Chapter 39

Appeal and Post-Disposition Proceedings

§ 39.01 SCOPE OF THE CHAPTER

The MANUAL is intended as an aid in representing alleged delinquents in the trial process; post-disposition proceedings are beyond its purview. The purpose of this chapter is merely to identify the principal corrective procedures that are available to the respondent following an unfavorable disposition (to obtain appellate or collateral review of the adjudication of delinquency; to modify or terminate a period of incarceration or to enforce the respondent's right to treatment while in the institution; to seal or expunge records of the conviction after a certain period of time) and to sketch the nature of the principal proceedings that may be instituted against the respondent during the post-disposition period (revocations of probation and parole and extensions of a term of incarceration).

§ 39.02 APPELLATE REVIEW

§ 39.02(a) The Right To Appeal

Juvenile court statutes typically give the respondent a right to appeal an adjudication of delinquency. *See, e.g.,* COLO. REV. STAT. § 19-2.5-1301 (2023); IND. CODE ANN. § 31-32-15-1 (2023); TEX. FAM. CODE ANN. § 56.01 (2023). *See also In the Interest of A.K.*, 825 N.W.2d 46, 49-52 (Iowa 2013) (notwithstanding the state legislature's revision of the juvenile code to eliminate the requirement that "delinquency proceedings . . . be tried in equity," which had been the basis for appellate review of delinquency adjudications "de novo, as in all equity cases," the Iowa Supreme Court rejects the state's argument for uniform standards of appellate review in juvenile and adult criminal cases, and instead preserves "our de novo standard of review of the sufficiency of the evidence for juvenile adjudications" because this higher standard for juvenile appeals appropriately recognizes the differences between juvenile and adult proceedings, including the lack of a jury trial right in juvenile delinquency cases). If a State allows appeals of criminal convictions, a juvenile respondent who is not given a statutory right to appeal may be able to contend that this disparate treatment violates the equal protection of the laws. *See, e.g., In re Brown,* 439 F.2d 47 (3d Cir. 1971); *In the Matter of Arthur N.,* 36 Cal. App. 3d 935, 112 Cal. Rptr. 89 (1974).

The scope of appellate review encompasses, generally, all properly preserved claims of error in the pretrial and trial rulings of the judge, "plain" or fundamental errors even though not properly preserved (*see*, *e.g.*, *Puckett v. United States*, 556 U.S. 129, 135 (2009) ("'[P]lain-error review' . . . involves four steps, or prongs. First, there must be an error or defect – some sort of "[d]eviation from a legal rule" – that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. . . . Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. . . . Third, the error must have affected the appellant's

substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings.' . . . Fourth and finally, if the above three prongs are satisfied, the court of appeals has the *discretion* to remedy the error – discretion which ought to be exercised only if the error '"seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."'"); *cf. United States v. Campbell*, 2023 WL 3244595, at *3 (11th Cir. 2023) ("[w]e have held that '[t]he absence of a decision by either [the Supreme Court or this] Court rules out a holding that the asserted error was 'plain' because there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it'"); *accord*, *United States v. Faunce*, 66 F.4th 1244 (10th Cir. 2023); *United States v. Rosser*, 2023 WL 4080095, at *3 (6th Cir. 2023) ("[b]ecause no binding precedent requires . . . [recognition of the rule purportedly violated by a trial court's actions to which the defendant did not object,] no plain error occurred"); *and United States v. Davis*, 140 S. Ct. 1060 (2020); *Henderson v. United States*, 568 U.S. 266 (2013); *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018); *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018); *compare Molina-Martinez v. United States*, 578 U.S. 189 (2016), *with Greer v. United States*, 141 S. Ct. 2090 (2021)), and the sufficiency of the evidence to support an adjudication of delinquency, within the normal restrictions of appellate evidentiary review. *See*, *e.g., United States v. Hillie*, 14 F.4th 677 (D.C. Cir. 2021); *Pigeon v. State*, 133 Nev. 1061, 408 P.3d 160 (Table), 2017 WL 6043408 (Nev. 2017). *And* s*ee United States v. Flores*, 995 F.3d 214, 225 (D.C. Cir. 2021) (reversing convictions on two counts predicated upon an inapplicable statute "even though the convictions do not affect the length of the current sentence" imposed on a third count for which the conviction and sentence are valid: the invalid convictions "infringe Flores' liberty and constitute 'an impermissible punishment.' . . . The erroneous convictions affect Flores' substantial rights by leaving in place the special assessments and subjecting him to the collateral consequences of two serious criminal convictions."); *Dhinsa v. Krueger*, 917 F.3d 70, 76 n.4 (2d Cir. 2019); *but see Kassir v. United States*, 3 F.4th 556 (2d Cir. 2021). *See generally* JONATHAN M. PURVER & LAWRENCE TAYLOR, HANDLING CRIMINAL APPEALS (1980 & Supp.); CHARLES A. BIRD, ADVANCED TOPICS IN APPELLATE PRACTICE: THE PATH TO MASTERY (2021).

Following review by the highest court of a jurisdiction in which review may be had (*compare Thompson v. City of Louisville*, 362 U.S. 199 (1960), *with Costarelli v. Massachusetts*, 421U.S.193 (1975)) – or following the refusal of that court to review the case if its jurisdiction is discretionary (*see*, *e.g.*, *Douglas v. California*, 372 U.S. 353 (1963)) – any federal issues preserved throughout the trial and appellate proceedings may be presented to the Supreme Court of the United States. Ordinarily the appropriate method of review by the Supreme Court in criminal and juvenile delinquency cases is by writ of *certiorari* under 28 U.S.C. § 1254(1) (governing federal prosecutions) or 28 U.S.C. § 1257(a) (governing state prosecutions). (The Supreme Court's potentially relevant jurisdiction to issue original writs of habeas corpus, conferred by 28 U.S.C. § 2241(a), (c)(3), is essentially moribund, but not useless in truly extraordinary circumstances (*see In re Shuttlesworth*, 369 U.S. 35 (1962)).) Review by *certiorari* is discretionary with the Court. *See generally* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE (10th ed. 2013).

§ 39.02(b) The Indigent Respondent's Right to Counsel Upon Appeal; to a Trial Transcript for Use on Appeal; and to Waiver of Appellate Filing Fees

Whenever the State creates an appellate process for juvenile cases, an indigent respondent has a right to court-appointed counsel at least on the first appeal as of right, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Halbert v. Michigan*, 545 U.S. 605, 609, 621 (2005) ("in first appeals as of right, States must appoint counsel to represent indigent defendants": "Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson"); *Evitts v. Lucey,* 469 U.S. 387, 393-94 (1985) (dictum), and cases cited; *Douglas v. California,* 372 U.S. 353, 358 (1963); *see also Reed v. Duter,* 416 F.2d 744 (7th Cir. 1969); *In the Interest of L.G.T.,* 216 So.2d 54 (Fla. App. 1968); *and compare Coleman v. Thompson*, 501 U.S. 722 (1991), *with Martinez v. Ryan*, 132 S. Ct. 1309 (2012). The right to counsel on appeal encompasses a due process right to effective performance by appellate counsel, whether court-appointed or retained. *Evitts v. Lucey,* 469 U.S. at 396.

Some statutes explicitly provide for the preparation of a free transcript of the trial for use on appeal when the respondent is indigent. *See, e.g.,* CAL. WELF. & INST. CODE § 800(d) (2023). Even when this is not provided by statute, the Fourteenth Amendment requires that a State provide indigent criminal defendants and juvenile respondents with free transcripts on both direct and collateral criminal appeals (*e.g.*, *Draper v. Washington*, 372 U.S. 487 (1963); *Long v. District Court*, 385 U.S. 192 (1966); *Gardner v. California*, 393 U.S. 367 (1969); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Mayer v. City of Chicago*, 404 U.S. 189 (1971); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 107, 110-12 (1996) (discussing the *Griffin-Mayer* line of precedent); *compare United States v. MacCollom*, 426 U.S. 317 (1976)), and that filing fees be waived in both appeals and collateral-attack proceedings (*Burns v. Ohio*, 360 U.S. 252 (1959); *Smith v. Bennett*, 365 U.S. 708 (1961); *see also Halbert v. Michigan*, 545 U.S. at 610-11; *M.L.B. v. S.L.J.*, 519 U.S. at 111 & n.4).

