

STATE OF NEW YORK
COUNTY OF ONONDAGA COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

AFFIRMATION IN OPPOSITION
TO PROSECUTION MOTION
PURSUANT TO CPL § 722.23 (1)
SEEKING TO PREVENT
REMOVAL

-against-

INDICTMENT NO.:
INDEX NO.:

J.M.,
An Adolescent Offender,

Defendant.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS:

I, ALAN ROSENTHAL, an attorney duly admitted to practice in the Courts of the State of New York, pursuant to CPLR § 2106, affirm this 15th day of October 2026, 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 reply affirmation as provided for in CPL § 722.23 (1)(c) in opposition to the prosecution motion seeking to prevent removal of this action to family court.
- 2) I make this affirmation based upon a review of documents that have been provided to me by the Court Clerk, the motion of the prosecutor and the supporting documents annexed thereto, extensive interviewing of J.M., and investigation of all of the circumstances as documented by the exhibits offered to this Court.

- 3) Pursuant to CPL § 722.23 (1) and (2) this Court is required to order the removal of this action to Family Court, involving a youth charged as an adolescent offender, unless the prosecution can either prove by a preponderance of the evidence at a sixth day hearing one or more of the three factors set forth in CPL § 722.23 (2)(c) exist, that is (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; or (iii) the defendant unlawfully engaged in vaginal sexual contact, oral sexual contact, anal sexual contact, or sexual contact as defined in Penal Law § 130.00, or within thirty days of arraignment, the prosecution makes a motion to prevent removal and proves that extraordinary circumstances exist that should prevent the transfer of the action to Family Court.
- 4) In the instant case, the prosecution has waived the sixth day hearing, conceding that none of the factors in CPL § 722.23 (2)(c) exist.
- 5) To prevent removal the prosecution must file a motion within thirty calendar days of arraignment. In the instant case the motion was not filed until the thirty-second calendar day, and as a result of the untimely motion, removal must be ordered.
- 6) The motion filed by the prosecution is required by CPL § 722.23 (1) (b) to contain allegations of sworn fact based upon the personal knowledge of the affiant. In the instant case, the motion does not contain allegations of sworn fact based upon the personal knowledge of the affiant, and as a result the prosecution cannot prevail on this motion.
- 7) The prosecution motion is required to indicate, pursuant to CPL § 722.23 (1)(b), if the prosecution seeks a hearing. In the instant case, the prosecution has failed to include a

request for a hearing, and as a result they have waived their right to such a hearing. However, CPL § 722.23 (1)(c) does provided that the defense may request a hearing. The defense does request a hearing (or the defense also waives a hearing, relying on the documents submitted with this affirmation).

- 8) Pursuant to CPL § 722.23 (1)(d) this Court must deny the prosecution motion to prevent removal of the action to Family Court unless the Court makes a determination upon such motion that extraordinary circumstances exist that should prevent the transfer of the action to family court. The legislative history and substantial case law have recognized that this language evidences a strong statutory presumption in favor of removal.
- 9) Under the Raise the Age (RTA) legislation, cases involving adolescent offenders are presumptively removed from the newly created youth part of superior court to family court. The goals of RTA include treating 16- and 17-year olds as children rather than adults; providing adolescents and opportunity to reform; promoting rehabilitation through better access to youth-focus services; avoiding the onus of a criminal conviction, including its stigma and collateral consequences; avoiding the punitive and traumatic effects of incarceration; and holding youth accountable through age-appropriate sanctions.
- 10) The Legislature intended that in the overwhelming bulk of the cases the matter would be promptly transferred from adult court to Family Court. Denials of removal were contemplated to be extremely rare, limited by the presumption that only one out of a 1,000 cases would remain in the youth part – only those extremely rare and exceptional cases would not be removed. It was intended that the extraordinary

circumstances requirement would set a high standard or a very high bar for the prosecution to meet.

