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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 8

GUERRERO (ERRICK),

Appellant.

20 Eagle Street
Albany, New York
January 7, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Guerrero.

3 MR. KEEM: Good afternoon. May it please the
4 court. Brad Keem, I represent appellant, Errick Guerrero.
5 I'd like to reserve three minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yes.

7 MR. KEEM: The court is tasked with determining a
8 framework for deciding the presence of extraordinary
9 circumstances under Raise the Age. It is our position that
10 a totality of the circumstances test does not capture
11 extraordinary circumstances, and instead, that the two-part
12 test is - - -

13 JUDGE TROUTMAN: Is extraordinary circumstances
14 defined by the legislature?

15 MR. KEEM: Extraordinary circumstances is not,
16 Your Honor, but - - -

17 JUDGE TROUTMAN: And has the legislature, for
18 instance, in sections of the Domestic Relations Law defined
19 extraordinary circumstances?

20 MR. KEEM: They have, Your Honor. And I think
21 that is one of the items that we can use to determine
22 whether extraordinary circumstances are appropriate.

23 JUDGE TROUTMAN: But because they did not here,
24 does that not suggest that they were leaving it to the
25 court to consider the totality of the circumstances and use

1 the court's discretion based upon the evidence and
2 circumstances of the individual, the conduct alleged, et
3 cetera, to come to a determination? Because it said
4 extraordinary circumstances without a definition.

5 MR. KEEM: I think what's different here is that
6 extraordinary - - - basically, totality of the
7 circumstances devolves into a balancing test. And fifty-
8 one to forty-nine is not extraordinary. And what we have
9 in the statute - - - in the legislative history - - -

10 JUDGE GARCIA: But what - - -

11 JUDGE CANNATARO: Doesn't that depend on what
12 your definition of extraordinary is? Because there's a
13 tension, I think, in the Appellate Division writings
14 between extraordinary in its everyday usage. There were, I
15 think, some references to dictionaries or, you know, some -
16 - - which is something that doesn't happen every day or
17 something, you know, not exceedingly rare, because then
18 there's also references to legislative sources - - -
19 historical sources that are qualitatively different. So as
20 a first-line question, I guess I'm asking you, is the term
21 extraordinary circumstances ambiguous in this context such
22 that we have to go beyond the everyday usage or what this
23 court might have said about extraordinary circumstances and
24 go deeply into the legislative history? Or is that just an
25 everyday term that we're able to define for ourselves like

1 some members of the Appellate Division did?

2 MR. KEEM: I think the court must go deeper, and
3 I think when it does, the - - -

4 JUDGE CANNATARO: So it's ambiguous?

5 MR. KEEM: I believe that it is.

6 JUDGE CANNATARO: What's ambiguous about
7 extraordinary circumstances? I feel like I've - - - I've
8 heard that phrase before.

9 MR. KEEM: Certainly. And I think what's
10 ambiguous about it is that we don't have any guidance as to
11 what it could mean here without looking at what is very
12 clear legislative history.

13 CHIEF JUDGE WILSON: So what - - -

14 JUDGE CANNATARO: So why can't it mean - - - I'm
15 sorry. Go ahead, Chief.

16 CHIEF JUDGE WILSON: Go ahead.

17 JUDGE CANNATARO: Why can't it mean what the
18 dictionary says it means?

19 MR. KEEM: Well, because - - - so exceptional
20 circumstances, the definition, exceptional, to a marked
21 extent beyond what is usual. So what - - -

22 JUDGE CANNATARO: Yeah.

23 MR. KEEM: - - - beyond what is usual - - -

24 JUDGE CANNATARO: Yeah.

25 MR. KEEM: - - - that's not fifty-one to forty-

1 nine. That's not a balancing - - -

2 CHIEF JUDGE WILSON: So I - - - can I - - - so
3 let me - - -

4 MR. KEEM: If we go back to totality of the
5 circumstances, that's not a balancing test.

6 CHIEF JUDGE WILSON: I don't understand why - - -
7 and this is sort of what Judge Cannataro was getting at - -
8 - why you view totality of the circumstances as being
9 fifty-one, forty-nine when the overlay is extraordinary
10 circumstances. But let me - - - you can think about that
11 for a minute. But the thing I really wanted to ask you is,
12 are - - - are you saying you lose under the totality of
13 circumstances test?

14 MR. KEEM: No. Absolutely not.

15 CHIEF JUDGE WILSON: So then why do you care?

16 MR. KEEM: We care because the - - - if you look
17 at the lower court cases and the Appellate Division,
18 there's a lack of a framework. When you look at totality
19 of the circumstances here - - -

20 CHIEF JUDGE WILSON: Well, totality is a
21 framework.

22 MR. KEEM: - - - you're - - - at the same time,
23 that doesn't respect the legislative history.

24 CHIEF JUDGE WILSON: Why is that?

25 MR. KEEM: Because the legislative history talks

1 about the overwhelming bulk of cases presumptive transfer.

2 CHIEF JUDGE WILSON: Sure. But couldn't we ask
3 whether the totality of the circumstances shows that it's
4 extraordinary? There's an overwhelming - - - you can use
5 whatever word you want. But this - - -

6 MR. KEEM: Certainly this court could.

7 CHIEF JUDGE WILSON: - - - this court can answer
8 those questions. When we're saying totality, we're looking
9 for totality of what?

10 MR. KEEM: Absolutely. This court could, but in
11 looking at how the lower court cases are looking at
12 extraordinary - - -

13 CHIEF JUDGE WILSON: All right. So - - - but
14 that doesn't require us to develop a two-part test, does
15 it?

16 MR. KEEM: It doesn't require the court to
17 develop the two-part test, but the two-part test better
18 captures the essence of what the legislature was after.

