Trial Manual for Defense Attorneys in Juvenile Delinquency Cases

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2014 Edition

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Chapter 1

The Nature, Purpose, and Structure of the Manual

§ 1.01 THE NATURE AND PURPOSE OF THE MANUAL

This MANUAL is a how-to-do-it guidebook for handling juvenile court cases from beginning to end. It differs from most books about juvenile court, which typically begin with an examination of the history and philosophy of juvenile court and thereafter focus (exclusively or predominantly) upon the aspects of juvenile practice that differ from adult criminal procedure. The MANUAL pretermits any discussion of purely academic, historical, or philosophical matters and deals exclusively with the tasks, skills, rules of law, and issues of strategic judgment involved in representing clients in juvenile court. Rather than ignoring those aspects of juvenile proceedings that mirror adult criminal practice, the MANUAL examines them at every stage.

This MANUAL is, quite consciously, a manual for defense attorneys. While the MANUAL contains some material that may also be useful to other players in the system, it does not purport to describe or analyze subjects falling outside the purview of a defense attorney's obligations to his or her client.

§ 1.02 THE STRUCTURE OF THE MANUAL

The MANUAL proceeds, more or less, according to the chronology of an individual delinquency case. Thus the chapters begin with the earliest stages at which defense counsel enters the case, then advance through the pretrial stages and trial, and conclude with disposition and post-dispositional remedies.

The goal of making this MANUAL easy to use during court hearings has led to the authors' abandonment of various conventions of manual-writing. The MANUAL deals with topics as they become relevant at each particular stage of a proceeding even when this format requires dispersing material with related subject matters among different chapters. For example, the topic of suppression motions is covered in five different chapters: a section on drafting these motions is found in the chapter on motions that need to be filed shortly after Initial Hearing; later there comes a chapter on techniques for handling suppression hearings, and then three substantive chapters covering, respectively, motions to suppress tangible evidence, confessions, and identifications. The latter chapters summarize the voluminous federal and state law on their respective subjects.

Citation form in the MANUAL has also been adapted to the realities of trial practice. Thus, for example, a short-form citation to a case will only refer back to prior citations within the same subsection so that attorneys consulting a chapter in the midst of a trial or hearing will not need to waste time in searching for the full citation in prior sections.

§ 1.03 CAVEAT — THE UNIQUENESS OF CASES

Although this MANUAL attempts to summarize the practices and procedures that should be followed in an ordinary juvenile court case, no case is "ordinary" in any but a highly artificial sense. Every case is intensely personal to the accused. Every accused is a complex and unique individual. Every prosecution of an accused is unique in facts and in law and makes unique demands on the defense attorney. Every defense attorney has his or her own style. There is no such thing as conducting a defense generally. What is right in one case is wrong in another. The most important attribute of the good defense lawyer is perceptive selectivity — the ability to determine the precise requirements of each case and to respond to them in a highly specific manner.

No book can capture or instill that quality. All that is attempted here is a listing of available options for the lawyer, an identification of the major strategic considerations that may affect choice among the options, an introductory description of the prevailing legal principles and potential legal arguments, procedures, and practical techniques that counsel may encounter or may wish to employ, some warnings about common problems, and some suggestions of ways to avoid them or to cope with them. Counsel will have to cull all of these things according to his or her own lights and the needs of his or her particular case in order to make the ultimate, lonely decision what to actually do.

§ 1.04 A SECOND CAVEAT — THE NEED FOR A PRO

The goal of this MANUAL is to dispel somewhat the edge of uneasiness that the lawyer with little or no juvenile court experience naturally feels when s/he is retained or appointed to represent a juvenile client. Having even a very general notion of what is coming and what can be done about it rightly inspires some confidence, and confidence can be very important in dealing with the client. However, as in all matters of grave professional responsibility, the lawyer must be careful not to let confidence get out of hand. Juvenile court practice *is* a specialty, and there is a lot at stake. It remains vital for the lawyer with relatively little juvenile court experience to recognize when s/he is getting into waters deeper than s/he can swim. In matters of complexity or difficulty, counsel should consider the practicability of consulting (formally or informally and on a limited or extended basis), associating with, or withdrawing in favor of, a more experienced juvenile court practitioner.

Chapter 2

Introduction to Delinquency Practice: The Role of Defense Counsel

§ 2.01 OVERVIEW OF THE CHRONOLOGY OF A DELINQUENCY CASE

§ 2.01(a) First Stage: Representation of Clients Prior to the Initial Hearing

Although defense attorneys normally begin their representation of a client at the child's first court appearance — which is commonly called the "Initial Hearing" — there are some instances in which a defense attorney may become involved in a delinquency case prior to the child's first appearance in court.

The attorney may be telephoned by a parent or other relative of a child, who reports that the child was just arrested and is presently at the police station. This scenario, which is described and analyzed in §§ 3.13-3.25 *infra,* requires prompt action on the attorney's part. Counsel will need to go to the police station immediately to protect the client's rights and, most important, to prevent the client from making incriminating statements. Thereafter, if the police refuse to release the child and send him or her to a juvenile detention facility pending Initial Hearing, counsel may be able to persuade the facility administrator to exercise his or her discretion to release the child. See § 3.24 *infra.*

If the attorney is contacted by the child or his or her parent at the time of arrest or any time prior to the child's first appearance in court, counsel also may be able to play a role in the probation intake process. See §§ 3.26-3.28 *infra.* This process can be vital, since in many jurisdictions, the Probation Department has the discretion to dismiss, or at least to recommend dismissal of, cases other than certain statutorily enumerated felonies. And even when the Probation Department does not play any role in the decision to prosecute, the probation interview can be crucial because the information elicited at that interview will shape the Probation Department's recommendation about whether the child should be released or detained pending trial.

Another fairly common scenario involving representation prior to Initial Hearing begins with a telephone call to counsel from a child or his or her relative, saying that the child is "wanted" by the police. The complex considerations involved in advising a client in this situation are described in §§ 3.29-3.33 *infra.*

§ 2.01(b) The Initial Hearing

The Initial Hearing normally consists of: appointment of counsel in those cases in which the child and his or her parent or guardian are financially eligible for court-appointed counsel; the juvenile respondent's arraignment on the Petition; a judicial determination of whether the respondent will be detained or released pending trial; scheduling of a trial date; and, in cases in

which the court orders detention, a judicial determination of whether there is probable cause to believe that the respondent committed the charged offense. The precise nature of these court functions and the steps that counsel must take to safeguard the respondent's interests are discussed in Chapter 4.

In many jurisdictions the judge at the Initial Hearing has the power to order a mental examination if the respondent appears to be mentally ill or mentally retarded. The strategic considerations involved in deciding whether or not to oppose such an examination are discussed in Chapter 12, which covers the range of issues that arise when counsel represents a client who is mentally ill or mentally retarded.

§ 2.01(c) Preparation of the Case for Trial

Most of the chapters in Part I are devoted to the complex process of preparing a case for trial. This process of trial preparation will need to be undertaken in every delinquency case. Even though many cases will eventually result in a guilty plea, counsel will be unable to advise the client about the wisdom of pleading guilty until counsel has completed the investigation, discovery, and motions practice necessary to support an accurate assessment of the chances of winning at trial.

Because the tasks involved in trial preparation are scattered among so many chapters, a summary of them is provided in Chapter 6. This chapter is designed as a roadmap of the strategic decisions that counsel must make and the steps that s/he must take immediately after completing the Initial Hearing. Chapter 6 also describes the advance preparation for disposition that needs to be begun at this stage. One specific aspect of trial preparation — the preparation involved when representing a client who is mentally ill or mentally retarded — is treated separately in Chapter 12.

§ 2.01(d) The Alternative Courses of Action That Can Remove a Case from the Trial Calendar

Various events can derail a case from progressing to trial. First of all, there are a number of ways in which the case may be terminated favorably to the respondent. The Petition may be withdrawn by the prosecutor because further police investigation has shown that the case lacks merit, or because of witness problems, or for a host of other reasons. The case may be dismissed by the court in response to a defense motion, such as a motion to dismiss the Petition for legal insufficiency (see Chapter 17), a motion to dismiss for want of prosecution (see § 15.03 *infra*), or a motion to dismiss for social reasons (see Chapter 19). Or, in many jurisdictions, the case may be diverted out of the system by means of a formal system of diversion that suspends the case for a designated period of time (usually six months) and, upon the respondent's completion of that probationary period without being rearrested or violating other specified conditions, results in dismissal of the case.

Another event that can derail the case from progressing to trial is a proceeding instituted by the State to transfer or waive the client to adult court. If the prosecution succeeds in this venture, the case will be transferred to adult court, and the juvenile case will end. Since the sentences that can be meted out in adult court are greater than those in juvenile court, counsel will almost invariably oppose transfer. A fuller description of the transfer process and arguments that can be made in opposition to transfer are contained in Chapter 13.

The final event that can prevent a case from reaching trial is a guilty plea. After completing most of his or her investigation and trial preparation, counsel will be in a position to advise the client whether the improbability of winning a trial militates in favor of a guilty plea, as explained in Chapter 14. Chapter 14 also describes additional considerations involved in assessing the advisability of a guilty plea, tactics for plea negotiations with the prosecutor, techniques for counseling the client with respect to a plea, and the procedures involved in the actual entry of the plea.

§ 2.01(e) Filing of Motions and the Motions Hearing

In most jurisdictions the local statute or court rule sets a deadline for filing of defense motions. That deadline usually is the fifteenth or thirtieth day after the client's arraignment at Initial Hearing. Chapter 7 lists the motions that counsel should consider filing and discusses strategic considerations in drafting the motions.

The hearing on the motions is usually held on the day of trial, immediately before the actual start of trial. In some jurisdictions the motions hearing is held a period of days or even weeks prior to trial. In still others, the motions hearing takes place in the midst of trial, when the issue that is the subject of the motion arises.

A motions hearing can consist of either oral argument by the attorneys on the applicable law or a full-scale evidentiary hearing followed by legal arguments. The non-evidentiary form of motions hearing is described in Chapter 16, along with suggestions of techniques for arguing motions. Thereafter, Chapters 17-21 cover the substantive law involved in the various types of motions that may give rise to a non-evidentiary motions hearing: motions to dismiss the charging paper for legal insufficiency, lack of jurisdiction, double jeopardy, and other basic defects (Chapter 17); motions for severance of counts or co-respondents (Chapter 18); motions to dismiss for social reasons (Chapter 19); motions for a change of venue or recusal of the judge (Chapter 20); and motions relating to the jury (Chapter 21). Four other types of non-evidentiary motions are integrated in larger chapters: motions for discovery are covered in Chapter 9, which examines both informal and formal discovery processes; while defense motions for a continuance, motions to dismiss for want of prosecution when the prosecutor seeks a continuance, and motions to dismiss on speedy trial grounds are all discussed in Chapter 15, dealing with the timing of pretrial proceedings and trial.

Motions to suppress evidence ordinarily generate evidentiary hearings. The complex

tactical considerations involved in preparing for and handling a suppression hearing are described in Chapter 22. The substantive law of suppression then is taken up in Chapters 23-25: motions to suppress tangible evidence (Chapter 23); motions to suppress confessions and admissions (Chapter 24); and motions to suppress identification testimony (Chapter 25).

As explained in Chapter 26, pretrial rulings denying a defense motion or resolving some other issue unfavorably to the defense cannot be appealed interlocutorily. Chapter 26 describes the prerogative writs of mandamus and prohibition, which may be employed in certain circumstances to gain interlocutory review of pretrial rulings.

§ 2.01(f) The Trial

The timing of the trial and such timing-related matters as continuances and speedy trial motions are covered in Chapter 15. Chapter 27 describes the general characteristics of a trial and explores the differences in defense tactics in bench and jury trials.

The trial process has been subdivided, for easy reference, into ten subparts: the preliminary conference with the judge at the commencement of the trial, which may involve a variety of evidentiary and procedural matters (§§ 27.10-27.13); selection of the jury, when jury trial is available and has been elected (Chapter 28); opening statements (Chapter 29); an overview of the evidentiary issues that are likely to arise at trial (Chapter 30); tactics and techniques for handling prosecution witnesses (Chapter 31); the motion for acquittal (or "Prima Facie Motion"), which defense counsel must make at the conclusion of the prosecution's case-in-chief (Chapter 32); strategic considerations involved in, and techniques for, presenting the case for the defense (Chapter 33); the law of objections and motions for mistrials, along with the tactical considerations involved in deciding whether to object and/or move for a mistrial (Chapter 34); the renewed motion for acquittal and closing argument at the end of a bench trial (Chapter 35); and the concluding stages of a jury trial, including the renewed motion for acquittal, jury instructions, jury arguments, and the jury's deliberations and verdict (Chapter 36).

Chapter 37 takes up the subject of motions for a new trial, which, in some jurisdictions, can be made only during the period between the trial and disposition.

§ 2.01(g) Disposition

More than any other stage of the process, the dispositional phase of a juvenile case differs markedly from its adult criminal counterpart. The express goal of juvenile dispositions is rehabilitation of the offender, and dispositional hearings therefore focus upon the needs of the child rather than the nature of the crime. As a result, psychological and social-work assessments of the juvenile's potential for rehabilitation can spell the difference between probation and incarceration. Accordingly, in cases in which incarceration appears at the outset to be a significant possibility, counsel will want to begin gathering social information about the client as early as possible, enlisting the aid of mental health experts and social workers when needed. In

these cases, counsel should also explore the wide variety of community-based and residential programs that are available to juvenile offenders in most jurisdictions. Chapter 38 describes the range of sentencing alternatives, the steps that counsel should take in preparing for a dispositional hearing, and strategies for conducting the hearing.

§ 2.01(h) Appeal and Post-Disposition Proceedings

As explained in Chapter 39, appeals and post-disposition proceedings have less impact on a juvenile's liberty than they do in adult criminal cases, since the comparatively short length of a juvenile sentence means that a sentence will have been completely served by the time appellate or collateral relief is ordered. However, appeals and post-disposition proceedings nevertheless should be pursued in juvenile cases for the sake of expunging the conviction and avoiding whatever collateral consequences may flow from the existence of a juvenile record. Chapter 39 describes the appellate and collateral remedies available in most jurisdictions.

§ 2.02 JUVENILE COURT TERMINOLOGY

Most juvenile courts subscribe to a special vocabulary that has been developed for delinquency cases as a way of emphasizing rhetorically that a delinquency offense is not a "crime" The charging paper is a "Petition" that does not "charge" "crimes" but rather "alleges" that the child "committed acts, which, if committed by an adult, would be crimes." The accused is not a "defendant" but a "respondent." "Guilty pleas" are "admissions." "Sentencing" is "disposition," the term of incarceration to which the juvenile is sentenced is usually called either "placement" or "commitment," and the place of confinement is denominated a "receiving home," "youth center," "industrial school," "detention facility," or "placement facility."

As the Supreme Court recognized in *In re Gault,* 387 U.S. 1 (1967), the "verbiage, . . . cliché [and] . . . 'rhetoric of the juvenile court'" (*id.* at 29-30) has served to obfuscate the actual nature and ramifications of the actions of the juvenile court. "The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time." *Id.* at 27.

This MANUAL will use much of the customary juvenile court terminology, notwithstanding its obfuscating nature, since defense attorneys will have to accede to the protocol expected by the juvenile court judges before whom they appear. Frequently, however, the MANUAL will use an adult court term because the juvenile term is too distorting or because the juvenile term is too imprecise (such as the phrase "admission," which is normally used in juvenile court to refer to both confessions to the police and guilty pleas).

In addition to the virtually universal juvenile court vocabulary, several jurisdictions have developed their own unique terms. For example, depending upon the jurisdiction, pretrial detention may be called "remand" or "stepback"; the probation officer who appears at the Initial

Hearing may be called the "Court Liaison Officer" or "Intake Probation Officer"; the agency that oversees detention facilities may be called the "Department of Human Services," "Social Services Administration," "Department of Juvenile Justice," or "Division for Youth." Since it is impossible to cover all of these idiosyncrasies, this MANUAL will use only those terms that have become an established part of the universal juvenile court vocabulary, leaving it to the reader to uncover local variations.

§ 2.03 THE ROLE OF DEFENSE COUNSEL IN A DELINQUENCY CASE

Until the Supreme Court's decision in *In re Gault,* 387 U.S. 1 (1967), it was widely believed that delinquency proceedings should be informal, with "[t]he rules of criminal procedure . . . altogether inapplicable" (*id.* at 15) and the child deprived of "the procedural rights available to his elders" (*id.* at 17). Under that model, defense attorneys either were absent altogether from the courtroom (*see id.* at 35-36) or were expected to serve the "best interests of the child" by providing the court with a full picture of the child's social problems, even if that meant assisting in obtaining the conviction and incarceration of the child.

In *Gault,* the Court recognized that "[f]ailure to observe the fundamental requirements of due process has resulted in instances . . . of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." 387 U.S. at 19-20. Declaring that "the condition of being a [child] . . . does not justify a kangaroo court" (*id.* at 28), the *Gault* opinion spelled out a panoply of due process protections in delinquency proceedings, including the right to counsel. *See id.* at 34-42. In doing so, the Court recognized that the proper role of defense counsel in a delinquency proceeding is the same as in an adult criminal case: to assist the client in "cop[ing] with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the client] . . . has a defense and to prepare and submit it." *Id.* at 36 (footnotes omitted). *See also, e.g.*, *In re Christopher T.*, 129 Md. App. 28, 34, 740 A.2d 69, 72 (1999) ("a juvenile's right to counsel in a delinquency proceeding is commensurate with the right to counsel in a criminal case"); *People v. Austin M.*, 2012 IL 111194, 975 N.E.2d 22, 40, 42, 363 Ill. Dec. 220, 238, 243 (2012) ("the type of 'counsel' which due process and our Juvenile Court Act require to be afforded juveniles in delinquency proceedings is that of *defense counsel*, that is, counsel which can only be provided by an attorney whose singular loyalty is to the defense of the juvenile"; "When counsel attempts to fulfill the role of GAL [guardian *ad item*] as well as defense counsel, the risk that the minor's constitutional and statutory right to counsel will be diluted, if not denied altogether, is too great. . . .We conclude, therefore, that the interests of justice are best served by finding a *per se* conflict when minor's counsel in a delinquency proceeding simultaneously functions as both defense counsel and guardian *ad litem*.").

The canons of ethical conduct explicitly incorporate this conception of defense counsel's role in juvenile delinquency cases. The Model Rules of Professional Conduct require that attorneys "maintain a normal client-lawyer relationship" with clients who are minors, AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14(a) (2014), even

"children as young as five or six years of age, and certainly those of ten or twelve." *Id.* Comment to Rule 1.14(a). As long as the client is not so incompetent as to be unable to "adequately act in the client's own interest," *id.,* Rule 1.14(b), s/he must be accorded the prerogative of making "decisions concerning the objectives of representation." *Id.*, Rule 1.2(a). If counsel reasonably believes that the client's young age or another factor such as mental impairment so severely "diminish[es]" the client's "capacity to make adequately considered decisions in connection with the representation . . . [that] a normal client-lawyer relationship with the client" cannot be maintained and if counsel furthermore "reasonably believes" that the client "is at risk of substantial physical, financial or other harm unless action is taken and [that the client] cannot adequately act in the client's own interest," then counsel may take "reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." *Id*., Rule 1.14(a), (b). *See also* INSTITUTE OF JUDICIAL ADMINISTRATION – AMERICAN BAR ASSOCIATION JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Standard 6.7 & Commentary (1980). "In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician." AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Comment to Rule 1.14. *See also* Marty Beyer, *What's Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel*, 58 GUILD PRACTITIONER 112 (2001); Melinda G. Schmidt, N. Dickon Reppucci & Jennifer L. Woodard, *Effectiveness of Participation as a Defendant: The Attorney-Client Relationship*, 21 BEHAV. SCI. & L. 175 (2003). "In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections." AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Comment to Rule 1.14. *See also* ROBIN WALKER STERLING, ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT (National Juvenile Defender Center 2009); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 255-57, 270-80 (2005); Patricia Puritz & Robin Walker Sterling, *The Role of Defense Counsel in Delinquency Court*, 25 CRIM. JUST. 16 (Spring 2010).

In juvenile court, as in adult court, "counsel must take all reasonable lawful means to attain the objectives of the client." *Nix v. Whiteside,* 475 U.S. 157, 166 (1986). *See also Jones v. Barnes,* 463 U.S. 745, 751 (1983) ("[i]t is . . . recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

Some commentators have argued that defense attorneys should view the "client" in delinquency cases as being the parent of the allegedly delinquent child. *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 118-29 (1979). The untenability of this position is evident when one considers that the prerogative of the "client" to define the "objectives of representation" (*see* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, *supra,* Rule 1.2(a)) includes such crucial judgments as the decision to plead guilty, accepting an adjudication of delinquency without putting the prosecution to its proof. The courts have recognized that the rights of a child which are affected by these decisions are personal to him or her and cannot be waived by his or her parent or guardian. *See, e.g., Smith v. State,* 484 So. 2d 560, 561 (Ala. Crim. App. 1986); *In re Christopher T.*, 129 Md. App. at 47, 740 A.2d at 79; *In re S.W.T.,* 277 N.W.2d 507, 512-13 (Minn. 1979); *In the Matter of Butts*, 157 N.C. App. 609, 614, 582 S.E.2d 279, 283 (2003). Accordingly, it is the child, and not the parent or guardian, who is the "client," *see In re Henderson,* 199 N.W.2d 111, 115 (Iowa 1972); Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children,* 59 N.Y.U. L. REV. 76, 88-90 (1984); Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836 (2006), except perhaps in those rare cases in which the child is incompetent and the parent or guardian has been appointed guardian *ad litem* in the delinquency proceedings, *see* § 12.19(b) *infra. See also* IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, *supra,* Standards 6.1, 6.3, 6.5 & Commentary.

Chapter 3

Representing Clients Before Initial Hearing; Steps To Take if a Client Is at the Police Station or Is "Wanted" by the Police

Part A. Introduction

§ 3.01 STAGES AT WHICH THE LAWYER MAY ENTER THE CASE

A defense attorney most commonly enters a juvenile delinquency case at the Initial Hearing. If the client is indigent, an attorney is ordinarily appointed by the court at Initial Hearing. If the client's parent can afford to retain counsel, the parent and client most often retain the attorney immediately prior to the Initial Hearing, and the lawyer then enters his or her appearance at the hearing. The role of an attorney at the Initial Hearing and the client's right to counsel at that hearing are discussed in Chapter 4, along with a description of the strategic considerations that should inform counsel's actions in preparing for and conducting the hearing.

Occasionally, however, an attorney enters a case prior to Initial Hearing. The most common scenarios of this type are (i) the attorney receives a phone call from a parent or other relative of the child, stating that the child was just arrested and is presently on the way to the police station or already at the stationhouse; (ii) the attorney is contacted by the child or parent or other relative after arrest, but prior to the probation intake process, and represents the child in the Probation Department's intake process; and (iii) the attorney receives a phone call from a client who is "wanted" by the police for a crime for which s/he has not yet been arrested, for failing to appear for a court hearing, or for escaping from a juvenile detention facility.

This chapter takes up each of these scenarios in turn, describing the steps that counsel must take in each situation to protect his or her client's rights. As a predicate for that discussion, Part B of this chapter presents an overview of the procedures that police departments and probation offices generally follow from the time of arrest until the Initial Hearing.

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§ 3.02 GENERAL APPROACH IN ENTERING A CASE: THE NEED TO MOVE QUICKLY

In each of the scenarios examined in this chapter, counsel will need to move quickly. For example, if the client is at the police station, a delay on counsel's part may result in the client's succumbing to police pressure and confessing before counsel can reach the station and avert the confession. In these situations, as in all stages of the case, counsel's preparation and research should be as thorough as practicable. Knowledge of the individual case and client and of the local procedures and functionaries can spell the difference between wise choices of action and foolish ones. But at the outset of a juvenile case particularly, a trade-off does exist between the virtues of time-consuming preparation and the importance of getting started quickly to prevent the client's interests from being irreparably damaged by fast-breaking events that will not wait for counsel to

make a consummately prepared appearance.

Part B. Overview of the Initial Stages of the Juvenile Justice Process

§ 3.03 ARREST

The statutory standards for arresting a child (often termed "taking the child into custody") for a delinquency offense usually parallel the standards for arresting adult criminal defendants. The arrest can be either: (a) pursuant to an arrest warrant (usually called a "custody order") issued by a judge or magistrate on the basis of an affidavit establishing probable cause (often called "reasonable cause" in juvenile statutes) to believe that the child committed a delinquent offense; or (b) without a warrant, on the officer's own determination that s/he possesses facts making out probable cause (or "reasonable cause") to believe that an offense was committed and that this particular juvenile is the perpetrator (or aider and abettor in the perpetration) of the offense. As a practical matter, the courts rarely deal with arrest warrants (or "custody orders") in juvenile cases because the vast majority of juveniles are arrested at or near the scene of a crime shortly after its commission.

The arrest invariably is followed by a "search incident to arrest." See § 23.08 *infra.* Frequently, the police also will conduct an on-the-scene identification procedure, known as a "show-up," in which the respondent is shown to the complainant and any other eyewitnesses for identification. See § 25.03(a) *infra.* Thereafter, the police usually take the alleged delinquent to the police station for "booking," interrogation, and possibly additional identification procedures. See §§ 3.04, 3.05, 3.08, 3.09 *infra.*

§ 3.04 POLICE PRACTICES FOLLOWING ARREST — LOGGING-IN

Following an arrest, an alleged delinquent is generally taken immediately to the police station (or divisional or precinct headquarters) in the precinct in which the arrest took place. The respondent's arrival at the station is ordinarily, but not invariably, noted in a police log for juvenile cases. (This is usually maintained separately from the adult log, in order to conform to local statutory requirements of confidentiality for juveniles.) In some jurisdictions the police treat logging-in as part of the "booking" or "slating" process described in § 3.08 *infra.* The juvenile log normally contains a dozen or so respondents to the page, and it records not merely the name and the time of logging but also the time and the place of arrest, some identifying characteristics of the respondent (such as sex, race, date of birth, and parent's name), and the charge. Some police departments conceive logging-in as a recording routine unrelated to "booking" and maintain two books — the log and the blotter. Under this latter practice all juveniles brought to the station may be logged in on arrival, and those against whom it is decided to lodge charges may later be noted in the arrest book or "blotter." Or children against whom it is clear that charges will be lodged may be noted immediately on the blotter, whereas children brought in "for investigation" or "on suspicion" may be noted in the log (sometimes called the "small book").

In any event, police generally feel no obligation to make an immediate log or blotter entry when there are investigative reasons for not doing so. For example, the police may refrain from recording the respondent's name in the log in very serious cases in which the police wish to interrogate the respondent for a lengthy time, free of any interference from parents or lawyers.

In addition to recording the respondent's name in a logbook showing either arrivals at the station or arrests, the police in many jurisdictions also will record the respondent's name and any personal property taken from the respondent in a property log. Unlike property seized as proceeds or evidence of the crime (and held by the police or the prosecution until trial), this personal property can be retrieved at any time by the respondent, his or her parent, or the attorney (with proper authorization). Frequently, this personal property will include a jacket, bag, or other items that counsel will want to retrieve in order to substantiate a defense of misidentification.

§ 3.05 INTERROGATION AND OTHER INVESTIGATIVE PROCEDURES

Whatever the logging-in practice, the police usually subject the respondent to some interrogation subsequent to arrival at the station and prior to the full "booking" process. If the arrest is a misdemeanor or minor felony, the questioning will be conducted by an ordinary patrol officer (usually the arresting officer). In some jurisdictions the booking and questioning of juveniles in minor cases is handled by specially designated "Youth Services Division" police officers. In serious felony cases, particularly if the case has assumed some notoriety, the interrogation will be conducted (either in whole or in part) by detectives of the special squad (whether homicide, sex, robbery, burglary, narcotics, or vice) that investigated the case; in jurisdictions that possess Youth Services Divisions, the youth officer may sit in on the detective's interrogation or may receive the juvenile for booking and further questioning after the detectives have completed their interrogation. If special squads of detectives are involved in the interrogation, frequently the interrogation will be held in the central headquarters of the special squad; after completion of that interrogation, the juvenile may be transported to the precinct of arrest (or, in some jurisdictions, to the headquarters of the Youth Services Division) for booking and possibly further questioning.

Regardless of the nature or title of the interrogating officer, the purposes of the interrogation are always the same: to secure the respondent's admission or confession to the offense for which s/he was arrested, the respondent's implication of other persons involved in the offense, and the respondent's admission or confession of other "uncleared" or "open" offenses that s/he may have committed. In particular cases, such as those involving the arrest of persons known or believed to be youth-gang members, the police may also seek, through interrogation, to learn general information about recent developments in the neighborhood or the gang or about its members, which information they believe to be useful for intelligence or crime control.

In addition to interrogation a respondent may be subjected to other investigative procedures before or immediately after booking. S/he may be exhibited to witnesses in a lineup or show-up. S/he may be taken to the scene of the crime to "reenact" or demonstrate what

happened. S/he may be taken home or elsewhere to assist the police in finding secreted or discarded weapons, loot, or evidence; and in this connection, s/he may be asked to give consent to warrantless police searches that, without this consent, would require a search warrant. Specimens of the respondent's hair or blood, swabs, washes, or body scrapings may be taken for laboratory analysis. Each of these police actions may develop incriminating evidence. A respondent may have rights not to be subjected to some of these procedures altogether and not to be subjected to others in the absence of his or her attorney. But these rights can be waived — and they often will be waived unless counsel takes adequate steps to insure their protection.

§ 3.06 POLICE NOTIFICATION OF THE RESPONDENT'S PARENT(S)

In virtually all jurisdictions, statutes or police regulations require that the police notify a juvenile's parent that his or her son or daughter was arrested. In some jurisdictions the requirement is a mere formality, and no sanctions attach to the police officers' failure to notify the parent. In some jurisdictions, however, statutes or court decisions specify that the police department's failure to make serious, good faith efforts to notify the parent *and* to arrange the parent's presence during interrogation will invalidate any resulting confessions. See § 24.14 *infra.*

Statutory notification requirements of this sort, which police generally follow, compensate in part for police officers' invariable refusal to grant juveniles any rights of communication after arrest. Theoretically, any arrested person — whether adult or juvenile — has the right under *Miranda v. Arizona,* 384 U.S. 436 (1966), to make contact with the outside world, in order to obtain counsel prior to undergoing interrogation. *Minnick v. Mississippi*, 498 U.S. 146, 152-54 (1990). *Miranda* expressly requires that any in-custody interrogation be preceded by several warnings including the warning that the suspect has the right to the presence of counsel, and, if indigent, the right to court-appointed counsel, during interrogation. See §§ 24.07, 24.09 *infra.* "[A] person taken into custody [must] be advised immediately" of these rights, *Doyle v. Ohio*, 426 U.S. 610, 617 (1976) (dictum); *see, e.g.*, *Stansbury v. California*, 511 U.S. 318 (1994); *Berkemer v. McCarty*, 468 U.S. 420 (1984), and "the police [must] respect the accused's decision to exercise the rights outlined in the warnings." *Moran v. Burbine,* 475 U.S. 412, 420 (1986) (dictum); *see, e.g.*, *Missouri v. Seibert*, 542 U.S. 600, 608, 611-12 (2004) (plurality opinion); *id*. at 620-22 (Justice Kennedy, concurring); *Smith v. Illinois,* 469 U.S. 91 (1984) (per curiam). As a practical matter, however, police rarely provide criminal defendants with the opportunity to make a phone call prior to interrogation, and it is even rarer that an officer makes that option available to a juvenile respondent. In some cases in which the police have failed to give the respondent an opportunity to contact counsel, it may be possible to argue that any resulting confession or identification testimony must be suppressed under federal or state constitutional doctrines or under state statutes requiring that the police afford an arrestee an opportunity to make a telephone call to an attorney. *See, e.g.*, *Commonwealth v. Jones*, 362 Mass. 497, 502-04, 287 N.E.2d 599, 603-04 (1972) (explained in *Commonwealth v. Jackson*, 447 Mass. 603, 615, 855 N.E.2d 1097, 1106 (2006)) (intentional police denial of an arrestee's "statutory right to use a telephone" can result in suppression of "an incustody [sic] inculpatory statement or

corporeal identification"); *State v. Beaupre*, 123 N.H. 155, 159, 459 A.2d 233, 236 (1983). (In some States, the juvenile code contains an express guarantee of a juvenile arrestee's right to make a telephone call. *See, e.g.*, CAL. WELF. & INST. CODE § 627(b) (2014); NEB. REV. STAT. § 43-248.01 (2014). In those States that have an adult criminal code provision of this sort but no parallel provision in the juvenile code, the adult criminal statute often will be worded broadly enough to apply to juvenile arrestees as well.)

§ 3.07 POLICE EXERCISE OF DISCRETION WHETHER TO CHARGE THE RESPONDENT

State statutes and police regulations generally furnish the police with broad discretion to "divert" juvenile cases from the system by simply dropping the charges with a warning or, in some jurisdictions, by referring the child to a local social services agency or community service program. Statistical studies indicate that substantial numbers of juvenile cases (often as many as 50 per cent of all arrests) are resolved in this manner.

Studies of the nature and effects of this informal diversion process suggest that the primary factors influencing the charging decision include: the seriousness of the offense (and, in many jurisdictions, statutes or police regulations wholly eliminate police discretion to drop charges of certain enumerated felonies); the age of the child (with children of ages 12 and under being diverted on a regular basis); the child's prior record of convictions, charges, and prior contacts with the police; the race, gender, and socio-economic status of the child (with indigent African American and Hispanic males facing the highest likelihood of referral to court); the demeanor of the child (with youths who seem respectful to the officers and fearful of sanctions viewed as "salvageable" and therefore diverted from the system); the comments and attitude of the parents upon being informed of the child's arrest (with the officer assessing whether the parents are likely to appropriately punish the child and control his or her misbehavior in the future); and, finally, the individual officer's personal feelings about the efficacy of the juvenile justice system and the likelihood that a minor offender will derive any benefits from court intervention.

In most jurisdictions, police departments maintain some sort of record of "contacts" with respondents in cases that are subsequently dropped or diverted. These records are consulted when the police wish to determine whether a newly arrested child is truly a first offender and "worthy" of diversion.

§ 3.08 BOOKING OR SLATING

Following the period of interrogation and the decision of the police to formally charge the respondent with an offense, the charges are noted in police records. This is the booking or slating process, which involves making a record of the name of the respondent and of some identifying information about him or her (usually gender, race, date of birth, address), the time and place of the arrest, and the offenses charged. These items are recorded in summary form on a police

blotter and, in more detail, on arrest cards, on file forms, or on both. In conformance with local statutory requirements of confidentiality in juvenile cases, these records usually are kept separate from records concerning adult criminal defendants.

The booking or slating process also usually includes the police officer's filling out detailed and sometimes extended printed forms. The forms commonly include some type of arrest report, calling for the respondent's name, nickname, age, date of birth, identifying characteristics (gender, race, height, weight), address and phone number, parents' addresses and phone numbers, the name and general location of the respondent's school, and the respondent's current grade in school. These arrest reports often require information concerning the time, date, and location of the offense; the time, date and location of the arrest; whether any other juvenile respondents or adult defendants were arrested for the same offense; whether any force was employed in effecting the arrest; whether the respondent confessed to the offense and possibly also what the respondent said. In addition to these arrest reports, the police frequently also prepare a supplement to the original "event" or "incident" or "complaint" report that was filed at the time that the crime was first reported. This supplement usually recounts the details of the arrest, possibly the content of any confessions and the results of any identification procedures, and a statement of whether the arrest "closes" the case or whether there are still unarrested perpetrators being sought. Finally, in particular cases, the police may fill out additional forms: for example, firearms cases require special forms listing serial numbers and descriptions of guns and bullets; narcotics cases require detailed information about the nature and weight of the drugs and the property numbers assigned the drugs, as well as a "buy report" by the undercover officer; eyewitness identifications may require special cards or forms listing the description originally given and the words spoken by the witness in identifying or failing to identify the respondent.

The nature of the forms and the precise procedures followed by the police vary greatly among jurisdictions. It is important that counsel become familiar with both the types of forms used and the information contained upon those forms, in order to subpoena documents that can prove invaluable at trial. See §§ 8.16, 8.17, 8.19(a) *infra.*

§ 3.09 FINGERPRINTING AND PHOTOGRAPHING

Two common components of police booking procedures in adult criminal cases are the fingerprinting and photographing of the defendant, which enable the police to maintain fingerprint records and mug shots for use in later investigations. As a result of the juvenile court's philosophy of confidentiality, statutes in approximately half of the States limit the power of the police to fingerprint or photograph juvenile respondents after arrest. The scope of that limitation varies widely. In some States the police must obtain the consent of a juvenile court judge in order to fingerprint or photograph a juvenile. In other States the police are empowered to fingerprint and photograph juveniles, but only in serious felonies designated in the statute and/or only if the juvenile is above a certain age.

In a few States there are restrictions on police practices of filing and disseminating

fingerprint records and mug shots. These statutes generally require that the police keep juvenile fingerprint records and photographs separate from adult records, and withhold the juvenile records from the adult criminal files routinely forwarded to the F.B.I.

In several States the statutes also create mechanisms that attorneys can and should employ to compel destruction of juveniles' fingerprint records and photographs in the event of a favorable disposition of the case or after the juvenile has passed a certain age. See §§ 37.03, 39.08 *infra.*

§ 3.10 POLICE DECISION WHETHER TO DETAIN THE RESPONDENT PENDING ARRAIGNMENT

After deciding to lodge charges against the respondent and after booking (and possibly also fingerprinting and photographing) the respondent, the police decide whether to detain the respondent pending the first court appearance (generally known as the "Initial Hearing") or release the respondent to the custody of his or her parents. If the police opt for detention and court is still in session and the "cut-off time" for bringing the child to court (usually early- to mid- afternoon) has not yet passed, then the detained respondent will be brought to court immediately for arraignment and a judicial determination of the need for pretrial detention. In cases in which the police have decided to detain pending arraignment and the cut-off time has already passed, the police will bring the detained youth to a juvenile detention facility to be held overnight and transported to court in the morning. If the police opt for release, then the juvenile and his or her parents will be given a form (in some jurisdictions, called an "appearance ticket") instructing them to come to court on a specified later date (usually about two weeks later) and to report to Probation Intake.

The ramifications of the police decision to detain or release are substantial. If a child enters court from the cell-block, then judges, prosecutors, and probation officers often apply an unspoken presumption that the detention should continue for the period pending trial. On the other hand, if the child is released and stays out of trouble for the two weeks prior to the first court appearance, there often will be an implicit presumption that the release status should continue. (Indeed, in some jurisdictions, community release cases are arraigned before a magistrate who does not even have the power to detain the child pending trial.)

State statutes and police regulations generally direct the police to base the detention/release decision on an assessment of the probability of continued criminal conduct and the probability of flight if the child is released. However, in making those assessments, the police usually will consider all of the factors described in § 3.07 *supra* as influencing police discretion on the charging decision. Thus the nature of the offense, the respondent's age, prior record, gender, race, socio-economic status, and demeanor all will inform the police judgment regarding the youth's propensity for future dangerousness or flight and thereby will determine whether the child is detained or released. In some jurisdictions the statutes or police regulations specify that a child shall not be released on charges of certain enumerated felonies.

§ 3.11 ALLEGED DELINQUENTS DETAINED BY THE POLICE PENDING ARRAIGNMENT: TRANSPORTATION TO THE JUVENILE DETENTION FACILITY AND THE *DE NOVO* JUDGMENT ON DETENTION OR RELEASE BY FACILITY STAFF

If the police decide to detain a child in a delinquency case and court has been adjourned for the day (or the cut-off time for bringing children to court has passed), then the police will transport the respondent to a juvenile detention facility where s/he will be held overnight so that s/he can be brought to court in the morning. For children who are arrested on a weekend, the period of pre-court detention may extend up to 72 hours.

In many jurisdictions state statutes empower some official stationed at the detention facility to make a *de novo* decision whether the child should be detained or released into parental custody pending the first court appearance. (That official may be an employee of the juvenile court's probation department or a specifically designated official of the state agency charged with administering the juvenile detention facilities, or a member of the staff of the particular facility.) The governing statute or the applicable agency regulations usually direct that official to base the detention/release determination on a prediction of the child's propensity for future criminal conduct and likelihood of flight. Frequently, agency regulations will amplify this general standard by directing the officials to consider the nature of the present offense and the respondent's prior record. Also, statutes and agency regulations frequently prohibit release in enumerated felony cases.

If the agency official decides to release the child into parental custody, the child and parent are given a form directing them to report to the probation intake office on a subsequent date (usually two weeks later). If the parent refuses to take the child home, then the respondent will be detained overnight and brought to court in the morning. If the parent wishes to accept custody but is unable to arrange transportation from the facility, then, in some jurisdictions the child will be brought home by a facility staff member; in other jurisdictions the parent's inability to arrange transportation results in the child's staying in detention.

In some jurisdictions the official stationed at the detention facility has the additional option of detaining the child overnight in a group home or "shelter house" for alleged delinquent youth. That option may be employed in cases in which the parent refuses to accept custody or in which the nature of the offense or the respondent's prior record warrant a detention option more confining than outright release but less severe than detention in a secure facility.

§ 3.12 THE PROBATION INTAKE PROCESS

Whether a child is detained or released, s/he will go through a probation intake process prior to arraignment. The timing and nature of that process vary slightly, depending on whether the child was detained or released.

In most jurisdictions the probation intake process is designed to serve two functions: (i) to assess whether the "social factors" in the case (that is, the child's age, prior record, parental supervision, school attendance, and attitude) warrant "diversion" of the case — which can mean either outright dismissal of the charges or temporary abatement of any court proceedings and the promise of eventual dismissal after the child has completed some counseling or community service program; and (ii) in the event that the probation office concludes that diversion is inappropriate (or in jurisdictions where the probation office is not the final arbiter of the diversion decision, if the prosecutor's office or judge concludes that diversion is inappropriate), to assess the need for a judicial order of detention of the child pending trial. The probation office's procedures for gathering the information necessary to make these judgments invariably include an interview of the child and his or her parent(s) or guardian, consultation of prior court records concerning the child, and discussions with any present or prior probation officers of the child. The intake process usually also will include telephone conversations with the attendance officer of the child's school and with any mental health professionals who may have been seeing the child.

In detention cases this process usually is relatively truncated, in light of the need to complete the paperwork necessary to send the case into court for arraignment quickly. As soon as the child is brought in from the juvenile detention facility, s/he will be interviewed by an intake probation officer in the cell-block. That same probation officer then will interview the parent, consult prior court records on the child, and make whatever phone calls are feasible. The probation officer then will make a decision on diversion (or, in some jurisdictions, will make a recommendation regarding diversion to the prosecutor's office or the judge). If the case is a detention case, it most likely will not be diverted: whatever aspects of the child's background or the current offense caused the police and the detention facility official to opt for detention usually will also result in the denial of diversion. (In fact, in some jurisdictions the intake probation office follows a policy, whether formal or informal, of automatically rejecting diversion in all detention cases.) Thus the probation officer's primary focus in detention cases usually will be the gathering of sufficient information to make a recommendation to the court regarding the need for pretrial commitment. At arraignment the probation officer will present the recommendation and a summary of the social information underlying that recommendation to the court. See § 4.19 *infra.*

In cases in which the respondent was released by either the police or a detention facility official, the probation intake process will usually take place two to four weeks after arrest. When the respondent and his or her parent appear at the probation office in accordance with their "appearance ticket" (see §§ 3.10, 3.11 *supra*), they will be interviewed by an intake probation officer. Thereafter, the probation officer will check the child's records and will call the child's school, any present or prior probation officers that the child has had, and any mental health personnel who have seen the child. In some jurisdictions the practice is to complete that intake process, determine the propriety of diversion, and, if necessary, send the case into court for arraignment, all on the day of the interview with the respondent. In other jurisdictions the child and parent are instructed to return on another date for the final decision on diversion and, if necessary, for arraignment.

After the probation office has completed its intake process, the intake probation officer will send some type of form to the agency that prosecutes juvenile delinquency cases, informing that agency of the decision regarding diversion (or, in some jurisdictions, making a recommendation regarding the prosecutor's decision on diversion). If the case is not to be diverted, the probation office or the prosecutor's office will prepare a charging document ("petition") and will send the petition and any necessary supporting documents to the court clerk's office. The court clerk's office then prepares the official court file, and when that file is received in the arraignment courtroom, the case is ready for arraignment.

Part C. Representing Juveniles Who Have Just Been Arrested and Are Still at the Stationhouse or Holding Facility: Dealing with the Police and Other Damage Control

§ 3.13 THE TELEPHONE CALL FROM A PARENT OF A CHILD WHO HAS JUST BEEN ARRESTED AND IS STILL AT THE STATIONHOUSE

A late night telephone call from a distressed parent or guardian of a recently arrested juvenile is a common occurrence in the lives of both retained and appointed counsel. The appointed lawyer is usually contacted because s/he already represents the child on some charge and therefore is known to the parent. The retained lawyer may be contacted either because of such an existing relationship with the family or because the parent has obtained the lawyer's name from an acquaintance, a reference, or the phone book. More than any other situation, this scenario requires immediate action on the part of the lawyer. The attorney must move quickly to prevent the respondent from making any incriminating statements to the police. The lawyer's success in that endeavor can literally mean the difference between conviction and acquittal when the case eventually reaches trial.

Because of the need for prompt action, the attorney should keep the phone conversation with the parent or guardian as brief as possible. (The attorney should be sure to explain the need for succinctness, in order to avoid seeming insensitive to the fears and concerns of the parent or guardian.) At this point the only vital information is that which is needed to locate the respondent, gain access to him or her, and establish oneself in the eyes of the police as respondent's counsel. The attorney should get the following items:

1. The respondent's name (with spelling).

2. The caller's name (with spelling), relationship to the respondent, and telephone number (so the attorney can call back for a follow-up conversation after locating and communicating with the client).

3. Authorization from the caller to represent the respondent, at least at this stage.

4. Any information the caller may have about which police station the respondent was taken to. The caller may know precisely, as a result of having received a call

from the police notifying him or her of the arrest. If the caller does not know, the attorney should ask: where the arrest was made; whether it was made by uniformed or plainclothes police officers; and whether the officers belonged to a special squad (such as homicide, robbery, burglary, narcotics, vice) or were otherwise identifiable by the caller.

5. The offense for which the respondent was arrested, if the caller knows. The nature of the offense may be important in attempting to locate the respondent, especially if a special squad is involved in the interrogation. Conversely, a lengthy description of the facts of the case not only is unnecessary at this stage but is counterproductive in light of the need for quick action. When, as so frequently happens, the parent launches into an explanation of why the respondent is innocent, the attorney must gently but firmly explain his or her need for acting quickly to find the respondent and should indicate that s/he would like very much to hear what the parent has to say on a later occasion when there is more time. (Such explanations are not only necessary as a matter of common courtesy but also effective lawyering, since good relations with the parent usually are essential to proper handling of the case.)

§ 3.14 LOCATING A CLIENT WHO WAS RECENTLY ARRESTED

The most effective way to locate the respondent is usually a series of trial-and-error telephone calls. The order of the calls depends in part upon the amount of time that has elapsed since the arrest, but the first call should ordinarily go to the desk officer of the police station for the precinct where the arrest occurred, and the second call should go to any officer in that precinct who has been specially designated to conduct the "booking" of all juveniles. In all but serious felony or special-squad cases, these officers are likely to know where the respondent is and what officer is in charge of "booking" and interrogating the respondent. See §§ 3.04, 3.05, 3.08 *supra*.

In serious felony cases and special-squad cases, detectives usually conduct an interrogation of the respondent prior to turning the respondent over to a uniformed officer or Youth Division officer for booking. See § 3.05 *supra*. As a result, in cases in which the detectives are still in the process of interrogating the respondent, and especially if that interrogation is taking place in a special-squad headquarters in another region, the desk officer and other officers in the precinct stationhouse are unlikely to have any knowledge of the whereabouts of the respondent. Accordingly, if counsel fails to obtain information about the respondent's location from the precinct-station desk or Youth Services officer for that region, calls should next be made to the commanding officer of any detective squads for that precinct and then to the commanding officers of special squads (such as homicide, narcotics, vice) whose headquarters are in other regions. Counsel should also check with the local juvenile detention facility, in the unlikely event that an officer brought the child directly to the facility without first filling out all of the usual paperwork at the police station.

If all of these phone calls prove fruitless, then counsel should call the commanding officer on duty in the arrest precinct and confront him or her with the fact that the client has disappeared since being arrested in that commander's precinct. If the commander claims ignorance, counsel should ask for the name and phone number of the highest ranking official of the police department then on duty and should call this official to confront him or her with the client's disappearance. Finally, a call to a member of the prosecutor's staff objecting to the incommunicado detention of the respondent may produce some information. All else failing, counsel should call a judge of the court of record of the county and ask to appear before the judge at the earliest possible opportunity to present a petition for a writ of *habeas corpus* directed to the chief of police, the prosecutor, or both, charging them with the illegal custody of the respondent.

§ 3.15 KEEPING RECORDS OF CALLS TO POLICE OFFICERS

It is absolutely essential that counsel keep a record of the times at which s/he made telephone calls to locate the respondent and the names (correctly spelled), ranks, and badge numbers of all officers to whom s/he spoke. These may be needed in moving to suppress confessions on the grounds of unnecessary police delay. See § 24.15 *infra*. In more extreme cases of police delay, the information may be needed for petitions for a writ of *habeas corpus* to free the respondent from police custody.

§ 3.16 CALLS FROM A CLIENT WHO IS IN POLICE CUSTODY

It is the rare case in which counsel will receive a phone call directly from a juvenile client in police custody, since the police invariably violate juvenile respondents' rights to contact an attorney prior to interrogation. See § 3.06 *supra*. When counsel does receive a call directly from the client, counsel should immediately elicit the client's precise whereabouts. The client should be asked to identify his or her location by precinct or headquarters' name and street address or, if these are unknown, by general location and building description. S/he should be asked whether s/he has heard or seen anything suggesting that s/he might be taken by the police to any other location; if so, where and when. As a failsafe, s/he should also be asked the street location where s/he was arrested, the charge, and whatever s/he knows about the identity of the arresting and investigating officers.

Once counsel has completed obtaining this information concerning the client's location, the steps that must be taken are the same as those followed in cases in which the attorney was contacted by the parent or guardian and tracked the respondent down through trial-and-error telephone calls. Those steps are summarized in § 3.17 *infra* and described in greater detail in §§ 3.18-3.25 *infra*.

§ 3.17 OVERVIEW OF THE STEPS TO BE TAKEN AFTER COUNSEL HAS SUCCEEDED IN LOCATING THE RECENTLY ARRESTED CLIENT

After counsel has located the recently arrested client, counsel should take the following

steps to safeguard the client's immediate interests and to further the long-range goal of winning the case at trial.

If the client is still in police custody and has not yet been moved to a juvenile detention facility pending arraignment:

1. Gain immediate access to the client by phone in order to relay the information the client needs most urgently. For techniques for persuading police officers to permit counsel to speak with the client by phone, see § 3.18 *infra*.

2. In the phone conversation with the client, counsel should:

    a. Secure the client's permission to represent him or her. See § 3.19(a) *infra*.

    b. Warn the client, in the strongest possible terms, against: making any statements whatsoever to the police; speaking with cellmates or visitors; or agreeing to searches or other police investigative procedures. See § 3.19(b)-(d) *infra*.

    c. Obtain any other information that will be useful in attempting to secure the client's immediate release. See § 3.19(e) *infra*.

    d. Instruct the client to tell a police officer, while counsel is still on the phone to hear this said, that the client does not want to talk with the police or prosecuting authorities in counsel's absence but wants to conduct all future communications with the authorities through counsel as his or her attorney.

3. Speak with the investigating officer and the booking officer and:

    a. Clearly and firmly declare that, as counsel for the respondent, counsel is informing the police that the respondent is exercising his or her constitutional rights: to refuse to answer questions; to refuse to answer questions without the presence of counsel (an assertion that is separate from and even more important than the invocation of the general right to silence); and to refuse to consent to any searches, identification procedures, or other investigative procedures. See § 3.20 *infra.*

    b. In the event that counsel intends to follow the preferred course of action of going personally to the police station, request that the officer not conduct any interrogation, identification procedure, or other investigative procedure with the client until counsel arrives at the station and confers with the client. See § 3.20 *infra.*

c. Obtain other information that will be useful in attempting to secure the client's immediate release or in handling later stages of the case. See § 3.20 *infra.*

4. After speaking with the investigating officer and booking officer, call the respondent's parent/guardian and:

   a. Obtain whatever additional information is needed to attempt to secure the respondent's immediate release. See § 3.21 *infra.*

   b. Make whatever arrangements are necessary for the parent/guardian to accept custody of the respondent in the event that counsel succeeds in securing the respondent's release. See § 3.21 *infra.*

5. Take whatever steps are necessary to prevent the police from interrogating the respondent and to attempt to secure the respondent's release:

   a. Preferably, counsel should go personally to the police station to prevent interrogation of the client and to attempt to negotiate his or her release into parental custody. See § 3.22 *infra.*

   b. If counsel cannot follow the preferred course of going personally to the police station, then counsel should make whatever telephone calls can be made, as the next best alternative for protecting the respondent's rights and interests. See § 3.23 *infra.*

6. If counsel fails to persuade the police to release the respondent, then counsel must speak with any officials at the juvenile detention facility or officials of any other agency who have the power to release the respondent notwithstanding the police decision to detain and attempt to secure the respondent's release. See § 3.24 *infra.*

If, at the time that counsel first locates the client, s/he no longer is in police custody and already has been moved to a juvenile detention facility:

1. Gain access to the client by phone, secure the client's permission to represent him or her, and caution the client against speaking about the facts of the offense with any cellmates or visitors. See § 3.24 *infra.*

2. If any officials at the facility (or other agency) have the power to release the respondent notwithstanding the police decision to detain, then speak with those official[s] and attempt to secure the respondent's release. See § 3.24 *infra*.

§ 3.18 GAINING IMMEDIATE ACCESS TO THE CLIENT: PERSUADING POLICE OFFICERS TO ALLOW COUNSEL TO SPEAK WITH A RECENTLY ARRESTED CLIENT ON THE TELEPHONE

The first step after locating the client should be to talk with the client by phone. See § 3.19 *infra.* Unfortunately, in the vast majority of cases, police officers will be very resistant to the notion of counsel's speaking with the client.

In attempting to cut through police interference, it is usually wise to begin by seeming cooperative and congenial. Most police officers have a surfeit of angry phone calls from citizens, victims, and lawyers, and they usually react to such phone calls by becoming even more truculent. By contrast, a cordial phone call that attempts to deal with the officer on a professional-to-professional basis may be disarming and eventually successful. In dealing with the police, it is always useful to anticipate their interests and, if possible, offer counsel's assistance in achieving the officers' goals in exchange for counsel's access to the client. Thus, for example, counsel might state:

> Officer, until I speak with my client, it's my duty, as [his] [her] lawyer, to tell you that [he] [she] does not wish to answer any questions until I get there. Now, if I can have a chance to talk with [him] [her] on the phone right now, so that I can get a better sense of what this case is all about, it may be that I'll end up advising [him] [her] to cooperate with you and possibly to cut a deal. But, I can't make any decision about that, and I certainly can't advise my client about that unless you let me talk with [him] [her] on the phone.

Although it is *very* rare that counsel will ever end up advising the client to cooperate with the police, the fact that that advice is prudent in even a small number of cases means that counsel should not feel reluctant to promise to *consider* advising the client in that manner. In all such dealings with the police, counsel should take precautions against later being misquoted (for example, by an officer who testifies that s/he questioned the respondent only after both the client and the attorney waived counsel's presence during the interrogation). Counsel should make notes of the conversation immediately and, when time permits, write a memo to the file regarding the content of the conversation.

If this approach does not work, counsel should take down the officer's name and badge number, and the name and phone number of his or her commanding officer. Counsel then should call the commanding officer and attempt to persuade him or her to order the arresting officer to permit counsel to speak with the client on the phone. If the commanding officer proves as unbudging on the phone as did the arresting officer, then counsel should give whatever precautionary instructions s/he can (see § 3.20 *infra*), and then go immediately to the police station where the respondent is being held. Frequently, counsel will obtain much better results in person than s/he did on the phone.

§ 3.19 THE TELEPHONE CONVERSATION WITH THE CLIENT WHO IS PRESENTLY IN THE CUSTODY OF THE POLICE

§ 3.19(a) Preliminary Matters To Discuss with the Client

If the attorney succeeds in persuading the police to permit him or her to speak with the client on the phone, the first thing to do is to obtain an explicit statement by the client that s/he wants counsel to represent him or her. If counsel was initially contacted by a caller on behalf of the client, counsel should explain that the caller asked counsel to represent the client and to give whatever help counsel can provide. Counsel should ask the client whether s/he wants counsel to represent him or her and explain that counsel is willing to represent the client for the time being, at least until there is time to get together and talk about whether the client wants counsel to continue on the case. Assuming the client is willing to be represented by counsel, counsel should obtain an explicit statement to that effect from the client and then should tell the client that counsel is now formally the client's lawyer. In the event that counsel is able to follow the preferred course of personally traveling to the police station, counsel should also tell the client that s/he will be coming down to see the client immediately (or as soon as counsel judges that s/he can get there), giving a specific time estimate.

The other preliminary matter to which counsel should attend in the phone conversation with the client is to ensure that the remainder of the conversation will be private. Counsel should ask the client where the telephone the client is using is located (detectives' room? pay telephone in the corridor?) and whether any officer is listening to the call. (The client should be instructed to answer this last question "yes" or "no" without indicating that the subject of the conversation is the risk of eavesdropping.) The client also should be asked whether any other individuals, such as nonpolice employees of the stationhouse or persons arrested with the client, are within earshot. If there is a possibility that any police officer or other individual may be eavesdropping on the conversation, counsel should warn the client to use "yes" and "no" answers whenever possible. In very serious felony cases, particularly those with some notoriety or those involving major drug rings, counsel also must be alert to the possibility of wiretapping of the police phone or of police officers listening on an extension phone and must modify his or her own end of the phone conversation accordingly.

§ 3.19(b) Advising the Client: Protecting the Client from Interrogation

The first and most emphatic advice that the attorney should give in a telephone conversation with a client who is presently at a police station is:

> Say nothing to the police. Tell them nothing at all. Do not answer any questions from the police until you and I have had a chance to talk privately.
>
> If the police try to question you or to talk to you at all — about *anything* — tell them your lawyer told you not to talk. If they say anything about having evidence against you or if they tell you what the evidence is or if they bring in someone else who says

> something against you, then they are just trying to get you to talk. Don't fall for it. If they promise to drop the charges after you confess or if they threaten to stick you with more charges if you don't talk, they're just trying to trick you. Don't fall for any of their tricks. Whatever they say, tell them your lawyer told you not to talk.
>
> Sometimes, the police tell arrested kids that their lawyers don't know anything and that only the police know what's good for the kid. That's just another police trick. They're trying to get you to say something so that they can get the judge to lock you up for a long time.
>
> So, make sure you don't say anything to them. Just keep saying that your lawyer told you not to talk.

This phraseology is preferable to any of the other standard formulations used by lawyers in advising their clients not to confess. Telling the client not to say "anything" is better than telling him or her not to "make a statement," since many clients believe that a "statement" means a written, signed confession. It is also better than advising the client not to make any written or oral confessions, since often clients will not understand that "confessions" include what they believe to be exculpatory statements (for example: "I didn't break into the house, I just stood outside as a lookout"). Advising the client to say explicitly "My lawyer told me not to say anything" is better than advising the client to remain silent, because it is more concrete and therefore easier for the client to understand; it gives the client *something* to say instead of having to suffer the discomfort of standing mute in the face of questions or accusations, and so may be easier for the client to do; and it avoids the risk that the client's total silence may later be used against him or her as a "tacit admission." See § 24.23 *infra*.

The advice not to talk to the police should be given in *all* cases. Concededly, there is sometimes a possibility that wholehearted cooperation on the client's part might result in the police exercising their discretion to drop the charges or at least to release the client pending arraignment. See §§ 3.07, 3.10 *supra.* However, the possibility of obtaining those benefits is usually so slim and the consequences of confession so devastating in the long run that a cost-benefit analysis has to result in advising the client not to talk. In the few cases in which the client's alibi or explanation is so foolproof that it would have persuaded the police to drop the charges, that same result can be achieved through negotiations with the prosecutor involving none of the risks that talking to the police entails. Similarly, in the few cases in which cooperation would have resulted in a police decision to release the respondent, that same result can usually be achieved without a confession by persuading a detention facility official or probation officer to exercise his or her discretion to release the respondent. See § 3.24 *infra.* Finally, counsel can minimize even the comparatively negligible risk of adverse consequences flowing from a lack of cooperation with the authorities by urging the client to insist that s/he is refusing to speak with the police solely because of counsel's advice. By placing the onus on the attorney, the client can obtain whatever benefits might accrue from appearing to be a cooperative child (see §§ 3.07, 3.10 *supra*) while avoiding the overwhelmingly detrimental consequences of a confession.

§ 3.19(c) Cautioning the Client Against Speaking with Cellmates or Visitors

In addition to telling the client not to speak with the police, counsel should caution the client against speaking with cellmates, co-respondents, and adult co-defendants. Cellmates may be snitches, and co-respondents and adult co-defendants may become turncoats. Counsel should be aware that this is a lesson that most juveniles find hard to accept. Lacking the adult criminal defendant's experience with cellmates or co-defendants who "turned," juveniles tend to trust naively the loyalty of their friends and peers. For this reason, counsel should stress the importance of not talking with cellmates, co-respondents, and adult co-defendants and may wish to mention that a large number of people who get busted end up snitching in order to save their own skins.

Counsel should also warn the client about the possibility that the police will eavesdrop on any visits or telephone conversations that s/he may have with family or friends while at the police station. To minimize this danger, it is wise to advise the client (i) to make and receive no visits or phone calls except from counsel or from close family members who need to be reassured that the client is all right, and (ii) during any family calls and visits, to say nothing unnecessary and certainly nothing about the client's whereabouts or actions before s/he was arrested or anything else that might have any connection with the case.

§ 3.19(d) Other Advice To Give the Client: Protections Against Lineups, Show-ups, and Other Police Investigative Procedures

Once counsel has fully warned the client against speaking with the police (§ 3.19(b) *supra*) and against speaking with cellmates, co-respondents, adult co-defendants, and visitors (§ 3.19(c) *supra*), counsel will have established the most urgently needed protections of the client's interests. There is additional advice that counsel can give regarding other police investigative procedures, but this should be given if, and only if, counsel believes that the youthful client is capable of assimilating the lengthy discourse involved and will not end up forgetting some of the basic advice about confessions as a result of informational overload. That judgment by counsel needs to be based on the child's age, emotional state, and degree of physical exhaustion. Throughout the phone conversation, counsel should periodically ask the client questions that will force the client to repeat back the advice that counsel has just given (for example: "Okay, now what are you going to say when the police say that if you tell them what happened, they'll drop the charges and you can go home?"). Such questions will not only serve as a mechanism for double-checking the client's comprehension of the previously given advice, but they will also enable the attorney to gauge whether the client's current attention span warrants venturing into the realm of useful-but-not-indispensable advice.

If the client seems reasonably alert, counsel should next advise him or her how to deal with lineups and other identification procedures that may occur while s/he is at the police station. It is presently unclear to what extent the police can lawfully compel an unwilling accused to submit to identification confrontations in the absence of counsel. See § 25.06 *infra.* The client

should accordingly be advised to object to any lineup, show-up, or confrontation for identification purposes that is held in counsel's absence, and to tell the police, if they say anything about showing the client to any witness for possible identification, that the client wants to have his or her lawyer present and that s/he is asking the police either to phone the lawyer (giving them the lawyer's number) or to let the client phone the lawyer, so that the lawyer can come down to the station and represent the client during any identification procedure. The client should also be instructed that in the event that the police do place the client in a lineup or display the client to any person for identification, the client should not speak any words or answer any questions — including his or her name — during the procedure. S/he should not, however, physically resist being exhibited; and if the police insist on going ahead with the exhibition after s/he has told them that s/he objects to it, the client should follow whatever orders the police may give with regard to the client's going up onto a lineup stage or stepping forward or walking about. S/he should never attempt to hide his or her face or to make faces. These tactics, or a failure to obey instructions to step forward or walk about, will only focus attention on him or her and thereby increase the chances of being identified as the perpetrator; they may also be used against the client as evidence of guilt; and physical resistance to the officers may result in a beating or the lodging of assault-upon-an-officer charges or both. If the police tell the client that s/he is being taken to a lineup or identification room, s/he should orally object to the absence of counsel but should not sit down or physically refuse to go, since this action may result in the witnesses being brought back to view the client in the cell — a far more suggestive form of confrontation than the lineup itself. If the police tell the client that s/he is being taken anywhere to be shown to witnesses, s/he should insist, *first*, that s/he be given a chance to phone his or her lawyer and to have the lawyer present and, *second*, that s/he not be shown to witnesses except in a lineup with other people who resemble the client. Once in a lineup or identification confrontation, s/he should observe and remember everything about it that s/he can, particularly (a) how many other persons were in the lineup, how they were dressed, and what they looked like (getting their names, if possible without attracting attention to the client or afterwards if the client sees these persons again while s/he is in custody); (b) how many witnesses were asked for identifications, what they said, what the officers said to them, their names, and what they looked like; (c) how many police officers were present and their names, badge numbers, and descriptions; and (d) the time and place of the lineup. The client should not attempt to take notes during the lineup or in any place where s/he may be observed by the witnesses to the lineup, but when s/he returns to the cell, s/he should request paper and a pen from the guards and immediately write down everything that s/he can remember.

The client should also be instructed that if anyone asks for permission to go to the client's house or to any other place in order to search for evidence or weapons or pieces of clothing or anything else, s/he should say, "My lawyer told me to say, 'No,'" whether or not s/he thinks that the things the police are looking for will be found or that the search will prove the client innocent. S/he should be instructed to give the same answer if the police ask the client to lead them to any place or thing or to act out or demonstrate any action; and to object to being taken from the cell area for any reason, saying that s/he wants to stay there and wait for an attorney who is coming. S/he should be instructed not to sign any forms or papers and not to write down

anything for the police. Again, the proper answer is "My lawyer told me to say 'No' until s/he gets here." The client should be instructed that if anyone attempts to inspect or examine his or her body, to take swabs or washes or scrapings from it, to cut nails or take hair samples, the client should tell them "My attorney said to wait until s/he got here"; but if they go ahead anyway, the client should not try to fight them off.

§ 3.19(e) Eliciting Information from the Client That Will Be Useful in Attempting To Secure the Client's Release

In the relatively rare situation in which the attorney was initially contacted by the client directly rather than by a parent or other relative on the youth's behalf (see § 3.16 *supra*), it is essential that the attorney elicit from the client his or her parent's (or guardian's or close relative's) name and phone number. In addition, since this is the only situation in which the attorney will not already know the client's current location (since it is the only situation in which the attorney did not track down the client before talking to him or her), the attorney must elicit from the client his or her current location by precinct or headquarters' name and street address or, if these are unknown, by general location and building description.

Whether it was the client who called, or the more common situation of the attorney reaching the client, counsel should ask the client precisely where *within* the building s/he is. This information will be important later when the attorney goes to the station, in order to deal with desk officers who profess ignorance of the client's being in the station. Counsel should also ask the client whether s/he has heard or seen anything suggesting that s/he might be taken by the police to any other location; if so, where and when.

Counsel should ask the following questions to elicit information that will be useful in attempting to secure the client's release:

1. Counsel should ask the client what the police have said that the client is being charged with. Counsel should be sure to ask: "Is that all of the charges that they have told you?" Counsel also should inquire whether the police said anything about possibly adding any other charges or about the client's being involved in any other criminal matters, and specifically what. In asking these questions, counsel must, of course, refrain from eliciting any statements that could be overheard by police regarding the client's version of the present offense or any other offenses with which s/he may be charged. The discussion should be limited to the charges the police are contemplating and should not get into the facts underlying any of those charges. Since many juvenile clients are eager to tell their version of the facts and will doubt counsel's competency or loyalty if s/he refuses to allow the client to relate the facts, counsel must explain the need for confidentiality at this point and reassure the client that there will be time later to discuss the facts in a private setting, free of the risk of police eavesdropping.

2. If the client's age and the nature of the charges make waiver to adult court a realistic possibility under local statutes, counsel should ask the client whether the police have said anything about seeking waiver to adult court. This will enable counsel to start preparing immediately for a major battle on the issue of waiver. See Chapter 13.

3. If, as in most jurisdictions, local statutes permit the police to release the child into the custody of his or her parents, counsel should ask the client whether the police have said anything about the possibility of the client's being released to his or her parents.

4. If counsel is practicing in one of the relatively few jurisdictions that permit bail in juvenile cases, then counsel should ask the client whether s/he has been told (and, if not, ask the client to ask the police now) whether bail has been set for the client and at what amount. Counsel also should ask the client who should be called (parent, grandparent, other relative, or friend) to put up bail money or to pay the bond premium.

In addition to these questions, which provide information necessary for attempting to secure the client's release, counsel should also inquire into the client's immediate medical needs. Counsel should ask the client whether s/he is hurt or injured or needs any sort of medical attention. Counsel also should ask the client whether the police are mistreating the client in any way.

§ 3.19(f) Concluding the Telephone Conversation with the Client in Police Custody

Counsel should keep in mind that most juveniles have had very little experience with the criminal justice system, and they are likely to be frightened both by their current incarceration and by the unknowns of what will happen in court (and what will happen when they have to face their undoubtedly enraged parents). Counsel should try to reduce the client's anxiety by letting the client know when counsel will be back in touch with the client and what counsel will be doing to try to secure the client's release:

1. If counsel intends to adopt the preferred course of action of going to the police station, counsel should tell that to the client, and give the client a reasonable time estimate of how long it will take for counsel to get to the station. Counsel should tell the client not to worry if the client is moved before counsel arrives, since counsel will try to track the client down and visit the client wherever s/he has been taken. Counsel should add, however, that there is a possibility that the police will not allow counsel to see the client and that if the client does not see counsel, it is because of police interference and not through any lack of effort on counsel's part.

2. If counsel is not going to go to the station or if counsel is not planning to leave for

the station immediately, counsel should give the client a telephone number at which counsel can be reached.

3. Whether counsel intends to go to the police station or not, counsel should tell the client that:

   a. Counsel will call the client's parents immediately to reassure them that the client is all right, to arrange for their presence in court so as to increase the client's chances of being released in court, and to enlist the parents' aid in trying to secure an even earlier release of the client;

   b. Counsel will also take whatever other steps might help in attempting to secure the client's immediate release, including talking with the police and any probation officers and/or agency officials who might have some power over the client's current detention;

   c. If the client is not released, then the client will be taken to court, and the judge will decide whether to release the client; counsel will be in court with the client, and counsel will try to convince the judge in court to release the client [adding when appropriate: and counsel feels confident that the judge will release the client to the custody of his or her parent(s)].

Before ending the conversation, counsel should instruct the client to get the attention of a police officer and tell the officer, while counsel listens on the phone, that the client does not wish to talk further with the police in the absence of counsel and that the client wants all further dealings with the police to be conducted by counsel on the client's behalf. Once the client has made a statement of this sort, with counsel in a position to testify that s/he heard it made, the client has obtained the fullest possible protection against police interrogation while in custody, short of counsel's physical presence. For, under the rule of *Edwards v. Arizona,* 451 U.S. 477 (1981), the police may not thereafter question the client, even with full *Miranda* warnings and waivers, "unless the [client] . . . himself [or herself] initiates further communication, exchanges or conversations with the police." *Id.* at 485; *see also Minnick v. Mississippi*, 498 U.S. 146, 150-56 (1990)*; Smith v. Illinois,* 469 U.S. 91, 95 (1984) (per curiam); *Shea v. Louisiana,* 470 U.S. 51, 54-55 (1985); *Montejo v. Louisiana*, 556 U.S. 778, 794-95 (2009). The procedure advised in this paragraph is important; without it, counsel's own admonitions to the police not to interrogate the client, and any promises made by the police to counsel that they will not, may be worthless. *See Moran v. Burbine,* 475 U.S. 412 (1986). *But cf. People v. Grice*, 100 N.Y.2d 318, 321-22, 324, 794 N.E.2d 9, 10-12, 13, 763 N.Y.S.2d 227, 229-30, 232 (2003) (state constitutional right to counsel attaches, and "interrogation is prohibited unless the right is waived in the presence of counsel," if an attorney or "the attorney's professional associate" informs the police "'of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant'").

§ 3.20 TELEPHONE CONVERSATIONS WITH THE POLICE ON BEHALF OF A CLIENT WHO IS PRESENTLY IN POLICE CUSTODY

In dealing with the police on behalf of a recently arrested client who is still in police custody, counsel should pursue three major goals: (i) to prevent the police from interrogating the client or conducting other investigative procedures; (ii) to secure the immediate release of the client; and (iii) to obtain as much information as possible about the facts of the offense for which the client has been arrested. The prevention of interrogation should be counsel's primary objective, since a confession will severely limit counsel's chances of winning the case at trial and preventing long-term incarceration. However, in structuring conversations with the police, the topic of interrogation should normally be left for last, since counsel's efforts to prevent interrogation will be seen by the police as marking the beginning of an adversarial relationship between them and counsel; from that point onward, counsel can expect that the officer(s) will cease being cooperative and providing information.

Thus counsel should ordinarily structure conversations with the police in the following manner:

1. Begin by speaking with whatever officer happens to be with the client at the moment (whether that is the investigating officer, the booking officer, a detective, or a special Youth Services Division officer), since that is the officer who is most likely to be on the verge of (or in the course of) interrogating the client. That interrogation should be the attorney's immediate concern; later phone calls or a trip to the police station can deal with officers who might be planning to interrogate the client later on; as for interrogations that have already taken place, there is very little counsel can do about those until the time comes to start preparing motions to suppress.

2. In the conversation with the officer, counsel should:

   A. Begin by explaining that counsel is an attorney and has been asked by the respondent's parent or guardian or other close relative to represent the client and is, in fact, now representing the client.

   B. "Confide" in the officer that counsel has no information about the case whatsoever, and therefore would appreciate some idea of why the client was arrested. (As a practical matter, this approach is much more likely to elicit information about the case than an aggressive demand for information or a series of lawyer-like questions.) In the course of any ensuing conversation about the arrest, counsel should ask the officer what specific charges are now placed against the client (being sure to ask "Is that all the charges?"); whether other charges are being considered; and if so, what they are. (Although the police have discretion to drop charges and

divert the respondent from the juvenile justice system (see § 3.07 *supra*), there is not much point in counsel trying to persuade the police to drop the charges: the police tend to view the arrest and charging decisions as their prerogative and generally resent attorney attempts to influence the diversion decision; counsel's only real hope for shaping the police decision regarding diversion is through advice to the parent. See § 3.21 *infra.*)

C. Attempt to find out whether the police might be willing to release the respondent to his or her parent(s) pending arraignment. This should be a preliminary broaching of the subject of release, to be followed up by additional negotiations after counsel has spoken with the client's parent(s) further and obtained social information that can be used in attempting to persuade the police to release the client. (The additional negotiations preferably will take place at the police station when counsel goes there; but, if counsel is not able to go to the station, those negotiations should be conducted in a follow-up phone call to the police. See §§ 3.22, 3.23 *infra.*)

D. If counsel is practicing in a jurisdiction that permits bail in juvenile cases, ask the officer whether bail has been set for the client; if so, how much; if not, whether stationhouse bail is ordinarily fixed for charges such as those against the client and how much; and, if the officer has indicated a possibility that additional charges may be placed against the client, what the bail on those charges will be.

E. Ask the officer where the client is now, including the precise location within the building; whether there are any plans to move the client elsewhere and, if so, where and when; whether the officer will be handling all of the remaining booking of the client or whether that will be handled by other officers, and who.

F. Having obtained all possible information concerning the charges, facts of the offense, and possibilities for release, deliver the following instructions, advice, and requests regarding police interrogation and other investigative procedures:

(i) Tell the officer that counsel is requesting the officer not to interrogate the client or to ask the client any questions; tell the officer that counsel has instructed the client to say nothing, to answer no questions, and to waive no rights; tell the officer that, as attorney for the respondent, counsel is informing the officer that the client is hereby asserting his or her right to refuse to answer questions and his or her right to refuse to answer questions without

the presence of counsel; if counsel intends to go to the police station, add that counsel is requesting that no interrogation take place until counsel arrives at the station (expressing the hope that counsel will be able to cooperate with the officer as soon as s/he arrives but saying that s/he must really ask the officer not to deal any further with the client at this time, until counsel has had a chance to confer with the client and to find out what the matter is all about).

(ii) Tell the officer not to ask for the client's consent to conduct any search or investigation; tell the officer that counsel has instructed the client to give no consents; and tell the officer that counsel, on behalf of the client, is informing the officer that the respondent refuses to consent to any searches or other investigations.

(iii) Tell the officer not to place the client in a lineup or exhibit the client for identification or make any physical or mental examination, body inspection, or test of any sort on the client in the absence of counsel; tell the officer that counsel has instructed the client to give no consents and to participate in no investigative procedures in the absence of counsel; state that, as counsel for the respondent, counsel is asserting the respondent's right to have counsel present during any identification or other investigative procedure.

(iv) Say to the officer that counsel is formally requesting that the officer relay the foregoing instructions and requests for the handling of the respondent to any other officers who may become involved in the booking or interrogation of the respondent or who may come into contact with the respondent while s/he is at the police station.

G. Conclude the phone conversation with the officer as follows:

(i) If the client has indicated that s/he needs medical treatment, tell the officer to take the client to the hospital, and then ask what hospital the client will be taken to [adding, if appropriate, that counsel will meet them at the hospital].

(ii) If counsel intends to go to the police station, tell the officer that counsel will be at the station as soon as s/he possibly can, and request that the officer not move the client from the station for any

purpose (except for medical treatment if the client has indicated that s/he needs medical treatment).

(iii) Take the officer's name (with spelling), rank, and badge number, and ask the officer where s/he will be and how counsel can contact him or her during the next few hours.

3. Having completed the phone conversation with the officer who currently has custody of the client, counsel then should repeat that conversation: (A) with any officers that the first officer indicated would later be involved in the booking of the respondent; and (B) with any officers, such as the precinct's Youth Services Division Officer, who will most likely take part in the booking or interrogation of the respondent notwithstanding the first officer's failure to mention them.

§ 3.21 FOLLOW-UP CONVERSATION WITH THE PARENT OR GUARDIAN OF THE CLIENT

After counsel has finished talking with the police on the phone, counsel will need to call the parent or guardian of the client. (If it was the parent or guardian who initially contacted counsel, this will, of course, be a follow-up call; if counsel was initially contacted by the client himself or herself or by some other concerned relative or friend, counsel will need to make contact with the parent or guardian for the first time.)

The first and most important topic to discuss with the parent/guardian is the subject of the client's release. If the police expressed to counsel their willingness to release the client to parental custody, then counsel should determine whether the parent/guardian is willing to accept custody of the child pending arraignment. If the parent/guardian is unwilling to accept custody either because of frustration with the child or a notion that a "taste of jail" will teach the child a needed lesson, then counsel should educate the parent/guardian regarding certain realities of the juvenile court system: that, frequently, children who are detained prior to arraignment will be ordered detained for the much longer period pending trial, notwithstanding the parent/guardian's desire at that point to take the child home; and that the ensuing pretrial detention could have devastating effects upon both the chances of winning at trial and the chances of preventing a subsequent sentence of incarceration. In addition, if counsel has knowledge of any harsh conditions or inadequate services at the local juvenile detention facility (and particularly if counsel has knowledge of recurring physical and sexual assaults upon inmates by other inmates), counsel has a legal obligation to the juvenile client and a moral obligation to the parent/guardian to let the parent/guardian know that the facility is not the ideal rehabilitative facility the parent/guardian may be envisioning.

Assuming that the parent/guardian is (or becomes) willing to accept custody of the child and assuming that the police already have expressed their willingness to release the child to parental custody, counsel then must make the necessary arrangements for the parent/guardian to

go to the police station and pick up the child. Preferably, counsel will arrange to meet the parent/guardian at the station, so that counsel can facilitate the release process and also so that counsel can prevent both the child and the parent/guardian from making any damaging statements to the police. If counsel is unable to go to the station, counsel will need to instruct the parent/guardian which station to go to and which officer(s) to see, and counsel should caution the parent/guardian against saying anything (or allowing the child to say anything) to the police about the crime for which the child was arrested. See § 3.19(b) *supra.* Finally, counsel will need to discuss the subject of transportation: counsel should assist the parent/guardian in finding out the right route (by car or mass transit) to the police station; or if the parent/guardian is totally unable to arrange transportation and if counsel is driving to the station, counsel should consider offering to give the parent/guardian a lift to the station.

If the police did not indicate a willingness, or if they expressed an outright unwillingness, to release the respondent, then counsel will need to take the following steps to try to secure the respondent's release: (i) ask the parent/guardian whether the police have already called to notify him or her of the child's arrest; if the police have not yet called, then advise the parent/guardian that s/he can improve the client's chances for release by being as cooperative as possible with the police (without making any damaging statements or giving consent to interrogation or searches or other investigative procedures) and by letting the police know that the parent/guardian intends to take steps to discipline the child even if the child is released by the police (without describing such severe disciplinary measures that the child will end up being removed from the home because of police allegations of child abuse); (ii) advise the parent/guardian, whether or not the police have already called him or her, to be cooperative and express appropriate disciplinary intentions in the event that the parent/guardian is called by any police officers who may be reconsidering the issue of detention as a result of counsel's efforts or by any probation officers or detention facility officials who may be making a *de novo* judgment regarding the need for detention pending arraignment; (iii) counsel should then elicit from the parent/guardian social information about the child that counsel can use in attempting to persuade the police to release the child: information about the child's behavior at home, school attendance, conduct in school, school grades, part-time and summertime employment experiences, prior record of convictions and arrests, whether the child is presently on probation and the probation officer's name and phone number, and other information bearing on the likelihood that the parent/guardian can control the child and that the child will stay out of trouble if s/he is released to the parent; (iv) under this scenario, when the police have not yet indicated any willingness or have expressed an unwillingness to release the respondent, there is no reason to send the parent/guardian to the police station unless counsel can change the police officers' minds; thus counsel should simply obtain a phone number at which the parent/guardian can be reached during the next several hours in the event that counsel can persuade the police to release the client into parental custody.

If counsel is practicing in a jurisdiction that permits bail in juvenile cases, counsel also will need to ask the parent/guardian whether s/he can and will pay the bond premium or put up sufficient assets to cover any bail that is realistically likely to be set and, if not, whether there are any other relatives or friends who can provide all or part of the bail money. If the parent/guardian

can put up the bail money, then counsel should arrange to have the parent/guardian meet counsel at the police station or court where bail will be posted (or at a bail bonder's office) at a designated time. If counsel is unable to go to the police station or bail bonder's office to personally oversee the payment of the bond, then counsel will need to give the parent/guardian detailed instructions on how to contact the bail bonder (giving a group of names of bail bonders from which the parent/guardian can choose) and how to navigate through the bail bond payment process.

After fully covering the topic of potential release of the client, counsel should elicit from the parent/guardian any information that the police may have given him or her regarding the facts of the offense, the charges that the police intend to lodge against the client, and whether the police intend to seek waiver to adult court. This information may prove useful in immediate discussions with the police (see §§ 3.22, 3.23 *infra*); on the other hand, there is still a premium on time and if the parent/guardian embarks on a lengthy discourse, it may be necessary to curtail the conversation tactfully. See § 3.13 *supra.*

§ 3.22 COUNSEL'S ACTIVITIES ON THE CLIENT'S BEHALF AT THE POLICE STATION

After speaking by telephone with the client (if possible), the police, and the parent/guardian, counsel should go as quickly as possible to the police station. The following discussion covers each of the matters that counsel should attend to at the police station; if counsel is unable to go to the station personally or to send someone (like a law partner or law clerk), then counsel should make the additional phone calls described in § 3.23 *infra.*

Upon arriving at the police station, counsel should show the desk officer some identification (like a Bar I.D. card) or other document that identifies counsel as an attorney. S/he should say that s/he is representing the respondent (or has been asked to represent the respondent) and that s/he wishes to see the respondent immediately. If a delay of more than a few minutes occurs, s/he should repeat this request and ask, alternatively, to see the commanding officer. If the commanding officer proves obstructive, counsel may be able to obtain assistance from the prosecutor's office; in some urban areas, a deputy prosecutor is assigned to be on call for after-hours emergencies and can be reached through the prosecutor's office switchboard. In extreme situations, counsel should call a judge of the local court of record and arrange to present a prompt petition for a writ of *habeas corpus* directed to the chief of police, the prosecutor, or both. Again, in some areas, there is an emergency judge available for after-hours crises. If the desk officer or the commanding officer tells counsel that s/he can see the client but only after the completion of interrogation (or lineup procedures, or other investigative procedures, or booking), counsel obviously should insist that the procedures stop until counsel has had a chance to confer with the client.

Once counsel reaches the client, s/he should request the use of a room in which the two can consult privately. As soon as counsel and the client are out of earshot of the police and other

persons, counsel should immediately instruct the client that: (a) s/he should respond to any questions from the police or anyone else by saying "my lawyer told me not to talk"; (b) s/he should respond to any requests for permission to search for evidence or weapons or anything else by saying "my lawyer told me to say, 'No'"; (c) s/he should not sign or write any papers for the police or anyone else; (d) s/he should not agree to leave the cell area or go with the police to any other place except to court or to a detention facility (but s/he should not forcibly resist a police officer's attempt to take him or her to another location); and (e) if the police say that they intend to exhibit the client to any witnesses or subject him or her to any sort of bodily or mental examination, s/he should ask to phone counsel so that s/he can confer with counsel and have counsel present during the examination. Once these crucial instructions have been given, counsel can move on and ask the client for information about the client's background (home life, school, employment, and after-school activities) that counsel can use in trying to persuade the police to release the client. Thereafter, to the extent that time permits, counsel can question the client about the information that counsel will need at the Initial Hearing (see § 4.07 *infra*) and about the facts of the offense (see § 5.06 *infra*).

After the interview with the client has been completed, there are several matters that counsel will need to discuss with the police. The first matter that should be covered (before the conversation with the police takes a confrontational turn, leading to the drawing of battle lines) is the subject of the client's release to parental custody. Counsel should ask whether the police intend to release the client; if the police have decided against release or have not yet reached a decision, then counsel should use the positive social information that counsel elicited from the parent/guardian (§ 3.21 *supra*) and from the client interview to try to persuade the police to release the client; in making these arguments, counsel should emphasize that s/he is primarily trying to provide additional information to assist the police and is not trying to infringe upon police prerogatives. In jurisdictions that permit bail in juvenile cases, counsel also should discuss the availability (and applicable amount) of "stationhouse bail" — that is, bail set by the police, usually according to a prescribed schedule.

After the subject of the client's release has been resolved, counsel should ask the investigating officer whether the client has made any written or oral statements. If s/he has, counsel should request to see them or, in the case of oral statements, to be told of their contents immediately. Counsel should ask whether the client has been exhibited to any possible witnesses for identification purposes and whether any tests or examinations have been conducted on the client. If so, counsel should ask the nature of the identification proceedings or tests, who conducted them, what results they produced, and the names of all persons present during the identification or testing procedures. Counsel should ask whether any future identification or testing procedures are anticipated, what procedures and when; and s/he should ask and arrange to be present when they are conducted. Counsel should tell the investigating officer that s/he has instructed the client not to talk to anyone and not to give any consents or waivers in counsel's absence; and s/he should ask the officer not to question or talk with the client unless counsel is present and not to take any consents or waivers from the client without counsel's prior approval.

Before leaving a client in custody, counsel should have the client inform an officer, in counsel's presence, that the client does not wish thereafter to talk or deal with the police or prosecuting authorities without counsel but wants to communicate with them only through counsel. See § 3.19(f) *supra.* Counsel should give the officer counsel's professional card and should also give one to the desk officer on the way out.

Counsel who obtains permission to attend identification or examination procedures should ordinarily act as unobstrusively as possible. S/he should not attempt to interfere with them in any way or to play any part beyond making suggestions for improvement of their reliability and fairness — for example, suggestions about the form of lineup that should be conducted. Counsel's primary role is that of an observer. S/he should watch and take notes on everything that happens, be sure to get the names of all persons present, and ask questions both before and afterwards about anything s/he does not understand. If it appears that the procedures will involve the respondent's performing any kind of action — for example, giving a voice exemplar or walking about on a lineup stage — counsel should ask to be told in advance what that action will be and should request the opportunity to confer privately with the respondent before the procedures begin, so that s/he will not have to interrupt them for the purpose of giving the respondent advice.

At a lineup or show-up, counsel should ask to speak to the possible identifying witnesses *before* the respondent is exhibited to them. It will be the rare case in which the police will permit such interviews. But at the earliest time when counsel can obtain access to the witnesses, counsel should ask them (i) to describe in detail the person who they think committed the offense; (ii) to describe the circumstances under which they observed that person; (iii) how sure they are that they could recognize the person if they saw the person again; (iv) by what characteristics they could recognize the person; (v) what description of the person they have given the police; (vi) whether they have previously been asked by the police to attempt to identify anyone, either in the flesh or by photograph, and whether they made any identifications on these occasions; and (vii) what they have been told by the officers who brought them or asked them to come to the station today.

Whenever counsel is permitted to attend a show-up, counsel should object to the show-up procedure and request that the police conduct a lineup instead. Counsel should point out the likelihood that any show-up results will be suppressed in court because there are no exigencies requiring a show-up instead of a lineup. See § 25.03(a) *infra.*

Counsel should attempt to ensure that any lineup is composed of at least six persons who resemble the respondent in general characteristics — age, skin color, height, weight, body type, hair style, clothing, and accessories; and counsel should ask that all subjects be exhibited in street clothes, not jail garb or, in the case of police officer "fillers" in the line, articles of clothing that are identifiable as parts of a police uniform. If more than one witness is to view the lineup, the witnesses should not be present during one another's viewings; the positions of all subjects in the lineup should be changed between witnesses; and the witnesses should not be assembled where

they can talk together either before or after the conclusion of the proceedings. At the lineup, counsel should record the names, descriptions, and means of later contacting all witnesses who are present to view the lineup (whether or not they attempt to make any identifications), what is said to them, and what they say. Counsel should record the manner in which the lineup is conducted, including distances, lighting, any directions to the subjects to walk, motion, or speak, what they do, and when in the course of these proceedings any identification is made. S/he should also note the names, ranks, and badge numbers of all officers present and of those who brought witnesses to the lineup. Similar interviews, observations, and notes should be made at show-ups. (Counsel should be aware that police detectives and officers usually record their own observations of lineups and show-ups in handwritten notes and typed reports and that in some jurisdictions lineup proceedings are videotaped by the police. Any such police notes, reports, and videotapes can and should later be subpoenaed by counsel. See §§ 8.17, 8.19(a)(5) *infra.*)

In the case of other testing procedures, counsel should record the names of all technicians and officers present and the means of contacting them and should ask them to describe for counsel what procedures, materials, substances, chemicals, and so forth, they are using, as they proceed. If possible, counsel should get them to describe, *before* any testing is done, what indicators or results they believe will demonstrate positive and negative findings. Counsel should also ask them whether their testing procedures will affect the substances being tested and, if so, request that they leave a sufficient amount of the substances untouched for subsequent defense testing. Any refusals of the technicians or officers to cooperate in these regards or to explain what they are doing should be noted.

§ 3.23 ACTIONS THAT CAN BE TAKEN TO PROTECT THE CLIENT'S RIGHTS IN LIEU OF A TRIP TO THE POLICE STATION

There is no fully adequate substitute for a trip by counsel to the police station. However, if for some reason counsel cannot go to the station, there are phone calls s/he can make that will further some of the same objectives as the trip to the station.

After speaking with the client by telephone (§ 3.19 *supra*), having a preliminary phone conversation with the police officer(s) (§ 3.20 *supra*), and speaking by phone with the parent/guardian of the client (§ 3.21 *supra*), attorneys who cannot go to the station should call back the investigating officer and:

1. Discuss the possibility of the respondent's release to parental custody, using the social information elicited from the client and the parent/guardian to try to persuade the officer to agree to release (and couching all arguments in terms of providing the officer with additional information, so as not to seem to be attempting to encroach upon police prerogatives).

2. In jurisdictions that permit bail for juveniles, elicit all information necessary for obtaining stationhouse bail. See § 3.20(2)(D) *supra.*

3. Reiterate and reinforce all advice, instructions, and requests that counsel gave in the earlier phone conversation with this officer or other officers regarding police interrogation of the client, identification procedures, and other investigative procedures. See § 3.20(2)(F) *supra.*

If counsel was able to persuade the police to release the client to parental custody (or, in jurisdictions permitting bail for juveniles, if counsel was able to arrange the setting of stationhouse bail), then counsel should call back the parent/guardian and arrange for the parent/guardian to secure the client's release. This will require detailed instructions to the parent/guardian regarding the place to go (police station, detention facility, bail bonder's office), the individuals to speak with, and the procedures to follow. The parent/guardian also must be cautioned against making any statements to the police and should be urged to restrain the client from making any statements to the police.

§ 3.24 ACTING ON BEHALF OF CLIENTS WHO HAVE BEEN MOVED FROM THE POLICE STATION TO A JUVENILE DETENTION FACILITY PENDING INITIAL HEARING

Counsel will need to deal with detention facility officials in either of two situations: (i) when, upon first receiving the phone call regarding a newly arrested client and tracking down the client's current whereabouts, counsel discovers that the client has already been moved from the police station to a juvenile detention facility pending arraignment; or (ii) when counsel got to the client or the police prior to any such movement of the client, but counsel was unable to sway the police from their decision to detain the client in the detention facility pending Initial Hearing. The measures that must be employed to protect the client's interests in these two situations are essentially identical, with one exception: In the first situation, when counsel is establishing contact with the client for the first time, counsel will need to go through the usual preliminary steps of first speaking with the client by phone (and covering all of the matters described in § 3.19(a)-(c) and (e)-(f) *supra*) and speaking with the parent/guardian about his or her willingness to accept custody of the client and about the client's prior behavior and prior record (§ 3.21 *supra*). Once counsel has completed these telephone conversations, s/he will be ready to attempt to persuade the detention facility officials to release the client to his or her parent/guardian.

In many jurisdictions an official stationed at the detention facility — a probation officer, social services agency employee, or member of the staff of the facility — has the power to make a *de novo* decision about whether children received at the facility should be detained or released into parental custody pending Initial Hearing. The governing statute or the applicable agency regulations usually direct this official to base the detention/release determination on a prediction of the child's propensity for future violence and likelihood of flight. Frequently, statutes or agency regulations prohibit the agency from releasing respondents charged with enumerated serious felonies.

Counsel's goal obviously is to persuade the official to release the respondent to parental

custody. The ammunition for counsel's arguments should be the social information that counsel elicited during the interview of the client and during the phone conversation with the client's parent/guardian. The factors to emphasize should be: the young age of the respondent; his or her lack of any prior record (or, as appropriate: lack of prior convictions, although s/he may have been arrested before; lack of many prior convictions or arrests; lack of convictions for serious felony offenses; lack of convictions for serious felony offenses involving violence; or lack of serious, violent offenses in the recent past); the child's good behavior at home, as reported by the parent/guardian; the child's good school attendance record, good conduct in school, and good school grades; any summertime or part-time employment experiences showing the respondent's reliability or industriousness; and the comparatively minor nature of the present offense (or, as appropriate: the lack of violence even though the offense was serious; the lack of any concrete police evidence linking this respondent to the offense; and any other factors making it plausible that the respondent actually is innocent and falsely arrested).

If it is simply impossible for counsel to go to the detention facility, then these arguments will need to be made over the phone to the appropriate official. However, counsel's chances of securing the client's release will be vastly improved by a personal trip to the detention facility. Facility officials are not used to seeing attorneys (especially late at night), and they will often respond to an attorney's appearance by treating the case as an exceptional situation that warrants something other than routine rubberstamping of the police officers' decision to detain the child.

If the respondent is currently (or was previously) on probation or parole (in many jurisdictions, called "aftercare") and if the respondent has a good relationship with his or her current or former probation or parole officer, counsel should telephone the officer and enlist his or her aid in lobbying the facility official to release the respondent. Frequently, an agency official will respond far more favorably to a fellow worker than to a defense attorney, in part because of the inevitable institutional loyalty to others in the same line of work (even when they are from another division of the same agency or another agency) and in part because s/he will view the worker as being less partisan than a defense attorney. If it is after work hours and if the probation or parole officer's home number is not listed in the phone book, counsel can try asking the respondent's parent or guardian, since some officers give out their home numbers to respondents' parents in case problems crop up after hours. If counsel is unable to learn the officer's home number and if counsel is confident that the officer will give a good report, counsel can ask the agency official to call the officer at home; frequently these officials have listings of the home numbers of their colleagues.

If counsel succeeds in persuading the detention facility official to release the respondent into parental custody, then counsel usually will need to call the parent/guardian and arrange his or her picking the client up from the facility. In some jurisdictions, if the parent/guardian is unable to arrange transportation, the facility will arrange to bring the child home. Facilities that lack provisions for transportation may, depending upon local regulations and custom, permit the attorney to take the child home if the parent/guardian is unable to come to the facility to pick up the child.

Finally, in jurisdictions that permit bail in juvenile cases, if the attorney has not as yet arranged bail, the detention facility official's decision to deny release will necessitate the arranging of bail. Procedures for securing the client's release on bail are discussed in § 4.27 *infra.*

§ 3.25 FINAL STEPS TO TAKE ON BEHALF OF THE NEWLY ARRESTED CLIENT IN CUSTODY PENDING ARRAIGNMENT

If counsel has taken all the steps described in §§ 3.20 and 3.22 or 3.23 *supra* for dealing with the police and in § 3.24 *supra* for dealing with detention facility officials and has nevertheless been unable to secure the release of the respondent pending Initial Hearing, counsel has done everything possible to try to bring about release. Counsel now will need to take steps to prepare for Initial Hearing. Since the respondent is detained, that hearing will take place at the earliest possible opportunity: later the same day if court has not yet been adjourned for the day and the "cut-off time" for bringing children to court has not yet passed; the following morning (or, if into a weekend, the following Monday morning) after court has adjourned or the cut-off time has passed. Counsel will need to speak with the parent/guardian promptly to: (i) arrange that the parent/guardian attend the hearing, since the judge probably will not release the child if the parent/guardian does not appear; (ii) ensure that the parent/guardian will be willing to accept custody of the child during the pretrial period if the judge orders release; and (iii) coach the parent/guardian on the need for relating positive information about the client to the probation officer in the upcoming probation intake interview. See § 3.27 *infra.* Counsel should take advantage of any remaining time to gather whatever additional information about the child will help to construct persuasive arguments for pretrial release. See § 4.09 *infra.*

If the client was released by the police or by a detention facility official, then counsel will have considerably more time to prepare for Initial Hearing. In most jurisdictions children who are released by the police or a detention facility are not required to report to court for at least two weeks. (Upon being released, the child and his or her parent or guardian are given a document instructing them to report to court (or the probation office) on a certain date.) Counsel thus will usually have a period of at least two weeks to consult with the client and his or her parent/guardian regarding the probation intake interview and the Initial Hearing and to do any other necessary preparation for the hearing and the arguments on pretrial detention.

Part D. Entering the Case at the Probation Intake Stage: Representing Children Who Were Released After Arrest and Have Not Yet Gone Through Probation Intake

§ 3.26 OVERVIEW OF THE ROLE THAT THE ATTORNEY POTENTIALLY CAN PLAY IN THE PROBATION INTAKE PROCESS

In most jurisdictions the probation intake process is designed to provide social information for a probation officer's determinations (i) whether to "divert" the case out of the juvenile justice system (or in some jurisdictions whether to recommend that the prosecuting

agency divert the case); and (ii) if the case is not diverted, whether to recommend pretrial detention or release of the child at Initial Hearing. See § 3.12 *supra.* The probation intake process generally consists of a probation officer's interview with the child and with the parent, consultation of prior court records on the child, discussion with any other probation officers who have previously supervised or are currently supervising the child on probation, telephone calls to check on the child's attendance and behavior in school, and possibly also telephone calls to the supervisors of the child in any part-time or summertime jobs and to mental health professionals who may have seen the child previously.

The most common situation in which defense counsel confronts the probation intake process is when s/he has been retained by a parent/guardian whose child was released immediately after arrest and who was directed to appear in court (or in the probation office) for a probation intake interview prior to Initial Hearing. Court-appointed counsel may deal with the probation intake process if a former or current client is rearrested and contacts the attorney for advice prior to probation intake on the new case. Attorneys who enter the case at or after the Initial Hearing usually will not encounter probation intake issues, since the process already will have been completed by that time.

The role that the attorney can play in influencing the probation intake process ordinarily is a very limited one. The attorney usually will not be permitted to attend the probation officer's interview with either the child or the parent/guardian. Also, most probation officers will be at least somewhat resistant to attempts by attorneys to advocate to them what their decisions should be. There are, however, two ways in which the attorney can indirectly influence the outcome of the probation intake process: (i) by counseling the child and parent/guardian how to deal with the probation officer and what information to provide during the intake interviews (see § 3.27 *infra*); and (ii) by gathering positive social information about the child and relaying that information to the intake probation officer (see § 3.28 *infra*).

§ 3.27 COUNSELING THE CHILD AND PARENT/GUARDIAN TO PREPARE THEM FOR THE PROBATION INTAKE INTERVIEWS

The first and most important task in preparing a child and parent/guardian for the probation intake process is to let them know that any information they give to the probation officer will probably be relayed to the judge. Many probation officers begin a probation intake interview by assuring the child and parent/guardian that anything they tell the probation officer will be kept confidential. Although that statement may be technically accurate in that juvenile probation files are not available to the general public, it is incumbent upon defense counsel to ensure that the child and parent/guardian do not suffer from the misconception that the probation officer will keep secret everything s/he is told. Counsel should inform the child and parent/guardian that any social information disclosed to the probation officer may be relayed to the judge at the Initial Hearing and, if the child is convicted, may find its way into the presentence report. Thus any unfavorable social information related to the probation officer may impair the child's chances of pretrial release at Initial Hearing and, if the child is convicted, may

hurt the child's chances of receiving a favorable sentence. By educating the child and parent/guardian in this manner, counsel can ensure that any decision by the child or parent/guardian to disclose negative social information is based on an informed judgment and not on a misimpression of absolute confidentiality. Simultaneously, counsel should encourage the child and parent/guardian to relate to the probation officer any positive social information about the child's school performance, employment experiences, and other activities. However, counsel should warn the child and parent/guardian that any information they give the probation officer may be verified through telephone calls to schools, prior employers, and so forth; thus the child and parent/guardian should be careful not to succumb to the natural temptation to exaggerate the child's good points and accomplishments.

How the child and parent/guardian behave during the probation intake interviews is often as important as what they say. In deciding whether to exercise discretion in favor of diverting a case or recommending pretrial release, many probation officers will be affected by such intangible factors as the attitude and demeanor of the child and parent/guardian, the degree of respect that the child seems to accord to both the parent/guardian and the probation officer, and the degree of emotional support that the parent/guardian seems to be providing to the child. In order to advise the child on these matters in a way that will make sense to the child and will simultaneously not be demeaning, the attorney might consider using the analogy of a job interview: The child should be advised to dress up as if s/he were trying to get a good job, should look the probation officer in the eye while talking to him or her, and should act respectfully both towards the probation officer and towards his or her parent or guardian. In advising the parent/guardian, counsel should just be straightforward about the power that the probation officer wields and the degree of impact that these probation intake interviews can have on the child's case and freedom.

§ 3.28 THE ATTORNEY'S OPPORTUNITIES FOR DIRECT INVOLVEMENT IN THE PROBATION INTAKE PROCESS

Since most probation officers will resist and resent any attempts by the attorney to play the role of advocate in the diversion or pretrial detention decisions of the probation office, the attorney usually can achieve the best results by assuming the seemingly neutral role of information-provider: relaying to the probation officer positive social information about the child that the probation officer might not have obtained otherwise. Most probation officers are heavily burdened with high caseloads and have too little time to attend to each case. As a result, probation officers will make only the most urgently needed phone calls on each case and often will fail to uncover available mitigating facts. Thus, in a relatively common example, the probation officer may call the attendance officer of the child's school and be told that the child was marked absent for most of the year; the child tells the attorney, and the attorney verifies by obtaining the school records, that the child actually attended each day, but simply skipped homeroom period and thus was marked absent when attendance was called. In some cases, the attorney might learn that the child is indeed skipping school but that the attendance problems are caused by the child's frustration and humiliation at being unable to keep up with the class as a

result of undiagnosed or inadequately remedied learning disabilities. When facts of this sort are relayed to the probation officer, they will often bring about the desired result far better than counsel's arguments.

Thus when an attorney enters a case during the probation intake stage, s/he should promptly interview the child and parent/guardian, elicit all possible positive social information about the child, and obtain the written releases of information from parent/guardian and child necessary for counsel's examination of school records and other agency records concerning the child. See § 5.11 *infra.* The attorney then should take whatever steps are necessary to obtain third-party verification of the positive social information. That verification should preferably be in written form, since documents will be more persuasive than the attorney's affirmation that s/he received verification in a phone conversation. Thus the attorney might obtain copies of school records and arrange to have letters written by teachers, former summertime employers, coaches, after-school activity program supervisors, priests or ministers, and even neighbors. The key is to think creatively both in exploring the question of the child's positive traits with the parent/guardian and child and in gathering supporting documents. For example, the best supporting document might be a photograph of the child's trophies for sports accomplishments or a piece of pottery that the child made in an after-school program that s/he regularly attends. Any such mitigating evidence can be passed on to the probation officer either by the attorney or by the parent/guardian in the interview with the probation officer. Of course, the goal of obtaining written or tangible evidence of the child's positive traits must be given up if there is no time for it; in such cases, phone conversations with teachers or other relevant individuals will have to suffice. Once the attorney has located and spoken with such supportive individuals, s/he can recount the phone conversation to the probation officer and possibly urge the probation officer to call that individual.

The limited role of the attorney that has been described here can be expanded when an attorney has developed a good reputation within the probation office and has developed a good prior relationship with the particular probation officer who is handling the case. A probation officer who has come to know and trust a certain attorney will often be much less resistant to overt arguments by the attorney directed to swaying the probation office's decisions. For this reason attorneys can significantly increase their effectiveness by taking the time to get to know probation officers.

After the probation office has completed its intake process, either the case will be diverted or the paperwork on the case will be sent to the prosecutor's office for preparation of the charging document. If the case is going forward (and will be "papered" or "petitioned" by the prosecutor's office), then counsel's next step must be to prepare for arraignment. See Chapter 4.

Part E. The "Wanted" Client: Representing Children Who Have Not Yet Been Arrested But Who Are Being Sought by the Police

§ 3.29 THE INITIAL PHONE CALL FROM THE "WANTED" CLIENT

Attorneys may encounter the problem of a client who is "wanted" by the authorities in either of two ways: when a potential client contacts the attorney for the first time because of his or her suspicions (or knowledge) that s/he is being sought by the police; or when an already-existing client believes (or knows) that s/he is being sought by the police for crimes other than the one(s) on which s/he is already being represented by the attorney. For obvious reasons, when the attorney is contacted by the client himself or herself (rather than by a relative or friend on behalf of the client), the contact is usually in the form of a phone call: Few clients trust an unknown (or even partially known) attorney enough to appear in the attorney's office and face what the client believes to be a significant risk of betrayal to authorities.

In all dealings with "wanted" clients, the attorney must be sensitive to the paranoia that inevitably settles in when an individual leads the life of a fugitive. In the beginning of any phone conversation with a "wanted" client, counsel should explain that the attorney-client privilege covers anything that the client may say about his or her situation and current whereabouts. It is clear under the code of ethics that such conversations do, indeed, fall within the attorney-client privilege; if any attorney labors under the delusion that lawyers are obliged to surrender their clients or facilitate their clients' arrests by telling the authorities where the client can be found, ethical considerations militate that that attorney either refuse to speak with the "wanted" client at all or, at the very least, begin the conversation by warning the client that the attorney may relay to the police any or all of the information that the client divulges. If an attorney, albeit aware of the attorney-client shield, nevertheless feels personally uncomfortable with knowing the client's location, that attorney certainly has the prerogative of asking the client not to reveal his or her whereabouts to the attorney. (Indeed, that type of request may have the fringe benefit of noticeably reducing the client's suspicions about the attorney.)

In any event, after settling the attorney-client privilege, counsel should elicit precisely why the client believes that s/he is wanted by the authorities. A client ordinarily becomes aware that s/he is wanted for arrest because of police efforts to locate the client, because of news reports, or because s/he learns of the arrest of companions. Of course, s/he may be wrong in believing that s/he is wanted, and counsel acting on behalf of a supposedly wanted client should be careful when making inquiries of the authorities not to give them any ideas or information that they do not already have. Before calling them, the attorney should carefully question the client about why the client believes that s/he is wanted. The preliminary interview should also cover: (i) what the client knows about the nature of the charges; (ii) what the client knows about the events underlying the charges; (iii) the client's assessment of whether s/he appears to be in danger of immediate arrest before counsel can discuss with the authorities the possibility of a voluntary surrender; (iv) information that the attorney will need in order to make a strategic judgment and advise the client about the likelihood of release in the event that the client does surrender to the

authorities (including information concerning the prior criminal record of the client; the willingness of the client's parent/guardian or other relatives to accept custody of the client pending trial; the client's record of school attendance; and, in jurisdictions that permit bail in juvenile cases, the sources and amount of the client's resources for making bail); and (v) depending upon the degree of trust that has been established between attorney and client thus far and depending upon the client's assessment of the imminence of arrest, the attorney may wish to begin a conversation about the advisability of a voluntary surrender if the client should indeed turn out to be wanted by the police (see § 3.31 *infra*). If the attorney does not broach the final subject — the advisability of surrender — in this preliminary interview, counsel should at the very least note that s/he will suggest some advice on that issue after ascertaining the client's actual status as well as other pertinent information. Finally, the attorney should obtain the client's permission to contact the authorities on his or her behalf and, without revealing the client's whereabouts, inquire whether s/he is actually wanted and whether the police would be willing to enter into any agreements regarding the client's release in the event of surrender.

§ 3.30 MAKING INQUIRIES OF THE POLICE AND PROSECUTOR

After obtaining the client's permission to contact the authorities, counsel should consider thoughtfully how much information can be revealed to the authorities without suggesting that the client feels or is guilty of some offense and ought to be wanted by the police if s/he is not already. Forearmed with a plausible, nonincriminating reason for the inquiry, counsel should phone the police officer who would logically handle the client's arrest (either those police said to be looking for the client or the desk officer or Youth Services Division officer for the district of the client's residence) or the prosecutor's office (if, in this locality, the prosecutor's office customarily gets involved in prearrest investigations and charging decisions) or, in some jurisdictions, the division of the court clerk's office that is responsible for maintaining records of all judicially approved arrest warrants or "custody orders." Counsel should identify himself or herself as an attorney, say that s/he has been informed that the police may be looking for the client, and ask whether this is so. If it is, s/he should ask whether an arrest warrant for the client has been issued and what the charges are. In jurisdictions that permit bail in juvenile cases, counsel should also ask whether the warrant specifies a bail figure; if it does not, counsel should ask whether the police are authorized to set bail on the charges and what the amount of the bail will be.

Particularly in cases in which the police are seeking the client for a warrantless arrest, the precinct desk officer may have little information to give counsel and may refer counsel to the investigating officers. In any event, on the basis of the information counsel receives from the desk officer (or prosecutor or court clerk), counsel should consider whether s/he wants to speak directly with the investigating officers in order to ask them about the nature of the charges, the circumstances of the supposed offense or offenses, and the likelihood of police release after arrest (or, in some jurisdictions, the likelihood of the police setting stationhouse bail). This will depend on whether counsel believes that s/he can get more information than s/he will be giving out in such a conversation. It also will depend on counsel's assessment of the likelihood that an

offer to arrange the surrender of the wanted client can be used as leverage to bargain for concessions from the police on the issue of postarrest release of the client. Thus, for example, counsel should attempt to extract a commitment from the police that they will exercise their discretion to release the child pending arraignment if s/he surrenders. See § 3.10 *supra*. Even in jurisdictions where the police are barred by statute or police regulations from releasing juveniles charged with certain enumerated felonies, the officers can nevertheless opt for release by redefining the crime for purposes of arrest as a less serious offense — unless, of course, the arrest was pursuant to a warrant specifying one of the enumerated felonies. In jurisdictions that permit bail in juvenile cases, counsel can bargain for stationhouse bail as the *quid pro quo* for surrender. Although the police may have (or may claim that they have) little discretion in setting the amount of bail because it is fixed by a bail schedule, they sometimes do possess some *de jure* discretion in regard to stationhouse bail, and they — or the prosecutor — can always exercise *de facto* discretion either by (i) changing the nature of the charge (unless a warrant has been issued) in order to change the applicable bail schedule figure or (ii) agreeing to go jointly with counsel to a magistrate or judge (who is not bound by the bail schedule) and to recommend that bail be set in an amount different from the bail-schedule figure.

In some cases, the police will refuse to make any concessions on release or bail in return for the client's surrender, because they feel that they do not have discretion to make them, because they are confident that they can soon and easily arrest the client anyway, or because they prefer postarrest detention of the client in order to further their in-custody investigations or to keep the client "off the street" following his or her apprehension. If the police stonewall, counsel should phone the prosecutor's office and attempt to negotiate a surrender and the setting of reasonable release terms (or, in some jurisdictions, setting of reasonable bail) directly with a prosecuting attorney. If the prosecutor is willing, the arrest of the respondent can take place in the courthouse itself, and then the arresting officer can take the respondent directly to the court detention area to await the prosecutor's completion of the charging documents. Even if the prosecutor is unwilling, counsel often can arrange with a courtroom clerk and intake probation officer to have the case called so that the client can surrender in court.

Even though these alternative means to surrender are available, counsel should begin by attempting to negotiate with the police. Generally, police officers are more interested than prosecutors in "closing" open police cases by arrest, since the officers will thereby amass statistics that improve their chances for promotion. Accordingly, police officers have the greatest incentive to agree to bargains proposed by defense counsel, such as the trade-off of surrender for postarrest release.

§ 3.31 THE FOLLOW-UP CONVERSATION WITH THE CLIENT: COUNSELING THE CLIENT ON THE ADVISABILITY OF SURRENDER

After talking with the authorities, counsel will want to confer again with the client, to discuss the client's feelings about surrendering and to advise the client concerning the wisdom of that course in general as well as the specifics of any agreements that counsel thinks s/he can

negotiate with the authorities and the mechanics of surrender if one is arranged. There are several potential benefits to surrendering: (i) The most significant from the client's perspective will be the possibility of postarrest release by the police, pursuant to any agreements that counsel can negotiate; (ii) a less immediate but equally tangible benefit will be the enhanced likelihood of release at arraignment, since counsel will be able to argue to the judge that the client's decision to surrender voluntarily demonstrates both that flight is unlikely and that the respondent is a responsible individual; (iii) by surrendering at a prearranged time with counsel present, the client can avoid the embarrassment and inconvenience of being dragged out of his or her home or school by the police and furthermore can avoid the risk of physical injury from a violent confrontation with the arresting officer; (iv) by surrendering in the presence of counsel, the client ensures that there will be no postarrest custodial interrogation.

As for the alternative course of not surrendering and attempting to evade the police, this option entails significant risks (of inconvenience, embarrassment, possible physical injury, and greater likelihood of detention) and usually provides very little benefit. Although the client may buy a little time "on the street," the police, at least in serious cases, are usually fairly prompt in executing arrest warrants. Moreover, the police usually have little trouble in finding fugitive juveniles: Since children are generally dependent upon their parents or other relatives for shelter and food, most juveniles tend to "hide" in their own homes or the homes of close relatives, where they are readily found by the police. There is one exceptional situation in which a client's successful evasion of the police will produce a distinct benefit. In many jurisdictions there is a maximum age (usually 18 or 21) beyond which a child cannot be incarcerated in a juvenile placement facility. *See, e.g.,* N.Y. FAM. CT. ACT § 355.3(6) (2014). In these jurisdictions a child who commits a crime that is not subject to "waiver" or transfer to adult court (see Chapter 13) and who eludes capture until s/he has passed the maximum age for commitment to a juvenile facility has gained absolute immunity from imprisonment. Moreover, s/he probably will not be prosecuted for the crime: A prosecutor is unlikely to incur the expense of prosecution solely to put a conviction on the child's record when that conviction can thereafter be sealed or expunged (see § 39.08 *infra*).

Counsel will need to advise the client concerning all of these factors so that the client can make an informed decision whether to surrender. Although counsel can (and often should) advise the client to surrender, the final decision of course must be left to the client.

§ 3.32 ARRANGING THE SURRENDER

If the client decides to surrender, then the attorney can finalize the negotiations with the police and arrange the mechanics of the surrender. Counsel should insist upon securing assurances from the police that the client will not be interrogated, exhibited to witnesses for identification, or subjected to searches or examinations while in custody prior to being released. A time and place for surrender should be agreed upon, and counsel should accompany the client to assure that the arrangements which s/he has made with the police or prosecutor are carried out. In jurisdictions that permit bail for juveniles, arrangements should also be made in advance,

either with a professional bail bonder or by getting the requisite cash, securities, or property deed in hand, to have the necessary security for posting bail available at the time of surrender.

§ 3.33 THE SURRENDER AND SUBSEQUENT ASPECTS OF THE CASE

If in the course of the actual surrender of the client, the police officer begins to renege on his or her agreements with counsel, the attorney should resort to what is, as a practical matter, the only available recourse: to tell the officer that if s/he fails to live up to the bargain, counsel will inform all members of the local defense bar that that particular officer is not to be trusted in any negotiations on surrender or any other matters. Since many officers are very concerned with closing cases and amassing arrest statistics, the potential decline in surrenders may have an impact and may cause (or at least encourage) the officer to adhere to the original terms of the agreement.

Once the surrender has been accomplished, counsel then will need to take all the steps that normally must be followed at that particular postarrest stage of a juvenile case. If release of the client was not part of the agreement with the police, counsel will need to try to persuade detention facility officials to release the client to parental custody. See § 3.24 *supra*. If release was part of the agreement and the client in fact was released, then counsel will need to deal with the probation intake process. See §§ 3.26-3.28 *supra*. Then, once the case reaches court, counsel will need to handle the Initial Hearing, a topic that is taken up in the next chapter.

Chapter 4

The Initial Hearing: Prehearing Interview; Arraignment; Pretrial Detention Arguments; Probable-Cause Hearing

Part A. Introduction

§ 4.01 THE NATURE OF THE INITIAL HEARING; SCOPE OF THE CHAPTER; TERMINOLOGY

"Initial Hearing" (or "Initial Appearance") is the term used in most jurisdictions to refer to the first hearing at which the respondent appears before a judicial officer — a judge, magistrate, or court commissioner. Depending upon the jurisdiction, the hearing may encompass all or some of the following court functions:

1. Ascertainment of the respondent's eligibility for court-appointed counsel and, if the respondent is eligible, appointment of defense counsel (see § 4.04 *infra*);

2. Arraignment of the respondent on the charging paper (commonly known as the "Petition") (see §§ 4.12, 4.13 *infra*);

3. Determination whether the respondent will be released or detained pending trial and, in some jurisdictions, setting of bail (see §§ 4.15-4.27 *infra*);

4. Scheduling of a trial date (see § 4.14 *infra*);

5. Referral of the respondent for a mental health examination (see §§ 12.11-12.15 *infra*).

Most jurisdictions conduct the arraignment at Initial Hearing, *see, e.g.,* N.Y. FAM. CT. ACT § 320.4(1) (2013), although some jurisdictions permit the prosecution to postpone the filing of a Petition and the arraignment for a limited period of time under exceptional circumstances. *See, e.g., In the Matter of T.G.T.,* 515 A.2d 1086 (D.C. 1986) (construing a D.C. statute to permit a prosecution continuance of the filing of the Petition for up to five days following Initial Hearing upon a "clear showing of a legitimate state objective to be served by the postponement," *id.* at 1087; but detention or shelter care can only be ordered in such circumstances "if the juvenile is given reasonably specific notice of the nature of the charge," *id.*). Some jurisdictions incorporate both the detention determination and the probable-cause determination in the Initial Hearing, *see, e.g.,* D.C. CODE §§ 16-2310(a), 16-2312(e)-(f) (2014), while others provide for an adversarial detention determination at Initial Hearing followed some days later by a probable-cause hearing, *see, e.g.,* N.Y. FAM. CT. ACT § 325.1(2) (2014).

Because of the substantial diversity in the order in which the various stages are reached,

this chapter will simply address each stage — arraignment, detention, probable-cause hearing, and scheduling of the trial date — as a separate topic, without attempting to elaborate upon the numerous permutations that result from combining or separating the stages.

Terminology also varies substantially among jurisdictions. For purposes of this chapter and the rest of the book, the term "arraignment" will be employed to refer to the formal proceeding at which the respondent is advised of the charges and enters a plea. That plea — which juvenile court parlance styles an "admission" or "denial" — will be designated a plea of "guilty" or "not guilty" in this discussion, to avoid confusion with the concept of incriminating admissions in the context of police interrogation and suppression of confessions. Finally, for the sake of simplicity, the term "judge" will be employed to refer to the judicial officer conducting the Initial Hearing, even though some jurisdictions assign such hearings to a magistrate or court commissioner rather than a judge.

§ 4.02 COPING WITH THE IDIOSYNCRASIES OF INITIAL HEARINGS: RUSHED PROCEEDINGS AND JUVENILE COURT PARLANCE

Counsel should expect that the Initial Hearing will be a pretty rushed proceeding, especially in metropolitan courts where dozens of cases are scheduled for Initial Hearing each day. The setting inside the courtroom is often chaotic, with juvenile respondents, their parents, the prosecutors, defense attorneys, and bailiffs moving about the well of the courtroom, periodically approaching the bench, and going back and forth to the cell-block. Sometimes the prosecution will request a continuance to complete its investigation, and this will be granted before defense counsel even reaches counsel table.

The defense attorney will have to maintain composure in this confusion. When s/he does not understand what the judge is doing, or has done, with counsel's case, s/he should ask the court respectfully for an explanation. The record should be clear on whether the arraignment has been held or continued and, if continued, on whose motion. Defense objections to a prosecution-sought continuance should be noted. If defense counsel is confronted by something unexpected, s/he should ask for time to confer with the client or for a continuance to a later hour or date. S/he should resist being harried or pressured into snap judgments on matters that s/he has not previously considered.

Counsel will also encounter local idioms and acronyms that can bewilder novice attorneys and even experienced attorneys whose practice has been in adult criminal court or juvenile courts of other jurisdictions. See § 2.02 *supra.* Attorneys who are first beginning practice in a juvenile court are well advised to learn the vocabulary quickly by consulting other attorneys who regularly appear in the court and by watching court proceedings.

Part B. Appointment of Counsel

§ 4.03 THE RIGHT TO COUNSEL AT INITIAL HEARING

A juvenile respondent in a delinquency proceeding, like an adult defendant in a criminal proceeding, has a constitutional right to counsel, including the right to court-appointed counsel if s/he is indigent. *See In re Gault,* 387 U.S. 1, 41 (1967). In every delinquency case the "child and his parents must be notified of the child's right to be represented by counsel retained by them or, if they are unable to afford counsel, that counsel will be appointed to represent the child." *Id.*

The Sixth Amendment right to counsel applies at every "critical stage" of the proceedings, *White v. Maryland,* 373 U.S. 59 (1963) (per curiam), "at or after the time that adversary judicial proceedings have been initiated against [the individual] . . . — 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams,* 430 U.S. 387, 398 (1977). *See also Montejo v. Louisiana*, 556 U.S. 778, 786 (2009); *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 198, 213 (2008). The right is triggered at "such time as the '"government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified."'" *Moran v. Burbine,* 475 U.S. 412, 432 (1986).

Under these principles it has long been clear that the Sixth Amendment requires the appointment of counsel to represent indigents at arraignment. *Hamilton v. Alabama,* 368 U.S. 52 (1961); *see, e.g., Rothgery v. Gillespie County, Texas*, 554 U.S. at 198, 213; *Moran v. Burbine*, 475 U.S. at 428; *see also Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012); *Gonzales v. Commissioner of Correction*, 308 Conn. 463, 68 A.3d 624 (2013). Accordingly, when, as in the majority of jurisdictions, Initial Hearing includes an arraignment, a juvenile respondent is entitled to be represented by counsel at the Initial Hearing. In those jurisdictions where Initial Hearing does not involve an arraignment but consists of an adversarial detention hearing and a determination of probable-cause, the Sixth Amendment right to counsel should also apply. Although the Supreme Court has occasionally described the time at which the right attaches as the "first formal charging proceeding" *(Moran v. Burbine,* 475 U.S. at 428), it plainly can attach earlier, depending upon the "state system[ ] of criminal procedure," *Gerstein v. Pugh,* 420 U.S. 103, 123 (1975). *See, e.g., Coleman v. Alabama,* 399 U.S. 1 (1970). *See also, e.g.*, *State in the Interest of P.M.P.*, 200 N.J. 166, 177-78, 975 A.2d 441, 447-48 (2009) (state statutory right to counsel, which applies to "'every critical stage of the proceeding which, in the opinion of the court may result in the institutional commitment of the juvenile,'" is triggered when "the Prosecutor's Office initiates a juvenile complaint and obtains a judicially approved arrest warrant"). In *Moore v. Illinois,* 434 U.S. 220 (1977), the Court concluded that the right to counsel attached at a prearraignment preliminary hearing whose purpose under state criminal procedure was "to determine whether there was probable-cause to bind petitioner over to the grand jury and to set bail." *Id.* at 228. In reaching this conclusion in *Moore,* the Court emphasized that the accused "found 'himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Id.* This is no less true of a juvenile detention proceeding, in which the prosecutor is seeking detention and

an effective response requires a knowledge of the complex statutory and caselaw standards governing detention determinations. Indeed, because of the special disabilities of youth, there is particular reason to conclude that "[t]he child 'requires the guiding hand of counsel at every step in the proceedings against him.'" *In re Gault,* 387 U.S. 1, 36 (1967) (dictum). *See also Schall v. Martin,* 467 U.S. 253, 279 (1984) (in approving the constitutionality of preventive detention for juveniles, the Court emphasizes that the detention statutes in question conferred upon juveniles "the right to a hearing [and] . . . to counsel").

Many jurisdictions also give juveniles a statutory entitlement to counsel at all stages of a delinquency proceeding, including the detention hearing. *See, e.g., T.K. v. State,* 126 Ga. App. 269, 190 S.E.2d 588 (1972); *State ex rel. M.C.H. v. Kinder,* 317 S.E.2d 150 (W. Va. 1984); CAL. WELF. & INST. CODE § 633 (2014); N.Y. FAM. CT. ACT §§ 307.4(2), 320.2(2) (2014); S.D. CODIFIED LAWS §§ 26-7A-30, 26-7A-31 (2014).

§ 4.04 THE MECHANISMS FOR APPOINTING COUNSEL OR ARRANGING FOR THE PRESENCE OF RETAINED COUNSEL AT INITIAL HEARING

Whenever a child appears at arraignment without an attorney, the parent or guardian of the child will be asked whether s/he intends to retain counsel for the child or whether the family is requesting that the court appoint counsel for the child. If the parent opts for appointment of counsel, there will be an inquiry into the parent's financial status to determine whether the parent can afford to retain an attorney.

The mechanism for conducting that inquiry varies widely among jurisdictions. In some localities the inquiry is conducted by the intake probation office; in others the court has created a special agency whose sole responsibility is to oversee the administrative details of the appointment process; in still others the judge conducts the inquiry in court. Depending upon local practice (and often upon the preferences of the inquirer), the inquiry into financial status may be brief or very detailed. If an attorney is consulted by an indigent parent beforehand, the attorney should urge the parent to be realistic in his or her declaration of financial means. All too many parents inflate their financial status for the sake of pride, and as a result, they lose the opportunity to obtain the court-appointed counsel to which they are entitled.

If the family qualifies for appointment of counsel, the judge will assign either a staff attorney of the local public defender's office or a member of the sector of the private bar that accepts appointment to cases of indigent clients. (There is usually a procedure for attorneys who are willing to be appointed to enter their names on either a monthly or daily list; counsel newly entering the juvenile law field should consult private attorneys who are already practicing regularly in juvenile court for instructions on the local procedure.)

In some jurisdictions public defenders and private attorneys are available in court each day for appointment to cases. In these jurisdictions an attorney will be appointed, and arraignment will take place immediately thereafter. In other jurisdictions there is no corps of

attorneys available for daily appointment, and the ordinary practice is to appoint a particular attorney by name, then adjourn the arraignment to another date (possibly two to four weeks later) to permit the designated attorney to appear. In the latter jurisdictions, if the prosecutor requests immediate pretrial detention, the judge will usually make a temporary assignment of an attorney who happens to be in court to handle an arraignment and a pretrial detention hearing in the case.

In appointing attorneys to represent indigent clients, the court normally will not consult the child and parent about their preferences regarding the identity of the attorney. However, there are two situations in which the child (and/or parent) has a right to express a preference. First, if the child has been through the system before and has formed a special relationship of trust with a particular attorney and if that attorney is willing and able to take the new case, then the court should honor the already-existing attorney-client relationship by reappointing that attorney. *See, e.g., Harris v. Superior Court,* 19 Cal. 3d 786, 797-99, 567 P.2d 750, 757-58, 140 Cal. Rptr. 318, 325-26 (1977); *People v. Horton*, 11 Cal. 4th 1068, 1098-1101, 906 P.2d 478, 496-98, 47 Cal. Rptr. 516, 534-36 (1996). *See also*, *e.g.*, *People v. Griffin*, 20 N.Y.3d 626, 630, 632, 987 N.E.2d 282, 284, 286, 964 N.Y.S.2d 505, 507, 509 (2013); *People v. Burton*, 28 A.D.3d 203, 204, 811 N.Y.S.2d 663, 663-64 (N.Y. App. Div., 1st Dep't 2006); *Davis v. State*, 261 Ga. 221, 222, 403 S.E.2d 800, 801 (1991). Accordingly, if the court attempts to appoint a new lawyer for a client and the lawyer learns during the initial interview that the child and/or parent prefer reappointment of an attorney who previously represented the child, the lawyer should bring this matter to the court's attention and request reappointment of that attorney.

Second, the child, the parent, or both may object to the court's selection of counsel on the ground that the designated attorney previously represented the child in a manner that the child, the parent, or both found grossly unacceptable. If the attorney is aware of the client's dissatisfaction or learns of it through the client interview, s/he should gauge whether it will nevertheless be possible to form a sound relationship of trust with the client. If such a relationship will be impossible, the attorney cannot provide effective assistance of counsel and should request that the court assign a different lawyer. If the attorney believes that the current problems in attorney-client relations can be surmounted, s/he should still bring the matter to the court's attention so that the court can inquire into the client's grievances and make an independent assessment of the need for appointing a different attorney.

If the parent declares that s/he will retain counsel or if the family is deemed financially ineligible for court-appointed counsel, the arraignment usually will be adjourned to a new date (usually two to four weeks later) to give the parent time to find and hire an attorney. If the prosecutor requests immediate pretrial detention, the judge ordinarily will appoint a public defender or private attorney to "stand in" for purposes of representing the child in an arraignment and pretrial detention hearing.

The process by which attorneys are retained and thereafter enter their appearances at the adjourned arraignment is normally clear-cut. There are, however, two difficult situations that are worthy of mention. First, attorneys should be very reluctant to be retained by the parent if the

alleged delinquent also has a pending PINS case. The parent, after all, is the party who is pressing charges against the child in the PINS case. Accordingly, the attorney, in effect, is being paid by an individual who is an opposing party in another proceeding. In order to attempt to eliminate this conflict-prone situation, the attorney should ask the court to appoint counsel for the child (and possibly to appoint the attorney himself or herself under the court-appointment process for cases of indigent clients). If the court is unwilling to do so, and if there is no alternative to parental payment of the attorney, then the lawyer should accept the case but only after very carefully cautioning the parent about the attorney's necessary loyalty to the child. *See, e.g.,* INSTITUTE OF JUDICIAL ADMINISTRATION-AMERICAN BAR ASSOCIATION JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Standard 5.3(C) (1980) ("If a parent has retained counsel for a juvenile and it appears to the court that the parent's interest in the case conflicts with the juvenile's interest, the court should caution both the parent and counsel as to counsel's duty of loyalty to the juvenile's interests").

The second difficult situation, which is analogous, arises when the familial relationship between a parent and an allegedly delinquent child has deteriorated to the point of hostility. Although the legal interests of parent and child may not be technically antagonistic here, there usually is a clear divergence between the goals of the client and the paying parent. *See, e.g., id.,* Commentary to Standard 5.3(C) ("[p]arents often resent their children for the trouble, embarrassment and expense brought upon the family by court involvement"). In such circumstances the attorney once again should seek court appointment of counsel for the child and, if that proves impossible, should caution the parent about the primacy of the attorney's loyalties to the child. *See id.,* Standard 5.3(C).

§ 4.05 WAIVER OF THE RIGHT TO COUNSEL

In adult criminal cases the defendant has a Sixth Amendment right to waive counsel and proceed *pro se* as long as the defendant has been "made aware of the dangers and disadvantages of self-representation" and chooses self-representation voluntarily, knowingly, and intelligently. *Faretta v. California,* 422 U.S. 806, 835 (1975). *But cf. Indiana v. Edwards*, 554 U.S. 164, 174 (2008) (Sixth Amendment "permits a State to limit th[e] . . . defendant's self-representation right by insisting upon representation by counsel at trial . . . on the ground" that the defendant, although possessing "sufficient mental competence to stand trial," "lacks the mental capacity to conduct his trial defense unless represented"); *McKaskle v. Wiggins,* 465 U.S. 168 (1984) (defendant's right to self-representation was not violated by judge's appointment of standby counsel and by standby counsel's intermittent, unsolicited participation in the trial); *Martinez v. Court of Appeal*, 528 U.S. 152, 163 (2000) ("neither the holding nor the reasoning in *Faretta* requires [States] to recognize a constitutional right to self-representation on appeal from a criminal conviction, . . . [although] [i]t does not preclude the States from recognizing such a right under their own constitutions").

In *In re Gault,* 387 U.S. 1 (1967), the Court implicitly assumed, without actually deciding, that the same right to waive counsel would be afforded juveniles in delinquency

proceedings. *See id.* at 42 (Gault and his mother had "a right . . . to be confronted with the need for specific consideration of whether they did or did not choose to waive the right [to counsel]"). However, the Court in *Gault* also indicated that the right to counsel can be waived in a delinquency case only if the waiver is made by both the child and his or her parent or guardian. *See id.* at 41-42.

There is a sound basis for limiting the right of juveniles to waive counsel, even with the assent of a parent. The empirical evidence regarding juveniles' waivers of rights demonstrates that a large portion of the population of juveniles is incapable of comprehending and executing a knowing waiver of the right to counsel. *See* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 193-94 (1981); for further discussion of this empirical evidence, see § 24.10(b) *infra.* And although the involvement of a parent or guardian does bring an adult's comprehension and perspective to bear on the waiver decision, some parents and guardians have interests antithetical to their children's. See § 4.04 *supra.*

The problematic aspects of juvenile waivers of the right to counsel have led some state legislatures to flatly prohibit such waivers, *see, e.g.,* IOWA CODE ANN. § 232.11(2) (2014); TEX. FAM. CODE ANN. § 51.10(b) (2014), and this approach is advocated by the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association. *See* IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Standard 6.1(A) (1980). *See also* WIS. STAT. ANN. § 938.23(1)(m)(a) (2014) (prohibiting waiver of counsel by juveniles below the age of 15 and specifying that, if a court accepts a knowing and voluntary waiver of counsel by a "juvenile 15 years of age or older," the court "may not place the juvenile in a juvenile correctional facility or a secured residential care center for children and youth, transfer supervision of the juvenile to the department for participation in the serious juvenile offender program, or transfer jurisdiction over the juvenile to adult court"). Other States follow the course of permitting waivers, but only after the youth has been fully advised of the consequences of waiver by an attorney, *State ex rel. J.M. v. Taylor,* 276 S.E.2d 199 (W. Va. 1981), or the judge, *In re B.M.H.,* 177 Ga. App. 478, 339 S.E.2d 757 (1986); *A.S. v. State*, 923 N.E.2d 486, 492-93 (Ind. Ct. App. 2010); *In re Christopher T.*, 129 Md. App. 28, 40-41, 740 A.2d 69, 75-76 (1999), or after a hearing at which it is shown by clear and convincing evidence that the child has knowingly and intelligently waived the right to counsel and that such a waiver is in the child's best interest, N.Y. FAM. CT. ACT § 249-a (2014); *see also In re Interest of Dalton S.*, 273 Neb. 504, 515, 730 N.W.2d 816, 825-26 (2007); *In re C.S.*, 115 Ohio St. 3d 267, 283-84, 874 N.E.2d 1177, 1192-93 (2007). *Cf. United States v. Ross*, 703 F.3d 856, 868-71 (6th Cir. 2012) (although the record "clearly support[ed]" the district court's initial finding that the adult defendant "had knowingly and voluntarily waived his right to counsel," the district court erred, when new questions about the defendant's competency surfaced, by "permitt[ing] him to represent himself at the competency hearing": "the Constitution requires a defendant to be represented by counsel at his own competency hearing, even if he has previously made a knowing and voluntary waiver of counsel").

Part C. Pre-Hearing Interview of the Client and Parent, and Other Necessary Preparation for the Initial Hearing

§ 4.06 INSISTING UPON AN OPPORTUNITY TO CONDUCT A PRE-HEARING INTERVIEW WHEN COUNSEL IS RETAINED OR APPOINTED IMMEDIATELY BEFORE THE HEARING

If an attorney enters a case before the day of Initial Hearing (see Chapter 3), s/he will ordinarily have the time to conduct a full-scale initial interview of the client, covering both the information needed in order to handle the Initial Hearing (including all of its components: arraignment, detention hearing, and probable-cause hearing) and the information needed in order to begin preparing for trial. However, attorneys who are retained by a client shortly before, or on the day of, the Initial Hearing and attorneys who are appointed by the court on the day of the hearing face the dilemma of insufficient time to fully interview the client and prepare for the hearing.

Some judges may be amenable to a newly retained or appointed attorney's request to continue the Initial Hearing for a few days to allow counsel sufficient time to interview the client and prepare for the hearing. Of course, such a continuance should not be sought if the client will be detained during the period until Initial Hearing unless counsel has reason to believe that the continuance would make it possible to gather information that would spell the difference between a longer period of pretrial detention and release. If the client will not be detained during the period until the hearing, and particularly when a currently detained client will be released during that period, counsel should ordinarily ask the court for the continuance unless: there is a significant risk that a parent or guardian or some other individual who has come to court on the respondent's behalf (like a counselor from a community program) will fail to reappear on the new date; or counsel is aware of detrimental information about the respondent that the prosecutor and probation officer have not yet learned and a continuance would give them a chance to uncover the detrimental information.

In most jurisdictions, however, the judges will not be amenable to defense requests to continue the Initial Hearing, and counsel will have to make do with the limited time that is available. In this situation counsel will have to focus the initial client interview upon the subjects that must be covered in preparation for the hearing itself. See § 4.07 *infra.*

Sometimes, counsel will have to take firm action to assure that s/he can interview the client at all prior to the Initial Hearing. In some jurisdictions attorneys for indigent respondents are appointed at the beginning of the Initial Hearing and are then expected to conduct the hearing immediately, even though they have not yet interviewed their clients. While this dilemma arises with far less frequency when counsel is retained, last-minute retention of the attorney may result in counsel's meeting the client just as the case is being called, and the judge may reject counsel's request that the case be recalled later in the day. Any such judicial pressures to conduct a hearing without a prior client interview are simply unacceptable. Counsel should insist upon interviewing

the client before going forward with any of the components of the Initial Hearing. S/he should insist upon adequate time for the interview: The information necessary to provide effective assistance at the Initial Hearing, described in § 4.07 *infra* may take some time to elicit, especially with an uncommunicative client; and counsel cannot afford to give short shrift to any of the topics that must be covered. Finally, counsel should insist upon a private setting for the interview — a setting that avoids the risk of eavesdropping by guards or other prisoners and in which the client will feel comfortable revealing confidences.

If the judge wishes to forge ahead with the Initial Hearing notwithstanding counsel's request for an opportunity to conduct an adequate first interview with his or her new client, counsel should ordinarily take the position that the client's Sixth Amendment right to effective assistance of counsel will be violated unless sufficient time is allowed for counsel to interview the client and prepare for the hearing. However, there are no hard-and-fast rules here. In some cases in which there is a risk of pretrial detention, it may be possible to take advantage of the judge's impatience and desire to push cases along, to extract a commitment from the judge not to detain the respondent. For example, counsel can state:

> Your Honor, I have not yet had an opportunity to interview my client. If there is any possibility that the Court will detain my client, then the Sixth Amendment requirement of effective assistance of counsel demands that I conduct a full and adequate interview and effectively prepare to argue the issue of pretrial detention.

Frequently, counsel will find that the lateness of the hour and the prospect of protracting a lengthy Initial Hearing calendar will lead a judge to make a commitment that the respondent will not be detained. Under these circumstances there is a tactical benefit to going forward, and there will be no disadvantages as long as counsel is careful not to waive any rights, such as the right to a probable-cause hearing.

In some jurisdictions public defenders and other court-appointed attorneys are informed early in the morning, some hours prior to Initial Hearing, that they will be appointed to a certain respondent's case at the hearing if that respondent is eligible for court-appointed counsel. In these jurisdictions counsel should seize the opportunity to interview the respondent as soon as s/he receives notice of a possible appointment. Inevitably, there will be more time and opportunity for a calm, effective client interview at that point in the day than after the Initial Hearings begin. Moreover, this type of early start on the case will enable counsel to contact relatives, teachers, and social workers who may have information about the respondent that can be used at arraignment in arguing against pretrial detention. See §§ 4.08, 4.09 *infra.* Finally, in many jurisdictions, there will be an additional logistical reason for conducting the interview early in the day whenever the respondent has been detained pending arraignment: In these jurisdictions early interviews can be conducted in the relatively private setting of the general cell-block area of the courthouse; later interviews must be conducted in small holding cells adjoining the courtroom, in the presence of other juveniles who are being held in the cells.

When interviewing the client prior to formal appointment, counsel need not worry about the applicability of the attorney-client privilege as a safeguard of the confidentiality of their communications. Whenever a client consults with an attorney for the purposes of possible representation, the conversation is fully protected by the attorney-client privilege, whether it occurs in a private office or in a cell-block. All that counsel needs to do to guarantee this protection is to conduct the interview in a fashion that minimizes the risk that it will be overheard by third parties, taking whatever precautions against eavesdropping the physical surroundings permit.

§ 4.07 THE INFORMATION THAT NEEDS TO BE ELICITED FROM THE CLIENT IN ORDER TO PREPARE FOR THE INITIAL HEARING

As explained in § 4.01 *supra,* jurisdictions vary on the matters taken up at Initial Hearing. Since counsel's pre-hearing interview of the client should be designed to cover the topics necessary to prepare for the Initial Hearing, the nature of the pre-hearing interview will vary somewhat among jurisdictions. The following sections describe the information that needs to be elicited for purposes of the two crucial judicial determinations made at Initial Hearing in most jurisdictions: (a) the determination whether the respondent will be detained pending trial and (b) the probable cause determination. Usually, no facts will be needed to prepare for the arraignment phase of the Initial Hearing. See § 4.13 *infra.*

§ 4.07(a) Information To Elicit in Preparation for the Detention Hearing

Counsel should cover the following matters in the pre-hearing interview of the client in order to elicit the information needed to argue for pretrial release:

1. Whether the child behaves at home and gets along with his or her parent/guardian well enough that the parent/guardian will be willing to take the child home in the event of release.

2. Whether, to the child's knowledge, the parent/guardian plans to be present at the Initial Hearing. If the interview is being conducted in the courthouse shortly before the Initial Hearing and counsel has not personally seen the parent/guardian at the courthouse, counsel should ask the child whether the parent/guardian is there and should also ask the child for his or her home phone number so that counsel can telephone the parent/guardian, if necessary, as well as the phone numbers of other relatives in the event that no one is home at the child's house. If the child believes that the parent/guardian will not be present, counsel should elicit the reasons for this absence, whether the presence of the parent/guardian can be arranged (either at the time set for the present Initial Hearing or at another time to which it might practicably be adjourned), and, if not, the names and phone numbers of other adult relatives, such as siblings, who could come to court in lieu of the parent/guardian and convey the parent/guardian's willingness to take the

child home.

3. If the parent/guardian is not willing to take the child home, counsel should learn whether there is some other adult relative — such as a grandparent, aunt or uncle, or adult sibling or cousin — who would be willing to take in the child for the period pending trial. Counsel should ascertain not only the name but also the address and phone number of the relative so that counsel can verify the relative's willingness and furnish this verification to the court during counsel's argument.

4. Whether the child regularly attends school, the grade level s/he is in, and a rough estimate of academic performance, including any incidents of suspension or expulsion. Counsel will need the name of the school so that counsel can telephone its attendance officer and verify a lack of truancy and other gross misconduct.

5. Whether the child is presently employed (either full-time or part-time) and whether the child has had any previous jobs, including summer jobs. Counsel should elicit not only the nature, place, hours, and approximate dates of employment but also the names of any employers or supervisors who can verify that the child was a reliable and trustworthy worker.

6. Whether the child is presently on probation or parole (called aftercare in several jurisdictions) and, if so, the name of the child's probation or parole officer and the child's assessment of what the probation or parole officer is likely to say about the child's adjustment.

7. Whether the child has ever been arrested previously and the outcome of the prior case(s). Counsel will have to check the client's record independently, but the client's rendition of it may tip counsel off to charges that are missing from the central records — such as very old or very recent charges — that might nevertheless be known to the probation officer who recites the child's record to the judge. In asking about prior record, counsel must bear in mind that many children are unsophisticated regarding the court system and may believe, for example, that a prior grant of unsupervised probation was a "dismissal" of the case because the child was neither incarcerated nor on active probationary supervision.

8. Whether the child presently has a curfew set by his or her parent/guardian, what that curfew is, how often the child complies with it, and, in the event of noncompliance, how late the child comes home.

9. Whether the child uses alcohol or drugs, and whether s/he is undergoing or has undergone treatment for alcohol or drug abuse.

10. Whether the child is presently, or has in the past been, involved in any counseling programs or after-school or weekend community programs and, if so, the names (and, if the child knows, phone numbers) of any counselors who can speak about the child's reliability and lack of dangerousness.

11. Whether there are any significant mitigating facts about the offense — or prior or pending offenses — that can be cited to dispel the notion that the seriousness of the offense[s] necessitates the child's detention for the protection of the community.

In cases in which counsel believes that there is a significant chance of detention, counsel should also discuss with the client the possibility that counsel will request detention in a group home or other non-secure environment if it becomes clear that the judge is going to detain the client. This type of advance warning is advisable because the signals that the judge gives off during the hearing may not be evident to the client, and the impression s/he will receive is that the lawyer has sold him or her down the river. Post-hearing explanations will be futile, since counsel will already have lost the trust of the client, and counsel's explanations will appear to be *post hoc* excuses.

On rare occasions counsel will see a client who expresses a desire to be incarcerated at the secure detention facility. Requests of this sort must be handled with great sensitivity. Most often, they are fueled by either (i) the child's desire to flee abuse by the parent/guardian or some other adult relative living in the house, or (ii) the child's depression at having been arrested and having disappointed his or her family. Any client would be loth to discuss such personal matters with an attorney whom s/he has just met, and some clients may not even be consciously aware of their own motivations. In such situations a viable option may be to describe shelter care to the client and ascertain whether s/he would be willing to be detained in a community-based setting of this sort. Most clients who manifest this type of disturbance will agree to shelter care, and once placement in a shelter house has been achieved, counsel can arrange for the respondent to talk over his or her problems with a psychiatrist or psychologist.

§ 4.07(b) Information To Elicit in Preparation for the Probable-Cause Determination

As explained in § 4.28 *infra, Gerstein v. Pugh,* 420 U.S. 103 (1975), requires that in any case in which the court orders pretrial detention, the judge must first determine that there is probable-cause to believe that the respondent committed the charged offense. Some jurisdictions provide for a full-scale evidentiary hearing on the issue of probable-cause as part of the Initial Hearing; others provide only that the judge at the Initial Hearing must review the sufficiency of sworn affidavits submitted by the prosecution; still others provide for review of affidavits and similar documents at the Initial Hearing and convene an evidentiary probable-cause hearing some days later. See §§ 4.01 *supra,* 4.28(b) *infra.*

If counsel is practicing in a jurisdiction in which evidentiary probable-cause hearings are

held as part of the Initial Hearing and if the case is one in which the respondent may be detained, counsel will need to prepare for the Hearing by interviewing the client about the facts of the offense. Such an interview should generally follow the format for fact interviews described in § 5.06 *infra,* although that format should be adjusted to the limited time available for a pre-hearing interview and the limited functions of a probable-cause hearing. For example, since counsel ordinarily will not be calling defense witnesses at a probable-cause hearing, counsel should not waste valuable time by eliciting the addresses and phone numbers of potential defense witnesses. Rather, counsel should focus on facts that can be used in cross-examining any complainant, police officer, or eyewitness who is likely to be called by the prosecutor. Thus counsel's interview might cover, for example, biases on the part of the complainant that might cause him or her to lie or deficiencies in lighting that might have led to an error in eyewitness identification.

If counsel is practicing in a jurisdiction in which the probable-cause determination at Initial Hearing is made solely on the basis of affidavits, counsel will not need to use the client interview to prepare for the probable-cause determination. The issue in such a jurisdiction is only whether the affidavits are sufficient to make out probable-cause of every element of the offense, and thus counsel's argument will be limited to the sufficiency of the documents. However, counsel will still need to conduct at least a skeletal interview concerning the circumstances of the offense in order to gather mitigating facts that can be used in arguing against pretrial detention. See § 4.07(a)(11) *supra.*

§ 4.07(c) Other Subjects To Cover in the Initial Interview

For the attorney appointed on the day of Initial Hearing, the pre-hearing interview of the client will be the attorney's first contact with the client. Accordingly, counsel will need to preface the interview with an introduction of himself or herself and an explanation of the attorney's function and the attorney-client privilege. See § 5.04 *infra.*

§ 4.08 INTERVIEW OF THE CLIENT'S PARENT OR GUARDIAN TO GATHER INFORMATION RELEVANT TO THE DETENTION DETERMINATION

In addition to conducting a pre-hearing interview of the client, counsel also will need to interview the client's parent or guardian. The paramount question to resolve in talking with the client's parent or guardian is his or her willingness to take the child home in the event that the judge releases the child. As indicated in § 3.21 *supra,* some parents and guardians initially may be in favor of a brief period of detention, either because they are angry at their children for having been arrested or because they have the misconception that detention will teach the child a needed lesson. As § 3.21 *supra* explains, it may be necessary to offset the anger or dispel the misconception by telling these parents and guardians about the harsh realities of institutional life and the potentially devastating impact of detention on the likelihood of winning at trial.

Counsel should interview the parent or guardian about the child's behavior at home, inquiring particularly into: whether the child has a curfew, what that curfew is, and how regularly

s/he complies with the curfew; whether there have been any problems with the child running away from home; whether the child has any psychological or substance abuse problems that require immediate attention; whether the parent or guardian has received adverse reports from the child's school regarding attendance, behavior, or academic performance; and whether the parent or guardian can recall the nature and disposition of any prior arrests of the child (since the parent/guardian may have a better recollection and understanding of the prior cases than does the child).

Counsel should ascertain from the parent or guardian whether s/he has already been interviewed by the probation officer and, if so, what s/he told the probation officer about each of these aspects of the child's background and home situation.

Assuming that the parent/guardian is willing to take the child home, counsel should tactfully inquire into the employment of the parent/guardian and any adult relatives who live in the home. If any of these individuals are employed in jobs that are likely to impress the judge with the individual's responsibility, particularly jobs in law enforcement or the court system, that individual's promise to watch over the child during the pretrial period and to bring the child to court on the trial date could be decisive in securing release.

Counsel's interview of the parent or guardian prior to the Initial Hearing will usually be brief because of the limited time available. However, at some point after the hearing, counsel will need to explain to the parent or guardian that counsel represents the child and not the parent or guardian. See §§ 5.03(b), 511 *infra*; see also § 4.04 *supra.*

§ 4.09 TELEPHONE CALLS TO MAKE IN PREPARATION FOR THE INITIAL HEARING

In preparing for the detention hearing phase of the Initial Hearing, counsel will need to make the following telephone calls:

1. To the client's parent or guardian if s/he is not present at court (or to another relative if the parent or guardian cannot be reached or, having been reached, is unable to come to court), to arrange that an adult be present at the Hearing prepared to represent that the parent or guardian is willing to take the client home if released before trial;

2. To another adult relative willing to take the child into his or her home for the period of time until trial if the parent or guardian is unwilling to do so;

3. To the child's school, to verify a lack of truancy, suspensions, and expulsions;

4. To any employers and counselors named by the child, to verify the facts reported by the child and to elicit favorable descriptions of the child; and

5. If the child is currently on, or was previously on, probation or parole, to the child's probation or parole officer, in order to: ascertain the child's adjustment (which counsel can cite in arguing for release); lobby the worker in the event that s/he is consulted by the Intake Probation Officer regarding the probation department's recommendation for detention; and if the worker has favorable things to say about the respondent, ask the worker to contact the Intake Probation Officer (in the event that the Intake Probation Officer does not seek the worker's input) and make a pitch to the Intake Probation Officer on the respondent's behalf.

§ 4.10 EXAMINATION OF THE CHILD'S PRIOR RECORD BEFORE THE INITIAL HEARING

It is essential that counsel examine an accurate compilation of prior charges against the child in advance of the detention hearing phase of an Initial Hearing. As explained in § 4.19 *infra,* the judge will hear a full recitation of the client's prior record from the probation officer. If the client has a prior record of convictions or even arrests, that may be the central factor relied upon by the probation officer and prosecutor in asserting that s/he is so dangerous as to require pretrial detention. Counsel's review of the record prior to the hearing is necessary in order to gather facts and construct arguments to rebut the inference of dangerousness advanced to support these requests for detention. In addition, thorough familiarity with the record may prove to be useful in correcting any factual inaccuracies in or misimpressions conveyed by the probation officer's recitation of the respondent's prior record. As explained in § 4.20 *infra,* the probation officer may describe a prior charge, of which the respondent was acquitted at trial, by simply declaring that that charge was "dismissed." It is clearly in the respondent's interest for defense counsel to amplify that kind of ambiguous description and let the judge know that there was an acquittal at trial and not merely a dismissal on a technicality. Moreover, occasionally the probation officer who appears in court may not have the most current information about the respondent's charges; and counsel may, for example, need to correct the probation officer's characterization of a charge as still pending by explaining that that charge was recently withdrawn by the prosecution for lack of evidence.

In most jurisdictions the most up-to-date compilation of a juvenile's prior record will be found in the juvenile court clerk's office. Because juvenile files are not public records, the clerk may be resistant to counsel's examination of the prior records of the client. Counsel should insist on seeing the records, explaining that access to these records is essential to counsel's preparation for the detention hearing and therefore required by the child's Sixth Amendment right to effective assistance of counsel. If necessary, counsel should obtain an order from the judge permitting access to the records.

§ 4.11 ASCERTAINING THE POSITIONS OF THE PROBATION OFFICER AND PROSECUTOR, AND LOBBYING TO CHANGE UNFAVORABLE POSITIONS

In the detention hearing phase of the Initial Hearing, a probation officer will report on the

child's prior record and background and will make a recommendation regarding the appropriateness of release. See § 4.19 *infra.* The probation officer's report will be based on court records and an interview of the respondent. The interview may or may not have been conducted by the probation officer who will appear in court. Some jurisdictions divide the Probation Office into different units, with certain units interviewing all new arrestees and other units appearing in court and relating the facts gathered by the interviewers. If a child is already on probation, the courtroom probation officer will usually rely on a report from the child's current probation officer.

It is advisable for counsel to consult the courtroom probation officer before the Initial Hearing in order to elicit any facts about the respondent's background that counsel does not already know, to ascertain the recommendation that the probation officer intends to make regarding the need for detention, and, if that recommendation is unfavorable, to gently lobby the probation officer regarding release. Most probation officers will be amenable to such discussions with counsel if the attorney is polite and deferential to the probation officer's greater experience in working directly with children. If counsel can learn the precise motivations of the probation officer, then counsel may be able to propose alternatives to detention that will address the probation officer's concerns. For example, if the probation officer is primarily concerned about the respondent's disobedience of a curfew set by the parent, s/he may be amenable to counsel's suggestion that the respondent be released with a curfew set — and enforced — by the court.

If the courtroom probation officer resists counsel's arguments and if there is a probation officer who has had greater contact with the respondent than the courtroom probation officer — for example, in cases in which the respondent is already on probation for another offense or in which the courtroom probation officer is relying on an interview by a different probation officer — it may prove fruitful to contact that other probation officer and engage his or her assistance in lobbying the courtroom probation officer. This must be done very carefully, however, in order to avoid arousing the courtroom probation officer's ire for seemingly going behind his or her back to enlist the aid of his or her colleagues.

Finally, depending upon the prosecutor who is handling the case, it may be useful to consult the prosecutor as well, eliciting the recommendation that s/he intends to make and possibly lobbying him or her. Some prosecutors adopt an extremely adversarial stance, refusing to divulge information in advance of the hearing; some prosecutors are happy to discuss the matter; still others are guardedly willing to talk, in exchange for an equal amount of information from defense counsel. Here again, it is important to understand the adversary's motivation and to tailor requests and arguments to address his or her concerns. See § 14.16 *infra.*

Part D. Arraignment

§ 4.12 NOTIFICATION OF THE CHARGES

The arraignment usually begins with the court advising the respondent of the charges in

the Petition. Due process requires that "the child and his parents or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the [trial]." *In re Gault,* 487 U.S. 1, 33 (1967). In several states notice requirements are also prescribed by statute. *See, e.g., In the Matter of Michael M.*, 3 N.Y.3d 441, 821 N.E.2d 537, 788 N.Y.S.2d 299 (2004).

Usually, at arraignment the clerk of the court or the bailiff hands a copy of the Petition to defense counsel and the respondent or gives counsel an extra copy to give the respondent. Thereafter, most judges read the Petition aloud so as to advise the respondent orally of the charges and then ask the respondent (or defense counsel on behalf of the respondent) whether the respondent understands that these charges have been lodged against him or her. This procedure varies considerably, depending upon the predilections of the particular judge, the age of the child, and the number of cases on the docket for that date. Some judges carefully explain the charges to the child in informal language, especially if the child is very young. In metropolitan jurisdictions with heavy arraignment calendars, many judges employ the shorthand procedure of having counsel waive the formal reading of the Petition aloud, with the understanding that counsel will explain the charges to the child after the hearing has been completed. As long as counsel faithfully fulfills the obligation of explaining the Petition to the child afterwards, there is no reason to refuse to follow local custom in waiving formal reading of the Petition.

Since, technically, the parent/guardian must be advised along with the child, some judges refuse to go forward with an arraignment if the parent or guardian failed to come to court with the child. Usually, there is no reason to resist a continuance, since delay tends to favor the defense. See § 15.01 *infra.* There may be reasons, however, why counsel will wish to avoid delay in a particular case. If the child has been detained, it is clearly in his or her interest to move forward through all stages of the case as quickly as possible. In addition, some clients who are not detained are anxious to move the proceedings along quickly and end the anxiety of awaiting trial. If counsel has sound reasons for avoiding delay, and the client wishes to go forward without his or her parent or guardian being present, then counsel can inform the court that the child wishes to waive the presence of a parent or guardian. Depending upon the jurisdiction and the particular judge presiding over the arraignment, the judge may simply accept counsel's representation or may inquire of the child to ensure that the waiver is voluntary, knowing, and intelligent. (The client can be prepared for such judicial inquiries by means of a role-play in which counsel plays the role of judge and asks the respondent all of the questions that the judge might ask, such as: "Do you understand that you have the right to have a parent or guardian present during your arraignment on this Petition?" "Do you understand what an arraignment is?" "Do you want to proceed without your parent or guardian being present?" "Have you spoken with your attorney about your decision to proceed without your parent or guardian being present?" "Did your attorney explain to you your right to have your parent or guardian present?" "Do you know where your parent [guardian] is?" "Do you know why s/he is not in court today?" "Why do you want to proceed without your parent or guardian here?")

§ 4.13 THE RESPONDENT'S ENTRY OF A PLEA

After the respondent has been notified of the charges, the judge will request the respondent's entry of a plea of "guilty" or "not guilty." In jurisdictions that strictly observe juvenile court parlance, the question will be framed in terms of an "admission" or "denial" of "acts that, if committed by an adult, would be crimes."

In all but the most unusual case, counsel will advise the client against entering a plea of "guilty" at this stage of the proceedings. As explained in Chapter 14, a decision to plead guilty requires a complex analysis of the facts of the case and other strategic considerations that counsel will not be in a position to make until after investigation and negotiations with the prosecutor. Nothing is lost by delaying the decision about a guilty plea until counsel and the client are adequately informed, since there will be ample opportunity at later stages of the case to enter a guilty plea if the client so chooses.

The rare case in which counsel might advise a client to plead guilty on the day of arraignment would be one in which counsel's representation of the child began prior to arraignment and counsel has already had an opportunity to investigate the case and confer at length with the child. Even then, counsel must be cautious about urging a guilty plea at arraignment, since there are likely to be concrete benefits to delaying the guilty plea as long as possible. See §§ 14.15, 14.25 *infra.*

Counsel should check local procedural rules governing arraignment in juvenile court to make sure that the old common-law procedure for special pleas and demurrers is not followed. Under the common law, such special pleas had to be made prior to the entry of a general plea of guilty or not guilty, and a plea of "not guilty" would waive all special pleas not previously entered. Although this procedure is still followed in adult criminal courts in some States, it is seldom employed in juvenile court.

§ 4.14 SETTING THE TRIAL DATE AND DEADLINES FOR MOTIONS AND SPECIAL DEFENSIVE PLEAS

After the respondent has been advised of the charges and has entered a plea of "not guilty," some judges proceed immediately to scheduling of the trial. But if this scheduling process takes place prior to the judge's determination of the respondent's pretrial detention status, counsel will not be in any position to know what s/he wants in the way of a trial date. Counsel's preferences regarding the scheduling of the trial will depend almost entirely on the respondent's detention status: If the client is released pending trial, then counsel will wish as late a trial date as possible in order to thoroughly investigate the case and also to enable the child to amass a relatively lengthy period of good behavior that can be cited at sentencing in the event that the respondent is convicted; if, on the other hand, the respondent is detained pending trial, then counsel will wish as early a trial date as possible to minimize the length of detention.

Accordingly, in all cases other than those in which counsel is fully confident that the child will be released (such as cases of first offenders charged with minor offenses), counsel should respond to a judge's attempt to set the trial date before determining the child's detention status by stating respectfully that counsel wishes to defer a setting of a trial date until after the judge has resolved the detention issue. If the judge nevertheless proceeds immediately with scheduling the trial date, counsel should state for the record that s/he may wish to accelerate the trial date in the event that the respondent is detained.

In cases in which the respondent is released pending trial, counsel should insist upon sufficient time to conduct necessary investigation. If the judge attempts to pressure counsel into accepting an early trial date, counsel should invoke the client's right to effective assistance of counsel and point out that counsel cannot be effective without sufficient time to investigate and prepare the case for trial. Counsel can also note that the Supreme Court expressly recognized in *In re Gault,* 387 U.S. 1 (1967), that juveniles, no less than adults, have the right to a "reasonable opportunity to prepare for trial" and sufficient time "in advance of the hearing to permit preparation." *Id.* at 33. See § 15.02 *infra.*

In cases in which the respondent is detained pending trial, counsel will have a much more difficult task gauging the amount of preparation time to request. Although counsel naturally will wish to avoid prolonging the child's pretrial detention, counsel cannot allow this consideration to eclipse the goal of preparing with sufficient thoroughness to win the case at trial and thereby prevent the far greater loss of liberty that could occur at sentencing. As a general rule, counsel should select the earliest practicable date and seek a continuance later if counsel cannot complete pretrial preparation by that date.

In most jurisdictions, statutes or court rules establish a certain deadline for filing suppression motions, discovery motions, and other defense motions. In addition, many jurisdictions establish a deadline (possibly the same one, possibly earlier or later) for announcing that the defense intends to employ an insanity defense or an alibi defense. See §§ 9.11-9.12 *infra.* Under most deadlines of this sort, the clock starts ticking at arraignment. For example, counsel may have 15 days from arraignment to file a discovery motion and 30 days from arraignment to file suppression motions and a notice of intention to invoke an alibi defense. If, at arraignment, counsel anticipates that s/he will be unable to comply with the deadlines, s/he should ask the court to extend them for a specified amount of time (whether that be two weeks or a month). Most judges will accede to such requests if counsel has an adequate reason for the extension (such as when counsel will be in trial for most of the time period). For other methods of extending deadlines for motions, see § 7.05 *infra.*

As noted in § 4.13 *supra,* counsel will need to consult local practice to make sure that the old common-law procedure of special pleading is not followed. Under that procedure certain "special pleas" — such as objections to jurisdiction and pleas of double jeopardy — had to be made prior to the entry of a general plea of guilty or not guilty at arraignment. Under the

procedure usually followed in juvenile court, objections of this sort are raised in pretrial motions. See Chapter 17.

Part E. Pretrial Detention and Bail

§ 4.15 INTRODUCTION: PRETRIAL DETENTION AND BAIL IN JUVENILE COURT

In adult criminal court the vast majority of defendants are either released on recognizance or held subject to release on bail in an amount set by the court. Although the Eighth Amendment's prohibition against "excessive bail" does not preclude preventive detention pending trial, *see United States v. Salerno*, 481 U.S. 739 (1987), very few adult criminal defendants are, in fact, preventively detained.

The situation is very different in juvenile court. "Every State, as well as the United States in the District of Columbia, permits preventive detention of juveniles accused of crime." *Schall v. Martin,* 467 U.S. 253, 267 (1984); *see id.* at 267 n.16 (listing statutes). Pretrial detention is used with considerable frequency in some jurisdictions, especially in metropolitan areas.

The majority of jurisdictions have rejected the use of bail in juvenile court. In some of these jurisdictions, statutes expressly prohibit bail for juveniles. *See, e.g.,* HAW. REV. STAT. § 571-32(h) (2014); OR. REV. STAT. § 419C.179 (2014); UTAH CODE ANN. § 78A-6-113(12) (2014) (prohibiting bail except when the juvenile lives out-of-state or when the offense is a traffic violation or certain other minor infractions). In other jurisdictions, in which the juvenile statutes are silent on the subject of bail, the courts have rejected juveniles' claims of an entitlement to bail, reasoning in part that the juvenile code's presumption in favor of release supplies sufficient protection of the child's liberty rights. *See, e.g., Aubrey v. Gadbois,* 50 Cal. App. 3d 470, 123 Cal. Rptr. 365 (2d Dist. 1975); *Pauley v. Gross,* 1 Kan. App. 2d 736, 574 P.2d 234 (1977); *State v. Gleason,* 404 A.2d 573, 582-83 (Me. 1979); *People ex rel. Wayburn v. Schupf,* 47 A.D.2d 79, 365 N.Y.S.2d 235 (N.Y. App. Div., 2d Dep't 1975); *Morris v. D'Amario,* 416 A.2d 137 (R.I. 1980); *see also In re William M.,* 3 Cal. 3d 16, 26 n.17, 473 P.2d 737, 744 n.17, 89 Cal. Rptr. 33, 40 n.17 (1970); *State v. M.L.C.*, 933 P.2d 380, 385-87 (Utah 1997). Finally, in several jurisdictions in which the statutes are silent on the issue of bail for juveniles and the appellate courts have never addressed the issue, trial judges simply assume that bail is inapplicable in juvenile court because the juvenile code provides only for detention or release.

In roughly one fourth of the States, the juvenile code does allow bail in delinquency cases. *See* COLO. REV. STAT. ANN. § 19-2-509 (2014); CONN. GEN. STAT. ANN. § 46b-133(b) (2014); MASS. GEN. LAWS ANN. ch. 119, § 67 (2014); MINN. STAT. ANN. § 260B.176(1) (2014); NEB. REV. STAT. § 43-253(5) (2014); OKLA. STAT. ANN. tit. 10A, § 2-2-403(B) (2014); S.D. CODIFIED LAWS § 26-7A-52 (2014); TENN. CODE ANN. §§ 37-1-114(c)(7), 37-l-117(e) (2014); WASH. REV. CODE ANN. §§ 13.40.040(5), 13.40.050(6) (2014); W. VA. CODE § 49-5-8a(a) (2014). The nature of these statutory schemes, and particularly the relationship between bail and preventive detention, is discussed in § 4.27(b) *infra.*

The right to bail for juveniles presently exists exclusively as a creature of statute. Although a constitutional right to bail for juveniles has in the past been founded upon a construction of the Eighth Amendment as guaranteeing bail for all persons regardless of age (*Trimble v. Stone*, 187 F. Supp. 483 (D. D.C. 1960); *but see Fulwood v. Stone*, 394 F.2d 939, 943 & n.13 (D.C. Cir. 1967)) and a construction of the Due Process Clause as requiring bail to preserve the presumption of innocence *(State in the Interest of Banks*, 402 So.2d 690, 694-95 (La. 1981)), the Supreme Court in *United States v. Salerno*, 481 U.S. at 752-55, held that the Eighth Amendment does not guarantee a right to bail for all persons charged with criminal offenses, and the Court in *Schall v. Martin,* 467 U.S. at 272-74, rejected the argument that preventive detention of juveniles is *per se* a violation of due process. The state courts are, of course, free to construe state constitutional provisions differently from their federal counterparts, see § 7.09 *infra,* and some state constitutional provisions concerning bail would naturally lend themselves to more protective constructions because they expressly guarantee a right to bail whereas the Eighth Amendment does nothing more than prohibit "excessive bail." However, the state courts thus far have proven unwilling to construe state constitutional bail provisions (including provisions establishing an apparently universal right to bail) as applicable to juveniles. *See L.O.W. v. District Court,* 623 P.2d 1253, 1258-59 (Colo. 1981); *Morris v. D'Amario,* 416 A.2d 137, 139-40 (R.I. 1980); *Baker v. Smith,* 477 S.W.2d 149 (Ky. 1971).

The standards for pretrial detention are discussed in § 4.17 *infra.* The criteria governing the awarding of bail in those jurisdictions that permit bail for juveniles are discussed in § 4.27 *infra.*

§ 4.16 THE FUNDAMENTAL IMPORTANCE OF SECURING THE CHILD'S RELEASE AT THE DETENTION HEARING

It is essential that counsel prepare carefully for the detention hearing, since its outcome can have a decisive impact on the entire case. As the empirical evidence suggests, and as trial lawyers can attest from personal experience, pretrial detention significantly increases the likelihood of conviction at trial and incarceration at sentencing. *See* Stevens H. Clarke & Gary Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference,* 14 LAW & SOC'Y REV. 263, 293-94 (1980); Patricia Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study,* 39 N.Y.U. L. REV. 631 (1964). One explanation for this phenomenon is that the incarceration of the accused prevents him or her from assisting defense counsel in finding witnesses and preparing the case for trial. *Barker v. Wingo,* 407 U.S. 514, 533 & n.35 (1972); *Schall v. Martin*, 467 U.S. 253, 297 & n.24 (1984) (Marshall, J., dissenting); *Kinney v. Lenon,* 425 F.2d 209 (9th Cir. 1970). Other factors may include "'[c]onditions of confinement . . . that are so harsh or intolerable as to induce [the accused] to plead guilty, or that damage his appearance or mental alertness at trial.'" *United States v. Edwards,* 430 A.2d 1321, 1355 (D.C. 1981) (Ferren, J., concurring and dissenting). Finally, the increased likelihood of conviction at trial may be attributed in part to the psychological impact of detention on the finder of fact, who is, in most jurisdictions, a judge. Since judges are well aware that detention is most often ordered because of a significant prior criminal record, the judge is likely to presume that a juvenile who

has been detained pending trial has a prior record, and this presumption may in turn render the judge more willing to conclude that the respondent is guilty of the present charge. The greater likelihood of incarceration at sentencing may be attributed in part to the fact that the respondent, unlike children who were released before trial, cannot point to recent evidence of ability to adjust in the community.

Detention is also a crucial issue because of its potentially devastating impact on the child's development. As Judge Patricia Wald of the United States Court of Appeals for the District of Columbia Circuit has observed, juvenile detainees are "[o]ften brutalized" and a young detainee "may be sodomized within a matter of hours." Patricia M. Wald, *Pretrial Detention for Juveniles*, in PURSUING JUSTICE FOR THE CHILD 119 (Margaret K. Rosenheim, ed., 1976); *see also D.B. v. Tewksbury,* 545 F. Supp. 896, 903 (D. Or. 1982); Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001 (2005). In addition, detained juveniles are "demoralized by lack of activities and trained staff. . . . Over half the facilities in which juveniles are held have no psychiatric or social work staff. A fourth have no school program." Wald, *supra* at 119. Finally, as Justice Marshall has pointed out, "the impressionability of juveniles may make the experience of incarceration more injurious to them than to adults; all too quickly juveniles subjected to preventive detention come to see society at large as hostile and oppressive and to regard themselves as irremediably 'delinquent.'" *Schall v. Martin,* 467 U.S. at 291 (Marshall, J., dissenting) (footnote omitted)

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§ 4.17 STATUTORY AND CASELAW STANDARDS FOR THE DETENTION DETERMINATION

In most jurisdictions the juvenile code contains a statutory provision requiring that a detention hearing be held within a specified period of time following arrest. *See, e.g.,* ILL. COMP. STAT. ANN. ch. 705, § 405/5-415(1) (2014) (40 hours excluding weekends and holidays); IND. CODE ANN. § 31-37-6-2 (2014) (within 48 hours excluding weekends and holidays); N.Y. FAM. CT. ACT § 307.4(5) (2014) (within 72 hours "or the next day the court is in session, whichever is sooner"); W. VA. CODE § 49-5-8(c)(4), (d) (2014) ("In no event may any delay in presenting the juvenile for a detention hearing exceed the next day after he or she is taken into custody."). *See also JV-111701 v. Superior Court In and For County of Maricopa*, 163 Ariz. 147, 149-52, 786 P.2d 998, 1000-03 (Ariz. App. 1989) (juvenile court rule providing for initial hearing within 24 hours violated the Equal Protection Clause by excluding weekends and holidays from calculation of the 24-hour period while the parallel rule for adult criminal defendants included weekends and holidays within the 24-hour period for bringing an adult arrestee before a magistrate). Such detention hearings are ordinarily conducted as nonevidentiary arguments by the attorneys. See § 4.19 *infra.* However, in some jurisdictions, the factual statements made in support of detention must be in the form of sworn testimony. *See, e.g., Doe v. State,* 487 P.2d 47, 53 (Alaska 1971); *In re Luis M.,* 180 Cal. App. 3d 1090, 1094, 226 Cal. Rptr. 39, 41 (1986) (respondent who is detained can request a detention rehearing, at which s/he can confront and cross-examine the authors of reports relied upon to justify detention).

The substantive standard employed in most jurisdictions authorizes detention in cases in which: (i) there is a substantial probability that the respondent will flee the jurisdiction to avoid trial; or (ii) there is a serious risk that the respondent will be a danger to others by committing further crimes before the trial date. *See, e.g.,* N.Y. FAM. CT. ACT § 320.5(3) (2014). Some jurisdictions add to this list an imminent risk that the respondent will be a danger to himself or herself by attempting suicide or other seriously self-destructive behavior. *See, e.g.,* D.C. SUPER. CT. JUV. RULE 106(a)(3)(iii)-(iv) (2014).

In assessing whether there is a risk of flight, the courts generally will consider: whether the respondent has failed to appear for court proceedings in prior cases; whether the respondent has a stable address where s/he can be reached by the court if necessary, and the length of time that the child and his or her family have been living at this or another stable address; and whether there is an adult — whether parent, guardian, or adult sibling — who can take responsibility for ensuring that the child will return to court on the correct date. In the case of children who live out-of-state, the courts are generally more prone to assign a higher risk that the child will fail to return although, in fact, there is no reason to treat these cases differently from those of local children as long as there is a responsible adult who will ensure the child's return to the jurisdiction. Some judges also consider a history of running away from home as relevant to the risk of flight, although such indicia of problems in the child's relationship with his or her parents should not control the resolution of the very different question of the likelihood of the child's complying with a court order.

In predicting whether the child is likely to commit future crimes if released, the courts generally consider a host of factors, including:

> the nature and seriousness of the charges; whether the charges are likely to be proved at trial; the juvenile's prior record; the adequacy and effectiveness of his home supervision; his school situation, if known; the time of day of the alleged crime as evidence of its seriousness and a possible lack of parental control; and any special circumstances that might be brought to [the judge's] attention by the probation officer, the child's attorney, or any parents, relatives, or other responsible person accompanying the child.

Schall v. Martin, 467 U.S. 253, 279 (1984) (describing the factors generally relied upon by Family Court judges in New York City). In authorizing consideration of other crimes of the respondent, the detention standards of some jurisdictions carefully distinguish between crimes against the person and crimes against property, limiting the judge's consideration of other crimes against property to crimes involving "serious loss or damage," D.C. SUPER. CT. JUV. RULE 106(a)(2)(iii) (2014), or property "offense[s] constituting a felony." TENN. CODE ANN. § 37-1-114(c)(2) (2014).

In some jurisdictions the juvenile code not only sets forth a substantive standard for the detention decision but also specifies that an order of detention must be supported by a finding that there is an "immediate and urgent necessity" for detention. *See, e.g.,* CAL. WELF. & INST.

CODE § 636(a) (2014); ILL. COMP. STAT. ANN. ch. 705, § 405/5-501 (2014); NEB. REV. STAT. § 43-253(5) (2014). In such a jurisdiction counsel can argue that the statute requires that the prosecution make a two-part showing to justify detention. First, the prosecution must show that detention is justified under the governing substantive criterion of risk of flight or dangerousness. Second, the prosecution must show that this risk of flight or dangerousness is so grave as to give rise to an "immediate and urgent necessity" for detention.

In many States the detention statute or caselaw limits detention to those cases in which there is no less restrictive alternative. *See, e.g., Doe v. State,* 487 P.2d 47, 53 (Alaska 1971); *Commonwealth ex rel. Sprowal v. Hendricks,* 438 Pa. 435, 265 A.2d 348 (1970); *State ex rel. M.C.H. v. Kinder,* 317 S.E.2d 150, 156-57 (W. Va. 1984); TENN. CODE ANN. § 37-1-114(c)(7) (2014). Counsel should stress this requirement and argue against detention on the ground that less restrictive measures (such as home detention, daily telephone calls to a probation officer, or, if necessary, placement in a group home) would be sufficient to guard against the risks identified by the prosecutor.

Several jurisdictions require that a judge who orders detention state the reasons for detention on the record so that the determination can be reviewed on appeal. *See, e.g., Doe v. State,* 487 P.2d 47, 53 (Alaska 1971); *State ex rel. M.C.H. v. Kinder,* 317 S.E.2d 150, 158-59 (W. Va. 1984); N.Y. FAM. CT. ACT § 320.5(3) (2014).

Many States specify that children below a certain age (usually designated as age ten) cannot be placed in a secure detention facility. *See, e.g.,* N.Y. FAM. CT. ACT § 304.1(3) (2014). *See State ex rel. M.C.H. v. Kinder,* 317 S.E.2d 150, 157 & n.19 (W. Va. 1984) (listing the statutory minimum age limits of several States). Even in jurisdictions that lack such a statutory age limit, most judges are extremely reluctant to place a very young child in detention and will do so only if the charged offense is heinous. If detention of a young child is necessitated by the parent's unwillingness to take the child home, the judge usually will place that child in a group home rather than a secure detention facility.

§ 4.18 POSSIBLE PLACES OF DETENTION

Knowledge of the types of juvenile detention facilities that are commonly employed by the court are important for several reasons. First and most fundamentally, that knowledge enables counsel to formulate requests for alternatives to detention in a secure facility. Familiarity with the services and programs provided at the various detention facilities will furthermore enable counsel to argue that detention is inappropriate in cases in which a facility cannot attend to the child's special educational or psychological needs. Familiarity with private group homes and community-based programs will make it possible to quickly construct alternatives to pretrial detention.

Most jurisdictions provide for two forms of detention: "secure detention" and "shelter care" (called "non-secure detention" in some jurisdictions).

"Secure detention" means, in most states, placement in a penal-type facility for juveniles. These facilities may differ from adult penal institutions in that they may provide "educational and recreational programs and counseling sessions run by trained social workers." *Schall v. Martin*, 467 U.S. 253, 271 (1984) (describing New York City's Spofford Juvenile Center). However, notwithstanding the existence of such programs, "secure detention entails incarceration in a facility closely resembling a jail . . . [in which] the detainee suffers stigmatization and severe limitation of his freedom of movement." *Id.* at 290-91 (Marshall, J., dissenting) (also describing Spofford). In addition, despite the existence of programs, a juvenile detainee may be physically and psychologically damaged by sexual assaults by other inmates. *See id.* at 290; Patricia M. Wald, *Pretrial Detention for Juveniles,* in PURSUING JUSTICE FOR THE CHILD 119 (Margaret K. Rosenheim, ed., 1976). Finally, there is reason to doubt the adequacy of the educational and counseling programs provided at many of these detention facilities. *See* Wald, *supra* at 119.

A "shelter house" or "non-secure detention facility" has been described as "an open facility in the community, a sort of 'halfway house,' without locks, bars, or security officers where the child receives schooling and counseling and has access to recreational facilities." *Schall v. Martin,* 467 U.S. at 271 (describing New York City's non-secure detention facilities). Children detained in these shelter houses attend school in the community, either the school they attended prior to detention or the school closest to the shelter house. Most of the facilities are "secure" in the sense that the children are locked in the shelter at night, and their activities during the day are carefully monitored.

Several jurisdictions have a system of "home detention" as an alternative to placement in a detention facility. Children placed in "home detention" live at home and attend their usual school, but their activities are monitored by a home detention worker, who regularly checks with the school and the child's parent or guardian. Home detention is usually reserved for children who have been charged with relatively minor offenses and have a limited prior record.

Some States permit pretrial detention of juveniles in adult facilities in regions of the State in which there is no juvenile detention facility or in which the juvenile facilities that do exist are too small to house the entire population of pretrial detainees. *See, e.g.,* MONT. CODE ANN. § 41-5-349 (2014); N.D. CENTURY CODE ANN. § 27-20-16(1)(e) (2014). When authorizing placement of juveniles in adult jails, statutes of this sort usually require that juveniles be placed in a division of the jail "separate and removed from those for adults." N.D. CENTURY CODE ANN. § 27-20-16(1)(e) (2014). However, tragic cases of physical and sexual abuse of children placed in adult jails (*see, e.g., Doe v. Burwell,* 537 F. Supp. 186 (S.D. Ohio 1982); *see also Cox v. Turley,* 506 F.2d 1347, 1350-53 (6th Cir. 1974); AMNESTY INTERNATIONAL, BETRAYING THE YOUNG: HUMAN RIGHTS VIOLATIONS AGAINST CHILDREN IN THE U.S. JUSTICE SYSTEM 37-39 (November 1998); AMERICAN BAR ASSOCIATION STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN, AMERICA'S CHILDREN *STILL* AT RISK 265-67 (2001)) have led some States to flatly prohibit placement of children in adult jails, *see, e.g.,* MO. REV. STAT.§§ 211.151(2), (4) (2014); OHIO RULE JUV. PROC. 7(H) (2014); PA. CONS. STAT. ANN. tit. 42, § 6327(a), (c) (2014); *see also* Official Comment to PA. CONS. STAT. ANN. tit. 42, § 6327 (2014) (quoting Uniform Juvenile

Act's explanation that such prohibitions "'are designed to avoid the harm resulting from exposing children to adult criminals and the degrading effect of jails, lockups, and the like'"), and has led to federal legislation requiring that States receiving funds under the Juvenile Justice and Delinquency Prevention Act refrain from placing juveniles in adult jails and lockups except for brief periods of up to 48 hours (excluding weekends and holidays) pending an initial court appearance. *See* 42 U.S.C. § 5633(a)(13)(B) (2014). The practice of placing juvenile pretrial detainees in adult jails has also been found to be "fundamentally unfair" in violation of due process, in that the juvenile court's invocation of the *parens patriae* rationale to deny the normal procedural rights accorded to adult criminals necessitates a corresponding parental "solicitude" in the choice of where to detain the child pending trial. *D.B. v. Tewksbury,* 545 F. Supp. 896, 906-07 (D. Or. 1982).

§ 4.19 THE DETENTION HEARING: PROCEDURE

Although practice varies somewhat among jurisdictions, most juvenile courts adhere, more or less, to the same general procedure for detention hearings.

The hearing usually commences with an oral report by a probation officer, covering: the respondent's record of prior and pending cases; prior incidents of failure to appear for court proceedings; whether the respondent is presently on probation or parole and, if so, how the respondent's current probation or parole officer describes the respondent's adjustment; regularity of attendance at school, incidents of suspension or expulsion, and possibly whether the respondent is failing one or more classes; whether the parent or guardian has any complaints about the child's behavior at home or the child's compliance with the curfew set by the parent/guardian; and whether the child has any psychological or substance abuse problems. The probation officer concludes by making a recommendation regarding the appropriateness of detention and, if s/he recommends detention, the appropriate level of detention. (For discussion of the possible levels of detention, see § 4.18 *supra*.)

During the probation officer's recitation or at its conclusion, the judge may ask for clarification of aspects of the report or for more details. The prosecutor or defense counsel also can seek clarification or additional details by asking the judge to question the probation officer or, in courts following a less formal procedure, by asking the probation officer directly. However, counsel should be wary of asking for clarification or further details; unless counsel has good reason to believe that the answer will be favorable, counsel should avoid the risk of eliciting unfavorable information.

If the probation recommendation is for release, the judge will usually move quickly, summarily asking the prosecutor whether s/he agrees with the recommendation. Assuming that the prosecutor concurs, the judge will order release and move on to the scheduling of the trial.

If the probation officer recommends detention or if the prosecutor objects to a probationary recommendation of release, the prosecutor will address the court next. The

prosecutor is likely to highlight any negative facts described by the probation officer and to supplement those facts with a description of any aggravating aspects of the current offense or prior offenses of the respondent. The prosecutor will conclude by making his or her recommendation regarding the need for detention and the appropriate level of detention.

The judge then will turn to defense counsel. Defensive arguments are described in § 4.21 *infra*.

Most judges rule at the conclusion of defense counsel's presentation, although some judges allow the prosecutor and defense attorney to engage in reply and rebuttal arguments. Some judges address questions to the parent/guardian, asking whether s/he is willing to take the child home, whether there are problems in the child's behavior at home, and whether the parent/guardian is willing to take responsibility for ensuring that the child will return to court on the correct date. Some judges address the respondent directly, asking him or her whether s/he will behave and attend school if released. (Although technically, defense counsel can object to a judge questioning the respondent directly rather than through counsel, it is not advisable to do so if counsel is confident that the questions are harmless and that a judicial colloquy with the child may turn the tide in favor of release.)

§ 4.20 PREVENTING OR OBJECTING TO ANY MENTION OF PRIOR CHARGES THAT HAVE BEEN NOLLED, DISMISSED, OR SEALED

In many jurisdictions the probation officer's recitation of prior charges of the respondent includes a variety of dismissed charges such as: cases in which the respondent was arrested but the prosecutor elected not to bring charges (an exercise of prosecutorial discretion known in some jurisdictions as "no-papering" or "NPD" ("No Petition Drawn")); cases in which the respondent was charged by the prosecution, but the prosecutor subsequently withdrew the charges because of lack of prosecutorial merit or witness reluctance or any of a host of other reasons (a process called, depending upon the jurisdiction, "withdrawing the Petition," "entering a nolle prosequi," or simply "dismissal by the prosecution"); cases in which the respondent successfully completed a period of diversion and the case subsequently was sealed (called "diversion," "adjournment in contemplation of dismissal," or "probation without verdict"); cases dismissed as part of a plea bargain; cases in which the court granted the defense's "Motion to Dismiss in the Interests of Justice" (known in some jurisdictions as a "Motion to Dismiss for Social Reasons," see Chapter 19); and cases that resulted in acquittal at trial. The common practice in reciting the existence of such a dismissed case is for the probation officer to declare ambiguously that the case was "dismissed after arrest."

This practice is highly prejudicial to the respondent, since some judges subscribe to the maxim that "where there's smoke, there's fire." A judge may erroneously believe (either consciously or unconsciously) that a crime was dismissed for technicalities and was actually committed by the respondent when, in fact, the ubiquitous characterization of "dismissal" is concealing an acquittal at trial or a withdrawal of the case because the prosecutor determined that

the wrong child was arrested.

Accordingly, when practicing in jurisdictions in which probation officers recite dismissed charges, counsel should routinely request at the beginning of every detention hearing that the court bar any mention of dismissed cases. Counsel should argue that those cases are irrelevant because they are not probative on the issue of the respondent's character and future dangerousness. *Cf. In the Matter of Moe v. New York City Department of Probation,* 133 Misc.2d 98, 102, 506 N.Y.S.2d 830, 833 (N.Y. Sup. Ct. 1986), *aff'd,* 72 N.Y.2d 662, 532 N.E.2d 1254, 536 N.Y.S.2d 26 (1988) (prohibiting inclusion of "arrests which were favorably terminated" in juvenile pre-sentencing reports because that "information is not material or relevant as to petitioner's character"). The inevitable response to this request will be a rejoinder (on the part of either the prosecutor or the judge) that juvenile court procedure presumes the judge's ability to ignore irrelevant and even prejudicial matters in making a decision. Counsel should preempt that argument by pointing out that if the judge intends to ignore such information, then there can be no legitimate justification for the probation office's even relating it.

Attorneys who practice frequently in juvenile court are well-advised to obtain a dispositive ruling from the bench and then seek the probation office's establishment of a policy precluding the practice of reciting dismissed charges. The inadequacy of raising the issue case-by-case is that even if the judge excludes prior dismissed charges, s/he has been alerted that charges of this sort exist in the respondent's record. Nor can counsel solve this problem by making the request routinely in every case, including cases in which the respondent has no prior arrests, since the attorney's ethical obligations to the first-offenders prohibit jeopardizing their position by causing the judge to believe that they, too, have sealed or dismissed cases in their background.

§ 4.21 DEFENSE ARGUMENTS FOR RELEASE OF THE RESPONDENT

In framing arguments for release, counsel must decide initially whether it is in the respondent's interest to distinguish between factors relating to risk of flight and factors relating to future dangerousness. Most probation officers and prosecutors fail to make this distinction and instead indiscriminately rattle off a roster of the child's failings without identifying whether the listed problems relate to flight or dangerousness. In certain cases the defense position will be improved by pointing out the distinction. For example, if it is evident that the probation officer and prosecutor are seeking detention solely to curb the risk of flight, then counsel can point out that the respondent's criminal record and behavior problems at school are irrelevant to the stated reason for detention. Even if the probation officer and prosecutor are proceeding on both grounds, distinguishing the grounds is beneficial if the argument for detention is weak on each ground and increases in strength only through the mixing of factors. Conversely, if the case for detention is strong on both grounds, and the favorable points that can be cited by counsel relate only to one ground, it is in the respondent's interest to leave the muddle unclarified and argue that the favorable points outweigh the reasons for detention.

§ 4.21(a) Arguments Relating to the "Risk of Flight"

In arguing that there is no significant risk of flight, counsel should stress any of the following factors that are applicable, arguing that these factors indicate that the respondent will appear for trial:

1. The way the respondent was arrested was that s/he went to the police station and surrendered, and this fact demonstrates that the respondent has no desire to flee or avoid responsibility for the offense.

2. Upon being released initially by the police or the detention facility, the respondent thereafter responsibly came to court for the detention hearing.

3. The respondent has reliably appeared for any prior proceedings in the case or any prior meetings with the probation intake officer.

4. The respondent has no history of prior failures to appear in any court cases. (If the respondent has a lengthy record, counsel can turn it to the defense's advantage by pointing out that in all of the prior cases, the client consistently appeared for trial rather than fleeing.)

5. The respondent and his or her family have a stable address in the community, where they have lived for a significant period of time, and there is no reason to believe that the child would flee his or her only means of support.

6. The parent/guardian is willing to take responsibility for ensuring the child's return on the trial date.

7. The regularity of the child's school attendance and/or regularity of appearances for probation or parole meetings demonstrates the child's compliance with officially imposed obligations.

If the respondent does have a history of prior failures to appear, and the probation officer or prosecutor brings up this devastating fact, counsel will need to either give an explanation for the failures to appear (assuming that counsel has learned from the client that s/he had a legitimate reason for missing those court appearances) or else minimize their impact (by pointing out, for example, that the failures to appear happened a long time ago when the respondent was much younger and less mature than s/he is now; and/or that the respondent was living with an irresponsible parent or guardian at the time and is now living with a more responsible adult relative).

§ 4.21(b) Arguments Relating to Future Dangerousness

In urging that the factors cited by the probation officer or prosecutor do not warrant a finding that the respondent is so dangerous as to require detention, counsel can make the following arguments.

§ 4.21(b)(1) Arguments Concerning the Prior Record of the Child

If the child has no prior record of convictions or arrests, this is by far the most compelling defense argument and should be stressed by counsel. Counsel should point out that the lack of any prior record proves that the instant offense, even if committed by the respondent, was an isolated event, and there is no basis for predicting future dangerousness. *See, e.g., In re M.L.DeJ.*, 310 A.2d 834, 836 (D.C. 1973) ("'the nature and circumstances of the pending charge[]' [s]tanding alone, . . . would not constitute sufficient grounds for detention"). If the respondent does have a prior record (and if counsel has been unable to exclude mention of the prior charges, see § 4.20 *supra*), then counsel should characterize the record in whatever way is most favorable. For example, counsel can make any of the following arguments in appropriate cases: Although the child has prior charges or pending charges or both, there have been no convictions, and the child must be presumed innocent of what are merely allegations; although the respondent does have prior convictions, these convictions happened a long time ago (pointing out that a year is a significant period of time developmentally in a child's life), and there have been no new arrests (or, if there have been arrests, no new convictions) since that time; although there are prior or pending charges, there are mitigating aspects of these offenses (for example, the respondent was a passive follower in a crime committed by older children or the offense was a minor property offense or both).

§ 4.21(b)(2) Arguments Concerning the School Performance of the Child

If the respondent is attending school regularly but the probation officer or prosecutor stresses that s/he is failing classes, counsel can respond that academic failure merely shows the need for a more appropriate school placement, and possibly a special educational placement, but does not relate to either risk of flight or dangerousness. If the problem described by the probation officer or prosecutor is truancy, similar arguments can be made, but most judges regard truancy as relevant to dangerousness, since they view truants as "problem children" with a poor prognosis for their future conduct. This view can be rebutted, however, if counsel can explain the truancy as linked to a legitimate problem that can be corrected. For example, if the respondent has been avoiding school because of the embarrassment of being unable to keep up with the academic material, counsel can explain this problem to the judge and furthermore explain that counsel will talk with the special education teachers at the school to find the child a more appropriate school placement. Similarly, if the respondent has been staying away from school because s/he has been left back so many times that s/he is now in a class with children who are much younger and physically smaller, counsel can make a commitment to explore "alternative school" programs for adolescents. In discussing the educational deficits of the child, counsel

should, whenever possible, avoid stating these problems in open court and embarrassing the child further; the best course is to ask leave to approach the bench to discuss a sensitive issue.

§ 4.21(b)(3) Arguments Concerning Curfew

If the probation officer or prosecutor stresses the inappropriately late curfew set by the parent or guardian, counsel can simply suggest that the court set an earlier curfew to be enforced by the parent or guardian. If the curfew problem described by the probation officer or prosecutor is that the child has not been complying with a reasonable curfew set by the parent or guardian, counsel can respond that the inevitable resistance to parental authority can be remedied by the court imposing a curfew, with the parent or guardian directed to report any violations of the court-imposed curfew.

§ 4.21(b)(4) Arguments Concerning Psychological or Substance Abuse Problems

If the probation officer or prosecutor predicates the request for detention wholly or in part upon psychological or substance abuse problems of the child, counsel can respond that these problems can and will be adequately remedied through community-based programs if the child is released. Counsel can significantly enhance the persuasiveness of this argument if s/he can relate that s/he has already telephoned an appropriate program prior to the hearing and obtained the program's commitment to promptly interview the client for admission.

§ 4.21(c) Arguments Relating to the Respondent's Danger to Himself or Herself

As mentioned in § 4.17 *supra,* danger to self is listed as a basis for detention in some state statutes and court rules. In jurisdictions that list only risk of flight and danger to others as predicates for detention, *see, e.g.,* N.Y. FAM. CT. ACT § 320.5(3) (2014), counsel should object to any judicial reliance on the detainee's danger to self as a reason for detention, pointing out that the legislature established an exclusive list of permissible bases for detention.

In jurisdictions that do authorize detention on the basis of the child's danger to self, counsel should argue that detention and placement in a facility for delinquents is not an appropriate solution to mental problems and, indeed, is likely to exacerbate those problems. Counsel should point out that the particular problem highlighted by the probation officer or prosecutor can be addressed in a community-based program, and counsel should commit himself or herself to finding an appropriate program for the child. (Preferably, counsel will already have made the necessary phone calls, in which case counsel can notify the court that the child already has an admissions interview scheduled.)

§ 4.21(d) Arguments Applicable to All of the Bases for Detention

§ 4.21(d)(1) Arguments Citing Aspects of the Child's Life That Have Changed or Will Change in the Near Future

As the previous sections have indicated, prosecutorial reliance on problematic aspects of the child's life or behavior can be rebutted by pointing out that the underlying cause of the problems has been remedied already or will be remedied in the immediate future. There are a host of arguments of this sort that can be made. If the respondent is charged with being an accomplice to a crime by an older youth or adult and that older youth or adult has been detained pending trial, counsel can argue that the primary bad influence on the respondent is now gone. If the respondent's delinquent behavior or self-destructive behavior stems in part from parental neglect or abuse, it will be persuasive to point out that the respondent henceforth will be living with a grandparent or other relative. And, if the respondent's criminal conduct can be linked in part to his or her belonging to a neighborhood gang, it will be significant that the relative whose house s/he is moving into lives in a distant region.

§ 4.21(d)(2) Arguments Based upon the Inappropriateness of the Detention Facilities for the Particular Respondent

As explained in § 4.18 *supra,* a knowledge of the services offered at the various detention facilities can be a powerful tool in the hands of a defense attorney. If counsel can point to specific rehabilitative needs of the child — such as special educational or psychological needs — and is sufficiently familiar with the facilities to know that they lack such services, counsel probably can derail an otherwise certain rush to detain. If counsel knows that the facilities house only (or mostly) children above a certain age, s/he can argue that a respondent who is much younger than that age would be in danger of assaults by other inmates if detained. In jurisdictions that detain children in adult jails (see § 4.18 *supra*), it is often worthwhile to inform the court that such practices have been prohibited in other jurisdictions because of the grave danger to the child's physical and mental health.

§ 4.21(d)(3) Argument That Detention of the Respondent Would Unfairly Impede Counsel's Pretrial Investigation of the Case

Whenever an individual is "locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo,* 407 U.S. 514, 533 (1972). *See also Schall v. Martin,* 467 U.S. 253, 297 & n.24 (1984) (Marshall, J., dissenting). This general effect on pretrial preparation could be cited in support of release in every case, but a mere generalized argument will usually be unpersuasive. In cases in which counsel can make a particularized showing that the respondent's liberty is crucial to defense investigation of the case, this sort of showing may prove decisive in effecting pretrial release. Thus in *Kinney v. Lenon,* 425 F.2d 209 (9th Cir. 1970), the court held that a trial court's "failure to permit [the juvenile respondent's] . . . release for the purpose of aiding the preparation of his defense unconstitutionally interfered with his due-process right to a fair trial" (*id.* at 210) because there

had been a "strong showing" (*id.*) that the respondent was the only person who could track down defense witnesses. The respondent in *Kinney,* charged with assault and battery for a schoolyard fight, had "allege[d] that there were many potential witnesses to the fight, that he cannot identify them by name but would recognize them by sight, that [the defense] . . . attorneys are white though he and the potential witnesses are black, that his attorneys would consequently have great practical difficulty in interviewing and lining up witnesses, and that [the respondent] . . . is the only person who can do so." *Id.* This showing was found sufficient to compel release even in the face of the prosecution's assertion of "previous instances of harassment of the state's witnesses." *Id.*

In making a showing of specific need for the respondent's assistance in pretrial investigation, counsel should be careful to avoid giving the prosecutor discovery of the defense case. When it is necessary to cite details of the proposed defense, counsel should seek leave of the court to make an *ex parte* proffer. See §§ 11.03(b), 16.04 *infra.*

§ 4.21(e) Fallback Requests for a Result Short of Outright Release

If it becomes clear to counsel that the judge will not entertain the possibility of outright release of the respondent, then counsel will have to propose an alternative in order to avoid the drastic consequence of detention in a secure facility. Depending upon local facilities and practices, counsel will wish to consider the following alternatives in the following order:

1. Home detention (see § 4.18 *supra*);

2. Bail;

3. Home detention during the week to enable the child to attend school, combined with weekends in a shelter house (or, if necessary, in a secure detention facility) so that the judge can be confident that the child's conduct is monitored on weekends;

4. Full-time detention in a private group home willing to accept the child (assuming that the level of care and the degree of liberty in such a private facility make it preferable to a state-administered shelter house);

5. Detention in a shelter house (see § 4.18 *supra*);

6. Detention in a secure facility combined with school release or work release or both.

In some jurisdictions counsel also can employ the fallback argument that the judge should leave the determination of level of detention to the administrative agency in charge of detention. Obviously, counsel will resort to such an approach only when s/he has good reason to believe

that the agency is likely to be more lenient than the judge in selecting the site of detention. In cases in which counsel elects this option, counsel can argue to the judge that the agency can gather more facts about the child and/or has the social work expertise to assess the most appropriate place of detention.

In going to any of these fallback arguments, the most difficult issue is timing. If counsel proposes the fallback alternative too soon, the judge may seize upon it as a compromise solution even though s/he would have ordered release in the end. Conversely, if counsel waits too long, the judge may fix upon secure detention, convince himself or herself of the correctness of that result, and then be unwilling to consider counsel's fallback proposals. There are no fixed rules that can be set forth to handle the timing issue. Counsel must listen carefully to the judge's rejoinders to counsel's and the prosecutor's arguments and deduce the way the judge is leaning and his or her degree of flexibility at each point in the arguments.

§ 4.22 USING THE PROBABLE-CAUSE HEARING TO PREVENT DETENTION

Under *Gerstein v. Pugh,* 420 U.S. 103 (1975), it is a prerequisite for detention that the State show that there is probable-cause to believe that a crime was committed and that the respondent was the perpetrator. See § 4.28(a) *infra.* Some States provide for an evidentiary hearing on probable-cause as part of the Initial Hearing whenever the judge is inclined to detain the respondent; other States provide for a determination of probable-cause at Initial Hearing on the basis of affidavits and may also provide for a second determination of probable-cause at an evidentiary hearing three to five days later. See § 4.28(b) *infra.* Under any of these statutory schemes, the defense can prevent detention by showing that the evidence which the State has proffered (either in the form of affidavits or testimony) is insufficient. If counsel can persuade the judge that the State has failed to make out probable-cause on some element of the crime or that the State has failed to show probable-cause to believe that the respondent was the perpetrator, then the judge must release the respondent. The finding of "no probable-cause" also may result in dismissal of the Petition, either by operation of law or because the judge's reaction to the evidence leads the prosecutor to dismiss the case. See § 4.28(b) *infra.*

In some cases the prosecution's evidence will be marginally sufficient to make out probable-cause but apparently too weak to sustain a conviction at trial under the more rigorous "reasonable doubt" standard. Even though the judge can lawfully detain in such cases, many judges will respond to a basic-fairness argument that stresses the injustice of subjecting the respondent to several weeks of detention in a case that is likely to result in acquittal at trial.

Finally, in some cases, the evidence at the probable-cause hearing, while strongly satisfying the probable-cause standard and perhaps even strongly showing guilt, will highlight mitigating aspects of the offense. In these cases the mitigating facts may supply a predicate for asking that the judge reconsider the earlier assessment that the respondent is dangerous to others.

§ 4.23 PREVENTING DETENTION BY ATTACKING THE SUFFICIENCY OF THE PETITION

Sections 17.01-17.07 *infra* describe the legal bases for challenging the sufficiency of the Petition. In most jurisdictions these challenges are made in the form of a written motion to dismiss the Petition, filed within a certain period of time (usually 30 days) following the arraignment. However, in cases in which the judge orders pretrial detention, counsel should orally raise any defects in the Petition that render the charging paper invalid. Counsel should argue that both the juvenile statutes and due process require that there be a valid charge, and charging paper, on which to detain the respondent.

§ 4.24 STEPS TO TAKE IF THE CLIENT IS DETAINED

Detention can be a terrifying experience for a child, especially one who has never been detained before. If the judge orders detention, counsel should confer with the client immediately afterward in the cell-block, informing the client that counsel will explain to the client's parent/guardian how to visit the child at the detention facility and that counsel will come to the facility (specifying the date) to discuss the case with the child. Thereafter, counsel should inform the parent/guardian of visiting hours and travel directions to the facility. (Attorneys who practice extensively in juvenile court are well-advised to carry several sets of written travel directions to give to parents and guardians.)

If the child requires special attention at the facility — because s/he needs psychological services or special medication or because s/he is extremely young or vulnerable and therefore needs protection against assaults by other inmates — counsel should request that the court write provisions for this special treatment into the detention order. If the judge complies with the request, counsel should telephone the administrator of the facility to ensure that s/he is notified of the court order. If the judge denies the request, stating that the facility will surely take care of these matters, then a telephone call to the facility is particularly crucial, to inform the administrator of the child's special needs and the judge's assumption that the facility will attend to them. If the facility refuses, then counsel will need to return to court and seek a supplemental order.

Finally, in the event that counsel obtained a court order delegating the selection of the level of custody to the administrative agency that oversees detention facilities (see § 4.21(e) *supra*), counsel will have to speak to the appropriate agency officials to lobby for the least restrictive level of custody.

§ 4.25 OBTAINING RELIEF FOR CLIENTS WHOSE INITIAL HEARING HAS NOT BEEN HELD PROMPTLY

As explained in § 4.17 *supra,* most jurisdictions specify a precise time limit within which a newly arrested child must be brought to court for a hearing on the issue of pretrial detention. In

some jurisdictions, however, the statute establishes only a general requirement that the juvenile be brought before a judge "promptly" or within a "reasonable period of time."

In jurisdictions that specify a time limit, counsel representing a child held beyond that limit without a hearing should petition the juvenile court for an immediate hearing or apply for a writ of habeas corpus. *See, e.g., People v. Clayborn,* 90 Ill. App. 3d 1047, 414 N.E.2d 157, 46 Ill. Dec. 435 (1980); *State ex rel. Morrow v. Lewis,* 55 Wis.2d 502, 200 N.W.2d 193 (1972). In jurisdictions that do not specify a time limit, counsel representing a child who has been held for a period of time longer than 24 hours (excluding weekends and legal holidays) should petition the juvenile court for a hearing or seek habeas corpus relief, arguing that the general statutory requirement of promptness has been violated. *See, e.g., United States v. DeMarce,* 513 F.2d 755 (8th Cir. 1975) (delay of 80 hours between arrest and presentment before magistrate violated Federal Juvenile Delinquency Act, which prohibits the detention of a newly arrested child "for longer than a reasonable period of time before brought before a magistrate"). *See also County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991) (discussed in § 4.28(a) *infra*) (setting an outer limit of 48 hours, absent "a bona fide emergency or other extraordinary circumstance," for the judicial determination of probable cause required by the Fourth Amendment, and cautioning that even a hearing "provided within 48 hours . . . may violate . . . [the Fourth Amendment] if the arrested individual can prove that his or her probable cause determination was delayed unreasonably"); *In the Matter of Benjamin L.*, 92 N.Y.2d 660, 668, 708 N.E.2d 156, 160, 685 N.Y.S.2d 400, 404 (1999) (the inherent nature of the juvenile justice system and various developmental aspects of adolescence create a particularly compelling "need for swift and certain adjudication at all phases of a delinquency proceeding").

If the court rules that the detention period was excessive, then this statutory violation may supply a basis for suppressing statements taken during the period (*see, e.g., United States v. DeMarce,* 513 F.2d at 758; see § 24.15 *infra*) as well as tangible evidence whose seizure stemmed from statements made or consent given by the respondent during this period (see § 23.14 *infra*).

§ 4.26 ADDITIONAL DETENTION ISSUES ARISING FROM OTHER CHARGES OR OTHER LEGAL PROBLEMS WITHIN THE JURISDICTION, IN OTHER PARTS OF THE STATE, OR IN OTHER STATES

Frequently, a respondent faces legal problems and the possibility of detention as a result of more than just the delinquency case in which counsel has been appointed. These include: (i) custody orders issued by a judge of the same jurisdiction in which the respondent is presently appearing, authorizing the respondent's arrest either on an additional charge or for failure to appear in a hearing on another pending charge; (ii) petitions filed within the same jurisdiction to revoke probation or parole that the respondent received in a prior case, in light of the violation of law underlying the new arrest; (iii) custody orders issued by judges in other parts of the State, authorizing the respondent's arrest in connection with additional charges for which the respondent has not previously been arrested, pending cases in which the respondent failed to

appear, or petitions to revoke probation or parole in light of the present new charge; and (iv) requests for extradition to another State on the grounds that the child is a runaway (from either a parent/guardian or a detention facility) or that the child is "wanted" for a crime in the other State. These ancillary legal problems may impact upon the child's liberty in either of two ways. The mere existence of the additional legal problems may lead the judge to order detention in the case in which counsel is defending the respondent. Or, if counsel secures the respondent's release in the new case, that victory may be rendered meaningless because the child continues to be held in custody pending the resolution of his or her other legal problems. The remedies available to defense counsel vary, depending upon the nature of the child's ancillary legal problem and whether it arose within the State or out-of-State.

§ 4.26(a) Ancillary Legal Problems Within the State in Which the Respondent Is Appearing for the Detention Hearing

§ 4.26(a)(1) Custody Orders To Arrest the Respondent on Another Charge

Under the statutory standards of most jurisdictions, the existence of another charge (whether already filed or not yet filed) can be considered by the judge in assessing whether the respondent needs to be detained pending trial on the present charge on the grounds of future dangerousness. See § 4.17 *supra.* If the other charge is minor, counsel can certainly argue that its existence is not very probative of dangerousness; indeed, some jurisdictions exclude minor property crimes from the detention analysis. See *id.* Moreover, because the charge is still only an allegation and has not been proven, counsel can argue that the presumption of innocence precludes any reliance on it in assessing the respondent's dangerousness.

The judge may order release on the present charge but indicate that s/he intends to hold the child in custody pending his or her Initial Hearing on the other charge (or, if the other charge emanates from a different part of the State, pending transportation to that locale for Initial Hearing). In such instances counsel should argue that the judge's finding that there is no appreciable risk of flight on the present charge militates for release of the child so that s/he can appear on his or her own for Initial Hearing on the other charge as well.

§ 4.26(a)(2) Custody Orders Resulting from Prior Failures To Appear for Court Hearings

The fact that a custody order has been issued upon the respondent's failure to appear for a prior hearing is one of the most severe problems that counsel can encounter when trying to secure a child's release at a detention hearing. The judge can certainly consider such a failure to appear as evidence of a risk of flight in deciding whether to detain the child on the present charge. See § 4.17 *supra.* Moreover, even if the judge releases the child on the present charge, the judge can hold the child pursuant to the custody order pending the child's appearance before the judge who issued the custody order.

The only realistic prospect of success in this situation exists in cases in which the

respondent can interpose a factual defense that: (A) s/he was not aware of the obligation to appear at the hearing which s/he missed, because s/he did not receive notice of that hearing or because s/he was told by her attorney or a court official that appearance was not necessary; (B) s/he was unable to attend the hearing for legally sufficient reasons, such as that s/he was incarcerated or appearing in a court in another jurisdiction on the date of the hearing; or (C) s/he was unable to attend for some reason which, although not technically sufficient to excuse the nonappearance, is strongly mitigating, such as that s/he was taken out-of-state by his or her parent/guardian and could not return on his or her own or that s/he was attending the funeral of a relative. When the nonappearance can be excused on grounds of this sort and if the respondent has no other record of failure to appear, a judge will frequently overlook the single transgression and release the respondent pending his or her appearance before the judge who issued the custody order.

§ 4.26(a)(3) Petitions To Revoke Probation or Parole in Light of the Violation of Law Evidenced by the New Arrest

As explained in §§ 39.04-39.05 *infra,* a petition can be filed to revoke the respondent's probation or parole on a prior charge if the respondent is arrested for a new crime or if the respondent commits "technical violations," such as missing appointments with his or her probation or parole officer. When the respondent appears for a detention hearing on a new charge, s/he may discover that the probation or parole agency has placed a "hold" on him or her, requesting detention until a hearing can be held to determine whether the new charge (and any technical violations that are now being pressed in addition to the new charge) justify revocation of probation or parole.

The key to overcoming probation and parole holds is to telephone the probation or parole officer who requested the hold and convince him or her that: (A) proceedings to revoke probation or parole should be delayed until after the resolution of the new charge at trial, and the probation or parole officer should defer to the judge's assessment of whether the respondent needs to be detained pending that trial; or (B) even if the probation or parole officer is unwilling to continue the revocation proceedings, the determination of the child's detention status pending a revocation hearing should be left to the judge presiding at Initial Hearing on the new charge. In attempting to persuade the probation or parole officer, counsel should stress: any facts about the new offense that indicate that the respondent's guilt is dubious or that the offense is relatively minor even if the respondent is guilty; and any favorable aspects of the respondent's adjustment to probation or parole that suggest that this is an isolated lapse from grace and that the progress otherwise made by the child should not be undone by incarceration, at least prior to a determination that s/he is guilty of the new charge.

§ 4.26(b) Extradition to Another State: The Interstate Compact

An Interstate Compact regulates the extradition of youth who have left their home state without permission of a parent or guardian and also provides for transfer of supervision of an

adjudicated delinquent when s/he moves to another State. The original Interstate Compact on Juveniles, drafted in 1955 and adopted by all States, has been replaced by an Interstate Compact for Juveniles. The Compact was drafted between 2000 and 2002 and then presented to the States and Territories for adoption. As of 2014, it has been adopted by all of the States, the District of Columbia, and the Virgin Islands.

Articles III and IV of the Compact establish an "Interstate Commission for Juveniles" ("ICJ"), which is empowered to "promulgate rules" that have "the force and effect of statutory law" and are "binding in the compacting states" (Article IV, § 2). The ICJ issued a set of rules in December 2009, which became effective on March 1, 2010, and which thereafter were amended in various ways in the ensuing years. The current version of the rules (which has an effective date of April 1, 2014) is available at http://www.juvenilecompact.org.

The ICJ also has issued a number of advisory opinions, which can be found in Appendix IV of the ICJ's "Bench Book for Judges & Court Personnel" (2014), also available at the above website.

A child who has run away from a lawful custodian (which may be a parent, guardian, group home, or detention facility) to another jurisdiction can either elect to return voluntarily or to resist extradition and demand a hearing. If the child voluntarily consents to return home, s/he will be transported home promptly in accordance with ICJ Rule 6-102.

If the child declines to return voluntarily, and if s/he is an "escapee, absconder or accused delinquent," then the "home/demanding state" must "present to the court or appropriate authority a Requisition Form . . . requesting the juvenile's return" (ICJ Rule 6-103A(2)), accompanied by "copies of supporting documents that show entitlement to the juvenile" (ICJ Rule 103A(2)(a)), such as, for example, an "Order of Adjudication" or "Petition Alleging Delinquency" (*ibid*.). If the youth is "already in custody," the Requisition Form and accompanying documents must be submitted "within "sixty (60) calendar days of notification of the youth's refusal to voluntarily return." ICJ Rule 6-103A(2). A hearing must be held in "the state where the juvenile is located" within 30 calendar days of the receipt of the requisition, but "[t]his time period may be extended with the approval of both ICJ Offices." ICJ Rule 6-103A(4). If a youth is "not already detained, the court shall order the juvenile be held pending a hearing on the requisition." *Ibid*.

If the court finds that the requisition is "in order," then "the judge shall order the juvenile's return to the home/demanding state" (ICJ Rule 6-103A(5)(a)), and the return ordinarily must take place "within five (5) days of the receipt of the order granting the requisition" (ICJ 6-103A(8)), although "[t]his time period may be extended with approval from both ICJ Offices" (*ibid*.), and also the "holding/receiving state" can delay return until any "pending charges" in the "holding/receiving state" have been "resolved." ICJ Rule 7-103. "Juveniles held in detention, pending non-voluntary return to the demanding state, may be held for a maximum of ninety (90) calendar days." ICJ Rule 6-103A(7).

In counseling a child whether to return voluntarily or demand a hearing, the attorney should inform the child that there are two major disadvantages to contesting extradition: (I) the child will probably remain detained for a period of time, which could be up to 90 days; and (ii) that period of detention will not buy any significant promise of victory at the extradition hearing, since the only issue at the hearing will be whether the extradition papers comply with the technical requirements. Naturally, if the client wishes to contest extradition, counsel should comply with the client's wishes notwithstanding counsel's own view that this course is not in the child's best interests.

§ 4.26(c) Arranging for Counsel in the Respondent's Other Cases

Once the detention hearing is completed, the respondent will probably face additional hearings on the other charges or probation/parole holds or fugitive warrants. If these matters arise out of an existing case — if, for example, they involve allegations that the respondent failed to appear for a hearing or violated probation or parole — counsel must notify the attorney who represented the child in that case, so s/he can continue representation of the child. On the other hand, if the problem arises out of a charge that has not as yet been filed and if counsel is unable to represent the child on the new charge, then counsel must arrange to have another lawyer take responsibility for the new case. If the child's parent/guardian is not eligible for a court-appointed lawyer, counsel should give the parent/guardian a list of defense attorneys who practice in juvenile court in the relevant jurisdiction. If the child and his or her family are indigent, counsel should contact the public defender's office in the relevant jurisdiction and notify the appropriate supervisor or staff attorney that a hearing will be held and that the child needs representation. All of these steps should be taken as soon as possible after the conclusion of the detention hearing so as to allow the maximum amount of time for preparation for the next hearing.

§ 4.27 BAIL

Section 4.15 *supra* lists the States that permit bail in juvenile court. The following sections describe the concrete steps that an attorney must take with respect to bail in those jurisdictions.

§ 4.27(a) Interviewing the Client and Parent/Guardian To Elicit the Information Necessary To Argue the Issue of Bail

Section 4.07 *supra* described the information that counsel must elicit from the client during a pre-hearing interview in order to argue effectively against preventive detention. Much of this information will also be relevant in arguing that a low bond should be set. The amount of the bond is supposed to reflect the sum that is necessary to guarantee the respondent's appearance for trial. Hence factors such as lengthy residence in the community, substantial family ties in the community, and steady attendance at school not only tend to demonstrate that preventive detention on the basis of a risk of flight is unwarranted but also indicate qualities of reliability and stability that militate for low bail if a bond is to be imposed.

In addition to the information pertinent to both preventive detention and bail, counsel practicing in jurisdictions that permit bail for juveniles will also need to elicit facts regarding the family's financial resources. This financial information will assist counsel to argue both that a modest bond is all that is necessary to assure the respondent's appearance at trial and also that a larger amount of bail is legally excessive (see § 4.27(c) *infra*). Inquiries regarding family finances will usually have to be directed to the client's parent or guardian, since most children are unfamiliar with their parents' or guardian's income levels and assets. Counsel should inquire, in particular, into: salary (both gross and net) if employed; amount of unemployment benefits received if unemployed; any supplementary income, such as social security; any welfare or public assistance payments received; value of all significant assets, such as a home, automobile, bank account, and real property; liabilities, such as debts, installment payments, and mortgages; number of dependents, and the strain they put on (or contributions they make to) family income.

§ 4.27(b) Arguing the Availability of Bail: Interaction Between Preventive Detention and Statutory Rights to Bail

As explained in § 4.15 *supra,* roughly one fourth of the States permit bail for juveniles. However, the juvenile code in each of these jurisdictions also contains a preventive detention statute, authorizing detention to guard against flight or future crimes. *See Schall v. Martin,* 467 U.S. 253, 267 n.16 (1984) (listing the juvenile preventive detention statutes of the 50 states and the District of Columbia). Thus the first issue that defense counsel confronts in framing an argument for bail is whether the guarantee of bail qualifies the authorization of preventive detention or *vice versa.*

A few of the jurisdictions provide some guidance in the statutes themselves. *See, e.g.,* NEB. REV. STAT. § 43-253(5) (2014) (indicating that the right to bail can be overridden when there is a need for detention); WASH. REV. CODE ANN. § 13.40.040(5) (2014) ("a juvenile detained under this section may be released upon posting a probation bond set by the court"); *see also* WASH. REV. CODE ANN. § 13.40.050(6) (2014). However, the juvenile codes in most of the bail-authorizing States shed little light on the relationship between bail and preventive detention. *See, e.g., L.O.W. v. District Court,* 623 P.2d 1253, 1260 (Colo. 1981) (observing that "[t]he detention criteria" and "the statutory right to bail" "appear to conflict" and provide little assistance in resolving the conflict).

The courts that have confronted this dilemma have responded by construing the detention system as incorporating the concept that bail provides a substitute for detention even in cases in which the judge finds that detention is needed to guard against flight, *L.O.W. v. District Court,* 623 P.2d at 1261; *State ex rel. M.C.H. v. Kinder,* 317 S.E.2d 150, 158-59 & n.25 (W. Va. 1984), or future crimes, *Kinder,* 317 S.E.2d at 158-59 & n.25. Under this construction, which counsel should urge upon the courts of bail-authorizing jurisdictions that have not as yet adopted it, the judge must first apply the statutory detention criteria in choosing between release without bail and preventive detention; once the judge has concluded that detention is appropriate under the flight and dangerousness criteria, then the judge must go on and make a bail determination. *See*

id.

§ 4.27(c) Arguing Against High Bail: The Constitutional Prohibitions Against "Excessive" Bail; Equal Protection Issues in Cases of Indigent Clients

The Eighth Amendment to the federal Constitution and most state constitutional provisions governing bail prohibit "excessive bail." Accordingly, "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more." *United States v. Salerno,* 481 U.S. 739, 754 (1987). *Accord, Stack v. Boyle,* 342 U.S. 1 (1951). Similarly, in jurisdictions in which bail is used as an alternative to detention in deterring future crimes (see §§ 4.15, 4.27(b) *supra*), "the government's proposed conditions of release or detention [must] not be 'excessive' in light of the perceived evil." *Salerno,* 481 U.S. at 754. Employing the information about the family income that counsel elicited during pre-hearing interviews (see § 4.27(a) *supra*), counsel can argue that a bond which is a substantial but affordable expense for the family will both deter the child from committing infractions which can result in forfeiture of the money and induce the parent or guardian to monitor the child's behavior carefully.

An argument for the proposition that detention of an indigent in default of bail which s/he cannot make violates the Habeas Corpus Clause, the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and cognate state constitutional guarantees is developed in Caleb Foote, *The Coming Constitutional Crisis in Bail,* 113 U. PA. L. REV. 959, 1125 (1965), and may be pressed on habeas corpus in state and federal courts. Professor Foote's Equal Protection arguments, in particular, draw strong support from subsequent decisions condemning the incarceration of indigents in default of payment of fines imposed upon conviction. *Williams v. Illinois,* 399 U.S. 235 (1970); *Tate v. Short,* 401 U.S. 395 (1971); *In re Antazo,* 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970). *Cf. Bearden v. Georgia,* 461 U.S. 660, 664-68 (1983); *Estelle v. Williams,* 425 U.S. 501, 505-06 (1976) (dictum). Similar arguments prevailed in a path-breaking decision in *Pugh v. Rainwater,* 557 F.2d 1189 (5th Cir. 1977), which, while reversed on narrow grounds *en banc,* 572 F.2d 1053 (5th Cir. 1978), resulted in an *en banc* endorsement of the panel's essential conclusion that "[t]he incarceration of those who cannot [afford to post money bail], without meaningful consideration of other possible alternatives [that is, other forms of pretrial release], infringes on both due process and equal protection requirements." 572 F.2d at 1057. *See also*, *e.g.*, *Robertson v. Goldman*, 179 W. Va. 453, 369 S.E.2d 888 (1988). This conclusion is particularly persuasive in the juvenile context because incarceration of indigent juveniles penalizes them for matters wholly beyond their control — the indigency of the children's parent/guardian and the federal and state labor laws and mandatory school attendance laws that preclude the children themselves from working. Significantly, many jurisdictions have juvenile court statutes or rules limiting restitution by setting a minimum age and/or a maximum amount (*see, e.g.*, N.Y. FAM. CT. ACT § 353.6(1) (2014)) or using other devices to ensure that an order of restitution does not exceed the juvenile's financial means (*see, e.g.*, N.C. GEN. STAT. § 7B-2506(4), (22) (2014) ("the court shall not require the juvenile to make restitution if the juvenile satisfies the court that the juvenile does

not have, and could not reasonably acquire, the means to make restitution”)).

§ 4.27(d) Arguing for the Least Onerous Type of Bail

In jurisdictions that allow bail for juveniles, the court may have the option of choosing among various types of bail:

1. A surety bond posted by a licensed bail bonder is ordinarily put up by the bonder in exchange for the client’s payment of a premium (usually about 10 per cent of the face of the bond, or a little more or less, depending upon the face amount of the bond and the nature of the charge) and often also on condition that the client’s family post some collateral security, such as a house or automobile. Whether or not the client appears for trial, the bail bonder keeps the premium of roughly 10 per cent as a fee for writing the bond; and in the event that the client fails to appear for trial and forfeits the bond, the bail bonder will seek to attach the collateral or will institute an action against any individual who served as guarantor or will do both.

2. A bond that permits the client or a family member or friend to make bail by depositing the premium amount set by statute or local practice (usually 10 percent) directly with the court avoids the necessity of purchasing a surety bond from a licensed bonder. The great virtue of this system is that the person who deposited the premium amount can recover it from the court at the conclusion of the case if the client faithfully appears for all hearings. In some jurisdictions the clerk of court is required to retain a portion of the deposit as an “administration fee,” but this is usually a very small amount.

3. A cash bond requires that the full amount of the bond be paid to the court in cash or negotiable securities and permits the recovery of the cash or securities at the conclusion of the case.

4. A real property bond requires that a deed to property or other document of title be lodged with the court clerk. This too can be recovered at the conclusion of the case.

In jurisdictions that permit juvenile respondents to make bond by posting a recoverable premium with the court, this is usually the form of bail that counsel should seek to arrange, since it will ordinarily demand the smallest expenditure of money to put up the bond and will usually enable the client to recover that money later. When this option is not available, either because local practice does not permit it or because the judge has rejected it, counsel’s choice among other forms of bail will ordinarily depend upon the financial resources of the client, the amount of the premium that would be charged by a bail bonder, and what, if any, collateral the bonder would insist upon. If a family member or friend can afford to post a cash bond or a real property

bond, the temporary surrender of these assets with the assurance that they will be returned later (as long as the client faithfully appears) may be more palatable than paying an unrecoverable premium to a bail bonder. However, clients of limited means often have no real choice other than the bail bonder.

§ 4.27(e) Ensuring That There Are No "Hold" Orders Before Permitting the Client's Family or Friends To Post Bail

As explained in § 4.26 *supra,* a respondent may be subject to a "hold" order as a result of another charge (or other legal problem) within the jurisdiction, or in another part of the State or another State. If there is such a ''hold" order, the only effect of posting bond will be to free the respondent from any restrictions imposed with respect to the charge upon which the bail was set, while leaving him or her still in custody on the other charges or other legal problems. Obviously, counsel needs to guard against such futile expenditure of bail money. Usually, counsel will learn about any "hold" orders during the detention hearing because the existence of the "hold" and the reasons for it will be mentioned by the probation officer. However, in rare cases, the probation office is uninformed, and the "hold" is not discovered until later, after the family member or friend has posted bond. Thus, prior to any posting of bond, counsel should ask the client whether s/he is on probation or parole in another case or another jurisdiction or has pending charges in or is "wanted" in another case or another jurisdiction. If counsel learns that there is a potential for a "hold" which has not yet materialized, counsel may decide to defer attempts to make bail until the various "holds" have been lodged and s/he has had a chance to deal with them through the remedies described in § 4.26 *supra.*

§ 4.27(f) Assisting the Client's Family or Friends in Posting Bond

Even after bail has been set by the court and after counsel has determined that there are no "hold" orders, his or her job with respect to bail is not completed. The family members or friends who intend to put up bail will usually need counsel's assistance in actually posting the bond and securing the child's release.

In cases in which the bond is to be paid to the court (whether that bond is a premium deposit, cash bond, or real property bond (see § 4.27(d) *supra*)), the steps for posting bond will usually include: obtaining the signatures of the client and the surety on a bond (ordinarily a form document), delivering the signed bond and the security to the court, and then taking whatever receipt is provided by the court to the appropriate authority (which may be another office in the court, the administrator of the court marshals, the police, or an official designated by the agency in charge of juvenile detention facilities). The assistance of counsel will usually be invaluable in negotiating these steps, since bureaucrats are far less likely to give the run-around to an attorney than to an uninformed and usually distraught parent or guardian of the child.

In cases in which a surety bond is ordered, counsel will need to help the client's family or friend obtain the services of a professional bail bonder. Counsel should compile a periodically

updated list of the names, addresses, and phone numbers of local bail bonders and should hand copies of the list to clients' family members or friends who request that information. Once the relative or friend has selected a bail bonder, it will usually be necessary for counsel to help find that particular bonder: most bonders are away from their offices precisely because they have to be in court (either juvenile or adult court) posting bond and appearing with clients. If counsel is unfamiliar with the local bonders' usual haunts, s/he can obtain that information by asking other attorneys who practice regularly in juvenile and adult court. Once the bonder has been located, the bonder will usually take charge of the situation and attend to all of the steps needed to secure the client's release. However, some bonders are insufficiently attentive to respondents' interests and do not move through the posting process as quickly as they could; thus counsel should keep a watchful eye over the bond-posting process and prod the bonder when necessary.

Part F. The Probable-Cause Hearing

§ 4.28 CONSTITUTIONAL AND STATUTORY RIGHTS TO A PROBABLE-CAUSE DETERMINATION

§ 4.28(a) Constitutional requirements

In *Gerstein v. Pugh,* 420 U.S. 103 (1975), the Supreme Court of the United States held that the Fourth Amendment to the federal Constitution, which has long been construed as forbidding arrests without probable-cause (see § 23.07 *infra*), entitles every arrested person to "a judicial determination of probable-cause as a prerequisite to extended restraint of liberty following arrest." 420 U.S. at 114. Consequently, persons arrested without an arrest warrant (and hence without a prearrest judicial finding of probable-cause) may not be confined pending trial unless they are given the opportunity for a probable-cause determination "by a judicial officer . . . promptly after arrest." *Id.* at 125. *Accord*, *Powell v. Nevada*, 511 U.S. 79, 80 (1994); *County of Riverside v. McLaughlin*, 500 U.S. 44, 47, 52-53 (1991); *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion) (dictum); *Baker v. McCollan,* 443 U.S. 137, 142-43 (1979) (dictum).

Although the Court has been "hesitant to announce that the Constitution compels a specific limit" on *how* "promptly" after arrest the constitutional probable-cause determination must be afforded, the Court has provided guiding principles "to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds." *County of Riverside v. McLaughlin*, 500 U.S. at 56. "[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *Id*. But even a hearing provided within 48 hours "may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." *Id*. "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.* In cases in which "an arrested individual does not receive a probable cause determination within 48 hours," the government bears the "burden . . . to demonstrate the existence of a bona fide emergency or

other extraordinary circumstance" to justify the delay. *Id*. at 57. *Accord*, *Powell v. Nevada*, 511 U.S. at 80. "The fact that in a particular case it may take longer than 48 hours to consolidate [the probable cause determination with other] pretrial proceedings[, such as arraignment,] does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends." *County of Riverside v. McLaughlin*, 500 U.S. at 57.

The constitutional requirement announced in *Gerstein* clearly applies to juvenile court proceedings. *See, e.g., Moss v. Weaver,* 525 F.2d 1258 (5th Cir. 1976); *Bell v. Superior Court,* 117 Ariz. 551, 574 P.2d 39 (Ariz. App. 1977); *In the Matter of D.E.R.*, 290 Kan. 306, 313-14, 225 P.3d 1187, 1193 (2010); *State in the Interest of Joshua,* 327 So. 2d 429 (La. App.), *cert. denied,* 329 So. 2d 450 (La. 1976); *In the Matter of Roberts,* 290 Or. 441, 622 P.2d 1094 (1981). *Compare Alfredo A. v. Superior Court*, 6 Cal. 4th 1212, 1216, 1231-32, 865 P.2d 56, 58-59, 68-69, 26 Cal. Rptr. 623, 625-26, 636 (1994) (recognizing that "[i]t is beyond dispute that *Gerstein*'s constitutional requirement of a prompt judicial determination of probable cause . . . extends to juveniles as well as adults" but holding that "the strict 48-hour rule subsequently announced in *McLaughlin*" does not "automatically apply in the juvenile detention setting" and that California's 72-hour rule is constitutionally adequate when considered in context of the State's "comprehensive statutory scheme governing postarrest juvenile detention"), *with In re S.J.*, 686 A.2d 1024, 1026 & n.6 (D.C. 1996) (per curiam) (applying *Gerstein and McLaughlin* to juvenile delinquency context), *and State v. K.K.H.*, 75 Wash. App. 529, 533-34, 536, 878 P.2d 1255, 1258-59 (1994) (same as *S.J.*, *supra*).

The rule of *Gerstein* is, however, a very narrow one in several regards. First, it fails, by its terms, to protect persons arrested under arrest warrants. *Gerstein,* 420 U.S. at 117 n.19; *Michigan v. Doran,* 439 U.S. 282, 285 n.3 (1978). (*But see In re Walters,* 15 Cal. 3d 738, 543 P.2d 607, 126 Cal. Rptr. 239 (1975), extending *Gerstein* to require a postarrest probable-cause determination in cases of arrests made under a warrant.)

Second, *Gerstein* does not require that the probable-cause determination be "accompanied by the full panoply of adversary safeguards — counsel, confrontation, cross-examination, and compulsory process for witnesses." *Gerstein,* 420 U.S. at 119. *Accord, Schall v. Martin,* 467 U.S. 253, 275 (1984). To the contrary, it sanctions "[t]he use of an informal procedure," *Gerstein,* 420 U.S. at 121, in which there is no constitutional right to the appointment of counsel, *id.* at 122-23, no "confrontation and cross-examination" need be allowed, *id.* at 121-22, and the determination of probable-cause may presumably be made "on hearsay and written testimony," *id.* at 120. All that is constitutionally required is "a fair and reliable determination of probable-cause." *Id.* at 125; *see also Baker v. McCollan,* 443 U.S. at 143 & n.2; *Hewitt v. Helms,* 459 U.S. 460, 475-77 (1983).

Finally, failure to give an accused a prompt probable-cause determination does not foreclose subsequent prosecution or provide grounds for its dismissal; it merely renders the accused's pretrial confinement unconstitutional. *Gerstein v. Pugh,* 420 U.S. at 119; *see Bell v. Wolfish,* 441 U.S. 520, 534 n.15 (1979).

Gerstein's basic requirement of a prompt probable-cause determination in cases of warrantless arrests does not add much to the general procedures prescribed by many state statutes for the protection of juveniles taken into custody. See § 4.28(b) *infra*. A significant number of States go beyond *Gerstein* by providing, as a matter of state law, for an immediate non-adversarial determination of probable cause at the detention hearing, followed soon after by a formal adversarial probable-cause hearing. *See, e.g., Schall v. Martin,* 467 U.S. 253 (1984) (New York Family Court Act, which permits detention only when the "supporting depositions . . . establish probable-cause" at the detention hearing (*id.* at 275-76) and "[a] formal probable-cause hearing is then held within a short while thereafter" (*id.* at 277), "provides far more predetention protection for juveniles than we found to be constitutionally required for a probable-cause determination for adults in *Gerstein"* (*id* at 275)). In some States, however, *Gerstein's* requirement of "prompt" probable-cause determinations may have the salutary effect of "acceleration of existing" state procedures. *Gerstein,* 420 U.S. at 124. As noted above, the United States Supreme Court has established the rule of thumb that promptness for *Gerstein* purposes ordinarily means within 48 hours, and it has said explicitly both that delays beyond 48 hours must be justified by a showing of extraordinary circumstances and that the practice of consolidating *Gerstein* determinations with other preliminary proceedings (such as an adversarial hearing on probable cause) "does not qualify as an extraordinary circumstance." *County of Riverside v. McLaughlin*, 500 U.S. at 57. Moreover, when the *Gerstein* requirement is violated, any confessions or other statements taken from the respondent during the period of excessive delay are arguably inadmissible in evidence as the fruits of an unconstitutional detention. *See, e.g.*, *State v. Huddleston*, 924 S.W.2d 666, 675-76 (Tenn. 1996) (suppressing a statement obtained by the police during the 72-hour period that the defendant was held without judicial determination of probable cause in violation of *Gerstein* and *McLaughlin*); *Norris v. Lester*, 545 Fed. Appx. 320, 321, 327 (6th Cir. 2013) ("appellate counsel was ineffective for failing to argue [under *County of Riverside v. McLaughlin*] that [Norris'] confession was obtained after the violation of his constitutional right to a prompt probable-cause determination"). *See also Powell v. Nevada*, 511 U.S. at 85 n.* (noting that the Court has not yet ruled on the question whether "a suppression remedy applies" to a *Gerstein* violation of "failure to obtain authorization from a magistrate for a significant period of pretrial detention"). In this respect, *Gerstein* provides the constitutional predicate for an updated version of what used to be known as the "*McNabb-Mallory"* exclusionary rule. See § 24.15 *infra.*

§ 4.28(b) Statutory Requirements

Several States have enacted statutes requiring a probable-cause hearing in any case in which the respondent is detained pending trial. *See, e.g.,* D.C. CODE § 16-2312(e)-(f) (2014); ILL. COMP. STAT. ANN. ch. 705, § 405/5-501 (2014); ME. REV. STAT. ANN. tit. 15, §§ 3203-A(4-A), 3203-A(5)(C) (2014); N.Y. FAM. CT. ACT §§ 325.1-325.3 (2014); PA. CONS. STAT. ANN. tit. 42, § 6332(a) (2014). Some states even provide by statute or court rule for a probable-cause hearing in cases in which the child is not detained. *See, e.g., J.T. v. O'Rourke,* 651 P.2d 407 (Colo. 1982) (preliminary hearing must be granted "[i]n cases where the juvenile is charged with the commission of an act which if committed by an adult, would be a felony or class 1

misdemeanor," *id.* at 412).

The statutes commonly require that the court make a two-pronged determination that: (i) there is probable-cause to believe that an offense took place; and (ii) there is probable-cause to believe that the respondent was the perpetrator. *See, e.g.,* N.Y. FAM. CT. ACT § 325.3(1)(a)-(b) (2014). If the court finds that the prosecution has not made the requisite showing of probable-cause on either of these prongs, the respondent must be released. *See, e.g.,* D.C. CODE § 16-2312(f) (2014). In cases in which the court concludes that probable-cause is lacking, some jurisdictions also require dismissal of the Petition, permitting its reinstatement only if the prosecutor can show newly discovered evidence. *See, e.g.*, ILL. COMP. STAT. ANN. ch. 705, § 405/5-501(1) (2014). Other jurisdictions do not explicitly provide by statute that the Petition must be dismissed. *See, e.g.,* N.Y. FAM. CT. ACT § 325.3(4) (2014) (if court finds that probable-cause is lacking, "the case shall be adjourned and the respondent released from detention"). However, the practical result will usually be dismissal, since most prosecutors will exercise their discretion to dismiss a case rather than going to trial on evidence that is so flimsy that it could not support even a determination of probable-cause.

§ 4.29 THE FUNCTIONS OF THE PROBABLE-CAUSE HEARING FROM THE DEFENSE PERSPECTIVE

The most important function of the probable-cause hearing is the one contemplated by *Gerstein v. Pugh* and state statutes: preventing the pretrial detention of a respondent when the State cannot show probable-cause to believe that s/he committed the offense. See § 4.28 *supra.* It should be noted that some judges will make a finding of "no probable-cause" if the evidence suggests that the respondent is innocent even though it marginally establishes probable-cause. Although such rulings are not contemplated by the technical purposes of the probable-cause hearing, they represent a dictate of fundamental fairness that a child should not be exposed to the harms of pretrial detention (see § 4.16 *supra*) when the evidence is so weak that the prosecution is realistically unlikely to prove its case at trial.

As explained in § 4.28(b) *supra,* a judicial finding that probable-cause is lacking can also result in the dismissal of the Petition — by operation of statute in some jurisdictions, by discretionary prosecutorial action in others.

In addition to the functions of testing the predicates for detention and continued prosecution, there are various informal or extralegal uses of the probable-cause hearing that are almost as important to the defense.

The first of these is discovery. By hearing the prosecution's witnesses and cross-examining them, defense counsel can learn a good deal about what s/he is going to have to meet at trial. This opportunity for discovery is particularly important because, in most jurisdictions, other opportunities and procedures for discovery are rather limited. (See Chapter 9.) Although the discovery function of the probable-cause hearing is not formally recognized as legitimate by

state statutes or most state courts — and, indeed, many judges sustain objections to defense cross-examination questions that appear to be motivated by the desire for discovery — there is caselaw supporting its legitimacy. *See, e.g., Coleman v. Alabama,* 399 U.S. 1, 9 (1970) (plurality opinion) (in reasoning that preliminary examination is a "critical stage" for Sixth Amendment purposes, the plurality adverts to the discovery function as a legitimate defense interest); *Adams v. Illinois,* 405 U.S. 278, 282 (1972) (plurality opinion) (recognizing the defense interest in discovery, although holding it insufficient to warrant the retroactive application of *Coleman* in the absence of a showing of "actual prejudice," 405 U.S. at 285, at least in a jurisdiction that provided "alternative [discovery] procedures," *id.* at 282); *Hawkins v. Superior Court,* 22 Cal. 3d 584, 588, 586 P.2d 916, 918-19, 150 Cal. Rptr. 435, 437-38 (1978) (recognizing "the important discovery function served by an adversarial preliminary hearing"); *Manor v. State,* 221 Ga. 866, 868-69, 148 S.E.2d 305, 307 (1966) (mentioning the denial of discovery opportunities in holding that a defendant whose waiver of preliminary examination was coerced is entitled to a reversal of the ensuing conviction, notwithstanding supervention of an otherwise valid indictment); *People v. Hodge,* 53 N.Y.2d 313, 318-19, 423 N.E.2d 1060, 1063, 441 N.Y.S.2d 231, 234 (1981) ("because discovery and deposition, by and large, are not available in criminal cases, [discovery by means of the preliminary examination] . . . may not only be an unexampled, but a vital opportunity to obtain the equivalent" and "early resort to that time-tested tool for testing truth, cross-examination, in the end may make the difference between conviction and exoneration"); *Harris v. State*, 841 P.2d 597, 599 (Okla. Crim. App. 1992) ("A preliminary hearing is conducted for the benefit of the accused . . . and serve[s] as a means of discovery for the defendant").

Discovery can, of course, serve purposes in addition to preparation for trial. The opportunities for discovery at a probable-cause hearing also "provide the defense with valuable information about the case against the accused, enhancing its ability to evaluate the desirability of entering a plea." *Hawkins v. Superior Court,* 22 Cal.3d at 588, 586 P.2d at 919, 150 Cal. Rptr. at 438.

The second of the informal functions of a probable-cause hearing is the creation of transcribed, sworn testimony that can be used at trial. The hearing provides the opportunity for "skilled interrogation of witnesses by [the defense] . . . lawyer [that] can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial," *Coleman v. Alabama,* 399 U.S. at 9.

The probable-cause hearing also provides counsel with an opportunity to demonstrate to the client that counsel is committed to fighting for the client's rights. The resulting rapport between attorney and client can be crucial in subsequent stages of the case.

§ 4.30 THE DECISION WHETHER TO DEMAND OR WAIVE THE PROBABLE-CAUSE HEARING

The statutory right to a probable-cause hearing can be waived by the respondent, just like

any other right, as long as the waiver is made knowingly, intelligently, and voluntarily. Because the hearing provides opportunities to realize the substantial benefits described in § 4.29 *supra* — avoidance of detention, dismissal of the Petition, discovery, creation of valuable transcript material for use at trial, and establishment of rapport with the client — waiver is ordinarily highly inadvisable. There are, however, a few instances in which defense counsel should consider advising the client to waive the probable-cause hearing.

The first instance arises in jurisdictions in which the detention determination and probable-cause determination are parts of the same proceeding. If the judge is obviously wavering between secure detention and shelter care, it may be prudent for the client to waive the probable-cause hearing to prevent the judge's exposure to gruesome evidence that could tip the balance in favor of secure detention.

Counsel should also consider advising the client to waive the hearing if the chances of a defense victory are slim and the taking of evidence would benefit the prosecutor by preserving the testimony of a witness who probably would not appear at trial because of declining health, plans to leave the jurisdiction, or other circumstances. *See Crawford v. Washington*, 541 U.S. 36, 57 (2004) (prosecution may be able to introduce, at trial, recorded "preliminary hearing testimony" of a currently unavailable witness "if the defendant had an adequate opportunity to cross-examine" the witness on the pertinent subject matter at the preliminary hearing). *Cf. People v. Fry*, 92 P.3d 970, 972 (Colo. 2004) (preliminary hearing testimony of an unavailable prosecution witness was not admissible at trial "[b]ecause preliminary hearings in Colorado do not present an adequate opportunity for cross-examination").

A waiver also might be appropriate in cases in which the complainant is likely to mellow prior to trial if s/he is not further antagonized. This is particularly so when the complainant is the respondent's relative or close friend, who filed charges in the heat of anger. It may also hold true in cases of extremely minor offenses, such as trespass or trivial destruction of property, in which the complainant's initial annoyance is likely to fade over time. The potential vice of the probable-cause hearing in cases of this sort is that defense counsel's rigorous cross-examination of the complainant at the hearing may intensify the complainant's hostility, ensuring his or her commitment to pressing charges, solidifying his or her version of the events at a time when s/he is most angry, and guaranteeing that s/he will later refuse to be interviewed by anyone representing the respondent's interests.

Finally, a waiver is advisable in any case in which the probable-cause hearing will tip off the prosecutor to facts of which s/he is not presently aware, if that revelation will hurt the respondent. This would be true in situations in which counsel learns of a defect in the prosecution's case that, in all probability, will not be corrected before the case goes to trial if not brought to the prosecutor's attention at the probable-cause hearing. It would also be true in situations in which the facts known to defense counsel suggest that the respondent could have been charged with more serious offenses than those contained in the Petition, and a probable-cause hearing would alert the prosecutor to the more serious offenses in time to amend the

Petition prior to trial.

§ 4.31 NATURE OF THE PROBABLE-CAUSE HEARING; DEFENSE RIGHTS AT THE HEARING

§ 4.31(a) Nature of the Proceedings

The probable-cause hearing is in most respects conducted like a trial. The rules of evidence are ordinarily enforced, although several jurisdictions permit the introduction of hearsay evidence. *See, e.g.,* CONN. GEN. STAT. ANN. § 46b-133(d) (2014); ME. REV. STAT. ANN. tit. 15, § 3203-A(4-A) (2014); *contra*, N.Y. FAM. CT. ACT § 325.2(3) (2014) (requiring "non-hearsay evidence"). The prosecution must make a showing of probable-cause of every element of the offense and of the respondent's identity as its perpetrator. The *corpus delicti* must ordinarily be proved before any admissions by the respondent may be received in evidence, but the judge has some discretion to allow variance from this order of proof. Compare § 24.20 *infra.* Witnesses are questioned in the ordinary fashion, and real evidence is admitted as exhibits. Cross-examination of witnesses is permitted, although some judges tend to limit its scope to a narrower compass than would be allowed at trial. See § 4.33 *infra.* Sequestration of witnesses is allowed within the sound discretion of the judge. There is modification of these rules in varying degrees in some jurisdictions, and local practice must be consulted.

§ 4.31(b) Right to Counsel

The right to counsel at an Initial Hearing is discussed in § 4.03 *supra.* As explained in that section, a juvenile has a Sixth Amendment right to counsel at a probable-cause hearing and, in most jurisdictions, also has a statutory right to counsel.

§ 4.31(c) Right To Cross-Examine Prosecution Witnesses and To Present Defense Witnesses; Right To Subpoena Witnesses; Right to Disclosure of Exculpatory and Impeaching Evidence

Under state law in most jurisdictions the respondent has the right to cross-examine the prosecution's witnesses at the probable-cause hearing. *See, e.g., In the Matter of R.D.S.,* 359 A.2d 136, 139 (D.C. 1976); *State in the Interest of Morrison,* 406 So. 2d 246, 248 (La. App. 1981). The right to cross-examine at the probable-cause hearing may also be protected by the federal guarantee of confrontation incorporated in the Fourteenth Amendment, *Pointer v. Texas,* 380 U.S. 400 (1965); *Barber v. Page,* 390 U.S. 719 (1968); *Olden v. Kentucky,* 488 U.S. 227 (1988) (per curiam); *compare California v. Green,* 399 U.S. 149, 165-66 (1970); *and see Mascarenas v. State,* 80 N.M. 537, 458 P.2d 789 (1969), or by the Due Process Clause. See § 4.33 *infra.*

State law also commonly accords the defense the right to present evidence at a probable-cause hearing. *See, e.g., State in the Interest of Morrison,* 406 So. 2d at 248; D.C. CODE § 16-

2312(e) (2014). This right is also arguably guaranteed by the federal Constitution. *Cf. Jenkins v. McKeithen,* 395 U.S. 411 (1969).

The respondent's right to present evidence at the probable-cause hearing is reinforced by the right to subpoena witnesses, *see, e.g., Coleman v. Burnett,* 477 F.2d 1187, 1202-07 (D.C. Cir. 1973), *in forma pauperis* under the Equal Protection principle of *Griffin v. Illinois,* 351 U.S. 12 (1956), if the respondent is indigent and makes an adequate showing that the witness's testimony will be material and helpful to the defense on the issue of probable-cause, *see Washington v. Clemmer,* 339 F.2d 715, 718-19, 725-28 (D.C. Cir. 1964); *In the Matter of R.D.S.,* 359 A.2d at 139-40; *cf. United States v. Valenzuela-Bernal,* 458 U.S. 858, 866-71 & n.7 (1982).

There is disagreement among the state courts as to whether the disclosure rights assured to defendants at the trial stage by *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny (discussed in § 9.09(A) *infra*)) apply at a probable-cause hearing. For a holding that they do and for reference to the conflicting authorities, *see People v. Gutierrez*, 214 Cal. App. 4th 343, 153 Cal. Rptr. 3d 832 (2013).

Although *Gerstein v. Pugh,* 420 U.S. 103 (1975), holds that these rights are not necessary incidents of the probable-cause determination required by the Fourth Amendment, *Gerstein* does not deny that they may be constitutionally obligatory in the "full preliminary hearing . . . procedure used in many States." *Id.* at 119. Rather, *Gerstein* says that "[w]hen the hearing takes this form, adversary procedures are customarily employed" and "[t]he importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination." *Id.* at 120. Analogously, *Gerstein* recognizes no constitutional right to counsel at a Fourth Amendment probable-cause hearing, *id.* at 122-23, but asserts that if the State chooses to conduct a full preliminary examination in lieu of a minimal probable-cause hearing, then "appointment of counsel for indigent defendants" is required. *Id.* at 120.

§ 4.31(d) Right to Transcription of the Proceedings

An indigent respondent can assert a federal constitutional right to the transcription of the proceedings at state expense, since (a) the transcript would be an important aid to defense trial preparation as well as to impeachment of prosecution witnesses at trial, *cf. Coleman v. Alabama,* 399 U.S. 1, 9 (1970) (plurality opinion); *Britt v. North Carolina,* 404 U.S. 226, 228 (1971); (b) a solvent respondent could employ a stenographer to make a transcript; and (c) the Equal Protection Clause of the Fourteenth Amendment, as construed in *Griffin v. Illinois,* 351 U.S. 12 (1956), forbids the states to deny an indigent, for the sole reason of indigency, an important litigation tool that a solvent individual could buy. *See Roberts v. LaVallee,* 389 U.S. 40 (1967); *Britt v. North Carolina,* 404 U.S. at 228 (dictum); *Bounds v. Smith,* 430 U.S. 817, 822 & n.8 (1977) (dictum); *United States ex rel. Wilson v. McMann,* 408 F.2d 896 (2d Cir. 1969); *Peterson v. United States,* 351 F.2d 606 (9th Cir. 1965); *cf. Washington v. Clemmer,* 339 F.2d 715, 717-18 (D.C. Cir. 1964); *compare United States v. MacCollom,* 426 U.S. 317 (1976).

In localities in which it is not routine practice to have probable-cause hearings attended by a court reporter or stenographer, counsel should be sure to have a stenographer or recording device present and should move for payment of the cost by the state if the client is indigent.

§ 4.31(e) Procedures To Challenge Denial of Rights to or at a Probable-Cause Hearing

In most jurisdictions the appropriate form of procedure by which to seek redress for the denial of a right at the probable-cause hearing is a prerogative writ proceeding — prohibition or mandamus — challenging the actions of the judge, magistrate, or commissioner who is conducting the hearing. For example, if the judge refuses to subpoena defense witnesses or refuses a defense request for free transcription of the testimony in the case of an indigent, counsel should seek mandamus to compel the judge to provide these services or prohibition to restrain the completion of the hearing without them. In some jurisdictions a bill in equity is used in lieu of the prerogative writs; in others a simple motion in the court of record is appropriate if the probable-cause hearing is being conducted by a magistrate or court commissioner who is subject to the supervisory jurisdiction of the judge.

If counsel is retained or appointed after the probable-cause hearing stage, s/he should immediately ascertain from the client, the prosecutor, or court records whether a probable-cause hearing was, in fact, held. (Since the client is unlikely to know what a "probable-cause hearing" is and may confuse it with the non-evidentiary detention hearing, the best question to ask the client is whether there was a hearing at which people took the witness stand and testified.) If any part of a probable-cause hearing was held, ordinarily counsel should have the stenographic notes transcribed or, if the client is an indigent, move for their transcription at state expense. See § 4.37 *infra.* If the transcript shows defects in the hearing that counsel wishes to challenge or if there has been no hearing and no valid waiver or if there is no transcript of the hearing and no valid waiver of a transcript, counsel should decide whether s/he wants a probable-cause hearing at this time. See § 4.30 *supra.* If so, then s/he should move the judge who is presently presiding over the case (in other words, the judge to whom the case has been assigned for trial) to hold proceedings in abeyance and to transfer the case back to the judge who presided over the Initial Hearing so that a procedurally correct probable-cause hearing can be held. Counsel should point out that the transfer back to the earlier judge is necessary to avoid the trial judge hearing potentially prejudicial information that is relevant solely to the detention and probable-cause determinations and would not be admissible at trial. *See, e.g.,* D.C. CODE § 16-2312(j) (2014). If the trial judge refuses to order a hearing or refuses to transfer the case or if the Initial Hearing judge, upon receiving the case, refuses to convene a hearing, the appropriate form of relief in most jurisdictions will be, again, prohibition or mandamus.

§ 4.32 DEFENSIVE CONDUCT OF THE PROBABLE-CAUSE HEARING — CROSS-EXAMINING FOR DISCOVERY AND IMPEACHMENT

As explained in § 4.29 *supra,* defense counsel has three principal goals at the probable-cause hearing: (1) to show that the prosecution has not met its burden of proof and thereby to

prevent detention of the respondent and, in some jurisdictions, also secure dismissal of the charges against the respondent; (2) to put the testimony of the prosecution witnesses on record in a way that makes them most impeachable at trial; and (3) to discover as much of the prosecutor's case as possible.

Once the prosecution has made out a *prima facie* case, there is no great likelihood that cross-examination will destroy it so completely as to prevent a finding of probable-cause. Accordingly, at that point, counsel should proceed with the objectives of discovery and of nailing down impeachable prosecution testimony.

Frequently counsel may find that s/he is working at cross-purposes in seeking to discover and to lay a foundation for impeachment simultaneously. S/he will obviously have to accommodate these objectives in particular situations with an eye to which objective is more important in dealing with an individual prosecution witness. If counsel vigorously cross-examines the witness, in an effort to get a contradiction or concession on record, the witness will normally dig in and give a minimum of information in an effort to save his or her testimonial position; and, more than likely, s/he will be uncooperative if counsel thereafter attempts to interview the witness prior to trial. On the other hand, if counsel engages the witness in routine examination, amiable and ranging, counsel may be able to pick up many clues for investigation and for planning of the defense. Of course, some witnesses resent any kind of cross-examination. If counsel thinks that this type of witness is lying or confused, counsel may wish to pin the witness down. Under no circumstances, however, should counsel educate the witness about the weaknesses of his or her testimony. To avoid mutual education by prosecution witnesses, the rule on witnesses should ordinarily be invoked. See § 27.11 *infra.*

The probable utility of cross-examining for impeachment depends almost as much on the prosecutor as on the witness. If the prosecutor is one who prepares witnesses as carefully for the probable-cause hearing as for trial, the likelihood is small of getting anything out of the witness at the hearing that will be useful to impeach him or her at trial. Most prosecutors, however, do not have the time to prepare witnesses thoroughly for the probable-cause hearing, with the result that the hearing provides a unique opportunity to catch the prosecution witnesses, on record, with their guards down. Counsel should be loth to pass up any opportunity for thorough questioning of witnesses at the probable-cause hearing, since this may be counsel's only real chance to learn their stories in detail prior to trial. Although counsel will certainly attempt to obtain statements from the prosecution witnesses during subsequent investigation (see § 8.12 *infra*), the reality is that most defense attorneys have limited investigative resources, are often unable to track down prosecution witnesses, and commonly have trouble persuading them to cooperate and be interviewed even after they have been tracked down. And while the formal discovery process will provide counsel with some information about the prosecutor's case (see Chapter 9), it allows only limited access to witness statements (see § 27.12(a) *infra*).

§ 4.33 RESISTING LIMITATIONS ON CROSS-EXAMINATION

Many judges allow defense counsel very grudging room for cross-examination at the probable-cause hearing on the reasoning that guilt is not at issue, that the prosecution needs only show probable-cause and not proof beyond a reasonable doubt, and that, therefore, nothing cross-examination might disclose is relevant.

The theoretical answers to this reasoning are (a) that it would be plainly relevant if cross-examination forced the witness to withdraw his or her testimony on direct examination, and (b) that the statute expressly permitting the respondent to cross-examine prosecution witnesses, call defense witnesses, or both at the probable-cause hearing (as most statutes do) assumes that the judge is not to restrict the inquiry to a bare-bones hearing of the prosecution's evidence, untested for credibility. The cases cited in § 4.29 *supra* contain quotable language endorsing the right of the defense to conduct a probing cross-examination at the probable-cause hearing.

Most judges, however, like to push the hearing along and will often not be persuaded by these theories. Counsel should continue to attempt to cross-examine, as long as s/he can decently do so, in order to make clear for the record the extent of the limitations imposed on cross-examination. S/he should then respectfully ask the judge whether all cross-examination is going to be disallowed and, if not, what areas the judge is precluding. If the judge says that s/he cannot tell until counsel asks the questions, counsel should resume attempts to cross-examine. Eventually the judge will shut counsel off altogether. Counsel should then object to the denial of cross-examination on the grounds of the client's statutory right to a probable-cause hearing (§ 4.28(b) *supra*) and the statutory and constitutional rights to confrontation (§ 4.31(c) *supra*), effective representation by counsel (see § 9.09(b)(1) *infra*), and a fair hearing, as well as on the ground that the statute giving respondents a right to present testimony (see § 4.31(c) *supra*) envisions that the judge will hear both sides of the case. The record should be clear that this objection has been overruled if it has. Counsel is now in a position to pursue the type of prerogative writ proceeding described in § 4.31(e) *supra.*

An unfortunate *dictum* in a plurality opinion of the Supreme Court appears to accept, without federal constitutional quarrel, a state law practice permitting the magistrate "to terminate the preliminary hearing once probable cause is established*." Adams v. Illinois,* 405 U.S. 278, 282 (1972). This language may be seized upon by lower courts as giving the judge virtually unlimited power to curtail defensive cross-examination. But the Supreme Court did not, in fact, have before it in the *Adams* case any instance of curtailment of the defensive conduct of a preliminary hearing. The plurality opinion was merely noting, as relevant to the question of the retroactivity of the constitutional requirement of appointed counsel at preliminary hearing (see § 4.03 *supra*), that "because of limitations upon the use of the preliminary hearing for discovery and impeachment purposes, counsel cannot be as effectual as at trial." 405 U.S. at 282. So it is fair to urge that the *Adams dictum* must be read narrowly: as allowing judicial discretion to curb cross-examination pursued "for discovery and impeachment purposes" only, "once probable-cause is established," *id.,* but not as authorizing the restriction of cross-examination designed to test the

foundation of the probable-cause showing itself, even if the cross-examination does also provide some discovery. For it seems plain that if, with one exception not presently relevant, a *parolee* has a right "to confrontation and cross-examination" at a preliminary parole-revocation hearing, *Morrissey v. Brewer,* 408 U.S. 471, 487 (1972), juvenile respondents have rights that are at least as ample at a probable-cause hearing, which is "part of a criminal prosecution," *id.* at 480. *See also Gagnon v. Scarpelli,* 411 U.S. 778, 781-82, 788-90 (1973). (*Gerstein v. Pugh,* 420 U.S. 103 (1975), does not hold to the contrary. See § 4.31(c) *supra*.)

Certainly, counsel is on far firmer ground when s/he can justify his or her questions on cross-examination as going to probe the prosecution's showing of probable-cause than when they have no justification other than discovery. Only when there is no possibility of successfully urging that a line of questioning goes to probable-cause and that therefore it is within the purview of the classic functions of the probable-cause hearing (see § 4.29 *supra*) should counsel attempt to justify it on the basis of a right to discovery as such (see § 9.09 *infra; cf.* § 4.29 *supra*), pointing out, if possible, why in the case at bar, unlike *Adams,* there are no effective "alternative procedures" for discovery. 405 U.S. at 282.

§ 4.34 CALLING ADVERSE WITNESSES

One rather venturesome method of discovery at a probable-cause hearing is to call adverse witnesses whom the prosecution fails to call. Since the prosecution normally wants to present just enough evidence to satisfy its burden of making a *prima facie* case and does not want to show more than it has to, it will usually refrain from calling all the witnesses it plans to use at trial. The defense can call these witnesses as its own, but if it does so, it is ordinarily limited to nonleading questions (see §§ 31.13, 33.25 *infra*), since the witness is on direct examination. The prosecutor may then lead the witness on cross-examination. Of course, the story that unfolds may be enlightening, but it may also be destructive for the respondent. At best, defense counsel may get a favorable story at the cost of giving the prosecutor the opportunity to hammer it into the worst possible shape. At worst, counsel may perpetuate damning testimony. Ordinarily, then, counsel should not use this tactic in the case of any witness who is not already known to the prosecutor; nor, even then, unless the witness has refused to be interviewed by the defense notwithstanding strenuous efforts by counsel to get him or her to talk out of court (see §§ 8.13-8.14 *infra*).

The presiding judge may permit defense counsel, on request, to call a person as a hostile witness for purposes of cross-examination. This will work only very infrequently, partly because hostility is difficult for the defense to show without confessing guilt (except when the witness has a demonstrable animosity to the respondent apart from the events giving rise to the charge or when other prosecution witnesses have related incriminating hearsay declarations of the witness) and partly because most judges apparently feel that the calling of adverse witnesses by the defense has no place in a proceeding in which the only purpose is to require that the prosecution show probable-cause. Certainly, the best case for a defensive claim of the right to call a witness as hostile is the case in which that witness's hearsay declarations have been put in by the

prosecution; here, defense counsel can legitimately purport to be challenging the prosecutor's *prima facie* showing and can also make some mileage out of the constitutional rights of confrontation and due process (see § 4.31(c) *supra;* §§ 9.09(b)(3), 9.09(b)(4), 31.13 *infra*).

§ 4.35 CALLING DEFENSE WITNESSES

Presentation of defense witnesses — particularly the respondent — at the probable-cause hearing will have damaging and probably irreversible consequences for the respondent's chances of prevailing at trial. The prosecutor will obtain complete discovery of the defense case and can send the police out to undermine the defense theory of the case. In addition, the prosecutor will be able to lay a foundation for impeachment of defense witnesses at trial. When, as frequently occurs, the client wishes to take the stand, or to present other defense witnesses at the probable-cause hearing, counsel must carefully explain to the client that: (a) the prosecutor's burden of proof at the probable-cause hearing is so minimal that s/he is bound to win the hearing regardless of defense testimony; and (b) the presentation of that testimony will probably doom the respondent's chances of winning at trial.

There is, however, one narrow circumstance in which counsel should consider the presentation of defense witnesses. On rare occasions, the presentation of defense testimony will prevent the judge from ordering pretrial detention, either because it precludes a finding of probable-cause or because it sufficiently mitigates the crime to dissuade the judge from ordering detention notwithstanding the existence of probable-cause. In these cases — and it should be emphasized that they are very rare — the goal of securing the child's liberty will outweigh the tactical advantages of reserving the evidence until trial.

§ 4.36 OBJECTING TO INADMISSIBLE EVIDENCE

To the extent that local practice makes the rules of evidence applicable at a probable-cause hearing (see § 4.31(a) *supra*), counsel will sometimes have the opportunity to object to prosecution evidence as inadmissible. Generally s/he should object only if (a) there is a good chance that the prosecution will fail to make a *prima facie* case; or (b) counsel is sure s/he already knows everything s/he could learn from the evidence. If the prosecution has a good case on its face, counsel will need investigative leads to defend against it. One of the best methods of discovery is to permit the witness to make all the hearsay and other inadmissible statements that s/he wants. By allowing the testimony, counsel can also obtain the means to guard against the disclosure of prejudicial information to the fact-finder at trial. Prior to a bench trial, counsel can use the notes of the probable-cause testimony to support a motion *in limine* and argue before a judge other than the trial judge that the prosecutor should be forbidden to present the prejudicial matter at trial. See §§ 7.03(a), 7.03(c), 30.02(a)(1) *infra.* If a jury trial is to be had, counsel can make a similar pretrial motion in *limine* or can use the probable-cause hearing notes to make and argue anticipatory objections out of the hearing of the jury at trial. See § 30.02(a)(2) *infra.*

Of course, the tactic of non-objection is a two-edged sword, for the prosecution may also

discover facts, previously unnoticed, that might be helpful to its case. Here again, it matters how careful or careless the prosecutor is known to be in his or her out-of-court investigation.

§ 4.37 OBTAINING A TRANSCRIPT

Many of the tactical suggestions made in the preceding sections have assumed that there will be a reporter or stenographer transcribing the testimony. Whether a court reporter routinely attends probable-cause hearings depends on local practice. Counsel should not assume that a reporter will be in attendance but should inquire. If local practice does not provide for a court reporter, the expense of a stenographer should be considered by the defense. Alternatively, a tape recorder or dictating machine might be employed. The obvious advantage of a transcript is its potential use at trial to impeach a witness who alters his or her testimony. Additionally, it is an invaluable aid in preparing for cross-examination at the trial.

In some jurisdictions in which the testimony is routinely recorded, it is nevertheless not transcribed unless specially ordered by a party. Again, counsel should inquire whether this is the situation and should order a transcript if necessary.

When both recording and transcription are routine, the transcripts are normally forwarded within several days after the hearing to the office of the clerk of court. Counsel may wish to examine the hearing transcript in the clerk's office before deciding whether to order a defense copy, in order possibly to save the client an unnecessary expense. If the client is unable to afford a transcript — or a stenographer, when testimony is not reported — counsel should request transcription — or reporting and transcription, as the case may be — at state expense. In the event that local law does not give counsel a right to what s/he wants, s/he should invoke the federal Equal Protection doctrine adverted to in § 4.31(d) *supra* and § 11.03(a) *infra.* Procedures for enforcing the demand are considered in § 4.31(e) *supra.*

§ 4.38 CONTINUANCES

In a few jurisdictions a continuance of the probable-cause hearing may be made only with the respondent's assent. The more ordinary practice permits continuances in the discretion of the judge upon the application of either prosecution or defense. That discretion is doubtless now limited by *Gerstein v. Pugh,* 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), see § 4.28(a), (b) *supra*; and the citation of *Gerstein* in opposition to a prosecution-sought continuance is appropriate *unless* local law can be construed to permit the judge to make a probable-cause determination upon affidavits without a full evidentiary hearing. If the judge grants the prosecution a continuance that defense counsel believes is excessive, counsel may challenge it for abuse of discretion by mandamus, or file a petition for a writ of habeas corpus if the client is in custody.

