more than one purpose," this Court has said that the Excessive Fines Clause applies to *any* statutory scheme that "serv[es] *in part* to punish." *Austin v. United States, 509 U. S. 602, 610, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)* (emphasis added). It matters not whether the scheme has a remedial purpose, even a predominantly remedial purpose. So long as the law "cannot fairly be said *solely* to serve a remedial purpose," the Excessive Fines Clause applies. *Ibid.* (emphasis added; internal quotation marks omitted). Nor, this Court has held, is it appropriate to label sanctions as "remedial" when (as here) they bear "'no correlation to any damages sustained by society or to the cost of enforcing the law,'" and "any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." *Id., at 621-622, 113 S. Ct. 2801, 125 L. Ed. 2d 488*, and n. 14.

[578]** *Second*, the District Court asserted that the Minnesota tax-forfeiture scheme cannot "be punitive because it actually confers a windfall on the delinquent taxpayer when the value of the property that is forfeited is less than the amount **[***24]** of taxes owed." *505 F. Supp. 3d, at 896*. That observation may be factually true, but it is legally irrelevant. Some prisoners better themselves behind bars; some addicts credit court-ordered rehabilitation with saving their lives. But punishment remains punishment all the same. See Tr. of Oral Arg. 61. Of course, no one thinks that an individual who profits from an economic penalty has a *winning* excessive-fines claim. But nor has this Court ever held that a scheme producing fines that punishes some individuals can escape constitutional scrutiny merely because it does not punish others.

Third, the District Court appears to have inferred that the Minnesota scheme is not "punitive" because it does not turn on the "culpability" of the individual property owner. *505 F. Supp. 3d, at 897*. But while a focus on "culpability" can sometimes make a provision "look more like punishment," this Court has never endorsed the converse view. *Austin, 509 U. S., at 619, 113 S. Ct. 2801, 125 L. Ed. 2d 488*. Even without emphasizing culpability, this Court has **[*1382]** said a statutory scheme may still be punitive where it serves another "goal of punishment," such as "[d]eterrence." *United States v. Bajakajian, 524 U. S. 321, 329, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)*. And the District Court expressly approved the Minnesota tax-forfeiture scheme in this case in large part because "'the ultimate possibility **[***25]** of loss of property serves as a *deterrent* to those taxpayers considering tax delinquency.'" *505 F. Supp. 3d, at 899* (emphasis added). Economic penalties imposed to deter willful noncompliance with the law are fines by any other name. And the Constitution has something to say about them: They cannot be excessive.

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***Shepard's*®:** Tyler v. Hennepin Cnty. 598 U.S. 631,143 S. Ct. 1369,215 L. Ed. 2d 564,2023 U.S. LEXIS 2201,29 Fla. L. Weekly Fed. S. 851: (U.S. May 25, 2023)

No subsequent appellate history. **Prior history** available.

Appellate History (6)

Prior

1. Tyler v. Hennepin Cty., 505 F. Supp. 3d 879, 2020 U.S. Dist. LEXIS 228081, 2020 WL 7129894

Court: D. Minn. | **Date:** December 4, 2020

2. **Affirmed by and**
Motion granted by:

Tyler v. Hennepin Cty., 26 F.4th 789, 2022 U.S. App. LEXIS 4207, 2022 WL 468801

Court: 8th Cir. Minn. | **Date:** February 16, 2022

3. **Rehearing denied by and**
En banc and
Rehearing denied by:

Tyler v. Minnesota, 2022 U.S. App. LEXIS 7844

Court: 8th Cir. Minn. | **Date:** March 24, 2022

4. **Writ of certiorari granted:**

Tyler v. Hennepin Cnty., 143 S. Ct. 644, 214 L. Ed. 2d 382, 2023 U.S. LEXIS 406, 2023 WL 178396

Court: U.S. | **Date:** January 13, 2023

5. **Motion granted by:**

Tyler v. Hennepin Cnty., 143 S. Ct. 1443, 215 L. Ed. 2d 646, 2023 U.S. LEXIS 1501, 2023 WL 2939578

Court: U.S. | **Date:** April 14, 2023

6. **Citation you *Shepardized*™**

Reversed by:

Tyler v. Hennepin Cnty., 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201, 29 Fla. L. Weekly Fed. S. 851

Court: U.S. | **Date:** May 25, 2023

Citing Decisions (46)

U.S. Supreme Court

1. Moore v. Harper, 600 U.S. 1, 143 S. Ct. 2065, 216 L. Ed. 2d 729, 2023 U.S. LEXIS 2787, 29 Fla. L. Weekly Fed. S. 1088

LB **Cited by:** 143 S. Ct. 2065 p.2088; 216 L. Ed. 2d 729 p.754
... that this Court must respect. As in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law. State law, for example, “is one important source” for defining property rights. **Tylerv.Hennepin County, 598 U. S. ___, ___,143 S. Ct. 1369, 215 L. Ed. 2d 564, 571(2023)** ; see also Board of Regents of State Colleges **v.** ...

Discussion: | **Court:** U.S. | **Date:** June 27, 2023

2. Fair v. Cont'l Res., 143 S. Ct. 2580, 216 L. Ed. 2d 1191, 2023 U.S. LEXIS 2382, 91 U.S.L.W. 3316, 2023 WL 3798629

LB **Cited by:** 143 S. Ct. 2580 p.2580; 216 L. Ed. 2d 1191 p.1191
... granted. On petition for writ of certiorari to the Supreme Court of Nebraska . Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Nebraska for further consideration in light of **Tylerv.Hennepin County, 598 U. S. ___,2023 U.S. LEXIS 2201(2023)** . ...

Discussion: | **Court:** U.S. | **Date:** June 5, 2023

1st Circuit - Court of Appeals

3. Toney v. Guerriero, 2023 U.S. App. LEXIS 29875, 2023 WL 7321897

Y **Distinguished by:**
... 2018 U.S. Dist. LEXIS 16571, 2018 WL 662482, at *8 . So that decision is not a game-changer for Plaintiff. In a post-briefing letter, see Fed. R. App. P. 28(j) , Plaintiff claims that a recent Supreme Court opinion — **Tyler v. Hennepin Cnty., 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** — helps his cause. But Tyler is a takings-clause case, not a procedural-due-process case involving the Parratt/Hudson doctrine. See Tyler , 598 U.S. at 634 (framing "[t]he question ...

Discussion: | **Court:** 1st Cir. | **Date:** September 1, 2023

1st Circuit - U.S. District Courts

4. United States v. Newman, 2023 U.S. Dist. LEXIS 201221, 2023 WL 7413349

Y **Distinguished by:**
... Second, Mr. Newman contends that, based on the Government's "grossly incorrect estimate of home value," the sale of 13 Annies Way would "violate the Fifth Amendment's 'Takings' clause as the Defendant will not receive just compensation." Id. at 3. Citing **Tyler v. Hennepin County, Minnesota, 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** , Mr. Newman observes that "Courts support just compensation if a public entity is moving to seize personal property." Id. Mr. Newman estimates ...

Discussion: | **Court:** Dist. Maine | **Date:** November 9, 2023

2nd Circuit - Court of Appeals

5. Duvall v. Cnty. of Ontario, 83 F.4th 147, 2023 U.S. App. LEXIS 25804, 72 Bankr. Ct. Dec. (LRP) 233, 2023 WL

6323123

Followed by: 83 F.4th 147 p.155
... Bankruptcy Court 's decision, the County explains that New York state law permitted it to keep the approximately $69,000 in surplus funds from the sale of the Property. But that defense is now unavailable in light of **Tyler v. Hennepin County, 143 S. Ct. 1369, 1380, 215 L. Ed. 2d 564(2023)** , which held that Fundamental Rights, Eminent Domain & Takings Involuntary Acquisition & Diminution of Value, Takings Collection of Tax, Tax Deeds & Tax Sales Nonmortgage Liens, Tax Liens HN12 There ...

Discussion: | **Court:** 2d Cir. | **Date:** September 29, 2023

3rd Circuit - Court of Appeals

6. **Lutter v. JNESO**, 86 F.4th 111, 2023 U.S. App. LEXIS 29489

Cited by: 86 F.4th 111 p.127
... ("[P]rivate use of the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment ."). The invasion of that interest is actual since the funds were taken out of her paycheck against her wishes and used by JNESO. See **Tyler v. Hennepin County, 598 U.S. 631, 636, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** (recognizing a claim that one party kept money that it was not entitled to was "a classic pocketbook injury sufficient ...

Discussion: | **Court:** 3d Cir. N.J. | **Date:** November 6, 2023

3rd Circuit - U.S. District Courts

7. **Toyota Motor Credit Corp. v. Borough of Wyoming**, 2023 U.S. Dist. LEXIS 202071

Cited by:
... takes their property without paying for it, and thereafter may bring their claim in federal court under § 1983 . See Knick v. Twp. of Scott, Pennsylvania , 139 S. Ct. 2162 , 204 L. Ed. 2d 558 (2019) . See also **Tyler v. Hennepin Cnty., Minnesota, 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564, (2023)** (Government's retention of the money remaining after disputedly abandoned property was sold was a classic taking for which taxpayer was entitled to just compensation). As previously ...

Discussion: | **Court:** Middle Dist. Pa. | **Date:** November 9, 2023

8. **Stephanatos v. Wayne Twp.**, 2023 U.S. Dist. LEXIS 153086, 2023 WL 5605564

Distinguished by:
... Since Plaintiff's Complaint was dismissed in 2013, Plaintiff has made numerous attempts to relitigate and appeal, all of which have been rejected. D.E. 85, 88, 111. Plaintiff seeks to reopen this matter now because of the Supreme Court 's recent decision in **Tyler v. Hennepin County, 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** . See Plf. Br. at 3. Plaintiff contends that his case should be reopened pursuant to Federal Rules of Civil Procedure 60(b)(4) , (b)(5) , and (b)(6) ...

Court: Dist. N.J. | **Date:** August 30, 2023

3rd Circuit - U.S. Bankruptcy Courts

9. **Heidt v. BV001 Reo Blocker LLC (In re Heidt)**, 2023 Bankr. LEXIS 3034

Cited by:
... , for the proposition that a homeowner's remedy under 11 U.S.C. § 548 is not limited to a homestead exemption under 11 U.S.C. § 522(h) . They noted that the Second Circuit opined that "[b]ut that defense is now unavailable in light of Tyler v. Hennepin County , 598 U.S. 631 **, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** , which held that there is an unconstitutional taking in violation of the Takings Clause when a county keeps surplus funds accrued

from a tax foreclosure." DuVall , 83 ...

Discussion: | **Court:** Bankr. Dist. N.J. | **Date:** November 3, 2023 | **Headnotes:**: HN7, HN8, HN9

4th Circuit - U.S. District Courts

10. Garcia v. Richland Cnty. Treasury, 2023 U.S. Dist. LEXIS 194104, 2023 WL 7287171

Cited by:

... tax may be challenged in state court, and finding an available remedy within the meaning of the Tax Injunction Act is not inadequate because the challenger may not obtain their desired relief). Additionally, Plaintiff has not shown there has been a taking in this case. Although Plaintiff cites **Tyler v. Hennepin County, MN, 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** , the case does not apply to the facts at hand. In Tyler , the Supreme Court held that the State's retention ...

Discussion: | **Court:** Dist. S.C. | **Date:** September 27, 2023

5th Circuit - Court of Appeals

11. Baker v. City of McKinney, 84 F.4th 378, 2023 U.S. App. LEXIS 26988

Cited by: 84 F.4th 378 p.383

... Takings Clause of the Fifth Amendment to the United States Constitution . Fourth, the Court has increasingly intimated that history and tradition, including historical precedents, are of central importance when determining the meaning of the Takings Clause . See **Tyler v. Hennepin County, 598 U.S. 631, 637-44, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** (determining the applicability of the Takings Clause from "[h]istory and precedent" reaching back to the Magna Carta); Horne v. Department ...

Discussion: | **Court:** 5th Cir. Tex. | **Date:** October 11, 2023 | **Headnotes:**: HN13

5th Circuit - U.S. District Courts

12. Ambriz v. Hegar, 2023 U.S. Dist. LEXIS 133137

Cited by:

... , which held the failure to compensate with interest for the time the property was in the state's possession was a taking without compensation. After briefing was completed, Ambriz filed a motion for leave to file a notice of supplemental authority to inform the court of **Tyler v. Hennepin Cnty., Minnesota, 598 U.S. 631, 143 S. Ct. 1369, 1374, 215 L. Ed. 2d 564(May 25, 2023)** . Ambriz contends Tyler provides new and compelling support for his arguments. Clark held the constitution does ...

Court: Western Dist. Tex. | **Date:** June 20, 2023

6th Circuit - Court of Appeals

13. Freed v. Thomas, 81 F.4th 655, 2023 U.S. App. LEXIS 23639, 2023 FED App. 0208P, 2023 FED App. 208P (6th Cir.)

Cited by: 81 F.4th 655 p.658

... a . The Supreme Court recently resolved a case with similar facts. Hennepin County , Minnesota , sold the delinquent taxpayer's house "for $40,000 to satisfy a $15,000 tax bill" and kept the remaining $25,000. **Tyler v. Hennepin County, 598 U.S. 631, 634, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** . The district court there dismissed for failure to state a claim, and the Eighth Circuit affirmed. Id. at 636 . The Supreme Court unanimously reversed, affirming "the principle that ...

Discussion: | **Court:** 6th Cir. Mich. | **Date:** September 6, 2023 | **Headnotes:**: HN8

6th Circuit - U.S. District Courts

14. Fox v. Cnty. of Saginaw, 2023 U.S. Dist. LEXIS 189919, 2023 WL 6978518

Cited by:

... Constitution. See Rafaeli, LLC v. Oakland Cnty. , 505 Mich. 429 , 952 N.W.2d 434 (Mich. 2020) (holding a county's retention of surplus proceeds from a tax-foreclosure sale violates the Michigan Constitution); **Tyler v. Hennepin Cnty., Minn., 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** (holding a county's retention of surplus proceeds from a tax-foreclosure sale violates the Fifth Amendment of the U.S. Constitution). In September 2023, the Sixth Circuit determined the ...

Discussion: | **Court:** Eastern Dist. Mich. | **Date:** October 23, 2023

15. Tr. Constr. Inc. v. Summit Cnty., 2023 U.S. Dist. LEXIS 170988, 2023 WL 6258612

Cited by:

... filed this suit alleging a due process violation and takings claims under both federal and state law. On December 15, 2022, the County moved for summary judgment on all three claims. TR Construction opposed the motion, and the County replied in support. On June 10, 2023, both parties filed supplemental briefing on the impact of the Supreme Court's decision in in **Tyler v. Hennepin County, Minnesota, 143 S.Ct. 1369, 215 L. Ed. 2d 564(2023)** . The Court now resolves the parties' arguments. ...

Discussion: | **Court:** Northern Dist. Ohio | **Date:** September 26, 2023

16. Santana v. Cnty. of Wayne, 2023 U.S. Dist. LEXIS 154454, 2023 WL 5655511

Cited by:

... (holding that foreclosing county was "required to return the surplus proceeds to plaintiffs and that [the County's] failure to do so constitutes a government taking under the Michigan Constitution entitling plaintiffs to just compensation"); **Tyler v. Hennepin Cnty., Minn., 598 U.S. 631, 639(2023)** ("The County had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due. By doing so, ...

Discussion: | **Court:** Eastern Dist. Mich. | **Date:** August 31, 2023

17. Sinclair v. Meisner, 2023 U.S. Dist. LEXIS 98308, 2023 WL 3854068

Cited by:

... . Since then, they have also filed a petition for certiorari from the Sixth Circuit's decision in this case, No. 22-894. ECF No. 75. On May 25, 2023, the Supreme Court issued a written opinion resolving **Tyler , No. 22-166, S. Ct. , 598 U.S. 631 , 143 S. Ct. 1369 , 215 L. Ed. 2d 564 , 2023 U.S. LEXIS 2201 , 2023 WL 3632754 (May 25, 2023)** . II. LEGAL STANDARD A court has inherent power to stay proceedings. See Landis v. N. Am. Co. , 299 U.S. 248 , 254 , 57 S. Ct. 163 , 81 ...

Discussion: | **Court:** Eastern Dist. Mich. | **Date:** June 6, 2023 | **Headnotes:**: HN5, HN7

6th Circuit - U.S. Bankruptcy Courts

18. Reinhardt v. Prince (In re Reinhardt), 2023 Bankr. LEXIS 2770, 73 Bankr. Ct. Dec. (LRP) 27, 2023 WL 8011108

Distinguished by:

... (6th Cir. 2022) . To complete the report of this area of the law, the United States Supreme Court found that a similar Minnesota foreclosure procedure violated the takings clause of the United States Constitution . **Tyler v. Hennepin Cty., 143 S.Ct. 1369, 598 U.S. 631, 215 L. Ed. 2d 564(2023)** . The Michigan Legislature reacted to Rafaeli, Lowry , and a number of individual and class action lawsuits against county treasurers by changing the tax forfeiture and foreclosure procedures. ...

Discussion: | **Court:** Bankr. Eastern Dist. Mich. | **Date:** November 17, 2023

7th Circuit - Court of Appeals

19. United States Bank Trust N.A. v. Walworth Cnty., 2023 U.S. App. LEXIS 22123, 2023 WL 5344345

Cited by:
... Andrew T. Phillips , Attorney, ATTOLLES LAW, S.C., Milwaukee , WI . KENNETH F. RIPPLE , Circuit Judge, ILANA DIAMOND ROVNER , Circuit Judge, MICHAEL B. BRENNAN , Circuit Judge. ORDER In light of the Supreme Court's decision in **Tyler v. Hennepin County, Minnesota, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** , we vacate the district court's judgment and remand for de novo reconsideration. ...

Discussion: | **Court:** 7th Cir. Wis. | **Date:** August 16, 2023

7th Circuit - U.S. District Courts

20. Daoud v. City of Chicago, 2023 U.S. Dist. LEXIS 146735

Cited by:
... should not apply because neither Sonna nor Wow Chicago was a party to the state lawsuit brought by Royal Ice Cream . "To bring suit, a plaintiff must plead an injury in fact attributable to the defendant's conduct and redressable by the court." **Tyler v. Hennepin Cty., Minnesota , U.S. , 143 S. Ct. 1369 , 1374 , 215 L. Ed. 2d 564 (2023)** (citing Lujan v. Defenders of Wildlife , 504 U.S. 555 , 560-61 , 112 S. Ct. 2130 , 119 L. Ed. 2d 351 (1992)). "At the pleading stage, 'general ...

Discussion: | **Court:** Northern Dist. Ill. | **Date:** August 22, 2023 | **Headnotes:**: HN1

9th Circuit - Court of Appeals

21. Rancho Mirage Mobilehome Cmty., LP v. Coachella Valley Water Dist., 2023 U.S. App. LEXIS 28728, 2023 WL 7123771

Cited by:
... , provides that private property shall not be taken for public use, without just compensation. It is beyond dispute, however, that taxes and user fees are not takings. "The Takings Clause , applicable to the States through the Fourteenth Amendment , provides that 'private property [shall not] be taken for public use, without just compensation.'" **Tyler v. Hennepin County, 598 U.S. 631, 637, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** (quoting U.S. Const. amend. V) (alteration in original). ...

Discussion: | **Court:** 9th Cir. Cal. | **Date:** October 30, 2023

9th Circuit - U.S. District Courts

22. Griffin v. Breed, 2023 U.S. Dist. LEXIS 209151, 2023 WL 8113896

Followed by:
... Because Plaintiff fails to allege that she has a legally protected interest in the Property, Plaintiff does not have standing to pursue the claims in the Third Amended Complaint. See 2023 U.S. Dist. LEXIS 149892, [WL] at *2 (quoting **Tyler v. Hennepin Cnty., 598 U.S. 631, 143 S. Ct. 1369, 1374, 215 L. Ed. 2d 564(2023)** ; Van v. LLR, Inc. , 61 F.4th 1053 , 1063 (9th Cir. 2023)). Because Plaintiff does not have standing, she does not present a "case or controversy," and therefore ...

Discussion: | **Court:** Dist. Haw. | **Date:** November 22, 2023

23. Sullivan Equity Partners, LLC v. City of Los Angeles, 2023 U.S. Dist. LEXIS 167510, 2023 WL 6130615

Distinguished by:
... property at issue, and, as concluded above, plaintiff has failed to show that the revocation of its permits violated

its right to due process. Accordingly, the revocation of plaintiff's permits occurred through lawful government action, and plaintiff cannot now argue that it has a right to be compensated for a measure meant to penalize it. See Bennis , 516 U.S. at 442 . Plaintiff cites to a recent Supreme Court decision, **Tyler v. Hennepin Cnty, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** ...

Discussion: | **Court:** Central Dist. Cal. | **Date:** September 15, 2023

24. Griffin v. Breed, 2023 U.S. Dist. LEXIS 149892, 2023 WL 5508097

Cited by:

... federal court therefore lacks subject matter jurisdiction.") (citation omitted))). To have standing, i.e. , "[t]o bring suit, a plaintiff must plead an injury in fact attributable to the defendant's conduct and redressable by the court." **Tyler v. Hennepin Cnty., 143 S. Ct. 1369, 1374, 215 L. Ed. 2d 564(2023)** (citation omitted). "An 'injury in fact' is 'an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.'" ...

Discussion: | **Court:** Dist. Haw. | **Date:** August 25, 2023 | **Headnotes:**: HN1

25. Sahm v. Ali, 2023 U.S. Dist. LEXIS 143794, 2023 WL 5278661

Cited by:

... Plaintiff for refusing to vacate the Property at issue, is therefore "impersonating an officer." Dkt. #75 at 2. Plaintiff argues that the writ of restitution Commissioner Moore signed is thereby a "criminal" act and as such an "illegal and unlawful taking under the recent Supreme Court case Tyler v. Minnesota No. 12-166." The Court has reviewed **Tyler v. Hennepin Cnty., Minnesota, 598 U.S. 631(2023)** , in which a taxpayer brought an action against Hennepin County in Minnesota state court ...

Court: Western Dist. Wash. | **Date:** August 16, 2023

26. AOAO Maalaea Yacht Marina v. Dep't of Planning for the Cnty. of Maui, 2023 U.S. Dist. LEXIS 113892, 2023 WL 4305183

Cited by:

... Plaintiff points to a recent United States Supreme Court opinion that reasoned that state law is one important source to define property rights, but that state law cannot be the only source. ECF No. 44 at 11 (citing **Tyler v. Hennepin Cnty., Minnesota, 598 U.S. 631, 143 S. Ct. 1369, 1375, 215 L. Ed. 2d 564(2023)**). Plaintiff thus argues that "examination of Plaintiff's property interest may be necessary for purposes of its takings and due process claims regardless of its vested rights ...

Discussion: | **Court:** Dist. Haw. | **Date:** June 30, 2023

11th Circuit - Court of Appeals

27. Clement v. United States AG, 75 F.4th 1193, 2023 U.S. App. LEXIS 19534, 29 Fla. L. Weekly Fed. C 2793

Cited by: 75 F.4th 1193 p.1202

... Likewise, a criminal defendant forfeits the right to the assistance of counsel by failing to secure counsel in a reasonable time. See United States v. Fowler , 605 F.2d 181 , 183 (5th Cir. 1979) . So too in civil cases may a person forfeit a constitutional right merely by failing to comply with a statutory requirement. See, e.g., **Tyler v. Hennepin Cnty., 598 U.S. 631, 143 S. Ct. 1369, 1378-79, 215 L. Ed. 2d 564(2023)** (explaining that property owners in Nelson v. City of New ...

Discussion: | **Court:** 11th Cir. | **Date:** July 28, 2023

D.C. Circuit - Court of Appeals

28. Valancourt Books, LLC v. Garland, 82 F.4th 1222, 2023 U.S. App. LEXIS 22715

Cited by: 82 F.4th 1222 p.1231
... to possess, use and dispose of them. A government demand to turn over personal property is of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine. By requiring copyright owners to provide physical copies of books, the mandatory deposit provision "effect[s] a 'classic taking in which the government directly appropriates private property for its own use.'" **Tyler v. Hennepin Cnty., 143 S. Ct. 1369, 1376, 215 L. Ed. 2d 564(2023)** ...

Discussion: | **Court:** D.C. Cir. Ct. of App. | **Date:** August 29, 2023 | **Headnotes:**: HN7

D.C. Circuit - U.S. District Court

29. Ctr. for Biological Diversity v. United States EPA, 2023 U.S. Dist. LEXIS 137361, 53 Envtl. L. Rep. 20127, 2023 WL 5035782

Cited by:
... populations of specific species in Washington since EPA approved the state's water criteria and about the potential impact on cyanide toxicity due to climate change. See Compl. ¶¶ 98-99. These facts must be treated as true at this stage of litigation. See **Tyler v. Hennepin Cty., Minn., 143 S. Ct. 1369, 1374, 215 L. Ed. 2d 564(2023)** ("This case comes to us on a motion to dismiss for failure to state a claim. At this initial stage, we take the facts in the complaint as true."). Further, ...

Discussion: | **Court:** District of D.C. | **Date:** August 8, 2023

Federal Circuit - Court of Appeals

30. Jenkins v. United States, 71 F.4th 1367, 2023 U.S. App. LEXIS 16296

Cited by: 71 F.4th 1367 p.1376
... A recent Supreme Court case suggests that the retention of the proceeds of the sale over and above any legal charges (or, here, permitting a third party to retain such proceeds) itself presents a takings issue. See **Tyler v. Hennepin County, 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564, slip op. at 5-6 (U.S. 2023)** . The government's apparent theory here is that it had no responsibility for the impound lot's actions and that, in any event, Mr. Jenkins abandoned the vehicles. 7 In a citation ...

Discussion: | **Court:** Fed. Cir. | **Date:** June 28, 2023

31. Ideker Farms, Inc. v. United States, 71 F.4th 964, 2023 U.S. App. LEXIS 15005

Cited by: 71 F.4th 964 p.988
... took both a permanent flowage easement on Plaintiffs' land and destroyed Plaintiffs' crops. 10 Even though state law generally determines the scope of the property interest, Cedar Point , 141 S. Ct. at 2075-76 ; cf. **Tyler v. Hennepin Cnty., 598 U.S. 631, 143 S. Ct. 1369, 1375, 215 L. Ed. 2d 564(2023)** (explaining that other sources of law may govern what "property" is protected from takings), whether the crops are considered a part of the value of the real estate or separate personal ...

Discussion: | **Court:** Fed. Cir. | **Date:** June 16, 2023

32. May v. United States, 2023 U.S. App. LEXIS 13964, 2023 WL 3836088

Distinguished by:
... "[T]here was a single agreement that was [allegedly] breached on a single occasion," a circumstance outside the

continuing-claims doctrine. Tamerlane , 550 F.3d at 1146 . 1 Mr. May calls our attention to the Supreme Court's recent decision in **Tyler v. Hennepin County, Minnesota, No. 22-166,598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201, 2023 WL 3632754(U.S. May 25, 2023)** . The decision in Tyler , though it involves a takings claim, does not involve a statute-of-limitations ...

Discussion: | **Court:** Fed. Cir. | **Date:** June 6, 2023

Federal Claims Court

33. Livingston v. United States, 167 Fed. Cl. 604, 2023 U.S. Claims LEXIS 2406

Cited by:
... 90 L. Ed. 1206 , 106 Ct. Cl. 854 (1946) ; Ruckelshaus v. Monsanto Co. , 467 U.S. 986 , 1001-1004 , 104 S. Ct. 2862 , 81 L. Ed. 2d 815 (1984) . **Tyler v. Hennepin Cnty., Minn., 143 S. Ct. 1369, 1375, 215 L. Ed. 2d 564(2023)** . In addition to "'having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest.'" Huntleigh USA Corp. v. United States ...

Discussion: | **Court:** Fed. Cl. | **Date:** September 29, 2023 | **Headnotes:**: HN5

34. Reid v. United States, 167 Fed. Cl. 539, 2023 U.S. Claims LEXIS 2074

Cited by: 167 Fed. Cl. 539 p.543
... In their reply brief, plaintiffs changed their position, in part, arguing that their takings claim, Count I, survives Fairholme because intervening precedent from the Supreme Court invalidates the takings analysis set forth in the Fairholme decision. Plaintiffs assert that "in light of the Supreme Court's decision in **Tyler [v. Hennepin County., 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)]** , this Court is no longer bound by the Federal Circuit 's decision in Fairholme on the merits of ...

Discussion: | **Court:** Fed. Cl. | **Date:** September 1, 2023

35. Fisher v. United States, 167 Fed. Cl. 535, 2023 U.S. Claims LEXIS 2072, 2023 WL 5663240

Cited by: 167 Fed. Cl. 535 p.539
... In their reply brief, plaintiffs changed their position, in part, arguing that their takings claim, Count I, survives Fairholme because intervening precedent from the Supreme Court invalidates the takings analysis set forth in the Fairholme decision. Plaintiffs assert that "in light of the Supreme Court's decision in **Tyler [v. Hennepin County, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)]** , this Court is no longer bound by the Federal Circuit 's decision in Fairholme on the merits of ...

Discussion: | **Court:** Fed. Cl. | **Date:** September 1, 2023

36. Elec. Welfare Trust Fund v. United States, 166 Fed. Cl. 709, 2023 U.S. Claims LEXIS 1589

Cited by: 166 Fed. Cl. 709 p.715
... , the court must identify the property interest that was allegedly taken and determine whether such a property interest is cognizable under the Takings Clause of the Fifth Amendment . Adams , 391 F.3d at 1218 ; see **Tyler v. Hennepin Cnty., 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** (analyzing a Fifth Amendment taking claim by first identifying the plaintiff's interest in the appropriated property). Second , "[o]nce a property right has been established, the court must ...

Discussion: | **Court:** Fed. Cl. | **Date:** July 7, 2023

Iowa Supreme Court

37. Livingood v. City of Des Moines, 991 N.W.2d 733, 2023 Iowa Sup. LEXIS 62

Cited by: 991 N.W.2d 733 p.741
... (Fed. Cir. 1995) . The purpose of the takings clause is "to bar the Government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" **Tyler v. Hennepin Cnty., 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201(2023)** (quoting Armstrong v. United States , 364 U.S. 40 , 49 , 80 S. Ct. 1563 , 4 L. Ed. 2d 1554 (1960)). Here, the city is not taking property for a public use. It is not ...

Discussion: | **Court:** Iowa | **Date:** June 9, 2023 | **Headnotes:**: HN13

Michigan Court of Appeals

38. Yono v. Cnty. of Ingham, 2023 Mich. App. LEXIS 9587

Cited by:
... 471 Mich 445 ; 684 NW2d 765 (2004) ; see also Jackson , Mich App at ; 2023 Mich. App. LEXIS 2010 . Additionally, the United States Supreme Court essentially adopted the reasoning set forth in Hall when it issued **Tyler v Hennepin Co, Minn, 598 U.S. 631, 638 ; 143 S Ct 1369 ; 215 L Ed 2d 564(2023)** . There, the Supreme Court stated that unjust taking occurs in the federal context if the government takes a person's property and keeps it instead of holding a foreclosure ...

Discussion: | **Court:** Mich. Ct. App. | **Date:** December 28, 2023

39. Muskegon Cnty. Treasurer v. Beeman (In re Muskegon Cnty. Treasurer for Foreclosure), 2023 Mich. App. LEXIS 7760

Cited by:
... , our Legislature rectified this constitutional infirmity with 2020 PA 256, and respondents have not shown that the act wrote their constitutionally protected property rights out of existence by imposing a notice requirement. Respondents urge this Court to follow a recent decision of the federal Supreme Court decision of **Tyler v Hennepin Co, Minnesota , 598 U.S. 631 ; 143 S Ct 1369 ; 215 L. Ed. 2d 564 (2023)** . Tyler is not, however, factually similar to the present case; rather, it is similar ...

Discussion: | **Court:** Mich. Ct. App. | **Date:** October 26, 2023 | **Headnotes:**: HN7

40. Jackson v. Southfield Neighborhood Revitalization Initiative, 2023 Mich. App. LEXIS 6834

Cited by:
... [], 51 F.4th [at] 190 (Kethledge , J., for the Court) ("[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take."). [**Tyler v Hennepin Cnty., 598 U.S. ___,143 S. Ct. 1369 ; 215 L Ed 2d 564(2023)** .] While the Supreme Court 's citation to and quotation of Hall certainly should not be considered a validation of all of its holdings, the Tyler opinion also impliedly adopted the reasoning in ...

Discussion: | **Court:** Mich. Ct. App. | **Date:** September 21, 2023 | **Headnotes:**: HN5

Minnesota Tax Court

41. Wendell v. Comm'r of Revenue, 2023 Minn. Tax LEXIS 25, 2023 WL 4441638

Cited by:
... . The excessive fines clauses are not limited to criminal proceedings. Wilson , 656 N.W.2d at 552 . And as recently restated by the United States Supreme Court , "[e]conomic penalties imposed to deter willful

noncompliance with the law ... cannot be excessive." **Tyler v. Hennepin Cnty., 598 U.S. 631, 143 S. Ct. 1369, 1382, 215 L. Ed. 2d 564(2023)** (Gorsuch, J., concurring). The Minnesota Supreme Court , in Wilson , outlined the test for determining a fine's constitutionality. 656 ...

Discussion: | **Court:** Minn. T.C. | **Date:** July 10, 2023

New Jersey Superior Court, Appellate Division

42. [257-261 20th Ave. Realty, LLC v. Roberto](), 2023 N.J. Super. LEXIS 121, 2023 WL 8359623

Followed by:
... and Perez Friscia. PEREZ FRISCIA The opinion of the court was delivered by PEREZ FRISCIA, J.S.C. (temporarily assigned). In this tax sale foreclosure appeal, we address whether the United States Supreme Court 's recent decision in **Tyler v. Hennepin County, 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** , which declared a taxing authority's confiscation of a property owner's equity violated the Fifth Amendment Takings Clause , bars a third-party tax sale certificate holder's foreclosure ...

Discussion: | **Court:** New Jersey Superior Court-Appellate Division | **Date:** December 4, 2023 | **Headnotes:**: HN4, HN7, HN13

43. [Ace Holding v. Corr](), 2023 N.J. Super. Unpub. LEXIS 1303, 2023 WL 4770872

Distinguished by:
... argument when they failed to demonstrate exceptional circumstances). Perceiving no abuse of discretion in the judge's denial of defendant's motion, we affirm. We acknowledge defendant's post-argument submission of **TylerTyler v. Hennepin County , U.S. , 143 S. Ct. 1369 , 215 L.Ed. 2d 564 (2023)** . Tyler, unlike this case, involved allegations of a governmental entity's unconstitutional taking of property without just compensation in violation of the Fifth Amendment . In this case, ...

Discussion: | **Court:** New Jersey Superior Court-Appellate Division | **Date:** July 27, 2023

New Mexico Court of Appeals

44. [State ex rel. Dearborn v. Clarke](), 2024-NMCA-002, 2023 N.M. App. LEXIS 79, 2023 WL 6527774

Cited by:
... confirmed that a property owner whose property is sold by the state for delinquent taxes is entitled under the Takings Clause of the Fifth Amendment to the United States Constitution to any amount received in excess of the property owner's debt to the state. See **Tyler v. Hennepin Cnty., Minn., 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** (concluding that a delinquent taxpayer has a property interest for purposes of the Takings Clause in any surplus exceeding the taxpayer's ...

Discussion: | **Court:** N.M. Ct. App. | **Date:** October 5, 2023

Virginia Supreme Court

45. [McKeithen v. City of Richmond](), 893 S.E.2d 369, 2023 Va. LEXIS 44

Cited by: 893 S.E.2d 369 p.375
... 118 S. Ct. 1925 , 141 L. Ed. 2d 174 (1998) (citation omitted). If allowed to do so, government could simply "'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate." **Tyler v. Hennepin Cnty., 598 U.S. 631, 638, 143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** (citation omitted). "This is the very kind of thing," the United States Supreme Court has said, "that the Taking Clause of the Fifth Amendment was meant to prevent." Webb's ...

Discussion: | **Court:** Va. | **Date:** October 19, 2023 | **Headnotes:**: HN5

Wisconsin Court of Appeals

46. **Selk v. Herrick**, 2023 WI App 44, 409 Wis. 2d 93, 995 N.W.2d 497, 2023 Wisc. App. LEXIS 780

LB **Cited by:** 409 Wis. 2d 93 p.93; 995 N.W.2d 497 p.497

Court: Wis. Ct. App. | **Date:** July 20, 2023

Other Citing Sources: (77)

Annotated Statutes

1. **U.S. Const. Amend. 5**

... Tyler v. Hennepin Cty., 26 F.4th 789 , 2022 U.S. App. LEXIS 4207 (8th Cir. 2022) , reh'g denied en banc 2022 U.S. App. LEXIS 7844 (8th Cir. Mar. 24, 2022) , cert. granted, 143 S. Ct. 644 , 214 L. Ed. 2d 382 , 2023 U.S. LEXIS 406 (2023) , rev'd,**598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564 , 29 Fla. L. Weekly Fed. S. 851 , 2023 U.S. LEXIS 2201 (2023)**. District court did not violate defendant's substantive due process rights by committing him to additional restoration treatment ...

Content: Statutes

2. **U.S. Const. Amend. 14**

... Tyler v. Hennepin Cty., 26 F.4th 789 , 2022 U.S. App. LEXIS 4207 (8th Cir. 2022) , reh'g denied en banc 2022 U.S. App. LEXIS 7844 (8th Cir. Mar. 24, 2022) , cert. granted, 143 S. Ct. 644 , 214 L. Ed. 2d 382 , 2023 U.S. LEXIS 406 (2023) , rev'd,**598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564 , 29 Fla. L. Weekly Fed. S. 851 , 2023 U.S. LEXIS 2201 (2023)**. 232. What constitutes "deprivation" or "taking" of property Taking by state of private property of one person or corporation ...

Content: Statutes

3. **Minn. Const. Art. 1, @ 13**

... . The Minnesota takings clause also encompasses takings in which the government destroyed or damaged property. Tyler v. Hennepin Cty., 26 F.4th 789 , 2022 U.S. App. LEXIS 4207 (8th Cir. Minn. 2022) , rev'd,**143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201(U.S. 2023)**. Overview: As a city ordinance did not infringe any right to exclude others from entering and ...

Content: Statutes

4. **Minn. Stat. sec. 270C.7101**

... Minn. Stat. §§ 270C.7101 and 270C.7108 , subd. 2. So too if a taxpayer does not pay taxes on her personal property, like a car. Minn. Stat. § 277.21 , subd. 13.**Tyler v. Hennepin Cnty.,143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201(U.S. 2023)**. Tax Law: State & Local Taxes: Income Tax: Individuals, Estates & Trusts: Imposition of Tax ...

Content: Statutes

5. **Minn. Stat. sec. 279.03**

... . The transaction occurs at a judgment sale; the title vests in the State subject only to the rights of redemption allowed by statute. Minn. Stat. § 280.41 . Tyler v. Hennepin Cty., 26 F.4th 789 , 2022 U.S. App. LEXIS 4207 (8th Cir. Minn. 2022) , rev'd,**598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201(U.S. 2023)**. Tax Law: State & Local Taxes: Real Property Tax: General Overview Amendment to Minn. Stat. § 279.03 in 1990, which added ...

Content: Statutes

6. **Minn. Stat. sec. 281.18**

... tax-forfeiture plan does not allow the former owner to recover any proceeds of the sale that exceed her tax debt. Tyler v. Hennepin Cty., 26 F.4th 789 , 2022 U.S. App. LEXIS 4207 (8th Cir. Minn. 2022) , rev'd, 143 S. Ct. 1369**, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201(U.S. 2023)**. Legal Periodicals 21 Hamline L. Rev. 469 . TREATISES AND ANALYTICAL MATERIALS 45 Dunnell Minn. Digest TAXATION § 12.02 , Volume 45 Taxation, TAXATION, ...

Content: Statutes

7. **Minn. Stat. sec. 550.08**

... , 550.08 (2022). Likewise, if a bank forecloses on a home because the homeowner fails to pay the mortgage, the homeowner is entitled to the surplus from the sale. Minn. Stat. § 580.10 .**Tyler v. Hennepin Cnty.,143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201(U.S. 2023)**. TREATISES AND ANALYTICAL MATERIALS 21 Dunnell Minn. Digest EXECUTION , Volume 21 Evidence § § 6.00-14.11 to Execution, EXECUTION, Scope. 21 Dunnell Minn. ...

Content: Statutes

8. **Minn. Stat. sec. 550.20**

... , 550.08 (2022). Likewise, if a bank forecloses on a home because the homeowner fails to pay the mortgage, the homeowner is entitled to the surplus from the sale. Minn. Stat. § 580.10 .**Tyler v. Hennepin Cnty.,143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201(U.S. 2023)**. Legal Periodicals 21 Hamline L. Rev. 395 . TREATISES AND ANALYTICAL MATERIALS 21 Dunnell Minn. Digest EXECUTION , Volume 21 Evidence § § 6.00-14.11 to Execution, ...

Content: Statutes

9. **Minn. Stat. sec. 580.10**

... , 550.08 (2022). Likewise, if a bank forecloses on a home because the homeowner fails to pay the mortgage, the homeowner is entitled to the surplus from the sale. Minn. Stat. § 580.10 .**Tyler v. Hennepin Cnty.,143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201(U.S. 2023)**. Real Property Law: Financing: Mortgages & Other Security Instruments: Satisfaction & Termination: General Overview Because Minn. Stat. § 580.10 did not ...

Content: Statutes

Practical Guidance

10. **U.S. Supreme Court Bankruptcy Roundup**

...**Tyler v. Hennepin County,143 S. Ct. 1369(U.S. May 25, 2023)**, that a real estate tax foreclosure proceeding in which a local taxing authority refused to pay the surplus realized from the sale to the homeowner violated the Takings Clause of the Fifth Amendment to the U.S. Constitution . In so ruling, the Court reversed a 2022 decision by the U.S. Court of Appeals for the Eighth Circuit that a real estate tax foreclosure proceeding in which a local taxing authority refused to pay the sale surplus ...

Content: Practical Guidance

Law Reviews and Periodicals

11. **ARTICLE: HARSH CREDITOR REMEDIES AND THE ROLE OF THE REDEEMER**, 92 Fordham L. Rev. 935

... jurisdictions allowed for local governments to acquire the property by strict foreclosure, sell the property, and

keep the surplus. This was the plight faced by Geraldine Tyler, who racked up a tax debt of $15,000 and lost a $40,000 home to Hennepin County in Minneapolis, without seeing a penny of the surplus. 70 See**Tyler v. Hennepin Cnty.,143 S. Ct. 1369, 1373(2023)**. In 2022, the U.S. Supreme Court held that the windfall to Minnesota was an unconstitutional taking. 71 Id. at 1380**(2023)**...

Content: Law Reviews | **Date:** December 1, 2023

12. **ARTICLE: ARTICLE III, THE BILL OF RIGHTS, AND ADMINISTRATIVE ADJUDICATION**, 92 Fordham L. Rev. 397

... The Eighth Amendment can also demand an Article III court's involvement in certain types of cases. In particular, when a federal administrative agency seeks to impose punitive fines or career bans that impact an individual in significant, life-altering ways, agency action may implicate the Eighth Amendment bar against "excessive fines" 72 U.S. CONST. amend. VIII ; see also**Tyler v. Hennepin Cnty.,143 S. Ct. 1369, 1382(2023)**(Gorsuch, J., concurring) ("Economic penalties imposed to deter ...

Content: Law Reviews | **Date:** November 1, 2023

13. **ARTICLE: ARTICLE III, THE BILL OF RIGHTS, AND ADMINISTRATIVE ADJUDICATION**, 92 Fordham L. Rev. 397

... The Eighth Amendment can also demand an Article III court's involvement in certain types of cases. In particular, when a federal administrative agency seeks to impose punitive fines or career bans that impact an individual in significant, life-altering ways, agency action may implicate the Eighth Amendment bar against "excessive fines" 72 U.S. CONST. amend. VIII ; see also**Tyler v. Hennepin Cnty.,143 S. Ct. 1369, 1382(2023)**(Gorsuch, J., concurring) ("Economic penalties imposed to deter ...

Content: Law Reviews | **Date:** November 1, 2023

14. **ARTICLE: LEADING CASE: CONSTITUTIONAL LAW: Fifth Amendment Takings Clause Tyler v. Hennepin County**, 137 Harv. L. Rev. 310

... In response, the Supreme Court has diminished the role of state law in defining the relevant interest, instead appealing to what resembles a "general law of property": jurisdictionless understandings of history and tradition, as well as other states' laws. 6 Maureen E. Brady, The Illusory Promise of General Property Law , 132 YALE L.J.F. 1010 , 1015**(2023)**. This past Term, in Tyler v. Hennepin County , 7**143 S. Ct. 1369(2023)**. the Supreme Court unanimously held that a Minnesota statutory ...

Content: Law Reviews | **Date:** November 1, 2023

15. **ARTICLE: LEADING CASE: CONSTITUTIONAL LAW: Elections Clause Independent State Legislature Theory Moore v. Harper**, 137 Harv. L. Rev. 290

... The majority framed this as simply applying federal courts' "duty to safeguard" the Federal Constitution, 76 Id. at 2088-89 . in line with "other areas" in which federal courts claim ultimate supervisory authority over state law. 77 Id. at 2088 (citing, inter alia,**Tyler v. Hennepin County,143 S. Ct. 1369, 1375(2023)**(Takings Clause); Gen. Motors Corp. v. Romein, 503 U.S. 181 , 187 (1992) (Contracts Clause)). These areas of federal interference are intended to be exceptions. Cf. ...

Content: Law Reviews | **Date:** November 1, 2023

16. **ARTICLE: TAX FORFEITURES AND THE EXCESSIVE FINES MUDDLE**, 118 Nw. U. L. Rev. Online 170

... case centered on Hennepin County's foreclosure of the condominium home of Tyler, a 94-year-old widow, after

she failed to pay her delinquent property taxes. 7 Tyler , 143 S. Ct. at 1374 . Tyler owed approximately $2,300 in taxes and $12,700 in statutory interest, penalties, and costs associated with her debt. 8 See Petition for Writ of Certiorari at 3, Tyler ,**143 S. Ct. 1369(2023)**(No. 22-166). The county sold her home for $40,000, but rather than returning to her the $25,000 worth of ...

Content: Law Reviews | **Date:** October 8, 2023

17. **Articles: Constraining and Licensing Arbitrariness: The Stakes in Debates about Substantive-Procedural Due Process**, 76 SMU L. Rev. 613

... Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 , 541 (1985) . The Takings Clause has its own jurisprudence. See, e.g. , Kelo v. City of New London, 545 U.S. 469 (2005) San Remo Hotel, L.P. v. City and Cnty. of San Francisco, 545 U.S. 323 (2005) **Tyler v. Hennepin Cnty.,598 U.S. 631(2023)** . As Justices explained in several rulings, the point was not only to respect and protect individuals, but also to sustain the legitimacy of governments by requiring fair and open process. A ...

Content: Law Reviews | **Date:** 2023

18. **ARTICLES: TOWARD PRINCIPLED BACKGROUND PRINCIPLES IN TAKINGS LAW**, 10 Tex. A&M L. Rev. 427

... This means that a property owner may only challenge an access regulation within a few years of its promulgation. The Supreme Court's most recent Takings Clause opinion, its unanimous 2023 ruling in **Tyler v. Hennepin County ,** 210 **Tyler v. Hennepin County,143 S. Ct. 1369(2023)** . illustrates the contemporary Court's understanding that valid takings claims can still be time-barred if a landowner misses even a brief window to invoke their rights. In that case, Hennepin County tried to justify ...

Content: Law Reviews | **Date:** 2023

19. **ARTICLE: REVIEW: KEEPING OUR REPUBLIC**, 2023 Harv. J.L. & Pub. Pol'y Per Curiam 1

... a panel on federalism, we will explore the curious and sometimes nebulous line between federal and state governments. We will consider how common law adjudication in states relates to the legislation we demand to make law at the federal level. We will examine how states may regulate the content of substantive rights and whether state regulation may transcend state borders. 12 See e.g. , **Tyler v. Hennepin County,598 U.S. 631(2023)** ; National Pork Producers v. Ross, 143 S. Ct. 1142 **(2023)** ...

Content: Law Reviews | **Date:** 2023

Treatise Citations

20. **Post-Hearing Evaluation.**, 1 IL Zoning, Eminent Domain and Land Use Manual @ 7.10

... But state law cannot be the only source; otherwise, a State could sidestep the Takings Clause by disavowing traditional property interests. 203 **Tyler v. Hennepin County, ___ U.S. ___, ___,143 S.Ct. 1369, 215 L.Ed. 2d 564** (May 25, 2023, sl. op at 5). So the U.S. Supreme Court also looks to traditional property law principles plus historical practice and the Court's precedents. 204 **Tyler v. Hennepin County, ___ U.S. ___, ___,143 S.Ct. 1369, 215 L.Ed. 2d 564** (May 25, 2023, sl. op at ...

Content: Treatises

21. **Constitutional Guarantee of Just Compensation.**, 1 IL Zoning, Eminent Domain and Land Use Manual @ 8.02

... is to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. 50 Armstrong v. United States, 364 U.S. 40 , 49 , 80 S.Ct. 1563 , 4 L. Ed. 2d 1554 (1960) ; **Tyler v. Hennepin County, ___ U.S. ___, ___,143 S.Ct. 1369, 215 L.Ed. 2d 564** (May 25,

2023, sl. op at 14); Northern Ill. Home Bldrs. Ass'n v. County of Du Page, 165 Ill. 2d 25 , 31–32 , 649 N.E.2d 384 , 388 (1995) , citing Dolan v. City ...

Content: Treatises

22. **No Title**, Moore's Federal Rules Pamphlet Publication Update

... Allegations that a county illegally appropriated the excess proceeds of a foreclosure sale after satisfaction of delinquent property taxes were sufficient to plausibly allege both standing to sue under Article III and to state a claim for relief under the Takings Clause . **Tyler v. Hennepin Cty.,143 S. Ct. 1369, 215 L. Ed. 2d 564, 1375–1381(2023)** (Part 1, Civil Rule 12). To bring a fraud claim under 15 U.S.C. § 77k , the plaintiff must plead and prove that the securities at issue are ...

Content: Treatises

23. **Rule 8(a); Pleading Claim for Relief**, 1 Moore's Federal Rules Pamphlet @ 8.4

... In re Schering-Plough Corp. Intron/Temodar Consumer Class Action , 678 F.3d 235 , 243–244 (3d Cir. 2012) ; Amidax Trading Group v. S.W.I.F.T. SCRL , 671 F.3d 140 , 145 (2d Cir. 2011) ; see **Tyler v. Hennepin Cty., 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564, 570(2023)** (applying rule without stating it; allegation that county illegally appropriated excess proceeds of foreclosure sale after satisfaction of delinquent property taxes stated "classic pocketbook injury" sufficient ...

Content: Treatises

24. **Rule 12(b); Raising of Defenses by Pre-Answer Motion**, 1 Moore's Federal Rules Pamphlet @ 12.4

... (7th Cir. 2015) ; In re Schering-Plough Corp. Intron/Temodar Consumer Class Action , 678 F.3d 235 , 243–244 (3d Cir. 2012) ; Amidax Trading Group v. S.W.I.F.T. SCRL , 671 F.3d 140 , 145 (2d Cir. 2011) ; see **Tyler v. Hennepin Cty., 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564, 570(2023)** (applying rule without stating it; allegation that county illegally appropriated excess proceeds of foreclosure sale after satisfaction of delinquent property taxes stated "classic pocketbook ...

Content: Treatises

25. **NEW DEVELOPMENTS**, 1 Antieau on Local Government Law, Second Edition Special Alert

... right to speak freely." The Court also noted that determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions, but in this case, however, the parties had stipulated that Ms. Smith sought to engage in expressive activity. In **Tyler v. Hennepin County, Minnesota, 143 S. Ct. 1369(2023)** , the U.S. Supreme Court unanimously reversed the dismissal of a homeowner's suit, and held that the homeowner had plausibly alleged a violation ...

Content: Treatises

26. **No Title**, 1 Collier Pamphlet Edition 11 U.S.C. @ 548

... calculus do these procedures convey to the debtor value that is substantially comparable to the worth of the transferred property. Therefore, the transfer is pursuant to the RPTL is subject to avoidance under section 548. Gunsalus v. Cty. of Ontario, 37 F.4th 859 (2d Cir. 2022) . Accord Lowry v. Southfield Neighborhood Revitalization Initiative (In re Lowry), 2021 U.S. App. LEXIS 13042 (6th Cir. Dec. 27, 2021) . See also **Tyler v. Hennepin Cnty., 598 U.S. ___,143 S. Ct. 1369(2023)** ...

Content: Treatises

27. **Partial and Total Destruction**, 1Apt1 Condominium Law and Practice: Forms @ 69.02

... extraordinary insurance expense (or conversely, a windfall) upon later discovery. Additionally, for complete insurance protection, the board of managers should be advised to periodically revise their insurance picture, keeping abreast of changes in project values and the costs of materials. [4] Constitutional Issues There are many constitutional issues in eminent domain law. 62 See generally **Tyler v. Hennepin County, 598 U.S. ___,143 S. Ct. 1369, 1376, 1379, 215 L. Ed. 2d 564, 571(2023)** ...

Content: Treatises

28. **U.S. Supreme Court Decisions, Both Decided May 25, 2023, Protect Private Property Owners from Overreach by Local (Tax Sale) and Federal (Wetlands) Regulators: Tyler v. Hennepin County and Sackett v. EPA1Cite as Michael Allan Wolf, Powell on Real Property®, U.S. Supreme Court Decisions, Both Decided May 25, 2023, Protect Private Property Owners from Overreach by Local (Tax Sale) and Federal (Wetlands) Regulators: Tyler v. Hennepin County and Sackett v. EPA (LexisNexis Matthew Bender 2023). The author thanks Nancy Greening for her invaluable insights and advice. This Special Alert is excerpted from Michael Allan Wolf, Powell on Real Property® (LexisNexis Matthew Bender) with permission.**, 1 Land Use Law Special Alert

... while neither case featured a dissenting opinion denying that landowner rights had been violated, an intriguing combination of concurring justices offered owner-friendly alternatives to the majorities' rationales, which is perhaps a sign that in the current iteration of the Roberts Court partisan divides are not set in stone, at least not in the important area of property rights protection. I. Tyler v. Hennepin County In Tyler v. Hennepin County , 2 **Tyler v. Hennepin Cnty.,143 S. Ct. 1369(2023)** ...

Content: Treatises

29. **Elements of Claim for Inverse Condemnation*Authored by Kevin Shirey, Esq. except for §?4.01 which was contributed by Michael Allan Wolf, Author of Powell on Real Property®. Updates (except in §?4.01) contributed by Coulter Boeschen, Esq.**, 1 LNPG: Minnesota Real Estate Litigation @ 4.15

... **Tyler v. Hennepin Cnty., 215 L. Ed. 2d 564(2023)]** . There, the court observed: The Takings Clause does not itself define property. For that, the Court draws on "existing rules or understandings" about property rights. But state law cannot be the only source. Otherwise, a State could "sidestep the Takings Clause by disavowing traditional property interests" in assets it wishes to appropriate. So we also look to "traditional property law principles," plus historical practice and this Court's ...

Content: Treatises

30. **Overview of Real Estate Security Interests*Authored by Edward E. Robinson, Esq.**, 1 LNPG: Minnesota Real Estate Litigation @ 5.03

... is among a minority of jurisdictions that deem delinquent property forfeited in its entirety for the owner's failure to pay property taxes. Most states, in contrast, impose restrictions on tax foreclosure sales, either by requiring that no more than the minimum amount of land be sold to satisfy the outstanding tax debt, or by requiring that surplus proceeds from the tax sale be returned to the taxpayer. In **Tyler v. Hennepin Cnty., ___ U.S. ___,143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** , ...

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31. **Pleading Jurisdiction**, 1 Manual of Federal Practice @ 3.08

... (7th Cir. 2015) ; In re Schering-Plough Corp. Intron/Temodar Consumer Class Action , 678 F.3d 235 , 243–244

(3d Cir. 2012) ; Amidax Trading Group v. S.W.I.F.T. SCRL , 671 F.3d 140 , 145 (2d Cir. 2011) . **Tyler v. Hennepin Cty., 598 U.S. ___,143 S. Ct. 1369, 215 L. Ed. 2d 564, 570(2023)** (allegation that county illegally appropriated excess proceeds of foreclosure sale after satisfaction of delinquent property taxes stated "classic pocketbook injury" sufficient to plausibly allege ...

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32. **Failure to State Claim**, 1 Manual of Federal Practice @ 4.24

... (when complaint alleged antitrust conspiracy, mere conclusory allegations that parallel action resulted from illegal agreement were insufficient). The plausibility requirement of the Twombly/Iqbal line of authority does not require detailed fact pleading or offering evidence to support the claims. **Tyler v. Hennepin Cty.,598 U.S. ___,143 S. Ct. 1369, 215 L. Ed. 2d 564, 1375–1381(2023)** (allegations that county illegally appropriated excess proceeds of foreclosure sale after satisfaction ...