19 JUDGE SINGAS: And Mr. Keem, you never mentioned
20 a two-part test below, right? This is the first time you
21 guys are raising this two-part test. In fact, below, I
22 think you said it was unwarranted given the totality of the
23 circumstances. So in fact, not only did you not mention
24 it, I think you took the position that you're arguing
25 against now. So how - - - how did - - -

1 MR. KEEM: So - - -

2 JUDGE SINGAS: - - - how is this preserved?

3 MR. KEEM: Yeah. Well, the evolution of the case
4 law and the oral argument and the dissent, I think permits
5 this court to consider the two-part test.

6 JUDGE HALLIGAN: Can I ask - - -

7 JUDGE SINGAS: How is that if you never raised it
8 for the court to say, look, we're objecting here because
9 you didn't follow the two-part test, and you just removed
10 this case using a totality of the circumstances?

11 MR. KEEM: I think, on the basis of - - - of what
12 the dissent indicated and - - -

13 JUDGE SINGAS: So the dissent can now preserve
14 your argument?

15 MR. KEEM: That would be our argument if your - -
16 - if your opinion is that we didn't adequately preserve
17 that in - - - at the Appellate Division.

18 JUDGE HALLIGAN: Can I ask you to shift gears for
19 a minute? I take it you're arguing that the evidence
20 regarding the adjudications and the tickets could not be
21 considered under 381.2, right? But I'm not sure maybe to
22 continue with preservation generally, I'm not sure how you
23 preserve that because I don't think that there was an
24 objection from defense counsel to the reference to those
25 facts and not an objection specifically on this basis.

1 MR. KEEM: There is no - - - the statute doesn't
2 have a carve-out currently for the consideration of that
3 confidential information - - -

4 JUDGE HALLIGAN: Which statute? 381.2?

5 MR. KEEM: The Raise the Age itself.

6 JUDGE HALLIGAN: Okay.

7 MR. KEEM: So - - -

8 JUDGE HALLIGAN: But I take it you're now telling
9 us that the judge was not permitted to consider the fact of
10 those adjudications and tickets because 381.2 prohibits
11 that? Am I correctly understanding your position?

12 MR. KEEM: Yes, Your Honor.

13 JUDGE HALLIGAN: And where was that objection
14 made in the proceedings below?

15 MR. KEEM: There was not an objection.

16 JUDGE HALLIGAN: Okay. So how is that preserved
17 for our review?

18 MR. KEEM: Your Honor, I would ask the court to
19 consider it in the - - - in regard to, it - - - it was
20 confidential, so it couldn't be deter - - - it was improper
21 for the court to consider it.

22 JUDGE HALLIGAN: Okay. And so going to - - -

23 JUDGE TROUTMAN: Well, then how does amenable to
24 services - - - or does that matter? How does amenable to
25 services factor in if you can't know the information about

1 prior contact with family court?

2 MR. KEEM: So the adolescent offender could
3 certainly waive that his confidential - - - his or her
4 confidentiality by bringing forth that evidence in their
5 opposition to the People's - - -

6 JUDGE TROUTMAN: So what about the argument that
7 you're using a shield and a sword?

8 MR. KEEM: It's certainly - - - I understand,
9 Your Honor. And I understand your point, but at this time,
10 there is no carve-out in either statute that permits - - -

11 JUDGE HALLIGAN: What do you do about the cases
12 that say, notwithstanding 381.2, that the underlying facts
13 can come in? I think that's been held in both the SORA
14 context, and if I'm remembering correctly, Sandoval as
15 well. Why wouldn't a similar distinction - - - I'm not
16 sure what that distinction means exactly, but why wouldn't
17 it apply in this context as well?

18 MR. KEEM: Again, I think the stat - - - because
19 of the statutory language, but my - - -

20 JUDGE HALLIGAN: Well, wait. The statutory
21 language in 381 or in - - -

22 MR. KEEM: 380 - - - in 381 and the lack of a
23 carve-out in Raise the Age.

24 JUDGE HALLIGAN: But how is that distinguishable
25 from the way in which the courts have drawn a line between

1 admitting the adjudications between - - - not admitting the
2 adjudications, but allowing admission of what the courts
3 call the underlying facts or acts.

4 MR. KEEM: It's not, but I think - - -

5 JUDGE HALLIGAN: So wouldn't those - - -

6 MR. KEEM: I think with - - -

7 JUDGE HALLIGAN: - - - wouldn't we proceed in the
8 same way - - - I'm just trying to understand why you would
9 distinguish this.

10 MR. KEEM: Yeah. And again, I would, again,
11 point to the importance of what the legislature was trying
12 to accomplish with Raise the Age and - - -

13 JUDGE HALLIGAN: Do you understand what that
14 distinction means? I'm grappling with - - - with what we
15 mean when we say you can't admit the adjudication, but you
16 can admit the underlying acts. Does that - - - how do you
17 make sense of that?

18 MR. KEEM: The underlying acts could have
19 aggravating and mitigating circumstances that could be
20 relevant to the determination of retention or removal.

21 JUDGE HALLIGAN: In terms of what happened below
22 here, it seemed to me there were a lot of information in
23 the mitigation report, right? How come - - - this is just
24 a process question I don't know the answer to. How come
25 that information isn't available or presented in the course

1 of deciding whether the individual is amenable to services
2 for purposes of removal?

3 MR. KEEM: That is a great question, Your Honor.
4 And I wish that the motion in opposition to removal had
5 some of those excellent facts, you know.

6 JUDGE HALLIGAN: So there's not something about
7 the process that precludes it. It just didn't happen here?

8 MR. KEEM: I think it's the timing, and I think
9 that counties are working to make sure that mitigation is
10 done in a more timely fashion now.

