PRACTICE ADVISORY:

NAVIGATING REMOVAL OF ADOLESCENT OFFENDER CASES POST-GUERRERO

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On February 17, 2026, the New York Court of Appeals issued its 4-3 decision in the case of 17-year-old Errick Guerrero who was charged with robbery and burglary as an Adolescent Offender. *People v. Guerrero,* 2026 NY Slip Op 00826 (2026) https://www.nycourts.gov/reporter/3dseries/2026/2026_00826.htm. Leading up to that decision, it was generally anticipated that the Court would decide what "extraordinary circumstances" meant in the context of a prosecutor's challenge to the presumptive removal of a violent felony from adult court to family court, and how a court was to make that determination. In particular, it was expected that the Court would decide whether the two-part test enunciated during the legislative debate and adopted by many lower courts was required to be used by Youth Part judges when making the "extraordinary circumstances" determination.

That two-part test, as explained during the legislative debate, requires that "[t]ransfer to 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).[2] The term "two-part test" was coined by the court in *People v. J.J.,* 74 Misc. 3d 1223(A) (Co. Ct. Ulster County 2022) referring to the standard articulated by the bill's sponsor during the Assembly debate.

It seemed unlikely that the Court of Appeals could avoid application of the two-part test to a determination of "extraordinary circumstances" since it featured so prominently in the legislative debate, was widely considered by lower courts, and seemed so crucial to the analysis. But avoid it they did. Instead, leaving the lower courts with little guidance, other than to make the "extraordinary circumstances" determination using "the broad discretion of the court" after "considering the totality of the facts and circumstances before it." However, as will be explained herein, the good news is that the Court of Appeals did not jettison the high standard of the two-part test. We should still advocate for the use of the two-part test, and Youth Part judges can and should continue to use that analysis.

The purpose of this practice advisory is threefold. First, is to suggest ways that you can prevent the decision in *People v. Guerrero* from being weaponized by the prosecution to bar the removal of your next Adolescent Offender case to family court. Second, is to extract the lessons

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[1] A heartfelt thank you for the valued contributions to this practice advisory from Kathleen Dougherty, Kate Rubin, Theresa Moser, Anthony Katchen, Susan Bryant, Stephanie Batcheller, and Rebecca Besdin.

[2] https://assembly.state.ny.us/raisetheage/transcripts/full-debate.pdf.

learned from the *Guerrero* removal hearing. Third, to propose what you can do to better prepare for your next "extraordinary circumstances" hearing.

One of our goals as defense lawyers is to prevent the prosecutor's burden of proving "extraordinary circumstances" from being lowered below what the Legislature intended to be a "very high bar" by the use of the amorphous standard provided by *People v. Guerrero,* and to limit retention in adult court to only "those extremely rare and exceptional cases." (Assembly Debate at 37, 83). A second of our goals is to sufficiently explain the statute's structure and purpose so that the Youth Part judge fully appreciates "the key question" identified by the *Guerrero* dissent when determining removal – "whether a 'possibility exists that [the defendant's] deficiencies will be reformed'" citing *Roper v. Simmons,* 543 U.S. 551, 570 (2005). "If so, that young person deserves an opportunity to receive services instead of adult punishment."

To achieve our goals and the purposes of this practice advisory, it is first necessary to carefully parse what the Court of Appeals did and didn't say in *People v. Guerrero*.

Analyzing *Guerrero*

The Court ruled that "[t]he sole question before us is whether the youth part abused its discretion as a matter of law in granting the People's motion to prevent removal. Because the court did not abuse its discretion in reaching that determination, we affirm." How did the Court avoid addressing whether the two-part test should be applied by courts to make an "extraordinary circumstances" determination? And for our purposes, should the two-part test be applied by courts in the future?

To avoid addressing the two-part test the Court of Appeals determined that the defendant "failed to preserve his contention that the court erred" by not engaging "in a two-part inquiry." The Court faulted defendant because he "did not argue for the application of such a test before the youth part."

With the issue unpreserved, what test did the Court of Appeals apply? The Court's analysis simply relied upon a determination as to whether the lower court had abused its discretion. "The only question before us is whether the youth part, considering the totality of the facts and circumstances before it, abused its discretion as a matter of law in determining that extraordinary circumstances existed that should prevent removal to Family Court (*see* CPL 722.23 [1][d])." All that can be deduced is that the Court of Appeals placed "the extraordinary circumstances determination within the broad discretion of the court" to be made by "considering the totality of the facts and circumstances." Not a particularly demanding standard.