The defense itself may want a brief continuance to investigate prior to cross-examining the prosecution's witnesses. A defense request for a continuance can invoke the respondent's

federal Sixth and Fourteenth Amendment rights to counsel (see § 4.03 *supra* and §§ 9.09(b)(1), 15.02 *infra*) as well as local statutory provisions granting the judge discretion to continue the probable-cause hearing on defense motion. However, when the result of a defense continuance will be the elongation of the respondent's period of detention, counsel should not request such a continuance unless absolutely necessary, and even then only with the client's approval.

Chapter 5

The Client Interview

§ 5.01 INTRODUCTION: SCOPE OF THE CHAPTER; OVERVIEW OF THE CHRONOLOGY OF AN INITIAL INTERVIEW

There are essentially three types of initial interviews, which differ according to the circumstances under which counsel is meeting the client and conducting the interview. The first type, which will be denominated the "full-scale interview," is conducted without extraneous time pressures and covers all of the information that counsel will need to know in preparing for trial as well as for all pretrial and posttrial proceedings. This "full-scale interview" may take place in counsel's office when the client first comes to see counsel, or at a detention facility when counsel goes to see the client at the behest of a parent or upon appointment by the court. The second type of initial interview is the one described in § 3.22 *supra,* in which counsel meets a newly arrested client at the police station and, because of the limited time and restrictive setting, must focus upon the crucial message to convey to the client at this point: that the client should refrain from making any statements to the police about the crime for which s/he was arrested. The third type of initial interview is the one described in § 4.07 *supra,* in which counsel meets the respondent on the day of the Initial Hearing and, again under rushed circumstances, must interview the client with a focus on information needed for the detention hearing and probable-cause hearing. In the latter two scenarios, the rushed interview that counsel conducts in his or her first meeting with the client will have to be supplemented by a later interview (in counsel's office if the client is released; at the detention facility if s/he is not), in which counsel covers all of the elements of the "full-scale interview" that s/he was forced to neglect in the first meeting with the client.

A "full-scale interview" consists of essentially six separate stages:

1. The introductory phase, in which counsel introduces himself or herself to the child and parent, and explains counsel's need for meeting with the child alone (see § 5.03 *infra*);

2. The initial phase of counsel's private meeting with the child, in which counsel establishes rapport with the child, explains the attorney-client privilege, and discusses other preliminary matters (see § 5.04 *infra*);

3. Questioning of the client about the facts of the offense, defense witnesses, and other matters that counsel needs to know in order to prepare for trial and prepare pretrial motions (see §§ 5.06, 5.07 *infra*);

4. Eliciting the client's social history, especially facts needed for the detention hearing if that hearing has not yet taken place (see § 5.08 *infra*);

5. Final instructions to the client about refraining from talking with the police or anyone else about the case and instructions about the importance of promptly relaying any new information to counsel (see § 5.10 *infra*); and

6. Upon completion of the separate interview of the client, further discussion with the parent or guardian, which counsel should conduct in the presence of the client (see § 5.11 *infra*).

§ 5.02 PREPARING FOR THE INTERVIEW

Proper preparation for an interview is required if counsel hopes to achieve the objective of inspiring confidence and trust in the client. It is important that counsel be acquainted with the specific charges against the respondent and the elements of the charged offenses in order to avoid floundering when taking the client's story. Knowledge of the applicable penalty provisions is indispensable in order to answer the question — which the client will almost certainly ask — about what kind of a sentence the client is facing. If the interview takes place prior to the detention hearing, counsel should also be prepared to answer the client's questions about the likelihood of avoiding pretrial detention.

§ 5.03 THE INTRODUCTORY PHASE: EXPLAINING TO THE FAMILY THE NEED FOR COUNSEL'S MEETING WITH THE CLIENT ALONE

§ 5.03(a) The Reasons for Meeting with the Client Alone

In order to get the accurate account of the facts that counsel will need to investigate the case, counsel must meet with the client outside the presence of the child's parent or guardian. If the parent or guardian is present, the client may be afraid to speak truthfully about his or her participation in the crime, either because s/he is afraid of the sanctions the parent/guardian will impose or because s/he is afraid of disappointing the parent/guardian. Even those clients who admit involvement in front of the parent/guardian often minimize their involvement and distort the facts in order to present the best picture. Clients may be unwilling to admit even noncriminal conduct in the parent/guardian's presence if that conduct violates parental directives such as a curfew or an order to stay away from certain friends.

In addition to creating subtle impediments to accurate interviewing, some parents overtly intrude on the interview process, telling certain events from their own perspective and preventing the child from relating the events.

Moreover, the presence of the parent or guardian can have detrimental legal consequences. The vast majority of jurisdictions do not recognize a parent-child privilege. *See, e.g., United States v. Davies,* 768 F.2d 893, 896-900 (7th Cir. 1985); *Cissna v. State,* 170 Ind. App. 437, 439-40, 352 N.E.2d 793, 795 (1976); *State v. Gilroy,* 313 N.W.2d 513, 518 (Iowa 1981); *State v. Bruce,* 655 S.W.2d 66, 68 (Mo. App. 1983); *In the Interest of O.F.*, 773 N.W.2d

206, 210-11 (N.D. 2009); *DeLeon v. State,* 684 S.W.2d 778, 782 (Tex. Crim. App. 1984). *See generally* Catherine J. Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 STAN. L. REV. & POL'Y REV. 85, 90-102 (2003). Thus parents who wish to testify against their children and recount the child's incriminating statements are free to do so, and parents who do not wish to testify can be subpoenaed to testify against their will. Even in the few jurisdictions that have established a parent-child privilege, there are exceptions to the privilege, and thus counsel can never be confident that the privilege will shield statements made during an interview in the parent/guardian's presence. *See, e.g., In the Matter of Mark G.,* 65 A.D.2d 917, 917, 410 N.Y.S.2d 464, 465-66 (N.Y. App. Div., 4th Dep't 1978) (notwithstanding New York's common-law parent-child privilege, father could testify, over defense objection, to his son's admission of delinquency offense because the statement was not made "in confidence and for the purpose of obtaining support, advice or guidance" from the father, and the father did not "wish[] to remain silent and keep respondent's answer confidential").

§ 5.03(b) Explaining to Parents Why They Should Absent Themselves from the Interview

If the initial client interview takes place in a detention facility or the juvenile detention area of the courthouse, the child's parent or guardian obviously will not be present during the interview.

If, on the other hand, the interview takes place in counsel's office, the client's parent will usually enter the office with the client. Counsel then confronts the difficult task of explaining to the parent counsel's need for a private interview with the client. The parent is likely to resist any explanation that his or her presence could bias the interview and will instead insist that the child feels perfectly comfortable in discussing any subject whatsoever in front of the parent. If counsel insists upon the biasing effect of the parent's presence, that insistence may produce nothing but ill will and intransigence on the parent's part.

In attempting to bring about the parent's departure, counsel cannot afford to anger or irritate the parent. Besides the obvious dictates of common courtesy, maintenance of a good relationship with the parent is essential because the parent will play a pivotal role in the determination of the child's pretrial status and posttrial disposition. Counsel may need to persuade a reluctant parent to keep the child at home in order to avoid pretrial detention or a disposition of incarceration. In addition, certain community-based programs demand the parent's involvement in the admissions interview and therapeutic programs, and counsel may need to talk the parent into participating.

Counsel should ordinarily begin the interview by meeting briefly with the child and parent together. During this group session, counsel should explain the nature of the charges, the potential consequences, and the chronology of the legal proceedings to come. Counsel then should describe the functions of a defense attorney in a delinquency case and explain, in the clearest possible terms, that counsel is the attorney for the child and not for the parent or for the

family as a whole. Having laid that groundwork, counsel can state the all-important bottom line: that, because the child is the client, counsel will need to meet with him or her alone to discuss the case.

Most parents will accept counsel's explanation of roles and the need for a private meeting between attorney and client. If the parent still is unwilling to absent himself or herself from the interview, counsel can explain the potentially detrimental legal consequences of the parent's presence. As explained in § 5.03(a) *supra,* most jurisdictions lack a parent-child privilege and even the few States that possess such a privilege have created exceptions to the privilege. Most parents will be amenable to absenting themselves from the interview once they understand that their presence could expose them to the risk of being subpoenaed to testify against the child.

§ 5.04 COMMENCING THE PRIVATE INTERVIEW OF THE CLIENT: ESTABLISHING RAPPORT, EXPLAINING THE ATTORNEY-CLIENT PRIVILEGE, AND OTHER PRELIMINARY MATTERS

§ 5.04(a) The Importance of Establishing a Good Attorney-Client Relationship

The initial interview in a delinquency case is probably the most important exchange that counsel will have with the client. It largely shapes the client's judgment of the lawyer, and the first judgment may be indelible. At the least, it gravely influences all future dealings of the two. The lawyer's primary objective in the initial interview, therefore, is the establishment of an attorney-client relationship grounded on mutual confidence, trust, and respect.

§ 5.04(b) Putting the Client at Ease and Establishing a Relationship of Trust

There are always difficulties in interviewing and relating to clients, whether they are adults or juveniles, because of differences in perspective — and possibly in goals — as well as whatever cultural, class, and racial differences may exist. When the client is a juvenile, the attorney-client relationship is further complicated by the age gap between counsel and client. Children often are reluctant to speak to adult strangers about anything important. A child may give different meanings to words and may make a host of assumptions about how adults (including adult attorneys) feel and act. A juvenile client may distrust the lawyer simply because s/he is an adult and thus reject the attorney's declaration that his or her loyalty is to the client and that s/he will carry out the client's wishes.

An understanding of the client's mind set is essential in striking up an attorney-client relationship. Counsel must remember that the client is a person in trouble and that the last thing s/he needs is more trouble from counsel. Counsel should therefore make the beginning of the initial interview with the client as undemanding as possible. Questions should be kept very simple until the client's abilities to understand questions, to think, and to articulate answers have been evaluated. Thereafter, counsel should keep well within the limits of the client's vocabulary and comprehension skills.

Counsel should avoid displaying any indication that the client is making a bad impression or is failing to provide what counsel wants. To the contrary, counsel should convey the sense that the client is doing well and is giving counsel helpful information. The client usually enters upon this meeting with certain preconceptions about lawyers that are far from favorable. These include the notions that lawyers are self-interested, uncaring, grasping, and untrustworthy. If the client is street-wise, s/he is also likely to hold the more specific belief that criminal defense lawyers only want to talk their clients into pleading guilty to save themselves the trouble of trying cases. Counsel should attempt to rectify, or at least alleviate, these preconceptions by showing genuine concern for the client as an individual human being — not just another faceless client in a parade of stereotyped clients — and by showing a willingness to work on the client's behalf.

In pursuing the goal of rapport with the client, counsel should make use of any available personalizing touches. For example, in addition to asking the client's name, counsel should ask the client's nickname and, having learned the nickname, ask the client whether s/he would prefer counsel's using the nickname or the client's given name. Offering to do concrete things for the client (for example, if the client is in detention, offering to contact the client's family) is a more credible demonstration of counsel's willingness to work for the client than general self-touting professions of industriousness in the future. If the client evidences particular concern over the police officers' seizure of the respondent's cash or other personal property, counsel should promise to look into the situation and do whatever can be done to retrieve the property.

Perhaps the single most important impression to convey is that counsel views his or her own job as being exclusively to serve and help the client to the best of counsel's abilities. S/he should avoid giving the client any grounds for suspicion or confusion about the lawyer's role or loyalties or motives, which may arise if the lawyer begins to ask for information without saying why s/he wants it. The client should be told that the lawyer's only purpose and only interest are to represent the client and that, in order to make sure that nothing is overlooked which could help the client, counsel needs certain information. If the relevance of counsel's questioning to the client's needs and interests is not perfectly obvious — obvious, that is, to a layperson, not a lawyer — counsel should explain why s/he is asking this or that.

The client should be made to feel comfortable and secure in the presence of counsel. When explaining something to the client, it is usually better to ask "okay?" than "Do you understand that?" Whatever the client tells counsel should be received with interest and an attempt to understand, even if it does not appear relevant to the immediate tasks at hand as counsel conceives them. Patience in hearing the client out is crucial, since under stress s/he will frequently be rambling and inarticulate. S/he should not be shut off without explanation — or at all, unless time is pressing; and, when s/he must be turned from one subject to another, counsel should explain the need to change the subject in a way that does not make the client feel like a fool.

§ 5.04(c) Giving the Client a Business Card

In the course of establishing rapport and putting the client at ease, it is often useful to give the client a business card and to use the card as a prop to reinforce certain messages. Pointing out the portion of the card containing counsel's phone number, counsel should explain that s/he is giving the client the number so that the client can call whenever s/he has questions or has information to impart to counsel. Counsel should simultaneously explain that it will be necessary for counsel and the client to keep in touch and work together closely in fighting against the charges. In this manner, counsel will reinforce the message that counsel is there to help the client and will also convey the all-important message that the client should relate any and all information that s/he can think of. Finally, counsel will implicitly let the client know that the client also needs to make an effort both to get along with counsel and to assist in finding witnesses and preparing the case

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§ 5.04(d) Explaining the Attorney-Client Relationship

A useful way to emphasize that counsel's sole interest lies in serving the client, without sounding like this is a sales pitch learned on a used car lot, is to find some obviously relevant, operational reason for describing counsel's role. Often the best occasion comes in connection with an explanation of the attorney-client privilege — an explanation that is independently desirable, in any event, in order to assure the client that s/he can tell his or her story to counsel in complete confidence. Counsel may say something like this, for example:

> Now, I'm going to ask you to tell me some things about yourself and also about this charge they have against you. Before I do, I want you to know that everything you tell me is strictly private, just between you and me. Nothing you tell me goes to the police or the prosecutor or the judge or your parent(s) or anybody else. Nobody can make me tell them what you said to me, and I won't.
>
> Maybe you've heard about this thing that they call the attorney-client privilege. The law says that when a person is talking to [his] [her] lawyer, whatever [he] [she] tells the lawyer is confidential and secret between the two of them. This is because the law recognizes that the lawyer's obligation is to [his] [her] client and to nobody else; that the lawyer is supposed to be 100 per cent on the client's side; that the lawyer is only supposed to help [his] [her] client and never do anything — or tell anybody anything — that might hurt the client in any way. The prosecutor is the one who is supposed to represent the government in prosecuting cases; and the judge's job is to judge the cases. But the law wants to make sure that — even if everybody else is lined up against an accused — there is one person who is not supposed to look out for the government but to be completely for the person who's accused of the crime. That is the person's lawyer.
>
> As your lawyer, I am completely for you. And I couldn't be completely for you if I could be forced to tell anybody else the things that you say to me in private. So you can

trust me and tell me anything you want without worrying that I will ever pass it along to anyone else because I won't. I can't be questioned or forced to talk about what you tell me, even by a court, and I am not allowed to tell it to anyone else without your permission because I am 100 per cent on your side, and my job is to work for you and only for you; so everything we talk about stays just between us. Okay?

§ 5.04(e) Settling the Roles of Attorney and Client and Explaining the Need for a Truthful Rendition of the Facts

Counsel should further allay the client's suspicions by explaining that all of the fundamental decisions about the objectives of representation will be made by the client and not by counsel. Counsel should explain that any and all major decisions in the case — such as whether to go to trial or offer a guilty plea — will be the client's to make, and that counsel will keep the client apprised of all developments in the case and, when decisions of any consequence have to be made, discuss them with the client. Counsel should explain that s/he will raise any defense that the law permits and will take any action necessary to protect the client's rights. But counsel should also notify the client that counsel will make strategic judgments about how to investigate the case and how to apply the law, based on counsel's legal training and experience, explaining that that is precisely why the client has a lawyer.

The explanation of roles also provides a convenient opportunity for conveying to the client one of the most important messages: that counsel needs to hear a truthful account of the facts from the client in order to effectively investigate and prepare the case for trial. If counsel waits to deliver this message until immediately prior to asking questions about the facts of the crime, the impression that will be conveyed to the client will be that counsel expects the client to lie and is taking steps to prevent such lies. Thus it is useful to incorporate this message early in the interview as simply one more of several preliminary explanations.

Having covered the roles of attorney and client, counsel can easily turn to the need for a truthful rendition of the facts, explaining that in order to efficiently investigate the case, counsel needs to know the truth. Counsel should explain that some clients believe that an attorney wants to hear only favorable things but that that is incorrect, and the omission of unfavorable details will cause counsel to waste time trying to prove facts that cannot be proved when that time could be better spent on putting together a defense that will work. Counsel can also mention to the client that many people accused of a crime have lost their trials precisely because they did not tell their lawyers the truth and the prosecutor came up with something that defense counsel did not know about in advance. Counsel should reassure the client that it is not counsel's job to judge the client, but rather to represent the client whether s/he is guilty or innocent and that that is precisely what counsel intends to do. Of course, in addition to saying these words, counsel must incorporate their message in counsel's own conduct and questioning style: counsel should avoid giving any sign of moral condemnation of the client's conduct. Adolescents are surprisingly sensitive to a listener's reaction and are likely to respond to any indications of reprobation by thereafter concealing the worst facts.

§ 5.05 NOTE-TAKING DURING THE INTERVIEW: EXPLAINING THE NEED FOR TAKING NOTES; TECHNIQUES FOR TAKING NOTES IN THE LEAST DISRUPTIVE MANNER

It is advisable to explain to the client in the preliminary phase of the interview the need for note-taking. Clients inevitably will be apprehensive about counsel's recording the facts of the crime and may fear that counsel will turn these notes over to the prosecutor or the judge.

An effective way of alleviating the client's suspicions is by linking the explanation of note-taking with the earlier explanation of the attorney-client privilege. Counsel should begin by stating that "I hope you won't mind if I take notes of some of the things you tell me" and then explain that these are only for counsel's own use, to help counsel remember details of what the client says. Counsel then should tell the client that counsel will never show the notes to anyone else and that counsel in fact *cannot* show the notes to anyone else because of the attorney-client privilege. In this manner counsel simultaneously reinforces the impact of the earlier explanation of the attorney-client privilege, providing the client with a concrete demonstration of the privilege in action.

When the client begins relating facts about his or her background or the circumstances of the offense, counsel will have a natural tendency to start taking notes immediately. Counsel should hold off for a little while, however, since it will be easier to establish rapport if counsel is looking the client in the eye and appears interested in the information rather than writing with machinelike dispassion. A good way to begin note-taking and to demonstrate counsel's interest and competence is for counsel to summarize aloud the essential material that the client has thus far given counsel, while counsel writes it down. (This material should not be described to the client as "what is important," since that description implies that everything else the client has said so far is unimportant. Throughout interviews with a client, counsel should be careful to avoid inadvertently judgmental pronouncements (for example, "I want to go back over the parts of your story that are relevant for our purposes and ask some more about those").) As counsel summarizes and writes, s/he can ask clarifying or amplifying questions.

Long periods of writing in silence should be avoided. If an extended note has to be written, counsel should vocalize it as s/he writes and then ask the client, "Is that correct?" (At later stages of the relationship with a client, writing or reading notes silently for a protracted period may occasionally be useful for particular purposes — for example, to give the client a chance to absorb or think over a point without feeling pressured to respond quickly, or to unnerve a client who counsel believes is lying — but these are exceptions to the general rule that the client should not ordinarily be left hanging while counsel concentrates on counsel's notes.) Once the client gets into the swing of his or her story, it is usually wise for counsel to take notes of every significant point while the client is talking. Excessive writing is ill-advised, however, because it impedes counsel's ability to observe the client's nonverbal expressions and also suggests that counsel is more interested in the facts than in the client as a person.

Perhaps the best way to take sufficiently detailed notes without excessive writing is to develop the knack of writing down key words and key phrases — using the client's own language rather than translating it or summarizing it in counsel's terminology — and then, *after the interview,* when counsel is back in his or her office, going over the notes while memory is still fresh and writing out or dictating a lengthier and more coherent version of what the client said, together with counsel's observations, interpretations, and impressions. Using the client's exact words in the original notes will stimulate counsel's recall of the things that were said before and after the noted words, particularly if counsel reviews the notes and prepares the refined interview report shortly after the end of the interview. (When counsel has enough control over his or her schedule, s/he will find it useful to leave a half-hour or so free immediately following interviews for the latter purpose. This may appear profligate, but experience shows that it is more efficient than either trying to write out copious notes during an interview or trying to reconstruct the details of information obtained in an interview by going over terse notes half a day or more after they were taken.)

Detailed records of client interviews, particularly of interviews conducted shortly after the time of the offense with which the client is charged, are invaluable tools in defense work. They serve subsequently to refresh both counsel's mind and the client's memories; they can be used for a variety of practical purposes (for example, to support counsel's representations of fact during efforts to convince the prosecutor to drop or reduce the charges or during plea bargaining; to support counsel's representations to the court in support of requests for continuances, state-paid investigative or consultative assistance, or *forma pauperis* subpoenas to gather defensive evidence; to support counsel's representations to the court in support of motions; to assist in preparing the respondent to testify); and they may also be admissible at trial in the client's behalf if the prosecution seeks to create the impression that the client's trial testimony is a recent fabrication. In addition, notes will shield counsel from unwarranted attacks (such as inadequate representation and suppression of facts favorable to the defense) should the respondent ultimately be convicted.

In some jurisdictions, however, interview notes or reports may be discoverable by the prosecution and usable to impeach the client if s/he testifies at trial. See §§ 9.11, 27.12(b), 33.03 *infra.* When this is the case, counsel may be able to insulate these materials against disclosure by (1) including within counsel's written notes of the client's oral statements sufficient analytic and evaluative commentary to imbue the whole writing with "work product" protection, *see Upjohn Co. v. United States,* 449 U.S. 383, 397-402 (1981); and (2) not reading or submitting the notes to the client for approval after counsel has put them into final form (*cf. Goldberg v. United States,* 425 U.S. 94, 105-7 (1976)). For discussion, see §§ 8.10, 9.13 *infra.* But, even with these precautions, "work product" protection is not completely guaranteed, particularly if the client testifies at trial (*cf. United States v. Nobles,* 422 U.S. 225, 236-40 (1975), discussed in §§ 9.12, 9.13 *infra*)*;* and if disclosure to the prosecution is a possibility under local practice, counsel must weigh its risks against the advantages of note taking or recordkeeping.

§ 5.06 INTERVIEWING THE CLIENT ABOUT THE FACTS OF THE OFFENSE

In situations other than the rushed interview at the police station or on the day of Initial Hearing (see § 5.01 *supra*), counsel is well advised to begin the substantive portion of the initial interview with a discussion of the facts of the offense. A client expects his or her attorney to be interested in the client's innocence and in hearing about defense witnesses. Counsel's avoiding or even delaying these subjects may be viewed by the client as incompetent lawyering or as a manifestation that the lawyer doubts the client's innocence.

Counsel's opening questions about the facts of the offense should avoid giving the appearance that s/he believes that the client knows anything about the crime, since the obvious corollary is that counsel believes that the client was involved in its commission. Usually, a neutral way of beginning is by asking the client what s/he knows about what the police are saying that s/he did. This will usually prompt a narrative by the client, in which s/he will relate both the gravamen of the charges and the degree to which s/he has personal knowledge of the facts of the crime.

An effective way of conducting a fact interview is to employ a three-stage interviewing process:

1. Counsel should begin by inviting the client to tell the story in his or her own words, with few, if any, interruptions by the lawyer. This puts the client most at ease and informs the lawyer what the client thinks is important. It gives the lawyer a collection of unsolicited details on which to cross-examine the client later if the lawyer suspects untruth. And it shows the lawyer something about how the client's mind works, his or her intelligence, and verbal ability. There is no sense in starting to ask questions that may be above the client's level of comprehension.

2. Once the client's rendition of the facts is completed, counsel should go over the story again, aiding the client to remember and recount everything s/he can about the relevant events, conditions, things, and people. In performing this task, it is useful to take blocks or parts of the client's story, and go through each block, using the journalistic "who, what, why, when, where, and how" approach to fill in details omitted by the client when s/he related that block of information. A technique that is effective with some clients is to cast all questions and answers in the present tense (for example: "and what do you do next?"), thereby stimulating the client's reliving of the experience.

3. In the third round of the interview, counsel should fill in additional details and elicit explanations. Counsel should pick up on words used by the client in rounds one and two, asking the client to explain slang terms that are unfamiliar to counsel. Counsel should elicit the names, addresses, and phone numbers of any and all witnesses to the crime or related events that happened prior to or

> subsequent to the crime. If the client is unable to provide a full name, counsel should seek out any identifying information, such as the witness's nickname, relatives, and friends; if the client is unable to provide an address or phone number, counsel should ask the client about the areas that the witness usually frequents, and arrange for the client or the client's relative or friend to point out the witness to counsel. Counsel also should fill in any omissions or unclarities in the client's rendition of the events. Counsel can spot the less obvious omissions by putting himself or herself in the client's situation and deducing what the client would be likely to have seen, heard, and felt, as well as by imagining the natural consequences of the events described by the client.

In interviewing the client about the facts of the offense, counsel should refrain from overtly cross-examining the client unless the client is obviously lying and discovery of the truth appears immediately necessary for effective defense investigation. Such an overt manifestation of distrust can irreparably injure the attorney-client relationship. Counsel will have ample opportunities later to put tough questions to the client, after the attorney-client relationship has solidified.

§ 5.07 INTERVIEWING THE CLIENT ABOUT FACTS NEEDED FOR SUPPRESSION MOTIONS

In order to gather the facts needed to draft suppression motions, counsel will need to elicit all of the information that the client knows about the police investigation of the case as well as the circumstances of the client's arrest, booking, and interrogation. Counsel should begin with any contact that the client had with the police in connection with the case prior to arrest — for example, investigative interviews that did not lead to arrest at that point in time, police searches of the client's house prior to the arrest, and police interviews with relatives or friends of the client prior to the arrest. Counsel then should take the client through the details of the arrest, focusing in particular on police searches, seizures, administration of *Miranda* warnings, and interrogation. Thereafter, counsel should use the same sort of chronological approach to cover all of the details of the booking process and any interrogation that took place in the police car on the way to the station or at the stationhouse.

If the client was arrested on the scene rather than some days or months later, and if s/he has been detained since the time of arrest, counsel also will want to record the articles of clothing that the client is wearing and their colors. These could be highly significant in showing that the client's attire at the time of arrest did not match the complainant's and/or eyewitnesses' description of the perpetrator. If the client was not arrested on the scene, or if the client was released after arrest and thus has had an opportunity to change clothes prior to seeing counsel, counsel will need to ask the client to recount what s/he was wearing on the day of arrest (if s/he remembers) and any witnesses who can corroborate the client's description.

§ 5.08 INTERVIEWING THE CLIENT ABOUT HIS OR HER SOCIAL HISTORY

A full social history of the child — particularly home life, education, work record, and prior criminal record — is essential to much of counsel's work on the case. This social information plays a crucial role at the detention hearing (see §§ 4.17, 4.19 *supra*) and at disposition (see Chapter 38). It may provide the basis for a motion to dismiss for social reasons (see Chapter 19) and can be a useful tool in plea negotiations with the prosecutor (see § 14.16 *infra*).

If counsel's first interview with the client takes place on the day of Initial Hearing, the interview will have to cover much of the client's social history (see § 4.07(a) *supra*), but the rushed circumstances of the interview will preclude comprehensive coverage. In the post-hearing interview counsel should pick up any details s/he missed in the earlier interview.

The checklist in § 5.13 *infra* suggests a host of topics to be covered in exploring the client's social history. The list includes the information needed to conduct the detention hearing, in the event that the interview takes place prior to Initial Hearing. See also § 4.07(a) *supra.* In going through the topics contained in the checklist, counsel should be alert to subtle indications of deep-rooted problems. For example, the way in which the client describes his or her home life may hint at the existence of child abuse or neglect. The client's description of his or her school history may suggest the existence of special educational problems that even the school has not yet noticed.

§ 5.09 COMPLAINTS OF BRUTALITY OR MISTREATMENT; OTHER CUSTODIAL COMPLAINTS

If the client reports that s/he was abused by the police or by detention facility officials or abused by other inmates as a result of official negligence, counsel should promptly investigate these allegations. The client should be questioned in detail respecting time, place, and nature of the official conduct complained of, its background, and the identity or description of all officials involved or present at the time. Observable contusions and lacerations on the client should be photographed in color. A private physician should be summoned to examine major injuries if possible; the county medical society or a civil liberties group, like the American Civil Liberties Union, can help find a physician for this purpose. Witnesses should be interviewed who last saw the client prior to arrest and who can testify concerning his or her physical condition at that time. Counsel should also investigate whether any police officers or facility guards who were involved in the incident sustained injuries of their own, since the defense to most allegations of mistreatment is that the officer or guard had to use force to effectuate the arrest or subdue an unruly prisoner.

Obviously, if the respondent is still detained and may be subjected to further abuse, counsel's first step must be to prevent any more abuse. This can usually be done by reporting the incident to the administrator of the facility, who will usually take the necessary step of

transferring the child to a more protective environment. If the administrator refuses to take the necessary action, counsel should file a motion with the judge who ordered detention, requesting an immediate directive to transfer the child to a more protective environment or, if the facts warrant it, a reduction in the level of detention to home detention or a group home.

As long as counsel takes these steps to avert the risk of further abuse and to gather evanescent evidence before bruises and memories fade, counsel can delay until somewhat later any decisions about what should be done to rectify injuries already inflicted upon the client. If there appears to be merit in a suit for damages in a state court or in the federal courts under the Civil Rights Act, 42 U.S.C. § 1983 (*see Monroe v. Pape*, 365 U.S. 167 (1961)), counsel can subsequently speak with the client and his or her parent about such an action, brought by counsel or some other attorney selected by the client and parent.

Counsel should also consider whether any evidence of police brutality can be put to good use in motions to suppress evidence (see §§ 23.14, 24.04(a) *infra*) and motions to dismiss for social reasons (see § 19.03(d) *infra*).

Frequently, clients who are in detention complain about lack of medical treatment, exercise, food, and numerous other things. Most of these problems can be corrected administratively by informing the authorities in charge about them. Counsel should see the commanding officer on duty if the client is in a police station or the ranking administrator of a detention facility if s/he is detained. State court relief may be available if the conditions of the client's confinement are substantially out of line with civilized standards; federal court relief is available only if they are really egregious (*see Bell v. Wolfish,* 441 U.S. 520 (1979)). Recourse to the courts is appropriate if requests for necessary medical attention are not promptly honored. In addition to state statutes and regulations that impose responsibility on custodial officers for the well-being of prisoners, the Due Process Clause of the Fourteenth Amendment requires that a prisoner's serious medical needs be met by his or her custodians, at least in some presently ill-defined circumstances. *See City of Revere v. Massachusetts General Hospital,* 463 U.S. 239, 244-45 (1983).

§ 5.10 CONCLUDING THE PRIVATE INTERVIEW OF THE CLIENT

At the conclusion of the private interview with the child, counsel should give him or her the warnings set forth below. These warnings should be given, whether or not the client is in custody and whether or not s/he has previously been given these warnings. Counsel should advise the client to:

1. Say nothing at all to the police, tell them nothing under any circumstances, and reply to all police questions or approaches by saying that the client's lawyer has told the client not to answer questions or to talk with anyone unless the lawyer is present.

2. Take the same position with prosecuting attorneys and under no circumstances discuss any offer or deal with the police or the prosecuting attorneys in counsel's absence.

3. Discuss the case with no one and particularly not with cellmates, co-respondents, adult co-perpetrators, lawyers for the co-respondents or adult co-perpetrators, or reporters; and tell anyone who wants to discuss the case or who has information about it to contact counsel.

4. Neither write nor sign any papers or forms requested by the police or prosecuting attorneys or relating to the case in any way.

5. Refuse (if the client is at liberty) to go anywhere with the police or with prosecuting attorneys, who may ask the client to accompany them, unless they have an arrest warrant; and tell them that if they want the client to go anywhere or to do anything, they should contact counsel first.

6. Refuse (if the client is in custody) to participate in any lineup or to appear before any person for possible identification in counsel's absence; refuse to accompany the police or prosecuting attorneys to any place outside of the regular cell and recreation areas of the detention facility, except to court, in counsel's absence; object to any inspection of the client's body, physical examination, or test of any sort in counsel's absence; request permission to telephone counsel immediately in the event that the police begin any lineup or identification procedure, inspection, examination or test; and, if put in a lineup or exhibited for identification over his or her objection, observe and remember all of the circumstances (see § 3.19(d) *supra*).

7. Refuse consent to anyone who may ask the client's permission to search the client's home or automobile or any place or thing belonging to the client.

8. Respond to all accusations and to anyone who gives any evidence against the client or says anything against the client by stating that the client's lawyer has told the client not to talk to anybody unless the lawyer is present.

9. Telephone counsel as soon as possible if anything at all comes up relating to the case — if anyone whom the client does not know tries to talk to him or her about it, if co-respondents or adult co-perpetrators have squealed on the client, or if the client gets any new information or receives any communication from the court about the case.

10. If the client goes or is taken to court and counsel is not present when the client's case is called, tell the judge that counsel is supposed to be present and request that

the judge wait for counsel to arrive (if the client knows that counsel is aware of this court date) or that the judge telephone counsel or permit the client to telephone counsel and inform counsel that the client is in court (if the client suspects that counsel does not know about the proceedings).

In some situations, counsel may decide that it is in the client's interest to make a statement to the police or to the prosecutor or otherwise to cooperate in their investigation. The usual instance is a case in which counsel believes that the authorities can be persuaded to drop charges (see §§ 8.14, 9.06 *infra*) or a case in which a favorable plea bargain appears to be negotiable (see §§ 14.15, 14.18 *infra*), particularly when the authorities and the client are considering the client's turning state's evidence and testifying against accomplices. Even if the client is contesting guilt and a trial appears likely, there are situations (rare, to be sure) in which the defense stands to gain by cooperating with the prosecution's evidence-gathering efforts. For example, defense counsel who has interviewed an eyewitness to the offense and is confident that the witness will not identify the respondent in a lineup may want to have a lineup held. Or if the respondent's story includes an admission of some incriminating facts (for example, presence at the scene of the offense or commission of the *actus reus*) but denies others (for example, participating in the *actus* or having the requisite *mens rea*) or asserts facts supporting some affirmative defense (for example, self-defense; mistake of fact), a written or oral statement to the police may be advised as the best means of putting the respondent's version of the facts before a judge or jury without the respondent's being subject to impeachment. (Prosecutors tend to present these incriminating admissions in their case-in-chief, even when they have ample independent proof of the facts admitted; and if the prosecution offers only a portion of the respondent's statement, the defense is entitled to put the whole of it into evidence.) Thus adduced at trial — whether by the prosecution or the defense — the statement does not open the respondent up to either cross-examination or the sorts of impeaching evidence (see §§ 33.06, 33.09 *infra*) to which the respondent would be exposed if s/he told the same story on the stand in court. Counsel's decisions to cooperate in the staging of a lineup, to permit the client to make a statement, or to provide other evidence to the prosecution in these situations will, of course, qualify the general advice to the client described earlier. In all of these cases, however, counsel should be present during any face-to-face dealings between the client and the police or prosecutors, and counsel should examine any writing or physical evidence before it is turned over to them. The client should never be allowed to communicate with the authorities in counsel's absence. Hence it is best always to give the client the full roster of advice in this section without modification; then if circumstances justify exceptions to the general rules stated here, counsel can subsequently work with the client to decide upon these exceptions and to implement them.

If the client is still in police custody at the time of the interview, counsel should not leave without first having the client personally tell a police officer, with counsel listening (and coaching if necessary), that the client does not wish to speak with the police or prosecuting authorities at any time in the future in the absence of counsel but wants to conduct all communications with the authorities from now on solely through the medium of counsel. See § 3.19(f) *supra.*

§ 5.11 THE FINAL STAGE OF THE INTERVIEW: THE DISCUSSION WITH THE CLIENT AND HIS OR HER PARENT(S); FEE-SETTING; OBTAINING RELEASES OF INFORMATION

After counsel has completed the separate interview of the client, counsel should bring the parent back into the room and talk with the client and parent together. It is essential that the client remain in the room during counsel's discussion with the parent. Since children are naturally disposed to believing that adults stick together, s/he would inevitably view his or her exclusion as motivated by counsel's intention to abrogate the attorney-client privilege and reveal to the parent everything the client said. Thus, excluding the child can undo whatever progress counsel has made toward establishing a good attorney-client relationship and quite possibly prevent any future meaningful relationship with the client.

The parent will naturally be curious about what counsel discussed with the client. Counsel can satisfy the parent's curiosity and simultaneously convey an important message to the client by seizing the opportunity for explaining the attorney-client privilege to the parent. After noting that counsel discussed the case with the client, counsel then should explain to the parent that the attorney-client privilege forbids counsel from revealing the content of that discussion to anyone, including, unfortunately, the parent. Counsel should furthermore explain that if the parent questions the child about the facts or about the child's discussion with counsel, the parent could learn facts (whether inculpatory or exculpatory) that would render the parent vulnerable to being subpoenaed as a witness for the prosecution. As explained in § 5.03(a) *supra,* the vast majority of jurisdictions have no parent-child privilege, and even the handful of jurisdictions that recognize such a privilege make various exceptions to it.

There are numerous questions that counsel may need to address to the parent. If the parent is a potential witness in the case (for example, if the parent may be an alibi witness, or observed the crime take place, or was present during police interrogation when *Miranda* warnings might or might not have been given), counsel will have to conduct a factual interview of the parent, just as counsel would with any other factual witness. If the child was unable to provide certain background information, such as the names of prior schools s/he attended or the addresses and phone numbers of relatives or witnesses, counsel may be able to get the needed information from the parent. However, counsel should always inform the client during the earlier private session with him or her that counsel intends to ask these questions of the parent, and that s/he will ensure that the client is present during the interview of the parent.

If counsel is going to handle the case on a fee basis rather than as court-appointed counsel for an indigent client or as a *pro bono* matter, counsel also will need to discuss fees with the parent. Misunderstandings about fees are a vexatious and unnecessary irritant, and it behooves counsel to come to an early and very clear fee agreement. After determining the nature of the case and the evidentiary and investigatory problems likely to be involved, counsel should calculate a fair fee and agree upon it with the parent. Fee-setting in a delinquency case is normally based on an advance estimate of the amount of time that will be necessary to handle the

case and not on a post-audit hourly basis. What expenses are to be paid by whom and what exact stages of the process (that is, through to, but not including, trial; through trial; through a first appeal; and so forth) are to be covered by the fee should be explicitly stated and the agreement reduced to writing and signed. Counsel is cautioned to advise the parent that failure to pay the full fee before trial will result in counsel's withdrawal from the case; experience indicates that fees in delinquency cases, like fees in criminal cases, are hard to collect after trial, no matter what its outcome.

Counsel should ask the client and his or her parent to sign "Release of Information" forms so that counsel will be able to obtain records about the client from his or her school and other agencies that preserve confidentiality of records. The form signed by the client should contain wording such as the following:

RELEASE OF RECORDS AND INFORMATION

I, [name of client], am currently being represented by [name of counsel and counsel's organization or law firm].

I hereby authorize you to release to [name of counsel] and his or her law partners, investigators, social workers, and other employees, any and all records including (but not limited to) educational evaluations and school records (including my cumulative record folder and all its contents, all academic records, special education records, guidance reports, anecdotal records, incident reports, records kept by the guidance counselor, and any other records maintained by the school), as well as medical, social, psychiatric and psychological records, and any and all records and reports prepared by social workers.

I understand that my right to confidentiality means that you cannot share this information without my consent. I fully understand that I am requesting that you reveal confidential information to the named individual(s). I feel that [name of counsel] will be able to use the material to help me, and I am authorizing the release of this information for that reason.

_____
Signature of client

_____
Client's date of birth

_____
Date of Signature

The form signed by the parent or guardian should be entitled "Consent by Parent or Guardian to Release of Confidential Records and Information Pertaining to a Child" and should

parallel the language of the client's release form, with the words "my child" substituted where appropriate. Before the client and the parent or guardian sign the forms, counsel should carefully explain the content of the forms and their legal effect. Counsel should explain that s/he may need the records in order to prepare for trial and in order to prepare motions. Since some clients will be apprehensive that counsel may show unfavorable records to the judge, counsel should reassure the client and the parent or guardian that counsel will keep the records to himself or herself unless they help the case, and only in that event will s/he show the records to the court. If the client continues to be apprehensive about counsel's disclosure of the records to the judge, counsel can offer to consult the client after the records have been obtained to verify that the client approves of counsel's decision to use the records. Counsel should also inform the client that counsel will not show the records to anyone outside the court system and that the court system must maintain the confidentiality of any records about a juvenile.

At the conclusion of the interview, counsel should explain to the parent and child the upcoming stages of the case, describe the actions counsel intends to take in investigating the case and preparing for trial, and schedule any further meetings that will be needed.

§ 5.12 SUBSEQUENT INTERVIEWS WITH THE CLIENT

Usually the client must be interviewed on more than one occasion. In counsel's preparation for trial, facts will be discovered that were untouched in earlier interviews, and these must be reviewed and analyzed with the client. Increasingly, the client should be cross-examined in a fashion that may range from counsel's mild expression of surprise at a contradiction to open incredulity and grilling, depending upon counsel's best judgment of what is necessary at once to preserve the lawyer-client relationship and to get the truth. Accused delinquents often do lie to their lawyers. If a client is to be saved from himself or herself, s/he must be made to tell counsel the truth. And whether or not s/he is lying, s/he must be confronted with any inconsistencies among the pieces of the story s/he is telling or between the client's story and other information obtained by counsel, since these will or may be exposed at trial.

One way to cross-question the client vigorously without creating the impression that counsel disbelieves or distrusts the client is to engage in an explicit exercise of role-playing, in which counsel first prepares and rehearses the testimony that the client might give in his or her own defense at trial and then plays prosecutor for purposes of cross-examining the client. This kind of dry run of cross-examination, as well as direct examination, will be necessary anyway in any case in which the client is actually going to take the stand at trial (see §§ 10.09(c), (d), 10.10 *infra*). It can also be used to confront the client with any embarrassing holes or contradictions in the client's story while maintaining an attitude of complete confidence in the client's truthfulness, although "the prosecutor" will have some pretty tough questions to throw at the client. At some point during these interviews with the client, preferably near the time of trial when counsel has all the information that s/he will have at trial, the client should be given an objective appraisal of the case, with counsel avoiding unfounded optimism or pessimism.

§ 5.13 INTERVIEW CHECKLIST

What follows is the substance of a "model" or "ideal" interview, covering most of what the lawyer will have to learn from the client in order to defend the client adequately throughout the several stages of an ordinary delinquency case. Circumstances often will not permit coverage in the initial interview of everything that is included here.

(*to be completed by attorney following interview*)

Attorney's file no.: _____

Delinquency case no.: _____

Client's name: _____

Charges: _____

_____

Date and hour of interview: _____

Place of interview: _____

_____

Name of interviewer: _____

INTERVIEW SHEET

Name (have the client spell even common names):

All aliases and nicknames:

Address (if apartment or room, include number):

Phone (or phone at which client can be reached and name of person there):

Date of birth:

Place of birth:

Place of residence at time of arrest:

Prior places of residence (from latest to earliest):

Residence: From (date): To (date):

Education:

Name of school and location Current Grade Date last attended

Frequency of Attendance:

Passing or Failing Subjects?

Present or prior employment, including summer jobs and part-time jobs) (separate notation of all employers if more than one):

Name of employer:

Address:

Phone:

Type of business:

Nature of work done by client:

Hours and days of work:

Period of employment:

Reason employment terminated if client is not still employed in this job:

Client's father:

Name: Type of work:

Living ☐ Deceased ☐

If living:

Address:

Phone:

Client's mother:

Name: Type of work:

Living ☐ Deceased ☐

If living:

Address:

Phone:

Client's brother(s) and sister(s):

Name: Type of work:

Living ☐ Deceased ☐

If living:

Address:

Phone:

Age:

By whom was client raised? Indicate if parents were separated during any period of client's childhood. If client was raised by persons other than a parent, get data for those persons as for parents, *supra.*

Is the client a noncitizen and at risk of immigration consequences, either as a result of an unfavorable outcome of the delinquency case or merely because government officials learn of the client's noncitizen status? (For discussion of potential immigration consequences, see § 14.07 *infra*.) Is the parent or guardian with whom the client lives a noncitizen who might be subject to immigration consequences if government officials learn of his or her noncitizenship status as a result of the client's delinquency case?

Does (or did) client use drugs? ☐ Yes ☐No

Type(s):

Since (date):

Present frequency of use:

Has client received treatment for a drug problem or participated in any form of detoxification program? ☐ Yes ☐ No

If yes, describe:

Name of agency:

Address:

Phone:

Name(s) of counselor(s) or professional personnel:

Address:

Phone:

Does client use alcohol? ☐Yes ☐No

Volume of use:

If heavy drinker, since (date):

Has client received treatment for an alcohol problem or participated in any form of detoxification program? ☐ Yes ☐ No

If yes, describe:

Name of agency:

Address:

Phone:

Name(s) of counselor(s) or professional personnel:

Address:

Phone:

Physical and mental condition:

Present physical disabilities:

Present physical illnesses:

Is client presently under medical care? ☐ Yes ☐ No

Doctor's name:

Address:

Phone:

Serious physical injuries (and all head injuries):

Type:

Cause:

Date:

If hospitalized, name, address, and city of hospital, and dates of hospitalization:

Has client ever been in a mental hospital or institution? ☐ Yes ☐ No

Name, address, and phone of hospital:

Has client ever been treated by a psychiatrist or psychologist? ☐ Yes ☐ No

Name, address, and phone of psychiatrist or psychologist:

Circumstances leading to treatment:

Has client ever undergone psychiatric or psychological evaluation? ☐ Yes ☐ No

Names, addresses, and telephone numbers of evaluators:

Circumstances leading to evaluation:

Prior record (all arrests, from latest to earliest and any pending juvenile and adult charges, in any jurisdiction):

Date of arrest:

Jurisdiction (city and state):

Charge(s):

Dismissal, diversion, or other resolution without trial or guilty plea:

Plea (guilty or not guilty; if guilty, of what charges):

Trial by judge or jury:

Name of judge:

Adjudication (guilty or not guilty; if guilty, of what charges):

Disposition:

Date disposition handed down:

Name of attorney:

Address of attorney:

Phone of attorney:

Time served:

Institution:

Dates on probation or parole:

from (date): to (date):

Name of probation or parole officer:

Rearrest for probation or parole violation:

Date of rearrest:

Violation charged:

Disposition:

WAS CLIENT ON PROBATION OR PAROLE AT THE TIME OF THIS ARREST? ☐ Yes ☐ No

Probation or parole:

On which of the above prior charges (indicate by number):

WAS CLIENT UNDER ANY PENDING CHARGES AT THE TIME OF THIS ARREST? ☐ Yes ☐ No

Which of the above prior charges was pending (indicate by number)

WAS CLIENT WANTED FOR ARREST ON OTHER CHARGES IN ANY JURISDICTION AT THE TIME OF THIS ARREST? ☐ Yes ☐ No

Jurisdiction:

Charge(s):

How client knows s/he is wanted:

Name of law enforcement agency involved if known:

Name of officers involved if known:

Present custodial status:

Facility:

Bail:

Where posted:

When posted:

Amount:

Form (cash, property, professional surety):

If bonding company, name:

Who paid for the bail:

THE CLIENT SHOULD BE ASKED TO TELL EVERYTHING S/HE KNOWS ABOUT THE PRESENT CHARGE, IN CHRONOLOGICAL ORDER: WHAT S/HE DID, WHAT HAPPENED TO HIM OR HER, WHO

WAS INVOLVED, WHEN AND HOW THE CLIENT WAS ARRESTED, AND EVERYTHING THAT THE POLICE HAVE DONE WITH THE CLIENT SINCE ARREST. AT THE CONCLUSION OF THE CLIENT'S STORY, COUNSEL SHOULD ASK QUESTIONS —WHO, WHAT, WHY, WHEN, WHERE, AND HOW—FOR CLARIFICATION. BEFORE TERMINATING THE INTERVIEW, COUNSEL SHOULD BE SURE S/HE KNOWS AT LEAST THE FOLLOWING:

Client's version of the events on which the charge is based or, if the client denies involvement, where the client was and what s/he was doing at the time of the events on which the charge is based:

Witnesses (indicate if immediate contact is advised for any reason):

Witnesses to the events on which the charge is based (including the complainant and persons who may be prosecution witnesses):

Alibi witnesses:

Character witnesses:

For each witness:

Name (get spelling and all aliases and nicknames):

Address:

Phone:

Other information helpful in locating the witness (where does s/he work, where does s/he "hang out," is s/he on public assistance, where does s/he collect the relief check, and so forth, as appropriate):

Arrest:

Who, what, why, when, where, and how?

Who was with the client when s/he was arrested? Were they also arrested? Get information as for witnesses, *supra.*

Was client under the influence of drugs when arrested or had s/he taken drugs recently?

☐ Yes ☐ No

Was client drunk when arrested or had s/he taken alcohol recently? ☐ Yes ☐ No

Was client ill when arrested? ☐ Yes ☐ No

Was client struck or roughly handled during arrest or thereafter?

☐ Yes ☐ No If so, describe injuries:

Date and time of arrest:

Exact location of arrest:

Names of arresting officers:

Did they have a warrant? ☐ Yes ☐ No

What did they say the charge was?

What questions did they ask the client?

What did the client tell them?

Did police at the time of arrest or any other time take anything from the client's person, home, place of work, automobile, place where the client was, or from the premises or property of any other person? ☐ Yes ☐ No

Thing taken:

Did police have a search warrant? ☐ Yes ☐ No

Describe circumstances under which the thing was taken:

For all persons present, get information as for witnesses, *supra:*

After arrest:

Every location to which client was taken by police:

Exact times of confinement in each place:

Number of officers present in each place (get names, ranks, and descriptions of each officer significantly involved in investigation):

Interrogation:

Where did it take place?

When and how long?

Interrogating officers:

Other persons present:

Was a lie detector test given? ☐ Yes ☐ No

What specific questions did the officers ask? (This is often a good means of learning something about the prosecution's case.)

Did the police confront the client with any evidence against the client? What:

Did the police tell the client that any person had incriminated the client or that any co-respondent or adult co-perpetrator had confessed? Who:

Did any co-respondent or adult co-perpetrator confess or incriminate the respondent in his or her presence? Who:

Did client tell the police anything? ☐ Yes ☐ No

What, in detail:

Did client make a written statement? ☐ Yes ☐ No

Did s/he sign it? ☐ Yes ☐ No

Did client till out or sign any forms? ☐ Yes ☐ No

Describe the forms:

Did client make an oral statement? ☐ Yes ☐ No

Was it tape recorded? ☐ Yes ☐ No

Was it stenographically transcribed? ☐ Yes ☐ No

Did anybody write it out or take notes on it? ☐ Yes ☐ No

Other circumstances at the time of the client's statement, in detail:

Was client previously warned:

That s/he had a right to remain silent? ☐ Yes ☐ No

That anything s/he said could be used against him or her? ☐ Yes ☐ No

That s/he had a right to a lawyer before making a statement? ☐ Yes ☐ No

That if s/he could not afford a lawyer, one would be appointed before any questioning?

☐ Yes ☐ No

What did client say in response to these warnings?

Was client asked whether s/he understood each warning? ☐ Yes ☐ No

How did s/he respond?

Was s/he asked whether s/he was willing to make a statement after having been given these warnings? ☐ Yes ☐ No

How did s/he respond?

Was s/he asked to sign a form or card with these warnings written on it? ☐ Yes ☐ No

How did s/he respond to each warning, waiver, or question on the form or card?

Was s/he given any physical examination; was a blood sample taken; was hair taken or combed; was a drug or alcohol test administered or body inspection of any sort made; was the client examined by a doctor or mental health professional?

Where:

When:

Describe the examination, test, or inspection:

All persons present:

Did anyone say anything about what the examination, test, or inspection showed?

☐ Yes ☐ No

Was client asked for permission to make the examination, test, or inspection?

☐ Yes ☐ No

How did s/he respond?

Was s/he told that s/he had a right to refuse or to have an attorney present?

☐ Yes ☐ No

How did s/he respond?

Was client exhibited in a lineup or brought, under any circumstances, before any person for identification? ☐ Yes ☐ No

Where:

When:

Describe the situation:

All persons present (including police, identifying witnesses, other persons in lineup, co-respondents and adult co-perpetrators):

What did the police say to the identifying witness:

What did the identifying witness say:

Was client asked for permission to put him or her in the lineup or to exhibit him or her for identification? ☐ Yes ☐ No

How did s/he respond?

Was s/he told that s/he had a right to refuse or to have an attorney present?

☐ Yes ☐ No

How did s/he respond?

Was s/he asked to do anything during the identification procedure (walk around, turn to one side, gesture, speak)? ☐ Yes ☐ No

What did s/he do or say?

Was s/he told that s/he had a right not to do these things? ☐ Yes ☐ No

How did s/he respond?

Was client asked to reenact anything (same subquestions as for lineup)? ☐ Yes ☐ No

Was client asked to give permission for the search of any place or thing? ☐ Yes ☐ No

Where:

When:

By whom was the request made?

All persons present:

For what place or thing was permission to search requested?

What was the search supposed to be looking for?

What was said to the client by the person requesting permission?

What did client say?

Was client told that s/he had a right to refuse permission? ☐ Yes ☐ No

How did s/he respond?

Was anything said about a search warrant? ☐ Yes ☐ No

What was the client told about the warrant?

Prior judicial proceedings:

Has client appeared in court? ☐ Yes ☐ No

When:

What court:

Address or location of court:

Nature of proceedings:

Who was present (names or descriptions of judge, prosecutor, police):

Were charges read or shown to the client? ☐ Yes ☐ No

What were they:

Was client asked to plead? ☐ Yes ☐ No

What did s/he plead:

Who testified:

What did they testify:

Did client testify?

What did s/he testify?

Was client represented by a lawyer? ☐ Yes ☐ No

Name, address, phone, or description of lawyer:

Did the lawyer give client a business card, and does the client still have it?

What else happened in court:

Was the client given a slip of paper or a form of any sort? ☐ Yes ☐ No

If so, where is it? (Counsel wants to obtain this form as soon as s/he can get it from the client or the client's family, since it will state the charges and next court appearance date more accurately than the client can remember them and will contain the court's case number.)

Are there any co-respondents or adult co-perpetrators? ☐ Yes ☐ No

Name(s):

If in custody, where:

If at liberty, get information as for witnesses, *supra.*

Name(s) or description(s) of attorneys for co-respondents or adult co-perpetrators:

COUNSEL SHOULD OBTAIN:

1. The client's and parent's or guardian's signatures on releases giving counsel the right to inspect all school, medical, psychological, and other agency records relating to the client (see § 5.11 *supra*);

2. Where appropriate,

   (a) Information relating to bail (see § 4.27(a) *supra*).

   (b) A signed retainer and fee agreement (see § 5.11 *supra*).

Chapter 6

Case Planning: Deciding What Things To Do To Prepare for Trial and the Order in Which To Do Them

§ 6.01 SCOPE AND PURPOSE OF THIS CHAPTER

One of the most difficult aspects of defense work is attending to the myriad tasks that must be completed prior to trial. Defense counsel must simultaneously seek out and take statements from prosecution witnesses, conduct discovery, draft and litigate motions, interview defense witnesses and prepare them to testify, engage in plea negotiations with the prosecutor, subpoena police reports and other documents, retain defense experts, and consult with the client.

This inordinate series of tasks is complicated still further by the time pressures attending the process. Counsel will often have only a short period of time between arraignment and trial in which to perform the tasks. In a case in which the respondent is not detained, counsel may have a month or a month and a half in which to prepare for trial; if the respondent is detained, the time period likely will be two to three weeks. Moreover, some of the tasks require several weeks to perform: if counsel subpoenas reports from a police department, hospital or public agency, s/he should anticipate that the records division of that agency will be slow in responding; if counsel plans to retain an expert witness, s/he should expect that it will take some time to locate an appropriate expert and for the expert to find the time to conduct the examination or test that counsel needs.

The only possible solution to this problem, albeit an imperfect solution, is to begin performing the tasks as soon as counsel has a skeletal understanding of the facts of the case, and thereafter revise plans and strategies as more information becomes known. Since the client interview will tell counsel the most important foundational facts — the facts of the offense from the client's perspective — counsel should form a tentative plan of action immediately after interviewing the client. That plan of action should take the form of a preliminary "theory of the case" which will shape counsel's next moves, at least until such time as new information warrants revision of the theory of the case.

This chapter is designed to assist counsel in forming a plan of action and implementing it. While each case naturally is unique in its facts and in the series of tasks that must be performed to prepare it for trial, this chapter will sketch out some of the general considerations that counsel should keep in mind in the planning process. Section 6.02 *infra* explains the nature and functions of a defense theory in counsel's preparation for trial. Section 6.03 *infra* describes the steps that counsel should take to conduct the vital fact-gathering process and the order in which those steps should be taken. Sections 6.04 and 6.05 *infra* provide an overview of, respectively, the defense motions that counsel should consider filing and the actions that counsel should take at this early stage of the case to begin preparing for disposition. Finally, § 6.06 *infra* suggests some short-cuts

that public defenders with high caseloads can use to minimize the amount of time involved in performing the numerous tasks involved in case preparation.

§ 6.02 THE DEFENSE "THEORY OF THE CASE": A FLEXIBLE BLUEPRINT FOR TRIAL PREPARATION

On the basis of the first full-scale client interview (see § 5.01 *supra*), counsel should formulate a tentative defense "theory of the case." The "theory of the case" is a detailed outline of the defense that counsel will mount at trial; it describes the particular fabric of law and facts upon which counsel will rely to secure a favorable verdict. The theory of the case that counsel develops at this stage must necessarily be tentative and flexible enough to change as new information is gathered, since counsel does not yet have a complete picture of what the prosecution witnesses and defense witnesses will say and what pertinent scientific, tangible, or documentary evidence exists or can be produced to prove or disprove guilt. As new facts are learned, counsel should continually update the theory of the case, interpolating the new information and reassessing previous judgments about options and alternative courses of action.

In order for the prosecution to establish guilt at trial, it will have to prove both: (i) that a crime was committed, and (ii) that the respondent was the person who committed it. Accordingly, a defense theory of the case should involve attacks upon either or both of these prongs of the prosecution's theory of the case.

§ 6.02(a) Defense Theories That Depend upon Refuting the Prosecution's Assertion That a Crime Was Committed

There are essentially three ways of precluding the prosecution from proving that a crime was committed.

First, the defense can show that, even assuming that all of the prosecution's witnesses are telling the truth, there is insufficient proof of one or more of the elements of the crime. Thus, for example, if the crime that is charged requires proof of a certain monetary value (such as Grand Larceny or certain degrees of Destruction of Property), counsel can refute the existence of the particular crime either by demonstrating that the prosecution has failed to prove the requisite value or by presenting defense evidence that the object in question was not worth as much as the prosecution asserts. Or, if the crime involves a mental element, the defense can refute it either by arguing that the prosecution's evidence is not sufficient to warrant the inference that the respondent entertained the requisite *mens rea* or by presenting defense evidence (through the respondent, other defense witnesses, or both) that controverts the existence of the guilty mental state.

Second, the defense can show that, even assuming that all of the prosecution's witnesses are telling the truth, some affirmative defense renders the respondent's actions noncriminal. For example, in a murder case, the prosecution witnesses may be truthfully recounting their

observations of the respondent's stabbing of the victim; but when their testimony is supplemented with defense evidence (consisting of testimony by the respondent, other defense witnesses, or both), the defense will ask the factfinder to conclude that the victim provoked the attack by actions which induced the respondent to have reasonable fear of imminent bodily harm, within the applicable doctrine of self-defense.

Third, the defense can show that the prosecution's witnesses are not telling the truth, either because they are fabricating *(i.e.,* lying) or because they are mistaken. As a general matter, it is easier to prove mistake than outright fabrication because the factfinder (judge or jury) will ordinarily be reluctant to believe that a prosecution witness is lying under oath. However, a theory of fabrication may prevail if the defense can show that the witness has a compelling motive to lie. A theory that the complaining witness is fabricating the existence of a crime can be supported with evidence that the witness:

1. Has a motive to accuse the respondent falsely in order to get him or her into trouble because of past incidents that have caused the witness to be angry at or jealous of the respondent or his or her family or friends;

2. Has some other motive for fabricating a crime, such as, for example: to collect insurance money; to cover up some other crime that the complainant has committed; or to win a reward from the police for snitching (for example, dismissal of pending charges against the complainant or a financial reward); or

3. In cases in which the complaining witness is a police officer, that the officer fabricated the crime in order to inflate his or her arrest figures and thereby gain credit with superiors (such as, for example, by planting drugs on the respondent in a drug case) or in order to cover up an ill-founded arrest that would have made the officer look bad or exposed the officer to a civil suit for false arrest (and, when violence was involved in the arrest, for assault and battery).

A theory that the complaining witness is mistaken in thinking a crime took place can be supported by showing that some innocent set of events occurred that the complainant misinterpreted as a crime. For example: the respondent merely asked the complainant for a hand-out, and the complainant thought the respondent was shaking him or her down in a robbery; the police encountered the respondent running away from the vicinity of a closed shop with a burglar alarm ringing and naturally assumed the respondent had attempted to break in, when, in fact, the alarm went off because of a short circuit and the respondent was running for a bus; a store security guard observed the respondent taking merchandise past a cash register and arrested the respondent for shoplifting, when the respondent was merely looking for a register that was less crowded. Of course, in addition to explaining away the complainant's testimony as a fabrication or a mistake, counsel will have to explain away the testimony of any eyewitnesses. The theory may be the same for the eyewitnesses as for the complainant, or it may be different (as, for example, when the defense asserts that the complainant is mistaken and that an eyewitness is

lying in a desire to support the complainant, who is a relative or co-worker).

§ 6.02(b) Defense Theories That Depend upon Refuting the Prosecution's Assertion That the Respondent Was the Perpetrator

The prosecutorial evidence linking the respondent to the crime will usually take the form of one or more of the following: (i) an identification of the respondent by the complainant, an eyewitness, or both; (ii) an incriminating statement by the respondent, confessing to the offense, admitting conduct or exhibiting knowledge that implicitly implicates the respondent, or reciting an alibi that the police have shown to be false; (iii) testimony or statements by a co-respondent or uncharged snitch identifying the respondent as the perpetrator; and/or (iv) scientific evidence, such as serology evidence in sex offenses, fingerprint analysis, hair analysis, fiber analysis identifying threads found at the crime scene as stemming from an article of the respondent's clothing, or a swab of the respondent's hand showing that s/he recently fired a gun.

Several of these forms of prosecutorial evidence are subject to suppression or exclusion on pretrial motions. Motions to suppress confessions and admissions are covered in Chapter 24, and motions to suppress identification testimony in Chapter 25. Motions to sever a co-respondent's case from the respondent's on the ground that the co-respondent made a statement incriminating the respondent, and back-up arguments that the statement should, at the very least, be redacted to remove all references to the respondent, are described in § 18.10(a) *infra.*

Assuming that the defense does not succeed in suppressing or excluding the incriminating evidence of the respondent's identity as the perpetrator, there are several ways of refuting the evidence at trial.

Identification testimony by the complainant or an eyewitness can be challenged by asserting that the witness is mistaken in identifying the respondent and that the mistake occurred for one or more of the following reasons:

1. The respondent bears some resemblance to the actual perpetrator and was selected because s/he was the only one among the suspects viewed (in the show-up, lineup or photo array) who fit the perpetrator's description.

2. The police caused (or helped to cause) the identification by something they said to the witness or by their employment of a suggestive identification procedure that conveyed to the witness who it was that the police wished the witness to identify.

3. Some event occurred that caused the witness to superimpose the respondent's face, which s/he saw after the offense, on top of the memory of the perpetrator's face, and the witness now honesty but mistakenly believes that respondent's was the face s/he saw. This theory can be used when, for example: the witness saw the respondent in police custody or at the police station and deduced that the police

naturally would have caught the right person; the witness saw the respondent in the vicinity of the crime or heard the respondent saying something similar to the words spoken by the perpetrator or saw the respondent wearing clothes similar to those worn by the perpetrator; or the witness and the respondent had an encounter that suggested to the witness that the respondent was the perpetrator.

4. The witness is identifying a person of another race, and thus the identification process is subject to the weaknesses and vagaries of cross-racial identification.

Identification testimony by the complainant or an eyewitness also can be refuted by asserting that the witness is lying. To make this theory persuasive, the defense might urge, for example, that:

1. The witness bears a grudge against the respondent.

2. The witness needs to pin the crime on somebody in order to escape prosecution for his or her own complicity in it or in order to gain some benefit, such as the dismissal of pending charges against the witness or cash compensation as an informer, and the respondent happens to be an available scapegoat (because the respondent fits the description of the perpetrator or was at the scene of the crime or possesses a criminal record that would make the respondent's guilt believable).

3. Although there is no clear motive to which the defense can point, the defense does not bear the burden of proving why the eyewitness(es) are lying but merely has to raise a reasonable doubt; and the demonstration that the witness(es) are lying here certainly does raise a reasonable doubt.

These same theories can be used to discredit a co-respondent or snitch who identifies the respondent as the perpetrator.

A confession or incriminating statement by the respondent, that the defense was unable to suppress on constitutional grounds in a pretrial hearing may nevertheless be assailable at trial under state law doctrines of involuntariness. See § 24.16 *infra.* Even when such challenges are unavailable or prove unsuccessful, counsel can argue to the factfinder at trial that the coercive circumstances under which the statement was made render it untrustworthy. See § 24.21 *infra.* Finally, the facts may support a thesis that the police fabricated the statement in an attempt to bolster their case, although counsel should anticipate that a judge, sitting as factfinder, will be loth to conclude that police officers lied.

In challenging a prosecution case based on scientific evidence, counsel can employ any one or more of three approaches. (i) S/he can use a rival expert to show that this expert reached a conclusion contrary to that of the prosecution expert and can assert that the defense expert's conclusion is the correct one, or at least that a reasonable doubt has been raised. (ii) S/he can use

a defense expert, or cross-examination of the prosecution expert, to show that even if the prosecution expert's conclusions are correct, they are not very damning. For example, the impact of a scientific finding that the respondent has the same blood type as the perpetrator can be minimized by showing that one quarter of the human race shares that blood type. (iii) S/he can use a defense expert, or cross-examination of the prosecution expert, to show that there are potential inaccuracies or uncertainties in the scientific method employed (in general, or under the circumstances of this particular case) that raise legitimate doubts about the correctness of the prosecution expert's results. Most genuine experts are sufficiently cautious that they will freely admit the potential for inaccuracy that plagues many scientific tests.

In any case in which the prosecution is likely to use scientific evidence at trial, counsel should consider retaining a defense expert to consult with counsel about these possible approaches and to testify at trial if appropriate. When the client is indigent, counsel can request court funds to retain the expert. See § 11.03 *infra.* Often, it will be worthwhile to test the waters by talking with the prosecution's expert prior to retaining a defense expert. Many forensic experts on the police force, unlike line police officers, are willing to talk with defense attorneys. By questioning the prosecution's expert about the nature, bases, and degree of certainty of his or her conclusions, and particularly by inquiring whether there is anything unusual or difficult about the analysis of the data being analyzed in this case, counsel can make a preliminary assessment of the utility of challenging the expert testimony with a rival witness. If, for example, the prosecution's scientific evidence is based upon a simple chemical test, the test is normally highly accurate, its application in the present case was routine, and the tester seems unshakeable, it may be wise to stick to factual defenses rather than retaining a rival expert, especially if the respondent is a paying client who can ill afford the expert's fee.

§ 6.02(c) The Building Blocks for Constructing a Defense Theory of the Case

Obviously, counsel's selection of a theory of the case depends upon the evidence that is available, both the defense evidence that can be gathered and the weaknesses in the prosecution's case that can be exploited. A potential resource in this process is the respondent, who can supply the defense perspective on events as well as the names of possible defense witnesses and some information about the biases of prosecution witnesses.

However, a successful theory of the defense will often depend upon counsel's own identification of flaws in the prosecution's case.

In looking for potential weaknesses in the prosecution's case, counsel should carefully compare statements that prosecution witnesses gave at different times. If the version of the events that a witness gave to the police on the day of the crime is more favorable to the defense than the present version, then the theory of the case may be that the witness's memory has faded over the course of time and that the witness's inability to correctly remember one or more significant details gives reason to discredit anything else the witness now says that was not in his or her original statement to the police. Or the theory may be that the witness is now intentionally

fabricating in order to convict the respondent and that this demonstrates that the grudge which the witness has against the respondent is sufficient to induce the witness to lie, including either lying about the existence of a crime or lying about the respondent's identity as the perpetrator.

Another technique for pinpointing exploitable weaknesses in the prosecution's case is to consider whether there are aspects of the prosecution witnesses' behavior that are illogical and fail to comport with normal human behavior. For example, if the complainant or eyewitness has known the respondent for years, it stands to reason that s/he would give the police the respondent's name as soon as s/he is interviewed by them. If s/he failed to give the respondent's name to the police until some time later, counsel can use this quirk to support a theory that the witness has decided to pin the crime falsely on the respondent as a result of a grudge that began after the date of the crime (or a long-standing grudge that the witness was not quick enough to act upon at the time of the police interview). In order to recognize anomalies of this sort, counsel will often find it productive to trace through, from beginning to end, an imaginary "normal" scenario in which a crime such as the one charged takes place; by comparing that scenario with the real-life events, counsel will quickly spot actions and statements on the part of prosecution witnesses that fail to comport with expectable behavior.

A similar reasoning process, in which counsel mentally traces through the normal police procedures in a case such as the respondent's will enable counsel to pinpoint exploitable flaws in the police officers' version of searches, seizures, confessions, and identification procedures. For example, in a case in which counsel is challenging a police officer's *Terry* frisk of the respondent (see § 23.10 *infra*) and the officer claims that s/he believed the bulge in the respondent's pocket to be a gun, counsel can exploit the officer's failure to take the normal steps for protecting himself or herself from an armed suspect, such as radioing for back-up, drawing his or her own service revolver, and immobilizing the respondent by having him or her "assume the position" with hands up against a wall or against a car, well away from coat or pants pockets.

§ 6.02(d) Implications of the Choice of Defense Theory for Trial Preparation

There are several ways in which the defense theory of the case will shape counsel's trial preparation.

First of all, the theory of the case will inform the way in which counsel assigns priorities to the tasks to be performed in the defense investigation of the case. As a practical matter, even though counsel may wish to arrange an investigative interview of every possible prosecution and defense witness, often that will not be feasible. In many jurisdictions, the prosecution is not obligated to inform the defense of the identity of its witnesses (see § 9.07(b) *infra*), and the investigator will have to spend considerable time searching for unknown prosecutorial witnesses. Even defense witnesses may not be easy to find, since often the client has no idea of the names or addresses of people who were standing on the street, observing the events. In an imperfect world, in which each aspect of the defense investigation consumes time and limited investigative resources, counsel will have to determine the relative importance of tasks, looking first — or

directing an investigator to look first — for certain witnesses, documents, and exhibits. Thus, for example, in an assault case in which the respondent's self-defense claim does not dispute the occurrence of the assault or even the manner in which the assault was committed but instead depends upon an incident earlier the same day in which the complainant threatened to kill the respondent the next time they met, counsel will assign priority to finding any witnesses to the earlier threat and witnesses who can recount a history of threats and violence by the complainant against the respondent or attest to the complainant's reputation for violence. Of course, the initial assignment of priorities will have to be progressively revised in accordance with new information that is learned. For example, if the prosecution reveals in discovery that government witnesses will recount the respondent's making statements during the assault that are inconsistent with a theory of self-defense, counsel then will have to assign top priority to finding defense witnesses who describe the assault differently.

Once counsel has identified the most important witnesses, the defense theory of the case determines what questions should be asked of those witnesses. In essence, counsel is working backwards from a goal defined by the theory of the case: Having identified what ultimate picture of events and people the defense will want to ask the factfinder to accept at the end of the trial, counsel can specify what defensive facts need to be elicited during the trial, and thence counsel can deduce the questions that need to be asked of witnesses to learn those facts. This focusing function of the defense theory of the case also plays an important role in deciding, for example, which expert witnesses to retain and what to ask them to evaluate; what legal research has to be conducted in preparation for drafting jury instructions or making bench arguments on the merits at trial; and what additional legal research and planning have to be undertaken in anticipation of evidentiary issues that are likely to come up at trial.

Third, the defense theory of the case will shape counsel's decisions about what motions to file. For example, if the respondent made a statement to the police telling a wholly exculpatory story of self-defense and if the defense theory at trial will mirror that statement, counsel may decide to refrain from filing a motion to suppress the statement. Or if the defense's theory at trial depends upon testimony by a co-respondent and if a severance of the co-respondent's case from the respondent's will have the result of eliminating the co-respondent as a defense witness, counsel may opt in favor of abandoning an available severance motion. See § 18.08 *infra.*

Fourth, the defense theory of the case will shape the way in which counsel conducts the probable-cause hearing and any suppression hearings. As explained in § 4.29 *supra* and § 22.02 *infra,* evidentiary hearings of this sort can be used for the purpose of laying a foundation for later impeachment of prosecution witnesses at trial. If, at the time of the probable-cause or suppression hearing, counsel has a vision of what the defense theory will be at trial, counsel can design his or her cross-examination at the hearing to serve this purpose most effectively, creating the best possible transcript material for use at trial even if this requires the curtailment or sacrifice of some lines of cross-examination that might have increased the defense's relatively marginal chance of winning the hearing itself. See § 22.04 *infra.*

These are some of the most significant ways in which the theory of the case can shape trial preparation. It would not be an overstatement to say that the theory of the case should inform every single act of counsel's. For example, counsel's decision whether to seek a continuance or whether to assert a speedy trial demand when the prosecution seeks a continuance will depend upon the availability of defense witnesses needed to prove the defense theory of the case. Counsel's advice to the client about whether to take the witness stand at trial will depend upon the theory of the case, as well as additional considerations such as whether the judge is likely to penalize the respondent at sentencing for what the judge may view as perjurious testimony. For further discussion of the many ways in which the theory of the case can guide trial preparation, see Ty Alper, Anthony G. Amsterdam, Todd Edelman, Randy Hertz, Rachel Shapiro Janger, Jennifer McAllister-Nevins, Sonya Rudenstine & Robin Walker-Sterling, *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLIN. L. REV. 1, 4-32 (2005).

§ 6.03 GATHERING THE FACTS NEEDED TO SUPPORT THE DEFENSE THEORY OF THE CASE

There are four institutionally recognized methods for learning the facts of the case:

1. Client interviews (see Chapter 5);

2. Defense investigation, including interviews of potential prosecution and defense witnesses, subpoenaing of police reports and other documents, inspection or acquisition of various physical objects (see Chapter 8);

3. Informal and formal procedures for discovery of information from the prosecution (see Chapter 9);

4. Retention of expert witnesses who can perform scientific tests, such as ballistics, serology, or fingerprint examinations, that will shed light on the pertinent facts (see Chapter 11).

In addition to these methods, there are three informal means of gleaning facts: filing motions that will require the prosecutor to respond with pleadings that reveal aspects of the prosecution's case; conducting hearings, such as the probable-cause hearing and suppression hearings, in such a way as to gain disclosure of the prosecution's case at trial (see §§ 4.29, 4.32 *supra*; §§ 22.02, 22.04(b) *infra*); and informal conversations with the prosecutor about the case during plea negotiations, other meetings, or casual conversations while waiting for a court hearing to begin (see § 14.15 *infra*).

Counsel should take advantage of all of these procedures for obtaining factual information. Because some of them require more time than others, they should be set in motion first so that they will be completed in time for trial. Generally, the following steps should be

taken at the earliest practicable time, on the day of the Initial Hearing if possible:

1. Counsel should prepare subpoenas for documents. These will not take counsel long to prepare and must be prepared early because it may take a long time for the relevant agencies to comply with the subpoenas.

2. Counsel should direct an investigator to start tracking down and interviewing prosecution and defense witnesses and gathering necessary documents and exhibits. As explained in § 6.02 *supra,* counsel should use the theory of the case to assign priorities to these investigative tasks, explaining to the investigator the order in which s/he should perform the various necessary tasks. If counsel does not have an investigator and the client is indigent, counsel should immediately file a motion for court funds for appointment of an investigator (see §§ 8.04, 11.03 *infra*).

3. Counsel should retain any expert witnesses who will be needed (see §§ 11.01, 11.02, 12.08-12.10 *infra*), or, if counsel is representing an indigent client, file a motion for court funds to retain the experts (see§ 11.03 *infra*).

4. Counsel should conduct an immediate informal discovery session with the prosecutor or, if the prosecutor is unable to meet that day, schedule an appointment as early as possible.

By taking these steps expeditiously, counsel will learn the information needed to shape further investigation of the case, the information needed to prepare suppression motions and other substantive motions (see Chapter 7), and the information needed to conduct plea negotiations effectively (see § 14.16 *infra*). The motions proceedings and plea negotiations, in turn, will provide counsel with more facts, which can be used in conducting suppression hearings and the trial.

§ 6.04 FILING MOTIONS THAT ARE CONSISTENT WITH THE THEORY OF THE CASE

The motions that counsel should ordinarily consider filing are:

1. Motions for discovery (see § 9.07 *infra*);

2. Motions to suppress tangible evidence, confessions and incriminating statements, and identification testimony (see Chapters 22-25);

3. Motions for severance of counts or respondents (see Chapter 18);

4. Motions challenging the sufficiency of the Petition or the jurisdiction of the court

(see Chapter 17);

5. Motions seeking a change of venue (see §§ 20.01-20.03 *infra*) or recusal of the judge (see §§ 20.04-20.07 *infra*); and

6. Motions to dismiss for social reasons (see Chapter 19).

This is not, of course, an exclusive list: counsel may have to develop motions to deal with case-specific problems, such as, for example, prosecutorial interference with defense access to witnesses (see § 8.13 *infra*). Counsel should familiarize himself or herself with local rules setting deadlines for the filing of motions. In many jurisdictions the applicable statute, court rule, or local custom requires that motions be filed within a specific time (usually set at 15 or 30 days) after arraignment. See § 7.05 *infra.*

§ 6.05 SETTING IN MOTION THE PROCESS NEEDED TO PREPARE FOR DISPOSITION IN THE EVENT OF CONVICTION

As explained in Chapter 38, counsel can often prevent a sentence of incarceration in the event of conviction by presenting evidence of the respondent's potential for rehabilitation and by offering community-based (or, when necessary, residential) programs as alternatives to incarceration. An attorney who waits until the respondent has been convicted to begin preparing for disposition will discover that s/he is unable to gather the necessary background information or obtain interviews for the child at programs in the short time between trial and disposition. Accordingly, as explained in § 38.09 *infra,* counsel is well advised to begin the process of preparing for disposition as early as possible.

Counsel should obtain the child's school records in every case. In addition to playing a crucial role in counsel's preparation for disposition, the school records may reveal comprehension and reading problems that will support a motion to suppress a confession (see § 24.10(b) *infra*) or may be so favorable as to supply a basis for a motion to dismiss for social reasons (see § 19.03(a) *infra*).

If the client appears to be suffering from mental problems — either mental illness or mental retardation — counsel should arrange a mental examination by a psychiatrist or psychologist. See §§ 12.08-12.10 *infra.*

If the client's record or the nature of the current offense makes the client a likely candidate for incarceration, counsel should begin contacting appropriate community-based programs and arranging for interviews for the client. See § 38.14 *infra.* In such cases counsel also should make use of opportunities to enlist the aid of social workers in locating suitable programs and preparing a study of the child's background. See §§ 38.10, 38.14 *infra.*

§ 6.06 METHODS OF MAXIMIZING THE TIME AVAILABLE FOR, AND THE EFFECTIVENESS OF, CASE PREPARATION IN PUBLIC DEFENDER OFFICES IN WHICH CASELOADS ARE PROHIBITIVELY HIGH

Probably the most difficult aspect of being a public defender is coping with the high caseload that assistant public defenders normally carry. In some jurisdictions staff attorneys in a public defender's office have active caseloads of more than a hundred cases pending trial at any one time. When a new staff attorney begins work, s/he is often thrown into a courtroom and assigned to handle the heavy caseload left behind by his or her predecessor, with little or no training. Attorneys thrown into such a position may feel that manuals such as this one are simply irrelevant to their practice because the high caseload, constant court appearances, and perennial deadlines preclude the type of individual attention to cases and careful preparation that this MANUAL contemplates. If the attorney succumbs to this bleak view and sacrifices case preparation in some or all of his or her cases, s/he will not only deprive the clients of their Sixth Amendment right to effective assistance of counsel, but s/he will also violate the canons of ethics requiring thorough and competent preparation. *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1 (2014); AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY EC 6-4 (1980); American Bar Association, Formal Op. 06-441 (May 13, 2006) ("Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation"); Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771 (2010); *In re Edward S.*, 173 Cal. App. 4th 387, 412-15, 92 Cal. Rptr. 3d 725, 745-48 (2009); *Public Defender, Eleventh Judicial Circuit of Florida v. State*, 115 So.3d 261, 270, 274, 279, 282 (Fla. 2013); *State ex rel. Missouri Public Defender v. Waters*, 370 S.W.3d 592, 597, 605-08, 612 (Mo. 2012); *State v. A.N.J.*, 168 Wash.2d 91, 112, 225 P.3d 956, 966-67 (2010).

The high caseload of a public defender undoubtedly does make the job of defending each individual client more difficult. However, there are countervailing virtues in an institutional defender's office that offer the possibility of maximizing efficiency in case preparation.

The first of these is the fact that the attorney's practice is highly specialized. Because all or most of the cases handled by the attorney will be delinquency cases, the attorney will need to take the same actions and can use the same pleadings and forms again and again. For example, counsel will need to subpoena police reports and the school records of the respondent in every single case. This ministerial task, which tends to be very time-consuming, needs be done personally only once at the start of the attorney's career. Once the attorney has developed a format for these subpoenas, s/he can leave it to a law clerk, investigator, or administrative assistant to do the routine and mechanical job of copying the language devised by the attorney onto a subpoena bearing each new case's name and docket number. Similarly, certain routine motions, such as motions for discovery, can be duplicated with relatively little adaptation in each case.

A second type of routinization of counsel's practice takes advantage of the recurrence of fact patterns in delinquency cases. For example, counsel will probably handle several drug possession cases involving the so-called "dropsie" fact pattern (see § 23.13 *infra*) and will be able to use virtually the same motion to suppress tangible evidence and virtually identical questions for cross-examining the police officer and the prosecution chemist in every such case. This type of replication of fact patterns also can be found in, for example, cases in which the prosecution's proof turns upon a show-up identification (see § 25.03(a) *infra*), and counsel can consistently litigate an identification suppression motion and thereafter stress at trial the factors that precluded the witness from getting a good look at the perpetrator and the suggestiveness of the show-up procedure. Obviously, there is no need to reinvent the wheel in case after case. Since either the attorney himself or herself or some other attorney in the office is likely to have handled a particular fact pattern before, counsel can resort to that prior case file to obtain forms for writing the necessary motions, drafting direct and cross-examination questions, and preparing the *prima facie* motion and closing argument.

Another, and perhaps the most important, virtue of an institutional defender's office is a factor that has already been implicit in this discussion: the existence of a number of colleagues with whom to share information and resources. Other trial attorneys in the office are likely to have motions, names of expert witnesses, cross-examination techniques, and even artful phrases for closing arguments, that counsel can use in his or her own practice. In addition, the appellate attorneys on the staff will have briefs containing caselaw needed to litigate in new cases the various issues raised on earlier appeals. The key to making use of these large resources is establishing an office-wide "motions bank" (a central file containing copies of all substantive motions filed by the trial attorneys), a "brief bank" of appellate briefs, and a central file listing the cases (with the attorneys' names) that present issues likely to recur (such as the previously mentioned identification and drug issues and, for example, issues relating to serology, ballistics, alibi, character evidence, and self-defense).

Of course, a staff attorney in a public defender's office cannot do an adequate job unless the office provides him or her with sufficient resources. The most important of these is investigative assistance. Unfortunately, many public defender offices depend upon a small band of professional investigators to handle all of the investigative work for the office. Because the caseload carried by the office is far too heavy to be served by a handful of investigators (especially in view of the large number of witnesses to be interviewed and other investigative tasks to be done in each case), the investigative division soon degenerates into doing nothing more than serving subpoenas. A very effective solution to this problem was developed by the Public Defender Service for the District of Columbia and thereafter duplicated in public defender offices in Minneapolis and Seattle. These offices make use of law students and college students from local schools who spend a semester or a year working on a volunteer basis as investigative interns. The interns are recruited and trained by a staff investigator who also supervises the investigations performed by the interns. The interns are assigned to individual attorneys, and they meet with their attorneys to discuss the witnesses that should be interviewed, the statements that should be taken, and the exhibits that should be gathered in each case. The offices that have

created a system of this sort have discovered that it produces benefits for all involved: the attorneys obtain a corps of dedicated and enthusiastic workers who, albeit inexperienced, quickly learn the ropes and devote the time and energy necessary to perform first-rate investigation; the students, in turn, obtain credit from their schools for the work and can obtain a valuable credential on their résumés as well as letters of recommendation from the attorneys for whom they worked.

Another essential resource for public defender offices that handle delinquency cases is a division of social workers. As explained in §§ 38.10, 38.14 *infra,* much of the dispositional work in a delinquency case is the social work involved in finding an appropriate community-based program to propose to the judge at disposition. Social workers have the expertise and the knowledge of community resources necessary to effectively perform the tasks of diagnosing the child's or parent's needs and finding a program to suit those needs. A prototype of this sort of social work complement exists at the New York City Legal Aid Society's Juvenile Rights Division, which has a large corps of social workers assisting the attorneys on delinquency cases.

Assuming that the office maintains adequate investigative and social work divisions and assuming that the office possesses motions banks, brief banks, and other central information systems, a staff attorney can start most of the work needed to prepare a case for trial on the day of the Initial Hearing. Immediately after completing the hearing and conducting a full-scale interview of the client, the attorney would develop a defense theory of the case (see § 6.02 *supra*); meet with an investigator, relate the theory of the case, and inform the investigator which witnesses need to be located and interviewed and which documents and other exhibits need to be gathered; give the case name and number to an administrative assistant and instruct him or her to fill out subpoenas for police reports and for the child's school records, which can be served by the investigator; locate motions and other materials from prior cases with similar fact patterns, adapt them to the unique facts of the new case, and give the adapted versions of the motions to the administrative assistant to type; telephone and retain expert witnesses who will be needed for trial or disposition; and, if the child appears to have psychological or emotional problems or special needs, meet with an office social worker, brief him or her on the case, and request that s/he meet with the client and investigate programs suitable to the child's needs. Once freed of all of the mechanical and nonlegal aspects of case preparation, the attorney will be able to devote time (in this as well as other pending cases) to the functions that only an attorney can perform — working with witnesses and drafting examination questions and legal arguments.

Chapter 7

Selecting and Drafting Motions: Strategic and Practical Considerations

§ 7.01 THE IMPORTANCE OF MOTIONS PRACTICE; THE OBJECTIVES TO BE SOUGHT

Pretrial motions practice is crucial to effective defense work. Successful litigation of motions can win the case — either by producing outright dismissal of the Petition (for example, when the defense prevails on a motion challenging the legal sufficiency of the Petition or the jurisdiction of the court) or by excluding evidence that the prosecution needs in order to win the trial (for example, when the defense prevails on a motion to suppress tangible evidence, confessions, or identification testimony).

Even when the defense loses a motion, there are often net benefits to litigating it. Motions practice serves as a highly effective discovery technique; the prosecutor's written and oral responses to the defense motion, and evidentiary hearings held on the motion, provide the defense with information about the prosecution's case that it would not otherwise have learned. In addition, when a motion generates an evidentiary hearing, defense counsel gains an invaluable opportunity to pin down prosecution witnesses on the record, developing transcripts that can be used at trial to impeach the witnesses with prior inconsistent statements.

The defense also gains other fringe benefits from motions practice. The judge's ruling on the motion may provide a fertile source of reversible error on appeal. In cases in which a guilty plea is under consideration but counsel is not sure about the strength of the government's case, an evidentiary hearing on a motion to suppress can provide a preview of the prosecution's evidence that will enable counsel to evaluate realistically the wisdom of the offered plea. Or if counsel has concluded that a plea is wise but the client is unconvinced, the client's observation of the prosecution's witnesses at an evidentiary suppression hearing may change the client's mind and enable him or her to reach the right decision. In instances in which police conduct is particularly reprehensible, the unpleasant prospect of its exposure at a motions hearing may occasionally persuade the prosecutor to drop the charges or may give the defense considerable leverage in plea bargaining. Hearings on motions, whether they are evidentiary hearings or oral arguments, may also strengthen the attorney-client relationship and lead the client to place greater trust in the attorney's advice generally, since the client sees the attorney fighting for him or her in court.

§ 7.02 THE MOTIONS THAT COUNSEL SHOULD CONSIDER

Counsel will need to make a decision early in the case about what motions to file. In most jurisdictions a local statute or court rule establishes a deadline (usually 15 days or 30 days after arraignment) for filing motions. See § 7.05 *infra.*

Counsel should begin by examining the Petition to determine whether it contains

deficiencies that render it subject to a motion to dismiss. See §§ 17.03, 17.05-17.07 *infra.* Other grounds for dismissing the Petition that counsel should consider are jurisdictional defects (see § 17.04 *infra*) and double jeopardy (see § 17.08 *infra*). If the charges in the Petition are based on more than one incident, counsel should consider a motion to sever counts (see §§ 18.01-18.05 *infra*), and if the client is charged jointly with one or more co-respondents, counsel should consider a motion for severance of respondents (see §§ 18.07-18.10 *infra*). In rare cases motions for consolidation of charges or respondents may be advisable. See §§ 18.06, 18.11 *infra.*

On the basis of counsel's interviews with the client and discovery from the prosecution, counsel should determine whether the prosecution's case is likely to include any tangible evidence seized from the respondent, any confessions or admissions by the respondent, or any identification testimony. If so, counsel should evaluate the potential of a motion to suppress evidence under the doctrines described in Chapters 23 (tangible evidence), 24 (confessions and admissions), and 25 (identifications).

If the informal discovery process has proven inadequate and the prosecutor has refused to turn over information that the defense requires, counsel should file motions for discovery. See § 9.07 *infra.* Counsel should also consider motions for sanctions if counsel learns that evidence has been destroyed (see §§ 9.09(b)(6), (7) *infra*) or that the prosecutor has told witnesses not to talk with counsel or defense investigators (see § 8.13 *infra*).

If the client has a limited prior record and appears to be doing well in school, counsel should consider a motion to dismiss the case for social reasons. See Chapter 19.

Counsel then should give thought to the trial forum. If there are reasons to believe that the respondent would not receive a fair trial in the jurisdiction in which the case is presently pending, counsel can file a motion to change venue. See §§ 20.01-20.03 *infra.* If there are reasons to believe that the judge presiding over the case may not be impartial, counsel can file a motion for recusal. See §§ 20.04-20.05 *infra.*

If counsel is practicing in a State that allows jury trials in juvenile cases, s/he will want to consider motions to challenge aspects of juror selection. See § 21.03 *infra.*

Depending upon the theory of the case that counsel chooses (see § 6.02 *supra*), counsel may need to retain expert witnesses. If so, and if the client is indigent, counsel will have to file a motion for state funds for expert assistance. See § 11.03 *infra.*

Developments during the pretrial stage may necessitate motions addressed to the timing of pretrial proceedings and trial. It may become strategically desirable to advance the date of pretrial hearings, the trial, or both (see § 15.01 *infra*), or counsel may want to file a motion for a continuance in order to gain more time for investigation and preparation (see § 15.02 *infra*). If the prosecution seeks a continuance, counsel may respond with a motion to dismiss for want of prosecution (see § 15.03 *infra*) or on grounds of denial of a speedy trial (see § 15.04 *infra*) or

both.

§ 7.03 DECIDING WHETHER TO RAISE AN ISSUE IN A PRETRIAL MOTION OR AT TRIAL

Local practice may give the defense the option of raising certain defenses and contentions either by pretrial motion or at trial. Counsel should consider the following reasons for and against litigating a motion prior to trial.

§ 7.03(a) Reasons for Litigating an Issue by Pretrial Motion

Election of the pretrial motion forum ordinarily results in an earlier adjudication of the issues raised. This may be important not only when success on the issues will require dismissal of the entire prosecution, so that termination of the case in the respondent's favor is expedited, but also when success on the issues will weaken the prosecution's litigating posture or morale and thereby increase the defense's leverage in plea bargaining. Conversely, when there is substantial likelihood that the defense will lose the issues no matter when they are presented, they may be more effective bargaining counters if mentioned to the prosecutor during plea negotiations as contentions that the defense intends to raise at trial rather than being raised and definitively lost prior to the negotiation.

A major reason to opt for the pretrial motion forum is that the defense may thereby be able to obtain extensive discovery of the prosecution's case that can then be used to improve defensive investigation and trial preparation.

If interlocutory appellate review of adverse rulings on pretrial motions is available (a comparatively rare phenomenon in most jurisdictions, see § 26.01 *infra*), the motions procedure will allow enough time for counsel to pursue appellate remedies of errors that, as a practical matter, are uncorrectable after verdict.

Depending upon the idiosyncrasies of local practice, there may be various other benefits to litigating certain issues by pretrial motion. In jurisdictions in which motions scheduled in advance of the trial date are heard by a motions judge rather than the trial judge, counsel can use the choice of forum to select the more favorable judge. In such jurisdictions, litigating issues before a judge other than the trial judge also avoids the risk that the trial judge will hear evidence during the motions hearing that is inadmissible at trial but may unconsciously affect the judge's trial verdict. In jurisdictions that permit juries in juvenile trials, the pretrial motion procedure minimizes the risk of lengthy sidebar proceedings or proceedings in the jury's absence that will bore or irritate the jurors; it also reduces the risk that prejudicial material exposed in these proceedings will be leaked to the jury.

If counsel is seeking dismissal on a legal issue that is both technical and close, litigating it in a pretrial motion forum rather than at trial may also improve the defense's chances of

prevailing. Judges are understandably reluctant to dismiss a case on a narrow legal point after the parties have prepared and all of the witnesses have appeared for trial.

§ 7.03(b) Reasons for Litigating an Issue at Trial Rather Than in a Pretrial Motions Forum

On the other hand, there may be considerable advantages to postponing the presentation of certain defenses and contentions until after trial has begun. Some defense contentions will be more compelling in the context of the case as it develops at trial than in isolation as they appear on pretrial motion.

A consideration militating strongly in favor of delaying various issues until trial is that this plan of action can prevent the prosecutor from ever obtaining appellate review of a ruling favorable to the defense. Local practice may permit prosecutorial appeals (or petitions for prerogative writs) following pretrial rulings but not following rulings made in the course of trial. Moreover, the beginning of trial marks the point at which jeopardy attaches for purposes of the federal constitutional guarantee against double jeopardy, see § 17.08(b) *infra.* Rulings in favor of the respondent prior to that point may be appealed by the prosecution to the extent permitted by local practice, whereas rulings in favor of the respondent after that point may not be appealed if either: (A) they are tantamount to an acquittal, or (B) they result in an acquittal. Probably also they cannot be appealed if they result in the termination of the trial without a general verdict or finding of guilty, other than upon the respondent's own motion — such as, for example, when the charges are dismissed by the court *sua sponte* or at the instance of the prosecution following a trial ruling in favor of the respondent upon a motion or objection that does not affirmatively request dismissal or a mistrial — at least in the absence of "a manifest necessity" for terminating the trial. See §§ 17.08(c), 17.08(e) *infra.* Although the law in this area is tortuous and confused, the bottom line is that serious, often insurmountable practical, statutory, and constitutional difficulties impede prosecutorial appeals from midtrial rulings in the respondent's favor, whereas pretrial (or posttrial) rulings of identical purport can be readily appealed by the prosecutor.

§ 7.03(c) Casting the Issue in the Form of a Pretrial Motion When the Pretrial Forum Is Preferable

If, after weighing the competing considerations, counsel concludes that the considerations described in § 7.03(a) *supra* preponderate, then counsel should employ any applicable pretrial motion procedure provided by statute or court rule. If neither statutes nor rules authorize any such procedures, counsel will have to be resourceful in inventing them. In a number of jurisdictions, for example, courts will entertain common law motions *in limine* seeking pretrial rulings on (a) issues of law whose disposition importantly affects defense trial strategy (such as the admissibility of evidence that the prosecution is expected to offer to impeach the respondent if the respondent elects to testify), *e.g., New Jersey v. Portash,* 440 U.S. 450 (1979); (b) the admissibility of prosecution evidence that if mentioned in the prosecutor's opening statement or proffered at trial may prejudice the respondent despite an eventual ruling by the trial judge

sustaining a defense objection to the evidence, *e.g., Gasaway v. State,* 249 Ind. 241, 231 N.E.2d 513 (1967); *In the Matter of Joshua P.*, 270 A.D.2d 272, 704 N.Y.S.2d 853 (N.Y. App. Div., 2d Dep't 2000); *State v. Latham,* 30 Wash. App. 776, 638 P.2d 592, 594-95 (1982), *aff'd,* 100 Wash. 2d 59, 667 P.2d 56 (1983); (c) the admissibility of defense evidence, *cf. United States v. Helstoski,* 442 U.S. 477 (1979) (prosecution motion for ruling *in limine* on the admissibility of prosecution evidence); or (d) issues of law whose disposition renders the presentation of certain defense evidence unnecessary or irrelevant, *e.g., Lewis v. United States,* 445 U.S. 55 (1980). *See* Stephen H. Peskin, *Innovative Pre-Trial Motions in Criminal Defense,* 1 AM. J. TRIAL ADVOCACY 35, 64-73 (1977), and authorities collected; *Luce v. United States,* 469 U.S. 38, 41 n.4 (1984) (dictum). (The latter two kinds of motions *in limine* are particularly useful when defense counsel expects to lose the motion at the trial level but wishes to preserve the legal issue for appeal and when the defense evidence in question is difficult or costly to gather or present or is inconsistent with alternative defense trial strategies or may be less persuasive factually than is the legal claim for its admissibility.)

§ 7.04 CHOOSING BETWEEN ORAL AND WRITTEN MOTIONS

When local practice gives the defense the option to make pretrial motions orally or in writing, it is ordinarily better to make them in writing. Written motions assure that both the relief sought by the defense and the grounds upon which it is sought are preserved in the record, whereas oral motions entail the risk that counsel may omit to make (or the court reporter may fail to hear) significant points. Many state appellate courts will not entertain claims of error unless the record shows that the specific legal contention sought to be raised on appeal was presented to the trial court; and federal constitutional contentions must ordinarily be made in state trial courts with explicit reference to the provision of the Constitution on which counsel relies in order to support subsequent Supreme Court review (see § 39.02(a) *infra*) and to avoid the danger that the federal claim will be held to have been waived for purposes of postconviction federal habeas corpus (see § 39.03(b) *infra*). If, for any reason, a motion *is* made orally, counsel should be sure that a stenographer or reporter is present. Similarly, a stenographer or reporter should be present when the judge rules orally on any matter.

§ 7.05 TIMELY FILING OF THE MOTION: METHODS FOR EXTENDING THE FILING DEADLINE AND FOR OBTAINING RELIEF FROM FORFEITURES ENTAILED AS A CONSEQUENCE OF UNTIMELY FILING

In most jurisdictions the applicable state statute or court rule specifies a certain time period within which all motions must be filed. The deadline usually is either 15 days or 30 days after arraignment. Obviously, counsel must pay careful attention to the deadline; failure to meet it may result in the court refusing to entertain the motion.

If counsel finds that s/he will be unable to file a motion on time (because, for example, counsel cannot obtain discovery from the prosecutor within the specified time period or because counsel's heavy trial schedule precludes the preparation and timely filing of the motion), counsel

will need to take one of the following measures to protect the client's rights: (i) At arraignment, request that the court extend the normal period for filing motions; (ii) on or before the deadline, file a motion to extend the deadline to a later date; (iii) if the impediment is a lack of necessary factual information resulting from insufficient discovery or investigation, file the motion on time but in an incomplete or even skeletal form, and explain in the body of the motion that the supporting facts will be supplemented at a later time after discovery or investigation has been completed; (iv) secure a firm commitment from the prosecutor that s/he will consent to (or will not oppose) defense counsel's filing of the motion *nunc pro tunc* after the expiration of the normal filing period.

It cannot be emphasized too strongly that defense attorneys must not rely on longstanding local customs of permitting late-filing of motions without prior leave of court. All too many defense attorneys have found, to their dismay, that theirs was the first case in which the customary informality and relaxed filing procedure was suddenly abrogated.

In the event that counsel does encounter the unfortunate situation in which s/he missed a filing deadline without prior leave or prosecutorial assent, all is not necessarily lost. Depending upon the facts of the case, counsel may be able to argue that the usual procedural requirement of timely filing should be waived for one or more of the following reasons:

1. Prior to the expiration of the filing period, the defense did not know, and could not reasonably have known, the facts that provide the basis for filing a motion. *Gouled v. United States,* 255 U.S. 298, 305 (1921); *United States v. Johnson,* 713 F.2d 633, 649 (11th Cir. 1983) (defense lacked knowledge of facts because prosecutor failed to provide adequate discovery); *DiPaola v. Riddle,* 581 F.2d 1111, 1113-14 (4th Cir. 1978) (facts of the incident prevented respondent from knowing of the illegal aspects of the police officers' actions, and therefore respondent could not have told counsel); *In re Anthony S.*, 162 A.D.2d 325, 557 N.Y.S.2d 11 (N.Y. App. Div., 1st Dep't 1990) (Family Court abused its discretion by denying leave to late-file a suppression motion which counsel was unable to file prior to trial because counsel was appointed to the case only four days before trial and the client's detention status impeded access to the client); *and see Murray v. Carrier,* 477 U.S. 478, 488 (1986) (dictum). This doctrine would also justify the waiver of the timeliness requirement if the client's inability to communicate effectively with counsel (because of, for example, the client's particularly young age or educational deficits) prevented counsel from learning the relevant facts from the client in time to meet the filing deadline.

2. Prior to the expiration of the filing period, the defense did not know, and could not reasonably have known, of the legal basis for the motion because the caselaw giving rise to such a motion had not yet been decided. *Reed v. Ross,* 468 U.S. 1, 16 (1984); *see Murray v. Carrier,* 477 U.S. at 488 (dictum).

3. Prosecutorial interference or some other external factor beyond counsel's control prevented counsel from filing the motion in a timely fashion. *See Strickler v. Greene*, 527 U.S. 263, 283-90 (1999); *Amadeo v. Zant,* 486 U.S. 214 (1988); *Murray v. Carrier,* 477 U.S. at 488 (dictum).

4. Counsel reasonably relied on a longstanding local practice under which late-filing was always permitted. *See Spencer v. Kemp,* 781 F.2d 1458, 1470-71 (11th Cir. 1986).

5. Regardless of whether there was or was not good cause for counsel's procedural default, filing of the motion *nunc pro tunc* should be permitted because, at this stage, there will be no prejudice to the prosecution or to the administration of justice if the defense is permitted to file the motion, whereas preclusion of the motion may well result in a later finding of ineffectiveness of counsel (*see Kimmelman v. Morrison,* 477 U.S. 365 (1986); *see, e.g.*, *Tice v. Johnson*, 647 F.3d 87, 106-08 (4th Cir. 2011); *Thomas v. Varner*, 428 F.3d 491, 499-504 (3d Cir. 2005); *People v. Ferguson*, 114 A.D.2d 226, 228-31, 498 N.Y.S.2d 800, 801-03 (N.Y. App. Div., 1st Dep't 1986)) and a retrial that will be costly both to the parties and to the administration of justice.

The foregoing arguments will often result in the court's agreeing to entertain the motion on the merits despite its lateness. If the court does not do so, counsel will have to put on the record any facts that bring the case within one of the five enumerated principles or could otherwise be viewed as excusing counsel's procedural default, so as to lay the groundwork for an appeal contending that the trial judge abused his or her discretion in holding the motion procedurally barred.

§ 7.06 THE FORM OF THE MOTION; THE NEED FOR AFFIDAVITS

Requirements regarding the form of the motion vary considerably among jurisdictions, and counsel will need to check the applicable statutes and court rules as well as local practice and custom in his or her particular court. In some jurisdictions law and facts are combined in a single pleading; in other jurisdictions the motion is limited to factual averments and may or must be accompanied by a separate memorandum of points and authorities setting forth the law.

Some jurisdictions require the attachment of affidavits or affirmations. Often, this requirement can be satisfied by an affirmation of counsel, setting forth all the facts that s/he has a good-faith basis for believing to be true. Depending upon local rules, counsel may or may not have to specifically identify the sources of each of the facts which s/he is affirming and may or may not have to state that any facts of which she has no personal knowledge are asserted "on information and belief." In those jurisdictions in which counsel is required to attach affidavits by the witnesses themselves, counsel should keep these affidavits as cursory as possible to avoid giving the prosecutor material with which to impeach the witness at an evidentiary hearing on the

motion or at trial.

§ 7.07 DECIDING WHETHER TO SEEK AN EVIDENTIARY HEARING FOR CLAIMS THAT CAN BE PROVEN WITH AFFIDAVITS ALONE

When counsel's position on a motion depends upon the establishment of facts that are not already in the record, counsel should decide whether to request an evidentiary hearing of the motion or to file supporting factual affidavits with the motion. Of course, local practice may compel one of these procedures or the other for certain motions. When the motion is a motion to suppress evidence, counsel ordinarily is required to prove the facts at an evidentiary hearing and may have to make a factual proffer or file affidavits as a threshold matter to establish his or her entitlement to a hearing. See § 7.06 *supra;* § 7.08 *infra.*

On the other hand, in many jurisdictions, counsel will have the option of proceeding by affidavit or evidentiary hearing on motions such as a motion to dismiss for social reasons, a motion challenging the venire (in those jurisdictions that grant jury trials to juveniles), or a motion claiming that the prosecutor has violated due process by instructing witnesses to refuse to talk to the defense. When local practice leaves the option to the movant, counsel should consider the following factors in making the choice: (a) the relative persuasiveness of the factual showings that can be made, respectively, by affidavit and by live testimony; (b) the opportunities that an evidentiary hearing may give the defense for pretrial discovery of the prosecution's case; (c) the opportunities that an evidentiary hearing may give the prosecution for pretrial discovery of the respondent's case and for locking defense witnesses into impeachable positions by cross-examination; (d) the delay of the trial that may be necessitated by a pretrial evidentiary hearing; and (e) in courts in which "long" or evidentiary pretrial motions are heard by a different judge from "short" or on-the-papers motions, the judge who will be most favorable to the defense.

§ 7.08 DRAFTING THE MOTION SO AS TO GAIN RELIEF WITHOUT UNDULY DISCLOSING THE DEFENSE CASE

In drafting written motions that will have to come on for an evidentiary hearing — which will usually be motions to suppress evidence — counsel should be careful to avoid unduly disclosing either the facts or law that s/he intends to rely upon at the hearing. If the motion gives the prosecutor unnecessary advance notice of the points on which counsel intends to cross-examine prosecution witnesses, the prosecutor can coach those witnesses to avoid traps and undermine defense strategies. For example, if the suppression motion sets forth in detail the police conduct that counsel is challenging, the police officers (who are, by nature, deeply interested in sustaining their arrests, searches, and confessions) are likely to conform their testimony to fit whatever theories validate their conduct. In addition, undue disclosure of counsel's factual and legal theories will give the prosecutor the time and opportunity to gather rebuttal witnesses and adjust the prosecution's proof.

Thus the best practice in drafting motions that will come on for an evidentiary hearing is

(a) to state the relief wanted with great clarity, (b) to state the source of law relied on (statute, state constitutional provision, federal constitutional provision, and so forth) specifically, but (c) to disclose as little as possible of the legal theory and the factual matter that will be presented in support of the motion. If counsel thinks it desirable to clarify the defense's factual and legal contentions for the court, this can best be done by a brief filed and served at the close of the evidentiary hearing.

This approach may need to be modified, however, in jurisdictions in which local statutes or court rules require a threshold showing of law and fact in order to get an evidentiary hearing. The key in such jurisdictions is (a) to draft the motion so as to barely meet the applicable standard without revealing any additional facts or law, and (b) to the extent possible, to stick to the facts already known to the prosecution and the legal theories that will be obvious to the prosecutor or that cannot be cured by prosecutorial coaching of witnesses. Thus, for example, if counsel moves to suppress an identification from a photo spread, counsel should cite the state and federal due process clauses, document the general due process point that unreliable and unnecessarily suggestive police-staged identification procedures are inadmissible (see §§ 25.02, 25.03(c) *infra*), and then relate one or more obvious defects in the photo spread (such as, for example, the fact that the respondent is the only child in an array full of adults) without mentioning other less obvious defects and particularly without adverting to defects that can be patched up testimonially by the prosecutor (such as the suggestive writing on the backs of the photographs, which the identifying witness can be coached to say s/he never saw) and without revealing any materials that counsel will use in cross-examining prosecution witnesses (such as the statement that the identifying witness gave to a defense investigator, admitting s/he saw the suggestive writing and also mentioning suggestive comments by the police).

Another reason for occasionally deviating from the general rule of keeping the factual and legal expositions in the motion as sparse as possible is the strategic consideration that a lengthy and sound legal analysis is likely to make the judge treat the case more seriously and to accord more latitude to the defense at the evidentiary hearing. Some judges believe that short, boilerplate motions are usually nonmeritorious; consequently, they will insist that the hearings on such motions be kept short and will truncate counsel's examinations of witnesses. If the complexity of counsel's legal analysis demonstrates to the judge that this is something more than an exercise in futility, the judge is likely to accord more latitude to the defense in its cross-examination and to give more careful consideration to the resolution of the issues. Of course, even when pursuing this strategy, counsel should refrain from giving the prosecutor advance notice of the facts upon which counsel will rely or of defense strategies.

§ 7.09 INVOCATION OF STATE CONSTITUTIONAL PROVISIONS IN THE MOTION

In the years since the Warren Court era, the Supreme Court of the United States has increasingly cut back on the protections that the federal Constitution's Bill of Rights gives criminal defendants, particularly in regard to searches and seizures, interrogations and confessions. Quite a few state supreme courts have reacted by construing the parallel provisions

of their state constitutions so as to preserve some of the safeguards eliminated by the United States Supreme Court. *See generally* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995); Judith S. Kaye, *Dual Constitutionalism In Practice And Principle*, 42 RECORD BAR ASS'N CITY OF NEW YORK 285 (1987); Hans E. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153 (1992).

State courts are of course free to construe state constitutional provisions as providing greater protection for individual rights than the Constitution of the United States, *PruneYard Shopping Center v. Robbins*, 447 U.S.74, 81 (1980); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam); *New Jersey v. T.L.O.,* 469 U.S. 325, 343 n.10 (1985); *Oregon v. Hass,* 420 U.S. 714, 719 (1975), although they may not drop below the protections afforded by federal constitutional guarantees, *Burgett v. Texas,* 389 U.S. 109, 114 (1967).

The list of state court decisions construing state constitutional guarantees as more protective than the parallel provisions of the Constitution of the United States is far too lengthy and varied to set forth here. The most significant of these decisions will be cited as they become relevant to discussions of the substantive law underlying various defense motions.

Whenever researching a legal claim for a motion, it is essential that counsel check thoroughly for state constitutional decisions. A decision of the Supreme Court of the United States rejecting a claim cannot be viewed as dispositive, since the state courts may have endorsed the claim on state constitutional grounds. Assuming that the state courts have not yet addressed the issue, counsel must be alert to the possibility of breaking new ground in state constitutional law and convincing the state courts to construe the state constitution as more protective than the parallel provision of the Constitution of the United States.

When urging the state courts to rely on the state constitution to reach a result contrary to a holding of the Supreme Court of the United States, counsel should provide the court with a rationale for interpreting the state constitutional provision more expansively than its federal analogue. Although the state courts need not cite a rationale for resorting to the state constitution, counsel's identification of a rationale may prove decisive in persuading the trial judge (and later the state appellate courts) to adopt state grounds of decision.

When dealing with a state constitutional provision whose wording differs from its federal counterpart, or whose history evidences the framers' intent to establish a standard different from the federal constitutional standard, counsel has a compelling argument that the state court should

construe that provision differently from the way the United States Supreme Court has interpreted its federal analogue. *See, e.g., State v. Glass,* 583 P.2d 872 (Alaska 1978); *State v. Simpson,* 95 Wash. 2d 170, 622 P.2d 1199 (1980). When dealing with a state constitutional provision whose wording mirrors the federal constitutional guarantee and whose constitutional history proves of no avail, counsel will need to cite to aspects of "policy, justice and fundamental fairness" that compel a more protective state constitutional standard. *People v. P.J. Video, Inc.,* 68 N.Y.2d 296, 303, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986). *See, e.g., State v. Novembrino,* 105 N.J. 95, 146, 519 A.2d 820, 850 (1987) ("the privacy rights of our citizens and the enforcement of our criminal laws . . . [are] matters of 'particular state interest' that afford an appropriate basis for resolving . . . [the] issue on independent state grounds"); *State v. Stoddard,* 206 Conn. 157, 537 A.2d 446 (1988) (declining to follow *Moran v. Burbine,* 475 U.S. 412 (1986), and construing the state constitution as establishing more exacting due process protections for the right to counsel because of Connecticut's history of rigorous enforcement of the right to counsel). In making such policy arguments for rejecting the result reached by the Supreme Court of the United States, counsel frequently will find it useful to cite to state constitutional decisions from other states rejecting that ruling of the Supreme Court, commentators' criticisms of the Supreme Court ruling, and analyses in the opinions of the dissenting Supreme Court Justices. *See, e.g., Commonwealth v. Upton,* 394 Mass. 363, 476 N.E.2d 548 (1985); *State v. Novembrino,* 105 N.J. at 152-56, 519 A.2d at 853-56.

Even when litigating a claim that has not been addressed by the Supreme Court of the United States, counsel should cite to the state constitutional provision in addition to the Constitution of the United States. In the event that the state court grants relief on both federal and state grounds, the state constitutional grounding of the ruling will protect it from reversal by the Supreme Court of the United States. *See Michigan v. Long,* 463 U.S. 1032, 1041 (1983): "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

Chapter 8

Defense Investigation

Part A. General Aspects of Defense Investigation

§ 8.01 INTRODUCTION; SCOPE OF THE CHAPTER

As defense attorneys learn very early in their careers, most cases turn primarily on the presentation of evidence rather than on legal argument. The *facts* are counsel's most important asset not only in litigating the case at trial but also in every other function counsel performs: urging the prosecutor to drop or reduce charges, negotiating a plea bargain with the prosecutor, urging a favorable sentencing recommendation on a probation officer or judge.

Investigation is the principal method by which counsel gathers the facts s/he will need. Although there are additional instruments for fact-gathering, such as discovery (see Chapter 9) and motions practice (see Chapter 7), they are far less reliable and comprehensive than the time-honored practice of hitting the streets and looking for witnesses.

One key aspect of defense investigation, the interview with the client, is described in Chapter 5. The following aspects of investigation are discussed in the present chapter:

1. Locating and interviewing defense witnesses (see §§ 8.06-8.10 *infra*);

2. Interviewing and taking statements from prosecution witnesses (see §§ 8.11-8.15 *infra*);

3. Observing the scene of the crime and other relevant sites (see § 8.05 *infra*); and

4. Gathering documents and exhibits (see §§ 8.16-8.19 *infra*).

An additional form of investigation — the retention of expert witnesses to investigate specialized issues in the case — is discussed in Chapter 11.

§ 8.02 USING THE DEFENSE THEORY OF THE CASE TO GUIDE THE INVESTIGATION

As explained in Chapter 6 *supra,* counsel should develop a defense theory of the case and use it to guide the investigation. Since counsel's time and resources are not unlimited, the investigation must be selective — often painfully so. Development of a theory of the case will make possible conscious selectivity and thoughtful assignment of priorities.

Almost always, one issue, or a very few issues, should stand out as having paramount

importance. Whereas the prosecution must prove all the elements of its case, the defense need do nothing more than destroy one element of the prosecution's case. It is seldom profitable to take on more than one or, at most, a couple. Hence the defense should aim at the few weakest points in the prosecution's case or at the few strongest points in the respondent's defense.

Also as explained in Chapter 6, however, counsel must avoid becoming a prisoner of his or her theory. In the search for facts that support the defense theory, counsel must be alert to those that do not and to facts that suggest a preferable theory. In short, counsel must go to the sources that are most likely to contain information relevant to his or her theory, but while s/he is tracking down those sources, s/he must gather all other information potentially germane to the case that can be gathered with little additional time and effort. Counsel also must constantly re-evaluate what s/he has thus far gathered and determine whether to keep on the same track or switch to a new one. By keeping his or her eyes open and plans flexible as s/he pursues the places of most likely paydirt, s/he may find unexpected nuggets that call for digging in new directions. Counsel must always have priorities but be willing to change them.

§ 8.03 STARTING PROMPTLY AND PRESERVING PERISHABLE EVIDENCE

Counsel's first priority should be to establish a rational order of priorities. To do this, counsel must know something about the case in broad outline. In addition to interviewing the client and hearing his or her version of the events, counsel will need to know something about the prosecution's version. Since the discovery process described in Chapter 9 may take some time and since most police officers are unwilling to talk with a defense attorney or investigator, the fastest and most effective technique for learning the prosecution's version of the events is to go to the police station and obtain a copy of the incident report filled out by the police at the time of the complainant's first report of the crime. See § 8.19(a)(1) *infra.*

Speed is generally essential in investigation. Physical facts change. An object of importance may be discarded. Witnesses may disappear or forget. Particularly in urban areas, individuals are highly mobile. They may go away suddenly and leave no trace. Or if they remain in the area, they may quickly blend into the neighborhood, becoming impossible to locate as their principal identifying characteristic — proximity to the offense or arrest — dissolves. If and when they are ever found again, they may be useless as witnesses because they have forgotten crucial details.

It is especially important to move quickly in tracking down and speaking with alibi witnesses. Alibis depend, of course, upon the witness's having a detailed recollection of what s/he and the respondent were doing at a precise point in time. Since often those activities will be quite ordinary, such as standing on a street corner and chatting, even the slightest delay on counsel's part can cause uncertainties to creep in. After a couple of days, and certainly after a couple of weeks, the witness will no longer be certain whether the conversation with the respondent took place at, for example, 3 p.m. or 3:10. And the entire alibi could depend on that ten minute difference if the distance between the scene of the crime and the location of the

conversation could be traversed in ten minutes. While there are certain techniques the defense can use in jogging alibi witnesses' memories and preserving the alibi evidence, see § 33.22 *infra,* the best technique is to get to the witness before his or her memory starts to fade. Before presenting an alibi theory at trial, defense counsel will have to make a rigorously critical review of the credibility of the testimony supporting that theory. Alibis are often difficult to sell to a judge or jury. But counsel should not allow initial skepticism regarding a client's claim of alibi to dampen or delay thoroughgoing investigation of potential alibi witnesses. *See Stitts v. Wilson*, 713 F.3d 887, 893 (7th Cir. 2013) ("When a defendant's alibi is that he was at a nightclub at the time of the shooting, where there are presumably many people, we cannot fathom a reason consistent with Supreme Court precedent that would justify a trial counsel's decision to interview only a single alibi witness without exploring whether there might be others at the venue who could provide credible alibi testimony. There is simply no evidence in the record to suggest that exploring the possibility of other alibi witnesses 'would have been fruitless' under these circumstances.").

Counsel's other top priorities in starting the investigation should be those items that are perishable: physical objects that are mobile or changeable; witnesses who are mobile or imprecisely identified but related to some specific location at a recent point of time; witnesses whose involvement is such that they may forget if not questioned quickly. Counsel should move on these items as rapidly as s/he can. This is so not only because of the risk of irreparable losses but also because early investigation makes the most efficient use of counsel's limited resources: an hour's search while the track is warm may be worth days later. Once a reasonable effort has been made to find the known perishable items, counsel should evaluate everything s/he has, estimate the points of strength, and proceed with further investigation to consolidate them.

§ 8.04 USE OF AN INVESTIGATOR

Whether counsel should hire an investigator or conduct the investigation personally will depend in part, of course, upon the financial resources available to the defense. If the respondent is indigent, the constitutional right to state-funded expert assistance, see § 11.03(a) *infra,* affords a basis for seeking state funding for investigative services. *See, e.g., State v. Second Judicial District Court,* 85 Nev. 241, 453 P.2d 421 (1969); *Mason v. Arizona,* 504 F.2d 1345, 1351-52 (9th Cir. 1974) (dictum); *Smith v. Enomoto,* 615 F.2d 1251, 1252 (9th Cir. 1980) (dictum). For discussion of procedures for seeking state funding, see § 11.03(b) *infra.*

An investigator is recommended, when practicable, for several reasons. Money spent to hire an investigator is usually economically spent, since an investigator's time is less costly than counsel's. Counsel does, or will, have other things to do in the case that can be done only by a lawyer, which may occupy counsel at times when investigative needs are critical. A good investigator also has sources of information unavailable to all but the most experienced defense lawyers in a locality — community contacts, official contacts (acquaintances in the police department, prison records department, probation department, and so forth), and contacts with other professional fact gatherers (news reporters, social workers, local politicians and their

staffers). Furthermore, the investigator can readily be called upon to testify if any conflicts arise between the stories given by witnesses at trial and the stories they previously gave in an investigative interview. Moreover, if counsel decides that photographs are necessary for the defense, a person other than counsel will have to take them and be available to testify to lay a foundation for their admission into evidence, should the prosecutor not stipulate to their accuracy.

Intelligent use of an investigator, however, requires thoughtful attention by counsel. Counsel must explain the case and the initial theories of the defense fully to the investigator at the outset and must inform the investigator periodically of counsel's current thinking in order to avoid squandering defense resources in the collection of useless information. Frequent, regularly scheduled check-ins by phone ordinarily serve this purpose best; most of the time, they can be kept brief.

If counsel is practicing in a jurisdiction that permits the prosecutor to obtain notes of interviews of witnesses who testify at trial for the defense, counsel will need to explain to the investigator the reasons for refraining from taking notes when interviewing defense witnesses and for reporting orally to counsel about the content of the interviews. See § 8.10 *infra.*

§ 8.05 THE IMPORTANCE OF PERSONALLY OBSERVING THE SCENE OF THE CRIME AND OTHER RELEVANT SITES

Whether or not counsel uses an investigator, it is usually wise for counsel personally to inspect the site of any important event in the case: the offense, the arrest, a search and seizure. Although counsel will be principally looking for specific items, s/he will often perceive others that put a whole new complexion on the case — items having a significance that would escape anyone but counsel. Frequently, for example, at the time of trial, when a prosecution witness is testifying about events in detail not previously known to the defense, it becomes apparent to counsel who has been at the scene — and only because s/he has been at the scene — that the witness is mistaken or confused on matters of spatial relations. (A witness who, on direct examination, has carefully drawn a diagram of an unobstructed street corner can be quite visibly flustered by the question on cross-examination whether there is not, in fact, a telephone booth on that corner.)

It is also helpful in many cases for counsel to participate in a re-enactment of pertinent events, such as a search-and-seizure episode in which the client claims the police pushed their way through an apartment door, whereas the police will expectably claim that they knocked and saw illicit activities inside when the door was opened. By playing the role of a police officer in this situation, counsel can become dramatically aware of physical restrictions on the witness's field of vision that may break the officer's testimony wide open on a motion to suppress. Of course, counsel should be sure that the scene has not undergone changes between the time of the critical events and that of counsel's visit. And re-enactments should not be undertaken, if avoidable, in places where the public or the police can watch the replay.

Part B. Locating and Interviewing Defense Witnesses

§ 8.06 THE NEED TO INTERVIEW ANY WITNESSES WHOM THE RESPONDENT WISHES TO CALL

As explained in § 8.02 *supra,* counsel will normally determine the order of the investigation, and which witness interviews have priority, in accordance with the theory of the case.

The one exception to this general rule is that counsel must talk with any witnesses specifically named by the client, however tangential they may appear to counsel. Notwithstanding counsel's belief that these witnesses are unimportant, counsel may be wrong. Moreover, every client is entitled to the small comfort, at least, that his or her lawyer does not disbelieve the client without fair inquiry. Finally, failure to look for witnesses named by the client is, perhaps, the most frequent ground of post-conviction attacks against the competence of trial counsel. *See, e.g.*, *Cannedy v. Adams*, 706 F.3d 1148, 1159-62 (9th Cir. 2013). Accordingly, counsel should make efforts to find the witnesses and, if the witnesses cannot be located, inform the client of that fact and also make notes of counsel's efforts to find them and of the conversation with the client. If counsel succeeds in finding the witnesses but decides, after talking with them, that they have nothing useful to say or are unconvincing, counsel should discuss these matters with the client and make a file note both of the reasons for counsel's conclusions and of the discussion of them with the client.

§ 8.07 LOCATING WITNESSES

Primary sources for names, addresses, and locations of witnesses include the prosecution, police, news media and their reporters, and the respondent. If these provide inadequate leads, counsel must resort to visiting the scene as quickly as possible and contacting any person that might be remotely connected with the incident to inquire who knows or saw anything relevant. This aspect of defense investigation is time-consuming and often frustrating. Its importance, however, cannot be overemphasized.

Counsel should always ask any person interviewed whether other witnesses were present and then get the fullest possible description of them. When identification is by name, the spelling of the name and its phonetic spelling should be taken, if possible. Counsel should always ask whether the witness has any aliases or nicknames; where the witnesses lives or lived; where s/he works or worked; whether s/he is on public assistance and where s/he collects welfare checks, foodstamps, or any other regular source of income; whether s/he belongs to a union or frequents a hiring hall and, if so, which one; where s/he "hangs out" and with whom; whether s/he has a girlfriend or boyfriend, and where that person lives; whether the witness plays the numbers or gambles in some other manner and where; whether s/he has ever been in prison, been arrested, or been in the military.

In trying to locate a witness when only the witness's name is known, checks should be made of the telephone directory, telephone company, electric and gas companies, voting registrars, tax assessors, traffic court, department of motor vehicles, credit card companies, credit-rating bureaus, hospital and department store billing records, probation and parole departments, Veteran's Administration, Department of Public Welfare, and Social Security Office. If the neighborhood is known as well, counsel should also check the social work agencies, settlement houses, churches, finance companies, debt-collection agencies, employment agencies, labor union offices and hiring halls, political ward leaders, liquor stores, bars, and the precinct station.

If the crime took place in a public area (on the street or in the hallway of a building), it is often productive to go door-to-door to each apartment and store-front that overlooks the scene of the crime. Invariably, this canvassing technique will produce one or more witnesses who watched the crime or events immediately preceding or following it from the window of their home or business.

If the scene of the investigation will be a low-income or working class neighborhood, counsel and/or the investigator should dress in casual clothes. Dressing in a suit will make the attorney or investigator look like a plain-clothes police detective or probation officer, thereby ensuring that no one on the street will talk to him or her. It is often very effective to have the respondent or one of his or her adult relatives or friends accompany counsel or the investigator to demonstrate that counsel or the investigator has benign intentions and to introduce counsel or the investigator to contacts on the street.

§ 8.08 KEEPING TRACK OF WITNESSES

Having located and interviewed the defense witnesses, counsel should be sure to gather the information necessary to keep track of the witnesses in the event that they change their address and/or telephone number prior to the trial date. Although counsel may decide provisionally that particular individuals will not be called as witnesses (because their information is not helpful or because their appearances, backgrounds, or uncertainty of recollection leaves them too susceptible to discrediting cross-examination), it is rare that counsel can predict all the future contingencies that may make it necessary to call any individual as a witness after all. It is wise therefore to keep tabs on every witness interviewed who knows anything about the case.

In interviewing the witness, counsel should ask for not only (a) the witness's current address and telephone number but also (b) any plans to move, and when and where and (c) in any event, the names, addresses, and telephone numbers of other persons through whom s/he can be contacted. The rapport-building preliminary conversation described in § 8.09 *infra* lends itself naturally to a discussion of the witness's interests, hobbies, and activities; if counsel makes notes of these, it may be possible to use the information to track the witness down in the event that s/he changes his or her address.

§ 8.09 INTERVIEWING DEFENSE WITNESSES

Counsel (or the investigator) should ordinarily begin any interview of a witness by identifying himself or herself as the attorney (or attorney's investigator) for the respondent. Counsel (or the investigator) should show the witness some form of identification.

Thereafter, it is usually advisable to engage the witness briefly in some topic of casual conversation to put the witness at ease and establish rapport. The choice of topic will depend upon the witness and counsel's (or the investigator's) own style. If the respondent is detained, and the witness is a relative or friend of the respondent's, the witness will usually be eager to hear about the respondent's health and emotional state, and this topic can serve as an effective ice-breaker. If the witness is a stranger to the respondent, counsel will need to come up with some topic that the witness and counsel have in common: photographs, trophies, and posters on the witness's wall may suggest hobbies or interests about which counsel can speak knowledgeably. Of course, if counsel is ignorant of the subject matter or if such casual conversation is not consistent with counsel's personal style, s/he should refrain from any such attempts at rapport-building: visibly artificial attempts at striking up a conversation are often worse than jumping immediately into the business at hand.

Frequently, counsel will need to overcome a witness's reluctance to speak with him or her. Unless the witness is a relative or friend of the respondent's, s/he may be unwilling to "get involved" because of the uncertainty of what s/he will have to do as a witness and fears of the degree of inconvenience it will entail. Counsel must overcome this reticence by an effective pitch of some sort. One argument that sometimes works is to stress the importance of the witness's giving information, since s/he is the only one who has it and the client's liberty is at stake. Counsel can also state that as a citizen, the witness has a duty to tell what s/he knows and that if s/he were, unfortunately, placed in the predicament of counsel's client, s/he would expect others to come forward. If all else fails and counsel believes the witness has important information, counsel must subpoena the witness and hope that the witness will talk to counsel prior to trial. Of course, except in an otherwise hopeless case, this should not be done if the prosecutor is unaware of the witness and if there is a substantial chance that the witness's story will be damning.

The basic technique described in § 5.06 *supra* is usually effective in taking a witness's story. Counsel should always ask every witness whether the witness has discussed the case with anyone else, with whom, and what was said. Particular care should be taken to have the witness describe in detail what s/he has told the police or any prosecution investigator to whom s/he has spoken. S/he should also be asked what the investigators said, including their specific questions. These may give counsel investigative leads and insight into the other side's theory of the case.

Just as counsel must cross-examine his or her client, when interviewing the client, so s/he must cross-examine other witnesses. This has several purposes: to find out the truth, and in detail, as an aid to counsel's further investigation; to evaluate the witness for the purpose of deciding whether to use the witness at trial; and to educate and prepare the witness for cross-

examination by the prosecutor. The latter two purposes can generally be served at a subsequent interview; therefore, unless the first purpose is compelling, counsel may be advised to forego too vigorous cross-examination in an initial witness interview. Counsel stands to gain considerably by being in the witness's good graces, and it makes no sense to anger the witness unnecessarily by pressing the witness hard before favorable relations are established. If a witness finds it an uncomfortable or unpleasant experience to be interviewed by counsel, the witness will not be readily available for subsequent interviewing and may even shade his or her story so as to discourage counsel from calling him or her at trial. The approach to cross-examining one's client suggested in § 5.12 *supra* — describing the questioning as a role play or dry run of the cross-examination that the prosecutor might conduct at a trial — is also a useful device for asking other potential defense witnesses the probing questions that are necessary to test the durability of their stories without implying that counsel personally has any doubts about their truthfulness.

If cross-questioning shakes a witness (or may leave the witness feeling shaken) but counsel concludes that the witness's story is nevertheless sufficiently solid to be potentially useful to the defense, counsel should follow up with some supportive questioning that will assist the witness to regain a warranted measure of confidence and should end by reassuring the witness that the witness is doing just fine. Counsel should never let a witness leave an interview feeling that his or her story has been demolished or disbelieved unless, in fact, counsel is convinced that the story is a fabrication. Minor inconsistencies and errors that counsel realizes are unimportant because they are perfectly natural and will not seriously impair the witness's credibility may nevertheless cause a legally unsophisticated witness to experience painful self-doubts. Unless those doubts are assuaged by some comfort from counsel at the end of the interview, the witness is likely to dwell on them following the interview, and the witness's story is likely to become weaker, more hesitant, and more heavily qualified than it needs to be or should be.

§ 8.10 THE NEED TO REFRAIN FROM TAKING WRITTEN STATEMENTS OF DEFENSE WITNESSES OR TAKING INTERVIEW NOTES IF PRACTICING IN A JURISDICTION IN WHICH THOSE STATEMENTS AND NOTES ARE DISCOVERABLE BY THE PROSECUTION

As explained in §§ 27.12(b) and 33.03 *infra,* in some jurisdictions the prosecution can obtain discovery of written statements that defense counsel or the defense investigator takes from a defense witness and even the attorney's or investigator's notes of an interview of a defense witness. The statements and notes can then be used by the prosecutor to impeach the witness. Accordingly, defense attorneys who practice in such jurisdictions should ordinarily refrain (and instruct the investigator to refrain) from taking written statements of defense witnesses or even taking notes during the interview of a defense witness.

Section 9.13 *infra* suggests that the information given by the witness can probably be preserved (for the sake of counsel's remembering it and possibly refreshing the witness's recollection later) without running the risk of prosecutorial discovery through counsel's recording the information in a "strategy memorandum" which will be insulated from discovery as

the attorney's "work product." Accordingly, whenever counsel conducts the interview, s/he should record the information in such a strategy memorandum, interweaving legal theories and strategic considerations. If the investigator conducts the interview, s/he should be instructed to orally report the content of the interview to counsel so that counsel can then record the information in a strategy memorandum.

Part C. Interviewing and Taking Statements from Adverse Witnesses

§ 8.11 THE UNIQUE ASPECTS OF INTERVIEWING ADVERSE WITNESSES

Many of the investigative techniques that have been described in the context of defense witnesses will also be employed when dealing with adverse witnesses. The methods described in § 8.07 *supra* for tracking down witnesses and in § 8.09 *supra* for interviewing a witness will be useful, regardless of whether the interviewee is potentially a witness for the defense or prosecution.

The primary difference in dealing with a prosecution witness is the need for taking a written statement or, if the witness refuses to permit counsel to take a statement, careful notes of what the witness says. Techniques for taking such a statement are described in § 8.12 *infra.* There are also additional considerations when the adverse witness is a police officer (see § 8.14 *infra*) or a co-respondent or adult co-perpetrator (see § 8.15 *infra*). Finally, there are special steps that counsel will need to take and possibly motions to file when an adverse witness reports that s/he has been instructed by the prosecutor to refuse to talk with the defense. See § 8.13 *infra.*

§ 8.12 TAKING STATEMENTS FROM ADVERSE WITNESSES

§ 8.12(a) The Reason for Taking Statements

In interviewing prosecution witnesses, the defense has two central goals: (i) to learn facts about the prosecution's case which will enable counsel to pinpoint weaknesses and develop rebuttal evidence; and (ii) to elicit statements from the witness, at a time when s/he probably has not yet been coached by the prosecutor, which can be used to impeach the witness at trial in the event that s/he changes his or her version of the events.

The best way of achieving the goal of recording the witness's statements for possible use in impeaching the witness at trial is to record the information in a written document signed by the witness. Since the document will be signed by the witness, s/he will have a hard time disowning it or denying its content.

As explained in § 8.10 *supra,* counsel usually should not take written statements from defense witnesses because they can be discovered by the prosecution. Taking written statements from a potential prosecution witness is a wise bet, however, since those statements will seldom tell the prosecutor anything that s/he cannot learn directly from the witness and since the

impeachment value of a written statement by a likely adverse witness is particularly high. If counsel is not sure whether a particular witness will be a prosecution or defense witness, the safest course of action is to proceed without taking notes to interview the witness sufficiently to find out whether his or her story is more helpful or damaging to the defense; then, if it is more damaging than helpful, to classify the witness tentatively as an adverse witness and take a written statement.

§ 8.12(b) Arranging To Be Accompanied to Interviews of Adverse Witnesses

Whenever counsel conducts an interview of an adverse witness, counsel will need to bring along an observer (either counsel's investigator or a law partner or some other employee). This "shot-gun rider" serves two principal functions. First, s/he will be available to testify concerning what the adverse witness said, should occasion arise for the defense to impeach that witness with a prior inconsistent statement. Second, the "shot-gun rider" can protect counsel against possible charges of berating, overbearing, or attempting to corrupt the witness.

§ 8.12(c) Technique for Taking a Written Statement; Content of the Statement

The preliminary procedures of identifying oneself and building rapport, described in § 8.09 *supra,* are especially important when the witness is an adverse witness. The identification of counsel (or counsel's investigator) is essential to ward off a witness's claiming at trial that the interviewer misrepresented himself or herself as working for the police or the prosecutor's office. Rapport-building to establish some human connection between interviewer and witness is important in order to break through the witness's reluctance to talk with someone who is "from the other side" and the witness's almost inevitable disinclination to sign a document proffered by a stranger.

Once counsel (or the investigator) has established some degree of rapport, s/he should go through the witness's version of the facts once without taking a statement or even mentioning the possibility of a written statement. Having heard the story once through, counsel should then ask the witness to go through the story once more, and while s/he does so, counsel or the investigator should write up the witness's account in narrative form in a multi-page statement. The three-round format for fact-interviewing, described in § 5.06 *supra,* lends itself nicely to the interviewing of an adverse witness. The first round, in which the witness tells the story in his or her own words, is conducted without anything being written down. The second round, in which counsel goes through the witness's statement in detail, is the stage at which counsel (or the investigator) will simultaneously write down what the witness is saying. And, during the third round, as counsel asks the witness for additional details and clarification, counsel (or the investigator) can make corrections and additions to the written statement.

The statement should begin with a formal heading containing wording such as the following:

> This is the statement of [name of witness], date of birth _____, given to [name[s] of counsel and/or the investigator or other individual who accompanied counsel], on [date and time of statement] at [location where statement was given, such as, for example "the living room of my apartment, 250 Main Street, apartment 4W"].
>
> I have been told by [name[s] of counsel and/or the investigator or other individual] that [he] [she] [they] [is] [are] working for the defense of respondent, [name of respondent], who has been charged with committing an offense on [date of offense] at [location of offense].

The body of the statement should be written in the first person singular, since it will be signed by the witness himself or herself. It should be written in the witness's own vernacular: counsel (or the investigator) should faithfully record any grammatical errors or slang terms rather than damaging the statement's accuracy by correcting the witness's speech.

The statement should be written out in narrative form, in full sentences and paragraphs. Every other line should be skipped so that there is room for corrections by the witness. The pages of the statement should be consecutively numbered so that it will be impossible for the witness to claim later that counsel or the investigator added or deleted pages.

When counsel (or the investigator) has finished writing the statement, s/he should read the statement aloud to the witness, sitting next to him or her and allowing him or her to read along as counsel (or the investigator) reads aloud. The witness should be invited to make any additions, deletions, or corrections that s/he wishes, and every single alteration of this type should be initialed by the witness. As each page is completed, the witness should be asked to initial the bottom of the page.

When the entire statement has been read aloud, the witness should be asked whether s/he has anything to add or correct, and any such additions or corrections should be made. Then counsel (or the investigator) should write a concluding paragraph with wording such as the following:

> I have read this [number of pages in the statement]-page statement and have had it read to me by [name of counsel or investigator]. I have also had the opportunity to make all of the additions, deletions, and corrections I desired. To the best of my knowledge, this statement is accurate, correct, and complete.

The witness then should be asked to sign the statement on the line immediately below the concluding paragraph and to record the date of the signature.

§ 8.12(d) Alternatives to a Signed Statement When the Witness Is Unwilling To Sign a Statement

As persuasive as defense counsel or the investigator may be, some witnesses will never consent to sign a statement. However, there are some alternatives to a signed statement that are almost as effective for impeaching a witness at trial who strays from the account s/he gave counsel or the investigator.

Even if the witness is unwilling to sign the statement, in an excess of caution about putting his or her signature to any document, s/he may be willing to initial each of the pages of the statement as well as all of the corrections. This initialing is, for counsel's purpose, tantamount to a signature, since it evidences the witness's adoption of the statement. Alternatively, the witness who is unwilling to sign or initial anything may be willing to write out in longhand on the statement any corrections that s/he wishes to make to counsel's (or the investigator's) original written version. This too can later be said persuasively to manifest an implied adoption of the whole document as corrected.

If the witness is unwilling to sign, initial, or even hand-correct the statement, counsel nevertheless should review the statement with the witness in its entirety and elicit the witness's oral ratification of its accuracy. If the witness is unwilling to orally ratify the statement, s/he should be asked to orally ratify counsel's (or the investigator's) notes. This oral ratification of the statement or the notes will suffice for impeachment purposes, with the defense investigator (or other employee present at the interview) testifying that the witness orally ratified the written statement. *Cf. Goldberg v. United States,* 425 U.S. 94, 105, 107-08 n.12, 110-11 & n.19 (1976).

§ 8.13 OVERCOMING PROSECUTION WITNESSES' UNWILLINGNESS TO TALK WITH AN ADVERSARY; STEPS TO TAKE IF THE WITNESS SAYS THAT S/HE HAS BEEN ADVISED BY THE PROSECUTOR TO REFUSE TO TALK WITH THE DEFENSE

With some prosecution witnesses it will be necessary to overcome not only the natural reluctance to speak with a stranger (see § 8.09 *supra*) but a more specific notion that they are somehow forbidden to speak with the opposition. Counsel will need to explain to these individuals that witnesses do not "belong" to one side or the other, that the witness has as much obligation as a citizen to talk to defense counsel as to the prosecution, and that if the witness does not do so, the trial will be unfair. Of course, a witness has no *legal* obligation to talk to either the prosecution or the defense *(e.g., United States v. White,* 454 F.2d 435, 438-39 (7th Cir. 1971)), and counsel must not suggest that s/he has. But the witness's *moral* obligations to tell what s/he knows to the defense, as well as to the police or prosecutor, should be stressed.

If a prospective prosecution witness continues to refuse to talk to counsel, counsel should ask whether the prosecutor (or a police officer) has told the witness not to talk to the defense. If the answer is yes or if counsel is not satisfied with the truth of a no answer, counsel should call the prosecutor and ask whether any instructions have been given to any witness. If they have, counsel should point out to the prosecutor that the courts have repeatedly held that such instructions violate an accused's due process right to investigate the case. *See, e.g., Gregory v.*

United States, 369 F.2d 185 (D.C. Cir. 1966); *United States v. Munsey,* 457 F. Supp. 1, 4-5 (E.D. Tenn. 1978); *Kines v. Butterworth,* 669 F.2d 6, 8-9 (1st Cir. 1981) (dictum), and cases cited; *State v. Simmons,* 57 Wis. 2d 285, 203 N.W.2d 887, 892-93 (1973) (dictum), and cases cited; *see also United States v. Gonzales*, 164 F.3d 1285, 1292 (10th Cir. 1999); *United States v. Carrigan,* 804 F.2d 599, 603-04 (10th Cir. 1986); *Johnston v. National Broadcasting Company, Inc.,* 356 F. Supp. 904 (E.D.N.Y. 1973); *Coppolino v. Helpern,* 266 F. Supp. 930 (S.D.N.Y. 1967); *State v. Murtagh*, 169 P.3d 602, 608, 610-13, 615, 617 (Alaska 2007); *People v. Eanes,* 43 A.D.2d 744, 350 N.Y.S.2d 718 (N.Y. App. Div., 2d Dep't 1973); *State v. Hofstetter*, 75 Wash. App. 390, 395-403, 878 P.2d 474, 478-82 (1994), and cases cited. *See generally* Brad Rubin & Betsy Hutchings, *Blockading Witnesses: Ethical Pitfalls for Prosecutors*, N.Y. LAW J., Dec. 6, 2006, at 4, col. 4. Counsel should add that, by giving such instructions, the prosecutor has violated ethical directives. *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(f) (2014) (except in certain designated special circumstances, "[a] lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party"); AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 39 ("[a] lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party"); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.1(d) (3d ed. 1993) ("Prosecution Function Standards") ("A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.").

Counsel then should ask the prosecutor to call the witness immediately and tell him or her that s/he can talk to the defense. Counsel should request that the prosecutor's phone conversation with the witness take place with defense counsel on the phone. If the prosecutor is resistant to this notion, counsel should explain that counsel's inability to independently verify the prosecutor's removal of the taint of the earlier instructions will necessitate counsel's filing a motion for sanctions in order to safeguard the respondent's constitutional right to unimpeded access to witnesses.

Unless the prosecutor gives complete satisfaction, counsel should file a motion with the court of record having jurisdiction of the case. Depending upon local practice, such a motion may be styled like ordinary motions or in the form of an Order to Show Cause. The motion should seek the following alternative forms of relief: (a) dismissal of the Petition on the ground that the prosecutor's misconduct has so severely interfered with the preparation of the defense that there is no way either of knowing how much harm has been done or of setting it right at this stage; (b) a court-ordered deposition of each of the witnesses with whom the prosecutor or any police officer has discussed the case, so that counsel can ask the questions that s/he would have asked in an investigative interview if not for the prosecutor's interference, *see, e.g., United States v. Carrigan,* 804 F.2d 599, 604 (10th Cir. 1986) (upholding a trial court's order of a deposition: "[a]n order merely to cease . . . [prosecutorial] interference, after the fact, might be insufficient because the witnesses' free choice might have been already perverted and the witnesses likely to

refuse voluntary interviews"); or, at least (c) a hearing in which each of the witnesses who has spoken with the prosecutor or any police officer is brought before the court and instructed by the judge that s/he is free to speak to the defense. *Cf.* the procedure approved in *United States v. Mirenda,* 443 F.2d 1351, 1355 n.3, 1356 (9th Cir. 1971); *and see United States v. Vole,* 435 F.2d 774, 778 (7th Cir. 1970): "[w]itnesses are the special property of neither party and in the absence of compelling reasons, the . . . court should facilitate access to them before trial whenever it is requested."

Of course, counsel may decide that the trouble and friction involved in this procedure are not justified by its likely yield or that at least this course of action should be delayed until counsel sees whether more ordinary discovery procedures (see Chapter 9) reveal what counsel wants.

§ 8.14 INTERVIEWING POLICE OFFICERS

Except in cases in which there are particular reasons to keep a low profile (for example, when counsel's independent researches disclose that the police conducted a slipshod initial investigation and are doing no further investigating, so that counsel prefers to let sleeping dogs lie), counsel should always try to speak with the arresting officer and all officers who participated in the police investigation of the case. Often these attempts will prove fruitless, since many police officers are so distrustful of defense attorneys that they will refuse to talk. However, there are a variety of factors that might motivate a police officer to speak with a defense attorney in a particular case, including: a willingness to give juveniles in general a break or a liking for the particular respondent; qualms about whether the respondent really is guilty; a liking for defense counsel or a desire to match wits with a defense attorney; or a desire to "cut a deal" with the respondent under which the respondent will incriminate other suspects, testify against co-respondents or adult co-perpetrators, "cooperate" by becoming an informer, or "close" unsolved cases by admitting them.

If the officer refuses to speak with counsel, counsel should ask why. If the officer indicates that s/he has been instructed not to talk by the prosecutor or by a superior officer or that s/he is simply following a department policy, counsel should file the type of motion described in § 8.13 *supra,* challenging the prosecutor's or police department's interference with the respondent's due process right to investigate the case. Even if the officer's refusal to talk is not the product of prosecutorial or departmental interference and is merely an individual choice, counsel nevertheless may want to seek a judicial order compelling him or her to tell counsel what s/he knows, on the theory that police officers are not mere private witnesses but are state officials with criminal law enforcement duties and due process obligations, *Curran v. Delaware,* 259 F.2d 707 (3d Cir. 1958), and hence may no more instruct themselves than they may instruct one another to refuse information to the defense. *Cf. Coppolino v. Helpern,* 266 F. Supp. 930 (S.D.N.Y. 1967).

Even when counsel succeeds in getting a police officer to talk, it is unlikely that counsel will persuade the officer to sign a written statement or even to permit counsel to write out a

statement. However, as long as counsel conducts the interview with an investigator or other employee of counsel's present, that individual can serve as an impeachment witness if, at trial, the officer denies the information s/he related to counsel. See § 8.12(b) *supra.* Some officers may also be willing to go over counsel's notes and ratify them orally, an action that is almost as good for counsel's purposes as a written statement. See § 8.12(d) *supra.*

If counsel succeeds in getting an officer to talk, it is usually advisable to see the officer again on other occasions and conduct as many follow-up conversations about the case as time permits. Inevitably, the officer will feel progressively more comfortable with counsel and will increasingly reveal information about the case. In addition, the more frequent the conversations between an officer and counsel, the more difficult it is for the officer to recall what s/he has said to counsel and the more cautious s/he will be at trial to refrain from embroidering the facts.

If an officer expresses a desire to "cut a deal" with the respondent, counsel should ordinarily deflect any discussions of the actual deal by explaining that counsel first needs to hear everything the officer can tell counsel about the case so that counsel can advise the client whether a deal would be worthwhile. Counsel should almost never make any actual agreements with the police. If the client is going to enter into an agreement, that agreement should be made with the prosecutor, since it is only the prosecutor who has the power to drop or reduce charges, and the police officers' promises are not necessarily binding upon the prosecutor.

The one exception to this general rule is the situation in which the police are willing to bargain away charges that the prosecutor does not yet know about and the police are willing to include in the bargain a commitment to withhold all information about the charges from the prosecutor. If the officer can be trusted (a fact which counsel will need to verify by speaking with other members of the local defense bar who have dealt with the officer in the past), then it may well be wise to take the risk of making an agreement directly with the officer in order to prevent the prosecutor and the court from ever learning of the charge.

§ 8.15 INTERVIEWING CO-RESPONDENTS AND ADULT CO-PERPETRATORS

It is essential that counsel speak to any juveniles who are jointly charged with the respondent as co-respondents, any juveniles who are charged separately (in juvenile or adult court) with the same or connected crimes, and any adult co-perpetrators who are charged in adult court. Although their version of the events may parallel and support the respondent's, it is equally likely that co-respondents and co-perpetrators have turned state's evidence, or may do so in the future, and will end up testifying for the prosecution against the respondent. In addition, even when co-respondents don't turn state's evidence, they may present a defense at trial that denies their own guilt by placing all of the blame on the respondent.

Before questioning co-respondents or adult co-perpetrators, counsel should ascertain whether they are represented by an attorney. If they are, courtesy dictates that the individual's lawyer be contacted for permission to conduct the interview.

An interview with a co-respondent or adult co-perpetrator should explore thoroughly what information s/he has given the authorities and whether s/he intends to testify for the prosecution and implicate the respondent. Counsel also should interview the co-respondent or co-perpetrator about the facts of the offense and take a written statement. In the event that the individual turns state's evidence and testifies against the respondent, the written statement can be used for impeachment. If s/he does not, the written statement may nevertheless be useful: in the event that counsel wishes to present the individual's testimony exonerating the respondent but is stymied by the individual's claim of the Fifth Amendment privilege, a written statement may be admissible as an admission against penal interest, provided that counsel has followed the procedures required by local rules or caselaw for taking a statement against penal interest. (These usually include the requirement that the witness know at the time of the statement that it is against his or her penal interest. Accordingly, counsel or the investigator may need to advise the witness of that fact before taking the statement.)

Part D. Gathering Police Reports, Other Documents, and Real Evidence That Will Be Needed as Defense Exhibits at a Motions Hearing or at Trial

§ 8.16 THE NEED FOR GATHERING THE MATERIALS, AND THE TIMETABLE

Counsel's prospects of prevailing at an evidentiary motions hearing or at trial will usually depend upon the thoroughness with which counsel has sought out and obtained police reports, other pertinent documents, and real evidence relevant to the case. Police reports containing witnesses' prior statements are often the only way of learning what the prosecution witnesses will say at trial (since many will refuse to talk to counsel), so as to plan an effective cross-examination. These police reports are also indispensable for impeachment purposes. Official documents such as hospital records, Weather Bureau records, and the medical examiner's report in a homicide case are similarly invaluable in planning the defense theory of the case and in cross-examining prosecution witnesses whose stories are at odds with the official reports.

Counsel will need to begin gathering the documents and other materials as quickly as possible. Certain real evidence such as objects dropped at the scene of the crime — or the layout of the crime scene itself as it was at the time of the crime — is highly perishable and will be lost if counsel does not retrieve it — or photograph it — quickly. Even less obviously perishable objects may be lost through delay: in some jurisdictions, tape recordings of police radio communications are routinely erased after a certain number of months and the tapes re-used by the police department. Finally, many documents (like police reports, hospital records, school reports, and even court transcripts) may take weeks to acquire; the acquisition process must be started early so that it can be completed in time for trial.

§ 8.17 METHODS FOR GATHERING THE MATERIALS

Some of the materials that counsel will wish to gather are public documents, available for the asking. For example, in many jurisdictions, the initial police report (usually called a

"complaint report" or "incident report") is a public document that can be obtained by simply going to the police station in the precinct in which the crime occurred and paying a nominal fee for the photocopying of the document.

Most of the documents and exhibits that counsel will wish to gather, however, will need to be subpoenaed. The constitutional and statutory law governing subpoena practice are described in §§ 10.04-10.05 *infra;* the procedures for obtaining subpoenas, in § 10.04 *infra;* and the procedures for serving and enforcing them, in §§ 10.06-10.07 *infra.*

Subpoenas for documents, called subpoenas *duces tecum*, are directed to the custodian of records of whatever agency or entity is in possession of the documents, directing the custodian to appear in court with the original documents on the date of the motions hearing or trial. These subpoenas are ordinarily required to specify with considerable particularity the documents or records sought. In theory the subpoenas *duces tecum* are not to be employed for discovery but only to procure evidentiary matter for use at trial. As a practical matter, however, counsel may be able to persuade the custodian to permit counsel to inspect the subpoenaed document prior to the beginning of the trial proceedings, or counsel may persuade the judge to order the custodian to show counsel the document immediately before trial, during preliminary proceedings, or during a recess, in the interest of saving time at trial.

Real objects in the possession of law enforcement or government officers or third parties can also be reached by subpoenas *duces tecum.* If counsel wishes to inspect them or to have them tested by defense experts before trial, a motion for production and inspection should be made. See § 9.07(c) *infra.*

§ 8.18 PRESERVING REAL EVIDENCE

When counsel obtains a physical object that has evidentiary value in the case, counsel will need to take certain steps to preserve it in its original form and to guard against allegations at trial that the object has been altered.

The object should be retained in the custody of some credible person (an investigator or counsel's secretary will do) under lock and key. The person who has had custody of the item can then be called at trial to identify it and to testify that there has been no change in its condition since the time it was first received.

If the physical condition of any object is important and is subject to change, counsel should have the custodian inspect the object and make a written, signed description of it at the time of its receipt, one copy of which should be retained with the object and another in counsel's files. If the custodian is likely to have more than one object of a kind, each should be tagged with the date of its receipt and the name of the case to which it refers.

At trial, counsel will also have to present witnesses who can trace the chain of custody of

the object from the point of its relation to the relevant events into the custodian's hands. For this reason, counsel should, if possible, have the object picked up in the first instance by counsel's investigator or secretary rather than by counsel personally, since it is undesirable — and, in some courts, forbidden — for counsel to testify.

If counsel wishes to have tests made of the object or to show it to anyone, counsel should have the custodian deliver the object manually to the tester or person in question, and the custodian should then recover it manually when the test or inspection has been completed. This simplifies problems of proving the identity of the object and the lack of change in its condition at the time of trial. If the object is to be left with the tester or person, even briefly, s/he should be instructed (1) not to allow it out of his or her possession until it is recovered by the custodian; (2) to keep it in a secure place, under conditions similar to those described in the second and third paragraphs of this section, whenever s/he is not actually working with it; and (3) that s/he will very likely be required to testify in court that s/he complied with the preceding two instructions. When an object is to be tested, counsel should also instruct the tester to make some mark on the object that, while not affecting its probative quality, will allow the tester to identify it at trial as the same object that s/he tested. The expert's written report to counsel should describe the object and indicate what mark the expert made on it.

§ 8.19 TYPES OF MATERIALS TO GATHER

There are as many sources of information as there are different factual situations. Among the most useful to keep in mind are:

§ 8.19(a) Police Reports and Related Materials

§ 8.19(a)(1) Complaint Reports

The complaint report (sometimes called "event report" or "incident report") is filled out by an investigating officer when the complainant first reports the crime. This document usually contains: identifying information about the complainant (name, address, phone number); a record of the time and location of the crime; the complainant's description of the crime; the complainant's or eyewitnesses' descriptions of the perpetrator(s); and a list of any injuries suffered by the complainant. The complaint report is extremely useful at suppression hearings and at trial. The complainant's account of the events can be used to impeach the complainant if s/he diverges from this account in his or her testimony. The description of the perpetrator's appearance and attire is usually the only written record of the complainant's and eyewitnesses' descriptions prior to their observing the respondent in a show-up or lineup, and it can be used to impeach these witnesses if they subsequently mold their descriptions of the perpetrator to fit the respondent. Often the description of the injuries suffered by the complainant will contain the name of the hospital that treated those injuries, thereby identifying the hospital to which counsel should direct a subpoena for the complainant's medical records. See § 8.19(c)(6) *infra.*

§ 8.19(a)(2) Arrest Reports

The arrest report is filled out by the officer who arrested (or assisted in the arrest of) the respondent. This document will contain identifying background information about the respondent. The report will be useful in suppression hearings because it often lists: incriminating statements allegedly made by the respondent; property allegedly seized from the respondent; the precise time of arrest (which can be used to calculate the length of any interrogations that took place during the booking process); and the respondent's height and weight at the time of arrest (useful if the respondent has grown by the time of the suppression hearing and the defense needs to show that the respondent's height and build at the time of the offense did not match descriptions of the perpetrator). If arrest reports in the jurisdiction also contain a factual account of the offense, then counsel should obtain the arrest reports for all juvenile co-respondents and adult co-perpetrators who were arrested, since the accounts in those reports will often be inconsistent with the accounts in the respondent's arrest report, and such inconsistencies can be used to impeach the witnesses who gave the accounts to the officers, the officers who prepared the reports, or both.

§ 8.19(a)(3) Tape Recordings of 911 Telephone Calls and Police Radio Communications

If a crime is reported by an emergency phone call to the police (usually called a "911 call"), many police departments record and temporarily store the recording of the telephone conversation between the caller and the police operator. Similarly, if the investigating officers engage in radio communications with the police dispatcher or with each other during the investigation of a case, many jurisdictions record and store tape recordings of these radio communications. These various recordings can be crucial, since they may contain descriptions of the perpetrator given by the complainant prior to viewing the respondent in a show-up or lineup, or they may demonstrate a sequence of events at odds with the complainant's or police officers' versions of the crime or the police investigation, or both. In many jurisdictions these recordings are routinely erased after a designated period of time (in some jurisdictions, three months) and the tapes re-used; accordingly, defense counsel must subpoena them immediately after starting work on the case. *Cf. Freeman v. State*, 121 So.3d 888, 895-97 (Miss. 2013).

§ 8.19(a)(4) Arrest Photographs

If arrest photographs were taken, these will often be relevant and should be subpoenaed. When length of hair or facial hair is relevant to the description of the perpetrator, a mug shot will often be the best available evidence of the respondent's appearance at the time of the offense. In some jurisdictions the police take full-color photographs; if the respondent was arrested on the day of the offense, these will show the clothing s/he was wearing and can be used at a suppression hearing (to demonstrate inconsistencies with the description of the perpetrator, and thereby that the police lacked probable cause to arrest or that the identification procedures were invalid) and at trial (to show that discrepancies between the appearance of the perpetrator and the appearance of the respondent on the day of the offense raise a reasonable doubt).

§ 8.19(a)(5) Eyewitness Identification Reports

In some jurisdictions the police prepare special forms whenever an identification procedure is employed, to record the result of the procedure and the precise words used by the eyewitness in identifying (or failing to identify) the respondent. These forms are obviously important in connection with any identification suppression claim and also can be used to impeach the witness at trial if s/he claims a greater degree of certainty or a different basis for recognizing the respondent than is reflected in the witness's words at the time of the pretrial identification.

§ 8.19(a)(6) Forms and Reports for Confessions

If the respondent gave a written statement, there will often be a typed police form containing the statement and bearing the respondent's signature. Significantly, that form will usually contain not only the content of the confession but the times when the interrogation began and when the statement was signed, enabling counsel to calculate the number of hours that the interrogation lasted and to argue that its excessive length rendered the confession involuntary, unreliable, or both. If the confession was oral and never reduced to a signed statement, there will often be notes of the contents of the confession in the arrest report.

§ 8.19(a)(7) Additional Police Reports That Must Be Filled Out When the Crime Is of a Certain Type

Depending upon the nature of the case, any one or more of the following reports may also exist. These reports frequently contain a factual narrative of the crime that will prove useful at a suppression hearing or trial.

1. In drug possession or sale cases there will frequently be a "buy report" describing the transaction in detail if the drug transaction was conducted by an undercover officer. There will also always be chemists' reports documenting the nature and weight of the drug and possibly containing an officer's description of the circumstances under which the drug came into the officer's possession.

2. In cases in which the police recover a firearm, there will usually be a special report describing the gun and its serial number and also describing any bullets that were recovered. There will also usually be a ballistics report describing the results of a test-firing of the gun, reporting whether the gun is operable, and possibly also reporting the results of any tests to match the gun with expended bullets recovered in connection with this case or other cases.

3. In cases in which scientific evidence of the perpetrator's identity was recovered from the scene of the crime — such as fingerprints, footprints, hairs, or fragments of clothing — there will usually be (A) reports by evidence technicians describing

their collection of the evidence and (B) reports by the relevant police experts describing the degree to which the recovered fingerprints, footprints, or hairs match those of the respondent, and/or the degree to which the recovered fabric matches articles of clothing belonging to the respondent.

4. In cases of sex offenses there will usually be (A) reports of a physical examination of the complainant, describing physiological indications of forcible intercourse and noting the blood type of any semen recovered from the complainant's body and (B) serology reports detailing whether the respondent's blood type matches that of the semen recovered from the complainant's body.

5. If the crime involved a shooting and the respondent is arrested shortly after the commission of the crime, there may be a report of a paraffin test examining whether the respondent recently fired a gun.

6. If a complainant was injured, some jurisdictions require that the police fill out a special report describing the precise extent of the injury and the nature of any medical treatment administered on the scene.

7. In homicide cases there will usually be an autopsy report available from the medical examiner's or coroner's office.

§ 8.19(a)(8) Property Reports

In many jurisdictions the investigating officers are required to fill out property reports whenever any tangible evidence is recovered from the suspect or from the scene of a crime. If the crime was a serious felony, some police departments dispatch a special "crime scene search squad," which will produce its own reports on property recovered from the scene.

§ 8.19(a)(9) Police Photographs and Diagrams

The police may possess photographs and diagrams of the crime scene and possibly also a police artist's sketch or composite of the suspect. These materials are usually available to the defense only through the discovery procedures described in Chapter 9.

§ 8.19(a)(10) Police Regulations and Policy Statements

In many jurisdictions the local police department has special regulations or policy statements governing police procedure in making arrests and *Terry* stops, conducting on-the-street pat-downs, taking confessions, and arranging identification viewings. Copies of these regulations and policy statements (both those applicable to adult suspects and any special regulations designed for dealing with juveniles) should be obtained, either informally from the police department or via subpoena. Frequently, an officer's violation of his or her own

department's internal regulations will weigh heavily in a judge's determination of the validity of police procedures in the particular case.

§ 8.19(a)(11) Reports and Other Materials Generated by the Booking Process

There may be various reports and materials generated during the booking process. Those that are most often useful at a suppression hearing or at trial include:

1. The arrest photographs of the respondent described in § 8.19(a)(4) *supra;*

2. Notations on the police blotter indicating the time when the respondent was received at the police station (often useful in establishing the length of interrogation at a hearing on a motion to suppress statements);

3. Notations in the property book at the precinct station showing

   (A) property that was seized from the respondent as evidence and

   (B) other personal property that was in the respondent's possession at the time of arrest;

4. Reports by the juvenile division of the police department regarding their processing and possibly also interrogation of the respondent; and

5. Reports by the detention facility at which the respondent was placed pending Initial Hearing, regarding staff processing and possibly also interrogation of the respondent.

§ 8.19(b) Transcripts and Other Court Documents

§ 8.19(b)(1) Transcripts

As suggested in § 4.31(d), (e) *supra,* if a probable-cause hearing was held in the case, counsel should obtain a copy of the transcript. Frequently, that transcript will prove useful in impeaching the police officer(s) and other witnesses who testified at the probable-cause hearing.

If a separate probable-cause hearing was held for a juvenile co-respondent or if a preliminary hearing was held in the case of an adult co-perpetrator, then transcripts of those hearings should also be obtained.

§ 8.19(b)(2) Search Warrants and Arrest Warrants

If a search was conducted by the police pursuant to a search warrant or if the respondent

was arrested pursuant to an arrest warrant, counsel should obtain the warrant and any affidavits the police filed in order to obtain the warrant(s). These items will usually be turned over by the prosecutor in informal discovery, see Chapter 9; alternatively, counsel can obtain them from the clerk's office of the court that issued the warrant.

§ 8.19(b)(3) Gerstein Proffers

In some jurisdictions there is a practice of placing a written "*Gerstein* proffer" (see § 4.28(a) *supra*) in the court files of detained adult defendants and juvenile respondents, showing probable cause to believe that the individual committed the crime charged. Such documents, usually prepared by the police officers on the case, will be useful in impeaching those officers and possibly also the civilian witnesses who provided the facts that the officers incorporated in the *Gerstein* proffer.

§ 8.19(b)(4) Psychological Evaluations

Particularly in cases in which counsel is seeking to show that the respondent was mentally, educationally, or emotionally impaired in ways that adversely affected his or her capacity to make a valid waiver of *Miranda* rights, confess voluntarily, give competent consent to a search, or form the *mens rea* of a particular crime, counsel will need a relatively contemporaneous psychological evaluation of the respondent. Counsel may be able to save the time and expense of obtaining a new evaluation if the respondent has been the subject of prior delinquency, PINS, or neglect proceedings. Frequently, the court files, probation files, or other agency files for those proceedings will contain a psychological evaluation of the respondent that is sufficiently recent to serve counsel's purposes.

§ 8.19(c) Other Exhibits and Materials To Gather

§ 8.19(c)(1) Photographs

Although police photographs of the crime scene are often available through discovery, see Chapter 9, these will seldom be sufficient to fulfill all defense needs, and counsel will have to commission the taking of additional photographs. Defense photographs should be taken from several angles and at several distances, so that all spatial relations involved are fully depicted. Counsel should remember that photographs are not admissible until a foundation has been laid by a person who testifies that they are an accurate reproduction of the scene that s/he observed. A photographer should therefore be selected who will be available at the time of the trial and who will make a good and personable witness. S/he should be informed that s/he will be asked at trial, as a basis for testifying that the photographs are accurate, whether s/he has a present recollection of the scene that s/he photographed. Counsel should ordinarily obtain:

1. Photographs of the scene of the crime (to show matters that are not apparent in the police photographs, such as the absence of street lights, in support of a contention

that the scene was too dark for the complainant and eyewitnesses to get a good look at the perpetrator).

2. In cases involving motions to suppress tangible evidence, photographs of the scene of a challenged arrest or *Terry* stop (to help illustrate the precise course of events) or of the scene of a challenged search (to show, for example, that items which the police will testify were in "plain view" could not in fact have been seen from the officers' vantage point).

3. In cases involving a motion to suppress identification testimony or a misidentification defense at trial, photographs of the scene of a show-up identification (to illustrate, for example, how far the witness actually stood from the respondent during the show-up, or the dim lighting in the location where the show-up took place at the relevant time of day).

4. In cases in which the respondent was injured, and that injury is relevant to the theory of the defense (for example, as evidence of physical abuse by the police in a hearing on a motion to suppress a confession or as evidence of an assault by the complainant in a self-defense case), photographs of the respondent's injuries. These should be taken as quickly as possible before the bruises fade or the injuries heal.

5. In cases in which the respondent's facial appearance, hair length, height, or build at the time of the incident will be relevant to an identification suppression motion, motion to suppress tangible evidence (to show lack of probable cause to arrest), or misidentification defense at trial, photographs of the respondent. These should be taken as soon as possible after counsel enters the case because the physiognomy of a juvenile can change markedly within a relatively short period of time, and, if it does not, the prosecution will doubtless argue that it did. When taking photographs for the purpose of depicting the respondent's height, the respondent should be photographed next to a measuring stick or next to an adult who is the same size, is a personable witness, and can testify to his or her exact height at the suppression hearing or trial.

§ 8.19(c)(2) Diagrams and Maps

Diagrams of the scene of the crime, the scene of the arrest, or the scene of a search will frequently prove useful in suppression hearings and at trial. Such diagrams should be drawn on poster board or on large sheets of graph paper, since diagrams drawn on a blackboard at trial cannot be easily preserved for appeal. Diagrams and maps should be drawn to scale whenever possible. In some cities it may be possible to obtain a large area map from the city planner's office.

§ 8.19(c)(3) Records of Lighting and Weather Conditions

In hearings on identification suppression motions and in presenting a defense of misidentification at trial, it frequently will be necessary to show that an eyewitness's or complainant's ability to observe was limited because of poor lighting or weather conditions. Records showing weather conditions and the time of sunrise and sunset can usually be obtained from the United States Weather Bureau.

§ 8.19(c)(4) School Records of the Respondent

Whenever a juvenile case involves a confession, the respondent's school records should be obtained as quickly as possible. Frequently, these records will demonstrate the existence of a learning disability, a language problem, or reading or comprehension deficits that will strongly support a claim that the respondent lacked ability to understand and competently waive *Miranda* rights. If the records suggest significant impairment, counsel should interview the respondent's school teachers (and, if possible, the teacher or psychologist who prepared the records) to determine whether these witnesses will suffice to substantiate the defense claim. If not, then counsel should consider the possibility of hiring a psychologist to examine the respondent for the specific purpose of determining his or her ability to understand and competently waive *Miranda* rights. See § 24.10(b) *infra*.

§ 8.19(c)(5) Medical Records of the Respondent

If a confession suppression motion involves a claim that the respondent was physically abused by the police or if the defense at trial will be that the respondent acted in self-defense after being injured by the complainant, it will be essential to obtain the hospital and other medical records pertaining to any examination or treatment that the respondent received on account of the injuries inflicted by the police or complainant.

§ 8.19(c)(6) Medical Records of the Complainant

If one of the charges in the Petition is an assault or battery charge that depends upon the prosecution's proving a certain level or degree of injury, the medical records of the complainant are obviously essential. Even when this is not the case, medical records of the complainant may be useful to show that the complainant is fabricating the extent of his or her injuries, so that counsel can then argue that the remainder of the complainant's testimony is no more credible than the exaggerated reports of injury. Finally, medical records frequently record the complainant's version of how s/he was injured, and this account may be useful in impeaching the witness at the suppression hearing or trial.

§ 8.19(c)(7) Records To Support an Alibi Defense

There is a variety of records that can support an alibi defense. Depending upon the facts, counsel may find it useful to obtain: a log by the local television network documenting that the

television program which the respondent claims s/he was watching (and the precise events s/he describes) was, in fact, shown at the time of the crime's occurrence; school attendance records to corroborate the respondent's alibi that s/he was in school at the time of the crime; or time clock cards to demonstrate that the respondent was at work at the time of the crime.

§ 8.19(c)(8) News Media Files and Photographs

If the crime involved a certain amount of notoriety, it may have been reported in the local newspapers or "hot" media. If so, the texts of news items may quote statements by the complainant or other witnesses that will be useful in impeaching them. In addition, newspapers may possess still photographs and TV stations may possess footage of relevant scenes, people, or events.

Chapter 9

Pretrial Discovery

Part A. Introduction

§ 9.01 THE NATURE OF DISCOVERY IN DELINQUENCY CASES; SCOPE AND ORGANIZATION OF THE CHAPTER

The jurisdictions differ significantly with respect to the nature of the discovery procedures employed in juvenile court and the specificity with which those procedures are spelled out in the applicable juvenile court statute, court rules, and caselaw. Several jurisdictions conduct discovery in delinquency cases in accordance with adult criminal court procedures for discovery. This result is accomplished in some jurisdictions by juvenile court statutes or court rules mirroring the adult standards (*see, e.g.,* D.C. SUPER. CT. JUV. RULE 16 (2014) (based on D.C. SUPER. CT. CRIM. RULE 16); FLA. RULE JUV. PROC. 8.060 (2014) (based on FLA. R. CRIM. PROC. 3.220); N.Y. FAM. CT. ACT §§ 330.1, 331.1-331.7 (2014) (derived from CRIM. PROC. LAW § 200.9 and article 240)), in other jurisdictions, by juvenile statutes or court rules declaring that the adult discovery rules shall be applicable to delinquency proceedings (*see, e.g.,* IND. CODE ANN. § 31-32-10-1 (2014); WASH. REV. CODE ANN. § 13.40.140(7) (2014)), and in still other jurisdictions, by caselaw holding that in the absence of a statute or court rule, discovery procedures in delinquency cases should approximate those followed in adult criminal cases, *see, e.g., Joe Z. v. Superior Court,* 3 Cal. 3d 797, 801, 478 P.2d 26, 28, 91 Cal. Rptr. 594, 596 (1970). Some jurisdictions have reacted to the civil nature of delinquency proceedings by providing for discovery that is more liberal than criminal discovery (*see, e.g., People ex rel Hanrahan v. Felt,* 48 Ill. 2d 171, 175, 269 N.E.2d 1, 4 (1971) (notwithstanding a state statute that applies criminal discovery rules to delinquency proceedings, court holds that juvenile court has discretion to "allow a broader discovery than is allowed in criminal cases")) or that is virtually equivalent to the liberal discovery rules employed in civil proceedings (*see T.P.S. v. State,* 590 S.W.2d 946, 954 (Tex. Civ. App. 1979) (acknowledging that Texas Family Code calls for application of civil discovery rules to delinquency proceedings, but construing the statute in a restrictive manner and holding that discovery in delinquency cases can be more limited than in other civil cases)). Finally, in some jurisdictions the statutes and court rules are silent about the procedures for, and scope of, discovery in delinquency cases, and the courts have not yet addressed these issues.

Since most jurisdictions that have addressed the issue treat delinquency proceedings as subject to criminal discovery procedures, this chapter will focus on the devices available for criminal discovery and the arguments that can be made for broadening its scope in delinquency cases. Attorneys who practice in those few jurisdictions that authorize civil discovery in delinquency cases should consult local statutes and caselaw, as well as the numerous treatises available on the subject of civil discovery.

As a matter of practice, criminal discovery involves two processes or phases: "informal"

and "formal" discovery. Most prosecutors are willing to hand over to the defense upon request certain categories of materials which it is clear that a court would order the prosecutor to divulge if the defense made a motion to discover them. Informal discovery devices (such as the "discovery letter," see § 9.05 *infra,* and the "discovery conference," see § 9.06 *infra*) provide a quick route to obtaining this material. When the informal devices fail because the prosecutor refuses voluntarily to divulge information requested by the defense, counsel must turn to "formal" discovery devices, such as motions to compel the prosecutor to disclose the information.

Part B of this chapter examines the informal methods for obtaining discovery. Part C takes up the formal discovery methods, describing the devices that can be employed and exploring constitutional doctrines that can be invoked in support of motions for court-ordered discovery going beyond that provided by statutes and local common law. Finally, Part D discusses the prosecutor's right to discovery from the defense.

While employing informal and formal discovery devices, defense counsel should not lose sight of opportunities to use other pretrial proceedings to acquire information about the prosecution's case. The recognized mechanisms for overt discovery in criminal cases — both informal and formal — remain far more limited than those in civil practice and are usually inadequate to advise the defense of everything it needs to know to prepare fully for trial. In this current state of the practice, defense counsel's ingenuity in devising self-help techniques is distinctly at a premium.

Several motions that counsel can file will lead to the prosecutor's disclosing facts not previously known to the defense. See Chapter 7. Evidentiary hearings, such as the probable-cause hearing (see §§ 4.28-4.37 *supra*) and suppression hearings (see Chapter 22), present invaluable opportunities to uncover additional information. Police and court records and transcripts of prior judicial proceedings are also important sources to delve into. See §§ 8.16, 8.19 *supra.* In particular cases there may be other adventitious opportunities for discovery, such as the coroner's inquest in homicide cases or a prior trial resulting in a mistrial. And counsel's pretrial discovery strategy must, of course, be coordinated with a complementary strategy of defense investigation. See Chapter 8.

Counsel should be aware that there are additional discovery processes that are activated at trial. Section 27.12 *infra* describes those processes and suggests techniques for invoking their benefits at a sidebar conference immediately prior to the commencement of the trial.

§ 9.02 THE GENERAL POSITION OF THE DEFENSE ON DISCOVERY

As explained in § 9.01 *supra,* in those jurisdictions that have addressed the scope of discovery in delinquency proceedings, the statutes or court decisions usually regulate such discovery in accordance with the discovery procedures employed in adult criminal cases rather than the more liberal discovery procedures employed in civil cases.

When practicing in a jurisdiction that has not as yet resolved the scope of discovery in delinquency proceedings, counsel should argue that the civil nature of delinquency cases calls for application of civil discovery rules, or at least for discovery that is more liberal than ordinary criminal discovery. *See, e.g., People ex rel. Hanrahan v. Felt,* 48 Ill. 2d 171, 269 N.E.2d 1 (1971).

Even when practicing in jurisdictions that have authoritatively resolved to use criminal discovery rules in delinquency proceedings, counsel can make certain policy arguments in support of the expansion of those rules to permit broader discovery to the defense. Counsel can point out that the quest for truth at trial is better served, under an adversary system of litigation, if the evidence of one party does not come as a surprise to the other but, being known at a time in advance when there is opportunity to check it out through adequate investigation, appears in court subject to meaningful cross-examination and rebuttal.

One of the rationales commonly relied upon to deny liberal discovery in adult criminal cases is the notion that criminal defendants, more than civil litigants, once forewarned are likely to flee the jurisdiction, bribe or intimidate witnesses, or engage in other misbehavior. Even if this spectre were real in the adult criminal context — and there has never yet been any adequate showing made to support the proposition that the dangers *are* greater in criminal cases generically than in civil cases (*compare NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 239-41 (1978), finding a special danger of witness intimidation in NLRB proceedings because of the "peculiar character of labor litigation," *id.* at 240) — these fears are usually inappropriate in the juvenile context. Juveniles, heavily dependent upon their parents for basic necessities, are unlikely to flee the jurisdiction even if forewarned. And, even if risk of flight or of witness intimidation were a significant danger in an individual case, the greater availability of pretrial detention in juvenile cases (see § 4.15 *supra*) would make it possible to eliminate the danger by detaining the child pending trial. Counsel can, therefore, urge that an attitude of openness akin to that which animates modern civil discovery practice should prevail in juvenile cases unless the prosecutor can make some particularized showing that in *this* case and with respect to *this* discovery request, the speculative dangers that so largely shape adult criminal discovery practice have some factual substance to them.

The other principal argument advanced against liberal discovery in adult criminal cases is the supposed inefficiency or unfairness of giving the defendant discovery against the prosecutor when such discovery must inevitably remain a "one-way street" because the Privilege Against Self-Incrimination precludes prosecutive discovery against the defendant. But the evolving caselaw suggests that the Fifth Amendment is *not* an absolute bar to criminal discovery in favor of the prosecution. See § 9.12 *infra.* Moreover, even if it were an absolute bar — or to the extent that it is a bar — the "one-way street" argument is nonetheless basically unsound. That is so because the Fifth Amendment itself is a one-way street and was designed to be. No one would suppose that because it protects an adult defendant or juvenile respondent against compulsory self-incrimination, the prosecution should be permitted to incriminate the accused with perjurious or unreliable evidence. See § 9.09(b)(5) *infra.* The efficiency and fairness of

prescreening the prosecution's evidence for veracity and reliability is not diminished simply because the overriding policy of the Fifth Amendment makes impossible what would be equally, but independently, desirable — the prescreening of defense evidence as well. Aversion to one-way streets, in this dimension, is nothing more or less than a repudiation of the constitutional Privilege. Such a repudiation is particularly indefensible because the best founded attacks on the policy of the Privilege have always rested upon its tendency to protect the guilty, whereas it is the innocent who are worst hurt by denial of discovery on one-way street logic. Finally, the realities of criminal investigation are a one-way street the other way. Police and prosecutors have resources to gather and preserve evidence incomparably greater than those of the accused. *See Wardius v. Oregon,* 412 U.S. 470, 475-76 n.9 (1973). If equal advantage were the measure of fairness in criminal procedure — which the Fifth Amendment fundamentally denies — discovery in favor of the defense would nevertheless be required in virtually all situations.

§ 9.03 THE ADVISABILITY OF PURSUING INFORMAL DISCOVERY METHODS BEFORE RESORTING TO FORMAL DISCOVERY DEVICES

As a general rule, counsel should always pursue informal discovery options, asking the prosecutor for whatever is wanted, before counsel embarks upon discovery motions and other formal discovery devices. Judges understandably dislike being asked for compulsive orders when it is not clear that compulsion is necessary, and are likely to tell counsel to pursue informal remedies first. Indeed, in some jurisdictions, the discovery statutes explicitly require that defense attorneys employ informal discovery procedures before resorting to discovery motions. Moreover, if the defense has sought and been denied informal discovery, the balance of equities will tip in the defense's favor, with the judge blaming the prosecution for the expenditure of court time on a discovery matter.

Part B. Informal Discovery

§ 9.04 DESIGNING A STRATEGY FOR INFORMAL DISCOVERY

Prior to engaging in informal discovery, counsel will need to thoroughly familiarize himself or herself with local discovery rules and the constitutional doctrines that can be invoked in support of defensive discovery (described in § 9.09 *infra*). Even though counsel usually will not cite explicitly to these rules and doctrines, a knowledge of the scope of the respondent's formal discovery rights is important in deciding what information to request and the degree to which counsel can insist that s/he is entitled to the information. Moreover, occasionally it may be possible to break through an impasse in informal negotiations by demonstrating to the prosecutor that a particular doctrine or citation supports counsel's discovery request.

As a general rule, counsel should not restrict informal discovery requests to the information to which the defense is authoritatively entitled as a matter of law; instead counsel should seek everything that a liberal and enlightened criminal procedure would allow to the defense. Later in the process, when counsel is seeking judicial relief because of the prosecutor's

refusal to disclose information, counsel will need to weigh carefully whether to be venturesome or to limit discovery motions to materials that are plainly discoverable under the recognized statutes, rules, and constitutional doctrines. See § 9.08 *infra.* But, given the theory of informal discovery — that defense counsel is merely asking for whatever information the prosecutor is willing to disclose voluntarily — counsel need not, and should not, feel restricted to the categories of information that the prosecutor can be compelled to disclose through formal discovery.

§ 9.05 THE DISCOVERY LETTER

Generally, it is preferable to make discovery requests in written form. Discovery letters permit the type of careful phrasing that is difficult to achieve in oral requests. Moreover, if the prosecutor denies the request and counsel moves the court for a discovery order, it will be important to show precisely what counsel requested; a letter serves as the best record that any particular request was made and obviates arguments about how the request was framed. Finally, the written format permits an extended series of requests that would tax a prosecutor's time and patience if made orally in a discovery conference or a phone conversation.

To the extent possible, counsel should make the requests in the discovery letter highly specific. *Cf. United States v. Agurs,* 427 U.S. 97, 106-07 (1976). On the other hand, a discovery request limited to materials that defense counsel has sufficient information to identify with particularity may fail to cover some items that are crucial to the defense. One device for dealing with this problem is to frame discovery requests in the form of a series of concentric circles of increasing breadth and generality. Thus, for example, in an armed robbery prosecution, counsel might request:

(I) The following real or physical objects or substances:

(A) The "thing of value" that it is alleged in Count One of the Petition the respondent took from the complainant, John Smith, on or about May 1, 2014;

(B) Any other thing that it is claimed was taken from John Smith during the course of the robbery alleged in Count One;

(C) The "pistol" described by Detective James Hall at page 6, line 4 of the transcript of the probable-cause hearing in this case;

(D) Any other weapon that it is claimed was used by the respondent during the course of the robbery alleged in Count One of the Petition;

(E) Any other thing that it is claimed was used by the respondent as an instrumentality or means of committing the robbery alleged in Count One;

(F) Any real or physical object or substance that:

(1) the prosecution intends to offer into evidence at any trial or hearing in this case;

(2) the prosecution is retaining in its custody or control for potential use as evidence at any trial or hearing in this case;

(3) is being retained for potential use as evidence at any trial or hearing in this case by, or within the custody or control of:

(a) any personnel of the Oak City Police Department;

(b) any personnel of the State Bureau of Investigation;

(c) any personnel of the Oakland County Criminalistics Laboratory;

(d) [following paragraphs designate other relevant agencies];

(4) has been submitted to any professional personnel [as defined in a "Definitions" paragraph of the discovery request, encompassing all forensic science experts and investigators] for examination, testing, or analysis in connection with this case by:

(a) the Office of the Corporation Counsel [or whatever agency prosecutes juvenile delinquency cases];

(b) the District Attorney's office;

(c) any person previously described by paragraph (I)(F)(3)(a), (b), (c) or (d);

(5) has been gathered or received in connection with the investigation of this case by:

(a) the Office of the Corporation Counsel [or whatever agency prosecutes juvenile delinquency cases];

(b) the District Attorney's office;

(c) any personnel previously described by paragraph (I)(F)(3)(a), (b), (c), or (d);

(6) is relevant to:

(a) the robbery alleged in Count One of the Petition;

(b) the identity of the perpetrator of that robbery;

(c) the investigation of that robbery;

(d) the physical or mental state, condition, or disposition of the respondent at the time of:

(i) that robbery;

(ii) the confession allegedly made by the respondent, described by Detective James Hall at page 10, lines 12-23 of the transcript of the probable-cause hearing in this case;

(iii) any other confession, admission, or incriminating statement allegedly made by the respondent;

(iv) the present stage of the proceedings or any previous or subsequent stages of the proceedings;

(G) Every real or physical object or substance within the categories previously described by paragraphs (I)(A) through (I)(F), which hereafter comes into the possession, custody, or control of, or is, or hereafter becomes, known to:

(1) the Office of the Corporation Counsel [or whatever agency prosecutes juvenile delinquency cases];

(2) the District Attorney's office;

(3) any person previously described by paragraph (I)(F)(3)(a), (b), (c), or (d).

(II) [Following paragraphs describe other categories of materials — respondent's statements, witnesses' statements, police and investigative reports and records, lab test results, exculpatory materials, and so forth — in a similar manner.]

Discovery requests in this form have the virtue of covering everything that might be discoverable, whether known or unknown to defense counsel, while insulating counsel's requests

for narrower or more specific categories from denial on the ground that the broader or more general categories are impermissible "fishing expeditions" or include undiscoverable material.

Counsel should always include in every discovery letter a paragraph stating that each request for discovery should be construed as seeking not only information presently in the possession of the prosecution or its agents, but also "all like matter that hereafter comes into the possession of, or becomes known to, the attorney for the prosecution, or the police, or any other agents of the prosecution."

§ 9.06 THE DISCOVERY CONFERENCE

As a general rule, counsel should attempt to meet with the prosecutor in a discovery conference in addition to sending the type of discovery letter described in § 9.05 *supra.* The conference often will yield information not produced in the prosecutor's written response to the discovery letter.

The key to conducting a discovery conference effectively is to set an informal, conversational tone from the beginning. If counsel treats the conference as governed by strict rules, s/he will soon find the prosecutor denying every request on the theory that discovery in criminal and delinquency cases is very limited. If, on the other hand, counsel suggests that the two attorneys simply "talk over the case," the give-and-take of ordinary conversation usually will result in the prosecutor's disclosing information to which the defense is not technically entitled. Of course, "give-and-take" means precisely that: prosecutors usually will not give information that they are not required to give unless they feel that they are getting information in exchange. Accordingly, counsel should decide in advance what bits of information can be disclosed to the prosecutor as barter without in any way damaging the defense case or giving away too much of the defense strategy.

In addition to seeking information about the case, counsel should use the discovery conference as a vehicle for learning the prosecutor's attitude toward the seriousness of the offense and for discussing the possibility of dismissal of the Petition. If counsel can honestly and convincingly urge the client's innocence or the unfounded nature of a given charge, s/he may attempt to convince the prosecutor at this stage to drop charges or to present lesser ones. Counsel should remember that the prosecutor's personal view of guilt or innocence is important and that it is based on information — both favorable and unfavorable to the respondent — that may not be admissible as evidence in court. A complainant's shabby character or prior unfounded complaints may do counsel no good when the case goes to trial; it is with the prosecutor that they can be put to good effect. If counsel has arranged for the client to take a polygraph test and if the results are favorable, it is often effective to show those results to the prosecutor in support of a bid for dismissal.

It may also be useful to let the prosecutor know that counsel intends to work hard at the case (either explicitly, by saying so and explaining counsel's concern for the client, or implicitly,

by describing the motions that counsel intends to file or other work counsel intends to do on the case). The value of this is two-fold. First, if the prosecutor thinks that defense counsel is going all out, the prosecutor's estimate of the time and trouble involved in trying the case will increase and so may the prosecutor's willingness to offer concessions in order to settle the case before trial. Second, counsel's visible dedication to a client often tends to make the prosecutor's own attitude toward the client more sympathetic, in the view that the client probably has something on the ball to inspire all that zeal. Both of these impressions can, of course, backfire in some cases, causing the prosecutor to prepare more thoroughly or to develop a more competitive turn of mind. Counsel should seek to learn as much as possible about this particular prosecutor's psychology by asking other informed defense practitioners. Sometimes counsel will decide to keep contact with the prosecutor at a minimum in order to decrease the visibility of the case or avoid arousing the prosecutor's combativeness.

Finally, if the respondent is interested in "cutting a deal" with the State — exchanging testimony against a co-respondent or adult co-perpetrator for dismissal of the Petition or a plea to a lesser charge (see §§ 5.10, 8.14 *supra;* §§ 14.15, 14.18 *infra*) — counsel might begin discussing this possibility with the prosecutor at the discovery conference.

Part C. Formal Discovery: Mechanisms and Legal Bases

§ 9.07 TYPES OF FORMAL DISCOVERY PROCEDURES

Local practice varies widely with regard to whether and which discovery procedures are available. Counsel will need to consult local statutes, court rules, and caselaw, and counsel should confer with other defense attorneys practicing in the jurisdiction, to ascertain what types of discovery devices are customary. Even if certain devices are not recognized by the local courts, counsel can argue that they should be. Authorities and arguments supporting the recognition of various devices are found in the following literature, most of which is outspoken in favor of broadened criminal discovery: AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Chapter 11 ("Discovery Standards") (3d ed. 1996); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?,* 1963 WASH. U. L.Q. 279; Richard M. Calkins, *Criminal Justice for the Indigent,* 42 U. DET. L.J., 305, 334-35, 337-39 (1965); Richard M. Calkins, *Grand Jury Secrecy,* 63 MICH. L. REV. 455 (1965); Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review,* 53 FORDHAM L. REV. 391 (1984); Ronald L. Carlson, *False or Suppressed Evidence: Why a Need for the Prosecutorial Tie,* 1969 DUKE L.J. 1171; Robert L. Fletcher, *Pre-Trial Discovery in State Criminal Cases,* 12 STAN. L. REV. 293 (1960); Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149, 1172-98 (1960); Sheldon Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice,* 42 NEB. L. REV. 127 (1962); David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent?,* 49 CALIF. L. REV. 56 (1961); Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567 (1986); Barry Nakell, *Criminal Discovery for the Defense and the Prosecution — The Developing*

Constitutional Considerations, 50 N.C. L. REV. 437 (1972); Barry Nakell, *The Effect of Due Process on Criminal Defense Discovery,* 62 KY. L.J. 58(1973-74); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541; Daniel A. Rezneck, *The New Federal Rules of Criminal Procedure,* 54 GEO. L.J. 1276 (1966); Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097 (2004); Hon. H. Lee Sarokin & William E. Zuckermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie this Presumption*, 43 RUTGERS L. REV. 1089 (1991); Roger J. Traynor, *Ground Lost and Found in Criminal Discovery,* 39 N.Y.U. L. REV. 228, 749 (1964); Peter Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 121-31 (1974); Bureau Draft, *A State Statute to Liberalize Criminal Discovery,* 4 HARV. J. LEGISLATION 105 (1966); Katherine L. Hensley, Note, *Discovery Depositions: A Proposed Right for the Criminal Defendant,* 51 S. CAL. L. REV. 467 (1978); Edward M. Glickman, Note, *Disclosure of Grand Jury Minutes to Challenge Indictments and Impeach Witnesses in Federal Criminal Cases,* 111 U. PA. L. REV. 1154 (1963). A general approach to defense counsel's argument for broadened discovery rights is contained in § 9.02 *supra,* and constitutional considerations that may be advanced to support those rights are enumerated in § 9.09 *infra.*

The most commonly recognized formal discovery devices are discussed in §§ 9.07(a)-9.07(d) *infra.*

§ 9.07(a) Motion for a Bill of Particulars

Upon the filing of a charging paper that is insufficiently detailed to inform the respondent of the vital statistics of the offense charged, s/he may move for a bill of particulars, setting out in the motion the additional information that s/he seeks. The defense is ordinarily entitled to (a) the specific date and time of the offense; (b) its street location; (c) the name of the complainant or victim; and (d) the means by which it is asserted that the respondent committed the offense. Allowance of a bill of particulars is generally said to rest in the discretion of the court, and the standard jargon is that the bill does not lie to discover prosecution "evidence" (that is, means of proving facts, as distinguished from the operative facts of the offense themselves). But counsel should note the more liberal practice recognized in *Will v. United States,* 389 U.S. 90, 99 (1967).

In most jurisdictions the defense may not demur to the facts stated in the prosecutor's bill of particulars or move to dismiss it on the ground of failure to state an offense; and, in the event that the prosecution's proof at trial varies from the particulars contained in the bill, the defense is usually given nothing more in the way of relief than a continuance (or mistrial and continuance if continuance without a mistrial is not feasible); only very rarely will a court dismiss a prosecution for variance of the proof from a bill of particulars. The bill is therefore a device of limited utility.

§ 9.07(b) Motion for a List of Prosecution Witnesses

In many jurisdictions the statutes, court rules, or caselaw confer upon the defense a right

to the names of all witnesses whom the prosecution plans to use at trial. Usually this is limited to witnesses in the prosecution's case-in-chief and does not extend to potential rebuttal witnesses.

The right to a witness list is given by statutes or rules of two sorts: those that require the names of witnesses to be endorsed on the charging paper and those that authorize the defense to demand the names from the prosecutor. Even under statutes of the former sort, it is often common for prosecutors to withhold a witness list unless defense counsel ask them for it. If local rules require the inclusion of witnesses' names in the Petition, counsel can move to dismiss the Petition for failure to state the names. If the local rules do not establish such a requirement, counsel should either demand the list from the prosecutor directly or move the court for an order requiring the prosecutor to produce a list, as occasion warrants.

If, at trial, the prosecution attempts to present a witness not named in the list (or, in jurisdictions requiring the inclusion of names in the charging paper, a witness not named in the charging paper), counsel should object to the witness's testifying. The judge has the discretion to (i) exclude the testimony of the witness, or (ii) allow the witness to testify and allow the defense a continuance to prepare for cross-examining the witness and to gather defense witnesses responsive to the unannounced witness's testimony.

§ 9.07(c) Discovery Motions

In addition to the two specific types of discovery motions that have been described thus far — motions for a bill of particulars and motions for a list of witnesses — most jurisdictions provide for a generalized discovery motion in which the defense can seek production of any other information to which it is entitled by statute, court rule, or caselaw.

Depending upon the facts of the case, the defense may wish to move for production or inspection of:

1. *Physical objects*. Counsel should ask that these be released for testing by defense experts, if advised; or the court can be asked to order that defense experts be allowed to attend testing by prosecution experts.

2. *Medical and scientific reports.*

3. *Police and other investigative reports.* See § 8.19(a) *supra.*

4. *Written and oral statements of the respondent.*

5. *Written and oral statements of any co-respondents, adult co-perpetrators, or other alleged accomplices*.

6. *Statements of witnesses*.

7. *Official records* (maintained by detention facilities, prisons, jails, hospitals, probation departments, and so forth) relating to the respondent, co-respondents, adult co-perpetrators, and prosecution and defense witnesses, including materials relevant to credibility in the personnel files of police witnesses, investigative reports relating to previous complaints by the present complainant, and records of all police and prosecutorial transactions with any undercover agents involved.

8. *Criminal records* of the respondent, co-respondents, adult co-perpetrators, and prosecution and defense witnesses.

9. *Grand jury transcripts*, if grand jury proceedings were held in connection with any co-perpetrators charged as adults.

10. *Photographs and other visual aids* shown to witnesses by investigating officers for purposes of identification. *See Simmons v. United States,* 390 U.S. 377, 388 (1968) (dictum).

§ 9.07(d) Other Discovery-Related Motions

In addition to the foregoing motions, local practice may recognize (or counsel may be able to persuade the judge to recognize) one or more of the following types of motions, which involve the court's ordering the prosecution or prosecution witnesses to participate in certain discovery-related procedures:

1. Motions for medical or psychiatric examination of the complainant or other prosecution witnesses.

2. Motions for an order requiring the complainant and other prosecution witnesses to speak with the defense because of prosecutorial or police interference with the defense right to investigate. See § 8.13 *supra.*

3. Motions for an order requiring police witnesses to speak with the defense. See § 8.14 *supra.*

4. Motions for leave to take depositions of witnesses (complainants, police, and so forth), orally or on written interrogatories. *See, e.g.*, FLA. RULE JUV. PROC. 8.060(d) (2014) (establishing a procedure for depositions in delinquency cases patterned after the deposition procedure employed in adult criminal cases); VT. RULE FAM. PROC. 1(d)(4) (2014) (expressly incorporating the adult criminal procedure rules for depositions). *See also* § 8.13 *supra* (circumstances that may justify a trial order of deposition of a prosecution witness, even when depositions are not ordinarily available under local procedure, to remedy prosecutorial misconduct in advising a witness to refuse to talk with defense counsel or a

defense investigator).

In addition, counsel can, in certain circumstances, move for the detention of persons as material witnesses (see §§ 9.10(a), 10.02 *infra*).

§ 9.08 GENERAL STRATEGY WHEN EMPLOYING FORMAL DISCOVERY PROCEDURES

As explained in § 9.04 *supra,* counsel should ordinarily seek as much information as possible in informal discovery procedures. A different tack may be advisable, however, when requesting judicial relief through formal discovery motions. By limiting these motions to what counsel is likely to get, counsel can display an attitude of undemanding reasonableness that may persuade the court to exercise its discretion in favor of discovery in areas in which the local practice allows discovery but does not require it. Since discovery law in most jurisdictions confers broad discretionary power on the trial judge, it often makes sense to get or keep on the judge's good side by requesting nothing that s/he could regard as exorbitant. In deciding whether to employ this strategy, or whether to go for broke and ask for everything that an enlightened criminal procedure would give the defense, or whether to take some intermediate position between these two extremes, counsel will need to assess the temperament of his or her individual judge very carefully.

In any event counsel should make discovery requests as specific as possible, identifying the material that is wanted (*cf. United States v. Agurs,* 427 U.S. 97, 106-07 (1976)) and describing its relevance and importance for the preparation of the defense unless self-evident *(cf. United States v. Valenzuela-Bernal,* 458 U.S. 858, 871-74 (1982)). If counsel is unable to identify with specificity certain kinds of information that s/he wants, s/he should guard against the risk that the judge will deny the entire discovery motion as a "fishing expedition" by employing the "concentric circles" approach described in § 9.05 *supra.*

When requesting judicial relief, counsel should always relate his or her attempts to obtain the information through informal discovery, and the prosecutor's refusal to disclose it. See § 9.03 *supra.* If counsel sent a discovery letter to the prosecutor (see § 9.05 *supra*), a copy of the letter as well as any prosecutorial responses should be attached as an appendix to the discovery motion. When seeking judicially ordered disclosure of information to which the defense is not plainly entitled as a matter of routine under established precedent, counsel should take pains to demonstrate his or her efforts and inability to obtain the information independently: for example, counsel should recite his or her attempts to interview the prosecution witness(es) who know the information and the fact that the witness(es) refused to speak with counsel or the defense investigator. By documenting his or her assiduity, counsel will emphasize the point that s/he truly needs the information and is not just being lazy. An absence of any alternative means for obtaining the information underlines the need for judicial action. *Compare California v. Trombetta,* 467 U.S. 479, 488-90 (1984).

§ 9.09 CONSTITUTIONAL DOCTRINES THAT CAN BE INVOKED IN SUPPORT OF DEFENSE DISCOVERY

The *Brady* rule, which, as described in § 9.09(a) *infra,* provides a defense right to discovery of exculpatory information, is a firmly established doctrine, recognized and regularly applied in all jurisdictions. The other doctrines described in this section, which provide constitutional rationales for broader defense discovery rights, have not as yet been authoritatively recognized. Accordingly, when relying on the latter doctrines, counsel will need to fully brief their legal basis and should furthermore present a very compelling factual showing of need.

§ 9.09(a) The *Brady* Doctrine: The Right to Prosecutorial Disclosure of Evidence Helpful to the Defense

Brady v. Maryland, 373 U.S. 83 (1963), and its progeny require that the prosecution disclose, upon defense request, evidence in the prosecutor's possession that is material and potentially helpful to the defense. The Court ruled in *Brady* that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. *Accord*, *Smith v. Cain*, 132 S. Ct. 627 (2012); *Cone v. Bell*, 556 U.S. 449, 451, 469-70 (2009); *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999); *Kyles v. Whitley*, 514 U.S. 419, 432-38 (1995); *United States v. Tavera*, 719 F.3d 705, 711-12 (6th Cir. 2013).

In *Brady,* the evidence improperly suppressed by the prosecution was a co-defendant's confession that identified the co-defendant as the lone triggerman in a robbery-murder. In *United States v. Bagley,* 473 U.S. 667 (1985), the Court made clear that "[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule," and thus the *Brady* doctrine extends to "evidence that the defense might . . . use[] to impeach the Government's witnesses by showing bias or interest." *Id.* at 676. *Accord*, *Strickler v. Greene*, 527 U.S. at 280; *Kyles v. Whitley*, 514 U.S. at 433. *See also Smith v. Cain*, 132 S. Ct. at 630-31; *Amado v. Gonzalez*, 2014 WL 3377340, at *9-*10, *13-*15 (9th Cir. July 11, 2014); *Johnson v. Folino*, 705 F.3d 117, 129-30 (3d Cir. 2013)*; United States v. Mahaffy*, 693 F.3d 113, 130-33 (2d Cir. 2012); *In re Stenson*, 174 Wash. 2d 474, 488-89, 276 P.3d 286, 293-94 (2012). For example, "*Brady* requires prosecutors to disclose any benefits that are given to a government informant, including any lenient treatment for pending cases." *Maxwell v. Roe*, 628 F.3d 486, 510 (9th Cir. 2010), and cases cited.

The *Brady* "rule encompasses evidence 'known only to police investigators and not to the prosecutor' . . . [and] therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" *Strickler v. Greene*, 527 U.S. at 280-81 (quoting *Kyles v. Whitley,* 514 U.S. at 437-38); *Youngblood v. West Virginia*, 547 U.S. 867 (2006) (per curiam); *Aguilar v. Woodford*, 725 F.3d 970, 982-83 (9th Cir. 2013). *A fortiori*, a prosecutor's duty to learn about exculpatory and

impeaching evidence "includes evidence held by other prosecutors;" "knowledge of that evidence is imputed to . . . [the trial prosecutor] under *Brady*." *Id.* at 982.

"It is well established that the state violates a defendant's right to due process under *Brady* when it withholds evidence that is 'favorable to the defense' (and material to the defendant's guilt or punishment). . . . In describing evidence that falls within the *Brady* rule, the Supreme Court has made clear that impeachment evidence is 'favorable to the defense' even if the jury might not afford it significant weight." *Lambert v. Beard*, 537 Fed. Appx. 78, 86 (3d Cir. 2013). "We further hold that, to the extent the state court determined that the Police Activity Sheet was not exculpatory or impeaching under *Brady* because it was ambiguous, such determination was an unreasonable application of clearly established Supreme Court precedent." *Id.* at 85-86.

Defense counsel should always make a general *Brady* request in his or her discovery letter to the prosecution (see § 9.05 *supra*) and in discovery motions (see § 9.07(c) *supra*). Such a request might be framed in terms such as the following:

> any and all information within the possession of the prosecution which could constitute evidence favorable to the accused, or which may lead to material exculpatory evidence, within the meaning of *Brady v. Maryland,* 373 U.S. 83 (1963).

In addition, counsel should make particularized requests for any specific *Brady* information that might exist. While the prosecution does not escape its obligation to turn over *Brady* information when the defense request is "merely a general request" — or even when "there has been no [defense] request at all" — *United States v. Agurs,* 427 U.S. at 106-07; *Strickler v. Greene*, 527 U.S. at 280; *Kyles v. Whitley*, 514 U.S. at 433-34, the chances of reversal of a conviction may be somewhat improved if the prosecution failed to honor a specific *Brady* request. *See United States v. Bagley,* 473 U.S. at 682-83 (opinion of Blackmun, J.); *Pennsylvania v. Ritchie,* 480 U.S. 39, 58 n.15 (1987). *See also*, *e.g.*, *People v. Vilardi*, 76 N.Y.2d 67, 71-78, 555 N.E.2d 915, 916-21, 556 N.Y.S.2d 518, 519-24 (1990) (specific *Brady* request by defense counsel triggers the enhanced protections afforded by the state constitutional version of the *Brady* doctrine).

Because *Brady* and its progeny involved invalidations of convictions in response to posttrial revelations that the prosecutor had failed to disclose information favorable to the accused at any time prior to the conclusion of a trial, they do not speak directly to the requisite timing of *Brady* disclosures. But their rationale implies that disclosure of *Brady* material "must be made at such time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case." *United States v. Pollack,* 534 F.2d 964, 973 (D.C. Cir. 1976). *See also, e.g.*, AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.11(a) (3d ed. 1993) ("Disclosure of Evidence by the Prosecutor") (disclosure of *Brady* material "at the earliest feasible opportunity"); *id*., Standard 11-2.1(a) (1996) ("Prosecutorial Disclosure") (disclosure "within a specified and reasonable time prior to trial").

Compare United States v. Ruiz, 536 U.S. 622, 625, 631, 633 (2002) (*Brady* doctrine "does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant," given that pre-plea prosecutorial disclosure of "'information establishing the factual innocence of the defendant'" and other constitutional and systemic protections guard against the risk that "innocent individuals, accused of crimes, will plead guilty"), *with State v. Huebler*, 275 P.3d 91, 96-98 (Nev. 2012) ("the considerations that led to the decision in [*United States v.*] *Ruiz* do not lead to the same conclusion when it comes to material exculpatory information": "While the value of impeachment information may depend on innumerable variables that primarily come into play at trial and therefore arguably make it less than critical information in entering a guilty plea, the same cannot be said of exculpatory information, which is special not just in relation to the fairness of a trial but also in relation to whether a guilty plea is valid and accurate."; "We are persuaded by language in *Ruiz* and due-process considerations that a defendant may challenge the validity of a guilty plea based on the prosecution's failure to disclose material exculpatory information before entry of the plea.") *and Bridgeforth v. Superior Court*, 214 Cal. App. 4th 1074, 1077, 1087, 154 Cal. Rptr. 3d 528, 530, 538 (2013) ("applying the traditional three-factor due process analysis utilized in *Ruiz* . . . [and] the remaining considerations cited in *Ruiz*" to hold that the due process clauses of the federal and state constitutions require "the prosecution to disclose, prior to the preliminary hearing, evidence in its possession that is both favorable to the defense and material to the probable cause determination to be made at the preliminary hearing"). And, in any event, both prosecutors and judges should be sensitive to the argument that pretrial discovery is a better way to run a system than disclosure at trial, with a constitutionally compelled mistrial and continuance, or postconviction litigation of questions of nondisclosure. "[T]he aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.'" *Smith v. Phillips,* 455 U.S. 209, 219 (1982). This is why, as the Supreme Court noted pointedly in *Agurs,* "the prudent prosecutor will resolve doubtful questions in favor of disclosure." 427 U.S. at 108. *See also Cone v. Bell*, 556 U.S. at 470 n.15 ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. . . . As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles v. Whitley*, 514 U.S. at 439-40 ("Unless . . . the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result. ¶ This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. . . . This is as it should be. Such disclosure will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'. . . And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."); *Strickler v. Greene*, 527 U.S. at 281 (the *Brady* doctrine reflects "the special role played by the American prosecutor in the search for truth in criminal trials" and the prosecutor's

interest in ensuring that "'justice shall be done'" (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935))); *Banks v. Dretke*, 540 U.S. at 696 ("[a] rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

§ 9.09(b) Other Bases for Constitutional Contentions of Rights to Discovery

The following subparagraphs sketch additional constitutional principles to which defense counsel can sometimes advert in developing arguments to support particular discovery requests.

§ 9.09(b)(1) The Sixth Amendment Right to Counsel

The Sixth Amendment right to counsel, incorporated into the Fourteenth Amendment by *Gideon v. Wainwright,* 372 U.S. 335 (1963); *see also, e.g.*, *Alabama v. Shelton*, 535 U.S. 654, 661-62 (2002), guarantees more than that the respondent must have a lawyer. It assures "effective aid in the preparation and trial of the case," *Powell v. Alabama,* 287 U.S. 45, 71 (1932), and it is violated whenever defense counsel's performance is inadequate to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 691-692 (1984); *see id*. at 685-86; *Rompilla v. Beard*, 545 U.S. 374, 387-390 (2005); *Wiggins v. Smith*, 539 U.S. 510, 521-22, 524-28, 533, 534-35 (2003); *Williams v. Taylor*, 529 U.S. 362, 390-91, 395-97 (2000). The Amendment is not solely — or even primarily — an admonition to defense attorneys to do the best job they can under the circumstances. More basically, it invalidates any state-created procedure that compels counsel to operate under circumstances which preclude an effective defense effort. *Powell v. Alabama*, 287 U.S. at 71-73; *Holloway v. Arkansas*, 435 U.S. 475, 481-86 (1978); *Holt v. Virginia*, 381 U.S. 131 (1965); *Ferguson v. Georgia,* 365 U.S. 570 (1961); *Brooks v. Tennessee,* 406 U.S. 605 (1972); *Geders v. United States,* 425 U.S. 80 (1976); *Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980) (dictum). "[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." *Herring v. New York,* 422 U.S. 853, 857 (1975). For example, the Sixth Amendment has repeatedly been held to condemn eve-of-trial appointments of counsel that leave the lawyer inadequate time to prepare for trial. *E.g., Jones v. Cunningham,* 313 F.2d 347 (4th Cir. 1963); *Martin v. Virginia,* 365 F.2d 549 (4th Cir. 1966); *Roberts v. United States,* 325 F.2d 290 (5th Cir. 1963); *Townsend v. Bomar,* 331 F.2d 19 (6th Cir. 1964); *People v. Stella*, 188 A.D.2d 318, 318-19, 590 N.Y.S.2d 478, 478-79 (N.Y. App. Div., 1st Dep't 1992). *See also*, *e.g.*, *Catalan v. Cockrell*, 315 F.3d 491, 492-93 (5th Cir. 2002). Timely appointment of counsel was required by *Powell v. Alabama,* the fountainhead of all right-to-counsel cases, because during the pretrial period "consultation, thoroughgoing investigation and preparation were vitally important." 287 U.S. at 57. If adequate *time* to prepare is a constitutional mandate, adequate *information* to prepare is arguably no less necessary. For, as the Supreme Court has recognized, the pretrial gathering of this information is a vital part of the effective assistance of counsel that the Constitution commands. *See Coleman v. Alabama,* 399 U.S. 1, 9 (1970); *Adams*

v. Illinois, 405 U.S. 278, 281-82 (1972); *see also Rompilla v. Beard*, 545 U.S. at 387 ("The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense."); *Wiggins v. Smith*, 539 U.S. at 522, 524-26, 531-32, 534; *Williams v. Taylor*, 529 U.S. at 396; *Strickland v. Washington,* 466 U.S. at 690-91.

§ 9.09(b)(2) The Right to Fair Notice of Charges

In *Cole v. Arkansas,* 333 U.S. 196, 201 (1948), the Supreme Court recognized the "principle of procedural due process . . . that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." In *In re Gault,* 387 U.S. 1, 33-34 (1967), the Court recognized that a juvenile charged with a delinquency offense has the same right to fair notice of the charges as an adult criminal defendant. "These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." *Jackson v. Virginia,* 443 U.S. 307, 314 (1979).

"Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" *In re Gault,* 387 U.S. at 33. This principle may — though it probably needs not — be derived from the express right given an accused by the Sixth Amendment "to be informed of the nature and cause of the accusation." *See Faretta v. California,* 422 U.S. 806, 818 (1975) (dictum); *Herring v. New York,* 422 U.S. 853, 856-57 (1975). Even in noncriminal matters the Supreme Court has found a due process right to adequate notice of the issues posed for adjudication in a proceeding affecting individual interests. *E.g., Morgan v. United States,* 304 U.S. 1 (1938); *Gonzales v. United States,* 348 U.S. 407 (1955); *Goldberg v. Kelly,* 397 U.S. 254, 267-68 (1970) (dictum); *cf. Wolff v. McDonnell,* 418 U.S. 539, 563-64 (1974); *Goss v. Lopez,* 419 U.S. 565, 578-82 (1975); *Vitek v. Jones,* 445 U.S. 480, 494-96 (1980); *but see Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1, 14 n.6 (1979). A passing *dictum* in *United States v. Agurs,* 427 U.S. 97, 112 n.20 (1976), says that "the notice component of due process refers to the charge rather than the evidentiary support for the charge"; but the line between these two will often be shadowy.

§ 9.09(b)(3) The Sixth Amendment Right to Confrontation

The extent to which the Sixth Amendment right to confrontation governs pretrial discovery is unclear in light of *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987). The lead opinion in *Ritchie,* written by Justice Powell, is a majority opinion except on one point: its analysis of the Confrontation Clause. On that point, Justice Powell, with three other Justices concurring, concluded that "the right of confrontation is a *trial* right" and cannot be "transform[ed] . . . into a constitutionally-compelled rule of pretrial discovery." *Id.* at 52. However, three Justices — Justices Brennan and Marshall in dissent, and Justice Blackmun concurring solely in the plurality's result on this point — concluded that the Confrontation Clause does confer upon the

defense a constitutional right to discovery of information that would facilitate effective cross-examination. *See id.* at 61-62 (Blackmun, J., concurring) ("In my view, there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness"); *id.* at 66 (Brennan, J., dissenting) ("the right of cross-examination . . . may be significantly infringed by . . . the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial"; the trial court's "denying access to the prior statements of the victim . . . deprived Ritchie of material crucial to any effort to impeach the victim at trial . . . [and was] a violation of the Confrontation Clause"). The remaining two Justices, Justices Stevens and Scalia, took no position on the Confrontation Clause issue, concluding that the writ of *certiorari* should have been dismissed because the lower court's judgment was not yet final. *See id.* at 78 (Stevens, J., dissenting).

The elements of a Confrontation Clause argument in support of discovery are set forth in Justice Brennan's dissent in *Ritchie. See* 480 U.S. at 66-72. Since the argument has not been rejected by a majority of the Court — and, indeed, was expressly supported by three members of the Court — counsel can continue to press it as a basis for discovery requests. *See, e.g.*, *State v. Peseti*, 101 Hawai'i 172, 186, 65 P.3d 119, 133 (2003); *Commonwealth v. Barroso*, 122 S.W.3d 554, 559-60, 561 (Ky. 2003).

§ 9.09(b)(4) The Right To Present Defensive Evidence

The Sixth Amendment guarantees a criminal defendant or juvenile respondent the right "to have compulsory process for obtaining witnesses in his favor." In *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987), a majority of the Court recognized that "[o]ur cases establish, at a minimum, that criminal defendants have the right to the Government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Id.* at 56. "[C]onclud[ing] . . . that compulsory process provides no *greater* protections in this area than those afforded by due process," the Court elected to analyze the claim solely as a *Brady* issue, *id.* at 56; see § 9.09(a) *supra,* without "decid[ing] . . . whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment."

Pending the Court's resolution of the parameters of the compulsory process right, counsel can argue that the Compulsory Process Clause of the Sixth Amendment, when coupled with the Due Process Clause, confers a right to present defensive evidence, *see Webb v. Texas,* 409 U.S. 95 (1972); *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973), which, in turn, implies a corollary right to pretrial discovery of information in the sole possession of the prosecution that might lead to defensive evidence. *Cf. Roviaro v. United States,* 353 U.S. 53 (1957); *United States v. Augenblick,* 393 U.S. 348, 356 (1969) (dictum). *See generally* Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845 (1995).

§ 9.09(b)(5) The Right Against Concealment of Evidence That Impeaches Prosecution Testimony

A line of decisions from *Mooney v. Holohan,* 294 U.S. 103 (1935), to *Miller v. Pate,* 386 U.S. 1 (1967), condemns the prosecutive presentation of perjured testimony. *See generally Strickler v. Greene*, 527 U.S. 263, 281 & n.19 (1999) (dictum); *United States v. Agurs,* 427 U.S. 97, 103-04 (1976) (dictum). Specifically, the Court has held that the Due Process Clause invalidates a state conviction obtained after a trial at which the prosecutor has knowingly elicited false testimony from a witness, even on a matter relating to the witness's credibility rather than directly to the defendant's guilt, *Alcorta v. Texas,* 355 U.S. 28 (1957), or at which the prosecutor has knowingly permitted the witness to testify falsely on such a matter, *Napue v. Illinois,* 360 U.S. 264 (1959). Under *Napue,* if the prosecution knows of any evidence inconsistent with the testimony of one of its material witnesses and "relevant to his credibility," the defense and "the jury [are] . . . entitled to know of it." *Giglio v. United States,* 405 U.S. 150, 155 (1972). *See, e.g.*, *Dow v. Virga*, 729 F.3d 1041, 1047-51 (9th Cir. 2013); *Guzman v. Secretary*, 663 F.3d 1336 (11th Cir. 2011); *Sivak v. Hardison*, 658 F.3d 898 (9th Cir. 2011). *Cf. Moore v. Illinois,* 408 U.S. 786, 797-98 (1972) (dictum). *And see Phillips v. Ornosky*, 673 F.3d 1168, 1183-1185 (9th Cir. 2012) ("*Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (en banc) controls this case. . . . In *Hayes*, as here, the prosecutor had reached a deal with the attorney for a key state witness, James, providing for the dismissal of all felony charges against him . . . if he testified against Hayes at trial. *Id*. at 977. As in this case, the prosecution elicited a promise from James's attorney that James would not be informed of the deal, and at trial James testified that he had received no promise of benefits in exchange for his testimony. *Id*. at 977, 980. As we observed in *Hayes*, and as is equally applicable here, that a witness may have been unaware of the agreement entered into on his behalf may mean that his testimony denying the existence of such an agreement is not knowingly false or perjured, but it does not mean it is not false nevertheless. As we explained in *Hayes*: ¶ '[T]hat the witness was tricked into lying on the witness stand by the State does not, in any fashion, insulate the State from conforming its conduct to the requirements of due process. . . . The fact that the witness is not complicit in the falsehood is what gives the false testimony the ring of truth, and makes it all the more likely to affect the judgment of the jury. That the witness is unaware of the falsehood of his testimony makes it more dangerous, not less so.' ¶ . . . In *Hayes* we made clear in no uncertain terms that the practice of 'insulating' a witness from her own immunity agreement so that she can profess ignorance of the benefits provided in exchange for her testimony is an egregious violation of the prosecution's obligations under *Napue*."). It is but a short step to hold that since the whole of every witness's testimony impliedly asserts its veracity, nondisclosure of any material known to the prosecution that is legally admissible to impeach the witness would also violate due process. *Cf. Giles v. Maryland,* 386 U.S. 66 (1967). The California Supreme Court, for example, has required disclosure of the felony record of a prosecution witness on this theory. *In re Ferguson,* 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971).

§ 9.09(b)(6) The Right Against Prosecutorial Suppression of Evidence Favorable to the Defense

The *Brady* doctrine described in § 9.09(a) *supra* governs prosecutorial disclosure of evidence helpful to the defense. A closely related, but conceptually distinct, doctrine prohibits the prosecutor from suppressing evidence favorable to the defense. This right was recognized as an alternative ground of decision in *Pyle v. Kansas,* 317 U.S. 213 (1942), and *Wylde v. Wyoming,* 362 U.S. 607 (1960). It is best expounded in *United States ex rel. Almeida v. Baldi,* 195 F.2d 815 (3d Cir. 1952).

This doctrine is at the heart of the caselaw described in § 8.13 *supra,* establishing a right to judicial relief when the prosecution suppresses evidence by instructing witnesses not to speak with defense counsel or a defense investigator. The doctrine would also seem to imply a right of defense access to any exculpatory or favorable materials that are within the exclusive control of the prosecutor, such as impounded physical objects. The Supreme Court has recognized that if the police or the prosecutor, acting in "bad faith," destroys evidence "potentially useful" to the defense, its destruction violates the accused's due process rights. *See Arizona v. Youngblood*, 488 U.S. 1, 57-58 (1988) (dictum); *Illinois v. Fisher*, 540 U.S. 544, 547-48 (2004) (per curiam) (dictum). *Compare id*. at 549 n.* (Justice Stevens, concurring in the judgment) (collecting citations to cases in which, "[s]ince *Youngblood* was decided, a number of state courts have held as a matter of state constitutional law that the loss or destruction of evidence critical to the defense does violate due process, even in the absence of bad faith"); *State v. Tiedemann*, 162 P.3d 1106, 1115-17 (Utah 2007) (rejecting *Arizona v. Youngblood*'s "bad faith" requirement on state constitutional grounds); *People v. Handy*, 20 N.Y.3d 663, 669, 988 N.E.2d 879, 882, 966 N.Y.S.2d 351, 354 (2013) (declining to reach the question of whether to reject *Youngblood* on state constitutional grounds and instead "resolv[ing] this case, following the approach taken by the Maryland Court of Appeals in *Cost v. State*, 417 Md. 360, 10 A.3d 184 (2010), by holding that, under the New York law of evidence, a permissive adverse inference charge should be given where a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and where that evidence has been destroyed by agents of the State"). As long as the evidence has not been destroyed but is still in the state's possession, the language and logic of the Supreme Court's decisions are clear that "the good or bad faith of the prosecution is irrelevant" and that the prosecution "must disclose material exculpatory evidence." *Illinois v. Fisher*, 540 U.S. at 547. *Accord*, *Arizona v. Youngblood*, 488 U.S. at 57.

§ 9.09(b)(7) The Right Against an Unfair Balance of Advantage Favoring the Prosecution

The decision in *Wardius v. Oregon,* 412 U.S. 470 (1973), appears to be seminal inasmuch as it recognizes that the Due Process Clause "does speak to the balance of forces between the accused and his accuser." *Id.* at 474. *See also United States v. Ash,* 413 U.S. 300, 309 (1973), noting the Sixth Amendment's concern against "the imbalance in the adversary system that otherwise [that is, without defense counsel] resulted with the creation of a professional prosecuting official." These decisions suggest that Justice Cardozo's famous phrase about

keeping "the balance true," *Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934), may be more than just a jurisprudential attitude: It may be a constitutionally enforceable right of the defense.

Although this notion is still embryonic, two obvious implications of *Wardius* deserve note. First of all, any criminal procedures that provide "nonreciprocal benefits to the State" in regard to the investigation, preservation, and presentation of its evidentiary case should be constitutionally assailable "when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." 412 U.S. at 474 n.6. For example, if procedures are available by which the prosecution can detain witnesses or collect and secure other evidence, favorable to its case, then either the prosecution should be obliged equally to collect, secure, and make available witnesses and evidence favorable to the defense, or at least the defense should be given equal use of the procedures. *Cf. People ex rel. Gallagher v. District Court,* 656 P.2d 1287 (Colo. 1983) (defendant was denied due process when police refused to perform forensic test requested by defense counsel before testing was rendered impossible by preparation of homicide victim's body for burial); compare the cases holding that the unnecessary destruction of material evidence in the course of forensic testing by the prosecution, so as to preclude independent testing by defense experts, constitutes a violation of due process, *State v. Vannoy*, 177 Ariz. 206, 209-12, 866 P.2d 874, 878-80 (Ariz. App. 1993); *People v. Hitch,* 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974); *People v. Nation,* 26 Cal. 3d 169, 604 P.2d 1051, 161 Cal. Rptr. 299 (1980) (dictum); *People v. Gomez,* 198 Colo. 105, 596 P.2d 1192 (1979); *People v. Garries,* 645 P.2d 1306 (Colo. 1982); *State v. Blackwell*, 245 Ga. App. 135, 137-42, 537 S.E.2d 457, 460-63 (2000); *People v. Taylor,* 54 Ill. App. 3d 454, 369 N.E.2d 573, 12 Ill. Dec. 76 (1977); *People v. Dodsworth,* 60 Ill. App. 3d 207, 376 N.E.2d 449, 17 Ill. Dec. 450 (1978); *and see California v. Trombetta,* 467 U.S. 479 (1984) (limiting this doctrine to "evidence that both possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means," *id.* at 489), *and Arizona v. Youngblood*, 488 U.S. 1, 57-58 (1988), limiting the doctrine to destruction in "bad faith"). If court orders or compulsory process can be issued to assist the prosecution in conducting lineups, fingerprint or handwriting or voice comparisons, or other scientific tests, the results of those investigations must be disclosed to the defense; and judicial process must be made available for the conduct of similar investigations at the instance of the defense, at least to search out "evidence that might be expected to play a significant role in the . . . defense," *California v. Trombetta,* 467 U.S. at 488. *See Evans v. Superior Court,* 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974); *cf. United States v. Ash,* 461 F.2d 92, 104 (D.C. Cir. 1972) (en banc) (dictum), *rev'd on other grounds,* 413 U.S. 300 (1973).

Second, *Wardius* raises the question to what extent "the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." 412 U.S. at 475 n.9. In a case in which counsel can compile a strong record of his or her unsuccessful attempts to obtain important defensive information from the prosecution and his or her equally unsuccessful efforts to acquire the information through independent sources, it may be possible to persuade a court that the traditional plight of the impecunious respondent — going into trial blind in the face of a well-prepared adversary —

itself requires the allowance of corrective discovery measures under *Wardius.*

§ 9.09(b)(8) The Obligation of the Equal Protection Clause That a State Not Permit an Indigent Respondent To Be Deprived of "The Basic Tools of an Adequate Defense" by Reason of Poverty

The equal protection doctrine guaranteeing an indigent respondent "the basic tools of an adequate defense," *Britt v. North Carolina,* 404 U.S. 226, 227 (1971) (dictum), is discussed in § 4.31(d) *supra* and § 11.03(a) *infra.* One method of compensating for the investigative disadvantage suffered by impoverished respondents, compared to respondents who have money, is to allow the defense the products of prosecutive investigation through discovery.

§ 9.10 RESPONSES TO PROSECUTORIAL ASSERTIONS THAT THE INFORMATION THAT THE DEFENSE IS SEEKING IS PRIVILEGED

§ 9.10(a) The "Informer's Privilege"

The courts have recognized an "informer's privilege" that empowers the prosecution to conceal the name of a confidential source of information, upon a claim of the privilege by the prosecutor and a representation that disclosure would endanger the prosecution's interests.

In *Roviaro v. United States,* 353 U.S. 53 (1957), the Supreme Court discussed the applicability of the privilege to block a criminal defendant's request for the name of an informer who appeared, from the trial testimony, to have been a central figure in the narcotics transactions with which the defendant was charged. The Court there required disclosure of the name, concluding "that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* at 62. *See also United States v. Valenzuela-Bernal,* 458 U.S. 858, 870-71 (1982) (dictum); *State v. Jackson*, 239 Conn. 629, 631-37, 687 A.2d 485, 486-89 (1997); *Commonwealth v. Madigan*, 449 Mass. 702, 705-11, 871 N.E.2d 478, 481-86 (2007); *State v. Florez*, 134 N.J. 570, 578-83, 636 A.2d 1040, 1044-46 (1994).

The Court cut back somewhat on the *Roviaro* doctrine in *McCray v. Illinois,* 386 U.S. 300 (1967), upholding a trial court's refusal to order disclosure of the name of an informer at a hearing on a motion to suppress tangible evidence, even though the informer's information was being relied upon to support a warrantless arrest and incidental seizure. However, the diffuseness of the *McCray* decision makes it difficult to ascertain exactly how much of *Roviaro* it retracts. Certainly, "*McCray* does not establish an absolute rule against disclosure," even at a suppression hearing. *State v. Casal,* 103 Wash. 2d 812, 817, 699 P.2d 1234, 1237 (1985). *"McCray* . . . concluded only that the Due Process Clause of the Fourteenth Amendment did not require the

State to expose an informant's identity routinely, upon a defendant's mere demand, when there was ample evidence in the probable-cause hearing to show that the informant was reliable and his information credible." *Franks v. Delaware,* 438 U.S. 154, 170 (1978). Moreover, *McCray*'s limitations upon *Roviaro* arguably apply only to informers whose information bears exclusively upon a pretrial search-and-seizure issue and do not affect the *Roviaro* rules governing informers who have information pertinent to the central trial issue of guilt or innocence. So, for the present, defense counsel would be warranted in continuing to press for the disclosure of informers' names, both before and at trial, as defensive needs dictate. Of course, the attempt should be made to assimilate the case as much to *Roviaro,* and to segregate it as much from *McCray,* as possible. If an informer's identity is needed both to challenge a search and seizure, for example, and to defend on the guilt issue, a pretrial discovery motion should rest on the latter need.

Even when the informer's privilege does bar disclosure of an informant's identity, it does not protect "the contents of a communication [when these] will not tend to reveal the identity of an informer"; nor does it protect the informer at all "once . . . [his or her] identity . . . has been [otherwise] disclosed to those who would have cause to resent the communication." *Roviaro v. United States,* 353 U.S. at 60 (dictum). Its purpose is to prevent the improvident unmasking of government undercover agents. *Cf. Weatherford v. Bursey,* 429 U.S. 545, 557-60 (1977). Nothing in the privilege, therefore, precludes inquiry into such matters as a confidential informant's batting average (see § 23.32(b) *infra*) or the terms of the informant's compensation by the government or the informant's own guilt of criminal offenses or the promises of immunity made to the informant to induce him or her to inform. Nor, once an informant is known, does the privilege authorize the prosecution to shield that informant from being interviewed by the defense. When counsel ascertains an informant's identity and finds that the informant is evading attempts to be contacted and interviewed or when it otherwise appears that s/he may vanish before trial, counsel should not hesitate to seek his or her arrest as a material witness. See § 10.02 *infra.* Police spies, "special agents," and undercover informers often are criminals cooperating with the government in return for nonprosecution; they are exceedingly unstable and likely to disappear without a trace; and the prosecution cannot be relied upon to know of their whereabouts. If defense counsel wants to be assured that they will be around at the time of trial, therefore, counsel may have no option but to use material-witness procedures to have them jailed. *Cf.* § 10.08(c) *infra.*

§ 9.10(b) Work Product

In federal cases, the "work product" doctrine of *Hickman v. Taylor,* 329 U.S. 495 (1947), and *Upjohn Co. v. United States,* 449 U.S. 383, 397-402 (1981), appears to apply to criminal discovery, *see United States v. Nobles,* 422 U.S. 225, 236 (1975) (dictum), protecting "the mental processes of the attorney," 422 U.S. at 238, whether that attorney be the prosecutor or defense counsel, *see id.* at 238 & n.12; *cf. United States v. Valenzuela-Bernal,* 458 U.S. 858, 862 n.3 (1982). *But see Goldberg v. United States,* 425 U.S. 94, 101-08 (1976) ("work product" protection does not bar production at trial of prior statements of government witnesses that are "otherwise producible under the Jencks Act" (*id.* at 108)).

Whether such a limitation of defense discovery is recognized in state criminal cases is, of course, in the first instance a matter of local law. But local law cannot extend "work product" protection to any materials that are constitutionally required to be disclosed to the defense. *Davis v. Alaska,* 415 U.S. 308 (1974); *cf. Chambers v Mississippi,* 410 U.S. 284 (1973). Thus, for example, a "work product" privilege could not override the prosecutor's due process obligation to disclose exculpatory materials and such impeaching information as the existence of promises made by the prosecutor to prosecution witnesses. See § 9.09(a) *supra.*

§ 9.10(c) Other Claims of Governmental Privilege

It is not uncommon for prosecutors to "stonewall" defense discovery requests by broad claims of some unspecified privilege to protect "governmental secrets" or "government operations" or the "confidential relations" of government employees. If any privilege of this sort is recognized beyond the scope of the informer's privilege (§ 9.10(a) *supra*) and the attorney's work product doctrine (§ 9.10(b) *supra*), it is extremely narrow, *see, e.g., United States v. Nixon,* 418 U.S. 683 (1974); *Kerr v. United States District Court,* 426 U.S. 394 (1976), and is arguably altogether inapplicable in criminal and delinquency prosecutions because "it is unconscionable to allow [a government] . . . to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *United States v. Reynolds,* 345 U.S. 1, 12 (1953) (dictum).

Part D. Discovery by the Prosecution Against the Defense

§ 9.11 THE PROSECUTION'S RIGHT TO DISCOVERY

Most States have enacted statutes requiring that respondents who intend to employ a defense of alibi or insanity must file a pretrial notice of their intention and inform the prosecution of certain particulars relating to the proposed defense, including the names of witnesses who will be called to prove it. In addition, in many States, statutes confer upon the prosecution a right to obtain discovery from the defense of certain other categories of information such as the names and sometimes statements of intended defense witnesses, reports of defense experts, and tangible evidence. The latter statutes are generally of one or the other of two types: those that give the prosecution affirmative independent discovery rights; and those that give the prosecution reciprocal discovery rights, allowing the prosecutor to obtain certain types of information from the defense if and after the defense has first sought similar information from the prosecution.

Even when discovery by the prosecutor is legislatively authorized, it is "limited . . . by . . . constitutional privileges." *Standefer v. United States,* 447 U.S. 10, 22 (1980) (dictum). The limitations imposed by the Fifth Amendment Privilege Against Self-Incrimination are discussed in § 9.12 *infra,* and those established by the Sixth Amendment right to counsel in § 9.13 *infra.*

If counsel is practicing in a jurisdiction that has no statute authorizing prosecutorial discovery, counsel should oppose all discovery motions by the prosecution on the ground that

such a radical change from traditional procedures is a matter for the Legislature and should not be ordered by a court without express legislative authority. It is one thing for the judiciary to institute discovery procedures in favor of the defense, inasmuch as these procedures tend to promote constitutional values that are particularly committed to the care of courts. See § 9.09 *supra; and see Jencks v. United States,* 353 U.S. 657 (1957). It is quite another thing to institute unprecedented procedures in favor of the prosecution — procedures that often raise close constitutional questions and that prosecutors (unlike juvenile respondents) surely have the power to obtain from the Legislature if the Legislature deems those procedures advisable. *Cf. United States v. LaSalle National Bank,* 437 U.S. 298, 312-13 (1978) (dictum).

§ 9.12 FIFTH AMENDMENT LIMITATIONS UPON PROSECUTORIAL DISCOVERY

When the Court in *Williams v. Florida,* 399 U.S. 78 (1970), sustained the constitutionality of an alibi-notice statute, the Court's Fifth Amendment analysis started from the premise that the defendant intended to present the alibi information at trial. There could be no viable claim of compelled self-incrimination, the Court said, because the choice to adduce or withhold this information was left entirely to the defendant; all the statutory requirement of an alibi notice did was to advance the *time* of disclosure of material that the defendant had freely elected to spread upon the record at trial in any event. *Id.* at 83-86. The corollary of this reasoning is that court-ordered disclosure to the prosecution of any potentially incriminating matter that the defense does *not* intend to produce at trial violates the Fifth Amendment. *See Prudhomme v. Superior Court,* 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970). Indeed, the Supreme Court has impliedly so held several times since *Williams. Brooks v. Tennessee,* 406 U.S. 605 (1972); *New Jersey v. Portash,* 440 U.S. 450 (1979); *United States v. Doe,* 465 U.S. 605 (1984); *compare Estelle v. Smith,* 451 U.S. 454 (1981), *with Buchanan v. Kentucky,* 483 U.S. 402, 422-24 (1987), *and Kansas v. Cheever*, 134 S. Ct. 596, 600-02 (2014).

No pretrial discovery sought by the prosecution may therefore be ordered that would require the respondent, personally or through counsel, to make any oral or written statement whose contents "would furnish a link in the chain of evidence needed to prosecute the [respondent] . . . for a crime," *Hoffman v. United States,* 341 U.S. 479, 486 (1951); *see Blau v. United States,* 340 U.S. 159, 161 (1950); *Maness v. Meyers,* 419 U.S. 449, 461 (1975), or that would provide "'an investigatory lead,' [or produce] . . . evidence . . . by focusing investigation on [the respondent] . . . as a result of his compelled disclosures," *Kastigar v. United States,* 406 U.S. 441, 460 (1972), unless the information which is ordered to be disclosed is either information that the respondent intends to adduce at trial or information that the prosecutor could properly bring out on cross-examination of the respondent in the light of what the respondent does intend to adduce at trial — that is, material "reasonably related to those [subjects that will be] brought out in direct examination" of the respondent, *United States v. Nobles,* 422 U.S. 225, 240 (1975), or material constituting proper rebuttal of other defense evidence, *see Buchanan v. Kentucky,* 483 U.S. at 422-24; *Kansas v. Cheever*, 134 S. Ct. at 600-02, 603.

Ordering the respondent to disclose tangible evidence, on the other hand, would not

violate the Fifth Amendment Privilege, under the principle that the Fifth Amendment forbids only "testimonial self-incrimination," *Fisher v. United States,* 425 U.S. 391, 399 (1976). *See also Schmerber v. California,* 384 U.S. 757 (1966) (extracting blood from drunk-driving suspect for chemical analysis does not violate Fifth Amendment); *United States v. Mara,* 410 U.S. 19 (1973) (requiring suspect to produce handwriting exemplar does not violate Fifth Amendment); *United States v. Dionisio,* 410 U.S. 1 (1973) (requiring suspect to speak for voice identification does not violate Fifth Amendment). And the Supreme Court has applied this principle to permit compelled production of preexisting writings, *Fisher v. United States*, 425 U.S. at 414, including an incriminated person's own business records, *United States v. Doe*, 465 U.S. 605 (1984). The cases that allow the compulsion of document production by an individual whom those documents incriminate severely limit but do not completely overrule *Boyd v. United States,* 116 U.S. 616 (1886), insofar as *Boyd* forbids courts to compel the production of a person's "private books and papers," *id.* at 633. *Boyd* is no longer good law as to "business records," *United States v. Doe,* 465 U.S. at 606; *see also Fisher v. United States*, 425 U.S. at 414; *Andresen v. Maryland*, 427 U.S. 463 (1976), but it may survive as a protection of nonbusiness papers (*see Fisher v. United States,* 425 U.S. at 414 (distinguishing *Boyd*); *United States v. Miller,* 425 U.S. 435, 440 (1976) (same); *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 355-56 (1977) (treating *Boyd* ambiguously); *United States v. Ward,* 448 U.S. 242, 251-54 (1980) (same); *United States v. Doe,* 465 U.S. at 610-11 & nn.7, 8 (same)), or at least of peculiarly private papers like personal letters and diaries (*cf. Hill v. California,* 401 U.S. 797, 805-06 (1971) (reserving the question); *Fisher v. United States,* 425 U.S. at 401 n.7 (same)). Given this uncertain state of the law, defense counsel is warranted in interposing Fifth Amendment objections to any prosecutorial discovery request seeking nonbusiness documents whose contents incriminate a respondent.

The Fifth Amendment also unquestionably forbids prosecutorial discovery of any document — business or nonbusiness, and whether written by the respondent or by anyone else — when the *act of producing that document,* as distinguished from the contents of the document, would be incriminating. This is the case whenever (a) the act of production would constitute an admission of the existence or possession of the document, in a context in which such an admission would be probative of the respondent's guilt, *United States v. Hubbell*, 530 U.S. 27, 36 & n.19 (2000); *United States v. Doe*, 465 U.S. at 612-14; *Fisher v. United States*, 425 U.S. at 410-12 (dictum), or (b) the act of production would constitute an implicit authentication of the document, when such an authentication could be used by the prosecution as part of its case against the respondent, *id.* at 412-13 & n.12 (dictum); *Andresen v. Maryland,* 427 U.S. at 473 & n.7 (dictum). In these situations, notably, the prosecution cannot avoid the Fifth Amendment objection by foreswearing evidentiary use of the implications arising from the act of production, *see United States v. Doe*, 465 U.S. at 612-14; if the prosecution *could* use those implications in any way to make its case against the respondent, then the respondent cannot constitutionally be required to produce.

Similarly, the pretrial discovery of other tangible objects possessed by the respondent whose existence or possession is incriminating, or of information obtained by defense counsel from third parties whose identities or connections with the case could lead the prosecution to

incriminating evidence should be forbidden because, whatever the original source of that information may have been, it is now being sought from the respondent through compulsory process addressed to the respondent (*compare United States v. Miller*, 425 U.S. at 440-45; *Andresen v. Maryland*, 427 U.S. at 473-77; *Couch v. United States*, 409 U.S. 322 (1973)) for possible use by the prosecutor in prosecuting the respondent. *See People v. Havrish*, 8 N.Y.3d 389, 393-97, 866 N.E.2d 1009, 1012-16, 834 N.Y.S.2d 681, 684-88 (2007) (when the defendant in a domestic violence case was ordered by the court to "surrender any and all firearms owned or possessed," the unlicensed handgun which he surrendered to the police should have been suppressed as a compelled communication in violation of the Fifth Amendment Privilege Against Self-Incrimination: "the surrender of evidence can be testimonial if, by doing so, defendant tacitly concedes that the item demanded exists or is in defendant's possession or control when these facts are unknown to the authorities and would not have been discovered through independent means"). Admittedly, *United States v. Nobles,* 422 U.S. 225 (1975), appears to hold that the Fifth Amendment privilege does not cover records of defense interviews with persons other than the accused, at least when those persons are independently available to the prosecution. But *Nobles* was a case involving the prosecution's power to secure discovery of portions of a defense investigator's report after (1) the prosecution had concluded its case-in-chief at trial and (2) the defense had called the investigator to testify concerning interviews with prosecution witnesses. *See Corbitt v. New Jersey,* 439 U.S. 212, 219 n.8 (1978). In this situation the defense has voluntarily presented evidence about a set of facts; its evidence indicates that the underlying facts are not only already known to the prosecution but also have already been the subject of testimony by prosecution witnesses; and its Fifth Amendment claim is therefore necessarily limited to a contention that a particular recorded version of those same facts is privileged merely because it was made by an agent of the defense other than the accused. *Nobles'* rejection of that contention does not imply that a respondent can be compelled by court order to come forward with materials whose existence, possession, or authentication are incriminating *unless and until* s/he has voluntarily elected to adduce those materials at trial. This compulsion would obviously affront the basic policy of the Self-Incrimination Clause that requires the prosecution "'to shoulder the entire load,'" *Miranda v. Arizona,* 384 U.S. 436, 460 (1966); *compare Andresen v. Maryland,* 427 U.S. at 475-76 & n.8.

Counsel should therefore resist, on Fifth Amendment grounds, any and all prosecutorial discovery prior to the time when s/he has had an opportunity to investigate and prepare the defense case; and s/he should insist upon the right to defer decision concerning what s/he will present at trial until s/he has been given ample prior disclosure of the prosecutor's case to enable counsel to make that decision intelligently. If prosecutorial discovery is ever to be ordered, the respondent has a due process right to reciprocal discovery under *Wardius v. Oregon,* 412 U.S. 470 (1973), see § 9.09(b)(7) *supra;* and the decision in *Brooks v. Tennessee*, 406 U.S. 605 (1972), demonstrates that no disclosure may be required of the defense unless (i) *prior* to the time when the respondent is asked to disclose, (ii) s/he is given a sufficient preview of the prosecutor's case to make an advised and intelligent decision concerning what, if any, defensive evidence s/he will present at trial. *Brooks* invalidated a statute requiring that if a defendant was going to testify, s/he must testify before any other defense evidence was presented. That

requirement was held to violate the Fifth Amendment on the ground that the constitutional Privilege Against Self-Incrimination forbids forcing the defense to decide whether or not to present the defendant's testimony before "its value can be realistically assessed," *id.* at 610. *See also Portuondo v. Agard*, 529 U.S. 61, 70 (2000) (discussing *Brooks*). But surely, if a criminal defendant or juvenile respondent cannot be compelled to decide whether to testify and to "subject himself to impeachment and cross-examination at a time when the strength of *his* other evidence is not yet clear," *id.* at 612 (emphasis added), a defendant or respondent cannot be compelled to furnish the prosecution with information that may be used in any fashion to incriminate him or her — even merely by "focusing investigation on [the respondent] . . . as a result of his compelled disclosures," *Kastigar v. United States,* 406 U.S. 441, 460 (1972) — prior to the time when the respondent has been sufficiently informed about the prosecutor's evidence to decide what defensive evidence will be "necessary or even helpful to his case," *Lakeside v. Oregon,* 435 U.S. 333, 339 n.9 (1978) (dictum). Under *Brooks,* such a requirement violates not merely the Fifth Amendment but also the Sixth Amendment right to counsel, "[b]y requiring the accused and his lawyer to make [an important tactical decision regarding the presentation of defensive evidence] . . . without an opportunity to evaluate the actual worth of their evidence." *Brooks v. Tennessee,* 406 U.S. at 612. *See also Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980) (dictum).

It is a difficult question whether the Fifth Amendment forbids conditioning defense discovery upon reciprocal disclosures that, if ordered directly, would violate the privilege. Certainly, when the respondent has a constitutional right to discovery under any of the doctrines identified in § 9.09 *supra,* the respondent's enforcement of that right cannot be conditioned upon the waiver of another constitutional right, and in such instances, the reciprocal disclosure requirement would seem to be invalid. *Cf. Simmons v. United States,* 390 U.S. 377, 389-94 (1968), reaffirmed in *United States v. Salvucci,* 448 U.S. 83, 89-90 (1980); *Lefkowitz v. Cunningham,* 431 U.S. 801, 807-08 (1977); *Brooks v. Tennessee,* 406 U.S. at 607-12. In other cases, however, it is likely that a requirement of reciprocation can be imposed and the defense presented with the choice of both giving and getting or neither.

§ 9.13 "WORK PRODUCT" PROTECTIONS AGAINST PROSECUTORIAL DISCOVERY

When the "work product" doctrine was discussed in § 9.10(b) *supra* in connection with defense discovery of prosecutorial files, it was explained that the prosecution's ability to use the "work product" privilege to insulate its files from defense discovery is initially a matter of state law. However, when the issue is one of whether defense files are "work product," the issue assumes constitutional dimension. The function of the "work product" doctrine is to provide "a privileged area within which [the attorney] . . . can analyze and prepare his client's case," *United States v. Nobles,* 422 U.S. 225, 238 (1975), in order to "assure the thorough preparation and presentation of . . . the case," *ibid.;* and the Sixth Amendment countenances "no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process," *Herring v. New York,* 422 U.S. 853, 857 (1975). The Sixth Amendment right to the effective assistance of counsel (described and documented in §

9.09(b)(1) *supra*) therefore arguably requires "work product" protection of defense counsel's trial preparation, in addition to whatever "work product" protection it is given by state law. The *Nobles* case holds nothing to the contrary, although it does permit limited prosecutorial discovery of a defense investigator's report *after* the defense has presented the investigator's testimony at trial and thereby waived both the "work product" and Sixth Amendment protections. *See* 422 U.S. at 240 n.15.

The "work product" doctrine is primarily designed to shield materials that reveal an attorney's analyses and assessments of the case, including evaluations of potential witnesses. For this reason, it is particularly protective of counsel's own notes of oral statements of witnesses, as distinguished from written or transcribed statements of witnesses or even defense investigators' reports reflecting the oral statements of witnesses. *See Upjohn Co. v. United States,* 449 U.S. 383, 399-402 (1981). Thus counsel may wish to increase the likelihood of avoiding prosecutorial discovery by taking oral instead of written statements from witnesses and by including appropriate evaluative matter in his or her notes of those statements. See § 8.10 *supra*. Anything that discloses counsel's "litigating strategies [is not] . . . the subject of permissible inquiry by his opponent. . . ." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 862 n.3 (1882) (dictum).

Chapter 10

Subpoenaing and Preparing Defense Witnesses To Testify at a Motions Hearing or Trial

Part A. Selecting and Subpoenaing Witnesses

§ 10.01 SELECTION OF WITNESSES FOR A MOTIONS HEARING OR TRIAL

The principal criterion in selecting witnesses for an evidentiary motions hearing (such as a suppression hearing) or for trial is whether a witness has something to say that materially supports the theory of the defense. Although counsel's search for sources of proof must be wide-ranging, counsel must be highly selective in what s/he actually puts on at the motions hearing or trial. It is vital that the evidence be tightly organized so that the defense theory will come across in a cohesive presentation.

A second, almost equally important criterion in selecting witnesses is whether the witness will improve or depreciate the *atmosphere* of the defense. To some extent a respondent is identified with his or her witnesses by the judge (and even more so by jurors, in those jurisdictions that permit jury trials in juvenile cases). This makes the demeanor of defense witnesses critical — their apparent honesty, sound judgment, equanimity, and likeableness. A personable witness might be called to testify cumulatively on a minor point, whereas a shifty or abrasive witness would not be similarly used.

An important consideration in selecting witnesses is whether the witness has prior convictions that are admissible under the impeachment doctrines described in § 30.07(d) *infra* — because of the prejudice to both the witness's credibility and the atmosphere of the defense if the witness is impeached with his or her prior convictions. Counsel should never put a witness on the stand without knowing whether the witness has a criminal record and without having evaluated the possible prejudice to the defense if it is used to impeach the witness. Every prospective witness must be asked whether s/he has ever been charged with any criminal offense and what was the disposition of the charge. To make the investigation complete and the inquiry as little embarrassing as possible, counsel should ask about "any sort of criminal charge, big or little, including traffic violations and even juvenile court charges"; s/he can further ease the witness's embarrassment by explaining that s/he always asks this question "because lots of people have some sort of criminal charge made against them at some time." *After* counsel has obtained the witness's complete record, s/he can explain (if this is the case under local practice) that juvenile convictions, traffic offenses, other minor convictions, and arrests that did not result in conviction cannot be used in court to impeach the witness.

§ 10.02 THE NEED TO SUBPOENA DEFENSE WITNESSES AND KEEP TRACK OF THEM UNTIL THE TRIAL DATE

Once counsel has selected whom to use as witnesses at the motions hearing or trial, counsel will then need to: (i) subpoena the witnesses to the hearing or trial; and (ii) keep in close touch with the witnesses until the hearing and trial have taken place.

Counsel should always subpoena defense witnesses rather than depend upon them to show up voluntarily at the hearing or trial. In the event that the witness fails to show up (either intentionally or inadvertently), counsel probably will be unable to obtain a continuance (see §§ 10.07, 15.02 *infra*) unless s/he can represent to the court that the witness is under subpoena. Similarly, in the very rare case in which counsel elects to respond to a no-show by requesting a bench warrant (see § 10.07 *infra*), that remedy will be unavailable unless the absent witness was under subpoena.

One of the most difficult aspects of subpoenaing witnesses is explaining to a witness who wants to be helpful why s/he is being subpoenaed when s/he has already told counsel that s/he is willing to come to court voluntarily. In responding, counsel should assume the witness's good faith and explain that if some unanticipated factor such as major illness prevents the witness from coming to court, counsel needs to be able to honestly tell the judge that the witness is under subpoena in order to obtain a continuance. In jurisdictions in which witnesses receive witness fees or mileage allowances from the court upon showing the subpoena that they received, counsel can also explain that the subpoena is necessary in order for the witness to be paid.

If a person who is expected to be called as a prosecution witness also has certain information that is necessary to the defense case, counsel should serve a defense subpoena upon the witness rather than relying on the prosecution to bring the witness to court. Otherwise, if the prosecutor decides that the witness is more helpful to the defense than to the prosecution, the prosecutor can excuse the witness from coming to court. Even if the witness appears to be an essential part of the prosecution's case, the prosecutor may respond to the witness's failure to appear by deciding to go forward with the other prosecution witnesses rather than risk a dismissal on speedy-trial grounds; if this occurs and the witness is not under defense subpoena, defense counsel will be forced to go to trial without the witness.

Even after a witness has been subpoenaed, counsel will need to keep in close touch with the witness until s/he has testified at the motions hearing or trial. A subpoena will be of little use if, by the time of the hearing or trial, the witness has moved to a new location and cannot be found. For this reason counsel (or his or her investigator) should always elicit from witnesses whom they interview the witness's address, telephone number, any expected plans to move, and the names of persons through whom they can be contacted. See § 8.08 *supra.* Once counsel has decided to use a witness at trial, the witness should be given counsel's telephone number and told to call in the event of a change in residence or a trip out of town. If the witness is crucial and appears geographically unstable, it may be wise for counsel to call the witness at reasonable

intervals during the pretrial period. This assures that the witness will not be gone long before s/he is missed by counsel and that counsel can take up pursuit while the trail is fresh.

If a witness is leaving the jurisdiction, if the witness's health is bad, or if s/he may be unavailable at trial for any other reason, counsel should consider whether the risk of losing the testimony warrants taking the witness's deposition, notwithstanding the creation of a transcript that can be used by the prosecutor in impeaching the witness if s/he ends up testifying. Local statutory procedures for the taking of depositions to preserve testimony must be consulted. (Frequently these will be codified only in codes of civil procedure, but an examination of their terminology will usually disclose that they are applicable in delinquency cases as well.) In the case of hostile witnesses whom counsel has reason to believe may flee, hide out, or avoid service of a subpoena, an application to the court for their arrest as material witnesses may be advised. Most jurisdictions have statutes that authorize the detention of material witnesses and that can be invoked by the defense as well as the prosecution. When material-witness procedures are limited by law or practice to the prosecutor's use, defense counsel should invoke them anyway and argue that such a limitation is unconstitutional within the principles of § 9.09(b)(7) *supra.*

§ 10.03 TYPES OF SUBPOENAS; PERSONS SUBJECT TO SUBPOENA

A witness subpoena can be issued to any person in the jurisdiction who has testimony relevant to the case. Under local practice an expert witness may be immune from subpoena to testify solely *as* an expert witness on matters of his or her expertise, but s/he is not immune from process when s/he has factual information that is pertinent to a proceeding. For this reason counsel may ordinarily subpoena government doctors and psychiatrists, for example, when they have examined the respondent in a detention facility or in a state hospital. Counsel may also subpoena police laboratory personnel, coroner's personnel, the complainant's physician (subject to the claim of any applicable doctor-patient privilege), and the like.

If counsel needs a witness who is involuntarily confined in a prison or hospital, counsel must apply to the court for a writ of *habeas corpus ad testificandum.* The writ directs the custodian of the confining institution to produce the witness for trial. In some cases a judge will also issue the writ to bring a witness to a place at which counsel can conveniently interview him or her. Issuance of the writ is ordinarily discretionary, and courts require some showing of the materiality of the witness's testimony. For discussion of the steps counsel can take to avoid disclosing defense facts and strategy, see § 10.05 *infra.*

Subpoenas for documents and records, known as subpoenas *duces tecum,* are discussed in § 8.17 *supra.*

§ 10.04 PROCEDURE FOR OBTAINING SUBPOENAS

Subpoenas are ordinarily obtained from the office of the clerk of the court. Although issued in the name of the judge or the court, they customarily are filled out — or handed out in

blank for counsel's completion — by the clerk or a deputy clerk, without action of the judge.

Forma pauperis subpoenas often may issue only by leave of court, granted upon motion. The prosecution may resist such a motion by the defense. In the case of paid subpoenas, objection is ordinarily raised by a motion to quash the subpoenas, made by the person subpoenaed or by the party adverse to the litigant who has procured issuance of the subpoena, after the subpoena has been served.

Subpoenas may be quashed on various grounds covered by local practice, including improper service, ignorance on the part of the subpoenaed person of any matter relevant to the proceedings, lack of jurisdiction or statutory authority of the court to issue the subpoena, and privilege. The subpoena may also be resisted by having the subpoenaed person appear and refuse to be sworn. Prosecutors will occasionally move *ex parte* for the quashing of defense subpoenas directed to government officers or employees, and courts have been known to grant the motion, leaving defense counsel uninformed until the time of trial that it has been granted. If counsel suspects that the prosecutor may resist a subpoena directed to a witness allied in interest with the prosecution, counsel should inform the prosecutor a few days before trial that the witness has been subpoenaed (a fact which the prosecutor doubtless already knows) and that the witness's presence at the trial is particularly wanted by defense counsel. In this fashion, if the witness does not appear by reason of some secret or last-minute maneuvering by the prosecutor, counsel is in a position to be righteously indignant over the prosecution's lack of candor when, at trial, the defense makes its motion for a bench warrant (§ 10.07 *infra*), continuance (§ 15.02 *infra*), or mistrial (§ 34.11 *infra*), as may seem appropriate.

§ 10.05 RIGHT TO PROCESS AT PUBLIC EXPENSE WHEN THE RESPONDENT IS INDIGENT

As the Supreme Court has observed, the Compulsory Process Clause of the Sixth Amendment "establish[es], at a minimum, that criminal defendants have the right to the Government's assistance in compelling the attendance of favorable witnesses at trial." *Pennsylvania v. Ritchie,* 480 U.S. 39, 56 (1987). When the respondent is an indigent, the Equal Protection Clause of the Fourteenth Amendment doubtless requires the issuance of subpoenas for material defense witnesses at public expense. See § 4.31(d) *supra;* see also § 11.03(a) *infra.*

The procedure for obtaining subpoenas *in forma pauperis* is not problematic in most jurisdictions. Often the court clerk's office routinely issues subpoenas at public expense in cases of indigents. In some jurisdictions, although local rules technically require an affidavit by counsel showing "good cause" or "materiality," custom permits these affidavits to be filled out with boilerplate language tracking the statute or court rule.

In other jurisdictions, however, factually detailed documentation is demanded, and this requirement poses the very serious hazard of alerting the prosecution to the projected defense. In such jurisdictions counsel should prepare an affidavit making the requisitely detailed showing

(*see United States v. Valenzuela-Bernal,* 458 U.S. 858, 867 n.7 (1982) (dictum)), seal the affidavit, and file it with a motion asking that the court receive it in sealed form and consider it *in camera,* without disclosure to the prosecutor, on the ground that it reveals an aspect of defense trial strategy. (This procedure should be followed even in jurisdictions that purportedly provide for *ex parte* submissions, if the reality of the practice is that prosecutors regularly obtain access to the supposedly confidential documents filed by the defense.) If the sealing motion is denied, counsel should move to dismiss all charges against the respondent because of its denial and then either refuse to make the required factual averments or make them under objection (depending on whether s/he can practicably afford to go to trial without the witness) on the ground that the respondent's rights under the Compulsory Process Clause of the Sixth Amendment to the federal Constitution (*see Washington v. Texas,* 388 U.S. 14(1967)), the Equal Protection Clause of the Fourteenth Amendment, and parallel state constitutional guarantees are infringed if an indigent is obliged to disclose his or her defensive case in a way that a respondent with money is not, as the precondition of obtaining compulsory process. See § 9.09(b)(4) *supra* and § 11.03(b) *infra.*

§ 10.06 MECHANICS OF SERVING SUBPOENAS

Counsel will need to check the local rules for service of process, which may be in the juvenile statute, the criminal procedure statutes, or the civil procedure statutes. In most jurisdictions the rules specify that service is valid only if the subpoena is served personally rather than by mail, and only if served within a certain geographic area. The rules often also establish a deadline, in terms of the number of days before trial when the subpoena must be served. In some jurisdictions the rules require that transportation fees be tendered to the witness at the time of service of the subpoena.

If possible, counsel should always arrange for service of the subpoena by a private process server rather than by the marshal, a sheriff, a police officer, or other law enforcement personnel, for they may tell the prosecutor the identity of witnesses to whom defense subpoenas have been directed.

In many jurisdictions the rules specify that the process server must fill out an affidavit of service. Even if the rules contain no such requirement, it is good practice to obtain an affidavit of service from the process server and retain it in counsel's file, in case any question arises about the date, exact time, and location of service.

§ 10.07 REMEDIES IF A SUBPOENAED WITNESS FAILS TO APPEAR

Technically, the remedy when a subpoenaed witness fails to appear is for counsel to request the issuance of a bench warrant (or attachment, or *capias*) to have the witness arrested and brought into court by the marshals.

In actuality, it will be the rare case when counsel requests a bench warrant for a defense witness. Quite obviously, a witness who is dragged into court in handcuffs will not be an eager or

friendly witness. Although the witness can be compelled to testify under threat of contempt, the result may be that the witness will shape his or her testimony so as to cast the respondent in the most unfavorable and damaging light.

Accordingly, if a crucial witness fails to appear, counsel should seek a continuance. Counsel should offer to make an *ex parte* proffer in support of the continuance motion, with the witness's name and the substance of his or her testimony. (The reason for proceeding *ex parte* is to avoid providing the prosecutor with notice of defense strategy and with impeachment material in case the witness subsequently appears or is found.) This proffer is necessary for the appellate record in the event that the judge denies the request. In most jurisdictions counsel will need to represent to the court that the witness is under subpoena; in some jurisdictions it will be necessary to call the process server to testify that the witness was, in fact, subpoenaed.

The rare circumstances in which counsel might seek issuance of a bench warrant for a witness are when: (i) counsel has been unable to locate the witness or to persuade the witness to come to court, and a bench warrant is the only alternative; and (ii) the witness is already as hostile as s/he can be, and counsel will be able to extract the desired testimony from the witness on the stand regardless of his or her belligerence.

A refusal by the court to direct the issuance of process or an attachment or to grant a defense continuance requested because of the failure of a properly subpoenaed witness to appear ordinarily is not appealable interlocutorily. If the refusal happens in the course of a protracted trial, it may be possible to ask an appellate court for a writ of mandamus to compel the trial judge to act. See Chapter 26. The ordinary method of review, however, is upon appeal from the final judgment of conviction. As previously explained, counsel should establish a record for that appeal by making a detailed *ex parte* proffer of what the nonappearing witness would have testified. If the judge refuses to permit an *ex parte* proffer, the substance of the witness's testimony should be stated in very general terms. Counsel should then renew the request at the close of defense testimony, this time reciting in detail what the witness would have testified had s/he appeared.

§ 10.08 SPECIAL ASPECTS OF SUBPOENA PRACTICE NECESSITATED BY THE MISSING-WITNESS DOCTRINE

§ 10.08(a) The Missing-Witness Doctrine

The missing-witness doctrine allows the finder of fact (whether judge or jury) to treat a party's failure to call a witness who is peculiarly available to that party and who is shown to have knowledge of pertinent facts as giving rise to an inference that the witness's testimony would have been unfavorable to that party. In a jury trial an instruction to this effect may be given on request of either the prosecution or the defense if the judge is satisfied that a factual basis for it exists in the failure of the other party to call a particular witness. In a bench trial either side can ask the judge to use this inference in his or her decisionmaking on the issue of guilt or innocence.

A missing-witness inference can be a powerful tool in closing argument. Local practice varies concerning whether, if an adequate basis for the missing-witness charge is not laid, counsel is permitted to argue from the failure of the other side to call a witness. *See, e.g.*, *People v. Thomas*, 21 N.Y.3d 226, 230-31, 991 N.E.2d 200, 203, 969 N.Y.S.2d 426, 429 (2013) (defense counsel was entitled to make "a missing witness argument" in closing even though counsel did not make "a request for a missing witness instruction" or "make an offer of proof as a predicate for a missing witness argument").

§ 10.08(b) Subpoenaing Defense Witnesses To Avoid a Missing-Witness Inference Against the Defense

To avoid the use of the inference against the defense, counsel should review his or her evidence prior to trial, noting whether there are witnesses (i) whom s/he has been unable to locate or does not plan to call and (ii) who will appear from the trial testimony either (A) to have material evidence helpful to the defense if the defense version of the facts is true (for example, a person who, respondent will testify, was with the respondent at some other place at the time of the offense) or (B) to have witnessed events relating to the offense and to be allied in interest with the defense (for example, respondent's brother who was with the respondent at the time of the episode giving rise to the charge). Counsel should subpoena these persons. If they are served and appear, s/he can tender them to the prosecutor. If they cannot be served or do not appear, s/he can inform the court and the prosecutor that s/he has served the witness or attempted to serve the witness, as the case may be. Counsel should have the process server prepared to testify that service was made or that diligent unsuccessful efforts to find the witness were made, and counsel should proffer the process server's testimony to this effect. The defense is now virtually immune against the possibility of a missing-witness charge. *But see People v. Hall*, 18 N.Y.3d 122, 130-31, 960 N.E.2d 399, 403-04, 936 N.Y.S.2d 630, 634-35 (2011) (under New York law, the proffering of a witness to the other side's counsel does not rebut the basis for a missing witness inference because "the common-sense inference that a [party's] failure to call a seemingly friendly witness suggests some weakness in a party's case . . . is not rebutted when the opposing party chooses not to call the same witness — a witness who, by definition the opposing party would expect to be hostile").

In some cases, when the prosecutor is denying the existence of a person whom the respondent claims was with the respondent at the time of the offense and when the process server has found verification of the existence of such a person in the course of unsuccessful efforts to locate him or her, defense counsel may want to call the process server to testify. In this situation the avowed purpose of the testimony is to show vigorous efforts to locate the missing person in order to rebut any negative inference from that person's absence, and hearsay reports about the person that the process server attempted to follow up are admissible to prove the extent of the process server's efforts. Incidentally, these reports tell the factfinder that the person does exist.

Of course, if bringing a particular witness into the case is going to give the prosecutor something s/he can use advantageously and does not now have, counsel may well prefer to risk a

missing-witness inference rather than to issue a subpoena.

§ 10.08(c) Laying a Foundation for a Missing-Witness Inference Against the Prosecution

The missing-witness instruction is often refused if the party requesting it appears to have had ample opportunity to subpoena the witness, since the witness is not then thought to be uniquely available to the opposing side. Therefore, if counsel's investigation identifies an individual who would appear able to help the prosecution's case but whom counsel cannot locate or whom counsel knows the prosecution is not going to call, counsel will often want to have that person subpoenaed and to be prepared to prove the unsuccessful diligent efforts of a process server to find the person. This will lay the basis for a defense request that the missing-witness charge be given against the prosecution. In connection with police spies, informers, "special agents," and other similar marginal and transitory police characters, counsel should both issue subpoenas and write the prosecutor at an early stage of the investigation, asking the prosecutor to make certain that the police know the whereabouts of the witness, so that s/he can be available for trial. Frequently s/he will disappear, and counsel is then in a position to request a missing-witness instruction even if the prosecutor professes present unsuccessful efforts to locate the person, based on the prosecutor's failure, after notice, to keep in touch with the witness prior to trial when the prosecutor had an opportunity to do so. Compare §§ 9.10(a), 9.10(c), 10.02 *supra.*

Part B. Preparing Defense Witnesses To Testify

§ 10.09 TECHNIQUES OF WITNESS PREPARATION

The technique of preparing a witness to testify is different from that of interviewing a witness to discover facts. Whereas investigative interviews involve striking up a congenial relationship and encouraging expansiveness that produces free-roaming narration by the witness, trial preparation focuses on what specific pertinent testimony the witness has to offer and on how to present it most effectively.

§ 10.09(a) Reviewing the Facts and Trial Procedure with the Witness

Counsel should review the facts previously ascertained from this witness and others, point out any discrepancies or unclarities, and have the witness resolve them to the extent that they are truthfully resolvable. (It is not necessary, or even desirable, that all defense witnesses come into trial with the same "pat" story; but no defense witness should be permitted to testify without awareness of the points at which his or her testimony diverges from that of other known witnesses or without a plausible explanation for the divergence.)

Counsel should explain the general theory of the defense to each witness and demonstrate the witness's role and exact place in this defense. Trial procedures, including the purposes and methods of direct, cross, and redirect examination, and objections, should also be explained. The

atmosphere of court must be made as familiar as possible so that the witness will be at ease when s/he arrives for the trial. Indeed, with a particularly important and nervous defense witness, it may be wise for counsel to take the witness to observe the examinations of witnesses in another trial.

§ 10.09(b) Instructions to the Witness About Demeanor and Dress

The witness should be instructed (i) not to answer any question unless s/he understands it but simply to say that s/he does not understand the question if s/he does not (many witnesses do not realize that this is appropriate or even permissible behavior in court), and (ii) to give answers that are true to the best of the witness's knowledge rather than trying to guess and say what would be a favorable answer from the defense standpoint.

The importance of the overall impression created by the witness's conduct in the courtroom (both on the stand and off) should be mentioned, and counsel should discuss with the witness how the witness can make the best impression. (This may be different for different witnesses. In some cases it is desirable for the witness to appear serious and businesslike; in some cases, relaxed and easy-going; in some cases, nervous or upset. Counsel cannot ethically or practically teach a witness to act in ways that dissimulate but can and should assist the witness to perceive and control aspects of the witness's demeanor that may convey undesired messages.)

It is ordinarily wise for counsel to suggest to the witness how s/he should dress for court and, if practicable, to ask the witness to come to a pretrial interview dressed as s/he will dress when s/he testifies. (Admonitions to some witnesses to "dress well" or "dress casually" may produce results that amaze — and horrify — counsel; it is best for counsel to see in advance what the witness thinks these admonitions mean.) For witnesses who are regular church-goers, an instruction to dress "as if they were going to church" will produce the effect that counsel wishes.

