

## THE ABC'S OF DEFENDING J.O.'S, A.O.'S, Y.O.'S AND J. D.'S.

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September 18th, 2020

Defending young people charged with crimes committed between the ages of seven (the earliest age of responsibility for Family Court purposes) and 19 (when Youthful Offender [Y.O] status is no longer an option in criminal court), can arguably be as challenging as chaperoning a kindergarten sleepover or trying to maintain social distancing at a back-to-school, campus-wide keg party during a pandemic.

There are so many offender designations and procedural machinations based on the age of the offender (at the time of the alleged crime), and the level of offense committed (misdemeanor, non-violent felony, violent felony, designated felony offense), that counsel must be sufficiently conversant with the many different sections of the Criminal Procedure Law (including but not necessarily limited to (CPL:1.02[42], 180.75, 190.71, 210.43, 220.10[g], 310.85, 330.25, 720.10, Art.722, 725 Penal Law (PL:10.-00[18], 30.00, 60.02, 70.05 Family Court Act (FCA Art. 3: Sections: 301-315; 301-312; 315; 320-325; 330-332; 335-340; 344; 350-355 et seq.), to know whether, when and how a case should originate in Family Court or must/may be transferred there from Criminal Court, or remain in Criminal Court where the defendant may still, if he/she qualifies as an "eligible youth"(CPL 720.10[2]), be able to avoid the stigma and attendant disabilities of an adult criminal conviction.

Although juvenile courts date back to the 1920's, New York was one of the last states to raise the age for adult criminal responsibility from 16 to 18 years of age under the appropriately named "Raise the Age" statute (CPL Art 722) which also created a "Youth Part" of Superior Court (CPL 722.10) to preside over felony cases involving 16 year-old offenders (effective 10/1/18) and 17-year-olds (effective 10/1/19) who are charged with felonies.

These cases are, depending on the circumstances, often transferred to Family Court for a JUVENILE DELINQUENCY (JD) adjudication under Article 3 of the Family Court Act (FCA), and even if they remain in the Youth Part, they are overseen by a Family Court judge (or "accessible magistrate") who is specially trained in matters of juvenile justice, adolescent development, custody and care of youths and effective treatment methods for reducing unlawful conduct by them. (CPL 722.10[2]).

The emphasis on treatment and reducing criminal conduct reflects an approach that is more rehabilitative and restorative than the adult model which tends to be more punitive in nature. It is driven, at least in part, by scientific research which suggests that the adolescent brain is an undeveloped work-in-progress that manifests itself in vulnerability to peer pressure, a tendency toward impulsive, risky behaviors and a lack of appreciation for the long-term consequences of behavior.

Responding to adolescent criminal conduct with incarceration (especially with adult offenders), is considered to be not only punitive but entirely unproductive in terms of discouraging recidivism and developing better, socially conscious and productive behaviors. This is especially so when the youngster already comes from a dysfunctional family (or whatever facsimile thereof he/she has), is doing poorly in school (if attending at all), and has few positive role models or peers who can guide him/her in the right direction. Research further suggests that punitive sanctions can stifle the development of the inchoate brain and cause significant cognitive psychological and emotional damage. (See "Raise the Age" article by Laura Pearl Spivack MS/MSW in Psychology Today 2015).

Even in Superior Courts, then, the emphasis appears to be on minimizing the prospect of incarceration and providing opportunities at every turn for client-specific services including mental health and/or drug/alcohol counseling and supervision based on an individualized risk assessment. (See CPL 722.00: Probation Case Plans). The ultimate goal, it seems, is to enable the offender to find his/her way back to society unburdened by the millstone of a criminal conviction and supervised in a way that encourages maximum compliance and takes into account the importance of protecting the community from further criminal conduct.

## CPL ARTICLE 722: THE ADOLESCENT OFFENDER (AO)

An adolescent offender (AO) is a youth age 16 or 17 who is charged with a felony, whether non-violent (NVF) (PL 70.00) or a violent felony (VF) (PL 70.02) whose case, at least initially, is handled in the Youth Part of Superior Court (CPL 722.10), which has exclusive jurisdiction over AO'S (as well as juvenile offenders (JO'S) [PL 10.00[8]], unless and until the case has been transferred to Family Court pursuant to CPL Art. 725).

### CPL 722.21: PROCEEDINGS ON FELONY COMPLAINT:

1. When the defendant is arraigned in Youth Part by a Family Court Judge (or by the most accessible magistrate in his/her absence), he/she will, if detained, be brought before the next session of the Youth Part. If not detained, he/she will be ordered to appear at the next session.
2. If the defendant WAIVES A FELONY HEARING (FH), the defendant will be held for action of the grand jury.
3. If a FH is held, the court must either : a. hold the case for action of the grand jury (upon reasonable cause [RC] to support the defendant's commission of a felony); b. direct that the action be TRANSFERRED PER CPL 725 TO FAMILY COURT (upon RC to believe that D did not commit a felony but is a JUVENILE DELINQUENT [JD], per FCA 301.2) WHEREUPON FCA 308.1 [PRELIMINARY PROCEDURES] applies (excluding subsection 13); or if there is NO RC to believe D committed any criminal act, then dismiss the action and release D if in custody or, if on bail, exonerate it.

4. NOTWITHSTANDING THE ABOVE, where D is charged with a FELONY (EXCLUDING a Class A felony outside PL 220.00 [drugs offenses]), a VF or a JO FELONY (CPL 1.20(42))[EXCEPT WHERE : i. D causes significant physical injury or ii displayed a firearm in furtherance of an offense or iii unlawfully engaged in sexual conduct per PL ART 130) (CPL 722.23[2][c]),

THE COURT SHALL (UPON NOTICE FROM THE DA THAT HE/SHE WILL NOT MOVE TO PREVENT REMOVAL PER CPL 722.23), ORDER TRANSFER OF THE ACTION TO FAMILY COURT PER CPL 725.