- 11) To give meaning to the presumption of removal and maintain the high standard that the prosecution must reach, the Legislature set out, and many courts have adopted, a two-part test that should be used by this Court to determine whether extraordinary circumstances exist. Both prongs must be satisfied. First, the prosecution must prove that highly unusual and heinous facts exist, and second, that there is strong proof that the young person is not amenable or would not benefit in any way from the heightened services in Family Court.
- 12) To undertake this two-part test, this Court must consider the totality of the facts and circumstances before it. When considered in this way, it is evident that the prosecution has failed to establish that this case is one that involves highly unusual and heinous facts, nor have they provided strong proof that J.M. is not amenable or would not benefit in any way from the heightened services in Family Court.
- 13) The prosecution's argument regarding whether J.M. is amenable to or would benefit from the heightened services offered by family court is unpersuasive. They have offered no proof that J.M. could derive no possible benefit from having this case heard in family court, nor have they offered sufficient proof that he is not amenable to family court services. J.M. has undoubtedly had a difficult life, as explained below in the section on mitigating circumstances and in the defense mitigation report attached as Exhibit A. However, it should not be inferred from his past behavior that he is not amenable to services; more importantly, the record does not establish that he would not benefit from the heightened services offered by family court. Rather than

providing justification for retaining this case in Youth Part, J.M.'s history of trauma and family instability should be viewed as a mitigating factor supporting removal of the action to Family Court. The evidence indicates that when J.M. is provided with appropriate services, he can be successful and thus would likely benefit from the services offered by Family Court.

- 14) Neither J.M.'s prior involvement in the juvenile system nor the nature of the offense charged are the basis for a finding of extraordinary circumstances.
- 15) In determining extraordinary circumstances, courts must also consider all the circumstances of the young person, including mitigating and aggravating circumstances.
- 16) The prosecution has directed the Court to several ostensibly aggravating factors which do not rise to the level to make the circumstances highly unusual and heinous. On the other hand, the mitigating factors are overwhelming. As indicated during the legislative debate, even if aggravating factors are proven, mitigating circumstances could result in denial of an extraordinary circumstances finding.
- 17) The aggravating circumstances submitted by the prosecution do not meet the threshold of "extraordinary circumstances."
- 18) Among the numerous mitigating factors that this Court should consider are the following¹:

a)

¹ For a full discussion of extraordinary circumstances and the important role that mitigating factors play in an extraordinary circumstances determination, see § 4:36 and § 4:37 of A Defense Attorney's Guide: Representing Adolescents which can be found online at https://www.ocbaacp.org/wp-content/uploads/2024/09/A-Defense-Attorneys-Guide_Representing-Adolescents.pdf. At pages 90-93 is a checklist of mitigating factors applicable to an extraordinary circumstances analysis. You will undoubtedly find several that are applicable to your case.

- b)
- c) etc.

- 19) The defense submits the attached mitigation report as Exhibit A to more completely set forth the mitigating factors of this case.
- 20) The mitigating circumstances militate in favor of denying the prosecution's motion.
- 21) The prosecution has attempted to introduce before this court information pertaining to J.M.'s prior family court proceedings. 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 this, and the defense objects to any such references.
- 22) The prosecution seeks to establish extraordinary circumstances by the submission of hearsay in the affirmation in support of the motion and in the supporting documents. Hearsay cannot serve as the basis for proving extraordinary circumstances. The defense objects based upon CPL § 722.23 (1)(b) and asks that the prosecution motion be denied.
- 23) The prosecution has failed to meet its burden of proof that extraordinary circumstances exist in this case. That burden of proof to be met is clear and convincing evidence, although in this case they have failed to even meet the lower burden of preponderance of the evidence.
- 24) Considering all of the circumstances of the case, as well as the circumstances of the young person, considering the text of the statute, the presumption in favor of removal to family court, the purpose and intent of the RTA legislation that the "overwhelming bulk of the cases" be transferred to family court, and all of the aggravating and mitigating circumstances, the prosecution has failed to prove extraordinary

circumstances, and for the reasons set forth above, the defense asks that the prosecution motion to prevent removal be denied and a removal order be entered forthwith.

Dated: Syracuse, New York
October 15, 2026

Alan Rosenthal
Attorney for J.M.