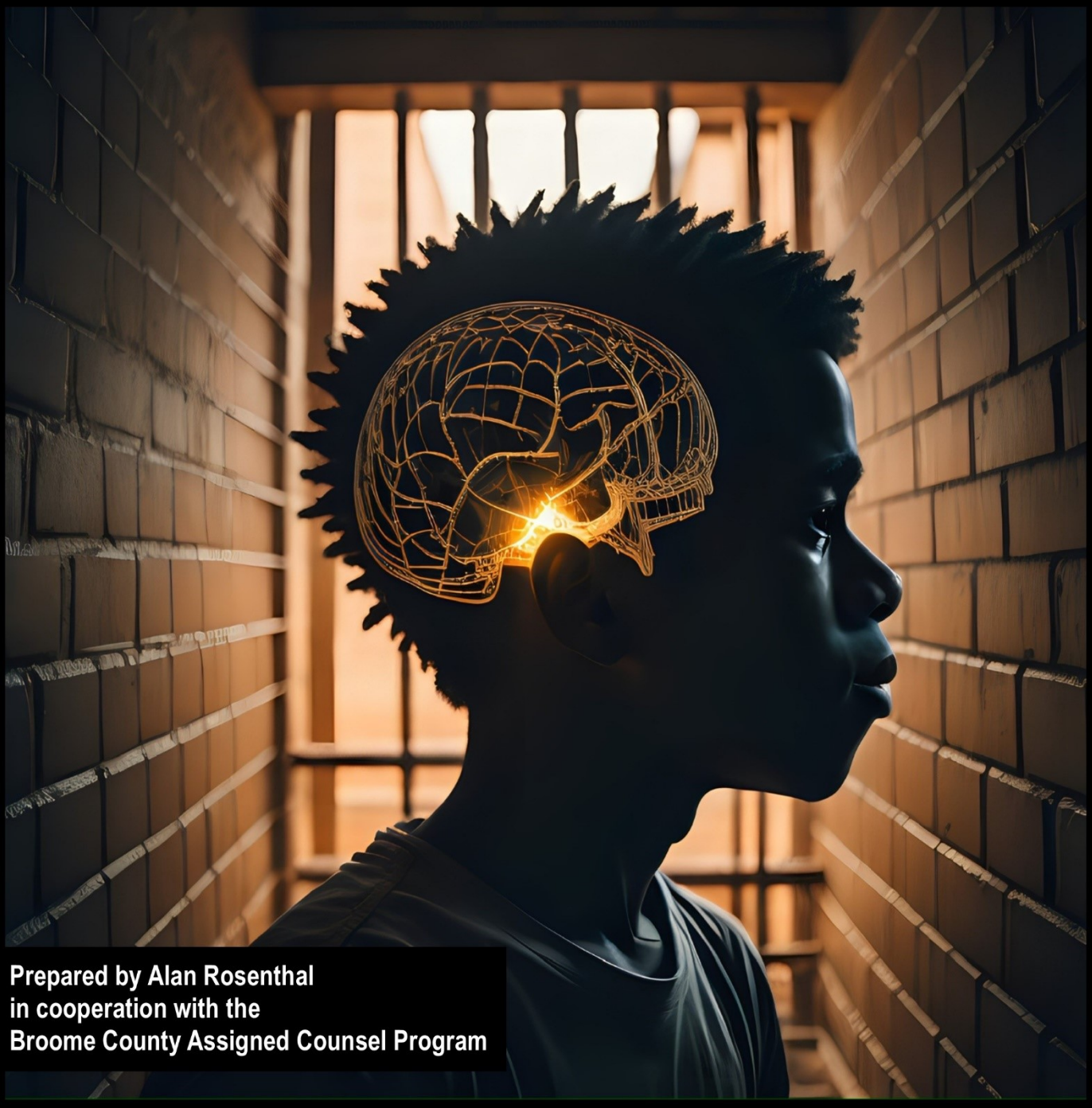
A Defense Attorney's Guide: Representing Adolescents

JO • AO • YO • Retroactive YO • SORA



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in cooperation with the
Broome County Assigned Counsel Program

ACKNOWLEDGMENTS

I would first like to acknowledge the many young people that I have represented over the years from whom I have learned about the difficulties of youth caught up in the criminal legal system. It is a legal system that is ill-adapted for adults, never mind adolescents. Some have survived the trauma of being treated as an adult in a system that is not appropriate for young people and have gone on to live successful and amazing lives. Many others have not been able to overcome the disadvantage that the stigma of an adult conviction carries with it. Their cases have taught me many invaluable lessons that I seek to pass on to other defense attorneys who will take on the issues in many different forums.

To the many unnamed advocates who have fought tirelessly for the passage of RTA, RTLA, and Retroactive Youthful Offender we are thankful for the tools that you have given to us to help better represent our clients.

I would like to thank the many individuals who have written, published and conducted Continuing Legal Education Programs regarding issues related to representing adolescents. I have borrowed from them liberally and acknowledge their contributions. By sharing our work, we hopefully help raise the bar for the performance of defense attorneys throughout New York. I acknowledge the invaluable help of Dr. Shoshanna Must in the writing of Chapter 3. A special thanks to Patricia Warth, Nancy Ginsburg, Mandy Jaramillo, Gary Muldoon, Elizabeth Walker, Elizabeth Isaacs, Savita Sivakumar, Marty Beyer, Janet Sabel, Stephanie Tischler, Nicole Geoglis, Allison Haupt, Barbara Zolot, and to Deborah Weissman and Marsha Weissman for their research assistance. Also, a thank you to the New York State Office of Indigent Legal Services and the Broome County Assigned Counsel Program for helping to make this publication possible. Finally, a thank you to Jeff VanBuren for design and Craig Cordes for editing.

PREFACE

I have attempted to adopt person-first language to describe our clients who have been charged or convicted by the criminal legal system. It is our attempt to use destigmatizing language. Labels like "offender," "adolescent offender," "juvenile offender," "youthful offender." and "sex offender" are an unfair life sentence. Often these terms are used even before there has been a conviction. Use of these terms prevents people from living hopeful, helpful, productive lives, and preventing successful reentry and reintegration. Such labels create barriers to employment, housing, family life, and education. They also convey harmful images and messaging in a courtroom, to the judge, the prosecutor, and to our own clients.

Yet this terminology is the accepted language used by the media, law enforcement, judges, prosecutors, academics, legislators, and even treatment providers. As if the public shaming that comes from a criminal conviction isn't enough, people who have been charged or convicted face the constant reminder by our language. Person-first language is a way to emphasize the person and view what they have been charged with or convicted of as only one act of a whole person's life. It is not their identity. Yet if we repeat it enough, they begin to believe it about themselves.

Our clients are adolescents. Their behavior will change over time and their brains will more fully develop as they grow into their mid-twenties. Because of the transience of the "signature qualities" of adolescence, permanent labels are even more harmful. As defense lawyers we should reject the use of such labels. We should adopt person-first language and seek to elevate the humanity of our clients. Whenever possible our clients should be referred to as people. People who are charged with an offense. People who are charged as a juvenile who has offended. People who have committed a crime of a sexual nature. It is something that they have been accused of or have done. It is not who they are.

Our words are important.[1] Stigmatizing language serves to reinforce our overly punitive, misguided, and counterproductive public policies. It reinforces a judge's tendency to default to retribution to be imposed upon someone who is "other" than us. We should refer to the people we defend thoughtfully and purposefully. We can do our part to help the people we serve overcome demonization, myths, and stigma.

DEDICATION

Judge Langston C. McKinney

[1] We owe a debt of gratitude to Eddie Ellis and the Center for NuLeadership on Urban Solutions. Eddie's Open Letter to Our Friends, first circulated in 2007, has inspired many people to embrace the concept that our words matter and that we must see the humanity in those we represent. Given the opportunity, they can be our fellow citizens and our colleagues. Letter available at Microsoft Word - CNUS lang ltr_regular.doc (cmjcenter.org).

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INTRODUCTION

§ 1:1 A Developmental Approach

This guide for defense attorneys addresses selected issues regarding the defense of adolescents. Whether removal, sentencing, youthful offender, retroactive youthful offender, or SORA, the issues all have one thing in common: It is critical that the defense team and the judge recognize that adolescents are different from adults. To accomplish this, it is suggested that you take a developmental approach.[1]

Perhaps the most significant challenge when representing adolescents is to dispose of the case in a way that allows for their successful and productive reentry and reintegration into society without the stigma of a criminal record, incarceration, or registration for a sex offense. A developmental approach will help you meet this challenge.

What is often identified as the fourth stage of the history of New York courts' processing of adolescent criminal cases was inspired by the U.S. Supreme Court's decision in *Roper v. Simmons,* 543 U.S. 551 (2005). That landmark decision represented a return to a rehabilitative model for adolescents and a departure from the retributive model that was in use for the three decades prior. It is a time when the courts finally caught up with the scientific research on adolescent behavior and brain development.

Relying on science, *Roper* and its progeny identified certain, transient "signature qualities" of youth: 1) immaturity, and an underdeveloped sense of responsibility leading to recklessness, impulsivity, and heedless risk-taking; 2) vulnerability to peer pressure; and 3) a character that is not yet well formed. Because of these qualities, the Supreme Court considered adolescents to have "diminished culpability" and "heightened capacity to change." "For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small portion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persists into adulthood." *Roper* at 570 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: *Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).

Recognizing the developmental differences between adults and adolescents in both behavior and the brain has come to be recognized as a developmental approach. A 2013 National Academy of Science report highlighted the importance of using research on adolescent development to guide decision-making using a "developmental approach."[2] This developmental

[1] See the Appendix of this guide for a helpful chart adapted from a chart developed by Dr. Marty Beyer and the Nation Juvenile Defender Center (A Developmental Framework for Representing Adolescents).
[2] National Research Council, *Reforming Juvenile Justice: A Developmental Approach* (2013).

approach was adopted into New York's evolving jurisprudence regarding adolescents by the Court of Appeals in *People v. Rudolph,* 21 N.Y.3d 497 (2013).

In taking a developmental approach, defense counsel must first educate themselves about the pertinent science and research. The next step is to educate the judge. Your challenge is to interest the judge in having a full picture of what was behind your client's offense, and what services are necessary to reduce your client's risk of reoffending and to promote his or her successful and productive reentry and reintegration into society. To prevent the judge from defining your client by his or her offense, you will want to present the many developmental and historical factors, including trauma and disabilities, contributing to the criminal behavior.

You cannot do this alone. You will need to build a defense team that includes a social worker and/or mitigation specialist.

§ 1:2 Overview of this Guide

Chapter 2 of this guide briefly summarizes the history of the treatment of adolescents in our legal system. Chapter 3 forms the foundation for defense counsel's representation. Be it removal to family court, youthful offender, sentencing, retroactive youth offender, or SORA, the theme is the same: Adolescents are different. In this chapter, both the scientific basis for a developmental approach and a jurisprudential basis are addressed. In Chapter 4, the procedures for removal to family court are addressed both for young people charged as juveniles or adolescents who are accused of criminal conduct. The role of mitigation in these proceedings is developed. Chapter 5 reviews how to effectively present the case for a youthful offender finding and what the procedural steps are. In this chapter, eligibility for a youthful offender adjudication is explained. Chapter 6 also covers making the case for a youthful offender finding, but for adolescents charged with a sex offense. In this chapter, suggestions are made as to how to overcome the myths and misconceptions regarding adolescents who have committed a crime of a sexual nature. Chapter 7 covers mitigation. The mitigation covered in this chapter will apply to all proceedings involving your adolescent clients. A trauma-informed and developmental approach to mitigation is presented. The importance of a pre-sentence memorandum is discussed, and the role of the mitigation specialist is explained. In Chapter 8, sentencing and placement are addressed. The penological purposes of sentencing are reviewed, and there is a section on how to use these penological purposes to make the case for a particular sentence. This section also includes several sentencing charts for individuals convicted as a juvenile offender, for youthful offender sentences, and for juvenile delinquents facing possible placement. Chapter 9 addresses SORA for the adolescent who has been convicted of a sex offense. There is a focus on Risk Factor #8 in the risk assessment instrument, which is based upon the wrongheaded notion that adolescents convicted of sex offenses are at an elevated risk to reoffend. Chapter 10 addresses the most recent reform enacted for the benefit of adolescents. Dubbed "retroactive youthful offender," this statute provides relief for individuals who were convicted of a crime, were eligible for a youthful offender finding, but were denied this finding at the time of the original sentence.

§ 1:3 Statutory Definitions

Adolescent Offender — **(A.O.)** A person charged with a felony committed on or after October 1, 2018 when he or she was 16 years of age or on or after October 1, 2019 when he or she was 17 years of age. (CPL § 1.20 [44]).

Armed Felony — Means any violent felony offense defined in section 70.02 of the penal law that includes as an element either:
(a) possession, being armed with or causing serious physical injury by means of a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious physical injury may be discharged; or
(b) display of what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm. (CPL § 1.20 [41]).

Causes Significant Physical Injury — Such an action disqualifies an AO from removal to Family Court pursuant to CPL § 722.23 (2)(c)(i).

The Legislature did not include a definition of the term "causes significant physical injury" in CPL § 722.23 regarding the removal of A.O. cases from Youth Part of superior court to Family Court when it enacted the RTA legislation. However, a definition can be gleaned from case law and legislative history.

"Causes significant physical injury" occurs when an AO directly causes injury to another person that is grater than "physical injury" but need not rise to the level of "serious physical injury" as those terms are defined in Penal Law § 10.00 (9) and (10). Aggravating factors are required to raise physical injury to the level of significant physical injury including bone fractures, injuries requiring surgery, death, injuries resulting in disfigurement or injuries that require extended treatment or hospitalization beyond the date of the incident. The injury has to go beyond substantial pain. The actions of the AO must be the direct cause of the significant physical injury to be disqualifying from removal to Family Court and cannot be predicated on accomplice liability or acting in concert.

Designated Felony Act — Means an act which, if done by an adult, would be a crime: (i) defined in sections 125.27 (murder in the first degree); 125.25 (murder in the second degree); 135.25 (kidnapping in the first degree); or 150.20 (arson in the first degree) of the penal law committed by a person thirteen, fourteen, fifteen, sixteen, or

seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (ii) defined in sections 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); 130.35 (rape in the first degree); 130.50 (criminal sexual act in the first degree); 130.70 (aggravated sexual abuse in the first degree); 135.20 (kidnapping in the second degree) but only where the abduction involved the use or threat of use of deadly physical force; 150.15 (arson in the second degree) or 160.15 (robbery in the first degree) of the penal law committed by a person thirteen, fourteen, fifteen, sixteen, or seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (iii) defined in the penal law as an attempt to commit murder in the first or second degree or kidnapping in the first degree committed by a person thirteen, fourteen, fifteen, sixteen, or seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (iv) defined in section 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); subdivision two of section 160.10 (robbery in the second degree) of the penal law; or section 265.03 of the penal law, where such machine gun or such firearm is possessed on school grounds, as that phrase is defined in subdivision fourteen of section 220.00 of the penal law committed by a person fourteen, fifteen, sixteen, or seventeen years of age; or such conduct committed as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; (v) defined in section 120.05 (assault in the second degree) or 160.10 (robbery in the second degree) of the penal law committed by a person fourteen, fifteen, sixteen or seventeen years of age but only where there has been a prior finding by a court that such person has previously committed an act which, if committed by an adult, would be the crime of assault in the second degree, robbery in the second degree or any designated felony act specified in paragraph (i), (ii), or (iii) of this subdivision regardless of the age of such person at the time of the commission of the prior act; (vi) other than a misdemeanor committed by a person at least twelve but less than eighteen years of age, but only where there have been two prior findings by the court that such person has committed a prior act which, if committed by an adult, would be a felony. (FCA § 301.2 [8]).

Extraordinary Circumstances

The Legislature did not include a definition of "extraordinary circumstances" in CPL § 722.23 regarding the removal of A.O. cases from Youth Part of superior court to family court when it enacted the RTA legislation. However, a definition can be gleaned from case law, the dictionary definition, and the legislative history.

"Extraordinary circumstances" in the context of cases to be prevented from presumptive removal to Family Court, means that very limited and extremely rare case where the facts and circumstances are highly exceptional to a very marked extent, very unusual, and that go far beyond that which is usual, regular, or customary or foreseeable in the normal course of events. The judicial analysis to determine what rare case rises over the very high bar of extraordinary circumstances is based upon consideration of the totality of circumstances and a balancing of aggravating and mitigating factors.

Infancy

1. Except as provided in subdivisions two and three of this section, a person less than seventeen, or commencing October first, two thousand nineteen, a person less than eighteen years old is not criminally responsible for conduct.

2. A person thirteen, fourteen or, fifteen years of age is criminally responsible for acts constituting murder in the second degree as defined in subdivisions one and two of section 125.25 and in subdivision three of such section provided that the underlying crime for the murder charge is one for which such person is criminally responsible or for such conduct as a sexually motivated felony, where authorized pursuant to section 130.91 of this chapter; and a person fourteen or, fifteen years of age is criminally responsible for acts constituting the crimes defined in section 135.25 (kidnapping in the first degree); 150.20 (arson in the first degree); subdivisions one and two of section 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); paragraphs (a) and (b) of subdivisions (1), (2) and (3) of section 130.35; former subdivisions one and two of section 130.35 (rape in the first degree); subdivisions one and two of former section 130.50 (criminal sexual act in the first degree); 130.70 (aggravated sexual abuse in the first degree); 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); 150.15 (arson in the second degree); 160.15 (robbery in the first degree); subdivision two of section 160.10 (robbery in the second degree) of this chapter; or section 265.03 of this chapter, where such machine gun or such firearm is possessed on school grounds, as that phrase is defined in subdivision fourteen of section 220.00

of this chapter; or defined in this chapter as an attempt to commit murder in the second degree or kidnapping in the first degree, or for such conduct as a sexually motivated felony, where authorized pursuant to section 130.91 of this chapter.
3. A person sixteen or commencing October first, two thousand nineteen, seventeen years of age is criminally responsible for acts constituting:
(a) a felony, as defined in subdivision five of section 10.00 of this chapter;
(b) a traffic infraction, as defined in subdivision two of section 10.00 of this chapter;
(c) a violation, as defined in subdivision three of section 10.00 of this chapter;
(d) a misdemeanor as defined in subdivision four of section 10.00 of this chapter, but only when the charge for such misdemeanor is:
(i) accompanied by a felony charge that is shown to have been committed as a part of the same criminal transaction, as defined in subdivision two of section 40.10 of the criminal procedure law;
(ii) results from reduction or dismissal in satisfaction of a charge for a felony offense, in accordance with a plea of guilty pursuant to subdivision four of section 220.10 of the criminal procedure law, unless the proceeding is removed to the Family Court pursuant to paragraph (g-1) of subdivision five of section 220.10 of the criminal procedure law; or
(iii) a misdemeanor defined in the vehicle and traffic law.
4. In 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).

Juvenile Delinquent

(J.D.) "Juvenile delinquent" means:
(a)(i) a person at least twelve and less than eighteen years of age, having committed an act that would constitute a crime if committed by an adult; or
(ii) a person over sixteen and less than seventeen years of age or, a person over sixteen and less than eighteen years of age commencing October first, two thousand nineteen, having committed an act that would constitute a violation as defined by subdivision three of section 10.00 of the penal law if committed by an adult, where such violation is alleged to have occurred in the same transaction or occurrence of the alleged criminal act; or
(iii) a person over the age of seven and less than twelve years of age having committed an act that would constitute one of the following crimes, if committed by an adult: (A) aggravated criminally negligent homicide as defined in section 125.11 of the penal law; (B) vehicular manslaughter in the second degree as defined in section 125.12 of the penal law; (C) vehicular

manslaughter in the first degree as defined in section 125.13 of the penal law; (D) aggravated vehicular homicide as defined in section 125.14 of the penal law; (E) manslaughter in the second degree as defined in section 125.15 of the penal law; (F) manslaughter in the first degree as defined in section 125.20 of the penal law; (G) aggravated manslaughter in the second degree as defined in section 125.21 of the penal law; (H) aggravated manslaughter in the first degree as defined in section 125.22 of the penal law; (I) murder in the second degree as defined in section 125.25 of the penal law; (J) aggravated murder as defined in section 125.26 of the penal law; and (K) murder in the first degree as defined in section 125.27 of the penal law; and
(b) who is:
(i) not criminally responsible for such conduct by reason of infancy; or
(ii) 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. (FCA § 301.2 [1]).
No J.D. adjudication may be denominated a conviction (FCA § 380.1 [1]) and no J.D. is subject to registration under SORA.

Juvenile Offender

(J.O.) Means (1) a person, thirteen years old who is criminally responsible for acts constituting murder in the second degree as defined in subdivisions one and two of section 125.25 of the penal law, or such conduct as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; and (2) a person fourteen or fifteen years old who is criminally responsible for acts constituting the crimes defined in subdivisions one and two of section 125.25 (murder in the second degree) and in subdivision three of such section provided that the underlying crime for the murder charge is one for which such person is criminally responsible; section 135.25 (kidnapping in the first degree); 150.20 (arson in the first degree); subdivisions one and two of section 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); (a) and (b) of subdivision (1), (2) and (3) of section 130.35 (rape in the first degree); former subdivisions (1) and (2) of section 130.35 (rape 1) subdivisions one and two of former section 130.50; 130.70 (aggravated sexual abuse in the first degree); 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); 150.15 (arson in the second degree); 160.15 (robbery in the first degree); subdivision two of section 160.10 (robbery in the second degree) of the penal law; or section 265.03 of the penal law, where such machine gun

or such firearm is possessed on school grounds, as that phrase is defined in subdivision fourteen of section 220.00 of the penal law; or defined in the penal law as an attempt to commit murder in the second degree or kidnapping in the first degree, or such conduct as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law. (CPL § 1.20 [42]).

Removal

The legal process by which a J.O. or A.O. case is transferred from the Youth Part of superior court to Family Court where the order of removal and the pleadings and proceedings shall be deemed to be a petition filed to originate a juvenile delinquency proceeding. Upon filing of an order of removal in a criminal court the criminal action shall be terminated. (FCA § 311.1 (7), CPL §§ 722.20, 722.21, 722.23, 725.05 and 725.10).

RTA

Raise the Age (RTA) refers to the legislation passed in New York in 2017. As of October 1, 2019, the age of criminal responsibility in New York was raised to 18 years of age. RTA created Youth Parts, and a new adolescent offender (AO) category for 16 and 17-year-olds. Felony charges for AOs will start in Youth Part of superior court, and most of those cases will be removed to Family Court. As a result of RTA:

- 16 and 17-year-olds charged with Penal Law misdemeanors are prosecuted in Family Court as Juvenile Delinquents.
- 16 and 17-year-olds charged with V&T misdemeanors are considered adults and are prosecuted in local criminal court.
- 16 and 17-year-olds charged with felonies are considered AOs and, if their cases are removed from Youth Part to Family Court, they will be considered Juvenile Delinquents. If they are not removed they will remain in Youth Part to be prosecuted as adults.

RTLA

Raise the Lower Age (RTLA) refers to legislation enacted in New York, effective December 29, 2022, that raises the lower age of juvenile delinquency under the Family Court Act from 7 to 12 years old, except for children, 7 to 12 years old charged with one of the eleven homicide offenses listed in FCA § 301.2. For children ages 7 to 12 years old, except those charged with homicide offenses, previously prosecuted as Juvenile Delinquents, they will no longer be subject to arrest and prosecution in Family Court but will have services made available to them and their families through the differential response program.

Violent Felony Offense	Means a class B, C, D, or E violent felony offense for the offenses listed in Penal Law § 70.02 (1) and for which a sentence is authorized and the range of the term of the sentence is within the ranged established by Penal Law § 70.02 (2) and (3). (Penal Law § 70.02).
Youth	Means a person not less than twelve years of age and not more than twenty-two years of age, or a person over the age of seven and less than twelve years if alleged to be or adjudicated a juvenile delinquent for an act constituting the crime of homicide. (Executive Law §502 [4]). However, for the purposes of Youthful Offender adjudication "youth" means a person charged with a crime alleged to have been committed when he or she was at least sixteen years old and less than nineteen years old or a person charged with being a JO.
Youthful Offender	**(Y.O.)** An adolescent convicted of a misdemeanor or a felony who was at least 16 years old and less than 19 years old at the time of the commission of the offense, including a person convicted as an adolescent offender or a person convicted as a juvenile offender (14 or 15 years old at the time of the commission of a designated felony) who has been determined by the court to be an eligible youth and for whom the conviction has been vacated and been replaced by a youthful offender finding and who has been sentenced pursuant to Penal Law § 60.02. A youthful offender adjudication is comprised of a youthful offender finding and the youthful offender sentence. A youthful offender adjudication is not a judgment of conviction for any crime or any offense. (CPL article 720).
Youth Part	Means the youth part of the superior court that has exclusive jurisdiction in all proceedings in relation to J.O.s and A.O.s except for cases that are removed to Family Court. Judges presiding in the youth part must receive training in specialized areas, including, but not limited to, juvenile justice, adolescent development, custody and care of youths, and effective methods of reducing unlawful conduct by youths. (CPL § 722.10).

§ 1:4 Categories of Minors

Category	Age	Statutory Authority	Statutory Definition	Court of Jurisdiction
Person in Need of Supervision (PINS)	Up to 18	Family Court Act Article 7	Family Court Act § 712 (a)	Family Court
Juvenile Delinquent	12[3] up to 18	Family Court Act Article 3	Family Court Act § 301.2 (1)	Family Court
Juvenile Offender	13 up to 16	CPL Article 722	CPL § 1.20 (42)	Youth Part Superior Court
Adolescent Offender	16 up to 18	CPL Article 722	CPL § 1.20 (44)	Youth Part Superior Court
Youthful Offender	13 up to 19	CPL Article 720	CPL § 720.10	Superior or Local Criminal Court

§ 1:5 Age Ranges for Purposes of this Guide

Juveniles	Ages 12 to 18
Early Adolescence	Ages 10 to 13
Middle Adolescence	Ages 13 to 18
Late Adolescence	Ages 18 to 22
Young Adults/Emerging Adults	Ages 22 to 25

[3] As a result of Raise the Lower Age (RTLA), effective 12/29/22, children between the ages of 7 to 12 years old will no longer be prosecuted in Family Court as Juvenile Delinquents (JD) and will be provided services and support through differential response, instead of arrest and prosecution, except for children charged with homicides who will be prosecuted in Family Court as JDs as set forth in FCA § 301.2 (1)(a)(iii).

CHAPTER 2

HISTORICAL CONTEXT

CHAPTER 2 SECTIONS

CHAPTER 2

HISTORICAL CONTEXT

Savita Sivakumar and Alan Rosenthal

§ 2:1 Introduction

Before New York City's Flatiron Building or Bryant Park, Broadway and East 23rd Street was home to America's first ever House of Refuge for Juvenile Delinquents. What began in an armory left over from the War of 1812 with 9 minors in need of "education and treatment" became the model for juvenile penitentiaries across the nation.[1] The institution was established in 1825 by wealthy, philanthropic New Yorkers and eventually backed by State and City funds.[2] It had two goals: 1) to remove offenders under age 16 from the harsher adult facilities and 2) to rescue "poor, destitute, and vagrant" youth, often the children of immigrants, from a life of delinquency. In an article from 1860, the New York Times lauded the House of Refuge as one of the best in existence and an important establishment for "the future prosperity and security of our large cities."[3] The facility boasted fully regimented schedules for its adolescent inmates including educational instruction, chores to help run the institution, meals, recreation, leisure, and supervised employment post-release.[4] Within a decade of opening, the facility held 1,678 inmates.[5]

Similar reform schools popped up around the state to accommodate the growing juvenile detention population. The publicly-funded Western House of Refuge opened in 1846 in Rochester, no longer needing philanthropic support.[6] In 1887, a House of Refuge for Women was built in Hudson, New York.[7] State training schools were built in Warwick and Coxsackie.[8] The New York House of Refuge was relocated to a brand new facility on Randall's Island.[9] The movement also spread through the rest of the country.[10] In 1876, the 38 United States had 51

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[1] *OUR CITY CHARITIES.; The New-York House of Refuge for Juvenile Delinquents*, N.Y. TIMES (January 23, 1860). Available at https://www.nytimes.com/1860/01/23/archives/our-city-charities-the-newyork-house-of-refuge-for-juvenile.html).
[2] Pickett, Robert S., House of Refuge: Origins of Juvenile Reform in New York State, 1815-1857 (Syracuse University Press, 1969). Available at https://doi.org/10.2307/j.ctv64h7hd).
[3] *OUR CITY CHARITIES, supra* note 1.
[4] Pickett, *supra* note 2
[5] Golding, Elisabeth and Roe, Kathleen, *The Greatest Reform School in the World: A Guide to the Records of the New York House of Refuge* (New York State Archives, 1989). Available at www.archives.nysed.gov) at 4.
[6] Monroe County Library, The Western House of Refuge. Available at https://www.libraryweb.org/rochimag/architecture/LostRochester/WesternHouse/WesternHouse.htm).
[7] Lowell, Josephine Shaw, House of Refuge for Women, 1887-1904, (Prison Public Memory Project Sept., 2014). Available at https://www.prisonpublicmemory.org/blog/2014/house-of-refuge-for-women.
[8] Golding, *supra* note 5 at 6.
[9] Pickett, *supra* note 2.
[10] Lawrence, Richard and Hemmens, Craig, Juvenile Justice: A Text/Reader, History & Development of the Juvenile Court and Justice Process, (2008) at 21.

reform schools.[11] By 1890, almost all of the 44 United States had a reform school, some were modified to accommodate racial segregation.[12]

However, funding was slowly reduced to a trickle and during the 1870s, the House of Refuge fell under harsh scrutiny. The State led investigations into exploitation of confined youth, inadequate care, corporal punishment, violent outbreaks among residents, and religious intolerance.[13] Despite increasing regulation, the problems persisted. Continued criticism led to the eventual dissolution of the New York House of Refuge in 1935.[14] The remaining residents were scattered to juvenile facilities across the state and eventually, most of the existing facilities were transformed into the penitentiaries for adults or juveniles we know today.[15] While the New York House of Refuge never saw the 21st century, the ideas behind its creation still govern our juvenile justice system. Alongside the life of this penitentiary, the juvenile legal system began to take shape.

§ 2:2 Stage 1: Creating the Courts - *1825-1960s*

Until the mid-1900s, there was no separate criminal code for juveniles. At that time, the "infancy presumption" reigned. The infancy presumption hailed from the Blackstone era of the1700's and demanded the prosecution establish, "beyond all doubt and contradiction…that the youth could understand the distinction between right and wrong and could further understand the consequences of the illegal act," before any juvenile conviction.[16] That high standard for criminal conviction of a child under the age of 14 complemented the doctrine of nonintervention, which prioritized parental discretion.[17]

As Houses of Refuge grew in popularity, the Courts drifted away from the idea that "parents know best." Reformatories like the Houses of Refuge reflected the doctrine of *parens patriae,* which encouraged the state to intervene in a child's life whenever their current development was deemed inadequate because their parents were failing to raise them "properly."[18] For example, in *Ex Parte Crouse* in 1838, a young girl's father protested her confinement at a House of Refuge, but the Court ignored him.[19] The Court confined Mary Ann Crouse to a reformatory school under the rationale that the state would provide the structure and education she needed that her father could and did not.[20] That same court set the precedent that the House of Refuge and its counterparts were reformatory and did not constitute a form of

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[11] Krisberg, B, *Legacy of Juvenile Corrections,* 57 Corrections Today 122 (1995) at 154.
[12] *Id.*
[13] Lawrence, *supra* note 10 at 22-23.
[14] Sobie, Merril, *The Development of New York's Family Court*, 17 Judicial Notice: A Periodical of New York Court History 27 (2022), at 28.
[15] Immarigeon, Russ, *Refuges, Reformatories, and Training Schools for Girls: A Bibliography of* Historical Studies, Prison Public Memory Project (2013).
[16] Sobie, Merril, *The Family Court: An Historical Survey*, 60 New York State Bar Journal 53 (1988) at 53.
[17] Gomes, Sara V., *New York's Raise the Age Law: Restoring the Juvenile Justice System Leaves Courts Legislating from the Bench*, 40 Pace Law Review. 458 (2020) at 462.
[18] Lawrence, *supra* note 10 at 22-23.
[19] *Ex parte Crouse*, 4 Wharton (Pa.) 9, 11 (1838). The conduct of the young girl, Mary Ann Crouse, to deserve such confinement is debated. Some say she committed no crimes. Some scholars believe she, a 9-year-old, had killed a two-year-old child.
[20] Lawrence. s*upra* note 10 at 22-23.

incarceration, negating any inquiry into due process and the limitations on freedom implied by the confinement.[21]

The shift from nonintervention toward government regulation of children's behavior ran concurrent to the growth of an unattended children's population.[22] Merril Sobie, a nationally renowned expert and scholar on family and children's law, attributes the shift to the Civil War, during which children suffered mass disruptions to family structure, losing their fathers to war and the support of extended family.[23] Additionally, war-driven industrialization required child labor, forcing migration from rural areas to the cities where the factories were located.[24] The influx of unmonitored children mobilized the "child-saving" movement that helped fund the Houses of Refuge and other reformatory schools.[25]

In 1865, the New York Legislature enacted the "Disorderly Child" Act. The Act required the Court to address any parent or guardian's complaint that a child is 'disorderly' in a "delinquency hearing," where the court was required to consider whether to commit the child to a reformatory, even if there was no allegation of criminal activity.[26] The "child-saving movement" brought on more legislation akin to the Disorderly Child Act to tackle parental neglect and child abandonment, all in the name of government intervention for the greater good. Child-saving legislation eventually led to the creation of separate juvenile court systems across the country and adaptation of "delinquency hearings."

Cook County, Illinois (Chicago) became the first to establish a separate juvenile court system in 1899.[27] In 1922, New York created the Children's Part of the NY Criminal Courts, which was a separate juvenile section of the Criminal Courts, a step toward a separate court system for juveniles.[28] By 1945, all (then 48) states had some sort of juvenile court system, built on the doctrine of *parens patriae* and with "delinquency hearings" as the procedural backbone.[29] The purpose of these courts is conveyed in *Commonwealth v. Fisher* from the 1905 Pennsylvania Supreme Court:[30]

> To save a child from becoming a criminal, or from continuing a career of crime…the legislatures surely may provide for the salvation of such a child, if its parents or guardians be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection.

During this period, New York vacillated on its approach to juvenile justice, attempting to balance the rigid codifications in criminal courts that served as an example for delinquency adjudication with the *parens patriae* doctrine, which mandated a reform-

[21] Lawrence, s*upra* note 10 at 22-23.
[22] Sobie, *supra* note 16 at 53.
[23] Sobie, *supra* note 16 at 53-54.
[24] Sobie, *supra* note 16 at 53-54.
[25] Sobie, *supra* note 16 at 53-54.
[26] L.1865, c. 172.
[27] Lawrence, *supra* note 10 at 24.
[28] Gomes, *supra* note 17 at 463.
[29] Lawrence, *supra* note 10 at 25.
[30] 213 Pa. 48 (1905).

based touch in juvenile proceedings, and ignored the mounting similarities between reformatory schools and adult prisons.[31]

The original Children's Part "delinquency hearings" were assigned to a separate tribunal "held by the several magistrates in rotation," within New York's existing criminal part.[32] The reform acts that followed codified many of the practices from historical delinquency hearings, including the use of the term "delinquent," and the impact of adjudication. In 1909, the New York Penal Code provided, "the commission…of a crime, not capital or punishable by life imprisonment," by any child between the age of seven and sixteen, "which if committed by an adult would be a felony," could only elicit an adjudication of juvenile delinquency.[33] Delinquents could be committed to reformatories for up to three years but could not be sent to adult prisons.[34] Because these hearings were at this point held under the umbrella of criminal courts, the delinquency hearings included all the safeguards available in adult criminal courts including jury trials, criminal standards of evidence, and appellate review.[35]

Between 1922 and 1927, New York established statewide children's courts[36] and in 1933, the legislature provided those children's courts with jurisdiction over child custody and support hearings, a formative step towards the creation of the modern-day Family Court. These new children's courts were made a division of the Domestic Relations Court, firmly planting the future of juvenile adjudications in the civil arena. Initially, the independent courts operating in a pseudo-criminal environment lacked the safeguards of a criminal court. The new laws were interpreted by underqualified judges in closed courtrooms with relaxed rules.[37] Thus began a tug-of-war between a system with procedural safeguards on the one hand, and *parens patriae,* in which the government itself was the child's safeguard, on the other.

During this first stage, there was a recognition that adolescents are developmentally different than adults and there was a focus on their rehabilitation. This was reflected in the enactment in 1943 of New York's first youthful offender statute. The rationale underlying the initial youthful offender statute (*see* New York Code of Criminal Procedure §§ 252-a to 252-h) was the desire to remove the stigma and disabilities which attach to a formal criminal record so as to aid in rehabilitation.[38]

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[31] Sobie, Merril, *The Juvenile Offender Act: Effectiveness and Impact on the New York Juvenile Justice System*, 26 New York Law School Law Review 677 (1981) at 682-682. Available at http://digitalcommons.pace.edu/lawfaculty/366/

[32] *Id.*

[33] 1909 N.Y. Laws, ch. 48, § 2186.

[34] Sobie, *supra* note 31 at 684.

[35] *People v. Fitzgerald,* 244 N.Y. 307, 316 (1927).

[36] Sobie, *supra* note 14 at 32.

[37] John P. Woods, *New York's Juvenile Offender Law: An Overview and Analysis,* 9 Fordham Urban Law Journal 1 (1980) at 8.

[38] Peterson, Ruth, *Youthful Offender Designations and Sentencing in the New York Courts,* 35 Social Problems 111 (1988) at 114; Levine, Howard, *The Youthful Offender Under the New York Criminal Procedure Law,* 36 Albany Law Review 241 (1972) at 242, 248.

In 1956, the New York Legislature raised the age for capital punishment and lifetime imprisonment from 14 to 15 because the country would not tolerate criminal trials for 14-year-olds.[39] But in 1960, despite decades of work to separate juvenile and adult offenders, Governor Rockefeller and the New York Legislature approved a statute that allowed 15-year-olds adjudicated for crimes of "designated felonies" (first-degree assault, burglary, manslaughter, rape, robbery, sodomy, kidnapping, or murder) to be housed in a correctional facility for offenders under the age of 21, further blurring the line between saving the children and punishing them like adult criminals.[40]

§ 2:3 Stage 2: Due Process Reforms - *1962-1970*

In 1962, the New York legislature passed the "Family Court Act," still in place today, which effectively replaced the old Children's Court system. The Family Court Act established "Family Courts" with jurisdiction over all proceedings related to "family" life: child abuse and neglect, parental and guardianship rights, adoption, juvenile delinquency, alimony, divorce, paternity, and child support.[41]

The Act rejected giving family court jurisdiction over 17- and 18-year-olds.[42] Otherwise, the reorganization of the previous children's courts under the Family Court Act merely cemented much of the delinquency jurisdiction and disposition procedures in existence. The due process protections contained in the Family Court Act were eventually lauded and adopted by the groundbreaking Supreme Court case, *In re Gault,* in 1967.[43]

In re Gault and other Supreme Court cases in the 1960s and 1970s transformed juvenile court systems around the country by recognizing that delinquency adjudications are, indeed, hearings that could result in commitment to an institution and thereby, require the same elements of due process afforded to adults. In *In re Gault*, 387 U.S. 1, 56 (1967), a 15-year-old's adjudication and commitment were remanded because his constitutional right to notice, counsel, cross-examination, and against self-incrimination were all violated. In *In re Winship*, 397 U.S. 358, 368 (1970) a 12-year-old charged with stealing money from a woman's purse was found to be entitled to a "proof beyond reasonable doubt" evidentiary standard, In *Breed v. Jones,* 421 U.S. 519, 537 (1975), a juvenile court waiver transferring a 17-year-old to criminal court *after* delinquency adjudication was found to violate the child's double jeopardy rights because the adjudication hearing was equivalent to a trial.

This era of litigation attempted to rectify the uncertainty and imbalance caused by the belief that juveniles did not require the same due process protection as adults because of the children's courts' intent to "treat," rather than "punish." *See Kent v. United States,* 383 U.S. 541, 556 (1966) (where the Supreme Court recognized that children's courts

[39] Sobie, *supra* note 31 at 684.
[40] Sobie, *supra* note 31 at 685.
[41] FCA Chapter 868, Article 1, Part 1, Section 115.
[42] Sobie, *supra* note 31 at 685.
[43] 387 U.S. 1, 40, 48, 55-57 (1967); The Gault Decision and the New York Family Court Act, 19 Syracuse Law Review 753 (1968).

afford juveniles "neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children").

Eventually the due process protections afforded to children would be the only wall between them and the country's attack on the newly perceived generation of "super-predators," adolescent drug dealers, and sexual predators.

§ 2:4 Stage 3: Punishment Replaces Rehabilitation - *1971-2000s*

As the due process protections for children ramped up, so did their prosecution. During the latter half of the 20th century, the long-held perspective that "juveniles were different than adults," and the concomitant focus on rehabilitation was rejected, while a new emphasis on retribution was embraced. As violent youth crime rates rose, public opinion no longer believed that a delinquency hearing was appropriate to adjudicate the new violent juvenile offenders roaming the country.[44] Critics railed at the depiction of young criminals as children, a characterization that was discordant with media images of teenage street gangs spreading fear to urban neighborhoods. Under the mantra of "adult crime, adult time," young people convicted of crimes became subject to increasingly harsh punishments.[45] Many of these convictions were administered in adult criminal courts and the sentences were ordered served in correctional facilities that had been previously reserved for individuals 18 and older."[46]

Steeped in racial undertones, the 1970s brought on a draconian approach to criminal justice, beginning with the establishment of the Crime Commission in 1965. The Commission was charged with proposing legislation to clean up the "crime in the streets," a key issue during the previous presidential election.[47] A political climate that eviscerated politicians for being "soft" on crime caused a bipartisan push for harsher penalties, mandatory minimums, and swift action.[48] This mentality bled into juvenile proceedings as well. The tale of "[a] new, remorseless, mutant juvenile," mostly "nonwhite kids whose resentments are honed and hardened in the slums," became a looming threat, especially because at the time, their age restricted the system's ability to incarcerate them.[49] That changed quickly.

In order to create the "Great Society" that President Lyndon B. Johnson promised his constituents, he declared a War on Crime to curb crime and disorder in urban centers.[50] The 1965 Law Enforcement Assistance Act created the "frontline soldier"

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[44] Colier, Linda J., *Adult Crime, Adult Time*, Washington Post, Mar. 29, 1998. Available at https://www.washingtonpost.com/wp-srv/national/longterm/juvmurders/stories/adultcrime.htm).
[45] *Id.*
[46] Steinberg, Laurence, *Adolescent Brain Science and Juvenile Justice Policymaking,* 23 Psychology, Public Policy, and Law 410 (2017) at 410.
[47] Vorenberg, James, The War on Crime: The First Five Years, The Atlantic, May 1972. Available at https://www.theatlantic.com/past/docs/politics/crime/crimewar.htm).
[48] Cruz, Jamie Santa, *Rethinking Prison as a Deterrent to Future Crime,* Knowledgeable Magazine (July 18, 2022). Available at https://daily.jstor.org/rethinking-prison-as-a-deterrent-to-future-crime/).
[49] The Youth Crime Plague, TIME July 11, 1977. Available at https://content.time.com/time/subscriber/article/0,33009,919043-1,00.html).
[50] Lassister, Matthew, and the Policing and Social Justice History Lab, *Detroit Under Fire: Police Violence, Crime Politics, and the Struggle for Racial Justice in the Civil Rights Era,* University of Michigan Carceral State Project,

policemen, armed with bulletproof vests, helicopters, tanks, rifles, gas masks, and other military-grade hardware.[51] Beginning in 1967, the Crime Commission reviewed FBI reports for the seven "index" crimes – homicide, rape, aggravated assault, robbery, burglary, larceny, and auto-theft – and found large increases in crime between 1960 and 1970.[52] The Commission's findings spurred a self-protection movement evidenced by a billion dollar increase in federal aid to local law-enforcement programs, massive expansion in the private security industry, and even the German Shepherd becoming the second most popular breed of dog.[53]

The Nixon Presidential Campaigns in 1968 and 1972 pledged to be tough-on-crime and continued to vilify black communities to provide his constituents with a target as the source of the disorder they feared.[54] To further support a punitive approach, the movement leaned on the idea that the criminal justice system had not only become soft on crime, but also that rehabilitation efforts were futile.[55] Robert Martinson, a leading criminologist, became the face of "Nothing Works," advising the public and legislators alike that the rehabilitation efforts of the criminal justice system were ineffective.[56] Even though many of the studies on which he based his opinions were false and ill-informed, his ideas spread and politicians were able to justify increased, aggressive police presence and mass incarceration over restorative approaches to criminal justice.[57]

The tough-on-crime era led politicians and community members to begin heightened surveillance of impoverished areas and sparked a new target for crime control: drug offenders.[58] At a press conference on June 17, 1971, President Nixon declared drug abuse "public enemy number one." "In order to fight and defeat this enemy," he continued, "it is necessary to wage a new, all-out offensive."[59] This set New York and the rest of the country on a wildly punitive and counterproductive path.

During a 1994 interview, President Nixon's domestic policy chief, John Ehrlichman, explained the ulterior motives. Ehrlichman explained that the Nixon campaign had two enemies: "the antiwar left and black people."[60] Baum quoted Ehrlichman as saying: "We knew we couldn't make it illegal to be either against the war or black, but getting the public to associate the hippies with marijuana and blacks with

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(2021). Available at https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/national-and-local-war-on-crime

[51] *Id.*

[52] Vorenberg, *supra* note 47.

[53] Vorenberg, *supra* note 47.

[54] Baum, Dan, *Legalize it All*, Harper's Magazine (April 2016). Available at https://harpers.org/archive/2016/04/legalize-it-all/.

[55] Miller, Jerome, *The Debate on Rehabilitating Criminals: Is It True That Nothing Works?* Washington Post (March 1989). Available at https://www.prisonpolicy.org/scans/rehab.html).

[56] *Id.*

[57] *Id.*

[58] Mann, Brian, *The Drug Laws That Changed How We Punish*, NPR February 14, 2013. Available at https://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish.

[59] Richard Nixon Foundation, *Public Enemy Number One: A Pragmatic Approach to America's Drug Problem* (2016). Available at https://www.nixonfoundation.org/2016/06/26404/.

[60] Baum, *supra* at note 54.

heroin, and then criminalizing both heavily, we could disrupt those communities."[61] This appears consistent with the sentiment captured in the Haldeman Diaries. "[The] President emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to."[62]

Following Nixon's lead, New York Governor John Rockefeller joined in the War on Drugs, creating unprecedented mandatory prison sentences for those convicted of distributing or even possessing drugs.[63] The 1973 Rockefeller Drug Laws became the standard for most of the country and, eventually, the federal government.[64] Many states adopted harsh sentencing structures that included mandatory minimums and three-strike laws, which impose harsher sentences (often life) on any individual facing sentencing for a third felony convictions.[65] Eventually, state legislatures began restricting access to early release for good behavior with 'truth-in-sentencing' and determinate sentencing practices. In New York, the Sentencing Reform Act of 1995 mandated completion of 85% of a sentence for anyone convicted of a violent felony. Racial tensions skyrocketed as racial disparities built up in New York's prisons system as heightened surveillance in impoverished neighborhoods led to the swift incarceration of millions of people of color.[66] New York's prison population increased, new state and federal prisons were built, and millions of people of color were either directly incarcerated or displaced due to a family member's incarceration.[67] The effects of Rockefeller's draconian drug laws still haunt this country to this day.

The tough-on-crime era also targeted adolescents. In 1978, New York Governor Hugh Carey announced the reversal of his long-standing belief that juveniles should not be tried as adults.[68] Governor Carey had been accused of being soft on crime by his political opponents and his re-election was in jeopardy. On a plane trip to a Rochester campaign event, Governor Carey read that Willie Bosket, the 15-year-old "baby-faced butcher," who killed two men and shot a third during an attempted robbery had been sentenced to just 5 years in a juvenile facility, the maximum for juvenile crime at the time. Upon landing, he called an emergency legislative session to address youth crime declaring that Willie Bosket should have received a much higher sentence.[69] The Juvenile Offender Act of 1978, (the "Willie Bosket Law)" created the label "juvenile offender,"

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[61] Baum. *Supra* at note 54.
[62] H.R. Haldeman Diaries Collection, January 18, 1969 – April 30, 1973 (Monday, April 28 entry), National Archives and Records Administration. Available at https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/haldeman-diaries/37-hrhd-journal-vol02-19690428.pdf.
[63] Mann, *supra* note 58.
[64] Mann, *supra* note 58.
[65] *"Three Strikes" Laws: Five Years Later*, Prison Policy Initiative. Available at 3strikes.pdf (prisonpolicy.org).
[66] Mann, *supra* note 58.
[67] Mann, *supra* note 58.
[68] Eli Hager, *The Willie Bosket Case*, The Marshall Project (Dec. 29, 2014). Available at https://www.themarshallproject.org/2014/12/29/the-willie-bosket-case).
[69] *Id.*

introduced mandatory sentencing for juveniles, and automatic waivers into adult criminal court for designated felonies regardless of age.[70]

Governor Carey won his re-election. He captured the growing public sentiment, as evidenced by a 1978 New York Times Article, to the effect that "most adolescents, like most adults, fully understand that serious crime is wrong, and when they offend the law, they deserve to be punished like adults."[71]

Governor Carey's new approach to juvenile criminal justice was part of a national trend, driven by the same fear underlying the War of Crime. The federal government enacted the Juvenile Justice and Delinquency Prevention Act of 1974, marking juvenile crime as a national concern.[72] The Act added to the Law Enforcement Assistance Act, providing additional federal aid for local law enforcement programs as news media and influential criminologists began warning the country of an influx of "an estimated 270,000 more young predators on the streets."[73] Legislative panic followed. Between 1978 and 1999, all 50 states had enacted legislation to combat juvenile crime in an alarmingly similar fashion to adult crime.[74] Much of this new legislation included provisions like those included in the Willie Bosket Law: (1) legislative exclusions to juvenile court jurisdiction, expansion of juvenile court waivers, and direct filing discretion for prosecutors, which all authorized mandatory and presumptive transfer of a juvenile case from Family Court to Criminal Court; and (2) increasing juvenile sentencing options such as mandatory minimums and new maximums of life imprisonment.[75] The U.S. Supreme Cour got on board. In 1984, *Schall v. Martin* authorized juvenile pre-detention.[76] In 1989, *Stanford v. Kentucky* authorized the juvenile death penalty.[77]

The regulation and attitudes around the country in this stage was a severe departure from the rehabilitative roots of the juvenile justice system. The juvenile system was no longer focused on providing rehabilitation or reformatory experiences for troubled youth but had morphed into a mini-version of the criminal courts. It cast aside the doctrine of *parens patriae*, abdicating its previously assumed parental responsibility for the child. The difference between juveniles and adults – age, development, and

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[70] Lazarow, Katherine, *The Continued Viability of New York's Juvenile Offender Act in Light of Recent National Developments*, 57 New York Law School Law Review 595 (2012-2013) at 604.
[71] Morse, Stephen, *Attacking Youth Crime*, The New York Times (Dec. 30, 1978). Available at https://www.nytimes.com/1978/12/30/archives/attacking-youth-crime.html).
[72] Rovner, Joshua, *Youth Justice by the Numbers*, The Sentencing Project (May 16, 2023). Available at https://www.sentencingproject.org/policy-brief/youth-justice-by-the-numbers/).
[73] *The Superpredator Myth, 25 Years Later*, Equal Justice Initiative (Apr. 7, 2014). Available at https://eji.org/news/superpredator-myth-20-years-later/).
[74] Jackson-Cruz, Elizabeth, *Social Constructionism and Cultivation Theory in Development of the Juvenile "Super-Predator"* (2019). USF Tampa Graduate Theses and Dissertations. https://digitalcommons.usf.edu/etd/7814; Brief of Juvenile Law Center and Center on Race, Inequality, and the Law as Amici Curiae In Support Of Defendant-Appellant Jose Matias at 10-11, People v. Jose Matias, 205 A.D.3d 557 (1st Dept. 2022).
[75] Lazarow, Katherine, *supra* note 70 at 612.
[76] *Schall v. Martin*, 467 U.S. 23, 24 (1984).
[77] *Stanford v. Kentucky*, 492 U.S. 361, 362 (1989)

experience – were being ignored with the adoption of a "you do adult crime, you do adult time," mentality.

After only a year of its implementation, Sobie proffered that, "a sufficiently strong pattern has emerged to warrant alternatives" to the Juvenile Offender Act.[78] He warned legislators that a juvenile offender whose case originates in the adult system, as opposed to Family Court, would be subject to "a far more formalistic, adversarial environment," unfettered media access and publicity, greater prosecutorial authority, less options for diversion, and a lack of social services.[79] In his view, the "vast majority of children...do not require the severity of adult criminal prosecution or punishment," and therefore, the transition to adult prosecution of juveniles could not be justified.[80]

Adding to the increased criminalization of juveniles was the myth of the super-predator. Princeton University Professor John Dilulio coined the term "super-predator" to describe the "radically impulsive, brutally remorseless youngsters," who would be flooding the nation's streets armed and ready to "murder, assault, rob, burglarize, deal deadly drugs, joining gun-toting gangs, and created serious disorder."[81] Unsurprisingly, Dilulio also argued that the majority of these super-predators, raised by fellow criminals under a "social fabric of fragile and undependable social ties," would be predominantly black.[82] Dilulio encouraged quick action to combat the impending onslaught of super-predators and his calls infected juvenile courts everywhere.[83] Black children, especially, did not require *parens patriae,* protective social services, or opportunities for reform – they should to be disciplined and punished like their adult counterparts.

The heightened surveillance in neighborhoods of color, draconian drug laws, mass incarceration, harsher sentencing structures, vindictive sentencing, and barriers to re-entry were, throughout this stage, applied to juveniles in full force and the impact continues. Security officers began appearing in schools. Juvenile indictment and detention rates soared. By 1985, there were about 4,000 people under 18 in adult prisons and jails.[84] By 1997, this number had climbed to 14,500.[85] While arrests for designated felonies had increased, arrests for disorderly conduct, curfew violations, loitering, and drug offenses had increased even more.[86] New York led the charge against the super-predators, becoming the first state to lower the age of criminal responsibility to 13.

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[78] Sobie, *supra* note 31 at 718.
[79] Sobie, *supra* note 31 at 718.
[80] Sobie, *supra* note 31 at 718.
[81] Howell, James, Preventing and Reducing Juvenile Delinquency (2003) at 4.
[82] Dilulio, John, *The Coming of The Super-Predators*, Washington Examiner (Nov. 27, 1995) Available at https://www.washingtonexaminer.com/magazine/1558817/the-coming-of-the-super-predators/).
[83] Forman, James Jr. and Vison, Kayla, *The Superpredator Myth Did a Lot of Damage. Courts Are Beginning to See the Light,* The New York Times (Apr. 20, 2022). Available at https://www.nytimes.com/2022/04/20/opinion/sunday/prison-sentencing-parole-justice.html). *See* also, Bobert, Carroll & Hancock, Lynnell, *Superpredator: The Media Myth that Demonized a Generation of Black Youth,* The Marshall Project (November 20, 2024). Available at https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth/.
[84] Rovner, *supra* note 72.
[85] Rovner, *supra* note 72.
[86] Rovner, *supra* note 72.

It is remarkable that in a relatively short period of time the U.S. experienced at least four moral panics that drove criminal legal policy during Stage 3. As already discussed, there was the panic about crime generally, the panic about drugs, and the panic about super-predators. Starting in the 1990s, we witnessed yet another panic, dubbed the sex panic.[87] This sex panic has bred widespread and ever-escalating panicked legislation, impacted the lives of more than a million people and their families, and caused public hysteria and violence.[88] It also affected countless lives of adolescents. In New York the panic has led to the incarceration and registration of children as young as 14 years old and has continued despite science and evidence that diverges dramatically with the unsupported myths and misperceptions that have gripped the media, politicians, and the public.

This sex panic arose in the wake of the rape and murder of seven-year-old Megan Kanka in 1994. It gave rise to "Megan's Law" in New Jersey which created a registry for individuals convicted of sex offenses. In 1994, President Clinton took up the cause, resulting in the enactment of "The Jacob Wetterling Act" which required every state to establish a registry. In 1996 Congress enacted a federal "Megan's Law" requiring all states to adopt a public notification requirement.

In New York this panic gave rise to a series of laws, including the Sex Offender Registration Act (SORA) effective on January 21, 1996, the Sexual Assault Reform Act (SARA) effective on February 1, 2001, and the Sex Offender Management and Treatment Act (SOMTA) effective on April 4, 2007. SORA established a public registry for individuals, including adolescents convicted of sex offenses, as well as a public notification system. SARA established restrictions that prohibited an individual on the registry and under community supervision by parole or probation from mere presence or residence within 1,000 feet of a school grounds. SOMTA provided for the civil management of individuals presumed to be likely to recidivate following the completion of their prison terms who suffer from a mental abnormality and are either dangerous or require strict and intensive supervision.

For people determined to need civil management, there are two distinct dispositional outcomes: civil confinement to a secure facility or management in the community under strict and intensive supervision and treatment (SIST). The insidious nature of civil management is that it is imposed on a person even after the completion of their criminal sentence. SOMTA also increased the sentences for people convicted of sex offenses.

As of February 2, 2024, there were 42,958 people on New York's registry. According to the New York Attorney General's Office, *A Report on the Sex Offender Management Treatment Act,* as of March 31, 2023, there were 154 people on a regimen of SIST and 332 people under civil commitment in secure treatment facilities.[89]

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[87] Carpenter, Catherine, *Panicked Legislation,* 49 Notre Dame Journal of Legislation 1 (2023) at 2.
[88] *Id.*
[89] *A Report on the Sex Offender Management Treatment Act April 1, 2022 to March 31 2023,* Letitia James, Attorney General, New York State Office of the Attorney General Sex Offender Management Bureau (2023) at 15 and 64.

A further measure of the punitive nature of Stage 3 is the administration of the death penalty. In 1972, the U.S. Supreme Court invalidated all death penalty statutes in *Furman v. Georgia,* 408 U.S. 238 (1972). New York reinstituted the death penalty in 1973. That was struck down by the Court of Appeals in 1984. In 1995, newly elected Governor George Pataki fulfilled a campaign promise and signed legislation reinstating the death penalty in New York. In 2004, that statute was declared unconstitutional by the Court of Appeals.

The harshness of our sentencing regime and incarceration generally for both adults and adolescents, during Stage 3 is well documented. The punitiveness that gripped our carceral philosophy is captured in former U.S. District Court Judge Nancy Gertner's recent article. "I was a judge at a time when the American criminal justice system went off the rails [1994-2011]. We became more punitive than we had ever been in our history, when we imposed punishments harsher than any other country in the Western world, when we were mired in what some have called our failed experiment in mass incarceration."[90] Judge Gertner continued, "[f]rom the moment I ascended to the bench to my very last day, I could not shake my horror at the laws I was obliged to apply, even as I was applying them."[91]

§ 2:5 Stage 4: A Developmental Approach to the Adolescent Legal System - *2005-Present*

By the beginning of the 21st century, the prior 25 years' harsh and punitive approach to both juveniles and adults in the criminal legal system began to be questioned. As the public and policy-makers began to have second thoughts about the retributive approach, mass incarceration, racial disparities, and an utter failure of harsh policies, New York moved into the fourth stage of its juvenile legal system, characterized by an embrace of rehabilitation, deinstitutionalization, treatment, programs, concerns about reentry and reintegration, stigma caused by criminal records, and the awareness that adolescents are different than adults and should be treated appropriately.

Many factors contributed to the widespread dissatisfaction with the punitive approach of the preceding quarter-century, and to an interest in a less draconian response to youth crime and crime generally. First, there was a recognition that the myths that took hold in the tough-on-crime era were by and large not true, and that policy-makers' responses to these myths were causing more harm than good across communities. The moral panic and fear began to subside. Second, juvenile crime rates dropped and the scourge of the "super-predator" never materialized. Third, incarceration-based policies severely strained the state budget. Fourth, mounting evidence indicated that imposing harsh sentences on young people convicted of crimes did not reduce offending or improve public safety. Fifth, a growing body of research in developmental psychology and brain science brought a new understanding of adolescent behavior, and evidence was building that some community-based programs and treatments for adolescents were quite effective. Resistance to the punitive approach began to grow as communities organized

[90] Gertner, Nancy, *Unfinished Business,* Inquest (August 3, 2021).
[91] *Id.*

and demanded reforms in the conditions of confinement and deinstitutionalization. Various reports by advocates and task forces underscored the inhumane conditions in New York Office of Child and Family Services' (OCFS) juvenile facilities.[92]

The first of the major reforms in the 21st century occurred in 2004. The first phase of the Drug Reform Law Act (DLRA) became effective in 2004 and initiated the dismantling of the notorious Rockefeller Drug Laws. These reforms shortened the length of sentences for drug offenses and provided for resentencing for men and women already serving lengthy sentences, many of which were life sentences. The initial DLRA was followed by two subsequent iterations of reform in 2005 and in 2009. The DLRA of 2009 brought with it judicial diversion and the concept that New York should take a therapeutic rather than a punitive approach to substance abuse. These reforms in the adult system affected the sentences of many adolescents who had been caught up in New York's war on drugs. It also represented the winds of change.

The next major event on the path of reform came in 2005 with the Supreme Court of the United States' decision in *Roper v. Simmons,* 543 U.S. 551 (2005), and three cases that followed, *Graham v. Florida,* 560 U.S. 48 (2010), *Miller v. Alabama,* 567 U.S. 460 (2012), and *Montgomery v. Louisiana,* 577 U.S. 190 (2016). The Supreme Court relied upon the significant developments in neuroscience and developmental psychology over the preceding decade to conclude that adolescents are fundamentally different from adults in ways that diminish their culpability and enhance their amenability to rehabilitation. The reasoning of the high court was adopted by the New York Court of Appeals to begin the evolution of the developmental approach in New York jurisprudence in the concurring opinion of Judge Graffeo in *People v. Rudolph,* 21 N.Y. 497, 506 (2013). "[S]ociety's understanding of juvenile brain function and the relationship between youth and unlawful behavior has significantly evolved…Young people who find themselves in the criminal courts are not comparable to adults in many respects – and our jurisprudence should reflect that fact." *Id.* at 506. Slowly, our society and the courts have attempted to roll back the harsh "adult crime, adult time," panic that plagued the turn of the 21st century.

In 2006 there was a significant amendment to the Penal Law that altered and redirected the goals of sentencing. Effective June 7, 2006, Penal Law § 1.05 (6) was amended to include as a fourth statutory purpose of sentencing; "the promotion of their successful and productive reentry and reintegration into society." This was added to the three existing statutory purposes of sentencing – deterrence, incapacitation, and rehabilitation.

These three purposes of sentencing were recognized by the Court of Appeals in *People v. Oliver,* 1 N.Y.2d 152, 160 (1955). Notably, the court rejected retribution as a sentencing goal, finding that "There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution." *Id.* at 160. In 1965 the Temporary Commission on Revision of the Penal Law and Criminal Code specifically rejected the

[92] Weissman, Marsha, Ananthakrishnan, Vidhya, Schiraldi, Vincent, *Moving Beyond Youth Prisons: Lessons from New York City's Implementation of Close to Home,* Columbia University Justice Lab (2019) at 2.

inclusion of retribution among Penal Law § 1.05 factors.[93] Retribution was added as a goal of sentencing by judicial fiat, not by legislation, first in *People v. Notey,* 72 A.D.2d 279, 282 (2d Dept. 1980) and then a month later in *People v. McConnell,* 49 N.Y.2d 340, 346 (1980). No doubt this was the product of that stage 3 era of devotion to punishment. Unfortunately, it is one of the remnants of New York's jurisprudential dark age that has stuck with us and it is certainly not the only vestige of the age of punishment to have carried over. Perhaps the most notable carry-over is the Juvenile Offender Act of 1978 which gave us the juvenile offender laws, that in many instances, treat 14- and 15-year-olds more harshly than their 16- and 17-year-old counterparts.

By the mid-1990s, New York heavily relied on incarceration for young people caught up in the juvenile legal system. During this time, roughly 3,800 youth convicted of crimes annually were sent to large facilities, operated either by the New York State Office of Children and Family Services (OCFS) or by private providers contracted by OCFS.[94] These facilities were largely located in upstate New York, far from youths' homes and communities, particularly for youth from New York City. Upon returning home from these placements, youth often felt disconnected, resulting in poor outcomes.[95] Inside juvenile institutions, harsh and deadly conditions became the norm.[96] By 2008, New York's state-operated youth prisons came under investigation by the U.S. Department of Civil Rights Division. A scathing report followed.[97]

In September 2008, Governor Paterson convened the Task Force on Transforming Juvenile Justice to create a road map for juvenile system reform in New York. The Task Force issued its report in December 2009 entitled *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York.* One of the findings of the Task Force was that "New York's juvenile justice system is failing in its mission to nurture and care for young people in state custody. The state's punitive, correctional approach has damaged the future prospects of these young people, wasted millions of taxpayer dollars, and violated the fundamental principles of positive youth development."[98] The Task Force concluded that the state's punitive juvenile legal system model had failed and that it was in urgent need of reform.[99] The report went on to establish some guiding principles, chiefly that institutionalizing young people should be the choice of absolute last resort,[100] that there should be a recognition that youth are developmentally different from adults[101] and that the racial disparities had to be addressed.[102]

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[93] Allen, Ronald, *Retribution in a Modern Penal Law; The Principle of Aggravated Harm,* 25 Buffalo Law Review 1 (1975) at 3.
[94] Weissman, *supra* note 92 at 1.
[95] Weissman, *supra* note 92 at 1.
[96] Weissman, *supra* note 93 at 12.
[97] Weissman, *supra* note 93 at 18.
[98] A Report of Governor David Paterson's Task Force on Transforming Juvenile Justice, *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State* (2009) at 8.
[99] *Id.* at 10.
[100] *Id.* at 11.
[101] *Id.* at 18.
[102] *Id.* at 27.

With a push from the recommendations in the Task Force Report, advances in research in developmental psychology and neuroscience, the evolving jurisprudence that adolescents are different from adults, and demands for change from advocates and families affected by a punitive juvenile legal system, several broad areas of reform emerged: reduction in incarceration, applying the knowledge about youth development to policy and practice, diverting youth away from the legal system, reducing racial disparities, and a focus on promoting reentry and reintegration.[103]

On March 30, 2012, Governor Andrew Cuomo signed into law the Close to Home (C2H) legislation as part of the 2012-2013 New York State Budget. The new law required the shifting of responsibility for the residential care of NYC youth adjudicated as juvenile delinquents from the state to NYC. The C2H initiative was based upon the recognition that the well-being of youth, families, and their communities would be best served by minimizing the dislocation of youth from their families and building on positive connections between young people and their communities. The goal was to create a developmentally appropriate system without sacrificing public safety. C2H was not purely an initiative that transferred custody for youth from one jurisdiction to another, but rather, a complete reform of a youth legal system.[104] C2H ushered in a number of changes intended to support young people and limit the use of incarceration. Central to this shift was a significant expansion of community-based non-residential alternative options and the establishment of small, home-like facilities to house youth sentenced to and out-of-home placement.[105] By keeping youth "close to home" and connected to their families, schools, and community the goal was to make it easier for them to transition back to their lives after release, and become successful, productive adults.[106]

Recognition of the commonsense notion that adolescents are simply different than adults sparked the push toward New York's partial reform of its juvenile legal system, albeit over the course of many years.[107] In 2017, New York enacted Raise the Age (RTA) legislation that was phased in, becoming effective for 16-year-olds on October 1, 2018, and for 17-year-olds on October 1, 2019. The legislation was officially titled, "[a]n act to amend the criminal procedure law, the executive law, the family court act and the penal law, in relation to raising the age of adult criminal responsibility from sixteen to eighteen so that you who are charged with a crime may be treated in a more age-appropriate manner." (S4121). As a result, New York ended its dubious distinction of being one of the last two states (North Carolina being the other) to prosecute all youth as adults when they turn 16 years of age. New York no longer refuses to recognize what research and science confirm – that adolescents are different and placing them in the adult criminal legal system doesn't work for them and doesn't work for public safety.

RTA created a new Adolescent Offender (A.O.) classification; established a new Youth Part in Superior Court; established a procedure by which almost all felony cases

[103] Weiss, Giudi, *The Fourth Wave, Juvenile Justice Reforms for the Twenty-First Century,* National Campaign to Reform State Juvenile Justice Systems for the Juvenile Justice Funders' Collaborative (2013) at 13.
[104] Weissman, *supra* note 92 at 9.
[105] Weissman, *supra* note 92 at 10.
[106] Weissman, *supra* note 92 at 18. 10.
[107] Gomes, *supra* note 17 at 9.

involving 16- and 17-year-olds can be removed to Family Court; and required misdemeanor cases, with the exception of Vehicle and Traffic Law misdemeanors, to be heard in Family Court.

RTA reflects the reform ideals of the past twenty years. The rationale for RTA included recognition that: youth should be treated in an age appropriate manner; there has been significant scientific evidence that informs us about youth development; there is an evolving jurisprudence that recognized that adolescents are different from adults; there are lifelong implications for young people when they are stigmatized with the scarlet letter of a criminal conviction; youth are less culpable than adults and are more amenable to rehabilitation.

As historic a reform as RTA is, it must be kept in mind that New York State left the Juvenile Offender Act intact. The Juvenile Offender Act, which allows the prosecution of 13-, 14- and 15-year-olds as adults for violent felonies, is a jurisprudential relic from a time when New York turned to punishment and incarceration out of fear and panic and chose to treat young adolescents the same as adults. As such, we are left with an adolescent legal system that simultaneously embraces treating younger adolescents as being the same as adults, with punishment as the goal and rehabilitation as an afterthought, while at the same time treating older adolescents, not as adults, but age-appropriately, with the primary goal of rehabilitation and successful reentry and reintegration.

Effective November 2, 2021, Article 720 of the CPL (Youthful Offender Procedure) was amended to add a new subsection, CPL § 720.20 (5) that now provides an opportunity to apply for a youthful offender adjudication retroactively, for anyone otherwise eligible at the time of sentencing who had previously been denied youthful offender status and has not been convicted of any crime in at least five years since either the imposition of the sentence or from the date of release from incarceration, if an incarcerative sentence was imposed. According to the bill sponsor's memo, this legislation was the result of a recognition that youthful offender adjudication is an important tool to limit the life-long consequences a criminal conviction can have for many young people. "Retroactive youthful offender adjudication will enable more New Yorkers to fully integrate into their communities without being continuously stigmatized for mistakes made in their youth."[108]

Raising the Lower Age of Juvenile Delinquency (RTLA) became effective on December 29, 2022. The law raises the lower age of juvenile delinquency under the Family Court Act from 7 to 12 years of age, with an exception for homicide. The amendment also raises the age for youth in secure detention from 10 to 13 years of age, unless the youth is alleged to have committed a homicide offense. In addition, RTLA requires local departments of social services to develop differential responses for children younger than 12 who do not fall under the definition of juvenile delinquent and whose behavior would otherwise bring them under the jurisdiction of Article 3 of the Family Court Act. The justification for the bill was "to help reduce future interaction with the

[108] Assembly bill sponsor's memo to A6769.

juvenile justice system and child welfare system…by ensuring children receive the necessary services."[109]

An awareness of the history of the development of New York's juvenile legal system is important. Many relics from the age of retribution, "nothing works," fear of the "super-predator," and panicked legislation over sexual offending have been carried over to this new era of reform. If we are not vigilant and fail to fight vigorously to keep the progress we have made, we run the risk of slipping into another dark age of adolescent jurisprudence.

[109] Assembly bill sponsor's memo to A04982A.

CHAPTER 3

ADOLESCENTS ARE DIFFERENT

CHAPTER 3 SECTIONS

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ADOLESCENTS ARE DIFFERENT

Alan Rosenthal and Shoshanna Must

§ 3:1 Adolescents Are Different

"Adolescents are different from adults – and juvenile offenders are different from adult criminals"[1] in ways that have come to be judicially recognized, and that impact how the criminal legal system should respond to their criminal behavior with regard to removal to family court, youthful offender adjudication, sentencing, and SORA. That adolescence is characterized by a unique set of features that warrant its consideration as a distinct period of development is indisputably supported by the research of the past three decades.[2]

The Supreme Court has famously said, "as any parent knows and as the scientific and sociological studies" confirm, adolescents are different than adults. *Roper v. Simmons,* 543 U.S. 551, 569 (2005). The differences between juvenile and adult offenders are "marked and well understood." *Id.* at 572. The difference between adolescents and adults has been acknowledged by many courts in different contexts. Per *Miller v. Alabama,* 567 U.S. 460 (2012). for example: adolescents are "constitutionally different from adults for the purposes of sentencing." *Id.* at 471.

"[O]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults." *J.D.B. v. North Carolina,* 564 U.S. 261, 274 (2011). "Certainly, the youthful offender statute reflects the legislature's recognition of the difference between a youth and an adult, and the legislature clearly made a policy choice to give a class of young people a distinct benefit." *People v. Francis,* 30 N.Y.3d 737, 750 (2018).

The differences are recognized in the Raise the Age legislation. The statutory construct for removal of cases from youth part to family court reflects a "recognition on the part of New York's Legislature that justice requires that adolescent offenders, as well as juvenile offenders, be treated differently than adults within the criminal justice system, given the unique circumstances and needs" of adolescents. *People v. J.P.,* 63 Misc. 3d 635, 639 (Sup. Ct. Bronx County 2019). In *People v. Rudolph,* 21 N.Y.3d 497 (2013), Judge Graffeo's concurring opinion recognized the importance of the differences between adolescents and adults and cited to the Supreme Court's decision in *Graham v. Florida,* 560 U.S. 48 (2010), in asserting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." 21 N.Y.3d at 506.

[1] Scott, Elizabeth & Steinberg, Laurence, Rethinking Juvenile Justice (2008) at 13.
[2] *Id.* at 29.

§ 3:2 Evolving Jurisprudence

Youth parts and trial court judges continue to be reluctant to order removal to family court or grant youthful offender adjudications, impose harsh sentences, and are punitive with SORA determinations regarding adolescents, yet the rationales underlying these predilections are contradicted by psychological and neuroscientific evidence that unequivocally demonstrates significant changes in brain development, behavior, and personality throughout the life-course, and especially during adolescence and through the early to mid-twenties.[3]

Undoubtedly, the courts lag far behind developments in science. We all suffer – mostly our clients – as we prod the courts to catch up. Despite their penchant for punishment, there is an evolving jurisprudence that is driven both by science and by the U.S. Supreme Court decisions relating to adolescents. Defense counsel should use this developing jurisprudence and science to educate, persuade, and cajole courts to adopt a more enlightened approach whenever adolescent defendants appear before them.

In a series of decisions regarding the sentencing of adolescents, beginning with *Roper v. Simmons,* 543 U.S. 551 (2005), and continuing with *Graham v. Florida,* 560 U.S. 48 (2010), *Miller v. Alabama,* 567 U.S. 460 (2012), and *Montgomery v. Louisiana,* 577 U.S. 190 (2016), the U.S. Supreme Court has established that adolescents are fundamentally different from adults in ways that diminish their culpability and enhance their amenability to and likelihood of reform and rehabilitation. These differences, addressed below in § 3:4 and § 3:5, when considered together, require that "the chronological age of a minor itself" be treated as "a relevant mitigating factor of great weight" (*Miller*, 567 U.S. at 476), and that adolescents be given special consideration and protection by the courts.

The logic and reasoning of the U.S. Supreme Court has been adopted by the New York Court of Appeals. Marking a beginning for the evolution of our jurisprudence in New York, Judge Graffeo's concurring opinion in *People v. Rudolph,* 21 N.Y.3d 497 (2013), embraced the emerging jurisprudence, stating:

> *[S]ociety's understanding of juvenile brain function and the relationship between youth and unlawful behavior has significantly evolved. As the United State Supreme Court has recognized, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds… These developments in the body of knowledge concerning juvenile development underscore the need for judicial procedures that are solicitous of the interests of vulnerable youth, especially under New*

[3] Casey, B.J., Simmons, Cortney, Somerville, Leah & Baskin-Sommers, Arielle, *Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders,* 5 Annual Review of Criminology 321 (2022). Steinberg, Laurence, Cauffman, Elizabeth & Monahan, Kathryn, *Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders,* U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (2015) at 7-8. Perker, Selen & Chester, Lael, *Time for Change: A National Scan and Analysis of Hybrid Justice Systems for Emerging Adults,* Columbia University Justice Lab (2023) at 15. National Academies of Sciences, Engineering, and Medicine, *The Promise of Adolescence: Realizing Opportunity for All Youth* (2019) at 17 & 22.

> *York's youthful offender process… Young people who find themselves in the criminal courts are not comparable to adults in many respects – and our jurisprudence should reflect that fact.*

Id. at 506. This sentiment was repeated by the court in *People v. Francis,* 30 N.Y.3d 737, 750 (2018). Even the website, NYCourts.gov, seems to recognize the change, stating, "Scientific research has shown that prosecuting and placing children in the adult criminal justice system does not work."[4]

Lower courts have been slower to adopt this evolving view but have done so on occasion. In several cases, there has been a recognition that our jurisprudence must acknowledge that adolescents should be treated differently by the criminal legal system because of the "scientific studies showing that brain development is incomplete through late adolescence, impairing the ability of young people to assess the risks and consequences of their acts." *People v. D.L.,* 62 Misc. 3d 900, 905 (Family Ct. Monroe County 2018). As a result of the scientific evidence establishing the differences, "children are less culpable in the criminal context than adults and more amenable to change," thus warranting special treatment. *Id.* at 905.

In *People v. Doe*, 62 Misc.3d 574 (Sup. Ct. Queens County 2018), Judge Zayas recognized this evolving jurisprudence: "Courts and legislators have relatively recently begun to acknowledge, in a more thoughtful and forceful way, that younger offenders are often less culpable than adults who commit the same offenses and, therefore, should be treated differently by the criminal justice system." *Id.* at 579. For other cases acknowledging this evolving jurisprudence and requiring different treatment of adolescents than adults within the criminal legal system, *see People v. J.P.,* 63 Misc.3d 635, 649 (Sup. Ct. Bronx County 2019) and *People v. H.M.,* 63 Misc.3d 1213(A) (Sup. Ct. Bronx County 2019).

The RTA legislation has also contributed to this evolving jurisprudence. The Senate RTA bill Sponsor's Memo notes that the legislation was informed by both the scientific evidence regarding child development and brain science, and by the U.S. Supreme Court decisions beginning with *Roper v. Simmons.* A primary rationale for the RTA legislation was the knowledge that adolescents are "less mentally culpable for their actions than adults" and "have a greater chance of rehabilitation."

§ 3:3 Judicial Recognition of the Differences Between Adolescents and Adults

The U.S. Supreme Court decisions in *Roper, Graham, Miller* and *Montgomery* identified three general differences between adolescents and adults, which have been referred to as "salient characteristics" or "signature qualities." These three characteristics are that:

1. Adolescents "have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking."
2. Adolescents "are more vulnerable to negative influences and outside pressures, including from their family and peers: they have limited control over their

[4] NYCourts.gov, *Raise the Age.* Available at Raise the Age (RTA) | NY CourtHelp (nycourts.gov).

environment and lack the ability to extricate themselves from horrific, crime-producing settings."

3. An adolescent's character "is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity."

See Montgomery v. Louisiana, 577 U.S. 190, 207 (2016).

As a result of these characteristics, the Supreme Court repeatedly held in that quartet of cases that adolescents have both a "diminished culpability" and a "heightened capacity for change." *Miller*, 567 U.S. at 479.

The reasoning of the Supreme Court is instructive to defense counsel representing adolescents in non-capital cases; it applies with equal force to issues of removal, Y.O., sentencing, and SORA. The Center for Appellate Litigation has applied this reasoning to model jury instructions, a link to which can be found in the Appendix of this guide.

The Supreme Court reasoned that an adolescent has diminished culpability for several reasons. First, an adolescent's "transient rashness, proclivity for risk, and inability to assess consequences" lessen the "moral culpability." *Miller,* 567 U.S. at 471. Second, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68. Third, "[t]he ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively." *Miller*, 567 U.S. at 492.

The Supreme Court also reasoned that an adolescent is more capable of change than adults. This is because, first, the "signature qualities" of adolescence "are all transient." *Miller,* 567 U.S. at 476. As the person matures, those qualities of recklessness and risk-taking diminish. A greater possibility exists that the adolescent's character deficiencies will reform over time. Second, as the adolescent matures, the brain will continue to develop and will provide a balance for self-control. Third, "[f]or most teens [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Roper,* 543 U.S. at 570. Fourth, it is the "rare juvenile offender whose crime reflects irreparable corruption." *Graham,* 560 U.S. at 76.

This understanding has not been limited to the U.S. Supreme Court. New York courts have also acknowledged the "signature qualities" of adolescence and recognized that our growing scientific knowledge about adolescence must play a critical role in the evolving jurisprudence. *See, People v. Rudolph,* 21 N.Y.3d 497, 506 (2013); *People v. Francis,* 30 N.Y.3d 737, 759 (2018); *People v. H.M.,* 63 Misc. 3d 1213(A) (Sup. Ct. Bronx County 2019); *People v. D.L.,* 62 Misc.3d 900, 906 (Family Ct. Monroe County 2018).

A corollary to this recognition is that the three "signature qualities" make it more likely that "youths will engage in criminal conduct." *People v. Doe,* 62 Misc.3d 574, 580 (Sup. Ct.

