Chapter 4

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

Part A. Introduction

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

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

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

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

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

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

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

Most jurisdictions conduct the arraignment at Initial Hearing, *see, e.g.,* N.Y. FAM. CT. ACT § 320.4(1) (2023), although some jurisdictions permit the prosecution to postpone the filing of a Petition and the arraignment for a limited period of time under exceptional circumstances. *See, e.g., In the Matter of T.G.T.,* 515 A.2d 1086 (D.C. 1986) (construing a D.C. statute to permit a prosecution continuance of the filing of the Petition for up to five days following Initial Hearing upon a "clear showing of a legitimate state objective to be served by the postponement," *id.* at 1087; but detention or shelter care can only be ordered in such circumstances "if the juvenile is given reasonably specific notice of the nature of the charge," *id.*). Some jurisdictions incorporate both the detention determination and the probable-cause determination in the Initial Hearing, *see, e.g.,* D.C. CODE §§ 16-2310(a), 16-2312(e)-(f) (2023), while others provide for an adversarial detention determination at Initial Hearing followed some days later by a probable-cause hearing, *see, e.g.,* N.Y. FAM. CT. ACT § 325.1(2) (2023).

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

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

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

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

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

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

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

Part B. Appointment of Counsel

§ 4.03 THE RIGHT TO COUNSEL AT INITIAL HEARING

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

The Sixth Amendment right to counsel applies at every "critical stage" of the proceedings, *White v. Maryland,* 373 U.S. 59 (1963) (per curiam), "at or after the time that adversary judicial proceedings have been initiated against [the individual] . . . – 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams,* 430 U.S. 387, 398 (1977). *See also Montejo v. Louisiana*, 556 U.S. 778, 786 (2009); *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 198, 213 (2008); *Shabazz v. State*, 2018 Ark. App. 399, 557 S.W.3d 274, 280 (2018) ("the Sixth Amendment right to counsel applies to suppression hearings"); *People v. Smith*, 30 N.Y.3d 626, 92 N.E.3d 789, 69 N.Y.S.3d 566 (2017) (the defendant had a right to representation by counsel on the prosecution's pretrial motion to compel him to submit to a buccal swab). The right is triggered at "such time as the '"government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified."'" *Moran v. Burbine,* 475 U.S. 412, 432 (1986). It extends though sentencing (*Mempa v. Rhay*, 389 U.S. 128 (1967); *Lafler v. Cooper*, 566 U.S. 156, 165 (2012); *United States v. Freeman*, 24 F.4th 320 (4th Cir. 2022) (en banc); *Lewis v. Zatecky*, 993 F.3d 994 (7th Cir. 2021)), post-sentencing proceedings (*Richardson v. Superintendent Coal Township SCI*, 905 F.3d 750 (3d Cir. 2018); *Parker v. State*, 604 S.W.3d 555 (Tex. App. 2020)), and at least the first appeal as of right from conviction and sentence (*Douglas v. California*, 372 U.S. 353 (1963); *Swenson v. Bosler*, 386 U.S. 258 (1967); *Halbert v. Michigan*, 545 U.S. 605 (2005)); *cf. Belknap v. State*, 426 P.3d 1156 (Alaska App. 2018) (the right to counsel extends to motions for the sentencing credit authorized by a statute providing such credit to defendants who were on court-ordered electronic monitoring programs during their bail release); *and compare Martinez v. Ryan*, 566 U.S. 1 (2012), *and Trevino* v. *Thaler*, 569 U. S. 413 (2013), *and Commonwealth v. Bradley*, 261 A.3d 381 (Pa. 2021), *with Coleman v. Thompson*, 501 U.S. 722 (1991), *and Davila v. Davis*, 582 U.S. 521 (2017), and *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022).

Under these principles it has long been clear that the Sixth Amendment requires the appointment of counsel to represent indigents at arraignment. *Hamilton v. Alabama,* 368 U.S. 52 (1961); *see, e.g., Rothgery v. Gillespie County, Texas*, 554 U.S. at 198, 213; *Moran v. Burbine*, 475 U.S. at 428; *see also Missouri v. Frye*, 566 U.S. 133, 140 (2012); *Gonzales v. Commissioner of Correction*, 308 Conn. 463, 68 A.3d 624 (2013). Accordingly, when, as in the majority of jurisdictions, Initial Hearing includes an arraignment, a juvenile respondent is entitled to be represented by counsel at the Initial Hearing. In those jurisdictions where Initial Hearing does not involve an arraignment but consists of an adversarial detention hearing and a determination of probable-cause, the Sixth Amendment right to counsel should also apply. Although the Supreme Court has occasionally described the time at which the right attaches as the "first formal charging proceeding" *(Moran v. Burbine,* 475 U.S. at 428), it plainly can attach earlier, depending upon

the "state system[ ] of criminal procedure," *Gerstein v. Pugh,* 420 U.S. 103, 123 (1975). *See, e.g., Coleman v. Alabama,* 399 U.S. 1 (1970). *See also, e.g.*, *State in the Interest of P.M.P.*, 200 N.J. 166, 177-78, 975 A.2d 441, 447-48 (2009) (state statutory right to counsel, which applies to "'every critical stage of the proceeding which, in the opinion of the court may result in the institutional commitment of the juvenile,'" is triggered when "the Prosecutor's Office initiates a juvenile complaint and obtains a judicially approved arrest warrant"). In *Moore v. Illinois,* 434 U.S. 220 (1977), the Court concluded that the right to counsel attached at a prearraignment preliminary hearing whose purpose under state criminal procedure was "to determine whether there was probable-cause to bind petitioner over to the grand jury and to set bail." *Id.* at 228. In reaching this conclusion in *Moore,* the Court emphasized that the accused "found 'himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Id.* This is no less true of a juvenile detention proceeding, in which the prosecutor is seeking detention and an effective response requires a knowledge of the complex statutory and caselaw standards governing detention determinations. Indeed, because of the special disabilities of youth, there is particular reason to conclude that "[t]he child 'requires the guiding hand of counsel at every step in the proceedings against him.'" *In re Gault,* 387 U.S. 1, 36 (1967) (dictum). *See also Schall v. Martin,* 467 U.S. 253, 279 (1984) (in approving the constitutionality of preventive detention for juveniles, the Court emphasizes that the detention statutes in question conferred upon juveniles "the right to a hearing [and] . . . to counsel").

Many jurisdictions also give juveniles a statutory entitlement to counsel at all stages of a delinquency proceeding, including the detention hearing. *See, e.g., T.K. v. State,* 126 Ga. App. 269, 190 S.E.2d 588 (1972); *State ex rel. M.C.H. v. Kinder,* 317 S.E.2d 150 (W. Va. 1984); CAL. WELF. & INST. CODE § 633 (2023); N.Y. FAM. CT. ACT §§ 307.4(2), 320.2(2) (2023); S.D. CODIFIED LAWS §§ 26-7A-30, 26-7A-31 (2023).

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

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

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

to obtain the court-appointed counsel to which they are entitled.

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

In some jurisdictions public defenders and private attorneys are available in court each day for appointment to cases. In these jurisdictions an attorney will be appointed, and arraignment will take place immediately thereafter. In other jurisdictions there is no corps of attorneys available for daily appointment, and the ordinary practice is to appoint a particular attorney by name, then adjourn the arraignment to another date (possibly two to four weeks later) to permit the designated attorney to appear. In the latter jurisdictions, if the prosecutor requests immediate pretrial detention, the judge will usually make a temporary assignment of an attorney who happens to be in court to handle an arraignment and a pretrial detention hearing in the case.

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

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

independent assessment of the need for appointing a different attorney.

