

Chapter 2

Introduction to Delinquency Practice: The Role of Defense Counsel

§ 2.01 OVERVIEW OF THE CHRONOLOGY OF A DELINQUENCY CASE

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

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

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

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

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

§ 2.01(b) The Initial Hearing

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

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

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

§ 2.01(c) Preparation of the Case for Trial

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

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

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

Various events can derail a case from progressing to trial. First of all, there are a number of ways in which the case may be terminated favorably to the respondent. The Petition may be withdrawn by the prosecutor because further police investigation has shown that the case lacks merit, or because of witness problems, or for a host of other reasons. The case may be dismissed by the court in response to a defense motion, such as a motion to dismiss the Petition for legal insufficiency (see Chapter 17) or a motion to dismiss for want of prosecution (see § 15.03 *infra*). A motion for diversion can result in the case being removed from the court calendar, held in abeyance for a designated period of time, and ultimately dismissed if the respondent complies with all of the conditions of the diversion order (see Chapter 19).

Another event that can derail the case from progressing to trial is a proceeding instituted by the state to transfer or waive the client to adult court. If the prosecution succeeds in this venture, the case will be transferred to adult court, and the juvenile case will end. Since the

sentences that can be meted out in adult court are greater than those in juvenile court, counsel will almost invariably oppose transfer. A fuller description of the transfer process and arguments that can be made in opposition to transfer are contained in Chapter 13.

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

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

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

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

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

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

(Chapter 24); and motions to suppress identification testimony (Chapter 25).

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

§ 2.01(f) The Trial

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

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

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

§ 2.01(g) Disposition

More than any other stage of the process, the dispositional phase of a juvenile case differs markedly from its adult criminal counterpart. The express goal of juvenile dispositions is rehabilitation of the offender, and dispositional hearings therefore focus upon the needs of the child rather than the nature of the crime. As a result, psychological and social-work assessments of the juvenile’s potential for rehabilitation can spell the difference between probation and incarceration. Accordingly, in cases in which incarceration appears at the outset to be a significant possibility, counsel will want to begin gathering social information about the client as early as possible, enlisting the aid of mental health experts and social workers when needed. In these cases, counsel should also explore the wide variety of community-based and residential programs that are available to juvenile offenders in most jurisdictions. Chapter 38 describes the range of sentencing alternatives, the steps that counsel should take in preparing for a

dispositional hearing, and strategies for conducting the hearing.

§ 2.01(h) Appeal and Post-Disposition Proceedings

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

§ 2.02 JUVENILE COURT TERMINOLOGY

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

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

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

In addition to the virtually universal juvenile court vocabulary, several jurisdictions have developed their own unique terms. For example, depending upon the jurisdiction, pretrial detention may be called "remand" or "stepback"; the probation officer who appears at the Initial Hearing may be called the "Court Liaison Officer" or "Intake Probation Officer"; the agency that oversees detention facilities may be called the "Department of Human Services," "Social Services Administration," "Department of Juvenile Justice," or "Division for Youth." Since it is

impossible to cover all of these idiosyncrasies, this MANUAL will use only those terms that have become an established part of the universal juvenile court vocabulary, leaving it to the reader to uncover local variations.

§ 2.03 THE ROLE OF DEFENSE COUNSEL IN A DELINQUENCY CASE

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

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

The canons of ethical conduct explicitly incorporate this conception of defense counsel's role in juvenile delinquency cases. The Model Rules of Professional Conduct require that attorneys "maintain a normal client-lawyer relationship" with clients who are minors, AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14(a) (2023), even "children as young as five or six years of age, and certainly those of ten or twelve." *Id.* Comment to Rule 1.14(a). As long as the client is not so incompetent as to be unable to "adequately act in the client's own interest," *id.*, Rule 1.14(b), s/he must be accorded the prerogative of making