Queens County 2018). It is normative adolescent behavior.[5] Rare is the teenager who has not committed some act of delinquency during their adolescence. Most don't get caught. This was the basis for Judge Graffeo to observe in *People v. Rudolph* that "society's understanding of juvenile brain function and the relationship between youth and unlawful behavior has significantly evolved." *Rudolph*, 21 N.Y.3d at 506.

§ 3:4 Developmental Science of Adolescents

Adolescence is distinct from both childhood and adulthood due to the outsized developmental advances that take place during this time. Second only to infancy, this time period marks sweeping and radical changes across all areas of a person's development; it is both transitional and formative, as dramatic biological, psychological, behavioral, social, and emotional change occurs.[6] The confluence of emotional, cognitive, and identity development, based on endogenous and exogenous influence, compels recognition of adolescents as separate and distinct from their younger or older counterparts, especially regarding conceptualizing behavior.

Developmental science has long recognized the dynamic process of childhood into adolescence. Individuation is followed by identity formation, and cognitive and emotional changes abound, along with a propensity toward risky behavior; adolescence is often a period of tumult and intensity. Broadly speaking, at a time where youth are "finding themselves," away from their parents and in relation to their peers, they are faced with limitations in their ability to anticipate the future or perceive the import of their choices and are guided by emotions over logic.[7] These conditions increase the probability of reckless behaviors that lead to legal involvement. The following areas of development are distinctive for adolescents and are important for understanding why criminal behavior is often prevalent during this period.

Adolescents Are More Impulsive and Have Less Self-Control

When considering adolescent behavior through a developmental lens, the correlation between overall immaturity and risky behavior is evident. A youth is more short-sighted, more intense, and more reckless in terms of what is considered, what is relevant, and what is expressed. Research indicates that, overall, adolescents have a harder time controlling their mood, behavior, and impulses than adults.[8] Adolescents are hypersensitive to emotional contexts, which impacts their self-control. That is, heightened levels of emotional intensity decrease the ability to self-manage behavior. For example, adolescents demonstrate much less self-control

[5] Steinberg, Laurence & Scott, Elizabeth, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty,* 58 American Psychologist 1009 (2003) at 1015.
[6] Tolan, Patrick, Walker, Tammi, Reppucci, N. Dickon, *Applying Developmental Criminology to Law: Reconsidering Juvenile Sex Offenses,* 14 Justice Research and Policy 117 (2012) at 126. Scott, Elizabeth & Steinberg, Laurence, Rethinking Juvenile Justice (2008) at 32.
[7] Scott, Elizabeth & Steinberg, Laurence, Rethinking Juvenile Justice (2008) at 43.
[8] Steinberg, Laurence, Graham, Sandra., O'Brien, Lia, Woolard, Jennifer, Cauffman, Elizabeth., & Banich, Marie *Age Differences in Future Orientation and Delay Discounting,* 80 Child Development 28 (2009) at 39.

than adults when asked to inhibit responses when presented with emotional cues.[9] The ability to use effective cognitive strategies to control emotion in social situations increases with age; adolescents use less beneficial coping strategies to deal with their emotions when compared to adults. Even as adolescents improve in their logical abilities, evidence suggests that, due to their limited life experience, they are less readily able to deploy logical reasoning to real-world situations. In addition to this limitation, they are not as able to quickly process information to inform decision-making. The psychosocial development lags behind the basic cognitive abilities, and at times can interfere with the intact cognitive processes. Age-related differences in decision-making abilities are also influenced by the social and emotional distinctions between adolescents and adults, demonstrating the role that a tenuous grasp on emotional management has on thinking and actions.[10] Thus, in highly stimulating situations that involve sensation-seeking or social pressures, adolescents struggle to manage their emotions effectively, in turn inhibiting their ability to think "clearly," despite their general decision-making ability. It is understandable then how adolescents can participate in experiences that are harmful to themselves as well as to others, even if, fundamentally, they did "know better."

Adolescents are Heavily Influenced by Their Peers

Adolescents are also more influenced by others, particularly their own social group,[11] and this is especially pronounced in older adolescents.[12] This tendency relates to the individuation process, by which adolescence is a time of separate from caregivers, and identity formation. Youth seek increased independence and find identification instead with peers. They both compare and conform: social comparison involves peers measuring their behavior against the behavior of others; social conformity involves peers adapting their behavior and persona to one another's. The influence of peers on adolescent behavior is much stronger than in any other time-period across the lifespan.[13] Research shows that adolescents make risky decisions more than both younger children and older adults, and that they make these decisions more often in the presence of peers than when alone. External "peer pressure" may or may not even play a role.[14] In other words, while peer pressure may be an influence on adolescent behavior, the inherent need for connection through peer approval and rejection-avoidance plays a more subtle role in adolescent behavior, as they seek to compare and conform. Recognizing these conditions allows for a more nuanced understanding of why adolescents more often commit crimes in groups, and why antisocial behavior is regularly observed during the late-adolescent period.

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[9] Insel, Catherine, Tabashneck, Stephanie, Shen, Francis, Edersheim, Judith, Kinscherff, Robert *White Paper on the Science of Late Adolescents A Guide for Judges, Attorneys, and Policymakers* Center for Law, Brain & Behavior at Massachusetts General Hospital (2022) at 2 and 13,

[10] Scott, Elizabeth & Steinberg, Lawrence, *Adolescent Development and the Regulation of Youth Crime*, 18 *The Future of Children 15* (2009) at 20.

[11] Scott, *supra* note 1at 38-39.

[12] Gardner, Margo, & Steinberg, Lawrence *Peer influence on risk taking, risk preference, and risky decision making in adolescence and adulthood: an experimental study,* 41 Developmental Psychology 625 (2005) at 632.

[13] Steinberg, Lawrence. *Risk Taking in Adolescence: What Changes and Why?* 1021 Annals New York Academy of Science 51 (2004) at 56.

[14] Scott, Elizabeth, Reppucci, Dickon N., & Woolard, Jennifer, *Evaluating Adolescent Decision Making in Legal Contexts,* 19 Law and Human Behavior 221 (1995) at 230. Monahan, Kathryn, Steinberg, Lawrence, & Cauffman, Elizabeth *Affiliation with Antisocial Peers, Susceptibility to Peer Influence, and Antisocial Behavior During the Transition to* Adulthood, 45 Developmental Psychology 1520 (2009) at 1527.

Adolescents Take More Risks and Think More About Rewards

Adolescents may perceive risk sufficiently, but in their evaluation of risk, minimize the dangers of risk-taking behavior.[15] They tend to focus more on the reward components of the behavior, and give less consideration to possible negative outcomes.[16] Sensation-seeking propensities and an emphasis on immediate gratification also inform the reward-focused view of "risky" behavior (e.g., using drugs or driving recklessly).[17] Peer influences on the reward system operate simultaneously, and also affect the perception of risk.[18] Adolescents may consider heavily the possibility of peer disapproval, the social currency at stake, and the thrill involved in their risk/reward analysis.

As discussed above, emotional pitch also influences the evaluation of risk. Under intense arousal and emotions, adolescents tend to make worse decisions, especially when it comes to evaluating risk versus reward.[19] The additional strain of more complex feelings such as rejection, anxiety, and desire make it more difficult for adolescents to think through consequences or use common sense.

Adolescents' unique consideration of reward over risk is further amplified by inherent limitations in executive functioning (specifically, planning) capacities. Adolescents are limited both in their planning capacities and consideration of the future.[20] They tend to plan for the short-term rather than the future, and to be more focused on the "here and now" than more abstract long-term considerations. Decreases in planning ability occur between ages 10 and 15, making adolescents worse in their ability to plan. This suggests that adolescents do not think about the long-term consequences of their behavior, making them more prone to engage in risky decisions and behavior. Adolescents who are worse at delaying gratification are more susceptible to real-world risk-taking, such as drug use, reckless driving, unprotected sex, and other dangerous behavior.

In addition to brain structure development, which will be discussed below in § 3:5, reasons for the deficits during this time frame include limited life experience, i.e., less memory to draw upon to inform decisions to delay gratification and consider long-term implications of behavior. Consequences 5 or 10 years into the future may be too far-reaching for an adolescent to consider. It is developmentally appropriate for older youths to focus more on short-term rewards than future risks.

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[15] Gardner, *supra* note 12 at 632.
[16] Scott, *supra* note 1 at 42.
[17] Van Duijvenvoorde, Anna C.K., Van Hoorn, Jorien, Blankenstein, Neeltje E. *Risks and rewards in adolescent decision-making,* 48 Current Opinion in Psychology Article 101457 (2022) at 1.
[18] Breiner, Kaitlyn, et al, *Combined effects of peer presence, social cues, and rewards on cognitive control in adolescents* 60 Developmental Psychobiology 292 (2018) at 298.
[19] Botdorf, Morgan, Rosenbaum, Gail M., Patrianakos, Jamie, Steinberg, Laurence & Chein, Jason M. *Adolescent risk-taking is predicted by individual differences in cognitive control over emotional, but not non-emotional, response conflict*, 31 Cognition and Emotion 972 (2017) at 977.
[20] Scott, *supra* note 10 at 20.

This Risky Phase Is Likely Time-Limited

Experimentation, which includes risky behavior, is a normal part of identity development, and not aberrant.[21] Risky behaviors, however pronounced in their expression and possible outcomes, are also transient and generally do not persist into adulthood. During maturation, these tendencies decrease. As a stable identity is formed, self-esteem and self-reliance are enhanced, and independence from peers grows in the latter part of adolescence, risky behavior desists. Much of adolescent criminal misconduct results from developmental habits that are characteristic of adolescence. While this fact supports optimism and relief for parents and stakeholders in youth development, it is of equal importance in the legal framework.

Late Adolescence/Emerging Adults

Roper v. Simmons, 543 U.S. 551 (2005) and its progeny were premised on the notion that adolescents are different from adults and must be treated different from adults for the purposes of sentencing. The age of demarcation for the signature qualities of youth in those cases was set at seventeen years. *Miller v. Alabama,* 567 U.S. 460 (2012). *Miller* was informed by an evolving understanding of adolescent brain development and developmental research. Since the decision, scientific research has emerged that reinforces *Miller,* but takes it a step further, extending the age of adolescent behavioral development through the early to mid-twenties.[22] Some have suggested that the 18- to 25-year-old group be recognized as a distinct developmental category – one during which adolescents "emerge into adulthood.[23] In the Massachusetts case, *Commonwealth v. Mattis,* "emerging adults" was defined as someone who is eighteen, nineteen, or twenty years of age. 493 Mass. 216, 217 (2024) (footnote 1).

For some of our clients the maturation and development processes are further delayed and disrupted by childhood trauma. Trauma may cause significant shifts in developmental trajectories, adversely affecting biological, social, cognitive, emotional, and spiritual/existential development.[24]

In *Commonwealth v. Mattis*, the Supreme Judicial Court of Massachusetts recognized the "unique characteristics" of emerging adults that render them "constitutionally different" from adults for purposes of sentencing. *Id.* at 237. The court approved four core findings regarding the science of emerging adults' brains. Emerging adults: (1) have a lack of impulse control similar to 16 and 17-year-olds in emotionally arousing situations, (2) are more prone to risk-taking in pursuit of rewards than those under 18 and those over 21 years, (3) are more susceptible to peer influence than individuals over 21 years, and (4) have a greater capacity for change than older individuals due to the plasticity of their brains. *Id* at 225.

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[21] Scott, *supra* note10 at 23-24.
[22] Insel, *supra* note 9 Catherine, at 2.
[23] Perker, Selen & Chester, Lael, *Time for Change: A National Scan and Analysis of Hybrid Justice Systems for Emerging Adults,* Columbia University Justice Lab (2023) at 15.
[24] Cruz, Daniel, Lichten, Mattew, Berg, Kevin & George, Preethi, *Developmental trauma: Conceptual framework, associated risks and comorbidities, and evaluation and treatment,* 13 Frontiers in Psychiatry 800687 (2022) at 2.

A 2019 report from the National Academies of Science explains this shift in the understanding of adolescence, noting that "the unique period of brain development and heightened brain plasticity . . . continues into the mid-20s," and that "most 18- to 25-year-olds experience a prolonged period of transition to independent adulthood, a worldwide trend that blurs the boundary between adolescence and 'young adulthood' developmentally speaking." The report concludes that "it would be developmentally arbitrary in developmental terms to draw a cut-off line at age 18.[25]

While legal distinctions have tended to separate 18- to 20-year-olds ("late adolescents'), separating this age group from both younger adolescents and adults, developmental science now describes overwhelming similarities between this group and younger adolescents.[26] Brain development continues during this time, as the various processes that cause behavioral vulnerabilities continue through one's late teens and early 20s.[27] The prefrontal cortex (the part of the brain largely responsible for planning, reasoning and judgment) is one of the last parts of the brain to develop, continuing into one's mid-twenties.[28] The developmental and neurological distinctions made between young and mid-adolescents and adults also apply to late adolescents.

For example, impulsivity and peer influence for those ages 18 to 20 have been demonstrated to be comparable to 16- and 17-year-old youths. Like younger adolescents, 18- to 20-year-olds are still undergoing changes in the prefrontal cortex, experiencing the vulnerability of increased impulsivity, and lacking fully developed planning ability and foresight into the consequences of their actions.[29] The impact of emotions on decision-making is also similar between this older adolescent group and their younger counterparts. Like their younger versions, late adolescents take risks to obtain certain rewards, specifically in the realm of thrill- or sensation-seeking and show higher rates of risky behavior compared to children or adults. Thus, while treated differently when it comes to laws and legal considerations, developmental science informs that late adolescence approximates middle adolescence in terms of immaturity, impulsiveness, and susceptibility to influence.

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[25] National Academies of Sciences, Engineering, and Medicine, *The Promise of Adolescence: Realizing Opportunity for All Youth* (2019) at 22. Available at https://nap.nationalacademies.org/resource/25388/interactive/.

[26] *Commonwealth v. Mattis,* 493 Mass. 216 (2024); Insel, Catherine, Tabashneck, Stephanie, Shen, Francis, Edersheim, Judith, Kinscherff, Robert *White Paper on the Science of Late Adolescents A Guide for Judges, Attorneys, and Policymakers* Center for Law, Brain & Behavior at Massachusetts General Hospital (2022) at 2.

[27] Casey, *supra* note 3 at 325.

[28] Somerville, Leah, *Searching for Signatures of Brain Maturity. What Are We Searching For*? 92 Neuron 1164 (2016) at 1165.

[29] Icenogle, Grace et al. *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample*. 43 Law and Human Behavior 69 (2019) at 69; Sowell, Elizabeth, Thompson, Paul, Holmes, Colin, Jernigan, Terry, & Toga, Arthur, *In vivo evidence for post-adolescent brain maturation in frontal and striatal regions* 2 Nature 859 (1999) at 860; Steinberg, Laurence et al., *Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation,* 21 Developmental Science e12532 (2018) at 2 and 8.

PRACTICE TIPS

Advances in science have led inextricably to the conclusion that our clients between the ages of 18 to 21 ("emerging adults") have the signature characteristics of youth that warrant their being treated differently than adults for purposes of sentencing. This is a particularly important point to make to the judge when arguing for a youthful offender adjudication for a client who was 18 at the time of the offense, or for a client who is not eligible for youthful offender, but who is less than 21, and for purposes of sentencing should be considered less culpable than an adult and receive an age-appropriate sentence.

§ 3:5 Brain Science of Adolescents

The formidable body of social science research outlined above was made possible largely through longitudinal studies. More recently, however, neuroscience research using brain imaging has reinforced what social scientists observed in natural and lab settings.[30] Specifically, both social science and neuroscience inform us that the brain continues to mature through adolescence and into young adulthood, with significant changes in lobal structure as well as overall brain function, helping to define this period as both "transitional" and "formative."[31]

Plasticity is a core component of brain development in adolescence; it is now widely understood that the "brain is under construction" during the time of adolescence.[32] Maturation processes influence this plasticity and involve the strengthening and weakening of neural connections through pruning and myelination.[33] Synaptic pruning is the process whereby unused pathways between neurons are eliminated, increasing the brain's efficiency through streamlining connective processes.[34] While this pruning occurs around the brain, it is most concentrated in the prefrontal lobe during adolescence.[35] Myelination involves the strengthening of connections: electrical impulses are transmitted through the brain more seamlessly due to increased conduction by a fatty substance formed around the neurons.[36] The increase of white matter in the prefrontal cortex enhances cognitive capacities. Myelination processes increase from adolescence and extend into adulthood, which explains why the prefrontal lobe is one of the last brain regions to fully develop.[37] Both pruning and myelination are required for emotional processing and behavioral control, which are observed to gradually take root during this time

[30] Steinberg, Laurence, *Adolescent Development and Juvenile Justice,* 5 Annual Review of Clinical Psychology 459 (2009) at 465-466.
[31] Scott, *supra* note 1 at 32.
[32] Arain, Mariam, Haque, Maliha, Johal, Lina, Mathur, Puja, Nel, Wynand, Rais, Afsha, Ranbir, Sandhu, Sharma, Sushil, *Maturation of the adolescent brain,* 9 Neuropsychiatric Disease and Treatment 449 (2013) at 449-450. Kanwal, Jagmeet, Jin Jung You, Zhang, Ming *Brain Plasticity During Adolescence: Effects of Stress, Sleep, Sex and Sounds on Decision Making,* 6 Anatomy and Physiology: Current Research 1 (2016) at 1.
[33] Giedd, Jay, Molloy, Elizabeth, Blumenthal, Jonathan, *Adolescent Brain Maturation,* Chapter 2 in Encyclopedia of the Human Brian, V.S. Ramachandran Ed. (2002) at 19.
[34] Monahan, Kathryn, Steinberg, Laurence, & Piquero, Alex, *Juvenile justice policy and practice: A developmental perspective*, 44 Crime and Justice: A Review of Research 577 (2015) at 582.
[35] Spear, Linda *Adolescent Neurodevelopment,* 52 Journal of Adolescent Health 57 (2013) at 58-59.
[36] *Id.* at 58-59.
[37] *Id.* at 59.

period.[38] Dopaminergic changes in both the prefrontal cortex and limbic system have implications for increased sensation-seeking behavior and emotional intensity due to the role this neurotransmitter plays in emotions and the brain's reward/punishment circuitry.[39]

The prefrontal cortex and limbic system are heavily implicated in adolescent development, particularly as relates to executive functioning and emotional changes.[40] Understanding the brain's development helps explain its influence on adolescents' risk-taking propensities.

Prefrontal Cortex

Brain regions, such as the prefrontal cortex, increase their connectivity through the pruning and myelination process described above.[41] The prefrontal cortex is responsible for (among other functions) problem solving, judgment, impulse control, and social and sexual behavior.[42] Because this brain region is one of the last to fully develop, many adolescents display extreme immaturity. Even if adolescents understand something is dangerous based on experience, an immature prefrontal cortex can still produce risky behavior, especially if emotions are implicated, overwhelming the brain system altogether.[43] Specific regions of the brain (e.g., ventral striatum) show increased activity when engaged in risk-taking or sensation-seeking behaviors,[44] showing a correlation between brain function and behavioral presentation.[45] As such, adolescents are more likely to engage in problematic behavior due to their neurological limitations. While executive functions such as impulse regulation, consequential thinking, and planning and organization evolve, the ever-changing states predispose adolescents to risk-taking behavior. Over time, brain systems that control self-regulation increase. As adolescents age into adulthood, more completely developed brain regions strengthen self-control capacities.[46] An adult brain would show a much more connected system among brain regions due to the success of the pruning and myelination processes, with higher-order thinking functions more established due to prefrontal cortex development.

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[38] Thomson, Ross, Lewis, Marc, Calkins, Susan *Reassessing Emotional Regulation,* 2 Child Development Perspectives 124 (2008) at 128.
[39] Steinberg, Laurence, *A Social Neuroscience Perspective on Adolescent Risk-Taking* 28 Developmental Review 78 (2008) at 83.
[40] *Id.* at 96.
[41] Spear, *supra* note 35 at 58.
[42] Arain, *supra* note 32 at 449.
[43] Qu, Yang, Galvan, Adriana, Fuligni, Andrew, Lieberman, Matthew, & Telzer, Eva, *Longitudinal Changes in Prefrontal Cortex Activation Underlie Declines in Adolescent Risk Taking*, 35 The Journal of Neuroscience 11308 (2015) at 11313.
[44] Galvan, Adriana, Hare, Todd, Parra, Cindy, Penn, Jackie, Voss, Henning, Glover, Gary, Casey, B.J., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26 The Journal of Neuroscience 6885 (2006) at 6891.
[45] Scott, *supra* note 1 at 44.
[46] Luna, Beatriz et al., *Maturation of Widely Distributed Brain Function Subserves Cognitive Development* 13 Neuroimage 786 (2001) at 791.

Limbic System

The limbic system is composed of the amygdala, hippocampus, and hypothalamus.[47] These structures are responsible for emotions such as fear and anger, and the threat activation system. Studies demonstrate that adolescents tend to rely more on the emotional regions of their brains than the prefrontal cortex region during interpersonal interactions and when making decisions.[48] During early adolescence, persons experience stronger emotional intensity and lability and are more sensitive to social influences and bonding, which increase risk-taking propensities. Adolescents tend to be more swayed by, as well as misinterpret, emotions, making them quick to anger and to make decisions based on emotions. during this time of growth, dopamine, the neurotransmitter that helps one experience pleasure and pain, decreases.[49] Serotonin, which is responsible for mood and impulse control, among other functions, also decreases.[50] The decreased levels of dopamine and serotonin serve to increase the value of sensation and reward-seeking behavior.[51] Adolescents may also require higher levels of stimulation to achieve the same levels of pleasure, driving them to riskier decisions.

Because the brain structure changes during this time of rapid growth, adolescents are primed to make worse decisions, have impaired self-control, and are more focused on high reward and immediate gain. The limbic system strongly influences a person's propensity for stronger emotional responses and increased sensation-seeking, and overrides the inchoate prefrontal process, which is still in development. As such, an adolescent's responses and decisions are based more on emotion and less on basic logic. The interplay between both the prefrontal and limbic regions of the brain can create challenging situations for any adolescent in thinking and feeling his or her way through a potentially risky situation.

Brain Function

In addition to structural changes in the brain, changes related to brain function also have profound impact on neurological development. Self-regulation develops over time as different brain regions are implicated and the adolescent brain becomes more efficient at self-regulating, especially in terms of risk-taking behaviors.[52] Adolescents also experience increased sensitivity to pleasurable experiences. Largely due to the influence of hormonal changes during puberty, brain reward-center activity spikes when adolescents expect something "pleasurable" to happen.[53] Even if there is a risk, if an adolescent expects something pleasurable to happen, they are more likely to engage in that act in pursuit of a reward. Lastly, the brain's evolving response to arousing stimuli reflects the emotional processing and self-control regions becoming more established. The influence of peer pressure decreases as an adolescent ages. He or she becomes

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[47] Catani, Marco, Dell-Acqua, Flavio, Thiebaut de Schotton, Michel, *A revised limbic system model for memory, emotion and behavior,* 37 Neuroscience and Biobehavioral Reviews 1724 (2013) at 1729.
[48] Arain, *supra* note 32 at 449.
[49] Arain, *supra* note 32 at 452.
[50] Arain, *supra* note 32 at 452.
[51] Arain, *supra* note 32 at 449.
[52] Luna, *supra* note 46 at 791.
[53] Bjork et al., *Incentive-Elicited Brain Activation in Adolescents: Similarities and Differences in Young Adults*, 24 The Journal of Neuroscience 1793 (2004) at 1800.

more readily able to consider feelings and how to manage them, and less likely to surrender to peer influence.

The Interplay Between Developmental and Brain Science in Adolescents

Adolescent development and brain science provide the neurological underpinnings to adolescent behavior, specifically, the more challenging behaviors that relate to potential criminal conduct. The structural and functional changes of specific brain regions impact motivations, behaviors, and influences. Because the prefrontal cortex takes significant time to develop, developmental immaturity in decision-making, and lack of future orientation can persist.[54] Adolescents seek greater thrill-seeking and sensation-seeking experiences due to reduced dopamine and serotonin, and focus on reward over risk.[55] Areas of the brain that make up the behavior/reward circuitry are activated when the role of peers is introduced, which in turn can cause more risk-taking behavior, due to adolescents being less able to manage impulses and focused on reward in the form of peer validation and acceptance.[56] Over time, however, these influences become less salient. Self-control capacities increase due to increased efficiency in the prefrontal cortex, a larger number of brain regions playing a role, and increased connectivity among these brain regions.[57] The myelination and pruning processes create a more stable and streamlined information-processing system, and self-regulation strategies are better developed and more readily employed.[58] Adolescents' criminal behavior decreases as they enter adulthood.

For an excellent example of a case that made full use of the science of the adolescent brain to inform the decision in a youthful offender resentencing case, *see People v. H.M.,* 63 Misc. 3d 1213(A) (Sup. Ct. Bronx County 2019).

§ 3:6 Desistance and the Age-Crime Curve

Over the past fifty years, the term "desistance" has been differently defined. A more modern and roundly accepted definition was provided by Michael Rocque. He defined desistance as "the process by which criminality, or the individual risk for antisocial conduct, declines over the life-course, generally after adolescence.[59]

The notion that "'incorrigibility is inconsistent with youth' is one of the animating purposes of New York's recently enacted Raise the Age legislation." *People v. Doe,* 62 Misc.3d 574, 580 (Sup. Ct. Queens County. 2018) (quoting *Graham v. Florida,* 560 U.S. 48, 73 [2010]).

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[54] Scott, *supra* note 1 at 44.
[55] Steinberg, Laurence, *A Social Neuroscience Perspective on Adolescent Risk-Taking,* 28 Developmental Review 78 (2008) at 83.
[56] Botdorf, Morgan, Rosenbaum, Gail M., Patrianakos, Jamie, Steinberg, Laurence & Chein, Jason M., *Adolescent risk-taking is predicted by individual differences in cognitive control over emotional, but not non-emotional, response conflict* 31 Cognition and Emotion 972 (2017) at 980.
[57] Luna, *supra* note 46 at 791.
[58] Spear, *supra* note 35 at 58.
[59] Rocque, Michael, *But What Does It Mean? Defining, Measuring, and Analyzing Desistance From Crime in Criminal Justice,* Chapter 1 in Desistance From Crime: Implications for Research, Policy, and Practice, National Institute of Justice (2021) at 2.

"[T[he relationship between youth and unlawful behavior" and the fact that the "signature qualities" of adolescence make them more prone to risk-taking and criminal behavior is counterbalanced by the fleeting quality of this delinquency-prone period. "Indeed, [t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Roper,* 543 U.S. at 570.

The court in *Roper v. Simmons* quoted Laurence Stein & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty,* 58 American Psychologist 1009, 1014 (2003) as to the significant issue of desistance as follows:

> *For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.*

Roper, 543 U.S. at 570.

It is this reality - almost all adolescents will age-out of criminal behavior - that makes it so difficult for a court to determine whether the criminal conduct is attributable to transient immaturity or irreparable corruption. It is this judicial prediction that is the basis for removal, sentencing, and Y.O. adjudication. We have all seen judges who self-righteously proclaim our clients to be monsters, beyond reform and rehabilitation. Perhaps even thinking of our client as a "superpredator", a now thoroughly discredited concept.[60] And they do this on a whim, with very little basis in either science or the context of our clients' lives. The difficulty of such crystal-ball gazing was recognized by the court in *Roper,* citing generally Steinberg and Scott. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[61] *Roper*, 543 U.S. at 573.

The association between age and crime is one of the most established facts in the field of criminology.[62] It is generally agreed that aggregate crime rates peak in late adolescence/early adulthood (ages 18-21) and gradually drop thereafter.[63] Although most adults who engage in criminal behavior also offended during adolescence, most juveniles who commit a crime do not reoffend in adulthood. This is true even among those juveniles who engage in more serious

[60] In *State v. Belcher,* 342 Conn. 1 (2022), the Connecticut Supreme Court held that a sentence in which the judge relied on the characterization of the defendant as a "superpredator" was illegal.
[61] Steinberg, *supra* note 5 at 1014-1016.
[62] Kazemian, Lila, *Pathways to Desistane from Crime Among Juveniles and Adults,* Chapter 6 in Desistance From Crime: Implications for Research, Policy, and Practice, National Institute of Justice (2021) at 163.
[63] *Id.* at 163.

forms of crime.[64] While counterintuitive, a robust body of research indicates that committing a violent crime before age 20 is *not* a strong predictor of a persistent criminality.[65]

To understand this phenomenon, Steinberg explains that it is important to begin with a distinction between "adolescence-limited" and "life-course persistent" offenders. Dozens of longitudinal studies have shown that the vast majority of adolescents who commit antisocial acts desist from such activity as they mature into adulthood, and that only a small percentage – between five and ten percent, according to most studies – become chronic offenders. Thus, the great majority of juvenile offenders are adolescence-limited.[66]

The age-crime correlation is borne out in what criminologists refer to as the age-crime curve. In a line graph, crime is plotted on the "y"-axis (vertical axis) and age is plotted on the "x"-axis (horizontal axis), allowing for comparison of the prevalence of crime as compared to age. The graph demonstrates that the prevalence of offending tends to increase from late childhood, peaks in the teenage years (from 15 to 19), and then declines in the early 20s. The pattern appears as a bell-shaped curve, with the peak slightly younger for nonviolent crimes and slightly older for violent ones, declining thereafter.[67] This relationship between age and crime is robust and has been found in many different countries and over historical time.[68]

[64] *Id.* at 163.
[65] Insel, Catherine, Tabashneck, Stephanie, Shen, Francis, Edersheim, Judith & Kinscherff, Robert, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers,* Center for Law, Brain & Behavior at Massachusetts General Hospital (2022) at 38.
[66] Steinberg, Laurence, *Adolescent Development and Juvenile Justice,* 5 Annual Review of Clinical Psychology 459 (2009) at 478.
[67] *Id.* at 478.
[68] Scott, Elizabeth, Grisso, Thomas, Levick, Marsha & Steinberg, Laurence, *The Supreme Court and the Transformation of Juvenile Sentencing,* Models for Change (2015) at 7. Available at https://jlc.org/resources/supreme-court-and-transformation-juvenile-sentencing.

AGE-CRIME CURVE

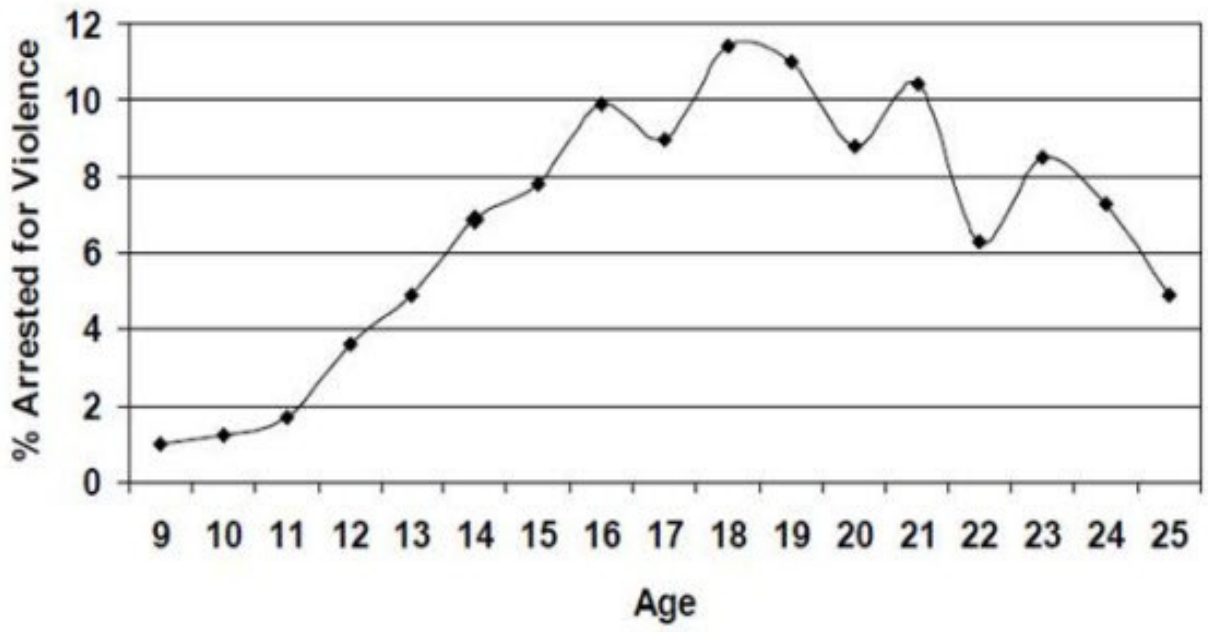

Figure 1: An example of an age-crime curve
Source: Loeber, Rolf, and Rebecca Stallings, "Modeling the Impact of Interventions on Local Indicators of Offending, Victimization, and Incarceration," in Young Homicide Offenders and Victims: Risk Factors, Prediction, and Prevention from Childhood, eds. Rolf Loeber and David P. Farrington, New York: Springer, 2011: 137-152.

That most adolescents who have criminally offended do not continue their behaviors into adulthood has been consistently confirmed in research studies. One such study was published by in a report by the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention, which analyzed the most comprehensive data set currently available about serious adolescent offenders and their lives in late adolescence and early adulthood. The most significant finding of the study was that "[m]ost youth who commit felonies greatly reduce their offending over time, regardless of intervention. Approximately 91.5% of youth in the study [aged fourteen to eighteen] reported decreased or limited illegal activity during the 3 years following their court involvement."[69]

Lila Kazemian explains that the age-crime curve creates a paradox. Individuals are more susceptible to crime in late adolescence, but they are also more likely to abandon criminal behavior after this period. As such, some of the more punitive criminal justice interventions (e.g., denial of removal to family court, criminal conviction record, denial of Y.O., and imprisonment) targeting adolescents may interrupt an otherwise downward slope of criminal behavior.[70]

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[69] Mulvey, Edward, *Highlights From Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders,* U.S. Department of Justice, Office of Juvenile Justice & Delinquency Prevention (2010) at 1. Available at https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/230971-factsheet.pdf.
[70] Kazemian, *supra* note 62 at 163-164.

There are several potential reasons why the vast majority of adolescents who have criminally offended "age out" of their antisocial behavior. It is important to understand how adolescents in the system get out of trouble, and what factors substantially influence the process of desistance. Danielle Boisvert suggests that the factors affecting desistance may include psychological factors (psychosocial), biological factors, and sociological factors.[71]

Psychological explanations for desistance focus on the internal developmental changes, discussed in terms of personality characteristics or psychosocial maturity factors. With maturation, adolescents develop the ability to control impulses, suppress aggression, consider others and the consequences of one's actions, take personal responsibility, and resist peer influence.[72] Psychologists have suggested that desistance is best understood by contrasting the developmental trajectories of sensation-seeking and impulse control.[73] Sensation-seeking – the tendency to pursue novel, exciting, and rewarding experiences – increases substantially around the time of puberty, and remains high into the early 20s, when it begins to decline. In contrast, performance in terms of "executive functions" (planning, thinking ahead, and self-regulation) is low during childhood and improves gradually over the course of adolescence and early adulthood; individuals do not evince adult levels of impulse control until their early or mid-20s.[74] Studies have supported the conclusion that adolescents are more vulnerable to coercive pressure than adults, and that the presence of peers increases risky decision-making by adolescents more so than older individuals.[75]

The biological explanations for desistance focus on the development of the brain, and how this influences offending behavior from adolescence to adulthood. As explained above in § 3:5, the adolescent brain is still under construction. This uneven development leads to high-risk and impulsive behavior in adolescence that subsides as the slower-to-develop parts of the brain catch up in adulthood. The brain continues to mature through adolescence and into the early 20s, with large-scale structural change occurring in the frontal lobes, most importantly with the prefrontal cortex, and other brain regions.[76] The prefrontal cortex is central to "executive functions" – advanced thinking processes that are employed in planning ahead and controlling impulses, and in weighing the costs and benefits of decisions before acting.[77] Brain maturation typically occurs through several process – two of the most important being pruning and myelination. Both processes make information processing more efficient. Connections between the frontal regions of the cortex and other parts of the brain involved in processing social and emotional information undergo maturation through adolescence and into early adulthood.[78] This

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[71] Boisvert, Danielle, *Desistance From Crime: Implications for Research, Policy, and Practice,* Chapter 2 – *Biosocial Factors and Their Influence and Desistance,* National Institute of Justice (2021) at 41.
[72] Steinberg, Laurence, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop,* MacArthur Foundation (2014) at 2. Available at https://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf.
[73] Scott, *supra* note 68 at 7.
[74] Scott, *supra* note 68 at 7.
[75] Scott, *supra* note 6 at 7.
[76] Scott, *supra* note 1 at 44.
[77] Scott, *supra* note 1 at 44.
[78] Scott, *supra* note 1 at 45.

improves the individual's ability to refrain from high-risk and impulsive behavior, as the various regions of the brain more effectively share information to perform these tasks.

Sociological explanations for the decline of crime with age also stress the central role of common life events and participation in social institutions such as family, marriage, employment, school, and religion. Bonds to conventional social institutions promote a lessening of deviant peer associations, exposure to new friends and extended family, changes in residence and routine activities, parenthood, and shifts in self-identity and personal responsibility – all in support of desistance.[79]

As illustrated, several different theoretical frameworks have been suggested by researchers to explain desistance. For criminal defense purposes, we need not choose one over the other. Different theoretical explanations may have more relevance for different adolescents. *What we do know is that judges do not have the capacity to make long-term predictions about desistance for any of our clients.* Desistance is likely to occur as a result of various turning points and cognitive shifts that occur as adolescents enter into adulthood. Our job as defense lawyers is to convince the judge that desistance is not determined by early risk factors or the seriousness of the crime. Defense counsel should suggest interventions that could potentially impact offending trajectories and accelerate the process of desistance from crime.

The inescapable and key conclusion from the Pathways to Desistance study of serious juvenile offenders is that the vast majority – even those who have committed serious crimes – will become mature, law-abiding adults simply as a consequence of growing up.[80]

As Laurence Steinberg explained, "[A] teenager's brain has a well-developed accelerator but only a partly developed brake. . .. By around 15 or16, the parts of the brain that arouse a teen emotionally and make him pay attention to peer pressure and the rewards of actions – the gas pedal – are probably all set. But the parts related to controlling impulses, long-term thinking, resistance to peer pressure and planning – the brake, mostly in the frontal lobes – are still developing."[81]

§ 3:7 Adolescent Sexual Behavior

As discussed in § 3:1: "Adolescents are different from adults – and juvenile offenders are different from adult criminals." Equally true and well-recognized is that, contrary to some intransigent judicial opinions, adolescents who sexually offend are different from adults who do

[79] Kazemian, *supra* note 62 at 167-168.
[80] Steinberg, *supra* note 72 at 4.
[81] USA Today article 12/2/07.

so,[82] and they have more in common with other adolescents who offend in non-sexual ways.[83] For reasons discussed in § 3:4 (developmental behavioral science) and § 3:5 (neuroscience), it is mistaken to equate adolescent and adult sexual behavior. There is no demonstrated empirical relationship between youth sex crimes and adult sex crimes.[84] Adolescent sex offending is not predictive of adult sex offending, and adolescents tend to mature out of sexual offending behavior; they are not likely to commit another sexual offense.[85] In other words, adolescents "age out" of sexual offending in the same way they age out of other delinquent behavior.

In the quartet of U.S. Supreme Court cases, *Roper, Graham, Miller, and Montgomery,* the signature qualities of adolescents were identified. Adolescents "have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." Adolescents "are more vulnerable to negative influences and outside pressures." Their character "is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." *Montgomery v. Louisiana,* 577 U.S. 190, 207 (2016). Adolescents have a "heightened capacity for change." *Miller v. Alabama,* 567 U.S. 460, 479 (2012); *see* § 3:3.

Considering these developmental characteristics, it is not surprising that social scientists have observed that adolescence and emerging adulthood is a time when risky behavior – such as unprotected sex, substance abuse, and risky driving behaviors – peak, in the same way that criminal behavior peaks. Because of these characteristics of adolescence, some courts have taken a developmental approach to sentencing, removal, and youthful offender adjudications.

A developmental approach to adolescent sexual offending is equally appropriate. The distinctive attributes of youth are all applicable to adolescents who sexually offend. The Supreme Court conclusion that these characteristics, which are grounded in neuroscience and developmental research, render adolescents categorically less culpable than adults and must be taken into account for sentencing, so too this analysis also applies to adolescents who sexually offend. Adolescents who sexually offend, like their peers who criminally offend generally, are prone to poor decision-making, impulsivity, peer influence, and risky behavior.

Researchers in neuroscience and developmental criminology have found that there are significant differences between adults and juveniles in their capacity to plan ahead, regulate emotions, control behavior, and weigh the costs and benefits of decisions. Tolan and his colleagues conclude that this research suggests a qualitatively different basis for much of the

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[82] Carpentier, Julie & Proulx, Jean, *Recidivism Rates of Treated, Non-Treated and Dropout Adolescent Who Have Sexually Offended: a Non-Randomized Study,* 12 Frontiers in Psychology 1 (2021) available at https://www.researchgate.net/publication/355195059_Recidivism_Rates_of_Treated_Non-Treated_and_Dropout_Adolescent_Who_Have_Sexually_Offended_a_Non-Randomized_Study.

[83] Lobanov-Rostovsky, Christopher, *Recidivism of Juveniles Who Commit Sexual Offenses,* Sex Offender Management Assessment and Planning Initiative Research Brief, U.S. Department of Justice (2015) at 5, available at https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/juvenilerecidivism.pdf.

[84] Pickett, Malik, Satifka, Emily, Shah, Riya with Wiener, Vic, *Labeled for Life: A Review of Youth Sex Offender Registration Laws,* Juvenile Law Center, (2020) at 2. Available at https://jlc.org/resources/labeled-life-review-youth-sex-offender-registration-laws.

[85] *Id.* at 2.

sexual offense behavior of adolescents, as compared to that of adults.[86] As a result, they caution against relating adolescent sexual offending to pathology, predicting sexual reoffending, or assuming a high risk of sexual reoffending.[87] Adequate consideration should be given to adolescent sexuality as a normal part of development, identifying and adjusting for developmental differences.[88] Sexual offending in adolescence is not indicative of psychopathy or predatory behavior, but is now recognized as related to developmental stages of youth and the neurobiology.

The highest courts of several other states have recognized the difference between adolescent and adult sexual offending and have applied the developmental approach crafted by the U.S. Supreme Court in *Roper* and its subsequent decisions. For example, the Supreme Court of New Jersey acknowledged being guided by *Roper* in an adolescent sex offense registration case, where the expert witnesses pointed to multiple studies confirming that adolescents who commit sex offenses are more likely to act impulsively and be motivated by sexual curiosity, in contrast to adult sex offenders whose conduct may be predatory or psychopathic. *In re C.K.,* 233 N.J. 44, 51 (2018). The Supreme Court of Pennsylvania found that the distinctions between adolescents and adults, as recognized in *Roper* and its progeny, "are particularly relevant in the area of sexual offenses, where many acts of delinquency involve immaturity, and sexual curiosity rather than hardened criminality." *In re J.B.,* 107 A.D.3d 1, 19. (2014). The Supreme Court of Ohio found sex offender registration of adolescents to be unconstitutional, relying upon the signature characteristics of youth articulated in *Roper* and *Graham,* and recognizing that "[n]ot only are juveniles less culpable than adults, their bad acts are less likely to reveal an unredeemable corruptness." *In re C.P.,* 131 Ohio St.3d 513, 524 (2012).

In addition to the differences between adolescents and adults resulting from the developmental stages that adolescents are going through, there are other important distinctions that help debunk popularly held myths. First, the sexual recidivism rates for adolescents are lower than they are for adults.[89] Second, only a relatively small percentage of juveniles who commit a sexual offense will sexually reoffend as adults. Generally, adolescents who commit a sexual offense do not sexually offend later in life.[90] Third, adolescent sexual offending is not predictive of adult sexual offending.[91]

As defense lawyers, it is our job to convince judges to adopt an approach to our clients who are charged with sex offenses that accounts for their stages of psychological and neurological development. They should not be treated as adults, particularly when determining a youthful offender adjudication. It is critical to avoid both a conviction and SORA. As one court observed, "Few labels are as damaging in today's society as 'convicted sex offender,'" as sex offenders are 'the lepers of the criminal justice system.'" *In re C.K.,* 23 N.J.44, 71 (2016).

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[86] Tolan, *supra* note 6 at 129.
[87] Tolan, *supra* note 6 at 132-133.
[88] Tolan, *supra* note 6 at 137.
[89] Lobanov-Rostovsky, *supra* note 83 at 5.
[90] Lobanov-Rostovsky, *supra* note 83 at 5.
[91] Zimring, Franklin, Jennings, Wasley, Piquero, Alex & Hays, Stephanie, *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort,* 26 Justice Quarterly 58 (2009) at 61.

Without a youthful offender adjudication, "the status of sex-offender registrant will impair a juvenile, as he grows into adulthood, from gaining employment opportunities, finding acceptance in his community, developing a healthy sense of self-worth, and forming personal relationships. In essence, the juvenile registrant will forever remain a social pariah." *In re C.K.,* 23 N.J. 44,74 (2016).

§ 3:8 Recognizing the Difference Matters

Understanding the differences between adolescents and adults is critical to appreciating the U.S. Supreme Court's conclusion that adolescents are different from adults for purposes of sentencing because they have "diminished culpability" and a "greater chance of rehabilitation." These analytic steps lead inescapably to the conclusion that adolescents should be granted greater access to removal to family court, more robust judicial utilization of youthful offender adjudications, less severe and more appropriate sentences, and greater opportunities for rehabilitation.

With this knowledge, we can turn to the task of educating judges as to the following:

- Given the potential for change in adolescents and understanding the developmental processes at work, a judge is unable to meaningfully predict future criminal behavior based on prior behavior.
- From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult.
- Focus should be on sanctions that maximize the young offender's potential for change and reform.
- Great weight should be placed on youth as a mitigating factor.
- Once the diminished culpability of adolescents is recognized, it is evident that the penological justifications for sentencing apply to adolescents with lesser force than to adults.
- Because most teenage lawbreakers are not likely to reoffend, a key consideration in responding to their criminal conduct is the impact of the disposition on their prospects for productive adulthood.
- Judges make decisions every day about kids, and they need to make those decisions based on science – not on fear, misconceptions, or assumptions that are mistaken or irrelevant to long-term outcomes.
- Adolescents are different from adults.

Armed with this knowledge, we are in a better position to explain to judges how our jurisprudence has evolved, how this evolution has been driven by advances in neuroscience and developmental psychology, and why judges must prioritize rehabilitation over retribution, promoting successful and productive reentry and reintegration into society over deterrence and incapacitation.

PRACTICE TIPS

Whether you are arguing for removal to family court, a youthful offender adjudication, a retroactive youthful offender adjudication, or a SORA downward departure based upon the defendant's adolescence, you will want to constantly remind the judge of the developmental and neurological differences between adolescents and adults discussed in this chapter. At every turn, you should take the opportunity to repeat the wisdom reflected by the Court of Appeals in *People v. Rudolph*: "Young people who find themselves in the criminal courts are not comparable to adults in many respects – and our jurisprudence should reflect that fact." 21 N.Y.3d 497, 506 (2013). Prosecutors often play to the worst tendencies of judges by dehumanizing our adolescent clients and making them appear to be miniature adult monsters. Don't let them get away with this.

CHAPTER 4

REMOVAL OF ADOLESCENT OFFENDER AND JUVENILE OFFENDER CASES TO FAMILY COURT

CHAPTER 4 SECTIONS

CHAPTER 4

REMOVAL OF ADOLESCENT OFFENDER AND JUVENILE OFFENDER CASES TO FAMILY COURT

§ 4:1 Introduction to Removal to Family Court

The youth part of superior court has exclusive jurisdiction over all proceedings involving people charged as juvenile offenders (J.O.) or as adolescent offenders (A.O.), except as provided in articles 722 or 725 of the Criminal Procedure Law. *See* CPL § 722.10 (1). All proceedings remain in the Youth Part unless the case is ordered removed to family court.

The superior court may, if the statutory requirements are met, order removal of an adolescent or juvenile offender case from the youth part to the family court of the county in which such action or charge was pending. CPL § 725.05. The order must specify the section pursuant to which the removal is authorized. Where removal is authorized pursuant to subdivision (3)(b) of CPL §§ 722.20 or 722.21, the court order must specify the act or acts it found reasonable cause to believe the defendant did. CPL § 725.05 (2). Where removal is authorized pursuant to subdivision (4) of CPL §§ 722.20 or 722.21, the court order must specify the act or acts it found reasonable cause to allege. CPL § 725.05 (3).

It is imperative that defense counsel be aware of the considerable differences between the procedures and criteria for removal of both juvenile offender and adolescent offender cases. Keep in mind that the J.O. removal procedures that date back to 1978 were inexplicably left untouched by RTA, while the A.O. removal procedures were enacted in 2017. The J.O. removal process is a relic of a reactive era and was left intact despite legislative and judicial recognition that "society's understanding of juvenile brain function and the relationship between youth and unlawful behavior has significantly evolved" (*People v. Rudolph,* 21 N.Y.3d 497, 506 [2013] [Graffeo, J. concurring]), particularly since 1978. *See also People v. Robert C.,* 46 Misc. 3d 382, 383 (Sup. Ct. Queens County 2014). The differences will be discussed below.

When an order of removal is issued, the criminal action is terminated and there can be no further criminal proceedings in any criminal court with respect to the offense or offenses charged in the accusatory instrument which was the subject of removal. CPL § 725.10 (2). Except in the case of an adolescent offender who has been directed to appear at the department of probation for adjustment pursuant to CPL § 725.05 (7), when an order of remand is filed with family court, a proceeding pursuant to Family Court Act article 3 must be originated, and the family court must then assume jurisdiction and proceed. CPL § 725.10 (1) and (2).

§ 4:2 Advantages of Removal

There are considerable differences between family court and superior court treatment of a young person. Avoiding a criminal conviction is one of the main objectives of a criminal defense

attorney, as this will eliminate many of the collateral consequences that your client would face later in life. When an A.O. case is removed to family court, the defendant (who upon removal becomes the "respondent") may have their case adjusted by probation and avoid an adjudication altogether. Even if there is a juvenile delinquency adjudication, the respondent will receive the benefit of FCA § 380.1, which provides that no juvenile delinquency adjudication can be denominated a conviction, and that no person adjudicated a juvenile delinquent can be denominated a criminal by reason of such adjudication. The section also provides that an adjudication shall not disqualify a person from pursuing or engaging in any lawful activity, occupation, profession, or calling.

Although replacing a juvenile or adolescent offender criminal court conviction with a youthful offender adjudication also avoids a judgment of conviction for a crime pursuant to CPL § 720.35 (1), the judge has considerable discretion to determine whether an eligible youth will be granted youthful offender status. Removal of the case to family court eliminates reliance on judicial discretion to avoid the conviction. It also avoids having to expend a Y.O. adjudication that your client may need at a later date. Note should be taken that either a juvenile delinquency adjudication in family court for a designated felony, or a youthful offender adjudication in youth part, will make a youth ineligible for a subsequent Y.O.

Removal has been aptly described as an "escape hatch." *People v. Robert C.,* 46 Misc. 3d 382, 385 (Sup. Ct. Queens County 2014). Removal to family court should also provide your client with a greater range of supportive services.

In many instances the sentencing range for a juvenile or adolescent offender in youth part is harsher and lengthier than the period of placement that may be imposed on a juvenile delinquent in family court. The sentence faced by your client in youth part, whether as a juvenile or adolescent offender, may be ameliorated by a youthful offender adjudication, by limiting the term of the sentence to that which could be imposed on a person convicted of a class E felony. *See* Penal Law § 60.02 (2).

A comparison of the sentencing ranges for juvenile offenders, adolescent offenders, youthful offenders, and placement for juvenile delinquents can be found in Chapter 8 of this guide.

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§ 4:3 Removal of a Juvenile Offender Case to Family Court

The procedures and criteria for removal of a juvenile offender case from youth part to family court are set forth in CPL §§ 722.20 and 722.22 and CPL article 725. (Article 725 pertains to both the removal of juvenile offender and adolescent offender cases, although the article is titled Removal of Proceedings Against Juvenile Offender to Family Court.)

A judicial determination that removal would be in the interests of justice is the prerequisite to removal of a juvenile offender case from youth part to family court.

§ 4:4 Removal of Juvenile Offender at Arraignment

When a 13-, 14-, or 15-year-old is charged as a juvenile offender and is arraigned in a youth part, the court must determine whether such juvenile should be detained. For purposes of recognizance, bail, and commitment, CPL article 510 is applicable to youths charged as a J.O. All the designated offenses for which a youth can be charged as a J.O. are qualifying offenses for purposes of bail. Therefore, at arraignment of all cases charged as a J.O., defense counsel should be prepared to make an effective argument for their client to be released on their own recognizance, or non-monetary bail, or if bail, in an amount that is within the client's financial means. In addition, the court may immediately remove the case to family court if the prosecutor consents. CPL § 722.20 (1).

§ 4:5 Juvenile Offender Waiver of Preliminary Hearing

If the defendant waives the preliminary hearing, the youth part court must order that the defendant be held for the action of the grand jury. CPL § 722.20 (2).

§ 4:6 Removal or Other Dispositions of Juvenile Offender After Preliminary Hearing

If there is a preliminary hearing, the youth part judge must dispose of the felony complaint in one of three ways at the conclusion of the hearing:

a) If there is reasonable cause to believe that the defendant committed a J.O. offense, the court must order that the defendant be held for the action of a grand jury (CPL § 722.20 (3)[a]); or
b) If there is not reasonable cause to believe that the defendant committed a J.O. offense, but there is reasonable cause to believe that the defendant is a "juvenile delinquent" as defined in FCA § 301.2 (1), the court must direct that the action be removed to family court, and specify the act or acts it found reasonable cause to believe the defendant did (CPL § 722.20 (3)[b]); or
c) If there is not reasonable cause to believe that the defendant committed any criminal act, J.O. or J.D., the court must dismiss the felony complaint and discharge the defendant from custody, if in custody, or if at liberty on bail, the court must exonerate bail (CPL § 722.20 (3)[c]).

§ 4:7 Removal of Juvenile Offender at the Request of the Prosecutor

At the request of the prosecutor, the court shall order removal of the action against a juvenile offender to family court if, upon consideration of the nine interests of justice criteria specified in CPL § 722.22 (2), the court determines that removal would be in the interests of justice. CPL § 722.20 (4).

If the felony complaint charges the J.O. with:

Murder 2 (Penal Law § 125.25),
Rape 1 (1)(a), (2)(a), (3)(a) (Penal Law § 130.35 (1)(a), (2)(a), (3)[a]), Rape 1 as formerly defined in Penal Law § 130.35 (1) and Criminal Sexual Act as formerly defined in Penal Law § 130.50 (1) or an armed felony as defined in CPL § 1.20 (41)(a)[1]

the youth part court's determination that the action be removed to family court, in addition to being based upon a finding of the interests of justice, must also be based on a finding of one or more of the following factors:

(i) Mitigating circumstances bearing directly upon the manner in which the crime was committed; or
(ii) Where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense; or
(iii) Possible deficiencies in proof of the crime.

CPL § 722.20 (4).

§ 4:8 Removal of Juvenile Offender Case on Motion of the Defendant in the Interests of Justice Prior to Preliminary Hearing

When the defendant has not waived a preliminary hearing and a preliminary hearing has not yet commenced, the defendant may make a motion to remove the action to family court pursuant to CPL § 722.22. CPL 722.20 (5). The defendant's motion pursuant to CPL § 722.20 (5) must be made prior to commencement of the preliminary hearing.

The procedural rules of CPL § 210.45 (1) and (2) are applicable to this motion. The motion must be made in writing and upon reasonable notice to the prosecutor. The motion papers must contain sworn allegations of fact by the defendant or by another person or persons, and may be based upon personal knowledge of the affiant or upon information and belief. If based upon information and belief, the affiant must state the sources of such information and the grounds of such belief.

When the defendant makes this motion for removal, the court must determine the motion pursuant to CPL § 722.22, considering the nine factors listed in CPL § 722.22 (2). Removal of the action to family court pursuant to CPL article 725 must be ordered if the court determines that to do so would be in the interests of justice.

The nine factors the court must consider, to the extent applicable, individually and collectively, include:

a) the seriousness and circumstances of the offense;
b) the extent of harm caused by the offense;
c) the evidence of guilt, whether admissible or inadmissible at trial;

[1] Note that this only applies to subsection (a) and does not apply to subsection (b).

d) the history, character and condition of the defendant;
e) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
f) the impact of a removal of the case to family court on the safety or welfare of the community;
g) the impact of a removal of the case to the family court upon the confidence of the public in the criminal justice system;
h) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and
i) any other relevant fact indicating that a judgment of conviction in the criminal court would serve no useful purpose.

CPL § 722.22 (2).

These factors are similar to, but not the same as the factors the court must consider on a motion to dismiss an indictment in furtherance of justice pursuant to CPL § 210.40.

If there is reasonable cause to believe that the J.O. committed either:
Murder 2,
Rape 1(1)(a), (2)(a), (3)(a), former Rape 1 (1),
former Criminal Sexual Act 1 (1), or
an armed felony as defined in CPL § 1.20 (41)(a)

the provisions of CPL § 722.22 (b) apply, the consent of the prosecutor is required, and the court must find one of the following factors:

(i) Mitigating circumstances bearing directly upon the manner in which the crime was committed; or
(ii) Where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense; or
(iii) Possible deficiencies in proof of the crime.

CPL § 722.22 (1)(b)(i-iii).

When the defendant's motion for removal is made prior to commencement of the preliminary hearing, and there is <u>not</u> reasonable cause to believe that the J.O. committed one or more of the crimes of Murder 2, Rape 1 (1)(a), (2)(a),or (3)(a), former Rape 1 (1), former Criminal Sexual Act 1 (1), or an armed felony as defined in CPL § 1.20 (41)(a), the exception provisions of CPL § 722.22 (1)(b) shall not apply. CPL § 722.20 (5). That means that the consent of the prosecutor is not required for removal, nor is it necessary for the court to find any of the three special factors listed in CPL § 722.22 (1)(b)(i-iii). All that is required is that the court determine that removal of the action to family court would be in the interests of justice.

PRACTICE TIPS

Since your motion, whenever made, is based upon an interests-of-justice analysis, it is important to be attentive to the nine statutory factors that the court must consider. In particular, you will want to address any and all mitigation that your investigation turns up. Both factors (d) and (i) invite you to develop the mitigation in support of the motion. Consideration of "the history, character and condition of the defendant" and "any other relevant fact indicating that a judgment of conviction in the criminal court would serve no useful purpose" provide basis to support the mitigation. Submission of mitigation should not wait until the time of sentencing. Telling your client's story and providing context for your client's behavior should start on day one. To do this effectively, you may want to submit a mitigation report along with your motion, or append exhibits supporting the mitigation to the removal motion.

§ 4:9 Court's Inquiry on Removal Motion

When making a determination regarding removal, whether before commencement of the preliminary hearing pursuant to CPL § 722.20 (4) or (5) or after arraignment upon an indictment pursuant to CPL § 722.22, the court is permitted to make such inquiry as it deems necessary. CPL § 722.20 (6)(c) and CPL § 722.22 (3). Any evidence that is not legally privileged may be introduced and, if the defendant testifies, such testimony may not be introduced in any future proceeding, except to impeach the defendant's testimony at such future proceeding as inconsistent prior testimony. CPL § 722.20 (6)(c) and CPL § 722.22 (4).

§ 4:10 Requirements for Court and Prosecutor to Effectuate Removal

If the court orders removal of the action to family court, it must state on the record the factor or factors upon which its determination is based, and must give its reasons for removal in detail and not in conclusory terms. CPL § 722.20 (6)(a) and § 722.22 (5)b).

If the prosecutor consents to removal, the prosecutor must state on the record the reasons for consent to removal of the action to family court. The reasons must be stated in detail and not in conclusory terms. CPL § 722.20 (6)(b) and § 722.22 (5)(b).

Note that these requirements are the same for removal ordered prior to the commencement of the preliminary hearing and for removal after arraignment of a J.O. upon an indictment.

§ 4:11 Only One Removal Motion Permitted

Movant beware. Where a defendant makes a motion for removal prior to the preliminary hearing pursuant to CPL § 722.20 (5), and that motion has been denied, no further motion for removal pursuant to either CPL § 722.20 (5) or after indictment pursuant to CPL § 722.22 may be made by the defendant with respect to the same offense or offenses. CPL § 722.20 (6)(d).

Despite this limitation imposed by CPL § 722.20 (6)(d), there are other limited opportunities for removal, several of which require the consent of the prosecution. These other opportunities for removal are discussed in § 4:49.

PRACTICE TIPS

Although we might be tempted to adopt a general practice that defense counsel seek removal as early as possible, there may be exceptions to this general practice. The bar to successive removal motions imposed by CPL § 722.20 (6)(d) should give you pause.

At least two considerations come to mind when making the strategic decision about whether to bring a motion for removal prior to the preliminary hearing or after arraignment upon the indictment.

First, it is essential that the motion be well investigated, prepared, and presented. You may choose to delay the motion until after indictment if you are not fully prepared to go forward with the motion prior to the preliminary hearing. If more time is necessary to adequately investigate, prepare the motion, gather supporting documents, and prepare a mitigation report, that is an important consideration. You might only get one shot.

Second, depending on the jurisdiction in which you practice, you may find yourself in front of a different judge in the youth part at the time of the preliminary hearing than will preside once the case is indicted. As you well know, all judges are not the same. Whether you make your removal motion prior to the preliminary hearing or after arraignment upon the indictment may depend upon which judge will be more receptive to the motion. There is no substitute for being familiar with the judges' attitudes and idiosyncrasies in the jurisdiction where the case is pending. If you are not familiar with the judges who will hear your motion, you should take the time to inquire of colleagues who have that familiarity.

§ 4:12 Removal Terminates Proceedings in Criminal Court

When a removal motion is granted and a removal order is filed, the criminal action upon which the order of removal is based must be terminated and there can be no further criminal proceedings in any local or superior criminal court, including the youth part of the superior court, with respect to the offense or offenses charged in the accusatory instrument that was the subject of removal. CPL § 722.20 (6)(f); CPL § 725.10 (2). All further proceedings, including motions and appeals, must be made in accordance with the laws pertaining to family court and, for this purpose, all findings, determinations, verdicts and orders, other than the order of removal, must be deemed to have been made by the family court. CPL § 725.10 (2).

§ 4:13 Motion to Remove a Juvenile Offender After Arraignment upon an Indictment

After the juvenile offender is indicted and has been arraigned, a court may order removal on the motion of defense counsel, the prosecutor, or upon the court's own motion. CPL

§ 722.22 (1). The procedures for a motion to remove are controlled by CPL § 722.22 and apply to both a motion filed prior to the time of the preliminary hearing and a motion filed after arraignment upon an indictment. Because the procedures are the same, you will want to reread § 4:8 - § 4:12 of this guide.

Except in the case of an indictment charging a juvenile offender with murder 2, rape 1 under subdivision (1)(a), (2)(a) or (3)(a), former rape 1 (1), former criminal sexual act 1 (1), or an armed felony as defined in CPL § 1.20 (41)(a), there is no statutory requirement that the prosecutor consent to removal, and the court's determination of the motion is based upon whether removal would be in the interests of justice after considering the factors set forth in CPL § 722.22 (2).

In making its determination the court must, to the extent applicable, examine individually and collectively the following factors:

(a) the seriousness and circumstances of the offense;
(b) the extent of harm caused by the offense;
(c) the evidence of guilt, whether admissible or inadmissible at trial;
(d) the history, character and condition of the defendant;
(e) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
(f) the impact of a removal of the case to family court on the safety or welfare of the community;
(g) the impact of a removal of the case to the family court upon the confidence of the public in the criminal justice system;
(h) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and
(i) any other relevant fact indicating that a judgment of conviction in the criminal court would serve no useful purpose.

If the indictment charges a juvenile offender with murder 2, rape 1 under subdivision (1)(a), (2)(a) or (3)(a), former rape 1 (1), former criminal sexual act 1 (1), or an armed felony as defined in CPL § 1.20 (41)(a) then CPL § 722.22 (b) applies. In such case, for the court to order removal, the statute requires the consent of the prosecutor, and that the court find at least one of the following factors:

(i) mitigating circumstances bearing directly upon the manner in which the crime was committed: or
(ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense; or
(iii) possible deficiencies in proof of the crime.

CPL § 722.22 (1)(b)(i-iii). In addition to finding one of the three factors, the court must also determine that removal would be in the interest of justice, after considering the nine factors in CPL § 722.22 (2).

§ 4:14 Is the Prosecutor's Consent Required?

In CPL § 722.22 (1)(a), it is clear from its absence that the prosecutor's consent is not required when the defendant moves for removal or the court does so on its own motion, provided that the accusatory instrument does not charge a juvenile offender with murder in the second degree, rape 1 (1)(a), (2)(a), (3)(a), former rape in the first degree under subdivision (1), former criminal sexual act in the first degree under subdivision (1), or an armed felony as defined in CPL § 1.20 (41)(a). This was recognized by the court in *People v. Robert C.,* 46 Misc. 3d 382 (Sup. Ct. Queens County 2014). Where the statute does not require the prosecutor's consent for removal, the court may order removal of the defendant's case to family court over the prosecutor's objection. But what if it does charge one of the specified offenses? Is the consent of the prosecutor then required?

CPL § 722.22 (1)(b) does contain the requirement that the removal order is "with the consent of the district attorney" if the indictment charges a juvenile offender with murder in the second degree, rape in the first degree under subdivision (1)(a), (2)(a), or (3)(a), former Rape 1 (1), former criminal sexual abuse 1 (1), or an armed felony as defined in CPL § 1.20 (41)(a). However, the statute is not the end of the story. A review of case law provides us with a different answer.

In *People v. Smith,* 217 A.D.2d 221 (4th Dept. 2001), the court held that "[d]espite the apparent intent of the Legislature to condition removal on the consent of the District Attorney (CPL 210.43[b])[2], the Court of Appeals has held that the District Attorney may not withhold his consent arbitrarily and that, in any event, the trial court retains statutory and inherent authority to remove an accused juvenile offender to Family Court in the interest of justice and over the objection of the prosecutor." *Id.* at 239. The *Smith* court cited to the Court of Appeals decision in *Matter of Vega v. Bell,* 47 N.Y.2d 543, 551-553 (1979). A similar conclusion was reached in *People v. Charles M.,* 286 A.D.2d 942 (4th Dept. 2001), where the court acknowledged that "[b]ecause defendant was charged with an armed felony offense, removal is permitted only with the consent of the District Attorney (citing to the statutory requirement), unless the court determines that removal is warranted 'in the interests of justice over the objections of the District Attorney,'" again citing to *Matter of Vega v. Bell.*

Based upon the logic of this line of cases tracing back to *Matter of Vega v. Bell,* a cogent argument can be made that the court is not precluded from ordering removal without the prosecutor's consent in cases where one of the specified felonies is charged.

There is another argument that defense counsel should make for removal in those cases where the client is charged with an armed felony, when the prosecutor refuses to consent. CPL § 722.22 (1)(b) requires the prosecutor's consent for removal in the case of a person charged as a juvenile offender, but there is no such requirement for the prosecutor's consent for removal when an individual is charged as an adolescent offender. This gives rise to an equal protection challenge. In *People v. K.S.,* 2024 NY Slip Op 24150 (Sup. Ct. Richmond County 2024) the

[2] Former CPL § 210.43 (1)(b) was repealed effective in 2018 but was left intact and simply renumbered effective in 2018 as CPL § 722.22.

court held that CPL § 722.22 (1)(b), as applied to K.S., violates his right to equal protection of the law under Article I, § 22 of the New York Constitution and the Fourteenth Amendment of the Unites States Constitution, and struck that portion of the statute that requires the consent of the prosecutor.

§ 4:15 Are the Nine Interests of Justice Factors Exclusive?

The question may arise as to whether the nine factors set out in CPL § 722.22 (2) that the court must consider when determining a motion for removal in the interests of justice are exclusive or whether the court can consider additional factors. The language of the statute does not definitively answer the question. CPL § 722.22 (2) simply mandates that, in making the removal determination, the court must "to the extent applicable, examine individually and collectively" the nine factors.

In *People v. E.S.B.,* 68 Misc. 3d 472 (Co. Ct. Nassau County 2020) the court treats the nine factors as exclusive. In support of an interests of justice removal motion, defense counsel argued in mitigation that the J.O. played a minor role in the offense. Judge Singer rejected that argument, finding that such a factor is not included in the list of nine factors to be considered by the court in making its interests of justice determination. *Id.* at 477. In contrast is the thoughtful decision of Judge Zayas in *People v. Robert C.,* 46 Misc. 3d 382 (Sup. Ct. Queens County 2014).

In *People v. Robert C.*, the court addressed an "interests of justice" removal motion and gave considerable weight to the fact that the J.O. "was the less active participant during the robbery." *Id.* at 390. The court in this case, as compared to *People v. E.S.B.,* found that the defendant's less active role was properly considered under factor (a) – "circumstances surrounding the offense." *Id.*

Judge Zayas's decision in *People v. Robert C.* illustrates that many mitigating factors that are not specifically referenced in CPL § 722.22 (2) are subsumed in those factors. His point should be well-taken that the various interests of justice factors, including factors (g) and (i), "leave[] sufficient room for courts to consider, in the appropriate case, the evolving social science evidence regarding juvenile development and its effects on the removal determination." *People v. Robert C.*, 46 Misc.3d at 387.

PRACTICE TIPS

Although the nine factors may be exclusive, they are certainly broad enough to encompass any relevant mitigating factor based upon the reasoning in *People v. Robert C.* Instead of trying to argue that the nine interests of justice factors are not exclusive, defense counsel may want to argue that whatever mitigating factor that arises falls within the scope of at least one of the nine factors. You will also want to consider including references to the evolving social and brain science regarding the development of adolescents to underscore the appropriateness of removal, using both social science literature and the evolving judicial understanding that adolescents are different from adults. Extend the application of developmental and neuroscience from its use in sentence mitigation to your arguments for removal, whether for J.O.s or A.O.s.

§ 4:16 The Effect of a Grand Jury Indictment

An indictment by the Grand Jury cuts off the J.O.'s right to both a preliminary hearing pursuant to CPL § 722.20 (3) and to have a removal motion heard prior to the commencement of a preliminary hearing and indictment pursuant to CPL § 722.20 (5). Once the Grand Jury indicts, a finding of reasonable cause to hold and prosecute a defendant has been made, hence the need for a preliminary hearing is obviated. *Vega v. Bell,* 47 N.Y. at 550. A removal determination is not required prior to an indictment. *Id.* at 550-551.

Of course, the J.O. still retains the right to seek removal post-indictment pursuant to CPL § 722.22 (1). The practical effect of the indictment is that the preliminary hearing is no longer required, and the J.O.'s motion to remove is delayed and may be heard in front of a different judge.

§ 4:17 Are "Exceptional Circumstances" Required to Grant J.O. Removal?

If a J.O. is charged with murder in the second degree, rape in the first degree under subdivision (1)(a), (2)(a), or (3)(a), or an armed felony as defined in CPL § 1.20 (41)(a), the court must find one or more of the following circumstances to order removal: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in the poof of the crime. [CPL 722.22 (1)(b)].

In addition, whether in the case of these specified offenses or any other offense, CPL § 722.22 (1)(a) and (b) allow for removal if, after consideration of the nine factors set forth in CPL § 722.22 (2), the court determines that to do so would be in the interests of justice. That is all the statute requires.

Despite the specific requirements of the statute, the Court of Appeals in *Matter of Vega v. Bell,* 47 N.Y.2d 543 (1979) required more. The court held that only in "the unusual or exceptional case" or "exceptional circumstances" should removal be granted. *Id.* at 549, 553. The court apparently created this limitation based upon its belief that only those cases involving "exceptional circumstances can be dealt with more effectively within the juvenile system" (*Id.* at 549) or "warranted more lenient treatment" (*Id.* at 550). Of course, there is no such language in the statute (or in CPL § 180.75, the analogous statute that the court in *Matter of Vega* was actually interpreting) that expressly places such limitation on the statutory removal power of the trial court determining a J.O. removal motion. *See People v. Robert C.*, 46 Misc. 3d 382, 385 (Sup. Ct. Queens County 2014).

Although in the years following the passage of the Juvenile Offender law, courts held that removal of a juvenile offender case should be only granted in "exceptional circumstances," the judicial application of the statute has, in more recent years, focused on an analysis of the statutory, interests of justice factors.

The limitation of J.O. removal to "exceptional circumstances" created by the Court of Appeals in *Matter of Vega* has been applied by the Appellate Division in both the Second and Fourth Departments. *See People v. Sanchez,* 128 A.D.2d 816 (2d Dept. 1987), *People v. Smith,* 217 A.D.2d 221 (4th Dept. 2001), and *People v. Charles M.,* 286 A.D.2d 94 (4th Dept. 2001). However, it has been more than 23 years since an appellate court has adhered to that judicially constructed limitation. Can it be that we are still stuck with a framework for J.O. removal that treats denial of removal as the default unless there are "exceptional circumstances," an analysis that is directly contrary to that for A.O. removal?

When considering removal of an A.O. case, as discussed at § 4:19 through § 4:39, the more recently enacted A.O. removal statute provides that the court shall grant removal unless the prosecutor proves that "extraordinary circumstances" exist that should prevent the transfer to family court. CPL § 722.23 (1)(d). In other words, the default is to grant removal, the presumption being that only one out of a 1,000 cases would remain in the youth part and those would be the "extremely rare and exceptional" ones. *People v. S.J.,* 72 Misc. 3d 196, 199 (Family Court Erie County 2021).

When making a removal motion for a J.O., you will want to find out in advance whether the presiding judge requires a showing of "exceptional circumstances" in order to grant removal. If so, you should be prepared to provide all mitigation that would support an "exceptional circumstances" finding (*see People v. Robert C.,* 46 Misc. 3d 382 [Sup. Ct. Queens County 2014]), in addition to advocating that the standard should be updated and standardized for all removal applications in the interests of justice, regardless of the A.O. or J.O. designation. Moreover, there is no rational justification to apply a more stringent standard to the younger juvenile offenders than the older adolescent offenders.

PRACTICE TIPS

In 1979, in *Matter of Vega v. Bell*, the Court of Appeals created the "exceptional circumstances" limitation based upon the reasoning that prevailed at the time, i.e., that for juvenile offenders, only "exceptional circumstances can be dealt with more effectively within the juvenile system," and "lenient treatment and transfer to Family Court" was not warranted "unless there exist certain special circumstances." *Matter of Vega*, 47 N.Y.2d at 550-551. This reasoning was abandoned by the Legislature and the public with the passage of Raise the Age and our evolving understanding of adolescent brain development and behavior. This gave rise to a new approach that recognized that adolescents are different, and should not be treated the same as adults.

Raise the Age brought forward a recognition that family court is an appropriate forum for addressing more effectively most adolescents who find themselves facing criminal charges, and is not merely a dispensary of leniency.

You can use Judge Zayas's analysis in *People v. Robert C.,* 46 Misc. 3d 382, 383 (Sup. Ct. Queens County 2014) to argue that "society's understanding of juvenile brain function and the relationship between youth and unlawful behavior has significantly evolved since 1978," when the juvenile statute was enacted.

Also be prepared to draw upon Judge Graffeo's concurrence in *People v. Rudolph,* 21 N.Y.3d 497 (2013), which is relevant to the removal determination for juvenile offenders. "Young people who find themselves in the criminal courts are not comparable to adults in many respects – and our jurisprudence should reflect that fact." *Id.* at 506.

In the years since 1977, "society's understanding of juvenile brain function and the relationship between youth and unlawful behavior has significantly evolved." As the United State Supreme Court has recognized, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham v Florida*, 560 U.S. 48, 68 (2010). Sociological studies establish that young people, as compared to adults, often possess "an underdeveloped sense of responsibility," which can "result in impetuous and ill-considered actions and decisions." *Johnson v Texas*, 509 U.S. 350, 367 (1993). These developments in the body of knowledge concerning juvenile development underscore the need for judicial procedures that are solicitous of the interests of vulnerable youth." *People v. Rudolph,* 21 N.Y.3d at 506.

Counsel could effectively argue that in the 45 years since the decision in *Matter of Vega v. Bell,* the judicial approach to removal of juvenile offenders to family court has increasingly incorporated a transformative understanding of adolescent brain development and behavioral science. Reflected in the Raise the Age legislation is a recognition that "[i]n Family Court, young defendants would have better access to youth focused services and treatment and would be saved the onus of a criminal conviction, but would still be subject to appropriate sanctions to hold them accountable." *People v., D.L.* 62 Misc.3d 900, 904 (Family Ct. Monroe County 2018).

In other words, defense counsel might argue that we have come a long way from the court's inhospitable view of youth and family court in *Matter of Vega v. Bell.* This argument finds support in *People v. J.P.,* 63 Misc. 3d 635 (Sup. Ct. Bronx County 2019), where the court acknowledged that "the reform purposes of article 722 of the Criminal Procedure Law are manifest and the recognition on the part of the New York Legislature that requires that adolescent offenders, as well as juvenile offenders, be treated differently than adults within the criminal justice system, given the unique circumstances and needs of this population, is explicit." *Id.* at 649. In addition, counsel might argue that the *Vega* requirement of "exceptional circumstances" is not supported by the statute.

§ 4:18 A Denial of Removal Is Appealable

An order denying removal of a J.O. case is appealable following either a conviction by way of plea or jury verdict. In *People v. Charles M.,* 286 A.D.2d 942 (4th Dept. 2001), the Appellate Division reviewed the denial of removal of a J.O. case after a plea of guilty, and in *People v. Sanchez,* 128 A.D.2d 816 (2d Dept. 1987), reviewed the denial of removal of a J.O. case after a jury's guilty verdict.

§ 4:19 Removal of an Adolescent Offender Case to Family Court

The procedures and criteria for removal of an adolescent offender case from youth part to family court are set forth in CPL §§ 721.21, 722.22, 722.23 and article 725. Article 725 pertains to both the removal of J.O. and A.O. cases, although the article is titled Removal of Proceedings Against Juvenile Offender to Family Court.

§ 4:20 Purpose and Rationale of RTA Legislation

To effectively litigate removal to family court for adolescent offenders, it is helpful to understand both the purpose and rationale for this reform legislation.

Based upon a reading of the legislative history, Assembly debate, sponsor's memo, and case law, the goals of RTA can be summarized as follows:

- Treat 16- and 17-year-olds as children and not adults;
- Treat adolescents in a more age-appropriate manner;
- Provide adolescents with an opportunity to reform;
- Promote rehabilitation through better access to superior and youth-focused services;
- Avoid the onus of a criminal conviction, including stigma and collateral consequences;
- Avoid the punitive and traumatic effects of incarceration; and
- Hold youths accountable through age-appropriate sanctions.

It may be helpful to refer to the purposes of RTA in your affirmation or memorandum of law. A good place to begin is the Assembly record.

The RTA legislation was debated in the New York State Assembly on April 8, 2017. Case law addressing the issue of removal of A.O. cases to family court relies heavily on that debate. The transcript can be accessed at this link: full-debate.pdf (nyassembly.gov). The complete URL address is: https://nyassembly.gov/raisetheage/transcripts/full-debate.pdf.

RTA provides "a situation where only those cases where the truly violent felons would stay in the criminal part, and those kids who were not violent would be able to find their way to the family court where they not only could get superior services, but would be able to get better outcomes for their lives not only with services that were employed, but by not receiving a criminal record at the end of all of this so that they could change their life around." Assembly Record at p. 21. "[T]he object of the law is to treat 16- and 17-year-olds not as adults, but as children." Assembly Record at p. 67. "We cannot continue to treat children like adults in the criminal justice system. It is short-sighted, and a proven ineffective approach." Assembly Record at p. 86.In the sponsor's memo to Senate Bill S4121, the purpose of RTA was stated to be "so that youth who are charged with a crime may be treated in a more age-appropriate manner."

Several decisions addressing A.O. removal to family court have explained the purposes of the reform. "The intent of RTA is that children who are alleged to have committed crimes be rehabilitated rather than incarcerated and punished." *People v. J.M.,* 76 Misc. 3d 1299(A) (Sup. Ct. Erie County 2022). "[T]he legislators who negotiated the bill intended that virtually all cases be quickly transferred from Youth Part to Family Court. In Family Count, young defendants would have better access to youth focused services and treatment and would be saved the onus of a criminal conviction, but would still be subject to appropriate sanctions to hold them accountable." *People v. D.L.,* 62 Misc. 3d 900, 904 (Fam. Ct. Monroe County 2018). "[T]he objective of RTA is to treat 16- and 17- year- olds as children and not as adults, and to, whenever possible give them the opportunity to get back on the right track." *People v. J.H.,* 66 Misc. 3d 779, 783 (Co. Ct. Nassau County 2020). "[T]he reform purposes of article 722 if the CPL are manifest…that justice requires that adolescent offenders, as well as juvenile offenders, be treated differently than adults within the criminal justice system, given the unique circumstances and needs of this population." *People v. J.P.,* 63 Misc. 3d 635, 649 (Sup. Ct. Bronx County 2019).