The Court of Appeals decision did not address "whether highly unusual and heinous facts" had to be proven, nor whether the prosecution was required to submit "strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court." All that the Court addressed was that when the lower court considered the totality of the facts and circumstances after "weighing the considerable aggravating and mitigating factors" it did not abuse "its discretion as a matter of law in determining that

extraordinary circumstances exist that should prevent removal to Family Court." Their apparent "helpful" guidance was for courts to use their "broad discretion."

The Court of Appeals did not reject the two-part test. It made no pronouncement about the two-part test other than that it had not been preserved for appellate review. It left the door wide open for defense counsel to vigorously argue for application of the two-part test to any future "extraordinary circumstances" determination. Courts and defense counsel addressing "extraordinary circumstances" at removal hearings in the future should not feel they are hamstrung by this decision. Although the majority decision certainly treated Errick Guerrero's removal very unfairly, it hopefully did little damage to future removal cases. All that the Court did in *Guerrero* was to leave courts in the future to use "broad discretion" to apply that two-part test, if it is raised, by considering the totality of the facts and circumstances as to each prong, including the aggravating and mitigating factors. To the extent that this is consistent with the legislative debate (Assembly Debate at 39-40) we take no issue.

The three-judge dissent in *Guerrero* is very instructive. They concluded that the lower court had failed to meet either prong of the two-part test and thus had abused its discretion. The dissent disagreed with the majority's determination that the application of the two-part test had not been preserved. The dissent found the two-part test to be integral to the "extraordinary circumstances" determination and consistent with the goal of the Raise the Age legislation "to treat 'kids' lives [a]s worth saving' by giving them services rather than locking them in adult prisons" and that to fulfill the promise of Raise the Age, "extraordinary circumstances" must be a "high standard meant for the rarest of cases." "As the legislative history indicates, that inquiry [extraordinary circumstances] requires consideration of whether the People have demonstrated particularly unusual and heinous facts and strong proof that the defendant is not amenable to services." (Emphasis added).

The dissent was particularly concerned that the majority ignored extensive comments in the Assembly Debate which give meaning to the term "extraordinary circumstances." If we, as defense counsel, are to convince Youth Part judges to apply the two-part test, that "all cases will be presumptively transferred," the "overwhelming bulk" of the cases will be removed to family court, "denial of transfers should be extremely rare," to hold the prosecution to "a very high bar," and allow removal in all but "those extremely rare and exceptional cases," we must be well versed in the legislative history. (Assembly Debate at 37-8, 83). And we need to convince the Youth Part judges that they should be too, or at least more well versed than the four judge majority in the Court of Appeals.

To the dissent, an "extraordinary circumstances" inquiry is much more exacting than the "broad discretion" of a "totality of the circumstances" analysis suggested by the majority. The dissent explained that "[a]lthough we surely need not take literally the ratio of 1 out of every 1000 cases,[3] the sponsor made clear that a finding of "extraordinary circumstances" should be

[3] The reference to the 1 out of a 1000 cases ratio comes from the bill's sponsor during the Assembly debate when explaining what was meant by "extraordinary circumstances." "[W]e definitely intend that in the overwhelming bulk of the cases that the matter will be promptly transferred from the adult court to the family court. And, as a matter of fact, the standard was actually suggested…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 Debate at 37-38.

quite rare, and that a court's analysis of all the circumstances should consider whether the facts are 'highly unusual and heinous' and whether the defendant is amendable to services (Assembly Debate at 39)." Merely applying a "totality of the circumstances" analysis and leaving it to the "broad discretion of the court"[4] as the majority suggests, without the framework required by the two-part test, will allow courts to turn ordinary circumstances into extraordinary ones, thus defeating the purpose of the statute, resulting in many adolescents being prosecuted as adults, rather than it being the rare and exceptional case.[5]

There is one nugget for defense counsel buried in the *Guerrero* decision. Questions have arisen as to whether accomplice liability applies to those youth who act in concert regarding the specific conduct described at CPL § 722.23 (2)(c) that prevents removal if proven by a prosecutor by a preponderance of the evidence at a "Sixth-Day Hearing." The *Guerrero* decision seems to put that question to rest. Addressing the issue of the display of a firearm during this robbery the Court eliminated accomplice liability as a basis to prevent removal stating that "he participated in a preplanned home invasion in which he displayed a knife and where his accomplices' conduct in displaying firearms would have mandated retention of the case by the youth part if defendant had done so himself." (Emphasis added). (*see* CPL 722.23 [2][c][ii]).

