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:

- The maximum length of sentence for severe crimes is greater, sometimes equaling the maximum available for an adult. There are, however, some adult criminal sentences that cannot constitutionally be imposed on a minor. If an offender was below the age of 18 at the time of the crime, the Eighth Amendment prohibits a sentence of death (*Roper v. Simmons*, 543 U.S. 551 (2005)) and also prohibits the imposition of the following types of non-capital sentences:

  (i) A sentence of life imprisonment without the possibility of parole in a nonhomicide case. *Graham v. Florida*, 560 U.S. 48 (2010). *See also Budder v. Addison*, 851 F.3d 1047, 1049, 1055-56, 1059 (10th Cir. 2017) (*Graham* prohibited the sentencing of an offender who was 16 at the time of the crime to "three life sentences and an additional sentence of twenty years, all to run consecutively," which had the effect that "[h]e will not be eligible for parole under Oklahoma law until he has served 131.75 years in prison"; "The Court in *Graham* considered all 'sentences that deny convicts the possibility of parole.' . . . The Court repeatedly referred to

these sentences as 'life without parole sentences,' . . . but a sentencing court need not use that specific label for a sentence to fall within the category considered by the Court."); *People v. Caballero*, 55 Cal. 4th 262, 265, 268-69, 282 P.3d 291, 293, 295-96, 145 Cal. Rptr. 3d 286, 288, 291 (2012) ("a 110-year-to-life sentence imposed on a juvenile convicted of nonhomicide offenses contravenes *Graham*[ ]"); *Henry v. State*, 175 So.3d 675, 679-80 (Fla. 2015) (*Graham* prohibits a term-of-years sentence that has the effect of incarcerating a juvenile nonhomicide offender for his or her "natural life" without "a meaningful opportunity to obtain future early release . . . based on . . . demonstrated maturity and rehabilitation"); *State v. Moore*, 2016-Ohio-8288, 149 Ohio St. 3d 557, at 557, 76 N.E.3d 1127, 1128-29 (2016) ("a term-of-years prison sentence that exceeds the offender's life expectancy" violates *Graham*). *But see Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238, 242 (Mo. 2017) (because "*Graham* concerned 'juvenile offenders sentenced to life without parole solely for a nonhomicide offense[,]'" *Graham*'s prohibition does not apply to "multiple fixed-term sentences, which total beyond a juvenile offender's life expectancy" [emphasis in original]); *compare In re Allen v. Norman*, 570 S.W.3d 601 (Mo. App. 2018).

(ii) The *mandatory* imposition of a sentence of life imprisonment without the possibility of parole for any offender for any offense, including homicide. *Miller v. Alabama*, 567 U.S. 460, 465, 489 (2012); *Montgomery v. Louisiana*, 577 U.S. 190, 193-95 (2016). *See also People v. Gutierrez*, 58 Cal. 4th 1354, 1360-61, 324 P.3d 245, 249, 171 Cal. Rptr. 3d 421, 425 (2014) (the previous judicial construction of a state statute "as creating a presumption in favor of life without parole as the appropriate penalty for juveniles convicted of special circumstance murder" must be abandoned in order to avoid "violat[ing] the Eighth Amendment to the United States Constitution under the principles announced in *Miller*"; "*Miller* requires a trial court, in exercising its sentencing discretion, to consider the 'distinctive attributes of youth' and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' before imposing life without parole on a juvenile offender."); *State v. Booker*, 656 S.W.3d 49, 52-53 (Tenn. 2022) ("Mr. Booker stands convicted of felony murder and especially aggravated robbery – crimes he committed when he was sixteen years old. For the homicide conviction, the trial court automatically sentenced Mr. Booker . . . to life in prison, a sixty-year sentence requiring at least fifty-one years of incarceration. But this sentence does not square with the United States Supreme Court's interpretation of the Eighth Amendment. When sentencing a juvenile homicide offender, a court must have discretion to impose a lesser sentence after considering the juvenile's age and other circumstances.");

