

STATE OF NEW YORK
COUNTY OF ONONDAGA COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

DEFENDANT'S
OPPOSITION TO
PROSECUTION MOTION
TO PREVENT REMOVAL
TO FAMILY COURT

-against-

INDICTMENT NO.:
INDEX NO.:

J.M.,

Defendant.

MEMORANDUM OF LAW

Alan Rosenthal, Esq
Attorney for Defendant
White Memorial Building, Suite 204
100 E. Washington Street
Syracuse, New York 13202
(315) 559-2240

Sydney Zuber, Law Intern
Assisting on Memorandum of Law

TABLE OF CONTENTS

Preliminary Statement.....	2
Point I Context for Interpreting “Extraordinary Circumstances and Removal to Family Court.....	3
A. Purpose.....	3
B. Legislative History and Intent.....	5
C. Evolving Jurisprudence.....	9
Point II Applying the Concept of “Extraordinary Circumstances” to the Prosecutor’s Motion to Prevent Removal.....	15
A. Definitional Approach.....	15
B. Legislative History and Intent.....	16
C. Considering All of the Circumstances.....	18
D. Two-Part Test.....	19
E. Aggravating Factors and Mitigating Circumstances.....	21
Point III Mitigating Circumstances.....	25
Point IV Neither Recidivism nor the Nature of the Offense Is Determinative of “Extraordinary Circumstances”.....	26
Point V Neither Family Court Records nor References to Family Court Proceedings are Admissible at an “Extraordinary Circumstances” Hearing.....	27
Point VI The Prosecutor’s Motion Must Be Denied Because It Does Not Contain Allegations of Sworn Fact Based upon the Personal Knowledge of the Affiant.....	29
Point VII The Prosecution’s Burden of Proof to Prevent Removal at an “Extraordinary Circumstances” Hearing Is Clear and Convincing Evidence.....	31
CONCLUSION.....	32

PRELIMINARY STATEMENT

Pursuant to CPL § 722.23, this Court is required to order the removal of this action, involving a youth charged as an adolescent offender, to family court 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 or within thirty days of arraignment, the prosecution makes a motion to prevent removal and satisfies the Court that extraordinary circumstances exist that should prevent the transfer of the action to family court.

In the instant case the prosecution waived the sixth-day hearing, conceding that none of the factors in CPL § 722.23 (c) exist. The prosecution has moved to prevent removal. The determination to be made by this Court is whether the prosecution has established that extraordinary circumstances exist that should prevent the removal of this action to family court.

The Defendant, J.M., contests the prosecution's motion to prevent removal, and contends that pursuant to the Raise the Age Legislation this Court must order removal because the prosecution has failed to establish "extraordinary circumstances" sufficient to overcome the strong presumption in favor of removal.

POINT I

CONTEXT FOR INTERPRETING “EXTRAORDINARY CIRCUMSTANCES” AND REMOVAL TO FAMILY COURT

This Court is required to order the removal of this action to family court unless the prosecution makes a motion to prevent removal and satisfies the Court that “extraordinary circumstances” exist that should prevent the transfer of the action. CPL 722.23 (1). The term “extraordinary circumstances” is not defined in the Raise the Age Law. CPL § 722.23, *People v. Guerrero*, 45 N.Y.3d 659, 2026 NY Slip Op 00826, *3 (2026). As a result, it is helpful for a court to look to the purpose, legislative history and intent, and the evolving jurisprudence to interpret the meaning of the term “extraordinary circumstances” as used in the Raise the Age (RTA) Act, as they provide an analytic framework for doing so.

A. PURPOSES

Based on the legislative history, including the Assembly debate,¹ the Senate sponsor’s memo², and the subsequent case law construing the statute, the purposes and goals of RTA can be summarized as follows:

- “[M]odernize New York law to be in line with contemporary scientific research and with the practices in other states.” *People v. Lloyd F.*, 245 A.D.3d 69, 76 (2d Dept., 2025).
- Create a statutory scheme that ensures “that in the overwhelming bulk of the cases” – except “those extremely rare and exceptional cases” – “the matter will be promptly

¹ The RTA legislation was debated in the New York State Assembly on April 8, 2017. <https://nyassembly.gov/raisetheage/transcripts/full-debate.pdf>.

² <https://www.nysenate.gov/legislation/bills/2017/S4121>.

transferred from the adult courts to the family courts.” NY Assembly Debate on 2017 NY Assembly Bill A3009C, April 18, 2017 [Debate] at 37.

- Afford the overwhelming majority of adolescents the benefit of Family Court services and supervision instead of criminal prosecution.” *People v. Key*, 2026 NY Slip Op 05234, *13 (1st Dept. 2026).
- Treat adolescents in a “more age appropriate manner.” NY Senate Sponsor’s Memo on 2017 NY Senate Bill S4121[Sponsor’s Memo].
- “[T]reat 16- and 17-year-olds not as adults, but as children. Because “they are children and they are immature” and “[a]s children, they should always have an opportunity to get back on the right track.” Debate at 67, 86, *People v. M.M.*, 63 Misc. 3d 772, 780-781 (Co. Ct. Nassau County 2019).
- Provide “better access to youth focused services and treatment” and save adolescents from “the onus of a criminal conviction,” but still “subject [adolescents] to appropriate sanctions to hold them accountable.” *People v. D.L.*, 62 Misc. 3d 900, 904 (Family Ct. Monroe County 2019).
- Change the dynamics by giving adolescent offenders “an opportunity to rehabilitate” and “avoidance of a criminal record and incarceration.” *People v. D.P.*, 62 Misc. 3d 1226(A) (Family Ct. Erie County 2019).
- Take “a smarter, much more compassionate approach to juvenile justice.” Debate at 87.
- “[C]hange the trajectory of juvenile offenders’ lives,” by allowing for greater treatment and rehabilitation of youth rather than incarceration and punishment. *People v. L.M.*, 2026 NY Slip Op 50870(U), *16 (Co. Ct. Columbia County 2026), *People v. Damarion*

C., 2026 NY Slip Op 51064(U), *2 (Co. Ct. Erie County 2026), *People v. K.T.*, 86 Misc.3d 1240(A), 2025 NY Slip Op 51139(U), *8 (Co. Ct. Putnam County 2025).