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

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

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

§ 4.05 WAIVER OF THE RIGHT TO COUNSEL

In adult criminal cases, a mentally competent defendant has the federal constitutional right to waive counsel, including the right to dismiss court-appointed counsel, and to proceed *pro se*. *Faretta v. California*, 422 U.S. 806 (1975). *See*, *e.g.*, *Tatum v. Foster*, 847 F.3d 459 (7th Cir. 2017); *Tennis v. State*, 997 So.2d 375 (Fla. 2008). The standard of competency for this purpose is the same as the standard for competency to stand trial under *Dusky v. United States*, 362 U.S. 402

(1960), and cognate cases discussed in § 12.17 *infra*: "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" *Godinez v. Moran*, 509 U.S. 389, 396 (1993). *See United States v. Taylor*, 21 F.4th 94, 101-02 (3d Cir. 2021) (reversing a trial judge's refusal to allow the defendant to waive counsel and proceed *pro se*) ("[T]he District Court appears to have misdirected its focus when evaluating Taylor's request to represent himself. In his *pro se* filings and at the suppression hearing, Taylor advanced 'sovereign citizen' arguments. . . . The District Court focused on these arguments, noting that Taylor's claims were 'not founded on any rational legal principles' and 'sen[t] up a red flag.' . . . The record further indicates that the District Court had the merits of Taylor's claims in mind rather than his appreciation for the consequences of representing himself when it denied his request . . . . ¶ . . . In [*United States v.*] *Peppers*, [302 F.3d 120 (3d Cir. 2002),] we held that the district court erred because it denied the defendant's request to represent himself after focusing its inquiry on the defendant's knowledge of the law and practical ability to mount a defense. . . . We determined that, instead, the court should have investigated whether the defendant appreciated 'the structural limitations or perils of representing himself.'"); *and see United States v. Jones*, 65 F.4th 926 (7th Cir. 2023) (upholding a trial court's decision granting a defendant the right to proceed *pro se* in a similar case, even though the defendant's trial performance was a shambles). However, defendants may be denied the right to proceed *pro se* if the court finds that their mental condition is such that, while "competent enough to stand trial under *Dusky* . . . [if represented by counsel, they] . . . still suffer from severe mental illness to the point . . . [of being] not competent to conduct trial proceedings by themselves." *Indiana v. Edwards*, 554 U.S. 164, 178 (2008). *See also McKaskle v. Wiggins,* 465 U.S. 168 (1984) (defendant's right to self-representation was not violated by judge's appointment of standby counsel and by standby counsel's intermittent, unsolicited participation in the trial). (Reconciling *Edwards* and *Godinez* is not easy. *See* Todd A. Berger, *The Aftermath of* Indiana v. Edwards*: Re-Evaluating the Standard of Competency Needed for Pro Se Representation*, 68 BAYLOR L. REV. 680 (2016); Richard J. Bonnie, *Competence for Criminal Adjudication: Client Autonomy and the Significance of Decisional Competence* (forthcoming, OHIO STATE JOURNAL OF CRIMINAL LAW), *available at* https://ssrn.com/abstract=4365151). Granting a defendant leave to proceed *pro se* without an adequate inquiry into his or her competence "deprive[s the defendant] . . . of two distinct protections . . . : (1) protection of . . . [the] constitutional right to counsel . . . [despite] a mental disorder that prevent[s] him [or her] from understanding the significance and consequences of waiving that right . . .; and (2) protection of . . . [the] right to a fair trial . . . [insofar as s/he might be] unable to present a defense because of . . . mental impairment . . . ." *People v. Waldron*, 14 Cal. 5th 288, 309-10, 522 P.3d 1059, 1073, 303 Cal. Rptr. 3d 652, 669 (2023). When the respondent wishes to waive the right to counsel and to exercise the *Faretta* right of self-representation, s/he must be competent both to confer with counsel regarding the consequences and advisability of the preliminary waiver and then to handle the trial (or plea) proceedings without counsel's aid. *See People v. Wycoff*, 12 Cal. 5th 58, 89, 493 P.3d 789, 809, 283 Cal. Rptr. 3d 1, 26 (2021) ("It might be argued that a defendant who intends to waive counsel does not need to be able to consult with counsel, and therefore the first prong of the *Dusky* standard does not apply when competence to waive counsel is at issue. The argument fails

as a matter of logic because a defendant who is represented and is considering whether to waive counsel needs to consult with counsel in order to understand and weigh the pros and cons of that decision.").

"'It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts.' . . . Thus, a defendant must state his request to proceed pro se 'unambiguously to the court so that no reasonable person can say that the request was not made.'" *United States v. Williams*, 2023 WL 2945900, at *1 (3d Cir. 2023). *Compare Bolden v. Vandergriff*, 69 F.4th 479, 483 (8th Cir. 2023) (holding that a state trial judge was not obliged to allow a defendant to proceed *pro se* when the defendant's waiver of counsel was conditional: applying AEDPA's restricted standard of review (see § 49.2.3.2 *infra*), the Eighth Circuit finds that "Bolden conditioned his self-representation request on his speedy trial motions being denied, and wanted counsel to depose witnesses even after being informed counsel could not do so if he was *pro se*. From these facts, a court could reasonably conclude Bolden's waiver of the right to counsel was not unequivocal."). "[I]n situations where a defendant clearly, unequivocally, and timely invokes the right to self-representation, the trial court must inform the defendant 'of the dangers and disadvantages of self-representation,' . . . and conduct a '"searching or formal inquiry" to ensure that [the] waiver [of counsel] is knowing, intelligent, and voluntary . . . .'" *Cassano v. Shoop*, 1 F.4th 458, 466 (6th Cir. 2021); *United States v. Hakim*, 30 F.4th 1310, 1314-15 (11th Cir. 2022). This is the nearly ubiquitous practice in both state and federal courts. *See¸ e.g.*, *Godinez v. Moran*, 509 U.S. at 392-93; *United States v. Johnson*, 24 F.4th 590 (6th Cir. 2022); *State v. Murray*, 469 S.W.3d 921 (Mo. App. 2015); *State v. Klessig,* 211 Wis. 2d 194, 207, 564 N.W.2d 716, 721 (Wis. 1997); *State v. Victor*, 13-888 (La.App. 5 Cir. 12/23/14), 167 So.3d 118 (La. App. 2014); *Cortez v. State*, 2014 WL 1423339 (Tex. App. 2014); *People v. Baines*, 39 N.Y.3d 1, 197 N.E.3d 1282, 176 N.Y.S.3d 843 (2022); *but see Iowa v. Tovar*, 541 U.S. 77, 81 (2004) (holding that the federal Constitution does not *require* an admonition regarding the dangers and risks of self-representation but permits a defendant to waive counsel and plead guilty if "the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea"); *United States v. Schaefer*, 13 F.4th 875, 888 (9th Cir. 2021) (holding a waiver of counsel valid although the defendant was incorrectly advised regarding the length of the mandatory minimum sentence for the offenses charged; it was sufficient that the defendant be informed of the nature of the charges, the dangers and disadvantages of self-representation, and "the approximate range of his penal exposure," so that he could apprehend "the severity of his potential punishment"). The court may order the defendant to undergo a mental examination and/or may receive extrinsic evidence of relevant mental impairment. *See*, *e.g.*, *People v. Shiga*, 6 Cal. App. 5th 22, 210 Cal. Rptr. 3d 611 (2016); *People v. Davis*, 2015 CO 36M, 352 P.3d 950 (Colo. 2015); *State v. Connor*, 292 Conn. 483, 528-30, 973 A.2d 627, 656-57 (2009); *State v. Bartlett*, 271 Mont. 429, 898 P.2d 98 (1995). If the court has reason to doubt the defendant's competence to be tried or to proceed *pro se*, it may not allow him or her to waive counsel until after the competency issue has been resolved. *State v. Bolden*, 558 S.W.3d 513 (Mo. App. 2016). "The trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct" (*Faretta v.*

California, 422 U.S. at 834 n. 46) or whose performance demonstrates that s/he is unable or unwilling "to abide by rules of procedure and courtroom protocol" (*McKaskle v. Wiggins,* 465 U.S. at 173). But to justify termination, the defendant's conduct must be seriously disruptive; the mere asking of an objectionable question on cross-examination of a government witness, for example, is insufficient justification, even if the defendant should have known that the question was improper. *United States v. Engel*, 968 F.3d 1046 (9th Cir. 2020).

In *In re Gault,* 387 U.S. 1 (1967), the Court implicitly assumed, without actually deciding, that the same right to waive counsel would be afforded juveniles in delinquency proceedings. *See id.* at 42 (Gault and his mother had "a right . . . to be confronted with the need for specific consideration of whether they did or did not choose to waive the right [to counsel]"). However, the Court in *Gault* also indicated that the right to counsel can be waived in a delinquency case only if the waiver is made by both the child and his or her parent or guardian. *See id.* at 41-42.