The rationale for RTA is expressed in the Senate Bill S4121 Sponsor's Memo: "[M]any other states have reconsidered this issue in light of new evidence on child development and cognitive thinking. . . . Several studies have shown that treating minors as adults in the criminal justice system is often counterproductive in rehabilitating the youth and ineffective in preventing future criminal acts. Research has shown that children's brains do not fully develop until after the age of eighteen, and youth who engage in criminal conduct often do not have the same level of understanding of their actions as adults." The Sponsor's Memo cited to the Supreme Court decision in *Roper v. Simmons,* 543 U.S. 551 (2005) to provide justification for RTA, pointing out that the court had relied upon "evidence that minors are less mentally culpable for their actions than adults and further, that minors have a greater chance of rehabilitation." "Additionally, studies have shown that the penalties and longer sentences often imposed by adult criminal courts do not reduce the recidivism rate of youth who commit crimes, compared to similarly situated youth who are adjudicated in a juvenile court system. The services and alternative to detention programs available in Family Court can help meet the specific needs of each youth, including treatment for mental health and substance abuse often at low cost." The Sponsor's Memo also explains that part of the rationale for RTA was to mitigate the effect of the collateral consequences of a criminal conviction. "There are significant and sometimes lifelong implications for young people adjudicated in the criminal court system, which extend into the areas of education and employment, including earning potential." "Further, the ability to obtain and keep employment can be difficult for those with criminal records." "New York should adjust this aspect of its juvenile justice system to reflect the better understanding we now have of youth accused of crimes. We now know the potential that some of these youths have for redemption and the possibility to become productive members of society. "[3]

The rationale contained in the Senate Sponsor's Memo has been cited with approval in several A.O. removal decisions. *See, e.g., People v. G.C.,* 63 Misc. 3d 518, 519 (Co. Court Westchester County 2019).

[3] https://www.nysenate.gov/legislation/bills/2017/S4121.

The court's decision in *People v. D.L.* 62 Misc. 3d 900 (Fam. Ct. Monroe County 2018) provides an excellent explanation of the history behind the RTA and the Supreme Court jurisprudence that set the stage for New York's reform. RTA "recognized what our jurisprudence has long acknowledged, that children are less culpable in the criminal context than adults and more amenable to change. Moreover, courts have repeatedly relied on the scientific studies showing that brain development is incomplete through late adolescence impairing the ability of young people to assess the risks and consequences of their acts." *Id.* at 905. The court also discussed the principles and special status and characteristics that the Supreme Court has developed regarding young defendants dating back to *Roper v. Simmons,* 543 U.S. 551 (2005) and continuing through *Miller v. Alabama,* 567 U.S. 460 (2012). The court in *People v. D.L.* pointed out the significance of *Roper v. Simmons* and the Supreme Court's recognition of the lessened culpability of adolescents based on their lack of maturity, and youth's susceptibility to negative influences, impetuousness, and comparably irresponsible. In *Graham v. Florida,* 560 U.S. 48 (2010), the court recognized the immaturity of youth, and the potential for rehabilitation as they do mature. In *J.D.B. v. North Carolina,* 564 U.S. 261 (2011), the Supreme Court recognized the unique characteristics of children that render them more susceptible to influence. Finally, the court in *People v. D.L.* pointed to *Miller v. Alabama* and its recognition of the existence of salient characteristics in young defendants as a group, including recklessness and impetuousness. *People v. D.L.,* 62 Misc. 3d at 906 (citing to *Miller,* 567 at 471).

§ 4:21 Removal of Adolescent Offender at Arraignment

A defendant who was 16- or 17-years old at the time of the offense is charged as an adolescent offender, is arraigned in a youth part, and the provisions of CPL § 722.21 apply. If the youth part is not in session, the defendant must be brought before the most accessible magistrate designated by the appellate division to act as a youth part. The court must determine whether or not youth charged as an adolescent offender will be detained.[4] CPL § 722.21 (1). The court may, with the consent of the prosecutor, immediately remove the case to family court. CPL § 722.21 (1).

If the defendant is ordered to be detained, he or she shall be brought before the next session of the youth part. If not detained, the defendant shall be ordered to appear at the next session of the youth part, family court, or the local probation department.

§ 4:22 Adolescent Offender Waiver of Preliminary Hearing

If the defendant waives a preliminary hearing, the court must order that the defendant be held for the action of the grand jury with respect to the charge or charges contained in the felony complaint. CPL § 722.21 (2).

[4] For purposes of recognizance, bail, and commitment, CPL article 510 is applicable as it is for an adult.

§ 4:23 Removal or Other Dispositions After Preliminary Hearing for A.O.

If there is a preliminary hearing, at the conclusion of the hearing the youth part judge must dispose of the felony complaint in one of three ways:

a) If there is reasonable cause to believe that the defendant committed a felony, the court must order that the defendant be held for the action of a grand jury (CPL § 722.21 (3)[a]); or
b) If there is not reasonable cause to believe that the defendant committed a felony but there is reasonable cause to believe that the defendant is a "juvenile delinquent" the court must specify the act or acts it found reasonable cause to believe the defendant did and direct that the action be transferred to family court in accordance with CPL article 725 (CPL § 722.21 (3)[b]); or
c) If there is not reasonable cause to believe that the defendant committed any criminal act, the court must dismiss the felony complaint and discharge the defendant from custody if he is in custody, or if he is at liberty on bail, it must exonerate bail (CPL § 722.21 (3)[c]).

§ 4:24 Removal of Non-Violent Felony[5] for A.O. with Notice from Prosecutor that There Is No Opposition to Removal

When the defendant is charged with a felony other than a non-drug class A felony, a violent felony defined in Penal Law § 70.02, a J.O.-designated felony listed in CPL § 1.20(42)(1) or (2), or a vehicle and traffic law offense, the court must order transfer of an action against an adolescent offender to family court pursuant to CPL article 725 if the prosecutor gives notice to the court that he or she will not file a motion to prevent removal pursuant to CPL § 722.23. CPL § 722.21 (4).

§ 4:25 Removal of Non-Violent Felony for A.O. Without Prosecution Consent

Following the arraignment of an adolescent offender charged with a non-violent felony (excludes any class A felony except a drug felony, a violent felony defined in Penal Law § 70.02, a J.O. designated felony listed CPL §1.20 (42)(1) or (2), or a vehicle and traffic law offense), the court must order the removal of the action to family court in accordance with CPL article 725, unless within 30 calendar days of the arraignment, the district attorney makes a motion to prevent removal of the action to family court. If the defendant is ordered by the court to report to probation and fails to report as directed, the 30-day time period shall be tolled until such time as the A.O. reports to the probation department. CPL § 722.23 (1)(a). If the court does not direct the defendant to report to the probation department, this tolling provision likely does not apply.

[5] For purposes of removal of A.O. cases, a non-violent felony is described in CPL § 722.21 (4) as any felony that is not a class A felony defined outside of article 220 of the Penal Law (non-drug), not a violent felony defined in Penal Law § 70.02, and not a felony listed in CPL § 1.20 (42)(1) or (2).

§ 4:26 Prosecutor's Motion to Prevent Removal of a Non-Violent A.O.

In order to prevent removal of a non-violent A.O. case, the prosecutor must make a motion within 30 calendar days of the arraignment. Failure to do so should result in denial of the prosecution motion to prevent removal. In *People v. J.B.,* 63 Misc. 3d 424 (Co. Ct. Westchester County 2019), the court denied a hearing to the prosecution because the request for a hearing was not made within 30 days, although the motion to prevent removal apparently was. Applying the letter of the law as the court did in *People v. J.B.*, a failure to file the motion within 30 days should preclude consideration of the motion. The prosecutor's motion must be in writing and upon prompt notice to the defendant. The motion must contain allegations of sworn fact based upon personal knowledge of the affiant and shall indicate if the prosecutor requests a hearing. The motion shall be noticed to be heard promptly. CPL § 722.23 (1)(b). The factual part of an unsworn accusatory instrument cannot be the basis for an extraordinary circumstances finding. *People v. K.A.,* 65 Misc. 3d 1230(A) (Fam. Ct. Erie County 2019).

The defendant has a right to reply. The court must grant any reasonable delay requested by the defendant. Either party may request a hearing on the facts alleged in the prosecutor's motion to prevent removal of the action, and the hearing must be held expeditiously. CPL § 722.23 (1)(c).

PRACTICE TIPS

Because CPL § 722.23 (1)(b) requires that the prosecutor's motion must contain allegations of sworn fact upon personal knowledge of the affiant, defense counsel should carefully scrutinize the affidavit or affirmation supporting the motion. Where it is not based upon personal knowledge, defense counsel should argue that the motion to prevent removal must be denied. For support of this argument, see *People v. J.B.,* 63 Misc. 3d 424, 429 (Co. Ct. Westchester County 2019), where the court denied the prosecution motion to prevent removal because of the failure to meet the burden required by CPL § 722.23 (1)(b) to establish extraordinary circumstances based upon the personal knowledge of the affiant. There, the motion was based on conversations with and observations of other members of law enforcement. The court should consider only those exhibits and documents whose content contain allegations of sworn fact based upon personal knowledge of the affiant. *People v. A.P.,* 80 Misc. 3d 1204(A) (Co. Ct. Erie County 2023). Where the affirmation and felony complaint contain hearsay claims and do not contain allegations of "sworn fact" based upon personal knowledge, the motion to prevent removal should be denied for that reason. *People v. T.R.,* 62 Misc. 3d 1219(A) (Fam. Ct. Erie County 2018). Only non-hearsay facts can be considered. *People v. S.J.,* 72 Misc. 3d 196, 202 (Fam. Ct. Erie County 2021).

§ 4:27 Court's Determination of Motion to Prevent Removal of Non-Violent A.O.

The court must deny the prosecution motion to remove the action from youth part unless the court makes a determination that "extraordinary circumstances" exist that should prevent the transfer of the action to family court. CPL § 722.23 (1)(d). The court's determination must be

made within 5 days of the conclusion of the hearing or submission by the defense, whichever is later. The court's determination must include findings of fact and, to the extent practicable conclusions of law. CPL § 722.23 (1)(e).

The term "extraordinary circumstances" is not defined in the statute, but case law sets a very high bar for the prosecution to meet that standard. The term "extraordinary circumstances" is discussed later in this chapter at § 4.37.

PRACTICE TIPS

Because case law sets a very high bar for the prosecution to meet the "extraordinary circumstances" requirement, a memorandum of law will be helpful to remind the court of how high that standard is. As explained in *People v. S.J.,* 72 Misc. 3d 196, the legislative intent was that the "extraordinary circumstances" requirement be a high standard for the prosecutor to meet. Drawing from the record of the Assembly Proceedings discussing the meaning of "extraordinary circumstances," the court noted "[t]he presumption being that 'only one out of 1,000 cases would remain in youth part and those would be the extremely rare and exceptional ones.'" *Id.* at 198-199. The discussion of "extraordinary circumstances" and the legislative history in chapter § 4.37 should be of help in drafting your memorandum of law.

§ 4:28 Removal of Non-Violent A.O. on Consent of All Parties

As noted in CPL § 722.23 (1)(h), nothing in that subdivision precludes removal of a non-violent A.O. case to family court on the consent of all the parties.

§ 4:29 Removal of A.O. Charged with a Violent[6] Felony

Removal of a violent felony A.O. case to family court is controlled by CPL § 722.23 (2). If at the "sixth-day hearing" the prosecutor fails to prove by a preponderance of evidence one of the three factual circumstances as required by CPL § 722.23 (2)(c), the court must proceed to determine removal in accordance with CPL § 722.23 (1), as with non-violent felonies.

With the consent of the prosecutor, an A.O. charged with a violent felony may be removed to family court in accordance with CPL § 722.21 (5) and applying the interests of justice criteria of CPL § 722.22 (2).

§ 4:30 Procedures for Determination of Removal of A.O. Charged with a Violent Felony

When a 16- or 17-year old is charged as an adolescent offender with a violent felony (a class A felony, other than a drug felony defined in Penal Law article 220, or a violent felony defined in Penal Law § 70.02), the court must schedule an appearance no later than six calendar

[6] A violent felony for purposes of removal of an A.O. case to family court is described in CPL § 722.23 (2)(a) as an A.O. charged with a class A felony other than a Penal Law article 220 drug felony or a violent felony defined in Penal Law § 70.02.

days from the arraignment for the purpose of reviewing the accusatory instrument. CPL § 722.23 (2)(a). This appearance on the sixth day is sometimes referred to as a "sixth-day appearance," "sixth-day hearing" or "retention hearing." For the purposes of this guide, it will be referred to as a "sixth-day hearing."

§ 4:31 "Sixth-Day Hearing"

CPL § 722.23(2)(b) requires that at the court appearance scheduled for no more than six calendar days from arraignment, the court must review the accusatory instrument and any other relevant facts for the purpose of making a determination required by CPL § 722.23(2)(c). After reviewing the papers and hearing from the parties, the court must determine, in writing, whether the prosecutor proved by a preponderance of the evidence one or more of the following, as set forth in the accusatory instrument:

> (i) the defendant caused significant physical injury to a person other than a participant in the offense; or
>
> (ii) the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense; or
>
> (iii) the defendant unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact as defined in Penal Law § 130.00.

The preponderance of the evidence standard requires evidence sufficient to produce a reasonable belief in the truth of the facts asserted. *People v. A.S.,* 62 Misc. 3d 1220(A) (Fam. Ct. Erie County 2019) (citing 58A NY Jur 2d Evidence and Witnesses § 978). Or, as explained in *People v. C.B.,* 69 Misc. 3d 1223(A) (Co. Ct. Nassau County 2020), the preponderance of evidence standard "simply requires that the trier of fact believe that the existence of a fact is more probable than its nonexistence."

Several courts have held that at a "sixth-day hearing", as with most pretrial hearings, hearsay evidence is admissible to establish any material fact. *People v. J.W.,* 63 Misc. 3d 1210(A) (Sup. Ct. Kings County 2019); *People v. K.F.,* 67 Misc. 3d 607, 609 (Co. Ct. Nassau County 2020); *People v. B.H.,* 62 Misc. 3d 735, 739-740 (Co. Ct. Nassau County 2018).

If the court determines that the prosecutor has not proven any one of the three factual allegations by a preponderance of the evidence, the court must order that the action proceed in accordance with CPL § 722.23 (1), i.e., by following the procedures for removal of a non-violent felony. As such, removal would be required unless, within 30 calendar days of arraignment, the prosecutor makes a motion to prevent removal, and makes a showing that "extraordinary circumstances" exist to prevent removal. As the court noted in *People v. J.B.,* 63 Misc. 3d 424, 428 (Co. Ct. Westchester County 2019), the presumption of CPL § 722.23(2)(c) is that when an adolescent offender is charged with a violent felony that does not contain one of the three aggravating factors contained in CPL § 722.23 (2)(c), the case will be removed to family court; only the most exceptional cases were intended to remain in the youth part.

The purpose of the "sixth-day hearing" is to determine whether the case should be retained in the youth part and the A.O.'s case be disqualified from removal to family court.

In order to conduct a "sixth-day hearing," the court may need to address a number of issues. What is the meaning of "significant physical injury?" What does it mean to "display" a firearm? What meaning is to be given to the term "in furtherance of such offense?" Must the A.O. be the sole actor, or is he or she subject to accomplice liability? As used in circumstance (i), must the cause of the injury be direct or can it be indirect? These issues will be addressed below.

§ 4:32 Significant Physical Injury

One of CPL § 722.23 (2)(c)'s three statutory aggravating factors that, if proven by the prosecution by a preponderance of the evidence, will automatically retain the case in youth part and prevent removal, is that "the defendant caused significant physical injury to a person other than a participant in the offense." "Significant physical injury" is not defined in the RTA legislation, nor is that term found elsewhere in the Penal Law. Courts have developed a definition for "significant physical injury" by first looking at the dictionary definitions, and then turning to the legislative debate in the Assembly to determine the legislative intent.

The court in *People v. E.S.B.,* 70 Misc. 3d 1208(a) (Co. Ct. Nassau County 2020) reviewed the RTA legislative history to conclude that "the legislators intended that the 'significant physical injury' standard would fall somewhere between 'physical injury' and 'serious physical injury,' both of which are defined in the Penal Law.[7] (Assembly, Record of Proceedings, April 8, 2017 ["Assembly Record"]. p. 48). They anticipated that 'significant physical injury' would be accompanied by 'major aggravating factors, such as bone fractures [and] injuries requiring surgery' and that a 'significant physical injury' would be 'something more serious than a bruise, but less serious than a disfigurement. (Assembly Record, pp. 26-27)." To be exact, the Assembly sponsor of the RTA bill explained that "it is expected that significant physical injury would include major aggravating factors, such as bone fractures, injuries requiring surgery and some permanent disfigurement." Assembly Record, p. 49. The sponsor went on to explain that it must have "results that go significantly beyond those of physical injury," a standard that is "much more than just a bruise or significant pain." Assembly Record, p. 49.

Case law continues to develop the definition of "significant physical injury." For example, in *People v. V.A.M*., 73 Misc. 3d 293, 297-298 (Co. Ct. Nassau County 2021) the court found that stab wounds requiring seven sutures to close multiple wounds did not meet the "significant physical injury" standard, where the prosecution introduced no evidence that the victim required extended treatment or hospitalization beyond the date of the incident, and that allegations of "substantial plain" did not meet the standard. In comparison, in *People v. J.T.J.,* 69

[7] "Physical injury" is defined as "impairment of physical condition or substantial pain [Penal Law § 10.00 (9)], while 'serious physical injury' is defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ" [Penal Law § 10.00 (10)].

Misc. 3d 1209(A) (Fam. Ct. Erie County 2020), the court found that lacerations to the head requiring staples to stop the bleeding did constitute "significant physical injury," but that the substantial pain and bruising to the ribcage of the same victim did not meet the standard and was nothing more than physical injury.

Several cases have addressed the question of whether medical records are required at the "sixth-day hearing" on the issue of significant physical injury, concluding that it is unnecessary for the prosecution to produce such records. *See, e.g., People v. E.B.M.,* 63 Misc. 3d 576, 583 (Co. Ct. Nassau County 2019) and *People v. J.T.J.,* 69 Misc. 3d 1209(A) (Fam. Ct. Erie County 2020).

If the existence of a "significant physical injury" is at issue and your client is alleged to have used some form of weapon, you should be aware of several cases that seem to stand for the proposition that any injury caused by the use of a weapon constitutes a "significant physical injury." This spurious proposition was first rolled out by Judge St. George in an early A.O. removal decision in *People v. B.H.,* 62 Misc. 3d 735, 740 (Co. Ct. Nassau County (2018). This decision was then relied upon by Judge Carter in two of his removal decisions without any further analysis in *People v. J.T.J.,* 69 Misc. 3d 1209(A) (Fam. Ct. Erie County 2020) and *People v. A.S.,* 62 Misc. 3d 1220(A) (Fam. Ct. Erie County 2019). A careful reading of the Assembly Record and the two cases that Judge St. George relied upon for his conclusion that a "significant physical injury" exists "where the injury arose from the use of a weapon" helps to debunk his proposition. *See* Practice Tips below.

PRACTICE TIPS

If you are confronted with the argument from *People v. B.H.,* that any injury caused by a weapon must be per se a "significant physical injury" you will want to start with a careful reading of the Assembly Record at pp. 26-27 and 29. Judge St. George quotes from the Assembly Record at these pages, writing that, in the Assembly debate, it was noted that "a significant physical injury" would be "more serious than a bruise," and would likely involve "bone fractures, injuries that result in disfigurement." He then adds of his own accord: "i.e., injuries that were sustained through the use of a weapon (Assembly Records at 26-27, 29)." This explanatory information (i.e.) makes it seem as though the assembly debate contained a reference to the use of weapons to cause such injuries. The decision suggests that the Assembly sponsor, when explaining the RTA legislation, referenced injuries caused by the use of a weapon as being tantamount to "significant physical injury." However, no such reference to weapons was ever made by the sponsor.

Likewise, the court's reliance on two cases that purportedly stand for the proposition that "a significant physical injury . . . exists where the injury arose from the use of a weapon" is ill-conceived. Judge St. George cited two cases to support his proposition – *People v. McLean,* 128 A.D.3d 1094, 1095 (2d Dept. 2015) and *Matter of Angelica A. (Carlos A.),* 56 Misc. 3d 1220(A) (Fam. Ct. Bronx County 2017). Neither case concerned removal, nor did they involve an interpretation of the meaning of "significant physical injury." They just happened to be two random cases, probably found by a Lexis word search, that happened to use the expression "significant physical injury" to describe an injury. In the former case, a criminal case, the

appeals court was simply describing the shooting of the victim who was running away and was shot in the buttocks "causing significant physical injury, but he managed to get away." The court's use of the term "significant physical injury" bore no consequence to the outcome of the case and was merely descriptive, not definitional. In the latter case, having to do with child neglect, the term used by the court to describe the child's injury (caused by her father chasing her with a weapon) was not interpretive or definitional, but merely used by the court to explain the injury. Interestingly, the actual language of the court in *Matter of Angelica A.* was not, as Judge St. George purports it to be, "significant physical injury," but merely "significant injury." Simply stated, there is no basis for the proposition conjured up by the court in *People v. B.H.* Be prepared to confront the prosecution's attempts to rely upon this case and its line of reasoning.

§ 4:33 Defendant "Caused" Significant Physical Injury: Sole Actor Analysis

For the purpose of preventing removal, it is not sufficient for the prosecutor to prove that the complainant suffered "significant physical injury." As CPL § 722.23 (2)(c)(i) makes clear, and as has been recognized in case law, the prosecution must also prove by a preponderance of the evidence that it was this defendant that "caused" the significant physical injury. *People v. B.H.,* 62 Misc. 3d 735, 741 (Co. Ct. Nassau County 2018).

The language of CPL § 722.23 (c) makes clear that the requirement is that the prosecutor prove that it was "the defendant" who caused significant physical injury, displayed a firearm, shotgun or deadly weapon, or unlawfully engaged in the enumerated sexual offenses.

In order to refute the prosecutor's argument that your client caused the significant physical injury, it is helpful to be familiar with both how the legislature intended the term "caused" to be interpreted, and how case law has interpreted causation in the context of CPL § 722.23(2)(c). In response to a compound question about accomplice liability and adolescents present at the time of the crime, and whether they would also be disqualified from removal, the Bill Sponsor replied: "No. This test requires that the defendant be the sole actor, be the sole actor who causes the conduct outlined in this test. Again, in talking to Mr. Ramos, you can understand why we want to do that, because kids happen to get in trouble together all the time and may – it may be just one guy that really is the bad one – bad apple in the group, and don't want to punish all of them. It would also disqualify the defendant who directly caused the injury, who displayed the weapon in his hand, and who personally engaged in the unlawful sexual conduct."

From a reading of the legislative debate, it is clear that the prosecutor must prove that the defendant was the sole actor, who directly caused the significant physical injury and personally committed the disqualifying act. Accomplice liability, as such, cannot be the basis for a finding that the defendant caused the injury or committed the disqualifying act.

Several cases have supported this conclusion based upon their reading of the legislative history. In *People v. B.H.,* 62 Misc. 3d 735, 741-42 (Co. Ct. Nassau County 2018), for example, the court concluded that the RTA's legislative history required the prosecutor to show the A.O. directly caused the victim's injuries; rejected "acting in concert" liability, including gang

activity; and stated that the three disqualifying factors require that the A.O. be the sole actor. In *People v. J.H.,* 66 Misc. 3d 779, 782-83 (Co. Ct. Nassau County 2020), the court found the statutory language, "caused significant physical injury," to be clear and unambiguous, and held that it should be construed to give effect to the plain meaning of the words. CPL § 722.23 (2)(c)(i) is intended to disqualify an A.O.'s case from removal to Family Court "when he or she *directly* 'caused significant physical injury' to a nonparticipant in the offense." The court in *People v. J.H.* further explained that, even if the plain language of the statute were arguably ambiguous, the legislative history of the RTA legislation supports the same conclusion, that there must be direct causation. *Id.* at 783. In *People v. E.B.M.* 63 Misc. 3d 576, 584 (Co. Ct. Nassau County 2019), the court also emphasized that the injury must be directly caused by the defendant, explaining that the A.O. must have personally caused the injuries.

The requirement that the defendant be the "sole actor" can be misleading. It could be read to mean that, to be disqualified from removal, the defendant must have been the only person who committed the disqualifying conduct. On the other hand, it could be read to require that the defendant personally engaged in the disqualifying conduct. Defense counsel should be careful in how they address this issue. Judge Singer, in two decisions, opines that it is certainly possible for two defendants to take a clear and active role in personally and directly causing "significant physical injuries" to a victim. *People v. J.H.,* 66 Misc. at 783; *People v. E.B.M.* 63 Misc. 3d at 584. There is a distinction between the argument that (a) the prosecutor has not proven by a preponderance of the evidence that the defendant's actions directly caused the injuries and therefore should not be disqualified from removal, and (b) that the defendant should not be disqualified from removal because he was not solely responsible for the injuries. *See also People v. Y.L.,* 64 Misc. 3d 664, 669-70 (Co. Ct. Monroe County 2019) (holding that two co-defendant A.O.s can both actively and directly participate in the assault on the victim resulting in his significant physical injury, and thus both be disqualified from removal).

It is often the case with adolescents that they are not alone at the scene of an offense. Instead, they are frequently with a group of other young people, be it a group of friends or a "gang." Under these circumstances, courts have consistently rejected liability for a disqualifying factor predicated on "acting in concert." *See People v. B.H.,* 62 Misc. 3d 735, 741 (Co. Ct. Nassau County 2018); *People v. K.F.,* 67 Misc. 3d 607, 612 (Co. Ct. Nassau County 2020). For the disqualifying factor to be established, the prosecutor must prove by a preponderance of the evidence that your client personally engaged in conduct that caused the "significant physical injury" to the victim. Non-specific allegations that are general and broad "without attributing any specific conduct to the A.O." are not sufficient. *People v. E.S.B.,* 70 Misc. 3d 1028(A) (Co. Ct. Nassau County 2020). In *People v. E.S.B.*, a group of 6 youths, including the defendant A.O., assaulted the victim, kicking and punching him. One individual picked up a brick and repeatedly struck the victim in the head, allegedly causing "significant physical injury." The court ordered the case to proceed to removal, because the prosecutor had failed to prove that "'it is more probable than not' that this A.O. caused the victim to sustain a 'significant physical injury.'" The flaw in the prosecution's proof was the "inability to specify whether this A.O. was the individual who allegedly struck the victim in his face with the brick." There is no basis in the statutory language to expand the scope of disqualifications to include individuals who did not directly cause significant physical injury. *People v. J.H.,* 66 Misc. 3d at 783.

As of the writing of this manual, there have been no decisions from the Appellate Division addressing how the term "caused" in the disqualifying act "caused significant physical injury" is to be applied. A word of caution: In *Matter of Clark v. Boyle,* 210 A.D.3d 463, 469 (1st Dept. 2022), the prosecutor sought a writ of prohibition against Judge Boyle, who denied the prosecutor's motion seeking to disqualify the A.O. from removal because he caused significant physical injury to a person other than a participant in the offense and ordered the prosecution to proceed in accordance with CPL § 722.23 (1), and also against Judge Semaj, who denied the prosecutor's motion to prevent removal to family court, ruling that it was not a case of extraordinary circumstances. Judge Semaj ordered removal of the A.O. case to family court. The Appellate Division ruled that the case did not rise to the level where a writ of prohibition may issue. The prosecutor also asked the Appellate Division to issue a declaratory judgment as to the meaning of "cause" in CPL § 722.23(2)(c)(i) and "extraordinary circumstances" as used in CPL § 722.23(1)(d).

Although the Appellate Division declined to issue a declaratory judgment because "any declaratory judgment would amount to an advisory opinion," the appellate panel did cast doubt on how the lower courts have been interpreting "sole actor" and "direct cause," and on how high a bar was being set for a finding of "extraordinary circumstances." [8]

Do not be surprised to encounter prosecution arguments citing to this advisory/ non-advisory Appellate Division decision, which is undoubtedly *dicta.* The case is readily distinguishable by its unique fact pattern involving an intervening event, and because it is not upon close reading an acting-in-concert case.

§ 4:34 Defendant Displayed a Firearm, Shotgun, Rifle, or Deadly Weapon in Furtherance of Such Offense

A second aggravating factor that disqualifies an A.O. from removal is that the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of the offense. CPL § 722.23 (2)(c)(ii).

Mere possession of a weapon is not enough to prevent removal. The weapon must actually be displayed. Where the prosecutor failed to prove through testimonial and admissible evidence that the A.O. actually displayed a weapon, the defendant is not disqualified from removal. *People v. M.R.,* 68 Misc. 3d 1004, 1012 (Sup. Ct. Kings County 2020). In *People v. M.M.,* 63 Misc. 3d 772, 779-80 (Co. Ct. Nassau County 2019), the court gave extensive analysis to the term "display," concluding that what was required was that the defendant "show or make something evident," and that "CPL § 722.23 (2)(c)(ii) requires that, in order for an AO's case to be disqualified from removal to Family Court, the People must prove, by a preponderance of the evidence, that the A.O. showed or 'exhibited ostentatiously' an actual firearm or deadly weapon."

[8] In *Matter of Clark* the Appellate Division observed that "there is no requirement that the person be the 'sole' cause, and "[t]he word 'cause' in the statute at issues is nowhere qualified by the word 'direct.'" The Court also offered the aside that "one could question what set of facts would need to be presented to constitute 'extraordinary circumstances,' if the present scenario…does not qualify."

In *People v. C.R.,* 69 Misc. 3d 1223(A) (Co. Ct. Nassau County 2020), the court found that in the context of the removal statute "the term 'display' means to 'prominently exhibit something' where it can easily be seen and/or 'to make evident.'" In *People v. K.M.,* 2024 NY Slip Op 51061(U) (Co. Ct. Schenectady County2024) the court found that the handgun was displayed although it was partially obscured.

Under this factor, the prosecutor must also prove by a preponderance of the evidence that what was displayed was an actual firearm or deadly weapon. "Nothing in the plain language of the statute indicates that CPL § 722.23 (2)(ii) is intended to extend to cases where the A.O. has not displayed an *actual* firearm or 'deadly weapon,' but has only displayed 'what appears to be' a firearm or deadly weapon." *People v. M.M.,* 63 Misc. at 780. What is required under the statute is that "what is actually displayed, is in fact, a firearm or deadly weapon." *People v. D.G.,* 63 Misc. 3d 1237(A) (Sup. Ct. Kings County 2019).

Accessorial liability or accomplice liability cannot be the basis to prove that the defendant displayed a firearm. *People v. J.R.,* 2024 NY Slip Op 24218 (Co. Ct. Orange County 2024)

In order to invoke the second aggravating factor to disqualify the defendant from removal, CPL § 722.23 (2)(c)(ii) further requires that the display of the weapon be in "furtherance of the offense." The term "furtherance" is not defined in the RTA statute. In *People v. N.C.,* 65 Misc. 3d 996, 1002 (Sup. Ct. Bronx County 2019), the court undertook an extensive analysis and concluded that the words "in furtherance of" required proof that the display of the weapon was done to advance or promote the offense. The court rejected the prosecution argument that whenever an adolescent displays a firearm, he or she is "furthering" the commission of the crime of criminal possession of a weapon. The court required proof that the display of the weapon advanced the crime, which the prosecutor failed to present.

The question of whether a box cutter is a deadly weapon arose in the context of a "sixth-day hearing" in *Matter of K.M.,* 80 Misc. 3d 1203(A) (Co. Ct. Sullivan County 2023). The prosecution argued that a box cutter was a dagger and, as such, was a deadly weapon as defined in the Penal Law. The court examined the dictionary definitions of dagger and box cutter and concluded that "[b]ased upon the ordinary and commonly understood meanings of 'dagger' and 'box cutter' . . . a box cutter does not qualify as a deadly weapon."

PRACTICE TIPS

When arguing for removal, there will be occasions when you will want to advance a particular interpretation of a term, be it "significant physical injury," "display," "in furtherance of," "cause," or "extraordinary circumstances." To support your position, you may want to tether your argument to the legislative purpose of RTA, as the courts did in *People v. M.M.,* 63 Misc. 3d 772, 781 (Co. Ct. Nassau County 2019) and *People v. N.C.,* 65 Misc. 3d 996*,* 1002 (Sup. Ct. Bronx County 2019). The narrower the interpretation of the terms that would disqualify an adolescent from removal, the more consistent with the purpose of RTA it is. "Considering that the legislative intent behind RTA is to treat 16-year-old offenders different from adults and to implement a mechanism that will facilitate the transfer of the majority of cases to the Family

Court, it would be illogical for the court to construe CPL 722.23 (2)(c)(ii) in a way that expands the reach of the provision to cases that would otherwise proceed toward automatic removal to Family Court under CPL 722.23 (1)(a)." *People v. M.M.*, 63 Misc. 3d at 781.

§ 4:35 Removal Procedures for A.O. After Completion of "Sixth-Day Hearing"

If, at the completion of the "sixth-day hearing," the court makes a determination that the prosecutor has not proven by a preponderance of the evidence at least one of the three aggravating factors contained in CPL § 722.23 (2)(c), the court must order that the action proceed in accordance with CPL § 722.23 (1) by following the same removal procedures as are applicable for a non-violent felony. The court must order removal to family court in accordance with CPL article 755 unless the prosecutor makes a motion to prevent removal of the action within 30 calendar days of the arraignment. CPL §722.23 (1)(a).

The motion to prevent removal must be in writing and the defendant must be given prompt notice. The motion must contain allegations of sworn fact based upon personal knowledge of the affiant, and must so indicate if the prosecutor requests a hearing. The motion shall be noticed to be heard promptly. CPL § 722.23 (1)(b).

The defendant must be given an opportunity to reply to the prosecutor's motion, and must be granted any reasonable request for a delay. Either party may request a hearing on the facts alleged in the motion to prevent removal. The hearing must be held expeditiously. CPL § 722.23 (1)(c).

The linchpin of the prosecutor's motion to prevent removal is proof that "extraordinary circumstances" exist that should prevent transfer of the action to family court. If the prosecutor fails to prove "extraordinary circumstances," the court must deny the motion to prevent removal and order the case removed to family court. CPL § 722.23 (1)(d).

The court must make a determination in writing or on the record within 5 days of the conclusion of the hearing or submission by the defense, whichever is later. The determination must include findings of fact and to the extent practicable conclusions of law. CPL § 722.23 (1)(e).

§ 4:36 Extraordinary Circumstances

The statutory standard of CPL § 722.23 (1) establishes that the court must order removal unless, within 30 days of arraignment, the prosecutor makes a motion to prevent removal and proves that "extraordinary circumstances" exist that should prevent transfer of the action to family court. The Legislature intended this to set a "very high bar" for the prosecutor. Assembly Record, p. 83.

The RTA legislation that gave rise to the A.O. removal statutes does not define the term "extraordinary circumstances." Whether the prosecutor is seeking to establish "extraordinary circumstances" to support a motion within 30 days of arraignment to prevent removal of a non-violent felony, or to prevent removal of a violent felony after having failed to provide sufficient evidence at the "sixth-day hearing" that one of the three disqualifying circumstances exist, defense counsel must be intimately familiar with how this term has been interpreted by case law and how court decisions have heavily relied upon the legislative history and the Assembly debate on April 8, 2017.

Informed by the Assembly debate, courts have concluded that the "extraordinary circumstances" requirement set a "very high bar" for prosecutors to meet, and that denials of transfers to family court "should be extremely rare." *See People v. T.P.,* 73 Misc. 3d 1215(A) (Co. Ct. Nassau County 2021); *People v. D.J.,* 77 Misc. 3d 440, 443 (Fam. Ct. Erie County 2022). Courts have defined "extraordinary circumstances" as: "exceptional to a very marked extent," "most unusual," "far from common," "very outstanding," "very remarkable" (*see People v. J.P.,* 63 Misc. 3d 635, 649-50 (Sup. Ct. Bronx County 2019)), "very unusual," "remarkable," and as "circumstances that go beyond what is regular and foreseeable in the normal course of events" (*see People v. T.R.,* 62 Misc. 3d 1219(A) (Fam. Ct. Erie County (2018)) or "go beyond that which is usual, regular or customary" (*see People v. D.J.,* 77 Misc. 3d 440, 443 (Fam. Ct. Erie County 2022)).

While explaining the term "extraordinary circumstances," the bill sponsor explained, "under the language of this bill, we definitely intend that in the overwhelming bulk of the cases that the matter will be promptly transferred from adult court to family court. Assembly Record p. 37. The assemblyperson went on to explain that "the standard was . . . to create this type of presumption where only one out of 1,000 cases . . . those extremely rare and exceptional cases, would remain in the youth part." Assembly Record pp. 37-38. "[U]nder the bill, denials of transfer to the family court should be extremely rare." Assembly Record p. 39. Courts have frequently cited this language in the Assembly debate. *See, e.g., People v. M.M.,* 64 Misc. 3d 259, 268 (Co. Ct. Nassau County 2019); *People v. J.P.,* 63 Misc. 3d 635, 647 (Sup. Ct. Bronx County 2019).

Because of the very clear legislative record and the wording of the statute, courts have concluded that "the *presumption* of the newly enacted legislation is that when an adolescent offender is charged with a violent felony that does not contain one of the three aggravating factors contained in CPL 722.23 (2)(c), the case will be removed to Family Court, an indication that it was intended for only the most exceptional cases to remain in Youth Part." *People v. J.B.,* 63 Misc. 3d 424, 428 (Co. Ct. Westchester County 2019)*; see also People v. B.H.,* 63 Misc. 3d 244, 248 (Sup. Ct. Nassau County 2019).

The legislative debate gave rise to what one court has called the "two-part test" by which a court must assess whether "extraordinary circumstances" have been established by the prosecutor. "Transfer to the family court should be denied only when 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." Assembly Record p. 39. As the court pointed out in *People v. J.J.,* 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 2022), "[i]t is not

enough to prove the existence of 'highly unusual and heinous facts' in the underlying case. The People must also establish 'strong proof that the [AO] would not benefit in any way from the heightened services in the family court." Courts have repeatedly denied the prosecutor's request to prevent removal when the prosecutor has failed to meet this two-part test. *See, e.g., People v. M.M.,* 64 Misc. 3d 259. 271-72 (Co. Ct. Nassau County 2019); *People v. B.H.,* 63 Misc. 3d 244, 250 (Sup. Ct. Nassau County 2019); *People v. D.J.,* 77 Misc. 3d 440, 445 (Fam. Ct. Erie County 2022).

An additional gloss added onto the high standard of "extraordinary circumstances" was injected during the legislative debate. The bill sponsor explained that when a court undertakes the "extraordinary circumstances" analysis, "[t]he judge just look at all the circumstances of the case, as well as the circumstances – all of the circumstances of the young person" including "aggravating factors . . . but the court must – court must also consider individual mitigating circumstances, as well." Assembly Record pp.39-40. This has led some courts to view the proffered evidence in its totality by balancing any aggravating and mitigating circumstances to determine whether "extraordinary circumstances" exist. *See People v. J.S.* 66 Misc. 3d 1213(A) (C0. Ct. Nassau County 2020); *People v. B.H.,* 63 Misc. 3d 244, 249 (Sup. Ct. Nassau County 2019). Several courts have engaged in this "totality of the circumstances" analysis. *See People v. D.J.,* 77 Misc. 3d 440, 445 (Fam. Ct. Erie County 2022); *People v. T.P.,* 73 Misc. 3d 1215(A) (Co. Ct. Nassau County 2021).

The balancing of aggravating and mitigating factors and the "two-part test" are not separate standards from the "extraordinary circumstances" standard. They have been used by courts as a lens through which to view or assess whether the prosecution has met the high standard of "extraordinary circumstances."

PRACTICE TIPS

One might reasonably ask: how should the balancing of aggravating and mitigating factors be applied?

The notion of a balancing test connotes a balancing as to which factors weigh more heavily, i.e., which preponderate. But where there is a strong presumption in favor of removal, a balancing test is inapposite. The fact that the bill sponsor only indicated that a court should consider aggravating and mitigating factors, but did not reference a balancing test, suggests that some courts may have gone off track by engaging in a balancing of the factors.

A balancing test could dilute the presumption in favor of removal when, as is well established, denials of transfers to family court should be extremely rare, and only "one out of 1,000 cases . . . would remain in youth part."

Defense counsel should consider arguing that the court must not undertake any balancing of mitigating factors against aggravating factors. The court can consider aggravating factors to determine if the prosecutor has met the high standard of "extraordinary circumstances." If, and only if, the prosecutor's aggravating factors have established that "extraordinary circumstances" exist, should the court consider the mitigating factors to offset the aggravating factors. Support for this argument is found in *People v. S.J.,* 72 Misc. 3d 196, 203 (Fam. Ct.

Erie County), a case in which defense counsel offered no mitigating circumstances. Instead of engaging in a balancing test, the court held that it need not review the mitigating circumstances because "the submitted aggravating factors are insufficient to make a finding of extraordinary circumstances." In other words, what is required is not a balancing of aggravating against mitigating factors, but rather a consideration of mitigating factors to negate a finding of "extraordinary circumstances" where aggravating factors are present. Additional support for this argument is drawn from the Assembly Record, where the bill's sponsor explained that "[e]ven if these aggravating factors are proven, mitigating circumstances could result in denial of an extraordinary circumstances finding and, therefore, denial of the motion to stop the transfer to the family court." Assembly Record p. 40.

An alternative analysis is that the aggravating factors and mitigating circumstances are not balanced against each other, but are taken into consideration in the overall assessment of whether the high standard of "extraordinary circumstances" has been reached by the prosecutor.

§ 4:37 Aggravating and Mitigating Factors

Given that the "extraordinary circumstances" analysis of many courts includes a consideration of aggravating and mitigating factors, defense counsel must be familiar with what these factors are from both the legislative history and case law.

Many cases have drawn upon the RTA legislative debate, wherein several aggravating and mitigating factors were suggested, creating a non-exhaustive list of such factors. *See People v. S.J.,* 72 Misc. 3d 196, 199 (Fam. Ct. Erie County 2021); *People v. J.S.,* 66 Misc. 3d 1213(A) (Co. Ct. Nassau County 2020); *People v. J.P.,* 63 Misc. 3d 635, 648 (Sup. Ct. Bronx County 2019); *People v. M.R.,* 68 Misc. 3d 1004, 1009 (Sup. Ct. Kings County 2020); *People v. D.J.,* 77 Misc. 3d 440, 444 (Fam. Ct. Erie County 2022).

"The aggravating factors the Court must consider are: (1) whether the A.O. committed a series of crimes over a series of days; (2) whether the A.O. acted in an especially cruel and heinous manner; and (3) whether the A.O. was a leader of the criminal activity, who had threatened or coerced other reluctant youth into committing the crimes before the court." *People v. S.J.,* 72 Misc. 3d 196, 199 (Fam. Ct. Erie County 2021).

"The list of mitigating circumstances that the Court should consider that are meant to include a wide range of individual factors are the youth's 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, and abuse of alcohol or controlled substances by the AO, be it family or peers." *People v. S.J.,* 72 Misc. 3d 196, 199 (Fam. Ct. Erie County 2021).

For a full discussion of mitigation and the inclusion of a mitigation specialist on the defense team see Chapter 7.

In addition to the list of mitigating factors developed from the legislative debate, courts have developed their own mitigating factors specific to A.O. removal cases. Below is a checklist of mitigating factors to consider and develop when confronted with a prosecution motion to prevent removal. This is not an exclusive list; there are no limitations on what mitigation can be.

CHECKLIST OF MITIGATING FACTORS

- ☐ Client is amenable to the heightened services in family court.
- ☐ Client would benefit from the heightened services in family court.
- ☐ Client was affected by economic difficulties.
    - Assembly Record p. 40
- ☐ Client experienced substandard housing.
    - Assembly Record p. 40
- ☐ Client experienced poverty.
    - Assembly Record p. 40
- ☐ Client suffers from learning difficulties
    - Assembly Record p. 40.
- ☐ Client suffers from learning disabilities.
    - Assembly Record p. 40
- ☐ Client has experienced educational challenges.
    - Assembly Record p. 40
- ☐ Client has lack of insight and is susceptible to peer pressure due to immaturity.
    - Assembly Record p. 40
- ☐ Client affected by an absence of positive role models.
    - Assembly Record p. 40
- ☐ Client suffers from a lack of behavioral role models.
    - Assembly Record p. 40
- ☐ Client suffers from or has been exposed to alcohol or substance abuse by family or peers.
    - Assembly Record p. 40

☐ Extensive history with Child Protective Services.

- *People v. J.P.,* 63 Misc. 3d 635 (Sup. Ct. Bronx County 2019)

☐ CPS efforts thwarted by mother.

- *People v. J.P.,* 63 Misc. 3d 635 (Sup. Ct. Bronx County 2019)

☐ Neglected by mother.

- *People v. J.P.,* 63 Misc. 3d 635 (Sup. Ct. Bronx County 2019)

☐ Rejected by mother.

- *People v. J.P.,* 63 Misc. 3d 635 (Sup. Ct. Bronx County 2019)

☐ Mother failed to cooperate with services for client.

- *People v. J.P.,* 63 Misc. 3d 635 (Sup. Ct. Bronx County 2019)

☐ Client made positive efforts at class work and activities while incarcerated.

- *People v. J.P.,* 63 Misc. 3d 635 (Sup. Ct. Bronx County 2019)

☐ Resides with foster mother due to mother's ongoing substance abuse issues.

- *People v. T.P.,* 73 Misc. 3d 1215(A) (Co. Ct. Nassau County 2021)

☐ No contact with biological father.

- *People v. T.P.,* 73 Misc. 3d 1215(A) (Co. Ct. Nassau County 2021)

☐ Parents abandoned him at a young age.

- *People v. J.J.,* 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 2022)

☐ Subjected to physical violence by mother.

- *People v. J.J.,* 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 2022)

☐ Psychiatric diagnosis.

- *People v. J.J.,* 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 2022)

☐ Educational difficulties.

- *People v. J.J.,* 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 2022)

☐ The potential state prison sentence that this AO would face militates against a finding of "extraordinary circumstances."

- *People v. J.P.,* 63 Misc. 3d 635 (Sup. Ct. Bronx County 2019)

☐ Client is the less culpable of the two perpetrators.

- *People v. J.P.,* 63 Misc. 3d 635 (Sup. Ct. Bronx County 2019)

☐ Client's home life contributed to his recidivism.

- *People v. J.P.,* 63 Misc. 3d 635 (Sup. Ct. Bronx County 2019)

☐ Currently working for a youth program and engaged in pro-social activities.

- *People v. R.B.,* 2023 NY Slip Op 50917(U) (Youth Part Erie County 2023)

☐ Enrolled at local Community College.

- *People v. R.B.,* 2023 NY Slip Op 50917(U) (Youth Part Erie County 2023)

☐ Mental health issues.

- *People v. R.M.,* 63 Misc. 3d 541 (Co. Ct. Westchester County 2018)

☐ Client faced personal challenges which impacted his insight and judgment.

- *People v. M.R.,* 68 Misc. 3d 1004 (Sup. Ct. Kings County 2020)

☐ Experienced recurring periods of homelessness.

- *People v. M.R.,* 68 Misc. 3d 1004 (Sup. Ct. Kings County 2020)

☐ Housing instability.

- *People v. M.R.,* 68 Misc. 3d 1004 (Sup. Ct. Kings County 2020)

☐ Lack of strong familial support.

- *People v. M.R.,* 68 Misc. 3d 1004 (Sup. Ct. Kings County 2020)

☐ Client suffering from substance abuse issues.

- *People v. M.R.,* 68 Misc. 3d 1004 (Sup. Ct. Kings County 2020)

☐ Immaturity, lack of insight, and poor judgment exacerbated by personal difficulties.

- *People v. M.R.,* 68 Misc. 3d 1004 (Sup. Ct. Kings County 2020)

The Center for Disease Control and Prevention (CDC) has produced a list of risk factors that increase the likelihood of experiencing adverse childhood experiences (ACEs) and can affect children for years to come. These individual and family risk factors include:

- Families experiencing caregiving challenges related to children with special needs (for example, disabilities, mental health issues, chronic physical illness);
- Children and youth who do not feel close to their parents/caregivers and feel like they cannot talk to them about their feelings;

- Youth who start dating early or engaging in sexual activity early;
- Children and youth with few or no friends or with friends who engage in aggressive or delinquent behavior;
- Families with caregivers who have a limited understanding of children's needs or development;
- Families with caregivers who were abused or neglected children;
- Families with young caregivers or single parents;
- Families with low income;
- Families with adults with low levels of education;
- Families experiencing high levels of parenting stress or economic stress;
- Families with caregivers who use spanking and other forms of corporal punishment for discipline;
- Families with inconsistent discipline and/or low levels of parental monitoring and supervision;
- Families that are isolated from and not connected to other people (extended family, friends, neighbors);
- Families with high conflict and negative communication styles; and
- Families with attitudes accepting of or justifying violence or aggression.

Community Risk Factors include:

- Communities with high rates of violence and crime;
- Communities with high rates of poverty and limited educational and economic opportunities;
- Communities with high unemployment rates;
- Communities with easy access to drugs and alcohol;
- Communities where neighbors do not know or look out for each other, and there is low community involvement among residents;
- Communities with few community activities for young people;
- Communities with unstable housing and where residents move frequently;
- Communities where families frequently experience food insecurity; and
- Communities with high levels of social and environmental disorder

PRACTICE TIPS

Because you will be required to present mitigating circumstances, the first order of business is to engage a mitigation specialist. As explained in § 5:18, the mitigation specialist is uniquely positioned to help the defense team develop this aspect of the case.

Include as many mitigating factors as you can in your reply to the prosecutor's motion to prevent removal. If the judge in your case is engaging in a "balancing test" of aggravating and

mitigating factors, you will undoubtedly want to tip the balance in your client's favor. If the judge is considering mitigating factors to weigh against a finding of "extraordinary circumstances," you will need to present that mitigation to counter the prosecutor's motion to prevent removal.

One approach to consider is to ask the judge to first determine whether "extraordinary circumstances" have been established by the prosecution. Suggest that consideration of the mitigating factors need only be undertaken if the prosecution has first established that "extraordinary circumstances" exist.

In *People v. M.M.H.,* 67 Misc. 3d 1216(A) (Co. Ct. Nassau County 2020), defense counsel failed to present any mitigation evidence. The court used a "totality of the circumstances" approach, and found that the prosecution demonstrated "extraordinary circumstances," which warranted denying removal because defense counsel "did not present to the Court any potential mitigating circumstances to offset the aggravating factors." Never put yourself and your client in that position.

The "two-part test" discussed in the assembly debate and acknowledged in several court decisions dictates that "[t]ransfer to the family court should be denied only when 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." Assembly Record p. 39; *People v. J.J.,* 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 20222). Since the prosecutor cannot satisfy this test if you provide mitigating evidence that your client is amenable to services in family court and would benefit from such heightened services, you must be prepared with this evidence in every case.

Mitigating factors are essential to your arguments when it comes to sentencing, advocating for a Youthful Offender adjudication, plea negotiations, or to counter the prosecution's motion to prevent removal to family court. There should never be a case in which you are unable to develop at least some mitigation. The only limitation to mitigation is your own imagination and creativity. It will be a very rare client for whom several of the mitigating factors listed above do not apply.

§ 4:38 Adverse Childhood Experiences (ACEs)

When youth part judges make their "extraordinary circumstances" determination, they should consider the mitigating circumstances presented by defense counsel. Mitigating factors include both the negative circumstances or traumatic events that have impacted the adolescent, but also the positive circumstances and attributes, including resilience and protective factors that make rehabilitation likely. Defense counsel should highlight any personal circumstances that help explain the client's diminished culpability and potential for rehabilitation.

One way to demonstrate the negative circumstances that have impacted an adolescent is to list them individually. However, these individual traumatic factors have a cumulative effect: the greater the number of traumatic events that a child experiences, the greater the risk to his or

her development and emotional and physical health.[9] One way to explain the effect of the multiple mitigating factors on your client is through an assessment instrument that provides a score for adverse childhood experiences (ACEs).

Individual trauma results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening, and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being.[10] Emerging research has documented the links between exposure to traumatic events, impaired neurodevelopmental and immune systems responses, and subsequent health and behavior risks.[11] The effects of the traumatic events are long-lasting, and may occur immediately or may have a delayed onset.[12]

Published in 1998 as a collaboration between the Centers for Disease Control and Kaiser Permanente, the original ACEs study was one of the first to look at the relationship between chronic stress in childhood and subsequent health and behavioral outcomes.[13]

The ACEs questionnaire measures 10 adverse childhood experiences. Counting each ACE as one, individuals score between 0 and 10. The experiences assessed by the questionnaire fall into three categories: 1) physical, emotional, and sexual abuse; 2) physical and emotional neglect; and 3) households with mental illness, domestic violence, parental divorce or separation, substance abuse, or incarceration.

A link to the ACEs questionnaire is included in the appendix to this guide.

The term ACEs refers to a range of events that a child can experience, which can cause trauma and chronic stress responses. Multiple, chronic, or persistent stress can impact a child's developing brain and has been linked in numerous studies to a variety of high-risk behaviors, chronic diseases, and negative health outcomes. As the number of ACEs a person encounters increases, so does the risk for negative outcomes, including high-risk behavior leading to involvement in the criminal and juvenile legal system.[14]

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[9] Buffington, Kristine, Dierkhising, Carly & Marsh, Shawn, *Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency,* National Council of Juvenile and Family Court Judges, (2010) at 6. Available at https://www.ncjfcj.org/wp-content/uploads/2012/02/trauma-bulletin_0.pdf.

[10] SAMHSA, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach* (2014). at 7. Available at https://www.samhsa.gov/resource/dbhis/samhsas-concept-trauma-guidance-trauma-informed-approach.

[11] *Id.* at 2.

[12] *Id.* at 8

[13] Felitti, Vincent, Anda, Robert, Nordenberg, Dale, Williamson, David, Spitz, Alison, Edwards, Valerie, Koss, Mary & Marks, James, *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study,* 14 American Journal of Preventive Medicine 245 (1998)

[14] Graf, Gloria, Chihuri, Stanford, Blow, Melanie & lie, Guohua, *Adverse Childhood Experiences and Justice System Contact: A Systematic Review,* 147 Pediatrics 1 (2021). Also, Folk, Johanna, Kemp, Kathleen, Yurasek, Alison, Barr-Walker, Jill, & Tolou-Shams, Marina, *Adverse Childhood Experiences Among Justice-Involved Youth: Data-Driven Recommendations for Action Using the Sequential Intercept Model,* 76 American Psychologist 268 (2021).

Accumulating ACEs – especially 4 or more – often correlates with various forms of criminal justice contact during young and middle adulthood, including an arrest or multiple arrests.[15] Assessment by a mental health professional may be recommended, in addition to inclusion in your submission and presentation to the court.

Poverty experienced during childhood is a mitigating factor that impacts the lives of so many of our clients and should not be overlooked. "Economic difficulties" and "poverty" were specifically articulated as mitigating factors by the RTA bill's sponsor during the legislative debate. *See* Assembly Record, p. 40; *People v. S.J.,* 72 Misc. 3d 196, 199 (Fam. Ct. Erie County 2021). Trauma experienced earlier in someone's life – whether caused by structural forces, poverty, and/or the effects of racial discrimination – can be acutely "criminogenic" (i.e., persons exposed to them have a higher probability of subsequently engaging in crime). Explaining the connections between poverty, childhood trauma, maltreatment, and subsequent criminality places adolescent criminal behavior in a more meaningful and more mitigating context. *See* Haney, Craig, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation,* 36 Hofstra Law Review 835, (2008) at 864-875, for a compelling explanation of the myriad ways poverty can impact an individual's life and have criminogenic effects.

PRACTICE TIPS

You should consider having your client assessed using the ACEs questionnaire, and, if the score is 4 or higher, including this with your submission to the court.

It is important to note that there are many types of childhood trauma that are not included in the ACEs questionnaire (e.g., racism, bullying, seeing others abused, grief, homelessness, loneliness, foster care, witnessing violence or death), which can also increase the likelihood of high-risk and criminal behavior. The ACEs score is not an exclusive list of adverse childhood experiences; it serves more as a baseline.

Developmental psychologist and author, James Garbarino, emphasizes that a high ACEs score should constitutes compelling mitigation in a sentencing decision.[16] Likewise, the score should be considered a mitigating factor for removal and youthful offender adjudication. In some states (e.g., Florida), judicial training materials now emphasize the importance of understanding emergent ACEs research for just this reason. One can only hope that the judge you are appearing before is familiar with ACEs and the far-reaching implications of childhood trauma.

§ 4:39 Adolescents Are Resilient

Resiliency is the capacity for human beings to thrive in the face of adversity, including traumatic experiences.[17] Resilience is defined as a pattern of positive adaptations in the context

[15] Testa, Alexander, Jackson, Dylan, Ganson, Kyle, & Nagata, Jason, *Adverse Childhood Experiences and Criminal Justice Contact in Adulthood,* 22 Academic Pediatrics 972 (2021).
[16] Garbarino, James, *ACEs in the Criminal Justice System,* 17 Academic Pediatrics S32 (2017).
[17] Buffington, *supra* note at 11.

of past or present adversity.[18] Research suggests that the degree to which one is resilient is influenced by a complex interaction of risk and protective factors that exist across various domains, such as individual, family, community, and school.[19] Protective factors and adaptive skills balance against adversity and risks. Resilience transpires when protective factors and adaptive skills outweigh adversity or risk.

It is the interaction between biology and the environment that builds the capacity to cope with adversity and overcome threats to healthy development. The individual can adapt and develop resilience over time. Research on resiliency suggests that youth are more likely to overcome adversity when they have caring adults in their lives. Through positive relationships with adults, youths experience a safe and supportive connection that fosters self-efficacy, increases coping skills, and enhances natural talents.[20] This includes both intrapersonal skills – self-regulation, self-reflection, creating and nurturing sense of self and confidence – and interpersonal skills – establishing safe, stable, and nurturing relationships.[21]

Not all adolescents develop resiliency, but most do. Resiliency can come about without any intervention. But research has shown that resilience can also be learned, and can mitigate the impact of ACEs. There are a variety of evidence-based treatments that have been shown effective in working with youths who have experienced trauma.[22] Individuals never completely lose the ability to improve their coping skills, and often learn how to adapt to new challenges. Early life experiences are critical, but it is never too late to build resilience.[23]

From neuroscience, we know that, in the late teens, developmental changes occur in the brain's learning and reward systems. Relative to children and younger adolescents, late adolescents (ages 18-21) are more likely to use positive feedback, and less likely to use negative feedback to update and refine their decisions. In other words, adolescents are primed to learn from rewards. This change in learning strategy is because of enhanced connectivity occurring in the brain.[24] The changes in the learning system that occur during adolescence suggest that individuals in this developmental window may be more amendable to intervention and rehabilitation.[25]

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[18] Wright, Margaret,& Masten, Ann, *Resilience Process in Development: Fostering Positive Adaptations in the Context of Adversity,* in S. Goldstein & R.B. Brooks (Eds), Handbook of Resilience in Children, (pp. 17-37) (2005) at 18.
[19] Buffington, *supra* note 9 at 11.
[20] Buffington, *supra* note 9 at 11.
[21] Johns Hopkins Bloomberg School of Public Health, *ACEs Resource Packet:Adverse Childhood Experiences (ACEs) Basics,* The Child & Adolescent Health Measurement Initiative.at 3. Available at https://www.childhealthdata.org/docs/default-source/cahmi/aces-resource-packet_all-pages_12_06-16112336f3c0266255aab2ff00001023b1.pdf
[22] Buffington, *supra* note 9 at 11.
[23] Center on the Developing Child, Harvard University, *In Brief: The Science of Resilience.* Available at https://developingchild.harvard.edu/science/key-concepts/resilience/ .
[24] Insel, Catherine, Tabashneck, Stephanie, Shen, Francis, Edersheim, Judith, & Kinscheff, Robert, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers,* Center for Law, Brain & Behavior, Massachusetts General Hospital (2022) p.55. Available at https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/.
[25] *Id.* at 55.

Several interventions that have been effective in mitigating the negative effects of childhood trauma include cognitive behavioral therapy, mindfulness practices, exercise and physical activity, good nutrition, adequate sleep, healthy social interactions, and placement in schools that have integrated trauma-informed and resilience-building practices.

Protective factors may occur naturally, or they may be the product of intervention by providing improved living arrangements, adult support and care, and changes of environment. These interventions can best be provided through family court, and that is an essential part of defense counsel's argument for removal. Such interventions (with the help of probation, it can be argued), help to create the protective factors that counter the trauma that the adolescent has experienced and will experience. It can also be emphasized that state prison is exactly what the client does not need – because of its counterproductive and trauma-inducing qualities. In *People v. J.P.,* 63 Misc. 3d 635, 651 (Sup. Ct. Bronx County 2019), Judge Boyle recognized the detrimental effects of a state prison sentence on an adolescent. He found that the prospect of a state prison sentence did not add to a finding of extraordinary circumstances, but militated against retaining the case in adult part, and in favor of removing the case to family court.

Research on ACEs dates back to 1998 and the pioneering work of Vincent Felitti and his colleagues.[26] Of course, not all childhood experiences are limited to those that involve adversity. Research demonstrates that both positive and adverse experiences shape brain development, health, and behavior. There are positive experiences that can reduce the effects of adversity, and build resilience in children and adults.

Over the past decade, researchers have turned their attention to positive childhood experiences, developing a line of research that has examined the relevance of cumulative positive childhood experiences (PCEs) and protective and compensatory experiences (PACEs) in building resilience to ACE exposure.[27] From this research, we now know that the cumulative effects of positive childhood experiences can help to mitigate the detrimental health, mental health, and behavioral consequences of ACEs.[28] The brain is continually changing in response to the environment. If the toxic stress stops and is replaced by practices that build resilience, the brain can slowly undo many of the stress-induced changes.

Baglivio and his colleagues conducted a study that found that, while a high ACEs score is associated with increased criminal offending, a high PCE score decreased recidivism, as measured by both rearrest and reconviction.[29] They concurred with the conclusion of Bethell and her colleagues that "a joint inventory of ACEs and PCEs . . . may improve efforts to assess

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[26] Felitti, *supra* note 13.
[27] Bethel, Christina, Jones, Jennifer, Gombojav, Narangerel, Linkenbach, Jeff, & Sege, Robert, *Positive Childhood Experiences and Adult Mental and Relational Health in a Statewide Sample: Associations Across Adverse Childhood Experiences Levels,* 173 JAMA Pediatrics e193007 (2019). Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6735495/ .
[28] Baglivio, Michael & Wolff, Kevin, *Positive Childhood Experiences (PCE): Cumulative Resiliency in the Face of Adverse Childhood Experiences,* 19 Youth Violence and Juvenile Justice 139 (2021).
[29] *Id.*.

needs, target interventions, and engage individuals in addressing the adversities they face by leveraging existing assets and strengths."[30]

This research led to the development of two questionnaires that focus on recurring positive childhood experiences – the seven-question PCEs and the ten-question PACEs questionnaire. Defense counsel can reference these protective and compensatory experiences to identify factors that will increase the likelihood of resilience, reduction in criminal behavior, and amenability to rehabilitation for a client.

PRACTICE TIPS

While developing your mitigating factors to defend against the prosecutor's motion to prevent removal, avoid producing the impression that your client has been subjected to so much trauma and adversity that he or she is beyond redemption or rehabilitation. By addressing the protective factors that weigh the balance in favor of resiliency, you will present your client as amenable to rehabilitation.

Defense counsel can also argue that removal provides the best opportunity for development of the protective factors and the resiliency needed to counter the ACEs that the client has encountered over a short but trauma-filled lifetime.

It may help to be familiar with some of the protective factors. Below are the protective and compensatory factors developed in the PCEs and PACEs.

PCEs (Positive Childhood Experiences):

1. Feel able to talk to your family about feelings;
2. Feel your family stood by you during difficult times;
3. Enjoy participating in in community traditions;
4. Feel a sense of belonging in high school;
5. Feel support by friends;
6. Have at least two non-parent adults who took genuine interest in you; and
7. Feel safe and protected by an adult in your home.

PACEs (Protective and Compensatory Experiences) include ten relationship and resource factors:

1. Unconditional love from a parent/caregiver;
2. Spending time with a best friend;
3. Volunteering or helping others;
4. Being part of a social group;
5. Having support from an adult or mentor outside the family;
6. Living in a clean, safe home with enough food;
7. Having resources and opportunities to learn at school;
8. Engaging in a hobby;
9. Being physically active or playing sports; and

[30] *Id.* at 154.

10. Having daily routines and fair rules at home.

There are tools for measuring resiliency, and you may want to consider the use of an expert to administer one of the following assessments:

- Connor-Davidson resiliency scale (CD-RISC)
- Resiliency scale for adults (RSA)
- Child and Youth Resilience Measure (CYRM)
- Benevolent Childhood Experiences (BCEs)
- Protective and Compensatory Experiences questionnaire (PACE)
- Positive Childhood Experiences (PCE)

§ 4:40 The "Extraordinary Circumstances" Hearing

Litigation over removal issues since the enactment of RTA has developed certain rules and concepts applicable to the "extraordinary circumstances" hearing. Certain rules and concepts are still developing.

One might wonder, what is the burden of proof at the "extraordinary circumstances" hearing? There is little doubt that the burden of proof is on the prosecutor. CPL § 722.23 (1) presumes that removal will occur unless the prosecutor makes a motion to prevent removal within 30 calendar days of arraignment. Since it is only the prosecutor's motion that can prevent removal, the prosecutor, as the proponent of the motion, bears the burden of proof, and must come forward with allegations of sworn fact based upon personal knowledge of the affiant to establish "extraordinary circumstances." Courts have repeatedly denied motions to prevent removal where the prosecutor has "failed to meet their burden that extraordinary circumstances exist." *See, e.g., People v. M.R.,* 68 Misc. 3d 1004, 1012 (Sup. Ct. Kings County 2020); *People v. J.S.,* 66 Misc. 3d 1213(A) (Co. Ct. Nassau County 2020) ("The People have failed to prove the existence of 'extraordinary circumstances'"); and *People v. J.P.,* 63 Misc. 3d 635, 652 (Sup. Ct. Bronx County 2019) ("[N]o extraordinary circumstances have been established by the People").

Clearly, the burden of proof is on the prosecutor, but what quantum of proof is required? Curiously, the legislature imposed a preponderance of evidence standard on the prosecutor in CPL § 722.23(2)(c), to prove that one of the three disqualifying aggravating factors exists. But no reference to the applicable standard is mentioned in CPL § 722.23 (1). Defense counsel should argue that the burden of proof is by clear and convincing evidence.

Support for this argument is found in the words of the debate: The "intent with this bill is that extraordinary circumstances is a *very high bar."* Assembly Record p. 83. "Transfer to the family court should be denied only when 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." Assembly Record p. 39. Certainly, the legislature intended something more than a showing by preponderance of the evidence. It is surprising that with more than several dozen reported cases having denied prosecution motions to prevent removal, the burden of proof has only been addressed by one judge. This case can be cited by

defense counsel for the proposition that the burden of proof on the prosecution is clear and convincing evidence. "Since the initial burden of proof on the People is a mere preponderance of the evidence, an additional quantum of proof is necessary to rebut the statutory presumption. Logically, then, the burden of proof on this type of motion must be something *more* than a mere preponderance." *People v. J.J.,* 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 2022).

The prosecutor may not rely exclusively on the allegations in the accusatory instrument. The motion must "contain allegations of sworn fact based upon the personal knowledge of the affiant" CPL § 722.23 (1)(b); *People v. J.J.,* 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 2022).

The prosecution may not, in any way, use the A.O.'s juvenile delinquency history in any application for removal under the statute. Family Court Act § 381.2 (1) expressly prohibits the use of the A.O.'s juvenile delinquency history, including his past adjudications, past admissions, and statements to the court against him or his interests in any other court. *People v. MM.,* 64 Misc.3d 259, 269 (Co. Ct. Nassau County 2019). This prohibition also applies to juvenile delinquency adjudications in other states. *People v. M.R.,* 68 Misc. 3d 1004, 1010 (Sup. Ct. Kings County 2020); *People v. T.P.,* 73 Misc. 3d 1215(A) (Co. Ct. Nassau County 2021).

The prosecution may not seek to prove "extraordinary circumstances" with hearsay. *People v. S.J.,* 72 Misc. 3d 196, 202 (Fam. Ct. Erie County 2021); *People v. T.R.,* 62 Misc. 3d 1219(A) (Fam. Ct. Erie County 2018).

Unlike the limitations placed on youthful offender adjudications by CPL § 720.10, CPL article 722 and 725 do not limit an A.O.'s eligibility for removal based on prior juvenile delinquency adjudications, youthful offender adjudications, or even prior criminal convictions, including prior felony convictions. *People v. J.P.,* 65 Misc. 3d 635, 650 (Sup. Ct. Bronx County 2019).

When judges are determining whether there are "extraordinary circumstances," they should view the facts and draw reasonable inferences in the light most favorable to the non-moving party – the adolescent defendant. *People v. M.M.,* 64 Misc. 3d 259, 271 (Co. Ct. Nassau County); *see also* Assembly Record, pp. 101-102.

Whether an adolescent may be prosecuted as an A.O. depends upon if the adolescent was 16 or 17 years old at the time of the commission of the crime. The defendant's age at the time of removal is a different story. Removal to family court, which will result in a juvenile delinquency proceeding, is controlled by Family Court Act § 302.2. Removal and commencement of a juvenile delinquency proceeding can occur up to the respondent's twentieth birthday, if the prosecution is for a felony committed when the respondent was aged 16 or older.

Defense counsel should be aware of a case of questionable precedential value. In *People v. A.G.,* 62 Misc. 3d 1210(A) (Sup. Ct. Queens County), the defendant had multiple cases pending, some subject to removal, and some that predated the enactment of the RTA legislation. The court found that this multiplicity of cases constituted an extraordinary circumstance such that removal should be prevented because removal of some cases and not others would thwart a global disposition. This case is of limited precedential value because the court failed to engage in

the required "extraordinary circumstances" analysis, and applied an interest of justice analysis that is not appropriate for A.O. removal purposes.

§ 4:41 Removal of a Violent Felony A.O. at the Request of the Prosecutor

Pursuant to CPL § 722.21 (5), at the request of the prosecutor, the court must order removal of an action against an A.O. charged with class A felony (other than a drug felony) or a violent felony defined in Penal Law § 70.02, if it determines that to do so would be in the interests of justice after considering the criteria in CPL § 722.22 (2).

Where the felony complaint charges the A.O. with murder in the second degree, rape in the first degree sub. (1)(a), (2)(a), (3)(a), or an armed felony as defined in CPL § 1.20 (41)(a), a determination to remove such action to family court must, in addition to an interests of justice determination based upon the criteria in CPL § 722.22 (2), also be based upon a finding of one or more of three factors:

(i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or

(ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not s minor as to constitute a defense to the prosecution; or

(iii) possible deficiencies in proof of the crime.

CPL § 722.21 (5).

To effectuate this removal, the court must state on the record the factor or factors upon which its determination is based, and the court must give reasons for removal in detail and not in conclusory terms. CPL § 722.21 (6)(a). The prosecutor must state on the record the reasons for his consent to removal, and the reasons must be stated in detail and not in conclusory terms. CPL § 722.21 (6)(b). For the purpose of making its determination, the court may make such inquiry as it deems necessary. Any evidence that is not legally privileged may be introduced. If the defendant testifies, his testimony may not be introduced against him in any future proceeding, except to impeach his testimony at such future proceeding as an inconsistent prior statement. CPL § 722.21 (6)(c).

§ 4:42 Removal of A.O. When All Parties Agree

Pursuant to CPL § 722.23 (2)(e), the court may order the removal of the action to family court where all parties agree.

§ 4:43 Removal When Charges in Accusatory Instrument Are Reduced

Whenever one or more of the charges in the accusatory instrument are reduced, such that the elements of the highest remaining charge would be removable pursuant to CPL § 722.23 (1)

or (2), then the court, sua sponte or in response to a motion by the defendant, shall promptly notify the parties and direct that the matter proceed in accordance with CPL § 722.23 (1). The prosecutor must file any motion to prevent removal within 30 days of effecting or receiving notice of such reduction. CPL § 722.23 (3).

§ 4:44 Defendant A.O. May Waive Removal

Pursuant to CPL § 722.23 (4), a defendant may waive review of the accusatory instrument by the court and the opportunity for removal. The waiver by the defendant must be knowingly and intelligently made in open court, in the presence of and with the approval of defense counsel and the court. In *People v. A.L.,* 65 Misc. 3d 979 (Syracuse City Court 2019), such a waiver was attempted by the defendant and denied by the court.

§ 4:45 Other Removal Provisions

In addition to the removal provisions contained in CPL articles 722 and 725, there are several other removal provisions applicable at various stages of the proceedings.

The grand jury may request removal pursuant to CPL § 190.71 (b) for both J.O.'s and A.O.'s if: (1) such act is one for which it may not indict; (2) it does not indict such person for a crime; and (3) the evidence before it is legally sufficient to establish that such person did such, and competent and admissible evidence before it provides reasonable cause to believe that such person did such act.

CPL § 210.30 (7) provides that, upon a motion to inspect the grand jury minutes, a court may direct removal pursuant to CPL article 725 for either an A.O. or J.O. under certain circumstances. Where the evidence is legally insufficient to establish the offense or lesser offense for which the defendant is criminally responsible, the court must dismiss. Upon dismissal, unless the court authorizes the prosecutor to resubmit to a subsequent grand jury, and upon a finding that there was sufficient evidence to believe is a juvenile delinquent, and upon specifying the act or acts it found sufficient evidence to believe defendant committed, the court may direct removal pursuant to CPL article 725.

Where the defendant is a J.O., and the indictment does not charge a person 14 or 15 years old with the crime of murder in the second degree, the prosecutor can recommend a plea and removal to family court in the interests of justice by submitting a subscribed memorandum that satisfies the statutory requirements. CPL § 220.10 (5)(g)(iii).

Where the defendant is an A.O., and the prosecutor consents to a plea to a misdemeanor, the plea shall be deemed replaced by an order of fact-finding in a juvenile delinquency proceeding, pursuant to FCA § 346.1, and the action must be removed to family court in accordance with CPL article 725. If the plea is to a felony, the court may remove the action to family court in accordance with CPL § 722.23 and CPL article 725. CPL § 220.10 (5)(g-1).

Where a verdict is rendered with respect to a crime, but the defendant is not criminally responsible by reason of infancy, the court must proceed following subdivision (2) or (3) of CPL § 310.85. Subdivision (2) provides that if a verdict of guilty also is rendered regarding a crime for which the defendant is criminally responsible, or the defendant is awaiting sentence on another criminal conviction, or is under a sentence of imprisonment on another criminal conviction, the verdict rendered with respect to a crime for which he is not criminally responsible must be set aside and must be deemed a nullity. If subdivision (2) is not applicable, the court must follow subdivision (3), which requires that the court must order that the verdict be deemed vacated and replaced by a juvenile delinquency fact determination. Upon so ordering, the court must direct that the action be removed to the family court in accordance with the provisions of CPL article 725.

Where a defendant is a J.O. or an A.O. who has been convicted after a verdict, but who has not been convicted of murder in the second degree, upon motion with the consent of the prosecutor, the action may be removed to the family court in the interests of justice pursuant to CPL article 725. CPL § 330.25.

§ 4:46 Retroactivity of RTA

RTA is not retroactive, and thus does not provide an opportunity for retroactive removal to family court. The plain language of the definition of adolescent offender in CPL § 1.20 (44) clearly states that it will not apply to felonies committed prior to either October 1, 2018, for adolescents who were 16 years old at the time of the offense, or to felonies committed prior to October 1, 2019, for adolescents who were 17 years old at the time of the offense. RTA was denied retroactive application in *People v. Wright,* 71 Misc. 3d 964 (Sup. Ct. Kings County 2021).

CHAPTER 5

MAKING THE CASE FOR YOUTHFUL OFFENDER

CHAPTER 5 SECTIONS

CHAPTER 5

MAKING THE CASE FOR YOUTHFUL OFFENDER

§ 5:1 Youthful Offender Defined

A "youthful offender" is defined as an adolescent convicted of a misdemeanor or a felony who was at least 16 years old and less than 19 years old at the time of the commission of the offense, including a person convicted as an adolescent offender or a person convicted as a juvenile offender (14 or 15 years old at the time of the commission of a designated felony), who has been determined by the court to be an eligible youth and for whom the conviction has been vacated and been replaced by a youthful offender finding, and who has been sentenced pursuant to Penal Law § 60.02. A youthful offender adjudication is comprised of a youthful offender finding and the youthful offender sentence. A youthful offender adjudication is not a judgment of conviction for any crime or any offense. CPL article 720. A youthful offender adjudication is often referred to as a "Y.O."

§ 5:2 Purpose of a Youthful Offender Adjudication

The statutory purposes of a youthful offender adjudication are "relieving the eligible youth from the onus of a criminal record" and "not imposing an indeterminate term of imprisonment of more than four years." CPL § 720.20 (1)(a). Avoidance of the stigma and lifetime of collateral consequences was a chief legislative concern. The youthful offender provisions were codified as the result of "a legislative desire not to stigmatize youths between the ages of 16 and 19 with criminal records triggered by hasty or thoughtless acts which, although crimes, may not have been the serious deeds of hardened criminals." *People v. Drayton,* 39 N.Y.2d 580, 584 (1976). "A youthful offender adjudication is nothing short of 'the opportunity for a fresh start, without a criminal record': an opportunity that a 'judge would conclude . . . is likely to turn the young offender into a law-abiding, productive member of society.'" *People v. Francis,* 30 N.Y.3d 737, 741 (2018) (quoting *People v. Rudolph,* 21 N.Y.3d 497, 501 [2013]). The youthful offender status allows a judge to mete out fair punishment for an adolescent's crimes, "yet mitigates future consequences in recognition of, *inter alia,* the youth's lack of experience and the court's hope for his future constructive life." *People v. Cruikshank,* 15 A.D.2d 325, 333-34 (3d Dept. 1985) (*aff'd sub nom. People v. Dawn Marie C.,* 67 N.Y.2d 625 [1986]).

In sum, the purpose of a youthful offender adjudication is to avoid the stigma of a criminal conviction, promote rehabilitation, and ameliorate the sentence. The desire to eliminate the stigma and disabilities that attach from a criminal conviction, so as to promote rather than impede rehabilitation dates back to the initial youthful offender statute enacted in 1943 in New York Code of Criminal Procedure §§ 252-a to 252-h.[1]

[1] Peterson, Ruth, *Youthful Offender Designations and Sentencing in the New York Courts,* 35 Social Problems 111, (1988) at p. 114. Levine, Howard, *The Youthful Offender Under the New York Criminal Procedure Law,* 36 Albany Law Review 241 (1972) at p. 242, 248.

§ 5:3 Procedure

Initial Sealing

When an accusatory instrument is filed with a court against an apparently eligible youth charging only misdemeanors, and such youth has not previously been adjudicated a youthful offender or convicted of a crime, it must be filed as a sealed instrument, though only with respect to the public. In such a case, the initial arraignment and all subsequent proceedings may, in the discretion of the court and with the defendant's consent, be conducted in private. CPL § 720.15.

The sealing of the accusatory instrument and the discretionary opportunity for proceedings to be conducted in private do not apply to a youth charged with a felony. CPL § 720.15 (3).

When a youth is charged with prostitution (Penal Law § 230.00), the provisions requiring or authorizing the sealing of the accusatory instrument and the privacy of the proceedings shall apply regardless of whether the youth had, prior to commencement of trial or entry of plea of guilty, been convicted of a crime or been adjudicated a youthful offender, or subsequent to such conviction for prostitution is convicted of a crime or been adjudicated a youthful offender. CPL § 720.15 (4).

Y.O. Eligibility

A person is determined to be an "eligible youth" and is unconditionally eligible for a youthful offender adjudication if he or she meets the statutory requirements of CPL § 720.10 (2). However, a second determination of eligibility is required if the person stands convicted of an armed felony, rape 1, or aggravated sexual abuse; such persons are presumptively ineligible for a youthful offender adjudication pursuant to CPL § 720.10 (2)(a). The court must determine eligibility based on a finding of whether one of two mitigating factors required by CPL § 720.10 (3) exists. *See* § 5:6.

When an eligible youth, as defined in CPL § 720.10 (2), is convicted (by plea or verdict, Penal Law § 1.20 [13]), the judge must order a pre-sentence investigation of the defendant. Eligibility is determined at the time of conviction *See* § 5:9.

In any case where the court has not already agreed to adjudicate the defendant a youthful offender, defense counsel should submit a defendant's pre-sentence memorandum pursuant to CPL § 390.40.[2]

Y.O. Adjudication

At the time of sentencing, after considering the probation department's report and hopefully the defendant's pre-sentence memorandum, the court must determine whether or not the eligible youth will be granted youthful offender status. CPL 720.20 (1). This determination must be made regardless of whether the defendant has failed to make a request for Y.O., waived Y.O., or plea-bargained away the right to be considered a youthful offender. *See* §5:11.

[2] For some Assigned Counsel Programs such as Onondaga County, panel attorney's submission of a defendant's pre-sentence memorandum on a Y.O. case is mandatory, and a recognition of best practice.

Pursuant to CPL § 720.20 (1)(a), the judge is required to make the Y.O. determination in accordance with the following criteria: If, in the opinion of the court, the interest of justice would be served by relieving the eligible youth from the onus of a criminal record and not imposing an indeterminate term of imprisonment of more than four years, the court may, in its discretion, find the eligible youth is a youthful offender.

When Y.O. Is Mandatory

When the conviction is had in local criminal court, and the eligible youth, prior to commencement of trial or entry of plea of guilty, has not been convicted of a crime or found a youthful offender, it is mandatory that the judge find that the defendant is a youthful offender. CPL § 720.20 (1)(b).

If the conviction is for prostitution, it is mandatory that the judge find the person a youthful offender (CPL § 170.80 [2]), regardless of any priors (CPL § 720.25).[3]

When Y.O. is "All or Nothing"

Where an eligible youth is convicted of two or more crimes, set forth in separate counts of an accusatory instrument or in two or more accusatory instruments consolidated for purposes of trial, the court cannot find the defendant to be a youthful offender on only one count; it is all or nothing. CPL § 720.20 (2).

