

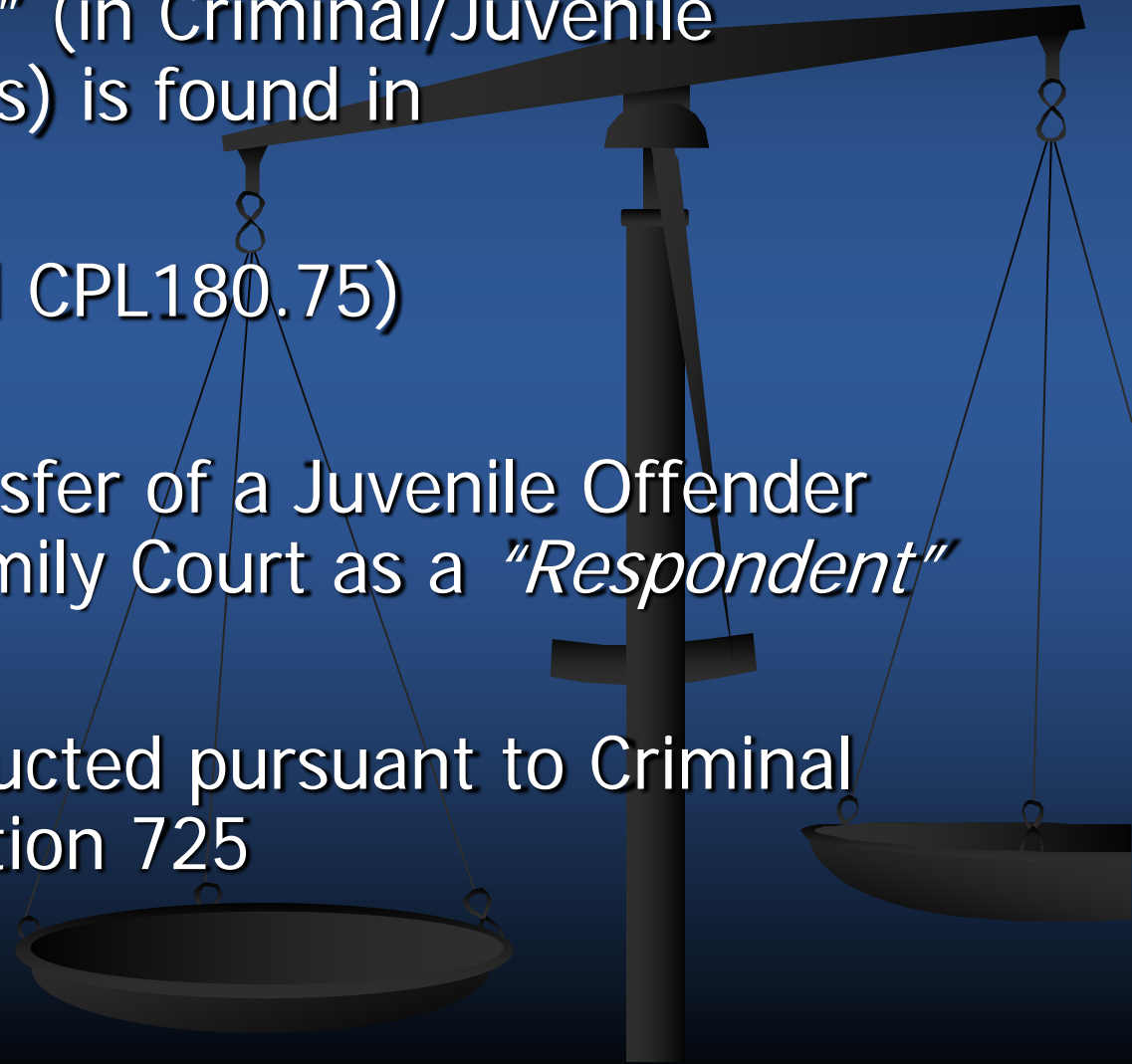
# Transfers and Removals: The Basics

The term "Removal" (in Criminal/Juvenile Delinquency Matters) is found in

- FCA § 310.2
- CPL § 725.05 (and CPL180.75)

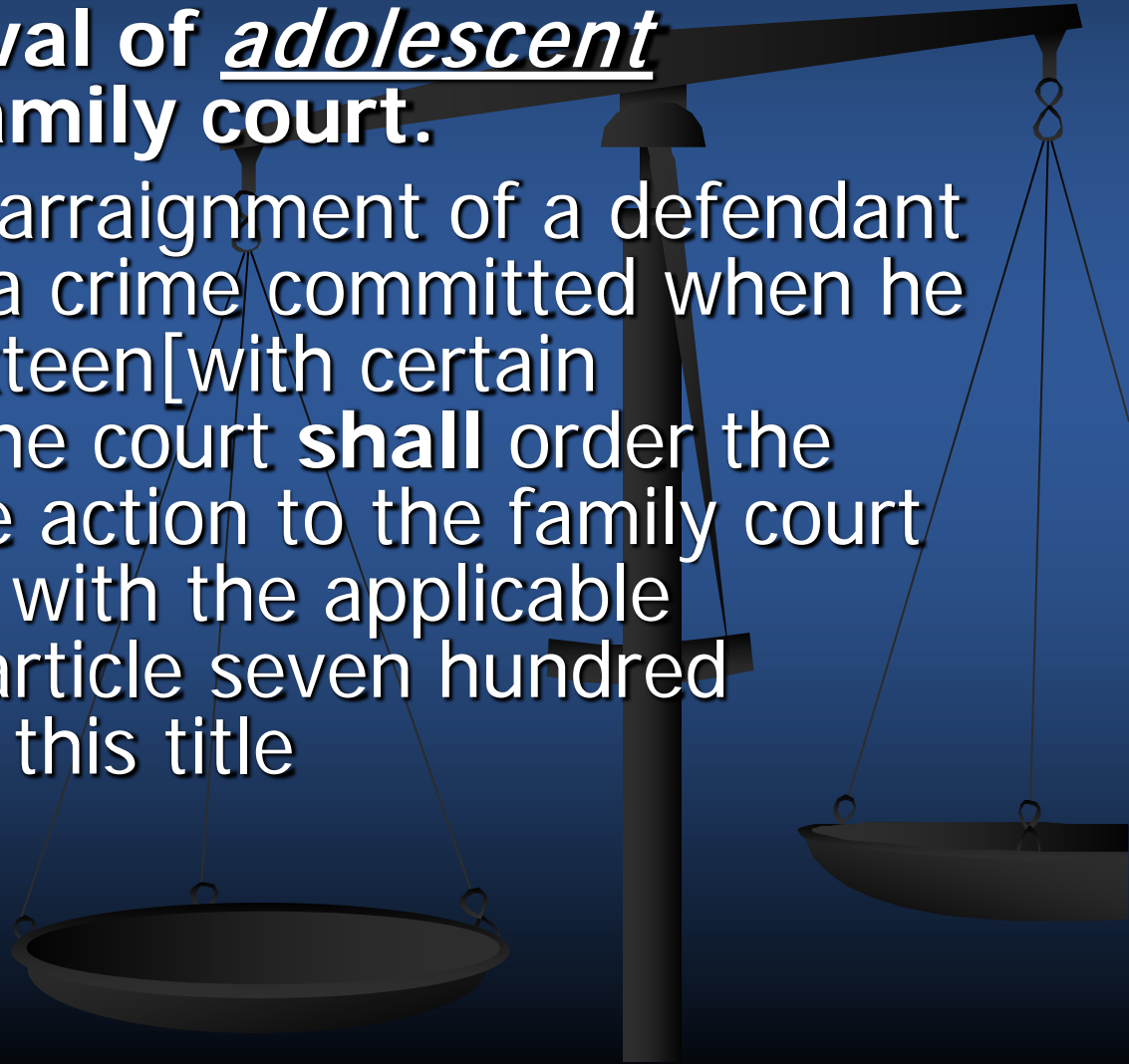
Removal is the transfer of a Juvenile Offender "*Defendant*" to Family Court as a "*Respondent*"

Removals are conducted pursuant to Criminal Procedure Law Section 725



# Difference Between a Transfer vs. Removal – is there one?

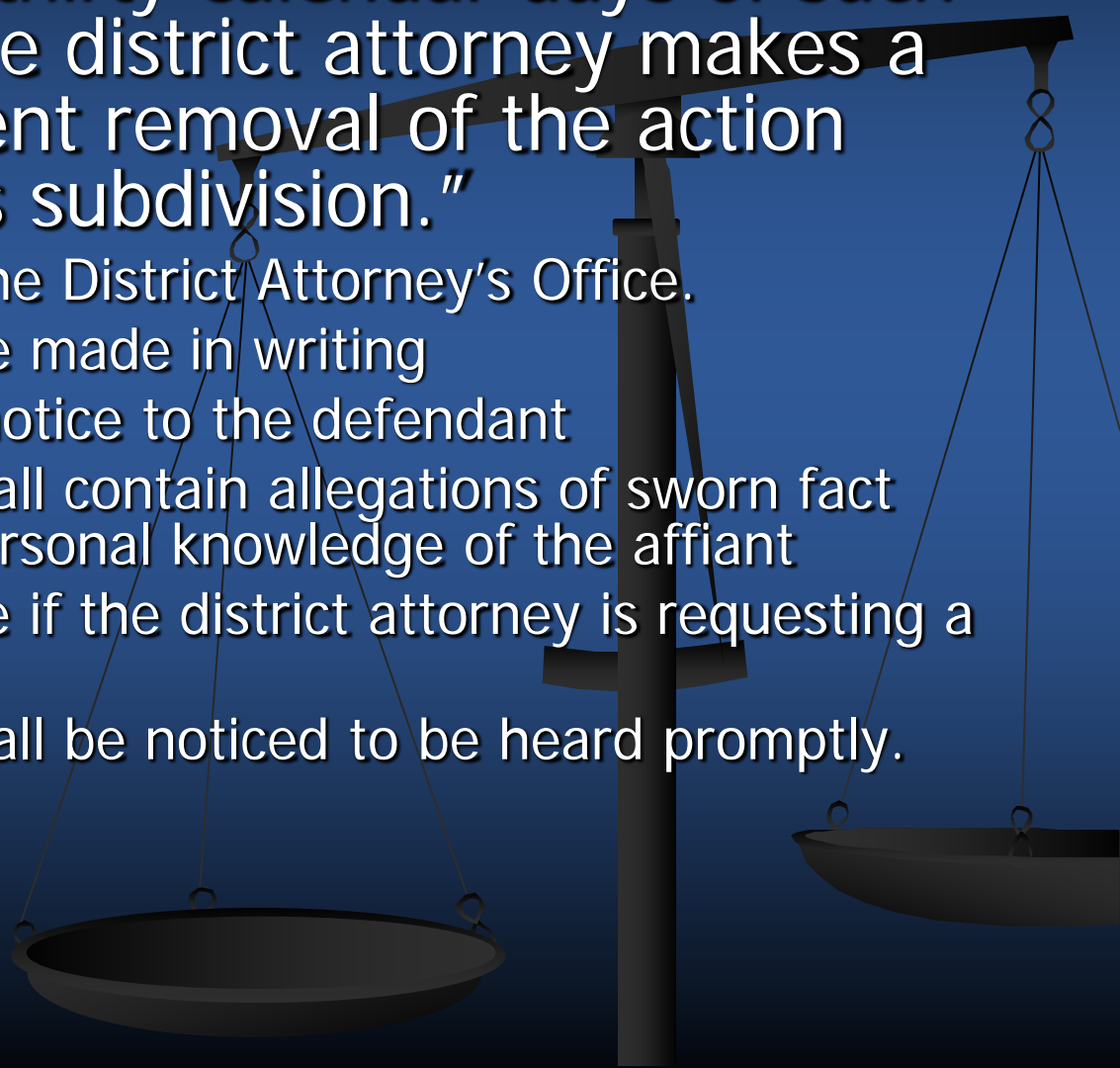
- **722.23. Removal of adolescent offenders to family court.**
  - Following the arraignment of a defendant charged with a crime committed when he or she was sixteen [with certain exceptions], the court **shall** order the removal of the action to the family court in accordance with the applicable provisions of article seven hundred twenty-five of this title