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

The problematic aspects of juvenile waivers of the right to counsel have led some state legislatures to flatly prohibit such waivers, *see, e.g.,* IOWA CODE ANN. § 232.11(2) (2023); TEX. FAM. CODE ANN. § 51.10(b) (2023), and this approach is advocated by the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association. *See* IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, Standard 6.1(A) (1980). *See also* WIS. STAT. ANN. § 938.23(1)(m)(a) (2023) (prohibiting waiver of counsel by juveniles below the age of 15 and specifying that, if a court accepts a knowing and voluntary waiver of counsel by a "juvenile 15 years of age or older," the court "may not place the juvenile in a juvenile correctional facility or a secured residential care center for children and youth, transfer supervision of the juvenile to the department for participation in the serious juvenile offender program, or transfer jurisdiction over the juvenile to adult court"). Other States follow the course of permitting waivers, but only after the youth has been fully advised of the consequences of waiver by an attorney, *State ex rel. J.M. v. Taylor,* 276 S.E.2d 199 (W. Va. 1981), or the judge, *In re B.M.H.,* 177 Ga. App. 478, 339 S.E.2d 757 (1986); *A.S. v. State*, 923 N.E.2d 486, 492-93 (Ind. App. 2010); *In re Christopher T.*, 129 Md. App. 28, 40-41, 740 A.2d 69, 75-76 (1999), or after a hearing at which it is shown by clear and convincing evidence that the child has knowingly and intelligently waived the right to counsel and that such a waiver is in the child's best interest, N.Y. FAM. CT. ACT § 249-a (2023); *see also In re Interest of Dalton S.*, 273 Neb. 504, 515, 730 N.W.2d 816, 825-26 (2007); *In re C.S.*, 115 Ohio St. 3d

267, 283-84, 874 N.E.2d 1177, 1192-93 (2007). *Cf. United States v. Ross*, 703 F.3d 856, 868-71 (6th Cir. 2012) (although the record "clearly support[ed]" the district court's initial finding that the adult defendant "had knowingly and voluntarily waived his right to counsel," the district court erred, when new questions about the defendant's competency surfaced, by "permitt[ing] him to represent himself at the competency hearing": "the Constitution requires a defendant to be represented by counsel at his own competency hearing, even if he has previously made a knowing and voluntary waiver of counsel").

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

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

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

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

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

Sometimes, counsel will have to take firm action to assure that s/he can interview the client at all prior to the Initial Hearing. In some jurisdictions attorneys for indigent respondents are appointed at the beginning of the Initial Hearing and are then expected to conduct the hearing immediately, even though they have not yet interviewed their clients. While this dilemma arises with far less frequency when counsel is retained, last-minute retention of the attorney may result in counsel's meeting the client just as the case is being called, and the judge may reject counsel's request that the case be recalled later in the day. Any such judicial pressures to conduct a hearing without a prior client interview are simply unacceptable. Counsel should insist upon interviewing the client before going forward with any of the components of the Initial Hearing. S/he should insist upon adequate time for the interview: The information necessary to provide effective assistance at the Initial Hearing, described in § 4.07 *infra* may take some time to elicit, especially with an uncommunicative client; and counsel cannot afford to give short shrift to any of the topics that must be covered. Finally, counsel should insist upon a private setting for the interview – a setting that avoids the risk of eavesdropping by guards or other prisoners and in which the client will feel comfortable revealing confidences.

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

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

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

In some jurisdictions public defenders and other court-appointed attorneys are informed early in the morning, some hours prior to Initial Hearing, that they will be appointed to a certain respondent's case at the hearing if that respondent is eligible for court-appointed counsel. In these jurisdictions counsel should seize the opportunity to interview the respondent as soon as s/he receives notice of a possible appointment. Inevitably, there will be more time and opportunity for a calm, effective client interview at that point in the day than after the Initial Hearings begin. Moreover, this type of early start on the case will enable counsel to contact

relatives, teachers, and social workers who may have information about the respondent that can be used at arraignment in arguing against pretrial detention. See §§ 4.08, 4.09 *infra.* Finally, in many jurisdictions, there will be an additional logistical reason for conducting the interview early in the day whenever the respondent has been detained pending arraignment: In these jurisdictions early interviews can be conducted in the relatively private setting of the general cell-block area of the courthouse; later interviews must be conducted in small holding cells adjoining the courtroom, in the presence of other juveniles who are being held in the cells.

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

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

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

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

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

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

2. Whether, to the child's knowledge, the parent/guardian plans to be present at the Initial Hearing. If the interview is being conducted in the courthouse shortly before the Initial Hearing and counsel has not personally seen the parent/guardian at the courthouse, counsel should ask the child whether the parent/guardian is there and should also ask the child for his or her home phone number so that

counsel can telephone the parent/guardian, if necessary, as well as the phone numbers of other relatives in the event that no one is home at the child's house. If the child believes that the parent/guardian will not be present, counsel should elicit the reasons for this absence, whether the presence of the parent/guardian can be arranged (either at the time set for the present Initial Hearing or at another time to which it might practicably be adjourned), and, if not, the names and phone numbers of other adult relatives, such as siblings, who could come to court in lieu of the parent/guardian and convey the parent/guardian's willingness to take the child home.

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

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

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

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

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

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

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

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

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

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

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

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

As explained in § 4.28 *infra, Gerstein v. Pugh,* 420 U.S. 103 (1975), requires that in any case in which the court orders pretrial detention, the judge must first determine that there is probable-cause to believe that the respondent committed the charged offense. Some jurisdictions provide for a full-scale evidentiary hearing on the issue of probable-cause as part of the Initial

Hearing; others provide only that the judge at the Initial Hearing must review the sufficiency of sworn affidavits submitted by the prosecution; still others provide for review of affidavits and similar documents at the Initial Hearing and convene an evidentiary probable-cause hearing some days later. See §§ 4.01 *supra,* 4.28(b) *infra.*

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

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

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

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

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

In addition to conducting a pre-hearing interview of the client, counsel also will need to interview the client's parent or guardian. The paramount question to resolve in talking with the client's parent or guardian is his or her willingness to take the child home in the event that the judge releases the child. As indicated in § 3.21 *supra,* some parents and guardians initially may be in favor of a brief period of detention, either because they are angry at their children for

having been arrested or because they have the misconception that detention will teach the child a needed lesson. As § 3.21 *supra* explains, it may be necessary to offset the anger or dispel the misconception by telling these parents and guardians about the harsh realities of institutional life and the potentially devastating impact of detention on the likelihood of winning at trial.

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

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

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

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

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

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

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

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

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

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

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

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

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

In most jurisdictions the most up-to-date compilation of a juvenile's prior record will be found in the juvenile court clerk's office. Because juvenile files are not public records, the clerk may be resistant to counsel's examination of the prior records of the client. Counsel should insist on seeing the records, explaining that access to these records is essential to counsel's preparation

for the detention hearing and therefore required by the child's Sixth Amendment right to effective assistance of counsel. If necessary, counsel should obtain an order from the judge permitting access to the records.

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

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

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

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

Finally, depending upon the prosecutor who is handling the case, it may be useful to consult the prosecutor as well, eliciting the recommendation that s/he intends to make and possibly lobbying him or her. Some prosecutors adopt an extremely adversarial stance, refusing to divulge information in advance of the hearing; some prosecutors are happy to discuss the matter; still others are guardedly willing to talk, in exchange for an equal amount of information

from defense counsel. Here again, it is important to understand the adversary's motivation and to tailor requests and arguments to address his or her concerns. See § 14.16 *infra.*

Part D. Arraignment

§ 4.12 NOTIFICATION OF THE CHARGES

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

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

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

"Do you want to proceed without your parent or guardian being present?" "Have you spoken with your attorney about your decision to proceed without your parent or guardian being present?" "Did your attorney explain to you your right to have your parent or guardian present?" "Do you know where your parent [guardian] is?" "Do you know why s/he is not in court today?" "Why do you want to proceed without your parent or guardian here?")

§ 4.13 THE RESPONDENT'S ENTRY OF A PLEA

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

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

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

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

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

After the respondent has been advised of the charges and has entered a plea of "not guilty," some judges proceed immediately to scheduling of the trial. But if this scheduling process takes place prior to the judge's determination of the respondent's pretrial detention status, counsel will not be in any position to know what s/he wants in the way of a trial date. Counsel's preferences regarding the scheduling of the trial will depend almost entirely on the

respondent's detention status: If the client is released pending trial, then counsel will wish as late a trial date as possible in order to thoroughly investigate the case and also to enable the child to amass a relatively lengthy period of good behavior that can be cited at sentencing in the event that the respondent is convicted; if, on the other hand, the respondent is detained pending trial, then counsel will wish as early a trial date as possible to minimize the length of detention.

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

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

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

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

As noted in § 4.13 *supra,* counsel will need to consult local practice to make sure that the old common-law procedure of special pleading is not followed. Under that procedure certain "special pleas" – such as objections to jurisdiction and pleas of double jeopardy – had to be made prior to the entry of a general plea of guilty or not guilty at arraignment. Under the procedure usually followed in juvenile court, objections of this sort are raised in pretrial motions. See Chapter 17.