Content: Treatises

33. **Failure to State Claim?Rule 12(b)(6) Motion**, 2 Moore's Federal Practice - Civil Sec. 12.34

... Accordingly, a motion to dismiss for failure to state a claim must now be judged according to the "plausibility" standard set out in the Twombly decision. 6.3 Courts must apply plausibility standard of Twombly decision. **Tyler v. Hennepin Cty., 598 U.S. —,143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201, at *8–*10 (2023)** (allegations that county illegally appropriated excess proceeds of foreclosure sale after satisfaction of delinquent property taxes were sufficient to plausibly ...

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34. **Lack of Subject-Matter Jurisdiction**, 2 Moore's Federal Practice - Civil Sec. 12.30

... fact is insufficient regardless of whether it relates to a claim for relief or a basis for jurisdiction. Jurisdictional allegations are therefore subject to the same plausibility requirement that applies to allegations of a claim for relief under the Twombly/Iqbal line of authority (see § 12.34[1]). 13.1 Plausibility requirement applies to jurisdictional allegations. See **Tyler v. Hennepin Cty., 598 U.S. —,143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201, at *6–*8 (2023)** ...

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35. **Constitutional Basis of Right of Eminent Domain**, 13 Moore's Federal Practice - Civil Sec. 71.1.02

... Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 , 239 , 17 S. Ct. 581 , 41 L. Ed. 979 (1897) (condemnation by state of private lands require just compensation under Fourteenth Amendment); see **Tyler v. Hennepin County,598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564, 570–575, 577(2023)** (local government's retention, after tax sale, of excess value of taxpayer's home over amount of tax debt violated Fifth Amendment's Takings Clause , which is applicable to states ...

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36. **The Right of Former Owners in Tax Deeded Property**, 16 NH Prac. Series: Municipal Taxation & Road Law @ 43.13

... regardless of whether the former owner took steps to correct the consequences of the tax delinquency, whenever a municipality acquires property by tax deed and the equity in the property exceeds the amount owed. 77 Polonsky v. Town of Bedford, 173 N.H. 226 , 238 A.3d 1102 , 2020 N.H. LEXIS 48 (2020) . This result is consistent with the holding of the United States Supreme Court in its 2023 opinion in Tyler v. Hennepin County. 77.1 **Tyler v.**

Hennepin County,143 S. Ct. 1369, 2023 U.S. LEXIS 2201 ...

Content: Treatises

37. **Statewide Procedures**, 3 NY Practice Guide Real Estate @ 19.01

... ordinance did not 'absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale,' but instead simply defined the process through which the owner could claim the surplus, we found no Takings Clause violation." **Tyler v. HennepinCnty.,143 S. Ct. 1369, 215 L. Ed. 2d 564, 575, 2023 U.S. LEXIS 2201, * 17(2023)** . Ironically, only days before Tyler was decided, the Appellate Division, Second Department held that, based on earlier precedent, that "where, as here, ...

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38. **U.S. Supreme Court Decisions, Both Decided May 25, 2023, Protect Private Property Owners from Overreach by Local (Tax Sale) and Federal (Wetlands) Regulators: Tyler v. Hennepin County and Sackett v. EPA**, 1 Powell on Real Property Special Alert

... neither case featured a dissenting opinion denying that landowner rights had been violated, an intriguing combination of concurring justices offered owner-friendly alternatives to the majorities' rationales, which is perhaps a sign that in the current iteration of the Roberts Court partisan divides are not set in stone, at least not in the important area of property rights protection. I. Tyler v. Hennepin County In Tyler v. Hennepin County , 2 **Tyler v. Hennepin Cnty.,143 S. Ct. 1369(2023).** ...

Content: Treatises

39. **U.S. Supreme Court Update 2023**, 1 Powell on Real Property Special Alert

... of the company holding the funds under our common-law rules due to recordkeeping gaps, then it is sufficiently "similar" to a money order to fall presumptively within the FDA. Such is the case with the Disputed Instruments. 12 Delaware , 143 S. Ct. at 712 . Those Disputed Instruments did not fit within the statutory exception of "third party bank checks," despite Delaware 's argument. TYLER V. HENNIPIN COUNTY In Tyler v. Hennepin County , 13 Tyler v. Hennepin Cnty., **143 S. Ct. 1369(2023)** ...

Content: Treatises

40. **Who Gets the Forfeited Loot and What It Can Be Used For.**, 1 Prosecution and Defense of Forfeiture Cases P 7.02

... Hall v. Meisner, 51 F.4th 185 , 188 (6th Cir. 2022) . The Eighth Circuit, in a terrible decision, upheld Minnesota 's almost identical real estate tax-forfeiture scheme, but the Supreme Court reversed in a powerful unanimous decision. **Tyler v. Hennepin Cnty.,143 S. Ct. 1369, 215 L. Ed. 2d 564(2023)** . At oral argument, all the justices pummeled Hennepin County 's outstanding Supreme Court lawyer, seeing no merit in any of the county's many arguments. The Court held that Hennepin County's ...

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41. **Excessive Fines Clause.**, 1 Prosecution and Defense of Forfeiture Cases P 12.11

... 's real property tax-forfeiture scheme did not violate the Excessive Fines Clause because its "primary purpose" is "remedial"—aimed at "compensating the government for lost revenues due to the non-payment of taxes." But, in an excellent concurring opinion in Tyler v. Hennepin Cnty. , 10.2 **143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201(May 25, 2023)** . The Court unanimously held that Minnesota 's scheme violated the Takings Clause ; accordingly, it did not have to decide Ms. Tyler's ...

Content: Treatises

42. **No Title**, 7 New York Real Property Forms Annotated FORM 699

... ordinance did not 'absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale,' but instead simply defined the process through which the owner could claim the surplus, we found no Takings Clause violation." **Tyler v. Hennepin Cnty.,143 S. Ct. 1369, 215 L. Ed. 2d 564, 575, 2023 U.S. LEXIS 2201, at *17(2023)** . The owner's tax liability is not extinguished by a tax sale which is subsequently vacated by the court as invalid. Matter of County of Seneca v. Maxim ...

Content: Treatises

43. **No Title**, 7 New York Real Property Forms Annotated FORM 703

... ordinance did not 'absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale,' but instead simply defined the process through which the owner could claim the surplus, we found no Takings Clause violation." **Tyler v. Hennepin Cnty.,143 S. Ct. 1369, 215 L. Ed. 2d 564, 575, 2023 U.S. LEXIS 2201, at *17(2023)** . Ironically, only days before Tyler was decided, the Appellate Division, Second Department held that, based on earlier precedent, "where, as here, the ...

Content: Treatises

44. **CONDEMNATION**, 1 Virginia Civil Benchbook @ 11.01

... Such other facilities necessary to the construction, maintenance, or operation of a public facility. [2] Constitutional and statutory considerations U.S. Const. amend. V Va. Const. art. I, § 11 [a] Private property shall not be taken for public use without just compensation. [i] **Tyler v. Hennepin Cnty.,143 S. Ct. 1369(2023)** Murr v. Wisconsin, 137 S. Ct. 1933 (2017) Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) Board of Supervisors v. Route 29, LLC, 301 Va. 134 (2022) The unconstitutional ...

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45. **Enforcing Tax Liens**, 13 Warren's Weed New York Real Property @ 133.23

... , 199 , 1 L. Ed. 2d 171 , 176 , 1956 U.S. LEXIS 34 , * 14 (1956) . On the other hand, in Tyler v. Hennepin Cnty ., 61.3 **143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201(2023)** . the Supreme Court found that where a municipality retained the surplus after a tax sale, the taxpayer plausibly asserted a Takings Clause violation. The Court observed that most states refund the surplus to the taxpayer. Addressing its earlier determination in ...

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46. **Determining Nature and Effect of Tax Titles**, 13 Warren's Weed New York Real Property @ 134.05

... Matter of Ellis v City of Rochester, 227 AD2d 904 , 643 N.Y.S.2d 279 (4th Dept. 1996) . The constitutionality of New York 's tax foreclosure or tax lien sales systems is called into question by Tyler v. Hennepin Cnty., 164.3 **143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201(2023)** . in which the Supreme Court found that where a municipality retained the surplus after a tax sale, the taxpayer plausibly asserted a Takings Clause violation. The Court observed that most states ...

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47. **Anticipating Effect of Irregularities and Jurisdictional Defects in Tax Titles**, 13 Warren's Weed New York Real

Property @ 134.06

... with an assessed value of $52,000 were lost for failure to pay water taxes in the amount of $879.50—a trusted bookkeeper failed to make the payment and the owner did not receive actual notice of that failure until after the period to redeem had passed. Nelson v. City of New York, 352 U.S. 103 , 77 S. Ct. 195 , 1 L. Ed. 2d 171 (1956) . On the other hand, in **Tyler v. Hennepin Cnty.,143 S. Ct. 1369, 215 L. Ed. 2d 564, 2023 U.S. LEXIS 2201(2023)** , the Supreme Court found that where a ...

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48. **Interests remaining after foreclosure.**, 17 Michigan Digest, Taxes @ 499

... for just compensation where the county (pursuant to the tax foreclosure scheme under Minnesota law) retained the $25,000 excess over the owner's delinquent property tax debt of $15,000 after selling the property for $40,000 at a tax foreclosure sale. **Tyler v. Hennepin County,2023 U.S. LEXIS 2201(2023)** . Op Atty Gen. Liens for future installments of special assessments levied by townships are not extinguished by tax foreclosure proceedings under the General Property Tax Act (MCLS §§ 211.78–78p ...

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49. **Disposition of Proceeds from Sales**, 30 M.L.P. 2d Taxation @ 347

... for just compensation where the county (pursuant to the tax foreclosure scheme under Minnesota law) retained the $25,000 excess over the owner's delinquent property tax debt of $15,000 after selling the property for $40,000 at a tax foreclosure sale.—**Tyler v. Hennepin County,2023 U.S. LEXIS 2201(2023)**. The former property owners have a "deep rooted" common law property interest in the surplus funds that continue to exist even after the fee simple title to the property vests with the government ...

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50. **SHEETZ v. COUNTY OF EL DORADO**, 2023 U.S. S. Ct. Briefs LEXIS 4217

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51. **CHONG v. CITY OF SEATTLE**, 2023 U.S. S. Ct. Briefs LEXIS 4198

... 2014 WL 4854542 (Ohio App. Sept. 30, 2014) Sharif v. Leahy, 133 Wash.App. 1007 (2006) Sinclair v. City of Seattle, 61 F.4th 674 (9th Cir. 2023) Thompson v. Ashe, 250 F.3d 399 (6th Cir. 2001)**Tyler v. Hennepin Cnty.,598 U.S. 631(2023)**United States v. Rosales-Garay, 283 F.3d 1200 (10th Cir. 2002) United States v. Traficant, 368 F.3d 646 (6th Cir. 2004) United States v. 16 Clinton Street, 730 F.Supp. 1265 (S.D.N.Y. 1990) Watkins v. U.S. ...

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52. **SHEETZ v. COUNTY OF EL DORADO**, 2023 U.S. S. Ct. Briefs LEXIS 4064

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v. Olech, ...

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53. **SHEETZ v. COUNTY OF EL DORADO**, 2023 U.S. S. Ct. Briefs LEXIS 3638

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55. **DEVILLIER v. TEXAS**, 2023 U.S. S. Ct. Briefs LEXIS 3555

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57. **DEVILLIER v. TEXAS**, 2023 U.S. S. Ct. Briefs LEXIS 3560

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58. **MCELRATH v. GEORGIA**, 2023 U.S. S. Ct. Briefs LEXIS 3104

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62. **335-7 LLC v. CITY OF NEW YORK**, 2023 U.S. S. Ct. Briefs LEXIS 2639

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64. **BURNS v. IOWA**, 2023 U.S. S. Ct. Briefs LEXIS 2565

... 365 U.S. 505 (1961) Skinner v. Ry. Lab. Exec. Ass'n, 489 U.S. 602 (1989) Smith v. Maryland, 442 U.S. 735 (1979) State v. Williford, 767 S.E.2d 139 (N.C. Ct. App. 2015)**Tyler v. Hennepin County, Minnesota,598 U.S. 631(2023)**United States v. Chadwick, 433 U.S. 1 (1977) United States v. Davis, 690 F.3d 226 (4th Cir. 2012) United States v. Di Re, 332 U.S. 581 (1948) United States v. Jones, 565 U.S. 400 ...

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65. **335-7 LLC v. CITY OF NEW YORK**, 2023 U.S. S. Ct. Briefs LEXIS 2428

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66. **ASTRAZENECA UK LTD. v. ATCHLEY**, 2023 U.S. S. Ct. Briefs LEXIS 2250

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67. **NEWELL-DAVIS v. PHILLIPS**, 2023 U.S. S. Ct. Briefs LEXIS 2045

... The Case of the Tailors of Ipswich, 77 Eng. Rep. 1218 (K.B. 1610) The Pocket Veto Case, 279 U.S. 655 (1929) Timbs v. Indiana, 139 S. Ct. 682 (2019) Tiwari v. Friedlander, 26 F.4th 355 (6th Cir. 2022) **Tyler v. Hennepin County,143 S. Ct. 1369(2023)** United States v. Carolene Products, 304 U.S. 144 (1938) United States v. Vaello-Madero, 142 S. Ct. 1539 (2022) Washington v. Glucksberg, 521 U.S. 702 (1997) Whole Woman's Health v. Hellerstedt, ...

Content: Court Filings | **Date:** July 13, 2023

68. **CAO v. PFP DORSEY INVS.**, 2023 AZ S. Ct. Briefs LEXIS 213

... 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in many landmark United States Supreme Court cases in defense of the right to make reasonable use of one's property, and the corollary right to obtain just compensation when that right is infringed. See, e.g., **Tyler v. Hennepin Cnty., 143 S. Ct. 1369(2023)** ; Sackett v. Env't Prot. Agency , 598 U.S. 651 **(2023)** ; Wilkins v. United States , 598 U.S. 152 **(2023)** ...

Content: Court Filings | **Date:** September 26, 2023

69. **CAO v. PFP DORSEY INVS.**, 2023 AZ S. Ct. Briefs LEXIS 211

... recently confirmed that although state law is one source for understanding property rights, "state law cannot be

the only source. Otherwise, a State could sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate." **Tyler v. Hennepin Cnty., 598 U.S. 631, 638(2023)** (quotation marks omitted). Here, the fact that condominium purchasers might know about A.R.S. § 33-1228 before purchasing does not mean that the eradication of the property ...

Content: Court Filings | **Date:** September 12, 2023

70. **APR CONSTR., INC. v. CITY OF SAN DIEGO**, 2023 CA App. Ct. Briefs LEXIS 4866

... Constitution. Thus, it held due process considerations bar governmental entities from claiming that sovereign immunity shields them from liability if they obtain such improper financial benefits at the expense of others. Recetly, that court focused on these issues in **Tyler v. Hennepin Cnty., (May 28, 2023) 598 U.S.___,143 S. Ct. 1369, 1371** . The appellant, Geraldine Tyler, owned a condominium which had accumulated unpaid real estate taxes, interest and penalties. After the county seized ...

Content: Court Filings | **Date:** October 12, 2023

71. **GEDNEY v. COUNTY OF ORANGE**, 2023 CA App. Ct. Briefs LEXIS 3007

... I. THE NOTICE THE ASSESSOR GAVE TO THE TRUSTEE OF THE GEDNEY BYPASS AND SURVIVOR'S TRUSTS AND NOT THE GEDNEY FAMILY 1978 TRUST NOTED ON THE GRANT DEED WAS IMPROPER AND CONSTITUTES AN UNCONSTITUTIONAL TAKING UNDER THE FIFTH AMENDMENT In the recently published case of **Tyler v. Hennepin County, Minnesota (2023) U.S. , 143 S.Ct. 1369** (" Tyler "), the Supreme Court reviewed the history of the Fifth Amendment Takings clause and how it is to be applied in situations involving the ...

Content: Court Filings | **Date:** July 3, 2023

72. **BA HOTEL & RESORT v. BUENA PARK**, 2023 CA App. Ct. Briefs LEXIS 2840

... for damages. As noted above, the Avidity case rejects this argument where the government itself has interfered with performance. Furthermore, in a case decided by the United States Supreme Court after the underlying case had been determined, **Tyler v. Hennepin County, 143 S.Ct. 1369(May 25, 2023)** , a unanimous Supreme Court held that it constitutes an unconstitutional taking for a government entity to take property and keep the excess of what the property is worth. Even under ...

Content: Court Filings | **Date:** June 26, 2023

73. **KOPLOW v. URREA**, 2023 FL S.Ct. Briefs LEXIS 405

... " § 72.9 ("[t]he creditor may not apply the payment to a debt for which the payor is not liable, as, for example, the debt owed by a spouse of the payor or by a corporation owned or controlled by the payor")(citations omitted). See also **Tyler v. Hennepin County , U.S. , 143 S. Ct. 1369 , 1377 (May 25, 2023)** (the Court held that the judgment creditor "could not use the toehold of the tax debt to confiscate more property than was due"). The courts' holdings in the purported ...

Content: Court Filings | **Date:** July 6, 2023

74. **Johansen Constr. Co. v. Revitalization**, 2023 WA App. Ct. Briefs LEXIS 1453

... dispute regarding the receiver's interest in property. Here, there is no bona fide dispute over the Receiver's interest in Castle Walls ' bank account. See Section A.1 supra . C. The Turnover Order Is Not an Unconstitutional Taking of Johansen's Property . **Tyler v. Hennepin County, 598 U.S. 631, 143 S.Ct. 1369, 215 L.Ed.2d 564(2023)** is inapposite. Tyler involved a situation where a county, which foreclosed on a real estate

lien, kept the excess proceeds from the sale ...

Content: Court Filings | **Date:** September 22, 2023

75. **In the Receivership v. Claimant Johansen Constr. Co., LLC, Appellant.**, 2023 WA App. Ct. Briefs LEXIS 1269

... The February 2023 Revision Order imposes an unconstitutional taking, minimally of the funds Johansen's joint checks directed to AW. The U.S. Supreme Court this past May ruled that individuals' property rights are to be protected and their seizure, or unjustified retention, can constitute an unconstitutional taking. See **Tyler v. Hennepin County, 598 U.S. 631, (2023)** (reversing dismissal of 94-year-old taxpayer's takings claim where the state "retained" $ 25,000 of "surplus proceeds" after ...

Content: Court Filings | **Date:** August 23, 2023

76. **In the Receivership**, 2023 WA App. Ct. Briefs LEXIS 1764

... The February 2023 Revision Order imposes an unconstitutional taking, minimally of the funds Johansen's joint checks directed to AW. The U.S. Supreme Court this past May ruled that individuals' property rights are to be protected and their seizure, or unjustified retention, can constitute an unconstitutional taking. See **Tyler v. Hennepin County, 598 U.S. 631, (2023)** (reversing dismissal of 94-year-old taxpayer's takings claim where the state "retained" $ 25,000 of "surplus proceeds" ...

Content: Court Filings | **Date:** August 21, 2023

Motions

77. **Msp Recovery Claims Series**, 2022 U.S. Dist. Ct. Motions LEXIS 610095

... is a primary payer responsible for payment and/or reimbursement of J.M.'s accident-related expenses." Id. ¶ 44 (emphasis added). Case 1:22-cv-01238-WCG Filed 09/29/23 Page 4 of 6 Document 30 9. These allegations sufficiently alleged Plaintiff's injury and causation for standing. See, e.g., **Tyler v. Hennepin Cty., Minn.,598 U.S. 631, 636 -37 (2023)** ("This is a classic pocketbook injury sufficient to give [plaintiff] standing . . . . At this initial stage of the case, [plaintiff] need not definitively ...

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1. **Lujan v. Defenders of Wildlife**, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351, 1992 U.S. LEXIS 3543, 15 Immigr. Cas. Rep. A1-147, 60 U.S.L.W. 4495, 6 Fla. L. Weekly Fed. S 374, 92 Cal. Daily Op. Service 4985, 92 D.A.R. 7876, 92 D.A.R. 8967, 34 Env't Rep. Cas. (BNA) 1785, 22 Envtl. L. Rep. 20913

   Citing

   First Ref: 143 S. Ct. 1369 at p.1374
   Discussion: | **Court:** U.S. | **Date:** June 12, 1992

2. **Warth v. Seldin**, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343, 1975 U.S. LEXIS 76

   Citing

   First Ref: 143 S. Ct. 1369 at p.1374
   Discussion: | **Court:** U.S. | **Date:** June 25, 1975

3. **TransUnion LLC v. Ramirez**, 141 S. Ct. 2190, 210 L. Ed. 2d 568, 2021 U.S. LEXIS 3401, 28 Fla. L. Weekly Fed. S 1005, 2021 WL 2599472

   Citing

   First Ref: 143 S. Ct. 1369 at p.1374
   Discussion: | **Court:** U.S. | **Date:** June 25, 2021

4. **Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.**, 560 U.S. 702, 130 S. Ct. 2592, 177 L. Ed. 2d 184, 2010 U.S. LEXIS 4971, 78 U.S.L.W. 4578, 22 Fla. L. Weekly Fed. S 484, 70 Env't Rep. Cas. (BNA) 1505, 40 Envtl. L. Rep. 20160

   Citing

   First Ref: 143 S. Ct. 1369 at p.1375
   Discussion: | **Court:** U.S. | **Date:** June 17, 2010

5. **Jones v. Flowers**, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415, 2006 U.S. LEXIS 3451, 74 U.S.L.W. 4200, 19 Fla. L. Weekly Fed. S. 158

   Citing

   First Ref: 143 S. Ct. 1369 at p.1375
   Discussion: | **Court:** U.S. | **Date:** April 26, 2006

6. Phillips v. Washington Legal Found., 524 U.S. 156, 118 S. Ct. 1925, 141 L. Ed. 2d 174, 1998 U.S. LEXIS 4003, 66 U.S.L.W. 4468, 11 Fla. L. Weekly Fed. S 634, 98 Cal. Daily Op. Service 4563, 1998 Colo. J. C.A.R. 3102, 98 D.A.R. 6227

LB **Citing**

First Ref: 143 S. Ct. 1369 at p.1375
Discussion: | **Court:** U.S. | **Date:** June 15, 1998

7. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815, 1984 U.S. LEXIS 124, 52 U.S.L.W. 4886, 21 Env't Rep. Cas. (BNA) 1062, 14 Envtl. L. Rep. 20539

LB **Citing**

First Ref: 143 S. Ct. 1369 at p.1375
Discussion: | **Court:** U.S. | **Date:** June 26, 1984

8. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358, 1980 U.S. LEXIS 157, 49 U.S.L.W. 4033

LB **Citing**

First Ref: 143 S. Ct. 1369 at p.1375
Discussion: | **Court:** U.S. | **Date:** December 9, 1980

9. Armstrong v. United States, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554, 1960 U.S. LEXIS 1860

LB **Citing**

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10. United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, 1946 U.S. LEXIS 3008, 106 Ct. Cl. 854

LB **Citing**

First Ref: 143 S. Ct. 1369 at p.1375
Court: U.S. | **Date:** May 27, 1946

11. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S. Ct. 854, 79 L. Ed. 1593, 1935 U.S. LEXIS 1127, 2 Ohio Op. 537, 28 Am. B.R. (n.s.) 397, 97 A.L.R. 1106

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1375
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12. County of Mobile v. Kimball, 102 U.S. 691, 12 Otto 691, 26 L. Ed. 238, 1880 U.S. LEXIS 2080

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1375
Discussion: | **Court:** U.S. | **Date:** January 10, 1881

13. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517, 2002 U.S. LEXIS 3028, 70 U.S.L.W. 4260, 15 Fla. L. Weekly Fed. S 203, 2002 Cal. Daily Op. Service 3495, 54 Env't Rep. Cas. (BNA) 1129, 32 Envtl. L. Rep. 20627, 10 A.L.R. Fed. 2d 681

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1376
Discussion: | **Court:** U.S. | **Date:** April 23, 2002

14. Stead's Ex'rs v. Course, 8 U.S. 403, 4 Cranch 403, 2 L. Ed. 660, 1807 U.S. LEXIS 400

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1376
Discussion: | **Court:** U.S. | **Date:** March 14, 1807

15. Nelson v. New York, 352 U.S. 103, 77 S. Ct. 195, 1 L. Ed. 2d 171, 1956 U.S. LEXIS 34

Y **Distinguishing**
B **Explaining**

First Ref:143 S. Ct. 1369 at p.1378
Discussion: | **Court:** U.S. | **Date:** December 10, 1956

16. United States v. Lawton, 110 U.S. 146, 3 S. Ct. 545, 28 L. Ed. 100, 1884 U.S. LEXIS 1666, 19 Ct. Cl. 709

B **Explaining**

First Ref:143 S. Ct. 1369 at p.1378
Discussion: | **Court:** U.S. | **Date:** January 21, 1884

17. United States v. Taylor, 104 U.S. 216, 14 Otto 216, 26 L. Ed. 721, 1881 U.S. LEXIS 1993, 17 Ct. Cl. 427

B **Explaining**

First Ref:143 S. Ct. 1369 at p.1378
Discussion: | **Court:** U.S. | **Date:** December 5, 1881

18. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 210 L. Ed. 2d 369, 2021 U.S. LEXIS 3394, 28 Fla. L. Weekly Fed. S 960, 2021 WL 2557070

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1379
Discussion: | **Court:** U.S. | **Date:** June 23, 2021

19. Texaco, Inc. v. Short, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738, 1982 U.S. LEXIS 23, 50 U.S.L.W. 4117, 72 Oil & Gas Rep. 217

Y **Distinguishing**

First Ref:143 S. Ct. 1369 at p.1380
Discussion: | **Court:** U.S. | **Date:** January 12, 1982

20. Austin v. United States, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488, 1993 U.S. LEXIS 4407, 61 U.S.L.W. 4811, 7 Fla. L. Weekly Fed. S 572, 93 Cal. Daily Op. Service 4820, 93 D.A.R. 8138, 1994 A.M.C. 1206

B **Concurring opinion citing**

First Ref:143 S. Ct. 1369 at p.1381
Discussion: | **Court:** U.S. | **Date:** June 28, 1993

21. United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314, 1998 U.S. LEXIS 4172, 66 U.S.L.W. 4514, 11 Fla. L. Weekly Fed. S 662, 98 Cal. Daily Op. Service 4757, 1998 Colo. J. C.A.R. 3239, 98 D.A.R. 6736, 172 A.L.R. Fed. 705

B **Concurring opinion citing**

First Ref:143 S. Ct. 1369 at p.1382
Discussion: | **Court:** U.S. | **Date:** June 22, 1998

6th Circuit - Court of Appeals

22. Hall v. Meisner, 51 F.4th 185, 2022 U.S. App. LEXIS 28474, 2022 FED App. 226P (6th Cir.), 2022 FED App. 0226P, 2022 WL 7366694

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1375

Discussion: | **Court:** 6th Cir. Mich. | **Date:** October 13, 2022

8th Circuit - Court of Appeals

23. Tyler v. Hennepin Cty., 26 F.4th 789, 2022 U.S. App. LEXIS 4207, 2022 WL 468801

LB **Citing**

Discussion: | **Court:** 8th Cir. Minn. | **Date:** February 16, 2022

8th Circuit - U.S. District Courts

24. Tyler v. Hennepin Cty., 505 F. Supp. 3d 879, 2020 U.S. Dist. LEXIS 228081, 2020 WL 7129894

B **Concurring opinion citing**

First Ref:143 S. Ct. 1369 at p.1374

Discussion: | **Court:** Dist. Minn. | **Date:** December 4, 2020

Indiana Supreme Court

25. O'Brien v. Coulter, 2 Blackf. 421, 1831 Ind. LEXIS 12

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1377

Discussion: | **Court:** Indiana Supreme Court | **Date:** November 8, 1831

Minnesota Supreme Court

26. Farnham v. Jones, 32 Minn. 7, 19 N.W. 83, 1884 Minn. LEXIS 73

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1376

Discussion: | **Court:** Minn. | **Date:** April 2, 1884

27. Kureger v. Market, 124 Minn. 393, 145 N.W. 30, 1914 Minn. LEXIS 539

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1380

Discussion: | **Court:** Minn. | **Date:** January 23, 1914

28. Rowe v. Minneapolis, 49 Minn. 148, 51 N.W. 907, 1892 Minn. LEXIS 151

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1380

Discussion: | **Court:** Minn. | **Date:** March 23, 1892

Minnesota Court of Appeals

29. County of Blue Earth v. Turtle, 593 N.W.2d 258, 1999 Minn. App. LEXIS 491, 3 No. 18 Minn. Lawyer 29

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1374
Discussion: | **Court:** Minn. Ct. App. | **Date:** May 4, 1999

30. City of St. Paul by Housing & Redevelopment Auth. v. St. Anthony Flats Ltd. Partnership, 517 N.W.2d 58, 1994 Minn. App. LEXIS 495

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1375
Discussion: | **Court:** Minn. Ct. App. | **Date:** May 31, 1994

Mississippi Supreme Court

31. Griffin v. Mixon, 38 Miss. 424, 1860 Miss. LEXIS 16

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1377
Discussion: | **Court:** Miss. | **Date:** April 1, 1860

New York Supreme Court App. Div.

32. In re Foreclosure of Tax Liens, 1 A.D.2d 895, 149 N.Y.S.2d 679, 1956 N.Y. App. Div. LEXIS 6115

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1379
Discussion: | **Court:** N.Y. App. Div. 2d Dep't | **Date:** March 12, 1956

Virginia Supreme Court

33. Martin v. Snowden, 59 Va. 100, 18 Gratt. 100, 1868 Va. LEXIS 6

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1377
Discussion: | **Court:** Va. | **Date:** 1868

West Virginia Supreme Ct. of Appeals

34. McClure v. Matiland, 24 W. Va. 561, 1884 W. Va. LEXIS 83

LB **Citing**

First Ref:143 S. Ct. 1369 at p.1377
Discussion: | **Court:** W. Va. | **Date:** September 20, 1884

Legend

	Warning - Negative Treatment is Indicated	R	Red - Warning Level Phrase
Q	Questioned - Validity questioned by citing references	O	Orange - Questioned Level Phrase
	Caution - Possible negative treatment	Y	Yellow - Caution Level Phrase
	Positive - Positive treatment is indicated	G	Green - Positive Level Phrase
A	Analysis - Citing Refs. With Analysis Available	B	Blue - Neutral Level Phrase
I	Cited - Citation information available	LB	Light Blue - No Analysis Phrase
	Warning - Negative case treatment is indicated for statute		

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Youth Part Removals, Including AO's and JO's

Faith Lovell, Esq.
David S. Meffert, Esq.

New York Official Reports

--- N.Y.S.3d ----, 2024 WL 186677 (N.Y.A.D. 3 Dept.), 2024 N.Y. Slip Op. 00212

***1** In the Matter of Lucas Y., Alleged to be a Juvenile Delinquent. Columbia County Attorney, Respondent; Lucas Y., Appellant.

OPINION

Supreme Court, Appellate Division, Third Department, New York
535227
Decided and Entered:January 18, 2024
Calendar Date:December 13, 2023

Before:Garry, P.J., Lynch, Reynolds Fitzgerald, McShan and Mackey, JJ.

APPEARANCES OF COUNSEL

Mitchell S. Kessler, Cohoes, for appellant.
William J. Better, PC, Kinderhook (Veronica S. Concra of counsel), for respondent.

Mackey, J.

Appeal from an order of the Family Court of Columbia County (Jonathan D. Nichols, J.), entered April 12, 2022, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 3, to adjudicate respondent a juvenile delinquent.

Following a fact-finding hearing, at which the victim provided sworn testimony, Family Court determined that respondent had committed acts that, if committed by an adult, would have constituted the crimes of criminal sexual act in the third degree and sexual misconduct (Penal Law §§ 130.20 [2]; 130.40 [3]). The court adjudicated respondent a juvenile delinquent and placed him on probation for a period of 18 months, subject to various terms and conditions, and entered an order of protection in favor of the victim. This appeal by respondent ensued.

Initially, we reject respondent's claim that Family Court lacked jurisdiction to adjudicate him a juvenile delinquent. The charges set forth in the petition were offenses over which Family Court had original jurisdiction (*see* Family Ct Act §§ 301.2 [1] [a]; 302.1; *Matter of Trevon Y.*, 81 AD3d 841, 841 [2d Dept 2011]). Although a felony complaint accusing respondent of criminal sexual act in the third degree concerning the same incident had previously been filed in County Court, both the People and respondent had consented on the record to remove the case to Family Court, prior to the Family Court petition being filed, and County Court (Nichols, J.) directed such removal on the record. Although an order of removal was not signed until sometime thereafter, the prosecution in County Court was effectively terminated prior to the Family Court petition being filed (*see* Family Ct Act § 311.1 [7]; CPL 722.21 [1]; 725.00 *et seq.*). [1]

Contrary to respondent's further contention, the juvenile delinquency petition filed by petitioner was not jurisdictionally defective. Pursuant to Family Ct Act § 311.2, "to be facially sufficient, a juvenile delinquency petition must contain nonhearsay allegations establishing every element of each crime charged and the respondent's commission thereof" (*Matter of Tashawn MM.*, 218 AD3d 906, 907 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; *see Matter of Michael DD.*, 33 AD3d 1185, 1186 [3d Dept 2006]) and comply with the requirements of Family Ct Act § 311.1. The Court of Appeals has held that a prosecuting agency may supplement the removal order and accompanying papers with a supporting deposition in order to satisfy the requirement of Family Ct Act § 311.2 (3) that a petition be supported by nonhearsay allegations establishing, if true, every element of each charged crime (*see Matter of Michael M.*, 3 NY3d 441, 448 [2004]). Here, the victim's supporting deposition satisfied the requirements of Family Ct Act § 311.2 (*see id.*).

We also find no merit in respondent's contention that his statutory right to a speedy fact-finding hearing was violated (*see* Family Ct Act § 340.1 [2]; ***2** *Matter of Zachary L.*, 218 AD3d 867, 869-870 [3d Dept 2023]). [2] The record shows that respondent expressly and unconditionally waived his right to challenge the adjournments of the fact-finding hearing past the statutory 60-day period. In light of that waiver, respondent "cannot now be heard to complain" (*Matter of Ryan LL.*, 119 AD3d 994, 995 [3d Dept 2014] [internal quotation marks and citation omitted], *lv denied* 25 NY3d 904 [2015]; *see Matter of Willie E.*, 88 NY2d 205, 209-210 [1996]; *Matter of Daniel B.*, 129 AD3d 1152, 1153 [3d Dept 2015], *lv denied* 25 NY3d 914 [2015]; *Matter of Joseph CC.*, 234 AD2d 852,

853-854 [3d Dept 1996]; *see also Matter of Michael DD.*, 33 AD3d at 1186).

Respondent also contends that Family Court's determination is against the weight of the evidence. "When presented with a weight of the evidence argument in a case, such as this one, where a different determination would not have been unreasonable, we view the evidence in a neutral light while according deference to the credibility determinations of Family Court" (*Matter of Alexander CC.*, 191 AD3d 1113, 1115 [3d Dept 2021] [internal quotation marks and citations omitted]). As relevant here, "[a] person is guilty of criminal sexual act in the third degree when . . . [h]e or she engages in . . . anal sexual conduct with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent" (Penal Law § 130.40 [3]). "A person is guilty of sexual misconduct when . . . [h]e or she engages in . . . anal sexual conduct with another person without such person's consent" (Penal Law § 130.20 [2]).

The victim testified that on the evening in question, she visited respondent at his home and agreed to engage in vaginal intercourse. While the victim and respondent were engaging in vaginal intercourse, respondent inserted his penis into the victim's anus. The victim testified that she told respondent to "please stop" because it hurt and that if it happened again, they were done having sex. According to the victim, respondent proceeded to insert his penis into her anus on two more occasions after she told him she did not want to participate in anal intercourse. She further testified that she was unable to stop him because he overpowered her, and he only stopped when he saw that there was feces and blood on his body and bedding. The victim testified that after she left respondent's home, she called her cousin and told her what had happened.[3] The victim also testified that she thereafter blocked respondent on all social media accounts except "iMessage" in order to retrieve a necklace she left at his house. During this communication to retrieve her necklace, respondent asked the victim to delete all messages from the evening of the incident, which she did. She testified that she eventually reported the incident to her school counselor and that she did not speak up sooner because she feared what people might think.

Although a different determination would not have ***3** been unreasonable in light of the fact that the allegations rested entirely on an assessment of the victim's credibility, having considered the evidence and giving deference to Family Court's credibility determinations, we are satisfied that the determination is supported by the weight of the evidence (*see Matter of Alexander CC.*, 191 AD3d at 1115-1116; *Matter of Devin Z.*, 91 AD3d 1035, 1036 [3d Dept 2012]; *Matter of Gordon B.*, 83 AD3d 1164, 1167 [3d Dept 2011], *lv denied* 17 NY3d 710 [2011]; *Matter of Jared WW.*, 56 AD3d 1009, 1010-1011 [3d Dept 2008]). The victim testified that respondent forcefully subjected her to anal intercourse without her consent, which supports both criminal sexual act in the third degree and sexual misconduct (*see* Penal Law §§ 130.20 [2]; 130.40 [3]). Although respondent is correct that there was no physical evidence supporting his commissions of the act, neither statute requires such evidence (*see* Penal Law §§ 130.20 [2]; 130.40 [3]). Simply stated, Family Court was in the best position to assess the victim's credibility, as it saw and heard her testimony firsthand (*see Matter of Paul QQ.*, 256 AD2d 751, 751 [3d Dept 1998]).

As a final matter, we reject respondent's contention that he received ineffective assistance of counsel. The record reflects that he certainly received meaningful representation throughout the proceeding. In that regard, any objection predicated upon improper procedure, violation of respondent's speedy-trial right or lack of adjustment services would have had little to no chance of success (*see Matter of Bernard K.*, 280 AD2d 728, 729 [3d Dept 2001]). Respondent's counsel was prepared at every conference, was aware of the speedy-trial time limitations and appropriately waived such rights and zealously defended respondent at the fact-finding hearing by cross-examining the victim, eliciting inconsistencies and objecting when necessary (*see Matter of Alexander CC.*, 191 AD3d at 1117). Viewed in the totality, respondent was provided with meaningful representation (*see id.* at 1116-1117; *Matter of Michael DD.*, 33 AD3d at 1186; *Matter of Gregory AA.*, 20 AD3d 726, 726-727 [3d Dept 2005]; *Matter of Bernard K.*, 280 AD2d at 729). Respondent's remaining contentions, to the extent not specifically addressed, have been examined and found to be lacking in merit.

Garry, P.J., Lynch, Reynolds Fitzgerald and McShan, JJ., concur.

ORDERED that the order is affirmed, without costs.

FOOTNOTES

Footnotes

1 Indeed, County Court stated on the record that "[t]his matter will be discontinued as a criminal matter, and it will now be handled as a juvenile delinquency matter in [F]amily [C]ourt."

2 At no time during the proceedings was respondent held in detention.

3 The cousin testified that the victim called her on the evening of the incident and relayed that she was penetrated anally against her consent.

New York
Official Reports

212 A.D.3d 615, 181 N.Y.S.3d 323, 2023 N.Y. Slip Op. 00085

****1** In the Matter of Omar G., a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division, Second Department, New York
2022-01745, 2022-01746, D-1409-2020
January 11, 2023

CITE TITLE AS: Matter of Omar G.

HEADNOTES

Crimes
Evidence
Excited Utterances—911 Emergency Recording

Crimes
Evidence
Excited Utterances—Admission of Video Recording of Non-Spontaneous Statements Subsequent to 911 Call Made by Mother while Being Interviewed by Police Officers in Her Apartment Not Harmless Error

Austin I. Idehen, Jamaica, NY, for appellant.
Sylvia O. Hinds-Radix, Corporation Counsel, New York, NY (Jane L. Gordon and Deborah E. Wassel of counsel), for respondent.

In a juvenile delinquency proceeding pursuant to Family Court Act article 3, Omar G. appeals from (1) an order of fact-finding of the Family Court, Kings County (Alan Beckoff, J.), dated January 21, 2022, and (2) an order of disposition of the same court dated March 9, 2022. The order of fact-finding, after a hearing, found that the appellant committed acts which, ***616** if committed by an adult, would constitute the crimes of criminal possession of a weapon in the second degree, criminal possession of a firearm, endangering the welfare of a child, and obstructing governmental administration in the second degree. The order of disposition, insofar as appealed from, upon the order of fact-finding and after a hearing, adjudicated the appellant a juvenile delinquent.

Ordered that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as that order was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

Ordered that the order of disposition is modified, on the law, by deleting the provision thereof adjudicating the appellant a juvenile delinquent based upon the finding that he committed an act which, if committed by an adult, would have constituted the crime of criminal possession of a weapon in the second degree; as so modified, the order of disposition is affirmed insofar as appealed from, without costs or disbursements, the order of fact-finding is modified accordingly, and the matter is remitted to the Family Court, Kings County, for a new fact-finding hearing on the count of the petition charging criminal possession of a weapon in the second degree.

The appellant, an adolescent offender (*see* CPL 1.20 [44]), was charged in the Criminal Court with criminal possession of a weapon in the second degree, among other offenses, based on an incident during which he brandished a gun in the presence of his mother, his nine-year-old brother, and the appellant's infant daughter in the family's apartment. This juvenile delinquency proceeding was initiated by the removal of the criminal action from the Criminal Court to the Family Court pursuant to Criminal Procedure Law article 725 (*see* Family Ct Act § 311.1 [7]).

At a fact-finding hearing in the Family Court, a recording of the call placed by the mother to the 911 emergency number during the incident was admitted into evidence under the ****2** excited utterance exception to the hearsay rule. During this call, the mother told the 911 operator, in an anxious tone and without being prompted, that "I need police. . . . My son's got a gun and he's waving it. . . . I have kids in the house." She indicated that she needed to return to the apartment, which she had left in order to make the call.

The Family Court also admitted into evidence, again under the excited utterance exception, a video recording of a statement made by the mother during questioning by police officers ***617** in the apartment after the appellant had been arrested and taken to a police station, and permitted a police officer to testify as to the contents of the mother's statement. While being interviewed by police officers, the mother recounted to the police officers that the appellant, while displaying a gun, said to her "I will boom you," and also said that he would "boom" the mother's boyfriend.

After the fact-finding hearing and a dispositional hearing, the Family Court, inter alia, found that the appellant committed acts which, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the second degree, criminal possession of a firearm, endangering the welfare of a child, and obstructing governmental administration in the second degree, and adjudicated him a juvenile delinquent. This appeal ensued.

The appellant has cited no authority that supports his contention that the petition must be dismissed in its entirety because the Family Court was divested of jurisdiction when the presentment agency filed a superseding petition that added a count alleging conduct that would constitute attempted criminal possession of a weapon in the second degree. To the extent that it was improper to add the new count since it charged conduct for which the appellant could be held criminally responsible and the Family Court therefore had no original jurisdiction over that count (*see Matter of Raymond G.*, 93 NY2d 531 [1999]), the appropriate remedy would be dismissal of the improperly added count (*see Matter of Elizabeth R.*, 243 AD2d 427, 427-428, 429 [1997], *affd* 93 NY2d 531 [1999]). Since no finding adverse to the appellant was made with respect to the count alleging conduct that would constitute attempted criminal possession of a weapon in the second degree, no remedial action is warranted.

Contrary to the appellant's contention, the recording of the mother's 911 call fell within the excited utterance exception to the rule against

hearsay. The mother made the call immediately after a startling and disturbing event, while she was still concerned for the safety of the two children in the apartment, and her demeanor indicated that the statements represented "impulsive and unreflecting responses" to the startling event (*People v Caviness*, 38 NY2d 227, 231 [1975]; *see People v Thomas*, 187 AD3d 949, 950 [2020]; *People v Jaber*, 172 AD3d 1227, 1230 [2019]).

The Family Court erred, however, in admitting as excited utterances the statements subsequently made by the mother while being interviewed by police officers in her apartment. ***618** Those statements, made after the appellant had been handcuffed and removed from the scene, were not spontaneous, but were made in narrative form and in response to prompting, after sufficient time had passed to render the mother capable of engaging in reasoned reflection (*see People v Johnson*, 1 NY3d 302, 306-307 [2003]; *People v Leach*, 137 AD3d 1300, 1300-1301 [2016]). Although the mother raised her voice and became agitated as she recalled the incident, she was no longer acting under the stress of the incident itself, and her tone "did not evidence an inability to reflect upon the events" (*People v Cantave*, 21 NY3d 374, 382 [2013]).

While the error in admitting the mother's out-of-court statements that the appellant threatened to "boom" her and her boyfriend had no apparent effect on the Family Court's findings as to the counts charging criminal possession of a firearm, endangering the welfare of a child, and obstructing governmental administration in the second degree, those statements supplied proof of the appellant's intent to use the gun unlawfully against another (*see* Penal Law § 265.03 [1]). Thus, the error in admitting those statements was not harmless with respect to the charge of criminal possession of a weapon in the second degree, and the presentment agency does not argue otherwise.

The appellant's remaining contentions are without merit.

****3** Accordingly, the appellant is entitled to a new fact-finding hearing on the count of the petition charging criminal possession of a weapon in the second degree. Connolly, J.P., Wooten, Zayas and Wan, JJ., concur.

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New York
Official Reports

93 N.Y.2d 531, 715 N.E.2d 486, 693
N.Y.S.2d 482, 1999 N.Y. Slip Op. 05336

In the Matter of Raymond
G., a Person Alleged to be a
Juvenile Delinquent, Respondent.
Presentment Agency, Appellant.

Court of Appeals of New York
118
Argued May 6, 1999;
Decided June 10, 1999

CITE TITLE AS: Matter of Raymond G.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered October 30, 1997, which (1) reversed, on the law, an order of the Family Court, New York County (Judith B. Sheindlin, J.), adjudicating respondent a juvenile delinquent upon a finding that respondent committed acts which, if committed by an adult, would constitute the crime of assault in the second degree, and (2) dismissed the petition. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of the [Family] Court, properly made?"

Matter of Raymond G., 243 AD2d 427, affirmed.

HEADNOTES

Courts
Family Court
Lack of Original Jurisdiction over Acts for Which Juvenile Subject to Criminal Prosecution

(1) Family Court's jurisdiction over acts for which a juvenile can be held criminally responsible is limited to transferrals where prosecution was commenced in a criminal court and thereafter was removed to Family Court, since the Legislature, in 1978 in response to a perceived epidemic of violent criminal conduct by juveniles, divested the Family Court of original jurisdiction over several serious acts committed by 13, 14 and 15 year olds in favor of original jurisdiction in the adult criminal justice system. The statutory scheme eliminated Family Court's original jurisdiction for persons under the age of 16 who, having been deprived of an infancy defense (*see,* Family Ct Act § 301.2 [1]; Penal Law § 30.00 [2]), can be held criminally responsible for their actions. Accordingly, in a juvenile delinquency proceeding arising out of respondent's alleged participation in an attack on three individuals at a subway station in which he was charged with multiple counts of assault in varying degrees, the highest being two counts of assault in the first degree, respondent had no infancy defense under section 30.00 (2) and thus, initially could be held criminally responsible. As a result, Family Court had no jurisdiction over him unless and until he were to become "the defendant in an action ordered removed from a criminal court to the family court" pursuant to section 301.2 (1) (b).

Courts
Family Court
Lack of Original Jurisdiction over Acts for Which Juvenile Subject to Criminal Prosecution--Divestiture of Concurrent Jurisdiction

(2) Family Court's jurisdiction over acts for which a juvenile can be held criminally responsible is limited to transferrals where prosecution was commenced ***532** in a criminal court and thereafter was removed to Family Court, since the Legislature, in 1978 divested the Family Court of original jurisdiction over several serious acts committed by 13, 14 and 15 year olds in favor of original jurisdiction in the adult criminal justice system. Although Penal Law § 30.00 (3) still makes infancy a defense in most criminal prosecutions, the legislative scheme did not preserve concurrent original jurisdiction over juvenile offenders in Family Court. While that subdivision states that "lack of criminal responsibility by reason of infancy, *as defined in this section,* is a defense" (emphasis supplied), subdivision (2) thereof eliminates the defense of infancy for certain enumerated offenses. Moreover, although the Legislature left intact the definition of "designated felony acts" in article 3 of the Family Court Act, it cannot be said that the Family Court has retained concurrent original jurisdiction over juveniles charged with first degree assault; while there is an overlap between juvenile offender crimes and designated felony acts, there are a number of designated felony acts which are not also juvenile offenses. Therefore, as to those offenses that are designated felony acts but do not give rise to juvenile offender status, Family Court's original jurisdiction had to be retained because the defense of infancy is still available to youths charged with those offenses, and in the event of removal, Family Court will have jurisdiction to consider all of the counts charged against the youth, including those over which it lacked original jurisdiction.

Courts
Family Court
Lack of Original Jurisdiction over Acts for Which Juvenile Subject to Criminal Prosecution--Prosecutorial Discretion

(3) Family Court's jurisdiction over acts for which a juvenile can be held criminally responsible is limited to transferrals where prosecution was commenced in a criminal court and thereafter was removed to Family Court, since the Legislature, in 1978 in response to a perceived epidemic of violent criminal conduct by juveniles, divested the Family Court of original jurisdiction over several serious acts committed by 13, 14 and 15 year olds in favor of original jurisdiction in the adult criminal justice system. It cannot be said that Family Court retains concurrent original jurisdiction over juvenile offenders charged with serious acts since that would confer upon the prosecutor a discretion not authorized by the statutory scheme. So long as there is an extant charge pending against a defendant under the age of 16 for which that youth may be held criminally responsible, a transfer to Family Court may not be effected unless a criminal court reviews the case and

finds removal to be within the interests of justice. Thus, to permit, at the election of the District Attorney, a juvenile offender to be charged originally in Family Court would circumvent the legislative directive to have juvenile offenses criminally prosecuted except in those instances where a court finds removal appropriate.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 34, 36, 37, 39, 43.

Carmody-Wait 2d, Courts and Their Jurisdiction §§ 2:125-2:127; Proceedings Involving Abused and Neglected Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:144, 119A:151. ***533**

McKinney's, Family Ct Act § 301.2 (1); Penal Law § 30.00 (2), (3).

NY Jur 2d, Criminal Law, §§ 966-969; Domestic Relations, § 1331.

ANNOTATION REFERENCES

See ALR Index under Juvenile Courts and Delinquent Children.

POINTS OF COUNSEL

Michael D. Hess, Corporation Counsel of New York City (*Sharyn Rootenberg* and *Larry A. Sonnenshein* of counsel), for appellant.
Where a 13, 14, or 15-year-old juvenile has committed a statutorily targeted and enumerated offense, the Family and Criminal Court systems share concurrent original jurisdiction to preside over proceedings against that class of juveniles. (*Matter of Meleick H.*, 170 Misc 2d 230, 238 AD2d 339, 90 NY2d 805; *People v Murphy,* 128 AD2d 177; *Matter of Hassan v Magistrates' Ct. of City of N. Y.,* 20 Misc 2d 509, 10 AD2d 908, 8 NY2d 750, 364 US 844; *Ivey v State of New York,* 80 NY2d 474; *Matter of Elizabeth R.,* 169 Misc 2d 58, 243 AD2d 427, 92 NY2d 843; *Matter of Nick C.,* 172 Misc 2d 739; *Matter of Steven L.,* 101 Misc 2d 320; *Matter of Consolidated Edison Co. v Department of Envtl. Conservation,* 71 NY2d 186; *People v Newman,* 32 NY2d 379, 414 US 1163; *Alweis v Evans,* 69 NY2d 199.)
Lawrence Katz, New York City, for respondent.
The Family Court does not have jurisdiction over acts which must be charged as crimes. (*Matter of Vega v Bell,* 47 NY2d 543; *Matter of Meleick H.,* 170 Misc 2d 230; *Rodriguez v Myerson,* 69 AD2d 162.)

OPINION OF THE COURT

Levine, J.

In 1996, after allegedly participating in an attack against three individuals at a subway station, then 15-year-old respondent Raymond G. was charged with delinquency for multiple counts of assault in varying degrees, the highest being two counts of assault in the first degree (Penal Law § 120.10 [1], [2]), in a designated felony act petition filed in Family Court (*see,* Family Ct Act § 311.1 [5]). Respondent moved to dismiss the top counts on the ground that Family Court lacks original ***534** jurisdiction over acts for which a juvenile could be subject to criminal prosecution.

Family Court denied respondent's motion and asserted jurisdiction. During the fact-finding hearing, respondent admitted to acts which if committed by an adult would constitute assault in the second degree. He was adjudicated a juvenile delinquent and placed in a limited secure facility for up to 18 months. On respondent's appeal, the Appellate Division reversed Family Court's order of disposition and dismissed the petition, holding that, absent an order of removal from a criminal court pursuant to CPL article 725, Family Court lacked jurisdiction over offenses for which a juvenile could be held criminally responsible. The court also granted dismissal of the remaining counts of the petition on speedy hearing grounds (*see,* Family Ct Act § 340.1). The Appellate Division granted petitioner presentment agency leave to appeal upon the certified question of whether its order reversing the order of Family Court was properly made.

(1) We now affirm, concluding that Family Court's jurisdiction over acts for which a juvenile can be held criminally responsible is limited to transferrals where prosecution was commenced in a criminal court and thereafter was removed to Family Court. Thus, respondent was entitled to dismissal of the first degree assault counts of the petition. The presentment agency does not independently challenge the Appellate Division's consequent conclusion that, with the assault in the first degree counts dismissed, respondent was denied his right to a speedy hearing on the remaining counts under Family Court Act § 340.1 (1).

Now and since its inception, Family Court has possessed "exclusive original jurisdiction over any proceeding to determine whether a person is a juvenile delinquent" (Family Ct Act § 302.1 [1]; *see,* Family Ct Act former § 713, added by L 1962, ch 686; *see also,* NY Const, art VI, § 13 [b]; Family Ct Act § 115 [a] [vi]). Until 1978, a juvenile delinquent was defined as a "person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime" (Family Ct Act § 712 [former (a)]; L 1978, ch 481, § 47). Thus, had this offense been committed prior to 1978, respondent, who was 15 years old at the time of commission, unquestionably would have been subject to the original and exclusive jurisdiction of Family Court.

In reaction to a perceived epidemic of violent criminal conduct by juveniles, however, in 1978 the Legislature ***535** " 'criminalized' several serious acts committed by thirteen-, fourteen-, and fifteen-year-old youths" (Besharov and Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 301.2, at 25). Thus, the Legislature divested the Family Court of original jurisdiction over such acts in favor of original jurisdiction in the adult criminal justice system (*see,* Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 10.00, at 24 [for certain crimes, 13, 14 and 15 year olds are subjected to "prosecution in a criminal court *rather than* to a proceeding in the Family Court" (emphasis supplied)]; Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 180.75, at 167 [referring to the youths who, after the 1978 amendments "would be dealt with by the adult system *rather than* in Family Court" (emphasis supplied)]; Bellacosa, Practice Commentary, McKinney's Cons Laws of NY, Book 11A

[1982 ed], CPL 180.75, at 165 [pertinent 1978 amendments to the CPL were added as "part of a detailed legislative scheme to *transfer* responsibility for the most violent juveniles from Family to Criminal Courts" (emphasis supplied)]).

The statutory means chosen by the Legislature to execute the task of "criminalizing" certain juvenile offenses through divestiture of Family Court original jurisdiction began with creating a class of "juvenile offenders" consisting of 15, 14, and in a few instances, 13 year olds who are accused of committing any of a number of specifically named serious violent felonies (*see,* Penal Law § 10.00 [18]; CPL 1.20 [42]). Next, the Legislature provided for the divestiture of Family Court's original jurisdiction over these juvenile offenders by recasting the Family Court Act definition of juvenile delinquent to exclude them, while at the same time making correlative revisions to the Penal Law to render juvenile offenders subject to criminal prosecution (L 1978, ch 481, §§ 28, 47).

As revised, "juvenile delinquent" is defined as "a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult, (a) *is not criminally responsible for such conduct by reason of infancy,* or (b) *is the defendant in an action ordered removed from a criminal court* to the family court pursuant to article seven hundred twenty-five of the criminal procedure law" (Family Ct Act § 301.2 [1] [emphasis supplied]). To complement the new definition of juvenile delinquent, Penal Law § 30.00, the infancy defense, was amended to expressly exclude the availability of the defense to juvenile offenders ***536** (*see,* Penal Law § 30.00 [2], as amended by L 1978, ch 481, § 28). Thus, Family Court's *original* jurisdiction was eliminated for persons under the age of 16 who, having been deprived of an infancy defense, can be held criminally responsible for their actions.

Here, respondent had no infancy defense under Penal Law § 30.00 (2) and thus, initially could be held criminally responsible for the alleged assault. As a result, Family Court has no jurisdiction over respondent unless and until he were to become "the defendant in an action ordered removed from a criminal court to the family court" (Family Ct Act § 301.2 [1] [b]).