- “[R]educe the disproportionate impact of the criminal justice system upon adolescents of color.” *People v. Lloyd F.*, 245 A.D.3d at 76-77.
- “[M]itigate the lifelong consequences that can result from mistakes attributable to adolescent immaturity.” *Id.* at 77.
- “[E]xpand access to supportive services that promote positive outcomes for youth. *Id.* at 77.
- Allow adolescents to “get better outcomes for their lives” ...”so that they could change their life around,” because “kids’ lives are worth saving.” Debate at 21, 74.
- Provide “an off ramp for children accused of criminal behavior.” *People v. L.M.*, 232 N.Y.S.3d 347, 349 (Co. Ct. Columbia County 2025).
- “[I]mprove public safety and outcomes for justice involved children.” *Id.* at 350.

B. LEGISLATIVE HISTORY AND INTENT

The Raise the Age legislation was ultimately enacted by the Legislature in 2017 as part of a broader omnibus bill that addressed multiple issues (*see* L 2017. Ch 59, § 1, part WWW, § 1-a). *People v. Lloyd F.*, 245 A.D.3d at 75.

The legislative history that is used to determine the intent of the Legislature in proposing the Raise the Age legislation is primarily drawn from the debate that occurred in the New York Assembly on April 8, 2017. Assembly Person, Joseph Lentol, explained the purpose and intent of the Raise the Age legislation at length. He made clear that the drafters intended that there would be a presumption in favor of transfer to Family Court. “Outside of the list involving the most serious felony conduct, all cases will be presumptively transferred.” Debate at 39. He further

explained that it was their intention “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.”

Debate at 37-38. The statements made by Assembly Member Lentol “illustrate the Legislature’s intent to create a sweeping presumption in favor of removing these cases to Family Court.”

People v. Aaron VV, 246 A.D.3d 131, 136 (3d Dept. 2025). In *People v. Lloyd F.*, 245 A.D.3d 69, 77 (2d Dept. 2025), the court began its analysis “with the presumption[s] that the vast majority of adolescent offender cases should be removed to Family Court. The presumption in favor of removal was also recognized in *People v. Key*, 2026 NY Slip Op 05234 (1st Dept. 2026) and *People v. Neyshaliz M.V.*, 2026 NY Slip Op 04581 (4th Dept. 2026).

The Legislature intended to create a statutory scheme that ensures “that in the overwhelming bulk of the cases that the matter will be promptly transferred from the adult courts to the family courts.” Debate at 37. That this was the intention of the Legislature was recognized in *People v. Lloyd F.*, 245 A.D.3d at 75 and *People v. Key*, 2026 NY Slip Op 05234 at *4.

The Legislature intended that very few cases would not be removed to Family Court, and it would be limited to the extremely rare and exceptional case. “[D]enials of transfer to the family court should be extremely rare.” Debate at 39. The legislative intent that adolescents should be prosecuted in criminal court “only in the most exceptional cases” has been acknowledged in *People v. VV Aaron VV*, 246 A.D.3d at 136 and *People v. Lloyd F.*, 245 A.D.3d at 73. This reflects the Legislature’s determination that such matters are more appropriately addressed in a rehabilitative forum. *Id.* at 72. In *People v. Lloyd*, the court interpreted the Legislature’s deliberate use of the phrase “extraordinary circumstances” “as reflecting a clear policy choice – that adolescent offenders should be prosecuted in criminal court only in the most exceptional cases.” *Id.* at 76.

In order to ensure that the overwhelming bulk of the cases would be transferred to Family Court and that only the extremely rare and exceptional case would remain in adult court, the Legislature intended that the burden of proving “extraordinary circumstances” in order to prevent removal would be very high. During the legislative floor debate it was explained that the “intent with this bill is that extraordinary circumstances is a very high bar” and that it “will be a high standard for the DA to meet” requiring “strong proof.” Debate at 39 and 83. In *People v. Aaron IV*, the court found that it was the intent of the Legislature “that the People’s burden is exceedingly high on a motion to prevent removal.” *People v. Aaron IV*, 246 A.D.3d at 136.

Although the drafters of this legislation did not define the term “extraordinary circumstances,” Assembly Person Lentol made it very clear during the floor debate what was intended. “Transfer to the family court should be denied only when highly unusual and heinous facts are proven, and 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.” Debate at 39. This was first referred to as the two-part test in *People v. J.J.*, 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 2022) and has frequently been used by courts to analyze whether the prosecution has established that “extraordinary circumstances” exist, referencing the Assembly debate directly in applying this standard. See *People v. Lloyd F.*, 245 A.D.3d at 75-76; *People v. D.L.*, 62 Misc. 3d 900, 907 (Family Ct. Monroe County 2018); *People v. E.H.*, 86 Misc. 3d 1218(A) (Family Ct., Erie County 2025).