Part E. Pretrial Detention and Bail

§ 4.15 INTRODUCTION: PRETRIAL DETENTION AND BAIL IN JUVENILE COURT

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

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

The majority of jurisdictions have rejected the use of bail in juvenile court. In some of these jurisdictions, statutes expressly prohibit bail for juveniles. *See, e.g.,* HAW. REV. STAT. § 571-32(h) (2023); OR. REV. STAT. § 419C.179 (2023); UTAH CODE ANN. § 80-6-207(11) (2023) (prohibiting bail except when the juvenile lives out-of-state or when the offense is a traffic violation or certain other minor infractions). In other jurisdictions, in which the juvenile statutes are silent on the subject of bail, the courts have rejected juveniles' claims of an entitlement to bail, reasoning in part that the juvenile code's presumption in favor of release supplies sufficient protection of the child's liberty rights. *See, e.g., Aubrey v. Gadbois,* 50 Cal. App. 3d 470, 123 Cal. Rptr. 365 (2d Dist. 1975); *Pauley v. Gross,* 1 Kan. App. 2d 736, 574 P.2d 234 (1977); *State v. Gleason,* 404 A.2d 573, 582-83 (Me. 1979); *People ex rel. Wayburn v. Schupf,* 47 A.D.2d 79, 365 N.Y.S.2d 235 (N.Y. App. Div., 2d Dep't 1975); *Morris v. D'Amario,* 416 A.2d 137 (R.I. 1980); *see also In re William M.,* 3 Cal. 3d 16, 26 n.17, 473 P.2d 737, 744 n.17, 89 Cal. Rptr. 33, 40 n.17 (1970); *State v. M.L.C.*, 933 P.2d 380, 385-87 (Utah 1997). Finally, in several jurisdictions in which the statutes are silent on the issue of bail for juveniles and the appellate courts have never addressed the issue, trial judges simply assume that bail is inapplicable in juvenile court because the juvenile code provides only for detention or release.

In roughly one fourth of the States, the juvenile code does allow bail in delinquency cases. *See* CONN. GEN. STAT. ANN. § 46b-133(b) (2023); MASS. GEN. LAWS ANN. ch. 119, § 67 (2023); MINN. STAT. ANN. § 260B.176(1) (2023); NEB. REV. STAT. § 43-253(5) (2023); OKLA. STAT. ANN. tit. 10A, § 2-2-403(B) (2023); S.D. CODIFIED LAWS § 26-7A-52 (2023); TENN. CODE

ANN. §§ 37-1-114(c)(7), 37-l-117(c) (2023); WASH. REV. CODE ANN. §§ 13.40.040(5), 13.40.050(6) (2023); W. VA. CODE § 49-4-706(a) (2023). The nature of these statutory schemes, and particularly the relationship between bail and preventive detention, is discussed in § 4.27(b) *infra.*

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

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

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

It is essential that counsel prepare carefully for the detention hearing, since its outcome can have a decisive impact on the entire case. As the empirical evidence suggests, and as trial lawyers can attest from personal experience, pretrial detention significantly increases the likelihood of conviction at trial and incarceration at sentencing. *See* Stevens H. Clarke & Gary Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference,* 14 LAW & SOC'Y REV. 263, 293-94 (1980); Patricia Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study,* 39 N.Y.U. L. REV. 631 (1964). One explanation for this phenomenon is that the incarceration of the accused prevents him or her from assisting defense counsel in finding witnesses and preparing the case for trial. *Barker v. Wingo,* 407 U.S. 514, 533 & n.35 (1972); *Schall v. Martin*, 467 U.S. 253, 297 & n.24 (1984) (Marshall, J., dissenting); *Kinney v. Lenon,* 425 F.2d 209 (9th Cir. 1970). Other factors may include "'[c]onditions of confinement . . . that are so harsh or intolerable as to induce [the accused] to plead guilty, or that damage his

appearance or mental alertness at trial.'" *United States v. Edwards,* 430 A.2d 1321, 1355 (D.C. 1981) (Ferren, J., concurring and dissenting). Finally, the increased likelihood of conviction at trial may be attributed in part to the psychological impact of detention on the finder of fact, who is, in most jurisdictions, a judge. Since judges are well aware that detention is most often ordered because of a significant prior criminal record, the judge is likely to presume that a juvenile who has been detained pending trial has a prior record, and this presumption may in turn render the judge more willing to conclude that the respondent is guilty of the present charge. The greater likelihood of incarceration at sentencing may be attributed in part to the fact that the respondent, unlike children who were released before trial, cannot point to recent evidence of ability to adjust in the community.

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

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§ 4.17 STATUTORY AND CASELAW STANDARDS FOR THE DETENTION DETERMINATION

In most jurisdictions the juvenile code contains a statutory provision requiring that a detention hearing be held within a specified period of time following arrest. *See, e.g.,* ILL. COMP. STAT. ANN. ch. 705, § 405/5-415(1) (2023) (40 hours excluding weekends and holidays); IND. CODE ANN. § 31-37-6-2 (2023) (within 48 hours excluding weekends and holidays); N.Y. FAM. CT. ACT § 307.4(5) (2023) (within 72 hours "or the next day the court is in session, whichever is sooner"); W. VA. CODE § 49-5-8(c)(4), (d) (2023) ("In no event may any delay in presenting the juvenile for a detention hearing exceed the next day after he or she is taken into custody."). *See also JV-111701 v. Superior Court In and For County of Maricopa*, 163 Ariz. 147, 149-52, 786 P.2d 998, 1000-03 (Ariz. App. 1989) (juvenile court rule providing for initial hearing within 24 hours violated the Equal Protection Clause by excluding weekends and holidays from calculation of the 24-hour period while the parallel rule for adult criminal defendants included weekends and holidays within the 24-hour period for bringing an adult arrestee before a magistrate). Such detention hearings are ordinarily conducted as nonevidentiary arguments by the attorneys. See

§ 4.19 *infra.* However, in some jurisdictions, the factual statements made in support of detention must be in the form of sworn testimony. *See, e.g., Doe v. State,* 487 P.2d 47, 53 (Alaska 1971); *In re Luis M.,* 180 Cal. App. 3d 1090, 1094, 226 Cal. Rptr. 39, 41 (1986) (respondent who is detained can request a detention rehearing, at which s/he can confront and cross-examine the authors of reports relied upon to justify detention).

The substantive standard employed in most jurisdictions authorizes detention in cases in which: (i) there is a substantial probability that the respondent will flee the jurisdiction to avoid trial; or (ii) there is a serious risk that the respondent will be a danger to others by committing further crimes before the trial date. *See, e.g.,* N.Y. FAM. CT. ACT § 320.5(3) (2023). Some jurisdictions add to this list an imminent risk that the respondent will be a danger to himself or herself by attempting suicide or other seriously self-destructive behavior. *See, e.g.,* D.C. SUPER. CT. JUV. RULE 106(a)(3)(iii)-(iv) (2023).

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

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

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

Schall v. Martin, 467 U.S. 253, 279 (1984) (describing the factors generally relied upon by Family Court judges in New York City). In authorizing consideration of other crimes of the respondent, the detention standards of some jurisdictions carefully distinguish between crimes against the person and crimes against property, limiting the judge's consideration of other crimes against property to crimes involving "serious loss or damage," D.C. SUPER. CT. JUV. RULE

106(a)(2)(iii) (2023), or property "offense[s] constituting a felony." TENN. CODE ANN. § 37-1-114(c)(2) (2023).

In some jurisdictions the juvenile code not only sets forth a substantive standard for the detention decision but also specifies that an order of detention must be supported by a finding that there is an "immediate and urgent necessity" for detention. *See, e.g.,* CAL. WELF. & INST. CODE § 636(a) (2023); ILL. COMP. STAT. ANN. ch. 705, § 405/5-501 (2023); NEB. REV. STAT. § 43-253(5) (2023). In such a jurisdiction counsel can argue that the statute requires that the prosecution make a two-part showing to justify detention. First, the prosecution must show that detention is justified under the governing substantive criterion of risk of flight or dangerousness. Second, the prosecution must show that this risk of flight or dangerousness is so grave as to give rise to an "immediate and urgent necessity" for detention.

In many States the detention statute or caselaw limits detention to those cases in which there is no less restrictive alternative. *See, e.g., Doe v. State,* 487 P.2d 47, 53 (Alaska 1971); *Commonwealth ex rel. Sprowal v. Hendricks,* 438 Pa. 435, 265 A.2d 348 (1970); *State ex rel. M.C.H. v. Kinder,* 317 S.E.2d 150, 156-57 (W. Va. 1984); TENN. CODE ANN. § 37-1-114(c)(7) (2023). Counsel should stress this requirement and argue against detention on the ground that less restrictive measures (such as home detention, daily telephone calls to a probation officer, or, if necessary, placement in a group home) would be sufficient to guard against the risks identified by the prosecutor.