# Difference Between a Transfer vs. Removal – is

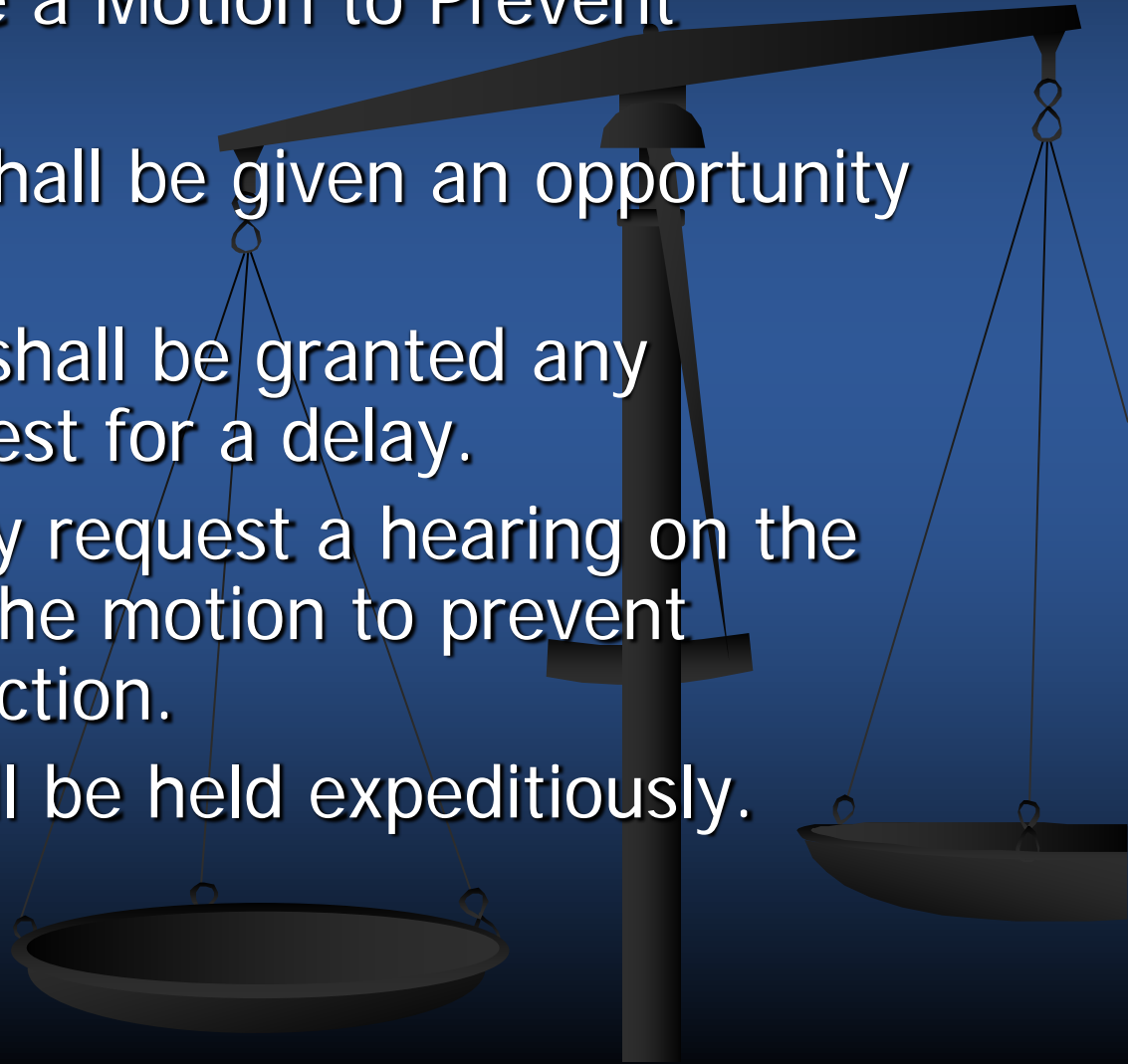
there one?

- “unless, within thirty calendar days of such arraignment, the district attorney makes a motion to prevent removal of the action pursuant to this subdivision.”
  - Burden is on the District Attorney’s Office.
  - motion shall be made in writing
  - upon prompt notice to the defendant
  - The motion shall contain allegations of sworn fact based upon personal knowledge of the affiant
  - It shall indicate if the district attorney is requesting a hearing.
  - The motion shall be noticed to be heard promptly.



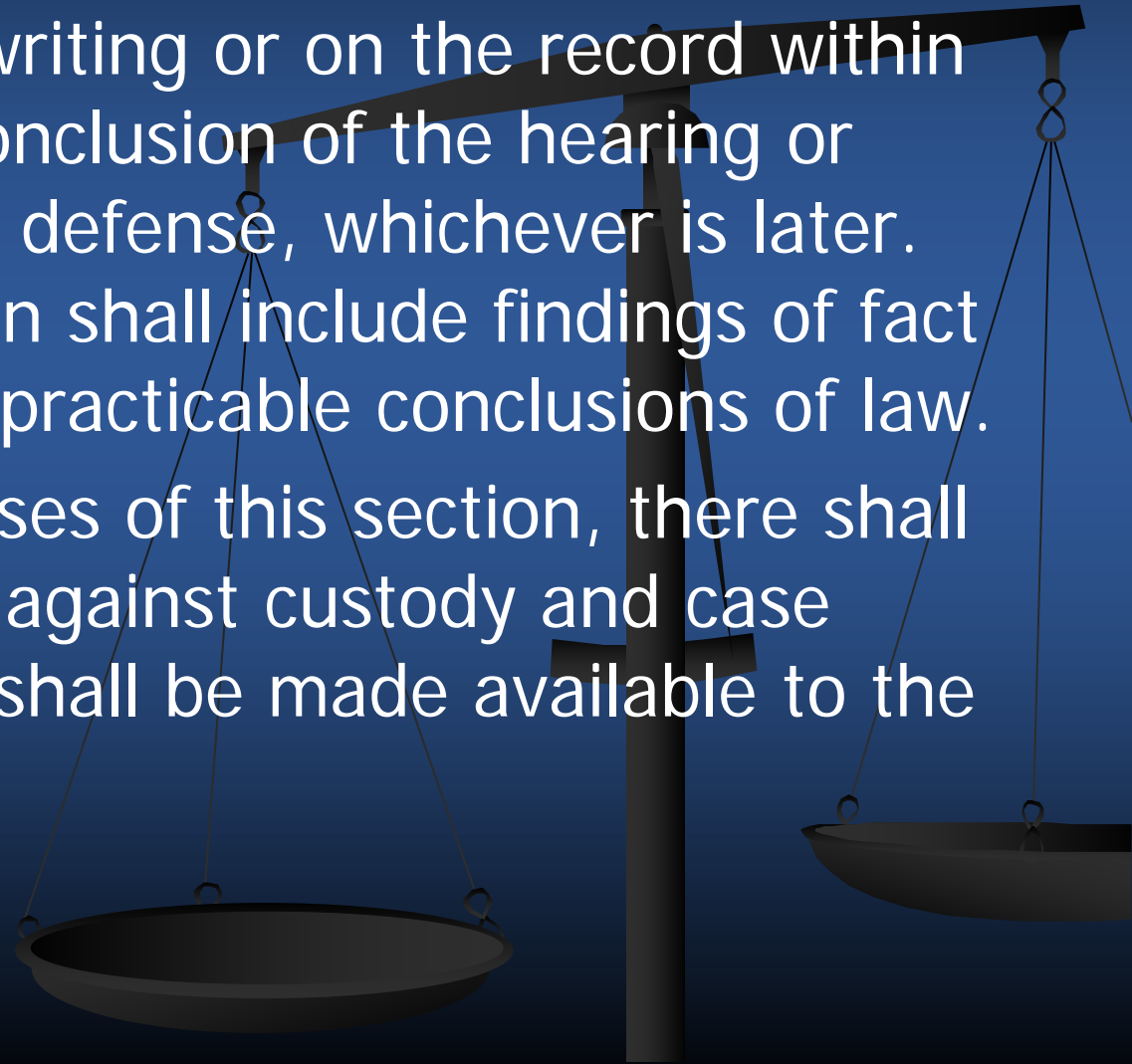
# Difference Between a Transfer vs. Removal – is there one?

- When the DA make a Motion to Prevent Removal:
  - The defendant shall be given an opportunity to reply.
  - The defendant shall be granted any reasonable request for a delay.
  - Either party may request a hearing on the facts alleged in the motion to prevent removal of the action.
  - The hearing shall be held expeditiously.



# Court Issues in "Transfer Cases"

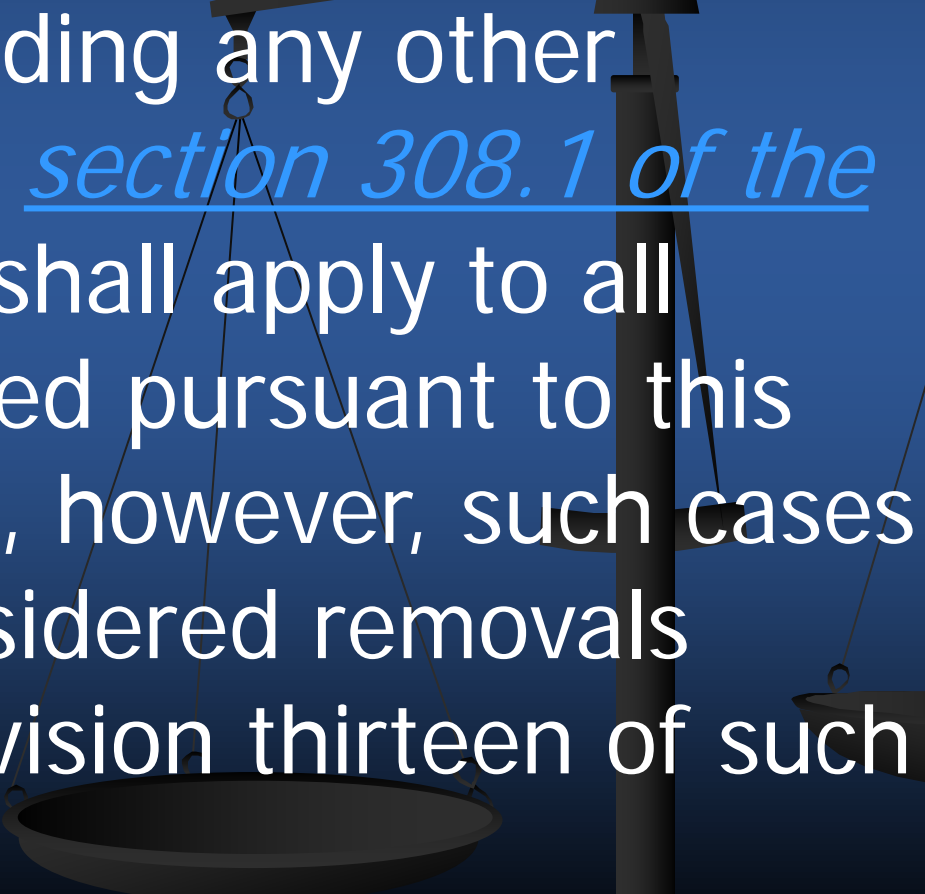
- **§ 722.23. (e)** The court shall make a determination in writing or on the record within five days of the conclusion of the hearing or submission by the defense, whichever is later. Such determination shall include findings of fact and to the extent practicable conclusions of law.
- **(f)** For the purposes of this section, there shall be a presumption against custody and case planning services shall be made available to the defendant.