After setting forth the “two-part test,” Assembly Person Lentol explained that a court should consider “aggravating factors” and “mitigating circumstances” to help it determine whether the prosecution had proven that “extraordinary circumstances” exist that should prevent the transfer of the action to family court. Undoubtedly, it was the legislative intent that both

aggravating and mitigating factors be considered. Debate at 39-40. *People v. J.S.*, 66 Misc. 3d 1213(A) (Co. Ct. Nassau County 2020). No guidance was given as to how the aggravating and mitigating factors should be considered; whether in a balancing test or otherwise, or how consideration of the aggravating and mitigating factors should interface with the “two-part test.” However, what Assembly Person Lentol did explain was that “even 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.” Debate at 40. What does seem clear is that even if some aggravating factors are proven, and even if no mitigating factors are presented by the defense, the aggravating factors may still not be sufficient to make a finding of extraordinary circumstances. *People v. S.J.*, 72 Misc. 3d at 203. At least one court has given some further guidance. “Our balancing of aggravating factors and mitigating factors is guided by an overarching consideration: whether the ‘possibility exists that [the adolescent offender’s] deficiencies will be reformed’ (*Roper v. Simmons*, 543 US at 570), or, conversely, whether there is ‘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 tr at 39).” *People v. Lloyd, F.*, 245 A.D.3d at 77.

Finally, it was the intent of the Legislature to adjust the removal procedures to reflect the better understanding we now have of youth accused of crime in light of new evidence of child development and cognitive thinking and the evolving jurisprudence as applied to adolescents. See Senate Sponsor’s Memo, *People v. Lloyd F.*, 245 A.D.3d at 73-75; *People v. Guerrero*, 45 N.Y.3d 659, *4-5 (2026) dissenting opinion of Judge Halligan in which Chief Judge Wilson and Judge Rivera concurred.

C. EVOLVING JURISPRUDENCE

The impetus for the Raise the Age legislation was the growing body of scientific evidence on adolescent brain and behavioral development that gave rise to the United States Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005). "Since *Roper*, the United States Supreme Court has continued to acknowledge that developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *People v. Lloyd F.*, 245 A.D.3d at 74. "In line with this evolving understanding, New York took steps to reform its approach to youth in the justice system." *Id.* at 74.

To appreciate the context in which this court should interpret "extraordinary circumstances," it is helpful to review the evolving jurisprudence that gave rise to the Raise the Age statutes.

In the past two decades the jurisprudence of how we address the criminal behavior of adolescents 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). This evolving jurisprudence was most recently addressed by Judge Halligan in her concurring opinion in *People v. Carnegie*, 2026 NY Slip Op 03379, 2026 N.Y. LEXIS 764, *13-15 (2026).

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”³ in ways that have come to be judicially recognized and that impact how the criminal legal system should respond to their criminal behavior regarding 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.⁴

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

³ Scott, Elizabeth & Steinberg, Laurence, *Rethinking Juvenile Justice* (2008) at 13.

⁴ *Id.* at 29.

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, 649 (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 was 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), a youthful offender case, 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 States 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 repeated by the court in *People v. Francis*, 30 N.Y.3d 737, 750 (2018), and in Judge Halligan’s concurring opinion in the recent case of *People v. Carnegie*, 2026 NY Slip Op 03379 (2026).

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).

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, 472 (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. Lloyd F.* 245 A.D.3d 69, 73-74 (2d Dept. 2025); *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); *People v. J.P.*, 63 Misc. 3d 635, 649 (Sup. Ct. Bronx County 2019).

This evolving jurisprudence and our understanding that adolescents have both a “diminished culpability” and a “heightened capacity for change” led to the Raise the Age legislation and helps interpret why such a high bar has been set by requiring the prosecution to prove “extraordinary circumstances” to prevent removal to Family Court. Our evolving understanding of adolescents helps inform the aspirational goals of RTA “that children who are alleged to have committed crimes be rehabilitated rather than incarcerated and punished,” *People v. K.T.*, 86 Misc. 3d 1240(A) (Co. Ct. Putnam County 2025), and the underlying objective “to treat 16- and 17-year-olds not as adults, but as children because they are children and they are immature and as children they should always have an opportunity to get back on the right track.” *People v. M.M.*, 63 Misc. 3d 772, 780 (Co. Ct. Nassau County 2019). It is this evolving understanding that led the Appellate Division, Second Department, to conclude that “extraordinary circumstances should only be found in the most exceptional cases.” *People v. Lloyd F.*, 245 A.D.3d at 73.

POINT II

APPLYING THE CONCEPT OF “EXTRAORDINARY CIRCUMSTANCES” TO THE PROSECUTION’S MOTION TO PREVENT REMOVAL

To interpret the phrase “extraordinary circumstances” courts have been guided by the statute’s text, common ordinary meaning as reflected in dictionary definitions, legislative history, purpose, and intent. *People v. Lloyd F.*, 245 A.D.3d at 72-73. Regardless of what analysis this court employs to determine whether the prosecution has met its exceedingly high burden of proving “extraordinary circumstances” exist to prevent removal of this action to Family Court – definitional, total circumstances, two-part test, or balancing aggravating and mitigating circumstances – the prosecution has failed to meet its burden of proof.

A. Definitional Approach

The phrase “extraordinary circumstances” is not defined in the Raise the Age legislation. “In the absence of a statutory definition, the Court of Appeals instructs that words of ordinary import must be construed with their usual and commonly understood meaning, and that dictionary definitions may serve as useful guideposts in determining the meaning of a word or phrase. *Id.* at 72. Some courts, although certainly not all, not satisfied with the notion that “extraordinary circumstances” means what it says, have looked to the definition to give it further meaning.

Courts have used the Merriam-Webster definition as “beyond what is usual, regular, or customary” or “exceptional to a very marked extent” and the Black’s Law Dictionary as “[b]eyond what is usual, customary, regular, or common.” *Id.* at 73. *See also People v. T.P.*, 73 Misc. 3c 1215(A) fn 3 (Co. Ct. Nassau County 2021). Also, Webster’s Third New International

Dictionary defines it as “most unusual,” “far from common,” “very outstanding,” “very remarkable.” *People v. J.P.*, 63 Misc. 3d 635, 649 (Sup. Ct. Bronx County 2019). Considering these definitions in conjunction with the impetus for the passage of the Raise the Age legislation led at least one court to conclude that “extraordinary circumstances should only be found in the most exceptional cases.” *People v. Lloyd F.*, 245 A.D.3d at 73.