11 JUDGE HALLIGAN: But you think it would bear on
12 the removal question if the information were available?

13 MR. KEEM: Absolutely. Your Honors, I don't - -
14 -

15 JUDGE RIVERA: Can you address why in your
16 opinion - - - let's say we don't agree on the two-part
17 test. We think it's the totality of the circumstances
18 test, just hypothetically speaking. Why aren't there
19 extraordinary circumstances here?

20 MR. KEEM: There are not extraordinary
21 circumstances here because it's not unusual and heinous,
22 number one. So he acted impetuously. The Roper v. Simmons
23 - - -

24 JUDGE TROUTMAN: It's impetuous to do a home
25 invasion with armed people?

1 MR. KEEM: Led by a twenty-two-year-old, a
2 twenty-one-year-old, and his friend, another adolescent.

3 JUDGE TROUTMAN: But it's planned. It's
4 premeditated.

5 MR. KEEM: He didn't know the person, and he was
6 on drugs when he decided to partake in this after being
7 supplied a butter knife from the twenty-two-year-old.

8 JUDGE HALLIGAN: And the victim was hit
9 repeatedly with a gun.

10 MR. KEEM: His own gun that he had after Prince -
11 - -

12 JUDGE HALLIGAN: Yeah. But he was - - - he was
13 hit, I think, in the face several times, the record
14 indicates, with a gun. That seems serious.

15 MR. KEEM: Not by my client. And certainly, he
16 did not go to the hospital. He did put one of the
17 adolescent offenders in the hospital.

18 JUDGE CANNATARO: How is - - -

19 JUDGE HALLIGAN: Isn't the five years - - - five
20 years is a long time, right? Why isn't that enough to - -
21 - why isn't that record support for the court to be able to
22 conclude that your client was no longer amenable to
23 services?

24 MR. KEEM: Well, first, I would say that, in that
25 five-year period, he was - - - he never was kicked out of

1 services for failure to appear. There is a dearth for the
2 other - - -

3 JUDGE HALLIGAN: No. But the - - - the record
4 does indicate that whether we can consider it or not, you
5 have the 381 argument, but that there were multiple - - -
6 there was multiple offenses that occurred following his
7 commencement.

8 MR. KEEM: Well, first, I'd like to stress that
9 this was the first time that he had a criminal case that
10 had this removal question. The other offenses were lower-
11 level offenses. And that considering this - - -

12 JUDGE TROUTMAN: So what about the argument that
13 as opposed to being amenable to services, shows that he's
14 now engaging in escalating behavior?

15 MR. KEEM: Well, it's certainly unfortunate that
16 this is - - - it is an escalated behavior. But I don't
17 think that that's - - - precludes him from family court
18 services in considering what Raise the Age is about and
19 what the - - -

20 JUDGE CANNATARO: But if we're considering the
21 circumstances and the extraordinary this - - -
22 extraordinariness thereof, wouldn't the escalation, in
23 light of his history, be relevant to that question?

24 MR. KEEM: It is relevant. But again, this is a
25 high bar. This is one in a thousand cases - - -

1 JUDGE RIVERA: What about - - - what's the
2 relevance of his mental health history?

3 MR. KEEM: Incredibly relevant. And the fact
4 that he's - - -

5 JUDGE RIVERA: I mean, he's seventeen, but does
6 he really have the mind of a seventeen-year-old?

7 MR. KEEM: Absolutely not. And that's what Roper
8 v Simmons tells us. That's why Raise the Age was passed.
9 It is not just his mental health. His father was killed at
10 the Justice Center. He never had a paternal role model.

11 JUDGE RIVERA: He was two grades behind?

12 MR. KEEM: Two grades behind. He - - - he has a
13 tremendous amount of mitigating circumstances. If the
14 court - - -

15 JUDGE CANNATARO: Raise the Age isn't for people
16 just with developmental delays or things like that, right?
17 It - - - it's based on science that informs our
18 understanding of the immature brain. Isn't that the
19 general purpose behind Raise the Age?

20 MR. KEEM: It is one of the purposes, yes.

21 JUDGE CANNATARO: And you sort of identified, I
22 think, a good marker of that immaturity of brain
23 development, neurological development. And that's
24 impetuosity, you know. You throw a rock through a
25 window; you get into a fight over nothing. You - - - you

1 know, you don't think it. It's like my dad used to say.
2 You don't think before you do something. But going back to
3 a question Judge Troutman asked you, this was planned. It
4 was premeditated. Weapons were obtained and a plan was
5 hatched. How does that fit within the immature, impetuous
6 mind rubric that I thought we were talking about in Raise
7 the Age?

8 MR. KEEM: Well, I think it's more than that.
9 There's - - - he's vulnerable to negative influences. And
10 I think we look at the fact of his age - - -

11 JUDGE CANNATARO: You think that - - - that's a
12 quality reserved for young people?

13 MR. KEEM: Certainly, a seventeen-year-old and a
14 twenty-two-year-old. I - - - I'm not sure what Your Honor
15 - - -

16 JUDGE CANNATARO: I'm saying, you don't think
17 forty-year-olds are capable of being influenced by outside
18 forces.

19 MR. KEEM: Oh, absolutely.

20 JUDGE CANNATARO: I don't know that that's really
21 relevant.

22 MR. KEEM: I think that in Roper v. Simmons, that
23 was one of the main catalysts to their determination to
24 treat adolescents different, was that they were
25 particularly vulnerable to peer pressure. I think that his

1 character is not adequately formed. So he may not have
2 been able to say - - -

3 JUDGE HALLIGAN: But you agree that all of those
4 characteristics could be overcome by circumstances of
5 criminal conduct itself, right?