# When the Motion is granted

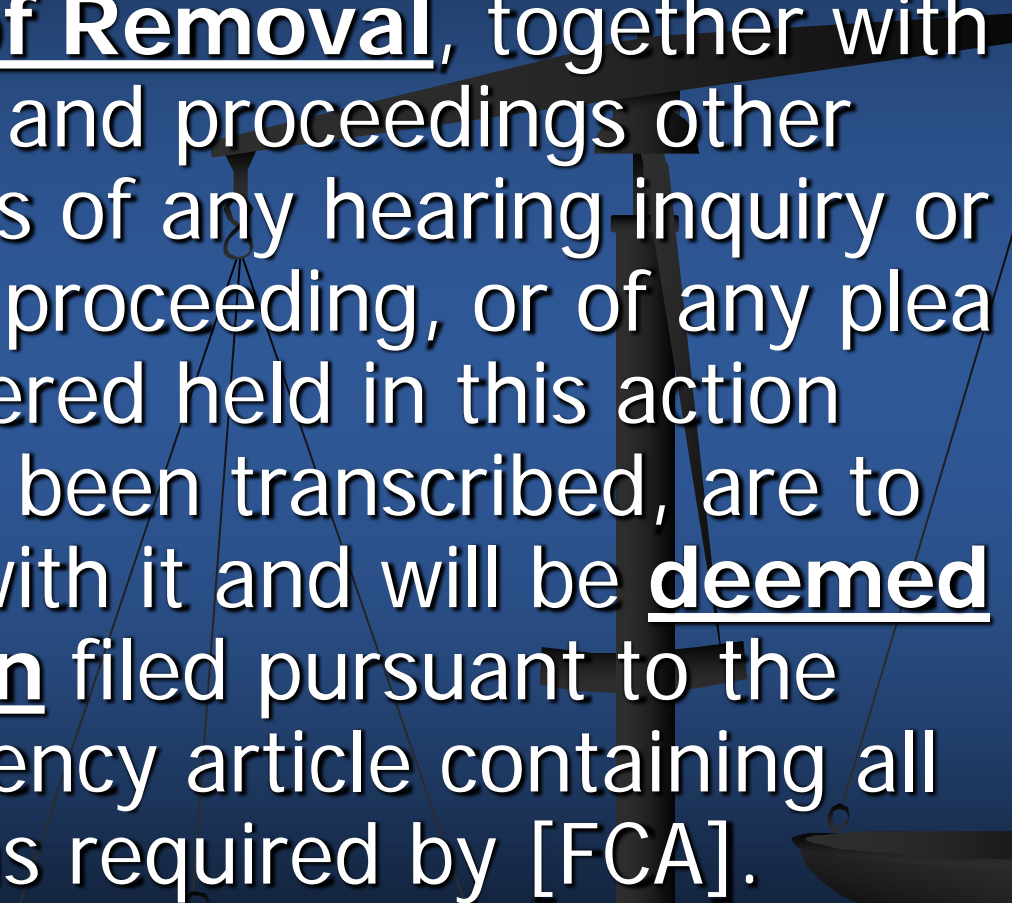
## § 722.23. (g)

Notwithstanding any other provision of law, [section 308.1 of the family court act](#) shall apply to all actions transferred pursuant to this section provided, however, such cases shall not be considered removals subject to subdivision thirteen of such section 308.1.

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# Basics

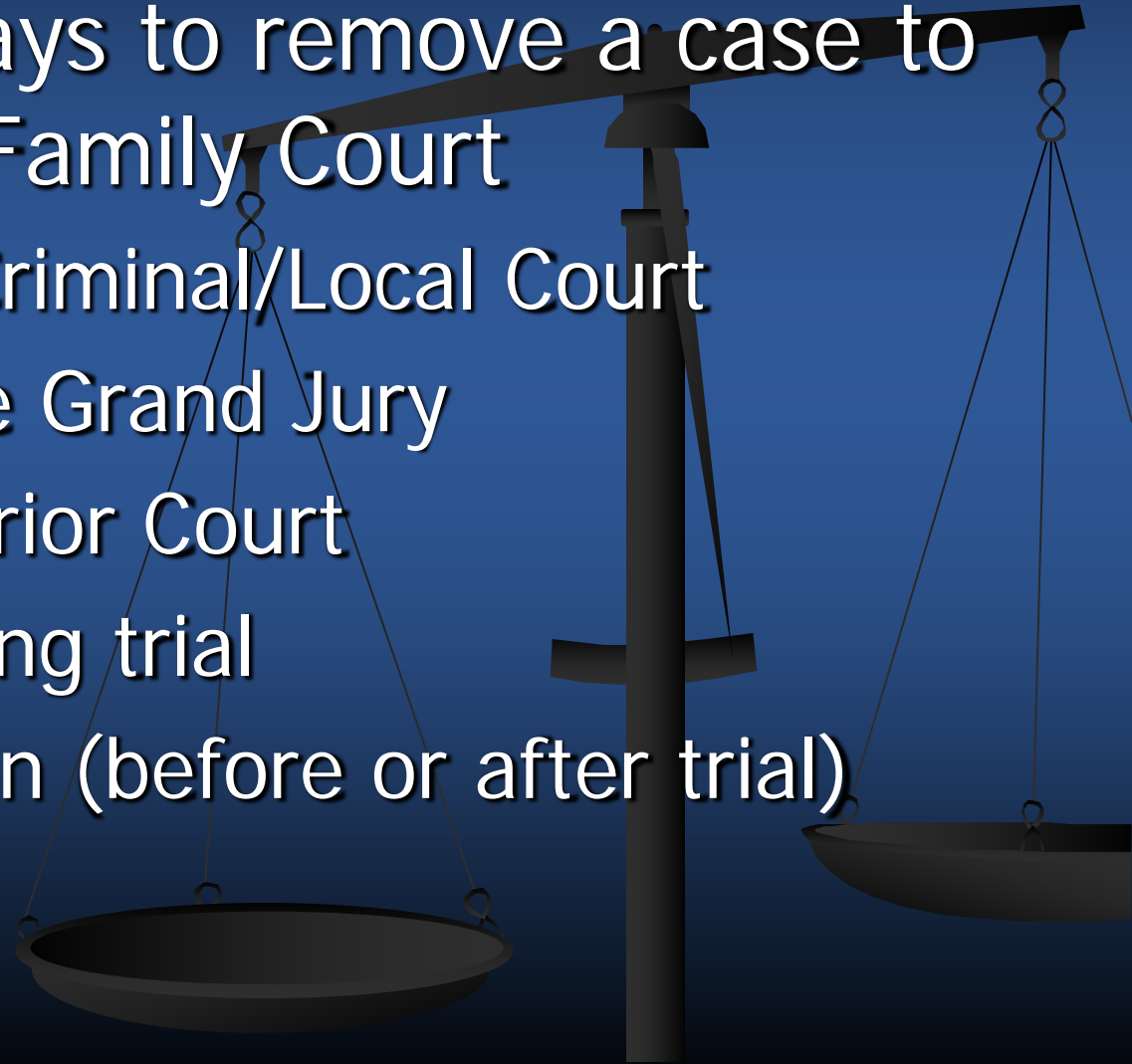
The Order of Removal, together with those pleadings and proceedings other than the minutes of any hearing inquiry or trial, grand jury proceeding, or of any plea accepted or entered held in this action that has not yet been transcribed, are to be transferred with it and will be deemed to be a petition filed pursuant to the juvenile delinquency article containing all of the allegations required by [FCA].



# Basics

There are 5 ways to remove a case to  
Family Court

1. Order of the Criminal/Local Court
2. Request of the Grand Jury
3. Order of Superior Court
4. Verdict following trial
5. By plea bargain (before or after trial)



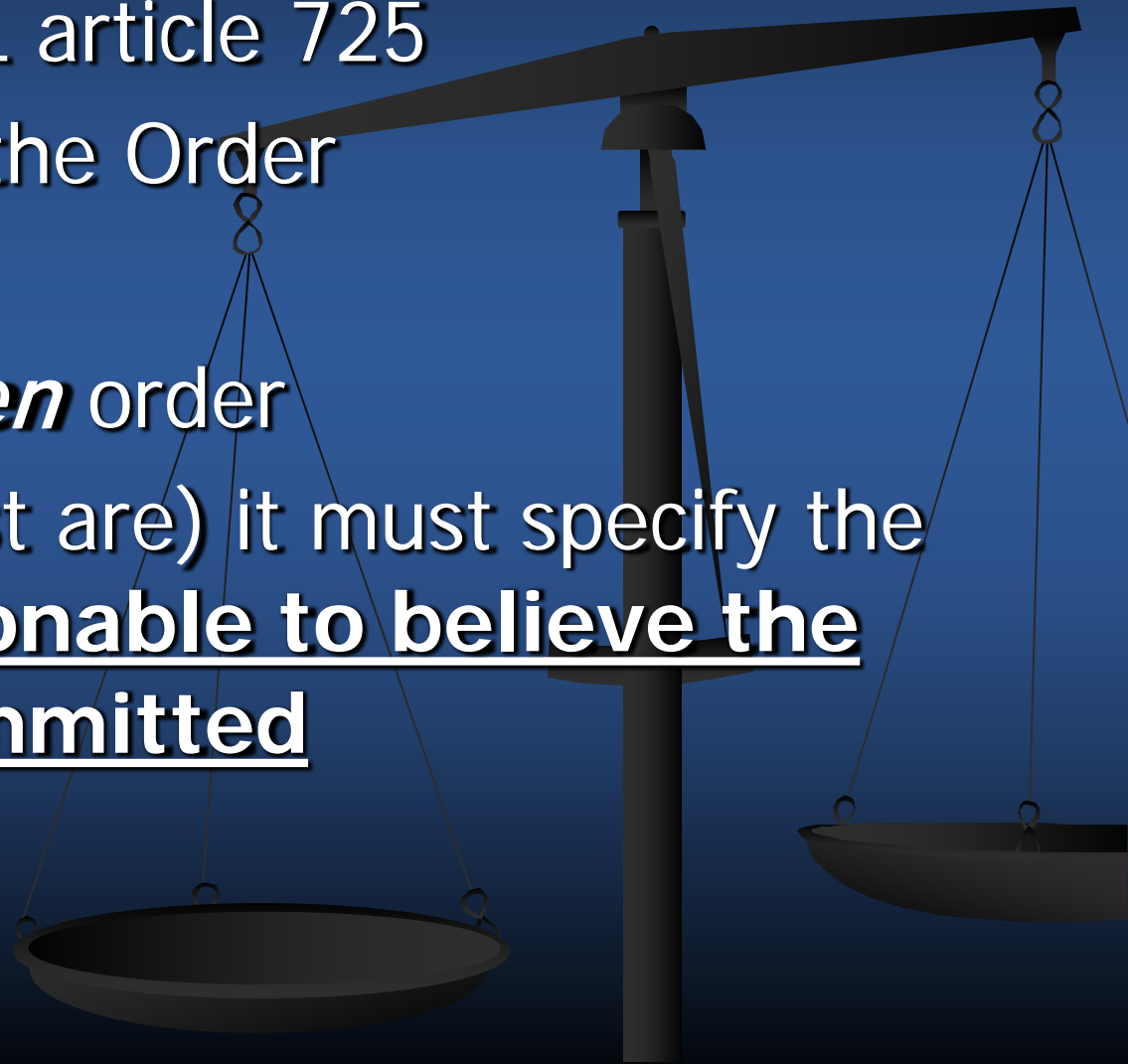


# Order of Removal

As defined by CPL article 725

Requirements of the Order

- A formal *written* order
- If pre-trial (most are) it must specify the acts it is reasonable to believe the youth has committed

