

# CENTER FOR APPELLATE LITIGATION

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## ISSUES TO DEVELOP AT TRIAL

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*CPL § 720.10(1) presently limits youthful offender eligibility to people at least 16 years old and less than 19 years old at the time of the offense’s commission. If your client was older than 19, even by a day, he or she is statutorily ineligible, even if they would otherwise be eligible and an excellent candidate. Unless acquitted after trial or the beneficiary of post-conviction relief, they will carry the burden and stigma of a criminal conviction for a long time, possibly the rest of their lives.*

*This issue proposes using last year’s amendment to the Equal Protection Clause of the New York State Constitution (“Prop 1”), which, among other amendments, added “age” as a protected characteristic, to argue that your client between the ages of 19 and 25 (under 26)<sup>1</sup> is YO-eligible – that CPL § 720.10(1)’s age classification in defining “youth” so narrowly violates state constitutional equal protection.*

*To help you make this challenge, we provide a template notice of motion, affirmation, and memorandum of law (in Word so you can adapt as needed). Also, because you’ll be challenging the constitutionality of a statute, you’ll need to provide Notice to the Attorney General. A template Notice is also attached. Please carefully review the memo before filing and make any corrections, updates or changes you see fit.*

The logic of the challenge, set forth in the template memo of law, goes like this:

- Before Prop 1, the State constitutional Equal Protection Clause (art. I, § 11) provided no express protection on the basis of age, and courts uniformly rejected age-based challenges under both the Fourteenth Amendment and the State Constitution by applying rational-basis scrutiny, the lowest level of scrutiny and what essentially amounted to a rubber stamp of Legislative choices.
- With Prop 1, “age” – which the drafters neither qualified nor defined, and which therefore covers both the young and the old – is now an enumerated protected characteristic, on par with race, nationality and religion (art. I, § 11(a)). Further, an important amendment to the separate Civil Rights Clause of the provision, which pre-Prop-1 was a relatively powerless mechanism for challenging discrimination, is now an independent and self-standing path for challenging discriminatory State action.
- As age is now a protected class and age-based classifications can be directly challenged under the Civil Rights Clause of the state constitutional provision, CPL§ 710.20(1)’s

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<sup>1</sup> When the class is referred to as “under 26” or “between 19 and 25,” it means emergent adults aged 19 through 25, up to their 26<sup>th</sup> birthday.

eligibility limitation to people who were less than 19 years old at the time of the crime's commission can be challenged as discriminatory by similarly situated individuals. Because the classification concerns an enumerated characteristic, it is subject to heightened scrutiny upon review.

- The exclusion of people between 19 and 25 violates equal protection because, although the government has a compelling interest in protecting youth from the burden and stigma of a criminal conviction, the neuroscience supports that individuals older than 19 and less than 26 are neurologically indistinguishable from those covered by the statute. There is, therefore, no “compelling,” or even “important,” state interest for limiting the benefits of YO adjudication to those under 19 while excluding people whose brain development signals the same reduced culpability and capacity for change. The statute is not narrowly tailored because, by excluding 19 to 25 year olds, it “leaves appreciable damage” to the State’s “supposedly vital interest” in protecting young people from severe criminal liability and punishment “unprohibited.” *Reed v Town of Gilbert*, 576 U.S. 155, 172 (2015). The challenge is especially strong for those under 21, because the neuroscience equating the brain development of juveniles and the brain of “late adolescents” is even more established and has been adopted by high courts in other states to ban, either categorically or presumptively, life without parole sentences for those who committed their offenses when under 21.
- The remedy for this underinclusiveness is to extend eligibility under CPL § 710.20(1) to individuals “charged with a crime alleged to have been committed when he was at least sixteen years old and less than twenty-six years old. . . . “
- Accordingly, the court must find your 19–25-year-old client to be a “youth” within the definition of CPL § 720.20(1) and, if otherwise meeting eligibility requirements, eligible for YO adjudication by the court.

*Note that the Youth Justice and Opportunity Act, currently introduced in the Senate and Assembly, would provide this remedy statutorily. However, pending passage of that Act (and Gov. Hochul signing it), this constitutional challenge provides a tool for trying to get broader YO access.*

#### **Practice Pointers:**

- **Per advice from the Immigrant Defense Project, this motion, if successful, may not (and probably won't) benefit non-citizen clients who are over 19 in terms of their immigration issues (i.e., the adjudication will still stand as a “conviction” for immigration purposes), so counsel representing such clients should be aware of this before litigating. You can consult with Ryan Muennich, at [ryan@immdefense.org](mailto:ryan@immdefense.org) if you have questions.**
- *You can use this argument to animate plea bargaining. In all cases, we advise submitting this motion well before sentencing so the court has enough information to decide whether your client is, in fact, an eligible youth before sentencing. Although we don't expect that*

*a trial court will grant your novel application, this is an issue that should be pressed. We post-conviction practitioners would be thrilled to pursue it on appeal.*

- *As noted above, while we frame the challenge to apply to emergent adults under 26 to allow for the broadest reach, the neuroscience on which the challenge depends is particularly strong with respect to late adolescents (those under 21). **If your client is older than 19 but under 21, please adapt your motion accordingly and use the suggested alternative paragraph in the “Science” section of the memorandum accordingly.***<sup>2</sup>

**\*\*\* GOOD LUCK!!\*\*\***

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<sup>2</sup> When the class is referred to as under 21 or individuals “between 19 and 20,” it means late adolescents aged 19 through 20, up to their 21<sup>st</sup> birthday.