6 MR. KEEM: Absolutely. And we have the - - -
7 obviously, the three different circumstances in the
8 statute. And then - - -

9 JUDGE HALLIGAN: But beyond that, I take it you
10 agree - - - I see your light's on, but that circumstances
11 of a crime that's not presumptively ineligible, not on
12 those three categories, could be serious enough, I guess
13 heinous and unusual is the terminology that,
14 notwithstanding the challenges that a court could conclude
15 that the individual was not appropriate for adjudication in
16 family court?

17 MR. KEEM: Certainly. But again, heinous and
18 unusual would be if this victim was elderly, if this was a
19 child and their mother, if there was serious physical
20 injury. That is not this case.

21 JUDGE CANNATARO: So - - -

22 JUDGE RIVERA: Did he plan? Was he the one who
23 planned?

24 MR. KEEM: He was absolutely not the one who
25 planned. And again, these - - - if the legislature wanted

1 to make every burglary one and robbery one into a house
2 part of cases that automatically go to adult court, it
3 could have done that. It didn't. This is the - - -

4 JUDGE TROUTMAN: Well, then why didn't
5 legislature define extraordinary circumstances and say - -
6 -

7 MR. KEEM: I sure wish they did.

8 JUDGE TROUTMAN: - - - that home invasions, it
9 doesn't matter unless they're elderly people, but - - - and
10 point to fact. You're suggesting that the fact that there
11 was chanting of stab him, that's not particularly heinous.
12 That's just normal criminal behavior. Are you suggesting
13 that certain victims are less worthy?

14 MR. KEEM: I'm not suggesting that. I'm
15 suggesting that that is a factor of what makes cruel and
16 heinous or cruel and unusual, whatever the terms that we
17 want use - - -

18 JUDGE TROUTMAN: So it's not heinous here, again
19 - - -

20 MR. KEEM: - - - but stab him, stab - - -

21 JUDGE TROUTMAN: - - - because - - - this one is
22 not heinous even with the chanting because if they were
23 successful in stabbing - - - if one of them stabbed this
24 person, we could have had a death. Then it would have fit
25 within the specific one, correct?

1 MR. KEEM: Absolutely. But that's not what
2 happened here.

3 JUDGE TROUTMAN: So it doesn't matter, though,
4 that there was conduct engaged in that led - - - that could
5 be that close to it happening?

6 MR. KEEM: We don't know who said stab him, stab
7 him. In the motion by the People, they never say that it
8 was Errick. So we cannot put Errick to blame for that part
9 of the chanting.

10 JUDGE TROUTMAN: So he's - - - we can't consider
11 him as to anything because it was just a - - - other people
12 involved - - -

13 MR. KEEM: We can consider - - -

14 JUDGE TROUTMAN: - - - and because of his age, he
15 just automatically goes to family court. So there's really
16 no role of the court here?

17 MR. KEEM: No. That - - - that's not what I'm
18 arguing. If Errick came and it was - - - the circumstances
19 were different. But in these particular circumstances,
20 they don't raise the level to the one in a thousand case
21 that should go to criminal court.

22 JUDGE TROUTMAN: So is there a home invasion
23 where it would transfer in your mind - - -

24 MR. KEEM: Yes. An elderly person - - -

25 JUDGE TROUTMAN: Elderly only?

1 MR. KEEM: - - - or - - - no. I'm not saying
2 that, Your Honor, but I'm saying if you're asking me to
3 think of an example, then that's the example I'm going to
4 provide. Because the alternative is, okay, so what home
5 invasion doesn't make it?

6 JUDGE TROUTMAN: So what's the difference between
7 a home invasion - - - because the sanctity of the home - -
8 - and in fact, we have burglary - - - home burglary is
9 elevated over a burglary of a business because of a
10 sanctity of the home issue. So you're suggesting, unless
11 you have vulnerable individuals in the home, there is no
12 difference?

13 MR. KEEM: I - - - what I'm suggesting is that
14 the legislature had the opportunity to do what you're
15 suggesting and make all home invasion burglaries
16 automatically transferred to criminal court. They elected
17 not to do that. And I'm also suggesting to you - - -

18 JUDGE TROUTMAN: But again, the problem is, they
19 did not define extraordinary circumstances. That's the
20 real problem.

21 MR. KEEM: It is, Your Honor. And I would assert
22 that under these particular circumstances, that
23 extraordinary circumstances are not present.

24 JUDGE CANNATARO: Because?

25 MR. KEEM: Because this is a person that has

1 mental health issues, a tragic upbringing. He's not - - -
2 he's never been kicked out of services. He needs these
3 services.

4 JUDGE TROUTMAN: I'm confused as to why you can
5 consider those mitigating factors, but things that were
6 suggested as aggravating circumstances, you suggest the
7 court could not consider.

8 MR. KEEM: Well, first, we have to make a
9 distinction as to what was actually in their motion. Stab
10 him, stab him was never said by the People to have been
11 said by Errick. So the - - - what can be considered is
12 what was brought forth in these motions, which are not
13 robust. And - - -

14 JUDGE CANNATARO: But what about the parts about
15 the lack of responsiveness to the services rendered? Is -
16 - -

17 MR. KEEM: I - - - I would push back on
18 responsiveness to the services rendered because he never
19 was expelled from services.