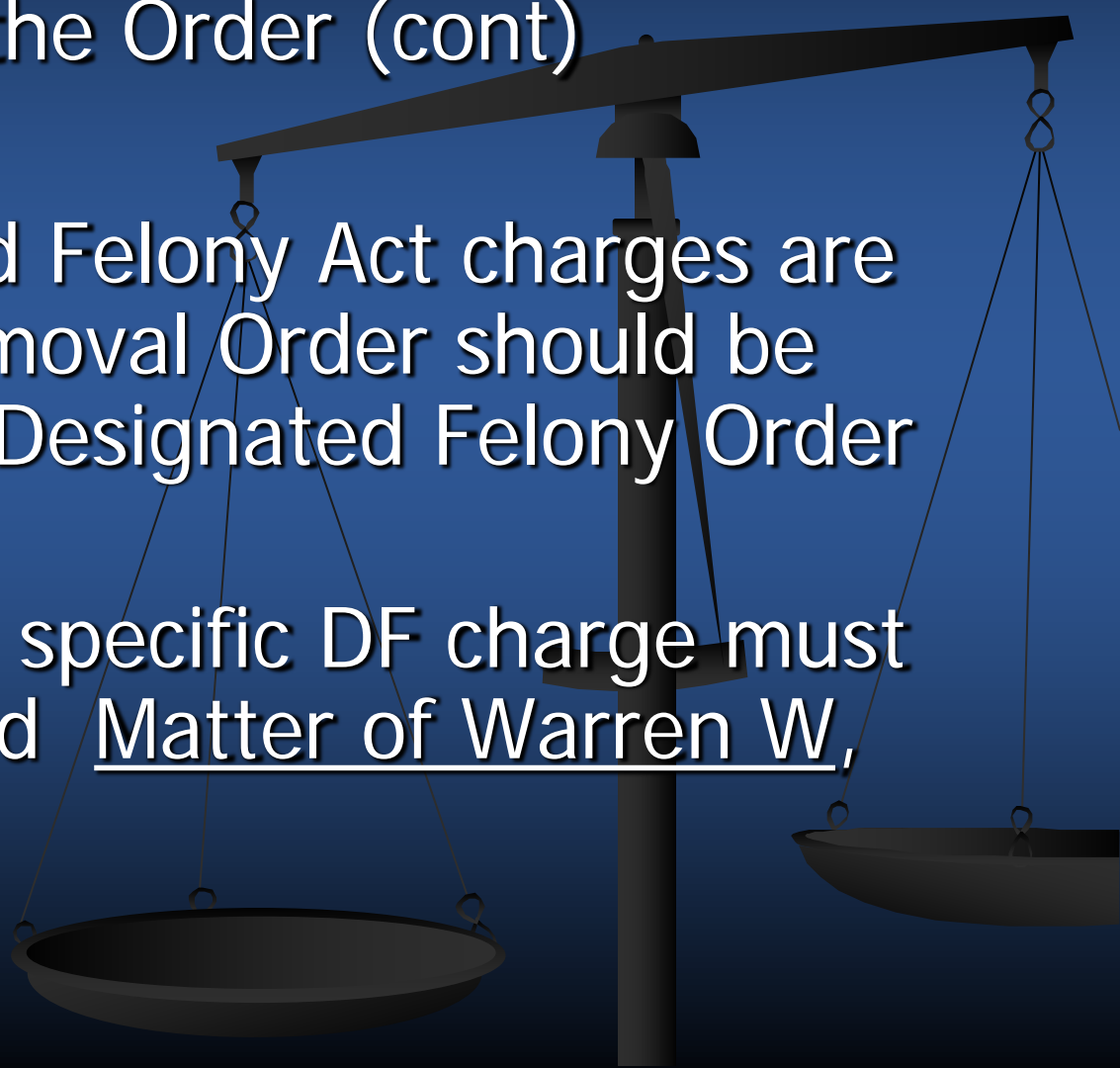


# Order of Removal

## Requirements of the Order (cont)

Where Designated Felony Act charges are alleged, the Removal Order should be identified as a "Designated Felony Order of Removal"

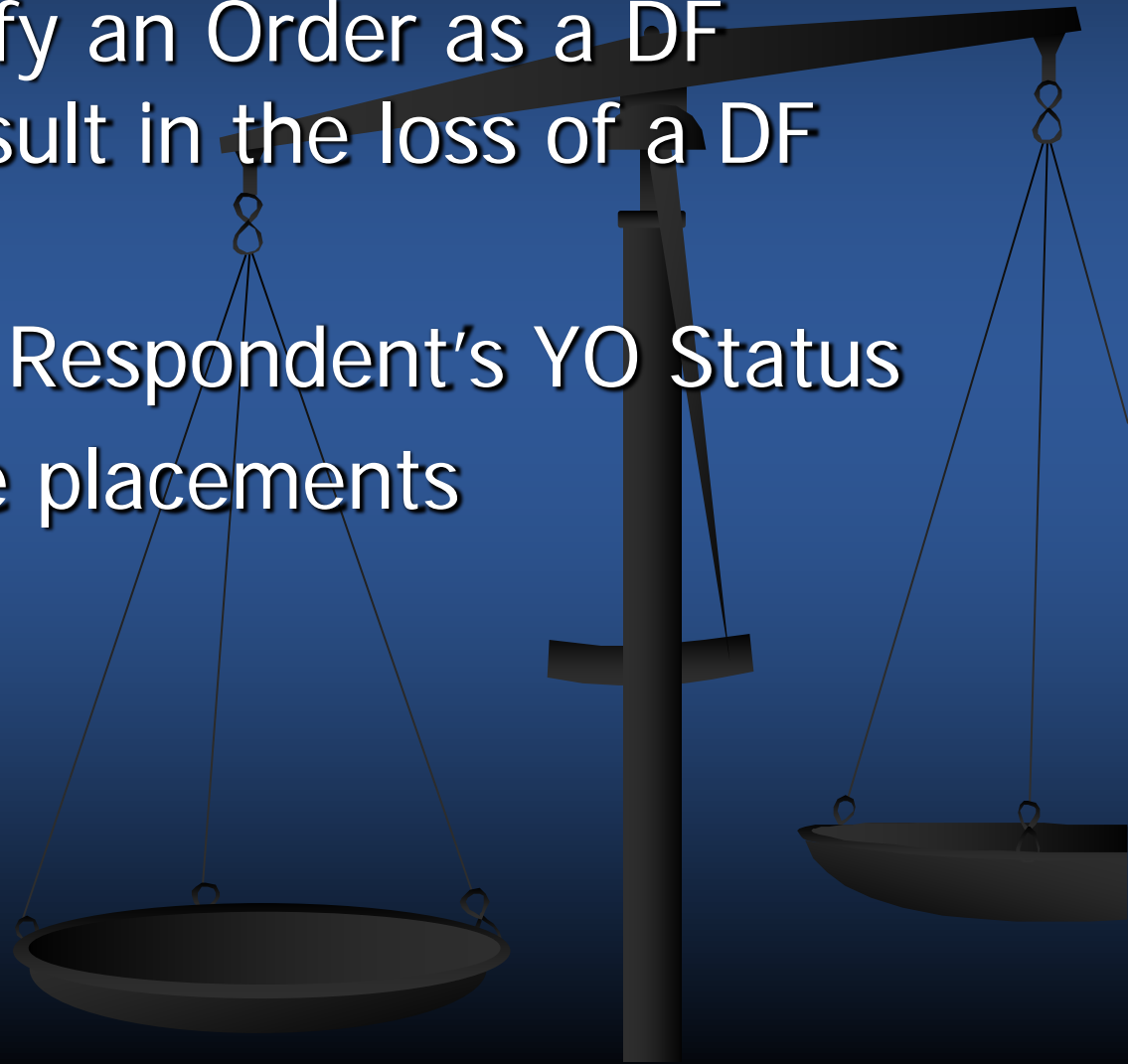
Additionally, each specific DF charge must also be identified Matter of Warren W,  
216 A.D.2d 225



# Order of Removal

Failure to identify an Order as a DF Removal will result in the loss of a DF finding

- Does not burn Respondent's YO Status
- Lose restrictive placements



# Order of Removal



Where the removal is pursuant to CPL § 180.75, the jurisdiction of the Family Court must still be established

FCA §311.2 requires that every petition contain non-hearsay allegations of fact to support each count.

This must be submitted on the first Family Court appearance

# Order of Removal

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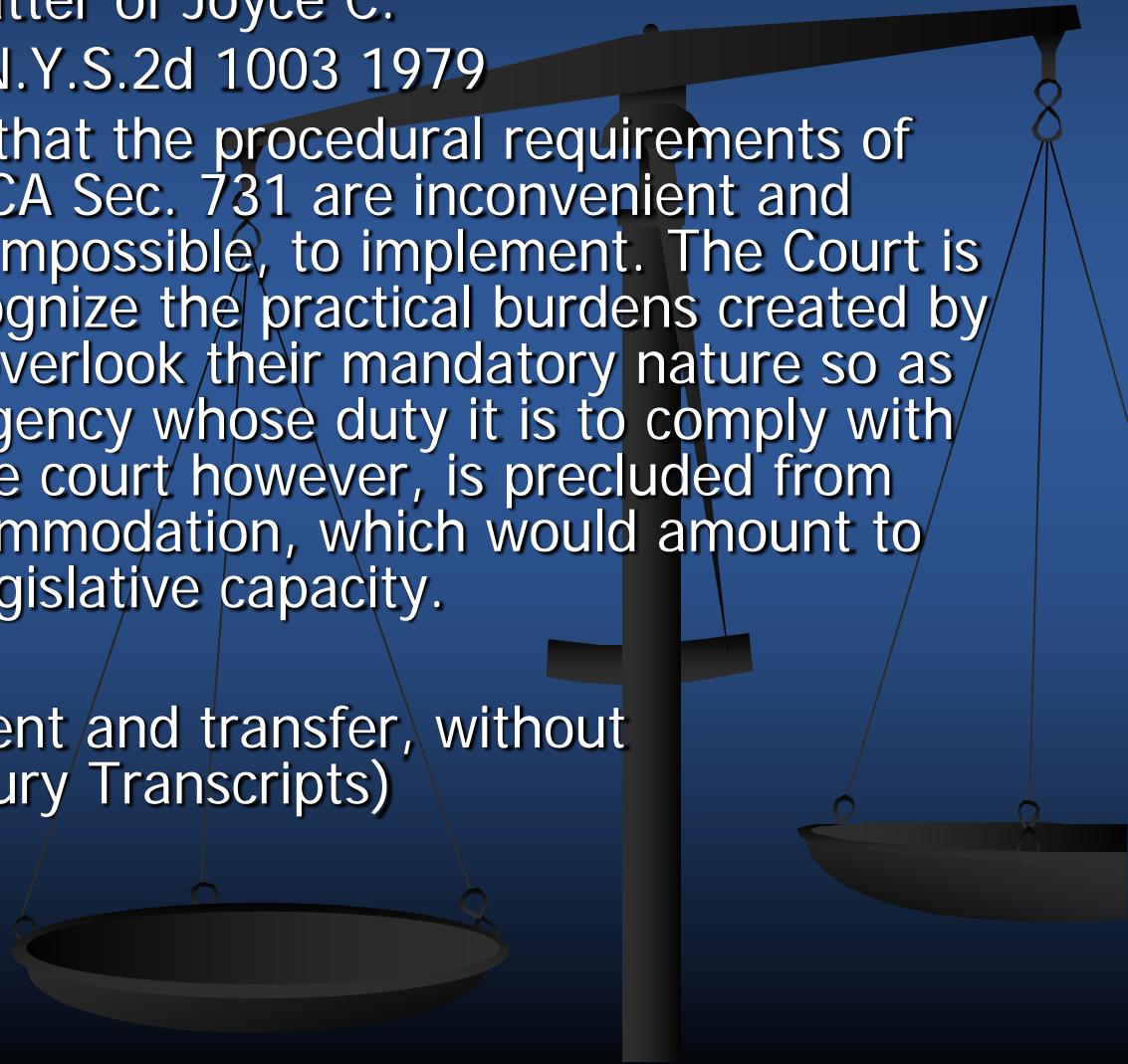
All pleadings and proceedings, including the removal minutes and the Grand Jury minutes must be transferred to the Family Court.