This Court addressed the impact of the 1978 amendments to the Family Court Act in *Matter of Vega v Bell* (47 NY2d 543, 551):

"All youngsters over a certain age who are accused of certain criminal activities are now *automatically* prosecuted within the adult criminal justice system unless there exist certain special circumstances warranting more lenient treatment and *transfer* to the Family Court" (emphasis supplied).

We recognized in *Matter of Vega v Bell* that the 1978 Legislature had decided that subjecting certain juveniles to criminal prosecution was "necessary to control violent juvenile crime in the face of what was considered to be the failure of the traditional means of treating that problem" (*id.,* at 548). Thus, consistent with the legislative goal that juvenile offenders will, as a general rule, be prosecuted as adults, Family Court does not have jurisdiction over such youths except where the juvenile offender's

case has been removed from a criminal court to Family Court.

(2) The presentment agency nevertheless argues that the legislative scheme preserves concurrent original jurisdiction over juvenile offenders in Family Court and, thus, the District Attorney has the discretion to authorize initial prosecution in that court. Its argument is two-fold. First, it contends that respondent fits within the amended definition of "juvenile delinquent" because Penal Law § 30.00 (3) still makes infancy a defense in *any* criminal prosecution. That section provides "[i]n any prosecution for an offense, lack of criminal responsibility by reason of infancy, *as defined in this section,* is a defense" (Penal Law § 30.00 [3] [emphasis supplied]). The presentment agency's argument wholly ignores the above-emphasized words, in that subdivision (2) of section 30.00 expressly eliminates the defense of infancy for all juvenile offenders. ***537**

Second, the presentment agency relies heavily on the fact that the 1978 Legislature, when providing that certain juveniles would be subject to criminal prosecution, left intact the definition of "designated felony acts" in article 3 of the Family Court Act--a definition which includes first degree assault and the other acts that are now subject to criminal prosecution (Family Ct Act § 301.2 [8]). Designated felony acts are a subset of juvenile delinquency, created by the Legislature in 1976 (L 1976, ch 878). There were no new jurisdictional prerequisites added to the Family Court Act in relation to this amendment because the purpose of creating the designated felony acts category was primarily to authorize more stringent sanctions by way of a lengthier, more secure placement (*see, e.g.,* Family Ct Act §§ 353.5, 355.3; *see also,* Besharov and Sobie, *op. cit.,* at 27). Essentially, the presentment agency argues that because the Legislature did not eliminate those offenses which are now subject to criminal prosecution from the definition of designated felony acts, it necessarily left original jurisdiction over those offenses in Family Court.

The presentment agency's reliance on the designated felony act provisions of the Family Court Act is misplaced. The continued inclusion of those provisions of Family Court Act article 3 concerning designated felony acts does not support the conclusion that Family Court has retained concurrent *original* jurisdiction over juvenile offenders such as respondent. First, while there is an overlap between juvenile offender crimes and designated felony acts, there are a number of designated felony acts which are not also juvenile offenses (*compare,* Family Ct Act § 301.2 [8] [including, *inter alia,* second degree assault in some instances, and first degree kidnapping and first degree arson when committed by a 13 year old], *with* CPL 1.20 [42]; Penal Law § 10.00 [18]; § 30.00 [2] [not including second degree assault under any circumstances and limiting criminal prosecutions of 13 year olds to murder cases]). Obviously then, as to those offenses that are designated felony acts but do not give rise to juvenile offender status, Family Court's original jurisdiction had to be retained because the defense of infancy is still available to youths charged with those offenses.

Second, in the event a juvenile offender's case is removed to Family Court from a criminal court,

Family Court has jurisdiction to consider all of the counts charged against the youth, including those designated felony acts over which Family Court lacked original jurisdiction. Thus, the provisions in ***538** article 3 of the Family Court Act for disposition of designated felony acts had to remain intact in order to subject the transferee to the restrictive placements provided for therein.

(3) In addition to being contrary to the clear language of the statutes and the evident legislative intent to divest Family Court of original jurisdiction over juvenile offenders, the presentment agency's theory of concurrent jurisdiction would confer upon the prosecutor a discretion not authorized by the statutory scheme. So long as there is an extant charge pending against a defendant under the age of 16 for which that youth may be held criminally responsible, a transfer to Family Court may not be effected unless a criminal court reviews the case and finds removal to be within "the interests of justice" (*see,* CPL 180.75 [4]; 210.43 [1]; 220.10 [5] [g] [iii]; 330.25 [3]; *cf.,* CPL 190.71 [removal authorized where Grand Jury fails to indict the juvenile on any offense for which criminal liability may be imposed]; CPL 310.85 [3] [removal necessary where verdict of guilty is returned only on a charge for which the juvenile defendant is not criminally responsible]). Thus, the presentment agency's position that, at the election of the District Attorney, a juvenile offender can be charged originally in Family Court, would circumvent the legislative directive to have juvenile offenses criminally prosecuted except in those instances where a court finds removal appropriate.

Accordingly, the order of the Appellate Division should be affirmed, without costs, and the certified question not answered as unnecessary given the fact that the Appellate Division order dismissing the petition was final.

Chief Judge Kaye and Judges Bellacosa, Smith, Ciparick, Wesley and Rosenblatt concur.
Order affirmed, without costs. Certified question not answered upon the ground that it is unnecessary. ***539**

New York Official Reports

Unreported Disposition
Slip Copy, 2024 WL 2266307
(Table), 2024 N.Y. Slip Op. 50582(U)

***1** The People of the State of New York,

v.

A.M., Defendant.

County Court, Putnam County
Docket No. FYC-70048-24
Decided on May 14, 2024

Digest-Index Classification:Infants--Adolescent Offenders--Transfer from Youth Part to Family Court--People's motion to prevent removal of second-degree assault prosecution to Family Court was denied upon failure to establish extraordinary circumstances after weighing aggravating and mitigating factors

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OPINION OF THE COURT

Anthony R. Molé, J.

The following papers were read and considered on the motion made by the People of the State of New York, pursuant to CPL 722.23 (1), for an order preventing removal of this action to the Family Court, Putnam County:

Motion Papers:

Affirmation in Support of ADA Breanne M. Smith (dated March 26, 2024); Unmarked Exhibit Attachments

Reply to Motion by Defense Counsel Christopher York, Esq. (dated March 29, 2024)

Upon review of the foregoing papers and the court file, the Court finds and determines the following:

In 2017, the New York State Legislature enacted the "Raise the Age Law," which defines a 16-or 17-year-old who was charged with a felony committed on or after October 1, 2018, or October 1, 2019, respectively, as an "adolescent offender" (CPL 1.20 [44]; *see* Penal Law § 30.00 [1], [3] [a]). The Raise the Age Law created a youth part of Superior or Supreme Court to decide on the proper forum for such prosecutions (*see* CPL 722.10 [1]) -- thus bringing this case before the undersigned as the presiding judge of the Youth Part.

I. *Procedural History and Background*

Defendant, an adolescent offender ("AO"), is currently 17 years old (born 2006). He is charged by felony complaint with assault in the second degree in violation of Penal Law § 120.05 (2), a class D felony (a violent felony). The AO was arraigned in the Youth Part on February 27, 2024, [1] when he entered a plea of not guilty and was released on his own recognizance. Subsequently, the AO waived the six-day felony hearing.

Although the AO is charged with a violent felony, the facts as delineated do not meet any of the three prongs as enumerated in CPL 722.23 (2). Because none of the aggravating factors enumerated in CPL 722.23 (2) exist here, the People indicated that they would make a written motion to prevent removal based on the existence of "extraordinary circumstances" sufficient to override the preference for removal to family court (CPL 722.23 [1]). [2]

The People timely filed such motion on March 26, 2024, [3] being within 30 days after the AO's arraignment on the felony complaint (*see id.* [1] [a]). The AO filed opposition papers on April 2, 2024. No reply papers were filed by the People.

In their moving papers, the People requested a hearing under CPL 722.23 (1) (c), which the Court conducted on May 6, 2024. Based on the evidence adduced at the hearing and the parties' written submissions, the Court makes the following findings of fact and conclusions of law.

***2** II. *Legal Standard*

CPL 722.23 (1) (a) states that the court "shall order the removal of the action to the family court," unless the District Attorney's Office files a written motion to block the removal predicated on extraordinary circumstances. But pursuant to CPL 722.23 (1) (d), the Court "shall deny" the People's motion to prevent removal "unless the Court makes a determination . . . that *extraordinary circumstances* exist that should prevent the transfer of the action to family court" (emphasis added).

The Legislature did not define the term "extraordinary circumstances" as it is used in the Raise the Age Law. So, this Court must follow the state's rules of statutory interpretation.

"We begin with our governing rule of statutory construction, namely that courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used. When statutory terms are not defined, dictionary definitions serve as useful guideposts in determining the word's ordinary and commonly understood meaning" (*People v Williams*, 37 NY3d 314, 317-318 [2021] [internal quotation marks and citations omitted]). While usually "the text itself is generally the best evidence of legislative intent" (*People v Ballman*, 15 NY3d 68, 72 [2010]), the absence of the term's definition compels the Court to "resort to other means of interpretation" (McKinney's Cons Laws of NY, Book 1, Statutes § 92, Comment).

Determining the meaning of statutory language sometimes calls for reference to dictionary definitions (*see People v Andujar*, 30 NY3d 160, 163 [2017]). The term "extraordinary" is defined as "[b]eyond what is usual, customary, regular, or common" (Black's Law Dictionary [11th ed 2019], extraordinary). It is similarly defined elsewhere as "going beyond what is usual, regular, or customary" (Merriam-Webster Online Dictionary, extraordinary [https://www.merriam-webster.com/dictionary/extraordinary [last accessed May 14, 2024]). Trial courts have referred to the common dictionary definition of the term "extraordinary," and interpreted the "plain meaning" of the phrase "extraordinary circumstances" as a set of facts that are "exceptional" and "highly unusual" (*see e.g. People v R.U.*, 70 Misc 3d 540, 547 [Co Ct, Nassau County 2020]; *People v J.P.*, 63 Misc 3d 635, 649-650 [Sup Ct, Bronx County 2019] [where the term was interpreted to be inclusive of "far from common, very outstanding, very remarkable"]).

Trial courts have also reviewed the legislative history of the Raise the Age Law to ascertain legislative intent in aspiring to construe the term's meaning. Legislators expressed that in assessing extraordinary circumstances, the presiding judge should consider the youth's situation holistically, including both aggravating factors and mitigating circumstances (*People v T.P.*, 73 Misc 3d 1215[A], *3 [Co Ct, Nassau County 2021] [quotation marks omitted]). Citing to the legislative record, trial courts have recognized that State Assembly members debating the Raise the Age Law expressed that the threshold of extraordinary circumstances is intended to be a very high standard for the District Attorney to satisfy; hence, preventing removals of adolescent offenders to the family court should be extremely rare (*see People v O.C.*, 80 Misc 3d 1204[A], *2 [Fam Ct, Erie County 2023]). "The Legislature . . . specifically contemplated that ***3** the courts would shape and determine the meaning of extraordinary circumstances in evaluating the factors of each individual case" (*see People v B.H.*, 63 Misc 3d 244, 248-250 [Sup Ct, Nassau County 2019] [internal quotation marks omitted]). Notwithstanding all of the foregoing, "one could question what set of facts would need to be presented to constitute extraordinary circumstances" (*Clark v Boyle*, 210 AD3d 463, 469 [1st Dept 2022], *lv denied* 39 NY3d 974 [2023] [internal quotation marks omitted]).

The legislative intent is indeed reliably manifest. The statute, as strictly construed, renders the matter presumptively subject to family court removal. With the foregoing legal standard and principles in mind, the Court now turns to the merits of the People's motion. [4]

III. *Factual Findings*

Here, the AO is charged by way of a felony complaint with one count of assault in the second degree in violation of Penal Law § 120.05 (2). That offense is a violent felony as defined in Penal Law 70.02 (1) (c). The charge stems

from February 15, 2024, when the AO allegedly struck the victim, G.B., multiple times with a metal baseball bat, causing swelling and bruising to the victim's hands, arms, and legs. G.B. is a minor (born 2008). [5]

Relevant here, a person commits intentional assault in the second degree when, "[w]ith intent to cause physical injury to another person, he [or she] causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument" (Penal Law § 120.05 [2]). Physical injury "means impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]).

Case law confirms that a baseball bat can be deemed a dangerous instrument. Depending on how it is used, a baseball bat can be readily capable of causing serious physical injury and thus satisfy the definition of a "dangerous instrument" (*see* Penal Law § 10.00[10], [13]; *People v Torres*, 211 AD2d 509, 509 [1st Dept 1995] [conviction affirmed where a child's toy baseball bat was found to constitute a dangerous instrument]). Hence, attacking another person with a baseball bat can support a conviction of assault in the second degree (*see e.g. People v Gurgov*, 129 AD3d 989, 990 [2d Dept 2015]; *People v Smoke*, 43 AD3d 1332, 1333 [4th Dept 2007], *lv denied* 9 NY3d 1039 [2008]; *People v Coffin*, 263 AD2d 780, 781 [3d Dept 1999]).

According to the victim and three witnesses, the victim encountered the AO at an Acme supermarket in the Town of Southeast and attempted to avoid him, so that a verbal or physical confrontation would not arise. When leaving the supermarket with his girlfriend, and as he was walking to enter a vehicle, the victim avers that the AO rushed at him with a dark-colored ***4** baseball bat, chased him around the vehicle, and struck him on his hands, arms, and legs with the bat until the AO fled the scene in his girlfriend's vehicle. The victim's girlfriend called the police to report the incident. The victim claims that as a result of the attack, he suffered pain and bruising to his arms and left thigh.

Pursuant to a search warrant, police later seized the metal baseball bat from the vehicle of the AO's girlfriend. On February 20, 2024, an investigator from the Putnam County Sherriff's Office contacted the AO's father in order to speak to the AO, advising him that the AO was facing an assault charge and he should promptly turn himself in to police. A few days later, the AO's father contacted the investigator and told him that the AO assaulted the complainant because he had threatened to rape the AO's younger sister. [6] The AO, accompanied by his father and his attorney, appeared at the Sherriff's Office on February 27, 2024 to surrender based on the criminal charge. He was arraigned that same day.

A. The People's Arguments

The People argue that compelling facts are present here to warrant retention of this case in the Youth Part. In so doing, they are of the view that the Legislature envisioned this exact sort of scenario for a court to find the existence of extraordinary circumstances in order to block removal to family court and keep the case for adjudication in the Youth Part.

The People's position in making this motion appears to be premised on the ground that removal to family court would merely amount to allowing the AO's criminal behavior to go without consequences. The People claim that the AO had malicious intent by carrying out a carefully planned violent attack on the victim, which was premeditated, and is corroborated by video camera footage capturing the incident. The People argue that the AO's calculated and brutal attack lacked impulsivity since he stalked, taunted, and intimidated the victim, was armed with a weapon, and caused him bodily harm by striking him with a metal baseball bat. The People insist that the AO's conduct is cruel and heinous -- thereby, rising to the level of extraordinary circumstances.

The People also rely on the certified disciplinary records from the AO's high school as an aggravating factor, which they believe demonstrate he has violent tendencies, despite school intervention, assistance, and suspensions. The People urge that the AO has several instances dating back to 2019 where he previously instigated confrontations with other students, and his prior school history reflects that he harassed, threatened, and assaulted other students. The People maintain that the AO's documented behavior has been troublesome for several years given his issues throughout high school and the disciplinary measures imposed upon him. Since prior services offered to him through school have been to no avail, the People believe that the AO would not be amenable to the services offered in family court, nor would the heightened services there steer him in the right direction since he is "heading down a path of violence and destruction."

In addition, the People posit that the AO comes from a unified family, lives in a stable ***5** household, and has the benefit

of parental guidance. They represent that based on the AO's appearance and demeanor in court, he is not facing economic or educational difficulties. The Court, however, finds this contention to be merely an assumption made by the People as will be delineated below.

B. The AO's Contentions

The AO does not dispute the factual aversions set forth in the People's moving papers. He counters that removal to family court is warranted here since extraordinary circumstances are not present. The AO explains that the reason prompting the incident is that the complainant threatened he would rape the AO's younger sister which, in turn, infuriated him and led him to confront the complainant in the first instance. He concedes that his conduct was not legally justified, but it should be "morally understandable" because he was trying to protect his sister. The AO represents that he carried out the assault as a warning to the victim to stay away from her. The AO also points to his upbringing, personal difficulties, and the cultural differences as an Albanian in how he poorly handled the situation.

The AO claims that he did not intend to cause the victim grave injury inasmuch as he had no intention to strike him in the head with a metal baseball bat, that he deliberately avoided contact with the victim's head, and the victim suffered minor, not serious, injuries as a result of the attack. According to the AO, he exercised restraint in how and where he struck the victim with the bat.

C. Testimony of the AO's Sister

The AO's sister, 16 years old, testified at the hearing on behalf of the AO in order to corroborate his reason for attacking the victim. Overall, the Court finds the AO's sister to be credible.

The AO's sister testified that well before the underlying incident, the complainant asked her several times to be his girlfriend, but she declined since it is against her Islamic religion, yet he continued to pressure her about a potential relationship and attempted to keep it a secret. According to the AO's sister, the complainant became frustrated and at some point, the complainant followed her around, gave her "dirty" looks that scared her, and the complainant also sent her text messages that he was "going to get" her. The AO's sister also testified that a few days before the incident (around the beginning of February 2024), the complainant sent her text messages saying that he would rape her; thus, she perceived his conduct as threatening and uncomfortable, so she asked her friends to accompany her to classes due to safety concerns. The AO's sister stated that after the assault, she reported the complainant's behavior to the school principal, who represented to her that he would speak with the complainant to address the matter.

The AO's sister conceded that she did not tell the AO about the text messages, nor did she show them to the police or the school principal. However, she testified that at some point, their mother took her cellphone and showed the AO the texts that were sent by the complainant to her. The AO's sister explained that she is no longer in possession of those text messages from the complainant because her mother took her cellphone, implying that she may have deleted ***6** them from her cellphone. Notably, the AO's sister testified that she told the AO about the complainant's conduct towards her. The AO's sister further testified that she learned about the assault after it occurred, and she knew the AO would protect her as her older brother.

IV. *Conclusions of Law*

CPL 722.23 (1) (b) states that every motion to prevent removal of an action to family court must "contain allegations of sworn fact based upon personal knowledge of the affiant." The undersigned has considered the felony complaint and the sworn written statements made to police by three eyewitnesses whose content fall within the mandate of CPL 722.23 (1) (b). The People rely upon the supporting depositions, which were subscribed and verified under penalty of perjury; thus, the content therein also falls within the requirement of CPL 722.23 (1) (b).

The Court has additionally reviewed the prosecutor's supporting affirmation and the exhibits annexed thereto, inclusive of photographs depicting the victim's injuries, screenshots of social media postings made by the AO messaging the victim, and the AO's school disciplinary records. The Court has also considered counsel's arguments on the motion.

All things considered, this case presents a close call. Extraordinary circumstances must be determined on a case-by-case basis. Ordinary cannons of construction warrant a full and liberal effectiveness to the legislative purpose of the Raise the Age Law. The Court underscores that the Legislature

contemplated that most youth part cases should be removed to family court.

Properly framed, the issue is whether the People have proven that the circumstances in the AO's case are so exceptional and beyond what is "usual," so as to overcome the presumption that this matter is "one in 1,000 cases" that would be kept by the criminal court and it should not be removed to family court (*People v T.P.*, 73 Misc 3d 1215[A] at *3). The Court finds that the People did not meet that heavy burden here.

The People contend that a determination of extraordinary circumstances must include consideration of the totality of circumstances, including the AO's prior transgressions and his conduct surrounding this offense. The Court disagrees. This case is *not* one of the rare or uncommon cases that falls within such criteria *(see People v J.G.*, 81 Misc 3d 1239[A], *3 [Fam Ct, Erie County 2024]; *People v J.R.*, 65 Misc 3d 1223[A], *5-6 [Co Ct, Nassau County 2019]). The Court finds that the cannons of construction, the legislative history, and the circumstances surrounding passage of the Raise the Age Law are contrary to the People's position that extraordinary circumstances are present here to warrant preclusion of removal to family court. In reaching this conclusion, the Court notes, again, that there is a strong presumption of removing an adolescent offender's case to the family court (*see People v W.H.*, 69 Misc 3d 278, 279 [Sup Ct, Kings County 2020]).

In support of their argument that extraordinary circumstances exist to prevent removal, the People author a descriptive story leading up to the timeline of the AO's arrest. The prosecutor's supporting affirmation, weaving a story of suspense and violence, attempts at times to fill in gaps and provide some testimonial evidence. It is rife with alleged statements made between the AO and an investigator from the Putnam County Sheriff's Office, as are set forth in the People's CPL 710.30 notice. Some of the factual allegations relied upon by the People are ***7** based upon conversations with a police officer. The prosecutor's supporting affirmation also contains other hearsay statements that are unsupported by an affidavit from the investigator, who has personal knowledge of the facts (*see* CPL 722.23 [1] [b]; *People v J.B.*, 63 Misc 3d 424, 428-429 [Co Ct, Westchester County 2019]). Reference by the People is also made to "video surveillance obtained by law enforcement" of the Acme parking lot area and the interior of the supermarket, which were not included as part of their motion.

The People maintain that the AO offered no proof of the alleged threat by the complainant to the AO's sister, noting that his opposition papers lack any such claimed evidence. The People fault the AO and his counsel for the AO's refusal to turn over his cellphone so that the prosecution can extract forensic data therefrom to retrieve deleted text messages in an effort to corroborate the AO's allegation that the complainant threatened to rape the AO's teenage sister. Also, the People aver that the AO initially denied involvement in the attack by telling police he had been home the entire day on the date of the incident.

The AO highlights in opposition that the People have a very high burden to prevent removal. Despite testimony provided at the hearing by the AO's sister, the People assert that the AO has failed to adduce proof that the complainant threatened at any time to rape her. At the same time, the burden here is on the People. It cannot be shifted to the AO. There is no indication that the AO's sister fabricated her version of the story. During her testimony, she appeared to the undersigned as candid, forthright, and sincere based on her demeanor. She credibly testified at the hearing by providing responsive answers based on what she could remember.

In assessing "extraordinary circumstances," the undersigned must consider the AO's predicament in its totality, including both aggravating factors and mitigating circumstances. Aggravating factors make it more likely that the matter should remain in the Youth Part. Conversely, mitigating circumstances make it more likely that the matter should be removed to family court. With that said, the Court must carefully look at this case having "its own intricacies and nuances" in deciding the People's motion to prevent removal (*People v S.J.*, 72 Misc 3d 196, 201 [Fam Ct, Erie County 2021]).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days; (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes. On the other hand, mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers (*see People v S.J.*, 72 Misc 3d at 199).

In the present scenario, the allegations in this case are very serious. The AO's actions should in no way be minimized. The AO's actions show calculation and malice. At the same time, if the AO's claim that the complainant made threatening remarks that he would rape his sister is also accepted as true, his conduct, while highly concerning and unjustified, is not exceptional to a very marked extent.

True, the AO exhibited aggressive and vicious conduct in purposefully confronting and ***8** attacking the victim. He engaged in dangerous behavior. The AO, in essence, implicitly concedes as much by not rebutting the account of the events as outlined in the People's motion papers. As to aggravating factors, the AO allegedly committed a crime on a single day. He did not commit a separate series of crimes over multiple days. The AO's premeditation and planning in the commission of the offense is an aggravating factor. While his conduct in assaulting the complainant with a metal baseball bat was arguably heinous and cruel, the AO did not lead, threaten, or coerce other reluctant youth in assaulting the victim, despite the fact that the AO was with his teenage girlfriend at the time. The AO's girlfriend was not charged or deemed an accomplice.

Although the AO's actions in physically attacking the complainant with a baseball bat are reprehensible, the Court holds that the surrounding facts of this incident are not overly exceptional to prevent removal. In drawing this conclusion, it has been held that a physical attack, in and of itself, does not compel a finding of extraordinary circumstances (*see e.g. People v A.M.*, 77 Misc 3d 1227[A], *3 [Sup Ct, Erie County 2023]).

Cases where extraordinary circumstances were found and kept in the youth part include armed robbery with other youth (*see People v B.T.*, 73 Misc 3d 1238 [A], *7-8 [Co Ct, Nassau County 2021]); repeatedly stabbing someone with a kitchen knife (*see People v V.M.*, 73 Misc 3d 1224[A], *3-4 [Co Ct, Nassau County 2021]); firing a handgun where the codefendants, acting in concert, were facing firearm-related offenses and attempted murder in the second degree (*see People v R.U.*, 70 Misc 3d 540, 541-548 [Co Ct , Nassau County 2020]; *People v D.S.*, 69 Misc 3d 1214[A], *1 [Co Ct, Nassau County 2020]); a brutally violent attack where codefendants repeatedly punched, stomped, and kicked a person who was unconscious and helpless, without signs to discontinue the assault until the codefendants were eventually restrained (*see People v C.S.*, 68 Misc 3d 1208[A], *4 [Fam Ct, Onondaga County 2020]); armed robbery using a collapsible type of knife with a 3½ inch blade, where the victim was cut on both hands and suffered deep lacerations, exposing the victim's bones and arteries in both hands, which required approximately 30 stitches and caused the victim severe bleeding and substantial pain (*see People v K.F.*, 67 Misc 3d 1215[A], *2-5 [Co Ct, Nassau County 2020]); and where codefendants, both charged with attempt to commit the crime of gang assault in the first degree, first provoked a homeless man suffering from mental health issues, and then proceeded to taunt, punch, and kick him repeatedly in his head, causing the man to suffer a broken nose with significant swelling to his head requiring hospitalization, all while an uncharged individual recorded the incident on video and livestreamed it on "Facebook Live" (*see People v Y.L.*, 64 Misc 3d 664, 665 [Co Ct, Monroe County 2019]).

As the AO correctly points out, the cases cited by the People in their moving papers are *not* on point, given that those courts did not find the existence of "extraordinary circumstances"; and therefore, denied the People's respective motions to prevent removal in those cases (*see People v J.P.*, 63 Misc 3d at 651-652; *People v B.H.*, 63 Misc 3d at 248-250).

At the hearing, the People cited a case from this Court: *People v S.B.* (Docket No. FYC-70002-20 [Co Ct, Putnam County 2020, Rooney, J.]), which they rely on in support of their application. In *People v S.B.*, Judge Rooney granted the People's motion to prevent removal to family court based upon a finding of extraordinary circumstances (*see. id.* at 5-8). The facts of that case however can be easily distinguished with this one. There, the youth defendant ***9** confronted another student regarding a dispute over money at a high school basketball game, provoked a fight in a school parking lot, preceded by a threat, before the youth defendant stabbed the student in the back with a fixed 3½ inch blade knife, causing puncture wounds that required sutures and medical treatment at a hospital (*see id.* at 2, 7; *see also People v C. S.*, 68 Misc 3d 1208[A] at *4). In stark contrast here, the AO's confrontation with the victim was prompted by the remarks and conduct at the AO's sister, not about a monetary matter, the weapon used by the AO was a metal baseball bat, and the victim suffered minor injuries. Hence, the People's reliance on *People v S.B.* is misguided.

The Court further notes that there are several analogous cases where, similarly as here, an adolescent offender was charged with assault in the second degree, but fellow jurists did *not* find the presence of extraordinary circumstances, and thus,

ultimately denied the People's motions to prevent removal (*see e.g. People v J.L.*, 78 Misc 3d 1231[A], *2-3 [Fam Ct, Erie County 2023]; *People v M.R.*, 68 Misc 3d 1004, 1010-1012 [Sup Ct, Kings County 2020]; *People v J.S.*, 66 Misc 3d 1213[A], *1-6 [Co Ct, Nassau County 2020]; *People v J.R.*, 65 Misc 3d 1223[A] at *1-6; *People v L.L.*, 2019 NY Slip Op 32330[U], *1-4 [Sup Ct, Queens County 2019]; *cf. People v J.G.*, 81 Misc 3d 1239[A] at *1-3; *Matter of Isaiah D.*, 72 Misc 3d 1120, 1122 [Fam Ct, New York County 2021]).

As the People would have it, the AO's past misconduct and transgressions in school should be an aggravating factor. "[T]he People may not, in any way, use the AO's juvenile delinquency history, including any past admissions or adjudications," in a motion to prevent removal (*People v J.J.*, 74 Misc 3d 1223[A], *3 [Co Ct, Ulster County 2022]; *see* Family Ct Act § 381.2 [1]).

Equally unavailing is the People's contention that the mitigating factors offered by the AO are not present or should be cast aside. The AO specifically asserts, among other things, that his father is disabled, suffering from several medical conditions, and that his father's health has been deteriorating over the last few years. According to the AO, he felt the need to take on the patriarchal role of protecting his sister's honor and defending her as her older brother. Additionally, the AO explains that as an Albanian, he has been called religious epithets and obscenities as a Muslim by students who are bullying him at high school. According to the AO, he has been repeatedly harassed by fellow students, including multiple threats of being assaulted. It may, for example, provide some context as to why the AO retaliated in such a manner.

Moreover, the AO avers that his family was oppressed in Albania, and they are struggling financially here due to his father's disability and severe health complications that prevent him from working, including his father's recent admission to the intensive care unit (ICU). This is somewhat corroborated with the AO's representation that his counsel fees are being paid by a "family friend trying to help him." Furthermore, the AO is currently pursuing a GED. He has intentions of joining the military after turning 18. The AO turns the age of majority in a matter of months. Relevant to this consideration is that if the AO's case remains in the Youth Part, it will be adjudicated under the criminal law where the AO faces the prospect of incarceration. [7]

Further, the AO's behavior here demonstrates the kind of poor judgment and impetuous conduct that militates in favor of removal to the family court in order to redirect his errant path. In fact, this is his first time facing criminal proceedings.

Next, the People rely heavily on the AO's school disciplinary records dating back to 2019 -- which were admitted into evidence at the hearing without objection -- for keeping this case in the Youth Part until disposition. In examining the potential mitigating circumstances, the Court notes that although the People state that the AO's school disciplinary records evince that he has a troubled history leading to suspensions, the Court finds that his disorderly behavior, use of racial slurs, insubordination, and acts of intimidation, harassment, and bullying are some of the exact mitigating factors expressed by the Legislature in the consideration of extraordinary circumstances (*see People v B.H.*, 63 Misc 3d at 250). While the People paint a picture of the AO's school disciplinary records to show that he is a troubled youth, the AO's school disciplinary records are not in any way connected to the underlying offense he is charged with. The Court has balanced the aggravating and mitigating factors in concluding to remove this matter to family court.

The Court further rejects the People's supposition that the AO is not amenable to, nor he would not in any way benefit from, the heightened services available in family court. The AO has faced challenges growing up that have significantly impacted his insight and judgment. Considering the totality of the circumstances, the Court finds that the AO is probably in greater need of the heightened services available in family court to aid him in addressing his behaviors and help him develop the skills necessary for rehabilitation. The People thus failed to overcome the burden of demonstrating that the AO is not amenable to or would not benefit from the heightened services provided in family court (*see People v K.K.*, 82 Misc 3d 1218[A], *3 [Fam Ct, Erie County 2024]).

The Court adds that in enacting the Raise the Age Law, the Legislature concluded that adolescent offenders should be treated differently than adult criminal defendants within the criminal justice system given the unique circumstances and needs of the young population. The aspirational goal of that scheme is that "children who are alleged to have committed crimes be rehabilitated rather than incarcerated and punished" (*People v J.L.*, 78 Misc 3d 1231[A] at *3). Removal to family court furthers the Legislature's articulated policy goals.

While mindful that the assault charge the AO is facing is serious, the violent nature of the crime, and the AO's conduct being very dangerous, the Court nonetheless must be guided by the statutory scheme. The decision here, though not an easy one, comports with the spirit of the Raise the Age Law. Transferring to family court is supported in the plain language of the relevant provisions and the legislative history.

"Reform is about changing the dynamics. The intent of the [Raise the Age Law] is to give adolescent and juvenile offenders an opportunity to rehabilitate. The goal is avoidance of criminal records and incarceration when possible and in appropriate circumstances" (*People v D.P.*, 62 Misc 3d 1226[A], *3 [Fam Ct, Erie County 2019]).

Removal to family court does not mean that the AO is getting a free pass. There are consequences in transferring this case to family court -- which will result in a juvenile delinquency proceeding under Family Court Act article 3.

The undersigned is aware that even upon removal, the Family Court Act provides for the possible placement upon adjudication at a facility developed for treatment while protecting the public. This Court is cognizant that various beneficial services and programs are readily available for a juvenile who is placed. This matter can be effectively adjudicated in family court where either rehabilitation or detention can be imposed. Having considered the totality of the record, this matter does not present to be so extraordinary as a basis for retaining the case in the Youth Part.

V. *Conclusion*

In sum, the Court holds that extraordinary circumstances do not exist here to prevent the removal/transfer of this case to the family court. The Court further concludes that the People did not meet their very high burden to prevent removal. Based on the totality of the circumstances, and after balancing the aggravating factors and mitigating factors in this case, the Court finds that the aggravating factors do not outweigh the mitigating circumstances. The People have failed to establish the existence of "extraordinary circumstances" warranting the retention of the AO's case in the Youth Part (*see People v B.H.*, 63 Misc 3d at 248-250). This case shall therefore be removed to the Family Court, Putnam County.

The People's remaining contentions, to the extent not specifically addressed herein, have been evaluated and determined to be without merit. Accordingly, it is hereby:

Ordered that the People's motion, made pursuant to CPL 722.23, to prevent removal to the Family Court is *DENIED*; and it is further

Ordered that this case shall be transferred to the Family Court, Putnam County; and it is further

Ordered that the Youth Part file shall be sealed, as is required by CPL 725.15; and it is further

Ordered that the AO and a member of the Putnam County Probation Department shall appear in Family Court on July 1, 2024, at 2 p.m. before the Hon. Joseph J. Spofford, Jr., J.F.C. for further proceedings thereon. [8]

A separate Order of transfer/removal shall issue herewith by the Clerk of the Court. [9]

This constitutes the opinion, decision, and order of the Court.

Dated: May 14, 2024

Carmel, New York

E N T E R:

Hon. Anthony R. Molé

Judge of the County Court

FOOTNOTES

Footnotes

1 The Hon. Joseph J. Spofford, Jr., J.C.C., conducted the arraignment in the undersigned's absence.

2 By waiving the statutory six-day hearing, the parties have, in effect, agreed that the Court base its determination to remove the case to family court solely on the People's underlying motion to block removal.

3 The District Attorney's Office did not file a notice of motion (*see* CPL 722.23 [1] [a]; CPLR 2214 [a]; *see also* *People v A.M.*, 77 Misc 3d 1227[A], *1 [Sup Ct, Erie County 2023]; *People v J.A.D.*, 70 Misc 3d 1222[A], *1 [Co Ct, Nassau County 2021]). In any event, the Court will disregard such error in order to consider the merits of the motion since the AO is not prejudiced, and a briefing schedule was previously established on the record with respect to the People's anticipated application (*see generally* CPLR 2001).

4 At the close of the hearing, the parties consented to waive the statutory timeframe for the Court's written decision on the People's motion (*see* CPL 722.23 [1] [e]; *People v M.R.*, 72 Misc 3d 791, 792 n 1 [Co Ct, Nassau County 2021]).

5 The Court will interchangeably refer to G.B. as the victim and the complainant in this Decision.

6 The Court will refer to her as the AO's sister throughout this decision since she is a minor and for purposes of maintaining her privacy.

7 Other sentencing options may be available if the AO is adjudicated a youthful offender under CPL Article 720.

8 The AO has prior family court history before Judge Spofford under Family File No. 14112.

9 The statute uses the terms “removal” and “transfer” interchangeably regarding the transfer of youth part adolescent offender proceedings to the Family Court. Neither term is defined in the Raise the Age Law. CPL 722.23 (1) (g) states that cases “transferred pursuant to this section . . . shall not be considered removals subject to [Family Court Act § 308.1 (13)]” (*see generally* Family Ct Act § 308.1 [3]; *People v D.L.*, 62 Misc 3d 900, 901 n 1 [Fam Ct, Monroe County 2018]).

New York Official Reports

Unreported Disposition
81 Misc.3d 1235(A), 202 N.Y.S.3d 725 (Table), 2024 WL 297027 (N.Y.Fam.Ct.), 2024 N.Y. Slip Op. 50079(U)

***1** The People of the State of New York

v.

D.M.-J., AO.

Youth Part, Erie County
Docket No. FYC-73909-23/001
Decided on January 16, 2024

CITE TITLE AS: People v D.M.-J.

ABSTRACT

Infants
Adolescent Offenders
Transfer from Youth Part to Family Court—Extraordinary Circumstances—People did not meet burden to prevent removal to Family Court where, although handgun was recovered from scene of crime, there was no proof it was used in furtherance of any crime.

People v D.M.-J., 2024 NY Slip Op 50079(U). Infants—Adolescent Offenders—Transfer from Youth Part to Family Court—Extraordinary Circumstances—People did not meet burden to prevent removal to Family Court where, although handgun was recovered from scene of crime, there was no proof it was used in furtherance of any crime. (Youth Part, Erie County, Jan. 16, 2024, Freedman, J.)

APPEARANCES OF COUNSEL

Denise A. Herman, Esq., (Assistant District Attorney)
Giovanni Genovese, Esq., (for the Principal)

OPINION OF THE COURT

Brenda M. Freedman, J.

The People having moved pursuant to Criminal Procedure Law, Article 722, § 722.23(1), et seq. for an order preventing removal of this action to the juvenile delinquency part of Erie County Family Court, and upon reading the Notice of Motion and Supporting Affidavit of Denise A. Herman, Esq. (Assistant District Attorney), dated January 4, 2024; responsive papers dated January 10, 2024 by Giovanni Genovese, Esq., on behalf of AO D.M.-J.; oral argument and a hearing on the motion having been waived; and due deliberation having been had, the Court finds the following:

PROCEDURAL HISTORY

AO D.M.-J. is charged under FYC-73909-23 with one count of Criminal Possession of a Weapon in the Second Degree, a class C felony, contrary to Penal Law Section 265.03(3) and Obstructing Governmental Administration in the Second Degree, a class A misdemeanor, contrary to Penal Law Section 195.05.

Accessible Magistrate Samuel P. Davis, Sr. arraigned AO A.G. on December 8, 2023 and released him on his own recognizance to the custody of his mother.

On December 8, 2023, AO D.M.-J. appeared for an arraignment in Youth Part, entering a plea of not guilty. The People conceded the six-day reading, and this Court found that the charges did not meet the requirements of CPL § 722.23(2)(c) to remain in Youth Part. The People indicated that they would make a motion under CPL, Art. 722, § 722.23(1) requesting this matter not be removed to Family Court. AO D.M.-J. was released, having voluntarily accepted probation services.

The decision date of the extraordinary circumstances motion was scheduled for January 18, 2024.

Findings of Fact

It is alleged that on December 7, 2023, at approximately 9:44 PM, a call came out for Threats in Progress. While responding to the call, the police officer received another radio call stating that a group of young males were threatening an individual. Upon arrival at the scene, the officer spoke with an older man ("Complainant 1"), who advised that approximately six to eight young males had harassed and threatened Complainant 1 while he was walking his dog. While the officer and Complainant 1 were talking, a second individual

("Complainant 2") approached the officer. Complainant 2 said he had been kicked in the back by a person who the officer believed was part of the group of kids that had harassed and threatened Complainant 1. Complainant 2 described the suspect that kicked him as a young black male wearing a hoodie with yellow on it. One of the complainants stated that the suspects were right around the corner. The officer headed in that direction and approached a group of young men, one of whom was wearing a hoodie with yellow on it. The individual with the hoodie with yellow on it fled down the street and was detained shortly thereafter. That youth was positively identified as the person who kicked Complainant 2 in the back.

Two other officers reported to the Threats in Progress call. One of those officers also spoke with Complainant 1. Complainant 1 told him that one person in the group of young males was wearing a black mask. Complainant 2 told the officers that the group of males was down the street. The officers saw the group and asked the individuals to stop. The young men ignored their instructions to stop and fled from the officers. One of the officers followed the suspect with a black mask and detained him. That suspect was identified as AO D.M.-J. The officer brought the AO. to his patrol vehicle, where AO D.M.-J. stated to the officer that "he had some weed on (his person)." Additionally, upon the Officer searching the AO, he discovered a gun in his waistband, which AO D.M.-J. stated he "found in the bushes." The gun was test fired and found to be operable. Further investigation revealed that the gun was reported stolen.

Conclusions of Law

Pursuant to CPL § 722.23(1)(a), the Court shall order removal of the action to Family Court unless, within 30 days of arraignment, the District Attorney makes a written motion to prevent removal of the action.

Pursuant to CPL § 722.23(1)(d), the Court shall deny the district attorney's motion to prevent removal unless the Court determines that extraordinary circumstances exist that should prevent the transfer of the action to Family Court. CPL § 722.23 does not define the term "extraordinary circumstances".

In People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021), the Court referenced the common dictionary and the legislative history of the Raise the Age legislation and interpreted "extraordinary circumstances" to mean that "the People's Motion Opposing Removal must be denied unless they establish the existence of an 'exceptional' set of facts which 'go beyond' that which is 'usual, regular or customary' and which warrant retaining the case in the Youth Part instead of removing it to the Family Court."

New York State Assembly members debating the Raise the Age legislation indicated that the extraordinary circumstances requirement was intended to be a "high standard" for the District Attorney to meet, and denials of transfers to Family Court "should be extremely rare". ***2** NY Assembly Debate on Assembly Bill A03009C, Part WWW, at 39, April 8, 2017; see also, People v S.J., 72 Misc 3d 196 (Fam Ct 2021). "[T]he People would satisfy the 'extraordinary circumstances' standard where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court'. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021) citing *Assembly Record*, p. 39.

The legislators indicated that in assessing "extraordinary circumstances", the Judge should consider the youth's circumstances, including both aggravating factors and mitigating circumstances. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021); *Assembly Record*, pp. 39 to 40. Aggravating factors make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record*, p. 40.

Mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record* at 40.

"The People may not, in any way, use the [AO's] juvenile delinquency history, including any past admissions or adjudications, in any application for removal under the statute." People v J.J., 74 Misc 3d 1223(A) [NY Co Ct 2022]; citing Family Court Act § 381.2(1); see also, People v. M.M., 64 Misc 3d at 269, supra, citing Green v. Montgomery, 95 NY2d 693, 697 (2001).

CPL § 722.23(1)(b) mandates that every motion to prevent removal of an action to Family Court "contain allegations of sworn fact based upon personal knowledge of the affiant." This Court considered only those exhibits and documents whose content fall within the mandate of CPL § 722.23(1)(b) in making this decision.

It is alleged that AO D.M.-J. was out at 10:00 PM in a group of six to eight young males. The group of males threatened and harassed an older man walking his dog, and one of the males kicked another individual in the back. All of the young males fled from police officers when they were directed to stop. AO D.M.-J. was apprehended and placed in a patrol car. AO D.M.-J. admitted to having marijuana in his possession, and police recovered a loaded firearm from his waistband. AO D.M.-J. said he found the gun in the bushes. An investigation revealed that the gun was reported stolen. AO D.M.-J. was the only individual in the group caught with a gun. The People argue in part that this makes AO D.M.-J. a principal leader in that group, as he would be the person who could defend the group using said weapon if necessary. AO D.M.-J. was associated in a group that committed two incidents of criminal behavior within one hour. Additionally, the People argue that the behavior of the group of young men -- kicking a complainant in the back and harassing and threatening an older man walking his dog -- demonstrates a lack of respect for others and empathy, illustrating that AO D.M.-J. would not be amenable to Family Court services.

Counsel for AO D.M.-J. raises mitigating factors in his responsive paperwork, stating that his client has been entirely compliant with his conditions of probation, illustrating that AO ***3** D.M.-J. is capable of benefitting from the heightened services of Family Court. Defense counsel states that the handgun recovered was not used in furtherance of a crime and there were no injuries as a result of these events. Additionally, defense counsel states that there is no evidence that AO D.M.-J. was the leader of this criminal activity, or that he coerced other youth into committing the crimes alleged. Further, counsel reiterates that this was one incident, and not a series of crimes over a series of days.

While this Court might agree with many of the People's arguments, it still finds that the People have not satisfied the "extraordinary circumstances " standard. Highly unusual and heinous facts have not been proven. This youth did not use a gun in furtherance of any crimes or display the gun. Although he was seen with the youth who kicked the older man in the back, AO D.M.-J. himself did not kick that person. Despite the People's argument to the contrary, the presence of the gun on AO D.M.-J.'s person, does not prove that this youth led, threatened, or coerced other reluctant youth into committing the crimes before the court.

This Court concludes that this is not the rare, "one out of 1,000 cases" that the Legislature envisioned would remain in the Youth Part and not be removed to Family Court. (Assembly, Record of Proceedings, April 8, 2017, pp. 37-38); see People v J.M., 64 Misc 3d 259, 268 [NY Co Ct 2019]. Extraordinary circumstances do not exist to prevent the transfer of this action to Family Court. The People did not meet its burden to prevent removal of this action to Family Court. This matter shall be removed.

This constitutes the opinion, decision, and order of this Court.

SO ORDERED.

ENTER

_____

HON. BRENDA M. FREEDMAN

[*1]

People v J.B.
2024 NY Slip Op 50529(U)
Decided on May 3, 2024
Youth Part, Erie County
Freedman, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on May 3, 2024

Youth Part, Erie County

The People of the State of New York

against

J.B., AO.

Docket No. FYC-70887-24/001

James Harrington, Esq., (Assistant District Attorney)

Daniel Schaus, Esq., (for the Principal AO J.B.)

Brenda M. Freedman, J.

The People having moved pursuant to Criminal Procedure Law, Article 722, § 722.23(1), et seq. for an order preventing removal of this action to the juvenile delinquency part of Erie County Family Court, and upon reading the Notice of Motion and Supporting Affidavit of James Harrington, Esq. (Assistant District Attorney), dated April 15, 2024; responsive papers on behalf of AO J.B. by Daniel Schaus, Esq. having been received on April 26, 2024; oral argument and a hearing on the motion

having been waived; and due deliberation having been had, the Court finds the following:

Procedural History

AO J.B. is charged under FYC-70887-24 with one count of Criminal Possession of Stolen Property in the Third Degree, in violation of Penal Law § 165.50, one count of Criminal Mischief in the third degree, in violation of Penal Law § 145.05(2), one count of Criminal Mischief in the Second Degree, in violation of Penal Law § 145.10, and one count of Unauthorized Use of a Vehicle, Third Degree, in violation of Penal Law § 165.05(1). Additionally, AO J.B. is charged under FYC-70921-24 with multiple Vehicle and Traffic Law infractions.

On March 21, 2024, this Court arraigned AO J.B. and released him on his own recognizance.

The six-day reading was held on March 27, 2024. The People conceded the reading. This [*2]Court found that the charges did not meet the requirements of CPL § 722.23(2)(c) to remain in Youth Part. The People indicated that they would make a motion under CPL § 722.23(1) requesting that this matter not be removed to Family Court. An extraordinary circumstances decision on motion was scheduled for May 3, 2024.

Findings of Fact

It is alleged that on March 12, 2024, at around 11:00 AM, Complainant reported that her 2021 Blue Kia Sportage was taken from her driveway overnight.

At approximately 3:30 that afternoon, a police officer was parked in a parking lot of a pharmacy and dental office. He saw a blue Kia Sportage pull into the parking lot. The vehicle was occupied by at least four unknown people. He saw the vehicle travel west towards the far end of the parking lot, make a loop around the parking lot, travel east along the building, then park between a black Chevy Trailblazer and a white Hyundai Tucson.

The Officer saw an unknown juvenile male attempting to gain entry to the Chevy Trailblazer. Another unknown male attempted to gain entry to the Hyundai Tucson, causing damage to the door handle and lock. The Officer drove over and parked behind the Sportage to prevent it from fleeing. He exited his vehicle to initiate a traffic stop, began to identify himself as a Police detective and gave verbal commands to the operator and occupants of the Sportage. The driver of the Sportage then placed the vehicle in reverse and began backing up. The Officer continued to give verbal commands

to the driver to stop the vehicle and identified as a police officer. The Sportage continued backing up and struck the passenger side of the Officer's vehicle, causing damage to the front passenger side door and the rear passenger side door. The driver of the Sportage then put the vehicle in drive and started driving forward. At this time, the driver and three other passengers exited the Sportage, while it was in motion. The Sportage struck the Tucson, causing damage to the front driver's door, estimated to exceed $2,000.00 on one estimate and approximately $1,773.00 pursuant to another estimate. The Sportage came to rest due to striking a sign and hill located in front of the vehicle. The Officer observed significant damage to the steering column of the Sportage.

Additional officers responded and helped apprehend the four individuals who fled the scene. In total, five juveniles were taken into custody relative to this incident. AO J.B. admitted to being the operator of the Sportage.

Conclusions of Law

Pursuant to CPL § 722.23(1)(a), the Court shall order removal of the action to Family Court unless, within 30 days of arraignment, the District Attorney makes a written motion to prevent removal of the action.

Pursuant to CPL § 722.23(1)(d), the Court shall deny the district attorney's motion to prevent removal unless the Court determines that extraordinary circumstances exist that should prevent the transfer of the action to Family Court. CPL § 722.23 does not define the term "extraordinary circumstances".

In People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021), the Court referenced the common dictionary and the legislative history of the Raise the Age legislation and interpreted "extraordinary circumstances" to mean that "the People's Motion Opposing Removal must be denied unless they establish the existence of an 'exceptional' set of facts which 'go beyond' that which is 'usual, regular or customary' and which warrant retaining the case in the Youth Part instead of removing it to the Family Court."

New York State Assembly members debating the Raise the Age legislation indicated that [*3]the extraordinary circumstances requirement was intended to be a "high standard" for the District Attorney to meet, and denials of transfers to Family Court "should be extremely rare". NY Assembly Debate on Assembly Bill A03009C, Part WWW, at 39, April 8, 2017; see also, People v S.J., 72 Misc 3d 196 (Fam Ct 2021). "[T]he People would satisfy the 'extraordinary circumstances' standard

where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court'. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021) citing *Assembly Record*, p. 39.

The legislators indicated that in assessing "extraordinary circumstances", the Judge should consider the youth's circumstances, including both aggravating factors and mitigating circumstances. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021); *Assembly Record*, pp. 39 to 40. Aggravating factors make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record*, p. 40.

Mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record* at 40. This Court considered only those exhibits and documents whose content fall within the mandate of CPL § 722.23(1)(b) in making this decision.

The People state that AO J.B.'s actions were cruel and heinous in that he was the driver of the stolen vehicle and caused an estimated $2,000.00 of damages to an unoccupied vehicle. The People also allege that AO J.B. was the leader of criminal activity who coerced other reluctant youth into committing crimes when he drove them to a parking lot for the purpose of unlawfully taking and possessing stolen vehicles for their enjoyment. Further, the People contend that AO J.B. will not be amenable to Family Court services.

Defense counsel alleges that the People have failed to meet their burden and this matter should be removed to Family Court. He argues that this Court should not assume that AO J.B. was the leader of criminal activity just because he was driving the vehicle. Additionally, AO J.B. and the passengers in the vehicle are of similar ages. Defense counsel further states, and this Court agrees, that stolen vehicles are a common occurrence in Erie County. This incident was not especially

heinous. No one was injured, and no weapons were recovered. The People do not allege that AO J.B. has a history in Youth Part. There were significant damages to other vehicles during this incident. With the removal of this case, Family Court will have the ability to award up to $1,500.00 in restitution.

Based on the foregoing, this Court finds that the People failed to meet their burden of proving that this young person is not amenable to or would not benefit in any way from the heightened services in Family Court.

Extraordinary circumstances do not exist to prevent the transfer of this action to Family Court. The People did not meet its burden to prevent removal of this action to Family Court. [*4]This matter shall be removed.

This constitutes the opinion, decision, and order of this Court.

SO ORDERED.
ENTER,
HON. BRENDA M. FREEDMAN

Return to Decision List

[*1]

People v J.W.-C.
2024 NY Slip Op 50251(U)
Decided on February 29, 2024
Youth Part, Erie County
Freedman, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on February 29, 2024

Youth Part, Erie County

The People of the State of New York

against

J.W.-C., AO.

Docket No. FYC-70111-24/001

James Harrington, Esq., (Assistant District Attorney)

Michael Cimasi, Esq., (for the Principal AO J.W.-C.)

Brenda M. Freedman, J.

The People having moved pursuant to Criminal Procedure Law, Article 722, § 722.23(1), et seq. for an order preventing removal of this action to the juvenile delinquency part of Erie County Family Court, and upon reading the Notice of Motion and Supporting Affidavit of James L. Harrington, Esq. (Assistant District Attorney), dated February 15, 2024; responsive papers dated February 22, 2024 by

Michael C. Cimasi, Esq., on behalf of AO J.W.-C.; oral argument and a hearing on the motion having been waived; and due deliberation having been had, the Court finds the following:

Procedural History

AO J.W.-C. is charged under FYC-70111-24 with one count of Criminal Possession of a Weapon in the Second Degree: Possession of a Loaded Firearm, in violation of PL § 265.03(3) and Criminal Possession of a Weapon in the Fourth Degree, in violation of PL § 265.01(9).

On January 16, 2024, AO J.W.-C. appeared for an arraignment in Youth Part and entered a plea of not guilty. The People conceded that the charges did not meet the requirements of CPL § 722.23(2)(c) to remain in Youth Part and indicated that they would make a motion under CPL Art. 722, § 722.23(1) requesting this matter not be removed to Family Court. AO J.W.-C. was released on RUS, and additionally, the Youth Part Resource Coordinator was appointed.

The decision date of the extraordinary circumstances motion was scheduled for February 29, 2024.

Findings of Fact

It is alleged that on January 15, 2024, at or around 12:03 AM, Buffalo Police Officers were responding to a report of a robbery when they were flagged down by a victim. The Victim said that he was an Uber driver. He had just dropped off a customer and was on his way home when he saw a man walking in the middle of the road. He slowed down and the man came to his window. The man said something that the Victim did not understand, and the Victim said "what". The man then pulled out a gray handgun and said, "get out of the car." The Victim got out of his car. The man said, "keys" and pressed the gun to the Victim's neck. The man ordered: "wallet and phone". Then the man got into Victim's vehicle and drove away.

Buffalo Police Officers were able to track the location of the Victim's stolen phone to a gas station. Patrol officers went to the gas station and surrounded it. They detained three individuals and arrested two of them: AO J.W.-C. and his co-defendant (AO J.W.-C.'s cousin).

Video surveillance of the gas station showed these three individuals exiting the stolen vehicle and entering a convenience store at the gas station. AO J.W.-C. is recorded putting a Polymer80 9mm Ghost Gun, loaded with one round in the chamber and 10 rounds in the magazine, into his waistband and then placing the firearm among bags of chips on a store shelf. The loaded firearm was

later recovered by an officer and submitted to the CPS lab.

AO J.W.-C. is charged with one count of Criminal Possession of a Weapon in the Second Degree: Possession of a Loaded Firearm, in violation of PL § 265.03(3) and Criminal Possession of a weapon in the Fourth Degree, in violation of PL § 265.01(9). AO J.W.-C.'s co-defendant (his cousin) was arrested and charged with Criminal Possession of Stolen Property and Unauthorized Use of a Vehicle.

Conclusions of Law

Pursuant to CPL § 722.23(1)(a), the Court shall order removal of the action to Family Court unless, within 30 days of arraignment, the District Attorney makes a written motion to prevent removal of the action.

Pursuant to CPL § 722.23(1)(d), the Court shall deny the district attorney's motion to prevent removal unless the Court determines that extraordinary circumstances exist that should prevent the transfer of the action to Family Court. CPL § 722.23 does not define the term "extraordinary circumstances".

In People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021), the Court referenced the common dictionary and the legislative history of the Raise the Age legislation and interpreted "extraordinary circumstances" to mean that "the People's Motion Opposing Removal must be denied unless they establish the existence of an 'exceptional' set of facts which 'go beyond' that which is 'usual, regular or customary' and which warrant retaining the case in the Youth Part instead of removing it to the Family Court."

New York State Assembly members debating the Raise the Age legislation indicated that the extraordinary circumstances requirement was intended to be a "high standard" for the District Attorney to meet, and denials of transfers to Family Court "should be extremely rare". NY Assembly Debate on Assembly Bill A03009C, Part WWW, at 39, April 8, 2017; see also, People v S.J., 72 Misc 3d 196 (Fam Ct 2021). "[T]he People would satisfy the 'extraordinary circumstances' standard where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court'. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021) citing *Assembly Record*, p. 39.

The legislators indicated that in assessing "extraordinary circumstances", the Judge [*2]should

consider the youth's circumstances, including both aggravating factors and mitigating circumstances. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021); *Assembly Record*, pp. 39 to 40. Aggravating factors make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record*, p. 40.

Mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record* at 40.