The circumstances of the instant case are not exceptional or most unusual so as to be beyond what is usual, regular or customary.

B. Legislative History and Intent

“[T]he legislative history of an enactment may also be relevant and is not to be ignored even if words be clear.” *Id.* at 72-73. Trial courts have reviewed the legislative history of the Raise the Age legislation to ascertain legislative intent in attempting to construe the term’s meaning. *People v. A.M.*, 82 Misc. 3d 1249(A) (Co. Ct. Putnam County 2024). Courts may look to legislative proceedings to ascertain the legislative intent. McKinney’s Statutes § 125.

The legislative intent can be found in the Assembly debate and is discussed at Point I, part B. It is clear that the term “extraordinary circumstances” was intended to narrow down to a very select few the number of cases that would be denied removal to family court. The intention was “to create this type of presumption [in favor of removal] where only one out of 1,000 cases...those extremely rare and exceptional cases, would remain in the youth part.” Debate at 37-38. Although the “one out of a 1,000” figure need not be taken literally, what is clear is that the Legislature intended “that in the overwhelming bulk of the cases that the matter will be promptly transferred from the adult courts to the family courts.” Debate at 37. In that same vein, “denials of transfers should be extremely rare” and “extraordinary circumstances is a very high bar.” Debate at 39 and 83. The reason for this “high bar” was explained during the debate to be

that the “object of the law is to treat 16- and 17-year-olds not as adults, but as children.” Debate at 67.

To appreciate the rationale behind the use of the term “extraordinary circumstances” and the very exceptional circumstances that it was intended to describe, it is helpful to understand how it came to be drafted into the statute. During the legislative debate “it was revealed that many of the legislators who developed and promoted the RTA bill wanted *all* cases involving sixteen and seventeen year old’s to be filed and heard exclusively in the Family Court, and that the mechanism wherein felony cases would start in the Youth Part, subject to removal to Family Court, was part of a compromise to reach agreement on the legislation.” *People v. J.R.*, 65 Misc. 3d 1223(A) (Co. Ct. Nassau County 2019) at *5. (*See* Debate at 21, 37-38, 85, 102. “[t]his was actually a compromise that was made at the table with the Governor and Republican Senators in order to make an accommodation to both sides.” Debate at 21]. The proponents of the original bill wanted all cases to start and remain in Family Court. The compromise allowed all cases to start in Youth Part, but all would be presumptively transferred except for the statutory exceptions provided in CPL § 722.23 (2)(c) and those cases proven by the prosecution to meet the “extraordinary circumstances” standard. During the debate, Assembly Person Lentol, while addressing the meaning of “extraordinary circumstances,” explained that the compromise was the result of Senator Lanza suggesting the term “when we met in the Governor’s office, the Chair of the Senate Codes Committee, to create this type of presumption where only one out of 1,000 cases, he said, for example, those extremely rare and exceptional cases, would remain in the youth part.” Debate at 37-38. “That would be in line with what Mr. Lanza and all of us concluded, was the purpose of this, so that one in 1,000 cases would be kept by the criminal case and the others would fall down to the family court.” Debate at 102. This compromise placated

those who questioned the RTA legislation by having cases start in the Adult Part, with a presumption that the vast bulk of the cases would be removed to Family Court but allow that the extreme exceptional and highly unusual case that genuinely merited being subjected to the consequences of adult court remain there.

The facts and circumstances of the instant case of J.B. are not extremely rare and exceptional so as to fall into that small group of the very select few whose cases must be retained in adult court.

C. Considering All of the Circumstances

To determine whether “extraordinary circumstances” exist so as to prevent removal, the Legislature intended that “[t]he judge must look at all the circumstances of the case – as well as the circumstances – all of the circumstances of the young person.” Debate at 39. This led the Court of Appeals to instruct that a court should consider “the totality of the facts and circumstances before it” using its “broad discretion” to make the “extraordinary circumstances determination.” *People v. Guerrero*, 2026 NY Slip Op 00826, *3. This does not mean that the court simply undertakes a broad totality of the circumstances analysis to decide whether the case should be retained, but rather it must consider all the facts and circumstances to decide whether it has before it a case that falls into that very narrow category of cases that is so exceptional and rare as to meet the “extraordinary circumstances” standard. As Judge Halligan, in dissent, joined by Chief Judge Wilson and Judge Rivera, pointed out, such discretion “must be exercised within the bounds envisioned by the Legislature.” *Id.* at *4. There are guide rails for the exercise of that discretion, not addressed by the majority.⁵ Guidance for the parameters of these guide rails is

⁵ The majority specifically declined to address those guide rails, reasoning that “defendant failed to preserve his contention that the court erred in considering the totality of the circumstances and was instead required to engage in a two-part inquiry, the first part of which is satisfied only if ‘highly unusual and heinous facts are proven and there is

clearly indicated by the legislative history. “The sponsor also emphasized two considerations that are crucial in that analysis [of extraordinary circumstances]: first, whether “highly unusual and heinous facts are proven,” and second, whether there is “strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court” (*id.* at 39).” *Id.* at *5.

Considering all of the circumstances, the prosecution has not proven this to be the exceptional case that meets the extraordinary circumstances standard.