The *Judge* must sign the Order

A Clerk's signature is **NOT** sufficient

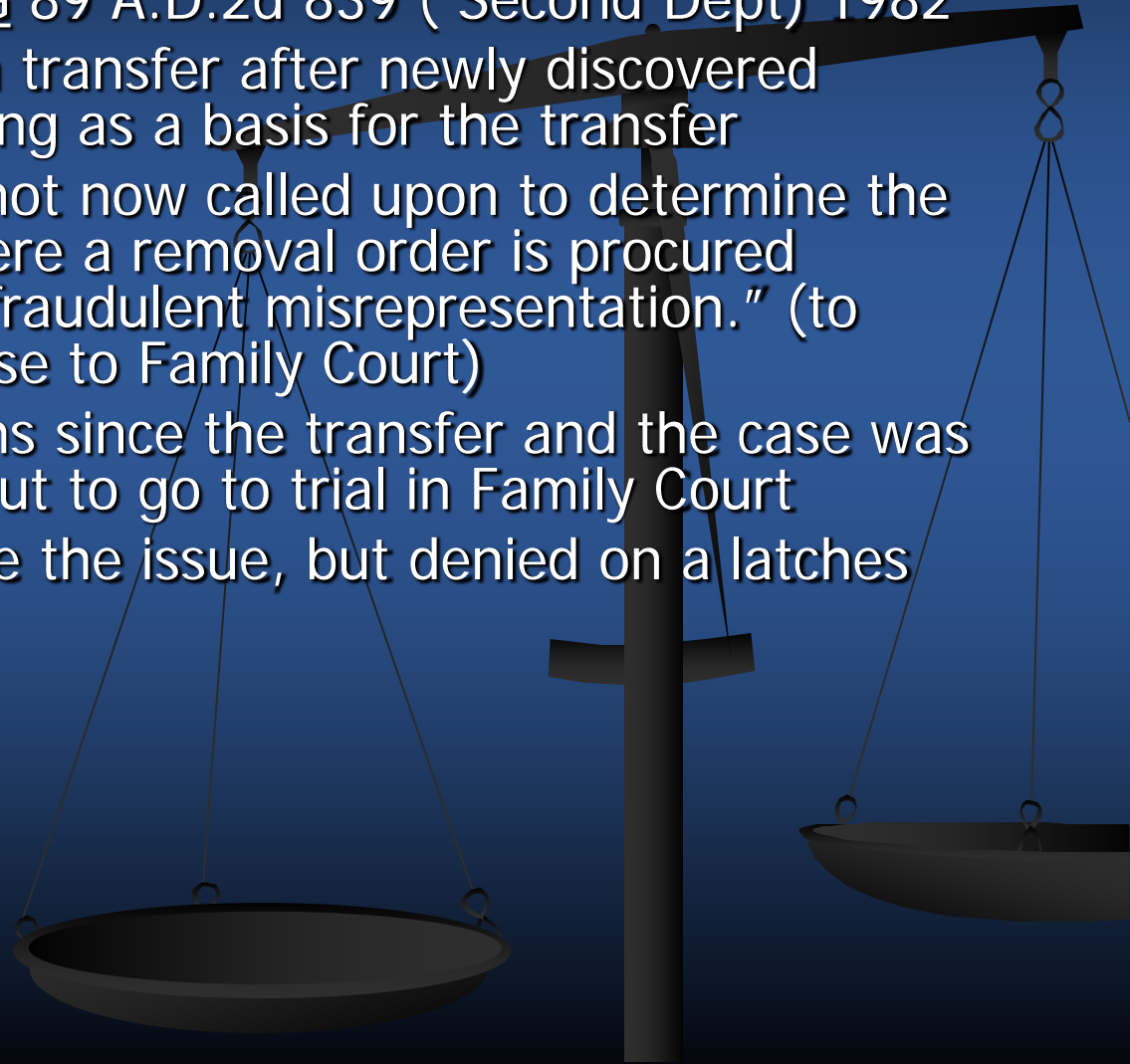
# If you do not get the papers?

- Matter of Martin D., Matter of Joyce C.
- 100 Misc.2d 339, 418 N.Y.S.2d 1003 1979
- It is argued, however, that the procedural requirements of CPL Sec. 725.05 and FCA Sec. 731 are inconvenient and difficult, if not, almost impossible, to implement. The Court is therefore urged to recognize the practical burdens created by these statutes and to overlook their mandatory nature so as to accommodate the agency whose duty it is to comply with these prescriptions. The court however, is precluded from providing such an accommodation, which would amount to the Court acting in a legislative capacity.
- (case involved Indictment and transfer, without accompanying Grand Jury Transcripts)
- Case dismissed.



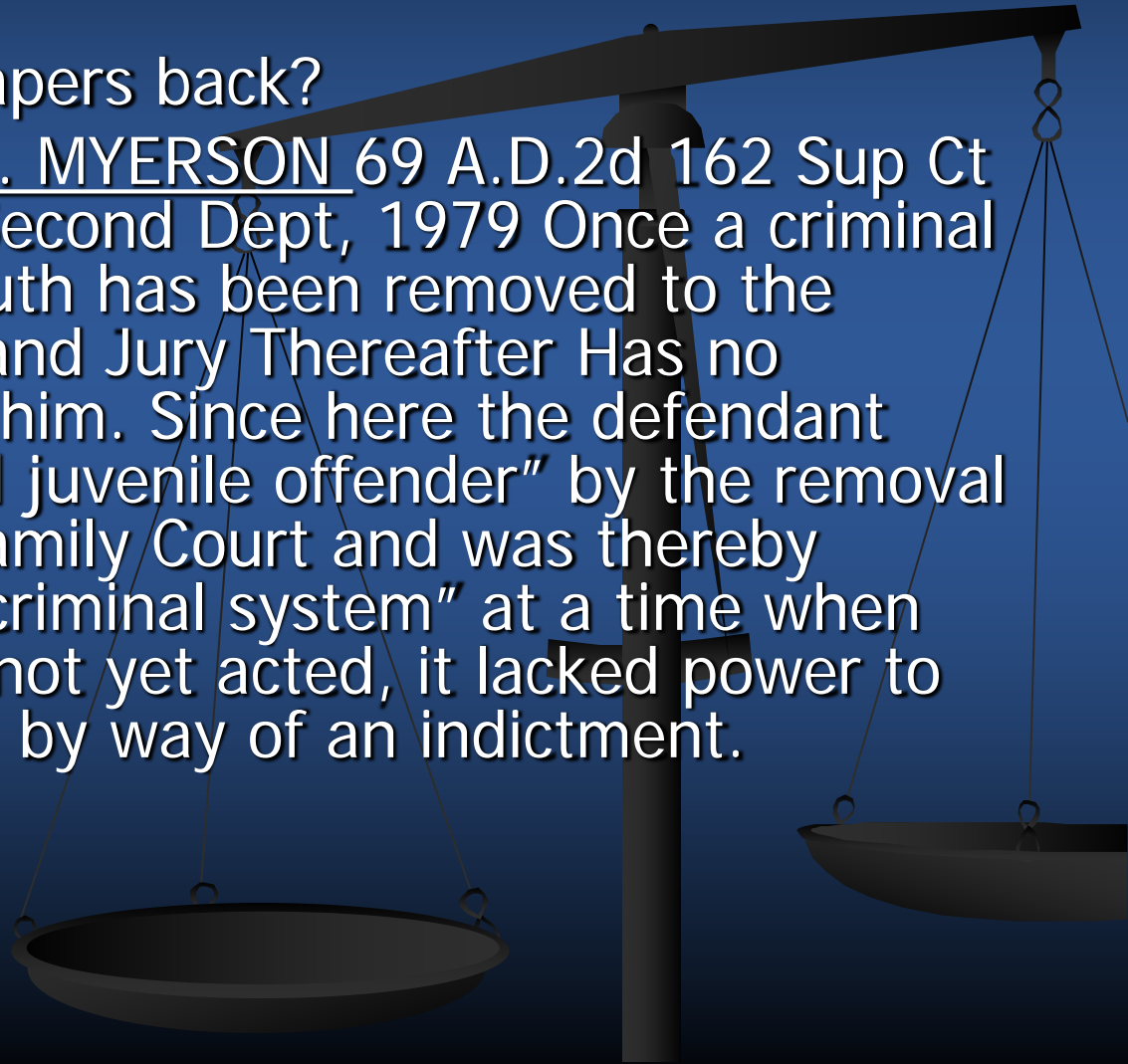
# Timing to Challenge to Transfer

- In the Matter of John G 89 A.D.2d 839 ( Second Dept) 1982
- Hearing argument on a transfer after newly discovered evidence of defense lying as a basis for the transfer
- "We note that we are not now called upon to determine the appropriate course where a removal order is procured through the juvenile's fraudulent misrepresentation." (to transfer Robbery 1<sup>st</sup> case to Family Court)
- It had been four months since the transfer and the case was in discovery stage, about to go to trial in Family Court
- Court did not determine the issue, but denied on a latches argument.



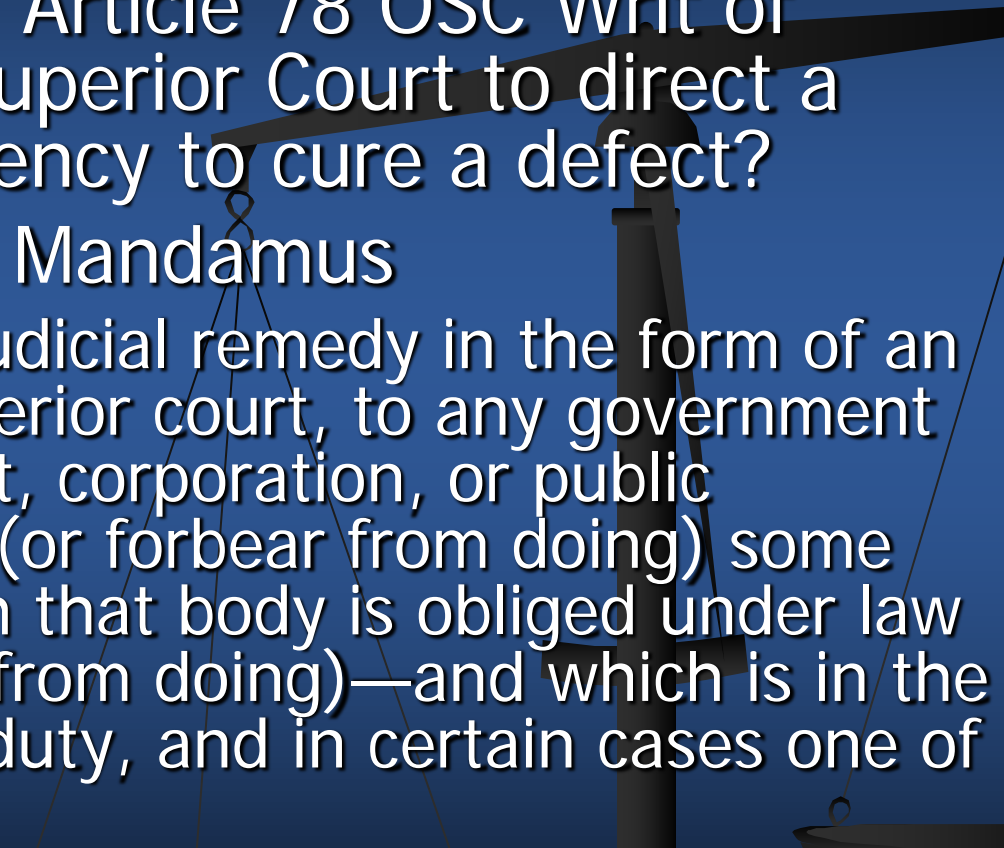
# Can You Send the Papers Back?