Post-Adjudication

Once the judge has determined that an eligible youth is a youthful offender, the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding. CPL § 720.20 (3). The judge must then sentence the defendant pursuant to Penal Law § 60.02. *See* 5:19.

If the judge determines that an eligible youth is not a youthful offender, the judge must order the accusatory instrument unsealed (if it had been sealed) and continue the action to judgment pursuant to the ordinary rules governing criminal prosecutions. CPL § 720.20 (4).

§ 5:4 Eligibility for Youth Offender Adjudication

The first step in the Y.O. process is to determine whether a person is eligible for youthful offender adjudication. An "eligible youth" is a person charged with a crime alleged to have been committed when he or she was at least sixteen years old and less than nineteen years old, or a person charged as a juvenile offender as defined in CPL § 1.20 (42). CPL § 720.10 (1) and (2). CPL § 720.10 (2) contains a number of exceptions to eligibility, and CPL § 720.10 (3) contains several exceptions to the exceptions.

[3] Under current law, this will only apply to a client who is 18 years old. All younger persons will be prosecuted in family court because prostitution is not a felony.

§ 5:5 Ineligibility for Youthful Offender Adjudication

A person is ineligible for a youthful offender adjudication who has been:

- previously convicted and sentenced for a felony, or
- previously adjudicated a youthful offender following a felony conviction, or
- previously been adjudicated a juvenile delinquent for a designated felony act.

An exemption from ineligibility is carved out for individuals charged with prostitution by CPL § 720.25. The fact that such person has previously been convicted of a crime or adjudicated a youthful offender does not disqualify such person from being adjudicated a youthful offender. Prior youthful offender adjudications pursuant to CPL § 170.80 cannot be considered in determining whether a person is an eligible youth, or in determining whether to find a person a youthful offender in any subsequent youthful offender adjudication.

A person is ineligible to be adjudicated a youthful offender if they are convicted of: (1) a class A-I or A-II felony; (2) an armed felony as defined in CPL § 1.20 (41); or (3) rape 1, a crime formerly defined in Penal Law § 130.50, or aggravated sexual abuse.

As to convictions for an armed felony, rape 1, and aggravated sexual abuse, there is an important exception that is discussed below in § 5:6. If at least one of the two mitigating factors listed in CPL § 720.10 (3) are determined by the court to exist, the youth will be considered an eligible youth, and will not be ineligible for youth offender consideration. CPL § 720.10 (2)(a).

§ 5:6 Mitigating Factors for Convictions for Armed Felonies, Rape 1, and Aggravated Sexual Abuse

Although a conviction for one of these enumerated felony offenses preliminarily makes the youth presumptively ineligible for a youthful offender adjudication, CPL § 720.10 (3) provides for an exception where the court determines that one or more of the following factors exist:

(i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or

(ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor, although not so minor as to constitute a defense to the prosecution.

The statute sets up a two-step analysis. First, at the time of conviction the court must determine whether the person is an "eligible youth," i.e., whether he or she meets the statutory requirements of CPL § 720.10 (1) and (2). In the case of one of the enumerated felonies, the court must determine whether one of the statutory mitigating factors set forth in CPL § 720.10 (3) has been established, so as to make the individual an "eligible youth." If the court determines that neither of the statutory mitigating factors has been established, the court's analysis ends, and the defendant is determined ineligible for youthful offender consideration. The court must make the determination that the mitigating factors do not exist on the record. *People*

v. Middlebrooks, 25 N.Y.3d 516, 527 (2015). If the court determines that one of the two mitigating factors in CPL § 720.10 (3) exist, the court must make a statement on the record of the reasons for its determination. CPL § 720.10 (3). This determination establishes the defendant as an eligible youth but does not end the analysis. At the time of sentencing, the court must then proceed to the second step of the two-part analysis, which is required in every youthful offender adjudication, once eligibility is established. This requires the court to exercise its discretion a second time in determining whether the eligible youth should be adjudicated a youthful offender. *People v. Middlebrooks* at 528; *People v. Marquis A.,* 145 A.D.3d 61, 69 (3d Dept. 2016). The second step of the analysis requires consideration not only of the previously determined special mitigating factors, but of the nine factors enumerated in *People v. Cruickshank,* 105 A.D.2d 325, 334 (3d Dept. 1985). The *Cruickshank* factors are discussed below at § 5:15.

As can be seen from the chart below, for armed felonies, the most common mitigating factor that bears directly on the manner in which the crime was committed is that the client did not use or display the weapon, or its possession did not result in injury to others.

CHART OF CPL § 720.10 (3) MITIGATING FACTORS FOR

ARMED FELONY, RAPE 1, AND AGGRAVATED SEXUAL ABUSE CONVICTIONS

Mitigating Factors Bearing Directly on the Manner in Which the Crime Was Committed

- *People v. Carlos M.-A.*, 180 A.D.3d 808, 808 (2d Dept. 2022) (vacating the conviction involving an armed felony and replacing with a Y.O. adjudication after first determining that defendant was an eligible youth where there were "mitigating circumstances that [bore] directly upon the manner in which the crime was committed," including that no physical harm or injury resulted to the complainant).
- *People v. Keith B.J.*, 158 A.D.3d 1160, 1160-61 (4th Dept. 2018) (in armed felony case, the court implicitly resolved the threshold issue of eligibility in the youth's favor where there were sufficient "mitigating circumstances" and adjudicating him a youthful offender in the interest of justice).
- *People v. Lindsey*, 166 A.D.3d 1565, 1565-66 (4th Dept. 2018) (reversing the lower court's determination that the youth was ineligible, where it was "undisputed that [the youth] did not use or display the gun at issue, nor did its possession result in injury to others," but ultimately denying youthful offender status).
- *People v. Marquis A.*, 145 A.D.3d 61, 68-70 (3d Dept. 2016) (concluding that the 16 year-old, who was convicted of first-degree robbery for taking sneakers while displaying what appeared to be a gun in his waistband, was an eligible youth where "the crime, although serious, did not cause physical injury to anyone involved and [the youth] neither brandished the object nor uttered any direct threats of violence during the incident," and then adjudicating the youth a youthful offender; key language is that "the lack of injury to others constitutes a 'mitigating circumstance that bears directly upon the manner in which the crime was committed'").
- *People v. Thomas R.O.*, 136 A.D.3d 1400, 1402-03 (4th Dept. 2016) (adjudicating Thomas R.O., who had been convicted of an armed felony, a youthful offender, where mitigating factors bearing directly on the manner in which the crime was committed, along with other factors, including his lack of a criminal record or history of violence and his history of mental illness, weighed in favor of youthful offender treatment).

- *People v. Amir W.*, 107 A.D.3d 1639, 1640-41 (4th Dept. 2013) (adjudicating the 16-year-old a youthful offender after determining that he was an eligible youth, where the complainants had brutally attacked him the day before and where he then fired a single shot into their house at a time when he knew they would not be home "to send a message").
- *People v. Glen W.*, 89 A.D.2d 883 (2d Dept. 1982) (adjudicating the youth a youthful offender after determining that there were "sufficient mitigating circumstances" to authorize eligibility in second-degree criminal possession of a weapon case).
- *People v. Davis*, 81 A.D.2d 510, 511 (1st Dept. 1981) (finding the youth eligible where the "shooting was hasty and thoughtless, rather than intentional or calculated," and adjudicating him a youthful offender).

As pertains to concurrent and consecutive sentencing discretion, pursuant to Penal Law § 70.25 (2-b)

- *People v. Garcia*, 84 N.Y.2d 336, 341-42 (1994) (holding that the sentencing court was authorized to sidestep the consecutive sentencing mandate and impose concurrent sentences pursuant to Penal Law § 70.25 (2-b), where it found "mitigating circumstances that bear directly upon the manner in which the crime was committed," including "lack of injury to others and nondisplay of a weapon" – "factors bear[ing] on defendant's personal conduct in committing the crime").
- *People v. Reyes*, 221 A.D.2d 202, 202-03 (1st Dept. 1995) (holding that the sentencing court properly exercised its narrow discretion under Penal Law § 70.25 (2-b) to impose a concurrent rather than consecutive sentence where there was no weapon used in one of the robberies and there were no injuries in the other robbery).

Where courts have found that the mitigating circumstances do not bear directly on the manner in which the crime was committed

- *People v. Vanleuvan*, 199 A.D.3d 1131, 1131-32 (3d Dept. 2021) (holding the lower court did not abuse its discretion in determining the 15-year-old youth convicted of criminal sexual act in the first degree ineligible, as the youth's alcohol and drug intoxication at the time of the incident did not bear directly on his personal conduct in committing the crime so as to constitute a mitigating circumstance).
- *People v. Lane*, 192 A.D.3d 1262, 1263 (3d Dept. 2021) (determining that the youth's "difficult upbringing" and "subsequent remorse" did not bear directly upon the manner in which the incidents, resulting in guilty pleas to rape in the first degree and criminal sexual act in the first degree, were committed, so as to make the youth eligible for youthful offender status).
- *People v. Victor*, 283 A.D.2d 205, 206-07 (1st Dept. 2001) (finding that the youth's explanation that "he himself had been sexually molested in the past, which trauma propelled him to re-enact that molestation, [did] not [] bear on the *manner* in which the crime was committed," but was "at best something that prompted or motivated him," and determining that the youth was ineligible).

Participation Was Relatively Minor

- *People v. James R.*, 93 A.D.2d 957, 957 (3d Dept. 1983) (affirming the lower court's youthful offender adjudication where the youths, having been convicted of armed felony offenses, had not been armed with guns and "were not the ringleaders in the affair, but rather were pressured by older companions to participate in the robbery").

PRACTICE TIPS

It is well established that the youthful offender procedure requires the court to take a two-step analysis: Step One – Determine if the person is an "eligible youth"; Step Two – Determine whether to make a finding that the "eligible youth" is a youthful offender.

When must these determinations be made? Standard practice is that the second step (the youthful offender finding) occurs at the time of sentencing. At that point in the case, the court will have received and reviewed the defendant's presentence memorandum, the probation report, and arguments from counsel, and will also have before it the *Cruikshank* factors that must be considered. The statute is specific on the timing: "[A]t the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender." CPL 720.20 (1).

But what about step one? When is the court required to determine that the person is an "eligible youth?" More particularly, in the case of a conviction for an armed felony, rape 1, or aggravated sexual abuse, when must the court make the determination that the person is an "eligible youth" by examining whether one of the two mitigating factors in CPL § 720.10 (3) exists?

It might surprise you to learn that the court is required to make this step one determination of "eligible youth" at the time of the conviction, not at the time of sentencing. This is contrary to standard practice. When the conviction is for a one of the four enumerated felonies, most courts wait until the time of sentencing to make both the determination of whether either of the two special mitigating factors exist so as to make the person eligible for youthful offender, and the determination of whether to make a youthful offender finding. Contrary to standard practice, the Court of Appeals says the statute requires that the initial determination of "eligible youth" must take place at the time of conviction. For most cases, that would be at the time of the plea. CPL § 1.20 (13).

CPL § 720.20 (1) requires that "upon conviction of an eligible youth, the court must order a pre-sentence investigation of the defendant." Prior to ordering the pre-sentence investigation, the court must determine if the person is an "eligible youth."

In *People v. Cecil Z.,* 57 N.Y.2d 899 (1982) the court recognized both the two-step determination and the timing requirements. CPL § 720.20 (1) "contemplates a two-determination procedure. First, as envisioned by the first sentence of the subdivision, there must be a determination at the time of conviction as to whether the defendant is an 'eligible youth' (as defined in CPL 720.10 subd 2), and if he is found to be an eligible youth the court must order a presentence investigation. Second, in accordance with the prescription of the second sentence, 'at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender.'" *Id.* at 901.

In *People v. Middlebrooks,* 25 N.Y.3d 516 (2015), the Court of Appeals clarified that this threshold determination of "eligible youth" also applied to the court's consideration of the special mitigation that applies to armed felonies and enumerated sex offenses. "Where,

however, the defendant has been convicted of an armed felony or an enumerated sex offense pursuant to CPL 720.10 (2)(a)(ii) or (iii), in order to fulfill its responsibility under CPL 720.20 (1) to make a youthful offender determination for every eligible youth, the court must make the threshold determination as to whether the defendant is an eligible youth by consider the factors set forth in CPL 720.10 (3)." *Id.* at 525. As noted above, the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL § 720.10 (3). *Id.* at 527.

The requirement that judges make this threshold determination of "eligible youth" at the time of the plea has important implications – both practical and strategic. As a practical matter, it is important to put the special mitigating factors of CPL § 720.10 (3) into the record for the judge's consideration at the time of the plea. This can be done by submitting your defendant's pre-sentence memorandum at this time, by other written submission, or by entering the special mitigation orally into the record. Requesting a determination as to whether your client is an "eligible youth" prior to the plea may force the judge to reveal whether he or she has ruled out youthful offender consideration and may remove that bait from the temptation of a plea bargain. Depending upon the strength of your special mitigation, you may make a strategic decision as to whether to press the court for a determination of eligibility at the time of the plea.

Whenever your client is eligible for a youth offender adjudication, a defendant's pre-sentence memorandum should be submitted, as authorized by CPL § 390.40. The memorandum should address both the CPL § 720.10 (3) special mitigating factors, the *Cruickshank* factors, and any other relevant mitigation. Such a memorandum will not only place the issues squarely before the sentencing judge, but also preserve the issue of an adverse Y.O. determination for appeal.

There is no formulaic way of addressing mitigating factors that "bear directly on the manner in which the crime was committed," but what is clear from case law is that it is not generalized mitigation. The mitigation must "bear directly on the manner" in which the crime was committed. The chart above should give you some ideas as to how the appellate courts have approached this issue, and what has been deemed sufficient to establish the existence of this mitigating factor.

§ 5:7 Effects of Youthful Offender Adjudication

● **Not a conviction**. Upon determining that an eligible youth is a youthful offender, the court must order that the conviction be deemed vacated. CPL § 720.20 (3). A youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does disqualify any person from holding public office or public employment or from receiving any license granted by a public authority. CPL § 720.35 (1).

● **Protection by Human Rights Law.** A person adjudicated a youthful offender receives the protection of Executive Law § 296 (16), which prohibits unlawful discriminatory practices, including inquiring about any arrest, or acting adversely based upon such arrest in connection with licensing, housing, employment, including volunteer positions, or providing credit or

insurance to such individual. No individual adjudicated a youthful offender shall be required to divulge information pertaining to any arrest or criminal accusation, and any individual required or requested to provide information about an arrest may respond as if the arrest, criminal accusation, and/or disposition did not occur. The statute does contain several exceptions and should be reviewed carefully when addressing this issue with a client. *See* Executive Law § 296 (16) for exceptions.

● **Records Confidential.** Except where specifically required or permitted by statute, or upon specific authorization of the court, all official records and papers are confidential. CPL § 720.35 (2). The statute does contain exceptions. *See* CPL § 720.35 (2), (3) and (4) for exceptions.

● **Limitation on Sentence.** The term of the sentence is limited by CPL § 720.20 (3) and Penal Law § 60.02. For a misdemeanor, generally, the maximum sentence is one year. For a misdemeanor where the conviction is had in a local criminal court and the eligible youth had not prior to commencement of trial or entry of a plea of guilty been convicted of a crime or found to be a youthful offender, the maximum sentence is six months. If the sentence is for a felony, the court must impose a sentence authorized to be imposed upon a person convicted of a class E felony, i.e.,, a sentence of no greater than 1 1/3 to 4 years. There still seems to be an open question as to what the maximum term of the sentence is for a drug offense, since the maximum sentence on a class E drug offense is 1 ½ years with 1 year PRS.

● **Immigration Consequences.** A youthful offender adjudication does not constitute a conviction for immigration purposes. In *Matter of Devison-Charles,* 22 I&N Dec. 1362 (BIA 2000), the Board of Immigration Appeals ruled that a youthful offender adjudication pursuant to article 720 of the New York CPL, which corresponds to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act, does not constitute a judgment of conviction for a crime within the meaning of section 101(a)(48)(A) of the Immigration and Nationality Act. However, nothing pertaining to immigration is neat and clean. There still may be immigration consequences triggered by a youthful offender adjudication. A violation of an order of protection or admission pertaining to a crime of moral turpitude or controlled substance are of particular concern. According to an advisory issued by the Immigrant Defense Project in January 2022, a youthful offender adjudication accomplished by way of a retroactive youth offender application pursuant to CPL § 720.20 (5) may still be considered a conviction and may not obviate the immigration consequences. Always consult with an immigration expert when representing non-citizen adolescents.

● **SORA.** Registration is only required of persons convicted of a sex offense or a sexually violent offense. Since a youthful offender adjudication is not a conviction, a person adjudicated for a sex offense is not subject to registration. Executive Law § 168-a (1) provides in relevant part that any conviction set aside pursuant to law is not a conviction for purposes of SORA. However, a youthful offender adjudication may be used in a subsequent SORA risk assessment to increase the total point score. *People v. Francis,* 30 N.Y.3d 737 (2018).

● **Civil Commitment (Article 10).** Where the underlying offense is a sex offense, and the person is sentenced to prison, but is also adjudicated a youthful offender, the question arises whether that person may be subject to civil commitment under article 10 of the Mental Hygiene Law. To be subject to civil commitment, a person must be a "detained sex offender" as defined in Mental Hygiene Law § 10.03 (g). To fall within the meaning of "detained sex offender" the person must be convicted of a sex offense. Since a youthful offender adjudication is not a conviction, a Y.O. is not subject to civil commitment. However, it should be noted that pursuant to CPL § 720.35 (4), where the underlying offense is a sex offense and the person is adjudicated a youthful offender, all records pertaining to the youthful offender adjudication shall be included in those records and reports that may be obtained by the commissioner of mental health or the commissioner of developmental disabilities, as appropriate; the case review panel; and the attorney general for civil commitment purposes on a subsequent incarceration for a sex offense conviction.

● **SARA.** Pursuant to the Sexual Assault Reform Act (SARA) a 1,000-foot residency or presence restriction is imposed on any person sentenced for a sex offense who is on parole or probation, and is a level 3 risk under SORA, or for whom the victim of the offense was less than 18 years old at the time of the offense. *See* Executive Law § 259-c (14) (relating to parole) and Penal Law § 65.10 (4-a) (relating to probation). Although for years it was assumed that a youthful offender adjudication would shield a person from the restrictions imposed by SARA, the Court of Appeals, in *People ex rel. E.S. v. Superintendent, Livingston Correctional Facility,* 40 N.Y.3d 230 (2023), held that a person adjudicated a youthful offender, although not subject to SORA registration, is subject to the mandatory SARA restriction from coming within 1,000 feet of school grounds, if they were sentenced to state prison and are subject to parole, post-release supervision, or conditional release. This does not apply to a Y.O. sentenced to probation. The bizarre result is that a youth will not be able to live with his or her parents if the parental home is within 1,000 feet of a school.

● **Not a Predicate.** A youthful offender adjudication for a felony may not be used as a predicate for enhanced sentencing purposes. *People v. Kuey,* 83 N.Y.2d 278, 283 (1994). However, a youthful offender adjudication from another state can be used as a predicate, if the other state would allow the adjudication to be used as a predicate for sentencing purposes in that state. *People v. Kuey,* at 285.

● **DNA.** A youthful offender is not required to provide a sample for DNA testing under Executive Law § 995-c (3)(a). A "designated offender" is subject to that requirement; however, a designated offender is defined in Executive Law § 995 as a person convicted of a felony or misdemeanor. Therefore, because a youthful offender adjudication is not a conviction, s/he is not a designated offender subject to that requirement. A youthful offender is also not subject to the DNA databank fee.

● **Fees and Surcharges.** Neither surcharges nor fees are applicable to a person adjudicated a youthful offender. Penal Law §§ 60.02 (3) and 60.35 (10) previously provided for such fees and surcharges for youthful offenders, but these statutes were repealed effective

August 24, 2020. Juvenile offenders, regardless of whether granted youthful offender status, are not subject to the mandatory surcharge, fees, or restitution. Penal Law § 60.00 (2). Even if denied youthful offender adjudication, the court may waive the mandatory surcharge, additional surcharge, town or village surcharge, crime victim assistance fee, DNA databank fee, sex offender registration fee and/or supplemental sex offender victim fee for any defendant who was under 21 years of age at the time of the offense. To affect such a waiver, the court must make one of the three statutory findings. CPL § 420.35 (2-a).

§ 5:8 Mandatory vs. Discretionary Youthful Offender Adjudication

Mandatory:

- Misdemeanor conviction, in local criminal court, for a person convicted for the first time of a crime, who has not previously been adjudicated a youthful offender. CPL § 720.20 (1)(b); and
- Conviction for the offense of prostitution, even if the person has a prior conviction for a crime or has previously been adjudicated a youthful offender. CPL § 170.80 (2).

Discretionary:

- Misdemeanor conviction in County Court or Supreme Court;
- Subsequent misdemeanor conviction; and
- First felony conviction, where the person is otherwise an eligible youth.

§ 5:9 Multiple Charges Pending – Multiple Y.O.s Possible

Questions arise when there are two or more charges pending, and all of the offenses were committed at the time the defendant was less than 19 years old.

One such circumstance occurs when an eligible youth is convicted of two or more crimes set forth in separate counts of an accusatory instrument or in two or more accusatory instruments consolidated for trial purposes. Under these circumstances, there is a controlling statute. Pursuant to CPL § 720.20 (2), the court must adjudicate the defendant a youthful offender for all of the convictions or for none. *People v. Chrisopher T.,* 48 A.D.3d 1131, 1132 (4th Dept. 2008).

A different circumstance arises when the person has two or more cases pending in the same or different courts, or even in different counties. For example, the person has a burglary case pending in one court and enters a plea of guilty (Case A). He then enters a plea of guilty in another court to robbery (Case B). After entering a plea in the robbery case (Case B), the person is sentenced and adjudicated a Y.O. on the burglary case (Case A). Can he subsequently also be adjudicated a Y.O. on the robbery conviction (Case B)? Under this sequence of events, the answer is, yes. He can be adjudicated a Y.O. on the latter plea to the robbery (Case B).

Here, the sequence of events is critical. In order to be eligible for a Y.O. on the robbery conviction (Case B), the plea on the robbery (Case B) must occur *prior to* the sentencing on the burglary case (Case A).

The rationale for this rule is found in both CPL §§ 720.10 (2)(b) and 720.20 (1), as explained in *People v. Cecil Z.,* 57 N.Y.2d 899, 901 (1982). Eligibility for youthful offender treatment is met at the time of the conviction, not at the time of sentencing (when the judge exercises his or her discretion to grant or deny Y.O. status). Thus, in the example above, at the time the person entered his plea of guilty on the robbery case (Case B), the court was required to make a determination of eligibility for Y.O. At that point the defendant had only been convicted, but not sentenced, on the prior burglary charge, and was therefore eligible for Y.O. adjudication on the robbery case. *See People v. Ramirez,* 115 A.D.3d 992 (2d Dept. 2014); *People v. Mosley,* 88 A.D.2d 520 (1st Dept. 1982).

If the plea on the robbery case (Case B) occurs after both the plea and sentencing on the burglary case (Case A), however, the defendant will not be eligible for Y.O. on the robbery case (Case B). The prior Y.O. adjudication, having occurred before the plea on robbery case (Case B), would make him an "ineligible youth" at the time of the robbery plea/conviction (Case B).

PRACTICE TIPS

As can be seen from the example above, defense counsel must be attentive to the sequence of pleas and sentencings when a youth has multiple open cases. When necessary, seek an adjournment of the sentencing for the case in which the plea was first entered, or advance the plea on the second case. When there are two different defense attorneys on two different cases, communication and careful coordination of schedules are necessary to avoid inadvertently squandering the defendant's opportunity to be adjudicated a Y.O. on the second case.

§ 5:10 Jury vs. Bench Trial

The trial of a misdemeanor in local criminal court is required to be a bench trial; a jury trial is not available if the defendant is eligible for a youthful offender finding. CPL § 340.40 (3). An eligible youth who is tried in County Court or Supreme Court is entitled to a jury trial.

§ 5:11 Pre-sentence Investigation Required After Conviction of Eligible Youth

After the conviction of an eligible youth, the court must order a pre-sentence investigation of the defendant. CPL § 720.20 (1).

§ 5:12 Sentencing Court Must Make a Youthful Offender Finding

Pursuant to CPL § 720.20 (1), the court must determine whether an eligible youth is a youthful offender at the time of pronouncing sentence. All eligible youth have the right "to have a court decide whether such [Y.O.] treatment is justified," and this is so "even where the defendant fails to request it or agrees to forgo it as part of a plea bargain." *People v. Rudolph,* 21 N.Y. 3d 497, 501 (2013). The determination must be made "on the record for every eligible youth." *People v. Middlebrooks,* 25 N.Y.3d 516, 527 (2015). In *Middlebrooks*, the court also held that the determination had to be made on the record as to "whether the defendant convicted

of an armed felony, or an enumerated sex offense is an eligible youth due to the presence of the CPL 720.10 (3) factors." *Id.* The right to have the court consider Y.O. adjudication cannot be plea-bargained away. *People v. Hobbs,* 158 A.D.3d 1308, 1309 (4th Dept. 2018). The youthful offender determination must be made, but the court is not required to give reasons for a denial. *People v. Minemier,* 29 N.Y.3d 414, 419-21 (2017).

Although the court must consider youthful offender eligibility and make a youthful offender determination, the prosecutor may be able to withdraw the plea bargain offer and scuttle the plea in the event of a Y.O. determination by the judge. It was held in *People v. Rudolph,* 21 N.Y. 3d 497, 502 (2013) that "the prosecutor may bargain for the right to withdraw consent to the plea agreement if youthful offender treatment is granted." Of course, this circumstance only arises when the prosecutor has consented to a plea down to a lesser offense or a plea to something less than the entire indictment, thus being in a position to withdraw consent to the plea bargain.

PRACTICE TIPS

Allowing the prosecutor to torpedo the judge's youthful offender finding seems to undermine the primary holding in *Rudolph* that a defendant has a right to "to have a court decide whether such [Y.O.] treatment is justified." elevating form over substance. What good does it do to determine that Y.O. is justified, then allow it to be blocked by the prosecutor? There is also the practical problem that it will be the rare judge who, knowing that the prosecutor will scuttle the plea bargain if the judge makes a youthful offender finding, will still make such a finding.

If the prosecutor has failed to memorialize that she has bargained for the right to withdraw consent to the plea agreement if youthful offender treatment is granted, there is an argument that the plea offer cannot be withdrawn when the judge makes its Y.O. determination. This argument is grounded in the language of *Rudolph* that appears to require that the prosecutor's right to withdraw consent must be bargained for. *People v. Rudolph* at 502.

Your client cannot plea-bargain away the right to have a youthful offender adjudication considered, but there is another option open for plea-bargaining: The defendant can bargain for the right to withdraw a guilty plea if the judge, at the time of sentencing, does not make a youthful offender finding. Courts generally allow a plea to be vacated if they cannot fulfill a sentence that has previously been agreed upon. *See* e.g. *People v. Johnson,* 14 N.Y.3d 483, 485 (2010).

§ 5:13 Preserving the Youthful Offender Issue for Appeal

If the sentencing court has entirely abrogated its responsibility to determine whether an eligible youth is entitled to youthful offender status, an appeal waiver does not foreclose appellate review. However, if there has been a valid waiver of the right to appeal and the sentencing court has considered and denied youthful offender treatment, the right to appellate review is foreclosed. *People v. Pacherelle,* 25 N.Y.3d 1021, 1024 (2015).

Defense counsel should be wary of an appeal waiver when there is a viable youthful offender issue. Even if it is advisable and advantageous to waive other appellate issues, counsel should attempt to exempt from the waiver the youthful offender issue in order to preserve it for appellate review.

§ 5:14 Defendant's Pre-sentence Memorandum

The defendant's presentence memorandum is the most powerful tool in your advocacy toolbox when it comes to plea bargaining, sentencing, and making the case for a youthful offender finding. *See* § 7:4.

§ 5:15 *Cruickshank* Factors

The statute (CPL § 720.20) provides little guidance to sentencing courts for the youthful offender determination, other than authorizing the court to grant an eligible youth Y.O. status if it is determined that "the interest of justice would be served by relieving the eligible youth from the onus of a criminal record and by not imposing an indeterminate term of imprisonment of more than four years."

Although the Y.O. statute does not establish any specific criteria to be considered upon an application for youthful offender status, the Third Department (in 1985) reviewed pertinent case law and concluded that there were nine factors to be considered. *People v. Cruickshank*, 15 A.D.2d 325, 333-34 (3d Dept. 1985). The nine "*Cruickshank* factors" (listed below with case annotations) have been applied by sentencing and appellate courts for almost forty years and continue to be used to this day.

Notably, it is important to keep in mind that the nine Cruickshank factors are not the *only* factors the court can or should consider and were never meant to be an exhaustive list of considerations. Other appropriate considerations may include matters of equity and discrimination. For instance, a court can consider "whether a defendant may be facing discrimination based on protected characteristics such as race or gender" and "take an intersectional approach by considering the combined effect of the defendant's characteristics and any bias that may arise therefrom." *People v. Z.H.*, 192 A.D.3d 55, 62 (4th Dept. 2020).

Cruickshank Factors
1. Gravity of the crime and manner in which it was committed 2. Mitigating circumstances 3. Prior criminal record 4. Prior acts of violence 5. Recommendations in the presentence reports 6. Reputation 7. Level of cooperation with authorities 8. Attitude toward society and respect for the law 9. Prospects for rehabilitation and hope for a future constructive life

Exploring the *Cruickshank* Factors

Factor 1: Gravity of the Crime and the Manner in which it was Committed

- Gravity of the Crime
    - The determination of youthful offender status must be made based on the crime for which the individual was convicted, not the crime for which he or she was indicted. *People v. Cruickshank,* 105 A.D.2d 325, 335 (3d Dept. 1985) (citing to *People v. Drummond,* 40 N.Y.2d 990, 992 (1976)).
    - The gravity of the crime and manner in which it was committed "alone does not mandate denial of youthful offender treatment." *People v. Cruickshank,* 105 A.D.2d 325, 335 (3d Dept. 1985); *People v. Shrubsall,* 167 A.D.2d 929, 930 (4th Dept.1990). Since the Legislature made youthful offender treatment available for serious crimes, it obviously determined that this factor alone did not warrant denial of a youthful offender finding. *Cruickshank*, itself, involved the homicide of the youth's father.
    - Where there are significant countervailing factors, even serious crimes can result in Y.O. adjudication. *See*, *e.g.*, *People v. Nicholas G.*, 181 A.D.3d 1273, 1273-74 (4th Dept. 2020) (granting Y.O. in first-degree sexual abuse case, where youth had no prior record or history of violence or sexual offending, substantial cognitive limitations, expressed genuine remorse, and had rehabilitative prospects); *People v. Keith B. J.*, 158 A.D.3d 1160 (4th Dept. 2018) (granting Y.O. in CPW2 case, where gravity of the crime was the only factor weighing against Y.O. treatment); *People v. H.M.*, 63 Misc.3d 1213(A) (Sup. Ct. Bronx County 2019) (granting Y.O. in first-degree manslaughter case, where youth stabbed homeless man for "imagined slight," but all other factors militated in favor of Y.O.).
    - Absence of injury to others "bear[s] directly on defendant's manner in committing the crime." *People v. Garcia*, 84 N.Y.2d 336, 342 (1992) (interpreting mitigating factors for felony sentencing generally under P.L. 70.25); *People v. Marquis A.*, 145 A.D.3d 61, 69 (3d Dept. 2016) (no injury to others).
    - Courts are less likely to grant Y.O. where the injury to the complainant is serious or life-threatening. *People v. Brendon V.*, 210 A.D.3d 113, 114 (2d Dept. 2022) ("severe long-term injuries to the complainant"); *People v. Sutton*, 184 A.D.3d 236 (2d Dept. 2020) (fractured jaw requiring metal plate and screws); *People v Mohawk*, 142 A.D.3d 1370, 1371 (4th Dept 2016) (multiple gunshot wounds to complainant's upper torso).
    - Even if no injury results, the threat of serious physical harm weighs against the applicant. *People v. Chambers*, 176 A.D.3d 1600, 1601 (4th Dept. 2019) (although no one harmed, youth set fire to residential buildings and caused $500,000 in property damage).
- Manner in which Crime Committed
    - The Court of Appeals has stated that assessing the manner in which the crime was committed requires consideration of "[f]actors directly flowing from and relating to defendant's personal conduct while committing the crime." *People v. Garcia*, 84 N.Y.2d 336, 342 (1994) (quotation marks and citation omitted).

- For crimes involving weapons or the threatened use of force, the young person's display or use of the weapon and the severity of the threat are highly relevant. *People v. Garcia*, 84 N.Y.2d 336, 342 (1992) (non-display of weapon properly considered as mitigating factor); *People v. Marquis A.*, 145 A.D.3d 61, 69 (3d Dept. 2016) (display of gun in waistband while stealing sneakers was "fleeting and unaccompanied by any threatening statements or direct gestures towards victims or others"). The complainant's subjective experience of the threat posed by a weapon may outweigh the actual threat. *People v. Stewart*, 140 A.D.3d 1654 (4th Dept. 2016) (fact that weapon was actually a BB gun was not a mitigating factor where complainant testified that it appeared to be a sawed-off shotgun and was pointed at her head); *People v. Henry*, 76 A.D.3d 1031, 1031 (2d Dept. 2010) (BB gun pointed at complainant's head).
- Courts differ on whether a youth's intoxication can qualify as a mitigating circumstance bearing on the manner in which the crime was committed. *Compare People v. Vanleuvan*, 199 A.D.3d 1131 (3d Dept. 2021) (intoxication potentially relevant to youth's decision to commit criminal sexual act in the first degree, but not to manner in which crime committed for Y.O. purposes) *with People v Carusso*, 94 A.D.3d 529, 531 (1st Dept. 2005) (reversing and adjudicating Y.O. based, in part, on finding that "intoxication evidently played a role in [the] robbery," despite jury having rejected intoxication defense).
- In cases involving an offense that was presumptively ineligible for Y.O. treatment but granted an exception under CPL 720.10(3) (*see* § 5:6), the first *Cruickshank* factor often overlaps with the analysis of whether that exception to ineligibility applies. This is because the exception applies if there are "mitigating factors that bear directly on the manner in which the crime was committed," or if the youth's participation was "relatively minor." CPL 720.10(3). Accordingly, courts sometimes conflate the analysis of eligibility for Y.O. treatment with the assessment on the merits under *Cruickshank*. *See*, *e.g.*, *People v. Amir W.*, 107 A.D.3d 1639, 1640-41 (4th Dept. 2013) (granting Y.O. in CPW2 case where youth fired single shot at unoccupied house as a "message," where residents had brutally attacked him the day before).

Factor 2: Mitigating Circumstances

- *Cruickshank* factor 2, "mitigating circumstances," is undoubtedly the most important of the factors. Depending upon how it is developed, mitigation can make or break the persuasiveness of your argument.
- This *Cruickshank* factor is a broad category that allows the defense to introduce a wide array of mitigation evidence. *See* Chapter 7 on Mitigation and Mitigation Checklist at § 7:1.
- *People v Amir W.*, 107 A.D.3d 1639, 1640-41 (4th Dept. 2013) (reversing denial of Y.O. in CPW2 case where 16-year-old was a victim of domestic violence).

Factor 3: Prior Criminal Record

- The absence of a criminal record should always be brought to the court's attention. *People v. Marquis A.*, 145 A.D.3d 61, 70 (3d Dept. 2016) (granting Y.O. in first-degree robbery conviction where 16-year-old had served juvenile probation, but had no criminal record or history of violence); *Cf. People v. Green*, 128 A.D.3d 1282 (3d Dept. 2015) (affirming Y.O. denial where home invasion robberies involved injury to complainant, youth had prior criminal history, and negative recommendation from Probation Dept.).
- For clients with a prior record, you should try to contextualize past offenses in light of any mitigating information, e.g., if past offenses were related to substance use disorder or addiction. *People v. Kwame S.*, 95 A.D.3d 664, 646 (1st Dept. 2012). Success in any treatment programs between arrest and sentencing should be highlighted. *People v. Marcel G.*, 183 A.D.3d 667, 667 (2d Dept. 2020) (success in drug treatment program, a condition of plea agreement, weighed in favor of Y.O. in Robbery 2 prosecution).

Factor 4: Prior Acts of Violence

- Similar to Factor 3 (prior criminal record), the lack of a history for violence weighs in favor of Y.O. treatment. *People v. Marquis A.*, 143 A.D.3d 61, 70 (3d Dept. 2016) (granting Y.O. in Robbery 1 case where 16-year-old had served juvenile probation but had no criminal record or history of violence); *People v. Keith B.J.*, 158 A.D.3d 1160 (4th Dept. 2018).
- Likewise, where there is evidence of prior violent acts, counsel should offer as much context as possible to help mitigate the earlier incidents.

Factor 5: Recommendations in the Presentence Reports

- Courts will always consider the recommendation of the Probation Department in the pre-sentence report as to whether youthful offender treatment is appropriate. However, it is vitally important that the defense team closely examine the PSR for inaccuracies, biased assumptions, and inappropriate clinical opinions. See § 7:6 for guidance on when and how to challenge the contents of the PSR.
- If Probation recommends Y.O., then counsel should always use this favorable fact in arguing for Y.O. adjudication. *See People v Carlos M.-A.*, 180 A.D.3d 808 (1st Dept. 2020) (reversing denial of Y.O. treatment in armed felony case where probation strenuously recommended Y.O.); *People v Amir W.*, 107 A.D.3d 1639, 1640-41 (4th Dept. 2013) (reversing denial of Y.O. in CPW2 case where Probation and CCA memo recommended Y.O.). *People v Kwame S.*, 95 A.D.3d 664, 664 (1st Dept. 2012) (citing recommendation for Y.O. treatment in PSR as factor in granting Y.O. adjudication); *People v Carusso*, 94 A.D.3d 529, 531 (1st Dept. 2005) (reversing and adjudicating on robbery 1 charge based, in part, on probation having recommended youthful offender treatment). However, courts are not bound by a favorable Y.O. recommendation in the PSR. *People v Chappelle*, 282 A.D.2d 881, 882 (3d Dept. 2001) (affirming denial of Y.O. treatment, despite Probation's recommendation of Y.O., due to failure to take responsibility as primary aggressor).
- Where the PSR does not recommend Y.O., counsel should not despair. In addition to closely examining the PSR for errors or bias that may have affected the Probation

Department's determination (*see* Practice Tips below in this section), you should also speak with your client about the interview with Probation to gain insight into what questions were asked, how the client was feeling that day, and any other relevant information that could contextualize the negative recommendation. *People v Marquis A.*, 145 A.D.3d 61, 70 (3d Dept. 2016) (reversing and granting Y.O. to 16-year-old in robbery 1 case, despite Probation's recommendation that he "be held accountable for his actions").

Factor 6: Reputation

- Reputation evidence can be used to support mitigating evidence that may fall under any of the other *Cruickshank* factors, as well as any other mitigating factors. For instance, in *Cruickshank* itself, the court cited favorably the youth's "reputation as an industrious, honest student who has respect for law and authority." 105 A.D.2d at 337; *see also People v. Z.H.*, 192 A.D.3d 55, 60-61 (4th Dept. 2020) (citing psychologist's finding that youth's reputation for avoiding violence had made her a target of violence, as well as her reputation for kindness to other incarcerated people in jail).

Factor 7: Level of Cooperation with Authorities

- Any cooperation with police or the prosecution should be highlighted. *People v. Terrence L.*, 195 A.D.3d 1041, 1042 (2d Dept. 2021). This is true even if the cooperation was not absolute. *People v Marquis A.*, 145 A.D.3d 61, 70 (3d Dept. 2016) (16-year-old convicted of robbery 1 should have been adjudicated Y.O., based in part on cooperation with police in admitting intent to steal shoes, even though post-arrest statement denied possessing or displaying the gun).
- A client's guilty plea can also be considered cooperation with authorities for purposes of Y.O. treatment. *People v. Sheldon O.*, 169 A.D.3d 1062, 1063 (2d Dept. 2019).

Factor 8: Attitude Toward Society and Respect for the Law

- The court must consider the defendant's present and likely future attitude, not the attitude that the defendant displayed during the commission of the underlying offense. *People v. Z.H.,* 192 A.D.3d 55, 61 (4th Dept. 2020).
- The client's youth at the time of the crime can factor into this analysis if some time has passed (such as in the context of a *Rudolph* resentencing), as counsel can cite the client's changed attitude as a consequence of having grown and matured over time. *People v H.M.*, 63 Misc. 3d 1213(A) (Sup. Ct. Bronx County 2019) (granting Y.O. in part due to the person's progress in prison and "the appropriate aging of his brain" that "altered his attitude").

Factor 9: Prospects for Rehabilitation and Hope for a Future Constructive Life

- An expert opinion from a psychologist or mitigation specialist about the client's prospects for rehabilitation can be helpful in establishing this factor. *People v. Jeffrey VV.*, 88 A.D.3d 1159, 1160 (3d Dept. 2011) (reversing denial of Y.O. after conviction of possession of an obscene sexual performance by a child, where psychological evaluation determined that youth did not have pedophilic interests, was participating in counseling,

and "could become a productive member of society if he continued counseling and received vocational training"). *People v Amir W.*, 107 AD3d 1639, 1640-41 (4th Dept. 2013) (reversing denial of Y.O. in CPW2 case where CCA memo endorsed favorable prospects of rehabilitation).

- Courts look favorably on a well-developed reentry plan that will increase the likelihood of future rehabilitation. *People v H.M.*, 63 Misc. 3d 1213(A), *3 (Sup. Ct. Bronx County 2019) (citing youth's solid re-entry plan and "evidence that he has been rehabilitated by maturation" as "provid[ing] a sense of bright prospects for a future constructive life").
- Positive employment records, military service papers, or certificates of relief from disabilities in criminal cases can also be helpful to show bright, future prospects. *People v. Marvin B.*, 111 A.D.2d 608 (1st Dept. 1985). So too can academic success, pre-arrest and while incarcerated, as well as the fact that the youth is a parent. *People v. Terrence L.*, 195 A.D.3d 1041, 1042 (2d Dept. 2021).

PRACTICE TIPS

All of the *Cruickshank* factors should be addressed in the defendant's pre-sentence memorandum. Below are some suggestions as to how to address the *Cruickshank* factors.

Gravity of the crime

The *Cruickshank* case involved parricide and Y.O. treatment was granted. The seriousness of the charge alone does not bar Youthful Offender treatment. Mitigating circumstances can help provide context and an explanation for the commission of even the most serious of crimes.

Regardless of the gravity of the crime, it cannot be assumed that the young client fully appreciated the gravity at the time of the offense. Adolescent brain research shows that the prefrontal and parietal regions of the brain that allow for consequential thinking in times of arousal are not fully developed until early adulthood.[4] In many situations, teens are not capable foreseeing consequences to their actions.[5] Developmental researchers have consistently found that social influence is most impactful in adolescence, when independent thought and perspective-taking abilities are limited.[6]

In some cases, providing context helps diminish the gravity of the offense.

Mitigating Circumstances

The mitigating circumstances of the Cruickshank case, specifically the defendant's history of victimization at the hands of the deceased, were found to bear directly on the manner in which the crime was committed. Mitigation that demonstrates the day-to-day realities of the

[4] Beltz, Adriene, *Connecting Theory and Methods in Adolescent Brain Research*. 28 Journal of Research on Adolescence 10 (2018) at 11.
[5] Baird, Abigail & Fugelsang, Jonathan, *The Emergence of Consequential Thought: Evidence from Neuroscience,* 359 Philosophical Transactions of the Royal Society of London Series B, Biological Sciences 1797 (2004) at 1801-02.
[6] Galvan, Adriana, *Adolescent Brain Development and Contextual Influences: A Decade in Review*). 31 Journal of Research on Adolescence 843 (2021) at 851.

client's life can help to contextualize the offense. It is important to take an ecological perspective of the client's life, situating his or her development and behavior in the context of primary relationships and environments. In addition to interviewing the client and close relations, records should be requested and reviewed that can bolster narrative accounts.

In addition to the several mitigating factors substantiated by appellate courts (listed previously in this chapter), the client's young age necessitates a developmental approach, and offers additional considerations for mitigation advocacy. Immaturity, disability, and trauma are essential factors to consider when telling the young client's life story.[7] Refer to the Developmental Framework in the Appendix for an in-depth study into how these three factors can inform your advocacy.

Defendant's Reputation

The client's reputation can be demonstrated in several ways: school records; psychological and other evaluations; written updates about program participation; interviews in support of a pre-sentence or pre-plea memorandum; letters of support from the community; etc. In one case, the psychologist's report was referenced to establish the client's positive reputation for non-violence, and her kind acts towards others in the jail was another factor considered by the court. *People v. Z.H.,* 192 A.D.3d 55, 60 (4th Dept. 2020).

The social media presence of the young client can contribute to a narrow and often harmful online image of the youth's reputation and character that is not representative of his or her actual behavior and reputation in the community. Youth culture promotes a display of popular trends and adolescent bravado curated for a specific audience. Interpretation of a young client's social media requires consideration of how the teen imagined the context and audience.[8] Collateral support in the form of letters, certificates, awards, recorded interviews, and photos can demonstrate the client's positive reputation and contributions to the community.

PRACTICE TIPS

Community and collateral resources are essential for documenting the character and reputation of the client. Your client's reputation can be demonstrated by providing the court with letters from family, teachers, coaches, clergy, neighbors, and other community members. When soliciting a letter of support:

- Provide appropriate information about how to address the court.
- Be specific with the request.
    - Writers should speak directly to their relationship and experience with the client.
    - Stories that illustrate the good citizenship of the client are useful.
- Urge the writer not to opine about the alleged offense.
- Writers can and should write about what they hope for the young person's future.

[7] Beyer, Marty, *A Developmental View of Youth in the Juvenile Justice System,* Chapter 1 in Juvenile Justice: Advancing Research, Policy, and Practice (Francine Sherman & Francine Jacobs, Eds.) (2011) at 5.
[8] Boyd, Dana, It's Complicated: The Social Lives of Networked Teens, (2014) at 29-36.

In addition, relevant contacts should be interviewed to inform the preparation of the mitigation report.

Recommendations in the Presentence Reports

A judge's decision about whether to grant Youth Offender status does not solely rest on Probation's recommendation in the presentence report. Courts give varying degrees of deference to the recommendations. An advocate should persist in seeking Y.O. treatment regardless of Probation's recommendation.

Probation's Presentence Investigation and Report (PSR) includes information about the defendant's history of delinquency or criminality, social history, employment history, family situation, economic status, education, physical and mental condition, and personal habits, as well as a victim impact statement. CPL § 390.30 specifies that in the case of young clients (under age 21), the court can order the defendant to undergo a physical or mental examination.

Bias and prejudice impact poor and ethnically/racially marginalized clients uniquely. A 2011 study that reviewed 2,115 PSRs for the factors that influenced probation recommendations and subsequent sentences revealed that probation investigations considered more extralegal mitigating factors for White defendants than Black defendants, and, as a result, Black defendants were less likely to be sentenced to probation.[9] It is incumbent upon the defense to offer mitigation that may be overlooked or ignored in the PSR, including the impact of bias on the treatment of the client.

Bias, equity, and discrimination have been recognized as appropriate factors for a court to consider when weighing mitigating factors. *People v. Z.H.,* 192 A.D.3d 55, 61-62 (4th Dept. 2020). The Appellate Division recommended that future courts "consider whether a defendant may be facing discrimination based on protected characteristics such as race or gender and to take an intersectional approach by considering the combined effect of the defendant's specific characteristics and any bias that may arise therefrom." *Id.*

Probation's PSR must be made available to the court (including defense) at least one court day before sentencing. CPL § 390.50 (2). Be sure to review the PSR with your client and be prepared to challenge any false or misleading statements in the PSR. *See* § 7:6.

The prosecutor may submit a presentence memorandum to the court. If such a memorandum is submitted, the defense attorney must receive a copy at least ten days prior to sentencing. CPL§ 390.40.

The Defense's pre-sentence memorandum is critical to providing a fuller alternative narrative than what is presented in Probation's PSR and any presentence memorandum submitted

[9] Freiburger, Tina & Hilinski, Carly, *Probation officers' recommendations and final sentencing outcomes*, 34 Journal of Crime & Justice 45 (2011) at 57-59.

by the prosecutor. The sentencing recommendation in the defense's memorandum is strongest when it provides a rationale for the proposed disposition that includes a thorough treatment plan to address any evident mental health or social adversities, and ample justification for how the defense-recommended sentence best serves the interests of justice, minimizes collateral consequences, and contributes to the well-being and safety of the community.

Defendant's Attitude Toward Society and Respect for the Law

The client's current, not past, attitude is the relevant factor. "A youthful offender determination requires a forward-looking analysis." The Fourth Department explained that the focus should not be on disrespect for the law that the defendant displayed during the commission of the offense. Instead, "the court must consider the defendant's present and likely future attitude." *People v. Z.H.,* 192 A.D.3d 55, 61 (4th Dept. 2020).

Experiences of racial bias and racist behavior, especially at the hands of law enforcement, are uniquely experienced by Black men. Behavioral health research into offending by adolescent Black males indicates that marginalizing experiences "spark a range of negative emotions, including anger and depression, as well as weaken bonds to orthodox society. . .. [C]riminogenic coping is increased by such negative emotions and weakened bonds when social support and legitimate coping strategies are limited."[10] In instances where the young person may have racialized, negative experiences, their attitude toward society and law enforcement must be contextualized. To inform sentence recommendations and treatment planning, empirical research has shown positive racial identity and role models to have a protective counter-influence on young men of color.[11]

Prospects for Rehabilitation

In every case in which your client is eligible for Y.O., age, as it relates to the prospect for rehabilitation, is a mitigating factor.

Adolescents have a unique capacity for resilience and rehabilitation due to their still-maturing brains. As the prefrontal cortex develops, young adults become more capable of reasoning and impulse control and less reliant on the amygdala and automatic response system wired for survival.[12] Research confirms that the vast majority of youth who display criminal behavior outgrow their criminogenic risk as they mature into adulthood.[13] *See* Chapter 3 (Adolescents Are Different) for a discussion of why adolescents are more amenable to rehabilitation than adults and its recognition in case law.

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[10] Isom Scott, D. & Seal, Zachary, *Disentangling the Roles of Negative Emotions and Racial Identity in the Theory of African American Offending*, 44 American Journal of Criminal Justice 277 (2019) at 279.
[11] *Id.* at 297.
[12] Buckingham, Samantha, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 Loyola of Los Angeles Law Review 801 (2013) at 832-837.
[13] Steinberg, Laurence, Cauffman, Elizabeth, & Monahan, Kathryn, *Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders*, Juvenile Justice Bulletin, Office of Juvenile Justice and Delinquency Prevention (2015) at 2.

The adolescent brain does not develop in a vacuum. Adolescents and young adults are susceptible to the influence of their social communities. This malleability is both an opportunity and a risk for young clients. Prosocial community-based programming, education, and mental health services can provide young people with the role models, relationships, and skills they need to develop into productive adult citizens.[14] Incarceration, on the other hand, forces a youth to mature in a social environment that does not nurture prosocial citizenship, and has the potential to further damage the prospects for rehabilitation and positive development. A 2022 review of the research on the impact of youth detention and incarceration found that:[15]

- Youth incarceration does not reduce offending, and, when controlling for relevant characteristics, closely correlates with higher rates of re-arrest as compared to community-based sentences;
- Youth incarceration limits educational and employment attainment;
- Youth incarceration leads to poorer health and wellbeing outcomes in adulthood, and correlates with shorter life expectancy;
- Abuse in juvenile facilities is commonplace, as is such treatment of young people in adult facilities; and
- Incarceration is especially damaging to youth who have experienced childhood trauma.

§ 5:16 Youthful Offender Adjudication for an Adolescent Charged as a Juvenile Offender

The Juvenile Offender law is an anachronism. It is the product of a bygone era, borne out of fear of juvenile crime, calls for retribution, rejection of rehabilitation, and a wrong-minded notion that children are no different than adults and deserve "adult time for adult crimes." New York's Juvenile Offender Act was passed in 1978, in significant part because of the prosecution of Willie Bosket, a 15-year-old Black child convicted in Family Court of killing two people. Media coverage relentlessly used this case to sow fears of Black children as dangerous, unruly, and irredeemable.[16] His sentence ("placement") for five years as a juvenile delinquent created an uproar. Governor Hugh Carey caved in to that political pressure by proposing the Juvenile Offender Act, dubiously called the "Willie Bosket Law," causing 13-, 14-, and 15-year-olds to be prosecuted as adults for "designated felonies."[17]

Such an approach has no place in our evolving jurisprudence with its developmental approach to adolescents, as heralded by the U.S. Supreme Court in *Roper v. Simmons,* 543 U.S.

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[14] Sheehan, Karen, Bhatti, Punreet, Yousuf, Sana, Rosenow, William, Roehler, Douglas, Hazekamp, Corey, Wu, Han-Wei, Orbuch, Rachel, Bartell, Tami, Quinlan, Kyran, & DiCara, Joseph, *Long-term Effects of a Community-based Positive Youth Development Program for Black Youth: Health, Education, and Financial Well-being in Adulthood.* 22 BMC Public Health 593 (2022) at 606.

[15] Mendel, Richard, Why *Youth Incarceration Fails: An Updated Review of the Evidence,* The Sentencing Project (2022) at 12-21. Available at https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence.

[16] Trujillo, Jared, *Reducing Multigeneration Poverty in New York Through Sentencing Reform,* 26 CUNY Law Review 225 (2023) at 249.

[17] *Id.* at 249.

551 (2012) and its progeny. The wisdom of Judge Graffeo's concurring opinion in *People v. Rudolph* should not go unheeded when it comes to a youthful offender determination: "Young people who find themselves in the criminal courts are not comparable to adults in many respects – and our jurisprudence should reflect that fact." *People v. Rudolph,* 21 N.Y. 497, 506 (2013).

It makes no sense to treat the younger adolescents – the juvenile offenders – more harshly than their older adolescent counterparts – the adolescent offenders – and yet that is what we do because of the operational effects of two laws created at different times, based on entirely different philosophies about how adolescents should be treated in our legal system, being applied contemporaneously. To counterbalance this absurdity, a strong argument can be made that juvenile offenders should be granted youthful offender adjudications as readily as adolescent offenders are granted removal to family court. In other words, it should be the rare and extraordinary case where a juvenile offender is not granted a youthful offender adjudication. Such an approach will provide some of the benefits that older adolescents receive by way of removal, which benefits are not currently afforded to younger adolescents.

§ 5:17 Mitigation

For a full discussion of mitigation *see* § 7:1.

§ 5:18 Other Mitigation and Considerations

See § 7:3.

§ 5:19 Adolescents Are Different

Once the differences between adolescents and adults are recognized, we then can appreciate the U.S. Supreme Court's conclusion that adolescents are different from adults for purposes of sentencing because they have "diminished culpability" and a "greater chance of rehabilitation." These analytic steps lead inescapably to the conclusion that there should be a more robust utilization of youthful offender adjudications, and greater opportunity for rehabilitation and promotion of young defendants' successful and productive reentry and reintegration into society.

See Chapter 3.

§ 5:20 The Role of the Mitigation Specialist

See § 7:5.

§ 5:21 Carefully Review, and Where Appropriate, Challenge the PSR

See § 7:6.

§ 5:22 Youthful Offender Sentence

The term of the sentence is limited by CPL § 720.20 (3) and Penal Law § 60.02.

If the sentence is for a misdemeanor, generally, the maximum sentence is one year. If the sentence is for a misdemeanor, the conviction is had in a local criminal court, and the eligible youth has not, prior to commencement of trial or entry of a plea of guilty, been convicted of a crime or found to be a youthful offender, the court must not impose a definite or intermittent sentence of imprisonment with a term of more than six months.

If the sentence is for a felony, the court must impose a sentence authorized to be imposed upon a person convicted of a class E felony, i.e., a sentence of no greater than 1 1/3 to 4 years.

For either a misdemeanor or felony Y.O., an authorized sentence includes probation, conditional discharge, unconditional discharge, a split (intermittent) sentence, or a definite sentence. For a felony, an indeterminate sentence is also authorized. However, for a controlled substance felony, the court cannot impose a sentence of a conditional discharge or an unconditional discharge if the youthful offender adjudication was substituted for a conviction. Penal Law § 60.02 (2).

If the conviction is for prostitution, a class B misdemeanor, the sentence can be no more than the sentence authorized for a violation – 15 days. CPL § 170.8 (2).[18]

If the authorized sentence would have been a determinate sentence, but for the youthful offender adjudication, there is authority holding that the sentence cannot be a determinate sentence and must be an indeterminate sentence, if it is to be a state prison sentence. *People v. Jorge D.,* 109 A.D.3d 16 (3d Dept. 2013). There still seems to be an open question as to what the maximum sentence could be if the underlying offense is a drug offense, since the maximum sentence on a class E drug offense is a determinate sentence of 1 ½ years with 1 year PRS.[19] Clearly, a person adjudicated a youthful offender should not be sentenced more harshly than his or her adult counterpart.

Consecutive terms on two or more youthful offender adjudications may not exceed 1 1/3 to 4 years. *People v. Antonio J.,* 173 A.D.3d 1743 (4th Dept. 2019); *People v. Christopher P.,* 136 A.D.3d 481 (1st Dept. 2016); *People v. David H.,* 70 A.D.2d 205 (3d Dept. 1979). However, if two sentences are being imposed – one on a youthful offender adjudication and another on an adult conviction – consecutive sentences can extend beyond the Y.O. maximum of 4 years. *People v. Malloy,* 34 A.D.3d 1046 (3d Dept. 2006).

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[18] This will only apply to a person who is 18 years old. Anyone younger will appear in Family Court as prostitution is not a felony.

[19] The Practice Commentary to McKinney's Penal Law § 60.02 by William Donnino suggests that "it would arguably be inconsistent with the purpose of youthful offender treatment to accord the youth a sentence which may require more state prison time than an adult would receive." The Court of Appeals has not reached this issue, however, the decisions in *People v. Jorge D.,* 109 A.D.3d 16 (3d Dept. 2013) and *People v. Teri W.,* 31 N.Y.3d 124 (2018) make it an uphill argument.

A sentence of probation for a person adjudicated a youthful offender, where the underlying offense is a sexual assault, will have a term of 10 years for a felony, and 6 years for a misdemeanor. Penal Law § 65.00 (3). *People v. Teri W.,* 31 N.Y.3d 124 (2018).

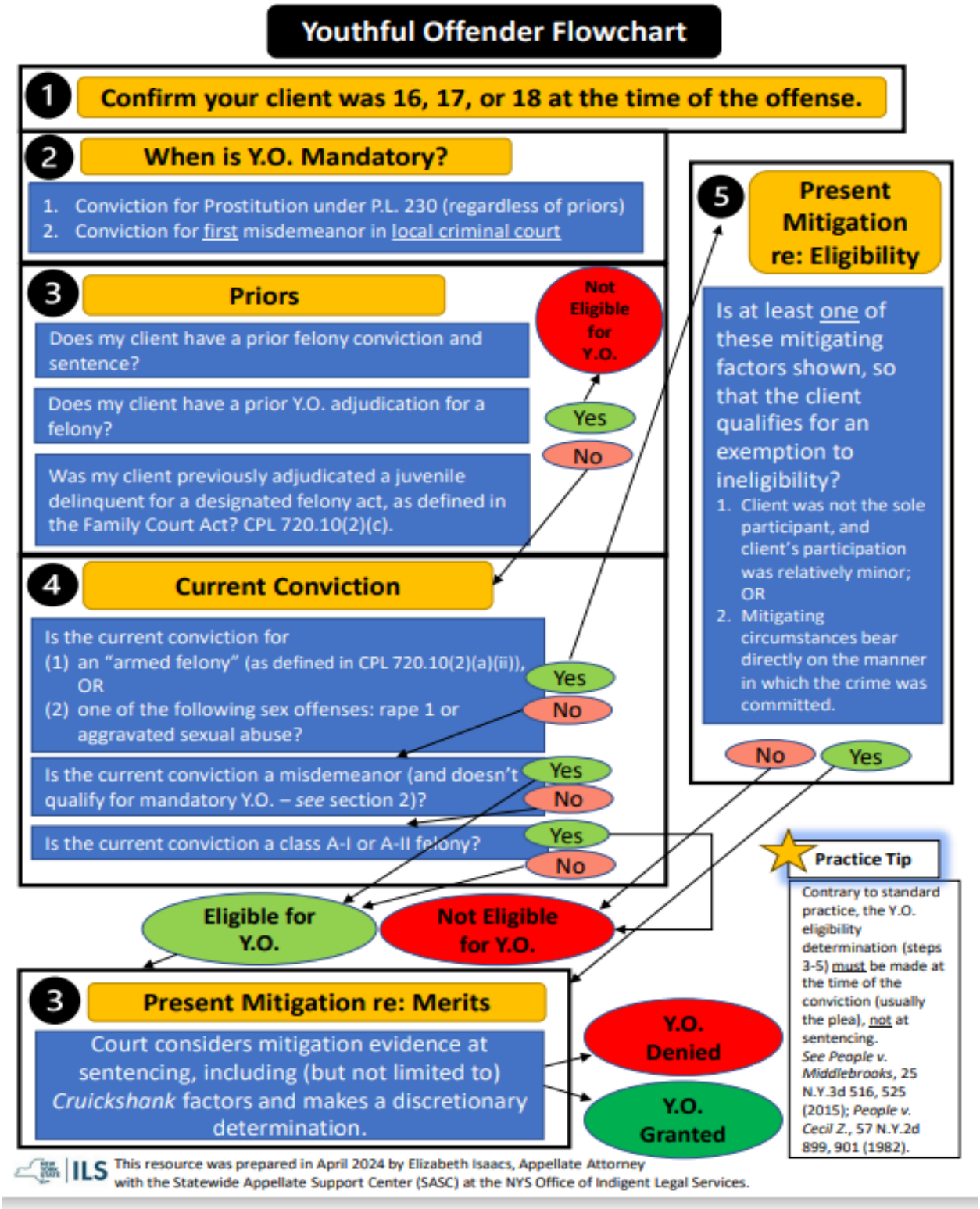
When sentencing a person who is charged as an adolescent offender, the judge must consider the age of the defendant in exercising discretion at sentencing, whether the sentence is as a youthful offender or not. CPL § 60.10-a (effective October 1, 2018).

§ 5:23 Youthful Offender Eligibility Chart

YOUTHFUL OFFENDER ELIGIBILITY

Misdemeanor	Y.O. Eligibility
AGE	
7 up to 12 years old	No. As of 12/29/22, as a result of RTLA, children in this age group are no longer subject to arrest and prosecution in Family Court as Juvenile Delinquents.
12 up to 18 years old	No. Cases proceed in Family Court; these are J.D. cases and are not denominated a conviction.
18 years old	Yes, if eligible under the criteria of CPL § 720.10. Cannot have previously been convicted and sentenced for a felony or been adjudicated a Y.O. following a felony conviction or been adjudicated a J.D. for a designated felony act listed in FCA § 301.2 (8). CPL § 720.25 provides an exception to this rule in cases involving Y.O. for prostitution required by CPL § 170.80 (2). When there is a conviction for a misdemeanor in local criminal court and the eligible youth had not, prior to commencement of trial or entry of a plea of guilty, been convicted of a crime or found to be a Y.O., Y.O. is mandatory. For a prostitution conviction, Y.O. is mandatory. CPL § 170.80 (2). If previously adjudicated a Y.O. for a misdemeanor, another Y.O. is permissible upon an interest of justice determination.
Felony	**Y.O. Eligibility**
AGE	
7 up to 12 years old	No. Children between 7 to 12 are not subject to arrest and prosecution for any felony except for the 11 homicide offenses listed in FCA § 301.2 (1)(a)(iii), in which case they are prosecuted in Family Court as a J.D.
12 years old	No. Only prosecuted in Family Court as a J.D.
Juvenile Offender (J.O.)	
13 years old	No. 13-year-old J.O. may only be prosecuted as an adult in Youth Part for acts constituting Murder 2 (1) or (2) or such conduct as a sexually motivated felony where authorized by Penal Law § 130.91. Since Murder 2 and sexually motivated felonies based on Murder 2 are class A felonies, they are not eligible for Y.O. CPL § 720.10 (2)(a).
14- and 15-year-olds	Yes, if charged with a serious or violent felony offense listed in CPL § 1.20 (42), not removed to Family Court pursuant to CPL §§ 722.20 or 722.22, and eligible under the criteria of CPL § 720.10 (2) and (3).
Felony	**Y.O. Eligibility**
AGE	
Adolescent Offender (A.O.)	
16- and 17-year-olds	Yes, if not removed to Family Court pursuant to CPL § 722.21, § 722.23, and the criteria in CPL § 720.10 are met. Note that if a conviction is for an armed felony, Rape 1, or Aggravated Sexual Abuse, the court must determine that a special mitigating factor exists per CPL § 720.10 (3). Y.O. is not available for any Class A conviction.
18 years old – Prosecuted as an adult.	Yes, if the criteria in CPL § 720.10 are met. Note that if conviction is for an armed felony, Rape 1, or Aggravated Sexual Abuse the court must determine that a special mitigating factor exists per CPL § 720.10 (3). Y.O is not available for any Class A conviction.

§ 5:24 Youthful Offender Flowchart



CHAPTER 6

MAKING THE CASE FOR YOUTHFUL OFFENDER FOR AN ADOLESCENT CHARGED WITH A CRIME OF A SEXUAL NATURE

CHAPTER 6 SECTIONS

CHAPTER 6

MAKING THE CASE FOR YOUTHFUL OFFENDER FOR AN ADOLESCENT CHARGED WITH A CRIME OF A SEXUAL NATURE

Alan Rosenthal and Shoshanna Must

§ 6:1 Introduction

In almost all areas of social policy, we recognize that adolescents can be impulsive, use poor judgment, and make uninformed choices. We find ways to hold them accountable for their actions and offer them the opportunity to learn and grow from these mistakes by developing the skills and attributes necessary to make better decisions and live healthy lives. In the context of the criminal legal system, we do this by statutes that provide for removal to family court or youthful offender adjudications. The U.S. Supreme Court has declared that criminal procedure law that fails to take defendant's youthfulness into account at all would be flawed (*Graham v. Florida,* 560 U.S. 48, 76 [2010]), and "the chronological age of a minor is itself a relevant mitigating factor of great weight" (*Miller v. Alabama,* 576 U.S. 460, 476 (2012)).

It is equally important to provide the same opportunities to adolescents who have been charged with a crime of a sexual nature because, in most instances, the causes are the same as with other delinquent behaviors.

Unfortunately, when it comes to adolescents who have been charged with crimes of a sexual nature, many judges turn a blind eye. They ignore what we know to be true. Their decisions are not informed by an understanding of adolescent sexual-conduct research or the research on adolescent neurological and social development.

The judicial perspective on adolescents convicted of crimes of a sexual nature stems from the popular notion that they are different from other criminals: namely, that they are more likely to recidivate and less likely to be rehabilitated.[1] Owing to the occasional grisly and aberrant story propagated by the media and camera-seeking politicians, people convicted of crimes of a sexual nature tend to be dehumanized.[2] Even the terminology of statute – "sexually violent offender" or "sexual predator" – isolates and diminishes their humanity, reducing them to animal-like creatures unworthy of the liberties and protections that others enjoy.[3]

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[1] Geer, Phoebe, *Justice Served: The High Cost of Juvenile Sex Offender Registration,* 27 Developments in Mental Health Law 33 (2008) at 37.
[2] *Id.* at 37.
[3] *Id.* at 37.

Our understanding of adolescents who commit crimes of a sexual nature must be grounded in an understanding of adolescent development generally.[4] A wealth of new information about adolescent brain and behavioral development has emerged since states began imposing registration requirements for adolescents convicted of crimes of a sexual nature.[5] This new information helps us to put adolescent sexual behavior in context.

Our challenge as defense lawyers is to debunk the myths about adolescents who have committed crimes of a sexual nature, which pervade public opinion, prompt prosecutors' moral panic, and jaundice judicial perspectives.

§ 6:2 Eligibility for Youthful Offender When Convicted of a Sex Offense

When representing a person who was under the age of 19 at the time of the offense, keep in mind that most sex offenses do not disqualify a person from youthful offender consideration. The eligibility and ineligibility criteria addressed in § 5:3, § 5: 4, and § 5:5 are applicable.

There are a few exceptions: CPL § 720.10 (2)(a) excludes any person convicted of an A-II offense; if the conviction is for either Predatory Sexual Assault (Penal Law § 130.95) or Predatory Sexual Assault Against a Child (Penal Law 130.96), your client is not eligible for a youthful offender adjudication.

CPL § 720.10 (2)(a) also excludes those convicted of Rape 1 (Penal Law § 130.35) and Aggravated Sexual Abuse 1, 2, or 3 (Penal Law §§ 130.70, 130.67, and 130.66), unless the court determines, pursuant to CPL § 720.10 (3) that one or more of the following factors exist:

i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or
ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution.

See § 5:6.

§ 6:3 Avoid the Registry

An adolescent convicted in the youth part of adult court of a "sex offense," or a "sexually violent offense" is subject to SORA registration. Correction Law § 168-f. As discussed below, registration can have debilitating effects on your adolescent client. It is a critical part of representation to take appropriate action to avoid registration for your client, if possible.

There are three ways that registration can be avoided, short of an acquittal at trial: (1) by plea bargain to a non-registrable offense; (2) by youthful offender adjudication; and (3) by removal to family court.

[4] Halbrook, Amy, *Juvenile Pariahs,* 65 Hastings Law Journal 1 (2013) at 8.
[5] *Id.* at 8.

● *Plea to a Non-registrable Offense*

When the prosecution's case is weak, the defendant is sympathetic, the victim's participation was consensual, or a combination of these and other factors exist, defense counsel may be able to negotiate a plea to a non-registrable offense. To take advantage of a strong bargaining position, defense counsel must identify potential non-registrable offenses and pursue negotiations. *See* Defending Against the New Scarlet Letter: A Defense Attorney's Guide to SORA Proceedings, 2d Edition, at § 10:1 for examples of offenses commonly negotiated in order to avoid SORA.

● *Youthful Offender*

It is a homerun whenever you can negotiate a youthful offender adjudication, but it is a grand slam when you can do so when the client is charged with a "sex offense" or a "sexually violent offense." A person who is adjudicated a youthful offender is not subject to SORA. This is because (1) to be subject to SORA, there must be a conviction, and (2) the definitional section of SORA explicitly provides that "[a]ny conviction set aside pursuant to law is not a conviction for purposes of this article [SORA]." Correction Law § 168-a (1).

Pursuant to CPL § 720.35 (1), "A youthful offender adjudication is not a judgment of conviction for a crime or any other offense." CPL § 720.20 (3) further clarifies that when a court determines that an eligible youth is a youthful offender, "the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding."

● *Removal to Family Court*

A Juvenile Delinquent in family court who is charged with a sexual offense cannot be required to register under SORA. (For a full discussion of removal for youth charged as juvenile or adolescent offenders, see Chapter 4 of this guide.)

§ 6:4 Making the Case for a Youthful Offender Finding – Overcoming Judicial Attitudes

The arguments and considerations for a youthful offender adjudication should be the same in the case of an adolescent charged with a crime of a sexual nature as they are for any other offense. The *Cruikshank* factors are equally applicable (see Chapter 5 on making the case for a youthful offender, generally).

However, lurking in the recesses of the judge's mind and on the tip of the prosecutor's tongue are additional concerns. The myths, memes, and misconceptions that infect the youthful offender proceeding for a person charged with a sexual offense must be addressed. Armed with research and science, defense counsel must try to overcome the stereotype that adolescents

charged with a crime of a sexual nature present an inherent danger and deserve degraded civic membership, justifying the creation of a zone of diminished rights.[6]

Public perception and policy are at odds with science when it comes to crimes of a sexual nature. Perhaps in no other area of the criminal legal system do we find such a significant mismatch between the prevailing laws, policies, and attitudes, on the one hand, and the scientific knowledge about adolescent development, on the other, than we do with the prosecution of adolescents for crimes of a sexual nature. The section below provides some information that you may find helpful to meet this challenge.

§ 6:5 Adolescents Who Sexually Offend Are Different From Adults Who Sexually Offend

"Adolescents are different from adults – and juvenile offenders are different from adult criminals," as discussed in § 3:1. It is equally true that adolescents who sexually offend are different from adults who do so,[7] and have more in common with other adolescents who offend in non-sexual ways.[8] See § 3:4 (research in developmental behavioral science) and § 3:5 (research in neuroscience).

It is mistaken to equate adolescent and adult sexual behavior. Each requires a different response. Brain and personality development, social functioning, and sexuality are different for young children, adolescents, and adults.[9] Research also indicates that adolescents and children are also more open to behavioral change than adults.[10] According to Lussier and Blokland, juveniles and adults who sexually offend are "two distinct phenomenon."[11] Sex offending committed in youth is, first and foremost, transitory, and not indicative of propensity for sex crimes.[12] The vast majority of adolescents desist from sexually offending while the vast majority of adults began sexually offending in adulthood.[13] There is no demonstrated empirical

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[6] Janus, Eric, *Preventing Sexual Violence: Alternatives to Worrying About Recidivism,* 103 Marquette Law Review 819 (2020) at 839.
[7] Carpentier, Julie & Proulx, Jean, *Recidivism Rates of Treated, Non-Treated and Dropout Adolescent Who Have Sexually Offended: a Non-Randomized Study,* 12 Frontiers in Psychology 1 (2021) available at https://www.researchgate.net/publication/355195059_Recidivism_Rates_of_Treated_Non-Treated_and_Dropout_Adolescent_Who_Have_Sexually_Offended_a_Non-Randomized_Study.
[8] Lobanov-Rostovsky, Christopher, *Recidivism of Juveniles Who Commit Sexual Offenses,* Sex Offender Management Assessment and Planning Initiative Research Brief, U.S. Department of Justice (2015) at 5, available at https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/juvenilerecidivism.pdf. *See* also Letourneau, Elizabeth & Miner, Michael, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo,* 17 Sexual Abuse: A Journal of Research and Treatment 293 (2005) at 296.
[9] Tabachnick, Joan & Klein, Alisa, *A Reasoned Approach: Reshaping Sex Offender Policy to Prevent Child Sexual Abuse,* Association for the Treatment of Sexual Abusers (2011) at 11. Available at https://docs.google.com/file/d/0B67htTDuFr48ak1tVktzT2ctaGc/edit?resourcekey=0-Y5459S-z2bw8ntrhTILryw.
[10] *Id.*at 11.
[11] Lussier, Partick & Blokland, Arjan, *The Adolescence-adulthood Transition and Robin's Continuity Paradox: Criminal Career Patterns of Juvenile and Adult Sex Offenders in a Prospective Longitudinal Birth Cohort Study*, 42 Journal of Criminal Justice 153 (2014) at 153.
[12] *Id.* at 160.
[13] *Id.* 153.

relationship between youth sex crimes and adult sex crimes.[14] Adolescent sex offending is not predictive of adult sex offending, as adolescents tend to "mature out" of sexual offending the same way they do for other delinquent behavior, and are unlikely to reoffend.[15] Eric Janus and his colleagues found that age-related "reductions in recidivism among sex offenders are consistent across studies," and that the "aging effect" is "one of the most robust findings in the field of criminology."[16] *See* § 3:6 for a discussion of desistance and the age-time curve.

In the quartet of U.S. Supreme Court cases – *Roper, Graham, Miller,* and *Montgomery* – the signature qualities of adolescents were identified. Adolescents "have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Miller v. Alabama,* 567 U.S. 460, 471 (2012). Adolescents "are more vulnerable or susceptible to negative influences and outside pressures." *Graham v. Florida,* 560 U.S. 48, 68 (2010). Their character "is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity" *Montgomery v. Louisiana,* 577 U.S. 190, 207 (2016). In addition, adolescents have a "heightened capacity for change." *Miller v. Alabama,* 567 U.S. 460, 479 (2012). *See* § 3:3.

In light of these developmental characteristics, it is not surprising that social scientists have observed that adolescence and emerging adulthood is a time when unprotected sex, substance abuse, reckless driving, other high-risk behavior peaks. Because of these characteristics of adolescence, some courts have taken a developmental approach to sentencing, removal, and youthful offender adjudications. A developmental approach to adolescent sexual offending is equally appropriate.

The distinctive attributes of youth are all applicable to adolescents who sexually offend. The Supreme Court's conclusion that these characteristics render adolescents categorically less culpable than adults, and must be taken into account for sentencing, also applies to adolescents who sexually offend. Adolescents who sexually offend, like their peers who criminally offend, generally, are prone to poor decision-making, impulsivity, peer influence and risky behavior.

Neuroscience and developmental criminology research indicates that there are significant differences between adults and juveniles in their capacity to plan ahead, regulate emotions, control behavior, and weigh the costs and benefits of decisions. Tolan and his colleagues conclude that this research suggests a qualitatively different basis for most sexual-offense behavior of adolescents, as compared to that of adults.[17] As a result, they caution against relating adolescent sexual offending to pathology, predicting sexual reoffending, or assuming high risk of sexual reoffending.[18] Adequate consideration should be given to adolescent sexuality as a normal

[14] Pickett, Malik, Satifka, Emily, Shah, Riya with Wiener, Vic, *Labeled for Life: A Review of Youth Sex Offender Registration Laws,* Juvenile Law Center (2020) at 2. Available at https://jlc.org/resources/labeled-life-review-youth-sex-offender-registration-laws.
[15] *Id.* at 2.
[16] Janus, *supra* note at 834.
[17] Tolan, Patrick, Walker, Tammi, Reppucci, N. Dickon, *Applying Developmental Criminology to Law: Reconsidering Juvenile Sex Offenses,* 14 Justice Research and Policy 117 (2012) at 129.
[18] *Id.* at 132-133.

part of development, identifying and adjusting for developmental differences.[19] Multiple studies confirm that adolescents who commit crimes of a sexual nature are motivated by impulsivity, naivete, and sexual curiosity, rather than predatory, paraphilic, or psychopathic characteristics.[20]

Adolescents and adults who sexually offend differ significantly due to a number of developmental, and particularly neurodevelopmental factors.[21] Functional Magnetic Resonance Imaging(fMRI) neurological studies have identified several key processes in the reorganization of the adolescent brain that are associated with changes in behavior that occur during adolescence. This and other research has documented that adolescents' diminished ability to manage their emotions, control impulses, solve problems, and react appropriately to the influence of others is in large part a reflection of (a) a socioemotional system that controls impulses, emotional arousal, and the influence of interpersonal relationships; and (b) a cognitive control system that involves deliberative thinking, foresight, impulse control, problem solving, and mature judgment.[22] Significant developmental changes in these systems that occur during adolescence are linked to the low rate of sexual recidivism for adolescents convicted of a crime of a sexual nature. Research indicates that, once detected, the vast majority of adolescents convicted of crimes of a sexual nature do not continue to engage in these behaviors.[23]

The highest courts of several other states have recognized the difference between adolescent and adult sexual offending and have applied the developmental approach crafted by the U.S. Supreme Court in *Roper* and its progeny. For example, the Supreme Court of New Jersey applied the *Roper* developmental jurisprudence to an adolescent sex-offense registration case, guided by expert witnesses that pointed to multiple studies confirming that adolescents who commit sex offenses are more likely to act impulsively and be motivated by sexual curiosity, in contrast to adults who may engage in predatory or psychopathic conduct. *In re C.K.,* 233 N.J. 44, 51 (2018). The Supreme Court of Pennsylvania found that the distinctions between adolescents and adults recognized by the U.S. Supreme Court "are particularly relevant in the area of sexual offenses, where many acts of delinquency involve immaturity, and sexual curiosity rather than hardened criminality." *In re J.B.,* 107 A.D.3d 1, 19 (2014). The Supreme Court of Ohio found sex offender registration of adolescents to be unconstitutional, relying upon the signature characteristics of youth articulated in *Roper* and *Graham,* and recognizing that "[n]ot only are juveniles less culpable than adults, their bad acts are less likely to reveal an unredeemable corruptness." *In re C.P.,* 131 Ohio St.3d 513, 524 (2012).

In addition to the differences attributable to adolescent social and neurological development, there are other important distinctions that help debunk popularly held myths about young people accused of sexual offenses. First, the sexual recidivism rates for adolescents are

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[19] *Id.* at 137.
[20] Shah, Riya, *Five Facts About Juvenile Sex Offender Registration,* ABA (2018. Available at Five Facts About Juvenile Sex Offender Registration (americanbar.org).
[21] Brandt, Jon et al., *Registration and Community Notification of Children and Adolescents Adjudicated of a Sexual Crime: Recommendations for Evidence-Based Reform,* Association for the Treatment of Sexual Abusers (2020) at 6. Available at https://texasvoices.org/wordpress/wp-content/uploads/2020/06/Registration-Community-Notification-of-Children-and-Adolescents.pdf.
[22] *Id.* at 6.
[23] *Id.* at 7.

lower than they are for adults.[24] Second, only a relatively small percentage of juveniles who commit a sexual offense will sexually reoffend as adults. Generally, adolescents who commit a sexual offense do not go on to sexually offend later in life.[25] Third, adolescent sexual offending is not predictive of adult sexual offending.[26] Fourth, research shows that for the majority of juveniles who commits a sexual offense, treatment works.[27]

Like most crimes committed by adolescents, sex offenses are often committed by juveniles for different reasons than for those who commit adult sex crimes.[28] However, when it comes to making a youthful offender determination, many judges fail to take these differences into consideration, preferring to rely on myths, memes, and misstatements, rather than science.