§ 39.02(c) The Need To Move Quickly To Preserve Appellate Remedies; First Steps

Rights may be lost if the steps required to perfect an appeal or other review proceeding are not taken within the times limited by law. The periods for taking those steps may run from verdict or from disposition or from judgment, depending on local statute or court rule. They ordinarily are not long. They may or may not be tolled pending resolution of timely posttrial motions (§ 37.02 *supra*), depending upon local practice. Counsel will want to proceed with dispatch in filing notices of appeal, presenting bills of exceptions, or otherwise complying with the requisites of statutes and court rules governing the manner in which appellate jurisdiction is perfected. In cases in which the respondent is indigent, counsel will ordinarily also have to file an application for leave to proceed *in forma pauperis* on appeal.

Counsel should arrange to obtain the trial transcript for use on appeal. If local practice does not provide for the filing of the transcript as a matter of course and if the respondent is indigent, counsel should move the trial court to order the transcript prepared at public expense.

See § 39.02(b) *supra.* Upon receiving the transcript, counsel should check it for accuracy. Ordinarily court rules allow several days after filing of the transcript with the clerk of court for counsel to file proposed amendments to it or exceptions to its accuracy. Prodigious trial notes by counsel are a valuable aid in having the transcript corrected. There are often inadvertent errors in transcripts; there may even be intentional errors or omissions, since some judges' stenographers take down what they know their judge meant to say rather than what the judge actually said, or they omit remarks made by the judge that they know the judge would not want in the record.

If the respondent has been ordered incarcerated, counsel should give consideration to the possibility of seeking his or her release pending appeal. In most jurisdictions the trial court has discretion to order a respondent released pending appeal, *see, e.g.,* CAL. WELF. & INST. CODE § 800(a) (2023); and in jurisdictions that permit bail for juveniles, the trial court usually has the option of allowing either release or bond pending appeal, *see, e.g.,* TEX. FAM. CODE ANN. § 56.01(g) (2023); WASH. REV. CODE ANN. § 13.40.230(5) (2023). A judge may be particularly amenable to releasing the respondent pending appeal in a case in which the conviction turned upon the resolution of a novel legal issue and the judge is uncertain about the validity of that resolution.

If counsel does not intend to represent an adjudicated respondent in appellate proceedings, counsel should promptly inform the respondent and his or her parent of (1) the respondent's right to appellate review (including the right to proceed at state expense if the respondent cannot afford to pay filing fees, costs, or the price of a transcript (see § 39.02(b)); (2) the time within which any actions necessary to obtain appellate review must be taken and what those actions are; (3) the realistic likelihood of success in appellate review proceedings, as counsel sees it; (4) the fact that counsel will not be representing the respondent in appellate review proceedings; (5) the fact that other counsel can be retained by the respondent to represent him or her on appeal; (6) the fact that if the respondent cannot afford to retain other counsel, a lawyer will be appointed by the court to represent him or her in at least the first appellate review proceeding as of right (see *id*.); and (7) the actions that the client needs to take to obtain appointment of new counsel. Unless the respondent does not want to appeal or is able to obtain other representation immediately, counsel should take the steps necessary to perfect appellate jurisdiction within the required times. *See Roe v. Flores-Ortega*, 528 U.S. 470, 478-81 (2000) (defense counsel's failure to consult with the client about the decision whether to appeal constitutes ineffective assistance of counsel whenever there are nonfrivolous grounds for appeal or the client has indicated any interest in taking an appeal); *Garza v. Idaho*, 139 S. Ct. 738 (2019) (defense counsel's failure to file a notice of appeal when the client requests that s/he do so constitutes ineffective assistance of counsel even when the client has executed an appeal waiver as a term of a plea bargain); *Rojas-Medina v. United States*, 924 F.3d 9 (1st Cir. 2019); *Rios v. United States*, 783 Fed. Appx. 886 (11th Cir. 2019); *and see Roe v. Flores-Ortega*, 528 U.S. at 479 (recognizing that state law may "impose[ ] on trial counsel a *per se* duty to consult with defendants about the possibility of an appeal"); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-9.1(a)-(c) (4th ed. 2017). Counsel's advice to the respondent and any action taken on the respondent's behalf, together with the respondent's expressed intention to

appeal, not to appeal, or to seek other representation, should be memorialized in detail in a letter to the respondent. Counsel should keep a file copy of this letter, together with any explanatory notes or memoranda that are necessary to preserve a record of counsel's judgments and reasoning in regard to an appeal.

§ 39.03 COLLATERAL REVIEW

§ 39.03(a) State Postconviction Remedies; *Federal Postconviction Relief from Federal Convictions*

Most States have established some form of procedure by which adult criminal convictions may be attacked following affirmance on direct review or expiration of the time for direct review. The procedure may involve the use of one of the traditional writs, such as *habeas corpus* or *coram nobis,* in common-law or statutory form (*see, e.g., In re Figueroa*, 4 Cal. 5th 576, 229 Cal. Rptr. 3d 673, 412 P.3d 356 (2018); *Jones v. Medlin*, 302 Ga. 555, 807 S.E.2d 849 (2017); *Patterson v. State*, 2021 Utah 52, 504 P.3d 92, 108-29 (2021)), or it may involve a modern postconviction procedure for claims of actual innocence (*e.g.*, MD. CODE CRIM. PRO. 8-301 (2023) *and* MD. RULE OF COURT 4-332 (2023); *see Faulkner v. State*, 468 Md. 418, 227 A.3d 584 (2020); *and see* ARIZ. REV. STAT. § 13-4240 (2023) *and* ARIZ. RULES CRIM. PRO. 33.1, 33.17 (2023) (providing that convicted felons may petition for DNA testing and, in the event of a favorable result, are entitled to a hearing to establish their eligibility for postconviction relief) *and* ARIZ. REV. STAT. § 13-4241 (providing that convicted felons may petition for (1) forensic testing using a procedure that was not available at the time of their sentencing but has become widely accepted in the scientific community, and (2) evidence to be uploaded to searchable databases that are subject to agency-imposed standards)) or of claims that new kinds or standards of scientific proof undermine the forensic evidence presented at the respondent's trial (*e.g.*, CONN. GEN. STAT. § 52-582); *and see* Valenta E. Beety, *Changed Science Writs and State Habeas Relief*, 57 HOUSTON L. REV. 483 (2020)). Regarding the limited role of federal civil rights actions under 42 U.S.C. § 1983 in these cases, *see Reed v. Goertz,* 143 S. Ct. 955 (2023); *Johnson v. Griffin*, 69 F.4th 506 (8th Cir. 2023). Prosecutors often respond to strong postconviction claims of innocence – whether presented through the new actual-innocence writs or through more traditional postconviction procedures – with settlement offers (such as the reduction of the petitioner's sentence to time served), *see* Ria Camila Angulo Amaya, Gibson Hatch & John P. Smith, *Plea Bargaining in the Shadow of a Retrial: Bargaining Away Innocence*, 2022 WIS. L. REV. 533; and such offers are also not uncommon in cases in which strong claims of constitutional procedural violations are based upon embarrassingly flagrant prosecutorial or law-enforcement misconduct, especially when the petitioner has a record of good prison behavior and/or relatively little time yet to serve. For a description and analysis of the evolving role of state postconviction procedures, *see* Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443 (2017).