"The People may not, in any way, use the [AO's] juvenile delinquency history, including any past admissions or adjudications, in any application for removal under the statute." People v J.J., 74 Misc 3d 1223(A) [NY Co Ct 2022]; citing Family Court Act § 381.2(1); see also, People v. M.M., 64 Misc 3d at 269, supra, citing Green v. Montgomery, 95 NY2d 693, 697 (2001).

CPL § 722.23(1)(b) mandates that every motion to prevent removal of an action to Family Court "contain allegations of sworn fact based upon personal knowledge of the affiant." This Court considered only those exhibits and documents whose content fall within the mandate of CPL § 722.23(1)(b) in making this decision.

The People allege that video surveillance of the gas station shows AO J.W.-C. exiting a vehicle that was reported stolen by gunpoint minutes earlier and removing a firearm from his waistband and placing it on a shelf inside the store. The People cite this as an exceptional circumstance, stating any patron of the store could have accessed this loaded weapon, putting everyone in danger. Additionally, the People allege that this AO will not be amenable to the heightened services of Family Court due to his alleged involvement in a robbery and shooting in September, 2023, illustrating that he is not open to modifying his behavior. Finally, the People indicate that AO J.W.-C. does not have any familial support at home, which adds an obstacle for this AO to be compliant with the heightened services of Family Court.

In support of mitigating factors, Defense counsel argues that AO J.W.-C. voluntarily accepted probation services and has remained compliant with the rules and regulations associated therewith, illustrating his willingness and ability to benefit from the heightened services offered by Family Court.

It is not alleged that AO J.W.-C. caused physical injury to anyone. The People have not made any allegations that AO J.W.-C. led or coerced other youths to participate in any crimes.

However, highly unusual and heinous facts have been proven. It is alleged that this AO had a loaded and operable Ghost Gun which had been involved in a robbery at gunpoint, and that he stashed it in that loaded and operable condition in a public place, amongst snacks, easily accessible to children and adults alike. While it is fortunate no one got hurt, that is likely because the police recovered the weapon shortly after it was abandoned. Additionally, the AO does not have support at home sufficient to ensure he adheres to the recommendations of Family Court services. Further, there is evidence to suggest this AO has been involved in another incident involving a loaded weapon. Although that matter remains under investigation, AO J.W.-C.'s [*3]DNA appears to be on that gun as well.

Extraordinary circumstances exist to prevent the transfer of this action to Family Court. The aggravating fsactors outweigh the mitigating circumstances. The People have met its burden to prevent removal of this action to Family Court. This matter shall remain in the Youth Part.

This constitutes the opinion, decision, and order of this Court.

SO ORDERED.
ENTER,
HON. BRENDA M. FREEDMAN

Return to Decision List

New York Official Reports

Unreported Disposition
81 Misc.3d 1235(A), 202 N.Y.S.3d 728 (Table), 2024 WL 297148 (N.Y.Fam.Ct.), 2024 N.Y. Slip Op. 50080(U)

***1** The People of the State of New York

v.

J.G., AO.

Youth Part, Erie County
Docket No. FYC-73909-20/001
Decided on January 25, 2024

CITE TITLE AS: People v J.G.

ABSTRACT

Infants
Adolescent Offenders
Transfer from Youth Part to Family Court—Extraordinary Circumstances—People did not meet burden preventing removal to Family Court where AO was involved in single car accident that struck electric pole, causing destruction to vehicle and pole.

People v J.G., 2024 NY Slip Op 50080(U). Infants—Adolescent Offenders—Transfer from Youth Part to Family Court—Extraordinary Circumstances—People did not meet burden preventing removal to Family Court where AO was involved in single car accident that struck electric pole, causing destruction to vehicle and pole. (Youth Part, Erie County, Jan. 25, 2024, Freedman, J.)

APPEARANCES OF COUNSEL

Denise A. Herman, Esq., (Assistant District Attorney)
Sunil Bakshi, Esq., (for the Principal)

OPINION OF THE COURT

Brenda M. Freedman, J.

The People having moved pursuant to Criminal Procedure Law, Article 722, § 722.23(1), et seq. for an order preventing removal of this action to the juvenile delinquency part of Erie County Family Court, and upon reading the Notice of Motion and Supporting Affidavit of Denise A. Herman, Esq. (Assistant District Attorney), dated January 12, 2024; responsive papers dated January 19, 2024 by Sunil Bakshi, Esq., on behalf of AO J.G.; oral argument and a hearing on the motion having been waived; and due deliberation having been had, the Court finds the following:

PROCEDURAL HISTORY

AO J.G. is charged under FYC-73909-23 with one count of Criminal Possession of Stolen Property in the Third Degree, PL § 165.50, a class D felony; one count of Obstructing Governmental Administration in the Second Degree, PL § 195.05, a class A misdemeanor; one count of Unlawfully Fleeing a Police Officer, PL § 270.25, a class A misdemeanor; one count of Reckless Driving, VTL § 1212, a misdemeanor; and nine other traffic infractions.

On December 15, 2023, AO J.G. appeared for an arraignment in Youth Part and entered a plea of not guilty. The People conceded the six-day reading, and this Court found that the charges did not meet the requirements of CPL § 722.23(2)(c) to remain in Youth Part. The People indicated that they would make a motion under CPL, Art. 722, § 722.23(1) requesting this matter not be removed to Family Court. AO J.G. was released, having voluntarily accepted probation services.

The decision date of the extraordinary circumstances motion was scheduled for January 26, 2024.

Findings of Fact

It is alleged that on December 10, 2023 at approximately 2:08 AM, in the Town of Amherst, a police officer responded to a report of two stolen vehicles (one Black SUV and one Red SUV) from a KIA dealership. Shortly thereafter, the Lieutenant saw a Black SUV speed past then do multiple donuts in an intersection. The Lieutenant saw a driver in the vehicle and no other passengers.

The Lieutenant saw the vehicle turn right and continue speeding, driving approximately 80 m.p.h. in a 45 m.p.h. zone. During pursuit of the vehicle, the Lieutenant observed

the vehicle driving on the wrong side of the road with no headlights on. The Lieutenant, as well as an Amherst Police Investigator, continued the high-speed pursuit of the Black SUV and observed as the vehicle erratically changed lanes, turned over a curb, and drove over a second curb in a Tops parking lot. The Black SUV was paced by the Investigator as going approximately 120 m.p.h. in a 45 m.p.h. zone. The Black SUV then went airborne and struck a support wire to an electrical pole in the Tops parking lot. The driver of the SUV fled the vehicle immediately after the crash. The Lieutenant began looking for the driver on foot. He heard a noise come from a dumpster near the accident and later saw someone, later identified as AO J.G., crawl out of the dumpster, which was located approximately 200 yards from the scene of the accident.

The Lieutenant went back to investigate the accident scene after AO J.G. was placed in custody. The Black SUV had crashed into an electric pole, and the damage to the electric pole created a live wire, which was an extreme hazard and could have caused serious physical injury or death to anyone who went into that area. The Black SUV was observed with front end damage, and there were car parts found at the scene consistent with the Black SUV.

Conclusions of Law

Pursuant to CPL § 722.23(1)(a), the Court shall order removal of the action to Family Court unless, within 30 days of arraignment, the District Attorney makes a written motion to prevent removal of the action.

Pursuant to CPL § 722.23(1)(d), the Court shall deny the district attorney's motion to prevent removal unless the Court determines that extraordinary circumstances exist that should prevent the transfer of the action to Family Court. CPL § 722.23 does not define the term “extraordinary circumstances”.

In People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021), the Court referenced the common dictionary and the legislative history of the Raise the Age legislation and interpreted “extraordinary circumstances” to mean that “the People's Motion Opposing Removal must be denied unless they establish the existence of an 'exceptional' set of facts which 'go beyond' that which is 'usual, regular or customary' and which warrant retaining the case in the Youth Part instead of removing it to the Family Court.”

New York State Assembly members debating the Raise the Age legislation indicated that the extraordinary circumstances requirement was intended to be a “high standard” for the District Attorney to meet, and denials of transfers to Family Court “should be extremely rare”. NY Assembly Debate on Assembly Bill A03009C, Part WWW, at 39, April 8, 2017; see also, People v S.J., 72 Misc 3d 196 (Fam Ct 2021). “[T]he People would satisfy the 'extraordinary circumstances' standard where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court'. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021) citing *Assembly Record*, p. 39.

The legislators indicated that in assessing ”extraordinary circumstances“, the Judge should consider the youth's circumstances, including both aggravating factors and mitigating circumstances. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021); *Assembly Record*, pp. 39 to 40. Aggravating factors make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record*, p. 40.

Mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record* at 40.

”The People may not, in any way, use the [AO's] juvenile delinquency history, including any past admissions or adjudications, in any application for removal under the statute.“ People v J.J., 74 Misc 3d 1223(A) [NY Co Ct 2022]; citing Family Court Act § 381.2(1); see also,

People v. M.M., 64 Misc 3d at 269, supra, citing Green v. Montgomery, 95 NY2d 693, 697 (2001).

CPL § 722.23(1)(b) mandates that every motion to prevent removal of an action to Family Court "contain allegations of sworn fact based upon personal knowledge of the affiant." This Court considered only those exhibits and documents whose content fall within the mandate of CPL § 722.23(1)(b) in making this decision.

It is alleged that AO J.G. was driving a stolen vehicle in the middle of the night. He was speeding, doing donuts in the middle of an intersection, and ultimately went airborne and struck an electrical pole. He risked the lives of anyone in his path, including the officers following him, and his own life. However, it is not alleged that he caused physical injury to anyone. He did not commit a separate series of crimes over multiple days. He is not alleged to have led, threatened, or coerced other reluctant youth into committing the crimes before the court. It is unclear whether the driver of the Red SUV has been apprehended, and the People have not made any allegations that AO J.G. led or coerced this driver to participate in any crimes. It is not alleged that this AO was in possession of a weapon.

This Court finds that highly unusual and heinous facts have not been proven. In support of mitigating factors, Defense counsel argues that AO J.G. does not have a criminal record, and the charges here may be consistent with adolescent type behavior. This Court feels as if AO J.G. may benefit from the heightened services of Family Court, having voluntarily accepted probation services.

This is not the rare, "one out of 1,000 cases" that the Legislature envisioned would remain in the Youth Part and not be removed to Family Court. (Assembly, Record of Proceedings, April 8, 2017, pp. 37-38); see People v J.M., 64 Misc 3d 259, 268 [NY Co Ct 2019]. Extraordinary circumstances do not exist to prevent the transfer of this action to Family Court. The aggravating factors do not outweigh the mitigating circumstances. The People did not meet its burden to prevent removal of this action to Family Court. This matter shall be removed.

This constitutes the opinion, decision, and order of this Court.

SO ORDERED.

ENTER,

_____

HON. BRENDA M. FREEDMAN

New York Official Reports

Unreported Disposition
Slip Copy, 2024 WL 1396228
(Table), 2024 N.Y. Slip Op. 50336(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

***1** The People of the State of New York
v.
J.M., AO.

Youth Part, Erie County
Docket No. FYC-70014-24/001
Decided on March 14, 2024

Digest-Index Classification:Infants--Adolescent Offenders--Extraordinary circumstances did not exist to prevent transfer from Youth Part to Family Court where offender did not flee scene, and it was not alleged that they used any weapons in furtherance of crime or participated in stealing vehicle

APPEARANCES OF COUNSEL

Denise Herman, Esq., (Assistant District Attorney)
Connor Dougherty, Esq., (for the Principal AO J.M.)

OPINION OF THE COURT

Brenda M. Freedman, J.

The People having moved pursuant to Criminal Procedure Law, Article 722, § 722.23(1), et seq. for an order preventing removal of this action to the juvenile delinquency part of Erie County Family Court, and upon reading the Notice of Motion and Supporting Affidavit of Denise Herman, Esq. (Assistant District Attorney), dated February 29, 2024; responsive papers having been filed on March 8, 2024 by Connor C. Dougherty, Esq., on behalf of AO J.M.; oral argument and a hearing on the motion having been waived; and due deliberation having been had, the Court finds the following:

PROCEDURAL HISTORY

AO J.M. is charged under FYC-70014-24 with one count of Criminal Possession of Stolen Property in the Fourth Degree, in violation of Penal Law § 165.45, a class E felony.

On January 29, 2024, AO J.M. appeared for an arraignment in the Youth Part, entering a plea of not guilty. The People conceded the six-day reading. This Court found that these charges did not meet the requirements of CPL § 722.23(2)(c) to remain in Youth Part. The People indicated that they would make a motion under CPL, Art. 722, § 722.23(1) requesting this matter not be removed to Family Court. The attorneys consented to various time waivers on the record, and the decision date of the extraordinary circumstances motion was scheduled for March 15, 2024. AO J.M. was released on her own recognizance, having voluntarily accepted probation services.

Findings of Fact

It is alleged that on January 2, 2024, there was a 911 call for an alleged robbery at 650 Tonawanda Street, Buffalo. Upon investigation, there were multiple suspects involved in said robbery; one group of suspects was driving a Red 2014 Ford Escape that was reported stolen in ***2** January, 2024. After the alleged robbery occurred, AO J.M. got into the Red Ford Escape with the perpetrators of said robbery. Officers observed the Red Escape driving erratically at a high speed. Upon attempting to pull the vehicle over, the Officers observed the Red Ford Escape driving at approximately sixty (60) miles per hour, going through stop signs, and driving through red lights. The Red Ford Escape subsequently crashed into a tree, and some of the occupants of the car ran from the vehicle and away from Police. AO J.M. exited the vehicle and was immediately taken into custody.

Conclusions of Law

Pursuant to CPL § 722.23(1)(a), the Court shall order removal of the action to Family Court unless, within 30 days of arraignment, the District Attorney makes a written motion to prevent removal of the action.

Pursuant to CPL § 722.23(1)(d), the Court shall deny the district attorney's motion to prevent removal unless the Court determines that extraordinary circumstances exist that should prevent the transfer of the action to Family Court.

CPL § 722.23 does not define the term "extraordinary circumstances".

In People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021), the Court referenced the common dictionary and the legislative history of the Raise the Age legislation and interpreted "extraordinary circumstances" to mean that "the People's Motion Opposing Removal must be denied unless they establish the existence of an 'exceptional' set of facts which 'go beyond' that which is 'usual, regular or customary' and which warrant retaining the case in the Youth Part instead of removing it to the Family Court."

New York State Assembly members debating the Raise the Age legislation indicated that the extraordinary circumstances requirement was intended to be a "high standard" for the District Attorney to meet, and denials of transfers to Family Court "should be extremely rare". NY Assembly Debate on Assembly Bill A03009C, Part WWW, at 39, April 8, 2017; see also, People v S.J., 72 Misc 3d 196 (Fam Ct 2021). "[T]he People would satisfy the 'extraordinary circumstances' standard where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court'. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021) citing *Assembly Record*, p. 39.

The legislators indicated that in assessing "extraordinary circumstances", the Judge should consider the youth's circumstances, including both aggravating factors and mitigating circumstances. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021); *Assembly Record*, pp. 39 to 40. Aggravating factors make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record*, p. 40.

Mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record* at 40.

"The People may not, in any way, use the [AO's] juvenile delinquency history, including any past admissions or adjudications, in any application for removal under the statute." People v J.J., 74 Misc 3d 1223(A) [NY Co Ct 2022]; citing Family Court Act § 381.2(1); see also, People v. M.M., 64 Misc 3d at 269, supra, citing Green v. Montgomery, 95 NY2d 693, 697 (2001).

CPL § 722.23(1)(b) mandates that every motion to prevent removal of an action to Family Court "contain allegations of sworn fact based upon personal knowledge of the affiant." This Court considered only those exhibits and documents whose content fall within the mandate of CPL § 722.23(1)(b) in making this decision.

The People argue that the actions of AO J.M. were especially cruel and heinous, in that she was associating with people who held a man up at gunpoint at a gas station, evaded police, and had a weapon accessible. Defense counsel for AO J.M. raises mitigating factors, stating that his client was not present for the robbery, was not the driver of the vehicle, and was not aware that the vehicle she was a passenger in was stolen. Defense counsel alleges that she is merely associated with the perpetrators here and had no part in these alleged crimes.

Even if AO J.M. was aware of the gun, it is not alleged that she used the firearm in furtherance of a crime. The People do not allege that AO J.M. led, threatened, or coerced other reluctant youth into committing the crime before the court. It is not alleged that she participated in the theft of the vehicle. It seems that, based on the facts as they are presented, AO J.M. got into a vehicle with the suspects who had allegedly robbed a driver at a gas station. AO J.M. was a passenger in the vehicle, there are no allegations that she drove the vehicle away from police, thereby evading arrest. Additionally, it is stated that AO J.M. was arrested upon exiting the vehicle; she did not flee the scene.

This Court finds that the People failed to meet their burden of proving that this young person is not amenable to or would not benefit in any way from the heightened services in Family Court. This is not the rare, "one out of 1,000 cases" that the Legislature envisioned would remain in the

Youth Part and not be removed to Family Court. (Assembly, Record of Proceedings, April 8, 2017, pp. 37-38); see People v J.M., 64 Misc 3d 259, 268 [NY Co Ct 2019]. Extraordinary circumstances do not exist to prevent the transfer of this action to Family Court. The People did not meet its burden to prevent removal of this action to Family Court. This matter shall be removed.

This constitutes the opinion, decision, and order of this Court.

SO ORDERED.

ENTER,

HON. BRENDA M. FREEDMAN

New York Official Reports

Unreported Disposition
Slip Copy, 2024 WL 1361149
(Table), 2024 N.Y. Slip Op. 50333(U)

***1** The People of the State of New York
v.
K.K., AO.

Youth Part, Erie County
Docket No. FYC-70421-24/001
Decided on March 21, 2024

Digest-Index Classification:Infants--Adolescent Offenders--Transfer from Youth Part to Family Court--Extraordinary Circumstances Did Not Exist to Prevent Transfer Where Offender Did Not Fire Gun or Use it in Furtherance of Crime

APPEARANCES OF COUNSEL

Denise Herman, Esq., (Assistant District Attorney)
Connor Dougherty, Esq., (for the Principal AO K.K.)

OPINION OF THE COURT

Brenda M. Freedman, J.

The People having moved pursuant to Criminal Procedure Law, Article 722, § 722.23(1), et seq. for an order preventing removal of this action to the juvenile delinquency part of Erie County Family Court, and upon reading the Notice of Motion and Supporting Affidavit of Denise Herman, Esq. (Assistant District Attorney), dated March 11, 2024; responsive papers having been filed on March 18, 2024 by Connor C. Dougherty, Esq., on behalf of AO K.K.; oral argument and a hearing on the motion having been waived; and due deliberation having been had, the Court finds the following:

PROCEDURAL HISTORY

AO K.K. is charged under FYC-70421-24 with one count of Criminal Possession of a Weapon in the Second Degree, in violation of Penal Law § 265.03(3), a class C felony and one count of Obstructing Governmental Administration in the Second Degree, in violation of Penal Law § 195.05, a misdemeanor.

On February 12, 2024, Accessible Magistrate Carney arraigned AO K.K. and released him to his Mother's custody.

On February 13, 2024, AO K.K. appeared for an arraignment in Youth Part, entering a plea of not guilty. The People conceded the six-day reading. This Court found that these charges did not meet the requirements of CPL § 722.23(2)(c) to remain in Youth Part. The People indicated that they would make a motion under CPL, Art. 722, § 722.23(1) requesting that this matter not be removed to Family Court. The decision date of the extraordinary circumstances motion was scheduled for March 25, 2024. AO K.K. was released under probation supervision, with a curfew, an ankle monitor at Probation's discretion, and various other conditions.

Findings of Fact

It is alleged that on February 11, 2024 at approximately 9:00PM, Police officers responded to two gun calls--one a shots fired call and the other a fight with guns call--in two adjacent areas. One Officer observed AO K.K. walk in front of his patrol vehicle, reach into his pocket, and grab an object. The Officer and his partner called out to the AO and asked him about shots being fired, and AO K.K. took off running. The Officer saw a dark colored object in AO K.K.'s hand that looked like a handgun as he was running; he then observed AO K.K. run into a house.

The Officer went to the house, announced his presence as a police officer, and asked the occupants to open the door. AO K.K. came outside wearing some of the same clothes he had been wearing earlier and was out of breath and sweating. The owner of the home (AO K.K.'s mother) signed a consent to search. While inside the home, it was ascertained that the firearm the Officer saw while he was running was stashed under AO K.K.'s mother's mattress. The Officer recovered one Reck P8 Kai firearm, which was loaded with nine live rounds. Additionally, the Officer observed approximately two eight balls of crack/cocaine in plain view in an open dresser drawer in the bedroom where the gun was found. The Officer recovered the drugs for destruction purposes because there was a child in the home. The police did not charge anyone with criminal possession of a controlled substance.

Another Officer heard a call that a male with a gun was with a female running into the home discussed above. Upon arrival, the Officer saw a live round near the living room doorway. Upon speaking with the residents of the home, they agreed to allow the Officers to search the living room. The Officer then returned to his patrol vehicle to retrieve a consent to search. While walking back to his vehicle, he saw AO K.K. in the back of a patrol vehicle. The Officer knew AO K.K. from a previous job. AO K.K. asked the Officer if his mom was going to jail for this. He responded that he did not know what he was talking about. AO K.K. asked the Officer if he could prevent his mom from going to jail if he told the Officer where the gun was located. The Officer responded that it was not his call. AO K.K. then said that the gun was under his mother's bed. The Officer told the other officers who were inside the home, and the gun was recovered. After the gun was recovered, AO K.K. screamed to his mother that he only had the gun because he had previously been shot.

Conclusions of Law

Pursuant to CPL § 722.23(1)(a), the Court shall order removal of the action to Family Court unless, within 30 days of arraignment, the District Attorney makes a written motion to prevent removal of the action.

Pursuant to CPL § 722.23(1)(d), the Court shall deny the district attorney's motion to prevent removal unless the Court determines that extraordinary circumstances exist that should prevent the transfer of the action to Family Court. CPL § 722.23 does not define the term “extraordinary circumstances”.

In People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021), the Court referenced the common dictionary and the legislative history of the Raise the Age legislation and interpreted “extraordinary circumstances” to mean that “the People's Motion Opposing Removal must be denied unless they establish the existence of an 'exceptional' set of facts which 'go beyond' that which is 'usual, regular or customary' and which warrant retaining the case in the Youth Part instead of removing it to the Family Court.”

New York State Assembly members debating the Raise the Age legislation indicated that ***2** the extraordinary circumstances requirement was intended to be a “high standard” for the District Attorney to meet, and denials of transfers to Family Court “should be extremely rare”. NY Assembly Debate on Assembly Bill A03009C, Part WWW, at 39, April 8, 2017; see also, People v S.J., 72 Misc 3d 196 (Fam Ct 2021). “[T]he People would satisfy the 'extraordinary circumstances' standard where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court'. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021) citing *Assembly Record*, p. 39.

The legislators indicated that in assessing ”extraordinary circumstances“, the Judge should consider the youth's circumstances, including both aggravating factors and mitigating circumstances. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021); *Assembly Record*, pp. 39 to 40. Aggravating factors make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record*, p. 40.

Mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record* at 40.

”The People may not, in any way, use the [AO's] juvenile delinquency history, including any past admissions or adjudications, in any application for removal under the statute.“ People v J.J., 74 Misc 3d 1223(A) [NY Co Ct 2022]; citing Family Court Act § 381.2(1); see also, People v. M.M., 64 Misc 3d at 269, supra, citing Green v. Montgomery, 95 NY2d 693, 697 (2001).

CPL § 722.23(1)(b) mandates that every motion to prevent removal of an action to Family Court ”contain allegations of sworn fact based upon personal knowledge of the affiant.“

This Court considered only those exhibits and documents whose content fall within the mandate of CPL § 722.23(1)(b) in making this decision.

Extraordinary circumstances that should prevent the transfer of the action to Family Court do not exist here. These facts here are not exceptional. The People allege that, while responding to a "shots fired" call, police officers saw AO K.K. running with a gun in his hand. Officers later searched AO K.K.'s mother's room; they recovered the gun from under her mattress, and they saw two eight balls of crack/cocaine in her open dresser. Defense counsel alleges that AO K.K. had gone to a neighbor's home to watch the Super Bowl. As he was walking home, two officers pulled up to AO K.K. on the wrong side of the street and ordered him to stop. Defense counsel argues that the Officers ordered AO K.K. to stop with very little, if any, reason to do so. It is not clear that the officers continued to the scene where the shots were fired.

The People do not allege that AO K.K. fired the gun or otherwise used the gun in furtherance of any crimes. There are no aggravating factors here. AO K.K. did not commit a series of crimes over multiple days, act in an especially cruel and heinous manner, or lead, threaten, or coerce other reluctant youth into committing the crimes before the court. However, ***3** there are mitigating circumstances. The fact that police recovered crack cocaine from an open drawer in AO K.K.'s mother's bedroom suggests that AO K.K. lacks positive behavior models and support at home.

This Court finds that the People failed to meet their burden of proving that this young person is not amenable to or would not benefit in any way from the heightened services in Family Court. Defense counsel states that AO K.K. has attended every scheduled appointment with Probation, but for one appointment when he did not have transportation. Even though he was unable to physically attend the meeting, he called his Probation Officer to explain the situation. He has fully abided by his curfew since it was set. He is participating in community-based programs and is registered for a GED program this Fall.

This is not the rare, "one out of 1,000 cases" that the Legislature envisioned would remain in the Youth Part and not be removed to Family Court. (Assembly, Record of Proceedings, April 8, 2017, pp. 37-38); see People v J.M., 64 Misc 3d 259, 268 [NY Co Ct 2019]. Extraordinary circumstances do not exist to prevent the transfer of this action to Family Court. This matter shall be removed.

This constitutes the opinion, decision, and order of this Court.

SO ORDERED.

ENTER,

HON. BRENDA M. FREEDMAN

93 N.Y.2d 949, 716 N.E.2d 173, 694 N.Y.S.2d 338, 1999 N.Y. Slip Op. 05334

In the Matter of Desmond J., a Person Alleged to be a Juvenile Delinquent, Appellant.

Court of Appeals of New York
116
Argued May 6, 1999;
Decided June 10, 1999

CITE TITLE AS: Matter of Desmond J.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 14, 1998, which affirmed an order of the Family Court, Queens County (Nora Freeman, J.), adjudicating appellant a juvenile delinquent upon a finding that appellant committed acts which, if committed by an adult, would constitute the crimes of rape in the first degree, burglary in the second degree, and sexual abuse in the first degree.

Matter of Desmond J., 246 AD2d 111, affirmed.

HEADNOTE

Infants

Juvenile Delinquents

Sufficiency of Delinquency Petition upon Removal from Criminal Court

In a juvenile delinquency proceeding in which respondent, then 14 years old, was originally charged in criminal court with first degree rape and related crimes, the juvenile delinquency petition was not jurisdictionally defective where the felony complaint, which was based on hearsay allegations from a detective, and supporting papers from the criminal proceeding were transferred to Family Court in the interests of justice and "deemed to be" a juvenile delinquency petition, and where the complainant, on the day after the transfer, signed a supporting deposition affirming the truthfulness and accuracy of the allegations of the felony complaint, since Family Court Act § 311.1 (7) excuses removal petitions from strict compliance with the otherwise applicable provisions of section 311.1. The allegations in the felony complaint were acceptable for commencing a criminal action; thus, if the felony complaint and other documents from the criminal proceeding are deemed a petition, it defies common sense and the clearly expressed intent of the Legislature that such papers should be deemed to be an incurable jurisdictionally deficient petition. The timing of the filing of the deposition did not constitute an improper amendment of the petition to cure the legal insufficiency of the factual allegations since the presentment agency immediately filed the supporting deposition on the date of respondent's initial appearance in Family Court, and in a removal context, that was the earliest stage at which the deposition could have been filed.

APPEARANCES OF COUNSEL

Jonathan M. Kratter, New York City, and *Monica Drinane* for appellant.
Richard A. Brown, District Attorney of Queens County, Kew Gardens (*John M. Castellano* and *Alyson J. Gill* of counsel), for respondent. ***950**
Michael D. Hess, Corporation Counsel of New York City (*Pamela Seider Dolgow* and *Fay Ng* of counsel), *amicus curiae.*

OPINION OF THE COURT

Memorandum.

The order of the Appellate Division should be affirmed, without costs.

In this juvenile delinquency proceeding, respondent, then 14 years old, was originally charged in a felony complaint with rape in the first degree and other related crimes. The felony complaint was based on hearsay allegations from a detective. Following arraignment in criminal court, the case was transferred to Family Court "in the interests of justice" pursuant to CPL 180.75. The order contains an uncontested finding by the criminal court of reasonable cause to believe that respondent committed the crimes charged in the felony complaint (*see,* CPL 725.05 [3]).

The felony complaint and supporting papers from the criminal proceeding were transferred to Family Court, where they were "deemed to be" a juvenile delinquency petition (Family Ct Act § 311.1 [7]). On the day after the transfer, the complainant signed a supporting deposition affirming the truthfulness and accuracy of the allegations of the felony complaint. One day later, respondent made his first appearance in Family Court. The presentment agency immediately handed up the supporting deposition and requested that it be filed with the papers transferred from criminal court. Respondent objected, arguing that only the felony complaint and the other papers transferred from criminal court could properly be deemed the petition. Respondent also moved to dismiss the petition as jurisdictionally defective, as it did not contain non-hearsay allegations satisfying all of the elements of the crimes charged.

Family Court denied the motion, and the Appellate Division affirmed, holding that Family Court Act § 311.1 (7) "excuses removal petitions from strict compliance with the otherwise applicable provisions of section 311.1" (246 AD2d 111, 115). The court noted that the allegations in the felony complaint were acceptable for commencing a criminal action. Thus, if the felony complaint and other documents from the criminal proceeding are "deem[ed]" a petition under Family Court Act § 311.1, it "defies common sense and the clearly expressed intent of the Legislature that such papers should be deemed to be an incurable jurisdictionally deficient petition" (*id.,* at 117). We agree.

Pursuant to Family Court Act § 311.1 (7), the felony complaint and additional papers transferred from criminal court ***951** are deemed to satisfy the requirements of Family Court Act § 311.1 (3). However, section 311.1 (7) does not expressly reference the requirement contained in Family Court Act §

311.2 (3) that "non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the [juvenile's] commission thereof." A felony complaint, by its very nature, need not satisfy this specific Family Court jurisdictional threshold (*see,* CPL 100.15 [3]). However, the felony complaint is legally "deemed" the petition. As section 311.2 states, and as this Court made clear in *Matter of Jahron S.* (79 NY2d 632, 638):

"Family Court Act § 311.2 clearly contemplates that ... supporting depositions may be filed in addition to petitions and that the sufficiency of the petition is to be measured by the factual allegations contained not only in the petition itself but also in any supporting deposition that may be attached to it."

Here, the complainant's supporting deposition filed with the papers transferred from criminal court satisfied the requirements of Family Court Act § 311.2. Respondent does not argue that the allegations in the deposition were insufficient, but instead contends that the timing of the filing of the deposition constituted an amendment of the petition to cure the "legal insufficiency of the factual allegations" in violation of Family Court Act § 311.5 (2) (b) and this Court's decision in *Matter of Rodney J.* (83 NY2d 503, 508). We reject respondent's argument.

The presentment agency immediately filed the supporting deposition on the date of respondent's (and the agency's) initial appearance in Family Court. In a removal context, this was the earliest stage at which the deposition could have been filed. While respondent contends that a deposition should have been filed in criminal court prior to the transfer, this would have been a superfluous, if not irregular, action. It would not be good and sound practice to require the filing of a document in criminal court that has no legal relevance to the criminal proceeding, solely to anticipate a distinctive jurisdictional requirement of Family Court. Nor need the case be delayed in criminal court pending a felony hearing or Grand Jury proceedings which would then become part of the petition pursuant to Family Court Act § 311.1 (7). This might directly contravene the legislative purpose to provide for a removal avenue "as quickly as possible" (*Matter of Vega v Bell,* 47 NY2d 543, 550). ***952** Under the facts of this case, the deposition was timely filed with the petition (Family Ct Act § 311.2) and thus was not an improper amendment of the petition within the meaning of Family Court Act § 311.5. We deem it unnecessary in this context to decide any broader question.

Chief Judge Kaye and Judges Bellacosa, Smith, Levine, Ciparick, Wesley and Rosenblatt concur.

Order affirmed, without costs, in a memorandum.

New York Official Reports

3 N.Y.3d 441, 821 N.E.2d 537, 788 N.Y.S.2d 299, 2004 N.Y. Slip Op. 08596

**1 In the Matter of Michael M., a Person Alleged to be a Juvenile Delinquent, Appellant

Court of Appeals of New York
1, 157
Argued October 20, 2004
Decided November 23, 2004

CITE TITLE AS: Matter of Michael M.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered October 21, 2003. The Appellate Division affirmed an order of the Family Court, Bronx County (Alma Cordova, J.), which had adjudicated appellant a juvenile delinquent, upon a fact-finding determination that appellant had committed acts which, if committed by an adult, would have constituted the crimes of attempted robbery in the first degree, attempted robbery in the second degree, assault in the second degree (two counts), attempted grand larceny in the fourth degree, and attempted criminal possession of stolen property in the fifth degree.

Matter of Michael M., 309 AD2d 631, reversed.

HEADNOTES

Infants
Juvenile Delinquents
Sufficiency of Removal Order

(1) In a juvenile delinquency proceeding that originated with the filing in Criminal Court of a felony complaint signed by a police officer and based on his interview of the victim, the order of removal to Family Court and the accompanying pleadings and proceedings containing only hearsay allegations were insufficient to satisfy the jurisdictional requirements for filing in Family Court. A removal order must be supported by nonhearsay factual allegations sufficient to establish every element of the crimes charged and the juvenile's commission of the crimes. Although a removal order and all associated pleadings and proceedings are deemed by Family Court Act § 311.1 (7) to be a petition to originate a juvenile delinquency proceeding in Family Court, the removal order and all associated pleadings and proceedings are not deemed to constitute a facially sufficient petition by virtue of section 311.1 (7)'s express terms. Section 311.1 (7) exempts a removal order from compliance with the requirement that a juvenile delinquency petition contain certain allegations required by section 311.1, but it does not excuse compliance with the requirement in section 311.2 (3) that petitions and/or supporting depositions must contain nonhearsay allegations.

Infants
Juvenile Delinquents

Sufficiency of Removal Order--Jurisdictional Defect is Nonwaivable

(2) In a juvenile delinquency proceeding that originated with the filing in Criminal Court of a felony complaint signed by a police officer and based on his interview of the victim, the order of removal to Family Court and the accompanying pleadings and proceedings containing only hearsay allegations were insufficient to satisfy the jurisdictional requirements for filing in FamilyCourt. ***442** The jurisdictional defect was nonwaivable and thus reviewable for the first time on appeal.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

Am Jur 2d, Appellate Review §§ 615, 691; Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 36, 37, 118, 119.

Carmody-Wait 2d, Proceedings Involving Abused and Neglected Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:256, 119A:258–119A:260; Carmody-Wait 2d, Criminal Procedure § 172:4495.

6 Law and the Family New York (2d ed) §§ 11:22, 11:26, 11:32.

McKinney's, Family Ct Act § 311.1 (7); § 311.2 (3).

NY Jur 2d, Appellate Review §§ 72, 562, 600–603, 619; NY Jur 2d, Domestic Relations §§ 1368–1370, 1391, 1434.

ANNOTATION REFERENCE

Validity, construction, and application of child hearsay statutes. 71 ALR5th 637.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: delinquency /s family /2 court /s removal /2 order & non-hearsay

POINTS OF COUNSEL

Legal Aid Society, Juvenile Rights Division, New York City (*Susan Clement* and *Monica Drinane* of counsel), for appellant.
The Family Court Act's unique jurisdictional requirements were not satisfied where the removal petition failed to contain nonhearsay allegations establishing every element of the crimes charged and no nonhearsay supporting deposition was filed with the petition at the initial appearance in Family Court or at any future point in the delinquency proceeding. (*Matter of Jahron S.,* 79 NY2d 632; *Matter of Rodney J.,* 83 NY2d 503; *People v Finnegan,* 85 NY2d 53, 516 US 919; *Matter of Robert J.,* 2 NY3d 339; *Matter of David T.,* 75 NY2d 927; *People v Alejandro,* 70 NY2d 133; *Matter of Detrece H.,* 78 NY2d 107; *Matter of Angel A.,* 92 NY2d 430; *People v Swamp,* 84 NY2d 725; *Matter of Neftali D.,* 85 NY2d 631.)
Michael A. Cardozo, Corporation Counsel, New York City (*Sharyn Rootenberg* and *Larry A. Sonnenshein* of counsel), forrespondent. ***443**
Pursuant to the express terms of Family Court Act § 311.1 (7), when a juvenile offender proceeding is commenced in Criminal Court

and removed to Family Court, the order of removal, which consists of the Criminal Court pleadings and proceedings, is legally sufficient to constitute a valid petition notwithstanding that it does not contain nonhearsay allegations establishing each element of the crimes charged. Therefore, the failure to supplement the removal petition with a supporting deposition containing nonhearsay allegations is nonetheless jurisdictionally sound and, in any event, may not be challenged for the first time on appeal.

(*Matter of Detrece H.,* 78 NY2d 107; *Matter of Desmond J.,* 246 AD2d 111, 93 NY2d 949; *Matter of David M.,* 229 AD2d 345; *Matter of Edward B.,* 80 NY2d 458; *Matter of Neftali D.,* 85 NY2d 631; *Matter of City School Dist. v New York State Pub. Empl. Relations Bd.,* 144 AD2d 35; *Matter of Allstate Ins. Co. v Libow,* 106 AD2d 110, 65 NY2d 807; *American Lodge Assn. v East N.Y. Sav. Bank,* 100 AD2d 281; *Sanders v Winship,* 57 NY2d 391; *Matter of Vega v Bell,* 47 NY2d 543.)

OPINION OF THE COURT

Read, J.

This appeal calls upon us to decide whether the jurisdictional requirements for filing in Family Court are met when an order of removal and the accompanying pleadings and ****2** proceedings contain only hearsay allegations; and, if they are not met, whether this deficiency is waivable. For the reasons that follow, we conclude that such a removal is jurisdictionally defective. Further, the defect is nonwaivable and thus is reviewable for the first time upon appeal.

I.

This case originated with the filing of a felony complaint on April 3, 2002 in Criminal Court, Bronx County. The complaint charged appellant Michael M., who was 14 years old at the time, with participating in a group assault on a 13-year-old boy to steal his bicycle. In the resulting melee, the 13 year old suffered a broken leg. The felony complaint was signed by a police officer and was based on his interview of the victim. In other words, the complaint contained only hearsay.

After Michael M. was arraigned, he was interviewed by the New York City Criminal Justice Agency, which recommended juvenile offender treatment. Accordingly, at a calendar call on May 15, 2002, the prosecutor asked Criminal Court to removethe ***444** case to Family Court "pursuant to CPL 180.75 [and] 210.43," [1] and handed up a form removal order for the judge to sign. [2] The prosecutor cited three factors to support her oral application: that Michael ****3** M. was not the "sole participant" in the attack; that removal would assure that the victim, who was of "tender age," would not be "subjected to needless trauma"; and that removal would not negatively affect the criminal justice system (*see* CPL 180.75 [6] [b]). The judge asked if there were "[a]ny objections," and Michael M.'s attorney replied "No." The judge did not place on the record the reasons causing him to exercise his discretion to order removal (*cf.* CPL 180.75 [6] [a], [c]; *see also Matter of Raymond G.*, 93 NY2d 531, 538 [1999]). He immediately signed the order, which directed Michael M. to appear in Family Court a week later, on May 22, 2002.

At his initial Family Court appearance, Michael M. was served with the felony complaint, the removal order and the transcript of the Criminal Court proceeding. On November 14, 2002, Family Court found that Michael M. had committed acts which, if committed by an adult, would constitute the felonies of attempted robbery in the first degree, attempted robbery in the second degree, assault in the second degree (two counts), attempted grand larceny in the fourth degree and attempted criminal possession of stolen property in the fifth degree. By orderof ***445** disposition dated November 22, 2002, Family Court placed him on probation for 24 months.

Michael M. challenged Family Court's jurisdiction in this matter for the first time on appeal, arguing that the removal order and its accompanying papers were facially insufficient because they contained only hearsay allegations. Citing to *Matter of Desmond J.* (93 NY2d 949 [1999]), the Appellate Division rejected Michael M.'s claim, stating that "[o]n this record, jurisdiction was sufficiently established" (309 AD2d 631 [1st Dept 2003]). We now reverse.

II.

A juvenile delinquency proceeding "is originated [in Family Court] by the filing of a petition" (Family Ct Act § 310.1 [1]). Family Court Act § 311.1 specifies the delinquency petition's contents. As relevant on this appeal, Family Court Act § 311.1 (7) provides that a removal order from a criminal court to Family Court and all associated "pleadings and proceedings" (other than those not yet transcribed) "shall be deemed to be a petition filed pursuant to subdivision one of section 310.1 containing all of the allegations *required by this* ****4** *section* [i.e., Family Ct Act § 311.1] notwithstanding that such allegations may not be set forth in the manner therein prescribed" (emphasis added). Here, the presentment agency takes the position that by virtue of section 311.1 (7)'s express terms, the removal order and whatever other pleadings and proceedings may accompany it in an individual case are deemed to constitute a facially sufficient petition. We disagree.

(1) The need for nonhearsay allegations stems not from Family Court Act § 311.1 ("this section"), but instead from subdivision (3) of a different section--Family Court Act § 311.2. The latter provision mandates that the factual allegations of a petition and/or any supporting depositions must contain "non-hearsay allegations [to] establish, if true, every element of each crime charged and the respondent's commission thereof" (Family Ct Act § 311.2 [3]; *see also* Family Ct Act § 315.1 [1] [a]; [2]). Section 311.1 (7) exempts a removal order from compliance with the requirements of section 311.1; it does not excuse compliance with section 311.2 and its nonhearsay requirements. Accordingly, we conclude that removals must be supported by nonhearsay factual allegations to establish every element of the crimes charged and the juvenile's commission of these crimes.

Other provisions in the Family Court Act support our reading of Family Court Act § 311.1 (7). In 1978, the Legislatureamended ***446** former Family Court Act § 731 to add the removal provision as subdivision (3) (*see* L 1978, ch 481, § 48), which provided in relevant part as follows:

> "When an order of removal . . . is filed with [Family Court] such order and the pleadings and proceedings transferred with it shall be and shall be deemed to be a petition filed pursuant to *subdivision one of this section* containing all of the allegations therein required notwithstanding that such allegations may not be set forth in the manner therein prescribed" (former Family Ct Act § 731 [3] [emphasis added]).

Subdivision (1) of former Family Court Act § 731, in turn, required the filing of a petition to originate a juvenile delinquency proceeding (comparable to Family Ct Act § 310.1 [1]). In addition, subdivision (1) required the petition to allege that the juvenile had committed an act that, if done by an adult, would constitute a crime and to specify the act as well as the time and place of its commission (former Family Ct Act § 731 [1] [a], restated in Family Ct Act § 311.1 [2], [3] [d], [e], [f], [g]); that the juvenile was under 16 years old at the time of the alleged act's commission (former Family Ct Act § 731 [1] [b], restated in Family Ct Act § 311.1 [3] [c]); and that the juvenile required supervision, treatment or confinement (former Family Ct Act § 731 [1] [c], restated in Family Ct Act § 311.1 [3] [j]).

Thus, the removal provision enacted by the Legislature in 1978 as former Family ****5** Court Act § 731 (3) did not, by its express terms, exempt a removal from compliance with any of the former Act's requirements except those in section 731 (1), which are broadly comparable to Family Court Act § 311.1's requirements from which a removal pursuant to section 311.1 (7) is exempt. Underscoring this point, the Legislature expressly stated that other provisions of the former Family Court Act were inapplicable to a removal order. For example, the Legislature amended former Family Court Act § 733, which provided for various individuals to originate a juvenile delinquency proceeding, to specify that its provisions did "not apply to a proceeding originated by the filing of an order of removal" (L 1978, ch 481, § 49; *see also* ch 481, § 50 [providing that former Family Ct Act § 734, relating to procedures for initiation of juvenile delinquency proceedings by individuals, did not apply in the removal context; ch 481, § 51 [providing that former FamilyCt ***447** Act § 734-a, relating to various approvals for the filing of a petition, did not apply in the removal context]). [3]

Similarly, former Family Court Act § 739, which governed release or detention after the filing of a petition and prior to an order of disposition, was amended by adding language as subdivision (c) to require that "[w]here the petition consists of [a removal order], the petition shall be deemed to be based upon a determination that probable cause exists to believe the respondent is a juvenile delinquent and the respondent shall not be entitled to any further inquiry on the subject of whether probable cause exists" (L 1978, ch 481, § 52). This language was carried over into Family Court Act § 325.1 (5) when the Legislature recodified the Family Court Act's juvenile delinquency provisions in 1982 (L 1982, ch 920, § 1). Interestingly, however, the Legislature provided an exception from section 325.1 (5) for a removal pursuant to CPL 725.05 (3)/CPL 180.75 (4)--the bases for Michael M.'s removal--provided that the juvenile was not afforded a probable-cause hearing for a reason other than waiver. [4] The Legislature also

enacted Family Court Act § 311.2 in 1982, but did not similarly provide any express exception from its nonhearsay requirements for a removal pursuant **6 to CPL 725.05 (3)/CPL 180.75 (4).

Nor does our decision in *Matter of Desmond J.*, which also involved a felony complaint based solely on hearsay allegations, contradict our reading of Family Court Act § 311.1 (7). At the initial appearance in Family Court in *Matter of Desmond J.*, the presentment agency filed a supporting deposition containing nonhearsay allegations to comply with Family Court Act § 311.2 (3). The juvenile "objected, arguing that only the felony complaint and the other papers transferred from criminal court could properly be deemed the petition[, and] moved to dismiss the petition as jurisdictionally defective, as it did not contain non-hearsay allegations" (93 NY2d at 950). Both Family Court and the Appellate Division (246 AD2d 111 [2d Dept 1998]) rejected the juvenile's claim. *448

The Appellate Division adopted the position pressed by the presentment agency here; i.e., that a removal order and whatever other pleadings and proceedings may accompany it are deemed by Family Court Act § 311.1 (7) to constitute a facially sufficient petition. The Appellate Division recognized that we had "consistently stated that a juvenile delinquency petition must contain nonhearsay factual allegations which support every element of the crimes charged to meet the legal sufficiency requirements of Family Court Act § 311.2" (246 AD2d at 113, citing *Matter of Neftali D.*, 85 NY2d 631 [1995]; *Matter of Rodney J.*, 83 NY2d 503 [1994]; *Matter of Edward B.*, 80 NY2d 458 [1992]; *Matter of Jahron S.*, 79 NY2d 632 [1992]; *Matter of Detrece H.*, 78 NY2d 107 [1991]; and *Matter of David T.*, 75 NY2d 927 [1990]). "All of these cases were decided upon the theory that because a juvenile delinquency petition may be used to deprive a juvenile of his liberty, the accuracy of the allegations contained therein must be reliable" (246 AD2d at 113-114). The Court concluded, however, that these considerations were not relevant in the removal context because "there will generally have been proceedings held [i.e., a felony hearing or grand jury proceeding] to test the case against the accused juvenile offender"; and, further, the Criminal Court "is required, depending upon the extent of action previously taken in Criminal Court, to make findings as to reasonable cause or evidentiary sufficiency" (*id.* at 115).

We affirmed the Appellate Division, but on different grounds entirely. As previously noted, the presentment agency had filed a supporting deposition satisfying the requirements of Family Court Act § 311.2 (3) at the initial appearance in Family Court. Because "[i]n a removal context, this was the earliest stage at which the deposition could have been filed," we concluded that the petition was not improperly amended within the meaning of Family Court Act § 311.5 (93 NY2d at 951), and was therefore facially sufficient. Accordingly, in *Matter of Desmond J.* we did not need to reach the "broader question" that we now resolve. (*Id.* at 952.) In short, because the papers transferred from the Criminal Court, as supplemented at the earliest possible **7 moment by the supporting deposition, in fact satisfied the requirements of section 311.2 (3),

we did not need to decide in *Matter of Desmond J.* whether they were required to do so.

(2) We have, moreover, consistently viewed petitions failing to satisfy Family Court Act § 311.2 (3) as exhibiting a nonwaivable jurisdictional defect (*see* ***449** *Matter of Neftali D.*, 85 NY2d at 636-637; *Matter of Rodney J.*, 83 NY2d at 507; *Matter of Jahron S.*, 79 NY2d at 637; *Matter of Detrece H.*, 78 NY2d at 109-110; *Matter of David T.*, 75 NY2d at 929).[5] In *People v Casey* (95 NY2d 354 [2000]), we recently considered whether a hearsay pleading violation of CPL 100.40 (1), from which Family Court Act § 311.2 is derived, is jurisdictional and nonwaivable. We concluded that it was not. In doing so, however, we noted "the importance of the curability of a particular procedural defect as a factor weighing in favor of requiring preservation" (*id.* at 367). Because a legally insufficient juvenile delinquency petition under Family Court Act § 311.2 (3) cannot be cured by amendment, "we have held that hearsay pleading defects in delinquency petitions need not be preserved" (*id.*).

Finally, there may indeed be cases where the reliability of the charges in a felony complaint will have been tested at a hearing or in the grand jury or otherwise during the course of juvenile offender proceedings taking place in a criminal court prior to removal. In such cases, the juvenile may receive protections equivalent to a nonhearsay supporting deposition. In this case, however, no such equivalent protections were afforded Michael M.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the petition dismissed.

R.S. Smith, J. (dissenting). We dissent, and would hold that Michael M. waived his right to have a nonhearsay deposition filed in support of the juvenile delinquency petition when he failed to raise ****8** this issue at any time before taking an appeal.

I

On April 2, 2002, a 13-year-old boy with a bicycle was set upon by a gang of other boys near Yankee Stadium. The assailants, trying to steal the bicycle, punched the victim in the face, knocked him down and kicked him while he lay on the ground. Michael, 14, was arrested near the scene and identified by thevictim ***450** and other witnesses as one of the participants in the assault.

Michael was arraigned on a felony complaint in Criminal Court. As is permissible (CPL 100.15 [3]), the Criminal Court complaint was based on hearsay; the arresting officer related what the victim had told him. Later, the prosecutor decided that a felony prosecution would not be necessary, and that a juvenile delinquency proceeding in Family Court would be preferable. On motion of the prosecution, and without objection, Michael's case was removed to Family Court.

Family Court complaints, unlike felony complaints in Criminal Court, must contain, or be supported by depositions that contain, "non-hearsay allegations" (Family Ct Act § 311.2 [3]). Thus, after the case was removed, the

City of New York, which was presenting the delinquency petition, should have submitted to the Family Court a deposition from the victim supporting the officer's hearsay complaint (*Matter of Desmond J.*, 93 NY2d 949 [1999]). The City omitted to do this. Michael did not complain of, or call the Family Court's attention to, the omission.

The case proceeded to a hearing, and Family Court found that Michael had committed acts which, if committed by an adult, would have constituted attempted robbery in the first degree, assault in the second degree, and several other crimes. Michael was adjudged a juvenile delinquent and placed on probation for 24 months. The Family Court's order of disposition required that he receive counseling and obey curfews. Michael appealed from this order and on appeal argued, for the first time, that the proceedings against him were flawed because no deposition containing "non-hearsay allegations" had been filed.

II

It is an unquestioned rule, applicable in almost all cases, that a litigant may not complain on appeal of errors that he did not bring to the attention of the lower court. There are a few exceptions, for errors so fundamental that justice requires their correction, but there is no reason in principle why a violation of the "non-hearsay" requirement of Family Court Act § 311.2 (3) should be placed in that category. Michael's argument here, which the majority accepts, is based not on principle but on some peculiarities in our Court's case law.

One of the errors considered so fundamental that it may be raised for the first time ****9** on appeal is the failure of an accusatoryinstrument ***451** to allege facts that constitute the charged crime. Where the acts the defendant allegedly committed do not violate the criminal statute on which the prosecution is based, we have permitted defendants to raise the issue on appeal even though they did not raise it below. We have grounded this result on the theory that an accusatory instrument that fails to allege essential facts is insufficient to confer jurisdiction on the trial court (*People v Case*, 42 NY2d 98 [1977]).

In *Case*, we stated the rule broadly: "A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution" (*id.* at 99; citation omitted). Language like this is open to the mistaken interpretation that not just a failure to allege facts constituting the charged crime, but every technical defect in the instrument, is a "nonwaivable jurisdictional" error. We made such a mistake, in dictum, in *People v Alejandro* (70 NY2d 133 [1987]). All we held in *Alejandro* was that a misdemeanor information charging defendant with resisting arrest was jurisdictionally deficient when the facts alleged failed to support an element of the charged crime--that the arrest in question was "authorized." In stating the rule, however, we tracked the language of the statute governing misdemeanor informations, Criminal Procedure Law § 100.40 (1) (c)--which, like the Family Court Act section at issue in this case, contains a "non-hearsay" requirement. Thus, we said in *Alejandro* that an information which "lacked the necessary nonhearsay allegations which would establish,

'if true, every element of the offense charged and the defendant's commission thereof' " contained a "jurisdictional defect which was not waived by defendant's failure to raise the issue until after completion of the trial" (*id.* at 134-135).

In *People v Casey* (95 NY2d 354, 362 [2000]) we found it necessary to "revisit" *Alejandro* and we retracted "*Alejandro*'s suggestion that the . . . non-hearsay requirement of CPL 100.40 (1) (c) was 'jurisdictional' and, thus, non-waivable and reviewable on appeal without preservation." Our holding in *Casey* rests in part on an analysis of the background and purpose of CPL 100.40 (1) (c), but also in part on what we called "the general principles governing the narrow instances where this Court has departed from the requirement that errors in criminal proceedings have to be preserved at the trial court in order to be reviewable as an issue of law." (*Id.* at 363.) We said in *Casey*:

> "[T]he failure to preserve has been excused for onlythe ***452** most fundamental procedural irregularities . . . [I]t is only 'where "the error complained of goes to the *essential validity* of the proceedings conducted below" such that "the entire trial is *irreparably tainted*," [that] it need not be preserved to present a question of law reviewable by this Court' (*People v Agramonte*, 87 NY2d 765, 770 [quoting *People v Patterson*, 39 NY2d 288, 295-296] [emphasis supplied]). ****10** Pleading errors involving omission of elements of the charged crime are fundamental. They impair a defendant's basic rights to fair notice sufficient to enable preparation of a defense and to prevent double jeopardy. *Hearsay pleading defects do not implicate any of those basic rights of an accused*." (*Id.* at 366 [emphasis added in part]; *accord People v Keizer*, 100 NY2d 114, 121 [2003] ["a purported hearsay defect in an accusatory instrument is nonjurisdictional"].)

The reasoning of *Casey* is convincing, and logically it should control our decision here. A problem arises, however, because, in a two-sentence dictum near the end of the *Casey* opinion, we distinguished juvenile delinquency proceedings from proceedings on Criminal Court misdemeanor informations, thus seeming to imply that the *Casey* rule would not apply in delinquency cases. We said:

> "Contrastingly, a legally insufficient juvenile delinquency petition under Family Court Act § 311.2 (3), the counterpart to CPL 100.40 (1) (c), cannot be cured by amendment (*see*, Family Ct Act § 311.5 [2] [b]). Thus, we have held that hearsay pleading defects in delinquency petitions need not be preserved (*see*, *Matter of Rodney J.*, 83 NY2d 503 [ ]; *Matter of Detrece H.*, 78 NY2d 107)." (95 NY2d at 367.)

This dictum, unlike the rest of the *Casey* opinion, will not withstand analysis. The first sentence of the dictum distinguishes juvenile delinquency from misdemeanor cases because a flaw in a delinquency petition, unlike a flaw in a misdemeanor information, "cannot be cured by amendment." As we noted in *Casey*, the curability of a procedural defect is an important factor weighing in favor of requiring preservation. However, although a defect in a delinquency petition cannot be cured *by amendment*, it can be cured. Here, for example, if Michael hadmade ***453** a timely motion to

dismiss the petition, his motion presumably would have been successful, but the City could simply have brought another petition. Here, as in *Casey*, curability furnishes an important reason why preservation should be required.

The second sentence of the *Casey* dictum says "we have held" that hearsay defects in delinquency petitions are nonwaivable--but the two cases cited for that proposition do not support it. Neither *Matter of Rodney J.* (83 NY2d 503 [1994]) nor *Matter of Detrece H.* (78 NY2d 107 [1991]) involved any issue of waiver. In both cases, the alleged delinquent had preserved the defect in the petition by moving to dismiss in Family Court. The same is true of two other cases cited by the majority here, *Matter of Jahron S.* (79 NY2d 632 [1992]) and ****11** *Matter of Neftali D.* (85 NY2d 631 [1995]). There appears to be only one case, *Matter of David T.* (75 NY2d 927 [1990]) in which we held that a hearsay defect in a delinquency petition was nonwaivable--and *David T.* is a brief memorandum decision in which we relied exclusively on *Alejandro*. There is no reason why the *David T.* holding should have survived our decision in *Casey*, 10 years later, to revisit *Alejandro*.