As defense lawyers, it is our job to convince judges to adopt an approach to our young clients who are charged with sex offenses that accounts for their stages of psychological and neurological development. They should not be treated as adults, and every effort should be made to secure a youthful offender adjudication. It is critical to avoid both a conviction and SORA registration requirements. As one court observed, "Few labels are as damaging in today's society as 'convicted sex offender' [as] sex offenders are 'the lepers of the criminal justice system.'" *In re C.K.,* 23 N.J. 44, 71 (2016). Without a youthful offender adjudication, "the status of sex-offender registrant will impair a juvenile, as he grows into adulthood, from gaining employment opportunities, finding acceptance in his community, developing a healthy sense of self-worth, and forming personal relationships. In essence, the juvenile registrant will forever remain a social pariah." *Id.* at 74.

§ 6:6 Adolescents Should Be Treated Differently from Adults

Adolescents who commit crimes of a sexual nature should be treated differently than adults who commit crimes of a sexual nature. As explained above in § 6:5, their brains are different, and what drives their behaviors is different.

Historically, professional opinions about adolescents who engaged in crimes of a sexual nature, and how they should be treated, were based on beliefs about adults who engaged in crimes of a sexual nature.[29] Scientific research in the field of neuroscience and adolescent behavior has proven that old approach to be misguided. In fact, there are significant

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[24] Lobanov-Rostovsky, Christopher, *Recidivism of Juveniles Who Commit Sexual Offenses,* Sex Offender Management Assessment and Planning Initiative Research Brief, U.S. Department of Justice (2015) at 5, available at https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/juvenilerecidivism.pdf.
[25] *Id.* at 5.
[26] Zimring, Franklin, Jennings, Wasley, Piquero, Alex & Hays, Stephanie, *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort,* 26 Justice Quarterly 58 (2009) at 61.
[27] Ratnayake, A. Ann, *Juvenile Sex Offenses: Finding Justice,* 48 Prosecutor, Journal of the National District Attorneys Association 42 (2014) at 42.
[28] Garfinkle, Elizabeth, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community Notification Laws to Juveniles,* 91 California Law Review 163 (2003) at 184.
[29] ATSA, *Adolescents Who Have Engaged in Sexually Abusive Behavior: Effective Policies and Practices,* Association for the Treatment of Sexual Abusers (2012).

differences.[30] A sufficient number of studies now exist that show most adolescents do not continue to sexually offend and are not on a life path for repeat offending, unlike adults.[31] Adolescents are also much more responsive to interventions.[32] Adolescents must be treated differently from adults; the causes of their sexual behavior are different, and the treatment is different.[33]

There are both scientific and jurisprudential reasons to treat adolescents and adults who commit crimes of a sexual nature differently.

From the U.S. Supreme Court, we have learned that, because of the "signature qualities of youth," adolescents' irresponsible behavior "is not as morally reprehensible," they have "diminished culpability," and "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper v. Simmons,* 543 U.S. 551, 570-71 (2005). Adolescents have a "heightened capacity for change" (*Miller v. Alabama,* 567 U.S. 460, 479 [2012]), and "greater prospects for reform" (*Montgomery v. Louisiana,* 577 U.S. 190, 207 [2012]). "[A] sentencer misses too much if he treats every child as an adult." *Miller v. Alabama,* 567 U.S. at 477.

Our jurisprudence regarding adolescents, generally, has long required that they should be treated differently from adults. The youthful offender provisions of the CPL "emanate from a legislative desire not to stigmatize youth between the ages of 16 and 19 with criminal records." *People v. Drayton,* 39 N.Y.2d 580, 584 (1976). Adolescence has been recognized as "a relevant mitigating factor of great weight." *Miller v. Alabama*, 567 U.S. at 576. In Judge Graffeo's concurring opinion in *People v. Rudolph,* she pointed to society's evolving understanding of the brain function and behavior of adolescents, and that "our jurisprudence should reflect that fact." *People v. Rudolph,* 21 N.Y.3d 497, 506 (2013). In *People v. Francis,* the court considered the copious scientific data establishing the psychological difference between children and adults to "underscore the need for judicial procedures that are solicitous of the interests of vulnerable youth, especially under New York's current youthful offender process." *People v. Francis,* 30 N.Y.3d 737, 750 (2018).

Because adolescents are more amenable to treatment and are lower risk to reoffend than adults, it makes sense that they should be treated differently and solicitously. Research findings indicate that rehabilitative efforts with most youth are effective, and that therapeutic interventions, rather than social control strategies such as detention or incarceration, are likely to be both more successful and more cost-effective, as well.[34] Prosecution and incarceration as an adult often takes a "one-size-fits-all" approach – "group therapy" for all, regardless of their needs. Former prosecutor, Paul Stern, in his manual for prosecuting juvenile sex crimes,

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[30] TDMHSAS Research Team, *Adolescents Who Have Engaged in Sexually Abusive Behavior,* Tennessee Department of Mental Health and Substance Abuse Services Best Practice Guidelines (2013) at 311.
[31] ATSA, *supra* note 29.
[32] TDMHSAS, *supra* note 30 at 312.
[33] ATSA, *supra* note 29.
[34] ATSA, *supra* note 29.

sponsored by the Association of Prosecuting Attorneys, points out the danger of this approach when applied to adolescent. "[A] one-size-fits-all policy without an appreciation for the specific risks and needs of the individual child and the consequences of various interventions [incarceration and registration] has the potential to worsen, not remedy a problem.[35]

Interventions and treatment are most likely to be effective if focused on dynamic risk factors delivered in an appropriate therapeutic style and involve systems impacting the youth outside of the treatment situation. This cannot be done in an incarcerative setting.[36] Socio-ecological models of intervention recognize the importance of family and environment and their impact on adolescents. The youth's environment, including his or her school, peer selection, and use of leisure time, is an important component of a comprehensive approach to rehabilitation.[37] This component cannot be meaningfully addressed in an institutional setting.

There is a growing professional consensus that adolescents who engage in crimes of a sexual nature have more potential for rehabilitation than adults who sexually offend.[38] There are several clinical explanations for why adolescents can be expected to be more responsive to treatment. First, the patterns of sexual offending of adolescents seem to be less embedded than those found in adults.[39] Second, adolescent sex offenses appear to be more exploratory in nature than those committed by adults, and do not signify permanent sexual deviance.[40] Third, adolescents, in general, and adolescents who commit crimes of a sexual nature, in particular, are still learning and developing interpersonal and social skills, and are more receptive to treatment programs that help them develop appropriate interactive and social behavior.[41]

Sexual offending by adolescents requires a response that takes the "signature qualities of youth" into account, in order to best serve both the interests of the youth and the protection of the community. As we now know from research over the last two decades, adolescents are constantly changing, developing, and learning. A legal response should take into account their developmental status. They are receptive to treatment that helps guide them to understand the complexities of the world and appropriate sexual and social behaviors. The adult corrections system is a wholly inappropriate setting for this learning process.[42]

As addressed in § 6:11, both an adult conviction and the resulting requirement of registration and notification are counterproductive for an adolescent who has committed a crime of a sexual nature. Increasingly, research findings show that registration and public notification policies, especially when applied to adolescents, are not effective and may do more harm than

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[35] Stern, Paul, *An Empirically-Based Approach for Prosecuting Juvenile Sex Crimes,* Child Abuse Prosecution Project, Association of Prosecuting Attorneys (2016) at 16.
[36] TDMHSAS, *supra* note 30 at 319.
[37] TDMHSAS, *supra* note 30 at 319.
[38] Geer, Phoebe, *Justice Served: The High Cost of Juvenile Sex Offender Registration,* 27 Developments in Mental Health Law 33 (2008) at 41.
[39] Geer, *supra* note 1 at 41.
[40] Geer, *supra* note 1 at 41.
[41] Geer, *supra* note 1 at 41.
[42] National Juvenile Justice Network, *Fact Sheet on Youth Who Commit Sex Offenses* at 1.

good.[43] Registration has deleterious effects on pro-social development by disrupting positive peer relationships and activities, and interfering with school and work opportunities, resulting in housing instability or homelessness, harassment and ostracization, lifelong stigmatization and instability.[44] Registration may actually elevate a youth's risk by increasing known risk factors for sexual and nonsexual offending, such as social isolation.[45]

Professor Apryl Alexander and her colleagues suggest a therapeutic jurisprudence (TJ) perspective when sentencing adolescents charged with crimes of a sexual nature. Therapeutic jurisprudence proposes that the laws should value psychological well-being, bring about healing and wellness, and strive to avoid imposing anti-therapeutic consequences when possible. It asserts that laws should not cause harm.[46] Therapeutic jurisprudence would seek to mitigate the anti-therapeutic effects on vulnerable adolescents, such as the stigma of a criminal conviction and registration.[47] Therapeutic jurisprudence instructs us to step back from myths and prevailing attitudes.[48] "We must educate ourselves, confront our fears, and resist the urge to succumb to reactionary responses, ever observant that, in TJ terms, upholding the offender's dignity will have a therapeutic effect, while dismissing dignity will have an anti-therapeutic effect."[49]

Professor Franklin Zimring, a nationally recognized expert in law, criminology, and juvenile justice has written about the "American travesty" and the failure of the courts to take the developmental status of adolescents who sexually offend into account.[50] Zimring suggests a developmental approach that would indeed treat adolescents and adults who have committed crimes of a sexual nature differently. "Considering the growing evidence supporting the lack of continuity of juvenile sex offending into adulthood, if these youth can be treated without unduly stigmatizing them and requiring them to register as sex offenders, then perhaps the labeling process can be avoided, and successful intervention can be achieved without disrupting the youth's relations with their peers and their nature social environment."[51]

Professionals working with adolescents find that a more balanced approach, emphasizing the strengths of the adolescent while addressing the specific controls needed to maintain a safe environment, is the most effective way to ensure that community safety concerns are met.[52] If treated with methods that are developmentally appropriate, the prognosis for living a healthy and

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[43]ATSA, *supra* note 29.
[44] ATSA, *supra* note 29.
[45] ATSA, *supra* note 29.
[46] Alexander, Apryl, Falligant, John, Marchi, Cory, Floding, Erica & Jennings, Marissa, *Sex Offender Registration and Notification Act with Adolescents Adjudicated for Illegal Sexual Behavior: A Therapeutic Jurisprudence Perspective,* 14 Frontiers in Psychiatry 1160922 (2023) at 2. Available at Frontiers | Sex offender registration and notification act with adolescents adjudicated for illegal sexual behavior: a therapeutic jurisprudence perspective (frontiersin.org).
[47] *Id.* at 2.
[48] Perlin, Michael & Cucolo, Heather, Shaming the Constitution: The Detrimental Results of Sexual Violent Predator Legislation (2017) at 170.
[49]*Id.* at 170.
[50] Zimring, Franklin, An American Travesty (2004) at xiii.
[51] Zimring, Franklin, Jennings, Wasley, Piquero, Alex & Hays, Stephanie, *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort,* 26 Justice Quarterly 58 (2009) at 73.
[52] Tabachnick, *supra* note 9 at 18.

productive life is much higher because most adolescents who commit crimes of a sexual nature do not continue to do so into adulthood.[53] Research shows that adolescents who have committed crimes of a sexual nature who have positive support systems, social bonds to the community, and stable housing and jobs, and whose basic human needs are met, have significantly lower recidivism rates.[54] To the contrary, a criminal record and being subjected to registration and community notification lead to instability. Multiple studies have shown that people subjected to public notification and residence restrictions suffer from significant stress factors, such as the loss of a job or home, harassment, and physical assault.[55] Experts in the field of adolescent sexual behavior attest to the fact that registration, public notification, and residence restrictions are "counterproductive to the goal of these youth developing the capacity to live successfully in a pro-social environment.[56]

§ 6:7 Anticipate and Respond to Prosecution Arguments Against a Youthful Offender Adjudication

From the first time you conference the case with the judge, the prosecutor may oppose your request for a youthful offender adjudication. Anticipate this so that you can respond immediately. There are a few standard prosecutorial claims that are easy to anticipate:

Prosecutor: *This is too heinous a sex crime to warrant a youthful offender adjudication.*
Defense: The legislature excluded certain offenses from youthful offender consideration. They did not exclude this category of sex offense, and so they obviously did not intend for youthful offender to be denied based upon the type of offense. In addition, the Court of Appeals has ruled in *People v. Cruikshank,* 105 A.D.2d 325, 335 (3d Dept. 1985) that the gravity of the crime and manner in which it was committed "alone does not mandate denial of youthful offender treatment."

Prosecutor: *This person is beyond rehabilitation.*
Defense: As was recognized by the U.S. Supreme Court in *Roper v. Simmons*, adolescents are more amenable to rehabilitation than adults because of their developmental stage. Scientific research has demonstrated that adolescents are highly amenable to rehabilitation. To quote from an article in the Prosecutor, a Journal of the national District Attorneys Association: "Research shows that for the majority of juveniles who commit a sexual offense, sex offender treatment works."[57]

Prosecutor: *Treatment of sex offenders doesn't work.*
Defense: To quote (again) from an article in the Prosecutor, a Journal of the national District Attorneys Association: "Research shows that for the majority of juveniles who commit a sexual offense, sex offender treatment works."[58]

[53] Tabachnick, *supra* note 9 at 18.
[54] Tabachnick, *supra* note 9 at 26.
[55] Tabachnick, *supra* note 9 at 25.
[56] Tabachnick, *supra* note 9 at 25.
[57] Ratnayake, *supra* note 27 at 42.
[58] Ratnayake, *supra* note 27 at 42.

Prosecutor: *This person needs to be on the registry.*
Defense: The registry is counterproductive, particularly for adolescents, and does nothing to reduce recidivism. *See* § 6:8 (Debunking Myths, Memes, and Misstatements). Both the registration requirement and the attachment of a criminal conviction for an adolescent who has committed a crime of a sexual nature is counterproductive. *See* § 6:11 and § 6:12.

Prosecutor: *Registration reduces recidivism.*
Defense: There is substantial research that establishes that the registry does not reduce recidivism. *See* § 6:8 (Debunking Myths, Memes, and Misstatements).

Prosecutor: *Adolescents have a high risk of recidivism and continue to offend as adults.*
Defense: Adolescents have a low risk of recidivism, and have a lower risk of recidivism than adults. Most adolescents do not go on to sexually offend as adults. *See* § 6:8 (Debunking Myths, Memes, and Misstatements).

Prosecutor: *This person is a predator and needs to be on the registry.*
Defense: Unlike adults, very few adolescents engage in crimes of a sexual nature because of predatory behavior but tend to do so because of the "signature qualities of youth."

§ 6:8 Debunking Myths, Memes, and Misstatements

It is difficult to know whether these myths, memes, and misstatements are disingenuous or simply misinformed.[59] They might represent rationales used to justify "society's perpetual enthusiasm for punitive sex regulation," recognized by Aya Gruber as "sex exceptionalism."[60] They might also stem from the societal "sex panic" described by Catherine Carpenter, with fear as the motivating factor.[61] But such fear would be based on a "mythical narrative" – a story based on false assumptions that generates a disproportionate response and fuels the panic.[62] The public's fear that "sex offenders" live among us in plain sight, prowl our streets, and assault our children has hardened into a perceived reality[63] that persists despite decades of research to the contrary.

Regardless of the cause of these myths, defense counsel must be aware of them and the empirical facts that debunk them. Without that knowledge, you will be helpless to confront a judge who is driven by misperceptions, and your client will pay the price.

Myth 1: People who are convicted of a crime of a sexual natural have a risk of recidivism that is "frightening and high."

[59] Chaffin, Mark, *Our Minds Are Made Up Don't Confuse Us with the Facts: Commentary on Policies Concerning Children with Sexual Behavior Problems and Juvenile Sex Offenders,* 13 Child Maltreatment 110 (2008) at 112.
[60] Gruber, Aya, *Sex Exceptionalism in Criminal Law,* 75 Stanford Law Review 755 (2023).
[61] Carpenter, Catherine, *Panicked Legislation,* 49 Notre Dame Journal of Legislation 1 (2022) at 2-3.
[62] *Id.* at 3.
[63] *Id.* at 4.

Prior to the enactment of SORA in New York and the passing of registration and notification laws nationwide, a commonly held belief was that people who are convicted of crimes of a sexual nature have a risk of recidivism that is "frightening and high." In 2002, this misperception was reinforced by an opinion of Supreme Court Justice Anthony Kennedy in *McKune v. Lile,* 536 U.S. 24 (2002), where the issue was whether the adverse consequences faced by a Kansas prisoner for refusing to make admissions required by a sexual abuse treatment program were so severe as to violate his right against compelled self-incrimination. Ruling against the prisoner, and specifically in support of his finding that state prison officials had a vital interest in rehabilitating people convicted of sex offenses, Justice Kennedy referred to "a frightening and high" risk of recidivism by *untreated* sex offenders that was "as high as 80%." *Id.* at 33-34. A year later, in *Smith v. Doe,* 538 U.S. 84 (2003), Justice Kennedy, again writing for the majority, upheld the retroactive application of Alaska's registry requirement, i.e., forcing registration of those convicted before the requirement was enacted. He reasoned that this did not violate the Ex Post Facto Clause because it was not punishment, but merely a civil measure reasonably designed to protect public safety. *Id*. at 96. In support of the law's reasonableness, he asserted (leaving out the modifier "untreated") that the risk of recidivism by "sex offenders" is "frightening and high," citing to his own opinion in *McKune. Id.* at 103.

We now know that Justice Kennedy's assertion of a "frightening and high" recidivism risk was based on inaccurate data. Nevertheless, the phrase has been influential: it has appeared in more than 160 lower court opinions, and has helped justify laws that effectively banish people on registries from many aspects of everyday life.[64]

In 2015, Justice Kennedy's assertion and the recidivism rate he referenced were debunked by scholars Ira Ellman and Tara Ellman.[65] Through their research, the Ellmans traced the claimed 80% recidivism rate to a single citation given in *McKune* to a 1988 publication of the U.S. Department of Justice, National Institute of Corrections, entitled "A Practitioner's Guide to Treating the Incarcerated Male Sex Offender." The Ellmans surmise that Justice Kennedy likely saw this publication cited in the amicus brief filed by the Solicitor General in support of the Kansas policy; the brief cites to the publication for the claim that "sex offenders" have an astonishingly high recidivism rate.[66] The Practitioner's Guide, itself, provides but one source for the claim, a 1986 article published in Psychology Today*,* a mass-market magazine aimed at a lay audience.[67]

The 1986 Psychology Today article was written by Robert Freeman-Longo, a counselor who ran a treatment program at an Oregon prison, and R. Wall, a therapist who worked with him. In the article, the authors state: "Most untreated sex offenders released from prison go on to commit more offenses – indeed, as many as 80% do."[68] The article gave no supporting references, offered no backup data, and mentioned no scientific control groups. Freeman-Longo

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[64] A Lexis search of legal materials found the phrase in 160 judicial opinions.
[65] Ellman, Ira & Ellman, Tara, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics,* 30 Const. Comment. 495 (2015).
[66] *Id.* at 498.
[67] Freeman-Longo, Robert & Wall, R., *Changing a Lifetime of Sexual Crime,* Psychology Today 58 (March 1986) at 58.
[68] *Id.* at 64.

has since repudiated his estimate, acknowledging that it did not accurately reflect recent research and should not be used as a basis for public policy.[69]

Adam Liptak, writing for the New York Times, summed up the situation: "The basis for much of American jurisprudence and legislation about sex offenders was rooted in an offhand and unsupported statement in a mass-market magazine, not a peer-reviewed journal."[70]

The misconception, however, persists to this day, among policymakers and the general public. And it is not just that the original premise – which worked its way into decisions of the U.S. Supreme Court – was based on insufficiently vetted information. Rather, the original premise has been directly invalidated by intervening research.

The myth that most people who sexually offend are at high risk to repeat their crimes has endured, despite decades of data to suggest otherwise.[71] A common misconception regarding adults who have offended is that "once a sex offender always a sex offender," which belies the actual, typically modest base rates of reoffending,[72] as well as the impact of specialized treatment.[73] This misconception has been extended to adolescents, as well.

In the 21 years since the *Smith v. Doe* decision, there have been numerous evidence-based, scientific studies on the question of the recidivism rate of people who commit crimes of a sexual nature. As research has accumulated, the empirical findings paint a striking picture. People with a conviction for a crime of a sexual nature have some of the lowest rates of same-crime recidivism of any category of offender. They are even less likely to commit another offense the longer they remain offense-free in the community – at a certain point becoming no more likely to commit a sex offense than anyone else in the general population.[74] This is true even for people initially deemed to be high risk.

Canadian scholar R. Karl Hanson and his colleagues have found through their research that the risk for new sex offenses diminishes and is eventually extinguished over time when people successfully remain sex offense-free in the community. The lower a person's risk level, the shorter the time to this desistance threshold. For example, people in the lowest risk category

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[69] Freeman-Longo repudiated the article's estimate in an interview with Joshua Vaughn for the Carlisle, Pennsylvania Sentinel published March 25, 2016.
[70] Liptak, Adam, *Did the Supreme Court Base a Ruling on a Myth?* N.Y. Times, March 6, 2017.
[71] Hanson, Karl R., Bussière, Monique, *Predicting Relapse: A Meta-Analysis of Sexual Offending Recidivism Studies* 66 Journal of Consulting and Clinical Psychology 348 (1998) at 357.
[72] *Id.* at 357..
[73] Gannon, Theresa, Liver, Mark, Mallion, Jaimee & James, Mark, *Does specialized psychological treatment for offending reduce recidivism? A meta-analysis examining staff and program variables as predictors of treatment effectiveness,* 73 Clinical Psychology Review Article 101752 at 11. Available at Does specialized psychological treatment for offending reduce recidivism? A meta-analysis examining staff and program variables as predictors of treatment effectiveness (sciencedirectassets.com)
[74] Hanson, R. Karl, Harris, Andrew, Helmus, Leslie & Thornton, David, *High-Risk Sex Offenders May Not Be High Risk Forever,* 29 Journal of Interpersonal Violence 2792 (2014). R. Karl Hanson, Andrew J.R. Harris, Elizabeth Letourneau, L. Maike Helmus, & David Thornton, *Reductions in Risk Base on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender,* 24 Psychol., Pub. Pol'y, and L. 48 (2017). R. Karl Hanson, *Long-Term Recidivism Studies Show That Desistance Is the Norm,* 45 Crim. Just. and Behavior 1340 (2018) at 1342.

were usually already past the desistance threshold at the time of their release from prison, while people in the average risk category crossed the desistance threshold after 8 to 13 years of being sex offense-free in the community. People in the high-risk category crossed the desistance threshold in years 16 to 20.[75]

Not only is the sex offense recidivism rate objectively low,[76] but the overall recidivism rate of people with sex offense convictions is also low when compared to recidivism rates of other categories of offenders – the second lowest, in fact, according to a 2019 report released by the Bureau of Justice Statistics ("BJS").[77] The BJS study found that in the nine years following release for 67,966 prisoners from 30 states, the recidivism rate for people convicted of a sex offense was lower than for people in any other offender category except for those convicted of homicide.[78]

Looking at similar-offense recidivism, the study found that only 7.7% of people convicted of a sex offense and released in 2005 were subsequently arrested for a sex offense during the nine-year follow-up period. By comparison, the study found that the similar-offense recidivism rate for people convicted of property offenses was 63.5%, for drug offenses was 60.4%, and for public order offenses was 70.1%.[79]

A similar BJS study was released in 2003.[80] That study involved a three-year follow-up of 9,691 people convicted of sex offenses, who were released from state prisons in 15 states in 1994. It found that people with sex offense convictions had a 25 percent lower overall re-arrest rate than people with non-sex offense convictions.[81] Looking at similar-offense data, the study found that 5.3% of the people who had been convicted of a sex offense were rearrested for another sex offense within three years.[82] This was consistent with BJS findings from the previous year, when researchers broke down the recidivism rate by crime-type, and found that the crime-of-conviction category with the lowest re-arrest rate was homicide, and the next lowest was sex offenses.[83]

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[75] Hanson, R. Karl, *Long-Term Recidivism Studies Show That Desistance Is the Norm,* 45 Crim. Just. and Behavior 1340 (2018) at 1342-43.
[76] Ewing, Charles, *Justice Perverted: Sex Offense Law, Psychology, and Public Policy* (2011) at xvii.
[77] Alper, Mariel & Durose, Matthew, *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14),* Special Report NCJ 251773, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (2019) at 4 .
[78] *Id.*
[79] *Id.* at 4-5.
[80] Langan, Patrick, Schmitt, Erica & Durose, Matthew, *Recidivism of Sex Offenders Released from Prison in 1994,* NCJ 198281, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (2003).
[81] *Id*. at 2.
[82] *Id.* at 24.
[83] Langan, Patrick, & Levin, David, *Recidivism of Prisoners Released in 1994,* Special Report NCJ 193427, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (2002) at 1, 8.

Myth 2: Adolescents have a high risk of sexual recidivism, and are a higher risk to reoffend than adults.

The misconception about the high rate of recidivism for adults convicted of crimes of a sexual nature is often also applied to adolescents convicted of such offenses.[84] Former prosecutor, Paul Stern, in his instructional manual for prosecuting juvenile sex crimes, addresses this misperception: "The truth is: the risk of sexual recidivism by juveniles is extremely low. That is, left alone or exposed to appropriate quality treatment, very few juvenile sex offenders reoffend."[85] Stern expresses the concern that policy-makers and prosecutors are ignoring the empirical evidence, and making decisions based on "fear" and "folklore,"[86] which "is to take the blindfold off of Lady Justice and put it on the prosecutor."[87] There has been an increasing accumulation of data demonstrating that the reasons cited to justify policies of registration and notification are no longer merely based on unproven or unexamined assumptions, but are flatly at odds with the facts as we know them."[88]

"The fact is that low future sex crime rates among juvenile sex offenders in the United States are a well-replicated, robust, and long-standing scientific finding."[89] Elizabeth Letourneau, an internationally recognized expert in child sexual abuse prevention and sex offender registration and notification (SORN) policy, notes that "the policies assume that children are at an especially high risk of recidivating. This is simply not true."[90] "Contrary to the myths underlying their enactment [SORN laws such as SORA], children found to have engaged in sexual misconduct very rarely reoffend."[91] To support her position, Letourneau pointed to a 2016 study published by Michael Caldwell, which she describes as the most definitive study on adolescent recidivism to date – as of 2021.[92] Caldwell's meta-analysis combined data from 106 studies involving nearly 34,000 cases of children adjudicated as minors for sexual offenses.[93] The weighted mean 5-year average sexual recidivism rate was 4.97 percent. This rate, however, was just 2.75 percent when limited to studies published more recently (between 2000 and 2015).[94] Caldwell concludes that this suggests that the current sexual recidivism rate for adolescents is likely to be below 3 percent.[95]

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[84] Brandt, *supra* note 21 at 5.
[85] Stern, Paul, *An Empirically-Based Approach for Prosecuting Juvenile Sex Crimes,* Child Abuse Prosecution Project, Association of Prosecuting Attorneys (2016) at 13.
[86] *Id.* at 10.
[87] *Id.* at 24.
[88] *Id.* at 9.
[89] Chaffin, Mark, *Our Minds Are Made Up Don't Confuse Us with the Facts: Commentary on Policies Concerning Children with Sexual Behavior Problems and Juvenile Sex Offenders,* 13 Child Maltreatment 111 (2008) at 112.
[90] Letourneau, Elizabeth, *Juvenile Registration and Notification Are Failed Policies That Must End,* Chapter in Sex Offender Registration and Community Notification Law: An Empirical Study, Wayne Logan and JJ. Prescott Eds. (2021) at 170.
[91] *Id.* at 164.
[92] *Id.* at 170.
[93] Caldwell, Michael, *Quantifying the Decline in Juvenile Sexual Recidivism Rates,* 22 Psychology, Public Policy, and Law 414 (2016). Available at https://floridaatsa.com/wp-content/uploads/2019/01/Caldwell_2016_Quantifying-the-decline-in-JSOR.pdf.
[94] *Id.* at 419.
[95] *Id.* at 419.

The U.S. Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) conducted a Sex Offender Management Assessment and Planning Initiative (SOMAPI), which produced an extensive report in 2017.[96] Chapter 3 of that report is entitled: *Recidivism of Juveniles Who Commit Sexual Offenses.* The report found that a relatively small percentage of juveniles who commit a sexual offense sexually reoffend as adults and placed the recidivism rate as ranging from 7 to 13 percent after 59 months.[97]

The SOMAPI report concluded that "recidivism rates for juveniles who commit sexual offenses are generally lower than those observed for adult sexual offenders.[98] This finding in the SOMAPI report is consistent with the findings of other researchers.[99] A report by the U.S. Department of Justice's Office of Juvenile Justice and Delinquency noted: "What virtually all of the studies show, contrary to popular opinion, is that relatively few [juvenile sex offenders] are charged with a subsequent sex crime."[100]

The low recidivism rate for adolescents who have been convicted of crimes of a sexual nature is so well established that it has been acknowledged in the high courts of several states. At the evidentiary hearing in *In re C.K.,* 233 N.J. 44 (2018), six experts testified, and all agreed that that the adolescent sex offense recidivism rates are relatively low, and that adolescent sex offenders are less likely to reoffend than adult sex offenders. *Id.* at 51-52. The highest court in New Jersey acknowledged that, since 2002, "scientific and sociological studies have shined new light on adolescent brain developments and on the recidivism rates of juvenile sex offenders compared to adult offenders." *Id.* at 74. The court acknowledged that "juvenile sex offenders are less likely to reoffend than adult sex offenders." *Id*. In a Pennsylvania case, the state's high court upheld a lower court finding that applying SORNA's lifetime registration requirements to juveniles was unconstitutional, pointing to the research studies relied upon by the trial court that indicated that "recidivism rates for juvenile sex offenders are far less than the recidivism rates of adult sexual offenders and, instead, are comparable to non-sexually offending juveniles." *In re J.B.,* 107 A.3d 1, 10 (2014).

The significant developmental changes that occur during adolescence help explain the low rate of sexual recidivism for adolescents who have been convicted of a crime of a sexual

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[96] Sex Offender Management Assessment and Planning Initiative (2017). Report available at Sex Offender Management Assessment and Planning Initiative (ojp.gov).

[97] Lobanov-Rostovsky, Christopher, Chapter 3: *Recidivism of Juveniles Who Commit Sexual Offenses,* Sex Offender Management Assessment and Planning Initiative (2017) at 262. Report available at Sex Offender Management Assessment and Planning Initiative (ojp.gov).

[98] *Id.* at 262.

[99] Lussier, Patrick, McCuish, Evan, Thivierge, Stephanie & Frechette, Julien, *A Meta-analysis of Trends in General, Sexual, and Violent Recidivism Among Youth with Histories of Sex Offending,* 25 Trauma, Violence &Abuse 54 (2023) at 65-66; Geer, Phoebe, *Justice Served? The High Cost of Juvenile Sex Offender Registration,* 27 Developments in Mental Health Law 33 (2008) at 400; Tennessee Department of Mental Health and Substance Abuse Services, *Adolescents Who Have Engaged in Sexually Abusive Behavior,* TDMHSAS Best Practice Guidelines (2023) at 312.

[100] Righthand, Sue & Welch, Carlann, *Juveniles Who Have Sexually Offended: A Review of the Professional Literature,* Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice (2001) at xvii.

nature.[101] While there is a tendency for the public to assume that adolescents charged with crimes of a sexual nature are unresponsive to treatment and at an increased risk of recidivism, the research indicates that, once detected and treated, the majority of adolescents do not continue to engage in these behaviors.[102]

Since the policy of registration is premised on the misperception that the recidivism rate of adolescents is high, the prosecution argument that a youthful offender adjudication must be avoided, so as to maintain the conviction and thus require registration, is baseless.

The misperception about the recidivism rates for adolescents who have sexually offended creates particularly thorny problems when it comes to a SORA risk assessment score. Risk Factor #8 is predicated on the myth that an adolescent who sexually offends at the age of 20 or less is at high risk of reoffending, and as a result is subjected to an assessment of 10 points. That the Board of Examiners of Sex Offenders and the courts continue to rely upon the myth that juvenile offenders have a high recidivism rate, and effectively treat their young age as an aggravating factor rather than a mitigating factor, is preposterous. This issue is addressed in Chapter 9 of this guide.

For a more in-depth discussion of the low recidivism rate for adolescents who have been arrested for a crime of a sexual nature, see Chapter 9.

Myth 3: Adolescents Who Sexually Offend Are Likely to Reoffend as Adults.

Paul Stern, a long-time former prosecutor, in his manual on prosecuting juvenile sex offenses, debunks this myth. "The truth is: for most juveniles engaged in sexually aggressive behavior it is not the start of a lifelong pattern."[103] Stern goes on to explain that "sexually abusive behavior by children and adolescents rarely persists into adulthood."[104] There is substantial support for Stern's conclusions from the research.

The Association for the Treatment and Prevention of Sexual Abuse (ATSA) has addressed concerns regarding the continuity of sexual offending by adolescents convicted of sex crimes into adulthood, and concluded that "research has indicated that continuation of sexual offending into adulthood by these youths is unlikely to occur."[105]

The Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) comes to the same conclusion. "A relatively small percentage of juveniles who commit a sexual offense will sexually offend as adults."[106] The office's message to policymakers (applicable to judges and prosecutors) is that juveniles

[101] Brandt, *supra* note 21 at 7.
[102] Brandt, *supra* note 21 at.7.
[103] Stern, s*upra* note 85 at 13.
[104] Stern, *supra* note 85 at 8.
[105] Brandt, *supra* note 85 at.9.
[106]Lobanov-Rostovsky, *supra* note 97 at 262.

who commit sexual offenses are not the same as adult sexual offenders, and that all juveniles who commit a sexual offense do not go on to sexually offend later in life.[107]

Numerous, nationally renowned researchers have also come to the same conclusion. Zimring and his colleagues specifically looked at the question of the continuity of sex offending by adolescents into adulthood. Through a series of bivariate analyses, they found that there was little to no association between being a juvenile who sexually offended and having continued that behavior into adulthood for either male or female youth.[108] This has become a widely accepted conclusion. "It is now recognized, that, contrary to popular belief, adolescents who have sexually offended (ASO) constitute a distinct clientele from adult sex offenders and that few of them will sexually reoffend in adulthood."[109] Lussier and Blokland analyzed the misperception that today's juvenile who sexually offends is tomorrow's adult who sexually offends. They explain that it is believed that the origins of this misperception stems from retrospective observations made with convicted adult sex offenders, especially in clinical settings.[110] An emerging corpus of research based on prospective longitudinal data, however, has challenged the misperception, and asserted that "the vast majority of juvenile sex offenders do not become adult sex offenders."[111]

Myth 4: Adolescent Sex Offending Is Predictive of Adult Sex Offending.

There is no demonstrated empirical relationship between youth sex crimes and adult sex crimes. As a result, "juvenile sex offending is not predictive of adult sex offending."[112]

Zimring and his colleagues specifically looked at the issue of predicting future sex offending.[113] They sought to examine the linkage between juvenile and adult sex offending, and to evaluate the predictive power of juvenile sex offending on adult sex offending. Their study concluded that "having a juvenile sex offense contributed virtually nothing insofar as predicting membership in any adult offender group, and particularly failing to predict the odds of being an adult sex offender."[114] In an earlier study based on data from Racine, Wisconsin, Zimring and his colleagues came to similar findings.[115] They concluded that the real policy implication for requiring registration for people convicted of a crime of a sexual nature "is that perhaps these registries are inappropriate because those on the list may not be any more likely to commit another sexual offense as criminal offenders who are not on these lists."[116]

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[107] Lobanov-Rostovsky, *supra* note 97 at 262.
[108] Zimring, *supra* note 26 at 61.
[109] Carpentier, Julie & Proulx, Jean, *Recidivism Rates of Treated, Non-Treated and Dropout Adolescent Who Have Sexually Offended: A Non-Randomized Study,* 12 Frontiers in Psychology 1 (2021) at 1. Available at https://www.frontiersin.org/journals/psychology/articles/10.3389/fpsyg.2021.757242/full.
[110] Lussier, *supra* note 99 at 153.
[111]Lussier, *supra* note 99 at 153.
[112] Pickett, *supra* note 15 at 2.
[113] Zimring, *supra* note 26 at 69.
[114]Zimring, *supra* note 26 at 69.
[115] Zimring, Franklin, Piquero, Alex & Jennings, Wesley, *Sexual Delinquency in Racine: Does Early Sex Offending Predict Late Sex Offending in Youth and Young Adulthood?* 6 Criminology & Public Policy 507 (2007).
[116] *Id.* at 530.

Myth 5: Registration and Notification Reduces Recidivism.

To date, no study supports this myth.[117] Studies examining the policies of several states and the federal government have all concluded that subjecting children to SORN has no impact on sexual recidivism.[118] The body of research on the consequences of SORN laws strongly suggests that typical SORN laws have essentially no effect on registrant sex offense recidivism.[119]

The most comprehensive study on the effectiveness of laws like SORA is a recently published meta-analysis that covered 18 research studies, reflecting 25 years of evaluation and data relating to 474,640 formerly incarcerated people.[120] As researchers Kristen Zgoba and Meghan Mitchell explain, the random-effects meta-analysis model they employed demonstrated that registration and notification laws have no effect on recidivism.[121]

Several other studies have analyzed the effectiveness of such laws, using data and research developed in the 20 years following the enactment of the federal Megan's Law in 1996. In one such study, published in 2018, Corey Call systematically reviewed 20 years of research on Megan's Law to address how successful it had been in reducing sexual victimization.[122] Call's analysis of 22 peer-reviewed articles revealed that, over the course of two decades, there had been a distinct lack of evidence showing that the registration and notification regime had been effective in reducing sex offending.[123] Call identified 10 studies that focused on the effect of Megan's Law on recidivism. Nine of the 10 studies concluded that Megan's Law had not led to a statistically significant decrease in sexual recidivism.[124] Even more striking, Call identified several scholars who suggested that the collateral consequences associated with registration and notification laws may actually increase the rate of recidivism.[125]

Five years before the publication of her 25-year meta-analysis, Zgoba and two of her colleagues conducted a study of the sexual and general recidivism rates of 547 people who were convicted of sex offenses and released from prison before and after the enactment of the original Megan's Law in New Jersey. Participants in the study were followed for an average of 15 years after release. No differences in recidivism rates were noted between the two cohorts.[126]

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[117] Letourneau, *supra* note 90 at 170.
[118] Letourneau, *supra* note 90at 170.
[119] Agan, Amanda & Prescott, *Offenders and SORN Laws,* Chapter in Sex Offender Registration and Community Notification Law: An Empirical Study, Wayne Logan and JJ. Prescott Eds. (2021) at 109. *See* also Agan, Amanda, *Sex Offender Registries: Fear Without Function?* 54 Journal of Law and Economics 207 (2011 at 208.
[120] Zgoba, Kristen & Mitchell, Meghan, *The Effectiveness of Sex Offender Registration and Notification: A Meta-Analysis of 25 Years of Findings,* 19 Journal of Experimental Criminology 71 (2023).
[121] *Id.* at 71.
[122] Call, Corey *Megan's Law 20 Years Later: A Systematic Review of the Literature on the Effectiveness of Sex Offender Registration and Notification,* 5 Journal of Behavioral and Social Sciences 205 (2018).
[123] *Id.* at 214.
[124] *Id.* at 210.
[125] *Id.* at 213.
[126] Zgoba, Kristen, Jennings, Wesley & Salerno, Laura, *Megan's Law 20 Years Later: An Empirical Analysis and Policy Review,* 45 Crim. Just. and Behavior 1028 (2018) at 1041.

A 2008 study by a team of researchers at the University of Albany School of Criminal Justice focused explicitly on New York's SORA.[127] Using data provided by DCJS, these scholars examined the impact of SORA on public safety.[128] The primary research question was: Are there differences in sexual offense arrest rates before and after the enactment of SORA?[129] The authors concluded that the enactment of SORA had no significant impact on rates of total sexual offending, rape, or child molestation – neither in the aggregate, nor in the sub-groups of those with and without prior sex offense convictions.[130] The results of this study are consistent with prior and subsequent research, and cast doubt on the effectiveness of registration and notification to reduce rates of sexual offending.[131]

A 2010 study by Tewksbury and Jennings is also of particular note. The results of this study established that registration and notification had virtually no impact on sexual recidivism.[132] The results were found to be in line with those reported in previous studies.[133] The authors of the article also make a salient practice point: The denial of a youthful offender adjudication in order to impose registration on an adolescent is unjustifiable. In light of the *de minimis* effect registration has on recidivism and the numerous negative consequences associated with registration, the wisdom of such a practice is questionable at best and an unnecessary expenditure of resources at worst. Other than providing of a "feel-good" policy for the public (or practice for the judge and prosecutor), "there is little demonstrable public safety value for sex offender registration and notification.[134]

Myth 6: Adolescents Who Commit Crimes of a Sexual Nature Are Not Amenable to Treatment.

Despite the perpetuated myth of incurability of juveniles who have committed crimes of a sexual nature, research during the last 20 years has suggested the opposite: treatment for youth who have sexually offended is effective.[135] Studies in the last two decades have documented this. A 2017 report sponsored by the U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking reviewed the research on the effectiveness

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[127] Sandler, Jeffrey, Freeman. Naomi & Socia, Kelly, *Does A Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law,* 14 Psychology., Public Policy, and Law 284 (2008).
[128] *Id.* at 284.
[129] *Id.* at 287.
[130] *Id.* at 297.
[131] *Id.*
[132] Tewksbury, Richard & Jennings, Wesley, *Assessing the Impact of Sex Offender Registration and Community Notification on Sex-Offending Trajectories,* 37 Criminal Justice and Behavior 570 (2010) at 579.
[133] *Id.* at 579.
[134] *Id.* at 579-80.
[135] Przybylski, Roger, Chapter 5: *Effectiveness of Treatment for Juveniles who Sexually Offend,* Sex Offender Management Assessment and Planning Initiative Report, U.S. Department of Justice (2017) at 313. Full report available at Sex Offender Management Assessment and Planning Initiative (ojp.gov). Research Brief available at https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/juveniletreatment.pdf. Pappas, Lacée, N. & Dent, Amy L. *The 40-year debate: a meta-review on what works for juvenile offenders,* 19 Journal of Experimental Criminology 1 (2021) at 26.

of treatment for juveniles who commit sexual offenses and found that the weight of evidence supported the conclusion that treatment can and does work.[136]

A review of recent meta-analyses on the effects of treatment on juveniles who sexually offended found significant and robust recidivism-reduction outcomes for those who had received treatment.[137] The study also revealed that there was a greater likelihood of reductions in recidivism from treatment for adolescents than for adults.[138] Adolescents are generally more responsive to treatment than adults because of their youth and developmental status.[139]

A recently published systematic review of the research literature on Multisystemic Therapy (MST) on adolescents who had sexually offended found MST to be an effective treatment.[140] The researchers found that the beneficial treatment effects of MST were rapid, manifesting in as little as months following treatment initiation, and long-lasting, for years or even decades after termination of treatment.[141] A U.S. governmental office under the Department of Justice, the Office of Juvenile Justice and Delinquency Prevention, concludes that adolescents who sexually offend can successfully respond to evidence-based treatments such as MST, problematic sexual behavior-cognitive behavioral therapy, and trauma-focused cognitive behavioral therapy.[142] They found that the recidivism rates are quite low for treated adolescents, demonstrating that with appropriate and effective treatment, most youth can learn to make better choices and be contributing members of society.[143]

For the youth who do reoffend, most do so non-sexually.[144] Rigorous studies, including meta-analytic undertakings, have found that treatment reduces both sexual and non-sexual risk in youth when applied appropriately.[145] Moreover, in comparison to treated adults, treated youth reoffend at a lower rate.[146] There is a growing professional consensus that juveniles who sexually offend have more potential for rehabilitation than their adult counterparts.[147] From a treatment provider perspective, this consensus garners support. The Association for the Treatment of Sexual Abusers cites to research indicating that adolescents are more open to behavior change

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[136] *Id.* at 313.
[137] Kim, Bitna, Benekos, Peter & Merlo, Alida, *Sex Offender Recidivism Revisited: Review of Recent Meta-analyses on the Effects of Sex Offender Treatment,* 17 Trauma, Violence & Abuse 105 (2016) at 114.
[138] *Id.* at 115.
[139] Halbrook, *supra* note 4 at 13.
[140] Satodiya, Ritvij, Bied, Adam, Shah, Kaushai, Parikh, Tapan & Ash, Peter, *A Systematic Review of Multisystemic Therapy in Adolescent Sex Offenders,* 52 Journal of American Academy of Psychiatry Law 51 (2024) at 59.
[141] *Id.* at 59.
[142] Office of Juvenile Justice and Delinquency Prevention, *Supporting Effective Interventions for Adolescent Sex Offenders and Children with Sexual Behavior Problems* 2020). Available at OJJDP News @ a Glance, July/August 2020 | Supporting Effective Interventions for Adolescent Sex Offenders and Children With Sexual Behavior Problems | Office of Juvenile Justice and Delinquency Prevention (ojp.gov).
[143] *Id.*.
[144] Reitzel, Lorraine, & Carbonell, Joyce, *The Effectiveness of Sexual Offender Treatment for Juveniles as Measured by Recidivism: A Meta-analysis* 18 Sexual Abuse 401 (2006) at 413.
[145] Worling, James, & Curwen, Tracey, *Adolescent Sexual Offender Recidivism: Success of Specialized Treatment and Implications for Risk Prediction* 24 Child Abuse & Neglect 965 (2000) at 979. Reitzel, Lorraine, & Carbonell, Joyce, *The Effectiveness of Sexual Offender Treatment for Juveniles as Measured by Recidivism: A Meta-analysis* 18 Sexual Abuse 401 (2006) at 413.
[146] Reitzel, *supra* note 144 at 413.
[147] Geer, *supra* note 1 at 41.

than adults, and that treatment programs have been shown to effectively reduce sexual re-offense more so in adolescents than adults.[148] Experts' testifying in litigation support this consensus as well. In *State of New Jersey IN the interest of C.K.,* 233 N.J. 44, 51 (2016), which went to the New Jersey Supreme Court, all four experts, who were clinical psychologists with expertise in the treatment and rehabilitation of both juvenile and adults who sexually offend, agreed that juveniles who sexually offend are more amenable to rehabilitation and less likely to reoffend than adults.

§ 6:9 Risk Assessment Is Different for Adolescents than for Adults

The assessment of sexual recidivism risk serves several purposes. The overall purpose is to estimate the risk of future sexual offending so that the most effective steps to reduce, contain, or eliminate that risk can be taken.[149] A risk assessment essentially serves as an investigative tool that helps inform and guide various interventions, treatment options, and legal proceedings.[150] When used for treatment, a baseline assignment of risk is typically set, then periodically re-evaluated during treatment, and can be used to determine the type and intensity of treatment needed, and to help define targets for treatment and case management.[151] The assessment can also be used for judicial decision-making on matters such as removal, sentencing, and treatment requirements.

Bonta and Andrews have characterized the evolution of risk assessment methods as occurring in four distinct phases, or generations.[152] "First generation" methods involved the assessment of risk as a matter of professional judgment. This was the practice for the first half of the twentieth century. "Second generation" methods, starting in the 1970s, relied upon statistically derived and static actuarial assessments of risk. Using evidence-based tools, actuarial risk assessment instruments consider individual items that have been demonstrated to increase the risk of reoffending, and assign these items quantitative scores. The scores on the individual items can then be totaled, with the presupposition that the higher the score, the higher the risk of reoffending. (The New York SORA RAI is an example of such a method, except that it has never been validated, thus making it even more unreliable.) "Third generation" methods, beginning in the 1980s, incorporate both the actuarial base of static assessments and the dynamic factors of a clinical assessment.[153] "Third generation" methods, often referred to as structured professional judgment, are increasingly common in sexual risk assessments of adults.[154] "Fourth generation" methods, finally, are described by Bonta as systematic and comprehensive. These newer risk assessment instruments integrate systematic intervention and monitoring with the assessment of a broader range of risk factors, some previously unmeasured, and other personal factors

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[148] Tabachnick, *supra* note 9 at 11 and 15.
[149] Rich, Phil, Chapter 4: *Assessment of Risk for Sexual Reoffense in Juveniles Who Commit Sexual Offenses* Sex Offense Management Assessment and Planning Initiative Report, U.S. Department of Justice (2017) at 269. Full report available at Sex Offender Management Assessment and Planning Initiative (ojp.gov). Research Brief available at https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/juvenilerisk.pdf.
[150] *Id.* at 269.
[151] *Id.* at 270.
[152] Bonta, James & Andrews, D.A., *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation* (2007) at 3-4. Available at https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rsk-nd-rspnsvty/rsk-nd-rspnsvty-eng.pdf.
[153] *Id.* at 4.
[154] Rich, *supra* note 149 at 273.

important to treatment.[155] (Notably, the third- and fourth-generation risk assessment instruments would not have been possible without the risk-need-responsivity model, discussed below.[156])

Predicting the likelihood of adult future behavior is, according to the experts, an inherently difficult task under any circumstances.[157] It is even more difficult when assessing adolescents. Research on risk assessment has demonstrated that risk assessment instruments must be attuned to the unique differences between youth and adults.[158] Accurate, developmentally sensitive assessments avoid serious unintended consequences of mislabeling youth as dangerous when they are not.[159] The process of risk assessment for adolescents who sexually offend is complicated by the relatively low base rates of sexual recidivism among youth. It is complicated even further by the youths' ongoing development and maturation.[160] In order to accurately estimate risk, the assessment instruments must account for developmental factors related to cognitive, neurological and personality development; formation of attitudes and acquisition of information; emotional and behavioral maturity; etc.[161] Given the developmental differences between adults and adolescents, different risk assessment instruments are needed for adolescents.[162] An adult risk assessment instrument, such as the New York SORA Risk Assessment Instrument (RAI), should not be used on adolescents.

Recent developments in the field of juvenile risk assessment suggest an increase in focus on the social context and developmental factors that distinguish youth from adults. Generally, risk assessment for youth is not as precise as it for adults.[163] Actuarial risk estimates based off group estimates are not available for juveniles because of low base-rates of reoffending and significant variability in research design.[164] Additionally, given the dynamism in youth development, risk assessments are not able to capture the changes that can occur quite rapidly in youth, and thus if accurate, are only so for a short time period.

Like treatment for adolescents, adolescent risk assessment was historically derived from adult tools, and thus focused on static (unchanging) risk factors at the expense of dynamic (change-agent) factors and protective factors.[165] Contemporary juvenile assessments have refocused on dynamic and responsivity issues, as well as protective factors, driven by the understanding that assessments must go beyond a risk level and help drive effective treatment. Dynamic risk factors are those factors that, upon intervention, can have a significant risk reduction effect.[166] Dynamic risk factors are those associated with current behaviors, thoughts,

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[155] Bonta, *supra* note 152 at 4.
[156] Bonta, *supra* note 152 at 4.
[157] Rich, *supra* note 149 at 270.
[158] Miccio-Fonseca, L.C., & Rasmussen, Lucinda, *Scientific Evolution of Clinical and Risk Assessment in Sexually Abusive Youth: A Comprehensive Review of Empirical Tools,* 27 Journal of Child Sexual Abuse 871 (2018) at 873.
[159] *Id.* at 873.
[160] Rich, *supra* note 149 at 270.
[161] Rich, *supra* note 149 at 270.
[162] Caldwell, Michael, *What We Do Not Know About Juvenile Sexual Reoffense Risk,* 7 Child Maltreatment 291 (2002) at 291
[163] Rich, *supra* note 149 at 277-278, 287.
[164] Rich, *supra* note 149 at 275-276.
[165] Miccio-Fonseca, *supra* not 158 at 873, 891.
[166] Rich, *supra* note 149 at 270.

feelings, attitudes, situations, interactions, and relationships.[167] Protective factors are those factors that are present in a child's life that mitigate against offending, and have a buffering effect on risk factors.[168] Incorporating protective factors into risk assessment tools for adolescents who have sexually offended is a significant step in the evolution of such assessment instruments.[169] After completion of a study on the impact of protective factors in desistance from violent reoffending, Lodewijks and colleagues concluded "that protective factors should be an inextricable part of all risk assessment instruments used with youth."[170] Examples of protective factors are self-esteem, emotional health, family interactions, community connectedness, academic performance, and a caring relationship with a competent adult.[171]

The field is generally moving toward the use of structured checklists that identify and summarize protective factors and dynamic risk factors for youth and emerging adults. While not intended to predict future risk, these types of checklists instead help inform the treatment interventions needed to improve executive functioning skills and sexual and relationship health, based on literature and clinical experience. Additionally, assessments are recommended to be administered frequently, due to the awareness of the changing neurodevelopmental landscape that may influence both risk and strength variables. Research has highlighted the need for assessments to measure changes in risk, particularly in youth contexts.[172] Most juvenile assessments caution that their utility is limited after certain time frames, as restrictive as 6 months, or note that the risk estimate is limited to sexual recidivism prior to 18 years old.[173] ATSA warns that because adolescents are people in development with dynamic circumstances, assessments have a short "shelf-life" and should be updated every six months or when risk-relevant circumstances change.[174] Risk assessment developers and researchers Miccio-Fonseca and Rasmussen suggest reassessing youth at least annually.[175] To the contrary, the SORA RAI is administered once in the lifetime of an adolescent.

There is, as of yet, no clear consensus among experts about the appropriate, specific risk factors and protective factors applicable to assessment of adolescents who have sexually offended, as the field is in its infancy. What is generally agreed upon is that all known risk assessment instruments used for adolescents to date have limited predictive value.[176] These instruments are more appropriate for treatment purposes, rather than predicting risk. Some

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[167] Rich, *supra* note 149 at 270.
[168] Rich, *supra* not 149 at 288.
[169] Miccio-Fonseca, *supra* note 158 at 873.
[170] Lodewijks, Henny, de Ruiter, Corine & Doreleijers, Theo, *The Impact of Protective Factors in Desistance From Violent Reoffending: A Study in Three Samples of Adolescent Offenders,* 25 Journal of Interpersonal Violence 568 (2010) at 584.
[171] Borowsky, Iris, Hogan, Marjorie, & Ireland, Marjorie, *Adolescent Sexual Aggression: Risk and Protective Factors,* 100 Pediatrics e7 (1997) at 7.
[172] Stockdale, Keira, Olver, Mark, & Wong, Stephen, *The Validity and Reliability of the Violence Risk Scale - Youth Version in a Diverse Sample of Violent Young Offenders* 41 Criminal Justice and Behavior 114 (2013) at 115.
[173] Rich, *supra* note 149 at 271.
[174] Association for the Treatment of Sexual Abusers, *Adolescents Who Have Engaged in Sexually Abusive Behavior: Effective Policies and Practices* (2012) at 3.
[175] Miccio-Fonseca, *supra* note 158 at 890.
[176] Hempel, Inge, Buck, Nicole, Cima, Maaike & van Marle, Hjalmar, *Review of Risk Assessment Instruments for Juvenile Sex Offenders: What is Next?* 57 International Journal of Offender Therapy and Comparative Criminology 208 (2013) at 223.

researchers have warned that such instruments are not yet capable of making accurate estimates of risk and should be used with great caution in legal procedures such as civil commitment of adolescents or their placement on registries.[177]

The New York RAI does not reflect any of the variables that are now known to improve juvenile risk assessment. The RAI was designed specifically for adults, and thus the majority of factors are based on static factors for adults, which do not predict risk in youth. The factors are almost exclusively static, despite the understanding that adolescent risk assessment requires a developmental lens that is dynamic in nature, given the developmental changes of adolescence and emerging adulthood. Modern risk assessment for youth, as has been developed over the past two decades, now incorporates protective factors and a developmental approach to sexually offending adolescents. To the contrary, the SORA RAI was developed in 1996, and has not been revised since then to take into account the scientific advances. It is not designed to account for factors that mitigate against offending, especially for adolescents who are rapidly changing, and instead relies upon outdated notions about the high risk of sexual reoffending of adolescents and systematically overestimates the risk of reoffending that an adolescent who sexually offends prior to age 20 actually presents. When risk assessment instruments such as the SORA RAI are not robustly constructed and researched to be age appropriate, "the risk may be overestimated" thus having profound adverse impact on youth and their families, including unnecessary placement outside their homes, etc.[178] *See* chapter 9 of this guide – SORA.

One final thought about risk assessments: Psychologists who construct risk assessment tools follow several essential steps, which include obtaining a sizable sample, completing pilot studies, and then validating and cross validating the measure, thus assuring predictive accuracy and generalizability.[179] Not doing so "leaves a trail of likely inaccurate perceptions based on questionable findings, coupled with low accuracy rates."[180] None of these steps were taken when the SORA RAI was constructed, and have not been taken since. Adolescents should be adjudicated youthful offenders; they should not be subject to registration that lasts anywhere from 20 years to a lifetime, based upon a poorly constructed and unreliable instrument that is no better than a crystal ball. As one group of researchers concluded, when the predictive validity of a risk assessment instrument for adolescents who have sexually offended does not accurately predict recidivism, "it is highly questionable whether it is ethical to impose long-term consequences on juveniles based on these assessments."[181]

§ 6:10 Treatment Is Different for Adolescents than for Adults

Treatment reduces recidivism and risk for both adults and adolescents who have sexually offended. However, the treatment approaches and the factors to be addressed should be significantly different for these two distinct groups. That has not been the case, historically, as treatment for adolescents was largely based on models used with adults who had sexually offended.[182] The adult models that were formerly used on adolescents, although appropriate for

[177] Rich, *supra* note 149 at 290.
[178] Miccio-Fonseca, *supra* note 158 at 893.
[179] Miccio-Fonseca, *supra* note 158 at 874.
[180] Miccio-Fonseca, *supra* note 158 at 874.
[181] Hempel, *supra* note 176 at 223.
[182] Przybylski, *supra* note 135 at 303.

adults, inappropriately emphasized "deviant sexual interest" and had a "particular focus on the assessment and punishment of deviant sexual arousal and confrontational approaches to extract details of past sexual offenses."[183] This punishment-based or deficit-oriented approach developed for adults has now been soundly rejected for treatment of adolescents, which instead adopts a multi-dimensional, developmentally informed conceptualization of young people who engage in crimes of a sexual nature.[184] As knowledge about the developmental, motivational, and behavioral differences between adolescents and adults who have sexually offended has increased, therapeutic interventions for adolescents have become more responsive to the diversity of adolescent sexual behavior and specific offending-related factors found among adolescents.[185]

It is now well-accepted that there are significant dissimilarities that exist between adolescents who commit sexual offenses and their adult counterparts.[186] In ATSA's Adolescent Practice Guidelines, which provide an instructional framework for practitioners, the chief, foundational point is that: "Adolescents who have engaged in sexually abusive behavior are fundamentally different from adults who have sexually offended, and require a different set of guidelines with respect to assessment, intervention [treatment], and public policy approaches."[187] Because of these differences, renowned expert Michael Caldwell emphasizes the importance of treating adolescents who have sexually offended in developmentally sensitive ways.[188]

Treatment of adolescents who have sexually offended must take into account the ways that they are different from adults. Adolescents are generally more impulsive and less aware of the consequences of their behavior than adults, and their actions are less likely to be the product of psychosocial deficits.[189] Their sexual offending is influenced by multiple ecological systems; youth develop within a complex network of reciprocally interacting contexts and relationships.[190] Many adolescents who sexually offend desist from future offending, even in the absence of intervention.[191]

One of the most significant differences is related to how adolescents process information as a result of maturational changes in brain functioning.[192] There are also significant

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[183] McPherson, Lynne, Vosz, Meaghan, Gatwiri, Kathomi, Hitchcock, Clarissa, Tucci, Joe, Mithcell, Janise, Fernandez, Cyra & Macnamara, Noel, *Approaches to Assessment and Intervention with Children and Young People Who Engage in Harmful Sexual Behavior: A Scoping Review* 25 Trauma, Violence, and Abuse (2023) at 1594.
[184] *Id.* at 1594.
[185] Przybylski, *supra* note 135 at 303.
[186] Przybylski, *supra* note 135 at 304.
[187] Association for the Treatment of Sexual Abusers, *ATSA Practice Guidelines for Assessment, Treatment, and Intervention with Adolescents Who Have Engaged in Sexually Abusive Behavior* (2017) at 13.
[188] Caldwell, Michael, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism,* 54 International Journal of Offender Therapy and Comparative Criminology 197 (2010) at 207.
[189] Przybylski, *supra* note 135 at 304.
[190] Association for the Treatment of Sexual Abusers, *supra* note 187 at 44.
[191] Przybylski, *supra* note 135 at 304.
[192] Worling, James & Langton, Calvin, *Treatment of Adolescents Who Have Sexually Offended,* Chapter in Volume III of The Wiley Handbook on the Theories, Assessment, and Treatment of Sexual Offending, Douglas Boer Ed., (2016) at 1246-1247.

developmental changes during adolescence with respect to sexual identity, sexual interests, and the meaning of sexual thoughts and feelings. This gradual transition towards adult sexuality is the result of complex interactions between hormonal changes, brain development, and external stimuli.[193] Because of these differences, the motivating factors and thought processes involved in sexual offending for adolescents can be very different compared to those for adults. As a result, it is necessary that developmental issues directly inform treatment.[194] Worling and Langton have cautioned, furthermore, that some treatment approaches designed for adults may end up being detrimental for adolescents.[195] ATSA warns that sanctions and treatment approaches developed for adults should not be applied to adolescents except in rare cases (e.g., when developmentally appropriate and research-supported interventions have failed).[196]

The differences between adolescents who sexually offend and their adult counterparts has been recognized by some courts. Adolescents who sexually offend are more likely to act impulsively and be motivated by sexual curiosity, in contrast to adults, who are more often aroused by deviant sexual behavior or exhibit predatory or psychopathic conduct. Adolescents, because of their lack of maturity and delayed social and emotional development, are fundamentally different from adults who sexually offend. *In re C.K.,* 233 N.J. 44, 51 (2018).

The risk-need-responsivity (RNR) model was developed in the 1980s, and was formalized by Andrews, Bonta, and Hoge in 1990.[197] The model forms the basis for most risk assessment and treatment today. ATSA uses the principles of RNR as the empirical framework for its guidelines to the assessment and treatment of adolescents who have sexually offended. Bonta and Andrews briefly summarized the core principles of RNR as follows:

> **Risk principle:** Match the level of service to the individual's risk to re-offend. (One-size-fits-all treatment does not work because the level of treatment needs to be matched to the level of risk each individual presents).
>
> **Need principle:** Assess criminogenic needs and target them in treatment.
>
> **Responsivity principle:** Maximize the individual's ability to learn from rehabilitation intervention by providing cognitive behavioral treatment and tailoring the intervention to their learning style, motivation, abilities and strengths.[198]

Broadly, adolescent treatment prioritizes developmental considerations in interventions and treatment by focusing on family involvement, increasing self-regulation capacities, and tailoring treatment goals. The inclusion of caregiver support and family therapy highlights how adolescent treatment needs and intervention delivery are distinct from adult treatment, which

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[193] *Id.* at 1247.
[194] *Id.* at 1247.
[195] *Id.* at 1247.
[196] Association for the Treatment of Sexual Abusers, *supra* note 29 at 4.
[197] Andrews, D.A., Bonta, James & Hoge, R.D., *Classification for Effective Rehabilitation: Rediscovering Psychology,* 17 Criminal Justice and Behavior 19 (1990).
[198] Bonta, *supra* note 152 at 1.

does not have a family or caregiver support component. ATSA suggests that effective treatment interventions for adolescents are characterized by:

- focusing on dynamic factors supported by current research;
- promoting safety while facilitating pro-social and developmentally appropriate skill development;
- using evidence-based interventions that match presenting risk and needs;
- including caregivers and other positive supports;
- addressing risk and protective factors across the adolescent's natural ecologies (e.g., family, peers, school);
- occurring in the natural environment [not prison] when possible to allow the adolescent and his/her caregivers to practice skills and use social support in real-life situations;
- tailoring approaches to match individual characteristics and circumstances of adolescents (e.g. developmental status, learning styles, gender, culture); and
- addressing sexually abusive behavior problems, as well as other conduct problems.[199]

Multisystemic Therapy (MST) has been demonstrated to be a highly effective treatment in reducing recidivism of sexual harm in youth.[200] It is considered to be "best practice" for the treatment of adolescents who have committed crimes of a sexual nature.[201] MST is an intensive clinical treatment program assessing environmental factors associated with a participant's family, school, and community. The basic principle of MST includes the involvement of caregivers to achieve and maintain positive outcomes.[202] MST focuses on providing resources to address adverse factors in the youth's environment (financial stress, family functioning, negative peer influence, criminogenic determinants) and enable caregivers to develop certain desired skills.[203]

MST works with the family to help those who care for the youth improve their oversight, as well as increase healthy relationships with the youth. By helping improve both the endogenous and exogenous factors maintaining the adolescent behavior, the MST team works largely in the youth's home, educates guardians on certain parenting skills, and works to decrease stressors, negative peer involvement, and risk issues, while improving family functioning.

Responsivity approaches, i.e., how the treatment is delivered, are a central part of effective treatment interventions. Given the variability of developmental considerations and the numerous variables that contribute to adolescent offending, it is imperative that adolescent treatment-planning be individually tailored to the risk and strength profile of each unique adolescent. For most sex offense convictions involving adolescents, the judge has the discretion to impose either a sentence of probation or incarceration. However, there is current research that

[199] Association for the Treatment of Sexual Abusers, *supra* note 187 at 40-41.
[200] Kim, *supra* note 137 at 107.
[201] Satodiya, *supra* note 140 at 59.
[202] Satodiya, *supra* note 140 at 51.
[203] Satodiya, *supra* note 140 at 51.

indicates that placing youth in adult prison settings increases their risk of future violence and does not deter delinquent behavior.[204]

Not only is the general prison setting harmful to adolescents, the Department of Corrections and Community Supervision (DOCCS) only offers one treatment program for sexual offending, and that program is designed for adults. This treatment program does not meet any of the three principles of the Risk-Needs-Responsivity model appropriate for adolescents. DOCCS has an online document providing broad guidelines for its corrections-based treatment.[205] A review of the document reveals additional problems. First, the program uses adult assessment measures for treatment and placement.[206] It is unclear where an adolescent might be placed, given the unsuitability of these adult measures. Second, treatment offered in an adult carceral setting may place adolescents in groups with adults of all ages. The adolescent may well be exposed to developmentally inappropriate material and repeat offenders. The DOCCS manual discusses the objective of all persons in group sessions discussing their more recent and historical offending behavior.[207] Placing a youth in a group with adults can result in the adolescent focusing on objectives that are not pertinent to their risk profile, over-emphasis on sexual interest as a risk factor, and can expose the adolescent to antisocial and sexual harm experiences that are unrelated to his or her own. In addition, group therapy with adults may expose the adolescent to the deviant sexual thoughts of others. Some researchers express the concern that such exposure may be harmful because adolescents are at a stage where they are forming and revising their sexual identities.[208]

Current research suggests that treatment for adolescents should be community-based and should be offered in a natural environment.[209] This contraindicates treatment being delivered in institutionalized settings with program participants having little ability to generalize their learning and development to the outside "real" world. There are no a priori grounds to assert that an adolescent who has sexually offended should be placed outside the family home.[210] Research also indicates that treatment in the community is more effective than treatment in institutions.[211] In other words, if the prosecutor and the judge are committed to public safety and reducing recidivism, they should be made aware that evidence demonstrates that community treatment, rather than institutional treatment, is proven to best reduce recidivism for adolescents.[212] As noted by ATSA, "[m]ost adolescents can be safely treated in community settings. Residential and

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[204] Mendel, Richard, *Why Youth Incarceration Fails: An Updated Review of The* Evidence, The Sentencing Project (2022) at 4. Mendel, Richard, *Protect and Redirect: America's Growing Movement to Divert Youth Out of the Justice System,* The Sentencing Project (2024) at 5.
[205] New York State Department of Corrections and Community Supervision *Sex Offender Counseling and Treatment Program Guidelines* (2022). Available at soctp-procedures-and-guidelines-2022.docx (live.com)
[206] *Id.* at 13.
[207] *Id* at 19.
[208] Worling, James, *The assessment and treatment of deviant sexual arousal with adolescents who have offended sexually,* 18 Journal of Sexual Aggression 36 (2012) at 55.
[209] Przybylski, *supra* note 135 at 313.
[210] Worling, *supra* note 192 at 1255.
[211] Kim, *supra* note 137 at 115.
[212] Kim, *supra* note 137 at 115.

correctional settings should be reserved for the minority of youth who present with significant risk factors for recidivism or other treatment needs that cannot be met in community settings."[213]

By highlighting the different treatment needs that your client has, as compared to an adult who receives a one-size-fits-all treatment during incarceration, you may be able to persuade the judge that a non-incarcerative youthful offender sentence is appropriate.

§ 6:11 Convictions, Registration, and Community Notification for Adolescents Are Counterproductive

As can be seen from the research findings discussed in § 6:8 above, registration and notification have not achieved the purposes professed by their proponents – they have neither reduced recidivism, nor have they increased public safety. Even more concerning is that they have created such pernicious enmeshed consequences,[214] so as to undermine the goals of rehabilitation and promotion of successful and productive reentry and reintegration into society. As a result of the destabilizing effects of these collateral consequences, registration and notification may have increased recidivism rates and decreased public safety.

The pervasive enmeshed consequences of a criminal conviction have been well documented by the research literature over the past two decades.[215] Individuals convicted of crimes are stigmatized in ways that prohibit them from fully rehabilitating and reintegrating into society.[216] They face stigma and restrictions to the essential features of a law-abiding and dignified life – family, shelter, work, education, civic participation and financial stability. It is well established that stable housing, employment, education, and pro-social relationships are fundamental building blocks of successful rehabilitation and desistance from crime after an offense. Individuals are stigmatized when they are labeled, set apart and linked to undesirable characteristics, leading to loss of status and discrimination.[217]

This stigma and the barriers that a criminal conviction creates have been recognized for more than fifty years by policymakers. Legislative reforms have been enacted to ameliorate the effects of this stigma including youthful offender statutes, removal statutes, Human Rights Law (Executive Law § 296 [16]), Certificates of Relief and from Disabilities and Certificates of Good

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[213] Association for the Treatment of Sexual Abusers, *supra* note 187 at 41.

[214] The authors prefer the term enmeshed consequences rather than the more commonly used term of collateral consequences. For most of these consequences there is nothing collateral about them. They are a direct and foreseeable result of the conviction. It is only a legal fiction created by the courts that would have us view them as collateral.

[215] *See, e.g.,* Special Committee on Collateral Consequences of Criminal Proceedings, New York State Bar Association, *Re-Entry and Reintegration: The Road to Public Safety (2006;* Petersilia, Joan, When Prisoners Come Home: Parole and Prisoner Reentry (2003); Pager, Devah, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (2008); Mauer, Marc & Chesney-Lind, Meda (Eds.), Invisible Punishment: The Collateral Consequences of Mass Imprisonment (2002); Western, Bruce, Punishment and Inequality in America (2006).

[216] Huebner, Beth, Kras, Kimberly & Pleggenkuhle, Breanne, *Structural Discrimination and Social Stigma Among Individuals Incarcerated for Sexual Offenses: Reentry Across the Rural-Urban Continuum,* 57 Criminology 715 (2019) at 716.

[217] *Id.* at 716.

Conduct, Article 23-A of the Correction Law prohibiting unlawful discrimination based upon a person's criminal conviction, and the recently enacted Clean Slate Act.

The barriers created by the enmeshed consequences that flow from a criminal conviction have also been recognized by the courts. "[S]tigma results from the simple fact of a criminal conviction." *People v. Brown,* 41 N.Y.3d 279, 293 (2023). Courts have also recognized that the label of "sex offender" carries with it far greater stigma. "Sex offenders are societal pariahs. More than name calling by public officials, a sex offender label is a determination of status that can have a considerable adverse impact on an individual's ability to live in a community." *Id*. at 293. "[F]ew labels are as damaging in today's society as 'convicted sex offender.' Sex offenders are, as one scholar put it, 'the lepers of the criminal justice system,' with juveniles listed in the sex offender registry sharing this characterization." *In re C.P.,* 131 Ohio St.3d 513, 531 (2012).

The damage done to an adolescent by the label of "sex offender" due to a criminal conviction should be reason enough to argue for a youthful offender adjudication. Registration and community notification magnify that stigma and further diminish the adolescent's life chances, producing a cascade of negative effects on all manner of opportunities.[218]

Courts have recognized the harm done as a result of registration and community notification. "[W]idespread public dissemination of an individual's sex offender status and other personal information is likely to carry with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other adverse consequences. The consequences of community notification are unlimited, and the stigma created by SORA registration pervades into every aspect of an offender's life." *People v. Brown,* 41 N.Y.3d 279, 293 (2023).

The enmeshed consequences of registration and notification are identified in various resources and cases. Even the website for the New York State Unified Court System recognizes that "[s]ex offender registration can lead to social disgrace and humiliation, loss of relationships, jobs, and housing and both verbal and physical assaults."[219] *See People v. Diaz,* 150 A.D.3d 60, 66, 66 (1st Dept. 2017); *Doe v. Pataki,* 120 F.3d 1263, 179 (2d Cir. 1997).

Registration and community notification are even more invidious when required of adolescents, because "it is imposed at an age at which the character of the offender is not yet fixed." *In re C.P* at 525. "For a juvenile offender, the stigma of the label of sex offender attaches at the start of his life and cannot be shaken. With no other offense is the juvenile wrongdoing announced to the world… He will be hampered in his education, in his relationships, and in his work life… His entire life [will be] evaluated through the prism of his juvenile adjudication… It will define his adult life before it has a chance to truly begin." *In re C.P* at 525.

Registration has emotional and psychological effects on adolescents. Registration and notification has been found to be correlated to increased severity of depression and suicidal

[218] *Id.* at 717.
[219] New York State Unified Court System website, Sex Offender Registration Consequences. Available at Sex Offender Consequences| NY CourtHelp (nycourts.gov)

ideation in the adult life of juvenile registrants, regardless of whether registration status was private or public.[220] A recent study evaluating the consequences of registration on adolescents found that, compared to unregistered adolescents who were in treatment for problematic sexual behavior, registered adolescents were four times as likely to report having attempted suicide in the past 30 days; five times as likely to report having been approached by an adult for sex in the past year; and twice as likely to report having been sexually victimized in the past year.[221] Essentially, the registration and notification of adolescents actually increased the severity of depression, increased suicidality, and increased the risk of these young people being victimized and sexually abused by others, rather than preventing sexual abuse and improving public safety. As Letourneau and her colleagues noted about their study, "[i]t is difficult to conceive of more serious adverse events than attempting suicide or experiencing sexual victimization."[222]

Not only is registration and notification counterproductive for the adolescent's chances for a successful and productive life, it undermines public safety by increasing the likelihood of re-offense. "Community notification may particularly hamper the rehabilitation of juvenile offenders because the public stigma and rejection they suffer will prevent them from developing normal social and interpersonal skills – the lack of those traits has been found to contribute to future sexual offenses." *In re C.P* at 527.

A considerable body of research has identified an increase in recidivism, and a decrease in public safety, as counterproductive effects of registration and community notification. Registration and community notification cause substantial stress in people on the registry. When depression, lack of housing, decreasing familial and other interpersonal support systems, unemployment, and public shaming are combined, the risk of recidivism for people on the registry escalates substantially.[223] ATSA reports that adolescents required to register experience more stress, shame, stigma, isolation, loss of friendships, and hopelessness – all factors that are associated with increased risk of recidivism in adults convicted of crimes of a sexual nature. Further, reducing access to prosocial activities for these youth has the unintended consequences of weakening the protective factors that prevent reoffending.[224] By engendering hopelessness and homelessness, impeding contact with social support networks in the community, and creating disincentives for pro-social behavior, recidivism is made more likely.[225] Research findings showed that by disrupting positive peer relationships and activities, interfering with school and work opportunities, facilitating housing instability and homelessness, and increasing social alienation, these factors may increase rather than decrease an adolescent's risk of recidivism.[226] From the research, there is strong evidence that SORN laws – particularly community

[220]Brandt, *supra* note 21 at.11-12.
[221] Letourneau, Elizabeth, Harris, Andrew, Shields, Ryan, Walfield, Scott, Ruzicka, Amanda, Buckman, Cierra, Kahn, Geoffrey & Nair, Reshmi, *Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination,* 24 Psychology, Public Policy, and Law 105 (2018) at 114.
[222] *Id.* at 114.
[223] Reingle, Jennifer, *Evaluating the Continuity Between Juvenile and Adult Sex Offending: A Review of the Literature,* 35 Journal of Crime and Justice 427 (2012) at 433.
[224] Brandt, *supra* note 21 at.11-12.
[225] Ewing, *supra* note 76 at 115.
[226] Colorado SOMB. *Sex Offender Management Board White Paper on the Research, Implications, and Recommendations Regarding Registration and Notification of Juveniles Who Have Committed Sexual Offenses* (2017) at 10.

notification laws – counterproductively increase rather than decrease the likelihood that registrants will commit future sex crimes.[227]

SORN has been an abysmal failure. As a result, Elizabeth Letourneau, a leading expert on juvenile registration and notification, has joined with nearly every expert who has published research on juvenile registration to call for the end of SORN.[228] There is agreement among these experts that there are few areas of U.S. policy where the evidence of failure is clearer or where there is stronger consensus. Juvenile SORN is a policy that fails to protect communities and inflicts unjustified harm upon those it targets.[229]

PRACTICE TIPS

When arguing for a youthful offender adjudication, you may find it helpful to inform the judge that, without the benefit of youthful offender status, the registration and notification that flows from a criminal conviction will neither increase public safety nor reduce recidivism, but rather, will have a deleterious effect on your client and likely reduce public safety. You may find the facts and myth-busting in this section and the preceding four sections helpful.

At sentencing, it is not uncommon for judges to default to the goal of retribution. There is a danger that, when a sex offense is involved, their visceral inclination towards punishment will dominate their decision-making. Prosecutors play upon this to argue that imposing youthful offender status will allow the defendant to escape the punishment of SORA.

Although it is apparent for all to see that SORA is punishment, the courts have created the fiction that it is not punishment. Use that to your advantage. You must emphasize in your pre-sentence memorandum that, as much as the prosecutor wants SORA to be used as additional punishment, the courts have emphatically said that SORA should not be used for punishment. Neither punishment nor vengeance are the purpose of SORA. Remind the judge that SORA is a civil statute (*People v. Parilla,* 109 A.D.3d 20, 24 [1st Dept. 2013]); remedial (*North v. Board of Examiners,* 8 N.Y.3d 745, 752 [2007]); regulatory (*Doe v. Pataki,* 120 F.3d 1263, 1277-78 [2d Cir. 1997]); and presents a collateral consequence (*People v. Windham,* 10 N.Y.3d 801, 802 [2008]). The Court of Appeals has warned against the danger of treating SORA as punishment. "SORA requirements, unlike post-release supervision, are not part of the punishment imposed by the judge." *People v. Gravino,* 14 N.Y.3d 546, 556 (2010).

Judge Smith, dissenting in *People v. Gillotti,* 23 N.Y.3d 841, 865 (2014), emphasized that "SORA's purpose is not to punish." He went on to explain that "SORA is not an expression of outrage at the heinousness of a crime, or an attempt to make the offender suffer for what he has done." *Id.*

[227] Agan, *supra* note 119 at 109.
[228] Letourneau, *supra* note 90 at 176.
[229] Letourneau, *supra* note 90 at 176.

The argument might go as follows: As I have explained, SORA does not serve its stated purposes of either reducing an adolescent's risk of recidivism or increasing public safety. In fact, it has counterproductive effects that will not only push my client to the margins of society with little hope of rehabilitation, reentry, or reintegration, but it will undermine public safety. If a conviction needlessly subjects my client to SORA's harmful requirements with no legitimate purpose, then it becomes punishments. Only a youthful offender adjudication can avoid such an unwarranted and unjustifiable punishment.

Below are some articles and books that address the issues of registration and community notification, and their effects on adolescents.

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Garfinkle, Elizabeth, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community Notification Laws to Juveniles,* 91 California Law Review 163 (2003).

Geer, Phoebe, *Justice Served: The High Cost of Juvenile Sex Offender Registration,* 27 Developments in Mental Health Law 33 (2008).

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§ 6:12 SARA Is Counterproductive for Adolescents

The Sexual Assault Reform Act (SARA) imposes a restriction on where many people on the registry can either live or even pass nearby. These restrictions may prevent your adolescent client from living with his parents, extended family, or in some other stable housing situation.

Only a youthful offender adjudication will save your client from this onerous requirement of SORA.

Even if your client is adjudicated a youthful offender, he or she may not be entirely saved from SARA. If your client is sentenced to prison on a 1 to 3-year sentence or a 1 1/3 to 4-year sentence, and as a result is subject to parole or conditional release, he or she will be subject to SARA's residence restriction while on parole. This was the harsh holding in the recent case of *People ex rel. E.S. v. Superintended, Livingston Correctional Facility,* 40 N.Y.3d 230 (2023). If your client cannot find SARA compliant housing after reaching their prison release date, he or she will not be released by DOCCS. On the other hand, a person adjudicated a youthful offender who is sentenced to probation will not be subject to SARA. This presents a compelling argument for probation, or a definite sentence that limits parole or conditional release time.

Although entitled a "reform" SARA is more a reaction than a reform. It is an extremely harsh add-on to the already harsh consequences of SORA, prompting some courts to refer to it as being "akin to banishment," (*Matter of Williams v. DOCCS,* 136 A.D.3d 147, 158 [1st Dept. 2016]), and others to observe that requiring compliance with SARA's 1000-foot buffer zone as a condition of release from prison "effectively converts … [a] fully-served prison term into a life sentence." *Matter of Arroyo v. Annucci,* 61 Misc. 3d 930, 940 (Sup. Ct. Albany Co. 2018).

SARA was first enacted in 2000, and became effective on February 1, 2001. It was subsequently amended in 2005 to expand its scope in two significant respects.