- Can you send the papers back?
- RODRIGUEZ, v. A. F. MYERSON 69 A.D.2d 162 Sup Ct Appellate Division, Second Dept, 1979 Once a criminal charge against a youth has been removed to the Family Court the Grand Jury Thereafter Has no jurisdiction to indict him. Since here the defendant became "an accused juvenile offender" by the removal of the case to the Family Court and was thereby removed "from the criminal system" at a time when the Grand Jury had not yet acted, it lacked power to proceed against him by way of an indictment.



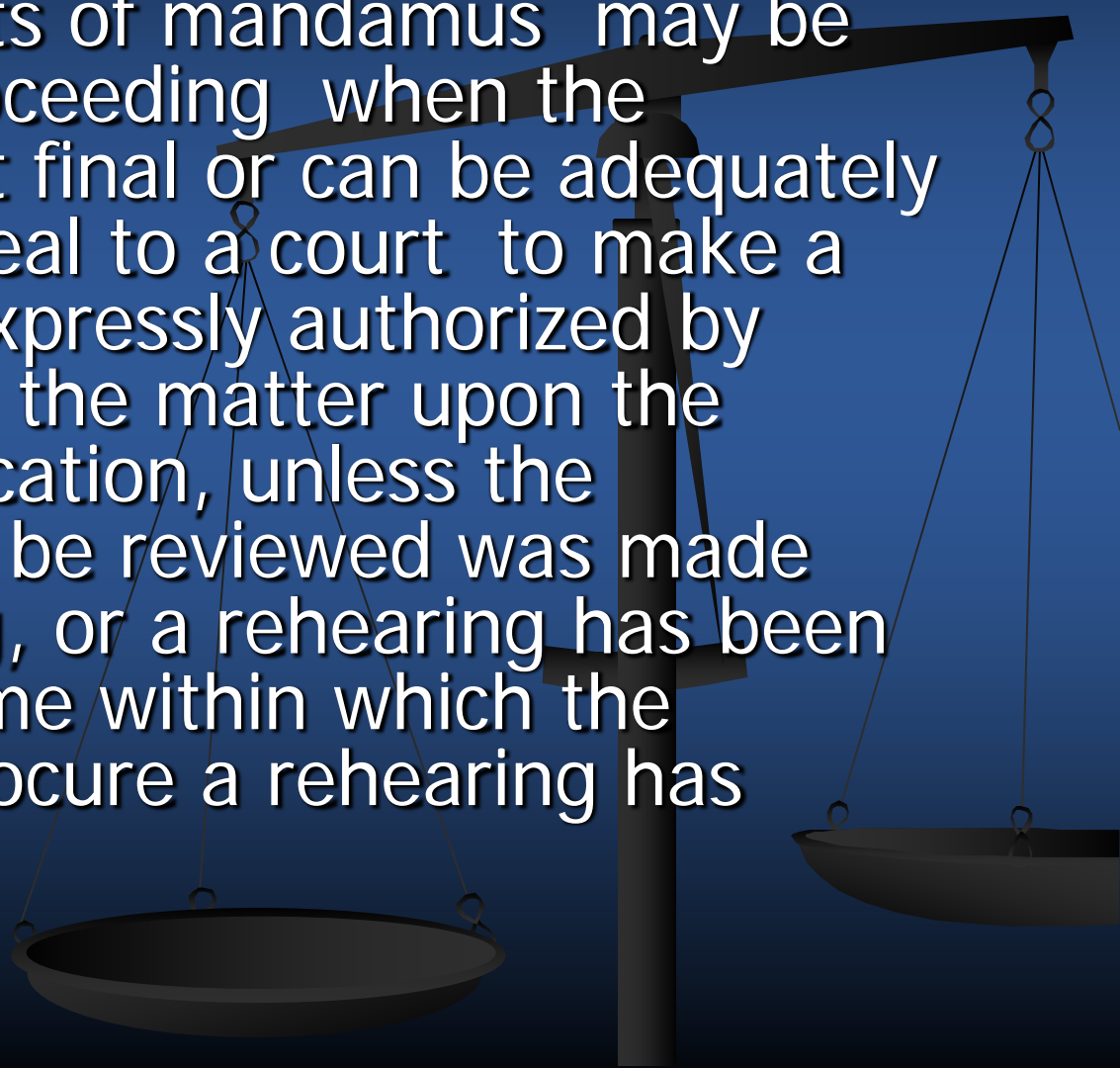


# Is There Authority to Stay the Transfer?

- Can you bring an Article 78 OSC Writ of Mandamus in a superior Court to direct a governmental agency to cure a defect?
  - What is a Writ of Mandamus
    - Mandamus is a judicial remedy in the form of an order from a superior court, to any government subordinate court, corporation, or public authority—to do (or forbear from doing) some specific act which that body is obliged under law to do (or refrain from doing)—and which is in the nature of public duty, and in certain cases one of a statutory duty
- 

# CPLR § 7801 Writs of Mandamus

- CPLR § 7801 writs of mandamus may be obtained in a proceeding when the proceeding is not final or can be adequately reviewed by appeal to a court to make a determination expressly authorized by statute to rehear the matter upon the petitioner's application, unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed.



# McKinney's CPLR § 7804

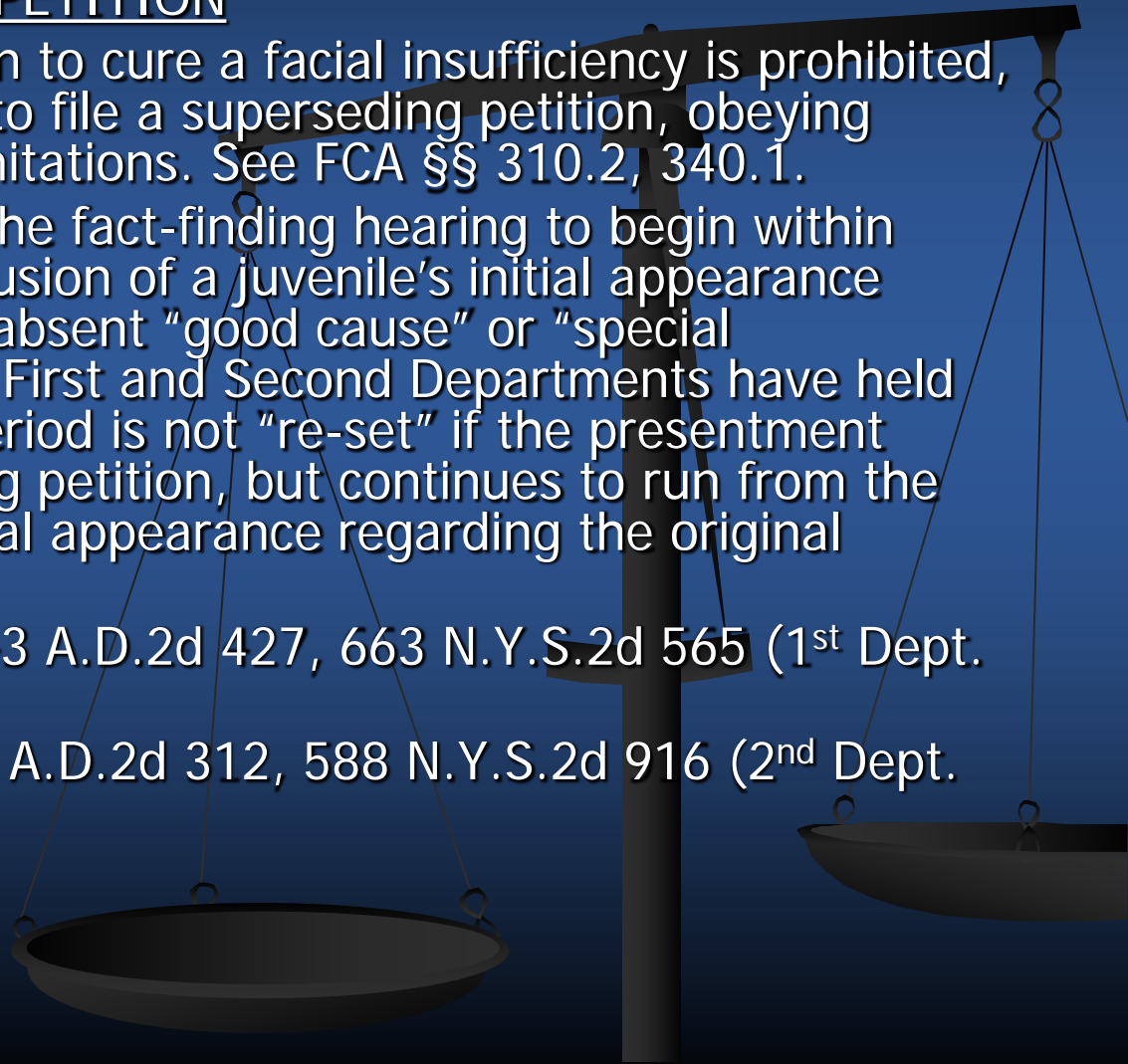
## § 7804. Procedure

- a proceeding in the nature of mandamus to compel usually must be preceded by a demand and refusal to perform. The commencement of the Article 78 proceeding itself can be considered the demand. Barhite v. Town of Dewitt, 2016, 144 A.D.3d 1645, 42 N.Y.S.3d 502 (4th Dep't), leave to appeal denied, 2017, 29 N.Y.3d 902, 57 N.Y.S.3d 705, 80 N.E.3d 398.
- Drastic? Politically Charged Action?

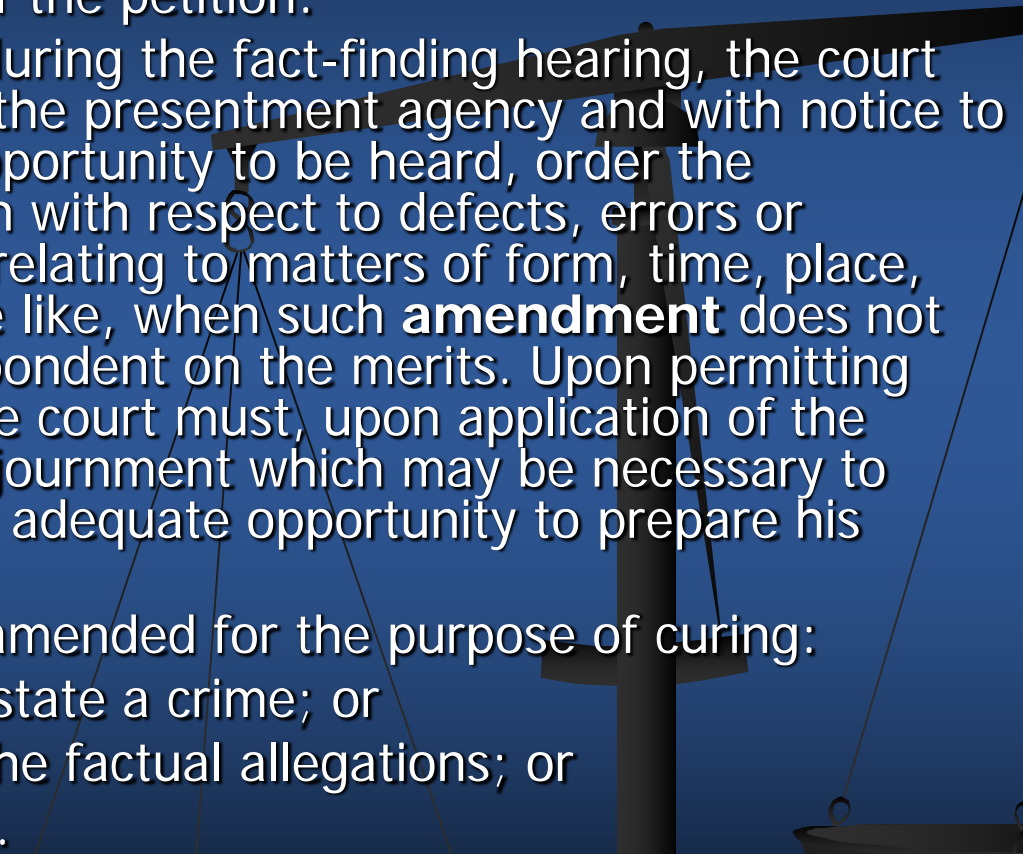
# File a Superseding petition? File New Petition and Join?