Sam v. State, 401 P.3d 834, 859, 860 (Wyo. 2017) ("consecutive sentences of a minimum of 52 years, with release possible when . . . [the juvenile] is 70 years old" are "the functional equivalent of life without parole and violate[ ] . . . *Miller* and its progeny"); *State v. Null*, 836 N.W.2d 41, 45, 70-75 (Iowa 2013) ("*Miller*'s principles are fully applicable to a lengthy term-of-year sentence as was imposed in this case," in which the defendant had to "serve at least 52.5 years of his seventy-five-year aggregate sentence"); *White v. Premo*, 365 Or. 1, 18, 443 P.3d 597, 607 (2019) (holding *Miller* applicable to a minimum sentence of 800 months imposed upon a single homicide conviction); *State v. Zuber*, 227 N.J. 422, 429-30, 152 A.3d 197, 201-02 (2017) ("before a judge imposes consecutive terms that would result in a lengthy overall term of imprisonment for a juvenile, the court must consider the *Miller* factors along with other traditional concerns"; "judges should exercise a heightened level of care before they impose multiple consecutive sentences on juveniles which would result in lengthy jail terms."); *People v. Buffer*, 2019 IL 122327, 137 N.E.3d 763, 434 Ill. Dec. 691 (2019) (noting the desirability of establishing a clear, categorical line for determining whether a term-of-years sentence amounts to a *de facto* LWOP sentence for *Miller* purposes and taking a cue from post-*Miller* legislation to hold that any sentence in excess of 40 years is subject to *Miller*'s requirement that youth and its attendant characteristics be considered in individualizing a juvenile offender's sentence). *But see United States v. Grant*, 9 F.4th 186 (3d Cir. 2021) (en banc) (approving a 65-year sentence for a juvenile convicted of one murder, one attempted murder, RICO conspiracy, and gun- and drug-possession counts, although recognizing that it exceeded his life expectancy); *Brown v. Precythe*, 46 F.4th 879, 887 (8th Cir. 2022) (en banc) (finding no federal constitutional deficiency in Missouri's *Miller*-fix legislation, which authorizes inmates mandatorily sentenced to LWOP as juveniles to apply for parole after 25 years and directs the parole board to consider fifteen factors bearing on the inmate's youthful judgment, subsequent emotional and intellectual development, and efforts toward rehabilitation; "Consideration of these factors provides 'some meaningful opportunity' for an offender to obtain release based on demonstrated maturity and rehabilitation. Missouri provides offenders with advance notice of their parole review, an opportunity to be heard (including through a delegate who may be a lawyer), and an opportunity to submit documents and letters of support. Inmates are interviewed by parole staff before the hearing, and the parole board considers a report from staff that addresses readiness for parole. These reports address maturity and rehabilitation. . . . At a hearing, the inmate and his delegate are permitted to address issues related to the inmate's transition to the community, including 'offender growth,' a topic that readily allows for information about the inmate's maturity and

rehabilitation.").

In *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), the Supreme Court rejected the claim that before a life sentence could be imposed for a homicide committed by a juvenile, the sentencer must make an explicit or implicit finding that the juvenile is permanently incorrigible. Prior to *Jones*, a number of lower courts had interpreted *Miller* as requiring such a finding or had implemented *Miller* by requiring such a finding. *See*, *e.g.*, *White v. Premo*, *supra.* Because the *Jones* opinion emphasizes that "our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder" (*id*. at 1323), it remains to be seen to what extent pre-*Jones* decisions that had cited *Miller* in demanding individualized findings regarding the character and maturity of each juvenile before imposing an LWOP sentence will be cut back after *Jones.* In a federal case which the Supreme Court remanded to the Ninth Circuit for reconsideration in the light of Jones, the Circuit Court reversed its earlier finding of a *Miller* violation (*United States v. Briones*, 35 F.4th 1150 (9th Cir. 2022)), but State courts have more leeway to reaffirm their pre-*Jones* precedents by treating them as based at least in part on state-law grounds. When invoking those precedents, counsel should emphasize anything in the respective opinions which suggests that they were not viewed by the authoring court as compelled by the constitutional rule of *Miller* but instead were thought to be appropriate as a matter of state law in implementing *Miller*'s underlying recognition that juvenile sentencing should be individualized and should take account of the defendant's level of maturity. State cases which did not require findings of incorrigibility but did require that the record reflect consideration of a juvenile's maturity level – not merely his or her chronological age – will be particularly helpful in arguing that the latter requirements survive *Jones*. *Compare Windom v. State*, 162 Idaho 417, 398 P.3d 150 (2017) (ordering resentencing where the trial court imposed a life-without-parole sentence for murder after stating "'I have considered the nature of the offense. I have considered the mental health issues. I have considered mitigating and aggravating factors. I have considered in mitigation, for example, the relative youth. I have considered the fact that he does not have a long criminal record.'" (*Id*. at 424, 398 P.3d at 157.) "*Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.' Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects '"unfortunate yet transient immaturity."'" *Id*. at