D. Two-Part Test

The legislative history, in the form of the Assembly debate, informs how a judge should apply the “extraordinary circumstances” analysis. It is this explicit statement by Assembly Person Lentol that explains what the prosecution must prove in order to establish the case as the rare and exceptional case that should result in a denial of removal of a case to Family Court. “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.” Debate at 39. This two-factor analysis was first dubbed the two-part test in *People v. J.J.*, 74 Misc. 3d 1223(A) at *3. “It 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.’” *Id.* at *3. This two-test was embraced by the three-judge dissent in *People v. Guerrero*, 45 N.Y.3d at *5 finding it to be “crucial in that analysis.” *Id.* at *5. Relying on the statement of Assembly Person Lentol, lower courts have widely considered those two

a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court.” *People v. Guerrero*, 45 N.Y.3d at *6.

factors in making “extraordinary circumstances” determinations, *Id.* at *5, citing *People v. Lloyd F.*, 245 A.D.3d at 75-76, and *People v. M.M.*, 64 Misc. 3d at 271-272. *See also People v. D.L.*, 62 Misc. 3d 900, 905, 907 (Fam. Ct. Monroe County 2018).

It is urged that this court utilize the two-part test in the case now before it.

Undoubtedly, the prosecution may be tempted to make the spurious argument that this Court should not use the two-part test, arguing that it was rejected by the Court of Appeals in *People v. Guerrero*, 45 N.Y.2d 659. But that argument is to no avail. The majority in *Guerrero* did not reach the issue of the applicability of the two-part test. Instead, it avoided addressing the issue by ruling that the “defendant failed to preserve his contention” that the lower court erred when it failed to “engage in a two-part inquiry.” *Id.* at *2.

Many adolescent offender removal cases have been decided since the *Guerrero* decision. In such cases, even while citing to *Guerrero*, judges have continued to rely upon the two-part test to undertake an “extraordinary circumstances” determination recognizing its vitality and that it had not been rejected by *Guerrero*. *See*, for example, *People v. Mahamed U.*, 2026 NY Slip Op 51326(U) (Co. Ct. Erie County 2026) and *People v. A.D.*, 2026 NY Slip Op 51165(U) (Co. Ct. Westchester County 2026).

The prosecutor must prove both parts of the two-part test to establish “extraordinary circumstances.” The prosecutor has failed as to both. The prosecutor has failed to prove “highly unusual and heinous facts,” and has also failed to overcome its burden to provide “strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court.”

E. Aggravating Factors and Mitigating Circumstances

Citing to the legislative debate, trial courts have recognized that the Legislature intended that the threshold of “extraordinary circumstances” is intended to be a very high standard for the prosecutor to satisfy; hence preventing removals of adolescent offenders to family court should be extremely rare. *People v. A.M.*, 82 Misc. 3d 1249(A), *2 (Co. Ct. Putnam County 2024).

When Assembly Person Lentol was asked to give examples of extraordinary circumstances that might lead to a denial of removal to Family Court, he responded that “it’s difficult to give firm examples.” Debate at 39. He did go on to explain what a judge would have to consider. “The judge must look at all the circumstances of the case, as well as...all of the circumstances of the young person.” Debate at 39. He went on to explain that “aggravating factors may be proven, but the courts...must also consider individual mitigating circumstances.” Debate at 39-40.

Several courts have found it helpful to describe “aggravating factors [as those factors that] make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court.” See *People v. D.J.*, 77 Misc. 3d 440, 443-444 (Fam. Ct. Erie County 2022) citing *People v. S.J.*, 72 Misc. 3d 196 (Co. Ct. Erie County 2021).

Aggravating factors have been found by trial courts, based upon the Assembly debate, to include whether “the Adolescent Offender: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. *People v. D.J.*, 77 Misc. 3d at 444, Debate at 40.

Assembly Person Lentol explained that “even 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.” Debate at 40. Even if aggravating factors are proven, they may not be sufficient to establish “extraordinary circumstances,” and it would not be necessary for a court to even consider mitigating circumstances. *See People v. S.J.*, 72 Misc. 3d at 203. In fact, there will likely be aggravating circumstances in just about every case, but it will be the rare case that they rise to the level of “extraordinary circumstances.”

Mitigating circumstances are meant to “include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers.” *People v. D.J.*, 77 Misc. 3d at 444, Debate at 40.

Nowhere in the legislative debate was it explained how aggravating and mitigating factors should be considered in relationship to each other or how they interface with the two-part test. Several cases appear to have assumed that considering a totality of the facts and circumstances is accomplished by simply balancing the aggravating and mitigating factors concluding that if aggravating factors tipped the balance that “extraordinary circumstances” would be established. That is not the proper analysis for four reasons. First, it totally ignores the two-part test. Second, during the legislative debate, a balancing of aggravating and mitigating factors was never suggested, only that they be considered. Third, the aggravating factors, when considered alone, even if there are no mitigating factors, may not be sufficient to rise to the level of “extraordinary circumstances” as in *People v. S.J.*, 72 Misc. 3d at 203. This renders a balancing test useless. Fourth, a simple balancing test will only determine which factors preponderate. It does not establish that “extraordinary circumstances” exist and it runs counter to

the strong presumption in favor of removal, and the legislative intent that only extremely rare and exceptional cases remain in adult court.

A different approach is warranted. First, the court should consider the aggravating factors to determine if they even rise to the level of “extraordinary circumstances.” If they do not, the analysis ends at that point and the prosecution’s motion to prevent removal to Family Court should be denied. If the aggravating factors do rise to the level of “extraordinary circumstances” and the two-part test is satisfied, the threshold issue is deemed satisfied, and the court must then turn to consideration of the mitigating circumstances to determine if they militate against a determination that “extraordinary circumstances” exist such that the motion to prevent removal should be granted. Support for this approach is found in *People v. S.J.*, 72 Misc. 3d 196, *People v. J.S.*, 66 Misc. 3d 1213(A), in the legislative debate, and in the fact that it is the prosecution that bears the burden of proof on this motion.