“decisions concerning the objectives of representation.” *Id.*, Rule 1.2(a). If counsel reasonably believes that the client’s young age or another factor such as mental impairment so severely “diminish[es]” the client’s “capacity to make adequately considered decisions in connection with the representation . . . [that] a normal client-lawyer relationship with the client” cannot be maintained and if counsel furthermore “reasonably believes” that the client “is at risk of substantial physical, financial or other harm unless action is taken and [that the client] cannot adequately act in the client’s own interest,” then counsel may take “reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.” *Id.*, Rule 1.14(a), (b). *See also* INSTITUTE OF JUDICIAL ADMINISTRATION – AMERICAN BAR ASSOCIATION JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Standard 6.7 & Commentary (1980); Fredrick E. Vars, *The Value of a Guardian Ad Litem in a Sell Proceeding*, 43-MAR THE CHAMPION 16 (2019). “In determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as: the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.” AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Comment to Rule 1.14. *See also* Marty Beyer, *What’s Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel*, 58 GUILD PRACTITIONER 112 (2001); Barry Kozak, *The Forgotten Rule of Professional Conduct – Representing a Client with Diminished Capacity*, 49 CREIGHTON L. REV. 827 (2016); Melinda G. Schmidt, N. Dickon Reppucci & Jennifer L. Woodard, *Effectiveness of Participation as a Defendant: The Attorney-Client Relationship*, 21 BEHAV. SCI. & L. 175 (2003). “In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client’s best interests and the goals of intruding into the client’s decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client’s family and social connections.” AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Comment to Rule 1.14. *See also* ROBIN WALKER STERLING, ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT (National Juvenile Defender Center 2009); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 255-57, 270-80 (2005); Patricia Puritz & Robin Walker Sterling, *The Role of Defense Counsel in Delinquency Court*, 25 CRIM. JUST. 16 (Spring 2010).

In juvenile court, as in adult court, “[c]ertain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.” AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, DEFENSE FUNCTION (4th ed. 2017), Standard 4-5.2(a), *Control and Direction of the Case*. “The decisions

ultimately to be made by a competent client, after full consultation with defense counsel, include: ¶ (i) whether to proceed without counsel; ¶ (ii) what pleas to enter; ¶ (iii) whether to accept a plea offer; ¶ (iv) whether to cooperate with or provide substantial assistance to the government; ¶ (v) whether to waive jury trial; ¶ (vi) whether to testify in his or her own behalf; ¶ (vii) whether to speak at sentencing; ¶ (viii) whether to appeal; and ¶ (ix) any other decision that has been determined in the jurisdiction to belong to the client.” *Id.*, Standard 4-5.2(b). *See also McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (“Trial management is the lawyer’s province: Counsel provides his or her assistance by making decisions such as ‘what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.’ . . . Some decisions, however, are reserved for the client – notably, whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal.”); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“[i]t is . . . recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal”); *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *Garza v. Idaho*, 139 S. Ct. 738, 746, 748 (2019); *Cooke v. State*, 977 A.2d 803, 809, 843 (Del. 2009) (“Here, defense counsel pursued a ‘guilty but mentally ill’ verdict over Cooke’s vociferous and repeated protestations that he was completely innocent and not mentally ill. This strategy deprived Cooke of his constitutional right to make the fundamental decisions regarding his case.”; “We conclude that defense counsel’s strategy infringed upon the defendant’s personal and fundamental constitutional rights to plead not guilty, to testify in his own defense, and to have the contested issue of guilt beyond a reasonable doubt decided by an impartial jury.”); *United States v. Read*, 918 F.3d 712 (9th Cir. 2019) (although the defendant was not mentally competent to represent himself, his attorney could not present a defense of insanity over his objection consistently with *McCoy*); *People v. Bloom*, 12 Cal. 5th 1008, 1015, 508 P.3d 737, 745, 292 Cal. Rptr. 3d 769, 777-78 (2022) (“At trial, defense counsel conceded Bloom’s responsibility for the deaths of all three victims in an effort to pursue a mental capacity defense to the murder charges. Bloom, however, was willing to accept responsibility only for the killing of his father and expressly objected to admitting responsibility for the deaths of the other two victims. In conceding responsibility for these victims against Bloom’s wishes, defense counsel violated Bloom’s Sixth Amendment right to choose the fundamental objectives of his defense under *McCoy*”); *State v. Tribble*, 193 Vt. 194, 204, 67 A.3d 210, 216 (2012) (counsel cannot raise a diminished-capacity defense over the defendant’s objection, nor may counsel waive the defendant’s right to confrontation by “stipulat[ing] to allow the State to take a preservation deposition of a critical witness for use in lieu of live testimony at trial”); *People v. Flores*, 34 Cal. App. 5th 270, 273, 246 Cal. Rptr. 3d 77, 79 (2019) (counsel improperly “overrode Flores’s stated goal of maintaining his innocence of the alleged acts. Instead, in pursuit of the understandable objective of achieving an acquittal, . . . [counsel] conceded the actus reus of the charged crimes [in an attempted vehicular murder trial by “conced[ing] the act of driving and instead assert[ing] that Flores never formed the premeditated intent to kill necessary for first degree murder,” and then, “at a subsequent trial on weapons possession charges, . . . conced[ing] that Flores possessed certain firearms, instead arguing that the possession was not ‘knowing’ because Flores did not understand the prohibited nature of the weapons”]. Although any reasonable lawyer might agree