§ 10.09(c) The Dry Run of the Witness's Testimony

Counsel should ordinarily engage every witness in a thorough "dry run" of direct, cross, and redirect examination, asking every question that counsel intends to ask in court or foresees that the cross-examiner may ask.

If counsel's questions are not bringing out the desired answers, they should be changed and that portion of the examination should be rerun until both counsel and the witness are satisfied with it. Counsel will often find it useful to ask for the witness's help in framing questions best suited to elicit the witness's story or particular details of it that counsel has noted in earlier investigative interviewing: "Last time we talked, you said ___. That seemed to me to be something that the court will want to hear. Now I am trying to get the right question to ask you, so that in your answer you will say it pretty much the same way you said it in our last interview. Would it be better if I asked ___ [suggesting one form of question] or if I asked ___ [suggesting another form of question]? Or maybe you can suggest a way to ask it that will be sure to bring

out the information we want."

In this process counsel may have to explain to the witness — without confusing technicalities and legal jargon — some of the constraints imposed upon counsel's questioning by the rules of evidence. "I can't just call you to the witness stand and say, 'Okay, go ahead and tell your story.' It's got to be a back-and-forth thing, in which I ask you particular questions, and you give the answers. There are certain legal rules about the questions I can ask. For example, I can't do what lawyers call 'leading a witness,' which means putting words into the witness's mouth by stating in my question the exact thing that I know from talking with you is going to be your answer. You've told me that it was very dark out that evening. I can't ask you in court, 'Was it very dark out?' and simply have you say 'Yes.' I've got to ask you something like, 'Would you please describe the lighting conditions,' and then *you* have to say, 'It was very dark out,' if it was. You see what I mean? My questions can direct you to the subject that I am asking about, but you have to be the one who fills in the details by your answer. So, if there are important details, you must be the one who remembers them and says them, and I must find the right questions. Also I have to ask the questions in a certain logical order. I can't ask, 'What time did Joe arrive at the drive-in?' before you have first testified that Joe *did* come to the drive-in that evening. Lawyers would call that question 'assuming a fact not in evidence,' and the judge would not let it be asked until I had first asked some question that caused you to tell the court that Joe did come to the drive-in. Now, going back to the beginning of the evening, let me try out a line of questions. After you have answered them we can go over the answers and see if everything has been brought out, and maybe we can improve the questions so as to be sure that they will bring everything out completely."

Optimal predictability in getting the answers that counsel wants in court is usually obtained by making the conditions in the "dry run" as similar as possible to those that will exist in the courtroom. The sequence of the questioning should be the same; and, once counsel has worked out questions that produce the desired result, s/he should stick closely to them in form and language. If alternative possible forms have been tried out, both counsel and the witness should be clear at the end of the "dry run" which questions will be asked in court and which will not. In important areas of the witness's testimony, single questions should not be asked in isolation; sizeable blocks of questions and answers should be run — and rerun as often as necessary — so that each question will be asked in the "dry run" against the same background that will frame it when it is later asked in court. To avoid confusion and to maximize the similarity between the "dry run" and the courtroom examination, counsel will find it useful to conduct the "dry run" itself with counsel standing and facing the witness, or at least sitting face-to-face with the witness some distance apart. When breaks are made in the "dry run" to discuss the questions and answers, to work on reformulations of questions, or to conduct follow-up investigative questioning that will not be used in court, counsel should change his or her physical position — for example, by coming over and sitting down beside the witness — so that the demarcation between the questioning that will occur in court and all of the other conversation in the preparatory interview will be sharp and clear. (If the witness is left confused and thinks that counsel intends to ask in court certain questions that counsel actually meant to ask in the

preparatory interview only for his or her information, or as try-outs that counsel then rejects as unsatisfactory, trouble is likely to follow. When the witness finds in court that the questions s/he expects are not being asked, s/he may begin to worry and think that s/he has done something wrong to cause counsel to deviate from the prepared line of questioning. Consequently, s/he may begin to look apprehensive or insecure or may blurt out the answer to the question that counsel "forgot" to ask, instead of responding to the question actually asked, or s/he may do both. Conversely, if questions that the witness does not expect to have asked in court *are* asked, the witness may feel that s/he has been misled or even betrayed by counsel; s/he is likely to lose his or her bearings and become visibly rattled. The key to effective witness preparation is a clear, common understanding by counsel and the witness concerning exactly what will happen in the courtroom.

§ 10.09(d) Preparing the Witness for Cross-Examination by the Prosecutor

A witness should be instructed that if s/he is asked on cross-examination whether s/he has previously discussed his or her testimony with defense counsel, s/he should reply that s/he has — and should do so in a manner that communicates a tone of "why, of course!" or "certainly! doesn't everybody?" If s/he is asked whether s/he has rehearsed his or her testimony with counsel, s/he should answer something along the lines of "[Mr.] [Ms.] ____ asked me all of the questions that were asked in court today, and I told [him] [her] exactly what my answers are." If asked whether defense counsel did not tell the witness how to answer the questions — or what answers were expected to the questions — the witness should reply in the vein of "No, first I told [Mr.] [Ms.] ____ exactly what I knew about the case, and then we went through all of these questions and answers because [Mr.] [Ms.| ____ told me that [he] [she] wanted to prepare the best questions to bring out in court the facts that I had told [him] [her]." (In a jury trial, if the prosecutor impugns the witness's integrity by asking any of these questions in a derisive manner, counsel may find it advisable at trial, *after letting the witness answer the question,* to demand in the jury's presence that the prosecutor produce the basis for the innuendo or discontinue that line of questioning.)

It is important for counsel to assure the witness that the "dry run" and other preparation of the witness's testimony which they are doing is perfectly proper — "I wouldn't ask you to do it if it weren't" — so that the witness will not feel or appear guilty when s/he is asked about it on cross-examination. And, in order to permit counsel to prepare the witness to answer questions on cross-examination in the manner just described both truthfully and comfortably, it is good practice for counsel to tell the witness, *before beginning the first rehearsal or "dry run,"* that, of course, counsel wants the witness to tell the truth in court; that counsel now wants to review the witness's testimony in order to assure that all of counsel's questions will be clear and understandable and to assure that counsel will be asking the best questions, in the best order, to bring out the witness's story. Counsel also wants to try out the sorts of questions that the prosecutor might ask on cross-examination, so that counsel can determine whether any redirect examination is likely to be necessary and can prepare questions for the redirect examination. (If the witness is one whom counsel wishes to invite to assist counsel in the formulation of

questions, this is also the time for an explanation of that process, as suggested in § 10.09(c) *supra*.)

In rehearsing cross-examination, counsel should spare the witness nothing that the prosecutor may possibly use against the witness at trial. Counsel may want to introduce delicate or embarrassing subjects in a friendly way by interrupting the "dry run" to explain why the prosecutor will probably question the witness on such-and-such a subject and why it is important that the witness answer the questions satisfactorily. But eventually the questions must be put to the witness in the "dry run" in the toughest form in which the prosecutor could put them. Rehabilitation can follow. See § 8.09 *supra.* There is a natural human tendency for defense counsel to go easy on a witness who, after all, is doing the respondent the favor of testifying in support of the defense case. That tendency should be avoided like the plague, since it can prove equally deadly.

A witness who has prior convictions that can be used for impeachment (see § 30.07(d) *infra*) should be told of the way in which s/he may be questioned about them at trial. See §§ 31.11, 33.06 *infra.* S/he should be instructed that when s/he is asked whether s/he is the person who was convicted of such-and-such a crime on such-and-such a date, s/he should listen carefully to the description of the crime and, if it is correct, s/he should answer the question by a simple "yes," without attempting to explain the conviction away. Any explanatory matter allowed by local practice can best be developed on redirect examination, and this aspect of the redirect should be rehearsed with care. Poor explanations of prior convictions are worse than no explanation at all.

§ 10.09(e) Refraining from Taking Notes or Written Statements from the Witness

As explained in §§ 27.12(b), 33.03 *infra,* some jurisdictions permit the prosecution to obtain prior written statements of witnesses whom the defense presents at trial. These statements can then be used by the prosecutor to impeach the witness if his or her testimony strays from the written statement. Accordingly, attorneys who practice in these jurisdictions should refrain from taking notes of what the witness says in preparatory interviews and certainly from recording the witness's proposed testimony in a signed statement. If notes are essential, they should be incorporated in a strategy memorandum that will probably be insulated from discovery as the attorney's "work product." See §§ 8.10, 9.13 *supra.*

§ 10.10 PREPARING THE RESPONDENT TO TESTIFY

Preparing the respondent to testify requires special care. The respondent's testimony is more carefully scrutinized than that of any other witness. That an alleged delinquent is presumed to be innocent until proved guilty is a canard. In reality, most juvenile respondents must prove their innocence — and often their likeableness as well.

The respondent normally testifies last so that s/he can have heard all the other testimony

given in the case. (It has been held unconstitutional to require a criminal defendant to testify first in a case in which the defense intends to present the testimony of the defendant and other defense evidence. *Brooks v. Tennessee,* 406 U.S. 605 (1972); *see also Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980) (dictum); *State v. Kido*, 102 Hawai'i 369, 374-78, 76 P.3d 612, 617-21 (Hawai'i App. 2003).) Because the respondent has a right to be present throughout the trial (see § 27.01 *infra*), s/he cannot be excluded during the testimony of earlier witnesses by the prosecutor's invocation of the rule on witnesses (see § 27.11 *infra*); and the court's power to forbid consultation between the respondent and defense counsel during the course of the trial is significantly limited by the Sixth Amendment, see § 27.02 *infra.* Thus a respondent who is reasonably bright and articulate usually makes the best clean-up hitter. There are bound to be some inconsistencies in the most well-planned defense testimony, but if the respondent testifies last, s/he is given the opportunity to reconcile any contradictions that have been left by earlier defense witnesses. The downside of this strategy is that the prosecutor may be able to argue in closing that the respondent has tailored his or her testimony to the preceding evidence. *See Portuondo v. Agard*, 529 U.S. 61, 63 (2000) (prosecutor's closing argument did not violate the Fifth or Sixth Amendments or the Due Process Clause by "call[ing] the jury's attention to the fact that the defendant [who testified last] had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly"); *but see State v. Daniels*, 182 N.J. 80, 97-100, 861 A.2d 808, 818-20 (2004) (rejecting the rule of *Portuondo v. Agard* on state constitutional grounds); *State v. Swanson*, 707 N.W.2d 645, 657-58 (Minn. 2006) (construing nonconstitutional state law to limit *Portuondo v. Agard* to cases in which there is "specific evidence" that accused "has tailored his testimony to fit the state's case"); *Commonwealth v. Gaudette*, 441 Mass. 762, 765-68, 808 N.E.2d 798, 801-03 (2004) (reserving the question of whether *Portuondo v. Agard* should be rejected on state constitutional grounds and limiting application of the rule to cases in which "there is evidence introduced at trial to support" a prosecutorial argument that accused "shape[d] his testimony to conform to the trial evidence"). Where such comment is permitted, it is probably less likely to impress the judge in a bench trial than the jury in a jury trial, particularly in locales where the convention of reserving the respondent's testimony until the end of defense evidence is so widely followed as to appear routine. If counsel concludes that the respondent should serve as clean-up hitter at trial, counsel must fully explain to the client the nature and implications of that role. The theory of the defensive case must be thoroughly described to the respondent, and counsel should explain what s/he is attempting to show by each witness (including the respondent) and how it all hangs together. Also, in those jurisdictions that have not developed state-law rules which will preclude the prosecutor from comment or cross-examination implying "tailoring" of the respondent's testimony (as in *Portuondo v. Agard*, *supra*), counsel should prepare the client for the possibility that the prosecutor may ask the client on cross whether s/he "did not sit here in court and listen to the testimony of all the other witnesses before testifying," whether s/he "did not discuss the testimony of the other witnesses with counsel before testifying," whether s/he and counsel "did not discuss your testifying in ways that would be consistent with the testimony of earlier witnesses," and so forth, and/or that the prosecutor may claim in closing argument that the respondent took advantage of the order of witnesses to adjust his or her testimony to what the other witnesses said.

To the best of counsel's ability, s/he should foresee and tell the respondent exactly what will happen at trial. It is important that the respondent be put at ease as much as possible, and the device of taking an unknowledgeable respondent to observe other trials is often advised.

As with other witnesses (see § 10.09(c) *supra*), the respondent's testimony should be subjected to "dry runs" to assure against omissions and inadvertent inconsistencies and to organize it in the most comprehensible and persuasive manner. See § 33.08 *infra.* Direct, cross, and redirect examination should be role-played; and in role-playing the cross-examination, counsel should press the respondent with the toughest questions that the prosecutor could conceivably ask at trial. See § 33.09 *infra*; see also §§ 5.12, 10.09(d) *supra.*

In particular, the respondent must have a plausible explanation for any confessions, admissions to police, or other prior inconsistent statements with which s/he will expectably be impeached. A serious problem in preparing the respondent's testimony is that there may be some prior statements of which counsel is unaware. (These may not surface before the respondent testifies. When a respondent has made multiple statements to the police, a canny prosecutor will often withhold some of them in the prosecution's case-in-chief, so as to leave fresh material for impeachment of the respondent or for rebuttal.) Discovery and investigation must be as complete as possible when the respondent's testimony is prepared, to minimize this hazard.

Finally, counsel should help the respondent to see ways in which the respondent can best present himself or herself to the judge or jury — both in the respondent's demeanor on the witness stand and in the respondent's deportment at counsel table throughout the trial — as a likeable person. But counsel should not ordinarily attempt to have the respondent dress, behave, or talk in a manner to which s/he is substantially unaccustomed or use vocabulary that is out of keeping with his or her character or situation in life. This sort of acting is seldom convincing. Whether "street talk" should be laundered depends upon counsel's appraisal of how it will go over with the judge or jury; profanities should almost always be edited out, since a judge or jury is likely to be irritated by a child using profanity.

§ 10.11 THE RESPONDENT'S DRESS FOR TRIAL

Clients not in custody should be advised to dress and groom neatly. The more "respectably" or "well" dressed they can appear without looking costumed for the occasion, the better. Counsel should ask the client to dress for one of their pretrial interviews as the client will dress at trial, so that counsel can look over the client's outfit and suggest any necessary improvements. See § 10.09(b) *supra.* If the case involves a misidentification defense, counsel should carefully check the description and ensure that the client does not dress in clothing matching or even approximating the clothing worn by the perpetrator: Such a similarity in attire precludes even the slim possibility of a witness failing to make an in-court identification and also unconsciously biases the judge or jury in favor of believing that the respondent is the perpetrator.

If a respondent is in custody, counsel should arrange for the client to have civilian clothes

to wear during the trial. See § 27.01 *infra.*

§ 10.12 CO-RESPONDENTS AND ACCOMPLICES

As explained in § 8.15 *supra,* counsel's investigation will need to include interviews of co-respondents, adult co-perpetrators, and unarrested accomplices. Except in unusual cases, it is probably not wise to call any alleged accomplice or co-respondent who is being tried separately to testify for the defense. If s/he disagrees with the respondent, both will be viewed as liars; if s/he agrees, it will be presumed that they colluded on their stories.

If counsel has been retained by, or appointed to represent, corespondents, counsel will need to be alert to any potential conflicts of interest and, if one exists, secure relief from the conflicting appointments. *Holloway v. Arkansas,* 435 U.S. 475 (1978). *See also Mickens v. Taylor*, 535 U.S. 162, 166-74 (2002); *Burger v. Kemp,* 483 U.S. 776 (1987); *Cuyler v. Sullivan,* 446 U.S. 335 (1980).

Chapter 11

Retaining and Working with Expert Witnesses

§ 11.01 DECIDING WHETHER TO RETAIN AN EXPERT WITNESS

There is a host of types of expert witnesses that may be useful in a delinquency case. Some of the most commonly used are:

1. Fingerprint examiners;
2. Ballistics experts;
3. Narcotics and drug experts;
4. A variety of mental health experts, including psychiatrists, psychologists, and neurologists (see §§ 12.08-12.10 *infra*);
5. Handwriting experts and questioned-document examiners;
6. Arson experts;
7. Shoeprint/tiretread experts;
8. Polygraph examiners;
9. Serologists;
10. Forensic pathologists;
11. Hair and fiber examiners;
12. DNA experts;
13. Experts on eyewitness identifications (*see, e.g.*, *People v. Santiago*, 17 N.Y.3d 661, 672-73, 958 N.E.2d 874, 883-84, 934 N.Y.S.2d 746, 754-55 (2011); *State v. Henderson*, 208 N.J. 208, 283-85, 289, 297-98, 27 A.3d 872, 916-17, 920, 925 (2011)); and
14. Experts on the factors that can produce a false confession (*see, e.g.*, *People v. Bedessie*, 19 N.Y.3d 147, 149, 161, 970 N.E.2d 380, 381, 388-89, 947 N.Y.S.2d 357, 358, 365-66 (2012); *State v. Perea*, 322 P.3d 624, 638-44 (Utah 2013)).

The list of potential experts is limited only by the reach of counsel's imagination. For example, counsel could end up using an automobile accident reconstruction expert (to explain the sequence of events in a vehicular homicide), an odontologist (to testify in an identification case that many youths other than the respondent possess gaps in their teeth that match those observed in the perpetrator), or even an arborist (to testify that the foliage on the tree at the time the crime occurred would have been so full as to obstruct the eyewitness's view).

In deciding whether to retain an expert witness, counsel is well advised to begin by interviewing the prosecution's experts. Most experts, even experts employed by the police force like fingerprint and ballistics examiners, view themselves as (or will be receptive to an approach that characterizes them as) neutral and concerned solely with the scientific facts; accordingly, the prosecution's experts usually will be amenable to discussing their findings and the scientific theories underlying their findings with defense counsel. In the course of these discussions,

counsel can become moderately educated in the relevant scientific field and can often learn enough about the specific scientific issue presented by the case to form some preliminary impressions about whether the prosecution expert's findings are assailable. This introduction to the field and the issues involved in the case is important for several reasons. If the client is a paying client rather than an indigent entitled to state-funded expert assistance under the doctrines described in § 11.03(a) *infra,* a preliminary assessment will help counsel and the client to decide whether it is worth paying the exorbitant rates charged by most experts. If the respondent is an indigent, the information will be critical in justifying to the judge the need for court appointment or compensation of a defense expert. See § 11.03(b) *infra*. The preliminary education afforded by the prosecution's expert will be of use when counsel shops around for a defense expert with the right background and experience. Once the defense expert is hired, counsel will be able to provide him or her with information about the prosecution expert's perspective. And counsel's exposure to the prosecution's expert and observations of the expert's manner will be useful in planning the cross-examination of the prosecution's expert

§ 11.02 SELECTING THE EXPERT

Most scientific fields have numerous subspecialties. In selecting an expert, counsel first will need to become sufficiently familiar with the scientific issues presented by the case to know what type of specialist is needed. This familiarity can be gained by interviewing the prosecution's expert (see § 11.01 *supra*) or by discussing the case with an authority in the field.

Once counsel knows enough to identify the specialty relevant to the case, the next task is to gather a list of experts in that specialty and to develop a set of preferences. Local experts are preferable, as long as they have the requisite expertise and credentials, since it will be possible for counsel to meet regularly with the expert and also for the expert to be flexible about the scheduling of the trial. (In addition, in jurisdictions in which juvenile cases are tried to juries, it is pertinent that juries commonly prefer local experts to "carpetbaggers.")

In gathering the names of potential experts and ranking them, counsel should consult: other defense attorneys who have used such experts (some public defender's offices have compiled lists of local and national experts); experts in the field or related fields whom counsel has reason to trust on the basis of his or her own or other defense attorneys' prior experience; and faculty members in the relevant departments of the state university and local private colleges.

Additional considerations involved in selecting a mental health expert, such as a psychiatrist, psychologist, or neurologist, are discussed in § 12.10 *infra*.

§ 11.03 OBTAINING STATE FUNDING FOR THE EXPERT WHEN THE CLIENT IS INDIGENT

§ 11.03(a) Constitutional Rights to State-Paid Expert Assistance

In *Ake v. Oklahoma,* 470 U.S. 68 (1985), the Court held that the "Fourteenth Amendment's due process guarantee of fundamental fairness" (*id.* at 76) requires that the State supply an indigent criminal defendant with the "'basic tools of an adequate defense'" (*id.* at 77, quoting *Britt v. North Carolina,* 404 U.S. 226, 227 (1971)), including, in appropriate cases, state funds for expert witnesses.

The defendant in *Ake* had requested, and was denied, state funds to hire a private psychiatrist. The Court began by explaining that the question of whether an expert constitutes a "'basic tool of an adequate defense'" (470 U.S. at 77), so as to activate a due process right to state-paid expert assistance, must be determined in accordance with the three-pronged balancing test of *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), which considers: (i) the "private interest that will be affected by the action of the State"; (ii) "the governmental interest that will be affected if the safeguard is to be provided"; and (iii) "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Ake,* 470 U.S. at 77. The Court easily resolved the first two considerations in Ake's favor, finding that a defendant's "private interest in the accuracy of a criminal proceeding that places [his or her] . . . life or liberty at risk is almost uniquely compelling," *id.* at 78, and that the State's financial interest in avoiding payment of a defense psychiatrist was "not substantial," especially "in light of the compelling interest of both the State and the individual in accurate dispositions," *id.* at 79. In applying the third consideration, the Court focused upon "the pivotal role that psychiatry has come to play in criminal proceedings," *id.* at 79, and the value of psychiatric testimony in enhancing "the potential accuracy of the jury's determination," *id.* at 83, and concluded that:

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83. Since Ake had satisfied these criteria and had shown psychiatric testimony to be a significant factor both at trial and sentencing, the Court held that the denial of a state-supplied psychiatrist violated due process.

Ake was a capital case, and Chief Justice Burger, concurring in the judgment, would have limited its holding to capital cases. *Id.* at 87 (Burger, C.J., concurring); *see also ibid*. (Rehnquist, J., dissenting). But the majority opinion is worded broadly to encompass both capital and noncapital cases. Moreover, the Court identified the interest in state-paid expert assistance as being "compelling" whenever an individual's "life or liberty" is at stake. *Id.* at 78. Accordingly,

the lower courts in most States have applied *Ake's* due process doctrine to noncapital cases. *See, e.g.*, *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987) (en banc); *Jones v. Sterling*, 210 Ariz. 308, 314-15, 110 P.3d 1271, 1277-78 (2005); *In re Allen R.,* 127 N.H. 718, 721-22, 506 A.2d 329, 331-32 (1986) (respondent in delinquency case had federal and state constitutional right to state-paid psychologist to testify at confession suppression hearing). *See generally* Donna H. Lee, Note, *In the Wake of* Ake v. Oklahoma*: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. REV. 154, 170-71 n.122 (1992).

Although *Ake* itself dealt only with psychiatric experts, the Court's reasoning applies to other kinds of expert assistance as well. The *Ake* decision is grounded upon the State's due process obligation to afford an indigent defendant "access to the raw material integral to the building of an effective defense," *id.* at 77; the same obligation exists whether the necessary "raw material" is a psychiatrist or some other type of expert. *See*, *e.g.*, *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987) (en banc) (expert in hypnosis); *People v. Lawson*, 163 Ill.2d 187, 218-230, 644 N.E.2d 1172, 1187-92 (1994) (shoeprint expert); *Rey v. State*, 897 S.W.2d 333 (Tex. Crim. App. 1995) (pathologist), and cases collected in *id.* at 338 n.4. The key to showing that the circumstances of any particular case give rise to an entitlement to a particular type of expert is to satisfy the third prong of the *Mathews v. Eldridge* test employed in *Ake* by making an adequate factual demonstration of "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Id.* at 77. Counsel will need to show that the scientific test that the expert can perform "is likely to be a significant factor in [the respondent's] . . . defense [and that] with such assistance, the [respondent] . . . might have a reasonable chance of success." *Id.* at 82-83; *see*, *e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (finding no violation of due process in the denial of funds for defense experts where an indigent defendant "offered little more than undeveloped assertions that the requested assistance would be beneficial"). The procedures for making such a showing in an individual case are discussed in § 11.03(b) *infra*.

Because the Court in *Ake* "conclude[d] that the Due Process Clause guaranteed to Ake the assistance he requested and was denied, [the Court had] . . . no occasion to consider the applicability of the Equal Protection Clause, or the Sixth Amendment" to the issue of state-paid expert assistance. 470 U.S. at 87 n.13. Counsel can, and should, couple an *Ake* due process claim with: (i) an argument that the Equal Protection Clause guarantees the respondent the same defensive resources that a nonindigent respondent could purchase and that are necessary "to assure . . . an adequate opportunity to present his [or her] claims fairly in the context of the State's [delinquency] . . . process," *Ross v. Moffitt,* 417 U.S. 600, 616 (1974) (dictum); *see, e.g., Williams v. Martin,* 618 F.2d 1021 (4th Cir. 1980); *cf. Griffin v. Illinois,* 351 U.S. 12 (1956); and (ii) an argument that the Sixth Amendment right to compulsory process of witnesses affords an indigent respondent the right to a state-paid expert witness, *see, e.g., People v. Watson,* 36 Ill. 2d 228, 232-34, 221 N.E.2d 645, 648-49 (1966). While these doctrines have not as yet been extensively developed, counsel may be able to argue that they support a broader right to state-paid assistance than the due process doctrine established in *Ake* and therefore afford a right to an

expert even when the facts do not bring a case within the *Ake* doctrine.

§ 11.03(b) Procedures for Obtaining State Funds for an Expert

Many jurisdictions have had procedures for state funding of experts for indigent criminal defendants and delinquency respondents since long before *Ake.* These procedures typically have suffered from either or both of two flaws: (i) they establish a ceiling, or maximum amount, of state funding in an individual case; or (ii) they require that defense counsel demonstrate the need for an expert by setting forth facts in a motion that is available to the prosecution and alerts the prosecutor to defense strategy. Counsel can challenge both of these defects under *Ake.* The due process right to state-paid expert assistance established in *Ake* cannot be restricted by financial considerations. The Court specifically held that "where the potential accuracy of the [factfinder's] determination is . . . dramatically enhanced [by the expert's testimony], and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield." 470 U.S. at 83. And the *Ake* decision explicitly assumes that the defense will be permitted to make showings in support of state-funded experts by *ex parte* proceedings. *See id.* at 82-83 (explaining that the due process right will be activated when the defense "make[s] an ex parte threshold showing to the trial court"). Certainly, the respondent cannot be compelled to disclose the theory and strategy of the defense to the prosecutor as the precondition of state financial assistance. *Cf. Simmons v. United States,* 390 U.S. 377, 384-94 (1968); *Brooks v. Tennessee,* 406 U.S. 605, 607-12 (1972). *See generally* Lee, *supra* at 171-91.

If local procedure allows *ex parte* motions for state-paid assistance and does not establish a ceiling that would conflict with counsel's needs in any particular case, counsel should follow it in drafting and filing the motions. (If unfamiliar with the prevailing procedures, counsel should check local statutes and court rules and consult experienced defense attorneys practicing in the juvenile court.) In particular, counsel should take advantage of statutes, court rules, and local practice that support the provision of funds to the defense without the factually specific preliminary demonstration of need required to trigger the due process doctrine announced in *Ake*.

When practicing in jurisdictions whose standards or procedures for state funding of defense experts are more restrictive than those established by *Ake* and are too restrictive to satisfy counsel's needs, counsel will have to file a motion requesting state funding and challenging those aspects of local practice that violate *Ake*. *Cf. Hinton v. Alabama*, 134 S. Ct. 1081, 1083, 1085, 1088 (2014) (per curiam) ("Hinton's trial attorney rendered constitutionally deficient performance" by presenting a toolmark "expert he knew to be inadequate" when counsel "could not find a better expert willing to work for $1,000" and counsel mistakenly "believed that he was unable [under state law] to obtain more than $1,000 to cover expert fees"; the trial judge who granted counsel's request for funding for an expert cited a $1,000 statutory maximum, but counsel should "have corrected the trial judge's mistaken belief that a $1,000 limit applied" and sought additional funding). The requisite showing for activating *Ake* rights is described in § 11.03(a) *supra*. As explained there, counsel should ordinarily ground the request for expert funding not only on *Ake's* due process ground but also on equal-protection and Sixth

Amendment compulsory-process grounds. If local practice does not provide for motions to be filed *ex parte,* counsel should couch the assertion of the need for expert assistance in very general terms, explaining that a more particularized description would reveal counsel's "litigating strategies" (*United States v. Valenzuela-Bernal,* 458 U.S. 858, 862 n.3 (1982)) to the prosecution, and offering to make a more detailed factual showing *ex parte* — either in chambers or by a sealed affidavit — as contemplated by *Ake,* 470 U.S. at 82-83.

§ 11.04 WORKING WITH THE EXPERT WITNESS DURING THE PRETRIAL STAGE

§ 11.04(a) The Need To Enlist the Expert's Assistance in Preparing the Defense Case

In interviewing potential expert witnesses for the defense, counsel must both prepare them and learn from them. Counsel has to become familiar with the area of their expertise so that s/he can intelligently determine how best to present the experts' testimony at trial. Considerable familiarity will also be necessary to cross-examine prosecution experts. *See*, *e.g.*, John T. Philipsborn, *Feature: When Fine Print Matters; Reviewing Mental Health Assessment and Testing-Related Literature and Test Manuals is a Key to Effectively Preparing and Examining Mental Health Experts*, 37 CHAMPION 40 (2013). Although counsel cannot afford to rely on the defense expert alone for education and should do independent reading on the subject, s/he will ordinarily have to draw heavily on the expert to explain technical matters that counsel inevitably will find difficult. Counsel should describe the entire legal theory of the defense to the expert and should ask the expert to suggest ways in which his or her testimony might best be presented to support the defensive theory.

§ 11.04(b) Preparing the Expert To Testify; Obtaining a Written Report from the Expert for Use at Trial

Once the expert's presentation has been worked out, it should ordinarily be committed to writing in the form of a report from the expert to counsel and should be dated and signed by the expert. Such a report will be useful to the expert in reviewing the case prior to trial, it will be useful to counsel in examining the expert at trial, and it may be admissible in evidence to illuminate and clarify the witness's testimony. So used, it provides an easy way of assuring that all points are presented and cohesively connected. However, a report of this sort may be subject to discovery by the prosecution after the expert has testified at trial, whether or not it has been used in direct examination or reviewed by the expert in preparing to testify (see §§ 27.12(b), 33.03 *infra*); and it might even become discoverable before trial under the circumstances and within the limitations described in §§ 9.11-9.13 *supra*. Counsel should not therefore ask the expert to make an *initial* report in writing; the risks are altogether too great that a legally untutored person — or even a person with considerable forensic experience who has not been thoroughly advised about the defense to be presented in a particular case — may expose himself or herself to impeachment by unconsidered or incautious phrasing.

After the expert has made an initial oral report (or perhaps more than one, in complex

matters), counsel should decide whether s/he is going to use that expert in the respondent's defense. If so, the expert's testimony should be hammered out, with attention to details of phrasing, in a series of interviews and dry-run examinations in which counsel advises the expert completely of the needs and pitfalls of the case and of the expert's role in it. Counsel should also inform the expert that his or her report will be available to the prosecutor for cross-examination and should instruct the expert, with specific examples, of the ways in which an adept cross-examiner can turn ambiguous language into inconsistencies. *Then* the expert should be asked to prepare a *draft* report, which can be finalized after it has been reviewed by counsel. See § 33.15 *infra*. Because any notes made by the expert in the course of his or her examinations, researches, or preparations may also be discoverable, counsel should tell the expert *before the expert begins any work on the case* that notes or memoranda must be made with extreme caution.

An expert's testimony should be keyed to the level of understanding of the factfinder. Obviously, in a jury trial the expert's testimony should be phrased more simply than it needs be in a bench trial. Use of commonly intelligible, dramatic illustrations and examples is one of the best methods of clarifying expert testimony. Concepts of mathematical probability, for example, may be expressed in terms of the likelihood that a coin which is flipped fairly will come up heads 5,000 times in a row. Or the level of probability that the expert's test results are not due to chance may be favorably compared with the level of probability used in testing potentially dangerous medical drugs before they can be marketed. For additional suggestions concerning expert testimony, see §§ 33.11-33.16 *infra*.

Chapter 12

Representing Clients Who Are Mentally Ill or Mentally Retarded

Part A. Overview: Stages at Which the Respondent's Mental Problems Will Be Relevant

§ 12.01 THE INITIAL INTERVIEW AND SUBSEQUENT CLIENT COUNSELING

As explained in § 5.03 *supra,* the initial interview of the child should be conducted outside the presence of the child's parents, siblings, or other relatives. There is far too great a chance that the child will shape his or her account of the events to please a parent or relative or that the family member will intrude his or her own personality and biases into the interview. The same is true of all subsequent meetings with the client for the purposes of explaining the case, preparing the client's testimony, or counseling the client on fundamental issues such as whether to plead guilty or go to trial.

This general rule may need to be modified in the case of some severely mentally ill or mentally retarded clients. If the client's mental problems are causing problems in attorney-client communications (either because of the client's language problems or comprehension difficulties), it may aid communication to bring in a relative or a friend who has had longtime dealings with the client. In these circumstances counsel will need to balance the potential benefits of such a procedure against the risks of biasing the results of the interview or client counseling session.

An alternative to a family member is a mental health professional of some sort — a psychiatrist, psychologist, neurologist, psychiatric social worker, and so forth. When the child has a previous relationship with such a professional, counsel should consult that professional and consider bringing the professional into some of the meetings between the client and counsel. In any event, counsel should seek the professional's assistance in understanding the client and the professional's advice concerning problems and the best techniques for communicating with the client. If the client has no previous relationship with a professional, counsel should consider retaining a professional specially to assist counsel in understanding and communicating with the client as well as for other purposes in the case. Difficulties and possible adverse consequences of the decision to bring a new mental health professional into a case are discussed in §§ 12.08-12.10 *infra.*

Whether or not a family member or a mental health professional is brought in to assist, counsel who is representing a client with mental problems will obviously need to take special pains and precautions in evaluating the client's perceptions, recollections, and interpretations of pertinent facts, in eliciting those facts through interviewing, in preparing the client to testify or for other court proceedings and for interviews with court personnel, and in explaining and talking through with the client all of the matters that bear on decisions that the client must make (such as whether to plead guilty or contest guilt) and decisions in which the client and counsel both participate (such as whether certain witnesses should be called to testify). Mental illness and

mental limitations potentially affect every aspect of the client's comprehension and behavior, often in subtle and nonobvious ways, and so potentially affect every aspect of the client's interaction with counsel. In the initial interview and subsequent meetings with a mentally ill or mentally retarded client, counsel should be constantly attentive to the areas and dimensions of the client's impairment. If counsel decides at some point to apply for court funds for retention of a psychiatrist or psychologist (see § 12.09 *infra*), counsel's previous observations may provide the facts necessary to support the application.

§ 12.02 THE INITIAL HEARING

In some jurisdictions judges can order a mental examination of the client at the Initial Hearing. See § 12.11 *infra.* As explained in § 12.12 *infra,* counsel should ordinarily oppose such examinations.

If an examination is held, counsel may find that the results are being used against the respondent at the detention hearing. The respondent's psychiatric disorders may be cited by the prosecutor, probation officer, or judge as one of the bases for finding that pretrial detention is warranted by a danger to self or others. See § 4.17 *supra.* Conversely, a respondent's mental problems may provide counsel with arguments against detention — or against detention in particular facilities — especially if those problems would make the respondent highly vulnerable to physical or emotional abuse in the facility or if detention would interrupt or adversely affect an ongoing course of therapy in a community-based program.

Counsel also must be cognizant of the fact that some clients will prefer a hospital setting to a juvenile detention facility or will benefit more from detention in the former than from detention in the latter. Thus in cases in which the court decides to order secure detention because of the nature of the offense or the respondent's prior record, a client with mental problems may direct counsel to seek a court-ordered mental examination on an in-patient basis. Occasionally, counsel may want to give independent consideration to this possibility, although it will very seldom be a wise course of action except in the case of a client with a substantial history of prior hospitalizations or state mental examinations, because the cost of the examination in disclosure of potentially damaging information will usually outweigh its benefit in improving the conditions of the client's detention. See § 12.12 *infra.*

§ 12.03 THE INVESTIGATIVE STAGE

As explained in §§ 12.08-12.09 *infra,* counsel should arrange a mental examination of the respondent by a defense psychiatrist or psychologist if it appears that the respondent is suffering from mental problems. This should be done early in the investigative stage. See § 12.08 *infra.*

Counsel should also begin immediately to gather any institutional or agency records concerning the mental health of the respondent. These include school records (particularly special education records), prior psychiatric or psychological reports contained in the

respondent's probation file, hospital records generated by emergency or out-patient treatment or periods of hospitalization, and records compiled by private psychiatrists or psychologists or community mental health centers where the respondent was evaluated or had therapy. In order to obtain these records, counsel will need release forms signed by the client and the client's parent or guardian, authorizing the release of these confidential records to counsel or his or her investigator. See § 5.11 *supra.*

§ 12.04 PRETRIAL MOTIONS AND OTHER PRETRIAL PLEADINGS

There are a number of pretrial motions and other pleadings that may be required by the client's mental problems. As already indicated, counsel may need to file a motion with the court seeking court funds for retention of a defense expert. See § 12.09 *infra.* Depending upon the results of the examination and the facts of the case, counsel also may be able to file the following defense motions: (i) a motion to dismiss for social reasons, on the grounds that the client's primary social problem, the mental illness or mental retardation, is already being dealt with by a community-based program that counsel has arranged (see Chapter 19); (ii) a motion to suppress a confession or other statements made by the respondent, on the basis of involuntariness of the statement on due process grounds (see § 24.05(b) *infra*) or state law (see § 24.16 *infra*), involuntariness of the respondent's waiver of *Miranda* rights (see § 24.10(a) *infra*), or the respondent's incapacity to make a "knowing and intelligent" waiver of *Miranda* rights (see § 24.10(b) *infra*); and (iii) a motion to suppress tangible evidence that was seized through a purportedly consensual search, on the ground that the client's mental problems vitiated the voluntariness of the consent (see § 23.18(a) *infra*).

In those rare cases in which counsel intends to pursue an insanity defense at trial (see § 12.23 *infra*), s/he will need to check local requirements for giving notice of such a defense. Many jurisdictions require that the defense be specially pleaded, or that written notification of intention to raise it be filed within a specified period (usually 30 days) after arraignment. On the equally rare occasions on which counsel decides to raise an incompetency claim (see § 12.19 *infra*), there will also be local rules governing the manner and timing of the claim.

§ 12.05 PLEA NEGOTIATIONS WITH THE PROSECUTOR

As explained in § 14.16 *infra,* some prosecutors are motivated by a desire to aid children to receive rehabilitative services for whatever problems led them to become involved in the juvenile justice system. In engaging in plea negotiations with these prosecutors, counsel may be able to persuade the prosecutor to agree to diversion (or, if the prosecutor is intent upon a conviction, to agree to a sentence of probation) by telling the prosecutor about the child's mental problems and about the programs that counsel has arranged to deal with those mental problems.

§ 12.06 TRIAL

The insanity defense, although not advisable (see § 12.23 *infra*), is available as a defense

at trial in most jurisdictions. See § 12.21 *infra.* Psychiatric evidence also may be relevant to a defense of infancy. See § 17.04(b) *infra.* Finally, some jurisdictions recognize a defense of "diminished capacity," which permits the respondent to use evidence of impaired mental capacity to show that s/he was incapable of forming the requisite *mens rea* for the charged offense(s).

§ 12.07 DISPOSITION

Counsel can sometimes use the respondent's mental problems as a mitigating factor at disposition. It is especially persuasive to be able to show that the respondent has been successfully attending a community-based program arranged by counsel to deal with the mental problems. This evidence may be the decisive factor in inducing the judge to grant probation. See § 38.14 *infra.* In cases in which the judge is intent upon ordering placement in a secure facility, the evidence of the respondent's mental problems and successful adjustment to the community-based program may persuade the judge to place the respondent in a therapeutic facility with psychiatric services rather than a juvenile correctional facility.

Part B. Retention of a Defense Psychiatrist or Psychologist

§ 12.08 REASONS FOR RETAINING A MENTAL HEALTH EXPERT AND THE REASONS FOR DOING SO EARLY IN THE PROCEEDINGS

When representing a client who appears to be mentally ill or mentally retarded or who appears to suffer from emotional problems, counsel should consider retaining a psychiatrist or psychologist to evaluate the respondent and determine whether the child's mental problems supply a predicate for pretrial defense motions (see § 12.04 *supra*), defenses at trial (see § 12.06 *supra*), or mitigation at disposition (see § 12.07 *supra*). Depending upon the results of the evaluation, the mental health expert may also be useful in helping counsel to find an appropriate community-based program to deal with the respondent's mental problems, and would presumably be available as a defense witness if counsel raises any legal issues that go to evidentiary hearing or to trial and involve the respondent's mental state or capacities. The expert will usually prepare a report that can be used by the defense in support of motions, in plea negotiations with the prosecutor (see § 12.05 *supra*), and at disposition (see §§ 38.09, 38.16, 38.22 *infra*).

Because the defense can often use to its advantage the fact that the respondent is successfully attending a community-based program for his or her mental problems (see § 12.07 *supra*) and because the persuasiveness of this argument increases proportionately with the length of time that the respondent has been in the program, counsel should move as rapidly as possible to retain a mental health expert to assess the child's needs and assist in finding a suitable program. Ordinarily, counsel should begin the task of finding a psychiatrist or psychologist as soon as counsel detects the presence of apparent mental problems — usually during the first client interview. Frequently, psychiatrists and psychologists have such busy schedules that appointments for evaluations must be scheduled several weeks in advance.

Of course, counsel cannot arrange a psychiatric evaluation without the client's agreement. Unless the client is obviously incompetent, s/he should have the final say on whether s/he will be subjected to an evaluation. Counsel can attempt to be persuasive, however, and may be most effective if s/he can get the client to understand that psychiatrists work with "sane" people as well as with "nuts," that they are very useful in helping "well" people with adjustment problems, and that many people who are not at all "sick" see psychiatrists.

§ 12.09 RETENTION OF THE PSYCHIATRIST OR PSYCHOLOGIST

There are essentially four ways of obtaining a mental evaluation of the respondent: (i) retaining a private psychiatrist or psychologist on his or her usual fee basis; (ii) arranging for a private examination on an informal basis, either for free or for a sliding-scale fee adjusted to the income of the respondent's parent or guardian; (iii) invoking provisions of law authorizing a respondent's examination by a state psychiatrist or psychologist or other "neutral" expert, on either an in-patient or out-patient basis; and (iv) requesting that the court appoint a state-paid psychiatrist or psychologist for the defense. Since the cost of a private examination at the usual rates charged by a psychiatrist or psychologist is prohibitive for most clients, counsel usually will need to consider one of the other alternatives.

The major problem with requesting a court-ordered mental examination by a state-employed or "neutral" expert is that the resulting report will be provided not only to defense counsel but also to the judge and the prosecutor. If the report contains aggravating facts about the respondent's psychic make-up or background, it may afford a basis for pretrial detention, refutation of the defense position on mental issues raised at motions hearings or at trial, and a harsher sentence than the respondent otherwise would have received. See § 12.12 *infra.* In addition, depending upon the jurisdiction, the courts may rule that the respondent's statements about the offense, made during the defense-requested examination and recounted in the report, can be used by the prosecution as evidence of guilt at trial. See § 12.15 *infra.*

A request for court funds to hire a defense expert may also be problematic, although less so. First of all, unless the judge permits counsel to make the request on an *ex parte* basis, the very act of seeking court funds for a mental health expert will tip off the prosecution to the fact that the respondent has mental problems and may lead to the prosecutor's seeking a court-ordered examination, directing its own investigative efforts into troubling aspects of the respondent's background, opposing pretrial release or community-based disposition because s/he does not want "a possible nut wandering around loose" or doing all of these things. In addition, in some jurisdictions judges will not grant a defense motion for court funds until after a court-ordered examination has shown that the respondent does indeed have mental problems warranting the appointment or retainer of a defense expert. In such jurisdictions the request for the defense expert will activate an order for a mental examination by a state-employed or "neutral" expert, with all of the problems just described.

Thus when the respondent's family is unable to afford the cost of a private examination, it

is generally wise for counsel to investigate the resources available in the community for nonofficial examination. These include: hospital clinics (which often offer individual or group therapy as well as evaluation at nominal or no cost); hospitals with psychiatric residencies; community mental health centers; the county medical society; social welfare agencies; the psychiatry and psychology departments of the local branches of the State University, as well as private universities; and private psychiatrists and psychologists who have been involved in the past with the juvenile justice system or whose speciality is child psychology and who might welcome the chance to render service or obtain experience in a delinquency case.

If counsel is unable to arrange for the informal examination of an indigent client by a private psychiatrist or psychologist, then counsel will have to apply for state funds to hire a defense expert. Counsel should move the court *ex parte* for funds to retain, or for court appointment of, a psychiatrist or psychologist as a defense consultant to examine the respondent and advise counsel regarding the respondent's mental state for purposes of assisting counsel to prepare the defense (see § 11.03 *supra*). This form of retainer or appointment will assure that information revealed by the client to the expert and information conveyed between counsel and the expert is shielded by attorney-client privilege. *See, e.g., People v. Lines,* 13 Cal. 3d 500, 507-16, 531 P.2d 793, 797-804, 119 Cal. Rptr. 225, 229-36 (1975); *United States v. Alvarez,* 519 F.2d 1036, 1045-47 (3d Cir. 1975). *See also Elijah W. v. Superior Court*, 216 Cal. App. 4th 140, 146, 150-60, 156 Cal. Rptr. 3d 592, 595, 599-606 (2013). If the motion is denied, counsel should file whatever objections may be necessary to preserve a claim of error, including federal constitutional error (see § 11.03 *supra*), in its denial.

If all of the previously described methods for obtaining a defense mental health expert have failed, then counsel must weigh the potential benefits of a court-ordered examination against all of the risks that that process entails. If the benefits clearly outweigh the risks, then counsel should request the court-ordered examination, making clear on the record that s/he is making this request only because the court has denied the respondent's request for state funds for a defense expert.

§ 12.10 SELECTING THE MENTAL HEALTH EXPERT: CHOOSING BETWEEN PSYCHIATRISTS AND PSYCHOLOGISTS; CHOOSING AMONG SPECIALTIES

This section sets forth some very rough generalizations about the suitability of various types of mental health experts for juvenile delinquency cases. In selecting an expert for a particular case, counsel is well advised to consult other defense lawyers who have retained a mental health expert in a similar type of case. If other lawyers are unable to make a recommendation, counsel should ask a faculty member of a university psychiatry or psychology department or a reputable local psychiatrist or psychologist to list experts with the specialized qualifications necessary to handle the case effectively.

In the rare case in which counsel raises an incompetency claim (see § 12.19 *infra*) or an insanity defense (see § 12.23 *infra*), it is advisable to retain a psychiatrist, preferably one who has

a speciality in working with children.

If counsel's primary goal is to obtain a report about the child's mental or emotional problems for use in a motion to dismiss for social reasons or for use at disposition, counsel should usually turn to a psychologist, preferably one with experience in working with children. As a general rule, psychologists tend to go deeper into the child's family history, social background, and emotional problems than many psychiatrists, and the objective tests employed by psychologists are particularly well suited to an assessment of the effects of the child's mental and emotional problems upon his or her adjustment at school and home. There are two exceptions to this general rule, however. Counsel will need to retain a psychiatrist in any case in which the child is presently taking or appears to require psychotropic medication: psychiatrists have the medical training necessary to calculate and prescribe psychotropic drugs. A psychiatrist also should be retained in cases in which counsel's dispositional proposal will recommend admission to a residential mental health facility: Most facilities of this sort will be more swayed by a psychiatrist's recommendation than a psychologist's.

In cases involving mentally retarded children, counsel should almost invariably retain a psychologist. An assessment of the respondent's comprehension and functioning levels will necessitate the I.Q. tests that psychologists administer. For this same reason, in any case in which counsel intends to challenge the respondent's comprehension of *Miranda* rights, counsel should usually retain a psychologist, preferably one with some expertise in the specialized area of comprehension of *Miranda* rights.

In some cases counsel will need to obtain a neurological evaluation of the respondent, which can be conducted by either a neurologist or a psychiatrist with a speciality in neurology. (There are also some psychologists specializing in neurological matters who have the requisite qualifications but these are not common, and counsel should have a recommendation for the particular psychologist from a trusted source before choosing this alternative.) The neurological evaluation is necessary to ascertain whether a child's disturbed behavior is due to brain damage caused by prenatal problems, birth trauma, or childhood head injuries. Such an explanation of the child's behavior, especially when coupled with an assessment that the malady is treatable through medication (as it often is), can be highly persuasive in a motion to dismiss for social reasons or in a dispositional argument.

In cases involving sex offenses, counsel should seek out an expert in assessment and treatment of sex offenders. Frequently, behavioral psychologists are especially skilled in developing modes of treatment for sex offenders.

In cases involving children under the age of 12, counsel will need to find a mental health expert with experience in working with such young children. Some psychologists have developed expertise in "play therapy" for very young children and employ versions of the standard psychological tests that are specially modified for use with very young children.

Part C. *Mental Health Examinations*

§ 12.11 THE JUDICIAL POWER TO ORDER A MENTAL HEALTH EXAMINATION

In most jurisdictions a statute confers upon the juvenile court the power to order a mental health examination of a child who is brought before the court on a delinquency charge. *See, e.g.,* D.C. CODE § 16-2315 (2014); NEB. REV. STAT. § 43-258 (2014); N.Y FAM. CT. ACT §§ 322.1-322.2 (2014); TEX. FAM. CODE ANN. § 55.11(a) (2014). Although statutes of this sort often specify that the precise purpose of the examination is to determine the child's competency to stand trial, *see, e.g.,* D.C. CODE § 16-2315(c)(1) & (2) (2014); N.Y. FAM. CT. ACT § 322.1(3) (2014), many judges order these examinations whenever there are indications of suicidal tendencies or other self-destructive behavior, in order to determine whether the court must take immediate action to prevent the child from harming himself or herself. Some judges employ an even looser practice of ordering mental examinations whenever the respondent is unusually young or there are indications of significant aberrations in the child's behavior. Finally, as a practical matter, even when the examination is ordered for a narrow purpose, the examining psychiatrist or psychologist may uncover other mental problems in the course of the examination and will then report those problems to the court.

In a number of jurisdictions mental health examinations can be ordered at Initial Hearing. *See, e.g.,* D.C. CODE § 16-2315(a) (2014);MINN. RULE JUV. DELINQUENCY PROC. 20.01 (2014). The issue usually arises as a result of a probation officer noticing, during his or her pre-hearing interview of the child, that the respondent is answering questions in a disjointed fashion suggestive of some type of mental problem. The probation officer reports that fact to the judge at Initial Hearing, and the judge then invites the prosecution and defense counsel to address the question whether a mental health examination should be ordered.

If an examination is not ordered at Initial Hearing, the authorizing statutes usually permit the judge to order an examination at any later stage of the case at which it becomes apparent that the child has mental problems. *See, e.g.,* N.Y. FAM. CT. ACT § 322.1(1) (2014) ("[a]t any proceeding . . . when [the court] is of the opinion that the respondent may be an incapacitated person").

§ 12.12 WHY DEFENSE COUNSEL SHOULD ORDINARILY OPPOSE A MENTAL HEALTH EXAMINATION

As a general rule, it is advisable for counsel to oppose the ordering of a mental health examination. First of all, there are detrimental consequences if the examination reveals that the respondent is, in fact, incompetent or so mentally ill as to be dangerous to self or others. Such a finding can lead to civil commitment and result in the child's institutionalization in a mental hospital for many years. For this reason a defense attorney in juvenile court should rarely, if ever, contemplate raising a claim of incompetency or interposing a defense of insanity. See §§ 12.19, 12.23 *infra.* Second, there are potential ancillary consequences of a mental health examination

even when the respondent is not found to be mentally ill. During the course of the examination, the client may tell the examining psychiatrist or psychologist incriminating facts — either about the charged offense or about other uncharged crimes — that will be recounted in the examiner's report. That report will be given not only to the judge and to defense counsel but also to the prosecutor. The prosecutor can usually use the incriminating information in securing an order of pretrial detention and, depending upon local statutes and caselaw, may be able to use it in securing a conviction at trial, a severe sentence, or both. See § 12.15 *infra.* In the rare case in which defense counsel decides to pursue a mental defense, the report may provide the prosecutor with information usable to refute that defense.

Of course, in cases in which counsel does consider employing a mental defense, s/he will need to have the child examined by a psychiatrist or psychologist. In addition, counsel should have the child evaluated in any case in which the child's apparent mental problems could be affirmatively helpful to the defense in pretrial motions, plea negotiations, or disposition. See §§ 12.04-12.07 *supra.* However, counsel should attempt to arrange such an evaluation through a private examination or through retention of a defense expert rather than through a court-ordered mental examination. See § 12.09 *supra.*

The strategic reasons for opposing the examination must, of course, give way to a client's express desire for an in-patient mental examination. In cases in which the judge has already ordered detention in a secure facility (or inevitably will do so because of the client's prior record or history of failures to appear), a client whose mental problems qualify him or her for hospitalization may prefer to spend the pretrial detention period in a hospital setting rather than a detention facility. In this, as in all decisions involving "the objectives of representation" (AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule l.2(a) (2014)), counsel must defer to the client's wishes. *Id.;* AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980); see generally § 2.03 *supra.* Even when the client is mentally ill or mentally retarded (as will often be the situation in cases in which the judge is seriously considering a mental examination), the attorney's ethical obligations dictate that s/he "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." MODEL RULES, Rule 1.14(a); CODE, *supra*, EC 7-12. It is only in those rare cases in which the mental impairment so severely "diminish[es]" the client's "capacity to make adequately considered decisions in connection with the representation . . . [that] a normal client-lawyer relationship with the client" cannot be maintained and in which counsel "reasonably believes" that the client "is at risk of substantial physical, financial or other harm unless action is taken and [that the client] cannot adequately act in the client's own interest," that counsel may take "reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." MODEL RULES, Rule 1.14(b). See § 2.03 *supra*; § 12.19(b) *infra*.

§ 12.13 ARGUMENTS THAT CAN BE USED IN OPPOSING A MENTAL HEALTH EXAMINATION

The statutes authorizing mental health examinations usually are silent concerning the criteria that the judge should consider in assessing the appropriateness of an examination. The statutes commonly confer upon the judge the discretion to order an examination whenever s/he deems it appropriate. *See, e.g.,* N.Y. FAM. CT. ACT § 251(a) (2014) ("when such an examination will serve the purposes of this act").

In default of any statutory standards that can be invoked, counsel will have to rely on commonsense arguments to persuade the judge that there simply is no need for the examination. For example, if the judge is considering the examination because s/he suspects that the client is incompetent and will be unable to assist counsel in preparing a defense (see § 12.17 *infra*), but counsel thus far has had no problems in communicating with the client, counsel can relate that fact to the judge and assure the court that counsel will obtain any necessary psychiatric assistance in the event that the client exhibits manifestations of incompetency or severe mental illness.

§ 12.14 ARGUMENTS THAT CAN BE USED IN OPPOSING AN ORDER THAT A MENTAL HEALTH EXAMINATION BE CONDUCTED ON AN IN-PATIENT BASIS

In the event that the judge orders a mental health examination over counsel's objections, the judge then has to determine whether that examination shall be conducted on an in-patient or out-patient basis. In-patient examinations are conducted at a State Hospital, with the child committed to the institution for a statutorily designated period of time to allow for the examination. The length of time permitted by statute varies substantially among jurisdictions, with some jurisdictions permitting 10 days (N.Y. FAM. CT. ACT § 322.1(2) (2014)) and other jurisdictions allowing a somewhat longer period of time (D.C. CODE § 16-2315(b) (2014) (initial period of 21 days which can be extended up to 21 more days)). When the examination is ordered on an out-patient basis, the child lives at home and has to report on one (or possibly two or three) occasions to a community mental health center for the evaluation.

The statute or common-law rules usually permit in-patient status only upon medical affidavits, upon a *prima facie* showing of the respondent's incompetency, or when "there is reason to believe" that the respondent is incompetent. Counsel should scrutinize the affidavits or other evidence mounted in favor of the preliminary determination of incompetency, pointing out any favorable evidence as well as any reasons for doubting the evidence (for example, when the affidavits contain multiple hearsay). In jurisdictions whose statutes or court rules expressly state a presumption in favor of out-patient examinations (*see, e.g.,* D.C. CODE § 2315(b) (2014)), counsel should stress the legal effect of that presumption, arguing that the professed preliminary showing of incompetency is insufficient to rebut the presumption.

Even if the evidence satisfies the requisite initial showing of incompetency, the judge usually possesses discretion not to commit the respondent for an in-patient examination. Thus

counsel can argue that it would be an inappropriate exercise of judicial discretion to commit a respondent involuntarily to a mental hospital because there are community mental health facilities available for the respondent's diagnosis on an out-patient basis. *Cf. State v. Page,* 11 Ohio Misc. 31, 228 N.E.2d 686 (C.P., Cuyahoga Cty. 1967).

In those cases in which the court announces its intention to order an in-patient examination, counsel can insist upon a hearing that satisfies the requirements of procedural due process. *Cf. Vitek v. Jones,* 445 U.S. 480, 491-94 (1980); *Jones v. United States,* 463 U.S. 354, 361-62 (1983) (dictum). This would appear to include both a full adversary hearing on whatever issues of fact are decisive of the propriety of a commitment order under state law *(Vitek v. Jones,* 445 U.S. at 494-96) and a right to challenge the findings supporting such an order on the ground that there is "no basis" for them in fact (*see Schware v. Board of Bar Examiners,* 353 U.S. 232, 239 (1957)).

Judicial orders committing the respondent for an in-patient examination are commonly unappealable as interlocutory; but they may be challenged by prerogative writs such as prohibition or mandamus, as local appellate practice makes appropriate. See Chapter 26. The committing court should be requested to stay its commitment order pending review by the writs. If it refuses to do so, a stay should be sought from the appellate court in which the application for the writ is filed. When no other form of review of commitment orders is recognized by local practice, *habeas corpus* should be used, and the *habeas* court should be asked to stay the respondent's commitment *pendente lite.*

§ 12.15 PROCEDURAL PROTECTIONS AT A MENTAL HEALTH EXAMINATION

§ 12.15(a) Fifth Amendment Protections Against Self-Incrimination

In *Estelle v. Smith,* 451 U.S. 454 (1981), the Court held that the Fifth Amendment Privilege Against Self-Incrimination is applicable to a criminal defendant's "statements . . . uttered in the context of a psychiatric examination," *id.* at 465. Specifically, *Smith* decided that a state defendant's Fifth Amendment rights were violated by the admission of opinion testimony of a psychiatrist called by the prosecution to prove the defendant's probable future dangerousness as the basis for a death sentence at the penalty stage of the defendant's capital trial, when the psychiatrist's opinion was based upon his questioning of the defendant during a pretrial competency examination ordered *sua sponte* by the trial court, without notice to the defendant and waiver by the defendant of his privilege against self-incrimination. *See Penry v. Johnson*, 532 U.S. 782, 793-94 (2001) (describing the ruling in *Smith*).

Although the facts of the *Smith* case involved an adult defendant in a capital sentencing hearing, the rule established in *Smith* is fully applicable to noncapital cases, *see, e.g., United States v. Chitty,* 760 F.2d 425, 430-32 (2d Cir. 1985), including juvenile court proceedings, *see, e.g., In the Matter of the Appeal in Pima County Juvenile Action No. J-77027-1,* 139 Ariz. 446, 679 P.2d 92 (Ariz. App. 1984); *In the Matter of J.J.S.*, 20 S.W.3d 837 (Tex. App. 2000); *State v.*

Diaz-Cardona, 123 Wash. App. 477, 98 P.3d 136 (2004). Moreover, the rule is not limited to evidence used at sentencing: it also applies to prosecution evidence offered on the issue of guilt. *See Estelle v. Smith,* 451 U.S. at 462-63 (Court observes that it could "discern no basis to distinguish between the guilt and penalty phases of [a] . . . capital murder trial so far as the protection of the Fifth Amendment privilege is concerned"). *See, e.g.*, *People v. Pokovich*, 39 Cal. 4th 1240, 1246, 1253, 141 P.3d 267, 271, 276, 48 Cal. Rptr. 158, 163, 169 (2006). *See generally* LOURDES M. ROSADO & RIYA S. SHAH, PROTECTING YOUTH FROM SELF-INCRIMINATION WHEN UNDERGOING SCREENING, ASSESSMENT AND TREATMENT WITHIN THE JUVENILE JUSTICE SYSTEM (Juvenile Law Center 2007); Lourdes M. Rosado, *Outside the Police Station: Dealing with the Potential for Self-Incrimination in Juvenile Court*, 38 WASH. U. J. L. & POL'Y 177 (2012).

Smith therefore supports the respondent's right to claim the Fifth Amendment and refuse to talk to a psychiatrist in any court-ordered mental examination unless the order for the examination explicitly provides that nothing disclosed by the respondent during the examination and no results of the examination may subsequently be used against the respondent for any purpose except to determine competency to stand trial, *see* 451 U.S. at 468, and that the same restriction applies to "any evidence derived directly and indirectly" from the respondent's disclosures and examination results, *see Kastigar v. United States,* 406 U.S. 441, 453 (1972). Counsel should either insist upon the inclusion of such a provision in the judicial order for an examination or advise the respondent not to say a word to the examiner under any circumstances, whichever seems more appropriate to the needs of the particular situation.

A more difficult question is whether the respondent is entitled to such a restrictive order if the defense acquiesces in or affirmatively seeks the mental examination. For, although defense counsel will almost always oppose the ordering of such an examination (see § 12.12 *supra*), s/he may find it necessary to accept or even to request an examination in situations in which the court has denied a motion for appointment of a defense mental health expert (see § 12.09 *supra*) or in which the respondent wishes an in-patient examination as an alternative to detention in a secure facility (see § 12.12 *supra*). The defendant in *Estelle v. Smith* had "neither initiate[d] a psychiatric evaluation nor attempt[ed] to introduce any psychiatric evidence," 451 U.S. at 468, and *Smith* was distinguished on this ground in *Buchanan v. Kentucky,* 483 U.S. 402 (1987), in which the Supreme Court held that when a defendant had *both* "joined in a motion for [a pretrial psychiatric] . . . examination" (*id.* at 423) *and* presented an expert witness at trial "to establish . . . a mental-status defense" (*id.* at 404), the prosecutor could constitutionally use the results of the examination to impeach this witness. *See also Penry v. Johnson*, 532 U.S. at 795 (discussing *Buchanan*); *Kansas v. Cheever*, 134 S. Ct. 596, 600-02 (2014) (discussing *Estelle v. Smith* and *Buchanan*). *Buchanan* poses the thorny problems: (i) whether *Smith*'s prohibition of prosecutorial use of pretrial psychiatric examination results continues to govern cases in which the examination was unopposed or sought by the respondent or was ordered in response to the respondent's raising of a claim of incompetency (in the very rare case in which s/he might do this, see § 12.19 *infra*) or some other psychiatric issue before trial *but the respondent presents no evidence in support of any psychiatric issue at the trial or dispositional hearing,* and (ii) whether

the exception to the *Smith* prohibition recognized by *Buchanan* is limited to the use of pretrial examination results *to rebut expert psychiatric evidence presented by the respondent at a trial or dispositional hearing,* or whether the respondent's raising of a psychiatric issue at the trial or hearing opens the door to the prosecutor's use of the results generally.

Regarding problem (i), the argument appears substantial that, unless and until the respondent actually presents evidence in support of a psychiatric plea or defense, *Smith* prohibits the prosecutor's incriminating use of any information produced by a pretrial psychiatric examination of the respondent, even one requested or invited by the defense. This is so because the logic of *Smith* was not that Smith's Fifth Amendment rights were violated by the competency examination conducted in that case — to the contrary, the Supreme Court acknowledged that the competency examination had been "validly ordered" by the trial judge *sua sponte,* 451 U.S. at 468 — but rather that the Fifth Amendment came into play "[w]hen [the psychiatrist] . . . went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of . . . future dangerousness, [so that] his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting," *id.* at 467; *see id.* at 465. *See also Allen v. Illinois,* 478 U.S. 364 (1986), upholding compulsory psychiatric examination of an individual subject to civil commitment proceedings so long as that individual "is protected from use of his [or her] compelled answers in any subsequent criminal case in which [s/]he is the defendant," *id.* at 368. Under this logic it should make no difference that the respondent originally moves for the examination or triggers it by a pretrial plea of incompetency unless such a motion or plea can properly be treated as a waiver of the Fifth Amendment Privilege. But it cannot. Under *Pate v. Robinson,* 383 U.S. 375 (1966), and *Drope v. Missouri,* 420 U.S. 162 (1975), every person accused of a crime has a federal constitutional right to an adequate psychiatric evaluation and judicial determination of competency to stand trial; and it would impermissibly place the respondent "'between the rock and the whirlpool'" (*Garrity v. New Jersey,* 385 U.S. 493, 498 (1967)) to treat the respondent's invocation of this right as a waiver of the Fifth Amendment Privilege. *See Simmons v. United States,* 390 U.S. 377, 389-94 (1968), reaffirmed in *United States v. Salvucci,* 448 U.S. 83, 89-90 (1980); *Brooks v. Tennessee,* 406 U.S. 605, 607-12 (1972); *Lefkowitz v. Cunningham,* 431 U.S. 801, 807-08 (1977); *cf. Jeffers v. United States,* 432 U.S. 137, 153 n.21 (1977) (plurality opinion); *United States v. Goodwin,* 457 U.S. 368, 372 (1982) (dictum); *Spaziano v. Florida,* 468 U.S. 447, 455 (1984) (dictum); and *compare United States v. Jackson,* 390 U.S. 570, 581-83 (1968), *with Middendorf v. Henry,* 425 U.S. 25, 47-48 (1976), *and Corbitt v. New Jersey,* 439 U.S. 212, 218-20 & n.8 (1978); *compare Jackson v. Denno,* 378 U.S. 368, 389 n.16 (1964), *with Spencer v. Texas,* 385 U.S. 554, 565 (1967), *and Jenkins v. Anderson,* 447 U.S. 231, 236-37 (1980). To treat the respondent's request for a psychiatric examination as a waiver of the Privilege is the more impermissible because the very purpose of the examination is to obtain information that is necessary to an intelligent judgment regarding the merit of potential psychiatric defenses and regarding the respondent's capability to participate in that judgment: A forced choice between forgoing such information and forgoing a constitutional right has none of the qualities of a valid waiver. *Compare Brooks v. Tennessee*, 406 U.S. 605, 607-12 (1972), *with Town of Newton v. Rumery*, 480 U.S. 386 (1987). In discussing *Smith* and

Buchanan, the Supreme Court has suggested that the justification for finding a waiver of the Fifth Amendment "'[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony'" is that in this situation "'his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he has interjected into the case.'" *Powell v. Texas*, 492 U.S. 680, 684 (1989) (per curiam), quoting *Estelle v. Smith,* 451 U.S. at 465. *Accord*, *Kansas v. Cheever*, 134 S. Ct. at 601 ("The rule of *Buchanan*, which we reaffirm today, is that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal. . . . Any other rule would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime."; "When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him."). No similar justification exists for finding waiver when the defendant has merely sought a mental examination for the purpose of determining whether to interject psychiatric issues into the case and has then elected not to do so. Thus *Smith*'s ban upon the use of evidence obtained from a pretrial psychiatric examination of a defendant to prove guilt or enhance penalty should apply "whether the defendant or the prosecutor requested the examination and whether it was had for the purpose of determining competence to stand trial or sanity," *Gibson v. Zahradnick,* 581 F.2d 75, 80 (4th Cir. 1978). *See Battie v. Estelle,* 655 F.2d 692, 700-03 (5th Cir. 1981); *and see Collins v. Auger,* 577 F.2d 1107, 1109-10 (8th Cir. 1978). It follows that orders for any of these sorts of examinations are required to contain a provision restricting the use of their products to the purposes for which the examination was ordered, and defense counsel should demand such a provision.

Regarding problem (ii), it is noteworthy that *Buchanan* describes the "narrow" issue it decides as "whether the admission of findings from a psychiatric examination . . . profferred solely to rebut other psychological evidence presented by . . . [the defendant] violated his . . . [constitutional] rights," 483 U.S. at 404; *see also id.* at 424-25. It treats this issue as "one of the situations that we distinguished from the facts in *Smith.*" *Id.* at 423. *See also Kansas v. Cheever*, 134 S. Ct. at 600-01 (discussing *Buchanan*). The *Smith* opinion itself, in noting that the prosecution might be permitted to use evidence obtained by a pretrial psychiatric examination of the defendant in rebuttal, appeared to limit this possibility to cases in which the defense (i) presents expert psychiatric evidence and (ii) addresses the evidence to the specific issue on which the prosecution offers its rebuttal evidence. *Estelle v. Smith,* 451 U.S. at 466 n.10; *see also id.* at 465-66; *Powell v. Texas,* 492 U.S. at 683-84, 685 n.3; *Kansas v. Cheever*, 134 S. Ct. at 603; *Gholson v. Estelle,* 675 F.2d 734, 741 & n.6 (5th Cir. 1982); *Battie v. Estelle,* 655 F.2d at 701-02. There are pre-*Smith* cases allowing the prosecution greater latitude in rebuttal — for example, permitting the prosecution to use the defendant's statements made during the psychiatric examination to impeach the defendant's trial testimony, by analogy to *Harris v. New York,* 401 U.S. 222 (1971) (see § 24.22 *infra*). *People v. Brown,* 399 Mich. 350, 249 N.W.2d 693 (1976); *People v. White,* 401 Mich 482, 257 N.W.2d 912 (1977). But in the light of *Smith* these decisions are assailable under the settled principle that a defendant's statements obtained in

disregard of the Fifth Amendment may not be used even to impeach the defendant's inconsistent testimony at trial. *See, e.g.*, *People v. Pokovich*, 39 Cal. 4th at 1253, 141 P.3d at 276, 48 Cal. Rptr. at 169 ("the Fifth Amendment's privilege against self-incrimination prohibits the prosecution from using at trial, for the purpose of impeachment, statements a defendant has made during a court-ordered mental competency examination"). *See also Mincey v. Arizona,* 437 U.S. 385, 397-98 (1978); *New Jersey v. Portash,* 440 U.S. 450, 458-60 (1979); *United States v. Leonard,* 609 F.2d 1163 (5th Cir. 1980).

§ 12.15(b) State Law Prohibitions Against Using Statements Made During a Mental Health Examination as Proof of Guilt at Trial

Apart from the Fifth Amendment protections enunciated in *Estelle v. Smith,* there are state statutes, court rules, and common-law decisions providing that statements made during a competency evaluation cannot be used to prove the accused's guilt at trial. *See, e.g.,* FLA. RULE JUV. PROC. 8.095(d)(5) (2014); ILL. COMP. STAT. ANN. ch. 725, § 5/104-14 (2014); ME. REV. STAT. ANN. tit. 15, § 3318-A(9) (2014); MINN. RULE JUV. DELINQUENCY PROC. 20.01(9) (2014); *United States v. Alvarez,* 519 F.2d 1036 (3d Cir. 1975); *Lee v. County Court,* 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705 (1971). The scope of this prohibition varies from jurisdiction to jurisdiction and may depend, within any given jurisdiction, on: the nature of the examination (that is, whether it was ordered to determine the respondent's competence to stand trial or the respondent's sanity at the time of the offense); whether the examination was ordered on defense motion or on motion of the prosecution or by the court *sua sponte;* whether it was ordered before or after the respondent tendered a claim of incompetency or a plea raising some psychiatric defense, such as not guilty by reason of insanity; whether the respondent raises some such defense at trial; and whether, if s/he does, s/he calls defense psychiatric experts to support it. Compare the approaches taken in *People v. Spencer,* 60 Cal. 2d 64, 383 P.2d 134, 31 Cal. Rptr. 782 (1963); *In re Spencer,* 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965); *People v. Arcega,* 32 Cal. 3d 504, 651 P.2d 338, 186 Cal. Rptr. 94 (1982); *Parkin v. State,* 238 So. 2d 817, 820 (Fla. 1970); *People v. Stevens,* 386 Mich. 579, 194 N.W.2d 370 (1972); *State v. Whitlow,* 45 N.J. 3, 210 A.2d 763 (1965); *State ex rel. LaFollette v. Raskin,* 34 Wis. 2d 607, 150 N.W.2d 318 (1967).

Part D. Incompetency To Stand Trial

§ 12.16 APPLICABILITY OF THE DOCTRINE OF INCOMPETENCY IN JUVENILE DELINQUENCY PROCEEDINGS

The criminal procedure statutes of every State codify the common-law rule that a criminal defendant may not be tried for a crime while s/he is incompetent to stand trial. In many jurisdictions the juvenile statutes expressly adopt the same rule for delinquency proceedings. *See, e.g.,* D.C. CODE § 16-2315(c)(1) (2014); N.Y. FAM. CT. ACT §§ 322.1-322.2 (2014). *See generally* Kellie M. Johnson, Note, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067, 1081-88 (2006) (surveying juvenile competency statutes). However, even if

the juvenile statutes do not specifically provide for a claim of incompetency, there is little doubt that a state court would recognize the viability of the claim. The Supreme Court has "repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Medina v. California*, 505 U.S. 437, 453 (1992)). *See also Drope v. Missouri,* 420 U.S. 162, 171-72 (1975); *Pate v. Robinson,* 383 U.S. 375, 385 (1966). Adhering to these decisions, the lower courts have consistently ruled on due process grounds that juvenile statutes must be construed so as to incorporate a prohibition against trial of a youth who is incompetent. *See, e.g., State ex rel. Dandoy v. Superior Court,* 127 Ariz. 184, 619 P.2d 12 (1980); *Golden v. State*, 341 Ark. 656, 660, 21 S.W.3d 801, 803 (2000); *In the Matter of K.G.*, 808 N.E.2d 631, 635, 639 (Ind. 2004); *Matter of S.W.T.,* 277 N.W.2d 507 (Minn. 1979); *State in the Interest of Causey,* 363 So. 2d 472 (La. 1978); *In the Matter of Two Minor Children,* 95 Nev. 225, 592 P.2d 166 (1979); *People ex rel. Thorpe v. Clark,* 62 A.D.2d 216, 403 N.Y.S.2d 910 (N.Y. App. Div., 2d Dep't 1978); *In re Grimes*, 147 Ohio. App. 3d 192, 195, 769 N.E.2d 420, 422-23 (2002); *In the Interest of SWM*, 299 P.3d 673, 678 (Wyo. 2013).

§ 12.17 STANDARD FOR DETERMINING COMPETENCY

The prevailing test of incompetency in most jurisdictions is the relatively simple one whether the respondent (a) by reason of mental disease or disorder is (b) unable at the time of plea or trial to (i) understand the nature and purpose of the proceedings or (ii) consult and cooperate with counsel in preparing and presenting the defense. *E.g., Dusky v. United States,* 362 U.S. 402 (1960); *In the Matter of W.A.F.*, 573 A.2d 1264, 1265, 1267-68 (D.C. 1990); *In the Matter of Erick B.*, 4 Misc.3d 202, 206, 777 N.Y.S.2d 253, 257 (N.Y. Fam. Ct., Brooklyn Cty 2004); ME. REV. STAT. ANN. tit. 15, § 3318-A(2) (2014). This is probably the federal constitutional test as well. *See Indiana v. Edwards*, 554 U.S. 164, 170 (2008); *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Pate v. Robinson,* 383 U.S. 375 (1966); *Drope v. Missouri,* 420 U.S. 162, 171-72 (1975). In those States in which the adult criminal code or caselaw sets forth specific standards for assessing competency to stand trial but the juvenile code does not, the courts have differed as to the applicability of the adult standards to juvenile delinquency cases. *Compare In the Matter of K.G.*, 808 N.E.2d 631, 639 (Ind. 2004) ("juveniles alleged to be delinquent have the constitutional right to have their competency determined before they are subjected to delinquency proceedings" but "the adult competency statute is not applicable in making that determination"), *with In the Matter of the Welfare of D.D.N.*, 582 N.W.2d 278, 281 (Minn. App. 1998) (adult competency standards apply: "the level of competence required to permit a child's participation in juvenile court proceedings can be no less than the competence demanded for trial or sentencing of an adult"), *and with In the Matter of Carey*, 241 Mich. App. 222, 233-34, 615 N.W.2d 742, 748 (2000) (adult statutes apply but "competency evaluations should be made in light of juvenile, rather than adult, norms"), *and In re J.M.*, 172 Vt. 61, 68, 769 A.2d 656, 662 (2001) (similar to *Carey*, *supra*), *and In the Interest of SWM*, 299 P.3d 673, 678 (Wyo. 2013) (similar to *Carey*, *supra*). *See also In the Matter of W.A.F.*, 573 A.2d at 1265 & n.4, 1266, 1267-68 (D.C. juvenile statute establishing competency standard that differs from adult court rule failed to "adequately protect[]" juveniles' due process "right not to be tried while

incompetent"; due process requires that "procedure followed in adult criminal prosecutions . . . be applied to juvenile delinquency proceedings"); *Timothy J. v. Superior Court*, 150 Cal. App. 4th 847, 860-62, 58 Cal. Rptr. 3d 746, 754-55 (2007) (juvenile can seek a finding of incompetency to stand trial based on "developmental immaturity" that does not constitute "a mental disorder or developmental disability"). Neurological and psychological research supporting the recognition that "the risk of incompetence is substantially elevated in early and mid-adolescence" and that it is important to take account of this phenomenon of "developmental incompetence" is reviewed in Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANNUAL REV. CLIN. PSYCHOL. 459, 477 (2009).

Under the typical formulation of the competency standard, courts usually will not find a respondent incompetent unless s/he is actively psychotic. However, in cases in which a finding of incompetency would be in the client's interest, counsel can argue that the incompetency standard should be extended to encompass: (a) respondents whose mental disorder affects their ability to recall the events of the period when the offense is alleged to have been committed, *see Wilson v. United States,* 391 F.2d 460 (D.C. Cir. 1968); (b) respondents whose mental disorder impairs their ability to testify intelligibly in their own defense; (c) respondents whose mental disorder precludes their participation in a rational fashion in certain crucial decisions, such as whether to plead guilty in return for a bargained disposition or whether to invoke the defense of insanity at the time of the crime (see § 12.24 *infra*); and (d) respondents whose physical disability prevents them from assisting in their own defense (*see, e.g.,* HAW. REV. STAT. § 704-403 (2014); ILL. COMP. STAT. ANN. ch. 725, § 5/104-16(b) (2014)). *See generally* Marty Beyer, *What's Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel*, 58 GUILD PRACTITIONER 112 (2001); Thomas Riffin, *Competence to Stand Trial Evaluations with Juveniles*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 15 (2006); Melinda G. Schmidt, N. Dickon Reppucci & Jennifer L. Woodard, *Effectiveness of Participation as a Defendant: The Attorney-Client Relationship*, 21 BEHAV. SCI. & L. 175 (2003); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005).

§ 12.18 RESULT OF A FINDING OF INCOMPETENCY

If a child is found to be incompetent to stand trial, s/he will be confined in a mental health facility, probably a State Hospital and, in cases of violent offenses, a secure ward of that hospital. In *Jackson v. Indiana,* 406 U.S. 715 (1972), the Court imposed the following due process restrictions upon the duration of the confinement:

> [A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore,

> even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.

Id. at 738.

Thus in cases in which the hospital concludes that restoration to competency is not probable and in which the State refrains from seeking civil commitment, the child will be released. Usually, the second of these conditions occurs only in cases of minor property offenses and minor offenses against the person, and even then only if the respondent has no significant prior record. If the gravity of the present offense or if the prior record causes the prosecutor to fear further crimes by the respondent, the prosecutor is likely to seek civil commitment as a way of getting the respondent off the streets. Moreover, in some jurisdictions the statute mandates the initiation of civil commitment proceedings if a juvenile is found to be incompetent to stand trial. *See, e.g.,* ARK. CODE ANN. § 9-27-502(b)(9)(A) (2014); D.C. CODE § 16-2315(c)(1) (2014).

Of course, even when the State elects to seek civil commitment, it will not necessarily succeed in committing the child. Under typical civil commitment statutes, an individual is subject to commitment only if s/he is mentally ill or mentally retarded, *see, e.g., Addington v. Texas,* 441 U.S. 418, 426 (1979), and if these conditions render the individual dangerous to self or others, *see O'Connor v. Donaldson,* 422 U.S. 563, 575-76 (1975); *see also Addington v. Texas*, 441 U.S. at 431-33 (due process requires that state statutes establish a standard of proof at least as high as "clear and convincing evidence" in civil commitment proceedings). Thus individuals whose incompetency is based on factors other than mental disease or defect — such as amnesia or physical disability (see § 12.17 *supra*) — will probably be deemed ineligible for civil commitment. And there are many mentally ill and mentally retarded people who, although incompetent to stand trial, are not dangerous to self or others. However, counsel should be aware of the risk that a far less demanding standard for commitment — one that asks only whether the child is mentally or emotionally ill and whether s/he can "benefit from treatment" — may be applied in cases of so-called voluntary commitment of a child by his or her parent or of a ward of the State by the public agency exercising guardianship. *See Parham v. J.R.,* 442 U.S. 584 (1979); *Secretary of Public Welfare v. Institutionalized Juveniles,* 442 U.S. 640 (1979).

If the State seeks and succeeds in obtaining an order of involuntary civil commitment, the commitment will continue until such time as the attending psychiatrist deems the respondent to have recovered from the mental illness or at least to have ceased being dangerous to self or others. Since such mental problems often are of long duration, the child could end up spending his or her childhood and even much of his or her adult life civilly committed to a mental institution. Indeed, the statistical evidence shows that "[c]hildren, on the average, are confined for longer periods than are adults." *Parham v. J.R.*, 442 U.S. at 628 (Brennan, J., concurring & dissenting).

§ 12.19 STRATEGIC CONSIDERATIONS IN DECIDING WHETHER TO RAISE A CLAIM OF INCOMPETENCY

§ 12.19(a) The General Inadvisability of Raising a Claim of Incompetency in a Juvenile Delinquency Case

Counsel should generally be very reluctant to raise a claim of incompetency in a juvenile delinquency case. As explained in § 12.18 *supra,* the consequence of a finding of incompetency may be civil commitment to a mental hospital for much of the child's lifetime. In adult criminal court, where a serious felony may carry a penalty of 20 years or more, it will occasionally be in the defendant's interest to accept prolonged hospitalization to escape an even longer prison sentence. However, in juvenile court, a delinquency finding rarely exposes the respondent to more than one and a half years of placement. See § 38.03(c) *infra.* Quite clearly, it is not worth averting the risk of that one and a half years of placement at the cost of many years of institutionalization in a mental hospital.

There are also other adverse consequences that can flow from raising a claim of incompetency. In the event that the respondent is found to be only temporarily incompetent, with the prospect of regaining capacity to stand trial, s/he may be held for several months in the mental hospital and then returned to court to face the original charge; then, if s/he is convicted and sentenced to a term of incarceration, the length of the sentence will not be proportionately reduced to give "credit" for the months s/he spent in the mental hospital. And in the event that the respondent is not found incompetent at all, the incompetency proceedings — the mental examination and the incompetency hearing — may provide the prosecution with information about the respondent's background and psychic make-up that the prosecutor can use: (i) at Initial Hearing, to secure an order of pretrial detention; (ii) at trial, to impeach the respondent's credibility as a witness, refute defenses of diminished capacity or insanity, and sometimes affirmatively prove guilt; and (iii) at sentencing, to argue for a harsher sentence on the ground that the respondent's mental problems render him or her too dangerous to leave at large in the community.

Finally, counsel must be aware that competency proceedings can consume several months, since there will probably be at least two mental examinations (one by defense experts and one by prosecution experts), and the court proceedings will be repeatedly continued because the experts' reports are not ready or the attorneys or experts have scheduling conflicts. This delay is yet another factor rendering an incompetency claim inadvisable in cases in which a client is detained pending trial or is likely to be committed for an in-patient evaluation.

§ 12.19(b) The Limited Circumstances in Which an Incompetency Claim May Be Advisable or Necessary

The one instance in which a claim of incompetency may be advisable is when counsel is confident that the child faces little or no risk of civil commitment if found incompetent. This circumstance would arise when: (i) the finding of incompetency would rest upon some physical condition or non-organic mental problem (such as amnesia) that could not serve as a "mental

disease or defect" rendering the child eligible for civil commitment under state statutory standards (see § 12.18 *supra*); or (ii) even though the finding of incompetency is based on a mental disease or defect, the defense psychiatrist or psychologist is certain that there is no basis for a finding that the respondent is so "dangerous" to self or others as to require civil commitment, and there is no risk that the child will be subjected to the less exacting standards applicable to third-party "voluntary" commitments of children (see § 12.18 *supra*). In these very rare circumstances counsel can feel reasonably safe that a finding of incompetency would spare the respondent from facing trial on the charged offenses without exposing him or her to the peril of civil commitment. However, even in these situations, the incompetency claim should not be pursued unless the defense psychiatrist or psychologist is confident that the respondent will not be classified as likely to regain capacity and thereby subjected to a period of hospitalization followed by return to court to face trial on the charges.

There may be some cases in which the respondent is functioning so poorly that s/he cannot communicate with counsel at all. In these unusual circumstances the ethical directives contemplate that the attorney will look to the incompetent person's "legal representative." *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14, Comment (2014); AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1980). Presumably, this would mean the child's parent or the adult relative or foster parent who serves as guardian of the child. *Cf. Parham v. J.R.,* 442 U.S. 584, 602-04 (1979). However, in cases in which the parent's or guardian's interests are adverse to the child's (see § 4.04 *supra*), counsel will be obliged to seek appointment of a guardian *ad litem* (*see, e.g.,* MINN. RULE JUV. DELINQUENCY PROC. 24.01(A) (2014); *see also R.L.R. v. State,* 487 P.2d 27, 35 & n.46 (Alaska 1971)), even though the practical consequence will be that the judge and prosecutor are alerted to the respondent's competency problems and may raise the incompetency issue that defense counsel would prefer to avoid (*but see People v. Tortorici*, 92 N.Y.2d 757, 767, 709 N.E.2d 87, 93, 686 N.Y.S.2d 346, 352 (1999) (trial court properly exercised its discretion in declining to order a pretrial competency hearing *sua sponte*, given the circumstances of the case including the "conscious choice of defendant's lawyer not to request a hearing (or to request the court to order a hearing *sua sponte*) . . . [and that] a *sua sponte* competency hearing might well have been viewed by the defense as interfering with its strategy")).

§ 12.20 PROCEDURES FOR RAISING AND LITIGATING A CLAIM OF INCOMPETENCY

In the uncommon case in which counsel does believe that a claim of incompetency to be tried may be in the respondent's interest, the first step that counsel must take is to retain a psychiatrist or psychologist to examine the respondent and determine whether: (i) s/he is arguably incompetent under the applicable standard (see § 12.17 *supra*); and (ii) there is little or no risk that raising the claim of incompetency will result in the respondent's being civilly committed or deemed likely to regain capacity to stand trial (see §§ 12.18, 12.19 *supra*). *Cf. Blakeney v. United States*, 77 A.3d 328, 342-43, 345 (D.C. 2013) ("The test for determining when defense counsel is obligated to raise the issue of the defendant's competency with the court

cannot be stated with precision. . . . That a defendant suffers from a severe mental disorder does not necessarily mean he is incompetent; the latter is a 'much narrower concept.' . . . [W]e hold that criminal defense counsel must raise the issue of the defendant's competency with the court if, considering all the circumstances, objectively reasonable counsel would have reason to doubt the defendant's competency. Failure to do so is constitutionally deficient performance."); *Humphrey v. Walker*, 294 Ga. 855, 874-75, 757 S.E.2d 68, 83 (Ga. 2014). The procedures for obtaining a defense mental health expert are described in § 12.09 *supra.*

Assuming that the examination results in a report attesting to the respondent's incompetency and assuming that counsel concludes that an incompetency claim is the proper strategy, counsel then will proffer the report to the court together with whatever written pleading, motion, or "suggestion" of present incompetency is required by local practice in order to raise the claim. In many jurisdictions the judge will, at this point, routinely grant a prosecutorial request that the respondent be ordered to submit to an examination by a prosecution psychiatrist or psychologist. But if the judge previously denied the defense request for a partisan expert and ordered a mental health examination by a "neutral" expert instead, counsel should now object to the court's granting the prosecution an adversarial benefit that was denied to the defense. *Cf. Wardius v. Oregon,* 412 U.S. 470, 474-75 & n.6 (1973). See § 9.09(b)(7) *supra.*

Once all examinations are completed and the reports filed, the judge will convene an evidentiary hearing on the issue of competency. In *Pate v. Robinson,* 383 U.S. 375 (1966), the Court made clear that the defense has a due process right to a hearing for the purpose of showing that the accused is incompetent to stand trial. *See also Drope v. Missouri,* 420 U.S. 162 (1975). The jurisdictions differ on who bears the burden of proof at the hearing, with some placing the burden upon the State once the issue has been raised, and others assigning the burden to the defense. *See Cooper v. Oklahoma*, 517 U.S. 348, 360-62 & nn.16-18 (1996) (citing state statutes and caselaw). In the latter jurisdictions, the quantum of the burden imposed on the defense is a "preponderance of the evidence." *See id*. at 361 n.17. The Supreme Court held in *Cooper v. Oklahoma* that imposing upon the accused the heavier burden of "clear and convincing evidence" would violate the Due Process Clause. *See id*. at 362-69. Although the Court has not yet addressed the distinct question of what burden must be placed upon the State when a finding of incompetency is sought against a respondent who opposes it and when the result is involuntary hospitalization, the reasoning of *Cooper v. Oklahoma* and the Court's decision in the civil commitment context in *Addington v. Texas*, 441 U.S. 418 (1979), strongly suggest that the burden must be placed upon the State to prove incompetency by "clear and convincing evidence." *See Jones v. United States*, 463 U.S. 354 (1983) (distinguishing *Addington* in cases in which a defendant has been found not guilty by reason of insanity because, in such cases, commitment is warranted by "the proof . . . [adduced at trial that the defendant] committed a criminal act as a result of mental illness," *id*. at 366-67 — a circumstance justifying "the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment," *id*. at 370); *and see Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

Part E. Insanity

§ 12.21 APPLICABILITY OF THE INSANITY DEFENSE TO JUVENILE DELINQUENCY PROCEEDINGS

In many States the insanity defense is just as applicable in juvenile court as it is in adult criminal court. *See, e.g., In re Ramon M.,* 22 Cal. 3d 419, 584 P.2d 524, 149 Cal. Rptr. 387 (1978) (mental retardation); *State in the Interest of Causey,* 363 So. 2d 472 (La. 1978); *In the Matter of Stapelkemper,* 172 Mont. 192, 562 P.2d 815 (1977); *In the Matter of L.J.,* 26 Or. App. 461, 552 P.2d 1322 (1976); *In the Interest of Winburn,* 32 Wis. 2d 152, 145 N.W.2d 178 (1966); *but see Golden v. State*, 341 Ark. 656, 660-62, 21 S.W.3d 801, 803-04 (2000) (state legislature has not provided for an insanity defense in juvenile court and the Constitution does not require it); *In the Matter of C.W.M.,* 407 A.2d 617 (D.C. 1979) (upholding the constitutionality of a D.C. statute that prohibits the use of an insanity defense in a juvenile trial but permits evidence of insanity as a mitigating circumstance at sentencing); *Commonwealth v. Chatman*, 260 Va. 562, 564-65, 538 S.E.2d 304, 304-05 (2000) (same as *Golden v. State*, *supra*). *Compare State in the Interest of R.G.W.,* 135 N.J. Super. 125, 342 A.2d 869 (1975), *aff'd,* 70 N.J. 185, 358 A.2d 473 (1976) (holding that the earlier ruling in *State in the Interest of H.C.,* 106 N.J. Super. 583, 256 A.2d 322 (Juv. and Dom. Rel. Ct., Morris Co. 1969), restricting insanity claims to the sentencing stage of juvenile proceedings, was legislatively superseded by a statute that authorizes the insanity defense in a juvenile trial). *See generally* Emily S. Pollock, Note, *Those Crazy Kids: Providing the Insanity Defense in Juvenile Courts*, 85 MINN. L. REV. 2041, 2052-59 (2001) (surveying state standards for the insanity defense in juvenile court).

§ 12.22 THE STANDARD FOR ACQUITTING ON GROUNDS OF INSANITY AT THE TIME OF THE OFFENSE

The traditional *M'Naghten* rule, which is still employed in many States, declares "that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case,* 8 Eng. Rep. 718, 722 (1843). *See, e.g.,* N.Y. FAM. CT. ACT § 303.3 (2014) (incorporating the insanity standard of N.Y. Penal Law). *Compare Clark v. Arizona*, 548 U.S. 735, 747, 756 (2006) (rejecting a due process challenge to Arizona's "fragment[ary]" *M'Naghten* rule which asks only the "moral incapacity" question of "whether a mental disease or defect leaves a defendant unable to understand that his action is wrong" and not the "alternative" "cognitive incapacity" question of "whether a mental defect leaves the defendant unable to understand what he is doing"). Several other States employ the American Law Institute (ALI) test, which provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 4.01 (1962), 10 U.L.A. 490-91 (1974). *See generally Clark v.*

Arizona, 548 U.S. at 749-52 & nn.12-22 (surveying varying formulations of the insanity defense and citing federal and state statutes and caselaw); *Delling v. Idaho*, 133 S. Ct. 504, 504-06 (2012) (Breyer, J., dissenting from denial of *certiorari*, joined by Ginsburg and Sotomayor, JJ.) (expressing the view that the Court should grant *certiorari* to determine whether the Due Process Clause prohibits "Idaho's modification of the insanity defense," under which "insanity remains relevant to criminal liability, but only in respect to intent," and which "permits the conviction of an individual who knew *what* he was doing, but had no capacity to understand that it was wrong").

In all jurisdictions the defense bears the burden of introducing sufficient evidence to raise the issue of insanity. The requisite quantum of evidence varies among jurisdictions. Some States provide that the defense can raise the issue by merely presenting "some evidence," or enough evidence to raise a reasonable doubt, whereupon the burden shifts to the prosecution to prove sanity beyond a reasonable doubt, just as it must prove every element of the offense beyond a reasonable doubt. In other States the defense bears the burden of persuasion and must prove insanity by a preponderance of the evidence. Constitutional challenges to placing the burden on the defense have been consistently rejected. *Rivera v. Delaware,* 429 U.S. 877 (1976) (per curiam); *see Patterson v. New York,* 432 U.S. 197, 201-05 (1977) (dictum); *Jones v. United States,* 463 U.S. 354, 368 n.17 (1983) (dictum).

§ 12.23 INADVISABILITY OF RAISING THE INSANITY DEFENSE IN JUVENILE DELINQUENCY CASES

The primary consideration militating against the raising of incompetency claims in juvenile court (see § 12.19 *supra*) — the risk of institutionalization in a mental hospital for many years more than the respondent would serve if convicted at trial — also renders the insanity defense highly inadvisable. Indeed, the risks are even greater in the context of insanity defenses. A respondent who is found incompetent to stand trial and who is then subjected to involuntary civil commitment proceedings is entitled to a hearing at which the State must show by clear and convincing evidence that the respondent is dangerous to self or others. See §§ 12.18, 12.20 *supra.* In a number of States the statutes provide for civil commitment of an insanity acquittee as an automatic consequence of the finding of insanity made at trial, even though that finding is usually made under the far weaker "preponderance of the evidence" standard and does not involve an express finding of dangerousness. *See, e.g.,* COLO. REV. STAT. § 16-8-105.5(4) (2014). In *Jones v. United States,* 463 U.S. 354 (1983), the Court sustained the constitutionality of a statutory scheme of this type. Under such a statutory scheme, an insanity acquitee is theoretically "entitled to release when he has recovered his sanity or is no longer dangerous." *Id.* at 368. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71 (1992) (state statute violated due process by allowing continuing confinement of insanity acquittee even after hospital review committee concluded that individual's mental illness was in remission); *see also Kansas v. Crane*, 534 U.S. 407, 412-13 (2002); *Richard S. v. Carpinello*, 589 F.3d 75, 82-85 (2d Cir. 2009). But once in an institution s/he is likely as a practical matter to be confined at the pleasure of the institution's medical staff, since they will both create and evaluate the record on which any subsequent

determination of recovery or dangerousness is going to be based, and their observations and findings are bound to be given great deference by the courts. *See, e.g.*, *State v. Klein*, 156 Wash. 2d 103, 124 P.3d 644 (2005).

Even in the States that extend the usual procedural protections in civil commitment proceedings to insanity acquittees, an insanity acquittal still poses greater risks than a finding of incompetency to stand trial. A respondent who is found incompetent to stand trial cannot have the pending delinquency charge used against him or her in the determination of "dangerousness" for civil commitment purposes, since s/he has never been convicted of the charge and must be presumed innocent. In contrast, "[a] verdict of not guilty by reason of insanity establishes two facts: (i) the [respondent] . . . committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness." *Jones,* 463 U.S. at 363. And in *Jones,* the Court concluded that "[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness," *id.* at 364, even when the criminal act is "a nonviolent crime against property." *Id.* at 365. The Court's conclusions on this point were made solely in the context of reviewing the reasonableness of a finding of legislative fact underlying a challenged statute, *see id.* at 364-65, and the Court's deference to legislative judgment in *Jones* would not necessarily justify a finding of fact in an individual case that the evidence shows a particular respondent to be "dangerous." *Cf. id.* at 365 n.14. However, notwithstanding this argument for distinguishing *Jones,* there is considerable risk that lower courts will follow the reasoning of *Jones* and find in individual cases that proof of delinquency satisfies the criterion of "dangerousness" for purposes of civil commitment.

In § 12.19(b) *supra,* it was suggested that counsel could consider a claim of incompetency with somewhat less trepidation in cases in which the defense psychiatrist was confident that the respondent would not qualify for civil commitment in that s/he was not "dangerous" to self or others. As the foregoing discussion demonstrates, the same analysis cannot be safely applied in the insanity context, since some jurisdictions permit automatic commitment of an insanity acquittee and, even in jurisdictions that require a finding of dangerousness, the judge could conceivably make that finding solely on the basis of the child's conviction of the crime.

§ 12.24 DEFENDING AGAINST THE JUDICIAL INTERPOSITION OF AN INSANITY DEFENSE

In some jurisdictions the court can raise the issue of insanity *sua sponte. See generally* Justine A. Dunlap, *What's Competence Got to Do with It: The Right Not to Be Acquitted by Reason of Insanity*, 50 OKLA. L. REV. 495, 508-10 (1997). In jurisdictions of this sort defense counsel may have to defend against the judge's interposition of the insanity defense, in order to avoid an insanity acquittal with the probable consequence of prolonged institutionalization in a mental hospital. Counsel can take the position that "the trial judge may not force an insanity defense on a defendant found competent to stand trial *if* the individual intelligently and voluntarily decides to forego that defense." *Frendak v. United States,* 408 A.2d 364, 367 (D.C. 1979) (emphasis in original); *accord, State v. Khan,* 175 N.J. Super. 72, 417 A.2d 585 (1980);

State v. Brown, 179 Vt. 22, 32-36, 890 A.2d 79, 88-91 (2005) (citing caselaw from other States). However, counsel should be prepared for an inquiry into the respondent's competency to intelligently waive an insanity defense, which is not necessarily the same as competency to stand trial. *See Frendak,* 408 A.2d at 367; *Phenis v. United States*, 909 A.2d 138, 154-60 (D.C. 2006).

Even if a judge is permitted to foist an insanity defense on an unwilling respondent, it does not follow that the consequence of the defense once established should be automatic involuntary civil commitment in those jurisdictions where such commitment is the usual fate of insanity acquittees. The *Jones* case discussed in § 12.23 *supra* attached importance to the fact that "automatic commitment under [the challenged statute was provided] . . . only if the *acquittee himself* advances insanity as a defense . . . ." *Jones v. United States,* 463 U.S. 354, 367 (1983) (emphasis in original); *see also id.* at 367 n.16. Counsel can therefore urge that ambiguous statutes should be so construed under the doctrine calling for statutory construction that avoids unnecessary constitutional issues; and, if the statute is not so construed, counsel can distinguish *Jones* in arguing that the statute is unconstitutional for all of the reasons advanced in the dissenting opinions in that case, 463 U.S. at 371-87.

Chapter 13

Transfer or Waiver to Adult Court

§ 13.01 INTRODUCTION

Every State provides that persons under a certain age who are accused of violating the penal law are eligible for prosecution as juvenile delinquents in juvenile court. However, every State also retains the power to selectively prosecute otherwise eligible juveniles in adult criminal court. When prosecuted in adult criminal court, juveniles are not referred to as delinquents, though frequently another label different from "criminal," such as "youthful offender" or "juvenile offender," will be used.

The decision to prosecute in adult court a person otherwise eligible for prosecution as a delinquent affects many different aspects of the process. On the credit side, the young person will be entitled to all of the constitutional and statutory rights that adults accused of crime enjoy in the State, including such rights as the right to trial by jury (a major benefit in the many jurisdictions in which there is no such right for accused delinquents), open and public proceedings, bail, and prosecution only on indictment by a grand jury. In addition, because sentencing in adult court is governed by statutory maximum terms graduated according to the severity of offenses rather than following the juvenile court model, which looks exclusively at the rehabilitative needs of the particular offender, the juvenile who is convicted only of a misdemeanor or minor felony offense may be eligible for, or actually receive, a sentence *less* severe than s/he would have received if prosecuted as a juvenile delinquent. On the debit side, the maximum sentence that the young person prosecuted in adult court may receive for serious offenses frequently is considerably greater than s/he could have received if adjudicated a delinquent. Not only is the maximum length of sentence for severe crimes greater, sometimes equaling the maximum available for an adult (except those sentences that are barred by the Eighth Amendment if the offender was below age 18 at the time of the crime, *see Roper v. Simmons*, 543 U.S. 551 (2005) (capital punishment); *Graham v. Florida*, 560 U.S. 48 (2010) (life without the possibility of parole in non-homicide cases); *see also Miller v. Alabama*, 132 S. Ct. 2455 (2012) (barring *mandatory* sentencing of life imprisonment without the possibility of parole for any offender who was below age 18 at the time of the crime); *People v. Caballero*, 55 Cal.4th 262, 268-69, 282 P.3d 291, 295-96, 145 Cal. Rptr.3d 286, 291 (2012); *State v. Null*, 836 N.W.2d 41, 70-75 (Iowa 2013); *Diatchenko v. District Attorney*, 466 Mass. 655, 658-59, 1 N.E.3d 270, 275-76 (2013) (Massachusetts Constitution's "cruel or unusual punishments" clause bars the "discretionary imposition" of a sentence of life in prison without the possibility of parole on "juvenile homicide offenders" "who were under the age of eighteen when they committed the crime of murder in the first degree" because such a sentence is "an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders")), but the place of confinement may be an adult correctional facility. (Many jurisdictions do provide that the part of the sentence that runs through the young person's minority (usually 18) must be served in facilities maintained by the department that supervises the incarceration of delinquents, rather than by the adult

correctional department.) *See generally* Aaron Kupchik, Jeffrey Fagan & Akiva Liberman, *Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis*, 14 STAN. L. & POL'Y REV. 57 (2003).

There are varied and numerous schemes for determining when and how the decision whether to prosecute as a juvenile or an adult is made. Several different schemes will be briefly described here. Although these schemes do not exhaust the variety employed by the fifty States, they provide a useful national overview.

In most States there is a minimum age below which a juvenile cannot be prosecuted in criminal court. In some jurisdictions all juveniles above a certain age may be prosecuted as adults. In some States, regardless of age, juveniles charged with specific serious offenses may be prosecuted in either juvenile or criminal court. In still other States juveniles charged with specific serious crimes *must* be tried in criminal court. In most jurisdictions juveniles charged with serious offenses who are above a certain age may be prosecuted either in juvenile or adult court.

Both the reasons for waiver and the process for making the determination vary widely from jurisdiction to jurisdiction. In those jurisdictions in which all juveniles charged with certain serious offenses, regardless of age, must be tried as adults, the prosecutor effectively decides where the child will be prosecuted, either by determining what degree of charge to lodge or by deciding in which court to file the charges. In the majority of jurisdictions there is discretion beyond that inherent in the charge selected, which must be exercised by a state official before the decision is made in which court the young person is to be prosecuted. In these jurisdictions typically the juvenile court judge is empowered to decide whether to transfer and must hold a hearing before making a transfer order, or, as it is sometimes called, an order "waiving" juvenile court jurisdiction. *Compare State in the Interest of V.A.*, 212 N.J. 1, 8, 50 A.3d 610, 614 (2012) (prosecutor has discretionary authority to seek waiver to adult court of juveniles "aged sixteen and over, who are charged with certain serious offenses," but the prosecutor must provide the court in each case with a motion seeking waiver and an accompanying statement of reasons, and the court reviews the waiver motion under an "abuse of discretion" standard that "involves a limited but nonetheless substantive review to ensure that the prosecutor's individualized decision about the juvenile before the court, as set forth in the statement of reasons, is not arbitrary or abusive of the considerable discretion allowed to the prosecutor by statute").

Needless to say, the decision to prosecute a person otherwise eligible for juvenile court jurisdiction in an adult criminal court is momentous. It should be no surprise that the first decision ever rendered by the Supreme Court of the United States on the subject of juvenile courts focused on the due process requirements that apply to this decision. In *Kent v. United States,* 383 U.S. 541, 556-57 (1966), the Court stated that waiver of jurisdiction is a "'critically important'" stage in the juvenile court process and must be attended by certain minimum safeguards of due process to satisfy the Constitution.

§ 13.02 FACTORS THAT AFFECT THE DECISION WHETHER TO OPPOSE TRANSFER TO ADULT COURT

Counsel can play an important role in defending a juvenile at this stage. What counsel does, however, depends on a number of factors. Initially, counsel must determine whether the client will be better off being prosecuted in juvenile court rather than in adult criminal court. Although this will usually be the case, counsel should not automatically assume that it is. Counsel must consider the following factors:

First, counsel should calculate the maximum sentence that the client could receive, the probable sentence that s/he would receive, and the potential places of confinement, if convicted in adult court and juvenile court respectively. Second, counsel should consider the respective probabilities of conviction by the two courts. It may be that on the facts of a particular case, as counsel foresees the case developing, the probability of acquittal by the judge who will sit as factfinder in juvenile court is close to zero. This may be, for example, because the case will turn on a question of credibility, and counsel knows from previous experience that the juvenile trial judge tends to resolve questions of credibility against the juvenile. Or the defense may turn on a contention — such as the reasonableness of the client's response to certain provocation by an assault complainant — that, in counsel's opinion, a jury is likely to accept but the judge very probably will not. Third, counsel should consider the probability, duration, and conditions of pretrial detention in the juvenile and the adult courts respectively. Fourth, counsel should consider the long-term effects of the process of prosecution in adult court. Will the client, once prosecuted in adult court, be forever ineligible for juvenile court prosecution in subsequent matters (as is the practice in most jurisdictions) and, if so, how likely is it (based on the age of the client and his or her prior record) that the client will be arrested on a new charge while still chronologically eligible for juvenile court? Counsel should also consider whether the client will be fingerprinted and photographed only if prosecuted in adult court or whether these records will be made and kept regardless of which court assumes trial jurisdiction.

Counsel's investigation of these factors will frequently require speaking with experienced attorneys in both juvenile and criminal court. After s/he has investigated and considered them, s/he should meet with the client for a lengthy counseling session. It is the client's right to decide what to do and to instruct the lawyer accordingly. See § 2.03 *supra*. But it is the lawyer's responsibility to counsel the client and to share with the client information that the client cannot possibly have. This includes the lawyer's best professional judgment on all of the subjects described in the preceding paragraph, however uncertain the lawyer may be about them. One of the most difficult — and common — tasks in which any lawyer must engage is making predictions or professional judgments about probable outcomes that are subject to uncertainty. To acknowledge that this cannot be done with scientific accuracy is not to conclude that it should not be attempted in the first place. Lawyers are compelled to predict.

§ 13.03 MEETING WITH THE PROSECUTOR

As indicated in § 13.01 *supra,* there are many different procedures for making the decision whether a juvenile will be prosecuted as an adult. In some jurisdictions the prosecutor does not have the power to choose the court, but unless the prosecutor requests transfer, the juvenile automatically will be prosecuted in juvenile court. In other jurisdictions the prosecutor's recommendation is heavily relied upon by the court. Depending upon the jurisdiction and the stage at which counsel enters the case (see Chapter 3), it may be possible to meet with the prosecutor before formal charges have been lodged. Such a meeting can be enormously beneficial, especially in jurisdictions in which the prosecutor has the power to choose in which court to prosecute, either directly (by filing charges in juvenile or criminal court as the prosecutor sees fit) or indirectly (by deciding what degree of charge to lodge in juvenile court, thereby making the client eligible or ineligible for adult court jurisdiction). Counsel should prepare for this meeting with the prosecutor by obtaining information about the client, his or her past juvenile record, and social history, including family, school, and community circumstances.

In the event counsel has determined that the client's interests are likely to be best served by prosecution in juvenile court, counsel will want to persuade the prosecutor to reduce the charges or otherwise assure or recommend that the case be kept in juvenile court. Often, however, it will not be possible to decide where the client's interests lie without investigating the charges themselves and conducting the analysis described in § 13.02 *supra*. Thus, at this first meeting, counsel may request that the prosecutor furnish him or her with information about the charges and grant him or her a brief period, of perhaps one or two days, to conduct an investigation into the charges. This is especially important since prosecutors frequently are unwilling to consider charging less than the maximum charge for which they believe that probable cause can be sustained unless the client is willing to plead guilty to a specified charge and avoid the need for any formal or drawn-out proceeding. Prior to conducting an investigation, counsel is in no position to accede to this request or to advise the client about it. (The very real possibility that the prosecutor will seek a guilty plea early on may be a reason not to hold this meeting in the first place. But counsel's choices are quite limited. If counsel does not intervene by seeking this meeting, the prosecutor will make his or her decision without any input from the defense. Thus, unless it appears that counsel's intervention is likely to *increase* the probability that the prosecutor will choose to prosecute in criminal court, there is not much to lose from setting up the meeting.)

§ 13.04 THE RIGHT TO A HEARING AND OTHER HEARING-RELATED RIGHTS

Except when the prosecutor unilaterally makes the choice of court or when the gravity of the offense charged automatically determines the court in which it must be prosecuted, the decision is made by a judge — usually the juvenile court judge, more rarely the criminal court judge.

Most jurisdictions provide by statute that juveniles are entitled to a hearing before the

final transfer decision. If there is no statutory right to a hearing, such a right may be conferred by the due process clause of the state or federal constitution. Determining whether a hearing is constitutionally required before a juvenile may be transferred involves careful study of the statutory scheme for transfer. When the scheme demands that certain facts be found before the juvenile may be transferred, the juvenile indisputably enjoys a constitutional right to a hearing preceding the decision to transfer. Because, under state law, the juvenile is entitled to be prosecuted in juvenile court *unless* certain facts are found that justify prosecution as an adult, this entitlement constitutes a "liberty" interest protected by due process.

The Supreme Court has held that "[a] liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' . . . or it may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). *See also Morrissey v. Brewer,* 408 U.S. 471 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778 (1973); *Board of Pardons v. Allen,* 482 U.S. 369 (1987); *Meachum v. Fano,* 427 U.S. 215, 223-27 (1976) (dictum); *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 67-68 (2009) (dictum). Once state law specifies a "set of facts which, if shown, mandate a decision favorable to the individual," the procedure for determining the facts must comport with due process, *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,* 442 U.S. 1, 10 (1979), and a hearing must be held if the facts are contested. *See, e.g., Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430-31 (1982); *Vitek v. Jones,* 445 U.S. 480, 488-91 (1980).

This is the rule even when the state laws that give rise to the liberty interest fail to provide for the procedural right to a hearing. "The categories of substance and procedure are distinct." *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 541 (1985). Whether or not a statute provides for a hearing, due process defines the minimum procedural protections that a State must afford before depriving an individual of a state-created liberty interest. *E.g., Goss v. Lopez,* 419 U.S. 565 (1975).

As previously indicated, in the majority of jurisdictions, judges decide in which court the juvenile is to be prosecuted. So long as this decision depends upon the determination of issues of fact or the application of a legal standard to particular cases, the judge may not make the decision without first holding a hearing; and this is so even if "the standards set by a statutory . . . scheme 'cannot be applied mechanically' . . . [and the judge has] discretion in this sense," *Board of Pardons v. Allen,* 482 U.S. at 375-76. In 1966, the Supreme Court ruled in *Kent v. United States,* 383 U.S. 541 (1966), that four basic safeguards are required before a judge may decide to transfer jurisdiction:

1. A hearing must be held;
2. The juvenile is entitled to representation by counsel at such a hearing;
3. Counsel must be given access to the juvenile's social records on request; and
4. The judge must state his/her reasons in support of a transfer order.

383 U.S. at 561-63. The *Kent* decision ultimately turned upon construction of the District of

Columbia statute at issue in that case, but the opinion sounds strongly in due process; and today its constitutional dimension is recognized by most authorities. *See, e.g.*, *Juvenile Male v. Commonwealth*, 255 F.3d 1069, 1072 (9th Cir. 2001); *Green v. Reynolds*, 57 F.3d 956, 960 (10th Cir. 1995); *Crick v. Smith,* 729 F.2d 1038 (6th Cir. 1984); *Stokes v. Fair,* 581 F.2d 287, 289 (1st Cir. 1978); *Geboy v. Gray,* 471 F.2d 575 (7th Cir. 1973); *United States ex rel. Turner v. Rundle,* 438 F.2d 839(3d Cir. 1971); *State v. R.G.D.,* 108 N.J. 1, 527 A.2d 834 (1987).

The only circumstances under which a judicial hearing may not be constitutionally required before the decision to transfer is effected are when that decision is made by the prosecutor as a matter of prosecutorial discretion (that is, when statutes expressly leave the decision up to the prosecutor, with no standards for making it) and when the decision is made by operation of law (that is, when statutes provide that persons charged with certain offenses are automatically prosecuted in a particular court). In the latter situation (for example, when a 17-year-old is charged with murder in a State in which all persons above 16 who are charged with murder must be prosecuted as adults), it cannot be said that the accused minor has any state law entitlement to prosecution as a juvenile. Because there is no protected "liberty" interest here, there is no constitutional requirement of a hearing.

A prosecutor may have the power to choose between the juvenile or adult court in either or both of two senses. First, by determining what charge to file, s/he may effectively be "choosing" the court in those jurisdictions in which certain charges automatically result in adult prosecution. It could conceivably be argued that the juvenile is entitled to some kind of review of the charging decision in these jurisdictions, despite the general immunity of prosecutorial charging decisions from due process constraints, *see, e.g., Heckler v. Chaney,* 470 U.S. 821, 831-32 (1985), and authorities cited; *United States v. Goodwin,* 457 U.S. 368, 380 & n.11 (1982). But this review will usually be provided by the ordinary forms of adult criminal procedure, which employ such institutions as the grand jury or a preliminary hearing to determine whether there is probable cause for the charge made.

Second, a prosecutor may be authorized to select the court in which to file the charges although the crime charged is one for which a juvenile is eligible to be prosecuted in either juvenile or adult court. In these circumstances it is strongly arguable that a hearing should be held before the transfer may be effected. Under the constitutional analysis previously summarized, it is not evident why a prosecutor should be permitted to make without a hearing the identical decision that, if delegated to a judge, would require a due process hearing. So long as under the statute in question the juvenile is entitled to be prosecuted in juvenile court unless reasons exist for prosecuting him or her in adult court, there is no functional difference between the two decisionmakers. Because of the significant impact it may have on the young person, the decision made by the prosecutor is "'critically important.'" *Kent v. United States,* 383 U.S. at 556. Like the same kind of decision by a judge, it involves large elements of judgment, but "discretion in this sense is not incompatible with the existence of a liberty interest" deserving of due process protection. *Board of Pardons v. Allen,* 482 U.S. at 376. Due process requires an opportunity to be heard in a timely manner. *Grannis v. Ordean,* 234 U.S. 385 (1914).

Unfortunately, most jurisdictions that empower prosecutors to choose the court have statutory schemes that cannot easily be read as providing an entitlement to juvenile court prosecution. *See, e.g., Johnson v. State,* 314 So. 2d 573, 577 (Fla. 1975). Unless the statute can be viewed as doing this — by providing, for example, an initial presumption in favor of juvenile court prosecution in some or all juvenile cases — then the prosecutor's decision to proceed in adult court does not deprive a juvenile of any "liberty," and no federal right will be said to have been infringed. *See, e.g., Cox v. United States,* 473 F.2d 334 (4th Cir. 1973); *United States v. Bland,* 472 F.2d 1329 (D.C. Cir. 1972); *Manduley v. Superior Court*, 27 Cal. 4th 537, 562-67, 41 P.3d 3, 19-23, 117 Cal. Rptr. 2d 168, 189-92 (2002). One of the few cases that provides support for the position that juvenile court jurisdiction cannot be abrogated under any circumstances unless the juvenile is given a hearing is *Miller v. Quatsoe,* 348 F Supp. 764 (E.D. Wis. 1972). In *Miller,* a juvenile who was in jail awaiting trial on another offense stabbed his jailer with a ballpoint pen. Rather than commence juvenile proceedings against him for this act, the juvenile authorities decided to defer prosecution for a few weeks until he turned 18 so that he could be charged as an adult without the necessity for a transfer hearing. Although the Wisconsin juvenile code recognized the accused's age at the time he was charged with a criminal act as controlling for purposes of juvenile court jurisdiction, the court held that this juvenile's criminal conviction was void. It first ruled expressly that a juvenile is constitutionally entitled to a hearing before a final determination is made to treat him as an adult; it then condemned the delayed filing of a complaint as a means of avoiding juvenile court jurisdiction without the requisite hearing, saying:

> Administrators of a state juvenile system may not manipulate administrative procedures so as to avoid state and constitutional procedural rights meant to protect juveniles. To do so is to deny the juvenile involved both due process and equal protection.

Id. at 766.

The court's decision was based upon the premise that, although the Constitution does not require a State to provide a dual criminal justice system with one set of procedures and penalties for juveniles and another for adults, once the State chooses to create such a system, it must observe due process and equal protection principles in deploying individual cases between the adult and juvenile jurisdictions. *See also State v. Becker,* 74 Wis. 2d 675, 677, 247 N.W.2d 495, 496 (1976) (requiring a due process hearing to determine whether delay in charging was for the purpose of manipulating the system to avoid juvenile court jurisdiction); *State v. Avery,* 80 Wis. 2d 305, 310-11, 259 N.W.2d 63, 65 (1977) (requiring a hearing to determine whether delay in charging was due to negligent failure of prosecutor to bring charge promptly); *State v. Hodges*, 28 Wash. App. 902, 904-05, 626 P.2d 1025, 1026 (1981) (following *Miller v. Quatsoe*, *State v. Becker*, and *State v. Avery*, in holding that "a criminal defendant is denied due process when the juvenile court loses jurisdiction through delays in arraignment which the state cannot justify in some manner as reasonable"). *But see McBeth v. Rose,* 111 Ariz. 399, 531 P.2d 156 (1975) (rejecting this same argument).

§ 13.05 THE RIGHTS TO CONDUCT A COMPLETE CROSS-EXAMINATION AND TO PRESENT A COMPLETE DEFENSE

Judges may wish to treat transfer hearings as less than plenary proceedings. They will rarely attempt to limit or control the type or amount of evidence that the prosecution intends to present. Rather, truncation is most likely to be imposed upon either the defense effort to cross-examine or the defense effort to present its own evidence, or both. These two areas are considered in the following subsections.

§ 13.05(a) Cross-Examination

Cross-examination is generally recognized as a basic safeguard for assuring reliable factual determinations. *See, e.g., In re Gault,* 387 U.S. 1, 56-57 (1967); *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses"); *Jenkins v. McKeithen,* 395 U.S. 411, 428-29 (1969) (plurality opinion); *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778, 785-87 (1973); 5 JOHN HENRY WIGMORE, EVIDENCE § 1367 (James H. Chadbourn rev. 1974). Very often, the evidence that counsel will want to challenge by cross-examination concerns the current charges against the juvenile, the prior history of the juvenile, and/or expert testimony concerning the juvenile's lack of amenability to treatment as a juvenile. Each of these issues requires full cross-examination to enhance the reliability of the findings and thereby assure the adequacy of the hearing and its comportment with due process. Undue restrictions upon cross-examination constitute an effective denial of the right to cross-examine and are constitutionally assailable. *Smith v. Illinois,* 390 U.S. 129, 131 (1968); *Davis v. Alaska,* 415 U.S. 308, 318 (1974); *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam); *Delaware v. Van Arsdall,* 475 U.S. 673, 678-79 (1986) (dictum).

§ 13.05(b) Presenting Defense Evidence

Although most state statutes do not explicitly give a juvenile the right to present evidence of his or her own at the transfer hearing, such a right is based in the Constitution. At least in those jurisdictions in which the hearing itself is constitutionally necessary, juveniles have a constitutional right to present relevant evidence that the prosecutor or probation department may have elected to withhold. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean,* 234 U.S. 385, 394 (1914). The constitutional right to be heard entails not only the right to confront and cross-examine witnesses and evidence presented by others but also the right to present evidence deemed important to the defense. *See, e.g., Chambers v. Mississippi,* 410 U.S. 284, 302 (1973); *Vitek v. Jones,* 445 U.S. 480, 495-96 (1980); *Crane v. Kentucky,* 476 U.S. 683, 690-91 (1986); *Rock v. Arkansas,* 483 U.S. 44, 49-53 & n.9 (1987).

Whenever counsel is contesting any fact made relevant by one or more of the criteria for transfer, this constitutional caselaw strongly supports the proposition that the juvenile has a due

process right to present all material evidence bearing upon that fact. "Ordinarily, the right to present evidence is basic to a fair hearing." *Wolff v. McDonnell,* 418 U.S. 539, 566 (1974); when an issue is disputed, the factfinder must listen to the facts on both sides. *Gagnon v. Scarpelli,* 411 U.S. 778, 785-87 (1973); *see also Barefoot v. Estelle,* 463 U.S. 880, 898-99 (1983). The "'minimum assurance [that a factfinder's determination is] . . . truly informed . . . requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected.'" *Ford v. Wainwright,* 477 U.S. 399, 414 (1986) (plurality opinion), quoting *Solesbee v. Balkcom,* 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting).

The Supreme Court has specifically held that when a sentencing judge can enhance the maximum sentence to which the defendant could otherwise have been subjected by making a posttrial finding that the defendant poses a "'threat of bodily harm to members of the public, or is an habitual offender and mentally ill,'" the requisite findings must be preceded by a hearing at which the convicted individual has the rights to be present with counsel, to be heard, to be confronted with and to cross-examine the witnesses against him or her, and to offer evidence of his or her own. *Specht v. Patterson,* 386 U.S. 605, 607 (1967). These due process protections were imposed even though the defendant had already been convicted beyond a reasonable doubt of the underlying criminal charges; they attached because he was subject to a greater maximum sentence than he would have been if additional posttrial findings of fact had not been made. In transfer hearings, an adverse finding to the juvenile plainly subjects the juvenile to a greater maximum sentence than would be permissible if the juvenile were prosecuted in juvenile court. Therefore, all of the hearing rights enumerated in *Specht* are constitutionally required. *Cf. State v. J.M.*, 182 N.J. 402, 416-18, 866 A.2d 178, 186-88 (2005) (exercising the court's inherent authority over court rules to modify the rules governing transfer hearings "to permit a juvenile to testify and present evidence at the probable cause portion of the waiver hearing" because "considerations of fairness" require this result "[g]iven our conclusion that the probable cause portion of the waiver hearing . . . is such a meaningful and critical stage of the proceedings," and concluding "[i]n light of our disposition of this matter" that there is "no need to reach the question whether due process requires providing juveniles the right to testify and present evidence at a probable cause hearing").

§ 13.06 THE RIGHT TO COURT-APPOINTED EXPERTS

Juveniles have the rights both to obtain independent opinions from experts on germane issues such as amenability to treatment and to present this evidence at the transfer hearing. *See In the Matter of the Appeal in Pima County Juvenile Action No. J-77027-1,* 139 Ariz. 446, 679 P.2d 92 (Ariz. App. 1984). If the jurisdiction in which the case is being prosecuted already recognizes these rights and if the client is indigent, counsel should consider making a timely application to have the court authorize the payment of fees to retain an independent expert. If the jurisdiction does not already recognize the rights, counsel should consider making a timely application and supporting it with a memorandum of law developing the constitutional arguments that the client is entitled to such an expert. In either case, *factual* matters documenting the need for expert

assistance should be submitted in a sealed affidavit accompanying the application, or the application should request leave to present them to the court *ex parte.* See § 11.03(b) *supra.*

Counsel should assert both due process and equal protection claims when urging the constitutional right to a court-appointed expert. See § 11.03(a) *supra.* The equal-protection framework is sketched in §§ 4.31(d), 11.03(a) *supra.* Due process analysis begins with *Ake v. Oklahoma,* 470 U.S. 68 (1985), discussed in § 11.03(a) *supra.* As noted there, *Ake* makes the due process right to state-paid expert assistance turn upon a three-factor approach derived from *Mathews v. Eldridge,* 424 U.S. 319 (1976). The three factors to be considered are: (1) the private interest that will be affected by a governmental action; (2) the governmental interest that will be affected if the proposed safeguard is provided; and (3) the risk of an erroneous deprivation of the affected interest if the safeguard is not provided. *Id.* at 335. As the following discussion will show, in a case in which the state's arguments for transfer rely in whole or in part on mental-health assessments, the three-factor *Mathews* analysis points strongly to the conclusion that the Constitution entitles an indigent accused to the provision of free expert assistance.

§ 13.06(a) The Private Interest of the Juvenile

The juvenile who is under consideration for transfer is subject to a major deprivation of liberty. S/he frequently will be exposed to a substantially greater maximum sentence if prosecuted as an adult than if prosecuted as a juvenile. In addition, many collateral consequences flow from the decision to prosecute as an adult that, singly or in combination, render the decision of substantial importance to the individual. These consequences include permanent maintenance of records of criminality and, if the juvenile is convicted of a felony offense, the formal status of a convicted felon with its accompanying disabilities: restrictions on occupational freedom, deprivation of voting rights and rights to hold public office, ineligibility for drivers' and other licenses, and subsequent subjection to sentencing enhancement mechanisms if convicted again.

§ 13.06(b) The Governmental Interest

The State has three interests that bear on the question how much process is due in transfer hearings. The State has an interest in economy of resources. Immediate economies may be realized by limiting expenditures to employ experts. However, these economies come at the expense of the State's separate interest in ensuring that decisions regarding transfer are accurate and reliable. The State would be ill-served by economizing on available steps that could increase the reliability of the transfer decision if the result of such cost-cutting is an increased risk of needlessly imprisoning juveniles for years that would have been avoided by a better informed decision not to transfer. In the long run the State frustrates its own economy interest when an inaccurate decision to transfer is made. The State also has an interest, invariably expressed in enabling or purpose clauses introducing the statutory juvenile justice scheme, in protecting its youth and in providing them with the least restrictive care and discipline consistent with the young person's needs and best interests. This interest, too, is undermined when the State needlessly or erroneously transfers a juvenile out of the juvenile system.

§ 13.06(c) Risk of an Erroneous Decision

The key issue here is whether the addition of independent experts for juveniles will enhance the reliability of the decisionmaking process and reduce the risk of erroneous transfer decisions. When the transfer decision is based in part on mental health assessments, there is a powerful need for experts who are able to dispute the State's claim. As *Ake* noted, mental health professionals "disagree widely and frequently on what constitutes mental illness." *Ake v. Oklahoma,* 470 U.S. at 81. Particularly when the court's final determination "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists," *Addington v. Texas,* 441 U.S. 418, 429 (1979), due process of law requires the opportunity to confront those experts and to present contrary evidence.

This consideration was decisive in *Ake.* Recognizing that independent mental health professionals are able to challenge the findings of state experts and enhance the decisionmaker's capacity for reliable and informed determinations, the Court held that "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." 470 U.S. at 80. The same observation is true in the transfer hearing context.

§ 13.07 NOTICE AND OPPORTUNITY TO PREPARE ADEQUATELY

When a transfer hearing is scheduled, due process requires that sufficient notice of that fact be given. This requirement has been held to be met if the juvenile, his or her parent, or his or her lawyer has been timely apprised of the purpose of the transfer hearing. The petition requesting waiver is required to contain facts supporting the request in order to give the juvenile adequate notice of both the fact that transfer is sought and the specific reasons asserted for transfer. *See In the Interest of J.V.R.,* 127 Wis. 2d 192, 378 N.W.2d 266 (1985). *See also State v. J.M.*, 182 N.J. 402, 419, 866 A.2d 178, 188 (2005) (state's motion for waiver must include a "statement of reasons for seeking waiver" so that the court can "determine that the reasons for seeking waiver are not arbitrary"). Adequate notice also requires the allowance of sufficient time to prepare a defense at the hearing. *See, e.g., Kemplen v. Maryland,* 428 F.2d 169 (4th Cir. 1970); *Miller v. Quatsoe,* 332 F. Supp. 1269 (E.D. Wis. 1971); *James v. Cox,* 323 F. Supp. 15 (E.D. Va. 1971); *Reed v. State,* 125 Ga. App. 568, 188 S.E.2d 392 (1972); *State v. Halverson,* 192 N.W.2d 765 (Iowa 1971); *Commonwealth v. Nole,* 448 Pa. 62, 292 A.2d 331 (1972). *See also Gingerich v. State*, 979 N.E.2d 694, 696, 712-13 (Ind. App. 2012) (juvenile court abused its discretion by denying defense counsel's "request for a continuance of the waiver hearing" to afford sufficient time to prepare for the hearing).

Insufficiency of notice prior to the transfer hearing should constitute a defect that will deprive the criminal court of jurisdiction. *See, e.g., James v. Cox,* 323 F. Supp. 15 (E.D. Va. 1971) (holding that the lack of notice and a failure to appoint counsel mandated redetermination of a transfer decision made eight years earlier); *State v. Grenz*, 243 N.W.2d 375, 381 (N.D. 1976) ("Due to the failure of the juvenile court to provide adequate notice of the [waiver] hearing to the defendant and his parents and the failure of the court to ascertain whether the defendant knew of

his right to counsel, the proceedings were statutorily insufficient to transfer jurisdiction from juvenile to district court . . . [and accordingly] [t]he subsequent conviction in district court upon a plea of guilty is void for lack of jurisdiction."); *Alaniz v. State*, 2 S.W.3d 451, 451-53 (Tex. App. 1999) (reversing a conviction of murder in a jury trial in adult criminal court and an adult criminal sentence because the failure to comply with statutory requirements for notice of a waiver hearing "deprived the juvenile court of jurisdiction . . . [and] thus, the . . . [adult criminal] court never acquired jurisdiction"; accused's "failure to object to the lack of personal service at the hearing on the waiver of jurisdiction did not constitute waiver" because "[a]s a juvenile, Alaniz did not have the capacity to waive service of process"); *see also Adams v. State,* 411 N.E.2d 160 (Ind. App. 1980) (failure to appoint counsel prior to waiver hearing was erroneous; thus juvenile court's waiver was unlawful and conviction must be reversed).

§ 13.08 PREPARING FOR THE HEARING

In most transfer hearings the critical document is the probation report on the past history of the juvenile. Counsel should try to obtain this document before the hearing by enlisting the aid of the probation officer.

Probation officers as a rule have an inordinate influence on the outcome of cases in juvenile court. For this reason it is crucial that counsel develop a good working relationship with the juvenile probation officer. The most important ingredients in developing such a relationship will be: (1) showing the probation officer that counsel can be trusted and that s/he will honor all commitments made to the probation officer; (2) demonstrating that counsel is a well-meaning individual whose primary interest truly is the welfare of the child; and (3) refraining from radical rhetoric that will inevitably alienate the probation officer. Counsel should ordinarily accord probation officers the courtesy of asking them to show counsel their reports before counsel moves for a court order that the report be disclosed.

In any event, whether counsel is able to obtain access to the report informally through the probation officer or whether counsel needs to make a motion in court for leave to inspect the report, counsel should read the report in advance of the transfer hearing. In some jurisdictions juveniles are entitled to full discovery of social history reports (but not necessarily police reports) in preparing for the transfer hearing. *See, e.g., In the Interest of T.M.J.*, 110 Wis. 2d 7, 327 N.W.2d 198 (Wis. App. 1982); *see also* D.C. CODE § 16-2307(f) (2013) (requiring that the statutorily mandated report prepared by the Director of Social Services and all social records that are to be made available to the judge at the transfer hearing must be made available to the juvenile's attorney at least three days prior to the hearing). Counsel is severely disadvantaged when s/he learns of information for the first time at the hearing because it often will be too late to investigate further and correct inaccurate or misleading information.

After reading the report, counsel should attempt to verify its contents. It is not sound to rely on the probation officer's or prosecutor's version of the client's prior record. It takes little effort to go to the record room in the courthouse and read through the records personally. Often,

charges, findings and dispositions will be misstated or exaggerated. Even more often, mitigating information will be omitted.

Frequently, reading the records will provide leads that should be followed up. If, for example, as a result of a previous charge the client was placed in a community-based program, counsel should speak to the person who supervised the client in that program. Counsel should try to obtain as many favorable facts about the client as possible. This can be accomplished by speaking to school personnel, including teachers, counselors, coaches, and deans, to find out what positive things each can say on the client's behalf. Counsel should interview these people and prepare affidavits or letters (depending upon the local jurisdiction's practices and rules of admissibility) and possibly subpoena these people to be available as witnesses at the hearing (depending upon the admissibility of their written submissions and upon the strategic benefits of live witness testimony).

Counsel should meet with his or her client to go over the contents of the report about him or her. Juvenile clients will not always be able to contradict erroneous record information about them, but counsel should not assume their incapacity. Often, clients, or their parents or other relatives, will be able to give the attorney information or leads to information that is critical. If counsel is permitted to photocopy the report, this should be done, and counsel should bring the report to interviews with the client and his or her relatives.

In some jurisdictions the prosecutor rather than the probation officer prepares the report and recommendation for the court's consideration at the transfer hearing. In this situation counsel should meet with the prosecutor and attempt to find out as much as possible about the case and the reasons transfer is being sought. At the meeting it will be useful for counsel to divide the discussion into two parts. The first has to do with the nature of the charges being lodged and the facts underlying those charges. Counsel will want to obtain information regarding the circumstances of the offense, any aggravating or mitigating features, and the strength of the prosecutor's case.

The second topic of discussion concerns the personal and criminal background of the client. Although at this stage of the process counsel will ordinarily have little information to share with the prosecutor concerning the charges themselves, counsel will have information regarding the client's personal history (from the client interview, from court records reviewed by counsel, and often from the client's parents) before meeting with the prosecutor. Counsel should begin discussion of this topic by asking what the prosecutor knows about the client's record and background and should listen carefully for possible points of misinformation or ignorance. Sometimes, simply correcting these points will be enough to convince the prosecutor to change a recommendation of transfer to one of keeping the case in juvenile court.

When counsel has relevant information about the client's personal history that varies from the prosecutor's information, s/he must make a strategic decision about whether to share this information in an effort to correct the prosecutor's version of the facts. If counsel concludes

that the prosecutor will probably recommend transfer even with the corrected version of the facts, it would serve little purpose to disclose them at the meeting. Under these circumstances it is usually advantageous to wait to correct the prosecutor's misinformation at the hearing itself, when the judge will learn the correct facts from the defense presentation and when the result will be to discredit the prosecution's case. The "new" information presented by the defense at the hearing may be sufficient to sway the judge to rule in the juvenile's favor, even if the information would not have proved dispositive had the prosecutor presented it correctly in the first place. This is so partly because the shading of the information coming from the defense will be more favorable to the juvenile than the shading that the prosecutor would have given the same information. In addition, transfer hearings, like all court proceedings, operate on subliminal as well as other levels. Thus defense counsel who is able to present himself or herself as more competent and thorough than the prosecutor will often win the contest even when the facts themselves would not produce that result.

The same general considerations affect counsel's decision whether to share with the prosecutor, before the hearing, any information known to counsel that suggests that the prosecutor's version of the facts relating to the current offense is erroneous. But here three qualifications come into play. First, at this early stage of the proceedings counsel's own information about the facts surrounding the offense is particularly susceptible to error, and counsel must be very cautious in making the judgment that it is superior to the prosecutor's. Second, the prosecutor will inevitably be particularly skeptical about defense counsel's version of events connected with the current offense and less likely to accept it than to accept many sorts of background information about the client that counsel may have to offer. Third, the facts surrounding the offense will very possibly have to be tried on the issue of guilt or innocence eventually, whether in juvenile court or adult court; and any information about the defense version of those facts that counsel gives the prosecutor now may well improve the prosecutor's preparation to rebut the defense version at trial.

Similar considerations, with appropriate modifications, should dictate counsel's strategic decisions whether to attempt to correct misinformation in the hands of a probation officer before the transfer hearing. In theory and often in fact, the probation officer does not occupy the same adversarial relationship to counsel that the prosecutor does, and the importance of keeping on the good side of probation officers to the extent possible has already been noted. Showing up a probation officer in court will not impress a judge as favorably as showing up a prosecutor and may even be resented by the judge as well as by the officer. On the other hand, when a probation officer is manifestly determined to recommend transfer, it makes little sense for counsel to assist him or her to correct any factual errors that would otherwise appear in his or her report. Counsel would do better to establish these errors at the hearing — as tactfully as is appropriate, depending upon the degree to which the probation officer has assumed an adversarial stance — and to argue to the judge that the errors undermine the probation officer's transfer recommendation.

§ 13.09 COUNSEL'S DECISION TO HOLD OR WAIVE A TRANSFER HEARING

The preceding section and most of the following sections of this chapter discuss strategies to maximize the chance of winning the hearing. The possibility of winning is only one good reason to hold a transfer hearing. Even when prosecution in adult court is the wisest course or when counsel concludes that there is no chance of avoiding transfer, in many jurisdictions the hearing presents an excellent opportunity to obtain discovery of the prosecution's case, since its testimony at the hearing will necessarily focus in part on the charges and on an inquiry into whether there is probable cause to believe that the juvenile committed the crime. Even if counsel does not intend to continue to represent the client in criminal court after transfer, counsel should strive to obtain as much information as possible for the next attorney. By forcing the prosecution to its proof at the transfer hearing, counsel will obtain invaluable information for the ultimate trial, whether that trial is held in juvenile or criminal court.

For these reasons it is ordinarily unwise to waive the right to a transfer hearing. There may, however, at times be countervailing considerations. The major ones are akin to those set forth in § 4.30 *supra* as bearing on the decision whether to waive a probable-cause hearing. Strategic considerations regarding the decision whether to present or hold back defensive evidence at the transfer hearing are mentioned in § 13.14 *infra.*

§ 13.10 MAKING A RECORD

An important job of defense counsel is to make an adequate record for purposes of appeal. Often, the outcome of a transfer hearing can be correctly predicted as adverse to the client. This may be due to the publicity surrounding the case, the track record of the judge, or other factors. Counsel must, however, keep one eye on the appellate courts and the possibility of reversible error. In order to make the best record for appellate review, counsel should have all documents relied upon by either the court or the parties marked for identification. Too often, transfer hearings are conducted as informal proceedings, from which it is difficult or impossible to obtain a suitable, reviewable record.

It is important to specify with particularity the grounds on which counsel is opposing the transfer. Depending on the jurisdiction, counsel should argue and make a record supporting arguments that: (a) the crime committed was not of sufficient severity to warrant transfer; (b) the client's previous record does not justify transfer; (c) the client is amenable to rehabilitation; (d) the prosecutor has failed to establish probable cause to believe that the client committed the offense; or (e) other local statutory criteria for transfer are not satisfied. In addition there are important, and often unsettled, legal issues that counsel should consider and research within the jurisdiction. Examples are discussed in the following two sections.

§ 13.11 STRUCTURING THE HEARING

Although the transfer hearing is unique, it is most akin to the dispositional hearing in

juvenile court. Readers are advised to consult Chapter 38, dealing with dispositional hearings, for additional insight into how best to conduct the transfer hearing.

The ultimate question to be determined at a transfer hearing is simply put: whether or not the juvenile should be prosecuted in adult court. Answering that question is much more difficult because it embraces the whole subject of the purpose and appropriateness of juvenile court itself. The substantive standard by which the decision is to be made is, in most jurisdictions, extremely vague. Commonly, the issue to be decided is whether the juvenile is amenable to the treatment and rehabilitation of the juvenile court. Without more specific criteria, judges are free to decide that issue in accordance with their own biases and intuition. To a large degree this is precisely the manner in which transfer decisions are made in many jurisdictions today. Studies reveal that judges weigh two factors above all else: the seriousness of the offense and the past history of the juvenile. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME, Appendix B, Table 5, at 78 (1967).

The Supreme Court in *Kent v. United States,* 383 U.S. 541 (1966), listed in an appendix to its decision eight criteria that the Court suggested for the District of Columbia. Although these criteria cannot be said to be of constitutional dimension in the way that the basic *Kent* holding has now come to be, see § 13.04 *supra,* they nevertheless serve as a useful guideline for counsel who wants to frame the transfer hearing to focus the evidence on specific factors. The Court's suggested criteria were:

"1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, *i.e.,* whether there is evidence upon which a Grand Jury may be expected to return an indictment. . . .

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime. . . .

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile. . . .

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court."

383 U.S. at 566-67.

By statute, court rule, or caselaw, most jurisdictions have developed some criteria that are to be considered in making the transfer determination. *See, e.g.*, *State v. Pittman*, 373 S.C. 527, 558-59, 647 S.E.2d 144, 160 (2007) (adopting above-quoted *Kent* criteria as the "eight factors" the "family court must consider" in determining whether to transfer a juvenile to adult court). A number of States that prescribe criteria require a finding of probable cause to believe that the juvenile committed an offense for which transfer is possible (*see, e.g.,* N.C. GEN. STAT. ANN. § 7B-2200 (2014); *In the Interest of T.R.B.*, 109 Wis. 2d 179, 192, 325 N.W.2d 329, 335 (1982)) and many States require an inquiry into the amenability of the juvenile to treatment services provided by the juvenile court and its ancillary agencies (*see, e.g.*, OR. REV. STAT. § 419C.349(4)(a) (2014)).

In addition to these considerations courts look at a variety of other factors, including the mental and physical condition of the child; the child's sophistication, maturity, emotional attitude, and pattern of living; the child's home or family environment; the child's school record; and the extent and nature of the child's prior delinquency record. *See, e.g.,* MD. CTS. & JUD. PROC. CODE ANN. § 3-8A-06(e) (2014). *Compare In the Matter of William M.*, 124 Nev. 95, 196 P.3d 456, 457, 464-65 (2008) (transfer statute that created a rebuttable presumption of prosecution in adult court in certain categories of cases, which juvenile could rebut by showing that the crime was "substantially influenced by substance abuse or emotional or behavioral problems," violated the Privilege Against Self-Incrimination by "requiring the juvenile to either accede to the criminal court's jurisdiction despite having a substance abuse or emotional or behavioral problem, or to admit guilt, even though that admission could later be used against him in juvenile or adult court proceedings"); *State v. Dixon*, 967 A.2d 1114, 1123-24 (Vt. 2008) (trial judge, who denied juvenile defendant's motion to transfer murder prosecution to juvenile court, impermissibly relied on a non-*Kent* factor that open adult court proceedings would "protect 'the ability of the public to follow the case'"; judge instead should have taken into account the legislatively-recognized state interest in "protect[ing] juveniles from the 'taint of criminality' that inevitably results from the publicity and permanence of [adult court] convictions").

§ 13.12 BURDEN AND STANDARD OF PROOF

In virtually every jurisdiction in which the juvenile court is empowered to order the transfer of the case to criminal court, the prosecution must prove by at least a preponderance of the evidence that a statutory justification for the transfer exists. *See, e.g.*, MD. CTS. & JUD. PROC.

CODE ANN. § 3-8A-06(d)(1) (2014). In some jurisdictions the prosecution must meet the heavier burden of clear and convincing evidence. *See, e.g.*, *In the Interest of T.R.B.*, 109 Wis. 2d 179, 191, 325 N.W.2d 329, 334 (1982).

This does not necessarily mean that the prosecution bears the burden of proof on all issues. In some States the burden of proof is initially on the prosecution to prove that there is probable cause to believe that the juvenile committed an offense for which transfer is authorized. Once the prosecution has met this burden, the burden shifts to the juvenile to show that s/he is amenable to treatment. A particular statutory scheme may provide that in certain categories of cases a juvenile is to be prosecuted as an adult unless there are reasons that justify keeping the case in juvenile court. Under provisions of this sort, the burden of proving the requisite reasons is on the juvenile. *See, e.g.*, *State v. Coleman*, 271 Kan. 733, 734-38, 26 P.3d 613, 615-18 (2001); *State v. R.G.D.,* 108 N.J. 1, 11-12, 527 A.2d 834, 839 (1987); *Commonwealth v. Moyer,* 497 Pa. 643, 646-47, 444 A.2d 101, 102-03 (1982).

Thus, for example, there may be a statutory presumption of prosecution in adult court for all juveniles above the age of 16 when there is probable cause to believe that the juvenile committed the crime of murder. Here, the transfer hearing would begin with the prosecution bearing the burden of proving three things: that the juvenile is above 16; that there is probable cause to believe that a murder was committed; and that there is probable cause to believe that the juvenile committed the murder. The defense will be free to challenge any or all of these factual propositions before it is obliged to present any evidence bearing upon any other transfer issues. Once the court finds that all three statutory preconditions have been satisfied by the requisite standard of proof, then the burden would shift to the juvenile to show that there are reasons to overcome the presumption of adult court prosecution. This burden is usually satisfied by a preponderance of the evidence.

§ 13.13 STRATEGY FOR THE HEARING

Once counsel has decided to oppose the transfer, see § 13.02 *supra,* the most important strategic decision to make is what issues to contest at the transfer hearing. As noted in the preceding three sections, there may be many specific issues to litigate at the hearing, depending on the quirks of law in the particular jurisdiction; but, reduced to the two principal ones, the issues are: (1) the seriousness of the crime charged and (2) the juvenile's amenability to care and treatment.

Contesting both of these issues, though possible and at times desirable, may result in losing both of them. Focusing on only one issue, by contrast, will frequently maximize the client's chances for a favorable outcome. For example, if the client is charged with a particularly serious offense and if counsel concludes that the prosecutor can establish probable cause to believe the client committed the offense, it may be best to concede the issue and focus exclusively on the client's amenability to treatment. Thus, if the client's previous juvenile court record is not particularly egregious or extensive and if the client has no skeletons in his or her

social history closet, the chances of winning the transfer hearing may be best if one begins the hearing by stating that the defense does not contest the existence of probable cause but contests only one issue: whether the client is amenable to treatment and therefore eligible to remain within the jurisdiction of the juvenile court. Counsel can suggest that the court proceed immediately to consideration of that issue, with no need to take its time hearing evidence of probable cause.

This approach may be met by a response from the prosecution or the court that the concession of probable cause does not obviate the need to demonstrate with particularity the type of crime involved because, in the particular jurisdiction, transfer requires a showing, for example, that the offense was committed in an aggressive, premeditated, or willful manner, or that it was committed against persons, or the like. In such a jurisdiction counsel can make a concession, which is best offered as a stipulation of facts, to these precise jurisdictional preconditions to transfer. Thus the hearing might begin with counsel stating to the court:

> Your Honor, the respondent wishes at this time to enter into the record the following stipulation: If the petitioner presented evidence on the subject, the record would authorize the court to enter a finding [or findings] of fact[s], based on [a preponderance of the evidence, or clear and convincing evidence, as appropriate] that there is probable cause to believe [whatever the jurisdictional preconditions are]. Because respondent concedes these points, the interests of judicial economy would best be served by moving directly to the prosecution's [or probation's] evidence on the only remaining issue in dispute: the respondent's amenability to treatment as a juvenile [or whatever the additional preconditions to transfer are that counsel has chosen to litigate].

This strategy is not available in all jurisdictions because, in some, the seriousness of the offense alone will be a lawful basis for transfer. Unless the highest court of the jurisdiction has expressly upheld this basis, counsel should be prepared to argue that more must be shown than that the client committed a particular offense or committed a particular offense in a particular way. *See, e.g.*, *In the Interest of E.M.*, 198 Ga. App. 729, 731-32, 402 S.E.2d 751, 752-53 (1991) (reversing a ruling of transfer to adult court because, although the State proved that "there are reasonable grounds to believe that the child committed the acts alleged" and other jurisdictional predicates for transfer, the statutory criterion that the transfer be in "'[t]he interests of the child'" "subsume[s]" a requirement of non-amenability to treatment and "the State did not meet its burden to prove appellant's non-amenability to juvenile treatment"); *In the Matter of the Welfare of Dahl,* 278 N.W.2d 316 (Minn. 1979) (unless statute so provides, the age of the juvenile and the seriousness of his or her alleged crime alone are insufficient to justify transfer) (superseded by statute, *see In the Matter of the Welfare of S.R.L.,* 400 N.W.2d 382 (Minn. App. 1987)); *A Juvenile v. Commonwealth,* 380 Mass. 552, 405 N.E.2d 143 (1980) (transfer held improper when findings dealt only with seriousness of crime and inadequacy of existing facilities); *In the Interest of Patterson,* 210 Kan. 245, 499 P.2d 1131 (1972) (court must find that youths are incorrigible or uncorrectable); *but see In the Matter of the Welfare of Givens,* 307 N.W.2d 489 (Minn. 1981). Of course, even in jurisdictions in which age and severity of offense are sufficient preconditions for

transfer, counsel is free to present evidence on amenability to treatment. But, in such a case, the strategy of stipulating age and severity of the crime would ordinarily not be the wisest course.

The strategy is best used in situations in which some showing of unamenability is an established element of the prosecution's case for transfer. Many jurisdictions, for example, indulge a presumption in favor of retaining certain juvenile matters in juvenile court (usually, cases of juveniles under a certain age) and make transfer to adult court a last resort to be used only when the juvenile court determines that the range of dispositions available within the juvenile system is inadequate in the particular case to meet the young person's needs. *See, e.g.*, *Shepard v. State,* 273 Ind. 295, 404 N.E.2d 1 (1980) (there is a presumption that it is in the best interest of the child to remain in the juvenile system and the state has the burden of overcoming the presumption). *See also In the Interest of D.T.,* 335 N.W.2d 638 (Iowa App. 1983); *M.L.S. v. State*, 805 P.2d 665, 671 (Okla. Crim. App. 1991). In these jurisdictions counsel should argue that the commission of a serious or even heinous crime is not enough to justify a transfer. *See, e.g., State v. Jump,* 160 Ind. App. 1, 309 N.E.2d 148 (1974); *State ex rel. Benton County Juvenile Dep't v. Cardiel,* 18 Or. App. 49, 523 P.2d 1057 (1974). Particularly when the juvenile does not have a history of criminal or delinquent behavior, this argument can be made forcefully. *See, e.g., W.F. v. State,* 144 Ga. App. 523, 241 S.E.2d 631 (1978) (when sole basis offered for juvenile's nonamenability to treatment was that he was 19 years old, appellate court held there was no evidence to sustain a transfer); *State ex rel. T.J.H. v. Bills,* 504 S.W.2d 76 (Mo. 1974).

Conversely, in cases in which the client's previous record is such that counsel concludes that the court will find that the client is an appropriate candidate for transfer based on that factor, counsel may wish to stipulate to this finding in order to obviate the need for the client's record being exhaustively developed before the judge. (Of course, as with the stipulation regarding probable cause, counsel should consider, in addition to the question whether the trial court would make a particular finding, whether that finding would probably be affirmed on appeal.) Unlike the stipulation as to probable cause, this stipulation needs not be made at the beginning of the hearing. Since it is likely that the first part of the case presented by the prosecution (or probation department) will be concerned with the crime itself, it would not be necessary to stipulate to non-crime-related facts until such facts are sought to be adduced in the hearing.

Limiting the focus of the hearing by stipulating certain issues out of controversy serves two valuable purposes. First, it eliminates potentially harmful and prejudicial evidence from lengthy exposure to the hearing judge. Second, it sharply focuses the hearing, and the judge's and the appellate court's attention, on the issue that counsel believes is most vulnerable to attack by the defense or most favorable to the defense.

§ 13.14 PUTTING ON A DEFENSE CASE

Defense counsel should consider presenting affirmative evidence about the charges against the client. In many jurisdictions juveniles may testify at transfer hearings about the circumstances underlying the pending charges without fear that such testimony can be used to

establish their guilt in the prosecution's case-in-chief at trial on the merits, whether the trial is ultimately held in adult or juvenile court. *See, e.g.,* IOWA CODE ANN. § 232.45(11)(b) (2014) (statement made by juvenile at waiver hearing not admissible as evidence in chief against juvenile in subsequent criminal proceedings). For this reason it may be possible for a juvenile who will not testify at trial to put on a defense at the transfer hearing, seeking to demonstrate by his or her testimony that no probable cause exists to believe s/he committed any offense, or the type of offense necessary for transfer. Such testimony may also be presented to mitigate the harshness of the offense or to alert the court to extenuating circumstances that may warrant leniency even though there is probable cause to believe the client committed a serious offense.

On the other hand, if the juvenile does later testify at trial on the merits, it is highly likely that any inconsistent testimony that s/he gave at the transfer hearing will be admissible for impeachment; cross-examination of the juvenile at the hearing may give the prosecutor some useful batting practice for cross-examination at trial; and the disclosure of the defense version of the facts may alert the prosecutor to the need — and possibly to leads — for further prosecutorial investigation aimed at disproving that version. With these points in mind, it would seldom be wise to present the juvenile's testimony at the transfer hearing if s/he is a probable defense witness at trial unless either (1) counsel is confident, at this early stage of the case, that the client's testimony is relatively stable, equally favorable to the defense on transfer issues and on issues of guilt or innocence, and probably not disprovable by the additional prosecutorial investigation that it may stimulate, or (2) winning the transfer hearing is more important than winning the trial (which it may well be if the evidence of guilt is compelling and the crime is a serious felony).

In addition to a defense focused on the charges themselves, counsel may wish to present evidence at the transfer hearing tending to prove that the client needs treatment, would benefit from the treatment programs available in juvenile court, or has resources in the family or community that would render especially appropriate a community-based treatment plan as a final order of disposition in juvenile court. These kinds of evidence may be presented even in jurisdictions in which transfer can be based solely on a showing of probable cause to believe that the juvenile committed a particular offense, as long as, under local law, amenability to treatment remains a relevant issue following proof of an offense that is a sufficient precondition to transfer. See § 13.12 *supra.* This defense is a bit risky, however. Often counsel will be going very far toward proving that the client needs placement. In jurisdictions in which the transfer judge is the only juvenile court judge and, accordingly, will sit as trier of fact in any subsequent juvenile court proceedings, there is an inordinate risk that the judge may adjudicate the client a delinquent in order to assure that s/he receives the treatment s/he so obviously needs. In any event, such a defense should not be pursued without the client's permission.

Counsel may wish to consider retaining an expert, such as a psychiatrist or psychologist to testify at the transfer hearing on the client's behalf. The expert may be a person who has previously evaluated the client or has previously treated or is currently treating the client. Alternatively, counsel may retain the expert just for the purpose of making an evaluation at the

transfer hearing. See §§ 12.08-12.10 *supra.* Here again, however, it is necessary to consider whether the expert might be more useful to the defense at later stages of the case (including suppression motions, trial, and sentencing); whether disclosure of the expert and his or her materials and theories to the prosecutor at the transfer hearing will enable the prosecutor to damage the expert significantly in later appearances; and, if this is a serious possibility, which stages of the case it is most important and possible for the defense to win. In addition to — or instead of — an expert, counsel should consider calling character witnesses, including teachers, community workers, or anyone else whom counsel concludes will make a favorable impression on the transfer judge, an appellate court, or both.

Counsel should also consider using social workers or doctors who are familiar with the treatment programs available to the juvenile court as experts to relate those programs to the specific needs of the client, in order to strengthen the record on the points that the client is amenable to rehabilitation or is otherwise an appropriate candidate for handling by the juvenile court.

An expert who has interviewed a juvenile without counsel's knowledge and assent may not testify against the juvenile over his or her objection unless the expert gave the juvenile *Miranda* warnings before the interview. *See Estelle v. Smith,* 451 U.S. 454 (1981). *See generally* LOURDES M. ROSADO & RIYA S. SHAH, PROTECTING YOUTH FROM SELF-INCRIMINATION WHEN UNDERGOING SCREENING, ASSESSMENT AND TREATMENT WITHIN THE JUVENILE JUSTICE SYSTEM (Juvenile Law Center 2007); Lourdes M. Rosado, *Outside the Police Station: Dealing with the Potential for Self-Incrimination in Juvenile Court*, 38 WASH. U. J. L. & POL'Y 177 (2012). Since the purpose of the transfer hearing, like the purpose of the penalty trial in *Smith,* is to determine the juvenile's susceptibility to harsher sentencing, the rule of *Smith* (see § 12.15(a) *supra*, § 38.07 *infra*) should be fully applicable in this setting. *See, e.g.*, *R.H. v. State*, 777 P.2d 204, 211-12 (Alaska App. 1989) (trial court violated *Estelle v. Smith* by "compelling R.H. to submit to a psychiatric evaluation for the purpose of determining his amenability to treatment as a child" but "the same conclusion would not be warranted had R.H. sought to present psychiatric evidence in his own behalf at the waiver hearing or had he otherwise affirmatively placed his mental condition in issue"); *People in the Interest of A.D.G.*, 895 P.2d 1067, 1073 (Colo. App. 1995) (relying on *Estelle v. Smith* and other Fifth Amendment caselaw to hold that "if a juvenile refuses to participate in a psychological evaluation ordered by the court as part of its investigation in a transfer hearing, such refusal cannot be used against him to prove that he is not amenable to treatment as a juvenile"); *Commonwealth v. Wayne W.*, 414 Mass. 218, 228-32, 606 N.E.2d 1323, 1330-32 (1993) (protections of *Estelle v. Smith* apply fully to juvenile transfer hearings and "foreclose a compelled psychiatric examination, where the juvenile does not seek to introduce his own psychiatric evidence," but "a juvenile defendant, who voluntarily chooses at a Part B hearing [on amenability to rehabilitation, held after a finding of probable cause] to present expert psychiatric evidence which includes the juvenile's own statements, is not denied his constitutional privileges against self-incrimination if he is ordered to submit to an examination by a psychiatrist retained by the Commonwealth"); *Christopher P. v. State*, 112 N.M. 416, 420, 816 P.2d 485, 489 (1991) (the "fifth amendment privilege against self-incrimination extends to

transfer proceedings" and was "violated in the proceedings below by the court's order compelling [the juvenile] to discuss the alleged offenses with the psychologist without the advice of counsel"). *But see People v. Hana*, 443 Mich. 202, 225-26, 504 N.W.2d 166, 177 (1993) (distinguishing between the two phases of the statutorily-bifurcated waiver hearing and holding that the "full panoply of constitutional rights" applies only to "the phase I adjudicative phase of the waiver hearing" and not "the phase II dispositional hearing" and therefore that the doctrine of *Estelle v. Smith* did not bar use of the accused's statements to a court psychologist). If defense counsel has the client examined by a psychiatrist or psychologist in preparation for the transfer hearing and the prosecution seeks to obtain discovery of the expert's evaluation before the hearing, counsel should object and argue that the report is covered by both the attorney-client privilege (see § 12.09 *supra*) and the Fifth Amendment Privilege Against Self-Incrimination and is not discoverable consistently with the Fifth Amendment or the Sixth Amendment right to effective assistance of counsel until the client chooses to rely upon the report or the expert in court. *See* § 12.15(a) *supra; In the Matter of Norman K.,* 62 A.D.2d 1038, 404 N.Y.S.2d 39 (N.Y. App. Div., 2d Dep't 1978).

§ 13.15 SPECIAL CONSIDERATIONS BEARING ON AMENABILITY TO TREATMENT

Counsel should be aware that in certain jurisdictions it may be possible to argue that the juvenile's amenability to treatment in a particular program that is either private or located out-of-state generates an obligation on the part of the State to contract for those services before it undertakes to transfer the child to the adult system. (See § 39.07 for an explanation of the right-to-treatment doctrine.) It may even be possible to argue that the State has an obligation to make available programs that will meet the needs of the juvenile in circumstances in which those programs do not currently exist but where it is shown that the juvenile would benefit from a placement with the particular program. *See, e.g., In re Welfare of J.E.C.,* 302 Minn. 387, 225 N.W.2d 245 (1975); *In re Welfare of I.Q.S.,* 309 Minn. 78, 91, 244 N.W.2d 30, 40 (1976) (the "absence of adequate security programs will not support a finding that the juvenile is not amenable to treatment"). *See also People v. Dunbar*, 423 Mich. 380, 396-97, 377 N.W.2d 262, 269 (1985) (overturning a waiver finding that was based on the availability of better vocational training programs in the adult correctional system). *But see State v. Toomey,* 38 Wash. App. 831, 690 P.2d 1175 (1984), *review denied,* 103 Wash. 2d 1012 (1985) (transfer of pregnant juvenile who, because of her pregnancy, could not be treated in existing facilities for delinquents upheld as valid).

§ 13.16 EVIDENTIARY RULES AT THE TRANSFER HEARING

Transfer hearings generally are viewed as dispositional in nature and, accordingly, the rules of evidence used at dispositional hearings are invoked. For the most part this means that hearsay is admissible at the hearing. But not all jurisdictions follow that rule, and counsel should become familiar with the evidentiary rules for dispositional hearings. Even in jurisdictions that allow hearsay, hearsay may not be admissible on all issues. The most common rule is that

hearsay is admissible to prove nonamenability to treatment; in many jurisdictions, hearsay may *not* be used to provide the requisite probable cause to believe the juvenile committed a crime for which transfer is authorized. *See, e.g.*, *In the Interest of P.W.N.*, 301 N.W.2d 636, 640 (N.D. 1981); *In the Interest of S.M.P.*, 168 W. Va. 626, 629-30, 285 S.E.2d 408, 410 (1981) (per curiam).

Many jurisdictions also provide that evidence against the juvenile, including statements of the juvenile or property seized from him or her, that would be suppressible at trial because it was obtained in violation of the state or federal constitution is admissible at a transfer hearing. *See, e.g., In the Interest of J.G.*, 119 Wis. 2d 748, 350 N.W.2d 668 (1984). This position has never been endorsed by the Supreme Court of the United States as a matter of federal constitutional law, and counsel should not hesitate to challenge it in an appropriate case, under both the federal and state constitutions.

§ 13.17 DOUBLE JEOPARDY

In *Breed v. Jones,* 421 U.S. 519 (1975), the Supreme Court extended the protection of the Double Jeopardy Clause of the Fifth Amendment to juveniles. Jones had been the subject of a juvenile Petition alleging the commission of an armed robbery, and, after a trial in juvenile court, was adjudicated a delinquent. In a subsequent proceeding, the court declared that Jones was not amenable to treatment and ordered that he be prosecuted as an adult. Over his double jeopardy objections, he was found guilty of robbery in the first degree by the adult criminal court and committed to the California Youth Authority.

The Supreme Court of the United States invalidated this conviction. It found that Jones had been placed in jeopardy "when the Juvenile Court, as the trier of the facts, began to hear evidence." 421 U.S. at 531. He could therefore not be prosecuted again for the same offense in adult court. The Supreme Court rejected the contention that there had been only one continuous jeopardy commencing with the juvenile court proceedings and not ending until the completion of the trial in criminal court.

Several important concepts concerning transfer stem from *Breed:*

1. In order to avoid placing a transferred juvenile in jeopardy for the second time in a criminal trial, a transfer hearing must be held prior to the commencement of any adjudicatory hearing in juvenile court, *See Sims v. Engle,* 619 F.2d 598, 601-05 (6th Cir. 1980) (once adjudicatory hearing began, juvenile could not be transferred to adult court since jeopardy had already attached in juvenile court); *People in the Interest of A.D.G.*, 895 P.2d 1067, 1072 (Colo. App. 1994) (although the State is correct in asserting that the trial court's ruling denying transfer was based on an erroneous legal standard, "the juvenile has been adjudicated a delinquent" already and "[a]s a result, we cannot remand for reconsideration of the decision not to transfer" since the juvenile "may not be once again placed in jeopardy" (citing

Breed v. Jones, *supra*)).

2. A finding at a transfer hearing that probable cause exists to believe the juvenile committed the act or acts alleged does not convert the proceeding into an adjudicatory hearing. Because the "Double Jeopardy Clause . . . is written in terms of potential or risk of trial and conviction, not punishment," 421 U.S. at 532, jeopardy does not attach at a proceeding in which guilt or innocence is not at issue.

3. Since transfer hearings must precede juvenile court trials and can consider evidence of probable cause, it may be necessary to "require that, if transfer is rejected, a different judge preside" at the trial. 421 U.S. at 536-37.

§ 13.18 STATEMENT OF REASONS

One of the essential elements of due process is that a decisionmaker must set forth the reasons for its decisions. *See, e.g., Morrissey v. Brewer,* 408 U.S. 471, 489 (1972); *Wolff v. McDonnell,* 418 U.S. 539, 564-65 (1974). In *Kent v. United States,* 383 U.S. 541 (1966), the Supreme Court held that "as a condition to a valid waiver order, [the juvenile is] . . . entitled to . . . a statement of reasons for the Juvenile Court's decision." *Id.* at 557. Since transfer is a "critically important" proceeding that requires careful consideration by the juvenile court and since a reviewing court "should not be remitted to assumptions[, the juvenile court must set forth] . . . a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts." *Id.* at 561.

Counsel should argue that it is insufficient for the judge merely to recite the language of the transfer statute in support of a transfer decision. Such a recitation is nothing but a conclusion that transfer is appropriate. Due process requires that the facts and reasons supporting this conclusion be set forth in the record. *See, e.g., Strosnider v. State,* 422 N.E.2d 1325 (Ind. App. 1981); *Summers v. State,* 248 Ind. 551, 230 N.E.2d 320 (1967). Without a clear statement of the reasons for a transfer, appellate courts cannot adequately review the transfer order. *See White v. Sowders,* 644 F.2d 1177 (6th Cir. 1980); *Franklin v. State*, 855 A.2d 274, 278 (Del. 2004). And if the transfer statute calls for certain findings, enumeration of these findings is a prerequisite to a valid transfer. *See, e.g.*, *Franklin v. State*, 855 A.2d at 278; *State v. Phinney*, 235 Neb. 486, 493-94, 455 N.W.2d 795, 800 (1990).

The final transfer order should also show affirmatively that a hearing was held and that the juvenile was represented by counsel, or that there was an effective waiver of the right to counsel. *See, e.g., Bingham v. Commonwealth,* 550 S.W.2d 535 (Ky. 1977).

§ 13.19 APPEALABILITY; TIMELINESS OF AN APPEAL

There is no uniform rule about whether an appeal may or must be taken immediately after

a decision to transfer, or whether claims of error in the transfer proceeding may or must be raised only after trial, in an appeal from conviction. Some States, following the well-known rule that jurisdictional errors are not waivable, allow a juvenile to challenge an erroneous transfer decision on appeal from the ensuing adult criminal court conviction. *See*, *e.g.*, *State v. Grenz*, 243 N.W.2d 375, 381 (N.D. 1976); *Alaniz v. State*, 2 S.W.3d 451, 451-53 (Tex. App. 1999); *State v. Kells*, 134 Wash. 2d 309, 313, 949 P.2d 818, 820 (1998). Other States require that a timely appeal be taken directly from the juvenile court order and hold that a failure to take such an appeal forfeits the right to review of that order, *see, e.g.*, *State v. Harwood*, 98 Idaho 793, 795, 572 P.2d 1228, 1230 (1977). In jurisdictions other than the latter States (which necessarily deem a transfer ruling to be an appealable "final order," *see id*. at 795, 572 P.2d at 1230), the States vary as to whether a transfer order is deemed an appealable "final order" or an interlocutory order, and, if the latter, whether it is appealable. *Compare, e.g.*, *In the Interest of Clay*, 246 N.W.2d 263, 264 (Iowa 1976) (transfer order is "not a final judgment from which appeal could be had as a matter of right"), *with In re Welfare of I.Q.S.*, 309 Minn. 78, 82, 244 N.W.2d 30, 35 (1976) ("referral decision is a final order and therefore appealable by either the state or the subject juvenile"), *and with People v. Martin*, 67 Ill. 2d 462, 465-66, 367 N.E.2d 1329, 1331, 10 Ill. Dec. 563, 565 (1977) (order of removal cannot be appealed interlocutorily by juvenile and is "reviewable on appeal by the juvenile from the criminal conviction if a conviction occurs," but an "order denying the removal motion" can be appealed immediately by the State and is "not reviewable by the People at the conclusion of the juvenile proceedings"), *and with In re J.L.W.*, 136 N.C. App. 596, 599, 602, 525 S.E.2d 500, 502, 504 (2000) (transfer order is a "final order" and appealable under *State v. T.D.R.*, 347 N.C. 489, 496, 495 S.E.2d 700, 703 (1998), but a finding of "probable cause, on the State's motion to transfer jurisdiction" is not appealable immediately), *and with United States v. A.W.J.*, 804 F.2d 492, 492-93 (8th Cir. 1986) ("orders transferring juveniles for adult prosecution," although "reviewable after trial," are also immediately appealable by accused "under the collateral order exception of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)").

Often the law in a jurisdiction is unsettled in one or more of these areas simply because no one has bothered making an adequate record and appealing to a higher court. Juvenile court lawyers may succeed at the appellate level on issues that meet with no success at the trial level. In all events, the decision whether or not to appeal must be the client's. *See Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Counsel is not free to forgo an appeal of a transfer order that the client wishes to appeal, *see Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); and counsel's failure to consult with the client about the decision whether to appeal constitutes ineffective assistance of counsel whenever there are nonfrivolous grounds for appeal or the client has indicated any interest in taking an appeal, *id*. at 478-81; *see also*, *e.g.*, *Ex Parte Cruse*, 474 So. 2d 109, 111-12 (Ala. 1985).

Chapter 14

Guilty Pleas

Part A. Introduction

§ 14.01 GUILTY PLEAS IN JUVENILE COURT

In all jurisdictions a juvenile respondent can enter a guilty plea in a delinquency case, just as an adult defendant can in a criminal case. Many of the standards and procedures for entry of a guilty plea in juvenile court are identical to those followed in adult criminal court. But there are some significant differences, which will be highlighted in this introductory section and then discussed in greater detail in the sections that follow.

The major difference between guilty pleas in adult court and guilty pleas in juvenile court is that one primary form of adult court plea bargaining — pleading to a lesser offense in order to reduce the maximum possible sentence to which the adult defendant is exposed — is inapplicable in the juvenile courts of most jurisdictions. The most common juvenile court statutory scheme empowers a judge at sentencing (or "disposition") to impose the same indeterminate sentence regardless of the nature or severity of the offense for which the respondent has been convicted (or to which the respondent has pled guilty). See § 38.03(c) *infra.* With what is perhaps the greatest single incentive for guilty pleas in adult court withdrawn, defense attorneys in juvenile court must consider and evaluate other potential advantages of guilty pleas. These include, for example, prosecutorial commitments to support a particular sentence. See § 14.06 *infra.*

Another significant difference between guilty pleas in adult and juvenile courts stems from the involvement of the parent in juvenile court pleas. It is clear in juvenile court, as it is in adult court, that the ultimate decision whether to plead guilty must be left to the client and that a defense attorney cannot plead a client guilty, or not guilty, against the client's will. *See Jones v. Barnes,* 463 U.S. 745, 751, 753 n.6 (1983) (dictum); *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013). Under this same logic the juvenile client's right to decide whether to plead guilty cannot be abrogated in favor of the client's parent. *Cf. Smith v. State,* 484 So. 2d 560, 561 (Ala. Crim. App. 1986) (in *Miranda* context, court explains that just as attorney cannot waive client's rights against self-incrimination, parent cannot waive rights of his or her child); *In re S.W.T.,* 277 N.W.2d 507, 512-13 (Minn. 1979) (parent cannot waive *Miranda* rights of child); *In the Matter of Butts*, 157 N.C. App. 609, 614, 582 S.E.2d 279, 283 (2003) (a statute establishing procedures for police interrogation of juveniles "protects the rights of the juvenile, which his parent cannot waive on his behalf"). Indeed, the parent's interests or goals may often be antagonistic to those of the child (see § 4.04 *supra*), and thus the parent would be a highly suspect guardian of the child's right to choose between pleading guilty and contesting the case at trial. In some jurisdictions, however, a judge who accepts a plea from a juvenile must ensure that the child's parent is aware of the plea and acquiesces in the child's

decision to forgo the constitutional right to trial. See §§ 14.24, 14.26(a) *infra.*

§ 14.02 ORGANIZATION OF THE CHAPTER; TERMINOLOGY

This chapter will begin by examining the factors affecting the choice to plead guilty (§§ 14.03-14.12 *infra*) and will then discuss plea negotiations with the prosecutor (§§ 14.13-14.18 *infra*), counseling the client (and parent) on the decision whether to plead guilty (§§ 14.19-14.24 *infra*), procedures at the plea hearing (§§ 14.25-14.28), and procedures for subsequently withdrawing or challenging the validity of a guilty plea (§§ 14.29-14.31). Under a strictly chronological organization the topic of plea negotiations, of course, would precede a discussion of the criteria for assessing the plea offer that has been extracted through the negotiations. But since a cost-benefit analysis of the value of a plea must inform each step of counsel's work in this area, including preparation for the plea negotiation session, the cost-benefit analysis will be taken up first.

In many jurisdictions the term "admission" is employed in juvenile court as a euphemism for the term "guilty plea." This terminology reflects the notion that a juvenile cannot be found "guilty" of a "crime," and therefore can merely "admit" to the status of being a "juvenile delinquent." The term "guilty plea" nevertheless will be used in this chapter and throughout this book, since it provides the most accurate description of the actual process and consequences involved in a juvenile's entry of an "admission." The term "guilty plea" also avoids the confusion engendered by the use of the term "admission" for both confessions to the police and guilty pleas.

In several jurisdictions the term "disposition" is often used in both juvenile court and adult court as a substitute for the term "guilty plea." In order to avoid confusion with the "disposition" (sentencing) phase of a juvenile case, the term "disposition" will not be used in connection with guilty pleas and will be used solely to refer to a juvenile sentence.

Part B. The Decision Whether To Plead Guilty or Go to Trial: Factors To Consider in Making the Decision

§ 14.03 OVERVIEW OF THE COST-BENEFIT ANALYSIS INVOLVED IN DECIDING WHETHER TO PLEAD GUILTY OR GO TO TRIAL

The determination of the advisability of a guilty plea usually requires a complex cost-benefit analysis that takes into account: (i) the likelihood of winning the case at trial; (ii) the chances that the judge, in the event of conviction, would penalize the respondent at sentencing for going to trial and — in the judge's opinion — wasting the court's time and (if the respondent testifies) perjuring himself or herself on the witness stand; and (iii) the advantages that could be gained through a guilty plea. Even a very likely victory at trial might be bartered away for the invaluable sentencing advantage, available in many jurisdictions, of probation without verdict (with the eventual outcome of dismissal of the case and expungement of arrest records). On the other hand, a juvenile respondent could reasonably opt for trial even in the face of overwhelming

prosecution evidence, when a guilty plea is unlikely to produce any sentencing advantages.

§ 14.04 ASSESSING THE LIKELIHOOD OF WINNING AT TRIAL

The threshold determination of the chances of acquittal at trial will require far more than a simple weighing of the relative merits of the prosecution's and defense's competing theories of the case. Counsel's calculus will have to incorporate a host of variables that are difficult to predict, such as the likely resolution of debatable issues of admissibility of specific evidentiary items, the odds of a prosecution or defense witness failing to appear for trial (and the likely response of the judge to such a failure to appear), and the effect of the judge's application of a variety of presumptions and other legal doctrines.

§ 14.04(a) The Strength of the Case for the Prosecution

The first step is, of course, to analyze the strength of the prosecution's case and the prosecutor's ability both to make out a *prima facie* case (thereby overcoming a defense motion to dismiss at the conclusion of the prosecutor's case-in-chief) and to sustain a guilty verdict at the conclusion of the trial. Counsel should begin by examining the Petition and listing all of the elements that the prosecution will need to prove in order to sustain each of the counts of the Petition. Then, using the information that counsel has learned through discovery and investigation, counsel should analyze the prosecutor's ability to prove each of these facts with the witnesses, documents, and exhibits believed to be available to the prosecution.

If counsel has learned through investigation that a prosecution witness will be out of town or otherwise unavailable on the trial date, counsel will need to predict whether the prosecutor will be able to procure a continuance in order to arrange the witness's presence, or whether the judge is likely to grant a defense motion for dismissal for want of prosecution. See § 15.03 *infra.* If counsel has learned through investigation that a prosecution witness is reluctant to come to court, counsel will need to predict whether the prosecutor will be able to secure the witness's presence through judicial enforcement of a subpoena and also whether, in the event that the witness's presence cannot be secured, the prosecution will be able to make its case without that witness. Similarly, if counsel can predict that certain necessary documents will be unavailable on the trial date — for example, in many jurisdictions, tape recordings of 911 phone calls, which the prosecution must turn over to the defense, are routinely erased before the time when the prosecutor gets around to requesting them from the police — counsel will need to evaluate whether the loss or destruction of the evidence will lead to the judge's granting a defense motion for sanctions such as dismissal of the case or preclusion of prosecutorial witnesses whose testimony relates to matters that would have been memorialized in the unavailable document. See § 27.12(a) *infra.*

In analyzing the prosecution's ability to sustain a guilty verdict, defense counsel will need to consider the effect of inferences and presumptions that will enable the prosecution to overcome factual hurdles in proving its case. For example, when the charge is criminal

possession of stolen property, the prosecutor may not have witnesses who can testify to any specific behavior or statements of the respondent that indicate knowledge that the property was stolen, but the prosecutor may nevertheless be able to sustain its case by invoking the common doctrine that a person who is in possession of recently stolen goods is presumed to know that the goods were stolen unless the defense proves otherwise. See § 35.06(d) *infra.*

The analysis of the quality of the prosecution's case also must take into account factors that may tend to impeach or discredit the prosecutor's witnesses or evidence. For example, if a witness made prior inconsistent statements to the police (recorded in police reports) or in pretrial hearings (the probable-cause hearing or a suppression hearing) or to the defense investigator (either an oral statement or, preferably, a written, signed statement), counsel will be able to use that statement to impeach the witness's credibility at trial. See § 31.10 *infra.* Similarly, if any of the prosecution witnesses have prior convictions or "prior bad acts" counsel will be able to impeach the witness's credibility with his or her prior record. See § 31.11 *infra.*

Finally, the analysis of the strength of the prosecution's case should take into account evidentiary doctrines that favor the defense. The most significant of these is, of course, the beyond-a-reasonable-doubt standard, which sets the ultimate benchmark that the prosecution's case must meet. Counsel also should consider other favorable doctrines, such as the "missing witness doctrine," which provides that a party's failure to present a witness within its control who could have elucidated the issues before the court gives rise to an inference that the witness would have testified adversely to that party. See § 10.08 *supra.*

Obviously, counsel will not be in a position to conduct this kind of thorough-going evaluation of the prosecution's case until after counsel has completed all or most of the discovery process and investigation of the case. Counsel's analysis of the prosecution's theory of the case and the facts available to the prosecutor will depend upon counsel's acquisition of police reports and witness statements. These reports and witness statements also must be scrutinized in order to determine whether there are any prior inconsistent statements that could turn the tide in favor of the defense at trial. Finally, crucial information about prior convictions of prosecution witnesses must be gleaned through the discovery process or through investigative interviews with the witnesses, prior to any serious consideration of a guilty plea.

§ 14.04(b) The Strength of the Case for the Defense

In much the same way that counsel analyzes the merits of the prosecution's case, counsel will also need to assess the strengths and weaknesses of the case for the defense. Once again, counsel should begin by identifying the variety of viable theories of the case, the facts that must be proven to sustain each of those theories, and the witnesses and exhibits necessary to prove each of these facts. See Chapter 6.

In the course of analyzing the strength of the prosecution's case, counsel will have already drawn up a list of the elements that the prosecution will have to prove in order to make

out a *prima facie* case. If counsel can successfully attack the prosecutor's proof on one or more of these elements, a *prima facie* motion to dismiss will be a central feature of the defense. Assuming that the judge will or could deny the defense's *prima facie* motion, defense counsel will need to assess whether any of the loopholes in the prosecution's case can be widened to the point of acquittal through the presentation of defense witnesses. For example, a tenuous prosecution case on *mens rea* might be successfully undermined by the respondent's testimony that s/he did not possess the requisite mental state. Of course, counsel's assessment of the odds of acquittal will also need to take into account the danger that the presentation of defense evidence could inadvertently strengthen an otherwise weak prosecution case. See § 33.01 *infra.*

In addition to considering attacks on the sufficiency of the prosecution's proof, counsel will need to consider the applicability of defenses such as alibi and self-defense. (For discussion of the variation of the prosecutor's burden in disproving defenses depending upon whether the defense is labelled an "affirmative defense," see § 35.05 *infra.*) Moreover, in rare cases, counsel will need to consider mental defenses such as incompetency, insanity, and infancy. See §§ 12.19, 12.23 *supra* and § 17.04(b) *infra.* Whenever counsel intends to present a defense, counsel should engage in an analysis that is essentially a mirror-image of the analysis used in examining the prosecution's ability to make out each of the elements of the offenses charged: Counsel must itemize the elements of the defense, enumerate the facts necessary to sustain each of these elements, identify the witnesses and exhibits necessary to prove each of these facts, and then assess their persuasiveness.

The analysis of the strength of the defense case naturally cannot be abstract: Counsel will once again need to factor in such practical variables as the likelihood that defense witnesses will actually come to court and the likelihood that essential exhibits can be obtained. If counsel anticipates that a defense witness will probably be out of town on the trial date or will be reluctant to appear, counsel will need to gauge whether the problem can be alleviated through remedial devices such as a continuance or judicial enforcement of a subpoena.

Counsel also must consider whether any defense witnesses will be impeached with prior inconsistent statements or a prior record or other discrediting facts. In this regard, counsel will need to devote particular care to the thorny question of whether a respondent with a prior record should testify. If the respondent has a prior record and testifies, state law may permit the prosecutor to impeach the respondent with prior convictions, prior bad acts, or both. See § 30.07(b) *infra.* If s/he does not testify, the judge will, in theory, adhere to the legal fiction that no adverse inferences can be drawn from the respondent's failure to take the stand. The reality, however, is that many judges believe that the respondent's refusal to take the stand indicates guilt or at least the existence of prior convictions or other highly detrimental information that the respondent is trying to conceal. Counsel must also consider the possibility that the judge may already know about, or will learn of, the prior record even if the respondent does not take the stand, as a result of: (1) the judge's having presided over a prior hearing in the case or a prior case of the respondent's; (2) sloppy administrative procedures that counsel will not be able to correct (such as court jackets that indicate the docket numbers of the respondent's other cases);

and (3) courthouse leaks (such as a bailiff mentioning the repeated court appearances of the respondent).

§ 14.04(c) Circumstances That Will Tend To Prejudice the Trier of Fact Against the Respondent

In conducting the analysis of the merits of the cases for the prosecution and the defense, counsel also will need to factor in variables that may undermine the objectivity of the trier of fact.

The most significant of these factors is the judge's distaste for, or outrage over, a particularly violent or repugnant crime. Hard drug offenses, violent sex crimes, and crimes involving gruesome injuries to the victim are likely to be viewed by judges as peculiarly abhorrent. Although many judges have the capacity to appraise a respondent's case objectively even in the face of inflammatory facts, there are judges whose objectivity and ability to apply a reasonable-doubt standard will be overwhelmed by the fear of erroneously setting free a perpetrator who may commit other such heinous offenses.

The judge's objectivity will frequently also be undermined in cases involving a particularly vulnerable victim, such as a young child or a senior citizen. An appraisal of the judge's probable mindset, moreover, must take into account such variables as the abrasiveness of the respondent and defense witnesses. Finally, the calculus must include the additional biases that may arise in cases involving interracial crimes.

The earlier discussion of the strength of the defense case mentioned the need for considering the possible impeachment of the respondent with his or her prior record. Counsel must consider not only the effect of such impeachment on the credibility of the respondent's testimony but also the very real possibility that the judge's learning of the respondent's prior record will subtly affect the judge's evaluation of the case as a whole.

Counsel also must consider whether the judge has prior knowledge of inadmissible evidence, as a result of this same judge's presiding over a pretrial suppression hearing or other pretrial hearing. Thus, for example, if the judge suppresses a confession or tangible evidence in a pretrial hearing and then refuses to recuse himself or herself (see §§ 20.04-20.07 *infra*), the judge may unconsciously consider the highly incriminating suppressed evidence notwithstanding its technical inadmissibility at trial.

It is also essential to consider the prejudicial impact of media accounts of the case. Such publicity may have informed the judge of damaging factual information, such as prior crimes of the respondent or inadmissible evidence, about which the judge otherwise would not have known. Moreover, many judges are highly sensitive to criticism in the media and may be less likely to acquit when such a decision could expose the judge to adverse publicity.

Of course, the prejudicial nature of these factors will be magnified in jurisdictions that permit jury trials for juveniles. Juries are far more prone than judges to be swayed by inflammatory facts and are far less likely than judges to be able to disregard inadmissible evidence.

In assessing the prejudicial impact of these factors, counsel must consider the personality and biases of the specific judge or jurors who will be hearing the case. In jurisdictions in which juvenile trials are bench trials, counsel should inquire of other attorneys who have previously appeared before the judge that will be conducting the trial, in order to become familiar with the judge's procedures and attitudes. (In certain circumstances, it may be possible to steer the trial in front of a particular judge, who would be desirable as a factfinder. See § 20.07 *infra;* see also § 14.09 *infra.*) If the jurisdiction is one that permits juries in juvenile trials, counsel should investigate jury attitudes in the locality as demonstrated in previous cases with similar facts.

§ 14.04(d) Superior (or Inferior) Ability, Experience, or Personableness on the Part of the Prosecutor Who Will Try the Case

Obviously, the superior abilities, experience, or personableness of the prosecutor can play a role in the outcome of the case and must be considered in the assessment of the likelihood of a victory at trial. However, exploration of the possibility of steering the case before a certain judge will once again be crucial here, since some judges will either discount such factors or will affirmatively aid an inexperienced attorney. (For this reason, when counsel is first beginning his or her practice, it is useful to inform the judge of that fact and ask the court's indulgence for counsel's ignorance and inexperience.)

The personalities of the attorneys and the nature of their prior relationship with the judge also can affect the judge's patience in listening to prolonged arguments, as well as the judge's willingness to rely upon the attorney's representations about facts and law.

§ 14.04(e) The Presence or Absence of Debatable or Dubious Legal Points Relating to Substantive or Evidentiary Matters on Which the Judge Might Commit Reversible Error in a Pretrial Ruling or in the Course of a Trial

The prospect of appellate reversal for trial-court errors plays a much smaller role in juvenile court practice than it does in adult criminal practice. Since the typical term of incarceration for a juvenile in most jurisdictions is no longer than 18 months, a juvenile who is sentenced to incarceration usually will have completed the period of imprisonment prior to issuance of an appellate opinion reversing the conviction. However, a trial judge's fear of error and appellate reversal may nevertheless work to the benefit of a juvenile respondent at trial. In the vast majority of jurisdictions the judge sits as both finder of fact and arbiter of legal issues. When a juvenile court judge is forced to rule on a novel question of law and resolves that question against the respondent, the judge's fear of appellate reversal may subtly affect the judge's determination on the ultimate issue of guilt or innocence.

§ 14.05 ASSESSING THE LIKELIHOOD THAT THE JUDGE WILL PENALIZE THE RESPONDENT AT SENTENCING BECAUSE THE RESPONDENT OPTED IN FAVOR OF A TRIAL INSTEAD OF A GUILTY PLEA

There are various factors that may cause a judge at sentencing consciously or unconsciously to penalize a respondent for having opted in favor of a trial instead of a guilty plea.

The judge may be irritated that the respondent has (in the judge's opinion) wasted the court's time by demanding a trial instead of simply pleading guilty. This is especially true when the prosecution's evidence of guilt is overwhelming and/or the respondent lacks a viable theory of the defense. (Conversely, if the respondent does present a viable albeit ultimately unsuccessful defense, many (although not all) judges will be tolerant of the respondent's opting in favor of a trial.)

The judge is particularly likely covertly to punish the respondent for insisting on a trial if the respondent takes the witness stand at trial and tells a story that the judge believes is perjurious. (In most situations in which the respondent testifies to an exonerating version of the events relating to the offense charged, the judge will have to find the respondent's testimony incredible in order to convict; thus the risk of an enhanced penalty exists to some extent in all such cases.) Even when the respondent does not take the stand, the defense presentation of testimony of friends or relatives of the respondent may cause the judge covertly to penalize the respondent at sentencing for having committed what the judge views as subornation of perjury.

The vast majority of judges engage in a practice of encouraging the attorneys to conduct a final round of plea negotiations immediately before the trial commences. Some judges go even further and either inquire into the precise nature of the plea bargains that have been offered or ask in a general way whether a plea offer was made that was a reasonable one. (The extent to which judges directly participate in plea negotiations between the prosecution and defense varies widely from jurisdiction to jurisdiction and from locality to locality. Some jurisdictions prohibit or restrict judicial involvement in plea bargaining, *see*, *e.g.*, FED. R. CRIM. P. 11(c)(1) (2014); *United States v. Davila*, 133 S. Ct. 2139 (2013); others recognize its legitimacy as a matter of law or established practice, *see*, *e.g.*, *State v. Warner*, 762 So.2d 507 (Fla. 2000); *Wilson v. State*, 845 So.2d 142 (Fla. 2003). Counsel should ascertain the local rules and practices in this regard and should learn what can be learned about particular presiding judges' attitudes toward brokering negotiations – as well as each available judge's probable predilections regarding what would constitute an appropriate disposition in counsel's client's case – before deciding whether, when, and how to engage a judge in counsel's dealings with the prosecutor.) If the judge believes that the plea offer was, in fact, reasonable, the judge may feel even more strongly that the respondent has wasted the court's time by insisting on a trial and may penalize a convicted respondent at sentencing. By the same token, when the plea offer is highly unreasonable and the respondent has opted for a trial solely (or partially) for that reason, defense counsel should seize any available opportunity to notify the judge of that fact even if the judge has not inquired. Once the judge

knows that the loss of time engendered by the trial was the result of the prosecutor's unreasonable plea policies, the judge is likely to direct his or her irritation at the prosecutor rather than the respondent. As a result, a convicted respondent will often receive the same sentence that the judge would have meted out after a guilty plea. However, this strategy of notifying the judge of an unreasonable plea offer and thereby laying the blame on the prosecution must be used with caution, for the result may be that the judge will pressure the prosecutor into offering a more favorable plea; if the respondent then refuses to accept the new plea offer and insists on a trial, the judge will be greatly irritated at the respondent's apparent disingenuousness and (in the judge's view) lack of gratitude for the judge's intervention on his or her behalf.

Many judges in juvenile court believe that "the first step to rehabilitation" is the admission of one's misdeeds and the demonstration of remorse. Judges who subscribe to this view may consciously or unconsciously penalize the respondent for contesting the charges rather than admitting his or her sins and immediately expressing remorse.

§ 14.06 ASSESSING WHETHER A GUILTY PLEA WOULD PRODUCE ANY SIGNIFICANT ADVANTAGES AT SENTENCING

§ 14.06(a) Introduction: The Analytical Process Involved in Gauging Potential Sentencing Advantages of a Guilty Plea

In assessing whether a guilty plea is likely to lead to significant advantages at sentencing, counsel must consider what are essentially four separate questions: (i) What is the maximum sentence the respondent could receive if s/he went to trial and were convicted of all of the offenses charged? (ii) What sentence, short of the maximum, is the judge likely to impose if the respondent were convicted at trial of the charges that the prosecutor will probably prove beyond a reasonable doubt? (iii) If the respondent were to plead guilty to the charging document, without any additional concessions from the prosecutor, what sentence would the judge be likely to impose? and (iv) Factoring in whatever additional concessions can be extracted (or have been extracted) from the prosecutor as a part of a plea bargain, what sentence is the judge likely to impose? If counsel can answer these questions to his or her satisfaction, s/he can construct the baselines for gauging the precise extent to which a guilty plea could aid the respondent at sentencing.

In developing the answers to these four questions, counsel's first step naturally must be to research the local law establishing the periods of incarceration and fines that can be imposed upon a juvenile for the commission of the offense(s) charged. This research will need to examine: (1) the maximum length of incarceration and maximum extent of fines that could be imposed for each of the charges; (2) whether the juvenile court statutes of the jurisdiction permit consecutive sentences for conviction of multiple offenses; (3) whether the length of the sentence can be enhanced as a result of statutes that provide for higher sentences for recidivists or for certain types of offenders (such as individuals who committed an enumerated serious felony or committed a crime while armed with an operable firearm); and (4) whether local statutes

establish any potentially applicable mandatory minimum penalties for the offense charged.

As explained in § 14.01 *supra,* the classic form of sentencing advantage available as a result of a guilty plea in adult court is inapplicable to juvenile court sentencings in most jurisdictions. This form of plea in adult court is one in which the defendant pleads guilty to a lesser offense included within the present charge and thereby obtains a guaranteed reduction of the statutory maximum sentence to the lesser sentence attached to the lesser charge. By contrast, in the vast majority of jurisdictions, the juvenile court statutes permit the imposition of the same indeterminate sentence without regard for the nature or severity of the offense. See § 38.03(c) *infra.*

Another common form of sentencing advantage of guilty pleas in adult court — the dismissal of several counts of a multi-count indictment in exchange for a plea, thereby precluding cumulative terms of incarceration for each of the counts that were dismissed — also is usually unavailable in juvenile court. In virtually all jurisdictions, sentences in juvenile court cannot be cumulative. Accordingly, regardless of whether the respondent has been convicted of a single crime or a number of crimes, the harshest possible sentence that can be meted out is a single indeterminate period of incarceration.

Since bargained guilty pleas in juvenile court cannot automatically curtail the length of incarceration as they can in adult court, the value of a guilty plea in juvenile court depends upon its producing other types of sentencing advantages. Section 14.06(b) *infra* examines the various alternative sentencing advantages that may be available and then looks also at the sentencing advantages available in the handful of jurisdictions whose juvenile court statutes do provide for some degree of differential sentencing based on the nature of the offense. Section 14.06(c) describes the variety of mechanisms for using a guilty plea to obtain one or more of these sentencing advantages. Obviously, any meaningful consideration of the value of a plea must take into account not only the theoretical availability of a sentencing advantage but also the practical feasibility of using one of these mechanisms to obtain the desired sentence.

§ 14.06(b) The Concrete Sentencing Advantages Available in Juvenile Court

An understanding of the sentencing advantages that may attend a guilty plea in juvenile court naturally requires familiarity with the unique indeterminate sentencing structure of juvenile court. That structure is described in detail in § 38.03(c) *infra.* For present purposes it is sufficient to conceptualize the range of juvenile court sentences as divided into three tiers, which are, in order of increasing severity: diversion, probation, and incarceration. As the following discussion will explain, the sentencing value of a guilty plea depends upon whether it will move a respondent down the three-tiered sentencing ladder to a sentencing option that is more lenient than the sentence that the respondent otherwise would be likely to receive.

"Diversion," the most lenient type of sentence, "diverts" the juvenile out of the court system by expunging the conviction and arrest records upon the juvenile's completion of a set

period of time without being rearrested. Available in most jurisdictions, this option may be called by a host of different names, including "adjournment in contemplation of dismissal" and "probation without verdict." The characteristics of the diversion vary significantly among jurisdictions. The length of the diversionary period may be a statutorily set term (usually six months or a year) or may be fixed on a case-by-case basis. Some jurisdictions provide for supervision by a probation officer during that period, either in all cases or at the discretion of the judge presiding over the case. All jurisdictions impose the requirement that the respondent remain crime-free during the period of diversion, but several jurisdictions also impose additional requirements such as regular school attendance, abstinence from drugs and alcohol, and meetings with a probation officer. Diversion is usually reserved for first or second offenders and can typically be obtained only in cases involving relatively minor offenses. It may be obtained even in serious cases, however, if defense counsel can persuade the judge or the prosecutor that the respondent is particularly law-abiding and well-behaved, that the crime has particularly mitigating aspects, or that there are significant flaws in the merits of the prosecution's case. In all jurisdictions that offer diversion, the option is, in theory, equally available to respondents who are convicted at trial and respondents who plead guilty. As a practical matter, however, a guilty plea may be the only way of securing the prosecutor's support for diversion, and prosecutorial support may be the only practical means for persuading the judge to award diversion. Accordingly, the determinative factor in whether to plead guilty may be the comparison between whatever likelihood exists of obtaining diversion after being convicted at trial and the likelihood of obtaining diversion as a result of a guilty plea that purchases a prosecutorial commitment to support diversion. For discussion of the forms of prosecutorial and judicial commitments to a particular sentencing option, see § 14.06(c) *infra.*

For more serious offenders and recidivists, who will be deemed ineligible for diversion, the central question in gauging the value of a guilty plea is whether the respondent faces a risk of incarceration in the event that he or she is convicted. If there is a substantial risk of incarceration, then the respondent may benefit greatly from a plea agreement in which the prosecutor (or ideally the judge) agrees to a sentence of probation.

If the nature of the offense or the respondent's prior record is so egregious that even probation is out of the question, and the inevitable effect of conviction (whether as a result of a trial or a guilty plea) is a sentence of incarceration, then a guilty plea usually offers no sentencing advantages. This is so because in most jurisdictions the sentencing judge cannot control the length of the period of incarceration. In virtually all jurisdictions a sentence of incarceration (called "commitment" in some jurisdictions and "placement" in others) is an indeterminate sentence that, in theory, can extend to the minor's age of majority. (In some jurisdictions the sentence imposed upon the child is an indeterminate sentence that extends to the child's age of majority; in other jurisdictions it is an indeterminate sentence of up to 18 or 24 months, which in theory can be extended annually until the child's age of majority.) Once the court has imposed the indeterminate sentence, custody of the child is transferred to the state agency that administers the juvenile placement facilities. The agency thereafter determines the release date on the basis of the child's behavior within the institution. Thus the judge has no power over the length of

sentence that the child actually will serve and cannot reward a guilty plea by imposing a shorter period of incarceration than would be imposed after trial. (As a practical matter almost all incarcerated juveniles are released by the incarcerating agency within 12 to 18 months.)

A few jurisdictions deviate from the usual indeterminate sentencing pattern and either provide for the automatic imposition of heavier sentences for more severe offenses or give the judge the authority to vary the sentence depending upon the nature of the offense. For example, in some jurisdictions, the indeterminate sentence imposed for a felony is greater than the indeterminate sentence imposed for a misdemeanor. In other jurisdictions the judge can impose indeterminate sentences of varying lengths depending upon the seriousness of the offense and upon the respondent's character and prior record. And, in still other jurisdictions, a juvenile sentencing judge can override the typical indeterminate sentencing pattern by specifying a fixed term of incarceration or by reserving a veto power over the agency's decision to release a particular respondent prior to the expiration of his or her indeterminate sentence. In jurisdictions of these types a juvenile respondent who is facing a strong likelihood of incarceration in the event of conviction may wish to consider a guilty plea if the plea can be used to limit the length of that incarceration.

In some jurisdictions the sentencing judge can exercise some control over the facility in which the respondent is incarcerated. Usually, the range of juvenile detention facilities includes a maximum security facility, one or more medium security facilities that are oriented towards treatment rather than security, and one or more community-based group homes. In jurisdictions that permit the sentencing judge to select the place of incarceration, the respondent may wish to consider a guilty plea that will maximize the respondent's chances for the least secure facility or the facility that provides the most meaningful rehabilitative services.

§ 14.06(c) Mechanisms for Using a Guilty Plea To Obtain One of the Sentencing Advantages Available in Juvenile Court

The most common mechanism for using a plea to engineer a reduction in sentence is to trade the plea for an agreement by the prosecutor that s/he will support (or not object to) a specific sentence desired by the defense. This option, and its various permutations and ramifications, is discussed in § 14.06(c)(1) *infra.* Section 14.06(c)(2) then examines the primary defect of this kind of prosecutorial agreement — the lack of any binding effect upon the sentencing judge — and describes the methods available in some jurisdictions for obtaining a judicial commitment to impose a specific sentence. Finally, § 14.06(c)(3) looks at other forms of prosecutorial aid that may be obtainable at the sentencing stage to affect the nature of the sentence.

§ 14.06(c)(1) Prosecutorial Commitments To Support (or Not Object to) a Specific Sentence

There are essentially three ways in which a prosecutor can commit himself or herself, as part of a plea agreement, to aid the defense in obtaining a particular desirable sentence. The most

advantageous from the defense perspective is a commitment by the prosecutor to tell the judge at sentencing that s/he supports the sentence that is being requested by the defense and joins the defense in seeking that sentence. Some prosecutors may not be willing to affirmatively recommend a specific sentence in this manner, either because they feel that the concession is unwarranted on the facts of the case or because their view of the prosecutorial role does not encompass such active support of the defense at sentencing. Such prosecutors may be willing to adopt the less active stance of announcing that they have no objection to the defense's sentencing request. Many judges view declarations of non-objection as virtually tantamount to an expression of outright support. Finally, prosecutors who are unwilling to express or even imply support may be willing to agree, as part of a plea bargain, to remain mute at sentencing. This commitment, although far less advantageous to the defense, nevertheless can prove helpful. By silencing the prosecutor, it increases the likelihood that the judge will be swayed by the unrebutted arguments of the defense. Moreover, many judges perceive a prosecutor's silence as an indication that there are no unduly aggravating facts in the case or in the respondent's prior record.

Clearly, these three types of prosecutorial commitments differ in the degree to which they benefit the respondent. However, the actual effect of such commitments cannot be gauged without a full understanding of the nature and effect of the pre-sentence report. As the following discussion will explain, all three forms of prosecutorial support may decisively shape the sentencing determination if the prosecutor agrees in addition to waive a pre-sentence report. Conversely, when a pre-sentence report is ordered by the judge and turns out to be unfavorable to the respondent, none of the forms of prosecutorial support may suffice to produce the sentence desired by the defense.

The pre-sentence report, which is discussed further in § 38.04(a) *infra,* is a report on the background of the respondent prepared by the probation department. Typically, such reports include descriptions of the facts of the present offense, the respondent's prior record, the respondent's attendance and behavior at school, the respondent's conduct at home as described by the parent, the respondent's use of alcohol or drugs, the probation officer's assessment of whether the respondent is remorseful about committing the crime, and the probation officer's diagnosis of the appropriate sentence for the respondent. As one might expect, the pre-sentence report plays a major role in shaping the judge's view of what sentence should be imposed.

In many jurisdictions the judge will be willing to dispense with the preparation of the pre-sentence report and instead proceed immediately to sentencing if the prosecution and defense jointly request such a procedure. (This practice is often followed even in jurisdictions whose statutes mandate the preparation of a pre-sentence report.) If the defense has succeeded in obtaining a prosecutorial commitment to support (or not object to) a specific disposition, it is strongly in the respondent's interest to waive the preparation of a pre-sentence report and to seek a similar waiver by the prosecution as part of the plea agreement. Since the judge's only sources of information about a respondent are the parties and the pre-sentence report, the elimination of the pre-sentence report deprives the judge of any factual basis for overriding the parties' unanimous request for a specific sentence. Accordingly, as a general matter, if the defense can

procure a prosecutorial commitment to waive the pre-sentence report and if the judge presiding over the case tends to follow the parties' wishes to waive a pre-sentence investigation, counsel can usually feel confident that a prosecutorial commitment to support (or not object to) a specific sentence will prove adequate to produce the desired sentence. This is also true, albeit to a somewhat lesser extent, of prosecutorial commitments to remain mute at sentencing. With the pre-sentence report waived and the prosecution remaining mute, the judge will have little reason to reject defense counsel's argument concerning the appropriate sentence.

Frequently, prosecutors are unwilling to ask for immediate sentencing and will insist upon the preparation of a pre-sentence report. These prosecutors may be perfectly willing to adopt one of the forms of support for a defense recommendation — express support for the specific sentence, declaration of the lack of any objection to the sentence, or remaining mute — but they insist that the judge should be given the pre-sentence information necessary to make an independent judgment concerning the appropriate sentence. Any plea agreements of this sort, permitting the preparation of a pre-sentence report, are risky propositions. An unfavorable pre-sentence report may lead a judge to reject even a defense sentencing request affirmatively supported by the prosecution. In gauging the value of prosecutorial support of this type, defense counsel will need to gather information bearing on two questions:

(A) How likely is it that the pre-sentence report will turn out to be favorable to the respondent? The evaluation of this factor will require investigation into the respondent's prior record, attendance and behavior at school, and conduct at home. Counsel cannot stop with the information furnished by the respondent and his or her parent about these matters; they will naturally be prone to exaggerate the positives and minimize the negatives. Defense counsel will need to verify the information independently by checking court records and obtaining the respondent's school records. Counsel must also obtain and evaluate the police version of the offense and the attitudes of the investigating officers about the offense and the respondent that will probably be conveyed to the probation officer who writes the pre-sentence report. In addition, counsel will need to familiarize himself or herself with local probation department policies and practices, in order to predict the likely recommendations of the report writer.

(B) How likely is it that prosecutorial support at sentencing will cause the judge to adopt the desired sentence even in the face of an unfavorable pre-sentence report? Counsel will need to speak to other juvenile defense attorneys who have conducted sentencings before the particular judge, in order to ascertain the degree of deference the judge pays to sentencing agreements between the defense and prosecution and also the kinds of aggravating facts that are most likely to sway the judge.

If defense counsel can feel confident that the pre-sentence report will be favorable (or, at least, not extremely detrimental) or that the judge is likely to defer to the parties' agreed-upon

sentence even in the face of an unfavorable pre-sentence report, then the respondent may be well advised to accept a guilty plea that promises prosecutorial support at sentencing even in the absence of a prosecutorial commitment to waive the pre-sentence report.

Occasionally, prosecutors who insist upon the preparation of a pre-sentence report are also adamant in refusing to make any commitments regarding the sentence until after they have viewed the pre-sentence report. In such instances most prosecutors will be amenable to entering into a contingent agreement that conditions their actions at sentencing (support for a specific sentence, declaration of the absence of any objection, or remaining mute) upon the pre-sentence report turning out to be favorable to the respondent. Such contingent agreements may be worthwhile from the defense perspective, as long as:

(A) Defense counsel has already checked on the respondent's prior record and conduct at school and at home and therefore knows that the pre-sentence report will, in fact, be favorable to the respondent.

(B) Defense counsel succeeds in securing a concrete agreement about the precise criteria that the respondent must satisfy in order to earn the agreed-upon sentence. A concrete identification of criteria is essential to ensure that the prosecutor (or judge) cannot later declare that an apparently favorable pre-sentence report is not commendatory enough to trigger the prosecutor's (or judge's) corresponding obligations. Concrete criteria might include: a pattern of regular attendance at school (perhaps specifying the number of absences that will be tolerated); no suspensions or expulsions from school since the initiation of the court case; no prior convictions; no serious misbehavior at home; and no evidence of use of alcohol or drugs.

§ 14.06(c)(2) Obtaining Judicial Ratification of the Parties' Agreement to a Specific Sentence

As earlier explained, all of the prosecutorial commitments that have been described are somewhat risky because a prosecutorial recommendation cannot tie the judge's hands. Some judges invariably go along with the recommendation; some never do; some do or do not, depending on the case. Negotiating for a sentencing recommendation is effective only if defense counsel has sufficient information about the judge who will be — or about all of the judges who may be — the sentencing judge. In some cases it may be possible to meet with the judge in chambers, in a formal or informal pretrial conference, to sound out his or her reaction to a proposed sentencing recommendation by the prosecutor. Defense counsel may wish to suggest such a conference when the judge's attitude toward sentencing recommendations is uncertain. *See*, *e.g.*, *State v. Warner*, 762 So.2d 507 (Fla. 2000).

In some localities a formal or informal practice of "conditional" plea bargaining has developed. Under this practice the prosecution and defense negotiate (i) the terms of the sentence

that the respondent will receive if s/he pleads guilty (for example, diversion, probation, or a specific short period of incarceration) or (ii) the rules that will be followed in sentencing the defendant if s/he pleads guilty (for example, that there will or will not be a pre-sentence report; that the sentence will be probation in the event that the pre-sentence report shows that the respondent has no prior convictions and is regularly attending school (or, in appropriate cases, in the event that the prosecution informs the court that the respondent is cooperating with the authorities by giving information or testifying against co-perpetrators)). The parties' agreement is then submitted to the sentencing judge for approval. If the judge agrees (i) to impose the bargained sentence or (ii) to observe the bargained sentencing rules, the respondent pleads guilty and the judge performs as agreed. If the judge does not agree, then the deal is off, and the case goes to trial (or to renegotiation). *See, e.g.*, *People v. Clancy*, 56 Cal. 4th 562, 570, 572-77, 299 P.3d 131, 135, 137-40, 155 Cal. Rptr. 3d 485, 490, 492-95 (2013). If this procedure is customary in counsel's jurisdiction, counsel should ordinarily follow it. If it is not, counsel should consider suggesting it to the prosecutor and the judge for use on an *ad hoc* basis.

§ 14.06(c)(3) Prosecutorial Commitments To Aid the Defense at Sentencing in Ways Other than Supporting (or Not Objecting to) a Specific Sentence

In addition to the previously described forms of prosecutorial aid at sentencing, there are a variety of ways in which the prosecutor can indirectly aid the defense with respect to sentencing. Depending upon the facts of the case and the inclinations of the prosecutor handling the case, it may be possible to obtain these indirect advantages either alone or in addition to prosecutorial commitments to support (or not object to) a specific sentence.

In some jurisdictions the timing of a guilty plea can be used to steer cases before a particular judge for sentencing, and the prosecution's assistance may be instrumental in controlling the timing of the plea. See § 14.09 *infra.* Since the sentencing practices of the judge will often determine whether the defense succeeds in obtaining a favorable sentence, a prosecutor's willingness to commit himself or herself, as part of a plea agreement, to aid the defense in steering the case before a particularly desirable judge may render the plea worthwhile. Obviously, in assessing the value of such a plea, the defense will need to investigate the sentencing practices and attitudes of all of the judges to whom the case could be shifted through the use of procedures that the prosecutor and defense counsel can implement and to compare them to the practices and attitudes of the judge who is currently presiding over the case.

Sometimes, prosecutors are willing to include in a plea agreement commitments regarding their description of the facts of the offense at sentencing. Obviously the prosecutor has great leeway in shaping his or her sentencing allocution, and s/he can choose to describe the facts of the offense in a brief and colorless manner or in an extensive and graphic manner. Frequently, prosecutors are willing to negotiate a commitment to refrain from mentioning (or at least, from belaboring) damaging facts, such as the extent of victim's injury or terror. This is especially true when the respondent has pled to a lesser count that is not based on the aggravating evidence. For example, when the respondent has pled guilty to possession of a gun, it may be possible to secure

a prosecutorial commitment not to mention at sentencing that the respondent also allegedly fired that gun. Limitations upon the aggravating facts heard by the judge can prove instrumental in securing a desired sentence. However, defense counsel must be cautious in using negotiated limitations of the facts in any cases in which the judge has ordered a pre-sentence report. Since pre-sentence report writers usually check the documents in the court file (and, in some jurisdictions, even speak with the victim in order to prepare a "victim impact statement"), the probation officer may learn of the excluded aggravating facts and may decide to include them in the pre-sentence report. When defense counsel predicts that there is a realistic possibility of the probation officer's learning of the excluded information (such as, for example, in a case in which the documents in the court file contain the information, or in a jurisdiction in which probation officers routinely speak with the complainant), defense counsel will need to raise the issue with the probation officer and attempt to convince him or her to respect the terms of counsel's arrangement with the prosecutor.

Another type of prosecutorial concession that can indirectly affect the outcome of the sentencing is a prosecutorial agreement to support the release, pending sentencing, of a respondent who was detained before trial. Many judges are willing to release a detained respondent, upon his or her entry of a guilty plea, if the prosecutor supports such a measure. (The rationale for this apparently paradoxical practice of detaining the respondent during the pretrial period of presumed innocence and then releasing him or her when s/he concedes guilt is somewhat murky. The explanation often given is that the respondent's acknowledgment of guilt constitutes his or her first step toward rehabilitation, and the release has been ordered to facilitate further progress toward that goal. More realistically, the process can be viewed as a systemic accommodation to plea bargaining: If judges fail to give effect to any of the terms of a plea bargain, the system of plea bargaining will soon fall apart and the courts will be overloaded with trials; and, on the spectrum of possible plea bargain conditions, the condition of pre-sentencing release is an easy one for a judge to accept, since a respondent's violation of the terms of the release will very shortly thereafter result in a sentence of incarceration.) In any event, whatever the rationale, pre-sentencing release of the respondent can prove instrumental to securing a favorable sentence. If the respondent can remain crime-free and demonstrate good behavior at school and at home during the weeks pending sentencing, defense counsel can use that record of good behavior to argue forcefully at sentencing that the respondent does not need to be incarcerated.

§ 14.06(c)(4) The Additional Intangible Effects of a Guilty Plea in Securing the "Good Will" of the Sentencing Judge

The foregoing analysis has been predicated upon the assumption that counsel can, at the time of the entry of the plea, obtain some type of commitment from either the prosecutor or judge concerning the sentence that will be imposed. In many cases it will be impossible to extract a commitment concerning sentencing from either prosecutor or judge. However, the mere entry of a guilty plea, without reciprocal commitments, may enable the respondent to reap one of the sentencing advantages described in § 14.06(b) *supra.* Judges tend generally to give lighter

sentences to juvenile respondents who plead guilty, either because the judge regards the plea as a sign of contrition and a first step toward rehabilitation or because the judge wants, consciously or unconsciously, to express appreciation for the respondent's contribution to alleviating the problem of docket congestion. In determining the likelihood that the judge will "give consideration" for a plea, even in the absence of a commitment, it is of course essential for counsel to check with other attorneys about the particular judge's sentencing policies as evidenced in prior cases.

§ 14.07 ASSESSING WHETHER THE RESPONDENT WILL SUFFER ANY COLLATERAL CONSEQUENCES AS A RESULT OF EITHER A GUILTY PLEA OR A CONVICTION AT TRIAL

In analyzing the advisability of a guilty plea, it is necessary to consider not only potential sentencing consequences but also certain collateral consequences that may attach to a conviction. These may sometimes be so devastating that a plea is not a viable option, even if the direct sentencing consequences of conviction can be brought within acceptable limits by negotiation. The most common and most important of these collateral consequences is the potential for revocation of the respondent's probation or parole (called "aftercare" in many jurisdictions). It frequently happens that a juvenile is arrested for a crime at a time when s/he is already on probation or parole for a prior conviction. In virtually all jurisdictions, if the respondent is convicted of the new crime, that conviction can serve as a basis for revoking the respondent's probation or parole and imposing a period of incarceration. (For discussion of the standards for revocation and the length of the term of incarceration that can be imposed upon revocation, see §§ 39.04-39.05 *infra*.) Accordingly, when a respondent is already on probation or parole, the entry of a guilty plea may be tantamount to acquiescing in a period of incarceration. This prospect may be sufficiently unattractive to the respondent that s/he will reasonably decide s/he has nothing to lose by going to trial, even with a weak defense that offers nothing more than the faintest hope of an acquittal. On the other hand, if defense counsel can persuade the prosecutor to include in the plea agreement a commitment to support an extension of the period of probation or parole instead of revocation, then a guilty plea may become a very attractive option.

Another potential collateral consequence of conviction is the risk that the conviction can serve as a basis for exposing the respondent to enhanced penalties for future offenses. There are various ways in which such a risk can arise. Under the laws of some jurisdictions, a juvenile adjudication can result in a respondent's facing a higher sentence as a recidivist if s/he is charged with and convicted of a new offense in juvenile court in the future. *See, e.g.*, N.Y. FAM. CT. ACT § 301.2(8)(v)-(vi), 353.5 (2014). In some States, a youth who has been convicted in juvenile court and is thereafter arrested for a new offense faces an enhanced risk of transfer to adult court on the new charge as a result of the prior adjudication. *See, e.g.*, OR. REV. STAT. § 419C.349(4)(e) (2014). In some States, the adult criminal court sentencing laws permit the use of a prior juvenile adjudication as a predicate for a more serious criminal charge and/or as a basis for aggravated sentencing (*see, e.g.*, *United States v. Woodard*, 694 F.3d 950, 952-55 (8th Cir. 2012); *State v. McFee*, 721 N.W.2d 607 (Minn. 2006); *but cf. United States v. McGhee*, 651 F.3d

153, 157-58 (1st Cir. 2011) (district court erred in classifying the defendant's prior Massachusetts youthful offender adjudication as a predicate for "career offender status" under the federal sentencing guidelines: the guidelines require that the court consider "whether the conviction is 'classified' as an adult offense 'under the laws of the jurisdiction' of conviction, . . . undermining any presumption in favor of a federal standard that disregards state labels," and "Massachusetts' nomenclature clearly distinguishes between youthful offenders and adults")), and therefore a youth who is convicted in juvenile court faces the risk of harsher penalties in adult criminal court if s/he is arrested for a new offense while still a juvenile and is transferred for prosecution to adult court or if s/he is arrested for a new crime after reaching the age at which individuals are automatically prosecuted in adult court. In any case in which a juvenile court adjudication can give rise to collateral consequences of this sort and in which there is at least some risk that the client may be rearrested for a new offense in the future, these risks must be factored into the assessment of whether to accept a guilty plea or instead to go to trial in the hope of averting a conviction and thereby avoiding any such collateral consequences. Accordingly, in evaluating the wisdom of a guilty plea and in working out the terms of any plea bargain with the prosecutor, counsel must always thoroughly research the jurisdiction's statutes, rules, and practices governing transfer and recidivist sentencing in juvenile and adult court, realistically assess the client's prognosis for staying out of trouble in the future, and discuss these subjects bluntly with the client.

Another factor to consider in the case of a respondent who is not a citizen of the United States is whether a guilty plea — or a conviction at trial — could have detrimental consequences for the respondent's immigration status. A noncitizen who is convicted of a crime in adult court may be subject to an order of removal (a euphemism for deportation) if the conviction is for any one of a range of types of crimes, including those classified by the Immigration and Nationality Act as "aggravated felonies"; "crimes involving moral turpitude"; certain types of controlled substance offenses; certain types of firearm offenses; and certain crimes of domestic violence, stalking crimes against children, or violations of protection orders. *See generally* MANUEL D. VARGAS, REPRESENTING IMMIGRANT CRIMINAL DEFENDANTS IN NEW YORK STATE (5th ed. 2011); Manuel D. Vargas, *Immigration Consequences of Guilty Pleas or Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 701 (2006). *See also, e.g.*, FED. R. CRIM. P. 11(b)(1)(o) (amended, effective Dec. 1, 2013, to require that the plea colloquy in federal criminal cases include a judicial warning to defendants who are "not a United States citizen" that a conviction may result in the defendant's being "removed from the United States, denied citizenship, and denied admission to the United States in the future"); . The Board of Immigration Appeals thus far has consistently ruled that a juvenile court adjudication of delinquency does not qualify as a conviction of a "crime" and therefore cannot result in immigration consequences (*see, e.g.*, *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000, INS motion for reconsideration denied 2001); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 137 (BIA 1981); *In the Matter of F-*, 2 I.&N Dec. 517, 518 (Central Office 1946; adopted by BIA 1946 (*see id*. at 524)), but "an act of juvenile delinquency could be considered an adverse factor in any application for a discretionary benefit under the immigration laws, and could trigger automatic ineligibility . . . under the Family Unity program." VARGAS, *supra*, § 4.1.A, at 66. Immigration laws are in a state of flux and there

is always the risk that statutory amendments, regulation changes, or agency interpretations or policies could result in greater consequences flowing from a delinquency adjudication. Accordingly, if counsel's client is a noncitizen, it is essential that counsel research the possible immigration consequences of a delinquency adjudication and consider whether a guilty plea might entail, increase, avoid or reduce the risk of any such consequences. *See Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) ("The[] changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important."). *See also, e.g.*, *Kovacs v. United States*, 744 F.3d 44, 48, 50 (2d Cir. 2014) (counsel "rendered ineffective assistance by giving erroneous advice concerning the deportation consequences of pleading guilty . . ., with the result that [Kovacs] is at risk of detention and deportation if he reenters the United States"); *United States v. Akinsade*, 686 F.3d 248, 251, 255-56 (4th Cir. 2012) (counsel committed ineffective assistance by misinforming the client that the charge to which the client was pleading was not a deportable offense); *Hernandez v. State*, 124 So.3d 757, 762-63 (Fla. 2013) (even if the accused was warned by the judge during the plea colloquy of the risk of deportation and the accused explicitly affirmed his understanding, defense counsel nonetheless can be found to be ineffective under *Padilla v. Kentucky* for "failing to warn [the accused] . . . of the clear immigration consequences of his plea": "an equivocal warning from the trial court is less than what is required from counsel and therefore cannot, by itself, remove prejudice resulting from counsel's deficiency"); *Commonwealth v. DeJesus*, 468 Mass. 174, 174-75, 9 N.E.3d 789, 791 (2014) (counsel committed ineffective assistance by advising his noncitizen client that a guilty plea to possession with intent to distribute cocaine would make him "'eligible for deportation'" when in fact "applicable immigration law . . . makes deportation or removal [for this crime] . . . automatic or 'presumptively mandatory'"). *Cf. United States v. Juarez*, 672 F.3d 381, 384, 385-90 (5th Cir. 2012) (counsel, who advised the client to plead guilty to lying about United States citizenship and illegal re-entry after deportation following a conviction of an aggravated felony, committed ineffective assistance because counsel "failed to independently research and investigate the derivative citizenship defense" which "is a defense to the alienage element of both crimes to which Juarez pled guilty").

There are a number of other civil disabilities that may flow from the respondent's acquisition of a criminal record, even if that record is a juvenile record. *See, e.g.*, *United States v. Juvenile Male*, 131 S. Ct. 2860, 2862-63, 2864 (2011) (per curiam) (15-year-old who pleaded "true" to a sexual offense in a federal delinquency prosecution was subject to a state law requirement to register as a sex offender). *See generally* Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111 (2006). *See also* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520 (2004). Although all jurisdictions supposedly guarantee confidentiality of juvenile records and most provide for some form of "sealing" of the records upon the juvenile's attainment of adulthood, the reality is that juvenile convictions are often discovered by the ex-offender's prospective employers, as well as by state and federal licensing agencies. Depending upon the effectiveness of the local jurisdiction's sealing laws and procedures, a juvenile conviction may

interfere with the juvenile's later attempts to: (i) enter an educational institution or obtain a professional license (such as a license to practice law or medicine); (ii) enter the military (including National Guard service, which is, in turn, the precondition for certain employments); (iii) obtain an occupational license (hack license, license to operate a bar, license to carry a firearm as a security guard, and so forth); (iv) obtain public office or employment (particularly in law enforcement or corrections careers); and (v) in cases in which the juvenile's conviction was for a traffic offense, obtain a driver's license or acquire car insurance at affordable rates.

Finally, a conviction may have the collateral consequence of enabling the State to permanently retain any property that was seized from the respondent at the time of arrest. Such property could include, for example, sums of money that the respondent was carrying (seized as proceeds of the crime) or the family automobile that the respondent was driving (seized as an implement of the crime). In many jurisdictions forfeiture statutes provide for the State's retention of such property whenever the respondent has been convicted at trial or has pled guilty. When the personal property that will be forfeited is very valuable to the respondent and when a trial could result in acquittal and the return of the property but would not pose the risk of incarceration in the event of conviction, a respondent could reasonably opt for the chance of winning the trial and regaining his or her property. It may be obvious to counsel that such a venture would *not* be worthwhile when going to trial *could* enhance the chance of incarceration, but counsel will often need to discuss this situation and explain its risks thoroughly to a juvenile client because many young children are more concerned with the concrete loss of the property than with the intangible possibility of future incarceration.

In each of these situations of potential collateral consequences, counsel must research fully both the legal basis for any collateral criminal or civil liability and the practical likelihood that the collateral consequence will actually take place.

§ 14.08 ASSESSING WHETHER A TRIAL WOULD BE DETRIMENTAL IN THAT IT WOULD EXPOSE THE JUDGE TO PARTICULARLY EGREGIOUS FACTS OR A HIGHLY SYMPATHETIC COMPLAINANT AND THEREBY CAUSE THE JUDGE TO IMPOSE A HARSHER SENTENCE IN THE EVENT OF CONVICTION

Our earlier discussion of factors to consider in analyzing the likelihood of winning at trial mentioned that particularly egregious facts or an especially sympathetic victim may cause a judge to lean unconsciously toward conviction. See § 14.04(c) *supra.* In the event that the respondent is convicted, egregious facts or a highly sympathetic victim may also cause the judge to impose a particularly harsh sentence. In this respect, the respondent may be significantly prejudiced by opting for a trial instead of a guilty plea. Although the judge in a plea colloquy does hear the egregious facts, see § 14.26(c) *infra,* the summary and dispassionate rendition of the facts that are characteristic of plea colloquies usually will not make an overwhelming impression on the judge. In sharp contrast, when a judge observes a vulnerable victim (such as a young child or senior citizen) testify at trial or hears any victim testify about the horrid physical injury or psychological trauma that s/he suffered, the judge inevitably will sympathize with the victim and, in the event

of conviction, may increase the punishment meted out to the respondent. Of course, this is not to say that a plea offer should be accepted in every case in which the facts are egregious or the victim is sympathetic. However, these factors must be taken into consideration in the cost-benefit analysis of whether to plead guilty or go to trial.

In assessing whether the egregious nature of the offense should tip the balance in favor of a plea, the first factor to consider is whether the facts of the offense are substantially more egregious than those in other cases heard by the judge. Counsel will have to find out the range of cases heard by the particular judge and assess where this specific crime falls on the spectrum. (For example, a judge who regularly presides over homicides and other major felonies will view an armed robbery in a very different light than would a judge who deals primarily with minor felonies and misdemeanors.) Counsel should additionally inquire of attorneys who have frequently appeared before the judge whether his or her previous sentencings reflect a particular sympathy for the type of victim involved in this respondent's case. In analyzing the judge's prior sentences in cases involving sympathetic victims or particularly egregious facts, counsel should also compare the length of sentences in cases in which the respondent went to trial with those in which the respondent pled guilty.

Another major factor to consider is the degree to which the judge has leeway to increase the sentence even if s/he wishes to do so. In § 14.06(a) *supra,* it was noted that the range of sentences that can be imposed in juvenile court is quite limited. Usually, the sole choice is between probation and a uniform indeterminate sentence. If that is the case and if the respondent's prior record is such that any new conviction will inevitably result in incarceration, then there is nothing the judge can do to further penalize the respondent even if the judge should be so inclined as a result of hearing the trial testimony. As a result, egregious facts or a sympathetic victim should militate for a guilty plea only when: (i) by pleading guilty and minimizing the impact of those facts, the respondent might realistically be able to avoid incarceration and obtain a sentence of probation; or (ii) even assuming that incarceration is virtually certain in the event of a guilty plea, the judge has the power to give the respondent the benefit of incarceration in a particularly desirable facility; or (iii) the jurisdiction is one that does provide a range of sentences for juveniles, so that the judge could aggravate the sentence as a result of hearing prejudicial trial testimony.

The third and final factor to consider in assessing the significance of egregious facts is whether the impact of those facts will actually be lessened by pleading guilty rather than going to trial. Although it is true that the brief, second-hand description of the offense that is given during a guilty plea (and is usually repeated in the pre-sentence report) will usually not be as devastating as live testimony at trial, there are some crimes (such as murder, rape, kidnapping) that are so egregious that the mere mention of the crime will be sufficient to predispose the judge in favor of a sentence of incarceration. In cases of this type, a guilty plea usually will not make a difference, and the respondent has nothing to lose by going to trial.

In determining whether a guilty plea will serve to avoid or blunt the influence of

devastating facts upon the judge, defense counsel should also consider the availability of strategies, such as those described in § 14.06(c)(1) and (3) *supra,* for limiting the factual information that will be put before the sentencing judge in the event of a plea. Clearly, in a case in which the respondent has a chance for probation, a plea agreement that ensures that the judge will never hear certain aggravating facts can spell the difference between probation and incarceration.

Having assessed the degree of damage that could be caused by the judge's hearing the live testimony at trial and the extent to which that damage could be limited by the mechanism of a guilty plea, counsel is finally ready to include these considerations in the general cost-benefit analysis of the advisability of a plea. If the respondent has a strong chance of prevailing at trial, that prospect should not ordinarily be traded away even for the benefits that might accrue from limiting the facts. On the other hand, if the respondent is likely to be convicted and a limitation upon the facts could give the respondent a good chance for probation instead of incarceration, then the respondent may be well advised to accept a plea offer.

Thus far, the discussion has considered only cases in which the facts that would emerge at trial are detrimental to the respondent. Counsel will also occasionally encounter situations in which a trial — even a trial that the respondent would surely lose — could be beneficial because the judge would hear and later remember powerful mitigating evidence in the form of extenuating or sympathetic circumstances surrounding the commission of the offense. For example, in a homicide case, the respondent may have only a slim chance of winning on a self-defense claim, but a trial may provide the opportunity for presenting the judge with persuasive evidence of provocation by the victim, which can be cited later at sentencing as a basis for mitigation of the sentence. In such cases, even the promise of prosecutorial support at sentencing may be insufficient to outweigh the benefits of going to trial and presenting the mitigating facts in the most forceful manner.

§ 14.09 ASSESSING WHETHER THE DECISION TO PLEAD GUILTY CAN BE USED TO STEER THE CASE BEFORE A FAVORABLE JUDGE FOR PURPOSES OF SENTENCING

Despite recent attempts to achieve judicial uniformity in sentencing, individual judges continue to differ enormously in their sentencing patterns and attitudes. As this section will explain, if counsel is practicing in an urban jurisdiction with several juvenile court judges, counsel can significantly affect the client's sentence by ensuring that the sentence is imposed by the right judge or is not imposed by the wrong judge. Of course, these considerations will be inapplicable in the smaller or rural jurisdictions, where there is only one juvenile court judge.

If practicing in a multijudge jurisdiction, counsel should investigate the sentencing practices of all of the judges before whom the case could be steered. Such information can be gleaned by discussing the topic with other juvenile court lawyers and with the prosecutor (assuming s/he is cooperative and trustworthy).

If the juvenile court judges in the jurisdiction periodically rotate assignments, counsel can control the identity of the judge by accelerating or delaying the case. If counsel is aware of an upcoming rotation and concludes that the present judge is more desirable than the incoming judge, counsel obviously wants to advance the case and hold the plea hearing before the current judge. Conversely, if counsel determines that the incoming judge will be a more favorable sentencer, the plea should be delayed until after the rotation has taken place. In some cases the prosecutor's assistance may be crucial in advancing or delaying the plea hearing, and it may be necessary to secure the prosecutor's assistance as an express or implicit condition of a plea agreement. See § 14.06(c)(3).

In a rare case the respondent may enter a guilty plea at arraignment in order to assure the assignment of the case to a particularly lenient judge who happens to be conducting arraignments that day. Such an occurrence should be extremely rare because defense counsel at arraignment usually will not yet have conducted enough discovery and investigation to be able to gauge the advisability of a guilty plea.

In some jurisdictions judges only retain jurisdiction over sentencing in cases in which a trial was held, and all guilty plea cases are sent to a single judge for sentencing regardless of which judge accepted the plea. In such jurisdictions if the judge who conducts sentencings in plea cases is a more lenient sentencer than the judge who would conduct the trial, then this disparity will be a powerful argument in favor of a guilty plea (assuming that there is a significant chance that the respondent would be found guilty at trial). On the other hand, if the judge to whom the case is assigned for trial is a more lenient sentencer than the judge who conducts sentencings in plea cases, then it may be in the respondent's interest to go to trial even in a case in which conviction is inevitable, solely for the purpose of guaranteeing that the lenient trial judge will retain the case for purposes of sentencing.

§ 14.10 ASSESSING WHETHER A GUILTY PLEA WOULD PREJUDICE THE RESPONDENT BY PRECLUDING APPELLATE REVIEW OF AN ADVERSE TRIAL COURT RULING ON A SUPPRESSION ISSUE OR OTHER ISSUE LITIGATED BEFORE TRIAL

In many jurisdictions the entry of a guilty plea waives all rights to appellate review of errors committed in judicial proceedings prior to the plea. Accordingly, in jurisdictions of this sort, if the defense litigates and loses a viable motion to suppress a confession, tangible evidence, or identification evidence, and the respondent thereafter enters a guilty plea, the defense forfeits the right to appeal the adverse suppression rulings. In cases in which the suppression arguments are strong, counsel must weigh the loss of the opportunities for their appellate vindication against the benefits of the plea. Similarly, a guilty plea waives — and counsel who is advising a respondent concerning the advantages and disadvantages of a plea must factor in the loss of — appellate review of other pretrial rulings, such as rulings on motions for a change of venue, for recusal of the judge, and so forth.

In an increasing number of jurisdictions, state legislatures have eliminated this dilemma, at least when suppression issues are concerned, by authorizing appellate review of pretrial suppression rulings even after the entry of a guilty plea. *See, e.g.,* N.Y. FAM. CT. ACT § 330.2(6) (2014). But counsel should make very sure that postplea appellate review is expressly authorized by statute or an authoritative judicial decision in the particular jurisdiction before advising a guilty plea with the expectation of obtaining appellate review of the preplea judicial rulings.

In jurisdictions that prohibit appellate review of preplea rulings, it may be possible to preserve appellate remedies by securing prosecutorial and judicial agreement to a "stipulated trial" procedure. Under this procedure the respondent consents to the submission of the case to the court for adjudication upon a stipulated statement by the parties of the evidence that would have been presented at a trial, and it is understood beforehand that the judge will thereupon convict and proceed to sentencing as though the respondent had pleaded guilty. Because this process conserves the prosecutor's time, the prosecutor may be willing to grant the same types of concessions that are normally granted in plea agreements. And, since there would be a trial in form, appellate review of pretrial rulings would be preserved. However, defense counsel must be fully confident of the viability of this procedure in the jurisdiction in which counsel is practicing before urging a client to use it.

§ 14.11 ASSESSING THE IMPACT OF THE ADDITIONAL CONSIDERATIONS THAT ARISE IN CASES IN WHICH THE RESPONDENT IS DETAINED BEFORE TRIAL

The calculus of the advantages of a guilty plea is altered somewhat in cases in which the respondent is detained before trial. In cases of this sort it will frequently be possible to include in the plea agreement a prosecutorial commitment to support postplea release of the respondent pending sentencing. Such an arrangement not only serves the client's desire for immediate freedom but also gives the respondent the chance to demonstrate good behavior in the community during the presentencing period and thereby "earn" a sentence of probation. See § 14.06(c)(3) *supra.*

Even when a guilty plea will not serve to secure the respondent's liberty pending sentencing, a respondent who is detained before trial may nevertheless have an interest in pleading guilty in order to cut down on the period of detention prior to sentencing. This will obviously be the case when a sentence of probation is expected; and it *may* also be the case even when an incarcerative sentence is likely because, in many jurisdictions, pretrial detention in juvenile cases is not credited against the length of sentences. Accordingly, when the respondent will probably be detained for a few months prior to trial, s/he may wish to plead guilty in order to accelerate the commencement of the service of sentence. While reducing the length of incarceration in this way is, of course, a legitimate consideration, defense counsel will need to ensure that the respondent is not allowing the discomfort of imprisonment to overwhelm his or her judgment in assessing the advisability of going to trial in a case in which there may be a viable defense.

§ 14.12 ASSESSING THE IMPACT OF OTHER FACTORS THAT MILITATE IN FAVOR OF EITHER A GUILTY PLEA OR A TRIAL

In addition to the factors previously listed, there are several other factors that may, in particular cases, affect the determination of the advisability of a guilty plea. Although the list of fact-specific variables is too lengthy to cover in its entirety, some of the most typical considerations are highlighted next.

Occasionally, counsel will encounter a case in which the prosecutor has under-charged the respondent in the sense that the offense charged is not the most serious charge that could be sustained on the facts of the case. In these circumstances a quick plea of guilty may be advisable in order to bar the subsequent filing of aggravated charges. The constitutional prohibition against double jeopardy (see § 17.08 *infra*) bars a respondent's prosecution upon greater charges following his or her conviction of a lesser included offense, *e.g.*, *United States v. Dixon*, 509 U.S. 688 (1993); *Heath v. Alabama*, 474 U.S. 82, 87-88 (1985) (dictum), except (a) "where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence," *Brown v. Ohio,* 432 U.S. 161, 169 n.7 (1977); *Illinois v. Vitale,* 447 U.S. 410, 419-21 & n.8 (1980); *compare Garrett v. United States,* 471 U.S. 773, 789-92 (1985); or (b) the State files the more serious charge at the outset, but the respondent elects to seek adjudication of the lesser charge first and succeeds in obtaining such an adjudication over the prosecutor's objection, *see Ohio v. Johnson,* 467 U.S. 493 (1984); *cf. Jeffers v. United States,* 432 U.S. 137, 151-54 (1977) (plurality opinion); or (c) the adjudication of the lesser charges is effected pursuant to a plea bargain that the respondent later breaches, *see Ricketts v. Adamson,* 483 U.S. 1 (1987).

In jurisdictions that provide jury trials in juvenile cases, counsel will also need to consider whether the nature of the evidence or the law or the character of the parties to the alleged offense is sufficiently controversial to set a jury at loggerheads, with the result that the jury may "hang" or bring in a compromise verdict of guilty on a lesser included charge.

Another factor to consider is whether the respondent does not "feel" guilty and is agreeing to the plea only with considerable reluctance. Given the fact that the decision is the client's to make and that it is the client who will have to live with the sentencing consequences of that decision, the comfort of the client should be a major factor. Moreover, if the client is unhappy with the plea, his or her unhappiness may be sufficiently apparent to the judge during the plea colloquy that the judge will not accept the plea. As indicated in § 14.26(c) *infra,* the judge may interrogate the respondent extensively in the course of accepting the guilty plea.

Finally, in certain cases, counsel will have to consider various circumstances that render a trial disadvantageous to the respondent, regardless of its outcome. Some respondents may have psychological or emotional problems that render them unable to cope with the nervous stress that attends a trial, particularly a lengthy trial. Some respondents may fear their parents' reactions to

hearing the testimony at trial, particularly when the offense is a sex offense or involves extreme violence. In jurisdictions that permit the media to attend the trial, counsel will also need to consider the respondent's reactions to publicity about the trial.

Part C. Plea Negotiations

§ 14.13 DEFENSE COUNSEL'S OBLIGATIONS IN PLEA NEGOTIATIONS

"Plea bargaining" and "bargain justice" conjure up some shabby images in many minds, ranging from a commercialized or lazy and incompetent defense practice to outright bribery and graft. Undoubtedly, there are some corruptions of plea bargaining. But the negotiated resolution of criminal matters is no more to be scorned for that reason than are all contracts because some contracts are fraudulent. There is absolutely nothing wrong with defense counsel's settling a criminal or juvenile delinquency case with authorization from the client and after fair dealings with the prosecutor.

What is involved in settlement, and in the antecedent negotiation, is an attempt to come to agreement on a disposition that serves and reconciles, as far as possible, the legitimate interests of the prosecution and the defendant or juvenile respondent, without the wasted effort and needless vagaries of trial. In criminal and juvenile matters, as in civil matters, negotiation is the essence of lawyering. Experienced criminal lawyers know that one of defense counsel's most important functions, perhaps the most important, is working out with the prosecutor the best possible disposition of a client's case in situations in which there is no realistic prospect of acquittal. The lawyer not only may properly do this, but s/he violates the obligation to represent the client adequately if s/he fails to do so. *See Missouri v. Frye*, 132 S. Ct. 1399, 1407-08 (2012); *Johnson v. Uribe*, 700 F.3d 413 (9th Cir. 2012); *Ebron v. Commissioner of Correction*, 307 Conn. 342, 53 A.3d 983 (2012).

§ 14.14 OPENING DISCUSSIONS WITH THE PROSECUTOR

Beginning early in the delinquency proceedings, counsel will have been discussing the case with the prosecutor. See §§ 4.11, 9.06 *supra.* Initial discussions should have focused principally on learning what the prosecutor was willing to disclose about the prosecution's case. But counsel should also have learned something about the prosecutor's attitude; counsel should have tried to affect that attitude in favor of the client; and in the course of urging a favorable exercise of the prosecutor's broad charging discretion, counsel should have asked specifically and ascertained what the prosecutor regards as a satisfactory disposition of the case. Counsel can ordinarily do this much without making any offer to plead the client guilty or even intimating that the client would or might be receptive to a course of action other than going to trial; and counsel can, therefore, do this much without specific authority from the client.

§ 14.15 WHEN NEGOTIATION SHOULD BEGIN

Exactly when negotiation in a stricter sense should begin — that is, when defense counsel should begin to raise the possibility of a guilty plea if some mutually satisfactory terms of settlement can be agreed upon — depends on a variety of circumstances.

Obviously, the paramount consideration is whether the respondent will derive any specific benefits as a result of pleading early in the process. One common example of a situation in which an early plea is often essential is when the crime was committed by a group of perpetrators. If all of the perpetrators have been arrested, the one who first cooperates to "break" the case and implicate the others will very likely receive the most consideration from the prosecution. (This is true both in cases involving a group of juvenile perpetrators and in cases involving a mixed group of juvenile and adult perpetrators (when the respondent's testimony may be used by either or both of the prosecutors of the juvenile and adult court cases)). If some members of the group have not even been caught yet, the respondent who seeks to win governmental consideration by turning over the names and/or locations of the unapprehended individuals also will need to move quickly in order to provide that information before the police force acquires it through independent investigation.

Defense counsel also may derive collateral advantages from early commencement of plea negotiations with the prosecutor. Plea negotiation is one of the most profitable methods of informal discovery. Most prosecutors will disclose their case to some extent in order to persuade defense counsel that a guilty plea is advised. Indeed, some prosecutors will disclose facts about their case *only* if a guilty plea is being discussed. And counsel certainly wants to begin discovery early. See Chapters 6 and 9.

Conversely, there may be reasons for delaying plea negotiations. One of the most important reasons for delay exists when counsel knows that the respondent has committed other crimes for which s/he has not yet been arrested. If counsel delays the negotiation and the respondent does end up being arrested for the other crimes, then counsel can negotiate for a plea that covers both the current case and the new cases. If counsel had gone ahead and worked out a plea bargain to cover simply the current case, the prosecutor might insist on a second plea (and often a far less favorable overall deal) when the new cases entered the system.

Moreover, even in cases in which an early plea might be beneficial, counsel is frequently in no position to negotiate at the outset of the case. Adequate factual investigation and legal research are the necessary preconditions of intelligent negotiation, lest counsel make bad bargains. And negotiation involves offering something, even if the something is only a possibility. Offering something *does* require authorization from the client. Counsel frequently will have nothing to offer at this early stage.

The client's attitude should play a major part in determining whether counsel initiates plea negotiations early in the process. Some clients will expect their attorney to begin promptly to discuss a plea with the prosecutor. The police, in their immediate postarrest interrogation of a respondent, often stress the value of cooperation (whether or not the respondent has been arrested

with others), partly to obtain a confession of the offense for which the arrest was made but more often to encourage the respondent to confess to, and hence to "clear," other unsolved crimes. These suggestions by the police set a tone that may make the respondent quite anxious to "clinch" a quick deal; and particularly if the client is savvy, s/he will expect counsel to jump into bargaining with both feet.

On the other hand, many clients persist long after arrest in vigorously protesting innocence and spouting plausible tales (some true, some not), which, if true, render the suggestion of a guilty plea inconceivable. Counsel cannot broach the subject of a possible guilty plea to such clients, for the purpose of obtaining their authority to negotiate, without appearing to call the client a liar. At this early stage in the process, counsel has not yet established the rapport needed to probe the client's position tactfully yet skeptically to see whether the client will stick to it in the face of all of the hard questions and hard facts that counsel will eventually have to put to the client. See §§ 5.06, 5.12 *supra.*

Accordingly, the best approach in gauging whether to initiate plea negotiation early is to allow oneself to be guided by the client's outlook in the initial interview. If the client admits guilt and feels that s/he has been caught red-handed, counsel may raise the question of a possible guilty plea and suggest that — if the client wishes — counsel will explore the prosecutor's attitude toward some sort of a plea bargain at the same time that counsel checks further into the facts of the case. Counsel should explain that:

1. Of course, counsel will make no commitments and will not indicate to the prosecutor that the client has any interest in pleading guilty.

2. Naturally, counsel does not as yet have any idea of the prosecutor's position. But counsel will undertake to find out what the prosecutor might be willing to accept in the way of a reduced sentence.

3. After counsel learns what the prosecutor is offering, counsel will relay that offer to the client so that the client can evaluate whether the offer is even worth considering. Counsel will at that point give the client his or her advice, but the final decision will be the client's.

4. Even if the client authorizes counsel to initiate discussions with the prosecutor, counsel intends to investigate the facts thoroughly in order to determine whether the prosecution's case is strong or weak. Counsel will not even consider a plea, or advise the client to consider a plea, unless counsel's investigation shows that the prosecutor's case is strong and likely to result in conviction at trial.

5. Counsel is starting out with the attitude that "if this case can be fought, we are going to fight it." Counsel's only reason for bringing up the possibility of a plea is that s/he does not want to overlook any opportunity for getting the most favorable

deal for the client if the client later decides that s/he would do better with a plea than with a trial.

Even with a client who acknowledges guilt, counsel is wise not to seem too attracted by a possible plea disposition at the outset, lest the client get the impression that counsel is anxious to sell out the client in order to save counsel work. But if counsel's mention of talking to the prosecutor elicits a positive reaction from the client, counsel might as well start talking early.

On the other hand, if the client denies involvement in the offense or speaks of contesting guilt and if there appear no pressing reasons to begin negotiation, counsel can let the matter go over until the initial phases of defense investigation have made counsel more familiar with the case. After counsel has investigated the facts and had a chance to study and make some tentative evaluation of the matters suggested in §§ 14.03-14.12 *supra,* s/he should raise with the client the question of a possible guilty plea. At this stage counsel is still not prepared to tell the client with any certainty what the advantages of a guilty plea will be, but s/he is in a position to suggest that there may be some advantages, depending on the prosecutor's attitude toward negotiation. Even though counsel may have come to the unilateral conclusion that the case is plainly one for a not-guilty plea and trial, s/he owes it to the client to give the client the option of having negotiation with the prosecutor explored as an alternative. Of course, if counsel and the client are agreed at this stage that the case should be fought out on the guilt issue, no matter what sort of disposition the prosecutor might agree to — or if the client is adamant against any thought of a guilty plea notwithstanding counsel's belief that negotiations looking to a plea might profitably be considered — the matter is ended. There remains nothing for counsel to do but prepare for trial and perhaps raise the issue with the client again later in light of subsequent developments.

§ 14.16 THE CONDITIONS PRECEDENT OF EFFECTIVE DEFENSE NEGOTIATION — THINGS TO KNOW ABOUT THE LAW, THE CASE, AND THE MOTIVATIONS OF THE PROSECUTOR

Thorough investigation must precede any serious negotiation. Counsel must know enough about the prosecutive and defensive cases — that is, about the facts, their likely provability in court, and the likely responses of a judge (or, in some jurisdictions, a jury) — to make, at least provisionally, the sort of evaluation suggested in § 14.04 *supra.*

Counsel also must be thoroughly familiar with the statutory scheme for sentencing of juveniles, the general sentencing practices of the juvenile court in which counsel is appearing, and the sentencing practices of the individual judge who is presiding over the case. In particular, counsel will need to know whether there are any specific sentencing advantages that can be gained by pleading guilty or whether the unique sentencing structure applicable to juvenile court will cause the sentence to be identical regardless of whether the respondent pleads guilty or goes to trial. See § 14.06(b) *supra.* In addition, counsel must thoroughly familiarize himself or herself with the possible mechanisms for using a guilty plea to obtain one of the sentencing advantages available under a juvenile sentencing scheme. See § 14.06(c) *supra.*

Defense counsel also will need to be thoroughly familiar with the facts of the case and the respondent's background, in order to make effective arguments in favor of the client and overcome the prosecutor's reluctance to offer a favorable plea agreement. For example, having thoroughly investigated the case, defense counsel can, if appropriate, mention flaws in the prosecution's case that might lead the prosecutor to be more amenable to the plea agreement sought by the defense. (Such a strategy must, of course, be employed with caution so as to avoid tipping the prosecutor off to flaws that the prosecutor can remedy prior to a trial.) Similarly, having thoroughly investigated the respondent's social history, defense counsel can affirmatively use favorable aspects of: the respondent's prior record of convictions and arrests; school records showing the respondent's attendance and performance at school; the parent's descriptions of the respondent's conduct at home; reports by employers of the respondent in present or prior part-time jobs or summer jobs; reports of psychiatrists, psychologists, or social workers who have examined the respondent; and reports by coaches at school or counselors who have worked with the respondent in community centers or other types of programs. Thorough investigation of the respondent's prior court records, school records, and conduct at home is also essential, of course, so that counsel can meaningfully assess contingent plea offers in which prosecutorial support for a certain sentence is conditioned upon the pre-sentence report showing that the respondent is well-behaved at school and at home. See § 14.06(c)(1) *supra.*

It is also crucial for counsel to familiarize himself or herself with any formal or informal policies of the prosecutor's office bearing on the sort of case involved. Frequently, prosecutors hide behind "office policies" that allegedly prevent the prosecutor's acquiescence in the type of plea agreement that defense counsel is proposing. Defense counsel can rebut this claim if s/he is prepared to cite previous similar cases in which the present prosecutor or other prosecutors in the office accepted the result presently sought by defense counsel.

Just as it is important to be familiar with office policies, it is equally important to familiarize oneself with the specific practices and motivations of the prosecutor handling the case. The prosecutor's calculus may be affected by a host of considerations, including: (i) considerations of justice; (ii) concern for the rehabilitative needs of the juvenile respondent; (iii) the obligation to satisfy superiors in the prosecutor's office and the wish to avoid their viewing the prosecutor as unduly lenient; (iv) the desire to avoid antagonizing the investigating police officers, whose cooperation and good will may be needed by the prosecutor in future cases, and who may feel chagrin at the prospect of the prosecutor dismissing or compromising a case which they did a good job of investigating; (v) the desire to make the complainant feel like his or her interests have been vindicated; (vi) in jurisdictions that permit media access to juvenile proceedings, the need to be able to justify to the public any "deal" that is made; and (vii) the desire to rid himself or herself of a case, and thereby reduce his or her caseload. If counsel learns the precise motivations of the prosecutor in the particular case, then counsel can highlight the considerations most likely to sway the prosecutor. If the prosecutor is most concerned with imposing some type of punishment upon the respondent in order to satisfy his or her superiors, the complainant, and the police officers, then s/he may be amenable to probation or even diversion as long as defense counsel can come up with a plan for restitution or community

service by the respondent. If, on the other hand, the prosecutor is truly committed to the rehabilitative ideal of the juvenile justice system, s/he will usually be receptive to arguments that a certain community-based program can serve the respondent's educational or psychological needs better than incarceration would. And prosecutors who are overwhelmed with caseload pressures will be particularly susceptible to defense proposals that will simultaneously resolve several cases of the respondent or several co-respondents' cases, or both.

When dealing with prosecutors who are concerned with the feelings of the investigating police officers or the complainant, counsel can, in an appropriate case, attempt to lobby these individuals in advance, possibly mentioning facts such as the minimal prior record of the respondent and the likelihood that the rehabilitative programs that will be ordered as a result of the plea will "straighten out" the respondent. However, counsel must be extremely cautious in deciding whether to lobby police officers or complainants and in selecting the arguments to use in lobbying them. All too often, such lobbying efforts can backfire, inciting the officer or complainant to call the prosecutor and voice their desire for a harsh sentence, or causing the prosecutor to feel resentful about defense counsel's attempt to "line up" individuals whom the prosecutor may erroneously view as witnesses that "belong" to the prosecution, or both.

After investigating the law, facts, and prosecutorial motivations, counsel should draft a blueprint for plea negotiations that encompasses:

A. What defense counsel can offer to the prosecutor, including:

1. A plea of guilty to one or another offense.

2. Voluntary submission to treatment programs, changes of residence (for example, moving out of a certain neighborhood or moving out of the jurisdiction), and other matters that could not be compelled by law.

3. Voluntary financial restitution or submission to community service.

4. Cooperation to incriminate or convict other persons.

5. Cooperation to clear uncleared crimes.

B. What relatively favorable dispositions can be extracted from the prosecutor, including one or more of the following:

1. The respondent's plea of guilty to a lesser offense included within the present charge.

2. The respondent's plea of guilty to less than all of the offenses charged, with dismissal of the others on a *nolle prosequi.*

3. The respondent's plea of guilty to the offense charged or to a lesser offense, on the prosecutor's promise to support (or not object to) a specific sentence, or to remain mute at sentencing, or to provide one of the other forms of aid at sentencing that are described in § 14.06(c) *supra.*

4. The respondent's plea of guilty to the offense charged or to a lesser offense, on the prosecutor's agreement to secure the dropping of other charges against the respondent in other jurisdictions, federal or state. The prosecutor may or may not be able to deliver on this agreement. Counsel should ordinarily get personal assurances from the other prosecutors involved. S/he should also be familiar with prosecutorial policies, or s/he may be making a bad deal. The federal government very infrequently prosecutes for a federal offense following state conviction on a charge based upon the same incident; the agreement to have federal charges dropped is therefore often worth little.

5. Interim benefits such as release pending disposition or acceleration of the date when the case will be brought on for disposition (a matter of significance to a respondent who has been detained before trial).

§ 14.17 TECHNIQUES OF PLEA NEGOTIATION

Like any negotiation, plea negotiation involves the art of agreeing with the other side's position on all points that are not essential to counsel as a means of getting the other side to agree with counsel's position on essential points. This means, analytically, that counsel must figure out what the prosecutor really wants and how to give the prosecutor what s/he wants without sacrificing what counsel wants. For example, a prosecutor who says that s/he thinks "this juvenile respondent ought to be taken off the streets" does not necessarily want incarceration; s/he may be saying that s/he wants the respondent out of the community so as not to give the complainant, the police, and this prosecutor any further trouble. S/he may be quite satisfied with a suspended sentence and probation if the respondent will live with relatives in a different neighborhood or county and probationary supervision can be shifted to that jurisdiction.

The multitude of possible offenses that could be charged in any factual situation (including offenses of which the respondent is not technically guilty) and the large range of kinds of assistance that the prosecutor can lend at sentencing (see § 14.06 *supra*) ordinarily give counsel plenty of possibilities for effective compromise if s/he reviews them thoroughly and uses imagination. Similarly, the range of informal accommodations must be viewed with imagination. A prosecutor who adamantly refuses to make a formal sentencing recommendation to the court, for instance, may be willing to make an informal recommendation to the probation officer who is writing up the pre-sentence report on the case — and the latter recommendation may be just as valuable to the defense as the former.

At the personal level, it is clearly desirable to minimize the extent of counsel's disagreements with the prosecutor without giving in to the prosecutor on substantive matters. It is particularly important for counsel to appear not to be standing in personal opposition to the prosecutor, even when counsel's position is opposed to the prosecutor's position. One way for defense counsel to avoid a clash of personalities with the prosecutor is for counsel to establish a personal posture that is not completely identified with counsel's bargaining position, by associating the bargaining position with the client and appearing to play the role of an honest broker between the client's interests and the prosecutor's. Thus, the "I-really-see-the-case-the-way-you-do-because-any-sensible-lawyer-would-know-that-what-you-say-makes-sense-but-you've-got-to-help-me-to-sell-it-to-my-client-by-giving-me-something-more-to-take-to-the-client-that-s/he-can-live-with" approach is frequently productive. This use of the absent client as a third force in negotiation allows defense counsel to hold firm to his or her position while establishing a broad base of personal and professional agreement with the prosecutor. It also avoids arousing any instincts that the prosecutor may have toward combative gamesmanship — that is, the game of "beating" defense counsel in flea-market haggling. However, when possible, counsel should never say that the client *does not* or *will not* accept the prosecutor's position, since this may simply redirect the prosecutor's combativeness toward the client. The better formulation is an "I-just-don't-think-I-can-sell-that-to-my-client-unless- . . ." approach or its equivalent.

Keeping on the prosecutor's good side and avoiding clashes that may arouse the prosecutor's ire at either the respondent or defense counsel is indispensable because, as a practical matter, the prosecutor ordinarily has the upper hand in the bargaining process. Although defense counsel may be able to appeal to some judges to lean on a prosecutor who stands adamant on an outrageous bargaining position (see § 14.05 *supra*), the prosecutor can usually get away with either stonewalling or playing very rough at the bargaining table. *See, e.g., Weatherford v. Bursey,* 429 U.S. 545, 561 (1977) ("there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial"); *Ricketts v. Adamson,* 483 U.S. 1, 9 n.5 (1987), citing *Mabry v. Johnson,* 467 U.S. 504 (1984) (same); *Bordenkircher v. Hayes,* 434 U.S. 357 (1978) (finding no constitutional objection to a prosecutor's filing a recidivist charge, carrying a mandatory life sentence, for the admitted purpose of inducing the defendant to accept the prosecutor's offer of a plea bargain involving a five-year sentencing recommendation); *United States v. Goodwin,* 457 U.S. 368, 377-80 (1982) (reaffirming *Bordenkircher*); *Alabama v. Smith,* 490 U.S. 794, 802 (1989) (same). The prosecutor is under heavy pressure to settle most cases in order to reduce the prosecution's trial docket to manageable proportions, and that pressure is defense counsel's greatest asset as long as counsel does nothing to give the prosecutor the impression that this case deserves "special treatment." But if the prosecutor gets riled, s/he usually has sufficient resources to make any particular case unpleasantly "special" for the respondent.

§ 14.18 THE PLEA AGREEMENT WITH THE PROSECUTOR

In most jurisdictions agreements between defense counsel and the prosecutor are not

reduced to writing. The reputation and integrity of each attorney are the only guarantees that each will keep his or her word. In theory, of course, a guilty plea entered in consideration of an oral prosecutorial promise that is not fulfilled must be set aside. *E.g., Santobello v. New York,* 404 U.S. 257 (1971); *Blackledge v. Allison,* 431 U.S. 63 (1977). But proof of the fact necessary to bring the theory into play is not easy; postconviction litigation over broken plea bargains can consume years; and the relief, if any, that the client ultimately gets may be nothing more than the right to stand trial. Therefore, if counsel does not know the particular prosecutor, s/he should check out the prosecutor's reputation by inquiry among knowledgeable members of the bar *before* a plea is entered.

Some States and localities have developed a practice of setting down the terms of plea bargains in writing and filing them with the court. *See, e.g., People v. West,* 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970). (This practice is often but not always incidental to the "conditional" plea bargaining procedure described in § 14.06(c)(2) *supra.*) The practice of memorializing the plea agreement in writing should ordinarily be followed if the prosecutor and the court can be persuaded to accept it. Defense counsel should always offer to draft the written instrument for the prosecutor's review rather than *vice versa,* since the drafter of a document has the advantages of initiative, inertia, and a working familiarity with the draft during any negotiations that may be required to secure its approval or arrange for its revision into final form.

A plea agreement contemplating that the respondent will serve as an informer or a witness against accomplices or will otherwise assist the prosecution in any way other than the mere entry of a plea of guilty should be detailed and unambiguous regarding (1) the specific actions that the respondent is to take, (2) the investigations or cases in which (or the persons against whom) s/he is to take those actions, (3) the circumstances under which s/he is to take the actions, and (4) the duration of the respondent's obligations to act. If s/he is to testify against accomplices, the agreement should specify precisely the proceedings in which s/he is required to testify, and should not leave unclear the scope of the respondent's duties in the event that proceedings against an accomplice later take varying twists (for example, prosecution of the accomplice on multiple charges involving separate trials; reprosecution of the accomplice following a mistrial or the appellate reversal of an initial conviction). Unclarity about the respondent's responsibilities in these eventualities must be avoided, since a respondent who subsequently disagrees with the prosecutor's interpretation of his or her responsibilities does so at the risk that the entire plea bargain will be set aside and s/he will then be prosecuted for the most serious offenses originally charged, if the courts should happen to prefer the prosecutor's interpretation to the respondent's. *Ricketts v. Adamson,* 483 U.S. 1 (1987).

When writing up a plea agreement, counsel will also need to take particular care regarding another aspect of any commitment made by the respondent to divulge factual information that could incriminate him or her in either the present offense or other offenses. Almost invariably, in cases in which the respondent has agreed to divulge information or to testify against accomplices, the prosecution will want to delay the respondent's sentencing until after the information has been provided or the testimony has been given. By holding the

sentencing over the respondent's head, the prosecutor guarantees compliance on the part of the respondent. See § 14.25 *infra.* Defense counsel must be concerned, however, with ensuring that the information or testimony will not be used against the respondent subsequently if, for any reason, the plea agreement falls apart. Language such as the following should therefore be included in the written agreement:

> The parties hereby agree that any statements, testimony, evidence, information, or leads of any sort that:
>
> (a) are capable of incriminating the respondent in the present offense or any other offense; and that
>
> (b) have been or are now or hereafter given by the respondent or the respondent's attorney to any of the following entities or individuals during the negotiation of this plea agreement or following its negotiation but before the agreement is fully executed by the respondent's sentencing:
>
> (i) the prosecutor or any other prosecuting authority of any jurisdiction;
> (ii) any police or criminal investigating authority of any jurisdiction;
> (iii) any law enforcement authority of any jurisdiction;
> (iv) any court of any jurisdiction;
> (v) any probation department or other agency of any such court;
> (vi) any agent or successor of any entity designated in items (i) through (v),
>
> are expressly understood to have been given in consideration of this agreement and shall not be used against the respondent in any way, directly or derivatively, by or before any entity or individual designated in items (i) through (vi), except:
>
> (1) with the respondent's express consent, in the course of proceedings undertaken to secure the respondent's conviction and sentencing pursuant to this plea agreement; or
>
> (2) for the sole purpose of upholding and enforcing that conviction and sentencing after they have been obtained according to the terms of this plea agreement and so long as neither of them has been vacated.
>
> In no event shall any such statements, testimony, evidence, information, or leads be used against the respondent in connection with any delinquency or criminal charge other than the charge[s] to which the respondent is presently agreeing to plead guilty.

Unless an agreement of this sort has been made with the prosecutor, counsel should not divulge,

or permit the respondent to divulge, any incriminating information to anyone during, or after, plea bargaining. *See Hutto v. Ross,* 429 U.S. 28 (1976) (per curiam).

Part D. Counseling the Client

§ 14.19 ADVISING THE CLIENT WHETHER TO PLEAD GUILTY

In advising a client whether to accept or reject a plea bargain, counsel should ordinarily begin by explaining that the final decision is entirely the client's and that counsel's job is merely to give the client advice on the basis of counsel's greater experience with the local juvenile court and the particular judge who is handling the case. Counsel should note that although the client may wish to discuss the decision with his or her parents, the ultimate decision is up to the client to make on the basis of his or her own independent judgment. Since children, especially those who are incarcerated, tend to seek advice from peers, it is probably wise to add that no one other than the client himself or herself can assess his or her best interests, and that the client should be wary about taking advice from others who do not have the same interests that the client does and will not have to live with the client's decision.

Counsel should then explain to the client all of the factors that militate for and against a plea, covering each of the considerations listed in §§ 14.04-14.12 *supra* that is relevant. In other words, counsel will need to explain to the client:

1. The likelihood of winning at trial, with a full explanation of the comparative strengths of the cases for the prosecution and the defense, as well as extraneous factors that might influence the result. (See § 14.04 *supra*.)

2. The chances that the judge might penalize the respondent at sentencing because the respondent opted in favor of a trial instead of a guilty plea. (See § 14.05 *supra.*)

3. The sentencing advantages that counsel expects or predicts the respondent will obtain through a guilty plea, including the specific terms of any agreement that counsel has reached with the prosecutor. Counsel should inform the client of the maximum sentence that s/he can receive if s/he pleads guilty and if s/he is convicted after a trial and should give the client counsel's best estimate of the sentence that the client will actually receive on each hypothesis, making clear the limits of counsel's ability to predict what the judge will do. (See § 14.06 *supra.*)

4. The risks of collateral consequences that might flow from a guilty plea and from conviction after a trial. (See § 14.07 *supra.*)

5. If the case involves particularly egregious facts or a highly sympathetic complainant, the risk that the judge's hearing those facts or seeing that

complainant at trial would prejudice the judge against the respondent at sentencing. (See § 14.08 *supra.*)

6. In jurisdictions that have more than one juvenile court judge, the chances of using a guilty plea to steer the case before a favorable judge for sentencing. (See § 14.09 *supra.*)

7. Any other special aspects of the case or the respondent that might cause a guilty plea to be particularly advantageous or detrimental. (See §§ 14.10-14.12 *supra.*)

In discussing all of these complex concepts, counsel must of course take pains to phrase the explanations in language that will be comprehensible to the client. Counsel should periodically check with the client to make sure that the client is, in fact, understanding counsel's explanations.

One of the most difficult decisions for a defense attorney to make is whether to employ the lawyer's considerable persuasive powers to influence the client's choice between a guilty plea and a trial. This is a particularly sensitive issue in handling juvenile cases, since juveniles are unlikely to have either the knowledge about the legal system or the strength of will to resist the lawyer's persuasion. The best rule of thumb is to use persuasion only when the cost-benefit analysis clearly and unequivocally points to a certain result and otherwise to restrict one's role to giving the client the information necessary for him or her to make a wholly independent decision.

The client should be given adequate time to think about the decision. For this reason it is often advisable to meet with the client to discuss the plea several days before the decision must be conveyed to the prosecutor.

§ 14.20 DISCUSSING THE GUILTY PLEA WITH THE CLIENT'S PARENT

It is almost always advisable for counsel to discuss the guilty plea with the client's parent as well as with the client. In some jurisdictions such a discussion with the parent is required if the child is going to plead guilty, because the statutes call for a judicial colloquy with the parent to ensure that the parent approves of the child's entry of a guilty plea. Even in jurisdictions that do not have a statutory requirement of parental involvement, consultation with the parent is advisable because parents usually will exert some influence over the child's decision.

It is crucial that counsel first meet with the client alone, to ensure that the client can make a tentative initial decision apart from his or her parent. Conversely, it is extremely important that counsel's session with the parent be attended by the client, so that the attorney's rapport with the client is not undermined by the client's fears that the attorney has relayed secret information to the parent. Maintenance of rapport with the client also calls for an explanation to the client, prior to the meeting with the parent, of why it is necessary to explain the plea to the parent, as well as an assurance that anything the client told counsel in confidence will not be repeated to the parent.

In explaining the guilty plea option to the parent, counsel should repeat the analysis of considerations that counsel covered in the discussion with the client. See § 14.19 *supra.* Counsel should stress to the parent that the criminal justice system demands that the ultimate decision be made by the client and not by the parent.

§ 14.21 MAKING A RECORD OF THE ADVICE GIVEN TO THE CLIENT AND THE PARENT

It is unfortunately one of the realities of criminal practice that defense attorneys need to take certain precautions to guard against later accusations of ineffectiveness or misconduct. Adult criminal defendants, faced with lengthy prison sentences occasionally resort to unwarranted accusations of ineffectiveness or misconduct on the part of their lawyers as a last-ditch effort to overturn their convictions. These problems arise far less frequently in juvenile court than in adult court, in part because juvenile sentences are much shorter than adult sentences and in part because juveniles usually lack the sophistication to dream up such ploys.

Among the most common claims of ineffectiveness or misconduct of defense counsel are allegations that counsel coerced the client to plead guilty or gave the client inadequate advice concerning the significance and consequences of the plea or concerning the client's rights. If counsel wishes to guard against the risk of these attacks, counsel should make file notes of all conversations with the client and the client's parent leading up to the client's decision to plead guilty. This record of the conversations should reflect that counsel gave the client and the parent all of the advice and explanations described in §§ 14.19-14.20 *supra.* The file record should also reflect when it was that the client communicated his or her decision to counsel, what that decision was, and that counsel immediately inquired whether the client clearly understood that the decision had to be the client's own and not the lawyer's or the parent's.

§ 14.22 SPECIAL PROBLEMS IN COUNSELING THE CLIENT WHETHER TO PLEAD GUILTY

§ 14.22(a) The Guilty Plea and the "Innocent" Client

Views differ on whether a lawyer may properly advise (or even permit) a client to plead guilty who protests his or her innocence. Fortunately, the moral problem seldom needs arise. If the case is such that a guilty plea is advised, the client probably (although not invariably) is guilty; and if counsel discusses the evidence critically with the client and subjects the client to the sort of cross-examination that in every case will be necessary to prepare adequately for trial (see §§ 5.12, 10.09(c)-(d), 10.10 *supra*), the client will usually admit guilt.