The vast majority of state courts have recognized that these adult collateral-review procedures are equally available to juveniles in delinquency cases. *See, e.g., Sult v. Weber,* 210

So.2d 739, 749 (Fla. App. 1968) ("[t]he motion for relief in the nature of coram nobis is available in the juvenile courts of this state . . . [even] without a declaratory rule authorizing it"); *E.C. v. Virginia Dep't of Juvenile Justice*, 283 Va. 522, 529-30, 536-37, 722 S.E.2d 827, 830-31, 835 (2012) (lower court erred in dismissing the adjudicated delinquent's petition for a writ of habeas corpus: the court had jurisdiction because "the petitioner was detained for purposes of habeas corpus when the petition was filed," and "[t]hat jurisdiction did not end because E.C. was released from detention during the course of the proceeding"; E.C.'s release from confinement also did not render the state postconviction petition moot because he continues to be subject to collateral consequences of the adjudication, including a sex offender registration requirement, the risk of the adjudication's serving as a predicate for enhanced sentencing in a future case, and limitations on future ownership and transportation of a firearm). *Compare A.S. v. State*, 923 N.E.2d 486, 489-90 (Ind. App. 2010) ("[p]ost-conviction procedures are not available to challenge a juvenile delinquency adjudication, which is civil in nature," but the juvenile could proceed instead under a court rule that provides a mechanism for seeking "relief from judgment").

State collateral-attack procedures are ordinarily limited to constitutional and other "fundamental" claims. Issue-preclusion rules in most States bar claims that were or could have been raised at trial and on direct appeal unless (1) a claim is characterized as jurisdictional *(see, e.g., Mosley v. State*, 986 So.2d 476 (Ala. App. 2007); *State ex rel. Zinna v. Steele*, 301 S.W.3d 510 (Mo. 2010)) or "structural" (*see, e.g., Reams v. State*, 2018 Ark. 324, 560 S.W.3d 441 (2018)), or (2) the presentation of the claim in the trial and direct review proceedings was obstructed by the courts or prosecuting authorities or by circumstances beyond defense counsel's control, such as the unavailability of the facts on which the contentions rest (*see, e.g., Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011), *partially overruled on an unrelated point*, *State v. Lane*, 308 Ga. 10, 23, 838 S.E.2d 808, 819 (2020)); or (3) the failure of the defendant's trial or appellate lawyers to raise the claim constituted ineffective assistance of counsel under the strict standard set by *Strickland v. Washington*, 466 U.S. 668 (1984) (*see, e.g., Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997); *Commonwealth v. McGill*, 574 Pa. 574, 832 A.2d 1014 (2003); *Ross v. State*, 2012 UT 93, 293 P.3d 345 (Utah 2012), *clarified in McCloud v. State*, 2021 UT 51, 496 P.3d 179, 189-93 (Utah 2021); *cf. State ex rel. Peete v. Moore*, 283 S.W.3d 818 (Mo. App. 2009)).

Typically, applications for state postconviction relief must be filed in a trial court (often the conviction court) in the first instance, and that court's decision denying or granting relief is subject to appellate review. Following the state appeal – or if no appellate process is available under the State's postconviction procedure – the defendant may file a petition for certiorari in the Supreme Court of the United States, seeking review of any rejected federal claims. *See* Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUMBIA L. REV. 159 (2021). In some jurisdictions the denial of a first postconviction petition does not act as res judicata to bar second and subsequent petitions, although doctrines of waiver or collateral estoppel may preclude particular claims. In a few States, appellate courts have original jurisdiction to receive postconviction applications raising some sorts of claims. *See*, *e.g.*, *Bailey v. Jones*, 225 So.3d

776 (Fla. 2017), superseded on an unrelated issue by *State v. Poole*, 297 So.3d 487 (Fla. 2020).

Where a state has created a postconviction procedure to remedy defects or errors underlying a conviction or to compensate a convicted individual for those defects or errors, that procedure may give rise to "'a liberty interest'" which entails federal Due Process protection. *Howard v. City of Durham*, 68 F.4th 934, 946 (4th Cir. 2023). In this event, the Fourteenth Amendment to the federal Constitution accords the individual a right, enforceable in federal court, against violations of """"fundamental fairness in [the] operation""" of the state postconviction process (*id*. at 947), in order "'to insure that [this] state-created right is not arbitrarily abrogated'" (*id*. at 948).

Some States have statutes providing for the medical parole of prison inmates under specified circumstances. Typically, requests for medical parole are first submitted to corrections officials; if denied, judicial review is available. *See*, *e.g.*, *Harmon v. Commissioner of Correction*, 487 Mass. 470, 168 N.E.3d 320 (2021).

A relatively recent development is the establishment in prosecutors' offices of a "conviction integrity unit" or similar bureau which investigates claims that convicted persons were in fact innocent and wrongly convicted and moves to vacate the conviction if such a claim is sustained. These units may be created by statute (*see*, *e.g.*, VERNON'S MO. STAT. ANN. § 547.031) or as an exercise of the prosecutor's executive authority (*see*, *e.g.*, Mike McPhate, *Record Number of False Convictions Overturned in 2015*, *New York Times*, February 3, 2016, *available at* https://www.nytimes.com/2016/02/04/us/record-number-of-false-convictions-overturned-in-2015, *available at* https://www.nytimes.com/2016/02/04/us/record-number-of-false-convictions-overturned-in-2015.html?searchResultPosition=2; Richard A. Oppel Jr. & Farah Stockman, *Prosecutors Usually Send People to Prison. These Are Getting Them Out, New York Times*, November 28, 2019, *available at* https://www.nytimes.com/2019/11/28/us/conviction-integrity-unit-innocence.html?searchResultPosition=6; Press release: *Attorney General Bonta Establishes First-Ever Post-Conviction Justice Unit within the California Department of Justice*, February 17, 2023, *available at* https://oag.ca.gov/news/press-releases/attorney-general-bonta-establishes-first-ever-post-conviction-justice-unit). Where they exist, counsel representing a client with a claim of innocence or of a serious violation of a basic procedural right does well to take soundings regarding the temper and capability of the unit's personnel and to contact them for assistance if the soundings are promising. *See*, *e.g.*, *People v. Morant*, 70 Misc. 3d 854, 136 N.Y.S.3d 685 (N.Y. Sup. Ct., Queens Cty. 2020); *Natividad v. Beard*, 2021 WL 3737201 (E.D. Pa. 2021); *Jackson v. Nassau County*, 602 F. Supp. 3d 352, 112 Fed. R. Serv. 3d 1360 (E.D. N.Y. 2022).

Federal convictions or sentences can be challenged after the conclusion of direct appeal (or after expiration of the time for direct appeal) through the procedure prescribed by 28 U.S.C. § 2255. A motion to "vacate, set aside, or correct" the defendant's sentence is filed in the district court of conviction; the denial of relief is appealable to the cognizant court of appeals; Supreme

Court review of the court of appeals's decision can be sought by *certiorari*. Grounds for relief are specified as being "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack . . . ." § 2255(a). Essentially, these include all grounds traditionally available for relief by *habeas corpus* (which is available in an incarcerated defendant's district of confinement only when "it . . . appears that the remedy by motion is inadequate or ineffective to test the legality of his detention . . .", *see* § 2255(e)) or *coram nobis*. *See United States v. Hayman*, 342 U.S. 205 (1952). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), section 2255 motions are subject to a one-year statute of limitations and various other AEDPA provisions (see § 39.03(b) *infra*; *and see Jones v. Hendrix*, 2023 WL 4110233 (U.S. 2023)) but are not governed by the exacting standard set by AEDPA's § 2254(d) for adjudicating the merits of a state-prisoner *habeas corpus* petition. On a § 2255 motion, a district court may vacate convictions on all counts or on some but not all counts, as appropriate; and in the latter case it should reconsider the cumulative sentence originally imposed on multiple counts. *Tellier v. United States*, 2023 WL 3608394 (2d Cir. 2023). Postconviction requests for DNA testing in support of a claim of innocence are authorized by 18 U.S.C. § 3600.