5. Per CPL 722.21(5), if the DA SO REQUESTS, the court SHALL order transfer of the case to Family Court for an AO charged with: a CLASS A FELONY, (not PL 220), or a VF if the court finds that it is in the INTERESTS OF JUSTICE to do so considering: a. the seriousness and circumstances of the offense, b. the extent of harm caused by the offense, c. the evidence of guilt, (whether or not admissible), d. the defendant's history, character and condition, e. the purpose of imposing an authorized sentence, f. the impact of removal on public safety, g. the impact of removal on public confidence in the justice system, h. the victim/complainant's attitude, i. any other relevant factors.

Where, however, the felony complaint charges the AO with Murder 2d degree, Rape 1st degree, Criminal Sex Act 1st degree, or an armed felony (CPL 1.20[41]), a determination to remove the case to Family Court must also be based on a finding of : i. MITIGATING CIRCUMSTANCES bearing directly on the commission of the crime; and/or ii. where D was not the sole participant, his role was RELATIVELY MINOR, and/or iii. there are PROOF PROBLEMS in the case.

CPL 722.23(1)(a): After arraignment of an AO for a crime OTHER THAN a Class A felony (excluding PL 220), a VF or JO-designated crime (CPL 1.20[42]), or a VTL offense, the court SHALL order removal per CPL 725 UNLESS the DA moves, within 30 days of arraignment, TO PREVENT REMOVAL.

CPL 722.23(1)(b): A motion by the DA to prevent removal must be in writing and on prompt notice to D, It must be based on personal knowledge and sworn allegations of fact. The DA may also request a hearing.

Per CPL 722.23 (c), the defendant must be given an opportunity to reply and to request a reasonable delay. He/she may also request an expeditious hearing.

The court MUST DENY the motion to prevent removal unless the DA establishes extraordinary circumstances. (CPL 722.23[d]).

The court, per CPL 722.23(e), must decide the motion with fact-findings and legal conclusions in writing within five days of the conclusion of the hearing or of receipt of D'S post-hearing submission.

CPL 722.23 (g): If the action is transferred, FCA 308.1 shall apply.

CPL 722.23(h): WHERE ALL PARTIES AGREE, the court may order removal to Family Court. In such case, the defendant proceeds as a JD under the FCA, and while he/she may, depending on circumstances, face the prospect of restrictive confinement in a juvenile detention facility, non-secure detention, supervised release, placement by Child and Family Services/DSS or return to home or foster care via an ACD, CD or probationary order, there is no prospect of an adult criminal conviction or incarceration in an adult correctional facility. Once transferred, the case cannot return to Adult Court.

CPL 722.23 (2)(a): Where an AO is arraigned upon a Class A felony (excluding PL 220), or upon a VF, the court SHALL schedule an appearance (on notice to the parties) WITHIN SIX DAYS to review the accusatory paperwork.

b. Upon such appearance, the court shall consider all relevant facts and direct that the case be transferred to Family Court unless the court determines in writing that the DA has shown by a PREPONDERANCE OF THE EVIDENCE either that: i. D caused significant physical injury or ii. D displayed a firearm in furtherance of such offense, or iii. D unlawfully engaged in sexual intercourse/ conduct/contact per PL 130. (CPL 722.23[2][c]).

d. Where the court declines to transfer the case to Family Court, it shall do so in writing or on the record with findings of fact and conclusions of law.

e. Where all parties AGREE to have the case transferred to Family Court, the court may so order.

3. If at any time one or more charges are REDUCED, such that the remaining counts are removable per subdivisions one and two, the court may, on its own motion or on motion of the defendant, direct that the matter be transferred to Family Court provided that the DA will have 30 days to move to prevent such removal for extraordinary circumstances.

4. D may waive review of the accusatory instrument but must do so knowingly, voluntarily and intelligently.

It should be noted that 16 and 17- year-old defendants charged only with PL MISDEMEANORS will be adjudicated directly in FAMILY COURT as a JD. If they are charged only with MISDEMEANORS UNDER THE VEHICLE AND TRAFFIC LAW (VTL), their cases will be adjudicated in the appropriate LOCAL CRIMINAL COURT. If such person is charged with PL FELONIES or VTL FELONIES AND MISDEMEANORS, they will all begin in the Youth Part and the felonies may be transferred to Family Court. If so, the accompanying misdemeanors will either remain in the Youth Part or be transferred to the appropriate local criminal court.

If a case is not transferred to Family Court, the AO may proceed with the usual motions (e.g. to dismiss, to suppress evidence) and either work out a plea disposition or proceed to trial. If the defendant is convicted of an offense, he/she is subject to "any sentence authorized to be imposed on a person who committed such offense at age 18 or older," but the court MUST consider the defendant's age when exercising discretion at sentencing. (PL 60.10).

Therefore, if a defendant is convicted of a non-violent felony (NVF), he/she is subject to the range of sentencing available to an adult felony offender (PL 70.00) including (depending on the level offense), probation (PL 65.00), a split sentence up to six months in jail and probation, a definite sentence up to one year in a local correctional facility or an indeterminate sentence of imprisonment in a state correctional facility. If the defendant is convicted of a violent felony (VF), he/she will be subject to a determinate sentence of imprisonment followed by post release supervision. (PL 70.02, 70.45).

## YOUTHFUL OFFENDER OPTION: CPL ART. 720

Counsel for the AO should make every effort to secure a Youthful Offender (YO) adjudication which not only reduces the defendant's sentence exposure, but most importantly, spares him/her an adult criminal record.

CPL 720.10 defines a "youth" as a person charged with a crime allegedly committed when he/she was at least 16 years old and less than 19 years old, or a person charged as a JO per CPL 1.20(42), i.e. a person 13 years old who is CRIMINALLY RESPONSIBLE for acts constituting Murder 2d degree (intentional, depraved indifference, or as a sexually motivated felony [SMF] per PL 130.91), and a person 14 and 15 years old charged with: Murder 2d degree (intentional, depraved indifference and felony murder where the underlying felony is one for which the person is criminally responsible; Kidnapping 1st degree, Arson 1st degree, Assault 1st degree, Manslaughter 1st degree, Rape 1st degree, Criminal Sex Act (CSA) 1st degree, Aggravated Sex Abuse (ASA) 1st degree, Burglary 1st degree, 2d degree, Arson 2d degree, Robbery 1st degree, 2d degree (PL 160.10[2], Criminal Possession of a Weapon 2d degree (on school grounds ) Attempted Murder 2d degree or Kidnapping 1st degree (or as a SMF).