## ■ FILING A SUPERSEDING PETITION

- When amending a petition to cure a facial insufficiency is prohibited, another option might be to file a superseding petition, obeying applicable speedy trial limitations. See FCA §§ 310.2, 340.1.
- FCA § 340.1(2) requires the fact-finding hearing to begin within sixty days after the conclusion of a juvenile's initial appearance before the Family Court, absent "good cause" or "special circumstances." Both the First and Second Departments have held that the sixty day time period is not "re-set" if the presentment agency files a superseding petition, but continues to run from the date of the juvenile's initial appearance regarding the original petition.
- *Matter of Elizabeth R.*, 243 A.D.2d 427, 663 N.Y.S.2d 565 (1<sup>st</sup> Dept. 1997)
- *Matter of Tommy C.*, 182 A.D.2d 312, 588 N.Y.S.2d 916 (2<sup>nd</sup> Dept. 1992)



# Amend the Petition?

- § 311.5. **Amendment** of the petition:
  - 1. At any time before or during the fact-finding hearing, the court may, upon application of the presentment agency and with notice to the respondent and an opportunity to be heard, order the **amendment** of a petition with respect to defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like, when such **amendment** does not tend to prejudice the respondent on the merits. Upon permitting such an **amendment**, the court must, upon application of the respondent, order any adjournment which may be necessary to accord the respondent an adequate opportunity to prepare his defense.
  - 2. A petition may not be amended for the purpose of curing:
    - (a) a failure to charge or state a crime; or
    - (b) legal insufficiency of the factual allegations; or
    - (c) a misjoinder of crimes.
- 

# Amending the Petition

- Amendment of the petition is proper to correct "defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like, when such amendment does not tend to prejudice the respondent on the merits." FCA § 311.5. *Matter of Charlene D.*, 214 A.D.2d 561, 625 N.Y.S.2d 243 (2<sup>nd</sup> Dept. 1995)
- Amendment permissible to correct clerical omission of general location of offense, when such information was contained in supporting papers and not prejudicial to juvenile on the merits *Matter of Catrice W.*, 208 A.D.2d 935, 617 N.Y.S.2d 900 (2<sup>nd</sup> Dept. 1994)
- Presentment agency representative's mistaken signature of petition on the line reserved for the notary held a "non-prejudicial irregularity relating to verification" and thus an amendable "matter of form" *C.f.: Matter of Victor L.*, 304 A.D.2d 486, 759 N.Y.S.2d 51 (1<sup>st</sup> Dept. 2003)
- Presentment agency allowed to change the alleged time of the incident from 11:30 a.m. to 12:45 p.m. so long as respondent was given as much time as needed to prepare an alibi defense
- **Practice Note:** Amendment of the petition can be done via written motion but is more commonly requested by oral motion for matters such as correcting the spelling of names or dates listed in the counts. Sworn depositions attached to the petition are not amendable by persons other than the deponent.

# Curing Petition Defects



- Legal insufficiencies in a juvenile delinquency petition, such as a failure to meet the *prima facie* standard, **cannot** be cured by amendment. See FCA § 311.5(2)(b). *Matter of Michael M.*, 3 N.Y.3d 441, 788 N.Y.S.2d 299 (2004)
- In case removed from adult criminal system, petition based on hearsay found insufficient and non-amendable *People v. Casey*, 95 N.Y.2d 354, 717 N.Y.S.2d 88, 95-96 (2000)
- Legally insufficient juvenile petitions may not be cured by amendment. (Dicta) *Matter of Detrece H.*, 78 N.Y.2d 107, 571 N.Y.S.2d 899 (1991)
- Petition based on hearsay cannot be cured by amendment; the recourse is to file a new petition *Matter of Francisco C.*, 238 A.D.2d 224, 657 N.Y.S.2d 16 (1<sup>st</sup> Dept. 1997)
- Adding a supplemental ballistics report to a petition to cure a legal insufficiency is an impermissible amendment of the petition *Matter of Steven S.*, 176 A.D.2d 101, 573 N.Y.S.2d 684 (1<sup>st</sup> Dept. 1991)
- Petition that fails to contain allegations pertaining to elements of the offense such as lack of P&A cannot be amended *Matter of Lisette V.*, 199 A.D.2d 513, 608 N.Y.S.2d 113 (2<sup>nd</sup> Dept. 1993)
- Petition that failed to allege every element of the offense charged could not be amended to cure this insufficiency . This effectively overturns part of the holding in:  
*Matter of Kelvin P.*, 166 A.D.2d 395, 561 N.Y.S.2d 196 (1<sup>st</sup> Dept. 1990)

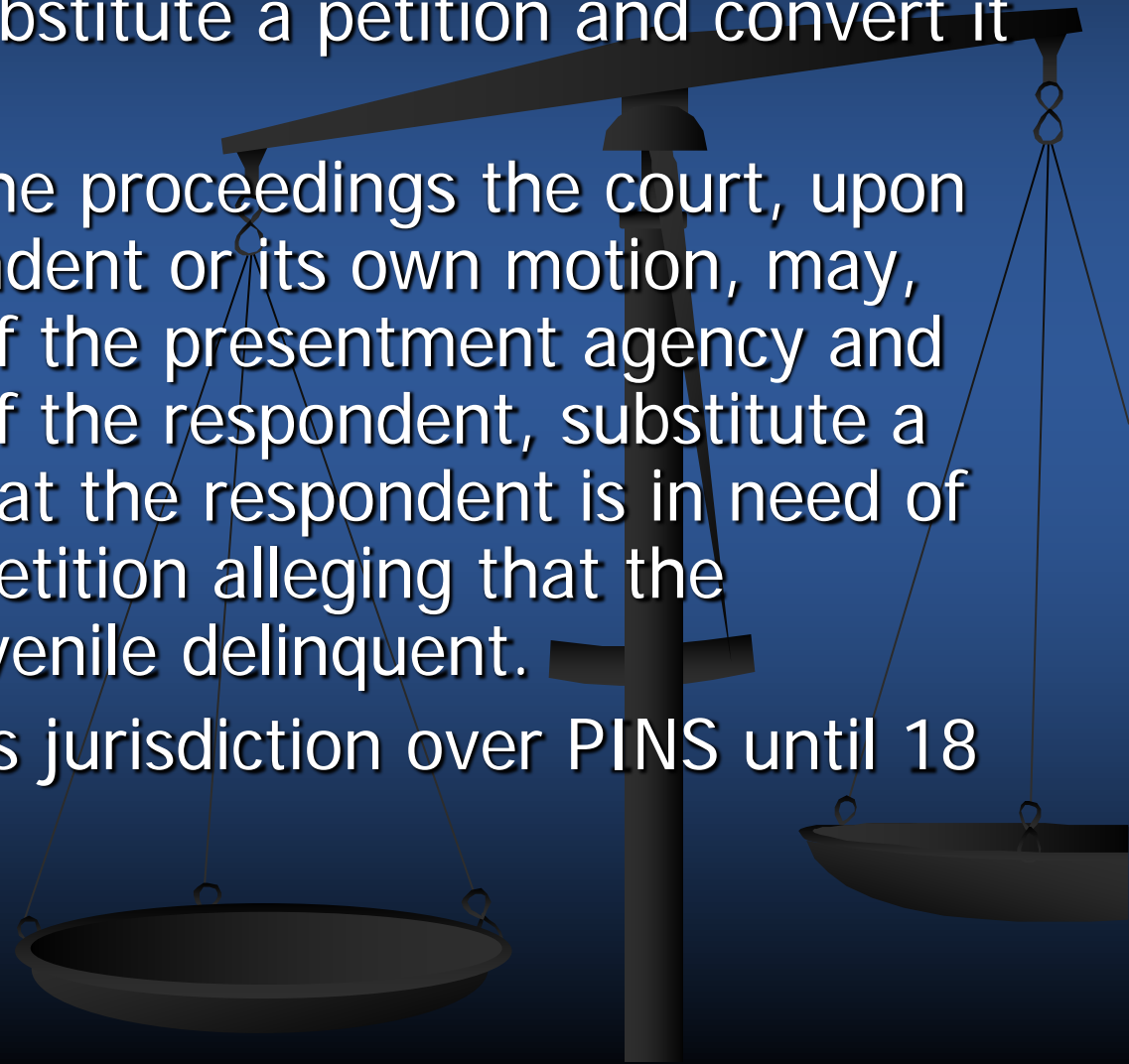
# Curing Defects Cont.

- **However**, in the case of removals from the adult criminal system, legal insufficiencies in a petition **can** be cured under certain circumstances. *Matter of Desmond J.*, 93 N.Y.2d 949, 694 N.Y.S.2d 338 (1999)
- When felony complaint based on hearsay was removed to Family Court, presentment agency's immediate submission of a non-hearsay supporting deposition at the first appearance in Family Court did not constitute an impermissible amendment of the petition
- **Furthermore**, in *Matter of Markim Q.,, infra*, the Court of Appeals found that legal insufficiencies in VOP petitions can be cured by amendment at any stage in the proceedings so long as the Family Court has given its permission to do so. Such amendment is permissible because, unlike initial delinquency petitions, VOP petitions are not jurisdiction-creating instruments. *Matter of Markim Q.*, 7 N.Y.3d 405, 822 N.Y.S.2d 746, 749-50 (2006)