We thus conclude that the majority errs in following the *Casey* dictum. We would instead follow the *Casey* holding and the powerful reasoning that supports it, and would conclude that a hearsay defect in a delinquency petition, like a hearsay defect in a criminal court misdemeanor information, is nonjurisdictional and may be waived.

III

The result in this case is unfortunate. It is always unfortunate--though, of course, it is sometimes inevitable--when a meritorious case fails because of a lawyer's omission to file the right piece of paper, but it is especially so in juvenile delinquency cases. Such cases serve not only to protect the community from troubled young people like Michael, but to give these young people themselves, to the extent that an imperfect system can manage it, the help they need. The rule the Court adopts today, by magnifying the consequences of a procedural error, correspondingly reduces the chances of doing practical good. When a boy or girl is adjudicated delinquent, and a court orders the services that it thinks most appropriate, the services may or may not help--but they will certainly not help if they are terminated in midstream because a lawyer has belatedlydiscovered ***454** a procedural glitch. Nor is it helpful to send the message to Michael, and to future Michaels, that violent and antisocial conduct will have no consequences if a lawyer can discover a long-neglected flaw in paperwork.

IV

Accordingly, we would affirm the decision of the Appellate Division.

Chief Judge Kaye and Judges G.B. Smith, Ciparick and Rosenblatt concur with Judge Read; Judge R.S. Smith dissents and votes to affirm in a separate opinion in which Judge Graffeo concurs.

Order reversed, etc.

FOOTNOTES

Footnotes

1 CPL 180.75 (4) provides that when a juvenile offender is arraigned before a local criminal court upon a felony complaint, the court shall order removal to Family Court at the District Attorney's request if, upon consideration of criteria specified in CPL 210.43 (2), removal is determined to be "in the interests of justice." These criteria, which the court must consider "to the extent applicable," include the seriousness and circumstances of the offense, the extent of harm caused and the evidence of guilt, whether admissible or inadmissible at trial (CPL 210.43 [2]). Additional showings are required where the felony complaint charges murder in the second degree, rape in the first degree and other specified serious crimes (*see* CPL 180.75 [4]). Further, where a court directs removal to Family Court, the provisions of CPL 725.05 govern the order. For a removal order made pursuant to CPL 180.75 (4), the court must specify the act or acts it found "reasonable cause to allege" (CPL 725.05 [3]).

2 The form order purports to be an order for Supreme Court to remove a criminal proceeding to Family Court upon the People's motion, acting pursuant to paragraph (a) of CPL 180.75 (4). This provision, which took effect on September 1, 1978 (*see* L 1978, ch 481, §§ 33, 67), was repealed when section 180.75 (4) was substantially amended, effective August 4, 1979 (*see* L 1979, ch 411, §§ 5, 26; Governor's Approval Mem, 1979 McKinney's Session Laws of NY, at 1800). Thus, the order is not only boilerplate, but outdated boilerplate.

3 When the Legislature recodified the Family Court Act's juvenile delinquency provisions in 1982, it restricted origination of juvenile delinquency proceedings to presentment agencies (*see* Family Ct Act § 310.1 [2]; *see also* L 1982, ch 920, §§ 1, 28).

4 As a result, Michael M. would have been entitled to a probable-cause hearing in Family Court because he was not afforded a hearing to test the evidence in Criminal Court, and he did not waive his right to a hearing on the felony complaint.

5 The dissent suggests that this disserves young people charged with juvenile delinquency. We do not doubt that among the purposes of a delinquency adjudication is the provision of necessary services to the delinquent. But we recognize as well that a system of justice must always ensure that procedural safeguards are met and legal requirements are fulfilled. Under our law, presentment

agencies may only prosecute based on a facially sufficient petition. Because their failure to do so has consequences, we are confident that they will be vigilant about complying with their statutory mandate in the future.

New York Official Reports

87 N.Y.2d 9, 660 N.E.2d
1108, 637 N.Y.S.2d 329

In the Matter of Robert O.,
a Person Alleged to be a
Juvenile Delinquent, Appellant.

Court of Appeals of New York
266
Argued October 24, 1995;
Decided December 5, 1995

CITE TITLE AS: Matter of Robert O.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 12, 1994, which affirmed an order of disposition of the Family Court, Dutchess County (Damian J. Amodeo, J.), entered upon a fact-finding order of that court finding, upon respondent's admission, that he had committed an act constituting unlawful possession of a weapon by a person under 16 years of age, adjudicating respondent to be a juvenile delinquent and placing him on probation for a term of 12 months.

Matter of Robert O., 207 AD2d 783, affirmed.

HEADNOTES

Infants
Juvenile Delinquents

Failure to Hold Timely Initial Appearance Not Ground for Dismissal with Prejudice

(1) In a juvenile delinquency proceeding, the failure to hold the "initial appearance" within 10 days of the filing of the delinquency petition as required by Family Court Act § 320.2 is not alone a reason to foreclose a timely prosecution of the underlying charges. While the Legislature has seen fit to give protected status to the 60-day limit for commencing the fact-finding phase by enacting the speedy fact-finding right and by providing an express ground for dismissal for its violation, the time period for holding the initial appearance has not been granted similar protected status. Nowhere in the Family Court Act is a dismissal for a violation of the 10-day limit for holding the initial appearance elevated to the status of a ground for dismissal with prejudice, and such a provision will not be read into the statute. Moreover, the requirement of Family Court Act § 320.2 that "good cause" for the delay be shown before departing from the 10-day initial appearance time limit is not eviscerated by permitting refiling of the petition, in view of the significant consequences that may result from the presentment agency's failure to show good cause for the delay.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 71, 73.

Family Ct Act § 320.2.

NY Jur 2d, Domestic Relations, § 1381. ***10**

ANNOTATION REFERENCES

See ALR Index under Children; Juvenile Courts and Delinquent Children.

POINTS OF COUNSEL

Schisler & Sall, Poughkeepsie *(Richard C. Schisler* and *David B. Sall* of counsel), for appellant.

The refiling of the juvenile delinquency petition herein, after its dismissal on speedy hearing grounds pursuant to Family Court Act §§ 310.2 and 320.2 (1), where appellant did nothing to cause the delay, was totally improper and without authority and the refiled petition should have been dismissed. *(Matter of Robert S.,* 192 AD2d 612; *Matter of Frank C.,* 70 NY2d 408; *Matter of Detrece H.,* 78 NY2d 107; *Matter of Shannon FF.,* 189 AD2d 420; *Matter of Tommy C.,* 182 AD2d 312.)

Ian G. MacDonald, County Attorney, Poughkeepsie *(Victor A. Civitillo* and *Christian R. Cullen* of counsel), for presentment agency, respondent.

I. The court below properly found that the presentment agency may file a second petition identical to one which was dismissed for failure to conduct the first appearance within 10 days because there is no right to a speedy first appearance comparable to the right to a speedy fact finding. *(Matter of Frank C.,* 70 NY2d 408; *Matter of Randy K.,* 77 NY2d 398; *Matter of Christopher WW.,* 189 AD2d 411; *Matter of Robert S.,* 192 AD2d 612; *Matter of Jose R.,* 83 NY2d 388; *Matter of Atthis D.,* 205 AD2d 263; *Matter of Satori R.,* 202 AD2d 432.)

II. The court below properly found that the presentment agency may file a second petition identical to the first one which was dismissed for failure to conduct the first appearance within 10 days because appellant's right to a speedy fact-finding hearing was not violated. *(Matter of Gabriel R.,* 208 AD2d 984; *Matter of Shannon FF.,* 189 AD2d 420; *Matter of Tommy C.,* 182 AD2d 312; *Matter of Jessie C.,* 154 Misc 2d 103; *Matter of J. V.,* 127 Misc 2d 780; *Matter of Rodney J.,* 83 NY2d 503; *Matter of Jahron S.,* 79 NY2d 632; *Matter of Detrece H.,* 78 NY2d 107; *Matter of David T.,* 75 NY2d 927.)

Jane M. Spinak, New York City, and *Robyn B. Millman* for the Juvenile Rights Division of The Legal Aid Society, *amicus curiae.*

The presentment agency in a juvenile delinquency proceeding should not be allowed to refile an identical petition to one which was previously dismissed due to a violation of Family Court Act § 320.2 (1). *(Matter of Jose R.,* 83 NY2d 388; ***11** *Matter of Randy K.,* 77 NY2d 398; *Matter of Frank C.,* 70 NY2d 408; *Matter of Satori R.,* 202 AD2d 432; *Matter of Robert S.,* 192 AD2d 612; *Matter of Atthis D.,* 205 AD2d 263; *Matter of Detrece H.,* 78 NY2d 107; *Matter of Shannon FF.,* 189 AD2d 420.)

Paul A. Crotty, Corporation Counsel of New York City *(Kristin M. Helmers* and *Deborah R. Douglas* of counsel), for New York City, *amicus curiae.*

The Court below properly concluded that a dismissal based upon the failure to hold an initial appearance within 10 days after the filing of the petition did not preclude the filing of a second petition on "speedy trial" grounds, where, as here, the fact-finding proceeding commenced within 60 days of the juvenile's initial appearance on the original petition. *(Matter of Detrece H.,* 78 NY2d 107; *People v Lomax,* 50 NY2d 351; *Matter of Gabriel R.,*

208 AD2d 984; *Matter of Shannon FF.,* 189 AD2d 420; *Matter of Tommy C.,* 182 AD2d 312; *Matter of Aaron J.,* 80 NY2d 402; *Matter of Atthis D.,* 205 AD2d 263, 85 NY2d 924; *Matter of Kevin G.,* 159 Misc 2d 288; *Royal Zenith Corp. v Continental Ins. Co.,* 63 NY2d 975; *Matter of Jose R.,* 83 NY2d 388.)

OPINION OF THE COURT

Titone, J.

In this juvenile delinquency proceeding we are called upon to determine the consequences of a failure to hold the "initial appearance" within 10 days of the filing of the delinquency petition as required by Family Court Act § 320.2. We conclude that this flaw is not alone a reason to foreclose a timely prosecution of the underlying charges.

On March 2, 1993, the presentment agency filed a petition alleging that respondent committed acts, which if committed by an adult, would constitute the crimes of burglary in the first degree, burglary in the second degree and petit larceny. The charges stem from respondent's alleged breaking and entering into a residence while armed and his theft of property therefrom. Respondent's initial appearance on the petition was not held until March 29, 1993.

Respondent then moved to dismiss the petition on the ground that the initial appearance was not held within 10 days of the date the petition was filed as required by Family Court Act § 320.2 (1) and no good cause was shown for the delay. The presentment agency conceded that dismissal of that petition was proper since no good cause had been shown, but argued that ***12** dismissal should be without prejudice to refile the petition. Family Court granted the motion and dismissed the petition on April 26, 1993.[1] On May 3, 1993, the presentment agency filed an identical petition against respondent. Respondent's appearance on the second petition was held on May 11, 1993.

Respondent then moved to dismiss the second petition pursuant to Family Court Act §§ 310.2, 320.2 and 332.1 (8) on the ground that his right to a speedy fact-finding hearing was violated. Family Court denied the motion, holding that the right to speedy fact finding guaranteed by the Family Court Act "is not compromised by allowing the refiling of a petition" where, as here, the fact-finding hearing commenced within 60 days of the initial appearance on the first petition. Respondent preserved his right to appeal after admitting that he committed acts constituting unlawful possession of a weapon by a person under 16 in satisfaction of all charges in the petition.[2] Respondent was adjudicated a juvenile delinquent and placed on probation for a term of 12 months.

The Appellate Division affirmed, with one Justice dissenting. The majority concluded that the presentment agency was not precluded from refiling a delinquency petition after the first was dismissed for failure to hold the initial appearance within 10 days of such filing where the juvenile's separate right to a "speedy hearing" was observed. The dissent opined that the presentment agency's failure to show "good cause" for the belated initial appearance required dismissal of the petition with prejudice in order to give effect to the statutory "good cause" language. We granted

respondent permission to take this appeal, and now affirm.

The Family Court Act prescribes the procedures and time frames for conducting the juvenile's "initial appearance," which is "the proceeding on the date the respondent first appears before the court after a [delinquency] petition has been filed and any adjournments thereof" (Family Ct Act § 320.1).[3] At the initial appearance, the juvenile is appointed a Law ***13** Guardian if independent counsel has not been retained, informed of the charges contained in the petition, and furnished with a copy of the petition (Family Ct Act § 320.2 [2]; § 320.4 [1]). At that time, the court must determine whether detention of the juvenile is warranted, whether the case should be referred to the probation service for adjustment services, the date of the probable-cause hearing for a detained child, the date of the fact-finding hearing, and other issues properly before it (*id.*, § 320.4 [2] [a]-[e]). Family Court Act § 320.2 (1) provides that "[i]f the respondent is not detained, the initial appearance shall be held as soon as practicable and, absent good cause shown, within ten days after a petition is filed."

Where the juvenile is not detained, an adjudication on the merits of the petition's charges, known as the "fact-finding" phase of the process, "shall commence not more than sixty days after the conclusion of the initial appearance" (Family Ct Act § 340.1 [2]), subject to adjournments for good cause and special circumstances (*see, id.*, § 340.1 [3]-[5]). The Legislature has given the time frame for commencing the fact-finding phase special status by providing that "[a]fter a petition has been filed ... the respondent is entitled to a speedy fact-finding hearing" (*id.*, § 310.2). No counterpart to this section exists for the initial appearance. To protect a juvenile's right to a "swift and certain adjudication" within the designated 60-day time period (*see, Matter of Frank C.*, 70 NY2d 408, 413), Family Court Act § 332.1 (8) expressly authorizes the filing of a pretrial motion to "dismiss[ ] a petition, or any count thereof, on the ground that the respondent has been denied a speedy fact-finding hearing contrary to section 310.2" (*id.*, § 332.1 [8]). Thus, under the legislative scheme, so long as the adjudication is completed within 60 days, unless good-cause or special-circumstances adjournments are in order, a respondent's right to a speedy fact finding has been preserved.

We reject respondent's contention that a violation of the 10-day period for holding the initial appearance alone warrants dismissal of the petition with prejudice, regardless of the date fact finding has commenced. While the Legislature has seen fit to give protected status to the 60-day limit for commencing the fact-finding phase by enacting the speedy fact-finding right and by providing an express ground for dismissal for its violation, the time period for holding the initial appearance has not been granted similar protected status (*cf., Matter of Jose R.*, 83 NY2d 388 [dismissal of petition for failing to timely complete dispositional phase not warranted where Family Court Act ***14** lacks provisions establishing right to a speedy disposition and authorizing dismissal of petition for such violation]).

The Family Court does not have inherent power to dismiss a juvenile delinquency petition.

Rather, that authority is governed by statute, and is available only in carefully delineated circumstances (*see,* Family Ct Act §§ 315.1, 332.1). Specifically, in addition to a dismissal for a denial of the right to a speedy fact finding, the grounds for dismissal are expressly limited to the existence of factual, legal or jurisdictional defects in a petition (*see, id.,* § 315.1), a violation of the Statute of Limitations of Family Court Act § 302.2 (*id.,* § 332.1 [9]) and a violation of the prohibition against double jeopardy as provided by Family Court Act § 303.2 (*id.,* § 332.1 [10]). Where a petition is dismissed as jurisdictionally defective, dismissal is generally without prejudice, and the presentment agency's proper recourse is to refile the petition (*see, Matter of Detrece H.,* 78 NY2d 107, 111). While the parties here agree that dismissal of the first petition was in order, they dispute whether that dismissal was with prejudice. Nowhere in the Family Court Act is a dismissal for a violation of the 10-day limit for holding the initial appearance elevated to the status of a ground for dismissal with prejudice, and we decline to read such a provision into this statute.

Respondent and supporting *amicus curiae* conclude that although the right to a speedy initial appearance is not explicitly found in the statute, it is encompassed in the right to a speedy fact finding. In other words, they argue that because the date of the fact-finding phase is derived from the date of the initial appearance, a delay of the initial appearance without good cause necessarily constitutes a violation of the speedy trial right and is thus similarly subject to the remedy of dismissal under Family Court Act § 332.1.

While theoretically a late initial appearance may directly delay adjudication of the merits in contravention of the statutory speedy fact-finding mandate, here that consideration is insignificant because no violation of the speedy fact-finding right occurred. From start to finish, respondent's adjudication was completed within 60 days of his appearance on the original petition.[4] Respondent does not claim that an adjudication on the merits had to be postponed due to the petition's refiling. ***15**

Indeed, were we to accept respondent's argument that the right to a speedy fact finding attaches to all individual proceedings taking place after the petition is filed, and is thus violated by holding a late initial appearance, we would be constrained to reach the same conclusion for an untimely probable cause hearing, which by definition occurs after the initial appearance, but prior to fact finding (*see,* Family Ct Act § 325.2 [1], [2]). Nonetheless, Family Court Act § 325.3 (4) belies that contention, providing that "[i]f the court or the presentment agency cannot hold a probable cause hearing within the limits of subdivision two of section 325.1, *the court may dismiss the petition without prejudice* or for good cause shown adjourn the hearing and release the respondent pursuant to section 320.5" (emphasis added). Given that this provision contemplates that dismissal without prejudice may be an appropriate remedy for failure to meet pre-fact-finding phase statutory deadlines in lieu of a showing of good cause for an adjournment, we conclude that similar relief is appropriate to redress a belated initial hearing, where no separate speedy fact-finding violation has occurred. Indeed, it would be illogical to permit dismissal without prejudice

for a probable cause hearing violation and not for an initial appearance violation, where the former is further along in the process and involves resolution of the substantive question whether reasonable cause to believe that respondent committed a crime exists.

Contrary to the views expressed by the Appellate Division dissent below, the requirement of Family Court Act § 320.2 that "good cause" for the delay be shown before departing from the 10-day initial appearance time limit is far from eviscerated by permitting refiling of the petition. The initial appearance, like the arraignment of an adult charged with a crime,[5] is the process by which the court obtains jurisdiction over the minor, determines if detention is warranted, and sets the dates for further proceedings (Family Ct Act §§ 320.2, 320.4; ***16** *see also, Matter of Atthis D.,* 205 AD2d 263, 267). The presentment agency's failure to show good cause for the arraignment delay resulted in significant consequences--the original petition was dismissed, jurisdiction over the juvenile was thereby lost, and the entire proceeding was stalled. As a result, the presentment agency was then required to refile the petition to regain jurisdiction and begin the process anew (*see, Matter of Detrece H.,* 78 NY2d 107, *supra*).

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Chief Judge Kaye and Judges Simons, Bellacosa, Smith, Levine and Ciparick concur. Order affirmed, without costs. ***17**

Footnotes

1 The order of dismissal does not indicate whether dismissal was with or without prejudice to refile.

2 The presentment agency does not contest respondent's right to appeal in this case.

3 The clerk of the court "shall notify the presentment agency and any appointed law guardian of the initial appearance date" (*id.,* § 320.2 [4]) to "insure [ ] that that agency will be apprised of the appearance and afforded an opportunity to participate" in the proceedings (Sobie, Practice Commentary, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 320.2, at 364).

4 Notably, we do not address whether the 60-day period should be measured for speedy fact-finding purposes from the date of the initial appearance on the first petition or on the refiled petition because here the fact-finding hearing was held within 60 days of the earlier appearance (*compare, Matter of Gabriel R.,* 208 AD2d

984, *and* *Matter of Tommy C.,* 182 AD2d 312 [measure 60 days from appearance on original petition], *with* *Matter of Marcus A.,* 155 Misc 2d 482 [speedy trial "clock" does not begin to run until initial hearing on new petition]; *cf.,* *People v Osgood,* 52 NY2d 37 [speedy trial clock in criminal action commences when first accusatory instrument is filed]).

5 Family Court Act § 320.4, which sets forth the procedures to be followed at the initial appearance, is derived from CPL 210.15, which governs arraignments in the criminal justice system (*see,* Sobie, Practice Commentary, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 320.4, at 371; Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 210.15).

New York Official Reports

182 A.D.2d 312, 588 N.Y.S.2d 916

In the Matter of Tommy C., a Person Alleged to be a Juvenile Delinquent, Respondent. Westchester County Attorney, Appellant.

Supreme Court, Appellate Division, Second Department, New York
91-02293
October 26, 1992

CITE TITLE AS: Matter of Tommy C.

SUMMARY

Appeal from an order of the Family Court, Westchester County (Bruce E. Tolbert, J.), entered January 25, 1991, which dismissed the petition in a juvenile delinquency proceeding.

HEADNOTES

Infants
Juvenile Delinquents
Timeliness of Fact-Finding Hearing

(1) Family Court Act § 340.1 requires that, if the respondent in a juvenile delinquency proceeding is not in detention, a fact-finding hearing shall commence within 60 days after the conclusion of the juvenile's "initial appearance", and when a juvenile delinquency petition is dismissed for facial insufficiency, and a second petition is filed, the 60-day deadline runs from the time of the juvenile's initial appearance on the first petition. Judicial interpretations of appropriate provisions of the Criminal Procedure Law may be considered in interpreting similar provisions of the Family Court Act (Family Ct Act § 303.1 [2]), and CPL 1.20 (17), which provides that a criminal action is commenced by the filing of an accusatory instrument and if more than one accusatory instrument is filed it commences when the first such instrument is filed, has been interpreted to require that where the original accusatory instrument is dismissed and another one is later filed the prosecution must be ready for trial within six months after the first instrument is filed (CPL 30.30). The Legislature intended that the time period in issue begins to run from the date of the initial appearance on the first petition, and a fact-finding hearing must be held within 60 days thereafter, subject to adjournments granted for cause, relief not sought in the instant case. In juvenile delinquency proceedings the date of the respondent's appearance on the original petition fixes the time from which the period of limitations for holding the respondent's fact-finding hearing is to be calculated, and accordingly, because the presentment agency failed to commence a fact-finding hearing within 60 days after the date of the respondent's initial appearance on the original petition, the respondent's right to a timely fact-finding hearing was violated and the petition was properly dismissed.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 44, 46.

CPL 1.20 (17); 30.30; Family Ct Act § 303.1 (2); § 340.1.

NY Jur 2d, Domestic Relations, §1690. ***313**

ANNOTATION REFERENCES

See Index to Annotations under Juvenile Courts and Delinquent Children.

APPEARANCES OF COUNSEL

Marilyn J. Slaatten, County Attorney of Westchester County, White Plains *(Carol L. Van Scoyoc* and *Vincent M. Cascio* of counsel), appellant *pro se.*
John F. Clennan, Ronkonkoma, for respondent.

OPINION OF THE COURT

Rosenblatt, J. P.

The case before us involves interpretation of the statutory deadlines for fact-finding hearings in juvenile delinquency proceedings. Family Court Act § 310.2 is a general provision, entitling the juvenile to a speedy fact-finding hearing. Family Court Act § 340.1 (2) is specific, and requires that, if the respondent is not in detention, a fact-finding hearing shall commence within 60 days after the conclusion of the juvenile's "initial appearance" *(see,* Family Ct Act § 320.1).

When a juvenile delinquency petition is dismissed for facial insufficiency, and a second petition is filed, does the 60-day statutory deadline run from the time of the juvenile's initial appearance on the first or second petition? This question, now before us, is one of first impression in the appellate courts of New York State. We conclude that the deadline runs from the initial appearance on the first petition.

By designated felony petition dated June 18, 1990, in the Family Court, Westchester County, the respondent was charged with committing acts which, if committed by an adult, would constitute the crimes of sodomy in the first degree (two counts) and sexual abuse in the first degree (two counts). On June 27, 1990, the respondent made his first appearance in the Family Court on the petition.

Thereafter, the respondent moved to dismiss the petition, asserting that it was defective because it failed to set forth any nonhearsay factual allegations. The Family Court (Tolbert, J.) agreed with the respondent and, accordingly, dismissed the petition by order dated August 10, 1990.

On October 29, 1990, 124 days after the respondent's initial appearance on the first petition, the presentment agency ***314** brought a second designated felony petition, charging the respondent with the same acts as in the first petition. The respondent moved to dismiss the second petition, asserting that his right to a timely fact-finding hearing had been violated because no fact-finding hearing had commenced within 60 days after his appearance on the initial petition. The Family Court agreed, relying upon judicial interpretations of analogous speedy trial provisions of the CPL, and dismissed the second petition.

The appellant does not claim that the lapse of time was occasioned by "good cause" (Family Ct Act § 340.1 [4] [b]), or "special

circumstances" (Family Ct Act § 340.1 [6]). Indeed, it never requested any adjournment, nor was one ever ordered. Instead, it argues that the time limitation for holding the fact-finding hearing began anew upon the respondent's appearance on the second petition.

Family Court Act § 303.1 (2) provides: "A court may ... consider judicial interpretations of appropriate provisions of the criminal procedure law to the extent that such interpretations may assist the court in interpreting similar provisions of this article [on juvenile delinquency]".

We find it proper to look to judicial interpretations of CPL 1.20 (17) to help answer the question before us. CPL 30.30 sets forth the time periods within which the prosecution must be ready for trial following the commencement of a criminal action. CPL 1.20 (17) provides: "A criminal action is commenced by the filing of an accusatory instrument against a defendant in a criminal court, and, if more than an accusatory instrument is filed in the course of the action, it commences when the first of such instruments is filed."

In *People v Lomax* (50 NY2d 351, 356), the Court of Appeals interpreted CPL 1.20 (17) to mean that: "there can be only one criminal action for each set of criminal charges brought against a particular defendant, notwithstanding that the original accusatory instrument may be replaced or superseded during the course of the action. This is so even in cases such as this, where the original accusatory instrument was dismissed outright and the defendant was subsequently haled into court under an entirely new indictment". Thus, the court held that where the original accusatory instrument is dismissed, and another one is later filed, the prosecution must be ready for trial within six months after the first instrument is filed *(see also, People v Osgood,* 52 NY2d 37; *People v Cortes,* 80 NY2d 201, 207, n 3). ***315**

Although the Family Court Act does not contain a provision similar to CPL 1.20 (17), the principles expressed in *Lomax (supra)* and *Osgood (supra)* as to when a criminal action is commenced parallel the legislative intent underlying the speedy fact-finding hearing provisions of the Family Court Act.

The appellant asserts that in dismissing the second petition, the Family Court erroneously relied upon judicial interpretations of the CPL. We disagree, and we hold that the Legislature intended that the time period in issue begins to run from the date of the initial appearance on the first petition, and that a fact-finding hearing must be held within 60 days thereafter, subject to adjournments granted for cause, relief not sought in the case before us.

We find unpersuasive the appellant's assertions that because the Court of Appeals, in *Matter of Frank C.* (70 NY2d 408), held that the speedy trial provisions of the CPL and the Family Court Act are not "analogous", judicial interpretations of the speedy trial provisions of the CPL are uninstructive here. Although in *Matter of Frank C.,* the Court of Appeals found no genuine analogy between the speedy trial provisions of the CPL and the Family Court Act, the court's analysis in interpreting Family Court Act § 340.1 centered on the over-arching legislative concern that juveniles be brought to trial promptly. The court noted,

by way of contrast, that the CPL is "aimed principally at prosecutorial delays rather than at the larger problem of bringing criminal defendants swiftly to trial" *(Matter of Frank C., supra,* at 412-413). The court pointed out that Family Court Act § 340.1 is not a prosecutorial readiness rule *(see also, Matter of Randy K.,* 77 NY2d 398, 404), but "a true 'speedy trial' provision, in that both its language and its underlying purpose are directed toward bringing the accused juvenile to trial" within the mandated time periods *(Matter of Frank C., supra,* at 413). Thus, while the court acknowledged that under the CPL, delays in bringing an accused to trial are excused if the delays are beyond the prosecution's control, the court refused to afford those allowances to presentment agencies in the context of juvenile delinquency fact-finding hearings *(see also,* Family Ct Act 340.1 [6]).

In *Matter of Randy K.* (77 NY2d 398, 402, *supra),* the Court of Appeals held that the strict time requirements of Family Court Act § 340.1 may not be waived, even by a respondent's ***316** willful failure to appear at a fact-finding hearing, and that even if the juvenile has absconded, the presentment agency must, nonetheless, comply with Family Court Act § 340.1 (4), (5) and (6), by moving to adjourn the fact-finding hearing. Thus, in *Matter of Randy K.,* the agency did not prevail even though the juvenile himself was entirely responsible for thwarting the fact-finding hearing. The case before us is stronger yet in compelling dismissal, considering that the delay was occasioned by the presentment agency, with no fault on the part of the juvenile *(cf., Matter of Faruq F.,* --- AD2d --- [decided herewith]).

Beyond the legislative intent and the instructive decisional law, there are implausible consequences that would follow if we do not measure the deadline from the respondent's first appearance on the initial petition. The short of it is that the time limitations could be circumvented and postponed repeatedly by filing successive petitions, each starting the clock anew, to the evisceration of the speedy fact-finding hearing concept itself.

We hold here that in juvenile delinquency proceedings the date of the respondent's appearance on the original petition fixes the time from which the period of limitations for holding the respondent's fact-finding hearing is to be calculated *(see, Matter of J. V.,* 127 Misc 2d 780; *Matter of Jessie C.,* --- Misc 2d --- [Fam Ct, Kings County, Apr. 1, 1992]). Because the Presentment Agency failed to commence a fact-finding hearing within 60 days after the date of the respondent's initial appearance on the original petition, the respondent's right to a timely fact-finding hearing was violated and the petition was properly dismissed. Accordingly, the order appealed from is affirmed, without costs or disbursements.

Miller, Ritter and Pizzuto, JJ., concur.
Ordered that the order is affirmed, without costs or disbursements. ***317**

588 N.Y.S.2d 916

End of Document

New York Official Reports

216 A.D.2d 225, 629 N.Y.S.2d 28

In the Matter of Warren W.,
a Person Alleged to be a
Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division,
First Department, New York
53399
(June 29, 1995)

CITE TITLE AS: Matter of Warren W.

HEADNOTE

INFANTS
JUVENILE DELINQUENTS

(1) Order which adjudicated appellant juvenile delinquent modified --- Appellant, then 15 years old, was indicted for second degree robbery; after trial in Supreme Court, appellant was found guilty, but of act that did not render him criminally responsible as juvenile offender; Supreme Court vacated guilty verdict, replaced it with juvenile delinquency fact-finding determination, and ordered case removed to Family Court; Family Court placed appellant with Division for Youth for 5 years (with first 18 months in secure facility) upon determining that he had committed designated felony act and applying disposition set out in Family Court Act § 353.5 (6); court denied appellant credit for time served in detention from time of his arrest until date of disposition; these determinations were in error --- Petition was not prominently marked as containing allegation that juvenile committed designated felony act, nor did presentment agency attach to petition certified copies of prior delinquency findings it was relying upon to convert ordinary felony act into designated felony act (see, Family Ct Act § 311.1 [5], [7]); accordingly, designated felony finding must be stricken and period of placement reduced to 18 months in accordance with Family Court Act § 353.3 (5) ---While presentment agency maintains that motion to strike designated felony marking was untimely, its reliance on Family Court Act § 332.2 (1), which states that 'all pretrial motions shall be filed within thirty days after conclusion of initial appearance and before commencement of fact-finding hearing', is misplaced; trial that led to fact-finding determination took place in Supreme Court, and appellant objected to designated felony charge at first hearing date in Family Court; finally, valid and sufficient accusatory instrument is nonwaivable jurisdictional prerequisite in delinquency proceeding --- While certified copies of prior delinquency findings were not included with petition, appellant's record was contained within papers and pleadings referred from Supreme Court, all of which were deemed petition; since record reflected appellant's prior criminal history, petition was not jurisdictionally defective --- 173-Day period served by appellant was in connection with criminal case, where defendants receive credit for all time spent in custody prior to sentencing; appellant is entitled to 173 days of credit for time served.

Order, Family Court, New York County (Judith Sheindlin, J.), entered on or about October 19,

1993, which adjudicated appellant a juvenile delinquent and placed him with the Division for Youth for a period of 5 years, the first 18 months of which were to be served in a secure facility and with no credit for the time spent in detention prior to disposition, unanimously modified, on the law, to strike the designated felony act marking and to reduce the period of placement to 18 months with a credit of 173 days for time served, and otherwise affirmed, without costs.

Appellant, then 15 years old, was indicted for second degree robbery. After jury trial in the Supreme Court, appellant was found guilty, but of an act that did not render him criminally responsible as a juvenile offender. Accordingly, the Supreme Court, pursuant to CPL 310.85, vacated the guilty verdict, replaced it with a juvenile delinquency fact-finding determination, and ordered the case removed to the Family Court for further proceedings pursuant to CPL 725.05.

The Family Court placed appellant with the Division for Youth for a period of 5 years (with the first 18 months in a secure facility), upon determining that he had committed a designated felony act as defined in Family Court Act § 301.2 (8) (vi), and then applying the disposition set out in Family Court Act § 353.5 (6). The court also denied appellant credit for time served in detention from the time of his arrest until the date of disposition. Both of these determinations were in error, however, and we modify the order of disposition accordingly.

Family Court Act § 311.1 (5) reads, in pertinent part: "If the petition alleges that the respondent committed a designated felony act, it shall so state, and the term 'designated felony act petition' shall be prominently marked thereon. Certified copies of prior delinquency findings shall constitute sufficient proof of such findings for the purpose of filing a designated felony petition."

In cases which are removed from the Supreme Court, Family Court Act § 311.1 (7) provides, in pertinent part: "When an order of removal pursuant to article seven hundred twenty-five of the criminal procedure law is filed with the clerk of the court, such order and those pleadings and proceedings, other than the minutes of any hearing inquiry or trial, grand jury proceeding, or of any plea accepted or entered, held in this action that has not yet been transcribed shall be transferred with it and shall be deemed to be a petition filed pursuant to subdivision one of section 310.1 containing all of the allegations ***226** required by this section notwithstanding that such allegations may not be set forth in the manner therein prescribed. *Where the order or the grand jury request annexed to the order specifies an act that is a designated felony act, the clerk shall annex to the order a sufficient statement and marking to make it a designated felony act petition."* (Emphasis added.)

It can be seen from the language above that both sections require that the petition be prominently marked as containing an allegation that the juvenile committed a designated felony act. The petition in this case was not so marked. Nor did the presentment agency attach to the petition certified copies of the prior delinquency findings it was relying upon to convert the ordinary felony act into a designated felony act. The failure to mark

the petition "designated felony act petition" precludes a finding that appellant committed an act which, if committed by an adult, would have constituted a designated felony offense (*Matter of Andrew D.,* 99 AD2d 510; *see also, Matter of Vladimir M.,* 206 AD2d 482, 483). Accordingly, the designated felony finding in this case must be stricken and the period of placement reduced to 18 months in accordance with Family Court Act § 353.3 (5).

While the presentment agency maintains that the motion to strike the designated felony marking was untimely, its reliance on Family Court Act § 332.2 (1), which states that "all pretrial motions shall be filed within thirty days after the conclusion of the initial appearance and before commencement of the fact-finding hearing", is misplaced. The trial that led to the fact-finding determination took place in the Supreme Court before the matter was transferred to the Family Court. Moreover, appellant objected to the designated felony charge at the first hearing date in the Family Court. Finally, a valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite in a delinquency proceeding (*Matter of David T.,* 75 NY2d 927, 929).

While the certified copies of prior delinquency findings were also not included with the petition, appellant's record was contained within the papers and pleadings referred from the Supreme Court, all of which were deemed a petition. Since this record reflected appellant's prior criminal history, the petition was not jurisdictionally defective in this regard (*cf., Matter of Jahron S.,* 79 NY2d 632).

In addition, appellant served 173 days prior to removal of the case to the Family Court and 84 days after the case was transferred. He was denied credit for the time previously ***227** served. While the Family Court may, in its discretion, deny a juvenile credit for time served (Family Ct Act § 353.5 [4] [a] [i]), the 173-day period served by appellant was in connection with the criminal case, where defendants receive credit for all time spent in custody prior to sentencing (Penal Law § 70.30 [3]). In Family Court, the juvenile is either detained or released; bail is not a consideration (Family Ct Act § 320.5). Had appellant, however, been able to post the bail, he would not have been incarcerated for the 173 days awaiting trial in Supreme Court. Accordingly, appellant is entitled to 173 days of credit for time served, under the circumstances.

The other issues raised by appellant are unnecessary to our determination and need not be addressed.

Concur--Ellerin, J. P., Kupferman, Rubin and Nardelli, JJ.

New York Official Reports

88 N.Y.2d 205, 666 N.E.2d
1043, 644 N.Y.S.2d 130

In the Matter of Willie E., a Person Alleged to be a Juvenile Delinquent, Appellant. George Dentes, as Tompkins County District Attorney, Respondent.

Court of Appeals of New York
88
Argued March 20, 1996;
Decided May 7, 1996

CITE TITLE AS: Matter of Willie E.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered June 8, 1995, which affirmed an order of disposition of the Family Court, Tompkins County (M. John Sherman, J.), adjudicating appellant to be a juvenile delinquent and placing him with the New York State Division for Youth for a period of 18 months, entered upon a fact-finding order of that court finding, after a hearing, that appellant committed acts which, if committed by an adult, would constitute the crimes of sexual misconduct and sexual abuse in the first degree.

Matter of Willie E., 216 AD2d 645, affirmed.

HEADNOTES

Infants
Juvenile Delinquents
Fact-Finding Hearing--Commencement of 60-Day Statutory Period Where Petition Refiled

(1) The 60-day period for commencing a fact-finding hearing in the Family Court begins with the initial appearance on the first petition when the petition is refiled due to the dismissal of the first petition. If the 60-day period does not commence until the initial appearance upon the filing of a second petition or a nondefective petition, the legislative policy of speedy determinations is subject to abuse.

Infants
Juvenile Delinquents
Fact-Finding Hearing--Adjournment for Good Cause

(2) In a juvenile delinquency proceeding, the facts constitute good cause for an adjournment of the fact-finding hearing beyond the 60-day statutory period for commencement of the fact-finding hearing (Family Ct Act § 340.1 [2]) where the court granted the juvenile's request for time in which to conduct discovery and file motions, thereby making compliance with the 60-day speedy trial requirement impossible, and the issue of good cause was explicitly raised prior to the adjournment by the presentment agency. When counsel seeks time for motions, which would delay the fact-finding hearing beyond the statutory speedy trial period, counsel arguably waives a speedy

trial, or, equivalently, the court may adjourn the proceedings for good cause. When good cause is granted under these circumstances, the court should consider any motions which are made on an expedited basis in order to ensure that the fact-finding hearing occurs in a timely manner. In this case, the hearing occurred within 30 days of the adjournment and 78 days from the first initial appearance. ***206**

Infants
Juvenile Delinquents
Presence of Parent at Hearing

(3) In a juvenile delinquency proceeding, in the absence of any request from the juvenile's attorney or the juvenile's parents, the absence of the parents from the hearing, despite being in the hall outside of the courtroom, is not a basis for reversal pursuant to Family Court Act § 341.2 (3) which requires the presence of a parent or other responsible person at any hearing.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 82, 87.

Carmody-Wait 2d, Proceedings Involving Abused and Neglected Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:241, 119A:242, 119A:245.

Family Ct Act § 340.1 (2); § 341.2 (3).

NY Jur 2d, Domestic Relations, §§ 1426, 1427, 1430.

ANNOTATION REFERENCES

See ALR Index under Juvenile Courts and Delinquent Children; Speedy Trial.

POINTS OF COUNSEL

Paul J. Connolly, Albany, for appellant.
I. The 60-day period for commencing the initial appearance on the second petition commenced upon the initial appearance on the first petition, which was dismissed for failure to afford appellant a prompt initial appearance and for jurisdictional insufficiency. *(Matter of Robert O.,* 87 NY2d 9; *Matter of Tommy C.,* 182 AD2d 312; *Matter of Marcus A.,* 155 Misc 2d 482; *Matter of Shannon FF.,* 189 AD2d 420; *Matter of Gabriel R.,* 208 AD2d 984; *People v Lomax,* 50 NY2d 351; *Matter of Randy K.,* 77 NY2d 398; *People v Osgood,* 52 NY2d 37; *People v Hamilton,* 46 NY2d 932.)
II. The Court below erred in rejecting appellant's contention that his parents' absence from the fact-finding hearing requires that he be afforded a new hearing. *(Matter of Dennis NN.,* 107 AD2d 914; *Matter of Roman,* 144 AD2d 315; *Matter of John L.,* 125 AD2d 472; *Matter of John D.,* 104 AD2d 885; *People v Antommarchi,* 80 NY2d 247; *People v Dokes,* 79 NY2d 656; *People v Parker,* 57 NY2d 136; *People v Epps,* 37 NY2d 343; *People v Smith,* 68 NY2d 725.)
George M. Dentes, District Attorney of Tompkins County, Ithaca *(Stephen B. Flash* of counsel), for respondent *pro se.*

I. The 60 days within which a fact-finding hearing is to be held ***207** recommences upon the completion of a second initial appearance where the first petition is dismissed. *(Matter of Rodney J.,* 83 NY2d 503; *Matter of Atthis D.,* 205 AD2d 263; *Matter of Robert O.,* 87 NY2d 9; *Matter of Tommy C.,* 182 AD2d 312; *Matter of Frank C.,* 70 NY2d 408.)

. The Court below correctly found dismissal of the first petition to be without prejudice to filing a second and correctly found no merit to appellant's argument that there was no good cause shown on the record for adjournment of the fact-finding hearing to 78 days from the first initial appearance. *(Matter of Robert O.,* 87 NY2d 9; *Matter of Robert S.,* 192 AD2d 612; *Matter of Randy K.,* 77 NY2d 398; *Matter of Gabriel R.,* 208 AD2d 984.)

I. The Court below correctly found no merit in appellant's argument that, though the parents were outside the courtroom with the Law Guardian's consent, the absence of appellant's parents in the courtroom during the hearing requires dismissal. *(Matter of Latrice R.,* 93 AD2d 838; *Matter of John L.,* 125 AD2d 472; *Matter of Roman,* 144 AD2d 315; *Matter of John D.,* 104 AD2d 885; *Matter of Atthis D.,* 205 AD2d 263.)

OPINION OF THE COURT

Smith, J.

(1, 2) The primary issues here are (1) whether the 60-day period for commencing a fact-finding hearing in the Family Court begins after the initial appearance on the first petition when the petition is refiled due to the dismissal of the first petition, and (2) whether the facts here constitute good cause for an adjournment despite the court's failure to so state on the record. We conclude that the initial appearance on the first petition commences the 60-day period and that good cause for the adjournment of the fact-finding hearing appears on the record.

The first petition, filed in this case on November 9, 1993, was an order of removal from the Tompkins County Court to the Family Court pursuant to CPL article 725. A Grand Jury hearing the case had made a request for removal pursuant to CPL 190.71. Pursuant to Family Court Act § 311.1 (7), the order of removal was deemed to be a petition in the Family Court. The document charged that on or about September 23, 1993, appellant committed (1) sexual abuse in the first degree by subjecting a person to sexual contact by forcible compulsion (Penal Law § 130.65 [1]), and (2) sexual misconduct by engaging in sexual intercourse with a female without her consent (Penal Law § 130.20 [1]).

An initial appearance on the petition originally scheduled for November 22, 1993 was rescheduled for November 24, 1993. ***208** Appellant moved to dismiss the petition on the grounds that the initial appearance was not scheduled within 10 days after the filing of the petition as required (Family Ct Act § 320.2 [1]; § 340.1 [3]) and that the petition was jurisdictionally defective because the Grand Jury minutes had not been filed within 30 days after the order of removal was filed (Family Ct Act § 311.1 [7]). The motion was granted on January 10, 1994 on both grounds.

A new petition with the same charges was made on January 11, 1994. The initial appearance of appellant on the new petition occurred

on January 12, 1994. The appellant did not respond affirmatively to the court's inquiry as to whether he intended to proceed with the fact-finding hearing scheduled, on the original petition, for January 14, 1994. The Law Guardian orally moved for a dismissal of the second petition on the grounds that the first petition had been dismissed for failure to grant a speedy trial in that the initial appearance had not occurred within 10 days of the filing of the petition, and the petition had, therefore, been dismissed with prejudice. The court denied the motion, stating that the dismissal was based on the sufficiency of the petition.

The Law Guardian then asked for the statutorily required 15 days for discovery (Family Ct Act § 331.7 [2]) and 30 days to make motions (Family Ct Act § 332.2 [1]). The Assistant District Attorney commented that any adjournment would have to be based upon a finding of good cause stated on the record. The court adjourned the matter to February 10, 1994, without stating on the record that it was for good cause.

By order to show cause dated February 2, 1994, appellant moved to dismiss the second petition on the ground the court lacked jurisdiction to adjudicate a refiled petition previously dismissed on speedy trial grounds. The court denied the motion, stating that the circumstances of the adjournment on January 10, 1994, including appellant's request for time to make motions, "were deemed good cause" by the court even though not explicitly stated on the record. The court reiterated that the dismissal of the first petition was "upon the grounds of jurisdictional deficiency," that a delay in the initial appearance beyond 10 days was not intended to be a speedy trial ground for dismissal, and that a hearing within 60 days of the initial appearance on the petition was still possible at the time of the dismissal.

Appellant's first argument is that the 60-day time period in which the fact-finding hearing must commence when a juvenile ***209** is not detained (Family Ct Act § 340.1 [2]) begins after the initial appearance on the first petition. Respondent contends that because a petition dismissed for a jurisdictional defect is a nullity, the 60-day period commences only upon the initial appearance on the second petition.

(1) In *Matter of Robert O.* (87 NY2d 9), this Court did not reach the issue of whether the 60-day period commences with the initial appearance on the first petition or with a subsequent petition.[1] We hold that under the facts here the 60-day period commences with the initial appearance on the first petition. This conclusion is consistent with the legislative mandate that there be a swift determination of the charges brought against juveniles. (*See, Matter of Frank C.,* 70 NY2d 408 [dismissal of petition upheld where adjournments beyond the 60-day period had not been based on good cause or special circumstances]; *Matter of Randy K.,* 77 NY2d 398 [failure of a juvenile to appear would not stop the 60-day period from running absent an adjournment for good cause].) If the 60-day period does not commence until an initial appearance on a second petition or a nondefective petition, the policy of speedy determinations is subject to abuse.

A fact-finding hearing may be adjourned pursuant to Family Court Act § 340.1 (4) on good cause. However, appellant argues that the

15 days for discovery and 30 days for motions permitted by statute rendered a speedy trial impossible and that good cause for adjourning the fact-finding hearing did not exist.

(2) Although many fact-finding hearings in juvenile delinquency proceedings are governed by the 60-day speedy trial requirement, some hearings must be held in as little as 14, and even 3 days after the initial appearance (*see,* Family Ct Act § 340.1 [1]).[2] The expedited nature of these hearings makes it impossible to provide the statutory periods for motions; nevertheless, the Family Court Act does not exempt these hearings from section 332.2 (1). Consequently, when counsel seeks time for motions, which would delay the fact-finding hearing beyond the statutory speedy trial period, counsel arguably waives a ***210** speedy trial (*see,* Sobie, Practice Commentary, McKinney's Cons Laws of NY, Book 29-A, Family Ct Act § 332.2, at 430-431), or, equivalently, the court may adjourn the proceedings for good cause.

Here, appellant's request for time in which to conduct discovery and file motions made compliance with the 60-day speedy trial requirement impossible. Consequently, at the time of the adjournment on January 12, 1994, the issue of good cause was explicitly raised by the respondent and when the court granted appellant's request for additional time, the case was adjourned for good cause. When good cause is granted under these circumstances, the court should consider any motions which are made on an expedited basis in order to ensure that the fact-finding hearing occurs in timely manner. In this case, the hearing occurred on February 10, 1994, within 30 days of the January 12 adjournment and 78 days from the first initial appearance.[3]

(3) Finally, in the absence of any request from the appellant's attorney or his parents that appellant's parents attend the hearing, the parents' absence from the hearing, despite their presence in the hall outside of the courtroom, is not a basis for reversal pursuant to Family Ct Act § 341.2 (3) which requires the presence of a parent or other responsible person at any hearing.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Chief Judge Kaye and Judges Simons, Titone, Bellacosa, Levine and Ciparick concur.
Order affirmed, without costs. ***211**

Footnotes

1 The Court held that the failure of the Family Court to hold an initial appearance within 10 days of the filing of the petition did not preclude a dismissal of and a refiling of the petition since the juvenile's right to a speedy fact-finding hearing was not violated.

2 Where the juvenile is detained on a petition charging an A, B or C felony, the hearing must be held within 14 days. Where the juvenile is detained and the highest charge in the petition is less than a C felony, the hearing must be held within three days (Family Ct Act § 340.1 [1]).

3 Of course, where a fact-finding hearing cannot be held within the statutory time period because the presentment agency has engaged in truly dilatory conduct, Family Court retains the discretion to find that no good cause for adjourning the hearing exists.

REMOVALS FROM THE YOUTH PART TO FAMILY COURT CASE CITATIONS

Matter of Lucas Y., 2024 N.Y. Slip Op. 00212 (3d Dept. 2024)

Matter of Omar G., 212 A.D.3d 615 (2d Dept. 2023)

Matter of Raymond G., 93 N.Y.2d 531 (1999)

People v A.M., 2024 N.Y. Slip Op. 50582(U) (County Ct., Putnam Co.)

People v D.M.-J., 81 Misc.3d 1235(A) (2024) (Youth Pt., Erie Co.)

People v J.B.,2024 N.Y. Slip Op. 50529(U) (Youth Pt., Erie Co.)

People v J.W.-C., 2024 N.Y. Slip Op. 50251(U) (Youth Pt., Erie Co.)

People v J.G., 81 Misc.3d 1235(A) (Youth Pt., Erie Co.)

People v J.M., 2024 N.Y. Slip Op. 50366(U) (Youth Pt., Erie Co.)

People v K.K., 2024 N.Y. Slip Op. 50333(U) (Youth Pt., Erie Co.)

Matter of Desmond J., 93 N.Y.2d 949 (1999)

Matter of Michael M., 3 N.Y.3d 441 (2004)

Matter of Robert O., 87 N.Y.2d 9 (1995)

Matter of Tommy C., 182 A.D.2d 312 (2d Dept. 1992)

Matter of Warren W., 216 A.D.2d 225 (1st Dept. 1995)

Matter of Willie E., 88 N.Y.2d 205 (1996)

Prosecuting a Juvenile Delinquency Rape Case Under Recent Amendments to New York State PL §130

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Linda D. Fakhoury, Esq.

PROSECUTING A JUVENILE DELINQUENCY RAPE CASE UNDER RECENT AMENDMENTS TO NEW YORK STATE PL §130

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CASELAW

COURT OF APPEALS

People v. Carroll, 95 N.Y.2d 375 (2000)

1st DEPARTMENT

In re Justique R., 99 A.D.3D 597 (1st Dept. 2012)

People v. Cordero, 257 A.D.2d 372 (1st Dept. 1999)

Matter of Emanuel G., 104 A.D.3d 611 (1st Dept. 2013)

People v. Green, 239 A.D.2d 248 (1st Dept. 1997)

People v. Tenden, 232 A.D.2d 244 (1st Dept. 1996)

2nd DEPARTMENT

People v. Menendez, 50 A.D. 3d 1061 (2d Dept. 2008)

People v. Williams, 259 A.D.2d 509 (2d Dept. 1999)

Matter of Jermaine G., 38 A.D.3d 105 (2d Dept. 2007)

3rd DEPARTMENT

People v. Newkirk, 75 A.D.3d 853 (3d Dept. 2010)

People v. White, 185 A.D.2d 472 (3d Dept. 1992)

People v. Porlier, 55 A.D.3d 1059 (3d Dept. 2008)

Matter of Zachary K., 299 A.D.2d 755 (3d Dept. 2002)

4th DEPARTMENT

People v. Hayes, 261 A.D.2d 872 (4th Dept. 1999)

People v. Moorhead, 224 A.D. 3d 1225 (4th Dept. 2024)

BRONX COUNTY FAMILY COURT CASE

Matter of Winner S., 177 Misc.2d 414 (1998)

STATUTES

Sex Offenses definitions of terms, NYS Penal Law § 130.30 (Before and after comparison)

Sexual Misconduct, NYS Penal Law § 130.20 (Before and after comparison)

Rape 1st Degree, NYS Penal Law § 130.35 (Before and after comparison)

Rape 2nd Degree, NYS Penal Law § 130.30 (Before and after comparison)

Rape 3rd Degree, NYS Penal Law § 130.25 (Before and after comparison)

Family Court Act §351.1: Probation, investigation and diagnostic assessment

ADDITIONAL MATERIAL

NY Sponsors Memorandum, 2023 A.B. 3340 (February 9, 2023)

FOR REFERENCE ONLY, NOT ATTACHED

Criminal Sexual Act 3rd Degree, NYS Penal Law §130.40 (Repealed effective September 1, 2024)

Criminal Sexual Act 2nd Degree, NYS Penal Law §130.45 (Repealed effective September 1, 2024)

Criminal Sexual Act 1st Degree, NYS Penal Law §130.50(Repealed effective September 1, 2024)

COURT OF APPEALS

New York
Official Reports

95 N.Y.2d 375, 740 N.E.2d 1084, 718
N.Y.S.2d 10, 2000 N.Y. Slip Op. 10303

The People of the State of New York, Respondent,
v.
John F. Carroll, Appellant.

Court of Appeals of New York
130
Argued October 17, 2000;
Decided November 21, 2000

CITE TITLE AS: People v Carroll

SUMMARY

Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered July 22, 1999, which modified, on the law, and, as modified, affirmed a judgment of the Rensselaer County Court (Joseph M. Sise, J.), rendered upon a verdict convicting defendant of rape in the first degree (three counts) and sexual abuse in the first degree (six counts), and sentencing defendant to concurrent terms of 12 1/2 to 25 years of imprisonment for each rape conviction, and to consecutive terms of 2 to 4 years for each sexual abuse conviction, said terms to run concurrently to the terms for the rape convictions. The modification consisted of reducing the sentence for the convictions of rape in the first degree to concurrent prison terms of 8 1/3 to 25 years, and of reducing the sentence for the convictions of sexual abuse in the first degree to consecutive prison terms of 1 1/3 to 4 years, to run concurrent to the terms for rape.

People v Carroll, 263 AD2d 768, reversed.

HEADNOTES

Crimes
Rape
Insufficient Evidence of Penetration--Testimony of Juvenile Victim

(1) In a sex crimes prosecution involving a juvenile victim, the evidence was not legally sufficient to sustain defendant's convictions for first degree rape since the required element of penetration was not established. There was no testimony that defendant put his penis inside the girl. She vaguely recalled feeling "pressure between [her] legs and inside [her] vagina." She never saw defendant's penis and did not remember any other details about the incidents-- what the "pressure" felt like, if it hurt, whether she was clothed or unclothed, or whether defendant was clothed or unclothed. She freely admitted she did not tell the police about feeling "pressure" when she first described the incidents and that, prior to her second interview in which she did recall the pressure, her memory was refreshed by visits to a "doctor" and a counselor. She also asserted during her first interview that she had never had intercourse, only to be told by a police officer after an examination by a nurse practitioner who worked with the police department that she was not a virgin. Even the trial court acknowledged that the girl "couldn't tell" whether intercourse had occurred and suggested other explanations or sources of the pressure. Moreover, there was no testimony from the child with respect to any instrumentality of penetration. ***376**

Crimes
Rape
Insufficient Testimonial or Physical Evidence of Penetration--Medical Testimony

(2) In a sex crimes prosecution involving a juvenile victim, the evidence was not legally sufficient to sustain defendant's convictions for first degree rape since the required element of penetration was not established. Although the inability of the victim to testify with respect to penetration is not conclusive if other evidence existed from which that fact could be established, the testimony of a nurse practitioner, who examined the victim at the behest of the police department, was not consistent with the facts and circumstances surrounding the alleged rape and, thus, did not provide any proof of penetration. The nurse practitioner indicated that an act of first-time forceful penetration would have produced significant tearing and bleeding, but no evidence of such trauma was presented.

Crimes

Rape
Insufficient Testimonial or Physical Evidence of Penetration--Defendant's Statements

(3) In a sex crimes prosecution involving a juvenile victim, the evidence was not legally sufficient to sustain defendant's convictions for first degree rape since the required element of penetration was not established. Not only was the testimony of the victim and of a nurse practitioner who examined the victim insufficient, defendant's statements did not constitute admissions from which a rational trier of fact could have found beyond a reasonable doubt that penetration occurred. Defendant's statements to the police were not explicit admissions to sexual abuse in general, or penetration in particular. Defendant's statement that the victim was not lying, after being confronted with a false polygraph examination he was told was authoritative that the girl was not lying, was far from a specific admission of having raped her. Rather than an assertion of guilt, defendant's statement was more akin to a statement of one distracted and troubled, of one floundering and confused, probing and seeking the answer to something not known. As such, this statement alone is insufficient to sustain defendant's rape conviction. Defendant's statement that the girl was not lying is even less significant given that no specific allegations were ever revealed to him during the interrogation.