2. An "eligible youth" (EY) means every youth who is found to be YO eligible EXCEPT where a. the conviction to be replaced is for a i. CLASS A-1 or A-2 FELONY, ii. an ARMED FELONY per CPL 1.20(41) Rape 1st degree, CSA 1st degree, Aggravated Sexual Abuse (except as provided in sub.3 below); or

b. such youth has PREVIOUSLY BEEN CONVICTED AND SENTENCED FOR A FELONY, or

c. he/she has PREVIOUSLY BEEN ADJUDICATED A YO following a felony conviction (or has been adjudicated a JD who committed a DESIGNATED FELONY ACT per the FCA on or after 9/1/78).

3. A youth convicted of an ARMED FELONY, RAPE 1ST, CSA 1ST, ASA 1ST still qualifies as an EY if the court finds:  
i. MITIGATING CIRCUMSTANCES that bear directly on the manner of commission of the crime, and/or ii. where D was not the sole participant, his/her involvement was comparatively minor. (Where the court determines that such EY is a YO, the court must state its reasons for such finding on the record and forward a transcript thereof to DCJS).

4. A YO FINDING is one which constitutes a SUBSTITUTE for a criminal conviction of an EY pursuant to a determination that he/she is a YO.

5. A YO SENTENCE is one imposed upon a YO finding.

6. A YO ADJUDICATION consists of a YO finding and YO sentence imposed thereon and is COMPLETED BY THE ENTRY OF SUCH SENTENCE.

Pursuant to CPL 720.20(1), upon the conviction (whether by plea or verdict) of an EY, the court must order a PSI and must decide whether to adjudicate D a YO AT SENTENCING based on:

- a. the court's opinion that the INTEREST OF JUSTICE WOULD BE SERVED by relieving the EY from the onus of a criminal record and by NOT IMPOSING a determinate or indeterminate sentence in excess of four years (maximum end of an indeterminate term of imprisonment for a YO substituted for a felony conviction. SEE PL 60.02 below).

3. Upon determining that D is a YO, the court must direct that the CONVICTION BE DEEMED VACATED AND REPLACED BY A YO FINDING (whereupon D must be sentenced per PL 60.02)

4. If the court declines to grant YO, the court must order the accusatory instrument unsealed and proceed to judgment.

#### PL 60.02 YO SENTENCING:

2. The sentence upon a YO adjudication substituted for ANY FELONY shall be the equivalent of a sentence for a Class E felony which includes probation up to five years, a split sentence of up to six months and jail followed by probation, a definite sentence of up to one year in jail or an indeterminate term of imprisonment in a state correctional facility ranging from one to three years up to one and a third to four years in prison. (PL 70.00[2][3]).

If the YO is substituted for a misdemeanor (D is 18 because 16 and 17 year olds charged/convicted of misdemeanors go to Family Court for JD treatment), D is subject to possible sentences of a conditional discharge, probation up to one year (B misdemeanor), three years (A misdemeanor), up to 60 days in jail for a B misdemeanor and six months in jail for a an A misdemeanor or a 60 day/probation split. YO is mandatory for a misdemeanor where D has no prior convictions or YO adjudications. (CPL 720.20[1][b]).

YO defendants are subject to the same mandatory surcharges per PL 60.35 as an adult offender. However, they are not required to pay a Sex Offender Registration fee, DNA Data Bank fee or Supplemental Sex Offender Victim Fee.

#### JUVENILE OFFENDERS:

PL 10.00(18) defines a JO in the same way as CPL 1.20(42) above based on the offender's age (13 and 14-15 years old) and the nature of the offense charged (enumerated above under CPL 720.10).

#### PROCEEDINGS ON FELONY COMPLAINT:

Pursuant CPL 722.20 1-3 the JO is arraigned in Youth Part (where he may or may not be detained), and then afforded a hearing (which he/she can waive), to determine if there is reasonable cause to believe that he/she committed a JO crime. If so, he/she will be held for action of the Grand Jury.

If there is reasonable cause (RC) to believe that he/she is NOT a JO but is a JD (per FCA 301.2, a person over seven years old and less than 18 [as of 10/1/19], who, having committed an act constituting a crime or violation if committed by an adult, is NOT CRIMINALLY RESPONSIBLE (CR) by reason of INFANCY,\*or is a defendant in an action removed to Family Court per CPL 725), the court must specify the acts it found RC to believe D committed and order the action REMOVED TO FAMILY COURT. (CPL 722.20[3][b]).

If there is no RC to believe D committed any criminal act, the court must DISMISS the felony complaint and either discharge the defendant from custody or exonerate bail. (CPL 722.20[3][c]).

#### INFANCY\*: PL 30.00:

1. Except as per subdivisions 2-3, a person younger than 18 years old (as of 10/1/19), is NOT CRIMINALLY RESPONSIBLE" (as an adult) for conduct.
2. A person age 13-15 (JO) is criminally responsible for the crimes enumerated in CPL 1.20(42) above.
3. A person age 16-17 (as of 10/1/19) (AO), is CR for a. a FELONY (PL10.00[5]); b. a TRAFFIC INFRACTION (PL10.00[2]); c. a VIOLATION (PL 10.00[3]; d. a MISDEMEANOR (PL 10.00[4] BUT ONLY WHEN SUCH MISDEMEANOR is: i. accompanied by a FELONY committed during the same criminal transaction, ii. results from a REDUCTION/DISMISSAL IN SATISFACTION OF A FELONY CHARGE PURSUANT TO A GUILTY PLEA PER CPL 220.10 or iii. a VTL MISDEMEANOR.
4. Lack of CR by reason of INFANCY is a DEFENSE to a prosecution for an offense.