Federal prosecutors can seek leave of court to have a conviction vacated and the underlying charges dismissed for any of a number of reasons, and the courts ordinarily defer to executive discretion and grant the requested leave. *See Rinaldi v. United States*, 434 U.S. 22 (1977); *United States v. Blaszczak*, 56 F.4th 230, 237-42 (2d Cir. 2022). In cases involving the belated emergence of persuasive evidence of innocence or involving changes in the law that decriminalize the conduct underlying a client's conviction or reduce the client's sentence, counsel should consider asking the U.S. Attorney's Office or the Department of Justice to move for appropriate rectification.

§ 39.03(b) Federal Habeas Corpus

A juvenile respondent who is adjudicated a delinquent in a state proceeding is also entitled to invoke federal habeas corpus remedies pursuant to 28 U.S.C. § 2241(c)(3) (2023) under the same circumstances as an adult criminal defendant. *See, e.g.*, *A.M. v. Butler*, 360 F.3d 787 (7th Cir. 2004); *United States ex rel. Murray v. Owens*, 341 F. Supp. 722, 723 (S.D.N.Y. 1972), *rev'd on other grounds,* 465 F.2d 289 (2d Cir. 1972).

Before resorting to federal habeas corpus, the respondent must "exhaust" all state remedies. 28 U.S.C. § 2254(b), (c) (2023). This requires that the respondent "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate process," including any discretionary appeals that are an "established part of the State's appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). *But see Carter v. Buesgen*, 10 F.4th 715, 716 (7th Cir. 2021) ("extreme and tragic" delay of more than four years without a state appellate court having considered the merits of a convicted defendant's appeal renders state appellate process ineffective and excuses the

requirement that it be exhausted by a merits decision); *see also Evans v. Wills*, 66 F.4th 681 (7th Cir. 2023).

As a result of statutory changes effected by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal habeas corpus petition in a non-capital case generally must be filed within one year from the date on which the judgment of conviction and sentence became final upon completion of direct review (including *certiorari* proceedings in the U.S. Supreme Court), 28 U.S.C. § 2244(d)(1) (2023).

AEDPA specifies that federal habeas corpus relief generally will not be granted unless the state court's adjudication of the claim was "contrary to . . . clearly established [Supreme Court] law" or "involved an unreasonable application of clearly established [Supreme Court] law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(1), (2) (2023). The voluminous federal caselaw interpreting and applying § 2254(d) flows from *[Terry] Williams v. Taylor*, 529 U.S. 362 (2000), through *Wilson v. Sellers*, 138 S. Ct. 1188 (2018).

A federal habeas court may not consider the merits of a claim that was rejected by the state courts on the basis of an adequate and independent state-law ground of decision – such as procedural default – unless the petitioner establishes "cause for the default and actual prejudice as a result of the alleged violation of federal law, or . . . that failure to consider the claim[ ] will result in a fundamental miscarriage of justice" (*Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see*, *e.g.*, *Amadeo v. Zant*, 486 U.S. 214 (1988); *Banks v. Dretke*, 540 U.S. 668 (2004); *Maples v. Thomas*, 565 U.S. 266 (2012)). As in state postconviction practice generally, cause to excuse a procedural default is demonstrated under some circumstances when the default was the result of ineffective assistance of counsel. *See*, *e.g.*, *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino* v. *Thaler*, 569 U.S. 413 (2013); *Girts v. Yanai*, 501 F.3d 743 (6th Cir. 2007); *Tice v. Johnson*, 647 F.3d 87 (4th Cir. 2011); *Griffin v. Harrington*, 727 F.3d 940 (9th Cir. 2013); *Baer v. Neal*, 879 F.3d 769 (7th Cir. 2018); *and cf. Kimmelman v. Morrison*, 477 U.S. 365 (1986); *but see Coleman v. Thompson*, 501 U.S. 722 (1991); *Davila v. Davis*, 137 S. Ct. 2058 (2017); *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). Also,"'[a] credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief.' *Fontenot v. Crow*, 4 F.4th 982, 1029 (10th Cir. 2021). "'[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."'" *Id*. at 1030. "[A]ctual innocence works to remove procedural obstacles to habeas relief in a manner that does not depend on satisfying requirements for standard equitable exceptions to those obstacles, which typically involve some excuse for the delayed presentation of a claim." *Id*. at 1032.

Federal habeas jurisdiction depends upon the petitioner's being "in custody" (28 U.S.C. § 2241(c) and § 2254(a)) at the time of filing of his or her petition or at the time when the petition is brought on for adjudication by the district court (see § 4.14, concluding paragraph

supra). The "custody" requirement is satisfied not only by physical incarceration but whenever a petitioner is subject to significant restrictions upon the degree of freedom which is an attribute of normal civilian life (as in cases of supervised release or parole with specified conditions). *Jones v. Cunningham*, 371 U.S. 236 (1963); *Hensley v. Municipal Court*, 411 U.S. 345 (1973); *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984); *Piasecki v. Court of Common Pleas*, 917 F.3d 161 (3d Cir. 2019); *but see Munoz v. Smith*, 17 F.4th 1237 (9th Cir. 2021); *Corridore v. Washington*, 2023 WL 4141642 (6th Cir. 2023).

The rules governing the filing and litigation of federal habeas corpus petitions and federal-prisoner section 2255 motions are numerous and exceedingly complex. For a detailed guide to the rules and the strategic considerations that counsel should take into account at each of the stages of these processes, see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (7th ed. 2015).

§ 39.04 REVOCATION OF PROBATION; MODIFICATION AND/OR TERMINATION OF PROBATIONARY CONDITIONS

As explained in § 38.03(c) *supra,* an order of probation ordinarily contains a series of conditions requiring, for example, that the respondent abstain from further criminal conduct, attend school regularly, and meet periodically with a probation officer. If the respondent violates one or more of these conditions, his or her probation can be revoked, and s/he can be resentenced to incarceration (for a period up to the maximum term that could have been imposed at the original dispositional hearing) or to any other disposition that was available at the original dispositional hearing. *See Mont v. United States*, 139 S. Ct. 1826 (2019). For a description of the range of dispositional alternatives, see § 38.03(c) *supra.* The applicable statutes, rules or precedents ordinarily restrict a court's revocation authority temporally, by providing, for example, that probation may be revoked only for a violation committed during the probationary period, or may be revoked only by an order entered during the probationary period (*see*, *e.g.*, *Grundy v. Commonwealth*, 400 S.W.3d 752 (Ky. App. 2013); *Stelljes v. State*, 72 S.W.3d 196, 201 (Mo. App. 2002)), and/or that revocation – or particular terms of revocation – may be ordered only within a limited time window after a violation or after the filing of an application for revocation (*see*, *e.g.*, *Commonwealth v. Wright*, 2015 PA Super 116, 116 A.3d 133 (Pa. Super. 2015); *Sutherland v. Commonwealth*, 910 S.W.2d 235, 237 (Ky. 1995)).

The jurisdictions differ in their procedures for revoking probation and in the frequency with which revocation is used. In some jurisdictions the probation department initiates a probation revocation proceeding by filing a notice of violation with the judge who entered the original order of probation, while in other jurisdictions the probation officer brings the violation to the attention of the juvenile prosecutor's office, which then files a petition to revoke probation if it deems that measure appropriate. Some probation offices (or some individual probation officers) rigorously enforce all conditions and will seek revocation if the respondent merely misses some appointments with the probation officer, while other offices (or individual officers) overlook these "technical" violations and will seek revocation only if the respondent is arrested

for a new offense while on probation.