Crimes
Evidence
Tape Recordings

(4) In a sex crimes prosecution, the trial court abused its discretion in failing to allow into evidence a police-recorded and arranged audiotape of defendant's conversation with the juvenile victim in which defendant denied the allegations made by the victim. The prosecution presented testimony that defendant "never denied" the allegations, and defendant's alleged "failure-to-deny" became a major theme in the prosecution's theory of the case. The jury was left with the distorted impression that defendant never, at any time, denied the allegations against him. The rule prohibiting the use of extrinsic evidence to impeach a witness on a matter that is merely collateral has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide. Given this setting, the fact that the court offered to give defendant a limited opportunity to explore whether or not he was specifically asked during the police interrogation if he denied the allegations, did not cure the error in the court's evidentiary ruling. Defendant was not permitted to elicit any testimony regarding his prior denials.

Crimes
Evidence
Excited Utterances--Police-Arranged Telephone Conversation between Crime Victim and Defendant

(5) In a sex crimes prosecution, surreptitiously recorded statements of the defendant, made during a police-arranged conversation between defendant *377 and the victim, in which the defendant was confronted with the victim's allegations and denied them, were not admissible under the excited utterance exception to the hearsay rule. Excited utterances are the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative, preventing the opportunity for deliberation and fabrication. On the particular facts in question, it cannot be said that the trial court abused its discretion in determining that the audiotape, made long after the occurrence of the alleged incidents, was not an excited utterance.

Crimes
Witnesses
Expert Witness--Child Sexual Abuse Accommodation Syndrome

(6) In a sex crimes prosecution involving a juvenile victim, the People properly offered an expert's testimony to explain Child Sexual Abuse Accommodation Syndrome (CSAAS) for the purpose of instructing the jury about possible reasons why a child might not immediately report incidents of sexual abuse. The expert's testimony did not attempt to impermissibly prove that the charged crimes occurred. Although the expert testified about CSAAS, he referred to it only generally insofar as it provides an understanding of why children may delay in reporting sexual abuse; he never opined that defendant committed the crimes, that the alleged victim was sexually abused, or even that her specific actions and behavior were consistent with such abuse. In fact, the expert had not interviewed either defendant or the alleged victim, and was not aware of the facts of the case.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Evidence, §§ 865, 882, 884, 885; Expert and Opinion Evidence, §§ 197, 242; Rape, §§ 3, 55, 58, 68.3, 76-81, 88, 90, 94-98, 100, 101.

Carmody-Wait 2d, Criminal Procedure §§ 172:2395-172:2398, 172:2500, 172:2558, 172:2559.

NY Jur 2d, Criminal Law, §§ 1932-1934, 2015, 3904, 3912, 3917, 3956, 3958, 3962, 3966, 3973, 3989.

ANNOTATION REFERENCES

See ALR Index under Evidence Rules; Expert and Opinion Evidence; Rape; Res Gestae.

POINTS OF COUNSEL

O'Connell and Aronowitz, Albany (*Michael L. Koenig* of counsel), and *Robert Rosenthal* for appellant.
I. The trial court's exclusion of vast amounts of material necessary to raise a defense and to confront and cross-examine prosecution witnesses violated Mr. Carroll's State and Federal constitutional rights and requires reversal. (*Davis v Alaska,* 415 US 308; *Smith v Illinois,* 390 US 129; ***378** *Reasonover v Washington,* 60 F Supp 2d 937; *People v Sepulveda,* 105 AD2d 854; *Chambers v Mississippi,* 410 US 284; *People v Ortiz,* 119 Misc 2d 572; *People v Freeman,* 145 Misc 2d 590; *People v Vasquez,* 88 NY2d 561; *People v Edwards,* 47 NY2d 493; *People v Dvoroznak,* 127 AD2d 785.) II. The prosecution's use of inappropriate, inadmissible and unsubstantiated expert testimony requires reversal. (*People v Cronin,* 60 NY2d 430; *People v Taylor,* 75 NY2d 277; *People v Colon,* 238 AD2d 18; *People v Seaman,* 239 AD2d 681; *People v Mercado,* 188 AD2d 941; *People v Knupp,* 179 AD2d 1030; *People v Shay,* 210 AD2d 735; *White v Illinois,* 502 US 346; *Maryland v Craig,* 497 US 836; *Idaho v Wright,* 497 US 805.) III. Conviction of rape counts absent any evidence of penetration requires reversal. (*People v Dunn,* 204 AD2d 919.) IV. Exclusion of evidence explaining how the accusations against Mr. Carroll were created and developed was improper and requires reversal. (*Crane v Kentucky,* 476 US 683; *People v Jovanovic,* 263 AD2d 182.) V. The Court below did not properly consider Mr. Carroll's weight of the evidence argument. (*People v Bleakley,* 69 NY2d 490; *United States v Wade,* 388 US 218; *Idaho v Wright,* 497 US 805; *Brown v Mississippi,* 297 US 278.)
Kenneth R. Bruno, District Attorney of Rensselaer County, Troy (*Bruce E. Knoll* of counsel), for respondent.
I. The lower court's exclusion of the audiotape of the conversation between the victim and defendant did not deprive him of a fair trial. (*People v Wilder,* 93 NY2d 352; *People v Scarola,* 71 NY2d 769; *People v Oliphant,* 201 AD2d 590, 83 NY2d 875; *People v Richardson,* 193 AD2d 969; *People v Dvoroznak,* 127 AD2d 785; *People v Clark,* 128 AD2d 270; *People v Sapia,* 41 NY2d 160, 434 US 832; *People v De George,* 73 NY2d 614; *People v Von Werne,* 41 NY2d 584; *People v Mink,* 267 AD2d 501, 94 NY2d 950.) II. Expert testimony by Dr. Hamill was properly admitted. (*People v Taylor,* 75 NY2d 277; *People v Cronin,* 60 NY2d 430; *People v Fish,* 235 AD2d 578, 89 NY2d 1092; *Werner v Sun Oil Co.,* 65 NY2d 839; *People v Mercado,* 188 AD2d 941; *People v Seaman,* 239 AD2d 681, 91 NY2d 954; *People v Shay,* 210 AD2d 735; *Daubert v Merrell Dow Pharms.,* 509 US 579; *People v Cintron,* 75 NY2d 249; *People v Thompson,* 267 AD2d 602.) III. The evidence of rape was legally sufficient. (*People v Bleakley,* 69 NY2d 490; *People v Ford,* 174 AD2d 853, 78 NY2d 955; *People v Dunn,* 204 AD2d 919, 84 NY2d 907.) IV. The exclusion of irrelevant evidence was proper. (*People v Robinson,* 88 NY2d 1001; *People v Starling,* 85 NY2d 509; *People v Jovanovic,* 263 AD2d 182, 94 NY2d 908.) V. The verdict was not against the weight of the evidence. (*People v Bleakley,* 125 AD2d 687, 69 NY2d 490.) ***379**

OPINION OF THE COURT

Wesley, J.

Defendant was convicted of three counts of rape in the first degree and six counts of sexual abuse in the first degree. Defendant's appeal challenges the legal sufficiency of the proof supporting the rape convictions and several of the trial court's evidentiary rulings, including its refusal to admit into evidence the audiotape of a police-initiated call

between defendant and his stepdaughter. We conclude that these contentions have merit and that the Appellate Division order sustaining defendant's convictions should be reversed, the counts of the indictment charging defendant with rape dismissed and a new trial ordered on the remaining counts.

I.

In 1997, defendant John Carroll was indicted for three counts of rape in the first degree and six counts of sexual abuse in the first degree arising from allegations brought against him by his then 13-year-old stepdaughter. Defendant had known the girl since she was approximately 2 1/2 years old, when he started dating her mother; they were married in 1989. After the birth of another child, they separated in 1993. Although defendant's relationship with his wife quickly deteriorated and was strained, he maintained contact with the children. His stepdaughter called him on a regular basis and he cared for the children after school.

The allegations against defendant came to light in early March 1997 after the girl told a friend about a dream in which someone named A.J. touched her. The friend spoke to the child's mother, who confronted her daughter about the dream. During the questioning, the mother mentioned the names of several men and asked whether any of them had ever touched her. Her daughter kept nodding no. Finally, she asked if defendant had ever touched her. She repeated the question after the girl did not answer, and the girl, after shaking her head no, began crying and responded yes. The mother called the police several days later.

On March 10, 1997, mother and daughter met with Troy Police Detective Sergeant Steve Weber. The girl told Detective Weber that defendant had been touching her chest and vaginal area since she was six years old. She also indicated to Weber that she was a virgin. Detective Weber arranged for the girl to be examined by Jane Szary, a nurse practitioner who worked ***380** with the Troy Police Department. The nurse practitioner reported that her findings were consistent with vaginal penetration. Weber told the girl that she was not a virgin.

Eight days later, the girl met with New York State Police Investigator Edmund Girtler. During this interview, the child now revealed that, in addition to the prior allegations of abuse, she had felt "pressure" between her legs and inside her vagina since the age of 10. Girtler then instructed her to telephone defendant for the purpose of eliciting incriminating statements which would be monitored and audiotaped. Confronted by his stepdaughter's allegations, defendant vehemently denied any inappropriate conduct, despite her continued accusations. The girl also asked defendant if he thought she was lying. He replied "I don't think you're making it up, I think that you've got different ideas of what may have happened ... You've had a rough life. A lot of things go through your mind."

Later that day, Weber and Girtler went to defendant's workplace and asked him to accompany them to the State police barracks for questioning. During the interview, Girtler confronted defendant with a fake polygraph test indicating that the girl had been truthful in her allegations that defendant had raped and sexually abused her. Defendant indicated that the girl "wasn't lying" and was not "a liar." After nearly three hours of questioning, defendant's attorney contacted the police and all questioning ceased. The defendant did not give a written statement and the officers did not videotape or otherwise record the interview.

Prior to trial, County Court granted the People's motion to exclude the audiotape and prohibited any questions concerning the tape. The court concluded that the tape was hearsay and that the excited utterance exception did not apply.

The only testimony concerning the facts of the three rapes charged in the indictment came from the child. She indicated that each rape occurred in an upstairs apartment at defendant's workplace. Two occurred in 1993 (spring and July) when the girl was nine and the third occurred in the summer of 1994 when she was 10.[1] With respect to each incident, the girl testified that Carroll "rolled me on my back and got on top of me, and I felt pressure between my legs and inside my vagina." She did not remember what she was wearing, if her clothes were on or off, or if defendant had his clothes on or off during ***381** any of the three incidents. When asked if she remembered anything more about the feeling of "pressure," she answered "no." She did not recall if it hurt, stating that she "just remember[ed] the feeling." She indicated that she could not describe the vaginal "pressure" she felt on the first two occasions because she didn't remember. She also stated she never saw defendant's penis.

On cross-examination she admitted that at her initial meeting with Weber, she failed to tell the detective about the incidents of vaginal "pressure." She claimed that, at the time of the first police interview, she "didn't remember exactly what happened," and that prior to the second police interview, her memory was refreshed by visits to a "doctor" and a counselor.

She also described several incidents during which defendant would come to her apartment after school and put his hands up her shirt or down her pants to touch her. These events occurred between January 1995 and February 1997 and constituted four of the six claims of sexual abuse.

The two police officers testified about defendant's interrogation. When Weber was questioned on direct examination if he specifically asked defendant about the child's allegations against him, he stated that he "asked [defendant] if [the girl] was lying and [defendant] replied that she wasn't lying." Weber was also asked if defendant had denied the allegations "in the beginning." Weber replied, "He never denied that he didn't do it." On cross-examination, Weber testified "He never said he didn't do it, that's right." Following Weber's testimony, defendant sought to introduce the audiotape to impeach Weber's statements on the ground that Weber falsely and unequivocally stated that defendant *never* denied the allegations. The court denied the application, finding that the only inference to be drawn from Weber's testimony was that defendant never denied the allegations in the context of the police interrogation.

Although the questioning of defendant lasted nearly three hours according to Girtler, defendant was never confronted with specific allegations made by the girl. When defendant was shown the fake polygraph test, Girtler also asked him if the child was lying, to which defendant responded "no." Girtler stated that Weber then asked if the girl was a liar, and defendant again said "no." On cross-examination, Girtler also testified that defendant never denied the allegations against him, stating that "He never said, I didn't do it." ***382**

Ms. Szary, the nurse practitioner, also testified. She indicated that she examined the girl and observed an "old transection in her hymenal band at the 7 o'clock position" which was "curved." She noted that if an object is pushed through the hymenal opening of a pre-menstrual child, and it was "a sudden, forceful type of entry, a one-time blow type of thing, it could be very, very damaging, [and] could cause significant tearing and bleeding" resulting in permanent scarring that would be visible years after the fact. The nurse was not asked if the child's condition was consistent with a series of rapes which preceded several incidents of sexual abuse or consistent with the use of some other instrumentality.

Defendant testified and denied all of the accusations against him. One of defendant's former employees testified that the apartment in which the charged acts occurred was frequently entered by employees unannounced during the day for use as a break room.

The jury convicted defendant of all nine counts in the indictment--three counts of rape in the first degree and six counts of sexual abuse in the first degree. Defendant was sentenced to 12 1/2 to 25 years for each rape conviction--to run concurrently with each other--and 2 to 4 years for each of the sexual abuse convictions--to run consecutively with each other but concurrently with the sentence imposed for the rape convictions.

The Appellate Division modified the judgment to correct an illegal sentence and, as so modified, affirmed (263 AD2d 768). The Court concluded that defendant's audiotaped statements were not admissible as an excited utterance and rejected his other evidentiary challenges to the tape's exclusion as without merit. The Court also held that the convictions were supported by legally sufficient evidence. A Judge of this Court granted defendant leave to appeal, and we now reverse.

II.

(1) We first consider whether the evidence is legally sufficient to sustain the rape convictions. Defendant argues that the evidence was insufficient to establish the required element of penetration. We agree.

The standard for review of legal sufficiency of the evidence in a criminal case is whether " 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' " (*People v Contes*, 60 NY2d 620, 621 [quoting *Jackson v Virginia*, 443 US 307, 319]). ***383**

Rape in the first degree is defined by statute as engaging in sexual intercourse with a female less than 11 years old (*see*, Penal Law § 130.35 [3]). Sexual intercourse "has its ordinary meaning and occurs upon any penetration, however slight" (Penal Law § 130.00 [1]). Moreover, the testimony of a child victim alone is sufficient because corroboration of sex offenses with respect to child victims is no longer required except in instances not pertinent here (*see, e.g.*, *People v Groff*, 71 NY2d 101, 109; *see also*, Penal Law § 130.16

[corroboration rule now limited to those sex offenses for which the victim is deemed incapable of consent because of a mental defect or mental incapacity]).[2] Thus, the element of penetration may be established by a child victim's testimony alone (*see, e.g., People v Hatfield,* 256 AD2d 1105, 1106, *lv denied* 93 NY2d 853).

In this case, there was no testimony that defendant put his penis inside the girl. She vaguely recalled feeling "pressure between [her] legs and inside [her] vagina." She never saw defendant's penis and did not remember any other details about the incidents--what the "pressure" felt like, if it hurt, whether she was clothed or unclothed, or whether defendant was clothed or unclothed. She freely admitted she did not tell Weber about feeling "pressure" when she first described the incidents and that, prior to her second interview in which she did recall the pressure, her memory was refreshed by visits to a "doctor" and a counselor. She also asserted during her first interview that she had never had intercourse, only to be told by Weber after Szary's examination that she was not a virgin. Indeed, even the trial court acknowledged that the girl "couldn't tell" whether intercourse had occurred and suggested other explanations or sources of the pressure, for example, "the weight of a male body on top of a child." Moreover, there was no testimony from the child with respect to any instrumentality of penetration.

(2) The girl's inability to testify with respect to penetration is not, however, conclusive, if other evidence existed from which that fact could be established (*see, People v Tench,* 167 NY 520, 522). The nurse indicated that any sudden, forceful entry would ***384** cause "significant tearing and bleeding," but the girl could not remember, and no other evidence established, that she was in any pain after these incidents or that she suffered any other adverse physical reactions consistent with forceful, sudden entry. The first charged act was the rape in the spring of 1993; all the charged acts of sexual abuse occurred on subsequent dates. According to the nurse practitioner's testimony, such a first-time act of forceful penetration would have produced significant tearing and bleeding, no evidence of which existed here. Because the nurse's testimony was not consistent with the facts and circumstances surrounding the alleged rape, it did not provide any proof of penetration (*see, People v Tench, supra,* at 523). Thus, there was no testimonial or physical evidence establishing penetration.

(3) Nor did defendant's statements constitute admissions from which a rational trier of fact could have found beyond a reasonable doubt that penetration did occur. Defendant's statements were not explicit admissions to sexual abuse in general, or penetration in particular (*cf., People v Keefer,* 262 AD2d 791, *lv denied* 94 NY2d 824; *People v Shepard,* 259 AD2d 775, *lv denied* 93 NY2d 979; *People v Bates,* 233 AD2d 937). Under the circumstances, defendant's statement, after being confronted with a false polygraph examination he was told was authoritative that the girl was not lying, was far from a specific admission of having raped her. Rather than an "assertion of guilt," defendant's statement was more akin to a statement "of one distracted and troubled, of one floundering and confused, probing and seeking the answer to something not known" (*People v Levra,* 1 NY2d 199, 206-207). As such, this statement alone is insufficient to sustain defendant's rape conviction (*see, id.,* at 208 [equivocal statement considered "in proper perspective" was insufficient to sustain conviction]). Indeed, defendant's statement that the girl was not lying is even less significant given that no specific allegations were ever revealed to him during the interrogation. Defendant was only told of vague, general allegations made by his stepdaughter.

In sum, the evidence was not sufficient to establish beyond a reasonable doubt the element of penetration (*see, People v Dunn,* 204 AD2d 919, *lv denied* 84 NY2d 907; *cf., People v Fuller,* 50 NY2d 628). The rape convictions cannot be sustained; the three counts of rape charged in the indictment must be dismissed. ***385**

III.

(4) Defendant also claims that the trial court erred in precluding the police-recorded audiotape of defendant's conversation with his stepdaughter. Under the circumstances presented here, we agree and hold that in light of the testimony that defendant "never denied" the allegations, the trial court abused its discretion in failing to allow the tape or testimony related to that conversation.

(5) Initially, we reject defendant's contention that his taped statements were admissible under the excited utterance exception to the hearsay rule. Trial courts are accorded wide discretion in making evidentiary rulings and, absent an abuse of discretion, those rulings should not be disturbed on appeal (*see, People v Aska,* 91 NY2d 979, 981). Excited utterances "are the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to

render the observer's normal reflective processes inoperative" preventing the opportunity for deliberation and fabrication (*People v Vasquez*, 88 NY2d 561, 574; *see*, *People v Edwards*, 47 NY2d 493, 497). On these facts, we cannot say that the trial court abused its discretion in determining that the audiotape was not an excited utterance.

(4) Defendant's alternative argument that the taped conversation should have been admitted to refute the prosecution's claims that defendant never denied the allegations against him has merit.

A court's discretion in evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense (*see*, *People v Hudy*, 73 NY2d 40, 57, *abrogated on other grounds by Carmell v Texas*, 529 US 513; *see also*, *Chambers v Mississippi*, 410 US 284, 294 ["The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"]).

At trial, both Weber and Girtler testified that defendant never denied the allegations against him. The People argue that the officers' testimony established only that defendant never denied the allegations during the police interrogation. However, Weber and Girtler both testified that defendant *never* denied the allegations. Moreover, defendant's alleged "failure-to-deny" became a major theme in the prosecution's theory of the case. The prosecutor's summation demonstrates just how important that theory was. ***386**

In her summation, the prosecutor stated that "he didn't outright deny. He never said, you know something, I never touched that child. ... He's a salesman. That's what they do. That's his job, to sell a product. He was making a pitch in here. And he sat there and he faced you. And, my God, members of the jury, it was like he was giving a lecture. ... Members of the jury, he had nine months to think about that. He had all week to think about his story. He's a man who sells things for a living." The prosecutor relied on and accentuated the perception that defendant never asserted his innocence prior to trial and defendant was never permitted to explain the context of his alleged admissions.

Given the officers' testimony that defendant never denied the allegations against him and the exclusion of the taped conversation, the jury was left with the distorted impression that defendant never, at any time, denied the allegations against him. The jury had no way of knowing that there was another point in time at which defendant had the opportunity to deny--and did deny--the allegations. Just as the People are allowed to rebut key assertions of the defense (*see, People v Blakeney*, 88 NY2d 1011), the defendant also is allowed to attempt to disprove the People's theory and rebut their key assertions (*see*, *People v Hudy, supra*, 73 NY2d, at 57-58; *see also, People v Aska, supra*, 91 NY2d, at 983 [Titone, J., dissenting]).

The proposed evidence was not merely relevant to the officers' credibility and was not simply a collateral matter (*see*, *People v Alvino*, 71 NY2d 233, 247). The rule prohibiting the use of extrinsic evidence to impeach a witness on a matter that is merely collateral "has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide" (*People v Knight*, 80 NY2d 845, 847). Such was the case here.

Defendant sought to introduce the tape not only to impeach the officers' credibility, but also to rebut the prosecution's stance--pressed vigorously-- that he never denied the allegations made against him and that he admitted his guilt. The inference that the People wanted the jury to draw from their witnesses was that by never denying the allegations, and by stating that his stepdaughter was not lying upon being confronted by the police, defendant was unmistakably admitting his guilt. This issue was at the heart of the People's case.

Given this setting, the fact that the court offered to give defendant a limited opportunity to explore whether or not he was ***387** specifically asked during the police interrogation if he denied the allegations did not cure the error in the court's evidentiary ruling. Defendant was not permitted to elicit any testimony regarding his *prior* denials. Thus, the trial court's decision under the circumstances was an abuse of discretion and "resulted in a trial that was decidedly skewed in the People's favor" (*People v Hudy, supra*, 73 NY2d, at 58).

IV.

(6) In light of the need for a new trial on the remaining charges of the indictment, we also reach defendant's other contentions concerning the use of expert testimony to explain Child Sexual Abuse Accommodation Syndrome (CSAAS). We have long held that expert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may

be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand (*see,* *People v Taylor*, 75 NY2d 277). In *People v Keindl* (68 NY2d 410, 422, *rearg denied* 69 NY2d 823), expert testimony was permitted to "rebut defendant's attempt to impair the credibility of [sexually abused children] by evidence that they had not promptly complained" of the abuse (*People v Taylor*, *supra*, 75 NY2d, at 288). Here, the People properly offered Dr. Hamill's testimony for the purpose of instructing the jury about possible reasons why a child might not immediately report incidents of sexual abuse.

Moreover, Dr. Hamill's testimony did not attempt to impermissibly prove that the charged crimes occurred (*see,* *id.*, at 293). Although Dr. Hamill testified about CSAAS, he referred to it only generally insofar as it provides an understanding of why children may delay in reporting sexual abuse. Dr. Hamill never opined that defendant committed the crimes, that defendant's stepdaughter was sexually abused, or even that her specific actions and behavior were consistent with such abuse (*cf.*, *People v Mercado*, 188 AD2d 941, 942 [expert permissibly testified to explain the victims' failure to promptly report, but impermissibly testified as to the manifestations of abuse that the children exhibited]). In fact, Dr. Hamill had not interviewed either defendant or his stepdaughter and was not aware of the facts of this case. [3]

Defendant's remaining contentions either lack merit or are unpreserved. ***388**

Accordingly, the order of the Appellate Division should be reversed, the counts of the indictment charging defendant with rape in the first degree dismissed and, as to those counts of the indictment charging defendant with sexual abuse in the first degree, a new trial ordered.

Chief Judge Kaye and Judges Smith, Ciparick and Rosen-blatt concur; Judge Levine taking no part.
Order reversed, etc.

Footnotes

1 The first two counts of sexual abuse charged in the indictment also occurred during the July 1993 and summer 1994 incidents.

2 Rules of corroboration that exist for other reasons may, however, be required in certain sex offense prosecutions. For example, a child under 12 years of age must understand the nature of an oath before being permitted to testify under oath in the prosecution of any crime (*see,* CPL 60.20 [2]). If a child does not understand the oath, unsworn testimony may be given, but a defendant may not be convicted of any offense solely upon such evidence (CPL 60.20 [3]; *see also,* *People v Groff*, 71 NY2d at 109-110, *supra*).

3 Defendant's related argument that CSAAS has no reliable scientific basis is not preserved.

1ST DEPARTMENT

New York
Official Reports

104 A.D.3d 611, 961 N.Y.S.2d
457, 2013 N.Y. Slip Op. 02144

**1 In the Matter of Emanuel G., a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division,
First Department, New York
March 28, 2013

CITE TITLE AS: Matter of Emanuel G.

HEADNOTE

Crimes
Criminal Sexual Act
Sufficiency and Weight of Evidence

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.
Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for presentment agency.
Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about February 21, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree (two counts), sexual abuse in the first degree (two counts), sexual misconduct and sexual abuse in the third degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously modified, on the law, to the extent of vacating the findings as to sexual misconduct and sexual abuse in the third degree and dismissing those counts of the petition, and otherwise affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see* *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. While the victim may have used childlike language to describe matters of anatomy, the totality of his testimony warrants the inference that appellant engaged in anal sexual conduct (Penal Law § 130.00 [2] [b]). As for the sexual abuse counts, the evidence warrants the inference that appellant acted for the purpose of sexual gratification.

Appellant did not preserve his arguments that the court erred in admitting certain medical records and that counsel for the presentment agency engaged in misconduct in cross-examination of appellant and in summation, and we decline to reach these claims in the interest of justice. As an alternative holding, we find that any errors were harmless, particularly in the context of a nonjury trial (*see* *People v Moreno*, 70 NY2d 403, 406 [1987]). **2

As the presentment agency concedes, the sexual misconduct and third-degree sexual abuse findings should be dismissed as lesser included offenses. Concur—Tom, J.P., Acosta, Saxe and Freedman, JJ. *612

New York
Official Reports

232 A.D.2d 244, 649 N.Y.S.2d 1

The People of the State of New York, Respondent,
v.
Velton Tenden, Also Known
as Velton Bender, Appellant.

Supreme Court, Appellate Division,
First Department, New York
58741
(October 1, 1996)

CITE TITLE AS: People v Tenden

HEADNOTE

CRIMES
APPEAL
Preservation of Issue for Review --- Rape --- Attempt --- Sufficiency of Evidence

(1) Judgment convicting defendant of attempted rape in first degree and sexual abuse in first degree affirmed --- Defendant's claim that evidence was legally insufficient to establish that he intended to forcibly compel complainant to engage in sexual intercourse is unpreserved for appellate review; in any event, complainant's testimony that defendant entered ladies' room of train station, grabbed her buttocks, demanded sex, pushed her to floor, obstructed her escape, pulled down his fly, and again demanded sex was evidence legally sufficient to establish defendant's intent to commit rape and actions carrying that intent forward to within dangerous proximity of criminal end.

Judgment, Supreme Court, New York County (Leslie Crocker Snyder, J.), rendered October 23, 1992, convicting defendant, after a jury trial, of attempted rape in the first ***245** degree and sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to concurrent terms of 7 1/2 to 15 years and 3 1/2 to 7 years, respectively, unanimously affirmed.

Defendant's claim that the evidence was legally insufficient to establish that he intended to forcibly compel the complainant to engage in sexual intercourse is unpreserved for appellate review (*People v Gray*, 86 NY2d 10), and we decline to review it in the interest of justice. In any event, if we were to review it, we would find that the complainant's testimony, viewed in a light most favorable to the People (*People v Contes*, 60 NY2d 620, 621), that defendant entered the ladies' room of Penn Station, grabbed her buttocks, demanded sex, pushed her to the floor, obstructed her escape, pulled down his fly, and again demanded sex was evidence legally sufficient to establish defendant's intent to commit rape and actions carrying that intent forward to within dangerous proximity of the criminal end (*see, Matter of Khaliek W.*, 193 AD2d 683; *People v Cobb*, 188 AD2d 308, *lv denied* 81 NY2d 969; *see also, People v Kelly*, 166 AD2d 195, *lv denied* 76 NY2d 987; *People v Pereau*, 99 AD2d 591, *affd* 64 NY2d 1055). We further find that the verdict was not against the weight of the evidence.

Concur--Milonas, J. P., Wallach, Nardelli, Tom and Mazzarelli, JJ.

New York
Official Reports

257 A.D.2d 372, 684 N.Y.S.2d
192, 1999 N.Y. Slip Op. 00001

The People of the State of New York, Appellant,

v.

Juan Cordero, Respondent.

Supreme Court, Appellate Division,
First Department, New York
2505
(January 7, 1999)

CITE TITLE AS: People v Cordero

HEADNOTES

CRIMES
CORROBORATION AS TO SEX OFFENSES

(1) Order which granted motion for trial order of dismissal reversed and verdict finding defendant guilty of sodomy and related offenses reinstated --- Jury found defendant guilty of anally sodomizing complainant, his six-year old nephew --- Trial court erred in refusing to allow complainant to give sworn testimony; even if court's competence determination was correct, court committed independent error in granting motion to dismiss since complainant's unsworn testimony was sufficiently corroborated by other evidence adduced by People (see, CPL 60.20 [3]) --- There was independent evidence tending to establish that complainant was sexually assaulted; complainant's mother and brothers testified that complainant's behavior noticeably changed immediately after incident; in absence of any other explanation for sudden rift between defendant and complainant, latter's changed behavior constitutes corroborative evidence --- Complainant's prompt outcries should have been considered as corroboration of his unsworn testimony since they occurred within short time after criminal incident and predated victim's unsworn testimony --- Defendant's statement to police showed him to have had exclusive opportunity to commit crime; notwithstanding that defendant's statement is exculpatory, all that is necessary is to connect defendant with crime in such way that jury may be reasonably satisfied that witness is telling truth --- Most powerful evidence of corroboration was recovery by police of can of cooking oil used in attack from exact location described by complainant, and identified by him; this corroborative evidence tends to establish both that crime was committed and that defendant committed it; recovery of oil dovetails so perfectly with seven-year old complainant's narrative of events that it significantly enhances reliability of his account --- Viewing evidence of complainant's changed demeanor, his prompt outcries, defendant's statement and recovery of physical evidence cumulatively, as is appropriate, sufficient independent evidence existed to corroborate complainant's unsworn testimony.

CRIMES
WITNESSES
Sworn Testimony by Child

(2) Order which granted motion for trial order of dismissal reversed and verdict finding defendant guilty of sodomy and related offenses reinstated --- Jury found defendant guilty of anally sodomizing complainant, his six-year old nephew --- Trial court erred in refusing to allow complainant to give sworn testimony; even if court's competence determination was correct, court committed independent error in granting motion to dismiss since complainant's unsworn testimony was sufficiently corroborated by other evidence adduced by People --- Record clearly shows complainant possessed sufficient intelligence and capacity to be sworn as witness; he demonstrated his familiarity with his personal circumstances and purpose of his visit to courtroom; he expressed understanding of distinction between telling truth and lying, and that telling truth was 'good thing'; complainant's statement that it was 'important' to tell truth when he was 'talking' in court reflected appreciation and recognition of moral obligation to testify truthfully --- Court's ruling that witness did not appreciate nature of oath or consequences of testifying falsely is not supported by voir dire record; witness was never asked about oath, or even whether he could keep 'promise' to tell truth; some of court's questions were confusing, and other questions were open-ended.

Order, Supreme Court, New York County (Patricia Williams, J.), entered on or about October 7, 1996, which granted defendant's motion for a trial order of dismissal, unanimously reversed, on the law, the motion denied, the jury verdict finding defendant guilty of sodomy in the first degree, sexual

abuse in the first degree and endangering the welfare of a child, reinstated, and the matter remanded for sentencing.

A jury found defendant guilty of anally sodomizing the complainant, his six-year old nephew. The trial evidence established that the complainant stayed at the apartment of his uncle on the night of November 11, 1995, with no one else ***373** present. The complainant woke up in the middle of the night because of a nightmare and asked defendant if he could sleep in his bed. Defendant agreed. Later, defendant removed the complainant's clothes and sodomized him. Defendant stopped in the middle of the assault to lubricate his penis with cooking oil he obtained from a kitchen cabinet.

The next day defendant brought the complainant with him to Brooklyn, and then brought him home. That evening, the complainant reported the incident to his two brothers and mother. The next day, the complainant's mother confronted defendant, who denied the accusation. Ultimately, child welfare officials and the police were alerted, and defendant was arrested. Defendant's statement to the police confirmed the complainant's account of what occurred on November 11-12, except for the sexual assault.

At the close of the prosecution's case, and again after the entire case, defense counsel moved pursuant to CPL 290.10 (1) for a trial order of dismissal. Counsel alleged that the trial evidence was legally insufficient because the complainant's unsworn testimony was not adequately corroborated. The prosecution opposed, arguing that the necessary corroboration was supplied by defendant's statement to the police, evidence of the complainant's changed demeanor after the incident, the complainant's prompt outcries to his brothers and mother, and the recovery by the police of the container of oil used during the attack. The court reserved decision until after the guilty verdict was rendered, but then granted the motion. The court subsequently filed a written opinion rejecting the People's arguments concerning the adequacy of the corroboration of complainant's unsworn testimony.

The People argue on this appeal that the trial court erred in refusing to allow the complainant to give sworn testimony. They further contend that even if the court's competence determination was correct, the court committed independent error in granting the motion to dismiss since the complainant's unsworn testimony was sufficiently corroborated by other evidence adduced by the People. As we agree with both of these arguments, we reverse and reinstate the jury's verdict.

"A child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of an oath." (CPL 60.20 [2].) To overcome the rebuttable presumption of incompetence, the infant must demonstrate sufficient intelligence and capacity to justify reception of his testimony (*People v Nisoff*, 36 NY2d 560, 566), and have " 'some conception' " of the obligations of an oath and the consequences ***374** of giving false testimony (*People v Parks*, 41 NY2d 36, 46). In light of the trial court's unique opportunity to participate in the inquiry of the witness, and to observe the witness's maturity and demeanor, the determination of whether the witness is competent to be sworn lies primarily with the trial court, and should not be disturbed unless clearly erroneous (*People v Parks, supra*, at 46; *People v Nisoff, supra*, at 566; *see also*, *Wheeler v United States*, 159 US 523, 524-525). In making this determination, the court should consider "the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the former" (*Wheeler v United States, supra*, at 524).

Prior to opening statements, the court examined the complainant outside the presence of the jury to determine if he could give sworn testimony. In response to the court's preliminary questions, the complainant told the court his name (spelling his last name), stated that he was seven years old and said that his birthday was April 13th. He further stated that he was in the second grade and gave his teacher's name. He identified the room he was in as a "courtroom" and the Trial Justice as a "Judge". The court asked the complainant why he was in court, and complainant responded "to talk about something". When the court asked "[w]hat is important when you talk to me about those things?" complainant responded "To tell the truth". The court then instructed him to tell a lie, and complainant responded "Like if I said your coat is green and it is not." Then, pointing to a court officer, the court asked whether it was the truth or a lie that the man was an "astronaut", and the complainant responded "a lie." The court asked whether he was "sure", explaining that although the man definitely didn't look like an astronaut, "sometimes it is tricky about truth and lies ... sometimes you don't know, right?" The complainant responded affirmatively.

The court's examination continued. The following questions and answers were cited by the court as a basis for its ruling:

"COURT: What happens if ... somebody asked you a question, right, like I did about the [astronaut], and you don't know the answer, what do you have to do?

"WITNESS: I don't know, say the truth.

"COURT: You have to tell me that you don't know. Can you do that?

"WITNESS: Um-hum.

"COURT: Are you sure? What happens if you tell a lie?

"WITNESS: Then that means that you lie ... ***375**

"COURT: What happens? What is going to happen if you tell something that is not true?

"WITNESS: I don't know.

"COURT: Is it a good thing to tell a lie or a good thing to tell the truth?

"WITNESS: It is a good thing to tell the truth."

The court then asked the attorneys for each side whether they had any further questions, and both declined. The court announced its ruling that it would not permit the complainant to be sworn, but would, pursuant to CPL 60.20 (2), allow him to give unsworn testimony. The court ruled that the complainant did not sufficiently understand the nature of an oath or the consequences of giving false testimony, as evidenced in part by the fact that "the family is not a churchgoing family so there is not a moral underpinning from some religious basis." The court also stated its concern about the complainant's ability to say that he did not know something, if, in fact, he did not.

Based on our careful review of the voir dire examination of the complainant, we conclude that the court's competence determination constituted an improvident exercise of discretion. The record clearly shows that the complainant possessed sufficient intelligence and capacity to be sworn as a witness (*People v Nisoff, supra*). He demonstrated his familiarity with his own personal circumstances and the purpose of his visit to the courtroom. Further, he expressed a keen understanding of the distinction between telling the truth and lying, and that telling the truth was a "good thing" (*see, People v Young,* 225 AD2d 339, *lv denied* 88 NY2d 971; *People v Shavers,* 205 AD2d 395, *lv denied* 84 NY2d 939; *see also, People v Torres,* 253 AD2d 502). Indeed, complainant's statement that it was "important" to tell the truth when he was "talking" in court reflected an appreciation and recognition of the moral obligation to testify truthfully.

The court's ruling that the witness did not appreciate the nature of an oath or the consequences of testifying falsely is not supported by the voir dire record. The witness was never asked about an oath, or even whether he could keep a "promise" to tell the truth. Rather, some of the court's questions were confusing. Other questions were open-ended, such as "What happens if you tell a lie?" This might elicit a variety of responses from a group of adults, let alone a seven-year old child. While it appears that the court was trying to determine whether the child understood the concept of punishment, "the law does not require that children define abstract concepts with the sophistication of an adult" (***376** *People v Mercado,* 157 AD2d 457, *lv denied* 75 NY2d 922; *see also, People v Cintron,* 214 AD2d 349, *lv denied* 86 NY2d 733). Given the child's demonstrated level of understanding, we have no doubt that more specific and concrete inquiries would have yielded an express recognition of the obligation to tell the truth, and the consequences of not doing so. However, the court declined the prosecutor's request to reopen the inquiry.

Were we to agree that the complainant was not competent to be sworn, we would nevertheless reverse on the ground that the People produced sufficient independent evidence corroborating the complainant's unsworn testimony. * Under CPL 60.20 (3), a defendant may not be convicted of an offense solely upon the unsworn testimony of a complaining witness. Rather, the unsworn witness's testimony must be corroborated by "evidence tending to establish the crime and connecting defendant with its commission." (*People v Groff,* 71 NY2d 101, 104.)

Here, there was independent evidence tending to establish that the complainant was sexually assaulted. The complainant's mother and brothers testified that complainant's behavior noticeably changed immediately after the incident (*see, People v Groff, supra; People v Badia,* 163 AD2d 4, 6; *see also, People v Morse,* 177 AD2d 1015, *lv denied* 79 NY2d 861). When he first returned home, he was quiet and withdrawn, and went immediately to watch television. Despite his previously close relationship with his uncle, the complainant would not come out of his room when defendant

visited after the incident, except when defendant offered him money. In the absence of any other explanation for this sudden rift between defendant and the complainant, the latter's changed behavior constitutes corroborative evidence.

The People also argued that the complainant's prompt outcries to his brothers and mother were further corroboration that a crime occurred. The trial court, citing this Court's decision in *People v Badia* (*supra*), ruled that such evidence failed to possess the requisite independence since it was merely a repetition of the complainant's unsworn testimony. There is conflicting authority on this issue (*compare, People v Page,* 162 NY 272, 276 [rape victim's prompt complaint to neighbor is not " 'other evidence' " within meaning of statute requiring corroboration ***377** for sex offenses]; *People v Badia, supra, with People v Yannucci,* 283 NY 546, 550 [corroborating evidence included victim's prompt complaint]; *People v Reed,* 125 AD2d 343; *People v Kulakowski,* 135 AD2d 1119, *lv denied* 70 NY2d 1007). However, in *People v McDaniel* (81 NY2d 10, 16), the Court of Appeals unambiguously stated: "[E]vidence that a victim of sexual assault promptly complained about the incident is admissible to corroborate the allegation that an assault took place". Although *McDaniel* discussed the issue of prompt outcry in a hearsay context, the Court's statement nonetheless supports the People's argument that the complainant's prompt outcries in this case should have been considered as corroboration of his unsworn testimony.

The prompt outcries in this case possessed the requisite independence for corroborative evidence since they occurred within a short time after the criminal incident and predated the victim's unsworn testimony. Thus, these prompt outcries may not be considered mere "repetition" of the complainant's unsworn testimony (*People v Badia, supra,* at 7).

People v Badia (*supra*) is distinguishable. In that case, the victim's prompt complaint was the sole evidence of corroboration in the case. In addition, the complainant had given a prior inconsistent version of the incident, which called into question the reliability of her account. Here, in contrast, other corroborative evidence existed and the complainant gave a detailed, consistent account of the attack. While prompt outcry evidence alone may not suffice to corroborate the testimony of an unsworn witness, it may be considered by the jury on the issue of corroboration under CPL 60.20 (*People v Watson,* 57 AD2d 143, 148, *revd on other grounds* 45 NY2d 867).

Moreover, *Badia* relied on a principle applicable in accomplice corroboration cases that "[c]orroborative evidence may not rely to any extent on the complaining witness's testimony" (*supra,* at 7). That principle applies in accomplice cases because the purpose of the corroboration requirement there is to prevent the falsification of evidence by an accomplice attempting to curry favor with the authorities (*see, People v Groff, supra; People v Hudson,* 51 NY2d 233, 238). However, this is an unsworn witness case, where the purpose of corroboration is to ensure the general trustworthiness of the unsworn testimony (*see, People v Groff, supra,* at 107-108). Accordingly, the principle is far less compelling in these circumstances.

There is also independent evidence connecting defendant to the crime. Here, defendant's statement to the police showed him to have had the exclusive opportunity to commit the crime ***378** (*see, People v Groff, supra,* at 110-111 [under certain circumstances, the opportunity to commit the crime can be sufficient to establish identity]; *see also, People v Dearstyne,* 230 AD2d 953, 959, *lv denied* 89 NY2d 921 [medical record and mother's testimony sufficiently corroborated unsworn testimony since it established defendant's opportunity to commit crime and that crime was committed]; *cf., People v Badia, supra,* at 6 [no evidence even remotely connecting defendant to time and place of the crime]; *People v Doellner,* 87 AD2d 987). Defendant's statement places him in the same bed as the complainant, at the precise time of the alleged attack. Only defendant's denial of any wrongdoing deviates from the complainant's testimony. Notwithstanding that defendant's statement is ultimately exculpatory, "[a]ll that is necessary is to connect the defendant with the crime in such a way that the jury may be reasonably satisfied that the [witness] is telling the truth" (*People v Daniels,* 37 NY2d 624, 630; *People v Groff, supra,* at 110).

Perhaps the most powerful evidence of corroboration was the recovery by the police of the can of cooking oil from the exact location described by the complainant, and identified by him. Although rejected by the trial court as too generic to have any probative significance, in fact, this corroborative evidence tends to establish *both* that a crime was committed and that defendant committed it. While the recovery of the oil would be insignificant if viewed in isolation, it dovetails so perfectly with the seven-year old complainant's narrative of

the events that it significantly enhances the reliability of his account.

Viewing the evidence of the complainant's changed demeanor, his prompt outcries, defendant's statement and the recovery of the physical evidence cumulatively, as is appropriate (*see, People v Toniczack,* 189 AD2d 926, 927, *lv denied* 81 NY2d 977; *People v Springer,* 127 AD2d 250, 254, *affd* 71 NY2d 997; *see generally, People v Nisoff, supra*), sufficient independent evidence existed to corroborate the complainant's unsworn testimony. As the Court of Appeals has stated: " 'Matters in themselves of seeming indifference ... may so harmonize with the [witness's] narrative as to have a tendency to furnish the necessary connection between the defendant and the crime' " (*People v Morhouse,* 21 NY2d 66, 74, quoting *People v Dixon,* 231 NY 111, 116-117; *see also, People v Groff, supra,* at 110). Accordingly, the motion for a trial order of dismissal should have been denied.

Concur--Rosenberger, J. P., Nardelli, Mazzarelli, Andrias and Saxe, JJ.

Footnotes

* We reject defendant's claim that the court's determination to submit only two items of corroboration, the complainant's changed demeanor and the defendant's post-arrest admissions, is binding on the prosecution. The People's submission of a written request to charge pertaining to four items of alleged corroboration preserves their objection for this Court's review (*People v Hoke,* 62 NY2d 1022).

New York
Official Reports

99 A.D.3d 597, 952 N.Y.S.2d 443
(Mem), 2012 N.Y. Slip Op. 07060

**1 In the Matter of Justique R., a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division,
First Department, New York
8235
October 23, 2012

CITE TITLE AS: Matter of Justique R.

HEADNOTES

Crimes
Criminal Sexual Act
Sufficiency of Evidence

Crimes
Witnesses
Unsworn Testimony by Child—Corroboration

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.
Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for presentment agency.
Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 26, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree, sexual abuse in the first and third degrees and sexual misconduct, and placed him on enhanced supervision probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was supported by legally sufficient evidence. The five-year-old complainant's unsworn testimony was properly permitted given that the complainant's response during the voir dire demonstrated a sufficient level of "intelligence ***598** and capacity to justify the reception thereof" (Family Ct Act § 343.1 [2]; CPL 60.20 [2]; *People v Paul*, 48 AD3d 833, 834 [2d Dept 2008]). The complainant testified that she was in her mother's bedroom watching television when the 13-year-old appellant came into the room, pulled down her pants, and "put his tail in my butt." When asked further questions about "tails," she explained that girls do not have "tails" and that boys "pee and do dee" out of their tails. She described that the "tail" felt hard and it hurt when appellant put it in her butt.

The complainant's testimony was corroborated by the testimony of her mother (Family Ct Act § 343.1 [3]; *People v Paul*, 48 AD3d at 834) who stated that on the evening of the incident, appellant, an extended family member who often plays with her children, was in one bedroom of her apartment playing video games with her 11-year-old son while her daughter, the complainant, was in another bedroom watching television with the door open. At one point during the evening, she looked through the open bedroom door and saw the complainant, who was on the bed, on her hands and knees in a bent over position, with her butt in the air, naked from the waist down, with appellant directly behind her. Appellant was fully clothed, his hands were at his sides, and the top button of his pants was unfastened. The complainant's mother further testified that she asked appellant what he was doing, and he "stumbled, kind of backed away from [complainant] and started to stutter." After she repeated the question, he answered ****2** that he had entered the bedroom to ask the complainant if he could borrow a video game. She told appellant to leave, and after he left, she asked her daughter what happened. After hearing what appellant had done, she called the police and took the complainant to the hospital, where she was examined. The record indicates that a rape kit was prepared but was never sent out for testing. The medical records show that the complainant told a doctor that appellant "put his tail on [her] butt" and "stuck his tongue in [her] butt."

The presentment agency met its burden of proof beyond a reasonable doubt. We reject appellant's argument that the inconsistencies in the complainant's testimony, which we find to be minor, render the Family Court's fact-finding determination against the weight of the evidence (*see Matter of Andre N.*, 282 AD2d 273 [1st Dept 2001], *lv denied* 96 NY2d 717 [2001]; *compare Matter of Arnaldo R.*, 24 AD3d 326 [1st Dept 2005]). Concur—Saxe, J.P., Sweeny, Richter, Abdus-Salaam and Román, JJ.

New York
Official Reports

239 A.D.2d 248, 657 N.Y.S.2d 669

The People of the State of New York, Respondent,
v.
Ronnie Green, Appellant.

Supreme Court, Appellate Division,
First Department, New York
60796
(May 15, 1997)

CITE TITLE AS: People v Green

HEADNOTES

CRIMES
APPEAL
Preservation of Issue for Review --- Rape --- Expert Testimony

(1) Judgment convicting defendant of rape affirmed --- While defendant's contention regarding admissibility of testimony by People's child sexual abuse expert is unpreserved for review, expert's testimony was admissible to establish how child could be raped without suffering physical injury and was not offered to prove that victim was raped.

CRIMES
RAPE
Medical Corroboration

(2) Judgment convicting defendant of rape affirmed --- Where complainant's testimony was consistent with slight penetration, absence of conclusive medical corroboration does not negate credible evidence furnished by child victim.

Judgment, Supreme Court, Bronx County (Edward Davidowitz, J.), rendered November 17, 1993, convicting defendant, after a jury trial, of rape in the first and third degrees, and sentencing him, as a second violent felony offender, to concurrent terms of 8 1/2 to 17 years and 2 to 4 years, respectively, unanimously affirmed.

Defendant's guilt was proved beyond a reasonable doubt and ***249** the verdict was not against the weight of the evidence (*People v Bleakley,* 69 NY2d 490). Where the complainant's testimony was consistent with slight penetration, "the absence of conclusive medical corroboration does not negate the credible evidence furnished by the child victim" (*People v Collins,* 166 AD2d 270, 271, *lv denied* 76 NY2d 1020).

Defendant's contention regarding the admissibility of testimony by the People's child sexual abuse expert is unpreserved for appellate review (*see, People v Smith,* 202 AD2d 366), and we decline to review it in the interest of justice. Were we to review it, we would find that the expert's testimony was admissible "to establish how a child could be raped without suffering physical injury and was not offered to prove that the victim was raped" (*supra*). Defendant's remaining contentions are without merit.

Concur--Milonas, J. P., Nardelli, Williams and Andrias, JJ.

2ND DEPARTMENT

New York
Official Reports

259 A.D.2d 509, 687 N.Y.S.2d
167, 1999 N.Y. Slip Op. 01893

The People of the State of New York, Respondent,
v.
Marvin Williams, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
93230, 96-08944
(March 1, 1999)

CITE TITLE AS: People v Williams

Appeal by the defendant from a judgment of the County Court, Nassau County (Kowtna, J.), rendered September 13, 1996, convicting him of rape in the first degree, rape in the second degree, sexual abuse in the first degree, and endangering the welfare of a child, upon a jury verdict, and imposing sentence.

HEADNOTE

CRIMES
RAPE
Sufficiency of Evidence

(1) Judgment convicting defendant of rape in first degree, rape in second degree, sexual abuse in first degree, and endangering welfare of child affirmed ---Evidence was legally sufficient to establish defendant's guilt beyond reasonable doubt; penetration of vulva or labia constitutes sexual intercourse even though victim's hymen remains intact and there is no penetration into vaginal canal; trial testimony clearly established that, at very least, defendant's penis penetrated complainant's vulva; additionally, complainant's testimony established element of forcible compulsion; fact that complainant did not suffer any physical injuries as result of sexual attack does not render verdict against weight of evidence --- Moreover, inconsistencies between complainant's out-of-court statements and her trial testimony merely created credibility issue which jury resolved in People's favor.

Ordered that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prosecution (*see, People v Contes,* 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Penetration of the vulva or labia constitutes sexual intercourse even though the victim's hymen remains intact and there is no penetration into the vaginal canal (*see, People v Groff,* 71 NY2d 101; *People v Berardicurti,* 167 AD2d 840). Here, the trial testimony clearly established that, at the very least, the defendant's penis penetrated the complainant's vulva. Additionally, the complainant's testimony established the element of forcible compulsion (*see, People v Hodges,* 204 AD2d 739; *People v Solorzano,* 163 AD2d 434). The fact that the complainant did not suffer any physical injuries as a result of the sexual attack does not render the verdict against the weight of the evidence (*see, People v Hodges, supra; People v Gonzalez,* 136 AD2d 735).

Moreover, the inconsistencies between the complainant's out-of-court statements and her trial testimony merely created a credibility issue which the jury resolved in the People's favor (*see, People v Collins,* 188 AD2d 608, 609).

The defendant's remaining contentions are without merit.

Bracken, J. P., Santucci, Goldstein and McGinity, JJ., concur.

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New York
Official Reports

50 A.D.3d 1061, 856 N.Y.S.2d
647, 2008 N.Y. Slip Op. 03671

**1 The People of the State of New York, Respondent
v
Ariel Menendez, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
April 22, 2008

CITE TITLE AS: People v Menendez

HEADNOTES

Crimes
Witnesses
Expert Witness

Although issue was unpreserved for review, sexual assault nurse examiner was qualified to render expert opinion; given education and employment history of witness, who was registered nurse, trial court did not err in permitting her to provide expert testimony—witness's testimony that large percentage of sexual assault victims exhibit no physical injuries to their sexual organs did not shift burden of proof; nor was her testimony speculative, given that it was based upon evidence already received.

Crimes
Witnesses
Expert Witness

Police witness was qualified to render expert opinion in field of blood splatter analysis, as he possessed requisite skill, training, education, knowledge or experience to provide reliable opinion.

Mark Diamond, New York, N.Y., for appellant.
Janet DiFiore, District Attorney, White Plains, N.Y. (Maria I. Wager, Richard Longworth Hecht, and Anthony J. Servino of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Westchester County (Zambelli, J.), rendered July 25, 2006, convicting him of murder in the first degree (two counts), rape in the first degree, and criminal sexual act in the first degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress his statements made to law enforcement officials.

Ordered that the judgment is affirmed.

Since the statements the defendant made to law enforcement officials were not introduced at trial, his contention that they were made without the benefit of *Miranda* warnings (*see* *Miranda v Arizona*, 384 US 436 [1966]) is academic for purposes of this appeal (*see* *People v Nevins*, 16 AD3d 1046, 1048 [2005]; *People v Vanier*, 178 AD2d 501 [1991]; *People v Adames*, 168 AD2d 623 [1990]).

The trial court's preliminary instructions, as a whole, were accurate as to the burden of proof (*see People v Fields*, 87 NY2d 821, 823 [1995]; *People v Belk*, 238 AD2d 346 [1997]; *People v Rodriguez*, 155 AD2d 627 [1989], *affd* 76 NY2d 918 [1990]). Moreover, in the single instance where the preliminary instruction was inaccurate, the defendant declined the issuance of curative instructions (*see People v Young*, 48 NY2d 995, 996 [1980]; *People v Simmons*, 204 AD2d 214, 215 [1994]).

The defendant contends that testimony of a sexual assault nurse examiner should have been precluded because she was unqualified to render an expert opinion and her testimony shifted the burden of proof and was speculative. However, only the defendant's challenge to her testimony as **2 speculative is preserved for appellate review. In any event, the defendant's contentions are without merit. Given the education and employment history of the witness, who was a registered nurse, the trial court providently exercised its discretion in permitting her to provide expert testimony (*see* *1062 *Matott v Ward*, 48 NY2d 455, 459 [1979]; *People v Lewis*, 16 AD3d 173 [2005]; *People v Morehouse*, 5 AD3d 925, 928 [2004]). The witness's testimony that a large percentage of sexual assault victims exhibit no physical injuries to their sexual organs did not shift the burden of proof (*see People v Heer*, 12 AD3d 1154, 1155 [2004]; *People v Shelton*, 307 AD2d 370, 371 [2003], *affd* 1 NY3d 614 [2004]; *People v Paun*, 269 AD2d 546 [2000]; *People v Houston*,

250 AD2d 535 [1998]; *People v Green*, 239 AD2d 248, 249 [1997]; *People v Smith*, 202 AD2d 366 [1994]). Nor was her testimony speculative, given that it was based upon evidence already received (*see Tarlowe v Metropolitan Ski Slopes*, 28 NY2d 410, 414 [1971]; *People v Cruz*, 233 AD2d 102 [1996], *affd* 90 NY2d 961 [1997]).

The defendant's contention that the trial court improvidently exercised its discretion in finding that a police witness was qualified to render an expert opinion in the field of blood splatter analysis is without merit, as the witness demonstrated that he possessed the "requisite skill, training, education, knowledge or experience" to provide a reliable opinion (*Matott v Ward*, 48 NY2d at 459; *see People v Hicks*, 2 NY3d 750, 751 [2004]; *People v Eckhardt*, 305 AD2d 860, 864 [2003]; *People v Rivera*, 236 AD2d 428, 429 [1997]).

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish the defendant's guilt of the crimes charged beyond a reasonable doubt.

Moreover, resolution of issues of credibility is primarily a matter to be determined by the jury, which saw and heard the witnesses, and its determination should be accorded great deference on appeal (*see People v Romero*, 7 NY3d 633, 644-645 [2006]; *People v Mateo*, 2 NY3d 383, 410 [2004], *cert denied* 542 US 946 [2004]). Upon the exercise of our factual review power (*see* CPL 470.15 [5]), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]; *People v Price*, 5 AD3d 117, 118 [2004]; *People v Shelton*, 307 AD2d at 371; *People v Slater*, 173 AD2d 1024, 1028 [1991]).

The defendant's remaining contentions are either without merit or do not require reversal. Skelos, J.P., Dillon, Leventhal and Chambers, JJ., concur.

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New York
Official Reports

38 A.D.3d 105, 828 N.Y.S.2d
160, 2007 N.Y. Slip Op. 00139

**1 In the Matter of Jermaine G.,
Respondent. Presentment Agency, Appellant

Supreme Court, Appellate Division,
Second Department, New York
2005-02953, D-20007/04
January 9, 2007

CITE TITLE AS: Matter of Jermaine G.