CPL 722.22 MOTION TO REMOVE JO TO FAMILY COURT:

1. Upon motion of a JO per CPL 722.20(5) [no action yet taken on a felony complaint], or after arraignment on an indictment, the court may, on its own motion or on motion by any party, (except as provided by paragraph b below) order REMOVAL of the action to FAMILY COURT per CPL 725 if, after considering the INTERESTS OF JUSTICE (IOJ) factors set forth above (enumerated here in CPL 722.22[2a-i]), the court determines that the IOJ would be served by doing so.
  2. The court may, if the DA consents, order removal of a JO indicted for Murder 2d degree, Rape 1st degree, CSA 1st degree, an ARMED FELONY if the court finds: i. MITIGATING FACTORS bearing on the commission of the offense, and/or ii. that D was only a minor participant (and not the only one).
  3. Motion procedures are governed by CPL 210.45.
  4. Any evidence not legally privileged may be considered by the court in making a decision to remove the case. If D testifies at a hearing on the matter, his testimony may not be introduced against him in any future proceeding except to IMPEACH his testimony at such future proceeding if he testifies.
5. a. An order of removal must be based on findings/detailed reasons and conclusions stated by the court on the record.
- b. The DA must also provide detailed reasons for his/her consent to removal to Family Court on the record.

AUTHORIZED SENTENCES FOR JUVENILE OFFENDERS:

PL 70.05:

1. A sentence of IMPRISONMENT for a JO FELONY CONVICTION SHALL BE AN INDETERMINATE TERM OF IMPRISONMENT. (A JO, AO, [whether or not granted YO status], who is given a determinate, indeterminate or definite sentence, and who is UNDER 21 at sentencing SHALL BE COMMITTED TO TO THE CUSTODY OF THE COMMISSIONER OF THE OFFICE OF CHILDREN/FAMILY SERVICES [CFS], who shall arrange for confinement in facilities of such office.
  2. However, if an AO who committed a crime on or after his/her 16th birthday receives a definite sentence up to one year, the judge may order that he/she serve such sentence in a specialized, secure juvenile detention facility.
- 2-3. The maximum indeterminate terms for each level offense (not YO'D), are specified in subdivision 2 and the minimum periods for felonies other than Murder 2d degree (2[a]), and for Arson 1st degree or Kidnapping 1st degree (2[b]), are one-third the maximum as follows:
- 2(a): Class A (Murder 2d degree): MIN: 5 to 9 years to MAX: Life; (e.g. Best: 5 to life; Worst: 9 to life);
- 2(b): Class A (Arson 1st degree, kidnapping 1st degree): MIN: 4 to 6 years to MAX: 12 to 15years, (e.g. Best: 4 to 12; Worst: 6 to 15);
- 2 ( c): Class B : MIN: 1/3 of MAX: not in excess of 10 years. (e.g. Worst: 3and1/3 to 10).
- 2(d): Class C: MIN: 1/3 of MAX: not in excess of 7 years. (e.g. Worst: 2and1/3 to 7).
- 2(e.) Class D: MIN: 1/3 of MAX: not in excess of 4 years. (e.g. Worst: 1and1/3 to 4).

## JUVENILE DELINQUENTS: FAMILY COURT ARTICLE 3:

Once a case is transferred from the Youth Part to Family Court, the latter court obtains exclusive jurisdiction over the JD proceedings from the filing of the order of transfer to the initial appearance through final disposition. (See generally FCA 302.2). Much more so than the Criminal Courts, the Family Courts overriding objectives are to address the needs of the JD (i.e. Respondent) with respect to his/her family/residential, education, counseling (e.g. drugs, alcohol, mental health), providing structure and guidance (and accountability), also taking into the account the importance of protecting the community from further criminal behavior.

The procedures provide, for the most part, the same due process protections afforded to defendants in criminal proceedings insofar as providing for prompt hearings on upon legally sufficient accusatory instruments (FCA 311.2), fact findings based upon competent admissible evidence (FCA 325.2), Discovery (FCA 330.1-335.2), motions to suppress evidence including statements, identification testimony and physical evidence (FCA 332.1), RULES OF EVIDENCE (similar to CPL Article 60 (FCA 240.1-347.1) with respect to: testimony by children, corroboration of accomplice testimony and of statements of the respondent, admissibility of identification testimony (with and without an in-court identification), impeachment by proof of conviction, impeaching one's own witness, the use of psychiatric testimony, rules regarding admissibility of the victim's prior sexual history.

There are also provisions for competency proceedings (FCA 322.1-322.2) and for the assertion of defenses/affirmative defenses including Alibi (FCA 335.1) and Not Responsible by Reason of Mental Disease or Defect (FCA 335.2). Like a criminal trial, fact-finding hearings require proof beyond a reasonable doubt (FCA 342.[2]) and dispositions seek, whenever possible, to impose the least amount of restriction on the respondent's liberty (except, perhaps, where he/she has been found to have committed a designated felony offense).

### A FEW DEFINITIONS: FCA 301.2

1. **JUVENILE DELINQUENT:** a person over age seven and less than 18 years old (as of 10/1/19) who having committed an act that would constitute a crime if committed by an adult is a. NOT CRIMINALLY RESPONSIBLE by reason of infancy or b. is the defendant in an action ordered removed from a criminal court to Family Court per CPL 725.
2. **RESPONDENT ( R );** the person against whom a JD petition is filed.
3. **DETENTION:** the temporary care and maintenance of a child AWAY FROM HIS/HER OWN HOME. Detention of a JD shall be authorized ONLY IN A FACILITY CERTIFIED BY THE DIVISION FOR YOUTH as a detention facility under EL 503.
4. **SECURE DETENTION FACILITY:** one characterized by PHYSICALLY RESTRICTIVE CONSTRUCTION/HARDWARE/PROCEDURES.
5. **NON-SECURE DETENTION FACILITY:** one characterized by the ABSENCE OF PHYSICALLY RESTRICTING CONSTRUCTION/HARDWARE/PROCEDURES.
6. **FACT-FINDING HEARING:** to determine whether R committed the acts alleged in the petition.
7. **DISPOSITIONAL HEARING:** to determine whether R needs SUPERVISION, TREATMENT OR CONFINEMENT. The standard of proof at this stage is PREPONDERANCE OF THE EVIDENCE (POE). (FCA 350.3[2]).
8. **DESIGNATED FELONY ACT:** an act which, if done by an adult, would be a crime including: MURDER 1ST DEGREE, 2D DEGREE, KIDNAPPING 1ST DEGREE, ARSON 1ST DEGREE, (committed by a 13-17 year old [as of 10/1/19], or such conduct was a SMF; ASSAULT 1ST DEGREE, MANSLAUGHTER 1ST DEGREE, RAPE 1ST DEGREE, CSA 1ST DEGREE, ASA 1ST DEGREE, KIDNAPPING 2D DEGREE [with threat of deadly physical force], ARSON 2D DEGREE, ROBBERY 1ST DEGREE (committed by a person 13-17 years old [as of 10/1/19],) or as a SMF, or an ATTEMPT TO COMMIT MURDER 1ST OR 2D DEGREE OR KIDNAPPING 1ST DEGREE] (by a person 13-17 years old as of 10/1/19), or committed as a SMF, or BURGLARY 1ST DEGREE, 2D DEGREE, ROBBERY 2D DEGREE [causing physical injury to a non-participant or displaying a firearm], CRIMINAL POSSESSION OF A WEAPON 2D DEGREE [ on school grounds] committed by 14-15 year old, or as SMF, ASSAULT 2D DEGREE OR ROBBERY 2D DEGREE (committed by 14-17 year old as of 10/1/19) with proof of prior such assault, ROBBERY 2D DEGREE OR ANY DFA (regardless of his/her age at the time of the prior), other than a MISDEMEANOR committed by a person between 7 and 18 years old (as of 10/1/19) but only where such person has been found by the court to have committed a prior felony.