423, 398 P.3d at 156. "[T]he sentencing hearing did not show that evidence was presented regarding the factors required by *Miller*. Those factors must be individualized for the juvenile being sentenced." *Id*. at 424, 398 P.3d at 157.), *with Johnson v. State*, 162 Idaho 213, 225, 395 P.3d 1246, 1258 (2017) (*Miller*'s requirement is satisfied if the sentencing court hears evidence including expert testimony regarding the immaturity of juveniles; it needs "not specifically find that . . . [the juvenile] was 'irreparably corrupt'").

Other cases in which lower courts had followed up on *Miller* by modifying pre-*Miller* procedures when the offender was younger than 18 at the time of the crime may or may not be adversely impacted by *Jones*. *See, e.g.*, *State v. Houston-Sconiers,* 188 Wash. 2d 1, 9, 391 P.3d 409, 414 (2017) ("Because 'children are different' under the Eighth Amendment and hence "criminal procedure laws" must take the defendants' youthfulness into account, sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there."); *People v. Holman*, 2017 IL 120655, 91 N.E.3d 849, 861-62, 418 Ill. Dec. 889, 901-02 (2017) (rejecting the view that *Miller v. Alabama*, *supra*, applies "to only mandatory life sentences," and "hold[ing] that *Miller* [also] applies to discretionary sentences of life without parole for juvenile defendants"); *Commonwealth v. Batts*, 640 Pa. 401, 411, 163 A.3d 410, 415-16 (2017) ("we . . . conclude that to effectuate the mandate of *Miller* and *Montgomery*, procedural safeguards are required to ensure that life-without-parole sentences are meted out only to 'the rarest of juvenile offenders' whose crimes reflect 'permanent incorrigibility,' 'irreparable corruption' and 'irretrievable depravity,' as required by *Miller* and *Montgomery*. Thus, . . . we recognize a presumption against the imposition of a sentence of life without parole for a juvenile offender. To rebut the presumption, the Commonwealth bears the burden of proving, beyond a reasonable doubt, that the juvenile offender is incapable of rehabilitation."); *Aiken v. Byars*, 410 S.C. 534, 542, 545, 765 S.E.2d 572, 576, 578 (2014) (in "South Carolina whose sentencing scheme *permits* a life without parole sentence to be imposed on a juvenile offender but does not *mandate* it," the rule of "*Miller* requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored"); *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016) (*Miller* barred the transfer, from juvenile to adult court, of a defendant who was below 18 at the time of the crime, for prosecution for an offense that carried a mandatory sentence of either death or life imprisonment); *In*

the Matter of Hawkins v. New York State Dep't of Corrections and Community Supervision, 140 A.D.3d 34, 40, 30 N.Y.S.3d 397, 400-01 (N.Y. App. Div. 3d Dep't 2016) (annulling the Parole Board's denial of parole and ordering "a de novo parole release hearing" because *Miller* and *Montgomery* give rise to "an analogous procedural requirement . . . at the parole release hearing stage" that, "[f]or those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue," and "[h]ere, neither the hearing transcript nor the [Parole] Board's written determination . . . reflects that the Board met its constitutional obligation to consider petitioner's youth and its attendant characteristics in relationship to the commission of the crime."); *State v. Hauser*, 2019-341 (La.App. 3 Cir. 12/30/19), 317 So.3d 598, 622-23 (La. App. 2019) (where a juvenile sentenced to LWOP for murder before *Miller* claimed that *Miller* entitled him to have the sentences modified to allow parole, the Court of Appeal reverses a trial court's postconviction ruling denying relief: "While Defendant's crimes seem every bit as heinous as the cases denying parole eligibility, he has the benefit of history that has shown tremendous evidence of rehabilitation. Defendant has compiled a stellar, model, and exemplary prison record. None of the evidence offered at the resentencing hearing suggested Defendant has not been rehabilitated. Again, the Supreme Court emphasized that '[t]he opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition – that children who commit even heinous crimes are capable of change.' . . . ¶ . . . Defendant has provided sufficient evidence to show he is not irreparably corrupt and is entitled to resentencing to two concurrent life sentences with the possibility of parole."). *And see Hill v. Whitmer*, 2020 WL 2849969, at *1 (E.D. Mich. 2020) ("All but the most irredeemable juvenile offenders are entitled to a meaningful opportunity to obtain release based on their demonstrated maturity and rehabilitation. Access to the very programming that enables juvenile offenders to make such a showing of rehabilitation – and that can play a significant role in parole hearings – is an important component of a meaningful opportunity. Here, the evidence demonstrates that class members are being denied timely access to programming and that noncompletion of programming has served as a basis for denying or deferring parole for some class members. The fact that some class members are thereafter provided a later opportunity to obtain parole is of no moment, as states must ensure that *all* opportunities to obtain release are meaningful."). And of course state-court decisions which drew upon their state constitutions to expand the protections of *Miller* in various ways remain unaffected by *Jones*. *See, e.g.*, *Commonwealth v. Perez*, 477 Mass. 677, 679, 80 N.E.3d 967, 970