As originally enacted, SARA barred people convicted of certain enumerated sex offenses, whose victims were under the age of 18, from knowingly entering school grounds, or a facility or institution that primarily cares for minors. The term "school grounds" was limited to the narrower part of the definition provided in Penal Law § 220.00 (14)(a), meaning "in or on or within any building, structure, athletic playing field, playground or land contained with the real property boundary."

Effective September 1, 2006, the Legislature amended SARA to make it apply not just to people convicted of the sex offenses enumerated in Executive Law § 259-c (14) and Penal Law § 65.10 (4-a) whose victims were under the age of eighteen at the time of such offense, but also to any such person convicted of the enumerated sex offenses who has been designated pursuant to SORA as a Risk Level 3. In addition, the definition of "school grounds" was broadened to incorporate the additional definition in Penal Law § 220.00 (14)(b), so as to include publicly accessible areas <u>within 1,000 feet</u> of the real property boundary line of any school. The expanded definition of "school grounds" is particularly devastating. By incorporating that definition, a person subject to SARA is restricted from entering into or upon any area accessible to the public located within 1,000 feet of the real property boundary line comprising any such school.

"Although the statute itself does not restrict the location of a residence per se, the expanded definition of 'school grounds' necessarily operates to restrict places where a parolee (or probationer) may live or travel." *Matter of Williams v. DOCCS.* 136 A.D.3d 147, 151 (1st Dept. 2016) (citing *People v. Diack,* 24 N.Y.3d 674, 681-682 [2015]).".Being that many urban areas of New York are densely populated with school buildings, which may appear every several blocks, this thousand-foot buffer zone often makes it impossible to find a place to live or work.

SARA's restrictions are enforced by making them mandatory conditions of parole, post-release supervision, conditional release (Executive Law § 259-c [14]), probation and a conditional discharge (Penal Law § 65.10 [4-a]).

Does SARA Reduce Recidivism?

Since residence restrictions impose such overbearing hardships, including an inability to find stable housing and creating a bar to release from prison, there is one obvious question: Does SARA work? The overwhelming response from the research is that it does not. A leading expert on SORN and residence restrictions has found as recently as 2021 that "[n]ot one research study evaluating the effectiveness of residence restrictions has produced evidence that they prevent recidivistic sex crimes." [230] Levenson explains that residence restriction's failure to prevent recidivism is not surprising given what is known about the causes and etiology of sexual crimes. "[T]he vast majority of sexual offending against children occurs among familiar parties, not strangers lurking in school zones."[231] A study by Tewksbury and his colleagues in Minnesota regarding reoffending by people on the registry found that not a single case involved an offense involving contact with a victim at a park, school, or other location typically included in residence restrictions.[232]

The U.S. Department of Justice Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Treating (SMART) reviewed the research on residence restrictions and released a report concluding that "[r]esearch has demonstrated that residence restrictions do not decrease and are not a deterrent for sexual recidivism. In addition, research has shown no significant decreases in sex crime following the implementation of residence restrictions."[233]

Is SARA Counterproductive?

The research brief from the SMART office of the Justice Department found that the research suggests that "residence restrictions may actually increase offender risk by undermining offender stability and the ability of the offender to obtain housing, work, and family support."[234] Research also shows that residence restrictions diminish housing availability and increase the likelihood of transience and homelessness, factors that interfere with safe and successful reintegration.[235] Levenson found that in densely populated metropolitan areas, extensive

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[230] Levenson, Jill, *Investigating the Etiology of Sexual Offending into Evidence-Based Policy and Practices,* Chapter 8 in Sex Offender Registration and Community Notification Law: An Empirical Evaluation (Wayne Logan & J.J. Prescott, Eds.) (2021) at 155.
[231] *Id.* at 155-56.
[232] Tewksbury, Richard, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions,* 42 Harvard Civil Rights-Civil Liberties Law Review 531 (2007) at 538-39.
[233] Lobanov-Rostovsky, Christopher, *Adult Sex Offender Management,* U.S. Department of Justice SMART Office, Sex Offender Management Assessment and Planning Initiative (SOMAPI) Research Brief (2015) at 4. Available at https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/adultsexoffendermanagement.pdf.
[234] *Id* at 4.
[235] Levenson, *supra* note 230 at 156.

exclusion zones leave few compliant residential options, creating a crisis of housing instability that exacerbates psychosocial stressors and contributes to risk for criminal recidivism and registration noncompliance.[236]

Residency restrictions push registrants away from the supervision, treatment, stability, and supportive networks they need to build and maintain successful, law-abiding lives.[237] People on the registry are prevented from living in the areas closest to jobs, public transit, and affordable housing.[238]

A testament to how truly ineffective and harmful residence restrictions are: the U.S. Department of Justice has advised against their use.[239] Likewise, noting the inefficacy of residential restriction statutes, the American Correctional Association (ACA) – the world's largest professional organization of corrections practitioners – has also taken a stance against residence restrictions.[240]

§ 6:13 SORA for Adolescents Undermines the Purposes of Sentencing

In Chapter 8 (Sentencing), the five purposes of sentencing are discussed, including deterrence, incapacitation, retribution, rehabilitation, and "the promotion of their successful and productive reentry and reintegration into society." Penal Law § 1.05 (6). For the reasons addressed in § 8:2, in reliance on *Roper v. Simmons,* 543 U.S. 551 (2005) and *Graham v. Florida,* 560 U.S. 48 (2010), retribution, deterrence and incapacitation are inapplicable or of secondary importance when it comes to the sentencing of adolescents. That leaves rehabilitation and reentry/reintegration as the two primary purposes of sentencing for adolescents.

Without a youthful offender adjudication, registration for an adolescent means that they will continue to have their lives scrutinized and impacted for at least 20 years, and perhaps for life, often without a realistic path to reentry, reintegration, and rehabilitation. The counterproductive effects of a conviction, registration, and community notification on an adolescent are discuss in § 6:11 above. Any hope is dashed by the unmerciful labeling and stigma that a young person will encounter as a result of registration and community notification. Consequently, the primary relevant purposes of sentencing are thwarted if a youthful offender adjudication is not ordered. In effect, registration and notification run contrary to the goals of rehabilitation and promoting successful and productive reentry and reintegration.

The goals of both the youthful offender statutes and juvenile delinquency statutes are to avoid stigma and provide confidentiality. Registration and community notification are the polar opposite of these goals. Stigma is purposefully imposed and broadcast. Notification and registration will anchor an adolescent to his crime. "It will be a constant cloud, a . . . reminder to

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[236] Levenson. s*upra* note 230 at 156.
[237] Tofte, Sarah & Fellner, Jamie, *No Easy Answers: Sex Offender Laws in the US,* Human Rights Watch (2007) at 9.
[238] *Id* at 102.
[239] Lobanov-Rostovsky, *supra* note 233 at 4.
[240] American Correctional Association, Resolution on Neighborhood Exclusions of Predatory Sex Offenders (January 24, 2007).

himself and the world that he cannot escape the mistakes of his youth. . . . It will define his adult life before it has a chance to truly begin." *In re C.P.,* 131 Ohio St.3d 513, 525 (2012). A sentence that fails to adjudicate an adolescent a youthful offender will, in some sense, be a purposeless sentence.

As U.S. District Court Judge Lynn Adelman observed, there is harm in making outcasts of people who commit crimes of a sexual nature, and benefits to treating and reintegrating them.

> Most important, there are more promising ways to deal with sex offenders. Instead of creating a subordinate class of others, we would be more successful by making efforts to integrate them into society after they have completed their sentences. People who have a stake in society are more likely to abide by its rules than people who are treated as outcasts. We ought to be humanizing rather than dehumanizing offenders. What is important is to adopt an approach to sexual violence that is based on evidence.[241]

[241] Adelman, Lynn, *The Harm in Making Outcasts of Sex Offenders,* 42 Raritan 128 (2022) at 143-44.

§ 6:14 Youthful Offender Eligibility Chart – For Adolescents Charged with a Sex Offense

Misdemeanor Sex Offense	Y.O. Eligibility
AGE	
7 up to 12 years old	No. As of 12/29/22, as a result of RTLA, children in this age group are no longer subject to arrest and prosecution in Family Court as Juvenile Delinquents.
12 up to 18 years old	No. Cases proceed in Family Court and are J.D. cases and are not denominated a conviction.
18 years old	Yes, if eligible under the criteria of CPL § 720.10. Cannot have previously been convicted and sentenced for a felony, or been adjudicated a Y.O. following a felony conviction, or been adjudicated a J.D. for a designated felony act listed in FCA § 301.2 (8). CPL § 720.25 provides exceptions to this rule in cases involving Y.O. for prostitution required by CPL § 170.80 (2). When there is a conviction for a misdemeanor sex offense in local criminal court and the eligible youth had not, prior to commencement of trial or entry of a plea of guilty, been convicted of a crime or found to be a Y.O., Y.O. is mandatory. For a prostitution conviction, Y.O. is mandatory. (CPL § 170.80 [2]). If previously adjudicated a Y.O. for a misdemeanor, another Y.O. is permissible upon an interest of justice determination.
Felony Sex Offense	**Y.O. Eligibility**
AGE	
7 up to 12 years old	No. Children between 7 to 12 are not subject to arrest and prosecution for any felony except for the 11 homicide offenses listed in FCA § 301.2 (1)(a)(iii), and then they are prosecuted in Family Court as a J.D.
12 years old	No. Only prosecuted in Family Court as a J.D.
Juvenile Offender (J.O.)	
13 years old	No. 13 year old J.O. may only be prosecuted as an adult in Youth Part for acts constituting Murder 2 (1) or (2) or such conduct as a sexually motivated felony where authorized by Penal Law § 130.91. Since Murder 2 and sexually motivated felonies based on Murder 2 are class A felonies, they are not eligible for Y.O. (CPL § 720.10 (2)[a]).

Felony Sex Offense	**Y.O. Eligibility**
AGE	
14 and 15 year olds	Yes, if not removed to Family Court pursuant to CPL §§ 722.20 or 722.22, and if eligible under the criteria of CPL § 720.10 (2), and if charged with a serious or violent felony offense listed in CPL § 1.20 (42), which includes such felony sex offenses as: Kidnapping 1 and victim less than 17 (including attempt); Rape 1 (1) and (2); or a sexually motivated felony where the conduct is an offense listed in CPL § 1.20 (42) and where authorized pursuant to Penal Law § 130.91.
Adolescent Offender (A.O.)	
16 and 17 year olds	Yes, if not removed to Family Court pursuant to CPL § 722.23, and the criteria in CPL § 720.10 are met. Certain offenses cannot be removed – any non-drug A felony, a violent felony, felonies listed in CPL § 1.20 (42) and VTL offenses. Certain cases may not be removed if the prosecutor proves by a preponderance of the evidence one or more of the following set forth in the accusatory instrument: i) defendant caused significant physical injury to a person other than a participant; ii) defendant displayed a firearm, shotgun, rifle or deadly weapon; or iii) defendant unlawfully engaged in the sexual conduct of sexual intercourse, oral sexual conduct or sexual contact as defined in Penal Law § 130.00. No removal if prosecutor makes a motion to prevent removal and proves extraordinary circumstances exist. All parties may consent to removal. Note that if a conviction is for an armed felony, Rape 1, or Aggravated Sexual Abuse court must determine a special mitigating factor exists per CPL § 720.10 (3). Y.O. is not available for any Class A conviction.
18 Years Old – Prosecuted as an adult.	Yes, if the criteria in CPL § 720.10 are met. Note that if sex offense conviction is for an armed felony, Rape 1, or Aggravated Sexual Abuse court must determine a special mitigating factor exists per CPL § 720.10 (3). Y.O is not available for any Class A conviction.

CHAPTER 7

MITIGATION

CHAPTER 7 SECTIONS

CHAPTER 7

MITIGATION

§ 7:1 Mitigation

Each of us is more than the worst thing we've ever done.

Bryan Stevenson, Just Mercy: A Story of Justice and Redemption

Following this powerful statement, Stevenson went on to say: "My work with the poor and the incarcerated has persuaded me that the opposite of poverty is not wealth; the opposite of poverty is justice." Mitigation can help us do justice.

Mitigation draws from the cumulative circumstances, events, and experiences over a person's lifetime, including but not limited to trauma, disabilities, Adverse Childhood Experiences (ACEs), neglect, abuse, poverty, and domestic violence, including physical, sexual, and psychological abuse, that shape human behavior, and that, in some instances, explain behavior that violates the law and is relevant to the person's moral culpability.

Mitigation is an opportunity to provide an understanding of the defendant. It reveals the defendant's humanity and exposes his or her human frailties. It provides a full picture – a lifetime video. The defendant is portrayed as so much more than the simplistic, decontextualized snapshot presented by the prosecution. It is not an excuse, but a compelling basis for mercy and compassion.

In *People v. Smith,* 69 Misc. 3d 1030, 1038 (Co. Ct. Erie County 2020), Judge DiTulio, in a case involving the mitigation of an offense involving domestic violence, observed that, when considering mitigation, the court must recognize the "cumulative effect of the abuse . . . paying particular attention to the circumstances under which defendant was living . . . adopting a 'full picture' approach in its review." The mitigation "cannot be compartmentalized or separated from her [the defendant's] action on the night of the crime. They are inextricably linked." *Id*. It is the job of defense counsel to craft the mitigation into a narrative that explains this inextricable linkage. Context is critical to understanding behavior.

The duty to develop and present mitigation for the purpose of both plea negotiations and sentencing has long been accepted as fundamental to defense lawyering. It is well established in the professional standards for criminal defense practice. Professional standards urge defense counsel to investigate, develop, and utilize mitigation for purposes of plea-bargaining and sentencing. See for example the *ABA Criminal Justice Standards for the Defense Function* (4th Edition), Standard 4-8.3 (d):

> Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible.

In similar fashion, see NLADA Performance Guidelines for Criminal Defense Representation (4th Edition), Guideline 8.1 (3): to ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court. For other professional standards on counsel's duty to develop and present mitigation see NYSDA *2021 Revised Standards for Providing Mandated Representation,* I (7)(i); NYSBA *2021 Revised Standards for Providing Mandated Representation,* I-7 (a) and (i); and Office of Indigent Legal Services *Standards and Criteria for the Provision of Mandated Representation*, Standard 9.

The New York Court of Appeals has long recognized the central role that mitigation plays in sentencing, describing the consideration of the defendant's individual circumstances as an essential component of the sentencing determination. "The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime charged, the *particular circumstances of the individual* before the court and the purpose of a penal sanction."[1] *People v. Farrar,* 52 N.Y.2d 302, 305 (1981) (emphasis added). In *People v. Notey,* 72 A.D.2d 279, 283 (2d Dept. 1980), the court recognized that the personal circumstances of the defendant – the temperament, mental and physical condition, past social history, and economic circumstances – were "the most significant factor in the sentencing process."

The "fundamental premise that a capital post-conviction defense team must, through storytelling, 'change the picture,' is now equally applicable to the defense team in a non-capital case."[2] At the heart of all mitigation is effective storytelling and the presentation of a counter-narrative. "Our job is to challenge the prosecution's (and society's) simplistic snap-shot of the

[1] The purposes of the penal sanction are currently found in Penal Law § 1.05 (6). At the time of the decision in *Farrar,* it was §1.05 (5), and consisted of three purposes – rehabilitation, deterrence, and incapacitation. In 2006 the statute was amended to add the addition purpose of "the promotion of their successful and productive reentry and reintegration into society." It should be noted that punishment or retribution is not a statutorily authorized purpose of sentencing, having been very specifically rejected as a justification for sentencing by the New York Temporary Commission on Revision of the Penal Law and Criminal Code. *See* Allen, Ronald, *Retribution in a Modern Penal Law: The Principle of Aggravated Harm,* 25 Buffalo Law Review 1 (1975) at p. 3. Retribution was also specifically rejected by the Court of Appeals in *People v. Oliver,* 1 N.Y.2d 152, 160 (1956) – "There is no place in the scheme of punishment for its own sake, the product simply of vengeance or retribution." In *Oliver* the Court recognized the three purposes of sentencing – incapacitation, deterrence, and rehabilitation. Retribution seems to have first been legitimized by a judicial sleight of hand, despite lack of legislative authorization, in *People v. Notey,* 72 A.D.2d 279, 282 (2d Dept. 1980) based upon a law review article, not a statute. In order to include retribution as the new fourth purpose of sentencing the court in *Notey* relied on Pugsley, Robert, *Retributivism: A Just Basis for Criminal Sentences,* 7 Hofstra Law Review 379, 381 (1975). No legislation. No Court of Appeals precedent. It was just a law review article that injected retribution into New York's sentencing jurisprudence with a little help from the Appellate Division.

[2] This was the premise in Olive, Mark & Stetler, Russell, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction,* 36 Hofstra Law Review 1067 (2008) at footnote 3. As the authors confess, the term "change the picture" was stolen by them not only from Professor Anthony Amsterdam but also Professor John Blume.

crime through a more complete narrative that humanizes our client and fully addresses her legal and moral culpability for the crime."[3]

Essential to mitigation storytelling is the alternative ending, or sentence, proposed by the defense team. While personal narratives that detail adversity and trauma can contextualize behavior within the life circumstances, the story must elevate the client's strengths, opportunity for rehabilitation, and value to their community. A recent review of sentencing decisions determined that, while in most circumstances the trauma history of the client served to mitigate the sentence, there were also cases where the trauma histories were explicitly cited as aggravating factors, interpreted as reducing the defendant's amenability to rehabilitation.[4] The protagonist of the mitigation story, the client, must be a person in whom the decision-maker believes and for whom he or she wants to exercise mercy. One way to do this is to demonstrate, through treatment planning and community support integration, how the defense-proposed sanction meets the treatment needs and builds on the strengths of the client. Each "pain point" must have a corresponding opportunity for healing to effectively counter any notion of irredeemability.

Both the U.S. and New York Constitutions guaranteed the right to effective assistance of counsel. Investigation and mitigation are fundamental to effective assistance of counsel. Without both careful investigation and meaningful mitigation, defense counsel is not "sufficiently familiar with the case and the defendant's background to make an effective presentation on the question of sentence." *People v. Gonzalez,* 43 A.D.2d 914, 915 (1st Dept. 1974). New York court's have recognized that failure to afford the defendant an opportunity for such representation is a deprivation of a constitutional right and will result in a reversal and remand for resentencing. *See e.g. People v. Wiggan,* 242 A.D.2d 549, 550 (2d Dept. 1997); *People v. Edmond,* 84 A.D.2d 938; *People v. Jones,* 181 A.D.3d 714, 714 (2d Dept. 2020).

Below is a checklist of possible mitigation themes that may help your defense team explore these issues during your client interviews. The essential role that the mitigation specialist plays on the defense team is discussed at § 7:5 of this chapter.

[3]Warth, Patricia, *Mitigation, Investigation, and Development: Representing Our Clients in the Context of Their Lives.* Available at https://www.ocbaacp.org/mitigation-investigation-and-development/ at p. 20.
[4] Jackson, Victoria, Sullivan, Danny, Mawren, Daveena, Freiberg, Arie, Kulkarni, Jayashri & Darjee, Rajan, *Trauma-informed Sentencing of Serious Violent Offenders: An Exploration of Judicial Dispositions with a Gendered Perspective,*28 Psychiatry, Psychology and Law748 (2021) at 760.

CHECKLIST OF POSSIBLE MITIGATION THEMES

Negative	Positive
☐ **Client as Victim:** • Child Abuse/Maltreatment • Childhood Neglect • Parental chaos (i.e., substance use, mental illness) • Witness to violence/abuse • Familial loss/death • Victim of Intimate Partner Violence • Victim of bullying/violence • Experiences of institutionalization • Experiences of bias, discrimination, oppression ☐ **Client Struggles with Substance Use Disorder:** • Age of first use • History of use • Most recent pattern of use (amt./frequency/route of admin.) • Prior efforts to stop • Medical consequences of use ☐ **Client Contends with Mental or Cognitive Disorder** • Prenatal/birth complications- maternal health • Neurodevelopmental impairment • Age of onset of symptoms • Specialized services received in school/community • Impact to relationships ☐ **Client has Limited Resources/Access** • Poverty • Under resourced community (urban or rural) • Limited education • Intergenerational trauma • Adultified minor • Experiences of racism/structural barriers • Missed opportunities for intervention ☐ **Client Experienced Acute Disturbance** • Recent trauma • Severe and active substance dependence • Change in medications • Extreme emotional state • Recent diagnosis/life stressor ☐ **Adverse Childhood Experiences**	☐ **Client Has Good Roots:** • Caregiver consistency • Adequate structure in home • Positive role models • Stability • Accepted by loved ones • Received affection and care ☐ **Client has Community:** • Active familial support • Friends and loving relationships • A steady home • Client is a positive influence for others (i.e., children, family, mentees) • Client is involved with Church, community orgs, schools, volunteerism • Professional community (i.e., military, civil service) • Letters of support ☐ **Client has Solid Prospects for Rehabilitation** • Engages with treatment program • Age, youth and plasticity of brain • Previous record of compliance • Strong support network ☐ **Client is Remorseful:** • Evidence for remorse in words and actions • Prepared statements of remorse • Willingness to make amends • Symptoms of distress since incident (suicidality, sleeplessness, behavior change) ☐ **Client has Little/No Criminal History:** • First time offender • No history of violent offense • Offenses related to substance dependence • Surprise by loved ones (i.e., action was "out of character") ☐ **Client Has Plans for the Future:** • Dreams of education • Plans for job/training • Hobbies and pastimes • Desire for family • Demonstrated effort to improve future (i.e. education/programs while detained). ☐ **Good character**

Below is a checklist of records that you may want to obtain to help you identify and document mitigation.

Checklist of Mitigation Records

- ❑ Medical Records
  - o Pre-natal
  - o Birth
  - o Pediatric Check-ups
  - o Emergency Room
  - o Illness/injury
- ❑ School Records
  - o IEP
  - o Report Cards
  - o Attendance Records
  - o Psychosocial Evaluations
  - o Disciplinary Records
- ❑ Office of Children and Family Services (or local equivalent)
  - o Child Protective Services (investigations)
  - o Foster Care
  - o Preventative Services
  - o Out of-Home Placements (delinquency)
- ❑ Mental Health
  - o Psychiatric Evaluation & Treatment
  - o Individual/family Therapy
- ❑ Public Benefits
  - o SSDI & SSI
  - o SNAP
- ❑ Sports/Recreation
  - o Certificates
  - o Rosters
  - o Lesson History
  - o Pictures
- ❑ Employment
  - o Pay Stubs
  - o Letter from Employer
- ❑ Probation/Community-based Supervision
  - o Probation Records & Referrals
  - o Updates from Community-based Programming

Below are some articles and research that address the subject of mitigation.

LITERATURE

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PRACTICE TIPS

Getting to know your client will allow you to learn mitigating information that will not only transform the attorney-client relationship, but also your advocacy.

There is mitigation in every case. It is our job to find it and to present it in a compelling narrative.

Professor David Cole has suggested that there is an "empathy gap" that arises from most Americans' lack of concern about the lives of those behind bars.[5] I would suggest that judges, like their fellow Americans, have this same "empathy gap." Mitigation provides a factual basis for bridging that gap, so that sentencing judges pay closer attention to the human beings whose live they are being asked to shut away.[6]

§ 7:2 A Trauma-Informed and Developmental Approach to Mitigation

Trauma is ubiquitous in criminal legal settings, with some research finding that over 90% of people who are incarcerated have experienced trauma, and up to 20% are diagnosed with post-traumatic stress disorder (PTSD).[7] Over 45 million children in the United States are affected by violence, crime, abuse, or psychological trauma each year, and many of them will become involved in the criminal legal system. The majority of youth involved with the legal system (70-90%) have been exposed to trauma.[8] The trauma experienced by youths involved in the legal system is often in multiple forms, including, but not limited to, physical abuse, sexual abuse, psychological abuse, secondary abuse of witnessing domestic abuse within the home, neglect, family and/community violence, sex trafficking or commercial sexual abuse, loss of a loved one, and bullying. Childhood exposure to violence and other traumatic events is a risk factor for arrest in adolescence, and youth with prior trauma exposure and related symptoms experience worse legal outcomes compared to youth without such a history.[9] Trauma experienced during childhood may result in profound and long-lasting negative effects that extend well into adulthood. The direct effects may be psychological, behavioral, social, and even biological. These effects are associated with longer-term consequences, including risk for further victimization, delinquency

[5] Cole David, *Turning the Corner on Mass Incarceration?* 90 Ohio State Journal of Criminal Law 27 (2011 at p. 40.
[6] Gohara, Miriam, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing,* 41 American Journal of Criminal Law 41 (2013) at p. 48.
[7] Jackson, *supra* note 4 at 748.
[8] National Child Traumatic Stress Network, Justice Consortium Attorney Workgroup Subcommittee, *Trauma-informed Legal Advocacy: A Resource for Juvenile Defense Attorneys,* National Center for Child Traumatic Stress (2018) at 1.
[9] *Id.* at 1.

and adult criminality, substance abuse, mental illness, and poor school performance.[10] Moreover, exposure to multiple forms of trauma or repeated trauma has a compounding effect.[11]

The emergence of trauma theory over the past several decades has created a significant shift in the way we understand how trauma affects criminal behavior and has given rise to a trauma-informed approach to sentencing and mitigation.[12] There is nothing new about a trauma-informed approach. Over the last decade, this concept has been developed for use in many different programs, organizations, and systems by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services (SAMHSA). The American Bar Association and the National Juvenile Defender Center have called for integrating trauma knowledge into daily legal practice.[13]

To take a trauma-informed approach, defense counsel must be willing to learn: What is trauma? What causes trauma? What are trauma's effects? How can the case of an adolescent client be presented in a trauma-informed way? SAMHSA recommends following the "Four Rs" as a framework for a trauma-informed approach: Realize, Recognize, Respond, and Resist Re-traumatization.[14] This framework can readily be adapted to a trauma-informed approach to sentencing and mitigation. **Realize** the impact of trauma on your client. **Recognize** your client's signs and symptoms of trauma. **Respond** by integrating knowledge about trauma into all facets of your representation, especially mitigation. **Resist** re-traumatization of your client.[15] Using a trauma-informed approach, defense counsel gives context and explanation for their client's behavior. By explaining the events that gave rise to the traumatic effects, moral culpability may be diminished because the adolescent was less able to control their behavior than a person who was not affected in the same way.

Using a developmental approach also helps explain why the client is less culpable, and how their conduct is consistent with the signature characteristics of adolescence.

In Chapter 3, we reviewed how neurological and behavioral science informs us that adolescents are different than adults. With the scientific advances has come a recognition from both the U.S. Supreme Court and the New York Court of Appeals that adolescents are different from adults "and our jurisprudence should reflect that fact."[16]

The developmental approach is a way to take this realization that adolescence matters and put it into practice. First, the defense team can use a developmental approach to understand their client and their client's behavior. Second, they must construct a narrative that provides a perspective of their client's actions seen through a developmental lens. Lastly, a strategy must be

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[10] Wyrick, Phelan & Atkinson, Kadee, *Examining the Relationship Between Childhood Trauma and Involvement in the Justice System,* 283 NIJ Journal 1 (2021) at 1.
[11] National Child Traumatic Stress Network, *supra* note 8 at 4.
[12] Rosenthal, Alan, *The Complexity of Sentencing Under the DVSJA: A Challenge for Judges and Defense Counsel,* 32 Atticus 39 (2020) at 40.
[13] National Child Traumatic Stress Network, *supra* note 8 at 2.
[14] SAMHSA, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach* (2014) at 9-10.
[15] Rosenthal, Alan, *supra* note 12 at 44.
[16] *Roper v. Simmons,* 543 U.S. 552, 569 (2005); *People v. Rudolph,* 21 N.Y.3d 497, 506 (2013).

devised to convince a judge to look at the youth through this developmental lens and understand his or her criminal behavior, not as a product of depravity and pure free-will, but as the result of their stage of development, ecological factors, trauma, and learning disabilities, which result in immature thinking, impulsivity, sensation-seeking, recklessness, poor decision-making, failure to appreciate risks and consequences, short-sightedness, underdeveloped sense of responsibility, and heightened susceptibility to peer influence. Similarly, you want the judge to understand your client's strengths and amenability to rehabilitation, and that the signature qualities of adolescence are transient, that their identity or character is not yet formed, and that they have a tremendous capacity for change.

Most judicial decisions made in youth part are based on chronological age and offense. Chronological age, divorced from the stages of development, tells us little about what is behind the offense – what precipitated it and what it means for that individual. The criminal act, itself, also tells us little about the youth if the complex factors, individual and contextual, that contributed to the offense, are not considered. Making decisions about youthful offender status and sentencing based on chronological age and offense does little for public safety and even less to help change the behavior of our adolescent clients.

A developmental approach allows defense counsel to present the adolescent's behavior so that it can be understood as resulting from immaturity and the effects of trauma, learning disabilities, and environmental influences. In the complex ways that we now understand development, our clients' behaviors should no longer be simplistically viewed as "bad choices" for which they must be held responsible and summarily punished.

A developmental approach requires more than just an understanding of adolescence developmentally; it must also include a trauma-informed approach, an appreciation for learning disabilities, and an ecological approach regarding the contexts in which the adolescent is maturing.[17]

Immaturity undoubtedly affects an adolescent's decision-making and behavior. This impulsivity and risky behavior can be further compounded by past victimization and trauma, which makes it more difficult for teenagers to make decisions rationally. "[T]rauma typically slows down development in children and can interfere with all aspects of a youth's functioning. While other children are growing emotionally, the child coping with trauma is distracted from normal developmental tasks and is occupied with sadness and feeling powerless."[18] Likewise, learning disabilities affect decision-making and behavior, including processing problems, executive function difficulties, and attention deficits. If this is not taken into consideration, the assumption is often that the youth fully comprehended what he or she should do and was simply oppositional and made a bad decision.

Many factors contribute to a person's path in life and to the criminal offense for which the person is in court. It is up to the defense team to make sure that a court is informed about the

[17] Beyer, Marty, *A Developmental View of Youth in the Juvenile Justice System,* Chapter 1 in Juvenile Justice: Advancing Research, Policy, and Practice (Francine Sherman & Francine Jacobs, Eds.) (2011) at 5.
[18] *Id.* at 9.

numerous developmental and historical factors contributing to an offense. The defense team must provide the court with a "full picture" and all the "cumulative" factors.[19] This complex developmental story is essential to address the unmet needs of your client, and to achieve rehabilitative and reintegrative outcomes instead of purely punitive sentences.

In order to tell your client's story in a developmental context, the defense team needs to answer four basic questions to explain the adolescent's diminished culpability and heightened capacity to change:

- Who was the adolescent at the time of the offense?
- What were the adolescent's family relationships, school experiences, and peer connections?
- What were the effects of immaturity, trauma, and disabilities on the adolescent's behavior at the time of the offense?
- What should the court do to promote the successful reentry and reintegration of the adolescent, and help reduce the likelihood of reoffending?

Using a developmental approach, defense counsel can identify the strengths and needs behind their client's behavior and recommend behavior-changing interventions. This provides an opportunity for the judge in your case to use developmentally sound services to support your client's resilience, so he or she can outgrow unacceptable behaviors. The alternative may well be that the judge views your client as a "bad seed" who is likely to become an adult offender, uses a one-size-fits-all approach to deny a youthful offender adjudication, and for adolescents, whether eligible for youthful offender or not, imposes incarceration.

It's not what you look at that matters,
it's what you see.

Henry David Thoreau

The challenge for a defense team that is using a trauma-informed and developmental approach is to compel the judge not just to look at the case file that contains your client's chronological age and a description of the offense, but to *see* your client.

Examples of New York decisions that have followed the lead of the U.S. Supreme Court in *Roper v. Simmons*, and have adopted a developmental approach, are listed below:

People v. Rudolph, 21 N.Y.3d 497 (2012) (Concurring Opinion) (Youthful Offender)
People v. Francis, 30 N.Y.3d 737 (2018) (Youthful Offender)
People v. D.L., 62 Misc. 3d 900 (Fam. Ct. Monroe County 2018) (A.O. Removal)
People v. Robert C., 46 Misc. 3d 382 (Sup. Ct. Queens County 2014) (J.O. Removal)
People v. H.M., 63 Misc. 3d 1213(A) (Sup. Ct. Bronx County 2019)

[19] *People v. Smith,* 69 Misc. 3d 1030, 1038 (Co. Ct. Erie County 2020), analyzing the proper way for the court to consider mitigation in a Domestic Violence Survivors Justice Act resentencing case.

§ 7:3 A Developmental Framework for Representing Adolescents

A helpful chart (A Developmental Framework for Representing Adolescents) can be found in the Appendix. This chart was adapted from a chart developed by Dr. Marty Beyer and the National Juvenile Defender Center. The original of the chart can be viewed at: A-Developmental-Framework-for-Juvenile-Disposition-and-Post-Disposition-Advocacy.pdf (defendyouthrights.org).

§ 7:4 Other Mitigation and Considerations

In addition to the mitigating factors provided in the checklist in this guide at § 7:1, there are other mitigating factors and considerations that you may want to address in your Defendant's Pre-sentence Memorandum.

1. Purposes of Sentencing – Penal Law § 1.05 (6)

   An effective strategy used by some defense attorneys and mitigation specialists is to link the mitigation and the rationale for the proposed sentence and Y.O. to the statutory purposes of sentencing. See the discussion of the purposes of sentencing in this guide at § 8:1 and § 8:2.

   One might also effectively argue that '[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham v. Florida,* 560 U.S. 48, 71 (2010). This argument can be coupled with the principle enunciated in *Montgomery v. Louisiana,* 577 U.S. 190, 207 (2016) that "the distinctive attributes of youth diminish the penological justifications" for imprisonment.

2. Positive Sentencing Factors – Protective factors, resilience, and amenability to rehabilitation

   In addition to the adverse experiences that have impacted your client's life, there must also be an emphasis on the positive factors in the defendant's life, such as educational and employment opportunities, family support, good deeds and accomplishments, willingness to access support services, and amenability to rehabilitation, particularly since the prospects for rehabilitation are one of the *Cruickshank* factors. *See* § 4:39 for a discussion of resilience and protective and compensatory experiences.

3. Collateral Consequences

   As a result of a criminal conviction and a prison sentence, your client will face many lifetime collateral consequences, sometimes including SORA registration. You should address those collateral consequences, arguing that a Y.O. will help

your client avoid such barriers and obstacles, and thus increase the prospects that he or she will be able to live a law-abiding and productive life.

4. Race, Gender, LGBTQ, and an Intersectional Approach

In *People v. Z.H.,* 192 A.D.3d 55, 62 (4th Dept. 2020), the court issued an invitation to defense counsel to address discrimination faced by our clients as a mitigating factor that helps to explain their conduct and helps to inject fairness into the criminal process.

"For Black youth, adolescent mischief can be a death sentence, or at least an excuse for police harassment and abuse. Racism and discrimination distort normal adolescent behaviors into crime and deviance among Black youth and deny them the grace and tolerance society extends to their peers. Even when data shows that White youth are just as likely as Black youth to use drugs, carry a weapon, drink while driving, and have unprotected sex, Black youth are more likely to be stopped, arrested, and punished for whatever they do."[20]

Black teenagers have their adolescence interrupted by police encounters and are dehumanized in the court system instead of being nurtured and supported in their community. They experience policing as traumatic.[21] This trauma is experienced directly in their daily encounters with police and indirectly through social media. Black youth can't avoid the traumatic images of police violence in social media, as they are confronted with the images of Trayvon Martin, Eric Garner, Walter Scott, Sandra Bland, Philando Castro, Stephon Clark, George Floyd, and others. Researchers have described "viral videos" of police killings as one of the most traumatic events facing adolescents of color.[22]

Defense counsel's challenge to persuade a judge to take a developmental approach, and to treat their adolescent client in an age-appropriate manner, is even more daunting when that adolescent is Black. Taking a developmental approach is predicated on an initial recognition that the particular adolescent who stands before the court is, in fact, a child – and this recognition is more nuanced than it might seem.[23] This recognition is informed by race, among other factors. Research has shown that Black youth are often perceived as less innocent, more adult, and less in need of nurturing, protection, support, and comfort than their White counterparts.[24] This phenomenon, which effectively reduces or removes the consideration of childhood as a mitigating factor in Black youths' behavior is

[20] Henning, Kristin, The Rage of Innocence: How America Criminalizes Black Youth (2021) at 13.
[21] *Id.* at 204-265,
[22] Tynes, Brendesha, Willis, Henry, Sewart, Ashley & Hamilton, Matthew, *Race-Related Traumatic Events Online and Mental Health Among Adolescents of Color,* 65 Journal of Adolescent Health 371 (2019) at 372.
[23] Epstein, Rebecca and Blake, Jamilia and González, Thalia, *Girlhood Interrupted: The Erasure of Black Girls' Childhood,* Georgetown Law Center on Poverty and Inequality (2017) at 2. Available at Girlhood Interrupted: The Erasure of Black Girls' Childhood by Rebecca Epstein, Jamilia Blake, Thalia González :: SSRN.
[24] *Id.* at 1-2.

known as "adultification.[25] This adultification bias often overlaps with hyper-sexualization and criminalization of Black youth.[26] Often, an adolescent's signature traits will be treated as "mitigating qualities" unless the adolescent is Black. Adolescent characteristics skew differently when race is added to the mix.[27] Impulsivity morphs into dangerous unpredictability. Misbehavior in the company of peers becomes "gang activity." The inability to appreciate long-term risks devolves into intrinsic irresponsibility.[28]

Defense counsel must explain the traumatic events of discrimination and dehumanization that wrench hope for a successful future from their adolescent clients' lives to a not-so-sympathetic judge.

5. Apply Developmental and Neuroscientific Research to Explain Adolescent Behavior

See Chapter 3 of this guide – Adolescents Are Different.

Three cases that reference developmental behavior and brain development, particular to adolescents in the context of addressing youthful offender, are helpful: *People v. Rudolph,* 21 N.Y.3d 497 (2013) (Graffeo, J., concurring); *People v. Francis,* 30 N.Y.3d 737 (2018); and *People v. H.M.,* 63 Misc. 3d 1213(A) (Sup. Ct. Bronx County 2019).

6. A More Moderate Prison Sentence Promotes Successful and Productive Reentry and Reintegration

Consider the argument that, although the court may deem some incarceration appropriate, a lesser term of imprisonment should be imposed so that the client can be released at a time when he or she will be eligible for youth-related reentry services, which better serve their rehabilitative needs.

7. Incarceration Is Counterproductive

Incarceration is not benign. It has profound short- and long-term effects on your adolescent client. Incarcerating a young person is "more damaging than rehabilitative."[29] Recent psychology studies suggest that incarceration has negative long-term effects on youths' development, physical and mental well-

[25] *Id.* at 2.
[26] Durham, Anissa, *What You Should Know About Adultification Bias,* USC Center for Health Journalism (2023). Available at What You Should Know About Adultification Bias | USC Center for Health Journalism.
[27] Taylor-Thompson, *Treating All Kids as Kids,* Brennan Center for Justice (2021). Available at Treating All Kids as Kids | Brennan Center for Justice.
[28] *Id.*
[29] Lambie, Ian & Randell, Isabel, *The Impact of Incarceration on Juvenile Offenders,* 33 Clinical Psychology Review 448 (2013) at 456.

being, education, and employment.[30] By separating adolescents from their parents, incarceration impedes a youths' abilities to form coping skills.[31] Instead of reducing crime, the act of incarcerating adolescents may in fact facilitate increased crime by aggravating recidivism.[32] The negative effects are magnified as punishments become harsher.[33] Longer stays in juvenile facilities did not reduce reoffending; institutional placement even raised offending levels in those with the lowest level of offending.[34] The process of incarceration, and the prison environment itself, can be traumatic or re-traumatizing.[35]

For sociologists of crime, the life path through adulthood normalizes young men, so criminal behavior recedes with age. Adolescents are drawn into the society of adults by passing through a sequence of life course stages – completing school, finding a job, getting married, and starting a family. The integrative power of the life course offers a way out of crime. People coming out of prison have little access to such a path. Although the normal life course is integrative, incarceration is disintegrative, diverting adolescents from the life stages that mark a person's gradual inclusion in adult society.[36] As a result, incarceration is counterproductive. It undermines your client's chances at a fulfilling, productive, and law-abiding life.

Below are some articles that can be used to support the argument against incarceration.

LITERATURE

Aizer, Anna & Doyle, Jr., Joseph, *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges,* National Bureau of Economic Research (2013).

Barnett, Elizabeth, Dudovitz, Rebecca, Nelson, Bergen, Coker, Tumaini, Biely, Christopher, Li, Ning & Chung, Paul, *How Does Incarcerating Young People Affect Their Adult Health Outcomes?* 139 Pediatrics 1 (2017).

[30] Holman, Barry & Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities,* Justice Policy Institute (2006) at 2.
[31] Dmitrieva, Julia, Monahan, Kathryn, Cauffman, Elizabeth & Steinberg, Laurence, *Arrested Development: The Effects of Incarceration on the Development of Psychosocial Maturity,* 24 Development and Psychopathology 1073 (2012) at 1073.
[32] Holman, Barry & Ziedenberg, *supra* note 30 at 4.
[33] Monahan, Kathryn, Steinberg, Laurence & Piquero, Alex, *Juvenile Justice Policy and Practice: A Developmental Perspective,* 44 Crime and Justice: A Review of Research 577 (2015) at 597.
[34] Mulvey, Edward, *Highlights From Pathways to Resistance: A Longitudinal Study of Serious Adolescent Offenders,* Office of Juvenile Justice and Delinquency Prevention (2010) at 3.
[35]Jackson, *supra* note 4 at 749.
[36] Western, Bruce, Punishment and Inequality in America (2006) at 4-5.

Buckingham, Samantha, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing,* 46 Loyola of Los Angeles Law Review 801 (2013).

Cauffman, Elizabeth, Gillespie, Marie, Beardslee, Jordan, Davis, Frank, Henandez, Maria & Williams, Tamika, *Adolescent Contact, Lasting Impact? Lessons Learned From Two Longitudinal Studies Spanning 20 Years of Developmental Science Research With Justice-System-Involved Youths,* 24 Psychological Science in the Public Interest 133 (2023).

Dmitrieva, Julia, Monahan, Kathryn, Cauffman, Elizabeth & Steinberg, Laurence, *Arrested Development: The Effects of Incarceration on the Development of Psychosocial Maturity,* 24 Development and Psychopathology 1073 (2012).

Holman, Barry & Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities,* Justice Policy Institute (2006).

Lambie, Ian & Randell, Isabel, *The Impact of Incarceration on Juvenile Offenders,* 33 Clinical Psychology Review 448 (2013).

Mayer, Alexis, *They're Only Kids: The Dangers of Detention and Alternatives to Incarcerating Youth,* Criminal Law Brief (2021).

Mendel, Richard, *Why Youth Incarceration Fails: An Updated Review of the Evidence,* The Sentencing Project (2022).

Monahan, Kathryn, Steinberg, Laurence & Piquero, Alex, *Justice Policy and Practice: A Developmental Perspective,* 44 Crime and Justice: A Review of Research 577 (2015).

Mulvey, Edward, *Highlights From Pathways to Resistance: A Longitudinal Study of Serious Adolescent Offenders,* Office of Juvenile Justice and Delinquency Prevention (2010).

National Research Council, *Reforming Juvenile Justice: A Developmental Approach,* National Academies of Science (2013).

Pacific Juvenile Defenders Center, *The Dangers of Detention: Using Research to Prevent or Limit Juvenile Incarceration.*

Waldeman, Christopher, *The Impact of Incarceration on the Desistance Process Among Individuals Who Chronically Engage in Criminal Activity,* Chapter 3 in Desistance From Crime: Implications for Research, Policy and Practice, National Institute of Justice (2021).

8. Age

The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside. *Johnson v. Texas,* 509 U.S. 350, 368 (1993). "[T]he chronological age of a minor is itself a relevant mitigating factor of great weight." *Edings v. Oklahoma,* 455 U.S. 104, 116 (1982). It is for this reason that Penal Law § 60.10-a requires that, when a sentence is being imposed on adolescent offender, the court must "consider the age of the defendant in exercising its discretion at sentencing."

9. Poverty

Poverty experienced during childhood affects the lives of so many of our clients and is a mitigating factor that should not be overlooked. "Economic difficulties" and "poverty" were specifically articulated as mitigating factors by the RTA bill's sponsor during the legislative debate (Assembly Record p. 40), as recognized in *People v. S.J.,* 72 Misc. 3d 196, 199 (Fam. Ct. Erie County 2021). As Craig Haney explains, research confirms that trauma experienced earlier in someone's life – even when caused by structural forces like poverty and the effects of racial discrimination – can be deeply "criminogenic" (that is, persons exposed to them have a higher probability of subsequently engaging in crime). Explaining the connections between poverty, childhood trauma, maltreatment, and subsequent criminality places adolescent criminal behavior in a more meaningful and more mitigating context. *See* Haney, Craig, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation,* 36 Hofstra L. Rev. 835 (2008) at 864-875, for a compelling explanation of the myriad ways poverty can impact an individual's life and have criminogenic effects.

10. Prosecuting Adolescents as Adults Doesn't Work

The New York State Unified Court System recognizes this very fundamental principle underlying the RTA legislation: "Scientific research has shown that prosecuting and placing children in the adult criminal justice system does not work."[37]

Research on the impact of adult prosecution and punishment and on the use of punitive sanctions more generally suggests that these practices may actually increase recidivism and jeopardize the development and mental health of juveniles.[38]

[37] Available at https://nycourts.gov/CourtHelp/Criminal/RTA.shtml.
[38] Steinberg, Laurence, *Adolescent Development and Juvenile Justice,* 5 Annual Review of Clinical Psychology 459 (2009) at 478.

§ 7:5 Defendant's Pre-sentence Memorandum

The Defendant's Presentence-sentence Memorandum is the most powerful tool in your advocacy toolbox for plea bargaining, sentencing, and making the case for a youthful offender finding.

Defendants' Pre-sentence Memorandums are authorized by CPL § 390.40. The memorandums may contain anything that is material for the Probation Report and anything pertinent to the question of sentence, and written statements by others in support of the facts alleged in the memorandum may be annexed. CPL § 390.40 (1). In other words, they can include just about anything.

The purpose of the Defendant's Pre-sentence Memorandum is to put forth a well-organized and persuasive presentation that makes the case for a youthful offender adjudication and a fair and appropriate sentence. This is accomplished by humanizing your client and placing the criminal conduct in the broader context of his or her life and experiences.

CPL § 390.40 (1) authorizes defense counsel to submit this Memorandum at "any time prior to the pronouncement of sentence." As such, it can be submitted both to the court and the prosecutor prior to the entry of plea, as a tool for plea-bargaining. A persuasive Defendant's Pre-sentence Memorandum has proven to be an effective tool for the purpose of plea negotiations. Failure to engage in effective plea negotiations could give rise to an ineffective assistance of counsel claim.

The narrative is the most critical portion of the Defendant's Pre-sentence Memorandum. All of the mitigation that has been developed is woven into a structured and persuasive account. The narrative paints a holistic portrait of the defendant, rather than simply cataloging seemingly unrelated mitigating factors. In providing a multi-dimensional view of the defendant, the narrative provides the judge with a viable alternative to the prosecution's oversimplified portrayal of the defendant. For this reason, Craig Haney has termed this the "mitigation counter-narrative."[39] The mitigation counter-narrative dispatches the prosecution narrative, which is characterized by being:

- a snapshot in time;
- a decontextualized view of the crime and the defendant;
- an exclusion of background and potentially mitigating information; and
- a simplistic morality play of good versus evil.

The mitigation counter-narrative is a nuanced, contextualized, humanized, and comprehensive view of the defendant and the circumstances of his life and the crime. At its best, the mitigation counter-narrative reveals the "unknown story" of the defendant through the

[39] Haney, Craig, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation,* 36 Hofstra Law Review 835 (2008) at p. 843.

thoughtful reconstruction of the events, circumstances, and conditions that colored his life.[40] In doing so, the narrative compels its audience to measure the defendant's life in totality, rather than by the single act for which he is charged or was convicted.[41] The judge can only assess the true legal and moral culpability of the defendant if defense counsel places the crime in the context of the defendant's life.

The Defendant's Pre-sentence Memorandum is important for several reasons. In fact, it may be considered ineffective assistance of counsel *not* to present a Defendant's Pre-sentence Memorandum, where the sentence has not been agreed upon as the result of a plea-bargain, or in the case of an adolescent who is eligible for youthful offender adjudication.

First, the memorandum provides defense counsel with the opportunity to present the case in a well-organized and thoughtful manner that captures the attention of the reader. This allows the judge and the prosecutor to give careful thought and consideration to the defense proposal. It is far more effective than an oral statement at sentencing, presented at a time when the judge may have already made up his or her mind. The Defendant's Pre-sentence Memorandum is your way of being there with the judge as he or she is making a tentative decision, and allows you to exert influence at that critical time.

Second, it makes a record that preserves the issue of Y.O. for appellate purposes. By making a full and complete record, the appellate court can address the issue of Y.O. and order an adjudication, without remanding the case to the sentencing court, where the sentencing judge will usually try to find a way to buttress the denial of Y.O. In both *People v. Amir W.,* 107 A.D.3d 1639 (4th Dept. 2013) and *People v. Thomas R.O.,* 136 A.D.3d 1400 (4th Dept. 2016), the Appellate Division was able to review the Y.O. factors established in the record, reverse the denial of Y.O., and grant Y.O. because the Defendant's Pre-sentence Memorandum was part of the record. Without the Defendant's Pre-sentence Memorandum, the Appellate Division would not have been able to meaningfully review the denial of Y.O. by the trial court. It is for this reason that some institutional defender offices have adopted a rule that a Defendant's Pre-sentence Memorandum must be submitted in every case where Y.O. has not been agreed upon prior to the time of sentencing.

Third, the Defendant's Pre-sentence Memorandum also makes a record that can form the basis for an appellate argument that the sentence was unduly harsh or severe. Note that there are times when appellate counsel may raise both youthful offender and unduly harsh and severe. A robust mitigation record below will help with both. The Appellate Division may affirm on the denial of youthful offender while at the same time modifying the sentence, either by reducing the term of the sentence as in *People v. Shea'honnie D.,* 217 A.D.3d 1419 (4th Dept. 2023), or by modifying the sentences from consecutive to concurrent as in *People v. Williams,* 219 A.D.3d 409 (1st Dept. 2023).

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[40] Mundy, Hugh, *It's Not Just for Death Cases Anymore: How Capital Mitigation Investigation Can Enhance Experiential Learning and Improve Advocacy in Law School Non-Capital Criminal Defense Clincs,* 50 California Western Law Review 31 (2013) at p. 49.
[41] *Id.* at 49.

Fourth, whenever a person is sentenced to a term of imprisonment, a copy of the Defendant's Pre-sentence Memorandum is delivered to the correctional facility when the defendant is transported. CPL § 390.60. The document has a life and an effect that endures long after sentencing. It is used by DOCCS for programming decisions, parole board release decisions if the sentence was indeterminate, and civil-commitment decisions if the conviction was for a sex offense.

One suggested format for the Defendant's Pre-sentence Memorandum is as follows:

I. Psycho-social History
II. Narrative (Tell the client's story.)
III. Y.O. Eligibility
    - Age and prior criminal history
    - Special mitigation if the conviction is for an armed felony, rape 1, a crime formerly defined in Penal Law § 130.50, or aggravated sexual abuse as required by CPL § 720.10 (3)
IV. Rationale for Y.O.
    - *Cruickshank* factors (*See* § 5:15)
    - Mitigation and other considerations
    - Adolescents are different from adults (Evolving understanding of adolescent behavior through developmental research and neuroscience.)
    - Evolving Jurisprudence of Adolescents (Why they are less culpable.)
V. Rationale for Sentence Recommendation
VI. Recommendations

PRACTICE TIPS

Begin work on your Defendant's Pre-sentence Memorandum early in the case. Whether you are going to write it yourself or are going to engage a mitigation specialist, it should be ready to use for plea-bargaining purposes.

Generally, you will want to file the memorandum with the court sufficiently in advance of sentencing to allow the judge time to carefully review it. If the judge reads your memorandum prior to reading the PSR and it helps him or her develop a sentence inclination, all the better. Aim to submit your memorandum a week in advance of sentencing.

There are times when a Defendant's Pre-sentence Memorandum should not be filed, e.g., if the judge has already committed to granting Y.O. But one reason that should *not* drive your decision is the conclusion that "it won't do any good." If there are good arguments to be made, you should make them. If the judge wants to reject the arguments, and they often do, that's up to the judge. Your job is to persuade – if not the trial court, then the Appellate Division. You cannot persuade if you do not try. And more importantly, you will have preserved the issue of

a denial of Y.O. or a harsh or excessive sentence for appeal. Mitigation is not optional; it is critical part of zealous advocacy.

§ 7:6 The Role of the Mitigation Specialist

As you have probably noted in reading this chapter, a tremendous amount of time, skill, and expertise goes into developing and writing a Defendant's Pre-sentence Memorandum. You might conclude that you have neither the time nor the skill-set necessary to develop this part of the case. Consider using a mitigation specialist.

Mitigation specialists are professionals who have clinical and information-gathering skills and training that most lawyers simply do not have and can be indispensable members of the defense team. They have the expertise to elicit, by trauma-informed methods, sensitive, deeply personal information that the client might never disclose without the mitigation specialist's rapport, insight, and expertise. They have the clinical skills to recognize mental health issues, developmental disorders, intellectual disabilities, addiction, and history of neglect, abuse, and domestic violence. Mitigation specialists can also help the defense team understand how these conditions might have affected the client's development and behavior, and to identify the most appropriate experts to examine and assess the client and testify on his or her behalf.

Bringing a mitigation specialist onto the defense team at an early stage helps the team prepare an effective plea-bargaining strategy, develop a compelling narrative, and gain the trust and confidence of the client. A mitigation specialist can even uncover evidence that may serve as a defense to a charge, lead to evidence that undercuts an involuntary confession, or, in some other way, helps defend the case. Early inclusion of a mitigation specialist as a member of the defense team also ensures that mitigation will be integrated into the case throughout the process, rather than hurriedly thrown together by defense counsel while still in shock from a guilty verdict or scrambling after a guilty plea is entered.

The mitigation specialist can compile a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyze the significance of the impact of the information gathered on the development of the defendant, including on personality and behavior; find and develop mitigating themes in the client's life history; identify the need for expert assistance; and work with the defense team, including the investigator and other experts to develop a comprehensive and cohesive case.

Often, clients require multiple meetings with the defense team to develop rapport and trust and, through those multiple meetings, mitigation evidence will emerge from the complex and multi-layered analysis of the client's life. Collateral interviews with people who know the client well are critical to building the mitigation record and can be time consuming. The mitigation specialist may be better equipped with both the skills and time to take on this critical role.

A mitigation specialist can help the defense team with these critical defense functions:

1. Seek out and identify mitigation.
2. Develop a mitigation counter-narrative.
3. Develop a plea-bargaining strategy.
4. Develop a sentencing theory (recommendation and rationale).
5. Develop a sentencing strategy.
6. Prepare a Defendant's Pre-sentence Memorandum.
7. Use the mitigation counter-narrative to tell your client's story at every stage and to implement the plea-bargaining and sentencing strategy.

You should include a mitigation specialist as part of the defense team. There is an enormous amount of work to properly prepare for plea negotiations and sentencing, and it is better done as a team. You will find that using a mitigation specialist will improve case outcomes.

§ 7:7 Carefully Review, and Where Appropriate, Challenge the PSR

There are a few steps defense counsel can take to address problems encountered with the content of probation reports. First, it is essential that you prepare your client for the probation interview. Do not assume that your client will know what to expect, and do not assume that that the answers they give during the probation interview will not cause problems with the sentencing judge. Issues relating to acceptance of responsibility, remorse, empathy, and acknowledgement of the operative facts can cause great damage when your client is not prepared for the probation interview. Time spent preparing your client for the probation interview is time well-spent.

Particularly in the case of an adolescent client, it is important that you attend the probation interview. Their adolescence alone is a good reason to be present when they are questioned by the probation officer.

You should be aware that there are a handful of appellate cases holding that a person does not have a Sixth Amendment right to counsel during the probation interview. *See People v. Cortijo,* 291 A.D.2d 352 (1st Dept. 2002); *People v. McNamara,* 103 A.D.3d 1273 (4th Dept. 2013); *People v. Brinkley,* 174 A.D.3d 1159 (3d Dept. 2019). But your client's lack of constitutional right to counsel at the interview does *not* mean that you cannot be present. With a little finesse, most probation officers will accommodate such a request.

The PSR is undoubtedly the single most troublesome source of information and misinformation when it comes to sentencing, youthful offender adjudication, prison programming, parole release, civil commitment, community supervision, and SORA. In addition to being the most important (and potentially harmful) document created in the criminal legal system, the PSR is, unfortunately, also the least challenged. Defense counsel must be vigilant to prevent misleading, unreliable, and conclusory statements from going unchallenged when they are identified in the PSR. This is especially true for Y.O. cases. Do not allow a probation officer's pseudo-clinical diagnosis to go unchallenged.

In *People v. Diaz,* 34 N.Y.3d 1179 (2020), the court made the importance of reviewing the PSR and challenging its accuracy very clear. "Defendants have a right to review the [probation] report prior to sentencing (*see* CPL 390.50[2][a]) and may challenge the accuracy of

any facts contained therein at that time (*see* CPL 400.100). Indeed, defendants have a strong incentive to timely dispute and seek correction of inaccurate statements because they may impact the court's sentencing determination." *Id.* at 1181. Not only could the PSR impact sentencing and youthful offender adjudication, it might also impact the SORA risk level, DOCCS's programming, and parole-release decisions. "Unless altered through this process [which can only be done at the time of sentencing], factual statements in PSI reports can supply an evidentiary basis for the imposition of points [in SORA risk-level assessments], as is clear from our precedent." *Id.*

Below is a checklist of steps to take to challenge improper information in the PSR:

- ☐ **Obtain a copy of the PSR in advance of sentencing.**
  This is provided for in CPL § 390.50 (2)(a).

- ☐ **Carefully review the PSR for improper information.**
  Enlist the defendant to assist you with this review. There are times when the defendant will pick up errors that defense counsel misses.

- ☐ **Request an adjournment in order to address problems identified in the PSR.**
  Several cases have found it reversible error for the trial court to refuse an adjournment for this purpose. *See People v. Martinez,* 185 A.D.2d 191 (1st Dept. 1992); *People v. Ranieri,* 43 A.D.2d 1012 (4th Dept. 1974).

- ☐ **File a motion to redact the erroneous information from the PSR and have it rewritten.**
  The procedural vehicles that can be used to challenge errors in a PSR are found in CPL § 380.30 (4) and CPL § 400.10 (1) and (3), which provide for either a presentence conference and/or a hearing. *People v. James,* 114 A.D.3d 1312 (4th Dept. 2014) recognized that the court could conduct a hearing to resolve discrepancies in the PSR. Such a summary hearing was held in *People v. Irwin,* 19 Misc. 3d 1118(A) (Co. Ct. Onondaga County 2008) which lasted almost a full day, with both the probation officer and a clinical psychologist being called to testify at the hearing. *Irwin* was a case in which defense counsel was successful in causing the probation officer's pseudo-clinical opinion to be redacted in order to protect against harm to the defendant in future SORA and SOMTA proceedings.

- ☐ **The motion must be filed before sentencing.**
  Erroneous information in the PSR must be corrected prior to sentencing and cannot be corrected afterwards. *Hughes v. Probation,* 281 A.D.2d 229 (1st Dept. 2001). Objection to the PSR must be made prior to or at the time of sentencing, or the objection is waived. *Wisniewski v. Michalski,* 114 A.D.3d 1188 (4th Dept. 2014).

- ☐ **Request a hearing to resolve factual discrepancies.**
  CPL § 400.10 (1) and (3) provide for a hearing to resolve factual discrepancies between the PSR and the Defendant's Pre-sentence Memorandum. If defense counsel does not object to the disputed statement in the PSR or move to strike it, the challenge to the sentencing based upon the court's failure to resolve the

discrepancies is not preserved for the purpose of appeal. *People v. Chambers,* 176 A.D.3d 1600 (4th Dept. 2019).

- □ **Make sure the erroneous information is not just corrected but is also redacted.**
  In *People v. Freeman,* 67 A.D.3d 1202 (3d Dept. 2009), the trial court corrected the errors contained in the PSR on the record. The Appellate Division held that was not sufficient. "Failing to redact erroneous information from the PSI created an unjustifiable risk of future adverse effects to defendant in other contexts, including appearances before the Board of Parole or other agencies." *People v. Freeman,* 67 A.D.3d at 1203.

- □ **Object if the probation officer attaches a RAI to the PSR.**
  The role of the probation officer has been described as providing a "neutral rendition of facts" and "not an adversarial one." *People v. Cortijo,* 179 Misc. 2d 178 (Sup. Ct. N.Y. Co. 1998), *aff'd* 291 A.D.2d 352 (1st Dept. 2002). Perhaps that has not been your experience. Some probation officers unmistakably have a prosecutorial and adversarial bent. To this end, some have been known to attach an unfavorable Risk Assessment Instrument (RAI) that they also prepared for the PSR. This is a not-so-thinly veiled attempt to convince the judge to impose a harsher sentence because of the defendant's purported high risk to reoffend. As the court in *People v. Freeman,* 67 A.D.3d 1202 (3d Dept. 2009) noted, this is entirely improper, and the RAI should be redacted. Likewise, objection should be made if the PSR makes reference to any of the risk factors from the RAI.

Cases of Interest – Correcting and Redacting the PSR

Where the PSR contains statements that are erroneous, inappropriate, inaccurate, unreliable, or amount to unqualified conclusions or unsubstantiated opinions, those statements should be redacted from the PSR. *See*:

- *People v. Cherry,* 166 A.D.3d 1220 (3d Dept. 2018);
- *People v. Washington,* 170 A.D.3d 1608 (4th Dept. 2019);
- *People v. James,* 114 A.D.3d 1312 (4th Dept. 2014);
- *People v. Freeman,* 67 A.D.3d 1202 (3d Dept. 2009);
- *People v. Irwin,* 19 Misc. 3d 1118(A) (Co. Ct. Onondaga Co. 2008);
- *People v. Boice,* 6 Misc. 3d 1014(A) (Co. Ct. Chemung Co. 2004); and
- *People v. Rampersaud,* 144 Misc. 2d 126 (Sup. Ct. Bronx Co. 1989).

PRACTICE TIPS

Challenging the PSR is an important, yet often neglected, area of criminal defense practice for all categories of cases, not just sex offense cases. A full discussion requires far more space than this guide permits. For a more detailed discussion of this issue, see Sentencing Tips for New York Lawyers: Obtain a Copy of the Pre-sentence Report and Request Corrections, available at

https://www.ocbaacp.org/wp-content/uploads/2021/11/Sentencing-Tips-Obtain-a-Copy-of-PSR-and-Correct.pdf.

Also available are a sample motion challenging portions of a PSR and a supporting Memorandum of Law.
https://www.ocbaacp.org/wp-content/uploads/2021/11/Motion-to-Correct-PSR.pdf

https://www.ocbaacp.org/wp-content/uploads/2021/11/Memo-of-Law-Correct-PSR.pdf

CHAPTER 8

SENTENCING AND PLACEMENT

CHAPTER 8 SECTIONS

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SENTENCING AND PLACEMENT

§ 8:1 The Purposes of Sentencing

In order to make an effective argument to justify your proposed sentence, it is helpful to be clear on the purposes of sentencing.

In 1956, the New York Court of Appeals declared the three penological purposes of sentencing to be deterrence, incapacitation, and rehabilitation. *People v. Oliver,* 1 N.Y.2d 152, 160 (1956). The court specifically rejected retribution, declaring that "[t]here is no place in the scheme of punishment for its own sake, the product simply of vengeance or retribution." *Id.*

In 1965, the modern, statutory purposes of sentencing took form. The revision of the entire Penal Law, including the general purposes statute, was largely the product of the New York Temporary Commission on the Revision of the Penal Law and Criminal Code ("the Commission"). The "Revised Penal Law" had an effective date of September 1, 1967.[1] The Commission was asked to "reappraise, in light of current knowledge and thinking, existing substantive provisions relating to sentencing, the imposition of penalties, and the theory of punishment relating to crime."[2]

The "old" or former Penal Law was the Penal Law of 1909, and § 20 pertained to sentencing. In the "new" Penal Law, enacted in 1965, Penal Law § 1.05, contained the general sentencing purposes. As adopted by the Commission the purposes of penal sanctions, according to Penal Law § 1.05 (5), are as follows:

> The general purposes of the provisions of this chapter are:
> …
> 5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection.

The Commission rejected retribution as a purpose of penal sanctions, and adopted the goals of deterrence, rehabilitation, and incapacitation.[3] According to the Commission, their reappraisal was meant to introduce "changes of a fundamental nature . . . in order to bring [the Penal Law] into step with modern sociological, psychological and penological thinking."[4]

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[1] Allen, Ronald, *Retribution in a Modern Penal Law: The Principle of Aggravated Harm,* 25 Buffalo Law Review 1 (1975) at 1.
[2] N.Y. Session Laws 1961, ch. 346, *as amended by* N.Y. Session Laws 1962, ch. 548, § 2(d).
[3] Allen, *supra* note at 3.
[4] *Memorandum of the Commission of Revision of the Penal Law and Criminal Code on the Penal Law* at xxxii.

In 1974, the Court of Appeals again acknowledged the three purposes of a penal sanction to be deterrence, rehabilitation, and incapacitation (social protection). *People v. Selikoff,* 35 N.Y.2d 227, 238 (1974).

Despite the pronouncements of the high court, the dark age of retributive punishment was beginning to take a philosophical hold. In that same year, sociologist Robert Martinson would unleash his influential theory that nothing works in corrections – not programs and not rehabilitation. Martinson published his piece in the neoconservative journal The Public Interest.[5] Criminology researchers have credited Martinson's theory as providing the foundation for one of the most significant shifts in modern American corrections. It moved American jurisprudence away from the utilitarian notion of rehabilitation, and into an era of Kantian retributivism. It mattered little that just five years later, Martinson, the man who had started it all, had come almost full circle.[6] He publicly repudiated most of his prior theory,[7] but the damage had been done in the minds of the public, jurists, and elected officials.

Retribution seems to have first been legitimized by a judicial sleight of hand, despite the lack of legislative authority, in *People v. Notey,* 72 A.D.2d 279, 282 (2d Dept. 1980), which relied on a law review article about the righteousness of retribution – not a statute, nor Court of Appeals precedent.[8] Just a month later, in *People v. McConnell,* 49 N.Y.2d 340, 346 (1980), the New York Court of Appeals injected retribution into the calculus, concluding that sentencing judges must consider incapacitation, deterrent, rehabilitative, and retributive aspects. The decision cited no legislative authority at all, and failed to mention the existing statute, Penal Law § 1.05 (5), which had established the three purposes of sentencing. Oddly, just a year later, in *People v. Farrar,* 52 N.Y.2d 302, 305-06 (1981), the Court of Appeals again addressed the purposes of a penal sanction – incapacitation, rehabilitation, and deterrence – this time citing to Penal Law § 1.05 (5), while making no mention of retribution, but also citing to *People v. McConnell.* Since 1980, New York courts have gone back and forth, at times referencing the three statutory purposes of sentencing in Penal Law § 1.05(5), and at other times adding in a fourth purpose – retribution.

In 1982, Penal Law § 1.05 was amended, moving the purposes section previously contained in subdivision 5 to subdivision 6, but continuing to exclude retribution. In 2006, there was a more significant amendment to the Penal Law, which altered and redirected the purposes of sentencing. Effective June 7, 2006, Penal Law § 1.05 (6) was amended to include a fourth statutory purpose of sentencing – "the promotion of their successful and productive reentry and reintegration into society." This was added to the three existing statutory purposes of sentencing – deterrence, incapacitation, and rehabilitation. Retribution was again excluded.

Unless and until some courageous defense attorney argues to the Court of Appeals that the court got it right in *People v. Oliver* when it declared that there is no place for retribution in

[5] Martinson, Robert, *What Works? – Questions and Answers About Prison Reform,* 35 The Public Interest 22 (1979).
[6] Sarre, Rick, *Beyond 'What Works?': A 25 Year Jubilee Retrospective of Robert Martinson's Famous Article,* 34 The Australian and New Zealand Journal of Criminology 38 (2001) at 41.
[7] Martinson, *supra* note 5.
[8] Pugsley, Robert, *Retributivism: A Just Basis for Criminal Sentences,* 7 Hofstra Law Review 379 (1975).

our jurisprudence, and that there is neither a statutory nor philosophical basis for including retribution as a purpose of sentencing, we will assume for our purposes that New York has five purposes for sentencing that a judge must consider before imposing a sentence.[9]

§ 8:2 Making the Case for a Sentence Based on the Penological Purposes

An effective argument to support your proposed sentence can be constructed using a developmental approach to the penological purposes of sentencing. As explained in Chapter 3, the U.S. Supreme Court set the groundwork for this argument, starting in *Roper v. Simmons,* 543 U.S. 551 (2005) and continuing to *Montgomery v. Louisiana,* 577 U.S. 190 (2016).

In *Miller v. Alabama,* 567 U.S. 460, 471 (2012), the Supreme Court explained that *Roper* and *Graham* "establish that children are constitutionally different from adults for purposes of sentencing." This difference results from the fact that adolescents have "diminished culpability and heightened capacity to change." *Id.* at 479. The Supreme Court looked to "developments in psychology and brain science" that "continue to show fundamental differences between juvenile and adult minds." *Graham v. Florida,* 560 U.S. 48, 68 (2010). This research led the court to identify three transient signature qualities of youth that result in their diminished culpability and heightened capacity to change: first, "[a] lack of maturity and underdeveloped sense of responsibility," often resulting in "impetuous and ill-considered actions and decisions" and "reckless behavior" (*Roper*, 543 U.S. at 569); second, adolescents' quality of being "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" than adults (*Id.* at 569); and third, that "the character of a juvenile is not as well formed as that of an adult" and "their personality traits are more transitory, less fixed" (*Id.* at 570).

In each of this quartet of cases, the Supreme Court looked to the penological purposes of sentencing as applied to adolescents. "Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications . . . apply to them with lesser force than adults." *Id.* at 571. [T]he penological justifications . . . collapse in light of the distinctive attributes of youth." *Montgomery,* 567 U.S. at 208.

The Supreme Court concluded in *Graham* that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." 560 U.S. at 71. This analysis assists us in crafting the argument that penological theory is inadequate to justify a sentence of incarceration in the case of our particular client.

Retribution

"The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender . . . [a]nd as *Roper* observed, whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." *Graham*, 560 U.S. at 71.

[9] *See People v. Burgh,* 89 A.D.2d 672 (3d Dept. 1982) where the court vacated the sentence because the sentencing judge had not considered all of the sentencing purposes by entirely ignoring rehabilitation.

Retribution is not proportional if a substantial period of incarceration "is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. When determining an appropriate sentence, a court must keep in mind that "[a] juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult." *Graham*, 560 U.S. at 68.

Deterrence

The Supreme Court found deterrence essentially inapplicable to adolescence. "As for deterrence it is unclear whether [any penalty, even] the death penalty has a significant or even measurable deterrent effect on juveniles . . . however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults [impulsiveness, ill-considered decisions, recklessness, inability to consider consequences] suggest as well that juveniles will be less susceptible to deterrence." *Roper*, 543 U.S. at 571. "The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Id.* at 572. Of course, if the death penalty was found not to have a deterrent effect, the possibility of punishment by incarceration would have an equally *de minimis* effect. As the court noted in *Graham,* "[b]ecause juveniles lack of maturity and underdeveloped sense of responsibility…often result in impetuous and ill-considered actions and decisions they are less likely to take a possible punishment into consideration." 560 U.S. at 72.

Incapacitation

Unlike an adult, who may have become a hardened criminal such that incapacitation for an extended time might be appropriate, adolescents are developing and changing behaviorally, and are more amendable to reform, thus the case for their incapacitation is less strong. As the court noted in *Roper, "*[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." 543 U.S. at 570.

The sentencing purpose of incapacitation is predicated on the concern about "recidivism" and a "serious risk to public safety." *Graham*, 560 U.S. at 72. To justify a period of incarceration requires the judge to assume that the adolescent is incorrigible and will be a danger to public safety for that extended period of time. As the Supreme Court pointed out in *Graham,* that requires the sentencer to make a judgment about the juvenile as a hardened criminal. "The characteristics of juveniles make that judgment questionable. It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 72-73. Such a determination of long-term incorrigibility would, in most cases, be misplaced, because "incorrigibility is inconsistent with youth." *Miller*, 567 U.S. at 473. Since youth's "signature qualities are all transient," it would be misguided to assume that the client's behavior would not change sooner than later. *Id.* at 476. The truth of this – that the behavior *does* generally change sooner than later – is borne out by desistance and the age-time curve for adolescent criminal behavior discussed at § 3:6.

"For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small portion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Roper*, 543 U.S. at 570. As the Supreme Court instructed, "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." *Graham*, 560 U.S. at 73.

Rehabilitation

If public safety is not a significant concern, and because retribution and deterrence have limited applicability to the sentence of an adolescent, then the remaining penalogical purpose, rehabilitation, is best achieved in the community with supervision and supportive services instead of in confinement, where the adolescent is isolated from family, counseling, a community network, employment, and school.

Although adolescents are more amenable to and more likely to reform than adults, incarceration can be counterproductive to rehabilitation. Incarceration is not benign. It will have profound short- and long-term effects on your adolescent client. Incarcerating a young person is "more damaging than rehabilitative."[10] Recent psychology studies suggest that incarceration has negative long-term effects on youths' development, physical and mental well-being, education, and employment.[11] By separating adolescents from their parents, incarceration impedes a youths' abilities to form coping skills.[12] Instead of reducing crime, the act of incarcerating adolescents may in fact facilitate increased crime by aggravating recidivism.[13] The negative effects are magnified as punishments become harsher.[14] Longer stays in juvenile facilities do not reduce reoffending; institutional placement raises offending levels even for those with the lowest level of offending.[15] The process of incarceration, and the prison environment itself, can be traumatic or re-traumatizing.[16]

For sociologists of crime, the life-path through adulthood normalizes young men and women, so criminal behavior recedes with age. Adolescents are drawn into the society of adults by passing through a sequence of life-course stages – completing school, finding a job, getting married, and starting a family. The integrative power of the life course offers a way out of crime.

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[10] Lambie, Ian & Randell, Isabel, *The Impact of Incarceration on Juvenile Offenders,* 33 Clinical Psychology Review 448 (2013) at 456.
[11] Holman, Barry & Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities,* Justice Policy Institute (2006) at 2.
[12] Dmitrieva, Julia, Monahan, Kathryn, Cauffman, Elizabeth & Steinberg, Laurence, *Arrested Development: The Effects of Incarceration on the Development of Psychosocial Maturity,* 24 Development and Psychopathology 1073 (2012) at 1073.
[13] Holman, *supra* note 11 at 4.
[14] Monahan, Kathryn, Steinberg, Laurence & Piquero, Alex, *Juvenile Justice Policy and Practice: A Developmental Perspective,* 44 Crime and Justice: A Review of Research 577 (2015) at 597.
[15] Mulvey, Edward, *Highlights From Pathways to Resistance: A Longitudinal Study of Serious Adolescent Offenders,* Office of Juvenile Justice and Delinquency Prevention (2010) at 3.
[16]Jackson, Victoria, Sullivan, Mawren, Daveena, Freiberg, Arie, Kuldarni, Jayashri & Darjee, Rajan, *Trauma-informed Sentencing of Serious Violent Offenders: An Exploration of Judicial Dispositions with a Gendered Perspective,*28 Psychiatry, Psychology and Law 748 (2021) at 749.

People coming out of prison have little access to such a path. Although the normal life course is integrative, incarceration is disintegrative, diverting adolescents from the life stages that mark a person's gradual inclusion in adult society.[17] Incarceration is, therefore, counterproductive. It undermines your client's chances at a fulfilling, productive, and law-abiding life.

Promote Their Successful and Productive Reentry and Reintegration into Society

In order to advance the penological purpose of promoting successful and productive reentry and reintegration, the most appropriate sentence is community supervision. If the goal is to promote successful and productive reentry and reintegration, it will be undermined by a sentence of incarceration. As sociologist Bruce Western explains, incarceration is disintegrative, diverting adolescents from the life stages that mark a person's gradual inclusion in adult society, thus delaying or undermining the reintegrative process.[18]

§ 8:3 Post-Indictment Plea Restrictions

Once a case is indicted, certain plea-bargaining restrictions are imposed by CPL § 220.10. The restrictions are different for adults, young people prosecuted as adolescent offenders, and juvenile offenders. Those restrictions are discussed below, with a focus on people prosecuted as adolescent and juvenile offenders.

Adults – 18 years old and older

All of the plea restrictions contained in CPL § 220.10 are applicable to adults except for CPL § 220.10 (5)(g), which is applicable only to juvenile offenders, and CPL § 220.10 (5)(g-1), which is applicable only to adolescent offenders.

Adolescent Offenders

The most onerous plea restrictions applicable to adults, which are contained in CPL § 220.10 (5)(a), (b), (c), and (d), do not apply to adolescent offenders pursuant to CPL § 220.10 (5)(g-1).

Where the plea is to a misdemeanor, the plea must be deemed replaced by an order of fact-finding in a juvenile delinquency proceeding, pursuant to FCA § 346.1, and the action must be removed to family court in accordance with CPL article 725. *See* CPL § 220.10 (5)(g-1).

Where the plea is to a felony, the court may remove the action to family court pursuant to CPL § 722.23 and CPL article 725. *See* CPL § 220.10 (5)(g-1).

[17] Western, Bruce, Punishment and Inequality in America (2006) at 4-5.
[18] *Id.* at 4-5.

Juvenile Offenders

Similar to the adolescent offender, the most onerous plea restrictions contained in CPL § 220.10 (5)(a), (b), (c), and (d) do not apply to juvenile offenders pursuant to CPL § 220.10 (5)(g).

Any plea entered pursuant to CPL § 220.10 (3) or (4) is restricted by CPL § 220.10 (5)(g) as follows:

(i) If the indictment charges a 14- or 15-year-old with the crime of murder 2, any plea of guilty must be to a crime for which the defendant is criminally responsible;
(ii) If the indictment does not charge murder 2, then any plea of guilty must be to a crime for which the defendant is criminally responsible, unless a plea of guilty is accepted pursuant to (iii) below – upon prosecutor's recommendation for removal of the action to family court;
(iii) If the indictment does not charge murder 2, the prosecutor may recommend removal of the action to family court. The prosecutor must meet the statutory requirements for removal under the statute. If the court is satisfied that the prosecutor has established the specific factors required and that the interests of justice would best be served by removal to family court, a plea of guilty to a crime or act for which the defendant is not criminally responsible may be entered.

Note, however, that there is an exception for a 13-year-old charged with murder 2, providing that the plea down can only be to a designated felony.

§ 8:4 Mitigation

See Chapter 7 (Mitigation), and especially § 7:4 (Defendant's Pre-sentence Memorandum) and § 7:5 (The Role of the Mitigation Specialist).

§ 8:5 Juvenile Offender Sentence Chart

JUVENILE OFFENDER SENTENCE CHART

Penal Law §§ 60.10 and 70.05

Mandatory Indeterminate Sentence[19]

Age	Class Felony	Minimum	Maximum	YO Eligible
	Class A Felony			
	Murder 2			
14,15	Intentional murder or such conduct as a sexually motivated felony	7 ½ - 15	Life	No
13		5 - 9	Life	No
14,15	Depraved indifference murder or such conduct as a sexually motivated felony	7 ½ - 15	Life	No
13		5 - 9	Life	No
14.15	Felony murder if underlying felony is a JO Offense	5 - 9	Life	No
14,15	Arson 1, Kidnapping 1	4-6	12 - 15	No
14,15	**Class B Felony**	1/3 of maximum	3 - 10	Yes*
14,15	**Class C Felony**	1/3 of maximum	3-7	Yes*
14,15	**Class D Felony**	1/3 of maximum	3-4	Yes*

[19] Mandatory indeterminate sentence except if adjudicated a youthful offender.

*Not eligible for youthful offender if 1) has a prior felony conviction and sentence, or 2) has a prior youthful offender adjudication for a felony, or 3) previously adjudicated a juvenile delinquent for a designated felony, or 4) if convicted of an armed felony, rape 1, or aggravated sexual assault, unless the court finds special mitigating circumstances provided in CPL § 720.10 (3), i.e., either mitigating circumstances that bear directly upon the manner in which the crime was committed, or where the defendant was not the sole participant in the crime and the defendant's participation in the crime was relatively minor.

§ 8:6 Adolescent Offender Sentence

● A person convicted as an adolescent offender is subject to the same sentencing scheme as an adult. Penal Law § 60.10-a.

● An adolescent offender, being 16 or 17 years old at the time of the offense, is eligible to be adjudicated a youthful offender if they meet the criteria to qualify pursuant to CPL § 720.10 (2) and (3). CPL § 720.10 (1).

● When imposing sentence on a person convicted as an adolescent offender, the court is required to consider the age of the person. Penal Law § 60.10-a.