A BRIEF SUMMARY OF THE STEPS IN THE PROCEEDING:

FCA 320.1(1): If R is detained, the INITIAL APPEARANCE must be held within 72 hours of the filing of the petition (or if transferred via CPL 725, on the date set in the order of transfer).

2. Attorney is appointed (if not already in the picture per Youth Part proceedings).

FCA 320.3: R and parents are entitled to NOTICE OF RIGHTS (e.g. to SILENCE and LEGAL REPRESENTATION).

FCA 320.4 (1). The court must ADVISE R of the charges and provide copy of same.

2(a): The Court must determine if DETENTION is necessary (FCA 320.5) or

b. REFER the case to PROBATION SERVICE (FCA 320.6).

c. If R is detained, the court must advise R of PROBABLE CAUSE hearing date (if not already held in Youth Part).

d. The court shall also determine FACT FINDING HEARING date.

FCA 320.5 RELEASE OR DETENTION:

2. The court may detain or RELEASE R on CONDITIONS, (Written Copy to R), and may modify them at any time prior to expiration of R's release.

3. DETENTION SHOULD NOT BE DIRECTED UNLESS AVAILABLE ALTERNATIVES (INCLUDING CONDITIONAL RELEASE [CR]) have been ruled out because: i. there is a SUBSTANTIAL PROBABILITY the R will not return to court; or ii. there is a SERIOUS RISK that R will commit a crime in the meantime.

b. A finding in favor of detention must include a statement of facts, the level of assessed risk pursuant to a CFS-approved RISK ASSESSMENT INSTRUMENT (RAI) and the reasons for such determination.

c. The court may consider ELECTRONIC MONITORING as an alternative.

d. If R may be a SEXUALLY EXPLOITED CHILD, the court may direct him/her to a safe house.

5. The court must also state (when ordering detention), that return to the home would NOT be in R's best interests.

FCA 320.6 REFERRAL TO PROBATION SERVICE:

1. If R is accused of a DFA, or a crime set forth in FCA 308.1(4), the PROBATION SERVICE (PS) must recommend whether R's case can be ADJUSTED per FCA 308.1.

2. If V and R consent to such referral, the court may refer the case to PS for adjustment but if R is accused of a DFA, the Presenting Agency (PA) (FCA 301.2[12]) must also consent,

3. If PS adjusts the case, the petition will be DISMISSED. (Counsel should push for such "adjustment" at the initial appearance, if not sooner).



#### FCA 321.1 ENTRY OF ADMISSION OR DENIAL

1. R must do one or the other at the initial appearance.
2. If R remains silent, the court must enter a DENIAL.

#### FCA 321.3 ACCEPTANCE OF ADMISSION:

1. Before accepting any admission, the court MUST advise R of his/her right to a FACT FINDING HEARING (FFH) and confirm via allocation of R and his parents that: a. he/she committed the act(s) alleged; b. his/her FFH waiver is VOLUNTARY; c. R is aware of the POSSIBLE DISPOSITIONAL ORDERS including: a CONDITIONAL DISCHARGE up to one year (FCA 352.2[1][a]), PROBATION up to two years and up to one more year if there are exceptional circumstances, (FCA 353.2), continuing the proceeding and PLACING R per FCA 353.3 (in his/her own home or with an authorized agency, or, per FCA 353.4, ( with the Office of Mental Health/Developmental Disabilities (if warranted), or PLACING R per FCA 353, or putting R in RESTRICTIVE PLACEMENT per FCA 353.5 (for DFA other than CLASS A FELONY) with CFS (for 3 years) for confinement in a SECURE FACILITY for 6 to 12 months and then to a RESIDENTIAL FACILITY for 6-12 months. (FCA 353.5[5][a][i-iii]).

FCA 352.2(2)(a): In determining the appropriate order of disposition, the court MUST CONSIDER the BEST INTERESTS OF R and well as the need for COMMUNITY PROTECTION.

FCA 321.3 (c): The court MUST STATE ITS REASONS FOR ACCEPTING R'S ADMISSION.

FCA 321.3 (3): The court must then ENTER AN APPROPRIATE ORDER (FCA 345.1) and SCHEDULE A DISPOSITIONAL HEARING (DH).

#### FCA 321.4(2): WITHDRAWAL OF ADMISSION (OR DENIAL):

2. At ANY TIME BEFORE entry of a FINDING (FCA 352.1), the court may allow to withdraw his/her previous admission (in which case, the petition is restored as it existed at the time of the admission).

#### FCA 322.1-.2 PROCEEDINGS REGARDING CAPACITY (COMPETENCY):

See text. (These proceedings are similar to those set forth in CPL Art. 730). However, if the court finds that R is incapacitated, it shall schedule a further hearing (per FCA 325.2) to determine whether there is probable cause (PC) to believe D committed a crime. (FCA 322.2[3]). If the court finds for a misdemeanor, then R is committed to the custody of the appropriate commissioner (e.g. OMH/DD) for up to 90 days and the petition is DISMISSED (FCA 322.2[4]).