(2017) ("[W]here a juvenile is sentenced for a nonmurder offense or offenses and the aggregate time to be served prior to parole eligibility exceeds that applicable to a juvenile convicted of murder, the sentence cannot be reconciled with [Massachusetts Constitution] art. 26 unless, after a hearing on the factors articulated in *Miller v. Alabama*, 567 U.S. 460, 477-478 . . . (2012) (*Miller* hearing), the judge makes a finding that the circumstances warrant treating the juvenile more harshly for parole purposes than a juvenile convicted of murder."); *Diatchenko v. District Attorney*, 466 Mass. 655, 658-59, 1 N.E.3d 270, 275-76 (2013) (the 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 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"); *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016) (construing the state constitution to "adopt a categorical rule that juvenile offenders may not be sentenced to life without the possibility of parole"); *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014) ("[W]e conclude all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional under the cruel and unusual punishment clause in article I, section 17 of our constitution. Mandatory minimum sentences for juveniles are simply too punitive for what we know about juveniles."); *State v. Bassett*, 192 Wash. 2d 67, 72-73, 428 P.3d 343, 345-46 (2018) (striking down "the provision of our state's *Miller*[ ]-fix statute that allows 16- and 17-year-olds to be sentenced to life without parole," and holding that "sentencing juvenile offenders to life without parole or early release constitutes cruel punishment and therefore is unconstitutional under article I, section 14 of the Washington Constitution").

Favorable post-*Jones* state constitutional decisions include *Fletcher v. State*, 2023 WL 3402874 (Alaska App. 2023) (an opinion containing a comprehensive survey of judicial and legislative developments concerning LWOP sentences for juveniles in the wake of *Miller v. Alabama*; holding that a sentence of 135 years of imprisonment imposed on a 15-year-old girl, with discretionary release in 45 years, is a *de facto* LWOP sentence (2023 WL 3402874, at *26-30); rejecting *Jones v. Mississippi* as a matter of state constitutional law; and concluding that the cruel-and-unusual prohibition in the Alaska state constitution "requires more than just . . . [*Jones*'s] unverified assumption that the sentencing court will apply the correct criteria and impose a constitutional sentence. We therefore hold, as a number of jurisdictions have, that the constitutional principles underlying *Miller* apply to discretionary life