In *People v. S.J.*, the prosecution proved that there were aggravating factors and the defense offered no mitigating circumstances at all. A pure balancing test would result in the aggravating factors outweighing the mitigating factors. Yet, the court concluded that “extraordinary circumstances” had not been proven to exist because the submitted aggravating factors were “insufficient to make a finding of extraordinary circumstances” and “[t]herefore, a review of mitigating circumstances is not necessary here.” *People v. S.J.*, 72 Misc. 3d at 203. In *People v. J.S.*, the court took the approach that aggravating factors and mitigating circumstances are not balanced against each other but rather, the mitigating circumstances are weighed against a finding of “extraordinary circumstances.” *People v. J.S.*, 66 Misc. 3d at *5.

A pure balancing test is inconsistent with the legislative scheme. It is important to keep in mind that as the proponent of the motion to prevent removal, the prosecution bears the burden of

proof and, as addressed during the legislative debate, that will be “a high standard for the DA to meet” and “is a very high bar.” (Debate at 39 and 83.) The burden of proof must be met by the prosecution on the threshold question of “extraordinary circumstances” – that is, have they presented aggravating circumstances that rise to the level of “extraordinary circumstances,” and have they met their burden of proving both prongs of the two-part test? If not, the motion should be denied. If they have, then and only then, does the burden of proof shift to the defense to prove mitigating circumstances that militate against the motion to remove the case to Family Court and against an “extraordinary circumstances” finding. To require the defense to prove mitigating circumstances prior to the prosecution having met its burden of proof improperly shifts the burden of proof to the defense. “[T]he burden here is on the People. It cannot be shifted to the AO.” *People v. A.M.*, 82 Misc. 3d at *7. This two-step approach finds support in the legislative debate. It was warned that “even if these aggravating factors [that may involve extraordinary circumstances] 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.” Debate at 40.

Because the mitigating circumstances in this case are so significant, impactful, and numerous, regardless of what approach this Court takes to consider both the aggravating factors and mitigating circumstances, the mitigating circumstances are so substantial as to outweigh the aggravating factors, and even if they didn’t outweigh the aggravating factors, they militate against removal.

POINT III

MITIGATING FACTORS

As set forth in the mitigation report submitted to this Court along with the affirmation opposing the prosecution motion to prevent removal to Family Court, there are substantial mitigating factors for this Court to consider. Remarkably, almost every mitigating factors that Assembly Person Lentol suggested during the legislative debate is present in this case and then some – “economic difficulties, substandard housing, poverty, learning disabilities...educational challenges, lack of insight and susceptibility to peer pressure immaturity, absence of positive role models, [absence of] behavioral role models, abuse of alcohol or controlled substances by the defendant, by family or by peers.” Debate at 40.

Defendant’s mitigation report has also identified the following additional mitigating factors:

- A very high ACEs score
- Difficulties foster care
- High lead level testing as a child
- Extensive history with Child Protective Services due to abuse and neglect
- Significant mental health diagnosis of ASD
- Poor judgment and impulsiveness
- Subjected to discrimination and bullying in school
- Proof that he would benefit from the heightened services of Family Court and is amenable to those services.
- Participation in programming and education – When provided services he has responded positively
- No contact with biological father
- Less culpable than his co-defendants
- Facing a potential state prison sentence – *See People v. J.P.*, 63 Misc. 3d at 651.⁶ *See also People v. D.L.*, 62 Misc. 3d at 906-907 and *People v. A.M.*, 82 Misc. 3d at *23.

⁶ “Further, in my view, the potential state prison sentence that this adolescent offender would face upon a conviction for a violent felony in supreme court does not add to a finding of extraordinary circumstances, rather it militates against such a finding in this case.”

All of these mitigating factors have a cumulative effect. When that cumulative effect is considered in conjunction with the developmental understanding of adolescents it is evident that the mitigating factors in this case militate against a finding of “extraordinary circumstances” and against the motion to prevent removal to Family Court.

POINT IV

NEITHER RECIDIVISM NOR THE NATURE OF THE OFFENSE IS DETERMINATIVE OF “EXTRAORDINARY CIRCUMSTANCES”

Recidivism is one of the problems that the Raise the Age legislation meant to address. (*See* Debate at 86, 211; Sponsor’s Memo). The intention behind Raise the Age was to “get better outcomes” for youth who become system-involved and provide an “opportunity to get back on the right track.” Debate at 21 and 86). “Treating re-offense by system-involved young people as “extraordinary” in and of itself would therefore defeat the purpose of the statute.” *People v. Guerrero*, 45 N.Y.3d at *6 (Dissent). The mere fact that an adolescent had previously been arrested and engaged in rehabilitative services and was later arrested, without more, “does not constitute ‘strong proof’ (Assembly tr at 39) that he or she is beyond the reach of the Family Court.” *People v. Lloyd F.*, 45 A.D.3d at 81.

Prior offending, standing alone, is not enough to establish that J.M. is not amenable to services. The premise that youth can change is central to Raise the Age, because “incurability is inconsistent with youth.” *People v. Doe*, 62 Misc. 3d 574, 580 (Sup. Ct. Queens County 2018) (quoting *Graham v. Florida*, 560 U.S. 48, 73 [2010]). J.M.’s conduct must instead be evaluated considering the transient characteristics of youth. As the Supreme Court recognized in *Roper*, the very qualities that contribute to adolescent risk-taking and unlawful behavior often diminish with maturity. *Roper v. Simmons*, 543 U.S. 551, 570 (2005). Accordingly, any prior offending

demonstrates, at most, a need for continued intervention. It does not establish that rehabilitation is unavailing, or that J.M. is not amenable to services.

The statute's structure confirms that the nature of the defendant's crime cannot support a finding of extraordinary circumstances. Had the Legislature contemplated that a particular charge "could overcome the RTA's statutory presumption in favor of removal, it could have included such a charge as one of the enumerated circumstances set forth in the statute that expressly prevents removal (*see* CPL 722.23 [2][c][i]-[iii]). It did not." *People v. Key*, 2026 NY Slip Op 05234, *11.