Should the client continue to assert innocence, counsel should consider the feasibility and desirability of a plea entered in accordance with *North Carolina v. Alford,* 400 U.S. 25 (1970), known in many jurisdictions as an *"Alford* plea" In *Alford,* the Court held that "an express admission of guilt . . . is not a constitutional requisite to the imposition of criminal penalty [sic]"

id. at 37, and therefore that a plea of guilty may constitutionally be accepted from a defendant who protests his or her innocence, as long as (i) the "defendant intelligently concludes that his interests require entry of a guilty plea" and (ii) "the record before the judge contains strong evidence of actual guilt." *Ibid.* In the wake of *Alford,* several jurisdictions have adopted procedures permitting adult defendants and juvenile respondents to plead guilty without an admission of guilt, as long as the defendant/respondent will concede on the record that the prosecution's evidence is sufficient to produce a guilty verdict and that the defendant/respondent accordingly is entering a plea of guilty as a tactical choice. *See, e.g.*, *In re Alonzo J.*, 58 Cal. 4th 924, 927, 931-34, 939, 320 P.3d 1127, 1128, 1131-33, 1136, 169 Cal. Rptr. 3d 661, 662, 665-68, 672 (2014) ("no contest" plea can be entered in a delinquency proceeding "'subject to the approval of the court,'" and will "establish[] the truth of the petition's allegations" and "thereby dispens[e] with the need for a contested jurisdictional hearing," just as would an admission; a "no contest" plea, like an admission, requires "the consent of the child's attorney"). However, *Alford* pleas are not accepted in all jurisdictions, and, even in jurisdictions that permit such pleas, some judges will not accept a guilty plea without an admission of guilt. *See generally* Peg Schultz, Note, *The Alford Plea in Juvenile Court*, 32 OHIO N.U. L. REV. 187 (2006).

If *Alford* pleas are permitted within the jurisdiction and are accepted by the judge presiding over the case, then counsel still needs to make two final decisions before advising the client to enter an *Alford* plea. The first of these is a tactical decision whether the tone of an *Alford* plea would vitiate whatever benefits counsel had hoped to gain for the client through the entry of a guilty plea. Judges who view a full confession of guilt as "the first step toward rehabilitation" are unlikely to give substantial credit for an *Alford* plea. The second decision facing counsel is a question of conscience: whether to take advantage of the *Alford* procedure and urge the client to enter a guilty plea notwithstanding the client's emphatic protestations of innocence. The fact that the *Alford* procedure is not unconstitutional does not mean that counsel is morally free to press it on a client in all cases. Most defense lawyers of the authors' acquaintance resolve this ethical issue by urging a client to follow the *Alford* procedure only when the client's guilt is clear and the tactical advantages of the plea are equally clear.

§ 14.22(b) Clients Who Are Unrealistic About the Chances of Winning at Trial

Counsel will occasionally encounter a client who unrealistically believes that s/he will win at trial notwithstanding counsel's explanation of the reasons why conviction is a virtual certainty. The first step in convincing the client of the realities of the situation should be to review with the client all of the written statements that counsel or counsel's investigator has taken from prosecution witnesses. See § 8.12 *supra.* If this fails to convince the client, then counsel should consider conducting a moot court version of the trial, including the respondent's direct and cross-examination, to show the respondent the precise manner in which the evidence would emerge at trial.

§ 14.23 PREPARING THE CLIENT FOR THE PLEA COLLOQUY

The client who is pleading guilty must be informed in advance, and in considerable detail, what to expect in court at the hearing in which the client will enter the plea. (Hereafter, this proceeding will be referred to as the "plea hearing," and the interchange between the judge and parties at the hearing will be referred to as the ''plea colloquy.") This preparation has three functions. First, it helps to set the client at ease, so that s/he will be less traumatized by the experience and will make a better impression in court. Second, it helps to reduce the likelihood that the client will say something that precludes the judge from finding that all of the criteria for a "knowing, intelligent, and voluntary" plea have been satisfied. Finally, it guards against the client's mentioning aggravating facts about the offense that need not be stated.

The jurisdictions vary substantially in regard to the formality of the plea colloquy and the extent to which judges insist upon documenting that the constitutional requirements for a voluntary plea (set forth in § 14.26(c) *infra*) are satisfied. As juvenile court becomes increasingly formalized, the judges are more commonly adhering to the ritual used in taking guilty pleas in adult criminal court. The following sections on preparing the client and his or her parent for the colloquy are predicated on the assumption that the judge will follow this ritual. If, however, counsel is practicing in a jurisdiction that still follows informal plea procedures, counsel will need to familiarize himself or herself with those procedures and prepare the client and his or her parent accordingly.

§ 14.23(a) Preparing the Client for the Colloquy on Waivers of Rights and Comprehension of Potential Sentences

In conducting the colloquy in which the respondent is questioned about his or her waiver of the right to trial and ancillary rights, judges almost invariably employ legal terminology that is far too complex to be understood by young, poorly educated juvenile respondents. For this reason, it is crucial that counsel, in a preparatory session with the client, both recite the questions in the form in which they will be asked in court and explain the meaning of each of the terms that will be used by the judge.

Although the language used in accepting guilty pleas varies among jurisdictions and among judges within the same jurisdiction, some or all of the following explanations may prove useful in preparing clients for the entry of a guilty plea:

> The first thing that's going to happen in the hearing is that I will explain to the judge what exactly you're pleading guilty to, and what deals the prosecutor has agreed to. It's important that you listen carefully to what I say in court, because the judge will ask you if you heard what I said and if you agree that what I said is correct. The judge may also ask you to repeat to him/her what the charge is that you're pleading guilty to. If s/he does, what will you say?
>
> Then, the judge is going to turn to you and ask you many questions to make sure that you understand what a trial is and what a plea of guilty is. What the judge is trying to

make sure of is that you understand what a trial is and that you understand that by pleading guilty, you're giving up your chance to have a trial.

Do you know what a trial is? [If the client says yes, ask the client to describe a trial, so that counsel can ensure that the client is not merely acquiescing in order to avoid seeming ignorant or uncooperative; if the client says no, ask the client if s/he has ever seen a trial on television or in the movies, referring to specific court-related programs, and then use the programs to explain the nature of trials.]

The judge is going to ask you if you understand that by pleading guilty, you're waiving your right to a trial. The word "waive" means to "give up." So what the judge is asking is whether you understand that you have a choice of either having a trial or pleading guilty; if you want to plead guilty, you give up your chance to have a trial. Are you sure that's what you want to do? So, what will you say when the judge asks you "Do you understand that by pleading guilty, you are waiving your right to a trial?"

The next thing the judge is going to do is to make sure that you know all the things that are part of a trial. That's again to make sure that you understand what it is that you're giving up when you give up a trial and plead guilty instead.

So, the judge will ask you first if you understand that in a trial, the prosecutor has the burden of proving you guilty beyond a reasonable doubt. What that means is that in a trial, the prosecutor would have to put on very strong evidence in order to prove that you're guilty of the crime they have charged you with. The prosecutor would have to put on enough convincing evidence to show the judge that there is no reason for doubting that you're guilty of the crime. If the prosecutor did not put on enough evidence to convince the judge that you committed the crime, then the judge would find you "not guilty."

Then the judge will ask you whether you understand that in a trial, the prosecutor would present witnesses to prove your guilt, and that your lawyer would have an opportunity to cross-examine those witnesses. What this means is that in a trial, the prosecutor would bring in witnesses to tell their side of the story. [Use the actual witnesses' names and facts of the case to illustrate.] I, as your lawyer, could ask the witnesses questions and quiz the witnesses in order to show that you did not do what they are saying you did. I could try to show, for example, that the witness was confused about what happened or that the witness is not telling the truth.

The judge will ask you if you understand that in a trial, you can present witnesses on your behalf as well. That means that in a trial, we could bring in witnesses for your side to tell what happened.

Then the judge will ask you whether you understand that in a trial, you would have the opportunity to take the witness stand but that no adverse inferences could be

drawn from your failure to testify. What all of this means is that in a trial, you could get on the witness stand, just like any other witness, and tell what happened, but that nobody could force you to get up on the stand and talk about what happened. If you decided not to take the stand, a judge could not hold that against you. A judge would not be allowed to decide that because you kept quiet, you must be guilty.

The judge will also ask you if you understand that by pleading guilty, you are waiving the right to appeal the decision of the trial court, except in the event of an illegal disposition. When people have trials, if the judge makes a mistake during the trial, then the lawyer who's defending the juvenile can go to a more powerful court and ask those judges to correct the mistake. If the judges in that higher court decide that the judge in the trial did make a mistake, then they can arrange for a new trial. But by giving up the right to trial and pleading guilty instead, you're also giving up your right to appeal any mistakes that might have happened in the trial. Of course, you can still appeal if the judge makes a mistake in the way s/he takes the plea or in the way s/he sentences you.

Now, all of those things that I just explained to you are the things that are part of a trial. By pleading guilty, you're saying that you don't want a trial and so you don't want any of those things that go along with a trial. Do you understand that?

The judge is also going to ask you whether you understand the maximum sentence you could receive for the charge that you're pleading guilty to. "Maximum sentence" means the most you could get as the punishment for this crime that you're pleading guilty to. The maximum sentence is _____. That doesn't mean that that's the sentence that you *will* get. It's just that the judge has to make sure that you know the most you could get. Now, if the judge asks you to tell him/her what the maximum sentence you could get is, what will you tell him/her?

After the judge has explained all that to you, s/he will ask you if anyone has promised you anything to get you to plead guilty. Now, as you know, the prosecutor has promised that s/he will _____, and I'm going to tell the judge that. The judge will then ask you whether "any other promises" have been made. What the judge is really asking is whether anyone promised you that the judge would give you a light sentence. You might have noticed that I've never promised you what sentence the judge will give you. That's because I'm not allowed to make any promises about what the judge will do. [If the prosecutor agreed, as part of the plea, to support a certain sentence: "The prosecutor has said that s/he would help us try to get the judge to give you a sentence of _____; but the prosecutor also isn't allowed to make any promises about what the judge will do."] So, when the judge asks you if "any promises have been made," the judge is trying to make sure that neither I nor the prosecutor nor anyone else made any *promises* about what the judge is going to do. What will you say when the judge asks you if any promises have been made to get you to plead guilty?

Then, the judge will ask you whether any threats have been made to get you to plead guilty. What the judge is asking is whether I or anybody else threatened you in order to force you to plead guilty. What will you say when the judge asks you about that?

The judge also will ask you whether you talked with your lawyer, me, about what you're doing today. What the judge is asking is whether we talked about the guilty plea, and whether I explained the things that I'm explaining to you right now. The judge is just trying to make sure that I did explain all these things to you. So, if the judge asks you if you talked with your lawyer about the guilty plea, what will you say?

[In jurisdictions that require the judge to engage in a colloquy with the parent of the respondent, or in cases in which the judge presiding over the plea has a practice of consulting the parent: "The judge also may ask you if you talked with your parent(s) about the plea. The judge always asks a juvenile's parent(s) whether she/he/they think that this guilty plea is a good idea. For that reason, I'm going to have to talk to your parent(s) about it. When I do talk to them about it, I'd like you to be there so that you can hear everything I tell them, unless you don't feel comfortable being there when I talk to them. Also, if you would rather talk to her/him/them about it first, that's fine. Do you want to talk to your parent(s) about it alone before I do?"]

If there is any significant possibility that the parent may not be present at the plea hearing, additional preparation of the respondent for that contingency may be required. See § 14.26(a) *infra.*

§ 14.23(b) Preparing the Client for the Admission of Guilt

There are some clients who will admit guilt to their lawyers and will agree to a plea of guilty when speaking with their lawyers but who never really accept the notion of their guilt as anything but a highly private affair — a secret between themselves and counsel — not for public announcement. Thus when the judge questions them about their version of the offense, they deny guilt. This, of course, will prove embarrassing to all concerned, and it may well cause the judge to refuse to take the guilty plea. Avoidance of the situation is possible if counsel advises the client before the plea hearing that a public admission of guilt in court will be required.

Judges vary substantially in the language that they use in asking the client to admit or deny guilt. It is extremely useful to learn the formulations used by the specific judge who will be presiding at the plea colloquy, so that the client can be prepped with the right code-words.

Some judges turn to the client and ask a question like: "Tell me what it is that you did on [date of the crime]." Quite obviously, a client who has not been adequately prepared would be at a loss to know what to say in response to this request. Counsel should explain to the client that the judge is seeking a brief recitation of facts that contains each of the specific details that the prosecutor would have to prove in order to convict the client of the charge to which the

respondent is pleading guilty. Counsel should then listen to the client's recitation to ensure that it does, in fact, cover each of the requisite elements of the crime.

Some clients believe that their answers must be restricted to the precise questions asked by the judge and that they are therefore precluded from making any additional statements about their remorse for committing the crime. It is important to correct that misconception, since, in fact, judges seem to be particularly interested in hearing children who admit guilt also express their contrition. Accordingly, counsel should inform the respondent that if s/he wishes to say that s/he is sorry or that s/he has learned a lesson, it is entirely appropriate to do so.

Some judges, rather than eliciting the facts from the respondent, ask the prosecutor to state the facts for the record, and then turn to the respondent and ask him or her whether those facts are correct. The respondent should be prepped to listen carefully to the prosecutor's recitation. In addition, counsel should advise the respondent that if the prosecutor goes beyond the facts essential for the elements of the charge to which the respondent is pleading and states additional aggravating circumstances of the offense, counsel will inform the judge that those acts are not acts which the respondent will be admitting.

§ 14.23(c) Advising the Client of the Risk of Detention Pending Sentencing

Upon the entry of a guilty plea, the judge typically has the option of either conducting the disposition hearing immediately or continuing the hearing to another date and ordering the probation department to prepare a pre-sentence report to aid the judge at disposition. See § 38.04(a) *infra* for discussion of the pre-sentence report. In most jurisdictions, if the judge decides to continue the hearing, the judge has the prerogative of reconsidering the respondent's detention status pending disposition. The respondent's pretrial detention status was, after all, set at arraignment, at a time when the judge had to presume the respondent's innocence. After the plea, however, the judge is free to consider the respondent's conceded guilt as a factor affecting his or her detention status pending disposition. In most jurisdictions the usual practice in cases in which the client has been released before trial is simply to maintain that release status pending disposition. However, in jurisdictions in which judges do give serious consideration to remanding a respondent following the entry of a plea, defense counsel will have to prepare the client for that possibility. Counseling the client on this issue requires that the attorney tread a fine line. It is necessary to warn the client of the hazard (in part because the law dictates that the client must be informed of all of the possible consequences of a guilty plea and in part as a courtesy so that the client will not be taken unawares), but counsel also wants to avoid frightening the client unnecessarily and causing him or her undue anxiety. In warning the client of the risk, counsel should accurately describe the probability of detention, based on counsel's knowledge of the judge and the facts of the case. Counsel ought to inform the client of the maximum duration of the detention period, should detention be ordered. (In most jurisdictions the juvenile court statute or local practice establishes a limit, such as two weeks, for detention pending disposition. See § 37.01 *infra.*) Counsel should also indicate the actual length of time that the respondent is likely to spend in detention prior to the disposition hearing, if that is less than the maximum and is

reasonably predictable.

§ 14.23(d) Counseling the Client About Appearance and Demeanor at a Plea Hearing

One of the most important aspects of the process of preparing a client for the plea hearing is counseling the client about appearance and demeanor at the hearing. The judge's sentencing determination and also the intermediate decision whether to detain the respondent pending disposition will turn in large part on the judge's assessment of the respondent's character, and that assessment can be significantly affected by the respondent's appearance and demeanor. The respondent should be advised to dress well. When giving this advice, counsel should avoid seeming unduly fastidious (an inevitable risk when an adult advises an adolescent to dress nicely) by explaining precisely why appearance is important and drawing on counsel's experiences to describe the impact that the respondent's appearance can have on the judge.

With respect to demeanor, counsel should explain to the client that it is important to speak loudly and clearly and to seem forthright. In addition, assuming that the client is remorseful, s/he should be advised to appear apologetic and not truculent.

If the prosecutor has not agreed to waive the preparation of a pre-sentence report or if the judge may order one despite the prosecutor's waiver (see § 14.06(c)(1) *supra*), counsel must also prepare the client for interviewing by the probation officer who will write the report. This important preparation is discussed in § 38.05(a) *infra.* It had best be postponed until after the plea hearing if that is practicable in the light of the practices of the probation office with regard to the time when it begins its pre-sentence workups and in the light of the respondent's detention status and counsel's own calendar. Before the plea hearing there will be too much for the client to absorb and remember in preparation for the hearing itself. But if there is any real prospect that the client's pre-sentence interviewing by the probation office will begin too soon after the plea hearing for counsel to prepare the client thoroughly for the interviewing in the wake of the hearing, then it must be done before the hearing.

§ 14.24 PREPARING THE PARENT FOR THE PLEA HEARING

In jurisdictions in which the judge must obtain the parent's consent to the entry of the plea (or where, despite the absence of any statutory requirement, judges make it a practice to obtain parental consent), counsel must of course prepare the parent for the questions that will be asked of him or her in the plea colloquy. The parent may be asked some or all of the following questions:

1. Did you have an opportunity to consult with your child concerning his/her decision to enter the plea of guilty?

2. Did you have an opportunity to consult with your child's attorney concerning the decision to enter the plea of guilty?

3. Did you hear me explain to your child the rights that s/he is waiving as a result of this guilty plea? Do you understand that s/he is waiving those rights?

4. Did you hear me explain to your child the maximum sentence that s/he could receive as a result of this plea? Do you understand that s/he could receive that sentence?

5. Do you agree with your child's decision to enter the guilty plea?

In addition to reviewing these questions and appropriate answers with the parent, counsel should verify that the parent is willing to have the child remain in the home pending sentencing. Some judges will ask, at the conclusion of the hearing, whether the parent is willing to keep the child at home.

Finally, since some judges question the parent about the child's conduct at home, counsel will need to discuss the child's behavior with the parent. Counsel needs to be forewarned of any problems that might lead the judge to consider detaining the child pending sentencing.

Part E. The Plea Hearing

§ 14.25 SCHEDULING THE PLEA HEARING

As explained in § 14.09 *supra,* in jurisdictions with more than one juvenile court judge, it may be possible to use the scheduling of the plea hearing to steer the case before a judge who will be lenient at sentencing. Quite obviously, counsel should take advantage of such opportunities since the identity of the sentencing judge frequently will control the severity of the sentence.

Even in cases in which the timing of the plea hearing will not affect the identity of the sentencing judge, counsel may need to give careful consideration to the scheduling of the hearing. In cases in which the respondent was released at arraignment, counsel will usually wish to delay the plea as long as possible in order to give the respondent more time to amass a record of doing well in the community. Delay is also advisable whenever counsel knows that an arrest for another charge is imminent, so that counsel can dispose of the upcoming charge in the same plea hearing. See § 14.15 *supra.* On the other hand, if the respondent has been detained pending trial, counsel will want to expedite the plea hearing (and possibly also the sentencing): in the event of post-plea diversion, dismissal, release pending disposition, or a disposition of probation, this effectuates the respondent's release from detention as quickly as possible; and in many jurisdictions where pre-adjudication or pre-sentence detention is not credited toward the service of a sentence, this enables a respondent who receives a sentence of incarceration to begin serving that sentence as soon as possible. See § 14.11 *supra.* Finally, there may be other reasons that the respondent may want an expedited plea hearing: For example, the respondent may be suffering considerable anxiety about the charge hanging over his or her head and may wish to get it over

with; or the respondent's entry into a certain desirable program or into the military may be awaiting the resolution of the pending charge.

Finally, there will be scheduling issues whenever the plea agreement includes a commitment by the respondent to testify as a prosecution witness against a juvenile co-respondent or adult co-perpetrator. As mentioned in § 14.18 *supra,* prosecutors typically will wish to schedule the plea in such a case prior to the respondent's testifying for the State and will wish to delay sentencing until after the testimony has been completed. If this procedure does not prejudice the respondent, there is no reason to oppose its use. Depending upon the facts of the case, however, delay of this sort could conceivably prejudice the respondent. If, for example, the respondent is detained and his or her release cannot be effected until the sentencing, then obviously a delay of the sentencing is very prejudicial. Similarly, if the end product of the plea and sentencing will be an outright dismissal of the charges, the respondent has a definite interest in advancing the sentencing date. Delay can also be detrimental in cases in which defense counsel fears that the prosecutor will not live up to his or her end of the bargain after the respondent's testimony against accomplices has been given; written plea agreements such as the one described in § 14.18 *supra* will provide some security against this risk but are not always obtainable. In situations such as these, defense counsel is sometimes able to persuade the prosecutor that the respondent has no love for the accomplices and can be counted on to testify against them without the coercion applied by keeping the respondent's own sentencing pending. Counsel can point out that the respondent will be more impeachable as a prosecution witness if those charges are still pending than if they have already been disposed of; and that even after sentencing, the sentence and the plea bargain are subject to rescission at the prosecutor's option if the respondent reneges on his or her promise to testify. *See Ricketts v. Adamson,* 483 U.S. 1 (1987). If the prosecutor is adamant about delaying the disposition, counsel should suggest alternative means of ameliorating the prejudice to the respondent. For example, if the respondent is in detention, counsel can suggest that the prosecutor join in a motion to release the respondent pending the delayed disposition. Or if the respondent is awaiting dismissal of the charge in order to enter a program such as the Job Corps that requires resolution of all pending charges prior to entry, counsel can suggest a dismissal in the interests of justice (see Chapter 19) with a stipulation that the defense will not oppose reinstatement of the charge in the event that the respondent fails to fulfill the requirement of testifying for the prosecution.

§ 14.26 PROCEDURE AT THE PLEA HEARING

§ 14.26(a) Essential Parties

Obviously, the respondent and defense counsel must be present for the plea. In most jurisdictions the prosecutor also must be present to confirm the accuracy of defense counsel's recitation of the terms of the plea agreement and to represent the State's interests at the plea hearing. In some jurisdictions, however, judges have adopted a practice of accepting pleas even in the absence of the prosecutor, in cases in which the respondent will clearly be released pending sentencing or in which the prosecution has waived argument on the respondent's

detention status pending sentencing.

An important issue is whether the parent must be present in order for the guilty plea to be valid. In some jurisdictions the courts have held that the respondent has an absolute right to have a parent present, and absent the respondent's knowing and intelligent waiver of that right, the plea may be invalid. *See, e.g., In re Kim F.*, 109 A.D.2d 706, 487 N.Y.S.2d 31 (N.Y. App. Div., 1st Dep't 1985) (vacating a juvenile's guilty plea in part because court failed to make reasonable efforts to arrange for the parent's presence at the plea hearing and accordingly failed to comply with the obligation of advising the parent of the rights waived as a result of the guilty plea). In jurisdictions of this sort, defense counsel will need to deal with a parent's failure to appear by preparing the respondent to engage in a colloquy waiving the parent's presence on the record. In some jurisdictions — or in cases of very young children (9- or 10-year-olds) in other jurisdictions — the judge may be unwilling to accept the child's waiver and inclined to continue the case to another date in order to secure the presence of the parent. In this situation if the defense has a need to move expeditiously (for example, if the respondent is detained, or if the respondent's entry into a certain program is contingent upon the resolution of the charges), defense counsel should consider requesting that the court appoint a guardian *ad litem* to substitute for the parent at the plea hearing.

§ 14.26(b) Defense Counsel's Preliminary Recitation; Putting the Plea Agreement on the Record

The judge will usually begin the plea hearing by asking defense counsel to declare whether or not the respondent intends to enter a guilty plea. This request is merely for the record in most instances; by now, the judge ordinarily will have been informed by the courtroom clerk that the case is being called for the purpose of entry of a guilty plea. The formulation used by judges to initiate the plea hearing varies among jurisdictions. In many jurisdictions, the standard formulation is a question, directed at defense counsel, asking whether the respondent has a "motion" or "application" s/he wishes to make. Defense counsel then is expected to reply: "The respondent wishes to withdraw his/her earlier denial of the Petition and enter an admission to [the count or counts to which the respondent is pleading guilty, with the statutory name of the offense charged in each count and a statement whether each count charges a misdemeanor or felony]."

It is ordinarily advisable for defense counsel, at this juncture, to state on the record the precise terms of the plea agreement with the prosecutor. In the event that the prosecutor later fails to fulfill one of the conditions of the agreement, a motion to vacate the plea will be greatly facilitated if the record reflects the complete terms of the agreement. (It is sufficient for purposes of the record if the prosecutor merely acquiesces silently in defense counsel's recitation of the terms of the agreement. However, in many jurisdictions, judges take the precautionary measure of asking the prosecutor on the record whether defense counsel has accurately recited the terms of the agreement.)

In deciding whether to put the agreement on the record, it is once again essential to know the practices of the individual judge presiding at the hearing. Some judges, particularly older judges, adhere to the once-dominant view that plea bargaining should be "a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges." *Blackledge v. Allison,* 431 U.S. 63, 76 (1977). These judges will be loth to hear the terms of the plea agreement, and an attorney's decision to forge ahead with a recitation of its terms runs the risk of incurring the judge's anger against both counsel and the client. When appearing before such judges, counsel is well advised to obtain a written plea agreement from the prosecutor (see § 14.18 *supra*) but to retain it in counsel's records rather than filing it with the court. Counsel can then rely on that document, in lieu of a recitation on the record, in the event that a disagreement about the terms of the plea bargain develops subsequently.

Similarly, in cases in which counsel has negotiated terms with the prosecutor that cannot be placed on the record, counsel should rely on a written plea agreement. For example, if counsel and the prosecutor have agreed to limit the facts of the offense that will be presented to the judge (see § 14.06(c)(3) *supra*), this agreement should be embodied in a written document signed by the prosecutor and preserved in counsel's files.

In some jurisdictions a respondent cannot enter a plea of guilty to any offense that is not expressly charged in the Petition. Thus the respondent cannot plead guilty to a lesser included offense subsumed within one of the charges in the Petition unless the Petition is amended to include the lesser offense. In these jurisdictions counsel merely needs to arrange with the prosecutor to amend the Petition: One of the preliminary matters in the plea hearing will then be a motion by the prosecutor for leave to amend the Petition to include the count to which the respondent will plead guilty.

In many jurisdictions defense counsel will be expected to include in his or her preliminary recitation a declaration that s/he has advised the respondent of his or her rights. Depending on local practice, counsel may also be required to enumerate all of the rights s/he described to the respondent. Thereafter, even if counsel has fully related his or her discussions with the respondent and the respondent's statements of willingness to waive each right, the judge must engage in a colloquy with the respondent and elicit waivers from the respondent on the record.

§ 14.26(c) The Plea Colloquy

Under *Boykin v. Alabama,* 395 U.S. 238 (1969), and *Brady v. United States,* 397 U.S. 742 (1970), the acceptance of a guilty plea in a criminal or delinquency case requires a preliminary judicial inquiry into whether the defendant/respondent is knowingly, intelligently, and voluntarily waiving the right to trial, entering the guilty plea, and accepting the possible consequences that could stem from conviction on the plea. The judge must question the respondent in order to determine that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement. "The plea must be voluntary and knowing and if it was induced by

promises, the essence of those promises must . . . in some way be made known." *Santobello v. New York,* 404 U.S. 257, 261-62 (1971).

In a number of jurisdictions the precise factors that must be covered in such a judicial inquiry are specified in the controlling statute, court rules, or caselaw. Generally, these factors include: the respondent's comprehension of, and voluntary waiver of, the right to trial and all attendant rights, such as the presumption of innocence, the requirement of proof beyond a reasonable doubt, the right to confront and cross-examine adverse witnesses, the right to present a defense, the right to testify in one's own behalf, and the right to appeal erroneous rulings at trial; the respondent's comprehension of the possible sentencing consequences, including the maximum sentence that could be imposed, and any collateral consequences, such as revocation of the respondent's current probation or parole; the existence of any promises or threats that might affect the voluntariness of the respondent's decision to enter the guilty plea; and the adequacy of the respondent's consultations with defense counsel regarding the plea. In some jurisdictions, the applicable statute, court rule, or caselaw requires that judges exercise particular caution to ensure that a juvenile comprehends the nature and possible consequences of a guilty plea. *See, e.g.*, *In the Matter of T.E.F.*, 359 N.C. 570, 575-76, 614 S.E.2d 296, 299 (2005) ("increased care must be taken to ensure complete understanding by juveniles regarding the consequences of admitting their guilt": "Our courts have consistently recognized that '[t]he [S]tate has a greater duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution.'").

In some jurisdictions the statute, court rule, or caselaw mandates that the judge must also inquire of the parent. Inquiries of the parent are usually directed at: whether the parent has consulted with his or her child concerning the plea that the child is entering; whether the parent has adequately consulted with defense counsel concerning the plea; whether the parent understands the rights that the child is waiving as a result of the plea and the possible consequences of the plea; and whether the parent believes that the plea is in the child's best interest. In jurisdictions that call for such an inquiry of the parent, judges will usually add to the colloquy with the child a question about whether the child has adequately consulted with his or her parent.

Once the judge has established the requisite record of the respondent's comprehension of his or her rights and voluntary waiver of those rights, the judge then will seek the respondent's admission on the record that s/he committed the criminal acts to which s/he is pleading. In some jurisdictions the judge will ask the respondent to state the facts documenting all of the elements of the charge. See § 14.23(b) *supra.* Many judges will ask the prosecutor, and some judges will also ask defense counsel, at the conclusion of the respondent's factual recitation, whether the attorney views the respondent's factual recitation as demonstrating every element of the offense. Some judges use the somewhat different practice of asking the prosecutor to recite the facts and then inquiring of the respondent whether those facts are correct.

In cases involving "*Alford* pleas," the judge will seek a statement from the respondent

conceding that the prosecution's evidence is sufficient to produce a guilty verdict. See § 14.22(a) *supra.* Judges taking an *Alford* plea will often ask the prosecutor and defense counsel whether they believe that the requirements for a valid *Alford* plea have been satisfied.

As explained in § 14.23 *supra,* juvenile court judges in several jurisdictions still follow the informal procedures tolerated prior to *Boykin v. Alabama*, 395 U.S. 238 (1969). Notwithstanding the host of constitutional and statutory requirements of careful questioning of the respondent, these judges direct only a few perfunctory questions at the respondent and rely almost exclusively on defense counsel's representations. In jurisdictions of this sort counsel must familiarize himself or herself with the idiosyncratic practices of the particular judge presiding over the case. In the event that the client subsequently wishes to mount appellate or collateral attacks on the validity of the plea (see §§ 14.30-14.31 *infra*), the *Boykin* violations usually will suffice to void it.

§ 14.26(d) Judicial Determination Whether To Proceed Directly to Disposition; Determination of the Respondent's Detention Status Pending a Delayed Disposition

Upon the completion of the plea colloquy and the judge's acceptance of the plea, the judge can either proceed directly to disposition or continue the disposition for a period of time to enable the probation department to prepare a pre-sentence report. In cases in which defense counsel has secured, as part of the plea agreement, a prosecutorial commitment to support a particular sentence, it is, of course, in the client's interest to proceed directly to disposition. See § 14.06(c)(1) *supra.*

In cases in which the judge elects to continue the disposition for the purpose of obtaining a pre-sentence report, the judge must determine the detention status of the respondent pending disposition. As explained earlier, in most jurisdictions the judge will routinely allow a respondent already on release status to remain free pending disposition. See § 14.23(c) *supra.* However, the judge does have the power to detain a previously released respondent for the period of time pending disposition. See *ibid.* In addition, a judge can release a previously detained respondent upon the respondent's entry of a guilty plea. See §§ 14.06(c)(3), 14.11 *supra*.

If the case is one in which the respondent was granted release status at arraignment and the jurisdiction is one in which judges give serious consideration to detaining previously released respondents pending disposition after a plea, the judge will usually turn to the prosecutor and ask whether s/he is seeking detention pending disposition. In cases of this sort it is obviously crucial for defense counsel to secure, as part of the plea agreement, a prosecutorial commitment to support continued release pending disposition or at least to remain mute on the issue of detention pending disposition. See § 14.06(c)(3) *supra.*

If the case is one in which the respondent was detained at arraignment, defense counsel should be prepared to argue for the respondent's release pending disposition. The likelihood of

prevailing on this argument will be improved immeasurably if counsel has secured prosecutorial support of pre-disposition release as part of the plea agreement. In addition, counsel's position will be greatly strengthened if, prior to the plea hearing, counsel has managed to arrange for the respondent's admission to an appropriate community-based program, so that counsel can argue that: (i) the respondent would be adequately supervised if released; and (ii) release for the period pending disposition would provide a good test of the respondent's ability to do well with the aid of the community-based program and would thereby inform the court whether a community-based alternative is an appropriate disposition.

§ 14.27 COPING WITH A PLEA THAT BREAKS DOWN

In criminal and juvenile court parlance a plea that "breaks down" is a plea in which the answers of the adult defendant or juvenile respondent fail to satisfy the judge, and, as a result, the judge rejects the plea and sets the case down for trial. A plea can break down either because the respondent does not correctly answer the questions concerning his or her waivers of rights (for example, because the respondent manifests an inability to understand certain rights or says that s/he is unaware of the maximum sentence) or because the respondent's recitation of facts fails to satisfy all of the elements of the offense (for example, because the respondent admits stabbing the complainant but asserts that the stabbing was in self-defense).

Most judges are tolerant of a juvenile respondent's failure to understand a question in the plea colloquy and will give defense counsel every reasonable opportunity to correct a misunderstanding. For example, if defense counsel requests a moment to confer briefly with the respondent in court, or even a brief recess to confer with the respondent outside the courtroom, the request will ordinarily be granted. Usually, in a consultation of this sort, counsel will succeed in clearing up the client's misunderstanding, and the plea colloquy can then continue. If, on the other hand, counsel is unable to clear up the misunderstanding and the respondent is adamant about the answer which s/he has given, then defense counsel has no choice but to terminate the plea hearing and set a trial date. In the event that the respondent subsequently changes his or her mind and wishes to plead guilty after all, counsel may be able to re-negotiate the original plea agreement with the prosecutor.

If a plea does break down irrevocably, counsel must take pains to ensure that the judge does not blame the respondent for wasting the court's time on a plea hearing that turned out to be a fruitless endeavor. In most cases in which a plea breaks down, it is the result of defense counsel's failure to prepare the client adequately by rehearsing every stage of the plea colloquy. If the problems can truthfully be attributed to defense counsel, counsel should let the judge know that it is counsel's fault and not the client's.

§ 14.28 PROCEDURE IN CASES IN WHICH THE PLEA WAS ACCEPTED AND THE CASE WAS ADJOURNED FOR A PRE-SENTENCE REPORT: PREPARING THE CLIENT AND THE PARENT FOR THE PROBATION INTERVIEW

If the judge adjourns the case to a new date for disposition and orders a pre-sentence report, then counsel will need to prepare the client and his or her parent for their meetings with the probation officer. The probation interview process and the steps counsel should take in preparing the client and parent for the interviews are discussed in § 38.05 *infra.*

Part F. Post-Conviction, Appellate, and Collateral Challenges to the Validity of the Guilty Plea

§ 14.29 MOTIONS TO WITHDRAW OR VACATE THE GUILTY PLEA

§ 14.29(a) Motion for Leave To Withdraw a Valid Guilty Plea

If the plea colloquy satisfied constitutional and state law standards and the guilty plea was valid, it may subsequently be withdrawn only by leave of court, in the court's discretion, usually for good cause shown. For obvious reasons, leave is granted more freely prior to sentencing than after sentencing, whether or not the applicable rules explicitly so provide.

Judges differ considerably in their willingness to permit guilty pleas to be withdrawn. In multijudge courts in which the judges rotate assignments from time to time, defense counsel should inquire of experienced criminal lawyers concerning the respective judges' attitudes, obtain the assignment schedule, and time the motion accordingly. (Of course, the motion should not, for this purpose, be delayed beyond any deadline set by local rules for a motion to withdraw, nor should it be delayed until sentencing if the respondent's change of heart occurs before sentencing.) The argument that an accused should be routinely permitted to withdraw a guilty plea before sentence, at least when neither the prosecutor nor the court has relied upon it to their disadvantage, has so far failed to command a majority of the Supreme Court of the United States, *see Neely v. Pennsylvania,* 411 U.S. 954 (1973) (opinion of Justice Douglas, dissenting from denial of *certiorari*); *cf. Dukes v. Warden,* 406 U.S. 250 (1972), but it is nevertheless worth making as a matter of state constitutional law. Alternatively, the argument should be advanced in terms of an abuse of discretion: It is likely that a state appellate court would reverse a juvenile conviction, as a matter of sound procedure if not of constitutional right, in any case in which a trial judge arbitrarily refused to allow the withdrawal of a guilty plea before sentencing.

A factor often considered by courts in determining whether to exercise their discretion in favor of permitting withdrawal of the plea is whether the respondent puts forth a credible assertion of innocence. A credible assertion of innocence will be treated as particularly compelling in cases in which the plea was an *Alford* plea (see § 14.22(a) *supra*), and the respondent therefore has never admitted guilt.

§ 14.29(b) Motion To Vacate an Invalid Guilty Plea

The preceding subsection assumed the validity of the plea. If the plea was arguably invalid, counsel can file a motion to vacate it. The motion can be filed either prior to or following

sentencing. In some jurisdictions appellate review of defects in a guilty plea cannot be obtained without prior exhaustion of trial-level remedies, such as a motion to vacate the plea.

The grounds for vacating a guilty plea as invalid include:

1. The plea was involuntary. *See, e.g., Machibroda v. United States,* 368 U.S. 487 (1962); *Fontaine v. United States,* 411 U.S. 213 (1973); *Godinez v. Moran*, 509 U.S. 389, 400 (1993) (dictum).

2. The plea was not effective as a knowing and intelligent waiver of the right to trial because the respondent lacked a full understanding of the charge, *e.g.*, *Bradshaw v. Stumpf*, 545 U.S. 175, 182-83 (2005) (dictum); *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (dictum); *Marshall v. Lonberger,* 459 U.S. 422, 436 (1983) (dictum); *Smith v. United States,* 309 F.2d 165 (9th Cir. 1962), including all of the critical elements of the offense, *see Henderson v. Morgan,* 426 U.S. 637, 647 n.18 (1976), and the possible penalty, *Marvel v. United States,* 380 U.S. 262 (1965); *Chapin v. United States,* 341 F.2d 900 (10th Cir. 1965); *In the Matter of Melvin A.*, 216 A.D.2d 227, 227-28, 628 N.Y.S.2d 698, 699 (N.Y. App. Div., 1st Dep't 1995) (guilty plea colloquy was defective because, *inter alia*, the judge failed to advise the respondent of the possibility that a period of placement can be extended); *cf. Lane v. Williams,* 455 U.S. 624, 630 & n.9 (1982) (reserving the question whether and under what circumstances a failure to inform a defendant of a mandatory parole term will invalidate a guilty plea); *Hill v. Lockhart,* 474 U.S. 52 (1985) (stating in dictum that a failure to inform a defendant that his eligibility for parole is restricted because of a prior conviction would not invalidate a guilty plea); *United States v. Ruiz,* 536 U.S. at 630 ("this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor"); *Libretti v. United States*, 516 U.S. 29 (1995); *United States v. Fisher*, 711 F.3d 460, 462, 469-70 (4th Cir. 2013) (granting the defendant's motion to vacate his guilty plea on the ground that "the law enforcement officer responsible for the investigation . . . [subsequently] admitted to having lied in his sworn affidavit that underpinned the search warrant for the defendant's residence and vehicle, where evidence forming the basis of the charge to which the defendant pled guilty was found": "the officer's affirmative misrepresentation, which informed the defendant's decision to plead guilty and tinged the entire proceeding, rendered the defendant's plea involuntary and violated his due process rights").

3. The judge who presided over the entry of the plea did not conduct an adequate inquiry into voluntariness and understanding on the record prior to accepting the plea. *See McCarthy v. United States,* 394 U.S. 459 (1969); *Boykin v. Alabama,*

395 U.S. 238 (1969); *United States v. Tien*, 720 F.3d 464, 470 (2d Cir. 2013).

4. The plea hearing was inadequate in some other respect, such as, for example, in jurisdictions in which the child has an absolute right to have a parent present at the plea, the parent was not present at the hearing, and the respondent did not effectively waive the parent's presence. *See* § 14.26(a) *supra*.

5. The prosecutor failed to comply with promises made to the respondent as part of the plea agreement — or, in cases in which the judge participated in "conditional plea bargaining," see § 14.06(c)(2) *supra,* the judge failed to comply with terms of the agreement. *See Santobello v. New York,* 404 U.S. 257 (1971); *Blackledge v. Allison,* 431 U.S. 63 (1977).

6. The respondent lacked the requisite mental competency to enter a plea of guilty. *See, e.g.*, *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993) (dictum); *Taylor v. United States,* 282 F.2d 16 (8th Cir. 1960). *See also In re Matthew N.*, 216 Cal. App. 4th 1412, 1414-15, 1420-22, 157 Cal. Rptr. 3d 233, 235, 239-40 (2013) (granting the juvenile's motion to withdraw his guilty plea on grounds of "*developmental* [in]competence" because of "the minor's unusual immaturity for his age (as his mother and both psychologists attested) and his inability to comprehend the legal concepts involved in the trial process . . . (as both trial counsel and the competency report attested)").

7. Defense counsel failed to provide the respondent with effective assistance of counsel in connection with the plea, *see Tollett v. Henderson,* 411 U.S. 258 (1973); *Hill v. Lockhart,* 474 U.S. 52 (1985) (dictum); *Johnson v. Uribe*, 700 F.3d 413 (9th Cir. 2012), or, in cases in which the respondent waived counsel, the waiver of counsel was not effective, *see Williams v. Kaiser,* 323 U.S. 471 (1945); *United States ex rel. Durocher v. LaVallee,* 330 F.2d 303 (2d Cir. 1964); *compare Iowa v. Tovar*, 541 U.S. 77 (2004). *See People v. Mitchell*, 21 N.Y.3d 964, 967, 993 N.E.2d 405, 407, 970 N.Y.S.2d 919, 921 (2013) (if a motion to withdraw a guilty plea is based on an allegation of ineffectiveness of counsel and if the defense attorney whose conduct has been challenged takes "a position contrary to the one taken by his client on the motion," "a conflict of interest arises, and the court must assign a new attorney to represent the defendant on the motion").

8. The court did not have jurisdiction over the offense.

9. Some constitutional right precluded the respondent's *prosecution* for the offense to which s/he pleaded guilty (as distinguished from the procedures used in the prosecution or in the investigation of the offense underlying it). *See Blackledge v. Perry,* 417 U.S. 21 (1974); *Menna v. New York,* 423 U.S. 61 (1975) (per curiam); *Haring v. Prosise,* 462 U.S. 306, 320 (1983) (dictum).

In addition to these challenges to the validity of the plea, counsel also can challenge the sentence imposed pursuant to the plea if that sentence exceeds the statutory maximum or if the sentencing procedure failed to comport with constitutional, statutory, or common-law requirements.

§ 14.29(c) The Prohibition Against Evidentiary Use of a Withdrawn or Vacated Guilty Plea in a Subsequent Trial

In the event that a guilty plea is vacated or withdrawn by leave of the court, it may not be used against the respondent as evidence of guilt at a subsequent trial on the charge to which the respondent initially pled guilty. This proposition was settled in federal practice by *Kercheval v. United States,* 274 U.S. 220 (1927); *see also* FED. R. CRIM. P. 11(f) (2014); FED. R. EVID. 410 (2014); *but cf. United States v. Mezzanatto*, 513 U.S. 196 (1995), and the *Kercheval* rule appears to have been constitutionalized by dictum in *Hutto v. Ross,* 429 U.S. 28, 30 n.3 (1976) (per curiam).

§ 14.30 APPELLATE REVIEW IN GUILTY PLEA CASES

A guilty plea ordinarily forecloses appellate review of any claim that error was committed in judicial proceedings prior to the entry of the plea. As discussed in § 14.10 *supra,* some jurisdictions make special provision, by statute, court rule, or caselaw, for appellate review of pretrial suppression rulings even after the entry of a guilty plea.

Appellate remedies are, of course, available to review the invalidity of the plea itself. Thus any of the claims described in § 14.29(b) could be raised on appeal. It bears repeating, however, that appellate courts in some jurisdictions will not entertain attacks on a guilty plea unless trial-level remedies, such as a motion to withdraw or vacate the plea, have first been exhausted.

Finally, appeal is always available to challenge a sentence imposed pursuant to a guilty plea on the grounds that the sentence exceeds the statutory maximum or that the sentencing procedure violated constitutional, statutory, or common-law commands.

§ 14.31 COLLATERAL REVIEW IN GUILTY PLEA CASES

In the majority of jurisdictions state court collateral review is available for constitutional claims or claims that could not have been raised on direct review. See § 39.03(a) *infra.* Federal constitutional claims can be raised in federal habeas corpus proceedings. See § 39.03(b) *infra.* Accordingly, constitutional defects in the validity of the plea or in the conduct of the plea hearing or sentencing proceedings can be challenged in state and federal collateral proceedings.

As a practical matter juvenile sentences usually are of such limited duration that a juvenile will have served his or her entire sentence prior to the time when direct appellate review

is completed, and thus there may appear to be no reason to pursue collateral remedies. However, even after the sentence has been served, a conviction may have ancillary consequences. For example, it might preclude the youth from ever entering the military, or it might serve as a predicate for enhanced juvenile sentencing or harsher adult court sentencing. Accordingly, there will be many situations in which counsel should pursue collateral remedies for an invalid guilty plea, even after the juvenile has completed serving his or her sentence.

Chapter 15

Defense Motions To Advance or for a Continuance; Motions To Dismiss for Want of Prosecution; Speedy Trial Motions

§ 15.01 DEFENSE MOTIONS TO ADVANCE THE DATE OF A PRETRIAL HEARING OR THE TRIAL

If the respondent is not detained pending trial, counsel will ordinarily not want to advance the date of pretrial hearings or the trial. It is usually in the respondent's interest to delay proceedings as much as possible because that will give the respondent a longer period of time in which to amass a record of good behavior and favorable community adjustment that can be cited at disposition to avoid a sentence of incarceration.

If the respondent is detained pending trial, counsel will have attempted at arraignment to set the trial for the earliest possible date that affords sufficient time for pretrial preparation. See § 4.14 *supra.* Thus counsel will rarely have reason to seek advancement of a case that is going to trial. However, if a detained client has decided to plead guilty, there is no reason to wait for a trial date that is weeks away in order to enter the plea. Counsel should advance the case so that the plea can be entered immediately. This procedure avoids needless preadjudication detention time, which, in most jurisdictions, is not credited to the sentence if the respondent is sentenced to incarceration. And in cases in which the plea may result in the client's being released pending disposition, an advancement of the plea date can bring about the respondent's early release.

In order to advance a case, counsel should secure the prosecutor's agreement to an advancement and to a particular date. Counsel then should contact the clerk of the court (or, as appropriate, the clerk of the judge who is presiding over the case), inform the clerk that the defense wishes to advance the date and that the prosecutor has consented, and request that the clerk calendar the case on the agreed-upon date.

§ 15.02 DEFENSE CONTINUANCES

Practice varies with regard to whether applications for continuances of pretrial hearings and of trial are required to be made in writing, on notice, in advance of the proceeding sought to be continued or whether they may be made orally on the date when the matter is listed. If local practice is receptive to continuance requests on the day of the hearing or trial, this course of action is ordinarily advised so that, in the event that the prosecutor also is not ready on the day of the hearing or trial, counsel can take advantage of the prosecutor's lack of readiness to seek dismissal for want of prosecution (see § 15.03 *infra*) or dismissal on speedy trial grounds (see § 15.04 *infra*).

If, on the other hand, there is any risk that a day-of-trial continuance request may be denied, counsel is ordinarily advised either to move in writing in advance or to inform the

prosecutor in advance of counsel's intention to move for a continuance. The prosecutor should be asked to join in, or to consent to, the defense motion. Joint continuance motions and motions noted "no opposition" are granted routinely in many courts, although this is less likely if the juvenile court statute or local court rules establish a strict time-line for trials (see § 15.04(a) *infra*). Even if the prosecutor is unwilling to agree, defense counsel is at least in the posture of having informed the prosecutor and having given him or her the opportunity to call off prosecution witnesses; a defense motion for continuance made in court without advance notice to the prosecutor may be regarded with suspicion and irritation by the judge, who will undoubtedly know that last-minute pleas of "not prepared" can be used as a tactic to discourage prosecution witnesses, once dragged needlessly into court, from appearing the next time that the case is called.

The trial judge ordinarily has exceedingly broad discretion to grant or to deny continuances. *See, e.g., Morris v. Slappy,* 461 U.S. 1, 11-12 (1983); *United States v. Cronic,* 466 U.S. 648, 659-62 (1984). However, the discretion is not absolute, *see*, *e.g.*, *Lee v. Kemna*, 534 U.S. 362 (2002), and defense counsel seeking a continuance over the opposition of the prosecutor should protect the record by a detailed statement of reasons — by affidavit, unless local practice permits oral representations in open court — for instance: recent appointment and lack of opportunity to prepare, unavailability of a witness, or need to appear in another court. If counsel is being rushed so quickly at any stage that s/he has inadequate opportunity to prepare, s/he should set out the circumstances with particularity in an application for a continuance invoking not only the general equities of the situation but also the respondent's federal and state constitutional rights to effective assistance of counsel and to a fair trial. Denials of ample time for defense preparation have been held to violate these guarantees. *See, e.g., Powell v. Alabama,* 287 U.S. 45 (1932); *Hawk v. Olson,* 326 U.S. 271 (1945); *Megantz v. Ash,* 412 F.2d 804 (1st Cir. 1969); *Rastrom v. Robbins,* 440 F.2d 1251 (1st Cir. 1971); *Moore v. United States,* 432 F.2d 730, 735 (3d Cir. 1970) (en banc); *Twiford v. Peyton,* 372 F.2d 670 (4th Cir. 1967); *Garland v. Cox,* 472 F.2d 875 (4th Cir. 1973); *MacKenna v. Ellis,* 263 F.2d 35, 41-44 (5th Cir. 1959); *Davis v. Johnson,* 354 F.2d 689 (6th Cir. 1966), *aff'd after remand,* 376 F.2d 840 (6th Cir. 1967); *Wolfs v. Britton,* 509 F.2d 304 (8th Cir. 1975); *United States v. King,* 664 F.2d 1171 (10th Cir. 1981). "[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guaranty of assistance of counsel cannot be satisfied by mere formal appointment." *Avery v. Alabama,* 308 U.S. 444, 446 (1940) (dictum). *See also In re Gault,* 387 U.S. 1, 33 (1967) (respondent in a delinquency case must receive notice "of the specific charge or factual allegations . . . sufficiently in advance of the hearing to permit preparation"); *In the Matter of John JJ.*, 298 A.D.2d 634, 636, 748 N.Y.S.2d 188, 189-90 (N.Y. App. Div., 3d Dep't 2002) (the respondent in a delinquency case was denied effective assistance of counsel because his lawyer interviewed him for the first time immediately before trial and failed to seek an adjournment to interview witnesses identified by the respondent and his mother).

§ 15.03 MOVING FOR DISMISSAL FOR WANT OF PROSECUTION OR OTHER APPROPRIATE RELIEF WHEN THE PROSECUTOR IS NOT READY TO PROCEED AT TRIAL OR A PRETRIAL HEARING

All courts have power to control their dockets and the calendaring of pending cases. This power may be expressly recognized in a state statute or court rule. But, even in jurisdictions having no such statute or rule, the power is an inherent attribute of every court.

The court's control over its own docket includes the prerogative of granting a defense motion to dismiss a case "for want of prosecution" if the prosecutor is not ready to proceed. Such dismissals are grounded upon the court's discretion, reviewable for abuse, and are treated in most jurisdictions as involving little legal analysis or technical complexity. The question presented is simply whether, in light of all the circumstances of the case, the harm shown to have occurred or that will occur to the respondent by reason of trial delay, the general policy of speedy trial (see § 15.04 *infra*), and the court's docket needs, dismissal is preferable to granting a prosecutorial request for a continuance.

Dismissal for want of prosecution may be with or without prejudice, depending on the sort of harm to the respondent that appears (see § 15.04(b) *infra*) and on the general equities of the situation. Obviously, counsel should always seek dismissal with prejudice if such a request is viable. And, if a case is dismissed with prejudice, counsel should ensure that the court file is marked accordingly.

If the prosecution moves for a continuance in the case of a respondent who is detained and if the court denies the respondent's resulting motion to dismiss for want of prosecution, counsel should then make a fall-back request for release of the respondent pending the adjourned trial date. Such a request for modification of the conditions of pretrial detention may ordinarily be entertained by the court at any time. Many judges are inclined to grant such requests, either because they are unwilling to penalize the respondent for the prosecutor's inefficiency or because they reason that the prosecutor's inability to bring in his or her witnesses signals some weakness in the prosecutor's case and portends the eventual dismissal of the case on its merits or for want of prosecution.

If the prosecutor is not ready to go forward at a pretrial evidentiary hearing on a motion, such as a suppression hearing, the appropriate remedy is a judicial order treating the motion as conceded or forfeited. *See, e.g., People v. Goggans,* 123 A.D.2d 643, 506 N.Y.S.2d 908 (N.Y. App. Div., 2d Dep't 1986), *appeal dismissed,* 69 N.Y.2d 1000, 511 N.E.2d 91 (1987) (affirming trial judge's summary granting of a motion to suppress on the ground that the prosecution's witnesses failed to appear and the prosecutor therefore was not ready to proceed).

§ 15.04 MOTIONS TO DISMISS ON SPEEDY TRIAL GROUNDS

In addition to requesting the court to exercise its inherent power to dismiss a case for

want of prosecution (see § 15.03 *supra*), counsel should respond to a prosecutorial request for a continuance or to other undue delay in the proceedings (such as a continuance ordered by the court as a result of its crowded docket and inability to reach the case on the scheduled trial date) by moving to dismiss the Petition on the ground that the respondent's rights to a speedy trial have been violated.

The following sections describe the various statutory and constitutional doctrines that can be cited in support of a motion for dismissal on speedy trial grounds.

§ 15.04(a) Statutory Rights to a Speedy Trial

In many jurisdictions the juvenile court statutes specify a timetable for delinquency trials and establish an accelerated schedule for cases in which the respondent is detained pending trial. *See, e.g.,* CAL. WELF. & INST. CODE § 657(a)(1) (2014) (trial within 30 days of filing of Petition; trial of a detained child within 15 days of order of detention); IND. CODE ANN. § 31-37-11-2 (2014) (trial within 60 days of filing of Petition; trial of a detained child within 20 days of filing of Petition); N.Y. FAM. CT. ACT § 340.1 (2014) (trial within 60 days generally; if child is detained, trial must be held within 3 days if the charge is a misdemeanor, within 14 days if the charge is a felony, and within "a reasonable length of time" if the charge is a homicide or a crime that resulted in the victim being incapacitated and unable to attend court).

Statutes of this sort provide a basis for dismissal of a case when pretrial delay has exceeded the statutory time limits as a result of either the prosecution's actions or the judge's crowded docket. *See, e.g., In the Matter of Frank C.,* 70 N.Y.2d 408, 410, 516 N.E.2d 1203, 1203, 522 N.Y.S.2d 89, 89 (1987) ("dismissal of the presentment agency's Petition is mandatory when the statutorily required fact-finding is delayed beyond the time limits delineated in Family Court Act § 340.1"); *In re Russell C.,* 120 N.H. 260, 414 A.2d 934 (1980). *See also, e.g.*, *Zedner v. United States*, 547 U.S. 489, 500-03 (2006) (violation of federal Speedy Trial Act required dismissal notwithstanding the defendant's prospective waiver of his statutory speedy trial rights because the Act "has no provision excluding periods of delay during which a defendant waives the application of the Act" and because the Act was designed to safeguard not only the defendant's right to a speedy trial but also the public's interest in a speedy trial).

If local caselaw interpreting the speedy trial statute governing adult criminal cases is favorable, counsel can argue that juveniles should be afforded protections at least as stringent. Counsel should be alert, however, to possibilities for arguing that the juvenile speedy trial act manifests a legislative intention to establish more rigorous protections for juveniles. For example, in *In the Matter of Frank* C., the New York Court of Appeals rejected the prosecution's attempt to incorporate into the juvenile statute the adult law's exclusion of delay caused by court congestion. Ruling that the juvenile statute was to be construed strictly to outlaw delay caused by either prosecutorial action or court congestion, the court in *Frank C.* explained that "the 'speedy hearing' provision . . . reflect[s] the significant changes in the legal rights of juveniles that have occurred since the late 1960's . . . [and must be interpreted consistently with the legislatively]

stated purpose . . . to assure swift and certain adjudication at all phases of the delinquency proceeding." 70 N.Y.2d at 413, 516 N.E.2d at 1205-06, 522 N.Y.S.2d at 91-92.

§ 15.04(b) Federal and State Constitutional Guarantees of Speedy Trial

Backstopping the common-law and statutory protections against undue trial delay are the constitutional Speedy Trial Clauses, state and federal. These apply to juveniles in delinquency proceedings, *see, e.g., P.V. v. District Court in and for the Tenth Judicial District,* 199 Colo. 357, 609 P.2d 110 (1980); *In the Interest of C.T.F.,* 316 N.W.2d 865 (Iowa 1982); *In re D.H.*, 666 A.2d 462 (D.C. 1995); *In re Thomas J.*, 372 Md. 50, 811 A.2d 310 (2002); *Piland v. Clark County Juvenile Court*, 85 Nev. 489, 457 P.2d 523 (1969); *In the Matter of Benjamin L.*, 92 N.Y.2d 660, 708 N.E.2d 156, 685 N.Y.S.2d 400 (1999); *Commonwealth v. Dallenbach*, 1999 Pa. Super. 101, 729 A.2d 1218 (1999); *State v. Jones*, 521 N.W.2d 662 (S.D. 1994), and, indeed, some courts have concluded that the nature of adolescence and the underlying rehabilitative goals of the Family Court call for applying speedy trial guarantees even more rigorously in juvenile court than in the adult criminal context, *see, e.g.*, *P.V. v. District Court in and for the Tenth Judicial District*, 199 Colo. at 360, 609 P.2d at 112 ("It is our view that the speedy resolution of juvenile proceedings brings about more significant benefits to a child and to society than are accrued through application of speedy trial rules in adult proceedings. Certainly the average juvenile is far more vulnerable to psychological harm during the pretrial period than the average adult would be."); *In the Matter of Benjamin L.*, 92 N.Y.2d at 667, 708 N.E.2d at 160, 685 N.Y.S.2d 404 (reasons for speedy adjudication "are even more compelling in the juvenile context [than in the adult criminal context]" because "a delay in the proceedings may undermine a court's ability to act in its adjudicative and rehabilitative capacities" and because the "nature of adolescence" may render a delay acutely prejudicial for the juvenile and his or her defense); *Commonwealth v. Dallenbach*, 729 A.2d at 1220 ("As the juvenile years are marked with significant changes and rapid development, children experience an acceleration in the passage of time so that, to a juvenile, one year may seem to be five. To ensure successful rehabilitation, the reformation program (including punishment) must commence within a reasonable time of the child's delinquent act so that the child can comprehend the consequences of his act and the need for reform."). The constitutional guarantees are significant not only in their own right (in that they may provide a more expansive basis for relief than that which is afforded by statutes and common law) but also as expressions of a policy in light of which the speedy trial statutes must be read and the common-law judicial discretion exercised.

The Speedy Trial Clause of the Sixth Amendment to the federal Constitution, which is incorporated into the Fourteenth Amendment and hence made binding on the States by *Klopfer v. North Carolina,* 386 U.S. 213 (1967), guards against three separate injuries that can be suffered by an accused as a result of undue trial delay: (i) prolonged pretrial incarceration; (ii) inconvenience, indignity, and anxiety resulting from the pendency of unresolved charges for a protracted period; and (iii) prejudice to the respondent's ability to present defensive evidence at trial when the trial is not held promptly in relation to the events at issue. *See, e.g., United States v. Ewell,* 383 U.S. 116, 120 (1966) (Speedy Trial Clause is "an important safeguard to prevent

undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself"). *See also Doggett v. United States*, 505 U.S. 647, 654 (1992); *Barker v. Wingo,* 407 U.S. 514, 532 (1972); *Dillingham v. United States,* 423 U.S. 64, 65 (1975) (per curiam); *United States v. MacDonald,* 456 U.S. 1, 7-9 (1982). The Sixth Amendment may therefore be invoked to support a demand for trial or for release from confinement or for dismissal of pending charges or for outright dismissal of the prosecution with prejudice, as the circumstances make appropriate. *See Klopfer v. North Carolina*, 386 U.S. 213 (1967) (demand for trial); *Braden v. 30th Judicial Circuit Court,* 410 U.S. 484 (1973) (demand for trial); *Smith v. Hooey,* 393 U.S. 374 (1969) (demand for trial or dismissal); *Dickey v. Florida,* 398 U.S. 30 (1970) (dismissal); *Strunk v. United States,* 412 U.S. 434 (1973) (dismissal). State caselaw must be consulted to determine whether the applicable state constitutional provision is also construed as protecting the full range of "speedy trial" concerns that justify these several forms of relief.

The standards that must be met in order to justify the differing forms of relief are obviously different. Each considers, however, both the duration of the delay and its "oppressive" quality, in terms of willful vexatiousness or avoidable negligence of the prosecution on the one hand and harm to the relevant interests of the defense on the other. *See, e.g., Petition of Provoo,* 17 F.R.D. 183 (D. Md. 1955), *aff'd per curiam,* 350 U.S. 857 (1955). *Compare Dickey v. Florida*, 398 U.S. 30 (1970), *with Harrison v. United States,* 392 U.S. 219, 221-22 n.4 (1968).

The major factors to be considered in determining whether pretrial delay violates the Sixth Amendment have been described as the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo,* 407 U.S. at 530. *See also Doggett v. United States*, 505 U.S. at 651; *United States v. MacDonald,* 435 U.S. 850, 858 (1978); *United States v. Eight Thousand Eight Hundred and Fifty Dollars,* 461 U.S. 555, 564-69 (1983); *United States v. Valenzuela-Bernal,* 458 U.S. 858, 868-70 (1982) (dictum). "[N]one of the four factors [is] . . . either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker v. Wingo,* 407 U.S. at 533; *see Moore v. Arizona,* 414 U.S. 25, 26 (1973) (per curiam). Thus "an affirmative demonstration of prejudice" is not always necessary to sustain a speedy trial claim. *Ibid. Accord*, *Doggett v. United States*, 505 U.S. at 655 ("consideration of prejudice is not limited to the specifically demonstrable[;] . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim"). Nor is it necessary that the delay be purposeful or oppressive. "Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense, in determining whether the Sixth Amendment has been violated but, as we noted in *Barker v. Wingo,* 407 U.S. 514, 531 (1972), they must 'nevertheless . . . be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.'" *Strunk v. United States,* 412 U.S. at 436. *Compare Vermont v. Brillon*, 556 U.S. 81, 85, 94 (2009) ("delays sought by [defense] counsel are ordinarily attributable [for speedy trial purposes] to the defendants they represent" but this "general rule . . . is not absolute": "Delay resulting from a

systemic 'breakdown in the public defender system' . . . could be charged to the State."); *Boyer v. Louisiana*, 133 S. Ct. 1702, 1704, 1706-07 (2013) (Sotomayor, J., joined by Ginsburg, Breyer & Kagan, JJ., dissenting from the dismissal of a writ of *certiorari* as improvidently granted) (in adjudicating a 6th Amendment speedy trial claim, a "delay caused by a State's failure to provide funding for an indigent's defense must count against the State, and not the accused": "Where a State has failed to provide funding for the defense and that lack of funding causes a delay, the defendant cannot reasonably be faulted.").

A major limitation upon the Sixth Amendment right to a speedy trial is that the right attaches only at the time of "indictment, information, or other formal charge" or of "arrest," *United States v. Marion,* 404 U.S. 307, 321 (1971), whichever comes first (*see Dillingham v. United States,* 423 U.S. 64 (1975) (per curiam); *United States v. MacDonald,* 456 U.S. 1, 6-7 (1982); *Baker v. McCollan,* 443 U.S. 137, 144 (1979) (dictum)). Therefore, pre-charge delay alone will not violate the Sixth Amendment, even though it can be cited as compounding the harms suffered through postcharge delay. In cases in which the precharge delay is substantial and in which it can be shown to have adversely affected the respondent's ability to prepare, preserve, or present defensive evidence, counsel may be able to secure dismissal on the alternative constitutional ground that the respondent's due process right to a fair trial has been violated. *E.g., United States v. Chase,* 135 F. Supp. 230 (N.D. Ill. 1955). The due process protections of the Fifth and Fourteenth Amendments to the federal Constitution and the parallel provisions of state constitutions forbid delay at any stage of a criminal or delinquency proceeding — including prearrest, precharge delay — that unfairly hampers the accused's ability to make a defense. *See United States v. Marion,* 404 U.S. at 324-26; *United States v. Lovasco,* 431 U.S. 783, 789, 795-97 & n.17 (1977); *United States v. MacDonald,* 456 U.S. 1, 7-8 (1982); *cf. Fontaine v. California,* 390 U.S. 593, 595-96 (1968). "[T]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused," *United States v. Lovasco,* 431 U.S. at 790; and although "investigative delay" will not support a due process contention, at least in the absence of very substantial and well-documented prejudice to the accused's trial defenses, *id.* at 795-96, any sort of "delay undertaken by the [prosecution] . . . solely 'to gain tactical advantage over the accused,'" *id.* at 795, or perhaps "'prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense,'" *id.* at 795 n.17, would present a case for dismissal on due process grounds. *See United States v. Gouveia,* 467 U.S. 180, 192 (1984) (dictum).

§ 15.04(c) Procedures for Litigating Speedy Trial Issues

Speedy trial motions naturally are not subject to the filing deadlines that govern other types of motions (see § 7.05 *supra*), since the violation at issue in a speedy trial motion usually will not take place until after the typical motions deadline has expired. Depending upon local rules, speedy trial motions may or may not have to be in writing.

In some jurisdictions the state constitutional speedy trial clause, the applicable statute or

court rule, or both may be construed as embodying a "demand rule." The demand rule holds that a respondent waives the benefit of speedy trial guarantees unless s/he expressly invokes them and demands a trial. Its effect ordinarily is that the time limits formally expressed as running from the time of arraignment or Initial Hearing actually begin to run only at the time of a defense demand for a speedy trial. The Supreme Court rejected the "demand rule" in this form as an element of a Sixth Amendment speedy trial claim in *Barker v. Wingo,* 407 U.S. 514, 528 (1972), but *Barker* warns that the accused's failure to make "an assertion of his right" to a speedy trial is one factor to be considered in adjudicating the merits of such a claim, *id.* at 530; see § 15.04(b) *supra,* and the States remain free to insist upon compliance with a demand rule as a condition precedent to invoking state constitutional or statutory rights to a speedy trial. Accordingly, except when there are tactical reasons not to do so, counsel should make a demand for a speedy trial at the earliest possible opportunity and renew that demand whenever the case is continued or delayed, coupling it with a motion for dismissal for violation of the respondent's speedy trial rights.

Chapter 16

Motions Hearings; Motions Arguments

Part A. Motions Hearings Generally

§ 16.01 EVIDENTIARY AND NON-EVIDENTIARY MOTIONS HEARINGS

Depending upon the type of motion involved and the specific facts at issue on the motion, a motions hearing can be either a non-evidentiary legal argument by the attorneys or a trial-like evidentiary hearing.

Motions that raise purely legal issues, such as motions challenging the sufficiency of the Petition or the jurisdiction of the court (see Chapter 17) are presented at non-evidentiary hearings, since they involve no factual disputes that need to be resolved through the presentation of testimony. The same is true of motions that turn upon facts already known to the court, such as most motions for recusal of the judge (§§ 20.04-20.07 *infra*), or facts verifiable through a review of court records, such as motions to dismiss the petition on double jeopardy grounds (§ 17.08 *infra*) or for a violation of speedy trial guarantees (§ 15.04 *supra*).

The quintessential type of motion that turns upon factual issues and therefore requires an evidentiary hearing is a motion to suppress evidence. Motions to suppress tangible evidence (Chapter 23), confessions (Chapter 24), and identification testimony (Chapter 25) all typically result in an evidentiary hearing followed by legal arguments on the law and facts. In some jurisdictions the defense must win the right to an evidentiary hearing by arguing, in a non-evidentiary legal argument, the sufficiency of the facts alleged in the suppression motion to state a claim under the applicable law. See §§ 7.06-7.08 *supra.* The prosecutor can, of course, obviate the need for an evidentiary hearing on a motion to suppress by stipulating to the facts alleged by the defense, thereby reducing the hearing to a legal argument on whether the stipulated facts satisfy the legal rules governing suppression.

Motions to dismiss for social reasons (Chapter 19) are treated very differently among jurisdictions. Some jurisdictions routinely convene evidentiary hearings on such motions; others resolve the motions on the basis of the pleadings and affidavits; still others give the defense the option of proceeding by either affidavit or evidentiary hearing.

Motions for severance (Chapter 18), motions for discovery (§ 9.07 *supra*), and motions to dismiss for prosecutorial misconduct can be either evidentiary or non-evidentiary, depending upon the specific issues and facts that they raise. Thus, for example, a motion to sever co-respondents based upon a co-respondent's statement implicating the respondent (see § 18.10(a) *infra*) would ordinarily go to a non-evidentiary hearing in which the judge reviews the statement and hears arguments on its legal implications, but a motion to sever based upon the defense's intention to present the testimony of the co-respondent in the defense case might necessitate an

evidentiary hearing on the contents of the testimony. See § 18.10(b) *infra.* Most motions for discovery turn upon undisputed facts about the general nature of the materials that the prosecution is unwilling to turn over to the defense; but a particular discovery motion could involve an evidentiary hearing on the question, for example, whether witnesses were unconstitutionally instructed by the prosecutor or police officers to refuse to speak with defense counsel and his or her investigator. See § 8.13 *supra.* Motions to dismiss for prosecutorial misconduct might turn upon facts already known to the judge — such as acts of misconduct that occurred in proceedings at which the judge was presiding, or acts reflected in the transcript of a prior proceeding — or they might, in certain cases, require direct and cross-examination of the prosecutor and witnesses to the prosecutor's behavior outside the courtroom.

Motions for a change of venue (§§ 20.01-20.03 *infra*) and motions challenging jury selection procedures (§ 21.03 *infra*) may turn upon case-specific facts, such as the nature and extent of prejudicial pretrial publicity in the case, or more general facts, such as the county's method of selecting the venire. Some jurisdictions require that the facts supporting such motions be established through affidavits; other jurisdictions require that the facts be presented at an evidentiary hearing; still others permit the defense to choose between these two options. The factors that counsel should consider in making the choice are described in § 7.07 *supra.*

§ 16.02 SCOPE OF THE CHAPTER

The following sections deal solely with non-evidentiary motions hearings, describing the procedures followed in such hearings and suggesting approaches to use in arguing motions. Techniques for conducting evidentiary hearings on motions to suppress are covered in Chapter 22; motions to dismiss for social reasons are covered separately in Chapter 19.

Part B. Non-Evidentiary Motions Arguments

§ 16.03 PROCEDURE

Usually, defense counsel, as the proponent of the motion, argues first, and the prosecutor responds thereafter. Depending upon local practice and the preferences of the judge presiding over the motions hearing, defense counsel may or may not be offered the opportunity to reply to the prosecutor's arguments. Counsel should always request leave to reply if s/he has something useful to say, whether or not rebuttal argument is standard operating procedure in this court. When practicing in courts that are less formal, where the question of who argues first is decided by which lawyer starts talking first, defense counsel should usually seize the initiative and speak first. The attorney who argues first has the invaluable opportunity to acquaint the judge with the facts and issues in the light most favorable to the presenter — a matter of particular importance inasmuch as the judge may very well not have read the motion. To some extent the first speaker can also control the order in which issues are taken up, addressing first the issues on which s/he is strongest.

Most judges conduct motions arguments like appellate arguments, feeling free to interrupt and pepper attorneys with factual and legal questions. Techniques for responding to judges' questions are described in § 16.07 *infra.*

Although counsel has the right to object to statements made by the prosecutor, many judges insist that counsel refrain from interrupting his or her opponent and instead make all objections at the conclusion of the prosecutor's argument. If this is the local custom, counsel should conform to it *unless:* (i) appellate caselaw suggests that "contemporaneous objection" rules require counsel to object at the moment when the prosecutor makes the improper statement; or (ii) the prosecutor is reciting information that is both very likely to be ruled inadmissible and strongly prejudicial to the respondent, in which case defense counsel should object and insist that the judge prohibit the prosecutor from continuing to relate the prejudicial information.

§ 16.04 GUARDING AGAINST UNDUE DISCLOSURES OF DEFENSE TRIAL EVIDENCE AND TRIAL STRATEGY

Whenever s/he is arguing pretrial motions or conducting any type of pretrial hearing, counsel must carefully guard against revealing to the prosecutor aspects of the defense trial evidence or strategy. This is particularly important with respect to matters that involve weaknesses of prosecution witnesses (such as their inconsistent statements to defense counsel's investigator) when the prosecutor does not already know about these matters, since their disclosure could lead to the prosecutor's coaching the witness to avoid defense traps.

Usually, the objective of avoiding revelation of defense secrets will not conflict with the objective of winning a motions argument. Most non-evidentiary motions focus upon aspects of the legal history of the case (such as the length of delays, as pertinent to speedy trial issues; the existence and nature of prior proceedings, as pertinent to double jeopardy issues; and so forth) that do not implicate the facts of the offense and accordingly do not call for any discussion of defense evidence or the defense theory of the case. However, some motions may be problematic. For example, when counsel is litigating a motion for severance of respondents on the ground of conflicting defenses, see § 18.10(c) *infra,* the judge may well reject counsel's attempt to describe his or her projected defense in broad, ambiguous terms and may demand of counsel a detailed description of the defense that counsel will offer at trial as a predicate for the judge's assessment of whether that defense so severely conflicts with the co-respondent's as to require a severance. Or a motion to dismiss for social reasons (see Chapter 19) might well be strengthened by a disclosure of facts that show the respondent to be innocent or, at worst, a passive follower in a crime committed by an older and more aggressive youth or adult.

Whenever confronted with the dilemma of whether to reveal defense secrets whose disclosure might win the motion for the defense, counsel must weigh the chances of winning the motion with and without the revelation; whether winning the motion will terminate the case, and, if not, the degree to which winning the motion would improve the defense's chances of winning the trial; and the degree to which revealing the defense evidence or trial strategy would impair

the defense's chances of winning the trial. In unusual cases in which the revelation is extremely important to winning the motion, extremely damaging to the defense's chances of winning the trial, and arguably protected by the respondent's Fifth Amendment Privilege Against Self-Incrimination (see § 9.12 *supra*), counsel should consider asking leave to present certain facts or arguments to the court *ex parte,* either in a sealed affidavit or in chambers. Judges will be resistant to this suggestion because it is untraditional and deprives the prosecutor, to some extent, of the right of reply. But proceedings conducted partly in the open and partly *ex parte* are becoming customary in a number of contexts (such as defense motions for state-paid expert assistance (see § 11.03(b) *supra*); prosecution submission of prior statements of prosecution witnesses to the court for screening before their production to the defense at trial (see § 27.12(a) *infra*); and prosecution submission of electronic surveillance logs to the court for screening and redaction before their production to the defense), and it is therefore possible that the judge will consider a similar procedure in the present context. In theory, the same request could be made in all cases in which the information that counsel seeks to withhold from the prosecutor is defense "work product" (see § 9.13 *supra*). But this is a very dangerous position for the defense to urge in most jurisdictions, because "work product" protection is usually extended to the prosecutor as well as defense counsel, and the defense has much to lose from any general legitimation of *ex parte* proceedings as a means of limiting pretrial disclosure in a system in which the prosecutor has every investigative advantage over the defense. See Chapter 9.

§ 16.05 THE EXTENT TO WHICH COUNSEL SHOULD ORALLY RECITE FACTS AND LAW ALREADY SET FORTH IN THE MOTION

In arguing a motion, counsel cannot assume that the judge has read the motions papers or any other pleadings in the case. Many trial judges are so overloaded with cases that they are unable to find the time to read motions papers. Or they are prevented from reading particular motions papers because the administrative processes of the court have caused the motion to sit unread in the clerk's office, awaiting filing in the court file. Nor can counsel assume that the judge will supplement what s/he hears in the oral argument by reading the motion and other pleadings after the argument. Many trial judges rule on motions from the bench at the conclusion of the attorneys' arguments.

Accordingly, unless counsel knows for certain that the judge has read the motion (as when the judge refers to a particular passage in the motion), counsel will need to recite in the oral argument any facts and law that are essential to the defense position. On the other hand, counsel cannot take the risk of offending the judge by stating or even implying counsel's assumption that the judge has not read the motion. For this reason counsel should avoid giving the impression that s/he is reiterating information and legal analysis contained in the motion. Also, as explained in § 16.06 *infra,* counsel typically wants to avoid engaging in detailed legal analysis in the oral argument.

Usually, the best way of reconciling all of these concerns is to touch upon each of the essential facts and legal points, while mentioning the pages of the motion on which important

legal points are more extensively developed and supported with citations. As long as counsel couches the references to the body of the motion as if they were shorthand substitutes for lengthier argument rather than directions to the judge to read a motion s/he has never looked at, this approach will be inoffensive. It may also have the salutary effect of inducing the judge to read at least those portions of the motion prior to ruling, if s/he has not done so already.

§ 16.06 THE INADVISABILITY OF STRING-CITING CASES OR ANALYZING COURT DECISIONS AT LENGTH

Counsel should almost never recite strings of citations to court decisions or engage in complex legal analysis in oral argument. Such matters are extremely tedious, and counsel's dwelling on them may lead the judge either to tune out or to cut counsel's argument short. Moreover, because these are not matters that the judge is going to remember (and few judges take notes during attorneys' arguments), spending time on these matters is unproductive and wastes the opportunity to use the argument to make more memorable and persuasive points.

As a general rule of thumb, counsel should treat the law bearing on the motion merely as a legal framework for organizing the key points to be made about the case at hand. S/he should state the legal framework simply and briefly and then devote most of the argument to fitting facts into that framework. Counsel should focus particularly on things that: (i) are dramatic (speaking to the heart of the case and making the judge *want* to rule in the respondent's favor); (ii) are factually persuasive; and (iii) give the judge some overall feeling about the case, enabling him or her to see the forest rather than the trees.

In those cases in which it is necessary to depend upon detailed analysis of prior caselaw, counsel should ordinarily set forth the analysis in the written motion and then direct the judge's attention to the relevant pages of the motion instead of orally reiterating the analysis. See § 16.05 *supra;* see also § 22.06 *infra.* If counsel refrained from setting forth a detailed legal analysis in the written motion for strategic reasons (see § 7.08 *supra*), s/he can sometimes offer to brief the issues in a supplementary memorandum of points and authorities. But this is more commonly done in argument at the close of an evidentiary motions hearing, particularly one in which extensive testimony has been taken. It is often impracticable in a non-evidentiary hearing, either because the judge intends to rule from the bench or because counsel simply has no good reason for failing to brief the issues fully beforehand. When, in these or other situations, counsel's only option is to analyze the caselaw orally, s/he should bring to the argument copies of any court decisions that were not amply covered in the written motion, and, upon reaching the points in the argument that depend on those decisions, offer to hand copies of the decisions to the judge and prosecutor rather than citing and quoting at length. Counsel can then alleviate much of the tedium and confusion of oral legal analysis by directing the judge's attention to relevant passages of the opinion (which should be highlighted, if they are short), essentially using the opinion as a prop in counsel's argument.

§ 16.07 THE IMPORTANCE OF BEING RESPONSIVE TO THE JUDGE'S QUESTIONS

The key to arguing motions is to be responsive to the judge's questions and address his or her concerns as thoroughly as possible. Since most judges rule on motions from the bench, they depend upon counsel's answers to their questions to resolve the issues that the judge finds most troublesome. Accordingly, the judge's questions will usually pinpoint the areas in which the judge most sorely needs to be persuaded in order to rule in the respondent's favor.

Counsel cannot afford to give short shrift even to questions that seem irrelevant or uninformed. Anything that is troubling the decisionmaker is, by definition, relevant. And questions that betray the judge's unfamiliarity with the issues or caselaw show a need to educate the judge through the answer to the question.

In preparing for oral argument, counsel should attempt to anticipate the questions that the judge is likely to ask and should develop persuasive answers. Since trial judges are generally concerned with staying well within established rules of law, counsel should be prepared to demonstrate that the rule counsel is advocating is wholly consistent with the controlling caselaw, and s/he should bring copies of the cases to the hearing to use as props in the argument if necessary See § 16.06 *supra.* Since trial judges are usually disinclined to adopt rules of great breadth and scope (either because they are cautious about binding themselves in the future or because they fear that the adoption of sweeping new rules invites appellate reversal), counsel should be prepared to show the limits of the rule s/he is advocating, preferably by distinctions that limit the rule to the unique facts of counsel's own case.

When the judge asks questions of counsel's opponent, counsel should listen to the questions as carefully as if they were directed to counsel himself or herself. As previously noted, the judge's questions usually identify the concerns that are of paramount importance to the judge. Accordingly, counsel cannot afford to allow the prosecutor to be the only party to address the matter. During counsel's reply to the prosecutor, counsel should say that s/he would like to state the respondent's position on the question that the judge addressed to the prosecutor, and then do so. If local practice does not normally afford counsel the opportunity to reply to the prosecutor, but counsel has a very persuasive answer to a question directed at the prosecutor, counsel should ask leave to state the position of the defense in response to the prosecutor's answer to the judge's question.

Chapter 17

Motions To Dismiss the Charging Paper

§ 17.01 TYPES OF CHALLENGES TO THE CHARGING PAPER; THE STAGES AT WHICH THESE CHALLENGES CAN AND SHOULD BE RAISED

There are a variety of grounds for challenging the sufficiency of a charging paper or some of its counts by a motion to dismiss the Petition or those counts. They include:

1. Failure of the Petition to allege facts constituting an offense. (See § 17.03 *infra*.)
2. Lack of jurisdiction to bring the case in the juvenile court, in that the respondent is too old to be prosecuted as a juvenile or too young to be prosecuted at all. (See § 17.04 *infra*.)
3. Failure to allege facts establishing venue. (See § 17.05 *infra*.)
4. Technical defects. (See § 17.06 *infra*.)
5. Expiration of the statute of limitations for the offense. (See § 17.07 *infra*.)
6. Double jeopardy. (See § 17.08 *infra*.)
7. Misjoinder of counts or of respondents. (See Chapter 18.)

In many jurisdictions, statutes or court rules require that motions challenging the sufficiency of the charging paper be made in writing, within a specified period of time (usually 15 or 30 days after arraignment). See § 7.05 *supra.* If the challenge is to the jurisdiction of the court, that challenge may be made at any time.

Even when local procedures require that motions be in writing, a challenge to the sufficiency of the charging paper can be made orally at a detention hearing to prevent detention on an invalid Petition. See § 4.23 *supra.*

§ 17.02 TERMINOLOGY

Under the specialized vocabulary employed in juvenile courts in most jurisdictions, juveniles cannot be "charged" with "crimes" but can merely be "alleged" to have "committed acts, which if committed by an adult, would constitute crimes" and which render the child "delinquent." Because this terminology is extremely unwieldy, the present chapter will use the words "charges" and "crimes" in discussing the pleading requirements governing Petitions and the sufficiency of their allegations. When practicing in jurisdictions that adhere rigidly to juvenile court parlance, counsel should, of course, substitute the appropriate juvenile court terms.

§ 17.03 FAILURE OF THE CHARGING PAPER TO ALLEGE FACTS CONSTITUTING A CRIME

A Petition (or counts thereof) can be fatally defective by reason of several types of

insufficiency of allegations. These insufficiencies are often confusingly grouped under the single rubric "failure to charge a public offense."

§ 17.03(a) Failure To Charge Acts That Are Criminal in Nature

The allegations may state fully and clearly what specific acts the respondent is charged with doing, but these acts may be no crime (or, as juvenile parlance would have it, may not be acts "which, if committed by an adult, would constitute a crime"). For example, a respondent may be charged under a statute penalizing one who "resists an officer in the execution of his [or her] duty," and the Petition may allege that the respondent did "run away and refuse to stop when called upon to stop by" the officer. A motion to dismiss here tests the prosecution's legal theory. Specifically, it raises the issue of law whether one who runs away from a police officer thereby "resists" the officer within the meaning of the statute.

Counsel should always check the caselaw to determine whether the courts have previously dealt with the kinds of acts with which the respondent is charged or equivalent acts. Frequently, prosecutors will charge respondents with acts that have previously been deemed insufficient to constitute a crime because the prosecutor is not aware of the prior decision or because the prior decision, while persuasive, is not controlling.

If there is no prior caselaw on the issue, then counsel's motion should be devoted primarily to a construction of the statute. Counsel should examine the legislative history of the applicable statute for indications that the legislature (1) considered various factual situations to which the statute was intended to apply and did not mean it to reach facts like those in the respondent's case or (2) enacted the statute to achieve certain goals of policy that do not call for an application of the statute to acts such as those committed by the respondent.

§ 17.03(b) Failure To Allege Facts That Make Out Every Element of the Charged Offense

A charging paper may quite simply have something missing. The conduct with which it charges the respondent is perfectly consistent with criminality, but some ingredient of the crime is omitted. Thus, for example, a Petition alleging that the respondent committed burglary by unlawfully entering the complainant's dwelling is legally insufficient because it omits one element of burglary: "intent to commit a crime therein." The allegation of unlawful entry might support a charge of criminal trespass, but it is insufficient to support the charged offense of burglary.

Local practice varies enormously with regard to the significance that an omission must have in order to be fatal. Most jurisdictions require allegations of: (1) the name of the respondent, (2) a description or characterization of the respondent's conduct that asserts (in factual or conclusory terms) every legal element of the offense charged (including acts done, any circumstances surrounding them that are necessary to make them unlawful, and the requisite

mental state or *mens rea*), (3) the place of the crime (disclosing venue in the court, see § 17.05 *infra*), and (4) the approximate date of the crime (within the statute of limitations, see § 17.07 *infra*). Beyond these rudiments, the States differ (and often differ from offense to offense) regarding what must be charged. Some jurisdictions require the name of the victim and great particularization of the means or instrumentalities of the offense. Others disregard these matters. Some disregard even the rudiments just described. Conspicuous among the latter are States that provide statutory "short forms," declaring that a charging paper shall be sufficient for the crime of *x* if it alleges: "On [date], respondent A committed the crime of *x* against complainant B within the jurisdiction of this Court." Local practice must be consulted in the matter.

§ 17.03(c) Lack of Specificity

A charging paper may be wholly unspecific and conclusory. It may duplicate the language of the criminal statute (A "did commit a lewd act") without giving the slightest idea what the respondent *did.* Again, the States vary considerably in the factual specificity required. Many permit allegations in conclusory statutory language under all but the vaguest statutes. *Cf. Michigan v. Doran,* 439 U.S. 282, 290 (1978) (dictum). However, there are limits. A formulation of the rule found in the caselaw of numerous jurisdictions is that: "It is generally sufficient that [a charging paper] . . . set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'. . . 'Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.' . . ." *Hamling v. United States,* 418 U.S. 87, 117-18 (1974); *see also United States v. Resendiz-Ponce*, 549 U.S. 102, 108-10 (2007); *United States v. Bailey,* 444 U.S. 394, 414 (1980).

Conclusory pleading has two particular vices. First, it impairs the respondent's rights to be "'fairly inform[ed] . . . of the charge against which he must defend,'" *United States v. Resendiz-Ponce*, 549 U.S. at 108 (quoting *Hamling v. United States*, 418 U.S. at 117); see § 9.09(b)(2) *supra,* and to have '"the record . . . sho[w] with accuracy to what extent he may plead a former acquittal or conviction [that is, double jeopardy, see § 17.08 *infra*]'" in the event of a subsequent prosecution. *Sanabria v. United States,* 437 U.S. 54, 66 (1978). Second, it deprives the respondent of any opportunity to test the prosecution's legal theory without contesting its facts — an opportunity traditionally provided by the motion to dismiss and by its progenitor, the common-law demurrer. See § 17.03(a) *supra.* Although some judges seem to think that a vague charging paper can be cured by a bill of particulars (see § 9.07(a) *supra*), the bill actually remedies only the first of these two vices. It does not touch the second because of the general rule that a demurrer or motion to dismiss will not lie to a bill of particulars. Therefore, attacks upon even venerable forms of conclusory charging papers can be forcefully argued on the ground that these preclude the court from performing its important function of testing the legal sufficiency of the prosecutor's case. *See, e.g., Russell v. United States,* 369 U.S. 749 (1962).

§ 17.04 JURISDICTIONAL DEFECTS: MAXIMUM AGE AND MINIMUM AGE REQUIREMENTS FOR JUVENILE COURT PROSECUTIONS

§ 17.04(a) Maximum Age

In every State the juvenile code defines the jurisdiction of the juvenile court by establishing a maximum age that marks the limit of eligibility for prosecution as a delinquent. The vast majority of States define 18 as the maximum age, although some jurisdictions have opted for 17 or 16. Many States provide that children within a certain age range (for example, ages 16 to 18) who commit certain crimes are eligible for prosecution in either the juvenile or adult court, thereby giving the two sets of courts concurrent jurisdiction over these children. See Chapter 13.

A key issue is whether juvenile court jurisdiction hinges on the respondent's age at the time of the filing of the Petition or at the time of the crime. Most States treat the respondent's age at the time of the crime as decisive, permitting juvenile court prosecution of a child who is older than the statutory maximum as long as s/he was under the maximum at the time of the crime. *See, e.g.,* CAL. WELF. & INST. CODE §§ 602, 604(a) (2014); COLO. REV. STAT. ANN. § 19-1-103(8)(a) (2014); N.Y. FAM. CT. ACT § 302.1(2) (2014). A few States turn eligibility for juvenile court prosecution on the child's age at the time the proceedings commence, *see, e.g.,* OR. REV. STAT. § 419C.005(1) (2014); *State v. Salavea*, 151 Wash. 2d 133, 141-42, 86 P.3d 125, 129 (2004) (under applicable statute, juvenile court jurisdiction turns on the "age of the defendant at the time of the proceedings, regardless of age at commission of the crime"), and another handful of States extend jurisdiction to children on the basis of their age at the time of the commission of the crime, provided that the child does not exceed another designated maximum age by the time the proceedings commence. *See, e.g.,* N.H. REV. STAT. ANN. § 169-B:4(I) (2014) (under 18 at the time of the crime, and under 19 at the time the petition is filed); PA. CONS. STAT. ANN. tit. 42, § 6302 (2014) (under 18 at the time of the crime and under 21 at the time the petition is filed); TEX. FAM. CODE ANN. § 51.02(2)(B) (2014) (under 17 at the time of the crime and under 18 at the time the petition is filed). In States that determine juvenile court jurisdiction by reference to the child's age at the time the proceedings commence, the courts have ruled that the juvenile court retains jurisdiction (or that the adult court lacks jurisdiction) when the prosecutor's or police officers' delay in commencing proceedings was motivated by the purpose of preventing the child from being eligible for juvenile court treatment. *See Miller v. Quatsoe,* 348 F. Supp. 764 (E.D. Wis. 1972), discussed in § 13.04 *supra; State v. Scurlock,* 286 Or. 277, 593 P.2d 1159 (1979); *State v. Hodges*, 28 Wash. App. 902, 904-05, 626 P.2d 1025, 1026 (1981); *State v. Becker,* 74 Wis. 2d 675, 247 N.W.2d 495 (1976).

Counsel must weigh considerations carefully and must consult with the client before challenging the jurisdiction of the juvenile court on the ground that the respondent is above the maximum age for juvenile court prosecution. By definition, if s/he is above this age, s/he is subject to prosecution as an adult. Accordingly, the net result of counsel's successful litigation of the motion to dismiss on jurisdictional grounds will usually be the dismissal of the juvenile court

Petition and the subsequent filing of a charging paper in adult criminal court. (While some offenses may be too minor for the adult court prosecutor to bother with, and some cases may fall between the cracks, counsel cannot accurately predict either of these contingencies.) Section 13.02 *supra* describes the factors that counsel should consider and about which counsel should advise the client in deciding whether to opt for prosecution in juvenile court or adult court.

§ 17.04(b) Minimum Age and the Infancy Defense

In a handful of States the statute defining the jurisdiction of the juvenile court establishes a minimum age, below which children are not subject to juvenile court prosecution and thus cannot be prosecuted in any court. *See* MASS. GEN. LAWS ANN. ch. 119, § 52 (2014) (age 7); MISS. CODE ANN. § 43-21-105(i) (2014) (age 10); N.Y. FAM. CT. ACT § 301.2(1) (2014) (age 7); TEX. FAM. CODE ANN. § 51.02(2)(A) (2014) (age 10); VT. STAT. ANN. tit. 33, § 5102(2)(C) (2014) (age 10). *See also In the Matter of the Welfare of S.A.C.*, 529 N.W.2d 517, 519 (Minn. App. 1995) (although the Juvenile Court Act's delinquency provisions do not establish a minimum age, the court concludes that the CHIPS ("child in need of protection or services") statute, which excludes children below the age of 10 from CHIPS jurisdiction, evidences a legislative "intent to take these children out of the delinquency definition" as well).

In some other States, in which the juvenile court statute is silent on the issue of minimum age, the courts recognize the common-law doctrine of infancy as applying to delinquency prosecutions. At common law, children under the age of seven were irrebuttably presumed to be incapable of forming criminal intent and therefore could not be culpable of an offense; children between the ages of seven and fourteen were subject to a rebuttable presumption of incapacity, which precluded prosecution unless the state proved that the child knew the wrongfulness of his or her act. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 23-24 (1769). *See also* Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687, 707-14 (2006). Some state courts have construed their juvenile court statutes in accordance with this common-law doctrine to deem children below a certain age exempt from prosecution as juveniles and to establish a rebuttable presumption that minors above that age and within a specified age range are incapable of committing a crime. *See, e.g., In re William A.*, 313 Md. 690, 693, 698-99, 548 A.2d 130, 131, 134 (1988) (the "common law defense of infancy" — "'under which an individual below the age of seven years cannot be found guilty of committing a crime'" and under which "'there is a rebuttable presumption'" that children "'between the ages of seven and fourteen . . . [are] incapable of committing a crime'" — "applies in juvenile delinquency adjudicatory hearings" because "[t]he defense is a firmly established principle of our common law; the General Assembly is undoubtedly cognizant of it, but the Legislature has never repealed it, nor modified it, nor stated that it is inapplicable to juvenile delinquency proceedings," and "[r]epeals by implication are, of course, disfavored"); *State v. Q.D.,* 102 Wash. 2d 19, 22-24, 685 P.2d 557, 559-60 (1984) (construing the juvenile court statute in light of the common-law doctrine and the adult Penal Code to bar prosecution of children below the age of eight and to establish a rebuttable presumption that children between 8 and 12 years of age are incapable of committing a crime); *State v. K.R.L.*, 67 Wash. App. 721,

724, 726, 840 P.2d 210, 212-13 (1992) (8-year-old was exempt from prosecution as a delinquent because the state failed to satisfy its "significant burden" of presenting "'clear and convincing'" evidence to rebut the presumption of incapacity to commit a crime). Other courts have relied upon the common-law doctrine in construing their statutes to bar prosecution of young children who lack the capacity to appreciate the wrongfulness of their actions or to form the mental element of the offense charged. *See, e.g., In re Gladys R.,* 1 Cal. 3d 855, 862-67, 464 P.2d 127, 132-36, 83 Cal. Rptr. 671, 676-80 (1970) (construing the juvenile statute to prohibit prosecution of children below the age of 14 who are unable to understand the wrongfulness of their conduct); *State in the Interest of C.P.,* 212 N.J. Super. 222, 229, 514 A.2d 850, 854 (1986) (construing the juvenile code to prohibit prosecution of children who are incapable of forming the *mens rea* of the offense charged or who are incapable of understanding the significance of the trial or aiding in their own defense); *In the Matter of Robert M.,* 110 Misc. 2d 113, 116, 441 N.Y.S.2d 860, 863 (N.Y. Fam. Ct. 1981) (construing the juvenile statute in light of the common-law and the social scientific literature to prohibit prosecution of children whose "immaturity . . . negatives the requisite specific intent" to constitute the offense charged). However, some courts wholly reject the infancy doctrine as a defense in juvenile court, reasoning that the doctrine was intended solely as a safeguard against exposure of children to the harshness of the criminal system and therefore is inapplicable to delinquency proceedings because these supposedly focus on rehabilitation rather than punishment. *See, e.g.*, *In re Tyvonne*, 211 Conn. 151, 161, 558 A.2d 661, 666 (1989); *State v. D.H.,* 340 So. 2d 1163 (Fla. 1976); *In the Interest of G.T.*, 409 Pa. Super. 15, 25, 597 A.2d 638, 643 (1991); *In re Michael,* 423 A.2d 1180 (R.I. 1981).

As explained in § 17.04(a) *supra,* most jurisdictions look to the age of the child at the time of the crime for jurisdictional purposes, but some jurisdictions look to the age of the child at the time of the filing of the Petition. Counsel can argue persuasively that, at least with respect to minimum age requirements, the only permissible consideration is age at the time of the crime, and that children who were ineligible for prosecution at the time of the crime cannot be prosecuted later. This follows from the nature of the common-law infancy doctrine: Its presumption of incapacity to form the requisite mental state for criminality was concerned with whether or not the child's age — and mental state as shaped by chronological age — at the time of the crime rendered him or her culpable for his or her actions.

In States that have a statutory or common-law minimum age requirement, counsel for an under-age respondent can raise the jurisdictional issue either by a pretrial motion to dismiss or at trial. If the statute or caselaw establish an absolute bar to prosecution of the child, there is no risk involved in raising the issue by pretrial motion, and that procedure is in the child's interest because it terminates the case quickly. But if the applicable statutory or common-law standard permits the prosecutor to prove eligibility for prosecution by showing that the respondent is capable of forming a particular mental state (the *mens rea* of the crime, an appreciation of the wrongfulness of the act, an understanding of the proceedings, an ability to assist in his or her own defense), counsel is well advised to raise the jurisdictional defense for the first time at trial, so that a prosecutor who has not spotted the issue will fail to gather the psychiatric and other evidence s/he needs to satisfy the prosecution's burden.

§ 17.05 DISMISSAL OF THE CHARGING PAPER FOR FAILURE TO ESTABLISH VENUE

A charging paper is subject to attack on venue grounds if: (a) the charging paper fails to allege facts establishing venue in the court where it is filed; or (b) the court in which the charging paper is filed does not, in fact, have venue over the case under the applicable statutory and constitutional venue rules. In most States either of these defects calls for the dismissal of the Petition; elsewhere, the cure for improper venue is a transfer to the court in which venue lies. The pleading component of venue — that is, the requirement that venue be stated in the charging paper — can ordinarily be satisfied by allegations in terms of "X street" or "Y township." The court will judicially notice that X street or Y township is within the geographical jurisdiction of the court, if it is.

The statutory and constitutional rules governing the venue of trial and disposition in juvenile cases are discussed in §§ 20.01-20.03 *infra,* along with the procedures for challenging and changing the current venue.

§ 17.06 TECHNICAL DEFECTS IN THE CHARGING PAPER

Charging papers may be assailed by motion on a host of technical grounds, some relating to the nature of the charging language ("duplicity," vagueness, noncompliance with prescribed statutory forms), others relating to strictly formal matters (failure of the Petition to carry the signature of the prosecutor as required by law, failure of the Petition to list the names of the witnesses it intends to present at trial (see § 9.07(b) *supra*), untimeliness of a motion by the prosecutor to amend the Petition, and so forth. *See, e.g.*, *Shaw v. Wilson*, 721 F.3d 908 (7th Cir. 2013). Some of these defects are remediable and will be ordered remedied without the dismissal, re-drawing, and re-filing of the Petition. Others are grounds for dismissal. Local practice must be consulted.

§ 17.07 STATUTE OF LIMITATIONS

Statutes of limitations of prosecutions prescribe the permissible period of time within which a charging paper may be filed after an event, asserting liability based on that event.

In many jurisdictions a charging paper is subject to a motion to dismiss if it either (a) does not allege the date of the offense charged with reasonable specificity ("on or about" will do) or (b) alleges a date that is beyond the period of limitations. Such a motion may, and usually must, be made before trial, within the deadline for pretrial motions (see § 7.05 *supra*). In other jurisdictions the respondent must go to trial and raise the defense of the statute of limitations by a demurrer to the evidence or a motion for acquittal at the close of the prosecution's case.

To find the statute of limitations that applies to a delinquency offense, counsel must check both the criminal statute establishing the period of limitations for the particular offense and

the juvenile code, which may set an earlier period of limitation based upon the child's attainment of the age of majority. *See, e.g.,* N.Y. FAM. CT. ACT § 302.2 (2014) ("juvenile delinquency proceeding must be commenced within the period of limitation prescribed in . . . the criminal procedure law or, unless the alleged act is a designated felony . . ., commenced before the respondent's eighteenth birthday, whichever occurs earlier"); *In re Luis R.*, 2013 IL App. 2d 120393, 992 N.E.2d 591, 592, 372 Ill. Dec. 749, 750 (2013) (juvenile court lacked jurisdiction even though the respondent "was under the age of 17 when he allegedly committed the offenses" because "he was over the age of 21 when the petition was filed").

§ 17.08 DOUBLE JEOPARDY

§ 17.08(a) Introduction: The General Rules

Guarantees against being "twice put in jeopardy" may be found in the Fifth Amendment to the federal Constitution and in most state constitutions. In *Benton v. Maryland,* 395 U.S. 784 (1969), the Supreme Court held that the Fifth Amendment guarantee was "incorporated" in the Due Process Clause of the Fourteenth Amendment and thereby made binding upon state criminal trials. In *Breed v. Jones,* 421 U.S. 519 (1975), the Court ruled that double jeopardy guarantees are fully applicable to juvenile delinquency proceedings.

Federal and state constitutional double jeopardy guarantees establish the general rule that a respondent may not be reprosecuted for the "same offense" if the first trial ended in acquittal or conviction, or if the first trial passed the stage at which jeopardy "attaches" and then ended in a mistrial declared without some "manifest necessity" or the respondent's assent. Each element of this general rule, however, has been qualified by complex definitions and exceptions. Section 17.08(b) *infra* defines the concepts of "attachment of jeopardy" and "same offense." Sections 17.08(c), (d), and (e) examine, respectively, the double jeopardy doctrines governing reprosecution when there has been an acquittal, conviction, or mistrial.

Sections 17.08(f), (g), and (h) then discuss other double jeopardy doctrines. Section 17.08(f) describes the collateral estoppel doctrine that applies to retrials. Section 17.08(g) explains the "dual sovereignty" exception to double jeopardy guarantees. Section 17.08(h) examines the double jeopardy implications of a juvenile court scheme in which evidence is heard first by a referee and the referee's findings are thereafter reviewed by a juvenile court judge.

§ 17.08(b) Definitions

§ 17.08(b)(1) "Attachment of Jeopardy"

Double jeopardy protections come into play only after a first trial has passed the stage at which jeopardy "attaches." In a bench trial jeopardy attaches when the first witness is sworn and the presentation of evidence commences. *Crist v. Bretz,* 437 U.S. 28, 37 n.15 (1978); *Serfass v. United States,* 420 U.S. 377, 388 (1975). In a jury trial jeopardy attaches when the jury is sworn.

Crist v. Bretz, 437 U.S. at 35-38; *Martinez v. Illinois*, 134 S. Ct. 2070, 2074-75 (2014) (per curiam).

§ 17.08(b)(2) "Same Offense"

Double jeopardy guarantees guard against a person "be[ing] subject for the *same offence* to be[ing] twice put in jeopardy of life or limb." U.S. CONST, amend. V (emphasis added). Thus a threshold issue in double jeopardy analysis is whether the offense for which the respondent is being prosecuted is the "same offense" for which s/he was previously tried. This issue is obviously clear-cut when the charge leveled against the respondent is precisely the same charge as in the first trial. More difficult issues emerge, however, when the respondent's conduct violates two separate statutory provisions, and s/he is prosecuted first for one statutory violation and then the other.

"Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature . . . intended that each violation be a separate offense. If [the legislature] . . . intended that there be only one offense — that is, a [respondent] . . . could be convicted under either statutory provision for a single act, but not under both — there would be no statutory authorization for a subsequent prosecution after conviction [or acquittal] of one of the two provisions, and that would end the double jeopardy analysis." *Garrett v. United States,* 471 U.S. 773, 778 (1985).

Techniques for divining legislative intent in the common situation in which it is unclear differ considerably among the jurisdictions. In construing federal legislation, the Supreme Court has employed the so-called *Blockburger* test, deriving from *Blockburger v. United States,* 284 U.S. 299 (1932), which "emphasizes the elements of the two crimes [and asks whether] . . . 'each requires proof of a fact that the other does not . . . .'" *Brown v. Ohio,* 432 U.S. 161, 166 (1977). *See, e.g.*, *Rutledge v. United States*, 517 U.S. 292, 297 (1996); *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Ball v. United States,* 470 U.S. 856, 861 (1985). However, the Court has cautioned that the *"Blockburger* rule[,] . . . [although] a useful canon of statutory construction," is not "a conclusive determinant of legislative intent" and "the *Blockburger* presumption must . . . yield to a plainly expressed contrary view on the part of [the legislature]." *Garrett v. United States,* 471 U.S. at 779. *See also Missouri v. Hunter,* 459 U.S. 359, 368 (1983); *Wood v. Milyard*, 721 F.3d 1190, 1195 (10th Cir. 2013).

In interpreting their state statutes, some state courts employ the *Blockburger* test. Other courts use an "identity of proof" test, which asks whether the proof advanced by the prosecution on one charge would support conviction on the other. Still others employ the "same transaction" or compulsory-joinder approach articulated by Justice Brennan, concurring, in *Ashe v. Swenson,* 397 U.S. 436, 450-60 (1970); *see* the authorities collected in *Brooks v. Oklahoma,* 456 U.S. 999, 1000 (1982) (opinion of Justice Brennan, dissenting from denial of *certiorari*).

§ 17.08(c) Reprosecution After An Acquittal

Double jeopardy guarantees clearly and unequivocally bar reprosecution for the same offense after an individual has been acquitted. *United States v. Martin Linen Supply Co.,* 430 U.S. 564 (1977); *see, e.g., Ball v. United States,* 163 U.S. 662, 671 (1896); *United States v. Scott,* 437 U.S. 82, 91 (1978); *Bullington v. Missouri,* 451 U.S. 430, 437-38, 445 (1981), and cases cited; *Yeager v. United States*, 557 U.S. 110, 117-20, 122-23 (2009). *Cf. Blueford v. Arkansas*, 132 S. Ct. 2044, 2050-52 (2012). "A trial court's actions constitute 'an acquittal on the merits when "the ruling of the judge . . . represents a resolution [in defendant's favor] . . . of some or all of the factual elements of the offenses charged."' . . . In determining whether a trial court's ruling represents a resolution in the defendant's favor of some or all of the factual elements of the offense charged, we consider both the form and the substance of the trial court's ruling. . . . A finding of insufficient evidence to convict amounts to an acquittal on the merits because such a finding involves a factual determination about the defendant's guilt or innocence." *State v. Sahr*, 812 N.W.2d 83, 90 (Minn. 2012) (reviewing relevant decisions of the U.S. Supreme Court and applying them to bar reprosecution after a trial judge has dismissed a charging paper on the basis of the prosecution's "concession that it lacked sufficient evidence to prove an essential element" of the offense initially charged (*id*.) and has denied the prosecution leave to amend that charge by adding a count alleging a lesser-included crime (*id*. at 87)). *See also, e.g.*, *Martinez v. Illinois*, 134 S. Ct. 2070, 2071, 2076 (2014) (per curiam) (trial judge's grant of defense counsel's motion for "a directed not-guilty verdict" when the State "declined to present any evidence" and instead moved for a continuance after the jury had been empaneled and sworn, "was an acquittal because the court 'acted on its view that the prosecution had failed to prove its case.' . . . And because Martinez was acquitted, the State cannot retry him."). *And see Evans v. Michigan*, 133 S. Ct. 1069, 1073, 1074-75 (2013) (trial judge's midtrial entry of a "directed verdict of acquittal" in a jury trial, based upon the judge's "view that the State had not provided sufficient evidence of a particular element of the offense" which "turn[ed] out" not to be "a required element at all," constituted "an acquittal for double jeopardy purposes" and barred a retrial notwithstanding the judge's error: "[A]n acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence, . . .; a mistaken understanding of what evidence would suffice to sustain a conviction, . . .; or a 'misconstruction of the statute' defining the requirements to convict, ... In all these circumstances, 'the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character.' . . . [O]ur cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense.").

Unlike jury trials, in which a verdict of "not guilty" obviously is an "acquittal" for purposes of double jeopardy, *Fong Foo v. United States,* 369 U.S. 141 (1962) (per curiam), there may be questions whether a dismissal in a bench trial constituted an acquittal so as to bar reprosecution. *See, e.g.*, *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). The rule (which also applies to ambiguous rulings terminating a jury trial) is that "'the trial judge's characterization of his own action cannot control the classification of the action.'" *United States v. Scott,* 437 U.S. at 96 (quoting *United States v. Jorn,* 400 U.S. 470, 478 n.7 (1971) (plurality opinion)). Instead, the

test is whether "'the ruling of the judge, whatever its label, actually represents a resolution [in the [respondent's] . . . favor], correct or not, of some or all of the factual elements of the offense charged.'" *United States v. Scott,* 437 U.S. at 97. *See, e.g., Sanabria v. United States,* 437 U.S. 54 (1978); *Martinez v. Illinois*, 134 S. Ct. at 2076. *See also In the Interest of M.H.P.*, 830 N.W.2d 216, 218-20 (N.D. 2013) (juvenile court judge's dismissal of a delinquency petition at disposition on the ground that M.H.P. was "not in need of treatment or rehabilitation" despite a finding at trial that he committed the charged act, functioned as an acquittal for double jeopardy purposes and "bars the State from appealing" because Nebraska's statutory definition of delinquency requires both a finding at trial that the child committed the charged act and a finding that the child is "in need of treatment or rehabilitation").

Although double jeopardy issues ordinarily arise when the government seeks to prosecute an individual after a first trial has concluded (either in a verdict or a mistrial), double jeopardy protections also may come into play if a trial judge grants a midtrial judgment of acquittal on one or more counts of the charging paper and is inclined to reconsider that ruling after the defense case has already commenced and the defense has begun presenting evidence. If the judge's ruling qualifies as a "judgment of acquittal" for double jeopardy purposes (under the test described in the preceding paragraph) and if state law does not expressly authorize judicial reconsideration of such a ruling (and — arguably — if, in addition, the judge does not reserve the right to reconsider or indicate that the ruling is not final), double jeopardy protections bar the trial judge from reconsidering the ruling. *Smith v. Massachusetts*, 543 U.S. 462, 473-74 (2005). *Compare Price v. Vincent*, 538 U.S. 634 (2003); *Schiro v. Farley*, 510 U.S. 222 (1994).

§ 17.08(d) Reprosecution After Conviction in the First Trial

Once convicted, a respondent may not be reprosecuted for the same offense. *E.g., Brown v. Ohio,* 432 U.S. 161 (1977); *Harris v. Oklahoma,* 433 U.S. 682 (1977) (per curiam). This rule is said not to preclude a second prosecution in certain "special circumstances." *Ricketts v. Adamson,* 483 U.S. 1, 8 (1987). Three such circumstances recognized by the caselaw are: (i) when "the State is unable to proceed on the [second] . . . charge at the outset because the . . . facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence," *Brown v. Ohio,* 432 U.S. at 169 n.7 (dictum); *see Garrett v. United States,* 471 U.S. at 789-92; (ii) when the prosecution makes multiple charges in the alternative at the outset and the respondent elects to obtain a disposition of some of them prior to the others, *Jeffers v. United States,* 432 U.S. 137, 151-54 (1977); *Ohio v. Johnson,* 467 U.S. 493 (1984); and (iii) when the conviction on the earlier charges was the result of a plea agreement that the respondent later violates, *Ricketts v. Adamson*, 483 U.S. at 8-12.

Double jeopardy guarantees also do not bar reprosecution of a previously convicted respondent if the respondent succeeded in getting the first conviction set aside by a posttrial motion, an appeal, or postconviction proceedings. *See, e.g., United States v. Tateo,* 377 U.S. 463, 465-68 (1964). However, retrial will be barred even after a conviction has been set aside if the basis for that action was a finding by either the trial court or an appellate court that the evidence

was insufficient to support the conviction. *Hudson v. Louisiana,* 450 U.S. 40 (1981); *Burks v. United States,* 437 U.S. 1 (1978); *Monge v. California*, 524 U.S. 721, 729 (1998) (dictum). *But see Tibbs v. Florida,* 457 U.S. 31 (1982) (reprosecution permissible when the basis for reversal was not insufficiency of the evidence, but rather that the appellate court, sitting as a "thirteenth juror" found the conviction to be "against the weight of the evidence").

§ 17.08(e) Reprosecution After the First Trial Ends in a Mistrial

Double jeopardy guarantees will not bar reprosecution if the first trial ended in a mistrial, at the request of, or with the acquiescence of, the respondent, *United States v. Dinitz,* 424 U.S. 600 (1976), except when the respondent's request for the mistrial was occasioned by prosecutorial misconduct "intended to 'goad' the [respondent] into moving for a mistrial," *Oregon v. Kennedy,* 456 U.S. 667, 676 (1982).

A mistrial declared without the respondent's assent will bar reprosecution, *see, e.g., Downum v. United States,* 372 U.S. 734 (1963); *United States v. Jorn,* 400 U.S. 470 (1971), except when the mistrial was declared under circumstances of "manifest necessity." *See, e.g., Illinois v. Somerville,* 410 U.S. 458 (1973); *Arizona v. Washington,* 434 U.S. 497 (1978); *Renico v. Lett*, 559 U.S. 766, 773-75 (2010); *Blueford v. Arkansas*, 132 S. Ct. at 2052-53. *Compare Mansfield v. State*, 422 Md. 269, 290-93, 29 A.3d 569, 581-83 (2011) (judge's declaration of a mistrial at the close of evidence in a bench trial — based on her knowledge of the defendant's having been twice previously convicted of similar crimes, once in a jury trial over which the judge herself presided — was not justified by a "manifest necessity," and retrial therefore was barred by double jeopardy, because the judge possessed this knowledge before jeopardy attached and, "rather than proceeding to try the petitioner, knowing what she did of his criminal history, the trial judge should have recused herself"); *In re Morris v. Livote*, 105 A.D.3d 43, 47, 962 N.Y.S.2d 59, 62 (N.Y. App. Div., 1st Dept. 2013) (double jeopardy barred a retrial after the first trial ended with the judge's granting the prosecution's motion for a mistrial based on "defense counsel's improper questioning" of a prosecution witness: "Although defense counsel's disregard of the court's instructions was blameworthy and understandably angered the court, the [defense] cross-examination did not rise to the level of the gross misconduct displayed in cases in which retrial was permitted").

§ 17.08(f) Collateral Estoppel

The Supreme Court has held that the federal Fifth Amendment embodies a "rule of collateral estoppel" (often called "issue preclusion") in criminal cases, *Yeager v. United States*, 557 U.S. 110, 119-20 & n.4 (2009); *Ashe v. Swenson,* 397 U.S. 436, 444 (1970), so that, following acquittal at a first trial, a criminal defendant or juvenile respondent may not be retried for any offense — whether or not it is the "same offense" within the definition of § 17.08(b)(2) *supra* — if conviction of the offense requires proof of facts that are inconsistent with the facts established in the accused's favor by his or her prior acquittal. *E.g., Yeager v. United States*, 557 U.S. at 119-20; *Simpson v. Florida,* 403 U.S. 384 (1971) (per curiam); *Harris v. Washington,*

404 U.S. 55 (1971) (per curiam); *Turner v. Arkansas,* 407 U.S. 366 (1972) (per curiam). *Cf. Schiro v. Farley*, 510 U.S. 222, 232-36 (1994); *and compare Dowling v. United States*, 493 US 342, 350-52 (1990). Conviction of a lesser included offense or degree of offense probably constitutes an implicit acquittal of the greater offense or degree for this purpose, as it certainly does for purposes of the rule barring reprosecution for the "same offense" following an acquittal, *Price v. Georgia,* 398 U.S. 323 (1970); *De Mino v. New York,* 404 U.S. 1035 (1972) (per curiam). *Compare Yeager v. United States*, 557 U.S. at 121-23 (when a jury acquits a defendant on some counts of a multi-count indictment and hangs on others that require a finding of the same "critical issue of ultimate fact" as "an essential element," the prosecution is barred from retrying the defendant on the counts on which the jury hung; "collateral estoppel" or "issue-preclusion analysis" cannot ascribe significance to a jury's inability to reach a verdict on the latter counts "[b]ecause a jury speaks only through its verdict" and thus "there is no way to decipher what a hung count represents"; "To identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide.") *and Roesser v. State*, 294 Ga. 295, 295, 298, 300, 751 S.E.2d 297, 297, 299, 301 (2013) (applying *Yeager v. United States* to hold that collateral estoppel barred retrial of the defendant for voluntary manslaughter, following a trial in which the jury acquitted the defendant of "malice murder, felony murder, and aggravated assault but was unable to reach a verdict on the lesser included offense of voluntary manslaughter"; "the jury in acquitting Roesser of [the higher counts] . . . necessarily determined that Roesser acted in self-defense and . . . this issue of ultimate fact constitutes a critical element of voluntary manslaughter"), *with Bobby v. Bies*, 556 U.S. 825, 835 (2009) (collateral estoppel does not apply to "a subsidiary finding that, standing alone, is not outcome determinative" but does apply to "a determination necessary to the bottom-line judgment").

§ 17.08(g) Reprosecution by a Different Sovereign

The double jeopardy clause does not bar successive prosecutions by different sovereigns. So, for example, a respondent convicted of bank robbery in a state court may subsequently be prosecuted for federal bank robbery of the same bank. *See, e.g., Abbate v. United States,* 359 U.S. 187 (1959); *United States v. Wheeler,* 435 U.S. 313 (1978). Similarly, when two different States are in a position to prosecute a respondent for the same or closely related conduct, the separate prosecutions do not violate the Fifth Amendment. *Heath v. Alabama,* 474 U.S. 82 (1985). The "two sovereignties" principle does not, however, permit successive prosecutions by a State and its political subdivisions (for example, municipalities); these are barred by double jeopardy whenever successive prosecutions by the same prosecuting agency would be. *Waller v. Florida,* 397 U.S. 387 (1970); *United States* v. *Wheeler,* 435 U.S. at 318-22 (dictum).

§ 17.08(h) Double Jeopardy Doctrines Governing a Juvenile Court Judge's Review of the Findings of a Referee or Hearing Officer

In some States delinquency Petitions are tried first to a hearing officer (sometimes called a "referee" or "master"), who makes factual and legal findings and submits recommendations to the juvenile court judge. The judge then either ratifies or rejects the findings and

recommendations of the hearing officer.

In *Swisher v. Brady,* 438 U.S. 204 (1978), the Court considered the double jeopardy implications of a trial judge's overturning of a master's order of dismissal. Under the Maryland statutory scheme at issue in *Swisher,* the juvenile court judge could not hear evidence but could only review the master's findings on the basis of the evidence presented to the master. The Court in *Swisher* sustained the statutory scheme on the narrow ground that the scheme did not subject juveniles to more than one trial or evidentiary hearing. The Court emphasized that the judge's review was merely a continuation of the original hearing and not a *de novo* hearing.

The *Swisher* decision leaves open the question whether a *de novo* hearing would constitute double jeopardy. The lower courts have split on this issue, with some courts holding that a *de novo* hearing would constitute double jeopardy, *see, e.g., Jesse W. v. Superior Court of San Mateo County,* 26 Cal. 3d 41, 603 P.2d 1296, 160 Cal. Rptr. 700 (1979); *R.G.S. v. District Court,* 636 P.2d 340 (Okla. Crim. App. 1981); *State v. Mershon*, 43 Wash. App. 132, 715 P.2d 1156 (1986), and other courts reaching the opposite conclusion, *see, e.g., In the Interest of Stephens,* 501 Pa. 411, 461 A.2d 1223 (1983), *appeal dism'd,* 466 U.S. 954 (1984) (holding that jeopardy does not attach at a master's hearing, because the master's findings are merely advisory).

Chapter 18

Motions for Severance (or Consolidation) of Counts or Respondents

Part A. Motions Challenging the Joinder of Counts or Seeking Consolidation of Counts

§ 18.01 INTRODUCTION: THE PROBLEM OF JOINED COUNTS; OVERVIEW OF THE POSSIBLE REMEDIES

State statutes, rules of court, and caselaw typically permit the prosecution to include in a single charging paper all charges arising from the same event or episode (for example, housebreaking, larceny, and receiving stolen property). Most jurisdictions further authorize the prosecutor to include in the Petition charges arising out of separate events or episodes that are (depending upon variances in local rules) (a) part of the same transaction or series of transactions, (b) part of a "common plan" or "common scheme" by the respondent, or (c) legally the same or similar (for example, housebreaking on May 5 and housebreaking on June 12).

In cases in which all the charges against the respondent arise from the same event or episode (such as the ordinary set of housebreaking-larceny-receiving charges based on a single break-in), the joinder results in little prejudice to the respondent, and thus there is little reason to seek severance. In any event, most courts will compel a joint trial in this situation, whether the respondent wants one or not.

However, in cases in which the prosecution has joined charges arising from different episodes or transactions (on the basis of the factual connection between the transactions or the legal similarity of the charges), the respondent faces a significant risk that the trier of fact, whether jury or judge, will view the aggregation of charges as increasing the likelihood that the respondent is guilty of each one. Thus, in cases that are going to trial, counsel will usually wish to challenge the joinder of the counts or seek severance. In rare cases, however, there may be countervailing benefits to having the counts joined for trial, and as a result, counsel may refrain from challenging the joinder; or when the prosecutor has filed separate Petitions, counsel may seek consolidation of the Petitions for a single trial. In addition, if the respondent wishes to enter pleas of guilty to separate Petitions or wishes to enter a plea of guilty to one Petition upon the basis of an agreement with the prosecutor that other Petitions will be dismissed (see §§ 14.06, 14.16 *supra*), consolidation may facilitate the implementation of a favorable plea agreement and may also enable the respondent to steer the case before the most favorable sentencing judge.

Section 18.02 describes the strategic variables that counsel should consider in deciding whether to challenge joinder of counts. Sections 18.03-18.05 then examine the motions that counsel can file to obtain dismissal or a severance on grounds of misjoinder and to obtain a severance on the grounds that the joinder, although technically valid, is prejudicial to the respondent. Section 18.06 discusses motions for consolidation.

Counsel must check local statutes, court rules, and caselaw to determine not only the precise terms of the joinder rules used in the jurisdiction but also the procedural requirements for raising joinder issues. In many jurisdictions motions attacking misjoinder or seeking severance must be filed within a specified period of time (usually 15 days or 30 days) following arraignment. See § 7.05 *supra.*

§ 18.02 DECIDING WHETHER TO OPPOSE A TRIAL ON MULTIPLE CHARGES

As explained in § 18.01 *supra,* usually the only joinder of charges that the defense can challenge is a joinder of charges emanating from different events or episodes. In deciding whether such joinder is undesirable to the respondent, counsel should consider:

(a) *What will be the effect of the trier's knowing that the respondent is charged with several offenses, quite apart from any proof of his or her guilt of those offenses?*

Generally the more a respondent is charged with, the worse s/he looks. Jurors and even many judges tend to operate on the principle that where there's smoke, there's fire. At the outset of the trial, when they are forming critical first impressions of the case that may affect their perceptions of much of the proof that follows, they know little about the respondent except what s/he is charged with. If the charges are several, the respondent starts with several sins.

In some cases, however, there may be countervailing considerations. If the respondent is obviously overcharged — if, for example, s/he breaks a few coin boxes in public telephone booths and is charged, for each booth, with burglary, theft, and malicious destruction — the cumulative weight of the overcharging may make out a case of persecution that will sway a jury or judge in the respondent's favor.

(b) *What will be the effect on the trier of the cumulation of evidence?*

Again, generally the more evidence there is against a respondent, the worse. But this may depend on whether the evidence comes from several sources or from one. If two package store proprietors give the same trier of fact "pretty sure" identifications of the respondent as the person who robbed them, conviction is more likely than if separate triers of fact heard the identifying witnesses. On the other hand, if a single complainant relates that the respondent committed an offense against him or her on several successive occasions, proof of an airtight alibi for one or more of those occasions may convince the trier of fact that the whole story is a fabrication, particularly if the defense can point to some motive for fabricating.

(c) *Will one defense depreciate another?*

If a respondent has a weak or unconvincing defense to one charge and a more substantial defense to another, the incredibility of the former is likely to attaint the latter. Or both defenses may be believable separately but unbelievable together, as when a respondent charged with two

rapes pleads alibi to the first and consent to the second.

(d) *Is it desirable to put the respondent on the stand in one case but not in the other?*

If so, separate trials are essential. Apart from problems of cross-examination, a respondent cannot practicably take the stand and leave part of the charges against him or her unanswered.

(e) *Is there a "clinching" piece of evidence in one case that would not be admissible in the other if it were tried separately?*

If so, the item may "clinch" both cases, as when a respondent charged with two holdups left a fingerprint at the scene of one.

(f) *To what extent will a unitary wrap-up of all charges against the respondent expedite the task of gathering the requisite defense witnesses?*

Although, in an ideal world, defense witnesses would be willing to come to court again and again, the reality is that defense witnesses other than the respondent's family will soon lose patience and stop coming to court. Even when local practice makes it possible to put these witnesses "on call," they may be unwilling to be available for more than one trial date. If this is the case, then counsel might consider reducing the risk of losing witnesses by trying all charges in a joint trial.

(g) *To what extent will the process of successive prosecution cause the prosecutor to offer favorable plea bargains?*

Most prosecutors are so overburdened that they are hard pressed to find the time to try cases. Frequently, a prosecutor who is unwilling to make a good plea offer to resolve joint charges slated for a single trial will be far more amenable to offering whatever it takes to avoid the daunting prospect of a series of trials. If the various charges involve the same complainant or other witnesses, the prosecutor also may be eager to avoid repeated trials because the likelihood of prosecution witnesses losing patience and failing to appear increases with each successive court date.

(h) *To what extent will a unitary wrap-up affect disposition?*

As explained in §§ 14.03, 14.05 *supra,* the judge may penalize a respondent at disposition for taking a case to trial when the evidence of guilt was obviously strong. If the respondent is facing several different charges, all of which are strong prosecution cases, and the respondent is unwilling to plead guilty to any of the charges, counsel may be well advised to try all of the cases in a single trial. If the cases are separated, and the respondent insists on going through with each trial, the massive time loss is sure to redound to the respondent's detriment at disposition.

As noted in § 18.01 *supra*, consolidation of charges for purposes of a plea or pleas covering all of the charges also can be used to work out the details of a satisfactory plea bargain and to bring the case before the judge who is known to be the most favorable sentencer. See § 18.06 *infra.*

(i) *To what extent will a unitary wrap-up affect the respondent's detention status?*

If the respondent is detained on all of the offenses presently pending trial, counsel should give some consideration to the beneficial effect of a unitary wrap-up on the respondent's detention status. If the respondent is likely to be acquitted of all charges or if s/he is likely to receive probation upon conviction, the resolution of all cases at once means that the respondent will be immediately released; to resolve them piecemeal probably means that the respondent will stay detained until all of the pending charges have been disposed of.

§ 18.03 MOTIONS TO DISMISS THE CHARGING PAPER FOR FAILURE TO ALLEGE FACTS JUSTIFYING THE JOINDER OF COUNTS

In some jurisdictions the applicable statutes, court rules, or caselaw provide the basis for a motion to dismiss a Petition (or to sever the counts joined in the Petition) if the Petition fails to allege *expressly* the facts upon which the permissibility of joinder depends. For example, when the statute authorizes joinder of charges arising out of acts that are part of a "common scheme," a multi-count Petition may be defective for failing to allege facts supporting the inference that there was indeed a common scheme incorporating all of the acts charged in the several counts.

§ 18.04 MOTIONS CHALLENGING MISJOINDER OF CHARGES

When a Petition joins charges that cannot properly be joined under the applicable joinder rules, it is subject to a motion to dismiss or, in some jurisdictions, a motion to sever counts or charges. These motions, which address the "misjoinder" of the counts or charges, are distinct from motions for a severance on the ground of prejudicial joinder. The latter motions, described in § 18.05 *infra,* assume the technical validity of the joinder and request relief from its prejudicial consequences.

In challenging the technical validity of joinder, counsel must consult the local statutes, court rules, and caselaw spelling out the requirements for joinder of offenses. In most jurisdictions there is extensive caselaw (usually in the context of adult criminal cases) elaborating the precise circumstances in which counts or charges can be joined on the ground that the offenses charged were parts of a "common scheme," or arose from the same or related transactions, or are legally the same or similar.

Counsel should particularly be alert to the issue of whether things joinable to joinable things are thereby joinable to each other: that is, whether, under a statute that allows joinder of (a) different offenses arising out of one transaction and (b) the same or similar offenses arising

out of different transactions, a Petition may charge: (1) housebreaking and (2) larceny, both on May 5, plus (3) housebreaking and (4) arson, both on June 12.

§ 18.05 MOTIONS FOR A SEVERANCE OF CHARGES ON THE GROUND OF PREJUDICIAL JOINDER

Unlike motions challenging misjoinder, see § 18.04 *supra,* motions for a severance by reason of prejudical joinder ask the court to order separate trials of properly joined counts on the ground that trying them together would prejudice the respondent.

In seeking to persuade the court that the respondent would be prejudiced by a joint trial of two or more charges, counsel can point to the types of potential harm described in paragraphs (a) through (e) of § 18.02 *supra.* Often, there is local caselaw that can be cited in support of a severance to avoid the particular form of prejudice urged by counsel. *See, e.g., In the Matter of William S.,* 70 Misc. 2d 320, 333 N.Y.S.2d 466 (N.Y. Fam. Ct. 1972) (joint trial of three separate acts of sodomy on different victims might prejudice the respondent by aggregating unrelated evidence); *Cross v. United States,* 335 F.2d 987 (D.C. Cir. 1964) (accused was prejudiced by joint trial in that he wished to take the stand with respect to one count but remain silent on another count).

In many localities counsel will find that the judges are obdurate in favor of joint trials to the fullest extent allowed by law and that they are reluctant to grant a severance whenever joinder is technically permissible because of the supposed saving of court time. In these localities particularly, the inquiry into "prejudice" is likely to turn into a balancing of the economies and other considerations favoring or disfavoring joint trial. Accordingly, counsel is wise to point to the lack of evidentiary overlap between the counts that s/he is asking to have severed — demonstrating (to the extent that the facts allow) that the prosecution's witnesses on one count will be completely (or substantially) different from those on the other count(s), and representing (when this is true) that the defense witnesses on the different counts will be completely (or substantially) different as well. Under these circumstances a judge might well conclude that a joint trial would not save any time and, therefore, that it is not worth the judge's while to suffer the unwieldiness of numerous sets of witnesses and a lengthy proceeding, particularly in the face of the respondent's tenable claims of potential prejudice to his or her defense.

§ 18.06 CONSOLIDATION OF COUNTS

As explained in §§ 18.01-18.02 *supra,* it will be the rare case in which the defense should seek consolidation for trial of charges that the prosecutor has filed in separate Petitions.

However, as § 18.01 also notes, a very different calculus applies to cases in which the respondent intends to enter a guilty plea covering charges in various Petitions. If the various Petitions are before different judges, counsel may be able to consolidate all of them, for purposes of a plea, before the judge who would be the most favorable sentencer. On the other hand, if local

procedure makes it impossible to predict which judge would receive the consolidated plea, then it is usually preferable to leave the cases before the different judges and to try to schedule the disposition by the most favorable judge first, counting on the other judges to defer to the sentence entered by the first judge rather than overriding it with a more punitive sentence (as, for example, by ordering a period of incarceration when the first judge ordered probation). In order to make the argument to the successor judges that they should go along with the disposition ordered by the first judge, however, it is important for counsel to be able to tell them that the first judge was fully advised about, and considered, all of the respondent's pending, unadjudicated charges.

When consolidation is desired, it may be ordered on stipulation, or on joint motion of the parties, or on motion of one of them, or it may be effected informally by the prosecutor's listing the cases for trial or plea together, with the acquiescence of the defense. Consolidation can be ordered in any case in which the rules governing joinder would have permitted the joinder of counts initially. If the prosecution and defense are agreed that consolidation will serve their mutual interests, the court will probably accept a stipulation consolidating even those charges that could not technically have been joined.

Part B. Motions Challenging the Misjoinder of Respondents or Seeking Severance of Respondents

§ 18.07 INTRODUCTION: THE PROBLEM OF JOINED RESPONDENTS; OVERVIEW OF THE POSSIBLE REMEDIES

Prosecutors almost always take advantage of local rules permitting the joinder for trial of co-respondents who are charged with participating in the same offense or offenses. Joinder of respondents is ordinarily in the prosecutor's interest for several reasons: (i) It saves the prosecutor from the time-consuming task of conducting successive trials, each with the same evidence. (ii) It minimizes the risk that prosecution witnesses will lose patience and stop coming to court. (iii) It enables the prosecutor to gain the impermissible benefit of aggregating the evidence against each respondent individually to mount a persuasive cumulative case against both.

The considerations that might lead defense counsel to favor or oppose a joint trial are listed in § 18.08 *infra.* As the discussion there indicates, it will usually be in the respondent's interest to seek a severance from joined co-respondents.

Challenges to the misjoinder of respondents are described in § 18.09 *infra.* Section 18.10 takes up the constitutional, statutory, and common law grounds for severance by reason of prejudicial (although technically permissible) joinder. Section 18.11 concludes by examining defense motions for consolidation of respondents.

As explained in § 18.01 *supra,* many jurisdictions require that motions challenging joinder and motions for severance be filed within a specified time (usually either 15 days or 30

days) following arraignment. Local statutes and court rules must be consulted.

§ 18.08 DECIDING WHETHER TO OPPOSE A JOINT TRIAL OF RESPONDENTS

The considerations favoring and disfavoring joint trial of respondents are exceedingly complex. The most significant are:

(a) *Will evidence be admitted at a joint trial that could not be admitted at the respondent's trial if s/he were tried separately?*

A principal item of concern in joint trials, and one that has generated considerable constitutional caselaw, is the admission at a joint trial of a co-respondent's confession that implicates not only the co-respondent but also the respondent. Section 18.10(a) *infra* examines the constitutional rules relating to this issue and the special modifications that some jurisdictions have adopted when applying the constitutional doctrines to bench trials in juvenile court. For the present purpose of listing the considerations militating for and against a joint trial, it is sufficient to state that the existence of a confession by the co-respondent significantly impairs the respondent's chances of prevailing at a joint trial. Although the confession may not be legally considered as evidence of the respondent's guilt (see § 18.10(a) *infra*), the judge or jury will hear it and will almost surely consider it in fact, whether consciously or unconsciously, insofar as it implicates the respondent. Even co-respondents' confessions that do not explicitly implicate the respondent (or that have been redacted to remove references to the respondent, see § 18.10(a) *infra*) can be extremely damaging to the defense, particularly when they factually contradict the respondent's theory of the defense or when the facts are such that both respondents are probably guilty if either one is.

Certain nonconfessional evidence that would be inadmissible against the respondent at a severed trial may also be admissible and hurtful at a joint trial. For example, in a robbery trial, if the respondent admits to being with the co-respondent at the time the crime was committed, evidence that the co-respondent was found in possession of stolen items a short while later will probably be the undoing of the respondent as well as the co-respondent.

(b) *Conversely, will evidence be excluded at a joint trial that would be admitted against the respondent at a separate trial?*

Products of an illegal search and seizure of a co-respondent may be admissible against the respondent because the respondent lacks standing to complain of the illegality. See § 23.15 *infra.* At a joint trial, they might have to be excluded, although this point is not clear. *See McDonald v. United States,* 335 U.S. 451 (1948).

(c) *What are the relative strengths of the defensive cases of the respondent and co-respondent(s)?*

Respondents with weak defenses tend to look particularly bad in comparison to those who have stronger defenses. If the co-respondent is likely to take the stand, this may cast a bad light on the respondent's failure to take the stand. (On the other hand, in a case in which the respondent should not testify because s/he could be impeached with a damaging prior record, it may be possible to present the respondent's defense through the co-respondent's testimony.)

(d) *What is the apparent relative blameworthiness of the respondent and the co-respondent(s)?*

Joint trial invites the trier of fact, whether judge or jury, to assess degrees of culpability. In a bench trial this is particularly significant because the judge is likely to mete out sentences according to these degrees of culpability. This suggests that the least culpable respondent has the most to gain from joint trial. But counsel cannot count on his or her client appearing the least culpable unless the stories of prosecution witnesses or irrefutable physical circumstances — for example, relative size and age — make the favorable comparison strongly evident. Otherwise, the co-respondents and their attorneys will also be vying to look the best of the bunch. In this and other situations of antagonistic defenses, separate trial should be sought.

(e) *Is there something particularly attractive or unattractive about the co-respondent(s)?*

The judge's or jury's positive or negative reactions to a co-respondent may rub off on the respondent at a joint trial.

(f) *Can counsel cooperate and work well with counsel for the co-respondent(s)?*

Do their defensive theories or trial strategies conflict?

(g) *What are the local rules, and what is the local practice, regarding limitation of the procedural rights of joined respondents?*

For example, will counsel's cross-examination of prosecution witnesses be cut off as "cumulative" of that of counsel for a co-respondent? In jurisdictions that permit jury trials for juveniles, will each joined respondent be permitted the full number of peremptory challenges to which s/he would be entitled at a separate trial, or will the respondents be required to apportion peremptories?

(h) *If trial is severed, who is likely to be tried first?*

Prior trial of the co-respondents may allow defense counsel full discovery of the prosecution's case in advance of his or her own trial. On the other hand, if they are convicted, they may turn state's evidence in an attempt to win sentencing consideration.

§ 18.09 MOTIONS CHALLENGING MISJOINDER OF RESPONDENTS

Statutes, court rules, and caselaw must be reviewed to determine the local rules governing joinder of respondents and also to determine whether the remedy for misjoinder is a motion to dismiss the Petition or a motion to sever the respondent's trial from that of the co-respondent(s). In some jurisdictions counsel will also be able to frame a motion for dismissal or severance on the technical ground that the Petition does not expressly allege the facts required to support a joinder of respondents. *See* § 18.03 *supra.*

The generally prevailing rule is that respondents may be joined in a single Petition, or their Petitions may be joined for trial, if the respondents are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. A respondent can challenge the Petition for misjoinder if, in addition to charging offenses in which both of two respondents allegedly participated, the Petition charges offenses that only the co-respondent is accused of committing. *See, e.g., Davis v. United States,* 367 A.2d 1254, 1260-64 (D.C. 1976).

§ 18.10 MOTIONS FOR A SEVERANCE OF RESPONDENTS ON THE GROUND OF PREJUDICIAL JOINDER

Motions for severance request a separate trial for the respondent, notwithstanding the technically proper joinder of co-respondents in the Petition. A severance may be granted if, for any reason, the respondent will suffer prejudice as a result of being tried jointly with the co-respondent(s). The most common bases for seeking severance are the following.

§ 18.10(a) Severance on the Basis of a Co-Respondent's Confession Implicating the Respondent

In *Bruton v. United States,* 391 U.S. 123 (1968), the Court held that the admission at a joint trial of a co-defendant's confession that incriminated the defendant violated the defendant's Sixth Amendment right of confrontation and that even clear limiting instructions were inadequate to save the constitutionality of the trial with regard to the defendant. Even in the situation known as "interlocking confessions," in which the defendant and co-defendant both confessed and their incriminating statements support each other, the *Bruton* rule prohibits the introduction at a joint trial of a co-defendant's statement that incriminates the defendant. *Cruz v. New York,* 481 U.S. 186 (1987) (rejecting the plurality opinion in *Parker v. Randolph,* 442 U.S. 62 (1979) and adopting the approach espoused by Justice Blackmun's concurring opinion in *Parker*).

The *Bruton* rule is limited to co-defendants' statements incriminating the defendant, and therefore a co-defendant's confession can be introduced at a joint trial "with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." *Richardson v. Marsh,* 481 U.S. 200, 211 (1987). *See also Gray v. Maryland*, 523 U.S. 185, 192-93 (1998) (addressing "a question that *Richardson* left open" and

holding that "*Bruton*'s protective rule" fully applies when the ostensible "redaction [of the co-defendant's confession] . . . replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol," with the result that "the jury will often realize that the confession refers specifically to the defendant"); *United States v. Taylor*, 745 F.3d 15, 29-30 (2d Cir. 2014) (redaction of the co-defendants' names from Taylor's statement failed to overcome the Confrontation Clause problem because the resulting "stilted circumlocutions" and the retention of the name of the co-perpetrator who testified for the prosecution would have made it "obvious [to the jury] that names have been pruned from the text" and "the choice of implied identity is narrow" since "[t]he unnamed persons correspond by number (two) and by role to the pair of co-defendants" on trial with Taylor); *Washington v. Secretary, Pennsylvania Dep't of Corrections*, 726 F.3d 471, 472, 480 (3d Cir. 2013) ("introduction into evidence of a jointly-tried nontestifying coconspirator's [redacted] confession," in which "Washington's name [was replaced] with 'someone I know' or 'the driver,'" violated the Confrontation Clause because other testimony "clearly and explicitly identified Washington as the driver"); *Eley v. Erickson*, 712 F.3d 837, 854-62 (3d Cir. 2013) (the trial court violated the Confrontation Clause by denying severance and allowing the admission of a jailhouse informant's account that a non-testifying co-defendant confessed to committing the charged crime with "'other two'" individuals, which the jury doubtless would have understood to refer to Eley and another co-defendant). The *Bruton* rule also is limited to cases in which the co-defendant does not testify at trial in a manner that exposes him or her to cross-examination on the confession by the defendant's attorney. *Nelson v. O'Neil,* 402 U.S. 622 (1971).

In jury trials in adult criminal cases, the *Bruton* rule provides a powerful argument in support of a defense motion for a severance in virtually every case in which the prosecution intends to introduce a co-defendant's statement that incriminates the defendant. The same is true in jury trials in juvenile court in the relatively few jurisdictions that recognize a right to a jury trial in delinquency proceedings (see § 21.01 *infra*). Some States apply the *Bruton* rule to bench trials (*see, e.g.*, *State v. M.M.*, 133 Wash. App. 1031, 2006 WL 1731316 (2006) (per curiam)), but in other States there are decisions saying that *Bruton* is inapplicable to bench trials in juvenile court because a judge is better able than a jury to perform the mental gymnastics necessary to avoid considering a co-respondent's confession in determining a respondent's guilt. *See, e.g., In re L.J.W.,* 370 A.2d 1333, 1336–37 (D.C. 1977); *State in the Interest of R.B.,* 200 N.J. Super. 573, 577, 491 A.2d 1311, 1313 (1985); *see also United States v. Cardenas*, 9 F.3d 1139, 1154-56 (5th Cir. 1993) (holding *Bruton* inapplicable to bench trials in adult criminal cases). This ground for denying *Bruton*'s protections to respondents in delinquency bench trials is at odds with the reasoning of *Lee v. Illinois*, 476 U.S. 530 (1986), an adult criminal case that addressed a distinct Confrontation Clause issue. In *Lee*, which involved a bench trial, the Court held that the judge's consideration of a non-testifying co-defendant's confession incriminating the defendant violated the defendant's Sixth Amendment right of confrontation. *See id*. at 539-46. *See also Crawford v. Washington*, 541 U.S. 36, 58 (2004) (replacing the analytic rubric used in *Lee* and other pre-*Crawford* cases to assess Confrontation Clause claims but explaining that *Lee*'s result was "faithful to the Framers' understanding" of the requirements of the Confrontation Clause). The *Lee* case is distinguishable from the usual *Bruton* situation because the judge in *Lee* not only

admitted the co-defendant's confession into evidence but considered it as substantive evidence against the defendant (see § 30.06 *infra*), whereas typically a judge in a bench trial would profess to compartmentalize his or her mind and not consider a co-respondent's statement against the respondent. The *Lee* decision is instructive, however, in that the majority's opinion contains an extended discussion of the presumptive unreliability and harmfulness of co-defendants' confessions even in the context of a bench trial. *See Lee*, 476 U.S. at 541-46 (the "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination," *id*. at 541). *See also Crawford v. Washington*, 541 U.S. at 64-65 (explaining, in the context of a jury trial, that cross-examination is essential to test the reliability of a "potential suspect['s]" statement that inculpates the accused); *Lilly v. Virginia*, 527 U.S. 116, 131 (1999) (plurality opinion) ("we have over the years 'spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants'" (quoting *Lee v. Illinois*, 476 U.S. at 541)); *Williamson v. United States*, 512 U.S. 594, 601 (1994). The *Lee* Court's reasoning provides support for the conclusion that judicial self-control is not an adequate substitute for the *Bruton* rule in bench trials; and *Crawford* adds (albeit in connection with a somewhat different aspect of judicial self-control) a strong admonition that it would violate the Constitution's "intended constraint on judicial discretion" (*Crawford v. Washington*, 541 U.S. at 76) to rely upon individual judges' subjective willingness and ability to protect accused persons as a substitute for "the constitutionally prescribed method of assessing reliability" (*id*. at 62) through confrontation and cross-examination. *See id*. ("The Framers . . . knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands.") Caselaw supporting the general proposition that judges should avoid engaging in mental gymnastics in lieu of objective procedural precautions is discussed in § 20.05 *infra*. In any event, in the present state of the law — with no authoritative ruling or even hint by the Supreme Court of the United States that the *Bruton* rule does *not* apply to bench trials — counsel can and should argue that a joint trial in which a co-respondent's confession may be offered into evidence presents a significant risk of running into reversible constitutional error, and that that risk alone is a sufficient reason for granting a severance of respondents.

§ 18.10(b) Severance on the Basis of the Respondent's Need To Call the Co-Respondent as a Witness

In some jurisdictions, state law provides a basis for severance in those cases in which the defense can show that a co-respondent's testimony would be favorable to the respondent. The theory underlying this doctrine is that in a joint trial, the co-respondent could elect to invoke his or her Fifth Amendment Privilege not to take the witness stand, and therefore the joint trial would prejudice the respondent by depriving him or her of a witness with exculpatory testimony. If the cases are severed and the co-respondent's case is tried before the respondent's, then the co-respondent is free to testify at the respondent's trial. (If the co-respondent is acquitted at his or her own trial, s/he can also be subpoenaed and compelled to testify; if s/he is convicted, his or her Fifth Amendment Privilege certainly continues until s/he is sentenced and probably also

continues throughout the pendency of his or her appeal, but s/he may elect to waive it in order to testify on the respondent's behalf.)

Typically, state law requires that the defense show both that the co-respondent has exculpatory testimony to offer on the respondent's behalf and that s/he is willing to testify for the respondent if the cases are severed. This showing is ordinarily made through an affidavit by counsel or the defense investigator affirming that s/he has spoken with the co-respondent, recounting the substance of the co-respondent's exculpatory testimony (in as little detail as possible, to avoid giving discovery to the prosecution), and relating the co-respondent's willingness to testify if the cases are severed and his or her trial is held first.

Although decisions recognizing this ground for severance are usually based on the state courts' supervisory powers, counsel can argue that the right to call the co-respondent as a witness — and whatever procedures such as severance are necessary to bring that about — are grounded in the Sixth Amendment rights to compulsory process and to present defensive evidence (see § 9.09(b)(4) *supra; Washington v. Texas,* 388 U.S. 14 (1967)), the Fourteenth Amendment due process right to a fair trial (see the authorities collected in § 13.05(b) *supra*), and equivalent state constitutional guarantees. Since, in most jurisdictions, the prosecution could secure the testimony of the co-respondent *against* the respondent, if it were incriminating, by granting the co-respondent immunity from prosecution, the principle of *Wardius v. Oregon,* 412 U.S. 470 (1973), discussed in § 9.09(b)(7) *supra,* strongly suggests that a severance sought by the respondent in order to obtain the same co-respondent's exculpatory testimony is constitutionally required in order to maintain "the balance of forces between the accused and his accuser." 412 U.S. at 474.

§ 18.10(c) Severance on the Basis of the Respondents' Conflicting and Irreconcilable Defenses

State law frequently affords a basis for severance on the ground that the defense that the co-respondent intends to offer irreconcilably conflicts with the defense that the respondent intends to offer. The theory underlying this ground for severance is that the benefits of judicial economy which justify a joint trial do not outweigh the concrete prejudice that the respondent suffers when a co-respondent essentially proves the case for the prosecution by rebutting the respondent's witnesses with a conflicting version of the events.

Typically, state caselaw imposes a stringent standard that a respondent must meet in order to obtain severance on this ground. The cases may require, for example, that counsel show that the defenses of the respondent and the co-respondent are directly conflicting and not merely inconsistent or that the conflicts are such that a trier-of-fact could conclude, solely on the basis of the conflicts, that the respondent is guilty.

§ 18.10(d) Severance on the Basis of the Disparity of the Evidence Against the Respondents

State law often provides a basis for severance when the evidence against the co-respondent is much stronger than the evidence against the respondent, and the spectre is thereby raised that the respondent will be found guilty by association. "It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." *Krulewitch v. United States,* 336 U.S. 440, 454 (1949) (concurring opinion of Justice Jackson). Usually, state law requires that the disparity of the evidence be substantial.

Although this doctrine affords a basis for severance in jury trials, it would probably be rejected as a ground for severance in a bench trial. Most judges would deny the notion that they are susceptible to being swayed by guilt-by-association. However, even in a bench trial, counsel may be able to secure severance when the evidence is not only disparate but includes items inadmissible against the respondent, admissible against the co-respondent, and incriminating as to the respondent. Although the *Bruton* rule described in § 18.10(a) *supra* deals exclusively with a co-respondent's confessions that incriminate the respondent, the logic underlying that rule calls for severance also in this situation. *See, e.g.*, *Zafiro v. United States*, 506 U.S. 534, 539 (1993) (explaining that one of the types of prejudice that can justify severance under FED. R. CRIM. PROC. 8(b) is when there is "[e]vidence that is probative of a defendant's guilt but technically admissible only against a codefendant," and citing *Bruton* as support). And § 18.10(a) makes the argument for the applicability of the *Bruton* principle to bench trials.

§ 18.11 DEFENSE MOTIONS FOR CONSOLIDATION OF RESPONDENTS

Although rare, there are some cases in which the respondent would benefit by being tried with co-respondents. See § 18.08 *supra.* The procedures for consolidation of respondents are the same as those for consolidation of offenses, described in § 18.06 *supra.* Usually, if the prosecutor has decided for strategic reasons to try the co-respondents separately, s/he will resist the respondent's motion for consolidation. In arguing the motion to the court, defense counsel should both point to whatever specific prejudice the respondent is suffering as a result of being tried separately and also advert to any economies that would be effected by a joint trial (compare § 18.05 *supra*), noting previous cases in which the prosecutor has elected to conduct a single trial of multiple respondents in similar circumstances, apparently in recognition of the force of those economies.

Chapter 19

Motions To Dismiss for Social Reasons

§ 19.01 THE LEGAL BASES FOR THE MOTION; PROCEDURAL REQUIREMENTS

In several jurisdictions the juvenile statutes or court rules give the judge discretion to dismiss a delinquency case for "social reasons" or "in the furtherance of justice." *See, e.g.,* N.Y. FAM. CT. ACT § 315.2 (2014). The jurisdictions vary considerably regarding the formulation and specificity of the standard provided to govern such dismissals. For example, the applicable District of Columbia Juvenile Court Rule says only that dismissal is authorized when it is "in the interests of justice and the welfare of the respondent." The New York Family Court Act provides for dismissal in the "furtherance of justice when, even though there may be no basis for dismissal as a matter of law, such dismissal is required as a matter of judicial discretion by the existence of some compelling further consideration or circumstances clearly demonstrating that a finding of delinquency or continued proceedings would constitute or result in injustice," N.Y. FAM. CT. ACT § 315.2(1) (2014), and directs the judge to consider the following specific factors, "individually and collectively":

(a) the seriousness and circumstances of the crime;

(b) the extent of harm caused by the crime;

(c) any exceptionally serious misconduct of law enforcement personnel in the investigation and arrest of the respondent or in the presentment of the petition;

(d) the history, character and condition of the respondent;

(e) the needs and best interest of the respondent;

(f) the need for protection of the community; and

(g) any other relevant fact indicating that a finding would serve no useful purpose.

N.Y. FAM. CT. ACT § 315.2(1)(a)-(g) (2014).

The statutes or court rules typically provide that a dismissal for social reasons may be ordered by the judge *sua sponte,* or on motion of the defense or the prosecution. *See, e.g.,* N.Y. FAM. CT. ACT § 315.2(2) (2014). As a practical matter, however, it will almost invariably be defense counsel who makes the motion.

Local procedures may require the defense to make the motion within a specified time following arraignment, like other pretrial motions. See § 7.05 *supra.* In some jurisdictions,

however, the applicable statute or court rule exempts motions to dismiss for social reasons from the usual motions deadline and allows the motion to be made "at any time subsequent to the filing of the petition." N.Y. FAM. CT. ACT § 315.2(3) (2014). For discussion of motions to dismiss the case at disposition on the ground that the respondent is not in need of rehabilitative services, see §§ 38.03, 38.19 *infra;* see also § 37.02(e) *infra.*

§ 19.02 CASES IN WHICH THE DEFENSE SHOULD FILE A MOTION TO DISMISS FOR SOCIAL REASONS; STRATEGIC REASONS FOR FILING THE MOTION EVEN WHEN IT IS NOT LIKELY TO PREVAIL

As a practical matter, even when the applicable statute or court rule announces broad grounds for dismissal for social reasons, the defense will win such a motion only in exceptional cases. Most judges count on the prosecutor and probation officer to weed out the cases whose facts do not warrant prosecution. Generally, the defense is likely to win a motion to dismiss for social reasons only if: (a) the offense is minor; (b) the respondent has little or no prior record; and (c) the respondent is doing well at school and is not a behavior problem at home.

Even in cases in which a motion to dismiss for social reasons is unlikely to succeed, there may be strategic reasons for filing it. The detailed presentation of mitigating evidence or evidence of police mistreatment of the respondent may lead the prosecutor to dismiss the charges or to make a more favorable plea offer. Even if the prosecutor does not spontaneously change his or her position and even if the judge denies the motion, the judge may exert pressure upon the prosecutor to exercise prosecutorial discretion in favor of dismissing the case, offering an adjournment in contemplation of dismissal (see § 14.06(b) *supra*), or at least making a more favorable plea offer.

In cases in which the defense intends to go to trial, a motion to dismiss for social reasons — and particularly an evidentiary hearing on the motion on the day of trial — can improve the respondent's chances of winning the trial by presenting the judge with character evidence that would not normally be admissible at trial. Although the judge technically will have to exclude this evidence from his or her consideration on the issue of guilt or innocence, its presentation would, at the very least, ensure that the judge does not unconsciously apply the various negative assumptions that tend to bias verdicts in favor of guilt. For example, some judges believe that the prosecutor would not bother pressing charges against a first offender who was doing well at school; these judges therefore assume that any respondent who is being prosecuted has a record and is a problem child. Even when the judge hears no evidence of such aggravating factors at trial, the judge assumes that they exist, and that evidence of them was not offered because of the rules of relevancy and restrictions upon admissibility of juvenile convictions. These assumptions can sway the verdict in three ways: The judge may believe that because the respondent has a prior record and is a problem child, s/he is more likely to have committed the crimes with which s/he is charged; the judge may find the respondent less credible for these reasons; and the judge may lean in favor of conviction in order to guarantee the child the court intervention and services s/he probably needs. The pretrial motion to dismiss enables the defense to demonstrate to the judge

that the reason s/he is hearing no evidence of prior convictions or behavior problems is because the respondent has none and, consequently, is not in need of court intervention.

The possibility of affecting the judge's mindset at trial militates against filing a motion to dismiss for social reasons in any case in which the respondent does have prior convictions or even prior arrests. In most jurisdictions that provide for such motions, the prosecution is free to rebut the respondent's motion by calling the court's attention to prior convictions and arrests that would be inadmissible in a juvenile trial. See § 30.07(b) *infra.* Thus counsel must question the respondent and his or her parent(s) thoroughly to make sure that there have been no prior convictions or arrests; counsel should make an independent check of court records, probation records, and, if possible, police records of contacts with the respondent; counsel should also ask the prosecution whether s/he knows of any prior convictions or arrests. For discussion of exceptions to the general rule of restricting motions to dismiss for social reasons to cases of first offenders, see § 19.03(c) *infra.*

§ 19.03 TYPES OF MITIGATING FACTS TO PRESENT IN A MOTION TO DISMISS FOR SOCIAL REASONS

§ 19.03(a) Mitigating Aspects of the Respondent's Character

The most important component of a motion to dismiss for social reasons is the presentation of favorable background information about the respondent. In identifying aspects of the child's life that the judge might view as mitigating and the witnesses who can best attest to these favorable aspects, counsel will need to be very creative. A motion to dismiss for social reasons might include, for example:

1. With respect to the child's school performance:

    a. Copies of the respondent's school records, showing that s/he is regularly attending school and receiving good grades.

    b. The respondent's report card, showing that s/he is receiving good grades.

    c. Copies of any awards that the respondent has won at school.

    d. Copies of exam papers on which the respondent received exceptionally good grades and copies of papers written for school that express constructive self-critical insights, unselfish attitudes, and touching feelings.

    e. Letters, affidavits, or testimony by teachers, deans, principals, and/or guidance counselors, attesting to the respondent's regular attendance, good behavior, and good academic performance.

2. Letters or testimony from employers and supervisors in any after-school jobs or summer jobs, present or past, attesting to the respondent's good work habits, reliability, and good attitude.

3. Letters or testimony from family members, attesting to the respondent's good behavior at home and setting forth anecdotes that demonstrate the respondent's virtues such as generosity, industriousness, and self-discipline.

4. Letters or testimony from neighbors, attesting to the respondent's good behavior in the neighborhood and describing incidents in which the respondent was helpful to the neighbors: carrying groceries, babysitting, and so forth.

5. If the respondent plays on any school teams, after-school teams, or community-center teams, letters or testimony from coaches attesting to the respondent's reliability and good sportsmanship; and photographs of any awards the respondent has won, particularly for good sportsmanship.

6. If the respondent is involved in any activities such as orchestra, drama, art classes, or vocational training at school or after school, letters or testimony from the teacher or supervisor and exhibits demonstrating the respondent's skill, such as pictures the respondent has drawn or pottery the respondent has made. Such objects not only humanize the respondent but also alert the judge that the respondent has talents that, if fostered and guided, will help keep the respondent out of further criminal activity.

§ 19.03(b) Mitigating Aspects of the Offense

Generally, in referring to mitigating aspects of the offense, counsel should scrupulously avoid disclosing to the prosecution the projected trial testimony of defense witnesses, or even revealing the respondent's version of the events. Since it will be the rare case in which the defense wins a pretrial motion to dismiss for social reasons, counsel cannot afford to reveal facts that, although supportive of the motion, would give discovery to the prosecutor and thereby undermine the respondent's chances of winning the trial. Generally, counsel should focus upon mitigating aspects of the prosecution's version of the crime, beginning statements with such phrasing as: "even under the prosecution's version of the events . . . ." For example, counsel might say: "Even under the prosecution's theory of what happened, no one was injured and the complainant recovered her property."

In describing the mitigating aspects of the crime, counsel should not play into rejoinders by the prosecutor or the judge that counsel is inappropriately minimizing the gravity of the offense or the trauma to the victim. Thus, for example, counsel should not claim that a mitigating aspect of an armed robbery was that the weapon was a toy gun, since the inevitable rejoinder will be that the victim had no way of knowing that the gun was not real. It is often an effective tactic

to state explicitly that counsel does not wish to minimize the gravity of the offense and then to go on to make the point that nonetheless the offense is less serious than the usual roster of violent crimes prosecuted in criminal court and juvenile court.

Counsel will ordinarily want to reserve written statements taken from prosecution witnesses until trial, rather than tipping off the prosecutor to the existence of the statements. Therefore, counsel should almost never submit such statements — or quote from them, or even refer to their existence — in a motion to dismiss for social reasons. However, in cases in which the statement is clearly of no worth in cross-examining the witness at trial but contains assertions that would be persuasive in a motion to dismiss (such as the assertions that a complainant wishes to drop the charges or that s/he was not injured), counsel might consider attaching the statement to the motion.

It is often an effective technique for counsel to arrange to have the respondent take a polygraph test and, if the respondent passes it, to attach the polygraph results to a motion to dismiss for social reasons. Although most jurisdictions exclude polygraph evidence at trial, the less formal rules of evidence applicable to pretrial motions often give the defense the opportunity to include the polygraph in a motion to dismiss for social reasons and thereby alert the judge that there is reason to doubt the respondent's guilt. Of course, counsel should not attach polygraph results if the recorded dialogue between the examiner and the respondent would disclose to the prosecutor aspects of the defense case at trial or provide the prosecutor with material for impeaching the respondent at trial.

§ 19.03(c) The Absence of a Prior Record of Delinquency Offenses

As explained in § 19.02 *supra,* it is essential that counsel not only question the client and his or her parent(s) but also check court records, probation records, and, if possible, police records, to ensure that the respondent has no prior convictions or arrests. Counsel can then relate in the motion his or her exhaustive search, so as to establish the credibility of counsel's assertion that there have been no prior convictions or arrests.

Section 19.02 *supra* also suggests the general rule that counsel should refrain from filing a motion to dismiss for social reasons if the effect is likely to be that the judge who will preside over the trial learns of convictions or arrests that s/he would not otherwise have found out about during trial. There are, however, some exceptions to this rule. If the defense strategy is to plead guilty in the event of a denial of the motion to dismiss and if the motion is being litigated primarily to induce the judge to pressure the prosecutor into making a more favorable plea offer (see § 19.02 *supra*), there is no harm to the judge's hearing of prior arrests and convictions, particularly if there were only a few and they were for very minor offenses.

Even if the defense strategy is to go to trial in the event that the judge denies the motion to dismiss, the defense would not ordinarily be hurt by the judge's hearing of a single prior arrest, particularly if defense counsel can document in the motion that the prior case was dismissed

because there was no evidence of the respondent's culpability. The motion should not, however, be made if the prior arrest was for the same type of crime as the one with which the respondent is now charged because the judge probably will believe that the similarity in charges is not coincidental.

§ 19.03(d) Evidence of Police Mistreatment of the Respondent

As indicated in § 19.01 *supra,* some statutes and court rules explicitly authorize the judge to consider "any exceptionally serious misconduct of law enforcement personnel in the investigation and arrest of the respondent" (N.Y. FAM. CT. ACT § 315.2(1)(c) (2014)) as a basis for dismissing for social reasons. Even if the applicable statute or court rule does not so provide, counsel should include any police mistreatment of the respondent in a motion to dismiss for social reasons, since the judge may view the respondent as having already suffered enough and may accordingly dismiss the petition.

Counsel should anticipate that the police will deny any allegations of mistreatment of the respondent, for the officers will be well aware that mistreatment of a juvenile could expose them to civil liability and internal disciplinary sanctions. Counsel must seek out all available non-police witnesses to the mistreatment as well as witnesses who can attest that the respondent was not injured prior to arrest and was severely injured thereafter. Counsel should have color photographs taken of the respondent's injuries before the bruises heal or fade. If counsel intends to proceed by evidentiary hearing rather than by affidavit (see § 19.04 *infra*), counsel should disclose as little of this evidence as possible in the written motion, to prevent the police officers from shaping their testimony to rebut defense evidence and avoid traps on cross-examination.

§ 19.04 DECIDING WHETHER TO REQUEST AN EVIDENTIARY HEARING OR PRESENT THE MOTION THROUGH AFFIDAVITS

When local practice gives the defense the option of proceeding by affidavit or by an evidentiary hearing, counsel will need to weigh:

1. Whether the witnesses who could attest to the mitigating social information are so persuasive in person that they would markedly improve the chances of success if they testified or, conversely, so unimpressive that their appearance might damage the defense case.

2. Whether the witnesses' information about the respondent is so limited that it is best to present that information in a short affidavit or letter (thereby conveying the impression that the witness could have said more if given the opportunity) rather than put these individuals on the witness stand where it will become apparent (through cross as well as direct) how limited their knowledge of the respondent really is.

3. Whether the witnesses know unfavorable as well as favorable information about the respondent, and whether cross-examination is likely to bring out the unfavorable information.

When local practice allows counsel to present affidavits in addition to live witnesses at an evidentiary hearing, the best course is to call only the wholly favorable witnesses to testify and substitute affidavits for the others.

§ 19.05 CONDUCTING THE EVIDENTIARY HEARING ON A MOTION TO DISMISS

If local practice allows defense counsel to select the date of the hearing, counsel should ordinarily set the hearing on the day of trial so that, if the judge denies the motion and proceeds to trial, favorable information about the respondent will be fresh in the judge's mind during the trial. See § 19.02 *supra.*

In most jurisdictions the rules of evidence are relaxed at pretrial hearings. Almost invariably, hearsay is permitted, see § 22.03(e) *infra,* and counsel may also be able to present evidence that is generally deemed incompetent, such as polygraph evidence showing that the respondent was truthful in denying involvement in the offense.

As explained in § 19.04 *supra,* counsel should take advantage of local rules permitting the presentation of affidavits at the hearing and should substitute such affidavits for witnesses who would not make a good impression or who know unfavorable facts about the respondent that might emerge in cross-examination.

In presenting the defense witnesses, counsel should keep in mind that the judge's patience will be limited. Lengthy testimony and a long list of witnesses may lead the judge to curtail the defense case by excluding later witnesses as cumulative. Accordingly, if the defense presentation is going to be lengthy, counsel should ordinarily lead with the strongest witnesses.

Chapter 20

Motions for a Change of Venue; Motions for Recusal of the Judge

Part A. Motions for a Change of Venue

§ 20.01 STATUTORY AND CONSTITUTIONAL RULES GOVERNING VENUE IN A DELINQUENCY CASE

§ 20.01(a) The Statutory Provisions

In most jurisdictions the juvenile statutes specify the venue of delinquency cases. Some States follow the typical adult criminal court rule that offenses are triable only in the county (or circuit, or other judicial unit) comprising the place in which the offense was committed. *See, e.g.,* COLO. REV. STAT. ANN. § 19-2-105 (2014); ME. REV. STAT. ANN. tit. 4, § 155(1) (2014); N.Y. FAM. CT. ACT § 302.3(1) (2014).

Other States broaden the traditional criminal rule, granting discretion to the juvenile court to set venue either in the county in which the offense was committed or in the county in which the child resides. *See, e.g.,* CONN. GEN. STAT. ANN. § 46b-142(a) (2014); OR. REV. STAT. § 419C.013(1) (2014); WASH. REV. CODE ANN. § 13.40.060(1) (2014) (for "cases in which diversion is provided by statute").

Still other States give the judge discretion to choose among the location of the crime, the county in which the child resides, and the locale in which the child was apprehended. *See, e.g.,* CAL. WELF. & INST. CODE § 651 (2014).

Finally, in some States, if the trial is held in the county in which the crime was committed, the case can thereafter be transferred for disposition to the child's county of residence. *See, e.g.,* COLO. REV. STAT. ANN. § 19-2-105(1)(a) (2014); N.Y. FAM. CT. ACT § 302.3(4) (2014); WASH. REV. CODE ANN. § 13.40.060(2)(b) (2014). The theory underlying such postconviction changes of venue is that the issues to be decided at disposition — the respondent's need for treatment or confinement; the types of community-based services available in the child's community — are likely to depend upon witnesses and evidence located in the child's home county.

§ 20.01(b) The Constitutional Provisions

At least arguably, the state legislature's power to regulate venue in delinquency cases is constricted by the guarantees of the Sixth Amendment, as applied to the States through incorporation in the Fourteenth Amendment (*see Duncan v. Louisiana,* 391 U.S. 145 (1968)). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district *wherein the crime shall have been*

committed, which district shall have been previously ascertained by law . . . ." U.S. CONST. amend. VI (emphasis added). Although its terms refer to "criminal prosecutions," and delinquency proceedings are not technically "criminal," "[l]ittle . . . is to be gained by any attempt simplistically to call the juvenile court proceeding either 'civil' or 'criminal.'" *McKeiver v. Pennsylvania,* 403 U.S. 528, 541 (1971) (plurality opinion). As a matter of due process, an alleged delinquent is entitled to whatever Sixth Amendment protections are "necessary component[s] of accurate factfinding." *Id.* at 543. *Cf. In re Gault,* 387 U.S. 1, 49-50 (1967) (despite the explicit language of the Fifth Amendment Self-Incrimination Clause referring to "criminal case[s]," the Court holds the Privilege applicable to juvenile delinquency proceedings: "[t]o hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings").

Although the Court concluded in *McKeiver* that the right to jury trial embodied in the Sixth Amendment is not essential to accurate factfinding, *see* 403 U.S. at 543, 547 (plurality opinion); *id.* at 554-55 (concurring and dissenting opinion of Justice Brennan), the venue requirement of the Sixth Amendment is an entirely different matter. By demanding that a trial be held within "the State and district wherein the crime shall have been committed," the Amendment ensures that the accused will have access to the witnesses and evidence essential to "accurate factfinding." *See, e.g., United States v. Johnson,* 323 U.S. 273, 278 (1944) (recognizing that the "large policy back of the constitutional safeguards" established in the venue clause is to protect the accused from "the serious hardship of defending prosecutions in places . . . [whose "remote[ness]" would cause] difficulties, financial and otherwise, . . . of marshalling . . . witnesses"); *see also Platt v. Minnesota Mining & Mfg. Co.,* 376 U.S. 240, 245-46 (1964). This is true whether the State is one that affords jury trials or only bench trials in juvenile cases, since the venue clause of the Sixth Amendment "strengthen[s] . . . the factfinding function" (*McKeiver v. Pennsylvania,* 403 U.S. at 547) — regardless of the nature of the finder of fact — by enabling the accused to gather the evidence to be presented to the factfinder.

§ 20.02 MOTIONS CHALLENGING THE CHARGING PAPER ON VENUE GROUNDS

The initial venue selected by the prosecutor must comply with the statutory and constitutional requirements described in § 20.01 *supra.* A Petition filed in the wrong venue is generally subject to a motion to quash or to dismiss, but in some jurisdictions the respondent's remedy may be merely a motion for transfer to the court of proper venue.

As explained in § 17.05 *supra,* a Petition also may be subject to dismissal for the technical defect of failing to allege facts establishing venue in the court in which it is filed.

§ 20.03 DEFENSE MOTIONS FOR A CHANGE OF VENUE

When the applicable venue rules would allow prosecution of a particular offense in more than one court (as, for example, in States in which the statute permits prosecution either in the county where the crime was committed or in the county where the respondent resides (see §

20.01(a) *supra*)), the prosecutor has the initial choice of venue. After the filing of the Petition, however, the defense can move for a change of venue. Unlike the motions described in § 20.02 *supra,* which attack the Petition on the ground that venue has been improperly selected or pleaded, motions for a change of venue assume the technical propriety of venue in the court in which the Petition has been filed and request that the case be transferred to some other court for trial or plea, on the ground that the initial venue is prejudicial to the respondent. The forms of prejudice ordinarily recognized by local statutes and caselaw as justifying a change of venue are: (a) inconvenience to the respondent, defense witnesses, or both; and (b) inability to obtain a fair trial in the court in which the charge is pending. A motion for a change of venue on these grounds may also be predicated on state and federal constitutional guarantees under some circumstances.

§ 20.03(a) Motions for a Change of Venue in Order To Secure Defense Access to Witnesses

As explained in § 20.01(b) *supra,* a respondent who is being prosecuted in a county other than the one in which the crime was committed has an arguable claim of right, under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, to change the venue of the trial to the "district wherein the crime shall have been committed," U.S. CONST. amend. VI, in order to protect the respondent's ability to seek out and produce defense witnesses at trial. However, because this constitutional theory is not yet established in the caselaw, counsel when invoking it should make a strong factual showing by affidavits or testimony that the defense is seriously handicapped in investigating and preparing for trial as a result of the venue chosen by the prosecutor. Counsel should also rest his or her request for a change of venue on the alternative non-constitutional basis described in the following paragraph.

In most jurisdictions, statutes, court rules, or common-law doctrines allow the respondent to request a discretionary transfer of venue in the interests of justice, on the ground that the respondent or his or her witnesses are inconvenienced by the prosecution's selection of venue. *See, e.g.,* N.Y. FAM. CT. ACT § 302.3(2) & Commentary (2014). Changes of venue on this ground are most commonly made for the purpose of moving a trial to the locale of the crime, to secure the respondent's access to witnesses. The defense can also invoke the doctrine in seeking to change venue to the child's county of residence, in order to prevent hardship to the respondent in attending court proceedings or to arrange "the presence of character witnesses [who are likely to reside] . . . in the district of [the respondent's] . . . residence." *United States v. Johnson,* 323 U.S. 273, 279 (1944) (Murphy, J., concurring).

§ 20.03(b) Motions for a Change of Venue on the Ground That a Fair Trial Cannot Be Had in the Court in Which the Charge Is Pending

This section discusses the right to a venue change in order to escape trial in a locality in which it will be impossible to empanel a fair and impartial jury by reason of community attitudes, inflammatory publicity, and so forth. It is pertinent only to jurisdictions that provide for

jury trials in delinquency cases. Motions for recusal or disqualification of a judge on grounds of bias, denominated "motions for a change of venue" in some jurisdictions, are discussed in §§ 20.04-20.07 *infra.* These may be made in connection with either bench trials or jury trials.

If the jurisdiction is one that affords jury trials in juvenile cases, the defense can invoke the extensive caselaw guaranteeing an accused's right to a fair trial by an impartial jury. *See, e.g., Patton v. Yount,* 467 U.S. 1025 (1984); *Murphy v. Florida,* 421 U.S. 794 (1975); *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Irvin v. Dowd,* 366 U.S. 717 (1961); *Coleman v. Kemp,* 778 F.2d 1487 (11th Cir. 1985). The constitutional due process right to a fair trial does not guarantee a venue change as its inevitable safeguard; but a venue change is one of the primary means for assuring a fair trial, *see Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 563-64 (1976), and may be required if other methods are insufficient, *Groppi v. Wisconsin,* 400 U.S. 505 (1971). Under the federal due process cases, the defense can seek a change of venue on the basis of public hostility against the respondent, public belief that the respondent is guilty, public outrage over the offense, or prejudicial news reporting or editorializing that vilifies the respondent or discloses inadmissible evidence against the respondent. A motion seeking a change of venue on these grounds is ordinarily required to be supported by affidavits, and the defense is given an evidentiary hearing if the motion and affidavits are facially sufficient. Evidentiary support for the proposition that a fair trial cannot be held in the locality may be found in: newspaper clippings, videotapes, audiotapes, and TV or radio scripts; testimony of persons knowledgeable about public opinion; opinion polls; evidence of petitions, resolutions, speeches, and so forth; and evidence of news conferences, press releases, and media interviews by the police and the prosecutor. In some jurisdictions a motion for venue change from a court in which the respondent asserts that s/he cannot be fairly tried must await the conclusion of *voir dire* examination of prospective jurors (see §§ 28.03-28.05 *infra*); only after an attempt to empanel a fair jury has been made and, in the opinion of the presiding judge, has failed, may venue be shifted. In other jurisdictions a motion for change of venue may be made prior to trial.

Before seeking a change of venue on the grounds sketched in the preceding paragraph, counsel should ascertain from knowledgeable local attorneys or court personnel *where,* in granting such motions, the court (or the judge presiding over the case) has been sending cases. Unlike the motions described in § 20.03(a) *supra,* which seek transfer of the case to a particular locale, a motion requesting a venue change on the ground of local juror bias cannot control what county the case will be sent to. After investigating the localities to which the case is likely to be sent in the event that a defense motion for a change of venue is granted, counsel should thoroughly review the risks and costs of being transferred to those locales and weigh them against the liabilities of remaining in the current forum.

Part B. Motions for Recusal or Disqualification of the Judge

§ 20.04 THE RIGHT TO AN IMPARTIAL JUDGE

In some jurisdictions the juvenile code explicitly provides for defense motions for recusal

or disqualification of a judge who is biased or prejudiced. *See, e.g.,* N.Y. FAM. CT. ACT § 340.2(3)(b) (2014); WASH. REV. CODE ANN. § 13.40.060(2)(a) (2014). Recusal may be automatic upon defense request in certain circumstances. *See, e.g.,* D.C. CODE §§ 16-2307(g), 16-2312(j) (2014) (upon defense request, judge who presided over detention hearing or transfer hearing must disqualify himself or herself from serving as the factfinder in a bench trial).

Even in jurisdictions whose codes do not explicitly provide for defense motions for recusal, the courts have consistently recognized a juvenile respondent's right to seek recusal, reaching this result either through the application of statutes or rules governing recusal in civil cases, *see, e.g., Anonymous v. Superior Court in and for the County of Pima,* 14 Ariz. App. 502, 484 P.2d 655 (1971); *State ex rel. R.L.W. v. Billings,* 451 S.W.2d 125 (Mo. 1970), or through the enforcement of the inherent common-law right to an impartial judge, *see, e.g., In the Matter of G.K.,* 497 P.2d 914, 915 (Alaska 1972) ("fundamental tenet of our system of justice that every litigant shall have his rights adjudicated by a judge who is disinterested, impartial, and unbiased").

In addition to statutory and common-law doctrines, the Due Process Clause of the Fourteenth Amendment and equivalent state constitutional provisions guarantee a right to an impartial judge. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009); *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997); *In re Murchison,* 349 U.S. 133, 136 (1955); *see, e.g., In re Ruth H.,* 26 Cal. App. 3d 77, 84-86, 102 Cal. Rptr. 534, 538-39 (1972); *State ex rel. Mitchell v. Bowman,* 54 Wis. 2d 5, 194 N.W.2d 297 (1972); *see also Tumey v. Ohio,* 273 U.S. 510 (1927); *Ward v. Village of Monroeville,* 409 U.S. 57 (1972); *Brown v. United States,* 377 F. Supp. 530, 539 (N.D. Tex. 1974); *Butler v. United States,* 414 A.2d 844, 852-53 (D.C. 1980) (en banc); *cf. Mayberry v. Pennsylvania,* 400 U.S. 455 (1971); *Johnson v. Mississippi,* 403 U.S. 212 (1971); *Taylor v. Hayes,* 418 U.S. 488 (1974); *Connally v. Georgia,* 429 U.S. 245, 247-50 (1977) (per curiam); *Withrow v. Larkin,* 421 U.S. 35, 47 (1975) (dictum); *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242-43 (1980) (dictum).

§ 20.05 GROUNDS FOR RECUSAL OR DISQUALIFICATION OF THE JUDGE

In some jurisdictions the mere filing of a motion for recusal bars the judge from presiding and requires transfer of the matter to another judge. *See, e.g., Anonymous v. Superior Court in and for the County of Pima,* 14 Ariz. App. 502, 484 P.2d 655 (1971); *Daniel V. v. Superior Court*, 139 Cal. App. 4th 28, 39-40, 49, 42 Cal. Rptr. 3d 471, 477-78, 485 (2006); FLA. RULE JUD. ADMIN. 2.330(f) (2014); *State v. Espinoza*, 112 Wash. 2d 819, 823, 774 P.2d 1177, 1179 (1989); *State ex rel. Mateo D.O. v. Circuit Court for Winnebago County*, 280 Wis.2d 575, 584, 696 N.W.2d 275, 280 (Wis. App. 2005). In most jurisdictions, however, the defense must assert specific grounds for recusal. Recusal statutes and caselaw uniformly require that a judge recuse himself or herself when s/he has some personal interest in the outcome of the case, a relationship to a party, or any actual form of bias or prejudice.

The recusal issue that arises most frequently in delinquency cases is whether a judge must

recuse himself or herself as the trier of fact in a bench trial when s/he has learned information about the respondent or the case prior to trial. Several courts have held that prior knowledge of the case or the respondent does not necessarily bar a judge from serving as the factfinder in a bench trial, since judges are presumed to be capable of ignoring inadmissible information and reaching a verdict solely on the facts elicited at trial. *See, e.g., In re Kean,* 520 A.2d 1271, 1277 (R.I. 1987); *In the Matter of Michael W.,* 122 Misc. 2d 243, 470 N.Y.S.2d 319 (N.Y. Fam. Ct. 1983). However, recusal is required if the information known to the judge is highly prejudicial, such as:

1. When the information known to the judge strongly suggests that the respondent is guilty of the charges, *see, e.g., Butler v. United States,* 414 A.2d 844 (D.C. 1980) (en banc) (adult criminal defendant deprived of due process when judge presided over bench trial after having been informed by defense counsel that the prosecution could prove its case beyond a reasonable doubt and that the defendant intended to commit perjury); *In re George G.,* 64 Md. App. 70, 494 A.2d 247 (1985) (judge should have recused himself as trier of fact in delinquency bench trial because he had previously convicted three co-perpetrators of the same crime, rejecting the same defense that the respondent intended to offer); *Brent v. State,* 63 Md. App. 197, 492 A.2d 637 (1985) (judge should have recused himself from presiding over adult criminal defendant's bench trial after learning of defendant's willingness to plead guilty and after having presided over the guilty plea proceedings of the co-defendants, at which statements were made implicating the defendant); *People v. Zappacosta,* 77 A.D.2d 928, 431 N.Y.S.2d 96 (N.Y. App. Div., 2d Dep't 1980) (judge should have recused himself from presiding over bench trial of adult criminal defendant because judge presided over the guilty plea proceeding of defendant's wife, who was his co-perpetrator, and judge thereby heard statements incriminating the defendant). *Cf. Watson v. State*, 934 A.2d 901, 906-08 (Del. 2007) (Family Court judge, who convicted the juvenile defendant in a bench trial based in part on the judge's rejection of the credibility of the juvenile's testimony, should have recused herself from a trial of the same juvenile immediately thereafter on an unrelated charge in which the juvenile's credibility would again be at issue).

2. When the judge is aware of inadmissible evidence about the respondent's other crimes, prior record, or other prejudical aspects of the respondent's character or record, *see, e.g., Commonwealth v. Goodman,* 454 Pa. 358, 362 & n.4, 311 A.2d 652, 654 & n.4 (1973) (judge who presided over suppression hearing should have recused himself from bench trial in marijuana possession case because, at the suppression hearing, "an impression was left from hearsay testimony as to probable cause that the appellants were trafficking in narcotics," and this evidence was both "highly inflammatory" and "inadmissible during the trial of the cause"); *In the Matter of James H.,* 41 A.D.2d 667, 341 N.Y.S.2d 92 (N.Y. App. Div., 2d Dep't 1973), *appeal withheld and case remanded on other grounds,* 34 N.Y.2d

814, 316 N.E.2d 334, 359 N.Y.S.2d 48 (1974), *appeal dism'd,* 36 N.Y.2d 794, 330 N.E.2d 649, 369 N.Y.S.2d 701 (1975) (when probation officer stated during delinquency trial that case was "a 'Training School' case," judge should have granted defense motion for disqualification to avoid appearance of prejudice); *cf. In re Gladys R.,* 1 Cal. 3d 855, 861-62, 464 P.2d 127, 132, 83 Cal. Rptr. 671, 676 (1970) (judge in delinquency trial committed reversible error by reviewing social study with "negative indications about [the child's] . . . home environment").

Even when the judge does not view himself or herself as actually biased, s/he must consent to recusal whenever his or her knowledge of prejudicial information would cause the proceedings to have an "appearance of impropriety." *See*, *e.g.*, *Perotti v. State*, 806 P.2d 325 (Alaska App. 1991) ("appearance of partiality" required that the trial judge recuse himself from serving as the sentencing judge in an adult criminal case in which he had presided over the proceeding to transfer the case from juvenile to adult court and had made a finding of non-amenability to rehabilitative treatment based on improperly-obtained psychiatric evidence); *In re Ruth H.,* 26 Cal. App. 3d 77, 86, 102 Cal. Rptr. 534, 539 (1972) ("persons appearing before the referee should have no basis to suspect him of partiality; appearances are important"); *People v. Zappacosta,* 77 A.D.2d at 930, 431 N.Y.S.2d at 99 (courts must be "[s]ensitive to the imperative that we avoid any situation which allows even a suspicion of partiality"); *In the Matter of James H.,* 41 A.D.2d at 667, 341 N.Y.S.2d at 93 ("[e]ven though the court may not be in fact influenced by what it hears, it is the appearance of prejudice against which the policy is directed"); *Commonwealth v. Goodman,* 454 Pa. at 361, 311 A.2d at 654 ("[w]e have every confidence that the trial judges of this Commonwealth are sincere in their efforts to avoid consideration of incompetent inflammatory evidence in reaching these judgments but we also are acutely aware that the appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements"). *See also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888 (2009) ("[T]he States have implemented ["judicial reforms"] to eliminate even the appearance of partiality. Almost every State . . . has adopted the American Bar Association's objective standard: 'A judge shall avoid impropriety and the appearance of impropriety.' ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004) . . . . The ABA Model Code's test for appearance of impropriety is 'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.' Canon 2A, Commentary"); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 6-1.9(a) (3d ed. 2000) ("[t]he trial judge should recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially or whenever his or her impartiality reasonably might be questioned"). And the recognition by the Supreme Court of the United States in *Breed v. Jones,* 421 U.S. 519, 536-37 (1975), that when a juvenile judge has presided over a pretrial transfer hearing, "the nature of the evidence considered at [that] . . . hearing may in some States require that, if transfer is rejected, a different judge preside at the [trial]" (see § 13.17 *supra*) can be cited as reflecting an assumption by the Court that propriety — if not constitutional due process — would be offended if a judge who has once been exposed to the prosecutor's adversary presentation of incriminating evidence against a respondent on a specific

charge were to sit as factfinder on the trial of that very charge.

Finally, even when recusal is not *required,* counsel can urge the judge to exercise his or her discretion in favor of recusal as a prophylactic measure to guard against any possible unconscious influences of the judge's prior knowledge on his or her factfinding function, or any possible appearance of impropriety. Counsel can point to decisions recognizing that even when the judge intends to faithfully ignore inadmissible information, it may still have an effect upon his or her mind. *See, e.g., United States v. Walker,* 473 F.2d 136, 138 (D.C. Cir. 1972) (although a "[j]udge is presumed to have a trained and disciplined judicial intellect, . . . [this] disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious"); *People v. Zappacosta,* 77 A.D.2d at 930, 431 N.Y.S.2d at 99 ("[e]ven the most learned [j]udge would have difficulty in excluding such information from his subconscious deliberations"); *In re George G.,* 64 Md. App. 70, 80, 494 A.2d 247, 252 (1985) (although "the sincerity [and] . . . the integrity of the trial judge" could not be doubted, "[s]ubconsciously, . . . [the impermissible information] apparently lingered on in the deep recesses of his mind"). Counsel then can suggest that, at least when recusal and substitution of another judge will impose no significant burden or inconvenience upon the judiciary, they are appropriate to avoid even the possibility of unconscious influences upon the judge. *See, e.g., United States v. Walker,* 473 F.2d at 138-39 (rejecting the argument that a judge *must* recuse himself or herself after learning that one of the defendants had offered a guilty plea, but observing that "it would be better if [the judge] . . . exercised his prerogative to recuse himself [in such a situation since this rule] . . . should be easy to observe and put no burden on the administration of justice"); *People v. Smith,* 264 Cal. App. 2d 718, 722, 70 Cal. Rptr. 591, 594 (1968) (indicating that "where a motion is properly made before trial, a pretrial [suppression] hearing before another judge is . . . preferable to a determination by the trial judge"); *Banks v. United States*, 516 A.2d 524, 529 (D.C. 1986) (although the trial judge did not commit an abuse of discretion by conducting a bench trial of a defendant whose guilty plea broke down because the defendant asserted his innocence and the prosecution refused to offer an *Alford* plea, "the preferable procedure would have been for the trial judge to certify the case to another judge for trial after he rejected the plea"). The same reasoning, calling for recusal when it is not burdensome to the judicial system, would also apply to cases in which there is a potential for the appearance of impropriety. *See, e.g., State v. Lawrence,* 344 N.W.2d 227, 231 (Iowa 1984) (upholding trial judge's exercise of discretion in favor of recusal because judge "felt his trial rulings might be questioned in the mistaken belief that he was reacting in some way to the fact that he had been asked to step aside").

§ 20.06 PROCEDURES FOR SEEKING RECUSAL OR DISQUALIFICATION

Local practice must be consulted with regard to the appropriate form of challenge to a judge (affidavit of bias, motion for recusation, and so forth) and the time when it must be made.

As explained in § 20.05 *supra,* in some jurisdictions, the filing of a facially sufficient affidavit or motion requires that the judge recuse himself or herself, without inquiry into the truth of the matters of fact averred. Under other procedures the underlying factual questions are heard

before the judge who is challenged or another judge.

The defense is entitled to put allegations of bias into the record in any manner necessary to present them to the court and save them for review. *See Holt v. Virginia,* 381 U.S. 131 (1965); *In re Little,* 404 U.S. 553 (1972). Ordinarily, a written motion with supporting affidavits is desirable to protect the record.

In some jurisdictions there is a procedure — sometimes called a motion for change of venue, sometimes called an affidavit of bias — that is actually used (by law or custom) as a form of peremptory challenge to the judge. It may not require any assertion of bias, or it may require simply an allegation of bias in conclusory form that the judges do not take seriously or resent. Ordinarily, motions or affidavits for removal of a judge under these peremptory-challenge procedures are timely only if filed before the judge has taken any action in the case; sometimes they are required to be filed within a specific time after the assignment of the case to the judge.

§ 20.07 TACTICAL CONSIDERATIONS IN DECIDING WHETHER TO SEEK RECUSAL AND IN FRAMING THE RECUSAL REQUEST

In deciding whether to seek recusal or disqualification of the judge, counsel must balance the liabilities of keeping the present judge (that is, the likely effects of biasing factors upon the judge's verdict and sentence) against the risk of incurring judicial wrath. If the motion is denied and the judge retains the case, whatever latent biasing factors originally existed may well be exacerbated by the judge's anger over being accused of bias. Even if the motion is granted, there may be repercussions: The judge to whom the case is transferred may resent counsel and the client for what the judge perceives as an attack upon a colleague or the judiciary in general.

In deciding whether to seek recusal, counsel also will need to compare the present judge with the other judges to whom the case might be assigned if the recusal motion is granted. Even if the current judge knows prejudicial information about the respondent or the case, s/he still might be a fairer factfinder than the other judges who could receive the case. And even if the present judge is so biased that s/he is likely to convict, it still might be preferable to keep the judge if the respondent's chances of winning at trial are slim no matter who the judge is and if the present judge is a relatively lenient sentencer.

Counsel can both maximize the chances of gaining recusal and minimize the risks of incurring judicial wrath by the way in which the recusal request is framed. Recusal motions should not ordinarily state or even imply that the judge is incapable of keeping an open mind. When the impact of prior exposures upon the judge must be identified, it should be described in terms of the potential unconscious effects of these exposures upon any human being in the judge's situation. See § 20.05 *supra.* Alternatively, when possible, counsel should rely upon the "appearance of impropriety" as the primary basis for recusal. See *ibid.*

Depending upon the temperament of the judge and counsel's relationship with the judge,

counsel may want to consider making an informal recusal request before filing a motion or invoking statutory recusation procedures. The initial soft-sell approach permits a graceful way out that will be accepted by some judges who would feel obliged to resist a formal motion making specific allegations of bias against them. However, some judges may resent such informal requests, viewing them as an attempt to use a back-door approach to obtain recusal for reasons that are so insubstantial that the attorney is not even willing to put them on the record.

In making the difficult decisions whether to seek recusal and how to frame recusal requests, counsel should always investigate both the general local attitudes toward these procedures and the known past reactions of the individual judge in question. In some jurisdictions, and with some judges, recusal motions are accepted as a routine forum-shopping device, which may ordinarily be safely used, without incurring judicial wrath. Conversely, what is accepted as stock pleading in one locality — or to one judge — may be taken as a deadly insult in another locality or by another judge in the same locality.

Chapter 21

Election or Waiver of Jury Trial; Motions Relating to the Jury

§ 21.01 THE RIGHT TO JURY TRIAL IN JUVENILE DELINQUENCY CASES

In *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), a majority of the Court held that juvenile respondents in delinquency proceedings do not possess a federal constitutional right, under either the Sixth Amendment or the Due Process Clause, to trial by jury. The plurality opinion by Justice Blackmun, joined by three other Justices, concluded that the "applicable due process standard" of "fundamental fairness" (*id.* at 543) does not require juries because "one cannot say that in our legal system the jury is a necessary component of accurate factfinding" (*id.* at 543); therefore "[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner" (*id.* at 547), converting "intimate, informal protective proceeding[s]" into "a fully adversary process," *id.* at 545. Justice Harlan concurred in the holding on the basis of his view that "criminal jury trials are not constitutionally required of the States, either as a matter of Sixth Amendment law or due process." *Id.* at 557. Justice Brennan, in a concurring and dissenting opinion, concluded that "the States are not bound to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve" — "to 'protect the [juvenile] from oppression by the Government,' . . . and to protect him against 'the compliant, biased, or eccentric judge' . . . [by] allow[ing] . . . what is in essence an appeal to the community conscience." *Id.* at 554. *See generally* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, in *Symposium on Juvenile Justice Reform*, 33 WAKE FOREST L. REV. 553 (1998).

The States are, of course, free to enact statutes granting a jury trial right to respondents in delinquency proceedings. *See McKeiver v. Pennsylvania*, 403 U.S. at 547; *id.* at 553 (White, J., concurring). Approximately one quarter of the States have enacted statutes providing for jury trials in juvenile cases. *See* COLO. REV. STAT. ANN. § 19-2-107 (2014) (establishing "a right to a jury trial for juveniles charged as aggravated offenders, and for juveniles charged with having committed a crime of violence," and "permit[ting] the court to order a jury trial in other kinds of juvenile cases, excepting only misdemeanor, petit offense or municipal ordinance violations," *A.C., IV v. People*, 16 P.3d 240, 242 (Colo. 2001)); MASS. GEN. LAWS ANN. ch. 119, § 55A (2014); MICH. COMP. LAWS ANN. § 712A.17(2) (2014); MONT. CODE ANN. § 41-5-1502(1) (2014); N.M. STAT. ANN. § 32A-2-16(A) (2014); OKLA. STAT. ANN. tit. 10A, § 2-2-401 (2014); TEX. FAM. CODE ANN. § 54.03(c) (2014); W. VA. CODE § 49-5-6 (2014); WYO. STAT. ANN. § 14-6-223(c) (2014). *See also* ARK. CODE ANN. § 9-27-505(a) (2014) ("right to a jury trial" for juveniles tried as an "extended juvenile jurisdiction offender"); MINN. STAT. ANN. § 260B.163(1)(a) (2014) ("child who is prosecuted as an extended jurisdiction juvenile has the right to a jury trial on the issue of guilt"); *In re G.O.*, 191 Ill.2d 37, 42, 727 N.E.2d 1003, 1006, 245 Ill. Dec. 269, 272 (2000) (Illinois "Juvenile Court Act grants a jury trial to both habitual and

violent juvenile offenders"). The Alaska Supreme Court has construed its state constitution as conferring a right to a jury trial upon juveniles in delinquency cases. *R.L.R. v. State,* 487 P.2d 27, 32-33 (Alaska 1971). The Kansas Supreme Court, which had initially followed *McKeiver* in holding in 1984 that juveniles do not have a right to a jury trial, reached the opposite result in 2008 on both federal and state constitutional grounds because "the Kansas juvenile justice system has become more akin to an adult criminal prosecution" as "the focus has shifted to protecting the public, holding juveniles accountable for their behavior and choices, and making juveniles more productive and responsible members of society," all of which has "eroded the benevolent *parens patriae* character that distinguished . . . [the juvenile justice system] from the adult criminal system." *In the Matter of L.M.*, 286 Kan. 460, 466, 469-70, 473, 186 P.3d 164, 168, 170, 172 (2008). The courts in other States have thus far declined to find a right to a jury trial in juvenile court on either federal or state constitutional grounds, *see, e.g.*, *In the Matter of Reynolds*, 317 Or. 560, 857 P.2d 842 (1993); *State v. Lawley,* 91 Wash. 2d 654, 591 P.2d 772 (1979), although some courts have held on federal or state constitutional grounds that the state's denial of a jury trial right for juveniles has systemic ramifications such as precluding placement of juveniles in adult correctional facilities (*see In re C.B.*, 708 So.2d 391 (La. 1998); *In re Jeffrey C.*, 146 N.H. 722, 725, 781 A.2d 4, 7 (2001); *In the Interest of Hezzie R.*, 219 Wis. 2d 848, 580 N.W.2d 660 (1998)) or precluding the use of a delinquency adjudication as a predicate felony for enhancing an adult criminal sentence (*see State v. Brown*, 879 So.2d 1276 (La. 2004)), or requiring more intensive appellate review of the sufficiency of the evidence underlying a delinquency finding in a bench trial (*see In the Interest of A.K.*, 825 N.W.2d 46, 51 (Iowa 2013) ("juvenile proceedings differ from criminal proceedings in . . . [the] important respect . . . [that] [n]either statutory nor constitutional provisions guarantee juveniles the right to a jury trial," and "[t]his important distinction between adult and juvenile proceedings favors a more in-depth appellate review of the facts supporting and opposing an adjudication")). *See also* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111 (2003).

The plurality also observed in *McKeiver v. Pennsylvania* that "[t]here is, of course, nothing to prevent a juvenile court judge, in a particular case where he feels the need, or when the need is demonstrated, from using an advisory jury." 403 U.S. at 548. The California Supreme Court in *People v. Superior Court of Santa Clara County,* 15 Cal. 3d 271, 539 P.2d 807, 124 Cal. Rptr. 47 (1975), construed the California juvenile code as authorizing judges in delinquency cases to appoint advisory panels to assist in the factfinding process, while the Illinois Supreme Court in *People ex rel. Carey v. White,* 65 Ill. 2d 193, 357 N.E.2d 512, 2 Ill. Dec. 345 (1976), interpreted the Illinois statute in precisely the opposite manner.

Even though the federal Constitution does not impose the requirement that a State provide jury trials to juveniles, the Constitution does regulate the manner in which jury trials are conducted in those jurisdictions that have opted for them in delinquency cases. The due process mandate of "fundamental fairness" demands that procedures in delinquency cases be conducive to "accurate factfinding." *McKeiver v. Pennsylvania,* 403 U.S. at 543 (plurality opinion); *see id.*

at 534-55 (Brennan, J., concurring). *See also In re Gault,* 387 U.S. 1, 30-31 (1967); *In re Winship*, 397 U.S. 358 (1970). Accordingly, jury trial procedures in delinquency cases must comport with any aspects of adult jury procedure that are necessary for accurate and impartial factfinding. *See, e.g., People in the Interest of R.A.D.,* 196 Colo. 430, 586 P.2d 46 (1978) (juries in juvenile cases must comply with the due process requirement of an impartial jury, and therefore juveniles can exercise the traditional adult criminal right to challenge for cause venirepersons who are employed by a law enforcement agency). The federal constitutional restraints against discriminatory jury selection (see § 21.03(b) *infra*) also control juvenile court juries just as they do adult criminal juries; the recognition of those restraints predated the incorporation of the Sixth Amendment into the Fourteenth and does not depend upon an underlying federal constitutional right to jury trial at all.

It is presently unclear whether the federal constitutional mandate of "accurate factfinding" has any implications for the required size of the jury in a delinquency case or for the requirement of unanimity in jury decisionmaking. *In Williams v. Florida,* 399 U.S. 78 (1970), the Court held in the context of an adult criminal trial that the Sixth Amendment did not demand a common-law jury of 12 persons but was satisfied by a jury of six. Five, however, is too few. *Ballew v. Georgia,* 435 U.S. 223 (1978). In *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon,* 406 U.S. 404 (1972), the Court sustained provisions allowing nine-to-three and ten-to-two nonunanimous criminal verdicts. However, "conviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense" was held to be unconstitutional in *Burch v. Louisiana,* 441 U.S. 130, 134 (1979). *See also Brown v. Louisiana,* 447 U.S. 323 (1980).

§ 21.02 ELECTION OR WAIVER OF JURY TRIAL

§ 21.02(a) Procedure

The right to trial by jury may be waived by a respondent. The respondent technically has no right to insist on a bench trial rather than a jury trial, *see Singer v. United States,* 380 U.S. 24 (1965); *Gannett Co.* v. *DePasquale,* 443 U.S. 368, 383 (1979) (dictum), and in most jurisdictions a respondent's waiver of the state-created right to jury trial is conditioned on approval by the prosecutor and the judge. However, prosecutors and judges are almost invariably willing to approve a jury waiver without second thought because bench trials are generally quicker and less cumbersome than jury trials. As a consequence, the choice between jury trial and bench trial is, as a practical matter, the respondent's in most cases.

In many jurisdictions the respondent's waiver must be in writing. Local practice often requires that the written waiver be signed not only by the respondent, but also by his or her parent, the defense attorney, the prosecutor, and the judge.

Procedures vary regarding when the respondent is required to make an election between jury trial and bench trial. In some States s/he must demand or waive a jury at arraignment; in other States, within a specified period before trial. If the respondent demands a jury at

arraignment, s/he is ordinarily given leave, rather freely, to withdraw that demand later and ask for a bench trial. If s/he waives at arraignment, subsequent requests for jury trial may be entertained in the court's discretion; some judges grant them liberally, but many are grudging. Of course, the initial waiver may also be attacked as invalid. *See, e.g.*, *In re R.A.B.*, 197 Ill.2d 358, 368, 757 N.E.2d 887, 894, 259 Ill. Dec. 24, 31 (2001). If made without a lawyer at arraignment, it is pretty clearly invalid by force of the federal constitutional right to counsel. *See Hamilton v. Alabama,* 368 U.S. 52 (1961); *Coleman v. Alabama,* 399 U.S. 1 (1970).

§ 21.02(b) Factors That Should Be Considered in Deciding Whether To Elect or Waive a Jury Trial

The factors to be considered in deciding whether to elect a jury trial or a bench trial are manifold. A few of the more important are these:

1. *What judge will try the case if a jury is waived, and how appealing to that judge is this type of case, or this respondent's defense, or this respondent as a person?* Particular judges may be known to be "easy" or "hard" on respondents of certain ethnic or religious groups or social backgrounds, and this inclination should be evaluated. Similarly, particular judges are "hard" or "easy" on drug cases, or sex cases, or consent defenses in sex cases, and so forth. If there is a strong likelihood of a guilty verdict, how stiff a sentencer is the judge?

2. *What judge will try the case if a jury is not waived?* The trial judge is ordinarily the sentencing judge. Therefore, the sentencing predilections of the two judges who will try the case with and without a jury respectively must be compared.

3. *What evidence that the judge will hear can be excluded from a jury's consideration?* Judges at a bench trial invariably hear some things that a jury would not because (a) some exclusionary rules of evidence are more lax in nonjury trials; (b) the judge at a bench trial both rules on the admissibility of evidence and receives the evidence as the trier of fact; and (c) it is virtually impossible to convince an appellate court that the receipt of inadmissible evidence in a bench trial was prejudicial. Although trial judges are given great credit by appellate courts for having reasoning powers that allow them to compartmentalize their minds and segregate admissible from inadmissible evidence in arriving at a verdict (*see, e.g., Harris v. Rivera,* 454 U.S. 339, 346 (1981) (per curiam); see § 20.05 *supra*), as a practical matter trial judges are no less human than jurors. Thus a judge may be unwilling to acquit a person of a serious crime after the judge has heard and excluded an inadmissible confession, even though the admissible evidence of guilt is weak; whereas a jury hearing the same admissible evidence but unaware of the confession might well acquit.

4. *Is there an angle in the case that may win over a jury but that would be disregarded by a judge?* Juries may react with aversion to police brutality, an overzealous prosecutor, or other circumstances that would not affect a judge.

5. *Conversely, on the evidence admissible at a jury trial, is the case one in which jurors would be more likely than a judge to be swayed by emotional factors prejudicial to a respondent?* Several points are involved here. Experienced trial judges are more accustomed than jurors to seeing the physical injuries of victims of crimes of violence and may be less shocked by them. Even if the judge is incensed by the atrocity of a crime, s/he is usually more able than jurors to apply certain technical rules for weighing evidence on the question of the respondent's identity as its perpetrator — for example, the rules requiring corroboration of the testimony of a rape complainant or accomplice. Similarly, judges, more than juries, are concerned about the specific legal elements of a crime and may be able to keep attention focused on them even in a gruesome case. In general the concept that the prosecution bears the burden of proof beyond a reasonable doubt has more meaning to a judge than to jurors; and the closer is the question of guilt, the more likely is a judge than a jury to acquit.

6. *Is there a good legal defense that a jury will not be able to comprehend?* Generally, apart from individual judges' idiosyncrasies and predilections, it is advisable to submit legally complicated defenses to a judge. For example, questions of "breaking" in a burglary case, of "asportation" in a larceny case, and of property valuation, when the value of property may spell the difference between a misdemeanor and a felony, are more likely to be understood by a judge than by a jury.

7. *Are there controversial factual questions not resolvable from the evidence except by "hunches" with regard to credibility or by inferences that may be drawn differently by persons with different backgrounds?* Generally, a jury must be unanimous to convict, and it is harder to secure the agreement of the hunches or intuitions of 12 persons than of 1 person.

8. *Will some sort of evidence be presented that a judge is more likely to credit than a jury or vice versa?* Judges (and particularly some judges) are notorious for their inability to discredit police testimony. This is understandable enough; the judge has probably heard this same officer testify against a dozen or a hundred guilty respondents. On the other hand, judges are frequently far more skeptical than jurors with regard to the testimony of child sex complainants.

9. *Is it a general practice in the locality, or has the judge who will try the respondent on a waiver made it a practice, to reward jury waivers by more lenient sentencing?* Courts with docket congestion are particularly prone to the attitude that a respondent who insists on a jury trial is a nuisance.

10. *Is the evidence of guilt overwhelming, and is the defense essentially specious?* Quite apart from any general practice of rewarding jury waivers with sentencing leniency, a judge will often punish a respondent harshly for taking a jury trial in a frivolous case.

11. *Is the case likely to raise difficult or unsettled questions of legal doctrine, either with regard to the admissibility of evidence or with regard to the substantive elements of the offense?* There are more ways in a jury trial than in a bench trial for a judge to err and for the judge's

errors to be made visible and reversible. In a bench trial, a judge can conceal beneath a general finding of guilt the resolution of points of law that in a jury trial s/he would have to state explicitly in the jury charge. The more unsettled those questions are, the more likely the judge is to err; hence the more desirable it is to have the judge rule explicitly as s/he must in a jury-tried case. Similarly, in a bench case, some judges make it a practice to take defense objections to the admissibility of evidence under advisement, and then, when it is clear that the prosecution has a sufficient case apart from the contested evidence, to insulate themselves from reversal by announcing that they are not going to consider the contested evidence but find the respondent guilty without it. This sort of evasion of tricky evidentiary issues cannot be worked in a jury trial.

12. *Will a jury waiver speed up the disposition of the case, and is speedy disposition in the respondent's interest?*

§ 21.02(c) Counseling the Client

Obviously, the many complex and interrelated tactical factors that affect the choice of jury trial or bench trial are better appraised by counsel than by the respondent. Counsel therefore should make the choice in the first instance and explain to the client thoroughly and persuasively his or her reasons for that choice. Counsel may properly urge upon the client that counsel's choice is the only safe one and that the alternative is foolhardy, if this is true. The right to jury trial is, however, the sort of highly personal and emotionally charged right that should ultimately be left the client's wishes. If the respondent insists on a jury trial against the advice of counsel, a jury trial would seem to be advised. *See Jones v. Barnes,* 463 U.S. 745, 751, 753 n.6 (1983) (dictum); *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (dictum).

§ 21.03 MOTIONS CHALLENGING JURY SELECTION AND HANDLING

§ 21.03(a) State Law and Federal Constitutional Grounds for Challenging the Composition or Handling of the Jury

The processes by which jurors are selected vary enormously from jurisdiction to jurisdiction. Violations of the applicable statutes or court rules — such as, for example, a jury commissioner's lack of the requisite qualifications, the failure to follow required procedures for composing the jury roll, or the improper service of jury notices or summons — may provide a state law basis for challenging a venire that has been selected through the flawed process.

Federal constitutional challenges to jury selection procedures or to the composition or the handling of jury rolls, jury lists, venires, or panels also may be available. The principal constitutional claims of this sort are:

1. Systematic exclusion of a racial or other "distinct class" of citizens (discussed in § 21.03(b) *infra*);

2. Deprivation of a fair trial by an impartial jury because of prejudicial publicity,

community hostility, and the like (see § 20.03(b) *supra*); and

3. Deprivation of a fair trial by an impartial jury because of the jurors' exposure to extrajudicial proof of guilt, *Rideau v. Louisiana,* 373 U.S. 723 (1963), their subjection to unfair domination of court officers, *Turner v. Louisiana,* 379 U.S. 466 (1965), their subjection to prejudicial remarks by such officers, *Parker v. Gladden,* 385 U.S. 363 (1966), or their exposure to such officers in the dual role of prosecution witness and jury chaperon, *Gonzales v. Beto,* 405 U.S. 1052 (1972) (per curiam).

Objections to jury panels and to particular jurors are ordinarily made immediately prior to and during *voir dire* examination respectively. See §§ 28.02-28.05 *infra.* However, attacks upon the standards or manner of selection or upon the composition of the jury rolls or the venire, based on defects in any anterior stage of the process, are frequently required to be raised at some specified time before trial by a motion to quash the venire, by an objection to the rolls or the array, or by a similar procedure.

§ 21.03(b) Motions Challenging the Jury Selection Process on the Ground of Systematic Exclusion of a Racial or Other "Distinct Class" of Citizens

The Equal Protection Clause of the Fourteenth Amendment to the federal Constitution forbids the systematic exclusion of racial, ethnic, religious, or economic groups from jury service. *Coleman v. Alabama,* 389 U.S. 22 (1967), and cases cited (African Americans); *Turner v. Fouche,* 396 U.S. 346, 356-61 (1970) (same); *Hernandez v. Texas,* 347 U.S. 475 (1954) (Mexican-Americans); *Castaneda v. Partida,* 430 U.S. 482 (1977) (same); *Schowgurow v. State,* 240 Md. 121, 213 A.2d 475 (1965) (atheists); *Labat v. Bennett,* 365 F.2d 698 (5th Cir. 1966) (wage earners). This principle condemns the systematic exclusion of any "distinct class" of citizens shown to be viewed or treated differently from other classes in the local community. *Hernandez v. Texas,* 347 U.S. at 478; *Castaneda v. Partida,* 430 U.S. at 494-95. In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Supreme Court held that the systematic exclusion of women from juries in criminal cases is forbidden by the Sixth Amendment as incorporated into the Due Process Clause of the Fourteenth; and in subsequent cases the Court has treated *Taylor* as overruling its antiquated holding in *Hoyt v. Florida*, 368 U.S. 57 (1961), that exclusion of women from criminal juries did not violate the Equal Protection Clause. *See J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127, 134-35 (1994) (describing *Taylor v. Louisiana* as having "repudiated the reasoning of *Hoyt*," and observing, that although "*Taylor* distinguished *Hoyt* . . ., [t]he Court now . . . has stated that *Taylor* 'in effect' overruled *Hoyt*" (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 n.1 (1991))). Given the Court's application of the Equal Protection Clause in *J.E.B. v. Alabama* ex rel. *T.B.* to prohibit a state actor's intentional discrimination on the basis of gender in using peremptory strikes in jury selection, and given the Court's record in other contexts of barring gender discrimination on equal protection grounds, *see, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-28 (1982), it is evident that women would now be held to be a "distinct class" whose exclusion from any

jury selection process would render the resulting juries unconstitutional. *See also Machetti v. Linahan,* 679 F.2d 236 (11th Cir. 1982); *White v. Crook,* 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court). Whether the systematic exclusion of particular age groups — for example, young people or the elderly — would also be condemned is a more difficult question, which the Supreme Court has reserved. *Hamling v. United States,* 418 U.S. 87, 137 (1974). *See* Donald H. Zeigler, *Young Adults as a Cognizable Group in Jury Selection,* 76 MICH. L. REV. 1045 (1978). A jury whose composition is affected by systematic exclusion may be challenged even by a respondent who is not a member of the excluded class. *Campbell v. Louisiana*, 523 U.S. 392 (1998) (dealing with a racial-exclusion challenge to the selection of grand jurors but explicitly assimilating the rule for grand-jury challenges and petit-jury challenges); *Peters v. Kiff,* 407 U.S. 493 (1972).

The accepted method of proving claims of systematic exclusion has been described as follows:

> "The first step is to establish that the group [claimed to be excluded] is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve [as jurors] . . . , over a significant period of time. . . . This method of proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class. . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing."

Rose v. Mitchell, 443 U.S. 545, 565 (1979), quoting *Castaneda v. Partida,* 430 U.S. at 494. The opinion in *Duren v. Missouri,* 439 U.S. 357 (1979), implies that underrepresentation alone is not sufficient; it must also be shown that "this underrepresentation is due to systematic exclusion of the group in the jury-selection process," *id.* at 364, as the result of "discriminatory purpose," *id.* at 368 n.26. *See also Berghuis v. Smith*, 559 U.S. 314, 327 (2010). However, *Duren* also recognizes that both systematic exclusion and discriminatory purpose may be inferred from a "significant discrepancy shown by the statistics" comparing a group's numbers in the general population with its numbers in jury pools and panels, and on juries. *Duren*, 439 U.S. at 368 n.26. *See also Berghuis v. Smith*, 559 U.S. at 327-33. Counsel will therefore want to investigate jury lists, going back ten years or so, in order to demonstrate a pattern of discrimination. These are public records, available from the jury clerk or commissioners. If the clerk's or commissioners' records contain racial designations, the jury is probably challengeable upon the showing of even a relatively small discrepancy between the percentages of the racial minority group in the general population and on jury panels. *Avery v. Georgia,* 345 U.S. 559 (1953); *Whitus v. Georgia,* 385 U.S. 545 (1967); *Alexander v. Louisiana,* 405 U.S. 625 (1972); *cf. Castaneda v. Partida,* 430 U.S. at 493-95. When racial designations or indications of a selection process that "is not racially neutral" (*Rose v. Mitchell,* 443 U.S. at 565) do not appear in the records, it is important to seek out other aspects of the procedure that are "susceptible of abuse" (*ibid.*). Any nonrandom method

of culling or cutting prospective jurors would seem to be "susceptible of abuse" in this sense (*see id.* at 548 n.2, 566; *and see Castaneda v. Partida,* 430 U.S. at 497, describing the key-man system as "highly subjective"); but, in the absence of some form of identification of prospective jurors by nonneutral characteristics in the records available to jury-selection officials, a stronger statistical showing of underrepresentation is apparently required.

In any event counsel should conduct the most thorough statistical study practicable for a period going back at least a decade, comparing the proportion of minority individuals in the general population of the country (as reflected in the latest federal census figures), with the proportions of minority individuals (a) who are on the jury rolls and (b) who have actually served as jurors. *See Alexander v. Louisiana,* 405 U.S. 625 (1972). If the jury records do not contain racial identifications, tax digests may. Sophisticated statistical methods for analyzing the data are available, and it is wise to consult a statistician for possible use as an expert witness. *See, e.g.,* NJP LITIGATION CONSULTING (Elissa Krauss & Sonia Chopra, eds.), JURYWORK: SYSTEMATIC TECHNIQUES, chs. 5 & 6 (2d ed. 2012-13); NATIONAL JURY PROJECT & NATIONAL LAWYERS GUILD, THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE (David Kairys, ed. 1975); Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 HARV. L. REV. 338 (1966); David Kairys, *Juror Selection: The Law, A Mathematical Method of Analysis, and a Case Study,* 10 AM. CRIM. L. REV. 771 (1972); Peter W. Sperlich & Martin L. Jaspovice, *Statistical Decision Theory and the Selection of Grand Jurors: Testing for Discrimination in a Single Panel,* 2 HASTINGS CONST. L.Q. 75 (1975). Judicial receptivity to these statistical modes of proof is reflected in *Castaneda v. Partida,* 430 U.S. at 496-97 n.17; *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339-40 (1977); *Vasquez v. Hillery,* 474 U.S. 254, 259-60 (1986); *cf. McCleskey v. Kemp,* 481 U.S. 279, 293-94 & n.13 (1987).

§ 21.04 INVESTIGATION OF PROSPECTIVE TRIAL JURORS

Under some local practice the jury list containing the names of the venirepersons for a term of court at which a respondent is scheduled to be tried is required to be served upon the defense. Under other practices the jury list may be published or may be available for inspection in the office of the clerk of court, or counsel may be entitled to demand a copy from the clerk. This jury list, which ordinarily contains the names, addresses, and occupations of the venirepersons, is an indispensable document. Once counsel has it, counsel can begin to make an investigation of the prospective jurors; and an intelligent use of this opportunity may spell the difference between conviction and acquittal for the respondent.

Since there will be little time for background investigation after the jury panel enters the courtroom, counsel needs all the advance information s/he can get. Methods of getting it range from systematic, very extensive (and expensive) investigation of the venirepersons — or the employment of the juror investigating services that are found in many cities — to casual inquiries of other attorneys (who may have handled a trial in which one or more of the venirepersons served as jurors) or of counsel's acquaintances who may happen to be neighbors or associates of a listed venireperson. How much investigation counsel can undertake will be determined by the

resources at counsel's disposal, in light of the nature and seriousness of the case. But, at at the very least, counsel should get the list and make what inquiries s/he practicably can about the character and attitudes of the persons on it. Prosecutors frequently maintain records of jurors who have served on past venires, with notes on their performances and demonstrated attitudes. A motion for discovery of these records on the theory advanced in § 9.09(b)(7) *supra* may be worth a try.

Chapter 22

Suppression Hearings

§ 22.01 THE TIMING OF THE SUPPRESSION HEARING

As explained in Chapter 7, motions practice varies considerably among jurisdictions. Some States require motions to suppress to be made in writing and filed by a specified pretrial deadline; other States allow the motions to be made orally at trial.

In jurisdictions that require written motions, the hearing on the motion may, depending upon the jurisdiction, be conducted in advance of trial or in the midst of trial. In some jurisdictions, evidentiary hearings on motions to suppress are commonly held days or even weeks before the trial. (Such an early scheduling of suppression hearings is particularly advantageous to the defense, since it enhances the usefulness of the hearings for discovery. See §§ 22.02, 22.04 *infra.*) In other jurisdictions the suppression hearing is commonly held right before trial and, depending upon local practice, defense counsel may or may not find it easy to obtain a continuance of the trial for the purpose of getting a transcript of the suppression hearing. In still other jurisdictions the suppression hearing (frequently called a *voir dire*) takes place in the course of trial, at the time when the first witness is asked about the challenged evidence.

The trial-objection procedure, which has fallen into disfavor in most jurisdictions as pretrial motions practice has developed, permits the respondent to object to suppressible evidence for the first time at trial. A *voir dire* is then held on the objection. To be sure, even in jurisdictions that require pretrial motions, the defense can request the suppression of evidence for the first time at trial in exceptional circumstances, for example, when defense counsel could not reasonably have known of the challenged evidence or the factual or legal grounds for challenging it prior to trial. See § 22.07 *infra.* Similarly, in pretrial-motion jurisdictions the defense can renew a previously denied suppression motion at trial on the basis of newly discovered evidence. See § 22.07 *infra.* What distinguishes the trial-objection jurisdictions is that objections to suppressible evidence are routinely entertained, with no need to show special circumstances, at the time when the evidence is presented by the prosecution at trial. But the objection must be made when the first prosecution witness begins to testify about the suppressible evidence; an objection made later in the trial is usually held untimely under local rules.

§ 22.02 DEFENSE GOALS AND STRATEGIES AT A SUPPRESSION HEARING

Suppression hearings may be used by the defense for several different purposes. To use a suppression hearing effectively, defense counsel will need to make a preliminary determination of which purposes s/he should be pursuing in the particular case. Often, a clear-cut choice between one purpose and another will be necessary, because the purposes or important means for achieving them are inconsistent. This is ordinarily not a choice that can be put off until the time of the evidentiary hearing: Both the content of the suppression motion and the nature of counsel's

pre-hearing preparation will vary considerably depending upon counsel's choice of goals and consequent strategies for the hearing.

The first and most obvious potential goal is to win the hearing and secure suppression of the evidence. Victory in a suppression hearing will frequently result in the prosecutor's dismissing the entire case against the respondent. For example, suppression of the drugs and all police testimony relating to their seizure in a drug possession case usually leaves the prosecutor without any evidence of the respondent's alleged wrongdoing. In many cases suppression of eyewitness identification testimony or of a confession deprives the prosecution of the only available evidence of the respondent's identity as the perpetrator of the offense. Even when a defense victory at the suppression hearing does not wholly prevent the prosecutor from going forward to trial, the suppression ruling may create major gaps in the prosecutor's proof and thereby substantially improve the chances for an acquittal at trial.

An alternative defense goal at the suppression hearing is to obtain discovery of the prosecution's case on the issue of guilt. Depending upon which claims are litigated and the way in which defense counsel shapes the hearing, the prosecutor's evidence at the suppression hearing may provide a full preview of the prosecution's case-in-chief at trial. For example, if the suppression motion challenges the legality of the respondent's arrest on the ground that the arresting officers lacked probable cause, the prosecutor may be obliged to present extensive testimony regarding the facts of the crime known to the police and the facts that led the police to believe that the respondent was the perpetrator. In addition to obtaining this disclosure of the prosecution's evidence, counsel may also be able to obtain discovery of documents that would not otherwise be available until mid-trial: In many jurisdictions the prosecution's presentation of a witness in a suppression hearing activates a prosecutorial duty to turn over to the defense any prior written statements of that witness or documents prepared by that witness. *See, e.g.,* N.Y. FAM. CT. ACT § 331.4(3)(a) (2014). Beyond this discovery of the content of the prosecution's case, defense counsel also gains a valuable opportunity to watch prosecution witnesses on the stand and acquire insights into their vulnerability to particular approaches on cross-examination. Indeed, it is often possible to use a suppression hearing to test risky lines of cross-examination in order to determine what questions can be safely used at trial. In jurisdictions where delinquency cases are tried to a jury or where liberal recusal rules permit the defense to obtain a different judge for the trial (see § 22.07 *infra*), the ultimate trier of fact will never hear the results of defense counsel's experimentation. And even when the judge presiding at the motion hearing does sit at the respondent's bench trial, counsel can use experimentation in the motion hearing to decide what evidence should be put into the trial record. Naturally, these discovery benefits will be enhanced in jurisdictions where the suppression hearing is held in advance of trial. However, even discovery procured in a mid-trial hearing can prove immensely useful in determining what additional cross-examination would be fruitful or dangerous and in deciding other questions of trial tactics, such as whether to put the respondent on the stand or to present other defense witnesses.

A third potential goal of the suppression hearing is to extract concessions from

prosecution witnesses on the record, for use in impeaching those witnesses at trial. Often prosecutors fail to coach their witnesses prior to the suppression hearing with the same care that they employ in preparing for trial, and it will be possible to lure an unwary prosecution witness into conceding affirmatively helpful points. At the very least, it should be possible to circumscribe the degree of damage that the witnesses will be able to do at trial. See § 22.04(c) *infra.* Finally, the mere fact that the witness is telling his or her version of the facts twice — once at the suppression hearing and again at trial — often proves beneficial: Particularly when the suppression hearing takes place some time before trial, witnesses will change their stories and can then be impeached with their prior inconsistent testimony. All of these means of controlling or discrediting prosecution witnesses' trial testimony will, of course, be immeasurably enhanced by obtaining a transcript of the suppression hearing to use for impeachment at trial. See § 22.07 *infra.*

There are several other potential benefits that the defense may gain from litigating suppression motions. The trial court's ruling may provide a source of reversible error on appeal. In cases in which a guilty plea may be advisable but counsel is not sure about the strength of the prosecution's case, a preview of its evidence in the suppression hearing will often enable counsel to make a realistic evaluation of the wisdom of a plea. When counsel has concluded that a plea is necessary but the client is unconvinced, the client's observation of the prosecution witnesses at the suppression hearing may change the client's mind or at least open him or her to further discussion of the subject with fewer illusions. In instances in which police conduct is particularly reprehensible, the unpleasant prospect of its exposure at a hearing may occasionally persuade the prosecutor to drop charges or may give the defense considerable leverage in plea bargaining (see §§ 14.16-14.18 *supra*). And a suppression hearing may have the fringe benefit of improving attorney-client relations (and leading the client to place greater trust in the attorney's advice on trial strategy and other matters), since the client will, often for the first time, see the attorney fighting for the client in court. But these additional or ancillary benefits of the suppression hearing will not ordinarily shape counsel's strategies or techniques in litigating a motion. Counsel's primary considerations in preparing for and handling the suppression hearing will usually be the potential goals of getting the evidence suppressed, obtaining discovery, and creating impeachment material for use at trial. When these three goals prove inconsistent, counsel will have to choose among them. See § 22.04 *infra.*

§ 22.03 PROCEDURAL ASPECTS OF THE SUPPRESSION HEARING

§ 22.03(a) The Defense Response When a Prosecution or Defense Witness Fails To Appear

Frequently, the prosecutor will announce that an essential prosecution witness has failed to appear and that the prosecution is therefore seeking a continuance of the suppression hearing. If the hearing is scheduled for the day of trial and the prosecutor is requesting a continuance of the trial as well, counsel should invoke any applicable speedy-trial sanctions, such as dismissal of the case or release of a respondent who is detained. See Chapter 15. Even if the suppression

hearing is scheduled days or weeks before trial, counsel should ask for sanctions as a result of the prosecutor's inability to proceed: If the prosecutor or the judge remarks that the hearing can be re-scheduled without delaying the trial, counsel should respond that sanctions are nonetheless appropriate to deter prosecutors from cavalierly ignoring suppression hearing dates, to the detriment of the court's calendar and discouragement of defense witnesses. The apt sanction, counsel should insist, is a judicial ruling that the motion has been conceded (in essence, forfeited) by the prosecution. *See, e.g., People v. Goggans,* 123 A.D.2d 643, 506 N.Y.S.2d 908 (N.Y. App. Div., 2d Dep't 1986), described in § 15.03 *supra.* If the judge seems dubious about the appropriateness of this remedy, counsel should point out that it is the closest possible analogue to the trial-date sanction of dismissal when the prosecutor is unable to proceed (see § 15.03 *supra*) and also that it is the only effective deterrent of prosecutorial neglect.

Occasionally, prosecutors will attempt to get around a witness's failure to appear by going forward with hearsay testimony to cover the matters that the missing witness would have recounted. Although hearsay testimony usually is admissible in suppression hearings, counsel should point out the inherent unreliability of second-hand information that is insulated from testing by cross-examination and should argue accordingly that the hearsay testimony is not sufficient to satisfy the prosecutor's burden of persuasion at the hearing. See § 22.03(e) *infra.*

A trickier problem for defense counsel arises when a missing prosecution witness is crucial for the *respondent's* case at the hearing and the prosecutor elects to go forward by presenting other witnesses who observed the same events. This is the situation that defense counsel was advised to forestall by subpoenaing all prosecution witnesses whom s/he would need. See § 10.02 *supra.* If counsel has failed to subpoena a prosecution witness who is crucial for the defense case, counsel will need to seek a continuance, and that continuance probably will be charged to the defense for speedy-trial purposes. See § 15.04 *supra.* If counsel did subpoena the prosecution witness, then counsel should explain that the witness is essential to the defense presentation and, in requesting a continuance, should ask that the continuance be charged to the prosecution (or, as a fall-back position, that the continuance be charged jointly to defense and prosecution). Although the prosecutor undoubtedly will argue strenuously that the continuance should be charged solely to the defense, since the prosecution is able to go forward, defense counsel should respond that the witness failed to obey a court subpoena and that that failure should be charged to the party that is ultimately in control of the witness.

If the missing witness is needed by the defense solely to impeach another prosecution witness in the event that the latter witness denies a prior inconsistent statement, defense counsel does not necessarily have to request a continuance. Counsel has the option of alerting the judge to the possible need for the witness and then offering to proceed without the witness, on the understanding that counsel will be given the opportunity to complete the hearing by calling the missing witness at a later date if necessary. As counsel can point out to the judge, it may never be necessary to present the missing witness, since the testifying witness may admit to making the impeaching statement. In any such colloquies with the judge, defense counsel must carefully guard against alerting the prosecutor to the nature of the anticipated impeachment; if the court

wishes a detailed proffer, counsel should insist that that proffer be made *ex parte* to avoid disclosure of defense strategies to the prosecution.

If the missing witness is solely a foundational witness (for example, the police communications division officer who would have testified to police procedures for recording radio communications), defense counsel should consider offering to go forward as long as the prosecutor will stipulate to the foundational facts. The stipulation should, in most cases, suffice to fill counsel's needs. It is usually advisable to make in open court the offer of going forward on a stipulation. Then, if the prosecutor refuses to stipulate and defense counsel is forced to ask for a continuance to obtain the missing foundational witness, the judge will know to attribute the disruption of the court's calendar to the prosecutor's obstructionism and will be more disposed to grant the continuance. Often, the judge will even intervene and put pressure on the prosecutor to agree to the stipulation.

Whenever defense counsel does need to seek a continuance of a suppression hearing, counsel should be ready to argue both the factual basis for the request and the respondent's legal right to obtain a continuance in order to prepare adequately for the hearing. See § 15.02 *supra.* In requesting the continuance, however, counsel should again be alert to the danger of revealing defense strategies to the prosecution. If the continuance is necessitated by a defense witness's failure to appear and if revelation of the witness's name might lead the police to interview the witness before the next hearing, counsel should simply omit the witness's name or offer to reveal it to the judge *ex parte.*

§ 22.03(b) Waiving the Respondent's Presence in Suppression Hearings That Involve an Identification Suppression Claim

Whenever counsel is litigating an identification suppression claim, counsel should consider waiving the client's presence during the testimony of any witness whose eyewitness identifications are being challenged. This waiver is strongly desirable from the defense perspective for two reasons.

First, the eyewitness's observation of the respondent during the suppression hearing will aggravate the effect of prior suggestive police procedures and may ensure the witness's identification of the respondent at trial. Not only will the witness have seen the respondent for an additional, prolonged period of time, so that s/he will be more likely to feel and testify persuasively at trial that the respondent "looks familiar" but also the witness will have seen the respondent in a highly suggestive setting. (Unlike a lineup, the setting of the suppression hearing makes it quite obvious which person in the courtroom has been charged as the culprit.) Second, the presence of the respondent at the suppression hearing frustrates any hope of obtaining from the witness an unvarnished description of the perpetrator for use in arguing the suppression motion: The witness will simply describe the youth s/he is observing at counsel table.

In several jurisdictions the courts have recognized the accused's right to waive his or her

presence at an identification suppression hearing, relying on either or both of two rationales: (i) that the constitutional protections against suggestive pretrial identification procedures entitle the defense to avoid an additional unnecessary and suggestive encounter between the accused and the eyewitness, and (ii) that the accused's right to be present during all court hearings is a personal, waivable right because it exists solely for the accused's protection and not for the protection of any governmental interests. *See, e.g., People v. Huggler,* 50 A.D.2d 471, 473-74, 378 N.Y.S.2d 493, 496-97 (N.Y. App. Div., 3d Dep't 1976); *Singletary v. United States,* 383 A.2d 1064, 1070 (D.C. 1978).

The court will usually insist that counsel demonstrate on the record that the respondent's waiver is a knowing and voluntary relinquishment of the right to be present at the hearing. Counsel can make the requisite showing either: (i) by presenting a written waiver signed by the respondent (and, if the respondent is very young, also signed by the respondent's parent), which sets forth the respondent's understanding of his or her right to be present, the reasons for waiving the right to be present, and the respondent's desire to waive the right; or (ii) by bringing the respondent to the hearing solely for the purpose of responding to the court's inquiry into the voluntariness of the waiver and then sending the respondent out of the courtroom before the eyewitness enters.

Whether the respondent's presence should be waived for all or only part of the hearing depends upon the roster of witnesses who will testify at the hearing. If most of the witnesses are eyewitnesses to the crime, then the respondent's presence should be waived during the entire hearing and the respondent should be kept away from any parts of the courthouse where s/he might encounter or be observed by any of the eyewitnesses. On the other hand, if there is a significant portion of the hearing that the respondent can safely attend — and naturally also if the respondent will take the stand at the hearing — then counsel should waive the respondent's presence only during the portions of the hearing when eyewitnesses will be in or around the courtroom. Counsel should make arrangements for the respondent to sit during those portions of the hearing in a location where s/he is not likely to be observed by any of the eyewitnesses and to enter and leave the courtroom by a route that will not lead to any encounters with the eyewitnesses.

§ 22.03(c) Enforcing the "Rule on Witnesses" in a Suppression Hearing

Throughout a trial both parties have the right to insist that the opposing witnesses be excluded from the courtroom, in order to prevent them from hearing information that might affect their testimony. See § 27.11 *infra.* This "rule on witnesses" should similarly be invoked by the defense at a suppression hearing. At the beginning of the hearing, defense counsel should request that the courtroom be cleared of any prosecution witnesses who might testify either at the suppression hearing or at the trial. Counsel also must be alert throughout the hearing to the possibility of a prosecution witness entering and remaining in the courtroom. If, notwithstanding counsel's precautions, a prosecution witness does overhear another witness's testimony, counsel should request that the court impose the only sanction that will both remedy the violation and

deter future misconduct by prosecution witnesses: exclusion of the witness's testimony at the suppression hearing and trial.

As at trial the operation of the rule on witnesses does not bar the respondent from the courtroom. S/he has a right to be present while all testimony in the case is taken. See § 27.01 *infra.* For discussion of the circumstances under which the respondent should waive his or her right to be present at a suppression hearing, see § 22.03(b) *supra.*

§ 22.03(d) Who Proceeds First in the Suppression Hearing: The Burdens of Production and Persuasion

Even though the suppression motion is a defense motion, it is customary in many jurisdictions for the prosecution to proceed first and to present the testimony of all police officers and other witnesses whom the prosecution intends to call. As a result, the defense has the distinct advantage of being able to cross-examine (and thereby lead and control) the officers and other prosecution witnesses. In some jurisdictions, however, the defense is expected to proceed first, at least on some suppression issues. In these jurisdictions, defense counsel will usually want to invoke the constitutional caselaw dealing with burdens of production and persuasion, described in this section, to argue that the prosecutor should be required to proceed first. On rare occasions, the defense may reap some benefit from proceeding first — for example, when: (i) the officers are known to be unprepared and the prosecutor is an experienced and able examiner who can effectively shape their testimony on direct; or (ii) the rules of evidence in the particular jurisdiction permit parties to lead and impeach their own witnesses; or (iii) the judge will permit the officers and other prosecution witnesses to be called as hostile witnesses (see § 33.25 *infra*). But in most jurisdictions the greater ability to lead and impeach witnesses on cross-examination makes it wise for defense counsel to force the prosecutor to proceed first whenever possible.

The allocation of the burden of production (also known as the burden of going forward) and of the burden of persuasion (also known as the burden of proof) varies with the constitutional issue being litigated:

(i) *Search and seizure issues.* Federal constitutional law permits the burden of going forward to be imposed on the defense, *see Rawlings v. Kentucky,* 448 U.S. 98, 104-05 (1980), although, of course, state statutes, court rules, or state constitutional caselaw can elect to impose that burden on the prosecution instead. *See, e.g., People v. Dodt,* 61 N.Y.2d 408, 415, 474 N.Y.S.2d 441, 445, 462 N.E.2d 1159, 1163 (1984). In jurisdictions where the defense does bear the burden of going forward on Fourth Amendment issues, that burden is easily satisfied whenever the search or seizure was made without a warrant. Once the defense has shown that a search or seizure was conducted and that the police lacked a warrant authorizing it, the Fourth Amendment shifts the burden of persuasion to the prosecution to prove that the warrantless search or seizure falls within one of the established exceptions to the warrant requirement. *See McDonald v. United States,* 335 U.S. 451, 456 (1948); *United States v. Jeffers,* 342 U.S. 48, 51 (1951); *cf. Vale v. Louisiana,* 399 U.S. 30, 34 (1970); *Schneckloth v. Bustamonte,* 412 U.S. 218,

219, 222 (1973) (dictum); *Florida v. Royer,* 460 U.S. 491, 497 (1983) (plurality opinion). When the police did possess a warrant authorizing the search or seizure, federal constitutional law would appear to permit the imposition of the burden of persuasion of the invalidity of the warrant or the search upon the defense, *see, e.g., Malcolm v. United States,* 332 A.2d 917, 918-19 (D.C. 1975), but some States impose the burden of persuasion upon the prosecution even in these cases. *See, e.g., State v. Heald,* 314 A.2d 820, 828-29 (Me. 1973); *Canning v. State,* 226 So. 2d 747, 752 (Miss. 1969); *State v. Martin*, 145 N.H. 362, 364, 761 A.2d 516, 518 (2000). As for the quantum of evidence that the prosecution must present to satisfy its burden, on most issues the federal constitution requires nothing more than a preponderance of the evidence, *United States v. Matlock,* 415 U.S. 164, 177, 178 n.14 (1974); *cf. Colorado v. Connelly,* 479 U.S. 157, 167-69 (1986); *Nix v. Williams,* 467 U.S. 431, 444 n.5 (1984); *and see Bourjaily v. United States,* 483 U.S. 171, 175-76 (1987) (dictum), although "the States are free, pursuant to their own law, to adopt a higher standard" with respect to the prosecutorial burden. *Lego v. Twomey,* 404 U.S. 477, 489 (1972). Some States have, indeed, imposed upon the prosecution the higher standard of clear-and-convincing evidence in proving certain specific exceptions to the warrant requirement. *See, e.g., Stone v. State*, 348 Ark. 661, 669, 74 S.W.3d 591, 596 (2002) (consent searches); *Blair v. Pitchess,* 5 Cal. 3d 258, 274, 486 P.2d 1242, 1253, 96 Cal. Rptr. 42, 53 (1971) (consent searches); *People v. Zimmerman,* 101 A.D.2d 294, 475 N.Y.S.2d 127 (N.Y. App. Div., 2d Dep't 1984) (consent searches); *People v. Dorney,* 17 Ill. App. 3d 785, 788, 308 N.E.2d 646, 648 (1974) (abandonment); *State v. Ibarra*, 953 S.W.2d 242, 245 (Tex. Crim. App. 1997) (consent searches). In jurisdictions where the defense is assigned a burden of persuasion in warrant cases, the applicable standard is a preponderance of the evidence. *See, e.g., State v. Edwards,* 98 Wis. 2d 367, 297 N.W.2d 12 (1980).

(ii) *Challenges to the admissibility of a confession.* When the issue is the voluntariness of a confession or other statement of the respondent's, the prosecution bears the burden of persuasion. *Lego v. Twomey,* 404 U.S. at 489 (dictum); *see also United States v. Raddatz,* 447 U.S. 667, 678 (1980); *Missouri v. Seibert*, 542 U.S. 600, 608 n.1 (2004) (plurality opinion). The quantum of proof required as a matter of federal constitutional law is "a preponderance of the evidence," *Lego v. Twomey,* 404 U.S. at 489; *accord*, *Missouri v. Seibert*, 542 U.S. at 608 n.1 (plurality opinion), although several States have, "pursuant to their own law, . . . adopt[ed] [the] . . . higher standard" (*Lego v. Twomey,* 404 U.S. at 489) of proof beyond a reasonable doubt. *See, e.g., People v. Jiminez,* 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978); *State v. Carter,* 412 A.2d 56, 60 (Me. 1980); *Lowe v. State*, 800 So.2d 552, 554-55 (Miss. App. 2001); *In the Matter of Jimmy D.*, 15 N.Y.3d 417, 423, 938 N.E.2d 970, 973, 912 N.Y.S.2d 537, 540 (2010). Although the jurisdictions vary with respect to which party bears the burden of production in a confession suppression hearing, the Supreme Court's imposition of the burden of persuasion on the prosecution and the fact that it is the prosecutor who is proffering the evidence support the argument that the proper procedure is to place the burden of production on the prosecution. When the issue is a waiver of *Miranda* rights, the prosecution again bears the burden of persuasion, *Miranda v. Arizona,* 384 U.S. 436, 475-76, 479 (1966); *see also Brewer v. Williams,* 430 U.S. 387, 402-04 (1977); *Tague v. Louisiana,* 444 U.S. 469 (1980) (per curiam); *Missouri v. Seibert*, 542 U.S. at 608 n.1 (plurality opinion); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401

(2011), by a preponderance of the evidence, *Colorado v. Connelly,* 479 U.S. at 167-69; *Missouri v. Seibert*, 542 U.S. at 608 n.1 (plurality opinion). Although the *Connelly* opinion states unequivocally that "[w]henever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence," *id.* at 168, it is possible that a heavier burden of proof exists on the separate issue raised by *Edwards v. Arizona,* 451 U.S. 477 (1981), in *Miranda* cases in which "an accused has [once] invoked his right to have counsel present during custodial interrogation," *id.* at 484. *Edwards* held that an accused person in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id*. at 484-85. *See also Minnick v. Mississippi*, 498 U.S. 146, 150-56 (1990); *Davis v. United States*, 512 U.S. 452, 458 (1994) (dictum); *Montejo v. Louisiana*, 556 U.S. 778, 794-95 (2009) (dictum). The issue of "initiation" is the distinctive feature of "'a bright-line rule to safeguard preexisting rights [vouchsafed by *Miranda*],'" *ibid.,* not a mere subspecies of the "waiver" issue. *See Smith v. Illinois,* 469 U.S. 91, 95 (1984) (per curiam) ("if the accused invoked his right to counsel, courts may admit his responses to further questioning only on a finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked"). "The [*Edwards*] rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms." *Minnick v. Mississippi*, 498 U.S. at 151. The Supreme Court has repeatedly said that "[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application" — its capacity to provide "'"clear and unequivocal"' guidelines to the law enforcement profession." *Id*., quoting *Arizona v. Roberson*, 486 U.S. 675, 682 (1988). Arguably, to preserve the clarity and firmness of "[t]his 'rigid' prophylactic rule," *ibid.,* embodying an unprecedented "*per se* approach," *Solem v. Stumes,* 465 U.S. 638, 647 (1984), the prosecution should be required to show by clear and convincing evidence "once a suspect has invoked the right to counsel, [that] any subsequent conversation . . . was initiated by him," *id.* at 641. *See Smith v. Illinois,* 469 U.S. at 95 n.2; *and see, e.g.*, *State v. Tidwell*, 775 S.W.2d 379, 386 (Tenn. Crim. App. 1989). But the question remains an open one. *But see Moore v. Berghuis*, 700 F.3d 882, 888 (6th Cir. 2012), discussed in § 24.11(C), reasoning that "[t]he government did not show by a preponderance of the evidence, and the [state] . . . trial court did not clearly find, that Moore, and not the officer, initiated further conversation" after Moore had invoked his right to counsel under *Edwards*. The Sixth Circuit opinion does not explicitly consider its choice of this quantum of proof or address possible alternatives; and because its "review [of] the district court's denial of Moore's petition for a writ of habeas corpus [was restricted by] . . . the standards of review as set forth in the Antiterrorism and Effective Death Penalty Act of 1996" (*id*. at 886), its phrasing of the quantum cannot be taken as addressing the applicable burden in non-AEDPA cases.

(iii) *Identification suppression issues.* When the issue is whether the respondent's right to counsel at a post-arraignment lineup was violated, the prosecution bears the burdens of

production and persuasion and must show either that counsel was actually present or that there was a valid waiver of the right to counsel. *See, e.g., United States v. Garner,* 439 F.2d 525, 526-27 (D.C. Cir. 1970). If a violation of the right to counsel is established, then the prosecution cannot elicit an in-court identification unless it shows by clear and convincing evidence that the in-court identification has an independent source. *See United States v. Wade,* 388 U.S. 218, 240 n.31 (1967); *United States ex rel. Whitmore v. Malcolm,* 476 F.2d 363, 365 n.2 (2d Cir. 1973). If the suppression motion challenges eyewitness identification procedures on due process grounds, most jurisdictions require that the defense satisfy an initial burden of showing suggestivity, with the burden then shifting to the State to show by clear and convincing evidence that the identification was nevertheless reliable. *See, e.g., People v. Monroe*, 925 P.2d 767, 774 (Colo. 1996); *People v. McTush,* 81 Ill. 2d 513, 520, 410 N.E.2d 861, 865, 43 Ill. Dec. 727 (1980); *State v. Howe*, 129 N.H. 120, 123, 523 A.2d 94, 96 (1987); *People v. Rahming,* 26 N.Y.2d 411, 417, 259 N.E.2d 727, 731, 311 N.Y.S.2d 292, 297 (1970).

In jurisdictions where the defense is ordinarily expected to proceed first in suppression hearings, defense counsel can insist that the order of procedure be reversed for any issues for which federal constitutional caselaw imposes the burden of production on the prosecutor. (Where the allocation of the burden of production has not yet been resolved by the Supreme Court but has been imposed upon the prosecution by state courts in other jurisdictions, counsel should use the logic of that caselaw to urge the local court to alter its practice.) If defense counsel once succeeds in convincing the court that the Constitution places the burden of production upon the prosecutor on at least one issue, counsel can then argue that the hearing will be too unwieldy if the defense is left to carry the burden of production on other issues. Counsel should point out that the alternation of burdens of production would result in both parties calling the same witnesses to the witness stand and alternating styles of examination depending upon the issue to which each particular question is relevant — a procedure calculated to result in numerous time-consuming objections and rulings.

If the judge is not persuaded and insists that the defense must carry the burden of production on some issues, counsel should request leave to call police officers and any other persons who are allied in interest with the prosecution as hostile witnesses, with the right to ask leading questions on direct examination. See § 33.25 *infra.* (In support of this request, counsel should point out that police personnel not only have reasons of professional pride and self-advancement for seeking to uphold the legality of arrests, searches, seizures, confessions, and identification procedures in which they have participated but are also subject to potential civil and criminal liability if their conduct in these connections is found to have violated constitutional rights. *See, e.g., Monroe v. Pape,* 365 U.S. 167 (1961) (civil liability under the federal Civil Rights Acts); *Screws v. United States,* 325 U.S. 91 (1945) (criminal liability under the federal Civil Rights Acts); *cf. Town of Newton v. Rumery,* 480 U.S. 386 (1987); *and see United States v. Price,* 383 U.S. 787, 794 (1966) (criminal liability of private individuals who are "willful participant[s] in joint activity with the State or its agents").) When the respondent's burden of production can be satisfied by proving an easily-established threshold fact — for example, that the search was warrantless — counsel should seek a stipulation from the prosecutor conceding

the threshold fact and, once the stipulation is made, insist that the prosecutor proceed with his or her witnesses, allowing subsequent opportunity for rebuttal testimony by the defense. As a rule, such requests should be made in open court at the beginning of the hearing so that, if the prosecutor refuses to stipulate, the judge can see that the defense is being required to waste the court's time in proving the obvious because of the prosecutor's obstructionism. Counsel should then announce that s/he will present evidence only to the extent necessary to prove the threshold fact, reserving further testimony for rebuttal.

§ 22.03(e) The Admissibility of Hearsay Testimony in Suppression Hearings

As a general matter, hearsay is admissible in suppression hearings. *United States v. Matlock,* 415 U.S. 164, 172-77 (1974); *United States v. Raddatz,* 447 U.S. 667, 679 (1980) (dictum). However, there are certain limitations upon the prosecution's use of hearsay. The defense has a right to confront and cross-examine the prosecution's witnesses at a suppression hearing, *see, e.g.*, *United States v. Hodge*, 19 F.3d 51, 53 (D.C. Cir. 1994); *United States v. Salsedo*, 447 F. Supp. 1235, 1241 (E.D. Cal. 1979); *People v. Edwards*, 95 N.Y.2d 486, 491, 719 N.Y.S.2d 202, 204-05, 741 N.E.2d 876, 878-79 (2000); *State v. Ehtesham,* 309 S.E.2d 82, 84 (W. Va. 1983), and a prosecutor cannot use hearsay evidence in such a way as to deprive the defense of meaningful cross-examination of a prosecution witness. *See, e.g., State v. Terrell,* 283 N.W.2d 529, 531 (Minn. 1979) (prosecution cannot make its case at a suppression hearing merely by submitting transcript of grand jury testimony to show lawfulness of a search); *State v. Mondo,* 325 N.W.2d 201, 203 (N.D. 1982) (prosecution cannot evade defendant's right to confrontation by relying on affidavit from judge who issued search warrant); *People v. Talley,* 410 Mich. 378, 301 N.W.2d 809 (1981) (prosecution cannot rely exclusively upon preliminary hearing transcript to meet its burden at suppression hearing).

A second limitation upon the general rule of admissibility of hearsay is that the prosecutor's hearsay evidence is subject to exclusion if particularized reasons appear for doubting its reliability. Thus if defense counsel has a good-faith basis for asserting that the out-of-court declarant lacked personal knowledge of the matters s/he reportedly stated or had some bias against the respondent, the prosecutor should be required to produce the declarant for cross-examination by the defense. *See United States v. Matlock,* 415 U.S. at 175-77 (in holding that hearsay evidence was admissible at a suppression hearing, the Court stresses that the witness "harbored no hostility or bias against respondent that might call her statements into question" and that the hearsay statements "were also corroborated by other evidence received at the suppression hearing" and bore "indicia of reliability"). Multiple hearsay can be challenged as particularly unreliable because of the inherent potential for errors and inaccuracies when a statement is relayed between several individuals.

Finally, even if the proffered hearsay evidence is admissible, it may be insufficiently persuasive to meet the prosecutor's burden of proof (see § 22.03(d) *supra*) on a particular suppression issue. *See, e.g.*, *People v. Moses*, 32 A.D.3d 866, 868, 823 N.Y.S.2d 409, 411 (N.Y. App. Div., 2d Dep't 2006) (the prosecution's burden of production at a hearing on a motion to

suppress identification testimony as the fruit of an unlawful *Terry* stop was not satisfied by the testimony of a police officer who transported the complainant to the location of the show-up but was not involved in the stop of the defendant, could not testify to the circumstances of the stop, and offered nothing more than a "vague and equivocal hearsay" account of a statement made by the arresting officer which "was inadequate to demonstrate" the validity of the arresting officer's actions in stopping and detaining the defendant and transporting him to the location of the show-up).

§ 22.03(f) The Defense Right to Disclosure of Prior Statements of Prosecution Witnesses

In some jurisdictions, statutes or court rules give the respondent the right to obtain from the prosecutor all prior statements of witnesses who testify for the prosecution at the suppression hearing. *See, e.g.,* N.Y. FAM. CT. ACT § 331.4(3)(a) (2014). The prosecutor typically is obligated to disclose all written or oral statements in his or her possession or the possession of the police or other governmental agencies. The statutes and rules usually provide that this disclosure must be made after each witness has finished his or her direct examination. As a practical matter, however, counsel can often obtain the prior statements of all prosecution witnesses from the prosecutor at the beginning of the suppression hearing by requesting them at that time in the interest of efficiency. If the prosecutor refuses counsel's request and insists upon the prerogative of turning over the statements only at the technically obligatory time, counsel should inform the judge of this and explain that there may be delays during the hearing while counsel pauses to read the statements turned over by the prosecutor. Mentioning the issue before the hearing commences may lead the judge to lean on the prosecutor to turn over the statements immediately; at the least, it will improve the judge's patience when defense counsel does indeed take time to read the statements during the course of the hearing.

In jurisdictions that do not provide for disclosure by statute or court rule, counsel should nevertheless request all prior statements of each prosecution witness and should assert that the denial of access to these materials is an unconstitutional infringement upon the respondent's right to cross-examine. *Cf. United States v. Salsedo,* 477 F. Supp. 1235, 1241 (E.D. Cal. 1979) ("[d]epriving the defendants of the government's records as to what the agents knew at the time of [their challenged action] . . . makes meaningful cross-examination almost impossible," and this "'deni[al] [of] the right of effective cross-examination . . . is . . . constitutional error of the first magnitude'"). In the event that the judge refuses to order the production of the documents, defense counsel should request their disclosure again at trial (see § 27.12(a)(1) *infra*) and then consider whether they reveal any basis for a motion to reopen the suppression hearing on the ground of newly discovered information contained in the documents.

In those jurisdictions where the respondent is expected to proceed first at the suppression hearing and is obligated to conduct direct examinations of police officers, defense counsel should nevertheless request all prior statements of the officers in the possession or control of the prosecution. To support the logic of this request, counsel can point to the disclosure provision in

the Federal Rules of Criminal Procedure, which declares that, for purposes of the rules on "Producing Statements at a Suppression Hearing," "a law enforcement officer is considered a government witness." FED. R. CRIM. P. 12(h) (2014). As the commentary to the federal rule explains, this provision reflects the practical consideration that a police officer's loyalty invariably belongs to the government regardless of who has called the officer as a witness; the systemic interest in testing the credibility of the officer can be effectuated only by permitting defense counsel to have access to prior statements of the witness. If the court denies access, counsel will again have to be alert to the possibility of moving to reopen the suppression hearing after obtaining the documents at trial.

§ 22.04 TECHNIQUES FOR CROSS-EXAMINING PROSECUTION WITNESSES AT A SUPPRESSION HEARING

Defense counsel must tailor his or her cross-examination style and the form of cross-examination questions to fit the goal that s/he is pursuing in litigating the suppression hearing. See § 22.02 *supra.* Thus the nature of the cross-examination will vary considerably depending on whether counsel is trying to win the hearing, obtain discovery, or create impeachment material for use at trial.

§ 22.04(a) Examination Techniques When Counsel's Primary Goal Is To Win the Suppression Hearing

If counsel has decided that winning the suppression hearing takes precedence over any other potential goals, s/he will often have to pass up tempting opportunities for discovery on cross-examination in order to avoid the risk of eliciting material that would bolster the prosecution's case on suppression issues. Thus, for example, if the defense is pressing a Fourth Amendment claim of invalid arrest and the prosecutor's direct examination of the arresting officer has been so terse as to make it unlikely that the judge will find probable cause for the arrest, counsel must resist the temptation to seek extensive discovery of the facts of the offense and the police investigation by cross-examining and should simply waive cross-examination lest s/he fill the gaps in the prosecutor's showing of probable cause.

When the goal of winning the hearing overrides that of discovery, counsel will ordinarily proceed in the following ways:

(i) During the prosecutor's direct examination of witnesses, counsel will object to all potentially inadmissible evidence that could impair the chances of winning the suppression hearing, even though counsel might like to know the inadmissible information for discovery purposes.

(ii) As previously suggested, counsel will occasionally forgo cross-examination of a prosecution witness altogether when the direct examination by the prosecutor has been strongly beneficial to the defense and when the witness's answers to cross-examination questions (or

when the prosecutor's opportunity for a redirect examination) might remedy the prosecutor's original omissions.

(iii) When counsel does choose to cross-examine a prosecution witness, s/he will avoid straying into areas that could open the door to harmful further prosecutorial examination on redirect, even though those areas would be ideal for discovery.

(iv) In cross-examining witnesses, counsel will usually use closed-ended questions rather than the kind of open-ended questions suitable for discovery purposes. For example, in litigating a claim that the police did not have probable cause to arrest the respondent on the basis of the complainant's description, counsel might ask: "Officer, the description you received from Ms. _____ did not include any mention of a blue coat, did it?" Counsel would not ask: "What exactly did the complainant say when she was describing her assailant?" Although the latter question would provide excellent discovery, it also gives the officer the chance to bring up portions of the description that match the respondent.

In addition to eschewing opportunities to obtain discovery of the prosecution's case, counsel may also allow a strong prospect of winning the hearing to dictate the otherwise inadvisable course of revealing facets of the defense case (including, for example, statements taken from prosecution witnesses by defense investigators) that ordinarily would be saved until trial. And suppression hearings that have a realistic chance of winning are the only suppression hearings in which counsel should seriously consider presenting the testimony of defense witnesses and the respondent. See § 22.05 *infra.*

§ 22.04(b) Examination Techniques When Counsel's Primary Goal in Litigating the Suppression Motion Is To Obtain Discovery

When counsel is contemplating using a suppression hearing for the purpose of discovery, s/he will have to engage in a cost-benefit analysis, weighing the value to the defense of each particular item of discovery in preparing for trial against the likelihood and value of winning the suppression motion and the extent to which that likelihood might be impaired by any particular discovery tactic. As implied in § 22.04(a) *supra,* defense counsel would usually be ill-advised to pursue discovery when the chances of winning the suppression of crucial prosecution evidence are very strong, since the cross-examination questions necessary for discovery often will fill gaps in the prosecutor's case at the hearing. If, however, the chances of winning the hearing are remote or if the damage that questioning for discovery could cause to those chances is minimal, then counsel can take advantage of the excellent discovery opportunities afforded by a suppression hearing.

Defense strategies and techniques in a hearing conducted primarily for discovery purposes are the converse of those just described for handling a suppression hearing aimed to produce a defense victory:

(i) Counsel should ordinarily cross-examine every prosecution witness to the maximum extent permitted by the court, covering every area that could conceivably arise at trial. But counsel should not refer to any prior statements of the witness or other documents of which the prosecutor might be unaware that could give the defense an edge at trial.

(ii) Counsel should use predominantly open-ended cross-examination questions, for example: "What was the description of the perpetrator?" "What else did the complainant say?" "What did you do next?" The major disadvantage of closed-ended questions in this context is that they restrict the witness to areas already known to counsel instead of encouraging the witness to tell everything s/he knows about the case. Counsel should use questions like, "Have you told me everything you remember about . . .?" and "Is there anything else you haven't mentioned about . . .?" to get at material that counsel may not have previously contemplated.

(iii) Counsel should not put the respondent or any other defense witnesses on the stand at the suppression hearing. Since the hearing is not being conducted to win, there is no reason to give the prosecutor discovery of the defense case at trial or to risk producing material that the prosecutor can use for impeachment of defense witnesses at trial.

In preparing to use a suppression hearing for discovery, counsel's major task will be to construct reasonable arguments to justify every cross-examination question as relevant to some issue being litigated at the hearing. The problem here is the same one discussed in § 4.33 *supra* in relation to probable-cause hearings. The prosecutor invariably will object to defense cross-examination questions that appear to be motivated by a desire to obtain discovery of the prosecution's case. (The technically correct prosecutorial objection here is irrelevancy, although many prosecutors cite the nonexistent objection that a question should be disallowed simply because it is "discovery.") When a prosecutor does interpose the correct objection, "irrelevant," even judges sympathetic to the defense effort to obtain some discovery will need to protect the record by demanding that defense counsel explain how the challenged question can produce information bearing on the suppression claim that is being adjudicated. Accordingly, for every discovery-oriented cross-examination question that counsel intends to ask, s/he will need to be prepared to demonstrate that the question is relevant to the issues at the suppression hearing. For this purpose, it is useful to keep in mind that a cross-examination question is technically relevant whenever (i) any possible answer to it would make any fact that supports the respondent's legal theory or theories on the suppression motion more probable, or would make any fact that supports the prosecution's theory or theories less probable, than it would be without the answer; *or* (ii) any possible answer would reflect adversely upon the general credibility of the witness or upon the accuracy of any fact supporting the prosecution's theory or theories to which the witness testified on direct examination; *or* (iii) any possible answer would decrease the force of any inference that might be drawn from any piece of testimony given by the witness on direct examination in support of the prosecution's theory or theories; *or* (iv) any possible answer might begin a process of undermining the witness's confidence in any piece of testimony given on direct examination that supports the prosecution's theory or theories, so that the witness might be led eventually to retract it.

In preparing for a suppression hearing at which the primary goal is discovery, counsel will also need to plan out thoroughly the sequence of cross-examination questions for each prosecution witness. Even if counsel is able to justify the questions against the prosecutor's objections of irrelevancy, the judge may increasingly lose patience with an attorney who appears to be primarily engaged in seeking discovery and may, at some point, rule out further cross-examination. Thus counsel will want to structure the cross-examination of every witness in such a way that the key questions covering the matters in which counsel is most interested are asked early in the examination, before questioning is likely to be cut off. In order to decrease judicial impatience, it is useful to intersperse questions that bear clearly and directly on the issues being litigated among counsel's more noticeably discovery-oriented questions: Judges are far less likely to cut off cross-examination when they feel that discovery is a secondary goal rather than counsel's primary purpose. Counsel should also strive to keep the cross-examination questions flowing at a rapid-fire rate; judges with crowded calendars will not tolerate slow examination styles or delays while the attorney thinks of new questions or consults documents.

To the inexperienced practitioner it may seem that suppression hearings conducted for the purpose of discovery require little preparation. As the foregoing discussion has suggested, however, counsel will need to devote substantial time to planning before the hearing in order to be able to take full advantage of the opportunities for discovery.

§ 22.04(c) Examination Techniques When Counsel's Primary Goal Is To Lay a Foundation for Impeachment at Trial

In suppression hearings conducted primarily for the purpose of creating transcript material that can be used to impeach prosecution witnesses at trial, counsel will usually be pursuing one or more of the following objectives:

(i) To lure the witness into making statements that are affirmatively helpful because:

(a) They tend to negate some element of the offense (thereby preventing conviction altogether or limiting conviction to a lesser included charge);

(b) They tend to establish some fact that supports an affirmative defense (for example, self-defense);

(c) They tend to establish some fact that mitigates the gravity of the offense and will thereby help at sentencing (for example, the fact that the respondent was the look-out and was not directly involved in the beating of the complainant).

(ii) To circumscribe damaging testimony so that the witness cannot make even more damaging statements at trial (for example, by pinning an eyewitness down to the statement that s/he could not have observed the face of the perpetrator for more

than three minutes, in order to prevent the witness from lengthening the time and thus enhancing the persuasiveness of his or her identification of the respondent at trial).

Generally, in pursuing any of these objectives, counsel should make heavy use of "closed" questions — that is, forms of questioning which demand specific answers and leave the witness with the smallest possible range of choice about what to say or what words to say it in. ("At the moment when you first saw the two people standing in the doorway, how many feet were you from the closer of those two people?" "Well, when why you say 'a couple of feet,' do you mean that it was closer to two feet or closer to ten feet?" "Closer to six feet or closer to ten feet?") Questions calling for yes-or-no answers will often constitute a substantial part of this sort of cross-examination. ("You told the police officers at the scene that those two people came running at you, didn't you?" "'Running' was the word you used to describe how they came toward you, isn't that right?") An effective way to lock a witness in to unambiguous answers is to take full advantage of the cross-examiner's right to use leading questions, stating the exact factual proposition that counsel wants to extract from the witness and asking the witness only whether or not that proposition is correct. ("It is true, is it not, that as soon as you saw the two persons start running toward you, you began to run away from them?" "And when you were grabbed, you were grabbed around the neck from behind, isn't that correct?" "You had turned your face away from them by that time, right?" "As soon as you started running, you turned to look where you were running, didn't you?") Particularly when the objective of the cross-examination is to circumscribe damaging testimony, it is important to "bottom out" the witness's story by establishing that what s/he has described as the things s/he saw or heard or did that fall within any significant category of information constitute *all* s/he heard or saw or did within that category. This is best achieved by "nothing else" questions. ("So, apart from the time, which you have estimated as a few seconds, immediately after you saw the two people standing in the doorway and before they began to run in your direction, there never was any time before the lineup when you saw either of those two people standing still, was there?" "Apart from what you told the police at the scene, you didn't observe anything else about the facial features of either of the two persons, did you?" "Except for the one word 'Hey!' that was shouted at you, you heard nothing else said by either of the two persons prior to the lineup, did you?")

Counsel should be prepared to adjust the order of subjects covered to fit the demeanor of the witness. Frequently, civilian witnesses will be fairly pliant at the beginning of a cross-examination (either because the witness is nervous and cowed or because the witness does not have any reason yet to distrust or dislike the defense attorney) and will become progressively more difficult to handle (as the nervousness wears off or as the witness comes to realize that the defense attorney is succeeding in extracting statements that are helpful to the defense). Thus it often will prove useful to lead off the cross-examination with the factual propositions that counsel is most concerned with proving or anticipates having the most difficulty extracting from the witness. On the other hand, if there are a few points that can be tied down without pushing the witness hard and without the witness perceiving that s/he is conceding anything significant or embarrassing, these points should usually be taken up before the first point on which counsel

expects to have to dominate the witness perceptibly, since that will mark the end of the honeymoon period with most witnesses.

In attempting to extract concessions from hostile witnesses who are trying to out-maneuver counsel by saying the opposite of whatever counsel is seeking, it will often be productive to use false leads. This technique consists of getting the witness to believe that counsel wants the converse of what s/he really wants or of getting the witness so concerned to avoid falling into an apparent trap that s/he will back away from it and thereby fall into counsel's real trap. For example, in an identification suppression hearing at which counsel is trying to show that the eyewitness's photographic identification resulted from the witness's having observed the respondent in a lineup the week before (rather than from having seen the respondent commit the crime), counsel might ask questions which imply that counsel is trying to discredit the witness's perceptual abilities or memory by showing that the witness was unable to connect the person in the photograph with the person in the lineup; in response, the witness probably will assert vigorously that s/he recognized the photograph as depicting the person s/he saw in the lineup.

False leads can be used in four different ways in a suppression hearing:

(i) To establish propositions that will be useful solely in attempting to win the suppression hearing (for example, that the respondent did not give consent to the search of his room that led to the recovery of the contraband);

(ii) To establish propositions that will be useful both in the suppression hearing and at trial (for example, in an identification suppression hearing: that it was dark at the time of the incident — a fact tending to establish the unreliability of the identification as a basis for suppression and also bolstering the defense of misidentification that counsel intends to present at trial);

(iii) To establish propositions that will be neither useful nor harmful at the suppression hearing but will be useful at trial (for example, in a Fourth Amendment hearing: that it was dark at the time of the incident — a fact irrelevant to the respondent's Fourth Amendment claim but one that bolsters the misidentification defense at trial); and

(iv) To establish propositions that will be harmful to the respondent at the suppression hearing but useful to his or her defense at trial.

Statements in the last of these categories can often be drawn out of an unfriendly witness, such as a police officer, precisely *because* of their evident harmfulness to the respondent's claim for suppression. Consider the following two illustrations:

(A) Assume that the charge is possession of drugs and that the police claim they obtained consent to search the respondent's bedroom and bureau from his brother,

who shared the bedroom and the bureau. If defense counsel contests the brother's authority to consent (see § 23.18(b) *infra*) and behaves during cross-examination as if s/he is trying to get the police officer to say that the bureau was used exclusively by the respondent, the officer undoubtedly will react by strengthening his or her testimony that the brother had equal, if not greater, access to the bureau. By the end of the cross-examination, counsel will probably have gotten the officer to say that most, if not all, of the clothing in the bureau at the time of the search belonged to the brother; that most of the clothing in the drawer with the drugs belonged to the brother; that the bureau was closer to the brother's bed; and that the brother acted as if he had free and constant access to the bureau. Counsel will thereupon have lost the battle by helping the prosecution to justify the search on consent grounds. However, counsel will have won the war by acquiring material to use in impeaching the officer at trial if the officer tries to change stories when counsel springs the respondent's true defense: that the drugs belonged to the brother and were placed by the brother in his drawer of his bureau.

(B) Suppose that the charge is assault with a firearm and that the respondent has made a statement to the police admitting the commission of the shooting but explaining it on self-defense grounds. Counsel has a good-faith basis for challenging the voluntariness of the statement and proceeds to do so. Inevitably, when counsel begins to cross-examine police officers on the subject of voluntariness and tries to get them to agree that the respondent resisted the coercive efforts of the police, the officers will insist that the respondent willingly came forward and was absolutely cooperative. Once again, the defense will have lost the suppression hearing. But, at trial, defense counsel will be able to force the officers to admit that the respondent's actions were not those of a guilty person who has something to hide.

§ 22.04(d) Examination Techniques When Counsel Has a Mixture of Goals at the Suppression Hearing

The foregoing three sections focused on cases in which counsel had a single overriding objective at the suppression hearing. In many cases, however, counsel might wish to pursue more than one goal. For example, there may be a realistic chance of winning the suppression hearing, yet counsel may be insufficiently sanguine about the probability of victory to be wholly comfortable about forgoing opportunities for discovery and creation of impeachment material. As the previous sections have suggested, pursuing multiple goals may jeopardize them all. For example, cross-examining for discovery or to create impeachment material may unavoidably elicit facts that will destroy any chance of winning the hearing. In many cases counsel is realistically required to choose one strategy and follow it single-mindedly — unless, of course, during the hearing that strategy is proving unworkable.

There are other cases, however, in which counsel can, with careful advance planning, pursue a range of goals. For example, if counsel is litigating several different suppression claims

or theories, it may be possible to seek victory on one claim or theory, while using others to obtain discovery and create impeachment material. For example, in an identification suppression hearing, counsel might seek discovery through a claim that the police lacked probable cause to arrest the respondent (see § 23.07 *infra*), might seek to pin down impeachment material by cross-examination predicated on the claim that a show-up on the scene was impermissibly suggestive (see § 25.03(a) *infra*), and might seek to win yet a third claim, that a subsequent lineup was unconstitutionally held without the presence of counsel (see § 25.06 *infra*).

In deciding whether to mix strategies, counsel will need to be completely familiar with the facts of the case and all possible legal issues that could be litigated at the suppression hearing, and s/he will need to conduct a cost-benefit analysis that considers (i) the likelihood and value of succeeding on each strategy if pursued alone, (ii) the extent to which potentially winning strategies will be impaired by mixing them with other strategies, and (iii) whether the predictable impairment is outweighed by the probable gains to be achieved from pursuing a mixture of strategies.