with counsel’s judgment, *McCoy* instructs that this is a decision for the client to make.”); *State v. Humphries*, 181 Wash. 2d 708, 714, 336 P.3d 1121, 1124 (2014) (a defense attorney may not “stipulate an element of the crime [at trial] . . . over the defendant’s known and express objection”); *State v. Luby*, 904 N.W.2d 453, 455 (Minn. 2017) (“defense counsel provided ineffective assistance by conceding the only disputed elements of the charged offenses – premeditation and intent – without his consent”); *State v. Brown*, 2018-01999 (La. 9/30/21), 330 So.3d 199, 226 (La. 2021) (in a capital trial the defendant instructed his attorney not to call the defendant’s mother as a witness in mitigation at the penalty stage; when the lawyer insisted that the mother be called, the defendant requested that he be permitted to discharge the lawyer and represent himself; the trial judge informed the defendant that he could not limit the lawyer’s choice of witnesses if he continued to be represented by counsel: he was required to choose between allowing the lawyer to call his mother or waiving the right to counsel and proceeding *pro se* in the penalty trial; the defendant chose to proceed *pro se* and was sentenced to death; the Louisiana Supreme Court holds his *Faretta* waiver (see § 1.4 *infra*) invalid because the trial judge misinformed the defendant regarding his options: it joins “[o]ther jurisdictions [that] have similarly held that a capital defendant’s right to instruct his counsel not to present mitigating evidence encompasses the right to limit the amount and/or type of mitigating evidence counsel may present.”); *Figueroa-Sanabria v. State*, 2023 WL 4246244 (Fla. 2023) (same ruling where a capital defendant wanted no mitigation evidence presented at the penalty trial). Counsel should advise the client regarding all of these issues that are ultimately for the client to decide. See *McCoy v. Louisiana*, *supra*, 138 S. Ct. at 1509 (“Counsel . . . must . . . develop a trial strategy and discuss it with her client, . . . explaining why, in her view, conceding guilt [or other strategic courses] would be the best option.”); counsel should thoroughly research and investigate all legal and factual matters bearing on available options and should advise the client of that information together with each option and its consequences; and counsel may also urge the client forcefully to choose the options that counsel believes to be in the client’s best interests. However, particularly when it comes to defining those interests – determining the ultimate goals that should be pursued in the litigation – the client has the last word. See Colin Miller, *The Real McCoy: Defining the Defendant’s Right to Autonomy in the Wake of McCoy v. Louisiana*, 53 LOYOLA U. CHI. L. J. 405 (2022); Natalia Hamilton, Note, *The Right to Decide An Attorney is Wrong: The Extent of a Defendant’s Right to Control the Objective of the Defense and Reject Counsel’s Trial Strategy*, 74 BAYLOR L. REV. 285 (2022). For thoughtful reflections on the moral and ethical morass that counsel must navigate in cases of mentally disturbed clients who insist upon courses of action that counsel views as severely self-damaging, see Steve Zeidman, *Whose Case Is It Anyway? Florida v. Nixon and McCoy v. Louisiana: Pro-Defendant or Pro-Government?*, 37-SUM CRIMINAL JUSTICE 26 (2022).

In other matters (designing and implementing strategy, formulating the client’s legal contentions, selecting evidence and shaping its presentation, and so forth), the bottom-line judgments are for counsel to make. “An attorney undoubtedly has a duty to consult with the client regarding ‘important decisions,’ including questions of overarching defense strategy. . . . That obligation, however, does not require counsel to obtain the defendant’s consent to ‘every tactical decision.’ *Taylor v. Illinois*, 484 U.S. 400, 417-418 . . . (1988) (an attorney has authority

to manage most aspects of the defense without obtaining his client’s approval).” *Florida v. Nixon*, *supra*, 543 U.S. at 187. *See also United States v. Rosemond*, 958 F.3d 111, 122 (2d Cir. 2020) (“[c]onceding an element of a crime while contesting the other elements falls within the ambit of trial strategy”); *Christian v. Thomas*, 982 F.3d 1215 (9th Cir. 2020) (alternative ground) (counsel who followed his client’s instructions to contest identity and argue that the client was not the perpetrator of a murder did not violate *McCoy* by arguing self-defense as an alternative theory for acquittal); *and see Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (“counsel must take all reasonable lawful means to attain the objectives of the client” while remaining obedient to the applicable rules of professional conduct, such as the prohibition against knowingly presenting perjurious testimony).