Several jurisdictions require that a judge who orders detention state the reasons for detention on the record so that the determination can be reviewed on appeal. *See, e.g., Doe v. State,* 487 P.2d 47, 53 (Alaska 1971); *State ex rel. M.C.H. v. Kinder,* 317 S.E.2d 150, 158-59 (W. Va. 1984); N.Y. FAM. CT. ACT § 320.5(3) (2023).

Many States specify that children below a certain age (usually designated as age ten) cannot be placed in a secure detention facility. *See, e.g.,* N.Y. FAM. CT. ACT § 304.1(3) (2023). *See State ex rel. M.C.H. v. Kinder,* 317 S.E.2d 150, 157 & n.19 (W. Va. 1984) (listing the statutory minimum age limits of several States). Even in jurisdictions that lack such a statutory age limit, most judges are extremely reluctant to place a very young child in detention and will do so only if the charged offense is heinous. If detention of a young child is necessitated by the parent's unwillingness to take the child home, the judge usually will place that child in a group home rather than a secure detention facility.

§ 4.18 POSSIBLE PLACES OF DETENTION

Knowledge of the types of juvenile detention facilities that are commonly employed by the court are important for several reasons. First and most fundamentally, that knowledge enables counsel to formulate requests for alternatives to detention in a secure facility. Familiarity with the services and programs provided at the various detention facilities will furthermore enable counsel to argue that detention is inappropriate in cases in which a facility cannot attend to the child's

special educational or psychological needs. Familiarity with private group homes and community-based programs will make it possible to quickly construct alternatives to pretrial detention.

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

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

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

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

Some States permit pretrial detention of juveniles in adult facilities in regions of the State in which there is no juvenile detention facility or in which the juvenile facilities that do exist are too small to house the entire population of pretrial detainees. *See, e.g.,* MONT. CODE ANN. § 41-5-349 (2023); N.D. CENTURY CODE ANN. § 27-20.4-08 (2023). When authorizing placement of juveniles in adult jails, statutes of this sort usually require that juveniles be placed in a division of the jail "separate and removed from those for adults." N.D. CENTURY CODE ANN. § 27-20-16(1)(e) (2023). However, tragic cases of physical and sexual abuse of children placed in adult jails (*see, e.g., Doe v. Burwell,* 537 F. Supp. 186 (S.D. Ohio 1982); *see also Cox v. Turley,*

506 F.2d 1347, 1350-53 (6th Cir. 1974); AMNESTY INTERNATIONAL, BETRAYING THE YOUNG: HUMAN RIGHTS VIOLATIONS AGAINST CHILDREN IN THE U.S. JUSTICE SYSTEM 37-39 (November 1998); AMERICAN BAR ASSOCIATION STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN, AMERICA'S CHILDREN *STILL* AT RISK 265-67 (2001)) have led some States to flatly prohibit placement of children in adult jails, *see, e.g.,* MO. REV. STAT.§§ 211.151(2), (4) (2023); OHIO RULE JUV. PROC. 7(H) (2023); PA. CONS. STAT. ANN. tit. 42, § 6327(a), (c) (2023); *see also* Comment to PA. CONS. STAT. ANN. tit. 42, § 6327 (2023) (quoting Uniform Juvenile Act's explanation that such prohibitions "'are designed to avoid the harm resulting from exposing children to adult criminals and the degrading effect of jails, lockups, and the like'"), and has led to federal legislation requiring that States receiving funds under the Juvenile Justice and Delinquency Prevention Act refrain from placing juveniles in adult jails and lockups except for brief periods of up to 48 hours (excluding weekends and holidays) pending an initial court appearance. *See* 34 U.S.C. § 11133(a)(13)(B) (2023). The practice of placing juvenile pretrial detainees in adult jails has also been found to be "fundamentally unfair" in violation of due process, in that the juvenile court's invocation of the *parens patriae* rationale to deny the normal procedural rights accorded to adult criminals necessitates a corresponding parental "solicitude" in the choice of where to detain the child pending trial. *D.B. v. Tewksbury,* 545 F. Supp. 896, 906-07 (D. Or. 1982).

§ 4.19 THE DETENTION HEARING: PROCEDURE

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

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

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

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

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

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

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

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

In many jurisdictions the probation officer's recitation of prior charges of the respondent includes a variety of dismissed charges such as: cases in which the respondent was arrested but the prosecutor elected not to bring charges (an exercise of prosecutorial discretion known in some jurisdictions as "no-papering" or "NPD" ("No Petition Drawn")); cases in which the respondent was charged by the prosecution, but the prosecutor subsequently withdrew the charges because of lack of prosecutorial merit or witness reluctance or any of a host of other reasons (a process called, depending upon the jurisdiction, "withdrawing the Petition," "entering a nolle prosequi," or simply "dismissal by the prosecution"); cases in which the respondent successfully completed a period of diversion and the case subsequently was sealed (see Chapter 19); cases dismissed as part of a plea bargain; and cases that resulted in acquittal at trial. The common practice in reciting the existence of such a dismissed case is for the probation officer to declare ambiguously that the case was "dismissed after arrest."

This practice is highly prejudicial to the respondent, since some judges subscribe to the maxim that "where there's smoke, there's fire." A judge may erroneously believe (either

consciously or unconsciously) that a crime was dismissed for technicalities and was actually committed by the respondent when, in fact, the ubiquitous characterization of "dismissal" is concealing an acquittal at trial or a withdrawal of the case because the prosecutor determined that the wrong child was arrested.

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

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

§ 4.21 DEFENSE ARGUMENTS FOR RELEASE OF THE RESPONDENT

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

only to one ground, it is in the respondent's interest to leave the muddle unclarified and argue that the favorable points outweigh the reasons for detention.

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

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

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

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

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

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

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

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

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

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

§ 4.21(b) Arguments Relating to Future Dangerousness

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

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

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

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

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

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

§ 4.21(b)(3) Arguments Concerning Curfew

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

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

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

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

As mentioned in § 4.17 *supra,* danger to self is listed as a basis for detention in some state statutes and court rules. In jurisdictions that list only risk of flight and danger to others as predicates for detention, *see, e.g.,* N.Y. FAM. CT. ACT § 320.5(3) (2023), counsel should object to any judicial reliance on the detainee's danger to self as a reason for detention, pointing out that the legislature established an exclusive list of permissible bases for detention.

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

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

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

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

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

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

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

Whenever an individual is "locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo,* 407 U.S. 514, 533 (1972). *See also Schall v. Martin,* 467 U.S. 253, 297 & n.24 (1984) (Marshall, J., dissenting). This general effect on pretrial preparation could be cited in support of release in every case, but a mere generalized argument will usually be unpersuasive. In cases in which counsel can make a particularized showing that the respondent's liberty is crucial to defense investigation of the case, this sort of showing may prove decisive in effecting pretrial release. Thus in *Kinney v. Lenon,* 425 F.2d 209 (9th Cir. 1970), the court held that a trial court's "failure to permit [the juvenile respondent's] . . . release for the purpose of aiding the preparation of his defense unconstitutionally interfered with his due-process right to a fair trial" (*id.* at 210) because there had been a "strong showing" (*id*.) that the respondent was the only person who could track down defense witnesses. The respondent in *Kinney,* charged with assault and battery for a schoolyard fight, had "allege[d] that there were many potential witnesses to the fight, that he cannot identify them by name but would recognize them by sight, that [the defense] . . . attorneys are white

though he and the potential witnesses are black, that his attorneys would consequently have great practical difficulty in interviewing and lining up witnesses, and that [the respondent] . . . is the only person who can do so." *Id.* This showing was found sufficient to compel release even in the face of the prosecution's assertion of "previous instances of harassment of the state's witnesses." *Id.*

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

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

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

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

2. Bail;

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

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

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

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

In some jurisdictions counsel also can employ the fallback argument that the judge should leave the determination of level of detention to the administrative agency in charge of detention. Obviously, counsel will resort to such an approach only when s/he has good reason to believe that the agency is likely to be more lenient than the judge in selecting the site of detention. In cases in which counsel elects this option, counsel can argue to the judge that the agency can gather more facts about the child and/or has the social work expertise to assess the most appropriate place of detention.

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

§ 4.22 USING THE PROBABLE-CAUSE HEARING TO PREVENT DETENTION

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

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

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

§ 4.23 PREVENTING DETENTION BY ATTACKING THE SUFFICIENCY OF THE PETITION

Sections 17.01-17.07 *infra* describe the legal bases for challenging the sufficiency of the Petition. In most jurisdictions these challenges are made in the form of a written motion to dismiss the Petition, filed within a certain period of time (usually 30 days) following the

arraignment. However, in cases in which the judge orders pretrial detention, counsel should orally raise any defects in the Petition that render the charging paper invalid. Counsel should argue that both the juvenile statutes and due process require that there be a valid charge, and charging paper, on which to detain the respondent.