It is advisable for counsel to check in periodically with the respondent and the probation officer, to keep tabs on the respondent's adjustment. Often, a warning to a respondent who is straying will be sufficient to put the client back on the right track. And often counsel will be able to persuade a probation officer to refrain from filing revocation proceedings and to give the respondent another chance.

If a notice of violation is filed and revocation sought, the respondent has a due process right under *Gagnon v. Scarpelli,* 411 U.S. 778 (1973), to "two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his . . . [probation] and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision." *Id.* at 781-82. "At the preliminary hearing, a probationer . . . is entitled to notice of the alleged violations of probation . . ., an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. . . . The final hearing is a less summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause, but the 'minimum requirements of due process' include very similar elements: ¶ '(a) written notice of the claimed violations of [probation] . . .; (b) disclosure to the [probationer] . . . of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body . . .; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation] . . . .'" *Id.* at 786 (quoting *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972)). *See also Black v. Romano*, 471 U.S. 606, 611-12 (1985) (describing the requirements established in *Gagnon*, *supra*); *McDaniels v. State*, 451 P.3d 403, 404 (Alaska App. 2019) ("[a]lthough it is well established that neither the Alaska Rules of Evidence nor the Confrontation Clause apply to probation revocation proceedings, it is equally well established that defendants in probation revocation proceedings have a due process right to confront witnesses against them unless the State demonstrates that there is good cause to deny them that right"); *State v. White*, 158 Idaho 827, 353 P.3d 448 (Idaho App. 2015) (same); *State v. Brown*, 313 Or. App. 283, 496 P.3d 701 (2021) (same); *State v. Tate*, 1999 UT App 302, 989 P.2d 73 (Utah App. 1999); *Sparks v. State*, 983 N.E.2d 221, 224-25 (Ind. App. 2013) ("Indiana has codified the due process requirements and requires that an evidentiary hearing be held to determine whether the State has proven the probation violation by a preponderance of the evidence. . . . Failure to hold an evidentiary hearing is a fundamental error and requires reversal. . . . If a probationer admits to the violation, an evidentiary hearing is not required. . . . But if the probationer is unrepresented, the court must advise him of his right to counsel even if he or she decides to admit the probation violation. . . . If there is an admission, the court can go to the second step of the process to determine whether the violation warrants revocation, but the probationer must be given an opportunity to provide mitigating evidence suggesting that the violation does not warrant revocation."); *and see Ponder v. State*, 341 Ga. App. 276, 278, 800

S.E.2d 19, 20-21 (2017) ("This Court has previously held that '[d]ue process requires that a defendant be given written notice of the claimed violation of his probation prior to a probation revocation hearing.' Consequently, in order to revoke the probationary features of a sentence the defendant 'must have notice and opportunity to be heard, the notice being sufficient to inform him not only of the time and place of the hearing and the fact that revocation is sought, but the grounds upon which it is based." In addition, a defendant's probation may not be revoked when 'there is no evidence that the defendant violated its terms in the manner charged in the notice, even though there be evidence at the hearing that the defendant violated the terms of probation in some other manner as to which there was no notice given.' Thus, if a judgment is 'based upon an offense not charged in the petition for revocation, it must be reversed.' ¶ In this matter, . . . the State's petition to revoke Ponder's probation sought to do so on the ground that he committed a new offense of *misdemeanor* stalking. But the trial court's order provided that it was revoking Ponder's probation on the ground that he committed a new *felony* offense – presumably the offense of aggravated stalking mentioned by the State during the revocation hearing. Given these particular circumstances, the trial court revoked Ponder's probation on a basis that was not alleged in the State's petition, and in doing so, it erred. Accordingly, we reverse the trial court's order."); *United States v. Timmons*, 950 F.3d 1047, 1050, 1051 (8th Cir. 2020) ("the district court denied [Timmons] the [due process] right to confront the key witness against him at his revocation hearing" by allowing the government to introduce into evidence a police body camera recording of Timmons' domestic partner describing his assault on her and showing her injuries, even though "[t]here was no significant hurdle to procuring [her] live testimony" and "[t]he Government has also failed to show that [her] recorded police statement was inherently reliable"); *United States v. Johnson*, 710 F.3d 784, 788-89 (8th Cir. 2013) (the district court violated the defendant's due process "'right to confront and cross-examine adverse witnesses'" at a revocation hearing by relying on a police report – which contained the defendant's confession to a new crime – without requiring that the prosecution at least provide an adequate explanation for its failure to present testimony by "the arresting officer, or another officer who was present when the confession was made"); *Commonwealth v. Costa*, 490 Mass. 118, 119-20, 128-29, 189 N.E.3d 284, 289, 296 (2022) (although the Supreme Judicial Court rejects the probationer's argument that the trial court's reliance on hearsay statements by the complainant (the probationer's former fiancée) violated the probationer's "right to confront adverse witnesses," the high court holds that the trial court violated the due process clauses of the federal and state constitutions by denying the probationer's request to call the complainant as a witness, thereby "violat[ing] his right to present a defense": "The Commonwealth's case [for revocation of probation] rested entirely on the complainant's credibility"; "the probationer's 'best chance' to impeach her credibility was through the complainant's live testimony"; and the probationer "provided ample, specific reasons to question the complainant's credibility"); *Williams v. State*, 138 So.3d 342, 344-45 (Ala. Crim. App. 2013) (reversing an order revoking probation because the judge's "oral findings fail to 'create a record sufficiently complete to advise the parties and the reviewing court of the reasons for the revocation of [probation] and the evidence the decision maker relied upon'" and thus violated Alabama Criminal Procedure Rule 27.6(f) and due process); *Hess v. Commonwealth*, 17 Va. App. 738, 742, 441 S.E.2d 29, 32 (1994) (when the same judge presides at the criminal trial of a probationer who is charged with a new criminal

offense and also presides at a subsequent probation revocation hearing for that probationer, s/he may consider testimony s/he received at the criminal trial in support of the revocation of probation, but only "*provided* that the judge delineates during the evidentiary portion of the revocation proceeding precisely the evidence that is being considered" (emphasis added)); *cf. United States v. Jordan*, 991 F.3d 818 (7th Cir. 2021) (invoking the federal appellate courts' supervisory powers to require that a judge who revokes probation [a/k/a supervised release] provide on the record an adequate explanation of the reasons for both the revocation decision and the consequent sentence imposed).

"[C]ounsel should be provided in cases where, after being informed of his right to request counsel, the probationer . . . makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself." *Gagnon v. Scarpelli,* 411 U.S. at 790-91.

Although the Court's announcement of these due process requirements in *Gagnon* took place in the context of an adult probation revocation proceeding, they clearly apply to juvenile proceedings as well. *See, e.g.*, *K.W.J. v. State*, 905 So.2d 17 (Ala. Crim. App. 2004); *B.S. v. State*, 886 So.2d 1062 (Fla. App. 2004); *State v. Doe,* 104 N.M. 107, 717 P.2d 83 (N.M. App. 1986); *G.G.D. v. State,* 97 Wis. 2d 1, 292 N.W.2d 853 (1980); *State ex rel. E.K.C. v. Daugherty,* 298 S.E.2d 834 (W. Va. 1982). Several jurisdictions have codified the requirements in their juvenile court acts, *see, e.g.,* ILL. COMP. STAT. ANN. ch. 705, § 405/5-720 (2023); N.Y. FAM. CT. ACT § 360.3 (2023); WASH. REV. CODE ANN. § 13.40.200(2) (2023), or juvenile court rules, *see, e.g.,* D.C. SUPER. CT. JUV. RULE 32(i) (2023).