without parole sentences (or their functional equivalents). We further hold that, before a sentencing court can impose a sentence of life without parole (or its functional equivalent) on a juvenile offender tried as an adult, the Alaska Constitution requires a sentencing court to affirmatively consider the juvenile offender's youth and its attendant characteristics and to provide an on-the-record sentencing explanation that explicitly or implicitly finds that the juvenile offender is one of the 'rare' juvenile offenders 'whose crime reflects irreparable corruption.'" 2023 WL 3402874, at *18); *and State v. Comer*, 249 N.J. 359, 401, 403, 266 A.3d 374, 399-400 (2022) ("Against the backdrop of the United States Supreme Court's pronouncements on juvenile offenders and our prior holding in [*State v.*] *Zuber*, [227 N.J. 422, 152 A.3d 197 (2017),] the existing statutory scheme [for sentencing juveniles to "lengthy periods of incarceration"] runs afoul of Article I, Paragraph 12 of the State Constitution. It presents the very situation this Court highlighted in *Zuber*: the imposition of lengthy sentences with substantial periods of parole ineligibility on juveniles, which cannot be reviewed at a later time. . . . ¶ . . . Allowing minors a later opportunity to show they have matured, to present evidence of their rehabilitation, and to try to prove they are fit to reenter society would address the problem posed. . . . ¶ To save the statute from constitutional infirmity, we therefore hold under the State Constitution that juveniles may petition the court to review their sentence after 20 years."; "At the hearing on the petition, judges are to consider the *Miller* factors – including factors that could not be fully considered decades earlier, like whether the defendant still fails to appreciate risks and consequences, and whether he has matured or been rehabilitated. . . . ¶ A defendant's behavior in prison since the time of the offense would shed light on those questions. . . . In particular, the trial court should consider evidence of any rehabilitative efforts since the time a defendant was last sentenced. . . . ¶ After evaluating all the evidence, the trial court would have discretion to affirm or reduce a defendant's original base sentence within the statutory range, and to reduce the parole bar below the statutory limit to no less than 20 years."). *And see In the Matter of the Personal Restraint of Monschke*, 197 Wash. 2d 305, 322, 326, 482 P.3d 276, 285, 287 (2021) (reasoning from *Miller*, the court applies the state constitution to forbid mandatory LWOP sentences for defendants younger than 21: scientific studies cited in the opinion make it clear that "'biological and psychological development continues into the early twenties, well beyond the age of majority'" and show "that no meaningful neurological bright line exists between age 17 and age 18 or, as relevant here, between age 17 on the one hand, and ages 19 and 20 on the other hand."); *People v. Parks,* 510 Mich. 225, 987 N.W.2d 161 (2022) (a post-*Jones* opinion recognizing that the imposition of a mandatory LWOP sentence on an 18-year-old does

not violate the federal Constitution but holding that it does violate the Michigan Constitution's ban on cruel or unusual punishment "because it fails to take into account the mitigating characteristics of youth, specifically late-adolescent brain development" (*id*. at 232, 987 N.W.2d at 164-65): "consider[ing] the scientific and social-science research regarding the characteristics of the late-adolescent 18-year-old brain" (*id*. at 248, 987 N.W.2d at 173), "the Michigan Constitution requires that 18-year-olds convicted of first-degree murder receive the same individualized sentencing procedure . . . as juveniles who have committed first-degree murder" (*id*. at 244, 987 N.W.2d at 171).