If the court finds PC for a FELONY, R shall be committed to OMH/DD for up to one year which may be extended annually upon application with notice. (FCA 322.22[5]).

FCA 322.2(5)(b): If R is still in the commissioner's custody by age 18, or if D committed the unlawful act at age 16 and is still in the commissioner's custody past age 21, the commissioner shall so notify the court clerk and the petition will be DISMISSED. (R may still be confined for voluntary or involuntary care pursuant to the MHL (FCA 322.2 [6]).

FCA 322.25)( c): if the court finds PC for a DFA, R must receive treatment in a RESIDENTIAL FACILITY under the authority of the OMH. The commissioner or R may later petition for transfer to a NON-RESIDENTIAL FACILITY (FCA 322.2[7]).

FCA 322.2(8): If the commissioner believes that R is NO LONGER INCAPACITATED, he/she may petition the court for a hearing on notice to R and the PA with opportunity to be heard. If the court finds that R is NO LONGER INCAPACITATED, R shall be returned to court for further proceedings.

PROBABLE CAUSE HEARING (PCH): FCA 325.1.2.3

FCA 325.1:

- 1a. If R denies the petition at the initial appearance (IA) and is detained for more than 3 days before there is a FFH, the court shall schedule a PCH.
2. The PCH shall be held within three days after the IA or within 4 days of the filing of the petition (whichever is sooner).
3. The court may adjourn the PCH up to 3 more days for good cause.
4. R may waive the PCH (but non-readiness is not a waiver).
5. Where the petition is in Family Court vis transfer order per CPL 725.05, (and R had a PC hearing per CPL722.20 in the Youth Part), the petition will be DEEMED to be BASED ON PC to believe that R is a JD. Otherwise R gets a PC hearing.

FCA 325.2: ORDER OF PROCEDURE:

- 1(a) PA MUST call witnesses and offer evidence.
  - b. R may testify but his/her testimony CANNOT be used against him/her in any future proceedings EXCEPT to impeach him/her if he/she testifies at such future proceeding;
  - c. R may be allowed to call witnesses.
2. All witnesses (unless the court otherwise permits), must give sworn testimony. All witness (including R), may be CROSS EXAMINED.
3. ONLY NON-HEARSAY EVIDENCE SHALL BE ADMITTED TO ESTABLISH PC (aka REASONABLE CAUSE) but certified, sworn reports of experts and technicians and statements of (e.g. ownership, non-permission, value) as would be admissible at a FELONY HEARING (FH) (or in a Grand Jury) may be admitted (unless the court requires the witness to testify upon a showing by R that the documentary evidence offered is NOT sufficiently reliable).

FCA 325.3 PC HEARING DETERMINATION:

- 1a-b. By the same standards as a FH, the court shall determine if there is RC to believe R committed a crime.
2. The court must cite the pertinent PL (or other) sections for which RC was found.
3. The court will then (if R is still detained), determine whether continued detention is necessary per FCA 320.5
4. If the court finds no RC, then R shall be released and the proceedings will be adjourned. If the PA cannot hold a hearing per FCA 325.1 the court may dismiss the petition without prejudice.

#### FCA 346.1 FACT FINDING HEARING/REMOVAL:

1. Where the case is in Family Court by virtue of an order of removal per CPL 220.10 (Guilty Plea), 310.85 (Guilty Verdict where D not responsible because of INFANCY), or 330.25 (Post Verdict Removal for AO/JO with DA consent), the requirements of a FFH will be deemed satisfied upon the filing of the transfer order in Family Court, and no further FFH is required (unless any specification required by CPL 725.05 is unclear).

#### FCA 340.1: FACT FINDING HEARING:

1. If R is IN DETENTION on a CLASS A, B or C FELONY, the FFH shall commence within 14 days of the IA except as per subdivision 4. If the highest offense is a CLASS C FELONY (and R is detained), the hearing shall begin within 3 days of the IA.
2. If R is NOT IN DETENTION, the FFH shall begin within 60 DAYS of the IA (except as per subdivision 4).
3. If the case is in Family Court via CPL 725.05 transfer order, the IA is the date specified in such order.
4. The court MAY ADJOURN the FFH: a. on its own motion or of the PA for good cause for up to 3 days where R is IN DETENTION, and up to 30 days where R is NOT DETAINED. BUT if there is PC to believe R committed a HOMICIDE or a crime which incapacitated a person from coming to court, the court may adjourn for a REASONABLE LENGTH OF TIME.
5. Reasons for adjournments must be stated on the record.
6. Successive adjournments require a showing of SPECIAL CIRCUMSTANCES.
7. If R fails to appear for the FFH and a warrant issues per FCA 312.2, the period from the warrant until his/her arrest/voluntary return is EXCLUDED from the calculation of time for holding the FFH. (Due Diligence must be used to find and produce R).

#### FCA 340.2 PRESIDING JUDGE:

1. The same judge at IA should preside through FFH unless a mistrial is declared.
2. The FFH judge (or who accepts R's admission) should preside over the DH.
3. The case may be re-assigned if a. the original judge cannot preside due to illness/disability/vacation/retirement, or b. is shown to be biased or c. it is not practicable for him/her to preside.

#### FCA 341.2 EXCLUSION OF PUBLIC

1. The general public may be excluded from any proceeding, and only R, counsel, the PA and representatives of authorized agencies with a direct interest in the case shall be admitted.

#### FCA 341.2: PRESENCE OF RESPONDENT AND PARENTS:

1. R and parents SHALL BE PRESENT at any hearing and at the AI. (Per sub.3, the court may proceed without the parents if reasonable and substantial efforts were made to notify them and R and counsel are present).
2. R may be removed from proceeding for disruptive conduct that persists despite court warning.