The preceding principles, honed by scholars and practitioners, provide an indispensable compass for defense attorneys as they try to navigate the complex world of juvenile delinquency practice. Yet, even the most experienced, committed defense attorneys will admit to sometimes feeling baffled and frustrated by difficulties in dealing with particular clients. These include, for example, the client who seems hell-bent on doing something that is tactically dangerous; the client who is antagonistic to counsel for no apparent reason (or at least not one that is evident to counsel); and sometimes simply a client whom counsel personally dislikes. In such situations, it is useful for attorneys to remind themselves that juvenile delinquency respondents usually are under extreme stress, not only because of the charge that hangs over their heads but also because of a variety of difficult life circumstances that comprise the background for the charge. *See generally* STEPHEN ELLMANN, ROBERT D. DINERSTEIN, ISABELLE R. GUNNING, KATHERINE R. KRUSE & ANN C. SHALLECK, *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 34-47 (2009); *see also id.* at 6-7 (explaining the ideal of client-centeredness); Heather M. Harris, *Building Holistic Defense: The Design and Evaluation of a Social Work Centric Model of Public Defense*, 31 (No. 6) *CRIMINAL JUSTICE POLICY REVIEW* 800 (2020). Also, counsel needs to keep in mind that a client’s decisions about the case, including decisions regarding such fundamental matters as whether or not to enter a guilty plea, may be influenced by a host of complicated feelings about family and self that the client may not feel comfortable sharing with a stranger like counsel, however well-meaning counsel may be. *See, e.g.*, Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 *MICH. L. REV.* 485, 570-75 (1994). Defense attorneys should approach this work with a humble recognition of the limits of their ability to understand the circumstances of their clients’ lives and relationships, and should reconcile themselves to the sometimes painful reality that faithful adherence to the ethos of defense work requires providing the best possible defense even (and perhaps especially) to the most difficult clients. They should also be aware of the damaging effects that the stresses and painful exposures of their own lives may have on their ability to maintain a dispassionate perspective on their clients. *See, e.g.*, Amy F. Kimpel, *Violent Videos: Criminal Defense in a Digital Age*, 37 *GA. ST. U. L. REV.* 305 (2021).

Some commentators have argued that defense attorneys should view the “client” in delinquency cases as being the parent of the allegedly delinquent child. *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 118-29 (1979).

The untenability of this position is evident when one considers that the prerogative of the “client” to define the “objectives of representation” (see AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, *supra*, Rule 1.2(a)) includes such crucial judgments as the decision to plead guilty, accepting an adjudication of delinquency without putting the prosecution to its proof. The courts have recognized that the rights of a child which are affected by these decisions are personal to him or her and cannot be waived by his or her parent or guardian. See, e.g., *Smith v. State*, 484 So.2d 560, 561 (Ala. Crim. App. 1986); *State v. Lee*, 298 Ga. 388, 389, 782 S.E.2d 249, 250 (2016); *In re Christopher T.*, 129 Md. App. at 47, 740 A.2d at 79; *In re S.W.T.*, 277 N.W.2d 507, 512-13 (Minn. 1979); *In the Matter of Butts*, 157 N.C. App. 609, 614, 582 S.E.2d 279, 283 (2003). Accordingly, it is the child, and not the parent or guardian, who is the “client,” see *In re Henderson*, 199 N.W.2d 111, 115 (Iowa 1972); Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 88-90 (1984); Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836 (2006), except perhaps in those rare cases in which the child is incompetent and the parent or guardian has been appointed guardian *ad litem* in the delinquency proceedings, see § 12.19(b) *infra*. See also IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, *supra*, Standards 6.1, 6.3, 6.5 & Commentary.