§ 4.24 STEPS TO TAKE IF THE CLIENT IS DETAINED

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

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

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

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

As explained in § 4.17 *supra,* most jurisdictions specify a precise time limit within which a newly arrested child must be brought to court for a hearing on the issue of pretrial detention. In some jurisdictions, however, the statute establishes only a general requirement that the juvenile be brought before a judge "promptly" or within a "reasonable period of time."

In jurisdictions that specify a time limit, counsel representing a child held beyond that limit without a hearing should petition the juvenile court for an immediate hearing or apply for a writ of habeas corpus. *See, e.g., People v. Clayborn,* 90 Ill. App. 3d 1047, 414 N.E.2d 157, 46 Ill.

Dec. 435 (1980); *State ex rel. Morrow v. Lewis,* 55 Wis. 2d 502, 200 N.W.2d 193 (1972). In jurisdictions that do not specify a time limit, counsel representing a child who has been held for a period of time longer than 24 hours (excluding weekends and legal holidays) should petition the juvenile court for a hearing or seek habeas corpus relief, arguing that the general statutory requirement of promptness has been violated. *See, e.g., United States v. DeMarce,* 513 F.2d 755 (8th Cir. 1975) (delay of 80 hours between arrest and presentment before magistrate violated Federal Juvenile Delinquency Act, which prohibits the detention of a newly arrested child "for longer than a reasonable period of time before brought before a magistrate"). *See also County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991) (discussed in § 4.28(a) *infra*) (setting an outer limit of 48 hours, absent "a bona fide emergency or other extraordinary circumstance," for the judicial determination of probable cause required by the Fourth Amendment, and cautioning that even a hearing "provided within 48 hours . . . may violate . . . [the Fourth Amendment] if the arrested individual can prove that his or her probable cause determination was delayed unreasonably"); *In the Matter of Benjamin L.*, 92 N.Y.2d 660, 668, 708 N.E.2d 156, 160, 685 N.Y.S.2d 400, 404 (1999) (the inherent nature of the juvenile justice system and various developmental aspects of adolescence create a particularly compelling "need for swift and certain adjudication at all phases of a delinquency proceeding").

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

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

Frequently, a respondent faces legal problems and the possibility of detention as a result of more than just the delinquency case in which counsel has been appointed. These include: (i) custody orders issued by a judge of the same jurisdiction in which the respondent is presently appearing, authorizing the respondent's arrest either on an additional charge or for failure to appear in a hearing on another pending charge; (ii) petitions filed within the same jurisdiction to revoke probation or parole that the respondent received in a prior case, in light of the violation of law underlying the new arrest; (iii) custody orders issued by judges in other parts of the State, authorizing the respondent's arrest in connection with additional charges for which the respondent has not previously been arrested, pending cases in which the respondent failed to appear, or petitions to revoke probation or parole in light of the present new charge; and (iv) requests for extradition to another State on the grounds that the child is a runaway (from either a parent/guardian or a detention facility) or that the child is "wanted" for a crime in the other State. These ancillary legal problems may impact upon the child's liberty in either of two ways. The mere existence of the additional legal problems may lead the judge to order detention in the case in which counsel is defending the respondent. Or, if counsel secures the respondent's release in

the new case, that victory may be rendered meaningless because the child continues to be held in custody pending the resolution of his or her other legal problems. The remedies available to defense counsel vary, depending upon the nature of the child's ancillary legal problem and whether it arose within the State or out-of-State.

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

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

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

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

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

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

The only realistic prospect of success in this situation exists in cases in which the respondent can interpose a factual defense that: (A) s/he was not aware of the obligation to appear at the hearing which s/he missed, because s/he did not receive notice of that hearing or because s/he was told by her attorney or a court official that appearance was not necessary; (B) s/he was unable to attend the hearing for legally sufficient reasons, such as that s/he was incarcerated or appearing in a court in another jurisdiction on the date of the hearing; or (C) s/he was unable to attend for some reason which, although not technically sufficient to excuse the

nonappearance, is strongly mitigating, such as that s/he was taken out-of-state by his or her parent/guardian and could not return on his or her own or that s/he was attending the funeral of a relative. When the nonappearance can be excused on grounds of this sort and if the respondent has no other record of failure to appear, a judge will frequently overlook the single transgression and release the respondent pending his or her appearance before the judge who issued the custody order.

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

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

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

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

An Interstate Compact regulates the extradition of youth who have left their home state without permission of a parent or guardian and also provides for transfer of supervision of an adjudicated delinquent when s/he moves to another State. The original Interstate Compact on Juveniles, drafted in 1955 and adopted by all States, has been replaced by an Interstate Compact for Juveniles. The Compact was drafted between 2000 and 2002, presented to the States and Territories, and then adopted by all of the States, the District of Columbia, and the Virgin Islands.

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

The ICJ also has issued a number of advisory opinions, which can be found in Appendix IV of the ICJ's "Bench Book for Judges & Court Personnel" (2023), also available at the above website.

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

If the child declines to return voluntarily, and if s/he is an "Escapee, Absconder or Accused Delinquent," then the "demanding state" must "present to the court or appropriate authority a . . . Requisition . . . requesting the juvenile's return" (ICJ Rule 6-103A(3)), accompanied by "copies of supporting documents that show entitlement to the juvenile" (ICJ Rule 6-103A(3)(a)), such as, for example, an "Order of Adjudication" or "Petition Alleging Delinquency" (*id*.). *See, e.g.*, *In the Matter of a Proceeding Involving the Interstate Compact on Juveniles, Aubree C.*, 2018 WL 3462521 (N.Y. Family Ct., Monroe County May 9, 2018) (denying the State of Delaware's "request for return" of a youth who was on pre-adjudication probation in Delaware, had traveled to New York for "'testing placement,'" and was alleged to have "breached his probation by committing a new crime" (*id*. at *1, *4, *6); "[A]fter a facial examination of requisition the court finds that it is not in order and that it is substantially defective. Furthermore, the basis for entitlement for return outlined in the requisition, that Aubree breached his probation, has not been demonstrated. Therefore, the request for return is denied and the youth is discharged." *Id*. at *6. "While there is no decisional case law guidance as to when the requisition is 'in order,' Rule 6-103A[3][a] mandates that the requisition be verified by affidavit unless a judge is the requisitioner. A facial examination of the requisition and amended requisition reveals that neither document is not [*sic*] properly verified. Moreover, the ground cited for return, breach of probation conditions, is not supported by documentation." *Id.* at *5. "The conditions of pre-adjudication probation submitted to this court do not include any requirement that Aubree refrain from criminal behavior. He was only directed to perform community service, stay away from Buffalo Wildwings/Target, complete Shoplifter's Alternative, pay a $10 victim's compensation fund fee and pay restitution if a request was made in 90 days. Thus, on the face of the documents presented by Delaware there was no breach of probation. ¶ While the level of due process in Compact proceedings is generally minimal, at the very least a juvenile is entitled to notice in the requisition of the reasons the demanding state wants his return, as well as notice of which legally appropriate official is demanding return. Here the requisition was not properly signed or properly verified. Probation Officer Krystall Hall is

listed as the requisitioner, but was not a proper person for execut[ing] the requisition. It further appears that someone other than Ms. Hall signed the requisition, but the identity of that individual is not apparent since the signature is illegible and there is no name under the signature. The verification subsequently signed by Deputy Compact Administrator Francis C. does not cure the defects concerning the identity and signature of the requisitioner since she did not sign the requisition herself." *Id*. at *6.).

If the youth is "already in custody," the Requisition and accompanying documents must be submitted "within sixty (60) calendar days of notification of the juvenile's refusal to voluntarily return." ICJ Rule 6-103A(3). If a youth is "not already detained, the court shall order the juvenile be held pending a hearing on the requisition." ICJ Rule 6-103A(5). A hearing must be held in "the state where the juvenile is located" "within thirty (30) calendar days of the receipt of the requisition," but "[t]his time period may be extended with the approval from both ICJ Offices." *Id*.

If the court orders the juvenile's return to the demanding state, the return ordinarily must take place "within five (5) business days of the receipt of the order granting the requisition" (ICJ 6-103A(9)), although "[t]his time period may be extended up to an additional five (5) business days with approval from both ICJ Offices" (*id*.). "[W]hen pending charges exist in the holding/receiving state," "[j]uveniles shall be returned only after [the] charges are resolved . . . unless consent is given by the holding/receiving and demanding/sending states' courts and ICJ Offices." ICJ Rule 7-103. "Juveniles held in detention, pending non-voluntary return to the demanding state, may be held for a maximum of ninety (90) calendar days." ICJ Rule 6-103A(8).