FCA 342.FACT FINDING HEARING: ORDER OF PROCEEDING:

1. The parties may give an opening with PA going first.
2. PA must offer evidence in support of petition.
3. R may offer evidence.
4. PA may offer rebuttal evidence and then R may offer sur-rebuttal within court's discretion. (Court may, in interest of justice permit evidence that should have been presented in a party's original case),
- 5-6. R then then PA may give a summation,
7. The court shall then consider the case and make a FINDING.

FCA 342.2: QUANTUM OF PROOF:

1. ONLY COMPETENT, MATERIAL AND RELEVANT EVIDENCE MAY BE ADMITTED at the FFH.
2. Any finding that R committed a crime (if committed by an adult) must be based on PROOF BEYOND A REASONABLE DOUBT. (PBRD).
3. An ORDER OF REMOVAL per CPL 220.10, 310.85, 330.25 constitutes PBRD and a determination that D committed the acts specified in the transfer order.

FCA 345.1 ORDERS:

1. If the allegations in the petition are established the court shall enter an appropriate order and schedule a DISPOSITIONAL HEARING (DH). IF R is found to have committed a DFA, the order must so state.
2. If allegations are not established, the court shall dismiss the petition (or specific counts not sustained).

FCA 350.1 DISPOSITIONAL HEARING (DH):

1. If R is DETAINED and NOT found to have committed a DFA, the DH shall commence within 10 DAYS of the FCA 345.1 order (except as per sub.3).
2. In all other cases, the hearing shall commence within 50 DAYS of such order (except as per sub. 3).
3. The court may ADJOURN the DH: a. on its own motion or of PA for up to days for good cause; b on R's motion for up to 30 days for good cause.
4. The court must state reasons for granting an adjournment on the record.
5. Successive adjournments will not be granted without a showing of SPECIAL CIRCUMSTANCES (not including court congestion).

#### FCA 350.2: ORDER OF REMOVAL

1. Where the proceeding is commenced by transfer order per CPL 220.10, 310.85 or 330.25, the date of entry of the FCA 345.1 order (directing a DH), is deemed to be the date when the transfer order was filed in Family Court.
2. The clerk shall schedule an appearance within 7 days from the date the transfer order was filed at which time a DH shall be scheduled.

#### FCA 350.3 DISPOSITIONAL HEARING: QUANTUM OF PROOF:

1. Only RELEVANT and MATERIAL EVIDENCE may be admitted,
2. An ADJUDICATION at conclusion of the DH must be based on a PREPONDERANCE OF THE EVIDENCE (POE).
3. The PS SHALL APPEAR at the DH.
4. V shall have the right to make a statement regarding disposition upon 10 days notice to the court. The court, in turn, shall provide 7 days notice to R of V's intent to make such statement. V SHALL NOT be made aware of the final disposition.

#### FCA 350.4 ORDER OF PROCEDURE OF DISPOSITIONAL HEARING:

1. The court, with the parties' consent, may direct the PS to summarize the Investigation Report (IR), if one has been prepared, and provide any further statement concerning the advisability of SPECIFIC DISPOSITIONAL ALTERNATIVES (SDA).
2. The court may call witnesses, including the preparer of the IR or DIAGNOSTIC STUDIES (DS), to offer evidence as to the advisability of specific DISPOSITIONAL alternatives. Such witnesses may be cross examined.
3. The PA may call witnesses (including the preparer of the IR or DS).
4. R may also call witnesses (including IR and/or DS preparer).
5. The court may allow rebuttal and sur-rebuttal evidence.
- 5(a). V may make an oral or written statement.
6. The PA may make a recommendation regarding SDA.
7. R may also deliver a statement of recommendation regarding SDA.
8. The court may permit rebuttal statements by both sides.
9. The court shall then consider the case and ENTER A DISPOSITIONAL ORDER (DO).

FCA 351.1 PROBATION INVESTIGATION (PI) AND DIAGNOSTIC ASSESSMENT (DA):

1. Following a determination that R has committed a DFA (and BEFORE the DH), the court SHALL ORDER A PI and a DA. The PI shall include information pertaining to: R's history including prior conduct, his/her family situation and any previous psychiatric/psychological reports, school adjustment, social assistance from voluntary or public agencies and R's response to such services. The DA shall include: psychological tests, psychiatric interviews to determine MENTAL CAPACITY AND ACHIEVEMENT, EMOTIONAL STABILITY AND MENTAL DISABILITIES. It shall also include a CLINICAL ASSESSMENT of any situational factors that may have contributed to RO'S conduct. When feasible, EXPERT OPINION SHALL BE RENDERED AS TO THE RISK THAT R PRESENTS TO OTHERS AND TO HIM/HERSELF, WITH A RECOMMENDATION AS TO THE NEED FOR RESTRICTIVE PLACEMENT.
2. Following a determination that R committed a CRIME, (and pre-DH), the court SHALL ORDER a PI and MAY ORDER a DA.
3. In districts with a Juvenile Justice Close-to-Home initiative, the PS shall develop and submit for approval to CFS a PRE-DISPOSITIONAL RISK ASSESSMENT INSTRUMENT (RAI).

FCA 352.1 FINDINGS:

1. If, after the DH, the court determines that R needs SUPERVISION, TREATMENT OR CONFINEMENT (STR), the court shall enter a FINDING that R is a JD and order a. APPROPRIATE DISPOSITION per FCA 352.2
2. If the court finds that R does NOT require STR, the petition SHALL BE DISMISSED.

FCA 352.2 ORDER OF DISPOSITION (OD):

1. Upon conclusion of the DH, the court shall enter an OD of:
  - a. Conditional Discharge (up to one year) per FCA 353.1; or
  - b. Probation (up to 2 years plus an additional year if there are exceptional circumstances) per FCA 353.2; or
  - c. Continuation and placement per FCA 353.3; or
  - d. Placement per FCA 353.4; or
  - e. Continuing the proceeding and order RESTRICTIVE PLACEMENT per FCA 353.5.
2. In considering an appropriate order, the court shall consider R'S NEEDS/BEST INTERESTS and the need for COMMUNITY PROTECTION.

FCA 352.3 ORDER OF PROTECTION (OP):

1. Upon issuing an order per FCA 352.2 or FCA 315.3 (ACD, except for DFA), the court may enter an OP (no-contact or non-offensive contact) for good cause shown.
2. An OP lasts for the period specified by the court, but shall not exceed the time specified in any DO or order of ACD.