§ 22.04(e) Using Diagrams in Cross-Examination

In litigating Fourth Amendment claims, counsel will often find it helpful to ask each officer to draw a diagram of the scene of the arrest, search, or seizure in issue, describing the events in detail in relation to the diagram. Diagrams drawn by each officer should be removed from view before the entry of the next police witness, and counsel should ask the court not only for leave to remove the diagram after the testimony of the first witness but also for a ruling precluding the use of that diagram by the prosecutor in examining subsequent prosecution witnesses. The policy underlying the rule on witnesses supports such a request, and by keeping from each police witness the diagrams drawn by the others, visibly inconsistent versions of the affair can sometimes be elicited that will persuade the judge or an appellate court to discredit the officers.

To make the best record for an appellate court, counsel should have the officers draw their diagrams with a marker on graph paper rather than use a blackboard.

§ 22.05 DETERMINING WHETHER TO PRESENT THE TESTIMONY OF THE RESPONDENT AND OTHER DEFENSE WITNESSES

Frequently, the defense will need to subpoena and present testimony from defense witnesses in order to win a suppression hearing. For example, if the respondent's claim is that the police unlawfully coerced the respondent's mother into agreeing to a police search of the respondent's bedroom, the mother probably will need to testify about the nature and effects of the coercion. If a confession suppression claim is that the respondent did not understand the *Miranda* warnings, it will probably be necessary to present testimony both by the respondent (about his or her lack of comprehension) and by a psychologist who tested the respondent's reading and comprehension levels (see § 24.10(b) *infra*).

There are several strategic factors that must be considered in deciding whether to present the respondent or other defense witnesses in a suppression hearing. The decisions will have to be made at least tentatively at an early stage of counsel's preparation, in order to leave sufficient time to subpoena the witnesses and prepare them to testify. (Even when a witness is loyal to the respondent, a subpoena is advisable, to make the necessary record for a continuance in the event of the witness's failure to appear. See § 10.02 *supra*.) On the other hand, counsel should not allow himself or herself to feel locked in to the tentatively chosen strategy; s/he must constantly re-evaluate goals and strategies and adapt them to unanticipated developments at the hearing.

§ 22.05(a) Testimony by the Respondent

In deciding whether to put the respondent on the witness stand in a suppression hearing, counsel should consider that whatever testimony the respondent gives at the hearing can probably be used to impeach the respondent if s/he testifies at trial. Although a respondent's testimony in a suppression hearing cannot be used against him or her in the prosecutor's case-in-chief at trial on the issue of guilt, *Simmons v. United States,* 390 U.S. 377 (1968); *Brown v. United States,* 411 U.S. 223, 228 (1973) (dictum); *United States v. Salvucci,* 448 U.S. 83, 89-90 (1980) (dictum), the prosecution is probably free to use it for impeachment of the respondent's trial testimony to the extent that the two are inconsistent. *Cf. Harris v. New York,* 401 U.S. 222 (1971) (confession suppressed on *Miranda* grounds can be used as prior inconsistent statement to impeach accused at trial). (Counsel can, however, argue that this kind of impeachment should be barred by *New Jersey v. Portash,* 440 U.S. 450 (1979), which holds that an accused cannot be impeached with prior testimony which s/he was compelled to give in violation of the Fifth Amendment Privilege Against Self-Incrimination. Arguably a respondent's testimony in a suppression hearing is "compelled" and involuntary in the sense that the respondent is confronted with the "Hobson's choice" (*Simmons v. United States,* 390 U.S. at 391) "either to give up what he believed, with advice of counsel, to be a valid . . . [constitutional] claim [to have evidence suppressed] or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Id.* at 394. *Cf. Harrison v. United States,* 392 U.S. 219 (1968); *McDaniel v. North Carolina,* 392 U.S. 665 (1968) (per curiam).) Counsel may be able to limit cross-examination at the suppression hearing so as to avoid incriminating admissions, *see*, *e.g.*, *People v. Lacy*, 25 A.D.2d 788, 788, 270 N.Y.S.2d 1014, 1015-16 (N.Y. App. Div., 3d Dep't 1966) (at a hearing on a motion to suppress statements, "the defendant may take the stand and testify as to his request for counsel at the time of the arrest and as to all facts relevant to . . . the alleged confession and waiver and by so testifying, the defendant does not subject himself 'to cross-examination on the [circumstances of the crime]'"), but often this will not be easy to do if the cross-examining prosecutor is at all capable.

If the respondent's testimony probably would be instrumental in winning the suppression hearing and a victory at the hearing probably would result in the prosecutor's dismissal of the case, these prospects usually justify accepting the risks of impeachment. Even if the chances of victory at the suppression hearing are not overwhelming, testimony by the respondent at the hearing may be justified if there is little chance that the respondent will testify at trial or if the

respondent's testimony at the hearing will be limited to matters such as the respondent's comprehension of *Miranda* warnings, which do not overlap any of the subjects about which the respondent may testify at trial. *See, e.g.*, *People v. Lacy*, 25 A.D.2d at 788, 270 N.Y.S.2d at 1015-16.

Apart from the risk of impeachment at trial, there may be tactical reasons to forgo presenting the respondent's testimony at a suppression hearing. It is often possible to establish a marginal case of unconstitutional police conduct on the basis of police testimony alone, whereas the respondent's version of the relevant events portrays the officers' behavior as considerably more egregious and blatantly unlawful. The question whether to put the respondent on the stand in this situation is particularly difficult. Many judges believe that respondents are prone to exaggerate police misconduct; these judges are slow to credit any respondent's testimony, particularly when it consists of horror stories. Therefore, calling the respondent to testify entails the risk of irritating the judge to such an extent that s/he will strain the facts and the law to uphold the police.

On the other hand, if the respondent's description of atrocious police conduct is strongly credible, and particularly if it is corroborated by independent witnesses or evidence, proof of flagrant police abuse can spell the difference between victory and defeat in a suppression hearing. The Supreme Court has held — in a decision of uncertain breadth — that the scope of taint attending an unconstitutional search and seizure may depend in part on the flagrancy of the unconstitutionality. *Brown v. Illinois,* 422 U.S. 590, 603-05 (1975); *cf. United States v. Leon,* 468 U.S. 897, 911 (1984); see § 23.39 *infra.* And, as a practical matter, trial and appellate judges who can be persuaded that the police have behaved abominably are more likely to rule in the respondent's favor on any close questions in the case.

Several collateral dangers bear upon the decision whether to put the respondent on the stand in a suppression hearing. The respondent's testimony may give the prosecutor discovery of the defenses planned for trial and thereby improve the prosecutor's presentation on the issue of guilt. In cross-examining the respondent at the suppression hearing, the prosecutor can develop a sense of the respondent's personality and susceptibility to certain cross-examination tactics and may consequently do a better job of cross-examination at trial. Finally, if the judge at the suppression hearing is the same judge who will preside at a bench trial and at sentencing, unpersuasive testimony by the respondent at the hearing could prove detrimental in later stages of the case: The judge's discrediting of this testimony could lead the judge also to discredit the respondent's testimony at trial, and the judge's belief that the respondent has perjured himself or herself could lead to a harsher sentence.

Notwithstanding all these risks, there will be many cases in which the chances of victory at the suppression hearing are sufficiently strong, and the contribution that the respondent's testimony can make is sufficiently important, that defense counsel will opt in favor of having the respondent testify. The final decision must be made by the respondent personally (see § 33.07 *infra*); counsel should explain the potential benefits and risks and advise the respondent about the

best course.

When the respondent does testify at the suppression hearing, it is usually best that s/he testify last. Having heard all of the prior evidence, s/he will be in a position to rebut police testimony effectively and to explain any apparent inconsistencies in the accounts of defense witnesses. See § 33.02 *infra.*

§ 22.05(b) Testimony by Defense Witnesses Other Than the Respondent

Calling defense witnesses other than the respondent to the stand in a suppression hearing is an even riskier venture than calling the respondent. In many jurisdictions the prosecutor is permitted to present their prior recorded testimony in the case-in-chief at trial if they are unavailable at the time of trial. As a matter of federal constitutional law, *Crawford v. Washington*, 541 U.S. 36 (2004), eliminates any Confrontation-Clause objection to a prosecutor's use at trial of the pretrial testimony of a witness "where the . . . [witness] is unavailable [at the time of trial], and . . . where the defendant has had a prior opportunity to cross-examine," *id*. at 59; thus, the courts are very unlikely to be receptive to Confrontation-Clause objections to the recorded testimony of a witness *called by the defense* at a suppression hearing if s/he thereafter becomes unavailable. Counsel could conceivably object to the admission of such testimony in the prosecution's case-in-chief at trial by invoking the rule of *Simmons v. United States*, 390 U.S. 377 (1968), and arguing that the logic of the rule — that an accused may not constitutionally be required to choose between the constitutional rights at issue in suppression hearings and the privilege against self-incrimination, *see United States v. Kahn,* 415 U.S. 239, 242 (1974) (per curiam) — should be extended to any sort of evidence that the defense is compelled to present in court (*cf. Harrison v. United States,* 392 U.S. 219 (1968)) in order to assert the respondent's rights against the governmental illegality that necessitated the motion to suppress. *Cf. Fisher v. United States,* 425 U.S. 391, 399-400 n.5 (1976) (dictum); *Andresen v. Maryland,* 427 U.S. 463, 472 & n.6 (1976) (dictum). However, this extension is far from clear, *cf. United States v. Nobles,* 422 U.S. 225, 233-34 (1975), and counsel cannot afford to rely on it in the present state of the law.

Even where local caselaw or local prosecutorial practices make it unlikely that a prosecutor would use a defense witness's suppression hearing testimony in the prosecution's case-in-chief at trial, presentation of defense witnesses at the hearing will expose them to the possibility of impeachment at trial with any inconsistent statements contained in their prior testimony. The defense might argue that the logic of *New Jersey v. Portash,* 440 U.S. 450 (1979), § 22.05(a) *supra,* prohibits this use of the prior testimony because the respondent was "compelled" to present it in order to vindicate the constitutional rights at issue in the suppression hearing; but the argument requires extensions of both *Portash* and *Simmons* and is not, therefore, a safe shield against the risk of impeachment. *Cf. United States v. Nobles,* 422 U.S. at 233-34.

Finally, apart from the dangers of prosecutorial use of the testimony at trial, counsel who calls defense witnesses at a suppression hearing may give the prosecutor discovery of the version

of the facts that the defense intends to present at trial, together with "batting practice" in cross-examining potential defense trial witnesses. Counsel must weigh all these risks against the likely benefits in deciding whether to present the testimony of any particular defense witness at the suppression hearing. If the chances of winning the hearing are substantial and the witness's testimony would be instrumental in winning, then the witness should be called despite the risks — unless, of course, counsel is conducting the hearing for some other purpose than to win it (see § 22.02 *supra*) or unless the evidence that is the subject of the suppression motion is not crucial for the prosecution's proof of guilt. The cost-benefit analysis should lead to the same result if the risks associated with the witness testifying at the suppression hearing are relatively small: for example, when the witness's knowledge about the case relates solely to the issues in the suppression hearing and the witness would not be useful to either the prosecution or the defense at trial or when the witness's testimony at the suppression hearing can be limited solely to the suppression issues even though the witness has additional knowledge bearing on facts that are expected to be in issue at trial.

Whenever counsel plans to use a potential trial witness as a witness at the suppression hearing and to limit his or her testimony at the hearing so as to avoid discovery and possible impeachment of the defense case at trial, counsel will have to prepare that witness with particular care to ensure that the witness's answers do not "open the door" to wide-ranging cross-examination by the prosecutor. And when later preparing that witness to testify at trial, counsel should review with the witness the transcript of his or her testimony at the suppression hearing, to minimize the risk that the witness will inadvertently diverge from it and thereby expose himself or herself to impeachment.

§ 22.06 ARGUING THE MOTION AND OBTAINING THE FORMAL JUDICIAL FINDINGS NECESSARY FOR EFFECTIVE APPELLATE REVIEW

At the conclusion of the evidentiary hearing on the motion, counsel will ordinarily proceed immediately to argue the motion orally, integrating the applicable legal principles with the facts adduced at the hearing. In rare cases counsel may have to request a continuance of oral argument because the evidence has generated new legal issues that counsel had not anticipated and now needs to research or because counsel's notes and memory of the evidence are not sufficient and counsel wants to review a transcript of the hearing in preparation for argument. Since judges will often be resistant to continuing the arguments (particularly when trial is scheduled to begin right after the suppression hearing), counsel may be required to explain precisely why the additional research or transcript is essential to his or her ability to represent the respondent competently in arguing the motion. If the court nevertheless denies the request for a continuance, counsel will have to proceed with the oral argument. In this situation counsel should consider requesting leave to submit a supplementary written memorandum based upon counsel's additional research and review of the transcript. If the court denies even that request and immediately rules on the motion, counsel should thereafter conduct the contemplated legal research, acquire the transcript, or both, and should incorporate any favorable new legal authorities or transcript references in a motion for reconsideration of the ruling.

In oral arguments on suppression motions, it is customary in most jurisdictions for the defense to proceed first because the respondent is the moving party. On issues on which the prosecution bears the burden of persuasion (see § 22.03(d) *supra*), defense counsel could perhaps insist that the prosecutor argue first. However, it is usually in defense counsel's interest to argue first, thereby gaining the advantage of framing the issues and also getting the right to have the last word by arguing in rebuttal.

When arguing the motion, defense counsel should make aggressive use of the applicable burdens of production and persuasion. (See § 22.03(d) *supra*.) If the evidentiary record is bare or insufficient on an issue on which the prosecution bears the burden of production or persuasion, it will usually reward counsel's effort to remind the judge that the prosecutor had an obligation to establish the missing facts and that, therefore, any deficiency of evidence on the issue must be held against the prosecution.

As explained in § 16.06 *supra,* it is usually inadvisable in making motions arguments to recite strings of case citations or to analyze prior cases at length. As § 16.06 suggests, when intricate legal analysis is necessary, counsel should consider handing copies of the applicable decisions to the judge and prosecutor and using these as props in the argument. In addition, counsel should relieve the tedium of extensive legal analysis by continually referring to specific facts that emerged from the evidence at the suppression hearing. If the judge curtails counsel's legal analysis or if it proves impossible to give a coherent oral explanation of the applicable law, counsel should request leave to submit an additional written memorandum of points and authorities.

As in any other motions argument, it is essential that counsel be attentive to the judge's questions (both those addressed to counsel and those addressed to the prosecutor) and attempt to answer those questions as thoroughly as possible. See § 16.07 *supra.*

In some jurisdictions the judge is required to state specific findings of fact and conclusions of law in ruling on suppression motions. In other jurisdictions the judge may dispense with these formalities and merely announce an ultimate ruling on the motion, provided that there is an adequate evidentiary record to support it. Depending upon the nature of the judge's ruling, defense counsel may wish to ask the judge to make (or clarify) particular findings of fact or legal rulings in order to facilitate appellate review. If the judge has ruled in the respondent's favor and counsel anticipates that the prosecutor will appeal, counsel obviously has an incentive to aid the judge in insulating the ruling from reversal on appeal. Counsel should therefore consider requesting that the judge amend or clarify any troublesome or ambiguous findings of fact or legal conclusions. If the judge has ruled against the respondent on a ground that counsel suspects is legally erroneous but the judge did not sufficiently identify this reasoning, counsel may wish to request elaboration in order to ensure that an appellate court will not be able to conclude or conjecture — as appellate courts are prone to do — that the trial court was relying on some other, permissible rationale. However, if a request for clarification will likely lead a judge to seek out more unassailable bases for the denial of a suppression motion or

to bolster the denial by making additional findings of fact contrary to the defense, counsel will be wiser to leave ambiguities in the record and decide later what possible use to make of them in appellate arguments.

§ 22.07 AFTER THE SUPPRESSION HEARING: PROTECTING THE RESPONDENT'S RIGHTS AT TRIAL AND PRESERVING APPELLATE REMEDIES

If the motion to suppress is denied, the defense typically cannot take an interlocutory appeal but can obtain appellate review only after conviction and sentencing. If the motion to suppress is granted, the prosecution in some jurisdictions has a statutory or common-law right to pursue an interlocutory appeal; when the prosecutor chooses to forgo that appeal and proceeds to trial without the benefit of the suppressed evidence, an acquittal at trial will forever insulate the suppression ruling from appellate review. In cases in which the motion was granted in part and denied in part, an interlocutory appeal by the prosecutor may activate a defense right to cross-appeal on rulings that were adverse to the respondent. *See, e.g., People v. Fenelon,* 88 Ill. App. 3d 191, 410 N.E.2d 451, 43 Ill. Dec. 451 (1980); *Commonwealth v. Mottola,* 10 Mass. App. 775, 412 N.E.2d 1280 (1980), *review denied,* 383 Mass. 890, 441 N.E.2d 1042 (1981).

When an interlocutory appeal is taken, an attorney with a client in detention should request the trial court to release the client pending appeal. Counsel can argue that the trial court's suppression ruling provides the best basis for predicting the outcome of the appeal and that it is highly unfair to subject the respondent to protracted incarceration for a crime for which s/he will probably never be convicted. If the trial court does not release the respondent pending appeal, counsel should ask the appellate court to do so (by a motion filed in the appeal, by a separate appeal of the trial court's refusal to grant release, or by a petition for a writ of habeas corpus, as local practice makes appropriate) and should request in the alternative that the appellate court hear the appeal of the suppression ruling on an expedited basis.

If the defense loses the suppression motion or if the defense wins and the prosecutor elects to forgo interlocutory appeal, many judges will insist upon proceeding immediately to trial. Often, the defense will want a continuance in order to obtain the transcript of the suppression hearing for use in impeaching prosecution trial witnesses. If, without revealing the defensive strategy imprudently, counsel can articulate specific ways in which the transcript would assist the defense at trial, counsel should advert to them as supporting a motion for a continuance for the purpose of effectuating the respondent's constitutional rights to effective assistance of counsel, confrontation, and a fair trial. See § 15.02 *supra.* When the respondent is indigent, counsel should move that a transcript be made and furnished to him or her at state expense, under the Sixth and Fourteenth Amendment doctrines noted in §§ 4.31(d) and 9.09(b)(1) *supra.*

Frequently, the judge who presides at the suppression hearing will hear testimony, such as hearsay evidence, that would be inadmissible under the more stringent rules of evidence applicable at trial. If the same judge then presides at a bench trial of the respondent's guilt or innocence, the result is a finder of fact jaundiced by exposure to inadmissible evidence. The

result is even more unfair when a judge suppresses evidence (such as a confession or an identification) and, having heard it at the suppression hearing, is expected to put it completely out of mind in deciding the respondent's guilt or innocence at trial. Some jurisdictions have dealt with these problems by requiring that the trial be conducted by a different judge from the one who presided at the suppression hearing. In other jurisdictions, assuming that there is more than one juvenile court judge, counsel may wish to seek recusal of the judge who presided at the suppression hearing on the ground that s/he has heard prejudicial information inadmissible at trial. For the standards governing recusal, tactical considerations in deciding whether to seek recusal, and suggestions for the framing of recusal requests, see §§ 20.04-20.07 *supra.*

Counsel litigating suppression motions must familiarize themselves with the idiosyncratic local requirements for obtaining appellate review of suppression rulings. In some jurisdictions the pretrial denial of a motion to suppress evidence can be reviewed on appeal only if defense counsel renews the motion or objects to the admission of the evidence at trial. In some jurisdictions a suppression ruling unfavorable to the defense can be appealed even after a guilty plea; in other jurisdictions the right to appeal can be preserved only by casting the guilty plea in the form of a fictitious "stipulated trial" (see § 14.10 *supra;* § 30.02(c) *infra*); in still others the respondent must plead not guilty and go through a full-fledged trial in order to obtain appellate review of the suppression ruling.

Occasionally, in cases in which the defense has lost a suppression motion, new facts emerge at trial that would have significantly strengthened the original motion or provided an independent basis for suppression. Under these circumstances counsel should move to re-open the suppression hearing. *See Gouled v. United States,* 255 U.S. 298, 305, 312-13 (1921) ("where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial"); *United States v. Raddatz,* 447 U.S. 667, 678 n.6 (1980) (dictum) (recognizing that a federal "district court's authority to consider anew a suppression motion previously denied is within its sound judicial discretion"); *cf. Murray v. Carrier,* 477 U.S. 478, 488 (1986) (holding, in the context of collateral challenges to a criminal conviction, that defense counsel's reasonable lack of knowledge of the facts giving rise to a legal claim constitutes sufficient cause to excuse counsel's failure to pursue the claim in timely fashion). *See also*, *e.g.*, *Commonwealth v. Haskell*, 438 Mass. 790, 792, 784 N.E.2d 625, 627-28 (2003) ("renewal [of a suppression motion] 'is appropriate where new or additional grounds are alleged which could not reasonably have been known when the motion was originally filed,' . . . but the remedy is not restricted to those circumstances" since "[a] judge's power to reconsider his own decisions during the pendency of a case is firmly rooted in the common law").

Chapter 23

Motions To Suppress Tangible Evidence

Part A. Introduction: Tools and Techniques for Litigating Search and Seizure Claims

§ 23.01 OVERVIEW OF THE CHAPTER AND BIBLIOGRAPHICAL NOTE

The Fourth Amendment to the Constitution of the United States, forbidding "unreasonable searches and seizures," is the subject of an extensive jurisprudence. Issues raised by the numerous Fourth Amendment doctrines are multiple and complex; the law is often uncertain and in flux. The best general treatment of the subject is WAYNE R. LAFAVE, SEARCH AND SEIZURE (5th ed. 2012 & Supp.). *See also* JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED — PRETRIAL RIGHTS 175-461 (1972); JOHN WESLEY HALL, JR., SEARCH AND SEIZURE (3d ed. 2000); ARNOLD MARKLE, THE LAW OF ARREST AND SEARCH AND SEIZURE (1974); WILLIAM E. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS (2d ed. 2003 & Supp.); JOSEPH A. VARON, SEARCHES, SEIZURES AND IMMUNITIES (2d ed. 1974). There are voluminous law review articles of good quality on specific subtopics.

Rather than attempt still another doctrinal discourse here, this chapter approaches the law of search and seizure from a different angle. After a brief description of the major constitutional guarantees that defense counsel may invoke to challenge the legality of police searches and seizures and thereby the admissibility of prosecution evidence produced by those activities (§ 23.02 *infra*), the text sets out a checklist of questions that counsel can ask and answer (with minimal investigation) about the facts of any particular case s/he is handling (§ 23.03 *infra*). The references following each question will direct counsel to subsequent sections containing functional analyses of the law applicable to the basic factual situation targeted by the question. These analyses should assist counsel in identifying particular aspects of law enforcement activity that may be assailable in each situation, together with the theoretical grounds and supporting authorities for assailing them.

Throughout the sections on search and seizure law, an emphasis will be placed on issues likely to arise in a typical juvenile delinquency practice. Issues such as searches of students in school will receive greater attention than, for example, electronic surveillance (which tends to be used primarily in police investigations of adult perpetrators) or administrative searches (which tend to be searches of the workplace, thereby involving primarily adults). When issues like electronic surveillance or administrative searches do crop up in a delinquency case, counsel should consult the treatises cited in the first paragraph of this section.

Most of the caselaw discussed in this chapter is adult court caselaw, since most of the developments in search-and-seizure law have taken place in adult court prosecutions. However, the Supreme Court has made clear that the Fourth Amendment applies to adults and juveniles alike and that adult court precedents regarding search and seizure are equally applicable to

juvenile prosecutions. *See New Jersey v. T.L.O.,* 469 U.S. 325, 337-38 (1985) (equating the privacy rights of children and adults and demonstrating that prior adult court precedents also define the limits of police intrusiveness in searching or seizing children).

§ 23.02 CONSTITUTIONAL AND STATUTORY RESTRAINTS ON SEARCHES AND SEIZURES

§ 23.02(a) General Principles of Fourth Amendment Law

The Fourth Amendment's proscription of unreasonable searches and seizures governs federal prosecutions by its express terms and state prosecutions by incorporation into the Due Process Clause of the Fourteenth Amendment, *Mapp v. Ohio,* 367 U.S. 643 (1961). It regulates the actions of the police, other law enforcement agents, other government officials (see § 23.34 *infra*) and, in limited circumstances, private citizens (see § 23.36 *infra*).

Perhaps the simplest way of viewing the vast array of Fourth Amendment caselaw is by breaking it down into six categories of cases:

(i) Caselaw defining the powers of police officers to conduct a search of a person, place, or thing, and to seize items discovered in that search, without the benefit of a search warrant. The Supreme Court has repeatedly declared that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357 (1967). *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2482 (2014); *Georgia v. Randolph*, 547 U.S. 103, 109 (2006); *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Minnesota v. Dickerson*, 508 U.S. 366, 372-73 (1993); *Thompson v. Louisiana,* 469 U.S. 17, 19-20 (1984); *United States v. Karo,* 468 U.S. 705, 714-15, 717 (1984). The "jealously and carefully drawn" exceptions to the warrant requirement (*Jones v. United States,* 357 U.S. 493, 499 (1958)) include searches and seizures made with the valid consent of an authorized person (see § 23.18 *infra*), incident to a valid arrest (see § 23.08 *infra*), under "exigent circumstances" (see § 23.20 *infra*), in an operable motor vehicle that there is probable cause to believe contains criminal objects (see § 23.24 *infra*), and after an officer's observation of contraband or crime-related objects in "plain view" (see § 23.22(b) *infra*). In addition to these specific exceptions to the warrant requirement, the courts also will excuse the absence of a warrant and will test a search or seizure under the standard of "general reasonableness" in situations in which the "intrusion on the individual's Fourth Amendment interests" is minimal (*United States v. Place,* 462 U.S. 696, 703 (1983); *see, e.g.*, *Samson v. California*, 547 U.S. 843 (2005); *United States v. Sczubelek*, 402 F.3d 175, 184-87 (3d Cir. 2005)), or the police conduct at issue is of a type that "historically has not been, and as a practical matter could not be, subjected to the warrant procedure," *Terry v. Ohio,* 392 U.S. 1, 20 (1968); *see, e.g.*, *Illinois v. McArthur*, 531 U.S. 326, 330-37 (2001); *Delaware v. Prouse,* 440 U.S. 648, 653-55 (1979); *Michigan v. Summers,* 452 U.S. 692, 699-701 (1981), or "'in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant . . . requirement

impractical,'" *O'Connor v. Ortega,* 480 U.S. 709, 720 (1987) (plurality opinion); *see, e.g.*, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002); *Griffin v. Wisconsin,* 483 U.S. 868 (1987); *New Jersey v. T.L.O.,* 469 U.S. 325 (1985).

(ii) Caselaw concerning warrantless seizures of the person, either in the form of an "arrest" or in the form of the less extensive restraint first recognized in *Terry v. Ohio*, 392 U.S. 1 (1968), and commonly called a *"Terry* stop." See §§ 23.04-23.14 *infra.*

(iii) Caselaw dealing with searches and seizures made pursuant to a search warrant. See § 23.17 *infra.*

(iv) Caselaw pertinent to the procedural issue of when a respondent has a sufficient interest in the area searched or the item seized to mount a challenge to the search or seizure. See §§ 23.15, 23.23 *infra.*

(v) Caselaw addressing the procedural question of whether, if a search or seizure was unconstitutional, the prosecution may nevertheless use particular items of evidence at trial because they are not viewed as "tainted" by the unlawful search or seizure. See §§ 23.37-23.40 *infra.*

(vi) Caselaw defining the extent of Fourth Amendment regulation of searches and seizures by government officials who are not in the field of law enforcement, such as public school teachers (*see Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *New Jersey v. T.L.O.,* 469 U.S. 325 (1985)) and probation officers (*see Griffin v. Wisconsin, supra*), and searches or seizures by private citizens acting in collaboration with the police. See § 23.33-23.36 *infra.*

§ 23.02(b) State Constitutional Protections Against Searches and Seizures

As explained in § 7.09 *supra,* some state courts in recent years have begun to construe state constitutional provisions as providing greater protections than the parallel provisions of the Constitution of the United States as interpreted by the Supreme Court of the United States. This has occurred particularly in the area of searches and seizures. A number of state courts have developed an extensive body of state constitutional law on searches and seizures, rejecting major doctrines that limit Fourth Amendment rights. Although the state constitutional decisions are too numerous to survey systematically, some of the most significant ones will be noted in the relevant subsections of this chapter. As § 7.09 advises, defense counsel should always invoke state constitutional provisions in addition to the federal Fourth Amendment, even when there are no state constitutional precedents on the issue. This is a cost-free practice, and the advantages of winning a search-and-seizure claim on state-law grounds always make that possibility worth pursuing.

§ 23.02(c) State Statutory Provisions Relating to Searches and Seizures

In many jurisdictions there are statutes (i) specifying the circumstances under which a police officer or a private citizen may make an arrest for a felony or misdemeanor (see § 23.07 *infra*), (ii) limiting the degree of force that may be employed in the course of an arrest, and (iii) enacting "knock-and-announce" requirements under which a police officer must give adequate warning of the officer's identity and intention to enter a dwelling before entering forcibly (see § 23.21 *infra*). These statutes, which control police procedure in both adult and juvenile cases, are often instrumental in securing suppression of evidence seized as a result of an unlawful arrest. Other statutory regulations of searches and seizures are found in some States but these are less common or less frequently involved in juvenile cases.

In addition to statutes applicable to both adult and juvenile cases, many jurisdictions have special statutory provisions governing police conduct in arresting and booking juveniles. See § 3.06 *supra;* § 24.14 *infra.* Violations of these procedures may, in an appropriate case, result in the suppression of tangible evidence.

Finally, there is a federal statute (18 U.S.C. §§ 2510-2522 (2014)) and, in several jurisdictions, state statutes, governing police use of electronic surveillance.

§ 23.03 ANALYZING SEARCH AND SEIZURE ISSUES: THE QUESTIONS TO ASK

In examining a case for possible search and seizure issues, counsel should begin by breaking down the series of police actions into their component parts, since each specific act by the police may give rise to a separate claim for relief. For example, in a case in which the police stop a person, pat the person down, arrest the person, and seize objects from the person's possession, counsel should consider all of the following issues: Did the police have a sufficient basis for making the initial *Terry* stop? Even if the police had the requisite basis for a *Terry* stop, did they have the additional "specific and articulable facts" necessary for a *Terry* frisk? If there was an adequate basis for the *Terry* frisk, did the manner in which the frisk was conducted exceed constitutional limits for a pat-down? Did the police thereafter have an adequate basis for an arrest? Did the subsequent search incident to arrest exceed constitutional limits? If not, was the seizure of each particular object that the search uncovered constitutionally justified? Any of the distinct police actions identified in these questions could generate a basis for suppressing evidence.

The following questions should be asked in analyzing search and seizure claims:

(1) Was the respondent stopped, accosted, arrested, or taken into custody by officers at any time?

(a) If so, is it in the interest of the defense to characterize the police action as an arrest or as a *Terry* stop? See § 23.05 *infra.* Do the facts support the

preferred characterization? See § 23.06 *infra.*

(b) If the police action is characterized as an arrest:

(i) Did the police have the requisite probable cause to make the arrest? See §§ 23.07, 23.11 *infra.*

(ii) Did the police search the respondent incident to the arrest? If so, did the search comply with the requirements for searches incident to arrest? See § 23.08 *infra.*

(iii) Did the postarrest custodial treatment of the respondent comport with constitutional and statutory requirements? See §§ 23.08(c), 23.14 *infra.*

(c) If the police action is characterized as a *Terry* stop:

(i) Did the police have the requisite factual basis for a *Terry* stop? See §§ 23.09, 23.11 *infra.*

(ii) Did the police conduct a *Terry* frisk? If so, did they have the requisite facts to support a *Terry* frisk? See §§ 23.10-23.11 *infra.*

(d) Did the police search any closed containers that the respondent had in his or her possession? See §§ 23.08(b), 23.12 *infra.*

(e) Was the respondent's body or clothing inspected? Was any physical examination of the respondent made? Were any tests conducted on the respondent's body or on any object or fluid, hair, or like substance taken from the respondent's body? See § 23.14 *infra.*

(2) Did the police enter or search the respondent's home, any premises with which s/he had more than transitory connections, or any premises in which the respondent was legitimately present at the time of the police entry or search?

(a) If so, does the respondent have a constitutionally protected interest that permits him or her to challenge the police entry into the premises, the police search of areas within the premises, or both? See § 23.15 *infra.*

(b) If the respondent does have the requisite interest:

(i) Was the police entry and was the search authorized by a search warrant? If so, was the warrant validly issued, and was it validly

executed? See § 23.17 *infra.*

(ii) Was the police entry and was the search authorized by an arrest warrant? If so, did the police limit their activities to arresting the subject of the warrant or use the arrest entry to conduct an impermissible search? See §§ 23.19, 23.22(d) *infra.*

(iii) Was the police entry and was the search authorized by exigent circumstances? If so, did the police confine their activities to a range within the scope of this justification? See §§ 23.20, 23.22(d) *infra.*

(iv) Was the police entry and was the search authorized by the consent of the respondent? If so, was the respondent's consent voluntary? See § 23.18(a) *infra.*

(v) Was the police entry and was the search authorized by the consent of some individual other than the respondent? If so, did that individual have the authority to consent to the search of the area? Was the consent voluntary? See § 23.18(b) *infra.*

(c) Did the police at any time after they entered the premises detain or search the person of the respondent? If so:

(i) Did the police have the requisite basis for detaining the respondent? See § 23.22(c) *infra.*

(ii) Did the police have the requisite basis for searching the person of the respondent? See § 23.22(c) *infra.*

(d) Did the police seize any item that was allegedly in plain view? If so, did the seizure comport with the rules governing the plain view exception to the warrant requirement? See § 23.22(b) *infra.*

(e) Did the police comply with the rules requiring them to announce their identity and intention to enter before effecting a forcible entry of a dwelling? See § 23.21 *infra.*

(3) Did the police stop, search, or seize any motor vehicle?

(a) If so, does the respondent have a constitutionally protected interest that permits him or her to challenge the police conduct in stopping, searching or seizing the vehicle? See § 23.23 *infra.*

(b) If the respondent does have the requisite interest:

(i) Did the police stop the vehicle while it was moving? If so, did the police have the requisite factual basis for a *Terry* stop? See § 23.27 *infra.*

(ii) Did the police order the respondent out of the vehicle? If so, did they have the requisite basis to issue that order? See § 23.28 *infra.*

(iii) Did the police conduct a search of the vehicle incident to an arrest of the respondent? If so, was the arrest valid? Was the search properly limited in scope? See § 23.26 *infra.*

(iv) Did the police conduct an evidentiary search of the vehicle? If so, did they have the requisite probable cause for that search? See § 23.24 *infra.*

(v) During the stop or search of the vehicle, did the police seize any item that was allegedly in plain view? If so, did the seizure comport with the rules governing the plain view exception to the warrant requirement? See § 23.22(b) *infra.*

(vi) Was the asserted basis for the stop of the vehicle a traffic infraction? See § 23.28 *infra.*

(vii) Was the vehicle impounded and thereafter searched in an "inventory search"? If so, was the search conducted pursuant to standardized police procedures? Was the alleged inventory a mere pretext for an otherwise impermissible evidentiary search? See § 23.25 *infra.*

(viii) Did the police open any closed containers that were in the vehicle? See § 23.24 *infra.*

(4) Was the respondent or were his or her possessions searched while at school?

(a) If so, was the search conducted by a school official without the involvement of the police? Was it:

(i) A search of the respondent's person? See §§ 23.33-23.34 *infra.*

(ii) A search of the respondent's locker or desk? See § 23.35 *infra.*

(b) Was the search conducted by a police officer or by a school official acting under the direction of, or in conjunction, with a police officer? See § 23.36 *infra.*

(5) Did the police act on the basis of information obtained from informants, whether those informants were "special agents," police spies, or private citizens? See § 23.32 *infra.*

When police conduct that may give rise to search and seizure issues has occurred, it is important to think comprehensively about all the items that could be suppressed as a result of a ruling that the search or seizure was unconstitutional. For example, if an arrest is found to be unlawful, the suppressible fruits of that arrest may include any physical object or substance seized at or after the time of the arrest, any show-up or lineup observations made at or after the time of the arrest, identifications of the respondent's photograph in a photographic array that was made possible because the respondent was photographed upon arrest, confessions or statements of the respondent made in custody after the arrest or otherwise induced by pressures flowing from the arrest, any physical object or substance or observation obtained by a search or seizure whose validity depends upon consent given while the respondent was in custody after the arrest or upon consent otherwise induced by pressures flowing from the arrest, testimony of witnesses whose identity was learned by interrogation of the respondent following the arrest, and fingerprint identification evidence based upon exemplars taken at the time of the arrest. See § 23.37 *infra.* While some of these potential fruits of the arrest may be found eventually to be too attenuated to require suppression, see *ibid.,* counsel cannot afford to overlook any conceivably viable suppression arguments.

In analyzing the validity of a search or seizure, it is crucial to isolate the facts and circumstances known to the police at the time of the search or seizure from those facts later learned by the police. The constitutionality of police officers' conduct "must [be] judge[d] . . . in light of the information available to them at the time they acted." *Maryland v. Garrison,* 480 U.S. 79, 85 (1987). *See also Florida v. J.L.*, 529 U.S. 266, 271 (2000) ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search."); *United States v. Jacobsen,* 466 U.S. 109, 115 (1984) ("[t]he reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred"). It is not always easy to determine what facts were known by the police at the time of a search or seizure. For example, police officers often amend the complaint report, supposedly containing the facts learned from the victim on the scene (see § 8.19(a)(1) *supra*), to add a detailed description of the respondent based upon the officers' observations of the respondent after arrest. Counsel should not accept these reports at face value but must cross-examine the police officer to ascertain what precise facts were known to him or her when s/he undertook the search or seizure.

Part B. On-the-Street Encounters with the Police: Arrests, Searches Incident to Arrest, Terry *Stops,* Terry *Frisks, and Other Encounters*

§ 23.04 THE SPECTRUM OF ON-THE-STREET ENCOUNTERS BETWEEN CITIZENS AND THE POLICE: CONTACTS, *TERRY* STOPS AND ARRESTS

As the Supreme Court has observed, "[s]treet encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life." *Terry v. Ohio,* 392 U.S. 1, 13 (1968). The Court thus far has identified three categories of encounters, which have differing ramifications for police prerogatives and citizens' rights: contacts, *Terry* stops, and arrests.

§ 23.04(a) Contacts

The Fourth Amendment is not called into play by "law enforcement officers . . . merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen . . . [even if] the officer identifies himself as a police officer. . . . The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. . . . He may not be detained even momentarily without [triggering Fourth Amendment protections that require] reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Florida v. Royer,* 460 U.S. 491, 497-98 (1983) (plurality opinion). *But cf. Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), discussed in § 23.11(b) *infra*.

§ 23.04(b) The Dividing Line Between Contacts and "Seizures" Within the Meaning of the Fourth Amendment

If a police officer, going beyond this kind of detention-free contact, "accosts [the] individual and restrains his freedom to walk away, he has 'seized' that person" within the meaning of the Fourth Amendment's restrictions upon "seizures." *Terry v. Ohio,* 392 U.S. 1, 16 (1968); *Brown v. Texas,* 443 U.S. 47, 50 (1979); *Brendlin v. California*, 551 U.S. 249, 254-55 (2007). The restraint may be physical, *Sibron v. New York,* 392 U.S. 40, 67 (1968), or it may take the form of a command to "stand still" or to "come along" or any other gesture or expression indicating that the person is not free to go as s/he pleases. *Dunaway v. New York,* 442 U.S. 200, 203, 207 n.6 (1979); *see Florida v. Royer,* 460 U.S. at 501-03 & n.9 (plurality opinion); *id.* at 511-12 (concurring opinion of Justice Brennan); *Brendlin v. California*, 551 U.S. at 254-55. "What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Immigration and Naturalization Service v. Delgado,* 466 U.S. 210, 215 (1984). The touchstone of a Fourth

Amendment seizure of a person is whether the police behavior "would . . . have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988). *Accord*, *Kaupp v. Texas*, 538 U.S. 626, 629 (2003) (per curiam); *see also Brendlin v. California*, 551 U.S. at 254-55, 262 ("A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. . . . When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v. Mendenhall,* 446 U.S. 544 (1980), who wrote that a seizure occurs if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,' *id*., at 554 (principal opinion). Later on, the Court adopted Justice Stewart's touchstone . . . but added that when a person 'has no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured better by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter' . . . . [W]hat may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away."). *See, e.g.*, *United States v. Black*, 707 F.3d 531, 537-39 (4th Cir. 2013); *Clark v. State*, 994 N.E.2d 252, 263 (Ind. 2013). *Cf. United States v. Drayton*, 536 U.S. 194, 203-04 (2002) (police questioning of passengers on a bus did not amount to a "seizure" for Fourth Amendment purposes when "[t]he officers gave the passengers no reason to believe that they were required to answer the officers' questions," "left the aisle free so that [passengers] could exit," and did "[n]othing . . . that would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter"); *California v. Hodari D.*, 499 U.S. 621 (1991) (there was no "seizure" for purposes of the Fourth Amendment when police officers chased a suspect who failed to comply with their directive to halt; therefore, the officers' lack of a basis for the directive and the pursuit provided no Fourth Amendment ground for suppression of contraband the suspect discarded during the chase; the Court says that "the so-called *Mendenhall* test, formulated by Justice Stewart's opinion in *United States v. Mendenhall,* 446 U.S. 544, 554 (1980), and adopted by the Court in later cases . . . [citing *Chesternut* and *Delgado*] states a *necessary,* but not a *sufficient,* condition for seizure — or, more precisely, for seizure effected through a 'show of authority.' *Mendenhall* establishes that the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person," *id*. at 627-28; if, after such a show of authority, the citizen does not attempt to flee or resist but rather "yield[s]," s/he is deemed to have been seized, *id*. at 626; *see also id*. at 629; but if, instead of complying with the show of authority, the citizen flees, no "seizure" is effected until s/he is thereafter physically restrained or submits to restraint, *id*. at 628-29).

"When assessing whether a juvenile was seized for purposes of the fourth amendment, [it is appropriate to] . . . modify the reasonable person standard to consider whether a reasonable

juvenile would have thought that his freedom of movement was restricted." *People v. Lopez*, 229 Ill. 2d 322, 346, 353-54, 892 N.E.2d 1047, 1061, 1065-66, 323 Ill. Dec. 55, 69, 73-74 (2008). The precedents for considering the particular susceptibility of young people to be overawed by an aura of police authority when a court is determining whether a juvenile is in "custody" for *Miranda* purposes are discussed in § 24.08(a) *infra* and should be persuasive in the present context as well. *See J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2398-99, 2402 (2011) ("a child's age properly informs the *Miranda* custody analysis" because the relevant inquiry is "'how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave,'" and "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave").

As a doctrinal matter, these rules involve a strictly objective inquiry; they do not turn either on the suspect's subjective belief that s/he is or is not free to leave (*Brendlin v. California*, 551 U.S. at 258 n.4) or on the officer's unmanifested intentions to restrain the suspect if the suspect attempts to leave (*id*. at 259-62) (the passenger in a stopped automobile was "seized" within the meaning of the Fourth Amendment even though the record did not establish that the officer "'was even aware [the passenger] was in the car prior to the vehicle stop'" and thus the officer may not have intended to stop the passenger: "the objective *Mendenhall* test of what a reasonable passenger would understand . . . leads to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority"). *See also Kaupp v. Texas*, 538 U.S. at 632 (handcuffing of a suspect was a significant factor in the classification of police conduct as a seizure tantamount to an arrest notwithstanding evidence that the sheriff's department "'routinely'" used handcuffs for safety reasons when transporting individuals: "the officers' motivation of self-protection does not speak to how their actions would reasonably be understood" by the suspect); *United States v. Mendenhall*, 446 U.S. at 554 n.6 (opinion of Justice Stewart, announcing the judgment of the Court); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *United States v. Hensley*, 469 U.S. 221, 234-35 (1985). However, as a practical matter, judges conducting a suppression hearing in the first instance often tend to be moved in the direction of finding a "seizure" when the officers can be gotten to concede that they would not have permitted the suspect to leave if the suspect had attempted to do so. Therefore, counsel may be well advised to ask the officer or officers a question like: "If [the client] had simply ignored you, turned [his] [her] back on you and walked away, are we to understand that you would have done nothing to prevent [him] [her] from taking off?" Officers with an ego will commonly be unwilling to say that they would have done nothing in this insulting situation; and, if they do say so, the question and answer will have done the defense no harm under the ultimate "objective *Mendenhall* test" (*Brendlin v. California*, 551 U.S. at 260). Prosecutorial objections to the question can be met by the observation that U.S. Supreme Court opinions attach significance to the information that the question seeks to elicit, *see*, *e.g.*, *Florida v. Royer*, 460 U.S. at 503 (plurality opinion) ("the State conceded in the Florida courts that Royer would not have been free to leave the interrogation room had he asked to do so. Furthermore, the state's brief in this Court interprets the testimony of the officers at the suppression hearing as indicating that had Royer refused to consent to a search of his luggage, the officers would have held the luggage and sought a warrant to authorize the search."); *Dunaway v. New York*, 442 U.S. at 203, 212 ("although . . .

[Dunaway] was not told he was under arrest, he would have been physically restrained if he had attempted to leave"); *id*. at 212 (Dunaway "was never informed that he was 'free to go'; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody") — perhaps because an officer's subjective intentions will frequently manifest themselves in visible appearances or "actions . . . [that] show an unambiguous intent to restrain" (*Brendlin v. California*, 551 U.S. at 255).

Some states courts extend their state constitutional guarantees against unreasonable searches and seizures to police conduct that would not be characterized as a "seizure" under the federal Fourth Amendment caselaw. There are, for example, decisions requiring that the police have a degree of justification for conduct that the United States Supreme Court put beyond the bounds of Fourth Amendment regulation in *United States v. Drayton*, 536 U.S. at 203-04 (*see*, *e.g.*, *People v. McIntosh*, 96 N.Y.2d 521, 755 N.E.2d 329, 730 N.Y.S.2d 265 (2001)), and *Hodari D.*, 499 U.S. at 629 (*see*, *e.g.*, *People v. Holmes*, 81 N.Y.2d 1056, 1057-58, 619 N.E.2d 396, 397-98, 601 N.Y.S.2d 459, 460-61 (1993)).

§ 23.04(c) *Terry* Stops

Although there is a "general rule that seizures of the person require probable cause to arrest," *Florida v. Royer,* 460 U.S. at 499 (plurality opinion), the Court in *Terry v. Ohio* "created a limited exception to this general rule: certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime." *Florida v. Royer,* 460 U.S. at 498 (plurality opinion). "The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.* at 500. For further discussion of the standards for *Terry* stops, see § 23.09 *infra*; for discussion of the standards for *Terry* frisks, see § 23.10 *infra.*

§ 23.04(d) Arrests

The line on the spectrum that separates *Terry* stops from arrests can be described as the "point [at which] . . . police procedures [are] . . . qualitatively and quantitatively . . . so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments." *Hayes v. Florida,* 470 U.S. 811, 815-16 (1985). Obviously, that line is not always easy to pinpoint. As the Court itself has observed, its decisions in "*Terry* [*v. Ohio, supra*], *Dunaway* [*v. New York, supra*], [*Florida v.*] *Royer*[*, supra*] and [*United States v.*] *Place,* [462 U.S. 696 (1983)] considered together, may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest." *United States v. Sharpe,* 470 U.S. 675, 685 (1985). Certainly, any time the police

"forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes," the police have "crossed" "the line" between *Terry* stops and arrests and have effected a "seizure[] . . . sufficiently like [an] arrest[] to invoke the traditional rule that arrests may constitutionally be made only on probable cause." *Hayes v. Florida,* 470 U.S. at 816. *Accord*, *Kaupp v. Texas*, 538 U.S. 626, 631-32 (2003) (per curiam) (seizure requiring probable cause occurred when "a group of police officers rous[ted] . . . [the 17-year-old defendant] out of bed in the middle of the night," handcuffed him and took him to the police station in his underwear, and then questioned him in an interrogation room, even though the officers said "'we need to go and talk,'" the defendant verbally acquiesced, and the sheriff's department routinely used handcuffs for transporting individuals); *Dunaway v. New York,* 442 U.S. at 212 (when police removed defendant from his home, transported him to the police station against his will and interrogated him, the defendant's "detention . . . was in important respects indistinguishable from a traditional arrest"). With respect to lesser intrusions upon an individual's freedom, the point of arrest is flexible, defined on a case-by-case basis by whether the circumstances of the detention were "more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry* line of cases," *Florida v. Royer,* 460 U.S. at 504 (plurality opinion); *Reid v. State*, 428 Md. 289, 293, 51 A.3d 597, 599 (2012) (police officer's use of a Taser to fire two metal darts into [the suspect's] back converted what otherwise may have been a *Terry* stop into a *de facto* arrest for Fourth Amendment purposes"). *Accord, Michigan v. Summers,* 452 U.S. 692, 696-97 (1981) (to escape "the general rule that an official seizure of the person must be supported by probable cause, even if no formal arrest is made," the detention must be "significantly less intrusive than an arrest"). The criteria normally considered in making that assessment are described in § 23.06 *infra.* For further discussion of the standards for making an arrest, see § 23.07 *infra.*

§ 23.04(e) "Custody" for Purposes of the *Miranda* Doctrine

It should be noted that there is one other constitutionally significant point on the spectrum of intrusiveness of police contacts with citizens. The protections established in *Miranda v. Arizona,* 384 U.S. 436 (1966), and its progeny, are triggered by the police placing a criminal defendant or juvenile respondent in "custody." See § 24.08(a) *infra.* In *Berkemer v. McCarty,* 468 U.S. 420 (1984), the Court made clear that the *Miranda* concept of custody envisions a greater degree of intrusiveness than a *Terry* stop. *See id.* at 439-40. It is uncertain, however, whether the *Miranda* concept of "custody" is synonymous with the Fourth Amendment standard of seizures requiring probable cause. For further discussion of the *Miranda* concept of "custody," see § 24.08(a) *infra.*

§ 23.05 TACTICAL REASONS FOR SEEKING A CATEGORIZATION OF POLICE CONDUCT AS AN ARREST OR AS A *TERRY* STOP

Because there is no "litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop," *Florida*

v. Royer, 460 U.S. at 506, the classification of the police action in each case will depend substantially upon the facts that defense counsel elicits from the witnesses and on the quality of counsel's arguments.

Obviously, it is always in the interest of the defense to characterize a police action as a seizure of the person rather than a "consensual encounter," because only seizures trigger the protections of the Fourth Amendment. The determination whether the defense stands to gain by characterizing the seizure as a *Terry* stop or as an arrest is not quite so clear-cut. Before the criteria for classifying seizures are discussed, it is useful to examine the strategic considerations that may make one or the other of the two classifications more beneficial to the respondent.

Ordinarily, defense counsel will wish to establish that a particular restraint was an arrest rather than a *Terry* stop (or, in cases in which the degree of police restraint escalated over a period of time, that the arrest occurred earlier, rather than later, in the sequence of events). The arrest category is usually more favorable to the defense because the requirements that the police must satisfy in order to make a valid arrest are more demanding than those for a *Terry* stop, see §§ 23.07, 23.09 *infra,* and thus it will be more difficult for the prosecution to justify the seizure. Moreover, in certain cases, the classification of the seizure as an "arrest" will provide additional grounds for suppression apart from the central claim that the invalidity of the seizure tainted all evidence derived from it. (For discussion of the concept of "derivative evidence," see § 23.37 *infra*.) For example, in cases involving confessions or other statements of the respondent, the greater level of custody involved in an arrest will ordinarily guarantee *Miranda* protection, see § 24.08(a) *infra;* compare § 23.04(e) *supra,* and the greater degree of coerciveness inherent in an arrest will tend to undermine the voluntariness of the statements, see § 24.04 *infra.* In cases involving a respondent who purportedly consented to a search or seizure, the coerciveness of an arrest may vitiate the validity of the consent, see § 23.18(a) *infra.*

In certain cases, however, it may be in the interest of the defense to characterize a restraint as a *Terry* stop rather than an arrest. One of the most important examples of this is when the classification of the restraint as a *Terry* stop can be used to invalidate a subsequent search of the respondent. If the restraint were characterized as an arrest and the arrest was lawful because the police had probable cause to arrest, then any postarrest search would be valid as a search incident to arrest. See § 23.08 *infra.* On the other hand, if the restraint were classified as a *Terry* stop and if the police lacked the requisite basis for a *Terry* frisk — specific and articulable facts warranting a reasonable conclusion that the respondent was armed and dangerous, see § 23.10 *infra* — then the frisk would be invalid and the fruits of the frisk would have to be suppressed. (Before deciding to attempt to bring a case within the latter principle, however, counsel should consider whether s/he can also bring it within the general rule that "a search incident to a lawful arrest may not precede the arrest," *Sibron v. New York,* 392 U.S. 40, 67 (1968), and can avoid the narrow exception permitting a search incident to arrest to be made immediately preceding the arrest as a part of a single course of action. See § 23.08(d) *infra*.)

§ 23.06 CRITERIA FOR CATEGORIZING A RESTRAINT AS EITHER A *TERRY STOP* OR AN ARREST

As already explained, the defense will always want to classify a police action as a "seizure," in order to invoke the protections of the Fourth Amendment. This first step of showing that a "seizure" occurred is ordinarily achieved by establishing that the police made some "show of official authority." *Florida v. Royer,* 460 U.S. 491, 502 (1983) (plurality opinion), that would cause a "'reasonable person'" to believe "'that he was not free to leave,'" *ibid.* See § 23.04(b) *supra.* Thus, in *Royer,* the plurality concluded that a constitutionally protected seizure had occurred when the officers identified themselves as narcotics agents, told the defendant that he was suspected of transporting drugs, asked him to accompany them to the police room while retaining his airplane ticket and driver's license, and in no way indicated that he was free to leave. *Id.* at 502-03. *See also Reid v. Georgia,* 448 U.S. 438 (1980) (per curiam).

The next step is to elevate the seizure from a *Terry* stop to an arrest. Counsel should consider developing the facts on each of the following subjects that bear upon the stop/arrest classification.

§ 23.06(a) The Length of the Restraint

On numerous occasions the Court has said that one of the factors that distinguishes *Terry* stops from arrests is the relative brevity of a *Terry* stop. *See, e.g., United States v. Place,* 462 U.S. 696, 709 (1983) (explaining that "[a]lthough we have recognized the reasonableness of seizures longer than the momentary ones involved in *Terry,* . . . the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," and then invalidating a 90-minute detention of an air traveler's luggage on reasonable suspicion: "[A]lthough we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case"); *Florida v. Royer,* 460 U.S. at 500 (plurality opinion) ("This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"); *Dunaway v. New York,* 442 U.S. 200, 212 (1979) (stops are limited to "brief and narrowly circumscribed intrusions"); *United States v. Brignoni-Ponce,* 422 U.S. 873, 878, 880-82 (1975); *Terry v. Ohio,* 392 U.S. at 10. *See also, e.g.*, *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (dictum) ("brief investigatory stops"). *Cf. United States v. Sokolow,* 490 U.S. 1, 10-11 (1989) (dictum).

In *United States v. Sharpe,* 470 U.S. 675 (1985), the Court retreated somewhat from an iron-clad rule that a *Terry* stop must be no longer than momentary. While continuing to recognize that "'brevity . . . is an important factor'" (*id.* at 685, quoting *United States v. Place, supra*), the Court in *Sharpe* stressed that "our cases impose no rigid time limitations on *Terry* stops" (*Sharpe,* 470 U.S. at 685) and stated:

> [W]e have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. . . . In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. . . . A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation . . . .

Id. at 685-86. Applying this standard to the facts of the *Sharpe* case, the Court concluded that the 20-minute investigative detention at issue was a *Terry* stop and not an arrest because: (i) the police officer "pursued his investigation in a diligent and reasonable manner" and "proceeded expeditiously," and there was no indication "that the officers were dilatory in their investigation"; (ii) to perform the investigation it was necessary to detain the suspect during the 20-minute period; (iii) the police were acting in a swiftly developing situation; and (iv) "[t]he delay in this case was attributable almost entirely to the evasive actions" of one of the suspects and, in the absence of that suspect's "maneuvers, only a short and certainly permissible pre-arrest detention would likely have taken place," *id.* at 687-88.

In the wake of the *Sharpe* decision, the relevant question is whether the detention exceeded the "time reasonably needed to effectuate" the "law enforcement purposes to be served by the stop," *id.* at 685; *accord*, *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (dictum) ("A seizure . . . can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" justifying the seizure); *Illinois v. McArthur*, 531 U.S. 326, 332 (2001) (dictum) ("this time period was no longer than reasonably necessary for the police, acting with diligence, to [complete the activity that justified the suspect's restraint]"); *and see, e.g.*, *United States v. Jenson*, 462 F.3d 399, 404 (5th Cir. 2006); *State v. Coles*, 217 N.J. 467, 489-91, 91 A.3d 1, 14-15 (2014), assuming, of course, that those purposes are consistent with the function of a *Terry* stop, to confirm or dispel an officer's suspicions by nonintrusive methods of investigation. *See, e.g.*, *People v. Ryan*, 12 N.Y.3d 28, 30-31, 904 N.E.2d 808, 809-10, 876 N.Y.S.2d 672, 673-74 (2009) (even assuming that the police had reasonable suspicion to stop the defendant, the detention exceeded the permissible bounds of a *Terry* stop and became a seizure requiring probable cause when the police held the defendant at the location for 13 minutes while they conducted a photo identification procedure, apparently "to make it convenient for the police to arrest defendant if a positive identification subsequently occurred"). When, as in *United States v. Place,* the police seized a suspect's luggage for 90 minutes in order to arrange for a narcotics-sniffing dog and when the police had forewarning of the suspect's arrival which would have permitted them to make advance preparations and thereby shorten the detention period, a reviewing court could properly conclude that the police failed to act diligently. *See United States v. Sharpe,* 470 U.S. at 684-85 (explaining the holding in *Place*). But diligence is not the only issue. The most diligent of police officers is not permitted to extend a *Terry* stop indefinitely simply because the purpose of the stop cannot be achieved in a finite period of time. As the Court acknowledged in elaborating its new standard in *Sharpe,* "[o]bviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop." 470

U.S. at 685. And the Court in *Sharpe,* when describing the need for allowing the police to pursue their investigations, specified that it was contemplating investigations that were to be conducted "quickly." *Id.* at 686.

§ 23.06(b) Whether the Police Transported the Respondent from the Location of the Stop

The police frequently transport a suspect from the place of the initial seizure to another location, either for the purpose of questioning the suspect in a more private setting or for the purpose of showing the suspect to an eyewitness in a show-up identification procedure. In *Hayes v. Florida,* 470 U.S. 811 (1985), *Dunaway v. New York*, *Florida v. Royer*, and *Kaupp v. Texas*, 538 U.S. 626 (2003) (per curiam), the ambulatory nature of the detention was a significant factor in the Court's classification of the detention as an arrest rather than a *Terry* stop.

In *Hayes v. Florida,* the Court concluded that the forcible removal of a suspect from his home and the non-consensual transportation of the suspect to the police station constitute such an "intrusi[on] with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments." 470 U.S. at 816. Similarly, in *Dunaway v. New York,* two of "[t]he pertinent facts relied on by the Court" in finding that the detention was an arrest "were that (1) the defendant was taken from a private dwelling; [and] (2) he was transported unwillingly to the police station." *United States v. Sharpe,* 470 U.S. at 684 n.4 (explaining the holding in *Dunaway*).

In *Royer,* one of the factors that transformed "[w]hat had begun as a consensual inquiry in a public place" (460 U.S. at 503) into a full arrest was the transportation of the defendant some 40 feet to a small airport room for questioning. In condemning this movement of the suspect, the plurality in *Royer* stressed that "[t]he record does not reflect any facts which would support a finding that the legitimate law enforcement purposes which justified the detention in the first instance were furthered by removing Royer to the police room prior to the officer's attempt to gain his consent to a search of his luggage." 460 U.S. at 505. *See also United States v. Sharpe,* 470 U.S. at 684 (discounting the portion of the *Royer* opinion that seemed to rely on the length of the detention, and defining the opinion as being concerned primarily with "the fact that the police confined the defendant in a small airport room for questioning").

In the *per curiam* opinion in *Kaupp v. Texas*, the Court relied on the reasoning in *Hayes v. Florida* and *Dunaway v. New York* to hold that the police conducted a seizure that was "'in important respects indistinguishable from a traditional arrest' and therefore required probable cause or judicial authorization" when they removed the 17-year-old defendant from his home in the middle of the night in handcuffs, "placed [him] in a patrol car, dr[o]ve[] [him] to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned." 538 U.S. at 631. Quoting from *Hayes v. Florida* and citing *Florida v. Royer*, the Court explained that "we have never 'sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for

investigative purposes . . . absent probable cause or judicial authorization.'" *Id*. at 630 (quoting *Hayes v. Florida*, 470 U.S. at 815). The Court in *Kaupp* reiterated that "[s]uch involuntary transport to a police station for questioning is 'sufficiently like arres[t] to invoke the traditional rule that arrests may constitutionally be made only on probable cause.'" *Id*. (quoting *Hayes v. Florida*, 470 U.S. at 816).

§ 23.06(c) The Nature of the Setting in Which the Detention Takes Place

In *Berkemer v. McCarty,* 468 U.S. 420 (1984), in the course of holding *Miranda* inapplicable to roadside questioning of motorists detained pursuant to traffic stops, the Court made some general observations concerning the distinction between *Terry* stops and arrests. Explaining that typical traffic stops differ from the usual *Miranda* custodial setting in that the "exposure to public view . . . diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse," the Court then commented that in this respect, "the usual traffic stop is more analogous to a so-called *'Terry* stop' . . . than to a formal arrest." *Id.* at 438-39. The Court noted that *Terry* stops are normally characterized by "[t]he comparatively non-threatening character of [the] detentions." *Id.* at 440.

Such an analysis surely played an important part in the decision in *Florida v. Royer, supra.* In condemning the transportation of the suspect, the plurality stressed that the effect of the move was to shift the suspect from a "public place" to "a small room — a large closet . . . [where] [h]e was alone with two police officers," 460 U.S. at 502. Although the *Royer* plurality did not expressly characterize the change in location as designed to increase the pressure on the suspect, that conclusion is implicit in the plurality's strong criticism of the lack of any "legitimate law enforcement purposes" in "removing Royer to the police room prior to the officers' attempt to gain his consent to a search of his luggage." *Id.* at 505.

Significantly, the progenitors of the "stop" doctrine, *Terry v. Ohio* and *Sibron v. New York,* originally recognized the "stop" power in the context of stops made on the street or in a public place. In extending that power to cases in which police officers board a bus and question passengers, the Court in *United States v. Drayton*, 536 U.S. 194 (2002), and *Florida v. Bostick*, 501 U.S. 429 (1991), said that "[t]he fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure." *Drayton*, 536 U.S. at 204; *Bostick*, 501 U.S. at 439-40. Acknowledging that "[w]here the encounter takes place is one factor" in assessing whether a "seizure" has taken place, *Bostick*, 501 U.S. at 437, the Court explained that "an encounter [that] takes place on a bus" may be no more intrusive than one that "occurred on the street" "because many fellow passengers are present to witness [the] officers' conduct, [and thus] a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances," *Drayton*, 536 U.S. at 195.

With the exception of a single type of scenario — which the Supreme Court thus far has addressed in a few decisions — all of the Court's rulings upholding stops have involved "on-the-street" situations, *Dunaway v. New York*, 442 U.S. at 210-11, or encounters in similarly public

places, such as buses or airport concourses (*United States v. Mendenhall*, 446 U.S. 544, 560-66 (1980) (plurality opinion on this point)). The sole exception is the scenario in which officers who are executing a valid search warrant for contraband in a home detain an occupant of the premises during the search — a scenario the Court addressed in *Michigan v. Summers*, 452 U.S. 692 (1981), and again in *Muehler v. Mena*, 544 U.S. 93 (2005). In *Summers*, the Court held that in this situation, officers executing a valid search warrant have "the limited authority to detain the occupants of the premises while a proper search is conducted," 452 U.S. at 705. *Accord*, *Los Angeles County v. Rettele*, 550 U.S. 609, 613-14 (2007) (per curiam). *Cf. Bailey v. United States*, 133 S. Ct. 1031, 1038 (2013) (*Summers* doctrine is strictly limited to "cases [in which] the occupants detained were found within or immediately outside a residence at the moment the police officers executed the search warrant"); *United States v. Watson*, 703 F.3d 684, 691-92 (4th Cir. 2013). In *Muehler*, the Court added that the police also may engage in the additional intrusion of handcuffing an occupant during the search if this measure is necessitated by "inherently dangerous" circumstances such as those that existed in the *Muehler* case, where the "warrant authoriz[ed] a search for weapons and a wanted gang member reside[d] on the premises" and there was a "need to detain multiple occupants." 544 U.S. at 100. But, as the Court emphasized in establishing the general rule in *Summers*, the police officers' possession of a search warrant in these cases precludes any possibility that the police have arranged for detention in a non-public place for the sake of exploiting the coercive atmosphere to gain information or consent to a search or seizure. The *Summers* Court made a point of explaining that "the type of detention imposed here is not likely to be exploited by the officer" to extract information from the suspect since "the information the officers seek normally will be obtained through the search and not through the detention." *Summers*, 452 U.S. at 701. *See also Muehler*, 544 U.S. at 101-02 (explaining that, although the police questioned the handcuffed suspect about her immigration status, the case did not require that the Court consider the constitutionality of "questioning that extended the time [the detainee] . . . was detained" or that otherwise "constitute[d] an independent Fourth Amendment violation"). Moreover, in this scenario, extraction of a consent to search or seize would be superfluous since the officers already have a warrant. *Cf. Illinois v. McArthur*, 531 U.S. 326 (2001), in which the Court upheld the conduct of police who, after discussions with a homeowner on his front porch, refused to permit him to enter his home unaccompanied by a police escort during a two-hour period while they were seeking a search warrant for the home, based on probable cause to believe there was marijuana inside. The Court justified the restraint of the homeowner's freedom because "the police had good reason to fear that, unless restrained, . . . [he] would destroy the drugs before they could return with a warrant, *id*. at 332, and it noted that, on the two or three occasions when a police officer accompanied the homeowner into the house during the two-hour wait, the homeowner had "reentered simply for his own convenience, to make phone calls and to obtain cigarettes" and had given his consent to the officer's escorting him inside for these purposes, *id*. at 335.

Accordingly, in situations other than the *Summers-Muehler* and *McArthur* scenarios, counsel can argue that detention of a suspect in a "'police dominated'" setting (*Berkemer v. McCarty*, 468 U.S. at 439), in which no or few other members of the public are "present to witness officers' conduct" (*United States v. Drayton*, 536 U.S. at 204), renders the detention

more intrusive because of the "[]threatening character of the detention[]" (*id*. at 440) and thereby transforms what might otherwise be merely a *Terry* stop into an arrest requiring probable cause. The argument has particular force when the police have moved the suspect from a public location to a setting of that sort — a particularly intimidating action. See the discussion of *Florida v. Royer*, in the second paragraph of this section.

§ 23.06(d) Whether the Detention Was for the Purpose of Interrogation

If the purpose of the police detention of the suspect is interrogation, the courts are particularly likely to view the interrogation as an arrest requiring probable cause rather than a *Terry* stop. In *Dunaway v. New York,* the Court concluded that when the police transported the suspect to the police station for the purpose of interrogation, the "detention . . . was in important respects indistinguishable from a traditional arrest." 442 U.S. at 212; *see also United States v. Sharpe,* 470 U.S. at 684 n.4 (explaining the holding in *Dunaway*). In *Kaupp v. Texas*, 538 U.S. 626 (2003) (per curiam), the Court applied the reasoning of *Dunaway* to hold that the police had conducted a seizure that was "'in important respects indistinguishable from a traditional arrest' and therefore required probable cause or judicial authorization" when they removed the 17-year-old defendant from his home in the middle of the night in handcuffs and drove him "to the sheriff's offices, where he was taken into an interrogation room and questioned." 538 U.S. at 631 (quoting *Dunaway v. New York*, 442 U.S. at 212). Such "involuntary transport to a police station *for questioning*," the Court explained, is "'sufficiently like arres[t] to invoke the traditional rule that arrests may constitutionally be made only on probable cause.'" *Id*. at 630 (emphasis added). Similarly, in *Florida v. Royer,* it was deemed significant that the police transported the defendant to the police room for the purpose of interrogation rather than legitimate "reasons of safety and security." 460 U.S. at 504-05 (plurality opinion). By contrast, in *Michigan v. Summers,* 452 U.S. at 701-02 & n.15, the Court emphasized that the detention of the suspect, which the Court classified as a *Terry* stop, was not designed to extract information from the suspect.

§ 23.07 CIRCUMSTANCES JUSTIFYING AN ARREST

"Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Michigan v. DeFillipo,* 443 U.S. 31, 36 (1979). In virtually all jurisdictions the conditions for a valid arrest are specified by either statute or caselaw. In several jurisdictions the juvenile court statutes establish additional requirements for arrests of juveniles. See §§ 3.03-3.09 *supra.*

In cases in which a juvenile respondent is arrested on an arrest warrant (in some jurisdictions called a "custody order"), the defense can challenge the validity of the warrant, and thereby the validity of the arrest, by arguing that the warrant was issued without a showing of probable cause to believe that the respondent committed an offense. *See Giordenello v. United States,* 357 U.S. 480 (1958), as explained in *Aguilar v. Texas,* 378 U.S. 108, 112 n.3 (1964); *Steagald v. United States,* 451 U.S. 204, 213 (1981) (dictum). In determining whether such an argument is viable, counsel will need to obtain the affidavit or sworn complaint that was

submitted by the prosecutor or police officer in support of the request for the arrest warrant and examine the sufficiency of the facts presented to the magistrate or judge who issued the warrant. In cases in which an arrest warrant does not correctly name the respondent and instead is issued on the basis of an alias, a nickname, or a description of the person sought, counsel also may be able to challenge the validity of the warrant on the grounds that it does not identify the respondent with the requisite particularity. *See, e.g., United States v. Doe,* 703 F.2d 745 (3d Cir. 1983).

In most juvenile delinquency cases, however, defense counsel will have to deal with a warrantless arrest rather than an arrest made pursuant to a warrant. Juveniles are usually arrested on the street shortly after a crime has occurred, and the officers have not gotten a warrant. In most jurisdictions the requirements for a warrantless arrest depend upon whether the underlying crime is a felony or a misdemeanor:

(i) If the underlying crime is a felony, a warrantless arrest can be made whenever the arresting officer (or the officer who ordered or requested the arrest) was in possession of facts providing probable cause to believe that the crime was committed and that the person to be arrested had committed it. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003); *United States v. Watson,* 423 U.S. 411 (1976); *United States v. Santana,* 427 U.S. 38 (1976); *Michigan v. DeFillippo,* 443 U.S. 31, 36 (1979).

(ii) If the underlying crime is a misdemeanor, the rule in most jurisdictions is that a warrantless arrest can be made only when the offense was committed in the presence of the arresting officer. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 355-60 (2001) ("Appendix to Opinion of the Court," listing and quoting state statutes). Although "violations of state arrest law" are not necessarily "also violations of the Fourth Amendment" (*Virginia v. Moore*, 553 U.S. 164, 173 (2008)), there are hints in some Supreme Court opinions that the majority state-law rule limiting misdemeanor arrests to offenses committed in the presence of the arresting officer is also the rule of the Fourth Amendment, *see id*. at 171 ("In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, . . . [t]he arrest is constitutionally reasonable."); *id*. at 178 ("When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest"); *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause."); *Atwater v. City of Lago Vista*, 532 U.S. at 354 ("[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). The Court has explicitly reserved the question. *See id.* at 341 (observing that the issue before the Court did not require "speculat[ion] whether the Fourth Amendment entails an 'in the presence' requirement for purposes of misdemeanor arrests," and citing, with a "*cf.*" signal, Justice White's statement in a dissent that "'[T]he requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment'" (quoting *Welsh v.*

Wisconsin, 466 U.S. 740, 756 (1984) (Justice White, dissenting))). The argument for a "presence" requirement has strong historical support; most of the common-law authorities extensively canvassed in the *Atwater* opinion, 532 U.S. at 326-43, condition an officer's arrest power in misdemeanor cases upon the circumstance that the misdemeanor was "committed in the presence of the arresting officer" (JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT – A STUDY IN CONSTITUTIONAL INTERPRETATION 45 (Johns Hopkins University Studies in Historical and Political Science, Ser. 84, No. 1, 1966), quoted in *Atwater*, 532 U.S. at 336; *and see* the earlier American commentaries cited in *id*. at 343) or "committed in his view" (see the English treatises quoted in *Atwater*, 532 U.S. at 330-31), or that the offender was found or "taken in the very act" (*Money v. Leach*, 3 Burr. 1742, 1766, 97 Eng. Rep. 1075, 1088 (K.B.1765), quoted in *Atwater*, 532 U.S. at 332 n.6). But even if the "presence" rule is not a Fourth Amendment limitation, it is the common rule at state law and, where it is, it triggers the constitutional requirement that an arrest be legally authorized in order to be valid. *Cf. United States v. Di Re*, 332 U.S. 581 (1948); *Michigan v. DeFillippo*, 443 U.S. at 36.

Thus a showing of "probable cause" is the minimum precondition for a valid arrest, with or without a warrant. Much of the law of the Fourth Amendment is concerned with the concept of "probable cause." Not only arrest warrants but also search warrants are issued upon a magistrate's or a judge's finding of probable cause; not only warrantless arrests but also many types of warrantless searches depend upon the officer's possession of probable cause. Whether the issue is the validity of an arrest or a search, the constitutional phrase *probable cause* means "'a reasonable ground for belief,'" *Brinegar v. United States,* 338 U.S. 160, 175 (1949): "Probable cause exists where 'the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the [requisite] belief . . .,'" *id.* at 175-76; *accord*, *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013) ("A police officer has probable cause to conduct a search when 'the facts available to [him] would "warrant a [person] of reasonable caution in the belief"' that contraband or evidence of a crime is present. . . . .The test for probable cause is not reducible to 'precise definition or quantification.' . . . . All we have required is the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'"); *Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 371 (2009) ("a 'fair probability' . . . or a 'substantial chance'"); *Maryland v. Pringle*, 540 U.S. at 370-71; *Wong Sun v. United States,* 371 U.S. 471, 479 (1963). Specifically, probable cause to *arrest* is established when there are reasonable grounds to believe that the particular person sought to be arrested has committed a crime; probable cause for a *search* is established when there are reasonable grounds to believe that objects connected to criminal activity or otherwise subject to seizure are presently located in the particular place to be searched. *Zurcher v. Stanford Daily,* 436 U.S. 547, 556-57 n.6 (1978); *Steagald v. United States,* 451 U.S. 204, 213 (1981); *Safford Unified School District # 1 v. Redding*, 554 U.S. at 370. There are elaborate definitions of the concept of probable cause, *e.g., Gerstein v. Pugh,* 420 U.S. 103, 111-12 (1975); *Dunaway v. New York,* 442 U.S. 200, 208 n.9 (1979), and innumerable constructions of it in individual factual situations.

Because of the infrequency of arrest warrants in juvenile cases, the topic of probable

cause for the issuance of warrants will be taken up later in discussing search warrants. See § 23.17 *infra.* With respect to warrantless arrests, the probable cause requirement must be "strictly enforced." *Henry v. United States,* 361 U.S. 98, 102 (1959); *accord, United States v. Watson,* 423 U.S. 411, 432 n.6 (1976) (Powell, J., concurring) (emphasizing the Court's "longstanding position that . . . [such a warrantless arrest] should receive careful judicial scrutiny"). In determining whether the police had probable cause to arrest, the central question is what facts the police knew before the arrest, for "an arrest is not justified by what the subsequent search discloses." *Henry v. United States,* 361 U.S. at 104. *See also Maryland v. Pringle*, 540 U.S. at 371 ("To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause"); *Florida v. Harris*, 133 S .Ct. 1050, 1059 (2013) ("we do not evaluate probable cause in hindsight, based on what a search does or does not turn up"); and see the concluding paragraph of § 23.03 *supra*. For discussion of some of the factors commonly considered by the courts in assessing whether there was probable cause, see § 23.11 *infra.*

When an arrest is made, with or without a warrant, upon probable cause to believe that a particular individual has committed an offense but the police mistakenly arrest the wrong individual, their arrest is nonetheless legal if (i) they honestly believe that the person arrested is the individual sought and (ii) they have probable cause for this belief. *Hill v. California,* 401 U.S. 797 (1971).

Fourth Amendment restrictions on the amount of physical force that can be used to effect an arrest or other seizure are the subject of a body of case law emanating from *Tennessee v. Garner*, 471 U.S. 1 (1985). *See, e.g.*, *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), and cases discussed; *Tolan v. Cotton*, 134 S. Ct. 1861 (2014). In some circumstances, violations of these restrictions may require the exclusion of evidence produced by the excessive force. *Cf.* § 23.24 i*nfra*, discussing *Winston v. Lee*, 470 U.S. 753 (1985), and cognate cases.

§ 23.08 SEARCHES INCIDENT TO ARREST

§ 23.08(a) The "Search Incident to Arrest" Doctrine

Warrantless searches of an arrested person's clothing and body surfaces are routinely permitted incident to a valid arrest. *United States v. Robinson,* 414 U.S. 218 (1973); *Gustafson v. Florida,* 414 U.S. 260 (1973); *United States v. Chadwick,* 433 U.S. 1, 14 (1977) (dictum). "[A] lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area." *New York v. Belton,* 453 U.S. 454, 457 (1981). "The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested [actually] possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search." *Michigan v. DeFillippo,* 443 U.S. 31, 35 (1979). *See also Illinois v. LaFayette,* 462 U.S. 640, 644-45 (1983) (dictum); *Michigan v. Long,* 463 U.S. 1032, 1048, 1049 & n.14 (1983) (dictum). *Cf. Knowles v. Iowa*, 525

U.S. 113, 116-19 (1998) (the rationales of the "search incident to arrest" doctrine do not justify a full search of a vehicle when the police stop a motorist for speeding and issue a citation rather than arresting him); *Virginia v. Moore*, 553 U.S. 164, 176-77 (2008) (reaffirming *Knowles*) (dictum); *Riley v. California*, 134 S. Ct. 2473, 2493 (2014) ("when a cell phone is seized incident to arrest," "a warrant is generally required before . . . a search" may be made of digital information on the phone) (discussed further in § 23.08(b) *infra*); *Commonwealth v. Morales*, 462 Mass. 334, 335, 344, 968 N.E.2d 403, 405, 411-12 (2012) (search incident to arrest that resulted in exposure of the defendant's buttocks to public view on a public street constituted a "strip search" that violated both the federal and state constitutions). A search incident to arrest may be made either at the site of the arrest, *United States v. Robinson*, 414 U.S. at 224-26, 236, or at the stationhouse to which the arrested person is taken, *United States v. Edwards,* 415 U.S. 800 (1974).

The power to search incident to arrest is restricted to "the arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon [to attack the arresting officer] or destructible evidence." *Chimel v. California,* 395 U.S. 752, 763 (1969). *See also United States v. Chadwick,* 433 U.S. 1, 14 (1977); *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 326 (1979). "That limitation, which . . . define[s] the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. . . . If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Arizona v. Gant*, 556 U.S. 332, 339 (2009). Police officers could not, for example, predicate their entry and search of a house on the arrest of a defendant outside the house. *See, e.g., Vale v. Louisiana,* 399 U.S. 30 (1970); *Shipley v. California,* 395 U.S. 818 (1969). *See also Arizona v. Gant*, 556 U.S. at 343-44 (narrowing previous rulings in *New York v. Belton* and *Thornton v. United States*, 541 U.S. 615, 617 (2004), to "hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," but announcing an additional rule, which "does not follow from *Chimel*," to permit a search incident to arrest in certain "circumstances unique to the vehicle context," see § 23.26 *infra*).

Within the "wingspan" area defined by *Chimel*, a warrantless search incident to arrest is valid, provided that the arrest itself is valid, *see* § 23.07 *supra*.

§ 23.08(b) Searches of Containers in the Possession of Arrested Persons

An issue that frequently arises in cases of searches incident to arrest or *Terry* frisks is whether these warrantless search powers extend to a closed container that the respondent is carrying, such as a knapsack or gym bag.

In *United States v. Chadwick,* 433 U.S. 1 (1977), the Court implied that large locked

receptacles, such as luggage, may be taken from an arrested person as a matter of routine incident to arrest. But the Court also stated explicitly (although in *dictum*) that containers seized in this manner may not thereafter be *opened* without a warrant based upon probable cause. *Id.* at 14-16 & n.10. *See also Horton v. California,* 496 U.S. 128, 142 n.11 (1990) (dictum); *United States v. Place,* 462 U.S. 696, 701 n.3 (1983) (dictum).

In *New York v. Belton,* 453 U.S. 454 (1981), which the Court later circumscribed in *Arizona v. Gant*, 556 U.S. 332 (2009), the Court appeared to take a contrary position. *Belton* upheld an arresting officer's opening of a zippered pocket in a leather jacket found on the seat of a car following arrest of the car's occupants. In *dictum* the Court in *Belton* stated a very broad rule that the scope of search incident to arrest of a motorist extends to "the contents of any containers found within the passenger compartment," *Belton*, 453 U.S. at 460, including "luggage, boxes, [and] bags," *id.* at 460-61 n.4, "whether [the container] . . . is open or closed," *id.* at 461.

The subsequent opinion in *United States v. Ross,* 456 U.S. 798 (1982), further compounds the confusion. First, the Court in *Ross* gratuitously comments that "[a] container carried at the time of arrest *often* may be searched without a warrant and even without any specific suspicion concerning its contents." *Id.* at 823 (emphasis added). Second, the Court asserts (in the different context of a *Carroll* vehicle search, see § 23.24 *infra*), that "a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case," *id.* at 822. The latter observation appears to rule out any distinction between "paper bags, locked trunks, lunch buckets, and orange crates," *ibid.,* so far as the Fourth Amendment privacy interests of the respective possessors of these containers is concerned. Within the framework of the search-incident-to-arrest doctrine, the containers might still be distinguished, allowing search of the paper bag and not the trunk, on the ground that the arrestee's ability to seize weapons or destructible evidence from the former is greater. That distinction is, however, difficult to reconcile with the holding of *United States v. Robinson,* 414 U.S. at 235, that "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Belton* not merely quotes this *Robinson* language but draws from it the conclusion that the power of search incident to arrest encompasses "containers [which are] . . . such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested." 453 U.S. at 461. Differences in the accessibility of various containers to the arrestee can hardly be thought decisive of the application of a doctrine that permits search of containers that could not hold a weapon or evidence in the first place. *See Thornton v. United States*, 541 U.S. 615, 623 (2004) (*Belton* rule does not "depend[] on differing estimates of what items were or were not within reach of an arrestee at any particular moment"). So *Belton* rests the search-incident-to-arrest power not upon the risk that the arrestee may grab the contents of the container but upon the concept that a "lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have"

in containers within his or her reach. *Ibid.* But if this is so, the question arises why the search-incident-to-arrest power is restricted to the area within the arrestee's reach, as *Belton* concedes that it is (*id.* at 457-58, 460), and as *Gant* declares unequivocally (*see Arizona v. Gant*, 556 U.S. at 335 ("a vehicle search incident to a recent occupant's arrest" is not constitutionally "authorize[d]" "after the arrestee has been secured and cannot access the interior of the vehicle")). *Chadwick* squarely holds that the privacy interests inhering in "property in the possession of a person arrested in public" (433 U.S. at 14) but outside of his or her reach are *not* dissipated by the fact of a lawful custodial arrest. 433 U.S. at 13-16. And it adds that "[u]nlike searches of the person, *United States v. Robinson,* 414 U.S. 218 (1973) . . ., searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." 433 U.S. at 16 n.10.

This area of Fourth Amendment law was muddied still further when the Court in *California v. Acevedo*, 500 U.S. 565 (1991), revised the rules governing a *Carroll* vehicle search (see § 23.24 *infra*) to eliminate the distinction that *Ross*, in explaining the import of *Chadwick* and *Arkansas v. Sanders*, 442 U.S. 753 (1979), drew between what the police may do when they have probable cause to believe that a seizable object is concealed in a vehicle and what they may do when they have probable cause merely to believe that a seizable object may be contained within some particular receptacle carried in the vehicle. The *Acevedo* decision concerned solely a *Carroll* vehicle search and accordingly did not address the nature and scope of the "search incident to arrest" doctrine.

In *Arizona v. Gant* in 2009, the Court disavowed the lower courts' "broad reading of *Belton*" as authorizing "a vehicle search . . . incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search." *Gant*, 556 U.S. at 343. Explaining this curtailment of the lower courts' expansive applications of *Belton*, the *Gant* Court stated:

> To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would . . . untether the rule from the justifications underlying the *Chimel* exception — a result clearly incompatible with our statement in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." 453 U.S., at 460, n. 3. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

Ibid. Although the five-Justice majority in *Gant* characterized its decision as merely a "narrow[ing]" of *Belton* (*id*. at 348 n.9), the four dissenting Justices viewed the *Gant* majority opinion as "effectively overrul[ing]" both *Belton* and *Thornton v. United States* (*id*. at 355 (Justice Alito, dissenting, joined in pertinent part by Chief Justice Roberts and Justices Kennedy and Breyer)).

Even though *Gant* did not address (and had no reason to address) the preexisting rules governing searches of containers incident to the arrest of an individual outside the automobile context, *Gant* throws into question some of the lower court caselaw on this subject because that caselaw was expressly predicated on *Belton*. *See, e.g.*, *State v. Roach*, 234 Neb. 620, 627-30, 452 N.W.2d 262, 267-69 (1990) (concluding that *Belton* applies outside the automobile context and relying on the court's own and other courts' broad readings of *Belton* to uphold a search of a closed container in the possession of an individual arrested inside a house). Given *Gant*'s repudiation of a broad reading of *Belton*, counsel can argue that the best source of Supreme Court guidance on the proper handling of container searches incident to arrest is *Chadwick*. In States in which the courts relied on *Belton* to authorize container searches even when the container was not physically accessible to the arrestee at and after the time s/he was seized by the arresting officers, counsel can challenge that rule by invoking *Gant*'s explanation that, in the absence of "circumstances unique to the automobile context" (*Arizona v. Gant*, 556 U.S. at 335), the "search-incident-to-arrest exception . . . rule does not apply" when "there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search" (*id*. at 339). *See also, e.g.*, *State v. Lamay*, 140 Idaho 835, 839-40, 103 P.3d 448, 452-53 (2004) (pre-*Gant* decision that rejected *Belton* as inapplicable outside the automobile context and held that the customary rules on searches incident to arrest inside a dwelling do not permit the search of an arrestee's knapsack if the arrestee is handcuffed and the knapsack is "nearly fifteen feet away . . . and located in a different room"); *People v. Gokey,* 60 N.Y.2d 309, 311, 313-14, 457 N.E.2d 723, 724, 725, 469 N.Y.S.2d 618, 619, 620 (1983) (state high court, which had previously rejected *Belton* in favor of a state constitutional rule that resembles the rule the Supreme Court eventually adopted in *Gant*, applies its state constitutional rule to hold that a warrantless search of an arrestee's duffel bag was unlawful, even though the bag was "within the immediate control or 'grabbable area'" of the arrestee "at the time of his arrest" because the "defendant's hands were handcuffed behind his back and he was surrounded by five police officers and their dog" and thus the circumstances did not "support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag").

In *Riley v. California*, 134 S. Ct. 2473 (2014), the Court addressed the question "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested." *Id*. at 2480. Distinguishing between "physical objects" and "digital content on cell phones," the Court concluded that the two governmental interests underlying "*Robinson*'s categorical rule" for searches of "physical objects" — the risks of "harm to officers and destruction of evidence" — do not have "much force with respect to digital content on cell phones." *Id*. at 2484-85. Moreover, while "*Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself," "[c]ell phones . . . place vast quantities of personal information literally in the hands of individuals," and "[a] search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*." *Id*. at 2485. *See also id*. at 2488-89 ("Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."); *id*. at 2489 ("Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person.

The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone."); *id*. at 2494-95 ("Modern cell phones[,] . . . [w]ith all they contain and all they may reveal, . . . hold for many Americans 'the privacies of life'" (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))). Accordingly, the Court "decline[d] to extend *Robinson* to searches of data on cell phones, and h[e]ld instead that officers must generally secure a warrant before conducting such a search." *Riley v. California*, 134 S. Ct. at 2485. *See also id*. at 2494 ("even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone"); *United States v. Lopez-Cruz*, 730 F.3d 803, 805-06, 808 (9th Cir. 2013) (although the defendant consented to a border patrol agent's request to inspect and search two cell phones that the defendant identified as belonging to a friend of his, "the agent's answering of the phone [which led to the acquisition of information that incriminated the defendant] exceeded the scope of the consent that [the agent] obtained and, thus, violated Lopez's Fourth Amendment right").

§ 23.08(c) "Inventory" Search Incident to Incarceration

If an arrested person is to be incarcerated, the police may remove, examine, and inventory everything in his or her possession at the lockup. *Illinois v. LaFayette,* 462 U.S. 640, 646-48 (1983). This "inventory search" power permits the opening, without a warrant, of any container carried by the person, whether or not the police have any reason to suspect its contents and whether or not they could practicably secure the container during the period of the person's incarceration without opening it up. *Ibid.* Presumably the rule of *Riley v. California*, 134 S. Ct. 2473 (2014) — which bars the application of the "search incident to arrest" doctrine to the digital content of a cell phone because "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person," *id*. at 2489; see also § 23.08(b) *supra*, discussing *Riley* — applies as well in the context of "inventory" searches incident to incarceration and requires that such a search be authorized either by a search warrant or by some "case-specific exception" that "justif[ies] a warrantless search of a particular phone" (*id*. at 2494). *See also State v. Granville*, 423 S.W.3d 399, 402 (Tex. Crim. App. 2014) (pre-*Riley* decision holding that a search warrant was needed for the police to examine the contents of a cell phone that was taken from the defendant "during the booking procedure and placed in the jail property room": the arrestee, a "high-school student[,] did not lose his legitimate expectation of privacy in his cell phone simply because it was being stored in the jail property room"; the officer "could have seized appellant's phone and held it while he sought a search warrant, but, even with probable cause, he could not 'activate and search the contents of an inventoried cellular phone' without one").

Inventory searches must be conducted "in accordance with established inventory procedures." *Id.* at 648. *See id.* at 644 (explaining that the validity of inventory searches is to be determined by the principles of *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), a decision that calls for standardized procedures to control "'the discretion of the official in the field,'" 440 U.S. at 655); *see also Colorado v. Bertine,* 479 U.S. 367, 372-76 (1987) (analogizing inventory

searches of automobiles to inventory searches of arrested individuals and reaffirming that inventory searches of automobiles must be conducted in accordance with "standard criteria"); *Florida v. Wells*, 495 U.S. 1, 4 (1990); *City of Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000).

Jail personnel may also conduct an intrusive visual search of the body — including body cavities — of an individual who is being admitted into the general population of a holding facility, for the purpose of detecting and confiscating any materials that would compromise the facility's security. *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510 (2012).

§ 23.08(d) Search Prior to the Point of Arrest

The general rule is that "a search incident to a lawful arrest may not precede the arrest." *Sibron v. New York,* 392 U.S. 40, 67 (1968). However, the Court has recognized two narrow exceptions to this rule.

If the search and the arrest are parts of a single course of events and "the formal arrest followed quickly on the heels of the challenged search," *Rawlings v. Kentucky,* 448 U.S. 98, 111 (1980), then it is not "particularly important that the search preceded the arrest rather than vice versa." *Ibid.* However, the police officer must, of course, have "probable cause to place [the respondent] under arrest" at the time of the search, *ibid.,* and "[t]he fruits of the search of [the respondent's] person . . . [cannot be] necessary to support probable cause to arrest." *Id.* at 111 n.6. *Accord, Sibron v. New York,* 392 U.S. at 63 ("[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification").

In cases in which the search and the arrest are not a single course of events, a search prior to arrest nevertheless may be valid if it is restricted to the "very limited search necessary to preserve" some evidence of "ready destructibility" that the suspect would otherwise likely destroy. *Cupp v. Murphy,* 412 U.S. 291, 296 (1973). Thus, in *Cupp,* the Court approved the officers' taking scrapings of what appeared to be dried blood from the fingernails of a suspect, at a point in time when the police already had probable cause to arrest the suspect, even though the formal arrest did not occur until a month later. The Court emphasized that the scope of the search must be strictly limited to the measures needed to "preserve . . . highly evanescent evidence," *id.* at 296, and that "a full *Chimel* search [the type of extensive search permitted incident to arrest upon probable cause] would [not be] . . . justified . . . without a formal arrest and without a warrant." *Ibid.* See the discussion in *Illinois v. McArthur*, 531 U.S. 326, 331-34 (2001), of police authority to prevent alerted suspects from destroying evidence; and see the cases dealing with a similar issue in the context of building searches, discussed in § 23.22(c) *infra*. Note that this authority depends upon the possession by the police of probable cause to believe that seizable evidence exists and is within the capacity of the suspect to destroy. *See Illinois v. McArthur*, 531 U.S. at 334 ("We have found no case in which this Court has held unlawful a temporary seizure *that was supported by probable cause* and was designed to prevent the loss of evidence . . . . (emphasis added)); *Knowles v. Iowa*, 525 U.S. 113, 116 (1998) (in cases in which *there is*

probable cause to arrest a suspect, "the need to preserve evidence for later use at trial" is one of the justifications for allowing a warrantless search incident to arrest). If the police lack probable cause (either to search for seizable evidence or to arrest a suspect), they have no power to seize evidence in the first place, *see*, *e.g.*, *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993), so they cannot justify a "preventive" search on the theory that it is necessary to preserve destructible evidence.

§ 23.09 CIRCUMSTANCES JUSTIFYING A *TERRY* STOP

In *Terry v. Ohio,* 392 U.S. 1 (1968), the Supreme Court held that a state could constitutionally authorize its law enforcement officers to conduct a "stop" — a brief on-the-street detention for the purpose of inquiry and observation — under circumstances giving rise to a rational suspicion of criminal activity but not amounting to the probable cause necessary for arrest. *Terry* "created an exception to the requirement of probable cause, an exception whose 'narrow scope' . . . [the Supreme] Court 'has been careful to maintain.'" *Ybarra v. Illinois,* 444 U.S. 85, 93 (1979); *see also Dunaway v. New York,* 442 U.S. 200, 207-10 (1979); *Florida v. Royer,* 460 U.S. 491, 499 (1983) (plurality opinion); *id.* at 509-11 (concurring opinion of Justice Brennan). *See also Kaupp v. Texas*, 538 U.S. 626, 630 (2003).

The *Terry* stop must rest upon specific, identifiable facts that, "judged against an objective standard," *Terry v. Ohio,* 392 U.S. at 21; *see Delaware v. Prouse,* 440 U.S. 648, 654 (1979), give rise to "a reasonable and articulable suspicion that the person seized is engaged in criminal activity," *Reid v. Georgia,* 448 U.S. 438, 440 (1980) (per curiam); *see Brown v. Texas,* 443 U.S. 47, 51-53 (1979). Considering "the totality of the circumstances," the "detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez,* 449 U.S. 411, 417-18 (1981); *see also Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002); *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000); *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989) (dictum); *Kolender v. Lawson,* 461 U.S. 352, 356 n.5 (1983) (dictum). Conduct or circumstances that "describe a very large category of presumably innocent [persons]" is not sufficient, *Reid v. Georgia,* 448 U.S. at 441; *Brown v. Texas,* 443 U.S. at 52; *cf. Ybarra v. Illinois,* 444 U.S. at 91; *compare United States v. Sokolow*, 490 U.S. at 8-11; the "particularized suspicion" must be focused upon "the particular individual being stopped," *United States v. Cortez,* 449 U.S. at 418; *see also, e.g.*, *United States v. Black*, 707 F.3d 531, 540-41 (4th Cir. 2013). Information "completely lacking in indicia of reliability would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized." *Adams v. Williams,* 407 U.S. 143, 147 (1972) (dictum). *See, e.g.*, *Florida v. J.L.*, 529 U.S. 266, 271 (2000) (an anonymous tip which lacks "moderate indicia of reliability" will not justify a stop, and this is the rule even where the tip contains an "accurate description of a subject's . . . location and appearance"; "[t]he reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person"; and the *Terry* requirement of "standard pre-search reliability testing" in terms of reasonable suspicion is not relaxed in the cases where the tip

asserts that the subject is in possession of an illegal firearm); *United States v. Freeman*, 735 F.3d 92, 97-103 (2d Cir. 2013); *United States v. Brown*, 448 F.3d 239 (3d Cir. 2006); *United States v. Patterson*, 340 F.3d 368 (6th Cir. 2003); *United States v. Mallides,* 473 F.2d 859 (9th Cir. 1973); *Irwin v. Superior Court,* 1 Cal. 3d 423, 462 P.2d 12, 82 Cal. Rptr. 484 (1969), *modified in In re Tony C.,* 21 Cal. 3d 888, 894, 582 P.2d 957, 960, 148 Cal. Rptr. 366, 369 (1978); *cf. Navarette v. California*, 134 S. Ct. 1683, 1686, 1688-90 (2014); *United States v. Ramsey,* 431 U.S. 606, 612-15 (1977); *Jernigan v. Louisiana,* 446 U.S. 958, 959-60 (1980) (opinion of Justice White, dissenting from denial of *certiorari*).

The power of the police to conduct a *Terry* stop is more limited when the stop is for the purpose of "investigat[ing] past criminal activity . . . rather than . . . to investigate ongoing criminal conduct." *United States v. Hensley,* 469 U.S. 221, 228 (1985). The *Terry* decision itself and almost all of the caselaw establishing standards for *Terry* stops involved situations in which the "police stopped or seized a person because they suspected he was about to commit a crime . . . or was committing a crime at the moment of the stop." 469 U.S. at 227. In such situations the stop is justified by the exigencies of crime prevention and the need to avert an imminent threat to public safety. *Id.* at 228. "A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly . . . [and] officers making a stop to investigate past crimes may have a wider range of opportunity to choose the time and circumstances of the stop." *Id.* at 228-29. To conduct a stop for the purpose of investigating a completed crime, a police officer must "have a reasonable suspicion, grounded in specific and articulable facts, that [the] . . . person . . . was involved in or is wanted in connection with a completed felony." *Id.* at 229. Moreover, in authorizing such investigatory stops in *United States v. Hensley,* the Court strongly indicated that these stops may be conducted only in cases in which the police previously "have been unable to locate [the] . . . person," 469 U.S. at 229, and therefore need to exercise the "stop" power in order to prevent "a person they encounter" (*ibid.*) from "flee[ing] in the interim and . . . remain[ing] at large." *Ibid. See id.* at 234-35 (emphasizing that the defendant was "at large" and that the officers who conducted the stop could reasonably conclude, on the basis of a "wanted flyer," that "a warrant might have been obtained in the period after the flyer was issued"). It is only the inability to find the defendant or respondent in a fixed location — to fully "choose the time and circumstances of the stop" (*id.* at 228-29) — that creates the exigency necessary to conduct a stop for the purpose of investigating a completed crime. *See id.* at 228-29; *see also Brown v. Texas,* 443 U.S. at 51. Thus, at least arguably, when the police have known the respondent's address and failed to avail themselves of the opportunity of conducting a purely voluntary "contact" at the respondent's home (see § 23.04(a) *supra*), they may not use their suspicions about the respondent's involvement in a completed crime to conduct a *Terry* stop.

For discussion of some of the factors commonly considered by the courts in gauging whether there was an adequate basis for a *Terry* stop, see § 23.11 *infra.*

§ 23.10 CIRCUMSTANCES JUSTIFYING A *TERRY* FRISK; THE PLAIN TOUCH DOCTRINE

In *Terry v. Ohio,* 392 U.S. 1 (1968), the Court ruled that a state could constitutionally authorize not only a "stop" but also, under appropriate circumstances, a "frisk" — a pat-down for weapons or a similar "self-protective" search. The frisk must be made incidental to a valid accosting or stop.

A *Terry* frisk cannot be conducted for the purpose of seeking evidence; it can only be conducted for the purpose of discovering weapons that might be used against the officer. *See Sibron v. New York,* 392 U.S. 40, 64-65 (1968); *Ybarra v. Illinois,* 444 U.S. 85, 93-94 (1979); *Michigan v. Long,* 463 U.S. 1032, 1049-52 & n.16 (1983); *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993); *Florida v. J.L.*, 529 U.S. 266, 269-70 (2000). To justify a frisk, the officer needs more than the reasonable suspicion of criminal activity that will justify a stop and needs more than merely a hunch that the suspect might be armed. The officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the conclusion that the officer "is dealing with an armed and dangerous individual," *Terry v. Ohio,* 392 U.S. at 21, 27; *see Sibron v. New York,* 392 U.S. at 63-64; *Ybarra v. Illinois,* 444 U.S. at 92-93; *Michigan v. Long,* 463 U.S. at 1049-52 & nn.14, 16; *Minnesota v. Dickerson*, 508 U.S. at 373; *Florida v. J.L.*, 529 U.S. at 269-72; *Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *Dunaway v. New York*, 442 U.S. 200, 209 n.11 (1979) (dictum). *But cf. Samson v. California*, 547 U.S. 843, 846, 851-52 (2006) (police officer, "who was aware that [Samson] was on parole" and stopped him based on a belief that there was "an outstanding parole warrant" for him but then confirmed that no such warrant had been issued, could nonetheless frisk Samson because Samson's expectation of privacy was diminished by having signed a statutorily-required agreement to a parole condition of being subject to a "'search or seizure by a parole officer or other peace officer . . . with or without cause'"); *compare State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010) ("reject[ing] the holding of *Samson* under the Iowa Constitution" and "conclud[ing] that a parolee may not be subjected to broad, warrantless searches by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search").

In addition to limiting the situations in which an officer can make a frisk, the Fourth Amendment also regulates the manner in which frisks may be conducted. A frisk must be "limited to that which is necessary for the discovery of weapons." *Terry v. Ohio,* 392 U.S. at 26. *See Sibron v. New York,* 392 U.S. at 65-66; *United States v. Brignoni-Ponce,* 422 U.S. 873, 880-82 (1975); *Pennsylvania v. Mimms,* 434 U.S. 106, 111-12 (1977) (per curiam); *Florida v. Royer,* 460 U.S. 491, 500 (1983) (plurality opinion); *id.* at 509-11 (concurring opinion of Justice Brennan). "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Minnesota v. Dickerson*, 508 U.S. at 373. Emphasizing that the frisk approved in *Terry* consisted of "a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault" and that it was only after the discovery of such objects that "the officer in *Terry* place[d] his hands in the pockets of the men he searched," the Court in *Sibron v. New York* condemned a frisk in which the officer, "with no attempt at an initial limited exploration for arms, . . . thrust his hand into [the defendant's] pocket." 392 U.S. at 65. *See also State v. Privott*,

203 N.J. 16, 31-32, 999 A.2d 415, 424-25 (2010) (police officer exceeded the permissible scope of a *Terry* frisk by "lift[ing] defendant's tee-shirt to expose defendant's stomach, and in doing so, observ[ing] a plastic bag with suspected drugs in the waistband of defendant's pants"). In *Minnesota v. Dickerson,* 508 U.S. at 378-79, the Court held that a "police officer . . . overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*" by "continu[ing] exploration of respondent's pocket after having concluded that it contained no weapon." The frisk must be "limited to those areas in which a weapon may be placed or hidden." *Michigan v. Long*, 463 U.S. at 1049 (during a *Terry* search of the passenger compartment of an automobile, the *Terry* frisk doctrine permits officers to search only those areas that could contain a weapon and were accessible to the suspect). *See also United States v. Askew*, 529 F.3d 1119, 1123, 1127-44 (D.C. Cir. 2008) (*en banc*) (police officers' partial unzipping of the defendant's outer jacket during a show-up to allow the victim to see whether the defendant's sweatshirt matched that of the perpetrator exceeded the lawful bounds of a *Terry* frisk).

If, in the course of a *Terry* frisk, "a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity [as contraband] immediately apparent," the officer may be able to seize the object pursuant to the "plain touch" (sometimes called the "plain feel") doctrine. *Minnesota v. Dickerson*, 508 U.S. at 373, 375-76. For the "plain touch" doctrine to justify a seizure, "the officer who conducted the search . . . [had to have been] acting within the lawful bounds marked by *Terry*" at the time s/he discovered the contraband (*id*. at 377); the "incriminating character of the object . . . [had to have been] immediately apparent" to the officer without, for example, engaging in "'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'" after it was already apparent that the "pocket . . . contained no weapon" (*id*. at 378-79); the officer's recognition of the contraband nature of the object must reach the level of "probable cause" (*id*. at 377); and it must be evident from the circumstances that the officer was not exploiting an authorized *Terry* frisk for weapons to engage in "the sort of evidentiary search that *Terry* expressly refused to authorize . . . and that [the Court has] . . . condemned in subsequent cases" (*id*. at 378). *But cf. People v. Diaz*, 81 N.Y.2d 106, 110-12 & n.2, 612 N.E.2d 298, 301-02 & n.2, 595 N.Y.S.2d 940, 943-44 & n.2 (1993) (rejecting the "plain touch" doctrine altogether on state constitutional grounds).

§ 23.11 FACTORS COMMONLY RELIED ON BY THE POLICE TO JUSTIFY AN ARREST OR A *TERRY* STOP OR FRISK

Invariably, the police invoke the same general factors in case after case to justify their decisions to arrest or to conduct a *Terry* stop and frisk. In part, this may be due to police experience that these factors are reliable indicators of criminal conduct. In part, it may be because police officers have learned the proper formulaic responses necessary in order to obtain judicial ratification of their actions. The following subsections discuss some of the more controversial factors.

§ 23.11(a) "High Crime Neighborhood"

Police routinely cite the high crime rate in a neighborhood to justify a stop or an arrest. Although the prevalence of crime in a certain area may be of some relevance in determining probable cause or articulable suspicion, *see Carroll v. United States,* 267 U.S. 132, 159-60 (1925); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), the Supreme Court has indicated that this factor should be given little weight as a predicate for either an arrest or a *Terry* stop. In *Brown v. Texas,* 443 U.S. 47 (1979), the Court invalidated a *Terry* stop that was based in part on the crime-prone character of the neighborhood, saying: "The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct." *Id.* at 52. *Accord*, *Illinois v. Wardlow*, 528 U.S. at 124 ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." (citing *Brown v. Texas*, *supra*)); *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) ("In our present society, the demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances. To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion."); *People v. Shabaz,* 424 Mich. 42, 60-61, 378 N.W.2d 451, 459 (1985); *People v. Holmes*, 81 N.Y.2d 1056, 1058, 619 N.E.2d 396, 398, 601 N.Y.S.2d 459, 461 (1993) (suspect's presence in a "known narcotics location," even when combined with his flight from the police and a "bulge in the pocket of his jacket," did not provide the requisite basis for a *Terry* stop: "Given the unfortunate reality of crime in today's society, many areas of New York City, at one time or another, have probably been described by the police as 'high crime neighborhoods' or 'narcotics-prone locations.'"). Mere presence in a crime-ridden locale also cannot supply the predicate for a *Terry* frisk. *See Ybarra v. Illinois,* 444 U.S. 85, 93-96 (1979) (holding that the defendant's presence in a sparsely occupied one-room bar "at a time when the police had reason to believe that the bartender would have heroin for sale," 444 U.S. at 91, did not justify a reasonable belief that the defendant was armed and dangerous).

§ 23.11(b) Failure To Respond to Police Inquiry; Flight

Frequently the police detain or arrest an individual because the individual refused to answer questions or because s/he walked or ran away when the police attempted to question him or her.

When suspects choose to answer the questions of the police, "the responses they give to [the] officers' questions" can be considered in the calculus of probable cause or articulable suspicion. *United States v. Ortiz*, 422 U.S. 891, 897 (1975). It is not clear, however, whether (and, if so, to what extent) a refusal to answer inquiries may be given weight in justifying a stop or arrest. In a number of cases, a majority or plurality of the Supreme Court or an individual Justice has stated that a suspect's refusal to answer police questions cannot provide a predicate for satisfaction of the Fourth Amendment criteria for a *Terry* stop or an arrest. *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) ("when an officer, without reasonable suspicion or probable

cause, approaches an individual, the individual has a right to ignore the police and go about his business"; an individual has the "right to . . . remain silent in the face of police questioning"); *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (a suspect's "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure"); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (a "detainee is not obliged to respond" to a police officer's questions); *Kolender v. Lawson*, 461 U.S. 352, 365 (1983) (Justice Brennan, concurring) (a *Terry* suspect "must be free . . . to decline to answer the questions put to him"); *Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality opinion) (a suspect's "refusal to listen [to police questions] or answer does not, without more, furnish . . . grounds" for a *Terry* stop); *Terry v. Ohio*, 392 U.S. at 34 (Justice White, concurring) (a suspect's "refusal to answer furnishes no basis for an arrest"). Similar statements can be found in lower court opinions. *See, e.g.*, *Moya v. United States*, 761 F.2d 322, 325 (7th Cir. 1985); *People v. Howard*, 50 N.Y.2d 583, 591-92, 408 N.E.2d 908, 914, 430 N.Y.S.2d 578, 584 (1980). In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), however, the Court rejected a Fourth Amendment challenge to a "stop and identify" statute that allowed an officer to detain a person to "'ascertain his identity'" if the "'circumstances . . . reasonably indicate that the person has committed, is committing or is about to commit a crime'" and that permitted the suspect's failure to give the officer his or her name under these circumstances to be punished criminally as "'obstruct[ing] and delay[ing] . . . a public officer in attempting to discharge his duty.'" *Id*. at 181-82. In upholding the statute, the Court stated that "[t]he principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop," as long as the "statute does not alter the nature of the stop itself" and as long as the police do not use the statutory authority "to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence." *Id*. at 187-88, 189. The *Hiibel* ruling is expressly limited to situations (and, thus, jurisdictions) in which a statute authorizes an arrest of an individual for refusing to divulge his or her name during a *Terry* stop. *See id*. at 187-88 (explaining that prior Court statements, such as those quoted above, regarding a suspect's right to refuse to answer questions concern the nature and import of Fourth Amendment protections while the *Hiibel* "case concerns a different issue, . . . [in that] the source of the legal obligation arises from Nevada state law, not the Fourth Amendment"). *See also, e.g.*, *City of Topeka v. Grabauskas*, 33 Kan. App. 2d 210, 222, 99 P.3d 1125, 1134 (2004) (rejecting prosecution's *Hiibel* argument because "[u]nlike the State of Nevada, we have no statute requiring persons to identify themselves . . . [and thus] *Hiibel* is clearly distinguishable from this case"). Moreover, even in jurisdictions possessing a statute such as the one upheld in *Hiibel*, "the statutory obligation does not go beyond answering an officer's request to disclose a name" (*Hiibel,* 542 U.S. at 187), and thus a suspect's failure to answer police questions about other matters presumably cannot be factored into the calculus of probable cause or articulable suspicion. *See id*. at 185 (explaining that "the Nevada Supreme Court . . . [had] interpreted . . . [the applicable statute] to require only that a suspect disclose his name. . . . 'The suspect is not required to provide private details about his background, but merely to state his name to an officer when reasonable suspicion exists' . . . . As we understand it, the statute does not require a suspect to give the officer a driver's license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means — a choice, we assume, that the suspect may make — the statute is satisfied and no violation occurs."); *and see id*. at 187-88

(explaining that a state statutory requirement that "a suspect . . . disclose his name in the course of a valid *Terry* stop is consistent with" "the purpose, rationale, and practical demands of a *Terry* stop" and "does not alter the nature of the stop itself"). Finally, even under a statute such as the one upheld in *Hiibel*, the initial stop that prompts the question about identity must be "based on reasonable suspicion, satisfying the Fourth Amendment requirements" for *Terry* stops (*id*. at 184; *see id*. at 188; *see also, e.g.*, *Commonwealth v. Ickes*, 582 Pa. 561, 873 A.2d 698 (2005) (striking down a "stop and identify" statute that, unlike the one in *Hiibel*, failed to require a valid *Terry* stop as a predicate for the request for identification)); any subsequent "arrest [of] a suspect for failure to identify himself [pursuant to the state statute] . . . [must be] reasonably related to the circumstances justifying the stop" (*Hiibel*, 542 U.S. at 188-89); and it must be apparent from the circumstances that "[t]he officer's request [for identification] was . . . not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence" (*id*. at 189).

Flight may be relevant to the determination of probable cause or articulable suspicion, *see Illinois v. Wardlow*, 528 U.S. at 124-25; *Sibron v. New York,* 392 U.S. 40, 66-67 (1968), but it is not dispositive and cannot, in and of itself, supply the basis for an arrest or a stop. *See, e.g.*, *Illinois v. Wardlow*, 528 U.S. at 124 ("flight," although "suggestive" of "wrongdoing," "is not necessarily indicative of wrongdoing"); *United States v. Green,* 670 F.2d 1148, 1152 (D.C. Cir. 1981); *People v. Holmes*, 81 N.Y.2d 1056, 1058, 619 N.E.2d 396, 398, 601 N.Y.S.2d 459, 461 (1993) (suspect's flight from the police, even when combined with his presence in a "known narcotics location" and a "bulge in the pocket of his jacket," did not provide the requisite basis for a *Terry* stop). Moreover, unless the flight occurs under circumstances in which it is reasonable to infer guilty knowledge, the flight cannot be considered at all. *See, e.g., Wong Sun v. United States,* 371 U.S. 471, 482-83 (1963) ("when an officer insufficiently or unclearly identifies his office or his mission, the occupant's flight . . . must be regarded as ambiguous conduct [and] . . . afford[s] no sure . . . inference of guilty knowledge"); *People v. Shabaz,* 424 Mich. at 64, 378 N.W.2d at 461. *See also Illinois v. Wardlow*, 528 U.S. at 128-29, 131-35 (Justice Stevens, concurring in part and dissenting in part, joined by Justices Souter, Ginsburg, and Breyer) (identifying a variety of "instances in which a person runs for entirely innocent reasons" and scenarios in which "[f]light to escape police detection . . . may have an entirely innocent motivation"). *Cf. id*. at 124 (majority opinion) (*Terry* stop was justified by the totality of circumstances, including the suspect's "unprovoked," "[h]eadlong flight" "upon noticing the police").

§ 23.11(c) Furtive Gestures

Frequently, a "furtive gesture" of the respondent's will be the impetus for a stop or an arrest. Although "deliberately furtive actions" may be considered, *Sibron v. New York,* 392 U.S. at 66, the purported furtiveness of the gestures must be carefully scrutinized to determine whether they could be equally consistent with innocent behavior. *See, e.g., Reid v. Georgia,* 448 U.S. 438, 441 (1980) (per curiam) (invalidating a *Terry* stop because the allegedly furtive "manner in which the petitioner and his companion walked through the airport" was "too slender a reed to support the seizure"); *Brown v. Texas,* 443 U.S. at 52 (striking down a *Terry* stop that

was based on the defendant's "'look[ing] suspicious'" and seemingly walking away from a companion upon the arrival of the police, while in a "'high drug problem area'" (*id*. at 49); *compare Florida v. Rodriguez,* 469 U.S. 1 (1984) (per curiam). If the officer's assertions about "furtive gestures" are vague, defense counsel should consider pinning the officer down on precisely which gestures s/he viewed as suspicious, in order to be able to argue that these actions are consistent with innocent conduct. However, if counsel knows from interviews with the respondent or witnesses that the respondent's actions really were suspicious, counsel should refrain from giving the officer an opportunity to clarify a vague account.

§ 23.11(d) Arrests and *Terry* Stops Based on Tips from Informants

Frequently, a police officer's decision to conduct an arrest or a *Terry* stop is based on information obtained from either an ordinary citizen or a regularly employed police spy. The standards regulating police reliance on such information, which impact on not only seizures of the person but also searches of premises and automobiles, are discussed in §§ 23.31-23.32 *infra.*

§ 23.12 POLICE SEIZURES OF OBJECTS FROM THE RESPONDENT'S PERSON; POLICE DEMANDS THAT A RESPONDENT HAND OVER AN OBJECT IN HIS OR HER POSSESSION

Frequently, in the course of an on-the-street encounter between a juvenile respondent and the police, a police officer will seize an object from the respondent. Such "a seizure of personal property [is] . . . *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant . . . [or is justified by] some . . . recognized exception to the warrant requirement." *United States v. Place,* 462 U.S. 696, 701 (1983). *See, e.g., Beck v. Ohio,* 379 U.S. 89 (1964); *Torres v. Puerto Rico,* 442 U.S. 465 (1979). Objects may be seized from the respondent's person and may be searched without a warrant pursuant to the doctrine of "search incident to arrest" if all of the requirements of that doctrine, including probable cause to arrest, are satisfied. See § 23.08(b) *supra.* And if the respondent is carrying an object that is visibly contraband, in plain view of the officer, then the seizure and search of that object may be justifiable under the "plain view" doctrine. See § 23.22(b) *infra.*

Under certain narrowly defined exigent circumstances, for example, when "the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime," *Arizona v. Hicks,* 480 U.S. 321, 327 (1987), the police may be able to conduct a *"Terry*-type investigative . . . detention" of the object. *United States v. Place,* 462 U.S. at 709. However, this limited extension of the *Terry* doctrine has thus far been applied only in cases of "investigative detention of [a] vehicle suspected to be transporting illegal aliens," *Arizona v. Hicks,* 480 U.S. at 327 (citing to *United States v. Cortez,* 449 U.S. 411 (1981), and *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975)) and a case involving a "seizure of [a] suspected drug dealer's luggage at [an] airport to permit exposure to [a] specially trained dog," *Arizona v. Hicks,* 480 U.S. at 327 (citing to *United States v. Place, supra*). In each of the cited cases, the Court demanded "reasonable suspicion" of the criminal nature of the object seized, in

the ordinary sense of the *Terry* doctrine (see § 23.09 *supra*), as a necessary precondition of the seizure.

Quite obviously, the police cannot avoid these constitutional restrictions upon seizures by simply ordering the respondent to turn over the object rather than physically taking it from the respondent's possession. *See, e.g., Kelley v. United States,* 298 F.2d 310, 312 (D.C. Cir. 1961) (police officers' demand that "appellant systematically disclose the contents of his clothing, first one pocket, then another, and then another, was no less a search . . . than if the police had themselves reached into the appellant's pockets"); *United States v. Hallman,* 365 F.2d 289, 291-92 (3d Cir. 1966); *In the Matter of Bernard G.*, 247 A.D.2d 91, 94, 679 N.Y.S.2d 104, 105 (N.Y. App. Div., 1st Dep't 1998) (police officers' "ask[ing] . . . [a juvenile] to empty his pockets . . . was the equivalent of searching his pockets themselves"). In cases in which the police officers frame their demand in the form of a request and purportedly obtain the respondent's consent to the officers' taking control of the object or searching it, the constitutionality of their actions will ordinarily turn on whether there was a valid, voluntary "consent" under the principles set forth in § 23.18(a) *infra. See, e.g., Florida v. Royer,* 460 U.S. 491 (1983); *People v. Gonzalez,* 115 A.D.2d 73, 499 N.Y.S.2d 400 (N.Y. App. Div., 1st Dep't 1986), *aff'd,* 68 N.Y.2d 950, 502 N.E.2d 1001, 510 N.Y.S.2d 86 (1986). But when the sole justification for the encounter is a *Terry*-type investigative detention, a request for consent to conduct a search of the respondent's person or possessions which is unrelated to that justification has been held impermissible, tainting the ensuing consent and a search pursuant to it. *State v. Smith*, 286 Kan. 402, 184 P.3d 890 (2008).

§ 23.13 THE RESPONDENT'S ALLEGED ABANDONMENT OF CONTRABAND UPON THE ARRIVAL OF THE POLICE: THE "DROPSIE" PROBLEM

Police officers frequently testify that, when approached or accosted, the respondent threw away an incriminating object, which was then picked up by the officer, or that the respondent disclosed the object to their sight in an attempt to hide it somewhere away from his or her person. This testimony is calculated to invoke the doctrines that the observation of objects "placed . . . in plain view" is not a search, *Rawlings v. Kentucky,* 448 U.S. 98, 106 (1980) (dictum); *see, e.g., Rios v. United States,* 364 U.S. 253, 262 (1960), and that it is neither a search nor a seizure to pick up "abandoned" objects thrown on a public road, *California v. Greenwood,* 486 U.S. 35 (1988); *California v. Hodari D.*, 499 U.S. 621, 624 (1991); *see, e.g., Lee v. United States,* 221 F.2d 29 (D.C. Cir. 1954).

In these "dropsie" or "throw-away" cases, the defense can prevail by showing that:

(a) The alleged abandonment of the property was itself the product of unlawful police action. Thus abandonment will not be found if (i) the respondent was illegally arrested or illegally detained prior to the time of the alleged "drop," *see Reid v. Georgia,* 448 U.S. 438 (1980) (per curiam); *United States v. Beck,* 602 F.2d 726 (5th Cir. 1979); *Commonwealth v. Harris,* 491 Pa. 402, 421 A.2d 199 (1980); *State v. Bennett,* 430 A.2d 424 (R.I. 1981); (ii) the

police were engaged in an unlawful search prior to the time of the alleged "drop," *United States v. Newman,* 490 F.2d 993 (10th Cir. 1974); *State v. Dineen,* 296 N.W.2d 421 (Minn. 1980); or (iii) the police were in the course of unlawfully pursuing the respondent at the time that s/he allegedly threw away the object, *People v. Shabaz,* 424 Mich. 42, 378 N.W.2d 451 (1985); *People v. Torres,* 115 A.D.2d 93, 499 N.Y.S.2d 730 (N.Y. App. Div., 1st Dep't 1986); *Commonwealth v. Barnett,* 484 Pa. 211, 398 A.2d 1019 (1979).

(b) The "dropped" object fell into a constitutionally protected area. *See, e.g., Rios v. United States,* 364 U.S. at 262 n.6 (taxicab "passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have 'abandoned' it"); *Work v. United States,* 243 F.2d 660, 662-63 (D.C. Cir. 1957) (trash receptacle into which defendant placed phial of narcotics upon police officers' entry of the house was within the constitutionally protected "curtilage" of the home); *Commonwealth v. Ousley*, 393 S.W.3d 15, 18, 26-29, 33 (Ky. 2013) (police officers' search of "closed trash containers," which were near the defendant's home, was unlawful because "[t]he containers had not been put out on the street for trash collection" and were within the "curtilage" of the home).

(c) The police "dropsie" story is a fabrication, as it often is. *See, e.g.*, *People v. Quinones*, 61 A.D.2d 765, 766, 402 N.Y.S.2d 196, 198 (N.Y. App. Div. 1st Dep't 1978). In seeking to show that the police officers are fabricating, defense counsel should cross-examine the officers on what they did prior to the "drop" that caused the respondent to disclose to them incriminating matters that were otherwise well-concealed. If plainclothes police are involved, this fact, together with the fact that the respondent had not previously encountered the officers, should be brought out. Even the habitual credulity of judges with regard to police testimony is sometimes shaken by accounts of a respondent's tossing away incriminating (and often highly valuable) objects at the approach of unannounced, unknown, and unidentifiable police.

§ 23.14 POSTARREST CUSTODIAL TREATMENT OF THE RESPONDENT

Postarrest custodial treatment of a juvenile respondent is regulated in most jurisdictions either by statute or by caselaw. The typical postarrest procedures are described in some detail in §§ 3.03-3.12 *supra.* Counsel should be alert to the possibility that an arresting officer's failure to follow a constitutionally or statutorily required procedure rendered the post-arrest confinement unlawful and supplies a basis for suppressing evidence obtained during the postarrest period. For example, if the police keep the respondent at the stationhouse for an undue length of time instead of bringing him or her to court expeditiously for arraignment, this will almost certainly violate local statutory requirements and may also fall afoul of the constitutional protections in this area (see § 4.28(a) *supra*), thereby tainting evidence such as confessions or lineup identifications obtained during the period of undue delay. See § 24.15 *infra.* Similarly, if the police fail to follow local statutory requirements for notifying the respondent's parent and arranging the parent's presence during interrogation, these omissions may render the respondent's confessions suppressible. See § 24.14 i*nfra.* Police brutality during the postarrest period may render any subsequent confessions or consents to searches unlawful, see § 24.04(a) *infra,* and can be cited as

a basis for seeking dismissal of the case in the interests of justice. See § 19.03(d) *supra.*

The postarrest period is also significant in that it is often the stage at which the police conduct physical examinations, extractions of body fluids, hair, and so forth. Searches that intrude into the body or breach the body wall — and perhaps other intimate personal examinations — are governed by a set of constitutional principles articulated in *Schmerber v. California,* 384 U.S. 757 (1966), and *Winston v. Lee,* 470 U.S. 753 (1985). The "individual's interests in privacy and security are weighed against society's interests in conducting the [search] procedure . . . [in order to determine] whether the community's need for evidence outweighs the substantial privacy interests at stake." *Winston v. Lee,* 470 U.S. at 760. *Compare, e.g.*, *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510, 1513, 1518, 1521, 1523 (2012) (jail's policy of requiring that "every detainee who will be admitted to the general population . . . undergo a close visual inspection while undressed," notwithstanding the absence of "reasonable suspicion of a concealed weapon or other contraband," did not violate the Fourth Amendment, given the "undoubted security imperatives involved in jail supervision" and the "reasonable balance [that had been struck] between inmate privacy and the needs of the institution[]"), *with People v. Hall*, 10 N.Y.3d 303, 312-13, 886 N.E.2d 162, 169, 856 N.Y.S.2d 540, 547 (2008) ("manual body cavity search" of a suspect at the police station to remove contraband observed during a lawfully conducted strip search violated the Fourth Amendment because there were no exigent circumstances preventing the police from obtaining a warrant). In the application of this balancing test, the following factors are central to an assessment of the "reasonableness," and thereby of the constitutionality, of the search:

(a) Whether the police officers obtained a search warrant; or, if they failed to obtain a warrant, whether their failure to obtain a warrant was justified because the imminence of disappearance of the evidence made it impracticable to obtain a warrant. *Schmerber,* 384 U.S. at 770; *Winston v. Lee,* 470 U.S. at 761. *See, e.g.*, *Missouri v. McNeely*, 133 S. Ct. 1552, 1563, 1568 (2013) ("in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant"; "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically"); *State v. Butler*, 232 Ariz. 84, 88-89, 302 P.3d 609, 613-14 (2013) (blood and breath test for driving under the influence requires a warrant or an exception to the warrant requirement even when administered pursuant to "Arizona's implied consent statute"; if the state seeks to rely on the accused's consent to the test, and if "the accused is a juvenile, factors such as age and the presence of parents are properly considered when assessing the voluntariness of consent to a search, just as they are relevant in assessing the voluntariness of a confession").

(b) Whether the search was justified by a "clear indication" that incriminating evidence would be found. *Schmerber,* 384 U.S. at 770; *see Winston v. Lee,* 470 U.S. at 762 (quoting the *Schmerber* "clear indication" standard). The Court in *United States v. Montoya de Hernandez,* 473 U.S. 531, 540 (1985), subsequently glossed the "clear indication" standard as requiring nothing more than probable cause, but there remains room to argue that a particularly exacting

judicial review of the probable-cause determination is appropriate in this context because the degree of justification required for a search always depends upon the extent of "the invasion which the search entails" (*Camara v. Municipal Court,* 387 U.S. 523, 536-37 (1967); *see, e.g., Terry v. Ohio,* 392 U.S. 1, 21 (1968); *Tennessee v. Garner,* 471 U.S. 1, 7-9 (1985)), and "'intrusions into the human body' . . . perhaps implicate[] . . . [the] most personal and deep-rooted expectations of privacy" (*Winston v. Lee,* 470 U.S. at 760).

(c) "[T]he extent to which the procedure may threaten the safety or health of the individual." *Winston v. Lee,* 470 U.S. at 761. With respect to this factor it is particularly relevant to consider whether: "all reasonable medical precautions were taken"; any "unusual or untested procedures were employed"; and "the procedure was performed 'by a physician in a hospital environment according to accepted medical practices.'" *Ibid.; Schmerber v. California,* 384 U.S. at 771-72.

(d) "[T]he extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity." *Winston v. Lee,* 470 U.S. at 761. With regard to this consideration, it is relevant to examine whether the procedure involved any "'trauma, or pain'" or violated "the individual's interest in 'human dignity.'" *Id.* at 762 n.5. *See, e.g.*, *Maryland v. King*, 133 S. Ct. 1958, 1969, 1980 (2013) ("DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure . . . [w]hen officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody"; the Court observes that "[a] buccal swab [to obtain a DNA sample] is a far more gentle process than a venipuncture to draw blood . . .[; it] involves but a light touch on the inside of the cheek . . . [and] no 'surgical intrusions beneath the skin'"; and there are "significant state interests in identifying . . . [the arrestee] not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody"). A prime example of a deprivation of dignity sufficient to violate the Due Process Clause occurred in *Rochin v. California,* 342 U.S. 165 (1952), when "police officers broke into a suspect's room, attempted to extract narcotics capsules he had put into his mouth, took him to a hospital, and directed that an emetic be administered to induce vomiting." *Winston v. Lee,* 470 U.S. at 762 n.5. "[D]ue process concerns could be involved if the police initiate[] physical violence while administering the [blood alcohol] test, refuse[] to respect a reasonable request to undergo a different form of testing, or respond[] to resistance with inappropriate force." *South Dakota v. Neville,* 459 U.S. 553, 559 n.9 (1983) (dictum); *see also id.* at 563.

(e) Whether there is a "compelling need" (*Winston v. Lee,* 470 U.S. at 766) for the intrusion or examination, in that the procedure is "'a highly effective means of determining'" facts important to the "fair[] and accurate[] determin[ation] [of] guilt and innocence" (*id.* at 762), and guilt cannot be effectively proven by other means. Thus a blood test was approved in *Schmerber* because the test is "'a highly effective means of determining the degree to which a person is under the influence of alcohol'" and "the difficulty of proving drunkenness by other means . . . [rendered the] results of the blood test . . . of vital importance if the State were to enforce its drunken driving laws." *Winston v. Lee,* 470 U.S. at 762-63 (explaining the holding in

Schmerber). Conversely, the Court concluded in *Winston v. Lee* that the state had not shown a "compelling need" for the surgical removal of a bullet from the defendant's body, since the state possessed "substantial" alternative evidence of guilt. *See id.* at 765-66.

Certain types of physical examinations conducted by the police also may run afoul of other constitutional prohibitions. Tests and examinations that involve the eliciting of "communications" from the accused (such as polygraph tests or the use of "truth serums") — and perhaps others that require his or her willed cooperation — are impermissible in the absence of a valid waiver of the Privilege Against Self-Incrimination. *See Estelle v. Smith,* 451 U.S. 454 (1981) (psychiatric examination); *Schmerber v. California,* 384 U.S. at 764 (dictum) ("lie detector tests"); *South Dakota v. Neville,* 459 U.S. at 561 n.12 (dictum) (same); see § 12.15(a) *supra.* A physical examination that is extremely abusive, degrading, or unfair may violate the Due Process Clause of the Fourteenth Amendment. *See Rochin v. California*, 342 U.S. 165 (1952); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961) (alternative ground); *United States v. Townsend,* 151 F. Supp. 378 (D. D.C. 1957). Finally, to an extent that is not yet clear, tests and examinations whose reliability depends upon careful administration are impermissible if conducted in the absence of counsel and without a valid waiver of the right to counsel, following the initiation of adversary judicial proceedings. *See Winston v. Lee,* 470 U.S. at 763 n.6 (reserving the question). *Compare United States v. Wade,* 388 U.S. 218 (1967), and *Moore v. Illinois,* 434 U.S. 220 (1977), *with Gilbert v. California,* 388 U.S. 263, 267 (1967); and see §§ 24.13, 25.06 *infra.*

Part C. Police Entry and Search of Dwellings or Other Premises

§ 23.15 THE THRESHOLD ISSUE: RESPONDENT'S EXPECTATION OF PRIVACY

§ 23.15(a) Introduction to the Concept of Constitutionally Protected Interests and "Standing" To Raise Fourth Amendment Claims

In the foregoing discussion of arrests and *Terry* stops, it was unnecessary to deal with the question whether the police conduct adversely affected any constitutionally protected interest of the respondent. A respondent always has the requisite interest in the privacy and security of his or her own person to be able to challenge a seizure of the person in the form of an arrest or a *Terry* stop or to challenge a search of the person incident to an arrest or stop. When one confronts the issue of searches of dwellings or other premises, however, it becomes necessary to inquire whether the respondent has the kind of relationship to the premises that permits him or her to complain if the Constitution is violated in searching them.

Prior to *Rakas v. Illinois,* 439 U.S. 128 (1978), this inquiry was framed in terms of whether a criminal defendant or juvenile respondent had "standing" to challenge the violation. *Rakas* changed the terminology to "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Id.* at 140. *See also United States v. Payner,* 447 U.S. 727, 731-32 (1980); *United States v. Salvucci,* 448 U.S.

83, 95 (1980); *Rawlings v. Kentucky,* 448 U.S. 98, 104-06 (1980). But *Rakas* also recognized that this terminological change would seldom affect either the nature of the traditional inquiry or its result, 439 U.S. at 138-39; and the term "standing" continues to be used in some jurisdictions as a convenient label for the *Rakas* determination that a particular respondent "is entitled to contest the legality of [the law enforcement conduct which s/he challenges as the basis for invoking the exclusionary rule]," *Rakas,* 439 U.S. at 140. *See United States v. Payner,* 447 U.S. at 731.

§ 23.15(b) Expectation of Privacy; Areas in Which a Respondent Will Ordinarily Be Deemed To Have the Requisite Expectation

In the context of searches of premises, a juvenile respondent's "standing" will almost always depend upon showing that s/he had a legitimate expectation of privacy in the premises. This is so because the two principal kinds of constitutionally protected interests that anyone can have in real property are privacy interests and possessory interests; and a juvenile will seldom be the legal possessor of real property. Thus, as a practical matter, the test of a respondent's right to base a suppression claim upon an unconstitutional search of premises is whether the respondent "had an interest in connection with the searched premises that gave rise to 'a reasonable expectation [on his or her part] of freedom from governmental intrusion' upon those premises." *Combs v. United States,* 408 U.S. 224, 227 (1972). An individual may have "a legitimate expectation of privacy in the premises he was using and therefore . . . claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his 'interest' in those premises might not have been a recognized property interest at common law." *Rakas v. Illinois,* 439 U.S. at 143 (dictum). When the respondent's relationship to searched premises is such that s/he "could legitimately expect privacy in the areas which were the subject of the search and seizure [that s/he seeks] . . . to contest," s/he is entitled to challenge the legality of the search and seizure. *Id.* at 149 (dictum).

All of the following are examples of premises for which the respondent can claim the requisite expectation of privacy:

(i) The respondent's home. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion.'"); *Wilson v. Layne*, 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies th[e] centuries-old principle of respect for the privacy of the home"); *United States v. Karo,* 468 U.S. 705, 714 (1984) ("[a]t the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable"); *United States v. Johnson,* 457 U.S. 537, 552 n.13 (1982) ("the Fourth Amendment accords special protection to the home"); *Payton v. New York,* 445 U.S. 573, 589-90 (1980); *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Justice Kennedy, concurring) ("it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people"); *Commonwealth v. Porter P.*, 456 Mass. 254, 260-61 & n.5, 923 N.E.2d 36, 44-45 & n.5 (2010) (juvenile had a reasonable

expectation of privacy in, and standing to challenge a search of, the "room that the juvenile and his mother shared at the shelter," which was "their home" even though it was "a transitional living space," and even though "he did not own the room," "he was limited in his use of the room," and "shelter staff members had a master key and could enter the room for 'professional business purposes'"). *Compare United States v. Knights*, 534 U.S. 112, 114, 119-20, 121 (2001) (an individual who was placed on probation pursuant to a California statute that establishes a probation condition that the probationer will "'[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer,'" and who signed a probation order agreeing to abide by this condition, had a "significantly diminished . . . reasonable expectation of privacy" in his home and was subject to a search of the home based on "reasonable suspicion that [the] probationer . . . is engaged in criminal activity"), *with Jones v. State*, 282 Ga. 784, 787-88, 653 S.E.2d 456, 459 (2007) (*Knights* rule is inapplicable because the State has not identified any "valid law, legally authorized regulation, or sentencing order" that limited the defendant's "right not to have his home searched without a warrant" as a result of his probationary status and that provided him with adequate "notice of that deprivation of rights"), *and with State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010) (relying on the state constitution to hold that a parolee had an undiminished privacy right to challenge a police search of his motel room).

(ii) An unleased room that is occupied from time to time by the respondent, in rental property owned by the respondent's parents. *Murray v. United States,* 380 U.S. 527 (1965) (per curiam), *vacating* 333 F.2d 409 (10th Cir. 1964). *See also United States v. Murphy*, 516 F.3d 1117, 1124 (9th Cir. 2008), *superseded on another issue by Fernandez v. California*, 134 S. Ct. 1126 (2014) (the rent-paying lessor of various storage units "testified that he allowed Murphy to stay in the storage units [rent-free] . . . and gave him a key that opened all of the units"; "Murphy's living situation was unconventional, but the record shows that the storage units were the closest thing that he had to a residence. He was sleeping in unit 14 and storing his belongings in unit 17. For the purposes of the Fourth Amendment, this is sufficient to create an expectation of privacy and thus the authority to refuse a search.").

(iii) A home that the respondent is visiting as a "social guest" at the invitation of the homeowner or another resident. *See Minnesota v. Carter*, 525 U.S. at 109 n.2 (Justice Ginsburg, dissenting) (explaining that although the Court majority ruled that there was no reasonable expectation of privacy under the facts of the case, it is "noteworthy that five Members of the Court [one of whom joined the majority opinion and also issued a concurring opinion, one of whom concurred in the judgment, and three of whom dissented] would place under the Fourth Amendment's shield, at least, 'almost all social guests'" (quoting *id*. at 99 (Justice Kennedy, concurring)); *In the Matter of Welfare of B.R.K.*, 658 N.W.2d 565, 572-78 (Minn. 2003). *See also Minnesota v. Olson*, 495 U.S. 91, 98 (1990) (accused had a reasonable expectation of privacy in a friend's duplex in which he was "[s]taying overnight" as a "houseguest"); *Jones v. United States*, 362 U.S. 257 (1960), as explained in *Rakas v. Illinois*, 439 U.S. at 141, and *Minnesota v. Carter*, 525 U.S. at 89-90 (majority opinion). *Cf. id*. at 102 (Justice Kennedy, concurring) (although, "as

a general rule, social guests will have an expectation of privacy in their host's home," "[t]hat is not the case before us" in that "respondents have established nothing more than a fleeting and insubstantial connection with . . . [the] home," they were using the "house simply as a convenient processing station" for packaging cocaine, they had never "engaged in confidential communications with [the homeowner] . . . about their transaction," they "had not been to . . . [the] apartment before, and [they]. . . left it even before their arrest").

(iv) A hotel room in which the respondent is staying, however temporarily or sporadically. *Stoner v. California,* 376 U.S. 483 (1964); *United States v. Jeffers,* 342 U.S. 48 (1951) (hotel room rented by defendant's aunts, who had given defendant a key and permission to use the room at will; he "often entered the room for various purposes" (*id.* at 50)).

(v) In the case of respondents who are employed, their office or work area, even if it is shared with other employees, *O'Connor v. Ortega,* 480 U.S. 709, 714-19 (1987) (public employee's office); *United States v. Lefkowitz,* 285 U.S. 452 (1932) (business office); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 311-15 (1978) (employees' work areas in factory building); *Mancusi v. DeForte,* 392 U.S. 364 (1968) (union office shared by defendant and other union officials); *Villano v. United States,* 310 F.2d 680 (10th Cir. 1962) (employee's desk in retail store); *United States v. Blok,* 188 F.2d 1019 (D.C. Cir. 1951) (employee's desk in government office).

(vi) "Public" places in which it is customary to allow temporary exclusive occupancy with a measure of privacy, such as taxicabs, *Rios v. United States,* 364 U.S. 253, 262 n.6 (1960); *but cf. Rakas v. Illinois,* 439 U.S. at 149 n.16 (dictum), pay telephone booths, *Katz v. United States,* 389 U.S. 347 (1967), public lavatory cabinets, *Bielicki v. Superior Court,* 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962); *People v. Mercado,* 68 N.Y.2d 874, 501 N.E.2d 27, 508 N.Y.S.2d 419 (1986), and rented lockers in commercial storage facilities, *United States v. Karo,* 468 U.S. at 720 n.6 (dictum). *Compare Hudson v. Palmer,* 468 U.S. 517 (1984); *Bell v. Wolfish,* 441 U.S. 520, 556-58 (1979).

For discussion of privacy rights in the interior of automobiles, see § 23.23 *infra.*

§ 23.15(c) "Curtilage" and "Open Fields"; Multifamily Apartment Complexes

The "curtilage" of a home — that is, "the area immediately surrounding a dwelling house," *United States v. Dunn,* 480 U.S. 294, 300 (1987) — is treated as "part of the home itself for Fourth Amendment purposes," *Oliver v. United States,* 466 U.S. 170, 180 (1984), and thus receives the same "Fourth Amendment protections," *ibid. Accord*, *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) ("the curtilage of the house . . . enjoys protection as part of the home itself"); *State v. Kruse*, 306 S.W.3d 603 (Mo. App. 2010).

In determining whether any particular area is or is not within the curtilage, "the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may

expect that the area in question should be treated as the home itself. . . . [C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. . . . [T]hese factors are useful analytic tools . . . to the degree that, in any given case, they bear upon the centrally relevant consideration — whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *United States v. Dunn,* 480 U.S. at 300-01. Applying this four-part analysis in *Dunn,* the Court concluded that "the area near a barn, located approximately 50 yards from a fence surrounding a ranch house" (*id.* at 296) and "60 yards from the house itself" (*id.* at 302) "lay outside the curtilage of the ranch house" (*id.* at 301) and was not entitled to Fourth Amendment protection because (i) "the substantial distance" from not only the house but also the fence surrounding the house "supports no inference that the barn should be treated as an adjunct of the house," *id.* at 302; (ii) "[v]iewing the physical layout of respondent's ranch in its entirety, . . . it is plain that the fence surrounding the residence serves to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house," and the area in question "stands out as a distinct portion of respondent's ranch, quite separate from the residence," *ibid.*; (iii) "the law enforcement officials possessed objective data indicating . . . that the use to which the barn was being put could not fairly be characterized as so associated with the activities and privacies of domestic life that the officers should have deemed the barn as part of respondent's home," *id.* at 302-03; and (iv) "[r]espondent did little to protect the barn area from observation by those standing in the open fields . . . [since] the fences were designed and constructed to corral livestock, not to prevent persons from observing what lay inside the enclosed areas," *id.* at 303.

In the urban context, application of the four-part test of *United States v. Dunn* will ordinarily produce the result that "curtilage" is coextensive with a fenced yard. *See Oliver v. United States,* 466 U.S. at 182 n.12 ("for most homes, the boundaries of the curtilage will be clearly marked"); *California v. Ciraolo,* 476 U.S. 207, 212-13 (1986) (treating the area within a fenced yard as curtilage under an analysis that anticipates *Dunn*'s). This is consistent with pre-*Dunn* caselaw. *See, e.g., Weaver v. United States,* 295 F.2d 360 (5th Cir 1961); *Hobson v. United States,* 226 F.2d 890 (8th Cir. 1955); *State v. Parker,* 399 So. 2d 24 (Fla. App. 1981), *review denied,* 408 So. 2d 1095 (Fla. 1981); *People v. Pakula,* 89 Ill. App. 3d 789, 411 N.E.2d 1385, 44 Ill. Dec. 919 (1980). Separate closed structures on residential property — garages, for example — are generally held protected by the Fourth Amendment without reference to the ordinary indicia of "curtilage," such as fencing in. *Taylor v. United States,* 286 U.S. 1 (1932); *see, e.g., State v. Daugherty,* 94 Wash.2d 263, 616 P.2d 649 (1980). *See also Commonwealth v. Ousley*, 393 S.W.3d 15, 27-29 (Ky. 2013) (trash cans, which were "sitting on the driveway very near the home," were within the "curtilage" even though "the area in question" was not "enclosed by a fence": "The home was in an urban area that does not lend itself to enclosures" and a resident's decision to forego fencing "(for example, because the lot on which his home sits is small) cannot deprive him of having curtilage surrounding his home"); *State v. Kruse*, 306 S.W.3d 603, 611-12 (Mo. App. 2010) ("The State argues that Kruse did not have an expectation of privacy in his

backyard. The State notes that there were no gates or objects to hinder entrance into the backyard. Nothing obstructed a person's view into the back yard except the buildings. There appears to be a well-travelled route from the driveway to the rear of the property, marked by large pieces of wood resembling railroad ties. The two 'no trespassing' signs were posted on doors, which the State says implies that access was denied to the interior of the residence or shed without permission. ¶ We cannot agree that there was no expectation of privacy in the backyard. The officers arrived at the Kruse residence after midnight. No exterior lights were on to welcome the public to come on the premises. The entrance to the residence is in the front yard. The 'no trespassing' signs would ordinarily be understood to assert a privacy interest on the entire property. The back yard could not be seen from the road and was not in plain view. The back yard and backdoor were enclosed by trees on three sides and the home on the fourth side. ¶ By entering into the back yard, the police were entering onto property as to which there was a privacy interest protected by the Fourth Amendment").

With respect to tenants living in multifamily apartment complexes, some courts have viewed their "curtilage" as very limited. *See, e.g.*, *Commonwealth v. Thomas,* 358 Mass. 771, 774-75, 267 N.E.2d 489, 491 (1971). However, if the building is secured against entry by the general public, then any of the tenants may be able to rely upon the collective expectation of privacy in the corridors and hallways, *e.g.*, *United States v. Heath*, 259 F.3d 522 (6th Cir. 2001); *United States v. Carriger,* 541 F.2d 545, 549-52 (6th Cir. 1976); *United States v. Booth,* 455 A.2d 1351 (D.C. 1983), and the basement, *e.g., Garrison v. State,* 28 Md. App. 257, 345 A.2d 86 (1975). *Compare McDonald v. United States,* 335 U.S. 451 (1948), *with United States v. Dunn*, 480 U.S. 294 (1987). Similarly, if the backyard to the building is not accessible to the general public, and particularly if it is surrounded by a fence, the backyard area may be "sufficiently removed and private in character that [a tenant] . . . could reasonably expect privacy," *Fixel v. Wainwright,* 492 F.2d 480, 484 (5th Cir. 1974). Counsel urging these results can argue that, in light of the established principle that "the Fourth Amendment accords special protection to the home," *United States v. Johnson,* 457 U.S. 537, 552 n.13 (1982); *see, e.g., Groh v. Ramirez*, 540 U.S. 551, 559 (2004); *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Wilson v. Layne*, 526 U.S. 603, 610 (1999); *Welsh v. Wisconsin,* 466 U.S. 740, 748 (1984); *Florida v. Jardines*, 133 S. Ct. at 1414*; Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Justice Kennedy, concurring), it would be anomalous to deny at least as much protection to shared residential facilities as is given to shared workplace facilities, *see, e.g., Mancusi v. DeForte,* 392 U.S. 364 (1968).

The Fourth Amendment's protection of the home and its "curtilage" does not extend to "'the open fields.'" *United States v. Dunn,* 480 U.S. at 300; *Oliver v. United States,* 466 U.S. at 180; *Hester v. United States,* 265 U.S. 57 (1924). "[O]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas." *Oliver v.*

United States, 466 U.S. at 179.

Moreover, if a police officer, while situated in an "open field" or in an area that is otherwise open to the public, engages in "naked-eye observation of the curtilage" (*California v. Ciraolo,* 476 U.S. 207, 213 (1986)), that observation is not treated as a "search" subject to Fourth Amendment restrictions. See § 23.16 *infra.*

§ 23.15(d) Police Search or Seizure of an Object Belonging to the Respondent from Premises in Which the Respondent Has No Privacy Interest

Even if the respondent does not have a privacy interest in any premises searched by the police, s/he may nevertheless challenge a police examination or seizure of an object during a police search of the premises if the respondent is the owner of that object. As the Court observed in *United States v. Jacobsen,* 466 U.S. 109, 113 (1984), "an individual's possessory interests in [a certain piece of] . . . property" confers upon that individual a Fourth Amendment right to challenge a police officer's "meaningful interference with [his or her] . . . possessory interests in that property." *Ibid.* Thus, in *Jacobsen,* the Court concluded that the defendant had the requisite privacy interest to challenge government agents' assertion of control over, and search of, a package which the defendant had consigned to a private freight carrier, even though the defendant obviously had no privacy interest in the Federal Express office where the search took place. *Id.* at 114-15. *See also, e.g.*, *Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 374 n.3 (2009); *Bond v. United States*, 529 U.S. 334, 336-37, 338-39 (2000); *Walter v. United States,* 447 U.S. 649 (1980); *State v. Crane*, 329 P.3d 689, 694-95 (N.M. 2014) (construing the state constitution to hold that a motel occupant had a reasonable expectation of privacy in garbage that was placed in "opaque garbage bags," which were "sealed from plain view . . . [and] placed directly in the dumpster, rather than being left in the motel room for disposal by the housekeeping staff").

The individual's privacy interest in objects that s/he owns extends to "[l]etters and other sealed packages [since these objects] are in the general class of effects in which the public at large has a legitimate expectation of privacy." *United States v. Jacobsen,* 466 U.S. at 114. This is the case as well for the contents of a cell phone. *See Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014) (discussed in § 23.08(b) *supra*) ("Modern cell phones[,] . . . [w]ith all they contain and all they may reveal, . . . hold for many Americans 'the privacies of life'" (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))); *United States v. Lopez-Cruz*, 730 F.3d 803, 805-06, 808 (9th Cir. 2013) (pre-*Riley* decision holding that the defendant, whose car was stopped by border patrol agents and who agreed to the agents' request to inspect and search two cell phones that the defendant identified as belonging to a friend of his, "had a reasonable expectation of privacy in the phones" and could challenge an agent's actions in accepting an incoming call and "passing himself as Lopez" and thereby obtaining information that incriminated Lopez: "Lopez had possession of the phones and was using them. He certainly had the right to exclude others from using the phones. He also had a reasonable expectation of privacy in incoming calls and a reasonable expectation that the contents of those calls 'would remain free from governmental

intrusion.'"). *See also United States v. Davis*, 754 F.3d 1205, 1211, 1217 (11th Cir. 2014) (pre-*Riley* decision holding that "'cell site location information,'" which is stored in cell phone service providers' records and which "reveals which cell tower carried the call to or from the customer" and thus "the location of the cell phone user at the time and date reflected in the call record," is "within the subscriber's reasonable expectation of privacy" and thus "[t]he [government's] obtaining of that data without a warrant is a Fourth Amendment violation"); *Commonwealth v. Augustine*, 467 Mass. 230, 231, 232, 4 N.E.3d 846, 849, 850 (2014) (construing the state constitution to hold that the state must obtain a search warrant in order to acquire "historical cell site location information for a particular cellular telephone" from "a cellular telephone service provider"; the court observes that although the information "at issue here is a business record of the defendant's cellular service provider, he had a reasonable expectation of privacy in it"); *State v. Earls*, 70 A.3d 630, 633 (N.J. 2013) (construing the state constitution to hold that "cell-phone users have a reasonable expectation of privacy in their cell-phone location information, and that police must obtain a search warrant before accessing that information"); *State v. Reid*, 194 N.J. 386, 399, 945 A.2d 26, 33-34 (2008) (state constitution "protects an individual's privacy interest in the subscriber information he or she provides to an Internet service provider"). *But see City of Ontario v. Quon*, 560 U.S. 746, 761-62 (2010) (upholding a police department's review of text messages sent and received on a government-owned pager that was issued to a police officer and that was reviewed by the department for the purpose of "determin[ing] whether [the officer's] overages were the result of work-related messaging or personal use," where the officer had been given advance notice "that his [text] messages were subject to auditing").

§ 23.15(e) "Automatic Standing"

In some States, criminal defendants and juvenile respondents have "automatic standing" to challenge seizures of contraband whenever they are charged with possession of that contraband; they need not show any proprietary interest or expectation of privacy in the place from which the contraband was seized. This "automatic standing" rule was the law of the Fourth Amendment before *United States v. Salvucci,* 448 U.S. 83 (1980). When the Supreme Court abolished it in *Salvucci,* some state courts responded by reinstating the rule as a matter of state constitutional law. *E.g., State v. Settle,* 122 N.H. 214, 447 A.2d 1284 (1982); *Commonwealth v. Porter P.*, 456 Mass. 254, 261 n.5, 923 N.E.2d 36, 45 n.5 (2010); *State v. Alston,* 88 N.J. 211, 440 A.2d 1311 (1981); *Commonwealth v. Sell,* 504 Pa. 46, 470 A.2d 457 (1983); *State v. Simpson,* 95 Wash. 2d 170, 622 P.2d 1199 (1980); *see also People v. Millan,* 69 N.Y.2d 514, 508 N.E.2d 903, 516 N.Y.S.2d 168 (1987) (adopting a version of automatic standing that grants standing whenever a charge of criminal possession is based upon a statutory presumption of constructive possession). In States that have not reconsidered the "automatic standing" issue since *Salvucci,* counsel should draw upon the reasoning of these decisions to urge the state courts to restore "automatic standing." See § 7.09 *supra.*

§ 23.16 POLICE ENTRY OF PREMISES: GENERAL PRINCIPLES

An entry into a building is a "search" within the Fourth Amendment. *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 325 (1979). To be constitutional, any police entry of a building must either: (i) be authorized by a search warrant, see § 23.17 *infra;* or (ii) fall within one of the "few specifically established and well-delineated exceptions" to the warrant requirement (*Katz v. United States,* 389 U.S. 347, 357 (1967)), see §§ 23.18-23.20 *infra. E.g.*, *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) ("Because '"the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"' stands '"[a]t the very core" of the Fourth Amendment,' . . . , our cases have firmly established the '"basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable. . . .'"); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."); *United States v. Karo,* 468 U.S. 705, 714-15 (1984) ("[s]earches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances"); *Welsh v. Wisconsin,* 466 U.S. 740, 750 (1984) (a "presumption of unreasonableness . . . attaches to all warrantless home entries"); *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) ("when it comes to the Fourth Amendment, the home is first among equals"). *See also State v. Jackson*, 742 N.W.2d 163, 177 (Minn. 2007) ("in order to be constitutionally reasonable, nighttime searches [of the home] require additional justification beyond the probable cause required for a daytime search"); *State v. Gill*, 755 N.W.2d 454, 459-60 (N.D. 2008) (joining several federal circuits in holding that warrantless entries of a home cannot be justified by a so-called "community caretaking function of law enforcement officers").

If a police entry of a building violates these rules, all observations made by the police within the building and all objects seized by the entering officers are excludable. *Johnson v. United States,* 333 U.S. 10 (1948); *Chapman v. United States,* 365 U.S. 610 (1961); *Work v. United States,* 243 F.2d 660 (D.C. Cir. 1957); *United States v. Merritt,* 293 F.2d 742 (3d Cir. 1961). Evidence derived from these observations or things is also excludable. See § 23.37 *infra.*

The concept of a "search" also encompasses situations in which police officers, although not physically entering an area, use artificial contrivances like peepholes or electronic surveillance equipment to extend their presence into a private area. *See, e.g., Silverman v. United States,* 365 U.S. 505 (1961); *Regalado v. California,* 374 U.S. 497 (1963) (per curiam); *United States v. Karo,* 468 U.S. 705, 714 (1984); *Kyllo v. United States*, 533 U.S. at 34-35, 40; *United States v. Jones*, 132 S. Ct. 945, 949 (2012). *See also Florida v. Jardines*, 133 S. Ct. at 1417-18 ("The government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment."). If, on the other hand, the police merely used technology as a means for viewing what was exposed to observation by the public at large, then there is no "search" for Fourth Amendment purposes. *See, e.g., Texas v. Brown,* 460 U.S. 730, 740 (1983) (plurality opinion) (officer's use of flashlight to examine interior of automobile was not "search" since "the interior of an automobile . . . may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers"); *United States v. Dunn,* 480 U.S. 294, 305 (1987) ("the officers' use of the beam of a flashlight, directed through the essentially open front of respondent's barn, did not transform their observations into

an unreasonable search within the meaning of the Fourth Amendment"); *see also, e.g., California v. Ciraolo,* 476 U.S. 207, 215 (1986) (warrantless observation of marijuana plants in the fenced yard of a home, made possible because police officers flew over the yard in a private plane and observed it from an altitude of 1,000 feet, did not violate the homeowner's reasonable expectation of privacy because the marijuana plants were "visible to the naked eye," albeit only with the assistance of the aircraft); *cf. Dow Chemical Co. v. United States,* 476 U.S. 227, 237-39 (1986) (in the context of inspections of commercial property, where "the Government has 'greater latitude,'" the Court approves the use of an aerial camera that enhanced human vision "somewhat" but was not "so revealing of intimate details as to raise constitutional concerns"; the Court notes that use of "[a]n electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions").

The basic principle in this area was established by *Katz v. United States,* 389 U.S. 347, 353 (1967), holding that "electronically listening to and recording . . . words [spoken in a zone of] . . . privacy upon which [a person] . . . justifiably relied" is a "search" for Fourth Amendment purposes, without regard to "the presence or absence of a physical intrusion into any given enclosure." The principle is illustrated by comparing the decisions in *United States v. Knotts,* 460 U.S. 276 (1983), and *United States v. Karo,* 468 U.S. 705 (1984). In *Knotts,* the Court held that police officers' tracing of the movements of an automobile by means of an electronic beeper planted in a can of chloroform purchased by a drug manufacturing suspect was not a "search" since it revealed nothing more than what could be observed through "[v]isual surveillance from public places." 460 U.S. at 282. In *Karo,* the police employed the same tactic of installing an electronic beeper in a can of ether, but the can thereafter ended up inside a private home. Distinguishing the *Knotts* case as limited to surveillance of a public area, the Court in *Karo* held that "the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence." 468 U.S. at 714. *See also*, *e.g.*, *Kyllo v. United States*, 533 U.S. 27, 29, 31 (2001) ("the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment": "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' . . . constitutes a search — at least where (as here) the technology in question is not in general public use"). *Compare United States v. Jones*, 132 S. Ct. at 949 ("hold[ing] that the Government's installation of a GPS [Global-Positioning-System] device on a target's vehicle, . . . and its use of that device to monitor the vehicle's movements, constitutes a 'search'" — although basing this ruling on a "common-law trespassory test" rather than "the *Katz* reasonable-expectation-of-privacy test" — and concluding that the government's attachment of the GPS tracking device to the underside of Jones' vehicle constituted a "physical intrusion" into "private property for the purpose of obtaining information" and thus a "'search' within the meaning of the Fourth Amendment when it was adopted"), *with id*. at 957-58, 964 (Alito, J., concurring in the judgment, joined by Ginsburg, Breyer & Kagan, JJ.) (rejecting the majority's reliance on "18th-century tort law" and reaching the same result as the majority by

"asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove," and concluding that although "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable," "the use of longer term GPS monitoring" — such as occurred in this case, where "law enforcement agents tracked every movement that respondent made in the vehicle he was driving" for "four weeks" — "impinges on expectations of privacy" and thus constitutes a "search" for purposes of the Fourth Amendment).

§ 23.17 ENTRY OF PREMISES PURSUANT TO A SEARCH WARRANT

Search warrants are issued by a magistrate (or, in some jurisdictions, by a judge) in an *ex parte* proceeding. Defense attorneys thus are almost never in a position to contest the sufficiency of the application for a warrant before the warrant is executed. They ordinarily confront the subject of search warrants after the search has been completed, the respondent arrested, and charges filed.

In *United States v. Leon,* 468 U.S. 897 (1984), and *Massachusetts v. Sheppard,* 468 U.S. 981 (1984), the Supreme Court limited the grounds for Fourth Amendment challenges that defense counsel can mount in this setting against searches made pursuant to a warrant. *Leon* and *Sheppard* held that evidence obtained by a search conducted under a search warrant should not be suppressed if the police officers executing the warrant reasonably relied on the magistrate's determination of probable cause in issuing the warrant, even though the magistrate's finding of probable cause was erroneous. *See also Arizona v. Evans*, 514 U.S. 1, 14-16 (1995) ("good faith" rule of *Leon* and *Sheppard* also applies when the police, in making an arrest, reasonably rely on a computer record of a warrant which a court clerk erroneously failed to update to reflect the later quashing of the warrant); *Herring v. United States*, 555 U.S. 135, 137, 146-47 (2009) (rule of *Arizona v. Evans* also applies when an arresting officer's reasonable but erroneous belief in the existence of "an outstanding arrest warrant" stems from "a negligent bookkeeping error by another police employee" who failed to update the police computers when the warrant was recalled, but the "good faith" rule is inapplicable and "exclusion [of the fruits of the arrest] would certainly be justified" "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests" or if "systemic errors" in a warrant system were so "routine or widespread" as to make it "reckless for officers to rely on . . . [the] unreliable warrant system"). *Leon* and *Sheppard* are not substantive constitutional decisions; they do not modify the explicit Fourth Amendment rule that a search warrant issued without probable cause is unconstitutional; they simply withdraw the ordinary Fourth Amendment exclusionary rule as a means of enforcing this particular constitutional command. *See also Herring v. United States*, 555 U.S. at 140-45; *Arizona v. Evans*, 514 U.S. at 15-16. *Cf. Hudson v. Michigan*, 547 U.S. 586, 588, 594 (2006) (discussed in § 23.21 *infra*) (withdrawing the exclusionary rule as a remedy for violations of the "knock and announce" rule); *Davis v. United States*, 131 S. Ct. 2419, 2423 (2011) (withdrawing the exclusionary rule as a remedy "when the police conduct a search in compliance with binding precedent that is later overruled"; the Court explains that "suppression would do nothing to deter

police misconduct in these circumstances").

In the wake of *Leon* and *Sheppard,* there are essentially seven situations in which defense counsel can seek suppression of the proceeds of a search conducted pursuant to a search warrant: (i) when the affidavit submitted in support of the issuance of the warrant states merely "'bare bones'" conclusions, *United States v. Leon,* 468 U.S. at 915, 923 n.24, 926, or is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,'" *id.* at 923; (ii) when the police knowingly or negligently fail to limit their application for a warrant to the pertinent unit of a multiunit building; (iii) when "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," *id.* at 923; (iv) when the affidavit includes information obtained by an earlier unconstitutional search or seizure and this information is necessary to sustain a finding of probable cause; (v) when the magistrate who issues the warrant is not neutral and detached, thereby rendering reliance on the warrant unreasonable, *ibid.*; (vi) when the warrant is "so facially deficient — *i.e.,* in failing to particularize the place to be searched or the things to be seized — that the executing officers cannot reasonably presume it to be valid," *ibid.;* and (vii) when the police, in executing the warrant, exceeded the authority granted by it. These seven situations are discussed in greater detail in the following subsections.

The retraction of the Fourth Amendment exclusionary rule in *Leon* and *Sheppard* does not, of course, control the evidentiary consequences of state constitutional violations in the issuance of warrants. Defense counsel can and should ask state courts to reject *Leon* and *Sheppard* as a matter of state constitutional law and continue to suppress evidence obtained by any search made pursuant to a warrant issued without probable cause. *See, e.g., State v. Novembrino,* 105 N.J. 95, 157-58, 519 A.2d 820, 856-57 (1987); *People v. Bigelow,* 66 N.Y.2d 417, 426-27, 488 N.E.2d 451, 457-58, 497 N.Y.S.2d 630, 636-37 (1985). See § 7.09 *supra.*

§ 23.17(a) "Bare Bones" Affidavits

In *United States v. Leon,* the Court recognized that a search warrant and a search conducted pursuant to that warrant are manifestly invalid if the affidavit submitted in support of the issuance of the warrant states merely "'bare bones'" conclusions, *Leon,* 468 U.S. at 915, 923 n.24, 926, or is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,'" *id.* at 923. Although it is not clear precisely what level of insufficiency will render an affidavit challengeable on a motion to suppress, the logic of *Leon* — to preserve the exclusionary rule in warrant cases when any adequately trained police officer would know that a search warrant is unconstitutional — implies that suppression is required at least in the case of a wholly conclusionary affidavit that merely recites the ultimate fact in issue or the affiant's belief of it (for example, that *X* has a sawed-off shotgun in a certain house). The inadequacy of such an affidavit is so well settled in Fourth Amendment jurisprudence that an officer would be grossly derelict not to know it. *See, e.g., Nathanson v. United States,* 290 U.S. 41 (1933); *Aguilar v. Texas,* 378 U.S. 108 (1964); *Riggan v. Virginia,* 384 U.S. 152 (1966) (per

curiam); *Illinois v. Gates,* 462 U.S. 213, 239 (1983) ("[a]n officer's statement that '[a]ffiants have received reliable information from a credible person and do believe' that heroin is stored in a home, is likewise inadequate"). Conclusory assertions that the person to be arrested or whose house is to be searched is a "known criminal" or is "known" to deal in narcotics should be accorded "no weight." *See Spinelli v. United States,* 393 U.S. 410, 414, 418-19 (1969). Allegations that the person named in the warrant *consorts* with "known" criminals, narcotics dealers, and the like, are doubly worthless. *See United States v. Hatcher,* 473 F.2d 321 (6th Cir. 1973).

§ 23.17(b) Improper Multiunit Warrant Applications

If officers seeking a warrant know "or even if they should have known" that the premises described in their application includes separate units with different occupants, they are constitutionally obliged to limit the application to the unit that they are presenting probable cause to search. *Maryland v. Garrison,* 480 U.S. 79, 85-87 (1987) (dictum); *see also United States v. Voustianiouk*, 685 F.3d 206, 215 (2d Cir. 2012). A violation of this obligation should entail exclusion of any evidence seized from the other units, because the rationale of *Leon* and *Sheppard* is to withdraw the exclusionary rule as a remedy for *magistrates'* errors in the search warrant process but preserve it as a remedy for *police errors.*

§ 25.17(c) Affidavits Containing "Deliberate Falsehoods" or Statements Manifesting a "Reckless Disregard for the Truth"

In *Franks v. Delaware,* 438 U.S. 154 (1978), the Court held

> that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155-56. The rule of *Franks* "has a limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded." *Id.* at 167.

"To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations

must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted . . . is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing." *Id* at 171-72. *Accord, United States v. Leon,* 468 U.S. at 914, 923.

§ 23.17(d) Warrants Based on Tainted Evidence

If an affidavit in support of a search warrant includes information that is the product of an earlier unconstitutional search or seizure by the police and does not contain sufficient independent evidence to make out probable cause without reference to the tainted evidence, the resulting warrant and any search made under its authority are invalid. *United States v. Karo,* 468 U.S. 705, 719-21 (1984) (dictum); see § 23.40 *infra.* To the extent that the earlier unconstitutionality was the consequence of improper police conduct rather than improper magisterial conduct, it continues to invoke the exclusionary sanction that *Leon* and *Sheppard* retain as a curb on the police and withdraw only as a curb on magistrates.

§ 23.17(e) Neutral and Detached Magistrate

Exclusion of evidence seized under a warrant is obligatory, even when the police acted in "good faith," if the magistrate who issued the warrant was not neutral and detached. *Leon,* 468 U.S. at 923. This principle would include situations "where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979)," *Leon,* 468 U.S. at 923, "allow[ing] himself to become a member, if not the leader, of the search party which was essentially a police operation . . . [and] acting . . . as an adjunct law enforcement officer." *Lo-Ji,* 442 U.S. at 327. It would also include situations in which the magistrate "'serve[s] merely as a rubber stamp for the police.'" *Leon,* 468 U.S. at 914.

§ 23.17(f) The Particularity Requirement

The *Leon/Sheppard* doctrine does not alter the longstanding Fourth Amendment requirement that a warrant must identify the premises to be searched and the things to be seized with reasonable particularity. *Leon,* 468 U.S. at 923; *Sheppard,* 468 U.S. at 988 n.5; *see, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 557-63 (2004); *Maryland v. Garrison,* 480 U.S. 79 (1987). The Supreme Court has "clearly stated that the presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant." *Groh v. Ramirez*, 540 U.S. at 559. "The manifest purpose of this particularity requirement [is] . . . to

prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers [of the Fourth Amendment] intended to prohibit." *Maryland v. Garrison*, 480 U.S. at 84. *See also Groh v. Ramirez*, 540 U.S. at 557-58 ("The fact that the *application* [for the warrant] adequately described the 'things to be seized' does not save the warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents."; the Court declines to reach the question of whether "the Fourth Amendment prohibits a warrant from cross-referencing other documents," noting that "most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant"); *Lo-Ji Sales, Inc. v. New York,* 442 U.S. at 325-26; *Dalia v. United States,* 441 U.S. 238, 255-56 (1979) (dictum); *Stanford v. Texas,* 379 U.S. 476 (1965); *United States v. Galpin*, 720 F.3d 436, 446 (2d Cir. 2013) ("Where, as here, the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance. As numerous courts and commentators have observed, advances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain."); *In re Appeal of Application for Search Warrant*, 71 A.3d 1158, 1162, 1172, 1174, 1181, 1183 (Vt. 2012) (judicial officer who "granted a warrant to search the residence and to seize electronic devices to be searched at an off-site facility" had the authority to attach *ex ante* conditions "requiring that the search [of the electronic devices] be performed by third parties or trained computer personnel separate from the investigators and operating behind a firewall," "requiring that the information be segregated and redacted prior to disclosure," "requiring police to use focused search techniques," and "prohibiting the use of specialized search tools without prior court authorization"; "Because modern computers contain a plethora of private information, exposing them to wholesale searches presents a special threat of exposing irrelevant but damaging secrets."; "especially in a nonphysical context, particularity may be achieved through specification of how a search will be conducted"). *But cf. United States v. Grubbs*, 547 U.S. 90, 98-99 (2006) ("The Fourth Amendment does not require that the warrant set forth the magistrate's basis for finding probable cause," and, in the case of an anticipatory search warrant, "does not require that the triggering condition . . . be set forth in the warrant itself").

§ 23.17(g) Scope of the Search Permitted in Executing a Warrant

The "good faith" doctrine of *Leon* and *Sheppard* does not in any way affect the courts' obligation to review "the reasonableness of the manner in which [a search warrant] . . . was executed." *Maryland v. Garrison,* 480 U.S. 79, 84 (1987).

The permissible scope of a search pursuant to a warrant is strictly limited to the premises specified in the warrant. *Id.* at 86-87. When the officers who are applying for a warrant know or should know that a particular building contains multiple units, their application and the warrant are required to specify the individual unit to be searched. See § 23.17(b) *supra.* If, however, they

reasonably believe that the entire building is a single unit and in good faith obtain a warrant for the building as a whole, their "failure to realize the overbreadth of the warrant" will be deemed "objectively understandable and reasonable," *Maryland v. Garrison,* 480 U.S. at 88, and their search of any portion of the building will be sustained until such time as it discloses that separate units do exist within the building. *Id.* at 86-89. At that time a continuation of the search beyond the unit for which probable cause was shown to the magistrate — and perhaps any further search at all until the warrant is reissued with a more limited specification of the place to be searched — is unconstitutional, *id.* at 86-87, and the products of the search are suppressible.

Within the premises specified by the warrant, "the scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found.'" *Id.* at 84. *Accord, New York v. Belton,* 453 U.S. 454, 457 (1981) ("'[t]he scope of [a] search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible'"). The officers may search "the entire area in which the object of the search may be found," performing whatever additional "acts of entry or opening may be required to complete the search. Thus a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found." *United States v. Ross,* 456 U.S. 798, 820-21 (1982) (dictum); *cf. Dalia v. United States,* 441 U.S. 238, 257-58 (1979) (dictum). However, the search may not extend into areas that could not contain the objects specified in the warrant. *See United States v. Ross,* 456 U.S. at 824 (dictum). "[A] warrant to search for a stolen refrigerator would not authorize the opening of desk drawers." *Walter v. United States,* 447 U.S. 649, 657 (1980) (plurality opinion) (dictum).

Nor may the officers seize anything not specified in the warrant, *Marron v. United States,* 275 U.S. 192, 196-98 (1927); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 394 n.7 (1971) (dictum); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 323 (1978) (dictum); *see also United States v. Ganias*, 755 F.3d 125, 137-38 (2d Cir. 2014) (government exceeded the scope of a "warrant for the seizure of particular [business record] data on a computer" by retaining a forensic mirror image of the computer's hard drive for two-and-a-half years "until [the government] finally developed probable cause to search and seize" computer files containing "personal financial records . . . not covered by the . . . [original search] warrant"); *United States v. Sedaghaty*, 728 F.3d 885, 910-15 (9th Cir. 2013) ("The question we consider de novo is whether the search was unreasonable because agents relied on the affidavit in support of the warrant to expand the authorized scope of items detailed in the warrant itself." "The plain text of the warrant . . . clearly delineates what is to be seized." "May a broad ranging probable cause affidavit serve to expand the express limitations imposed by a magistrate in issuing the warrant itself? We believe the answer is no. The affidavit as a whole cannot trump a limited warrant."); *cf. Lo-Ji Sales, Inc. v. New York,* 442 U.S. at 325, except objects coming within the "plain view" doctrine discussed in § 23.22(b) *infra*: that is, objects which the officer encounters while conducting a search of the limited scope just described and which give the officer probable cause to believe that they are contraband or otherwise subject to seizure, *Arizona v. Hicks,* 480 U.S. 321 (1987); *Texas v. Brown,* 460 U.S. 730 (1983) (plurality opinion).

Regarding searches of *persons* found on the premises, see § 23.22(c) *infra.*

§ 23.18 WARRANTLESS ENTRIES OF BUILDINGS AND SEARCHES ON CONSENT

The police may enter a building without a warrant whenever they obtain the valid consent of a party who has the authority to admit persons to the building. *Washington v. Chrisman,* 455 U.S. 1, 9-10 (1982). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). *See also, e.g.*, *United States v. Lopez-Cruz*, 730 F.3d 803, 805-06, 808 (9th Cir. 2013) (although the defendant consented to a border patrol agent's request to inspect and search two cell phones that the defendant identified as belonging to a friend of his, "the agent's answering of the phone [which led to the acquisition of information that incriminated the defendant] exceeded the scope of the consent that [the agent] obtained and, thus, violated Lopez's Fourth Amendment right").

§ 23.18(a) Voluntariness of the Consent

In order to be valid, the consent must be voluntary. *Amos v. United States,* 255 U.S. 313 (1921). It must "not be coerced, by explicit or implicit means, by implied threat or covert force . . . no matter how subtly . . . applied." *Schneckloth v. Bustamonte,* 412 U.S. 218, 228 (1973) (dictum). "'[W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving [by a preponderance of the evidence, *see United States v. Matlock,* 415 U.S. 164, 177, 177-78 n.14 (1974)] that the consent was, in fact, freely and voluntarily given.'" *Schneckloth v. Bustamonte,* 412 U.S. at 222, and cases cited; *see also Florida v. Royer,* 460 U.S. 491, 497 (1983) (plurality opinion); *United States v. Mendenhall,* 446 U.S. 554, 557 (1980) (dictum).

As with confessions, see § 24.03 *infra,* the test of voluntariness is said to turn upon "the totality of all surrounding circumstances," *Schneckloth v. Bustamonte,* 412 U.S. at 226: "[A]ccount must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents," *id.* at 229; *cf. United States v. Watson,* 423 U.S. 411, 424-25 (1976). Factors that may render a person "vulnerable" and particularly susceptible to coercion include youth, emotional disturbance, lack of education, and mental deficiency. *See, e.g.*, *State v. Butler*, 232 Ariz. 84, 88-89, 302 P.3d 609, 613-14 (2013); *In re J.M.*, 619 A.2d 497, 502-04 (D.C. 1992); and see § 24.05 *infra.*

Courts are loth to find voluntary consent when police entry is sought under an apparent show of authority to enter and is merely acquiesced in by the occupant. *Johnson v. United States,* 333 U.S. 10 (1948); *Bumper v. North Carolina,* 391 U.S. 543 (1968); *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 329 (1979). *See also United States v. Shaw*, 707 F.3d 666, 669 (6th Cir. 2013) ("An officer may not falsely tell a homeowner that he has an arrest warrant for a house, then use that falsity as the basis for obtaining entry into the house."). Valid consent may be

obtained from an individual who is in police custody, *United States v. Watson,* 423 U.S. at 424, but "courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody." *Schneckloth v. Bustamonte,* 412 U.S. at 240 n.29. *See, e.g., United States v. Hall,* 565 F.2d 917, 920 (5th Cir. 1978); *Guzman v. State,* 283 Ark. 112, 120, 672 S.W.2d 656, 659-60 (1984); *Commonwealth v. Smith,* 470 Pa. 220, 228, 368 A.2d 272, 277 (1977). *See also Kaupp v. Texas*, 538 U.S. 626, 631 (2003) (per curiam) (police officers' removal of a 17-year-old suspect from his home in the middle of the night and transporting of him to the stationhouse could not be deemed "consensual" even though the suspect said "'Okay'" in response to an officer's statement "'we need to go and talk'" because there was "no reason to think [the suspect's] answer was anything more than 'a mere submission to a claim of lawful authority'"). Consent during a period of *illegal* custody should be *eo ipso* ineffective. *Florida v. Royer,* 460 U.S. at 507-08 (plurality opinion); *id.* at 508-09 (concurring opinions of Justices Powell and Brennan); *United States v. Murphy*, 703 F.3d 182, 190 (2d Cir. 2012). See § 23.37 *infra.*

At least with regard to persons who have not been taken to the stationhouse or other place of closed confinement, the police may obtain valid consent for a warrantless search without first warning the consenting party of his or her Fourth Amendment rights, *see Coolidge v. New Hampshire,* 403 U.S. 443, 484-90 (1971); *Schneckloth v. Bustamonte,* 412 U.S. at 234; *United States v. Matlock*, 415 U.S. at 167 n.2; *United States v. Watson,* 423 U.S. at 424-25; *Edwards v. Arizona,* 451 U.S. 477, 483-84 (1981) (dictum), since "knowledge of a right to refuse is not a prerequisite of a voluntary consent," *Schneckloth v. Bustamonte,* 412 U.S. at 234; *see also United States v. Drayton*, 536 U.S. 194, 206 (2002); *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). Even with respect to these persons, however, "knowledge of the right to refuse consent is one factor to be taken into account" in determining voluntariness, *Schneckloth v. Bustamente*, 412 U.S. at 227; *see also United States v. Drayton*, 536 U.S. at 206; *United States v. Mendenhall,* 446 U.S. at 558-59, and the Court has not rejected the argument that explicit warnings should be required in the case of persons who *are* in police custody "in the confines of the police station," *United States v. Watson,* 423 U.S. at 424, or in similar settings where "the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation," *Schneckloth v. Bustamonte,* 412 U.S. at 247, in which the reasoning of *Miranda v. Arizona*, 384 U.S. 436 (1966), see §§ 24.07-24.08 *infra,* appears to be fully applicable, *Berkemer v. McCarty,* 468 U.S. 420, 437-40 (1984); *Arizona v. Roberson,* 486 U.S. 675, 685-86 (1988); *United States v. Washington,* 431 U.S. 181, 187 n.5 (1977) (dictum); *Roberts v. United States,* 445 U.S. 552, 560-61 (1980) (dictum). *See Schneckloth v. Bustamonte,* 412 U.S. at 240 n.29, 247 n.36. *Cf. Ohio v. Robinette*, 519 U.S. at 35 (motorist who was stopped for speeding on the open road, and who was thereafter given a verbal warning and received his driver's license back from the police officer, did not have to be "advised that he is 'free to go'" in order for his consent to the officer's request to search the car to be "recognized as voluntary").

§ 23.18(b) Authority To Consent: Consent by a Party Other Than the Respondent

Consent by a party other than the respondent is a significant issue in juvenile court

because the police routinely obtain consent for entry of a respondent's room and search of his or her belongings from the respondent's parent.

The test of a third party's authority to consent is whether the third party possessed — or reasonably appeared to the police to possess — "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. at 171. *See also Georgia v. Randolph*, 547 U.S. 103, 109 (2006) ("the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant"); *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Matlock*, 415 U.S. at 171 n.7. *See also Georgia v. Randolph*, 547 U.S. at 111 ("The constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules."); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969); *Stoner v. California*, 376 U.S. 483 (1964) (hotel manager's consent to the entry of a guest's room is ineffective); *Chapman v. United States*, 365 U.S. 610 (1961) (landlord's consent to the entry of a tenant's house is ineffective); *cf. Payton v. New York*, 445 U.S. 573, 583 (1980) (three-year old child's opening of the door to the house could not constitute valid consent to a police entry to arrest the child's father).

Although "voluntary consent of an individual possessing [or reasonably appearing to possess the requisite] authority" may suffice "*when the suspect is absent*," *Georgia v. Randolph*, 547 U.S. at 109 (emphasis added), a different standard applies when a co-occupant "who later seeks to suppress the evidence . . . is present at the scene and expressly refuses to consent." *Id*. at 106. In *Georgia v. Randolph*, the Court addressed the latter scenario and held that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Id*. at 122-23. *Accord*, *Fernandez v. California*, 134 S. Ct. 1126, 1133 (2014). *See also United States v. Johnson*, 656 F.3d 375, 377-79 (6th Cir. 2011) (defendant's objection to the search at the scene was sufficient to override the consent given by his wife and her grandmother, even though the defendant "was not a full-time resident of the home and his possessory interest was therefore inferior to that of" the consenting individuals, "who lived there full-time": the Supreme Court in *Randolph* "expressly avoided making . . . distinctions" between "relative degrees of possessory interest among residential co-occupants"). *Compare Fernandez v. California*, 134 S. Ct. at 1130, 1134 (domestic violence victim's consent to police entry of the home she shared with the defendant was valid, notwithstanding the defendant's objection at the time the police arrived, because the "consent was provided by [the] . . . abused woman well after her male partner had been [lawfully] removed" by the police; when "an occupant . . . is absent due to a lawful detention or arrest" (and

the Court emphasizes that the defendant did not "contest the fact that the police had reasonable grounds for removing him from the apartment so that they could speak with Rojas, an apparent victim of domestic violence, outside of [the defendant's] . . . potentially intimidating presence," and did "not even contest the existence of probable cause to place him under arrest"), the absent occupant "stands in the same shoes as an occupant who is absent for any other reason") *with State v. Coles*, 217 N.J. 467, 491-92, 494, 91 A.3d 1, 15-16 (2014) ("As the United States Supreme Court's *Fernandez* opinion makes clear, valid third-party consent is subject to the exception that the third party's consent cannot be manufactured through the unlawful detention of the defendant"; the New Jersey Supreme Court holds on state constitutional grounds, "bolstered by Fourth Amendment principles," that the officers' initially valid detention of the defendant became unlawful once his identity and residence were confirmed and thus he "was being unlawfully detained by police, a few houses away from his home" at the time the police obtained consent from his aunt to search his bedroom in her house; the "asserted consent-based search" therefore was unlawful because "[t]he officer's action detaining defendant in a patrol car when probable cause to arrest was lacking effectively prevented any objection from defendant" and "[it] also prevented him from disputing his aunt's statements in response to police inquiries about control over the room").

It should be noted that in *Randolph* the objecting party and the consenting party were both adults; it is unclear whether the result would be different if the objecting party were a juvenile and the consenting party were his or her adult relative, caretaker or other owner of a possessory interest in the premises that the juvenile lacks; but prosecutors will predictably argue that a child cannot countermand an adult possessor's consent to a police entry into premises. In cases of this sort, courts may well draw distinctions between different portions of the premises, holding, for example, that the child's objection cannot exclude the police from common portions of a dwelling but can preclude them from searching the child's own room or areas of it reserved for storage of the child's personal effects. *See Georgia v. Randolph*, 547 U.S. at 112, quoted in the paragraph after next; and *cf.* § 23.35 *infra*.

At least in the absence of a child's refusal of consent to police entry and search of the home, a parent ordinarily will be deemed to have the authority to consent to an entry of the home in which s/he lives with the respondent and to an inspection of any of the "common areas" of the home. The question whether a parent has the authority to consent to a search of his or her child's room is a far less clear-cut issue. In *Griffin v. Wisconsin,* 483 U.S. 868 (1987), the Court observed in *dictum* that the interest of "parental custodial authority" would weigh against the application of the warrant requirement to a "search of a minor child's room," *id.* at 876, but that issue was not before the Court, and the majority decision does not purport to address the constitutional interests that could outweigh the interest of "parental custodial authority." Some lower courts have chosen to adopt a general rule on this subject, either recognizing an absolute parental right to consent emanating from the parent's ownership of, or control over, the premises, *see, e.g., United States v. Stone,* 401 F.2d 32, 34 (7th Cir. 1968); *Maxwell v. Stephens,* 348 F.2d 325, 336-38 (8th Cir. 1965), or conversely holding that the right to consent to a search of one's room is a personal right that cannot be waived by one's parent, *People v. Flowers,* 23 Mich. App.

523, 527, 179 N.W.2d 56, 58 (1970).

Unless defense counsel is in a jurisdiction that has already adopted a categorical rule concerning a parent's power to consent to the search of his or her child's room, counsel's safest course will usually be to elicit facts showing that this particular family treated the respondent's room as reserved for his or her private occupancy and use, to the exclusion of other family members, including the parent(s). Such a showing would bring the case within the general rule that a parent cannot consent to search of an area or object that has been clearly demarcated as reserved for the child's use. *See, e.g., In re Scott K.,* 24 Cal. 3d 395, 595 P.2d 105, 155 Cal. Rptr. 671 (1979) (parent's authority to consent to search of the home did not extend to consenting to search of child's locked toolbox inside the child's bedroom); *State v. Peterson,* 525 S.W.2d 599, 608-09 (Mo. App. 1975) (father could not validly consent to search of child's room because the room was exclusively reserved for the child's occupancy and use); *see also United States v. Peyton*, 745 F.3d 546, 552-56 (D.C. Cir. 2014) (adult defendant's great-great-grandmother, with whom he shared a one-bedroom apartment, lacked both actual and apparent authority to consent to a search of a closed shoebox of his that was next to his bed: "The fact that a person has common authority over a house, an apartment, or a particular room, does not mean that she can authorize a search of anything and everything within that area."); *cf. Georgia v. Randolph*, 547 U.S. at 112 ("when it comes to searching through bureau drawers, there will be instances in which even a person clearly belonging on premises as an occupant may lack any perceived authority to consent; 'a child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted,' 4 LaFave § 8.4(c), at 207 (4th ed. 2004), but no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parents' bedroom"); *Reeves v. Warden,* 346 F.2d 915 (4th Cir. 1965) (co-tenant cannot consent to entry of an area reserved for defendant's private occupancy and use). In making such a showing, counsel should stress any of the following facts that can be proved: The respondent's room has a lock on it and is normally locked when the respondent is not inside the room; the parent does not normally enter the respondent's room without asking the respondent's permission (and the parent does not regularly enter the room at will for the purpose of cleaning it); the family has an understanding that the room has been set aside for the respondent's private use, and this was done for the sake of giving the respondent an area that s/he could view as private and exclusively his or her own.

§ 23.19 WARRANTLESS ENTRY FOR THE PURPOSE OF MAKING A VALID ARREST

If the police possess a valid *arrest* warrant for an occupant of a building, they may enter the premises without a *search* warrant for the purpose of effecting the arrest. *Payton v. New York,* 445 U.S. 573, 602-03 (1980) (dictum).

Before the decisions in *Payton v. New York* in 1980 and *Steagald v. United States,* 451 U.S. 204 (1981), there was a substantial body of caselaw permitting "arrest entries" without any

sort of warrant in a variety of circumstances. The only warrantless arrest entries that survive *Payton* and *Steagald* are those made "in 'hot pursuit' of a fugitive," *Steagald v. United States,* 451 U.S. at 221, or under other "exigent circumstances" (see § 23.20 *infra*) that make it impracticable to obtain a warrant, *Steagald v. United States,* 451 U.S. at 213-16, 218, 221-22. *See United States v. Johnson,* 457 U.S. 537 (1982); *Minnesota v. Olson,* 495 U.S. 91, 100-01 (1990), discussed in § 23.30 *infra.* The mere "'inherent mobility' of persons" sought to be arrested does not suffice to establish this exception to the warrant requirement because the police can cope with that problem "simply by waiting for a suspect to leave the third person's home before attempting to arrest that suspect." *Steagald v. United States,* 451 U.S. at 221 n.14. *Cf. Payton v. New York,* 445 U.S. at 583 (dictum).

Police making either of the two permissible types of arrest entry without a search warrant — entries pursuant to an arrest warrant and entries under exigent circumstances — are governed by the following rules:

(i) The intended arrest itself must be valid within the principles of § 23.07 *supra.* If the arrest is not valid, the arrest entry falls with it. *E.g., Massachusetts v. Painten,* 368 F.2d 142 (1st Cir. 1966), *cert. dismissed,* 389 U.S. 560 (1968).

(ii) There must be probable cause to believe that the person sought to be arrested is within the premises. *E.g., Lankford v. Gelston,* 364 F.2d 197 (4th Cir. 1966); see *Steagald v. United States,* 451 U.S. at 214 n.7 (by implication); *Payton v. New York,* 445 U.S. at 583, 603 (by implication). An arrest entry may not be made unless the officers have "probable cause to believe . . . [that he is] in . . . [the] home." *Maryland v. Buie,* 494 U.S. 325, 332 (1990).

(iii) Upon entry, the police may "search anywhere in the house that . . . [the person sought] might . . . [be] found." *Id.* at 330. However, the entry and search may not exceed the bounds appropriate in hunting for a person, *id.* at 335-36, and they may not intrude into closed areas too small to contain a human being, *see United States v. Ross,* 456 U.S. 798, 824 (1982) (dictum), unless the officers have probable cause to believe that the person sought to be arrested is armed and that they therefore "need to check the entire premises [for weapons] for safety reasons," *Payton v. New York,* 445 U.S. at 589 (dictum); *see Warden v. Hayden,* 387 U.S. 294, 298-300 (1967).

(iv) "Once . . . [the person sought has been] found, . . . the search for him . . . [is] over, and there . . . [is] no longer that particular justification for entering any rooms that had not yet been searched." *Maryland v. Buie,* 494 U.S. at 333. "[A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. See also § 23.08 *supra.* "Beyond that, however, . . . [the only basis for continuing the search or entering additional rooms after the arrest is the "protective sweep" doctrine described in § 23.22(d) *infra,* which requires] articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer

in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie,* 494 U.S. at 334.

Another exception to the search warrant requirement, related to, but analytically distinct from, the "arrest entry" exception, was recognized in *Washington v. Chrisman,* 455 U.S. 1 (1982). When a person who has been validly arrested in a location other than his or her home requests and receives permission from the arresting officer to return home before being taken to the lockup, the officer may accompany that person into the home, as an exercise of "the arresting officer's authority to maintain custody over the arrested person." *Id.* at 6. *Contra, State v. Chrisman,* 100 Wash. 2d 814, 676 P.2d 419 (1984) (on remand, the Washington Supreme Court rejects the *Washington v. Chrisman* holding on state constitutional grounds).

§ 23.20 WARRANTLESS ENTRY UNDER "EXIGENT CIRCUMSTANCES"

As explained earlier, the police may effect an entry for the purpose of making an arrest under "exigent circumstances" that preclude the acquisition of an arrest warrant. See § 23.19 *supra.* Thus, in *Warden v. Hayden,* 387 U.S. 294 (1967), the Court approved a building entry by officers without a warrant for the purpose of arresting a fugitive under circumstances of "hot pursuit": The police observed the defendant flee from the crime scene, saw him enter the building, and reached the building less than five minutes after the defendant. *Cf. United States v. Santana,* 427 U.S. 38, 42-43 & n.3 (1976); *Steagald v. United States,* 451 U.S. 204, 218, 221-22 (1981) (dictum).

"[T]he police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh v. Wisconsin,* 466 U.S. 740, 749-50 (1984). "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Id.* at 750. *Accord, Vale v. Louisiana,* 399 U.S. 30, 34-35 (1970); *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 358-59 (1977); *Mincey v. Arizona,* 437 U.S. 385, 393-94 (1978); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "[I]n the absence of hot pursuit there must be at least probable cause to believe that [facts constituting exigent circumstances — such as the "'imminent destruction of evidence, . . . or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling'" — are] . . . present." *Minnesota v. Olson,* 495 U.S. 91, 100 (1990). *See, e.g.*, *United States v. Collins*, 510 F.3d 697, 701 (7th Cir. 2007) (government's claim of "exigent circumstances" for a warrantless entry of a dwelling, based on an asserted risk of destruction of evidence, is rejected because "[t]he government has failed to show that in this case the police had probable cause to believe that evidence was being, or was about to be, destroyed when they entered"); *United States v. Ramirez*, 676 F.3d 755, 762 (8th Cir. 2012) (hotel room occupant's "attempt to shut the door once he became aware of the police presence outside [the] room" — by partially opening the door in response to an officer's knocking and claiming to be housekeeping staff — did not provide a reasonable basis for believing that "the destruction of evidence was imminent": the occupant "was under no obligation to allow the

officers to enter the premises at that point and was likewise within his bounds in his attempt to close the door"); *Turrubiate v. State*, 399 S.W.3d 147, 149, 154 (Tex. Crim. App. 2013) (exigent circumstances exception is not supported by "probable cause to believe that illegal drugs are in a home coupled with an odor of marijuana from the home and a police officer making his presence known to the occupants"; there must be "additional evidence of . . . attempted or actual destruction based on an occupant's movement in response to the police knock"). *Compare Kentucky v. King*, 131 S. Ct. 1849, 1854, 1858, 1863 (2011) (if the police had a reasonable basis to believe that evidence in a dwelling was at risk of imminent destruction, which the Court "assume[s] for purposes of argument," the exigent circumstances exception could justify a warrantless entry of the dwelling even though "the police, by knocking on the door of a residence and announcing their presence, cause[d] the occupants to attempt to destroy evidence." As long as "[t]he conduct of the police prior to their entry into the apartment was entirely lawful," and "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment," "the exigent circumstances rule applies") *with King v. Commonwealth*, 386 S.W.3d 119, 122 (Ky. 2012), *cert. denied*, 133 S. Ct. 1995 (2013) (on remand of *Kentucky v. King* from the Supreme Court, the Kentucky Supreme Court holds that "the Commonwealth failed to meet its burden of demonstrating exigent circumstances justifying a warrantless entry" because "the sounds . . . [from inside the dwelling that the police] described at the suppression hearing [as evidencing efforts to destroy evidence] were indistinguishable from ordinary household sounds, and were consistent with the natural and reasonable result of a knock on the door") *and State v. Campbell*, 300 P.3d 72, 74, 78-79(Kan. 2013) ("the exigent circumstances exception does not apply in light of the officer's unreasonable actions in creating the exigency" by not "simply knock[ing] on the door and wait[ing] for an answer . . . [or "announc[ing] his presence" but instead] covering the peephole and positioning himself to block the occupant's ability to determine who was standing at the door," thereby causing an occupant to "open[] the door about a third of the way" while visibly armed with a gun).

In *Welsh v. Wisconsin,* the Court held that in cases of arrest entries under a claim of exigent circumstances, "an important factor to be considered in determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." 466 U.S. at 753. Explaining that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed," *ibid.,* the Court in *Welsh* struck down a warrantless home entry to make an arrest for the offense of driving while intoxicated. The Court found that "the best indication of the State's interest in precipitating an arrest" was the State's classification of the offense as "a noncriminal, civil forfeiture offense" and refused to allow an arrest entry for such an offense, notwithstanding the risk that "evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant." *Id.* at 754. The *Welsh* opinion did not go quite as far as holding that "warrantless entry to arrest a misdemeanant is never justified, but only that such entry should be rare." *Stanton v. Sims*, 134 S. Ct. 3, 6 (2013) (per curiam). There is, however, language in the *Welsh* opinion that supports a categorical rule limiting warrantless arrest entries under exigent circumstances to felony arrests. *See Welsh v. Wisconsin*, 466 U.S. at 750 n.12, 752-53. At the very least, *Welsh* "counsel[s] that suspicion of minor offenses should

give rise to exigencies only in the rarest of circumstances." *White v. Stanley*, 745 F.3d 237, 240-41 (7th Cir. 2014) ("smell of burning marijuana" inside a house did not provide a basis for exigent-circumstances entry of the house). *See also Minnesota v. Olson,* 495 U.S. at 100-01 (holding that the lower court "applied essentially the correct standard in determining . . . that in assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered," and approving the lower court's "fact-specific application of th[is] . . . proper legal standard . . . [to reject a claim of exigent circumstances even though the] grave crime [of murder] was involved . . . [because] respondent 'was known not to be the murderer but thought to be the driver of the getaway car,' . . . and . . . the police had already recovered the murder weapon"). *Cf. Brigham City v. Stuart*, 547 U.S. at 405 (distinguishing *Welsh v. Wisconsin* on the ground that "*Welsh* involved a warrantless entry by officers to arrest a suspect for driving while intoxicated" and "the 'only potential emergency' confronting the officers was the need to preserve evidence (i.e., the suspect's blood-alcohol level)" whereas "[h]ere, the officers were confronted with ongoing violence occurring within the home"); *Stanton v. Sims*, 134 S. Ct. at 6 (noting that in *Welsh* "'there was no immediate or continuous pursuit of [Welsh] from the scene of a crime'" and cautioning that "despite our emphasis in *Welsh* on the fact that the crime at issue was minor — indeed, a mere nonjailable civil offense — nothing in the opinion establishes that the seriousness of the crime is equally important *in cases of hot pursuit*"; the "federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect," *id*. at 5 (citing cases)).

When the police make a valid arrest entry in "hot pursuit," they may lawfully observe anything in the building that comes into "plain view" while they are seeking out the suspect and effecting his or her arrest, and they may seize objects in "plain view" if, but only if, there is probable cause to believe that the objects are contraband or crime-related. See § 23.22(b) *infra.* They may not search the premises more intensively or intrusively than is necessary to find the person sought to be arrested, *see Arizona v. Hicks,* 480 U.S. 321 (1987), except when that person is known to be armed. In *Warden v. Hayden,* the Court did allow police who entered a building in "hot pursuit" of an armed fugitive to make a warrantless search within the building to the extent necessary to find weapons. 387 U.S. at 298-300.

In addition to "hot pursuit" arrest entries, law enforcement officers may make warrantless building entries in the "exigent circumstances" presented by a manifest need to render assistance to an occupant who is in physical danger or to prevent serious bodily injury. *See Michigan v. Fisher,* 558 U.S. 45, 47-49 (2009) (per curiam) ("emergency aid exception" to the warrant requirement — which permits "law enforcement officials . . . [to] 'enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury'" — justified a warrantless entry of a home by police officers who "respond[ed] . . . . to a report of a disturbance" and, upon "arriv[ing] at the scene," "encountered a tumultuous situation in the house," "found signs of a recent injury, perhaps from a car accident, outside," and "could see violent behavior inside" the house; the circumstances were sufficient to justify a reasonable belief on the officers' part that an occupant "had hurt himself (albeit non-fatally) and

needed treatment that in his rage he was unable to provide, or that [the occupant] was about to hurt, or had already hurt someone else"); *Brigham City v. Stuart*, 547 U.S. at 403 ("law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury"); *Michigan v. Tyler,* 436 U.S. 499, 509-10 (1978) (firefighting officials require neither "a warrant [n]or consent before entering a burning structure to put out the blaze," 436 U.S. at 509; and, because "[f]ire officials are charged not only with extinguishing fires, but with finding their causes," *id.* at 510, they "need no warrant [or consent] to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished," *ibid.*). *See also, e.g.*, *Ryburn v. Huff*, 132 S. Ct. 987, 990-92 (2012) (per curiam); *United States v. Barone,* 330 F.2d 543 (2d Cir. 1964); *Mincey v. Arizona,* 437 U.S. at 392-93 (dictum), and authorities cited; *cf. Wayne v. United States,* 318 F.2d 205 (D.C. Cir. 1963).

In *dicta,* the Supreme Court has frequently suggested the existence of a more general "exigent circumstances" exception to the warrant requirement. *See, e.g., Johnson v. United States,* 333 U.S. 10, 14-15 (1948); *United States v. Jeffers,* 342 U.S. 48, 51 (1951); *Chapman v. United States,* 365 U.S. 610, 615 (1961); *Mincey v. Arizona,* 437 U.S. at 392-94; *Michigan v. Summers,* 452 U.S. 692, 702 n.17 (1981); *cf. Torres v. Puerto Rico,* 442 U.S. 465, 471 (1979); *New York v. Belton,* 453 U.S. 454, 457 (1981). However, the Court has never sustained a warrantless building entry on the "exigent circumstances" theory when the purpose of the entry was to make a *search* unassociated with an arrest or with the peacekeeping responsibilities of the police to provide emergency aid and to avert serious bodily injury. Probably the "exigent circumstances" exception extends no further than "hot pursuit" and "emergency assistance" cases, *see Vale v. Louisiana*, 399 U.S. at 34-35; *Mincey v. Arizona*, 437 U.S. at 392-93, although the tenor of some of the Supreme Court *dicta* does. *See State v. Vargas*, 213 N.J. 301, 305, 313-17, 321-26, 63 A.3d 175, 177, 182-84, 187-89 (2013) (reviewing relevant decisions of the U.S. Supreme Court and concluding that these decisions do not support treating the "community-caretaking" function of the police — as manifested here by the police officers' seeking to "check on the welfare of a resident" in response to concerns expressed by the landlord — as "a justification for the warrantless entry and search of a home in the absence of some form of an objectively reasonable emergency").

§ 23.21 "KNOCK AND ANNOUNCE" REQUIREMENTS: RESTRICTIONS UPON THE MANNER OF POLICE ENTRY

The preceding sections deal with restrictions upon the *circumstances* under which building entries can be made. There are also legal restrictions upon the *manner* of police entry.

In most jurisdictions, "knock and announce" statutes require that the police announce their presence and identity as officers, explain the purpose of their intended entry, and request to be admitted peaceably, before they may break and enter. *See, e.g., Miller v. United States,* 357 U.S. 301 (1958) (construing 18 U.S.C. § 3109 and the local law of the District of Columbia). Although these statutes are commonly framed in terms of police "breaking" open a door, their

requirements are usually held to apply whenever the police open any door, whether locked or unlocked, forcibly or nonforcibly, *see Sabbath v. United States*, 391 U.S. 585 (1968), and in some jurisdictions the statutes are also applied to police entries through an already open door, *People v. Buckner,* 35 Cal. App. 3d 307, 313-14, 111 Cal. Rptr. 32, 36-37 (1973).

The statutes or cases construing the statutes usually provide for emergency exceptions to the "knock and announce" requirement. The exceptions commonly include situations in which there is reasonable ground to believe that an announcement would (i) jeopardize the safety of the entering officer, (ii) cause the destruction of evidence, or (iii) be a "useless gesture" because it is apparent from the surrounding circumstances that the occupants of the premises already know of the authority and purpose of the police. *See, e.g., Miller v. United States,* 357 U.S. at 308-10; *Sabbath v. United States,* 391 U.S. at 591; *cf. Dalia v. United States,* 441 U.S. 238, 247-48 (1979); *Washington v. Chrisman,* 455 U.S. 1, 10 n.7 (1982).

The Supreme Court has recognized that "knock and announce" requirements are embodied in the Fourth Amendment. *See Wilson v. Arkansas*, 514 U.S. 927 (1995) (the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment"). *Accord*, *United States v. Banks*, 540 U.S. 31, 36-37 (2003); *United States v. Ramirez*, 523 U.S. 65, 70 (1998); *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997). The Court has held, however, that the exclusionary rule is not available to suppress evidence obtained in the course of a building entry that is unconstitutional solely because the entering officers violated the Fourth Amendment "knock and announce" rule. *Hudson v. Michigan*, 547 U.S. 586, 599-600, 602 (2006). *See also id*. at 602-03 (Justice Kennedy, concurring in part and concurring in the judgment) (one member of the 5-Justice majority writes separately to "underscore[]" the following "[t]wo points": "First, the knock-and-announce requirement protects rights and expectations linked to ancient principles in our constitutional order . . . [and] [t]he Court's decision should not be interpreted as suggesting that violations of the requirement are trivial or beyond the law's concern. Second, the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today's decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression."). Because *Hudson v. Michigan* concerned the nature and effects of a Fourth Amendment violation, the decision self-evidently does not restrict the availability of the exclusionary rule to suppress evidence seized in violation of "knock and announce" requirements established by federal or state statutes or state constitutional or common law. *See, e.g.*, *Commonwealth v. Sanchez*, 907 A.2d 477, 488-90 (Pa. 2006) (a post-*Hudson* decision analyzing whether police conduct violated state's "knock and announce" statute).

§ 23.22 SCOPE OF PERMISSIBLE POLICE ACTIVITY AFTER ENTERING THE PREMISES

§ 23.22(a) The Requisite Relationship Between Police Activity Inside the Dwelling and the Purpose of the Entry

The scope of an officer's investigatory powers, once inside a building, is defined by the circumstances that permitted his or her entry under the principles of §§ 23.16-23.20 *supra. See, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 611 (1999) ("the Fourth Amendment . . . require[s] that police actions in execution of a warrant be related to the objectives of the authorized intrusion"); *Maryland v. Garrison,* 480 U.S. 79, 87 (1987) (normally, "the purposes justifying a police search strictly limit the permissible extent of the search"); *id.* at 84 ("the scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found'"); *New York v. Belton,* 453 U.S. 454, 457 (1981) ("'[t]he scope of [a] search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible'"); *Horton v. California,* 496 U.S. 128, 140 (1990) ("[i]f the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more"). A search must be "carefully tailored to its justifications," so as to avoid "tak[ing] on the character of the wide-ranging exploratory searches the Framers [of the Fourth Amendment] intended to prohibit." *Maryland v. Garrison,* 480 U.S. at 84. *See also Maryland v. Buie,* 494 U.S. 325, 335-36 (1990).

Thus, as explained in § 23.17(g) *supra,* when the police enter a dwelling or other premises pursuant to a search warrant, the search ordinarily may not extend into areas that are not covered by the warrant or into areas that could not contain the objects specified in the warrant. If the entry was predicated upon the consent of a member of the household, the officers' movement within the home is limited by the scope of the consent that was given and the extent of the individual's authority to consent. See § 23.18 *supra.* If the entry was made for the purpose of effecting an arrest, whether with or without a warrant, the officers possess only the freedom of movement necessary to locate and to apprehend the person sought to be arrested (see § 23.19 *supra*), unless they can justify a further search of the premises as a "protective sweep" (see § 23.22(d) *infra*). If the entry was made in the exercise of the officers' peacekeeping functions, they may not undertake even the most minimal search beyond the needs of those functions. *Arizona v. Hicks,* 480 U.S. 321 (1987). *See, e.g.*, *In the Matter of the Welfare of J.W.L.*, 732 N.W.2d 332, 339 (Minn. Ct. App. 2007) (police officer, who lawfully entered a dwelling without a warrant under the exigent circumstances exception due to a 911 call from inside the dwelling, thereafter violated the Fourth Amendment by taking photographs of graffiti in a bedroom that were subsequently used to connect the respondent to graffiti incidents).

§ 23.22(b) Police Officers' Search and Seizure of Objects While Searching the Premises; the "Plain View" Exception to the Warrant Requirement

Often, while inside the premises, police officers catch sight of an object that they believe to be contraband or evidence of a crime. The officer will then inspect the object further or will seize it.

As explained in § 23.15(d) *supra,* a respondent has a constitutionally protected interest against the search or seizure of an object that belongs to him or her, regardless of whether s/he is

on the premises at the time the search or seizure takes place, and regardless of whether s/he has any privacy interest in the premises. Like other searches and seizures made without a warrant, "warrantless searches of such effects are presumptively unreasonable," *United States v. Jacobsen,* 466 U.S. 109, 114-15 (1984), and must be brought within one of the exceptions to the warrant requirement in order to be valid.

However, an officer's mere observation of an object from a location where the officer is entitled to be is not considered a "search" within the meaning of the Fourth Amendment. See § 23.16 *supra.* "[O]bjects falling in the plain view of an officer who has a right to be in the position to have that view" may be scrutinized without any further justification and without Fourth Amendment limitation. *Harris v. United States,* 390 U.S. 234, 236 (1968); *see Arizona v. Hicks,* 480 U.S. 321, 325 (1987). As long as the officer's entry and movement to the location were justified by either a warrant or an exception to the warrant requirement, the "viewing of the object in the course of a lawful search is as legitimate as it would have been in a public place." *Id.* at 327.

Although simple observation of the object is not a constitutionally regulated "search," any action by the police that "'meaningfully interfere[s]' with [a] respondent's possessory interest in [an object] . . . amount[s] to a seizure" within the Fourth Amendment. *Arizona v. Hicks,* 480 U.S. at 324; *Horton v. California,* 496 U.S. at 136-37. And any physical manipulation of the object that reveals its hidden features or contents is a "search" of the object. Thus, in *Hicks,* when officers who had entered a residence in an emergency peace-keeping situation observed what they suspected to be stolen stereo equipment, the Court acknowledged in *dictum* that their "mere recording" of a stereo component's serial number would not constitute a search or seizure if the serial number was in plain view, 480 U.S. at 324, but the Court held that when the officers went beyond merely observing the stereo equipment and moved it slightly for the purpose of disclosing serial numbers that were *not* in plain view, their action constituted a *"search* of objects in plain view," *id.* at 327. This was an "independent search," "unrelated to the objectives of the authorized intrusion" into the residence, which "produce[d] a new invasion of respondent's privacy," and it consequently violated the Fourth Amendment in the absence of adequate justification. *Id.* at 325.

To justify a "seizure" or a "search" of an object which is in "plain view," the prosecution must demonstrate that the following three conditions are satisfied:

(i) The officer must be lawfully in the location from which s/he observed the object. *See, e.g., Arizona v. Hicks,* 480 U.S. at 326 ("'the initial intrusion that brings the police within plain view of such [evidence] [must be] . . . supported . . . by one of the recognized exceptions to the warrant requirement,' . . . such as the exigent-circumstances [exception]"); *Horton v. California,* 496 U.S. at 137 ("[i]t is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed"); *State v. Kruse*, 306 S.W.3d 603 (Mo. App. 2010); *cf. Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Minnesota v. Dickerson*, 508 U.S.

366, 375 (1993), discussed in § 23.10 *supra* (police must be "lawfully in a position from which they view an object").

(ii) The seizure or search of the object must be justified by "probable cause to believe the [object] . . . was stolen," *Arizona v. Hicks,* 480 U.S. at 328, or is "contraband," *id.* at 327 (dictum), or was an instrument or is evidence of a crime. *Cf. Minnesota v. Dickerson*, 508 U.S. at 375 (police must have "probable cause to believe that an object in plain view is contraband"). As the Court explained in *Arizona v. Hicks,* a seizure or search of an object discovered "during an unrelated search and seizure" must be justified under the same "standard of *cause*" that "would have been needed to obtain a warrant for that same object if it had been known to be on the premises." *Id.* at 327. The "incriminating character [of the object] must . . . be 'immediately apparent.'" *Horton v. California,* 496 U.S. at 136. *Cf. Minnesota v. Dickerson*, 508 U.S. at 375 ("If . . . the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object — *i.e.,* if 'its incriminating character [is not] "immediately apparent,"' . . . — the plain-view doctrine cannot justify its seizure."). Thus, in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), the plain view exception did not justify a police seizure of "two automobiles parked in plain view on the defendant's driveway . . . [because even though] the cars were obviously in plain view, . . . their probative value remained uncertain until after the interiors were swept and examined microscopically." *Horton v. California,* 496 U.S. at 134-37 (explaining the holding in *Coolidge*). *Compare Horton,* 496 U.S. at 142 (upholding a police seizure of firearms and stun guns in plain view under circumstances in which "it was immediately apparent to the officer that they constituted incriminating evidence"). (Under certain narrowly defined exigent circumstances, when "the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime," a seizure might be "justified on less than probable cause." *Arizona v. Hicks,* 480 U.S. at 327. Thus far, however, this narrow exception has been found to apply only in cases of "investigative detention of [a] vehicle suspected to be transporting illegal aliens," *ibid.* (citing to *United States v. Cortez,* 449 U.S. 411 (1981), and *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975)) and in a case involving a "seizure of [a] suspected drug dealer's luggage at [an] airport to permit exposure to [a] specially trained dog," *Arizona v. Hicks,* 480 U.S. at 327 (citing to *United States v. Place,* 462 U.S. 696 (1983)).) If a police officer has probable cause to believe that a certain substance is a narcotic, then the additional seizure involved in destroying a minute amount of the substance in the course of a narcotic "field test" does not necessitate a search warrant. *United States v. Jacobsen,* 466 U.S. at 124-26.

(iii) In cases in which a police seizure of an object involves an invasion of the respondent's interests above and beyond the initial observation of the object, the additional intrusion also must be constitutionally justified. "[N]ot only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself," *Horton v. California,* 496 U.S. at 137. *Cf. Minnesota v. Dickerson*, 508 U.S. at 375 ("the officers [must] have a lawful right of access to the object"). Thus, for example, "'[i]ncontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But

even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.'" *Horton v. California*, 496 U.S. at 137 n.7. *See, e.g.*, *People v. Vega*, 276 A.D.2d 414, 414, 714 N.Y.S.2d 291, 291-92 (N.Y. App. Div., 1st Dep't 2000) (police officers, who observed contraband in the defendant's room from the officers' "lawful vantage point" in "the hallway in th[e] residential hotel" could not rely on the "plain view" doctrine to enter the room and seize the contraband: "it was still necessary to establish that the police had lawful access to the [interior of the defendant's room] . . . either by way of a search warrant or some exception to the warrant requirement, such as exigent circumstances").

In *Coolidge v. New Hampshire,* a plurality of the Court concluded that the plain view doctrine should also be subject to a requirement that "the discovery of [the] evidence in plain view . . . be inadvertent," 403 U.S. at 469. Subsequently, in *Horton v. California,* a majority of the Court rejected this rule, holding that "even though inadvertence is a characteristic of most legitimate 'plain view' seizures, it is not a necessary condition." 496 U.S. at 130. However, in the two decades between the *Coolidge* and *Horton* decisions, state court decisions in 46 States had followed the *Coolidge* plurality's approach of recognizing an "inadvertent discovery" requirement for "plain view" searches and seizures. *Horton,* 496 U.S. at 145 (dissenting opinion of Justice Brennan); *see id.* at 149-52, Appendix A (listing the state court decisions). In many of these States, it may be possible to persuade the state courts to retain the "inadvertent discovery" rule as a matter of state constitutional law. *See, e.g.*, *State v. Meyer*, 78 Hawai'i 308, 314 & n.6, 893 P.2d 159, 165 & n.6 (1995); *Commonwealth v. Balicki*, 436 Mass. 1, 9-10, 762 N.E.2d 290, 298 (2002). See generally § 7.09 *supra*.

§ 23.22(c) Detention and Searches of Persons Found on the Premises

Occasionally, in executing a search warrant for a dwelling, the police detain and search one or more individuals who were on the premises at the time the police entered.

If the search warrant specifically names a certain person and authorizes the search of that person, then the police may conduct the search as long as the warrant and the search comply with the requirements described in § 23.17 *supra.* If the warrant does not authorize the search of individuals but merely authorizes a search of the premises to find certain objects, then the officers cannot extend their search of the premises to the individuals present on the premises. "[A] warrant to search a place cannot normally be construed to authorize a search of each individual in that place." *Ybarra v. Illinois,* 444 U.S. 85, 92 n.4 (1979). *See also United States v. Watson*, 703 F.3d 684, 689-94 (4th Cir. 2013). If the police have specific and articulable facts giving rise to a reasonable belief that a particular individual on the premises is armed and dangerous, then the officers may conduct a *Terry* frisk of that individual. See § 23.10 *supra.* But "[t]he 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized . . . search is taking place." *Ybarra v. Illinois,* 444 U.S. at 94.

In *Ybarra v. Illinois,* the Court struck down a police pat-down of a patron of a bar, who was on the premises during the execution of a search warrant for the bar and the bartender. The Court explained that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." 444 U.S. at 91. As several lower courts have recognized, the principles established in *Ybarra* necessarily apply not only to searches of patrons of a commercial establishment but also to searches of individuals who are visiting a private home at the time that the police effect an entry and search of the home. *See, e.g., United States v. Clay,* 640 F.2d 157, 161-62 (8th Cir. 1981); *People v. Tate*, 367 Ill. App. 3d 109, 853 N.E.2d 1249, 304 Ill. Dec. 883 (2006); *State v. Vandiver*, 257 Kan. 53, 891 P.2d 350 (1995); *Beeler v. State,* 677 P.2d 653 (Okla. Crim. App. 1984); *Lippert v. State,* 664 S.W.2d 712 (Tex. Crim. App. 1984). *Cf. Leveto v. Lapina*, 258 F.3d 156, 163-65 (3d Cir. 2001) (Alito, J.) (IRS agents executing a search warrant could not validly frisk a homeowner in the absence of justification for a *Terry* frisk). *See also Guy v. Wisconsin*, 509 U.S. 914, 914-15 (1993) (Justice White, dissenting from denial of *certiorari*) (describing a division of authority among lower courts with regard to "whether this Court's holding in *Ybarra v. Illinois* . . . applies where a search warrant for drugs is executed in a private home").

In *Michigan v. Summers*, 452 U.S. 692, 705 (1981), and *Muehler v. Mena*, 544 U.S. 93 (2005), the Court did hold that an owner or resident of premises may be detained and prevented from leaving the premises while the police execute a search warrant of the premises. *See also Bailey v. United States*, 133 S. Ct. 1031 (2013); *Los Angeles County v. Rettele*, 550 U.S. 609 (2007) (per curiam); *Illinois v. McArthur*, 531 U.S. 326 (2001), discussed in § 23.06(c) *supra*. Using broad language, the Court stated in *Summers*, and reiterated in *Muehler*, that "a warrant to search for contraband . . . implicitly carries with it the limited authority to detain the occupants of the premises while a proper search [of the premises themselves] is conducted." *Summers*, 452 U.S. at 705; *Muehler*, 544 U.S. at 98 (quoting *Summers*); *Los Angeles County v. Rettele*, 550 U.S. at 613 (quoting *Summers*); *Bailey*, 133 S. Ct. at 1037 (quoting *Summers*). However, the facts of these cases and the reasoning of the opinions demonstrate that the phrase "occupant[] of the premises" is meant to refer solely to "residents" (terms that are used interchangeably by the *Summers* Court, *see id*. at 701-03; *see also Rettele*, 550 U.S. at 609, 615; *Muehler*, 544 U.S. at 106, 110 (Justice Stevens, concurring) (concurring opinion, representing the views of 4 Justices, describes occupants as "resident[s]," each of whom "had his or her or own bedroom") and not to persons who happen to be visiting the premises at the time when the police effect their entry. In *Summers*, in which the Court announced the rule that an occupant may be detained while the police search a home pursuant to a warrant, the defendant owned the house that was searched and several of the Court's rationales for upholding the detention were predicated upon the defendant's status as the owner of the premises. The Court explained that the defendant, as owner of the house, could facilitate the search by "open[ing] locked doors or locked containers to avoid the use of force that is . . . damaging to property," 452 U.S. at 703; the Court pointed out that "residents" like the defendant would ordinarily wish to "remain in order to observe the search of their possessions," *id*. at 701; and it observed that since the place of detention was the detainee's own residence, the seizure would "add only minimally to the public stigma associated with the search itself," *id*. at 702. In *Muehler*, the Court did not revisit the reasoning for the rule,

treating its earlier holding in *Summers* as "categorical[ly]" authorizing the detention of a resident who "was asleep in her bed" when the police executed the warrant and "entered her bedroom" (544 U.S. at 96, 98), and the Court focused on a new question presented by the facts of *Muehler*: whether the police improperly engaged in the additional intrusion of handcuffing this resident for the duration of the search. The Court concluded that handcuffing is permissible if this measure is necessitated by "inherently dangerous" circumstances such as those that existed in the *Muehler* case, where the "warrant authoriz[ed] a search for weapons and a wanted gang member reside[d] on the premises" and there was a "need to detain multiple occupants." *Id*. at 100. *But cf. id*. at 102 (Justice Kennedy, concurring) (member of 5-Justice majority concurs to explain, *inter alia*, that "[t]he restraint should . . . be removed if, at any point during the search, it would be readily apparent to any objectively reasonable officer that removing the handcuffs would not compromise the officers' safety or risk interference or substantial delay in the execution of the search."). In *Bailey*, the Court made clear that the *Summers* rule is strictly limited to "cases [in which] the occupants detained were found within or immediately outside a residence at the moment the police officers executed the search warrant" (133 S. Ct. at 1038). "A spatial constraint defined by the immediate vicinity of the premises to be searched is . . . required for detentions incident to the execution of a search warrant. The police action permitted here — the search of a residence — has a spatial dimension, and so a spatial or geographical boundary can be used to determine the area within which both the search and detention incident to that search may occur. Limiting the rule in *Summers* to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification. Once an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe." (*Id*. at 1042.) *Dicta* in the *Bailey* opinion use the term "occupant" without specifying the precise connection that it implies between the premises being searched and the individual whose detention is in question under *Summers* (*see id*. at 1038-41), but the Court does describe the *Summers* rule as involving a "detention [that] occurs in the individual's own home" (*id*. at 1041), and the Court emphasized that the "exception [that *Summers* created] to the Fourth Amendment rule prohibiting detention absent probable cause must not diverge from its purpose and rationale" (*id*. at 1038).

As some lower courts have concluded, the *Summers* rule cannot be construed as authorizing detentions of individuals who happen to be visiting the premises at the time of a police entry. *See, e.g.*, *Lippert v. State*, 664 S.W.2d 712 (Tex. Crim. App. 1984); *State v. Broadnax*, 98 Wash. 2d 289, 654 P.2d 96 (1982). *See also Commonwealth v. Catanzaro*, 441 Mass. 46, 51-52 & n.10, 803 N.E.2d 287, 291 & n.10 (2004). In order to detain visitors, the police must have the specific and articulable facts necessary to conduct a *Terry* stop. *See* § 23.09 *supra*. Nor does the *Summers* rule authorize a *frisk* of anyone — visitor, resident or owner — in the course of executing a search warrant for premises. *See, e.g.*, *Leveto v. Lapina*, 258 F.3d at 163-66; *Denver Justice and Peace Committee, Inc. v. City of Golden*, 405 F.3d 923, 928-32 (10th Cir. 2005). As § 23.10 *supra* indicates, the power to detain an individual briefly for investigation, whether under *Terry* or under *Summers*, carries with it no automatic power to frisk that individual; any frisk must be justified by a particularized and objectively reasonable suspicion

that the detainee is armed and dangerous. *See, e.g.*, *id*. at 932.

§ 23.22(d) "Protective Sweep" of the Premises

"A 'protective sweep' is a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie,* 494 U.S. 325, 327 (1990). When the police "effect[] the arrest of a suspect in his home pursuant to an arrest warrant, [the police] may conduct a warrantless protective sweep of all or part of the premises . . . if the searching officer 'possesse[s] . . . a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[s] . . ." the officer in believing' . . . that the area swept harbor[s] . . . an individual posing a danger to the officer or others." *Id.* at 327-28. *See also id.* at 334, 335-37. The Court in *Buie* "emphasize[d] that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is . . . not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. . . . The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Id.* at 335-36.

Part D. Automobile Stops, Searches, Inspections, and Impoundments

§ 23.23 THE THRESHOLD ISSUE: RESPONDENT'S INTEREST IN THE AUTOMOBILE OR EXPECTATION OF PRIVACY INSIDE IT

Just as a respondent who seeks to challenge a police entry and search of premises must have a constitutionally protected interest or legitimate expectation of privacy in the premises, see § 23.15 *supra,* so, too, a respondent who seeks to challenge a police stop or search of an automobile must have the requisite possessory or privacy interest in the vehicle — or, alternatively, a sufficient personal interest in its unhindered movement — to complain about the particular police action in question.

A respondent has a sufficient interest to complain of an unconstitutional automobile search in each of the following situations:

(i) The automobile belongs to the respondent, even though it is out of his or her possession at the time of the search, *see, e.g., Cash v. Williams,* 455 F.2d 1227, 1229-30 (6th Cir. 1972); *United States v. Powell*, 929 F.2d 1190, 1196 (7th Cir. 1991) (an absentee owner has standing to challenge the search of a vehicle although s/he does not have standing to challenge the mere stopping of the vehicle for a purported traffic violation); *State v. Foldesi*, 131 Idaho 778, 963 P.2d 1215 (Idaho App. 1998), as long as the respondent has not given up possession of the vehicle in a manner that deprives him or her of any remaining legitimate expectation of privacy in it, *United States v. Jenkins*, 92 F.3d 430, 434-35 (6th

Cir. 1996); *see generally Rakas v. Illinois,* 439 U.S. 128 (1978).

(ii) The automobile is in the respondent's lawful possession under circumstances that comport the possessor's ordinary right to exclude undesired intrusions by others, *see Rakas v. Illinois,* 439 U.S. at 144 n.12 (dictum). This would certainly include situations in which the respondent is driving a family member's or friend's automobile with the permission of the owner. *See, e.g.*, *United States v. Valdez Hocker*, 333 F.3d 1206 (10th Cir. 2003); *People v. Lewis*, 217 A.D.2d 591, 593, 629 N.Y.S.2d 455, 457 (N.Y. App. Div., 2d Dep't 1995). *Cf. Minnesota v. Olson,* 495 U.S. 91, 96-100 (1990); *Jones v. United States,* 362 U.S. 257 (1960), as explained in *Rakas v. Illinois,* 439 U.S. at 141. It would also include situations in which the respondent rented the automobile from a car rental agency. *Cf. Stoner v. California,* 376 U.S. 483 (1964) (hotel room). When a rental agreement limits the persons who may drive the vehicle, the question of the standing of an unauthorized driver — someone to whom the renter has entrusted the vehicle in violation of that limitation — has divided the courts. *See United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006) (holding that an unauthorized driver has standing if, but only if, he or she has received the renter's permission to use the car), and cases collected in *id*. at 1196-97.

(iii) The automobile is a taxicab in which the respondent is a lawful passenger. *See Rios v. United States,* 364 U.S. 253, 262 n.6 (1960).

(iv) The respondent is a lawful occupant of any vehicle at the time of the search, *United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006) ("when a vehicle is illegally stopped by the police, no evidence found during the stop may be used by the government against any occupant of the vehicle unless the government can show that the taint of the illegal stop was purged," *id*. at 251), and cases cited; *see also United States v. Kimball*, 25 F.3d 1, 5-6 (1st Cir. 1994), and the search invades an area of the vehicle in which, as a lawful occupant, the respondent has "any legitimate expectation of privacy," *Rakas v. Illinois,* 439 U.S. at 150 n.17 (dictum). *See also Bond v. United States*, 529 U.S. 334, 338-39 (2000) ("a bus passenger [who] places a bag in an overhead bin" has a reasonable expectation that "other passengers," "bus employees," and police officers will not "feel the bag in an exploratory manner").

A respondent can complain of an unconstitutional *stop* of an automobile if s/he was in the vehicle at the time of the stop. *Brendlin v. California*, 551 U.S. 249, 251, 257 (2007) ("When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. . . . We hold that a passenger is seized as well and so may challenge the constitutionality of the stop."; "A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver"); *United States v. Grant*, 349 F.3d 192, 196 (5th Cir. 2003). If the respondent was not in the automobile at the time of the stop, s/he can nevertheless

challenge the stop if s/he is the owner of the automobile, *see Cash v. Williams,* 455 F.2d at 1229-30, or if s/he has established a sufficient privacy interest in the automobile through repeated use to invoke the same rights as an owner. *Cf. Jones v. United States,* 362 U.S. 257 (1960), as explained in *Rakas v. Illinois,* 439 U.S. at 141; *Minnesota v. Olson,* 495 U.S. at 96-100.

Even when an individual has the requisite possessory interest or expectation of privacy in an automobile, s/he cannot claim any privacy rights with respect to the car's Vehicle Identification Number (VIN) located on the dashboard "because of the important role played by the VIN in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the VIN is placed in plain view." *New York v. Class,* 475 U.S. 106, 114 (1986). In *Class,* the Court held that the public nature of the VIN empowers the police to move papers obstructing the VIN, in order to view the number in the course of a valid stop for a traffic violation, at least under circumstances in which the driver on his or her own initiative leaves the vehicle and therefore is not in a position to accede to a lawful request to move the papers so that the number can be inspected. *See id.* at 114-16. *Contra, People v. Class,* 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986) (reaffirming, on state constitutional grounds, the opinion reversed in *New York v. Class, supra*). In cases in which an entry into a car was not justified by a traffic violation, some lower courts have ruled that the public nature of the VIN does not justify the opening of the vehicle for the purpose of inspecting the VIN. *See People v. Piper,* 101 Ill. App. 3d 296, 427 N.E.2d 1361, 56 Ill. Dec. 815 (1981); *State v. Simpson,* 95 Wash. 2d 170, 622 P.2d 1199 (1980); *but see United States v. Forrest,* 620 F.2d 446 (5th Cir. 1980).

For discussion of the "automatic standing" principle and other doctrines governing "standing" to challenge searches and seizures, see § 23.15 *supra.*

§ 23.24 EVIDENTIARY SEARCHES OF AUTOMOBILES: THE "AUTOMOBILE EXCEPTION" TO THE WARRANT REQUIREMENT

Automobiles are the subject of a specialized Fourth Amendment jurisprudence stemming from *Carroll v. United States,* 267 U.S. 132 (1925). As presently interpreted, *Carroll* permits warrantless stopping and search of moving vehicles if, but only if, the searching officers have probable cause to believe that seizable objects are concealed in the vehicle. *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 315 n.10 (1978) (dictum); *Wyoming v. Houghton*, 526 U.S. 295, 300-01 (1999); *compare Chambers v. Maroney*, 399 U.S. 42 (1970), *and Colorado v. Bannister,* 449 U.S. 1 (1980) (per curiam), *with Preston v. United States,* 376 U.S. 364 (1964), *and Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216 (1968). *See also California v. Carney,* 471 U.S. 386 (1985) (extending the *Carroll* rule to a motor home parked in a downtown parking lot); *Florida v. White*, 526 U.S. 559, 565, 566 (1999) (the *Carroll* rule permitting search of a vehicle based on probable cause to believe that it contains contraband may permit seizure of the car based on "probable cause to believe that the vehicle *itself* was contraband" as long as "the warrantless seizure . . . did not involve any invasion of respondent's privacy" because, for example, the vehicle was in "a public area").

If there is probable cause to believe that seizable objects may be concealed in any part of the vehicle, then the police may search every part of the vehicle and every container within it which is capable of holding the seizable object. *Wyoming v. Houghton*, 526 U.S. at 307; *California v. Acevedo*, 500 U.S. 565, 580 (1991); *United States v. Ross,* 456 U.S. 798 (1982); *United States v. Johns,* 469 U.S. 478, 482-83 (1985). The only limitation on the scope of the search is that it may not extend into areas incapable of holding the object, including containers that are not "capable of concealing the object of the search." *Wyoming v. Houghton*, 526 U.S. at 307 (dictum); *United States v. Ross,* 456 U.S. at 820-21, 823-24 (dictum).

The *Carroll* decision and its progeny establishing special rules for automobile searches and seizures are based in substantial part upon the inherent mobility of automobiles, which renders the securing of a warrant impracticable. *See Wyoming v. Houghton*, 526 U.S. at 304; *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam); *California v. Carney,* 471 U.S. at 390-91. (The caselaw also mentions two other factors that distinguish automobiles from buildings — the lesser degree of privacy that an automobile offers, *e.g.*, *Pennsylvania v. Labron*, 518 U.S. at 940; *South Dakota v. Opperman,* 428 U.S. 364, 367 (1976), and the fact that automobiles are subject to extensive noncriminal regulation by the state, *e.g.*, *Pennsylvania v. Labron*, 518 U.S. at 940; *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973). But the latter factors have never been invoked independently to uphold a warrantless police search that invades what privacy an automobile *does* afford, in a case where no noncriminal regulatory concern drew police attention to a particular vehicle.) Accordingly, in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), the Court held that an almost totally immobilized automobile could not be searched without a warrant. *Coolidge* arguably forbids the application of *Carroll*'s automobile exception to the warrant requirement in situations in which there are no reasonable grounds to apprehend that a vehicle may be moved before a warrant can be obtained. *See id.* at 462 (plurality opinion) (except "where 'it is not practicable to secure a warrant,' . . . the 'automobile exception,' despite its label, is simply irrelevant"); *United States v. Bazinet*, 462 F.2d 982, 986 n.3 (8th Cir. 1972). The *Carroll* rule applies, in other words, only "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes — temporary or otherwise." *California v. Carney,* 471 U.S. at 392.

When the police have probable cause to make a warrantless search of a vehicle under *Carroll* but, instead of searching it on the street, they lawfully impound it, they may exercise the *Carroll* prerogative to search it without a warrant later at the police station, *e.g., Chambers v. Maroney,* 399 U.S. at 52; *Michigan v. Thomas,* 458 U.S. 259, 261-62 (1982) (per curiam); *Florida v. Meyers,* 466 U.S. 380 (1984) (per curiam); *and see United States v. Ross,* 456 U.S. at 807 n.9 ("if an immediate search on the street is permissible without a warrant, a search soon thereafter at the police station is permissible if the vehicle is impounded"), at least when no additional invasion of privacy interests results from their delay in making the search and when the delay is not inordinate, *see United States v. Johns,* 469 U.S. at 487 (dictum), citing Justice White's dissenting opinion in *Coolidge v. New Hampshire,* 403 U.S. at 523. The same rule permitting delayed searches applies to closed containers found in the vehicle. *United States v. Johns*, 69 U.S. at 482-83.

§ 23.25 INVENTORY SEARCHES OF IMPOUNDED VEHICLES

The immediately preceding section dealt with the circumstances under which the police can conduct warrantless searches of automobiles "for the purpose of investigating criminal conduct, with the validity of the searches . . . dependent on the application of the probable cause and warrant requirements of the Fourth Amendment." *Colorado v. Bertine,* 479 U.S. 367, 371 (1987). "By contrast, an inventory search may be 'reasonable' under the Fourth Amendment even though it is not conducted pursuant to warrant based upon probable cause." *Ibid.*

The police may conduct an "inventory search" of the contents of an impounded automobile, including an examination of the contents of containers found in the automobile (*id.* at 374-75), if the inventory search complies with the following three requirements:

(i) The search must be conducted in accordance with "standardized procedures," *id.* at 372, based upon "reasonable police regulations relating to inventory procedures," *ibid. Accord, Florida v. Wells,* 495 U.S. 1, 4 (1990) ("standardized criteria . . . or established routine"); *South Dakota v. Opperman,* 428 U.S. 364, 366, 376 (1976). *See, e.g., Wells,* 495 U.S. at 4-5 (suppressing contraband found in the course of an alleged inventory search because "the Florida Highway Patrol had no policy whatever with respect to the opening of closed containers encountered during an inventory search . . . [and] absent such a policy, the instant search was not sufficiently regulated to satisfy the Fourth Amendment").

(ii) The police must not act "in bad faith or for the sole purpose of investigation," *Colorado v. Bertine,* 479 U.S. at 372. *See also id.* at 374 (speaking of "reasonable police regulations relating to inventory procedures administered in good faith"); *id.* at 376 (noting that "[t]here was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity"); *Florida v. Wells,* 495 U.S. at 4 ("an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence"); *South Dakota v. Opperman,* 428 U.S. at 376 (police had no "investigatory . . . motive"); *Cady v. Dombrowski,* 413 U.S. 433, 447 (1973) (officer conducting the search had no purpose to look for criminal evidence). *See also City of Indianapolis v. Edmond*, 531 U.S. 32, 45-46 (2000) (dictum) (discussing "inventory search" caselaw).

(iii) The vehicle must be lawfully "in the custody of the police," *Colorado v. Bertine,* 479 U.S. at 372, in the sense that an adequate justification exists for the police to impound the vehicle, *see South Dakota v. Opperman,* 428 U.S. at 365-66, 375; *Cady v. Dombrowski,* 413 U.S. at 443. Depending upon state law, the police may be empowered to impound an automobile for traffic or parking violations, *South Dakota v. Opperman,* 428 U.S. at 365-66, 375; incident to the arrest of the driver, *Colorado v. Bertine,* 479 U.S. at 368 & n.1; and in connection with routine highway management duties, such as the removal of a disabled vehicle that was "a nuisance along the highway," *Cady v. Dombrowski,* 413 U.S. at 443.

In approving an inventory search in *South Dakota v. Opperman,* the Court emphasized

that the car's owner was "not present to make other arrangements for the safekeeping of his belongings." 428 U.S. at 375. In its subsequent decision in *Colorado v. Bertine,* the Court held that the Fourth Amendment does not require the police to forgo an inventory search in favor of the "'less intrusive'" procedure of offering a driver "the opportunity to make other arrangements for the safekeeping of his property." 479 U.S. at 373. Arguably, *Bertine* means only that the police need not opt for "'less intrusive'" procedures in deciding whether to conduct an inventory search incident to impoundment, whereas *Opperman* implies that the police do have to consider less intrusive alternatives in determining whether it is necessary to impound the car in the first place. The *Bertine* opinion recognizes that impoundments must be based on "standardized criteria, related to the feasibility and appropriateness of parking and locking [the] . . . vehicle rather than impounding it," 479 U.S. at 376, but because the only challenge made to the impoundment in *Bertine* was a claim that the applicable police regulation gave too much discretion to individual officers, *see id.* at 375-76, the Court there did not consider what other constitutional requirements, if any, govern impoundments as a distinct species of Fourth Amendment "seizures" of automobiles. Some state courts have found impoundments to be unreasonable and violative of the Fourth Amendment when the sole purpose of the impoundment was safekeeping of the automobile while the driver was in custody and that goal could have been achieved by the less intrusive measures of turning the car over to an unarrested passenger, *Virgil v. Superior Court,* 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968), or leaving the car parked in a legal parking space if this would not be unduly time-consuming for the police and would not expose the car to undue risk of theft or vandalism, *State v. Slockbower,* 79 N.J. 1, 397 A.2d 1050 (1979); *State v. Simpson,* 95 Wash. 2d 170, 662 P.2d 1199 (1980).

If the police have the authority to impound an automobile and to conduct an inventory search of it, they can make the search at the scene, at the police station, or at other locations. *Colorado v. Bertine,* 479 U.S. at 373 (inventory search was not rendered unreasonable simply because the vehicle "was towed to a secure, lighted facility"). "[T]he security of the storage facility does not completely eliminate the need for inventorying; the police may still wish to protect themselves or the owners of the lot against false claims." *Ibid.*

The state courts have been active in developing independent state constitutional restrictions upon inventory searches. *See, e.g., State v. Daniel,* 589 P.2d 408, 417 (Alaska 1979) (police cannot open "closed, locked or sealed luggage, containers, or packages contained within a vehicle" during an inventory search); *State v. Opperman,* 247 N.W.2d 673, 675 (S.D. 1976) ("noninvestigative police inventory searches of automobiles without a warrant must be restricted to safeguarding those articles which are within plain view of the officer's vision"). This is an area in which defense counsel is particularly advised to follow the suggestion of § 7.09 *supra* and invoke state-law principles as alternative grounds for challenging searches and seizures.

§ 23.26 SEARCHES OF AUTOMOBILES INCIDENT TO THE ARREST OF THE DRIVER OR OCCUPANTS

Automobiles may be subjected to a warrantless search of limited scope incidental to the

valid arrest of their drivers or occupants, under the doctrine of "search incident to arrest" (see § 23.08 *supra*), as modified by the Supreme Court in *Arizona v. Gant*, 556 U.S. 332 (2009) to account for certain "circumstances unique to the vehicle context" (*id*. at 343). These searches may be made without a warrant only at the immediate time and place of the arrest. *See Preston v. United States,* 376 U.S. 364 (1964); *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216 (1968); *Chambers v. Maroney* 399 U.S. 42, 47 (1970); *Cardwell v. Lewis,* 417 U.S. 583, 591-92 n.7 (1974); *id.* at 599 n.4 (Stewart, J., dissenting); *United States v. Chadwick,* 433 U.S. 1, 14-15 (1977). This "search incident to arrest" rule applies not only in "situations where the officer makes contact with the occupant [of a vehicle] while the occupant is inside the vehicle" but also "when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle." *Thornton v. United States*, 541 U.S. 615, 617 (2004). In accordance with the search-incident-to-arrest rule that applies to all situations including the automobile context, the search may "include 'the arrestee's person and the area "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.'" *Arizona v. Gant*, 556 U.S. at 339. *See also id*. at 343 (narrowing *New York v. Belton,* 453 U.S. 454 (1981), to clarify that the customary search-incident-to-arrest rule "authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search"). In *Gant*, the Court responded to "circumstances unique to the vehicle context" by holding that police officers also may search a vehicle incident to the arrest of a "recent occupant" "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Ibid*. *See also id*. at 343-44 (explaining that "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence," "[b]ut in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein"; Court applies its new rule to find a vehicle search to be unlawful because "Gant clearly was not within reaching distance of his car at the time of the search" and thus the search could not be justified under the customary search-incident-to-arrest rule, and "Gant was arrested for driving with a suspended license — an offense for which police could not expect to find evidence in the passenger compartment of Gant's car"). *Compare State v. Snapp*, 174 Wash.2d 177, 181-82, 275 P.3d 289, 291 (2012) (construing the state constitution to reject that portion of the *Gant* rule that allows a search of a vehicle incident to the arrest of a recent occupant when "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle").

When an automobile is stopped to ticket the driver for a traffic violation, a warrantless "search of the passenger compartment of [the] . . . automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect [driver or occupant] is dangerous and the suspect may gain immediate control of weapons [from the vehicle]." *Michigan v. Long,* 463 U.S. 1032, 1049 (1983). Unlike a search incident to arrest, which is authorized by the mere fact of a valid arrest, this latter sort of weapons search requires *both* a valid stop *and* reasonable grounds to believe that the driver or occupant is dangerous and may grab a weapon from the car to use against the officers. *Id.* at

1046-53 & nn.14, 16.

So far as the Fourth Amendment is concerned, an officer who sees a driver violate the traffic laws may choose either to make an arrest and thereby acquire the full power of search incident to arrest or to issue a ticket or other form of summons and acquire only the relatively limited search power described in *Long*. *See Virginia v. Moore*, 553 U.S. 164, 176-77 (2008); *Knowles v. Iowa*, 525 U.S. 113, 114, 118-19 (1998); *United States v. Robinson,* 414 U.S. 218 (1973); *Gustafson v. Florida,* 414 U.S. 260 (1973). Even if state law categorizes the traffic infraction as one that must be handled by a ticket or other form of summons rather than a full-scale arrest, an arrest which thus violates state law does not give rise to a Fourth Amendment basis for suppressing evidence unless either the arrest or the search incident to that arrest violated the Fourth Amendment. *See Virginia v. Moore*, 553 U.S. 164, 167, 171, 177-78 (even though police officers' arrest of Moore for driving on a suspended license violated Virginia state law, which restricted the officers to "issu[ing] Moore a summons instead of arresting him," the arrest satisfied the applicable Fourth Amendment standard of "probable cause to believe a person committed . . . [a] crime in [the officer's] presence," and accordingly the contraband obtained by the police in a valid search incident to arrest was not suppressible under the Fourth Amendment). Suppression in such cases may be available, however, on state constitutional grounds. *See, e.g., Commonwealth v. Hernandez*, 456 Mass. 528, 531-32, 924 N.E.2d 709, 711-12 (2010); and see § 7.09 *supra.*

§ 23.27 "*TERRY* STOPS" OF AUTOMOBILES AND ATTENDANT SEARCHES

"The law is settled that in Fourth Amendment terms a . . . stop [of a moving vehicle] entails a seizure of the driver [and any passengers in the vehicle] 'even though the purpose of the stop is limited and the resulting detention quite brief.'" *Brendlin v. California*, 551 U.S. 249, 255 (2007). *See also Arizona v. Johnson*, 555 U.S. 323, 327 (2009). By analogy to the *Terry* stop doctrine (§ 23.09 *supra*), "law enforcement agents may briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity." *United States v. Hensley,* 469 U.S. 221, 226 (1985); *see, e.g., United States v. Sharpe,* 470 U.S. 675 (1985); *Delaware v. Prouse,* 440 U.S. 648 (1979) (dictum). In limited circumstances, the police can also conduct a *Terry* stop of an automobile "to investigate past criminal activity." *United States v. Hensley,* 469 U.S. at 228. See § 23.09 *supra.* Neither sort of investigative stop may be made in the absence of "reasonable suspicion." *Brendlin v. California*, 551 U.S. at 254 n.2, 255-56; *United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006). The standard of "reasonable suspicion" for an automobile stop is the same as that for a pedestrian stop, discussed in § 23.09 *supra*. *See*, *e.g.*, *United States v. Uribe*, 709 F.3d 646, 649-50 (7th Cir. 2013); *United States v. Cohen*, 481 F.3d 896 (6th Cir. 2007).

"[A]s in the case of a pedestrian reasonably suspected of criminal activity," the *Terry* frisk doctrine permits "a patdown of the driver or a passenger [of a lawfully stopped vehicle] during a . . . [vehicle] stop" if the police have "reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. at 327. Also by analogy to

Terry, police who validly stop a vehicle may search some areas of it for weapons if the officers possess a reasonable belief, based on specific and articulable facts, that a detained suspect is dangerous and that s/he can gain immediate control of weapons from the vehicle. *Michigan v. Long,* 463 U.S. 1032, 1049 (1983). The search must, however, be "limited to those areas [of the vehicle] in which a weapon may be placed or hidden." *Ibid.*

§ 23.28 TRAFFIC STOPS AND ATTENDANT SEARCHES

Automobiles may, of course, be stopped for traffic violations, *see United States v. Robinson,* 414 U.S. 218 (1973), if — but only if — the police have "reasonable suspicion" to justify the traffic stop, *see Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *Brendlin v. California*, 551 U.S. 249, 254 n.2, 255-56 (2007). *See also United States v. Murphy*, 703 F.3d 182, 188 (2d Cir. 2012) (trial court did not err in rejecting, as incredible, a police officer's testimony at a suppression hearing that he observed the defendant's car exit the interstate without signaling and thus in violation of traffic laws); *State v. Kooima*, 833 N.W.2d 202, 210 (Iowa 2013) ("Cases decided by us and other courts require a personal observation of erratic driving, other facts to substantiate the allegation the driver is intoxicated, or details not available to the general public as to the defendant's future actions in order to spawn a reasonable inference . . . [that an anonymous] tipster had the necessary personal knowledge that a person was driving while intoxicated and the stop comports with the requirements of the Fourth Amendment. To hold otherwise would cause legitimate concern because such tips would let the police stop persons on anonymous tips that might have been called in for vindictive or harassment purposes or based solely on a hunch or rumor."). An officer making this sort of stop may order the driver out of the car, whether the officer proposes to arrest the driver or merely to give the driver a summons. *Pennsylvania v. Mimms,* 434 U.S. 106 (1977) (per curiam). In the former case, the officer may conduct a complete search of the driver's person and, under certain circumstances may also search the passenger compartment of the car incident to the arrest of the driver, as discussed in § 23.26 *supra*; and see § 23.08 *supra;* in the latter, the officer may frisk the driver and search the passenger compartment of the car for weapons if, but only if, the requisite conditions for a *Terry* frisk are met, see §§ 23.10, 23.26 *supra.*

If the officer invokes the *Mimms* doctrine to order the driver out of the car, the officer can detain the driver outside the car for the period of time necessary to conduct an inquiry and inspect the Vehicle Identification Number. *New York v. Class,* 475 U.S. 106, 115-16 (1986); *Arizona v. Johnson,* 555 U.S. at 333; see § 23.23 *supra*. However, a "traffic stop can be converted into a full-blown arrest if it extends beyond the time reasonably necessary to complete the purpose for which the stop was made." *Huff v. Reichert*, 744 F.3d 999, 1005-06 (7th Cir. 2014). The *Mimms* doctrine allows "an officer making a traffic stop . . . [to] order passengers to get out of the car pending completion of the stop." *Maryland v. Wilson*, 519 U.S. 408, 415 (1997). *See also Arizona v. Johnson,* 555 U.S. at 333 ("The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop."). *But see Maryland v. Wilson*, 519 U.S. at 415 n.3 (expressly reserving the question whether "an officer may forcibly detain a passenger for the entire duration of the stop"); *and cf. United States v. Hensley,* 469 U.S. 221,

235-36 (1985). The officer also can conduct a protective "patdown of . . . a passenger during a [lawful] traffic stop" under the customary *Terry* frisk standard if the officer has "reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. at 327, 333; *Huff v. Reichert*, 744 F.3d at 1009-10; see § 23.10 *supra*. Search activity exceeding the scope of a *Terry* frisk is not permitted; and when an officer, during a traffic stop, requests and receives permission from a passenger to conduct a search of his or her possessions for evidence unrelated to the traffic violation that justified the stop, the request has been held impermissible, the consent tainted, and the ensuing search and seizure unconstitutional. *State v. Smith*, 286 Kan. 402, 184 P.3d 890 (2008).

§ 23.29 LICENSE CHECKS; STOPS OF AUTOMOBILES AT ROADBLOCKS AND CHECKPOINTS

In *Delaware v. Prouse,* 440 U.S. 648 (1979), the Court condemned the previously widespread practice of "stop checks" of vehicles selected by roving patrols. The Court in *Prouse* held that the Fourth Amendment does not permit the flagging down of selected automobiles for the purpose of "check[ing] [the] . . . driver's license and the registration of the automobile" unless "there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered." 440 U.S. at 663.

The Court in *Prouse* suggested, however, that it might sustain other "methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion" by police officers. *Ibid.* It included "[q]uestioning of all oncoming traffic at roadblock-type stops [as] . . . one possible [constitutional] alternative." *Ibid.* In the subsequent case of *Michigan Department of State Police v. Sitz,* 496 U.S. 444 (1990), the Court upheld the constitutionality of "a State's use of highway sobriety checkpoints" (*id.* at 447), in which motorists passing through selected sites were "briefly stopped" (*id.* at 455), "briefly examined for signs of intoxication" (*id.* at 447), and asked some questions (*ibid.*), in accordance with established "guidelines setting forth procedures governing checkpoint operations [and] . . . site selection" (*ibid.*). "The average delay for each vehicle was approximately 25 seconds." *Id.* at 448. The Court acknowledged that "a Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint." *Id*. at 450. *Accord*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) ("It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment."). The *Sitz* Court concluded, however, that "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped" (496 U.S. at 455) provided the requisite constitutional justification for the use of the sobriety checkpoint procedure. The Court emphasized that the "'objective' intrusion [upon seized motorists], measured by the duration of the seizure and the intensity of the investigation, [w]as minimal" (*id.* at 452) and that the procedure did not suffer from the same "degree of 'subjective intrusion' and . . . potential for generating fear and surprise [on the part of seized motorists]" (*ibid.*) as did the roving-patrol stops condemned in *Prouse* (*see Sitz,* 496 U.S. at 452-53). The Court in *Sitz* further distinguished the sobriety checkpoint procedure from the roving-patrol stops

on the grounds that the "checkpoints are selected pursuant to . . . guidelines, and uniformed police officers stop every approaching vehicle" (*id.* at 453), thereby avoiding the "'kind of standardless and unconstrained discretion [which] is the evil the Court has discerned . . . in previous cases'" (*id.* at 454 (quoting *Prouse,* 440 U.S. at 661)) and the state in *Sitz* presented "empirical data" (*ibid.*) demonstrating that the checkpoint procedure made at least some measurable contribution to controlling "the drunken driving problem" (*id.* at 451; *see id.* at 454-55). Finally, the Court in *Sitz* took pains to make clear "what our inquiry is *not* about." *Id.* at 450. Explaining that the issue "address[ed] [was] only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers[,]" the Court noted that "[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." *Id.* at 450-51. The Court further cautioned that "[n]o allegations are before us of unreasonable treatment of any person after an actual detention at a particular checkpoint." *Id.* at 450.

Thereafter, in *City of Indianapolis v. Edmond*, the Court struck down a "highway checkpoint program whose primary purpose [wa]s the discovery and interdiction of illegal narcotics" (531 U.S. at 34), in which the police stopped a predetermined number of vehicles, conducted a license and registration check, and walked around each stopped car with a narcotics-detection dog (*see id*. at 34-35). In finding this practice to be unconstitutional, the Court distinguished *Sitz* and also an earlier decision that had upheld the routine stopping of vehicles and the brief questioning of their occupants by immigration authorities at designated checkpoints near an international border (*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), discussed in § 23.30 *infra*). "In none of these cases," the Court explained, "did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Edmond*, 531 U.S. at 38. Emphasizing that "our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion" and that "[w]e have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing" (*id*. at 41), the Court declared that "[w]e decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes" (*id*. at 44). "Because the primary purpose of the Indianapolis narcotics checkpoint program [wa]s to uncover evidence of ordinary criminal wrongdoing," the Court held that "the program contravenes the Fourth Amendment." *Id*. at 41-42. *See also id*. at 34, 48; *Singleton v. Commonwealth*, 364 S.W.3d 97, 104-06 (Ky. 2012) (applying *Edmond* to strike down a traffic checkpoint that was designed to catch violators of a city ordinance requiring that motor vehicles display a "city sticker" that shows residence or employment within city limits).

The Court returned to these issues in *Illinois v. Lidster*, 540 U.S. 419 (2003), rejecting a Fourth Amendment challenge to "a highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident." *Id*. at 421. The Court distinguished *Edmond* on the ground that that case "involved a checkpoint at which police stopped vehicles to look for evidence of drug crimes committed by occupants of those vehicles" (*id*. at 423) whereas the "primary law enforcement purpose [of the checkpoint in *Lidster*] was *not* to determine

whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others [and] . . . [t]he police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals." *Id*. at 423. Applying the criteria the Court had previously employed in *Sitz*, the Court upheld the checkpoint in *Lidster* because "[t]he relevant public concern was grave" in that "[p]olice were investigating a crime that had resulted in a human death . . . [a]nd the stop's objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort"; "[t]he stop advanced this grave public concern to a significant degree" in that "[t]he police appropriately tailored their checkpoint stops to fit important criminal investigatory needs"; and, "[m]ost importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect," in that "each stop required only a brief wait in line — a very few minutes at most," "[c]ontact with the police lasted only a few seconds," "[p]olice contact consisted simply of a request for information and the distribution of a flyer," and, "[v]iewed subjectively, the contact provided little reason for anxiety or alarm" since "[t]he police stopped all vehicles systematically" and "there is no allegation here that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops." *Id*. at 427-28.

In addition to approving the checkpoints in *Sitz* and *Lidster* and border stops by immigration authorities in *Martinez-Fuerte*, the Court has indicated that it is likely to accept standardized checkpoint procedures in other settings if the stops are not protracted, do not involve any physical searches of the car or occupants, and are not made solely at the discretion of officers in the field. In *Texas v. Brown,* 460 U.S. 730 (1983), the Court and all parties appear to have assumed the constitutionality of a "routine driver's license checkpoint." *See id.* at 733 (plurality opinion). And in *Prouse,* the Court noted that its holding did not "cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others." 440 U.S. at 663 n.26.

In light of the Court's opinions in these cases, the validity of various spot-check practices (for example, pollution emission tests, agricultural produce inspections, and game wardens' inspections, as well as driver's license and registration inspections) involving the brief stopping of vehicles without a reasonable suspicion that the particular vehicle stopped is being operated in violation of an applicable regulatory law appears to turn upon four considerations:

First is whether the "primary purpose [of the checkpoint program] was to detect evidence of ordinary criminal wrongdoing" (*City of Indianapolis v. Edmond*, 531 U.S. at 41) by one or more of the "vehicle's occupants" (*Illinois v. Lidster*, 540 U.S. at 423). Such situations are governed by "an *Edmond*-type rule of automatic unconstitutionality." *Id*. at 424. The Court stated in *dicta* in *Edmond* that an exception to this rule may apply to "emergency" situations, such as where the police set up "an appropriately tailored roadblock . . . to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route." *Edmond*, 531 U.S. at 44. But, in the absence of such "exigencies" (*ibid*.), *Edmond* prohibits a

checkpoint "program whose primary purpose is ultimately indistinguishable from the general interest in crime control," except when, as in *Lidster*, "[t]he stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others" and "[t]he police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals" (*Lidster*, 540 U.S. at 423).

Second is the extent to which some sort of spot check is necessary and will likely be effective to enforce the regulatory scheme in question. *See Illinois v. Lidster*, 540 U.S. at 427; *Michigan Department of State Police v. Sitz*, 496 U.S. at 451; *Delaware v. Prouse,* 440 U.S. at 658-61. Counsel challenging a checkpoint stop should contend that the standard of necessity is high. In approving the use of sobriety checkpoints in *Sitz,* the Court cited statistical and anecdotal evidence of the extent of "alcohol-related death and mutilation on the Nation's roads" (496 U.S. at 451 & n.*) and observed that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Id*. at 451; *accord*, *id*. at 455-56 (Justice Blackmun, concurring). Similarly, in sustaining immigration checkpoint stops in border regions, see § 23.30 *infra,* the Supreme Court has repeatedly emphasized "the enormous difficulties of patrolling a 2,000-mile open border," *United States v. Cortez,* 449 U.S. 411, 418 (1981), and the vital national importance of patrolling it effectively. *See, e.g., Almeida-Sanchez v. United States,* 413 U.S. 266, 273 (1973); *United States v. Brignoni-Ponce,* 422 U.S. 873, 878-79, 881 (1975); *United States v. Martinez-Fuerte,* 428 U.S. at 551-57. And, in upholding a "highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident," the Court in *Illinois v. Lidster* explained that "[t]he relevant public concern was grave . . . [in that] [p]olice were investigating a crime that had resulted in a human death . . . [and] [t]he stop advanced this grave public concern to a significant degree." 540 U.S. at 421, 427. *See also id*. at 425 ("voluntary requests [of "members of the public in the investigation of a crime"] play a vital role in police investigatory work"). With regard to the assessment of "'the degree to which . . . [a checkpoint procedure] advances the public interest'" (*Sitz,* 496 U.S. at 453), the Court has made clear that reviewing courts may not strike down a law enforcement technique that is a reasonable means of dealing with the problem simply because some "[e]xperts in police science" might view a different technique as "preferrable" [sic] (*ibid.*). However, a procedure may be found to violate the Fourth Amendment if the state fails to present empirical data justifying the procedure (*see Sitz,* 496 U.S. at 454-55) or if the procedure falls below an as yet unspecified threshold of effectiveness (*see Sitz,* 496 U.S. at 454-55 (finding that the sobriety checkpoint procedure under review sufficiently advanced the state's interest in controlling drunk driving because it resulted in arrests of "approximately 1.6 percent of the drivers passing through the checkpoint," which compared favorably with the "0.5 percent" "ratio of illegal aliens detected to vehicles stopped" by the immigration checkpoint procedure approved in *Martinez-Fuerte*)).

Third is the extent to which the visibility and regularity of the spot-check practice are likely to reduce motorists' apprehensions of danger and the feeling that they are being singled out for official scrutiny. *See Illinois v. Lidster*, 540 U.S. at 425, 427-28; *Michigan Department of*

State Police v. Sitz, 496 U.S. at 452-53; *Delaware v. Prouse,* 440 U.S. at 657.

Fourth is the extent to which the spot-check procedures limit and control the exercise of discretion by individual officers in determining which vehicles to stop and which ones to detain for longer or shorter periods. *See Michigan Department of State Police v. Sitz,* 496 U.S. at 452-53; *Delaware v. Prouse,* 440 U.S. at 653-55, 661-63. This latter factor is probably the most significant, for the Supreme Court's Fourth Amendment decisions have increasingly recognized that restricting police discretion in the execution of the search-and-seizure power is the Amendment's central purpose. *See, e.g., Johnson v. United States,* 333 U.S. 10, 13-17 (1948); *McDonald v. United States,* 335 U.S. 451, 455-56 (1948); *Beck v. Ohio,* 379 U.S. 89, 97 (1964); *See v. City of Seattle,* 387 U.S. 541, 545 (1967); *United States v. United States District Court for the Eastern District of Michigan,* 407 U.S. 297, 316-17 (1972); *United States v. Martinez-Fuerte,* 428 U.S. at 558-59, 566; *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 357 (1977); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 323-24 (1978); *Mincey v. Arizona,* 437 U.S. 385, 394-95 (1978); *Brown v. Texas,* 443 U.S. 47, 51 (1979); *Steagald v. United States,* 451 U.S. 204, 220 (1981); *Donovan v. Dewey,* 452 U.S. 594, 599, 601, 605 (1981); *New York v. Burger,* 482 U.S. 691, 703 (1987) (dictum). As in other fields of constitutional law in which excessive discretion embodied in a statutorily or administratively prescribed procedure may void it, factual evidence of divergent and particularly of discriminatory police practices in the administration of the procedure should be admissible and persuasive on this last issue. *See, e.g., Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Niemotko v. Maryland,* 340 U.S. 268 (1951); *Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969).

§ 23.30 BORDER SEARCHES OF AUTOMOBILES

The "border search" doctrine allows customs and immigration officials to stop and search all vehicles (or persons) entering the United States from abroad. It requires no warrant, probable cause, *Terry*-type "reasonable suspicion," or other justification. This unfettered search power is, however, limited to the "border itself [or] . . . its functional equivalents." *Almeida-Sanchez v. United States,* 413 U.S. 266, 272 (1973). *See also United States v. Flores-Montano*, 541 U.S. 149, 154 (2004) ("the expectation of privacy is less at the border than it is in the interior").

Other than at the border and its functional equivalents, customs and immigrations *searches* of automobiles may not be made without a warrant or probable cause. *Almeida-Sanchez v. United States*, 413 U.S. at 274-75 (condemning a warrantless "roving patrol" search without probable cause); *United States v. Ortiz,* 422 U.S. 891 (1975) (condemning a warrantless "fixed check point" search without probable cause). Roving patrols of customs or immigration agents are permitted to make brief warrantless *stops* of vehicles in regions near the border on the basis of "reasonable suspicion" that a particular vehicle contains smuggled goods or illegal aliens. *United States v. Brignoni-Ponce,* 422 U.S. 873, 880-84 (1975); *United States v. Villamonte-Marquez,* 462 U.S. 579, 587-88 (1983) (dictum) (discussing the border-search doctrines applicable to automobiles while developing a somewhat different rule for ships "located in waters offering ready access to the open sea"). These roving-patrol stops are akin to domestic

Terry stops and are governed by similar rules. See §§ 23.04-23.06, 23.09, 23.27 *supra.* "The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." *United States v. Brignoni-Ponce,* 422 U.S. at 881-82.

Equally limited stops of all or selected vehicles may be made routinely at fixed checkpoints in the border area, without a warrant, probable cause, or "reasonable suspicion." *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976). But the "claim that a particular exercise of [administrative] discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review." *Id.* at 559. Routine checkpoint stops, like roving-patrol stops made upon "reasonable suspicion," must be restricted to "brief questioning" and may not include either prolonged detention or search in the absence of "consent or probable cause." *Id.* at 566-67. *See also United States v. Flores-Montano*, 541 U.S. at 155 n.2 (reserving "the question 'whether, and under what circumstances, a border search might be deemed "unreasonable" because of the particularly offensive manner in which it is carried out'").

The opinions in *Ortiz* and *Brignoni-Ponce* purport to reserve the question whether searches and more extensive detentions in connection with immigration stops (either by roving patrols or at fixed checkpoints) may be made without reasonable suspicion or probable cause concerning the individual vehicle stopped, under the authorization of a search warrant "issued to stop cars in a designated area on the basis of conditions in the area as a whole," *Brignoni-Ponce,* 422 U.S. at 882 n.7; *see also Ortiz,* 422 U.S. at 897 n.3. This question was generated by Justice Powell's concurring opinion in *Almeida-Sanchez,* which adopts the concept of an "area" search warrant from the Supreme Court's building-code cases (*see Camara v. Municipal Court,* 387 U.S. 523 (1967)) and suggests that such a warrant might validate immigration searches in border areas. Because Justice Powell's concurrence was necessary to make up a 5-4 majority in *Almeida-Sanchez* and the Court has not become more sympathetic to Fourth Amendment rights since his departure, the likelihood is strong that "area" search warrants will be sustained in border-region immigration cases. *See also United States v. Martinez-Fuerte,* 428 U.S. at 555, 564 n.18.

The "border search" principles described in this section are limited to *international* borders and do not apply to interstate boundary lines. *Torres v. Puerto Rico,* 442 U.S. 465, 472-73 (1979); *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 702 (1965) (by implication); *see also United States v. Flores-Montano*, 541 U.S. at 152 ("The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."); *United States v. Montoya De Hernandez,* 473 U.S. 531, 538 (1985) ("the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior"); *id.* at 544 ("at the international border, . . . the Fourth Amendment balance of interests leans heavily to the Government").

Part E. Probable Cause or Articulable Suspicion Based on Information Obtained from Other Police Officers or Civilian Informants

§ 23.31 POLICE ACTION BASED ON INFORMATION LEARNED FROM OTHER POLICE OFFICERS

Frequently, Officer *A* concludes that a person is guilty of an offense and conveys that conclusion to Officer *B* — directly or through some form of police bulletin or dispatch or "wanted flyer" — in connection with a request or directive that the person be arrested or held for questioning. Some courts were inclined to sustain *B*'s arrest or stop of the person in this situation, even though *A* lacked probable cause or articulable suspicion for *A*'s conclusion, on the theory that *B* had probable cause or articulable suspicion generated by a communication from an apparently reliable informant — namely, fellow officer *A.* This bootstrap has, however, been firmly rejected by the Supreme Court on the obvious ground that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Whiteley v. Warden,* 401 U.S. 560, 568 (1971). *Accord, United States v. Hensley,* 469 U.S. 221, 230 (1985). Police dispatches gain no credibility from the mere fact of their internal transmission. *Cf. Franks v. Delaware,* 438 U.S. at 163-64 n.6.

Thus, when police officers rely on a flyer or dispatch to make an arrest, the admissibility of evidence uncovered during a search incident to that arrest "turns on whether the officers who *issued* the flyer [or dispatch] possessed probable cause to make the arrest." *United States v. Hensley,* 469 U.S. at 231 (dictum). *See, e.g.*, *People v. Powell*, 101 A.D.3d 756, 758, 955 N.Y.S.2d 608, 610 (N.Y. App. Div., 2d Dep't 2012). Similarly, in cases of *Terry* stops based on a flyer or dispatch, "[i]f the flyer [or dispatch] has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment." *Id.* at 232. Of course, this adequacy of the underlying information is only the necessary condition — not a sufficient condition — for the validity of a detention based upon internal police communications. In addition, the officer who effects the detention must be aware of the communication and must be able to identify the person detained as the individual sought. *See State v. Gardner*, 135 Ohio St. 3d 99, 104-05, 984 N.E.2d 1025, 1029-30 (2012) (even if there is a valid arrest warrant for an individual, a police seizure of that individual cannot be predicated on the existence of the warrant unless the arresting officer "knew that there was a warrant for the individual's arrest").

§ 23.32 POLICE ACTION BASED ON INFORMATION LEARNED FROM A CIVILIAN INFORMANT

§ 23.32(a) The General Standard

Unless a police officer witnessed the crime or some objective manifestation of criminal conduct, police action — whether it be an arrest, a search, a *Terry* stop or a *Terry* frisk — will usually depend upon information learned from civilians. The source of the information may be

either an ordinary citizen (a complainant or an eyewitness) or a "police informer" who is trading the information for cash or leniency on criminal charges to which s/he is subject. The identity of the source of the information may not even be known to the police, as in the case of an anonymous phone tip or an informant conveying information that s/he heard "on the street" without revealing the precise source of the information.

Defense attorneys usually confront the issue of informants' tips in either of two contexts: (i) when the officer presented the information to a magistrate in support of a request for a search warrant or arrest warrant and defense counsel is challenging a search or arrest made pursuant to the resulting warrant, or (ii) when the officer relied on the informant's tip in making a warrantless arrest, search, stop, or frisk. If the officer acted pursuant to a warrant, the scope of review of the magistrate's reliance upon information derived from nonpolice informants will be quite limited under Fourth Amendment doctrine, although it may be more expansive under state constitutional law. See § 23.17 *supra.* Essentially, the issue in warrant cases is whether the informant's information, as presented in the police affidavit in support of the warrant, was "'so lacking in indicia of probable cause as to render'" the issuance of a warrant manifestly unreasonable. *United States v. Leon,* 468 U.S. 897, 923 (1984); see § 23.17(a) *supra.*

In cases in which the officer acted without a warrant, the reviewing court must engage in a far more piercing examination of the reliability and sufficiency of the informant's communications to the police. Judicial review of police reliance on information from informants was formerly governed by a two-pronged test of "veracity" and "basis of knowledge" established in *Aguilar v. Texas,* 378 U.S. 108 (1964), and *Spinelli v. United States,* 393 U.S. 410 (1969). The *Aguilar-Spinelli* standard has been preserved in several States as a matter of state constitutional law, *see, e.g., State v. Kimbro,* 197 Conn. 219, 496 A.2d 498, 507 (1985); *Commonwealth v. Upton,* 394 Mass. 363, 476 N.E.2d 548 (1985); *People v. Johnson,* 66 N.Y.2d 398, 405-07, 488 N.E.2d 439, 444-45, 497 N.Y.S.2d 618, 623-24 (1985); *State v. Jackson,* 102 Wash. 2d 432, 443, 688 P.2d 136, 143 (1984), but federal Fourth Amendment doctrine is now controlled by the opinion in *Illinois v. Gates,* 462 U.S. 213 (1983). Although the *Gates* case itself involved a warrant, its rules have generally been accepted as governing warrantless police action based on hearsay information.