Neither recidivism nor the particular type of offense convert otherwise ordinary circumstances into extraordinary ones. *People v. Lloyd F.*, 45 A.D.3d at 81.

POINT V

NEITHER FAMILY COURT RECORDS NOR REFERENCES TO FAMILY COURT PROCEEDING ARE ADMISSIBLE AT AN "EXTRAORDINARY CIRCUMSTANCES" HEARING

The prosecution has improperly attempted to introduce evidence about family court juvenile delinquency proceedings regarding J.M. This Court must reject the admission of such evidence.

Confidential proceedings in family court protect young people from the legal barriers to education, employment, housing, and other stabilizing support that a criminal record imposes. Relying on those confidential records in extraordinary circumstances proceedings undermines these crucial protections and is impermissible under the Family Court Act § 381.2 (1).⁷

⁷ Riya S. Shah & Jean Stout, *Future Interrupted: The Collateral Damage Caused by Proliferation of Juvenile Records*, Juvenile Law Center (2016), https://jlc.org/sites/default/files/publication_pdfs/Future%20Interrupted%20-%20final%20for%20web_0.pdf.

Family Court Act § 381.2 (1) establishes an unequivocal rule that “neither the fact that a person was before the family court under this article for a hearing nor any confession, admission or statement” from the proceeding “is admissible as evidence against him or his interests in any other court.”

Long before the passage of Raise the Age, the Court of Appeals held that “[a]s a rule, a juvenile delinquency adjudication cannot be used against the juvenile in any other court for any other purpose,” citing to Family Court Act § 381.2 (1). *Green v. Montgomery*, 95 N.Y.2d 693, 697 (2001). This rule applies not just to juvenile delinquency adjudications but to “the fact that a person was before the Family Court in a juvenile delinquency proceeding.” *People v. Campbell*, 98 A.D.3d 5, 12 (2d Dept. 2012).

Since Raise the Age was implemented, trial courts in New York State have repeatedly held that courts cannot use an adolescent’s juvenile delinquency history when considering removal to family court. “Family Court Act § 381.2 expressly prohibits the use of the AO’s juvenile delinquency history” and “[t]hus, under the express terms of Family Court Act § 381.2 the court may not consider the AO’s juvenile delinquency history, as extensive as it may be, as a factor weighed against the removal of these cases to the Family Court.” *People v. M.M.*, 64 Misc. 3d 259, 269-271 (Co. Ct. Nassau County 2019); *see also People v. J.J.*, 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 2022) (“the People may not, in any way, use the AP’s juvenile delinquency history...in any application for removal under the statute”); *People v. C.B.*, 2026 NY Slip Op 51130 (Co. Ct. Columbia County, 2026); *People v. M.R.*, 68 Misc. 3d 1004, 1010 (Sup. Ct. Kings County 2020); *People v. J.K.*, 78 Misc. 3d 1221(A) (Fam. Ct. Erie County 2023); *People v. A.M.*, 82 Misc. 3d 1249(A) (Co. Ct. Putnam County 2024).

Undoubtedly, Family Court Act § 381.2 (1) “is clear on its face and provides that neither the fact that a person was before the Family Court in a juvenile delinquency proceeding for a hearing, nor any confession, admission, or statement made by such a person to the Family Court, or to any officer thereof in any state of that proceeding, is admissible in any other court.” *People v. Campbell*, 98 A.D.3d at 12. The only exception to that prohibition specifically provided by the Legislature is found in Family Court Act § 381.2 (2), which provides that another court may consider records and information on file with the family court when imposing sentence upon an adult after conviction. This exception is clearly inapplicable to an “exceptional circumstances” hearing. *People v. M.R.*, 68 Misc. 3d at 1010; *People v. M.M.*, 64 Misc. 3d at 270-271.

When a prosecutor submits proof related to the defendant’s juvenile delinquency history, “this proof could not be relied upon in deciding the motion” opposing removal to family court, according to the Appellate Division, Third Department, holding that the prosecution “improperly submitted proof related to defendant’s juvenile delinquency history in support of the motion. *People v. Aaron VV.*, 246 A.D.3d 131, 136 (3d Dept. 2025), citing to Family Court Act § 381.2.

Based upon the foregoing, the defense objects to all proof submitted by the prosecution pertaining to any juvenile delinquency proceedings involving J.M.

POINT VI

THE PROSECUTOR’S MOTION MUST BE DENIED BECAUSE IT DOES NOT CONTAIN ALLEGATIONS OF SWORN FACT BASED UPON THE PERSONAL KNOWLEDGE OF THE AFFIANT

If the prosecution moves pursuant to CPL § 722.23 (1) within thirty calendar days of arraignment to prevent removal, the motion must be in writing and must contain allegations of sworn fact based upon the personal knowledge of the affiant. CPL § 722.23 (1)(b). These

allegations of sworn fact based upon personal knowledge of the affiant must set forth “that extraordinary circumstances exist that should prevent the transfer of the action to family court.

People v. Aaron VV, 246 A.D.3d 131, 135 (3d Dept. 2025).

The prosecution may not rely exclusively on the allegations set forth in the accusatory instrument. *People v. J.J.*, 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 2022).

For example, the prosecutor’s unsworn statements about the defendant made on the record at a court appearance after already having moved to retain the matter in County Court cannot be relied upon in deciding the motion. *People v. Aaron VV*, 246 A.D.3d at 136. Where the prosecution has submitted exhibits and documents that do not contain allegations of sworn fact based upon personal knowledge of the affiant the Court should not consider them in determining the motion. *People v. J.K.*, 78 Misc. 3d 1221(A) (Fam. Ct. Erie County 2023).