§ 2.04 THE IMPORTANCE OF WATCHING FOR OPPORTUNITIES TO MAKE ARGUMENTS BASED ON THE UNIQUE NATURE OF THE JUVENILE COURT SYSTEM OR THE UNIQUE NATURE OF ADOLESCENCE

§ 2.04(a) Challenging Aspects of State or Local Procedure as Inconsistent with the Essence of the Juvenile Court System

The Supreme Court’s acceptance of a specialized court system for juveniles in *In re Gault*, 387 U.S. 1 (1967), and the Court’s willingness in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) to deny juveniles the adult defendant’s fundamental right to a jury trial because it might jeopardize “the juvenile court’s assumed ability to function in a unique manner” (*id.* at 547; see § 21.01 *infra*) presuppose that the juvenile court system actually operates in the protective manner assumed in *McKeiver*. See, e.g., *In re D.R.*, 2022-Ohio-4493, 2022 WL 17723951, at *1 (Ohio 2022) (“Ohio’s juvenile-justice system . . . seeks to care for, protect, and rehabilitate children while at the same time ensure public safety and accountability for wrongdoing by children. . . . These goals do not perfectly align, and often, in our attempt to achieve them, children in the juvenile system are caught between the two, receiving ‘the worst of both worlds,’ being afforded neither the full protections given to adults in criminal courts nor the individualized care and treatment required to rehabilitate them as juveniles. *Kent v. United States*, 383 U.S. 541, 556 (1966). ¶ The hybrid nature of juvenile courts – combining aspects of both the adult criminal-justice system and the *parens patriae* doctrine of protecting children – requires nuanced and balanced procedures ¶ A juvenile court’s ability to individually assess and treat juvenile offenders is a key element to maintaining fairness in our juvenile-justice system. So, too, is shielding juveniles from carrying the consequences and stigma of their juvenile delinquency into

adulthood. . . . And the juvenile-justice system values rehabilitation over punishment.”).

Accordingly, counsel should be alert to the possibility of raising a Due Process challenge to a statute, rule, or procedure that could result in a respondent’s being placed in an adult correctional facility as a result of a delinquency adjudication (*see, e.g., In re C.B.*, 708 So.2d 391, 392, 400 (La. 1998) (“a statute authorizing the Department of Public Safety and Corrections to promulgate a regulation requiring juveniles who have been adjudicated delinquent (not convicted of a crime) to be transferred to adult facilities upon reaching the age of seventeen” “violates the due process clause of our state constitution”: “The hallmark of special juvenile procedures is their non-criminal nature. If, after adjudication in the juvenile court, the juvenile can be committed to a place of penal servitude and required to perform hard labor alongside convicted felons, then ‘the entire claim of *parens patriae* becomes a hypocritical mockery.”’)) or receiving a harsher sentence in an adult criminal case as a result of a delinquency adjudication’s use as a predicate conviction to enhance an adult criminal sentence (*see, e.g., State v. Hand*, 2016-Ohio-5504, 149 Ohio St. 3d 94, 105, 73 N.E.3d 448, 459 (2016) (“Treating a juvenile adjudication as an adult conviction to enhance a sentence for a later crime is inconsistent with Ohio’s system for juveniles, which is predicated on the fact that children are not as culpable for their acts as adults and should be rehabilitated rather than punished.”’)).

The same reasoning provides a basis for challenging a statute, rule, or procedure that prevents the juvenile court from operating in an appropriately rehabilitative manner and “shielding juveniles from carrying the consequences and stigma of their juvenile delinquency into adulthood.” *In re D.R.*, 2022 WL 17723951, at *1. *See id.* at *1, *7 (striking down, on due process grounds, a provision of the state’s juvenile sex offender registration system that requires that a respondent who is “classified as a Tier 1 sex offender” retain “that classification at the completion-of-disposition hearing, no matter how effective the treatment was or whether any risk of reoffending is present” and that the respondent cannot “request an offender-classification review for three years,” with the result that if the juvenile “was 16 or 17 years old at the time of the offense,” the “Tier 1 classification follows the juvenile into adulthood”; “As applied in this case, . . . [the statute] imposes a punishment on D.R. [who was 16 at the time of the crime] that extends into his adulthood through a process that provides neither discretion by the juvenile court nor shielding by the juvenile-justice system; the statutory provision is therefore fundamentally unfair to D.R. and similarly situated juveniles.”; “Because . . . [the statute] did not allow the juvenile court to exercise its discretion at the completion-of-disposition hearing and make its own determination whether continuation of D.R.’s Tier I offender status into adulthood was necessary or warranted, the statute is fundamentally unfair as applied to D.R. and violates due process.”).