§ 8:7 Youthful Offender Sentence Chart

YOUTHFUL OFFENDER SENTENCE CHART

Penal Law §§ 60.02 and 70.00

Class of Offense	Definite of Intermittent	Indeterminate Term	
Misdemeanors			
Class A - Mandatory	Up to 6 months		
Class A - Discretionary	Up to 1 year		
Class B - Mandatory	Up to 3 months		
Class B – Mandatory (prostitution conviction)	Up to 15 days		
Class B - Discretionary	Up to 3 months		
Felonies		**Minimum**	**Maximum**
Class B	Up to 1 year	Not less than 1 year Not more than 1 1/3 yrs	Not less than 3 years Not more than 4 yrs
Class C	Up to 1 year	Not less than 1 year Not more than 1 1/3 yrs	Not less than 3 years Not more than 4 yrs
Class D	Up to 1 year	Not less than 1 year Not more than 1 1/3 yrs	Not less than 3 years Not more than 4 yrs
Class E	Up to 1 year	Not less than 1 year Not more than 1 1/3 yrs	Not less than 3 years Not more than 4 yrs

Notes:

1. A sentence of probation is available for both misdemeanors and felonies.
   Penal Law § 60.01 (2)(a)(i) and Penal Law § 65.00.
2. A split sentence is available for both misdemeanors and felonies.
   Penal Law § 60.01 (2)(d) and Penal Law § 65.00 (3).
3. A conditional discharge is an available sentence, except for a Y.O. adjudication for a controlled substance offense.
   Penal Law § 60.01 (2)(a)(i), Penal Law § 65.05 and Penal Law § 60.02 (2).
4. An unconditional discharge is an available sentence, except for a Y.O. adjudication for a controlled substance offense.
   Penal Law § 60.01 (3)(d), Penal Law § 65.20 (1), and Penal Law § 60.02 (2).
5. *See* § 5:20 of this guide.

§ 8:8 Juvenile Delinquent Placement

JUVENILE DELINQUENT PLACEMENT

Type of Offense And Placement	Maximum Placement	Possible Extension of Placement
Misdemeanor	Up to 12 months FCA § 353.3 (5)	Not more than 1 year* FCA § 355.3 (4)
Felony (not designated)	Up to 18 months FCA § 353.3 (5)	Not more than 1 year* FCA § 355.3 (4)
Designated Felony (Non-restrictive Placement)	Up to 18 months FCA §§ 353,3 (5), 353.5 (1), 352,2 (1)	Not more than 1 year* FCA § 355.3 (4)
Class A Designated Felony (Restrictive Placement)	Initial period of 5 years FCA § 353.5 (4)	Not more than 1 year* FCA § 355.3 (4)
All Other Designated Felonies (Restrictive Placement)	Initial period of 3 years FCA § 353.5 (5)	Not more than 1 year* FCA § 355.3 (4)

*There may be successive extensions of placement, but not past respondent's 18th birthday without their consent, and in no event past their 21st birthday (FCA § 355.3 [6]), except for an act committed when respondent was 16 years of age or older, and in such case not past respondent's 23rd birthday.

§ 8:9 Fees and Surcharges

FEES AND SURCHARGES

Category	Applicable	Authority
Juvenile Offender	**No**	None of the fees and surcharges required in Article 60 of the Penal Law, and particularly the mandatory surcharge, sex offender fee, DNA databank fee, supplemental sex offender victim fee, and crime victim assistance fee referenced in Penal Law § 60.35 are applicable to a person convicted as a juvenile offender. Penal Law § 60.00 (2) specifically provides that "the sole provision of this article [Article 60] that shall apply in the case of an offense committed by a juvenile offender is section 60.10 of this article and no other provisions of this article shall be deemed or construed to apply in any such case." Since Penal Law § 60.35 is within article 60, it does not apply.
Adolescent Offender	**Yes, unless waived**	An adolescent offender is treated as an adult for purposes of fees and surcharges, and the fees and surcharges required by Penal Law § 60.35 apply. However, CPL § 420.35 was amended effective August 24, 2020, to add sub. 2-a, authorizing a waiver of the fees and surcharges for a person under 21 provided the court finds that the person was under 21 at the time of the offense and makes one of the three statutory findings.*
Youthful Offender	**No.**	In order for the fees and surcharges required by Penal Law § 60.35 to be applicable, there must be a conviction. Since a youthful offender adjudication vacates the conviction (CPL § 720.20 [3]), and because CPL § 720.35 (1) provides that a youthful offender adjudication is not a judgment of conviction, no fees or surcharges are applicable. In addition, Penal Law § 60.02 and § 60.35 (10), which provided that a person adjudicated a youthful offender was subject to the fees and surcharges of Penal Law § 60.35, were repealed effective August 24, 2020. *See People v. Floyd,* 61 N.Y.2d 895, 896-97 (1984).

*For waiver, the court must find that the defendant was under age 21 at the time of the offense and:

(a) the imposition of such surcharge or fee would work an unreasonable hardship on the defendant, his or her immediate family, or any other person who is dependent on such defendant for financial support; or

(b) after considering the goal of promoting successful and productive reentry and reintegration as set forth in Penal Law § 1.05 (6), the imposition of such surcharge or fee would adversely impact the defendant's reintegration into society; or

(c) the interests of justice.

CHAPTER 9

SEX OFFENDER REGISTRATION ACT (SORA)

CHAPTER 9 SECTIONS

CHAPTER 9

SEX OFFENDER REGISTRATION ACT (SORA)

The highest risk that young people who have committed a crime of a sexual nature face is being deprived of the opportunity to live up to their full potential because of a fallacious risk assessment instrument that places them on a public registry.

§ 9:1 Introduction to SORA

If your client is convicted of a "sex offense" or a "sexually violent offense" as those terms are defined in Correction Law § 168-a (2) and (3), and you have been unable to persuade the judge to make a youthful offender finding, your client will be required to register as a "sex offender." You will face a SORA hearing, held pursuant to either Correction Law § 168-d or § 168-n, depending upon your client's sentence, or Correction Law § 168-k if for an out-of-state or federal conviction.

Analysis of the entire SORA process is beyond the scope of this guide. This chapter will cover the basics about the SORA risk assessment instrument (RAI) and several issues particularly relevant for your adolescent clients. When defending your client in a SORA proceeding, you may find it helpful to refer to *Defending Against the New Scarlet Letter: A Defense Attorney's Guide to SORA Proceedings, Second Edition* (available online at sora-manual-second-edition-2022.pdf (ny.gov).

§ 9:2 Risk Assessment Instrument (RAI)

The Legislature enacted Article 6-c of the Correction Law, thereby establishing the Board of Examiners of Sex Offenders ("the Board"), which consists of five members appointed by the governor. All members are required to be employees of the Department of Corrections and Community Supervisions (DOCCS), and to be experts in the field of the behavior and treatment of people who have sexually offended. Correction Law § 168-l (1). The Board is responsible for developing guidelines and procedures to assess the risk of repeat offense and threat posed to public safety. Correction Law § 168-l (5).

The Board developed the RAI and the Risk Assessment Guidelines and Commentary ("Guidelines"). The Guidelines discuss the general principles that underlie the RAI and explain the specific risk factors that the RAI assesses. In the Guidelines, the Board cautions that "[n]o one should attempt to assess a sex offender's level of risk without first carefully studying this commentary." Guidelines p. 1. It could be added: no one should attempt to defend a SORA case without first studying it, either. The Guidelines offer a roadmap to understanding the RAI and are widely cited and used by courts in setting risk levels.

The Board created a mathematical RAI that takes the form of a scoring sheet divided into four parts: Current Offense(s); Criminal History; Post-Offense Behavior; and Release Environment. There are a total of 15 risk factors, several in each of the four parts. The RAI assigns numerical values or points for each of the 15 risk factors. For each risk factor, the assessable points range from 0, on the low end, to between 5 and 30, on the high end, depending on the particular risk factor. The presumptive risk level is then calculated by totaling the points scored for each risk factor. People who score from 0 to 70 points under the instrument are presumptively Level 1; people who score from 75 to 105 points are presumptively Level 2; and people who score from 110 to 300 points are presumptively Level 3.

The RAI also provides four "overrides," which make a person a presumptive Level 3, regardless of the total risk factor score. The "overrides" are:

1) a person who has a prior conviction for a sex crime;

2) a person who inflicted serious physical injury or caused death;

3) a person has made a recent threat that he will reoffend by committing a sexual or violent crime; and

4) where there has been a clinical assessment that the person has a psychological, physical, or organic abnormality that decreases ability to control impulsive sexual behavior.

The RAI also allows a court to "depart" upward or downward from the presumptive risk level that results from the total risk score and overrides. The Guidelines provide that a court may depart from the presumptive risk level if it concludes that there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines. Guidelines p. 4.

Once the risk level is established, the court must make an additional determination. Attached to the RAI chart are three pages entitled Sex Offender Designation Form. This form provides the court with the Board and/or prosecution's recommendation as to whether a "designation" is warranted. The court is required to determine whether the defendant warrants designation as a "sexually violent offender," "predicate sex offender," or "sexual predator," as those terms are defined in Correction Law § 168-a (7), or whether none of the three categories is applicable.

Scoring of the RAI and the risk factors is discussed in Chapter 3 of *Defending Against the New Scarlet Letter*. Overrides, designations, and departures are discussed in the corresponding chapters for each in the same guide.

At a SORA hearing, the burden of proof is placed on the prosecution to prove each of the risk factors, overrides, designations, and any aggravating factor that would warrant an upward departure, by clear and convincing evidence. The only burden of proof borne by the defendant is to prove mitigating factors that would warrant a downward departure, and that burden is by a preponderance of the evidence. A complete discussion of the burdens of proof is included in Chapter 8 (Selected Issues) in *Defending Against the New Scarlet Letter.*

The RAI is flawed when used for adults, and even more flawed when applied to adolescents. It has been described as an error-prone, pseudo-scientific instrument, the reliance upon which, without an actual, clinical assessment, is neither reliable nor professional. The following is a list of flaws in the RAI gleaned from court decisions, experts, and articles on the subject:

1) The scientific articles and research upon which the RAI is based are outdated and frozen in time. The Board relied on a handful of studies ranging from 1976 to mid-1995 to create the instrument and write the Guidelines. Since then, empirical research, including prospective longitudinal studies, large meta-analytic studies, and theoretical-practice literature, have yielded substantial new information about the nature of sexual offending and how to assess an individual's risk of reoffending. The Board has not incorporated this empirical and theoretical literature or revised the RAI to reflect the significant developments.

2) The Board has not assessed the reliability or the validity of the RAI. There is no objective data from which to conclude that it accurately predicts the risk of reoffense.

3) The RAI provides for four overrides; however, there are no current empirical or theoretical findings to support the proposition that one factor, standing alone, is of such determinative value as to supplant the results of an entire risk assessment.

4) A number of the risk factors have weak associations with risk for sexual reoffense in the community, and other risk factors have no empirically demonstrated association with an increased risk for sexual reoffense in the community.

5) The predictive validity of the factors is limited, and the RAI total score is likely to produce inaccurate classifications.

6) Critical elements that have been identified by current research and are now known to be the most potent predictors are not included in the RAI, including: (i) time spent offense-free in the community; (ii) age at the time of release; (iii) intrafamilial or female victims; (iv) having lived with an intimate partner for two years; and (v) paraphilic interests.

7) The more contemporary and better-validated empirical efforts, known as actuarial assessments, point to the weaknesses inherent in the RAI.

8) The number of points assessed for each risk factor appear to have been arbitrarily determined.

9) Decisions regarding departures are based upon an irrational standard and are made without reliable evidence.

10) The Guidelines are not in accord with the legislative directive for risk assessment analysis, as set out in the Correction Law. The statute specifically directs the Board to include in the assessment "whether psychological or psychiatric profiles indicate a risk of recidivism." Correction Law § 168-l (5)(f). The statute also indicates that "the

sex offender's response to treatment" shall be included in the Guidelines. Correction Law § 168-l (5)(f). The Guidelines make no reference to either criterion.

11) The task of assessing risk of recidivism is made even more difficult where there has been no individualized psychiatric assessment of the defendant.

12) The RAI, unlike actuarial risk assessment instruments, such as the Static-99R, is generally not accepted by the scientific community.

13) In child pornography cases, the RAI routinely overstates the risk of reoffending, resulting in inaccurate risk-level adjudications. The reason for this overassessment of risk is that the RAI was not developed to assess non-contact, child pornography offenses.

14) Contrary to what the RAI requires for points to be assessed under Risk Factor 8, more recent empirical research demonstrates that sexual recidivism rates for people who commit sex offenses as adolescents are generally lower than those reported for individuals who commit sex offenses as adults.

15) There should be no assumption that risk factors that have proven reliable predictors of adult recidivism are valid predictors of adolescent sexual reoffending.[1]

Articles, Books, and Documents of Interest:

New York City Bar Association, *Report on Legislation regarding RAIs.* Available at https://www2.nycbar.org/pdf/report/uploads/20072469-SexOffenderRegistrationActReport.pdf

SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAW: AN EMPIRICAL EVALUATION (Wayne A. Logan & J.J. Prescott eds., 2021).

Daniel Conviser, *After 25 Years, It Is Time to Reform New York's Sex Offender Risk Assessment System: Part I,* NYLJ (Jan. 5, 2021).

Daniel Conviser, *After 25 Years, It Is Time to Reform New York's Sex Offender Risk Assessment System: Part II,* NYLJ (Feb. 9, 2021).

§ 9:3 Risk Assessment Is Different for Adolescents

Employing an appropriate risk assessment tool is essential for the assessment of individuals who have engaged in crimes of a sexual nature.[2] In employing a risk assessment tool, a key goal is to ensure that an evidence-based approach is used to manage risk. There must be a direct pathway between risk assessment and risk management, such that the use of risk

[1] Caldwell, Michael, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism,* 54 International Journal of Offender Therapy and Comparative Criminology 197 (2010) at 206.
[2] Jung, Sandy & Thomas, McKenzie, *A Compendium of Risk and Needs Tools for Assessing Male Youths At-Risk-to and/or Who Have Engaged in Sexually Abusive Behaviors,* 17 Sexual Offending Theory, Research, and Prevention e8085 (2022) at 1. Available at (PDF) A Compendium of Risk and Needs Tools for Assessing Male Youths At-Risk to and/or Who Have Engaged in Sexually Abusive Behaviors (researchgate.net).

assessment tools is not merely a bureaucratic exercise.[3] To avoid intuitive approaches or making non-evidence-supported decisions, one must ensure that meaningful psychological risk factors are considered.[4]

Predicting the likelihood of future adult behavior is, according to the experts, an inherently difficult task under any circumstances.[5] It is even more difficult for adolescents. Research on risk assessment has demonstrated that RAIs must be attuned to the unique differences between youth and adults.[6] Accurate, developmentally sensitive assessments avoid the serious, unintended consequence of mislabeling youths as dangerous when they are not.[7] The process of risk assessment for adolescents who sexually offend is complicated by the relatively low base rates of sexual recidivism among youth. It is further complicated by the ongoing development and maturation of youth.[8] Because adolescents change over time in terms of cognitive, neurological, and personality development, formation of attitudes and acquisition of information, and emotional and behavioral maturity, risk assessment instruments must account for these developmental factors in order to accurately estimate risk.[9] Given the developmental differences between adults and adolescents, different risk assessment instruments are needed for adolescents.[10] An adult risk assessment instrument such as the New York SORA Risk Assessment Instrument should not be used on adolescents.

Risk assessments designed for adults are inappropriate for adolescents. The Association for the Treatment and Prevention of Sexual Abuse (ATSA) has developed guidelines for the assessment of adolescents who have committed crimes of a sexual nature that call for a multi-faceted assessment approach clearly distinguishing between adults and adolescents.[11]

> *Adolescents who have engaged in sexually abusive behaviors are fundamentally different from adults who have sexually offended and require a different set of guidelines with respect to assessment.* (ATSA 2017).[12]

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[3] *Id.* at 2.
[4] *Id.* at 3.
[5] Rich, Phil, Chapter 4: *Assessment of Risk for Sexual Reoffense in Juveniles Who Commit Sexual Offenses*, Sex Offense Management Assessment and Planning Initiative Report, U.S. Department of Justice (2017) at 270. Full report available at Sex Offender Management Assessment and Planning Initiative (ojp.gov). Research Brief available at https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/juvenilerisk.pdf.
[6] Miccio-Fonseca, L.C., & Rasmussen, Lucinda, *Scientific Evolution of Clinical and Risk Assessment in Sexually Abusive Youth: A Comprehensive Review of Empirical Tools,* 27 Journal of Child Sexual Abuse 871 (2018) at 873.
[7] *Id.* at 873.
[8] Rich, *supra* note 5 at 270.
[9] Rich, *supra* note 5 at 270.
[10] Caldwell, Michael, *What We Do Not Know About Juvenile Sexual Reoffense Risk,* 7 Child Maltreatment 291 (2002) at 291
[11] ATSA, *ATSA Practice Guidelines for Assessment, Treatment, and Intervention with Adolescents Who Have Engaged in Sexually Abusive Behavior* (2017) at 13.
[12] *Id.* at 13.

The field of juvenile risk assessment has largely developed in its own right since 2001 and continues to do so.[13] Risk assessment tools have been specifically developed to assess the sexual behavior of male adolescents who have engaged in crimes of a sexual nature.[14] Some of the risk assessment instruments developed in the last two decades specifically for adolescents convicted of crimes of a sexual nature are as follows:

- Juvenile Risk Assessment Scale (JRAS)
- Juvenile Sexual Offense Recidivism Risk Assessment Tool-II (JSORRAT-II)
- Multiplex Empirically Guided Inventory of Ecological Aggregates for Assessing Sexually Abusive Children and Adolescents (MEGA♪)
- Assessment, Intervention, Moving On – Version 3 (AIM3)
- Estimate of Risk of Adolescent Sexual Offense Recidivism, Version 2 (ERASOR 2.0)
- Guided Assessment of Intervention Needs (GAIN)
- Juvenile Risk Assessment Tool – Version 4 (J-RAT)
- Juvenile Sex Offender Risk Assessment Protocol (JSOAP-II)
- Protective + Risk Observations for Eliminating Sexual Offense Recidivism (PROFESOR)
- Youth Needs and Progress Scale

Despite twenty years of progress by researchers on specialized risk assessments for adolescents, the SORA RAI has not changed since 1996. The New York RAI does not reflect any of the variables that are known to sound juvenile risk assessment. The RAI was designed specifically for adults, and thus the majority of factors are based on static factors for adults, which do not predict risk in youth. The focus almost exclusively on static risk factors fails to recognize the reality that understanding risk in adolescents requires a developmental lens that is dynamic in nature, given the developmental change propensities of adolescence and emerging adulthood. Modern risk assessment for youth developed over the past two decades now incorporates protective factors and a developmental approach to sexually offending adolescents.

The New York RAI is not designed to account for factors that mitigate against offending, especially for adolescents who are rapidly changing. It also relies upon outdated notions about the high risk of sexual reoffending of adolescents, thus overestimating the risk of reoffending that a person who sexually offends prior to age 21 presents. When risk assessment instruments such as the SORA RAI are not robustly constructed and researched to be age-appropriate, "the risk may be overestimated," thus having profound adverse impact on youth and their families, coupled with inappropriate placement outside their homes.[15]

The reasons that risk assessment is different for adolescents than for adults is addressed in depth in § 6:9 of this guide.

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[13] Rich, *supra* note 5 at 270.
[14] Jung & Thomas, *supra* note 2 at 2.
[15] Miccio-Fonseca, *supra* note 6 at 893.

§ 9:4 Risk Factor 8

In 1995, the Legislature enacted Article 6-C of the Correction Law (Sex Offender Registration Act [SORA]), effective on January 1, 1996. Correction Law § 168-l (5)(a)(v) directed the Board of Examiners of Sex Offenders (Board) to develop guidelines and procedures to assess the risk of a repeat offense by a person convicted of a crime of a sexual nature, and to include in that assessment "the age of the sex offender at the time of the commission of the first sex offense."

The Board, followed the direction of the Legislature and created the SORA RAI containing 15 risk factors, including Risk Factor 8. Risk Factor 8 requires the assessment of 10 points for any person whose first sex crime, whether a felony or a misdemeanor, was committed at age 20 or less. Risk Factor 8 is listed under the category of "Criminal History," even though the Guidelines (p. 13) require the assessment of points including individuals who were age 20 or less "at the time of the commission of the instant offense." As a result, an adolescent convicted for a first-time sex offense will be assessed 10 points at a SORA hearing, which will be added to their total risk factor score and often result in a total score making them a Level 2 instead of a Level 1 offender.

Incorrect Underlying Assumptions – The Adolescent Recidivism Rate is High

Implicit in SORA is the assumption that sexual offending of adolescents is driven by stable traits that are relatively unaffected by the developmental maturation or changing circumstances of adolescence.[16] Risk Factor 8 assumes that adolescents have exceptionally high rates of recidivating.[17] This is simply not true.[18]

This assumption is found in both the statute and in the Guidelines. In Correction Law § 168-l (5)(a) and (v), the Legislature directs that the "criminal history factors indicative of high risk of repeat offense" to be developed in the RAI include "the age of the sex offender at the time of the commission of the first sex offense." In the Guidelines the Board explicitly states its underlying assumption: "those who offend at a young age are more prone to reoffend." The Board cites four articles to support this assumption (Guidelines p. 13), which will be addressed later in this section.

In 1996, at the time the Board drafted the Guidelines, the professional assumption that adolescents were at a high risk to recidivate was already a minority view that had essentially been disproven by the extant research and would later be totally discredited by subsequent research. In 2002, the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP) issued a report entitled *Juveniles Who Have Sexually Offended: A Review of*

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[16] Caldwell, Michael, *Sexual Offense Adjudication and Sexual Recidivism among Juvenile Offenders,* 19 Sexual Abuse 107 (2007) at 108. Available at resource_557.pdf (njjn.org).
[17] Letourneau, Elizabeth, *Juvenile Registration and Notification Are Failed Policies That Must End,* Chapter in Sex Offender Registration and Community Notification Law: An Empirical Study, Wayne Logan and JJ. Prescott Eds. (2021) at 170.
[18] *Id.* at 170.

the Professional Literature. The report, citing to six studies, concluded that "[t]he results of research investigating recidivism after juveniles were referred for sex offenses typically reveal relatively low rates of sexual recidivism (8 to 14 percent)."[19] Three of the cited studies were reported in the literature well before 1996. One study, by Smith & Monastersky, was reported in 1986.[20] The two other studies (by the research teams of Schram, Milloy and Rowe, and Kahn and Chambers) were both reported in 1991.[21]

In 1996, Mark Weinrott reviewed 23 studies involving juvenile sexual offending recidivism that were conducted between 1943 and 1995. After reviewing the findings and methodologies of all of these studies, Weinrott concluded: "What virtually all of the studies show, contrary to popular opinion, is that relatively few JSOs [juvenile sex offenders] are charged with a subsequent sex crime."[22] Weinrott also found that there was no existing data to support the promotion of a more heavy-handed correctional approach.[23] While he acknowledged that there was growing support for registration, community notification, prohibiting expunction of criminal records, and prosecuting adolescents in criminal courts, Weinrott cautioned that there is nothing that shows such practices will deter youths from committing sex crimes or reduce recidivism among existing juveniles who commit crimes of a sexual nature.[24]

When the New York Legislature enacted SORA in 1995, the prevailing data indicating that adolescents were at low risk to reoffend was available. But politicians yielded to the "sex panic" that was sweeping the U.S., and did what was politically expedient, not what was informed by empirical data. Disconcertingly, the available research had minimal impact on the Board's development of the RAI and Guidelines. There were assumptions made by the Board that flew in the face of the known research at the time, despite the statute's mandate that Board members be "experts in the field of the behavior and treatment of sex offenders" (Correction Law § 168-l [1]). Even more disconcerting is the Board's failure over the past 30 years to update the RAI and Guidelines, particularly as they relate to adolescents, in light of the abundance of research that has disproven the Board's initial assumptions. But, as Michael Caldwell has recognized, public policies have often been grounded in questionable or inaccurate assumptions about the risk of juvenile sexual recidivism.[25] The SORA RAI is no exception, and New York's appellate courts have turned a blind eye.

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[19] Righthand, Sue & Welch, Carlann, *Juveniles Who Have Sexually Offended: A Review of the Professional Literature,* Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice (2001) at xvii.
[20] Smith, Wayne & Monastersky, *Assessing Juvenile Sexual Offenders' Risk for Reoffending,* 13 Criminal Justice and Behavior 115 (1986).
[21] Schram, Donna, Milloy, Cheryl & Rose, Wendy, *Juvenile Sex Offenders: A Follow Up Study of Reoffense Behavior,* Washington State Institute for Public Policy, Urban Policy Research, and Cambie Group International (1991); Kahn,Timothy & Chambers, Heather, *Assessing Reoffense Risk and Juvenile Sexual Offenders,* 70 Child Welfare 333 (1991).
[22] Weinrott, Mark, *Juvenile Sexual Aggression: A Critical Review*, Center for the Study of Prevention of Violence (1996) at 36. Available at Microsoft Word - CSPV-005.doc (state.co.us).
[23] *Id.* at 47.
[24] *Id.* at 47.
[25] Caldwell, Michael, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism,* 54 International Journal of Offender Therapy and Comparative Criminology 197 (2010) at 198.

The Problem of Applying Risk Factor 8 to First-Time Sex Offenses for Adolescents

Risk Factor 8 is applied to two distinct categories of individuals: (1) to an adult convicted of a sex offense, who was previously adjudicated or convicted for a sex crime at age 20 or less; and (2) to an adolescent who is convicted for a sex crime for the first time, and it is the instant offense for which the SORA hearing is being held. It is for this second group, your current adolescent client, for whom the assessment of points under Risk Factor 8 is particularly misplaced. It is against them that the mistaken assumption that their youth makes them a high risk to reoffend works a real injustice.

It is generally recognized that adolescents who commit crimes of a sexual nature follow one of three pathways over the life course: (1) a complete desistance pathway; (2) a continued nonsexual offending pathway; or (3) a continued sexual offending pathway.[26]

When Risk Factor 8 is applied to an adult who has sexually reoffended, it may be that a prior offense, which occurred when he or she was less than 21 years of age, is a potential indicator of continued sexual reoffending in adulthood. On the other hand, for the adolescent who commits a crime of a sexual nature for the first time prior to age 21, this being the instant SORA offense, it is inappropriate to treat their age as a risk factor, since more likely than not he or she will fall into pathways (1) or (2), and are at a low risk to reoffend sexually.

It was a grave mistake for the Board to include the "age at the time of the commission of the instant offense" within the scope of Risk Factor 8. In light of the overwhelming empirical evidence that adolescents are low-risk to sexually reoffend, the Guidelines should be amended by the Board to make clear that Risk Factor 8 is inapplicable to the "instant offense." In the alternative, it should be struck down by the courts.

The Adolescent Recidivism Rate Is Low

Although it challenges the myth and conventional assumption, it is now extremely well-established that the adult sexual recidivism rate is low. *See* § 6:8 of this Guide. For adolescents, the data indicating that their risk of sexual recidivism is low is even stronger.[27]

During the nearly three decades since SORA's enactment, great strides have been made in the research methodology and rigor that should have put to rest the outdated notion that adolescents are at high risk of sexual reoffense. Yet the Board has failed to adapt to these findings in the almost 30 years since it developed the RAI and its current version of Risk Factor 8.

As researchers Leon, Burton, and Alvare explain, "there are two kinds of methodologically rigorous research that allow strong conclusions about recidivism: prospective

[26] Caldwell, Michael, *What We Do Not Know About Juvenile Sexual Reoffense Risk,* 7 Child Maltreatment 291 (2002) at 300.
[27] Leon, Chrysanthi, Burton, David & Alvare, Dana, *Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses,* 17 Widener Law Review 127 (2011) at 146.

follow-up studies of large samples of released offenders and meta-analyses that combine multiple studies to allow for large sample analysis."[28] The Guidelines are based on neither.

Studies conducted by renowned criminologist Franklin Zimring and his colleagues improved upon prior research by utilizing large, community-based samples of birth cohorts from Wisconsin and Pennsylvania and following them into adulthood. Cohort studies identify large samples of city residents born in the same year and follow them through adolescence and into young adulthood. This kind of sampling corrects for many of the limitations that had plagued prior research about adolescent sexual offending.[29] Those old studies typically took a known group of individuals who had sexually offended, worked backwards to see what features members of the group had in common, then used their observations to make predictions in the other direction. Instead, cohort studies start with a much larger group and follow them forward over time. To identify predictors, the large samples are subjected to statistical analyses.[30] Cohort studies are one example of a prospective follow-up study.

Studies by Michael Caldwell, a nationally recognized psychologist and researcher in the field of adolescent sexual offending, are examples of meta-analyses that combine studies to allow for large sample analysis. (Meta-analysis is the statistical combination of the results of multiple studies addressing a similar research question. By synthesizing findings from various studies, meta-analysis provides a more comprehensive and reliable understanding of a particular research topic. This approach allows researchers to examine patterns, trends, and effects that may not be apparent in individual studies. Meta-analysis has the ability to increase statistical power. By combining the data of many studies, meta-analysis can increase the sample size, thereby improving the precision and generalizability of the findings.)

Using two entirely different and equally strong methodologies, Zimring and Caldwell arrived at the same conclusion: Adolescents who have committed crimes of a sexual nature are at low risk to reoffend.

Zimring and his colleagues published the results of their findings from the Racine birth cohorts in 2007.[31] This study has been widely recognized for its methodological sophistication and vastly improved generalizability over past research.[32] The study utilized three birth cohorts for the years 1942, 1949, and 1955. The total number of individuals followed into adulthood was 6,127. The follow-up periods were 14 years for the 1942 birth cohort, 7 years for the 1949 birth cohort, and 4 years for the 1955 birth cohort. The sexual reoffense rate was low, causing the researchers to conclude that juvenile who have sexually offended do not often commit sex offenses as adults.[33] In total, 8.5% of boys with juvenile, sex-related police contacts had adult, sex-related police contacts, compared with 6.2% of boys without any prior non-sex juvenile

[28] *Id.* at 145.
[29] *Id.* at 147.
[30] *Id.* at 147.
[31] Zimring, Franklin, Piquero, Alex & Jennings, Wesley, *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood,* 6 Criminology & Public Policy 507 (2007).
[32] Leon, *supra* note 27 at 147.
[33] *Id.* at 529.

police contact who had sex-related police contacts as adults.[34] These researchers pointed out that based upon the Racine data, it would be just as efficient to create a "potential sex offender registry," composed solely of young men with juvenile police contacts for auto theft.[35] The data did not support the assumption that juvenile sex offending was a harbinger of adult sexual offending.[36]

Two years after the Racine study, Zimring and his colleagues released the result of another study, which used data from the 1958 second Philadelphia birth cohort. This study followed 13,160 boys and 14,000 girls to the age of 26, and found that one in ten of the males with juvenile, sex-related offense police contacts had an adult sex-offense record in Philadelphia in the follow-up period.[37] The researchers concluded that using the juvenile sex offense records to predict who would become commit a sex offense as an adult would produce a false positive rate of 90 percent for the young men targeted, and that juveniles who had sexually offended were not significantly more likely than juveniles who had committed a non-sexual offense to later commit an adult offense of a sexual nature.[38]

Michael Caldwell conducted large-scale meta-analyses in 2010 and in 2016. The 2010 study reported on the meta-analysis of 63 data sets that examined the sexual recidivism among a total of 11,219 juveniles who had sexually offended. The follow-up period was five years. The weighted mean sexual reoffense rate for individuals who had first offended as a juvenile was 7.08%.[39] By contrast, the weighted mean general reoffense rate was 43.4%.[40] Caldwell concluded that these results indicate that juveniles who have sexually offended have a known rate of sexual recidivism that is low.[41]

Caldwell's 2016 study was even larger, and produced similar results. That study examined 98 data sets involving 33,783 cases of adjudicated juveniles who had committed crimes of a sexual nature between 1938 and 2014.[42] Elizabeth Letourneau, an internationally recognized expert in child sexual abuse prevention and sex offender registration and notification (SORN) policy, has described Caldwell's study as the most definitive study on adolescent recidivism to date (as of 2021).[43] The weighted base rate for detected sexual recidivism for the full sample was 4.97%.[44] However, the mean sexual recidivism rate was just 2.75% when studies

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[34] *Id.* at 529.
[35] *Id*. at 530.
[36] *Id.* at 529.
[37] Zimring, Franklin, Jennings, Wesley, Piquero, Alex & Hays, Stephanie, *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort,* 26 Justice Quarterly 58 (2009) at 65.
[38] *Id.* at 66.
[39] Caldwell, Michael, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism,* 54 International Journal of Offender Therapy and Comparative Criminology 197 (2010) at 202.
[40] *Id.* at 202.
[41] *Id.* at 206.
[42] Caldwell, Michael, *Quantifying the Decline in Juvenile Sexual Recidivism Rates,* 22 Psychology, Public Policy, and Law 414 (2016) at 416.
[43] Letourneau, Elizabeth, *Juvenile Registration and Notification Are Failed Policies That Must End,* Chapter 9 in Sex Offender Registration and Community Notification Law: An Empirical Study, Wayne Logan and JJ. Prescott Eds. (2021) at 170.
[44] Caldwell, *supra* note 42 at 417.

were limited to those published more recently (between 2000 and 2015).[45] Caldwell concluded that the current rate of juvenile sexual recidivism appears to be less than 5%, and, by contrast, the rate of general recidivism in this population appears to be up to eight times greater than the rate of sexual recidivism.[46] Applying the study's findings to risk assessment, Caldwell observed that "it is extraordinarily unlikely that a method could be devised that can identify a subgroup of juveniles who have sexually offended that pose a higher risk for sexual recidivism than for general recidivism."[47]

The most recent meta-analysis on the subject of adolescent sexual recidivism was undertaken by Patrick Lussier and his colleagues, with the results being published in 2024.[48] Data were collected from studies published worldwide between 1940 and 2019. A total of 158 empirical studies, involving 30,396 adolescents who had committed offenses of a sexual nature, were retrieved to examine instances of sexual recidivism. The study found that sexual recidivism rates of adolescents who have sexually offended have been consistently low (7-9%) across the period of the last 85 years.[49]

Despite the empirical data, the misconception about the high rate of recidivism for adults convicted of crimes of a sexual nature is often applied to adolescents convicted of such offenses, as well.[50]

Former prosecutor, Paul Stern, in his instructional manual for prosecutors on prosecuting juvenile sex crimes, addresses this misconception of the risk of recidivism. "The truth is: the risk of sexual recidivism by juveniles is extremely low. That is, left alone or exposed to appropriate quality treatment, very few juvenile sex offenders reoffend."[51] Stern expresses the concern that policy makers and prosecutors are ignoring the empirical evidence and making decisions based on "fear" and "folklore."[52] Doing so "is to take the blindfold off of Lady Justice and put it on the prosecutor."[53] There has been an increasing accumulation of data demonstrating that the purported justifications for policies of registration and notification are no longer merely unproven or unexamined, but are flatly at odds with the facts as we know them."[54]

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[45] Caldwell, *supra* note 42 at 418.
[46] Caldwell, *supra* note 42 at 421.
[47] Caldwell, *supra* note 42 at 421.
[48] Lussier, Patrick, McCuish, Evan, Thivierge, Stephanie & Frechette, Julien, *A Meta-analysis of Trends in General, Sexual, and Violent Recidivism Among Youth with Histories of Sex Offending,* 25 Trauma, Violence & Abuse 54 (2023).
[49] *Id.* at 67.
[50]Brandt, Jon et al., *Registration and Community Notification of Children and Adolescents Adjudicated of a Sexual Crime: Recommendations for Evidence-Based Reform,* Association for the Treatment of Sexual Abusers (2020) at 5. Available at https://texasvoices.org/wordpress/wp-content/uploads/2020/06/Registration-Community-Notification-of-Children-and-Adolescents.pdf.
[51] Stern, Paul, *An Empirically-Based Approach for Prosecuting Juvenile Sex Crimes,* Child Abuse Prosecution Project, Association of Prosecuting Attorneys (2016) at 13.
[52] *Id.* at 10.
[53] *Id.* at 24.
[54] *Id.* at 9.

"The fact is that low future sex crime rates among juvenile sex offenders in the United States are a well-replicated, robust, and long-standing scientific finding."[55] Elizabeth Letourneau, an internationally recognized expert in child sexual abuse prevention and sex offender registration and notification (SORN) policy, has critiqued those policies as being based on an inaccurate understanding of children who commit sex offenses. Letourneau points to the most important error in such policies – "the policies assume that children are at an especially high risk of recidivating. This is simply not true."[56] "Contrary to the myths underlying their enactment [SORN laws such as SORA], children found to have engaged in sexual misconduct very rarely reoffend."[57] To support her position, Letourneau cited to the study by Michael Caldwell published in 2016. In that study, Caldwell referenced the 33 studies conducted over the previous 15 years, which indicate that the current sexual recidivism rate for adolescents is likely to be below 3 percent.[58]

The U.S. Department of Justice Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), as part of its Sex Offender Management Assessment and Planning Initiative (SOMAPI), produced an extensive report in 2017.[59] Chapter 3 of that report is entitled: *Recidivism of Juveniles Who Commit Sexual Offenses.* The report found that a relatively small percentage of juveniles who commit a sexual offense will sexually reoffend as adults; it placed the recidivism rate at 7 to 13 percent after 59 months.[60]

The SOMAPI report concluded that "recidivism rates for juveniles who commit sexual offenses are generally lower than those observed for adult sexual offenders.[61] This finding is consistent with the same finding by other researchers.[62] A report by the U.S. Department of Justice Office of Juvenile Justice and Delinquency noted: "The results of research investigating recidivism after juveniles were referred for sex offenses typically reveal relatively low rates of sexual recidivism (8 to 14 percent)."[63]

There are several other prospective studies that confirm the low recidivism rate for adolescents. James Worling and his colleagues conducted a 20-year prospective national study.

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[55] Chaffin, Mark, *Our Minds Are Made Up Don't Confuse Us with the Facts: Commentary on Policies Concerning Children with Sexual Behavior Problems and Juvenile Sex Offenders,* 13 Child Maltreatment 111 (2008) at 112.
[56] Letourneau, *supra* note 43 at 170.
[57] Letourneau, *supra* note 43 at 164.
[58] Caldwell, *supra* note 42 at 419.
[59] Sex Offender Management Assessment and Planning Initiative (2017). Report available at Sex Offender Management Assessment and Planning Initiative (ojp.gov).
[60] Lobanov-Rostovsky, Christopher, Chapter 3: *Recidivism of Juveniles Who Commit Sexual Offenses,* Sex Offender Management Assessment and Planning Initiative (2017) at 262. Report available at Sex Offender Management Assessment and Planning Initiative (ojp.gov).
[61] *Id.* at 262.
[62] Lussier, Patrick, McCuish, Evan, Thivierge, Stephanie & Frechette, Julien, *A Meta-analysis of Trends in General, Sexual, and Violent Recidivism Among Youth with Histories of Sex Offending,* 25 Trauma, Violence &Abuse 54 (2023) at 65-66; Geer, Phoebe, *Justice Served? The High Cost of Juvenile Sex Offender Registration,* 27 Developments in Mental Health Law 33 (2008) at 400; Tennessee Department of Mental Health and Substance Abuse Services, *Adolescents Who Have Engaged in Sexually Abusive Behavior,* TDMHSAS Best Practice Guidelines (2023) at 312.
[63] Righthand, Sue & Welch, Carlann, *Juveniles Who Have Sexually Offended: A Review of the Professional Literature,* Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice (2001) at xvii.

The study examined the recidivism rate for adolescents who had sexually offended and were between 12 and 19 years of age.[64] The follow-up interval spanned from 12 to 20 years. The study found that only 11.5 percent of the participants were charged as adults for subsequent sexual offenses – up to an average age of approximately 31 years.[65] The results of this study support the finding that only a minority of adolescents who offend sexually are likely to be charged for sexual crimes by their late 20s or early 30s.[66] Donna Vandiver conducted a prospective analysis of recidivism for juvenile males who had a prior history of sexual offending. Her study used a sample of 300 registered male sex offenders, who were adolescents at the time of their initial arrest for a sex offense.[67] This sample was followed for 3 to 6 years after the subjects reached adulthood. Only 13 were arrested for a new sexual offense, equating to a recidivism rate of 4.3 percent.[68]

Vandiver emphasizes that it is imperative to delineate between the majority of young offenders, who will desist from sexual offending prior to adulthood, and the small subgroup that will continue sexually offending into their adulthood.[69] There is indeed a small subset of adolescents with considerable and/or persistent risk for perpetrating sexual harm; however, these youth are the exception rather than the norm.[70] The RAI fails to make this distinction, assessing 10 points for Risk Factor 8 for all adolescents who commit their instant offense prior to age 21.

Some of the most important findings of the last two decades with respect to the understanding of the criminal activity of juveniles who have sexually offended have come from prospective longitudinal studies based on samples of general offenders, including juveniles.[71] The study of the adolescence-to-adulthood transition for individuals who have sexually offended has extended well beyond the United States. Lussier and Blokland conducted a very large prospective longitudinal study using data from the 1984 Dutch Birth Cohort study that included 87,528 men.[72] The study found that the adolescent-limited group (individuals whose sexual offending desisted in adolescence) represented the vast majority of the juveniles who sexually offended. With a follow-up to age 23, about 95 percent of juveniles who had sexually offended fall within that group that did not reoffend sexually. In other words, the study reflected a 5 percent recidivism rate by age 23.[73] For the most part, therefore, sex offending committed in youth is first and foremost, transitory, and not reflective of a propensity for committing sex crimes.[74] For adolescents, sex offending is generally episodic and limited to the period of

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[64] Worling, James, Littlejohn, Ariel & Bookalam, David, *20-Year Prospective Follow-Up Study of Specialized Treatment of Adolescents Who Offended Sexually,* 28 Behavioral Science and the Law 46 (2010) at 48-49.
[65] *Id.* at 54.
[66] *Id.* at 56.
[67] Vandiver, Donna, *A Prospective Analysis of Juvenile Male Sex Offenders,* 21 Journal of Interpersonal Violence 673 (2006).
[68] *Id.* at 685.
[69] *Id.* at 675.
[70] ATSA, *supra* note at 5.
[71] Lussier, Patrick & Blokland, Arjan, *The adolescence-adulthood transition and Robins's continuity paradox: Crimnal career patterns of juvenile and adult sex offenders in a prospective longitudinal birth cohort study,* 42 Journal of Criminal Justice 153 (2014) at 155.
[72] *Id.* at 155.
[73] *Id.* at 160.
[74] *Id.* at 160.

adolescence, which reflects a reckless, sensation-seeking, here-and-now orientation typical to that period of development.[75]

The Colorado Sex Offender Management Board (SOMB) was created in 1992, and, under the current statute, is charged with developing standards and guidelines for the evaluation, treatment and supervision of adults and juveniles who have committed sexual offenses.[76] The SOMB convened a committee of experts in the field to review relevant research on SORN's negative implications for juveniles. This committee of experts issued a White Paper, which found that research does not support the incorrect assumption that juveniles who are convicted of sex offenses have a higher likelihood to commit a new sexual offense than other delinquent juveniles.[77] Of particular interest is their finding regarding the use of a risk assessment instrument, such as the SORA RAI, on adolescents: "While risk assessment tools are available for use with juvenile populations, currently there are no empirically valid risk assessment tools which are able to accurately determine the risk of recidivism for juvenile who commit sexual offenses in the long term."[78]

Treatment providers who have researched the recidivism rates for their adolescent clients who have sexually offended are in accord with the conclusion that the "base rate for sexual recidivism [for adolescents] is low – between 3 and 10 percent with a global average of approximately 5 percent."[79] In the *ATSA Adolescent Practice Guidelines,* it is reported that "research shows that sexually abusive behavior in adolescents rarely persists into adulthood. The vast majority . . . are not on a life trajectory for repeat offending."[80]

The significant developmental changes that occur during adolescence help explain the low rate of sexual recidivism for adolescents who have been convicted of a crime of a sexual nature.[81] While there is a tendency for the public to assume that adolescents charged with crimes of a sexual nature are unresponsive to treatment and at increased risk of recidivism, the research indicates that, once detected, the great majority of adolescents do not continue to engage in these behaviors.[82]

The failure of the Board, bar, and bench to respond to the overwhelming empirical data demonstrating that adolescents who have committed a crime of a sexual nature are at low risk to reoffend sexually has become a major embarrassment.[83]

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[75] *Id.* at 160.
[76] Colorado Sex Offender Management Board, *Sex Offender Management Board White Paper on the Research, Implications and Recommendations Regarding Registration and Notification of Juveniles Who Have Committed Sexual Offenses* (2017) at 1. Available at WhitePaperREJuvenileRegistrationFinal8-18-17Board.pdf (state.co.us).
[77] *Id.* at 8
[78] *Id.* at 8.
[79] ATSA, *supra* note 11 at 5.
[80] ATSA, *supra* note 11 at 5.
[81] Brandt, *supra* note 50 at 7.
[82] Brandt, *supra* note 50 at.7.
[83] Defense counsel should be aware of an article attempting to contradict current empirical findings that has occasionally been touted by prosecutors. Scurich, Nicholas & John, Richard, *The Dark Figure of Sexual Recidivism,* 37 Behavioral Sciences & the Law 158 (2019). The Scurich & John article is thoroughly dismantled by Lave,

Literature the Board Relied Upon to Support Including Risk Factor 8

Since the research accumulated over the past three decades overwhelmingly supports the conclusion that adolescents who have committed crimes of a sexual nature are at low risk to reoffend, how is it that the Board arrived at a contrary conclusion? In the Guidelines (p. 13), the Board cites to four articles to support its assumption that "those who offend at a young age are more prone to reoffend." All of these articles, discussed below, are at least 30 years old.

1) Groth, Nicholas & Loredo, Carlos, *Juvenile Sexual Offenders: Guidelines for Assessment,* 25 International Journal of Offender Therapy and Comparative Criminology 31 (1987).

   Nowhere in this article do the authors address the recidivism rate for adolescents who have sexually offended. What they do cite to is a 1982 study[84] by Groth, Longo & McFadin, based on research conducted more than 42 years ago, in which 137 male, adult, convicted "rapists and child molesters" were the subjects. The 137-person sample was drawn from men incarcerated for a sex offense conviction and men in a treatment center awaiting sentencing. In classic retrospective study fashion, the authors report that 47% of these men reported committing their first sexual offense between the ages of 8 and 18. From this, the Board apparently assumed that the recidivism rate for adolescents is high. As is obvious, the findings do not mean that 47% of adolescents sex offenders continue committing sexual offenses into adulthood.[85] The false premise of retrospective studies is addressed later in this chapter.

2) Barbaree, Howard, Hudson, Stephen & Seto, Michael, *Sexual Assault in Society, The Role of the Juvenile Offender,* Chapter 1 in The Juvenile Sex Offender (Barbaree, Marshall & Hudson eds.) (1993).

   Barbaree and colleagues acknowledge that, as of 1993, clinicians had very limited success in predicting sex offenders' recidivism.[86] The authors do suggest that, as a group, juveniles who sexually offend manifest developmental adjustment problems and histories of traumatic adjustment to their own victimization experiences, which makes them a "high-risk group" independent of their offense histories.[87] What the authors do not say is that these juveniles are high risk to reoffend sexually. There was no basis for the Board to interpret Barbaree's article to stand for the proposition that juveniles who are convicted

Tamara, Prescott, JJ. & Bridges, Grady, *The Problem with Assumptions: Revisiting "The Dark Figure of Sexual Recidivism,"* 39 Behavioral Sciences & the Law 1 (2021)..

[84] Groth, Nicholas, Longo, Robert & McFadin, J. *Undetected Recidivism among Rapists and Child Molesters,* 28 Crime and Delinquency 450 (1982).

[85] Davis, Glen & Leitenberg, Harold, *Adolescent Sex Offenders,* 101 Psychological Bulleting 417 (1987) at 417.

[86] Barbaree, Howard, Hudson, Stephen & Seto, Michael, *Sexual Assault in Society, The Role of the Juvenile Offender,* Chapter 1 in The Juvenile Sex Offender (Barbaree, Marshall & Hudson eds.) (1993) at 11.

[87] *Id.* at 11.

of a crime of a sexual nature are prone to reoffend sexually, particularly in light of the work of Caldwell,[88] Letourneau,[89] and Zimring[90].

3) Schwartz, Barbara, *Characteristics and Typologies of Sex Offenders,* Chapter 3 in The Sex Offender: Corrections, Treatment and Legal Practice (Schwartz & Cellini eds.) (1995).

   Schwartz's section on factors related to age relies on studies conducted between 1938 and 1980, but none of the studies have to do with sexual reoffense. There is nothing in this chapter that would serve as a basis for the Board's conclusion about the sexual recidivism rate of adolescents.

4) McConaghy, Nathaniel, Blaszczynski, Alex, Armstrong, Michael & Kidson, Warren, *Resistance to Treatment of Adolescent Sex Offenders,* 18 Archives of Sexual Behavior 97 (1989).

   This article reports on a study that was conducted more than 35 years ago, and involved a grand total of six adolescents, ranging in age from 14 to 19 years old, who were referred for treatment for sexual offending. The treatment modalities were imaginal desensitization, covert sensitization, medroxyprogesterone injections, and a combination of imaginal desensitization and medroxyprogesterone injections. Four of the adolescents required additional treatment, and three of the six sexually reoffended following treatment. The treatment modalities used have since been proven ineffective and abandoned, and based on such an extremely small sample, there is no meaningful conclusion that can be drawn about adolescent recidivism rates or adolescent resistance to treatment.

   A recidivism study should include a sample of sufficient size to conduct appropriate statistical tests of comparisons with or between studies.[91] Using a small sample is particularly dangerous in evaluations of treatment effectiveness and may lead to false conclusions.[92]

   There was a cohort of 39 adults who were also the subjects of this same study, and who were administered the same treatment modality. Using a retrospective approach, the researchers recorded that 21 of the subjects self-reported having commenced sexual offending in adolescence. This is hardly a valid basis from which to assume that adolescents have a high rate of sexual recidivism, generally, but apparently the Board did just that.

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[88] Caldwell, *supra* note 1 at 206.
[89] Letourneau, Elizabeth & Miner, Michael, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo,* 17 Sexual Abuse 293 (2005) at 300.
[90] Zimring, *supra* note 37 at 70.
[91] Furby, Lita, Winrott, Mark & Blackshaw, Lyn, *Sex Offender Recidivism: A Review,* 105 Psychological Bulletin 3 (1989) at 7.
[92] *Id.* at 7.

Research Finding Adolescents at High Risk to Sexually Reoffend Critiqued

Research on the recidivism rates of adolescents who have committed sexual offenses spans eight decades and has gone through three phases.[93] Pioneering research in the 1940s and 50s established that the risk of sexual recidivism for adolescents who had sexually offended was relatively low. The grandfather of all outcome studies of juveniles who had sexually offended was published in 1943 by Lewis Doshay, a psychiatrist long associated with New York City's Children's Court.[94] For his sample of 256 males who were clinic patients charged with sexual delinquency, the follow-up period was six years.[95] Doshay reported a sexual recidivism rate of 3.1 percent and a non-sexual recidivism rate of 15 percent.[96] Similar findings of low sexual recidivism rates for adolescents who sexually offended were found in studies by Dunham[97] and Atcheson, et al.,[98] both published in the 1950s.

In the 1980s and early 1990s, researchers questioned the earlier research. Clinical researchers noticed that a substantial proportion of adults who sexually offended reported having sexually offended during adolescence. In the second phase, research (such as that relied upon by the Board and referenced above) drew inferences from retrospective research with small and specific samples. This research coincided with the politically charged historical period of "tough on crime" and "adolescent predators." The idea that sexual offending during adolescence is a steppingstone toward adult offending became the predominant view, along with the assumption that adolescents who sexually offended were at high risk of continuing sexually offending as adults.[99]

Finally, in the third phase, starting in the 1980s and continuing to the present, contemporary research on adolescent sexual recidivism challenged the misperceptions and invalid assumptions of the second phase.[100] The contemporary researchers recognized the flaws in the earlier research, and utilized more generalized samples, larger samples, prospective longitudinal research, and meta-analysis to debunk the earlier misconceptions. This was recognized in the report for the U.S. Department of Justice by the SMART Offices, Sex Offender Management Assessment and Planning Initiative. The assumptions from the second phase are "an example of how studies can be misinterpreted and lead to inaccurate policies."[101] Since the 1980s, a significant body of knowledge specific to adolescents who commit sexual offenses has been developed, particularly in relation to the characteristics of these youth and their low risk of sexual reoffending. To accomplish this, researchers employed methodologies very different from those that retrospectively examined the history of adults who had sexually offended.[102]

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[93] Lussier, *supra* note 48 at 54.
[94] Zimring, Franklin, American Travesty (2004) at 57.
[95] *Id.* at 57.
[96] Doshay, Lewis, The Boy Sex Offender and his Later Career (1943) at 71-89.
[97] Dunham, H. Harren, Crucial Issues in the Treatment and Control of Sexual Deviation in the Community (1951).
[98] Atcheson, J.D. & Williams, D.C., *A Study of Juvenile Sex Offenders,* 111 American Journal of Psychiatry 366 (1954).
[99] Lussier, *supra* note 48 at 55.
[100] Lussier, *supra* note 48 at 55.
[101] Lobanov-Rostovsky, *supra* note 60 at 254.
[102] Lobanov-Rostovsky, *Recidivism of Juveniles Who Commit Sexual Offenses,* Research Brief, SOMAPI (2015) at 1. Available at https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/juvenilerecidivism.pdf.

It is now generally acknowledged that the research conducted during the second phase, which assumed that adolescents are at high risk of sexually reoffending, suffered from several serious flaws. Many of the studies were based upon very small samples, at times as little as six subjects.[103] Many of the studies were based upon samples drawn from a very limited type of subject, often from a correctional or clinical setting, thereby limiting the generalizability of the study's findings and exaggerating the risk of reoffending. Leon explains the sampling flaw. Recidivism studies fall under one of three categories of sampling: justice system, correctional, or clinical.[104] A justice system sample is a cross-section of the entire population of juveniles who have sexually offended, coming to the attention of the courts. It is the most representative study. A correctional population or sample is limited to a cross-section of individuals who have sexually offended and are confined in a prison. A clinical population comprises individuals who have offended sexually or generally, or others in treatment at a particular place or group of places. It is the least representative sample of the population of adolescents who have sexually offended.[105] The most significant flaw is the researchers' use of the retrospective methodology. As Hunter observes, the estimated high risk of juvenile sexual recidivism "may have been exaggerated by an over-reliance on retrospective research studies."[106] Hunter goes on to explain that longitudinal research, or the prospective tracking of individuals, typically provides a more accurate index of event likelihood.[107] Lussier and Blokland similarly recognize that contemporary researchers have long observed that retrospective data with adults who have sexually offended tend to artificially inflate the likelihood of continuity of sexual offending from adolescence to adulthood.[108]

Contemporary research has learned much from the failings of earlier research, and there have been considerable advances. Sampling procedures have been made more inclusive, including both high-risk and low-risk individuals in the sample. Samples are also much larger, allowing for more generalizable conclusions. There have been changes in research methodology and practices (e.g., the transition from retrospective to prospective longitudinal research).[109] Contemporary researchers have adopted the use of meta-analysis. For various reasons, quantitative meta-analysis of recidivism rates is considered a better alternative to individual studies, narrative reviews, or the pooling of secondary data stemming from a very small subset of samples.[110] This methodology limits potential bias, allows researchers to statistically control for certain, critical methodological aspects of studies, and allows for the pooling of findings from various studies while accounting for the sample size of each.[111]

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[103] Vandiver, *supra* note 67 at 675.
[104] Leon, Chrysanthi Leon, Appendix C in Zimring, An American Travesty (2004).
[105] *Id.*
[106] Hunter, John, *Understanding Juvenile Sex Offenders: Research Findings and Guidelines for Effective Management and Treatment,* Juvenile Justice Fact Sheet (2000) at 2. Available at 183507NCJRS.pdf (ojp.gov).
[107] *Id.* at 2, footnote 4.
[108] Lussier & Blokland, *supra* note 71 at 153.
[109] Lussier, *supra* note 48 at 56.
[110] Lussier, *supra* note 48 at 57.
[111] Lussier, *supra* note 48 at 57.

Retrospective vs Prospective Studies

It is important to clarify the difference between retrospective and prospective studies to appreciate how a change in research methodology has brought us closer to understanding the behavior of sexually offending adolescents, and why the risk of sexual reoffending was misperceived during the final decades of the last century.

In a retrospective study of sexual recidivism of adolescents, a cohort of individuals who have sexually offended as adults are asked to self-report if they sexually offended during adolescence. If a majority of adults respond in the affirmative, researchers and policymakers use backwards reasoning to infer that a majority of adolescents recidivate in adulthood. Chaffin explains the logical fallacy of "backwards reasoning." "This is analogous to reasoning that because many chronic heroin addicts began their drug-using careers as teen marijuana smokers, adolescents caught smoking marijuana should therefore be placed on a lifetime methadone program."[112] Zimring suggests that researchers from this earlier period were asking the wrong question.[113] "In fact, knowing what proportion of later sexual offenders committed an offense in adolescence tells us next to nothing about how likely it is that certain teen sexual behavior leads to later offending behavior, and therefore presents a very weak case for early intervention for the majority of teen sex offenses. The important issue is not how many later chronic offenders started young, it is what proportion of a group of young offenders presents a significant risk of further trouble."[114]

Prospective studies help answer that important question. They do so by studying a cohort of adolescents over time to determine the base rate of later adult offending, and whether the group that will later get in trouble can be predicted with any efficiency.[115] In a prospective study, a large cohort is identified and followed through adolescence and into adulthood. Over the course of the study, those adolescents who sexually offend are identified and tracked throughout the follow-up period to determine what percentage reoffend sexually in adulthood. The sexual offending may be determined by police contacts, arrests, adjudications, or convictions.

Court Decisions from Other States

The low recidivism rate for adolescents who have been convicted of crimes of a sexual nature is so well established that it has been acknowledged in the high courts of several states. At the evidentiary hearing in *In re C.K.,* 233 N.J. 44 (2018), six experts testified, and all agreed that that the adolescent sex offense recidivism rates are relatively low, and that they are less likely to reoffend than adult sex offenders. *Id.* at 51-52. The highest court in New Jersey acknowledged that since 2002, "scientific and sociological studies have shined new light on adolescent brain development and on the recidivism rates of juvenile sex offenders compared to adult offenders." *Id.* at 74. The court went on to find that "juvenile sex offenders are less likely to reoffend than adult sex offenders." *Id*.

[112] Chaffin, *supra* note 55 at 112.
[113] Zimring, *supra* note 94 at 55.
[114] Zimring, *supra* note 94 at 55.
[115] Zimring, *supra* note 94 at 55.

In a Pennsylvania case, the state's high court upheld the lower court finding that application of SORNA's lifetime registration requirements to juveniles is unconstitutional, pointing to the research studies relied upon by the trial court, which indicated that "recidivism rates for juvenile sex offenders are far less than the recidivism rates of adult sexual offenders and, instead, are comparable to non-sexually offending juveniles." *In re J.B.,* 107 A.3d 1, 10 (2014). In an Ohio case, the court also acknowledged that research does not support the contention of higher recidivism rates for people who have sexually offended, "especially for juvenile offenders." *In re W.Z.,* 194 Ohio App.3d 610 (Ohio Ct. App. 2011).

Early New York Decisions

A defense challenge to the assessment of points under Risk Factor 8 has, to date, rarely led to thoughtful judicial analysis by a SORA court. Whether that is because defense counsel have not been diligent in bringing challenges or because of judicial indifference is not clear.

Judge Marcy Kahn's decision in *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. New York County 2005) was the first to take up a challenge to Risk Factor 8. Jusino was 17 years old when charged for the first and only time with sexually offending. The Board recommended assessing 10 points for Risk Factor 8 because he was 20 years old or less. The court carefully reviewed the four articles that were cited in the Guidelines as the basis for the conclusion that "age at his first sex crime is a factor associated with recidivism: those who offend at a young age are more prone to reoffend." Guidelines at 13. The court found that the articles "cannot withstand analysis" as support for the Board's assessment of points, in that they were outdated, based upon studies that were decades old, and did not stand for the proposition for which they were cited. *Id.* at 480. The court also cited research that led to a contrary conclusion than the articles cited by the Board. Ultimately, the court declined to assess any points against Jusino, not because of the flaws in the Board's assumption, but because Risk Factor 8 was found to be inapplicable; it fell under the section relating to "Criminal History" as in "prior history," the court observed, and therefore did not apply to the instant or first offense. *Id.* at 477-478. After excluding the 10 points for Risk Factor 8, the court arrived at a total risk factor score of 85, making Jusino a presumptive Risk Level 2. The court then departed downward to a Risk Level 1 based upon several mitigating factors, but Jusino's youth and immaturity were not among them.

People v. Jusino should have been a precedent-setting case. It was not. No reported case followed Judge Kahn's critical analysis. Instead of updating and correcting its misplaced assumption about adolescents' risk of reoffense based upon contemporary research, the Board doubled down on Risk Factor 8 by amending the Guidelines in 2006 to include the qualifying phrase: "which includes his age at the time of the commission of the instant offense."

Two subsequent cases, both decided in 2009, mark the last times that the thoughtful analysis raised in *Jusino* has been referenced. In *People v. Santos,* 25 Misc. 3d 1212[A] (Sup. Ct. New York County 2009), the court generally criticized the RAI as being "obviously outdated," "frozen in time," and relying upon old research, the most recent "article [being] published in 1995." The court also observed, "The study of sex offender recidivism, risk assessment and treatment is a dynamic and ever changing discipline, where new research findings continually

modify the understanding of risk." In *People v. Oliver,* 37 Misc. 3d 1201[A] (Sup. Ct. Cayuga County 2009), the court expressed concern about Risk Factor 8, stating, "[A] review of the articles cited in the Guidelines . . . does not support the conclusion that age twenty is a more appropriate cut-off for the point allocation." However, because defense counsel had raised no constitutional or evidentiary objection to the Board's assessment of 10 points for Risk Factor 8, the court took no action.

Downward Departure

There are two ways to address a recommended assessment of 10 points for Risk Factor 8 by the Board or the prosecutor. The first way is to directly challenge the recommended assessment, arguing that it is irrational and contrary to a plethora of contemporary research about adolescents' risk to sexually reoffend. The second way is to request a downward departure based upon the client's youth, immaturity, and the empirical research that supports the conclusion that they are low risk to reoffend. For a thorough discussion of a request for a downward departure, see Chapter 5 of *Defending Against the New Scarlet Letter: A Defense Attorney's Guide to SORA Proceedings, Second Edition.* It is available online at *sora-manual-second-edition-2022.pdf (ny.gov)*.

Based upon the Court of Appeals' analysis of the RAI risk-factor scores and departures, it would appear that the more appropriate way to raise the issue of the client's youth, immaturity, and low risk to sexually reoffend is by way of a downward departure. The departure approach is analogous to that taken in *People v. Johnson,* 11 N.Y.3d 416 (2008) and *People v. Gillotti,* 23 N.Y.3d 841 (2014).

In *People v. Gillotti,* 23 N.Y.3d 841, 861 (2014), the Court of Appeals explained the "three analytical steps" required for a court to determine whether to depart from the presumptive risk level.

> **Step One**: "[D]ecide whether the aggravating or mitigating circumstances alleged by a party seeking a departure are, as a matter of law, of a kind or to a degree not adequately taken into account by the guidelines."
>
> **Step Two**: "[D]ecide whether the party requesting the departure has adduced sufficient evidence to meet its burden of proof in establishing that the alleged aggravating or mitigating circumstances actually exist in the case at hand."
>
> **Step Three**: "[T]he court must exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants a departure to avoid an over- or under-assessment of the defendant's dangerousness and risk of sexual recidivism."

As detailed earlier in this section, the last three decades of research has established that adolescents who sexually offend are clinically different from their adult counterparts, pose little risk to sexually reoffend, and have an inherent capacity for rehabilitation and maturation. The RAI and the Guidelines predate these important findings; they cannot adequately account for the empirical findings of research developed since 1995, when the RAI was created. Clearly, as to

step one of the *Gillotti* analysis, an adolescent's low risk to sexually reoffend is "not adequately taken into account by the guidelines."

"The ability to depart is premised on a recognition that an objective instrument, no matter how well designed, will not fully capture the nuances of every case." Guidelines at 4. "Departures can account for circumstances when the guidelines are not a perfect fit for a required risk assessment." *People v. Reid,* 141 A.D.3d 156, 58 (1st Dept. 2016). A risk factor based on outdated and discredited science is "not a perfect fit for a required risk assessment." Nothing in the SORA statute or Guidelines requires courts to turn a blind eye to scientific developments that occur subsequent to the RAI's creation. Courts retain broad "discretion to depart from the result indicated by the [RAI] in cases where that result does not make sense [to] avoid anomalous results." *Johnson,* 11 N.Y.3d at 418. The Guidelines caution that "[c]ircumstances that may warrant a departure cannot, by their very nature, be comprehensively listed in advance" (Guidelines at 4), plainly contemplating that future advances in criminological and social science research could warrant the use of a departure to account for such developments.

In *Gillotti* and *Johnson*, the court confronted the issue that the RAI was developed to address contact offenses, not non-contact offenses, such as child pornography, an issue that the Guidelines did not contemplate. The court recognized that assessing points under risk "factors 3 and 7 may overestimate the risk of reoffense and danger to the public by quite a few child pornography offenders." *Gillotti,* 23 N.Y.3d at 859. The court concluded that the solution was not to ignore the assessment of points for the risk factors themselves, even if inappropriate. The remedy for cases in which a result dictated by the RAI "does not make sense" was not to disturb the calculations of the instrument by ignoring certain risk factor scores, but to depart from the final presumptive risk level. "A SORA court should, in the exercise of its discretion, give particularly strong consideration to the possibility that adjudicating the offender in accordance with the guidelines point score and without departing downward might lead to an excessive level of registration." *Id.* at 860.

The Appeals Courts Turn a Blind Eye

Courts have ignored compelling scientific evidence that would enable them to render more accurate risk assessments, and often propped up a registration scheme that fails to accurately differentiate between a low-risk adolescent, who statistically poses no greater likelihood of sexually reoffending than any unregistered person, from a moderate or high-risk individual.

It appears that the Fourth Department is the only Department that has still not faced a request for downward departure based on the assessment of 10 points for Risk Factor 8 in a case where it was his first and only sex offense that was committed at the time he was 20 years old or less. In the Second and Third Departments, the courts have affirmed denials of downward departures based upon the individuals' young age, inexplicably claiming that young age at the time of the offense was adequately taken into account by the Guidelines, and that "an offender's age of 20 or younger at the time of a sex offense is deemed to be an aggravating factor rather than a mitigating factor." *People v. Tleis,* 222 A.D.3d 1012, 1013 (2d Dept. 2023). *See also*

People v. Alleyne, 212 A.D.3d 660 (2d Dept. 2023) and *People v. Lane,* 201 A.D.3d 1266 (3d Dept. 2022).

In the First Department, there have been a number of cases challenging lower court denials of downward departure requests based upon the individual's youth and immaturity as a mitigating factor. The Appellate Division has invariably affirmed the denials. The reasons for affirmance included: (1) youth was adequately taken into account by the RAI; (2) young age was not shown to reduce this particular defendant's risk of reoffending; and (3) the mitigating factors were outweighed by the seriousness of the crime (*see, e.g., People v. Jackson,* 214 A.D.3d 439 (1st Dept. 2023) and *People v., Ortiz,* 160 A.D.3d 442 (1st Dept. 2018)); (4) there are no point assessments that overassess the risk of reoffense (*People v. Bulina,* 205 A.D.3d 526 (1st Dept. 2022)); (5) the defendant "did not present any expert testimony or other evidence that might have allowed the SORA court to make a finding that defendant is less likely to reoffend based on his age" (*People v. Rodriguez,* 145 A.D.3d 489 (1st Dept. 2016)); and (6) the defendant (18 year old) is not really a juvenile entitled to use his youth as a mitigating factor (*Bulina,* 205 A.D.3d at 527).

Presented with the Appellate Division's science-denying decisions affirming denials of requests for downward departures, the Court of Appeals has consistently denied leave to appeal the affirmances, even in those cases where the appellant filled the record with a plethora of research and scholarly articles showing that adolescents are at low risk to sexually reoffend.

What we have learned from a review of the Appellate Division decisions is that embedded, false assumptions about sexual offending are not easily recast, even when the courts are presented with abundant, accurate, contrary data. The Appellate Division's position has so far been that "if the Board says it is true in the Guidelines, then it must be true." As Mark Chaffin describes this judicial intransigence: *Our Minds Are Made Up Don't Confuse Us with the Facts.*[116] Judges sometimes reject empirical facts when these facts do not comport with the false narrative they have embraced, particularly when that false narrative is driven by a moral panic. Psychologists call this "confirmation bias," which is "the tendency to acquire or process new information in a way that confirms one's preconception and avoids contradiction with prior beliefs."[117]

Chaffin describes the challenge ahead: "The question now is . . . how many children and youth may be needlessly harmed before rational, fact-based policies and practices supersede the minimization of our past and the moral panic of the present."[118]

[116] Chaffin, *supra* note 55.
[117] Carpenter, Catherine, *Panicked Legislation,* 49 Notre Dame Journal of Legislation 1 (2022) at 8.
[118] Chaffin, *supra* note 55 at 111.

PRACTICE TIPS

As unreceptive as the appellate courts have been to the empirical evidence that defense counsel have presented over the past decade, we should persist and continue to present the facts as we know them to be. Eventually the dam will break. Let's think about new ways to approach this issue.

If the 10 points assessed for Risk Factor 8 push your client up to a moderate or high risk, defense counsel should always move for a downward departure based upon the mitigation of the client's age. Youth can and should always be a mitigating factor. Press forward with the holdings of the U.S. Supreme Court. "[C]riminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham v. Florida,* 560 U.S. 48, 76 (2010). "[T]he chronological age of a minor is itself a relevant mitigating factor of great weight." *Miller v. Alabama,* 567 U.S. 460, 476 (2012). How can it be that in all aspects of our law, youth is a mitigating factor, but in the context of SORA, courts treat it as an aggravating factor?

Being informed by the cases we have lost, defense counsel should:

1) Present the case at the initial SORA hearing with an eye toward developing as complete a record as possible for appeal.
2) Consider using an expert. An expert can help establish a robust record for appeal. An expert can assess your client's risk level using more appropriate risk assessment instruments, review the contemporary research that establishes that adolescents are low risk to sexually reoffend, and explain:
    - why a one-size-fits all risk assessment such as the RAI is inappropriate for adolescents;
    - what a developmental approach is and how it affects the assessment of adolescents;
    - how your client's immaturity and impulsiveness account for this sexual offense, will change as the client develops, and make it unlikely that this particular adolescent will reoffend; and
    - why a treatment program specific to adolescents will be more effective than a treatment program developed for adults.
3) Submit copies of contemporary literature and the research that provides empirical evidence that adolescents are a low risk to reoffend sexually. Mark them as exhibits.
4) Explain in your supporting affirmation how Risk Factor 8 over-assesses your client's risk and that it is based upon the false and discredited assumption that all adolescents are at high risk to sexually reoffend.
5) Explain in your supporting affirmation why adolescence, immaturity, impulsiveness, and developmental changes are not factors taken into account by the RAI, which treats adolescence universally as an aggravating factor.
6) When representing a client who is 18, 19, or 20 years old, explain in your supporting affirmation why the jurisprudence developed for juveniles, based upon

brain and behavioral development, is equally applicable to emerging adults up to age 21. For a discussion of late adolescence/emerging adults, see §3:4 of this guide.

§ 9:5 Risk Factors 8, 9, and 10

Risk Factors 8, 9, and 10 fall under the category of criminal history. The assessment of points for these risk factors is predicated on a prior or current sex crime. Questions arise regarding whether an actual conviction or adjudication is required, and whether youthful offender and/or juvenile delinquency adjudications qualify. For a full discussion of these three risk factors, see *Defending Against the Scarlet Letter* (Second Edition) at § 3:9, § 3:10, and § 3:11.

Conviction or Adjudication Required

It is not sufficient that there is proof of the commission of a prior sex offense; there must be a resulting conviction or adjudication in order to assess points. *People v. Current,* 147 A.D.3d 1235, 1236-7 (3d Dept. 2017). For point assessments involving a sex crime, the crime of conviction or adjudication must be for an offense listed as either a "sex offense" or a "violent sex offense" in Correctional Law § 168-a (2) or (3). *See People v. Horne,* 61 A.D.3d 945 (2d Dept. 2009). In *People v. Miller,* 149 A.D.3d 1279 (3d Dept. 2017), however, the court held that endangering the welfare of a child should be treated as a sex crime and scored for Risk Factor 8 as a sex crime.

Youthful Offender Adjudication

Assessing points for a person who was adjudicated a youthful offender is proper for all of the criminal history risk factors. Guidelines at 6, 13; *People v. Francis,* 30 N.Y.3d 737 (2018).

Juvenile Delinquency Adjudication

Despite the Guidelines' directive that it is proper to consider offenses committed by individuals found to be juvenile delinquent (Guidelines at 6, 13), three departments of the Appellate Division have held that it is improper to consider a juvenile delinquency finding for Risk Factors 8, 9, and 10. *People v. Campbell,* 98 A.D.3d 5 (2d Dept. 2012); *People v. Brown,* 148 A.D.3d 1705 (4th Dept. 2017); *People v. Shaffer,* 129 A.D.3d 54 (3d Dept 2015).

Out-of-State Convictions and Adjudications

An out-of-state conviction or adjudication can be used for assessing points under criminal history and Risk Factor 9. In *People v. Perez,* 35 N.Y.3d 85 (2020), the Court of Appeals addressed a gap in the Guidelines and Correction Law, which leave open the question of whether out-of-state convictions may be considered in evaluating the risk of reoffense, such as in Risk Factor 9. The court held that reliance on out-of-state convictions for purposes of assessing points under Risk Factor 9 was appropriate, provided the conviction meets the "essential elements" provision of SORA (as explained in *North v. Board of Examiners of Sex Offenders of State of*

New York, 8 N.Y.3d 745 (2007)). For a full discussion of the "essential elements" test, see *Defending Against the Scarlet Letter* (Second Edition) at § 8:12.

In *People v. Hart,* 228 A.D.3d 15 (2d Dept. 2024), the court held that a juvenile delinquency adjudication from another state could be considered for purposes of Risk Factors 8 and 9 because: the provisions of Family Court Act § 381.2 limiting the use of such adjudications did not apply to out-of-state adjudications; New Jersey did not have a comparable proscription on the use of its juvenile delinquency adjudications; and New Jersey requires individuals adjudicated delinquent for a sex offense to register, unlike New York.

§ 9:6 Consensual Conduct – Downward Departure

Frequently, an adolescent will be charged with a sex offense involving sexual conduct with a consensual participant who is less than 17 years old.

The victim's consensual participation in the sexual conduct, regardless of age, is a recognized basis for downward departure both in the Guidelines (p. 9) and in case law.

Even though New York's Penal Law § 130.05 (3) deems a person incapable of consent when he or she is less than seventeen years old, it is well recognized that departure may be appropriate when the victim willingly participated in the sexual act, and the victim's lack of consent was due only to legal inability by virtue of age, as proscribed by the statute.

The Guidelines support such a departure: "The Board or a court may choose to depart downward in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points in this category results in an over-assessment of the offender's risk to public safety." Guidelines at 9.

A substantial line of cases has upheld downward departures when an underage victim is a willing participant in the sexual conduct. In the Fourth Department, this was deemed a special circumstance warranting a downward departure as early as *People v. Santiago,* 20 A.D.3d 885 (4th Dept. 2005), and reaffirmed by *People v. George,* 141 A.D.3d 1177 (4th Dept. 2016), *People v. Walker*, 146 A.D.3d 824 (2d Dept. 2017), and *People v. Fisher,* 177 A.D.3d 615 (2d Dept. 2019).

The mitigating factor of "willing participation" is usually accepted by courts as a basis for downward departure when presented in conjunction with other mitigating factors indicative of a reduced risk to public safety, e.g., no evidence of forcible compulsion, no prior sex offense conviction, and enrollment in a counseling program for people who have sexually offended. *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007). In *People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011), the court came close to requiring a showing of additional factors (no forcible compulsion, minimal age disparity). On the other hand, the court in *People v. Garcia,* 53 Misc. 3d 153(A) (App. Term 2d Dept. 2016) approved a downward departure to a Risk Level 1 based on the sole mitigating factor of the victim's willing participation in the sexual conduct, as did the Second Department in *People v. Fisher,* 177 A.D.3d 615 (2d Dept. 2019).

It was error for County Court to decline to grant a downward departure on the basis that the defendant had already benefited from the victim's consent by obtaining a "light criminal

sentence," as the criminal sentence is not an appropriate factor to be considered under the Guidelines. *People v. Secor,* 171 A.D.3d 1314 (3d Dept. 2019). Although the "light sentence" apparently aggravated the judge, the "light sentence" cannot be an aggravating factor to offset the mitigating factor in denying a downward departure.

§ 9:7 Constitutional Challenges

In light of what we now know about adolescents' high likelihood of desisting from crime, low risk to sexually reoffend, and amenability to treatment, it seems inappropriate to subject an adolescent to a mandatory designation as a sexually violent offender and condemn him or her to lifelong stigma and registration, without such government action being rationally related to a legitimate governmental purpose.

The illogic and fundamental unfairness of this practice has been the basis for numerous constitutional challenges based on the constitutional ban against cruel and unusual punishment and principles of substantive due process. To date, New York appellate courts have given none of these challenges serious consideration. *See*, e.g., *People v. Putland,* 187 A.D.3d 1073 (2d Dept. 2020); *People v. Bullina,* 205 A.D.3d 526 (1st Dept. 2022); *People v. Montesquieu,* 217 A.D.3d 548 (1st Dept. 2023).

Placement of juveniles on a registry for life despite the empirical data showing that they are not likely to be a lifetime threat to sexually reoffend has given rise to successful constitutional challenges in other states. See, e.g., *In re C.P.,* 131 Ohio St.3d 513 (2012); *In re C.K.,* 233 N.J. 44 (2018); *In re* J.B., 107 A.3d 1 (2014); *In re W.Z.,* 194 Ohio App.3d 610 (2011).

§ 9:8 Modification

An individual's risk level as previously determined at a SORA hearing may be modified pursuant to Correction Law § 168-o. The eligibility and procedures for a modification petition are set forth in Correction Law § 168-o (2) and (4). As a practical matter, a modification petition should generally not be pursued until your client has been offense-free in the community for approximately 10 years. In the case of a modification petition for a person who was an adolescent when he or she sexually offended and was determined to be a Risk Level 2 or 3, the waiting period might be shortened because their risk to reoffend is diminishing rapidly as a result of desistance and maturity. It is generally accepted that the risk assessment of adolescents is only valid for a short period of time and needs to be repeated at least annually (see above at § 6:9). Consequently, the initial SORA RAI assessment should be revisited after a shorter waiting period for an adolescent than an adult. Perhaps, based upon that rationale and the principles of a developmental approach, the Board can be convinced that a shorter period of time offense-free is justified in the case of an adolescent who has sexually offended and is seeking modification.

When submitting a modification petition, you may find it helpful to review *A Defense Attorney's Guide to SORA Modifications* (Correction Law § 168-o) (2019).[119]

[119] Rosenthal, Alan, *A Defense Attorney's Guide to SORA Modifications (Correction Law § 168-o)* (2019). Available at SORA Modification Manual.pdf (ny.gov).

PRACTICE TIPS

When filing a modification petition for a person who was initially placed on the registry as an adolescent, consider having your client undergo an updated risk assessment and include it as an exhibit to your petition.

CHAPTER 10

RETROACTIVE YOUTHFUL OFFENDER

CHAPTER 10 SECTIONS

CHAPTER 10

RETROACTIVE YOUTHFUL OFFENDER

§ 10:1 Introduction

Youthful offender adjudications, as provided for in Article 720 of the CPL, are among the most powerful procedural tools to avoid the stigma of a criminal conviction for our clients. Youthful offender law and practice, generally, is discussed in Chapter 5. But an important amendment to Article 720 was enacted in 2021 that should be incorporated into every defense counsel's toolbox.

On November 2, 2021, Governor Hochul signed A.6769/S.282 into law, thereby amending CPL § 720.20 by adding subsection (5), which allows for the retroactive application for a youthful offender finding.[1]

§ 10:2 Purpose

As stated in the bill sponsor's memo, the purpose of this amendment to Article 720 of the CPL is "to grant an individual who was an eligible youth but not determined to be a youthful offender by the sentencing court the opportunity to apply for a new determination."[2] The justification portion of the sponsor's memo further explains:

> *Youthful offender adjudication is an important tool to limit the life-long consequences a criminal conviction can have for young people. However, many eligible young people are not granted youthful offender status and subsequently face significant barriers caused by their criminal records carrying into their adult lives. This legislation would offer these individuals a second chance to receive a youthful offender determination so they can find relief from the onus of a criminal record. Under this bill, a person who was initially denied youthful offender treatment and has not been convicted of a crime for at least five years since their sentence would have the opportunity to apply to the sentencing court for a new determination. Retroactive youthful offender adjudication will enable more New Yorkers to fully integrate into their communities without being continuously stigmatized for mistakes made in their youth."*[3]

[1] NY State Senate Bill 2021-S282 (nysenate.gov); L 2021, ch 552, § 1, effective November. 2, 2021.
[2] Senate bill S.282 sponsor's memo. NY State Senate Bill 2021-S282 (nysenate.gov).
[3] NY State Senate Bill 2021-S282 (nysenate.gov).