SUMMARY

Appeal from an order of the Family Court, Kings County (Jane Pearl, J.), entered February 25, 2005 in a juvenile delinquency proceeding pursuant to Family Court Act article 3. The order granted respondent's motion to dismiss the petition as facially insufficient.

HEADNOTE

Infants
Juvenile Delinquents
Sufficiency of Petition—Utilization of Child Victim's Unsworn Deposition

A juvenile delinquency petition charging the 11-year-old respondent with unlawful sexual contact with his five-year-old cousin (*see* Penal Law § 130.50 [3]; § 130.65 [3]) should not have been dismissed as facially insufficient merely because the child victim's supporting deposition was unsworn. Although the nonhearsay allegations of a juvenile delinquency petition must ordinarily be sworn to in order to satisfy the facial sufficiency requirements (Family Ct Act §§ 311.1, 311.2), the critical test is whether the petition and supporting documents provide assurance both that there is a valid and documented basis for subjecting a juvenile to prosecution, and that there is a measure of reliability regarding the contents of a petition. Here, the formal, notarized written statement of the child victim, in conjunction with the mother's sworn statement corroborating various aspects of the child's allegations, was sufficient to provide both a valid and documented basis for subjecting respondent to prosecution, and a measure of reliability regarding the contents of the petition. Moreover, dismissal of the petition prior to a judicial determination of the allegations would result in not only a grievous harm to the victim, but also, potentially to respondent as well who, if the allegations are proved true, would be in need of professional intervention and help.

RESEARCH REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 80, 107.

Carmody-Wait 2d, Proceedings Involving Abused and Neglected Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:254, 119A:257–119A:259.

5 Law and the Family New York (2d ed) §§ 2:32, 2:33, 2:51.

McKinney's, Family Ct Act §§ 311.1, 311.2.

NY Jur 2d, Domestic Relations §§ 1368–1370, 1376.

ANNOTATION REFERENCE

See ALR Index under Juvenile Courts and Delinquent Children.

*106 FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: juvenile /2 delinquency /2 petition & unsworn /s deposition

APPEARANCES OF COUNSEL

Michael A. Cardozo, Corporation Counsel, New York City (*Barry P. Schwartz* and *Deborah A. Brenner* of counsel), for appellant.
Steven Banks, New York City (*Tamara A. Steckler* and *Daniel Greenbaum* of counsel), for respondent.

OPINION OF THE COURT

Ritter, J.P.

The presentment agency filed a petition pursuant to Family Court Act article 3 to have the respondent, 11-year-old Jermaine G., adjudged to be a juvenile delinquent. The petition alleged that the respondent committed acts which, if committed by an adult, would constitute the crimes of

criminal sexual act in the first degree (oral) (*see* Penal Law § 130.50 [3]), criminal sexual act in the first degree (anal) (*see* Penal Law § 130.50 [3]), and two counts of sexual abuse in the first degree (*see* Penal Law § 130.65 [3]), in that he subjected a child less than 11 years old to sexual contact. Two supporting depositions were annexed to the petition. The first was the statement of the five-year-old alleged victim. The body of the statement reads:

> "Jermaine is my cousin. On the last day that Jermaine lived in the apartment with my family, Jermaine put his pee pee (indicating penis) in my mouth. Jermaine put his pee pee inside of my boom boom (indicating buttocks). It hurt when Jermaine did this to me. My mom walked into the room and Jermaine ran inside his ****2** bedroom.
>
> "Jermaine did this to me many times, definitely more than two times since he moved into our apartment."

The alleged victim's statement did not recite that any false statements therein were punishable as a misdemeanor or otherwise. Further, the jurat does not indicate that the statement was "sworn to." Rather, it reads, "Said to before me this 9th day of August, 2004."

***107** The second supporting deposition was the sworn statement of the alleged victim's mother, who averred:

> "Jermaine G[.] is my nephew. Jermaine came to live with me at the above address in May 2004. Shortly after Jermaine came to live with me in May, I walked into the living room (in the evening) and observed [my son] with his head on Jeramaine's [*sic*] lap. When I walked into the room [my son] jumped up.
>
> "On July 26, 2004 I walked into the living room and I observed [my son] with his shorts and underpants down with his penis exposed. I observed [my son] laying on the couch pulling up his shorts. I observed Jermaine's underwear on the couch next to where [my son] was laying. I went into Jermaine's bedroom and observed Jermaine pulling up his shorts.
>
> "I asked [my son] what happened. [My son] told me in sum and substance 'Jermaine told me to turn round and he pulled my pants down. Jermaine kissed me on the back of my neck and put his pee pee in my boom boom.' 'Pee-pee' is the word [my son] uses for penis and 'boom boom' is the word he uses for buttocks. [My son] stated in sum and substance 'Jermaine does this to me all of the time.' "

After written and oral confessions by Jermaine G. were suppressed, he moved to dismiss the petition. He argued that the petition was facially insufficient because it was not supported by sworn nonhearsay allegations of fact sufficient to establish every element of the offenses charged, to wit: The alleged victim's statement, although sufficient, was not sworn to, and the mother's statement, although sworn to, did not establish every element of the offenses charged.

In opposition, the presentment agency argued that evidence set forth in the supporting depositions, if presented at a criminal trial, would be legally sufficient to prove guilt beyond a reasonable doubt because the unsworn testimony of the child victim was corroborated by the sworn testimony of the mother, whose testimony tended to establish the crimes charged and that the respondent committed them (*see People v Groff*, 71 NY2d 101, 109 [1987]). The presentment agency argued that it would be an absurd result to require the allegations of a juvenile delinquency ***108** petition to meet a greater standard of proof than would be required to prove guilt beyond a reasonable doubt at a criminal trial.

The Family Court granted the Law Guardian's motion and dismissed the petition as facially insufficient. The court noted that the child victim's statement was not sworn and determined that the mother's sworn statement did not establish each and every element of the crimes set forth in the petition. We reverse and reinstate the petition.

A juvenile delinquency petition is sufficient on its face when it substantially conforms ****3** to the requirements as to content prescribed in Family Court Act § 311.1, and:

> "2. the allegations of the factual part of the petition, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the respondent committed the crime or crimes charged; and
>
> "3. non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof." (Family Ct Act § 311.2.)

Although not required by the express language of statute, the Court of Appeals has held that the nonhearsay factual allegations must be sworn to satisfy the facial sufficiency requirement of the Family Court Act (*see Matter of Neftali*

D., 85 NY2d 631, 635 [1995]). The Court reasoned as follows:

> "The sufficiency requirements set forth in Family Court Act § 311.2 are not simply technical pleading requirements but are designed to ensure substantive due process protection to an alleged juvenile delinquent, who can be arrested and deprived of liberty based on the petition. Like a criminal information, the juvenile delinquency petition is the sole instrument for the commencement, prosecution and adjudication of the juvenile delinquency proceeding and, therefore, must comport with the statutory jurisdictional requisites of the Family Court Act." (*Matter of Neftali D., supra* at 634-635 [citations omitted].)

The Court continued:

> "A sworn recital that the factual allegations are accurate ***109** is particularly significant in the context of a delinquency petition not only because it is the sole accusatory instrument used to prosecute the juvenile but, also because there is no independent prior review of the evidence by a Grand Jury-like body. In this regard, we have applied a stringent test when construing challenges to the facial sufficiency of a juvenile delinquency petition to assure that there is a valid and documented basis for subjecting the juvenile to prosecution." (*Matter of Neftali D., supra* at 636 [citations omitted].)

"A verification attesting to the truth of the contents of a document on penalty of perjury is of the same effect as a testimonial oath, which at once alerts a witness to the moral duty to testify truthfully and establishes a legal basis for a perjury prosecution" (*id.* at 635-636). Such a verification "is intended to assure a measure of reliability regarding the contents of the petition" (*id.* at 636). "A witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished" (CPL 60.20 [2]).

Applying this requirement where, as here, a child is the only party who can provide the required nonhearsay factual allegations in support of a juvenile delinquency petition, which is often the case in petitions involving allegations of sexual misconduct, presents distinct problems. First, a child under the age of nine is presumed incompetent to testify under oath and may not do so unless the court determines that the child understands the nature of an oath (*see* CPL 60.20). Further, even if false testimony is given under oath, a child under the age of 16 cannot be subjected to criminal liability for perjury (*see* Penal Law § 30.00). A child seven years old or younger cannot even be adjudicated a juvenile delinquent (*see* Family Ct Act § 301.2 [1]). Thus, at least one purpose ****4** served by sworn testimony—to establish a basis to impose punishment for a false statement—will be illusory in many juvenile delinquency proceedings involving child witnesses. However, this does not necessarily mean that the purposes underlying the requirement of sworn testimony will not otherwise be satisfied when a child witness is involved. Common experience suggests that the very nature of the proceedings giving rise to a juvenile delinquency petition (e.g., the giving of a formal statement, the participation of various official agencies, etc.) will be sufficient to impress upon most children the moral duty to testify truthfully and to ***110** alert them to the fact that consequences will ensue if they do not. Concomitantly, this does not mean that the presentation of a sworn statement from a child witness is irrelevant to a determination as to the facial sufficiency of a juvenile delinquency petition. To the contrary, in *Matter of Nelson R.* (90 NY2d 359 [1997]), the Court of Appeals held that the sworn nonhearsay factual statement of a child witness was sufficient to satisfy the facial sufficiency requirement of a juvenile delinquency petition even in the absence of a determination or representation that the child was competent to provide the same.

In *Matter of Nelson R.* (*supra*), the only supporting deposition setting forth nonhearsay factual allegations against the respondent juvenile was from a child less than 12 years old. (At the time *Matter of Nelson R.* was decided, this was below the age of presumed competence to give sworn testimony [*see* L 2000, ch 1, § 11; CPL 60.20].) The deposition was "sworn to" before a notary and recited that, "false statements made herein are punishable as a class A misdemeanor or an act of juvenile delinquency" (*Matter of Nelson R., supra* at 361). The respondent argued that these recitations were not controlling in the absence of a representation that there had been a judicial determination that the child complainant in fact understood the nature of an oath. In upholding the facial sufficiency of the petition, the *Nelson R.* court held:

> "The failure of a petition to state affirmatively that a witness under 12 years of age has been judicially determined competent to swear to a supporting deposition does not render the petition facially insufficient and therefore does not mandate dismissal. Respondent's focus

> on the age of the complaining witness here, to the exclusion of all other factors, is misplaced. Although age is a relevant factor in determining the capacity of a person to make a statement under oath, the Family Court Act does not contain any age limitations or requirements for a witness swearing to a supporting deposition. Here, the notary's signature attested to the fact that the complainant had sworn to the truth of her deposition. Thus, there is no indication on the face of the petition that it was not properly sworn to (*cf.*, Family Ct Act § 343.1 [2]). Since the petition here was *facially* valid, any defect in the petition relating to the capacity of the complaining witness to swear to ***111** the supporting deposition was latent and dismissal at the outset of the proceedings was not required." (*Matter of Nelson R., supra* at 362-363 [citations omitted].)

Thus, here, the petition would have been facially sufficient under *Matter of Nelson R.* if the jurat on the alleged child victim's supporting deposition had read "sworn to" rather than "[s]aid to," and/or had there been a recitation in the statement that false statements therein were punishable as a misdemeanor or otherwise. This is true regardless of whether it was ultimately determined that the alleged child victim was competent to give sworn testimony, and/or the fact that he could not have been charged criminally or even adjudicated a juvenile delinquent for making a false statement. However, in light of the discussion, supra, we do not read *Matter of Nelson R.* as holding that there is a talismanic power to the form of the jurat or the recitations within a statement by a child witness such that the absence of the identified language is in all cases fatal to a finding that ****5** a juvenile delinquency petition is facially sufficient. Rather, the critical test identified by the case law is whether the petition and supporting documents provide assurance both that there is a valid and documented basis for subjecting a juvenile to prosecution, and that there is a measure of reliability regarding the contents of a petition. Here, the formal, notarized written statement of the child victim, although not sworn, in conjunction with the mother's sworn statement corroborating various aspects of the child's allegations, was sufficient to provide both a valid and documented basis for subjecting Jermaine G. to prosecution, and a measure of reliability regarding the contents of a petition. Thus, the petition should not have been dismissed as facially insufficient.

Finally, we note that dismissal of the petition here, prior to a judicial determination of the allegations, would result in not only a grievous harm to the victim, but also, potentially to the accused as well; who, if the allegations are proved true, is in need of professional intervention and help. "The overriding intent of the juvenile delinquency article is to empower [the] Family Court to intervene and positively impact the lives of troubled young people while protecting the public" (*Matter of Robert J.*, 2 N.Y.3d 339, 346 [2004]). We perceive no compelling countervailing benefit to be obtained from dismissing the petition at this juncture that would warrant such a result.

Accordingly, the order should be reversed, on the law, without costs or disbursements, the motion to dismiss the petition as ***112** facially insufficient should be denied, and the petition should be reinstated.

Krausman, Florio and Covello, JJ., concur.

Ordered that the order is reversed, on the law, without costs or disbursements, the motion to dismiss the petition as facially insufficient is denied, and the petition is reinstated.

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3rd DEPARTMENT

New York
Official Reports

75 A.D.3d 853, 906 N.Y.S.2d
133, 2010 N.Y. Slip Op. 06119

**1 The People of the State of
New York, Respondent-Appellant
v
David Newkirk, Appellant-Respondent.

Supreme Court, Appellate Division,
Third Department, New York
July 15, 2010

CITE TITLE AS: People v Newkirk

HEADNOTES

Crimes
Sexual Abuse
Sufficiency of Evidence

*854

Crimes
Proof of Other Crimes

In sexual abuse prosecution, motion for mistrial on ground that People unduly alluded to prior sexual abuse of victim was denied; although two responses by victim were improper, viewing comments in light of entire testimony and considering overwhelming evidence of defendant's guilt, impropriety was not so egregious as to deny defendant fair trial—prosecutor's comments during summation concerning dynamics of household did not expressly reference any prior crimes or bad acts by defendant and were not so substantially prejudicial as to deprive defendant of fair trial.

Crimes
Sexual Abuse
Evidence

In sexual abuse prosecution, evidence of blood found on victim's sheets and mattress pad was admissible; even if admission of blood evidence was error, in light of fact that there was no evidence that victim was physically injured during incidents or as to whose blood it was or when it was left there, there was no view of evidence which would suggest significant probability that defendant would have been acquitted but for wrongful admission of evidence.

Crimes
Sexual Abuse
Evidence

Insofar as sexual assault nurse examiner who treated victim after alleged incidents testified that there was no evidence of injury to victim, including vaginal tearing, admission of her testimony concerning vaginal tearing in general and use of diagrams of female genitalia did not constitute reversible error.

Crimes
Rape
Sufficiency of Evidence—Penetration

After determining that evidence was legally insufficient to support counts charging defendant with rape in first degree, court should have reduced convictions to lesser included offense of attempted rape in first degree; victim testified that defendant got on top of her, held her hands down, removed her clothes and placed his penis between her legs and rubbed it against her vagina; victim further testified that she squeezed her legs together to prevent sexual intercourse from occurring.

Lewis B. Oliver, Albany, for appellant-respondent. P. David Soares, District Attorney, Albany (Steven M. Sharp of counsel), for respondent-appellant.

Egan Jr., J. Appeals (1) from an order of the Supreme Court (Lamont, J.), rendered April 20, 2006 in Albany County, which partially granted defendant's motion for a trial order of dismissal, and (2) from a judgment of said court, rendered April 20, 2006 in Albany County, upon a verdict convicting defendant of the crime of sexual abuse in the first degree (three counts).

In a six-count indictment, defendant was charged with rape in the first degree (three counts) and sexual abuse in the

first degree (three counts). The indictment was based upon allegations that on May 2, 4 and 6, 2005, defendant raped the victim (born in 1987), his stepdaughter, and sexually abused her by rubbing his penis between her legs while using forcible compulsion. A jury convicted defendant on all six counts. Prior to sentencing, Supreme Court granted defendant's motion for a trial order of dismissal as to the three counts of rape in the first degree, concluding that the People's evidence was not legally sufficient to establish penetration (*see* CPL 290.10 [1]). Supreme Court thereafter sentenced defendant to three consecutive terms of imprisonment of 3½ years for the three sexual abuse in the first degree convictions, resulting in an aggregate sentence of 10½ years. Defendant now appeals from the judgment of conviction and the People appeal from the order dismissing the three rape in the first degree counts. ****2 *855**

Defendant argues that the evidence was legally insufficient to support his convictions for sexual abuse in the first degree, claiming that there was no evidence that he exerted physical force against the victim or implicitly or expressly threatened her. He further contends that the convictions were against the weight of the evidence. Initially, we note that defendant's motion to dismiss, made both at the close of the People's case and at the close of all the evidence, specifically addressed defendant's contention that the evidence was legally insufficient with regard to the rape charges. His challenge to the legal sufficiency of the sexual abuse in the first degree charges, however, was limited to a general motion to dismiss, and he did not specifically advance the grounds upon which he now relies on appeal. Accordingly, defendant failed to preserve the legal sufficiency issue he now raises on appeal (*see People v Finger*, 95 NY2d 894, 895 [2000]; *People v Nesbitt*, 69 AD3d 1109, 1110-1111 [2010], *lv denied* 14 NY3d 843 [2010]). Nevertheless, "we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Caston*, 60 AD3d 1147, 1148-1149 [2009]) for which there is no preservation requirement (*see People v Danielson*, 9 NY3d 342, 348 [2007]).

Insomuch as we find here that it would have been reasonable for the factfinder to reach a different conclusion, "[we] must, like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" (*People v Romero*, 7 NY3d 633, 643 [2006] [internal quotation marks and citations omitted]; *see People v Clark*, 51 AD3d 1050, 1051-1052 [2008], *lv denied* 10 NY3d 957 [2008]). Moreover, we must evaluate the evidence from a neutral prospective while extending appropriate deference to the factfinder's credibility (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Barringer*, 54 AD3d 442, 443 [2008], *lv denied* 11 NY3d 830 [2008]).

Defendant was convicted of having subjected the victim to sexual contact by forcible compulsion (*see* Penal Law § 130.65 [1]). Sexual contact is defined as "any touching of the sexual or other intimate parts of a person . . . for the purpose of gratifying sexual desire of either party" (Penal Law § 130.00 [3]). As relevant here, forcible compulsion is defined as compelling "by either . . . use of physical force; or . . . a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person" (Penal Law § 130.00 [8]). Here, the victim testified that on three separate occasions in May 2005, defendant picked the lock on her ***856** bedroom door, climbed on top of her and, while holding her hands, removed her pajama pants and underwear and rubbed his penis along the outside of her vagina until he ejaculated. The victim testified that she was unable to get away due to defendant lying on top of her and holding her hands. Further, semen samples found on the victim's sheets and on one pair of her underwear were linked, through DNA testing, to defendant. Upon our independent review of the record, and according the jury due deference in its resolution of credibility issues, we conclude that the verdict was supported by the weight of the evidence (*see People v Texidor*, 71 AD3d 1190, 1193 [2010]; *People v Pomales*, 49 AD3d 962, 963 [2008], *lv denied* 10 NY3d 938 [2008]).

Defendant also contends that Supreme Court erred in denying his motion for a mistrial. Defendant argues that the victim's testimony, as well as remarks by the People during summation, referenced prior sexual abuse of the victim by defendant and therefore violated Supreme Court's pretrial *Molineux* ruling that the prejudicial effect of such evidence far outweighed any probative value. At trial, when asked why she did not scream during the course of the alleged incidents, the victim testified, "Because it was something that always happened." The People then asked why she had not told her mother and the victim responded, "Because it's ****3** been going on." At this point defendant objected and immediately moved for a mistrial. Supreme Court reserved decision on the

motion for a mistrial, but granted defendant's motion to strike both answers. Thereafter, during summation, the People asked the jury to consider "the dynamics of [the victim's] family" and questioned why the victim's bedroom door had been locked, stating that "[t]hese things don't happen in a vacuum" and "this is not something that just out of the blue occurs." Following the People's summation, defendant again moved for a mistrial on the ground that the People unduly alluded to prior sexual abuse of the victim. The court thereafter denied the motions for a mistrial.

It is well settled that "the decision to grant or deny a motion for a mistrial is within the trial court's discretion and its decision will not be disturbed unless it amounts to an abuse of discretion" (*People v Benway*, 217 AD2d 884, 885 [1995]; *accord People v Miller*, 239 AD2d 787, 787 [1997], *affd* 91 NY2d 372 [1998]). Here, despite the fact that the two responses by the victim were improper, viewing the comments in light of the entire testimony and considering the overwhelming evidence of defendant's guilt, we conclude that the impropriety was not so egregious as to deny defendant a fair trial (*see* ***857** *People v Cunningham*, 222 AD2d 727, 730 [1995], *lv denied* 87 NY2d 1018 [1996]). Additionally, although defendant declined Supreme Court's offer of a prompt curative instruction, the court struck the responses and later instructed the jury to disregard all stricken testimony, alleviating any prejudice to defendant (*see People v Young*, 48 NY2d 995, 996 [1980]; *People v Johnson*, 67 AD3d 560 [2009], *lv denied* 14 NY3d 802 [2010]). Regarding the People's remarks during summation, inasmuch as "[r]eversal of a conviction for prosecutorial misconduct is warranted only where a defendant has suffered substantial prejudice such that he [or she] was deprived of due process of law" (*People v McCombs*, 18 AD3d 888, 890 [2005]), we find that, in the context of the trial, the comments concerning the dynamics of the household did not expressly reference any prior crimes or bad acts by defendant and were not so substantially prejudicial as to deprive defendant of a fair trial (*see People v Wilson*, 61 AD3d 1269, 1272 [2009], *lv denied* 14 NY3d 774 [2010]; *People v McKnight*, 306 AD2d 546, 548 [2003], *lv denied* 100 NY2d 596 [2003]).

We also reject defendant's claim that Supreme Court erred by admitting evidence of blood being found on the victim's sheets and mattress pad. Even if defendant was correct in his contention that the admission of the blood evidence was error, in light of the fact that there was no evidence presented that the victim was physically injured during the incidents or as to whose blood it was or when it was left there, we find that "there is no view of the evidence which would suggest a significant probability that defendant would have been acquitted but for the wrongful admission of this evidence" (*People v White*, 41 AD3d 1036, 1038 [2007], *lv denied* 9 NY3d 965 [2007]; *see People v Tatro*, 53 AD3d 781, 785 [2008], *lv denied* 11 NY3d 835 [2008]). We reach a similar conclusion as to defendant's challenge to the admission of testimony from the sexual assault nurse examiner who treated the victim after the alleged incidents. Insofar as the nurse testified that there was no evidence of injury to the victim, including vaginal tearing, the admission of her testimony concerning vaginal tearing in general and the use of diagrams of female genitalia did not, in our view, constitute reversible error (*see People v Rivera*, 70 AD3d 1177, 1181-1182 [2010]). Defendant's remaining challenges on appeal to the admission of evidence during trial were not preserved for our review by a proper objection (*see People v Gray*, 86 NY2d 10, 19 [1995]).

Finally, we find no merit to defendant's contention that his sentence was harsh and excessive and we discern no abuse of discretion or extraordinary circumstances warranting a reduc ***858** tion of the sentence in the interest of justice (*see* ****4** *People v Hodges*, 66 AD3d 1228, 1234 [2009], *lv granted* 13 NY3d 939 [2010]).

Turning to the People's appeal, we reject their contention that the evidence presented was legally sufficient to support a conviction of rape in the first degree. "A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person . . . [b]y forcible compulsion" (Penal Law § 130.35 [1]). Sexual intercourse "has its ordinary meaning and occurs upon any penetration, however slight" (Penal Law § 130.00 [1]; *see People v Brown*, 67 AD3d 1197, 1198 [2009]). During her testimony, the victim denied that defendant's penis penetrated her vagina but testified that his penis touched her vagina and rubbed against it without entering it, and that she had squeezed her legs together to prevent penetration. Additionally, her medical records indicate that she informed hospital staff that defendant was unable to penetrate her vagina and the sexual assault nurse examiner testified that the examination of the victim revealed no evidence of bruising, tearing, discharge or blood. Accordingly, as the evidence is legally insufficient to establish penetration, as opposed to external contact of the sexual parts (*see People v Porlier*, 55 AD3d 1059, 1061-1062 [2008]; *compare People v Jacobs*, 37 AD3d 868, 869-870

[2007], *lv denied* 9 NY3d 923 [2007]), we conclude that Supreme Court properly dismissed the three counts as to rape in the first degree.

We do, however, find merit in the People's contention that, after determining that the evidence was legally insufficient to support the counts charging defendant with rape in the first degree, Supreme Court should have reduced the convictions to the lesser included offense of attempted rape in the first degree.* In deciding a trial order of dismissal, the court may issue an order dismissing any count of an indictment if the trial evidence "is not legally sufficient to establish the offense charged therein or any lesser included offense" (CPL 290.10 [1] [a]). Based upon our review of the record, the evidence was legally sufficient to sustain the lesser included offense of attempted rape in the first degree (*see* Penal Law §§ 110.00, 130.35; *People v Jackson*, 48 AD3d 891, 892 [2008], *lv denied* 10 NY3d 841 [2008]). Specifically, the victim testified that defendant got on top of her, held her hands down, removed her clothes and placed his penis between her legs and rubbed it against her vagina. The victim fur ***859** ther testified that she squeezed her legs together to prevent sexual intercourse from occurring. Inasmuch as the court should have reduced the convictions to the lesser included offense supported by the evidence, we conclude that the convictions for rape in the first degree should be reinstated and thereafter reduced to convictions for attempted rape in the first degree (*see People v Smith*, 183 AD2d 653, 656 [1992], *lv denied* 80 NY2d 910 [1992]), and we remit the matter to Supreme Court for sentencing on said convictions. In light of the foregoing, the People's remaining arguments are academic.

Cardona, P.J., Peters, Spain and McCarthy, JJ., concur. Ordered that the order is modified, on the law, by reversing so much thereof as partially granted defendant's motion and dismissed counts one, two and three of the indictment charging ****5** rape in the first degree; motion denied to said extent, defendant is convicted of the lesser included offense of attempted rape in the first degree under said counts of the indictment and matter remitted to the Supreme Court for sentencing on said convictions; and, as so modified, affirmed.

Ordered that the judgment is affirmed.

FOOTNOTES

Footnotes

* Inasmuch as the People made their opposition to the trial order of dismissal known to Supreme Court, we find that this issue was preserved for our review (*see* CPL 470.05 [2]; *People v Caban*, 14 NY3d 369, 373 [2010]).

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185 A.D.2d 472, 585 N.Y.S.2d 889

The People of the State of New York, Respondent,
v.
Curtis White, Appellant.

Supreme Court, Appellate Division,
Third Department, New York
63617
(July 16, 1992)

CITE TITLE AS: People v White

Mercure, J.

Appeal from a judgment of the Supreme Court (Harris, J.), rendered May 10, 1991 in Albany County, upon a verdict convicting defendant of the crime of rape in the first degree.

HEADNOTES

CRIMES
CONFESSION

(1) Supreme Court properly concluded defendant's statement should not have been suppressed; defendant did not controvert police testimony that statement was made immediately after defendant was advised of his Miranda warnings, and record is devoid of evidence which would support defendant's claim statement was involuntarily given.

CRIMES
IDENTIFICATION OF DEFENDANT
Showup Identification

(2) In rape prosecution, Supreme Court properly denied suppression of defendant's showup identification by complainant; showup was conducted within one hour of crime and in close proximity to crime scene, and presence of handcuffs did not render identification impermissibly suggestive; moreover, Supreme Court correctly determined People had established independent basis for in-court identification, given complainant's observations of defendant in bar and during assault.

CRIMES
RAPE
Sufficiency of Evidence

(3) There was sufficient evidence of penetration to support conviction for first degree rape; complainant's testimony penetration had occurred was supported by medical evidence that area of vulva was red and swollen; medical evidence negating presence of semen was consistent with complainant's testimony she was able to escape from defendant soon after penetration occurred; moreover, ejaculation is by no means prerequisite to commission of rape which may occur upon any penetration, however slight.

On the night of June 7, 1990, the complainant left Izzy's Bar in the City of Albany and accepted defendant's offer of a ride home. The complainant testified that defendant then drove to an alley, dragged her out of the car, took off her clothes and raped her. After a struggle, the complainant, wearing only sneakers and socks, was able to get away and run to Central Avenue where she stopped a passing vehicle and asked the driver for assistance. Eventually, after obtaining some clothes, she told the police that she had been raped.

In the meantime, police had received a report of a possible rape in the back of 150 Central Avenue and had already commenced their investigation. The complainant's license was found in a purse which was located at the scene, and further investigation revealed that the complainant had gone to Izzy's *473 Bar that evening. Investigators dispatched to Izzy's Bar developed information that the complainant had been talking with a heavy-set black man named Gino wearing a "do rag". This description was transmitted to police units and Detective Joseph Hughes, recognizing the described person as defendant, proceeded with another detective to defendant's residence and ultimately located him. Hughes then requested that the complainant be driven by so she could view defendant, who was then in handcuffs. At the ensuing showup, the complainant identified defendant as her assailant. Following indictment and trial, defendant was found guilty of rape in the first degree and sentenced to a prison term of 8 1/3 to 25 years. Defendant now appeals.

We affirm. Initially, it is our view that Supreme Court properly denied suppression of defendant's showup identification by the complainant. The showup was conducted within one hour of the crime and in close proximity to the crime scene *(see, People v Duuvon,* 77 NY2d 541, 544; *People v Riley,* 70 NY2d 523, 529), and the presence of handcuffs did not render the identification impermissibly suggestive *(see, People v Cooper,* 152 AD2d 939, *lv denied* 74 NY2d 846; *People v Thomas,* 105 AD2d 1098). Moreover, Supreme Court correctly determined that the People had established an independent basis for an in-court identification, given the complainant's observations of defendant in the bar and during the assault *(see, People v Ramos,* 42 NY2d 834; *People v Carter,* 158 AD2d 851, 852).

We also reject the contention that there was insufficient evidence of penetration to support the conviction. The complainant's testimony that penetration had occurred was supported by medical evidence that the area of the vulva was red and swollen. Medical evidence negating the presence of semen was entirely consistent with the complainant's testimony that she was able to escape from defendant soon after penetration occurred. Moreover, "ejaculation is by no means a prerequisite to the commission of a rape which may occur 'upon any penetration, however slight' (Penal Law § 130.00 [1])" *(People v Gebert,* 118 AD2d 799, 802, *lv denied* 67 NY2d 943; *see, People v Chilson,* 133 AD2d 931, 932-933, *lv denied* 71 NY2d 893; *People v Kimard,* 98 AD2d 845, 847, *affd* 62 NY2d 910). Viewing the evidence adduced at trial in a light most favorable to the People *(see, People v Contes,* 60 NY2d 620), we find that it was legally sufficient to support the conviction.

We also agree with Supreme Court's conclusion that defendant's statement should not have been suppressed. Defendant ***474** did not controvert police testimony that the statement was made immediately after defendant was advised of his *Miranda* warnings, and the record is devoid of any evidence which would support defendant's claim that the statement was involuntarily given. In these circumstances, there is no basis to disturb Supreme Court's finding that defendant voluntarily waived his right to counsel *(see, People v Sirno,* 76 NY2d 967).

Defendant's remaining contentions are unpreserved for appellate review, without merit or constitute harmless error beyond a reasonable doubt *(see, People v Crimmins,* 36 NY2d 230).

Mikoll, J. P., Levine, Crew III and Harvey, JJ., concur.
Ordered that the judgment is affirmed.

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55 A.D.3d 1059, 865 N.Y.S.2d
732, 2008 N.Y. Slip Op. 08038

**1 The People of the State of New York, Respondent
v
Robert Porlier, Appellant.

Supreme Court, Appellate Division,
Third Department, New York
October 23, 2008

CITE TITLE AS: People v Porlier

HEADNOTES

Crimes
Indictment

In prosecution arising out of defendant's sexual abuse of young female relative over period of six years, time frames specified in indictment did not deprive defendant of due process; considering age of victim when abuse began, frequent recurrence of abuse, familial relationship between victim and defendant and unlikelihood of discovery, time span of season (i.e., summer 2001) was sufficiently particularized to permit defendant to prepare defense.

Crimes
Timeliness of Prosecution

In prosecution arising out of defendant's sexual abuse of young female relative over period of six years, court properly denied defendant's motion to dismiss based upon his due process right to prompt prosecution; while People charged defendant with crimes that occurred as much as six years earlier, these crimes were serious, defendant was only incarcerated for short time prior to indictment and prosecution obtained indictment less than one month after victim first reported sexual abuse.

Crimes
Confession

In prosecution arising out of defendant's sexual abuse of young female relative over period of six years, court properly denied defendant's motion to suppress his written statement; no *Payton* violation occurred, as investigator testified that police never entered defendant's home; defendant agreed to accompany officers to police barracks, was not handcuffed as he rode in front seat of unmarked police car, was administered *Miranda* warnings, was given drink of water prior to questioning, and was not arrested until after he provided written statement.

Crimes
Jurors
Selection of Jury

Court did not err in denying defendant's challenge of juror for cause; while juror indicated that she would have difficulty in carrying out her duties and applying proper burdens, court further questioned her and obtained affirmations that she could fairly and impartially fulfill her obligation to render determination based upon evidence and court's instructions.

Crimes
Rape

Evidence failed to prove that defendant committed crime of rape; defendant denied penetration in both his testimony and his written statement; victim testified that defendant "*tried* to have sex" with her and "tried" to put his penis in her vagina; when prosecutor asked "did his penis make contact with your vagina," victim simply answered "yes"—because evidence was legally insufficient to establish penetration, conviction was reduced to attempted rape in first degree.

Crimes
Corroboration of Admission

Without any proof supporting certain counts of indictment, other than defendant's uncorroborated confession, evidence was legally insufficient and those counts were dismissed.

Crimes
Sexual Abuse

In prosecution arising out of defendant's sexual abuse of young female relative over period of six years, evidence was insufficient to establish that victim was less than age 11 at time that certain conduct occurred, requiring reduction of count charging sexual abuse in first degree; defendant's written confession was vague regarding time periods, and dates victim testified to were all after she turned 11; because evidence established that defendant committed same conduct when victim was less than 14, conviction was reduced from sexual abuse in first degree to sexual abuse in second degree.

Crimes
Witnesses
Child Witness.—Leading questions were properly permitted to clarify or expedite child victim's testimony in sexual abuse case.

Kane, J. Appeal from a judgment of the County Court of ***1060** Washington County (Hall, Jr., J.), rendered June 29, 2007, upon a verdict convicting defendant of the crimes of sexual abuse in the first degree (nine counts), criminal sexual act in the first degree, rape in the first degree, sexual abuse in the third degree and endangering the welfare of a child.

A young female relative informed the State Police that defendant had been sexually abusing her for the past six years. Investigators recorded a controlled phone call between the victim and defendant, and then brought him to the station for an interview. Defendant signed a written statement wherein he admitted to several instances of sexual contact with the victim. A grand jury handed up an indictment charging defendant with sexual abuse in the third degree, criminal sexual act in the first degree, rape in the first degree, endangering the welfare of a child and nine counts of sexual abuse in the first degree. County Court denied defendant's motions to dismiss the indictment and suppress his written statement. After trial, he was convicted on all counts, prompting this appeal.

The time frames specified in the indictment did not deprive defendant of due process. "When time is not an essential element of an offense, the indictment . . . may allege the time in approximate terms," as long as it sets forth a time interval which reasonably informs the defendant of the nature of the accusations to enable the preparation of a defense (*People v Watt*, 81 NY2d 772, 774 [1993]; *see People v Dunton*, 30 AD3d 828, 829 [2006], *lv denied* ****2** 7 NY3d 847 [2006]; *People v Johnson*, 268 AD2d 891, 892 [2000], *lv denied* 94 NY2d 921 [2000]). Considering the age of the victim when the abuse began, the frequent recurrence of abuse, the familial relationship between the victim and defendant and the unlikelihood of discovery, the time span of a season (i.e., summer 2001) was sufficiently particularized to permit defendant to prepare a defense (*see People v Keefer*, 262 AD2d 791, 792 [1999], *lv denied* 94 NY2d 824 [1999]; *see also People v Watt*, 81 NY2d at 774; *People v Morgan*, 246 AD2d 686, 687 [1998], *lv denied* 91 NY2d 975 [1998]). A lack of further specification did not harm defendant here, as his defense was a categorical denial of any abuse or sexual contact (*see People v Morgan*, 246 AD2d at 687; *People v Stevens*, 176 AD2d 997, 998 [1991]).

County Court properly denied defendant's motion to dismiss based upon his due process right to prompt prosecution. While the People charged defendant with crimes that occurred as much as six years earlier, these crimes were serious, defendant was only incarcerated for a short time prior to indictment and the prosecution obtained an indictment less than one month after ***1061** the victim first reported the sexual abuse (*see People v Vernace*, 96 NY2d 886, 887 [2001]).

County Court also properly denied defendant's motion to suppress his written statement. The court's factual findings, which are entitled to deference (*see People v Kreydatus*, 305 AD2d 935, 936 [2003], *lv denied* 100 NY2d 595 [2003]), are fully supported by the testimony of the sole witness at the hearing, a State Police investigator. No *Payton* violation occurred, as the investigator testified that the police never entered defendant's home (*see People v Hansen*, 290 AD2d 47, 53 [2002], *affd* 99 NY2d 339 [2003]; *compare Payton v New York*, 445 US 573, 590 [1980]). The investigator testified that defendant agreed to accompany the officers to the police barracks, was not handcuffed as he rode in the front seat of the unmarked police car, was administered *Miranda* warnings, was given a drink of water prior to questioning, and was not arrested until after he provided a written statement

(*see People v Kreydatus*, 305 AD2d at 936). Defendant's contrary testimony at trial cannot be utilized to attack the court's decision following the *Huntley* hearing. The hearing transcript does not contain any proof that the statement was obtained involuntarily. Thus, suppression was not warranted.

County Court did not err in denying defendant's challenge of a particular juror for cause. While the juror initially indicated that she would have difficulty in carrying out her duties as a juror and applying the proper burdens, the court further questioned her and obtained affirmations that she could fairly and impartially fulfill her obligation to render a determination based upon the evidence and the court's instructions (*see* CPL 270.20 [1] [b]; *cf. People v Nicholas*, 98 NY2d 749, 751-752 [2002]; *People v McLean*, 24 AD3d 1110, 1111 [2005]).

The evidence fails to prove that defendant committed the crime of rape (count 12). Rape is committed when there is "any penetration, however slight" (Penal Law § 130.00 [1]; *see People v Carroll*, 95 NY2d 375, 383 [2000]; *Matter of Zachary K.*, 299 AD2d 755, 756 [2002]). Here, defendant denied penetration in both his testimony and his written statement. The victim testified that defendant "*tried* to have sex" with her and "tried" to put his penis in her vagina. When the prosecutor asked "did his penis make contact with your vagina," the victim simply answered "yes." Because the evidence is legally insufficient to establish penetration, as opposed to touching or external contact of the sexual parts (*see People v Carroll*, 95 NY2d at 383-384; *People v Dunn*, 204 AD2d 919, 920 [1994], *lv denied* 84 NY2d 907 [1994]), we reduce this conviction to attempted rape in the ***1062** first degree and remit for resentencing on that count (*see* CPL 470.15 [2] [a]; *People v Clark*, 52 AD3d 860, 861 [2008]). ****3**

The evidence is also legally insufficient to support the convictions on counts one, two and four of the indictment. "A person may not be convicted of any offense solely upon evidence of a confession or admission made by him [or her] without additional proof that the offense charged has been committed" (CPL 60.50). While "the additional proof required need not corroborate every detail of the confession," there must be some other proof tending to establish that the charged crime was committed (*People v Morgan*, 246 AD2d at 686; *see People v Groff*, 71 NY2d 101, 107 [1987]). Count one alleges that defendant rubbed the victim's buttocks with his hand, count two alleges that he touched and rubbed her buttocks with his penis and count four alleges that he placed his penis in contact with her anus. In her testimony, the victim never mentioned that defendant touched her buttocks or anus with any part of his body. Without any proof supporting counts one, two and four, other than defendant's uncorroborated confession, the evidence was legally insufficient and those counts must be dismissed.

The evidence was insufficient to establish that the victim was less than age 11 at the time that certain conduct occurred, requiring reduction of count three of the indictment charging sexual abuse in the first degree. Defendant's written confession was vague regarding time periods, and the dates the victim testified to were all after she turned 11. Because the evidence did establish that defendant committed the same conduct when the victim was less than 14, the conviction on count three must be reduced from sexual abuse in the first degree to sexual abuse in the second degree. The victim's testimony provided at least some proof to support the remaining counts (*see People v Dunton*, 30 AD3d at 829-830).

We will not disturb County Court's rulings to allow leading questions here. Leading questions, while ordinarily not permissible on direct examination, may be allowed in the trial court's discretion where they are deemed necessary to clarify or expedite a child victim's testimony in a sexual abuse case (*see People v Martina*, 48 AD3d 1271, 1272 [2008], *lv denied* 10 NY3d 961 [2008]; *People v Cuttler*, 270 AD2d 654, 655 [2000], *lv denied* 95 NY2d 795 [2000]).

The prosecutor's summation did not deprive defendant of a fair trial. Most of the statements objected to by defendant constituted fair comment on the evidence or a reasonable response to the defense summation. There was no flagrant or pervasive misconduct so as to deprive defendant of due process (*see* ***1063** *People v Robinson*, 16 AD3d 768, 770 [2005], *lv denied* 4 NY3d 856 [2005]). Defendant's remaining arguments have been reviewed and are without merit.

Mercure, J.P., Peters, Rose and Lahtinen, JJ., concur. Ordered that the judgment is modified, on the law, by reversing so much thereof as convicted defendant of the crimes of rape in the first degree under count 12 of the indictment, sexual abuse in the first degree under count three of the indictment, sexual abuse in the first degree under counts one and two of the indictment and criminal sexual act in the first degree under

count four of the indictment; reduce defendant's conviction under count 12 of the indictment to attempted rape in the first degree, reduce defendant's conviction under count three of the indictment to sexual abuse in the second degree, dismiss counts one, two and four of the indictment, vacate the sentences imposed on all five counts, and matter remitted to the County Court of Washington County for resentencing on counts three and 12 of the indictment; and, as so modified, affirmed.

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299 A.D.2d 755, 751 N.Y.S.2d
69, 2002 N.Y. Slip Op. 08858

In the Matter of Zachary K., a Person Alleged to be a Juvenile Delinquent, Appellant. St. Lawrence County Attorney, Respondent.

Supreme Court, Appellate Division,
Third Department, New York
90356
(November 27, 2002)

CITE TITLE AS: Matter of Zachary K.

HEADNOTES

INFANTS
JUVENILE DELINQUENTS
Rape

(1) Evidence established beyond reasonable doubt that respondent engaged in conduct constituting rape in first degree --- physician's testimony as to condition of victim's genitalia in combination with victim's testimony as to sexual contact and pain she experienced with respondent's companion provide sufficient basis for finding of fact that actual penetration, though slight, had occurred; respondent threatened victim with physical injury using knife, tied her up, had some sexual contact with her, and then waited while his companion raped her; this conduct amply supports finding of culpability as accomplice.

INFANTS
JUVENILE DELINQUENTS

(2) Inconsistencies between victim's testimonies at fact-finding hearing and at earlier probable-cause hearing were fully explored by respondent's counsel on cross-examination of victim and responded to by petitioner's counsel on redirect examination, and do not render victim's testimony incredible as matter of law or suggest that victim was mistaken as to essential conduct supporting charges against respondent.

Rose, J.

Appeal from an order of the Family Court of St. Lawrence County (Nelson, J.), entered June 29, 2001, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 3, to adjudicate respondent a juvenile delinquent.

Following a fact-finding hearing, Family Court found that respondent had, among other things, acted in concert with another youth in subjecting a 10-year-old female to sexual intercourse by forcible compulsion. The victim's testimony at the hearing disclosed that respondent, who was then 11 years old, and another older youth lured her into a shed, respondent threatened her with a knife, tied her up and told her to take off her clothes, and she was prevented from leaving until she agreed to let respondent and his companion rape her. The victim then described how each assailant had sexual contact with her for several minutes while the other waited outside. ***756** Deborah Duello, one of the physicians who examined the victim at the hospital, testified that she found redness and a laceration on the victim's external genitalia, although the victim's hymen was intact. Respondent contends that this evidence failed to establish beyond a reasonable doubt that he engaged in conduct which, if committed by an adult, would constitute the crime of rape in the first degree (Penal Law § 130.35 [2]), and that the victim's testimony was so inconsistent with her prior statements as to render it incredible.

On appellate review, Family Court, as the trier of fact, is entitled to have its determinations of witness credibility and resolution of disputed facts "afforded the same weight given a jury verdict" (*Matter of Joseph A.*, 244 AD2d 724, 725, *lv denied* 91 NY2d 813; *see Matter of Robert R.*, 238 AD2d 426, 427). Here, Duello's testimony as to the condition of the victim's genitalia in combination with the victim's testimony as to the sexual contact and pain she experienced with respondent's companion provide a sufficient basis for Family Court's finding of fact that actual penetration, though slight, had occurred (*see* Penal Law § 130.00 [1]; *People v Williams*, 259 AD2d 509, *lv denied* 93 NY2d 1007). In order to sustain respondent's guilt as an accomplice, the evidence, when viewed in a light most favorable to petitioner, must establish beyond a reasonable doubt that he acted with the requisite mental culpability and that, in furtherance thereof, he solicited, requested, commanded, importuned or

intentionally aided his companion to commit the act (*see* Penal Law § 20.00; *People v Long*, 294 AD2d 614, 616, *lvs denied* 98 NY2d 652; *People v Irving*, 107 AD2d 944, 945; *cf. Matter of John G.*, 118 AD2d 646). Here, respondent threatened the victim with physical injury using a knife, tied her up, had some sexual contact with her, and then waited outside for part of the time while his companion raped her. This conduct in committing the crimes charged amply supports a finding of culpability as an accomplice (*see Matter of Carmelo N.*, 228 AD2d 682, 682-683).

Respondent's citation to various inconsistencies between the victim's testimonies at the fact-finding hearing and at an earlier probable-cause hearing is also unavailing. These inconsistencies were fully explored by respondent's counsel on cross-examination of the victim and responded to by petitioner's counsel on redirect examination (*see Matter of Manuel W.*, 279 AD2d 662, 662-663). Moreover, the inconsistencies cited by respondent all relate to comparatively minor details of the victim's encounter with respondent and his companion. They do not render the victim's testimony incredible as a matter of *757 law or suggest that the victim was mistaken as to the essential conduct supporting the charges against respondent (*see Matter of Dowayne H.*, 278 AD2d 706, 707; *Matter of Romoan RR.*, 209 AD2d 861, 861). Accordingly, we find Family Court's determination of proof beyond a reasonable doubt as to the charges upon which respondent was found to be a juvenile delinquent amply supported by the record.

Similarly unavailing is respondent's remaining argument that Family Court erred in receiving the results of certain DNA testing on semen samples retrieved from the victim. Because Family Court's conclusion that respondent was an accomplice in the rape of the victim is not at all dependent on the existence or accuracy of these test results, we need not decide whether an adequate foundation was laid for their admission (*see People v Kelly*, 288 AD2d 695, 696, *lv denied* 97 NY2d 756; *People v Hamilton*, 255 AD2d 693, *lv denied* 92 NY2d 1032).

Cardona, P.J., Crew III, Carpinello and Lahtinen, JJ., concur. Ordered that the order is affirmed, without costs.

4TH DEPARTMENT

261 A.D.2d 872
Supreme Court, Appellate Division,
Fourth Department, New York.

PEOPLE of the State of New York, Plaintiff–Respondent,
v.
Jeffrey HAYES, a/k/a Jimmy King, Defendant–Appellant.

May 7, 1999.

Synopsis

Defendant was convicted in the Erie County Court, Drury, J., of first-degree rape and second-degree burglary arising from incident in which defendant pushed 85-year-old woman into her apartment and raped her. Defendant appealed. The Supreme Court, Appellate Division, held that: (1) evidence of penetration was sufficient; (2) People sufficiently established unbroken chain of custody of deoxyribonucleic acid (DNA) test results; and (3) defendant was not entitled to missing witness charge regarding People's failure to call nurse who handled rape kit.

Affirmed.

Attorneys and Law Firms

**358 Roland Hayes, Buffalo, for defendant–appellant.

**359 Cydney Kelly, Buffalo, for plaintiff–respondent.

PRESENT: LAWTON, J.P., HAYES, WISNER, PIGOTT, JR., and CALLAHAN, JJ.

Opinion

*872 MEMORANDUM:

Defendant was convicted following a jury trial of rape in the first degree (Penal Law § 130.35[1]) and burglary in the second degree (Penal Law § 140.25[2]) arising from an incident in which defendant pushed an 85–year–old woman into her apartment and raped her. Defendant contends that there was insufficient evidence of penetration to support the conviction of rape. We disagree.

Rape in the first degree is defined in relevant part as engaging in sexual intercourse by forcible compulsion (*see,* Penal Law § 130.35[1]). Sexual intercourse "has its ordinary meaning and occurs upon any penetration, however slight" (Penal Law § 130.00[1]). Although the testimony of the elderly victim was at times confused, she testified that defendant's penis did in fact penetrate her vagina "[a] little bit" and very slightly. That testimony is supported by medical evidence from the treating physician that laboratory tests revealing the presence of semen in the victim's vaginal canal were consistent with penetration having occurred. The victim's prior inconsistent statements were brought out before the jury, and merely raised an issue of credibility (*see, People v. Collins,* 188 A.D.2d 608, 609, 590 N.Y.S.2d 914, *lv. denied* 81 N.Y.2d 883, 597 N.Y.S.2d 944, 613 N.E.2d 976). The jury's determination must be accorded great weight and should not be disturbed on appeal unless clearly unsupported by the record (*see, People v. Collins, supra,* at 609, 590 N.Y.S.2d 914). Viewing the evidence

in the light most favorable to the People (*see, People v. Contes,* 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we conclude that the testimony of the victim and her treating physician is legally sufficient to establish that "penetration, however slight", occurred (Penal Law § 130.00[1]; *see, People v. George,* 217 A.D.2d 987, 988, 630 N.Y.S.2d 174, *lv. denied* 86 N.Y.2d 842, 634 N.Y.S.2d 451, 658 N.E.2d 229; *People v. Hobot,* 200 A.D.2d 586, 594, 606 N.Y.S.2d 277, *affd.* 84 N.Y.2d 1021, 622 N.Y.S.2d 675, 646 N.E.2d 1102; *People v. Collins, supra,* at 609, 590 N.Y.S.2d 914).

We reject defendant's contention that County Court erred in admitting the results of the DNA testing into evidence because the nurse who placed the samples in the rape kit did not testify. Although it would have been better to have the nurse testify, ***873** the People sufficiently established an unbroken chain of custody (*see, People v. Julian,* 41 N.Y.2d 340, 343–344, 392 N.Y.S.2d 610, 360 N.E.2d 1310). The testimony of the physician who took the samples from the victim was sufficient to establish the identity of the evidence and that no tampering had occurred.

There is no merit to defendant's contention that the court erred in failing to give a missing witness charge regarding the People's failure to call the nurse who handled the rape kit. Although defendant was aware that the witness would not testify, defendant did not request a missing witness charge until both sides had rested. That request was untimely (*see, People v. Gonzalez,* 68 N.Y.2d 424, 427–428, 509 N.Y.S.2d 796, 502 N.E.2d 583; *People v. Castro–Garcia,* 203 A.D.2d 899, 612 N.Y.S.2d 711, *lv. denied* 83 N.Y.2d 965, 616 N.Y.S.2d 18, 639 N.E.2d 758). Furthermore, defendant failed to establish that the witness would provide noncumulative testimony favorable to the People regarding a material issue (*see, People v. Kitching,* 78 N.Y.2d 532, 536, 577 N.Y.S.2d 231, 583 N.E.2d 944; *People v. Gonzalez, supra,* at 427, 509 N.Y.S.2d 796, 502 N.E.2d 583). In any event, any error is harmless (*see, People v. Crimmins,* 36 N.Y.2d 230, 241–242, 367 N.Y.S.2d 213, 326 N.E.2d 787; *People v. McCune,* 210 A.D.2d 978, 979, 621 N.Y.S.2d 246, *lv. denied* ****360** 85 N.Y.2d 864, 624 N.Y.S.2d 383, 648 N.E.2d 803). Despite the overwhelming evidence of guilt, defense counsel presented a credible defense that resulted in the dismissal of two charges. Thus, the contention that defendant received ineffective assistance of counsel lacks merit (*see, People v. Baldi,* 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400). Finally, considering the heinous nature of defendant's conduct and extensive criminal record, the court did not abuse its discretion in imposing the maximum permissible sentence.

Judgment unanimously affirmed.

All Citations

261 A.D.2d 872, 690 N.Y.S.2d 358, 1999 N.Y. Slip Op. 04353

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New York
Official Reports

224 A.D.3d 1225, 205 N.Y.S.3d
588, 2024 N.Y. Slip Op. 00502

**1 The People of the State of New York, Respondent,

v

Corry Moorhead, Appellant.

Supreme Court, Appellate Division,
Fourth Department, New York
19-02151, 43
February 2, 2024

CITE TITLE AS: People v Moorhead

HEADNOTES

Crimes
Witnesses
Expert Witness—Child Sexual Abuse Accommodation Syndrome

Crimes
Indictment
Amendment of When Crime Occurred

Crimes
Rape
Sufficiency of Evidence

Julie Cianca, Public Defender, Rochester (Bradley E. Keem of counsel), for defendant-appellant.
Sandra Doorley, District Attorney, Rochester (Nancy Gilligan of counsel), for respondent.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered October 29, 2019. The judgment convicted defendant upon a jury verdict of rape in the first degree.

It is hereby ordered that the judgment so appealed from is unanimously modified on the law by reducing the conviction of rape in the first degree (Penal Law § 130.35 [3]) to attempted rape in the first degree (§§ 110.00, 130.35 [3]) and vacating the sentence imposed and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for sentencing on that conviction.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [3]). The charge arose from an allegation that defendant raped the seven-year-old victim when defendant was living with the victim's family. The victim did not disclose the abuse until a year later. Defendant contends that an expert was not needed to explain to the jury the idea of delayed disclosure and that permitting such testimony deprived him of his right to a fair trial. We reject that contention. Expert testimony on child sexual abuse accommodation syndrome is admissible "for the purpose of explaining behavior that might be puzzling to a jury" (*People v Spicola*, 16 NY3d 441, 465 [2011], *cert denied* 565 US 942 [2011]; *see People v Nicholson*, 26 NY3d 813, 828 [2016]). Supreme Court did not abuse its ***1226** discretion in determining that the expert testimony would assist the jury in understanding the issue of delayed disclosure (*see Nicholson*, 26 NY3d at 827-829; *People v Shane*, 187 AD3d 1219, 1220 [2d Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *People v Bradberry*, 131 AD3d 800, 803 [4th Dept 2015], *lv denied* 26 NY3d 1086 [2015]; *see generally People v Austen*, 197 AD3d 861, 862 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021]).

Contrary to defendant's contention, the court properly granted the People's request to amend the indictment. The original indictment alleged that defendant raped the victim "on or about and between September 1, 2017 and December 25, 2017," and the amended indictment alleged that defendant raped the victim "on or about and around December 25, 2017." The amendment did not change the theory of the prosecution or otherwise tend to prejudice defendant (*see* CPL 200.70 [1]; *People v Sharlow*, 217 AD3d 1120, 1123-1124 [3d Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Butler*, 300 AD2d 1103, 1103 [4th Dept 2002], *lv denied* 99 NY2d 613 [2003]).

Defendant next contends that the conviction is not supported by legally sufficient evidence that he was the perpetrator or that penetration occurred. A conviction is supported by legally sufficient evidence "when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a

reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). A defendant is guilty of rape in the **2 first degree under Penal Law § 130.35 (3) when the defendant "engages in sexual intercourse with another person . . . [w]ho is less than [11] years old." As relevant here, " '[s]exual intercourse' has its ordinary meaning and occurs upon any penetration, however slight" (§ 130.00 [1]).

Here, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that it is legally sufficient to establish defendant's identity as the perpetrator. We agree with defendant, however, that the evidence is not legally sufficient to establish that penetration occurred (*see People v Carroll*, 95 NY2d 375, 382-384 [2000]). The victim testified that she awoke when defendant entered her bedroom wearing no clothes on the bottom part of his body. She testified that he got into her bed and that his penis touched her vagina. However, when asked whether defendant penetrated her, the victim testified either that she "forgot" or that she was "not sure" what happened. Additionally, **1227 the People did not establish the element of penetration through indirect or circumstantial evidence (*see id.* at 383-384; *People v Elioff*, 110 AD3d 1477, 1478 [4th Dept 2013], *lv denied* 22 NY3d 1040 [2013]; *People v Stebbins*, 280 AD2d 990, 990 [4th Dept 2001], *lv denied* 96 NY2d 925 [2001]). We therefore conclude that the evidence is legally insufficient to support the conviction, but we further conclude that the evidence is legally sufficient to support a conviction of the lesser included offense of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [3]; *see People v Porlier*, 55 AD3d 1059, 1061-1062 [3d Dept 2008]). We therefore modify the judgment accordingly, and we remit the matter to Supreme Court for sentencing on that conviction.