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

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

Once the detention hearing is completed, the respondent will probably face additional hearings on the other charges or probation/parole holds or fugitive warrants. If these matters arise out of an existing case – if, for example, they involve allegations that the respondent failed to appear for a hearing or violated probation or parole – counsel must notify the attorney who represented the child in that case, so s/he can continue representation of the child. On the other hand, if the problem arises out of a charge that has not as yet been filed and if counsel is unable to represent the child on the new charge, then counsel must arrange to have another lawyer take responsibility for the new case. If the child's parent/guardian is not eligible for a court-appointed

lawyer, counsel should give the parent/guardian a list of defense attorneys who practice in juvenile court in the relevant jurisdiction. If the child and his or her family are indigent, counsel should contact the public defender's office in the relevant jurisdiction and notify the appropriate supervisor or staff attorney that a hearing will be held and that the child needs representation. All of these steps should be taken as soon as possible after the conclusion of the detention hearing so as to allow the maximum amount of time for preparation for the next hearing.

§ 4.27 BAIL

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

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

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

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

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

As explained in § 4.15 *supra,* roughly one fourth of the States permit bail for juveniles. However, the juvenile code in each of these jurisdictions also contains a preventive detention

statute, authorizing detention to guard against flight or future crimes. *See Schall v. Martin,* 467 U.S. 253, 267 n.16 (1984) (listing the juvenile preventive detention statutes of the 50 states and the District of Columbia). Thus the first issue that defense counsel confronts in framing an argument for bail is whether the guarantee of bail qualifies the authorization of preventive detention or *vice versa.*

A few of the jurisdictions provide some guidance in the statutes themselves. *See, e.g.,* NEB. REV. STAT. § 43-253(5) (2023) (indicating that the right to bail can be overridden when there is a need for detention); WASH. REV. CODE ANN. § 13.40.040(5) (2023) ("a juvenile detained under this section may be released upon posting a probation bond set by the court"); *see also* WASH. REV. CODE ANN. § 13.40.050(6) (2023). However, the juvenile codes in most of the bail-authorizing States shed little light on the relationship between bail and preventive detention. *See, e.g., L.O.W. v. District Court,* 623 P.2d 1253, 1260 (Colo. 1981) (observing that "[t]he detention criteria" and "the statutory right to bail" "appear to conflict" and provide little assistance in resolving the conflict).

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

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

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

An argument for the proposition that detention of an indigent in default of bail which s/he cannot make violates the Habeas Corpus Clause, the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and cognate state constitutional guarantees is developed in Caleb Foote, *The Coming Constitutional Crisis in Bail,* 113 U. PA. L. REV. 959, 1125 (1965), and may be pressed on habeas corpus in state and federal courts. Professor Foote's Equal Protection arguments, in particular, draw strong support from subsequent decisions condemning the incarceration of indigents in default of payment of fines imposed upon conviction. *Williams v. Illinois,* 399 U.S. 235 (1970); *Tate v. Short,* 401 U.S. 395 (1971); *In re Antazo,* 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970); *Robertson v. Goldman*, 179 W. Va. 453, 369 S.E.2d 888 (1988). *Cf. Bearden v. Georgia,* 461 U.S. 660, 664-68 (1983); *Estelle v. Williams,* 425 U.S. 501, 505-06 (1976) (dictum). Similar arguments prevailed in a path-breaking decision in *Pugh v. Rainwater,* 557 F.2d 1189 (5th Cir. 1977), which, while reversed on narrow grounds *en banc,* 572 F.2d 1053 (5th Cir. 1978), resulted in an *en banc* endorsement of the panel's essential conclusion that "[t]he incarceration of those who cannot [afford to post money bail], without meaningful consideration of other possible alternatives [that is, other forms of pretrial release], infringes on both due process and equal protection requirements." 572 F.2d at 1057. *Id*. at 1058 ("We have no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint" and hence violate the Constitution."). This conclusion is particularly persuasive in the juvenile context because incarceration of indigent juveniles penalizes them for matters wholly beyond their control – the indigency of the children's parent/guardian and the federal and state labor laws and mandatory school attendance laws that preclude the children themselves from working. Significantly, many jurisdictions have juvenile court statutes or rules limiting restitution by setting a minimum age and/or a maximum amount (*see, e.g.*, N.Y. FAM. CT. ACT § 353.6(1) (2023)) or using other devices to ensure that an order of restitution does not exceed the juvenile's financial means (*see, e.g.*, N.C. GEN. STAT. § 7B-2506(4), (22) (2023) ("the court shall not require the juvenile to make restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution")).

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

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

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

collateral or will institute an action against any individual who served as guarantor or will do both.

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

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

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

In jurisdictions that permit juvenile respondents to make bond by posting a recoverable premium with the court, this is usually the form of bail that counsel should seek to arrange, since it will ordinarily demand the smallest expenditure of money to put up the bond and will usually enable the client to recover that money later. When this option is not available, either because local practice does not permit it or because the judge has rejected it, counsel's choice among other forms of bail will ordinarily depend upon the financial resources of the client, the amount of the premium that would be charged by a bail bonder, and what, if any, collateral the bonder would insist upon. If a family member or friend can afford to post a cash bond or a real property bond, the temporary surrender of these assets with the assurance that they will be returned later (as long as the client faithfully appears) may be more palatable than paying an unrecoverable premium to a bail bonder. However, clients of limited means often have no real choice other than the bail bonder.

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

As explained in § 4.26 *supra,* a respondent may be subject to a "hold" order as a result of another charge (or other legal problem) within the jurisdiction, or in another part of the State or another State. If there is such a ''hold" order, the only effect of posting bond will be to free the respondent from any restrictions imposed with respect to the charge upon which the bail was set, while leaving him or her still in custody on the other charges or other legal problems. Obviously, counsel needs to guard against such futile expenditure of bail money. Usually, counsel will learn about any "hold" orders during the detention hearing because the existence of the "hold" and the

reasons for it will be mentioned by the probation officer. However, in rare cases, the probation office is uninformed, and the "hold" is not discovered until later, after the family member or friend has posted bond. Thus, prior to any posting of bond, counsel should ask the client whether s/he is on probation or parole in another case or another jurisdiction or has pending charges in or is "wanted" in another case or another jurisdiction. If counsel learns that there is a potential for a "hold" which has not yet materialized, counsel may decide to defer attempts to make bail until the various "holds" have been lodged and s/he has had a chance to deal with them through the remedies described in § 4.26 *supra.*

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

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

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

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

Part F. The Probable-Cause Hearing

§ 4.28 CONSTITUTIONAL AND STATUTORY RIGHTS TO A PROBABLE-CAUSE

DETERMINATION

§ 4.28(a) Constitutional requirements

In *Gerstein v. Pugh,* 420 U.S. 103 (1975), the Supreme Court of the United States held that the Fourth Amendment to the federal Constitution, which has long been construed as forbidding arrests without probable-cause (see § 23.07 *infra*), entitles every arrested person to "a judicial determination of probable-cause as a prerequisite to extended restraint of liberty following arrest." 420 U.S. at 114. Consequently, persons arrested without an arrest warrant (and hence without a prearrest judicial finding of probable-cause) may not be confined pending trial unless they are given the opportunity for a probable-cause determination "by a judicial officer . . . promptly after arrest." *Id.* at 125. *Accord*, *Powell v. Nevada*, 511 U.S. 79, 80 (1994); *County of Riverside v. McLaughlin*, 500 U.S. 44, 47, 52-53 (1991); *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001) (dictum); *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion) (dictum); *Baker v. McCollan,* 443 U.S. 137, 142-43 (1979) (dictum).

Although the Court has been "hesitant to announce that the Constitution compels a specific limit" on *how* "promptly" after arrest the constitutional probable-cause determination must be afforded, the Court has provided guiding principles "to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds." *County of Riverside v. McLaughlin*, 500 U.S. at 56. "[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *Id*. But even a hearing provided within 48 hours "may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." *Id*. "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.* In cases in which "an arrested individual does not receive a probable cause determination within 48 hours," the government bears the "burden . . . to demonstrate the existence of a bona fide emergency or other extraordinary circumstance" to justify the delay. *Id*. at 57. *Accord*, *Powell v. Nevada*, 511 U.S. at 80. "The fact that in a particular case it may take longer than 48 hours to consolidate [the probable cause determination with other] pretrial proceedings[, such as arraignment,] does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends." *County of Riverside v. McLaughlin*, 500 U.S. at 57. *Cf. Alcocer v. Mills*, 906 F.3d 944 (11th Cir. 2018), and 800 Fed. Appx. 860 (11th Cir. 2020) (an arrestee stated a Fourth Amendment claim by alleging that she was detained overnight after posting bail because sheriff's officers suspected without probable that she was an illegal alien); *Williams v. Dart*, 967 F.3d 625, 632 (7th Cir. 2020) ("by conducting independent reviews of the courts' bail orders and on that basis continuing to hold persons already admitted to bail without purpose or plan for their release, the Sheriff arrogated to himself a decision that was not his to make. These allegations stated a claim under the Fourth Amendment.").