Under the *Gates* opinion, the question whether information received from an informant supplies the requisite predicate for a search and seizure (whether that predicate be probable cause or articulable suspicion) is to be determined by the "totality of the circumstances," including, *inter alia,* the "informant's 'veracity,' 'reliability,' and 'basis of knowledge.'" 462 U.S. at 230-39. Whereas the *Aguilar-Spinelli* standard treated "veracity" and "basis of knowledge" as separate criteria, both of which had to be satisfied, the *Gates* standard treats them as intertwined aspects of a "totality-of-the-circumstances analysis" in which "a deficiency in one [aspect] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." 426 U.S. at 233. In *Gates,* the Court concluded that it was possible to overlook the lack of direct evidences of "veracity" and "basis of knowledge" of an anonymous letter because the information in the letter was so detailed as to imply that the

informant must be highly knowledgeable and accurate, and "independent investigative work" by the police had corroborated substantial portions of the details relating to conduct by the suspects which "at least suggested" criminal activity. *Id.* at 243-46. *See also Navarette v. California*, 134 S. Ct. 1683, 1686, 1688-90 (2014) (an anonymous 911 call reporting that "a vehicle had run [the caller] . . . off the road" "bore adequate indicia of reliability for the officer to credit the caller's account" and to rely on this information in conducting a traffic stop because (1) the caller's report that "she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925— . . . necessarily claimed eyewitness knowledge of the alleged dangerous driving" and "[t]hat basis of knowledge lends significant support to the tip's reliability"; (2) police confirmation of "the truck's location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call) . . . suggests that the caller reported the incident soon after she was run off the road," and "[t]hat sort of contemporaneous report has long been treated as especially reliable"; and (3) "the caller's use of the 911 emergency system," which has "features that allow for identifying and tracing callers," is an additional "indicator of veracity," although this is not "to suggest that tips in 911 calls are *per se* reliable"; the Court majority in this 5-4 decision acknowledges that "this is a 'close case'"). *Compare Florida v. J.L.*, 529 U.S. 266, 270, 271-72 (2000) (an anonymous tip that a certain individual at a particular location was in possession of a gun did not provide the police with an adequate basis for a stop and frisk, even though the police found a person matching the description at that precise location, because "'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity'" and, although "there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop,'" the "unknown, unaccountable informant . . . neither explained how he knew about the gun nor supplied any basis for believing he had inside information about [the subject]" and the police confirmation of the accuracy of the tipster's "description of [the] subject's readily observable location and appearance . . . does not show that the tipster has knowledge of concealed criminal activity": "The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."); *United States v. Freeman*, 735 F.3d 92, 94, 97-103 (2d Cir. 2013) (an anonymous caller's two calls to 911 reporting that an individual "'is possibly armed with a firearm' and was 'arguing with a female'" and describing this individual's appearance in detail and giving his precise location "did not provide the police with the reasonable suspicion needed to stop Freeman": "[t]he fact that the call was recorded and that the caller's apparent cell phone number is known does not alter the fact that the identity of the caller is still unknown, leaving no way for the police (or for the reviewing court) to determine her credibility and reputation for honesty"; the detailed information about the individual's appearance and location "does nothing to 'show that the tipster has knowledge of concealed criminal activity'"; and "the facts that the stop occurred at night in a 'high crime' area" do not "enhance the reliability of the phone call by confirming in it some individualized detail"); *United States v. Martinez*, 486 F.3d 855, 863 (5th Cir. 2007) (finding no reasonable suspicion where the "police had verified information that the person in the car they stopped was the 'Angel' whom the informant desired to accuse" but "had no verified information . . . that linked Martinez to any criminal behavior" and "[t]he informant also provided no verifiable predictive information about Martinez's future

behavior that would have indicated any 'inside knowledge' about Martinez"); *United States v. Brown*, 448 F.3d 239, 252 (3d Cir. 2006) (concluding that "an excessively general description, combined with an honest but unreliable location tip [*i.e.*, a tip by a citizen whose identity is known but whose reliability is not known to the police,] in the absence of corroborating observations by the police, does not constitute reasonable suspicion under the 'narrowly drawn authority' of *Terry v. Ohio*"); *State v. Kooima*, 833 N.W.2d 202, 210-11 (Iowa 2013) ("we hold a bare assertion [of drunk driving] by an anonymous tipster, without relaying to the police a personal observation of erratic driving, other facts to establish the driver is intoxicated, or details not available to the general public as to the defendant's future actions does not have the requisite indicia of reliability to justify an investigatory stop. Such a tip does not meet the requirements of the Fourth Amendment.").

The pre-*Gates* caselaw applying the *Aguilar-Spinelli* test contains extensive discussion of the concepts of "veracity" and "basis of knowledge" with respect to informants' tips. Although *Gates* overrules the *Aguilar-Spinelli* approach of treating these factors as separate and independent criteria, it acknowledges the relevance of both and does not undermine the earlier judicial analyses of "veracity" and "basis of knowledge."

§ 23.32(b) "Veracity" of the Informant

The "veracity" inquiry examines whether there are facts showing either that the informant is generally credible or that the information that s/he gave on this particular occasion is reliable. *Aguilar v. Texas,* 378 U.S. at 114-15. Information from an informant of unknown or doubtful reliability is worth little. *E.g., Wong Sun v. United States,* 371 U.S. 471, 480-81 (1963); *Taylor v. Alabama,* 457 U.S. 687, 688-89 (1982); *Florida v. J.L.*, 529 U.S. at 270-71.

"[T]he ordinary citizen who has never before reported a crime to the police" is generally viewed as "more reliable than one who supplies information on a regular basis." *United States v. Harris,* 403 U.S. 573, 599 (1971) (Harlan, J., dissenting). If the source of information is an informant who "supplies information on a regular basis," then a critical question is whether the information supplied in prior cases proved to be accurate. *See, e.g., McCray v. Illinois,* 386 U.S. 300, 303-04 (1967); *United States v. Ross,* 456 U.S. 798, 817 n.22 (1982). Mere conclusory allegations about the accuracy of the informant in prior cases are insufficient, *see Gates,* 462 U.S. at 239; *Aguilar v. Texas,* 378 U.S. at 114-15; details must be supplied concerning the number of times the informant has provided information in the past and the extent to which that information led to arrests and convictions. *See, e.g., McCray v. Illinois,* 386 U.S. at 303-04 (credibility of an informant was sufficiently established by the informant's having supplied information on fifteen to twenty prior occasions that proved accurate and resulted in numerous arrests and convictions). In cross-examining a police officer on the issue of prior performance of an informant, defense counsel should try to pin down precisely how many *bad* tips the informant has given in the past. Although the courts have not squarely confronted the question of how high a "batting average" is necessary to establish the credibility of an informant and although it certainly is not "required that informants used by the police be infallible," *Illinois v. Gates,* 462 U.S. at 245 n.14, there will

be a point at which the number of prior instances of inaccuracy tips the scales in favor of a finding of unreliability. *See id.* at 234 (courts must engage in "a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip"); *Massachusetts v. Upton,* 466 U.S. 727, 732 (1984) (per curiam) (dictum) (same).

Apart from the general credibility of the informant, information given on a particular occasion gains reliability if it is an admission against penal interest. *See, e.g., United States v. Harris,* 403 U.S. at 583-85 (plurality opinion); *Spinelli v. United States,* 393 U.S. at 425 (Justice White, concurring). Conversely, when the informant is known to have an incentive to give incriminating information — when, for example, the informant was paid for the information — there is reason to distrust the information. *See, e.g., Rutledge v. United States,* 392 A.2d 1062, 1066 (D.C. 1978) ("the expectation of reward for services is an ambiguous variable which very well could furnish reason to be honest and accurate in the hope of being utilized again or, conversely, reason to distort or fabricate, in order to earn at least one payment"). For an excellent enumeration and analysis of the factors to be considered in evaluating the veracity of a citizen informant, *see United States v. Brown*, 448 F.3d at 249-51.

§ 23.32(c) The Informant's "Basis of Knowledge"

Whereas the "veracity" inquiry focuses on whether the informant is likely to be telling the truth, the inquiry into the informant's "basis of knowledge" is concerned with whether the informant has a sufficient basis for knowing the information s/he relates, even assuming that s/he is telling the truth. In *Aguilar v. Texas,* the Court held that one of the principal defects in a police officer's affidavit was its failure to reveal "some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were." 378 U.S. at 114.

The "basis of knowledge" concern is satisfied whenever the informant asserts a direct perceptual basis for knowing the facts: when, for example, the informant personally saw criminal behavior or contraband, *see, e.g., United States v. Bruner,* 657 F.2d 1278, 1297 (D.C. Cir. 1981), or was a participant in the crime, *see, e.g., United States v. Estrada,* 733 F.2d 683, 686 (9th Cir. 1984). Mere conclusory recitations, such as that "the informant had personal knowledge," will not suffice, *United States v. Long,* 439 F.2d 628, 630-31 (D.C. Cir. 1971): There must be some concrete, factual indication of the basis for the informant's "personal knowledge."

"In the absence of a statement detailing the manner in which the information was gathered," the Court explained in *Spinelli v. United States,* the requisite "basis of knowledge" may be shown by a "tip [that] describe[s] the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 393 U.S. at 416. *See also Florida v. J.L.*, 529 U.S. at 272 ("The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."). In applying this "self-verifying detail" doctrine, the courts must

critically consider whether the details themselves could have been learned through "casual rumor circulating in the underworld." *See, e.g.*, *United States v. Martinez*, 486 F.3d 855, 861-64 (5th Cir. 2007) (finding no reasonable suspicion where an informant "provided no verifiable predictive information . . . that would have indicated any 'inside knowledge'"); *United States v. Bush,* 647 F.2d 357, 364 & n.6 (3d Cir. 1981) (informant's statement that two men had flown to New York to obtain heroin and would return that evening was not an adequate "self-verifying detail," since it was not the type of fact that "arguably would only be known to someone with reliable information" and it was "surely equally probable that the informant was merely repeating a rumor overheard on the street"); *Shivers v. State*, 258 Ga. App. 253, 573 S.E.2d 494 (2002); *West v. State*, 137 Md. App. 314, 768 A.2d 150 (2000).

§ 23.32(d) Partial Corroboration of the Informant's Statement Through Police Investigation

In upholding reliance on the informant's tip in *Illinois v. Gates,* the Court stressed that the information "had been corroborated in major part" as a result of police investigation. 462 U.S. at 243. The Court explained that "[t]he corroboration of the letter's predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true." *Id.* at 244. These events, though not necessarily dispositive of criminal activity, were viewed by the Court as "suggestive of a prearranged drug run." *Id.* at 243. In contrast, in *Florida v. J.L.*, the Court held that an anonymous tip that a certain individual at a particular location was in possession of a gun did not provide the police with an adequate basis for stopping and frisking that individual, even though the police observations corroborated that there was a person matching the description at that precise location, because the corroborating observations must support the reliability of the tip's "assertion of illegality," not just the reliability of its "identif[ication] [of] a determinate person." 529 U.S. at 272. Thus, in gauging whether an informant's tip has been adequately corroborated through police investigation, the courts have been careful to require that the activity witnessed by the police be at least "suspicious," *Rutledge v. United States,* 392 A.2d 1062, 1066-67 (D.C. 1978), or "suggestive of . . . criminal activity," *People v. Elwell,* 50 N.Y.2d 231, 241, 406 N.E.2d 471, 477, 428 N.Y.S.2d 655, 662 (1980). *See also, e.g.*, *United States v. Reaves*, 512 F.3d 123, 127-28 (4th Cir. 2008).

In some circumstances, the corroboration can come from prior reports of criminal activity. Thus, in *Massachusetts v. Upton,* 466 U.S. 727 (1984), the Court found that an informant's tip describing stolen goods concealed in her former boyfriend's motor home was partially corroborated by police reports of recent burglaries in which the descriptions of certain of the items stolen "tallied with" the informant's descriptions of the stolen goods. *See id.* at 733-34.

§ 23.32(e) Disclosure of the Informant's Name at the Suppression Hearing

In cases in which a search or seizure was based either wholly or partly on an informant's

tip, defense counsel almost invariably will want to obtain the informant's name from the police or the prosecutor, so as to be able to make an independent investigation of the informant's prior "track record," the informant's "basis of knowledge," and any bias that the informant may have against the respondent. The so-called "informer's privilege" and its effect upon the respondent's rights to disclosure of the names of confidential informants at a suppression hearing is discussed in § 9.10(a) *supra.*

Part F. School Searches and Seizures

§ 23.33 APPLICABILITY OF FOURTH AMENDMENT PROTECTIONS TO THE SCHOOL SETTING

It has always been clear that the Fourth Amendment applies to searches and seizures made by police officers inside a school building. *See, e.g., Piazzola v. Watkins,* 316 F. Supp. 624, 626-27 (M.D. Ala. 1970), *aff'd,* 442 F.2d 284 (5th Cir. 1971). It is equally clear that if a school official conducts a search or seizure of a student at the behest of the police, the school official is acting as an "agent" of the police and is subject to the same restrictions that would govern police conduct under the circumstances. See § 23.36 *infra.*

Prior to *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), there was some debate about whether school officials were subject to the restrictions of the Fourth Amendment in conducting searches and seizures on their own initiative without any instigation by the police. In *T.L.O.*, the Court concluded that the Fourth Amendment's "prohibition on unreasonable searches and seizures applies to searches conducted by public school officials." *Id.* at 333. The *T.L.O.* opinion decisively rejects the argument that school officials' *in loco parentis* status confers the untrammeled search prerogatives of parents, saying:

> Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. . . . In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

Id. at 336-37. *Accord*, *Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 377 (2009) ("difference" between "[p]arents" and "school official[s]" "is that the Fourth Amendment places limits on the official"); *Vernonia School District 47J v. Acton*, 515 U.S. 646, 655 (1995).

Although holding that the Fourth Amendment governs school officials' searches, the Court in *T.L.O.* did not demand that such searches comply with the same rules that regulate police searches. The rules for assessing the validity of a school official's search of a student's person are discussed in § 23.34 *infra.* The topic of school officials' searches of students' desks and lockers is taken up in § 23.35 *infra. Compare J.P. ex rel. A.P. v. Millard Public Schools*, 285

Neb. 890, 892, 905, 908-09, 830 N.W.2d 453, 457, 465, 466-67 (2013) ("*T.LO.*['s] school-needs exception . . . for the search of students on school grounds" did not apply to a school official's search of a student's truck that was "parked on a public street across from the school" and thus "was not in the school environment or under the dominion and control of the school"). Finally, § 23.36 *infra* examines the standards that must be applied when a school official acts at the behest of the police rather than on his or her own initiative. *See generally* Barry C. Feld, T.L.O *and* Redding's *Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847 (2011); Annot., *Search conducted by school official or teacher as violation of Fourth Amendment or equivalent state constitutional provision*, 31 A.L.R.5th 229 (1995, updated). The lower courts are divided on whether school security officers (sometimes called "school resource officers" or "school safety officers") should be classified as "school officials" or "law enforcement officers" for purposes of the *T.L.O.* doctrine. *See, e.g.*, *State v. Meneese*, 174 Wash.2d 937, 947, 282 P.3d 83, 88 (2012) (discussing the caselaw of other jurisdictions and holding under the federal and state constitutions that the "school search exception" of *T.L.O.* did not apply to a school resource officer's search of a student's backpack because the officer was "a fully commissioned law enforcement officer employed by the Bellevue Police Department who has no ability to discipline students" and who "was seeking to obtain evidence for criminal prosecution, not evidence for informal school discipline").

It should be noted that the Court in *T.L.O.* expressly declined to address the question whether "the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities." *T.L.O.,* 469 U.S. at 333 n.3. It was unnecessary for the Court to reach this issue because the Court found the search of T.L.O. constitutionally valid. However, as the lower courts have concluded in applying the substantive rules announced in *T.L.O.,* the interests served by the exclusionary rule necessarily call for the exclusion of evidence unlawfully seized by school officials. *See, e.g., In re William G.,* 40 Cal. 3d 550, 567 n.17, 709 P.2d 1287, 1298 n.17, 221 Cal. Rptr. 118, 129 n.17 (1985); *R.S.M. v. State*, 911 So.2d 283 (Fla. App. 2005); *In re Doe*, 104 Hawai'i 403, 91 P.3d 485 (2004), *overruled on another issue*, *In re Doe*, 105 Hawai'i 505, 100 P.3d 75 (2004); *State v. Pablo R.*, 139 N.M. 744, 137 P.3d 1198 (N.M. App. 2006); *In the Interest of Dumas,* 357 Pa. Super. 294, 515 A.2d 984 (1986). Although the goal of deterring police misconduct is not implicated in this context, the exclusionary rule's other goals of assuring that individuals' rights to privacy are protected and of preserving "that judicial integrity so necessary in the true administration of justice" (*Mapp v. Ohio,* 367 U.S. 643, 660 (1961)) can only be effectuated by excluding unlawfully seized evidence from juvenile delinquency trials. *In re William G.,* 40 Cal. 3d at 567 & n.17, 709 P.2d at 1298 & n.17, 221 Cal. Rptr. at 129 & n.17. And because school officials are "state actors" charged with heeding the "strictures of the Fourth Amendment," *T.L.O.,* 469 U.S. at 336-37, and simultaneously charged with disciplinary responsibilities that may tempt them to disregard those strictures, there is much the same constitutional need to deter their misconduct as there is to deter police misconduct. *See, e.g., State v. Baccino,* 282 A.2d 869, 871 (Del. Super. 1971). Moreover, as Justice Stevens pointed out in an opinion concurring in part and dissenting in part in *New Jersey v. T.L.O.,* "[i]n the case of evidence obtained in school searches, the 'overall educative effect' of the exclusionary rule adds important symbolic force to this utilitarian judgment. . . . Schools are places where we inculcate

the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly." 469 U.S. at 373-74.

§ 23.34 SEARCHES OF THE STUDENT'S PERSON BY SCHOOL OFFICIALS

In developing a standard to regulate school officials' searches of students, the Court in *T.L.O.* balanced "the child's interest in privacy" against "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." *T.L.O.,* 469 U.S. at 339. The Court concluded that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject," *id.* at 340, including the warrant requirement and the probable cause requirement. *Id.* at 340-41. *Accord*, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 828-30 (2002); *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653 (1995). *See also Shuman ex rel. Shertzer v. Penn Manor School District*, 422 F.3d 141, 147 (3d Cir. 2005) (extending the *T.L.O.* standard for "searches in public schools" to "seizures in that context," and holding that a student was "'seized' within the meaning of the Fourth Amendment" when an assistant principal "told [him] to remain in the conference room under [the assistant principal's] direction for several hours," and that "reasonableness is the appropriate benchmark to determine whether [such] a seizure in the public school context survives Fourth Amendment scrutiny").

Under the standard adopted in *T.L.O.,* "the legality of a search of a student . . . depend[s] simply on the reasonableness, under all the circumstances, of the search." *T.L.O.*, 469 U.S. at 341. The determination of "the reasonableness of any search involves a two-fold inquiry: first, one must consider 'whether the . . . action was justified in its inception,' . . .; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Ibid.*

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

New Jersey v. T.L.O., 469 U.S. at 341-42 (footnotes omitted). *See also Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 371 (2009) ("Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raise a 'fair probability,' . . . or a 'substantial chance,' . . . of discovering evidence of criminal activity. The lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing."); *id*. at 372 n.1 ("[w]hen the

object of a school search is the enforcement of a school rule," "the rule's legitimacy" also may be at issue because a search can be found to be "unreasonable owing to some defect or shortcoming of the rule it was aimed at enforcing").

Applying the standard to the facts of the *T.L.O.* case, the Court concluded that (i) the school vice-principal's "decision to open T.L.O.'s purse was reasonable," *id.* at 347, because a teacher had observed T.L.O. smoking cigarettes in the girls' bathroom in violation of school rules and it was therefore reasonable to suspect that T.L.O. had cigarettes in her purse, *id*. at 345-46; (ii) when the vice-principal, in opening and removing a pack of cigarettes, observed a package of rolling papers, the "reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse . . . justified further exploration of T.L.O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money," *id.* at 347; and (iii) "[u]nder these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of 'people who owe me money' as well as two letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify [the vice-principal] . . . in examining the letters to determine whether they contained any further evidence." *Ibid.* Thus school searches, like all other searches, are subject to the general rule that each increasing level of intrusiveness must be justified by additional facts warranting the intensification of the intrusion.

In applying the *T.L.O.* standard in *Safford Unified School District # 1 v. Redding*, the Court similarly scrutinized the record carefully to determine whether the facts known to the school officials justified the initial intrusion and the subsequent level of additional intrusion. The Court concluded that (i) an assistant principal had adequate "suspicion . . . to justify a search of [a student's] . . . backpack and outer clothing" in the student's "presence and in the relative privacy of [the assistant principal's] . . . office," based upon information from other students giving rise to a reasonable suspicion that the student was "giving out contraband pills" in violation of a school rule and that the student was "carrying [such pills] . . . on her person and in the [backpack]"; but that (ii) when the school nurse and an administrative assistant thereafter conducted a more intrusive search of the student's person in the nurse's office, directing the student to "remove her clothes down to her underwear, and then 'pull out' her bra and the elastic band on her underpants," "thus exposing her breasts and pelvic area to some degree," this "quantum leap from outer clothes and backpacks to exposure of intimate parts" violated the Fourth Amendment because the facts known to the school officials did not indicate that there was "danger to the [other] students from the power of the drugs [that the student was "reasonably suspected of carrying"] or their quantity, . . . [or] any reason to suppose that . . . [the student] was carrying pills in her underwear." *Safford*, 557 U.S. at 368-69, 373-77.

In challenging school searches, defense counsel should argue that the *T.L.O.* standard incorporates the *Terry* "articulable suspicion" requirement, see § 23.09 *supra.* Significantly, when the Court applied the first prong of its *T.L.O.* test — the inquiry into whether there are

"reasonable grounds for suspecting that the search will turn up evidence" (*id.* at 342) — the Court relied on *Terry* and its progeny to define the requisite quantum of suspicion. *Id.* at 346 (saying that the inquiry demands more than the type of "'inchoate and unparticularized suspicion or "hunch"'" condemned in *Terry* and equating the required level of certainty with the *Terry*-level showing called for in *United States v. Cortez,* 449 U.S. 411 (1981)). *See also Safford Unified School District # 1 v. Redding*, 557 U.S. at 370 (reiterating *T.L.O.*'s ruling that "searches by school officials" are to be judged "'by a Fourth Amendment standard of reasonableness that stops short of probable cause'" and then referencing prior Fourth Amendment caselaw on probable cause in the adult criminal context to observe that "[p]erhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raise a 'fair probability,' . . . or a 'substantial chance,' . . . of discovering evidence of criminal activity" while "[t]he lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing"); *id*. at 373-74 (scrutinizing the record carefully to determine whether the specific facts known to school officials were sufficient to "justify a search of [the student's] backpack and outer clothing" based upon "reasonable suspicion" that the student was "carrying . . . . ["contraband pills"] on her person and in the carryall"); *id*. at 370 (summarizing the *T.L.O.* rule by saying that "[w]e have . . . applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student"). In applying *T.L.O.,* the lower courts have analyzed school officials' actions under this *Terry* standard of justification. *See, e.g., G.C. v. Owensboro Public Schools*, 711 F.3d 623, 633-34 (6th Cir. 2013) (in a decision issued even before the Supreme Court's announcement of strict privacy protections for cell phones' digital content in *Riley v. California*, 134 S. Ct. 2473 (2014), the court of appeals holds that school officials' search of a cell phone confiscated from a student violated *T.L.O.*, notwithstanding the school officials' "background knowledge of [G.C.'s] drug abuse . . . [and] depressive tendencies" because "there is no evidence in the record to support the conclusion . . . that the school officials had any specific reason at the inception of the . . . search to believe that G.C. then was engaging in any unlawful activity or that he was contemplating injuring himself or another student"); *In re William G.,* 40 Cal. 3d 550, 566, 709 P.2d 1287, 1297, 1297, 221 Cal. Rptr. 118, 128 (1985) (the *T.L.O.* "standard is more stringent than other 'less than probable cause' standards . . . because it depends on objective and articulable facts"); *In the Interest of Dumas,* 357 Pa. Super. 294, 298, 515 A.2d 984, 986 (1986) (striking down a school search under the *T.L.O.* standard because the assistant principal "was unable to articulate any reasons for []his suspicion" that the student who had been caught smoking cigarettes was "involved with marijuana").

Counsel should further argue that factors such as "furtive gestures" and refusal to answer questions should be accorded no greater weight in the school setting than in the context of a *Terry* stop and frisk. *See, e.g.*, *William G.*, 40 Cal. 3d at 567, 709 P.2d at 1297, 221 Cal. Rptr. at 128 (citing *Terry* caselaw for the conclusion that a student's "'furtive gestures' in trying to hide his calculator case from [school official's] view cannot, standing alone, furnish sufficient cause to search"); *see ibid.* (citing *Terry* caselaw for the proposition that "William's demand for a warrant did not create a reasonable suspicion upon which to base the search. Such conduct merely constitutes William's legitimate assertion of his constitutional right to privacy and to be

free from unreasonable searches and seizures. There are many reasons why a student might assert these rights, other than an attempt to prevent disclosure of evidence that one has violated a proscribed activity. A student cannot be penalized for demanding respect for his or her constitutional rights.”). For discussion of the relevance of these factors in the *Terry* context, see § 23.11 *supra.*

In litigating under the *T.L.O.* standard, counsel can also draw upon the caselaw dealing with a police officer’s right to rely on hearsay information in conducting a *Terry* stop or frisk, see §§ 23.31-23.32 *supra. See Safford Unified School District # 1 v. Redding*, 557 U.S. at 370-71 (recognizing that the Court’s prior decisions on probable cause, including cases dealing with police reliance on hearsay, “have an implicit bearing on the reliable knowledge element of reasonable suspicion” even though “these factors cannot rigidly control” the “lesser standard” governing “the required knowledge component” of reasonable suspicion for any particular school search since “the standards are ‘fluid concepts that take their substantive content from the particular contexts’ in which they are being assessed”); *id*. at 381-82 (Justice Ginsburg, concurring in part and dissenting in part) (disagreeing with the majority’s conclusion that an assistant principal who conducted an unconstitutional search had qualified immunity, and explaining that the unreasonableness of the school official’s actions is shown by, *inter alia*, his reliance “on the bare accusation of another student whose reliability the Assistant Principal had no reason to trust”). Thus, as a state court concluded in applying a general-reasonableness standard to a school search in a pre-*T.L.O*. case, there must be scrutiny of “the probative value and reliability of the information used as a justification for the search.” *Doe v. State,* 88 N.M. 347, 352, 540 P.2d 827, 832 (N.M. App. 1975).

Counsel should insist that the reviewing court strictly enforce the second prong of the *T.L.O.* standard — that the “scope” of a search be “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *T.L.O.,* 469 U.S. at 342. The Court’s analysis of the *T.L.O.* record under this prong can be used to illustrate the limitations it imposes on the scope of search. When the vice-principal knew nothing more than that a highly reliable source, a teacher, had observed a student smoking cigarettes in violation of a school rule, the vice-principal was permitted to take the limited step of opening the student’s purse and removing the cigarettes. *See id.* at 344-46. When that action revealed evidence of the criminal act of possession of marijuana, the vice-principal could engage in “further exploration” of the purse. *See id.* at 347. It was only after the discovery of marijuana itself — a discovery that in the police context would justify an arrest and a full-scale search incident to arrest — that the vice-principal was permitted to make the additional intrusion of examining the interior of the zippered compartment. *See ibid.* Finally, it was only after this intrusion revealed evidence of the far more serious crime of narcotics sale that the vice-principal was permitted to take the ultimate step of reading T.L.O.’s letters. *See ibid. Compare, e.g.*, *In the Interest of Doe*, 77 Hawai’i 435, 442-43, 887 P.2d 645, 652-53 (1994) (principal’s search of a student’s handbag conformed to *T.L.O.* standard because the principal had “reasonable grounds to suspect that Minor may be concealing marijuana in her purse” and “the search ceased” after the student emptied her purse, disclosing a bag of marijuana), *and State v.*

Drake, 139 N.H. 662, 667, 662 A.2d 265, 268 (1995) (principal's search of a student's knapsack complied with *T.L.O.* because the principal had reasonable grounds to believe that the student was "likely using, and possibly distributing, drugs" and would have drugs with him in school that day, and the principal first asked the student to empty his pockets, resulting in the discovery of a rolling paper package with what appeared to be marijuana on it, whereupon the principal asked the student to open his knapsack and thereby found several bags of marijuana), *with Coronado v. State*, 835 S.W.2d 636, 637, 641 (Tex. Crim. App. 1992) (although "the first prong of *T.L.O.* is met" in that the assistant principal had "reasonable grounds to suspect that [the student] was violating school rules by 'skipping'" class and leaving school early, the assistant principal's "searches of [the student's] clothing and person, locker, and vehicle were excessively intrusive in light of the infraction of skipping school," notwithstanding the assistant principal's reasons for suspecting that the student was selling drugs to other students).

In its post-*T.L.O.* decision in *Safford Unified School District # 1 v. Redding*, the Court elaborated upon *T.L.O.*'s general statements about "excessive[] intrus[ions]" by addressing the criteria that apply when school officials engage in a search that involves "exposure of [a student's] intimate parts." 557 U.S. 364, 370, 374-77 (2009). In *Safford*, a school nurse and an administrative assistant "directed [the student] to remove her clothes down to her underwear, and then 'pull out' her bra and the elastic band on her underpants," which "necessarily exposed her breasts and pelvic area to some degree." *Id*. at 374. The Court characterized such a search as a "quantum leap" beyond less intrusive searches of "outer clothes and backpacks" (*id*. at 377), and explained:

> [B]oth subjective and reasonable societal expectations of personal privacy support the treatment of such a search [that exposes a student's "intimate parts"] as categorically distinct [from less intrusive searches], requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.
>
> [Student] Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure. . . . The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be, see, *e.g.*, New York City Dept. of Education, Reg. No. A-432, p. 2 (2005), online at http://docs.nycenet.edu/ docushare/dsweb/Get/Document-21/A-432.pdf ("Under no circumstances shall a strip-search of a student be conducted").

> The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T.L.O.*, that "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place." 469 U.S., at 341 (internal quotation marks omitted). The scope will be permissible, that is, when it is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id*., at 342. . . .
>
> . . . The meaning of such a search [which exposes "intimate parts" of the student's body], and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.

Safford, 557 U.S. at 374-77. *See also id*. at 380 (Justice Stevens, concurring in part and dissenting in part) ("I have long believed that '"[i]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude."'" (quoting *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980))); *id*. at 381-82 (Justice Ginsburg, concurring in part and dissenting in part) ("humiliating stripdown search" of the 13-year-old student "was abusive"); *T.L.O.*, 469 U.S. at 382 n.25 (Justice Stevens, concurring in part and dissenting in part) (*T.LO.*'s prohibition of excessively intrusive searches of students precludes "the shocking strip searches that are described in some cases that have no place in the schoolhouse"); *Tarter v. Raybuck,* 742 F.2d 977, 982-83 (6th Cir. 1984) (body cavity search of student would be *per se* unreasonable). In *Safford*, the Court held that the school officials' "quantum leap from outer clothes and backpacks to exposure of intimate parts" violated the Fourth Amendment because the facts known to the school officials did not indicate that there was "danger to the [other] students from the power of the drugs [that the student was "reasonably suspected of carrying"] or their quantity, . . . [or] any reason to suppose that . . . [the student] was carrying pills in her underwear." *Safford*, 557 U.S. at 374, 376-77.

In cases involving older students, especially students close to the age of eighteen, defense counsel should argue that *T.L.O.*'s requirement that searches be tempered according to the "age . . . of the student," *T.L.O.,* 469 U.S. at 342, stringently restricts the authority of school officials in searching students whose privacy interests are more closely akin to adults'. Counsel can point out that the greater maturity of an older student renders it less justifiable to subordinate the student's privacy rights to the needs of the school. *Cf. Smyth v. Lubbers,* 398 F. Supp. 777, 785-86 (W.D. Mich. 1975) (college's assertion of the right to search students' dormitory rooms is rejected in part because the adult status of the students precludes their being denied the same privacy rights as adults outside the educational institution).

A question reserved in *T.L.O.* was "whether individualized suspicion is an essential element of the reasonableness standard . . . for searches by school authorities." 469 U.S. at 342 n.8. The Court explained that "[b]ecause the search of T.L.O.'s purse was based upon an individualized suspicion that she had violated school rules, . . . we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion." *Ibid*. *See also Vernonia School District 47J v. Acton*, 515 U.S. at 653

("The school search we approved in *T.L.O.*, while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing."). Thereafter, the Court has, on two occasions, upheld a program of random drug testing, without individualized suspicion, of students who voluntarily participated in extracurricular activities. *See Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. at 830-38 (school district's policy of random drug testing of students voluntarily participating in competitive extracurricular activities is upheld by applying a three-pronged standard — which considers the nature of privacy interest affected; the character of the intrusion; and the nature and immediacy of the government's concerns and the efficacy of the policy in meeting them — and concluding that (1) the privacy interests of the children were diminished because they voluntarily chose to participate in extracurricular activities which were highly regulated; (2) urinalysis was a "negligible" intrusion, especially given that the test results were not turned over to law enforcement officials, the only consequence of refusing to participate in drug testing was nonparticipation in the extracurricular activity, and students did not face expulsion or suspension or any other school-related sanctions even if they tested positive; and (3) there was sufficient evidence of student use of drugs to justify the need for the drug testing program); *Vernonia School District 47J v. Acton*, 515 U.S. at 646, 654-65 (school district's policy of "random urinalysis drug testing of students who participate in the District's school athletics programs" is upheld by applying the same three-pronged analytic apparatus employed in *Earls*, and concluding that (1) the very nature of school sports results in a lesser degree of privacy, and student athletes "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally"; (2) the urinalysis testing process, as administered under the district's guidelines, involved a "negligible" degree of intrusion; and (3) there was concrete evidence of a significant increase in the use of drugs by the student body, "'particularly those involved in interscholastic athletics,'" and there was a basis for concluding that "drug use by school athletes" gives rise to a "particularly high" "risk of immediate physical harm to the drug user or those with whom he is playing his sport"). As the Court's analyses in *Acton* and *Earls* make clear, the constitutionality of a search of students without individualized suspicion turns upon a balancing of context-specific facts and circumstances. *See, e.g.*, *Doe ex rel. Doe v. Little Rock School District*, 380 F.3d 349, 351, 354-56 (8th Cir. 2004) (rejecting a school district's attempt to apply *Acton* and *Earls* to justify a district practice of "subject[ing] secondary public school students to random, suspicionless searches of their persons and belongings," and explaining that, "[u]nlike the suspicionless searches of participants in school sports and other competitive extracurricular activities that the Supreme Court approved in *Vernonia* and *Earls*, in which 'the privacy interests compromised by the process' of the searches were deemed 'negligible,' . . . the type of search at issue here invades students' privacy interests in a major way"; "[i]n sharp contrast to these cases, the fruits of the searches at issue here are apparently regularly turned over to law enforcement and are used in criminal proceedings against students whose contraband is discovered"; and the district had failed to present the kinds of "particularized evidence" offered by the school districts "[i]n both *Vernonia* and *Earls* . . . to 'shore up' their assertions of a special need to institute administrative search programs for extracurricular-activity participants"); *B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1268 & nn.10-11 (9th Cir. 1999) (rejecting a school district's attempt to apply *Acton* to justify the use of a drug-sniffing dog to sniff all of the students in a classroom for

drugs, and explaining that, "[i]n contrast [to *Acton*], the search in this case took place in a classroom where students were engaged in compulsory, educational activities," and that, "[i]n sharp contrast" to *Acton*, "the record here does not disclose that there was any drug crisis or even a drug problem" at the school at the time of the search). *See also York v. Wahkiakum School District No. 200*, 163 Wash. 2d 297, 299, 178 P.3d 995, 997 (2008) (rejecting *Vernonia School District 47J v. Acton* on state constitutional grounds and holding that "warrantless random and suspicionless drug testing of student athletes violates the Washington State Constitution").

§ 23.35 SEARCHES OF STUDENTS' LOCKERS OR DESKS BY SCHOOL OFFICIALS

T.L.O. expressly reserved "the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies," and what "standards (if any) govern[] searches of such areas by school officials or by other public authorities acting at the request of school officials." 469 U.S. at 337 n.5.

A number of lower court decisions have concluded that students have a reasonable expectation of privacy in their lockers, at least in the absence of an express school policy or state regulation that could render such an expectation unreasonable, *see, e.g.*, *Commonwealth v. Snyder*, 413 Mass. 521, 526, 597 N.E.2d 1363, 1366 (1992) (citing caselaw from other jurisdictions). In situations involving a school policy or state regulation establishing a school's right of access to the contents of students' lockers, some courts have found that students lacked a reasonable expectation of privacy in their lockers, *see, e.g.*, *In Interest of Isiah B.*, 176 Wis. 2d 639, 649-50, 500 N.W.2d 637, 641 (1993) (there was a written school policy "retaining ownership and possessory control of school lockers . . ., and notice of the locker policy is given to students"), or had a reduced expectation of privacy in the locker, *see, e.g.*, *Commonwealth v. Cass*, 551 Pa. 25, 38-39, 709 A.2d 350, 356-57 (1998) (given that the Code of Student Conduct "forewarned [students] that their lockers are subject to a search by school officials without prior warning" and that "school officials . . . possess a master key that can open all combination locks" and "are constantly in the student lockers to make general repairs as needed, without first giving notice to the students," the students — although "possess[ing] a legitimate expectation of privacy in their assigned lockers" — had only a "minimal" "privacy expectation"), while other courts have held that students possess an undiminished expectation of privacy in their lockers even when a school policy or state regulation purports to render such a privacy expectation unreasonable, *see, e.g.*, *State v. Jones*, 666 N.W.2d 142, 147-48 (Iowa 2003) (a student "maintained a legitimate expectation of privacy in the contents of his locker" even though both "school district policy . . . and state law . . . clearly contemplate and regulate searches of school lockers").

Defense counsel can draw on language in the *T.L.O.* opinion to mount a persuasive argument that students should be viewed as having a privacy interest in lockers and desks assigned to them for the storage of personal belongings. The Court observed:

> Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. . . . Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

469 U.S. at 338-39. *See also Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 374 n.3 (2009) ("it is common ground that [a 13-year-old student] . . . had a reasonable expectation of privacy covering the personal things she chose to carry in her backpack").

In rebutting the argument that the school's proprietary interest in the locker or desk confers the right to search at will, defense counsel can analogize the student's privacy interest in his or her locker or desk to the privacy interest of a government employee in a locker or a desk provided by a governmental employer for the employee's exclusive use in a government building. In *O'Connor v. Ortega,* 480 U.S. 709 (1987), a plurality of the Court concluded that considerations similar to those involved in *T.L.O.*'s analysis of schoolhouse searches of students were pertinent to "workplace" searches of a public employee's desk and filing cabinet by his or her governmental employer. *See id.* at 719-26. Although there was a 4-1-4 split on several issues in *O'Connor,* five Justices agreed that the government employee in that case had a constitutionally protected privacy interest in his office; all nine Justices agreed that he had such an interest in his desk and file cabinets; and all nine agreed that a government employee *could* acquire a constitutionally protected privacy interest in the whole of an office assigned for his or her exclusive use despite its physical location in a government-owned building. *Id.* at 714-19 (plurality opinion); *id.* at 731 (concurring opinion of Justice Scalia) ("I would hold . . . that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter"); *id.* at 741 (dissenting opinion of Justice Blackmun) ("Dr. Ortega clearly had an expectation of privacy in his office, desk, and file cabinets, particularly with respect to the type of investigatory search involved here"). The plurality in *O'Connor* applied a *T.L.O.* standard to gauge the reasonableness of a search of the employee's desk and file cabinets, *see id.* at 725-26, and approvingly cited lower court caselaw applying a similar standard to an employer's search of an employee's locker. *See id.* at 721, citing *United States v. Bunkers,* 521 F.2d 1217 (9th Cir. 1975). Thus counsel can argue that the opinions in *O'Connor* demonstrate that the *T.L.O.* standard should apply to a teacher's or principal's search of a student's locker or desk, at least when the locker or desk is set aside for the student's personal use, the student stores "personal items" in the locker or desk, and the

school has not published regulations discouraging students from storing personal items in their lockers and desks. *See O'Connor,* 480 U.S. at 718-19; *see also Vernonia School District 47J v. Acton*, 515 U.S. 646, 665 (1995) (analogizing the issues that arise in a school search "when the government acts as guardian and tutor" of students to the issues that arise "when the government conducts a search in its capacity as employer (a warrantless search of an absent employee's desk to obtain an urgently needed file, for example)," and citing *O'Connor v. Ortega*); *United States v. Speights,* 557 F.2d 362 (3d Cir. 1977) (police officer had a legitimate expectation of privacy in a locker at the stationhouse); *Commonwealth v. Gabrielle,* 269 Pa. Super. 338, 409 A.2d 1173 (1979) (employee had legitimate expectation of privacy in a workplace locker).

§ 23.36 SEARCHES BY SCHOOL OFFICIALS AT THE BEHEST OF THE POLICE

The Supreme Court in *T.L.O.* also reserved the "question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies." 469 U.S. at 341 n.7.

With virtual unanimity the lower courts have held that when school officials act in cooperation with the police in conducting a search, the search must be judged under the ordinary rules that govern police searches, including the warrant requirement and the probable cause standard. *See, e.g., Picha v. Wielgos,* 410 F. Supp. 1214, 1219-21 (N.D. Ill. 1976); *Piazzola v. Watkins,* 316 F. Supp. 624, 626-27 (M.D. Ala. 1970), *aff'd,* 442 F.2d 284 (5th Cir. 1971); *M.J. v. State,* 399 So. 2d 996 (Fla. App. 1981); *State v. Heirtzler*, 147 N.H. 344, 349-52, 789 A.2d 634, 638-41 (2001). *Contra, Doe v. Renfrow,* 475 F. Supp. 1012 (N.D. Ind. 1979), *remanded in part on other grounds,* 631 F.2d 91 (7th Cir. 1980) (school search conducted by school officials in conjunction with police officers was not subject to the full protections of the Fourth Amendment because the school officials had initiated the search and invited the participation of the police and the police had agreed that no arrests would be made as a result of finding drugs on students). *See generally* Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067 (2003).

The caselaw holding that the involvement of the police calls forth the full panoply of Fourth Amendment protections is consistent with the long-established doctrine that even a search or seizure by a private citizen, normally not regulated at all by the Fourth Amendment, *United States v. Jacobsen,* 466 U.S. 109, 113-15 (1984); *Burdeau v. McDowell,* 256 U.S. 465 (1921), will be subject to Fourth Amendment restrictions if:

(i) The search was ordered or requested by a government official, *see, e.g., United States v. Hardin*, 539 F.3d 404, 417-20 (6th Cir. 2008) (apartment building "manager was acting as an agent of the government" when he entered the defendant's apartment at the request of police officers); *Corngold v. United States,* 367 F.2d 1 (9th Cir. 1966) (alternative ground) (customs agent asked an airline transportation agent to open a package placed with the airline for shipment); *People v. Barber,* 94 Ill. App. 3d 813, 419 N.E.2d 71, 50 Ill. Dec. 204 (1981) (police

officers requested that landlord enter tenant's apartment); *Commonwealth v. Dembo,* 451 Pa. 1, 301 A.2d 689 (1973) (police officer seeking evidence of criminal conduct asked postal authorities to open package; postal authorities had contractual authority to open any package to verify shipping rate); *compare United States v. Jacobsen,* 466 U.S. at 115 n.10 (in holding that Federal Express employee's opening of package was private action not subject to Fourth Amendment restrictions, the Court points out that "the lower courts found no governmental involvement in the private search"); or

(ii) The search was a "joint endeavor" of a private individual and the police, in that: (A) the police conducted the search jointly with the private citizen, *see, e.g., State v. Scrotsky,* 39 N.J. 410, 189 A.2d 23 (1963) (detective and defendant's landlady entered suspect's apartment together to recover landlady's stolen goods); *Nicaud v. State ex rel. Hendrix,* 401 So. 2d 43 (Ala. 1981) (police accompanied shipyard foreman onto shrimp boat); or (B) the officer tacitly encouraged the private citizen to conduct the search, *see, e.g., Moody v. United States,* 163 A.2d 337 (D.C. 1960); *State v. Becich,* 13 Or App. 415, 509 P.2d 1232 (1973); *Commonwealth v. Borecky,* 277 Pa. Super. 244, 419 A.2d 753 (1980). (It should be noted that although the probation officer's search of a probationer's home in *Griffin v. Wisconsin,* 483 U.S. 868 (1987), involved a police escort, *id.* at 871 — apparently requested by the probation officer in light of his articulable suspicion that the probationer possessed a handgun, *see ibid.* — the Court's opinion treats the search as having been "carried out entirely by the probation officers," *ibid.* Accordingly, the *Griffin* decision does not have any implications for the "joint endeavor" doctrine.)

Part G. Derivative Evidence: Fruits of Unlawful Searches and Seizures

§ 23.37 THE CONCEPT OF "DERIVATIVE EVIDENCE": EVIDENCE THAT MUST BE SUPPRESSED AS THE FRUITS OF AN UNLAWFUL SEARCH OR SEIZURE

When government agents have violated the restrictions of the Fourth Amendment or state constitutional or statutory protections against unlawful searches or seizures, the court must suppress not only evidence directly obtained by the violation but also "derivative evidence," that is, evidence to which the police are led "'by the exploitation of that illegality.'" *Wong Sun v. United States,* 371 U.S. 471, 488 (1963); *see also Brown v. Illinois,* 422 U.S. 590, 597-603 (1975); *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920); *Oregon v. Elstad,* 470 U.S. 298, 305-06 (1985) (dictum).

"*Wong Sun* . . . articulated the guiding principle for determining whether evidence derivatively obtained from a violation of the Fourth Amendment is admissible against the accused at trial: 'The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.' 371 U.S., at 484. . . . As subsequent cases have confirmed, the exclusionary sanction applies to any 'fruits' of a constitutional violation — whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the

accused obtained during an illegal arrest and detention." *United States v. Crews,* 445 U.S. 463, 470 (1980) (dictum). It also applies to the testimony of witnesses that has a sufficiently close "causal connection" to the constitutional violation, *United States v. Ceccolini,* 435 U.S. 268, 274 (1978); *see id.* at 274-75 (dictum), although in order to exclude "live-witness testimony . . . , a closer, more direct link between the illegality and that kind of testimony is required," *id.* at 278; *see also id.* at 280, except perhaps "where the search was conducted by the police for the specific purpose of discovering potential witnesses," *id.* at 276 n.4; *see also id.* at 279-80.

The possible chains of causal connection may be elaborate, *e.g., Smith v. United States,* 344 F.2d 545 (D.C. Cir. 1965); *United States v. Tane,* 329 F.2d 848 (2d Cir. 1964), and counsel should be alert to follow them out. "[T]he question" of the excludability of any particular piece of evidence is said to be "whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States v. Crews,* 445 U.S. at 471. *Compare Dunaway v. New York,* 442 U.S. 200, 216-19 (1979), *and Taylor v. Alabama,* 457 U.S. 687 (1982), *with Rawlings v. Kentucky,* 448 U.S. 98, 106-10 (1980); *and see United States v. Ceccolini,* 435 U.S. at 276 ("we have declined to adopt a *'per se* or "but for" rule' that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest"); *id.* at 273-74.

Thus, for example, if a respondent has been unconstitutionally detained or arrested, the evidence that must be suppressed as a result of the detention or arrest would include:

(a) *Any physical object or substance seized without a warrant at or after the time of arrest, the validity of whose seizure depends on the arrest. Beck v. Ohio*, 379 U.S. 89 (1964); *Sibron v. New York,* 392 U.S. 40, 62-66 (1968); *Whiteley v. Warden,* 401 U.S. 560 (1971). Searches incident to arrest (§ 23.08 *supra*) and "frisks" incident to a *Terry* stop (§ 23.10 *supra*) are unconstitutional if the arrest or stop is unconstitutional. *E.g., United States v. Di Re,* 332 U.S. 581 (1948); *Henry v. United States,* 361 U.S. 98 (1959). Similarly, if an unconstitutionally arrested or detained person attempts to drop or throw away objects or exposes them to the police when attempting to discard them, their observation and seizure are tainted by the arrest or detention. *Reid v. Georgia,* 448 U.S. 438 (1980) (per curiam); see § 23.13 *supra.*

(b) *Any observation made at or after the time of arrest, whose validity depends on the arrest. Johnson v. United States*, 333 U.S. 10 (1948). Thus, when police enter a building pursuant to the "arrest entry" doctrine (§ 23.19 *supra*), unconstitutionality of the arrest or intended arrest will invalidate their observations of objects in "plain view" (§ 23.22(b) *supra*) within the building and their subsequent searches or seizures of those objects. *See Johnson v. United States*, 333 U.S. at 12-13, 17; *Massachusetts v. Painten*, 368 F.2d 142 (1st Cir. 1966), *cert. dismissed,* 389 U.S. 560 (1968).

(c) *Confessions or statements made in custody after the arrest or otherwise induced by*

pressures flowing from the arrest "unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is '"sufficiently an act of free will to purge the primary taint."'" *Taylor v. Alabama,* 457 U.S. at 690. *See Wong Sun v. United States,* 371 U.S. at 484-88; *Brown v. Illinois*, 422 U.S. at 597-603; *Dunaway v. New York*, 442 U.S. at 216-19; *Lanier v. South Carolina*, 474 U.S. 25 (1985) (per curiam); *Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003) (per curiam). *Compare Rawlings v. Kentucky,* 448 U.S. 98, 106-10 (1980); *and cf. United States v. Ceccolini,* 435 U.S. at 273-79 (dictum). *But cf. New York v. Harris*, 495 U.S. 14, 21 (1990) ("where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton* [v. *New York*, 445 U.S. 573 (1980)]"). *Compare State v. Luuertsema*, 262 Conn. 179, 192-97, 811 A.2d 223, 231-34 (2002) (rejecting the *New York v. Harris* rule as a matter of state constitutional law); *People v. Harris*, 77 N.Y. 2d 434, 568 N.Y.S.2d 702, 570 N.E.2d 1051 (1991) (same).

(d) *Any physical object or substance or observation obtained by a search or seizure whose validity depends upon consent, when the consent is given in custody after the arrest or otherwise induced by pressures flowing from the arrest.* Consent to a police search or seizure (§ 23.18 *supra*) is ineffective if given during an unlawful confinement, *Florida v. Bostick*, 501 U.S. 429, 433-34 (1991) (if Bostick's consent to search had been obtained during a period of unlawful detention, the results of that search "must be suppressed as tainted fruit"); *Florida v. Royer,* 460 U.S. 491, 507-08 (1983) (plurality opinion); *id.* at 509 (concurring opinion of Justice Powell); *ibid.* (concurring opinion of Justice Brennan); *United States v. Murphy*, 703 F.3d 182, 190 (2d Cir. 2012); *Watson v. United States,* 249 F.2d 106 (D.C. Cir. 1957); *United States v. Klapholz,* 230 F.2d 494 (2d Cir. 1956), just as a confession or incriminating statement would be. See § 24.15 *infra.*

(e) *Fingerprint exemplars taken after the arrest*, *Davis v. Mississippi,* 394 U.S. 721 (1969); *Hayes v. Florida,* 470 U.S. 811 (1985); *Bynum v. United States,* 262 F.2d 465 (D.C. Cir. 1958); *see Taylor v. Alabama,* 457 U.S. at 692-93 (dictum), and, by the same logic, any other evidence obtained through physical custody of the defendant — lineup identifications, body-test results, and so forth (see § 23.14 *supra*). *E.g.*, *United States v. Crews*, 445 U.S. 463, 472 (1980) (the Court assumes the Government is correct in conceding that pretrial photo and lineup identifications following an arrest made without probable cause must be suppressed); *Young v. Conway*, 698 F.3d 69, 84-85 (2d Cir. 2012) (state court order suppressing the complainant's lineup identification as the fruit of an unconstitutional arrest without probable cause also should have precluded an in-court identification by the complainant because "the State failed to meet its burden to prove an independent basis [for an in-court identification] by clear and convincing evidence")*; People v. Teresinki*, 30 Cal.3d 822, 832, 180 Cal. Rptr. 617, 622-23, 640 P.3d 753, 758-59 (1982) (a pretrial identification by an eyewitness to a robbery based upon booking photos resulting from a vehicle stop and investigative detention made without reasonable suspicion must be suppressed); *Ferguson v. State*, 301 Md. 542, 547-53, 483 A.2d 1255, 1257-60 (1984) (an identification by a robbery victim in a holding cell showup following an arrest without probable case must be suppressed); *State v. Le*, 103 Wash. App. 354, 360-67, 12 P.3d 653, 656-60 (2000)

(an identification by a police officer who had witnessed a fleeing burglar and was called to view the defendant in a showup at the scene of the defendant's warrantless arrest in his home — a dwelling entry that violated the rule of *Payton v. New York* — should have been suppressed, although the trial court's failure to suppress it was harmless error because of other overwhelming evidence of guilt); 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(g) (5th ed. 2012); *but see United States v. Olivares-Rangel*, 458 F.3d 1104, 1112-16 (10th Cir. 2006) (holding that the exclusion of physical evidence obtained by routine processing of an arrestee following an unconstitutional arrest — in this case, an arrest tainted by an investigative stop without reasonable suspicion — is required only if the arrest was made for the purpose of obtaining that evidence). Different kinds of police lawlessness may entail different evidentiary consequences. *Compare People v. Gethers*, 86 N.Y.2d 159, 654 N.E.2d 102, 630 N.Y.S.2d 281 (1995) (a police-arranged identification following an arrest without probable cause must be excluded), *with People v. Jones*, 2 N.Y.3d 235, 810 N.E.2d 415, 778 N.Y.S.2d 133 (2004) (a police-arranged identification following a warrantless home arrest in violation of *Payton v. New York* ordinarily needs not be excluded).

(f) *Evidence derived from any of the foregoing sources.* However, evidence obtained by the police following an unconstitutional search or seizure is not suppressible if the prosecution shows that (i) the police officers' knowledge of the evidence and access to it derived from an "independent source" unconnected with the search or seizure, *Segura v. United States,* 468 U.S. 796 (1984); *Murray v. United States,* 487 U.S. 533 (1988), or (ii) the evidence "ultimately or inevitably would have been discovered by lawful means" in the course of events even if the search or seizure had not produced it, *Nix v. Williams,* 467 U.S. 431, 444 (1984) (Sixth Amendment decision placed on grounds equally applicable to the Fourth Amendment exclusionary rule); *see United States v. Stokes*, 733 F.3d 438, 446 (2d Cir. 2013) (the trial court erred in finding that the government satisfied its burden of proving " by a preponderance of the evidence that the guns and ammunition would inevitably have been discovered": the trial court "failed to account for all of the demonstrated historical facts in the record, and in doing so, failed adequately to consider . . . plausible contingencies that might not have resulted in the guns' discovery"); *but cf. State v. Rodrigues*, 128 Hawai'i 200, 211-15, 286 P.3d 809, 820-24 (2012) (discussing and applying a state constitutional rule that follows Justice Brennan's dissent in *Nix v. Williams* by requiring that the prosecution "'satisfy a heightened burden of proof'" of "clear and convincing evidence" in order to rely on the inevitable discovery exception).

§ 23.38 PROSECUTORIAL BURDEN OF DISPROVING "TAINT" OF UNLAWFUL SEARCH AND SEIZURE

When unconstitutional activity by the police or other government agents has been shown that may have led to evidence proffered by the prosecution, the prosecutor has the burden of demonstrating that the evidence is untainted. *See Harrison v. United States,* 392 U.S. 219, 224-26 (1968); *Brown v. Illinois,* 422 U.S. 590, 604 (1975); *Dunaway v. New York,* 442 U.S. 200, 218 (1979); *Rawlings v. Kentucky,* 448 U.S. 98, 107, 110 (1980); *Taylor v. Alabama,* 457 U.S. 687, 690 (1982); *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (per curiam); *United States v.*

Paroutian, 299 F.2d 486 (2d Cir. 1962), *aff'd after remand,* 319 F.2d 661 (2d Cir. 1963); *cf. Alderman v. United States,* 394 U.S. 165, 183 (1969) (dictum); *and compare Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 286-87 (1977).

In *Nix v. Williams,* 467 U.S. 431, 444 n.5 (1984), the Supreme Court implied that "the usual burden of proof" on this issue is "a preponderance of evidence." It may, however, be greater in situations in which the illegality is peculiarly likely to have tainted the sort of evidence that the prosecution is offering or when there is peculiar "difficulty in determining" questions of cause and effect because these involve "speculative elements." *Ibid.* Both considerations were mentioned in *Nix* as distinguishing *United States v. Wade,* 388 U.S. 218, 240 (1967), which held that the prosecutor's burden of proof in showing that in-court identification testimony is not tainted by the witness's exposure to the accused in an earlier, unconstitutional identification confrontation is "clear and convincing evidence." *See also Moore v. Illinois,* 434 U.S. 220, 225-26 (1977) (dictum). *And see Kastigar v. United States,* 406 U.S. 441, 461-62 (1972), holding that when an individual has given compelled testimony under an immunity grant, the prosecution bears "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *See also Braswell v. United States,* 487 U.S. 99, 117 (1988). Both *Nix* and *Wade* were Sixth Amendment right-to-counsel cases; *Kastigar* and *Braswell* were Fifth Amendment self-incrimination cases; the Supreme Court has not squarely addressed the prosecutor's burden of proving its evidence untainted following a Fourth Amendment search-and-seizure violation. But there appears to be no reason to distinguish among kinds of constitutional violations when it comes to the standards for determining whether derivative evidence is "'purged of the primary taint.'" *Johnson v. Louisiana,* 406 U.S. 356, 365 (1972). The *Nix* opinion derived its statement of the "usual burden of proof at suppression hearings" from Fourth and Fifth Amendment caselaw (*see also Colorado v. Connelly,* 479 U.S. 157, 167-69 (1986)); *Wade*'s companion case, *Gilbert v. California,* 388 U.S. 263, 272-73 (1967), expressly adopted principles of taint that were first announced in the Fourth Amendment context (*see also Moore v. Illinois,* 434 U.S. at 226, 231); the Court in *Harris v. New York,* 401 U.S. 222, 224-25 (1971), relied upon a Fourth Amendment case, *Walder v. United States,* 347 U.S. 62 (1954), when deciding the exclusionary consequences of a *Miranda* violation; and it later treated *Harris* as authoritative in another Fourth Amendment case, *United States v. Havens,* 446 U.S. 620, 624-27 (1980). The exclusionary rules that enforce the Fourth, Fifth, and Sixth Amendments are said to have the same essential purpose: "to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it," *Elkins v. United States,* 364 U.S. 206, 217 (1960). *See Colorado v. Connelly,* 479 U.S. at 166; *Linkletter v. Walker,* 381 U.S. 618, 633, 636-37 (1965) (Fourth Amendment); *Stone v. Powell,* 428 U.S. 465, 484-88 (1976) (same); *Illinois v. Krull,* 480 U.S. 340, 347 (1987) (same); *Johnson v. New Jersey,* 384 U.S. 719, 729-31 (1966) (Fifth Amendment); *Stovall v. Denno,* 388 U.S. 293, 297 (1967) (Sixth Amendment); *cf. United States v. Payner,* 447 U.S. 727, 735-36 n.8 (1980); *United States v. Johnson,* 457 U.S. 537, 561 (1982). Rules for litigating issues of taint under all three Amendments are therefore presumptively similar. *But see Oregon v. Elstad,* 470 U.S. 298, 304-09 (1985).

§ 23.39 RELEVANCE OF THE "FLAGRANCY" OF THE POLICE CONDUCT IN ASCERTAINING "TAINT"

A brief passage in *Brown v. Illinois,* 422 U.S. 590, 604 (1975), indicates that "the purpose and flagrancy of . . . official misconduct are . . . relevant" in determining the scope of taint that flows from Fourth Amendment violations. *See also Dunaway v. New York,* 442 U.S. 200, 218 (1979); *Rawlings v. Kentucky,* 448 U.S. 98, 109-10 (1980); *Taylor v. Alabama,* 457 U.S. 687, 693 (1982); *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (per curiam).

The *Brown* case itself involved the question of the admissibility of a confession following an illegal arrest (as did *Dunaway, Rawlings, Taylor*, and *Kaupp*). The *Brown* majority opinion leaves unclear whether the "flagrancy" principle is limited to that issue or is applicable to determinations of taint in other contexts. Arguably, "flagrancy" is particularly relevant in connection with the inquiry whether confessions, "(verbal acts, as contrasted with physical evidence)," 422 U.S. at 600, are tainted by unconstitutional police treatment of a suspect because the *degree* of official disregard of a suspect's rights is particularly likely to affect the suspect's choice to confess. *See Oregon v. Elstad,* 470 U.S. 298, 312 (1985). The *Brown* majority notes specifically that "[t]he manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." 422 U.S. at 605. If this is the rationale for considering "flagrancy" as a factor in the exclusionary calculus in confession cases, then "flagrancy" should also be considered in cases involving motions to suppress the tangible fruits of searches and seizures based on consent given after an unconstitutional arrest or stop, or in unconstitutional detention, or as a result of other unconstitutional police conduct that is potentially intimidating. And the courts do consistently consider the "flagrancy of . . . official misconduct" in consent-search cases. *E.g.*, *United States v. Martinez*, 486 F.3d 855, 865 (5th Cir. 2007) (applying the flagrancy principle in determining to exclude firearms seized in a dwelling search based upon consent given following a stop made without reasonable suspicion); *United States v. Robeles-Ortega*, 348 F.3d 679, 684-85 (7th Cir. 2003) (applying the flagrancy principle in determining to exclude drugs seized in a dwelling search based upon consent given following a forcible, warrantless entry by five DEA agents with drawn guns); *United States v. Jones*, 234 F.3d 234, 243 (5th Cir. 2000) (applying the flagrancy principle in determining to exclude drugs seized in a vehicle search based on consent given after a vehicle stop was unconstitutionally prolonged); *State v. Munroe*, 244 Wis. 2d 1, 13-14, 630 N.W.2d 223, 228-29 (Wis. App. 2001) (applying the flagrancy principle in determining to exclude drugs seized in a motel-room search based on consent given after an entry to request identification was unconstitutionally prolonged).

But the "flagrancy" principle may have still broader application. The *Brown* majority supports its "flagrancy" statement with a footnote citing lower court decisions that involved both confessional and nonconfessional evidence, *id.* at 604 n.9; and it purports, at the outset of its opinion, to be explicating the principles announced in *Wong Sun v. United States,* 371 U.S. 471 (1963), "to be applied where the issue is whether statements *and other evidence* obtained after an illegal arrest or search should be excluded," 422 U.S. at 597 (emphasis added). A concurring opinion by Justice Powell explains the relevance of "flagrancy" by reference to a notion which

has appeared in a few other Supreme Court decisions, *see, e.g., United States v. Peltier,* 422 U.S. 531, 542 (1975); *United States v. Janis,* 428 U.S. 433, 454 n.28, 458-59 n.35 (1976), that the exclusionary rule "is most likely to be effective" in cases of willful or gross police violations of the Constitution. 422 U.S. at 611. If *this* is the rationale for the "flagrancy" principle — or any part of its rationale — then the principle should apply to all exclusionary-rule issues. "In view of the deterrent purposes of the exclusionary rule[,] consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate. . . ." *Scott v. United States,* 436 U.S. 128, 135-36 (1978) (dictum). *See also id.* at 139 n.13; *United States v. Leon,* 468 U.S. 897, 911 (1984); *cf. Brendlin v. California*, 551 U.S. 249, 259-61, 263 (2007) (rejecting a lower court approach that would have permitted a police claim of lawful intent to *uphold* a seizure — by treating an officer's assertion that s/he had no intent to seize an individual as a basis for finding that no such seizure took place — and instead announcing a rule that is designed to avert the "powerful incentive" that police have to engage in certain "kind[s] of" conduct the Court has previously found to be unlawful); *but cf. Whren v. United States*, 517 U.S. 806 (1996) (rejecting the argument that an objectively valid traffic stop is unconstitutional when it is used as a pretext for an impermissible investigative search, and stating more generally that, in making the initial determination whether police action is constitutional, the Supreme Court has "never held . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment," *id*. at 812; thus, that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," *id*. at 813); *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (per curiam) (same); *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause."). For cases that take account of the flagrancy of unconstitutional police conduct in applying the exclusionary rule to evidence other than confessions and the products of consent searches, *see*, *e.g.*, *People v. Sampson*, 86 Ill. App. 3d 687, 694, 408 N.E.2d 3, 9, 41 Ill. Dec. 657, 663 (1980) (requiring a hearing on a motion to suppress a lineup identification following an arrest without probable cause); *Ferguson v. State*, 301 Md. 542, 549-53, 483 A.2d 1255, 1258-60 (1984) (excluding a showup identification following an arrest without probable cause); *Hill v. State*, 692 S.W.2d 716, 723 (Tex. Crim. App. 1985) (excluding a lineup identification following an arrest without probable cause or any legal authorization, made for the purpose of exhibiting the defendant in the lineup); *State v. Le*, 103 Wash. App. 354, 360-62, 12 P.3d 653, 657-58 (2000) (holding that a pretrial identification by a police officer who had witnessed a fleeing burglar and was called to view the defendant in a showup at the scene of the defendant's warrantless home arrest in violation of the rule of *Payton v. New York*, 445 U.S. 573 (1980), should have been suppressed, although its admission was harmless because of other overwhelming evidence of guilt); *and cf. United States v. Olivares-Rangel*, 458 F.3d 1104, 1112-16 (10th Cir. 2006) (holding that the exclusion of physical evidence obtained by routine processing of an arrestee following an unconstitutional arrest is required only if the arrest was made for the purpose of obtaining that evidence).

§ 23.40 UNAVAILABILITY OF "TAINTED" EVIDENCE AS JUSTIFICATION FOR ANY SUBSEQUENT POLICE ACTION

Illegally obtained evidence or information that may not be used in court also may not be used to justify any subsequent police action. The fruits of an illegal search, for example, may not be used to supply the probable cause required for a later arrest, *Johnson v. United States,* 333 U.S. 10 (1948), or search, *see United States v. Paroutian,* 299 F.2d 486 (2d Cir. 1962), *aff'd after remand,* 319 F.2d 661 (2d Cir. 1963); *cf. New Jersey v. T.L.O.,* 469 U.S. 325, 344 (1985) (dictum), or for the issuance of a warrant, *United States v. Giordano,* 416 U.S. 505, 529-34 (1974); *Steagald v. United States,* 451 U.S. 204 (1981) (by implication); *Hair v. United States,* 289 F.2d 894 (D.C. Cir. 1961). When they are so used, the products of the second police action are tainted by the illegality of the first, *see Alderman v. United States,* 394 U.S. 165, 177 (1969) (dictum); *United States v. Karo,* 468 U.S. 705, 719 (1984) (dictum), unless the prosecution shows "sufficient untainted evidence" (that is, information not derived in any way from the first action) to justify the later one, *ibid.* This evidence must be "genuinely independent of [the] . . . earlier, tainted [police action]," a condition that cannot be met if either (1) the police "decision to seek [a] . . . warrant [or conduct the second search] was prompted by what they had seen during the initial entry," or (2) "information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant [or is necessary to justify the second search without a warrant, if it was so made]." *Murray v. United States,* 487 U.S. 533, 542 (1988).

Chapter 24

Motions To Suppress Confessions, Admissions, and Other Statements of the Respondent

Part A. Introduction

§ 24.01 STRATEGIC REASONS FOR SEEKING SUPPRESSION OF THE RESPONDENT'S STATEMENTS, WHETHER INCULPATORY OR EXCULPATORY

The doctrines described in this chapter supply grounds for suppressing not only confessions but any statement by the respondent — "whether inculpatory or exculpatory — that the *prosecution* may seek to introduce at trial." *Rhode Island v. Innis,* 446 U.S. 291, 301 n.5 (1980) (emphasis in original); *see also Miranda v. Arizona,* 384 U.S. 436, 476-77 (1966).

Ordinarily, counsel will want to suppress all statements made by the respondent. In the case of a confession or a damaging admission, this is self-evident; the confession or admission is frequently the most damning thing the prosecutor has. In cases involving ostensibly exculpatory statements, a suppression motion is also the prudent course, since the facts that emerge at trial may render the statement more damaging than counsel can predict. For example, a statement asserting self-defense may prove to be detrimental in a case in which the state has no other persuasive proof that the respondent was the person who committed the assault. Moreover, counsel's pursuit of a suppression motion may serve the ancillary goals of discovery and creation of transcript material for use in impeaching prosecution witnesses at trial. See § 22.02 *supra.*

§ 24.02 APPLICABILITY OF ADULT COURT SUPPRESSION DOCTRINES TO JUVENILE COURT PROCEEDINGS

The discussion in this chapter of the constitutional and statutory grounds for suppressing statements interweaves adult and juvenile court caselaw. Although the Supreme Court has not expressly held the *Miranda* doctrine applicable to juvenile delinquency prosecutions, *Fare v. Michael C.,* 442 U.S. 707, 717 n.4 (1979), and has not explicitly addressed the "procedures or constitutional rights" governing suppression of statements extracted during the "pre-judicial stages of the juvenile process" (*In re Gault,* 387 U.S. 1, 13 (1967); *compare Haley v. Ohio,* 332 U.S. 596 (1948) (applying traditional due process requirements to determine the validity of a statement by a juvenile prosecuted in adult court)), the Court has recognized the logic of extending the safeguards provided in adult court to juvenile confessional evidence (*see In re Gault,* 387 U.S. at 49-52; *see also id.* at 56 & n.97) and has approvingly cited lower court caselaw applying adult court doctrines of statement suppression in juvenile court proceedings (*see id.* at 52-55). The lower courts uniformly hold these doctrines applicable to juvenile proceedings. *See, e.g., United States v. Fowler,* 476 F.2d 1091, 1092 (7th Cir. 1973); *In re Creek,* 243 A.2d 49 (D.C. 1968); *In the Interest of Edwards,* 227 Kan. 723, 725, 608 P.2d 1006, 1008-09 (1980); *State ex rel. Coco,* 363 So. 2d 207, 208 (La. 1978); *In re Meyers,* 25 N.C. App. 555,

558, 214 S.E.2d 268, 270 (1975).

Part B. Involuntary Statements

§ 24.03 GENERAL STANDARD FOR ASSESSING VOLUNTARINESS

As explained in § 22.03(d)(ii) *supra,* whenever the defense claims that a respondent's statement was "involuntary" and must be excluded from evidence under due process principles, the prosecution bears the burden of proving by a preponderance of the evidence (and, in some jurisdictions, by proof beyond a reasonable doubt) that the statement was voluntary.

"The [due process] question in each case is whether a [respondent's] . . . will was overborne at the time he confessed," *Reck v. Pate,* 367 U.S. 433, 440 (1961); *cf. United States v. Washington,* 431 U.S. 181, 188 (1977) — "whether the behavior of the State's law enforcement officials was such as to overbear [the respondent's] . . . will to resist and bring about confessions not freely self-determined," *Rogers v. Richmond,* 365 U.S. 534, 544 (1961), or whether the confession was "the product of an essentially free and unconstrained choice by its maker," *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961) (plurality opinion), approved in *Schneckloth v. Bustamonte,* 412 U.S. 218, 225-26 (1973). This question is said to be determined "on the 'totality of the circumstances' in any particular case." *Boulden v. Holman,* 394 U.S. 478, 480 (1969).

Despite the psychological flavor of the "voluntariness" label, the Supreme Court's involuntary-statement caselaw has gradually evolved to focus as much upon police mistreatment of suspects for its own sake as upon the effects of the mistreatment in wearing the suspect down. *See, e.g., Spano v. New York,* 360 U.S. 315, 320-21 (1959); *Blackburn v. Alabama,* 361 U.S. 199, 206-07 (1960); *Jackson v. Denno,* 378 U.S. 368, 385-86 (1964); *Beecher v. Alabama,* 389 U.S. 35 (1967) (per curiam); *Sims v. Georgia,* 389 U.S. 404 (1967) (per curiam); *Brooks v. Florida,* 389 U.S. 413 (1967) (per curiam); *Crane v. Kentucky,* 476 U.S. 683, 687-88 (1986); *but see Moran v. Burbine,* 475 U.S. 412, 432-34 (1986).

> This Court has long held that certain interrogation techniques either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. . . . Although these decisions framed the legal inquiry in a variety of different ways, usually through the "convenient shorthand" of asking whether the confession was "involuntary," . . . the Court's analysis has consistently been animated by the view that "ours is an accusatorial and not an inquisitorial system," . . . and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness.

Miller v. Fenton, 474 U.S. 104, 109-10 (1985).

Indeed, *some* coercive behavior on the part of government agents is an indispensable ingredient of an involuntary-statement claim; in *Colorado v. Connelly,* 479 U.S. 157 (1986), the Court rejected a defendant's contention that his confession was involuntary solely because his mental illness drove him to confess. But this does not mean that a defendant's mental, emotional, or physical vulnerability is immaterial. To the contrary, *Connelly* reaffirms the clear holding of *Blackburn v. Alabama,* 361 U.S. 199 (1960), that mental illness is "relevant to an individual's susceptibility to police coercion." 479 U.S. at 165. Subsequently, in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), the Court definitively declared that "we do consider a suspect's age and [extent of prior] experience [with the criminal justice system]" when gauging, for purposes of assessing the "voluntariness of a statement," whether "'the defendant's will was overborne,' . . . a question that logically can depend on 'the characteristics of the accused.'" *Id*. at 667-68 (majority opinion); *see also id*. at 668 (the "characteristics of the accused" relevant to this assessment "can include the suspect's age, education, and intelligence, . . . as well as a suspect's prior experience with law enforcement"). *See also Haley v. Ohio*, 332 U.S. 596, 599 (1948), discussed in § 24.05(a) *infra*. Other qualities relevant to the assessment of a suspect's susceptibility to coercion are mental retardation (*Reck v. Pate*, 367 U.S. at 441-44; *Culombe v. Connecticut*, 367 U.S. at 620-21, 624-25, 635), educational privation (*Payne v. Arkansas,* 356 U.S. 560 (1958); *Fikes v. Alabama,* 352 U.S. 191 (1957)), physical pain and drug ingestion (*Townsend v. Sain,* 372 U.S. 293 (1963); *Beecher v. Alabama,* 408 U.S. 234 (1972)), and any "unique characteristics of a particular suspect" (*Miller v. Fenton,* 474 U.S. at 109) that impair the suspect's "powers of resistance to overbearing police tactics" (*Reck v. Pate,* 367 U.S. at 442). In addition, the propriety or impropriety of police conduct is itself measured, to a large extent, by its tendency to weaken the suspect's will. *See, e.g., Spano v. New York,* 360 U.S. 315 (1959); *Lynumn v. Illinois,* 372 U.S. 528 (1963); *cf. Moran v. Burbine,* 475 U.S. at 423 ("[a]lthough highly inappropriate, even deliberate deception of an attorney [that keeps the attorney from coming to the police station to advise a suspect who is undergoing interrogation] could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident").

Thus the caselaw provides a basis for presenting involuntary-statement claims from any one or more of three perspectives:

(a) with an emphasis upon the *behavior* of the police as constituting "coercive government misconduct," *Colorado v. Connelly,* 479 U.S. at 163, that is "'revolting to the sense of justice,'" *ibid.,* quoting *Brown v. Mississippi,* 297 U.S. 278, 286 (1936); *see, e.g., Brooks v. Florida*, 389 U.S. at 414-15;

(b) with an emphasis upon the *effects* of the police behavior on the accused's psychological state, considering the accused's individual weaknesses and vulnerabilities, *see, e.g., Culombe v. Connecticut*, 367 U.S. at 620-21, 624-25, 635; *Davis v. North Carolina*, 384 U.S. 737 (1966); *Colorado v. Spring,* 479 U.S. 564, 573-74 (1987) (dictum), as bearing on the question whether the confession was """the product of a rational intellect and a free will,""" *Mincey v. Arizona,*

437 U.S. 385, 398 (1978); *see also Townsend v. Sain,* 372 U.S. at 308 ("[a]ny questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible"; emphasis in original); or

(c) with an emphasis upon the *tendency* of the police behavior to overbear the will of someone in the accused's position and condition, *see, e.g., Sims v. Georgia,* 389 U.S. 404 (1967); *Miller v. Fenton,* 474 U.S. at 116 ("the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne"; emphasis in original).

Defense counsel should select the perspective or perspectives that will make the most of the facts of the particular case.

It should be noted that although the lower courts occasionally confuse or interweave analyses of involuntariness and *Miranda* claims, the two claims are separate and distinct. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 432-35 (2000); *Miller v. Fenton,* 474 U.S. at 109-10; *Oregon v. Elstad,* 470 U.S. 298, 303-04 (1985); *Colorado v. Connelly*, 479 U.S. at 163-71; *cf. United States v. Patane*, 542 U.S. 630, 636-41 (2004) (plurality opinion). The doctrines may overlap in their application to the facts of a particular case: for example, the facts showing the involuntariness of the statement also will usually show the involuntariness of the respondent's waiver of *Miranda* warnings. *Cf. Colorado v. Connelly,* 479 U.S. at 169-70. But counsel should be precise in identifying the constitutional basis of the claim, since it may affect the scope of relief. For example, a statement suppressed on *Miranda* grounds cannot be used in the prosecution's case in chief but can be used to impeach the respondent if s/he testifies at trial, whereas a statement suppressed because of a finding of involuntariness under the Due Process Clause cannot be used by the prosecution for any purpose. See § 24.22 *infra.* In addition, the scope of exclusion of derivative evidence is broader in the case of involuntary statements than in the case of statements obtained in violation of *Miranda.* See § 24.19 *infra.*

§ 24.04 POLICE COERCION RENDERING A STATEMENT INVOLUNTARY

As explained in § 24.03 *supra,* "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly,* 479 U.S. 157, 167 (1986). "While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct." *Id.* at 163-64. The concept of "coercive police activity" includes physical force or the threat of force (see § 24.04(a) *infra*), excessively long detention or intimidating circumstances of detention (see § 24.04(b) *infra*), promises of leniency or threats of adverse governmental action (see § 24.04(c) *infra*), and tricks or artifices (see § 24.04(d) *infra*).

§ 24.04(a) Physical Force or Threat of Force

As the Supreme Court observed in *Sims v. Georgia,* 389 U.S. 404, 407 (1967) (per curiam): "It needs no extended citation of cases to show that a confession produced by violence or threats of violence is involuntary and cannot constitutionally be used against the person giving it." *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991) ("Fulminante's will was overborne in such a way as to render his confession the product of coercion" as a result of a fellow inmate, who was a government agent, offering to protect him from other inmates if he confessed: "Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient."); *Payne v. Arkansas,* 356 U.S. 560 (1958) (confession rendered involuntary by the totality of police conduct "and particularly the culminating threat" (*id.* at 567) that the Chief of Police was preparing to admit a lynch mob into the jail); *State v. Hilliard,* 318 S.E.2d 35, 36 (W. Va. 1983) (confession involuntary when police officer told accused he would "knock [his] . . . head off" if he didn't confess).

Serious physical abuse or the threat of it will ordinarily be held to render subsequent statements involuntary even when it is not closely related in time or circumstances to police interrogation or the making of the statements. *See, e.g.*, *Sims v. Georgia,* 389 U.S. at 405-07 (on the facts of the case, set forth at greater length in *Sims v. Georgia,* 385 U.S. 538 (1967), a confession was deemed involuntary because the defendant was physically abused, even though the abuse took place several hours prior to, and in a different location from, the confession); *Beecher v. Alabama,* 389 U.S. 35 (1967) (per curiam), as construed in *Colorado v. Connelly,* 479 U.S. at 163 n.1 (the "crucial element of police overreaching" was holding a gun to the head of the wounded defendant at the time of his arrest, five days prior to the interrogation and confession).

§ 24.04(b) Intimidating or Overbearing Circumstances of Interrogation or Detention

The coerciveness of interrogation increases with the length of the interrogation (*see, e.g., Haley v. Ohio,* 332 U.S. 596 (1948) (15-year-old questioned from midnight to 5 a.m.); *Spano v. New York,* 360 U.S. 315 (1959) (adult interrogated for eight hours); *Doody v. Ryan*, 649 F.3d 986, 990, 1023 (9th Cir. 2011) (*en banc*) ("sleep-deprived" 17-year-old interrogated by a "tag team of detectives" in "relentless, nearly thirteen-hour interrogation"); *In the Interest of Jerrell C.J.*, 283 Wis. 2d 145, 162-63, 699 N.W.2d 110, 118-19 (2005) (14-year-old questioned for five-and-a-half hours)), and with the length of time that the suspect is held incommunicado by the police (*see, e.g., Haley v. Ohio,* 332 U.S. at 600 (15-year-old held incommunicado and denied access to his mother for five days); *Gallegos v. Colorado,* 370 U.S. 49 (1962) (14-year-old held incommunicado for five days); *In the Interest of Jerrell C.J.*, 283 Wis. 2d at 162-63, 699 N.W.2d at 118-19 ("In this case, [14-year-old] Jerrell was handcuffed to a wall and left alone for approximately two hours. He was then interrogated for five-and-a-half more hours before finally signing a written confession . . . . The duration of Jerrell's custody and interrogation was longer than the five hours at issue in *Haley*. Indeed, it was significantly longer than most interrogations. Under these circumstances, it is easy to see how Jerrell would be left wondering 'if and when the inquisition would ever cease.'" (footnote omitted)). *See also Crowe v. County of San Diego*, 608

F.3d 406, 432 (9th Cir. 2010) (holding, in a civil rights action, that the police interrogations of two juvenile suspects violated their "Fourteenth Amendment rights to substantive due process" because the 14-year-old and 15-year-old youths "were isolated and subjected to hours and hours of interrogation during which they were cajoled, threatened, lied to, and relentlessly pressured by teams of police officers"). The coerciveness of these tactics also increases with the youth of the respondent. Thus the court in *State in the Interest of S.H.,* 61 N.J. 108, 293 A.2d 181 (1972), found a 10-year-old's confession involuntary because he was "isolated in a room with a detective for a period of 90 minutes" of interrogation (*id.* at 114, 293 A.2d at 184) and denied contact with his father. *See also, e.g.*, *A.M. v. Butler*, 360 F.3d 787, 797, 800-01 (7th Cir. 2004) (statement must be deemed involuntary because accused was 11 years old, "had no prior experience with the criminal justice system," and "was questioned for almost 2 hours in a closed interrogation room with no parent, guardian, lawyer, or anyone at his side"). There is an extensive jurisprudence on the subject of police denying juveniles access to their parents or guardians, which is described in § 24.14 *infra.* An excessive period of detention at the police station may also run afoul of state statutory requirements for post-arrest treatment of juveniles, which are described in § 24.15 *infra.*

Even if the period of detention is not excessively long, unusually harsh conditions of confinement preceding the confession, such as deprivations of food, sleep, or medication, can render the confession involuntary. *See, e.g., Greenwald v. Wisconsin,* 390 U.S. 519 (1968) (denial of food, sleep, and medication for high blood pressure); *Reck v. Pate,* 367 U.S. 433 (1961) (inadequate food and medical attention); *Payne v. Arkansas,* 356 U.S. 560 (1958) (three days with little food); *State v. Garcia*, 301 P.3d 658, 666-67, 668 (Kan. 2013) (confession was rendered involuntary by "coercive tactics" of "withholding requested relief for an obviously painful untreated gunshot wound over the course of a several-hours-long interrogation" ("[e]ven if Garcia did not confess solely to obtain medical treatment") and by the officer's assurance to the suspect that "a murder charge and accompanying life sentence could be avoided by admitting to the robbery and testifying against" another (even though "[i]t appears that Garcia refused to take the bait because he thought it was a trick")).

§ 24.04(c) Promises of Leniency or Threats of Adverse Governmental Action

A confession is involuntary if "'obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence.'" *Hutto v. Ross,* 429 U.S. 28, 30 (1976) (per curiam), quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897). *See, e.g., Lynumn v. Illinois,* 372 U.S. 528, 534 (1963) (confession held involuntary largely because police told the defendant "that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate'"); *Haynes v. Washington,* 373 U.S. 503, 514 (1963) (confession held involuntary in part because of "the express threat of continued incommunicado detention and . . . the promise of communication with and access to family"); *United States ex rel. Everett v. Murphy,* 329 F.2d 68 (2d Cir. 1964) (confession held involuntary when police falsely promised assistance in arranging less serious charges than they knew would be brought); *Rincher v. State*, 632 So.2d 37, 40 (Ala. Crim. App. 1993) (17-year-old's stationhouse statement was "coerced" because police captain "promised . . . [him] that he could go home if he made a

statement"); *People v. Ramadon*, 314 P.3d 836, 838, 844-45 (Colo. 2013) (defendant's statements were rendered involuntary by the interrogating officer's telling him "that, if he did not tell the truth, he would likely be deported to Iraq," and "insinuat[ing] that Ramadon would not be deported if he admitted to committing the sexual assault"); *State v. Howard*, 825 N.W.2d 32, 34, 41 (Iowa 2012) (interrogating detective "crossed the line into an improper promise of leniency" and thereby rendered the confession inadmissible by repeatedly referring to "getting help" for the suspect (who had been arrested for sexually abusing a minor) and overtly suggesting that "if Howard admitted to sexually abusing A.E. he merely would be sent to a treatment facility similar to that used to treat drug and alcohol addiction in lieu of further punishment"); *State v. Polk*, 812 N.W.2d 670, 676 (Iowa 2012) (interrogating officer "crossed the line" and rendered the resulting confession involuntary by "combining statements that county attorneys 'are much more likely to work with an individual that is cooperating' with suggestions [that] [defendant] would not see his kids 'for a long time' unless he confessed"); *In the Interest of J.D.F.*, 553 N.W.2d 585, 589 (Iowa 1996) ("J.D.F.'s inculpatory admission was induced by the police promising that they would take him home rather than to the juvenile intake center."); *State v. Brown*, 286 Kan. 170, 182 P.3d 1205 (2008) (child welfare agency worker unconstitutionally coerced statement by pressuring defendant to admit culpability for his child's injury or else risk losing custody of his children); *Dye v. Commonwealth*, 411 S.W.3d 227, 232-34 (Ky. 2013) (police coerced a confession by falsely telling the 17-year-old defendant that the only way to avoid the death penalty was to confess, even though the police "knew, or should have known, that . . . [he] was not death-eligible," and by telling the defendant that "a confession is the only way he will avoid daily prison assault"); *State v. Wiley*, 61 A.3d 750, 760 (Maine 2013) (interrogating officer's "concrete representation of a short jail sentence followed by probation in exchange for Wiley's cooperation" was a "primary motivating force for the ensuing confession" and rendered it involuntary); *State v. Smith,* 203 Neb. 64, 66, 277 N.W.2d 441, 443 (1979) (confession held involuntary when police promised to "attempt to have the matter transferred to juvenile court" if defendant cooperated).

§ 24.04(d) Tricks or Artifices

Although the Supreme Court has never ruled a confession involuntary solely because it was induced by tricks or artifices, the Court has cited trickery as one of the factors in the "totality of the circumstances" rendering confessions involuntary. *See Spano v. New York,* 360 U.S. 315 (1959) (police officer who was a close childhood friend of the defendant's misleadingly told the defendant that he, the officer, would get in trouble with the police force if defendant failed to confess). *See also Colorado v. Spring,* 479 U.S. 564, 576 n.8 (1987) (dictum) (citing *Spano* and *Lynumn v. Illinois, supra*).

Lower courts have similarly treated police artifice as a factor in the "totality of the circumstances" leading to a finding of involuntariness. *See, e.g.*, *United States v. Lopez*, 437 F.3d 1059, 1065 (10th Cir. 2006) ("in this case, the agents' misrepresentation of the evidence against Lopez, together with Agent Hopper's promise of leniency to Lopez if he confessed to killing Box by mistake, are sufficient circumstances that would overbear Lopez's will and make his

confession involuntary"); *United States v. Morales,* 233 F. Supp. 160 (D. Mont. 1964) (juvenile's statement found involuntary partly because he was falsely told that his accomplices had signed statements implicating him); *State v. Swindler*, 296 Kan. 670, 680-81, 294 P.3d 308, 315-16 (2013) (statement was involuntary because the police obtained it by using a "bait and switch" tactic of assuring the suspect that "he was free to terminate the interrogation and leave at any time" but then breaking these "rules of engagement . . . as soon as they thought Swindler might slip away without telling them what they wanted to hear"); *People v. Thomas*, 22 N.Y.3d 629, 642-43, 8 N.E.3d 308, 314-15, 985 N.Y.S.2d 193, 199-200 (2014) (police officers' "highly coercive deceptions" — threatening the defendant that if he "continued to deny responsibility for his child's injury, his wife would be arrested and removed from his ailing child's bedside," and falsely asserting that "his disclosure of the circumstances under which he injured his child was essential to assist the doctors attempting to save the child's life" — "were of a kind sufficiently potent to nullify individual judgment in any ordinarily resolute person and were manifestly lethal to self-determination when deployed against defendant, an unsophisticated individual without experience in the criminal justice system"); *Young v. State,* 670 P.2d 591 (Okla. Crim. App. 1983) (statement found involuntary partly because of polygraph examiner's "gross misstatement of the law" that defendant would have to convince judge and jury that he was "'perfectly innocent'"); *State v. Caffrey,* 332 N.W.2d 269, 272-73 (S.D. 1983) (juvenile's statement found involuntary partly because of the "interrogating officers['] deliberately mislead[ing] [him] . . . into thinking that he would be compelled to submit to a lie detector test"); *In the Interest of Jerrell C.J.*, 283 Wis. 2d at 163-64, 699 N.W.2d at 119 ("pressures brought to bear on the [14-year-old] defendant" included police officers' use of "psychological techniques" during interrogation: "Not only did the detectives refuse to believe Jerrell's repeated denials of guilt, but they also joined in urging him to tell a different 'truth,' sometimes using a 'strong voice' that 'frightened' him. Admittedly, it does not appear from the record that Jerrell was suffering from any significant emotional or psychological condition during the interrogation. Nevertheless, we remain concerned that such a technique applied to a juvenile like Jerrell over a prolonged period of time could result in an involuntary confession.").

Beyond their bearing on the issue of involuntariness, deceptive techniques of interrogation may impact the admissibility and weight of a respondent's incriminating statements under other evidentiary doctrines. When interrogating officers ply a suspect with information which they know to be untrue or misleading and which creates a significant risk of eliciting a false confession, counsel should urge that any inculpatory responses be excluded as unreliable, under the court's authority to refuse to admit evidence which is substantially more prejudicial than probative. See § 30.03 *infra*. In *Aleman v. Village of Hanover Park*, 662 F.3d 897, 906-07 (7th Cir. 2011), Circuit Judge Posner wrote for the court that "[t]he question of coercion is separate from that of reliability" and that "a trick that is as likely to induce a false as a true confession renders a confession inadmissible because of its unreliability even if its voluntariness is conceded. . . . If a question has only two answers — A and B — and you tell the respondent [untruthfully] that the answer is not A, and he has no basis for doubting you, then he is compelled by logic to 'confess' that the answer is B. . . . A confession so induced is worthless as evidence, and as a premise for an arrest." From Judge Posner's concluding phrase, it follows as

well that if the respondent's inculpatory statements are indispensable to the probable cause required for a subsequent arrest or search, the arrest or search is unconstitutional and any evidence which they produce is excludable on that account. See, *e.g.*, §§ 23.07, 23.17, 23.24, 23.26, 23.37, 23.40 *supra*. And even if the court refuses to entirely exclude a deception-induced inculpatory statement, respondent's counsel is free to argue to the trier of fact at trial that the deceptive interrogation procedure renders the statement incredible (see § 24.21 *infra*) and also casts doubt upon "the reliability of the investigation" as a whole by "'discrediting . . . the police methods employed in assembling the case,'" *cf. Kyles v. Whitley*, 514 U.S. 419, 446 (1995).

Under some circumstances there may be a constitutionally significant distinction between "affirmative misrepresentations" by the police and their misleading of a suspect through "mere silence." *Colorado v. Spring,* 479 U.S. at 576 & n.8. In *Spring,* the Supreme Court reversed the finding of two state appellate courts that a suspect's waiver of the privilege against self-incrimination was invalid and that his incriminating statements were improperly obtained when the interrogating officers who gave him his *Miranda* warnings (see § 24.07 *infra*) failed to inform him of the specific crimes about which he would be questioned and when the context of the interrogation did not make these apparent. The Court rejected this finding on the broad ground that a suspect's knowledge of the topic of an interrogation is not a necessary precondition for a valid waiver of the Fifth Amendment privilege and that interrogating officers are therefore not obliged to inform suspects on this subject. However, in dealing with Spring's argument that his interrogators had practiced a form of trickery by failing to tell him what crimes they were investigating, the Court emphasized both that "the Colorado courts made no finding of official trickery," 479 U.S. at 575, and that "mere silence by law enforcement officials as to the subject matter of an interrogation" (*id.* at 576) is distinguishable from the "affirmative misrepresentations by the police [that were found] sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege" in *Spano v. New York*, 60 U.S. 315 (1959), and *Lynumn v. Illinois,* 479 U.S. at 576 n.8. "In this case, we are not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation and do not reach the question whether a waiver of *Miranda* rights would be valid in such a circumstance." *Ibid. Cf. Moran v. Burbine,* 475 U.S. 412, 422-24 (1986), noted in § 24.10(a) *infra. See generally* WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* 209-15 (2001); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979).

§ 24.05 CHARACTERISTICS OF THE RESPONDENT THAT ARE RELEVANT TO THE ASSESSMENT OF VOLUNTARINESS

The Supreme Court has long recognized that personal characteristics of a suspect that render him or her particularly vulnerable to coercion — such as youth, mental illness, mental retardation, limited intellect, limited education, intoxication, and the effects of drugs — are significant factors in the "totality of the circumstances" that determine the voluntariness of a statement. *See, e.g., Haley v. Ohio,* 332 U.S. 596 (1948) (age of 15); *Culombe v. Connecticut,* 367 U.S. 568 (1961) (I.Q. of 64, illiteracy); *Fikes v. Alabama,* 352 U.S. 191 (1957) (less than third-

grade education).

In *Colorado v. Connelly,* 479 U.S. 157 (1986), the Court made clear that a claim of involuntariness for Fourteenth Amendment Due Process purposes cannot be based *solely* on the personal frailties of a suspect. Reversing a lower court finding of involuntariness predicated exclusively on the accused's mental illness, the Court emphasized that federal constitutional protections are triggered only by "'state action,'" *id.* at 165, and held that some form of "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause." *Id.* at 167. *Connelly* does, however, reaffirm in *dictum* that a suspect's "mental condition is surely relevant to an individual's susceptibility to police coercion," *id.* at 165, and it endorses the proposition "that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus," *id.* at 164. Thereafter, in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), the Court stated, albeit again in *dictum*, that "we do consider a suspect's age and [extent of prior] experience [with the criminal justice system]" when gauging, for purposes of assessing the "voluntariness of a statement," whether "'the defendant's will was overborne,' . . . a question that logically can depend on 'the characteristics of the accused.'" *Id*. at 667-68 (majority opinion); *see also id*. at 668 (the "characteristics of the accused" relevant to this assessment "can include the suspect's age, education, and intelligence, . . . as well as a suspect's prior experience with law enforcement"). *See also Procunier v. Atchley,* 400 U.S. 446, 453-54 (1971) (suspect's "[l]ow intelligence, denial of the right to counsel and failure to advise of the right to remain silent were not in themselves coercive [but] . . . were relevant . . . in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect"); *State v. Carrillo*, 156 Ariz. 125, 136, 750 P.2d 883, 894 (1988) (dictum) ("[W]e do not believe *Connelly* forbids consideration of the accused's subjective mental state. Certainly the police are not permitted to take advantage of the impoverished, the mentally deficient, the young, or the inexperienced by employing artifices or techniques that destroy the will of the weakest but leave the strong, the tough, and the experienced untouched."). Thus a suspect's vulnerable state of mind can lend coercive force to police words and actions that would not be deemed coercive in the case of a suspect with normal powers of resistance. *See, e.g., Reck v. Pate,* 367 U.S. 433, 442 (1961) (suspect's "youth, his subnormal intelligence, and his lack of previous experience with the police" impaired "his powers of resistance to overbearing police tactics"); *Haley v. Ohio,* 332 U.S. at 599 (five hours of incommunicado interrogation rendered a confession involuntary because the defendant was only 15 years old, and "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens"); *United States v. Preston*, 751 F.3d 1008, 1028 (9th Cir. 2014) (en banc) ("Even if we would reach a different conclusion regarding someone of normal intelligence, we hold that the officers' use of the [interrogation] methods employed here to confuse and compel a confession from the intellectually disabled eighteen-year-old before us produced an involuntary confession."); *United States v. Blocker,* 354 F. Supp. 1195, 1201-02 (D. D.C. 1973) ("[i]n this case, defendant's age [21] and limited mental ability suggest that the defendant would be particularly susceptible to psychological coercion in the form of threats and promises of leniency"). Moreover, personal characteristics such as youth and mental retardation may be

sufficient in and of themselves to render a statement inadmissible under state-law doctrines of involuntariness. See § 24.16 *infra.*

The following are common factors that may be considered as bearing on voluntariness under a federal constitutional analysis:

§ 24.05(a) Youth

The Supreme Court "has emphasized that admissions and confessions of juveniles require special caution," *In re Gault,* 387 U.S. 1, 45 (1967), and that the courts must take "the greatest care . . . to assure that the [juvenile's] admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair." *Id.* at 55 (footnote omitted). In reversing the conviction of a 15-year-old in *Haley v. Ohio,* 332 U.S. 596 (1948), the Court wrote:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child — an easy victim of the law — is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.

Id. at 599. The Court similarly stressed the inherent vulnerability of young people in finding in *Gallegos v. Colorado,* 370 U.S. 49 (1962), that a 14-year-old's confession was involuntary:

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. . . . He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.

Id. at 54. In *Yarborough v. Alvarado*, the Court reiterated that the "characteristics of the accused" relevant to the assessment of the "voluntariness of a statement" "can include the suspect's age, education, and intelligence, . . . as well as a suspect's prior experience with law enforcement." 541 U.S. at 667-68. *See also id*. ("we do consider a suspect's age and [extent of prior] experience [with the criminal justice system]" when gauging, for purposes of assessing the "voluntariness of a statement," whether "'the defendant's will was overborne'"). *Cf. Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (explaining, in the context of criminal sentencing, that the Court has recognized, based on "science and social science" as well as "common sense" and "what 'any parent knows,'" that "children 'are more vulnerable . . . to . . . outside pressures'").

The lower courts have similarly treated the youth of the suspect as a highly significant factor in assessing the voluntariness of a confession. *See, e.g., Woods v. Clusen,* 794 F.2d 293 (7th Cir. 1986); *Williams v. Peyton,* 404 F.2d 528 (4th Cir. 1968); *United States v. Preston*, 751

F.3d 1008, 1027-28 (9th Cir. 2014) (en banc) (18-year-old with an IQ of 65); *Shelton v. State,* 287 Ark. 322, 699 S.W.2d 728 (1985); *State in the Interest of S.H.,* 61 N.J. 108, 293 A.2d 181 (1972); *People v. Ward,* 95 A.D.2d 351, 466 N.Y.S.2d 686 (N.Y. App. Div., 2d Dep't 1983); *State v. Caffrey,* 332 N.W.2d 269 (S.D. 1983); *In the Interest of Jerrell C.J.*, 283 Wis. 2d 145, 159, 699 N.W.2d 110, 117 (2005) ("Simply put, children are different than adults, and the condition of being a child renders one 'uncommonly susceptible to police pressures.' . . . We therefore view Jerrell's young age of 14 to be a strong factor weighing against the voluntariness of his confession."). In urging courts to recognize the need for particular solicitude to assure that juveniles' inculpatory statements are not admitted into evidence unless they are truly voluntary, counsel can point to empirical findings that a disproportionately high percentage of documented instances of false confessions (about 33%) involve juvenile suspects. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 941-43 (2004). *See also* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257 (2007); Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 8-9, 19, 30-31 (2010); Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943 (2010); Joshua A. Tepfer, Laura H. Nirider & Lynda Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS. L. REV. 887, 904-08 (2010); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401 (2011) ("[T]he pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people to confess to crimes they never committed.' Corley v. United States, 129 S. Ct. 1558, 1570 (2009) (citing Drizin & Leo, The Problem of False Confessions in the Post–DNA World, 82 N.C. L. Rev. 891, 906–907 (2004)); see also *Miranda*, 384 U.S., at 455, n. 23. That risk is all the more troubling — and recent studies suggest, all the more acute — when the subject of custodial interrogation is a juvenile. See Brief for Center on Wrongful Convictions of Youth et al. as Amici Curiae 21–22 (collecting empirical studies that 'illustrate the heightened risk of false confessions from youth')"); *In the Matter of Jimmy D.*, 15 N.Y.3d 417, 431, 938 N.E.2d 970, 979, 912 N.Y.S.2d 537, 546 (2010) (Lippman, C.J., dissenting) ("So long as juveniles cannot be altogether preserved from rigors of police interrogation, it would behoove us not to minimize the now well-documented potential for false confessions when suggestible and often impulsive and impaired children are ushered into the police interview room."; "Children do resort to falsehood to alleviate discomfort and satisfy the expectations of those in authority, and, in so doing, often neglect to consider the serious and lasting consequences of their election. There are developmental reasons for this behavior which we ignore at the peril of the truth-seeking process."). A reference to these findings in briefing and argument is often useful for a couple of reasons. First, although the voluntariness and the reliability of confessions are analytically distinct issues (see § 24.21 *infra*), a judge who is persuaded that a confession poses significant risks of unreliability will, as a practical matter, be more prone to suppress it as involuntary. Second, in courts where the judge who presides at the suppression hearing is likely to be the same judge who will also sit as the trier of fact in a subsequent bench trial of the issue of the respondent's guilt or innocence (see § 22.07 *supra*), the respondent's interests are obviously best served by persuading the judge during the suppression hearing that any inculpatory statement

s/he hears is not only technically suppressible but probably inaccurate.

§ 24.05(b) Mental Illness, Mental Retardation, Limited Education

A factor such as mental illness, which impairs the suspect's "mental condition[,] is surely relevant to an individual's susceptibility to police coercion." *Colorado v. Connelly,* 479 U.S. at 165 (discussing *Blackburn v. Alabama,* 361 U.S. 199 (1960)). *See also, e.g., Spano v. New York,* 360 U.S. 315, 322 & n.3 (1959) (emotional instability); *Fikes v. Alabama,* 352 U.S. 191, 193, 196 (1957) (schizophrenia); *Eisen v. Picard,* 452 F.2d 860, 863-66 (1st Cir. 1971); *Jackson v. United States,* 404 A.2d 911, 924 (D.C, 1979) (mental illness).

A suspect may be rendered particularly vulnerable to police coercion by mental retardation or by intellectual deficits short of actual retardation. *See, e.g., Sims v. Georgia,* 389 U.S. 404 (1967) (limited mental capacity); *Davis v. North Carolina,* 384 U.S. 737 (1966) (low level of intelligence); *Reck v. Pate,* 367 U.S. 433 (1961) (mental retardation); *Culombe v. Connecticut,* 367 U.S. 568 (1961) (I.Q. of 64); *Shelton v. State,* 287 Ark. 322, 699 S.W.2d 728 (1985) (juvenile who was nearly 18 but had marginal intelligence and maturity); *In the Interest of Thompson,* 241 N.W.2d 2 (Iowa 1976) (I.Q. of 71); *State in the Interest of Holifield,* 319 So. 2d 471 (La. App. 1975) (mental retardation; I.Q. of 67); *In the Interest of Jerrell C.J.*, 283 Wis. 2d at 160, 699 N.W.2d at 117 ("low average intelligence").

Educational privation and illiteracy also are factors that can cause a suspect to be less capable of resisting domination by the police. *See, e.g., Sims v. Georgia,* 389 U.S. 404 (1967) (third-grade education and illiteracy); *Clewis v. Texas,* 386 U.S. 707 (1967) (fifth-grade education); *Culombe v. Connecticut*, 367 U.S. at 620-21, 624-25, 635 (illiteracy); *Fikes v. Alabama,* 352 U.S. at 196 (defendant was "uneducated"); *State v. Graham,* 277 Ark. 465, 642 S.W.2d 880 (1982) (limited education and illiteracy); *In the Interest of Jerrell C.J.*, 283 Wis. 2d at 160, 699 N.W.2d at 117 ("limited education" coupled with "low average intelligence").

§ 24.05(c) Effects of Drugs or Alcohol

As the Supreme Court has recognized, a suspect's will and ability to resist interrogation can be impaired by the effects of drugs. *See, e.g., Beecher v. Alabama,* 389 U.S. 35 (1967) (morphine); *Townsend v. Sain,* 372 U.S. 293 (1963) (scopolamine, a drug with "truth serum" properties). *See also Colorado v. Connelly,* 479 U.S. at 165-66 (discussing *Townsend v. Sain*). *Accord*, *United States v. Taylor*, 745 F.3d 15, 19-20, 23-26 (2d Cir. 2014) (xanax); *In re Cameron*, 68 Cal. 2d 487, 439 P.2d 633, 67 Cal. Rptr. 529 (1968) (thorazine); *People v. Fordyce,* 200 Colo. 153, 612 P.2d 1131 (1980) (morphine).

As several lower court decisions have recognized, intoxication through alcohol can have the same resistance-impairing effects as drugs and should be considered in assessing the voluntariness of a statement. *See, e.g., State v. Mikulewicz,* 462 A.2d 497 (Me. 1983); *State v. Discoe,* 334 N.W.2d 466 (N.D. 1983).

§ 24.05(d) Lack of Prior Experience with the Police

The Supreme Court has repeatedly recognized that "lack of previous experience with the police" can impair a suspect's "powers of resistance to overbearing police tactics." *Reck v. Pate,* 367 U.S. 433, 442 (1961); *see, e.g.*, *Yarborough v. Alvarado*, 541 U.S. at 667-68; *Clewis v. Texas,* 386 U.S. 707, 712 (1967); *Spano v. New York,* 360 U.S. 315, 321-22 (1959). *Accord, Woods v. Clusen,* 794 F.2d 293, 297 (7th Cir. 1986); *In the Interest of Jerrell C.J.*, 283 Wis. 2d at 161, 699 N.W.2d at 117 (limited "experience with law enforcement" — two prior arrests for misdemeanor offenses that never resulted in a delinquency finding — "may have contributed to [a 14-year-old's] willingness to confess"). *See also Fare v. Michael C.,* 442 U.S. 707, 726-29 (1979) (prior "experience with the police" relevant to assessment of voluntariness of *Miranda* waivers).

§ 24.05(e) Combination of Factors

Frequently, counsel's case will feature more than one of the foregoing factors and others — physical exhaustion, pain resulting from physical injuries, emotional depression, and so forth. Counsel should argue that the several factors combined to render the respondent particularly susceptible to coercion. *See, e.g.*, *A.M. v. Butler*, 360 F.3d 787, 800-01 (7th Cir. 2004) (11-year-old with no prior court experience); *Woods v. Clusen,* 794 F.2d 293 (7th Cir. 1986) (16-year-old with no prior court experience); *Thomas v. North Carolina,* 447 F.2d 1320 (4th Cir. 1971) (15-year-old with I.Q. of 72 and limited education); *In the Interest of Thompson,* 241 N.W.2d 2 (Iowa 1976) (17-year-old with I.Q. of 71 and fourth-grade reading level); *State in the Interest of Holifield,* 319 So. 2d 471 (La. App. 1975) (mentally retarded 14-year-old with I.Q. of 67); *In the Interest of Jerrell C.J.*, 283 Wis. 2d at 159, 699 N.W.2d at 117 (14-year-old with an I.Q. of 84 and limited prior involvement with the juvenile justice system). *Cf. Edmonds v. Oktibbeha County*, 675 F.3d 911, 914, 915, 916 (5th Cir. 2012) (recognizing, in the context of a section 1983 suit against police deputies, that the "thirteen-year-old[accused']s separation from his mother, his desire to please adults, and his inexperience with the criminal justice system all weigh against [a finding of] voluntariness [of his confession]," but ultimately concluding that voluntariness was established by the totality of the circumstances, including the accused's disclosure "in his videotaped retraction (and also later on national television)" that he falsely confessed in order "to help his sister" and that "the deputies did not coerce him into confessing"). The assistance of a psychological consultant who can testify as a defense expert or advise counsel of judicially noticeable writings documenting the interactive effects of factors present in the particular case will often be important. See §§ 12.08-12.10 *supra.*

§ 24.06 APPLICABILITY OF THE INVOLUNTARINESS DOCTRINE TO COERCION BY SCHOOL OFFICIALS OR PRIVATE CITIZENS

Although the Supreme Court has not considered the applicability of the due process doctrine of involuntariness to the school setting, the logic of the Court's decisions in *Colorado v. Connelly,* 479 U.S. 157 (1986), and *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), strongly suggests

that the doctrine does apply to coercive action by principals, teachers, and other school officials. Because the *Connelly* case involved the traditional setting of police interrogation, the Court understandably spoke in terms of "coercive police activity" as the "predicate" for a finding of involuntariness (*id.* at 167) in holding that a suspect's mental illness alone will not support such a finding. But the Court's basic reasoning was that "some sort of 'state action' [is required] to support a claim of violation of the Due Process Clause," *id.* at 165 — some "link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." *Ibid. See also id.* at 167 ("coercion brought to bear on the defendant by the State"); *id.* at 163 ("coercive government misconduct"); *State v. Brown*, 286 Kan. 170, 174-75, 182 P.3d 1205, 1209-10 (2008) (rejecting the state's argument that "coercive conduct must be induced by law enforcement" in order to render a statement involuntary under *Colorado v. Connelly*, and suppressing a statement induced by a child welfare agency worker: *Connelly* requires "a link between the coercive activity of the State and the defendant's resulting confession" but does not limit "'State actors'" to "law enforcement"). And the Court has recognized on other occasions that "school authorities are state actors for purposes of the constitutional guarantees of . . . due process" (*New Jersey v. T.L.O.*, 469 U.S. at 336) and that, "[i]n carrying out searches and other disciplinary functions pursuant to ["publicly mandated educational and disciplinary policies"] . . ., school officials act as representatives of the State." *Ibid. See also Goss v. Lopez,* 419 U.S. 565 (1975). Thus the conclusion is inescapable that, just as a school official's search of a student is subject to Fourth Amendment restrictions (see §§ 23.33-23.34 *supra*), a school official's interrogation of a student is subject to the due process doctrine of involuntariness. *See, e.g., People v. Benedict V.,* 85 A.D.2d 747, 747, 445 N.Y.S.2d 798, 799 (N.Y. App. Div., 2d Dep't 1981) (student's statement to detective inside the principal's office was rendered involuntary by the principal's "conduct in the questioning" when the principal "expressly assumed the role of parental protector and, in furtherance of that role, encouraged defendant to make a confession").

Coercive activity by a private citizen, on the other hand, is not "state action" that will trigger the due process doctrine of involuntariness. *See Colorado v. Connelly,* 479 U.S. at 165-66. But this is not to say that coercive private conduct is wholly irrelevant to the due process inquiry. There are at least two respects in which private action can play a role in a finding that a statement was involuntary:

First, the occurrence of private coercive action will be relevant to the extent that it made the youth particularly vulnerable to any coercion exercised by the police. The Court in *Connelly* plainly recognized that, as long as due process protections are called into play by "some sort of 'state action'" (*id.* at 165), non-police-related influences such as a suspect's mental problems may be "relevant to an individual's susceptibility to police coercion," *ibid.* See § 24.05 *supra.* Accordingly, if a parent or other private individual exerts pressure on the respondent prior to or during the police interrogation, this may be considered in assessing the impact of coercive police activity on the respondent.

Second, the connection between a private individual and the police may implicate the general rule that private action loses its "private" character when the citizen acts at the behest of,

or in conjunction with, the police. *Cf. People v. Jones,* 47 N.Y.2d 528, 393 N.E.2d 443, 419 N.Y.S.2d 447 (1979) (private security guard's questioning of suspect was subject to *Miranda* requirements because of police involvement in arresting the suspect and in creating a "custodial atmosphere" for the interrogation); *Sims v. Georgia,* 385 U.S. 538 (1967), and 389 U.S. 404 (1967) (per curiam) (brutality practiced on defendant by a private party in the presence of police officers who had the defendant in custody is given substantial weight in finding a confession involuntary). See also § 23.36 *supra;* §§ 24.12, 24.13(b) *infra.* Thus, for example, if the police request or encourage a parent to exercise a coercive influence over his or her child during police interrogation, the ensuing coercion may properly be attributed to the police. *See In the Matter of Raymond W.*, 44 N. Y.2d 438, 441, 377 N.E.2d 471, 472, 406 N.Y.S.2d 27, 28 (1978) (explaining that "if it be established that . . . [parental] guidance or influence is not exercised by the parent independently but at the behest or on behalf of the prosecutor, such circumstance should weigh heavily to indicate the involuntariness of the child's confession").

In addition, coercive activity by a private citizen may be sufficient in and of itself to render a statement inadmissible under state law doctrines of involuntariness. See § 24.16 *infra.*

Part C. Miranda *Violations*

§ 24.07 THE *MIRANDA* DOCTRINE GENERALLY

The rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), excludes any incriminating response made to custodial interrogation unless the response was preceded by specified warnings of the respondent's rights and an effective waiver by the respondent of those rights. "In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation." *Fare v. Michael C.,* 442 U.S. 707, 717 (1979) (dictum). *See also, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 437, 444 (2000) (reaffirming the *Miranda* doctrine and clarifying that, notwithstanding the Court's previous references to the "*Miranda* warnings as 'prophylactic,'" "*Miranda* announced a constitutional rule"); *Doyle v. Ohio,* 426 U.S. 610, 617 (1976); *Michigan v. Mosley,* 423 U.S. 96, 99-100 & n.6 (1975) (dictum).

"Custodial interrogation" is a term of art. The *Miranda* doctrine applies only when a respondent is in "custody" (or its "functional equivalent"), see § 24.08(a) *infra,* and makes statements in response to "interrogation," see § 24.08(b) *infra.*

If these two conditions are satisfied, *Miranda* requires the suppression of the respondent's statements whenever (a) the required warnings were not given or were defective (see § 24.09 *infra*); (b) the respondent's waiver of *Miranda* rights was involuntary (see § 24.10(a) *infra*) or was not "knowing and intelligent" (see § 24.10(b) *infra*); or (c) the police failed to honor the respondent's assertion of the right to remain silent or the right to counsel (see § 24.11 *infra*).

The *Miranda* rule governs statements made by a person in custody for any criminal offense, "regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." *Berkemer v. McCarty,* 468 U.S. 420, 434 (1984) (finding constitutional error in the admission of unwarned incriminating statements made after an arrest for a "misdemeanor traffic offense," *id.* at 429). The Supreme Court has created only two exceptions to the *Miranda* rule. First, in *New York v. Quarles,* 467 U.S. 649 (1984), the Supreme Court recognized "a narrow exception to the *Miranda* rule," 467 U.S. at 658, when police officers, "in the very act of apprehending a suspect [who had been reported to be armed and who was found to be wearing an empty shoulder holster when arrested], were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in [a public] . . . supermarket," *id.* at 657. "[O]n these facts," *id.* at 655, and when the only question asked by the arresting officer was "about the whereabouts of the gun," *id.* at 657, the Court held that "there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answer may be admitted into evidence." 467 U.S. at 655. *Quarles* has since been described as holding that "when the police arrest a suspect under circumstances presenting an imminent danger to the public safety, they may without informing him [or her] of [the *Miranda*] . . . rights ask questions essential to elicit information necessary to neutralize the threat to the public." *Berkemer v. McCarty,* 468 U.S. at 429 n.10. Second, in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), the Court recognized "a 'routine booking question' exception which exempts from *Miranda*'s coverage questions to secure the '"biographical data necessary to complete booking or pretrial services,"'" such as "name, address, height, weight, eye color, date of birth, and current age," as long as the questions asked are "reasonably related to the police's administrative concerns" and are not "'designed to elicit incriminatory admissions.'" *Id*. at 601-02 & n.14. *Compare United States v. Pacheco-Lopez*, 531 F.3d 420, 423-24 (6th Cir. 2008) ("booking exception" of *Pennsylvania v. Muniz* did not apply to officer's questions to defendant about "where he was from, how he had arrived at the house, and when he had arrived" because the house was "ostensibly linked to a drug sale" and therefore questions about the defendant's "origin" and his connections to the house were "'reasonably likely to elicit an incriminating response,' thus mandating a *Miranda* warning"); *People v. Hiraeta*, 117 A.D.3d 964, 964, 986 N.Y.S.2d 217, 218-19 (N.Y. App. Div., 2d Dep't 2014) (booking exception did not apply to "the defendant's statement to a detective regarding his gang affiliation, which was probative of his identity as one of the victim's attackers"). With these sole exceptions, "[i]n the years since the decision in *Miranda,* we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him [or her] questions without informing him [or her] of the [*Miranda*] rights . . ., [the] responses cannot be introduced into evidence to establish . . . guilt." 468 U.S. at 429.

§ 24.08 THE PRECONDITION FOR APPLICABILITY OF *MIRANDA* PROTECTIONS: "CUSTODIAL INTERROGATION"

§ 24.08(a) "Custody"

Miranda comes into play only "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona,* 384 U.S. 436, 444 (1966); *see also id.* at 477, 478; *Estelle v. Smith,* 451 U.S. 454, 466-67 (1981).

Thus the *Miranda* warnings and waivers are not required when investigating officers interview an unarrested suspect in his or her residence, even though "the 'focus' of [a criminal] . . . investigation may . . . have been on [him or her]," *Beckwith v. United States,* 425 U.S. 341, 347 (1976); they are not required when a suspect comes voluntarily to the police station in response to an officer's telephonic request for an interview, at least when the suspect is "immediately informed that [s/he is] . . . not under arrest" and when "there is no indication that [his or her] . . . freedom to depart [is] . . . restricted in any way," *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977) (per curiam); *see also California v. Beheler,* 463 U.S. 1121 (1983) (per curiam); and they are not required when a probationer is questioned by his or her probation officer during a probation-supervision conference in the latter's office, even when attendance at such conferences is a condition of probation enforceable by its possible revocation, *Minnesota v. Murphy,* 465 U.S. 420 (1984) ("Murphy was not 'in custody' for purposes of receiving *Miranda* protection since there was no '"formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest,'" *id.* at 430). *Cf. United States v. Mandujano,* 435 U.S. 564, 578-82 (1976) (plurality opinion) (alternative ground) (subpoenaed grand jury witness has no right to *Miranda* warnings or to have counsel present in the grand jury room). "[T]he roadside questioning of a motorist detained pursuant to a traffic stop [does not] . . . constitute custodial interrogation," *Berkemer v. McCarty*, 468 U.S. 420, 423 (1984), nor does questioning during a "'*Terry* stop'" (468 U.S. at 439-40; see §§ 23.04-23.06 *supra*), unless the person stopped "is subjected to treatment that renders him [or her] 'in custody' for practical purposes," 468 U.S. at 440, under the "settled [principle] that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest,'" 468 U.S. at 440. However, *Miranda* applies to the questioning of a person who is handcuffed and surrounded by police officers, even in a public place. *New York v. Quarles,* 467 U.S. 649, 654 n.4, 655 (1984) (dictum); *and see Berkemer v. McCarty,* 468 U.S. at 441 n.34, 442 n.36, giving other examples of street-arrest questioning that constitute "custodial interrogation." And it applies to any questioning of a person involuntarily detained in closed quarters, even though those quarters may be the person's own home and even though the questioning may be wholly unrelated to the reason for the detention. *Mathis v. United States,* 391 U.S. 1 (1968) (state prison inmate questioned in prison by federal revenue agent shortly before federal authorities decide to pursue a criminal tax investigation); *Orozco v. Texas,* 394 U.S. 324 (1969) (suspect arrested and questioned by police officers in his boardinghouse bedroom); *United States v. Hashime*, 734 F.3d 278, 280-81, 283-84, 285 (4th Cir. 2013) (interrogation of a 19-year-old was "custodial" even though it took place in his home, the officers said that "they were not there to arrest anyone but rather to execute a search warrant," "the door to the room in which he was interrogated was open," the officers told him that he "was free to leave," and the officers offered him "multiple breaks" during the interrogation: although these factors "do cut against custody, they are decidedly outweighed" by the "sheer length" of the three-hour interrogation, the number of federal and state law enforcement officers who "streamed into the house with their guns drawn,"

and the fact that Hashime "'was rousted from bed at gunpoint, . . . not allowed to move unless guarded, and ultimately separated from his family'" during the interrogation); *United States v. Craighead*, 539 F.3d 1073, 1084-89 (9th Cir. 2008) (an in-home interrogation is determined to be "custodial" for *Miranda* purposes under a standard that considers: "(1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made"); *In re I.J.*, 906 A.2d 249, 262-63 (D.C. 2006) (16-year-old juvenile, who was residing in a youth center pursuant to a court order of probation, was in "custody" for *Miranda* purposes when he was questioned by a police officer, in an office of the center, about a crime the youth allegedly committed on the premises). *Cf. Howes v. Fields*, 132 S. Ct. 1181, 1191, 1193 (2012) (questioning of a prison inmate does not automatically trigger *Miranda*'s requirements because "service of a term of imprisonment, without more, is not enough to constitute *Miranda* custody"; *Miranda* "custody" was not established on a record showing that the inmate was taken aside and questioned in private about "events that took place outside the prison" because "'[a]ll of the[] objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave'": the inmate "was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted"; the inmate "was not physically restrained or threatened and was interviewed in a well-lit, average-sized conference room, where he was 'not uncomfortable'"; and the inmate "was offered food and water, and the door to the conference room was sometimes left open").

The determination "whether a suspect is 'in custody' is an objective inquiry" that involves the following "'[t]wo discrete inquiries'":

> "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest."

J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402 (2011) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). *Accord*, *Berkemer v. McCarty*, 468 U.S. at 442; *Stansbury v. California*, 511 U.S. 318, 322-25 (1994) (per curiam). In the case of a minor, the Supreme Court has recognized that this "reasonable person" test must take into account the age of the child "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer." *J.D.B. v. North Carolina*, 131 S. Ct. at 2406. *See id*. at 2398-99 ("It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis."); *id*. at 2403 ("A child's age is far

'more than a chronological fact.' . . . It is a fact that 'generates commonsense conclusions about behavior and perception.' . . . Such conclusions apply broadly to children as a class. . . . Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children 'generally are less mature and responsible than adults,' . . . that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' . . . that they 'are more vulnerable or susceptible to ... outside pressures' than adults, ... Addressing the specific context of police interrogation, we have observed that events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.' . . . Describing no one child in particular, these observations restate what 'any parent knows' — indeed, what any person knows — about children generally."); *id*. at 2401 ("By its very nature, custodial police interrogation entails 'inherently compelling pressures.' . . . Even for an adult, the physical and psychological isolation of custodial interrogation can 'undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely.' . . . Indeed, the pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people to confess to crimes they never committed.' . . . That risk is all the more troubling — and recent studies suggest, all the more acute — when the subject of custodial interrogation is a juvenile."). *See generally* Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J. L. & SOC. POLICY 109 (2012). Even before the United States Supreme Court's *J.D.B.* decision, with its notable insistence that the special vulnerabilities of youth are an important factor for consideration, a number of state courts had recognized that a respondent's age must be taken into account in determining whether a minor is "in custody" for *Miranda* purposes. *See, e.g.*, *People v. Howard*, 92 P.3d 445, 450 (Colo. 2004); *In the Interest of Doe*, 130 Idaho 811, 818, 948 P.2d 166, 173 (Idaho App.1997); *People v. Lopez*, 229 Ill. 2d 322, 346, 353-54, 892 N.E.2d 1047, 1061, 1065-66, 323 Ill. Dec. 55, 69, 73-74 (2008); *In re D.A.R.*, 73 S.W.3d 505, 510-11 (Tex. App. 2002).

If the respondent was formally arrested or was placed under physical restraint "of the 'degree associated with a formal arrest,'" this plainly suffices to establish "custody" for *Miranda* purposes. *New York v. Quarles,* 467 U.S. at 655. If s/he was not, the "custody" issue requires "'examin[ation] [of] all of the circumstances surrounding the interrogation,' . . . including any circumstance that 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'" *J.D.B. v. North Carolina*, 131 S. Ct. at 2402. *See also ibid*. (the "custody" test "ask[s] how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave"; "On the other hand, the 'subjective views harbored by either the interrogating officers or the person being questioned' are irrelevant."). Relevant factors include (i) whether the detention was merely "temporary and brief" or was "prolonged" *(Berkemer v. McCarty,* 468 U.S. at 437-38; *see also id.* at 441); (ii) whether the respondent was subjected to only a "modest number of questions" or was subjected to "'persistent questioning'" (*id.* at 442 & n.36; *see also id.* at 438); and (iii) whether the questioning took place in a public location, where "exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the [suspect's] . . . fear that, if he does not cooperate, he will be subjected to abuse" (*id.* at 438). "Some of the factors relevant to whether a reasonable person

would believe he was free to leave include 'the purpose, place, and length of interrogation,' along with 'the extent to which the defendant is confronted with evidence of guilt, the physical surroundings of the interrogation, the duration of the detention, and the degree of pressure applied to the defendant.'" *State v. Snell*, 142 N.M. 452, 456, 166 P.3d 1106, 1110 (N.M. App. 2007), quoting *State v. Munoz*, 126 N.M. 535, 544, 972 P.2d 847, 856 (N.M. 1998).

For discussion of whether a school official's interrogation of a student inside the principal's office is sufficiently "custodial" to trigger *Miranda* protections, see § 24.12 *infra.*

§ 24.08(b) "Interrogation"

The *Miranda* concept of "interrogation" encompasses:

> express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). *Accord, Arizona v. Mauro,* 481 U.S. 520, 525-27 (1987).

As the Court has explained, this test "focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." *Rhode Island v. Innis,* 446 U.S. at 301. The assessment of the suspect's perceptions is predicated upon a "reasonable person" standard rather than a subjective standard, because "the police surely cannot be held accountable for the unforeseeable results of their words or actions." *Id.* at 301-02. Accordingly, "the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id.* at 302 (emphasis in original).

"In deciding whether particular police conduct is interrogation," the courts have been admonished to "remember the purpose behind [the] . . . decisions in *Miranda* and *Edwards* [*v. Arizona,* 451 U.S. 477 (1981)]: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona v. Mauro,* 481 U.S. at 529-30. Thus if the police set in motion "compelling influences [or] . . . psychological ploys" (*id.* at 529) that "implicate this purpose" (*id.* at 530) and create an "atmosphere of oppressive police conduct" (*id.* at 528 n.5), their behavior "properly could be treated as the functional equivalent of interrogation." *Id.* at 527.

In urging that police conduct short of explicit questioning amounted to "interrogation,"

counsel can point to the following sorts of factors: (i) "the police carried on a lengthy harangue in the presence of the suspect" rather than simply "a few offhand remarks," *Rhode Island v. Innis,* 446 U.S. at 303; (ii) "under the circumstances, the officers' comments were particularly 'evocative,'" *ibid.;* (iii) the police used "'psychological ploys, such as to 'posi[t]' 'the guilt of the subject,' to 'minimize the moral seriousness of the offense,' and 'to cast blame on the victim or on society,'" *id.* at 299 (quoting *Miranda,* 384 U.S. at 450); *see also Arizona v. Mauro,* 481 U.S. at 526, 529; and (iv) the police were aware that the suspect was "unusually disoriented or upset at the time of his arrest," or that the suspect was "particularly susceptible" to a certain type of police appeal or ploy, *Rhode Island v. Innis,* 446 U.S. at 302-03. *See also, e.g.*, *State v. Juranek*, 287 Neb. 846, 855-56, 844 N.W.2d 791, 801 (2014). The *Miranda* opinion cites a number of police manuals describing sophisticated interrogation techniques; counsel will often find it helpful to peruse these and other "police science" hornbooks because any similarity between the techniques they advise to elicit incriminating statements and the behavior of the officers in counsel's own case will be highly persuasive that the latter behavior was "interrogation." It is also persuasive to show, if possible, that the police *intended* to elicit an admission, for even though the officers' intentions are not controlling, the "intent of the police . . . may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response [from the suspect]." 446 U.S. at 301 n.7, 303 n.9.

In any case involving a juvenile respondent, and particularly a very young respondent, the age of the suspect is relevant in determining whether the police should have known that a certain statement or action was likely to evoke an incriminating response. *See Rhode Island v. Innis,* 446 U.S. at 302 n.8 ("unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known"); *Benjamin v. State*, 116 So.3d 115, 123 (Miss. 2013) (police officer's "tactics" of "foster[ing] the [14-year-old] suspect's mistaken belief that talking would allow him to avoid a night in jail" and encouraging the suspect's mother to "pressure" him to talk to the police "constituted the functional equivalent of interrogation" because the police should have known that these "psychological ploys" "were reasonably likely to elicit an incriminating response from fourteen-year-old Benjamin"); *In the Matter of Ronald C.,* 107 A.D.2d 1053, 486 N.Y.S.2d 575 (N.Y App. Div., 4th Dep't 1985) (because the respondent was only 13 years old and was unaccompanied by a parent or counsel, the police should have known that placing the alleged burglar's tools in front of him was likely to elicit an incriminating response).

§ 24.09 VALIDITY OF THE *MIRANDA* WARNINGS

Miranda requires that the police preface any "custodial interrogation" with the following warnings to the suspect:

(a) that s/he has a right to remain silent, *Miranda v. Arizona,* 384 U.S. at 467-68;

(b) that any statement s/he makes can and will be used in court as evidence against him or her, *id.* at 469; *Estelle v. Smith,* 451 U.S. 454, 466-67 (1981);

(c) that s/he has a right "to consult with a lawyer and to have the lawyer with him [or her] during interrogation," *Miranda v. Arizona,* 384 U.S. at 471; and

(d) that if s/he cannot afford a lawyer, s/he has a right to have a lawyer appointed without cost to represent him or her "prior to interrogation," *id.* at 474.

See generally id. at 444, 467-73.

Some jurisdictions require that an additional warning be given to any juvenile who may be subject to transfer to adult court, advising him or her of the possibility of transfer. *See, e.g., State v. Benoit,* 126 N.H. 6, 18-19, 490 A.2d 295, 303-04 (1985); *State v. Simon*, 680 S.W.2d 346, 353 (Mo. App. 1984). *See also In the Interest of J.M.J.*, 726 N.W.2d 621, 628 (S.D. 2007) ("advisement of the possibility of being tried as an adult, although not a per se rule, is 'a significant factor in evaluating the voluntariness of a statement or confession under the totality of the circumstances.'"). (For discussion of transfer, see Chapter 13.) One state court has ruled on state constitutional grounds that a juvenile must be given a supplementary *Miranda* warning advising him that "'if his counsel, parent, or guardian is not present, . . . he has a right to communicate with them, and that, if necessary, reasonable means will be provided for him to do so.'" *Ex Parte Whisenant,* 466 So. 2d 1006, 1007 (Ala. 1985).

Each of the *Miranda* warnings must be given expressly, and an incriminating statement made during custodial interrogation is inadmissible unless a foundation is laid for it by an affirmative showing in the trial record that all of the warnings were given. *See Clark v. Smith,* 403 U.S. 946 (1971) (per curiam) (reversing a conviction for admission of a confession made after three of the four *Miranda* warnings were given; only the right of an indigent to have state-paid counsel was omitted); *accord, Michigan v. Tucker,* 417 U.S. 433, 445 (1974) (dictum). Proof by the prosecution that the respondent knew his or her *Miranda* rights will not excuse a failure to warn. *Miranda v. Arizona,* 384 U.S. at 468-69, 471-73.

The police need not precisely parrot the language of *Miranda* when they give *Miranda* warnings. *Duckworth v. Eagan,* 492 U.S. 195, 201 (1989) (upholding a warning which included the statement "'We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court,'" *id.* at 198, on the ground that the warning *also* said explicitly, "'You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning,'" *ibid.;* the Court viewed this combination of advice as conveying the accurate information that, although the police were not obliged to furnish the arrested person with a lawyer, they were obliged to stop questioning him if he requested a lawyer, *id.* at 202-03); *Florida v. Powell*, 559 U.S. 50, 53, 62 (2010) (the *Miranda* requirement that an individual must be "'clearly informed,' prior to custodial questioning, that he has, among other rights, 'the right to consult with a lawyer and to have the lawyer with him during interrogation'" was adequately satisfied by a police officer's advising the defendant that he "has 'the right to talk to a lawyer before answering any of [the law enforcement officers'] questions,' and that he can invoke this right 'at any time . . . during th[e] interview'" because "[i]n combination, the two

warnings reasonably conveyed [the suspect's] right to have an attorney present, not only at the outset of interrogation, but at all times"); *see also California v. Prysock,* 453 U.S. 355 (1981) (per curiam). What is required is that the warnings be "'*a fully effective equivalent*'" of the *Miranda* language, *Duckworth v. Eagan,* 492 U.S. at 202, quoting *Miranda,* 384 U.S. at 476 (emphasis in the original *Duckworth* opinion), and "reasonably 'conve[y] to [a suspect] his rights as required by *Miranda,'"* 492 U.S. at 203, quoting *California v. Prysock,* 453 U.S. at 361. *Cf. United States v. Botello-Rosales*, 728 F.3d 865, 867-68 (9th Cir. 2013) (per curiam) ("the Spanish-language [*Miranda*] warning administered to Botello before he was interrogated failed to 'reasonably convey'" the "government's obligation to appoint an attorney for an indigent suspect who wishes to consult one" because "the Spanish word 'libre' [used by the detective] to mean 'free,' or without cost" actually "translates to 'free' as being available or at liberty to do something"; this "constitutional infirmity" was not "cure[d]" by the officers' prior administration of "correct *Miranda* warnings in English to Botello" because "[e]ven if Botello understood the English-language warnings, there is no indication in the record that the government clarified which set of warnings was correct"); *United States v. Murphy*, 703 F.3d 182, 193 (2d Cir. 2012) (police officer's "instruct[ion] [to] the defendants that they could 'decide at anytime to give up these rights, *and* not talk to us'" "failed to 'ensure'" that the defendants had "sufficient knowledge" of their "'constitutional rights relating to the interrogation'": the officer's "incorrect formulation strongly suggested that the defendants *should* talk if they wished to exercise their rights — or, put another way, that they would waive their rights if they remained silent"); *United States v. Wysinger*, 683 F.3d 784, 798-800 (7th Cir. 2012) (an admonition to a suspect that he had the "'right to talk to a lawyer for advice before we ask any questions or have one — have an attorney with you during questioning,'" "followed by diversionary tactics that redirect[ed] the suspect away from asserting those rights, frustrate[d] the purpose of the *Miranda* protections" by conveying to the suspect "that he could talk to an attorney before questioning *or* during questioning" when "[i]n fact, Wysinger had a right to consult an attorney both before *and* during questioning": "A person given a choice between having a lawyer with him before questioning or during questioning might wait until it is clear that questioning has begun before invoking his right to counsel;" here, the interrogating agent "implied that Wysinger could decide whether to exercise his rights after [the] Agent . . . 'la[id] it out for' him and told him 'what the story is,' and that, in the meantime, he should 'listen for a minute.' The time to invoke his rights, in other words, had not yet arrived."). A state court is, of course, free to construe its state constitution as requiring strict conformity with the language of *Miranda.* See § 7.09 *supra.*

§ 24.10 VALIDITY OF THE RESPONDENT'S WAIVER OF *MIRANDA* RIGHTS

In addition to showing that the respondent received valid *Miranda* warnings (see § 24.09 *supra*), the prosecution must show that the respondent made a voluntary, knowing, and intelligent waiver of the *Miranda* rights. *Edwards v. Arizona,* 451 U.S. 477, 482-84 (1981); *see, e.g., Garner v. United States,* 424 U.S. 648, 657 (1976) (dictum); *Fare v. Michael C.,* 442 U.S. 707, 724-27 (1979) (dictum); *see also Colorado v. Connelly,* 479 U.S. 157, 167-69 (1986). The element of "voluntariness" is discussed further in § 24.10(a) *infra,* and the "knowing and intelligent" element in § 24.10(b). The waiver must be made by the respondent himself or

herself; parents cannot waive *Miranda* rights on behalf of their children. *See, e.g., Smith v. State,* 484 So. 2d 560, 561 (Ala. Crim. App. 1986); *In the Matter of the Welfare of S.W.T.,* 277 N.W.2d 507, 512-13 (Minn. 1979).

A waiver needs not be express: "[I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *North Carolina v. Butler,* 441 U.S. 369, 373 (1979). In certain circumstances, "a waiver of *Miranda* rights may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.'" *Berghuis v. Thompkins*, 560 U.S. 370, 385 (2010) (quoting *North Carolina v. Butler,* 441 U.S. 369, 376 (1979)). *See Berghuis*, at 385-86 ("[t]he record in this case shows that Thompkins waived his right to remain silent," notwithstanding the absence of an explicit waiver, because "[t]here was more than enough evidence in the record to conclude that Thompkins understood his *Miranda* rights" and thus that "he chose not to invoke or rely on those rights when he did speak; Thompkins's answer to the interrogating officer's question was "a 'course of conduct indicating waiver' of the right to remain silent," and "there is no evidence that Thompkins's statement was coerced").

For discussion of the state's burden of persuasion in showing a waiver *of Miranda* rights, see § 22.03(d)(ii) *supra.*

§ 24.10(a) The Requirement That *Miranda* Waivers Be Voluntary

A waiver *of Miranda* rights, "[o]f course, . . . must at a minimum be 'voluntary' to be effective against an accused." *Colorado v. Connelly,* 479 U.S. 157, 169 (1986); *Miranda,* 384 U.S. at 444, 476. "'[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.'" *Colorado v. Spring,* 479 U.S. 564, 573 (1987); *Moran v. Burbine,* 475 U.S. 412, 420 (1986); *Fare v. Michael C.,* 442 U.S. at 725.

The Court has indicated that the "indicia of coercion" recognized in the context of the due process issue of the voluntariness of statements (see §§ 24.03-24.05 *supra*) are also relevant to the voluntariness of a waiver of *Miranda* rights. *See Colorado v. Spring,* 479 U.S. at 573-74; *Colorado v. Connelly,* 479 U.S. at 169-70. The decisive question is whether the respondent's "'will [was] overborne and his capacity for self-determination critically impaired' because of coercive police conduct." *Colorado v. Spring,* 479 U.S. at 574. In making that inquiry, the courts may consider: "'the duration and conditions of detention . . ., the manifest attitude of the police toward . . . [the accused], his physical and mental state, [and] the diverse pressures which sap or sustain his powers of resistance and self-control.'" *Ibid.* (quoting *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961) (opinion of Justice Frankfurter)).

Excessively long detention or detention under oppressive circumstances can suffice to render a *Miranda* waiver involuntary. See § 24.04(b) *supra. Miranda* says expressly that the fact that an accused's statement was made after "lengthy interrogation *or* incommunicado

incarceration . . . is inconsistent with any notion of a voluntary relinquishment of the privilege [against self-incrimination].” *Miranda v. Arizona,* 384 U.S. at 476 (emphasis added). One aspect of incommunicado detention of juveniles that has received substantial attention in the caselaw is denial of access to a parent or other “interested adult.” For discussion of the relevance of this factor in assessing voluntariness of a juvenile’s waiver, see § 24.14 *infra.*

The voluntariness of a *Miranda* waiver can also be undermined by a police officer’s use of force or the threat of force (see § 24.04(a) *supra*) or by police promises of leniency or threats of adverse governmental action (see § 24.04(c) *supra*). “[E]vidence that the accused was . . . tricked . . . into a waiver will, of course, show that the defendant did not voluntarily waive his [Fifth Amendment] privilege.” *Miranda,* 384 U.S. at 476. *See also id.* at 449-55 (describing the methods by which “interrogators . . . induce a confession out of trickery,” *id.* at 453). *Cf. Moran v. Burbine,* 475 U.S. 412 (1986) (accepting the basic proposition that police “‘trick[ery]’ . . . can vitiate the validity of a waiver,” *id.* at 423, but concluding that police misrepresentations to the suspect’s attorney did not undermine the voluntariness of waivers by a suspect who was unaware of them). And see the discussion of *Colorado v. Spring,* 479 U.S. 564 (1987), in § 24.04(d) *supra.*

As in the due process voluntariness context (see § 24.05 *supra*), the respondent’s “mental condition is surely relevant to an individual’s susceptibility to police coercion,” *Colorado v. Connelly,* 479 U.S. at 165; *see also J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (discussed in § 24.10(b) *infra*), and thereby to the assessment of the voluntariness of a waiver of *Miranda* rights. *See Colorado v. Spring,* 479 U.S. at 573-74; *see also Fare v. Michael C.,* 442 U.S. at 725. A waiver by a juvenile must be scrutinized with “special caution,” *In re Gault,* 387 U.S. 1, 45 (1967); *see also Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (explaining, in the context of criminal sentencing, that the Court has recognized, based on “science and social science” as well as “common sense” and “what ‘any parent knows,’” that “children ‘are more vulnerable . . . to . . . outside pressures’”), especially when the natural vulnerability of youth has been exacerbated by other factors, such as mental retardation, illiteracy, intoxication, or lack of prior experience with the court system. *See, e.g., Woods v. Clusen,* 794 F.2d 293 (7th Cir. 1986) (16-year-old with no prior court experience); *United States v. Blocker,* 354 F. Supp. 1195 (D. D.C. 1973) (21-year-old with “low intelligence” and only one prior arrest); *In re Estrada,* 1 Ariz. App. 348, 403 P.2d 1 (1965) (14-year-old with low level of education and literacy); *In re Roderick P.*, 7 Cal. 3d 801, 500 P.2d 1, 103 Cal. Rptr. 425 (1972) (mentally retarded 14-year-old with no prior arrests); *In the Interest of Thompson,* 241 N.W.2d 2 (Iowa 1976) (17-year-old with I.Q. of 71); *State in the Interest of Holifield,* 319 So. 2d 471 (La. App. 1975) (14-year-old with I.Q. of 67); *Commonwealth v. Cain,* 361 Mass. 224, 279 N.E.2d 706 (1972) (15-year-old with no prior experience with police, who was denied access to his father).

§ 24.10(b) The Requirement That *Miranda* Waivers Be “Knowing and Intelligent”

A *Miranda* waiver “must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the ‘totality of

the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v. Burbine,* 475 U.S. 412, 421 (1986) (dictum); *see Colorado v. Spring,* 479 U.S. 564, 573-74 (1987) (dictum).

The requirement of a "knowing and intelligent" waiver assumes particular importance in juvenile cases because, as the empirical evidence demonstrates, most juveniles — simply by reason of their age and limited education — fail to comprehend the language traditionally employed in *Miranda* warnings and the concepts embodied in the warnings. *See* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981) [hereafter Grisso I]; Rona Abramovitch, Karen Higgins-Bass & Stephen Bliss, *Young Persons' Comprehension of Waivers in Criminal Proceedings*, CANADIAN J. OF CRIMINOLOGY 309 (1993); Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395 (2013); Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26 (2006); Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 LAW & SOC'Y REV. 1 (2013); A. Bruce Ferguson & Alan C. Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970); Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis,* 68 CALIF. L. REV. 1134 (1980) [hereafter Grisso II]; Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431; Michele LaVigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: the Prevalence of Language Impairments among Juvenile and Adult Offenders and Why it Matters*, 15 U.C. DAVIS J. JUV. L. & POL'Y 37, 74-77 (2011); *see also* THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 113-55 (1986); Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (Winter 2006).

On the basis of a three-year series of empirical studies of delinquent youth and adult criminal offenders, Grisso concluded that: "[a]s a class, juveniles of ages 14 and below demonstrate incompetence to waive their rights to silence and legal counsel"; and "[a]s a class, juveniles of ages 15 and 16 who have I.Q. scores of 80 or below lack the requisite competence to waive their rights to silence and counsel." Grisso I at 193-94; Grisso II at 1160. Juveniles aged 15 and 16 with I.Q. scores above 80 exhibited "a level of understanding and perception" comparable to the sample population of 17-to-21 year-olds and thus could not be distinguished as a class from adults; nevertheless, approximately one third to one half of the 15 and 16 year-olds with I.Q. scores above 80 proved incapable of adequately understanding *Miranda* rights. Grisso I at 194; Grisso II at 1160.

In a study of sample populations of delinquent and nondelinquent youths, Ferguson and Douglas similarly found that more than 90 per cent of the juveniles failed to fully comprehend *Miranda* warnings, and that even the use of a simplified version of the language of the *Miranda* warnings did not remedy these deficiencies in comprehension. Ferguson & Douglas, *supra* at 53-

54.

To test the validity of the findings of psychological studies such as the foregoing in actual interrogation situations, Feld examined "quantitative and qualitative data — interrogation tapes and transcripts, police reports, juvenile court filings, and probation and sentencing reports — of the routine police interrogation of sixty-six juveniles sixteen years of age or older whom prosecutors charged with a felony offense." Feld, *supra* at 28. As he explains, the findings of his "study are very consistent with laboratory research . . . [and] tend[] to bolster the validity of developmental psychologists' experimental findings that younger juveniles do not understand their *Miranda* rights, lack adjudicative competence, and remain at greater risk to give false confessions." *Id*. at 99. *See also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 941-943 (2004), discussed in § 24.05(a) *supra*.

Some courts have cited such empirical studies as evidence that a substantial portion of the juvenile population is unable to comprehend *Miranda* warnings. *See, e.g.*, *A.M. v. Butler*, 360 F.3d 787, 801 n.11 (7th Cir. 2004); *State v. Benoit,* 126 N.H. 6, 13-14, 490 A.2d 295, 300-01 (1985); *In the Matter of B.M.B.*, 264 Kan. 417, 429-33, 955 P.2d 1302, 1310-13 (1998); *Commonwealth v. A Juvenile (No. 1),* 389 Mass. 128, 131-32, 449 N.E.2d 654, 656 (1983); *see also State in the Interest of S.H.,* 61 N.J. 108, 115, 293 A.2d 181, 184-85 (1972) (treating it as axiomatic that "[r]ecitation of the *Miranda* warnings to a boy of 10 even when they are explained is undoubtedly meaningless"); *In the Interest of Jerrell C.J.*, 283 Wis. 2d 145, 159 n.6, 699 N.W.2d 110, 117 n.6 (2005) (referring generally to "scholarly research" as supporting the proposition that "children are less likely to understand their *Miranda* rights" "[b]ecause their intellectual capacity is not fully developed"). *But cf. State v. Griffin*, 273 Conn. 266, 286-87, 869 A.2d 640, 652 (2005) (in holding that the judge at a suppression hearing was not required to admit the testimony of a defense expert who used a protocol developed by Thomas Grisso to evaluate the 14-year-old defendant's competency to understand *Miranda* warnings, the Connecticut Supreme Court says: "On the basis of the evidence presented at the suppression hearing, we simply cannot say that the trial court abused its discretion in ruling that the Grisso test [*i.e.*, Grisso's protocol for evaluating competency] did not satisfy the [state law] . . . standard [for admissibility of expert testimony] . . . [but] [o]f course, we do not foreclose the possibility that, in a future case, sufficient evidence regarding the reliability of the Grisso test will be presented such that it may be found to pass muster"). The New Hampshire Supreme Court in *State v. Benoit* ruled on state constitutional grounds that "before a juvenile can be deemed to have voluntarily, knowingly and intelligently waived" *Miranda* rights, "he or she must be informed, in language understandable to a child, of his or her rights," 126 N.H. at 18-19, 490 A.2d at 304, and the court set forth a simplified juvenile rights form in an appendix to its opinion, *id*. at 22-24, 490 A.2d at 306-07. The Kansas Supreme Court in *In the Matter of B.M.B.* and the Massachusetts Supreme Judicial Court in *Commonwealth v. A Juvenile (No. 1)* responded to the problem of juveniles' inability to comprehend *Miranda* warnings by establishing requirements that a parent or other concerned adult be present during police interrogation, and that the juvenile be permitted to consult with the adult. See § 24.14 *infra*.

In addressing the relevance of a suspect's young age for another aspect of the *Miranda* doctrine — the assessment of whether a suspect is in "custody" for purposes of *Miranda* (see generally § 24.08(a)) — the Supreme Court in *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) observed that "[t]ime and again," the Court has taken into account the constitutional implications of the inherent immaturity and vulnerability of youth, including in "the specific context of police interrogation":

> We have observed that children "generally are less mature and responsible than adults," *Eddings*, 455 U.S., at 115–116; that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion); that they "are more vulnerable or susceptible to . . . outside pressures" than adults, *Roper*, 543 U.S., at 569; and so on. See *Graham v. Florida*, [560 U.S. 48, 68,] 130 S. Ct. 2011, 2026 (2010) (finding no reason to "reconsider" these observations about the common "nature of juveniles"). Addressing the specific context of police interrogation, we have observed that events that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion); see also *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) ("[N]o matter how sophisticated," a juvenile subject of police interrogation "cannot be compared" to an adult subject). Describing no one child in particular, these observations restate what "any parent knows" — indeed, what any person knows — about children generally. *Roper*, 543 U.S., at 569.[FN5]
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> [FN5]Although citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions, the literature confirms what experience bears out. See, e.g., *Graham v. Florida*, [560 U.S. 48, 68,] 130 S. Ct. 2011, 2026 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds").

J.D.B. v. North Carolina, 131 S. Ct. at 2403 & n.5. *See also Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (explaining that the Court has recognized, based on "science and social science" as well as "common sense" and "what 'any parent knows,'" that "children are constitutionally different from adults for purposes of sentencing" because, *inter alia*, "children have a '"lack of maturity and an underdeveloped sense of responsibility,"' leading to recklessness, impulsivity, and heedless risk-taking," and "children 'are more vulnerable . . . to . . . outside pressures'"). The lower courts similarly have recognized that the very nature of adolescence causes juveniles to be less able than adults to weigh consequences and to make informed, meaningful judgments, even on highly important matters. *See, e.g.*, *People v. Mitchell*, 2 N.Y.3d 272, 275-76, 810 N.E.2d 879, 881-82, 778 N.Y.S.2d 427, 429-30 (2004) (establishing a more protective rule for the invocation of the state constitutional right to counsel in juvenile delinquency and juvenile offender cases because "[c]hildren of tender years lack an adult's knowledge of the probable cause of their acts or omissions and are least likely to understand the scope of their rights and how to protect their own interests . . . [and they] may not appreciate the ramifications of their decisions or realize all the implications of the importance of counsel"); *In the Matter of Benjamin*

L., 92 N.Y.2d 660, 669, 708 N.E.2d 156, 161, 685 N.Y.S.2d 400, 405 (1999) (establishing a more protective rule for the operation of the state constitutional right to a speedy trial in juvenile delinquency cases because "[t]ypically, a juvenile . . . is unlikely to appreciate the importance of taking affirmative steps toward the ultimate resolution of the case, and is just as unlikely to possess the means and sophistication to do so" and "[m]oreover, many youths in juvenile proceedings suffer from educational handicaps and mental health problems, which undermine their capacity to anticipate a future presentment and to appreciate the need to take self-protective measures").

The most effective way for counsel to use the published empirical studies in an individual case is by presenting expert testimony that combines a discussion of the general statistics with a finding by a psychiatrist or psychologist, based upon a clinical examination of the respondent, that this particular youth is unable to comprehend the *Miranda* warnings in the form in which they were administered to him or her by the police. Social scientists have developed forensic tests for assessing a juvenile's ability to comprehend *Miranda* rights; counsel can find an expert conversant with such tests by consulting local psychiatrists and psychologists and the relevant departments of the state university. *Cf. In re Ariel R.*, 98 A.D.3d 414, 417, 419, 950 N.Y.S.2d 17, 21 (N.Y. App. Div., 1st Dep't 2012) (respondent's treating psychiatrist, who was called as a witness for the defense at a confession suppression hearing, should have been allowed to "render an opinion as to whether appellant could have understood the juvenile *Miranda* warnings read to him" even though the psychiatrist "did not perform any tests on [the respondent] that were specifically designed to determine [respondent's] competency to waive *Miranda*"; the psychiatrist's "evaluations of [the respondent's] receptive communication skills and IQ . . . [were] sufficient to enable him to form an opinion as to the ultimate question of whether [respondent] had adequate language and cognitive skills to understand the *Miranda* warnings"). For general discussion of the use of expert witnesses and the right to court funds for retention of experts when representing indigent respondents, see Chapter 11 and §§ 12.08-12.10 *supra.*

To put together a persuasive presentation, counsel also should obtain the respondent's school records and should consult any teachers who could testify regarding the respondent's reading and comprehension abilities. If the child is in special education classes because of his or her learning disabilities or educational deficits, there may be extensive evaluations in the child's school file, and counsel should consider presenting the testimony of the special education teachers who prepared the reports. *See, e.g., Cooper v. Griffin,* 455 F.2d 1142 (5th Cir. 1972) (on the basis of special education teachers' testimony concerning the low I.Q. scores and comprehension levels of the juvenile defendants, the court concludes that their *Miranda* waivers were not "knowing and intelligent").

Counsel should also consider putting the respondent on the witness stand at the suppression hearing to testify about his or her understanding of the meaning of the various *Miranda* warnings. Such testimony can be dramatic and persuasive, providing the judge with a first-hand view of the child's limitations. *See, e.g., State in the Interest of Holifield,* 319 So. 2d 471, 472-73 (La. App. 1975).

§ 24.11 STATEMENTS TAKEN AFTER THE RESPONDENT HAS ASSERTED HIS OR HER *MIRANDA* RIGHTS TO SILENCE OR COUNSEL

The discussion in § 24.10 *supra* described the normal standard for assessing waivers of *Miranda* rights. If, instead of making an immediate and final waiver of *Miranda* rights, the respondent asserts at any time the right to silence or the right to counsel, there are more stringent standards for determining the validity of any subsequent *Miranda* waivers.

Provided that the respondent has used language adequate to assert the right (see § 24.11(a) *infra*), the standard to be applied following an assertion of the right to silence is the one discussed in § 24.11(b) *infra,* and the standard to be applied after an assertion of the right to counsel is the one discussed in § 24.11(c) *infra.*

§ 24.11(a) Sufficiency of the Language Used in Asserting the Right

An assertion of *Miranda* rights needs not expressly refer to the rights: As long as the respondent's statements manifest a "clear indication[]" of his or her desire to exercise a particular right, they are sufficient to invoke the right. *Brewer v. Williams,* 430 U.S. 387, 404-05, 412 n.1 (1977) (discussing invocation of the right to counsel); *Miranda v. Arizona,* 384 U.S. at 444-45 (the right to counsel is asserted whenever the suspect "indicates in any manner" that s/he wants a lawyer); *Davis v. United States*, 512 U.S. 452, 459 (1994) (the right to counsel is invoked if a suspect makes a "'statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney'"). *See, e.g., Michigan v. Mosley,* 423 U.S. 96 (1975) (the right to silence was invoked when a suspect told the police that he did not want to say "[a]nything about the robberies," *id.* at 105 n.11); *Smith v. Illinois,* 469 U.S. 91 (1984) (per curiam) (the right to counsel was invoked when, in response to administration of *Miranda* warnings, defendant said: "'Uh, yeah, I'd like to do that,'" *id.* at 93). *See also Arizona v. Roberson,* 486 U.S. 675, 681-84 (1988); *Connecticut v. Barrett,* 479 U.S. 523, 529 (1987) (dictum); *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *Hurd v. Terhune*, 619 F.3d 1080, 1088-89 (9th Cir. 2010) ("Hurd unambiguously invoked his right to silence when the officers requested that he reenact the shooting . . . [and] Hurd responded to the officers' requests by saying, among other things, 'I don't want to do that,' 'No,' 'I can't,' and 'I don't want to act it out because that — it's not that clear.'"); *United States v. Rodriguez*, 518 F.3d 1072, 1077-78, 1081 (9th Cir. 2008) (defendant, who responded to a question whether he wanted to talk to a law enforcement official by stating "'I'm good for tonight,'" had "at best, [made] an ambiguous invocation of the right to silence," but his subsequent statement had to be suppressed "because his interrogator failed to clarify [defendant's] . . . wishes with regard to his *Miranda* warnings" before commencing interrogation); *Anderson v. Terhune*, 516 F.3d 781, 787 (9th Cir. 2008) (en banc) ("Following the issuance of *Miranda* in 1966 and the literally thousands of cases that repeat its rationale, we rarely have occasion to address a situation in which the defendant not only uses the facially unambiguous words 'I plead the Fifth,' but surrounds that invocation with a clear desire not to talk any more. The state court accurately recognized that under *Miranda*, 'if [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain

silent, the interrogation must cease,' . . . but then went on to eviscerate that conclusion by stating that the comments were 'ambiguous in context ¶ . . . because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all. By asking defendant what he meant by pleading the fifth, the officer asked a legitimate clarifying question.['] ¶ Using 'context' to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law. It is not that context is unimportant, but it simply cannot be manufactured by straining to raise a question regarding the intended scope of a facially unambiguous invocation of the right to silence."); *Deviney v. State*, 112 So.3d 57, 77-78 (Fla. 2013) (suspect's repeated declarations during interrogation that he was "done" and "ready to go home" "represented an unequivocal invocation of his right to remain silent," particularly when "Deviney further indicated his desire to end questioning by standing and attempting to leave the interrogation room"); *State v. King*, 300 P.3d 732, 733, 735-36 (N.M. 2013) ("King clearly invoked his right to remain silent" when he responded to the officer's inquiry "'Do you wish to answer any questions?'" by stating "'Not at the moment. Kind of intoxicated.'": "There is nothing ambiguous about his statement, which made it clear that he did not want to speak with the police. The adverb 'not' is unequivocally a negative expression."; "Although King's statement suggested that he might want to talk at a later time, there was absolutely no respite from the interrogation in this case."); § 24.11(c) *infra* (further discussing the standards governing the invocation of the right to counsel).

In determining whether the words used by the respondent constituted an assertion *of Miranda* rights, the courts may properly take into account the "age and experience of a juvenile." *Fare v. Michael C.,* 442 U.S. 707, 725 (1979). *See, e.g., In the Interest of Thompson,* 241 N.W.2d 2, 7 (Iowa 1976) (17-year-old with low I.Q. asserted the right to counsel when, in response to a police inquiry whether he had a lawyer, he named an attorney; the court observes that such a child "should not be expected to persistently, repeatedly and articulately invoke his constitutional rights before they will be recognized").

Newly arrested juveniles frequently ask to speak to their parents, and some juveniles who are already on probation ask to speak to their probation officer. In *Fare v. Michael C.,* the Court rejected the argument that a request to speak with one's probation officer can "constitute[] a *per se* request to remain silent," 442 U.S. at 723, or a request for counsel, *id.* at 722-23. However, the Court recognized that in a particular case, the "age and experience of a juvenile [may] indicate that his request for his probation officer or his parents is, in fact, an invocation of [the] . . . right to remain silent." *Id.* at 725. *Accord, United States ex rel. Riley v. Franzen,* 653 F.2d 1153 (7th Cir. 1981) (recognizing that, in an appropriate case, a juvenile's request for a parent could constitute either an invocation of the right to silence or the right to counsel); *In the Matter of H.V.*, 252 S.W.3d 319, 326-27 (Tex. 2008) (sixteen-year-old unambiguously asserted the right to counsel by asking to speak to his mother and then, in response to a police denial of that request, stating that he "'wanted his mother to ask for an attorney'"). *See also People v. Rivera,* 41 Cal. 3d 388, 710 P.2d 362, 221 Cal. Rptr. 562 (1985) (ruling on state constitutional grounds that a juvenile suspect's request to speak with a parent will be deemed a *per se* invocation of the privilege against self-incrimination and will bar further interrogation).

If the respondent's initial assertion is adequately clear, then it is not rendered ambiguous by subsequent statements indicating a willingness to speak with the police. *Smith v. Illinois,* 469 U.S. 91 (1984) (per curiam). Such "subsequent statements are relevant only to the question whether the accused [later] *waived* the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred." *Id.* at 98 (emphasis added).

The courts will honor a partial assertion of *Miranda* rights and give effect to the limitations established by the suspect if those limitations are clearly and unequivocally stated. Thus, in *Connecticut v. Barrett,* 479 U.S. 523 (1987), the Court held that the defendant's statement that "'he was willing to talk about [the incident] verbally but he did not want to put anything in writing until his attorney came,'" *id.* at 526, constituted an invocation of the right to counsel with respect to written, but not oral, statements. *See also United States v. Jumper*, 497 F.3d 699, 706 (7th Cir. 2007) (defendant asserted his right to silence with respect to specific questions by saying, in answer to these questions, "'I don't want to answer that'").

The respondent can invoke his or her right to silence or to counsel even after initially waiving such rights. "The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." *Miranda v. Arizona,* 384 U.S. at 444-45.

§ 24.11(b) Assertion of the Right to Silence

"If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda v. Arizona,* 384 U.S. at 473-74; *see Michigan v. Mosley,* 423 U.S. 96, 100-01 (1975) (dictum). However, this does not mean that an arrested individual who has once declined to answer questions "can never again be subjected to custodial interrogation by any police officer at any time or place on any subject." *Mosley,* 423 U.S. at 102.

In *Mosley,* the Court sustained the admission of a murder confession by a defendant, notwithstanding his earlier assertion of his right to silence, because the unusual facts of the case showed that his assertion had been '"scrupulously honored'" (*id.* at 104) by the police. The defendant had been arrested for several robberies and, upon administration of full *Miranda* warnings, told the arresting officer that he did not want to say "'[a]nything about the robberies.'" *Id.* at 105 n.11. The arresting officer respected that assertion of the right to silence by "promptly ceas[ing] the interrogation," *id.* at 97, and the defendant was never again questioned about the robberies for which he had been arrested. *See id.* at 105-06. "After an interval of more than two hours," *id.* at 104, the defendant was taken from his cell to "another location" in the building, *ibid.,* "by another police officer," *ibid.,* who was not shown to have had any connection with the earlier questioning, *see id.* at 105. This second police officer gave the defendant another complete set of *Miranda* warnings and then questioned the defendant "about an unrelated holdup murder." *Id.* at 104. In response to the second administration of *Miranda* warnings, the defendant

signed a *Miranda* "notification form" and then answered questions, initially denying the murder and then, within 15 minutes, admitting guilt. *See id.* at 98. During all of these proceedings the defendant never asked to see a lawyer. *Id.* at 101 n.7. The Supreme Court held that "the admissibility of statements obtained after [a] . . . person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored,'" *id.* at 104, and that, on this record, Mosley's "'right to cut off questioning' was fully respected," *ibid.* "This is not a case . . . where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." *Id.* at 105-06.

Under *Mosley,* the courts will find that the police failed to "scrupulously honor" a suspect's invocation of the right to remain silent and will suppress any ensuing statement if the police (a) do not cease questioning as soon as the suspect invokes his or her right to silence, *see, e.g., Anderson v. Smith,* 751 F.2d 96, 102-03 (2d Cir. 1984), or (b) engage in "repeated rounds of questioning to undermine the will of the person being questioned," *Michigan v. Mosely,* 423 U.S. at 102; *see, e.g., United States v. Hernandez,* 574 F.2d 1362, 1368-69 (5th Cir. 1978); *People v. Jackson*, 103 A.D.3d 814, 816-17, 959 N.Y.S.2d 540, 543 (N.Y. App. Div., 2d Dep't 2013) ("arresting officer failed to 'scrupulously honor' the defendant's [assertion of the right to silence] . . . when he deliberately engaged the defendant in conversation . . . [and] told the defendant that, unless someone confessed to ownership of the gun, all three occupants of the car would be charged with its possession, . . . [thereby] engaging in the functional equivalent of interrogation in that he knew or should have known that his comments were reasonably likely to elicit an incriminating response").

When litigating cases in which interrogation was resumed after a respondent's assertion of the right to silence, counsel may be advised to seek a state constitutional ruling forbidding such a resumption even under circumstances in which *Mosley* would allow it. *See, e.g., People v. Pettingill,* 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978). See generally § 7.09 *supra.*

§ 24.11(c) Assertion of the Right to Counsel

"If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda v. Arizona,* 384 U.S. at 474. A request for an attorney triggers "additional safeguards" beyond those recognized in *Mosley* as attending an invocation of the right to remain silent. *Edwards v. Arizona,* 451 U.S. 477, 484 (1981); see *id.* at 484-85:

> [W]e . . . hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself

initiates further communication, exchanges, or conversations with the police.

See also Minnick v. Mississippi, 498 U.S. 146, 150 (1990); *Shea v. Louisiana,* 470 U.S. 51, 54-55 (1985); *Moore v. Berghuis*, 700 F.3d 882 (6th Cir. 2012) (a murder suspect turned himself in and asked the police to call the number on his attorney's business card; an officer called and got the attorney's answering service; the officer told the suspect that he had reached only the attorney's answering device, not the attorney. (*Id*. at 884.) The officer then "'asked [Moore] did he want to talk to [the officer] and [Moore] said yes he did.' The officer . . . then had Moore sign a form waiving his constitutional rights, and 'asked [Moore] could he tell [the officer] about . . . the fatal shooting . . . .'" (*Id*. at 888.) "[T]o demonstrate that Moore waived his asserted right to counsel and was therefore 'not subject to further interrogation by the authorities until counsel [was] made available to him,' the government must have shown that Moore 'himself initiate[d] further communication, exchanges, or conversations with the police.' *Edwards*, . . . Though the Supreme Court in [*Berghuis v.*] *Thompkins*[, 560 U.S. 370 (2010), discussed in § 24.10] recently addressed the issue of waiver of *Miranda* rights, we do not read *Thompkins*'s waiver analysis to alter the *Edwards* rule regarding waiver of the right to counsel. In *Thompkins*, the Court did not alter, or even speak to, the *Edwards* analysis regarding the waiver of the right to counsel; instead, *Thompkins* clarifies the waiver analysis for the right to remain silent." *Id*.*); Davis v. United States*, 512 U.S. 452, 458 (1994) (dictum); *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991) (dictum); *Montejo v. Louisiana*, 556 U.S. 778, 794-95 (2009) (dictum). *But see Maryland v. Shatzer*, 559 U.S. 98, 109, 110 (2010) (*Edwards* rule does not bar "reinterrogat[ion] after a break in custody that is of sufficient duration to dissipate . . . [the] coercive effects" of the initial period of "*Miranda* custody"; this will ordinarily be the case when the "break in custody" has been at least "14 days," a period of time that "provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody").

"Edwards set forth a 'bright-line rule' that all questioning must cease after an accused requests counsel." *Smith v. Illinois,* 469 U.S. 91, 98 (1984) (per curiam). "*Edwards* is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.' . . . The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick v. Mississippi*, 498 U.S. at 150-51. *See also Smith v. Illinois*, 469 U.S. at 97-99 (rejecting arguments that a request for counsel made partway through the administration of *Miranda* warnings was insufficient to trigger the *Edwards* rule and that equivocations in the suspect's responses to the remaining warnings could be considered as rendering his initial request for counsel ambiguous). "The *Edwards* rule . . . is *not* offense specific: Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present." *McNeil v. Wisconsin*, 501 U.S. at 177 (dictum). *Accord*, *Arizona v. Roberson*, 486 U.S. 675, 682 (1988).

"Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' . . . [I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable

officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, . . . [the Supreme Court's] precedents do not require the cessation of questioning. . . . Although a suspect need not 'speak with the discrimination of an Oxford don,' . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. at 459. S*ee also id*. at 462 (upholding determination of "courts below . . . that . . . [Davis'] remark to the . . . agents — 'Maybe I should talk to a lawyer' — was not a request for counsel" and that the agents could continue questioning "to clarify whether [Davis] . . . in fact wanted a lawyer"); *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (*Edwards* rule was not triggered by a defendant's announcement that he would not give the police a written statement unless his lawyer was present but had no problem in talking about the incident: "Barrett's limited requests for counsel . . . were accompanied by affirmative announcements of his willingness to speak with the authorities," *ibid*.); *People v. Nelson*, 53 Cal. 4th 367, 381, 266 P.3d 1008, 1019, 135 Cal. Rptr. 3d 312, 325 (2012) ("Where, as here, a juvenile has made a valid waiver of his *Miranda* rights and has agreed to questioning, a postwaiver request for a parent is insufficient to halt questioning unless the circumstances are such that a reasonable officer would understand that the juvenile is *actually* invoking — as opposed to *might be* invoking — the right to counsel or silence."). *Compare United States v. Hunter*, 708 F.3d 938, 948 (7th Cir. 2013) ("Given the decisive language and the prior context of Hunter's request to Detective Karzin, we find that Hunter's request, 'Can you call my attorney?' was an unambiguous and unequivocal request for counsel"); *United States v. Wysinger*, 683 F.3d 784, 795-96 (7th Cir. 2012) (defendant unequivocally invoked his right to counsel in an exchange with the interrogating officer that began with the defendant's asking "I mean, do you think I should have a lawyer? At this point?," to which the officer responded "If you want an attorney, by all means, get one," and the defendant replied "I mean, but can I call one now? That's what I'm saying."); *Wood v. Ercole*, 644 F.3d 83, 92 (2d Cir. 2011) (accused "unambiguously asserted his right to counsel" by saying 'I think I should get a lawyer'"); *Yenawine v. Motley*, 402 Fed. Appx. 997, 998 (6th Cir. 2010) (defendant's request for counsel was sufficient to trigger *Edwards*'s protection and to require the exclusion of his inculpatory statement where "(1) the . . . [defendant] was under police interrogation when he stated, '[M]aybe I should talk to an attorney'; (2) the . . . [defendant] named his attorney and gave the police officer his attorney's business card; and (3) shortly thereafter, the police continued questioning the . . . [defendant] and he gave a statement"); *Ballard v. State*, 420 Md. 480, 491, 24 A.3d 96, 102 (2011) (accused "unambiguous[ly] and unequivocal[ly] assert[ed] . . . the right to counsel" by stating: "'You mind if I not say no more and just talk to an attorney about this'").

"[I]f a suspect requests counsel [with the degree of clarity described in the preceding paragraph] at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Davis v. United States*, 512 U.S. at 458. With the sole exception of the situation in which the suspect has "reinitiate[d] conversation," the invocation of the *Miranda* right to counsel "bar[s] police-initiated interrogation unless the accused has counsel with him at the time of questioning." *Minnick v. Mississippi*, 498 U.S. at 153. *See also ibid*. ("when counsel is requested, interrogation must

cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney").

In order to sustain the admissibility of an incriminating statement under the *Edwards* exception for a suspect's reinitiation of discussions with the police, the prosecution must show not only that the respondent took the initiative in resuming the interchange by broaching or specifically requesting further conversation with police officers or prosecuting authorities but also that, in the ensuing interchange, any responses made by the respondent to police interrogation (as defined in § 24.08(b) *supra*) manifested a valid waiver of the rights to remain silent and to have counsel (under the standards described in § 24.10 *supra*). *See Minnick v. Mississippi*, 498 U.S. at 156 ("*Edwards* does not foreclose" further police questioning if "the accused . . . initiated the conversation or discussions with the authorities" and if there was "a waiver of Fifth Amendment protections"); *Smith v. Illinois*, 469 U.S. at 94-95 ("if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked"); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion) (dictum) ("even if a conversation . . . is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation"); *Benjamin v. State*, 116 So.3d 115, 123 (Miss. 2013) (even if the police officer's post-assertion interactions with the 14-year-old suspect had been initiated by the suspect himself rather than improperly engineered by the officer, the resulting statement nonetheless would have to be suppressed because "we cannot say that the record demonstrates that Benjamin's waiver was made with full awareness of the nature of the right and the consequences of abandoning it": "Benjamin's youth rendered him particularly susceptible to parental pressure" and "[i]t is manifestly apparent that Benjamin conceded to pressure from his mother and to his desire to avoid a night in jail in deciding to waive his rights").

The Supreme Court has not yet established criteria for the kind of communication from a detained individual to his or her custodians that will satisfy the "initiation" prong of the *Edwards* rule. In *Oregon v. Bradshaw,* the Court split 4-to-4 on whether a defendant's question to officers "'Well, what is going to happen to me now?'" manifested a "willingness and a desire for a generalized discussion about the investigation" or was "merely a necessary inquiry arising out of the incidents of the custodial relationship" that could not "be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation." 462 U.S. at 1045-46 (plurality opinion). The confession in *Bradshaw* was held admissible, but only through the concurring vote of Justice Powell, who adopted an analysis that was rejected by all eight other members of the Court.

In applying the "initiation" requirement, the lower courts have found waivers to be invalid when the police prompted or stimulated the suspect's initiation of communications by, for example, reciting incriminating evidence in detail, *see, e.g., Wainwright v. State,* 504 A.2d 1096 (Del. 1986); *Koza v. State,* 718 P.2d 671 (Nev. 1986), or informing the suspect that his or her

accomplices have given confessions incriminating him or her, *see, e.g., State v. Quinn,* 64 Md. App. 668, 498 A.2d 676 (1985), or telling the suspect about further investigation that police officers are conducting to gather incriminating evidence, *State v. McKnight*, 131 Hawai'i 379, 393-34, 319 P.3d 298, 312-13 (2013) (officer told the defendant "that they planned to execute a search warrant on his residence").

§ 24.12 APPLICABILITY OF *MIRANDA* REQUIREMENTS TO INTERROGATION BY SCHOOL OFFICIALS OR PRIVATE CITIZENS

Questioning by any "agent of the State" falls within *Miranda. See, e.g., Estelle v. Smith,* 451 U.S. 454, 466-67 (1981) ("That [the defendant] . . . was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial," once the answers to the questioning are sought to be used against the defendant at trial); *United States v. Fowler,* 476 F.2d 1091 (7th Cir. 1973) (interrogation of a juvenile by a postal inspector is controlled by *Miranda).* Questioning by a private citizen is also subject to the *Miranda* requirements if the citizen acted at the behest of, or in conjunction with, the police. *See, e.g., People v. Jones,* 47 N.Y.2d 528, 533, 393 N.E.2d 443, 445, 419 N.Y.S.2d 447, 450 (1979) (the state cannot avoid the *Miranda* "restrictions by using a private individual as its agent . . . nor can it claim that only a private act is involved when government officers, subject to constitutional limitations, have participated in the act"); *cf. In the Matter of Raymond W.,* 44 N.Y.2d 438, 439, 377 N.E.2d 471, 472, 406 N.Y.S.2d 27, 28 (1978) (coercive influence by a parent upon a child during interrogation would lose its private character if the parent acted "at the behest or on behalf of the prosecutor"). For discussion of this doctrine in other contexts, see § 24.06 *supra* (due process voluntariness); § 23.36 *supra* (Fourth Amendment); § 24.13(b) *infra* (Sixth Amendment).

While school officials are clearly "representatives of the State" (*cf. New Jersey v. T.L.O.,* 469 U.S. 325, 336 (1985)) for purposes *of Miranda,* the application of the *Miranda* rule to the school setting requires resolution of the separate threshold issue whether the school setting is sufficiently "custodial" (see § 24.08(a) *supra*) to trigger *Miranda* protections. In holding in *Minnesota v. Murphy,* 465 U.S. 420 (1984), that a probation interview in the probation officer's office was not "custodial" for *Miranda* purposes, the Court indicated the factors to be considered in assessing whether a nonpolice setting is custodial:

> Custodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers' will and to confess. . . . It is unlikely that a probation interview, arranged by appointment at a mutually convenient time, would give rise to a similar impression. Moreover, custodial arrest thrusts an individual into "an unfamiliar atmosphere"or "an interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner." . . . Many of the psychological ploys discussed in *Miranda* capitalize on the suspect's unfamiliarity with the officers and the environment. Murphy's regular meetings with his probation officer should have served to familiarize him with her and her office and to insulate him from psychological

> intimidation that might overbear his desire to claim the privilege. Finally, the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained. . . . Since Murphy was not physically restrained and could have left the office, any compulsion he might have felt from the possibility that terminating the meeting would have led to revocation of probation was not comparable to the pressure on a suspect who is painfully aware that he literally cannot escape a persistent custodial interrogator.

465 U.S. at 433. When a similar analysis is applied to interrogation of students inside a principal's or assistant principal's office, it becomes evident that such a setting, unlike the probation interview considered in *Murphy,* is "custodial." A mandatory directive to leave class and report to the principal's office stands in sharp contrast to "a probation interview, arranged by appointment at a mutually convenient time." *Ibid.* The principal's office is hardly a familiar or supportive setting for a student, since students normally are called into the office for disciplinary reasons. Given children's susceptibility to intimidation (see §§ 24.05(a), 24.10 *supra*) and the principal's unique position of authority over the children in his or her school, there is a high probability of "psychological intimidation that might overbear [the child's] desire to claim the [Fifth Amendment] privilege." 465 U.S. at 433. Finally, children ordered to report to a principal's office do not have the luxury of simply leaving the office at any time they choose; rather, they are "painfully aware that [they] . . . literally cannot escape a persistent custodial interrogator." *Ibid.* Accordingly, the logic of *Murphy* calls for the application of *Miranda* protections to questioning in the school setting, at least when such questioning occurs in the intimidating environment of a principal's or assistant principal's office. *See generally* Paul Holland, *Schooling* Miranda*: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39 (2006). *A fortiori*, "custody" is established when a student is summoned by a school administrator to his or her office and questioned there by a police officer. *See, e.g.*, *In the Interest of Doe*, 130 Idaho 811, 818-19, 948 P.2d 166, 174 (Idaho App. 1997); *N.C. v. Commonwealth*, 396 S.W.3d 852, 855, 865 (Ky. 2013); *In the Interest of C.H.*, 277 Neb. 565, 574-75, 763 N.W.2d 708, 715-16 (2009); *In re D.A.R.*, 73 S.W.3d 505, 512 (Tex. App. 2002); *State v. D.R.*, 84 Wash App. 832, 836-38, 930 P.2d 350, 353 (1997), *rev. denied*, 132 Wash. 2d 1015, 943 P.2d 662 (1997).

Part D. Other Constitutional, Common-Law, and Statutory Bases for Suppressing Statements

§ 24.13 SUPPRESSION UNDER THE SIXTH AMENDMENT RIGHT TO COUNSEL: THE *MASSIAH* PRINCIPLE

In *Massiah v. United States*, 377 U.S. 201 (1964), the Court held that the Sixth Amendment right to counsel required the exclusion of an incriminating statement made by a defendant to an electronically "bugged" police undercover informer in the absence of the defendant's lawyer after indictment. As construed in subsequent cases, the *Massiah* rule reaches all statements '"deliberately elicited'" by any overt or covert government agent from an accused who neither has a lawyer present nor has waived the right to have a lawyer present at any time

after the "initiation of adversary . . . proceedings." *United States v. Henry,* 447 U.S. 264, 273-74 n.11 (1980); *Maine v. Moulton,* 474 U.S. 159, 171-76 (1986); *Kuhlmann v. Wilson,* 477 U.S. 436, 456-59 (1986) (dictum); *Kansas v. Ventris*, 556 U.S. 586, 590 (2009).

Unlike the *Miranda* doctrine (see § 24.08(a) *supra*), the *Massiah* principle is not limited to situations in which the accused is in "custody." *Rhode Island v. Innis,* 446 U.S. 291, 300 n.4 (1980) (dictum); *United States v. Henry,* 447 U.S. at 273-74 & n.11 (dictum); *Massiah,* 377 U.S. at 206. Massiah himself was at large on bond when he made his incriminating statement, and the circumstances of its making were in no way coercive. *See Massiah,* 377 U.S. at 202-03.

The central issues in applying *Massiah* are whether the respondent's statement was made at a "critical stage" of the proceedings (§ 24.13(a) *infra*), whether it was "deliberately elicited" by the authorities (§ 24.13(b) *infra*), and, in cases in which the prosecution claims that the respondent waived the right to counsel, whether that waiver was valid (§ 24.13(c) *infra*).

§ 24.13(a) "Critical Stages" of the Proceedings

The *Massiah* doctrine applies to "any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches." *Moran v. Burbine,* 475 U.S. 412, 428 (1986); *see also id.* at 429-32. "[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings," and "[i]nterrogation by the State is such a stage." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). *See also Brewer v. Williams,* 430 U.S. 387, 398 (1977) ("a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him — 'whether by way of formal charge, preliminary hearing, indictment, information or arraignment'"); *compare Gerstein v. Pugh,* 420 U.S. 103, 122-25 (1975) (when the "state system[] of criminal procedure" (*id.* at 123) assigns only a "limited function and . . . nonadversary character" (*id.* at 122) to probable cause determinations, such determinations are not "critical stages" for purposes of the right to counsel); *Moss v. Weaver,* 525 F.2d 1258 (5th Cir. 1976) (applying *Gerstein* to juvenile court proceedings conducted under the same Florida procedures considered in *Gerstein).*

In most jurisdictions the "Initial Hearing" in a juvenile case involves arraignment on the Petition. See §§ 4.12-4.14 *supra.* Accordingly, the *Massiah* protections would commence at Initial Hearing. For discussion of variations in procedure at the Initial Hearing and their implications for the right to counsel, see § 4.03 *supra. See also, e.g.*, *State in the Interest of P.M.P.*, 200 N.J. 166, 177-78, 975 A.2d 441, 447-48 (2009) (state statutory right to counsel, which applies to "'every critical stage of the proceeding which, in the opinion of the court may result in the institutional commitment of the juvenile,'" is triggered when "the Prosecutor's Office initiates a juvenile complaint and obtains a judicially approved arrest warrant," and therefore "[t]he State's questioning of [a juvenile] defendant and the receipt of his statement in the absence of counsel" at this pre-arraignment stage requires suppression of the statement).

The Supreme Court has rejected the proposition that *Massiah* applies prior to the commencement of adversary proceedings on a particular charge if the suspect is already represented by an attorney in connection with other charges on which adversary proceedings have commenced. *See Texas v. Cobb*, 532 U.S. 162, 168 (2001) ("a defendant's statements regarding offenses for which he ha[s] not been charged . . . [are] admissible notwithstanding the [prior] attachment of his Sixth Amendment right to counsel on other charged offenses," even if those other charges are "'factually related'"; the attachment of the right to counsel on one charge will carry over to other offenses only when those offenses, whether or not formally charged, "would be considered the same offense [as the charged offense] under the . . . test [of *Blockburger v. United States*, 284 U.S. 299 (1932), discussed in § 17.08(b)(2) *supra*]"); *McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991); *Moran v. Burbine*, 475 U.S. at 428-32; *see also Maine v. Moulton*, 474 U.S. at 180 n.16; *Honeycutt v. Donat*, 535 Fed. Appx. 624, 629 (9th Cir. 2013). This is the rule in most jurisdictions. *See, e.g., State v. Sparklin,* 296 Or. 85, 672 P.2d 1182 (1983); *State v. Clawson,* 270 S.E.2d 659 (W. Va. 1980). *Cf. Rubalcado v. State*, 424 S.W.3d 560, 571-73 (Tex. Crim. App. 2014) (applying the rule of *Texas v. Cobb* but nonetheless concluding that the attachment of the right to counsel in a case in one county required the suppression of statements a police agent elicited from the defendant about uncharged conduct in another county because those statements "incriminate[d] [the] defendant with regard to [the] two separate offenses simultaneously" and the State ultimately used the statements against the defendant at trial in the case in which the right to counsel had already attached). Nevertheless, in States in which the courts have not yet ruled on the protections afforded by the state constitutional right to counsel in this context, counsel should urge them to adopt a state constitutional rule that an accused has the right to have counsel present during interrogation once the accused is represented by an attorney, regardless of whether that representation is on the charges about which the suspect is being interrogated or on other charges. *See, e.g.*, *People v. Cohen*, 90 N.Y.2d 632, 638-39 & n.*, 687 N.E.2d 1313, 1316-17 & n.*, 665 N.Y.S.2d 30, 33-34 & n.* (1997) (the attachment of the state constitutional right to counsel on one charge will bar questioning on another, not-yet-charged offense if "the two criminal matters are so closely related transactionally, or in space or time, that questioning on the unrepresented matter would all but inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel" or if the "defendant is in custody on the charge upon which the right to counsel has indelibly attached," regardless of whether the new matter is "related or unrelated" to the charge for which the defendant is in custody); and see § 7.09 *supra* generally in regard to arguments drawing upon state constitutional provisions.

In *Escobedo v. Illinois,* 378 U.S. 478 (1964), the Court indicated that a suspect's retention of counsel before interrogation can activate the Sixth Amendment right to counsel during pre-arraignment interrogation, at least when the suspect explicitly requests the presence of counsel during interrogation. Later cases have, however, reinterpreted *Escobedo* as based on the Fifth Amendment privilege against self-incrimination rather than the Sixth Amendment, *see Moran v. Burbine,* 475 U.S. at 428-31; *United States v. Gouveia,* 467 U.S. 180, 188 n.5 (1984), and have rejected the argument that pre-arraignment retention of an attorney alters the general rule that Sixth Amendment protections commence at the first formal charging proceeding. *Moran v.*

Burbine, 475 U.S. at 429-32. Counsel can, of course, urge the state courts to adopt a more protective rule on state constitutional grounds. *See, e.g., People v. Grice*, 100 N.Y.2d 318, 321, 794 N.E.2d 9, 10-11, 763 N.Y.S.2d 227, 229 (2003) ("A suspect's [state constitutional] right to counsel can . . . attach before an action is commenced when a person in custody requests to speak to an attorney or when an attorney who is retained to represent the suspect enters the matter under investigation"); *People v. Mitchell*, 2 N.Y.3d 272, 275-76, 810 N.E.2d 879, 881-82, 778 N.Y.S.2d 427, 429-30 (2004) ("the parent or legal guardian of a juvenile delinquent or juvenile offender [youths who are 13, 14, or 15 years old and are prosecuted in adult court] may invoke the [state constitutional] right to counsel on his or her child's behalf": "[a]lthough a third party cannot invoke counsel on behalf of an adult defendant," "[c]hildren of tender years lack an adult's knowledge of the probable cause of their acts or omissions and are least likely to understand the scope of their rights and how to protect their own interests . . . [and] may not appreciate the ramifications of their decisions or realize all the implications of the importance of counsel"); *People v. Houston,* 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986) (rejecting *Moran v. Burbine* on state constitutional grounds and holding that the Sixth Amendment right to counsel protects a suspect's relationship with retained counsel even earlier than the first formal charging proceeding); *State v. Stoddard,* 206 Conn. 157, 537 A.2d 446 (1988) (rejecting *Moran v. Burbine* on state constitutional grounds and construing the due process clause of the state constitution to require that "a suspect . . . be informed promptly of timely efforts by counsel to render pertinent legal assistance [and that] . . . [a]rmed with that information, the suspect . . . be permitted to choose whether he wishes to speak with counsel, in which event interrogation must cease," 206 Conn. at 166-67, 537 A.2d at 452); see generally § 7.09 *supra.*

§ 24.13(b) Statements "Deliberately Elicited" by the Government

The *Massiah* protections apply to ordinary police interrogation (*see Brewer v. Williams,* 430 U.S. 387 (1977); *Montejo v. Louisiana*, 556 U.S. 778, 786-87 (2009)), to court-ordered psychiatric examinations of the respondent whose products are used to incriminate him or her, *Estelle v. Smith,* 451 U.S. 454, 469-71 & n.14 (1981); *Powell v. Texas,* 492 U.S. 680 (1989) (per curiam), to conversations between the defendant and police spies or state-activated jailhouse snitches, *United States v. Henry*, 447 U.S. 264 (1980), and to similar "investigatory techniques that are the equivalent of police interrogation." *Kuhlmann v. Wilson,* 477 U.S. 436, 459 (1986). *See also, e.g.*, *State v. Oliveira*, 961 A.2d 299, 310-11 (R.I. 2008) (child protective services investigator was an "agent of the state" for Sixth Amendment purposes, even though she "did not interview defendant at the direct behest of the police or prosecution," because the agency's "protocol required that she work cooperatively with law enforcement personnel," she had already "exchanged information" with the police about the case, and she acknowledged that "one of her purposes in interviewing defendant was to 'add to the evidence'"); *Rubalcado v. State*, 424 S.W.3d 560, 574-76 (Tex. Crim. App. 2014) (complaining witness was a "government agent" for Sixth Amendment purposes because the "police encouraged [her] to call appellant for the purpose of eliciting a confession" and "supplied [her] with the recording equipment, and an officer was present during those calls").

When a police officer, informer, or agent "stimulate[s]" conversations with the respondent for the purpose of "elicit[ing] [incriminating] information," this "'indirect and surreptitious interrogatio[n]'" comes within *Massiah*'s strictures against deliberately eliciting incriminating statements. *United States v. Henry,* 447 U.S. at 273. Similarly, if the agent engages the respondent "in active conversation about [his or her] . . . upcoming trial [in a manner that is] . . . certain to elicit" incriminating statements, the agent's "mere[] participat[ion] in this conversation [will be deemed] . . . 'the functional equivalent of interrogation'" in violation of *Massiah. Maine v. Moulton,* 474 U.S. at 177 n.13; *Kuhlmann v. Wilson,* 477 U.S. at 459 (dictum). *See also, e.g.*, *Fellers v. United States*, 540 U.S. 519, 524-25 (2004) (the lower court "erred in holding that the absence of an 'interrogation' foreclosed petitioner's [Sixth Amendment] claim": "the officers in this case 'deliberately elicited' information from petitioner" by informing him, upon "arriving at petitioner's house, . . . that their purpose in coming was to discuss his involvement in the distribution of methamphetamine and his association with certain co-conspirators" as well as to arrest him in connection with his indictment on a methamphetamine conspiracy charge; the Sixth Amendment right to counsel applies in this situation even though the interchange between the petitioner and the arresting officers was no longer than 15 minutes and the petitioner apparently made his inculpatory admissions immediately upon being advised of the arresting officers' purpose); *Ayers v. Hudson*, 623 F.3d 301, 311-12 (6th Cir. 2010) ("agency in the *Massiah* context [is not limited] to cases where the State gave the informant instructions to obtain evidence from a defendant"; "[t]o hold otherwise would allow the State to accomplish 'with a wink and a nod' what it cannot do overtly").

On the other hand, there is no *Massiah* violation if the police plant a stool pigeon in an accused's jail cell as a cellmate but the "police and their informant" take no additional "action, beyond merely listening, that [is] . . . designed deliberately to elicit incriminating remarks." *Kuhlmann v. Wilson,* 477 U.S. at 459. "[A] defendant does not make out a violation of [*Massiah*] . . . simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police." *Kuhlmann v. Wilson,* 477 U.S. at 459.

If a civilian informer deliberately elicits statements from an accused within the foregoing principles, the courts will find a *Massiah* violation even though the government agents who employed the informer instructed him or her to refrain from questioning the accused (*United States v. Henry,* 447 U.S. at 268, 271) or to refrain from inducing the suspect to make incriminating statements, *Maine v. Moulton,* 474 U.S. at 177 n.14. *Compare Kulhmann v. Wilson,* 477 U.S. at 460-61 (no *Massiah* violation found when the informant not only was instructed to refrain from questioning or eliciting incriminating statements but "followed those instructions").

§ 24.13(c) Waiver

"[T]he Sixth Amendment right to counsel may be waived by a defendant [or respondent], so long as relinquishment of the right is voluntary, knowing, and intelligent." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (citing, *inter alia*, *Johnson v. Zerbst,* 304 U.S. 458, 464

(1938)). *See also*, *e.g., Carnley v. Cochran*, 369 U.S. 506, 513-16 (1962); *Montejo*, 556 U.S. at 797-98 (remanding so that Montejo can "press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, *e.g.*, his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer"). It is "incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege' . . . [and] courts [assessing "an alleged waiver of the right to counsel" must] indulge in every reasonable presumption against waiver." *Brewer v. Williams,* 430 U.S. 387, 404 (1977). *See also Satterwhite v. Texas,* 486 U.S. 249, 256 (1988).

When the respondent's incriminating statement was made to any sort of a police spy, there can obviously be no waiver; the fact that the accused is unaware s/he is making a statement for government consumption suffices to exclude the possibility of a waiver as defined by *Johnson v. Zerbst,* 304 U.S. at 464: that is, an "intentional relinquishment or abandonment of a known right or privilege." When the statement was made to a person whom the respondent knew to be a government agent, the test of a valid waiver of the right to counsel is basically similar in the Sixth Amendment context of *Massiah* and in the Fifth Amendment context of *Miranda*. *See Patterson v. Illinois,* 487 U.S. 285 (1988); *Montejo v. Louisiana*, 556 U.S. at 786, 794-95. The principles and precedents discussed in § 24.10 *supra* are generally controlling. *See, e.g., Brewer v. Williams,* 430 U.S. 387, 401-06 (1977). For example, a waiver made after administration of the ordinary *Miranda* warnings will "typically" be effective. *Montejo v. Louisiana*, 556 U.S. at 786, 794-95; *Patterson v. Illinois*, 487 U.S. at 300. However, because the Sixth Amendment imposes on "the prosecutor and the police . . . an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel," *Maine v. Moulton,* 474 U.S. at 171, some waivers that would be valid in the *Miranda* setting are not valid in the *Massiah* setting. *Patterson v. Illinois,* 487 U.S. at 297 n.9 (dictum) ("we have permitted a *Miranda* waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning [citing *Moran v. Burbine,* 475 U.S. 412 (1986)]; in the Sixth Amendment context, this waiver would not be valid"); *cf. Powell v. Texas,* 492 U.S. 680 (1989) (per curiam) (holding, in the context of a court-ordered pretrial psychiatric examination of an adult criminal defendant, that a determination that "the defendant waived his Fifth Amendment privilege by raising a mental-status defense [at trial] . . . [does] not suffice to resolve the defendant's separate Sixth Amendment claim" (*id.* at 685), and that the lower court erred by "conflat[ing] . . . the Fifth and Sixth Amendment analyses" (*id.* at 683) and by treating the defendant's waiver of his Fifth Amendment right to remain silent as also waiving the Sixth Amendment right to counsel).

In *Michigan v. Jackson,* 475 U.S. 625 (1986), the Supreme Court established a now-defunct "prophylactic rule that once a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right — even if voluntary, knowing, and intelligent under traditional standards — is presumed invalid if secured pursuant to police-initiated conversation." *Michigan v. Harvey*, 494 U.S. 344, 345-46 (1990). In *Montejo v. Louisiana*, the Court overruled *Jackson* and eliminated this "prophylactic rule," explaining that even "after arraignment, when Sixth Amendment rights have attached," a defendant is adequately protected by the "three layers of prophylaxis" that apply both before and after arraignment: "Under *Miranda*'s prophylactic

protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. 384 U.S., at 474. Under *Edwards* [*v. Arizona*]'[s] prophylactic protection of the *Miranda* right, once such a defendant 'has invoked his right to have counsel present,' interrogation must stop. 451 U.S. [477], at 484 [(1981)]. And under *Minnick* [*v. Mississippi*]'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, 'whether or not the accused has consulted with his attorney.' 498 U.S. [146], at 153 [(1990)]." *Montejo*, 556 U.S. at 794-95.

§ 24.14 CONSTITUTIONAL AND STATUTORY STANDARDS GOVERNING INVOLVEMENT OF A RESPONDENT'S PARENT OR GUARDIAN DURING POLICE INTERROGATION

§ 24.14(a) Constitutional Standards

In *Gallegos v. Colorado,* 370 U.S. 49 (1962), the Court indicated that the assessment of the voluntariness of a juvenile's statement should take into account the presence or absence of the child's parent or other concerned adults during police interrogation. Invalidating the confession of a fourteen-year-old as involuntary under the Due Process Clause, the Court explained:

> A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.

Id. at 54.

In *In re Gault,* 387 U.S. 1 (1967), the Court again recognized the important role of parents in safeguarding their children's rights during interrogation, indicating that "the presence and competence of parents" are relevant considerations in gauging the validity of a child's waiver of the right to self-incrimination. *Id.* at 55. The Court cited approvingly to requirements of parental presence in a State statute, state court caselaw, and the Standards for Juvenile and Family Courts. *See id.* at 48-49. However, the *Gault* decision itself was concerned solely with "admissions in court" (*id.* at 56) and did not resolve "the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process." *Id.* at 13.

Subsequently, in *Fare v. Michael C.*, 442 U.S. 707 (1979), the Court failed to include parental presence in its roster of factors relating to the voluntariness of a juvenile's waiver, *see id.* at 725, although this has little significance because the Court was not purporting to set forth an exclusive roster. *See id.* at 725 (factors specifically mentioned are "include[d]" among the relevant factors). *See, e.g., Quick v. State,* 599 P.2d 712, 719 (Alaska 1979) (treating the Court's

roster in *Michael C.* as self-evidently non-exclusive, and adding to the roster the consideration of "whether there has been any prior opportunity to consult with a parent, guardian, or attorney"). The Court in *Michael C*. found the juvenile respondent's waiver voluntary notwithstanding the absence of his parents during his interrogation. However, this holding also is of limited significance on the issue of parental presence because the Court did not have before it any claims that the absence of Michael C.'s parents was relevant to the constitutional analysis. *See id.* at 712-16. Moreover, even if the respondent in *Michael C.* had claimed that the absence of his parents impaired the voluntariness of his waiver, the Court could have found on the facts of that case that Michael C.'s advanced age, intelligence, and experience with the courts made him peculiarly unlikely to need parental support under a totality-of-the-circumstances analysis. *See id*. at 726 (emphasizing that the respondent "was a 16-½-year-old juvenile with considerable experience with the police[,] . . . [who] had a record of several arrests[,] . . . had served time in a youth camp, and . . . had been on probation for several years" and that "[t]here is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be"); *cf. id.* at 725-26 (explaining that different standards of waiver might apply in cases of "young persons . . . with limited experience and education and with immature judgment"); *see, e.g., Quick v. State,* 599 P.2d at 719-20 (having construed *Fare v. Michael C.* as permitting consideration of parental presence during interrogation as a factor in the totality of the circumstances, the Alaska Supreme Court follows *Michael C.*'s reasoning in upholding the admissibility of a confession of a 17-year-old with extensive prior court experience, notwithstanding the absence of his parents during the interrogation).

Several state court decisions, both before and after the Supreme Court's decision in *Fare v. Michael C.,* have concluded that parental presence is a relevant consideration in the totality of the circumstances (see § 24.10 *supra*) bearing upon the question whether a juvenile's waiver of *Miranda* rights was sufficiently voluntary, knowing, and intelligent. *E.g., In re Andre M.*, 207 Ariz. 482, 485-86, 88 P.3d 552, 555-56 (2004) ("'presence of the child's parents'" is always a factor to be considered in a totality-of-the-circumstances assessment of the validity of a juvenile's waiver of *Miranda* rights but it is a "particularly significant factor" in any case in which "law enforcement personnel . . . frustrates a parent's attempt to confer with his or her child"; and in the absence of a state showing of "good cause for barring a parent from a juvenile's interrogation, a strong inference arises that the state excluded the parent in order to maintain a coercive atmosphere or to discourage the juvenile from fully understanding and exercising his constitutional rights"); *In the Interest of Thompson,* 241 N.W.2d 2 (Iowa 1976); *State v. Fernandez*, 712 So.2d 485, 489 & n.5 (La. 1998); *McIntyre v. State,* 309 Md. 607, 526 A.2d 30 (1987); *State v. Hogan,* 297 Minn. 430, 440, 212 N.W.2d 664, 671 (1973); *Commonwealth v. Williams,* 504 Pa. 511, 475 A.2d 1283 (1984); *Theriault v. State,* 66 Wis. 2d 33, 223 N.W.2d 850 (1974).

State courts have also concluded that parental presence is a significant factor in the totality-of-the-circumstances test commonly used to assess the voluntariness of a juvenile's statement under the Due Process Clause (see §§ 24.03-24.06 *supra*). *E.g., State in the Interest of S.H.,* 61 N.J. 108, 293 A.2d 181 (1972) (finding juvenile's statement involuntary, in part because

police denied access to a parent); *Commonwealth v. Williams,* 504 Pa. at 521, 475 A.2d at 1288 (holding that parental access is a relevant factor in both *Miranda* and due process voluntariness analyses); *In the Interest of Jerrell C.J.*, 283 Wis. 2d 145, 161-62, 699 N.W.2d 110, 118 (2005) (finding 14-year-old's statement to be involuntary because, *inter alia*, "the police specifically denied Jerrell's requests to call his parents": "we view the denial of Jerrell's requests to talk to his parents as strong evidence of coercive police conduct").

Some state courts have gone beyond the totality-of-the-circumstances tests and have established a prophylactic rule requiring that a parent (or guardian or other "interested adult") be present at the interrogation of a juvenile and that the juvenile be permitted to consult privately with that adult prior to answering questions. Such a rule has been established through a variety of constitutional rationales, relying either on federal constitutional provisions, *see, e.g., Lewis v. State,* 259 Ind. 431, 288 N.E.2d 138 (1972) (in light of juveniles' susceptibility to coercion and their inability to appreciate the full consequences of their actions, the court adopts the "interested adult" requirement as a prerequisite to either voluntary or knowing and intelligent *Miranda* waivers); *In the Matter of B.M.B.*, 264 Kan. 417, 432-33, 955 P.2d 1302, 1312-13 (1998) (relying on empirical data on juveniles' inability to comprehend *Miranda* warnings and also caselaw from other jurisdictions to "conclude that the totality of the circumstances [standard] is not sufficient to ensure that . . . ["a juvenile under 14 years of age"] makes an intelligent and knowing waiver of his rights," given "the immaturity and inexperience of a child under 14 years of age and the obvious disadvantage such a child has in confronting a custodial police interrogation," and "hold[ing], therefore, that a juvenile under 14 years of age must be given an opportunity to consult with his or her parent, guardian, or attorney as to whether he or she will waive his or her rights to an attorney and against self-incrimination"); *Commonwealth v. A Juvenile (No. 1),* 389 Mass. 128, 449 N.E.2d 654 (1983) (focusing solely on the "knowing and intelligent" prong of the *Miranda* waiver requirements, the court relies on empirical evidence of juveniles' inability to comprehend *Miranda* rights to establish the "interested adult" rule as an indispensable requirement for knowing and intelligent waiver by a child under 14, and as important, but not decisive, in assessing whether a waiver by a child 14 or over was knowing and intelligent); *accord, Commonwealth v. Alfonso A.*, 438 Mass. 372, 780 N.E.2d 1244 (2003) (holding, in the case of a child over 14, that the "interested adult" rule precludes a waiver unless the adult is physically present or otherwise actually engaged in the interaction between the police and the juvenile — as, for example, by "participating through speaker telephone," 438 Mass. at 382, 780 N.E.2d at 1252 — and unless the adult is informed by the police of the juvenile's rights; recognizing that "'a juvenile in trouble may be embarrassed to ask for an adult's help,'" and that, unless the interested adult is actually engaged in the interaction "[t]here is too great a risk that a juvenile will engage in a show of bravado rather than admit to any desire or need to consult with an adult," 438 Mass. at 383, 780 N.E.2d at 1253); *State v. Presha*, 163 N.J. 304, 315-16, 748 A.2d 1108, 1114-15 (2000) (reaffirming the court's prior ruling in *In re S.H.* that "[i]n respect of confessions by juveniles of any age, courts should consider the adult's absence as a highly significant factor among all other facts and circumstances . . . [and] should give that factor added weight when balancing it against all other factors," and, in light of the changes in the juvenile justice process that have resulted in an "increased focus on the apprehension and prosecution of

youthful offenders" and a correspondingly enhanced "significance" of "the parent's role in an interrogation setting," especially "[w]hen younger offenders are in custody," adopting a """bright-line""" rule for cases involving "a juvenile under the age of fourteen" that "when a parent or legal guardian is absent from an interrogation involving a juvenile that young, any confession resulting from the interrogation should be deemed inadmissible as a matter of law, unless the adult was unwilling to be present or truly unavailable"), or state constitutional provisions, *see, e.g., In re E.T.C.,* 141 Vt. 375, 449 A.2d 937 (1982) (stressing the immaturity and limited capacity of juveniles, the court construes its state constitution to require parental presence and consultation as a prerequisite to voluntary and intelligent waiver of *Miranda* rights). The decisions employing a voluntariness analysis (under either the Due Process Clause or *Miranda*) can be squared with the Supreme Court's insistence in *Colorado v. Connelly,* 479 U.S. 157 (1986), that any finding of involuntariness rest upon coercive acts by the police, because a denial of a juvenile's access to his or her parents is a particularly coercive form of incommunicado detention. *See id.* at 163-64 & n.1 (recognizing that incommunicado detention satisfies the coercion requirement); see also §§ 24.04(b), 24.10(a) *supra.*

§ 24.14(b) Statutory Requirements

In addition to the constitutional grounds described in the foregoing section, several jurisdictions have statutes mandating parental presence during police interrogation of a juvenile that provide a statutory basis for suppression of juveniles' statements. *See, e.g., People v. Maes,* 194 Colo. 235, 571 P.2d 305 (1977) (statement held inadmissible because of the violation of a state statute requiring the presence of a parent or custodian during interrogation; social services caseworker could not act as the custodian because the statute requires that the child be "advised and counseled concerning his constitutional rights by someone whose interests are clearly with the child," *id* at 238, 571 P.2d at 306); *In the Interest of J.A.N.,* 346 N.W.2d 495 (Iowa 1984) (statement held inadmissible because of the violation of a state statute requiring parents' written consent to the waiver of the right to counsel when the child is under the age of 16); *In the Matter of Z.M.*, 337 Mont. 278, 292, 160 P.3d 490, 501 (2007) (suppressing a 14-year-old's statement because the police violated a state statute requiring that children below 16 years of age be afforded an opportunity to consult with a parent or counsel on "whether or not to waive his [or her] rights"); *State v. Smith,* 317 N.C. 100, 343 S.E.2d 518 (1986) (statement held inadmissible because the police violated a state statute requiring that the police cease all questioning if a juvenile suspect, after being advised of his or her statutory right to parental presence during police questioning, requests the presence of a parent); *State v. Branham*, 153 N.C. App. 91, 98-99, 569 S.E.2d 24, 28-29 (2002) (statement held inadmissible under a state statute because the 16-year-old suspect "requested his mother's presence during his statement" but the "officers neither produced her nor ceased the questioning"; the "defendant's mother['s] refus[al] to see him" does not render the statutory requirement inapplicable because "she did not have the ability to, in effect, waive [her son's] right to have her present during interrogation"); *J.T.P. v. State,* 544 P.2d 1270 (Okla. Crim. App. 1975) (statement held inadmissible because of the violation of a state statute requiring that a parent or guardian or attorney be present during the questioning of a juvenile and be advised of the child's rights).

Even States which do not specifically require parental presence during interrogation have statutes requiring that the police notify parents and guardians of a child's arrest. Violations of these notification requirements may provide a basis for suppression of the child's statements. *See, e.g., United States v. C.M. (A Juvenile)*, 485 F.3d 492, 499-501, 505 (9th Cir. 2007) (violations of the federal Juvenile Delinquency Act, including the Act's parental notification provisions, required exclusion of the ensuing statement); *State v. Walker,* 352 N.W.2d 239 (Iowa 1984) (statement held inadmissible because police violated a statute by failing to inform a father of the nature of the charge and of the father's right to speak to, and confer with, his son); *In the Matter of Michelet P.,* 70 A.D.2d 68, 419 N.Y.S.2d 704 (N.Y. App. Div., 2d Dep't 1979) (statement held inadmissible because police failed to comply with statutory requirement of parental notification); *Sublette v. State,* 365 So. 2d 775 (Fla. App. 1978), *app. dism'd,* 378 So. 2d 349 (Fla. 1979) (violation of statutory requirement of parental notification held to require suppression of children's statements, particularly where a child requests that officers contact his or her parent); *In the Interest of Jerrell C.J.*, 283 Wis. 2d 145, 166 & n.9, 699 N.W.2d 110, 120 & n.9 (2005) ("remind[ing] law enforcement officials that [a] Wisconsin [statute] . . . requires an 'immediate attempt' to notify the parent when a juvenile is taken into custody," and reaffirming a state common law rule that "the failure 'to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel' will be considered 'strong evidence that coercive tactics were used to elicit the incriminating statements'" and that the resulting statement should be deemed involuntary in violation of due process).

§ 24.15 STATEMENTS OBTAINED DURING A PERIOD OF UNNECESSARY DELAY FOLLOWING ARREST

In *McNabb v. United States,* 318 U.S. 332 (1943), and *Mallory v. United States,* 354 U.S. 449 (1957), the Supreme Court exercised its supervisory powers over the federal courts to enforce prompt-arraignment requirements (currently contained in Federal Rule of Criminal Procedure 5(a)) by excluding confessions obtained from arrested persons during a period of unlawful delay in bringing them before a judicial officer for a determination of probable cause. As a result of subsequent legislative enactments described in detail in *Corley v. United States*, 556 U.S. 303 (2009), the *"McNabb-Mallory* rule" has been modified to provide a basis for excluding confessions obtained during "unreasonable or unnecessary" delays of more than six hours before preliminary arraignment in federal prosecutions. *See id.* at 322. *See, e.g.*, *United States v. Pimental*, 2014 WL 2855009, at *1, *5-*6, *8 (9th Cir. June 24, 2014) (suppressing "incriminating statements that Torres Pimental made to Agent Aradanas on Sunday morning, about forty-eight hours after his Friday morning arrest, and before he was presented to a magistrate judge on Tuesday," because "[i]t is undisputed that Torres Pimental's incriminating statements . . . were made more than six hours after his . . . arrest and before his . . . initial appearance," and this "delay was not a result of the distance to be traveled to the nearest available magistrate holding a presentment calendar that Friday," and the "delay in presenting Torres Pimental [also] does not fall within" "'other reasonable delays apart from transportation, distance, and the availability of a magistrate'").

The juvenile court statutes of most States contain provisions requiring prompt delivery of a newly arrested juvenile to court or to a juvenile facility. These provisions supply a predicate for state-law exclusionary rules analogous to the *McNabb-Mallory* rule. *See, e.g., People v. Jordan,* 149 Mich. App. 568, 386 N.W.2d 594 (1986) (adopting "the exclusionary principle of *McNabb," id.* at 576, 386 N.W.2d at 598, and excluding a juvenile's statement because the police violated the statutory requirement that a child under the age of 17 be taken "immediately before the juvenile division of the probate court"); *State v. Wade,* 531 S.W.2d 726, 727 (Mo. 1976) (statement held inadmissible because police violated statutory requirement that a juvenile "shall be taken immediately and directly before the juvenile court or delivered to the juvenile officer or person acting for him"); *J.T.P. v. State,* 544 P.2d 1270 (Okla. Crim. App. 1975) (statement held inadmissible because the police violated a statutory requirement that a child "shall be taken immediately to the court"); *State v. George Anthony W.*, 200 W. Va. 86, 88, 92-94, 488 S.E.2d 361, 363, 367-69 (1996) (the statements of two juveniles are held inadmissible, and orders transferring the juveniles to adult court based on these statements are set aside, because the police violated a statutory requirement that "when a juvenile is taken into custody, he must immediately be taken before a referee, circuit judge, or magistrate," and the "evidence supports the conclusion" that the "primary purpose" of the delay was to question the juveniles about a homicide).

Arguably, the decision in *Gerstein v. Pugh,* 420 U.S. 103 (1975), lays a federal constitutional foundation for the *McNabb-Mallory* rule or something very close to it. As explained in § 4.28(a) *supra, Gerstein* establishes a Fourth Amendment right to a prompt judicial determination of probable cause following a warrantless arrest. *See, e.g.*, *Fisher v. Washington Metropolitan Area Transit Authority,* 690 F.2d 1133, 1140 (4th Cir. 1982); *Lively v. Cullinane,* 451 F. Supp. 1000, 1004-05 (D. D.C. 1978). Accordingly, when the police hold a respondent beyond the period prescribed by *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), as the limit of permissible detention without a probable-cause determination (see § 4.28(a) *supra*), counsel can argue that the Fourth Amendment requires the suppression of any statements made by the respondent during the unlawfully protracted custody. *See, e.g.*, *State v. Huddleston*, 924 S.W.2d 666, 675-76 (Tenn. 1996) (suppressing a statement obtained by the police during a 72-hour period in which the defendant was held without a judicial determination of probable cause in violation of *Gerstein* and *County of Riverside v. McLaughlin*); *Norris v. Lester*, 545 Fed. Appx. 320, 321, 327 (6th Cir. 2013) ("appellate counsel was ineffective for failing to argue [under *County of Riverside v. McLaughlin*] that [Norris'] confession was obtained after the violation of his constitutional right to a prompt probable-cause determination"). The general Fourth Amendment rule excluding statements made in confinement following an unconstitutional arrest (§ 24.18 *infra*) supports this result. However, as the Supreme Court observed in *Powell v. Nevada*, 511 U.S. 79, 85 n.* (1994), that Court has not yet ruled on the specific question whether "a suppression remedy applies" to a *Gerstein* violation of "failure to obtain authorization from a magistrate for a significant period of pretrial detention."

§ 24.16 STATE COMMON-LAW DOCTRINES REQUIRING THE SUPPRESSION OF STATEMENTS AS INVOLUNTARY

In addition to the federal constitutional doctrine excluding coerced confessions, see §§ 24.03-24.06 *supra,* there are state common-law doctrines that may exclude a confession on the ground that it is "involuntary." *See Colorado v. Connelly,* 479 U.S. 157, 167 (1986); *Rogers v. Richmond,* 365 U.S. 534, 540-44 (1961); *State v. Kelly,* 61 N.J. 283, 290-93, 294 A.2d 41, 45-46 (1972). Although the issue under the federal Constitution (and many state constitutional self-incrimination and due process clauses) is whether the respondent's will was overborne, the issue under the state's common law is likely to be whether the confession was made in circumstances that render it untrustworthy or unreliable.

The distinction between the constitutional and common-law doctrines is highly significant in juvenile cases. Personal characteristics of the respondent, such as youth, low I.Q., and suggestibility, that are pertinent but not decisive in the constitutional analysis, see §§ 24.03, 24.05 *supra,* may alone render a statement so unreliable as to require its exclusion under state common law.

In addition, the common-law doctrine affords a basis for suppressing statements coerced by private citizens. Whereas coercive behavior by private citizens cannot supply the "state action" necessary for a due process violation, *see Colorado v. Connelly,* 479 U.S. at 165-67, it may render a respondent's statement unreliable and thus inadmissible under state common law. *See, e.g., State v. Kelly,* 61 N.J. at 292-94, 294 A.2d at 46-47 (holding a statement coerced by a private security guard inadmissible under state law because it was unreliable although not unconstitutionally involuntary).

The substantive details and procedural aspects of the common-law doctrine of involuntariness vary considerably among jurisdictions, and counsel must consult local statutes and caselaw. In a number of jurisdictions, for example, the prosecutor must lay a foundation for the introduction of any statement of the respondent by showing that it was made "without the slightest hope of benefit" and "without the remotest fear of injury."

In cases in which the facts provide defense counsel with a viable state common-law challenge to a respondent's statement, counsel should ordinarily attempt to litigate that claim in a pretrial hearing even if the normal practice is to raise the issue by an evidentiary objection at trial. A mid-trial ruling excluding the statement as unreliable will come too late to prevent the trier of fact from hearing the contents of the statement in a bench trial; and even in a jury trial there is a risk of the jurors' getting wind that the question being litigated while they are sent out to wait involves a confession by the respondent. Accordingly, in jurisdictions that permit motions *in limine,* counsel will usually want to raise the common-law contention as an *in limine* matter and, if the statement is excluded, counsel should consider moving to recuse the motions judge from sitting as factfinder at a bench trial. See §§ 7.03, 20.05 *supra.* If the jurisdiction is one in which the court may entertain or decline to entertain motions *in limine* at its discretion, counsel

will increase the likelihood of obtaining a pretrial adjudication of the common-law ground by joining it with a constitutional ground (see §§ 24.03-24.15 *supra* and §§ 24.18-24.19 *infra*) on which pretrial suppression motions are authorized by statute or court rule or which are customarily litigated on pretrial motions *in limine* under local practice. Since the facts bearing on the common-law and constitutional grounds will invariably overlap, counsel can present strong arguments of judicial convenience for hearing the two (or more) claims at the same time.

§ 24.17 STATEMENTS OBTAINED BY EAVESDROPPING ON A CONVERSATION BETWEEN THE RESPONDENT AND DEFENSE COUNSEL

The Supreme Court has forbidden prosecutorial use of statements obtained by government agents through electronic eavesdropping on conversations between an accused and his or her lawyer. *Black v. United States,* 385 U.S. 26 (1966) (per curiam); *O'Brien v. United States,* 386 U.S. 345 (1967) (per curiam); *Roberts v. United States,* 389 U.S. 18 (1967) (per curiam); *see also Hoffa v. United States,* 385 U.S. 293, 306-09 (1966) (dictum). The lower courts also have steadfastly excluded evidence produced by eavesdropping that intrudes upon attorney-client communications. *See, e.g., State v. Beaupre,* 123 N.H. 155, 459 A.2d 233 (1983) (officer was in the room with the suspect while he telephoned his attorney); *State v. Sugar,* 84 N.J. 1, 417 A.2d 474 (1980) (police used an electronic device to listen in on a conversation between the suspect and counsel in an interrogation room).

Although the rule is clear, its doctrinal underpinnings are somewhat murky. In *Weatherford v. Bursey,* 429 U.S. 545 (1977), the Court characterized the above-cited decisions in *Black* and *O'Brien* as grounded upon the Fourth Amendment, but in *United States v. Morrison,* 449 U.S. 361, 364-65 (1981) (dictum), it treated them as based upon the Sixth Amendment right to counsel. The Sixth Amendment analysis is complicated further by the subsequent holding in *Moran v. Burbine,* 475 U.S. 412 (1986), that the Sixth Amendment does not protect the attorney-client relationship prior to the attachment of the right to counsel at the first formal charging proceeding.

In this unsettled state of the law, counsel is advised to advance alternative grounds for any motion to suppress statements obtained by police eavesdropping on attorney-client conversations. Counsel should urge that the statements must be suppressed under the Fourth Amendment (*see Weatherford v. Bursey, supra*; *Gennusa v. Canova*, 748 F.3d 1103, 1112-13 (11th Cir. 2014)), the Sixth Amendment (*see United States v. Morrison, supra*), state constitutional protections of the right to counsel (*see, e.g.*, *People v. Houston,* 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986) (rejecting *Moran v. Burbine* on state constitutional grounds and establishing protection for the attorney-client relationship even prior to the first formal charging proceeding)), state constitutional protections against unreasonable searches and seizures, the statutory or common-law privilege for attorney-client communications (*see, e.g., State v. Beaupre,* 123 N.H. at 159, 459 A.2d at 236), and, in cases of electronic eavesdropping, the federal and state statutory restrictions upon electronic surveillance (*see, e.g.,* 18 U.S.C. §§ 2510-2522 (2014)).

§ 24.18 STATEMENTS OBTAINED THROUGH VIOLATION OF THE RESPONDENT'S FOURTH AMENDMENT RIGHTS

The "derivative evidence" principle described in §§ 23.37-23.40 *supra* requires the suppression of statements that are the "fruits" of a Fourth Amendment violation. *See Wong Sun v. United States,* 371 U.S. 471 (1963). This exclusionary rule encompasses, for example, statements obtained from an accused following his or her unconstitutional arrest or detention, *e.g., Brown v. Illinois,* 422 U.S. 590 (1975); *Dunaway v. New York,* 442 U.S. 200 (1979); *Lanier v. South Carolina,* 479 U.S. 25 (1985) (per curiam); *Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003) (per curiam); *but cf. New York v. Harris*, 495 U.S. 14, 21 (1990) (discussed in § 23.37 *supra*), statements obtained by means of eavesdropping following an unlawful entry into protected premises, *e.g., Berger v. New York,* 388 U.S. 41 (1967), statements obtained by means of electronic eavesdropping in violation of the constitutional doctrines governing electronic surveillance, *e.g., Katz v. United States,* 389 U.S. 347 (1967), and statements made in response to being told of illegally seized evidence or in response to being confronted with the evidence itself, *e.g., Ruiz v. Craven,* 425 F.2d 235 (9th Cir. 1970); *State v. Blair,* 691 S.W.2d 259 (Mo. 1985); *cf. Fahy v. Connecticut,* 375 U.S. 85 (1963). (Statements obtained by electronic eavesdropping in violation of some, but not all, of the statutory regulations codified in 18 U.S.C. §§ 2510-2522 (2014) must also be suppressed. *Compare United States v. Chavez,* 416 U.S. 562 (1974), *and United States v. Giordano,* 416 U.S. 505 (1974), *with United States v. Donovan,* 429 U.S. 413 (1977). *See, e.g.*, *United States v. North*, 735 F.3d 212 (5th Cir. 2013).)

The aspect of the principle most frequently encountered in juvenile cases is the one concerning statements made in police custody following an unconstitutional arrest or *Terry* stop. These statements are inadmissible unless "intervening events break the causal connection between the illegal arrest [or stop] and the confession so that the confession is '"sufficiently an act of free will to purge the primary taint."'" *Taylor v. Alabama,* 457 U.S. 687, 690 (1982); *accord*, *Kaupp v. Texas*, 538 U.S. at 632-33; *compare Rawlings v. Kentucky,* 448 U.S. 98, 106-10 (1980). In determining whether the prosecution has met its burden of showing a break in the connection (see § 23.38 *supra*), "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant." *Brown v. Illinois,* 422 U.S. 590, 603-04 (1975). *Accord*, *Kaupp v. Texas*, 538 U.S. at 632-33. More particularly, the Supreme Court has recognized that illegal detentions "designed to provide an opportunity for interrogation [are] . . . likely to have coercive aspects likely to induce self-incrimination." *Michigan v. Summers,* 452 U.S. 692, 702 n.15 (1981) (dictum). The relevant Fourth Amendment restrictions on arrest and investigative detention are discussed in §§ 23.04-23.14 *supra.* See also § 23.37 *supra.*

§ 24.19 STATEMENTS TAINTED BY PRIOR ONES THAT WERE UNLAWFULLY OBTAINED: THE "CAT OUT OF THE BAG" DOCTRINE

Prior to *Oregon v. Elstad,* 470 U.S. 298 (1985), the finding that an incriminating statement had been taken from an accused in violation of either the due process requirement of

voluntariness or the *Miranda* rules commonly led to the suppression of any subsequent statement of the accused on the same subject before consulting a lawyer. This result was not commanded by any majority opinion of the Supreme Court of the United States but appeared to be required by the Court's *per curiam* decision in *Robinson v. Tennessee,* 392 U.S. 666 (1968), approving Justice Harlan's concurring opinion in *Darwin v. Connecticut,* 391 U.S. 346, 349-51 (1968). Justice Harlan there reasoned that once an accused has given the police a confession, his or her subsequent statements to them about the crime are more likely to be the products of a belief that the "cat is out of the bag" than of an independent choice to commit a fresh act of self-incrimination. Thus if the first confession was constitutionally inadmissible, it taints all later statements made by the accused without the legal advice necessary to place the first confession in perspective.

In *Elstad,* the Court rejected similar reasoning as the basis for an argument that "an initial failure of law enforcement officers to administer the warnings required by *Miranda* . . ., without more, 'taints' subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights." 470 U.S. at 300. *Elstad* holds that if the only illegality in obtaining a first incriminating statement is a *Miranda* violation, "a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible." *Id*. at 310-11. Thus, the "admissibility of any subsequent statement . . . turn[s] . . . solely on whether it is knowingly and voluntarily made." *Id.* at 309.

As a result of the analysis in *Elstad* and later Supreme Court decisions elaborating *Elstad*, the federal scope-of-taint rule to be applied in successive-statement situations now appears to turn upon the reason the first statement is found to be unconstitutional.

§ 24.19(a) Statements Tainted by a Prior Statement Taken In Violation of the Due Process Clause and the Self-Incrimination Clause of the Fifth Amendment

In *Elstad*, the Supreme Court recognized that "[t]here is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question . . . ." 470 U.S. at 312. Accordingly, *Elstad*'s repudiation of the concept of presumptive taint is limited to *Miranda* violations (§§ 24.07-24.12 *supra*) and does not extend to involuntary confessions (§§ 24.03-24.06 *supra*). *E.g.*, *United States v. Lopez*, 437 F.3d 1059, 1066-67 & n.4 (10th Cir. 2006); *Shelton v. State,* 287 Ark. 322, 699 S.W.2d 728 (1985). "When a prior statement is actually coerced," 470 U.S. at 310, or perhaps even when it is simply "obtained through overtly or inherently coercive methods which raise serious Fifth Amendment and Due Process concerns," *id.* at 312 n.3, *Elstad* says that "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession," *id.* at 310; and the admissibility of the second confession is subject to a "requirement of a break in the stream of events," *ibid.,* citing *Westover v. United States,* decided with *Miranda v. Arizona,* 384 U.S. 436

(1966). *See also Brown v. Illinois,* 422 U.S. 590, 605 n.12 (1975); *cf. Clewis v. Texas,* 386 U.S. 707, 710 (1967) (requiring the exclusion of a third incriminating statement made after two earlier ones where there was "no break in the stream of events . . . sufficient to insulate the [later] statement from the effect of all that went before"). In these due process cases, a second confession must be shown to be "an act independent of the [previous] confession," *Reck v. Pate,* 367 U.S. 433, 444 (1961), and the prosecution plainly bears the burden of proof on that issue, *Nix v. Williams,* 467 U.S. 431 (1984) (dealing with the exclusionary consequences of a confession obtained in violation of the Sixth Amendment and indicating that the prosecution's burden of proving the dissipation of taint is the same in Fifth Amendment cases, see § 23.38 *supra*). *See, e.g.*, *People v. Guilford*, 21 N.Y.3d 205, 209, 213, 991 N.E.2d 204, 206, 209, 969 N.Y.S.2d 430, 432, 435 (2013) (suppressing a statement as the fruit of an earlier involuntary statement because the prosecution failed to prove that the defendant had been "restored to the status of one no longer under the influence" of the coercion that tainted the earlier statement "so as to render plausible the characterization of [the] subsequent admission as voluntary." Although the 49½-hour interrogation that produced the involuntary first statement was followed by an "eight-hour 'break,'" during which the defendant was arraigned and had an opportunity to confer with counsel, these circumstances could not "attenuate[] the taint of the wrongful interrogation" and "transform [the defendant's] coerced capitulation into a voluntary disclosure").

§ 24.19(b) Statements Tainted by a Prior Statement Taken In Violation of *Miranda*

Although *Elstad* rejected a general rule of presumptive taint in the *Miranda* context, a violation of *Miranda* in the taking of one statement may nonetheless provide a basis for suppressing a subsequent statement as a fruit of the earlier violation in certain circumstances.

The Court in *Elstad* distinguished the case before it from cases "concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation." 470 U.S. at 313 n.3. Thus, as Justice Brennan observed in his dissenting opinion in *Elstad,* "the Court concedes that its new analysis does *not* apply where the authorities have ignored the accused's actual invocation of his *Miranda* rights to remain silent or to consult with counsel. . . . In such circumstances, courts should continue to apply the traditional presumption of tainted connection." 470 U.S. at 346 n.28 (emphasis in original). *See, e.g., State v. Hartley,* 103 N.J. 252, 511 A.2d 80 (1986) (concluding that the "cat out of the bag" doctrine has continuing vitality in cases in which the initial statement is suppressed on grounds of police failure to scrupulously honor a suspect's invocation of the rights to counsel or to remain silent).

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Court addressed the applicability of *Elstad* to a situation in which police officers question a suspect without *Miranda* warnings and then administer the warnings and re-question the suspect for the purpose of obtaining an admissible, *Mirandized* statement. A majority of the Court ruled that, in at least some circumstances, such a sequence of interrogations renders *Elstad* inapplicable and requires the suppression of the second statement as a fruit of the *Miranda* violation in obtaining the first

statement. A four-Justice plurality concluded that the admissibility of the subsequent *Mirandized* statement turns on "whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." 542 U.S. at 611-12. The inquiry into effectiveness involves the questions whether "the warnings [could] effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture" and whether the warnings could "reasonably convey that [the suspect] could choose to stop talking even if he had talked earlier." *Id*. at 612. Relevant factors include "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id*. at 615. It is also a plausible reading of the *Seibert* plurality opinion that *Miranda* warnings and other corrective procedures administered after a suspect has made initial admissions in violation of *Miranda* cannot "function 'effectively' as *Miranda* requires" (*id*. at 611-12) if they do not inform the suspect that those earlier admissions cannot be used in evidence against him or her, so that the suspect is no longer laboring under the impression that "what he has just said will be used, with subsequent silence being of no avail." *Id*. at 613. On the facts of the *Seibert* case itself, the plurality concluded that the midstream *Miranda* warnings were ineffective because "[t]he warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment," with "the same officer" doing the questioning; "nothing [was said] to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited"; and "[i]n particular, the police did not advise [Seibert]that her prior statement could not be used." *Id*. at 616. (A footnote to the sentence making the latter point says: "We do not hold that a formal addendum warning that a previous statement could not be used would be sufficient to change the character of the question-first procedure to the point of rendering an ensuing statement admissible, but its absence is clearly a factor that blunts the efficacy of the warnings and points to a continuing, not a new, interrogation." *Id*. at 616 n.7.) Justice Kennedy concurred in the judgment in *Seibert*, providing the fifth vote for suppression of Seibert's statement, on the narrower ground that "in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning," "postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made . . . to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver" and "[n]o curative steps were taken in this case." *Id*. at 622. *See also ibid*. (explaining that, under Justice Kennedy's approach, curative steps can include "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning [— which] may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn" — or, "[a]lternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient"); *Bobby v. Dixon*, 132 S. Ct. 26, 31-32 (2011) (per curiam) ("the effectiveness of th[e] [*Miranda*] warnings was not impaired by the sort of 'two-step interrogation technique' condemned in *Seibert*" because "there was simply 'no nexus' between Dixon's unwarned admission to forgery and his later, warned confession to murder" and

there was a "significant break in time and dramatic change in circumstances" between the two interrogations, "creat[ing] 'a new and distinct experience'" and "ensuring that Dixon's prior unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings he received before confessing to Hammer's murder"). *Compare United States v. Barnes*, 713 F.3d 1200, 1203, 1205-07 (9th Cir. 2013) (per curiam) ("the interrogation was a 'deliberate two-step' approach in contravention of *Missouri v. Seibert*" because the "evidence reflects that the agents deliberately employed the two-step interrogation tactic," "[t]here was no break or dividing point in the interrogation," "[t]he agents treated the second round of interrogation as continuous with the first," and "the agents took no curative measures to mitigate their error" such as "tak[ing] a substantial time break in the interrogation or warn[ing] Barnes that what he had said before the warnings could not be used against him"); *United States v. Capers*, 627 F.3d 470, 477, 483, 485 (2d Cir. 2010) (resolving an issue that "Justice Kennedy had no reason to explore" — "how a court should determine when a two-step interrogation had been executed deliberately" — by "hold[ing] that the burden rests on the prosecution to disprove deliberateness"; upon applying this standard to the facts of the case, the court finds that suppression of the defendant's second (post-warning) confession is required because "the Government has failed to meet its burden of demonstrating that Capers was not subjected to a [deliberate] two-step interrogation" and because "there were no curative measures to ensure that the defendant was not misled with regard to his rights prior to his second confession"); *Kelly v. State*, 997 N.E.2d 1045, 1053-55 (Ind. 2013) (post-warning statements were the "product of the "question-first" interrogation practice disapproved of in *Seibert* and therefore inadmissible" because the pre-warning and post-warning statements "concern the same subject . . . [and] were made in the same location, mere minutes apart, in response to the same officer. Most significantly, however, Chief Kiphart and another officer referred to Kelly's pre-warning admission three times during the post-warning interrogation. . . . Such references, we believe, inevitably diluted the potency of the *Miranda* warning such that it was powerless to cure the initial failure to warn, even if that failure was a product of good-faith mistake."); *State v. Navy*, 386 S.C. 294, 303-04, 688 S.E.2d 838, 842 (2010) (*Seibert* requires suppression of two postwarning statements, given the absence of "the curative measures suggested by Justice Kennedy," even though the record does not show that this was a case of a "deliberate" police use of a "'question first' strategy"); *Martinez v. State*, 272 S.W.3d 615, 626-27 (Tex. Crim. App. 2008) (applying Justice Kennedy's analysis in *Seibert* to suppress a videotaped statement obtained with a "deliberate two-step strategy" because "the officers did not apprise appellant of his *Miranda* rights when they began custodial interrogation and failed to apply any curative measures in order to ameliorate the harm caused by the *Miranda* violation").

Even in cases in which a respondent's second statement is not subject to federal constitutional suppression as the fruit of an earlier *Miranda* violation because of the rule of *Elstad* and the limitations of *Seibert*, counsel can urge the state courts to reject *Elstad* as a matter of state constitutional law and to preserve the "cat out of the bag" doctrine in its entirety. *See, e.g., State v. O'Neill*, 193 N.J. 148, 180-81, 936 A.2d 438, 457 (2007); *People v. Bethea,* 67 N.Y.2d 364, 493 N.E.2d 937, 502 N.Y.S.2d 713 (1986); *In the Matter of Daniel H.*, 15 N.Y.3d 883, 885-87, 938 N.E.2d 966, 968-69, 912 N.Y.S.2d 533, 535-36 (2010) (Ciparick, J., dissenting

from the dismissal of an appeal on jurisdictional grounds) (expressing the view that, under the state constitutional standard for analyzing *Seibert* issues, which resembles the *Seibert* plurality's approach, a juvenile's "age should be a factor in considering whether his *Mirandized* statement was sufficiently attenuated from his prior, unwarned statement" because the "risk that *Miranda* warnings might be ineffective is heightened where, as here, the suspect is a juvenile" and thus "is less likely than an adult to perceive any given period spent in constant police custody as a 'break,'" "is more likely to feel compelled to continue answering questions posed by the same officers who conducted the unwarned interrogation," and "is less likely to comprehend the meaning of *Miranda* warnings read shortly following a confession and understand that he can remain silent"); see generally § 7.09 *supra.*

§ 24.19(c) Statements Tainted by a Prior Statement Taken In Violation of the Sixth Amendment

The Supreme Court has expressly reserved the question "whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of [the] Sixth Amendment standards" discussed in § 24.13. *See Fellers v. United States*, 540 U.S. 519, 525 (2004). The analytic approach the Court used in *Elstad* to reject the concept of presumptive taint for fruits of a *Miranda* violation and to distinguish the situation of a coerced confession (see § 24.19(a) *supra*) would seem to render *Elstad* inapplicable when the interests at stake are those protected by the Sixth Amendment's right to counsel. As in the due process context, the prosecution bears the burden of proving that a Sixth Amendment violation in taking the previous statement did not taint the subsequent statement. *See Nix v. Williams*, 467 U.S. at 441-48.

§ 24.19(d) Statements Tainted by a Prior Statement Taken In Violation of the Fourth Amendment

The reasoning of *Elstad* and the distinction that it drew between *Miranda* violations and coercion in violation of the Due Process Clause (see § 24.19(a) *supra*) also suggest that *Elstad* does not limit the pre-*Elstad* caselaw recognizing that a statement can be suppressed as a fruit of a Fourth Amendment violation in taking a previous statement. *See Dunaway v. New York*, 442 U.S. 200, 218 n.20 (1979) (dealing with a second confession following one that was the product of an arrest without probable cause). As in the other contexts discussed in §§ 24.19(a) and 24.19(c) *supra*, the prosecution bears the burden of proving dissipation of taint. *See Nix v. Williams*, 467 U.S. at 441-48 (addressing the prosecutorial burden of disproving taint in the Sixth Amendment context and indicating that the same rule applies in Fourth Amendment cases).

§ 24.19(e) Potential Implications of *Elstad* for Physical Fruits of an Unconstitutionally Obtained Statement

The principles discussed in the preceding subparts have to do with suppression of *statements* as the fruits of a constitutional violation in obtaining a previous statement. In *United*

States v. Patane, 542 U.S. 630 (2004), a plurality of three Justices, joined by two other Justices on narrower reasoning, employed the rationale of *Elstad* to conclude that a *Miranda* violation in obtaining a statement does not provide a basis for suppressing "the physical fruits of the suspect's unwarned but voluntary statements." *Id*. at 634, 636 (plurality opinion). *Accord*, *id*. at 644-45 (Justice Kennedy, concurring in the judgment, joined by Justice O'Connor). Here again, the Court limited its analysis to *Miranda* violations, distinguishing them from the situation of a coerced statement. *See id*. at 634 (plurality opinion); *id*. at 645 (Justice Kennedy, concurring in the judgment). *See, e.g.*, *Dye v. Commonwealth*, 411 S.W.3d 227, 236-38 (Ky. 2013) (suppression of the defendant's statement as involuntary in violation of due process also required the suppression of the physical "evidence seized pursuant to the . . . search warrant . . . which was issued upon information contained in his involuntary confession"). Even with respect to *Miranda* violations, counsel can seek a more protective rule on state constitutional grounds. *See, e.g.*, *State v. Faris*, 109 Ohio St. 3d 519, 529, 849 N.E.2d 985, 996 (2006) ("We . . . join the other states that have already determined after *Patane* that their state constitutions' protections against self-incrimination extend to physical evidence seized as a result of pre-*Miranda* statements."); *State v. Knapp*, 285 Wis. 2d 86, 89, 130, 700 N.W.2d 899, 901, 921 (2005) (after the Supreme Court's *vacatur* and remand of the state supreme court's previous decision in light of *United States v. Patane*, the Wisconsin Supreme Court relies on the state constitution to again reach its previous result that physical evidence had to be suppressed as a fruit of a *Miranda* violation). See generally § 7.09 *supra*.

Part E. Trial Issues in Cases Involving Incriminating Statements by the Respondent

§ 24.20 PROSECUTORIAL PROOF OF *CORPUS DELICTI*

Many jurisdictions follow the rule that a confession may not be introduced into evidence until the prosecution has presented a *prima facie* case of the commission of the offense charged. This showing, called the *corpus delicti,* needs not include the identity of the respondent (although, of course, it is possible that some of the evidence comprising the *corpus delicti* will *also* tend to identify the respondent). In other jurisdictions the *corpus delicti* rule is simply a verbalism for the notion that a respondent's confession must be corroborated to make a submissible case for the prosecution; it relates to the standard of proof for a directed verdict and does not control the order of proof. See §§ 35.02, 35.04 *infra.*

Jurisdictions that do enforce the *corpus delicti* principle as regulating the order of proof ordinarily give the trial judge discretion to permit the prosecutor to vary the order and to prove the confession prior to the *corpus,* subject to "connecting up." Defense counsel should object to the confession and resist any variance in the order of proof. Frequently the prosecution's case on *corpus delicti* is borderline, and a judge who has heard the details of a confession will tend to lean somewhat against the accused in determining whether the *corpus* has been proved.

§ 24.21 THE RIGHT OF THE DEFENSE TO SHOW THE CIRCUMSTANCES UNDER WHICH THE STATEMENT WAS MADE

When a defense motion to suppress an incriminating statement of the respondent has been denied and the prosecution introduces the statement at trial, the defense will frequently want to show the coercive circumstances that prompted the statement, so as to persuade the trier of fact that the statement should be accorded little weight in the assessment of guilt or innocence. In *Crane v. Kentucky,* 476 U.S. 683 (1986), the Court made clear that a respondent cannot be precluded from presenting evidence of this sort at trial despite the denial of a pretrial motion challenging the confession as involuntary on the basis of the same evidence. The Court explained that the guarantees of "procedural fairness" embodied in the Sixth and Fourteenth Amendments (*id.* at 689-90) require that the defense be permitted to present evidence at trial concerning "the physical and psychological environment that yielded the confession . . . regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness." *Id.* at 689. *See also People v. Bedessie*, 19 N.Y.3d 147, 149, 161, 970 N.E.2d 380, 381, 388-89, 947 N.Y.S.2d 357, 358, 365-66 (2012) (recognizing that, "in a proper case," the accused is entitled to present "expert testimony [at trial] on the phenomenon of false confessions" because "there is no doubt that experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions"); *State v. Perea*, 322 P.3d 624, 640-41 (Utah 2013) ("expert testimony regarding the phenomenon of false confessions should be admitted so long as it meets the standards set out in rule 702 of the Utah Rules of Evidence and it is relevant to the facts of the specific case": "False confessions are an unsettling and unfortunate reality of our criminal justice system"; "expert testimony about factors leading to a false confession assists a 'trier of fact to understand the evidence or to determine a fact in issue'"; "[r]ecent laboratory-based studies have identified several factors that increase the likelihood of false confessions"; and "[t]o require a defendant to testify regarding the factors that contributed to his alleged false confession, rather than allow the use of an expert witness, opens the defendant up to cross-examination and impinges on his constitutionally guaranteed right against self-incrimination").

In arguing that the circumstances surrounding the making of a statement vitiate its credibility, counsel should point out that, as the Supreme Court has recognized, "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." *In re Gault,* 387 U.S. 1, 52 (1967). "[C]onfessions of juveniles require special caution" (*id.* at 45), and "the greatest care must be taken to assure that the admission . . . was not the product of . . . adolescent fantasy, fright or despair" (*id.* at 55). *See also J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401 (2011) ("[T]he pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people to confess to crimes they never committed.' . . . That risk is all the more troubling — and recent studies suggest, all the more acute — when the subject of custodial interrogation is a juvenile."). See generally § 24.05(a) (discussing empirical findings on false confessions by juvenile suspects); and the discussion of

an interrogator's trickery in obtaining a confession as a factor undermining its credibility in *Aleman v. Village of Hanover Park*, 662 F.3d 897 (7th Cir. 2011), summarized in § 24.04(d).

§ 24.22 THE PROSECUTOR'S POWER TO USE A SUPPRESSED STATEMENT FOR IMPEACHMENT

The rules governing prosecutorial use of suppressed statements to impeach a respondent's trial testimony vary, depending upon the constitutional doctrine under which the statement was suppressed.

If a statement was suppressed on grounds of involuntariness (§§ 24.03-24.06 *supra*), then the statement is inadmissible for impeachment or any other purpose at trial. *Mincey v. Arizona,* 437 U.S. 385, 397-98, 402 (1978); *see New Jersey v. Portash,* 440 U.S. 450, 458-60 (1979); *Kansas v. Ventris*, 556 U.S. 586, 590 (2009).

If a statement was suppressed on *Miranda* grounds (§§ 24.07-24.12 *supra*) but was not found involuntary, federal constitutional law does not forbid the prosecutor to use that statement for impeachment of the respondent's inconsistent testimony at trial. *Harris v. New York,* 401 U.S. 222 (1971); *Oregon v. Hass,* 420 U.S. 714 (1975).

Statements suppressed on Sixth Amendment grounds (§ 24.13 *supra*) also may be available to the prosecution to impeach a respondent's inconsistent testimony at trial. In *Kansas v. Ventris*, 556 U.S. 586 (2009), the Court held that a statement which had been deliberately elicited by a jailhouse informant acting as an agent for law enforcement officers and which had not been preceded by a valid waiver of the right to counsel was "concededly elicited in violation of the Sixth Amendment" but "was admissible to challenge [the defendant's] . . . inconsistent testimony at trial." *Id*. at 594.

State courts may take a dim view of the prosecutor's use of illegally obtained statements for impeachment, and counsel should argue that the state constitution prohibits prosecutors from using statements suppressed on *Miranda* or Sixth Amendment grounds for any purpose at trial. *See, e.g., People v. Disbrow,* 16 Cal. 3d 101, 113, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976); *State v. Santiago,* 53 Hawai'i 254, 265-66, 492 P.2d 657, 664 (1971); see generally § 7.09 *supra.*

Even under the federal constitutional rule permitting statements obtained in violation of *Miranda* and the Sixth Amendment to be used for impeachment of the respondent, they cannot be used to impeach defense witnesses other than the respondent. *See, e.g., James v. Illinois,* 493 U.S. 307 (1990) (state court erred in "expanding the scope of the impeachment exception to permit prosecutors to use illegally obtained evidence to impeach the credibility of defense witnesses" (*id.* at 313); the "impeachment exception [is] limited to the testimony of [the] defendant[]" (*id.* at 320)).

§ 24.23 ADMISSIBILITY OF EVIDENCE OF THE RESPONDENT'S PRE- OR POST-ARREST SILENCE

Prosecutors commonly offer evidence of a respondent's pretrial failure to avow innocence or deny guilt in either of two contexts. Proof that the respondent failed to deny accusations made in his or her presence by police or private citizens may be offered (usually in the prosecution's case in chief) as "adoptive admissions," or "tacit admissions." And proof that the respondent did not tell the police — or did not tell anyone before trial — the exculpatory story that s/he relates in his or her trial testimony may be offered (usually on cross-examination of the respondent, but sometimes through prosecution witnesses called in rebuttal) to impeach the respondent's testimony as a "recent fabrication."

Common-law rules of evidence regarding these two kinds of proof vary considerably from State to State. *See* Henry S. Hilles, Jr., Note, *Tacit Criminal Admissions,* 112 U. PA. L. REV. 210 (1963). However, there is a general consensus that a respondent's mere failure to answer questions (whether by the police or other persons) is inadmissible as an "adoptive admission" because a *question* asserts no facts that the failure to answer it can be deemed to "adopt"; and most States also hold that even a failure to deny specific accusatory statements is inadmissible as an "adoptive admission" unless the accusations were made under circumstances in which it would be natural for an innocent person to dispute them if they were untrue. *See, e.g., Commonwealth v. Nickerson,* 386 Mass. 54, 434 N.E.2d 992 (1982). Impeachment on a theory of "recent fabrication" is seldom so limited: For this purpose, evidence that the respondent simply failed to volunteer his or her exonerating story before taking the stand at trial may be admissible, provided only that s/he had some prior opportunity to volunteer it.

Apart from the complexities of these common-law evidentiary doctrines, proof of the respondent's silence to show an "adoptive admission" or "recent fabrication" raises state and federal constitutional issues. The constitutional analysis is affected by whether the silence that the prosecutor seeks to prove occurred (1) before or after arrest and (2) before or after administration of the *Miranda* warnings described in § 24.09 *supra.*

In *Doyle v. Ohio,* 426 U.S. 610, 619 (1976), the Supreme Court squarely held that an accused's "silence, at the time of arrest and after receiving *Miranda* warnings" is constitutionally inadmissible against him or her, even for the purpose of impeaching the accused's trial testimony as a recent fabrication. The reasoning of *Doyle* is that the *Miranda* warnings implicitly assure the person to whom they are given that s/he may remain silent with impunity, and it is fundamentally unfair and a violation of due process to use the person's subsequent silence as incriminating evidence, 426 U.S. at 617-19, particularly inasmuch as the silence is "insolubly ambiguous because of what the State is required to advise the person arrested," *id.* at 617. *See also Portuondo v. Agard*, 529 U.S. 61, 74-75 (2000); *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993); *Hurd v. Terhune*, 619 F.3d 1080, 1088-89 (9th Cir. 2010); *People v. Shafier*, 483 Mich. 205, 218-19, 768 N.W.2d 305, 313 (2009); *People v. Clary*, 494 Mich. 260, 833 N.W.2d 308 (2013); *State v. Brooks*, 304 S.W.3d 130, 133-34 (Mo. 2010). The *Doyle* doctrine prohibits the

state from "mak[ing] use of the defendant's exercise of [his] . . . rights [to remain silent] in obtaining his conviction," *Wainwright v. Greenfield,* 474 U.S. 284, 292 (1986), and thus bars not only the use of silence to impeach the accused but also any use of the accused's assertion of his *Miranda* rights as proof of sanity in a case in which an insanity defense is asserted. *Id.* at 295.

In *Greer v. Miller,* 483 U.S. 756 (1987), the Court held that *Doyle* did not require the invalidation of a conviction when the prosecutor asked a single impermissible question touching on the defendant's silence after *Miranda* warnings and the trial court immediately sustained a defense objection and gave a curative instruction. *Greer* illustrates the desirability of filing a pretrial motion for an order *in limine* forbidding the prosecutor's use or attempted use of evidence that is inadmissible under *Doyle.* See § 7.03 *supra* regarding the utility of such motions, at least in jurisdictions where the respondent is entitled to a jury trial and those in which it is possible to litigate motions *in limine* before a judge other than the one who will sit at a bench trial of the issue of guilt or innocence (§ 20.05 *supra*).

Doyle concerned the implications of the administration of *Miranda* warnings and thus does not govern prosecutorial evidence of either a respondent's pre-arrest silence, *Jenkins v. Anderson*, 447 U.S. 231, 239-40 (1980), or post-arrest silence when no *Miranda* warnings were given, *Fletcher v. Weir,* 455 U.S. 603, 606-07 (1982) (*per curiam*). In *Jenkins* and *Fletcher*, the Court rejected Fifth and Fourteenth Amendment challenges to a prosecutor's use of a defendant's silence to cross-examine him at trial — with pre-arrest silence in *Jenkins*; and in *Fletcher* with post-arrest silence when no *Miranda* warnings were given. Significantly, neither of the defendants in *Jenkins* and *Fletcher* had combined his silence with an explicit invocation of the Fifth Amendment Privilege Against Self-Incrimination. Moreover, because the prosecutorial use of the accused's silence in both cases occurred during the cross-examination of a testifying defendant at trial, the cases fit within the principle that once an accused has chosen to abandon his or her position of silence by testifying, the prosecution has an overriding interest in being permitted to test the accused's story for veracity through '"the traditional truth-testing devices of the adversary process.'" *Jenkins v. Anderson,* 447 U.S. at 238.

In *Salinas v. Texas*, 133 S. Ct. 2174 (2013), the Court granted *certiorari* on the question "[w]hether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights." *See* Petition for a Writ of *Certiorari* at I, Salinas v. Texas, 133 S. Ct. 2174 (2013) (No. 12-246), 2012 WL 3645103, at *i. *Salinas* once again involved a defendant who did not expressly invoke his Fifth Amendment Privilege Against Self-Incrimination, but the case differed from *Jenkins* and *Fletcher* in that the prosecutor used the defendant's prearrest, non-*Mirandized* silence in the prosecution's case in chief. In a 5-4 decision, the Court rejected the defendant's Fifth Amendment claim, but the majority was unable to agree on a rationale. A plurality opinion, authored by Justice Alito and joined by Chief Justice Roberts and Justice Kennedy, concluded that Salinas's "Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question." *Salinas*, 133 S. Ct. at 2178 (plurality opinion). Justices Thomas and Scalia concurred in the judgment on the

broader rationale that "Salinas' claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony." *Id*. at 2184 (Thomas J., concurring in the judgment, joined by Scalia, J., arguing for the overruling of the entire jurisprudence of *Griffin v. California* and its progeny (see § 33.05 *infra*)). The four dissenting Justices concluded that even when there has been no express invocation of the Fifth Amendment Privilege, use of an accused's silence in the prosecution's case-in-chief is nonetheless barred if "an exercise of the Fifth Amendment's privilege" can be "fairly infer[red] from an individual's silence and surrounding circumstances." *Id*. at 2191 (Breyer J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.).

In the wake of *Salinas*, it seems readily apparent that a suspect's explicit invocation of the Fifth Amendment Privilege Against Self-Incrimination *will* bar the prosecution from using the suspect's silence as evidence in its case in chief at trial. *See, e.g.*, *United States v. Okatan*, 728 F.3d 111, 114, 119, 120 (2d Cir. 2013) (Okatan, seated in his automobile, was approached by a border patrol agent who questioned Okatan about his reasons for being in the area, then "warned Okatan that lying to a federal officer is a criminal act and asked whether he was there to pick someone up. Okatan said that he wanted a lawyer" and the agent then arrested him. "[E]ven when an individual is not in custody, because of 'the unique role the lawyer plays in the adversary system of criminal justice in this country,' . . . a request for a lawyer in response to law enforcement questioning suffices to put an officer on notice that the individual means to invoke the privilege [against self-incrimination]." "[W]e conclude that where, as here, an individual is interrogated by an officer, even prior to arrest, his invocation of the privilege against self-incrimination and his subsequent silence cannot be used by the government in its case in chief as substantive evidence of guilt."). Although Justice Alito's plurality opinion only addresses the question of what happens when a suspect fails to invoke the Privilege explicitly, the opinion's wording and reasoning convey that the plurality surely would have reached the opposite result if the Privilege *had* been invoked explicitly. Moreover, even if only a single member of the plurality were to support a bar to the use of silence in such a situation, that single vote would combine with the four *Salinas* dissenters' votes to create a majority in favor of a prohibitory rule.

The prosecution should also be barred from using a suspect's silence in its case in chief if the suspect explicitly invoked the right to counsel after being advised of it, whether through *Miranda* warnings or in some other form. Such an invocation should command the protections of the *Doyle* exclusionary rule because the prosecution's use of silence under these circumstances would work the same type of unfairness that was condemned in *Doyle*.

In addition to these federal constitutional protections, prosecutorial use of an accused's pretrial silence may be prohibited or circumscribed by state rules of evidence or state constitutional guarantees. For example, some states have precluded prosecutorial use of an accused's pretrial silence because the evidence has low probative value (given that the accused's taciturnity may have been motivated by an awareness of the right to silence or of the risks of responding to police questioning, by distrust of the police, or by any of a host of other factors)

and there is a high risk that the introduction of the evidence will prejudice the accused. *See, e.g.*, *People v. Conyers,* 52 N.Y.2d 454, 458-60, 420 N.E.2d 933, 935-36, 438 N.Y.S.2d 741, 743-44 (1981). *See also State v. Easter*, 130 Wash. 2d 228, 235 n.5, 922 P.2d 1285, 1289 n.5 (1996) (citing caselaw from other States in which the courts "ruled on evidentiary grounds [that] pre-arrest silence is not admissible because of its low probative value and high potential for undue prejudice"). Some states have concluded that their state constitution's self-incrimination clause is broader than the Fifth Amendment and bars prosecutorial use of an accused's pretrial silence, at least if it took place after arrest, *Commonwealth v. Turner,* 499 Pa. 579, 454 A.2d 537 (1982); *State v. Davis,* 38 Wash. App. 600, 686 P.2d 1143 (1984), or "'at or near' the time of arrest, during official interrogation, or while in police custody," *State v. Muhammad*, 182 N.J. 551, 569, 868 A.2d 302, 312 (2005).

Chapter 25

Motions To Suppress Identification Testimony

§ 25.01 INTRODUCTION AND OVERVIEW

In the vast majority of delinquency cases, the prosecution proves the respondent's identity as the perpetrator through an in-court identification of the respondent: The complainant or an eyewitness testifies that the youth seated next to defense counsel was the perpetrator. (The exceptions are cases in which the perpetrator's identity is proved through scientific evidence (such as fingerprints or serology evidence), circumstantial evidence (such as the respondent's possession of the fruits of the crime), or the respondent's confession.)

Although some cases may involve a respondent who is a longstanding acquaintance of the complainant or eyewitness, most identifications in delinquency cases are based upon the complainant's or eyewitness's momentary observation of a stranger. Frequently, that identification has been shaped (or at least affected) by the witness's participation in one or more of the following police identification procedures:

(a) A "lineup" in which the witness observes the respondent standing among a group (usually ranging from seven to ten persons) and is asked to select the perpetrator.

(b) A "show-up" in which the witness is shown only the respondent and asked whether the respondent was the perpetrator.

(c) A "photographic identification procedure" in which the witness either is shown a group of photographs (a "photo array" usually consisting of five to ten "mug shots" or a "mug-book" — an entire book of mug shots) and asked to select the perpetrator or is shown a single photograph and asked whether the person depicted was the perpetrator.

As the Supreme Court has recognized, a "witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police," *Manson v. Brathwaite,* 432 U.S. 98, 112 (1977), and "'[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor — perhaps it is responsible for more such errors than all other factors combined.'" *United States v. Wade,* 388 U.S. 218, 229 (1967). *See also Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012) ("'the annals of criminal law are rife with instances of mistaken identifications'" (quoting *Wade*, 388 U.S. at 228)).

The Court has established three separate constitutional doctrines regulating the use of identification testimony, each of which provides a basis for suppressing identification testimony by the complainant and any eyewitnesses:

(a) *The due process doctrine:* Testimony concerning pretrial identifications at police-staged confrontations that are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" are constitutionally inadmissible, *Simmons v. United States,* 390 U.S. 377, 384 (1968) (dictum). *Accord*, *Perry v. New Hampshire*, 132 S. Ct. at 724-25 (dictum). See §§ 25.02-25.05 *infra.*

(b) *The Sixth Amendment doctrine:* Police-staged lineups and show-ups held after the right to counsel has attached may be unconstitutional if they were conducted in the absence of counsel for the respondent. See § 25.06 *infra.*

(c) *The Fourth Amendment doctrine:* Testimony regarding a lineup or other custodial identification made as a result of an illegal arrest or detention is inadmissible. See § 25.07 *infra*.

State-law doctrines may provide additional bases for objecting to identification testimony. See § 25.08 *infra.*

In some jurisdictions, statutes or court rules provide for a pretrial hearing on a defense motion to suppress identification testimony. At such a hearing the prosecutor ordinarily presents the police officer who conducted the identification procedure and the complainant or eyewitness who made the identification. (In some jurisdictions the prosecutor presents only the police officer, taking advantage of the admissibility of hearsay evidence in a suppression hearing (see § 22.03(e) *supra*) to have the officer testify to the witness's identification as well as the witness's account of his or her ability to observe the perpetrator.) In any pretrial identification suppression hearing at which an identifying witness will testify, it is advisable for the defense to waive the respondent's presence during the witness's testimony. See § 22.03(b) *supra.*

In other jurisdictions defense objections to identification testimony or motions to suppress it are litigated in a mid-trial hearing or a series of *voir dire* examinations of the prosecution's identification witnesses. In jury trials it "may often be advisable [and,] . . . [i]n some circumstances . . . may be constitutionally necessary" to conduct such hearings outside the presence of the jury, *Watkins v. Sowders,* 449 U.S. 341, 349 (1981), although there is no "*per se* [constitutional] rule compelling such a procedure in every case." *Ibid.*

This chapter examines the various doctrines governing suppression of identification testimony. Procedural requirements governing suppression motions and strategic considerations in drafting the motions are discussed in Chapter 7. Techniques for conducting a suppression hearing are discussed in Chapter 22.

Part A. Due Process Grounds for Suppressing an Identification as Unreliable

§ 25.02 THE DUE PROCESS STANDARD

The focus of the due process test of admissibility of identification testimony is the reliability of the identification. "It is the reliability of identification evidence that primarily determines its admissibility." *Watkins v. Sowders,* 449 U.S. 341, 347 (1981); *Manson v. Brathwaite,* 432 U.S. 98, 113-14 (1977). Police-staged identification procedures that are unduly suggestive may impair the reliability of the resulting identification and render it inadmissible. *Foster v. California,* 394 U.S. 440 (1969).

Under the due process standard the admissibility of an identification is determined by weighing "the corrupting effect of the suggestive identification" against factors showing the identification to be reliable notwithstanding the suggestiveness of the police-staged confrontation. *Manson v. Brathwaite,* 432 U.S. at 114. *See also Neil v. Biggers,* 409 U.S. 188, 199 (1972) (the "central question" is whether "the identification procedure was reliable even though the confrontation procedure was suggestive"). In gauging the reliability of the identification, "[t]he factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Manson v. Brathwaite,* 432 U.S. at 114. *See also Neil v. Biggers,* 409 U.S. at 199-200; *Simmons v. United States,* 390 U.S. 377, 385 (1968). If a suggestive police identification procedure created a "very substantial likelihood of irreparable misidentification," then the court must suppress both the pretrial identification, *Neil v. Biggers,* 409 U.S. at 197, and any in-court identifications tainted by the constitutionally defective pretrial identification, *see Coleman v. Alabama,* 399 U.S. 1, 4-6 (1970) (dictum).

Thus the federal due process inquiry has two parts. The court first examines whether any police identification procedure was suggestive. If it was suggestive, then the distorting influence of the procedure is weighed against considerations indicating that the identification is nevertheless reliable. Section 25.03 *infra* examines the factors involved in assessing the suggestiveness of a police identification procedure, and § 25.04 examines the reliability factors. Section 25.05 explores the possible arguments that a respondent is entitled to suppression of an unreliable identification even when there was no police suggestiveness.

Of course, the state courts are free to construe their state constitutions as establishing a more protective due process standard than the federal test for admission of identification testimony. *See, e.g.*, *State v. Henderson*, 208 N.J. 208, 287 n.10, 288-93, 27 A.3d 872, 919 n.10, 919-922 (2011) (construing the state constitution's due process clause to remedy the "shortcomings" of the Supreme Court's *Manson v. Braithwaite* standard by adopting a "new framework" that "allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on

helping jurors both understand and evaluate the effects that various factors have on memory"); *People v. Adams,* 53 N.Y.2d 241, 423 N.E.2d 379, 440 N.Y.S.2d 902 (1981) (rejecting the "totality of the circumstances" analysis of *Neil v. Biggers* and *Manson v. Brathwaite* in favor of the Supreme Court's earlier analytical approach, which looked first at the suggestiveness of the identification and, upon finding it unduly suggestive, excluded the identification unless the prosecution could show that the identification had an "independent source"); *Commonwealth v. Johnson*, 420 Mass. 458, 463, 472, 650 N.E.2d 1257, 1260, 1265 (1995) (same as *People v. Adams*, *supra*: "reject[ing] *Brathwaite*" on state constitutional grounds and "adher[ing] to the stricter rule of per se exclusion previously followed by the Supreme Court and first set forth in the *Wade-Gilbert-Stovall* trilogy"); *State v. Lawson*, 352 Or. 724, 740, 761-62, 291 P.3d 673, 685, 696-97 (2012) ("Based on [an] . . . extensive review of the current scientific research and literature," the state supreme court takes "judicial notice of the data contained in those various sources as legislative facts" to revise the state-law "test governing the admission of eyewitness testimony." *Inter alia*, the burden rests on "the state as the proponent of the eyewitness identification" to "establish all preliminary facts necessary to establish admissibility of the eyewitness evidence"; then, "[i]f the state satisfies its burden," the burden shifts to the defendant to establish that, "although the eyewitness evidence is otherwise admissible, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence"); *State v. Dubose*, 285 Wis.2d 143, 148, 165-66, 699 N.W.2d 582, 584-85, 593-94 (2005) ("adopt[ing] standards for the admissibility of out-of-court identification evidence similar to those set forth in . . . Stovall v. Denno, 388 U.S. 293 (1967)" and holding that "evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary," and specifying that "[a] showup will not be necessary . . . unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array"); see generally § 7.09 *supra.*

§ 25.03 SUGGESTIVENESS OF POLICE IDENTIFICATION PROCEDURES

There are a number of useful reference works that will assist counsel to identify the suggestive features in any particular police-staged identification confrontation. *See* BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1996); ELIZABETH LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (4th ed. 2007); NATHAN R. SOBEL, EYEWITNESS IDENTIFICATION — LEGAL AND PRACTICAL PROBLEMS (2d ed. 2002); PATRICK M. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965); A. DANIEL YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY (1979); John B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIM. 825, 841-43 (2010); Radha Natarajan, Note, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821 (2003); Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 STAN. L. REV. 969 (1977). The following

subsections discuss recurring features of identification procedures that *judicial opinions* have recognized as suggestive. Counsel should emphasize these when they are present but should also consult the literature to develop others.

§ 25.03(a) Show-ups

The Supreme Court has recognized that show-up identification procedures, in which the accused is exhibited to the witness in a one-on-one confrontation, are inherently suggestive. *See, e.g., United States v. Wade,* 388 U.S. 218, 234 (1967) ("[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police"); *see also Stovall v. Denno,* 388 U.S. 293, 302 (1967) ("[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned").

Notwithstanding the inherent suggestiveness of show-ups, the Court has sustained a show-up in the victim's hospital room against due process challenge when the use of this procedure was "imperative" because the witness was so gravely wounded that it was impossible to "kn[o]w how long . . . [the witness] might live." *Stovall v. Denno,* 388 U.S. at 302. Under these circumstances the Court found that the show-up was not *"unnecessarily* suggestive," *ibid.* (emphasis added); "the police followed the only feasible procedure," *ibid.* Several lower courts have similarly sustained immediate, on-the-scene show-ups as justified by the need to find the perpetrator rapidly. However, show-ups will not be approved when the lapse of time between the crime and the show-up rendered it unnecessary to employ the inherently suggestive show-up procedure. *See, e.g., People v. Brown,* 121 A.D.2d 733, 504 N.Y.S.2d 457 (N.Y. App. Div., 2d Dep't 1986) (show-up conducted an hour after the crime).

The inherent suggestiveness of a show-up is exacerbated by the police officers' use of procedures that: (a) provide the witness with additional reasons for believing that the single person being shown is the perpetrator, *see, e.g., Velez v. Schmer,* 724 F.2d 249 (1st Cir. 1984) (police used suggestive language: "'This is him, isn't it?'"); *Styers v. Smith,* 659 F.2d 293 (2d Cir. 1981) (show-up at police station after a police officer told the victim that he was leaving to pick up the robbery suspects); *People v. Adams,* 53 N.Y.2d 241, 248-49, 423 N.E.2d 379, 382, 440 N.Y.S.2d 902, 905 (1981) ("[s]howing the suspects together also enhanced the possibility that if one of them were recognized the others would be identified as well . . . [and] permitting the victims as a group to view the suspects . . . increased the likelihood that if one of them made an identification the others would concur"); *State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000) ("the witness was brought to a location where two individuals, wearing clothing similar to that described by the witness, were surrounded by uniformed police officers"); *State v. Williams,* 162 W. Va. 348, 249 S.E.2d 752 (1978) (police told the victim that his money was found in the possession of the three suspects whom he was about to view); or (b) magnify the custodial features of the situation, so as to enhance the impression that the police are certain of the respondent's guilt, *see, e.g.*, *Clark v. Caspari*, 274 F.3d 507, 511 (8th Cir. 2001) (during the show-up, the two suspects were handcuffed and "surrounded" by police officers, "one of whom

was holding a shotgun"); *United States ex rel. Hudson v. Brierton,* 699 F.2d 917 (7th Cir. 1983) (defendant locked in a jail cell at time of viewing); *People v. Brown,* 121 A.D.2d 733, 504 N.Y.S.2d 457 (NY. App. Div., 2d Dep't 1986) (during the show-up the suspects were surrounded by several police officers and had handcuffs dangling from their wrists).

§ 25.03(b) Lineups

A lineup is impermissibly suggestive if some aspect of the respondent's appearance (age, race, skin complexion, height, weight, attire) renders him or her distinctive from the others in the line, especially if the unique characteristic makes the respondent the only person in the line who fits the known description of the perpetrator. *See, e.g.*, *Raheem v. Kelly*, 257 F.3d 122, 135–37 (2d Cir. 2001) (lineup was suggestive in the case of two witnesses because they had given a description of the perpetrator as wearing a black leather coat and the defendant was the only person in the line wearing a black leather coat); *United States v. Downs*, 230 F.3d 272, 273, 275 (7th Cir. 2000) (lineup was suggestive because the witnesses had described the perpetrator as "lightly unshaven" and the defendant "was the only man in a line-up of five who lacked a moustache"); *Martin v. Indiana,* 438 F. Supp. 234 (N.D. Ind. 1977), *aff'd,* 577 F.2d 749 (7th Cir. 1978) (lineup was suggestive because the perpetrator had been described as a tall black man in his mid-thirties, and the only black man in the line other than the defendant was short and eighteen years old); *State v. Henderson,* 116 Ariz. 310, 569 P.2d 252 (1977) (lineup was suggestive because the perpetrator had been described as being in his early to middle thirties, and the defendant was 36 years old but the other five persons in the lineup were in their early to middle twenties); *People v. Sapp,* 98 A.D.2d 784, 469 N.Y.S.2d 803 (N.Y. App. Div., 2d Dep't 1983) (defendant was the only person in the line wearing the type of jacket that the witness had described the perpetrator as wearing); *State v. Boykins*, 173 W. Va. 761, 765-66, 320 S.E.2d 134, 138 (1984) (the defendant "was the only person in the lineup who wore a dark blue or black toboggan: the type of clothing the culprit allegedly wore," and "all but one of the people in the lineup was taller than" the defendant).

The manner in which the police conduct the lineup can also make it impermissibly suggestive. *See, e.g., United States v. Wade,* 388 U.S. 218, 234 (1967) (dictum) (practice of permitting witnesses to be present during each other's viewing of a lineup is "a procedure said to be fraught with dangers of suggestion"); *People v. Boyce,* 89 A.D.2d 623, 452 N.Y.S.2d 676 (N.Y. App. Div., 2d Dep't 1982) (suggestive post-lineup remarks by police).

§ 25.03(c) Photographic Identifications

The showing of a single photograph is highly suggestive and will be found unnecessarily suggestive in the absence of extraordinary circumstances because the police could easily put together a group of photographs to show the witness. *See Simmons v. United States,* 390 U.S. 377, 383 (1968); *Manson v. Brathwaite,* 432 U.S. 98 (1977); *United States v. Dailey,* 524 F.2d 911, 914 (8th Cir. 1975); *State v. Al-Bayyinah*, 356 N.C. 150, 157, 567 S.E.2d 120, 124 (2002).