The Fourth Amendment exclusionary rule does not apply in probation revocation hearings. *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998); *United States v. Hightower*, 950 F.3d 33 (2d Cir. 2020) (per curiam); *United States v. Charles*, 531 F.3d 637 (8th Cir. 2008); *United States v. Herbert*, 201 F.3d 1103 (9th Cir. 2000) (per curiam).

Some statutes and rules or the cases construing them expand the panoply of safeguards required by the federal constitutional guarantee of due process. For example, while the Court in *Gagnon* treated the right to counsel as conditional and dependent upon the facts of the case, a number of jurisdictions confer an automatic entitlement to counsel at a probation revocation hearing. *See, e.g.,* D.C. SUPER. CT. JUV. RULE 32(i)(3) (2023); N.Y. FAM. CT. ACT § 360.3(4) (2023); *K.E.S. v. State,* 134 Ga. App. 843, 216 S.E.2d 670 (1975). And although some courts have held that the due process prescriptions of *Gagnon* permit revocation to be based upon the prosecutor's proof of a violation by a mere preponderance of the evidence (*see, e.g., In the Matter of Belcher,* 143 Mich. App. 68, 371 N.W.2d 474 (1985), *appeal denied,* 424 Mich. 863

(1985); *In the Matter of Gregory M.,* 131 Misc. 2d 942, 502 N.Y.S.2d 570 (N.Y. Fam. Ct. 1986); *see also In re Eddie M.*, 31 Cal. 4th 480, 508, 73 P.3d 1115, 1132, 3 Cal. Rptr. 119, 140 (2003) (rejecting a due process challenge to a statute authorizing revocation of probation on a preponderance of the evidence for a "probation violation 'not amounting to a crime'")), several States require proof beyond a reasonable doubt (*see, e.g., People ex rel. C.B.,* 196 Colo. 362, 585 P.2d 281 (1978); *T.S.I. v. State,* 139 Ga. App. 775, 229 S.E.2d 553 (1976); *cf.* D.C. SUPER. CT. JUV. RULE 32(i)(3) (2023) (beyond-a-reasonable-doubt standard applies to revocations based on a new crime; preponderance standard applies to revocations based on technical violations)) or the intermediate standard of clear and convincing evidence (*see*, *e.g., In the Interest of C.E.E. v. Juvenile Officer,* 727 S.W.2d 451 (Mo. App. 1987); *but see C.L.B. v. Juvenile Officer*, 22 S.W.2d 233, 239 (Mo. App. 2000) (if probation revocation proceeding is used as "a forum for an adjudication of guilt of an act which would be a crime if committed by an adult, with all the collateral consequences of a conviction of that offense," then the "beyond a reasonable doubt standard" must be applied)).

When the request for revocation of probation is based upon the respondent's alleged commission of a new crime, the respondent will usually also be charged with the new crime in a separate Petition. In jurisdictions where the prosecutor's burden of proof at a probation revocation hearing is a preponderance of the evidence or clear and convincing evidence, counsel should attempt to delay the revocation hearing until after there has been a trial on the new Petition, so that the validity of the new charge is first tested at trial by a beyond-a-reasonable-doubt standard. If the judge refuses to delay the revocation hearing and revokes probation on the basis of the new crime before it has been separately adjudicated and if the respondent is then acquitted of the crime at trial, counsel should petition for reinstatement of probation.

If the basis of the request for revocation is that the respondent missed appointments with a probation officer, counsel should prepare for the revocation hearing by talking with the respondent and his or her parent to determine whether the respondent had a good reason for missing the appointments and whether s/he attempted to notify the probation officer that s/he was unable to come to the meeting. Counsel should also talk with the probation officer before the hearing and should ascertain what efforts the probation officer made to contact the respondent after the missed appointment. Some judges will respond to an apparent lack of effort or concern on the probation officer's part by giving the respondent another chance. Finally, counsel should discuss with the respondent and his or her parent any problems that have arisen with the probation officer and should explore the possibility that these reflect a personality conflict between the officer and either the respondent or the parent. If a personality conflict exists and if it contributed to the respondent's failure to keep appointments, counsel can argue at the revocation hearing that the respondent should be permitted to remain on probation and that a different probation officer should be assigned to the case as a way of testing the respondent's ability to adjust satisfactorily once this particular source of friction is eliminated.

Many other grounds for revocation of probation can be handled by devising a plan to correct the problematic aspects of the respondent's behavior that led to the revocation request.

Armed with a plan that shows promise, counsel can argue that the respondent should be kept on probation with the mandatory features of the plan added as new probation conditions. For example, if the request for revocation is based upon truancy or misconduct at school, counsel should determine whether the respondent's current school placement is appropriate. If it is not, counsel should identify a more suitable placement. If the current placement is appropriate (or unavoidable), counsel might consider arranging after-school tutoring or counseling. Satisfactory attendance at the new school or participation in the new after-school program would then be made additional conditions of the respondent's probation.

When the request for revocation is based upon alcohol or drug use, counsel should locate a good day-treatment program for substance abusers – or, if the respondent's problems are too severe for day-treatment, a good residential program. The chances of avoiding probation revocation will be greatly increased if counsel can arrange to have the respondent enter the new program before the revocation hearing. *Cf.* § 38.14 *supra.* If a new program has been arranged and particularly if the respondent has already begun to participate in it, counsel may be able to persuade the probation officer or the prosecutor to withdraw the petition for revocation or at least to hold it in abeyance for a specified period in order to allow the new program time to work. Or counsel can urge the judge at the hearing to take the same wait-and-see approach – to continue the case for a sufficient time to "give the new program a fair chance."

As noted in § 38.03(c) subdivision (3) *supra*, probation revocation for failure of a respondent to pay a fine or restitution is subject to the restriction imposed by *Bearden v. Georgia,* 461 U.S. 660, 672-73 (1983), which requires that the "sentencing court . . . inquire into the reasons for the failure to pay. . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment." *See also, e.g., People in the Interest of C.J.W.,* 727 P.2d 870 (Colo. App. 1986); *M.L. v. State*, 838 N.E.2d 525, 529-30 (Ind. App. 2005); WASH. REV. CODE ANN. § 13.40.200(2) (2023); *and see In re Timothy N.*, 216 Cal. App. 4th 725, 736-38, 157 Cal. Rptr. 3d 78, 86-88 (2014).*Cf. Stinnie v. Holcomb*, 355 F. Supp. 3d 514 (W.D. Va. 2018) (preliminarily enjoining as a violation of due process the enforcement of a statute providing for automatic suspension of driver's licenses of persons who fail to pay fines and court costs, with no opportunity for a hearing to show that the driver cannot afford the payments).

Counsel should be alert to the possibility that a probation condition whose violation is the subject of a probation revocation proceeding may itself be invalid – on the ground that it violated the federal or state constitutions or an applicable statute, rule, or regulation (*see*, *e.g.*, *United States v. Glover,* 893 F.3d 536 (8th Cir. 2018); *United States v. Washington,* 893 F.3d 1076, 1081-82 (8th Cir. 2018)) or inapplicable (*see*, *e.g.*, *State v. Whatley*, 2021-NCCOA-702, 281 N.C. App. 194, 867 S.E.2d 410 (2021)) – and therefore cannot provide a valid basis for revocation of probation. Similarly, if the revocation is based solely upon the defendant's conviction of a later crime, the reversal or invalidity of that conviction constitutes a basis for challenging the revocation. *See*, *e.g.*, *State v. Jones*, 247 N.W.2d 735 (Iowa 1976); *State v. Day*, 154 Idaho 649, 651, 301 P.3d 655, 657 (Idaho App. 2013); *Smith v. State*, 358 So.2d 909 (Fla.

App. 1978); *People v. Kaplan*, 7 Ill. App. 3d 155, 287 N.E.2d 246 (1972).