20 JUDGE CANNATARO: Oh, but you don't deny that
21 that's appropriately part of the argument that the - - -

22 MR. KEEM: Oh, yes. Absolutely.

23 JUDGE CANNATARO: - - - the other side has made?

24 MR. KEEM: We - - - yes. We have to consider
25 this.

1 JUDGE CANNATARO: You can say he needs the
2 services, and they can say the services aren't working for
3 him.

4 MR. KEEM: Precisely. And once we - - - when we
5 - - - if you - - - if the court is going to use - - - to
6 have - - -

7 JUDGE RIVERA: But the services are measured by
8 the condition of the child?

9 MR. KEEM: Yes, Your Honor.

10 JUDGE HALLIGAN: Well - - -

11 JUDGE RIVERA: The services that might be
12 appropriate to a - - - let's go with a fifteen-year-old for
13 the moment. A fifteen-year-old who has no mental health
14 issues might not be appropriate, or they may take longer
15 for someone who's got perhaps other obstacles for those
16 services to actually work?

17 MR. KEEM: And that's Errick in this case.

18 JUDGE HALLIGAN: And - - - but would the
19 amenability not also be measured not just by the needs of
20 the child, but the responsiveness of the child, which would
21 include any continued criminal conduct?

22 MR. KEEM: I don't dispute that. And I think
23 even considering that he's not - - - he - - - it's amenable
24 to service in any way. And I think, in any way, he has
25 demonstrated that he's amenable to those services.

1 JUDGE CANNATARO: But he - - -

2 JUDGE SINGAS: But it sounds like you think the
3 judge used the right and relevant factors to assess this.
4 I think what it's coming down to is you just don't agree
5 with the way that the judge weighed them.

6 MR. KEEM: Not - - - I would prefer if this court
7 created a framework besides totality of the circumstances
8 where the court was mandated to look at certain factors and
9 make findings of fact to conclusions of law.

10 JUDGE SINGAS: Okay. Buth that's not the
11 situation we have. You know, we could wish for the future,
12 but we're looking at what we have today. And I I think I'm
13 hearing you say the judge didn't do anything improper in
14 the sense of, it was looking at the relevant factors,
15 everything that's considered in the statutes. You just
16 disagree with the way that the judge came out at the end -
17 - - the weight that the judge was giving certain factors.
18 You think he should have weighed his background more.
19 Others might think he weighed his criminal history more.
20 It was all relevant. It was all within his discretion.
21 And I think your argument is that you just don't agree with
22 how it came out.

23 MR. KEEM: Well, there's no finding specifically
24 as to cruel and heinous or unusual and heinous act in - - -
25 in the lower court's decision.

1 JUDGE SINGAS: Yeah. But that's not required.

2 MR. KEEM: I think I would assert that the
3 statute and the legislative history would suggest that it
4 should be.

5 JUDGE SINGAS: Okay.

6 JUDGE CANNATARO: Where was the abuse of
7 discretion?

8 MR. KEEM: The abuse of discretion is in the fact
9 that the court didn't - - - in their findings of fact,
10 didn't find cruel and heinous. It didn't look adequately
11 at what amenability and - - - amenability to services mean.
12 It means that he skipped out on services, that he was nasty
13 to the teacher and got kicked out. Here, amenability was
14 demonstrated. The only time he went out of services was
15 because his mother pulled him out, and that is a crucial
16 factor. That is a mitigating factor, not an aggravating
17 factor. And that was something that the court, in my
18 opinion, looked at the wrong way.

19 CHIEF JUDGE WILSON: Thank you.

20 MS. DANNAN: Good afternoon. Elisabeth Dannan,
21 for the People. Our position is that the Youth Part judge
22 here applied the correct legal standard to determine that
23 extraordinary circumstances existed, and the Fourth
24 Department properly affirmed.

25 CHIEF JUDGE WILSON: What is extraordinary here.

1 MS. DANNAN: I would suggest that it - - - the
2 legislature, obviously, gave certain examples of it, but it
3 is beyond what is ordinary. Again - - -

4 CHIEF JUDGE WILSON: Well, including one in a
5 thousand, right?

6 MS. DANNAN: Well, that was suggested by one of -
7 - - as an aspirational goal by someone that - - -

8 CHIEF JUDGE WILSON: Well, by - - - by - - -

9 MS. DANNAN: - - - was mentioned by Lentol.
10 Another thing that - - -

11 CHIEF JUDGE WILSON: - - - by Lentol, who was, I
12 think, a sponsor, yes?

13 MS. DANNAN: Okay. Well, he stated that another
14 individual had said that. That's what he said. He did - -
15 -

16 CHIEF JUDGE WILSON: And did anyone push back on
17 that in the legislature?

18 MS. DANNAN: Nobody. I don't believe anyone
19 really addressed that. I do believe that another
20 consideration that is structural to the Raise the Age Act
21 does also inform the issue of extraordinary circumstances.
22 And that is the fact that family court judges applying
23 family court principles are to oversee the Youth Parts.
24 And the Family Court Act 301(1) mandates that, in any
25 proceeding under this article, the court shall consider the



1 needs and best interests - - - interests of the respondent
2 as well as the need for protection of the community. And I
3 think that this judge, in particular, if you look at the
4 record at what she did, that was exactly her concern.

5 JUDGE HALLIGAN: Can I ask you about that? So -
6 - -

7 MS. DANNAN: Yes.

8 JUDGE HALLIGAN: - - - subsection 1(e) says that
9 the court is required to make findings of fact, and to the
10 extent practicable, conclusions of law in - - - on the
11 record, right?

12 MS. DANNAN: Yes, Your Honor.

13 JUDGE HALLIGAN: And so when I look at the
14 proceedings, it seems to me that the judge notes a few
15 facts about the crime and then says that - - - essentially,
16 that the finding is resting on whether the defendant is
17 amenable to services. Is there an explicit finding that
18 you can point me to regarding the circumstances of the
19 crime itself constituting extraordinary circumstances?