- The place of confinement may be an adult correctional facility. Many jurisdictions do, however, 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. *See generally* Charles Puzzanchera & Sean Addie, *Delinquency Cases Waived to Criminal Court, 2010* (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Feb. 2014). *See, e.g.*, *State v. Mohi*, 901 P.2d 991, 998, 1004 (Utah 1995) (striking down the "direct-file" provision of the Utah juvenile court act, which gave "prosecutors undirected discretion to choose where to file charges against juvenile offenders," because the statute violated the Utah constitution's "uniform operation of laws" provision by "permit[ting] two identically situated juveniles, even co-conspirators or co-participants in the same crime, to face radically different penalties and consequences without any statutory guidelines for distinguishing between them"). 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"); *Ulla U. v. Commonwealth*, 485 Mass. 219, 224-25, 149 N.E.3d 713, 719-20 (2020) ("we have recognized that the transfer hearing procedure . . . could, in theory, be misused to proceed in an adult court against a person who committed an offense as a juvenile. Under this scenario, the Commonwealth intentionally could delay proceeding against a juvenile until after his or her nineteenth birthday, at which point the juvenile would have '"aged out" of the Juvenile Court's jurisdiction.' . . . Such inexcusable or bad faith delay would deprive a juvenile of certain advantages of the juvenile justice system. . . . In the event that such delay occurs, . . . we have provided a potential remedy for an aggrieved juvenile. Because inexcusable or bad faith delay could implicate due process concerns, . . . the 'acknowledged remedy for delay' is dismissal of the charging instrument"). *Cf. Noah v. Commonwealth*, 489 Mass. 498, 498-99, 502, 184 N.E.3d 784, 785, 788 (2022) (the trial court abused its discretion by granting "a continuance sought by the Commonwealth for the express purpose of delaying resolution of the case past the juvenile's eighteenth birthday" so that the juvenile would be subject to a potential sentence of twelve months in custody (which can be imposed on "a juvenile whose case is disposed of after his or her eighteenth birthday") rather than a potential sentence of "twenty days": "Where a request for a continuance has nothing to do with the orderly disposition of the case, but rather is directed at the timing of the juvenile's impending eighteenth birthday, and at extending the time of commitment beyond that ordinarily authorized by statute, the ample discretion allowed Juvenile Court judges is tightly constrained. A continuance may only be allowed in such circumstances if it is necessary to ensure the rehabilitation of the juvenile and express findings are made to that effect."). *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. See also §§ 11.03(a) *supra*, 14.29(a) *infra*. 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 In re D.M.*, 140 Ohio St. 3d 309, 309, 313, 18 N.E.3d 404, 406, 409 (2014) (in transfer ("bindover") hearings, "a prosecuting attorney is under a duty imposed by the Due Process Clauses of the Ohio Constitution and the United States Constitution and by Juv.R. 24(A)(6) to disclose to a juvenile respondent all evidence in the state's possession that is favorable to the juvenile and material either to guilt, innocence, or punishment"); D.C. CODE § 16-2307(f) (2023) (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 (2023); *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(2)(b)(A) (2023); *but see Commonwealth v. Taylor*, 2020 WL 2532223, at *1, *17 (Pa. 2020) (the trial court violated the accused's Fifth Amendment Privilege Against Self-Incrimination by relying in part on "the minor's decision not to admit culpability to the delinquent acts alleged" to conclude that the minor was not amenable to treatment services and therefore should be transferred to adult court: "The constitutional privilege against compelled self-incrimination 'is a fundamental one,' and any 'practice which exacts a penalty for the exercise of the right is without justification and unconstitutional.' . . This concern is no less significant when the penalty contemplated is the transfer of a minor to adult court for criminal prosecution, where the pain of imprisonment looms overhead like the Sword of Damocles. Because the juvenile court exacted a price for Taylor's exercise of his rights under the Fifth Amendment, its decision reflects a misapplication of the law, and thus an abuse of discretion.")).

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) (2023); *In the Matter of J.C.N.-V.*, 359 Or. 559, 562, 597-99, 2016 WL 3030203, at *1, *19-*20 (2016) ("Under the relevant statutes, ORS 419C.352 and ORS 419C.349, a youth under the age of 15 who is alleged to have committed murder may be waived into adult court only if, at the time of the conduct, he or she 'was of sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved.'"; "[T]he requirement that ORS 419C.349(3) imposes is not equivalent to a requirement that a youth have criminal capacity. Rather, to authorize waiver of a youth who otherwise is eligible for waiver under ORS 419C.349 or ORS 419C.352, a juvenile court must find that the youth possesses sufficient adult-like intellectual, social and emotional capabilities to have an adult-like understanding of the

significance of his or her conduct, including its wrongfulness and its consequences for the youth, the victim, and others. . . . ¶ . . . [T]he legislature intended that a juvenile court take measure of a youth and reach an overall determination as to whether the youth's capacities are, on the whole, sufficiently adult-like to justify a conclusion that the youth was capable of appreciating, on an intellectual and emotional level, the significance and consequences of his conduct. ¶ In making that determination, a juvenile court will be called on to consider its own knowledge and assessment of the capabilities of typical adults and the capabilities of the particular youth who is subject to waiver and any evidence on that subject that the parties may offer, such as the evidence that the juvenile court in this case considered. With regard to the capabilities of typical adults, a court could, for instance, consider its own understanding and evidence that the parties might offer indicating that adults have an ability to 'measure and foresee consequences,' . . . and are significantly better than adolescents at accurately perceiving and weighing risks and benefits. . . . ¶ . . . [T]the court must then determine whether the particular youth's capabilities are sufficiently similar to those of a typical adult that the court can conclude that the youth has the requisite appreciation of the nature and quality of the conduct involved. That determination will again require the court to consider its own assessment of the particular youth's capabilities, including evidence, such as the court in this case considered, of the actions in which the youth engaged and the youth's history. A court may reach a conclusion about a youth's capabilities from inferences that the court draws from that evidence and from any expert testimony that the parties may offer. Such evidence will necessarily be multi-faceted; there is no one capability that a youth must have to demonstrate that the youth meets the requisite standard. Instead, a court may well have to compile and balance competing evidence relating to a youth's capabilities"). *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) (2023). 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) (2023) (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).