Local law or practice may give the juvenile court the power to modify the conditions of probation and/or to terminate probationary supervision and release the respondent outright under specified circumstances or in the exercise of a broad discretion. *See United States v. Hartley*, 34 F.4th 919, 928 (10th Cir. 2022) (holding that a district court's blanket policy of reserving the early termination of supervised release to cases in which a convicted defendant had served a term of incarceration and denying consideration for early release to defendants initially sentenced to probation constituted an abuse of discretion: 18 U.S.C.A. §§ 3553(a) and 3564(c) enumerate a number of factors to be considered in individualized decisions whether to allow early release, and "'[a] trial court which fashions an inflexible practice in sentencing contradicts the judicially approved policy in favor of individualizing sentences'"); *cf. United States v. Sheppard*, 17 F.4th 449 (3d Cir. 2021), discussing the considerations to be taken into account and the procedures to be followed under 18 U.S.C.A. § 3583(e) on a motion to terminate supervision after a period of imprisonment.

§ 39.05 REVOCATION OF PAROLE

A respondent who completes a period of incarceration and is then released on parole (called "aftercare" in some jurisdictions) is subject to the revocation of parole for violation of the conditions set by the administrative agency that oversees parole. (In various jurisdictions this agency may be named the "Division for Youth," the "Youth Authority," the "Department of Human Services," and so forth.) If parole is revoked, the respondent is returned to incarceration for a term that differs among the jurisdictions. In some cases, statutes may authorize or require an extended period of parole supervision following reimprisonment. *See*, *e.g.*, *Johnson v. United States*, 529 U.S. 694 (2000); *but see United States v. Ruiz-Valle*, 68 F.4th 741 (1st Cir. 2023); *United States v. Hall*, 64 F.4th 1200 (11th Cir. 2023). If the basis for the revocation is an allegation that the defendant has committed a new criminal offense, s/he may also be prosecuted separately on that charge. *See*, *e.g.*, *United States v. Wilson*, 939 F.3d 929 (8th Cir. 2019); *United States v. Frederickson*, 988 F.3d 76 (1st Cir. 2021) (holding that the parolee's acquittal by a jury on the criminal charge did not preclude revocation of his parole on the basis of the same conduct that the jury had found insufficient for conviction). As with conditions of probation (see the preceding section), the underlying condition of parole may be legally assailable (*see*, *e.g.*, *In re Stevens*, 119 Cal. App. 4th 1228, 15 Cal. Rptr. 3d 168 (2004); *State v. Tewalt*, 243 W. Va. 660, 849 S.E.2d 907 (2020)); and violation of an invalid condition will not support revocation (*see*, *e.g.*, *People v. Austin*, 35 Cal. App. 5th 778, 247 Cal. Rptr. 3d 729 (2019)).

In some jurisdictions a statute or court rule specifies a maximum term. In other jurisdictions the respondent can be incarcerated for an indeterminate period, and the agency determines when release is appropriate. Technically, the indeterminate period of incarceration is limited by the date that the judge originally set at disposition as the end of the period of "commitment" or "placement," but many jurisdictions allow the agency to petition the court for an extension of the original term. See § 39.06 *infra.* Moreover, in some jurisdictions, the original

term of commitment or placement automatically extends until the youth has turned 18 or 21.

The procedural due process requirements that govern juvenile probation revocation hearings (see § 39.04 *supra*) also govern juvenile parole revocation hearings. *Morrissey v. Brewer,* 408 U.S. 471 (1972); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 989-93 (9th Cir. 2010). *See, e.g.,* WASH. REV. CODE ANN. § 13.40.210(4)(a) (2023); *L.H. v. Schwarzenegger*, 519 F. Supp. 2d 1072, 1081-85 (E.D. Cal. 2007); *In re Kimble*, 114 Ohio App. 3d 136, 142, 682 N.E.2d 1066, 1069 (1996); *State ex rel. J.R. v. MacQueen,* 163 W. Va. 620, 259 S.E.2d 420 (1979); *State ex rel. R.R. v. Schmidt,* 63 Wis. 2d 82, 216 N.W.2d 18 (1974). *See also Young v. Harper*, 520 U.S. 143, 144-45, 147-48, 152-53 (1997) (applying *Morrissey*'s protections to a pre-parole program which releases prisoners to relieve overcrowding, and which is therefore "a kind of parole as we understood parole in *Morrissey*"). And statutes or court rules may provide additional procedural protections for parolees charged with violations. *See*, *e.g.*, FED. RULE CRIM. PRO. 32.1; *United States v. Caffey*, 351 F.3d 804, 805 (8th Cir. 2003) ("'Rule 32's right of allocution applies to sentencing on revocation of supervised release when court imposes new sentence based on conduct that occurred during supervised release'"); *United States v. Sutton*, 916 F.3d 1134 (4th Cir. 2019) (a parolee must be granted confrontation and cross-examination of government witnesses unless good cause is shown for denying these safeguards: "the government must prove both [of two] factors; only if it shows 'that the burden of producing live testimony would be inordinate *and* offers in its place hearsay evidence that is demonstrably reliable' will good cause exist." (emphasis in original)). *Compare United States v. Alvear*, 959 F.3d 185, 191 (5th Cir. 2020) (upholding revocation based upon hearsay evidence because "the Government had a strong interest in allowing in . . . [the] out-of-court statements [of the parolee's wife], which we find to have had sufficient indicia of reliability": the government-interest requirement was satisfied by a showing that the parolee had assaulted and threatened his wife; she had obtained a restraining order against him but was afraid to testify); *United States v. Robinson*, 63 F.4th 530 (6th Cir. 2023) (the Fourth Amendment exclusionary rule does not apply in parole revocation hearings). *And cf. United States v. Foley*, 946 F.3d 681, 687 (5th Cir. 2020) (dictum) ("We now hold that a district court errs when it relies on a bare allegation of a new law violation contained in a revocation petition unless the allegation is supported by evidence adduced at the revocation hearing or contains other indicia of reliability, such as the factual underpinnings of the conduct giving rise to the arrest.").

Many of the defense arguments and strategies suggested in § 39.04 for use in probation revocation hearings also apply to parole revocation hearings. This includes the possibility, mentioned in the last paragraph of § 39.04, of arguing that the condition whose alleged violation is the subject of the revocation proceeding was invalid. In localities where parole revocation hearings are conventionally held before a judge of the juvenile court rather than before the agency, there may be a statutory basis for arguing that only the agency has jurisdiction to conduct the hearing. *See, e.g., In the Matter of J.M.W.,* 411 A.2d 345 (D.C. 1980). Of course, this argument should not be made unless counsel is confident that the respondent's chances for avoiding parole revocation are better with an agency decisionmaker than with the judge. Generally, the respondent will fare better before a judge because the agency is likely to respect

the parole officer's recommendation of revocation. However, if the juvenile correctional facility is overcrowded, the respondent's chances of escaping reincarceration may be better with an agency decisionmaker; the agencies are often more responsive to "bed pressure" than is the judiciary.