Defendant also contends that the verdict is against the weight of the evidence on the issue of identity. Viewing the evidence in light of the elements of the lesser included offense of attempted rape in the first degree (*see Danielson*, 9 NY3d at 349), we conclude that a verdict convicting defendant of that crime would not be against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Santiago*, 195 AD3d 1460, 1461 [4th Dept 2021], *lv denied* 37 NY3d 1099 [2021]).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct on summation is, for the most part, unpreserved for our review inasmuch as defendant failed to object to many of the statements he now challenges on appeal (*see People v Coggins*, 198 AD3d 1297, 1301 [4th Dept 2021], *lv denied* 38 NY3d 1032 [2022]; *see generally People v Gibson*, 134 AD3d 1512, 1512-1513 [4th Dept 2015], *lv denied* 27 NY3d 1151 [2016]). In any event, to the extent the prosecutor's remarks were improper, they were "not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020] [internal quotation marks omitted]; *see People v Palmer*, 204 AD3d 1512, 1514 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]) and did not shift the burden to defendant (*see People v Coleman*, 32 AD3d 1239, 1240 [4th Dept 2006], *lv denied* 8 NY3d 844 [2007]).

In light of our determination, we do not address defendant's contentions regarding the sentence and amendment of the presentence report. Present—Lindley, J.P., Montour, Ogden and Greenwood, JJ.

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BRONX COUNTY FAMILY COURT

177 Misc.2d 414
Family Court, Bronx County, New York.

In the Matter of WINNER S., a Person Alleged to be a Juvenile Delinquent, Respondent.

May 26, 1998.

Synopsis

In juvenile delinquency proceeding, the Family Court, Bronx County, Hunt, J., held that juvenile subjected complainant to "sexual contact" when he touched her with a pencil in her vaginal area over her clothing for the purpose of gratifying his own sexual desire.

Adjudicated accordingly.

Attorneys and Law Firms

****784 *414** Michael D. Hess, Corporation Counsel of New York City, New York City (Jennifer Abram, of counsel), for presentment agency.

Legal Aid Society, New York City (Monica Drinane and Vanessa Cherena, of counsel), Law Guardian.

Opinion

JOHN M. HUNT, Judge.

This Court must decide whether the Penal Code definition of "sexual contact" [Penal Law § 130.00(3)] includes an act whereby one gratifies sexual desire by using an inanimate object to touch the clothed "sexual or intimate parts" of another ***415** person without that person's consent. A review of relevant case law reveals no direct precedent on the pending issue.

The respondent in this case is charged with acts which if done by an adult would constitute the crimes of Sexual Abuse in the Second Degree [Penal Law § 130.60(2)] and Sexual Abuse in the Third Degree [Penal Law § 130.55]. At the fact-finding, the complainant, an eleven year old girl, testified that she knew the fifteen year old respondent as a fellow student in her junior high school and that he touched various parts of her body without her permission during English class on the morning of December 12, 1997. The complainant described an incident which began when the respondent placed his hand on her inner thigh and kept it there until she pushed it away. Although this initial unwanted touching might have been charged as an act of sexual abuse, see, *People v. Johnson,* 102 A.D.2d 895, 477 N.Y.S.2d 67 (2d Dept.1984), it is not. Instead, the petition alleges other acts which the complainant testified occurred immediately thereafter when the respondent touched her breast two to three times with his elbow and then touched her vaginal area with a pencil. Each of these latter touchings ostensibly occurred through or over the complainant's clothing.

"A person is guilty of sexual abuse in the second degree when he subjects another person to sexual contact and when such other person is ...(2) Less than fourteen years old." Penal Law § 130.60(2). A person is guilty of sexual abuse in the third degree "when he subjects another person to sexual contact without the

latter's consent..." Penal Law § 130.55. A required element in both of these provisions is that of "sexual contact," which is defined in the Penal Law as "any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing." Penal Law, § 130.00(3).

This court finds the complainant to be credible, credits her version of the respondent's unwanted touching of her body and finds that the only logical inference that flows from all the evidence presented is that the respondent acted intentionally in each instance and did so for the purpose of gratifying his own sexual desire. With respect to respondent's purposeful repeated touching of the complainant's breast with his own elbow, the court finds that the presentment agency has proven beyond a reasonable doubt that the respondent thereby subjected the complainant to "sexual contact" as the term is defined in ***416** Penal Law § 130.00(3). What remains for the court to determine is whether or not the respondent's further act of using a pencil to touch the complainant's genital area above her clothing falls within that same Penal Law definition of "sexual contact."

It is well settled that the Penal Law should not be strictly construed; instead, it should be interpreted "according to the fair import of [its] terms to promote justice and effect the objects of the law." Penal Law § 5.00. This rule has been held to authorize a court to dispense with hypertechnical or strained interpretations of the statute. *People v. Ditta,* 52 N.Y.2d 657, 439 N.Y.S.2d 855, 422 N.E.2d 515 (1981). Thus, conduct that ****785** falls within the plain, natural meaning of a Penal Law provision may be punished as criminal. *Id.* at 660, 439 N.Y.S.2d at 857, 422 N.E.2d 515.

Cases interpreting the definition of "sexual contact" [Penal Law § 130.00(3)] involve varied scenarios. Nevertheless, these cases typically share the common factual component of actual physical contact between a part of the victim's body and a part of the perpetrator's body accomplished either directly or through clothing.[1] This court found only one reported case, *People v. Hairston,* 101 A.D.2d 912, 475 N.Y.S.2d 615 (3rd Dept.1984) which considered whether touching another's intimate parts with an inanimate object could form the basis of a sexual abuse charge. In *Hairston,* the defendant was accused of sexually abusing a semi-clad four year old by placing both his exposed penis and a vibrator next to a child's vagina. The Third Department found that under the facts of that case, either act was sufficient to constitute a violation of § 130.65 of the Penal Law (Sexual Abuse in the First Degree).

In the sexual abuse provisions of the Penal Law, the only reference to the use of the term "foreign object" is found in § 130.66 (Aggravated Sexual Abuse in the Third Degree) and 130.70 (Aggravated Sexual Abuse in the First Degree) both of which contemplate the use of an instrument or article which is capable of causing physical injury when inserted into intimate parts of the body, see, Penal Law, § 130.00(9). Because of different intent requirements, several courts have held that the crime of Sexual Abuse is not a lesser

included offense ***417** of Aggravated Sexual Abuse, see, *People v. Renna,* 132 A.D.2d 981, 518 N.Y.S.2d 511 (4th Dept.1987); *People v. Green,* 56 N.Y.2d 427, 452 N.Y.S.2d 389, 437 N.E.2d 1146 (1982), rearg. denied 57 N.Y.2d 775, 454 N.Y.S.2d 1033, 440 N.E.2d 1343; cf., *People v. Wheeler,* 67 N.Y.2d 960, 502 N.Y.S.2d 983, 494 N.E.2d 88 (1986). Nonetheless, it has been argued that prior to the addition of Aggravated Sexual Abuse in the Third Degree to the Penal Law (L.1996, Ch.181, effective Nov. 1, 1996), the same conduct that is now chargeable under that section could also have been punishable as Sexual Abuse in the First Degree, see, Donnino, Practice Commentary, McKinney's Cons.Laws of N.Y., Book 39, Penal Law, Art. 130, at p. 422.

From the foregoing, it is clear that the term "sexual contact" as referred to in the statute and as used in the Penal Law encompasses many and varied forms of proscribed sexual touching. Given the inclusive nature of the statute, this Court finds, after consideration of all of the evidence offered in support of the petition, that the respondent subjected the complainant to "sexual contact" when he touched her with a pencil in her vaginal area over her clothing for the purpose of gratifying his own sexual desire.

Accordingly, the Court finds that the petitioner has established beyond a reasonable doubt counts 1 and 2 of the petition, Sexual Abuse in the Second Degree, a violation of Penal Law § 130.60(2), an A Misdemeanor. The remaining counts, 3 and 4, are dismissed as lesser included offenses. The matter is adjourned to August 3, 1998 for disposition.

All Citations

177 Misc.2d 414, 676 N.Y.S.2d 783, 1998 N.Y. Slip Op. 98399

Footnotes

1 Intimate parts of the body have been held to include the buttocks, see, *Matter of David M.,* 93 Misc.2d 545, 403 N.Y.S.2d 178 (Fam.Ct., Bronx, 1978), the genital area, see, *People v. Estela,* 136 A.D.2d 728, 524 N.Y.S.2d 66 (2d Dept.1988), the navel, see, *People v. Belfrom,* 124 Misc.2d 185, 475 N.Y.S.2d 978 (Sup.Ct., Queens, 1984), the leg, see, *People v. Graydon,* 129 Misc.2d 265, 492 N.Y.S.2d 903 (Crim.Ct., N.Y.Co.1985), and the mouth, see *People v. Rondon,* 152 Misc.2d 1018, 579 N.Y.S.2d 319 (Crim.Ct., Queens, 1992); but see, *People v. Kittles,* 102 Misc.2d 224, 423 N.Y.S.2d 107 (Suffolk Co. Ct., 1979).

STATUTES AND ADDITIONAL MATERIALS

Showing differences between versions effective October 13, 2010 to August 31, 2024 and September 1, 2024 [current]
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McKinney's Penal Law § 130.00

§ 130.00 Sex offenses; definitions of terms

The following definitions are applicable to this article:

1. "~~Sexual intercourse" has its ordinary meaning~~ **| Vaginal sexual contact" means conduct between persons consisting of contact between the penis |** and ~~occurs upon any penetration, however slight~~ **| the vagina or vulva |**.

2. (a) "Oral sexual ~~conduct~~ **| contact |**" means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.

(b) "Anal sexual ~~conduct~~ **| contact |**" means conduct between persons consisting of contact between the penis and anus.

3. "Sexual contact" means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.

4. For the purposes of this article "married" means the existence of the relationship between the actor and the victim as spouses which is recognized by law at the time the actor commits an offense proscribed by this article against the victim.

5. "Mentally disabled" means that a person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct.

6. "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent.

7. "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

8. "Forcible compulsion" means to compel by either:

a. use of physical force; or

b. a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped.

9. "Foreign object" means any instrument or article which, when inserted in the vagina, urethra, penis, rectum or anus, is capable of causing physical injury.

10. "Sexual conduct" means **| vaginal |**sexual ~~intercourse~~ **| contact |**, oral sexual ~~conduct~~ **| contact |**, anal sexual ~~conduct~~ **| contact |**, aggravated sexual contact, or sexual contact.

11. "Aggravated sexual contact" means inserting, other than for a valid medical purpose, a foreign object in the vagina, urethra, penis, rectum or anus of a child, thereby causing physical injury to such child.

12. "Health care provider" means any person who is, or is required to be, licensed or registered or holds himself or herself out to be licensed or registered, or provides services as if he or she were licensed or registered in the profession of medicine, chiropractic, dentistry or podiatry under any of the following: article one hundred thirty-one, one hundred thirty-two, one hundred thirty-three, or one hundred forty-one of the education law.

13. "Mental health care provider" shall mean a licensed physician, licensed psychologist, registered professional nurse, licensed clinical social worker or a licensed master social worker under the supervision of a physician, psychologist or licensed clinical social worker.

Credits

(L.1965, c. 1030. Amended L.1977, c. 692, § 2; L.1978, c. 723, § 1; L.1978, c. 735, § 1; L.1981, c. 696, § 1; L.1982, c. 560, § 1; L.1983, c. 449, § 1; L.1984, c. 650, § 1; L.1996, c. 122, § 5; L.2000, c. 1, §§ 1-a, 2, eff. Feb. 1, 2001; L.2003, c. 264, § 12, eff. Nov. 1, 2003; L.2004, c. 230, § 25, eff. July 27, 2004; L.2009, c. 485, §§ 1, 2, eff. Jan. 7, 2010; L.2010, c. 193, § 1, eff. Oct. 13, 2010**; L.2023, c. 777, § 2, eff. Sept. 1, 2024; L.2024, c. 23, § 1, eff. Sept. 1, 2024**.)

McKinney's Penal Law § 130.00, NY PENAL § 130.00

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Key: ~~deleted text~~ **added text**
5 deletions · **7** additions

McKinney's Penal Law § 130.20

§ 130.20 Sexual misconduct

A person is guilty of sexual misconduct when:

1. He or she engages in **| vaginal |** sexual ~~intercourse~~ **| contact |** with another person without such person's consent; or

2. He or she engages in oral sexual contact with another person without such person's consent; or

~~2~~ **| 3 |**. He or she engages in ~~oral sexual conduct or~~ anal sexual ~~conduct~~ **| contact |** with another person without such person's consent; or

~~3~~ **|4|**. He or she engages in sexual conduct with an animal or a dead human body.

Sexual misconduct is a class A misdemeanor.

Credits
(L.1965, c. 1030. Amended L.2000, c. 1, § 31, eff. Feb. 1, 2001; L.2003, c. 264, § 17, eff. Nov. 1, 2003**| ; L.2023, c. 777, § 51, eff. Sept. 1, 2024 |**.)

McKinney's Penal Law § 130.20, NY PENAL § 130.20

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Showing differences between versions effective February 1, 2001 to August 31, 2024 and September 1, 2024 [current]
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5 deletions · 7 additions

McKinney's Penal Law § 130.35

§ 130.35 Rape in the first degree

A person is guilty of rape in the first degree when ~~he or she engages in sexual intercourse with another person~~ :

1. he or she engages in vaginal sexual contact with another person:

(a) By forcible compulsion; or

(b) Who is incapable of consent by reason of being physically helpless; or

(c) Who is less than eleven years old; or

(d) Who is less than thirteen years old and the actor is eighteen years old or more;

2. he or she engages in oral sexual contact with another person:

~~1.~~ **| (a) |** By forcible compulsion; or

~~2.~~ **| (b) |** Who is incapable of consent by reason of being physically helpless; or

~~3.~~ **| (c) |** Who is less than eleven years old; or

(d) Who is less than thirteen years old and the actor is eighteen years old or more; or

3. he or she engages in anal sexual contact with another person:

(a) By forcible compulsion; or

(b) Who is incapable of consent by reason of being physically helpless; or

(c) Who is less than eleven years old; or

~~4.~~ **| (d) |** Who is less than thirteen years old and the actor is eighteen years old or more.

Rape in the first degree is a class B felony.

Credits
(L.1965, c. 1030. Amended L.2000, c. 1, § 34, eff. Feb. 1, 2001**| ; L.2023, c. 777, § 5, eff. Sept. 1, 2024 |**.)

McKinney's Penal Law § 130.35, NY PENAL § 130.35

Showing differences between versions effective February 1, 2001 to August 31, 2024 and September 1, 2024 [current]
Key: ~~deleted text~~ **added text**
6 deletions · **11** additions

McKinney's Penal Law § 130.30

§ 130.30 Rape in the second degree

A person is guilty of rape in the second degree when:

1. being eighteen years old or more, he or she engages in **| vaginal |** sexual ~~intercourse~~ **| contact |** with another person less than fifteen years old;~~ or~~

2. being eighteen years old or more, he or she engages in oral sexual contact with another person less than fifteen years old;

3. being eighteen years old or more, he or she engages in anal sexual contact with another person less than fifteen years old;

~~2~~ **|4|.** he or she engages in **| vaginal |** sexual ~~intercourse~~ **| contact |** with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated~~.~~ **|5|**

5. he or she engages in oral sexual contact with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated; or

6. he or she engages in anal sexual contact with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated.

It shall be an affirmative defense to the crime of rape in the second degree as defined in ~~subdivision~~ **| subdivisions |** one**|, two and three |** of this section that the defendant was less than four years older than the victim at the time of the act.

Rape in the second degree is a class D felony.

Credits
(L.1965, c. 1030. Amended L.1987, c. 510, § 2; L.2000, c. 1, § 33, eff. Feb. 1, 2001**| ; L.2023, c. 777, § 4, eff. Sept. 1, 2024 |**.)

McKinney's Penal Law § 130.30, NY PENAL § 130.30

End of Document

Showing differences between versions effective February 1, 2001 to August 31, 2024 and September 1, 2024 [current]
Key: ~~deleted text~~ **added text**
7 deletions · **13** additions

McKinney's Penal Law § 130.25

§ 130.25 Rape in the third degree

A person is guilty of rape in the third degree when:

1. He or she engages in **| vaginal |** sexual ~~intercourse~~ **| contact |** with another person who is incapable of consent by reason of some factor other than being less than seventeen years old;

2. He or she engages in oral sexual contact with another person who is incapable of consent by reason of some factor other than being less than seventeen years old;

3. He or she engages in anal sexual contact with another person who is incapable of consent by reason of some other factor other than being less than seventeen years old;

~~2~~ **|4|**. Being twenty-one years old or more, he or she engages in **| vaginal |** sexual ~~intercourse~~ **| contact |** with another person less than seventeen years old;~~ or~~

5. Being twenty-one years old or more, he or she engages in oral sexual contact with another person less than seventeen years old;

6. Being twenty-one years old or more, he or she engages in anal sexual contact with another person less than seventeen years old;

~~3~~ **|7|**. He or she engages in **| vaginal |** sexual ~~intercourse~~ **| contact |** with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent~~.~~ **| ; |**

8. He or she engages in oral sexual contact with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent; or

9. He or she engages in anal sexual contact with another person without such person's consent where such lack of consent is by reason of some factor other than the incapacity to consent.

Rape in the third degree is a class E felony.

Credits
(L.1965, c. 1030. Amended L.1987, c. 510, § 1; L.2000, c. 1, § 32, eff. Feb. 1, 2001**|; L.2023, c. 777, § 3, eff. Sept. 1, 2024 |**.)

McKinney's Penal Law § 130.25, NY PENAL § 130.25

End of Document

NY Spons. Memo., 2023 A.B. 3340

New York Sponsors Memorandum, 2023 A.B. 3340

February 9, 2023
New York Assembly
246th Legislature, 2023 Regular Session

NEW YORK STATE ASSEMBLY

MEMORANDUM IN SUPPORT OF LEGISLATION

submitted in accordance with Assembly Rule III, Sec 1(f)

SPONSOR: Cruz

TITLE OF BILL:

An act to amend the penal law, the criminal procedure law, the correction law, the social services law, the vehicle and traffic law, the family court act, the civil rights law, the civil practice law and rules, the agriculture and markets law, the judiciary law and the domestic relations law, in relation to sex offenses; and to repeal certain provisions of the penal law relating thereto

PURPOSE OR GENERAL IDEA OF BILL:

To amend the penal law to remove the penetration requirement from the rape statutes as well as to define rape as sexual intercourse, oral sexual conduct, or anal sexual conduct.

SUMMARY OF SPECIFIC PROVISIONS:

This bill removes the penetration requirement from the rape statutes, redefines rape to include oral and anal sexual conduct within the definition of rape and makes conforming changes throughout various areas of law.

JUSTIFICATION:

On March 28, 2012, a Justice of the New York State Supreme Court declared a mistrial on the rape charge against former New York City Police Officer Michael Pena. Pena was convicted of several other charges for holding the schoolteacher at gunpoint, threatening her life and forcibly sodomizing her. Pena was not convicted of rape despite overwhelming evidence of forcible, nonconsensual sexual conduct with a Bronx school teacher. It is galling that in the face of evidence

of the defendant's semen in the victim's underwear, redness to her genitals, eyewitness testimony and the victim's own account of the pain of the attack; Pena was not convicted of the top count of rape. Common sense dictates that what happened to the victim in this case is rape.

This bill will redefine rape to include oral and anal sexual conduct, which are now referred to as "criminal sexual act," so that these other forms of sexual assault are recognized by the law as rape.

PRIOR LEGISLATIVE HISTORY:

A6319A of 2022

S.8279 of 2019-2020 (Hoylman): Died in Codes

A.0794 of 2019-2020 (Simotas): Died in Rules

A.4295-A of 2017-2018

A.4959B of 2015-2016

FISCAL IMPLICATIONS:

No

EFFECTIVE DATE: This act will take effect on January 1, 2024.

NY Spons. Memo., 2023 A.B. 3340

End of Document

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 3. Juvenile Delinquency
Part 5. The Dispositional Hearing (Refs & Annos)

McKinney's Family Court Act § 351.1

§ 351.1. Probation, investigation and diagnostic assessment

Effective: April 10, 2017
Currentness

1. Following a determination that a respondent has committed a designated felony act and prior to the dispositional hearing, the judge shall order a probation investigation and a diagnostic assessment. For the purposes of this article, the probation investigation shall include, but not be limited to, the history of the juvenile including previous conduct, the family situation, any previous psychological and psychiatric reports, school adjustment, previous social assistance provided by voluntary or public agencies and the response of the juvenile to such assistance. For the purposes of this article, the 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. It shall include a clinical assessment of the situational factors that may have contributed to the act or acts. When feasible, expert opinion shall be rendered as to the risk presented by the juvenile to others or himself, with a recommendation as to the need for a restrictive placement.

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

2-a. [Expires and deemed repealed March 31, 2028, pursuant to L.2012, c. 57, pt. G, subpt. A, § 11.] (a) In a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law, the local probation department shall develop and submit to the office of children and family services for prior approval a validated pre-dispositional risk assessment instrument and any risk assessment process. The office shall share a copy of any such instrument and process with the office of probation and correctional alternatives and any expert consulting with the office pursuant to this section. Such department shall periodically revalidate any approved pre-dispositional risk assessment instrument. The department shall conspicuously post information about the instrument on its website, including but not limited to, the name of the instrument; the name and contact information of the person, institution or company that developed such instrument; what the instrument is intended to measure; the types of factors and information the instrument takes into consideration; the process by which the instrument is used in both the pre-disposition investigation and dispositional phase of a hearing; the purpose for the instrument and how the instrument informs the recommendation in the pre-dispositional investigation report; links to independent research and studies about the instrument as well as its own validation analysis relating to the instrument, when available; the most recent date the instrument was validated and the date the next re-validation process is anticipated to begin. The department shall confer with appropriate stakeholders, including but not limited to, attorneys for children, presentment agencies and the family court, prior to revising any validated pre-dispositional risk assessment instrument or process. Such department shall provide any approved pre-dispositional risk assessment instrument and process to the temporary president of the senate and the speaker of the assembly. Any revised pre-dispositional risk assessment instrument shall be subject to periodic empirical validation and to the approval of the office of children and family services. The office of children and family services shall consult with individuals with professional research experience and expertise in criminal justice; social work; juvenile justice; and applied mathematics, psychometrics and/or statistics to assist the office in determining the methods it will use to: approve the department's validated and revalidated pre-dispositional risk assessment instrument and

process; and analyze the effectiveness of the use of such instrument and process in accomplishing their intended goals; and analyze, to the greatest extent possible, any disparate impact on dispositional outcomes for juveniles based on race, sex, national origin, economic status, and any other constitutionally protected class, regarding the use of such instrument. The office shall consult with such individuals regarding whether it is appropriate to attempt to analyze whether there is any such disparate impact based on sexual orientation and, if so, the best methods to conduct such analysis. The office shall take into consideration any recommendations given by such individuals involving improvements that could be made to such instrument and process. The department shall provide training on the approved instrument and any approved process to the applicable family courts, presentment agency, and court appointed attorneys for respondents.

(b) Once an initial validated risk assessment instrument and any risk assessment process have been approved by the office of children and family services in consultation with the office of probation and correctional alternatives, the local probation department shall provide the applicable supervising family court judge with a copy of the validated risk assessment instrument and any such process along with the letter from the office of children and family services approving the instrument and process, if applicable, and indicating the date the instrument and any such process shall be effective, provided that such effective date shall be at least thirty days after such notification.

(c) Commencing on the effective date of a validated pre-dispositional risk assessment instrument and any approved process and thereafter, each probation investigation ordered under subdivision two of this section shall include the results of the validated risk assessment of the respondent and process, if any; and a respondent shall not be placed in accordance with section 353.3 or 353.5 of this part unless the court has received and given due consideration to the results of such validated risk assessment and any approved process and made the findings required pursuant to paragraph (f) of subdivision two of section 352.2 of this part.

(d) Notwithstanding any other provision of law to the contrary, data necessary for completion of a pre-dispositional risk assessment instrument may be shared among law enforcement, probation, courts, detention administrations, detention providers, presentment agencies, and the attorney for the child upon retention or appointment solely for the purpose of accurate completion of such risk assessment instrument. A copy of the completed pre-dispositional risk assessment instrument shall be made available to the attorney for the respondent and the applicable court.

(e) The local probation department shall provide the office of probation and correctional alternatives with information regarding the use of the pre-dispositional risk assessment instrument and any risk assessment process in the time and manner required by the office. The office may require that such data be submitted to the office electronically. The office shall not commingle any such information with any criminal history database. The office shall share such information with the office of children and family services. The office of children and family services shall use and share such information only for the purposes of this section and in accordance with this section. Such information shall be shared and received in a manner that protects the confidentiality of such information. The sharing, use, disclosure and redisclosure of such information to any person, office, or other entity not specifically authorized to receive it pursuant to this section or any other law is prohibited.

(f) The family courts shall provide the office of children and family services with such information, in the time and manner required by the office, as is necessary for the office to determine the validity and efficacy of any pre-dispositional risk assessment instrument and process submitted to the office for approval under this subdivision and to analyze any disparate impact on dispositional outcomes for juveniles in accordance with paragraph (a) of this subdivision. The office shall use and share such information only for the purposes of this section and in accordance with this section. Such information shall be shared and received in a manner that protects the confidentiality of such information. The sharing, use, disclosure and redisclosure of such information to any person, office, or other entity not specifically authorized to receive it pursuant to this section or any other law is prohibited.

(g) The office of probation and correctional alternatives shall promulgate regulations, in consultation with the office of children and family services, regarding the role of local probation departments in the completion and use of the pre-dispositional risk assessment instrument and in the risk assessment process.

2-b. [Expires and deemed repealed March 31, 2028, pursuant to L.2012, c. 57, pt. G, subpt. B, § 7.] The office of children and family services shall develop a validated pre-dispositional risk assessment instrument and any risk assessment process for juvenile delinquents. The office shall periodically revalidate any approved pre-dispositional risk assessment instrument. The office shall conspicuously post any approved pre-dispositional risk assessment instrument and any risk assessment process on its website and shall confer with appropriate stakeholders, including but not limited to, attorneys for children, presentment agencies and the family court, prior to revising any validated pre-dispositional risk assessment instrument or process. Any such revised pre-dispositional risk assessment instrument shall be subject to periodic empirical validation. The office of children and family services shall consult with individuals with professional research experience and expertise in criminal justice; social work; juvenile justice; and applied mathematics, psychometrics and/or statistics to assist the office in determining the method it will use to: develop, validate and revalidate such pre-dispositional risk assessment instrument; develop the risk assessment process; and analyze the effectiveness of the use of such pre-dispositional risk assessment instrument and process in accomplishing their intended goals; and analyze, to the greatest extent possible, any disparate impact on dispositional outcomes for juveniles based on race, sex, national origin, economic status, and any other constitutionally protected class, regarding the use of such instrument. The office shall consult with such individuals regarding whether it is appropriate to attempt to analyze whether there is any such disparate impact based on sexual orientation and, if so, the best methods to conduct such analysis. The office shall take into consideration any recommendations given by such individuals involving improvements that could be made to such instrument and process. The office also shall consult with local probation departments in the development of the validated pre-dispositional risk assessment instrument and the revalidation of such instrument. The office of children and family services shall provide training on the instrument and any process to the family courts, local probation departments, presentment agencies and court appointed attorneys for respondents. The office may determine that a pre-dispositional risk assessment instrument and any process in use pursuant to subdivision two-a of section 351.1 of this part may continue to be used pursuant to such subdivision instead of requiring the use of any instrument or process developed pursuant to this subdivision.

(a) Once an initial validated risk assessment instrument and risk assessment process have been developed, the office of children and family services shall provide the supervising family court judges and local probation departments with copies of the validated risk assessment instrument and process and notify them of the effective date of the instrument and process, which shall be at least six months after such notification.

(b) Commencing on the effective date of a validated risk assessment instrument and any risk assessment process and thereafter, each probation investigation ordered under subdivision two of this section shall include the results of the validated risk assessment of the respondent and process, if any; and a respondent shall not be placed in accordance with section 353.3 or 353.5 of this part unless the court has received and given due consideration to the results of such validated risk assessment and any process and made the findings required pursuant to paragraph (g) of subdivision two of section 352.2 of this part.

(c) Notwithstanding any other provision of law to the contrary, data necessary for completion of a pre-dispositional risk assessment instrument may be shared among law enforcement, probation, courts, detention administrations, detention providers, presentment agencies and the attorney for the child upon retention or appointment solely for the purpose of accurate completion of such risk assessment instrument, and a copy of the completed pre-dispositional risk assessment instrument shall be made available to the attorney for the respondent and applicable court.

(d) Local probation departments shall provide the office of probation and correctional alternatives with information regarding use of the pre-dispositional risk assessment instrument and any risk assessment process in the time and manner required by the office. The office may require that such data be submitted to the office electronically. The office shall not commingle any such information with any criminal history database. The office shall share such information with the office of children and family services. The office of children and family services shall use and share such information only for the purposes of this section and in accordance with this section. Such information shall be shared and received in a manner that protects the confidentiality of such information. The sharing, use, disclosure and redisclosure of such information to any person, office, or other entity not specifically authorized to receive it pursuant to this section or any other law is prohibited.

(e) Law enforcement and the family courts shall provide the office of children and family services with such information, in the time and manner required by the office, as is necessary for the office to develop, validate and revalidate any such pre-dispositional risk assessment instrument and process and to analyze any disparate impact on dispositional outcomes for juveniles in accordance with this section. The office shall use and share such information only for the purposes of this section and share it in accordance with this section. Such information shall be shared and received in a manner that protects the confidentiality of such information. The sharing, use, disclosure and redisclosure of such information to any person, office, or other entity not specifically authorized to receive it pursuant to this section or any other law is prohibited.

(f) The office of probation and correctional alternatives shall promulgate regulations, in consultation with the office of children and family services, regarding the role of local probation departments in the completion and use of the pre-dispositional risk assessment instrument and in the risk assessment process.

3. A child shall not be placed in accord with section 353.3 unless the court has ordered a probation investigation prior to the dispositional hearing; a child shall not be placed in accord with section 353.4 unless the court has ordered a diagnostic assessment prior to such hearing.

4. Each investigation report prepared pursuant to this section shall afford the victim the right to make a statement. Such victim impact statement 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, subject to availability of such information. In the case 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. Nothing contained in this section shall be interpreted to require that a victim or his or her family supply information for the preparation of an investigation report or that the dispositional hearing should be delayed in order to obtain such information.

5. (a) All diagnostic assessments and probation investigation reports shall be submitted to the court and made available by the court for inspection and copying by the presentment agency and the respondent at least five court days prior to the commencement of the dispositional hearing. All such reports shall be made available by the court for inspection and copying by the presentment agency and the respondent in connection with any appeal in the case.

(b) The victim impact statement shall be made available to the victim or the victim's family by the presentment agency prior to sentencing.

6. All reports or memoranda prepared or obtained by the probation service for the purpose of a dispositional hearing shall be deemed confidential information furnished to the court and shall be subject to disclosure solely in accordance with this section or as otherwise provided for by law. Except as provided under section 320.5 such reports or memoranda shall not be furnished to the court prior to the entry of an order pursuant to section 345.1.

7. The probation services which prepare the investigation reports shall be responsible for the collection and transmission to the office of probation and correctional alternatives, of data on the number of victim impact statements prepared. Such information shall be transmitted annually to the office of victim services and included in the office's biennial report pursuant to subdivision twenty-one of section six hundred twenty-three of the executive law.

Credits

(Added L.1982, c. 920, § 1, eff. July 1, 1983. Amended L.1983, c. 398, § 35; L.1985, c. 585, § 1; L.1985, c. 880, § 3; L.1986, c. 418, §§ 1 to 3; L.2004, c. 317, § 1, eff. Nov. 8, 2004; L.2010, c. 56, pt. A, § 54, eff. June 22, 2010; L.2010, c. 56, pt. A-1, §§ 3, 30, eff. June 22, 2010; L.2012, c. 57, pt. G, subpt. A, § 2, eff. April 1, 2012; L.2012, c. 57, pt. G, subpt. B, § 2, eff. April 1, 2012; L.2014, c. 489, § 5, eff. Dec. 17, 2014; L.2017, c. 59, pt. WWW, § 70-c, eff. April 10, 2017.)

McKinney's Family Court Act § 351.1, NY FAM CT § 351.1
Current through L.2024, chapters 1 to 443. Some statute sections may be more current, see credits for details.

Secure Detention Beds and Mental Health Services, or Lack Thereof

Claire Pulver, Esq.
Robert Fisher, Esq.

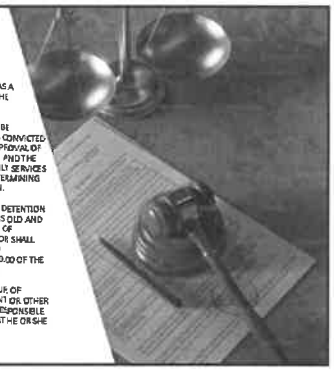
SECURE BEDS

OVERVIEW

- Placements for Juvenile Delinquents
- OCFS placement statistics – first quarter 2024
- OCFS – second quarter 2024

2

FCA 304.1: DETENTION



1. A FACILITY CERTIFIED BY THE OFFICE OF CHILDREN AND FAMILY SERVICES AS A JUVENILE DETENTION FACILITY MUST BE OPERATED IN CONFORMITY WITH THE REGULATIONS OF THE OFFICE OF CHILDREN AND FAMILY SERVICES.

2. NO CHILD TO WHOM THE PROVISIONS OF THIS ARTICLE MAY APPLY SHALL BE DETAINED IN ANY PRISON, JAIL, LOCKUP, OR OTHER PLACE USED FOR ADULTS CONVICTED OF CRIME OR UNDER ARREST AND CHARGED WITH CRIME WITHOUT THE APPROVAL OF THE OFFICE OF CHILDREN AND FAMILY SERVICES IN THE CASE OF EACH CHILD AND THE STATEMENT OF ITS REASONS THEREFOR. THE OFFICE OF CHILDREN AND FAMILY SERVICES SHALL PROMULGATE AND PUBLISH THE RULES WHICH IT SHALL APPLY IN DETERMINING WHETHER APPROVAL SHOULD BE GRANTED PURSUANT TO THIS SUBDIVISION.

3. THE DETENTION OF A CHILD UNDER THIRTEEN YEARS OF AGE IN A SECURE DETENTION FACILITY SHALL NOT BE DIRECTED, UNLESS SUCH CHILD IS AT LEAST TEN YEARS OLD AND IS CONSIDERED A JUVENILE DELINQUENT PURSUANT TO SUBPARAGRAPH (III) OF PARAGRAPH (A) OF SUBDIVISION ONE OF SECTION 301.2 OF THIS ARTICLE, NOR SHALL THE DETENTION OF A CHILD ADJUDICATED SOLELY FOR AN ACT THAT WOULD CONSTITUTE A VIOLATION AS DEFINED IN SUBDIVISION THREE OF SECTION 10.00 OF THE PENAL LAW, BE DIRECTED UNDER ANY OF THE PROVISIONS OF THIS ARTICLE.

4. A DETENTION FACILITY WHICH RECEIVES A CHILD UNDER SUBDIVISION FOUR OF SECTION 305.2 OF THIS PART SHALL IMMEDIATELY NOTIFY THE CHILD'S PARENT OR OTHER PERSON LEGALLY RESPONSIBLE FOR HIS OR HER CARE OR, IF SUCH LEGALLY RESPONSIBLE PERSON IS UNAVAILABLE THE PERSON WITH WHOM THE CHILD RESIDES, THAT HE OR SHE HAS BEEN PLACED IN DETENTION.

FCA § 320.5. THE INITIAL APPEARANCE; RELEASE OR DETENTION

1. At the initial appearance, the court in its discretion may release the respondent or direct his detention.

2. Rules of court shall define permissible terms and conditions of release. The court may in its discretion release the respondent upon such terms and conditions as it deems appropriate. The respondent shall be given a written copy of any such terms and conditions. The court may modify or enlarge such terms and conditions at any time prior to the expiration of the respondent's release.

FCA § 320.5. THE INITIAL APPEARANCE; RELEASE OR DETENTION (CONT)

3. (a) The court shall not direct detention unless available alternatives to detention, including conditional release, would not be appropriate, and the court finds that unless the respondent is detained:

(i) there is a substantial probability that he or she will not appear in court on the return date; or

(ii) there is a serious risk that he or she may before the return date commit an act which if committed by an adult would constitute a crime.

(b) Any finding directing detention pursuant to paragraph (a) of this subdivision made by the court shall state the facts, the level of risk the youth was assessed pursuant to a detention risk assessment instrument approved by the office of children and family services, and the reasons for such finding including, if a determination is made to place a youth in detention who was assessed at a low or medium risk on such a risk assessment instrument, the particular reasons why detention was determined to be necessary.

(c) If the court makes a finding that detention is necessary pursuant to subparagraphs (i) and (ii) of paragraph (a) of this subdivision, the court may consider, where applicable, as a condition of release, electronic monitoring of the respondent, if such electronic monitoring would significantly reduce the substantial probability that the respondent would not return to court on the return date, or the serious risk that the respondent may before the return date commit an act that if committed by an adult would constitute a crime.

(d) If the respondent may be a sexually exploited child as defined in subdivision one of section four hundredforty-seven-a of the social services law, the court may direct the respondent to an available short-term safe house as a condition of release.

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FCA § 320.5. THE INITIAL APPEARANCE; RELEASE OR DETENTION (CONT)

4. At the initial appearance the presentment agency may introduce the respondent's previous delinquency findings entered by a family court. If the respondent has been fingerprinted for the current charge pursuant to section 306.1, the presentment agency may also introduce the fingerprint records maintained by the division of criminal justice services. The clerk of court and the probation service shall cooperate with the presentment agency in making available the appropriate records. At the conclusion of the initial appearance such fingerprint records shall be returned to the presentment agency and shall not be made a part of the court record.

5. Upon a finding of facts and reasons which support a detention order pursuant to subdivision three of this section, the court shall also determine and state in any order directing detention:

(a) whether the continuation of the respondent in the respondent's home would be contrary to the best interests of the respondent based upon, and limited to, the facts and circumstances available to the court at the time of the initial appearance; and

(b) where appropriate and consistent with the need for protection of the community, whether reasonable efforts were made prior to the date of the court appearance that resulted in the detention order issued in accordance with this section to prevent or eliminate the need for removal of the respondent from his or her home or, if the respondent had been removed from his or her home prior to the initial appearance, where appropriate and consistent with the need for protection of the community, whether reasonable efforts were made to make it possible for the respondent to safely return home.

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SECTION 325.1
THE PROBABLE-CAUSE HEARING; TIME

1. At the initial appearance, if the respondent denies a charge contained in the petition and the court determines that the respondent shall be detained for more than three days pending a fact-finding hearing, the court shall schedule a probable-cause hearing to determine the issues specified in section 325.3 of this part.

2. Such probable-cause hearing shall be held within three days following the initial appearance or within four days following the filing of a petition, whichever occurs sooner.

3. For good cause shown, the court may adjourn the hearing for no more than an additional three court days.

4. The respondent may waive the probable-cause hearing, but the fact that the respondent is not ready for a fact-finding hearing shall not be deemed such a waiver.

5. Where the petition consists of an order of removal pursuant to article seven hundred twenty-five of the criminal procedure law, unless the removal was pursuant to subdivision three of section 725.05 of such law and the respondent was not afforded a probable cause hearing pursuant to subdivision three of section 722.20 of such law, the petition shall be deemed to be based upon a determination that probable cause exists to believe the respondent is a juvenile delinquent and the respondent shall not be entitled to any further inquiry on the subject of whether probable cause exists. After the filing of any such petition the court must, however, exercise independent, de novo discretion with respect to release or detention as set forth in section 320.5 of this part.

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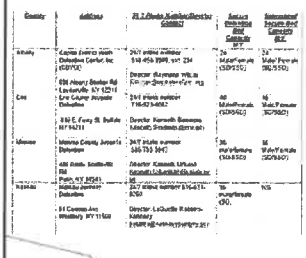
FCA § 340.1: TIMING OF FACT-FINDING

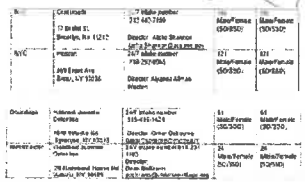
- **Other subsections omitted for clarity**

- **1. If the respondent is in detention and the highest count in the petition charges the commission of a class A, B, or C felony, the fact-finding hearing shall commence not more than fourteen days after the conclusion of the initial appearance except as provided in subdivision four. If the respondent is in detention and the highest count in such petition is less than a class C felony the fact-finding hearing shall commence no more than three days after the conclusion of the initial appearance except as provided in subdivision four.**
- **2. If the respondent is not in detention the fact-finding hearing shall commence not more than sixty days after the conclusion of the initial appearance except as provided in subdivision four.**
- **4. The court may adjourn a fact-finding hearing: (a) on its own motion or on motion of the presentment agency for good cause shown for not more than three days if the respondent is in detention and not more than thirty days if the respondent is not in detention; provided, however, that if there is probable cause to believe the respondent committed a homicide or a crime which resulted in a person being incapacitated from attending court, the court may adjourn the hearing for a reasonable length of time**

8

SECURE FACILITIES





9

NON SECURE DETENTION OUTSIDE OF NYC

RDS Non-Secure Facility	Director	Director Phone #	Director Email
Berkshire Farm NSD			
Children's Home of Wyoming Monroe County NSD			
Children's Village FCAP Genesee/Orleans NSD			
Berkshire Schodack NSD			
Hope for Youth NSD			
Mercy First NSD			
House of Good Shepherd			

Are any of you using non-secure beds for JD detention?
If so, how often?
Do you experience issues at the QRTP hearing?

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LOCAL SOLUTIONS

"Family House" of Kingston, Local to us

Pros: Oftentimes able to work with us on providing a bed

Pro-social and enrichment activities offered to residents

Residents able to attend school locally

Cons: Non-secure type of facility, only accept juveniles willing to stay there voluntarily, many group activities provide opportunities to abscond

How many of your counties have a emergency youth shelter?

DETENTION NUMBERS 2024

Excerpt from Juvenile Justice Detention Monitoring Report – from the first quarter of 2024, published by OCFS

In New York State (NYS), youth can be detained in relation to Adolescent Offender (AO), Vehicle and Traffic Law (VTL) Misdemeanor, Juvenile Offender (JO), and Juvenile Delinquency (JD) cases. Statewide, admissions on JD matters were most common (73%), followed by AO (18%), JO (8%), and VTL (0%) related events. This pattern was consistent for both NYC and ROS (see Figure 1).

In Q1 2024 (January 1, 2024 - March 31, 2024), a total of 969 detention admissions occurred across the state. As shown in Table 1, New York City (NYC) accounted for 54% (527) of those admissions, while the 57 non-NYC counties—which this report refers to as Rest of State (ROS)—accounted for 46% (442).

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TRENDS

- Also excerpted from OCFS 1st quarter report

Table 14. Admission Trends – Juvenile Delinquent (JD)

Quarter 1 2024	[illegible]	[illegible]	[illegible]	Last Quarter	This Quarter Last Year
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	11%	11%
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	4	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	3	-33%	-37%
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Clinton	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cortland	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	6	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	1	1	[illegible]	[illegible]

13

CONTINUED

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Nassau	[illegible]	[illegible]	[illegible]	[illegible]	3%
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Oneida	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Ontario	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rockland	4	[illegible]	[illegible]	[illegible]	[illegible]
St Lawrence	1	0	[illegible]	[illegible]	9%
Saratoga	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	130%
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	-25%
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	9%
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

*Percent change could not be calculated due to a zero count in the comparison period

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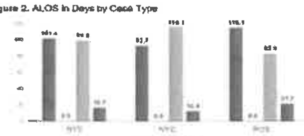
DETENTION NUMBERS 2024

Excerpt from Juvenile Justice Detention Monitoring Report – from the first quarter of 2024, published by OCFS

The type of case can result in different average lengths of stay. Table 4 (from 2024 Q1 Report) shows average length of stay (ALOS) varies widely by case type. Throughout the state, in Q1 2024, AOs had the longest ALOS (101.4 days), followed by JOs (99.0 days), and JDs (16.7 days)

Figure 2. ALOS in Days by Case Type



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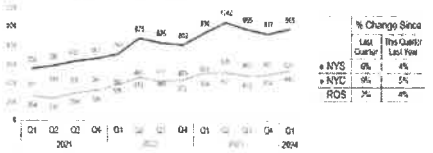
DETENTION NUMBERS Q1 2024

Excerpt from Juvenile Justice Detention Monitoring Report – from the first quarter of 2024, published by OCFS

Admissions increased (4%) when compared to Q1 last year
Statewide, admissions increased from 930 in Q1 2023 to 969 in Q1 2024. NYC (5%) and ROS (4%) both contributed to this increase

Figure 4. Admission Trends by Region



	% Change Since	
	Last Quarter	This Quarter Last Year
NYS	6%	4%
NYC	9%	5%
ROS	3%	-4%

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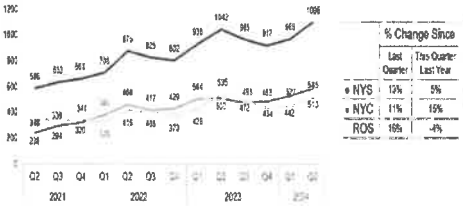
DETENTION NUMBERS Q2 2024

- Detentions up 13% from Q1 Statewide.
- Growth happened throughout the state, particularly outside NYC

Figure 4. Admission Trends by Region



	% Change Since	
	Last Quarter	This Quarter Last Year
NYS	13%	5%
NYC	11%	15%
ROS	16%	-4%

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FINDING DETENTION BEDS

Rest of State

Bed census often is inaccurate, DSS and our office need to call each facility, most will not commit a bed until they have an order
Our judges will not sign an order until they have a facility with a bed

Isn't this the joy we all feel when finding a detention bed?

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CASE STUDY – BRENDA S.

BACKGROUND

Brenda S. was known to Ulster County DSS for several years. As the result of a neglect case, she was placed with DSS in a residential placement.

- Brenda frequently absconded from her placement, and it was suspected (and later confirmed) that she was returning to her mother
- Brenda was accused of bringing illegal substances to her residence, and soliciting others to engage in sexual behaviors and substance use
- Brenda was accused of assaulting local police and staff at her residence
- **Brenda had also been given extensive therapeutic services in the community**
- **Brenda had worked with Coordinated Children's Services in Ulster prior to placement**

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INCIDENT

- **Brenda was found by local law enforcement in the presence of her mother, who was "squatting" in an unrelated man's home**
- **PD contacted Brenda's RTC, and staff arrived to pick her up and transport her approximately 1 hour back to the RTC**
- **As staff was driving the vehicle through town, Brenda reached into the front of the vehicle, then climbed into the front of the moving vehicle and attempted to turn off the vehicle's ignition (it was a push-to-start vehicle)**
- **Staff also alleged that Brenda attempted to grab the wheel**
- **Brenda also attempted to press other buttons near the wheel, seemingly in an attempt to stop the vehicle**
- **Brenda then jumped out of the vehicle and into traffic, as staff attempted to follow**
- **Brenda ended up back at the same local police department, who contacted our office**

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OPTIONS

Immediate pre-petition detention in Secure Detention

- Clearly a non-secure facility would be unable to hold Brenda, RTF not able to curtail AWOL behavior
- Could meet the criteria from FCA § 320.5(3)(a)(i): "there is a substantial probability that he or she will not appear in court on the return date"
- Staff would need to be available for probable cause hearing within 3 days, which could be arranged
- BUT our office and DSS called all secure facilities in the state, and no beds were available

Return to RTF

- RTF sent 15-day notice to DSS to find an alternate placement for Brenda
- File petition soon thereafter and attempt to find a placement as a disposition
- DSS would have to find alternate non-secure facility in the meantime
- DSS placements would not accept Brenda because of AWOL risk, unsafe behaviors, assaults on staff
- Any local options were either impossible or posed risk for Brenda (could not be returned to mom, no family nearby who could care for her, any facilities would not be able to address AWOL risk)

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SOLUTION FOR NOW

- During the pendency of the case, Brenda was brought to Westchester Medical Center, RTC refused to accept her back after release from WMC
- Brenda went from WMC to Family House (emergency youth shelter) but then absconded within 10 days, assaulted staff, and caused significant property damage
- Letter requesting that Judge issue a warrant in light of AWOL and risk to herself and others, reiterates that there are no appropriate placements available
- Judge declines to issue a warrant, Brenda called Family House and was told information regarding court appearance, and appeared at court for the next appearance with her mother
- Judge scheduled a conference. Brenda ran away before the conference date, and judge issued a warrant. Judge directed that if Brenda were to be picked up on the weekend, that she be brought to Children's Village

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BRENDA PICKED UP ON THE WARRANT

- Brought before judge, DSS requested additional time to find a secure bed
- Children's Village was no longer an option for Brenda
- DSS and our office are calling around for detention beds before the case has its second call
- Woodfield Detention Center in Valhalla has a bed available and the judge signs an order directing detention

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BRENDA'S HEARING – 3 DAYS LATER

- 2 workers were in the van, but one is unavailable (moved states, left no forwarding address, changed her phone number)
- We subpoena other worker, Trisha, as a witness. Trisha testifies to working at RTF, that she was assigned to transport Brenda on the day in question, and that Brenda attempted to grab the steering wheel and press ignition button
- Judge makes a finding against Respondent for Reckless Endangerment 2nd, and disposition is scheduled for later the same week
- Woodfield does not accept Brenda back, and she is sent to Family House for 3 days – and makes efforts to enroll in school and find a job

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DISPOSITION

First attempt:

- Contacted OCFS to notify them of the date but due to new personnel and miscommunication, nobody from OCFS showed up for disposition date
- Our office told the judge and he reluctantly scheduled a new dispositional appearance
- Detention bed at Woodfield is still not available
- Brenda returns to Family House and allegedly is on her best behavior

Second hearing date:

- OCFS is present
- We call DSS deputy director and probation officer as witnesses, PO recommends placement in secure detention
- Judge makes findings that child requires confinement and OCFS is the least restrictive alternative for Brenda
- Brenda is taken from the courthouse to OCFS
- Side note: at one of these appearances, Brenda's mother brought a dog into the courtroom in her purse

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ANOTHER CASE FOR BRENDA

- Following the second disposition date, Brenda was being transported when she asked to use the bathroom and the van stopped at a supermarket
- Brenda punched a former classmate in the head
- Our office filed the case and moved forward with the new charges, while Brenda was still placed with OCFS (case filed approximately 30 days after disposition hearing)
- Eventually, she made an admission and Probation recommended a 1-year conditional discharge with the added condition that she follow the terms and conditions of OCFS placement or any other residence
- At the time of disposition, Brenda was on partial community release and living with a relative, receiving OCFS services

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OTHER ISSUES: 2 EXAMPLES

- Another juvenile, "Miranda" was placed by her school in RTF, then had assaultive behaviors and AWOLs
- During AWOL, Coordinated Children's Services director issued a "pick-up order" under MHL 9.45 (no detention beds, acute psychiatric symptoms)
- Issue where the judge believed he was the one who would have to sign such an order
- Brought to MidHudson Regional Hospital, plan was for her to be admitted to RCPC
- After release, AWOL, Judge ordered that she stay with family friend and issued Order setting certain conditions for her release (i.e. keeping her phone charged)
- "Charles" had an ACD, and violated terms while living with grandmother, but she was reluctant to testify
- Initial recommendation from Review Committee was to place him with DSS, but no facilities would accept him due to finding of sexual abuse, assaultive behaviors in the community
- Probation recommended DSS placement, DSS said they could not place him and could not arrange for QRTP, judge rejected request for new PDI
- Disagreement over whether to request placement with OCFS, ultimately Charles was placed on Probation

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ISSUES RAISED BY OTHER COUNTIES

- Unable to find a bed for Juvenile so Juvenile held in interview room or in a hotel room with deputies supervising
- Issues for DSS finding RTC for juvenile, so only options are placement with OCFS or return to community where needs are not met and risk of harm is greater
- If child is under 12 years old, unable to place in secure detention even if criminal act is serious (such as stabbing mother's boyfriend
- Difficult to find placements for juveniles with risky behaviors in the community, also unable to find beds for 30-day diagnostics
- Other counties and our county have issues trying to find a mental health bed for youth who is in crisis, even where there should be grounds under MHL 9.41 or 9.45
- Many cases where Respondent is residing in the same house with their victim
- Parents often raise issues related to the safety of their other (younger) children when Respondents are absconding at different hours, violent with their siblings, or sneaking strangers into the home
- Adjourning disposition hearings because no beds are available to accept Respondent

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OCFS CONTACT INFORMATION: DOWNSTATE

Azizi Baker, Detention Specialist
Office of Children & Family Services
Adam Clayton Powell, Jr. State Office Building
163 West 125th Street, 14th Floor
New York, NY 10027
Phone: 212-961-8460

Tanikquaa Foye, Detention Specialist
Office of Children & Family Services
Adam Clayton Powell, Jr. State Office Building
163 West 125th Street, 14th Floor
New York, NY 10027
Phone: 212-961-1656

Judith Hartman-Giles, Detention Assistant:
718-401-2660

Stephanie Fields, Detention Assistant:
212-961-4077

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OCFS REST OF STATE CONTACT INFORMATION

- **Donte Blackwell**, Director, Bureau of Detention Services Adam Clayton Powell, Jr. State Office Building
  - 163 West 125th Street, 18th Floor New York, NY 1002
  - Phone: 212-383-7261
  - Mobile: 347-306-0156
- **Christine Anderson**, Program Coordinator and Technical Assistance: 518-408-3269
- **Daniel Smith**, Detention Specialist (Buffalo & Rochester Region): 518-469-5490
- **Jennifer Mims**, Detention Specialist (Capital District & Central Region): 518-473-3660

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THANK YOU

Robert J. Fisher
845-750-3932
rfis@co.ulster.ny.us

Claire L. Pulver
845-750-3125
cpul@co.ulster.ny.us

County	Address	24-7 Phone Number/Director Contact	Secure Detention Bed Capacity M/F	Specialized Secure Bed Capacity M/F
Albany	Capital District Youth Detention Center, Inc. (CDYCI)838 Albany Shaker Rd Loudonville, NY 12211	24/7 intake number: 518-456-9399, ext. 234 Director: Raymond Wilcox RWilcox@berkshirefarm.org	24 Male/Female (SD/SSD)	24 Male/ Female (SD/SSD)
Erie	Erie County Juvenile Detention 810 E. Ferry St. Buffalo NY 14211	24/7 intake number: 716-923-4062 Director: Kenneth Simmons Kenneth.Simmons@erie.gov	46 Male/Female (SD/SSD)	46 Male/Female (SD/SSD)
Monroe	Monroe County Juvenile Detention 400 Rush- Scottsville Rd. Rush, NY 14543	24/7 intake number: 585-753-5940 Director: Kenneth Urbanik Kenneth.Urbanik@dfa.state.ny.us	38 male/female (SD/SSD)	38 Male/Female (SD/SSD)
Nassau	Nassau Juvenile Detention 61 Carman Ave Westbury, NY 11590	24/7 intake number 516-571-9260 Director: LaQuetta Robbins-Kennedy lrobbins@nassaucountyny.gov	16 male/female (SD)	N/A
NYC	Crossroads 17 Bristol St. Brooklyn, NY 11212	24/7 intake number: 212 442-7100 Director: Aisha Shannon Aisha.Shannon@acs.nyc.gov	119 Male/Female (SD/SSD)	119 Male/Female (SD/SSD)
NYC	Horizon 560 Brook Ave Bronx, NY 10038	24/7 intake number: 718-292-0065 Director: Aiyanna Allman-Wooten	121 Male/Female (SD/SSD)	121 Male/Female (SD/SSD)

		Aiyana.allman-wooten@acs.nyc.gov		
Onondaga	Hillbrook Juvenile Detention 4949 Velasko Rd. Syracuse, NY 13215	24/7 intake number: 315-435-1421 Director: Omar Osbourne OmarOsbourne@ongov.net	51 Male/Female (SD/SSD)	51 Male/Female (SD/SSD)
Westchester	Woodfield Juvenile Detention 20 Hammond House Rd Valhalla, NY 10595	24/7 intake number 914-231-1103 Director: Dean DeKranis ddekranis@childrensvillage.org	24 Male/Female (SD/SSD)	24 Male/Female (SD/SSD)