While *Guerrero* was pending in the Court of Appeals two very helpful decisions were issued by the Second and Third Departments of the Appellate Division. Both decisions uphold the strong presumption in favor of removal and utilize the two-part test to determine "extraordinary circumstances." *See, People v. Aaron VV.,* 2025 NY Slip Op 05018 (3d Dept. 2025) and *People v. Lloyd F.,* 245 A.D.3d 69 (2d Dept. 2025). Post-*Guerrero* we should be arguing that the lower courts should follow these two decisions.

Prevent the Weaponization of *Guerrero*

Undoubtedly the prosecution will seek to use the decision in *Guerrero* to support their argument that removal should be denied based upon the new low standard for determining "extraordinary circumstances" set in that case. They will argue that the decision stands for the principle that the "extraordinary circumstances" hearing should be based on the court's "broad discretion" after considering the "totality of the facts and circumstances before it." Prosecutors will urge the court to ignore the two-part test, and the exacting standard suggested by the legislative debate.

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[4] The majority in *Guerrero* opined that "[t]he absence of guidance evinces a legislative intent to leave the extraordinary circumstances determination within the broad discretion of the court." The dissent acknowledged that judges have significant discretion to determine a motion to prevent removal but warns that "the statutory structure and legislative history constrain that discretion, as they do whenever a court applies a statute."

[5] The majority acknowledged how unexacting the standard they were applying was. Rather than *Guerrero* being a clear example of an extremely rare and exceptional case warranting retention in adult court, they conceded that "defendant's mental health is a substantial mitigating factor, and the alternative conclusion [to remove the case] would not have been unreasonable. That is, the court could have found it appropriate for the case to be removed so defendant could continue to receive Family Court services." Does this mean that in any close case, the Court of Appeals has given grace to the lower court to err on the side of retention rather than removal? That does leave one to wonder what the presumption in favor of removal means.

To counter the prosecution's attempt to use *Guerrero* to undermine the meaning of "extraordinary circumstances" defense counsel should be prepared to:

1) Carefully explain what was and wasn't decided in *Guerrero.*
2) Argue that the Court of Appeals in *Guerrero* did not address the two-part test because it found it was not preserved. As a result, the decision in *Guerrero* does not eliminate the two-part test.
3) Argue that the "broad discretion" standard set forth in *Guerrero* does not prevent the court from using that discretion to employ the two-part test that has been consistently used by courts since the enactment of Raise the Age.
4) Argue that *Guerrero* did not negate the rich legislative debate that helps courts give meaning to "extraordinary circumstances."
5) Argue that using the totality of the facts and circumstances analysis requires the court to consider all of the mitigating factors that your case presents which prevent retention of the case.
6) Argue that the prosecution has not met its burden of proof as to the two-part test.
7) Argue that the decision in *Guerrero* can be reconciled with application of the two-part test, and courts have done so subsequent to the Court of Appeals decision in *Guerrero. See, People v. Damone F.,* 2026 NY Slip Op 50250(U) (Youth Part Erie County 2026) https://nycourts.gov/reporter//3dseries/2026/2026_50250.htm.

Just two weeks after the Court of Appeals issued its decision in *People v. Guerrero,* the court in *People v. Damone F., id*., issued a decision in a case in which the prosecution sought to prevent removal, arguing that it had proven "extraordinary circumstances." In the court's decision, Judge Freedman acknowledged the Court of Appeals holding in *Guerrero* that a determination regarding extraordinary circumstances is left within the broad discretion of the court. Judge Freedman did not feel constrained in any way by *Guerrero.* She cited to the legislative history of the Raise the Age legislation drawing from the Assembly debate and specifically the applicability of the two-part test. "[T]he People would satisfy the 'extraordinary circumstances' standard where '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 the family court." Applying the two-part test Judge Freedman ordered that the case be removed to family court, finding that the prosecution had not proven that the facts of the case were "particularly unusual or heinous" and failed to prove that the defendant "is not amenable to the heightened services provided in Family Court or that such services have been exhausted" and thus did not establish that extraordinary circumstances existed.

Distinguish *Guerrero* by its Facts

Although the Court of Appeals embellished some of the facts it referenced in its decision, defense counsel should use the description of the crime and circumstances in *Guerrero* to distinguish it from the less egregious facts of your own case.