§ 39.06 EXTENSION OF A TERM OF INCARCERATION

In some jurisdictions a respondent who has been committed for a period of incarceration can be subjected to annual extensions of the commitment until the respondent turns 18 (or, in some jurisdictions, 21) on the grounds of additional need for rehabilitation or continuing need to protect the public. *See, e.g.,* D.C. CODE ANN. § 16-2322(c) (2023); N.Y. FAM. CT. ACT § 355.3 (2023). *Cf. Kenniston v. Department of Youth Services*, 453 Mass. 179, 180, 185, 187 & n.13, 900 N.E.2d 852, 855, 858, 860 & n.13 (2009) (statute authorizing "the continued commitment of a youth in the [Department of Youth Services'] custody for an additional three years after the youth's eighteenth birthday if the department determines that the youth 'would be physically dangerous to the public'" violates substantive due process because the statute "permits extended detention based solely on dangerousness, without any link to a mental condition or defect or an inability to control one's behavior"; moreover, "the statutory requirement that a juvenile be found 'physically dangerous' is unconstitutionally vague" because the "language contains no indication of the nature and degree of dangerousness that would justify continued commitment, and offers the department no guidance on how to make such a determination," which can be affected by "the differences in adolescent and adult decision-making and thought processes, and the additional difficulty these differences create for testing tools designed to assess an adolescent's risk of future dangerousness"); *In the Matter of Michael J.*, 180 Misc. 2d 538, 540-41, 691 N.Y.S.2d 277, 278-79 (N.Y. Fam. Ct., Monroe Cty. 1999) (a respondent who is the subject of a proceeding for an extension of placement "retains certain due process protections, including the right to notice of the hearing" – and accordingly is entitled to a "clear statement[ ] as to the bases for the request to continue his placement" – and the rights to "be present with counsel and have an opportunity to refute the petition"); *State in the Interest of J.J.*, 427 N.J. Super. 541, 557, 49 A.3d 877, 888 (2012) (when the State seeks to invoke a state statutory procedure for transferring an incarcerated juvenile over the age of 16 from a juvenile facility to an adult correctional facility based on a "'threat[ ] [to] the public safety'" or other "security" needs, due process requires, "[a]t a minimum," "written notice of the proposed transfer and the supporting factual basis, an impartial decision maker, an opportunity to be heard and to present opposition, some form of representation, . . . and written findings of fact supporting a decision to proceed with the transfer"); *and see Foucha v. Louisiana*, 504 U.S. 71 (1992); *Kansas v. Crane*, 534 U.S. 407 (2002). Practice differs widely among the jurisdictions with regard to how frequently the extension process is actually invoked. In some jurisdictions it is routinely used to extend the terms of large numbers of delinquents who are thought to need further rehabilitation. In other jurisdictions the authorities have reacted to chronic overcrowding in juvenile facilities by reserving the extension option for children who appear to be most severely in need of continued treatment or whose crime or behavior in the institution leads to their being branded as unusually dangerous.

In jurisdictions that permit extensions of a juvenile's term of incarceration, the applicable statute or caselaw usually provides for a hearing at which the state must make a showing to justify the extension and the defense can rebut this showing. If the basis for the requested extension is a need for continued rehabilitative services, counsel should seek out appropriate community-based programs and argue that these are adequate to serve the respondent's needs. See § 38.14 *supra.* Counsel should also thoroughly investigate the services that the respondent has been receiving in the institution. If they are inadequate or inappropriate, counsel can argue that the requested extension of incarceration is unjustifiable because the state has shown itself incapable of actually providing services suitable to the respondent's needs. See § 39.07 *infra.*

§ 39.07 MONITORING CONDITIONS OF CONFINEMENT; SEEKING THE RELEASE OF A RESPONDENT WHO IS NOT RECEIVING APPROPRIATE TREATMENT

As explained in §§ 38.24 and 38.29 *supra,* counsel should ordinarily request that a disposition order placing a respondent in an institutional facility specify the educational, vocational, and other rehabilitative services that the facility must provide the respondent. After the respondent is in the institution, counsel should keep in touch with him or her and ascertain whether s/he is receiving the specified services. If s/he is not, counsel can usually correct the situation by telephoning the administrator of the facility, explaining the problem, and advising the administrator that counsel will seek judicial enforcement of the disposition order unless the services it calls for are initiated promptly. If this does not produce a satisfactory outcome, counsel can file a motion for an order to show cause why the agency should not be held in contempt for failing to honor the court's disposition order.

When the reason for the failure to provide a respondent with the required services is that the facility lacks adequate resources (for example, in the case of a facility that cannot comply with an order for special education services because its teachers are not certified to teach special education or because it is understaffed), counsel may be able to persuade the court that the respondent should be released from incarceration. In many jurisdictions the juvenile code provides for modification or termination of a disposition of commitment, *see, e.g.,* CAL. WELF. & INST. CODE § 778 (2023); D.C. CODE ANN. § 16-2324(a) (2023); N.Y. FAM. CT. ACT § 355.1(1)(b) (2023), and counsel can argue that this relief is appropriate when the facility is unable to provide the services that the judge found were needed and that the respondent's commitment to the facility was intended to procure. The motion should assert that the respondent has a due process right to treatment and, where applicable, a statutory right to treatment under the state's juvenile code. *See, e.g., Nelson v. Heyne,* 491 F.2d 352 (7th Cir. 1974); *Alexander S. By and Through Bowers v. Boyd*, 876 F. Supp. 773 (D. S.C. 1995); *Pena v. New York State Division for Youth,* 419 F. Supp. 203 (S.D.N.Y. 1976), *approved in* 708 F.2d 877 (2d Cir. 1983); *but see Santana v. Collazo,* 714 F.2d 1172 (1st Cir. 1983). *See generally* Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791 (1995). If state law makes no provision for the modification or termination of commitment or if relief is not likely to be obtained through those procedures, counsel can file a petition for habeas corpus seeking the release of the respondent on the ground

that the institution is violating his or her constitutional right to treatment. *See Creek v. Stone,* 379 F.2d 106, 109 (D.C. Cir. 1967) (recognizing that a juvenile respondent can petition for habeas relief on the ground that the conditions in the detention facility "vitiate the justification for confinement").

The information that counsel gathers by monitoring the services provided to clients also can be useful in other ways. If counsel uncovers fundamental deficiencies in the treatment services or living conditions at a particular facility, that data may provide the basis for a civil suit (which can take the form of a class action) to improve conditions in the facility. *See generally* MICHAEL J. DALE, REPRESENTING THE CHILD CLIENT (2012). In addition, when counsel represents other clients at dispositional hearings, s/he can cite the weaknesses of the facility's services in arguing against placement at the facility.

§ 39.08 SEALING AND EXPUNGEMENT OF CONVICTION RECORDS

Several States provide for "sealing" the records of a juvenile conviction after the respondent has attained the age of majority or after the respondent, although still a juvenile, has remained crime-free for a specified period of time. *See, e.g.,* CAL. WELF. & INST. CODE § 781 (2023); D.C. CODE ANN. § 16-2335 (2023); OHIO REV. CODE ANN. § 2151.358 (2023). *See generally* RIYA SAHA SHAH, LAUREN FINE & JAMIE GULLEN, JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT (Juvenile Law Center 2014). Some States also provide for expungement of conviction records after a certain length of time or upon the respondent's attaining the age of majority. *See, e.g.,* CAL. WELF. & INST. CODE §§ 826-826.5 (2023); CONN. GEN. STAT. ANN. § 46b-146 (2023); *In the Matter of the Petition of C.B.*, 122 P.3d 1065 (Colo. App. 2005); *Nelson v. State*, 120 Wash. App. 470, 85 P.3d 912 (2003). *See generally* SHAH, FINE & GULLEN, *supra*. Expungement is also an available remedy after a conviction has been vacated in collateral-review proceedings, including federal *habeas. See, e.g., Gall v. Scroggy*, 603 F.3d 346 (6th Cir. 2010). ("Expungement" ordinarily entails the physical destruction of the records. "Sealed" records continue to be maintained but are placed in a separate file area rendered inaccessible except under specified extraordinary circumstances.) The sealing and expungement mechanisms may be automatic, or counsel may have to file a motion for a court order activating them. (See also § 37.03 *supra,* dealing with procedures for expunging court and police records in cases in which the respondent was acquitted at trial or in which the charges were dismissed without a trial.) If a client is entitled to expungement or sealing, counsel should ensure that the expungement or sealing actually takes place, and that the process is performed in a way that provides the requisite confidentiality protections. See § 37.03 *supra*.