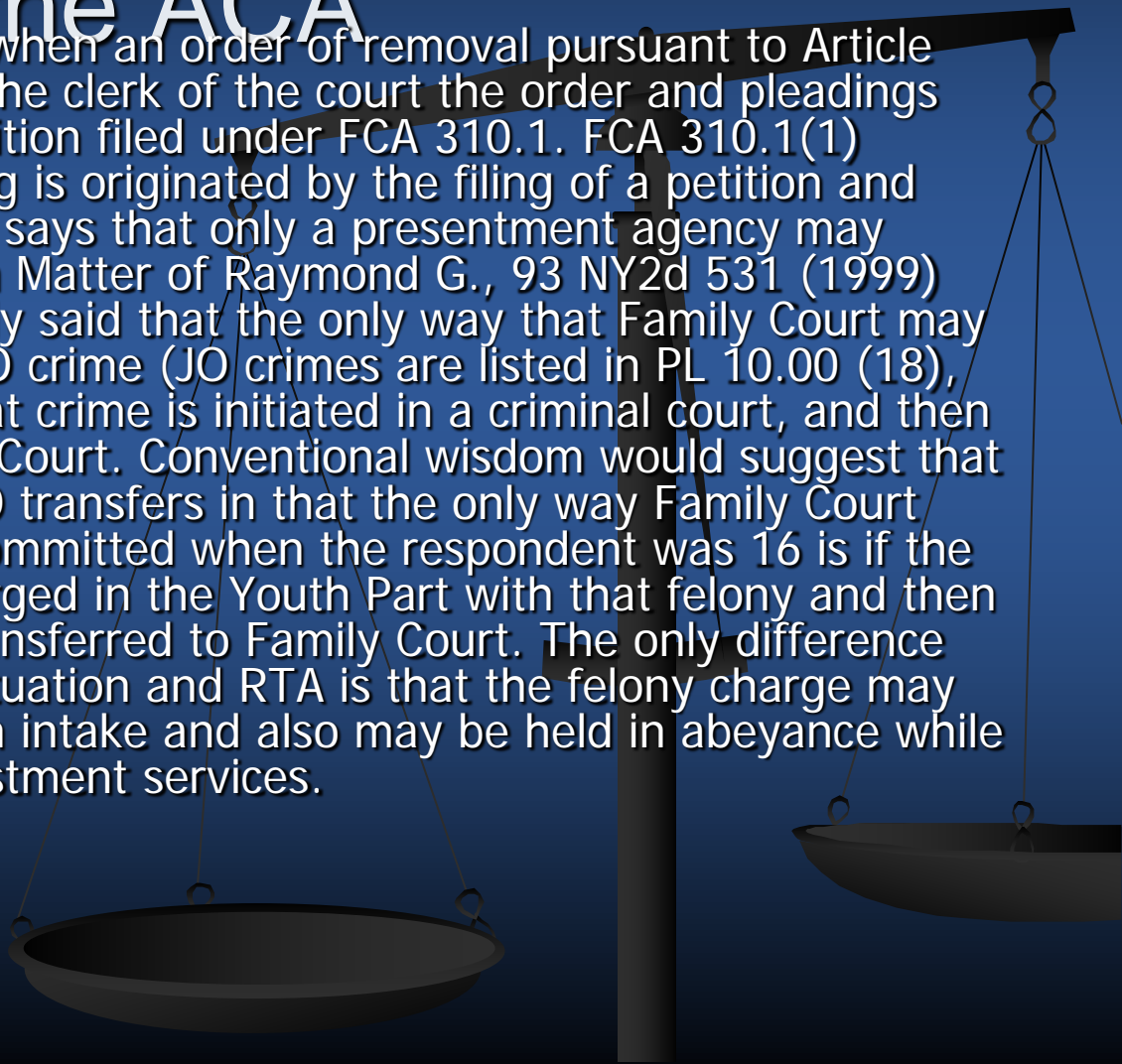
# § 311.4. Substitution of petition or finding

- One can always substitute a petition and convert it into a PINS:
- 1. At any time in the proceedings the court, upon motion of a respondent or its own motion, may, with the consent of the presentment agency and with the consent of the respondent, substitute a petition alleging that the respondent is in need of supervision for a petition alleging that the respondent is a juvenile delinquent.
- 2. Family Court has jurisdiction over PINS until 18

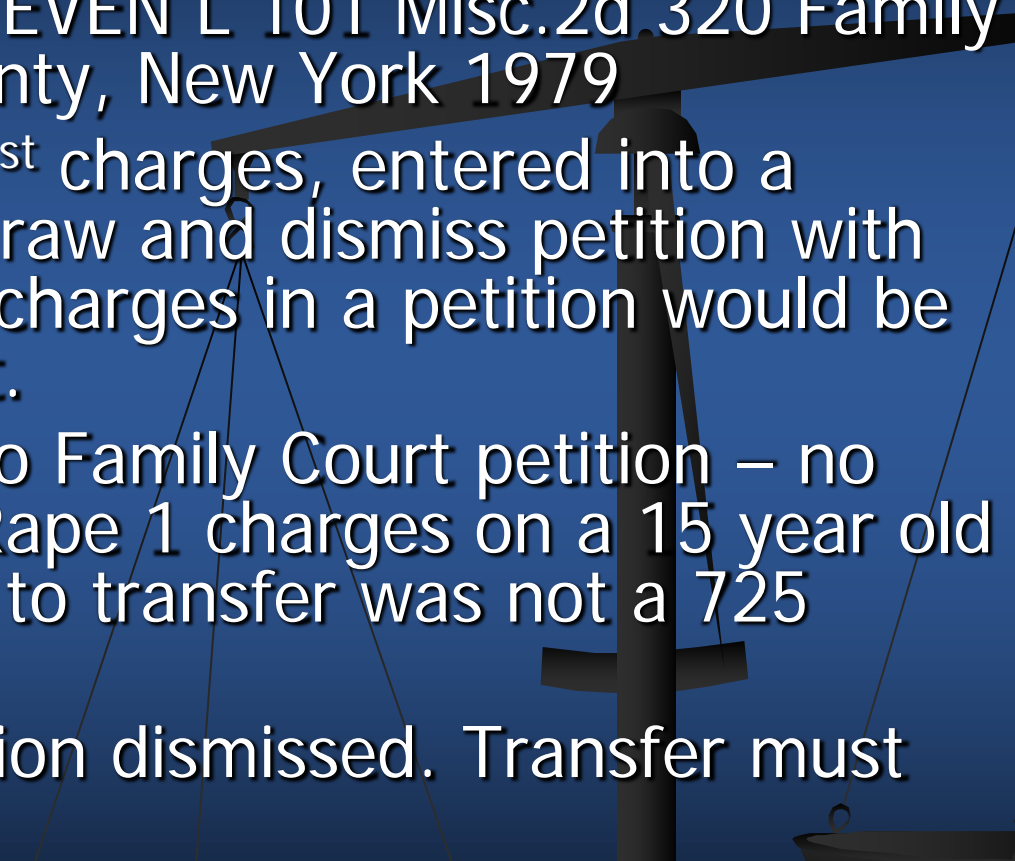


# Does the New RTA Legislation Expressly Permit The Filing of Lesser included Misdemeanors by the ACA

- FCA 311.1(7) provides that when an order of removal pursuant to Article 725 of the CPL is filed with the clerk of the court the order and pleadings shall be deemed to be a petition filed under FCA 310.1. FCA 310.1(1) provides that a jd proceeding is originated by the filing of a petition and subdivision 2 of that section says that only a presentment agency may originate a jd proceeding. In Matter of Raymond G., 93 NY2d 531 (1999) the Court of Appeals basically said that the only way that Family Court may acquire jurisdiction over a JO crime (JO crimes are listed in PL 10.00 (18), among other places) is if that crime is initiated in a criminal court, and then properly removed to Family Court. Conventional wisdom would suggest that Raymond G. will apply to AO transfers in that the only way Family Court may hear a felony charge committed when the respondent was 16 is if the respondent was initially charged in the Youth Part with that felony and then the felony complaint was transferred to Family Court. The only difference between the Raymond G. situation and RTA is that the felony charge may have a stopover in probation intake and also may be held in abeyance while probation tries to offer adjustment services.



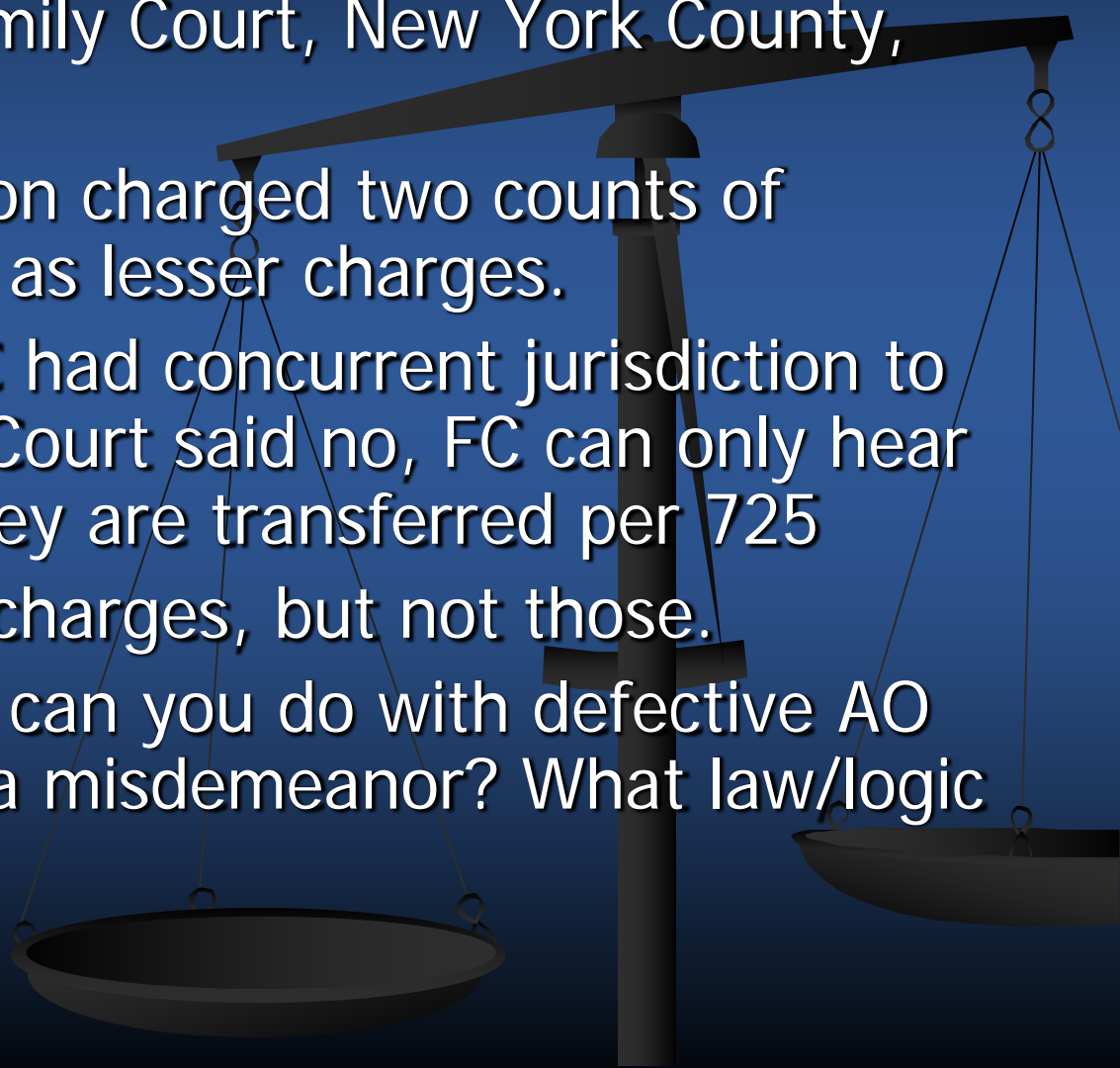
# Can DA stipulate to Transfer without CPL 725 compliance? No.

- In the Matter of STEVEN L 101 Misc.2d 320 Family Court, Monroe County, New York 1979
  - DA indicted Rape 1<sup>st</sup> charges, entered into a stipulation to withdraw and dismiss petition with understanding the charges in a petition would be filed in family court.
  - Defense objected to Family Court petition – no jurisdiction to file Rape 1 charges on a 15 year old and the stipulation to transfer was not a 725 transfer
  - Court agreed. Petition dismissed. Transfer must comply with 725
- 

# In the Matter of ELIZABETH R

- 169 Misc.2d 58 Family Court, New York County, New York. 1996
- Family Court petition charged two counts of Assault 1<sup>st</sup> as well as lesser charges.
- ACA argued the FC had concurrent jurisdiction to hear the charges. Court said no, FC can only hear those charges if they are transferred per 725
- Can charge lesser charges, but not those.
- QUESTION – what can you do with defective AO transfers? Charge a misdemeanor? What law/logic

-



# FCA Speedy Trial Requirements

## Reorganize this – thoughts?

- Speedy trial 310.2 (30.20) after petition filed or removal per 725.05
  - But what about 340.1 time of fact finding?
  - 340.1(2) says must be no later than 60 days after the first appearance.
    - First appearance from when? (case law)
  - Non consented delay – good argument that 340.1.2 – its now dead on speedy trial grounds.
  - Need a court case to say that 340.1 means at family court and not the beginning of youth court because 725.05.7 max of ten days - not modified?
  - 
  - Now I need to start thinking about doing a CPL 30.30 and FCA 340./310. Speedy trial motion and reply and historically- the courts have not overlapped. Now do they?
- 