§ 2.04(b) Using Social Scientific Literature About the Nature of Adolescence to Argue that Juveniles are Entitled to More Protective Standards than Adult Criminal Defendants

In some areas of criminal procedure, it has long been settled that the special nature of

adolescence calls for more protective legal rules than those applied to adult criminal defendants. For example, the U.S. Supreme Court recognized as early as 1948 that more protective standards must be employed in assessing the voluntariness of a confession by a juvenile because police interrogation which “would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.” *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion). Similarly, in *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962), the Court observed that “[n]o matter how sophisticated [s/he may be],” a juvenile subject of police interrogation “cannot be compared” to an adult subject.” And in *In re Gault*, 387 U.S. 1, 55 (1967), the Court stressed the importance of ensuring that a juvenile’s statements are neither “the product of . . . adolescent fantasy, fright or despair” nor “the product of ignorance of rights.” See generally §§ 24.05(a), 24.10, 24.21 *infra*.

Over the course of the past four decades, social scientists have considerably broadened the state of knowledge about adolescent development, identifying a number of cognitive and psychological differences between adolescents and adults. These social scientific findings have caused the courts to adopt important new protective rules for minors in delinquency proceedings and criminal cases. Empirical studies by clinical psychologist Thomas Grisso in the early 1980s found that juveniles are generally less able than adults to comprehend the vocabulary and concepts of *Miranda* warnings. These findings – along with corroborating data generated by follow-up studies – have led a number of courts to adopt more protective rules for assessing whether a juvenile knowingly and intelligently waived *Miranda* warnings. See § 24.10(b) *infra*. In the late 1990s, Grisso and other researchers affiliated with the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice built on the earlier work to examine a wide range of juvenile competencies that are relevant to criminal and juvenile justice. See *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* (Thomas Grisso & Robert G. Schwartz eds. 2000). The resulting studies have substantially enhanced the understanding of the adolescent brain, and have revealed – and, in further studies, continue to show – many ways in which juveniles’ cognitive capacities, judgment, and other psychological characteristics differ from those of adults. See, e.g., Elizabeth Scott, Natasha Duell, & Laurence Steinberg, *Brain Development, Social Context, and Justice Policy*, 57 WASH. U. J. L. & POL’Y 13 (2018); Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641 (2016); Elizabeth Cauffman, Adam Fine, Alissa Mahler, & Cortney Simmons, *How Developmental Science Influences Juvenile Justice Reform*, 8 U.C. IRVINE L. REV. 21 (2018). This new “adolescent brain science” has influenced the courts in a number of different areas, including the U.S. Supreme Court in ruling that in cases involving a defendant who was below the age of 18 at the time of the crime, the Eighth Amendment bars the imposition of a sentence of life without the possibility of parole in non-homicide cases (*Graham v. Florida*, 560 U.S. 48 (2010)) and bars mandatory imposition of a sentence of life imprisonment without the possibility of parole 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 § 13.10 *infra*. The Supreme Court also has relied on the developmental differences between youth and adults to adopt a more protective rule for determining when a juvenile is in “custody” for purposes of the *Miranda* rule. See § 24.08(a) *infra*.

It is essential that defense attorneys for juvenile clients familiarize themselves with the social scientific literature and the caselaw relying on it. Counsel will often be able to use the existing rules to press for a more favorable result and/or use the literature to argue for the adoption of new rules. As explained above, the data has already been found by the Supreme Court and lower courts to be relevant to the determination of the admissibility of a juvenile's confession and to sentencing determinations in adult criminal cases (and thus, by obvious extension, dispositions in delinquency cases). But there are many other aspects of a delinquency case where counsel could use the social scientific findings. These include opposing transfer to adult court (see Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010); see generally Chapter 13 *infra*); arguing that a juvenile client is not competent to stand trial (see Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (2006); Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005); see generally §§ 12.16-12.19 *infra*); asserting that juvenile delinquency cases should be governed by a stricter speedy trial rule than adult criminal cases (see § 15.04(b) *infra*); and arguing at trial that a juvenile or young adult was incapable of forming the *mens rea* for the charged crime(s) (see Kimberly Thomas, *Reckless Juveniles*, 52 U.C. DAVIS L. REV. 1665 (2019); Kim Taylor-Thompson, *States of Mind / States of Development*, 14 STAN. L. & POL'Y REV. 143 (2003)).