Governor Hochul, upon signing the legislation, stated:

> *Far too many New Yorkers who made poor choices at a young age are forced to deal with the lifelong consequences of criminal convictions that deny them a second chance at a productive, fulfilling life. Communities thrive when every member has the opportunity to contribute and it's time for New York to make the changes necessary for ensuring everybody has a fair shot at success. Thanks to this legislation, we can now support those who have learned from their mistakes by doing away with the stigma of a criminal conviction, and giving them the opportunity to get back on their feet.*[4]

The legislation marks a critical extension of the 2017 "Raise the Age" law, and helps rectify New York's past treatment of adolescents as adults, and failure to recognize how the neurological development of young people affects their behavior. It also marks another step towards a developmental approach for the New York criminal legal system. As stated by Assemblymember Michaëlle Solages, Chair of the Black, Puerto Rican, Hispanic & Asian Caucus and a co-sponsor of the legislation, "Everything we know about young people tells us that they continue to grow and mature well into emerging adulthood. This bill takes a small but important step toward aligning New York's youth justice system with the growing scientific consensus about youth development."[5]

§ 10:3 Eligibility

Eligibility is set forth in CPL § 720.20 (5)(a) as follows:

- An individual is eligible to apply for a retroactive youthful offender determination if he or she was an eligible youth at the time of sentencing, but were not determined to be a youthful offender by the sentencing court; and

- Five years have passed since the imposition of the sentence for which youthful offender adjudication was denied. However, if the sentence included a period of incarceration, including a period of incarceration imposed in conjunction with a sentence of probation (split sentence), the five years is measured from the individual's latest release from incarceration; and

- The individual has not been convicted of any new crime since the imposition of such sentence for which youthful offender adjudication was denied.

[4] Governor Hochul Signs Legislation Allowing Individuals Initially Eligible but Denied Youthful Offender Status to Reapply for Retroactive Designation | Governor Kathy Hochul (ny.gov).
[5] https://youthrepresent.org/news-blog/2021/6/10/legislature-passes-bill-to-allow-youth-tried-as-adults-second-chance-to-seal-records.

PRACTICE TIPS

Because the eligibility requirement of five years offense-free is so stringent, defense counsel should consider presenting the client who has been offense-free for five years as "presumptively" qualified to be determined a youthful offender in both the moving affidavit and memorandum of law.

§ 10:4 Procedure

The procedures for a retroactive Y.O. application are set forth in CPL § 720.20 (5)(a) and (c) as follows:

● Application is made to the sentencing court.

● A copy of the application must be filed and served upon the district attorney of the county in which the individual was convicted.

● The district attorney must notify the court within forty-five days of being served if he or she objects to the application.

● The court may hold a hearing on the application on its own motion or on the motion of either party.

● If the district attorney does not file a timely objection, the court must proceed forthwith.

§ 10:5 Factors to Be Considered

Pursuant to CPL § 720.20 (5)(b), the court must consider the following factors when making its Y.O. determination:

(i) Whether relieving the individual of the onus of a criminal record would facilitate rehabilitation and successful reentry and reintegration into society;

(ii) The manner in which the crime was committed;

(iii) The role of the individual in the crime which resulted in the conviction;

(iv) The individual's age at the time of the crime;

(v) Any mitigating circumstances at the time the crime was committed;

(vi) The individual's criminal record;

(vii) The individual's attitude toward society and respect for the law;
(viii) Evidence of rehabilitation and demonstration of living a productive life, including, but not limited to participation in educational and vocational programs, employment history, alcohol and substance abuse treatment, and family and community involvement.

PRACTICE TIPS

In much the same way the *Cruikshank* factors should be addressed in a pre-sentence memorandum at the time of initial sentencing (*see* §§ 5:15 and 7:4, *supra*), the eight statutory factors set forth in CPL § 720,20 (5)(b) should be addressed in an application for retroactive youthful offender adjudication and the supporting memorandum of law. Exhibits can be attached that help to establish some or all of the factors.

In addressing the factor in subdivision (v), obtain and review copies of the PSR, the defendant's pre-sentence memorandum, and a transcript of the sentencing minutes to determine what mitigation was previously presented, and what new mitigating facts can be added. Mitigation should be developed for the retroactive Y.O. application in much the same way it would be for a regular Y.O. case, including by careful interviews with not only your client, but also his/her family, friends, etc. See §§ 7:1 and 7:2 (checklist of mitigation records), *supra*.

The factor in subdivision (vii) asks the court to consider your client's "attitude toward society and respect for the law." A strong argument can be made that the court is to consider the individual's current attitude, not what was exhibited at the time of the offense, as the inquiry upon a retroactive youthful offender focuses on the person the client has become. Support for this position is found in *People v. Z.H.,* 192 A.D.3d 55, 61 (4th Dept. 2020), where the court held that, as to *Cruikshank* factor 8 (identical to the factor in CPL § 720.20 (5)(b)(vii)), the court must consider the present and likely future attitude, not the attitude displayed during the commission of the underlying offense.

In addressing the factor in subdivision (viii), develop all of the factual information that demonstrates your client's rehabilitation and productive life since the time of the offense. In a similar fashion to developing the mitigation for the initial criminal case, interview family, friends, teachers, employers, and others who can help corroborate the progress your client has made. Supplement the narrative accounts with documentation from DOCCS, programs, education, employment, civic participation, volunteer activities, and other pro-social endeavors.

Because there is so much information to gather and an important story to tell, consider engaging the assistance of a mitigation specialist. The role of a mitigation specialist is explained in § 7:5 of this guide.

Also, be aware of *People v. Adel N.,* 75 Misc. 3d 1228(A), which was one of the first reported decisions to address retroactive youthful offender, and a troublesome decision worth reading in its entirety, if only as a precautionary measure. Adel's application effectively focused on

factor (viii) by highlighting various educational and employment accomplishments and demonstrating his rehabilitation and productive life. The judge turned the intent of the legislature on its head, finding that these accomplishments barred Adel from a retroactive Y.O. because they demonstrated that he did not need a youthful offender adjudication. Adel, therefore, "failed to offer any evidence that the relief sought is necessary to 'facilitate rehabilitation and successful reentry and reintegration into society.'" Although it is well accepted that "some amount of stigma results from the simple fact of a criminal conviction" (*People v. Brown,* 41 N.Y.3d 279, 293 (2023), and the pervasive enmeshed consequences of a criminal conviction have been well documented, the lesson from *People v. Adel N.* is that an application should spell out the particulars of the difficulties your client has encountered because of the criminal conviction. Don't assume that the judge understands that the stigma from a criminal conviction infects every aspect of a person's life.

The enmeshed consequences encountered because of a criminal conviction are endless. Here are some issues to explore with your client so they can be detailed in the application for retroactive Y.O., to demonstrate how vacating the criminal record will facilitate rehabilitation and a successful reentry and reintegration into society.

1. Have you ever been denied an employment opportunity because of your criminal record?
2. Have you ever been terminated from a job because of your criminal record?
3. Have you ever been denied a promotion because of your criminal record?
4. Have you ever refrained from applying for a job or a promotion because it required a background check?
5. Have you ever been denied a place to live because of your criminal record?
6. Have you ever been denied admittance to a school or training program because of your criminal record?
7. Have you ever been denied a license because of your criminal record?
8. In what ways has the stigma from your criminal conviction affected your life?
9. How have people treated you differently because of your criminal conviction?

In addition to the application and exhibits, defense counsel should consider submitting a memorandum of law. Included in the Appendix are models for both an application for retroactive youthful offender and a memorandum of law.

§ 10:6 Additional Factors for the Court to Consider

- Time offense-free – There is a consensus that the recidivism risk of individuals convicted of a criminal offense declines the longer they remain offense-free in the community.[6] Kurlychek, Brame and Bushway found in their research that "if a person

[6] Hanson, R. Karl, Harris, Andrew, Letourneau, Elizabeth, Helmus, L. Maaike & Thornton, David, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender,* 34 Psychology, Public Policy, and Law 48 (2018) at 49.

with a criminal record remains crime-free for a period of about 7 years, his/her risk of a new offense is similar to that of a person without any criminal record." [7] For an adolescent who last offended prior to age 18, that period is about 5 years.[8]

● Desistance and the Age-Time Curve – *See* 3:6.

● A developmental approach – *See* Chapter 3.

● No longer a risk to public safety.

§ 10:7 Resentencing and Redetermination of Youthful Offender Adjudication

Defense counsel petitioning for retroactive Y.O. will often be returning to the same judge that previously denied your client a Y.O. adjudication. In doing so, be clear that you are *not* asking the judge to reconsider a prior determination. The question is not whether the denial of youthful offender status at the time of sentencing was correct, but whether a youthful offender adjudication is proper now, based on the criteria set out under the new statute.

Judge Ditullio, when confronted with a motion under the Domestic Violence Survivors Justice Act (CPL § 440.47 and Penal Law § 60.12) to revisit a prior sentence that she had imposed, sounded a clarion warning:

> *A court must never be so rigid as to be unwilling to revisit a decision. This is especially so where, as here, new information is brought to light and a new perspective is in order.*

People v. Smith, 69 Misc. 3d 1030, 1040 (Co. Ct. Erie County 2020).

§ 10:8 Resentencing and Redetermination: The Benefit of Hindsight

It is generally agreed that sentencing is "the most difficult and delicate decision that a judge is called upon to perform." *People v. Notey,* 72 A.D.2d 279, 283 (2d Dept. 1980). As recognized in *People v. Doe,* 62 Misc. 3d 575, 580, 81 (Sup. Ct. Queens County (2018), that undoubtedly includes the decision of whether to adjudicate an adolescent a youthful offender.

When resentencing or redetermining whether to adjudicate an individual a youthful offender, the task is made easier. Critically, the court has the benefit of hindsight. As a result of the retroactive youthful offender statute (CPL § 720.20 (5)(vi) and [ix]) and resentencing case law, the court is not only authorized, but required, to consider "mitigating circumstances at the

[7] Kurlychek, Megan, Brame, Robert & Bushway, Shawn, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement,* 53 Crime & Delinquency 64 (2007) at 80.
[8] *Id.* at 72.

time the crime was committed" that may or may not have come to light at the time of the initial sentencing, and all of the facts and circumstances that have developed since the time of the initial sentencing, including "evidence of rehabilitation and demonstration of living a productive life." It is well established that upon resentencing or redetermining a youthful offender adjudication. the court may consider conduct that occurred post-sentencing, including strides towards rehabilitation. *People v. Pepper,* 562 U.S. 476, 481 (2011); *People v. Kuey,* 83 N.Y.2d 278, 282-83 (1994); *People v. Garcia,* 196 A.D.3d 700, 700-701 (2d Dept. 2021); *People v. Flores,* 134 A.D.3d 425, 427 (1st Dept. 2015); *People Castillo,* 60 Misc. 3d 297, 303 (Sup. Ct. Bronx County 2018).

In *People v. Doe,* Judge Zayas recognized that what made the youthful offender determination so challenging was that "the decision rests, at least in part, on a prediction of whether the offender's criminal conduct is attributable to unfortunate yet transient immaturity, rather than being a manifestation of a lifelong antisocial personality." 62 Misc. 3d at 581 (internal quotations omitted). However, in the retroactive youthful offender context, "no such prescience is needed." *Id*. Since a retroactive youthful offender application can only be made after five years have passed from sentencing or the individual's release from incarceration, "the court will generally be able to tell, based on the defendant's actual record (or lack thereof), which of those two scenarios – fleeting immaturity as opposed to permanent incorrigibility – best explains the youthful criminal conduct." *Id.*

"The distinct possibility that a younger offender will mature and reform was also a significant part of the rationale behind the Court of Appeals' decision in *People v. Rudolph,* 21 N.Y.3d 497 (2013)." *People v. Doe,* 62 Misc. 3d at 580. As the court recognized in *People v. Francis,* 30 N.Y.3d 737, 741 (2018), "a YO is nothing short of the opportunity for a fresh start, without a criminal record; an opportunity that a judge would conclude…is likely to turn the young offender into a law-abiding, productive member of society." *People v. Francis,* 30 N.Y.3 at 741. The linchpin for the youthful offender determination is whether they "have a real likelihood of turning their lives around." *People v. Rudolph,* 21 N.Y.3d at 501.

As such, even if the sentencing judge's crystal ball did not reveal whether your client would turn his or her life around at the time of sentencing, having now lived in the community offense-free for more than five years makes that conclusion self-evident.

§ 10:9 Reprioritizing the Purposes of Sentencing

As discussed in Chapter 8 (Sentencing), there are five penological purposes of sentencing. The five purposes include the four statutory purposes expressed in Penal Law § 1.05 (6) – deterrence, incapacitation, retribution, and promotion of the successful and productive reentry and reintegration into society – along with the judicially adopted purpose of retribution. The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, "the crime charged, the particular circumstances of the individual before the court and the purposes of a penal sanction, i.e., societal protection, rehabilitation and deterrence." *People v. Farrar,* 52 N.Y.2d 302, 305 (1981).

"It is the sensitive balancing of these objectives and criteria in the individual case that makes the process of sentencing . . . most difficult and delicate." *Notey,* 72 A.D.2d at 283. The problem confronting the sentencing judge is the "determination of the priority and relationship between the objectives of punishment." *People v. Suitte,* 90 A.D.2d 80, 84 (2d Dept. 1982). Weighing and prioritizing the factors cannot be "fixed immutably" at any particular time. *Farrar,* 52 N.Y.2d at 306. The balancing and prioritizing of the factors change from plea to sentencing, sentencing to appeal, and again from sentencing to resentencing. When resentencing in the case of *People v. D.M.,* 72 Misc. 3d 960, 968 (Sup. Ct. Queens County 2021), the court reprioritized the sentencing purposes by placing greater emphasis on rehabilitation and promotion of the defendant's successful and productive reentry and reintegration into society, and less emphasis on retribution, deterrence and incapacitation.

For a retroactive youthful offender determination, CPL § 720.20 (5) directs the court to focus on (1) rehabilitation and (2) reentry and reintegration. What about retribution, deterrence, and incapacitation? These sentencing objectives deserve lesser emphasis for all the reasons provided by the U.S. Supreme Court in explaining why they have lesser applicability for the sentencing of adolescents – the transient "signature qualities" of youth, including diminished culpability and heightened capacity to change, etc. *See* § 8:2, *supra*.

Deemphasizing retribution, deterrence, and incapacitation makes sense for practical reasons, as well. At the time of the application for retroactive youth offender, the sentence will have already been served. Whatever retribution was deemed necessary has already been exacted. If the sentence involved incarceration, the purpose of incapacitation will have also been accomplished. Since your client has not been convicted of a crime in at least the past five years, deterrence is no longer a meaningful goal. If the prosecution argues that withholding a youthful offender adjudication was (or is) part of the punishment, remind the court that the purpose of youthful offender law is to allow for the possibility of avoidance of the stigma that comes from a criminal conviction, and all of the enmeshed collateral consequences. But courts have repeatedly held that collateral consequences are not punishment. Therefore, denial of Y.O. status is not a form of punishment.

Upon analysis, the only seriously relevant penological purposes that are applicable for determinations regarding retroactive youthful offender applications are those of rehabilitation and reentry/reintegration.

§ 10:10 What if the Adolescent Previously Waived Youthful Offender?

The issue of whether a court should consider a retroactive application for a Y.O. adjudication where the applicant previously waived Y.O. consideration or plea-bargained it away was addressed in *People v. Adel N.,* 75 Misc. 3d 1228 (A) (Sup. Ct. Queens County 2022). The court held that "defendant's waiver of youthful offender treatment as part of his plea does not render him ineligible for the instant relief that he seeks under the statute," citing to the reasoning in *People v. Rudolph,* 21 N.Y.3d 497, 499 (2013). (The sentencing court "must" determine whether defendant should be treated as a youthful offender, "even where defendant has failed to

ask to be treated as a youthful offender or has purported to waive his or her right to make such a request.")

§ 10:11 Retroactive Youthful Offender for Crimes of a Sexual Nature

An adolescent who is denied an initial youthful offender adjudication for a sex offense will be placed on the registry for at least 20 years, and perhaps for life. For such a client, a retroactive youthful offender adjudication is the quickest way off the registry.

If a retroactive youthful offender adjudication is granted for a person who was convicted of a sex offense, by statute the conviction is deemed vacated (CPL § 720.20 [3]), and the youthful offender adjudication is not a judgment of conviction for a crime (CPL § 720.35 [1]). Any conviction set aside pursuant to law is not a conviction for purposes of SORA. Correction Law § 168-a (1). When a judgment of conviction has been "set aside pursuant to law," "defendant does not qualify as a 'sex offender' within the meaning of SORA, and the risk level determination must be vacated." *People v. Congdon.* 215 A.D.3d 1269 (4th Dept. 2023). When the court notifies DCJS, the agency will/should quickly take your client off the registry.

See Chapter 6 (Making the Case for Youthful Offender for an Adolescent Charged with a Crime of a Sexual Nature) to assist you in drafting the application and memorandum of law for a retroactive Y.O. application for a client convicted of a sex offense. After debunking all the myths, memes, and misstatements about adolescents who are convicted of crimes of a sexual nature, you may convince the judge that your client's five years' offense-free is not surprising and evidences his maturation and desistance from sexual offending.

PRACTICE TIPS

The judge may be reluctant to grant a retroactive Y.O. adjudication for an individual who was convicted of a crime of a sexual nature. In any such case, remind the judge that the risk of sexual recidivism for an adolescent is universally accepted to be low. *See* § 6:8, *supra*. Bring to the judge's attention the research regarding the impact of time in the community offense-free on risk of recidivism. The argument could proceed along these lines: Like the risk for general recidivism, the risk of sexual recidivism declines the longer the individual remains offense-free in the community.[9] Eventually, the likelihood that this individual will commit a sex offense is no greater than that of anyone else in the general population.[10] Hanson and his colleagues published a study in 2014 finding that, on average, the recidivism risk was cut in half for each five years that a person who had sexually offended was offense-free in the community.[11] The study also found that, if a person was going to recidivate, this would most likely to occur in the first year or two after release.[12] Hanson and his colleagues found that below-average risk individuals reach the point where they are no more likely to sexually reoffend than persons who have not previously offended sexually when they have been

[9] Hanson, *supra* note 6 at 57.
[10] Hanson, *supra* note 6 at 59.
[11] Hanson, *supra* note 6 at 14.
[12] Hanson, *supra* note 6 at 10.

offense-free in the community for 0 to 6 years.[13] For individuals whose only sex offense conviction was committed as a juvenile, their risk of re-offense became equivalent to that of other non-offending young males after five years offense-free.[14]

§ 10:12 Sample Motion and Memorandum of Law

In the Appendix, a sample motion and memorandum of law are included. Use as much or as little as you find helpful.

§ 10:13 Immigration Considerations

At first blush, a retroactive youthful offender application may seem like the clear answer for a client facing deportation for a criminal conviction for an offense that occurred prior to his or her 19th birthday. But whereas a Y.O. adjudication granted at the time of original sentencing is not treated as a conviction for immigration purposes (*see Matter of Devison,* 22 I&N Dec. 1362 [BIA 2000]), the same might not be true of a retroactive youthful offender.

An advisory from the Immigrant Defense Project (IDP) specifically addresses the interplay between immigration law and retroactive youthful offender under CPL § 720.20 (5).[15] The advisory cautions that because the retroactive youthful offender process created under the new law diverges from both the traditional youthful offender process and the Federal Juvenile Delinquency Act, there is increased risk that a retroactive youthful offender determination will still be treated as a conviction under immigration law. Your non-citizen clients should be aware that a new youthful offender determination under CPL § 720.20 (5) may not protect them from immigration consequences because immigration authorities may yet consider a retroactive youthful offender determination, for their purposes, to be a conviction.

The IDP advisory further explains that "best practice" is to seek to have the judgment vacated by a CPL § 440.10 motion, then have the client replead and receive a standard youthful offender adjudication. The advisory also cautions that a retroactive youthful offender determination pursuant to CPL § 720.20 (5) may foreclose the option to later file a 440 motion, so consider using the strength of your potential retroactive Y.O. application as a basis, instead, to secure the prosecutor's consent to a CPL § 440.10 motion.

A final word of caution: as in all things related to immigration, you must consult with an immigration expert when considering a retroactive youthful offender application for a client who may face immigration consequences.

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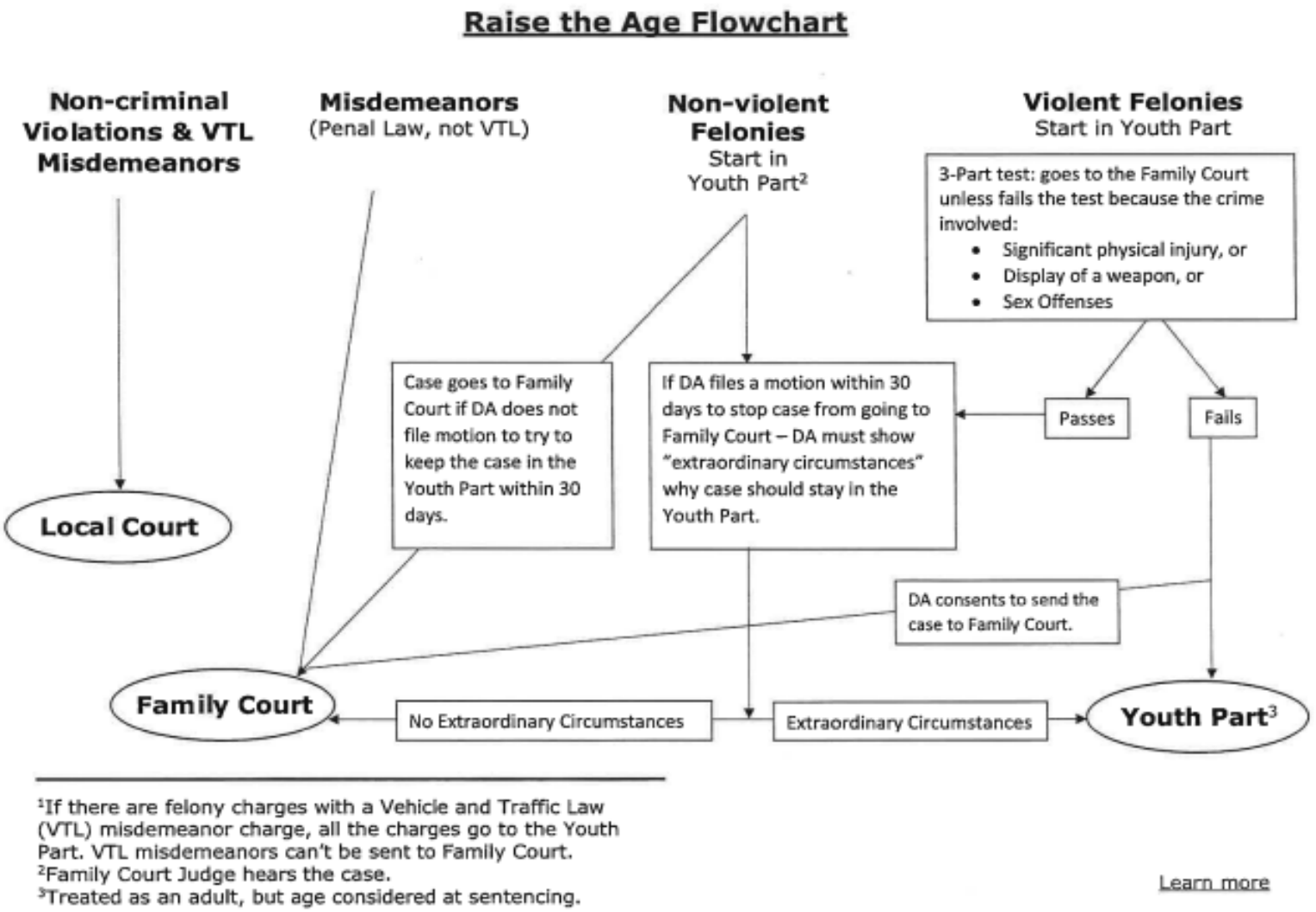
[13] Hanson, *supra* note 6 at 57.
[14] Hanson, R. Karl, *Long-Term Recidivism Studies Show That Desistance Is the Norm,* 45 Criminal Justice and Behavior 1340 (2018) at 1341.
[15] Immigrant Defense Project, *Special Considerations for Non-citizen Defendants Regarding Implementation of Youthful Offender Redetermination under New York State Bill S282/A6769* (January 13, 2022). Available at https://www.immigrantdefenseproject.org/wp-content/uploads/Special-Considerations-Immigrants-and-YO-Redetermination.pdf

APPENDIX


Raise the Age Flowchart
Non-criminal Violations & VTL Misdemeanors
Misdemeanors (Penal Law, not VTL)
Non-violent Felonies Start in Youth Part[2]
Violent Felonies Start in Youth Part
3-Part test: goes to the Family Court unless fails the test because the crime involved:
Significant physical injury, or
Display of a weapon, or
Sex Offenses
Passes
Fails
Case goes to Family Court if DA does not file motion to try to keep the case in the Youth Part within 30 days.
If DA files a motion within 30 days to stop case from going to Family Court – DA must show "extraordinary circumstances" why case should stay in the Youth Part.
Local Court
DA consents to send the case to Family Court.
Family Court
No Extraordinary Circumstances
Extraordinary Circumstances
Youth Part[3]
[1]If there are felony charges with a Vehicle and Traffic Law (VTL) misdemeanor charge, all the charges go to the Youth Part. VTL misdemeanors can't be sent to Family Court.
[2]Family Court Judge hears the case.
[3]Treated as an adult, but age considered at sentencing.
Learn more

A Developmental Framework for Representing Adolescents

SCIENTIFIC FINDINGS ON ADOLESCENCE	DEVELOPMENTAL CONCERNS	UNDERSTANDING THE OFFENSE DEVELOPMENTALLY	SUPPORTS AND SERVICES THAT PROMOTE SUCCESS
• Behavioral immaturity mirrors anatomical immaturity • Frontal lobe – responsible for impulse control, judgment, decision-making – develops slowly until early 20s • Rely on amygdala, primitive emotion center or brain whereas adults process similar information through frontal cortex • Prone to risk-taking; it is statistically aberrant to refrain from risk-taking in adolescence • More susceptible to stress, which further distorts already poor cost-benefit analysis • Most adolescent delinquent behavior occurs on a social stage where immediate influence of peers is the real motive • More vulnerable to peer influence. Importance of approval makes already risk- prone impulsive teen even more so • Trauma makes youth hypervigilant in response to threat • Character is not fully formed, and adolescents' signature qualities – including their susceptibility to peer influence and weakness in self-regulation – reflect their incomplete identity	**Immaturity**		
	Immature Thinking		
	• Unable to anticipate • Unable to see choices • Minimizes risk	• Did not plan "It happened." Impulsive • Had weapon with no plan to use • Saw no danger in street activities, getting high • "It's just talk" • Sexting/social media = harmless	• Instruction in anticipating consequences • Instruction in how to see choices; pros and cons • Instruction in decision-making: think before acting • Learning how to manage stress
	Immature Identity		
	• Not successful • Unstable self-definition • Needs acceptance • Can't function independently	• Sensitive to being picked on • Vulnerable to bullying • Does not ask for adult help • Wants to belong even with negative peers • Needs supervision • Influenced by more mature codefendant	• Being successful at something and opportunities to show it • Guided process for defining self, becoming a leader • Instruction in how to think without being influenced • Improved social skills to be accepted by positive pers • Preparation for work, given talents and challenges • Developing job skills; support on the job for good decisions
	Moral Development		
	• Fairness fanatic • Empathy • Fragile moral reasoning	• May have been righting a wrong • Did not realize someone might get hurt • Under stress, can't use usual moral beliefs • Can't walk away, especially when high, even though know right from wrong	• Learning positive ways to deal with unfairness • Practicing good moral reasoning under stress • Empathy awareness for those who have been harmed by the child's actions
	Disabilities		
	• Processing problems (digesting information) • Expressive/receptive language • Executive function deficits • Impaired sequencing • Difficulty concentrating	• Can't comprehend others' intentions • "Things happened too fast" • Poor communication. Stories out of order • Poor planner; organizing difficulties • Couldn't envision what would happen next • Became agitated under stress	• Specialized instruction to: • Improve reading by learning how to decode words • Improve comprehension • Improve self-talk and communication skills • Improve sequencing: seeing cause and effect • Practice comprehending instructions • Improve organization; learn how to prioritize • Learn how to concentrate and manage distractions
	Trauma (causes delayed development)		
	• Overreacts to threats • High anxiety • Depressed • Numbs feelings with substances	• If victim aggressive, responds as if a repeat of past maltreatment (reflex reaction) • Controlling and reacts to change; can't soothe self • Feels worthless; self-destructive • Lowered inhibitions, poor judgement if high during offense	• Trauma treatment to: • Help in writing a complete trauma history • See connections between triggers, feelings, and • actions and learn to respond differently • Separate past maltreatment from present provocations • Learning not to blame self; stop self-destructive acts • Learning to soothe self when agitated w/o substances • Positive view of self in future • Incorporate families into ongoing therapy; help with • family where there is conflict of substance abuse • If psychiatric medicine can ameliorate symptoms, • consistent labs and side effect monitoring must be • supervised by child psychiatrist staff with consent from the youth and parent (1 of 2)

A Developmental Framework for Representing Adolescents

SCIENTIFIC FINDINGS 0N ADOLESCENCE	INCARCERATION CAN EXACERBATE PROBLEMS AND INHIBIT SUCCESS	DEFENSE CONSIDERATIONS FOR COUNSELING ADOLESCENT CLIENTS
• Generally, adolescents cannot be expected to operate with maturity, judgment, risk aversion, or impulse control of an adult • Teen Who has suffered brain trauma, family trauma, abuse, or violence cannot operate at standard levels for adolescents • The vast majority of adolescents who engage in delinquent behavior desist from crime as they mature • Even the highest risk youth can succeed with appropriate opportunities • Youth crime participation may be necessary to avoid threat • Adolescents need clear information to assist counsel and make important legal decisions	**Immaturity**	
	• Learns to live by "institutional code" rather than within societal norms and social etiquette during key period of identity and moral development • Focus on compliance and control instead of providing teaching relationships with positive adult role models invested in youth achievement • Likely to experience exploitation and retaliation while moral reasoning is developing • Absence of regular interaction with prosocial peers • Lack of opportunities and adult guidance for autonomous decision-making and critical thinking • Youth 12 and under and developmentally delayed youth have special needs for emotional support, careful guidance and safety precautions due to their immaturity and physical vulnerability	• Sees offense as unintended, accidental – insists on innocence • No future time perspective to understand years of probation or incarceration • Doesn't see future risk. "I'm sure I'll never get arrested/be detained again" • Just wants to go home, or says, "I'll just do the time and get it over with" • Frightened: options are scary, shuts down so doesn't have to think about them • Feels dumb: hides ignorance; embarrassed to ask for clarification • Dependent – wants parent/defender to tell them what to do • Wants to be liked; wants to give "right" answer even if not true or thought out • Embarrassed; can't explain why acted that way • Big identity issue: can't face being type of person who did offense, especially if in media • Wants more attention from defender; lonely; hard not to be able to talk to anyone • Preoccupied by what friends/family think; distracted by family/friend problems • Stuck on police/detention unfairness; can't focus on legal issues • Shocked by what happened and consequences; hard to conceptualize a person was harmed as a result of what they did • Heartbroken by friend's betrayal; can't snitch; may never be able to tell everything • Feels court process is unfair; so has less faith in defender
	Disabilities	

	• Facilities often ill-equipped to:
	  • Implement IEPs or effective services to help youth learn to compensate for their disabilities
	  • Provide instruction to ensure youth experience school success and increase their academic skillls
	  • Provide necessary speech/language and executive function interventions
	  • Provide adequate or individualized adaptive or ameliorative therapies
	  • Provide preparation to meaningful reentry jobs for youth with disabilities
	  • Connect youth with appropriate special education services on reentry
		• May have difficulty comprehending even simply presented information
		• Struggles to consider two things at once; can't compare options
		• May have difficulty with strategic decision-making, especially with either/or thinking and fairness focus
		• Doesn't retain previous discussions; Poor logical connections between discussions
		• Can't tell what happened in normal sequence; leaves out/adds details each time
		• Easily distracted; can't concentrate on lengthy legal discussions

	Trauma (causes delayed development)	
	• Loss of existing community-based support systems can itself cause trauma or trigger post trauma • Sense of victimization by the system may trigger past victimization trauma • Fear, stress, isolation, and sense of abandonment can create new mental health issues or exacerbate existing issues • Vulnerable youth more susceptible to violence and abuse by residents of staff • Youth who are reactive to perceived threat or controlling because of anxiety, both due to past trauma, receive more discipline, are more often physically restrained, have more suicidal behavior, and spend more time in isolation; all of these interfere with positive development and may lengthen incarceration • Skilled trauma treatment, involvement of family in the youth's trauma recovery and combined trauma-substance abuse treatment are seldom provided	• Trouble trusting anyone Feels helpless — gives up; not fighting for self • Feels all options are so depressing, can't think about any of them; strong denial • Can't tolerate not being in control; uncertainty causes anxiety, impairs rational talk • Anxiety and depression worsen concentration; sinking into hopelessness interferes • Embarrassed they can't explain thinking because was under the influence of alcohol or drug

(2 of 2)

Adapted from Chart developed by Dr. Marty Beyer and the National Juvenile Defender Center
For more information, please contact Dr. Beyer at martbeyer@aol.com or NJDC at inquiries@njdc.info

Mitigation Themes

Adversity	Strengths
Client as Victim • Child Abuse/Maltreatment • Childhood Neglect • Parental chaos (i.e. substance use, mental illness) • Witness to violence/abuse • Familial loss/death • Victim of Intimate Partner Violence • Victim of bullying/violence • Experiences of institutionalization • Experiences of bias, discrimination, oppression **Client Struggles with Substance Use Disorder** • Age of first use • History of use • Most recent pattern of use (amt./frequency/route of admin.) • Prior efforts to stop • Medical consequences of use **Client Contends with Mental or Cognitive Disorder** • Prenatal/birth complications- maternal health • Neurodevelopmental impairment • Age of onset of symptoms • Specialized services received in school/community • Impact to relationships **Client Has Limited Resources/Access** • Poverty • Under-resourced community (urban or rural) • Limited education • Intergenerational trauma • Adultified minor • Experiences of racism/structural barriers • Missed opportunities for intervention **Client Experienced Acute Disturbance** • Recent trauma • Severe and active substance dependence • Change in medications • Extreme emotional state • Recent diagnosis/life stressor **Other Adverse Childhood Experiences**	**Client Has Good Roots** • Caregiver consistency • Adequate structure in home • Positive role models • Stability • Accepted by loved ones • Received affection and care **Client Has Community** • Active familial support • Friends and loving relationships • A steady home • Client is a positive influence for others (i.e. family, mentees) • Client is involved with church, community orgs, schools, volunteerism • Professional community (i.e. military, civil service) • Letters of support **Client Has Solid Prospects for Rehabilitation** • Engages with treatment program • Age, youth and plasticity of brain • Previous record of compliance • Strong support network **Client Is Remorseful** • Evidence of remorse in words or actions • Prepared statements of remorse • Willingness to make amends • Symptoms of distress since incident (suicidality, sleeplessness, behavior change) **Client Has Little/No Criminal History** • First time offender • No history of violent offense • Offenses related to substance dependence • Surprise by loved ones (i.e. action was "out of character") **Client Has Plans for the Future** • Dreams of education • Plans for job/training • Hobbies and pastimes • Desire for family • Demonstrated effort to improve future (i.e. education/programs while detained) **Good Character**

This resource was prepared in April 2024 by Elizabeth Walker, Special Assistant for Mitigation, with the Statewide Appellate Support Center (SASC) at the NYS Office of Indigent Legal Services.

STATE OF NEW YORK
COUNTY OF ONONDAGA COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

NOTICE OF MOTION PURSUANT TO CPL § 720.20 (5) FOR A RETROACTIVE YOUTHFUL OFFENDER FINDING

-against-

NYSID NO.:
J.M. INDICTMENT NO.:
Defendant. INDEX NO.:

PLEASE TAKE NOTICE, that upon the annexed affirmation of Alan Rosenthal, Esq., the attorney for the above-named defendant and the exhibits annexed thereto, the accompanying memorandum of law, and the prior proceedings in this case, the undesigned will move this County Court on the ____ day of _____, 2024, at _____ in the AM/PM, or as soon thereafter as counsel may be heard for an order granting the following relief:

1. Pursuant to CPL § 720.20 (5), find J.M. to be a youthful offender, and
2. Direct that the conviction entered against J.M on May 1, 2019 be deemed vacated and replaced by a youthful offender finding pursuant to the court's determination, and
3. Grant such additional and further relief as the Court deems just and proper.

Dated: Syracuse New York
June 1, 2024

_____
Alan Rosenthal, Esq,
Attorney for J.M.
White Memorial Bldg., Suite 204
100 E. Washington St.
Syracuse, New York 13202
(315) 559-2240

To: Onondaga County District Attorney
To: Clerk, Onondaga County Court

STATE OF NEW YORK
COUNTY OF ONONDAGA COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

AFFIRMATION IN SUPPORT OF MOTION PURSUANT TO CPL § 720.20 (5) FOR A RETROACTIVE YOUTHFUL OFFENDER FINDING

-against-

NYSID NO.:

J.M., INDICTMENT NO.:

Defendant. INDEX NO.:

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS:

ALAN ROSENTHAL, an attorney duly admitted to practice in the Courts of the State of New York, affirms this __ day of _____, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law:

1. I am the attorney for J.M., and I make this affirmation in support of his motion pursuant to CPL § 720.20 (5) for a retroactive finding that he is a youthful offender.

2. On November 2, 2021 Governor Hochul signed into law S.282/A.6769 (L 2021, ch 552, § 1 effective November 2, 2021) amending CPL § 720.20 by adding subsection (5) which permits an individual who was an eligible youth who was not determined to be a youthful offender at the time of the initial sentencing to apply to the sentencing court for a new determination after at least five years have passed since the imposition of the sentence or release from incarceration for which such individual was not determined to be a youthful offender,

provided that such individual has not been convicted of any new crime since the imposition of such sentence.

3. The Senate sponsor's bill memo declared the that the purpose of this legislation was "to grant an individual who was an eligible youth but not determined to be a youthful offender by the sentencing court the opportunity to apply for a new determination."[1]

CASE HISTORY

4. On ____, __, 2016, J.M. was arrested for the crime of Burglary in the Second Degree that was committed on the day of his arrest. On the day of the offense J.M was 17 years old.

5. On _____, __. 20__. J.M. pled guilty to Burglary in the Second Degree charged in Indictment No. _____ before Onondaga County Court Judge _____.

6. The Court sentenced J.M. on _____, __, 20__ to a one year definite sentence. The court found that J.M was an eligible youth but declined to make a finding that J.M. was a youthful offender.

7. J.M. was released from Onondaga County Correctional Facility on _____, __, 20__ having completed service of the one year determinate sentence.

ELIGIBILITY

8. In order to be eligible for a retroactive youthful offender finding pursuant to CPL § 720.20 (5) the applicant must have been an eligible youth at the time of the initial sentence. J.M meets that requirement. He was 17 years old at the time of the offense. He had no prior felony conviction, no prior youthful offender adjudication for a felony, and had not previously been adjudicated a juvenile delinquent who committed a designated felony. The crime

[1] NY State Senate Bill 2021-S282 (nysenate.gov)

for which he pled guilty, Burglary in the Second Degree, was not a conviction that would make him ineligible for a youthful offender finding.

9. J.M. meets the other statutory eligibility requirements for a retroactive youthful offender finding pursuant to CPL § 720.20 (5). First, although he was an eligible youth, the sentencing court did not make a youthful offender finding. Second, J.M. was last released from incarceration for the sentence that is the subject of this motion on _____, __. 20__. As a result, more than five years have passed between his last incarceration and the date of the filing of this motion. Third, the sentence was imposed on _____, __, 20__, and since that date, J.M. has not been convicted of any new crime.

STATUTORY FACTORS FOR CONSIDERATION

10. In considering whether a person should be determined to be a youthful offender retroactively, CPL § 720.20 requires the court to consider the following nine factors that are addressed below:

(i) Whether relieving the individual from the onus of a criminal record would facilitate rehabilitation and successful reentry and reintegration into society.

[Explain the barriers, enmeshed consequences, and discrimination that your client has suffered as a result of the stigma of this criminal conviction.]

(ii) The manner in which the crime was committed.

[Explain]

(iii) The role of the individual in the crime which resulted in the conviction.

[Explain]

(iv) The individual's age at the time of the crime.

[Give age and D.O.B.]

(v) The length of time since the crime was committed.

[Give the date of the crime and the amount of time since then up to the date of filing of the motion]

(vi) Any mitigating circumstances at the time the crime was committed.

[Review any mitigation that was presented at the time of sentencing and if there is mitigation that was not presented to the court, that should be highlighted.]

(vii) The individual's criminal record.

[You may want to attach your client's criminal history record. If your client has no criminal record other than this conviction, that should be highlighted.]

(viii) The individual's attitude toward society and respect for the law.

[If your client has been consistent in his/her positive attitude towards society and respect for the law since the time of this offense highlight that. If there is a significant improve from then until now, that should be highlighted. What is important is their attitude and respect now.]

(ix) Evidence of rehabilitation and demonstration of living a productive life including, but not limited to participation in educational and vocational

(x) programs, employment history, alcohol and substance abuse treatment, and family and community involvement.

[Tell the story of your client's success.]

11. The nine factors weigh in favor of granting the requested relief.

NARRATIVE

12. During his childhood and early adolescence J.M. was subjected to abject poverty. Every day was a struggle for food, clothing, housing, and adult attention and affection. All of these were conditions over which J.M. had no control. He was frequently left to fend for himself without proper food or clothing. During his early childhood his father was in prison, and he was neglected by his mother as she worked low paying jobs trying to avoid the next eviction. She was what clinicians refer to as a "psychologically unavailable caregiver." The negative effects of poverty on J.M.'s early childhood development left him with low levels of self-esteem, high levels of frustration, poor impulse control, and problematic intellectual performance and achievement. This poverty and economic deprivation played a direct role in leading J.M. down the path of delinquent and criminal behavior. He sought out companionship and emotional support from other kids in the neighborhood who were similarly situated. He was easily influenced by others. It is exactly that peer influence that led him to participate in the burglary that resulted in this conviction.

13. While serving his sentence at the Onondaga County Correctional Facility J.M. became involved in a mentoring program run by the Center for Community Alternatives. He was introduced to John Adams, who was his mentor and would become a lifelong friend. John mentored J.M. while he was incarcerated and continued to work with him upon his release. For

the first time in his life J.M. had an adult to serve as a positive role model. With John's guidance and mentorship J.M. was able to turn his life around. He is now happily married and employed at a steady job. He has hope for a better life. Yet he still faces the daily stigma of his criminal conviction that holds him back.

14. "The youthful offender provisions of the CPL emanate from a legislative desire not to stigmatize youths between the ages of 16 and 19 with criminal records triggered by hasty or thoughtless acts, which although crimes, may not have been the serious deeds of hardened criminals." *People v. Drayton,* 39 N.Y.2d 580, 584 (1976). In making the youthful offender determination the court is called upon to decide whether doing so "is likely to turn the young offender into a law-abiding, productive member of society." *People v. Francis,* 30 N.Y.3d 737, 741 (2019). Although at the time of the initial sentencing the court was unable to determine whether J.M. had the potential to turn his life around or was a hardened criminal, the passage of more than five years, during which J.M. has remained offense-free and has lived a law-abiding life, now provides the court with the benefit of hindsight.

15. The retroactive youthful offender statute provides a second chance, with the benefit of hindsight. Governor Hochul explained the rationale for offering a second chance for a youthful offender finding when she signed it into law. "Far too many New Yorkers who made poor choices at a young age are forced to deal with the lifelong consequences of criminal convictions that deny them a second chance at a productive, fulfilling life…Thanks to this

legislation, we can now support those who have learned from their mistakes by doing away with the stigma of a criminal conviction, and giving them the opportunity to get back on their feet."[2]

16. J.M has demonstrated by his words and deeds that he falls within that group of young people who would benefit from a youthful offender finding by a court that is now aware of his potential and is "solicitous of vulnerable youth, especially under New York's current youthful offender process." *People. Rudolph*, 21 N.Y.3d 497, 506 (2013). He has shown himself to be a responsible member of society who should be freed from the omnipresent stigma of a criminal record.

17. If the District Attorney consents to this application, it is requested that notice of such consent be provided to defense counsel and the court. If the District Attorney opposes this application, the statute requires that notice of objection be provided within 45 days. In the event that the District Attorney does give notice of objection to the application J.M requests a hearing. If the District Attorney does not file a timely objection, it is requested that the court proceed forthwith. In such an event, a hearing is requested.

WHEREFORE, it is respectfully requested that the court grant this CPL § 720.20 (5) application, make a finding that J.M. is a youthful offender, and direct that the conviction for Burglary in the Second Degree entered against J.M. on May 1, 2019, be deemed vacated and replaced by a youthful offender finding.

_____
Alan Rosenthal

[2] https://www.governor.ny.gov/news/governor-hochul-signs-legislation-allowing-individuals-initially-eligible-denied-youthful.

STATE OF NEW YORK

COUNTY OF ONONDAGA COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

J.M.

Defendant.

MOTION PURSUANT TO CPL § 720.20 (5) FOR A RETROACTIVE YOUTHFUL OFFENDER FINDING

NYSID NO.:
INDICTMENT NO.:
INDEX NO.:

MEMORANDUM OF LAW

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A. PRELIMINARY STATEMENT

At the age of 17, J.M. was convicted upon a plea of guilty to the crime of Burglary in the Second Degre. He was 17 years old at the time of the crime. He had no prior involvement in the juvenile or adult legal system. The plea was entered on March 5, 2019, and J.M. was sentenced by Onondaga County Court Judge _____, to a definite sentence of one year at the Onondaga County Correctional Facility. Although J.M. was an eligible youth, Judge_____ declined to find him to be a youthful offender.

J.M. now appears before this court on a motion pursuant to CPL § 720.20 (5) seeking a new youthful offender determination. He has met all the statutory requirements in order to proceed with this motion.

B. CPL § 720.20 (5)

The so-called retroactive youthful offender statute became effective on November 2, 2021. To enact this provision the Legislature amended CPL § 720.20 by adding subsection (5).

A person is eligible to apply for a retroactive youthful offender determination if that person was an "eligible youth" (as that term is defined in CPL § 720.10 [2]) at the time of sentencing but was not determined to be a youthful offender by the sentencing court. In addition, five years must have passed since the imposition of the sentence for which youthful offender adjudication was denied. If the sentence included a period of incarceration, including a period of incarceration imposed in conjunction with a sentence of probation, the five years is measured from the individual's latest release from incarceration. The final requirement for eligibility is that

the individual must not have been convicted of any new crime since the imposition of such sentence for which a youthful offender adjudication was denied.

J.M. was an eligible youth at the time of sentencing and also meets the eligibility criteria for this retroactive youthful offender application.

The procedures for this application are set forth in CPL § 720.20 (5)(a) and (c). The application is made to the sentencing court. A copy of the application must be filed and served upon the District Attorney of the county in which the individual was convicted. The District Attorney must notify the court within forty-five days of being served if he or she objects to the application. The court may hold a hearing on the application on its own motion or on the motion of either party. If the District Attorney does not file a timely objection, the court must proceed forthwith.

C. FACTORS FOR THE COURT'S CONSIDERATION

Pursuant to CPL § 720.20 (5)(b) the court must consider the following factors when making its determination:

(i) Whether relieving the individual of the onus of a criminal record would facilitate rehabilitation and successful reentry and reintegration into society;

(ii) The manner in which the crime was committed;

(iii) The role of the individual in the crime which resulted in the conviction;

(iv) The individual's age at the time of the crime;

(v) The length of time since the crime was committed.

(vi) Any mitigating circumstances at the time the crime was committed;

(vii) The individual's criminal record;

(viii) The individual's attitude toward society and respect for the law;

(ix) Evidence of rehabilitation and demonstration of living a productive life including, but not limited to participation in educational and vocational programs, employment history, alcohol and substance abuse treatment, and family and community involvement.

These nine factors are addressed in detail in the affirmation in support of this motion at paragraph 10. These factors weigh in favor of the applicant.

In addition to the nine statutory factors, the court is called upon to apply the jurisprudential principles developed by the courts for youthful offender determinations, adolescent developmental science, the effect of time offense-free, and the penological purposes of sentencing, all with the benefit of hindsight. These additional considerations are addressed below.

D. THE PURPOSE OF RETROACTIVE YOUTHFUL OFFENDER

On November 2, 2021, Governor Hochul signed A.6769/S.282 into law thereby amending CPL § 720.20 by adding subsection (5) allowing for the retroactive application for a youthful offender finding.[3]

As explained in the bill sponsor's memo, the purpose of this amendment to article 720 of the CPL is "to grant an individual who was an eligible youth but not determined to be a youthful offender by the sentencing court the opportunity to apply for a new determination."[4] The justification portion of the sponsor's memo sets forth the rationale for the amendment as follows:

[3] NY State Senate Bill 2021-S282 (nysenate.gov); L 2021, ch 552, § 1, effective November. 2, 2021.
[4] Senate bill S.282 sponsor's memo. NY State Senate Bill 2021-S282 (nysenate.gov).

> *Youthful offender adjudication is an important tool to limit the life-long consequences a criminal conviction can have for young people. However, many eligible young people are not granted youthful offender status and subsequently face significant barriers caused by their criminal records carrying into their adult lives. This legislation would offer these individuals a second chance to receive a youthful offender determination so they can find relief from the onus of a criminal record. Under this bill, a person who was initially denied youthful offender treatment and has not been convicted of a crime for at least five years since their sentence would have the opportunity to apply to the sentencing court for a new determination. Retroactive youthful offender adjudication will enable more New Yorkers to fully integrate into their communities without being continuously stigmatized for mistakes made in their youth."*[5]

Upon signing the legislation, Governor Hochul explained its purpose as follows:

> *Far too many New Yorkers who made poor choices at a young age are forced to deal with the lifelong consequences of criminal convictions that deny them a second chance at a productive, fulfilling life. Communities thrive when every member has the opportunity to contribute and it's time for New York to make the changes necessary for ensuring everybody has a fair shot at success. Thanks to this legislation, we can now support those who have learned from their mistakes by doing away with the stigma of a criminal conviction, and giving them the opportunity to get back on their feet.*[6]

E. REDETERMINATION AND RESENTENCING

It is understandable that a court reviewing its own prior youthful offender determination, or the determination of a judicial colleague, might take umbrage at the notion that the prior

[5] *Id.*
[6] Governor Hochul Signs Legislation Allowing Individuals Initially Eligible but Denied Youthful Offender Status to Reapply for Retroactive Designation | Governor Kathy Hochul (ny.gov).

determination was incorrect. But that is not the inquiry that a court is being asked to make for a retroactive youthful offender application.

The question is not whether the previous denial of youthful offender status was incorrect at the time of sentencing. The operative question is whether a youthful offender adjudication is proper now, under a new statute, with the benefit of hindsight.

Judge Ditullio sounded a clarion warning to her fellow judges when confronted with a motion for resentencing under the Domestic Violence Survivors Justice Act (DVSJA) (CPL § 440.47 and Penal Law § 60.12) to revisit a prior murder sentence of 25 years to life that she had imposed. The Judge cautioned:

> *A court must never be so rigid as to be unwilling to revisit a decision. This is especially so where, as here, new information is brought to light and a new perspective is in order.*

People v. Smith, 69 Misc. 3d 1030, 1040 (Co. Ct. Erie County 2020).

F. YOUTHFUL OFFENDER PRINCIPLES

The statutory purpose of a youthful offender adjudication is "relieving the eligible youth from the onus of a criminal record and by not imposing an indeterminate term of imprisonment of more than four years." (CPL § 720.20 (1)[a]). Avoidance of the stigma and the lifetime of collateral consequences was a legislative concern. The youthful offender provisions were a codification of "a legislative desire not to stigmatize youths between the ages of 16 and 19 with criminal records triggered by hasty or thoughtless acts which, although crimes, may not have been the serious deeds of hardened criminals." *People v. Drayton,* 39 N.Y.2d 580, 584 (1976). "A youthful offender adjudication is nothing short of 'the opportunity for a fresh start, without a

criminal record': an opportunity that a 'judge would conclude…is likely to turn the young offender into a law-abiding, productive member of society.'" *People v. Francis,* 30 N.Y.3d 737, 741 (2018) (quoting *People v. Rudolph,* 21 N.Y.3d 497, 501 [2013]). The youthful offender status allows a judge to mete out fair punishment for an adolescent's crimes "yet mitigates future consequences in recognition of, *inter alia,* the youth's lack of experience and the court's hope for his future constructive life." *People v. Cruikshank,* 15 A.D.2d 325, 333-34 (3d Dept. 1985) aff'd sub nom Dawn Marie C. 67 N.Y.2d 625 (1986).

In other words, the purpose of a youthful offender adjudication is to avoid the stigma of a criminal conviction, promote rehabilitation, and ameliorate the sentence. The desire to eliminate the stigma and disabilities that attach from a criminal conviction so as to promote rather than impede rehabilitation dates back to the initial youthful offender statute enacted in 1943 in New York Code of Criminal Procedure §§ 252-a to 252-h.[7]

Relieving the adolescent of the onus of a criminal record has become all the more salient since the enactment of the first youthful offender statute in 1943 in light of all we have come to realize over the last two decades about the pernicious effects of the collateral consequences of a criminal conviction including the barriers to employment, housing, and education. These collateral consequences are now well documented and understood. "As they presently stand, these collateral consequences hinder successful reintegration by restricting access to the essential features of a law-abiding and dignified life – family, shelter, work, civic participation and

[7] Peterson, Ruth, *Youthful Offender Designations and Sentencing in the New York Courts,* 35 Social Problems 111, (1988) at p. 114. Levine, Howard, *The Youthful Offender Under the New York Criminal Procedure Law,* 36 Albany Law Review 241 (1972) at p. 242, 248.

financial stability."[8] "These barriers doom us all: those blocked from successful re-entry find themselves on the road to recidivism, and the rest of us pay the price."[9] This concern has taken on greater significance since 2006 when the New York Legislature added to the four traditional purposes of sentencing (punishment, deterrence, incapacitation, and rehabilitation) an additional purpose of "the promotion of their successful and productive reentry and reintegration into society." (Penal Law § 1.05 [6]). A youthful offender adjudication is critical to accomplishing this newest purpose of reentry and reintegration.

Not only does the stigma from a criminal conviction result in barriers to employment, housing, and education, a research report released in 2020 by the Brennan Center found that convictions and imprisonment experienced early in life lower individuals' annual earnings.[10] For formerly imprisoned people the loss of earning is estimated to be 52 percent and for people with a felony conviction and no sentence of imprisonment the estimate is a 22 percent reduction in annual earnings.[11]

In addition to the principles developed in case law and from the youthful offender statute, in the traditional youthful offender determination, the court would consider the nine factors established in *People v. Cruikshank,* 15 A.D.2d 325, 334 (3d Dept. 1985) aff'd sub nom *Dawn Maria C.,* 67 N.Y.2d 625 (1986). For the purposes of a retroactive youthful offender application the *Cruikshank* factors are replaced by the nine statutory factors listed in CPL § 720.20 (5)(b)

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[8] New York State Bar Association, "Re-Entry and Reintegration: The Road to Public Safety (2006) at p. 445. *See* also, INVISIBLE PUNISHMENT: The Collateral Consequences of Mass Incarceration, Ed. Marc Mauer & Meda Chesney-Lind (2002).
[9] *Id.* at 445.
[10] Craigie, Terry-Ann, Grawert, Ames, & Kimble, Cameron, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality,* Brennan Center for Justice (2020).
[11] *Id.* at 14.

G. EVOLVING JURISPRUDENCE: A DEVELOPMENTAL APPROACH

In the past two decades the jurisprudence of how we address the criminal behavior of adolescence has evolved both within New York State and nationally. This evolving jurisprudence has largely been driven by our greater understanding of adolescents' cognitive and psychosocial development. Research in both behavioral science and neuroscience has informed the decision-making of both the judiciary and the legislature.

Judge Zayas recognized this evolving jurisprudence. "Courts and legislators have relatively recently begun to acknowledge, in a more thoughtful and forceful way, that younger offenders are often less culpable than adults who commit the same offenses and, therefore, should be treated differently by the criminal justice system." *People v. Doe,* 62 Misc. 3d 574, 579 (Sup. Ct. Queens County 2018). Other courts have acknowledged New York's evolving jurisprudence that requires treating adolescents differently than adults within the criminal legal system. *See People v. Rudolph,* 21 N.Y.3d 497, 506 (2013), *People v. Francis,* 30 N.Y.3d 737, 750 (2018), *People v. J.P.,* 63 Misc. 3d 635, 649 (Sup. Ct. Bronx County 2019) and *People v. H.M.,* 63 Misc. 3d 1213(A) (Sup. Ct. Bronx County 2019), *People v. D.L.,* 62 Misc. 3d 900, 905-06 (F. Ct. Monroe County 2018).

The RTA legislation contributed to this evolving jurisprudence. As noted in the Senate RTA bill Sponsor's Memo, it was informed by both the scientific evidence regarding child development and brain science and the U.S. Supreme Court decisions beginning with *Roper v. Simmons.* A primary rationale for the RTA legislation was the knowledge that adolescents are

"less mentally culpable for their actions than adults" and they "have a greater chance of rehabilitation."[1]

This jurisprudence began with a recognition that adolescents are different from adults. "Adolescents are different from adults – and juvenile offenders are different from adult criminals"[2] in ways that have come to be judicially recognized and that impact how the criminal legal system should respond to their criminal behavior with regard to removal to family court, youthful offender adjudication, and sentencing. That adolescence is characterized by a unique set of features that warrant its consideration as a distinct period of development is indisputably supported by the research of the past three decades.[3]

The Supreme Court has famously said, "as any parent knows and as the scientific and sociological studies" confirm, adolescents are different than adults. *Roper v. Simmons,* 543 U.S. 551, 569 (2005). The differences between juvenile and adult offenders are marked and well understood. *Roper* at 572. The difference between adolescents and adults has been acknowledged by many courts in different contexts. For example, adolescents are "constitutionally different from adults for the purposes of sentencing." *Miller v. Alabama,* 567 U.S.460, 471 (2012).

"[O]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults." *J.D.B. v. North Carolina,* 564 U.S. 261, 274 (2011). "Certainly, the youthful offender statute reflects the legislature's recognition of the difference between a youth and an adult, and the legislature clearly made a policy choice to give a class of young people a

[1] https://www.nysenate.gov/legislation/bills/2017/S4121.
[2] Scott, Elizabeth & Steinberg, Laurence, Rethinking Juvenile Justice (2008) at 13.
[3] *Id.* at 29.

distinct benefit." *People v. Francis,* 30 N.Y.3d 737, 750 (2018). The differences are recognized in the Raise the Age legislation. The statutory construct for removal of cases from youth part to family court reflects a "recognition on the part of New York's Legislature that justice requires that adolescent offenders, as well as juvenile offenders, be treated differently than adults within the criminal justice system, given the unique circumstances and needs" of adolescents. *People v. J.P.,* 63 Misc. 3d 635, 639 (Sup. Ct. Bronx County 2019). In *People v. Rudolph,* 21 N.Y. 3d 497, 506 (2013), Judge Graffeo, in her concurring opinion, recognized the importance of the differences between adolescents and adults and cited to the Supreme Court's decision in *Graham v. Florida* to the effect that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."

In a series of decisions regarding the sentencing of adolescents, dating back to 2005, beginning with *Roper v. Simmons,* 543 U.S. 551 (2005), to *Graham v. Florida,* 560 U.S. 48 (2010), *Miller v. Alabama,* 567 U.S. 460 (2012), and finally to *Montgomery v. Louisiana,* 577 U.S. 190 (2016), the U.S. Supreme Court concluded that adolescents are fundamentally different from adults in ways that diminish their culpability and enhance their amenability to and likelihood of reform and rehabilitation. These differences, when considered together, require that "the chronological age of a minor itself " be treated as "a relevant mitigating factor of great weight" (*Miller* at 476) and that adolescents be given special consideration and protection by the courts.

The logic and reasoning of the U.S. Supreme Court has been adopted by the New York Court of Appeals to begin the evolution of our jurisprudence in New York. In *People v. Rudolph,*

21 N.Y.3d 497, 506 (2013), Judge Graffeo's concurring opinion embraced the emerging jurisprudence stating:

> *[S]ociety's understanding of juvenile brain function and the relationship between youth and unlawful behavior has significantly evolved. As the United State Supreme Court has recognized, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds… These developments in the body of knowledge concerning juvenile development underscore the need for judicial procedures that are solicitous of the interests of vulnerable youth, especially under New York's youthful offender process… Young people who find themselves in the criminal courts are not comparable to adults in many respects – and our jurisprudence should reflect that fact.*

This sentiment was adopted by the court in *People v. Francis,* 30 N.Y.3d 737, 750 (2018). Even the website for NYCourts.Gov seems to have adapted to the change. "Scientific research has shown that prosecuting and placing children in the adult criminal justice system does not work."[4]

The U.S. Supreme Court in *Roper, Graham, Miller and Montgomery* identified three general differences between adolescents and adults, that have been referred to as "salient characteristics" or "signature qualities." The three adolescent characteristics identified are:

1. Adolescents "have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking."
2. Adolescents "are more vulnerable to negative influences and outside pressures, including from their family and peers: they have limited control over their environment and lack the ability to extricate themselves from horrific, crime-producing settings."
3. An adolescent's character "is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." *Montgomery v. Louisiana,* 577 U.S. 190, 207 (2016).

[4] NYCourts.gov, *Raise the Age.* Available at Raise the Age (RTA) | NY CourtHelp (nycourts.gov).

As a result of these differences, the Supreme Court repeatedly held in that quartet of cases that adolescents have both a "diminished culpability" and a "heightened capacity for change." *Miller v. Alabama,* 567 U.S. 460, 479 (2012).

The Supreme Court reasoned that an adolescent has diminished culpability for several reasons. First, an adolescent's "transient rashness, proclivity for risk, and inability to assess consequences" lessen the "moral culpability." *Miller v. Alabama,* 567 U.S. 460, 471 (2012). Second, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham v. Florida,* 560 U.S. 48, 68 (2010). Third, "[t]he ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively." *Miller* at 492.

The Supreme Court also reasoned that an adolescent is more capable of change than are adults. First, because the "signature qualities" of adolescence "are all transient." *Miller v. Alabama,* 567 U.S. 460 476 (2012). As the person matures those qualities of recklessness and risk-taking will diminish. A greater possibility exists that the adolescent's character deficiencies will reform over time. Second, as the adolescent matures, the brain will continue to develop and will provide a balance for self-control. Third, "[f]or most teens [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Roper v. Simmons,* 543 U.S. 551, 570

(2005). Fourth, it is the "rare juvenile offender whose crime reflects irreparable corruption." *Graham* at 76.

This recognition has not been limited to the U.S. Supreme Court. The "signature qualities" of adolescence have been acknowledged by New York courts while recognizing that our growing scientific knowledge about adolescence plays a critical role in the evolving jurisprudence. *See, People v. Rudolph,* 21 N.Y.3d 497, 506 (2013); *People v. Francis,* 30 N.Y.3d 737, 759 (2018); *People v. H.M.,* 63 Misc. 3d 1213(A) (Sup. Ct. Bronx County 2019); *People v. D.L.,* 62 Misc. 3d 900, 906 (F. Ct. Monroe County 2018). In *People v. H.M.,* 63 Misc. ed 1213(A) at *4, the court applied "[s]ociety's understanding of juvenile brain function and the relationship between youth and unlawful behavior" that "has significantly evolved" to grant a *Rudolph*-type resentencing to and make a youthful offender finding.

H. DESISTANCE

J.M. has remained offense-free for more than five years. As a result, it is highly unlikely that he will reoffend, and highly likely that he is on an upward trajectory to continue to live a law-abiding life. This is consistent with what criminological research tells us about desistance. His "signature qualities of youth" were indeed transient, and as J.M. matured, his impetuousness and recklessness that dominated his younger years predictably subsided.

The notion that "incorrigibility is inconsistent with youth" (*Graham v. Florida,* 560 U.S. 48, 73 [2010]) "is one of the animating purposes of New York's recently enacted Raise the Age legislation." *People v. Doe,* 62 Misc. 3d 574, 580 (Sup. Ct. Queens County 2018). Our more sophisticated understanding of "the relationship between youth and unlawful behavior" and the fact that the "signature qualities" of adolescence make them more prone to risk-taking and

criminal behavior is counterbalanced by the fact that this period of being prone to delinquency is fleeting. This fact was recognized in *Roper v. Simmons,* 543 U.S. 551, 570 (2005). "Indeed, [t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Roper* at 570.

The court in *Roper v. Simmons* quoted Laurence Stein & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty,* 58 American Psychologist 1009, 1014 (2003) as to the significant issue of desistance as follows:

> *For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.*

Roper at 570. This is the reality – almost all adolescents will age-out of criminal behavior.

The association between age and crime is one of the most established facts in the field of criminology.[5] It is generally agreed that aggregate crime rates peak in late adolescence/early adulthood (ages 18-21) and gradually drop thereafter.[6] Although most adults who engage in criminal behavior also offended during adolescence, most juveniles who commit crime do not persist in adulthood. This is true even among those who engage in more serious forms of crime.[7]

[5] Kazemian, Lila, *Desistance from Crime: Implications for Research, Policy, and Practice,* Chapter 6 – *Pathways to Desistance from Crime Among Juveniles and Adults, Steinberg,* National Institute of Justice (2021) at 163.
[6] *Id.* at 163.
[7] *Id.* at 163.

While counterintuitive, a robust body of research indicates that committing a violent crime before age 20 is not a strong predictor of a persistent criminal trajectory.[8]

This correlation between age and crime is borne out in what criminologists refer to as the age-crime curve. The line graph that captures the age-crime curve is composed of two axes called the "x-axis" or horizontal axis and the "y-axis" or vertical axis. Crime is plotted on the "y-axis and age is plotted on the "x-axis." By plotting on this graph, the prevalence of crime as compared to age can be demonstrated. The prevalence of offending tends to increase from late childhood, peak in the teenage years (from 15 to 19) and then decline in the early 20s. On a graph the pattern appears as a bell-shaped age trend. The peak is slightly younger for nonviolent crimes and slightly older for violent ones and declines thereafter.[9] This relationship between age and crime is robust and has been found in many different countries and over historical time.[10]

That most adolescents who have criminally offended do not continue their behaviors into adulthood has been consistently confirmed in research studies. One such study was published in a report by the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention which analyzed the most comprehensive data set currently available about serious adolescent offenders and their lives in late adolescence and early adulthood. The most significant finding of the study is that "[m]ost youth who commit felonies greatly reduce their offending over time, regardless of intervention. Approximately 91.5% of youth in the study [aged fourteen

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[8] Insel, Catherine, Tabashneck, Stephanie, Shen, Francis, Edersheim, Judith & Kinscherff, Robert, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers,* Center for Law, Brain & Behavior at Massachusetts General Hospital (2022) at 38.
[9] Steinberg, Laurence, *Adolescent Development and Juvenile Justice,* 5 Annual Review of Clinical Psychology 459 (2009) at 478.
[10] Scott, Elizabeth, Grisso, Thomas, Levick, Marsha & Steinberg, Laurence, *The Supreme Court and the Transformation of Juvenile Sentencing,* Models for Change (2015) at 7. Available at https://jlc.org/resources/supreme-court-and-transformation-juvenile-sentencing.

to eighteen] reported decreased or limited illegal activity during the 3 years following their court involvement."[11]

There may be several different reasons, or a combination of reasons, why most adolescents who have criminally offended age out of their antisocial behavior.

Psychological explanations for desistance focus on the internal developmental changes that some might call personality characteristics or factors of psychosocial maturity. With maturation, the characteristics of adolescence change, including impulse control, the ability to suppress aggression, consideration of others, thinking about the consequences of one's actions, personal responsibility, and resistance to peer influence.[12] Psychologists have suggested that desistance is best understood by considering the contrasting developmental trajectories of sensation-seeking and impulse control.[13] Sensation-seeking – the tendency to pursue novel, exciting and rewarding experiences – increases substantially around the time of puberty and remains high well into the early 20s, when it begins to decline. In contrast, performance on measures of what psychologists refer to as "executive functions," such as planning, thinking ahead, and self-regulation, is low during childhood and improves gradually over the course of adolescence and early adulthood; individuals do not evince adult levels of impulse control until their early or mid-20s.[14] Studies have provided support for the contention that adolescents are

[11] Mulvey, Edward, *Highlights From Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders,* U.S. Department of Justice, Office of Juvenile Justice & Delinquency Prevention (2010) at 1. Available at https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/230971-factsheet.pdf.
[12] Steinberg, Laurence, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop,* MacArthur Foundation (2014) at 2. Available at https://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf.
[13] Scott, *supra* note 19 at 7.
[14] Scott, *supra* note 19 at 7.

more vulnerable to coercive pressure than adults and that the presence of peers increases risky decision-making among adolescents but not older individuals.[15]

The biological explanations for desistance focus on the development of the brain and how it influences changes in offending behavior from adolescence to adulthood. The adolescent brain is still under construction. This uneven development leads to high-risk and impulsive behavior in adolescence that subsides as the development of other parts of the brain catch up in adulthood. The brain continues to mature through adolescence and into the early twenties, with large-scale structural change taking place during the period in the frontal lobes, most importantly with the prefrontal cortex and other brain regions.[16] The prefrontal cortex is central to "executive functions" – advanced thinking processes that are employed in planning ahead and controlling impulses, and in weighing the costs and benefits of decisions before acting.[17] Brain maturation typically occurs through several process – two of the most important being pruning and myelination. Both of these processes make information processing more efficient. Connections between the frontal regions of the cortex and other parts of the brain that are involved in processing social and emotional information undergo maturation through adolescence and into early adulthood.[18] This improves the individual's ability to refrain from high-risk and impulsive behavior as the various regions of the brain more effectively share information to perform these tasks. The development of the brain from adolescence to adulthood is discussed in detail in the

[15] Scott, *supra* note 19 at 7.
[16] Scott, Elizabeth & Steinberg, Laurence, RETINKING JUVENILE JUSTICE (2008) at 44..
[17] *Id.* at 44..
[18] *Id.* at 45..

court's reasoning to make a youthful offender adjudication in *People v. H.M.,* 63 Misc. 3d 1213 (A) (Sup. Ct. Bronx Couty 2019).

Sociological explanations for the decline of crime with age stress the central role of common life events and ties to social institutions such as family, marriage, employment, school, and religion. This framework argues that bonds to conventional social institutions trigger certain processes that support desistance from crime including reduced deviant peer associations, exposure to new friends and extended family, changes in routine activities, residential changes, parenthood, responsibility, and shifts in self-identity.[19]

The inescapable and important conclusion from the findings of the Pathways to Desistance study of serious juvenile offenders is that the vast majority – even those who have committed serious crimes – will become mature, law-abiding adults simply as a consequence of growing up.[20] After more than five years offense-free, it is clear that J.M. has followed the pathway to desistance.

As Laurence Steinberg has explained it, "a teenager's brain has a well-developed accelerator but only a partly developed brake…By around 15 or16, the parts of the brain that arouse a teen emotionally and make him pay attention to peer pressure and the rewards of actions – the gas pedal – are probably all set. But the parts related to controlling impulses, long-term thinking, resistance to peer pressure and planning – the brake, mostly in the frontal lobes – are still developing."[21]

[19] Kazemian, *supra* note 14 at 167-168.
[20] Steinberg, *supra* note 21 at 4.
[21] USA Today article 12/2/07.

As J.M now stands before this Court requesting a retroactive youthful offender finding, his brake has caught up to his gas pedal, and it no longer takes guesswork to conclude that his criminal actions were "hasty or thoughtless acts which, although crimes," were not "the serious deeds of hardened criminals." *People v. Drayton,* 39 N.Y.2d 580, 584 (1976).

I. TIME OFFENSE-FREE

J.M. has been offense-free for more than five years. Researchers and judicial common-sense have placed significance on time in the community offense-free.

There is a consensus among researchers that the recidivism risk of individuals convicted of a criminal offense declines the longer they remain offense-free in the community.[22] Kurlychek, Brame, and Bushway found in their research that "if a person with a criminal record remains crime-free for a period of about 7 years, his/her risk of a new offense is similar to that of a person without any criminal record." [23] For adolescent who last offended prior to age 18, that period is about 5 years.[24]

In *People v. Witchley,* 9 Misc. 3d 556, 558 (Co. Ct. Madison County 2005) the court took a more practical approach in determining the risk of reoffence based upon time offense-free in the community. The court applied the old adage "the proof of the pudding is in the tasting [sic] [eating]," to conclude that the "best indicator of a[n]…offender's likelihood of reoffending is his

[22] Hanson, R. Karl, Harris, Andrew, Letourneau, Elizabeth, Helmus, L. Maaike & Thornton, David, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender,* 34 Psychology, Public Policy, and Law 48 (2018) at 49.
[23] Kurlychek, Megan, Brame, Robert & Bushway, Shawn, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement,* 53 Crime & Delinquency 64 (2007) at 80.
[24] *Id.* at 72.

actual postrelease history." *Id.* at 558. Witchley's six years offense-free was "a factor which should be given substantial weight."

For J.M. the "proof is in the pudding" that he is not a "hardened criminal."

J. THE BENEFIT OF HINDSIGHT

It is generally agreed that sentencing is "the most difficult and delicate decision that a judge is called upon to perform." *People v. Notey,* 72 A.D.2d 279, 283 (2d Dept. 1980). That undoubtedly includes the challenging decision of whether to adjudicate an adolescent a youthful offender as recognized in *People v. Doe,* 62 Misc. 3d 575, 580, 81 (Sup. Ct. Queens County (2018).

When resentencing or redetermining whether to adjudicate an individual a youthful offender, the task is made easier. The court has the benefit of hindsight. That is critical. As a result of the retroactive youthful offender statute (CPL § 720.20 (5)(vi) and [ix]) and resentencing case law, the court is not only authorized, but is also required, to consider all of the facts about the "mitigating circumstances at the time the crime was committed" that may or may not have come to light at the time of the initial sentencing, and all of the facts and circumstances that have developed since the time of the initial sentencing, including "evidence of rehabilitation and demonstration of living a productive life." It is well established that upon resentencing or redetermination of a youthful offender adjudication the court may consider conduct that occurred post-sentencing, including strides towards rehabilitation. *People v. Pepper,* 562 U.S. 476, 481 (2011); *People v. Kuey,* 83 N.Y.2d 278, 282-83 (1994); *People v. Garcia,* 196 A.D.3d 700, 700-701 (2d Dept. 2021); *People v. Flores,* 134 A.D.3d 425, 427 (1st Dept. 2015); *People Castillo,* 60

Misc. 3d 297, 303 (Sup. Ct. Bronx County 2018), *People v. H.M.,* 63 Misc. 3d 1213((A) (Sup. Ct. Bronx County 2019 at *3-6.

In *People v. Doe,* 62 Misc. 3d at 581 Judge Zayas recognized that what made the youthful offender determination so challenging was "because the decision rests, at least in part, on a prediction of whether the offender's criminal conduct is attributable to "unfortunate yet transient immaturity" (*Montgomery v. Louisiana,* 577 U.S. 190, 208, 136 S. Ct. 718, 73, 193 L. Ed 2d 599 [2016] [internal quotation marks omitted]), rather than being a manifestation of a lifelong antisocial personality." However, in the retroactive youthful offender context, "no such prescience is needed." *People v. Doe,* 62 Misc. 3d at 581. The reason is obvious. Since a retroactive youthful offender application can only be made after 5 years have passed from sentencing or the individual's release from incarceration, "the court will generally be able to tell, based on the defendant's actual record (or lack thereof), which of those two scenarios – fleeting immaturity as opposed to "permanent incorrigibility" (*id. at 734)* – best explains the youthful criminal conduct." *People v. Doe,* 62 Misc. 3d at 581.

"The distinct possibility that a younger offender will mature and reform was also a significant part of the rationale behind the Court of Appeals' decision in *People v. Rudolph,* 21 N.Y.3d 497 (2013)." *People v. Doe,* 62 Misc. 3d at 580. As the court recognized in *People v. Francis,* 30 N.Y.3d 737, 741 (2018), "a YO is nothing short of the opportunity for a fresh start, without a criminal record; an opportunity that a judge would conclude…is likely to turn the young offender into a law-abiding, productive member of society." *People v. Francis,* 30 N.Y.3 at 741. The linchpin for the youthful offender determination is whether they "have a real likelihood of turning their lives around." *People v. Rudolph,* 21 N.Y.3d at 501.

Although at the initial sentencing it may have been difficult for the court to tell whether it was likely that J.M. would turn his life around, having lived in the community offense-free for more than five years, makes that conclusion self-evident.

K. REPRIORITIZING THE PURPOSES OF SENTENCING

Prior to 2006, generally, four principles were accepted as the purposes of criminal punishment: deterrence; rehabilitation; retribution; and isolation [incapacitation]. *People v. Notey,* 72 A.D.2d 279, 282 (2d Dept. 1980). Effective June 7, 2006, Penal Law § 1.05 (6) was amended to add a fifth purpose of sentencing: "the promotion of their successful and productive reentry and reintegration into society."

The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, "the crime charged, the particular circumstances of the individual before the court and the purposes of a penal sanction, i.e., societal protection, rehabilitation and deterrence." *People v. Farrar,* 52 N.Y.2d 302, 305 (1981).[25]

"It is the sensitive balancing of these objectives and criteria in the individual case that makes the process of sentencing…most difficult and delicate." *People v. Notey,* 72 A.D.2d at 283. The difficult problem confronting the sentencing judge is the "determination of the priority and relationship between the objectives of punishment." *People v. Suitte,* 90 A.D.2d 80, 84 (2d Dept. 1982). Weighing and prioritizing the factors cannot be "fixed immutably" at any particular time. *People v. Farrar,* 52 N.Y.2d at 306. The balancing and prioritizing of the factors change

[25] When the Court of Appeals decided *People v. Farrar,* Penal Law § 1.05 included only three statutory purposes of sentencing, then contained in subdivision (5) prior to subsequent amendment when the purposes were moved into subdivision (6).

from plea to sentencing, sentencing to appeal, and from sentencing to resentencing. When resentencing in the case of *People v. D.M.,* 72 Misc. 3d 960, 968 (Sup. Ct. Queens County 2021), the court reprioritized the sentencing purposes placing greater emphasis on rehabilitation and promotion of their successful and productive reentry and reintegration into society and less emphasis on retribution, deterrence and incapacitation.

What should reprioritization be when making a retroactive youthful offender redetermination? CPL § 720.20 (5) directs the court to focus on rehabilitation, reentry and reintegration. Obviously, those should be the priorities. What about retribution, deterrence, and incapacitation?

In four cases the U.S. Supreme Court addressed the proper approach to sentencing for adolescents. *Roper v. Simmons,* 543 U.S. 551 (2005), *Graham v. Florida,* 560 U.S. 48 (2010), *Miller v. Alabama,* 567 U.S. 460 (2012), and *Montgomery v. Louisiana,* 577 U.S. 190 (2016). In *Miller v. Alabama,* 567 U.S. 460, 471 (2012) the Supreme Court explained that *Roper and Graham* "establish that children are constitutionally different from adults for purposes of sentencing." This difference results from the fact that adolescents have "diminished culpability and heightened capacity to change." *Id.* at 479. The Supreme Court looked to "developments in psychology and brain science" that "continue to show fundamental differences between juvenile and adult minds." *Graham v. Florida,* 560 U.S. 48, 68 (2010).

In each of this quartet of cases the Supreme Court looked to the penological purposes of sentencing as they applied to adolescents. "Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications…apply to them with lesser force than adults." *Roper* at 571. [T]he penological justifications…collapse in light of the distinctive

attributes of youth." *Montgomery* at 208. The court in *Graham* explained the diminished applicability of retribution and deterrence, *Graham* at 68 and 71 and the court in *Roper* explained why the case for incapacitation is less strong when applied to adolescents. The logic applied by the Supreme Court was applied to a New York case involving a youthful offender resentencing, wherein the court concluded that the appropriate sentence based upon a reprioritizing of the sentencing purposes, was to adjudicate the person a youthful offender. *People v. H.M.,* 63 Misc. 3d 1213(A) (Sup. Ct. Bronx County 2019).

For practical reasons, deemphasizing retribution, deterrence, and incapacitation makes sense. By the time the application for retroactive youth offender was filed, the sentence had been served. Whatever retribution was to be exacted has been accomplished. The purpose of incapacitation was accomplished by J.M.'s incarceration. Because J.M. has remained offense-free for more than the past five years, it is evident that the purpose of deterrence has been served. As a result, the only remaining purposes to be prioritized when making a redetermination about granting a retroactive youthful offender adjudication are the penological purposes of rehabilitation, reentry, and reintegration.

CONCLUSION

At the time of this offense, J.M.'s behavior was driven by classic characteristics of adolescence – immaturity, poor decision-making, impulsivity, and being easily influenced by peers. As he has reached early adulthood he has matured and outgrown the signature qualities of adolescence. He has demonstrated that his criminal behavior was transient. This can be seen with the benefit of hindsight. A youthful offender finding will help advance the progress that J.M. has

already made, and by removing the stigma of this felony conviction it will promote the purposes of rehabilitation and his successful and productive reentry and reintegration into society.

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Respectfully submitted,

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ADDITIONAL RESOURCES

Center for Appellate Litigation Proposed Jury Instruction for Adolescent Client

https://appellate-litigation.org/files/galleries/Issues_To_Develop_September_2023.pdf

ACEs Resource Packet: Adverse Childhood Experiences (ACEs) Basics

https://www.childhealthdata.org/docs/default-source/cahmi/aces-resource-packet_all-pages_12_06-16112336f3c0266255aab2ff00001023b1.pdf

A Developmental Framework for Juvenile Disposition and Post-Disposition Advocacy

https://www.defendyouthrights.org/wp-content/uploads/A-Developmental-Framework-for-Juvenile-Disposition-and-Post-Disposition-Advocacy.pdf