A "photo array" — a group of photographs (usually mug shots) including the respondent's photograph — will be found suggestive if the respondent's photograph is the only one that matches the description of the perpetrator. *See, e.g., United States v. Sanders,* 479 F.2d 1193 (D.C. Cir. 1973) (only the defendant's photograph depicted facial hair that was in any way comparable to the witness's description of the perpetrator); *Commonwealth v. Thornley*, 406 Mass. 96, 99-101, 546 N.E.2d 350, 352-53 (1989) (a thirteen-photograph array was suggestive because both witnesses had described the perpetrator as wearing glasses, and "the defendant's picture was the only one in the array with glasses"); *Butler v. State*, 102 So.3d 260, 263, 265-66 (Miss. 2012) (photo lineup was impermissibly suggestive because the witness described the perpetrator as "around five-feet-five-inches tall," the accused is "actually five-feet-six-inches tall," "[t]he other suspects in the photo lineup were between five-feet-eleven-inches and six-feet-four-inches tall," and their relative heights would have been apparent because the suspects "were pictured standing beside a height marker"). As with lineups, see § 25.03(b) *supra,* a police officer's comments or the way in which the police conduct the photographic identification can render even a properly constituted photo array suggestive. *See, e.g., Simmons v. United States,* 390 U.S. at 383 ("[t]he chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime"); *United States v. Trivette,* 284 F. Supp. 720 (D. D.C. 1968) (detective drew witness's attention to the defendant's photograph by asking "'Is that the man?'"); *People v. Fernandez*, 82 A.D.2d 922, 440 N.Y.S.2d 677 (N.Y. App. Div., 2d Dep't 1981) (four eyewitnesses were permitted to view photographs together).

§ 25.03(d) Aggregation of Identification Procedures

Frequently, a witness is exposed to a combination of identification procedures For example, a witness who identifies the respondent in a show-up or a photographic identification display is thereafter shown the respondent in a lineup. The employment of successive identification procedures all involving the respondent is itself suggestive because the witness learns to recognize the respondent from the previous police-arranged viewing(s). *See Foster v. California,* 394 U.S. 440, 442-43 (1969).

§ 25.04 RELIABILITY OF THE IDENTIFICATION

As explained in § 25.02 *supra,* under the federal due process rule even suggestive police procedures will not render an identification inadmissible if the factors indicating its reliability outweigh the suggestiveness of the police conduct.

The factors to be considered in assessing the reliability of an identification include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Manson v. Brathwaite,* 432 U.S. 98, 113-14 (1977). Thus, in *Manson,* the Court held that the identification was reliable because:

(a) The witness had a good "opportunity to view" the perpetrator, since the scene was well-lit and the witness was "within two feet" of the perpetrator and "looked directly at" him for "two to three minutes." *Id.* at 114.

(b) The witness's "degree of attention" was excellent, in that the witness was "a specially trained, assigned, and experienced officer [who] . . . could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest [the perpetrator] . . . [and] that his claimed observations would be subject later to close scrutiny and examination at any trial." *Id.* at 115. In addition, since the witness was of the same race as the defendant, there were no problems of cross-racial identification. *Ibid.*

(c) The description given by the witness was extremely detailed and accurate, including the perpetrator's "race, his height, his build, the color and style of his hair, and the high cheekbone facial feature" as well as the "clothing the [perpetrator] . . . wore." *Ibid*.

(d) The witness was absolutely certain of the identification, stating, "'There is no question whatsoever.'" *Ibid*.

(e) The witness gave his description to the investigating officer "within minutes of the crime" and "[t]he photographic identification took place only two days later." *Id.* at 116.

In cases not exhibiting the indicia of reliability that marked the identification in *Manson,* lower courts have held that the suggestiveness of police procedures outweighed the identification's reliability. *See, e.g.*, *Raheem v. Kelly*, 257 F.3d 122, 138-40 (2d Cir. 2001) (witnesses to a robbery and shooting in a bar were "drinking scotch" and were not paying attention to the robbers until the witnesses "heard the shot and saw the shooter holding a gun, [and] the hold-up was announced," and "[p]lainly their attention was immediately focused more on th[e] man" who "brandished his gun at them" than at the other robber, and "[f]urther, it is human nature for a person toward whom a gun is being pointed to focus his attention more on the gun than on the face of the person pointing it"); *Velez v. Schmer*, 724 F.2d 249, 251-52 (1st Cir. 1984) (witnesses had only about a minute to observe the perpetrator and gave virtually no description); *Dickerson v. Fogg,* 692 F.2d 238, 245 (2d Cir. 1982) (victim was "frightened and agitated . . . having just had his life threatened and a gun at his neck"); *Jackson v. Fogg,* 589 F.2d 108 (2d Cir. 1978) (eyewitnesses had only a few seconds to observe the gunman before running for cover); *United States v. Dailey,* 524 F.2d 911 (8th Cir. 1975) (the witness had limited opportunity to observe the perpetrator, seeing him for no more than 30 seconds in heavy rain, and there was a discrepancy between the description and the defendant's appearance); *People v. Fuller,* 71 A.D.2d 589, 418 N.Y.S.2d 427 (N.Y. App. Div., 1st Dep't 1979) (there was a gross discrepancy between the appearance of the 17-year-old defendant and the witness's description of the perpetrator's age and build); *State v. Moore*, 343 S.C. 282, 289, 540 S.E.2d 445, 449 (2000) (the eyewitness "saw

the two defendants for only a very brief period of time, at some distance"; her "attention was likely not as acute as it might have been had she been the victim of a crime"; and "the degree of accuracy of [her] description is tenuous, at best . . . [since] [h]er descriptions were based primarily on the suspects' clothing and race, and that one was taller than the other").

§ 25.05 SUPPRESSION OF AN IDENTIFICATION AS UNCONSTITUTIONALLY UNRELIABLE EVEN THOUGH POLICE ACTION IS MINIMAL OR NON-EXISTENT

Under the federal due process standard for suppressing an identification as unconstitutionally unreliable, "a preliminary judicial inquiry into the reliability of an eyewitness identification" is required only if the identification was "procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry v. New Hampshire*, 132 S. Ct. 716, 730 (2012). *See id*. at 720-21 ("We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. . . . Our decisions . . . turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.").

In States that have not already chosen to follow the federal constitutional standard on this issue, counsel can argue that the state constitution or state statutes or rules should be construed to afford a suppression remedy for unreliable identifications even in the absence of suggestive police conduct. *See, e.g.*, *State v. Chen*, 208 N.J. 307, 310-11, 27 A.3d 930, 932 (2011) ("Recent social science research reveals that suggestive conduct by private actors, as well as government officials, can undermine the reliability of eyewitness identifications and inflate witness confidence. We consider that evidence in light of the court's traditional gatekeeping role to ensure that unreliable, misleading evidence is not presented to jurors. We therefore hold [under N.J. R. EVID. 104] that, even without any police action, when a defendant presents evidence that an identification was made under highly suggestive circumstances that could lead to a mistaken identification, trial judges should conduct a preliminary hearing, upon request, to determine the admissibility of the identification evidence."). *See also State v. Hibl*, 290 Wis.2d 595, 610-13, 618, 714 N.W.2d 194, 202-03, 206 (2006) (even when an identification did not stem from a "police procedure," as in cases of "'spontaneous' identifications resulting from 'accidental' confrontations" between an eyewitness and the suspect, the "circuit court still has a limited gatekeeping function to exclude such evidence under [WIS. STAT.] § 904.03"). See generally § 7.09 *supra*. In seeking to persuade a court to adopt such a rule, counsel will often find it useful to direct the court's attention to the extensive empirical evidence on the unreliability of eyewitness identifications even when the police were not involved. *See, e.g.*, the sources cited in § 25.03 and in *State v. Chen*, 208 N.J. at 938-40, 27 A.3d at 320-23; *Perry v. New Hampshire*, 132 S. Ct. at 738-39 & nn.5-11 (Sotomayor, J., dissenting).

Part B. Other Grounds for Suppressing Identification Testimony

§ 25.06 VIOLATIONS OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

Section 24.13 *supra* describes the doctrine holding that the Sixth Amendment right to counsel attaches at the time of commencement of adversary judicial proceedings. As noted in that section, some state courts have relied upon state constitutional guarantees to afford the protections of the right to counsel even earlier in the criminal process.

Once the right to counsel has attached, the respondent is entitled to the assistance of counsel at a lineup or show-up. *United States v. Wade,* 388 U.S. 218 (1967). The violation of that right requires the suppression of testimony relating to any identification made at the lineup or show-up. *Moore v. Illinois,* 434 U.S. 220, 231-32 (1977); *Gilbert v. California,* 388 U.S. 263, 272-74 (1967). In cases in which the right to counsel was violated, witnesses who participated in the unconstitutional lineup or show-up are also precluded from making an in-court identification of the respondent unless the prosecution proves "by clear and convincing evidence that the in-court identifications [are] . . . based upon observations of the suspect other than the lineup [or show-up] identification." *See United States v. Wade,* 388 U.S. at 240.

Unlike lineups and show-ups, photographic identification procedures do not require the presence of counsel under the Sixth Amendment caselaw. *United States v. Ash,* 413 U.S. 300 (1973).

§ 25.07 VIOLATIONS OF THE FOURTH AMENDMENT: IDENTIFICATIONS RESULTING FROM AN ILLEGAL ARREST OR *TERRY* STOP

If a lineup, show-up, or other identification exhibition is held while the respondent is in custody following an illegal arrest or *Terry* stop, any resulting identification must be suppressed as the fruit of the Fourth Amendment violation. See § 23.37 *supra.* In-court identifications tainted by the illegality of the earlier ones would also be inadmissible. *See United States v. Crews,* 445 U.S. 463, 472-73 (1980) (dictum); *Young v. Conway*, 698 F.3d 69, 84-85 (2d Cir. 2012).

A fact pattern that arises with considerable frequency and provides fertile grounds for suppression of identifications is that an eyewitness gives a very vague description of the perpetrator, the police arrest or detain the respondent because s/he matches the description, and an identification procedure is then held. If the defense succeeds in invalidating the arrest or *Terry* stop on the ground that the vague description failed to provide the requisite probable cause or articulable suspicion, see §§ 23.07, 23.09 *supra,* the identification must be suppressed.

§ 25.08 STATE LAW GROUNDS OF OBJECTION TO IDENTIFICATIONS

In addition to the constitutional rules that may require suppression of an identification,

some jurisdictions have evidentiary doctrines that afford a basis for objecting to identification testimony. In many jurisdictions police officers and other observers of an out-of-court identification are barred from recounting the identification by the hearsay rule, *see, e.g., State v. Degraffenreid,* 477 S.W.2d 57 (Mo. 1972), or by the rules prohibiting third-party bolstering of identifications, *see, e.g., People v. Walston,* 99 A.D.2d 847, 472 N.Y.S.2d 453 (N.Y. App. Div., 2d Dep't 1984); *Brownfield v. State,* 668 P.2d 1165 (Okla. Crim. App. 1983); *Lyons v. State,* 388 S.W.2d 950 (Tex. Crim. App. 1965). Some jurisdictions recognize an objection to identification evidence when the identification is so unreliable that its probative value is outweighed by its prejudicial nature.

Chapter 26

Interlocutory Review of Pretrial Rulings by Means of Prerogative Writs

§ 26.01 THE AVAILABILITY OF PREROGATIVE WRITS TO OBTAIN INTERLOCUTORY REVIEW OF PRETRIAL RULINGS

In most jurisdictions, pretrial rulings denying defense motions or resolving other issues unfavorably to the defense are unappealable because of the absence of any appellate jurisdiction to entertain interlocutory appeals. *See, e.g., In the Matter of Appeal in Maricopa County Juvenile Action No. JT-295003*, 126 Ariz. 409, 411, 616 P.2d 84, 86 (Ariz. App. 1980); *In the Interest of A.M.,* 94 Ill. App. 3d 86, 88, 418 N.E.2d 484, 485, 49 Ill. Dec. 630 (1981). The ordinary means of securing appellate review of claimed errors in pretrial rulings is an appeal from the trial court's judgment adjudicating the respondent a delinquent and entering a dispositional order. See § 39.02 *infra.*

Interlocutory review by an appellate court may nonetheless be available through the prerogative writs of mandamus and prohibition. In the vast majority of jurisdictions, statutes or the common law give appellate courts the power to issue these prerogative writs. In appropriate circumstances the writs may be used to obtain immediate review of pretrial orders in delinquency cases. *See, e.g.*, *Daniel V. v. Superior Court*, 139 Cal. App. 4th 28, 39-40, 49, 42 Cal. Rptr. 3d 471, 477-78, 485 (2006) (granting a petition for a peremptory writ of mandate on the ground that the trial judge had abused her discretion by erroneously denying, as untimely, a petition for judicial disqualification under a statute that "calls for automatic reassignment [of the case] to another judge if a challenge is duly presented"); *P.V. v. District Court in and for the Tenth Judicial District,* 199 Colo. 357, 609 P.2d 110 (1980) (granting a petition for writs of prohibition and mandamus and directing the trial court to dismiss a delinquency Petition for violation of the juvenile's constitutional and statutory rights to a speedy trial); *People ex rel. Thomas v. Judges of the Family Court,* 85 Misc. 2d 569, 379 N.Y.S.2d 656 (N.Y. Supreme Ct., Special Term 1976) (issuing a writ of prohibition forbidding the Family Court to try a juvenile on a Petition that was barred by double jeopardy); *State in the Interest of Joshua,* 327 So. 2d 429 (La. App. 1976) (granting a petition for writs of mandamus and prohibition and directing the juvenile court to give a detained juvenile a probable-cause hearing); *State ex rel. Mateo D.O. v. Circuit Court for Winnebago County*, 280 Wis. 2d 575, 584, 696 N.W.2d 275, 280 (Wis. App. 2005) ("grant[ing] the petition for a supervisory writ of mandamus and direct[ing] the chief judge and circuit court to honor the [juvenile's] request for judicial substitution" pursuant to a statute that provides for automatic disqualification upon the filing of a timely request "in proper form").

Traditionally, the prerogative writs lie to compel (in the case of mandamus) or to prohibit (in the case of prohibition) action by an inferior court that is necessary to prevent the court from proceeding unlawfully because of a "lack of jurisdiction" or "gross abuse of discretion." Many pretrial rulings in delinquency cases would seem susceptible of being brought within the framework of these concepts. "Jurisdiction" is a flexible notion, as the evolution of the term in

habeas corpus practice attests. *See Johnson v. Zerbst,* 304 U.S. 458 (1938); *Fay v. Noia,* 372 U.S. 391 (1963). "Lack of jurisdiction" needs not connote the absence of any competence in a court to act at all in a proceeding; it may also signify that some fundamental principle of law disempowers the particular action which the court is taking in a matter otherwise within its competence to adjudicate. And "gross abuse of discretion" may mean almost anything an appellate court wants it to mean, as every lawyer knows. Moreover, it is not uncommon for appellate courts, when refusing to issue prerogative writs on the ground that no "abuse of discretion" appears, nevertheless to offer some gratuitous advice to the trial court regarding the appropriate exercise of its discretion or otherwise to express opinions on the merits that the trial court may take to heart thereafter. *See, e.g., Kerr v. United States District Court,* 426 U.S. 394, 405-06 (1976).

Therefore, particularly when defense counsel can urge that a pretrial order in a delinquency case (a) is plainly wrong or (b) is wrong by force of a constitutional guarantee and (c) has the effect of imposing adverse consequences upon the respondent that may be irremediable at a subsequent stage, the case for interlocutory relief by prerogative writ would seem to be strong. Thus, for example, when the trial judge has denied an indigent respondent's motion for state funds for investigative services, counsel could invoke the constitutional doctrines discussed in §§ 4.31(d) and 11.03(a) *supra* in a petition for a writ of mandamus to compel the judge to authorize the funds. In support of this application for interlocutory review, counsel could stress the crucial need for prompt investigation to find witnesses and preserve physical evidence and could argue that delaying review until appeal would irremediably deprive the respondent of the opportunity to gather evidence indispensable for a fair trial.

§ 26.02 TACTICAL CONSIDERATIONS: POTENTIAL ADVANTAGES AND DISADVANTAGES OF INTERLOCUTORY REVIEW

Counsel would be well advised to keep in mind the possibilities of using mandamus or prohibition to attempt to secure relief against unfavorable pretrial orders. Matters such as discovery, speedy trial, double jeopardy, and the right to state-paid investigative assistance and expert consultation seem particularly appropriate subjects for interlocutory review by use of the writs.

As a practical matter, counsel will frequently come to an appellate court in a more favorable posture before trial than after. After trial the result of sustaining counsel's contention will be the reversal of a judgment and the consequent waste of a good deal of judicial and prosecutorial effort. After trial the case may come before appellate judges on a record that reeks of the respondent's guilt. Under these circumstances the judges are likely to resolve all doubts in favor of the prosecution. Furthermore, particular claims may be made more persuasive and their equities more visible at the pretrial stage. For example, in postjudgment review of the denial of a respondent's request for pretrial discovery, the appellate court will have the benefit of hindsight and may say that — in light of the developments at trial — the respondent does not seem to have been hurt by not knowing whatever s/he was denied the right to know in preparing his or her

defense. On an application for a prerogative writ before trial, the appellate judges know no more about the case than does defense counsel, and they can plainly see counsel's preparatory predicament. They may rule for a respondent at this stage in a case in which they would be hard pressed to rule for the respondent after judgment.

Pursuit of interlocutory review procedures also may indirectly produce relief by inducing the prosecutor to accede to defense counsel's requests. The prospect of an appeal after judgment is so remote as to give most prosecutors little reason to capitulate on close questions that the trial court will probably decide in favor of the prosecution. By contrast, the immediate headache of having to oppose an interlocutory mandamus petition may seem to the prosecutor incommensurate with the harm of giving the respondent what defense counsel wants.

On the other hand, there are potential disadvantages to interlocutory proceedings. The most important of these is the risk of irritating the trial judge by going over his or her head to a higher court. This risk is, of course, particularly grave in those jurisdictions where juvenile cases are tried without a jury, since the judge whose pretrial rulings are being "taken upstairs" will thereafter serve as the trier of fact at trial. If counsel is not sufficiently familiar with the judge to gauge his or her likely temperamental reactions to interlocutory writ proceedings, counsel should consult other attorneys who have appeared before that judge, particularly attorneys who have sought interlocutory review of the judge's pretrial rulings.

In cases in which the respondent is detained before trial, counsel also must take into account the risk of prolonging the period of pretrial detention as a result of interlocutory proceedings. When a detained respondent is likely to receive probation in the event of an adjudication of delinquency, it may well be preferable to delay appellate litigation of all issues until the postjudgment stage, after the respondent has been released from custody and placed on probation. Even when the respondent is likely to be sentenced to a period of incarceration if found delinquent, the consequences of prolonging his or her pretrial detention must be carefully considered in the many jurisdictions where a respondent receives no "credit" at sentencing for time spent in pretrial detention. In these situations, counsel will have to weigh the likelihood of prevailing in the interlocutory proceeding and thereby improving the prospects of winning at trial against the possible harms to the respondent of protracted pretrial detention.

Chapter 27

Trial: General Characteristics; The Opening Stage

Part A. General Characteristics of the Trial

§ 27.01 THE RESPONDENT'S PRESENCE DURING THE TRIAL

Under ordinary circumstances a criminal trial cannot be held *in absentia, see Drope v. Missouri,* 420 U.S. 162, 182 (1975), and the same rule applies to juvenile prosecutions, *see, e.g., R.L.R. v. State,* 487 P.2d 27, 42-43 (Alaska 1971); *In the Matter of Rodney R.,* 119 A.D.2d 677, 500 N.Y.S.2d 805 (N.Y. App. Div., 2d Dep't 1986). The accused "has a right to be present at all important stages of trial." *McKaskle v. Wiggins,* 465 U.S. 168, 178 (1984) (dictum); *Insyxiengmay v. Morgan*, 403 F.3d 657, 669 (9th Cir. 2005); *cf. Rushen v. Spain,* 464 U.S. 114, 117 (1983) (per curiam) (dictum). *See also United States v. Salim*, 690 F.3d 115, 122 (2d Cir. 2012) (the accused's "right to be present during sentencing," which "extends to resentencing," "requires physical presence and is not satisfied by participation through videoconference"); *United States v. Crandall*, 748 F.3d 476, 481 (2d Cir. 2014) ("the Sixth Amendment right to participate in one's own trial encompasses the right to reasonable accommodations for impairments to that participation, including hearing impairments").

In most jurisdictions the right derives from several sources. It is often conferred by statute or rule of court; it is held to be protected by the common state constitutional guarantees of due process and of confrontation; and it is protected by the Due Process Clause of the Fourteenth Amendment and by the Confrontation Clause of the Sixth Amendment to the federal Constitution. The latter two components of the right overlap but are not coextensive. "The [Supreme] Court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *Kentucky v. Stincer,* 482 U.S. 730, 745 (1987) (dictum); *see also United States v. Gagnon,* 470 U.S. 522, 526 (1985) (per curiam) (dictum) (same, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)); *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (dictum) ("an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings"); *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Justice Kennedy, concurring in the judgment) (an accused's "right to be present at trial . . . derives from the right to testify and rights under the Confrontation Clause").

In the *Stincer* opinion, the Court elaborates the scope of this Due Process right by saying that it is a "right to be present at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] . . . presence would contribute to the fairness of the procedure." 482 U.S. at 745. The same opinion seems to treat the measure of the Confrontation Clause right as "whether there has been any interference with the defendant's opportunity for effective cross-examination," *id.* at 744-45 n.17, as a result of the defendant's exclusion during a stage of the

trial at which the testimony of prosecution witnesses is received, *see id.* at 739-40. But the right is broader than that because the Court has squarely held that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact" in at least one situation in which the right of effective cross-examination was not significantly implicated. *Coy v. Iowa,* 487 U.S. 1012, 1016 (1988) (holding that the Confrontation Clause was violated by a procedure under which a screen was placed between the defendant and child complainants while they testified in a sex case, with no "individualized findings" that the "particular witnesses needed special protection," *id.* at 1021). *See also Maryland v. Craig,* 497 U.S. 836, 850 (1990) (dictum) ("our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured"). (For further discussion of the *Coy* and *Craig* cases, see § 46.01 *infra*.)

Whatever the exact scope of these several rights in esoteric situations, their effect in the ordinary case is to require the respondent's physical presence in court during all proceedings in which factual matters are at issue or in which dispositive rulings are made by the court, but not during arguments of purely legal questions or discussions of matters of trial administration at sidebar or in chambers. *Cf. United States v. Gagnon*, 470 U.S. at 526-29 (Constitution not violated by defendants' absence from chambers proceedings in which a juror who had expressed concern that one defendant appeared to be sketching jury members in the courtroom was questioned by court and counsel); *Kentucky v. Stincer*, 482 U.S. at 739-47 (Constitution not violated by defendant's absence from chambers proceedings in which prospective child witnesses were examined by court and counsel to determine their competency to testify; the Court notes that the same questions asked of the witnesses in chambers could have been repeated in open court and that the trial court's ruling that the witnesses were competent was subject to reconsideration during their courtroom testimony). Many trial judges routinely permit the respondent to be present during even chambers conferences on minor matters, and counsel should ordinarily request that his or her client be allowed to attend every proceeding in the case. This will reassure the client that counsel is not "selling out" in private conversations with the judge and prosecutor and will forestall postconviction allegations of covert "deals" between counsel and the court.

Proceedings that the respondent has a right to attend may be held in his or her absence only when:

(a) the respondent has personally waived the right to be present, *see Taylor v. Illinois,* 484 U.S. 400, 418 n.24 (1988) (dictum), citing *Cross v. United States,* 325 F.2d 629 (D.C. Cir. 1963), or

(b) the court finds that the respondent has chosen voluntarily not to attend the proceedings, *see Taylor v. United States,* 414 U.S. 17 (1973) (per curiam); *cf. Tacon v. Arizona,* 410 U.S. 351 (1973), *or*

(c) the respondent is engaging in disruptive courtroom conduct which makes it impossible to carry on the trial, *see Illinois v. Allen*, 397 U.S. 337 (1970); *United States v. Ward*, 598 F.3d 1054, 1057-60 (8th Cir. 2010); *Gray v. Moore*, 520 F.3d 616, 622-25 (6th Cir. 2008).

In *United States v. Gagnon,* 470 U.S. at 528-29, the Supreme Court held that the defendant's right to attend court proceedings guaranteed by Federal Criminal Rule 43 could also be waived simply by tacit acquiescence on the part of defendants who had knowledge that proceedings were being conducted in their absence; but the Court's consideration of these same defendants' Due Process contentions on the merits implies that a *constitutional* right to attend proceedings could not be so waived. *See Taylor v. Illinois*, 484 U.S. at 417-18 (dictum); *cf. Brookhart v. Janis,* 384 U.S. 1 (1966).

The respondent has a right to be free of handcuffs and other physical restraints in the courtroom. Only when a respondent "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom," does the court have discretion to order the respondent shackled as an alternative to trial *in absentia. Illinois v. Allen,* 397 U.S. at 343; *see also Estelle v. Williams,* 425 U.S. 501, 505-06 (1976) (dictum); *United States v. Haynes*, 729 F.3d 178, 188-90 (2d Cir. 2013). In a jury trial it is "inherently prejudicial" to require the respondent to appear before the jury in fetters, *Deck v. Missouri*, 544 U.S. 622, 635 (2005); *Holbrook v. Flynn,* 475 U.S. 560, 568 (1986) (dictum), since "the sight of shackles and gags might have a significant effect on the jury's feelings about the [respondent]." *Illinois v. Allen,* 397 U.S. at 344. And even in a bench trial it has been recognized that physical restraints undermine the presumption of innocence and the dignity of the proceedings and may also impair the respondent's ability to communicate effectively with counsel in presenting a defense. *Tiffany A. v. Superior Court*, 150 Cal. App. 4th 1344, 1348, 1361-62, 59 Cal. Rptr. 3d 363, 364-65, 374-75 (2007) (granting a writ of prohibition to "preclude the use of physical restraints upon . . . minors who appear in juvenile court proceedings . . . absent an individualized determination of need for the restraints": court distinguishes the use of shackles in juvenile proceedings from the shackling of adults in criminal cases because "[t]he objectives of the juvenile justice system differ from those of the adult criminal justice system, and thus justify a less punitive approach to those who stand accused (and not yet to be found criminally culpable) before the court"; "The use of shackles in a courtroom absent a case-by-case, individual showing of need creates the very tone of criminality juvenile proceedings were intended to avoid."); *In re Amendments to the Florida Rules of Juvenile Procedure*, 26 So.3d 552, 556, 562-63 (2009) (per curiam) ("We find the indiscriminate shackling of children . . . repugnant, degrading, humiliating, and contrary to the stated primary purposes of the juvenile justice system and to the principles of therapeutic justice"; rules are amended to prohibit the use of "[i]nstruments of restraint, such as handcuffs, chains, irons, or straitjackets, . . . on a child during a court proceeding . . . unless the court finds both that: (1) The use of restraints is necessary due to one of the following factors: (A) Instruments of restraint are necessary to prevent physical harm to the child or another person; (B) The child has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents

a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior; or (C) There is a founded belief that the child presents a substantial risk of flight from the courtroom; and (2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs."); *In re Staley,* 67 Ill. 2d 33, 364 N.E.2d 72, 7 Ill. Dec. 85 (1977) (reversing a delinquency adjudication in a bench trial because the respondent was handcuffed during the trial, and rejecting the argument that the rule prohibiting restraints applies only to jury trials). *See also In the Interest of R.W.S.*, 728 N.W.2d 326, 330 (N.D. 2007) ("With respect to a juvenile court proceeding, we recognize the concerns about the effect of visible physical restraints on a jury do not apply. However, we agree with those courts holding that juveniles have the same rights as adult defendants to be free from physical restraints.").

For similar reasons a respondent who is in custody is entitled to attend the trial in civilian attire rather than institutional garb. In a jury trial this is a matter of constitutional right if the respondent makes a timely request, because "the constant reminder of the accused's condition implicit in . . . distinctive, identifiable [institutional] attire may affect a juror's judgment." *Estelle v. Williams,* 425 U.S. at 504-05. *See, e.g., Bentley v. Crist,* 469 F.2d 854 (9th Cir. 1972), and cases cited. *See also Deck v. Missouri*, 544 U.S. at 635 (dictum). And although a judge in a bench trial is ordinarily presumed to be capable of ignoring this kind of prejudicial influence, "[p]rison attire [is] . . . offensive even when there is no jury." AMERICAN BAR ASSOCIATION. STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 15-3.1 (3d ed. 1996).

If the respondent is unable to speak English or is hearing-impaired, s/he is entitled to an interpreter in order to effectuate his or her rights to be present at all proceedings and to confront witnesses. *See, e.g.,United States* ex rel. *Negron v. New York*, 434 F.2d 386, 389-90 (2d Cir. 1970); INSTITUTE OF JUDICIAL ADMINISTRATION-AMERICAN BAR ASSOCIATION JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO ADJUDICATION, Standard 2.7(B) & Commentary (1980).

§ 27.02 DEFENSE COUNSEL'S PRESENCE

Defense counsel is entitled to be present at all stages of the trial, in the courtroom or in chambers. If counsel has reason to believe that the prosecutor has communicated with the judge *ex parte* about the case during a recess, counsel should insist that the communication be placed on the record. This is especially important in bench trials, in which the disclosure of inadmissible evidence, such as the respondent's prior record, can bias the judge's factfinding.

In jury trials, counsel must also be alert for any indications that the judge has communicated orally or in writing with the jury outside of counsel's presence. These communications may provide the basis for a mistrial motion, no matter how innocuous the message. *See, e.g., Rogers v. United States,* 422 U.S. 35 (1975); *cf. United States v. United States Gypsum Co.,* 438 U.S. 422, 459-62 (1978); *but see United States v. Gagnon,* 470 U.S. 522 (1985)

(per curiam). If counsel learns that any communication or message was conveyed between the judge and jury, counsel should ordinarily object and request that a record be made before a stenographer of the contents and circumstances of the occurrence. *See Rushen v. Spain,* 464 U.S. 114 (1983) (per curiam).

Attempts by the court to impose restrictions upon communication between defense counsel and the respondent during trial should be challenged under the Sixth and Fourteenth Amendments to the federal Constitution. *See In re Gault,* 387 U.S. 1, 36 (1967) ("[t]he child 'requires the guiding hand of counsel at every step in the proceedings against him'"). In *Geders v. United States,* 425 U.S. 80 (1976), the Supreme Court held that a trial court order forbidding a criminal defendant to consult with his attorney during an overnight recess taken while the defendant was on the witness stand violated the Sixth Amendment right to counsel. However, in *Perry v. Leeke,* 488 U.S. 272 (1989), the Court upheld an order forbidding the defendant to consult with his attorney during a 15-minute recess taken at the end of the defendant's direct examination and before cross. *Leeke* distinguished *Geders* on the ground that:

> the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony — matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. . . . The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right. But in a short recess in which it is appropriate to presume that nothing but the [defendant's ongoing] testimony will be discussed, the testifying defendant does not have a constitutional right to advice.

Perry v. Leeke, 488 U.S. at 284. *See also Martin v. United States*, 991 A.2d 791, 793-96 (D.C. 2010).

§ 27.03 THE PRESENCE OF THE RESPONDENT'S PARENT OR GUARDIAN

It is the customary practice in all jurisdictions to permit the respondent's parent or guardian to attend the trial. In some jurisdictions the juvenile code or caselaw explicitly confers upon the respondent the right to have his or her parent present during trial, and a violation of that right has been held sufficient to require the reversal of an adjudication of delinquency. *See, e.g., In the Matter of John D.,* 104 A.D.2d 885, 480 N.Y.S.2d 390 (N.Y. App. Div., 2d Dep't 1984) (judge's denial of a respondent's request for a continuance for the purpose of arranging his mother's presence at trial violated the statutory requirement that a parent be notified of trial and given a reasonable opportunity to attend); *In the Interest of Hopkins,* 227 So. 2d 282 (Miss. 1969) (application of the rule on witnesses to exclude a respondent's mother from the courtroom violated the statute requiring parental presence); *State in the Interest of V.M.*, 363 N.J. Super.

529, 535, 833 A.2d 692, 696 (2003) (trial court abused its discretion by applying the rule on witnesses to exclude the respondent's parent, given that "the parent's right to be present in the courtroom" outweighs "the acknowledged goals of sequestration").

The respondent has a due process right to have his or her parent or guardian notified of the trial. *In re Gault,* 387 U.S. 1, 33-34 (1967). However, it has been held that the respondent does not have a due process right to a continuance when a parent, who has been notified of the hearing date, fails to appear because of illness. *Ronald M. v. Dunston,* 628 F. Supp. 1200 (S.D.N.Y. 1986).

§ 27.04 BENCH TRIALS: THEIR NATURE AND IMPLICATIONS FOR DEFENSE STRATEGIES AND TECHNIQUES

§ 27.04(a) Nature of Bench Trials

As explained in § 21.01 *supra,* most States provide that delinquency cases are to be tried to a judge rather than a jury. In the remaining States the respondent has the option of electing or waiving a jury trial. See § 21.02 *supra.*

Bench trials tend to be far less formal than jury trials. In many jurisdictions it is customary for defense counsel to waive opening statement. See § 29.03(a) *infra* for discussion of factors to consider in deciding whether to follow this practice. Rules of evidence are often more lax in bench trials, since both the trial judge and the appellate courts like to believe that a judicial factfinder is capable of ignoring inadmissible and even prejudicial information. See §§ 18.10(a), 21.02(b)(3) *supra.* In some jurisdictions, judges seem to feel freer in a bench trial than in a jury trial to intervene in a lawyer's direct or cross examination by posing questions directly to the witness, but counsel can (and, where appropriate, should) press for the application of the same constraints upon judicial intervention that govern jury trials. *See, e.g.*, *In the Matter of Yadiel Roque C.*, 17 A.D.3d 1168, 793 N.Y.S.2d 857 (N.Y. App. Div., 4th Dep't 2005). *See generally* Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243 (2000).

As indicated in § 21.02(b), a judge is likely to react to the facts and the law in ways that a jury would not. Judges tend to credit the testimony of police officers and other professionals, and many judges are skeptical of the testimony of the respondent and his or her family and friends. Judges tend to be far less likely than juries to decide cases on the basis of emotion. This can be damaging when the equities favor the respondent (for example, when the respondent reacted to extreme provocation that is not legally exonerating), but it can be helpful in cases in which the victim is personable. Judges are capable of understanding complex legal defenses that a jury would not, and judges may also be more willing than jurors to apply legal doctrines that favor the defense such as the requirement of proof beyond a reasonable doubt and the prohibition against drawing adverse inferences from the accused's failure to take the stand.

As indicated in § 20.05 *supra,* bench trials may be complicated by the fact that the judge has learned inadmissible information about the case or the respondent from a variety of sources. If the judge's knowledge of this information derives from presiding over the detention hearing or a suppression hearing in the case, counsel will at least be aware of the nature of the information. But if the judge's source of knowledge is a hearing of a co-respondent at which counsel was not present or a prior case of the respondent's in which s/he was represented by a different attorney or scuttlebutt around the courthouse, counsel will not even be apprised of the facts that are potentially influencing the judge.

Judges also are affected by their experience in having presided over numerous prior trials and having observed certain fact patterns recur. Occasionally, this can be helpful to the defense — for example, (1) when a judge learns to overcome his or her incredulity about assertions of outrageous misconduct by the police during interrogations and searches because s/he has heard enough credible witnesses testify to them, or (2) when a judge learns to discredit certain standard police fabrications like the "dropsie" scenario described in § 23.13 *supra.* Far more often, however, the judge's experiential background is likely to hurt the respondent by making the judge skeptical of a defense that s/he has heard too often. For example, a judge who has heard numerous respondents claim that, at the time of their arrest for possession of a firearm, they had just found the firearm and were on their way to the police station to turn it in is likely to disbelieve a respondent's testimony to that effect even when it is supported by the facts and circumstances.

§ 27.04(b) Implications for Defense Strategies and Techniques

Because of the various tangible and intangible variables that may bias the judge's factfinding and because of most judges' receptivity to legal theories supported by appellate caselaw, defense counsel is usually advised to develop defenses that involve the application of some legal doctrine. A motion for a judgment of acquittal (see §§ 32.01, 35.01-35.04 *infra*) that relies upon appellate opinions to demonstrate that the prosecution's proof of a certain element of the crime is insufficient as a matter of law will often be more effective in a bench trial than an affirmative defense that depends upon the judge's crediting defense witnesses. *See generally* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, in *Symposium on Juvenile Justice Reform*, 33 WAKE FOREST L. REV. 553, 586-93 (1998); Paul Holland, *Sharing Stories: Narrative Lawyering in Bench Trials*, 16 CLIN. L. REV. 195 (2009).

Accordingly, in preparing for a bench trial, counsel should thoroughly research the appellate caselaw on each element of the crime or crimes that the prosecution has charged. In particular, counsel should seek out any appellate decisions holding the prosecution's proof of a certain element to be insufficient as a matter of law. Thus, for example, in an assault case in which a specified amount of physical injury must be proved in order to make out the degree of assault that is charged, counsel should gather and be prepared to cite appellate decisions calling for a more serious type of injury than the prosecution is likely to be able to prove. As § 35.02

infra suggests, when the law is particularly extensive or complex, counsel should consider preparing a written memorandum of points and authorities to submit in support of a motion for a judgment of acquittal.

Given the likelihood that legal doctrines will be influential in a bench trial, counsel should also thoroughly research the caselaw recognizing and defining potentially applicable inferences and presumptions, both those that favor the defense and those that favor the prosecution. Thus, for example, counsel should be prepared to cite caselaw requiring that the judge apply a "missing witness" inference when the prosecution fails to present a witness under its control, see § 10.08 *supra,* and should be prepared to rebut the prosecution's application of the same inference against the defense.

Whenever counsel intends to present an "affirmative defense" (see § 35.05 *infra*), counsel should exhaustively research the standards that the defense must satisfy, as well as the prosecution's obligation to disprove the defense. To the extent possible, counsel will want to frame the factual testimony to precisely fit the fact patterns of prior cases in which the defense prevailed and then to cite those cases in closing argument.

Counsel should consult other defense attorneys who have appeared before the judge, to find out whether s/he applies a stringent standard of proof beyond a reasonable doubt. If so, it may be advisable to rely solely on the defensive theory that the prosecution has failed to meet its burden of proof rather than presenting defense witnesses and taking the chance that the judge will find the witnesses incredible and will use their incredibility as a basis for convicting.

In conducting a bench trial, counsel will have to calculate the judge's patience and equanimity. As §§ 29.03(a), 34.07 *infra* suggest, it may be advisable to acquiesce in local customs of waiving opening statement and of limiting the frequency of objections if insisting upon formality will do nothing more than infuriate the judge and jaundice his or her reactions to the defense case.

Before moving for recusal or disqualification of a judge, counsel should carefully consider the possibility that the judge will deny the motion, with the net result that the judge will still preside over the case but have additional reason to resent counsel and the respondent. See § 20.07 *supra.*

Finally, it is important for counsel to keep in mind that the same judge who tries the facts will also preside over the disposition. If the judge is likely to view the respondent's testimony as perjurious and to penalize the respondent for it at disposition, it may be advisable to keep the respondent off the stand and to present the defensive version of the facts through other defense witnesses or through cross-examination of the prosecution's witnesses. If the judge is likely to believe that the respondent persuaded relatives or friends to perjure themselves, these witnesses should also be kept off the stand unless their testimony could spell the difference between conviction and acquittal.

§ 27.05 JURY TRIALS: PROCEDURAL MATTERS; ADJUSTING STRATEGY AND TECHNIQUES TO THE IDIOSYNCRASIES OF JURIES

§ 27.05(a) Procedural Matters

Several aspects of jury work are described in other chapters. Chapter 21 discusses the decision whether to elect or waive a jury trial, motions challenging the composition of the jury, and pretrial investigation of prospective trial jurors. Chapter 20 discusses motions for a change of venue on the ground that prejudicial publicity or public hostility would impair the impartiality of the jury. Chapter 28 discusses the *voir dire* process and defense tactics in selecting a jury.

In jury trials, counsel must be constantly alert to factors that may bias the jurors or improperly influence their decisionmaking. When practicing in a jurisdiction where juries are accompanied during courtroom breaks by an officer with law enforcement responsibilities rather than a court bailiff, counsel should ask the judge at the outset of the trial, in the absence of the jury, to question the officer to make certain that s/he had no contact with the investigation of the case or apprehension of the respondent and has not talked about the case with officers involved. *See Turner v. Louisiana,* 379 U.S. 466 (1965); *Gonzales v. Beto,* 405 U.S. 1052 (1972) (per curiam). If, during the course of the trial, counsel has reason to believe that a juror came into out-of-court contact with the prosecutor, a prosecution witness or any law enforcement officer, counsel should ask that the judge question the juror about the contact outside the presence of the other jurors. *Cf. Smith v. Phillips,* 455 U.S. 209, 215-17 (1982). The same procedure may be followed if a juror appears ill or asleep during the course of trial. *Cf. Tanner v. United States,* 483 U.S. 107, 127 (1987) (noting that counsel's observations of jurors during trial plays an important part in spotting incapacitation of individual jurors and thereby safeguarding an accused's "Sixth Amendment interests in an unimpaired jury"). However, counsel should request that the judge, when making these inquiries, not identify counsel as the source of the information that precipitated them, because that may prejudice the juror against the defense.

If counsel encounters the jury or individual jurors in the courthouse or elsewhere during trial recesses, s/he should say a polite good morning or good afternoon and nothing else. Counsel should instruct the respondent and his or her parent or guardian to do the same. Counsel, the respondent, and the respondent's family must scrupulously avoid talking to jurors during trial about anything, even things unrelated to the case, because if conversation is observed, the juror is likely to be called to the bench to explain it, and s/he will feel that the defense has gotten him or her into trouble with the court.

§ 27.05(b) Adjusting Strategies and Techniques to the Idiosyncrasies of Jury Trials

The nuances of effective jury work depend to a large extent upon fact-specific variables pertaining to the case (the type of crime; age, race, and gender of the accused; age, race, and gender of the victim; prejudicial evidence like gory photographs; extenuating facts like the provocation that caused the respondent to act; and sympathy-arousing facts like police

mistreatment of the respondent) and pertaining to the jury that has been selected (age, race, gender, social class, and occupations of the jurors). The few generalizations that can be offered about jury work must be applied cautiously, considering these specifics.

It is advisable, whenever possible, to prove the respondent's innocence rather than relying on the hope of persuading the jury to acquit an apparently guilty respondent because the prosecution has failed to prove its case beyond a reasonable doubt. To this end, counsel should seize the initiative early in the case, presenting the defense theory in an opening statement unless its disclosure at the outset would enable the prosecutor to rebut it more effectively in the prosecution's case-in-chief. See § 29.03(b), (c) *infra.* Since most jurors expect an innocent person to testify and since many of them will be incapable of following the judge's instruction to disregard the respondent's failure to take the stand, it is usually preferable for the respondent to testify in a jury trial. The exceptions are cases in which the respondent's story is inherently incredible or s/he presents it incredibly or s/he can be impeached with evidence of prior crimes. See §§ 33.05-33.09 *infra.*

A crucial difference between a jury trial and a bench trial is that jurors are not familiar with criminal law and criminal procedure. Accordingly, the jury will often be baffled by the directions that defense counsel is taking in cross-examination. Although counsel will have an opportunity in closing argument to weave together points made during cross-examination, the argument may come too late to win over some jurors, who will already have made up their minds that counsel is fighting over irrelevant points because s/he cannot contest the major incriminating facts. In addition, even when a juror follows the points that counsel is making, there will often be so much material covered that the juror will forget much of it. Therefore, when possible, counsel should use his or her opening statement to familiarize the jury with the key points in the defense theory of the case and should then explicitly develop those points in cross-examination of prosecution witnesses and direct examination of defense witnesses.

Jurors tune out quickly when things get tedious. In examining witnesses, counsel should present the crucial facts in the simplest and most straightforward manner possible. When s/he has to make a lengthy closing argument, counsel should modulate the volume of his or her voice and use dramatic pauses to attract the jury's attention at crucial points, as well as using verbal cues like "the most important thing for you to remember is . . . ."

Exhibits are very important in a jury trial. They can be used during examinations and during closing argument as props to keep the jury's attention and to make it easier for the jurors to follow and remember testimony. Thus, for example, a lengthy oral recitation of where the respondent walked is far less comprehensible and memorable than a poster on which the respondent draws his or her path, particularly if the poster is then introduced into evidence so that it can be examined by the jurors in the jury room.

Appearances also are important in a jury trial. The jurors are likely to be impressed by a respondent who dresses well and testifies in a forthright, coherent style. They are likely to be

swayed by character witnesses and alibi witnesses who are respectable members of the community. Throughout the course of the trial, counsel should periodically consult the client as the evidence emerges and tactical decisions need to be made, so that the jury can see that the respondent is a human being rather than a fearsome criminal. Counsel should prepare the client not to laugh, look bored, or make angry remarks during trial; the jury must not get the impression either that the respondent is not taking the charges seriously or that the respondent is prone to losing his or her temper.

In conducting a jury trial, counsel must always keep in mind the jurors' prerogative of acquitting on the basis of sympathetic facts that do not amount to a legal defense. Counsel should ordinarily present any mitigating facts that are admissible, even if they do not form a part of counsel's defense theory and even if counsel does not intend to rely on them in closing argument.

§ 27.06 PREPARATION OF A TRIAL FOLDER OR "TRIAL BRIEF" AND AN EXHIBIT FILE

Orderly examination of witnesses and quick citation of relevant authority impress judges and jurors. In addition, a well-presented case is easier for the trier of fact to grasp. Counsel will ordinarily find that an indispensable aid to the orderly presentation of a case at trial is a trial folder or, as it is sometimes called, a trial brief. This folder is for counsel's own use in the courtroom. Arranged to suit counsel's taste, it may contain (1) all papers filed of record; (2) reproductions of relevant statutes and cases; (3) a checklist of questions for each witness; (4) a checklist of exhibits, indicating through which witness each will be introduced; (5) statements taken from prosecution witnesses; (6) statements taken from defense witnesses; (7) any reports prepared by defense experts; (8) reproductions of all documentary exhibits; (9) copies of defense subpoenas and their returns; (10) any other documents and all materials gathered by investigators; and, in jury trials, (11) a checklist of questions for *voir dire* and (12) proposed jury instructions with supporting citations.

A separate file should be maintained of the original documents that counsel will put in evidence, in their proper order. Counsel should ascertain before trial whether it is the court's custom to have counsel mark (that is, number) their own exhibits or whether this is done by the clerk. If the former, counsel should save possible trial fumbling by marking the exhibits in advance. Each should be designated "Defense [or Respondent's] Exhibit No. ____," so that they can be numbered before trial without reference to the possible number of prosecution exhibits.

§ 27.07 DECIDING WHETHER TO CALL THE RESPONDENT BY FIRST NAME OR LAST NAME AT TRIAL

In juvenile court in most jurisdictions, the normal practice is to refer to the respondent by first name rather than as Mr. or Ms. _____. During pretrial proceedings and bench trials, counsel should follow local custom in calling a respondent by first name or last name. It makes no sense to irritate the judge by rejecting the procedure the judge views as customary and

appropriate.

In jury trials, however, counsel is freer to deviate, since jurors do not come into trial with any expectations or knowledge of customary juvenile court practice. Usually, the respondent gains some advantage from being called by his or her first name, especially in cases in which s/he is charged with a crime of violence. The first-name usage emphasizes the respondent's youthfulness, making him or her appear less menacing and culpable. On the other hand, calling the respondent by his or her last name lends an air of formality that may bring home to the jurors the gravity of the proceedings and the magnitude of their decision. There are no hard-and-fast rules here; counsel should be guided by what s/he believes will be best with the particular jury, what s/he feels comfortable with, and what the respondent prefers. Of course, much will depend on the age of and size of the respondent: It would be ludicrous for counsel to call a diminutive 12-year-old "Mr." or "Ms."

§ 27.08 PUBLIC TRIAL

Traditionally, delinquency proceedings have been closed to the public and the press in order to effectuate the juvenile courts' policies of confidentiality. *See Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 107-08 (1979). Although some jurisdictions remain rigorous in excluding the public and the press, there has been an increasing trend toward opening delinquency proceedings to both. *See generally* Linda A. Szymanski, *Confidentiality of Juvenile Delinquency Hearings (2008 Update)*, 13:5 NATIONAL CENTER FOR JUVENILE JUSTICE (NCJJ) SNAPSHOT (May 2008) (surveying state statutes on "confidentiality of juvenile delinquency hearings" and reporting that,"[c]urrently, 14 states have statutes and/or court rules that permit or require juvenile delinquency hearings to be open to the general public," and "[a]nother 21 states open delinquency hearings to the public but place certain age/offense requirements on the openness of the hearing"; and "[f]ifteen jurisdictions have statutes and/or court rules that generally close delinquency hearings to the public"). *But see, e.g.*, *In the Matter of M.C.*, 527 N.W.2d 290, 292 (S.D. 1995) (describing the South Dakota legislature's 1991 repeal of a statute that had afforded general public access to juvenile court hearings and the legislature's substitution of a statute requiring that such hearings be "'closed unless the court finds compelling reasons to require otherwise'"). Some States authorize public access in all cases except when the likely prejudice to a juvenile respondent outweighs the public interest, *see, e.g.,* IOWA CODE ANN. § 232.39 (2014); other States permit access in cases involving respondents over a certain age or crimes of a certain magnitude, *see, e.g.,* CAL. WELF. & INST. CODE § 676 (2014); MINN. STAT. ANN. § 260B.163(1)(c) (2014); and still other States permit press access while continuing to exclude the general public, *see, e.g.,* D.C. CODE ANN. § 16-2316(e)(2) (2014); ILL. COMP. STAT. ANN. ch. 705, § 405/1-5(6) (2014).

The state's power to regulate access to juvenile proceedings is circumscribed both by constitutional rights of the respondent and by First Amendment rights of the press and public. "The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 7

(1986) [*Press-Enterprise II*].

An adult criminal defendant has a Sixth Amendment right to a public trial. *In re Oliver,* 333 U.S. 257, 266-73 (1948); *Waller v. Georgia,* 467 U.S. 39 (1984); *Presley v. Georgia*, 558 U.S. 209, 211-15 (2010) (per curiam); *Herring v. New York,* 422 U.S. 853, 856-57 (1975) (dictum); *Gannett Co. v. DePasquale,* 443 U.S. 368, 379-81 (1979) (dictum). *See also People v. Alvarez*, 20 N.Y.3d 75, 78-79, 81, 955 N.Y.S.2d 846, 847, 849, 979 N.E.2d 1173, 1174, 1176 (2012) (ordering a new trial because of the violation of Alvarez's right to a public trial: "Upon returning from the lunch recess, defense counsel notified the court that, although it had escaped his notice, defendant advised him that his parents had not been present for the morning's jury selection proceedings. Although defendant's parents were present at that time, counsel moved for a mistrial based on the earlier denial of the right to a public trial. The court denied the motion, observing that the courtroom had been filled by prospective jurors and that in 'every trial we ask the family to step out and as soon as seats are available, they are [the] first ones offered seats.' ¶ . . . The protest raised by defense counsel in *Alvarez*, both immediately after the violation and as soon as he realized that an error had occurred, was sufficient to preserve the public trial issue. Notably, the court did not take issue with the credibility of counsel's representation that he had only just learned that defendant's parents had been excluded from the courtroom; nor was there any indication that counsel was attempting to engage in some type of artifice. In these circumstances, where only five jurors had been selected, the appropriate remedy would have been to grant the request for a mistrial and start jury selection anew.").

Due process requires that juvenile respondents be accorded the same right to protect themselves from "judicial oppression [by] . . . focusing community attention upon the trial of their cases." *McKeiver v. Pennsylvania,* 403 U.S. 528, 555 (1971) (concurring and dissenting opinion of Justice Brennan). *See, e.g., R.L.R. v. State,* 487 P.2d 27, 35-39 (Alaska 1971) (holding that juvenile respondents have a state constitutional right to a public trial). *But see State ex rel. Plain Dealer Publishing Company v. Geauga County Court of Common Pleas, Juvenile Division*, 90 Ohio St. 3d 79, 82-83, 734 N.E.2d 1214, 1218 (2000) (per curiam) (holding that, notwithstanding the federal and state constitutional guarantees that give rise to a "presumption of openness" in "most criminal proceedings," the media and the public "do not have a . . . constitutional right of access to . . . juvenile delinquency proceedings, including the transfer hearing" because "[j]uvenile court proceedings have historically been closed to the public, and public access to these proceedings does not necessarily play a significant positive role in the juvenile court process"). Accordingly, the power of a juvenile court to close the proceedings over the respondent's objection and demand for a public trial is doubtless very limited. Although "the [respondent's] right to an open trial may give way in certain cases to other rights or interests, such as . . . the government's interest in inhibiting disclosure of sensitive information, . . . [s]uch circumstances will be rare [and] . . . '[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Waller v. Georgia,* 467 U.S. at 45.

When the respondent conversely requests a closed trial or does not object to one, the

constitutional issues are more complicated. Fortunately, they seldom arise in practice because neither the press nor the public cares to attend most juvenile trials, and the ordinary juvenile court judge is unlikely to worry greatly about their theoretical rights to attend if nobody shows up in the courtroom demanding those rights. In the unusual case in which anyone is likely to demand them — ordinarily, cases of sensational crimes that have sparked sufficient media interest to create a realistic possibility that representatives of the press may undertake legal proceedings to gain admittance — counsel will have to contend with First Amendment issues. *Compare Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980) (closure of trial on the merits without considering alternative means of protecting the defendant from adverse publicity held unconstitutional); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982) (mandatory closure of portions of trial on the merits of a sex offense while complainants under age 18 are testifying held unconstitutional); *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984) [*Press-Enterprise I*] (closure of *voir dire* examination of prospective jurors and sealing of the *voir dire* transcript without considering alternative means of protecting the defendant from adverse publicity and protecting jurors' compelling privacy interests held unconstitutional); and *Press-Enterprise II*, 478 U.S. at 13-15 (closure of preliminary hearing and sealing of the transcript without adequate determinations that these procedures were necessary to protect the defendant's right to a fair trial and without consideration of alternative protective measures held unconstitutional), *with Gannett Co. v. DePasquale*, 443 U.S. at 387-94 (closure of pretrial suppression hearing held constitutional). In this situation the respondent must demonstrate that "closure is required to protect the [respondent's] . . . superior right to a fair trial, or that some other overriding consideration requires closure." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 564 (plurality opinion). *See Press-Enterprise I,* 464 U.S. at 510; *Press-Enterprise II,* 478 U.S. at 13-14. The court is obliged to balance the First Amendment rights of the press and the public against the danger that open proceedings will impair the respondent's right to a fair trial and such considerations as the "purposes and traditions of the juvenile court [which] dictate that . . . the delinquency proceeding be administered (1) to avoid for one who has the defense of infancy the stigma attached to defense or conviction of 'criminal' charges and (2) to assure, to the extent possible, that the young person's experience with the law is constructive and rehabilitative." *In the Matter of Robert M.,* 109 Misc. 2d 427, 429, 439 N.Y.S.2d 986, 988 (N.Y. Fam. Ct. 1981) (footnote omitted). *See, e.g.*, *In re J.D.C.*, 594 A.2d 70, 75-77 (D.C. 1991); *In the Interest of a Minor*, 205 Ill. App. 3d 480, 488, 563 N.E.2d 1069, 1074, 150 Ill. Dec. 942, 947 (1990); *In the Matter of N.H.B.*, 769 P.2d 844, 849 (Utah App. 1989). Orders to close proceedings or to restrict press or public access must be "'narrowly tailored to serve th[e] interest'" that necessitates the closure order. *Press-Enterprise I,* 464 U.S. at 510; *Press-Enterprise II,* 478 U.S. at 9, 15. Therefore, counsel who is seeking or defending a closure order must be careful to assure that the record reflects the evidence and the judicial findings required by *Richmond Newspapers,* 448 U.S. at 580-81 (plurality opinion); *Globe Newspaper,* 457 U.S. at 608 & n.20; *see also id.* at 611 n.27; *Press-Enterprise I,* 464 U.S. at 508-13; and *Press-Enterprise II,* 478 U.S. at 13-14; *and cf. Smith v. Daily Mail Publishing Co.,* 443 U.S. at 104-05: essentially, "specific findings . . . demonstrating that first, there is a substantial probability that the [respondent's] . . . right to a fair trial [or other overriding interests] will be prejudiced by publicity [or exposure] that closure could prevent and, second, reasonable alternatives to closure

cannot protect the [respondent's] . . . rights," *Press-Enterprise II,* 478 U.S. at 13-14. *Accord*, *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 151 (1993) (per curiam). *See, e.g.*, *In re J.D.C.*, 594 A.2d at 77-79; *In the Interest of a Minor*, 205 Ill. App. 3d at 490-92, 563 N.E.2d at 1076-77, 150 Ill. Dec. at 949-50; *In the Matter of M.C.*, 527 N.W.2d at 292-94; *In the Matter of N.H.B.*, 769 P.2d at 852-53.

As a tactical matter the defense will ordinarily want closure. Because the only juvenile cases that attract press attention are those involving heinous crimes, media coverage is likely to be highly unfavorable to the respondent, placing pressure upon the judge to convict. The exceptions, as explained in Justice Brennan's concurring and dissenting opinion in *McKeiver v. Pennsylvania,* are cases in which the respondent is charged with a political crime and "there may be a substantial 'temptation to use the courts for political ends,'" 403 U.S. at 556, or in which the circumstances of the case or the biases of the judge create other dangers of "misuse of the judicial process," *ibid.*

When a crime has stirred strong emotions in the community or in the victim's family, victim's-rights advocates or family members who want to see a respondent convicted and severely punished may seek to display their support for these results in various ways — by wearing mourning garb or message-bearing T-shirts or buttons in the courtroom (if spectators are admitted to the trial), by conducting demonstrations outside the courthouse, and so forth. In jurisdictions where delinquency charges are tried to a jury, counsel should move for an order prohibiting all such exhibitions in locations where the jury may be exposed to them. The motion should invoke the court's inherent authority to regulate its proceedings so as to "preserve the calm and dignity of a court," *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Justice Kennedy, concurring), and to avoid "a risk of improper considerations" affecting the jury's fair and impartial deliberation of the case, *id*. at 82 (Justice Souter, concurring). *See, e.g.*, *Wright v. State*, 276 Ga. 419, 420, 577 S.E.2d 782, 784 (2003) ("[t]he trial court forbade those wearing the T-shirts [bearing the victim's picture] from entering the courtroom, and the record does not show that any juror was ever exposed to a relative of . . . [the victim] who was wearing one."); *Johnson v. Commonwealth*, 259 Va. 654, 676, 529 S.E.2d 769, 781-82 (2000) ("When Johnson raised his objection to the buttons at the beginning of trial, the court ruled that the spectators would not be permitted to display the buttons in any manner that would allow the jurors to see them. The court also ruled that anyone wearing a button was required to refrain from any contact with any of the jurors."); *State v. Speed*, 265 Kan. 26, 48, 961 P.2d 13, 30 (1998) ("[I]t would seem that the wearing of such buttons or t-shirts is not a good idea because of the possibility of prejudice which might result. Under the circumstances, it would have been better for the district court to have ordered the buttons removed or the t-shirts covered up."); *State v. Rose*, 112 N.J. 454, 541-42, 548 A.2d 1058, 1104 (1988) ("[A] trial court's paramount responsibility in presiding over a criminal trial is to assure that the proceedings are conducted fairly and that a verdict is rendered impartially by the jury. To that end, a court has broad discretionary powers that may be exercised to protect the jury from extraneous pressures that might affect the proper discharge of its sworn duty. In appropriate circumstances, that power might properly be exercised by imposing limitations on the dress of police or correction officers, by prohibiting the display of buttons or

emblems, or by other proscriptions necessary to preserve decorum and an atmosphere of impartiality in the courtroom."). *Cf. Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt."). The motion should also invoke the state and federal due process guarantees of a fair trial by an impartial jury (see § 20.03(b) *supra*; § 28.03(a), subpart (iv) *infra*). *See State v. Franklin*, 174 W. Va. 469, 475, 327 S.E.2d 449, 455 (1985). The extent of federal constitutional protection in this area is cloudy in the wake of *Carey v. Musladin*, so it is particularly important for counsel to cite the respondent's state as well as federal rights to due process and to trial by an impartial jury. See § 7.09 *supra*.

§ 27.09 TRANSCRIPTION OF PROCEEDINGS AND THE RESPONDENT'S RIGHT TO OBTAIN A TRANSCRIPT

In most jurisdictions trials in juvenile court, like trials in adult criminal court, are routinely attended by a court reporter or stenographer who records the proceedings at public expense. Whenever this is not so, counsel should arrange to have a reporter present to record the trial proceedings; and if the respondent is indigent, counsel should move the court to order the trial recorded without cost to the defense. The constitutional right of an indigent to a state-paid transcription of stenographically recorded trial testimony in the event of an appeal is firmly settled, see § 39.02(b) *infra,* and on grounds which logically compel the conclusion that the indigent has a cognate right to have the proceedings recorded *in forma pauperis* in the first place. *See, e.g., State in the Interest of Collins,* 288 So. 2d 918 (La. App. 1973); *see also In re Gault,* 387 U.S. 1, 58 (1967) (describing the burdens imposed upon the judicial system when a juvenile court fails to transcribe the trial).

Counsel should be alert to local practices under which some portions of the trial, such as the closing arguments of counsel, are not transcribed. Counsel should request their transcription except when it is absolutely clear that nothing of any significance will occur in the proceeding. A full transcript is indispensable whenever there is any prospect of an appeal, since, for example, appellate courts reviewing a trial in which the closing arguments have not been transcribed are perfectly capable of calling "harmless error" the erroneous admission of the piece of inadmissible evidence that the prosecutor used to clinch his or her summation.

In major trials it is ordinarily possible for a respondent who can afford it to procure a "day transcript" — that is, to arrange with the court reporter to have each day's testimony transcribed in the afternoon and delivered to counsel in the evening for use at trial the next day. This is a valuable aid for many purposes: cross-examining prosecution witnesses, reviewing the testimony of defense witnesses to be sure that no gaps are left in the proof, quoting from the evidence in argument to the jury. Because of its considerable utility and its availability to those with money, the argument that an indigent has the right to the same service without cost is cogent. See § 4.31(d) *supra.* Accordingly, counsel should not hesitate to move for a free day transcript in a long

or complicated trial on a serious charge.

Part B. The Opening Stage of the Trial

§ 27.10 THE PRELIMINARY CONFERENCE WITH THE JUDGE BEFORE TRIAL BEGINS

In most cases it is customary for the judge, the prosecutor, and defense counsel to confer briefly immediately prior to the commencement of trial, to review the status of pretrial matters and assure that all pending motions that should be disposed of before trial have been disposed of; to estimate the probable length of trial and to plan convenient recesses; to make arrangements to accommodate the convenience of an expert witness and the like; to discuss any problems occasioned by the failure of witnesses to appear; and sometimes to attempt to expedite matters by stipulations. In a bench trial this pretrial conference is immediately followed by opening statements or, if counsel have waived openings (see § 29.03(a) *infra*), by the presentation of the prosecution's first witness. In a jury trial the pretrial conference is immediately followed by *voir dire* examination of prospective jurors. See Chapter 28.

Counsel may be well advised to request such a pretrial conference if one is not routinely held. Its utility should be considered for the purposes, among others, of:

(a) *Attempting to enlist some judicial support if counsel feels that the prosecutor is taking an unreasonable position in pressing certain charges that should be dropped or "trying out" an agreed sentencing recommendation on the judge* (see § 14.06(c)(2) *supra*). Judges differ considerably on whether they will involve themselves in plea negotiation and what they regard as a reasonable disposition of particular kinds of cases. Counsel who is not familiar with the attitudes of the presiding judge should inquire of other defense attorneys who have had experience with the judge before undertaking to pursue this goal.

(b) *Anticipating evidentiary problems that will arise at trial and attempting to resolve them.* If counsel anticipates that the prosecutor will attempt to introduce items of evidence whose admissibility the defense plans to contest, and particularly if the evidence will be prejudicial to the respondent, counsel should consider making a motion *in limine* at the pretrial conference for a ruling excluding the evidence. *Cf.* § 7.03 *supra.* In a jury trial such a ruling ensures that the evidence will not reach the jury through the prosecutor's opening statement or through a witness who blurts out the matter before defense counsel can object. In a bench trial, counsel may be able to persuade the judge to rule on the admissibility of the evidence without listening to its content (for example, ruling in the abstract that the respondent's prior juvenile record is inadmissible for impeachment except to the extent that it consists of *crimen falsi,* without hearing what kind or number of adjudications of delinquency it does consist of) or, if the content of the evidence is material to a ruling on its admissibility, certify the issue to another judge for resolution. See § 30.07(a) *infra*; see also §§ 20.05-20.07 *supra.* If the judge is unwilling to rule until the prosecutor has actually sought to introduce the challenged items of evidence at trial, counsel should request

an order that the prosecutor refrain from mentioning the evidence in opening statement and conduct examinations of witnesses in a fashion that will permit both a defense objection and a ruling on it before it is disclosed to the trier of fact.

(c) *Agreeing to stipulate certain matters, in the interest of trial convenience* (see § 30.02(b) *infra*).

(d) *Obtaining agreement that certain witnesses need not be called by either party and that neither party will request or be entitled to a missing witness instruction or inference because of the other party's failure to call them.* (See § 10.08 *supra.*) Counsel may also want to seek other agreements or advance judicial rulings on matters that will determine whether s/he is going to call particular witnesses: for example, an agreement or ruling that the presentation of good-character evidence by the defense will not open the door to the prosecutor's use of certain prior delinquency adjudications of the respondent in cross-examining the character witnesses (see §§ 30.07, 33.17 *infra*).

(e) *Obtaining discovery of the prosecution's case.* As explained in § 27.12 *infra,* in those jurisdictions where the prosecutor is obliged by discovery rules to turn over prior statements or convictions of prosecution witnesses after, but not before, the witness has concluded his or her direct examination, it may be possible to invoke the judge's discretion to order that these materials be delivered to defense counsel at some earlier time — at the beginning of trial or during a recess prior to the witnesses' testimony — by pointing out that this will avoid mid-trial delays. In addition, the defense will usually obtain some degree of discovery of the prosecution's case simply by raising and discussing the various matters noted in subsections (a)-(d) *supra* and similar matters.

(f) *Impressing the judge.* When the judge already knows and respects the prosecutor but defense counsel is a stranger to the court, defense counsel starts off at a significant disadvantage. In these circumstances the pretrial conference is an excellent opportunity for defense counsel to make a good impression on the judge by demonstrating counsel's preparation and reasoned judgment.

(g) *Getting a sense of the judge's attitude toward the case.* Counsel will want to learn, if s/he can, both how the judge is likely to react to certain kinds of evidentiary issues at trial (for example, whether the judge is disposed to exercise liberally or sparingly the court's discretion to exclude prejudicial matter (see § 30.03 *infra*); whether the judge is likely to respond favorably to a highly technical hearsay argument) and how the judge is likely to react to the case and to the respondent at sentencing in the event of conviction if the defense presents one or another line of evidence or argument. The answers to these questions may not only affect counsel's trial strategies but, in some cases, suggest the wisdom of a last-minute guilty plea instead of trial.

§ 27.11 THE RULE ON WITNESSES

The trial judge possesses "broad power to sequester witnesses before, during, and after their testimony." *Geders v. United States,* 425 U.S. 80, 87 (1976) (dictum); *see also Perry v. Leeke,* 488 U.S. 272, 281-82 (1989). Usually either party may request that all witnesses who have not yet testified in the case (and also those who may be recalled) be excluded during the taking of testimony. This is called, in the jargon, *asking for the rule on witnesses* or, simply, *asking for the rule.*

Counsel should normally invoke the rule on witnesses. It tends to give the defense an advantage in all cases in which the respondent is going to testify: Because the respondent cannot be excluded under the rule on witnesses (*ibid.;* see also § 27.01 *supra*), s/he ordinarily will be the only witness who has heard all the others. (In cases in which the respondent's parent or guardian will be a witness, counsel can oppose application of the rule on witnesses to exclude the parent or guardian. *See, e.g.*, *State in the Interest of V.M.*, 363 N.J. Super. 529, 535, 833 A.2d 692, 696 (2003); *In the Interest of Hopkins*, 227 So.2d 282 (Miss. 1969). In some jurisdictions, a victims' rights statute or state constitutional provision may establish an exception to the rule on witnesses for the victim and possibly also for the parent of a minor victim. *See, e.g.*, *State v. Uriarte*, 194 Ariz. 275, 277-79, 981 P.2d 575, 577-79 (Ariz. App. 1998); *see generally* Jay M. Zitter, *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R.5th 343 (2001 & Supp.).)

The rule is not ordinarily applicable to expert witnesses, but the court will consider excluding them in a particular case if there appears reason to do so.

In some courts a specific request is required if the rule is invoked against police witnesses: There is some sort of tacit agreement that they are not covered by an exclusion order unless their coverage is explicit. Counsel should explicitly mention them. A prosecutor will sometimes attempt to defeat the rule by asking that the investigating officer be permitted to remain at the prosecution table "to assist with the case." Defense counsel should strongly object to this procedure. There is no reason why a properly prepared prosecuting attorney needs assistance.

In cases involving a prosecution witness who is a child, when counsel's pretrial investigation indicates that the child has been coached by a parent, counsel should approach the bench at the beginning of the trial and request that the parent be excluded from the courtroom until after the child has testified, whether or not the parent is going to be a witness.

If the trial is conducted in a jurisdiction that permits press attendance at delinquency proceedings, see § 27.08 *supra,* and if media coverage of the trial is expected to be intensive, counsel should consider requesting not only that prosecution witnesses be excluded from the courtroom when they are not testifying but also that they be sequestered throughout the trial. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 581 (1980) (plurality opinion) (dictum). If

this request is denied, counsel should ask that at least the court bring all of the witnesses into the courtroom before the trial begins and admonish them not to read anything in the papers, watch anything on TV, or listen to anything on the radio about the case and not to discuss it with other people or listen to others discuss it, until after they have testified and been relieved from further attendance. Counsel should make clear that this latter request is not being made as an alternative to the request for sequestration previously denied and that counsel is preserving a claim of error in the denial of the first request even if the second is granted.

§ 27.12 DISCOVERY AT TRIAL

§ 27.12(a) Defense Discovery

Chapter 9 describes the information and materials that the respondent can obtain from the prosecutor in pretrial discovery. In many jurisdictions the prosecutor is obliged to turn over certain additional items at trial that s/he was not obliged to disclose prior to trial.

§ 27.12(a)(1) Prior Statements of Witnesses

The prosecutor is commonly required to furnish the defense with copies of all prior statements of prosecution witnesses, to the extent that the defense requests them. *See, e.g.,* MINN. RULE JUV. DELINQUENCY PROC. 10.04(1)(A) (2014). Although some jurisdictions require that these statements be delivered to the defense before trial, *see, e.g.,* FLA. RULE Juv. PROC. 8.060(a) (2014), other jurisdictions allow the prosecutor to withhold them until trial and to turn them over to defense counsel only at the commencement of the trial, *see, e.g.,* N.Y. FAM. CT. ACT § 331.4(1)(a) (2014), or from time to time during trial, at the conclusion of each respective witness's direct examination (*see, e.g., In re S.W.B.,* 321 A.2d 564 (D.C. 1974)).

In jurisdictions in which the defense is not technically entitled to obtain the prior statements of each witness until after the witness has testified on direct examination, counsel can often persuade the prosecutor (or, if persuasion fails, solicit the judge's assistance in pressuring the prosecutor) to turn over the prior statements of all prosecution witnesses at the beginning of the trial in order to avoid mid-trial delays caused by defense counsel's need to scrutinize the statements of every witness when counsel first receives them, during the period between each witness's direct examination and cross-examination. If the prosecutor has not turned the statements over to defense counsel before trial and has indicated that s/he does not intend to turn them over until each witness has testified on direct examination, counsel should ordinarily inform the court of this situation at the pretrial conference (see § 27.10 *supra*) and should seek the court's assistance in obtaining the statements earlier. Counsel might urge, for example, that the statements be turned over at the beginning of trial "in the interest of trial efficiency and so that I will not have to be continually requesting recesses to read statements in the middle of each witness's testimony." Prior statements of prosecution witnesses can be extremely useful in cross-examining their makers (see § 31.10 *infra*), and the earlier counsel obtains the statements, the more time s/he will have to use them in planning cross-examination. Obtaining the statements

early also enables counsel to start cross-examination immediately after the completion of direct examination in cases in which this seems desirable in order to deny a witness the opportunity to reflect and regroup between direct and cross or in order to begin undercutting a witness before the witness's testimony on direct "sinks in" and makes indelible impressions on the trier of fact. In a jury trial, counsel may also want to be prepared to begin cross-examination immediately in order to avoid the jury's thinking that s/he is delaying cross because the witness has "stumped" the defense with seriously damaging testimony.

If a prosecutor intentionally violates a statute or court rule by refusing to divulge witnesses' prior statements or if the prosecutor is unable to comply because the prosecuting authorities or the police have destroyed or lost the statements, counsel can seek sanctions such as the preclusion (or striking) of the testimony of the witness whose statements have not been furnished to the defense. In some jurisdictions the applicable statute or court rule specifically provides for these sanctions. In jurisdictions where it does not, counsel can base a request for sanctions upon the court's inherent authority to enforce the statute or court rule, as well as upon the constitutional doctrines described in § 9.09 *supra.*

In jurisdictions that do not have statutes or rules providing for disclosure of the prior statements of prosecution witnesses, counsel can invoke the constitutional doctrines described in § 9.09 as the basis for an argument that the court should order disclosure.

§ 27.12(a)(2) Prior Criminal Records of Witnesses

Some jurisdictions also require the prosecutor to turn over to the defense at trial any records of judgments of conviction of prosecution witnesses and information about any charges that are pending against prosecution witnesses. *See, e.g.,* MINN. RULE JUV. DELINQUENCY PROC. 10.04(1)(A) (2014) (including juvenile delinquency adjudications); N.Y. FAM. CT. ACT § 331.4(1)(b)-(c) (2014). In jurisdictions in which the applicable statute, court rule, or caselaw does not already provide for this kind of disclosure (including the disclosure of juvenile delinquency adjudications), counsel should invoke the constitutional doctrines described in § 9.09 *supra* in demanding all prior convictions and juvenile adjudications of prosecution witnesses.

In jurisdictions in which the prosecutor is merely required to turn over information about prior convictions and not the record of the judgments of conviction, counsel can usually obtain a certified record of the judgments from the court in which the convictions were handed down. A certified record will be necessary to prove the conviction if the witness denies the conviction when asked about it on cross-examination. See § 31.11 *infra.*

For techniques for impeaching witnesses with their prior record, see *id*.

§ 27.12(b) Prosecutorial Discovery

In some jurisdictions the prosecution has a right to discovery of the written or recorded

statements of defense witnesses prior to trial or at the commencement of the defense case or at the conclusion of each defense witness's direct examination. *See, e.g.,* FLA. RULE JUV. PROC. 8.060(b) (2014); N.Y. FAM. CT. ACT § 331.4(2)(a) (2014). Counsel should ordinarily resist any attempt by the prosecutor or the judge to compel the production of defense witnesses' statements before the commencement of the defense case at trial, insisting that the respondent has a constitutional prerogative to delay until that time the decision whether to present evidence. See § 9.12 *supra.* Insofar as local statutes or court rules require earlier disclosure, their constitutionality can be challenged under the principles discussed in that section. Statutes or rules that purport to require defense disclosure without requiring similar disclosure by the prosecution should be challenged under *Wardius v. Oregon,* 412 U.S. 470 (1973). See § 9.09(b)(7) *supra.* And see §§ 8.10, 9.13 *supra* for suggestions of ways in which counsel can insulate his or her own notes of pretrial interviews with defense witnesses as "work product."

§ 27.13 REQUESTS BY THE COURT THAT COUNSEL ESTIMATE THE LENGTH OF TIME THAT THE DEFENSE CASE WILL TAKE

Frequently, at the commencement of the trial, the judge will ask the prosecutor and defense counsel how long the case will take and how many witnesses each attorney intends to present. In a bench trial this inquiry is not particularly problematic so long as counsel is careful to emphasize that his or her assessment is extremely tentative and that s/he will not make any final decisions about defense evidence until after s/he has heard the prosecution's case-in-chief. In a jury trial, however, the inquiry can be deadly if made in front of the jury. Since jurors, unlike a judge, are not likely to understand the necessity for flexibility in any trial plan, they may respond to a later change of defense plans by deducing that defense counsel has found the prosecution's evidence more formidable than anticipated or has discovered mid-way through trial that the respondent and his or her witnesses were lying.

Accordingly, if asked in front of the jury about the expected length of the defense case or the number of defense witnesses, counsel should ask leave to approach the bench. Out of the hearing of the jury, s/he should explain that s/he has not yet decided whether to present evidence; that s/he wishes to hear the prosecution's case before s/he determines how to conduct the defense; that s/he will be prejudiced if s/he is forced to make a commitment in the presence of the jury at this time; and that s/he will be equally prejudiced if the jury is informed of counsel's indecision. S/he should then offer the judge for the court's own planning purposes the best estimate s/he can make of the probable length of the defense case if s/he does present evidence, and s/he should request that this estimate not be mentioned in the hearing of the jury.
If the judge insists on an announcement in open court or discloses counsel's estimate to the jury, counsel should object on the grounds of the federal and state constitutional privileges against self-incrimination and guarantees of the right to effective assistance of counsel. Counsel should point out that the purpose and effect of the self-incrimination privileges are to allow the defense to reserve the option of presenting or not presenting evidence until after the prosecution has proved its case; to require an election before that stage violates the privileges and also violates the respondent's constitutional rights to counsel by impeding counsel's ability to make an

advised decision with regard to how the defense should be conducted. *Cf. Brooks v. Tennessee,* 406 U.S. 605 (1972); *Lakeside v. Oregon,* 435 U.S. 333, 339 n.9 (1978) (dictum); *Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980) (dictum).

If a sidebar conference is refused, counsel should reply to the judge's inquiry by saying that it is difficult to tell how long the case will take, that it depends on the prosecution's evidence, how the cross-examination goes, the availability of witnesses, and a number of matters that are not yet evident. If the court attempts to put counsel down or to nail counsel down, counsel may want to move for a mistrial on the ground that requiring a commitment of evidence by the defense before the prosecution has presented a *prima facie* case violates the Fifth and Sixth Amendments and parallel state constitutional guarantees.

Chapter 28

Selecting the Jury at Trial: The *Voir Dire*

§ 28.01 INTRODUCTION

In a jury trial the *voir dire* is the process by which the actual trial jurors (and alternates) are selected from the jury panel. Prior to the *voir dire,* counsel has had no real hand in the jury selection process, apart from the possibility of attacking it here or there for procedural defects. At the *voir dire,* counsel will have the opportunity to play a large part in determining what particular jurors are going to sit on the trial of the case. S/he will also have his or her first chance to talk to those jurors — directly or indirectly — and to say some things to them that will strongly affect their attitudes toward counsel, the respondent, and the case.

§ 28.02 DEFENSE OBJECTIONS TO THE PANEL PRIOR TO THE *VOIR DIRE*

Before or at the time the panel is brought into the courtroom, counsel is given a list of the individuals on it, ordinarily indicating names, addresses, and occupations. Counsel's previous investigation of the venirepersons, coupled with this list of those among them who have been selected for the panel, may suggest some ground of challenge to the panel collectively. See §§ 21.03-21.04 *supra.* If counsel decides to make such a challenge, s/he should do so before the panel is brought in to the courtroom. If that is not possible, s/he should ask leave to approach the bench and should make the challenge out of the hearing of the prospective jurors. Counsel is hardly going to be received favorably by the jurors if, on their first contact, counsel is cast in the role of an objector — and one who opposes their very presence in court.

§ 28.03 *VOIR DIRE* PROCEDURE GENERALLY

Practice on *voir dire* differs widely from jurisdiction to jurisdiction. Its common features are these: Prospective jurors are told something about the case and the parties and participants in it. They are questioned, either individually or collectively or in both ways, to determine whether any of them are disqualified or subject to challenge and whether any should, for some reason, be excused. The prosecution and defense are given the opportunity to object to any juror on grounds sufficient in law to preclude him or her from sitting; and the trial jurors (and alternates) are selected from the remaining panelists through the exercise of peremptory challenges or "strikes" by prosecution and defense.

From this general description it will be noted that there are two sorts of challenges to individual jurors: challenges for cause and peremptory challenges.

§ 28.03(a) Challenges for Cause

Challenges for cause assert that a prospective juror is not lawfully able to serve. They

may be based on any of a number of grounds, the most important being:

(i) lack of statutory qualifications;

(ii) implied bias (direct interest in the outcome of the case; personal relationship to counsel, to the respondent, to the complainant or victim, to a witness, and so forth);

(iii) express bias (a firm conviction of guilt or innocence that the juror is unable to put out of account);

(iv) exposure to prejudicial publicity or to other extrajudicial influences that may render the juror not impartial (this is the constitutional standard of the Supreme Court's Due Process cases, *see, e.g., Rideau v. Louisiana,* 373 U.S. 723 (1963); *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Patton v. Yount,* 467 U.S. 1025, 1035 (1984) (dictum); see also § 20.03(b) *supra,* which is somewhat more favorable to the respondent than the usual state-law concept of express bias); in particular, a "juror's assurances that he is equal to [the] . . . task [of laying aside his or her previously-formed opinions and rendering a verdict based solely on the law and the evidence] cannot be dispositive of the accused's rights, and it remains open to the [respondent] . . . to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality,'" *Murphy v. Florida,* 421 U.S. 794, 800 (1975) (dictum); *see Irvin v. Dowd,* 366 U.S. 717 (1961); *compare Smith v. Phillips,* 455 U.S. 209 (1982); and

(v) any state of mind that makes it impossible for the juror to follow the court's instructions and to decide the case according to law.

The number of challenges for cause that counsel may make is, of course, unlimited; the challenges are tested for legal sufficiency by the court, but as long as they are sound, every juror susceptible to them must be excused.

§ 28.03(b) Peremptory Challenges

Peremptory challenges enable each party to veto a limited number of jurors. Except when the peremptories appear to be employed in a discriminatory manner to exclude certain cognizable groups, a peremptory challenge can be made by the prosecutor or defense counsel for any reason whatsoever, and the attorney cannot be required to give a justification or explanation. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, defense counsel can object to a prosecutor's use of peremptories to exclude "racial minorities" (*Miller-El v. Dretke*, 545 U.S. 231, 235 (2005)) or women (*J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127 (1994)), and, at least arguably, can invoke *Batson* to oppose the systematic exclusion of other cognizable groups as well (*see* NJP LITIGATION CONSULTING (Elissa Krauss & Sonia Chopra, eds.), JURYWORK:

SYSTEMATIC TECHNIQUES § 4:14 (2d ed. 2012-13)). The respondent can invoke the *Batson* doctrine even if s/he is not a member of the excluded group. *Powers v. Ohio*, 499 U.S. 400 (1991). Defense counsel's peremptory challenges are also subject to *Batson* objection by the prosecutor, at least insofar as they appear to be aimed at excluding racial minorities. *See Georgia v. McCollum*, 505 U.S. 42 (1992).

Under *Batson*, defense counsel can make out a *prima facie* case of discriminatory jury selection by showing that the prosecutor has exercised peremptories to exclude members of an "arguably targeted class" (*Miller-El v. Dretke*, 545 U.S. at 239) and that the numbers of group members excluded or other circumstances raise an inference that the prosecutor is challenging these persons on account of their membership in that group. The burden on defense counsel at this first step in the process of applying *Batson* (commonly called *Batson*'s "three-step inquiry," *Rice v. Collins*, 546 U.S. 333, 338 (2006), or *Batson*'s "burden-shifting framework," *Johnson v. California*, 545 U.S. 162, 170 (2005)) is simply to present enough evidence of various sorts so that "the sum of the proffered facts gives 'rise to an inference of discriminatory purpose,'" *id.* at 169 — an inference "that discrimination may have occurred," *id*. at 173. It is not necessary for the defense to show that "'it is more likely than not . . . [that the prosecutor's] peremptory challenges, if unexplained, were based on impermissible group bias.'" *Id*. at 168. *See also Madison v. Commissioner, Ala. Dept. of Corrections*, 677 F.3d 1333, 1338-39 (11th Cir. 2012) ("Madison argues that the Court of Criminal Appeals unreasonably applied clearly established federal law because the court used the wrong standard for establishing a prima facie case when it required Madison to establish 'purposeful racial discrimination' rather than to provide sufficient support for an inference of discrimination. We agree that requiring Madison to 'establish[ ] purposeful discrimination' is the wrong standard to apply for the first step of *Batson*, which only requires Madison to produce sufficient 'facts and any other relevant circumstances' that 'raise an inference . . . of purposeful discrimination.'" ¶ "Madison presented to the Alabama courts several relevant circumstances that in total were sufficient to support an inference of discrimination. . . . In addition to pointing out that the prosecutor used a number of his strikes against a variety of black jurors, Madison noted: (1) the failure of the prosecutor to ask questions to three of the challenged jurors, . . . (2) the case's racially sensitive subject matter, . . . and (3) the district attorney's office's prior discrimination in jury selection, occurring both in Madison's first trial and in other state cases."). "'Once the . . .[accused] makes [such] a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging . . . jurors' within [the] . . . arguably targeted class" and to "'give a clear and reasonably specific explanation of . . . [the prosecutor's] legitimate reasons for exercising the [peremptory] challeng[e].'" *Miller-El v. Dretke*, 545 U.S. at 239, quoting *Batson*, 476 U.S. at 97, 98 n.20. After the prosecutor has stated his or her reasons for challenging the jurors in the targeted class whom s/he has excused, "the court must . . . determine whether the defendant has carried his burden of proving purposeful discrimination. . . . This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Rice v. Collins*, 546 U.S. at 338, quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). *See also, e.g.*, *Adkins v. Warden*, 710 F.3d 1241, 1255-58 (11th Cir. 2013); *Harris v. Hardy*, 680 F.3d 942, 952-66 (7th Cir. 2012);

Ali v. Hickman, 584 F.3d 1174, 1192-96 (9th Cir. 2009).

In urging that a prosecutor's proffered race-neutral reasons for excusing jurors of the targeted class should not be credited, defense counsel would do well to note and argue that (1) the characteristics which the prosecutor claims explain his or her peremptory challenges of jurors belonging to the targeted class are shared by jurors who do not belong to the targeted class and who were not peremptorily challenged by the prosecutor, and/or (2) the existence of those characteristics was elicited by prosecutorial *voir dire* examination of jurors who belong to the targeted class, and the prosecutor did not question jurors who do not belong to the targeted class in ways calculated to elicit the existence of the characteristics. *See Snyder v. Louisiana*, 552 U.S. 472, 483-86 (2008); *Miller-El v. Dretke*, 545 U.S. at 244-52, 255-63; *Miller-El v. Cockrell*, 537 U.S. 322, 342-45 (2003). If the judge concludes that the prosecutor has acted with a purpose to prune the jury of members of the targeted class as such, the judge must either discharge the venire and begin anew with another panel or reinstate the challenged jurors. *See Batson*, 476 U.S. at 96-100 & n.24. *See generally* NJP LITIGATION CONSULTING (Elissa Krauss & Sonia Chopra, eds.), JURYWORK: SYSTEMATIC TECHNIQUES, ch. 4 ("*Batson* and the Discriminatory Use of Peremptory Challenges in the 21st Century") (2d ed. 2012-13).

The prosecution and the defense each has a limited number of peremptory challenges specified by law (ordinarily more in felony than in misdemeanor cases). It is by the exercise of these peremptory challenges, or "strikes" that counsel usually goes about trying to get the sort of jury s/he wants. S/he pursues the same ends, of course, by unearthing good legal grounds to challenge for cause a juror whom s/he does not like or by declining to challenge a juror, obviously challengeable for cause, whom s/he does like. But challenges for cause are of limited utility in this regard; peremptories are counsel's major tool for shaping the character of the jury.

§ 28.03(c) Variations in *Voir Dire* Procedure

Beyond the generalities noted thus far, it is difficult to describe *voir dire* procedure except as it is practiced in a particular court. Its variations are extreme. In some jurisdictions the judge conducts the *voir dire* questioning, while in others the attorneys do. In some jurisdictions the entire panel is questioned collectively, challenges for cause are made, and then 12 are placed in the box and peremptories are exercised; in other jurisdictions each individual juror is questioned, and then either challenged (for cause or peremptorily) or accepted; in still others, a group of 12 is questioned, challenges are made to these 12, and then new panelists are brought in — and questioned and challenged — as replacements for the original jurors who were struck for cause or peremptorily. Some jurisdictions take the view that *voir dire* questions must be limited to subjects that could give rise to challenges for cause; any enlightenment provided by the answers that enhances counsel's judgment on the intelligent exercise of peremptory challenges is supposed to be a mere by-product of inquiries directed to implied bias, to lack of statutory qualifications for jury service, or to similar grounds of challenge for cause. Other jurisdictions, however, recognize that a legitimate purpose of *voir dire* questioning is to enable counsel to find out the sort of person the prospective juror is, in order to determine whether or not to strike the

juror peremptorily.

Local practice must be consulted in preparing for *voir dire,* and particularly in drafting *voir dire* questions. The following sections will address, in general terms, the defensive functions of *voir dire* and the types of questions that counsel can ask (or can request that the judge ask) at *voir dire.*

§ 28.04 DEFENSIVE FUNCTIONS OF THE *VOIR DIRE;* PREPARED QUESTIONS; AUTHORITIES

The principal uses to which counsel can effectively put the *voir dire* are these:

(1) Discovering factual grounds to challenge individual jurors for cause (see § 28.05 *infra*).

(2) Making a record to support on appeal counsel's claims of error in the denial of earlier challenges to the venire (see § 21.03 *supra*) or of motions for change of venue on grounds of prejudicial publicity and the like (see § 20.03(b) *supra*).

(3) Sounding out the temper and attitudes of individual jurors to determine whether they should be struck peremptorily (see § 28.05 *infra*).

(4) Driving home to the jury certain principles that are vital to the defensive case (see § 28.06 *infra*).

(5) Disarming "surprise" prosecution evidence and taking the sting out of prejudicial disclosures that will be made at the trial (see § 28.07 *infra*).

(6) Establishing a good relationship with the jurors and explaining to them things counsel is going to do that they may misunderstand and dislike (see § 28.08 *infra*).

Because of the extraordinary variety of local *voir dire* procedures, detailed discussion of the means for pursuing these objectives is not practical in this MANUAL. Counsel should consult NJP LITIGATION CONSULTING (Elissa Krauss & Sonia Chopra, eds.), JURYWORK: SYSTEMATIC TECHNIQUES chs. 2-4, 17-18 (2d ed. 2012-13); ANN FAGAN GINGER, JURY SELECTION IN CRIMINAL TRIALS – NEW TECHNIQUES AND CONCEPTS (1975); 1 IRVING GOLDSTEIN & FRED LANE, GOLDSTEIN TRIAL TECHNIQUE §§ 9.21-9.86 (2d ed. 1981); CHARLES W. TESSMER, CRIMINAL TRIAL STRATEGY 51-68 (1968); WARD WAGNER, ART OF ADVOCACY – JURY SELECTION 1-6 to 1-53 (1983). The remaining sections of the present chapter are intended only to provide a few helpful hints.

At the outset it may be said that it is generally a good idea for defense counsel to prepare a list *of voir dire* questions in advance of trial. It is wise to write out each question on a separate

file card and to make three identical sets of the cards. One set is for counsel's own use. The second is either for submission to the court in jurisdictions in which the judge conducts *voir dire* interrogation or for filing of the appropriate cards to protect the record if counsel is permitted to interrogate the jurors personally but certain inquiries are disallowed by the court. The third set enables counsel to hand selected cards to the prosecutor for examination in the event of legal argument or negotiation about particular questions. Counsel will find that the pretrial drafting of *voir dire* questions makes it easier at the *voir dire* itself to concentrate attention on the important business of observing the prospective jurors. If any of the draft questions embody assertions of legal principles that are not obvious, counsel will also save fumbling and possible embarrassment by having notes of citations to support the principles.

§ 28.05 QUESTIONS TESTING THE ATTITUDES OF JURORS TO LAY A BASIS OF CHALLENGE FOR CAUSE OR TO INFORM THE EXERCISE OF PEREMPTORY CHALLENGES

These questions must be tailored in large part to the particular case and to local doctrinal restrictions on the scope of *voir dire* questioning. The following are standard inquiries:

(1) Are you related to, or are you friendly with, or do you have any close acquaintanceship with, anyone in the District Attorney's [Corporation Counsel's] Office?

(2) How about police officers — anyone in the Police Department here in the city? Other police officers anywhere? Law enforcement officers of any sort, such as federal revenue agents or military police or security guards?

(3) Have you ever had close relations with anyone in any of those categories?

(4) Have you yourself ever been a police officer or a military police officer or an employee of any law enforcement agency? Ever had any responsibilities for industrial or physical plant security or for investigating possibly criminal acts?

(5) Would you tend to believe the testimony of a police officer, just because s/he is a police officer, more than that of another witness?

(6) Have you or has any member of your family ever been the victim of a crime?

(7) Have you or has any member of your family ever been a complainant or a witness in a criminal case?

(8) Have you ever served on a jury in a delinquency case? In an adult criminal case? In a civil case?

(9) Do you think that anything in your earlier experiences as a juror might affect your ability to serve as a juror in the present case with complete impartiality and with no predispositions for or against my client?

(10) Had you ever heard anything about this case before you came into the courtroom today?

(11) Had you read anything about it in the newspapers? [To be asked only if counsel knows that there was significantly prejudicial newspaper publicity.] Or heard about it on the radio or TV? [Same.]

(12) (If yes) What newspaper [radio or TV program], do you remember?

(13) What did you read [hear] about the case? [To be asked only if the previously accepted jurors and the remaining unquestioned panelists are sequestered.]

(14) Did that mention my client's name or anything about him or her? [Same.]

(15) Would what you read [heard] make it any the more likely, in your mind, that my client has committed [is guilty of] the crime with which s/he is charged here?

(16) If you were to sit as a juror in this case, do you think that what you read [heard] would have any effect upon your attitude with regard to whether my client was guilty or innocent of the crime with which s/he is charged here?

(17) When you read [heard] that, did it cause you to form in your own mind any opinions concerning whether s/he was probably guilty or innocent?

(18) What was that opinion?

(19) Of course, we haven't heard any evidence here, but in light of that newspaper [radio, TV] story, would it take some evidence to change the opinion? [Arguably, a prospective juror's answer that it would require some evidence to change his or her opinion that the respondent is guilty supports a challenge for cause.]

(20) Have you had a chance to discuss that with anyone?

(21) Do you remember what you said? [To be asked only if the previously accepted jurors and the remaining unquestioned panelists are sequestered.]

(22) Did you say that my client was innocent or that s/he was guilty, something about whether s/he did it or not? [A previously *expressed* opinion of guilt is sufficient in some jurisdictions to disqualify a panelist for cause.]

(23) My client is charged with the crime of [murder]. Would the fact that s/he is charged with [murder], rather than with some other crime, make it seem more likely to you that s/he is guilty?

(24) Now, you know, of course, that you will be asked to return a verdict of guilty or not guilty in this case. If you heard the evidence and you thought that the respondent was probably guilty — you weren't convinced beyond a reasonable doubt that s/he was or s/he wasn't, but you thought the evidence showed s/he *probably* was guilty — would you be able to return a verdict of *not guilty* in this case?

(25) Would it bother you or weigh on your conscience to return a verdict of *not guilty* when you thought probably s/he was guilty?

(26) Would the fact that my client is [a member of a certain racial or ethnic group] and the complainant in this case is [a member of a different racial or ethnic group] — affect your judgment or your ability to decide this case in any way? (It is obviously preferable to ask more subtle questions probing possible racial prejudice if local practice allows them. But often it does not, and this form of inquiry is all that is permitted. One approach to the subject, which defense counsel can usually get away with, even in the most illiberal jurisdictions, is to ask at the beginning of the examination, following question (1) *supra:* "Now, this [murder] is supposed to have taken place near _____ [naming a recognizable intersection or landmark in the neighborhood]." Or: "[Mr.] [Ms.] _____, the person who was killed, lived [*or, alternatively,* "The respondent lives"] near _____." "Do you know where that is?" "Have you had any occasion to be in that area?" Biased jurors will frequently give a telltale response in describing or responding to the mention of a ghetto neighborhood, although these questions themselves can be justified by counsel as attempts to determine whether the juror is disqualified by reason of personal knowledge of the offense or of the parties.)

(27) Would there be any inconvenience to you if this case ran late and we had to stay over late here some day?

§ 28.06 DRIVING HOME PRINCIPLES VITAL TO THE DEFENSE CASE

Voir dire presents an excellent chance to describe to the jurors the few most basic and important principles on which the defensive theory of the case rests, to explore the meaning of those principles, and to obtain the assent of the jurors to them. The principles should be stated both in the orthodox terms that the court will use in its charge and in more immediate, striking formulations that communicate the orthodox terms forcefully and make the prospective juror think about them. In this way the judge's charge will echo what counsel has told the jury at the beginning of the case and vindicate and reinforce it.

Thus, for example, counsel might begin by asking a juror whether the juror could follow an instruction by the court to find the respondent not guilty of assault with intent to kill if the prosecution failed to prove that the respondent actually intended to kill. Then counsel might ask: "So, if the court were to charge you that in order to convict my client, you would have to be convinced that s/he actually intended to kill [Mr.] [Ms.] *X,* that she wanted [Mr.] [Ms.] *X* to die and intended when s/he shot to take [Mr.] [Ms.] *X*'s life away — you would follow that instruction?" "Now, if my client were to testify that s/he did not know the gun was loaded and you believed that —you believed s/he did not know it was loaded — although you thought it was terribly careless not to know that and it was reckless of my client to wave that gun around, s/he shouldn't have done something dangerous like that, but you believed she did not know it was loaded, you would acquit my client of assault with intent to kill, even though s/he did wave the gun around carelessly and shot somebody with it?" "So you could follow [His] [Her] Honor's charge that you had to find an actual intent to kill before you could convict, and you would say 'not guilty' of assault with intent to kill if you found that my client was careless and reckless and recklessly shot someone, not knowing that the gun was loaded?"

Questions (24) and (25) in § 28.05 *supra* are a similar reformulation of the concept that the prosecution has the burden of proof beyond a reasonable doubt. By securing the jurors' commitment to these propositions, counsel lays the foundation for a closing argument which reminds the jurors that they have all sworn they could do the difficult job demanded of them in this case, namely, to hold the prosecution to its proof beyond a reasonable doubt, even though they thought that the client possibly might be guilty, or probably was guilty, but that his or her guilt beyond a reasonable doubt was not established.

The circumstances of particular cases and counsel's theory of the defense will identify the basic principles that counsel wants to underscore to the jury in this fashion.

§ 28.07 DISARMING SURPRISE PROSECUTION EVIDENCE AND PREJUDICIAL DISCLOSURES

When the prosecution is going to get a certain shock value out of particular aspects of its proof or when highly prejudicial specific facts are inevitably going to be brought out at trial, counsel should disclose them to the prospective jurors on *voir dire.* This serves the double function of lessening their impact when the evidence is received and of allowing counsel to observe each juror's reaction to the damning item. "Now, if my client's own brother were to testify against [him] [her] at this trial, if [his] [her] own brother were to give evidence against [him] [her], would that affect your ability to give my client a fair trial?"

§ 28.08 ESTABLISHING A GOOD RELATIONSHIP WITH THE JURORS, EXPLORING THEIR BACKGROUNDS AND THINKING PATTERNS, AND FOREWARNING THEM OF CONDUCT BY COUNSEL THAT THEY MAY NOT LIKE

The *voir dire* is counsel's first contact with the jurors, and counsel must use it to make

friends. If possible, s/he should call each prospective juror by name. It is usually good practice to begin the examination of each juror with a number of questions about the juror's general background, such as:

(1) Where do you live, [Mr.] [Ms.] Jones?

(2) Have you lived here in [city] all your life?

(3) Could you tell us, please, where you were born and raised?

(4) And where did you go to school?

(5) Are you presently employed, [Mr.] [Ms.] Jones?

(6) Where do you work?

(7) What sort of work is it that you do at _____?

(8) Could you describe the nature of that job?

(9) And is there a [Mr.] [Mrs.] Jones? [Are you married?]

(10) Could you tell us whether [Mr.] [Mrs.] Jones is employed?

(11) What sort of work does s/he do?

(12) And do you have children?

(13) Girls or boys?

(14) How old?

(15) And where do they go to school [or, Are they employed, and so forth]?

The foregoing types of questions manifest an interest in the juror as a person and can be asked in a manner that makes counsel likeable as a person — as someone who is fond of kids, for example. Many of the questions are open-ended in the sense that they cannot be answered simply "yes" or "no" but require the juror to frame answers in the juror's own words; others of the questions leave the juror the option of a yes-or-no answer or a more elaborate response. The way in which the juror responds to these questions can tell counsel a good deal about the juror's intelligence, quickness of understanding, patterns of language and thought, cultural background, self-confidence or nervousness, decisiveness or indecisiveness, eagerness to please or recalcitrance. For that reason, open-ended questions should be used as much as possible

throughout the *voir dire,* but they are particularly easy to fashion and likely to be effective in the area of the juror's own background. Counsel cannot, for example, ask a juror open-ended questions about the beyond-a-reasonable-doubt standard or about the juror's attitude toward the credibility of police officers (see § 28.05 *supra*). These questions would be both objectionable (since the juror is not required or supposed to know the legal rules governing burden of proof or the evaluation of testimony; the juror is merely required to be willing to follow the court's instructions on those subjects) and potentially embarrassing (since a juror who is asked a legal question to which s/he does not know the answer will feel put down). On the other hand, jurors are obviously most knowledgeable and therefore most at ease on the topic of their own backgrounds.

A few jurors may be inclined to resent background questions as prying, but counsel can ordinarily avert any negative reaction of this nature by opening a *voir dire* examination with the following preliminary inquiries:

(1) Good morning, [Mr.] [Ms.] Jones. At this point in the proceedings it is the responsibility of the prosecuting attorney and me to ask certain questions of each individual person on the jury panel for the purpose of selecting an appropriate jury to sit in this case. We are not singling you out for questioning but will be asking questions of each person who is called as a possible juror. Is that all right?

(2) We have to ask each person some questions about his or her attitudes and background. We are not doing this to pry into your personal life or to snoop around in your privacy but only for the purpose of selecting an appropriate jury for this case. Would it be okay if I asked you some questions?

(3) Would you be willing to listen to these questions and to answer fully and freely any question that I ask you that does not seem to you to be too personal?

(4) And if I should ask you a question that seems to you too personal or embarrassing, would you be willing to tell me so, and maybe I can find some way to skip over the answer to that particular question?

(5) And if, not knowing you at all personally, I should happen to ask a question that is embarrassing, you wouldn't hold that against my client, would you?

This line of questions exemplifies a kind of questioning that counsel will also want to use in other areas *of voir dire* examination, in order to inform the jurors of things that counsel is going to do at trial that they may not like and to explain those things in a manner that makes them least objectionable. For example, "Do you think that you could be fair and impartial in considering the possibility that a child witness, like any other witness, might be mistaken in some part of his or her testimony?" "Certainly, no one likes to see a lawyer cross-examining a very young child or asking questions that may embarrass the child if the child is wrong. But you will

understand, won't you, that I am obliged to cross-examine witnesses, even if they are very young children, to see if they may be mistaken?" "And if I do cross-examine a child witness, would you hold that against my client?"

Among the things counsel will do in almost every trial that need to be explained to the jury are (1) peremptorily challenging prospective jurors on the *voir dire* (in most jurisdictions, jurors congregate for periods of weeks and make friends with fellow jurors; as a result they may be offended when counsel strikes another panelist); (2) objecting to evidence at trial (see § 34.07 *infra*)*;* (3) cross-examining the complaining witness (or any sympathetic witness); and (4) failing to extract a dramatic courtroom confession from the prosecution's star witness that s/he is really guilty of the crime with which the respondent is charged, as defense lawyers sometimes do on T.V. If a juror emits negative vibrations when forewarned of anything that counsel is going to do or of any damaging aspects of the prosecution's case (see § 28.07 *supra*) or if a juror is captious or hostile on the *voir dire,* counsel should not argue with the juror. Counsel should be nice to the juror (for the sake of the other jurors) and strike him or her quickly. Or in cases in which the jurors are not sequestered, counsel may want to use a juror of this sort, after deciding to strike him or her, as an opportunity to pursue the essentially pedagogic questioning described in § 28.06 *supra.*

§ 28.09 SELECTING JURORS

This is so largely an intuitive art that there is little safe to say about it. Apart from displays of hostility by a juror or specific factors in a juror's background that might predispose the juror against the respondent, counsel should be guided by the nature of his or her defense. If the defense, for example, requires conceptual thinking, counsel will want to be alert to strike unintelligent jurors. Ordinarily heterogeneity on the jury is desirable. Counsel should also give some credence to his or her instincts. All other things being equivocal, s/he may properly be governed by whether s/he *likes* a prospective juror. At this point, counsel is emotionally attuned to his or her own defense, and counsel will have subtle reactions of dislike to jurors on the basis of half-perceived, but often relatively reliable, signs that the juror is dangerous. In any event, the more counsel likes a jury, the better counsel will project to it.

Counsel should usually give the client the opportunity to advise counsel of any prospective jurors that she does not like and should strike those jurors unless there is a strong reason not to. Considering how unscientific *voir dire* is and considering that the respondent has experience in knowing who will dislike or fear him or her, the client is as likely to be right about whom to select or reject as is counsel. And because it is the respondent's liberty that is at stake, counsel ordinarily should give the respondent a veto over the persons who will sit in judgment on him or her.

Chapter 29

Opening Statements

§ 29.01 OPENING STATEMENTS GENERALLY

Immediately after the attorneys announce that they are ready to begin trial and before the first witness is called, the prosecuting and defense attorneys (in that order) are permitted to make opening statements, sometimes called opening arguments or opening speeches.

In many jurisdictions the only recognized function of the opening statement is to assist the jury (or the court, in a bench trial) to follow the evidence with greater understanding, by knowing in advance how the testimony of each witness and the significance of each exhibit fits into the whole case or the overall theory of the party who presents it. Counsel are accordingly expected to confine their opening statements to (1) outlining the substance of their respective cases; (2) naming their witnesses and summarizing the testimony of each; (3) enumerating the pieces of physical evidence or other exhibits that they will introduce and explaining what each is designed to show; and (4) relating each witness and piece of evidence to the theory of counsel's case (a process in which counsel are permitted to "state" but not to "argue" the inferences that they will subsequently ask the jury or the court to draw from the testimony and exhibits). *See, e.g., United States v. Dinitz,* 424 U.S. 600, 612-13 (1976) (concurring opinion of Chief Justice Burger), quoted with approval in *Arizona v. Washington,* 434 U.S. 497, 513 n.32 (1978) (dictum).

In other jurisdictions considerably more argumentative opening statements are permitted. In still others, the law is not clear regarding the precise function of the opening statement, and individual judges vary in the latitude they allow counsel.

As a practical matter, the trial judge's disposition is crucial in every jurisdiction because the line between describing a case and arguing it is inevitably fuzzy, and any good lawyer will attempt to use his or her first speech to the jury (or the court) to create a favorable impression. Nevertheless, counsel needs to ascertain before trial — both by legal research and by inquiry of local practitioners — whether the jurisdiction and the particular judge insist upon the narrower, "descriptive" form of opening statement or will tolerate a broader measure of argumentation and rhetoric. This is important both in planning the opening statement of the defense and in framing objections during the opening statement for the prosecution.

§ 29.02 THE OPENING STATEMENT FOR THE PROSECUTION

Counsel must be alert to stop the prosecutor from referring to inadmissible evidence in the prosecution's opening statement. If, as is often the case, counsel knows from discovery, defense investigation, or prior hearings that the prosecutor has items of evidence to which counsel is planning to object, counsel should raise the objections before the prosecutor begins his

or her opening statement and should ask the judge to forbid any reference to the contested items in the opening. (This can be done as a "preliminary matter" in the bench conference held just before the beginning of trial. See § 27.10 *supra*.) If counsel has not anticipated the prosecutor's reference to inadmissible items, counsel should object as soon as the prosecutor begins to talk about them. In a jury trial all discussion of the items and of counsel's objections to them should be held outside the presence of the jury. In open court, counsel should simply say, "Objection, Your Honor. May I approach the bench to state the grounds of the objection?" At the bench, counsel should describe the nature of the anticipated evidence and counsel's objections to it and should request that the prosecutor be prohibited from mentioning the evidence in opening or that, in the alternative, the court hear the evidence and counsel's objections to it and rule upon them in the absence of the jury before the prosecutor is permitted to open. (In *Frazier v. Cupp,* 394 U.S. 731 (1969), the Supreme Court held that a defendant was not constitutionally entitled to a mistrial when the prosecutor made a reference in opening to evidence that the prosecutor "reasonably expected to produce" (*id.* at 736) but that, as it turned out later, the prosecutor was unable to produce. Advance objection by defense counsel should dispel the reasonableness of the prosecutor's expectation that s/he will be permitted to introduce inadmissible evidence.) In a bench trial, counsel should, whenever possible, take the additional precaution of asking that all discussion of his or her objections be conducted without the prosecutor's relating the substance of the evidence so as to avoid the judge's hearing it before ruling on its admissibility. Thus, for example, the parties can argue and the judge can rule on the prosecutor's right to use a co-respondent's statement without discussing the contents of the statement.

Counsel also should listen for and object to any overly eloquent or emotional opening arguments by the prosecutor (unless s/he prefers to treat them as "opening the door" and to respond in kind), on the ground that they exceed the proper scope of opening statement and are "argumentative." If the law or the judge allows the prosecutor to make a relatively argumentative opening, defense counsel may nevertheless wish to object to particularly dramatic flourishes or heavy sales pitches. In jury trials, counsel may wish to ask that the judge remind the jury that the statements of counsel are not evidence and that the jury should keep an open mind and form no impressions about the case until they have heard the evidence that the *witnesses* will give.

§ 29.03 THE OPENING FOR THE DEFENSE

§ 29.03(a) Deciding Whether To Waive Opening Statement in a Bench Trial

In many jurisdictions it is customary for both sides to waive opening statement in a bench trial. This custom probably is based upon the assumption that judges know enough law to be able to deduce the prosecution's and respondent's theories of the case from their presentation of the evidence without the benefit of opening statements.

Where this is the custom, it is usually advisable to comply. In a bench trial much depends upon maintaining the good will of the judge. If the accepted practice is to waive opening and the prosecutor has followed this practice, the judge may well be irritated by what s/he views as

defense counsel's intention to waste the court's time.

In some cases, however, it is crucial to alert the judge to the defense theory of the case before the judge hears the prosecution's witnesses so that s/he will have that alternative perspective in mind while listening to the prosecution's testimony. This is particularly true in cases in which the defense theory will not emerge clearly during cross-examination of the prosecutor's witnesses and will first become evident from defense testimony. In these cases counsel should insist upon his or her right to present an opening, explaining that s/he intends to be brief. If the local custom is such that an opening is truly an extraordinary event in juvenile court, counsel should consider adding that s/he understands that openings are unusual but that the case is itself so unusual that an opening is essential. (Of course, counsel will then have to deliver on the promise to demonstrate that the case is, in fact, an extraordinary one.)

§ 29.03(b) Deciding Whether To Defer the Defense Opening

Most courts will permit counsel to reserve opening statement until after the close of the prosecutor's case and immediately before the defense begins its case. The obvious problem with opening earlier is that the opening statement may commit the defense to a particular tack that it will later find embarrassing. In addition, an opening that reveals defensive evidence unknown to the prosecutor may enable the prosecution to tailor its case-in-chief to that defense.

In a jury trial it is usually best for defense counsel to give his or her opening statement immediately after the prosecutor's, to avoid the psychological effect upon the jury of hearing only the prosecutor's side of the case at the outset. In cases in which counsel does not want to be prematurely committed to a particular line of proof or defensive theory or in which a detailed opening would reveal too much to the prosecutor, an opening statement can be framed that focuses on the prosecution's burden of proof, the importance of the jurors' keeping an open mind until they have heard all the evidence, the gravity of what is at stake for the respondent at the trial, and the weighty responsibility of the jurors in deciding the fate of another human being, and concludes simply by thanking the jurors in advance for their serious and impartial consideration of the case.

In a bench trial it is ill-advised to present an opening statement that merely recites general doctrines like the prosecution's burden of proof, because the judge will probably resent counsel's presuming to lecture the court about the basics of criminal law. Accordingly, in cases in which counsel cannot afford to be committed to a particular theory at the beginning of the trial, it is usually advisable to reserve opening until after the conclusion of the prosecution's case-in-chief.

In a joint trial of co-respondents in which counsel and the other respondent's attorney are presenting a united front (rather than presenting inconsistent defenses), the defense can maximize its advantage by having one defense attorney present an opening after the prosecutor and the other present his or her opening at the commencement of the defense case. Many judges will allow this procedure, since the cases have been joined for the prosecutor's and the court's

convenience, and the joinder should not prejudice the defense attorneys' prerogative to make separate decisions about when they wish to present their opening statements.

§ 29.03(c) The Contents of the Defense Opening Statement

Insofar as it undertakes to preview the evidence, counsel's opening statement should be scrupulously limited to what the defense will be able to prove. Overstatement of a case will reflect badly on the respondent and undermine any merit the defensive evidence may possess.

Defense opening statements should have a theme. They should strike a simple, clear, dramatic note, summing up the defense theory in a single image — or in a set of short, strongly connected phrases — that the jury or the judge will not forget and that will shape their perception and evaluation of the evidence. "You will see that the prosecution's case depends on [respondent's] having three legs. The complaining witness had a bearhug on one of them, and [respondent] was standing on the second when he supposedly kicked the complaining witness." Or: "But unless the assumed time of entry is right, the whole investigation you will hear so much about was wrong: They questioned the wrong shift of employees at the gas station, they identified and traced the wrong car, and they caught the wrong man."

Often it is possible to state themes of this sort in a striking, memorable way without describing the anticipated defense evidence in any detail. But sometimes — particularly when the defense evidence will be complex or will involve expert testimony — defense counsel will have to go through it thoroughly, explaining in straightforward, commonsense terms what it is designed to show and how the pieces of it combine to make that showing.

Chapter 30

Evidentiary Issues That Are Likely To Arise at Trial

§ 30.01 APPLICABILITY OF THE RULES OF EVIDENCE

In *In re Gault,* 387 U.S. 1 (1967), the Supreme Court condemned the use of hearsay in delinquency trials, observing that "[n]o reason is suggested or appears for a different rule in respect of sworn testimony in juvenile courts than in adult tribunals." *Id.* at 56. The *Gault* opinion referred with approval to juvenile justice standards that "state that testimony should be under oath and that only competent, material and relevant evidence under rules applicable to civil cases should be admitted in evidence." *Id.* at 56-57 (citing the Children's Bureau's Standards for Juvenile and Family Courts).

In a number of States a statute or court rule specifies that juvenile delinquency trials shall be conducted in accordance with the rules of evidence employed in adult court proceedings. Jurisdictions that have adopted uniform rules of evidence to govern adult civil and criminal cases usually apply these rules to juvenile delinquency cases as well. *See, e.g.,* NEB. REV. STAT. § 27-1101(1) (2014); R.I. RULES JUV. PROC. 9(b) (2014); WIS. STAT. ANN. § 938.299(4) (2014); WYO. RULE EVID. 1101(b)(3) (2014) & 1977 Committee Note. In jurisdictions that employ differing rules in civil and criminal cases, some States provide for the use of criminal rules of evidence in delinquency trials (*see, e.g.,* COLO. RULE JUV. PROC. 1 (2014); FLA. STAT. ANN. § 985.35(2) (2014); ILL. COMP. STAT. ANN. ch. 705, § 405/5-605(3)(a) (2014); IOWA CODE ANN. § 232.47(5) (2014); MINN. RULE JUV. DELINQUENCY 13.04 (2014); N.C. GEN. STAT. ANN. § 7B-2408 (2014); TENN. RULE JUV. PROC. 28(c) (2014); TEX. FAM. CODE ANN. § 54.03(d) (2014); W. VA. CODE § 49-5-2(k) (2014)), while others call for the use of civil rules (*see, e.g.,* KAN. STAT. ANN. § 38-2354 (2014); S.D. CODIFIED LAWS § 26-7A-56 (2014)). Still other jurisdictions provide in general terms that evidence in delinquency trials must be competent, relevant, and material, *see, e.g.,* D.C. CODE § 16-2316(b) (2014); NEV. REV. STAT. § 62D.040(4) (2014); N.Y. FAM. CT. ACT § 342.2(1) (2014), without saying whether evidentiary issues should be resolved in accordance with civil or criminal rules of evidence. Finally, in some jurisdictions the juvenile code does not address the question of evidentiary rules at all; the courts by custom follow either the criminal or the civil rules.

§ 30.02 PROCEDURAL DEVICES

Ordinarily, evidentiary issues are raised during trial by means of objections, motions to strike testimony, and motions for a mistrial. These procedures are discussed in Chapter 34.

When the evidence in question is extremely prejudicial, the normal processes for objecting to evidence will be inadequate. References to the existence of the evidence and discussions of its admissibility will jaundice the trier of fact. Section 30.02(a) discusses techniques for litigating the admissibility of highly prejudicial evidence out of earshot of the trier

in bench and jury trials. Section 30.02(b) discusses stipulations, which can be used to exclude prejudicial evidence and can also be used to obviate the need to seek out and present witnesses on technical or routine matters that the prosecution is prepared to concede. Section 30.02(c) then discusses the option of "stipulated trials," a procedure in which the entire trial is conducted on the basis of prior transcripts, stipulations, or both.

§ 30.02(a) Procedures for Litigating Evidentiary Issues Out of Earshot of the Trier of Fact

§ 30.02(a)(1) Bench Trials

Unlike jury trials, in which the division of responsibilities between judge and jury facilitates a resolution of sensitive evidentiary issues outside the hearing of the trier of fact, bench trials involve a trier who is also the arbiter of evidentiary issues. Even when evidence is excluded, the judge will ordinarily hear it in the course of determining its admissibility. Although all judges profess to ignore excluded evidence in deciding guilt or innocence, inevitably the evidence affects the judge's thinking. The problem is complicated further by the unwillingness of most judges to grant a recusal motion after hearing highly prejudicial evidence, see § 20.05 *supra,* and by the risk that a mere request for recusal will irritate the judge, see § 20.07 *supra.*

If counsel knows in advance, from defense investigation, discovery, or prior hearings in the case, that the prosecution intends to offer certain highly prejudicial and objectionable evidence, counsel should consider litigating the admissibility of the evidence before trial by making a motion *in limine* which can be heard by a judge other than the one who will preside over the trial. As explained in § 7.03(c) *supra,* some jurisdictions recognize pretrial motions *in limine* for the purpose of challenging the admissibility of prosecution evidence that, if mentioned at trial, may prejudice the accused despite an eventual ruling excluding it. Although these motions are ordinarily made in cases slated for jury trial, counsel can invoke the same procedure before a bench trial. Since a judge may resent the implication that s/he would consider prejudicial information s/he has excluded, counsel should stress that the motion *in limine* is being made merely as a precautionary measure to avert the possibility that inadmissible evidence might affect the judge unconsciously at trial. See § 20.07 *supra.* In addition, counsel may wish to point out that the motion procedure conserves judicial resources by obviating any need for a later request for recusal. Of course, in framing the motion and in arguing it, counsel will have to avoid revealing the nature of the inadmissible evidence and will need to be alert to object if the prosecutor begins to describe the evidence.

If counsel was unaware of the prejudicial evidence before trial or was otherwise unable to make a pretrial motion *in limine,* s/he might consider the alternative procedure of asking the trial judge to refer counsel's objections to another juvenile court judge for argument and resolution. This is an uncommon procedure, but it can be proposed to the judge as a highly practical one in courts in which several judges are assigned to hear delinquency matters. Brief recesses of bench trials for many reasons of administrative convenience are commonplace, and counsel can urge

that a recess to permit another judge to hear defense objections to particularly prejudicial items of prosecutorial evidence would not delay the trial unduly. Indeed, a special recess may not be necessary: the prosecution can proceed with other evidence, temporarily withholding the challenged item, until the next regularly scheduled recess; and during that recess the parties can arrange — with the trial judge's approval — to present the matter expeditiously to another judge.

§ 30.02(a)(2) Jury Trials

In jury trials, counsel should take all possible precautions to ensure that discussions of the admissibility of potentially prejudicial evidence are not held within the hearing of the jury. When objecting to seriously damaging items, counsel should ordinarily request that the court hear the objection at the bench ("at sidebar"). If the design of the courtroom makes it possible for the jurors to hear bench conferences, counsel should ask that the jury be excused during argument and decision of counsel's objection. However, most judges will not tolerate frequent requests to excuse the jury, and counsel must limit these requests to situations in which a revelation of the evidence to which s/he is objecting would bias jurors badly against the respondent or the defense theory of the case. Counsel should, in any event, make the requests at sidebar, not in open court, because the jurors are likely to be irked at the party responsible for making them suffer the inconvenience of traipsing in and out of the courtroom and the boredom of waiting out the resolution of a bench conference. To a somewhat lesser extent, they will be irritated by extended bench conferences even when the jury remains in the courtroom.

The timing of an objection is often crucial in a jury trial. If counsel waits until a witness has testified enough to whet the jury's appetite for a piece of evidence and only then objects to it, s/he will look like a captious spoiler trying to hide something. For this reason, when counsel anticipates that a particular witness is going to testify to objectionable evidence, counsel should consider (1) asking leave of the court to approach the bench for a sidebar conference, out of the hearing of the jury, as soon as the witness is called or at the very outset of a line of foundation testimony, (2) describing to the judge what counsel thinks is coming, (3) asking the prosecutor if this is correct and, if it is, (4) requesting that the jury be excused immediately while the admissibility of the evidence is explored on *voir dire.*

When preliminary questions of fact bear upon the admissibility of an item of evidence, the trial judge ordinarily decides those questions, even at a jury trial. During the presentation of testimony on these preliminary factual questions (sometimes called *voir dire* examination), the jury is often, although not invariably, excused, either on the court's initiative or at the request of counsel for one of the parties. In most situations in which the *voir dire* examination is occasioned by a defense objection to any significant piece of prosecution evidence, counsel should ask (at sidebar) that the jury be excused. This is usually a matter committed to the discretion of the trial judge. However, in jurisdictions where suppression issues are raised at trial rather than by pretrial motions, see § 22.01 *supra,* the respondent has a constitutional right to demand a hearing out of the presence of the jury on the admissibility of a confession challenged under federal constitutional exclusionary principles, *see Jackson v. Denno,* 378 U.S. 368 (1964); *Sims v.*

Georgia, 385 U.S. 538 (1967), and doubtless also upon any defense objection to evidence on the ground that it was obtained by an unconstitutional search and seizure or other violation of constitutional guarantees enforced by an exclusionary rule.

§ 30.02(a)(3) Preparing To Use the Procedures

To make effective use of the procedures described in the preceding two subsections, counsel should review his or her case file before trial and identify every item of prosecutorial evidence to which s/he plans to object. On the basis of the pretrial discovery that s/he has obtained, the independent factual investigation that s/he has done, and the pretrial hearings that s/he has conducted (often with the precise objective of ferreting out the details of the prosecution's trial evidence, see §§ 4.29, 22.02 *supra*), counsel should anticipate through which prosecution witnesses, and at what points in the testimony of each, the objectionable items are likely to be elicited. S/he should then plan out a comprehensive strategy of trial objections, deciding which ones to make in the ordinary fashion — by objecting and stating the grounds of objection in open court when the evidence is first offered by the prosecutor — and which ones to raise earlier in a witness's examination or even at the outset of trial, which ones to raise at sidebar, and on which ones to request still more unusual procedures, such as excusing the jury from the courtroom during evidentiary arguments or *voir dire,* or requiring the prosecutor to argue the admissibility of evidence without disclosing its substance in a bench trial. These decisions must be made on the basis of a comparative assessment of (A) the harm that each item of objectionable evidence will do if the trier of fact hears about it; (B) the likelihood of counsel's winning his or her objection to each item; and (C) the extent to which there is a precedent or compelling logical justification for the use of special procedures to litigate the objections to each item. A comprehensive strategy is important because of most judges' very limited patience with requests for unusual or time-consuming trial procedures: Counsel cannot expect to have more than a few of these requests granted in any trial, and s/he should save them for the points at which they will do the most good. In addition, a comprehensive strategy will sometimes give counsel the means to make his or her proposals of uncommon trial procedures more acceptable to the judge. For example, if counsel succeeds in persuading the judge to excuse the jury during a *voir dire* examination triggered by counsel's objections to one portion of a witness's testimony, counsel can suggest at the end of the *voir dire* that before the jury is brought back into the courtroom, counsel's objections to *other* anticipated portions of the witness's testimony should be heard and ruled upon, "as a matter of convenience to the court and the jury, so that it will not be necessary to consider sending the jury out again later when these other matters come up in the course of the witness's direct examination."

§ 30.02(b) Stipulations

Counsel should always keep in mind the possibility of offering to stipulate to matters that the prosecutor can amply prove.

Stipulations are particularly advisable when there is a risk that the prosecution's proof

will incidentally introduce some prejudicial matter. For example, counsel should consider stipulating (1) the fact of death in a homicide case, to avoid gruesome photographs and medical testimony; (2) the identity of a stolen object, to avoid its identification by a sympathetic theft complainant who has no other testimony pertinent to the case; (3) the authenticity of prosecution exhibits, to avoid chain-of-custody testimony resulting in a parade of police witnesses testifying with crackerjack efficiency that may appear to characterize the entire police investigation; and (4) the qualifications of prosecution experts, if they are impressive.

Stipulations can also be used to improve counsel's position on certain evidentiary objections. For example, when counsel objects to an item of prosecution evidence on the ground that its prejudicial impact outweighs its probative value (see § 30.03 *infra*), counsel can reduce its probative value substantially by announcing that s/he will stipulate the fact that the item is being offered to prove. *See Old Chief v. United States*, 519 U.S. 172 (1997).

Finally, stipulations will sometimes enable defense counsel to save the time and trouble involved in seeking out and examining witnesses to prove undisputed points. For example, if the prosecutor is willing to stipulate to the accuracy and authenticity of defense counsel's transcript of a police radio communications tape, counsel can forgo testimony by the police communications personnel who recorded the tape and by the individual who transcribed it. When a prosecutor who is cooperative in matters of this kind requests reciprocal stipulations to incontrovertible or unimportant points in the prosecution's case, counsel should ordinarily agree, both in order to maintain the prosecutor's cooperation and in order to avoid irritating the judge by appearing to be wasting the court's time in taking testimony on facts that could have been stipulated.

§ 30.02(c) Stipulated Trials

Counsel may, on occasion, wish to waive a full evidentiary trial and to submit the case to the court on an agreed statement of facts or on the police report or on the transcript of the probable-cause hearing or of a pretrial hearing on a motion to suppress. This procedure is called a "stipulated trial" in some jurisdictions, a "trial on a case-stated basis" in others.

The procedure is useful in cases in which there is no real factual dispute and the only matters in controversy are legal — the interpretation of an unclear rule of law or the application of an established rule to a novel set of facts. Thus, for example, in a case in which both parties agree that the respondent cursed at a police officer who was engaged in his or her official duties but the parties disagree about whether these facts make out the crime of obstruction of governmental administration, counsel might offer to stipulate the facts and argue only the legal issue. The judge will ordinarily appreciate the time and trouble saved and may reflect his or her appreciation at disposition in the event that the respondent is convicted.

In jurisdictions in which a pretrial suppression ruling cannot be reviewed on appeal following the accused's entry of a guilty plea, see §§ 14.10, 22.07 *supra,* the stipulated trial

procedure may offer advantages comparable to those of a guilty plea while preserving the respondent's right to appellate review of the suppression ruling. Because the stipulated trial process saves the prosecutor's and the judge's time, the prosecutor will often be amenable to offering whatever sentencing concessions would have accompanied a guilty plea (prosecutorial support for a disposition of probation, and so forth), and the judge will tend to be more lenient at disposition. Yet because the stipulated trial is technically a "trial," any errors in the pretrial suppression ruling are preserved for appeal.

There may be additional reasons for the stipulated trial procedure in particular cases. A police report may contain inadmissible matter favorable to the respondent or may reflect the investigating officer's sympathy for the respondent; the transcript of a probable-cause hearing may contain similarly inadmissible defense matter or a fatal defect in the prosecution testimony. When stipulating to trial on a prior transcript, counsel should make clear whether the parties are agreeing that the court may consider everything in the transcript or only the evidence presented there that would be admissible under the evidentiary rules applicable at trial. *Cf. Moore v. United States,* 429 U.S. 20 (1976) (per curiam).

§ 30.03 RELEVANCE; PROBATIVE WEIGHT VERSUS PREJUDICE

The initial inquiry with respect to the admissibility of any piece of evidence is, of course, its relevance (that is, pertinency to the issues) and its materiality (that is, the weight of its probative contribution to resolution of the issues).

In delinquency trials (as in adult criminal trials), the accused is often given the benefit of the doubt on close questions whether to admit or to exclude evidence. That is particularly true with regard to the admissibility of evidence proffered by the defense. Counsel can urge the judge that it would not be fair if the respondent were deprived of the chance to tell his or her story because of a close call on the question of relevance. Counsel can also point out that the judge's exercise of his or her discretion in favor of admissibility would avoid a possible conflict between state evidentiary rules and the federal constitutional right to present defensive evidence (see § 33.04 *infra*). This Sixth and Fourteenth Amendment right has been held to invalidate overly rigid state-law bars to the presentation of an accused's version of the facts. *Chambers v. Mississippi,* 410 U.S. 284 (1973); *Green v. Georgia,* 442 U.S. 95 (1979) (per curiam); *Crane v. Kentucky,* 476 U.S. 683 (1986); *Rock v. Arkansas,* 483 U.S. 44 (1987); *Lunbery v. Hornbeak*, 605 F.3d 754, 760-62 (9th Cir. 2010); *Cudjo v. Ayers*, 698 F.3d 752, 754-55, 762-68 (9th Cir. 2012).

The trial judge has broad discretion to balance the probative weight of proffered evidence against its possible prejudicial impact. If evidence is very prejudicial, the judge may exclude it although probative and admissible within technical evidentiary rules. *See, e.g., Hamling v. United States,* 418 U.S. 87, 127 (1974); *United States v. Abel,* 469 U.S. 45, 54 (1984); *Old Chief v. United States*, 519 U.S. 172, 180-85 (1997); *Crane v. Kentucky,* 476 U.S. at 689-90 (dictum). Defense counsel should be quick to invoke this discretion against potentially misleading, inflammatory, or emotion-rousing prosecution evidence. *See, e.g., United States v. Hale,* 422

U.S. 171, 173, 180 (1975); *cf. Jenkins v. Anderson,* 447 U.S. 231, 240 (1980).

§ 30.04 HEARSAY AND CONFRONTATION

Hearsay can be defined as evidence of "'a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.'" *Lee v. Illinois,* 476 U.S. 530, 543 n.4 (1986) (quoting McCormick on Evidence § 246, p. 584 (2d ed. [Cleary] 1972)). The rules of evidence or caselaw doctrines in every State exclude hearsay generally but provide numerous, varying, and often complex exceptions to the ban.

In addition to these common-law hearsay rules, the Confrontation Clause of the Sixth Amendment, which is applicable to state trials through its incorporation into the Fourteenth Amendment, *see Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965), bans prosecutorial proof of certain out-of-court statements in adult criminal trials. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011). The same confrontational protections are required in juvenile delinquency trials by the juvenile respondent's due process right to a fair trial. *See In re Gault,* 387 U.S. 1, 56-57 (1967).

The restrictions established by the constitutional right are not necessarily coincident with the hearsay doctrine of any particular jurisdiction. *See Crawford v. Washington*, 541 U.S. at 50-51. Evidence admissible within a hearsay exception or loophole may violate the right to confrontation. *Id*. at 51. Conversely, an out-of-court statement that is "a good candidate for exclusion under [a jurisdiction's] hearsay rules" will not invariably be subject to exclusion on federal Confrontation Clause grounds. *Id*.

The Supreme Court has emphasized that a primary "goal" of the Confrontation Clause is to ensure "reliability" of prosecutorial evidence by guaranteeing the accused the opportunity to "test[] [that evidence by] . . . cross-examination." *Id*. at 61. *See also United States v. Gonzalez-Lopez*, 548 U.S. 140, 145-46 (2006) (dictum). Prior to the Supreme Court's decision in 2004 in *Crawford v. Washington*, Confrontation Clause claims were governed by a standard established in *Ohio v. Roberts*, 448 U.S. 56 (1980), which permitted the admission of prosecutorial evidence that was not subject to cross-examination if the proffered evidence fell within a "'firmly rooted hearsay exception'" or was shown to bear "'particularized guarantees of trustworthiness.'" *See Crawford*, 541 U.S. at 60 (quoting *Ohio v. Roberts*, 448 U.S. at 66). In *Crawford*, the Court rejected this approach, explaining that "reliability" and "trustworthiness" cannot be the benchmarks of compliance with the Confrontation Clause since that constitutional guarantee requires not merely "that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id*. at 61. The Court in *Crawford* adopted a more straightforward, bright-line rule that bars prosecutorial introduction of an out-of-court "testimonial statement" unless (1) the declarant is not only absent from trial but "unavailable" and (2) the accused has had an adequate "prior opportunity for cross-examination"

of the witness. *See id*. at 54, 58, 59 & n.9, 68.

Although the Supreme Court has not as yet "spell[ed] out a comprehensive definition of [the term] 'testimonial,'" "leav[ing] [that task] for another day" (*id*. at 68 & n.10), the Court has made clear that the category of "testimonial statements" is a broad one, encompassing at least the following: testimony in a formal proceeding, such as "at a preliminary hearing, before a grand jury, or at a former trial" (*id*. at 68); affidavits prepared for litigation (*see id*. at 51-52; *see also, e.g.*, *United States v. Duron-Caldera*, 737 F.3d 988, 993-96 (5th Cir. 2013)); forensic analysis reports (such as, for example, a report in a drug sale or possession case that shows that "material seized by the police and connected to the defendant was [a controlled substance]"), at least where "the analysts' [written] statements . . . [were] prepared specifically for use at . . . trial" (*Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324, 329 (2009)); statements made to the police by a suspect in the course of police interrogation (*Crawford*, 541 U.S. at 52-53, 68-69); and (except in circumstances explained in the next paragraph) statements made to the police by a civilian witness at the scene of a crime, when the police arrive to investigate shortly after the commission of the crime (*see Davis v. Washington*, 547 U.S. at 829-32; *Michigan v. Bryant*, 131 S. Ct. at 1154-56). *See also State v. Swaney*, 787 N.W.2d 541, 554 (Minn. 2010) (Confrontation Clause applies not only to out-of-court statements of the nontestifying declarant but also to any "testimony that inescapably implies a nontestifying witness's testimonial hearsay statement"); *United States v. Charles*, 722 F.3d 1319, 1320-21, 1330-31 (11th Cir. 2013) (Confrontation Clause was violated by admission of Customs and Border Protection (CBP) officer's "testimony of the interpreter's statements of what [defendant] Charles said where Charles had no opportunity to cross-examine the interpreter" who "translated Charles's Creole language statements into English during the CBP officer's interrogation of Charles").

Thus far, the Court has definitively classified only one type of statement as falling outside the category of "testimonial" statements: "[s]tatements . . . made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. at 822. *See also ibid*. ("Statements . . . are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."); *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) ("When, as in *Davis* [*v. Washington*], the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause."). The judicial assessment of the "'primary purpose of the interrogation'" should be made by "objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." *Michigan v. Bryant*, 131 S. Ct. at 1162. "[T]he existence *vel non* of an ongoing emergency" at the time of the police questioning is not "dispositive of the testimonial inquiry" — since "whether an ongoing emergency exists is simply one factor" (*id*. at 1160) — but it is "among the most important circumstances informing the 'primary purpose' of an interrogation" (*id*. at 1157) because "statements made to assist police in addressing an ongoing emergency presumably lack

the testimonial purpose that would subject them to the requirement of confrontation" (*id*. at 1162). "[T]he existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public." *Ibid*. *Compare Davis*, 547 U.S. at 827-28 (holding that a portion of a civilian witness's statements to a 911 operator during the course of a 911 telephone call was nontestimonial because "the circumstances of [the complainant's] interrogation [by the 911 operator] objectively indicate [that the interrogation's] primary purpose was to enable police assistance to meet an ongoing emergency," in that the complainant "was speaking about events *as they were actually happening,* rather than 'describ[ing] past events'"; "any reasonable listener would recognize that [the complainant] . . . was facing an ongoing emergency"; the complainant's "call was plainly a call for help against bona fide physical threat"; "the nature of what was asked and answered . . . viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn . . . what had happened in the past"; and the complainant's "frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe"), *with id*. at 829-30 (holding, in the companion case of *Hammon v. Indiana*, that an in-person statement to the police by the complainant in a domestic disturbance at her home was "testimonial" because "[t]here was no emergency in progress"; the officer "was not seeking to determine (as in [the companion case,] *Davis*) 'what is happening,' but rather 'what happened'"; and the statement "recounted, in response to police questioning, how potentially criminal past events began and progressed"), *and with Michigan v. Bryant*, 131 S. Ct. at 1164-67 (a mortally wounded shooting victim's statement to the police, in which the victim identified the shooter and described the location of the shooting, was not "testimonial" because "the circumstances of the encounter [between the victim and the police] as well as the statements and actions of [the victim] and the police objectively indicate that the 'primary purpose of the interrogation'" was "'to enable police assistance to meet an ongoing emergency'": "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]"; the victim's "encounter with the police and all of the statements he made during that interaction occurred within the first few minutes of the police officers' arrival and well before they secured the scene of the shooting — the shooter's last known location"; the victim was "lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen" and "[h]is answers to the police officers' questions were punctuated with questions about when emergency medical services would arrive," and thus it cannot be said that "a person in [his] situation would have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution'"; the questions asked by the officers were "the exact type of questions necessary to . . . solicit[] the information necessary to enable them 'to meet an ongoing emergency'"; and "[n]othing in [the victim's] responses indicated to the police that, contrary to their expectation upon responding to a call reporting a shooting, there was no emergency or that a prior emergency had ended"). *See also, e.g.*, *State in the Interest of J.A.*, 195 N.J. 324, 329, 347, 348, 949 A.2d 790, 792, 803, 804 (2008) (statements by a witness to a police officer, "describing a robbery committed ten minutes earlier and his pursuit of the robbers," were "testimonial" and admitted in violation of the Confrontation Clause because "a declarant's narrative to a law enforcement officer about a crime,

which once completed has ended any 'imminent danger' to the declarant or some other identifiable person, is testimonial"). The Supreme Court has cautioned that even when a 911 call or in-person conversation with the police "begins as an interrogation to determine the need for emergency assistance" and is therefore initially nontestimonial, the exchange with the police can "'evolve into testimonial statements,' . . . once that purpose [of dealing with the emergency] has been achieved," *Davis v. Washington*, 547 U.S. at 828; *see also id*. at 828-29 ("[i]t could readily be maintained that" portions of the 911 call that followed the portion the Court classified as nontestimonial should be deemed "testimonial" because they followed the point at which "the emergency appears to have ended" and involved "a battery of questions" by the 911 operator). Thus, the Court has recognized that it may sometimes be necessary for judges to use an "*in limine* procedure . . . to redact or exclude the portions of any statement that have become testimonial, as [judges] do, for example, with unduly prejudicial portions of otherwise admissible evidence," *id*. at 829. Regarding *in limine* procedures, see §§ 7.03(c), 30.02(a)(1) *supra*.

In *dicta*, the Court has identified some other types of statements that may be non-testimonial for purposes of *Crawford*:

- "Business and public records . . . created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial" may be non-testimonial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009); *see also id*. at 311 n.1; *Crawford*, 541 U.S. at 56. But the Court has made clear that a "business or official record[]" *is* "testimonial" if it was "prepared specifically for use at . . . trial" — as is the case, for example, when the prosecution seeks to "prove its case via *ex parte* out-of-court affidavits" of forensic analysts. *Melendez-Diaz v. Massachusetts*, 557 U.S. at 324, 329. *Accord*, *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011) (the Confrontation Clause prevents the prosecution from "introduc[ing] a forensic laboratory report containing a testimonial certification — made for the purpose of proving a particular fact — through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification"; "[t]he accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist"); *Martin v. State*, 60 A.3d 1100, 1102-09 (Del. 2013); *State v. Navarette*, 294 P.3d 435, 436 (N.M. 2013). *Compare Williams v. Illinois*, 132 S. Ct. 2221 (2012) (affirming a lower court's rejection of a Confrontation Clause challenge to the admission of a testifying expert witness's reference to information in a forensic report prepared by a different, non-testifying expert, but announcing this ruling without attaining a majority on the rationale: a plurality opinion, authored by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy and Breyer, concluded that there was no Confrontation Clause violation because the "report itself was neither admitted into evidence nor shown to the [judicial] factfinder" in the bench trial (*id*. at 2230); the testifying expert "did not quote or read from the report" or "identify it as the source of any of the opinions she expressed" (*ibid*.); and the judicial factfinder could be relied upon to understand that the statement could not be "consider[ed] ... for its truth" (*id*. at 2240); a dissenting opinion by

Justice Kagan, joined by Justices Scalia, Ginsburg and Sotomayor, concluded that the challenged statement "went to its truth" and therefore was inadmissible (*see id*. at 2268); Justice Thomas, who concurred in the plurality's judgment, thereby providing a fifth vote for affirming the lower court's ruling, stated that he "share[s] the dissent's view" that the "statements were introduced for their truth" (*id*. at 2255, 2259), and that this classification is not vitiated by the fact that this was a bench trial (*id*. at 2259 n.1), but Justice Thomas nonetheless joined the plurality in affirming the conviction because of his view that unsworn forensic reports like the one at issue in this case "lack[] the requisite 'formality and solemnity' to be considered '"testimonial"' for purposes of the Confrontation Clause" (*id*. at 2255)) *with United States v. James*, 712 F.3d 79, 94-96, 99, 102 (2d Cir. 2013) (concluding that "[n]o single rationale disposing of the *Williams* case enjoys the support of a majority of the Justices" and therefore it is necessary to view *Williams* as "confined to the particular set of facts presented in that case" and to continue to "rely on Supreme Court precedent before *Williams*"; the court of appeals applies the pre-*Williams* rule to hold that autopsy and toxicology reports that were challenged on Confrontation Clause grounds were not "testimonial" because they were "not prepared primarily to create a record for use at a criminal trial"), *and Jenkins v. United States*, 75 A.3d 174, 176, 189, 190-92 (D.C. 2013) (agreeing with the 2d Circuit that "the splintered decision in *Williams*, which failed to produce a common view shared by at least five Justices, creates no new rule of law that we can apply in this case" and that it is therefore necessary to continue to follow "pre-*Williams* precedent in the Supreme Court and in our own jurisdiction"; the D.C. Court of Appeals applies the pre-*Williams* rule to hold that the trial court violated the Confrontation Clause by admitting the DNA "testimony and reports of the government's expert witness" "without making available for cross-examination the laboratory analysts who performed the underlying serological and DNA laboratory work"). *See also United States v. Duron-Caldera*, 737 F.3d at 994 n.4 (5th Cir. 2013) ("In *Williams*, there is no common denominator between the plurality opinion and Justice Thomas's concurring opinion. Neither of these opinions can be viewed as a logical subset of the other. . . . As *Williams* does not yield a 'narrowest' holding that enjoys the support of five Justices, it does not provide a controlling rule useful to resolving this case.")*; Commonwealth v. Tassone*, 468 Mass. 391, 392, 399-402, 11 N.E.3d 67, 68, 72-75 (2014) (applying the State's "common law of evidence" to hold that "an opinion regarding the results of DNA testing is admissible only where the defendant has a meaningful opportunity to cross-examine the expert witness about the reliability of the underlying data produced by such testing," and that "[h]ere, the defendant was deprived of a meaningful opportunity for such cross-examination because the analysts who generated the DNA profiles through DNA testing did not testify at trial, and the expert witness who offered the opinion of a match had no affiliation with the laboratory that tested the crime scene sample").

- "[A] clerk's certificate authenticating an official record — or a copy thereof — for use as evidence" may be non-testimonial but "a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it . . . [in a case in

which the defendant's] guilt depend[s] on the nonexistence of the record for which the clerk searched" is testimonial. *Melendez-Diaz v. Massachusetts*, 557 U.S. at 322-23; *see also United States v. Martinez-Rios*, 595 F.3d 581, 585-86 (5th Cir. 2010); *State v. Kennedy*, 846 N.W.2d 517, 525-27 (Iowa 2014); *People v. Pacer*, 6 N.Y.3d 504, 847 N.E.2d 1149, 814 N.Y.S.2d 575 (2006); *State v. Jasper*, 174 Wash.2d 96, 100, 114-16, 271 P.3d 876, 879, 886-87 (2012).

- Statements by a co-conspirator made during and in furtherance of the conspiracy may be non-testimonial. *See Crawford*, 541 U.S. at 56; *see also id*. at 58 (discussing *Bourjaily v. United States*, 483 U.S. 171 (1987)).

- Some "dying declarations" may be non-testimonial. *See Crawford*, 541 U.S. at 56 n.6 ("many dying declarations may not be testimonial"); *Michigan v. Bryant*, 131 S. Ct. at 1177 (Ginsburg, J., dissenting) ("Were the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions."). *But see*, *e.g.*, *United States v. Mayhew*, 380 F. Supp. 2d 961, 965 & n.5 (S.D. Ohio 2005) (rejecting the prosecution's argument that "dying declarations are an exception to the Confrontation Clause").

In cases in which the prosecution seeks to evade the protections of the Confrontation Clause by asserting that a statement is not being offered "for the truth of the matter asserted," the defense often will be able to challenge the validity of that claim. *See, e.g.*, *People v. Goldstein*, 6 N.Y.3d 119, 127-28, 843 N.E.2d 727, 732-33, 810 N.Y.S.2d 100, 105-06 (2005) (rejecting the prosecution's argument that the Confrontation Clause did not apply to a prosecution psychiatrist's testimony about hearsay statements underlying her diagnosis because these statements "were not offered to establish their truth" and were offered merely to "help the jury in evaluating . . . [the psychiatrist's] opinion": "Since the prosecution's goal was to buttress . . . [the psychiatrist's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true," and therefore the statements must be deemed to have been offered for the truth). *See also United States v. Nelson*, 725 F.3d 615, 620 (6th Cir. 2013) (rejecting the government's argument, in the context of a non-constitutional hearsay issue, that the content of a 911 call was "offered not for the truth of the matter asserted, but rather to show why the officers acted as they did": "[c]ontrary to the Government's position, the police officers' testimony about the 911 case . . . was effectively offered to prove the truth of the statements made" and was "thereby inadmissible" under FED. R. EVID. 802). Even if the judge accepts the prosecution's characterization of the statement as not being offered for the "truth of the matter asserted," defense counsel may be able to lodge a separate objection to the proffered evidence on the ground that the non-truth purpose for which the prosecution is seeking to admit the evidence is irrelevant or that the probative value of the evidence for that purpose is substantially outweighed by the prejudicial risk that the trier will impermissibly credit the evidence for its truth (see § 30.03 *supra*).

If the statement the prosecution seeks to admit is a "testimonial" statement by an

unavailable witness that is offered "for the truth of the matter," then *Crawford* requires its exclusion unless the defense has had an adequate "prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68. In cases in which there was a probable cause hearing and defense counsel cross-examined the now-unavailable prosecution witness at that hearing, the prosecutor may try to assert that the defense has had the requisite prior opportunity for cross-examination of the witness. But *Crawford* presupposes an adequate opportunity to "test" the reliability of a witness's account in the "crucible of cross-examination" (*see id*. at 61), and usually probable cause hearings are too limited in scope and depth to substitute for a full-blown, wide-ranging cross-examination at trial. *See*, *e.g.*, *People v. Fry*, 92 P.3d 970, 972 (Colo. 2004); *People v. Torres*, 962 N.E.2d 919, 932-34, 357 Ill. Dec. 18, 31-33 (Ill. 2012); *State v. Stuart*, 279 Wis. 2d 659, 672-76, 695 N.W.2d 259, 265-67 (2005); *cf. Lee v. Illinois*, 476 U.S. at 546 n.6 (state's argument that the accused "was afforded an opportunity to cross-examine [the author of the out-of-court statement] . . . during the suppression hearing" and that this opportunity satisfied the Confrontation Clause is rejected by the Court because the limited nature of the inquiry at a suppression hearing precluded an "opportunity for cross-examination sufficient to satisfy the demands of the Confrontation Clause"); *Corona v. State*, 64 So.3d 1232, 1241 (Fla. 2011) (discovery depositions, available to the defense in criminal cases under state rules, "do not meet *Crawford*'s cross-examination requirement" of "afford[ing] [the accused] an adequate opportunity to cross-examine the . . . declarant" because, *inter alia*, such depositions are "'not designed as an opportunity to engage in adversarial testing of the evidence against the defendant,'" and they are admissible at trial solely "'for purposes of impeachment'" and not as "'substantive evidence'").

In announcing a new standard for Confrontation Clause analysis of "testimonial" statements in *Crawford v. Washington*, the Supreme Court did not provide any guidance to the lower courts on how to apply the Confrontation Clause to statements that are classified as "non-testimonial." In the wake of *Crawford*, some lower courts concluded that the Confrontation Clause applies to non-testimonial as well as testimonial statements, and that the proper approach to assessing a Confrontation Clause challenge to admission of a non-testimonial statement is the pre-*Crawford* standard of *Ohio v. Roberts*, 448 U.S. 56 (1980). *See, e.g.*, *Summers v. Dretke*, 431 F.3d 861, 877 (5th Cir. 2005); *United States v. Hinton*, 423 F.3d 355, 358 n.1 (3d Cir. 2005); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004); *State v. Rivera*, 268 Conn. 351, 362-63, 844 A.2d 191, 200-01 (2004). In a post-*Crawford* decision, the Supreme Court indicated that non-testimonial statements may not implicate the Confrontation Clause, but the Court's view of the matter is far from clear because (1) its only direct statement on the subject comes in a passage in which the Court acts as if its earlier opinion in *Crawford* had resolved the matter by concluding that non-testimonial "hearsay . . . is not subject to the Confrontation Clause" (*Davis v. Washington*, 547 U.S. at 821), but a close reading of the *Crawford* opinion readily reveals that *Crawford* nowhere addressed this issue; and (2) the Court's only other statement on the subject — a comment that "[a] limitation [of the Confrontation Clause to "testimonial" statements] so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter" — is so oblique that it seems unlikely that the Court intended to treat this comment as its resolution of an issue that is of great importance to the lower courts

and litigants (*see, e.g.*, *Crawford*, 541 U.S. at 59 (rejecting a litigant's characterization of a prior decision by stating that the Court would not "authoritatively . . . announce" a significant doctrinal modification "in such an oblique manner")).

The Supreme Court has stated in *dicta* that an accused may "forfeit" the protections of the Confrontation Clause with respect to a witness's out-of-court statement by "obtain[ing] . . . the absence of a witness by wrongdoing." *Davis v. Washington*, 547 U.S. at 833. In making this statement, the Court explained that it was "tak[ing] no position on the standards necessary to demonstrate such forfeiture." *Id*. In *Giles v. California*, 554 U.S. 353 (2008), the Court definitively rejected a "theory of forfeiture by wrongdoing accepted by the California Supreme Court," explaining that the lower court's formulation diverged from "founding-era" and subsequent judicial conceptions of the "confrontation right" by failing to require a showing that the defendant not only caused the maker of the out-of-court statement "to be absent" but "engag[ed] in conduct *designed* to prevent the witness from testifying" and with the express "intent[ion] to prevent [the] . . . witness from testifying." *Id*. at 358-59, 368. *See also, e.g.*, *People v. Burns*, 494 Mich. 104, 115-17, 832 N.W.2d 738, 745-46 (2013) (evidence that the defendant "instructed" his infant daughter "'not to tell' anyone [about the alleged abuse] and warned her that if she told, she would 'get in trouble'" did not justify a finding of forfeiture of the Confrontation Clause by wrongdoing because the "defendant's contemporaneous statements to CB are as consistent with the inference that defendant's intention was that the alleged abuse go undiscovered as they are with an inference that defendant specifically intended to prevent CB from testifying"). Many jurisdictions have established standards for determining whether an accused's actions in procuring the absence of a prosecution witness should be deemed to forfeit the protections of the jurisdiction's hearsay rule, but at least some of these standards address only the hearsay rule and do not address the quite possibly distinct question of what standards and procedures are necessary when assessing a claim of forfeiture of the protections of the Confrontation Clause. *See, e.g.*, *United States v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002).

Crawford's prohibition against the admission of out-of-court, inculpatory, testimonial statements is not limited to cases in which the prosecution offers the text of the statement *verbatim*. Testimony paraphrasing the statement, describing its contents. characterizing its purport, or otherwise conveying to the trier of fact the incriminating thrust of the statement also violates a defendant's Confrontation Clause rights under *Crawford*. *See, e.g.*, *Ocampo v. Vail*, 649 F.3d 1098, 1108-13 (9th Cir. 2011) and cases cited: "Our conclusion is that before *Crawford* it was clearly established that testimony from which one could determine the critical content of the out-of-court statement was sufficient to trigger Confrontation Clause concerns, and that, far from undermining that standard, *Crawford* established principles with which that aspect of the pre-*Crawford* Confrontation Clause jurisprudence are fully consistent." *Id*. at 1108. "[I]t would be an unreasonable application of the core Confrontation Clause principle underlying *Crawford* to allow police officers to testify to the substance of an unavailable witness's testimonial statements as long as they do so descriptively rather than verbatim or in detail." *Id*. at 1109.

Counsel should be quick to back up state-law hearsay objections with federal

Confrontation Clause objections and to make the latter objections whenever the prosecution offers out-of-court declarations, not subject to cross-examination, that come within a local hearsay exception. Confrontation Clause objections have several advantages. They preserve a federal claim for postconviction review by the federal courts if it is rejected by the state courts. They enable counsel to request reconsideration of unfavorable local hearsay doctrines under constitutional rules that are relatively unfamiliar to state trial judges and are currently in a state of flux as judges struggle to define the unclear aspects of the *Crawford* doctrine. Under these circumstances, the judge may be inclined to give counsel the benefit of the doubt in order to avoid a risk of possible reversible error. And unlike hearsay objections, Confrontation Clause objections invoke a source of law — the constitutional guarantee to criminal defendants of a right to confront their accusers — which applies only to the prosecution's evidence, so they are less likely than hearsay objections to backfire and obstruct the presentation of the defense case.

§ 30.05 COMPETENCY OF WITNESSES

Delinquency cases often arise out of altercations between children. The complainant or witnesses to the offense may be so young that their competency to testify comes into question. "A number of States . . . mandate by statute that a trial judge assess a child's competency to testify on the basis of specified requirements. These usually include a determination that the child is capable of expression, is capable of understanding the duty to tell the truth, and is capable of receiving just impressions of the facts about which he or she is called to testify." *Kentucky v. Stincer,* 482 U.S. 730, 742 n.12 (1987) (citing to representative statutes). "Some States explicitly allow children to testify without requiring a prior competency qualification, while others simply provide that all persons, including children, are deemed competent unless otherwise limited by statute." *Ibid. See also Perry v. Commonwealth*, 390 S.W.3d 122, 127-28 (Ky. 2013) (trial court violated "due process and fundamental fairness" by denying the defense's motion for "an independent psychological evaluation" of the child complainant, which "raised the issue of [the child complainant's] competency to testify in light of possible mental problems and effects of the psychotropic drugs he was taking" and "argued that [the child complainant] did not know the difference between truth and a lie").

Most States that provide for competency inquiries follow the general rule that "'[t]here is no precise age which determines the question of competency [and that] . . . [t]his depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former.'" *Id.* at 741 n.11 (quoting *Wheeler v. United States,* 159 U.S. 523, 524 (1895)). Some States, however, specify that children below a certain age are presumptively incompetent. *See, e.g.,* N.Y. FAM. CT. ACT § 343.1(2) (2014) ("[a] witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath").

The inquiry into competency usually takes the form of a *voir dire,* conducted when the child witness takes the stand (in some jurisdictions after the child has been administered the oath, in other jurisdictions as a prerequisite for the administration of the oath). If the child is a witness

whom the prosecution seeks to present at trial, the qualifying questions are asked by either the prosecutor or the judge, and defense counsel is afforded the opportunity to cross-examine; if the child is a defense witness, either defense counsel or the judge will ask the qualifying questions, and the prosecutor will be allowed to cross-examine. "Children often are asked their names, where they go to school, how old they are, whether they know who the judge is, whether they know what a lie is, and whether they know what happens when one tells a lie." *Kentucky v. Stincer,* 482 U.S. at 741. *See also Harris v. Thompson*, 698 F.3d 609, 640-43 (7th Cir. 2012) (recognizing that in cases in which the defense plans to present a child witness at trial who will be subject to a competency inquiry, defense counsel's preparation for the competency hearing should include at least the following: "[i]nterviewing [the child witness] in advance . . . to familiarize [the child] with the types of questions he would be asked" at the hearing; "anticipat[ing] the [prosecutor's] approach in challenging competency"; and "developing a rapport with an understandably nervous and reticent child").

In cross-examining a child witness for the purpose of showing that the witness is not competent to testify, counsel should consider exploring the following lines of cross-examination: (a) whether the child has told lies to his or her parent or other relatives or friends without the other individual ever finding out that s/he told a lie; (b) if the child is very young, whether s/he believes that certain cartoon characters s/he watches on television are "real"; (c) what grade level s/he is in at school, whether s/he is in special education, and what types of grades s/he receives (for the purpose of arguing that the witness's educational deficits impair his or her competency to testify notwithstanding the child's age); and (d) whether the child has been coached by the prosecutor on what to say in the competency inquiry. *See, e.g.*, *In re J.M.*, 2006 WL 649627, at *5 (Ohio App. March 16, 2006) (trial court abused its discretion by deeming 12-year-old complainant to be competent to testify, based on routine *voir dire* questions and without thoroughly "delving . . . into the key issue of competency," despite "indications that [the witness] was in special education classes, that she had and continued to have imaginary friends, that she had at least one past diagnosis of schizophrenia, and that her ability to recollect even routine information such as the day, month, and year was severely limited").

§ 30.06 CO-RESPONDENTS' AND OTHER ACCOMPLICES' STATEMENTS IMPLICATING THE RESPONDENT

Section 18.10(a) *supra* describes the *Bruton* doctrine, which governs adult criminal cases in which the prosecution offers evidence of a co-defendant's out-of-court statements implicating the defendant. As explained there, in any trial in which the co-defendant will not testify, *Bruton* effectuates the defendant's Sixth Amendment right to confront and cross-examine the co-defendant as a declarant by requiring either severance of the co-defendant's trial or redaction of the statements to eliminate any reference to the defendant. As § 18.10(a) further explains, some state courts have held that the *Bruton* rule does not apply in juvenile delinquency bench trials. Such rulings typically are based on the rationale that a judicial trier of fact is capable of applying the co-respondent's confession solely to the determination of the co-respondent's guilt. But *Lee v. Illinois*, 476 U.S. 530 (1986), provides a basis for challenging that premise and urging that

Bruton should extend to bench trials. See, again, section 18.10(a), *supra*.

If the judge at a joint bench trial does permit the introduction of a co-respondent's statement implicating the respondent, it is clear that any "use [of the] hearsay evidence as substantive evidence against the [respondent]" (*Lee v. Illinois*, 476 U.S. at 542) violates the respondent's constitutional right to confrontation. *Id.* at 542-46. *See, e.g., In re Appeal No. 977 from Circuit Court of Baltimore County,* 22 Md. App. 511, 323 A.2d 663 (1974); *In the Matter of Quinton A.,* 49 N.Y.2d 328, 338-39, 402 N.E.2d 126, 131-32, 425 N.Y.S.2d 788, 793-94 (1980); *W.B. v. State,* 356 So. 2d 884 (Fla. App. 1978). As the Court explained in *Lee v. Illinois,* in ruling that the use of a co-defendant's statement to convict the defendant in a bench trial violated this Sixth Amendment right, "a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." 476 U.S. at 545. *See also Lilly v. Virginia*, 527 U.S. 116, 127-28, 131-34 (1999) (plurality opinion). Moreover, since the portions of the co-respondent's statement implicating the respondent cannot be used as substantive evidence against the respondent and have little probative value in establishing the co-respondent's guilt, counsel can argue that these "presumptively unreliable . . . passages" (*Lee v. Illinois*, 476 U.S. at 545) should be excluded from evidence altogether. Counsel can argue that, notwithstanding the judge's capacity to disregard this evidence in deciding the respondent's guilt, such redaction is a reasonable prophylactic measure to prevent even the possibility of prejudice to the respondent. See §§ 30.02(a)(1), 30.03 *supra;* see also § 20.05 *supra.*

If the prosecution seeks to introduce an out-of-court statement by an accomplice who is *not* being tried jointly with respondent and who is not testifying at trial, the statement ordinarily would be barred by the Confrontation Clause and often also by local hearsay rules. See § 30.04 *supra*.

In cases in which an accomplice testifies for the prosecution, there are no confrontation problems because the accomplice is available for cross-examination by the respondent's attorney. There are, however, state-law doctrines prohibiting conviction of a respondent solely on the basis of the uncorroborated testimony of an accomplice. See § 35.04 *infra.*

§ 30.07 ADMISSIBILITY OF EVIDENCE OF CONVICTIONS, OTHER CRIMES, OR BAD ACTS BY THE RESPONDENT OR A WITNESS FOR THE PROSECUTION OR DEFENSE

§ 30.07(a) Proof of "Other Crimes" of the Respondent in the Prosecution's Case-in-Chief

In most jurisdictions the adult criminal caselaw specifies a limited number of circumstances under which the prosecution, in its case-in-chief, can present evidence that the accused committed criminal acts other than the ones for which s/he is presently being tried. This

evidence may, for example, be admissible when the "other crimes" tend to show the respondent's identity as the perpetrator of the present crime (because the several crimes have a similar and characteristic *modus operandi*), the respondent's possession of a motive for the present crime, a common scheme or plan encompassing the present crime, or the absence of mistake or accident. The courts are usually fairly vigilant to keep prosecutorial proof of "other crimes" within the boundaries of this roster of accepted uses because all jurisdictions recognize the fundamental principle that "other crimes" cannot be introduced for the purpose of showing the accused's general bad character or predisposition to commit the crime with which s/he is presently charged, *see, e.g., Michelson v. United States,* 335 U.S. 469, 475-76 (1948). And even when the "other crimes" evidence falls within one of the technically admissible categories, it is still subject to exclusion in the discretion of the trial judge (see § 30.03 *supra*) if its prejudicial impact outweighs its probative value. *See, e.g.*, *United States v. Scott*, 677 F.3d 72, 74, 81, 82, 84 (2d Cir. 2012) (trial court abused its discretion and committed reversible error by permitting the prosecution to introduce "testimony from two police detectives that they were familiar with [the defendant] and had spoken to him on numerous occasions prior to his arrest in the instant case": identity was not "an issue *in dispute*," especially where it was conceded by defense counsel in opening statement, and "what little probative value this testimony may have had was substantially outweighed by the risk of unfair prejudice" in that the jury would likely "assume that the defendant's lengthy and numerous contacts with the police were . . . related to his bad character and criminal propensity"); *People v. Robinson,* 68 N.Y.2d 541, 549, 503 N.E.2d 485, 490, 510 N.Y.S.2d 837, 842 (1986) ("[p]rejudice involves both the nature of the crime, for the more heinous the uncharged crime, the more likely that jurors will be swayed by it, and the difficulty faced by the defendant in seeking to rebut the inference which the uncharged crime evidence brings into play"); *Campbell v. United States,* 450 A.2d 428, 430 (D.C. 1982).

If defense counsel elects to present character witnesses, of course, s/he will open the door to the prosecution's proof of bad character in rebuttal. See § 33.17 *infra;* compare §§ 30.07(b), 33.08 *infra.* But any attempt by the prosecutor to introduce "other crimes" evidence in the prosecution's case-in-chief should be resisted under the principles of the preceding paragraph. Counsel can cite the very strong language found in a number of judicial opinions to the effect that the exclusion of "other crime" evidence is "one of the most fundamental notions known to our law," *United States v. Beno,* 324 F.2d 582, 587 (2d Cir. 1963); *see, e.g., Ali v. United States,* 520 A.2d 306, 309-10 (D.C. 1987), arising "out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence," *Lovely v. United States,* 169 F.2d 386, 389 (4th Cir. 1948); *see State v. Melcher*, 140 N.H. 823, 830, 678 A.2d 146, 151 (1996); *and see Michelson v. United States,* 335 U.S. at 475-76 ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). Counsel also can draw upon caselaw which, in some jurisdictions, requires that the prosecution prove any admissible "other crimes" by a specified quantum of evidence. *See, e.g., Ali v. United States,* 520 A.2d at 310 n.4 (in order to use "other crimes" evidence, the prosecution must

present, at a pretrial hearing, clear and convincing evidence that the accused committed the other crime).

Even when the prosecution is permitted to present "other crimes" evidence within one of the accepted categories, the prosecutor is ordinarily barred from showing that the respondent was adjudicated a delinquent on the basis of those other crimes. See § 30.07(b) *infra.* Nor can the prosecution show any *arrests* of the respondent. "Prior arrest" evidence is universally excluded because it has no probative value and is extremely prejudicial. *See, e.g., People v. Cook,* 37 N.Y.2d 591, 338 N.E.2d 619, 376 N.Y.S.2d 110 (1975). But see § 33.17 *infra.*

Defense counsel who is representing a respondent with a record of prior arrests or convictions must be constantly on guard throughout the trial to avoid the accidental exposure of that record to the trier of fact. Numerous documents that may be offered as prosecution exhibits for other purposes — comparison fingerprint cards, photographs of the respondent at the time of arrest — may contain notations of the respondent's record. Counsel should inspect each exhibit carefully and take the time to read it as soon as it is marked for identification, before it is discussed or displayed in open court. S/he should be sure to look at the back of every exhibit. If matter relating to inadmissible arrests or convictions appears on an otherwise admissible exhibit, counsel should suggest some means of reproducing the exhibit without the prejudicial matter. In a jury trial these suggestions should be made at the bench, outside the earshot of the jury. In a bench trial, counsel should first attempt to arrange the reproduction of the exhibit by agreement with the prosecutor before the exhibit is shown to the judge; if the prosecutor does not agree to this, counsel should then ask the court to order the exclusion and excision of the inadmissible matter without inspecting it, so as to avoid possible prejudice. In jurisdictions in which the court file (which judges often peruse during the trial) normally contains papers showing the respondent's prior record or is marked in some manner to cross-reference the respondent's other cases, counsel should examine the file carefully and, if necessary, ask that the court refrain from viewing the file in order to avoid exposure to inadmissible evidence.

§ 30.07(b) Proof of the Respondent's Prior Convictions or Prior Bad Acts for Impeachment or in Rebuttal

In adult criminal trials the standard rule is that a defendant who testifies may be impeached with certain prior convictions. Ordinarily, any conviction of a felony or *crimen falsi* can be used for this purpose, but some jurisdictions disallow convictions that are more than a specified number of years old or allow these "stale" convictions only under designated circumstances (for example, when the nature of the crime makes them particularly probative of lack of credibility). Some jurisdictions also allow adult criminal defendants to be impeached with "prior bad acts" that did not result in a criminal conviction if (1) these acts are probative of the veracity of the defendant and (2) their probative value outweighs their prejudice to the defendant. The proper method of impeachment is usually for the prosecutor to ask the defendant on cross-examination whether s/he was convicted of a specified crime or whether s/he did a specified bad act on a specified date. If s/he denies the conviction or act or says that s/he does not remember,

the prosecutor can subsequently introduce a certified judgment of conviction in rebuttal but, in most jurisdictions, cannot introduce independent evidence of bad acts that were not reduced to conviction. It is not a condition of this kind of cross-examination that the prosecutor be able to prove the prior conviction or prior bad act by competent evidence apart from the defendant's answers on cross. Rather, the prosecutor is permitted to ask the questions whenever s/he can satisfy the judge that s/he has a good-faith basis for believing that the defendant suffered the convictions or committed the acts. *But see People v. Cantave*, 21 N.Y.3d 374, 377, 380, 993 N.E.2d 1257, 1260, 1262, 971 N.Y.S.2d 237, 239, 241 (2013) (the Fifth Amendment prohibition against a prosecutor's questioning a testifying defendant about a *pending* criminal charge for the purpose of impeaching credibility also bars the prosecution from cross-examining a testifying defendant who has "a conviction pending appeal" about "the underlying facts of that conviction" until "direct appeal has been exhausted").

In the vast majority of States, a juvenile adjudication cannot be used to impeach either an adult defendant in a criminal trial or a juvenile respondent in a delinquency trial. This result is dictated in some States by statutes prohibiting the use of a juvenile adjudication against the child in any subsequent proceeding, *see, e.g., Moore v. State,* 333 So. 2d 165 (Ala. Crim. App. 1976); in other States it is produced by statutes or caselaw excluding juvenile adjudications from the category of "convictions" that are admissible for impeachment, *see, e.g., People v. Peele,* 12 N.Y.2d 890, 188 N.E.2d 265, 237 N.Y.S.2d 999 (1963); *State in the Interest of K.P.,* 167 N.J. Super. 290, 400 A.2d 840 (1979); *State v. Matthews,* 6 Wash. App. 201, 492 P.2d 1076 (1971); and in still other States, it is a reflection of a general evidentiary rule prohibiting proof of juvenile adjudications, *see, e.g., People v. Massie,* 137 Ill. App. 3d 723, 484 N.E.2d 1213, 92 Ill. Dec. 358 (1985).

Some jurisdictions, however, do hold that juvenile adjudications are as admissible for impeachment as adult convictions, *see, e.g., State v. Mallory,* 270 S.C. 519, 242 S.E.2d 693 (1978), at least when the proceeding in which they are offered into evidence is a delinquency trial closed to the public, *In the Matter of the Welfare of C.D.L.,* 306 N.W.2d 819 (Minn. 1981) (*but see In the Matter of the Welfare of S.S.E.*, 629 N.W.2d 456, 459-60 (Minn. App. 2001)). In addition, even in jurisdictions that generally prohibit the use of juvenile adjudications, they may be used in certain circumstances. Some jurisdictions view the accused's presentation of good-character evidence (see § 33.17 *infra*) as opening the door to the prosecution's questioning of the character witnesses about the accused's otherwise inadmissible prior adjudications of delinquency, insofar as these are pertinent to the character trait that the accused has put in issue. *See, e.g., Wilburn v. State,* 289 Ark. 224, 711 S.W.2d 760 (1986); N.Y. FAM. CT. ACT § 344.1(2) (2013). And in some jurisdictions that allow impeachment with "prior bad acts," the prior bad acts underlying juvenile adjudications may be admissible for impeachment even though the adjudications themselves are not. *See, e.g., People v. Greer,* 42 N.Y.2d 170, 176, 366 N.E.2d 273, 277, 397 N.Y.S.2d 613, 617 (1977).

§ 30.07(c) Defense Impeachment of Prosecution Witnesses with Prior Convictions or Prior Bad Acts

State evidentiary rules and the confrontation clauses of the state and federal constitutions give the respondent a right to impeach an adult prosecution witness with the witness's adult convictions at the least.

> "Our cases construing the [confrontation] clause [of the Sixth Amendment] hold that a primary interest secured by it is the right of cross-examination." . . . Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.,* discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury [or the judge in a bench trial] a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony.

Davis v. Alaska, 415 U.S. 308, 315-16 (1974). *See also, e.g.*, *Slovik v. Yates*, 556 F.3d 747, 752-54 (9th Cir. 2009); *Vasquez v. Jones*, 496 F.3d 564, 570-74 (6th Cir. 2007).

Juvenile adjudications of a prosecution witness (whether that witness is presently an adult or still a juvenile) are normally subject to the statutory confidentiality provisions described in § 30.07(b) *supra.* But these provisions must give way to the accused's constitutional rights to confrontation in certain cases. In *Davis v. Alaska,* the Supreme Court held that the defense was entitled to use a juvenile witness's prior adjudication, for which he was on probation at the time he implicated the defendant, to cross-examine on the subject of bias — specifically, to show that the witness's probationary status gave him reason to make a false identification in order to avoid antagonizing the authorities and jeopardizing the continuation of his probation. The Court explained that: "[t]he State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." 415 U.S. at 320. "Whatever temporary embarrassment might result to [the witness] . . . or his family by disclosure of his juvenile record . . . is outweighed by [the accused's] . . . right to probe into the influence of possible bias in the testimony of a crucial identification witness." *Id.* at 319. *See also, e.g.*, *In re Douglas L.*, 625 A.2d 1357 (R.I. 1993).

The *Davis* decision was explicitly limited to the use of juvenile adjudications that showed bias. However, several lower courts have applied *Davis*'s logic to permit impeachment of prosecution witnesses with prior juvenile adjudications that reflect adversely on the witness's general credibility. *See, e.g., Tabron v. United States,* 444 A.2d 942, 943 (D.C. 1982) (if impeachment of a witness's general credibility is "'likely to be material to the outcome' of the trial"); *State v. Deffenbaugh,* 217 Kan. 469, 472-74, 536 P.2d 1030, 1034 (1975) (if the juvenile

adjudication is for an offense involving dishonesty or false statement); *State v. Hillard,* 421 So. 2d 220 (La. 1982) (if the court determines, on a case-by-case basis, that the accused's right to confrontation outweighs the state's policy of confidentiality).

Counsel can argue that the constitutional rights to confrontation also entitle the defense to cross-examine a prosecution witness with respect to any prior bad acts (whether committed as an adult or juvenile) that tend to show the witness's general untrustworthiness. *See, e.g., People v. Batista,* 113 A.D.2d 890, 493 N.Y.S.2d 608 (N.Y. App. Div., 2d Dep't 1985) (trial court erred in precluding the defense from impeaching a prosecution witness with his illegal gambling activities and failure to carry a green card). *See also United States v. Woodard*, 699 F.3d 1188, 1192, 1195-97 (10th Cir. 2012) (trial court violated the defendant's right to confrontation by preventing defense counsel from questioning a state Motor Transportation Division inspector about "a prior determination made by a different federal district judge [at a suppression hearing] that the MTD inspector was not credible"); *United States v. White*, 692 F.3d 235, 248-51 (2d Cir. 2012) (trial court improperly prevented defense counsel from cross-examining a police officer about his testimony at a suppression hearing in an unrelated case that resulted in the judge's "unequivocally discredit[ing] [the officer's] testimony"). And certainly the defense can impeach with any prior bad acts or pending charges that tend to show bias on the part of a witness, *see, e.g., Delaware v. Van Arsdall,* 475 U.S. 673 (1986) (trial court's refusal to permit cross-examination of a prosecution witness about the terms of an agreement under which a drunk driving charge against him was dismissed in exchange for his promise to speak to the prosecutor about the crime for which the defendant was on trial violated the defendant's Sixth Amendment right to confrontation); *Brinson v. Walker*, 547 F.3d 387, 390, 394-95 (2d Cir. 2008) (trial judge violated Confrontation Clause by preventing defense counsel from cross-examining the complainant "on whether he was fired from his job at . . . [a restaurant] for refusing to serve black patrons," information which defense counsel sought to elicit to support a defense theory that the complainant's "accusation [that he had been robbed by the defendant] was a deliberate lie, motivated by . . . [the complainant's] racial hatred of black people"); *Bentley v. State*, 930 A.2d 866, 869, 871-72, 874-75 (Del. 2007) (trial court violated defendant's rights to confrontation and to a fair trial by upholding a prosecution witness's assertion of her Fifth Amendment privilege and precluding defense counsel from cross-examining the witness, who had pending drug charges, about the witness's prior drug use, which defense counsel sought to elicit to "cast into doubt [the witness's] ability to perceive or remember" and to "establish bias or motive for the changes in her testimony"; the State could have avoided "[t]he substantial danger of prejudice from the preclusion of cross examination . . . [by seeking] use immunity for [the witness's] testimony"); *Longus v. United States*, 52 A.3d 836, 851-54 (D.C. 2012) (trial court improperly prevented defense counsel from cross-examining a police detective about two theories of potential bias: questioning to show that the detective "was under investigation by the U.S. Attorney for witness coaching," which "provided a motive for the detective to want to curry favor with the government"; and questioning "to show his 'corruption' through evidence that Detective Brown had . . . engaged in witness tampering in the . . . [other] case"); *Washington v. United States,* 461 A.2d 1037, 1038 (D.C. 1983) (even in the absence of a testimonial arrangement between the witness and the prosecutor, a pending charge against the witness may

be used to show bias in the form of the witness's "harbor[ing] a hope of better treatment if he testified as he did"); *State v. Clark*, 364 S.W.3d 540, 544-45 (Mo. 2012) (defense counsel was entitled to cross-examine a prosecution witness about having pled guilty to unrelated charges and his hope that "he would reap a benefit" from testifying for the State even though there was no plea agreement to that effect; the witness's "belief that his testimony would have a favorable effect on future sentencing may have been mistaken or speculative, but what is important is what he believed"); *cf. Davis v. Alaska,* 415 U.S. at 319-20, and can prove any bad acts of any person that are otherwise relevant to the respondent's theory of the case, such as a complainant's prior assaults in a case in which the respondent asserts self-defense and seeks to use the complainant's violent history to show that s/he was the aggressor or to show the reasonableness of the respondent's fear, *see, e.g., McBride v. United States,* 441 A.2d 644 (D.C. 1982); *see also People v. Petty*, 7 N.Y.3d 277, 285, 852 N.E.2d 1155, 1161, 819 N.Y.S.2d 684, 689-90 (2006) (in a self-defense case, the defendant can introduce "evidence of a deceased victim's prior threats against defendant . . . to prove that the victim was the initial aggressor, whether or not such threats . . . [were] communicated to defendant," because "such threats may indicate an intent to act upon them, thereby creating a probability that the deceased victim has in fact acted upon them as the initial aggressor").

§ 30.07(d) Prosecutorial Impeachment of Defense Witnesses with Prior Convictions or Prior Bad Acts

The same principles that permit the defense to impeach prosecution witnesses with prior adult convictions, see § 30.07(c) entitle the prosecution to impeach defense witnesses with prior adult convictions and, in some jurisdictions, with prior bad acts.

As § 30.07(b) *supra* explains, the vast majority of jurisdictions prohibit prosecutorial impeachment of an accused with prior juvenile adjudications. Some courts have, however, relied upon the rationale of *Davis v. Alaska* to permit the prosecution to impeach other defense witnesses with their prior juvenile adjudications. *See People v. Puente,* 98 Ill. App. 3d 936, 424 N.E.2d 775, 54 Ill. Dec. 25 (1981) (superseded by statute, *see In re K.D.*, 279 Ill App. 3d 1020, 1024, 666 N.E.2d 29, 32, 216 Ill. Dec. 861, 864 (1996)); *State v. Wilkins,* 215 Kan. 145, 523 P.2d 728 (1974). As other courts have recognized, however, this extrapolation from *Davis* is inconsistent with *Davis*'s holding and logic, since *Davis* was predicated upon the accused's Sixth Amendment right to confrontation, and the state has no constitutional right to confrontation. *See, e.g., State v. Thomas,* 536 S.W.2d 529, 531 (Mo. App. 1976); *Commonwealth v. Slaughter,* 482 Pa. 538, 552, 394 A.2d 453, 460 (1978). Accordingly, the interests in confidentiality that Alaska advanced in *Davis* as a basis for excluding juvenile adjudications should ordinarily preclude the prosecution from impeaching a defense witness with prior juvenile adjudications. *See Davis v. Alaska,* 415 U.S. at 319 ("The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.").

Chapter 31

Handling Prosecution Witnesses

§ 31.01 CROSS-EXAMINING PROSECUTION WITNESSES — GENERALLY

Defensive cross-examination should ordinarily be narrowly focused. Most of what the witness is saying is probably true and accurate; diffuse cross-examination will only demonstrate this and bolster the witness. Defense counsel should concentrate on specific weak points and crucial details of the witness's testimony. Except in the relatively rare situation in which it is necessary and possible to portray the witness as an outright perjurer — when, for example, the witness's testimony is exceedingly damaging, s/he could not plausibly be mistaken with regard to critical details, and substantial motivation for lying can be made to appear — it is probably wise to confine the cross-examiner's attack on the witness's story to the narrowest possible compass.

However, when a broad and forceful attack on the witness's credibility *is* advised, counsel has the right to pursue it, and should strenuously object to any attempt by the court to '"protect [the] . . . witness from being discredited,'" *Davis v. Alaska,* 415 U.S. 308, 320 (1974), by limiting cross-examination. The right to a "probing and searching cross examination" is commonly guaranteed by state law; in addition, "[t]he Confrontation Clause [of the Sixth Amendment to the federal Constitution] . . . has long been read as securing an adequate opportunity to cross-examine adverse witnesses," *United States v. Owens,* 484 U.S. 554, 557 (1988) (dictum); *see, e.g., Douglas v. Alabama,* 380 U.S. 415, 418 (1965); *Lee v. Illinois,* 476 U.S. 530, 539-43 (1986). *See also Crawford v. Washington*, 541 U.S. 36, 61 (2004) (the Confrontation "Clause's ultimate goal is to ensure reliability of [prosecutorial] evidence . . . [by] command[ing] . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination"). "[R]estrictions imposed by . . . the trial court on the scope of cross-examination" are, therefore, constitutionally assailable, *Delaware v. Fensterer,* 474 U.S. 15, 18 (1985) (per curiam) (dictum); *see, e.g., Smith v. Illinois,* 390 U.S. 129 (1968); *Davis v. Alaska*, 415 U.S. at 315-20; *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam); specifically, "a [respondent] . . . states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'"" *Delaware v. Van Arsdall,* 475 U.S. 673, 680 (1986) (dictum), quoting *Davis v. Alaska,* 415 U.S. at 318. *See, e.g.*, *Ortiz v. Yates*, 704 F.3d 1026, 1034-40 (9th Cir. 2012). "Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor or against a party [sic]. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury [or the judge in a bench trial], as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Abel,* 469 U.S. 45, 52 (1984). And the Sixth Amendment right of cross-examination extends not only to questions

calling for answers that directly show bias but also to questions that could open up a line of further examination ultimately showing bias. *Smith v. Illinois*, 390 U.S. at 750-51.

Leading questions are permitted on cross-examination and are a particularly useful tool: Not only can they be used to pin a witness down to specifics and to keep the witness from straying into areas that counsel does not want to open up, but they can also be used to obtain admissions of facts stated in the terms most favorable to the respondent's theory of the case. The standard form of cross-examination question for these purposes is a declarative statement followed by "isn't that true?" or an equivalent phrase. For example:

> The man who robbed you approached you from the direction of the gas station, isn't that true?
>
> When you first saw him, he was between you and the gas station, right?
>
> In reporting the robbery to the police, you said that you could not tell whether the man had come out of the gas station parking area or out of the vacant lot next door, didn't you?
>
> At the time you first saw him, he was far enough from the gas station so that you could not tell whether he had been on the station's property, is that correct?
>
> From your location all of the gas station lights were behind him, weren't they?
>
> And looking at him come toward you, you were facing directly into the lights at the gas station, weren't you?

The aim in fashioning questions of this sort is to phrase the facts as strongly in favor of the defense as is possible without running a serious risk that the witness will give a credible "no" answer. Thus the final question in the preceding series is preferable to "Looking at him come toward you, you were facing the lights at the gas station, weren't you?" because the latter formulation is unnecessarily weak. On the other hand, "the lights of the gas station were in your eyes, weren't they?" would be overly risky; and even "you were *looking* directly into the lights" is not as safe as "you were *facing* directly into the lights."

The preceding series also exemplifies the often profitable technique of using "probe" questions to lock the witness into a position in which s/he must give the desired answer to a "payload" question or, alternatively, to forewarn counsel that the payload question should not be asked. A negative answer to any of the questions before the last one would have permitted and advised the cross-examiner to drop the entire line without embarrassment or risk of a damaging backfire, whereas affirmative answers to all of them made it almost impossible for the witness to avoid giving an affirmative answer to the final question.

Before beginning cross-examination, counsel should give careful thought to the *areas that s/he had best stay out of* as well as to the areas that s/he wants to go into. S/he should review the elements of the offense and the overall state of the prosecutor's record on those elements, so as to avoid the cardinal sin of helping the prosecution by filling in the missing links in its case. S/he should keep in mind that by touching any particular subject on cross, s/he will open the door to redirect examination by the prosecutor on that subject, with the danger that the prosecution will improve its case. Conversely, subjects "beyond the scope of cross" may not ordinarily be taken up on redirect; and although trial judges have discretion to relieve a party of the rigor of this rule, most of them are more inclined to enforce it strictly than to relax it.

§ 31.02 POLICE WITNESSES

Counsel should keep in mind that policing is a highly rule-bound profession. Departmental regulations flourish, governing many aspects of police work and surrounding them with detailed codes of *shall*'s and *shall not*'s that are often utterly impractical for the officer in the field to obey. At the police academy and in police manuals, officers are taught "the way" to do this or that. The approved procedure remains in their minds as "the way" to do it, even though in practice they soon develop shortcuts that deviate dramatically from that procedure. As a result, police officers frequently fail to do all of the things that it is possible for defense counsel to show on cross-examination were required or expected of them. They are constantly neglecting to file prescribed reports, leaving items uncompleted in the filling out of reports, departing from specified investigative procedures, and so forth. (For example, it seems virtually impossible to train police not to pick up a gun found at the scene of a crime to check whether it is loaded, although the gun may have latent fingerprints on it.)

Thus a relatively productive way to impeach the testimony of a police officer is to set the officer up as an expert in criminal investigation by eliciting the officer's testimony that s/he is one; then to lead the officer into agreeing that certain specified methods described by counsel are proper (or, better still, required by local police regulations) in gathering evidence to be used at trial or in recording observations or the progress of an investigation; then to retrace the officer's direct-examination testimony in detail to demonstrate that s/he deviated substantially from the specified methods, that s/he failed to take various steps which they call for, and that much of the officer's testimony was not written into his or her report at the time of the incident, despite the fact that s/he handles hundreds of cases and intends to use his or her notes to refresh his or her recollection for trial. Counsel will find it helpful to peruse local police instructional manuals, teaching materials used at the local police academy or training center, and standard police texts on criminal investigation to help identify points of error in police techniques.

It is often tempting to try to show that the police have it in for the respondent or are picking on the respondent, but the effort to do so out of the mouths of the police almost never succeeds. *In no event* should counsel ask a police officer "What attracted your attention to the respondent?" or similar questions. The reply is guaranteed to elicit the police officer's experience with the respondent's prior criminal acts and may also elicit damaging rumor. (If police

witnesses volunteer prejudicial prior-crime or prior-arrest evidence, as they will frequently seek some pretext to do, a motion for a mistrial is in order. *Cf. State v. Kahinu,* 53 Hawai'i 536, 538-45, 498 P.2d 635, 643-44 (1972) (dictum), and cases cited; *Bowen v. Eyman,* 324 F. Supp. 339 (D. Ariz. 1970).)

In general, cross-examination of police witnesses should be very specific, calling for short *factual* answers and giving the witness no leeway to stray. Counsel should ask what a police officer *did,* not what the officer *thought;* "What specifically did you see Pat do next?" not "What happened next?" If a police officer begins to describe what Pat did next by saying "Pat appeared to be . . .," counsel should immediately interrupt and ask the judge to instruct the witness to answer the question, not to state his or her opinion. And counsel should never ask *why* a police officer did something. Counsel should ask only what the police officer did and the factual circumstances under which s/he did it. Counsel can argue in closing argument that the police officer did it for the wrong reasons if that is a permissible inference from the officer's actions in the circumstances. But trying to elicit a police officer's reasons from the officer's own mouth will get counsel nothing except self-serving protestations of angelic good faith, coupled with everything damning to the respondent that the officer can think of.

§ 31.03 ACCOMPLICES TURNED STATE'S EVIDENCE

When accomplices turn state's evidence and testify for the prosecution, their testimony is usually damning. The only way to undermine an accomplice's testimony is to show that s/he has some motive for fabricating. Standard techniques are to demonstrate (a) the accomplice's bias against the respondent; (b) the consideration s/he is getting from the prosecution from testifying; (c) his or her prior criminal record or bad character for truthfulness or both, within the limits allowed by local law and constitutional doctrines (see § 30.07(c) *supra;* §§ 31.11-31.12 *infra*); and (d) the inconsistent story that s/he told (accomplices always do) when first taken into custody, denying any complicity in these crimes (see § 31.10 *infra*).

An accomplice should ordinarily be asked whether charges against him or her have been filed; if so, whether they have been dropped or reduced or whether s/he is aware of any discussions that have been had in regard to the dropping or reduction of those charges or the sentence in his or her case. (If the accomplice lies, the prosecutor is constitutionally obliged to disclose the truth or suffer the invalidation of the respondent's conviction when the deal with the accomplice is kept and the truth is discovered. *Napue v. Illinois,* 360 U.S. 264 (1959); *Giglio v. United States,* 405 U.S. 150 (1972); *DeMarco v. United States,* 415 U.S. 449 (1974) (per curiam); *Jenkins v. Artuz*, 294 F.3d 284 (2d Cir. 2002); *Hawkins v. United States,* 324 F.2d 873 (5th Cir. 1963); *see Ring v. United States,* 419 U.S. 18 (1974) (per curiam). If a respondent is convicted at a trial at which an accomplice has testified for the prosecution and has denied making any deal with the authorities in exchange for his or her testimony, counsel should keep a close eye on the disposition of the charges against the accomplice — which are usually left pending until after s/he has testified and then fairly promptly disposed of — so that counsel can make a new trial motion on *Napue* grounds as soon as evidence of a *Napue* violation appears.)

Stressing the maximum penalties to which the accomplice could have been sentenced had there been no deal (especially if the accomplice was subject to being transferred to adult court and subjected to the much lengthier sentences that can be meted out there) is one way to attempt to persuade a judge or jury why someone in the accomplice's predicament could lie.

One caution should be observed in exploring the background of relations between the accomplice and the respondent in an effort to show personal bias. If counsel's interview of the client reveals that the client and the accomplice know each other primarily through their commission of crimes together, counsel should obviously refrain from cross-examining the accomplice about the nature of his or her relationship with the respondent in order to avoid eliciting otherwise inadmissible "other crimes" evidence (see § 30.07 *supra*). Sometimes it will be sufficient to phrase questions carefully and to instruct the witness to answer certain of them yes or no.

§ 31.04 COMPLAINANTS IN THEFT CASES

Many complainants who are victims of theft have no personal knowledge of the accused. Their only function is to identify the stolen items as those that were taken from them. If the item is unique, no cross-examination is ordinarily warranted; indeed, if the complainant is particularly vulnerable or personable, a stipulation may be advisable. See § 30.02(b) *supra.* If the item is a standard model, the complainant should be examined on the reliability of his or her claim that s/he recognizes that particular item as his or hers. It should be emphasized that the object in question is no different from thousands of similar objects that can be purchased in any store.

§ 31.05 COMPLAINANTS WHO IDENTIFY THE RESPONDENT, AND OTHER IDENTIFICATION WITNESSES

As indicated in § 25.01 *supra,* frequently an identification of the respondent as the perpetrator is made by a complainant or eyewitness who did not know the perpetrator and viewed him or her only momentarily. The in-court identification usually follows an out-of-court identification in a pretrial show-up, lineup, or photographic identification procedure. Chapter 25 describes the various constitutional and state-law challenges that can be made to testimony concerning out-of-court identifications as well as to in-court identifications that are tainted by an earlier, improper out-of-court identification process or that are otherwise unreliable. As explained in Chapters 22 and 25, many jurisdictions provide for a pretrial evidentiary hearing on a motion to suppress identification testimony, at which counsel can cross-examine the police officer who conducted the identification procedure and often the complainant or eyewitness who identified the respondent. Thus, by the time of the trial, counsel will frequently have had one opportunity to cross-examine the identifying witness and will know which cross-examination questions work and which do not.

Complainants who were victimized while confronting their assailant and who identify the respondent are best examined with an emphasis on the speed of the transaction, any bad lighting

and obstructions to vision, the lack of opportunity to observe carefully under the circumstances, and the fear that they were feeling at the time and that impeded detached and accurate appreciation of events or attention to the features of the assailant. *See, e.g.*, *People v. Bailey*, 102 A.D.3d 701, 702, 958 N.Y.S.2d 173, 175 (N.Y. App. Div., 2d Dep't 2013). It should be brought out that the complainant never saw the assailant before the few seconds or minutes in question and (if this is so) has not seen the assailant since. The complainant may be portrayed as one who is willing to risk an innocent person's conviction on false self-confidence in a stressful spur-of-the-moment impression.

Any discrepancies between the respondent's appearance at trial and the description of the assailant given to the police by the complainant should be emphasized. This can best be done by (a) asking whether the complainant described the assailant to the police; (b) asking on how many occasions descriptions were given; (c) asking what those descriptions were; (d) reading the description in the police report, unless the complainant relates it accurately, and asking whether that is not more like it; (e) exploring all details of discrepancy; and (f) asking whether the complainant's recollection was not better immediately after the offense than it is now. *Omission* in the original description of salient characteristics of the respondent is significant.

Even if a motion to suppress identification testimony has been litigated and denied, counsel is entitled to present a misidentification defense at trial and, in support of that defense, to explore at trial any suggestive police behavior that might have contributed to a misidentification. *See People v. Santiago*, 17 N.Y.3d 661, 672-73, 958 N.E.2d 874, 883-84, 934 N.Y.S.2d 746, 754-55 (2011) (trial court abused its discretion and committed reversible error by denying the defense's request to call an expert witness on eyewitness identifications). *Cf. Crane v. Kentucky,* 476 U.S. 683 (1986) (an accused's constitutional right to present a defense entitles the accused to adduce evidence at trial that his or her confession was coerced even though that issue was resolved against the accused in a pretrial suppression hearing); *Sales v. Harris,* 675 F.2d 532, 539-40 (2d Cir. 1982) (trial judge erred by instructing the jury, on the basis of a pretrial suppression ruling, that photographic identification procedures were nonsuggestive as a matter of law). If the complainant identified the respondent in a lineup or other police-staged confrontation, emphasis should be placed on (1) any circumstances in the identification situation that tended to single out, or "finger," the respondent (Was the respondent exhibited to the complainant alone? If in a lineup, was s/he dressed unlike the others? How much did the others resemble the respondent in gross characteristics?); and (2) any circumstances pointing to police persuasion or suggestion. It is fruitful to explore everything said by the police to the complainant prior to, or at the time of, the identification. But this can be safely done by asking a general question of that sort *only* if counsel knows from the pretrial suppression hearing or a *voir dire* hearing at trial that the respondent was not being held for other offenses at the time of the identification.

§ 31.06 THE COMPLAINANT IN A RAPE OR OTHER SEXUAL OFFENSE

In cross-examining a complainant in a sexual offense, counsel should ordinarily adopt as

solicitous and kindly a manner as possible. This is not merely a matter of showing consideration for an individual who has been traumatized; the factfinder (whether judge or jury) is likely to feel sympathy for the complainant, so that a belligerent or bantering tone on counsel's part will probably arouse the judge's or jury's ire. This is especially true when the complainant is a child. See § 31.08 *infra.*

The traditional defense technique of showing the victim's prior sexual history and lack of chastity has been made unavailable in some jurisdictions by "rape shield laws." *See, e.g.*, *Michigan v. Lucas*, 500 U.S. 145, 146-47 (1991). Even where it is available, it is likely to backfire with judges and jurors who subscribe to the increasingly accepted view that prior sexual history has nothing to do with whether one has or has not been raped. *See, e.g., McLean v. United States,* 377 A.2d 74 (D.C. 1977) (upholding a trial judge's exclusion of evidence of the complainant's reputation for unchastity and prior sexual relations with persons other than the accused because this evidence was insufficiently probative of consent).

There are essentially three defenses in rape cases: (i) misidentification; (ii) fabrication; and (iii) consent.

In cases in which the defense is misidentification, counsel should cross-examine the complainant on the factors that prevented the complainant from getting a good look at the assailant: it was dark out; the complainant's face was covered; the assailant's face was covered; the complainant was so terrified as to be unable to focus meaningfully on the perpetrator's face; and so forth. Whenever a misidentification defense is presented, it is extremely important that counsel speak with the prosecution's serology expert (see §§ 6.02(b), 11.01 *supra*) and possibly also retain a defense expert (see Chapter 11). Inconsistencies between the blood type, enzymes, proteins, or Rh factor of the respondent and those of the assailant can be decisive in vindicating the respondent; and even if there are no inconsistencies, counsel can often limit the impact of the prosecution's serology testimony by showing that the assailant's serological characteristics are shared not only by the respondent but by a large proportion of the population.

In cases in which the defense is fabrication (either that there was no sexual act at all or that the complainant is deliberately blaming the respondent for a sexual act committed by someone else), counsel will have to establish that the complainant bears a severe enough bias or grudge against the respondent to motivate a false charge of this magnitude.

In cases in which the defense is consent (or, more precisely, in which counsel plans to argue that the prosecution has not proved the element of lack of consent beyond a reasonable doubt), counsel should stress any objective manifestations of consent — words spoken by the complainant or acts committed by the complainant that are consistent with consent. Unused opportunities for escape or outcry should also be brought out.

In sex offenses other than rape, such as sodomy or indecent acts upon a minor, the applicable statute or caselaw usually specifies that consent is not a defense. Accordingly, the

cross-examination will need to pursue any available evidence of fabrication or misidentification.

§ 31.07 THE MUTUAL ASSAULT COMPLAINANT

In assault cases arising out of fights, cross-examination should emphasize the aggressiveness of the complainant. If the complainant can be made, while being cross-examined, to express hostility to the respondent or counsel, that sort of display is useful. Sometimes it can be elicited by a slightly abrasive or sarcastic manner of examination.

When favorable, the comparative size of the complainant and respondent, any disparity in their weapons, and any disproportion in the numbers of their allies should be developed. The complainant's ability to avoid the affray should also be developed, especially in cases involving charges of assault and battery on police officers. A police officer with a nearby radio to call for assistance, a partner to help quiet a situation, and training in handling arrests and disturbances should rarely have to resort to much physical force to control a juvenile. This can be pointed out in closing argument if the underlying facts are elicited on cross-examination.

§ 31.08 THE CHILD COMPLAINANT OR WITNESS

The subject of inquiries into a child witness's competency to testify is covered in § 30.05 *supra.*

In cross-examining child witnesses, counsel must treat them with the consideration that counsel would want to have extended to his or her own child, since the factfinder (whether jury or judge) will resent any treatment harsher than that which they would want extended to their children. Moreover, gentle methods and a considerate tone are most likely to win the confidence of the child and to establish that counsel is not the child's enemy. If the child witness responds to counsel's solicitous manner with recalcitrance or belligerence, then the factfinder will tolerate counsel's employment of a somewhat more aggressive manner.

Any young child's testimony can be attacked in one of two ways. If it is detailed, it smacks of something "pat" or "rehearsed," and counsel should stress the extent of the child's pretrial discussions of the case with parents, police, and the prosecutor. If it is sketchy, *that* should be emphasized in order to depict the child as one whose vagueness demonstrates a general unreliability arising from a failure to appreciate the significance of the whole matter.

§ 31.09 PROSECUTION EXPERTS

Cross-examining an expert witness is ordinarily a difficult and risky business. Most experts who testify are also expert testifiers, and counsel who attacks them needlessly does so at the peril of being made to look like a knave or a fool. In a jury trial especially, these appearances can prove far more harmful to the respondent's case than is the substance of the expert's testimony.

In general, an expert should not be cross-examined at any length unless s/he has substantially contributed to the prosecution's case or hurt the defense. Experts whose testimony supports minor or technical prosecutive points may be passed without cross-examination or asked a few questions designed to demonstrate the narrow scope of their testimony.

An expert whose testimony is significantly damaging must usually be cross-examined, but it is often wiser to attack him or her on some narrow point on which s/he is particularly vulnerable — and subsequently to urge in closing argument that the expert's failure on this point demonstrates ineptitude or carelessness that makes the expert's other views unworthy of credence — than to attack the expert broadside in the cross-examination itself. *Cf.* John T. Philipsborn, *Feature: When Fine Print Matters; Reviewing Mental Health Assessment and Testing-Related Literature and Test Manuals is a Key to Effectively Preparing and Examining Mentral Health Experts*, 37 CHAMPION 40 (2013). When there are no demonstrable flaws in the expert's methodology or reasoning, cross-examination should ordinarily be limited to asking whether the expert's conclusions are not simply his or her opinions and whether they do not depend on fact *A* or fact *B,* which the expert has been told by others in the course of his or her investigations or which s/he has been asked to assume hypothetically in court. Rebuttal evidence can then be addressed to specifics — to showing that fact *A* or *B* may not be true or that the witness's expert opinion differs from that of equally reputable experts.

An expert is frequently best cross-examined by confronting him or her with the fact that s/he differs from another expert and asking for an explanation of the disagreement. S/he will tend to do one of three things, all helpful to the cross-examiner: (a) display dogmatism by asserting that s/he is right; (b) display indecisiveness by admitting that it is a matter of a reasonable difference of opinion; or (c) attempt a technical resolution of the conflict and so lose the understanding of the factfinder (whether jury or judge).

Preparation for cross-examination of an expert imperatively requires that counsel (a) obtain the expert's report or the substance of the expert's testimony by pretrial investigation or discovery and (b) consult with a defense expert who can help counsel to (i) understand what the prosecution expert is saying, (ii) find holes in it, and (iii) identify recognized standard texts containing assertions of opinion inconsistent with those of the prosecution expert.

Armed with an inconsistent statement in a reputable textbook, counsel should ask the prosecution expert: (1) whether s/he recognizes the text as a reputable standard work; (2) whether s/he has read it; and (3) whether s/he consulted it in preparing his or her testimony for trial. [If s/he has read, or if s/he has used, the book, s/he should be asked: (4) whether it supports the opinion that s/he has given.] S/he should then be read specific passages from the text and asked to answer, with a yes or no: (5) whether s/he agrees with the statement just read; (6) whether it supports the opinion to which s/he has testified; and (7) whether it is not, in fact, inconsistent with the opinion to which s/he has testified. (In jury trials, it is especially important to press for a yes-or-no concession of inconsistency, since the jury will understand this response but may not understand the expert's direct examination. If the prosecutor objects to the forcing of the witness

to answer yes or no, counsel should remind the court that the prosecutor will have an ample opportunity to let the witness explain on redirect.)

If no standard texts can be found on which to base this sort of examination, conflicting opinions can be brought in by asking whether, if another reputable expert had made a study of the matter and concluded that . . . [describing the conclusion of the defense expert], the witness would think that such a conclusion was beyond the range of reasonable expert judgment. If the prosecutor objects that the question lacks foundation, counsel should offer to connect it up or, alternatively, ask for leave to recall the prosecution's expert for cross-examination following testimony by the defense expert.

Counsel should have the defense expert in court throughout the testimony of the prosecution expert (see § 27.11 *supra*) and, at the conclusion of the latter's direct examination, should request a recess to confer with the defense expert in order to prepare for cross. (In jury trials this request should be made at the bench so that if the defense expert is unable to discern any openings for productive cross-examination, it will not appear to the jury that the defense expert has been consulted and has given the prosecution's expert a clean bill of health.) After conferring with the defense expert, counsel should decide whether points of vulnerability in the testimony of the prosecution expert are best assailed by (1) cross-examining the prosecution expert or (2) having the defense expert do a book review of the prosecution expert's testimony when the defense expert testifies or (3) arguing in closing argument that the conclusions of the prosecution expert rest upon incorrect or unproved factual assumptions or upon illogical reasoning or (4) more than one of these methods.

Counsel should *not* routinely cross-examine on every point of a prosecution expert's testimony that counsel intends to dispute. Often, a critical review of the prosecution expert's reasoning by the defense expert, or even a critical review by defense counsel in closing argument, invoking the common sense of the factfinder to reveal the shortcomings of the prosecution expert's reasoning, will be more effective than attempting to obtain concessions of error from a hostile expert witness on cross.

§ 31.10 IMPEACHING PROSECUTION WITNESSES WITH THEIR PRIOR INCONSISTENT STATEMENTS

One of the most convincing ways of impeaching any witness is by confronting him or her with a prior inconsistent statement. In many cases counsel will have prior statements by a prosecution witness — either because a written or oral statement was taken by a police officer and turned over to defense counsel by the prosecution (see §§ 9.07(c), 27.12(a)(1) *supra*) or because a defense investigator interviewed the witness and obtained either an oral or written statement. A prosecution witness can be impeached with a prior inconsistent statement by asking the following series of questions:

(1) Now, on direct examination, you stated that . . . [repeating the statement

verbatim]?

(2) Have you ever given a different version of that event [or "those facts" *or whatever*]?

(3) You did discuss the matter with Officer *X* [*or* "You did testify at the preliminary hearing in this case" . . . *and so forth*], did you not?

(4) That was on . . . [date] at . . . [place]?

(5) Was anyone else present, do you remember?

(6) Do you remember that *Y* was there at that time?

(7) Did you make a statement at that time relating to the event [*or* "the facts" *or whatever*] that was the subject of your testimony on direct examination in which you said . . . [repeating the statement verbatim]?

(8) Was the statement you made on . . . [date] honest and truthful, so far as you know?

(9) Your memory would have been fresher then than it is now, would it not?

[In the case of an oral statement]:

(10a) And at that time, did you not say . . . [reciting the inconsistent statement]?

[In the case of a written statement]:

(10b) Was that statement written down, do you know?

(11) Who wrote it down?

(12) And did you read the statement that *Z* wrote down?

(13) Did it accurately record what you said at that time?

(14) *[If the statement is signed]:* Did you sign the statement?

Counsel should now have the statement marked as an exhibit for identification.

(15) I show you the document marked defense exhibit number 1 for identification. What is that document, if you know?

(16) Is that the statement which you made on . . . [date] and which *Z* wrote down?

(17) [If the statement is signed]: Directing your attention to page 2 of defense exhibit number 1 for identification, at the bottom of the page: Is that your signature?

(18) Directing your attention to page 2, line 7, did you not state at that time, quote . . . [reading inconsistent statement], end quote?

The following questions should be asked *only* if it is clear that the witness will not be able to reconcile the two statements or to explain the earlier one away persuasively:

(19) The statement I have just read, which you made on . . . [date], was not the same as your testimony on direct examination here in court today, was it?

(20) Was the statement that you made on . . . [date] a lie?

(21) Were you hiding something or trying to cover something up when you made it?

(22) Then your testimony on direct examination was not accurate on this subject, was it?

[If counsel wants to take up additional inconsistencies]:

(23) Now was there anything else in your testimony on direct examination that was not accurate?

(24) Was there anything else that was inconsistent with your statement on . . . [date]?

Counsel should now repeat questions (18)-(22) for each inconsistency, omitting questions (19)-(21) if the witness is personable or if the inconsistency is subtle.

In some jurisdictions it is permissible to cross-examine a witness concerning prior inconsistent statements without showing or disclosing the statement to the witness. Where this is allowed, it may be more effective for counsel to paraphrase than to quote the prior statement, particularly when a quick-minded witness assisted by the exact text could seize upon details to reconcile it with his or her present testimony.

Counsel should ordinarily not impeach a witness with prior statements unless the statements clearly contradict points of some importance in the witness's testimony. Confronting a witness with hypertechnical or trivial inconsistencies appears to be mere carping and usually does more harm to counsel's credibility than to the witness's. The principal exception to this rule is the case in which there are numerous minor inconsistencies in the prior statement or statements of a witness who could not be honestly mistaken (such as an accomplice turned state's evidence) and whom counsel is therefore attempting to portray as a deliberate liar.

If a witness denies having made a prior statement and if the statement is not "collateral" (that is, under the law of most jurisdictions, if its contents are pertinent to the respondent's theory of the case), counsel is permitted to present extrinsic evidence in the defense case to prove that the witness did make the statement. A prior oral statement may be proved by the testimony of anyone who heard it. A prior written statement may be admitted as an exhibit upon proper authentication by anyone who wrote it or saw it written or heard the witness acknowledge it as his or her statement.

If a witness professes not to remember having made a prior statement (rather than expressly denying the statement), the jurisdictions differ on whether the statement can be proved extrinsically. Ordinarily, counsel should respond to protestations of lack of memory by questioning the witness in detail about the circumstances surrounding the witness's making of

the statement: "Do you remember that *X* was there at the time?" "This was down in the jail, in the second floor cellblock, do you remember?" "Do you remember that you said . . . [repeating the statement in detail]?" Some jurisdictions permit counsel to hand the witness a prior written statement and ask the witness if that refreshes his or her recollection, even though the document itself is not technically admissible.

§ 31.11 IMPEACHING PROSECUTION WITNESSES WITH THEIR PRIOR CONVICTIONS AND PRIOR BAD ACTS

As explained in § 27.12(a)(2) *supra,* many jurisdictions require that the prosecution turn over to defense counsel the judgments of conviction of each prosecution witness who has a prior criminal record, or at least inform defense counsel about the prior convictions so that counsel can obtain a certified copy of the judgment from the convicting court. As explained there and in § 30.07(c) *supra,* the defense also is entitled to obtain from the prosecution and to use witnesses' prior juvenile adjudications and, in some jurisdictions, prior bad acts that the witness committed as an adult or as a juvenile.

To impeach a witness with a prior conviction, counsel should ask:

> Are you the Joseph B. Smith who was convicted of the crime of burglary on May 14, 2014, in the Circuit Court for *X* County in the State of *Y*?

If the witness admits the prior conviction, it neither needs to be nor may be proved extrinsically as well. If s/he denies the conviction, it may be proved by extrinsic evidence. A conviction is ordinarily proved by a certified record of the judgment and through identification of the witness as the convicted person by the testimony of a participant in his or her trial. (Some States accept identity of names as sufficient.)

If the witness does not deny the prior conviction but merely professes not to remember it, the jurisdictions differ on whether the defense is entitled to present extrinsic proof. In any event, counsel can and should question the witness in detail about the circumstances surrounding the conviction and — unless the facts of the crime were less damning than its name — about the underlying events on which the conviction was based. Although these underlying events are ordinarily not admissible if the witness either admits or denies the prior conviction, they are a proper subject of cross-examination of a witness who claims not to remember a prior conviction, provided that counsel frames the cross-examination as an effort to jog the witness's memory. (For example, "Would it refresh your recollection to know that the conviction I am asking you about was for beating John Doe with a tire iron?") Some courts will also permit counsel to hand the witness a certified copy of the judgment of conviction and to ask the witness if it refreshes his or her recollection, even though the document itself cannot be offered into evidence unless the witness denies the conviction. (When handing the document to the witness, counsel can ask, "Would it refresh your memory of this particular conviction if I show you a certified copy of the judgment of the Circuit Court for *X* County in the State of *Y,* convicting Joseph B. Smith of the

crime of burglary on May 14, 2014?")

Of course, it is quite impermissible to engage in this kind of examination unless the questions have a basis in fact, and counsel should be prepared to explain that basis to the court on request. However, the facts relied upon to supply the basis for cross-examining do not need to be provable by legally admissible evidence.

§ 31.12 IMPEACHING WITNESSES WITH THEIR REPUTATION FOR DISHONESTY

Extrinsic evidence of a witness's untruthful character (commonly in the form of testimony that the witness's reputation for truth and veracity is bad) is ordinarily admissible for impeachment (*see, e.g.*, *People v. Fernandez*, 17 N.Y.3d 70, 76-78, 950 N.E.2d 126, 130-32, 926 N.Y.S.2d 390, 394-96 (2011)), although local rules relating to this sort of evidence differ and should be consulted. Usually, it is profitless to attack a prosecution witness by this route unless (1) the prosecution witness is critical to the prosecution's case and is uncorroborated on essential points and (2) the defense can present several witnesses — themselves reasonably attractive — to testify to the bad character of the prosecution witness.

§ 31.13 THE PROSECUTOR'S TENDER OF A WITNESS TO AVOID A MISSING WITNESS INFERENCE

Some prosecutors guard against a missing witness inference or instruction (see § 10.08 *supra*) by tendering to defense counsel at trial witnesses whom the prosecution is not going to call. If counsel has not previously interviewed the witness and unless it is clear that what the witness knows is insignificant, counsel should request a continuance that is adequate to interview the witness privately. Thereafter, counsel may call the witness as a defense witness or may ask leave of court to call him or her as a hostile witness or may request that the court call him or her as a court witness. (See § 33.25 *infra.*)

The latter two procedures are particularly important in jurisdictions that follow the common-law rule forbidding a party to lead or impeach the party's own witnesses. A witness who is found by the court to be "hostile" to the party wishing to present the witness's testimony may be called for questioning as though s/he were on cross-examination and may be impeached by the calling party; and a court witness is called for cross-examination and is subject to impeachment by both parties.

Hostility (that is, adversity to the calling party's interests) must be demonstrated in order to support a request that a witness be called as hostile. Jurisdictions and individual judges vary considerably regarding the kind of showing of hostility that they require. But defense counsel can often obtain some relaxation of the respondent's burden by citing *Chambers v. Mississippi,* 410 U.S. 284 (1973), which holds that the federal Constitution forbids a State to couple rigorous "hostility" requirements with rigid prohibitions against impeaching one's own witness, so as to deprive the accused of any fair opportunity to present vital defensive evidence. See § 33.04 *infra;*

and *cf. Green v. Georgia,* 442 U.S. 95 (1979) (per curiam).

When the prosecution announces that it is not calling a witness because the witness's testimony would be "cumulative," that announcement alone arguably supports a finding of hostility to the defense, since it asserts that the witness will corroborate prosecution testimony. If the prosecutor makes the announcement or otherwise tenders a witness with a flourish in open court, counsel may want to move for a mistrial on the ground that the prosecutor is seeking to bolster the prosecution's case unfairly by asserting that s/he has evidence against the respondent which s/he is not presenting. (By analogy a prosecutor's assertion to this effect in closing argument has been held improper in virtually every jurisdiction that has considered the question.) In this situation a refusal by the court to allow the defense to call the witness as hostile for cross-examination, at the least, is an apparent denial of the right to confrontation. See § 30.04 *supra.*

§ 31.14 PROSECUTION CLAIM OF SURPRISE

Occasionally, a prosecutor will elicit nothing incriminating from a witness and will claim "surprise" in order to impeach the witness with a prior statement that *is* incriminating. See § 33.24 *infra.* The prior statement is theoretically being used to "neutralize" or discredit the witness's present testimony but is, in fact, the prosecutor's method of introducing inadmissible hearsay.

If the witness in his or her direct testimony has simply refused to answer or has said s/he does not remember or if the witness has given no testimony affirmatively damaging to the prosecution's case, counsel should vigorously resist any attempt to impeach the witness with a prior statement on the grounds (a) that there is nothing to neutralize or to impeach and (b) that the admission of the prior statement will violate the respondent's constitutional right of confrontation, *see Douglas v. Alabama,* 380 U.S. 415 (1965).

If the witness has damaged the prosecution, counsel should request leave to *voir dire* the witness (in a jury trial, out of the presence of the jury) before the claim of "surprise" is allowed. Counsel should then attempt to establish that the witness has indicated in some way to the prosecutor, before being called, either that s/he did not wish to testify for the prosecution or that s/he would not testify consistently with his or her prior statement or that s/he was going to give testimony of the sort which s/he did, in fact, give. Unless the prosecutor was, in reality, surprised, the prosecutor should not be permitted to claim surprise. *See, e.g., State v. Smith,* 289 N.C. 143, 221 S.E.2d 247 (1976).

Chapter 32

Motion for Acquittal (The "Prima Facie Motion")

§ 32.01 THE MOTION FOR ACQUITTAL

At the close of the prosecution's case, it is routine for defense counsel to move for a judgment of acquittal. (Terminology differs among jurisdictions. The motion is sometimes called a "motion to dismiss," a "*prima facie* motion," a "motion for a directed verdict" or a "demurrer to the evidence.") The motion or demurrer tests the legal sufficiency of the prosecution's evidence to sustain a verdict; that is, it asks the question whether a reasonable juror (or a reasonable judge in a bench trial), crediting the prosecution's testimony and drawing all rational inferences in the prosecution's favor, could find every element of the charge proved beyond a reasonable doubt. *See, e.g., Burks v. United States,* 437 U.S. 1, 16-17 (1978); and see generally §§ 35.01-35.06 *infra.*

The Supreme Court of the United States held in *In re Winship,* 397 U.S. 358 (1970), "that the Constitution requires proof of guilt beyond a reasonable doubt," *Cool v. United States,* 409 U.S. 100, 104 (1972), in state as well as federal prosecutions and in juvenile as well as adult criminal trials, *see Winship,* 397 U.S. at 365-68; *see also Ivan V. v. City of New York,* 407 U.S. 203 (1972). As a consequence, the constitutionally required standard for assessing the sufficiency of the prosecution's evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (emphasis omitted). *See also Pilon v. Bordenkircher,* 444 U.S. 1 (1979) (per curiam); *Tibbs v. Florida,* 457 U.S. 31, 41, 45 (1982) (dictum).

Counsel should never neglect to make a motion for acquittal at the close of the prosecution's evidence. Many courts will not entertain a motion for a judgment of acquittal at the close of all the evidence (see §§ 35.01, 36.01 *infra*) if such a motion was not first made before the presentation of defensive evidence. And unless a motion for acquittal has been entertained and denied on the merits, the sufficiency of the evidence to support an adjudication of delinquency cannot be raised on an appeal.

In arguing the motion in a bench trial, defense counsel should try to engage the judge in dialogue rather than to indulge in formal exhortation. The judge may deny the motion, but what s/he says may give an indication of how s/he views the prosecution's proof and therefore of the points to which defense testimony can most profitably be directed.

In a jury trial it is advisable to make the motion out of earshot of the jury, since there may be some adverse effect of having the jury hear the judge deny a defense contention that the prosecution's case is insufficient. If a recess is going to be called at about this time, counsel can make the motion after the jury has gone out. If not, counsel should ask leave to approach the

bench and should make the motion at sidebar.

§ 32.02 RESERVING RULING ON THE MOTION; "HOLDING OPEN"

Counsel should politely but firmly insist on getting a ruling on the motion. Some judges will attempt to reserve ruling, particularly in a bench trial, until the close of the case. This is error because it denies the respondent his or her right, central to the accusatorial system and protected by the constitutional Privilege Against Self-Incrimination (*see Brooks v. Tennessee,* 406 U.S. 605 (1972)), to have a judicial determination of the legal sufficiency of the prosecutor's case *before* the respondent is obliged to put in a defense. *Jackson v. United States,* 250 F.2d 897 (5th Cir. 1958) (jury trial); *Cooper v. United States,* 321 F.2d 274 (5th Cir. 1963) (bench trial); *R.J.W. v. State*, 910 So.2d 357, 359 (Fla. App. 2005) (applying state rule that governs delinquency bench trials). *Cf. Smith v. Massachusetts*, 543 U.S. 462, 471-72 (2005) (stating, in the context of a double jeopardy claim, that a rule that would permit a trial judge to grant a motion for acquittal on one or more counts at the close of the prosecution's case and then to reconsider that ruling after "the trial has proceeded to the defendant's presentation of his case" on the remaining counts would create the "possibility of prejudice" by potentially "induc[ing] a defendant to present a defense to the undismissed charges when he would be better advised to stand silent"). Any evidence that the respondent presents may be used against him or her, insofar as it fills gaps in or corroborates the prosecution's case. *See, e.g.*, *Smith v. Massachusetts*, 543 U.S. at 472 (describing state rules to this effect). This compelled self-incrimination is precisely the evil against which the privilege is directed.

Occasionally the prosecutor will ask the court to "hold open" the prosecution's case-in-chief because some exhibit has to be tidied up before it can be put in or because some witness on a formal point has been delayed or for some other reason of convenience. The excuse generally sounds sensible, and the suggestion that the case be held open is beguiling from the point of view of practicality if a continuance can be avoided by this apparently simple device. But the effect of the device may be far from simple in a close case, and "holding open" should be resisted on the ground that the presumption of innocence comports "the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion . . . ,'" *Taylor v. Kentucky*, 436 U.S. 478, 484 n.12 (1978); *Bell v. Wolfish,* 441 U.S. 520, 533 (1979) (dictum).

§ 32.03 DISMISSAL OF SOME COUNTS OR OFFENSES

The court may grant a judgment of acquittal on some counts of a multi-count Petition and deny it on others. It may order an acquittal on the charge made in the charging paper but deny it for some lesser included offense. See §§ 36.01, 36.05 *infra.*

In a jury trial, if the motion is granted in part, counsel should ordinarily ask the court to so inform the jury before the presentation of any defense evidence. This avoids the adverse psychological set that some jurors may develop if they perceive that the defense is not responding

to one of the prosecutor's contentions — a psychological block that may persist even when the jury learns, at the end of the whole case, that that contention will not be submitted to the jury. If the jurors are already negotiating their verdict (as juries do from time to time during breaks in the trial, notwithstanding the judicial admonition not to discuss the case), informing them that a particular charge has been dismissed also avoids the possibility that a pro-defense juror will compromise when there is nothing to compromise about.

Chapter 33

Presenting the Case for the Defense

Part A. General Aspects of the Defense Case

§ 33.01 THE DECISION WHETHER TO PRESENT DEFENSE EVIDENCE

In most trials it is not until the conclusion of the prosecution's case-in-chief and the court's denial of respondent's motion for acquittal (see Chapter 32) that counsel makes the final decision whether to present defense evidence. Of course, a tentative plan of the defense case has to be thoroughly worked out before trial; this is necessary for the adequate preparation of potential defense witnesses; the proposed defense testimony will also guide counsel's opening statement, if any, and counsel's cross-examination and objections during the prosecution's case-in-chief. But, except in a case in which it is plain from the outset that defense testimony is inevitable, counsel should design any opening statement and any other proceedings that s/he conducts before the end of the prosecution's case in such a way as to leave open the question whether the defense will present evidence.

That question has to be decided at last when the court overrules the motion for acquittal following the prosecution's case-in-chief. There are few generalities of any use to a defense lawyer at this point. Obviously, the weaker the prosecution's case, the more difficult is the choice, since defense testimony may supply deficiencies in the prosecution's evidence and bolster unconvincing aspects. How much it will tend to do so must be appraised by counsel. (In an assault case in which the identification testimony is flimsy, for example, an effective alibi would probably tip the scales in favor of acquittal; conversely, an imperfect presentation of a self-defense claim would do nothing more than fill the gap in the prosecution's case by proving that the respondent was the perpetrator.) In this regard counsel must remember that the prosecutor is going to have the opportunity to cross-examine the defense witnesses; that the prosecutor can lead them and hence push them around somewhat; and that — particularly in jurisdictions where "wide-open" cross-examination is permitted (that is, cross-examination going beyond the subject matter of the direct and touching anything pertinent to the case) — counsel may have a good deal to worry about from his or her own erstwhile supporters.

In making the decision, counsel also needs to evaluate the possible impact of the presentation of defensive evidence on the disposition of the case if the respondent is convicted. Defensive evidence that is favorable on the guilt question must nevertheless be scrutinized for its potential impact on punishment. Counsel must assess the risk that if the respondent takes the stand and denies guilt, the judge may view this testimony as perjurious and may impose a harsher sentence on that account.

Another factor to consider is the rule of practice in some localities that gives the prosecutor an opportunity for rebuttal closing argument if, but only if, the defense presents

evidence. See § 36.10 *infra.*

Beyond this, the only broad principle that is of much use is that generally no defensive evidence is better than unconvincing defensive evidence — from the point of view *both* of verdict and of sentence.

§ 33.02 ORDER OF DEFENSE WITNESSES

If the respondent testifies and other defense testimony is also presented, it is usually wise to have the respondent testify last. In this way the respondent has the opportunity to observe the whole proceeding, to reconcile any inconsistencies in the testimony, to avoid the pitfalls of other witnesses, and to fill in any gaps in the defense case. See § 10.10 *supra.*

The principle is not inflexible, of course, and particular reasons may be found to deviate from it. Because the Supreme Court has held that a prosecutor can, in closing argument, "call the jury's attention to the fact that . . . [an accused who testifies last] had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly," *Portuondo v. Agard*, 529 U.S. 61, 63 (2000), it may be advisable to avert such an argument by calling the respondent earlier in the defense case in situations in which counsel has reason to fear that the factfinder may be swayed by a claim of tailoring. But see § 10.10 *supra* (describing state caselaw rejecting the rule of *Portuondo v. Agard* on state constitutional grounds). Another scenario in which counsel may prefer to diverge from the general practice of calling the respondent last is when the defense presents expert testimony and the expert's opinion will be based in part on facts to be established at trial by the respondent. In such a case, the respondent should ordinarily precede the expert. On request, the court will release an expert from the ban of the rule on witnesses. See § 27.11 *supra.*

Other witnesses should testify in the order most conducive to logical presentation of the facts. Of course, their convenience also must be considered if the trial is protracted and if one day is better for them than another. But orderly presentation of the defense has to take priority over witness convenience except in cases of exceptional hardship or when the quality of the witness's testimony will be affected by forcing him or her to testify at the desirable moment in the trial rather than at a time s/he prefers. Interspersing one type of witness with another destroys the continuity of the defense and may so confuse the factfinder that the factfinder will give up any attempt to follow or understand the proceedings.

§ 33.03 DISCLOSURE TO THE PROSECUTION OF PRETRIAL STATEMENTS OF DEFENSE WITNESSES

As explained in § 27.12(a)(1) *supra,* many jurisdictions permit the defense to obtain from the prosecution, either at the commencement of the trial or at the conclusion of the prosecutor's direct examination of each witness, copies of prior statements made by prosecution witnesses relating to the subject matter of their testimony. Some jurisdictions also give the prosecutor the right to obtain from defense counsel copies of prior statements of a defense witness relating to

the witness's testimony. *See, e.g.,* N.Y. FAM. CT. ACT § 331.4(2)(a) (2014). The timing of the defense disclosure obligation ordinarily parallels that of the prosecutor: In jurisdictions that require the prosecutor to turn over prosecution witnesses' statements at the commencement of the trial, the defense is required to produce defense witnesses' statements at the commencement of the defense case, *see, e.g., ibid.;* in jurisdictions that call for prosecutorial disclosure at the conclusion of each witness's direct examination, the same practice governs defense disclosure.

In *United States v. Nobles,* 422 U.S. 225 (1975), the Supreme Court sustained the power of a federal trial judge, in the judge's discretion, to require disclosure to the prosecution of portions of a pretrial statement given to defense counsel by a witness (a defense investigator, in the *Nobles* case itself) who has testified for the defense. *See also Corbitt v. New Jersey,* 439 U.S. 212, 219 n.8 (1978) (dictum); *Taylor v. Illinois,* 484 U.S. 400 (1988) (by implication). The *Nobles* Court's discussion of the Fifth and Sixth Amendment implications of this kind of disclosure suggests that it is subject to a number of constitutional limitations.

First, in concluding that the disclosure in *Nobles* did not violate the Fifth Amendment Privilege Against Self-Incrimination (see § 9.12 *supra*), the Court emphasized that the statements which were ordered to be disclosed were not statements of the accused and did not contain any information conveyed by the accused to defense counsel or to the defense investigator. *See* 422 U.S. at 234. Thus, as is generally recognized by jurisdictions that provide for disclosure of defense witnesses' statements, the respondent's own statements are exempt from disclosure requirements. *See, e.g.,* N.Y. FAM. CT. ACT § 331.4(2)(a) (2014).

Second, in concluding that the compelled disclosure in *Nobles* did not violate any defense privilege under the "work product" doctrine or the Sixth Amendment (see § 9.13 *supra*), the Court stressed Nobles' waiver of those privileges "by electing to present the investigator as a witness." 422 U.S. at 239. The Court recognized that defense "[c]ounsel necessarily makes use throughout trial of the notes, documents, and other internal materials prepared to present adequately his client's case, and often relies on them in examining witnesses. When so used, there normally is no waiver. [With regard to the broad "work product" protection extended to counsel's own notes of oral statements of witnesses, see the subsequent decision in *Upjohn Co. v. United States,* 449 U.S. 383, 399-402 (1981).] But where, as here, counsel attempts to make a testimonial use of these materials," they are subject to discovery in the trial court's discretion. *Nobles,* 422 U.S. at 239 n.14. That discretion was not abused in *Nobles* because the "court authorized no general 'fishing expedition' into the defense files or indeed even into the defense investigator's report. *Cf. United States v. Wright,* . . . 489 F.2d 1181 ([D.C. Cir.] 1973). Rather, its considered ruling was quite limited in scope, opening to prosecution scrutiny only the portion of the statement that related to the testimony the defense witness would offer. The court further afforded [the defendant] . . . the maximum opportunity to assist in avoiding unwarranted disclosure or to exercise an informed choice to call for the investigator's testimony and thereby open his report to examination." 422 U.S. at 240-41.

In jurisdictions which have not enacted legislation providing for disclosure of defense

witnesses' prior statements to the prosecution, counsel can argue that procedural innovations of this sort should not be made judicially, without legislative authorization. See § 9.11 *supra.* (That argument was not made, and therefore not passed upon, in *Nobles*.) If the argument is unavailable or fails, the "limited and conditional nature" of the discovery allowed in *Nobles,* 422 U.S. at 240 n.15, should be emphasized in resisting prosecutorial requests for any broader disclosure. See § 9.12 *supra.*

§ 33.04 CHALLENGING RULES AND PRACTICES THAT INHIBIT THE PRESENTATION OF DEFENSE EVIDENCE; THE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants [and juvenile respondents] 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky,* 476 U.S. 683, 690 (1986). As the Court made clear in *Crane,* the constitutional right to present a defense operates as a limitation upon state evidentiary rules and courtroom practices that unduly restrict the presentation of defensive proof. Although "the Constitution leaves to . . . [trial] judges . . . 'wide latitude' to exclude evidence that is 'repetitive . . ., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues' [and the Court has] . . . never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability, . . . an essential component of procedural fairness is an opportunity to be heard [and] . . . [t]hat opportunity would be an empty one if the state were permitted to exclude competent, reliable evidence . . . when such evidence is central to the [accused's] . . . claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives [the accused] . . . of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Id.* at 689-91.

The federal constitutional right to present a defense has been held to forbid the exclusion of important defense evidence through the application of state evidentiary rules that are "arbitrary or disproportionate to the purposes they are designed to serve," *Rock v. Arkansas,* 483 U.S. 44, 56 (1987) (invalidating a State's categorical ban of hypnotically refreshed testimony as applied to a criminal defendant); *Holmes v. South Carolina*, 547 U.S. 319, 321, 325-26 (2006) (invalidating "an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict"), or are "applied mechanistically to defeat the ends of justice," *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973) (reversing a criminal conviction because the state courts had applied a combination of standard hearsay principles and rules against impeaching one's own witness to curtail the defendant's efforts to prove that another man had confessed to the crime with which the defendant was charged); *accord, Green v. Georgia,* 442 U.S. 95 (1979) (per curiam); *Cudjo v. Ayers*, 698 F.3d 752, 754-55, 762-68 (9th Cir. 2012); *United States v. White*, 692 F.3d 235, 246-48 (2d Cir. 2012); *Lunbery v. Hornbeak*, 605 F.3d 754, 760-62 (9th Cir. 2010). The right

may also override state procedural rules purporting to foreclose an accused's proof of facts that would seriously undermine the force of the prosecution's evidence of guilt, *Crane v. Kentucky*, 476 U.S. at 689-91 (invalidating a state practice that forebade a defendant whose confession had been held voluntary on a pretrial suppression motion from presenting evidence of involuntariness to the jury in an effort to discredit the confession), and it may restrict even the ordinary discretion of trial judges to exclude such evidence as unduly prejudicial, *cf. Olden v. Kentucky,* 488 U.S. 227 (1988) (per curiam) (holding that a rape defendant's Sixth Amendment right to confrontation was violated when his attorney was forbidden to show by cross-examining the complainant that she was cohabiting with the prosecution witness to whom she had made her first complaint of the rape; this evidence would have bolstered the defendant's "theory of the case . . . that . . . [the complainant] concocted the rape story to protect her relationship with . . . [the witness], who would have grown suspicious upon seeing her disembark from . . . [a] car [in which she was riding with the defendant]," *id.* at 230, and the state courts were constitutionally obliged to admit it despite their finding that its prejudicial impact outweighed its probative value). In addition, the right may provide a basis for challenging various practices by which judges and prosecutors harass or intimidate defense witnesses, *see Webb v. Texas,* 409 U.S. 95 (1972) (reversing a criminal conviction because the trial judge had frightened off a proffered defense witness by singling him out for threatening reminders that lying under oath would subject him to a perjury prosecution), and practices that inappropriately depreciate the consideration to be given to defense evidence, *see Cool v. United States,* 409 U.S. 100 (1972) (condemning an "accomplice" instruction that told the jury that a defense witness was not to be credited unless found believable beyond a reasonable doubt). *See also, e.g.*, *United States v. Murray*, 736 F.3d 652, 653-54 (2d Cir. 2013) (trial judge's denial of defense counsel's request to present "surrebuttal evidence to counter evidence introduced by the government on rebuttal" violated the defendant's "right to present a meaningful defense"); *People v. Oddone*, 22 N.Y.3d 369, 377, 3 N.E.3d 1160, 1164-65, 980 N.Y.S.2d 912, 916-17 (2013) (trial judge committed reversible error by refusing to allow defense counsel to refresh the recollection of a defense witness with a prior statement: even if the trial judge had been right to view this as impeaching one's own witness in violation of a local rule of evidence, "technical limitations on the impeachment of witnesses must sometimes give way, in a criminal case, to a defendant's right to a fair trial" (citing *Chambers v. Mississippi*, *supra*)).

Doubtless, a respondent's federal constitutional right to present defensive evidence is limited to evidence of demonstrable materiality. *See Nevada v. Jackson*, 133 S. Ct. 1990 (2013) ("Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence" (*id*. at 1992); ". . . this Court has never held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes" (*id*. at 1994)). Counsel who invokes the right must be prepared to make an appropriate proffer demonstrating that the evidence s/he seeks to introduce is important to the defense. *See Crane v. Kentucky,* 476 U.S. at 690-91; *cf. United States v. Scheffer*, 523 U.S. 303, 316-17 (1998); *United States v. Valenzuela-Bernal,* 458 U.S. 858, 866-72 (1982). But whenever this can be done, counsel should not hesitate to rely upon *Crane* and the other Supreme Court cases cited in the preceding paragraph to argue (1) that the trial judge

should exercise his or her state-law discretion in favor of the admissibility of evidence proffered by the defense if the question of admissibility is at all close because "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," *Chambers v. Mississippi,* 410 U.S. at 302, and a right of this importance should not be jeopardized on doubtful grounds; and (2) that if the judge does exclude the respondent's proffered evidence, s/he will be violating the respondent's federally guaranteed "'right to put before a jury evidence that might influence the determination of guilt,"' *Taylor v. Illinois,* 484 U.S. 400, 408 (1988) (dictum), quoting *Pennsylvania v. Ritchie,* 480 U.S. 39, 56 (1987) (dictum).

Part B. Testimony by the Respondent

§ 33.05 THE RESPONDENT'S RIGHT NOT TO TESTIFY

The respondent has a right not to take the stand, whether or not s/he presents other evidence in his or her defense. This is the effect of the Fifth Amendment Privilege Against Self-Incrimination, *Brooks v. Tennessee,* 406 U.S. 605 (1972); *Carter v. Kentucky,* 450 U.S. 288 (1981), which is "applicable in the case of juveniles as it is with respect to adults." *In re Gault,* 387 U.S. 1, 55 (1967).

If the respondent fails to testify, the prosecutor may not comment on the failure (nor may the judge make such a comment to the jury in a jury trial), other than to state that the respondent has the right not to testify and that no inferences can be drawn from the respondent's failure to take the stand. *Griffin v. California,* 380 U.S. 609 (1965); *Lakeside v. Oregon,* 435 U.S. 333, 336-39 (1978); *Carter v. Kentucky,* 450 U.S. at 297-301 (dictum); *United States v. Robinson,* 485 U.S. 25, 32-33 (1988) (dictum); *and see White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (dictum); *Gongora v. Thaler*, 710 F.3d 267 (5th Cir. 2013). In many courts the prosecutor will, however, be permitted to get away with asserting during closing argument that the prosecution's case is "unrebutted" or that "no one has denied" the testimony of prosecution witnesses. This sort of "general" comment is ordinarily held not to infringe the privilege, although some cases can be cited for the proposition that it is unconstitutional, at least when the accused is the only person who could rebut or deny the prosecution's evidence, *see Desmond v. United States,* 345 F.2d 225 (1st Cir. 1965); *United States v. Flannery,* 451 F.2d 880 (1st Cir. 1971); *United States v. Handman,* 447 F.2d 853 (7th Cir. 1971); *Lent v. Wells*, 861 F.2d 972 (6th Cir. 1988). The Supreme Court of the United States has not spoken authoritatively on the issue. *Compare United States v. Hasting,* 461 U.S. 499, 512-16 (1983) (concurring opinion of Justice Stevens, upholding prosecutorial comment) *with id.* at 506 n.4 (majority opinion, leaving the question undecided); *and see Lockett v. Ohio,* 438 U.S. 586, 594-95 (1978) (sustaining prosecutorial comment because defense counsel had "clearly focused the jury's attention on [the defendant's] . . . silence first," *id.* at 595).

In jury trials most courts will give defense counsel the option whether or not the jury should be instructed expressly concerning the respondent's right not to testify and the impermissibility of adverse inferences. (The Supreme Court has acknowledged that this practice

"may be wise," *Lakeside v. Oregon,* 435 U.S. at 340, while declining to hold that the Constitution forbids a trial judge to give the cautionary instruction over defense objection, *id.* at 340-41. If defense counsel requests the instruction, it is required by the Fifth Amendment. *Carter v. Kentucky*, 450 U.S. at 295-305; *James v. Kentucky*, 466 U.S. 341 (1984).) In most cases it is probably best for counsel to ask for the instruction.

§ 33.06 CONSIDERATIONS AFFECTING THE DECISION WHETHER THE RESPONDENT SHOULD TESTIFY

The decision whether to put the respondent on the stand is a crucial one. Generalities are largely illusory, but the following factors might be considered:

(A) *The desirability of having the respondent appear to "come clean."* It is widely agreed among criminal lawyers of experience that an accused's failure to take the stand is often construed by the trier of fact as an indication that the respondent is hiding something — hence that s/he has something to hide. This is perhaps more inevitable with juries than with judges, but it is true of both. Therefore, in most cases in which a respondent can tell a plausible exculpatory story, the respondent probably ought to testify unless there are strong affirmative reasons why s/he should not.

(B) *Whether the respondent has something to say that is legally and factually supportive of the theory of the defense.*

(C) *Whether what s/he has to say can be shown by other witnesses.*

(D) *Whether what s/he has to say and the way s/he says it are credible.* Both the inherent plausibility of the respondent's story and the respondent's demeanor are important. Demeanor includes not only the respondent's apparent honesty and sincerity (or their opposites) but also intelligence and articulateness. The prosecutor will be up for cross-examination of the respondent and may confuse a respondent who is not quick-witted and able to express himself or herself well. It is vital that the respondent not be disbelieved. More is involved than the obvious proposition that disbelieved testimony does no good. Many judges impose a harsher sentence (some even ordering incarceration when they otherwise would have granted probation) to penalize a respondent for what the judge concludes was perjurious testimony. (Doubts about the constitutionality of this practice were laid to rest in *United States v. Grayson,* 438 U.S. 41 (1978).)

(E) *Whether the respondent is likeable or distasteful, sympathetic or obnoxious.* Defense counsel should try to step out of role and take a fresh look at the respondent as the respondent has appeared to the factfinder throughout the trial up to this point. Does s/he make a better impression if s/he keeps quiet or if s/he talks?

(F) *Whether the respondent has a prior record that can be brought out for impeachment*

if s/he testifies. As explained in § 30.07(b) *supra,* the large majority of States prohibit the prosecutor from impeaching the respondent with evidence that s/he has been adjudicated a delinquent in the past, but some States permit such impeachment, and some others permit the prosecutor to impeach the respondent with the "prior bad acts" underlying the adjudications. (Since the form of the prosecutor's cross-examination question in the latter jurisdictions is not "were you adjudicated a delinquent for having done [the act]?" but rather "did you do [the act]?" the respondent is free to say "no" if that is the truth, even if s/he was wrongfully convicted of the prior offense. The prosecutor then is barred from introducing extrinsic evidence to the contrary. See § 30.07(b) *supra.* However, if the offense is one to which the respondent pleaded guilty, it is ordinarily advisable for the respondent to admit commission of the act because some judges might view a denial as "opening the door" to proof of the respondent's previous inconsistent admission and, in any event, the prosecutor certainly could bring up at disposition what appears to be a perjurious change of position.) In jurisdictions that permit such impeachment, counsel should carefully review the respondent's record with him or her to ensure that s/he does not respond to a question about prior adjudications or bad acts by saying "I don't remember" — an answer which, although it may be true, will brand the respondent as either a liar or a habitual criminal in the eyes of the judge or jury.

(G) *Whether the respondent has made a prior statement that the prosecutor has and with which the respondent can be impeached.* Prior inconsistent statements of a respondent are, of course, admissible to impeach his or her trial testimony. *E.g., Anderson v. Charles,* 447 U.S. 404 (1980) (per curiam). The prosecutor will not invariably use in the prosecution's case-in-chief every incriminating admission that s/he has. Particularly if the respondent has made some sort of admission followed by a full confession, the prosecutor may hold back the admission. Then, if the respondent testifies, the prosecutor can confront the respondent with the admission on cross-examination — thus introducing additional incriminating evidence in the midst of the defense case — and can also end the trial on a strong note by calling an officer to recount the admission in rebuttal. See § 10.10 *supra;* § 33.09 *infra.* As indicated in § 33.09, a respondent's prior admissions cannot be used for impeachment if they were involuntary (see § 24.03 *supra*), but they can be used for impeachment if they were voluntary even though they may have been obtained in violation of the rules of *Miranda v. Arizona,* 384 U.S. 436 (1966) (see § 24.07 *supra*) or the Sixth Amendment (see § 24.13 *supra*) or the Fourth Amendment (see § 24.18 *supra*). See also § 24.22 *supra.* And although the prosecution is not permitted to present in its case-in-chief the transcribed testimony of the respondent on a motion to suppress, *see Simmons v. United States,* 390 U.S. 377 (1968), the question has been pointedly reserved by the Supreme Court whether the accused's suppression-hearing testimony can be used to impeach his or her trial testimony to the extent that the two are inconsistent. *United States v. Salvucci,* 448 U.S. 83, 93-94 (1980). The likelihood is that the ultimate authoritative disposition of this issue will be in favor of allowing the prosecution to use the suppression-hearing transcript to impeach. *See id.* at 94 n.9.

(H) *Whether there is some incriminating evidence, inadmissible in the prosecution's case-in-chief because illegally obtained, that may be used in rebuttal if the respondent testifies.*

Evidence obtained in violation of the Fourth Amendment may be used to impeach or rebut the testimony of a juvenile respondent who elects to take the stand at trial if the illegally obtained evidence is inconsistent with any of the respondent's "statements on direct examination [or] . . . his answers to questions put to him on cross-examination that are plainly within the scope of the [respondent's] . . . direct examination." *United States v. Havens,* 446 U.S. 620, 627 (1980). The only limitations on the prosecutor's right to use unconstitutionally seized evidence for impeachment are that the evidence must be "reliable," *ibid.* (dictum), see § 33.09 *infra,* and that the prosecutor may not use it to impeach a respondent's testimony given in response to cross-examination "having too tenuous a connection with any subject opened upon direct examination . . .," 446 U.S. at 625, explaining *Agnello v. United States,* 269 U.S. 20, 35 (1925). The test of cross-examination that is not "too tenuous" is variously described in the *Havens* opinion as "proper cross-examination reasonably suggested by the [accused's] . . . direct examination," 446 U.S. at 627, and as "questions [that] would have been suggested to a reasonably competent cross-examiner by [the accused's] . . . direct testimony," *id.* at 626. *Cf. United States v. Nobles,* 422 U.S. 225, 240 (1975) (defining the scope of proper cross-examination, in another context, as extending to "matters reasonably related to those brought out in direct examination").

(I) *Whether evidence of the respondent's pretrial silence in the face of accusation is available and admissible to impeach the respondent.* In some cases, the prosecution may seek to use the respondent's pretrial silence against him or her. For example, the prosecution may seek to impeach the respondent with his or her failure to report to the police what s/he now claims was a justifiable homicide or assault, or with his or her failure to volunteer an exculpatory story when questioned by the police or others about events surrounding the offense, or with his or her failure to respond by denials when accused by the police or others. As § 24.23 explains, *Doyle v. Ohio,* 426 U.S. 610 (1976), prohibits the prosecution from using an accused's silence following arrest and the administration of *Miranda* warnings to impeach a testifying defendant, but post-*Doyle* decisions have found this rule to be inapplicable when the prosecution seeks to impeach a testifying defendant with pre-arrest silence (*Jenkins v. Anderson*, 447 U.S. 231, 239-40 (1980)) or post-arrest silence when no *Miranda* warnings were given (*Fletcher v. Weir,* 455 U.S. 603, 606-07 (1982) (*per curiam*)) or when the prosecution seeks to introduce evidence in its case-in-chief of non-*Mirandized* silence by an accused who did not expressly invoke the Fifth Amendment Privilege Against Self-Incrimination (*Salinas v. Texas*, 133 S. Ct. 2174 (2013)). As § 24.23 also explains, state constitutional decisions and evidentiary rules may bar prosecutorial uses of non-*Mirandized* silence in the case-in-chief and possibly also for the purpose of impeaching a testifying defendant. In cases in which the federal constitutional and state-law rules discussed in § 24.23 would bar the prosecution from introducing evidence of an accused's silence in its case in chief but would allow the prosecution to use such silence to impeach an accused who takes the witness stand, the decision whether to put the respondent on the stand must take into account the risk of opening the door to damaging evidence that the prosecutor could not otherwise introduce at trial.

(J) *Whether there is other potentially damaging impeaching matter available to the prosecutor and whether prejudicial matters in the respondent's background are likely to be*

brought out on cross-examination. Like other witnesses, a respondent may be impeached by showing his or her bad reputation for truth and veracity. See § 31.12 *supra.* This does not mean that the respondent's general bad character can be shown, and counsel should object if the prosecutor sets out to examine the respondent on various assorted misdeeds and so forth. Counsel must be especially alert while the prosecutor is cross-examining the respondent. Some apparently innocuous questions can be damaging: For example, the normally uncontroversial question "what grade are you in?" is problematic when the respondent's answer is so inconsistent with his or her age that it makes it obvious s/he has been repeatedly left back, presumably because of truancy or lengthy periods of suspension from school. The difficulty of objecting to these questions without prejudice will create problems if a respondent with a disreputable life style testifies.

(K) *Whether cross-examination of the respondent is likely to supply deficiencies or bolster weaknesses in the prosecution's case-in-chief.* See § 33.01 *supra.* The breadth of allowable cross-examination should be considered. See § 33.09 *infra.*

§ 33.07 EFFECT OF THE RESPONDENT'S CHOICE

Counsel should weigh these considerations and decide in the first instance whether s/he thinks that the respondent ought to testify. That decision, with its reasons, should be explained to the respondent. Counsel may properly urge the respondent that it is unwise or dangerous for the respondent to take the stand. When the unwisdom or the danger appears strong, counsel's urging may and should be strenuous. Counsel should always outline clearly to the respondent the hazards of testifying (whether or not counsel wants to put the respondent on). But if this fails to daunt the respondent and if counsel's advice against testifying fails to persuade the respondent, then s/he should ordinarily be allowed to testify. *See Jones v. Barnes,* 463 U.S. 745, 751, 753 n.6 (1983) (dictum); *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (dictum). *See also United States v. Gillenwater*, 717 F.3d 1070, 1077-79 (9th Cir. 2013).

§ 33.08 PRESENTING DIRECT TESTIMONY OF THE RESPONDENT

Direct examination of the respondent should be concise and orderly but should not abbreviate the respondent's testimony so that important details will be passed over rapidly. The respondent's testimony is a central event at the trial, and it ordinarily ought not be rushed or made to seem less than full.

As a general matter, questions should call for discursive or explanatory answers rather than mere "yes" and "no" responses and should give the respondent apparent freedom to do the talking. It is important that the respondent appear to want to tell his or her story and that the story appear to be the respondent's, not counsel's. The respondent should not be tightly restricted by short-answer questions that make him or her look like s/he is saying only what counsel wants to present. The more articulate, personable, and sympathetic s/he is, the more leeway s/he should be given to project his or her own image.

On the other hand, the scope of direct examination must be limited so as to avoid opening up areas in which damaging cross-examination can be pursued. Counsel should anticipate likely points of prejudicial cross-examination (see § 33.06 *supra*; § 33.09 *infra*) and should advise the respondent, and structure the direct examination, to keep away from matters that will open the door to them. In particular, the respondent should be warned that, both on direct and cross-examination, s/he must avoid broad protestations of innocence — "I've never been in trouble in my life," "I don't even know what marijuana smells like," "I would never do anything like that" — since these protestations may be treated by the court as raising the issue of character and opening the door to prosecutorial proof of bad character (see § 33.17 *infra*).

At some point in the direct examination, counsel should ask the client directly whether s/he committed the crime(s) with which s/he is charged. The formal denial has become such a standard part of the direct examination of respondents in juvenile trials that a judge sitting as trier of fact in a bench trial would view its omission as peculiar and possibly even suspicious. In jury trials, even though the jurors may have no prior courtroom experience, they will probably have a common-sense expectation that any innocent person on trial for a crime would explicitly deny guilt.

Defense lawyers differ about whether the formal denial is more effective at the beginning of a direct examination or at the end. The rationale for placing it at the beginning is that it enables the respondent to make a good impression by coming on strong and clear, and it also helps to structure the respondent's testimony by announcing the defense theory of the case up front and thereby assisting the trier of fact to appreciate the significance of the respondent's factual story when the respondent goes on to relate it in detail. The rationale for placing it last is that in a bench trial, the judge may view himself or herself as so sophisticated a factfinder that s/he will resent the attorney's commencing with formal denials rather than going directly to the hard facts; and in both bench and jury trials, a formal denial can provide a very strong conclusion to the respondent's testimony.

The formal denial would usually be framed along the following lines:

Q. Now, Richard, you have heard the testimony of the prosecution witnesses, and you know what you are charged with. I want you to look at [His] [Her] Honor [and the ladies and gentlemen of the jury] and tell [him] [her] [them] whether you are guilty of this crime that you are charged with here today?

A. No.

Q. Did you [*summarizing the key facts of the crime, such as* "rob Mr. John Jones on September 19, 2014, and steal $ 350.00 from him?"]

A. No.

§ 33.09 CROSS-EXAMINATION OF THE RESPONDENT

The prosecutor is usually given rather broad latitude to cross-examine the respondent and is frequently allowed to go somewhat beyond the scope of the direct examination even in jurisdictions that would forbid cross-examination of this breadth in the case of other witnesses. Although counsel should object to any cross-examination that goes outside the scope of the direct, s/he should not be surprised to see the objection overruled in the exercise of the trial judge's discretion.

On the other hand, attempts by the prosecutor to open up the respondent's background generally or to expose particularly prejudicial matters — gang associations, abuse of family members, and so forth — are blatantly impermissible and should be vigorously opposed. *See*, *e.g.*, *United States v. Romo*, 669 F.2d 285 (5th Cir. 1982); *United States v. Dickens*, 775 F.2d 1056 (9th Cir. 1985); *Hosford v. State*, 525 So.2d 789, 790-92 (Miss. 1988). Counsel should point out to the court that what is at issue here is not merely the scope of cross-examination but the fundamental principle that the prosecution may not present evidence of the respondent's character unless the respondent opens the character issue, and then only according to tightly restricted modes of proof. See § 30.07 *supra;* § 33.17 *infra.* Counsel should invoke the respondent's federal and state constitutional privileges against self-incrimination in objecting to any cross-examination that is not "reasonably related to those [matters] brought out in direct examination," *United States v. Nobles,* 422 U.S. 225, 240 (1975) (dictum), since the privileges are not waived concerning this material, and the very fact that the prosecutor is seeking to elicit it before the trier of fact establishes its incriminating character. *See also Blanks v. State*, 406 Md. 526, 540-41, 544, 959 A.2d 1180, 1188, 1190 (2008) (prosecution violated the attorney-client privilege by responding to the defendant's statement on direct examination that he had told only his father about his relationship with the murder victim by cross-examining the defendant about "when and what [he] . . . had discussed with his attorney about his relationship with the murder victim"). In a jury trial, the grounds and explanations for defense objections to the prosecution's cross-examination of the respondent should obviously be made at sidebar. See § 34.03 *infra*.

Although the range allowed in cross-examination of a respondent may be broader than ordinary, the ordinary rule prevails that the respondent may not be impeached by extrinsic evidence on collateral matters — that is, those which the prosecution could not prove in its case-in-chief. Similarly, although the respondent may be asked on cross-examination whether s/he made a prior inconsistent statement with respect to any matter that s/he asserts on direct examination, the prior statement may be proved extrinsically only if the matter is noncollateral. And the prosecution is not permitted to cross-examine the respondent about a prior statement unless the prosecutor, on defense objection, can satisfy the court that there is a basis in fact for the questioning: that is, that the respondent did make the statement. See § 31.11 *supra.*

Section 30.07(b) *supra* describes the general rule prohibiting the prosecutor from using a respondent's prior juvenile adjudications to impeach the respondent, and the exceptions to this general rule that are recognized in some jurisdictions.

As indicated in § 33.06(G), (H) *supra,* under *United States v. Havens,* 446 U.S. 620 (1980), a respondent's "prior inconsistent utterances [and] . . . other reliable evidence" may be used to impeach his or her testimony even though they were obtained in violation of the Fourth Amendment and thus are inadmissible in the prosecution's case-in-chief. *Id.* at 627. Under *Harris v. New York,* 401 U.S. 222 (1971), and *Oregon v. Hass,* 420 U.S. 714 (1975), and *Kansas v. Ventris*, 556 U.S. 586, 590 (2009), the respondent's prior inconsistent statements may similarly be used for impeachment even though they were obtained in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966), or the Sixth Amendment, see § 24.22 *supra*, "provided of course that [their] . . . trustworthiness . . . satisfies legal standards," *Harris v. New York,* 401 U.S. at 224; *see also Oregon v. Hass,* 420 U.S. at 722, 723. The meaning of the qualifications concerning "reliable evidence" in *Havens* and "trustworthiness" in *Harris* and *Hass* is obscure. It is firmly settled that involuntary prior statements (see § 24.03 *supra*) and statements obtained in violation of the respondent's federal and state constitutional privileges against self-incrimination may *not* be used for impeachment, *Mincey v. Arizona,* 437 U.S. 385, 397-98, 402 (1978); *New Jersey v. Portash,* 440 U.S. 450, 458-60 (1979), but the federal standard of involuntariness is not equivalent to "reliability" or "trustworthiness," *see Rogers v. Richmond,* 365 U.S. 534, 544-45 (1961). Perhaps the reference is to the traditional common-law standard governing the admissibility of confessions (see § 24.16 *supra*) or perhaps it is to state law — although a reference to state law would seem out of place in the "provided" clauses that qualify the announcement of a federal constitutional rule in *Harris* and *Hass* and doubly out of place in *Havens,* which involved a federal prosecution. Counsel therefore has a certain amount of leeway at present to argue that "trustworthiness" and "reliability" mean whatever they need to mean in order to bring the facts of his or her case outside of the ambit of *Harris*, *Hass*, and *Havens.* (Counsel should also note the restriction of those cases to impeachment of the respondent's testimony on direct examination or on cross-examination that is *within the scope of the direct:* The prosecutor may not invoke them to justify impeachment of the respondent's answers to questions that the prosecutor has "'smuggled in'" by broader cross-examination, *United States v. Havens,* 446 U.S. at 625, 626 (dictum).)

The extent to which the prosecution is permitted to impeach a respondent with his or her prior inconsistent testimony given at a suppression hearing or similar *voir dire* proceeding is presently unsettled. See § 33.06(G) *supra.*

Impeachment by prior silence is discussed in §§ 24.23 and 33.06(I) *supra.* Essentially, the respondent's postarrest silence after receiving *Miranda* warnings is inadmissible to impeach his or her trial testimony, *Doyle v. Ohio,* 426 U.S. 610 (1976), but other instances of prearrest or postarrest silence may be admissible so far as the federal Constitution is concerned. Counsel can and should invoke state constitutional guarantees and state-law evidentiary principles as grounds for prohibiting the latter kinds of impeachment. See §§ 7.09 and 24.23 *supra.*

Some judges will instruct counsel not to confer with their witnesses during recesses between direct and cross-examination or during recesses called while the witness is testifying on cross-examination. The constitutionality of these prohibitions as applied to the respondent

depends on the length of the recess and on whether the recess falls at a time when the respondent and counsel have any trial-related matters to discuss *other than the respondent's ongoing testimony.* "[T]he testifying . . . [respondent] does not have a constitutional right to advice" concerning the subject of his or her testimony, *Perry v. Leeke,* 488 U.S. 272, 284 (1989), but s/he does have a "right to unrestricted access to his lawyer for advice on a variety of trial-related matters . . . in the context of a long recess," even though the recess occurs while s/he is on the witness stand, *ibid.* (explaining *Geders v. United States,* 425 U.S. 80 (1976)). See § 27.02 *supra.* If a recess exceeds 15 or 20 minutes, an order forbidding communication between the respondent and his or her attorney is problematic under the *Geders* and *Perry* cases, and counsel should object to it as an infringement of the respondent's state and federal constitutional rights to the effective assistance of counsel.

§ 33.10 CORROBORATION OF THE RESPONDENT

It is vital to corroborate the respondent on every point on which corroboration is possible. Nothing should be left to rest on the respondent's unsupported testimony if there is any extrinsic proof of substance to support it. In particular, when the physical characteristics of sites or things are of any significance to the respondent's testimony and can be proved by such relatively incontrovertible proof as photographs or demonstrative evidence, this should be done. The time when the respondent left school should be corroborated by attendance sheets; the time when s/he left work by his or her timecard; the weather, by Weather Bureau records. Every matter in which the respondent is supported by proof that the trier of fact is likely to believe has a capacity to spread and envelop the respondent's testimony with an atmosphere of veracity. The respondent needs this badly, since any respondent's testimony is suspect for obvious self-interest.

The necessary qualification of this principle is that if no corroboration can be made of significant aspects of the respondent's story that would be corroborable if true, no corroboration should be offered of less significant items. It had better appear to the trier that counsel is slipshod than that counsel is diligent but does not have a case.

Part C. Expert Witnesses

§ 33.11 RULES GOVERNING EXPERT TESTIMONY

In States in which the admissibility of evidence is regulated by statutes or a set of rules, there is often a section or group of sections that covers expert testimony. In States that have not codified this aspect of the law of evidence or adopted a set of rules of evidence, local caselaw commonly prescribes the standards for presenting expert testimony.

Until the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the standard for admission of expert testimony in the federal courts and in the vast majority of States was the so-called "*Frye* test," drawn from *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). Under the *Frye* test, scientific evidence (or, more precisely,

scientific evidence of a novel type) was admissible only if the scientific technique was "sufficiently established in the particular field in which it belongs." *Id*. at 1014. *See Daubert*, 509 U.S. at 585-86 & n.4 (discussing the *Frye* test). In *Daubert*, the Court established a new standard for the federal courts, interpreting the Federal Rules of Evidence to provide that the admission of "novel scientific evidence at trial" (*id*. at 585) turns upon a trial judge's finding that the "scientific knowledge" to which "the expert is proposing to testify . . . will assist the trier of fact to understand or determine a fact in issue" (*id*. at 592). The Court explained that the question to be addressed by the trial judge "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id*. at 593. Emphasizing that "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test" (*id*.), the Court made the following "general observations" (*id*.):

> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. . . . ¶ Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. . . . ¶ Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, . . . and the existence and maintenance of standards controlling the technique's operation . . . . ¶ Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." ¶ The inquiry envisioned by [Federal] Rule [of Evidence] 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability — of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

Id. at 593-95. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court held that "*Daubert*'s general holding — setting forth the trial judge's general 'gatekeeping' obligation [under the Federal Rules of Evidence] — applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Id*. at 141. The Court reiterated in *Kumho* that "the test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Id*.

Although the *Daubert* decision was concerned only with what the Federal Rules of Evidence require in federal trials and is not binding on the state courts, quite a few state courts have replaced their former tests for admissibility of some or all kinds of expert testimony with a standard modeled on *Daubert*. Accordingly, in state court cases in many States (and, of course, in federal court cases), counsel will need to be familiar with the intricacies of the *Daubert* doctrine. For general sources on this topic, see, *e.g.*, 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED

STATES COURTS, Chapter 702 (2d ed., Joseph M. McLaughlin, ed., 2007 & Supp.); RICHARD O. LEMPERT, SAMUEL R. GROSS, JAMES S. LIEBMAN, JOHN H. BLUME, STEPHAN LANDSMAN & FREDRIC I. LEDERER, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 1088-1107 (4th ed. 2011); 1 KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, D.H. KAYE, ROBERT P. MOSTELLER, E.F. ROBERTS & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 203 (7th ed. 2013).

When preparing to present an expert witness for the defense or to cross-examine a prosecution expert, counsel should carefully consult any potentially applicable evidentiary requirements in the jurisdiction's statutes, rules or caselaw. Even when local practice treats certain rules of expert evidence as well-accepted, counsel should consider the possibility that a novel challenge could produce a different rule. *See, e.g.*, *People v. Goldstein*, 6 N.Y.3d 119, 126-29, 843 N.E.2d 727, 731-34, 810 N.Y.S.2d 100, 104-07 (2005) (questioning the parties' assumption at trial and on appeal that satisfaction of the established evidence doctrines governing the admissibility of a prosecution psychiatrist's opinion based on hearsay also permits the psychiatrist to testify to the underlying hearsay statements on which the opinion was based; noting that "[w]e have found no New York case addressing the question of when a party offering a psychiatrist's opinion . . . may present, through the expert, otherwise inadmissible information on which the expert relied"; observing that the federal rule of evidence on this subject was amended in 2000, and that, because the parties did not raise the issue, "[w]e are not called upon to decide here, and do not decide, whether the New York rule is the same as, or less or more restrictive than, this federal rule"; and ultimately holding that the underlying hearsay statements were inadmissible under a wholly distinct and adequately preserved claim that they violated the defendant's Confrontation Clause rights under the doctrines set forth in § 30.04 *supra*).

§ 33.12 QUALIFICATION OF THE EXPERT

§ 33.12(a) Subjects to Cover in Qualifying an Expert

Before an expert witness is competent to give an opinion, s/he must be qualified to the satisfaction of the court. There are no categorical standards of qualification; the matter is left essentially to the trial judge's discretion. If the expert's profession is licensed by the state, it is obviously desirable that s/he meet state standards for licensing. Eminence in the field will impress the trier of fact, but juries (and even many judges) prefer hometown experts. Counsel should attempt to form some impression of the credentials that are regarded as prestigious within the profession; handwriting experts, for example, usually become such by experience more than by formal training. A present or prior position with a law enforcement agency enhances the appearance of dispassion of the expert. In the same vein, counsel is ordinarily permitted to bring out, where applicable, the fact that an expert who has testified in other delinquency or criminal cases has predominately testified for the prosecution.

To qualify an expert, the following questions may be asked:

(1) Please state your name for the record.
(2) What is your profession [employment]?
(3) Would you tell the court, please, what is the subject matter of that profession [work]? [*Counsel and the expert should have rehearsed a short, general, nontechnical description.*]
[(4) Do you specialize within the field?]
[(5) What is your specialty?]
[(6) And what is that concerned with?] [*Again, only a brief description is wanted.*]
(7) Where are you employed? [*or:* Do you hold any particular job or position in your field? What is that job [position]?]
(8) With respect to your formal education, would you state what colleges and universities you attended, if any, and what degrees you may have received?
(9) Was that degree in any specialized field?
(10) And what field was that?
[(11) Are you licensed as a . . . in the State of . . . ?]
[(12) How long have you been licensed?]
[(13) Have you been in practice all that time?]
[(14) Are you also certified as a specialist in the field of . . . ?]
[(15) What does certification of that kind involve?]
[(16) And how long have you been so certified?]
(17) Would you tell us, please, what positions you have held since the completion of your formal education and the number of years in each?
(18) What are the duties and functions of your present position, please?
(19) How long have you held that position?
(20) [*With respect to any particularly important work experiences:*] Now, you said that for . . . years you were at . . . . Would you tell us what you did there, and what professional experience you had?
(21) In the course of your work, have you had occasion to conduct examinations of . . . [*stating the kind of examination involved in this case*]?
(22) How many such examinations would you say you have conducted?
[(23) And have you also done any teaching in the field of . . . ?]
[(24) When and where was that done?]
[(25) Have you published any works [that appeared in professional journals] in the field of . . . ?]
[(26) Would you state the titles of a few of those works, please?] [*The witness should be instructed to respond with a few titles that are the most pertinent to the subject matter of his or her testimony in the case.*]
[(27) Are you a member of any professional associations? Do you hold any special positions in those associations? What are the positions that you hold?]
[(28) Have you received any prizes and awards in the field? (*The witness should be instructed to answer this question with a simple "yes" rather than going on to rattle off his or her prizes and awards. Modesty is becoming and is cost-free here, since counsel can then proceed to ask:*) Would you please tell the court what

those prizes and awards were and what they were for?]

[(29) Dr. . . . , have you ever previously testified as an expert witness in court?]

(30) On how many occasions, if you remember? [*If the witness has previously testified for the prosecution in an impressive percentage of cases:* How many of those were in delinquency cases? How many were in criminal cases? Of the times you have testified in delinquency or criminal cases, how many times did you testify for the prosecution?]

[(31) And have you also been appointed by the court to testify [*or,* serve] as a neutral and impartial expert witness [in delinquency [*or* criminal] cases]?]

If the court please, I ask the court to accept Dr. . . . as a qualified expert in the field of . . . .

§ 33.12(b) Stipulating the Qualifications of the Expert

If the defense expert is known to the prosecution, the prosecutor will often offer to stipulate to the witness's qualifications. Counsel has a right to decline the stipulation and to make his or her record. Generally, it is advisable not to agree to stipulate to the witness's qualifications unless (a) there is some doubt whether s/he will qualify as an expert, (b) the witness's qualifications are less impressive than those of the prosecution's expert, or (c) the qualifications of the experts for both sides are equally impressive, and the prosecution has agreed to stipulation of the credentials of both witnesses.

§ 33.13 GENERAL STRUCTURE OF THE EXPERT'S TESTIMONY

An expert gives opinion testimony. S/he describes the studies s/he has performed, the conditions under which they were performed, and the reliability of the studies under these conditions. After describing the data that s/he has examined or observed, s/he must be asked whether s/he has formed an opinion, based upon these data, concerning a legally relevant issue. (For example: "Based upon the examinations of Ruth Jones [the respondent] that you have described, have you formed an opinion with regard to whether Ruth was capable or incapable of forming an intent to kill during the late evening of October 1?") Upon the expert's affirmative answer to this question, s/he may be asked what the opinion is. To be admissible, the opinion usually must be of "reasonable certainty."

After the expert has stated his or her opinion, s/he should be asked to explain the reasoning that led to it. This portion of the expert's testimony should ordinarily emphasize each item of factual information that supports his or her ultimate conclusion and also indicate that s/he has considered every item of factual information in the case that might tend to cut against his or her conclusion. S/he can deal best with the latter facts by either (1) describing how they can be reconciled with his or her conclusion if they can or (2) admitting that they cut against his or her conclusion and explaining why s/he gives greater weight to other facts that support his or her conclusion. Either sort of testimony tends to be more convincing on direct examination than on cross.

The direct examination of the expert should be concise. If at any time the witness uses technical terms, s/he should be asked to explain them. Expert testimony must be carefully prepared to assure that the witness will speak to the level of understanding of the trier of fact. During dry runs of the expert's testimony, counsel should point out to the expert the terms and concepts that will need explanation in everyday language. The expert should have formulated these explanations to the satisfaction of counsel before coming to court. An expert should never be put in the position of having to coin a definition for the first time on the stand. S/he is not necessarily used to explaining his or her specialty in terms that are not its own, and the explanation may make things even less clear.

Counsel's questioning of an expert at trial should show the expertise of the witness, not that of counsel. Simple questions drawing on the experience and knowledge of the expert and calling for full answers will impress upon the trier of fact that the witness possesses the knowledge and understanding necessary to testify authoritatively in his or her specialty.