20 MS. DANNAN: Yes, Your Honor. If you look - - -

21 JUDGE HALLIGAN: What page on the record would
22 that be?

23 MS. DANNAN: I would look at the motion of the
24 People and the response by - - -

25 JUDGE HALLIGAN: I'm looking at the - - - what

1 the judge says, though.

2 MS. DANNAN: Okay. I guess what - - - why I'm
3 asking you to look at the motion is because the People
4 referenced in paragraph 6 and paragraph 15 - - - or 13.

5 JUDGE HALLIGAN: Yeah. But what the judge says
6 is - - - and I'm at page 45 to 46 - - - is, what you've
7 been able to demonstrate to me more pointedly is that the
8 defendant is not amenable to services. And so I want to be
9 clear about that.

10 MS. DANNAN: Your Honor, what I'm trying to
11 explain is that, in the People's motion, they did not
12 request a hearing. The defense did not request a hearing.
13 The People rested. They said - - - they stated, we have
14 provided the documentary evidence of - - -

15 JUDGE HALLIGAN: Right.

16 MS. DANNAN: - - - the police reports, which
17 included the statements - - - the sworn statements of the
18 victim. The court then asked to get additional information
19 - - -

20 JUDGE HALLIGAN: Yes.

21 MS. DANNAN: - - - about the defendant
22 particularly.

23 JUDGE HALLIGAN: From, I believe, Ms. Donaldson?

24 MS. DANNAN: Yes. So that - - - and she did.
25 She found that they were, you know, terrifying

1 circumstances.

2 JUDGE HALLIGAN: I - - - I read that.

3 MS. DANNAN: But I believe that she wanted to
4 find additional circumstances regarding the individual - -
5 - regarding - - -

6 JUDGE HALLIGAN: But generally, I think we look
7 and the statute confirms that a court should make findings
8 of fact, not simply to take as - - - as, you know, a given
9 or as a finding of fact, whatever representations are made
10 in the parties' submission. So I think - - - but maybe I'm
11 missing something in here - - - that where we see that is
12 in the course of the proceedings and the statement the
13 judge makes, where the judge finds that the defendant is
14 not amenable to services. So I'm just wondering if there
15 is anywhere in the record an explicit statement where the
16 judge says the circumstances of the crime itself are
17 extraordinary.

18 MS. DANNAN: She didn't use precisely those
19 words, Your Honor, but she did say that they were
20 terrifying to the whole community. And I believe that the
21 fact that she requested that hearing specifically to find
22 whether the circumstances of the individual - - -

23 JUDGE RIVERA: That's true for any home invasion
24 - - -

25 MS. DANNAN: What's that?

1 JUDGE RIVERA: - - - then every home invasion is
2 extraordinary.

3 MS. DANNAN: I believe this one was more so, Your
4 Honor.

5 JUDGE HALLIGAN: Well, she also says - - - on the
6 terrified, she says, I can't arguably take that into
7 consideration. And then she goes on to say she's resting
8 her decision on amenability to services.

9 MS. DANNAN: I believe she said she couldn't take
10 it on the fear of, like, the - - - not the victim himself.
11 It was the - - - the mother and the aunt said they were
12 terrified.

13 JUDGE HALLIGAN: Uh-huh.

14 MS. DANNAN: So I think that's what she said.
15 But I do - - - she - - - I know this court did not give a
16 reasoned written explanation, but the same court, the same
17 judge did so in the case People v. C.S., 68 - - -

18 JUDGE HALLIGAN: But what we have is what we have
19 before us - - -

20 MS. DANNAN: Yes, Your Honor.

21 JUDGE HALLIGAN: - - - on this record, right?
22 That's what, I think, we're evaluating.

23 MS. DANNAN: Yes, Your Honor.

24 JUDGE RIVERA: Again, so what's extraordinary
25 about this home invasion - - -



1 MS. DANNAN: Well - - -

2 JUDGE RIVERA: - - - and - - - and his role?
3 Because the question is his role. He has no leadership
4 role. He's got serious mental health issues. He's two
5 grades behind. He is actually following through on the
6 services. What - - - what's extraordinary?

7 MS. DANNAN: What's extraordinary about it, Your
8 Honor?

9 JUDGE RIVERA: Yes.

10 MS. DANNAN: Well, I do believe that, you know,
11 as I said, with the motion, the People did say we have
12 provided the statements - - - the sworn statements of the
13 victim and the police reports, which do include accusations
14 that the defendant himself was armed with a knife and
15 threatened the victim here. So I believe - - - and there
16 was - - - you know, he did have a planning role there. The
17 - - - I'd say - - -

18 JUDGE RIVERA: He had a planning role?

19 MS. DANNAN: I believe they - - -

20 JUDGE RIVERA: Where is that in the record?

21 MS. DANNAN: Well, I believe they all - - - I
22 guess that was more at the trial, but there is at least
23 evidence that he, you know, had procured this knife, and he
24 was actively threatening the victim with it during this
25 home invasion. And there was - - -

1 JUDGE RIVERA: They all have knives.

2 MS. DANNAN: They were pocket knives, Your Honor.
3 This - - - he had the large knife, the machete-style knife,
4 and was specifically referenced as being the knife that was
5 threatening to this victim.

6 CHIEF JUDGE WILSON: Well, but - - - but the
7 legislature easily could have said, threatening - - - if
8 you have a knife and threaten somebody with it, that's an
9 automatic exclusion. They didn't do that, right?

10 MS. DANNAN: Yes, Your Honor. I - - -

11 CHIEF JUDGE WILSON: So can we - - -

12 JUDGE RIVERA: Well - - -

13 CHIEF JUDGE WILSON: - - - can we take - - - can
14 we inform ourselves by the exclusions as to what might
15 constitute extraordinary circumstances, that it would have
16 to be something sort of the same ilk or greater?