FCA 351.1 CONDITIONAL DISCHARGE: (SEE TEXT).

FCA 351.1 PROBATION: (SEE TEXT).

FCA 353.3 PLACEMENT:

1. Per FCA 352.2, the court may PLACE R in his/her home or with a suitable relative/private person or with the commissioner of local DSS or CFS.
2. In a district with a local close-to-home initiative, the court may direct the commissioner to provide necessary approved services to meet R's needs.
3. Where R is placed with CFS, unless the court authorizes placement with an authorized agency, the court shall otherwise authorize:
  - a. placement in a SECURE FACILITY; or
  - b. placement in a limited secure facility or
  - c. placement in a non-secure facility.
4. Where R is placed with CFS, the court may direct CFS to place R with an authorized agency.
5. If R has committed a FELONY, the initial period of placement SHALL NOT EXCEED 18 MONTHS. If a MISDEMEANOR, such initial commitment SHALL NOT EXCEED 12 MONTHS.

FCA 353.4 (See text for procedures with respect to R'S found to have a MI/DD).

FCA 353.5 RESTRICTIVE PLACEMENT (RP):

1. Where R has been found to have committed a DFA, the DISPOSITIONAL ORDER (DO) shall be made within 20 days of the conclusion of the DH, and shall include a finding (based on a preponderance of the evidence), whether R requires RP. If so, the court shall CONTINUE the proceeding and enter a DO for such placement.
2. FACTORS in deciding whether RP is required include:
  - a. R'S needs/best interests;
  - b. R's background (including information from the PI and DA);
  - c. The nature and circumstances of the offender, and whether R or any co-participant inflicted injury;
  - d. The need for community protection.
  - e. V'S age and physical condition.
3. THE COURT SHALL ORDER RP where R is found to have committed a DFO and INFLICTED SERIOUS PHYSICAL INJURY (SPI) on a person age 62 or older.
4. (a): Where R is found to have committed a designated CLASS A FELONY, the RP order SHALL PROVIDE that:
  - i. R shall be placed with CFS for an INITIAL PERIOD OF 5 YEARS.
  - ii. R shall first be confined in a SECURE FACILITY (SF) for 12-18 months. (If per sub. 5, it must be 18 months).
  - iii. After the period of ii, R shall then be placed in a RESIDENTIAL FACILITY(RF) for 12 MONTHS.
  - iv. R may NOT be released or transferred from a SF during the period set forth in ii above, nor may R be released from a RF during the period set forth in iii above. NO HOME VISITS for one year are allowed EXCEPT for EMERGENCY VISITS FOR MEDICAL TREATMENT OR SEVERE ILLNESS OR DEATH IN THE FAMILY.

(b): During the first 12 months of R's placement, NO MOTION, HEARING OR ORDER MAY BE MADE, HELD OR GRANTED per FCA 355.1 (NEW HEARING/STAYING, MODIFYING, TERMINATING AN ORDER). (BUT, a CPL 440.10 motion may be made).

c. During placement, i. after expiration of the initial period of confinement in a RF, R shall not be released therefrom without CFS written approval.

ii. Whenever not in a SF or RF, R SHALL BE SUBJECT TO INTENSIVE SUPERVISION.

iii. R shall NOT be discharged from CFS custody UNLESS a motion has been made and granted per FCA 355.1. Such motion SHALL NOT BE MADE BEFORE THE EXPIRATION OF THREE YEARS OF PLACEMENT.

d. Upon expiration of the initial period of placement (or any extension thereof), the placement MAY BE EXTENDED per FCA 355.3 on petition of any party or CFS, for an additional period not to exceed 12 months. BUT, no initial placement or extension of placement may exceed R'S 21st birthday, or for an act committed when R was 16 or older, and R has reached his/her 23rd birthday.

5. (a) Where R is restrictively placed for a DFA OTHER THAN a designated CLASS A FELONY, the order shall provide that i. R be placed with CFS for an INITIAL PERIOD of 3 YEARS. (The court may or may not credit R for time served in detention if deemed in his/her best interests and safety needs of the community).

ii. R shall be confined initially in a SF for 6 to 12 months.

iii. R shall then be placed in a RF for 6 to 12 months.

b. No motions, hearings per FCA 355.1 (other than 440.10) may be made/held during the first six months of placement.

c. i. During R'S placement (or extension after the period of initial placement), R shall not be released from a RF without CFS written approval.

ii. When not in a SF or RF, R is subject to INTENSIVE SUPERVISION.

iii. R shall not be discharged from the custody of CFS.

iv. CFS shall provide written reports to court regarding R'S status, progress and adjustment.

d. Upon expiration of the initial period of placement, the placement may be extended per FCA 355.3 upon petition of any party or CFS after a DH for an additional period up to 12 months. (But no extension may go beyond R'S 21st birthday).

e. The court may also enter an order per FCA 353.4(2) (where R found to have MI/DD).

#### FCA 354.2 DUTIES OF COUNSEL:

1. If the court enters a DO per FCA 352.2, R'S counsel MUST ADVISE R and his parents in writing of his/her RIGHT TO APPEAL to the APPELLATE DIVISION, the time limitations, the manner of instituting an appeal, how to obtain a transcript of testimony and the right to apply for leave to appeal as a poor person, if applicable.
2. Counsel should also ascertain whether R wishes to appeal and, if so, serve and file the necessary NOTICE OF APPEAL.



FCA 355.1: NEW HEARING: STAYING MODIFYING OR TERMINATING AN ORDER BASED ON CHANGE IN CIRCUMSTANCES (SEE TEXT OF STATUTE).

FCA 355.2: MOTION PROCEDURES (SEE TEXT)

FCA 355.3: EXTENSION OF PLACEMENT (SEE TEXT).

As is evident, the path of representing a young person charged with criminal acts can be a tortuous one, not unlike a hedge maze. Knowing the ages at which and the offenses for which a child can be adjudicated as an AO, JO, YO or JD, and the steps that must be taken to avoid protracted detention and provide for the client's rehabilitative needs can not only prevent one from hitting a dead end but also provide a road map to a successful outcome.