As described by the Court of Appeals, the facts of Guerrero's crime presented at the "extraordinary circumstances" removal hearing were as follows:

- Guerrero "participated in a preplanned armed home invasion" along with accomplices.

● It was a "premeditated attack."
● They "planned to break into the victim's house to rob him and then did so."
● Guerrero "displayed a knife" and "accomplices…displaying firearms."
● "[T]hey displayed their weapons, seized the victim, and threatened to stab him."
● "One accomplice took the victim's shotgun and struck him with it three times, causing physical injury."
● Guerrero "participated in a violent home invasion involving weapons and injuries to the victim."

Other facts from the *Guerrero* decision used to find "extraordinary circumstances" that you will want to distinguish:

● "Between May 2016 and January 2021, defendant received eight Family Court appearance tickets and two adjudications."
● Defendant "maxed out" of two terms of supervision.
● A month before the instant offense "defendant received an appearance ticket…for unauthorized use of a motor vehicle.
● Guerrero exhibited "a pattern of escalating criminal behavior."

Facts identified by the Court of Appeals to support a determination that Guerrero was not amenable to the heightened services of family court:

● Guerrero "had received many services over a period of five years that were intended to assist him in leading a law-abiding life."
● "[H]is criminal behavior escalated to the point that only a month after receiving a Family Court appearance ticket for unauthorized use of a motor vehicle, he participated in a preplanned home invasion in which he displayed a knife."

Lessons Learned from *Guerrero* "Extraordinary Circumstances" Hearing

We can learn a great deal from a review of the *Guerrero* hearing transcript. If we identify those opportunities to improve it will ultimately make us better lawyers. It is not enough to analyze a Court of Appeals decision. It is critical to analyze what could have been done differently to change the outcome. Identified below are some lessons learned from the "extraordinary circumstances" hearing gleaned from the hearing transcript, the affirmation in response to the prosecution's motion to prevent removal, the probation report, the defendant's presentence memorandum, as well as the appellate decisions:

● It is vital to fully develop mitigating factors. Here the mitigation was at best perfunctory. No investigation was undertaken. Defense counsel simply repeated what he was told by his client's mother. He told the court that Errick was diagnosed with Bipolar Diorder, ADHD, Operational Defiance Disorder (probably meaning Oppositional Defiant Disorder), and Schizophrenia. His father was murdered and Errick never fully recovered. Defense counsel further informed the court that Errick had been prescribed a number of medications and receives therapy through his school's counselors at least once a week. After reviewing the mitigation subsequently developed by both a mitigation specialist

and the probation department for the purpose of sentencing, a clearer and fuller picture of abuse, neglect, lead poisoning, hyperhydration, intellectual disabilities, absence of parental care and guidance, and extreme poverty emerges, helping to put Errick's actions in context. Had all of the mitigation been fully developed and presented at the time of the removal hearing one can imagine a different outcome. The words of the Court of Appeals' decision are haunting when one considers that a much more robust mitigation could have been presented. "To be sure, defendant's mental health is a substantial mitigating factor, and the alternative conclusion [removal to family court] would not have been unreasonable."

● Defense counsel should submit documentary evidence to support the mitigating factors.
● Defense counsel should engage a mitigation specialist for the purpose of the hearing.
● Defense counsel should submit a pre- and/or post-hearing memorandum of law.
● It is critical to present and preserve the two-part test as the standard that the court should require of the prosecution. Instead, defense counsel argued based on a "totality of the circumstances" that extraordinary circumstances did not exist.
● Argue that "highly unusual and heinous facts" has not been proven.
● It is always vital for defense counsel to investigate what services the client has received and what progress has been made. Always investigate the quality of services previously received. Here, counsel could have investigated the depth and effectiveness of the services that Errick had received through family court, documented the ways that he had benefitted from them and the extent to which they were insufficient to meet Errick's needs and could have presented evidence that Errick was amenable to the heightened services in the family court.
● Defense counsel should object to and preserve for appellate review the admissibility of evidence related to prior proceedings in family court. (Family Court Act § 381.2 [1]).
● Defense counsel could have objected to the probation officer's testimony.
● Defense counsel should always stress the presumption in favor of removing the case to family court.

Practice Tips for Your Next "Extraordinary Circumstances" Hearing

● Immediately, on the first day you open the case, begin to investigate and marshal every bit of mitigation that can be found. Leave no stone unturned. Collect all the documentation of these mitigation factors and prepare to present it as exhibits at the hearing. For a full discussion of "extraordinary circumstances" and the role important role that mitigating factors plays 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.
● Immediately engage a mitigation specialist as part of the defense team to help identify the mitigating factors and gather the documentation.