17 MS. DANNAN: Well, Your Honor, I think that the -
18 - - the Raise the Age Act explicitly gave family court
19 judges discretion over this because they are able to - - -
20 they have seen these type of cases with juvenile - - -

21 CHIEF JUDGE WILSON: Well, they can't say
22 anything is extraordinary, right? The discretion they were
23 given is within the bounds of what constitutes
24 extraordinary circumstances as a matter of law - - -

25 MS. DANNAN: Yes.

1 CHIEF JUDGE WILSON: - - - which is what we're
2 being asked to provide some guidelines around.

3 MS. DANNAN: Uh-huh.

4 CHIEF JUDGE WILSON: And my question is whether
5 we can look to the statute itself or the things the
6 legislature said, look, these are automatic, to say
7 extraordinary is going to have to be something like that or
8 greater than that.

9 MS. DANNAN: Well, I do believe that, you know,
10 in this case, she found that this defendant was not
11 amenable to family court services. And I would,
12 additionally, in light of, you know - - -

13 JUDGE RIVERA: What's the support for that in the
14 record?

15 MS. DANNAN: They'll - - - look, if the report
16 that was relied upon in the amicus brief for the defendant
17 of the Commission on Youth, Public Safety and Justice,
18 specifically links reform and lack of recidivism to receipt
19 of these services. So I would say, merely attending
20 services - - -

21 JUDGE RIVERA: Again, that's within the context
22 of the child's particular situation. And this is not even
23 really a person of mental and emotional growth even of a
24 seventeen-year-old.

25 MS. DANNAN: Yes. Well, I mean, I would say that

1 he had not responded in any appreciable way to these
2 services. And mere attendance and participation in
3 services without any sort of form or reform or any change
4 is not being amenable.

5 JUDGE HALLIGAN: How do we know that just based
6 on what's before the court at the time it makes the removal
7 decision?

8 MS. DANNAN: By the fact of all the - - - you
9 know, the cases, the continuing recidivism - - - the cases
10 being - - - continuing to come to the family court.

11 JUDGE HALLIGAN: And how do you square the 381.2
12 restriction with consideration of that?

13 MS. DANNAN: Well, I would argue that the 381.2
14 restriction is narrow in scope. You cannot - - - it
15 prohibits consideration of the fact that the defendant was
16 - - - or the adolescent offender was at a hearing - - -
17 before the court for a hearing or any admission confession
18 statement made to the court, or an officer.

19 JUDGE HALLIGAN: So all I see a reference to in
20 the record are the adjudications and the tickets, but not
21 anything about the underlying substance.

22 MS. DANNAN: Yes, Your Honor. Yes, Your Honor.

23 JUDGE HALLIGAN: So I guess I have two questions.
24 One is, is there anything other than what you just
25 referenced in this record? And secondly, I'm grappling

1 with what to make of the distinction between the fact of
2 the adjudications and the underlying acts.

3 MS. DANNAN: Yes, Your Honor. That is a
4 difficult - - - it is very cognitive dissonance in how to
5 assess whether defendant is amenable to services without
6 having any - - - with, you know, the privacy provision of
7 not being able to consider any family court records. That
8 is a - - - I think, an issue.

9 JUDGE HALLIGAN: So what should we do about that?

10 MS. DANNAN: I think that, looking at 381.2, it
11 is narrower in scope than a lot of courts are considering
12 it to be. I don't think it prohibits - - -

13 JUDGE HALLIGAN: And what do you see in this
14 record that goes beyond the reference to the fact of the
15 adjudications itself, which I take it is the distinction
16 you're drawing?

17 MS. DANNAN: Yes, which I would agree should - -
18 -

19 JUDGE SINGAS: Well, where in the act does it say
20 the adjudication - - - I'm looking at it, 381.2 - - -
21 neither the fact that a person was before the family court
22 under this article for a hearing, nor any confession,
23 admission, or statement made by him to the court or to any
24 officer thereof in any stage of the proceeding is
25 admissible as evidence against him.

1 MS. DANNAN: Well, Your Honor, we were hoping
2 that - - - we kind of had the same idea. But this court's
3 holding in Green v. Montgomery seems to imply that you
4 can't mention an adjudication in a - - - another court. So
5 that's why - - -

6 JUDGE HALLIGAN: So isn't that what's mentioned
7 here? Is the fact of - - -

8 MS. DANNAN: Yes.

9 JUDGE HALLIGAN: Okay.

10 MS. DANNAN: So - - -

11 JUDGE HALLIGAN: So why don't you have a problem
12 under 381 as read by Green?

13 MS. DANNAN: I would say, with the adjudications,
14 we do. I would say, not so much with the - - - not with
15 the family court appearance tickets. Those are not before
16 the court for a hearing.

17 JUDGE HALLIGAN: And do you think that the - - -
18 that 381 argument is preserved?

19 MS. DANNAN: No. It is not, Your Honor.

20 JUDGE HALLIGAN: So your understanding of the
21 process is that 381 would preclude reference to an
22 adjudication, but then they make it hard to gauge
23 amenability to services?

24 MS. DANNAN: Yes, it does, Your Honor. And that
25 does seem to fly in the face of the - - - you know, the

1 Raise the Age legislative intent to consider all the
2 circumstances of the individual. So there is some tension
3 there, which is difficult to get around, but I don't know
4 how we can get around it without, you know, a legislative
5 amendment. So that's - - - but - - -

6 JUDGE RIVERA: Do you think Raise the Age in the
7 history suggests that the legislature understood that it
8 may take several rounds before you reach a child?