§ 33.14 HYPOTHETICAL QUESTIONS

When an expert's opinion is required to be based on facts in addition to those of which s/he has personal knowledge or knowledge gained through his or her professional investigation of the matters at issue in the trial, s/he may testify in response to a hypothetical question of counsel that asks the expert to assume the requisite facts. These facts, of course, must be established by independent proof. It is obviously not necessary that the hypothetical question include all of the facts of record, but it is necessary that all of the facts which it does include be facts that could be found on the basis of the record.
As a practical matter counsel should include as much of the evidence as s/he can without making the question tediously long; if s/he does not, the expert will likely be asked on cross-examination whether his or her opinion would change if each of the omitted facts were added — one by one. Even if s/he says that the opinion would not change, s/he is cast in the posture of appearing to explain away matters and to defend his or her opinion more than is desirable

The form of the hypothetical question normally is "Now, I ask you to assume the following set of facts to be true and correct: [*stating facts*]. Assuming those facts to be true and correct, can you express an opinion with reasonable certainty as an expert whether [*stating the problem*]?" Following an affirmative answer to this question, counsel asks: "What is that opinion?" When the opinion is given, counsel asks for an explanation of the reasoning on which it is based. This much is technically necessary. The following dialogue is not, but it will add a good deal to the expert's explanation of the basis for his or her opinion:

Q. Now, Dr. . . ., I have just asked you to assume certain facts, which I related in detail, and to give the court your opinion based upon them. When I recited those facts, was that the first time that they had been brought to your attention?

A. It was not.

Q. When were those facts previously brought to your attention?

A. Several weeks ago, you gave me a statement of the same set of facts in writing and asked me to assume that they were true and to study them and formulate an opinion based on them.

Q. [*After marking document as a defense exhibit for identification:*] I show you this document, marked Respondent's Exhibit No. 1 for identification. Do you recognize that document?

A. I do.

Q. And what is it?

A. That is the statement of facts that you gave me several weeks ago, to which I just referred.

Q. Will you read that, please, to yourself and tell the court whether the statement of facts there is identical with the facts which I asked you to assume this afternoon.

A. It is.

Q. What did you do with this statement when I gave it to you?

A. I studied it carefully. I considered the facts that you had stated there, and, as you asked, I formulated an opinion on the basis of those facts.

Q. And was that opinion the one which you have given in court this afternoon?

A. Yes.

Q. Was the opinion you have given in court formed for the first time today?

A. Oh, no. It was based on a quite careful study and consideration of those facts, which I had had for several weeks.

COUNSEL: I ask that Respondent's Exhibit No. 1 be admitted into evidence. The witness has stated that these facts on which he [she] based his [her] opinion are the same as those which I asked him [her] to assume today. [*In a jury trial:* I think there is no need to have the jury see that if they do not want to, but they should have it available to examine if they wish.]

§ 33.15 THE EXPERT'S REPORT

Whether a defense expert testifies in response to a hypothetical question or entirely on the basis of facts gathered in his or her investigation of the case, s/he should ordinarily submit a signed and dated written report to counsel well in advance of trial. As noted in § 11.04(b) *supra,* such a report entails the danger that it may be discoverable by the prosecution under certain circumstances, but its value to the defense usually outweighs that danger *if* counsel advises the expert closely in the preparation of the report so as to assure that nothing potentially damaging creeps into it through inadvertence.

Most courts will permit counsel to examine the witness by use of the report. Counsel should have five copies at trial: one for counsel's own use, one for the witness, one for the court, one for the prosecutor, and one for formal admission into evidence. Counsel should (a) mark the report as an exhibit for identification, (b) hand it to the witness, ask leave of the court to hand it up to the judge, and hand a copy to the prosecutor, and (c) ask the witness to identify the exhibit. (The basic form of questions and answers for identification of a document appears in § 33.14 *supra.* In the present case, however, the witness should also be asked who is the author of the document and should reply that s/he is.) Counsel may then direct the witness's attention to anything in it, by page and paragraph number, that may prove useful in organizing the examination. This device is particularly desirable if there are matters such as charts, graphs, and diagrams; numerical equations; collections of numbers tabulating data; and so forth, on which the witness bases his or her reasoning or which explicate his or her analysis. In a bench trial, directing the witness's attention (and thereby the court's attention) to the page on which each matter of this sort appears will suffice to enable the judge to follow the train of the testimony. In a jury trial the charts, graphs, diagrams, or figures should be reproduced on large graph paper for display to the jury, and the witness should identify the enlargement displayed as identical to the one in his or her report.

At the close of the testimony, counsel should ask that the report be admitted as *substantive* evidence, stating that it exemplifies the testimony of the witness and that the witness will, of course, be subject to cross-examination on anything in it. In a bench trial, many courts will receive it, and the judge will find it useful, as a concise summary of the expert's reasoning, in evaluating the evidence. Incidentally, counsel is guaranteed, in this fashion, against any negligent omission in the trial examination. The report should be prepared with great care, of course, and may go through several drafts with counsel's criticism. In a jury trial, it is much less likely to be received, but it will have served the functions of (a) allowing the witness to testify with an organizing document of his or her own design in hand and (b) impressing the jury with the expert's care.

§ 33.16 PREPARING THE EXPERT FOR CROSS-EXAMINATION

In preparing an expert to testify at trial, counsel should have been careful to give the expert literally *all* the facts at counsel's disposal without editing or screening. Some of the facts

may be unimportant, but it is for the witness to make this judgment on the basis of his or her expert knowledge, not for counsel. Important or unimportant, the prosecutor may well confront the witness with any particular fact on cross-examination at the trial, and the witness should not be left in the graceless posture of having to make a pressured latter-day judgment of its importance.

When facts are contested, counsel should fully inform the expert concerning the prosecutor's version of the facts as well as the defense version. It is predictable that the prosecutor will ask the expert at trial whether his or her opinion would change if *x* fact were changed or if *y* fact were changed. Counsel should have asked the expert these questions on dry-run examinations, and the expert should have a ready answer at trial.

Counsel should also explain to the expert the process of impeachment by the use of standard or reputable texts, see § 31.09 *supra,* and should have the expert identify for counsel the texts most likely to be used by the prosecutor. Counsel and the expert should go through these together, anticipating the sorts of questions that might be based on them.

Finally, counsel should carefully review with the expert his or her pretrial report in preparation for cross-examination based upon it.

Part D. Character Witnesses

§ 33.17 RULES GOVERNING THE PRESENTATION OF CHARACTER TESTIMONY

The rules governing proof of character in a criminal or delinquency case are complex and not very sensible. Subject to local variation, they may be summarized as follows:

(1) The prosecution cannot open the issue of character. That is, it may not present evidence when the sole purpose of that evidence is to show that the respondent is a bad person and for that reason is probably guilty of this offense. See § 30.07(a) *supra.*

(2) The defense can, however, elect to make an issue of character by proving that the respondent is a good person and, accordingly, is probably not guilty of the offense.

(3) Defense evidence of good character is restricted, both in regard to subject and in regard to permissible form:

(a) The defense must address its character evidence to specific traits called in question by the charge against the respondent. It could appropriately prove the trait of honesty in defense of a prosecution for fraud but not for assault and battery. It might prove the traits of "peace and good order" against assault and battery but not fraud.

(b) These traits must be proved by a time-honored ritual. The witnesses called to prove them may testify only about the respondent's reputation for these traits in a community where the respondent lives or is known. The witnesses may not testify about their own opinions of the respondent or about any specific good deeds or acts of the respondent's that exemplify the character trait in question. What is called "character evidence" is thus essentially reputation evidence.

(4) In rebuttal, the prosecution may do two things:

(a) It may cross-examine the respondent's character witnesses. Since they have purported to testify about the respondent's general community repute, they may be asked about any bad rumors concerning the respondent that they may have heard. In this context some jurisdictions suspend the usual rule barring the introduction of a respondent's prior juvenile adjudications and even the universal rule excluding evidence of a respondent's prior arrests, and permit the prosecution to ask defense character witnesses on cross-examination whether the witness has heard that the respondent was arrested or adjudicated a delinquent or did a specified evil deed on a specified date. See § 30.07 *supra.*

(b) The prosecution may also present evidence independent of the defense character witnesses. But if it does this, it is limited to adverse rumor. It may prove that the respondent's reputation for the trait in question is bad. It may prove nothing else.

See generally Michelson v. United States, 335 U.S. 469 (1948).

§ 33.18 QUALIFICATIONS AND FORM OF EXAMINATION OF CHARACTER WITNESSES

The following are the essential legal qualifications of the character witness:

(a) That the witness knows the respondent.

(b) That the witness is familiar with some community where the respondent is well known (neighborhood, school, work, church) and where, if the respondent had bad character in the dimension to which the witness speaks, the respondent's bad character would be known.

(c) That the witness has discussed the respondent with other people on numerous occasions. (If s/he cannot say "more than a dozen," s/he will probably not be permitted to testify in many localities.)

(d) That those conversations have related to the character trait in question, which is germane to the offense with which the respondent is charged.

These qualifications, together with the very small amount of substantive evidence that the witness is permitted to give, are elicited by a set of standard questions, which differ somewhat on a local basis but generally run as follows:

(1) Please state your name for the record.
(2) Where do you live, [Mr.] [Ms.] . . . ?
(3) What is your occupation?
(4) Where do you work?
(5) Do you know . . . , this respondent?
(6) For how long have you known [him] [her]?
(7) Have you seen [him] [her] often during that time?
(8) What is the nature of your acquaintance?
(9) Do you know other people who know [him] [her] in . . . [*designating the appropriate community, on the basis of the answer to the previous question*]?
(10) Have you had occasion to discuss with these people [respondent's] reputation for [peace and good order]?
[(11) And have you also heard these people discuss [respondent's] reputation for [peace and good order] among themselves while you were present?]
(12) How frequently?
(13) What is [respondent's] reputation for [peace and good order]?

§ 33.19 CHOICE OF THE CHARACTER WITNESS

In a bench trial in a delinquency case, character testimony provides an invaluable opportunity to convey certain important messages to the judge. Many judges assume that any child who has been charged with a delinquency offense, whose case was not diverted by the prosecutor or the probation office, probably is so unruly at school or has such a long record that s/he needs court intervention. Judges who subscribe to this view may be prone, consciously or unconsciously, to return a conviction in order to ensure that the respondent receives the rehabilitative services which the judge (correctly or incorrectly) assumes that the respondent needs.

Through careful selection of character witnesses, counsel can correct these negative assumptions. If a teacher or guidance counselor from the respondent's school testifies, even if s/he testifies only to the limited information permitted from character witnesses, the judge will infer that the teacher's willingness to come to court on the respondent's behalf signifies that the respondent is a good student (with all that that implies: good attendance, good behavior, and good grades). The presentation of an employer or athletic coach or community center counselor will inform the judge that the respondent is involved in beneficial activities outside of school and thus may not need court intervention. Finally, in jurisdictions that allow the prosecutor to cross-

examine character witnesses about the respondent's juvenile adjudications, the prosecutor's failure to do so will alert the judge to the fact that the respondent has no prior record. It should be noted that, in many jurisdictions, these favorable aspects of the respondent's character and record can also be presented to a judicial trier of fact through a motion to dismiss for social reasons. See Chapter 19.

In a jury trial the trier of fact will be far less sophisticated about the implications of the character witnesses for the respondent's general adjustment at school, at home, and in the community. To jurors a character witness's real significance is as a presence standing up for the respondent — someone who has enough faith in the respondent to vouch for him or her. The witness is not permitted to say this, but s/he can look it. Character witnesses must be expressive. They, more than other witnesses, must be sympathetic. Prestige is desirable, but it must be coupled with likeableness.

There should be at least two character witnesses, preferably three or four. Individuality of character and some differences of types among the witnesses are desirable if the factfinder is not to be bored with the routine patter of the examination.

§ 33.20 PREPARATION OF THE CHARACTER WITNESS

Preparation of character witnesses is more important than it might seem in light of the flimsiness of the testimony they are allowed to give. Good preparation has several aspects:

The nature of the reputation testimony that the witness is being asked to give must be made clear to him or her. Some witnesses cannot seem to get straight that they are not being asked for their personal evaluation or opinion of the respondent. Precisely because the evidentiary rule is arbitrary and rather senseless, it must be carefully explained to the witness. The response of the inadequately prepared character witness — "Have I heard? I *know* the respondent. S/he's as honest as the day is long . . ." — is usually good for some courtroom humor but does the respondent no good. The witness simply gets into a wrangle with the judge, and the value of the exercise is lost.

Counsel must be sure that the witness has had enough contacts with people who know the respondent and that s/he has heard the respondent talked about sufficiently often so that s/he will qualify as a character witness. It is vital to direct the witness's attention to this subject and to the fact that it is going to be asked about in court. Many witnesses who have actually had sufficient contact with the respondent will appear not to have had it if they are not prepared for the standard cross-examination on *voir dire.* The prosecutor will ask the character witness, first, to limit himself or herself to the precise character trait s/he is speaking about — "honesty" — and to tell the court the names of some people with whom s/he has discussed that trait of the respondent, and how it came to be discussed. This will not be easy for the unprepared witness because, thinking under pressure, s/he is likely to give narrow range to the concept of "honesty" and also be trying to remember specific occasions on which *explicit* conversational reference was made to

this trait — which will probably have been few. The witness will therefore falter somewhat.

The prosecutor will then move in with the question on precisely how many occasions the witness can recall discussing this specific trait of the respondent's. Thinking literally and having been once stung, the witness will estimate conservatively. Not aware that s/he is likely to be disqualified if s/he answers that s/he has discussed the trait fewer than a dozen times or with fewer than a considerable number of persons, the witness will say "five or six times, maybe" and thus put himself or herself out of court.

There is no need for this problem to arise. Counsel must make the witness understand that people talk about "honesty" under many other names when they talk about the respondent and also when they act toward the respondent in ways that express confidence and trust. Counsel should elicit specific instances from the witness and give the witness confidence that s/he is on sound ground in recalling that the general sense of the community is that the respondent is honest. If the witness is left with the recollection of a half-dozen names with which to respond to the prosecutor's question to name names, s/he will be all right. It is usually understandable that s/he will have forgotten the names of another half-dozen persons with whom s/he has discussed the respondent or whom s/he has heard discuss the respondent, and s/he should be encouraged to say this when the prosecutor pushes him or her on cross if s/he believes that it is true. The important thing is that s/he does not fluster and that s/he continues to assert with confidence the fact that s/he has discussed the respondent's honesty often.

If the respondent has a record and the jurisdiction is one in which the prosecutor is allowed to bring that record out on cross-examination of defense character witnesses, then a character defense is very risky and unlikely to succeed. Should such a defense be put on, the witnesses must be prepared for the questions (1) whether they have heard about each of respondent's arrests and adjudications and (2) whether each arrest or adjudication, if it happened, would change the witness's view of the respondent's character. (The latter question is allowed in many jurisdictions, although the witness is not supposed to be testifying about his or her own view of the respondent. The theory is that the question tests the witness's standards for "honesty" and so forth.) Witnesses should be selected who answer both questions "no," the first with indignation and the second with conviction. Since "have you heard" means "have you heard in the community," there may be no problem in defense counsel's informing the witness of the respondent's record in the course of trial preparation, but the question is a sensitive one.

Even in jurisdictions that allow the prosecutor to bring out the respondent's prior record in cross-examining character witnesses, counsel has a valid ground of objection to questions about arrests or adjudications if: (a) the arrest or adjudication does not bear upon the specific character trait to which the witness has testified, or (b) the prosecutor has no sound basis in fact for asserting that there was an arrest or adjudication. In addition, the trial judge may, in his or her discretion, disallow questions about some or all prior arrests or adjudications as incommensurately prejudicial. See § 30.03 *supra.* In jury trials, counsel should request at sidebar that the prosecutor identify the arrests and adjudications that s/he intends to use so that the judge

can rule on their admissibility and can exercise this discretion before the jury hears any questions about the respondent's prior record.

§ 33.21 EXPERT EVIDENCE OF EXCULPATORY PERSONALITY TRAITS; DIMINISHED CAPACITY

In addition to lay reputation testimony, some jurisdictions permit expert testimony in support of a defense theory that the psychological traits of the respondent would make it unlikely for him or her to have committed the crime. This sort of testimony has been received particularly in the area of sex crimes, when the accused is charge with a pedophilic offense and has sought to prove by psychiatric evidence that his or her personality is inconsistent with this type of offense, or when the accused is charged with homosexual rape and offers psychiatric evidence that his or her sexual orientation is exclusively heterosexual, or *vice versa*. A showing might also be attempted, for example, in a homicide case involving extreme violence that the respondent was a passive type incapable of such violence.

This sort of evidence, going to show that the respondent did not do the act charged, should be distinguished from psychiatric or psychological evidence proffered to support the defense sometimes called *partial responsibility* or *diminished capacity.* The latter is presented when specific intent or some other precise mental state is an element of a crime: The defense expert is called to testify that the accused could not or did not form such an intent or such a mental state by reason of mental illness or other incapacitating factors. *See, e.g., United States v. Brawner,* 471 F.2d. 969, 998-1002 (D.C. Cir. 1972) (en banc), and cases cited. While more than half of the States permit persons who are charged with crimes defined in terms of subjective mental elements to adduce expert testimony for this purpose, many other States do not; and the Supreme Court of the United States has held that nothing in the federal Constitution requires a State to admit such "diminished capacity" evidence. *Clark v. Arizona*, 548 U.S. 735 (2006). *But see id*. at 756-65, reserving the question whether, if the prosecution asks the trier of fact to draw a specific factual inference from the accused's behavior (for example, that the accused drove around during pre-dawn hours with his car radio blaring for the purpose of stimulating a 911 call that would lure a police office into an ambush), the accused would have a federal due process right to respond with expert mental-health evidence that made this inference less likely (for example, that the accused suffers from schizophrenia, experiences auditory hallucinations, and plays his car radio at high volume to drown them out); *compare id* at 781-801 (Justice Kennedy, writing for three dissenting Justices and answering the latter question in the affirmative).

The recognition of expert character evidence has thus far been limited to a few jurisdictions, although that of "partial responsibility" has been relatively widespread. Both concepts seem to be on the advance, and resourceful counsel should have them in mind.

Part E. Other Defense Witnesses and Other Aspects of the Defense Case

§ 33.22 ALIBI WITNESSES

The key to establishing credible alibi testimony is to have the witness relate *why* s/he remembers being with the respondent at a specific time and at a specific place. Counsel should lead up to the date of the alibi by developing the relationship between the respondent and the witness and eliciting the times during the course of a week or a month (or within the appropriate pattern of their relationship) that they see each other. Counsel may then move to the month of the crime, pinpoint something unusual or significant that happened during that month, and then focus on the day of the crime, relating the date and the time to the significant happening just described and to the pattern of the witness's daily routine or relationship with the respondent. The nub of the matter is to prove convincingly that the witness can and does remember that particular day and time and could not be mistaken on it. Reference to the weather (which counsel can establish independently by United States Weather Bureau records admissible as business entries), television programs (provable independently by station records), and regular school or work hours (provable by school records, timecards, and other business records) is useful in fixing dates and times with certainty and apparent extrinsic corroboration.

In cases in which the witness remembers the respondent's clothing, and especially when s/he can cite a good reason for remembering it, counsel will usually want to elicit a description of the clothing that the respondent was wearing when the witness saw him or her — assuming, of course, that this differs from the perpetrator's clothing as described by prosecution witnesses. However, this should not be done when it would seem unrealistic for someone in the witness's position to recall the respondent's attire.

When preparing alibi witnesses, counsel should caution them not to claim to remember things they have forgotten. A standard prosecutorial tactic is to cross-examine alibi witnesses about wholly insignificant details, such as what the witness ate for breakfast or lunch or the precise time of irrelevant events that were not memorable. If the witness professes to have a superhuman memory of these details, the witness's credibility will be impaired not only with regard to the details but also with regard to the substance of the alibi.

§ 33.23 WITNESSES WHO ARE ALLEGED ACCOMPLICES

In the unusual case (see § 10.12 *supra*) when a witness who is an accomplice of the respondent under the prosecution's theory testifies for the defense, counsel should bring out (a) the lack of opportunity for the respondent to coerce the accomplice to testify favorably, (b) the lack of any other motive for the accomplice's favorable testimony, and (c) the potential benefits to the accomplice if s/he testifies against the respondent. These are principally matters to be stressed in closing argument, but they can be argued only if a testimonial basis is laid for arguing them. In some jurisdictions, a respondent is permitted to call an accomplice or other alleged perpetrator to the stand for the purpose of requiring him or her to claim the Privilege Against Self-Incrimination in front of the trier of fact, provided that the respondent has laid a foundation

for this tactic by evidence indicating the witness's possible guilt. *See State v. Whitt*, 220 W. Va. 685, 688-89, 696, 649 S.E.2d 258, 260-61, 269 (2007) (trial court violated the defendant's state constitutional right to compulsory process by preventing the defendant from calling an alleged accomplice to the witness stand for the purpose of having her assert a Fifth Amendment privilege in front of the jury: although state law ordinarily precludes a party from calling a witness to the stand "solely for the purpose of exercising his or her Fifth Amendment privilege," an exception applies "where a defendant in a criminal case seeks to call a witness to the stand who intends to invoke his or her Fifth Amendment privilege against self-incrimination and the defendant has presented sufficient evidence to demonstrate the possible guilt of the witness for the crime the defendant is charged with committing").

§ 33.24 SURPRISE BY A DEFENSE WITNESS

A defensive case that appears beautiful in prospect may be crippled by unexpected testimony of a defense witness. The best safeguard against this occurrence is careful preparation and the taking of detailed pretrial statements from witnesses. See § 8.12(a) *supra.* Whether statements should be taken in writing or orally involves a tradeoff. Written statements are usually more effective in impeaching a turncoat witness, but they are also more susceptible to discovery by the prosecution. See § 8.10 *supra.* The judgment should be made by counsel after considering both the sensitivity of the particular witness's information and the likelihood that s/he will change a favorable story that s/he has given counsel before trial. If counsel opts to take oral rather than written statements from witnesses, counsel should make detailed notes of the statements in a form that maximizes their "work product" insulation against discovery. See § 9.13 *supra.*

Whenever counsel has reason to suspect that a witness is unstable or untrustworthy or may have had second thoughts or may have changed his or her story since counsel took a pretrial statement, counsel should question the witness again in the few hours preceding trial. This can be done without alarming or offending the witness — or making the witness's trial testimony go stale — by asking the witness several specific questions about details that go to the heart of his or her story, purportedly for counsel's clarification.

If, notwithstanding all precautions, the witness turns around at trial and presents testimony damaging to the defense, counsel should inform the court that counsel has been surprised by the testimony of the witness and should request permission to impeach the witness. (In jury trials this request should be made at sidebar, and counsel should request that the jury be excused during any colloquy or *voir dire* on the issue.) In some jurisdictions counsel's representation that s/he has been surprised is sufficient to justify a judicial ruling permitting counsel to impeach his or her own witness. In other jurisdictions counsel will need to make an evidentiary showing of surprise. To do this, counsel should proceed as follows:

(1) Ask the witness whether the witness did not make a statement concerning this case to counsel (or to counsel's investigator) on *x* date at *A* place.
(2) Ask the witness whether s/he did not at that time sign (or correct or approve) a

written statement relating to the case.

(3) Mark the statement as an exhibit for identification.

(4) Hand it to the witness.

(5) Ask the witness whether s/he recognizes the document.

(6) Ask the witness whether it is not the statement that the witness gave counsel on *x* date.

(7) Read to the witness the portions of the statement that are inconsistent with the witness's trial testimony and ask the witness whether those are not the witness's statements.

(8) Ask the witness whether the witness has not seen counsel on *y* date and on *z* date since giving the statement to counsel on *x* date.

(9) Ask the witness whether they did not discuss the case on *y* date and on *z* date.

(10) Ask whether, in fact, they did not discuss the case this morning just before trial.

(11) Ask whether on any of those occasions the witness informed counsel that s/he was going to change his or her story from that in the written statement made on *x* date.

If the witness denies making the statement, counsel should represent to the court that counsel (or counsel's investigator) did take the statement from the witness, and counsel should offer to testify (or offer to call the investigator to testify) regarding the taking of the statement from the witness. Counsel should, in this representation or testimony, authenticate the statement as that given by the witness on *x* date. Counsel should then offer the statement in evidence.

In the case of an oral statement, of course, items (2) through (7) *supra* are omitted and replaced by counsel's narration to the witness of the witness's words on *x* date; and counsel's or the investigator's representation or testimony must establish the content of the witness's oral statement.

Once the judge determines that counsel has made an adequate showing of surprise, counsel will be permitted to impeach the witness with the prior statement. Of course, if the trial is a bench trial and if counsel has conducted the full line of questioning just described, the trier of fact will already have heard the impeachment. Accordingly, counsel can offer to forgo taking up the court's time by repeating the line of inquiry if the court prefers simply to treat the testimony of the witness on *voir dire* as if it had been taken also on the general issue (that is, on the question of the respondent's guilt or innocence) and to treat the witness's prior statement as admitted for impeachment on the general issue. In a jury trial, counsel will have to repeat the entire set of questions before the jury when it returns to the courtroom, and then pass or read the prior statement to the jury.

§ 33.25 COURT WITNESSES AND HOSTILE WITNESSES

The court has discretion to call witnesses *sua sponte* when the parties have not called them and the testimony indicates that they may have information desirable for the just disposition of the case. The discretion is broad: A trial judge will virtually never be reversed for calling a

witness (so long as its examination of the witness is fair and not slanted) or for failing to call one.

Counsel for either side may request that a witness be called as a court witness when the other side has not called the witness and the requesting party is unwilling to accept whatever "vouching-for" responsibility local evidentiary law imposes upon a party calling a witness as his or her own. Court witnesses may be examined as on cross-examination by both parties and impeached by both.

Counsel may also request leave of court to call a witness who is shown to be hostile for examination as on cross-examination and subject to impeachment. Here again, the trial judge has considerable discretion. but appellate reversals on the ground of improper refusal to permit defense counsel to call and examine persons as hostile witnesses (or adverse witnesses, in the terminology of some jurisdictions) can be found. And see § 33.04 *supra.*

The importance of the court-witness and hostile-witness procedures varies greatly from jurisdiction to jurisdiction, depending upon the restrictions to which a party is subject in leading and impeaching his or her own witnesses. When these restrictions are significant, counsel should take the position that all complainants, relatives of complainants, and all police, including informers, "special agents" and other police spies, are *per se* hostile to the defense. As for other witnesses, counsel may profitably attempt to demonstrate (a) personal animosity against the respondent, (b) an extrajudicial statement of the witness incriminating the respondent or (c) a refusal to talk to defense counsel, coupled with some signs of animosity. These and other matters should be developed by examination of the witness (which, in jury trials, should be conducted in the absence of the jury). Most courts will allow counsel to ask the witness leading questions for the purpose of attempting to show his or her hostility. When the witness denies facts that, if admitted, would make the witness hostile, counsel is usually allowed to prove them extrinsically.

Chapter 34

Objections to Evidence; Motions for Mistrial; Proffers; Rulings on Evidentiary Questions

§ 34.01 OBJECTIONS AND MOTIONS TO STRIKE; MAKING A RECORD

Except in unusual circumstances a claim of error in the admission of evidence will not be entertained on a postverdict motion for a new trial or on appeal or in postconviction proceedings unless an objection to the evidence was made and overruled at the time of its introduction. *See, e.g., Wainwright v. Sykes,* 433 U.S. 72 (1977).

Accordingly, if counsel wants to preserve a claim of error, s/he should be sure that the record clearly shows (a) that counsel did object and (b) that the court did rule on counsel's objection dispositively and unfavorably. In some jurisdictions it is also necessary for counsel to note a formal exception to the unfavorable ruling.

The trial transcript reflects only what the court reporter hears. Counsel must therefore make his or her objections — and obtain the court's rulings on them — orally and explicitly. Often, in the heat of the trial, the judge will see that counsel is rising to object and will rule on the objection before counsel begins to speak. Whether or not counsel gets to say anything, the court may overrule counsel by a shake of the head or by waving counsel down or by saying something ambiguous, like "Go on." Numberless appeals have been lost on account of these rulings. If something of the sort happens, counsel should say, "If the Court please, I would like to state for the record the grounds of the respondent's objection to this evidence and to have the record reflect that the objection has been overruled." Then the grounds of objection should be stated.

An objection by counsel is sometimes received by the court with a comment like: "Well, we'll see where that is going for a little longer." This is not a categorical rejection of counsel's point but an evasion and a postponement of ruling. If counsel wants to stand on the objection, s/he must ask the court whether the court has overruled counsel's objection at this point; s/he must get a verbal answer from the judge; and s/he must note an exception in jurisdictions where exceptions are required. Counsel must *also* renew the objection later if the prosecution continues down the same line. Similarly, if the judge states that s/he will take an evidentiary objection "under advisement" and thereafter ignores it, counsel will need to politely insist at the close of the prosecution's case and again at the close of all the evidence that the judge rule on the reserved question.

Courts will sometimes reply to an objection by admitting evidence contingently, for example, subject to "connecting up." Counsel must later move to strike when the contingency fails, for example, when the evidence is not connected up.

Each time an objectionable item of fact is proved, it ordinarily must be objected to. If the prosecution presents testimony of three witnesses on the same point, counsel must object to all three. Failure to object anew every time defeats *all* claims of error in the admission of the evidence, even though counsel may have properly objected once or twice.

If evidence is admitted either before an objection can be made or before the court has ruled on the objection, counsel should object (or repeat his or her objection), then move to strike the evidence. In a jury trial, counsel will also need to ask the judge to instruct the jury to disregard the stricken evidence. This will protect counsel's record if the judge overrules the objection. But it will do relatively little good if the judge sustains the objection, since jurors (and even many judges) are not really likely to disregard anything that they have heard. If the evidence is at all harmful, therefore, counsel should consider a motion for a mistrial. See § 34.11 *infra.*

In jury trials, counsel must make sure that the colloquy at sidebar conferences is being recorded by the court reporter. Counsel should tell the reporter before trial that counsel assumes all sidebar discussion will be recorded unless the judge expressly orders the discussion "off the record." If the reporter does not agree, counsel should make this arrangement with the court. Thereafter, whenever counsel approaches the bench, s/he should watch to see that the reporter comes, too; and until the reporter is within hearing distance, counsel should not start talking and should stop the judge or prosecutor from talking by observing that the reporter is not there. Any objection or ruling made during "off the record" conferences should be repeated for the record after their conclusion.

§ 34.02 TIME OF OBJECTION; QUIETING THE WITNESS

Objections to evidence must be made immediately after the question that calls for an inadmissible answer. If the witness begins to answer the question after the objection and before the court has ruled, counsel should gesture to the witness to stop and should immediately interrupt the witness by stating respectfully but loudly that an objection has been made.

Witnesses sometimes need repeated reminding that they cannot answer an inquiry to which an objection has been made unless the court overrules the objection. If a prosecution witness appears stubborn on the subject, a request should be made to the judge to admonish the witness to that effect. A motion for a mistrial may be appropriate if the witness has made an inadmissible disclosure and its prejudicial impact is considerable. In a jury trial, counsel may sometimes find self-help measures justified, particularly when a police witness persists in ignoring defense objections. A request to the judge to admonish the witness in this situation may be coupled with the observation in open court: "This officer has testified here many times, Your Honor, and s/he knows better than that."

§ 34.03 STATEMENT OF THE BASIS FOR OBJECTIONS; ARGUMENT ON EVIDENTIARY POINTS

Counsel should always state the grounds, and all of the grounds, for objecting to an item of evidence. This does not mean that the grounds for an objection must be stated in the same breath with the objection itself. To the contrary, unless local practice or the particular presiding judge requires that the reasons for objecting be stated contemporaneously with the objection — or unless the judge is one of those who makes instant rulings on objections and then resents counsel's stating the grounds of objection for the record — it is usually better for counsel to object simply by saying, "Objection, Your Honor" and then to pause before stating the grounds. There are two reasons for this. First, judges will often sustain an objection on grounds other than those which counsel had in mind and would have stated. Second, the delay gives counsel an added second or two to come up with the name or names of the objection or objections s/he wants to make.

The risk of delay, of course, is that the judge may rule before counsel has had a chance to influence the ruling by a persuasive statement of the grounds of objection. But most judges who do not perceive the grounds of objection will ask counsel what the objection is before ruling. If counsel still has not come up with the name of the objection by this time, s/he should start talking in nontechnical terms about whatever it is that *bothers* counsel in regard to the evidence to which s/he is objecting. Usually, the name of the objection will come to mind in a moment, when counsel starts describing what s/he senses to be wrong, in a commonsense way, with the evidence. For example: "Objection, Your Honor. . . . The prosecutor is putting words in the witness's mouth instead of letting the witness testify in [his] [her] own words — it's leading." Or: "Objection, Your Honor. . . . There hasn't been any testimony that this witness saw the respondent arrive at the bar, so the witness can't be asked what time the respondent arrived — no personal knowledge."

In most jurisdictions it is not obligatory for counsel to come up with the technical label of the objection — "leading," "no personal knowledge," — although it helps. Counsel should use the technical terminology as soon as it comes to mind; but if it fails to come immediately, counsel should make his or her point in concrete descriptive language.

If the judge does overrule counsel's objection before counsel states the grounds for it, counsel should ask respectfully, "May I state the grounds of that objection for the record, Your Honor?" Counsel has a right to state the grounds, in order to protect the record for appeal. S/he has no right to argue to the trial judge an objection that the judge has already overruled, and s/he should not appear to be doing that. If, however, the grounds that counsel states "for the record" — ostensibly to preserve the objection for appeal — convince the trial judge that counsel's objection has merit, most judges (or at least most judges whom counsel could have won over by an earlier statement of the grounds) will reverse their rulings. In any event, before the testimony resumes, counsel should have stated all the grounds of his or her objection.

When making an objection in a jury trial, counsel should consider whether the statement of grounds for the objection and any argument of evidentiary questions that the judge invites or permits should be presented within or without the hearing of the jury. If counsel's argument includes matters that s/he wishes the jury to hear (for example, a persuasive factual basis for rejecting the prosecutorial evidence being offered) and if the prosecutor's responsive argument is not likely to contain matters that counsel does *not* want the jury to hear, the obvious choice is open court. If, on the other hand, counsel's basis for objecting will appear to the jury to be an attempt to keep highly relevant evidence of guilt from them, counsel should ask leave to approach the bench and should make the objection at sidebar.

If the court refuses to allow a bench conference, counsel should state that s/he wishes to make an objection and that the grounds for the objection will be prejudicial (without saying to whom they will be prejudicial) if described from counsel table. Then, if the judge continues to refuse, counsel should state the objection in technical terms that will identify the grounds for the record without telling the jury more than is absolutely necessary ("the right to confrontation"; "the Privilege"), and counsel should amplify the record on the next occasion when the jury is out of the courtroom.

§ 34.04 ANTICIPATORY OBJECTIONS

As indicated in § 30.02(a)(2) *supra,* if counsel knows from defense investigation, discovery, or prior hearings that the prosecutor will attempt to introduce objectionable evidence through a particular witness, counsel should consider making an anticipatory objection when the witness is first called to the stand or when the prosecutor begins any line of questioning that may lead to the objectionable matter. Anticipatory objections are particularly useful in a jury trial because they serve to keep the trier of fact entirely unaware of the existence and nature of inadmissible pieces of evidence. When appropriate, counsel can ask the court to instruct a witness (or to direct the prosecutor to instruct the witness) not to go into certain matters or not to mention specified items or subjects in front of the jury.

In a bench trial, counsel may be able to persuade the judge to rule on the admissibility of a certain type of evidence (such as "other crimes" evidence) without listening to the contents of the specific items of evidence, see § 30.07(a) *supra,* that the prosecutor is seeking to adduce. In support of this procedure, counsel can point out that whenever it is feasible, it meets the prosecution's need for an evidentiary ruling without exposing the respondent to the prejudice inherent in a factfinder's hearing inadmissible evidence. See § 20.05 *supra.* If the prosecutor insists upon relating the contents of the evidence to the judge, counsel can suggest that this is a tactic designed to convey inadmissible evidence to the factfinder even if it is excluded and that the court should not countenance such an improper ploy.

When counsel knows before trial that the prosecutor's case includes objectionable evidence, counsel should, alternatively, evaluate the practicality and wisdom of challenging the evidence by a pretrial motion *in limine.* See §§ 7.03, 30.02(a)(1) *supra.* This course of action

may be particularly desirable in cases in which the respondent is slated for a bench trial and it is possible to present a pretrial motion to a judge other than the trial judge, so as to avoid the latter's hearing the objectionable evidence during colloquy on its admissibility. However, the proclivities of the two judges must be taken into account. If the judge who would rule on the pretrial motion is highly likely to deny it and the judge who will be presiding over the trial would at least attempt to exclude the evidence from his or her decisionmaking in the event that s/he holds it inadmissible, the pretrial motion procedure should obviously not be used.

§ 34.05 *VOIR DIRE* OF A WITNESS

Some objections to the admissibility of evidence require a preliminary determination of fact by the trial judge. For example, if counsel objects to a photograph or diagram of the scene of the crime on the ground that it does not fairly and accurately represent the scene, a ruling on the objection requires a preliminary factual determination whether the photograph or diagram *is* a fair and accurate representation. As explained in § 30.02(a)(2) *supra,* counsel can request a *voir dire* examination of a prosecution witness on the preliminary question of fact, cross-examining the witness about the specific issue raised and obtaining a ruling on that issue before the witness continues with his or her direct examination.

The *voir dire* procedure is primarily useful in jury trials, in which defense counsel can use it to (a) close off objectionable lines of inquiry before they get the jury guessing, (b) test and refine lines of potential cross-examination that might be risky if counsel pursued them in open court without knowing beforehand what the witness's answers would be, and (c) break up the flow of the prosecution's case.

Occasionally, *voir dire* examination may also be useful in a bench trial. For example, some issues raised on *voir dire* may require the testimony of more than a single witness to resolve, and defense counsel's invocation of the *voir dire* procedure may cause the prosecutor to present during the *voir dire* witnesses that s/he intended to reserve for later in the trial, thereby giving the defense information it would not otherwise have had for use in cross-examining the earlier prosecution witnesses. *Voir dire* examination also enables counsel to ensure that inadmissible matter will not make its way into the record as a basis for the judge's verdict and for appellate review of the sufficiency of the evidence, even though the trial judge does hear the objectionable matter during *voir dire.*

§ 34.06 CONTINUING OBJECTIONS

If a series of questions on a specific topic or if a number of similar questions on similar subjects is obviously going to be asked by the prosecutor and the whole line of questioning is objectionable to counsel, counsel should object when the first question is asked. If the court overrules the objection, counsel may ask the court to register a continuing objection to further testimony on the same topic or to further questions of the same kind. In this way counsel can protect the record without having to object after every question that is asked. Counsel should be

sure the record reflects that the court granted counsel's request for a continuing objection if it did. If counsel says s/he would like to enter a continuing objection to *X* and the judge says, "Denied," it is unclear whether the court has agreed to the continuing objection and overruled it on the merits or has insisted that counsel pursue specific objections. Counsel should respectfully ask for clarification.

§ 34.07 WHAT SHOULD BE OBJECTED TO

In both bench trials and jury trials, counsel should object to prosecution evidence only when a failure to do so will result in damage to the defense case. In a bench trial the judge will not be sympathetic to excessive objection, since judges like to think of themselves as capable of sorting the evidence without constraint by counsel. In a jury trial the jurors will usually view objections as obstructive and indicative that the defense does not want the truth told; therefore, needless objections merely invite needless bad will.

On the other hand, if evidence is significantly harmful to the respondent, it should ordinarily be objected to, despite any adverse effect that objection might have on a judge or jury. In addition to the obvious desirability of excluding the damaging evidence, it is important that counsel preserve any valid claims of error in the trial. This is so not only because of the possibility of reversal on an appeal but also because some judges, concerned about reversible errors that they may have committed during trial, will give respondents a significant "break" at sentencing in order to make it not worth the respondent's while to appeal.

In a jury trial, counsel can eliminate some of the harm that might develop from the making of frequent objections by raising on *voir dire* examination of the prospective jurors counsel's legal obligation to make objections to legally inadmissible matters and soliciting the jurors' agreement that they will not hold such objections against defense counsel or his or her client.

§ 34.08 MOTIONS TO STRIKE

Since it is not always convenient for the prosecution to prove things in a logical sequence, evidence is often admitted over defense objection, subject to "connecting up" or to a later showing of relevance. If the evidence is not connected up or shown to be relevant after the full development of the prosecution's case, counsel must move to strike it. A motion to strike is also proper if any line of testimony turns out to be inadmissible, although no objections were made when the testimony began because of appearances at that time that the testimony was unexceptionable. In addition, the court ordinarily has discretion to strike testimony to which counsel should have made but did not make timely objection. In a jury trial, counsel should normally follow up the granting of a motion to strike with a request that the jury be instructed to disregard the stricken evidence.

Whether in a bench trial or in a jury trial, a motion to strike is often a futile gesture, since,

even if the motion is granted, the factfinder has heard the excluded evidence. The motion to strike is nonetheless important because it serves to sift evidence on which a verdict can be based from that which, although introduced, cannot be used to support a verdict. (This is, of course, particularly important in bench trials before judges who scrupulously obey the obligation to ignore excluded evidence.) In addition, a motion to strike ensures that the record for appeal is clear about what evidence the appellate court can consider in ruling on a defense claim of insufficiency of the evidence.

§ 34.09 OBJECTION TO IMPROPER CONDUCT OF THE PROSECUTOR OR JUDGE

Counsel should be alert for prosecutorial misconduct that provides grounds for objections and mistrial motions. Objections and motions are particularly appropriate when the prosecutor has intentionally elicited inadmissible evidence before the trier of fact. But they are also apt when the prosecutor has engaged in other, more subtle attempts to subvert the trial process, such as couching objections to defense evidence in the form of denigrating or belittling remarks, making improper physical gestures, or using an objectionable tone of voice. (When the offensive prosecutorial conduct will not be evident in the transcript, counsel should ask that the record reflect the prosecutor's gesture or tone and should describe it in detail for the record.)
In a jury trial, counsel can ask leave to come to sidebar, assert that the impartiality of the jury has been impaired, and request appropriate relief — which may be a mistrial (see § 34.11 *infra*), corrective instructions to the jury, or an admonition to the prosecutor not to repeat the offensive behavior. In a bench trial, in which the judge will view himself or herself as capable of ignoring any prejudicial conduct by the prosecutor, counsel will not be able to obtain a mistrial unless s/he can point to some prejudicial effect upon a witness — for example, in the case of gestures that improperly coach a prosecution witness or intimidate a defense witness.

In a jury trial a similar objection or mistrial motion can be based on comments or conduct by the trial judge that would prejudice the jury. However, these objections and motions obviously must be made sparingly and with considerable deference.

§ 34.10 PROFFERS ON OBJECTIONS TO DEFENSE EVIDENCE

When the prosecution objects to a question asked of a witness by defense counsel or to the introduction of any other evidence that defense counsel has offered, counsel should make a proffer of (1) the contents of the evidence, (2) the facts which counsel asserts that the evidence will show, and (3) the ultimate issue or issues in the case to which those facts are relevant. Counsel should also state his or her position on the rule or principle of evidence involved. If the objection is sustained before counsel has had a chance to make the proffer (or "avowal" as it is called in some jurisdictions), counsel should ask leave to make a proffer.

Counsel's proffer should ordinarily be specific and detailed, since on an appeal counsel will have to convince an appellate court not merely that the trial judge erred in excluding the evidence but that the error was prejudicial — that is, that the excluded evidence might have

resulted in a verdict in favor of the defense. Despite the doctrinal formulations used to define "harmless error" in a given jurisdiction, many appellate judges simply will not reverse a conviction unless the improperly excluded evidence appears both important and credible.

If the trial judge refuses to permit a proffer, counsel should reduce the proffer to writing at the first opportunity (that is, ordinarily, at the next trial recess) and should again request leave to put it in the record. If no opportunity occurs before verdict, counsel should write up the proffer as an appendix to a postverdict motion for new trial. A trial court's denial of reasonable attempts to protect a record by proffers of excluded evidence is itself reversible error. In the case of documentary and real evidence, counsel will have marked his or her exhibits for identification before offering them. If they are excluded, counsel should request that they be filed and retained by the clerk of court (or take similar appropriate steps dictated by local practice) to assure that the excluded exhibits go up with the record on appeal.

§ 34.11 MOTION FOR A MISTRIAL

§ 34.11(a) Grounds for a Mistrial

The most common ground for a mistrial is that an error has occurred that cannot be cured by any remedial action of the parties or the court. Situations of this kind include the prosecutor's making improper arguments or eliciting inadmissible evidence so prejudicial that the factfinder is irremediably biased; an hysterical display by a witness; or a prejudicial out-of-court communication between a witness and a juror or between the prosecutor and the judge. In most jurisdictions there is an elaborate body of caselaw dealing with the question of what kinds of errors in the admission of evidence and what improper matters in the conduct of counsel, the witnesses, the court, and the jury in a jury-tried case are "curable" by instructions and which require mistrial.

In addition to trial errors and to events during trial (such as the exposure of jurors to prejudicial publicity) that make a fair conclusion of the trial unlikely, counsel may appropriately urge as the basis for a mistrial any circumstance that makes it difficult or inappropriate to go on with the trial. In jury trials an occurrence such as counsel's illness, illness of the respondent, sudden unavailability of a defense witness, or the prosecutor's disclosure of new information necessitating additional defense investigation will warrant a mistrial if a continuance is impracticable because the anticipated delay is longer than the time during which the jury can reasonably be held over. (In bench trials these kinds of problems are ordinarily handled by a continuance.)

§ 34.11(b) The Limited Availability of the Mistrial Remedy in Bench Trials

It is very rare for a judge in a bench trial to grant a motion for a mistrial. Even when grossly prejudicial evidence is elicited or other egregious errors occur, the judge is likely to respond to a motion for a mistrial by declaring that s/he will ignore the inadmissible evidence or

other improper matters and will decide the case solely on the proper facts of record.

Nevertheless, there are some circumstances under which the defense can obtain a mistrial even in a nonjury case. The categories of highly prejudicial occurrences mentioned in § 20.05 *supra* as warranting recusal of a judge should also furnish grounds for a mistrial. Thus, for example, if the prosecutor introduces inadmissible evidence of the respondent's prior record and this is particularly damning, a mistrial may be granted.

In moving for a mistrial in a bench case, counsel must be sensitive to the risk of irritating the judge by implying that s/he lacks the self-control to do what judges are presumed to be capable of doing — maintaining impartiality in the face of inadmissible evidence. Whenever possible, the mistrial motion should be couched in terms of a potential for unconscious influence on any reasonable mind or in terms of the appearance of impropriety if the trial continues to judgment. See § 20.07 *supra.*

§ 34.11(c) Deciding Whether To Request a Mistrial; Procedures for Moving for a Mistrial

Whether to move for a mistrial is a strategic matter. Counsel must keep in mind (a) how the case appears to be going — that is, the probability of a favorable verdict; (b) whether trial errors have already been committed to which counsel has reserved appropriate objections, whether they are likely to result in a reversal of any conviction on an appeal, and the costs (in delay, expense, and so forth) of appeal; (c) the costs (in delay, expense, and so forth) of a new trial following a mistrial at this point; and (d) the likely strengths of the parties at a new trial, which will frequently be different from their relative strengths at this trial because of (1) the discovery that this trial has given each party of the other's case, (2) the extent to which each party has learned to try his or her case better in trying it, (3) the nailing down of witness testimony in the present trial transcript, which can be used for impeachment at a new trial, (4) the possibility of a different trial judge, and so on.

If counsel decides to move for a mistrial, it is essential that counsel move quickly, making the motion as soon as the error of which counsel complains occurs or is disclosed and sufficient prejudice appears to justify the motion. This is an area in which courts are very strict in finding waiver by inaction. Frequently attorneys make objections without moving for a mistrial. Then in argument on postrial motions for a new trial, they will argue that each of their overruled objections in and of itself, and all cumulatively, caused such prejudice that a new trial is warranted. Both trial and appellate courts look on these tactics with a jaundiced eye, opining that if counsel feels an error is so prejudicial that it cannot be cured, s/he must move for a mistrial at that time rather than gamble for a favorable verdict before complaining.

A motion for a mistrial is made by declaring orally that counsel is moving for a mistrial and stating the grounds. In some jurisdictions motions for a mistrial in a jury trial are denominated "motions for the withdrawal of a juror," a phrase deriving from the common-law

notion that if a juror withdraws from the jury, there remain too few jurors to decide the issues lawfully and the case must be retried before a new jury.

A motion for a mistrial should be preceded by an objection to the admission of the prejudicial and inadmissible evidence or to the prejudicial misconduct on which the mistrial motion is based. Counsel needs not rely *solely* on that error, however. S/he can strengthen the equities of his or her claim that a mistrial is warranted and can improve the record for appeal if s/he announces that the motion is based not only on this present error but also on the previous errors of which s/he has complained, whose cumulative impact is now such that the respondent will be denied a fair trial if this trial continues. After denial of a first motion for a mistrial, subsequent motions may be made by announcing that counsel is "renewing" his or her motion for a mistrial, based upon the total impact on the trial of the errors that were previously made the basis for the motion and of the additional errors of which counsel now complains. Denial of a mistrial motion is appropriately assigned as the basis for a new trial motion after verdict, under most local practice. In many jurisdictions it must be so assigned in order to preserve the contention for appeal.

§ 34.11(d) Double Jeopardy Implications of a Mistrial

§ 34.11(d)(1) Defense Motions for a Mistrial

A respondent who moves for a mistrial waives any claim that a retrial would place him or her twice in jeopardy in violation of common-law and constitutional double jeopardy doctrines, *United States v. Dinitz,* 424 U.S. 600 (1976), "so long as the Government did not deliberately seek to provoke the mistrial request," *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980) (dictum). *See Oregon v. Kennedy,* 456 U.S. 667, 675-79 (1982). Defense mistrial motions should therefore be accompanied by the statement that the respondent "has been put in the position where [s/he] can no longer obtain a fair trial by reason of the prosecutor's conduct [the court's rulings]"; and, *after* the motion has been granted, defense counsel should ask the judge to make a finding on the record that it was intentionally provoked by the prosecution *if* the judge appears to be sufficiently irritated by the prosecution's conduct so that this judge is more likely to make such a finding than the judge who would later sit on a dismissal motion prior to a new trial.
In litigating the issue of prosecutorial intent, either on a request that the original trial judge make such a finding or on a motion to dismiss the prosecution prior to retrial (see § 17.08 *supra*), defense counsel should first ask the court to infer "provoking" intent from the nature of the prosecutor's conduct — that is, from the fact that it was blatant or reprehensible or repeated. *See Oregon v. Kennedy,* 456 U.S. at 675. Counsel should note that counsel is willing to examine the prosecutor under oath if necessary but feels that it may not be necessary because the court can, in this case, infer the requisite intent from the record of the first trial. If the court declines to draw the inference, counsel should call the prosecutor to the stand and ask leave to examine him or her as a hostile witness. See § 33.25 *supra.* Since the sorts of prosecutorial misconduct that result in mistrials are ordinarily so gross as to be the product of either abysmal ignorance of basic trial rules or malevolence, counsel should begin the examination by inquiring about the prosecutor's

legal training and experience and then proceed to question the prosecutor regarding his or her understanding of the rules that s/he violated in the first trial. Thus, if the prosecutor does not wish to appear a fool, s/he may have little choice but to appear a knave. Counsel should object to, and preserve as claims of error, any rulings by the court refusing to allow counsel to examine the prosecutor, refusing to declare the prosecutor a hostile witness, or refusing to allow counsel to force the prosecutor to undergo a thorough and searching examination under oath. The Supreme Court of the United States has said that the accused's double-jeopardy rights in this situation turn upon "a standard that examines the intent of the prosecutor," *Oregon v. Kennedy,* 456 U.S. at 675, and counsel therefore has a right to litigate this issue, however painful it may be for all concerned.

§ 34.11(d)(2) Prosecutorial Motions for a Mistrial or Mistrials Declared by the Court Sua Sponte

A successful mistrial motion by the prosecution, or the court's declaration of a mistrial *sua sponte,* over defense objection, creates complicated double jeopardy issues that the Supreme Court's decisions have left singularly confused. The Court's decision in *United States v. Jorn,* 400 U.S. 470 (1971), appears to hold that any mistrial declared without the accused's acquiescence constitutionally bars retrial unless the termination of the first trial was compelled by an imperative need arising from circumstances that were not the prosecutor's fault. *Jorn* thus takes a strict view of the traditional "manifest necessity" standard derived from *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824). *See also Arizona v. Washington,* 434 U.S. 497, 505-06 (1978) (speaking of a '"high degree'" of necessity).

However, the Court has not been consistently rigorous in applying the *Perez* standard. *Compare Downum v. United States,* 372 U.S. 734 (1963) (unexplained absence of a key prosecution witness does not make out "manifest necessity," at least when the prosecutor has allowed the jury to be sworn with knowledge that service of a summons on the witness was not yet effected), *with Illinois v. Somerville,* 410 U.S. 458, 464 (1973) ("manifest necessity" is found when, after the swearing of the jury, the prosecutor notices a negligent omission of a vital allegation from the indictment — an omission that would require reversal of any conviction on appeal or postconviction proceedings; the Court explains that "the declaration of a mistrial on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation would involve an entirely different question, *cf. Downum v. United States*"). *See also Sattazahn v. Pennsylvania*, 537 U.S. 101, 120-21 (2003) (Justice Ginsburg, dissenting) (reviewing the Court's double jeopardy caselaw on mistrials requested or provoked by the prosecution or declared by the court *sua sponte*).

Although the "manifest necessity" doctrine provides an unpredictable test at best, the declaration of a mistrial at the instance of anyone other than the defense obviously sets the stage for a strong double jeopardy claim. In particular, the prosecutor's "burden is a heavy one." *Arizona v. Washington,* 434 U.S. at 505 (dictum); *see also id.* at 507-09 & n.25, 514-16. "'The [Fifth Amendment] policy of avoiding multiple trials has been regarded as so important that

exceptions to the principle have been only grudgingly allowed,'" *Breed v. Jones,* 421 U.S. 519, 532-33 (1975), quoting *United States v. Wilson,* 420 U.S. 332, 343 (1975). A defense objection to preserve the claim is therefore advised in any case in which defense counsel does not feel that affirmative defensive interests are best served by acquiescence in a mistrial and a new trial.

Chapter 35

The Closing Stage of a Bench Trial: Renewal of the Motion for Acquittal; Closing Argument

§ 35.01 THE FUNCTIONS OF THE MOTION FOR ACQUITTAL AND CLOSING ARGUMENT IN A BENCH TRIAL; CONSOLIDATION OF THE MOTION AND CLOSING IN A SINGLE ARGUMENT

In order to explain the respective functions of the motion for acquittal and closing argument in a bench trial, it is necessary to begin by describing their functions in a jury trial, in which the roles of factfinder and arbiter of legal issues are distinct. In a jury trial the motion for acquittal is addressed to the judge as the arbiter of legal issues. It asks the judge to rule as a matter of law that the respondent cannot be convicted because, even crediting all of the prosecution's evidence and drawing every reasonable inference from it in favor of the prosecution, no reasonable juror could find the respondent guilty beyond a reasonable doubt. (This motion for acquittal, which is made at the conclusion of all the evidence, is a renewal of the motion made at the conclusion of the prosecution's case (see Chapter 32) and raises the same issue, but that issue is now presented on the basis of the evidence introduced by both parties.) In contrast, the closing argument to the jury asks the jurors to find as a matter of fact that the prosecution has not sustained its burden of proving the respondent guilty beyond a reasonable doubt.

In a bench trial, in which both legal and factual determinations are made by the judge, the distinction between the motion for acquittal and the closing argument becomes blurred. Moreover, as a matter of logistics, judges will not tolerate counsel's wasting the court's time by first arguing all of the facts in the context of a motion for a judgment of acquittal and then rearguing the facts in closing argument.

Accordingly, in many jurisdictions it is customary for the defense in a juvenile bench trial to consolidate its argument on the motion for acquittal with its closing argument. The sequence of arguments goes as follows:

(i) At the conclusion of the evidence (after the prosecution and defense have both "rested"), defense counsel renews his or her earlier motion for a judgment of acquittal and asks the court whether it wishes counsel to consolidate argument on the motion with closing argument, since they will address essentially the same facts and law.

(ii) When the court agrees, counsel presents an argument that analyzes the law and the facts, urging that the prosecution has not proved its case beyond a reasonable doubt.

(iii) The prosecution next presents a similarly consolidated argument, responding to the defense motion for acquittal and urging that the court should find the respondent guilty on the facts and the law.

(iv) Defense counsel replies to the prosecution's closing argument. (When first proposing the consolidated procedure, counsel should elicit from the court an assurance that counsel will, indeed, be permitted to reply to the prosecution's arguments. Counsel can point out that if the defense asserted its prerogative of making separate arguments on the motion and closing, the prosecutor would argue first (except in those rare jurisdictions where the defense always argues first in closing) and the defense would be entitled to reply to the prosecutor's arguments.)

(v) In those jurisdictions where the prosecutor is normally permitted to reply to the defense closing, the prosecutor has the last word under the consolidated procedure as well.

When this consolidated procedure is not customary or when a separation of the arguments would be advantageous to the defense and the court permits it, the procedure is ordinarily as follows: (i) the defense makes and argues its motion and the prosecution replies; (ii) then the prosecution closes, the defense responds, and the prosecutor replies (except in the rare jurisdictions where the defense closes first).

A judge in a bench trial "is given great latitude in controlling the duration and limiting the scope of closing summations." *Herring v. New York,* 422 U.S. 853, 862 (1975). That discretion is, however, circumscribed by the accused's constitutional "right to be heard [through counsel] in summation of the evidence," even in a bench trial. *Id.* at 864 (invalidating a state statute that empowered trial judges to refuse entirely to hear closing arguments in bench trials). By implication, *Herring* requires trial judges to allow defense counsel to make a closing argument of sufficient scope to perform the functions that led the Court to recognize summation as a constitutional right: to ''argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." *Id.* at 862.

A tactical issue that counsel must resolve in every case is whether to articulate the differences between the legal standards governing the motion for acquittal, on the one hand, and the determination of guilt or innocence, on the other (see § 35.03 *infra*), and then to address each standard in turn, or whether simply to address the facts of the case in a unified presentation. The key consideration here is the rule that a judge, in deciding a motion for acquittal, must credit all of the prosecution's evidence and draw every reasonable inference from it in favor of the prosecution. In closing argument, by contrast, defense counsel is entitled to analyze the comparative credibility of defense and prosecution witnesses and to urge the court to find the prosecution's evidence unpersuasive. As a rule of thumb, in cases in which the defense has some legal argument that demands acquittal even when all inferences favorable to the prosecution's theory of the case have been indulged, it is advantageous for defense counsel to say so, because

this enables the judge to acquit the respondent without resolving issues of credibility. In such cases counsel will ordinarily want to distinguish the two legal standards. If, on the other hand, the whole case boils down to a comparison of credibility of witnesses, counsel is usually better off simply addressing the facts without distinguishing between the legal standards applicable to the motion and to closing argument.

§ 35.02 GENERAL CONSIDERATIONS REGARDING THE CONTENT OF THE DEFENSE CLOSING IN A BENCH TRIAL

As indicated in § 27.04 *supra,* a judge will probably be more receptive to legal arguments than to purely factual arguments. Thus, for example, in an assault case in a jurisdiction where the prosecution must show a certain degree of injury in order to make out an aggravated form of assault, an argument that the requisite degree of injury has not been shown beyond a reasonable doubt (citing appellate caselaw that holds equivalent injuries insufficient) is more likely to prevail than a self-defense claim based upon the respondent's testimony and disputed by the complainant's. As mentioned in § 27.04(a) *supra,* judges are prone to be skeptical of the testimony of the respondent and his or her family or friends and, conversely, tend to credit the testimony of police officers uncritically.

Thus, as a general matter, counsel is wise to research each of the elements of the charged offense and to collect any caselaw defining those elements. Whenever the prosecution has failed to show one of the elements, counsel should delineate the failure, citing pertinent caselaw if there is any.

Counsel will often want to stress whatever burdens of proof the prosecution must satisfy, possibly also citing caselaw that describes the burdens in terms favorable to the defense. The central prosecutorial burden is, of course, the burden of proving each and every element of the offense beyond a reasonable doubt (see § 35.03 *infra*); counsel should research and cite appellate decisions reversing convictions for insufficient evidence on facts similar to those of the respondent's case. As noted in § 35.04 *infra,* many States impose special corroboration requirements on the prosecution in certain kinds of cases: They may, for example, forbid a conviction to be based solely on the respondent's uncorroborated confession or the uncorroborated testimony of an accomplice. In some jurisdictions the respondent's raising of particular defenses activates a prosecutorial burden to disprove those defenses beyond a reasonable doubt. See § 35.05 *infra.*

Counsel also should research and be prepared to invoke other evidentiary doctrines that may favor the defense in a particular case. For example, the "missing witness inference" described in § 10.08 *supra* can be cited in closing argument as one of the several factors raising a reasonable doubt.

Of course, the receptivity of judges to arguments based on legal doctrines similarly requires that counsel be prepared to rebut the prosecutor's invocation of doctrines advantageous

to the prosecution. In particular, counsel must become familiar with the roster of presumptions and inferences upon which the prosecutor can rely to prove factual propositions necessary for conviction. See § 35.06 *infra.*

Counsel should pay careful attention to any questions the judge asks during argument, whether they are addressed to counsel or to the prosecutor. Questions usually reveal the subjects about which the judge is primarily concerned and possibly also most open to persuasion.

In some jurisdictions the defense is required to submit its motion for acquittal in writing. Usually, the requirement is applied very loosely, and a typed (or even handwritten) one-sentence motion will suffice.

Whether counsel is practicing in such a jurisdiction or not, s/he should give serious thought to preparing a detailed legal memorandum when the defense turns upon a novel interpretation of the law. In this situation counsel can prepare the memorandum before trial, describing the applicable law but leaving the facts of the case for oral recitation after counsel has seen precisely how the facts emerged from the witnesses' testimony. The memorandum can be handed up to the judge (and copies given to the prosecutor and the clerk) during counsel's closing. This ensures that the judge will have an adequate grounding to follow legal arguments that may not be easy to elucidate orally, and it also ensures that the record for appeal is clear with respect to those arguments. (Counsel should make sure that the courtroom clerk files the memorandum *so* that it becomes a part of the formal record for the latter purpose.) In cases in which counsel has not had a chance to prepare a memorandum in advance, s/he can ask leave of the court to submit a post-argument written memorandum. This procedure runs the risk, however, that the judge may deny counsel's request and proceed directly to announce his or her verdict.

§ 35.03 THE LEGAL STANDARDS GOVERNING THE MOTION FOR ACQUITTAL AND THE DETERMINATION OF GUILT OR INNOCENCE

The prosecutor's burden in a criminal case — to prove guilt beyond a reasonable doubt — governs the determination of guilt or innocence in a delinquency trial as well. *In re Winship,* 397 U.S. 358 (1970). As explained in § 35.02 *supra,* the prosecutor's burden will often be a centerpiece of counsel's closing argument.

The burden also shapes the standard by which the judge is required to test the prosecution's proof in ruling on the motion for acquittal. The motion must be granted if no reasonable trier of fact could find that every element of the offense and the respondent's identity as the perpetrator have been proved beyond a reasonable doubt. This is the test that has traditionally been employed in most jurisdictions. In *Jackson v. Virginia,* 443 U.S. 307 (1979), the Supreme Court made clear that it is also the test required by the federal Constitution.

Because the prosecution bears these burdens of persuasion, the respondent is not required to submit any evidence to warrant a judicial finding of "not guilty" or to prevail on a motion for

acquittal. If the prosecution's evidence "could [not] support any rational determination of guilt beyond a reasonable doubt," the respondent wins the motion, *United States v. Powell,* 469 U.S. 57, 67 (1984); and if the prosecution's evidence fails in fact to convince the judge beyond a reasonable doubt, the respondent wins the verdict.

§ 35.04 INCREASED PROSECUTORIAL BURDEN IN SOME CASES; CORROBORATION REQUIREMENTS

In virtually every jurisdiction there are statutory or common-law rules that increase the burden on the prosecutor in some sorts of cases. These may take the form of "corroboration" requirements. For example:

(i) Many States provide that an accused's confession alone is not sufficient to support a verdict of guilty and must be corroborated by other evidence. *See, e.g.,* N.Y. FAM. CT. ACT § 344.2(3) (2014); PA. CONS. STAT. ANN. tit. 42, § 6338(b) (2014); TEX. FAM. CODE ANN. § 54.03(e) (2014); WASH. REV. CODE ANN. § 13.40.140(8) (2014); *In the Matter of R.A.B.,* 399 A.2d 81, 83 (D.C. 1979).

(ii) It is also common to provide that the uncorroborated testimony of an accomplice is not sufficient to support a verdict of guilty. *See, e.g.,* N.Y. FAM. CT. ACT § 343.2(1) (2014); TEX. FAM. CODE ANN. § 54.03(e) (2014); *In re Dugan,* 334 N.W.2d 300, 304 (Iowa 1983) (applying adult criminal court rule to delinquency cases); *In re Anthony W.*, 388 Md. 251, 273, 879 A.2d 717, 728 (2005) (same); *In the Matter of the Welfare of D.S.,* 306 N.W.2d 882, 883 (Minn. 1981) (same).

Another type of rule enhances the prosecution's burden by requiring that the prosecution produce more than a single witness to prove guilt. For example, in most jurisdictions the crime of perjury must be proved by the testimony of two witnesses or its equivalent.

§ 35.05 "AFFIRMATIVE DEFENSES"

There is often considerable confusion in the jurisprudence on the subject of "affirmative defenses" — that is, factual contentions upon which the accused is said to have the burden of proof.

There are, to be sure, certain issues — involving "defenses" in the nature of confession and avoidance — on which the accused does have the burden of proof (usually by a preponderance of the evidence) under the law of some States. These include duress, *see Dixon v. United States*, 548 U.S. 1, 8 (2006), lack of criminal responsibility (insanity), *see Patterson v. New York,* 432 U.S. 197, 202-06 (1977) (dictum); *Jones v. United States,* 463 U.S. 354, 368 n.17 (1983) (dictum); *Clark v. Arizona*, 548 U.S. 735, 768-69 (2006) (dictum); *but see Burks v. United States,* 437 U.S. 1, 3 n.2 (1978) (dictum) (federal practice), withdrawal from a criminal conspiracy, *see Smith v. United States*, 133 S. Ct. 714, 720 (2013) (federal practice), and (in a

couple of States) self-defense, *see Martin v. Ohio,* 480 U.S. 228 (1987); *Hankerson v. North Carolina,* 432 U.S. 233, 240 n.6 (1977) (dictum).

But in many jurisdictions the accused's burden on these issues is not the burden of persuasion; it is merely the burden of going forward. That is, unless the accused presents some evidence on the issue, the issue is not in the case; the prosecution may survive a motion for acquittal with no evidence at all addressed to the issue. *Cf. Hankerson v. North Carolina,* 432 U.S. at 237 n.3. If the accused does present "some evidence," however, the issue is raised, and once it is raised, the prosecution must prove its case on the issue beyond a reasonable doubt, just as it must prove every element of the crime beyond a reasonable doubt. (The phrase "some evidence" commonly used to describe how much the accused must adduce to justify submission of an issue, has different meanings in different States. In some States it signifies enough evidence to support a finding; in others it signifies enough evidence to "warrant consideration" or to raise a reasonable doubt.)

Furthermore, there are numerous matters that are not "affirmative defenses" in any sense, analytic or operational, although they may look like it. An alibi, for example, is not a defense. It is simply one way in which the accused may seek to disprove — technically, to throw a reasonable doubt upon — the question of identity, on which the prosecution plainly has its normal burden. If alibi testimony suffices to create a reasonable doubt, the respondent is entitled to be found not guilty; and if it compels a reasonable doubt in a reasonable mind, the respondent is entitled to the granting of a motion for acquittal. The same is ordinarily true with respect to intoxication as a "defense" to a charge requiring proof of specific intent. And the prosecution's burden is not lessened simply because the respondent relies upon certain sorts of evidence (such as accomplice testimony) for which strict evaluative standards (such as "care and caution") are accepted. *See Cool v. United States,* 409 U.S. 100, 103-04 (1972).

Finally, the same defensive evidence or theory of the case may bear on two or more issues. For example, in a homicide case the fact that the deceased initiated the fight in which s/he was killed by the respondent may go both to refute the existence of "premeditation and deliberation," an element of first-degree murder, and to establish self-defense, a justification. Even in jurisdictions where the respondent bears the burden of proof of the fact for the second purpose, s/he does not bear it for the first. *See Martin v. Ohio,* 480 U.S. at 231-34; *Smith v. United States*, 133 S. Ct. at 719 (if an affirmative defense "'negate[s] an element of the crime,'" the "State is foreclosed from shifting the burden of proof to the defendant").

The law on all of these subjects varies from State to State and is unsettled or in flux in many States. When it is not expressly governed by statute or a recent decision of the State's highest court, counsel should be alert to challenge even long-accepted local usages making "affirmative defenses" out of issues that should not analytically be treated as such. In addition to arguments based upon state-law analyses, counsel can argue that the federal constitutional requirement of proof beyond a reasonable doubt (see § 33.03 *supra*) is offended by treating essential components of criminal liability as "affirmative defenses" so as to relieve the

prosecution of the burden of proving them. *Compare Mullaney v. Wilbur,* 421 U.S. 684 (1975), *with Rivera v. Delaware,* 429 U.S. 877 (1976) (per curiam); *Patterson v. New York,* 432 U.S. at 210; *Martin v. Ohio,* 480 U.S. at 231-34; *and Smith v. United States*, 133 S. Ct. at 719-20. There are numerous issues here that are worth counsel's while to research, raise, and preserve for appeal if they are not won at the trial level. *See, e.g.*, *Conley v. United States*, 79 A.3d 270, 272-73 (D.C. 2013) (D.C. statute "making it a felony offense for a person to be present in a motor vehicle if the person knows that the vehicle contains a firearm . . . even if the person has no connection to or control over the weapon and is not involved in any wrongdoing" unconstitutionally shifted "the burden of persuasion with respect to a critical component of the crime" by "requir[ing] the defendant to shoulder the burden of proving, as an affirmative defense, that his presence in the vehicle was involuntary" "instead of requiring the government to prove that the defendant's continued presence was voluntary"). In a bench trial they are ordinarily raised by inclusion in counsel's arguments on the motion for acquittal or in counsel's closing argument. (In a jury trial they may be raised either in argument on the motion for acquittal or by requests for jury charges. See § 36.06 *infra*.)

§ 35.06 THE EFFECT OF INFERENCES AND PRESUMPTIONS

Another area of entrenched confusion that requires counsel's study of local law and may reward counsel's attack upon some aspects of it is the subject of inferences and presumptions.

As these terms are used by most writers on evidence, *inferences* and *presumptions* are descriptions of reasoning processes that lead from one factual proposition, *A,* to another proposition (factual or legal or both), *B.* The reasoning process tells how to get from *A* to *B.* Statutes or common-law doctrines that prescribe the reasoning process may make it permissive or mandatory; that is, they may tell triers of fact who have found *A* that the triers are *permitted* or that the triers are *required* to go to *B* under some or all circumstances.

§ 35.06(a) Inferences

An *inference* (more properly, a permissive inference) tells a trier that if *A* is established by the requisite quantum of proof, the trier may thereupon find *B.* The trier needs not find *B,* but s/he may. This means, if *B* is an element of a crime, that the trier may, but needs not, convict on proof beyond a reasonable doubt of *A.* For example, statutes provide that on the trial of a person for an intentional crime of violence, proof that the person was armed with an unlicensed handgun is *prima facie* evidence of intent to commit the violent crime. These statutes are ordinarily construed as creating a permissive inference. On proof that the accused had an unlicensed gun, the trier of fact *may* find the requisite criminal intent and thereby may convict, but it is not required to do so.

The effect of a permissive inference on the respondent's motion for acquittal is to. require its denial if the prosecution proves fact *A.* Although the statute makes *B* criminal, the prosecution can survive a motion for acquittal by proving *A.* The permissive inference empowers a trier who

has found *A* beyond a reasonable doubt to infer *B* and convict.

The term *inference* would also be used if the trier were permitted to find *B* beyond a reasonable doubt and to convict upon a finding that *A* was established by a preponderance of the evidence. Probably, statutes and common-law doctrines creating most permissive inferences do not intend to allow this. Thus, under the common form of unlicensed handgun statute mentioned earlier, it would probably be error for a judge to base a conviction of a crime of violence requiring specific intent upon a finding by a preponderance of the evidence that the respondent had an unlicensed gun. Unless the judge finds the fact of possession of an unlicensed gun beyond a reasonable doubt, s/he should not convict.

§ 35.06(b) Presumptions Generally

The term *presumption* is a mixed bag. Apart from the fact that it is often used improperly to denote permissive inferences as described in the preceding subsection, it has no uniform meaning. Writers on evidence often distinguish three kinds of presumptions: (i) presumptions that shift the burden of going forward (described in § 35.06(c) *infra*); (ii) presumptions that shift the burden of proof (§ 35.06(d) *infra*); and conclusive presumptions of law (§ 35.06(e) *infra*).

§ 35.06(c) Presumptions That Shift the Burden of Going Forward

In describing the trier's reasoning process from *A* to *B,* a presumption that shifts the burden of going forward says that when the proponent of evidence proves *A,* the trier must find *B* unless the opposing party presents some evidence that *B* is not true. If the opponent presents some evidence that *B* is not true, the presumption ceases to have effect in the case, and the proponent can win only if s/he satisfies the jury that *B* is true according to the ordinary standard of proof. (Of course, the same basic fact *A* that gave rise to the presumption may *also* give rise to a permissive inference of *B,* but it may not.)

In a number of jurisdictions, for example, the presumption of malice from an intentional killing is this sort of presumption. If the prosecution satisfies the factfinder that there was an intentional killing and the accused does not come forward with some evidence of justification or mitigation, the factfinder *must* convict of murder. If the accused comes forward with some evidence, the prosecution resumes its burden of proving malice beyond a reasonable doubt. How much evidence constitutes "some" evidence appears to vary from jurisdiction to jurisdiction, and the standard is often unclear. Compare § 35.05 *supra.*

The reasoning involved in presumptions that shift the burden of going forward is, of course, generally similar to the reasoning described in § 33.09 relating to the burden of proof in some jurisdictions on the insanity issue and similarly treated issues. The accused must come forward with some evidence of insanity; if s/he does, the prosecution must prove sanity beyond a reasonable doubt. Indeed, the "presumption of sanity" is sometimes spoken of. But the "presumption of sanity" is not a presumption at all because it does not deal with the relations

between two factual propositions. It states a rule that is uniformly applied, without the necessity of proof of any fact *A.* It is, in short, a burden-of-proof statement. *See Clark v. Arizona*, 548 U.S. 735, 766-69 (2006). So is the most celebrated presumption of them all, the "presumption of innocence." *See id*. at 766-67; *Taylor v. Kentucky,* 436 U.S. 478, 483-84 n.12 (1978). The confusion about presumptions is only compounded by these uses of the term to describe burdens of proof. *Cf. Lavine v. Milne,* 424 U.S. 577, 584-85 (1976).

§ 35.06(d) Presumptions That Shift the Burden of Proof

Under a presumption that shifts the burden of proof, the proponent of evidence, charged with the burden of proof of fact *B,* is entitled to win by proving fact *A* unless his or her opponent disproves *B.* This was the effect of the presumption of malice in some States prior to *Mullaney v. Wilbur,* 421 U.S. 684 (1975). In those States the jurors were charged that if they found that the accused had killed the deceased intentionally, they *must* convict unless the accused proved that the killing was justifiable or that some circumstance of mitigation existed.

This sort of presumption, like presumptions that shift the burden of going forward, may have differing effects, depending upon the extent ("the quantum") of the burden that is shifted to the accused: proof by a preponderance, proof by clear and convincing evidence, and so forth.

To complicate complications, there is another frequently encountered set of doctrines that look like presumptions that shift the burden of proof but are not presumptions as the term is used here. These are the effect of common-law rules or statutes that relate to what a factfinder may do with certain "unexplained" conduct of the accused. For example, unexplained possession of recently stolen property is *prima facie* evidence of theft. Unexplained possession of narcotics is *prima facie* evidence of their illegal importation. Unexplained presence at the site of an illegal enterprise is *prima facie* evidence of operating it. Insofar as these statutes require "explanation" from the accused, they appear to be presumptions shifting the burden of proof. But they do not shift the burden of proof because, in each case, unexplained possession merely authorizes conviction and does not compel it. If the trier of fact finds unexplained possession of recently stolen property, for example, it *may* convict, but it is not required to convict. What is involved is a hybrid permissive inference (see § 35.06(a) *supra*) and presumption. The accused has the burden of persuasion of avoiding an inference.

§ 35.06(e) Conclusive Presumptions of Law

The type of legal doctrine that is often called a "conclusive presumption of law" is really not a presumption at all. It functions in the manner of an outright rule of law. It says that when *A* is proved, *B* is treated as proved, and that is that. The statutory definition of the crime reads in terms of *B,* but *A* is the actual element of the crime for practical purposes.

This is the relationship between killing in the course of a felony and malice in most jurisdictions. Although the language of "presumption" is sometimes still used, it is clear that

killing in the course of a felony *is* malicious killing and *is* murder. The factfinder needs find nothing more.

To say that *operationally* a "conclusive presumption" functions precisely in the nature of a legal rule substituting the basic fact for the presumed fact is not to say, however, that for all legal purposes a "conclusive presumption" is treated as equivalent to a legal rule which turns upon the basic fact. The two may be treated differently, for example, for the purpose of applying certain constitutional limitations upon "presumptions" (§ 35.06(f) *infra*). See the distinction of *Vlandis v. Kline,* 412 U.S. 441 (1973), in *Weinberger v. Salfi,* 422 U.S. 749, 770-72 (1975); *cf. Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 22-24 (1976).

§ 35.06(f) Conclusion

The preceding discussion of inferences and presumptions has not been designed to explicate the law but to alert counsel to its complexity. The adjudication of delinquency cases involves a bewildering array of formalized inferences and presumptions (in the sense used here, meaning articulate legal doctrines of greater generality than the inferences drawn by a trier of fact in any particular case), most of which serve to get the prosecutor past a motion for acquittal. For listings, see 9 WIGMORE, EVIDENCE §§ 2499-2540 (James H. Chadbourn rev. 1981); 22 C.J.S. *Criminal Law* §§ 41-44 (2014); 22A C.J.S. *Criminal Law* §§ 954-71 (2014); 31A C.J.S. *Evidence* §§ 130-96 (2014). The statutes and judicial decisions that create or recognize them seldom say what kind of inferences or presumptions they are or prescribe their effects. General terms are used, such as "shall be presumed," "shall be *prima facie* evidence," "shall be presumptive evidence." An inordinate number of rulings on motions for acquittal depend upon the construction of these general terms and may construe them incorrectly or at least challengeably.

For example, it is almost invariably assumed that any doctrine allowing the presumption of the elements of an offense in a criminal or delinquency case allows the prosecution to survive a motion for acquittal. This is not so, of course. If the presumption is of the kind that shifts the burden of going forward (see § 35.06(c) *supra*) and if it is not accompanied by a permissive inference (see § 35.06(a) *supra*) and if the respondent comes forward as required, the prosecution cannot make a submissible case on the presumption alone. And the Supreme Court of the United States has held that at least one statute providing that "presence . . . shall be deemed sufficient evidence to authorize conviction" does not mean what it says and does not invariably allow the prosecution to defeat a motion for acquittal solely by proof of presence. *United States v. Gainey,* 380 U.S. 63, 68 (1965).

In addition to problems of statutory construction and of the application of old but obscure common-law inferences and presumptions, constitutional problems lurk in all of these devices that ease or satisfy the prosecution's ultimate burden of proof. *See, e.g., Leary v. United States,* 395 U.S. 6, 32-53 (1969), and cases cited; *Turner v. United States,* 396 U.S. 398 (1970); *Mullaney v. Wilbur,* 421 U.S. 684 (1975); *Hankerson v. North Carolina,* 432 U.S. 233 (1977);

Sandstrom. v. Montana, 442 U.S. 510 (1979); *Connecticut v. Johnson,* 460 U.S. 73 (1983); *Reed v. Ross,* 468 U.S. 1 (1984); *Francis v. Franklin,* 471 U.S. 307 (1985); *Yates v. Aiken,* 484 U.S. 211 (1988); *Barnes v. United States,* 412 U.S. 837, 844-46 (1973) (dictum); *compare Cupp v. Naughten,* 414 U.S. 141 (1973); *Patterson v. New York,* 432 U.S. 197 (1977); *County Court of Ulster County v. Allen,* 442 U.S. 140, 156-67 (1979). For "[i]n the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams,* 425 U.S. 501, 503 (1976) (dictum). The pertinent federal constitutional caselaw is murky, conceding an "inability to lay down any 'bright line' test" and "leav[ing] the constitutionality of statutes . . . to depend upon differences of degree." *McMillan v. Pennsylvania,* 477 U.S. 79, 91 (1986). Therefore, counsel's preparation for argument of the motion for acquittal and for closing argument in any case in which the prosecution may rely upon a statutory or common-law inference or presumption should include imaginative consideration of possible challenges to its applicability, its sufficiency to satisfy the prosecutor's ultimate burden of proof, and its state and federal constitutional validity.

§ 35.07 VARIANCE BETWEEN THE PROSECUTION'S PROOF AT TRIAL AND THE ALLEGATIONS OF THE PETITION

The prosecution's proof may make out a sufficient case of violation of the offense charged but one that deviates considerably in factual detail from the allegations of the Petition. When this occurs, counsel should move for a judgment of acquittal on grounds of variance or, in the alternative, for a continuance adequate to permit the defense to meet the prosecutor's unexpected proof. In most jurisdictions the motion for acquittal will be denied, and the prosecution will be permitted to amend the Petition, although the defense will often be granted the requested continuance to gather evidence to meet the prosecution's new theory. Indeed, when the variance is so substantial that its effect was to deprive the respondent of "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge," *Cole v. Arkansas,* 333 U.S. 196, 201 (1948), a refusal to grant a defense continuance is assailable on federal constitutional grounds. See § 9.09(b)(2) *supra.*

In some jurisdictions the applicable statute or caselaw establishes limitations upon the prosecutor's power to amend the Petition to adjust to variances in proof at trial. *See, e.g.*, N.Y. FAM. CT. ACT § 311.5 (2014) (although the prosecutor ordinarily may amend a Petition "before or during the fact-finding hearing . . . with respect to . . . variances from the proof relating to matters of form, time, place, names of persons, and the like" — such amendments giving rise to an automatic defense right to a continuance "necessary to accord the respondent an adequate opportunity to prepare his defense" — no amendment is permitted if it would "tend to prejudice the respondent on the merits" or if the amendment is sought 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"). Local practice must be consulted.

§ 35.08 REQUESTING FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE EVENT OF CONVICTION

When a judge convicts a respondent in a bench trial, counsel should consider asking the court to enter specific findings of fact and conclusions of law. Such a request is advised particularly in cases involving debatable questions of substantive law — concerning, for example, the construction of the statute under which the respondent is charged (compare § 36.06 *infra*) or the applicability or operation or constitutionality of standardized inferences and presumptions (see § 35.06 *supra*) — because a general finding of guilty will be sustained on appeal if there is sufficient evidence to support it under any available legal theory, whereas special findings enable the convicted respondent to obtain appellate review of the trial court's resolution of these contested legal issues. *Cf. Moore v. United States,* 429 U.S. 20 (1976) (per curiam). Special findings may also improve the respondent's chances of succeeding on appeal on a contention of insufficiency of the evidence or on a contention that the conviction was the product of "arbitrariness that would undermine confidence in the quality of the judge's conclusion," *cf. Harris v. Rivera,* 454 U.S. 339, 346 (1981) (per curiam) (dictum); *Petion v. State*, 48 So.3d 726, 737 (Fla. 2010) (appellate court's customary presumption that a "trial court judge [in a bench trial] rested its judgment on admissible evidence and disregarded inadmissible evidence" does not apply if the "record demonstrates that the presumption is rebutted through a specific finding of admissibility or another statement that demonstrates the trial court relied on the impermissible evidence").

However, special findings should obviously not be requested in cases in which the trial judge is likely to find against the respondent on all of the alternative legal grounds that s/he can muster. In such cases, a general verdict is preferable. *See Thomas v. Collins,* 323 U.S. 516 (1945). Nor should special findings ordinarily be requested in cases in which counsel has preserved claims of error in the admission of apparently important pieces of prosecution evidence over defense objection, since the judge's failure to rely on those particular pieces of evidence in specific findings of fact may lead an appellate court to find that their erroneous admission was harmless error.

When the respondent is acquitted by a judge following a bench trial, special findings should always be avoided. This is so because the prosecution may be permitted to appeal from a ruling in favor of the respondent that is based solely upon an assailable conclusion of law, whereas an appeal by the prosecution from a ruling in favor of the respondent based in any part upon factual findings would be barred by double jeopardy principles. *See United States v. Scott,* 437 U.S. 82, 96-97 & n.9 (1978) (dictum) (apparently endorsing the suggestion to this effect in *United States v. Jenkins,* 420 U.S. 358, 366-68 (1975), while overruling *Jenkins* on another point); *see also Smith v. Massachusetts*, 543 U.S. 462, 466-69 (2005); *compare Sanabria v. United States,* 437 U.S. 54, 63-73 (1978); *Smalis v. Pennsylvania,* 476 U.S. 140, 144-45 (1986); *Lockhart v. Nelson,* 488 U.S. 33, 39-40 (1988) (dictum); and *State v. Sago*, 2013 WL 1943006 (Minn. App. 2013) (distinguishing *Lockhart*).

Many juvenile court judges will be unfamiliar with the concept of special findings of fact. Counsel will often be able to find statutes or caselaw prescribing the procedure in adult criminal bench trials, *see, e.g.,* FED. R. CRIM. P. 23(c) (2014), which can be cited by analogy.

Chapter 36

The Closing Stage of a Jury Trial: Renewal of the Motion for Acquittal; Closing Argument; Jury Instructions; the Jury's Deliberations and Verdict

Part A. The Renewed Motion for Judgment of Acquittal

§ 36.01 THE RENEWED MOTION FOR ACQUITTAL; PARTIAL DIRECTED VERDICTS

Chapter 35 described the nature and functions of the renewed motion for acquittal in a bench trial, together with various legal doctrines that bear upon the motion. Most of what was said about the latter doctrines there is also pertinent to jury trials. In a jury trial, however, the motion has heightened importance because it determines whether the case will go to the jury or be dismissed by the judge.

The judge may grant a motion for acquittal in whole or in part. S/he may dismiss counts of the Petition and submit others to the jury. S/he may grant an acquittal on the offense charged in the charging paper and submit lesser included offenses to the jury.

Whereas defense argument on the motion for acquittal and closing argument are consolidated in a bench trial, they are, of course, separate in a jury trial. At the conclusion of all of the evidence (when both prosecution and defense have "rested"), defense counsel makes his or her renewed motion for acquittal, and the prosecutor responds. (Counsel should request that the jury be excused while the motion is made, argued, and ruled on, so that a denial of the motion does not convey to the jury the impression that the judge has ratified the sufficiency of the prosecution's case.) If the judge denies the motion in whole or in part, the attorneys then submit requests for jury instructions (see § 36.02 *infra*) and thereafter make their closing arguments to the jury (see §§ 36.10-36.12 *infra*).

In a jury trial on a criminal or delinquency charge, the court may not direct a verdict for the prosecution no matter how overwhelming and essentially uncontested the evidence of guilt. *See, e.g., United States v. Martin Linen Supply Co*., 430 U.S. 564, 572-73 (1977) (dictum); *Sandstrom v. Montana*, 442 U.S. 510, 516 n.5 (1979) (dictum); *Standefer v. United States*, 447 U.S. 10, 22 (1980) (dictum); *Rose v. Clark*, 478 U.S. 570, 578 (1986) (dictum); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (dictum).

Part B. Requests for Jury Instructions

§ 36.02 THE CONFERENCE ON INSTRUCTIONS

In many jurisdictions it is customary or obligatory, prior to the closing arguments of counsel, for the judge to confer with counsel to determine what the jury will be charged (or to

"settle" the instructions, as it is often called). This may be done as a matter of routine, or counsel may have to request a conference if s/he wants one.

At the conference the judge may read to counsel, or allow counsel to read, part or all of what the judge proposes to instruct the jury. (Usually the "standard" parts of the charge will not be read or made available to counsel unless specifically requested. If counsel wants to see what the judge is going to charge about the role and obligations of jurors, the process of jury deliberation, the attitudes with which the jurors should approach their deliberations, proof beyond a reasonable doubt, and other "boilerplate" matters, counsel will have to ask explicitly to see these portions of the judge's draft.) The judge will then entertain objections and proposed modifications and will rule on them.

Whether or not s/he is required to or does disclose his or her own draft charge to counsel, the court will receive and rule upon proposed instructions by both parties, often called *requests for charge* or *prayers* or *points for charge.* These are ordinarily submitted to the court in writing; in some jurisdictions they must also be filed with the clerk. At the conference the judge takes up each request for charge and rules on it, usually endorsing each request "allowed" ("granted"), "denied," or "charged in substance" ("covered"). (The last of these notations indicates that the judge accepts the principle of the requested instruction but has, or thinks s/he has, adequately dealt with the point in another portion of the draft charge.)

Local practice may require the attorneys to file their proposed instructions and to serve them on opposing counsel at a specified time before the conference. The procedure for preserving objections to the court's refusal to adopt proposed instructions also varies locally. In some courts all written requests for instructions are routinely made a part of the record that will go up on an appeal; in others, counsel may have to make special arrangements with the clerk to file those that the judge has denied, or counsel may have to incorporate them in oral objections or in bills of exceptions.

In jurisdictions that have form books of approved jury instructions (sometimes called "pattern instructions"), counsel can simply request "Number 344" or "Number 344 as modified by . . . [specifying any desired changes]." Whenever possible, and even though oral requests for charge may be permitted, counsel should submit the requests in writing in order to make the clearest possible record for appeal.

§ 36.03 THE LORE OF CHARGING THE JURY

In addition to the substantive law on which the court will charge the jury and which is discussed at the conference on instructions, there is, in many jurisdictions, a more or less elaborate body of law on the subject of the judge's charge itself — what it must contain, what it may contain, its form, and so forth — that counsel will want to have in mind.

Usually, there are a few matters concerning which the court is obliged on its own

initiative to charge the jury and to charge the jury correctly. The failure of counsel to bring omissions or errors in these matters to the court's attention is not fatal to a claim, on postrial motions or appeal, that the charge was inadequate or erroneous. The matters whose omission or incorrectness may subsequently be noticed as "plain error in the charge" are commonly limited to the elements of the offense, the statement that the burden of proof is on the prosecution beyond a reasonable doubt, and a statement of the number of jurors who must agree to render a verdict. All other claimed imperfections must be objected to and claimed omissions complained of. *See, e.g.*, *Henderson v. Kibbe*, 431 U.S. 145, 154-55 (1977); *Hankerson v. North Carolina*, 432 U.S. 233, 244 n.8 (1977) (dictum); *cf. United States v. Frady*, 456 U.S. 152 (1982); *Engle v. Isaac*, 456 U.S. 107 (1982).

The judge is ordinarily not required to give the charges requested by counsel in the precise language of the request, even though that language correctly states an applicable legal principle. The judge may cover the matter in his or her own language instead. But the jurisdictions differ in this regard, as they do on the questions (a) whether the judge is forbidden, permitted, or required to summarize the evidence or to comment on the evidence in addition to stating the applicable legal principles; (b) whether and under what circumstances the judge is required to give instructions on the theory of the defense; (c) whether the judge may refuse entirely to give a requested instruction because, although correct in its major outlines, it is incorrect on specific details or whether s/he has an obligation to give the substance of it, corrected as may be required to conform to law; (d) how tightly appellate courts will scrutinize particular passages in the charge for erroneous statements, as distinguished from reading the charge as a whole (for example, whether the judge who has given a general charge on reasonable doubt may use the form "if you find" in defining the several elements of the offense rather than "if you find beyond a reasonable doubt"), and so forth. Obviously, these various local doctrines relating to the charge and to the process by which it is required to be drawn up will affect the manner in which counsel proceeds at the conference on instructions, and counsel should go into the conference with an adequate grounding in them.

§ 36.04 GENERAL AREAS COVERED BY THE CHARGE

In general, the court's charge will cover: (1) the elements of the crime charged in the charging paper and of all lesser included crimes; (2) the elements of, or the legal principles necessary to evaluate, any defense theory (such as self-defense or entrapment); (3) the legal principles governing any factual and evidentiary issues presented by the case (such as the voluntariness of a confession or the preconditions for finding a tacit admission); (4) the number of jurors who must agree in order for the jury to return a verdict; (5) the prosecution's burden of proof beyond a reasonable doubt, the meaning of the phrase "beyond a reasonable doubt," the presumption of innocence, any special rules governing the prosecution's burden (such as corroboration requirements), and the allocation and quantum of the burden of proof on subsidiary issues (see §§ 35.03-35.05 *supra*); (6) permissive inferences and presumptions bearing on the ultimate issues in the case (see § 35.06 *supra*); (7) permissive inferences and presumptions and other "fact-finding aids" relating to standard and recognized fashions of reasoning from the

evidence (such as inferences from the failure of a party to call a witness (see § 10.08 *supra*), from a finding that a witness testified falsely in one particular, or from factual circumstances that the proof tends to show: flight of the respondent, possession of recently stolen property, and so forth); (8) required or recommended ways of weighing particular sorts of testimony (such as the requirement that the testimony of an accomplice be received with caution and scrutinized with care); (9) limitations on the permissible use of certain items of evidence (such as the use of one co-respondent's confession against the confessor but not against other respondents); (10) matters that are to be put out of account or not given described effects in the deliberations of the jury (such as the impermissibility of considering evidence that was struck, of drawing inferences from the respondent's failure to testify, of speculating from objections that were sustained, of treating the statements of counsel as evidence, or of treating the Petition as evidence); (11) the general role of the jury and the court (including the ultimate responsibility of the jury for factfinding, the requirement that the jury follow the law charged by the court, and admonitions not to draw inferences from the court's evidentiary rulings or rulings on motions for a directed verdict and not to speculate upon, or be influenced by, the judge's attitudes toward the case); (12) [in some jurisdictions] a summary of the evidence; (13) [in some jurisdictions] an expression of opinion on the evidence; and (14) procedures that the jury should follow in the process of deliberation (choosing a foreperson, using exhibits, requesting supplemental instructions, separating, and so forth).

Counsel should have considered all of these areas prior to the conference on instructions and should be familiar with the governing principles and aware of what s/he wants to have charged — and *not* to have charged — in each area. S/he will be particularly responsible for charges on the defense theories and on principles of law relating to them and for charges on evidentiary matters. In cases in which the respondent did not testify at trial, counsel will probably be asked specifically whether s/he wants a charge on the impermissibility of inference from the respondent's failure to testify. See § 33.05 *supra.*

§ 36.05 LESSER INCLUDED OFFENSES

It is especially important that counsel have a well-considered position on the submission of lesser included offenses. *See, e.g., McNeal v. State*, 412 S.W.3d 886, 889-90, 893 (Mo. 2013). The general principle theoretically applicable here is that the court may (and ordinarily must, on request of counsel, *see Keeble v. United States*, 412 U.S. 205, 208 (1973); *Jeffers v. United States*, 432 U.S. 137, 153-54 (1977) (plurality opinion)) submit to the jury any offenses that are lesser included offenses of the crime charged in the charging paper and upon which the evidence would support a conviction. *Compare Beck v. Alabama*, 447 U.S. 625 (1980) (holding that a defendant has a federal constitutional right to the submission of evidentially supported lesser offenses in a capital case), *and Williams v. Trammell,* 539 Fed. Appx. 844 (10th Cir. 2013), *with Schad v. Arizona*, 501 U.S. 624, 645-48 (1991) (rejecting a defendant's contention that "*Beck* require[s] that the jury in a capital case be instructed on every lesser included noncapital offense supported by the evidence," and holding that instructions which gave the jury "the option of finding [the defendant] . . . guilty of a [*i.e.*, at least one] lesser included noncapital offense"

"sufficed to ensure the verdict's reliability"), *and Hopkins v. Reeves*, 524 U.S. 88, 90-91 (1998) (holding that *Beck* does not require instructions on "offenses that are not lesser included offenses of the charged crime under state law"), *and Hopper v. Evans*, 456 U.S. 605 (1982) (distinguishing *Beck* because the *Hopper* record contained no evidence supporting conviction of a lesser offense), *and Spaziano v. Florida*, 468 U.S. 447 (1984) (distinguishing *Beck* because in *Spaziano* the lesser offense was barred by a statute of limitations; in this situation the Court holds that the accused should be given the choice between waiving the statute or waiving the lesser-included-offense instruction, *id.* at 456-57).

A "lesser included offense" is an offense defined by law in such a manner that (a) each of its elements is an element of the crime charged, and (b) it has no elements that are *not* elements of the crime charged, and (c) it lacks some element of the crime charged. *See, e.g., Schmuck v. United States*, 489 U.S. 705, 717-19 (1989), and authorities cited; *see also Carter v. United States*, 530 U.S. 255, 260-61 (2000). Thus assault is a lesser included offense of the crime of assault with a deadly weapon; assault is also a lesser included offense of rape; but assault with a deadly weapon is not a lesser included offense of rape, even though, in fact, in a particular rape case the assailant may have been armed and may have committed an assault with a deadly weapon.

Difficult technical problems arise with regard to whether some lesser offenses are included in some greater ones, particularly if the lesser offense has an element that is not necessarily coincident with an element of the greater crime in all cases but inevitably is so in a subclass of cases (for example, the question whether unauthorized use of government property is a lesser included offense of grand larceny in a case in which the allegedly stolen item *was* government property). Difficult problems also arise with regard to whether the record will support a conviction on the lesser charge (for example, whether, when theft is shown and the only evidence of the value of the stolen item is the complainant's generic description of it and his or her testimony that it was worth $110, the record will support a conviction of petty theft (theft of an item worth less than $100)).

Defense counsel will have considerable ground for legal contention on these issues. What is important for him or her to decide first is whether s/he *wants* a particular lesser included offense or *any* lesser included offenses submitted. The considerations are complex but boil down basically to the question whether counsel wishes to give the jury a compromise position. A jury faced with the alternatives of convicting on a serious crime or of acquitting *may* acquit, particularly if (a) the evidence is close or (b) the respondent is sympathetic or (c) there are extenuating circumstances or (d) the penalty for the offense charged seems incommensurately harsh. Given the option of conviction on a lesser charge, the jury may accept the lesser conviction. If counsel senses that the jury is divided and that the stronger jurors favor the defense, counsel may well want to have the jury decide guilt or innocence of the offense charged on an all-or-nothing basis.

Counsel must take stock of the jurors and decide whether s/he wants to put them to the

all-or-nothing choice. There are no general guidelines for this decision; it is a matter of the feel of the case and of the jury. If counsel decides that s/he does not want lesser charges given, s/he should resist them, arguing that they are not available in law or on the record. If s/he wants them, s/he should urge them and be prepared to submit instructions covering the elements of each one that s/he wants charged. As a practical matter, some judges will give considerable deference to the wishes of defense counsel and will not be strictly bound by the theoretical rules requiring the submission of lesser offenses. These judges feel that if counsel and the respondent want to put the jury to a yes-or-no decision on the major crime, they should generally be permitted to take that gamble. Similarly, many judges will submit lesser offenses, on counsel's request, even though there is hardly arguable support for them in the record. A ubiquitous practice, for example, is to submit the lesser offense of second-degree murder in a first-degree prosecution based on the felony-murder theory, even though there is often not a shred of evidence upon which the *mens rea* of second-degree murder can be found.

§ 36.06 DEFENSE REQUESTS FOR INSTRUCTIONS

The general theory of the defense determines what instructions counsel should request. S/he should consider, among other possibilities, requests for charges:

(a) *Limiting the use of items of prosecution evidence*. For example, in jurisdictions that allow the prosecutor to impeach the respondent with prior adjudications or prior bad acts (see § 30.07(b) *supra*), counsel may request an instruction that evidence of the respondent's prior adjudications or bad acts may be considered only insofar as the jury finds it relevant in assessing his or her credibility as a witness and may not be considered as bearing directly on the respondent's guilt or innocence, because the law does not permit the speculation that a person may be more or less likely to have committed the present offense simply because s/he has or has not committed an offense at some earlier time (see § 30.07(a) *supra*).

(b) *Depreciating the weight of categories or items of prosecution evidence.* For example, counsel may request an instruction that evidence of oral confessions is often unreliable and should therefore be received with caution.

(c) *Stating the general burden of proof and burdens on subsidiary issues favorably to the defense.* For example, counsel may request an instruction that the prosecution must prove each and every element of the offense beyond a reasonable doubt and to a moral certainty, and that a "reasonable doubt" does not mean a doubt for which a juror can identify any particular reason. For discussions of various verbal formulations that do and do not adequately convey the concept of reasonable doubt, *see Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

(d) *Stating the presumption of innocence.* Under some circumstances a respondent has a federal constitutional right to an instruction on the presumption of innocence *in addition to* an instruction on the prosecution's burden of proof beyond a reasonable doubt. *Compare Taylor v.*

Kentucky, 436 U.S. 478 (1978), *with Kentucky v. Whorton*, 441 U.S. 786 (1979) (per curiam).

(e) *Explaining the legal principles underlying defensive contentions.* For example, counsel may request an instruction that evidence of intoxication was admitted as bearing upon the question whether the respondent could and did form the requisite intent for the crime; that the specific intent to kill [*or* to steal, or whatever] is an element of the crime which must be proved beyond a reasonable doubt; that the respondent can no more be found guilty of the crime if the jury has a reasonable doubt concerning his or her intent than if it has a reasonable doubt whether s/he did the act of killing [*or* of taking money, or whatever]; and that if, by reason of the evidence presented regarding the respondent's intoxication, the jury has a reasonable doubt with regard to whether the respondent formed the required intent, the jury must acquit the respondent. Whenever the theory of the defense requires the jury to apply legal principles that are not subsumed within the elements of the crime charged, a request for instructions spelling out those principles is, of course, necessary. "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). *See also, e.g.*, *Harris v. Alexander*, 548 F.3d 200, 205-06 (2d Cir. 2008).

(f) *Instructing the jury not to consider matters that occurred during trial and that the jury may be disposed to hold against the respondent.* For example, counsel may request an instruction that the jury is not to infer guilt from the respondent's failure to take the stand. The defense appears to have an unqualified federal constitutional right to an instruction on this subject. *Carter v. Kentucky*, 450 U.S. 288 (1981); *James v. Kentucky*, 466 U.S. 341 (1984); *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (dictum); see § 33.05 *supra*.

Attention should also be paid to the possibility of a missing-witness instruction (see § 10.08 *supra*) and to the matter of lesser included offenses, discussed in § 36.05 *supra*.

Whether counsel's proposed charges should be conservative (stating the law as counsel knows s/he can clearly satisfy the court it is) or venturesome (embodying debatable defense theories) depends in part on whether, under local practice, a judge may refuse entirely to charge on a given subject simply because the specific instruction requested by defense counsel does not state the law correctly. See § 36.03 *supra*. When local law permits a judge thus to deny the whole of any requested instruction that is incorrect in part, counsel who wants to press a venturesome point should prepare alternative proposed charges, clearly designated as such, for submission *seriatim*. The alternatives should be cross-referenced and should specify the order of counsel's preference among them so that s/he can claim error in the failure to give a more favorable one even though a less favorable alternative which s/he proposed was given.

For example, counsel might submit instructions designated Respondent's Requests for Instruction 3, 3-A, and 3-B. Number 3 would tell the jury that the respondent cannot be convicted of assaulting an officer unless s/he actually knew that the person whom s/he assaulted was an officer. Number 3-A would tell the jury that the respondent cannot be convicted of assaulting an

officer unless s/he actually knew or was grossly reckless in failing to know that the person whom s/he assaulted was an officer, and it would contain at the top the notation: "If the Court refuses Respondent's Request for Instruction Number 3, respondent objects to that refusal and, without waiving that objection, requests that the Court instruct as follows" Number 3-B (telling the jury that the respondent cannot be convicted of assaulting an officer unless s/he actually knew or unless a reasonable person in the respondent's situation would have known that the individual s/he assaulted was an officer) would bear a similar notation at the top in reference to Number 3-A.

(If local practice allows, counsel should delay submitting Number 3-A until after the judge has refused Number 3 and should delay submitting Number 3-B until after the judge has refused Number 3-A. Judges given several alternative formulations at the outset may choose one that is less favorable to counsel than the one that the judge would have accepted if s/he had not been advised of the alternatives that were going to follow. If local practice requires the advance submission of all requests for instructions, then Request Number 3 in the preceding series would bear at the bottom the notation: "If this Request Number 3 is given, Respondent's Requests for Instruction Numbers 3-A and 3-B should not be given" and so forth.)

Like defense evidence, defense instructions should ordinarily be selective and should avoid raising too many issues for jury consumption. They should focus squarely on the defense theory of the case. They should state the rules of law underlying that theory clearly and succinctly, in terms that counsel will be able to pick up and use in his or her closing argument.

The requests to charge should not be argumentative. An easy way to connect the applicable law to the facts without being argumentative is to frame each instruction in the form of a hypothetical syllogism: "If you find *A* and if you find *B*, then you must return a verdict of not guilty [*or* "then you should consider *C*"]" — and adding definitions of *A* and *B* if necessary. There must, of course, be some support in the record for each finding hypothesized, and counsel should be prepared to tell the court what it is.

The drafting of proposed instructions usually warrants counsel's care, and often considerable creativity. Counsel should remember that it is through his or her proposed instructions that s/he has the opportunity to present the principal legal issues in the case — matters of statutory construction, matters relating to the requisite *mens rea* of the offense, and so forth. It is also at this point that counsel principally exercises a "law-testing" or "law-making" role — for example, by challenging accepted definitions of the crime charged. Finally, the erroneous refusal of the trial court to give requested instructions is a fertile field for error and reversal. Although it is not counsel's job to "plant" error, it is decisively counsel's job to press every legitimate legal claim the client has and to insist that the client not be convicted except at a trial at which those claims have been decided correctly.

§ 36.07 PREPARING AND PRESENTING THE DEFENSE REQUESTS

Even in jurisdictions where there is no conference on instructions (see § 36.02 *supra*), requests for charge are ordinarily required to be given to the court in writing before the lawyers make their closing arguments to the jury. If at all possible, counsel should prepare the requests before the end of the last witness's testimony, so as to avoid being caught in a last-minute rush that will make careful drafting impossible. When counsel has not had an opportunity to prepare his or her requests for charge in advance or when additional points come to mind in the closing minutes of the evidentiary trial, counsel should write out the requests in longhand on a legal pad for submission to the court. If there is no interruption of the proceedings between the conclusion of testimony and the commencement of closing arguments and counsel does not have his or her requests for charge completed, s/he should ask for a recess to draft them.

Unless local rules require or the court expressly orders earlier submission, counsel's requests for instructions should not be disclosed until just before the closing arguments begin, in order to avoid the premature elucidation of defensive theories or points of law of which the prosecutor is unaware. Since the judge's decision to grant or deny the requests will ordinarily have to be made on the spot, with no time for real research, counsel should bring to court suitably highlighted photocopies of any statutory texts and judicial opinions that s/he can find to support each request.

§ 36.08 LEARNING WHAT THE COURT PLANS TO CHARGE

One important function of the conference on instructions, from the viewpoint of the defense, is the opportunity it affords to learn what the court will charge. This will be important in planning counsel's closing argument.

As indicated in § 36.02 *supra*, some judges will routinely disclose everything of substance that they expect to charge, and in a number of jurisdictions they are required by law to do so. With other judges, counsel may have to inquire specifically what the court intends to charge on each particular point. With still others it is necessary to infer the court's intentions from discussion of counsel's requests to charge; thus argument concerning the requests may have to be pursued with this end in view.

§ 36.09 OBJECTIONS TO THE COURT'S CHARGE

Local practice may require that all objections to the court's proposed charge be noted at the time of the conference on instructions or may require that objections be noted after the court completes its charge to the jury. Sometimes objection at both times is required. Counsel should be familiar with the requirements.

Part C. Closing Argument

§ 36.10 CLOSING ARGUMENT GENERALLY

As a general matter, the closing arguments of the attorneys recapitulate the theories of each party and attempt to justify the inferences and conclusions that each feels should be drawn from the evidence. In almost all jurisdictions the prosecutor argues first and defense counsel second. In some jurisdictions the prosecutor is always permitted to rebut and thereby have the last word; in other jurisdictions the prosecutor is permitted to rebut only if the defense has presented evidence. Some judges will permit surrebuttal argument by the defense when the prosecutor has obviously sandbagged and reserved most of his or her substantive arguments for rebuttal so as to deprive defense counsel of the opportunity to respond to those arguments.

Counsel should be sure that s/he is familiar with the local rules concerning the order of closing. The nature of the closing argument for the defense is, of course, vitally affected by the question whether there is or is not going to be rebuttal.

Closing arguments in a jury trial are radically different from those in a bench trial as described in Chapter 35. Because juries are far less capable than judges of understanding legal doctrines and because jurors tend to be more receptive than judges to factual and common-sense arguments, the defense closing in a jury trial has to stress the facts and avoid lengthy discussion of legal doctrines. See § 36.12 *infra*. The jury's susceptibility to inflammatory arguments also requires that counsel be alert to object to prosecutorial references to prejudicial matters and appeals to the jurors' emotions. See § 36.11 *infra.*

§ 36.11 THE PROSECUTOR'S CLOSING

The prosecutor's closing argument will typically emphasize the enormity of the crime, the indisputable character of the prosecution's evidence (the efficiency of the investigating officers, the expertise of the prosecution's experts, the objectivity of its public-spirited eyewitnesses, and so forth), the incredibility and self-serving quality of the defense evidence, and — to the extent possible within the limits of the rule forbidding direct allusion to the respondent's character unless the respondent has opened that issue (see §§ 30.07(a), 33.17 *supra*) — the shabby nature of the respondent and defense witnesses.

Some judges consider it a matter of courtesy verging on obligation for opposing counsel not to interrupt one another's closing arguments to the jury. If this is a matter of the individual judge's courtroom etiquette rather than a jurisdiction-wide rule, counsel should elicit the judge's statement on the record that s/he wants objections to opposing counsel's argument to be withheld until the argument is finished. In the absence of such a statement, an appellate court may treat counsel's post-argument objections as untimely.

Even where this courtesy is expected, counsel should not hesitate to interrupt the

prosecutor's argument by objecting if the prosecutor plainly goes beyond allowable bounds — for example, by disparaging the respondent's character when no good-character defense has been presented; by arguing from struck evidence or from facts outside the record; by asserting the prosecutor's personal belief in the respondent's guilt; or by implying that there is additional incriminating evidence against the respondent that the prosecutor has not bothered to present. *See* AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(C)(3), (4) (1980); AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4(e) (2014); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 3-5.8(a)-(d) (3d ed. 1993); *Berger v. United States*, 295 U.S. 78, 85-89 (1935); *cf. Donnelly v. DeChristoforo*, 416 U.S. 637, 648 n.23 (1974) (dictum); *United States v. Young*, 470 U.S. 1, 8 (1985) (dictum); *Darden v. Wainwright*, 477 U.S. 168, 179-80 & n.12 (1986) (dictum); *Newlon v. Armontrout*, 885 F.2d 1328, 1335-38 (8th Cir.1989). Less egregious improprieties should be noted down on counsel's pad. After the prosecutor has concluded, counsel should approach the bench, describe each of them, object to each, and request corrective instructions.

In other localities, contemporaneous objection to improper argument is accepted or required. Counsel should be prompt to make it.

Sometimes counsel will wish to let objectionable arguments go without objection so as to treat them as opening the door to rebuttal, but in considering this tactic s/he must keep in mind who has the last word. When the prosecutor has made a number of factually unsupportable statements, it is often effective for counsel in his or her own closing argument to demonstrate that each of these is belied by the record, then to use the misstatements to portray the prosecution theory as, part and parcel, made up out of whole cloth.

§ 36.12 DEFENSE ARGUMENT

In general, defense counsel does best to focus on arguments that will make the jury affirmatively *want* to acquit the respondent. When possible, counsel should attempt to persuade the jury that the accused is innocent. However, arguments demonstrating innocence should always be combined with a reminder to the jury that it needs not find that the defense has proven the respondent innocent, merely that the prosecution has failed to prove the respondent guilty beyond a reasonable doubt. *See generally* Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992).

The weightiness of the prosecutor's burden is often the most important factor favoring the defense, and in these cases it is crucial for counsel to convey it to the jury. Unfortunately, "reasonable doubt" is also one of the most difficult concepts for a juror to understand. Counsel can help to explain the concept by describing the rationale for the prosecutor's burden: that the law cannot tolerate the risk of error or mistake in a decision that can affect an individual's liberty; therefore, the law has established an extremely high standard of certainty which the prosecution must satisfy. Counsel can also link the concept of reasonable doubt to the gravity of the jury's task when sitting in judgment on the liberty of a fellow human being and can

emphasize the seriousness of the jury's decision by pointing out that once the jurors have given their verdict, it will be too late for second thoughts and doubts that may crop up a week or two later. Counsel will sometimes want to link the concept to an everyday hypothetical situation that the jurors are likely to understand. For example (in a case in which there is a direct conflict between prosecution and defense testimony): "if someone accused your son or daughter of throwing a brick through their window and demanded that you punish the child, but another neighbor said s/he saw the whole thing happen and it was a different child who merely looked like your child, would you have some doubt about whether you should punish your child?" The concept of proof beyond a reasonable doubt also can be clarified by comparing it with the lesser burden in a civil case: "Although a civil lawyer needs only carry the ball over the 50-yard line, the prosecutor has to carry it the whole length of the field and over the goal line."

Once the concept of reasonable doubt has been defined, it can then be used to structure counsel's dissection of the prosecution's evidence at its weakest points (or of the prosecutor's summary of it if that is as, or more, vulnerable). Counsel can go through each link in the prosecutor's analytic chain (or each prosecution witness one by one), explaining the grounds for reasonable doubt that exist at each point (or the circumstances that cast a reasonable doubt upon the facts that the prosecution tried to prove through each witness). Or counsel can begin by announcing that there are *x* number of reasonable doubts in the case, then list and describe each doubt in turn, and finally advise the jury that it needs find only one of the doubts identified by counsel in order to acquit.

Whether counsel structures the argument around reasonable doubt or some other theme, it is important — particularly in a lengthy argument — to organize the argument in a way that the jury is likely to understand and remember during its deliberations. Often, an effective way of doing this is to state the specific, critical questions that the jury must decide in light of the law and the facts (this may boil down to the credibility of one witness or the reasonableness of one inference — wherever the defense is strongest) and then state the answers to those issues that the defense contends the evidence compels.

Although counsel will ordinarily stress facts more than law, s/he should give at least a brief statement of the governing law — particularly, the law governing the theory of the defense — since it must not appear that counsel is less able than the prosecutor to call the commands of the law to his or her support. Important legal rules should generally be quoted in the same language that the judge will use in the jury instructions. But counsel's statement of the law should be kept as brief and as simple as possible to avoid boring or confusing the jury. Whenever possible, the legal rules should be tied to their common-sense roots to enable the jury better to understand and remember the rules. Thus, for example, a "missing witness inference" (see § 10.08 *supra*) should not be described as some arcane legal rule, but rather as the law's recognition of the common-sense proposition that if the missing witness aided the prosecution's case, the prosecutor clearly would have presented that witness to the jury.

In a similar vein, the jurors' reservoir of life experiences can be used to support factual

arguments. For example, when the defense is misidentification, counsel can compare the situation to the everyday experience of seeing someone on the street and thinking it is an acquaintance, only to discover that it is someone who merely looks similar. Or, for example, in arguing that the jury should not credit a prosecution witness's story of his or her own doings, counsel can point out that the witness's self-reported actions just do not fit the way a person would be likely to act under the circumstances in common experience.

Often, the prosecutor's arguments will provide fodder for attacks upon the prosecution's case. If counsel can obtain a transcript of the prosecutor's opening statement or has taken careful notes, counsel can quote allegations that the prosecutor has failed to substantiate: "[Mr.] [Ms.]_____ promised you that the evidence would show *x*, and s/he did not come through on that promise." Similarly, counsel can quote verbatim from the prosecutor's closing argument and point out exaggerations and unsupported assertions.

In jurisdictions where the prosecutor is allowed rebuttal, counsel should anticipate and head off likely rebuttal arguments. It is usually helpful to tell the jury explicitly that the prosecutor will be given the last word under the rules of procedure and that counsel will have no chance to reply. The prosecutor should be made to appear unfair insofar as s/he abuses this favorable position to partisan advantage.

It is accepted form in closing arguments to express appreciation for the jurors' attention and interest. At least if the prosecutor does this, defense counsel must join in. However, these sentiments must be carefully phrased in order to avoid sounding condescending or implying that counsel expected otherwise from the particular jurors.

There is an adage that counsel should turn the case around and make the jury try the prosecutor, a prosecution witness, the police, the victim, the social system, or perhaps the court (but only one, not all of these!). Although the prosecutor will attempt to rebut any such argument by reminding the jury that the only person on trial is the respondent, the prosecutor's argument will be in vain if, in fact, the case against the police or the victim or whomever defense counsel chooses to try can be made substantially stronger than the case against the respondent.

There are, of course, bounds beyond which defense argument is not permitted to go. Defense counsel is forbidden, for example, to rely upon facts that have no basis in the evidence or to urge the jury to disregard the law or to mention matters — such as the sentence facing the respondent upon conviction — which it is improper under local practice for the jury to consider. The relevant rules vary considerably from State to State. Nevertheless, the Supreme Court of the United States has held that the Sixth and Fourteenth Amendments guarantee the accused "a right to be heard [through counsel] in summation of evidence," *Herring v. New York*, 422 U.S. 853, 864 (1975) (invalidating a state statute that empowered trial judges to refuse entirely to hear closing arguments in nonjury trials). The *Herring* opinion emphasizes that the "presiding judge . . . is given great latitude in controlling the duration and limiting the scope of closing summations," 422 U.S. at 862; but plainly that latitude does not extend to the imposition of restrictions upon

counsel which would frustrate the basic functions of summation that led the Supreme Court to recognize it as a constitutional right: to "argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions," *ibid*. *See, e.g.*, *Frost v. Van Boening*, 2014 WL 1677820, at *1, *8 (9th Cir. April 29, 2014) (en banc) (trial judge violated the Sixth Amendment right to counsel and the Due Process Clause by precluding defense counsel from arguing both of the "two legitimate defenses" that were available because the judge believed that these theories of the defense could not be argued in the alternative). Counsel who find themselves thus frustrated should reserve objections on Sixth and Fourteenth Amendment grounds as well as on the ground that the court has abused its discretion under state law.

The last sentences of the defense closing argument should be the crest of the speech, after which counsel should quietly express confidence that the jury will see the logic of the respondent's position, thank the jurors for their considerate attention, and stop. Stopping shortly after delivering the thrust of an argument deprives the prosecutor of time to collect his or her thoughts and to frame a strong rebuttal.

Part D. The Judge's Charge to the Jury

§ 36.13 TAKING OBJECTIONS TO THE COURT'S CHARGE

Whether or not the court's charge has been thoroughly picked over at a conference on instructions (§ 36.02 *supra*), counsel must give it careful attention as it is delivered. What is clear when written may not sound clear when spoken. Even if the judge has agreed to give certain instructions requested by the defense and appears simply to be reading them to the jury, counsel cannot afford to relax. Judges sometimes slip or ad lib, and counsel must be alert to object if the judge does not follow the script. If the judge offsets a defense instruction by charging an inconsistent or countervailing principle or theory elsewhere in the charge — as is quite common — counsel should object to the offsetting portion of the charge. *See Francis v. Franklin*, 471 U.S. 307, 322-25(1985); *Cabana v. Bullock*, 474 U.S. 376, 383-84 n.2 (1986).

Various kinds of restrictions imposed on the charge in many jurisdictions are noted in § 36.03 *supra.* These should be researched under local law and kept in mind.

Even jurisdictions that permit the judge to comment on the evidence impose some limitations on his or her power to slant it. Counsel might do well to clock how much time the judge spends summarizing the prosecutor's case and how much time the judge devotes to the defense. This is a helpful bit of raw data that can be used if counsel decides to approach the bench at the end of the charge and request additional instructions on some aspects of the defense case.

If the judge expresses an opinion on issues of credibility and guilt (as s/he is permitted to do in some jurisdictions), counsel should note the exact phrasing. When comment of this sort is allowed, it is nevertheless required to be qualified so as to leave clear that these issues are

ultimately for the jury. The accused "is entitled to have the credibility of his testimony, or that of witnesses called on his behalf, judged by the jury." *United States v. Bailey*, 444 U.S. 394, 415 (1980) (dictum).

When the judge has completed his or her charge, s/he will ask whether counsel has any objections. (If s/he neglects to ask and counsel has objections, counsel should request leave to come to sidebar. Some fair opportunity must be given to the parties to record objections to the court's charge out of the hearing of the jury. *See Hamling v. United States*, 418 U.S. 87, 132 (1974) (dictum).) In most jurisdictions objections to the charge as given must be made at the bench at this time, before the jury goes out, or they are lost. Counsel should state with particularity the portions of the judge's charge to which s/he objects and all of the legal grounds of objection to each of them, and s/he should be sure that the proceedings at the bench are being recorded.

Occasionally, the court's instructions will include some misstatement that is harmful to the defense, but counsel will not want the court to correct itself because that would once again draw the jury's attention to an aspect of the case that counsel would just as soon have the jury forget. In these circumstances counsel should note this point on the record, explain that the defense has already been prejudiced either way, and let the court cut the Gordian Knot if it chooses.

Should counsel have some objection to the court's demeanor in presenting the charge, counsel must describe the offending behavior in concrete detail. Obviously, this should be done only in extreme cases.

Counsel should always state specifically every objection s/he may have to the charge rather than taking a "general exception." If a general exception or no exception is taken to the charge, the charge will be upheld unless there was "plain error." See § 36.03 *supra*.

In addition to, or instead of, objecting to any portion of the charge as erroneous, counsel may request additional instructions amplifying or clarifying those given. Trial judges often grant these requests in their discretion, even though there was nothing objectionable in the original charge.

Part E. The Jury's Deliberations and Verdict

§ 36.14 CONDUCT OF THE JURY DURING DELIBERATIONS

Once the jury's deliberations have begun, the jurors are usually not permitted to separate until a verdict has been reached. If a verdict cannot be reached before a normal mealtime or day's end, deliberations may be stopped with the permission of the court, and the jury will be fed or housed under the supervision of court attendants. Although the jury is kept together during these recesses, it is not permitted to deliberate outside the jury room. (A number of jurisdictions give

the trial judge discretion to allow the jurors to go home overnight even after they have begun to deliberate; but whereas sequestration of the jury seems to be increasingly rare prior to the submission of the case, it remains the common practice after submission.)

In some jurisdictions the jury is routinely given a written copy of the court's charge to take into the jury room; in others this procedure is permitted in the court's discretion; elsewhere it is not permitted at all. The jurisdictions also vary on whether exhibits are sent out with the jury routinely, may be delivered to the jury room if specially requested by the jurors, or may not go to the jury room under any circumstances. Some courts allow the jurors during trial to take notes for use during their deliberations; others do not.

If the jury, after a period of deliberation, is irreconcilably divided, it is supposed to report that fact to the court. The court in its discretion may discharge the jurors or have them return to the jury room for further deliberations.

§ 36.15 SUPPLEMENTAL INSTRUCTIONS

After a jury has retired to deliberate, it may request leave of the court to return to the courtroom for a re-reading of part or all of the court's charge, or for further instructions on questions of law. The court, in its discretion, gives or refuses to give the supplemental instructions. In some jurisdictions any supplemental instructions given by the court are required to be restricted to the questions the jury has asked.

Supplemental instructions are given in open court in the presence of counsel and the respondent. They are subject to the same requirements of fairness and legal adequacy as the main charge, and counsel may object to them at sidebar after they are given.

The judge is ordinarily forbidden to send supplemental instructions or other communications out to the jury, in either written or oral form, through the medium of a bailiff or other messenger. See § 27.02 *supra*. In some jurisdictions this rule is so strict that it is held reversible error for a court to convey to the jury out of the presence of the parties even a brief note refusing the jury's request for additional instructions.

If the jurors request a reading of some portion of the testimony, they are brought back into the courtroom where the judge confers with the attorneys for both sides and decides whether the court reporter should read the jury anything and, if so, what.

Since counsel's presence will be promptly required if the jury asks for supplemental instructions or for the reading of testimony or if the jury reports itself deadlocked, counsel should either stay in the courtroom or tell the courtroom clerk where counsel can be reached while the jury is out. Counsel should never be more than a few minutes from the courtroom without obtaining prior permission of the court. Tardiness in returning to deal with any matters that arise during the jury's deliberations will incur the judge's wrath.

§ 36.16 INABILITY OF THE JURY TO AGREE; THE "DYNAMITE CHARGE"

If the jury has deliberated for a considerable time and has reached no agreement, the court may call it back to the jury box and inquire about the prospects of its reaching a verdict. The judge usually asks the foreperson to state, without revealing the current vote or majority position of the jury, whether further deliberations appear likely to produce agreement or whether the jury seems firmly deadlocked. The court may also give the jury additional instructions, although no request is made by the jury for them. The jurisdictions vary widely with regard to the amount of pressure that the judge may apply to the jury at this point by way of instructions admonishing the jurors to give consideration to the reasonable views of others, and so forth.

The so-called "dynamite charge," or *Allen* charge (after *Allen v. United States*, 164 U.S. 492 (1896)), is still permissible in many jurisdictions, although a number of appellate courts have come to condemn it as too strong. If the judge's charge prods the jury heavily to reach a verdict and if counsel guesses that the majority of the jurors are inclined to convict, counsel should object to the charge — noting with specificity any especially coercive language (*compare Jenkins v. United States*, 380 U.S. 445 (1965) (per curiam), *and United States v. United States Gypsum Co*., 438 U.S. 422, 462 (1978), *with Lowenfield v. Phelps*, 484 U.S. 231, 237-41 (1988)) — on the ground that its effect is to deprive the respondent of the right to an "uncoerced verdict," *id.* at 241 (dictum), and thus of the respondent's statutory right to jury trial, see § 21.01 *supra*, and due process right to "accurate factfinding," *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) (plurality opinion); see § 21.01 *supra. See*, *e.g.*, *Smith v. Curry*, 580 F.3d 1071, 1080 (9th Cir. 2009) ("An analysis of the Supreme Court's decisions, dating back to 1896, requires us to conclude that the California Court of Appeal's approval of the instruction in this case, directing the jurors to the evidence the judge believed supported conviction, crossed the boundary from appropriate encouragement to exercise the duty to deliberate in order to reach a unanimous verdict, and went into the forbidden territory of coercing a particular verdict on the basis of the judge's selective view of the evidence."); *United States v. Haynes*, 729 F.3d 178, 193-94 (2d Cir. 2013) ("the modified *Allen* charge . . . was coercive in the circumstances and context in which it was given" because "the Court had already given a modified *Allen* charge" and "[r]epeating a modified *Allen* charge . . . could reasonably be perceived by the jurors as the Court communicating its insistence on the jury reaching a unanimous verdict," and the judge's statement that it "'believe[d]' that the jury would 'arrive at a just verdict' on Monday" could have been viewed by a reasonable juror "as lending the Court's authority to the incorrect and coercive proposition that the only just result was a verdict," and the judge did not give a "balancing, cautionary instruction that no juror should give up conscientiously held beliefs").

§ 36.17 MISTRIAL FOR FAILURE TO AGREE

If the court is satisfied that the jurors are unable to agree after reasonable deliberations, it may declare a mistrial and discharge the jury. Should the respondent not object to the mistrial, s/he can be tried again on the same charge. If a mistrial is declared over the objection of the respondent, s/he may challenge the propriety of the court's action by pleading former jeopardy

against a new trial. See § 17.08 *supra.* The validity of the double jeopardy claim will hinge on whether the court abused its considerable discretion in declaring the mistrial. See § 34.11(d)(2) *supra.*

§ 36.18 RETURN OF THE VERDICT; POLLING

The jury usually returns its verdict, that is, its finding of guilt or innocence, by the announcement of its foreperson in open court in the presence of counsel and respondent. Local practice may also call for the foreperson to endorse the verdict on the charging paper, or the foreperson or all the jurors may be required to sign written verdict forms that have been sent out with the jury.

If the verdict is not guilty, the trial is concluded, the jury is dismissed, and the respondent is discharged. If the verdict is guilty, the prosecutor ordinarily requests that it be recorded. Before it is recorded, defense counsel usually has the right to poll each juror on each count of the Petition.

The crier or clerk of court commonly conducts the poll of the jury. Each count is read to each juror, and the juror is asked to state his or her verdict on it. In complicated cases involving multiple charges, defense counsel should request at sidebar that when polling the jurors, the crier should read the counts in a different order from the order in which they were originally submitted to the jury. Counsel should impress upon the court that s/he is not using this procedure as a strategem but is requesting it because it is a more accurate method of polling than the normal one of reading all the counts in order. The latter procedure lends itself to a rote response by the jurors.

The jury is only polled on those counts on which counsel requests a poll. The poll of a jury can be interrupted by counsel's stating that s/he is satisfied that the jury has agreed as the foreperson stated. Polling is then halted, and the verdict is recorded.

In most jurisdictions, logically inconsistent jury verdicts do not entitle an accused to a new trial or other relief as a matter of right. *See, e.g., United States v. Powell*, 469 U.S. 57 (1984). However, the inconsistency of verdicts may be considered by the trial judge in exercising his or her discretion to grant a new trial in the interests of justice (see § 37.02(d) *infra*); and counsel who requests a new trial on this ground should urge that the jury's conviction on counts that should not logically have been treated differently from other counts on which the jury acquitted demonstrates jury confusion, the marginal nature of the prosecution's proof of guilt, or both.

Chapter 37

Postverdict Proceedings

§ 37.01 SCHEDULING THE DISPOSITION DATE; RESPONDENT'S DETENTION STATUS PENDING DISPOSITION

If the respondent is convicted, ordinarily the court will schedule a date for a dispositional hearing and will order the probation department to investigate the respondent's background and prepare a report for the court's consideration at the hearing. (This is usually called a "pre-sentence report," "investigation and report," or "social study.") If the respondent is not detained pending disposition, the disposition date will be scheduled so as to give the probation department the amount of time it needs for preparation of its report — four to eight weeks in most jurisdictions. If the respondent is detained, most jurisdictions provide (by statute, court rule, or custom) for an accelerated probation investigation, and the disposition date is usually within two or three weeks. *See, e.g.,* N.Y. FAM. CT. ACT § 350.1 (2014) (disposition within 10 days if respondent is detained; within 50 days if not detained).

When the offense was relatively minor and the respondent's prior record is not very bad, the prosecutor will often be willing to join in — or at least not oppose — a defense request to waive preparation of a pre-sentence report and for entry of an immediate disposition (see § 14.06(c)(1) *supra*) of probation or perhaps even a "conditional discharge" (see § 38.03(c) *infra*). Usually, it is in the respondent's interest to seize the opportunity for an immediate disposition rather than take the risk that the pre-sentence report will turn up some unfavorable aspect of the respondent's background (such as school problems that defense counsel does not know about) or indications of the respondent's bad character (which might be simply the respondent's "bad attitude" during the pre-sentence interview) that might lead the judge to order incarceration. The exception to this general rule is the case in which counsel's own investigation of the child's background and school records leaves counsel confident that the pre-sentence report will be exemplary *and* the juvenile code provides a basis for dismissing a Petition after conviction on the ground that the respondent is not in need of supervision, treatment, or confinement. See §§ 37.02(e), 38.17(a), 38.19 *infra;* see also § 19.01 *supra.*

Occasionally it will be the prosecutor who requests an immediate disposition when counsel wants time to prepare for the dispositional hearing. In this situation counsel should invoke the respondent's federal and state constitutional rights to due process and effective assistance of counsel. See § 15.02 *supra.*

In cases in which the disposition is not immediate, the judge ordinarily has discretion to reconsider the respondent's detention status pending disposition. Nonetheless, in most locales it is customary simply to continue the respondent's pretrial detention status until disposition. In jurisdictions in which reconsideration of detention is commonplace, counsel will need to be prepared to argue against detaining a previously released respondent during the pre-disposition

period. The arguments are generally the same as those that would be made at a pretrial detention hearing (see §§ 4.17, 4.20-4.21 *supra*) with three exceptions: Counsel can obviously no longer insist that the respondent be presumed innocent of the pending charge; both the prosecutor and defense counsel will be able to draw upon the evidence that emerged at trial to support their respective positions; and defense counsel can cite the respondent's favorable community adjustment during the pretrial period as a powerful argument against detention pending disposition.

In the case of a respondent who was detained pending trial, counsel should be alert to the possibility of seeking a reduced detention status (detention in a group home or outright release) if the respondent was convicted of a less serious offense than the Petition charged (in which case counsel can argue that the original order of detention was based on the seriousness of the top count of the Petition, of which the respondent has now been acquitted) or if the evidence that emerged at trial was not as egregious as the prosecutor claimed in seeking pretrial detention of the respondent.

§ 37.02 POSTTRIAL MOTIONS TO FILE IN CASES IN WHICH THE RESPONDENT WAS CONVICTED

Practice on posttrial motions is generally regulated by statutes or court rules, and these should be consulted. Some States have modeled their posttrial motions process upon the procedure in adult criminal cases, providing for motions for a new trial and requiring that such motions be filed within a specified time period after the finding of guilt. *See, e.g.,* D.C. SUPER. CT. JUV. RULE 33 (2014) (motion for a new factfinding hearing within 7 days after finding of guilt except when the motion is based on newly discovered evidence, in which case the deadline is two years after judgment); FLA. RULE JUV. PROC. 8.130 (2014) (motion for rehearing within 10 days of entry of order); MINN. RULE JUV. DELINQUENCY PROC. 16.01 (2014) (motion for a new trial within 15 days after a finding that the allegations in the Petition are proved). Other jurisdictions provide in general terms for motions to modify or set aside an order of the court, *see, e.g.,* CAL. WELF. & INST. CODE § 778 (2014); N.Y. FAM. CT. ACT § 355.1(1)(a) (2014); TENN. RULE JUV. PROC. 34(d) (2014), and these provisions are viewed as a substitute for the traditional remedy of moving for a new trial in an adult criminal case. *See, e.g., In re Steven S.,* 91 Cal. App. 3d 604, 154 Cal. Rptr. 196 (1979) (trial court erred in denying defense counsel's motion for a new trial because, although the juvenile code does not provide for new trial motions, counsel correctly invoked the respondent's statutory right to modify or set aside an order of delinquency on the grounds of newly discovered evidence); *cf. In re P.S.C.,* 143 Ga. App. 887, 240 S.E.2d 165 (1977) (juvenile code's modification provision gave the trial judge authority to order rehearing in a proceeding to terminate parental rights).

Posttrial motions are usually required to be in writing. Even when they can be made orally, it is best to file them in writing to protect the record.

The most common grounds for moving for a new trial (or for moving to modify or set

aside the order of delinquency) are (a) erroneous legal rulings in the pretrial proceedings or at trial; (b) lack of jurisdiction or other fundamental defects in the proceedings; (c) newly discovered evidence; and (d) insufficiency of the evidence or a verdict that is "against the weight of the evidence." *See, e.g.,* FLA. RULE JUV. PROC. 8.130(a) (2014). If, as in most jurisdictions, there is no juvenile caselaw on these grounds for a new trial, counsel will usually be able to find adult criminal caselaw that can be cited by analogy.

§ 37.02(a) Errors in the Pretrial Proceedings or the Trial

A new trial (or modification of the order of delinquency) can be requested on the grounds of legal errors in the pretrial proceedings or at trial. In essence, a motion on these grounds asks the judge to reconsider his or her earlier rulings.

Any claim of error properly preserved by counsel at the pretrial and trial stages may be cited as a basis for relief. Certain fundamental errors and defects not noticed prior to verdict will also ordinarily be considered and, on these points, evidence outside the record may be received. *See, e.g., In the Matter of Glenn F.,* 117 A.D.2d 1013, 499 N.Y.S.2d 557 (N.Y. App. Div., 4th Dep't 1986) (reversing an adjudication of delinquency and granting a new trial because the trial court had failed to inquire whether co-respondents knowingly and intelligently consented to joint representation by the same attorney; the new trial motion was supported by respondents' demonstration of a significant possibility of conflict of interest). In addition to these fundamental errors, the trial judge commonly has discretion to notice lesser errors not properly preserved.

§ 37.02(b) Jurisdictional and Other Fundamental Errors

The respondent is clearly entitled to the setting aside of the adjudication if: (i) the court had no jurisdiction, (ii) the charging paper failed to charge an offense, or (iii) the statute on which the prosecution was founded is unconstitutional.

§ 37.02(c) Newly Discovered Evidence

There are two time-honored tests for the sufficiency of a new trial motion based on newly discovered evidence.

The first test applies in recantation cases and other cases in which the respondent contends that a prosecution witness gave false testimony at trial. The court must grant relief if it is reasonably well satisfied that the testimony given by a material prosecution witness was false, that without it the factfinder might have reached a different conclusion, and that the respondent either discovered the falsity of the testimony after trial or was surprised by it and unable to meet it at trial.

The second test applies in all other sorts of cases and requires (i) that new evidence have come to the respondent's attention after verdict, (ii) that the respondent's failure to learn of it

earlier was not the result of a lack of due diligence, (iii) that the evidence is so material that it would probably produce a different verdict on a new trial, and (iv) that it is not merely cumulative or impeaching (a requirement usually stated as independent of the materiality requirement, for reasons that are not apparent). Local variations of these rules abound, and the case law should be consulted. *Cf. United States v. Agurs,* 427 U.S. 97, 103-4, 110-13 (1976).

§ 37.02(d) Insufficiency of the Evidence or a Verdict "Against the Weight of the Evidence"

When the trial was a jury trial, the defense can move to set aside the verdict on the ground of insufficiency of the evidence. A posttrial motion for a judgment of acquittal on this ground raises the same issue as a pre-verdict motion for acquittal (see §§ 35.03, 36.01 *supra*) — whether a reasonable juror could find that the prosecution has proved its case beyond a reasonable doubt. The motion is seldom granted, for the obvious reason that the judge denied an identical motion before verdict and feels that his or her ruling at that time has been ratified by the jury's verdict finding the accused guilty. (In some jurisdictions a posttrial motion for acquittal must nevertheless be made because it is the precondition for challenging the sufficiency of the evidence on appeal.)

Alternatively, the defense can request a new trial on the ground that the verdict is "against the weight of the evidence." (In some jurisdictions the motion is styled a motion for a new trial "in the interests of justice." In others it is styled a motion for a new trial "on the ground of insufficiency of the evidence." In the latter jurisdictions the respondent may cite "insufficiency of the evidence" as a ground for a postverdict judgment of acquittal *or* as a ground for a new trial; the two kinds of relief are considered alternative remedies for the same defect.) New trials on this ground are far more commonly granted than are postverdict motions for acquittal. In ruling on a motion for a new trial on the ground that the verdict is "against the weight of the evidence," the judge is sometimes said to sit as a "thirteenth juror" — that is, to give expression to his or her own evaluation of the evidence. *See, e.g., Tibbs v. Florida,* 457 U.S. 31, 40-45 (1982). The judge is expected to accord considerable deference to the jury's verdict as resolving issues of credibility and of the cogency of inferences from circumstantial evidence; but if s/he remains doubtful about the strength of the prosecution's case, s/he may order a new trial as a means of requiring the prosecutor to submit it to a second test before a new jury. And less deference is to be given to the first jury's verdict if some circumstance in the selection of the jurors or their performance at trial suggests that the jury may have been affected by passion or prejudice.

When the trial was a bench trial, a claim of insufficiency of the evidence is unlikely to prevail because the judge has already found the evidence not merely technically sufficient but convincing. Nevertheless, the defense can obtain a new trial if it can show that the judge's weighing of the evidence was flawed because (i) the judge applied an erroneous standard in appraising the evidence, *see, e.g., In the Matter of Louis S.,* 68 A.D.2d 854, 414 N.Y.S.2d 555 (N.Y. App. Div., 1st Dep't 1979), or (ii) the judge considered evidence that should have been excluded from the determination of guilt, *see, e.g., Lee v. Illinois,* 476 U.S. 530 (1986) (judge in

adult criminal bench trial improperly considered a co-defendant's confession as substantive evidence against the defendant); *In the Matter of Jose R.,* 35 A.D.2d 972, 317 N.Y.S.2d 933 (N.Y. App. Div., 2d Dep't 1970) (judge in delinquency case erroneously considered statements of the respondent that should have been suppressed on *Miranda* grounds). And in a close case in which the judge was apparently wavering, a motion for a new trial (or to modify) will give the judge an opportunity to reconsider.

§ 37.02(e) Motion To Dismiss for Social Reasons

In jurisdictions that provide for motions to dismiss for social reasons or in the "interests of justice," these motions are ordinarily available even after conviction. The grounds for the motion are usually the same as in the pretrial stage, see Chapter 19 — that the respondent is not in need of court supervision. *See, e.g., In the Matter of McP.,* 514 A.2d 446 (D.C. 1986) (a delinquency petition can be dismissed for social reasons even after adjudication if the defense shows that the respondent is not in need of care or rehabilitation); *State ex rel. Juvenile Department of Multnomah County v. Dreyer*, 328 Or. 332, 334, 338, 341 976 P.2d 1123, 1125-26, 1128 (1999) (a delinquency petition can be dismissed in the furtherance of justice after adjudication even though the applicable statute "does not itself grant juvenile courts the authority to dismiss a delinquency petition after adjudication, [because] the statute establishes that the legislature contemplated that petitions might be dismissed at that stage"). Often, if the respondent was technically guilty of the offense charged but the offense was very trivial — such as a theft or "robbery" of a bag of potato chips from another child during lunch recess at school — the judge will convict the respondent but then be amenable to an immediate motion to dismiss for social reasons, especially if the child has little or no prior record. *Cf. In re Letisha D.*, 14 A.D.3d 455, 456-57, 788 N.Y.S.2d 374, 374-75 (N.Y. App. Div., 1st Dep't 2005) (vacating a delinquency adjudication and disposition of 12 months of probation and "remand[ing] with the direction to order an adjournment in contemplation of dismissal [ACD]" because the respondent had no prior record, the offense was minor, the respondent's home situation was stable, and an ACD would avoid the respondent's being "'branded' a juvenile delinquent"); *In re Justin Charles H.*, 9 A.D.3d 316, 317-18, 780 N.Y.S.2d 13, 13-14 (N.Y. App. Div., 1st Dep't 2004) (employing the same reasoning as in *Letisha D.* to substitute an ACD for a delinquency adjudication and a disposition of 12-months conditional discharge).

§ 37.03 MOTIONS FOR EXPUNGEMENT IN CASES IN WHICH THE RESPONDENT WAS ACQUITTED

In some jurisdictions a statute or court rule specifically provides that in cases in which the respondent is acquitted at trial or the Petition is withdrawn prior to trial, the court's records concerning the case and all law enforcement records (arrest reports, fingerprint records, arrest photographs) compiled in connection with the respondent's arrest shall be expunged, either automatically or upon the respondent's motion. *See, e.g.,* CONN. GEN. STAT. ANN. § 46b-146 (2014) ("[w]henever a child is dismissed as not delinquent . . ., all police and court records pertaining to such charge shall be ordered erased immediately, without the filing of a petition");

OHIO REV. CODE ANN. § 2151.358 (2014). Even when no statute or court rule of this sort exists, the defense can seek expungement in the exercise of the court's general equitable powers, *see, e.g., St. Louis v. Drolet,* 67 Ill. 2d 43, 364 N.E.2d 61, 7 Ill. Dec. 74 (1977); *In the Matter of Dorothy D. v. New York City Probation Department,* 49 N.Y.2d 212, 400 N.E.2d 1342, 424 N.Y.S.2d 890 (1980), or to vindicate the respondent's due process right to be free of the penalty of an arrest record (with its possibly adverse impact upon the respondent's future opportunities for employment or entry into the military) for an offense which the respondent did not commit, *see, e.g., In re Smith,* 63 Misc. 2d 198, 202-03, 310 N.Y.S.2d 617, 622 (N.Y. Fam. Ct. 1970); *Edward M. v. O'Neill,* 291 Pa. Super. 531, 540-43, 436 A.2d 628, 632-34 (1981).

Counsel should always request expungement because the veneer of confidentiality cloaking juvenile records is easily pierced. *See In re Smith,* 63 Misc. 2d at 200-02, 310 N.Y.S.2d at 619-22. If a motion for expungement is denied, counsel should request that the court at least (1) direct the prosecutor to take all necessary steps to assure that the fact of the respondent's acquittal following this arrest is noted in the records of the police and other law enforcement agencies, and (2) order the clerk of court and the probation department to note the acquittal on all court and probation records relating to the case.

Chapter 38

Dispositions

Part A. Overview of the Dispositional Stage and Dispositional Options

§ 38.01 THE UNIQUE NATURE OF SENTENCING IN JUVENILE COURT; OVERVIEW OF THE CHAPTER

It is at the dispositional phase that juvenile delinquency proceedings differ most strikingly from adult criminal proceedings. The dispositional process is the stage at which the attempt is made to provide individualized justice — the rationale of juvenile court. Lawyers who represent delinquents in juvenile court cannot do an effective job without recognizing the unique features of dispositional hearings and developing strategies to maximize the possibility of a favorable outcome at the dispositional hearing.

This chapter begins by describing the role of counsel at the dispositional phase of a delinquency case (§ 38.02). It discusses the unique features of the dispositional phase and the range of dispositions available in a delinquency case (§ 38.03), then describes the procedures prior to and at the dispositional hearing (§38.04). Sections 38.05-38.16 describe the various things counsel should do or consider doing in preparation for the dispositional hearing. Section 38.17 presents an argument for the right to an evidentiary dispositional hearing. Sections 38.18-38.24 deal with the conduct of evidentiary dispositional hearings. Sections 38.25-38.27 deal with the conduct of non-evidentiary hearings. Finally §§ 38.28-38.29 briefly discuss actions that counsel should consider taking after a final order of disposition has been entered. (Chapter 39 discusses in greater detail post-dispositional features of delinquency practice.)

§ 38.02 THE ROLE OF COUNSEL AT DISPOSITION

As explained in § 2.03 *supra,* the prevailing view of counsel's role in a delinquency case before *In re Gault,* 387 U.S. 1 (1967), was that counsel was free to substitute his or her own wishes for the objectives of the client. The result in the dispositional phase was that an attorney could defy his or her client's wishes and seek incarceration of the client if counsel believed that this course of action best served the client's needs. When *Gault* formalized the trial phase of a delinquency case and established fundamental rules for the relationship between counsel and client in that phase, the lessons it taught necessarily carried over to the dispositional phase. As recognized in the ethical standards governing representation in delinquency cases, the only legitimate *post-Gault* view of the attorney-client relationship at disposition is that the client defines the objectives of representation just as s/he does throughout the earlier stages of the case. The Juvenile Justice Standards of the Institute of Judicial Administration and the American Bar Association explain:

The role of counsel at disposition is essentially the same as at earlier stages of the

> proceeding: to advocate, within the bounds of the law, the best outcome available under the circumstances according to the client's view of the matter. . . . Counsel may, of course, appropriately advise a client with respect to community or correctional-therapeutic services that may be of long-term benefit; where circumstances warrant, counsel may also urge the client to accept these services or programs as part of a dispositional plan. Discharge of this counseling function must, however, be distinguished from the actual decision, which is for the client to make. Once full advice is given, the lawyer's own opinion of the client's needs or interests is subordinated to the client's definition of those interests, and the lawyer-client relationship generally demands that counsel advocate the client's desires as strenuously as possible.

IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, Commentary to Standard 9.3(a) (1980).

§ 38.03 THE DISPOSITIONAL OPTIONS AVAILABLE IN JUVENILE COURT

§ 38.03(a) Introduction

In virtually all jurisdictions the range of alternative dispositions available to the court is extremely broad. Even after an adjudication of delinquency based on a finding that the respondent committed a serious felony, the court is empowered to dismiss the case at the dispositional phase upon a showing that the respondent does not need any services and that dismissal is consistent with the best interests of both the respondent and the community. *See, e.g.*, *In the Matter of McP.*, 514 A.2d 446, 447, 448, 449-50 (D.C. 1986); *State ex rel. Juvenile Department of Multnomah County v. Dreyer*, 328 Or. 332, 334, 338, 341 976 P.2d 1123, 1125-26, 1128 (1999). *Cf. In re Letisha D.*, 14 A.D.3d 455, 456-57, 788 N.Y.S.2d 374, 374-75 (N.Y. App. Div., 1st Dep't 2005); *In re Justin Charles H.*, 9 A.D.3d 316, 317-18, 780 N.Y.S.2d 13, 13-14 (N.Y. App. Div., 1st Dep't 2004). Of course, dismissal is rare in cases in which the respondent was convicted of a serious felony.

Far more common is a disposition that leaves the respondent in his or her own community on probation. Probation itself encompasses a range of alternatives. A judge may require as little as that the respondent live at home, attend school regularly, and meet regularly with a probation officer. Or the judge may insist that while living at home, the respondent attend a program in the community (such as out-patient therapy or vocational training after school) or that the respondent participate in a residential community-based program (such as a drug rehabilitation program).

The more severe dispositional alternatives, from the respondent's point of view, involve placement out of the community. In some States the only placement available to a respondent who is removed from the community is in the state training school. In many States, however, there are various alternatives: group foster care; work camps; private residential programs with schooling; and the state training schools, which may range from minimum to maximum security

facilities.

§ 38.03(b) The Judge's Power To Order a Specific Program

In all jurisdictions judges have the power to order that, as a condition of probation, the respondent cooperate with a particular program. If the respondent fails to comply with the rules of the program, s/he will be in violation of probation. This type of conditional probation comes very close to placing the respondent with the program. However, it is not technically a placement. Depending on the jurisdiction, the judge may not have the power to place respondents with certain programs, or the program may not be required to accept the respondent into its care. By ordering probation conditioned upon the respondent's compliance with the rules of the program, the court can remain within the limits of its power and keep the respondent in the community. In addition, in many jurisdictions, judges do have the power to place respondents in particular facilities, at least when the facility is willing to accept the placement.

§ 38.03(c) The Range of Dispositional Alternatives

In most jurisdictions there are no formulas requiring specific sentences for adjudications of delinquency based upon particular crimes. Typically, an adjudication for any offense exposes a juvenile to an indeterminate period of incarceration that can theoretically extend to the child's age of majority, either through an initial indeterminate sentence until the child's age of majority or through annual extensions until that age. Commonly, a sentence of incarceration cannot be based solely upon the fact that a delinquent was convicted of violating the penal law. Rather, incarceration can be ordered only if there is both a crime and a showing that the delinquent requires treatment which must be provided in a secure facility in order to satisfy the community's needs for protection from the offender.

Conceptually, these are the factors that set juvenile court apart from adult criminal court. Though the statutory language may differ among jurisdictions, juvenile court judges typically are required to consider the individual needs and interests of the juvenile when fashioning a final order of disposition and to design an order that is the least drastic alternative consistent with the needs and best interests of the juvenile and the needs of society.

The range of dispositional alternatives and the judge's discretion in choosing among them are both extraordinarily broad. The array of dispositions available in most jurisdictions includes, in order of increasing severity:

1. Outright dismissal of the case without retaining jurisdiction of any kind over the respondent. Dismissal may be ordered for many reasons, including a showing that the respondent does not need or would not benefit from court intervention.

2. Probation without verdict (called by different names in different jurisdictions, including "adjournment in contemplation of dismissal" and "diversion"). Sentencing is delayed

for a specified period of time (usually six months or one year), and if the respondent remains arrest-free and complies with other court-ordered conditions throughout that period, the case is dismissed (and in many jurisdictions all court records of the case are sealed). Court-ordered conditions frequently include the requirements that the respondent attend school regularly and obey any curfew set by the parents. *But cf. United States v. Wolf Child*, 699 F.3d 1082, 1087 (9th Cir. 2012) (sentencing court's imposition of a supervised release condition prohibiting the defendant from "residing with or being in the company of any child under the age of 18, including his own daughters, and from socializing with or dating anybody with children under the age of 18, including his fiancée, . . . unless he had prior written approval from his probation officer" violated the "fundamental right to familial association," which is a "'particularly significant liberty interest'": the imposition of such a condition required at least "special findings on the record supported by evidence in the record, that the condition is necessary for deterrence, protection of the public, or rehabilitation, and that it involves no greater deprivation of liberty than reasonably necessary"); *Derick B. v. Superior Court*, 180 Cal. App.4th 295, 298, 306, 102 Cal. Rptr.3d 634, 635, 642 (2010) ("the juvenile court does not have the authority to impose a Fourth Amendment waiver as a condition of informal supervision" when a delinquency case is diverted; "a Fourth Amendment waiver condition" is not specifically authorized by the applicable statutes and is "essentially inconsistent with the stated philosophy and purpose of the informal supervision under [these statutes] . . . to divert the minor away from formal juvenile probation").

3. Restitution. Many jurisdictions provide for restitution as a disposition, making it either an available condition of probation (among others) or an end in itself. Restitution typically involves the respondent's paying compensation to a victim. The compensation can take the form of monetary payments — which may extend over a period of time — or can include community work service. In several jurisdictions the juvenile statute establishes an upper limit on the amount of monetary restitution that can be ordered, and some States restrict the use of the restitution option to cases in which the respondent is above a specified age at the time of the dispositional hearing. *See, e.g.*, N.Y. FAM. CT. ACT § 353.6(1) (2014) (fines may not exceed $1,500 and may be levied only when the juvenile is at least ten years old). *Cf. In re Don Mc.*, 344 Md. 194, 196, 202, 686 A.2d 269, 270, 273 (1996) (the trial court "abused its discretion . . . when it awarded restitution without first considering the age and circumstances of the child and in ordering restitution without providing Petitioner's mother a meaningful opportunity to be heard": "The plain language of the statute clearly requires that the court must first consider the age and circumstances of the child.").

4. Conditional discharge, also known as suspended judgment. This disposition is a cross between probation and adjournment in contemplation of dismissal. During the period of the suspended judgment, which often runs for one or two years, the respondent is expected to follow rules specified in the judgment. However, the respondent usually is not under direct supervision of a probation officer. At the completion of the period, the final order adjudicating the respondent a delinquent remains intact, unlike an adjournment in contemplation of dismissal.

5. Probation. This disposition — generally available to all respondents in all cases,

regardless of the type of crime that the respondent was found to have committed — is the most common disposition used in juvenile court. The typical length of probation is one or two years, depending on the jurisdiction and the gravity of the offense. In some jurisdictions the order of probation is indeterminate and extends until the respondent reaches the age of adult court jurisdiction. It is a common but not invariable practice for probation orders to contain numerous conditions, including meeting monthly with a probation officer, remaining crime-free, avoiding all use and possession of drugs and alcoholic beverages, obeying a curfew, and attending school regularly. *But cf. People v. Martin*, 51 Cal.4th 75, 82, 244 P.3d 496, 500, 119 Cal. Rptr.3d 99, 104 (2010) ("when under a plea agreement a defendant pleads guilty to one or more charges in exchange for dismissal of one or more charges, the trial court cannot, in placing the defendant on probation, impose conditions that are based solely on the dismissed charge or charges unless the defendant agreed to them or unless there is a 'transactional' relationship between the charge or charges to which the defendant pled and the facts of the dismissed charge or charges"); *State v. Doe*, 149 Idaho 353, 360, 233 P.3d 1275, 1282 (2010) (magistrate judge's order that juvenile respondent's parents "undergo urinalysis testing as a condition of their daughter's juvenile probation" "constituted a search under the Fourth Amendment of the U.S. Constitution that is presumptively invalid absent a warrant"); *Rechenski v. Williams*, 622 F.3d 315, 320, 325-32 (3d Cir. 2010) (prison's classification of a prisoner as a sex offender and recommendation that he be enrolled in a sex offender treatment program, even though he was "never charged with, nor convicted of, a sexual offense," violated the due process clause); *N.L. v. State*, 989 N.E.2d 773, 776 (Ind. 2013) ("a juvenile may only be ordered to register as a sex offender if, after an evidentiary hearing, the trial court expressly finds by clear and convincing evidence that the juvenile is likely to commit another sex offense").

6. Prison without walls. A relatively new form of final order of disposition is to confine the respondent to his or her home, usually with the aid of electronic devices, for a specified period of time, such as weekends.

7. Placement in a group home. The least intrusive form of disposition that removes a respondent from his or her home is placement in a community-based group home. These placements often allow the respondent to attend his or her regular school and to remain in close proximity to family and friends. The group home may be state-run or may be operated by a private child-care agency.

8. Indeterminate placement in a private residential facility. There are many alternatives to state-run residential institutions. In every jurisdiction there exist first-rate private residential facilities that at least occasionally accept court-ordered placements of delinquents. Some jurisdictions also permit juveniles to be placed in out-of-state facilities. Private residential facilities usually have greater resources than their state-run counterparts; they are often able to provide the respondent with more help; the conditions under which residents live are usually less harsh and restrictive; and private facilities tend to keep juveniles in their care for less time (often under one year). Placements in private facilities typically are for indeterminate periods, leaving the time of release to the discretion of the administrators.

9. Indeterminate placement in a state-run non-secure or minimum security juvenile facility. In most jurisdictions a sentence of incarceration (called "placement" in some jurisdictions and "commitment" in others) is an indeterminate sentence limited, in theory, only by the respondent's age of majority. In other jurisdictions it is an indeterminate sentence of up to 18 or 24 months that can, in theory, be extended annually until the respondent's age of majority. Once the court has imposed the indeterminate sentence, custody of the respondent is transferred to the state agency that administers juvenile placement facilities. In most jurisdictions the agency thereafter determines the respondent's release date on the basis of his or her behavior within the institution and his or her prior juvenile court record. In these jurisdictions the judge has no power over the length of sentence that the respondent actually receives. As a practical matter almost all incarcerated juveniles are released by the state-run facility within 12 or 18 months. All jurisdictions maintain a range of facilities from minimum to maximum security. In most jurisdictions the choice of facility to which the respondent will be sent rests with the agency administration. In some jurisdictions the sentencing judge can exercise some control over the choice of the facility.

10. Indeterminate placement in a state-run secure or maximum security juvenile facility. Maximum security facilities constrain the respondent's freedom of movement within the facility to a far greater degree than other facilities. Juveniles placed in maximum security facilities are also likely to remain incarcerated longer than juveniles kept in less secure facilities.

11. Determinate placement in a state-run juvenile facility. A few jurisdictions authorize or require that the respondent receive a determinate sentence or a placement in a facility for a mandatory minimum period of time. These sentences are usually reserved for juveniles who are adjudicated delinquent for committing very serious felonies or for juveniles who have an extensive record of delinquency adjudications. Determinate placements almost always are in maximum security facilities, at least for a portion of the placement period, after which a transfer to a less restrictive facility may be possible.

12. Incarceration in a state-run adult facility. In a few jurisdictions respondents adjudicated delinquent by the juvenile court may end up in adult prisons. This may occur either because the respondent is committed directly to the adult facility by the juvenile court or because the respondent is sentenced by the juvenile court to a term that extends beyond the age at which state-run juvenile facilities may no longer keep minors, and the respondent is transferred to prison upon reaching this maximum age.

§ 38.04 PROCEDURES PRIOR TO AND AT DISPOSITION

§ 38.04(a) The Role of the Probation Department; the Nature and Functions of the Pre-Sentence Report

In most jurisdictions once the respondent has been found to have committed a crime, the probation department will be directed to prepare and submit a report to the judge to be

considered when the judge makes the final order of disposition. This report, sometimes called a "pre-sentence report," an "investigation and report," or a "social study," usually will be written by a probation officer assigned to the case by the court or by the probation department. In some jurisdictions the prosecuting agency will recommend a disposition, either by itself or in addition to the probation department.

The probation officer's report is frequently the most important influence at the dispositional hearing. It is a report on the crime and on the background of the respondent. The report will typically include a description of the facts of the present offense (and, in some jurisdictions, a "victim impact statement"); descriptions of the respondent's prior record, of the respondent's attendance and behavior at school, of the respondent's conduct at home as described by the parent, and of the respondent's use of alcohol or drugs; the probation officer's assessment of whether the respondent is remorseful for having committed the crime (including observations about the respondent's attitude and behavior since arrest); a description of all previous efforts to provide the respondent with services (including the respondent's placement history and involvement in any community-based programs); a diagnosis of the respondent's needs; and the probation officer's recommendation of the most appropriate disposition for the respondent. Although the judge is not obliged to accept the recommendation of the probation department (or the prosecuting agency, if that agency is responsible for making a recommendation), a favorable recommendation is enormously helpful to the respondent, and an unfavorable recommendation is often difficult for the respondent to overcome.

§ 38.04(b) Other Diagnostic and Evaluative Material

In many jurisdictions it is common to order a mental health examination (which may consist of a psychological examination, a psychiatric examination, or both) whenever a placement is being considered. Typically, the mental health expert writes a report on the basis of a 30-to-45 minute interview of the respondent and a review of court-related information about the respondent. This report may be relied upon by the probation officer when making his or her dispositional recommendation, and the report itself is ordinarily submitted directly to the judge for consideration at the dispositional hearing. Reports by mental health experts frequently are also sent to agencies that may be considering accepting the respondent into their facilities.

Other tests, including medical and educational testing, may be ordered for the respondent. These would rarely be ordered without special reasons; often it is counsel for the respondent who requests additional tests.

§ 38.04(c) The Nature of the Dispositional Hearing

Depending on the jurisdiction, the dispositional hearing will be conducted either as a full evidentiary hearing with sworn testimony or as a non-evidentiary hearing similar in many respects to an adult sentencing hearing. In jurisdictions in which an evidentiary hearing is conducted, either the probation department or the prosecuting agency will begin the hearing by

recommending a particular order of disposition and will then support that recommendation with evidence. In a non-evidentiary hearing the probation department or the prosecuting agency will submit a written or oral recommendation that it will support by argument but not necessarily by evidence.

Part B. Preparing for Disposition

§ 38.05 COUNSELING THE RESPONDENT AND HIS OR HER PARENT AND ADVISING THEM HOW TO BEHAVE DURING THE DISPOSITIONAL PROCESS

§ 38.05(a) Counseling and Conferring with the Respondent

It is very important that counsel carefully and fully explain to the respondent the proceedings that follow an adjudication of delinquency. Respondents must be made aware of the possible dispositions that can be ordered and of the process by which the choice among them will be made. Counsel should emphasize the need to keep all appointments and to cooperate with the probation department.

Counsel should advise the respondent that everything s/he says to the probation officer and other court personnel who may interview him or her during the dispositional process will probably find its way into the probation report and will be used against the respondent if it is unfavorable. Respondents should be informed that probation officers are often interested in a respondent's expression of remorse. Continued protestations of innocence or signs of arrogance or hostility toward the victim or the authorities can be extremely damaging. *But cf. State v. Burgess*, 156 N.H. 746, 759-60, 943 A.2d 727, 737-38 (2008) ("where a defendant maintains his innocence throughout the criminal process," "denying a defendant leniency [at sentencing] simply because he fails to speak and express remorse [at sentencing] is equivalent to penalizing him for exercising his right to remain silent" to avoid "jeopardizing his post-trial rights," and thus would violate state constitution's Privilege Against Self-Incrimination); *Johnson v. Fabian*, 735 N.W.2d 295, 297, 310-12 (Minn. 2007) ("extension of . . . [prison] inmates' periods of incarceration as a disciplinary sanction for refusal to admit or discuss the inmates' crimes of conviction in a sex offender program" violates the Fifth Amendment Privilege Against Self-Incrimination if "a direct appeal of th[e] . . . conviction is pending, or as long as the time for direct appeal of that conviction has not expired" or if the admission would contradict the defendant's testimony at trial and thereby expose the defendant to the risk of prosecution for perjury); *State v. Washington*, 832 N.W.2d 650, 652, 661-62 (Iowa 2013) (sentencing judge violated the defendant's Fifth Amendment Privilege Against Self-Incrimination by imposing a term of community service far higher than what the State had recommended in the plea agreement after the defendant invoked his right to silence instead of answering the judge's question whether the defendant "would be 'clean or dirty' if he took a drug test"). Both probation officers and mental health personnel are likely to inquire into other criminal activity by the respondent. Rarely will the respondent help himself or herself by informing those officials about crimes s/he has committed. Similarly, probation officers and mental health personnel routinely

inquire about drug and alcohol use. The respondent should be made aware that admitting such use will often have a harmful effect upon the final disposition. In general, counsel wants to emphasize the enormous influence that the probation department's recommendation can have on the judge, so as to put the respondent in the right frame of mind when s/he meets with the probation officer or other court personnel.

In addition to advising the respondent about the mechanics of the dispositional process, counsel must also discuss the likely outcome of the case and the goals that the defense should seek to attain at the dispositional stage. As at the trial stage, this does not mean merely asking the respondent, "What do you want?" Lawyers, possessed as they are with knowledge and experience of the system, must provide their clients with the information that the client needs in order to make intelligent decisions. Lawyers must tell their clients what lies ahead in the process, what are the realistic chances of success of various arguments, and what, in the lawyer's opinion, will be the most effective argument to make. Lawyers also have an important function in helping the client to sort out and think through the client's objectives. However, counseling of these kinds must be done in a way that minimizes the risk of the lawyer's taking decision-making out of the client's hands. Lawyers representing young people possess vast influence and can inadvertently (or deliberately) manipulate their clients toward the result the lawyer wants. It is important for counsel to recognize this reality and to make every effort not to control the respondent when giving advice.

After a first meeting or series of meetings to discuss dispositional alternatives with the respondent, counsel will begin taking steps to secure the disposition that the respondent seeks. However, there may come a time when it is apparent that the respondent's preferred disposition is unobtainable. For example, the probation officer may oppose this disposition for reasons that are likely to prove persuasive to the court, and counsel may be finding it impossible to develop any credible dispositional plan that will meet the probation officer's concerns. This impossibility is often the result of failure to locate a suitable facility into which the respondent can be placed or of failure to find sufficient support for the respondent in the community to enable counsel to develop a positive image of the respondent for sentencing purposes. In these situations counsel should meet again with the respondent and discuss probable outcomes of the case. After devoting substantial efforts to the preparation of the case for disposition, counsel is in a position to ask the respondent to reconsider his or her dispositional goals.

This process may lead the respondent to develop new goals. Often, juveniles are rejected from facilities or programs that are potential alternatives to state-run residential institutions only because the juvenile has neglected to keep an appointment for an admission interview or has displayed a bad attitude in the interview. Sometimes in the light of the awareness that a commitment to a state training school is virtually certain unless the respondent works hard to avoid it, s/he will cooperate in keeping appointments and will improve his or her attitudes when interviewing the personnel of any remaining alternative facilities which counsel may be able to identify.

§ 38.05(b) Discussions with the Respondent's Parent or Guardian

It is also critically important to speak with the respondent's parent before any meetings that the parent may have with the probation officer or other court personnel, such as mental health experts. Counsel should ascertain from the parent what disposition s/he hopes the court will order. Different strategies are required depending on the answer to this question.

If the parent desires the least restrictive disposition possible, then the parent is already allied with the respondent and counsel, and the parent can be made a full member of the team. In this situation counsel should give the parent the same advice that is recommended in § 38.05(a) *supra.* The parent should be informed of the harm that can be done by revealing any criminal activities, drug or alcohol use, serious misbehavior at home, or other bad conduct of the respondent to the probation officer and other court personnel unless the parent is sure that they are already aware of this information. The parent should be informed of the procedures that lie ahead in the dispositional process and of the importance of the respondent's cooperating and maintaining good relations with the probation officer and other court personnel.

It is important for the parent to understand both the influence that the probation recommendation will likely have on the final outcome of the case and the influence that the parent can have on the recommendation made by the probation department. If the parent is properly instructed about the importance of cooperating with probation authorities, of demonstrating a concern for the respondent and a willingness to be attentive to the respondent's needs, and of supporting the respondent by reporting favorable information about him or her, the parent is most likely to be an asset in obtaining a favorable disposition. In addition, the parent will be able to influence the respondent to cooperate during the dispositional process.

If the parent is not already on the respondent's side but desires placement or some form of punishment for the respondent, counsel should not be quite as forthcoming with the parent and cannot treat the parent as an ally. But neither should counsel accept the parent's goal on its face. Counsel is free to, and should make every effort to, persuade the parent to support the least restrictive disposition feasible. This can sometimes be accomplished by informing the parent of the many alternatives to placement available in the community and the many ways the respondent can be supervised and helped without the necessity of a placement out of the home. Counsel should also consider the strategies recommended in § 3.21 *supra,* which discusses ways to persuade parents to support the release of a respondent who is being held at the precinct. One effective strategy is to inform the parent about known abuses in juvenile facilities and the existence of any lawsuits brought by inmates or former inmates seeking redress for injuries they received while in placement. Counsel is acting responsibly by truthfully telling a parent negative information which the parent does not know so that the parent's final view of what is the most appropriate disposition for his or her child is truly an informed decision.

§ 38.06 MEETING WITH PROBATION OFFICERS AND OTHER COURT PERSONNEL BEFORE THEY PREPARE DISPOSITIONAL REPORTS

Counsel should play an active role in the pre-dispositional process described in §§ 38.04(a)-38.04(b) *supra.* In many jurisdictions the individuals most likely to affect the final disposition are the probation officer and the psychiatrist or psychologist (if either or both of these types of mental health experts are used) who will evaluate the respondent and provide a recommendation and report to the court.

The probation officer will always meet with the respondent and his or her parent for a personal interview. This interview is often a major factor in the probation officer's final recommendation. It can be very useful for counsel to meet with the probation officer before s/he conducts this interview. Counsel should bring to the probation officer's attention all favorable information about the respondent that s/he likely does not know. Ideally, counsel may be able to influence the officer's ultimate recommendation. Even if counsel has no new information, counsel may be able to get the probation officer to think about the respondent in a new light by informally advocating a favorable perspective ("Considering the problems this kid has had, I think s/he's really made a terrific adjustment, don't you?").

Similarly, counsel should try to speak to the mental health expert who is scheduled to do an evaluation before s/he interviews the respondent. Much of an evaluating expert's recommendation will be based on the expert's interpretation of the respondent's attitude during this 30-to-45-minute interview. It is a truism that one's biases affect his or her judgment. If the only people with whom the evaluating expert has spoken before the interview are the prosecutor and the probation officer, there is a risk that the expert will have fixed negative ideas about the respondent which will color the evaluation process. Although counsel cannot completely avert the risk of negative bias, a meeting at which counsel reveals favorable things about the respondent before the expert first sees the respondent may be quite useful.

§ 38.07 DEALING WITH COURT MENTAL HEALTH PERSONNEL

As discussed in §§ 12.15(a) and 13.14 *supra,* the Supreme Court of the United States has held that the Fifth Amendment forbids a state-hired psychiatrist to interview an accused person and obtain information to be used at a sentencing hearing unless the accused has validly waived his or her privilege against self-incrimination. Failure to give the accused a *Miranda* warning and to obtain a waiver of the right to remain silent renders the interview results inadmissible for sentencing purposes. *Estelle v. Smith,* 451 U.S. 454 (1981). *See also Mitchell v. United States*, 526 U.S. 314, 329 (1999). *See generally* LOURDES M. ROSADO & RIYA S. SHAH, PROTECTING YOUTH FROM SELF-INCRIMINATION WHEN UNDERGOING SCREENING, ASSESSMENT AND TREATMENT WITHIN THE JUVENILE JUSTICE SYSTEM (Juvenile Law Center 2007); Lourdes M. Rosado, *Outside the Police Station: Dealing with the Potential for Self-Incrimination in Juvenile Court*, 38 WASH. U. J. L. & POL'Y 177 (2012).

Smith has been held to apply to juvenile court proceedings. *See, e.g., In the Matter of the Appeal in Pima County Juvenile Action No. J-77027-1,* 139 Ariz. 446, 679 P.2d 92 (Ariz. App. 1984); *In the Matter of J.S.S.*, 20 S.W.2d 837, 844-47 (Tex. App. 2000); *State v. Diaz-Cardona*, 123 Wash. App. 477, 487-88, 98 P.3d 136, 140-41 (2004). See also § 13.14 *supra*. Thus a respondent has the right to claim the Fifth Amendment and refuse to talk to a psychiatrist in any court-ordered mental examination if the results of the examination could be used to support a more restrictive disposition than the respondent might receive without them. The difficult question is whether counsel should advise a respondent to assert the Fifth Amendment privilege and decline to be interviewed by a state-hired expert in preparation for the dispositional hearing.

In some jurisdictions juvenile court judges routinely order a psychiatric or psychological examination or both whenever placement is likely. In other jurisdictions examinations are ordered only in special cases or on request of the respondent. Counsel should always inform the respondent of his or her right not to answer questions at any examination, but it may be poor advice to recommend that s/he exercise that right and remain silent.

In most jurisdictions neither the examination results nor any particular findings that might be based upon them are a precondition to imposing the maximum authorized sentence. The judge uses the examination results in deciding whether or not to impose a restrictive sentence, but s/he ordinarily has the power to impose the same sentence without any psychiatric or psychological results. In these circumstances it becomes a pertinent consideration that the respondent's assertion of the right to remain silent will typically be seen by the judge as an indication of non-cooperation and evidence of a lack of contriteness. Although it would violate the Fifth Amendment for the probation officer, prosecutor, or judge explicitly to treat the invocation of a constitutional privilege as a ground for viewing the respondent negatively, many probation officers and judges will implicitly do so. Counsel may thus prefer to advise the respondent to cooperate fully with the state-hired expert. If counsel does give this advice, counsel should prepare the respondent thoroughly for the expert's questions, informing the respondent that the expert often will be looking for expressions of contrition and remorse and that admissions to the expert of additional criminal activity, drug or alcohol use, or other misbehavior by the respondent may hurt the respondent unless these are already known to the authorities. See § 38.05(a) *supra.*

In jurisdictions in which specific findings that may be based upon an expert's report are necessary to enhance a sentence, it may be beneficial to the respondent to remain silent during the expert's examination. Even here, however, the respondent's failure to cooperate may hurt. If the expert is unable to conduct an interview, s/he may not be able to submit a report or to testify at the dispositional hearing on the basis of direct impressions obtained during the examination. But s/he may nonetheless be able to submit a negative report based on the respondent's history and background — information that the expert has received from the probation department and court records. Since the expert will almost certainly regard the respondent's invocation of the Fifth Amendment as a sign of non-cooperation, the expert will hardly be in a favorable frame of mind when writing his or her report.

It is clear under *Smith* that the respondent may waive the Fifth Amendment privilege and agree to an examination. The waiver may be explicit, given in response to questions put by the expert. A waiver may also be inherent in a request by the respondent for an examination by a state-hired expert. In the wake of *Buchanan v. Kentucky,* 483 U.S. 402 (1987), it is unclear whether the respondent's request for a court-appointed defense expert under *Ake v. Oklahoma,* 470 U.S. 68 (1985) (see § 38.09 *infra*), constitutes a waiver of the privilege not to undergo examination by a state-hired expert. The analysis in § 12.15(a) *supra* supports the conclusion that merely requesting the expert is not a waiver and that the respondent would have to introduce evidence based on the defense expert's examination or otherwise rely affirmatively upon the results of that examination in conducting the dispositional hearing in order for a court to find that the respondent has waived the Fifth Amendment privilege.

Many of the issues raised by *Smith* have not yet been settled as they apply to the dispositional phase of delinquency proceedings. In fact, many juvenile court personnel are unaware of *Smith* and its implications for juvenile court practice. For this reason, counsel may be able to take a wait-and-see approach. It is rare for a court-ordered expert to advise a respondent of any rights before or during an examination. The failure to obtain an explicit waiver of rights is a violation of *Smith,* and counsel may prefer to read the report before deciding whether to move to suppress it or whether to allow it to be used without objection at the dispositional hearing.

§ 38.08 OBTAINING A COPY OF THE PRE-SENTENCE REPORT AND OTHER REPORTS AND RECORDS FOR USE AT DISPOSITION

The most important document that will be considered by the judge at the dispositional hearing is the probation officer's report, described in § 38.04(a) *supra.* It is critical that counsel obtain this report in advance of the dispositional hearing. Counsel should also make an effort to obtain any other reports about the respondent that are likely to be introduced at the hearing. See § 38.04(b) *supra*.

Several jurisdictions entitle the respondent to this information by statute. *See, e.g.,* N.Y. FAM. CT. ACT § 351.1(5)(a) (2014) (requiring all diagnostic assessments and probation investigation reports to be made available for copying and inspection at least five days before the dispositional hearing). In other jurisdictions case law recognizes a right to discovery of the information. *See, e.g., J. B. v. State,* 418 So. 2d 423 (Fla. App. 1982).

Even when the jurisdiction does not have a clear rule granting the respondent access to probation and other pre-dispositional reports, counsel should try to obtain them by informally asking the probation officer in charge of the case to share them. Many probation officers will give information to counsel informally. But there may be disadvantages to getting it this way. When a probation officer has shared information with counsel in contravention of law, the lawyer cannot reveal in court, without endangering his or her relationship with the probation officer, that s/he obtained the records prior to the hearing.

If counsel is unable to obtain the reports informally or thinks it unwise to do so, counsel should make a motion for an order of the court requiring their disclosure. The motion should include an argument that failure to disclose the reports to the defense before the hearing will violate the respondent's right to effective assistance of counsel, since an essential part of that right is the capacity to prepare. *See, e.g., In the Matter of Jose D.,* 66 N.Y.2d 638, 485 N.E.2d 1025, 495 N.Y.S.2d 360 (1985). In addition, counsel should argue that allowing access to the reports before the hearing will promote judicial efficiency by avoiding the need for a continuance and a second hearing date if information revealed at the hearing surprises the defense. A motion is necessary in order to make an adequate record for appeal in the event of an unfavorable disposition in a case in which counsel was unable to obtain timely access to reports used in the dispositional process. *See, e.g.*, *J.B. v. State*, 418 So. 2d at 424.

In addition to obtaining the reports, counsel should subpoena all records bearing on the respondent that counsel will want to examine in preparation for the hearing. School records, child care program records and other records relating to the respondent that counsel has not previously inspected should be obtained in advance of the hearing.

If the respondent is or has been in special education, counsel should seek to obtain all school records concerning the respondent's placement in special education. These include the Individual Educational Placement (IEP) that must be developed for each student in special education and the clinical material developed for or by the Committee on Special Education, which is the entity that must recommend the particular educational placement appropriate for each student. These records are not necessarily kept in the local school attended by the respondent but may be in the district school building or some centralized facility. They often contain information about the respondent and his or her needs that is highly useful at the dispositional hearing.

Because the respondent's educational records, unlike the mental health and probation reports prepared for the dispositional hearing, are not in the possession of court personnel, a motion is not the appropriate procedure for obtaining them. Rather, counsel should have the respondent and the parent(s) execute a release of the records (see § 5.11 *supra*) and should secure a subpoena *duces tecum* addressed to their custodians (see § 8.17 *supra*).

School records and reports prepared by probation officers, psychiatrists, psychologists, and social workers form the basis for much of the information that will be before the court at the dispositional hearing. Counsel should review these materials with care, take notes on what is in them, and find out the meaning behind any term or diagnosis with which counsel is unfamiliar.

§ 38.09 SECURING PSYCHOLOGICAL EVALUATIONS AND OTHER ASSESSMENTS OF THE RESPONDENT

Planning and preparing for a possible dispositional hearing should begin when the lawyer first meets the respondent. As discussed in § 5.08 *supra,* information about the respondent's

social history — for example, whether s/he ever lived or was placed outside of his or her family's home — is important to have at the outset of a case. This information will alert counsel to areas in which additional evaluative material would be useful in the event that the case ever reaches a dispositional hearing. By focusing early on the possibility of a future dispositional hearing, counsel is able to request the independent social history workups and psychological or psychiatric evaluations that are often essential to counteract negative reports and assessments that are made by court personnel.

In preparation for the dispositional hearing, counsel may wish to have the respondent evaluated by a defense expert either to prove that the respondent has no need for supervision or (more often) to demonstrate with precision the particular needs that the respondent does have. If counsel lacks funds to hire an expert, s/he should request them from the court under *Ake v. Oklahoma,* 470 U.S. 68 (1985). See §§ 11.03(a), 13.06 *supra.* The utility of hiring a defense expert is that his or her evaluation is protected by the respondent's attorney-client privilege, *see, e.g., People v. Lines,* 13 Cal. 3d 500, 507-16, 531 P.2d 793, 797-804, 119 Cal. Rptr. 225, 229-36 (1975), and counsel has the option of ignoring any unfavorable results without the prosecutor or the court learning about them. To preserve this option, counsel should be sure that both the motion for funds and counsel's retainer agreement with the expert specify that the expert is being retained "as a defense consultant, to examine the respondent and advise counsel regarding the respondent's mental state for the purpose of assisting counsel to prepare for the dispositional hearing and to present information at the hearing if this is warranted by the respondent's needs." In some jurisdictions, communications to and from an expert retained unconditionally to *testify* or to *report to the court* on the respondent's behalf would not be protected by the privilege.

In selecting an expert for a particular case, counsel is well advised to consult other defense lawyers who have experience in juvenile court and, ideally, who are familiar with the judge before whom the respondent's case is scheduled. Some judges are more or less impressed with specific fields of expertise, such as psychology or psychiatry, and more or less impressed with individual experts who have been to court in the past. Sometimes personnel of the probation department or the clerk's office are able and willing to tell counsel the names of experts whom a particular judge repeatedly appoints as a court's witness or consultant when a "neutral" or "impartial" expert is desired; these experts will obviously have a credibility edge with the judge; but counsel should check them out with experienced defense lawyers, if possible, because some of them may be unsympathetic to respondents or prone to recommend restrictive dispositions.

Counsel might also consider consulting a faculty member of a university psychiatry or psychology department to obtain a list of qualified experts. Depending on the purpose for the use of the expert, counsel may prefer a psychiatrist over a psychologist or *vice versa.* As noted in § 12.10 *supra,* as a general rule psychologists tend to go deeper into the respondent's family history, social background, and emotional problems than many psychiatrists. However, this general rule should not dictate an undiscriminating preference for psychologists over psychiatrists. In certain cases a psychiatrist may be more useful to the defense, and in all cases the knowledge and experience of the particular expert should be considered. For example, when

counsel wishes to develop evidence that the respondent has specific needs and that, in the light of those needs, a particular type of dispositional alternative or a particular placement is appropriate, the expert's knowledge of available programs and their capacities to serve the respondent's needs should be the most important criterion in selecting the expert.

When retaining an expert, counsel should explain to the expert precisely what counsel's game plan is and what role counsel hopes the expert will be able to serve. Although the expert's informed views after examining the respondent will refine this plan and may sometimes require its modification, counsel's purposes in consulting the expert should nevertheless be made clear at the outset. An initial discussion of these purposes may lead counsel to conclude that the particular expert should not be retained. And if the expert is retained, s/he will be in the best position to assist the defense after being given a clear picture of what the defense is seeking to achieve in the dispositional phase.

§ 38.10 ENGAGING A SOCIAL WORKER

Often the most important resource for the respondent in developing a dispositional alternative that the court is likely to accept is a trained and knowledgeable social worker. The job requires an extensive knowledge of programs and services that few lawyers possess, and even for an unusually well-informed lawyer it is extremely time consuming without a social worker's help. If counsel works in a public defender office that has social workers on its staff, counsel should request their assistance shortly after meeting with the client to discuss the disposition.

Counsel who is not so fortunate as to have recourse to a staff social worker should consider retaining one for the particular case. If counsel is assigned, s/he should consider making a motion for court funds to employ a social worker as a defense consultant. The motion should be supported by an affidavit explaining the reasons that counsel requires expert assistance. The same principles that warrant the allowance of funds to hire other experts, such as psychiatrists, apply to social workers. See §§ 11.03(a), 13.06, and 38.09 *supra.*

In some localities there are organizations dedicated to finding and developing alternatives to institutionalization or prison. If there is such an organization in the vicinity, it will probably be worth calling to find out whether it has a social worker on its staff who is able to become involved in the case or whether it can recommend a suitable social worker.

In a community in which the local public defender office has social workers on its staff, counsel may wish to request their assistance even if s/he is not affiliated with that office. At the least, these social workers may be willing to share their knowledge of available programs and of names and telephone numbers of people to call for information. Their tips can be extraordinarily helpful when counsel is not conversant with the full range of programs and services that might enter into a dispositional plan in any particular case.

§ 38.11 GATHERING MITIGATION WITNESSES, LETTERS OF SUPPORT, AND EXHIBITS

Counsel should endeavor to interview people who know the respondent and are in a position to testify to the respondent's good character or capacity to benefit from a community-based program — teachers, social workers, program counselors, coaches, employers, ministers, adult friends, and neighbors. Those who have favorable things to say about the respondent and who are likely to make a good impression on the probation department and the court should be asked and assisted to write letters setting out their positive comments. These letters can first be drafted by counsel on the basis of counsel's interview notes and then sent to the witness for review and further input. If the witness uses personal stationery, s/he should write the final version up on that; or if s/he uses business or official stationery, counsel or the witness should arrange to have the final version typed on the witness's letterhead for the witness to sign. Whenever possible, counsel should assist the witness to shape the letter so that the witness's contribution to the case fits into the overall pattern that counsel is attempting to develop for the court.

Occasionally, witnesses are reluctant to provide information or to have their views reduced to writing because of institutional prohibitions: for example, a teacher or a coach may be told by a principal that s/he cannot become involved. Counsel should speak directly with the official who has forbidden the witness to cooperate and, if this does not solve the problem, counsel should speak with the official's hierarchical superior. Most officials will come around and permit an employee to cooperate once they are confronted by a lawyer who informs them in an amiable but obviously determined manner, first, that all that is required of the witness is the writing and signing of a letter, not losing a day of work by coming to court; second, that the witness's information is important because the respondent's liberty is at stake; and third, that counsel hopes it will not be necessary to call the court's attention to the official's interference with the collection of evidence needed in a judicial proceeding.

Letters of support can be extremely helpful to the respondent. Shared with the probation officer while s/he is still writing his or her report, they may acquaint the officer with favorable aspects of the respondent's background and activities about which s/he was unaware and may make the difference between a recommendation of probation and a recommendation of placement. The letters may also be presented directly to the court either as formal exhibits offered in evidence at an evidentiary hearing (see § 38.22 *infra*) or as attachments to the respondent's sentencing memorandum in a jurisdiction that conducts non-evidentiary dispositional hearings (see § 38.25 *infra*).

Counsel should collect other types of exhibits as well. School and institutional records (§ 38.08 *supra*) and, when appropriate, reports by a social worker (§ 38.10 *supra*), psychiatrist or psychologist (§ 38.09 *supra*) should be kept in the file for potential use as exhibits. Counsel should be creative in gathering exhibits. S/he should consider, for example, using trophies, honors, and awards that the respondent has won, team photographs and news photos or snapshots

of the respondent in activities, certificates of academic or other achievement, and items the respondent has made that demonstrate his or her artistic talents. The idea is to present the respondent to the probation officer or judge in a different and more favorable light than that in which the respondent would appear if viewed only as a convicted delinquent.

§ 38.12 MEETING WITH PROBATION OFFICERS AND OTHER COURT PERSONNEL AFTER THEIR DISPOSITIONAL REPORTS ARE WRITTEN

In addition to meeting with the probation officer, court experts, and other evaluating personnel before their work is begun, counsel should try to meet with these individuals again after their reports are prepared but before the dispositional hearing. These meetings can serve several purposes. First, counsel may be able to persuade the individual to change an unfavorable recommendation in the light of events that have occurred since the writing of the report. Second, counsel may be able to learn what the recommendation will be, so as to prepare better for the hearing. Third, counsel may be able to learn the bases for the recommendation and, if it is unfavorable, begin to gather specific items of information needed to oppose it, either by refuting its bases or by diluting them with additional facts.

When a psychiatrist or psychologist has written a report that is likely to be important at the dispositional hearing, counsel's meeting with the psychiatrist or psychologist can profitably focus on:

1. Clarifying any confusing information in the report;
2. Breaking down diagnoses into terms that counsel can understand;
3. Determining the bases upon which the report was formulated and its recommendation was made;
4. Determining whether community services would be appropriate to achieve the purposes of a recommended placement; and
5. Determining what, if any, additional information might have changed the recommendation.

In addition, counsel should seek to elicit facts relevant to the weight that ought to be given to the recommendation. These will assist counsel to prepare for cross-examination in jurisdictions in which the dispositional hearing is evidentiary; and the same facts will guide counsel's preparation of written materials for submission to the court in jurisdictions in which the hearing is non-evidentiary. For these purposes counsel will need to uncover facts that are often not contained in the report. They include:

a. The qualifications of the expert (education and training, employment history, length of time at this particular job, length of time working with juveniles, and so forth).
b. The number and length of contacts that the expert had with the respondent.
c. The setting in which those contacts occurred (time of day, place, noise level,

distractions, number of other people present, and so forth).

d. The quality of the contacts (respondent's communicativeness or uncommunicativeness, rapport with the expert, and so forth).

e. The conduct of the interview (what questions were asked; what answers were given; what information was elicited; what diagnostic tests were used, if any; what knowledge about the respondent, if any, did the expert have before the interview, and so forth).

f. All other factual data that entered into the evaluation and the recommendation (with whom, if anyone, did the expert speak about the respondent; what records relating to the respondent, if any, did the expert examine; what information about the respondent did the expert gather; what family members, teachers, employers, neighbors, and counselors did the expert *not* consult; whether the expert visited the respondent's home, and so forth).

§ 38.13 NEGOTIATING WITH THE PROSECUTOR OR PROBATION OFFICER

Working out an agreed disposition with the probation department or the prosecutor is often effective. Their agreement does not bind the judge but will usually be influential with him or her. Getting the respondent enrolled in a promising program *before* beginning discussions with probation officers and prosecutors can be an important factor in obtaining their agreement.

In many jurisdictions, if the prosecutor and defense counsel are agreed about the appropriate dispositional outcome, it is possible to present the matter to the court for an immediate disposition without any report or investigation by probation personnel. This approach is often worth pursuing, particularly in cases in which there is information about the respondent's background that has not yet come to light and that is likely to make a negative impression on a judge or probation officer. Eliminating unnecessary inquiries into the respondent's background avoids the risk that they will lead to unfavorable results.

§ 38.14 FINDING SUITABLE COMMUNITY-BASED OR RESIDENTIAL ALTERNATIVES TO INCARCERATION AND ARRANGING FOR THE RESPONDENT'S ADMISSION TO A PROGRAM PRIOR TO THE HEARING

If, on the basis of information obtained at the early stages of a case, counsel calculates that placement out of the home is a realistically possible final disposition, the best strategy available to the respondent may be to have begun a community-based treatment program before the dispositional stage is reached. This sometimes means that waiting until after trial to begin preparation for the dispositional hearing is waiting too long. It may foreclose the opportunity to make one of the strongest arguments that can be made at the dispositional phase of a delinquency proceeding — that since the time when the respondent committed the offense for which s/he has been adjudicated delinquent, s/he has been getting the help necessary to assure that the wrongdoing will not be repeated.

Judges are far more apt to accept the respondent's recommendation for a disposition when the recommended disposition is already underway and has been working. Frequently, judges' reluctance to use community-based programs arises from a lack of confidence that the respondent will attend or participate regularly or that the program will do any good. Predicting the future is always precarious. Counsel can reduce the judge's resistance to betting on the respondent by eliminating as many unknown variables as possible. When the respondent is already in a program, it is possible to argue that experience to date demonstrates both the respondent's willingness to attend this kind of program regularly and the program's initial success in assisting the respondent to stay out of trouble. The risk involved in the tactic is the other side of the same coin. If court officials, such as probation officers, are aware of the respondent's involvement in a community-based program while the delinquency case is going on, any failure of the respondent in the program is likely to come to their attention and if the probation department decides to recommend a placement out of the community, it will be able to refer to the respondent's failure during the pendency of the case as evidence that a more restrictive alternative is required.

Counsel should, if possible, obtain the services of a social worker to assist in identifying suitable community-based programs and arranging the respondent's admission into one of them. See § 38.10 *supra.* If counsel cannot get a social worker's help even to the extent of giving counsel a list of possible programs or informational contacts, counsel may be able to obtain a list or pamphlet of programs in the community by asking the local United Way, other social agencies — especially those that work with adolescents — or the local welfare department. Counsel needs not become an expert in community programs in order to represent the respondent adequately at the dispositional stage. But basic knowledge of these programs — including who runs them, how adolescents get admitted to them, and what services they are able to provide — is essential; and if counsel cannot secure the assistance of a social worker, counsel will have to acquire that knowledge personally. It may be necessary to arrange an interview for the respondent with a particular program or even to accompany the respondent to the interview. Counsel should do as much as possible to ease the respondent's task of gaining admission.

§ 38.15 TIMING OF THE HEARING: RIGHT TO A SPEEDY HEARING; DEFENSE MOTIONS FOR A CONTINUANCE

Many jurisdictions provide that dispositional hearings must be commenced or completed within a certain number of days after the fact-finding hearing is completed. It may not be in the interest of the respondent to insist upon the strict enforcement of this rule.

If the respondent is detained pending the dispositional hearing, there is obviously more reason to press the court to hold the hearing within the statutory period than if the respondent is at home. However, even when the respondent is detained, counsel's insistence upon a speedy dispositional hearing can irritate the judge or cause the judge to order an unfavorable placement because of lack of time to think about or to arrange a better one. If there is some hope that the judge can be persuaded to place the respondent in a program which the respondent prefers, it may

be best to wait until the judge is ready to make the preferred placement.

If the respondent is not detained pending the dispositional hearing, delay may or may not work to the respondent's advantage. When disposition is delayed long enough for the respondent to prove that s/he can be maintained in the community without getting into further trouble, the probability of probation or even of a conditional discharge is increased. *See e.g., In re Shannon A.,* 60 Md. App. 399, 483 A.2d 363 (1984). The risk is that the respondent will *not* stay out of trouble. If s/he is rearrested during the pendency of the dispositional hearing, the court may conclude that placement out of the community is necessary. Counsel should weigh the possible benefits and risks of delay on the basis of a realistic assessment of the respondent's capabilities and attitude and should make the decision case by case.

If counsel is unhappy with the probation officer's recommended disposition or anticipates an unsatisfactory order by the court, counsel may want to object to going forward with the dispositional hearing until all of the diagnostic reports required by statute or caselaw have been completed. If there are reports still to be made, it may be reversible error for the court to conduct the hearing without having the necessary reports in hand. *See, e.g., In the Matter of Jose Luis Q.,* 64 A.D.2d 600, 408 N.Y.S.2d 510 (N.Y. App. Div., 1st Dep't 1978). An objection by counsel during the hearing may require a continuance until the reports are complete.

§ 38.16 SUBMITTING A SENTENCING MEMORANDUM PRIOR TO THE HEARING

§ 38.16(a) Reasons for Submitting a Sentencing Memorandum

In jurisdictions in which the dispositional hearing is non-evidentiary, the principal means by which the judge will receive facts and arguments bearing on disposition is through written submissions and through the oral arguments made at the hearing. The court will always have before it a written submission from the probation department. Counsel should almost always submit a sentencing memorandum for the respondent.

This memorandum serves several purposes. (1) It allows counsel to provide the court with extensive documentation and detailed arguments that the judge may lack the patience to listen to in oral form. If counsel has done a thorough job preparing for the dispositional hearing, there will probably be more relevant information to share with the court than the judge will allow counsel to describe orally. (2) A written submission enhances counsel's ability to present the case for the respondent thoroughly and accurately, since counsel can edit and polish it. (3) A written report will usually be read by the judge earlier than the judge would have heard counsel's oral arguments. It provides an opportunity to persuade the judge before s/he has assimilated the probation report or heard the prosecutor's arguments. If counsel's written submission makes a strongly favorable initial impression on the judge, the judge may retain that impression even after hearing countervailing arguments. (4) Finally, a well-written sentencing memorandum suggests a level of professional quality that will often work to the client's advantage. The more care and effort counsel has put into preparation for the dispositional hearing, the more inclined the court

will probably be to think that the respondent deserves a fair disposition.

Most of the same benefits flow from a sentencing memorandum in jurisdictions in which the dispositional hearing is evidentiary. Written presentation can organize material in a way that complements the more dramatic but less orderly effect of testimony and exhibits. In evidentiary-hearing jurisdictions, however, counsel may want to focus the memorandum on (a) summarizing and analyzing facts that are already known to the prosecutor (such as those developed at the adjudicative hearing) and documentary materials that are readily available to the prosecutor (such as the respondent's juvenile court records) or contain no surprises, and (b) relating these facts and materials and the *kinds* of additional evidence that counsel will present at the dispositional hearing to counsel's theory of why a particular disposition is appropriate or inappropriate. Counsel may not want to include in the memorandum specific factual details that will make the respondent's evidentiary case boringly redundant of what the judge has previously read or will give the prosecutor a head start in preparing to rebut it.

§ 38.16(b) Writing the Sentencing Memorandum

A sentencing memorandum is ordinarily written either as a formal memorandum or as a letter to the court, depending on local custom and the particular judge's preference. Whichever form the document takes, counsel can and usually should attach as many exhibits to the memorandum as are useful. Any type of attachment that is informative is appropriate. Attachments can include the various kinds of letters and exhibits suggested in § 38.11 *supra* — anything counsel has been able to gather that presents the respondent in a more favorable perspective than his or her delinquent acts alone provide. These attachments should be designed to humanize the respondent, to make the judge think well of the respondent, and to give the judge reasons to allow the respondent to continue to live in the community. Letters attesting to the respondent's participation in after-school activities (or photographs or tangible products of the respondent's participation in those activities), for example, can be very helpful. Once the judge knows that the respondent's after-school hours are taken up in kinds of activities that strike the judge as wholesome or at least not dangerous, the respondent's chance for a disposition of probation is increased.

Section 38.16(a) *supra* notes that a written submission has the advantage of providing the judge with more information than the judge would allow counsel to present orally. This does not mean that it is effective advocacy to write a voluminous sentencing memorandum. The memorandum's value depends on the judge reading it. Different judges have differing degrees of toleration for lengthy reports. It is important for counsel to find out about the particular judge's attitudes in this regard and to prepare the report with them in mind. Probation department personnel, defense lawyers who have practiced before the judge, and social workers assigned to juvenile cases by the local public defender office are useful sources of information. If counsel learns that the judge is likely to read everything in a respondent's sentencing memorandum, counsel will ordinarily want to develop in detail all of the favorable facts s/he can muster about the respondent. If counsel learns that the judge will probably not read a lengthy memorandum,

counsel should keep it short and should state succinctly at the beginning the reasons supporting counsel's proposed disposition.

Some arguments about the factual details of the underlying offense are highly persuasive; others are not. If the respondent was a relatively passive participant in an offense committed principally by his or her companions, that is a helpful point to emphasize. If the companion(s) used a weapon but the respondent never had any weapon in his or her possession, that fact should also be emphasized. If the respondent was younger than the companions, their respective ages can be stressed in arguing that the respondent was influenced by a group of older youths (or adults) with whom s/he no longer associates. Arguments that may appear to make light of the offense should ordinarily be avoided. As mentioned in § 19.03(b) *supra,* counsel does not want to play into rejoinders by the prosecutor or the judge that counsel is inappropriately minimizing the gravity of the crime or the harm to the victim. However, if there was no physical injury to any victim and if the respondent committed no acts that were intended or likely to injure anyone physically, counsel can refer briefly to the fact that the offense was nonviolent in arguing that a disposition which leaves the respondent in the community is not unduly risky.

Often a respondent's best dispositional argument is that restrictive forms of placement are unnecessary because the causes of the respondent's wrongdoing have already been eliminated. To support this argument, counsel should present in the sentencing memorandum all the information s/he can acquire about changes in the respondent's situation and habits since arrest, including involvement in after-school programs, good school attendance, new school or residence, and development of a new set of friends.

Certain cases lend themselves to an effective argument that the respondent's arrest served as a catalyst in changing the respondent's way of life and turning him or her around. Many juvenile court judges believe deeply in rehabilitation and can be persuaded that the respondent has learned an important lesson about the wrongfulness of engaging in criminal behavior. *But cf. State v. Burgess*, 156 N.H. 746, 759-60, 943 A.2d 727, 737-38 (2008) (discussed in § 38.05(a) *supra*); *Johnson v. Fabian*, 735 N.W.2d 295, 297, 310-12 (Minn. 2007) (discussed in § 38.05(a) *supra*). Once persuaded of that, they will favor a disposition no worse than probation. To persuade them, counsel will want to include in the sentencing memorandum both (1) objective evidence of improvement in the respondent's behavior and (2) evidence that the respondent realizes s/he did wrong and is genuinely remorseful. The latter evidence may include quotations from the respondent or from people who have spoken with the respondent since arrest. *See generally* Martha Grace Duncan, *"So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469 (2002).

§ 38.17 THE RIGHT TO AN EVIDENTIARY DISPOSITIONAL HEARING

To fashion a dispositional order in a juvenile case, the statutes of most jurisdictions require more information than that the respondent committed a particular crime. Facts about the respondent's background and needs are also indispensable. In virtually all jurisdictions it is

reversible error for the court to enter a final order of disposition without first receiving a complete probation investigation and report. *See, e.g., E.C. v. State,* 445 So. 2d 661 (Fla. App. 1984). The report is presented and its results are developed at the dispositional hearing.

§ 38.17(a) Conceptual Underpinnings for a Dispositional Hearing

In many jurisdictions juvenile courts do not commonly conduct evidentiary dispositional hearings. If counsel nevertheless wants one, s/he should file a motion for an evidentiary hearing on the ground that the court's statutory responsibilities and the due process clauses of the state and federal constitutions demand it. This and the following subsection develop the arguments that counsel can make for that result.

In juvenile court the trial can best be seen as the precondition to the dispositional hearing. A case cannot reach the dispositional phase unless and until a juvenile is adjudicated delinquent. In most jurisdictions proof that the juvenile committed acts constituting a violation of the penal law is sufficient to support an adjudication of delinquency. But more is needed before a final order of disposition may be entered. Additional facts must be found relating to the juvenile's need for services or for the continuing jurisdiction of the court.

Morever, in some States the finding of a violation of the law, though necessary, is not sufficient even to adjudge a child delinquent. *See, e.g.,* N.Y. FAM. CT. ACT § 352.1(1), (2) (2014). In these States the delinquency adjudication itself requires the additional finding of fact that the juvenile needs the care, discipline, or supervision of the state.

The necessity of additional findings of fact going beyond the fact that the respondent violated the law is what sharply distinguishes juvenile dispositional proceedings from adult criminal sentencing. A criminal conviction suffices, without more, to authorize the imposition of a criminal sentence; and although criminal sentencing judges often do (and are sometimes statutorily obliged to) make additional factual inquiries for the purpose of advising their choice among sentencing options, the result of these inquiries does not go to the heart of the court's function in entering a final order, as it does in juvenile proceedings. Most juvenile court statutes express a benevolent, nonpunitive purpose underlying the existence of juvenile court. This purpose is designed to be met in the dispositional phase. In many jurisdictions it is required to be accommodated with the goal of protecting the community. But counsel can plausibly argue that the primary concern remains effectuation of the juvenile's welfare, because it is that concern which justifies the separate existence of juvenile court in the first place.

To attend properly to that concern — and also to reconcile it properly with the community's needs (which include not only security against the juvenile's possible repetition of harmful conduct but also the more lasting benefit that the community acquires when a child who has gone astray is rehabilitated as a productive and law-abiding citizen) — the court must receive and evaluate factual information bearing on a broader range of considerations than the juvenile's mere "guilt" or "innocence." If the court does not obtain the information, it is not doing its basic

job; and when the nature of the information is such that its reliability can best be assured by receiving and testing it at an evidentiary hearing, the holding of an evidentiary hearing is a necessary part of the court's fulfillment of its statutory mission. In some States which do not expressly require a dispositional hearing by statute, courts have ruled that a hearing is nevertheless required because the failure to consider evidence of a child's background, character, and environment as bearing on disposition is an abuse of discretion. *See, e.g., Rathbone v. State,* 448 So. 2d 85 (Fla. App. 1984); *In re Wilkinson,* 116 R.I. 163, 353 A.2d 199 (1976).

§ 38.17(b) The Constitutional Right to an Evidentiary Hearing

Even when an evidentiary hearing is not required by statute, counsel can argue that due process of law requires such a hearing. The Supreme Court in *Specht v. Patterson,* 386 U.S. 605 (1967), reviewed an adult criminal procedure through which a sentencing judge could enhance the sentence of a convicted defendant if the judge found, after conviction, that the defendant "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." *Id.* at 607. The decision whether or not to enhance a sentence was to be based upon a written psychiatric report. No hearing was held before the sentencing judge made the decision. The Supreme Court set aside a sentence enhanced by this procedure, holding that, because the sentencing court could not impose the higher sentence without making specific findings of fact adverse to the defendant, the Due Process Clause of the Fourteenth Amendment required that the defendant be given an opportunity to be present with counsel, to be heard, to be confronted with witnesses against him, to cross-examine, to offer evidence of his own, and to have findings made that were adequate for meaningful review on appeal. *Id.* at 610. See also § 13.04 *supra,* describing the basis for the settled rule that constitutional due process may require a hearing when state substantive law makes important consequences turn upon the establishment of particular facts, even though state procedural law does not demand that those facts be established at a hearing.

Whenever juvenile statutes or state caselaw require specific findings of fact adverse to the respondent before a final order of disposition may be entered, *Specht* supports the claim of a right to a hearing. Courts reaching this issue in juvenile proceedings have generally held that a juvenile is entitled to a hearing on the question of disposition. *See People v. Superior Court of Los Angeles,* 142 Cal. App. 3d 29, 190 Cal. Rptr. 721 (1983); *Norwood v. City of Richmond,* 203 Va. 886, 128 S.E.2d 425 (1962). As an appellate court in New York has said:

> It requires no citation of authority to support the principle that even the worst malefactor under our system of jurisprudence must be given a fair trial in accordance with the Constitution and the statutes. Surely, no less consideration should be given to this cardinal principle because the person charged is under the age of 16.

In re Dennis, 20 A.D.2d 86, 89, 244 N.Y.S.2d 798, 801 (N.Y. App. Div., 4th Dep't 1963).

Part C. Conducting An Evidentiary Hearing

§ 38.18 STRATEGIC REASONS FOR WAIVING THE RIGHT TO A HEARING

There are many cases in which insistence upon a formal dispositional hearing will not be in the respondent's interest. Often, the best strategy in the dispositional phase is to attempt to convince the probation officer, the prosecutor, or both to recommend the disposition that the respondent wants. See § 38.13 *supra.* When this is achieved, there is no reason to insist upon a hearing; counsel can simply inform the court that counsel has no objection to the recommendation of the probation department or the prosecutor.

The more difficult cases are those in which the probation department's recommendation is not what the respondent wants but is less restrictive than what the judge may order. In these cases counsel must weigh the benefits and risks of insisting on a formal hearing and opposing the recommended disposition. The likelihood of persuading the judge to order a more favorable disposition than was recommended has to be compared with the likelihood that the court will order a less favorable disposition than the recommendation. Counsel can often gain insight into these probabilities by speaking with other lawyers who have appeared before the judge. The prosecutor's likely reaction to counsel's insistence on a contested dispositional hearing should also be considered. Just as some judges and prosecutors may penalize a respondent for demanding a trial rather than accepting a guilty plea (see § 14.05 *supra*), some judges and prosecutors are prone to exact a toll if the respondent takes up their time by insisting on contested dispositional proceedings. Although they might have acquiesced in a recommended disposition if the respondent consented to it, they will seek a more restrictive disposition if the respondent opposes the recommendation. This does not mean that counsel should routinely advise the respondent to accept the recommended disposition. It does mean that counsel should not routinely advise respondents to oppose all recommended dispositions. The decision whether to advise the respondent to accept a proffered settlement in the dispositional phase is similar to the more familiar decision whether to advise the respondent to accept a plea bargain or go to trial, and it is similarly difficult. See §§ 14.03-14.12 *supra.*

§ 38.19 TECHNIQUES FOR CONDUCTING AN EVIDENTIARY DISPOSITIONAL HEARING

Counsel should develop a plan for how s/he wants the hearing structured and how s/he will go about trying to structure it that way. Often it is not easy to impose any sort of orderly structure on dispositional hearings because of the informality with which they have traditionally been conducted. In practice, judges and probation officers routinely assume that a juvenile who has been found to have engaged in criminal conduct perforce needs the discipline or protection of the court or is in need of supervision or confinement. As a result, the juvenile courts frequently conduct dispositional hearings as informal colloquies, and evidence concerning the needs of the juvenile is presented in an off-handed way. This makes it exceedingly difficult to create the kind of record that will support meaningful appellate review.

Statutes and caselaw permitting or requiring an evidentiary hearing obviously contemplate more than an informal colloquy, see § 38.17 *supra;* and counsel should consider whether it is to the respondent's advantage to insist that the hearing be conducted in a more formal manner. Often, the respondent's best chance of a favorable disposition lies in structuring the hearing to address in the proper order the questions that the hearing is designed to resolve. In most hearings held without a formalized structure, the question which the judge takes up first is the one that ought to come last: What final order of disposition is proposed? Very often, for example, the court will want to start by considering the recommendations made in conclusory diagnostic reports that advise a placement in a "structured" setting. But analysis of the kind of disposition that is appropriate should follow, not precede or substitute for, consideration of the respondent's needs. Ordinarily, counsel's task will be to try to focus the court's attention on those needs rather than on placement.

Informal hearings usually begin by the probation officer reading aloud the recommendation for final disposition and possibly also summarizing or reading excerpts from the probation report. When, as is often the case, there is no probation officer at the hearing, the judge usually will review the written report. Counsel should make a motion to have the probation report marked as an exhibit and admitted into evidence. This makes the record clear for appeal purposes and implicitly reminds the judge that the proceeding is a formal factfinding hearing subject to appellate review. And after the probation officer's report and any other evidence offered by the probation department and the prosecutor have been received, counsel should consider a motion to dismiss if the evidence is arguably too meager to justify a finding that the respondent has any need for the care or supervision of the state.

The point to press upon the court is that there are two related but separate questions to determine at the dispositional hearing: (1) Does the respondent need the "care, discipline or protection" of the state and, if so, (2) what final order of disposition should be entered. In some jurisdictions, if the answer to the first question is "no," the respondent may not be adjudicated delinquent, and the case must be dismissed. *See, e.g.*, N.Y. FAM. CT. ACT § 352.1(2) (2014) ("If, upon the conclusion of the dispositional hearing, the court determines that the respondent does not require supervision, treatment or confinement, the petition shall be dismissed."); *In the Matter of McP.*, 514 A.2d 446, 450 (D.C. 1986) ("While commission of a delinquent act creates a presumption that the juvenile is in need of care or rehabilitation, the juvenile may rebut that presumption at the dispositional hearing. . . . If the juvenile does rebut the presumption, he or she is not in need of care or rehabilitation and thus, by definition, is not a delinquent child subject to disposition."). In other jurisdictions a "no" answer precludes the court from ordering a restrictive placement. See § 38.17(a) *supra.* Only if the answer to the first question is "yes," does the second question arise: Given that the respondent needs the care of the state, what type of care does s/he need? Thus, at the beginning of the dispositional hearing, the focus should be upon the particular problems of the child, his or her needs, and his or her background.

Ordinarily, counsel should insist that evidence be presented addressed specifically to the respondent's need for care or supervision. When the only evidence before the court on this point

is the underlying act which caused the respondent to be charged with delinquency, counsel should argue that the state has not made a sufficient showing that the respondent is in need of placement. *See, e.g., In re B.C,* 169 Ga. App. 200, 311 S.E.2d 857 (1983). If, for example, the respondent goes to school regularly, does well at school and at home, and has never been in trouble before, so that the criminal act which brought the case to court appears uncharacteristic, *why* does the child need the care or supervision of the state? It may well be reversible error in such a case to enter a final order of placement. But unless the record of the dispositional hearing makes clear that the final order was entered without the factual showing required by the statute governing dispositions, an appeal will not be successful.

If and after the needs of the respondent have been documented at the dispositional hearing, it is in order to consider a particular placement or disposition in the light of those specific needs. At this point counsel needs to be particularly creative. The most difficult job at a dispositional hearing is to connect the respondent's specific treatment needs with the disposition that counsel is seeking and to show that those needs do not call for the more restrictive placement plan recommended by the probation officer.

As mentioned earlier in this section, very often the probation officer's recommendation will be for a "structured" setting — a common euphemism for the state training school or the maximum security facility in the state. In these cases counsel may wish to shift the focus of the hearing to the facility and its inability to provide the services appropriate for the respondent. Unless counsel is already familiar with the recommended facility and prepared to document its shortcomings (see § 39.07 *infra*), s/he will have to request a continuance in order to investigate it. One reason that counsel should always obtain a copy of the pre-sentence report in advance of the dispositional hearing if possible (see § 38.08 *supra*) is that this will ensure adequate time to collect the necessary information about a recommended facility without depending on the court's discretionary grant of a continuance.

Whether counsel investigates the recommended facility before the hearing or during a continuance, s/he may wish to have his or her own expert visit the facility so as to be able to testify in court about its capabilities and limitations. The issue at this stage of the hearing is whether the disposition recommended by the probation officer is "appropriate" within the meaning of the statute governing dispositional placements. It will not be an appropriate placement unless the recommended facility is realistically able to meet the specific needs of the respondent in the particular case. *See, e.g., In the Matter of Jose B.,* 71 A.D.2d 551, 418 N.Y.S.2d 73 (N.Y. App. Div., 1st Dep't 1979).

§ 38.20 THE APPLICABILITY OF THE RULES OF EVIDENCE

In virtually every jurisdiction hearsay is admissible at the dispositional hearing. Most jurisdictions do not require that evidence proffered at the hearing meet the ordinary tests of legal admissibility (see § 30.01 *supra*) but require only that the evidence be relevant and material.

Although hearsay is not objectionable as such, counsel should be alert to the possibility of challenging certain hearsay evidence on the ground of unreliability. Information about the respondent which was obtained from unchecked sources of dubious accuracy — such as third-hand information (hearsay within hearsay) that has no identifiable, dependable source — may be challengeable on the ground that it lacks a sufficient degree of trustworthiness to be accepted into evidence. The use of grossly unreliable evidence in adult criminal sentencing has been held to violate the Due Process Clause of the Fourteenth Amendment, *Townsend v. Burke,* 334 U.S. 736 (1948); *cf. Johnson v. Mississippi,* 486 U.S. 578 (1988), and counsel may want to backstop his or her common-law and statutory objections with references to the state and federal constitutional guarantees of due process. Often counsel will not be in a position to challenge the admissibility of evidence on these grounds without cross-examining or conducting *voir dire* to determine the source of the information; requests to question the authors of reports that contain unattributed or apparently unchecked hearsay can be supported by the assertion that questioning is necessary to permit adequate evaluation of the trustworthiness of second- or third-hand information. *Cf. Smith v. Illinois,* 390 U.S. 129 (1968). Once counsel has demonstrated that neither the person offering the information nor the source of the information can attest to its reliability, counsel should argue that the information is inadmissible for lack of trustworthiness.

§ 38.21 CROSS-EXAMINING THE PROBATION OFFICER OR MENTAL HEALTH EXPERT PRESENTED BY THE PROSECUTION

If the probation officer or the expert who prepared a pre-sentence report and recommendation is not expected to be in court, counsel should consider seeking a subpoena for him or her in order to cross-examine. This should ordinarily be done when counsel has reason to believe that the report contains inaccurate information or is based on unreliable hearsay that might be discounted by the judge or when, as discussed in the next paragraph, a particular disposition is recommended which counsel believes is inappropriate to the respondent's needs.

Often, of course, counsel will not choose to pursue the issue whether the respondent needs supervision; the respondent's previous record may, for example, foreclose any colorable claim that no form of supervision is necessary. In these cases the attorney should focus on identifying the specific needs of the respondent. This can often be profitably done by cross-examination of the probation officer and the authors of any other diagnostic reports submitted to the judge. Counsel's goal is to elicit a precise diagnosis of needs and a specific prescription of the necessary treatment for those needs. Then counsel can attack the recommended disposition as unlikely to provide the appropriate treatment.

The cross-examination can be conducted with any of several different strategies in mind. If counsel wishes to reinforce the respondent's need for treatment, the cross-examination should seek to cement the expert's opinion that the respondent has particular needs which can be served by certain programs. Such a cross-examination can be very friendly; the expert is simply being used by the respondent's attorney to emphasize facts that the expert concedes.

On the other hand, if counsel is aiming to oppose the expert's recommendation on the ground that the expert did not know enough about the respondent to make a reliable recommendation or on the ground that the expert's recommendation fails to connect the respondent's needs with the recommended facility's capacity to serve those needs, then the cross-examination may have to be more pointed. To discredit the expert's conclusions by demonstrating a lack of sufficient knowledge of the respondent, counsel should develop all of the shortcomings in the witness's contact with the respondent, including any inadequacy in the setting of the evaluative interview, limited time spent with the respondent, and failure to establish rapport during the interview. See § 38.12 *supra.*

To discredit the expert's recommendation on the ground that it is not responsive to the respondent's treatment needs, counsel may be able to show in some cases that the expert has little or no information about the programs and services actually provided in the facility that s/he recommends and that the recommendation is based upon the professed or supposed objectives of the facility rather than upon its real performance. Or counsel may be able to show that the expert is not aware of the full range of programs available to meet the respondent's treatment needs and, therefore, failed to consider alternatives that are superior to the expert's recommendation.

The various techniques for cross-examining expert witnesses suggested in § 31.09 *supra* are often useful in the present context. Particularly effective ways to attack a dispositional expert's conclusions are to show, in an appropriate case:

1. That the expert met with the respondent for only a short time;
2. That the conditions surrounding the interview were not optimal;
3. That the expert did little or nothing to put the respondent at ease;
4. That the expert has little knowledge of the respondent's family situation (for example, that s/he did not conduct home visits, interviewed only one family member, and so forth);
5. That the expert cannot identify any specific programs or services available in the facility s/he recommends that are suitable to the respondent's special treatment needs; and
6. That the expert is not familiar with available community alternatives that might serve the respondent's needs.

As the last two approaches imply, it is often productive to attack not only the expert's opinion about the respondent but also the expert's opinion about the efficacy (or relative efficacy) of the recommended placement. When counsel wishes to emphasize the inappropriateness of the ultimate recommendation in the light of the respondent's needs, counsel should pin down the expert's views of exactly what the respondent does need (asking, for example, whether psychotherapy is likely to be beneficial). Counsel can then elicit from the expert facts about the recommended placement facility — or about the particular facilities available to the court to provide the "structured'' setting recommended by the expert — which demonstrate that these facilities do not provide services adequate to meet the respondent's needs.

For example, if the expert has admitted that the respondent needs psychotherapy, counsel can show that the facilities under consideration have such limited psychiatric staff that the psychiatrists at the facility do nothing more than interview all new inmates upon arrival for classification and administration purposes (a common phenomenon at training schools). If the expert is not familiar with the services in the facilities under consideration, counsel should nevertheless ask the expert about the operations of the facilities, in order to display the expert's lack of knowledge so that counsel can argue that the expert's recommendation was based on a false expectation of the facility's capacity to treat a person with the respondent's needs.

The expert can be cross-examined by using hypothetical questions in which counsel adds more details to facts that the expert had at the time of making the recommendation. Questions can be posed to show that the expert did not know certain facts or did not assume certain facts to be true. Questions can also be posed to demonstrate that the expert did assume certain facts about the respondent or the recommended facility to be true and based the final recommendation, in part, on those assumptions (which counsel is prepared to prove independently are inaccurate).

§ 38.22 PRESENTING DEFENSE EVIDENCE

In jurisdictions that allow the presentation of evidence at dispositional hearings, caselaw almost invariably supports the rule that the court may not curtail the reasonable efforts of the respondent's lawyer to present relevant defense evidence. *In re Michael C.,* 50 A.D.2d 757, 376 N.Y.S.2d 167 (N.Y. App. Div., 1st Dep't 1975). This evidence may consist of reports and letters, since hearsay is admissible in most jurisdictions. The evidence may consist of calling witnesses. Obvious witnesses to consider are the respondent and his or her parent[s]. See §§ 38.26-38.27 *infra* for a discussion of preparing respondents and parents to address the court at the dispositional hearing. In addition, counsel should consider calling any witness who can provide factual information that supports the respondent's position on disposition, including: defense experts who have interviewed or evaluated the respondent; teachers; counselors; social workers; coaches; neighbors; and other adults whom the court is likely to credit.

Depending on the theory of the defense, the witnesses may be used to refute the conclusion that the respondent needs care and supervision, or the defense expert may be used to support a contention that the respondent's needs can be adequately met by supervision in the community. If the focus of counsel's theory is on the quality of services available in the facility or program recommended by the probation department or prosecutor, defense witnesses familiar with the facility's or program's capabilities and with the respondent's needs can be called to demonstrate that the recommended placement will not meet those needs.

Counsel may wish to use witnesses who are able to testify to the respondent's good character at home, in school, and in the community. Such individuals as teachers, religious counselors, employers, and neighbors who can testify to the respondent's good deeds or reputation for being responsible, well-behaved, and respectful are appropriate witnesses. Because the rules of evidence are considerably relaxed at dispositional hearings, these witnesses will

usually be permitted to state their own opinion about the respondent's character in addition to the respondent's reputation. Compare §§ 33.17-33.18 *supra.*

Counsel should consider introducing as exhibits any favorable reports that have been written by experts who have evaluated the respondent. Exhibits can also include letters of support from any of the people mentioned in this section who are in a position to say good things about the respondent. (In deciding whether to call any particular individual to testify in person or whether to present his or her favorable views of the respondent in written form, counsel should consider the extent of the individual's knowledge of the respondent and the strength of the individual's enthusiasm for the respondent. Compare § 19.04 *supra.* Other possible exhibits are discussed in §§ 38.11 and 38.16(b) *supra.*

When counsel uses defense experts at the hearing, counsel should stress the quality and number of contacts between the expert and the respondent — if, as is common, they are clearly superior to those of the probation department's expert — so that in closing, counsel can contrast the depth of the defense expert's knowledge of the respondent with the superficiality of the probation department expert's.

§ 38.23 PROPOSING A DISPOSITIONAL PLAN FOR THE DEFENSE

If counsel is able to show that the facility recommended by the probation department is inappropriate for the respondent, the judge will want to explore the question of what disposition *is* appropriate. Counsel will have to do more than prove that the probation department's recommendation is unsatisfactory; s/he will have to come up with a plan that is better. Once again, a defense expert may be very helpful. If a facility agreeable to the respondent can be located that will accept the respondent and that can be shown to best meet his or her needs, the chances of persuading the judge to place the respondent in that facility are optimal. (Of course, as already discussed, this strategy should not be used without the respondent's consent.)

In fashioning a dispositional plan and supporting theory for the defense, the best approach is to be creative. Precisely because there is little appellate law in the area of dispositional hearings and because the rules for juvenile court at this phase of the proceeding are supposed to be different from those of adult criminal court, lawyers are advised to think inventively and consider doing things that have not been tried before. *See, e.g., State in the Interest of Irving,* 434 So. 2d 543 (La. App. 1983) (upholding the trial court's discretion to impose a condition of probation that respondent live with a relative in another State). This means not only expanding the range of evidence presented at the hearing (see § 38.11 *supra*) but also expanding the range of dispositions available for the court to consider. Judges often appreciate proposals that offer new ways to serve the judge's dual goals of protecting the community and helping the respondent; many routes lead to these joint goals; unique proposals evolved out of the peculiar background and facts of each individual case should be explored. More than in any other area of juvenile court practice, counsel will find it effective to innovate boldly in preparing for a dispositional hearing.

Creativity is particularly fruitful in devising conditions of probation. Many jurisdictions require that the court order the "least restrictive alternative" consistent with the respondent's best interests and the protection of the community. *See, e.g.,* N.Y. FAM. CT. ACT § 352.2(2) (2014); *In the Interest of B.S.*, 192 Ill. App. 3d 886, 891, 549 N.E.2d 695, 698, 140 Ill. Dec. 44, 47 (1989); *State in the Interest of Racine,* 433 So. 2d 243 (La. App. 1983). In developing alternatives to incarceration, counsel will usually be able to identify a number of options that adequately protect the community. The following are some conditions of probation, among many, that counsel might consider proposing, depending on the facts and circumstances of the case: good school attendance; abstaining from certain conduct (such as associating with particular individuals or gangs); enrollment in a certain community-based program; keeping out of certain places; cooperating with specified individuals; making restitution; submitting a regular progress report.

There is, of course, a danger that counsel's efforts in inventing conditions of probation in order to make community-based treatment appear palatable to the court will lead the court to place more restrictions on the respondent's liberty than would have been imposed without counsel's assistance. This danger has two components. First, the respondent may be subjected to greater restraints than the court would have thought of by itself. Second, the more conditions are imposed, the greater the risk will be that the respondent will violate one or more of them and thereby become subject to the filing of a petition to revoke probation. These dangers must be factored into the decision how aggressive counsel should be in proposing novel alternatives to placement.

§ 38.24 THE NEED FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is important to have the judge state on the record the reasons for the final order of disposition. This not only improves the respondent's record for appeal but gives counsel information making it easier to assess the probable success of an appeal. Many jurisdictions require that the court state the reasons for its dispositional order and the facts supporting those reasons on the record. *See, e.g.,* N.Y. FAM. CT. ACT § 352.2(3) (2014). And, as noted in § 38.17(b) *supra,* one of the constitutional requirements for dispositional hearings derivable from *Specht v. Patterson,* 386 U.S. 605 (1967), is that "there must be findings adequate to make meaningful any appeal that is allowed." *Id.* at 610. Appellate decisions support the view that if the dispositional hearing is handled correctly, the record should clearly reflect the special needs of the respondent and the reasons for the choice of the particular disposition ordered by the court. *See, e.g., State in the Interest of George,* 430 So 2d 289 (La. App. 1983). Counsel should request that the court make specific findings of fact on these issues. In any case in which the court places the respondent in a private residential facility or in a state-run non-secure or secure facility (see § 38.03(c) *supra*), counsel should also request that the court specify the educational, vocational, and other rehabilitative services that the facility must provide the respondent. See § 39.07 *infra*.

Finally, if counsel believes that the record fails to support the dispositional order, it is important to object to the order on the record, setting forth the basis for the objection.

Part D. Conducting a Non-Evidentiary Hearing

§ 38.25 TECHNIQUES FOR CONDUCTING A NON-EVIDENTIARY HEARING

In most jurisdictions that use the non-evidentiary hearing procedure, the persons present at the hearing will be the probation officer (or a representative from the probation department), the prosecutor, counsel for the respondent, the respondent, and his or her parent. Rarely are there any formal procedures for beginning the hearing. Many non-evidentiary hearings are merely *pro forma* appearances at which the court imposes a sentence to which all parties are agreed. See §§ 38.13, 38.18 *supra.* If the respondent does not oppose the disposition recommended by the probation department and if the prosecutor indicates that s/he also acquiesces in the recommendation, the hearing will likely last only a few minutes.

Non-evidentiary hearings commonly consist of a colloquy that most resembles a trial-level oral argument. The hearing is not regularized and few rules exist regarding the order or length of presentations. In some jurisdictions the first person to speak is ordinarily the probation officer, who recommends a particular disposition. In other jurisdictions there is an uncertain void at the beginning of the hearing that is filled by the first person who starts talking. Usually, counsel should start and fill this void. Counsel should begin the hearing by summarizing the case and emphasizing the critical issues on which counsel wishes to focus. Compare § 38.19 *supra.* Judges will often give clues about how carefully they have read the pre-sentence report and, depending on the judge's familiarity with the case, counsel may choose to be more or less detailed.

In some cases the respondent does not oppose the probation department's recommendation, but the prosecutor has not clearly indicated acceptance of the recommended disposition. In these cases counsel must try to steer the dispositional hearing by being the first to speak, summarizing the recommended disposition and the reasons for imposing it. Sometimes this take-charge approach can preempt the prosecutor from opposing the recommendation.

The court at a non-evidentiary dispositional hearing usually receives documentary evidence and oral argument. The documentary evidence ordinarily consists of the probation officer's pre-sentence report and any other reports prepared for or by the probation department or the prosecutor, such as a mental health report. In addition, defense counsel is routinely permitted to submit a sentencing memorandum, which should set forth the respondent's proposed disposition and the grounds and reasons supporting it. See § 38.16(b) *supra.*

Counsel should make certain that all documents read by the judge are marked for identification at the hearing. Counsel should also read all these reports carefully and object to the admission of any parts of them that s/he believes should be excluded. See § 38.20 *supra.* Counsel should introduce into evidence all reports prepared by the defense and any letters, evaluations, and other exhibits on which counsel intends to rely.

The principal feature of the non-evidentiary hearing will be counsel's oral argument to the court supporting a particular order of disposition. This argument may be based on law — contending, for example, that in light of the respondent's ties to the community and prior record, there is no statutory basis to enter any order of disposition other than probation — or it may be based on fact, or on a combination of law and facts.

The most difficult cases, of course, are those in which the respondent opposes the probation department's recommended disposition. In these cases a key fact that counsel needs to know in order to determine how to proceed is the degree of familiarity that the judge already has with the written reports submitted before the hearing. Some judges will have read everything before the case is called. Some will have read nothing. Counsel should learn about the particular judge's practices by asking experienced lawyers who have appeared before that judge in the past. Depending on the jurisdiction, counsel's own sentencing memorandum may or may not have been submitted in advance of the hearing date.

Like any effective presentation, counsel's oral argument should develop a theme and support it appropriately. Section 38.16(b) *supra* suggests that there are more and less persuasive points that counsel can make in supporting or opposing a particular disposition. Frequently, the most effective argument to make orally is that the respondent has learned an important lesson from his or her misconduct and has changed for the better since being arrested. Because judges have heard this argument so often in other cases, it is crucial to support the argument with facts. Counsel should be prepared to cite specifically the portions of all documents and exhibits that support counsel's contentions.

If counsel has attached exhibits to the sentencing memorandum, see § 38.16(b) *supra,* counsel should make use of them in the oral presentation. If, for example, the respondent has produced works demonstrating artistic talent, counsel should have them in court so that s/he can display them during the presentation.

Even in jurisdictions that do not ordinarily conduct evidentiary hearings, there is the possibility of offering live testimony. It can be very effective strategy for counsel to bring witnesses to court and have them sit in the courtroom during the hearing. Once a witness is in court, counsel can ask the judge for permission for the witness to address the court; alternatively, counsel can inform the judge that the witness is present in case the judge would like to hear from him or her or has any questions to ask. Of course, the fact that people have bothered to show up in court at all, particularly in a jurisdiction in which it is uncommon to see witnesses at dispositional hearings, is likely to impact favorably on the judge. The more prestigious the witness, the more likely it is that the judge will display the courtesy of permitting the witness to speak.

If counsel's strategy is to argue that a particular facility is a more appropriate placement than the one proposed by the probation department, bringing someone to court who is familiar with the facility is similarly effective. At the least, counsel should weave the person's identity

and expertise into the oral presentation and point to the individual when doing so in order to emphasize counsel's preparedness for the hearing.

§ 38.26 WHAT THE RESPONDENT SHOULD SAY WHEN ADDRESSING THE COURT AT THE DISPOSITIONAL HEARING

As in adult criminal sentencing, juvenile court judges commonly give the respondent an opportunity to address the court. In any event, this is a procedure that counsel would ordinarily want to request. It is important for counsel to prepare with the respondent what s/he will say and how to say it. Especially with inarticulate respondents, a brief statement is appropriate. The most important things for the respondent to say have to do with (1) the lesson(s) s/he learned from the wrongdoing, (2) his or her repentance for committing a crime, and (3) any constructive plans for the future. It is particularly crucial for the respondent to express remorse when the pre-sentence report states inaccurately that the respondent does not feel any remorse. *But cf. State v. Burgess*, 156 N.H. 746, 759-60, 943 A.2d 727, 737-38 (2008) (discussed in § 38.05(a) *supra*); *Johnson v. Fabian*, 735 N.W.2d 295, 297, 310-12 (Minn. 2007) (discussed in § 38.05(a) *supra*); *State v. Washington*, 832 N.W.2d 650, 652, 661-62 (Iowa 2013) (discussed in § 38.05(a) *supra*). If the respondent has spent some time in a detention facility, expressions of fear or of having learned that crime doesn't pay are often things the judge wants to hear.

Although counsel should prepare the respondent to address the court, it is generally wise to let the respondent say pretty much what s/he wants to say, within reason. It is useful to have a dry-run rehearsal of what the respondent will say, but the statement should not be so rehearsed that it sounds canned.

Respondents who continue to deny any wrongdoing pose a difficult problem. In preparing them to address the judge at sentencing, counsel should advise them to talk about anything commendable that they are currently doing in the community (or, in the case of detained respondents, anything commendable that they were doing in the community before being detained or any programs in which they have successfully participated since being detained) and about realistic, constructive plans for the future. It is usually wise for the respondent to avoid any direct reference to the crime during his or her initial remarks. If the judge asks the respondent directly about the crime, it is, of course, necessary for the respondent to reply. Counsel should work with the respondent on a reply. Even when the respondent denies wrongdoing, it may be possible for the respondent to admit to an indiscretion of judgment, for example: (a) hanging out with the wrong crowd, (b) being out of his or her home at the wrong hours, or (c) being in the wrong part of town. These or any similarly worded expressions of regret can usefully split the difference between denying any responsibility for the crime (and thereby, in a bench trial, challenging the judge directly as factfinder) and insincerely admitting acts that the respondent, in fact, denies having committed.

Of course, there will be cases in which even this much concession is infeasible. If the respondent claims that s/he is a victim of mistaken identity and stands by the alibi defense that

s/he presented at trial, there is not much s/he can say at the dispositional hearing about the crime itself. In these cases the respondent's only practicable courses of action are to continue to assert innocence or to waive the right to address the court in person and rely solely on counsel's presentation. The question whether the judge is permitted to attach adverse inferences or consequences to a respondent's silence at a dispositional hearing — and, if so, what inferences and consequences are permissible — is a vexed question in the light of *White v. Woodall*, 134 S.Ct. 1697 (2014), which muddies the apparent implication of *Mitchell v. United States*, 526 U.S. 314 (1999), that a defendant cannot be penalized in any way for failing to address the court in a sentencing proceeding. In this state of the law, counsel should be alert to note anything said by the judge which suggests that he or she is penalizing the respondent for remaining silent; such comments are grist for appeal and other post-hearing challenges to an unfavorable disposition.

§ 38.27 WHAT THE PARENT SHOULD SAY WHEN ADDRESSING THE COURT

As explained in § 38.05(b) *supra,* counsel's task in preparing a parent for the dispositional process and the dispositional hearing differs depending on what sentence the parent wants to see imposed. If the parent, as well as the respondent, desires the least restrictive sentence, then the parent should be prepared to address the court with an emphasis upon the positive things that s/he can say about the respondent. The parent is in the best position to tell the judge about the respondent's attitude at home and his or her relationship with family members. When the parent has observed any favorable changes in the respondent's behavior since coming to court, the parent should report those changes. If, for example, the respondent has stopped hanging out with an individual or a group of adolescents of whom the parent disapproved and whose influence was, in the parent's opinion, partly responsible for the respondent's criminal activity, the parent should be prepared to tell this to the judge. The parent can also inform the judge about any community activities, school programs, and church activities in which the respondent participates, emphasizing those activities that the respondent has taken up (or has taken more seriously) since his or her arrest. If the respondent has begun any treatment or community-based program since his or her arrest, the parent should be prepared to comment upon the program and its perceived beneficial effects on the respondent.

Finally, the parent should be prepared to tell the judge about any aspirations the parent has for the respondent, the love s/he feels for the respondent, and the efforts that the parent is willing to make to assure that the respondent will not get into trouble again in the future

Part E. After the Hearing

§ 38.28 PRESERVING THE RIGHT TO APPEAL

Counsel's job does not end when the court enters its final order in the case. The role of trial counsel includes the responsibility to advise the respondent fully concerning his or her right to appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, 478-81 (2000) (defense counsel's failure to consult with the client about the decision whether to appeal constitutes ineffective assistance of

counsel whenever there are nonfrivolous grounds for appeal or the client has indicated any interest in taking an appeal); *id*. at 479 (recognizing that state law may "impose[] on trial counsel a *per se* duty to consult with defendants about the possibility of an appeal"); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-8.2(a), (b) (3d ed. 1993) ("Defense Function Standards") ("After conviction, defense counsel should explain to the defendant the meaning and consequences of the court's judgment and defendant's right of appeal. Defense counsel should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice. . . . ¶ Defense counsel should take whatever steps are necessary to protect the defendant's rights of appeal."). See also § 39.02(c) *infra* (steps to take to preserve the client's appellate remedies). Except when the respondent states explicitly that s/he does not wish to appeal or when s/he has another attorney retained or appointed for the appeal who explicitly informs counsel that the other attorney is taking the necessary steps to perfect appellate jurisdiction, counsel should take those steps within the times limited by statute or court rule. See § 39.02(c) *infra*.

§ 38.29 COUNSEL'S POST-DISPOSITIONAL ROLE

In non-evidentiary hearings as well as evidentiary hearings, counsel should request that a dispositional order of placement specify the types of rehabilitative services that the facility must provide the respondent. See § 38.24 *supra.* However, this alone will not ensure that the respondent actually receives the services. One of the most common and most frustrating aspects of the juvenile justice system is that carefully tailored court-ordered treatment programs for juveniles are not carried out by the institutions and agencies that are supposed to carry them out. Like any court order a juvenile court's final order of disposition is not self-enforcing. If a juvenile has been placed in a particular facility in order to assure that s/he gets certain treatment, it is critical that someone follow up on the placement to determine whether or not that treatment is actually being given. See § 39.07 *infra.*

For this reason counsel should consider, whenever possible, remaining on the case even after the court enters its final order. If counsel abandons the respondent at this juncture, the respondent frequently will have no way to enforce post-dispositional rights. Of course, many court assignments to represent indigent respondents terminate upon the final order of disposition. Counsel who were so assigned may wish to request that the court enter an order expressly continuing their representation of the respondent into the placement phase of the proceeding.

Chapter 39

Appeal and Post-Disposition Proceedings

§ 39.01 SCOPE OF THE CHAPTER

The MANUAL is intended as an aid in representing alleged delinquents in the trial process; post-disposition proceedings are beyond its purview. The purpose of this chapter is merely to identify the principal corrective procedures that are available to the respondent following an unfavorable disposition (to obtain appellate or collateral review of the adjudication of delinquency; to modify or terminate a period of incarceration or to enforce the respondent's right to treatment while in the institution; to seal or expunge records of the conviction after a certain period of time) and to sketch the nature of the principal proceedings that may be instituted against the respondent during the post-disposition period (revocations of probation and parole and extensions of a term of incarceration).

§ 39.02 APPELLATE REVIEW

§ 39.02(a) The Right To Appeal

Juvenile court statutes typically give the respondent a right to appeal an adjudication of delinquency. *See, e.g.,* COLO. REV. STAT. § 19-2-903(1) (2014); IND. CODE ANN. § 31-32-15-1 (2014); TEX. FAM. CODE ANN. § 56.01 (2014). *See also In the Interest of A.K.*, 825 N.W.2d 46, 49-52 (Iowa 2013) (notwithstanding the state legislature's revision of the juvenile code to eliminate the requirement that "delinquency proceedings . . . be tried in equity," which had been the basis for appellate review of delinquency adjudications "de novo, as in all equity cases," the Iowa Supreme Court rejects the state's argument for uniform standards of appellate review in juvenile and adult criminal cases, and instead preserves "our de novo standard of review of the sufficiency of the evidence for juvenile adjudications" because this higher standard for juvenile appeals appropriately recognizes the differences between juvenile and adult proceedings, including the lack of a jury trial right in juvenile delinquency cases). If a State allows appeals of criminal convictions, a juvenile respondent who is not given a statutory right to appeal may be able to contend that this disparate treatment violates the equal protection of the laws. *See, e.g., In re Brown,* 439 F.2d 47 (3d Cir. 1971); *In the Matter of Arthur N.,* 36 Cal. App. 3d 935, 112 Cal. Rptr. 89 (1974).

The scope of appellate review encompasses, generally, all properly preserved claims of error in the pretrial and trial rulings of the judge, "plain" or fundamental errors even though not properly preserved (*see*, *e.g.*, *Henderson v. United States*, 133 S. Ct. 1121 (2013)), and the sufficiency of the evidence to support an adjudication of delinquency, within the normal restrictions of appellate evidentiary review.

Following review by the highest court of a jurisdiction in which review may be had (or

following the refusal of that court to review the case if its jurisdiction is discretionary), *see Costarelli v. Massachusetts,* 421 U.S. 193 (1975), any federal issues preserved throughout the trial and appellate proceedings may be presented to the Supreme Court of the United States. Ordinarily the appropriate procedure for seeking Supreme Court review will be a petition for a writ of *certiorari* under 28 U.S.C. § 1257(a) (2014) (governing state prosecutions) or 28 U.S.C. § 1254(1) (2014) (governing federal prosecutions). *Certiorari* is discretionary with the Court.

§ 39.02(b) The Indigent Respondent's Right to Counsel Upon Appeal and to a Trial Transcript for Use on Appeal

Whenever the State creates an appellate process for juvenile cases, an indigent respondent has a right to court-appointed counsel at least on the first appeal as of right, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Halbert v. Michigan*, 545 U.S. 605, 609, 621 (2005) ("in first appeals as of right, States must appoint counsel to represent indigent defendants": "Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson"); *Evitts v. Lucey,* 469 U.S. 387, 393-94 (1985) (dictum), and cases cited; *Douglas v. California,* 372 U.S. 353, 358 (1963); *see also Reed v. Duter,* 416 F.2d 744 (7th Cir. 1969); *In the Interest of L.G.T.,* 216 So. 2d 54 (Fla. App. 1968). The right to counsel on appeal encompasses a due process right to effective performance by appellate counsel, whether court-appointed or retained. *Evitts v. Lucey,* 469 U.S. at 396.

Some statutes explicitly provide for the preparation of a free transcript of the trial for use on appeal when the respondent is indigent. *See, e.g.,* CAL. WELF. & INST. CODE § 800(d) (2014). Even when this is not provided by statute, the Fourteenth Amendment requires that a State which has created an appellate remedy furnish indigent respondents with a free trial transcript to enable them to make use of the remedy. *E.g., Griffin v. Illinois,* 351 U.S. 12 (1956); *Draper v. Washington,* 372 U.S. 487 (1963); *Mayer v. City of Chicago,* 404 U.S. 189 (1971). *See also Halbert v. Michigan*, 545 U.S. at 610-11; *M.L.B. v. S.L.J.*, 519 U.S. 102, 110-13 (1996).

§ 39.02(c) The Need To Move Quickly To Preserve Appellate Remedies; First Steps

Rights may be lost if the steps required to perfect an appeal or other review proceeding are not taken within the times limited by law. The periods for taking those steps may run from verdict or from disposition or from judgment, depending on local statute or court rule. They ordinarily are not long. They may or may not be tolled pending resolution of timely posttrial motions (§ 37.02 *supra*), depending upon local practice. Counsel will want to proceed with dispatch in filing notices of appeal, presenting bills of exceptions, or otherwise complying with the requisites of statutes and court rules governing the manner in which appellate jurisdiction is perfected. In cases in which the respondent is indigent, counsel will ordinarily also have to file an application for leave to proceed *in forma pauperis* on appeal.

Counsel should arrange to obtain the trial transcript for use on appeal. If local practice does not provide for the filing of the transcript as a matter of course and if the respondent is

indigent, counsel should move the trial court to order the transcript prepared at public expense. See § 39.02(b) *supra.* Upon receiving the transcript, counsel should check it for accuracy. Ordinarily court rules allow several days after filing of the transcript with the clerk of court for counsel to file proposed amendments to it or exceptions to its accuracy. Prodigious trial notes by counsel are a valuable aid in having the transcript corrected. There are often inadvertent errors in transcripts; there may even be intentional errors or omissions, since some judges' stenographers take down what they know their judge meant to say rather than what the judge actually said, or they omit remarks made by the judge that they know the judge would not want in the record.

If the respondent has been ordered incarcerated, counsel should give consideration to the possibility of seeking his or her release pending appeal. In most jurisdictions the trial court has discretion to order a respondent released pending appeal, *see, e.g.,* CAL. WELF. & INST. CODE § 800(a) (2014); and in jurisdictions that permit bail for juveniles, the trial court usually has the option of allowing either release or bond pending appeal, *see, e.g.,* TEX. FAM. CODE ANN. § 56.01(g) (2014); WASH. REV. CODE ANN. § 13.40.230(5) (2014). A judge may be particularly amenable to releasing the respondent pending appeal in a case in which the conviction turned upon the resolution of a novel legal issue and the judge is uncertain about the validity of that resolution.

If counsel does not intend to represent an adjudicated respondent in appellate proceedings, counsel should promptly inform the respondent and his or her parent of (1) the respondent's right to appellate review (including the right to proceed at state expense if the respondent cannot afford to pay filing fees, costs, and the price of a transcript); (2) the time within which any actions necessary to obtain appellate review must be taken and what those actions are; (3) the realistic likelihood of success in appellate review proceedings, as counsel sees it; (4) the fact that counsel will not be representing the respondent in appellate review proceedings; (5) the fact that other counsel can be retained by the respondent to represent him or her on appeal; (6) the fact that if the respondent cannot afford to retain other counsel, a lawyer will be appointed by the court to represent him or her in at least the first appellate review proceeding as of right; and (7) the actions that the client needs to take to obtain appointment of new counsel. Unless the respondent does not want to appeal or is able to obtain other representation, counsel should take the steps necessary to perfect appellate jurisdiction within the required times. Counsel's advice to the respondent and any action taken on the respondent's behalf, together with the respondent's expressed intention to appeal, not to appeal, or to seek other representation, should be memorialized in detail in a letter to the respondent. Counsel should keep a file copy of this letter, together with any explanatory notes or memoranda that are necessary to preserve a record of counsel's judgments and reasoning in regard to an appeal.

§ 39.03 COLLATERAL REVIEW

§ 39.03(a) State Postconviction Remedies

Most States have established some form of procedure by which adult criminal convictions

may be attacked following affirmance on direct review or expiration of the time for direct review. The procedure may involve the use of one of the traditional writs, such as *habeas corpus* or *coram nobis,* in common-law or statutory form, or it may involve a modern postconviction hearing procedure prescribed by statute or rule of court.

The vast majority of state courts have recognized that these adult collateral-review procedures are equally available to juveniles in delinquency cases. *See, e.g., Sult v. Weber,* 210 So. 2d 739, 749 (Fla. App. 1968) ("[t]he motion for relief in the nature of coram nobis is available in the juvenile courts of this state . . . [even] without a declaratory rule authorizing it"); *E.C. v. Virginia Dep't of Juvenile Justice*, 283 Va. 522, 529-30, 536-37, 722 S.E.2d 827, 830-31, 835 (2012) (lower court erred in dismissing the adjudicated delinquent's petition for a writ of habeas corpus: the court had jurisdiction because "the petitioner was detained for purposes of habeas corpus when the petition was filed," and "[t]hat jurisdiction did not end because E.C. was released from detention during the course of the proceeding"; E.C.'s release from confinement also did not render the state postconviction petition moot because he continues to be subject to collateral consequences of the adjudication, including a sex offender registration requirement, the risk of the adjudication's serving as a predicate for enhanced sentencing in a future case, and limitations on future ownership and transportation of a firearm). *Compare A.S. v. State*, 923 N.E.2d 486, 489-90 (Ind. Ct. App. 2010) ("[p]ost-conviction procedures are not available to challenge a juvenile delinquency adjudication, which is civil in nature," but the juvenile could proceed instead under a court rule that provides a mechanism for seeking "relief from judgment").

State collateral-attack procedures are ordinarily limited to "fundamental" claims (that is, for the most part, constitutional claims) or claims whose presentation in the trial and direct-review proceedings was obstructed by the courts or prosecuting authorities or by circumstances beyond defense counsel's control (such as the unavailability of the facts on which the contentions rest) or was excusably overlooked by defense counsel. The procedures typically call for an application for relief from the judgment to be made to a trial court (often the conviction court) in the first instance and allow appellate review of its disposition. Following state appellate review or if it is unavailable, the juvenile may seek review of any federal questions by the Supreme Court of the United States, ordinarily on *certiorari.* Frequently the denial of a first postconviction petition does not act as *res judicata* to bar second and subsequent petitions, although doctrines of waiver or collateral estoppel may bar particular claims.

§ 39.03(b) Federal Habeas Corpus

A juvenile respondent who is adjudicated a delinquent in a state proceeding is also entitled to invoke federal habeas corpus remedies pursuant to 28 U.S.C. § 2241(c)(3) (2014) under the same circumstances as an adult criminal defendant. *See, e.g.*, *A.M. v. Butler*, 360 F.3d 787 (7th Cir. 2004); *United States ex rel. Murray v. Owens*, 341 F. Supp. 722, 723 (S.D.N.Y. 1972), *rev'd on other grounds,* 465 F.2d 289 (2d Cir. 1972). Before resorting to federal habeas corpus, the respondent must "exhaust" all state remedies. 28 U.S.C. § 2254(b), (c) (2014). This

requires that the respondent "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate process," including any discretionary appeals that are an "established part of the State's appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). As a result of statutory changes effected by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal habeas corpus petition in a non-capital case generally must be filed within one year from the date on which the judgment of conviction and sentence became final upon completion of direct review (including *certiorari* proceedings in the U.S. Supreme Court), 28 U.S.C. § 2244(d)(1) (2014), and federal habeas corpus relief generally will not be granted unless the state court's adjudication of the claim was "contrary to . . . clearly established [Supreme Court] law" or "involved an unreasonable application of clearly established [Supreme Court] law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(1), (2) (2014). *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (6th ed. 2011 & Supp. 2014).

§ 39.04 REVOCATION OF PROBATION

As explained in § 38.03(c) *supra,* an order of probation ordinarily contains a series of conditions requiring, for example, that the respondent abstain from further criminal conduct, attend school regularly, and meet periodically with a probation officer. If the respondent violates one or more of these conditions, his or her probation can be revoked, and s/he can be resentenced to incarceration (for a period up to the maximum term that could have been imposed at the original dispositional hearing) or to any other disposition that was available at the original dispositional hearing. (For a description of the range of dispositional alternatives, see § 38.03(c) *supra.*)

The jurisdictions differ somewhat in their procedures for revoking probation and in the frequency with which revocation is used. In some jurisdictions the probation department initiates a probation revocation proceeding by filing a notice of violation with the judge who entered the original order of probation, while in other jurisdictions the probation officer brings the information to the juvenile prosecutor's office, which then files a petition to revoke probation if it deems that measure appropriate. Some probation offices (or some individual probation officers) rigorously enforce all conditions and will seek revocation if the respondent merely misses some appointments with the probation officer, while other offices (or individual officers) overlook these "technical" violations and will seek revocation only if the respondent is arrested for a new offense while on probation.

It is advisable for counsel to check in periodically with the respondent and the probation officer, to keep tabs on the respondent's adjustment. Often, a warning to a respondent who is straying will be sufficient to put the client back on the right track. And often counsel will be able to persuade a probation officer to refrain from filing revocation proceedings and to give the respondent another chance.

If a notice of violation is filed and revocation sought, the respondent has a due process right under *Gagnon v. Scarpelli,* 411 U.S. 778 (1973), to "two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his . . . [probation] and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision." *Id.* at 781-82. "At the preliminary hearing, a probationer . . . is entitled to notice of the alleged violations of probation . . ., an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. . . . The final hearing is a less summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause, but the 'minimum requirements of due process' include very similar elements: '(a) written notice of the claimed violations of [probation] . . .; (b) disclosure to the [probationer] . . . of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body . . .; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation] . . . .'" *Id.* at 786 (quoting *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972)). *See also, e.g.*, *United States v. Johnson*, 710 F.3d 784, 788-89 (8th Cir. 2013) (district court violated the defendant's due process "'right to confront and cross-examine adverse witnesses'" at a revocation hearing by relying on a police report — which contained the defendant's confession to a new crime — without requiring that the prosecution at least provide an adequate explanation for its failure to present testimony by "the arresting officer, or another officer who was present when the confession was made").

"[C]ounsel should be provided in cases where, after being informed of his right to request counsel, the probationer . . . makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself." *Gagnon v. Scarpelli,* 411 U.S. at 790-91.

Although the Court's announcement of these due process requirements in *Gagnon* took place in the context of an adult probation revocation proceeding, they clearly apply to juvenile proceedings as well. *See, e.g.*, *K.W.J. v. State*, 905 So.2d 17 (Ala. Crim. App. 2004); *B.S. v. State*, 886 So.2d 1062 (Fla. App. 2004); *State v. Doe,* 104 N.M. 107, 717 P.2d 83 (N.M. App. 1986); *G.G.D. v. State,* 97 Wis. 2d 1, 292 N.W.2d 853 (1980); *State ex rel. E.K.C. v. Daugherty,* 298 S.E.2d 834 (W. Va. 1982). Several jurisdictions have codified the requirements in their juvenile court acts, *see, e.g.,* ILL. COMP. STAT. ANN. ch. 705, § 405/5-720 (2014); N.Y. FAM. CT. ACT § 360.3 (2014); WASH. REV. CODE ANN. § 13.40.200(2) (2014), or juvenile court rules, *see, e.g.,* D.C. SUPER. CT. JUV. RULE 32(i) (2014).

Some statutes and rules or the state cases construing them expand the panoply of safeguards required by the federal constitutional guarantee of due process. For example, while the Court in *Gagnon* treated the right to counsel as conditional and dependent upon the facts of the case, a number of jurisdictions confer an automatic entitlement to counsel at a probation revocation hearing. *See, e.g.,* D.C. SUPER. CT. JUV. RULE 32(i)(3) (2014); N.Y. FAM. CT. ACT § 360.3(4) (2014); *K.E.S. v. State,* 134 Ga. App. 843, 216 S.E.2d 670 (1975). And although some courts have held that the due process requirements of *Gagnon* permit revocation to be based upon the prosecutor's proof of a violation by a mere preponderance of the evidence (*see, e.g., In the Matter of Belcher,* 143 Mich. App. 68, 371 N.W.2d 474 (1985), *appeal denied,* 424 Mich. 863 (1985); *In the Matter of Gregory M.,* 131 Misc. 2d 942, 502 N.Y.S.2d 570 (N.Y. Fam. Ct. 1986); *see also In re Eddie M.*, 31 Cal. 4th 480, 508, 73 P.3d 1115, 1132, 3 Cal. Rptr. 119, 140 (2003) (rejecting a due process challenge to a statute authorizing revocation of probation on a preponderance of the evidence for a "probation violation 'not amounting to a crime'")), several States require proof beyond a reasonable doubt (*see, e.g., People ex rel. C.B.,* 196 Colo. 362, 585 P.2d 281 (1978); *T.S.I. v. State,* 139 Ga. App. 775, 229 S.E.2d 553 (1976); *cf.* D.C. SUPER. CT. JUV. RULE 32(i)(3) (2014) (beyond-a-reasonable-doubt standard applies to revocations based on a new crime; preponderance standard applies to revocations based on technical violations)) or the intermediate standard of clear and convincing evidence (*see*, *e.g., In the Interest of C.E.E. v. Juvenile Officer,* 727 S.W.2d 451 (Mo. App. 1987); *but see C.L.B. v. Juvenile Officer*, 22 S.W.2d 233, 239 (Mo. App. 2000) (if probation revocation proceeding is used as "a forum for an adjudication of guilt of an act which would be a crime if committed by an adult, with all the collateral consequences of a conviction of that offense," then the "beyond a reasonable doubt standard" must be applied)).

When the request for revocation of probation is based upon the respondent's alleged commission of a new crime, the respondent will usually also be charged with the new crime in a separate Petition. In jurisdictions where the prosecutor's burden of proof at a probation revocation hearing is a preponderance of the evidence or clear and convincing evidence, counsel should attempt to delay the revocation hearing until after there has been a trial on the new Petition, so that the validity of the new charge is first tested at trial by a beyond-a-reasonable-doubt standard. If the judge refuses to delay the revocation hearing and revokes probation on the basis of the new crime before it has been separately adjudicated and if the respondent is then acquitted of the crime at trial, counsel should petition for reinstatement of probation.

If the basis of the request for revocation is that the respondent missed appointments with a probation officer, counsel should prepare for the revocation hearing by talking with the respondent and his or her parent to determine whether the respondent had a good reason for missing the appointments and whether s/he attempted to notify the probation officer that s/he was unable to come to the meeting. Counsel should also talk with the probation officer before the hearing and should ascertain what efforts the probation officer made to contact the respondent after the missed appointment. Some judges will respond to an apparent lack of effort or concern on the probation officer's part by giving the respondent another chance. Finally, counsel should discuss with the respondent and his or her parent any problems that have arisen with the

probation officer and should explore the possibility that these reflect a personality conflict between the officer and either the respondent or the parent. If a personality conflict exists and if it contributed to the respondent's failure to keep appointments, counsel can argue at the revocation hearing that the respondent should be permitted to remain on probation and that a different probation officer should be assigned to the case as a way of testing the respondent's ability to adjust satisfactorily once this particular source of friction is eliminated.

Many other grounds for revocation of probation can be handled by devising a plan to correct the problematic aspects of the respondent's behavior that led to the revocation request. Armed with a plan that shows promise, counsel can argue that the respondent should be kept on probation with the mandatory features of the plan added as new probation conditions. For example, if the request for revocation is based upon truancy or misconduct at school, counsel should determine whether the respondent's current school placement is appropriate. If it is not, counsel should identify a more suitable placement. If the current placement is appropriate (or unavoidable), counsel might consider arranging after-school tutoring or counseling. Satisfactory attendance at the new school or participation in the new after-school program would then be made additional conditions of the respondent's probation.

When the request for revocation is based upon alcohol or drug use, counsel should locate a good day-treatment program for substance abusers — or, if the respondent's problems are too severe for day-treatment, a good residential program. The chances of avoiding probation revocation will be greatly increased if counsel can arrange to have the respondent enter the new program before the revocation hearing. See § 38.14 *supra.* If a new program has been arranged and particularly if the respondent has already begun to participate in it, counsel may be able to persuade the probation officer or the prosecutor to withdraw the petition for revocation or at least to hold it in abeyance for a specified period in order to allow the new program time to work. Or counsel can urge the judge at the hearing to take the same wait-and-see approach — to continue the case for a sufficient time to "give the new program a fair chance."

In cases in which revocation is sought on the ground of the respondent's partial or total failure to pay a fine or restitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment require that the "sentencing court . . . inquire into the reasons for the failure to pay. . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment." *Bearden v. Georgia,* 461 U.S. 660, 672-73 (1983). *See, e.g., People in the Interest of C.J.W.,* 727 P.2d 870 (Colo. App. 1986); *M.L. v. State*, 838 N.E.2d 525, 529-30 (Ind. App. 2005); WASH. REV. CODE ANN. § 13.40.200(2) (2014). *See also In re Timothy N.*, 216 Cal. App. 4th 725, 736-38, 157 Cal. Rptr. 3d 78, 86-88 (2014).

§ 39.05 REVOCATION OF PAROLE

A respondent who completes a period of incarceration and is then released on parole (called "aftercare" in some jurisdictions) is subject to the revocation of parole for violation of the

conditions set by the administrative agency that oversees parole. (In various jurisdictions this agency may be named the "Division for Youth," the "Youth Authority," the "Department of Human Services," and so forth.) If parole is revoked, the respondent is returned to incarceration for a term that differs among the jurisdictions.

In some jurisdictions a statute or court rule specifies a maximum term. *See, e.g.,* WASH. REV. CODE ANN. § 13.40.210(4) (2014) ("period of confinement not to exceed thirty days" except in cases of enumerated offenses). In other jurisdictions the respondent can be incarcerated for an indeterminate period, and the agency determines when release is appropriate. Technically, the indeterminate period of incarceration is limited by the date that the judge originally set at disposition as the end of the period of "commitment" or "placement," but many jurisdictions allow the agency to petition the court for an extension of the original term. See § 39.06 *infra.* Moreover, in some jurisdictions, the original term of commitment or placement automatically extends until the youth has turned 18 or 21.

The procedural due process requirements that govern juvenile probation revocation hearings (see § 39.04 *supra*) also govern juvenile parole revocation hearings. *Morrissey v. Brewer,* 408 U.S. 471 (1972); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 989-93 (9th Cir. 2010). *See, e.g.,* WASH. REV. CODE ANN. § 13.40.210(4)(a) (2014); *L.H. v. Schwarzenegger*, 519 F. Supp. 2d 1072, 1081-85 (E.D. Cal. 2007); *In re Kimble*, 114 Ohio App. 3d 136, 142, 682 N.E.2d 1066, 1069 (1996); *State ex rel. J.R. v. MacQueen,* 163 W. Va. 620, 259 S.E.2d 420 (1979); *State ex rel. R.R. v. Schmidt,* 63 Wis. 2d 82, 216 N.W.2d 18 (1974).

Many of the defensive arguments and strategies suggested in § 39.04 for use in probation revocation hearings also apply to parole revocation hearings. In localities where parole revocation hearings are conventionally held before a judge of the juvenile court rather than before the agency, there may be a statutory basis for arguing that only the agency has jurisdiction to conduct the hearing. *See, e.g., In the Matter of J.M.W.,* 411 A.2d 345 (D.C. 1980). Of course, this argument should not be made unless counsel is confident that the respondent's chances for avoiding parole revocation are better with an agency decisionmaker than with the judge. Generally, the respondent will fare better before a judge because the agency is likely to respect the parole officer's recommendation of revocation. However, if the juvenile correctional facility is overcrowded, the respondent's chances of escaping reincarceration may be better with an agency decisionmaker; the agencies are often more responsive to "bed pressure" than is the judiciary.

§ 39.06 EXTENSION OF A TERM OF INCARCERATION

In some jurisdictions a respondent who has been committed for a period of incarceration can be subjected to annual extensions of the commitment until the respondent turns 18 (or, in some jurisdictions, 21) on the grounds of additional need for rehabilitation or continuing need to protect the public. *See, e.g.,* D.C. CODE ANN. § 16-2322(c) (2014); N.Y. FAM. CT. ACT § 355.3 (2014). *Cf. Kenniston v. Department of Youth Services*, 453 Mass. 179, 180, 185, 187 & n.13,

900 N.E.2d 852, 855, 858, 860 & n.13 (2009) (statute authorizing "the continued commitment of a youth in the [Department of Youth Services'] custody for an additional three years after the youth's eighteenth birthday if the department determines that the youth 'would be physically dangerous to the public'" violates substantive due process because the statute "permits extended detention based solely on dangerousness, without any link to a mental condition or defect or an inability to control one's behavior"; moreover, "the statutory requirement that a juvenile be found 'physically dangerous' is unconstitutionally vague" because the "language contains no indication of the nature and degree of dangerousness that would justify continued commitment, and offers the department no guidance on how to make such a determination," which can be affected by "the differences in adolescent and adult decision-making and thought processes, and the additional difficulty these differences create for testing tools designed to assess an adolescent's risk of future dangerousness"); *In the Matter of Michael J.*, 180 Misc. 2d 538, 540-41, 691 N.Y.S.2d 277, 278-79 (N.Y. Fam. Ct., Monroe Cty. 1999) (a respondent who is the subject of a proceeding for an extension of placement "retains certain due process protections, including the right to notice of the hearing" — and accordingly is entitled to a "clear statement[] as to the bases for the request to continue his placement" — and the rights to "be present with counsel and have an opportunity to refute the petition"); *State in the Interest of J.J.*, 427 N.J. Super. 541, 557, 49 A.3d 877, 888 (2012) (when the State seeks to invoke a state statutory procedure for transferring an incarcerated juvenile over the age of 16 from a juvenile facility to an adult correctional facility based on a "'threat[] [to] the public safety'" or other "security" needs, due process requires, "[a]t a minimum," "written notice of the proposed transfer and the supporting factual basis, an impartial decision maker, an opportunity to be heard and to present opposition, some form of representation, . . . and written findings of fact supporting a decision to proceed with the transfer"); *and see Foucha v. Louisiana*, 504 U.S. 71 (1992); *Kansas v. Crane*, 534 U.S. 407 (2002). Practice differs widely among the jurisdictions with regard to how frequently the extension process is actually invoked. In some jurisdictions it is routinely used to extend the terms of large numbers of delinquents who are thought to need further rehabilitation. In other jurisdictions the authorities have reacted to chronic overcrowding in juvenile facilities by reserving the extension option for children who appear to be most severely in need of continued treatment or whose crime or behavior in the institution leads to their being branded as unusually dangerous.

In jurisdictions that permit extensions of a juvenile's term of incarceration, the applicable statute or caselaw usually provides for a hearing at which the state must make a showing to justify the extension and the defense can rebut this showing. If the basis for the requested extension is a need for continued rehabilitative services, counsel should seek out appropriate community-based programs and argue that these are adequate to serve the respondent's needs. See § 38.14 *supra.* Counsel should also thoroughly investigate the services that the respondent has been receiving in the institution. If they are inadequate or inappropriate, counsel can argue that the requested extension of incarceration is unjustifiable because the state has shown itself incapable of actually providing services suitable to the respondent's needs. See § 39.07 *infra.*

§ 39.07 MONITORING CONDITIONS OF CONFINEMENT; SEEKING THE RELEASE OF A RESPONDENT WHO IS NOT RECEIVING APPROPRIATE TREATMENT

As explained in §§ 38.24 and 38.29 *supra,* counsel should ordinarily request that a disposition order placing a respondent in an institutional facility specify the educational, vocational, and other rehabilitative services that the facility must provide the respondent. After the respondent is in the institution, counsel should keep in touch with him or her and ascertain whether s/he is receiving the specified services. If s/he is not, counsel can usually correct the situation by telephoning the administrator of the facility, explaining the problem, and advising the administrator that counsel will seek judicial enforcement of the disposition order unless the services it calls for are initiated promptly. If this does not produce a satisfactory outcome, counsel can file a motion for an order to show cause why the agency should not be held in contempt for failing to honor the court's disposition order.

When the reason for the failure to provide a respondent with the required services is that the facility lacks adequate resources (for example, in the case of a facility that cannot comply with an order for special education services because its teachers are not certified to teach special education or because it is understaffed), counsel may be able to persuade the court that the respondent should be released from incarceration. In many jurisdictions the juvenile code provides for modification or termination of a disposition of commitment, *see, e.g.,* CAL. WELF. & INST. CODE § 778 (2014); D.C. CODE ANN. § 16-2324(a) (2014); N.Y. FAM. CT. ACT § 355.1(1)(b) (2014), and counsel can argue that this relief is appropriate when the facility is unable to provide the services that the judge found were needed and that the respondent's commitment to the facility was intended to procure. The motion should assert that the respondent has a due process right to treatment and, where applicable, a statutory right to treatment under the state's juvenile code. *See, e.g., Nelson v. Heyne,* 491 F.2d 352 (7th Cir. 1974); *Alexander S. By and Through Bowers v. Boyd*, 876 F. Supp. 773 (D. S.C. 1995); *Pena v. New York State Division for Youth,* 419 F. Supp. 203 (S.D.N.Y. 1976), *approved in* 708 F.2d 877 (2d Cir. 1983); *but see Santana v. Collazo,* 714 F.2d 1172 (1st Cir. 1983). *See generally* Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791 (1995). If state law makes no provision for the modification or termination of commitment or if relief is not likely to be obtained through those procedures, counsel can file a petition for habeas corpus seeking the release of the respondent on the ground that the institution is violating his or her constitutional right to treatment. *See Creek v. Stone,* 379 F.2d 106, 109 (D.C. Cir. 1967) (recognizing that a juvenile respondent can petition for habeas relief on the ground that the conditions in the detention facility "vitiate the justification for confinement").

The information that counsel gathers by monitoring the services provided to clients also can be useful in other ways. If counsel uncovers fundamental deficiencies in the treatment services or living conditions at a particular facility, that data may provide the basis for a civil suit (which can take the form of a class action) to improve conditions in the facility. *See generally* MARK I. SOLER, JAMES R. BELL, ELIZABETH J. JAMESON, CAROLE B. SHAUFFER, ALICE C.

SHOTTON & LOREN M. WARBOYS, REPRESENTING THE CHILD CLIENT (1987 & Supp.). In addition, when counsel represents other clients at dispositional hearings, s/he can cite the weaknesses of the facility's services in arguing against placement at the facility.

§ 39.08 SEALING AND EXPUNGEMENT OF CONVICTION RECORDS

Several States provide for "sealing" the records of a juvenile conviction after the respondent has attained the age of majority or after the respondent, although still a juvenile, has remained crime-free for a specified period of time. *See, e.g.,* CAL. WELF. & INST. CODE § 781 (2014); D.C. CODE ANN. § 16-2335 (2014); OHIO REV. CODE ANN. § 2151.358 (2014). Some States also provide for expungement of conviction records after a certain length of time or upon the respondent's attaining the age of majority. *See, e.g.,* CAL. WELF. & INST. CODE §§ 826-826.5 (2014); CONN. GEN. STAT. ANN. § 46b-146 (2014); *In the Matter of the Petition of C.B.*, 122 P.3d 1065 (Colo. App. 2005); *Nelson v. State*, 120 Wash. App. 470, 85 P.3d 912 (2003). ("Expungement" ordinarily entails the physical destruction of the records. "Sealed" records continue to be maintained but are placed in a separate file area rendered inaccessible except under specified extraordinary circumstances.) The sealing and expungement mechanisms may be automatic, or counsel may have to file a motion for a court order activating them. (See also § 37.03 *supra,* dealing with procedures for expunging court and police records in cases in which the respondent was acquitted at trial or in which the charges were dismissed without a trial.)

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