● Prepare and file a pre-hearing memorandum of law.[6] You should have prepared well in advance of assignment to the case, a boilerplate memorandum of law that can serve as a template for every Adolescent Offender case to which you are assigned. This memorandum of law should address the following points referencing both case law and the legislative debate:

□ The legislative history of Raise the Age and its purpose.
□ The evolving jurisprudence regarding adolescents.
□ The behavioral science and brain science that serves as the underpinning to removal of adolescent cases.
□ The presumption in favor of removal and that retention in adult court would occur only in the extremely rare and exceptional cases.
□ The very high bar that has been set for the prosecutor to prove "extraordinary circumstances."
□ The standard that the court should employ in making the "extraordinary circumstances" determination focusing on the two-part test. Note that the dissent in *Guerrero* was of the opinion that an extraordinary circumstances determination "requires" consideration of the two-part test and that the two-part test was "crucial" to the determination of "extraordinary circumstances."
□ Reference the two Appellate Division decisions issued shortly before the decision in *Guerrero* that uphold the strong presumption in favor of removal and the use of the two-part test to determine extraordinary circumstances. *See, People v. Aaron VV.,* 2025 NY Slip Op 05018 (3d Dept. 2025) and *People v. Lloyd F.,* 245 A.D.3d 69 (2d Dept. 2025).
□ How the court should weigh aggravating and mitigating circumstances.
□ Evidentiary issues that frequently arise.
□ Explain and distinguish *Guerrero* on the law and the facts.
□ Case law developments since the decision in *Guerrero* including *People v. Damone F.,* 2026 NY Slip Op 50250(U) (Youth Part Erie County 2026).
□ Recidivism or repeat offenses are not determinative in and of themselves sufficient proof that a youth is not amenable to services.
□ The burden of proof should be on the prosecution to prove "extraordinary circumstances" by clear and convincing evidence, not just a preponderance of the evidence. See § 4:40 of A Defense Attorney's Guide for suggestions about how to develop this argument.
□ Family Court Act § 381.2 (1) prohibits the juvenile delinquency history of any person from being admissible in evidence against them in any other court.

● Request permission to file a post-hearing memorandum. Order the hearing transcript.
● Be very familiar with the legislative history and the Assembly debate. The transcript of the debate can be found online at https://assembly.state.ny.us/raisetheage/transcripts/full-debate.pdf. See § 4:20 of A Defense Attorney's Guide for the legislative history and § 4:36 for the salient language from the Assembly debate.
● Make all evidentiary objections preserving the issues for appellate review.

[6] Do not hesitate to reach out to NYSDA, ILS, or your institutional defender offices for samples of memoranda of law they have used to advocate for removal. It is anticipated that a model memorandum of law will be available by the end of the summer, prepared in conjunction with the practice advisory.

● Prepare to present a strong affirmative case on the issue of your client's amenability to and need to benefit from the heightened services in family court. If your client has received services in the past be prepared to show how they benefitted from those services, or why those services were not appropriate for your client's particular circumstances.

●Argue that change is a signature quality of adolescence and that lack of responsiveness to services at a young age does not automatically mean that the young person may not be amenable to services or a more particular intervention now. Always challenge the prosecution theory that your client is not amenable to the heightened services of family court.

● Be prepared to use the services of an expert witness, psychologist, social worker, or expert in adolescent development to explain to the court your client's amenability to services, and what services would be most appropriate and effective. Explain why the program and services that have been tried did not work or were not appropriate. Document any progress your client made in any program whether through family court or otherwise.

● Place the key question for removal front and center when arguing at the hearing – "Whether a 'possibility exists that [the defendant's] deficiencies will be reformed'" citing to the dissent in *Guerrero,* citing to *Roper v. Simmons,* 543 U.S. at 570. This question was similarly framed by the Appellate Division in *People v. Lloyd F.,* 2025 NY Slip Op 04583 (2d Dept. 2025). "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.'"

● Object and preserve for appellate review that Family Court Act § 381.2 (1) prohibits the use of the A.O.'s juvenile delinquency history at an "extraordinary circumstances" hearing. There are many decisions on point. *See, People v. MM.,* 64 Misc. 3d 259, 269 (Co. Ct. Nassau County 2019).