9 MS. DANNAN: Several rounds to reach - - -

10 JUDGE RIVERA: Rounds before you reach a child.
11 That's like, one round of service may not - - - may not be
12 enough, given all of the limitations of the growth of the
13 adolescent brain. And in this particular situation, the
14 additional limitations and challenges that this child
15 faced.

16 MS. DANNAN: It does suggest, you know, one or
17 two adolescent mistakes. It does address - - - but I would
18 suggest that this record shows that this was more than
19 that. This was a persistent, you know, mode of behavior
20 that was not just one or two impetuous mistakes.

21 JUDGE RIVERA: Where does it say one or two?

22 MS. DANNAN: In the legislative history, it does.
23 I apologize. I'm not quite sure of the page of that, but
24 it is not - - -

25 JUDGE RIVERA: They could have said that, you

1 know. It's like three strikes, you're done.

2 MS. DANNAN: Yeah. I think they wanted to - - -

3 JUDGE RIVERA: Did they say that?

4 MS. DANNAN: No, they did not. I believe the - - -

5 -

6 JUDGE RIVERA: And they chose a phrase, even
7 though it's not defined, but one that certainly suggests
8 that it means more than sort of the common round of a - - -
9 a child continuing to act out and it being very difficult.
10 Anyone who's raised a teenager understands how challenging
11 - - -

12 MS. DANNAN: Yes.

13 JUDGE RIVERA: - - - it can be and how many times
14 you must repeat the same.

15 MS. DANNAN: Yes. And I - - - Your Honor, again,
16 I think that speaks to the fact that they specifically
17 asked for family court judges who are, you know, trained
18 and expert, and you know, are trained in the law in this
19 regard and with these particular type of defendants so that
20 they can make these kind of informed decisions. They have
21 this - - -

22 JUDGE RIVERA: Did this family court judge have
23 information and detail about the child's mental health
24 status?

25 MS. DANNAN: Did this court have that - - -

1 JUDGE RIVERA: Yes.

2 MS. DANNAN: - - - information?

3 JUDGE RIVERA: Yes.

4 MS. DANNAN: No. She just had what the - - -
5 what the defense counsel presented.

6 JUDGE RIVERA: Would - - - do you think that
7 would have been important to the analysis?

8 MS. DANNAN: If she'd had more information?

9 JUDGE RIVERA: Yes.

10 MS. DANNAN: I'm sure more information would - -
11 -

12 JUDGE RIVERA: About the mental health issues.

13 MS. DANNAN: More information about the mental
14 health issues?

15 JUDGE RIVERA: Yes. Yes.

16 MS. DANNAN: It could have been, Your Honor.
17 Obviously, more information is usually better. There was
18 not very much information presented by the defense in this
19 case. And I think the - - -

20 JUDGE RIVERA: It would be hard to fully
21 appreciate whatever are the mental health issues and
22 challenges if you don't have the right kind of information
23 in front of you.

24 MS. DANNAN: Yes.

25 JUDGE RIVERA: Speculation is not going to work,

1 right?

2 MS. DANNAN: But this was a family court judge
3 who was trained and had an appreciation for the mental
4 health challenges that are posed to defendant.

5 JUDGE TROUTMAN: What about the mother refusing
6 services as opposed to a claim that the child refused
7 services? How does that - - - what role does that play?

8 MS. DANNAN: Your Honor, I believe it's stated -
9 - - the record was that this mother had refused voluntary
10 services on one occasion on the last time that the
11 defendant had appeared in Youth Part. It did - - - so it
12 did not say there were no services provided, and it was
13 just on one occasion.

14 JUDGE TROUTMAN: So does that negatively impact
15 him? Should it be counted against him or not? Is his
16 mother conduct - - - mother's conduct, in refusing, his
17 conduct?

18 MS. DANNAN: His mother's conduct - - - I mean,
19 in one sense, that is a mitigating factor, and that his
20 mother is obviously not helping him as much as she could
21 be. In another aspect as to his amenability to services,
22 unfortunately, I think it kind of weighs against him
23 because if he is released to her custody, which would
24 happen if he had been - - - gone back to family court, the
25 same result would likely have obtained. Thank you, Your

1 Honors.

2 CHIEF JUDGE WILSON: Thank you.

3 MR. KEEM: Your Honors, if the court isn't going
4 to use the two-part test and use a totality of the
5 circumstance, I'd at least ask that it be similar to what
6 the Third Department did in Aaron v. VV., in that it ex - -
7 - it emphasizes the sweeping nature - - - the sweeping
8 presumption of removing to family court - - - retaining in
9 family court because the Appellate Division, Fourth
10 Department, didn't talk about presumption at all. It
11 didn't talk about anything in the legislative history that
12 really makes Raise the Age what it is. Simply stating
13 totality of the circumstances, guts, in my opinion, what
14 Raise the Age intends to do. And in this case, a finding
15 of - - - that Errick is - - - is not appropriate for family
16 court means that Trey, the ringleader, he's going to be
17 released in 2026, Vincente in 2026. Errick won't be
18 released till 2028, ten years in prison. And in these
19 circumstances, these facts, this mental health, this
20 background, this experience on services is certainly not
21 what Raise the Age intended.

22 JUDGE RIVERA: Is there anything in the record
23 about the quality of the services that he received?

24 MR. KEEM: So the record demonstrates he received
25 a rise, and he was doing counseling in school and received

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medication in school, and that - - - that there was nothing on the record reflecting that that was not working or that he wasn't benefiting from that.

CHIEF JUDGE WILSON: Thank you.

MR. KEEM: Thank you, Your Honors.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Guerrero (Errick), No. 8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

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