The prosecution may not seek to prove “extraordinary circumstances” with hearsay. “[O]nly nonhearsay facts can be considered.” *People v. S.J.*, 72 Misc. 3d 196, 202 (Fam. Ct. Erie County 2021). In a case where the affirmation and felony complaint contain hearsay claims and do not contain “sworn fact” based upon personal knowledge, the contents “do not fall within the mandate of CPL § 722.23 (1)(b) and the motion should be denied for that reason. *People v. T.R.*, 62 Misc. 3d 1219(A) (Fam. Ct. Erie County 2018).

In the instant case, the prosecutor has failed to provide allegations of sworn fact based upon personal knowledge of the affiant establishing extraordinary circumstances exist that should prevent the transfer of this action to family court, and as a result the prosecution motion should be denied.

POINT VII

THE PROSECUTION’S BURDEN OF PROOF TO PREVENT REMOVAL AT AN “EXTRAORDINARY CIRCUMSTANCES” HEARING IS CLEAR AND CONVINCING EVIDENCE

To prevent removal at the initial stage – that is, at the sixth-day hearing – the Legislature drafted the statute to require a specific burden of proof. CPL § 722.23 (2)(c) requires that the burden to be met is a preponderance of the evidence. To prevent removal at the sixth-day hearing the prosecution must prove by a preponderance of the evidence one or more of the following factors: 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...in furtherance of such offense; or iii) the defendant unlawfully engaged in sexual contact.

However, the Legislature did not establish how the prosecution’s burden should be measured on a motion to prevent removal based upon “extraordinary circumstances” at a thirty-day hearing, and there is no binding authority setting forth a standard. *People v. A.D.*, 2026 NY Slip Op 51165(U) (Co. Ct., Westchester County 2026). In *People v. J.J.*, 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 2022), the court concluded that the burden of proof on the prosecution should be “clear and convincing evidence,” reasoning that “[a]t this stage [extraordinary circumstances hearing] ... the statute has already rendered the matter presumptively subject to transfer. 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 [of removal]. Logically, then, the burden of proof on this type of motion [to prevent removal] must be something more than a mere preponderance. It should be closer to or resemble “clear and convincing evidence.” *Id.* The court in *People v. A.D.* agreed with the reasoning in *People v. J.J.*

This burden of “clear and convincing evidence” is inarguably consistent with the Third Department’s conclusion that the “People’s burden is *exceedingly high* on a motion to prevent removal.” *People v. Aaron VV.*, 246 A.D.3d 131, 136 (3d Dept. 2025).⁸ It is also consistent with the legislative intent. The “intent with this bill is that extraordinary circumstances is a *very high bar*” (Assembly Debate at 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 Debate at 39). “Strong proof” is certainly more than a mere preponderance.

In the instant case, the prosecution has failed to establish that “extraordinary circumstances exist,” under either standard.

CONCLUSION

The facts presented by the prosecution do not establish this as one of the “extremely rare and exceptional cases” contemplated by the Legislature in enacting Raise the Age.

Just as the court found in *People v. Lloyd F.*, 245 A.D.3d at 79-80, “the defendant’s alleged behavior exhibited the very characteristics of adolescent decision-making, according to the United States Supreme Court, that warrant the sensitive treatment of youth in the justice system – ‘impetuous and ill-considered actions and decisions’ resulting from ‘a lack of maturity and an underdeveloped sense of responsibility,’ heightened susceptibility to ‘negative influences and outside pressures, including peer pressure’ (*Roper v. Simmons*, 543 US at 569 [alteration and internal quotation marks omitted, and limited control over their immediate environment and inability to ‘extricate themselves from a criminogenic setting.’” It is for this very reason that

⁸ There is one reported lower court case that found that the prosecution’s burden of proof to establish extraordinary circumstances is measured by a preponderance of the evidence. *People v. W.H.*, 69 Misc. 3d 278, 282 (Sup. Ct. Kings County 2020). However, in *People v. W.H.* the court offered no rationale for its conclusion.

cases such as this fall within the range of behavior that the Legislature presumed would be more appropriately addressed in Family Court.

The prosecution has failed to prove that “extraordinary circumstances” exist in this case.

The prosecution has failed to prove “highly unusual and heinous facts” and has not presented “strong proof that the young person is not amenable or would not benefit in any way from the heightened services in family court.” Indeed, the defense has presented proof that J.M. would benefit from the heightened services in Family Court and that he is amendable to such services.

The aggravating circumstances alleged by the prosecution do not rise to the level of “extraordinary circumstances.”

The very substantial mitigating circumstances presented by the defense both outweigh the aggravating circumstances and clearly militate against a determination of “extraordinary circumstances” and a granting of the prosecution motion to prevent removal.

In *People v. Lloyd F.*, 245 A.D.3d at 77, the court set forth its overarching consideration that guided its consideration of aggravating and mitigating factors: “whether the ‘possibility exists that [the adolescent offender’s] deficiencies will be reformed (*Roper v. Simmons*, 543 U.S. at 570),” in which case the action should be removed to Family Court. Undoubtedly, the prosecution has failed to prove that there is no possibility that J.M. can be reformed. He is not a lost cause and his is not a life “for us to throw away.” Debate at 50. It is a life “worth saving.” Debate at 74.

Considering all the circumstances of this case, as well as the circumstance of J.M., interpreting “extraordinary circumstances” to apply to this case, so as to prevent removal to

Family Court, would deny J.M. the protection of Raise the Age and perpetuate the very harms Raise the Age sought to address.

For all the foregoing reasons, the prosecution motion to prevent removal should be denied and this action should be immediately removed to Family Court.

Dated: October 15, 2026

Alan Rosenthal
Attorney for Defendant
White Memorial Building, Suite 204
100 E. Washington Street
Syracuse, New York 13202
(315) 559-2240

Sydney Zuber, Law Intern
Assisting on Memorandum of Law

CC: Judge _____
ADA