The constitutional requirement announced in *Gerstein* clearly applies to juvenile court

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

The rule of *Gerstein* is, however, a very narrow one in several regards. First, it fails, by its terms, to protect persons arrested under arrest warrants (*Gerstein,* 420 U.S. at 117 n.19; *Michigan v. Doran,* 439 U.S. 282, 285 n.3 (1978)) unless the warrant itself is assailable because the procedures for issuing it failed to provide the requisite probable-cause determination (*cf. Manuel v. City of Joliet, Ill.*, 580 U.S. 357 (2017)). (*But see In re Walters,* 15 Cal. 3d 738, 543 P.2d 607, 126 Cal. Rptr. 239 (1975), extending *Gerstein* to require a postarrest probable-cause determination in cases of arrests made under a warrant.)

Second, *Gerstein* does not require that the probable-cause determination be "accompanied by the full panoply of adversary safeguards – counsel, confrontation, cross-examination, and compulsory process for witnesses." *Gerstein,* 420 U.S. at 119. *Accord, Schall v. Martin,* 467 U.S. 253, 275 (1984). To the contrary, it sanctions "[t]he use of an informal procedure," *Gerstein,* 420 U.S. at 121, in which there is no constitutional right to the appointment of counsel, *id.* at 122-23, no "confrontation and cross-examination" need be allowed, *id.* at 121-22, and the determination of probable-cause may presumably be made "on hearsay and written testimony," *id.* at 120. All that is constitutionally required is "a fair and reliable determination of probable-cause." *Id.* at 125; *see also Baker v. McCollan,* 443 U.S. at 143 & n.2; *Hewitt v. Helms,* 459 U.S. 460, 475-77 (1983). *But see Manuel v. City of Joliet, Ill.*, *supra,* which opens the door to challenging a probable-cause determination based upon perjury or fabrication of evidence by investigative or prosecutorial agents; *Sanchez v. Hartley*, 810 F.3d 750, 754 (10th Cir. 2016) ("According to Mr. Sanchez, the detectives and investigator sought legal process based on the confession even though they either knew the confession was untrue or recklessly ignored that possibility. If Mr. Sanchez's allegation is credited, it would involve a constitutional violation, for we have held that the Fourth Amendment prohibits officers from knowingly or recklessly relying on false information to institute legal process when that process results in an unreasonable seizure."); *accord, Miller v. Maddox*, 866 F.3d 386 (6th Cir. 2017); *Black v. Montgomery County*, 835 F.3d 358 (3d Cir. 2016); and see § 23.17(c) *infra* for elaboration of this principle in the context of challenges to search warrants.

Third, *Gerstein* is not read by the lower courts as requiring a bail hearing on the 48-hour timetable set by *County of Riverside v. McLaughlin*. *See Mitchell v. Doherty*, 37 F.4th 1277 (7th Cir. 2022).

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

Gerstein's basic requirement of a prompt probable-cause determination in cases of warrantless arrests does not add much to the general procedures prescribed by many state statutes for the protection of juveniles taken into custody. See § 4.28(b) *infra*. A significant number of States go beyond *Gerstein* by providing, as a matter of state law, for an immediate non-adversarial determination of probable cause at the detention hearing, followed soon after by a formal adversarial probable-cause hearing. *See, e.g., Schall v. Martin,* 467 U.S. 253 (1984) (New York Family Court Act, which permits detention only when the "supporting depositions . . . establish probable-cause" at the detention hearing (*id.* at 275-76) and "[a] formal probable-cause hearing is then held within a short while thereafter" (*id.* at 277), "provides far more predetention protection for juveniles than we found to be constitutionally required for a probable-cause determination for adults in *Gerstein"* (*id* at 275)). In some States, however, *Gerstein's* requirement of "prompt" probable-cause determinations may have the salutary effect of "acceleration of existing" state procedures. *Gerstein,* 420 U.S. at 124. As noted above, the United States Supreme Court has established the rule of thumb that promptness for *Gerstein* purposes ordinarily means within 48 hours, and it has said explicitly both that delays beyond 48 hours must be justified by a showing of extraordinary circumstances and that the practice of consolidating *Gerstein* determinations with other preliminary proceedings (such as an adversarial hearing on probable cause) "does not qualify as an extraordinary circumstance." *County of Riverside v. McLaughlin*, 500 U.S. at 57.

Moreover, when the *Gerstein* requirement is violated, any confessions or other statements taken from the respondent during the period of excessive delay are arguably inadmissible in evidence as the fruits of an unconstitutional detention. Although the Supreme Court has not yet ruled on the question whether "a suppression remedy applies" to a *Gerstein* violation through "failure to obtain authorization from a magistrate for a significant period of pretrial detention" (*Powell v. Nevada*, 511 U.S. at 85 n.*), the rationale of the Fourth Amendment exclusionary rule should require suppression. *See, e.g.*, *Anderson v. Calderon*, 232 F.3d 1053, 1071 (9th Cir. 2000) (dictum) ("we conclude that the appropriate remedy for a *McLaughlin* violation is the exclusion of the evidence in question – if it was "fruit of the poisonous tree")*; Norris v. Lester*, 545 Fed. Appx. 320, 321, 327 (6th Cir. 2013) ("appellate counsel was ineffective for failing to argue [under *County of Riverside v. McLaughlin*] that [Norris'] confession was obtained after the violation of his constitutional right to a prompt probable-cause determination"). *But see Lawhorn v. Allen*, 519 F.3d 1272, 1290-92 (11th Cir. 2008); *People v. Willis*, 215 Ill. 2d 517, 831 N.E.2d 531, 294 Ill. Dec. 581 (2005); *and compare State v. Huddleston*, 924 S.W.2d 666, 673 (Tenn.

1996) ("we conclude that the exclusionary rule should apply when a police officer fails to bring an arrestee before a magistrate within the time allowed by *McLaughlin*") *with State v. Carter*, 16 S.W.3d 762, 766-68 (Tenn. 2000) ("In *State v. Huddleston*, this Court determined that when a person confesses after having been detained for more than 48 hours following an arrest without a warrant and without a judicial determination of probable cause, the confession should be excluded unless the prosecution establishes that the confession '"was sufficiently an act of free will to purge the primary taint of the unlawful invasion."' . . . The burden is on the State to prove by a preponderance of the evidence the admissibility of a confession obtained under the circumstances here presented. . . .¶ . . . *Huddleston* . . . focused on the reason for the continued detention of the arrestee; that is, whether the individual was being held without probable cause 'for the purpose of gathering additional evidence to justify the arrest. . . .' . . . ¶ Here . . . there is no evidence that Carter was held for the purpose of gathering additional evidence or for other investigatory purposes"; this consideration and others support a finding that the prosecution met its burden showing dissipation of the taint of a *Gerstein* violation.). In this respect, *Gerstein* provides the constitutional predicate for an updated version of what used to be known as the "*McNabb-Mallory"* exclusionary rule. See § 24.15 *infra.*

In addition to the Fourth Amendment *Gerstein* rule and any applicable state statute, there are Due Process protections against protracted detention of a suspect without fair and reliable procedures for determining his or her probable guilt. *See Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) (recognizing "a liberty interest in being free from extended incarceration without any arraignment or pretrial procedure"); *Harris v. Clay County*, 40 F.4th 266 (5th Cir. 2022) (the six-year jail detention of a defendant who had been found incompetent to stand trial and whose civil commitment proceeding had been dismissed violated due process); *Barnes v. District of Columbia*, 793 F. Supp. 2d 260 (D. D.C. 2011) (recognizing a due process claim in cases of "overdetention", which "generally means that once a prisoner was entitled to release—because of a court order, the expiration of a sentence, or otherwise—the authority having custody over that person held them too long." *Id*. at 266. "Overdetentions potentially violate the substantive component of the Due Process Clause by infringing upon an individual's basic liberty interest in being free from incarceration absent a criminal conviction." *Id*. at 274-275.); *accord*, *Traweek v. Gusman*, 414 F. Supp. 3d 847 (E.D. La. 2019); *Tatum v. Moody*, 768 F.3d 806 (9th Cir. 2014) (holding that "[w]here . . . investigating officers, acting with deliberate indifference or reckless disregard for a suspect's right to freedom from unjustified loss of liberty, fail to disclose potentially dispositive exculpatory evidence to the prosecutors, leading to the lengthy detention of an innocent man, they violate the due process guarantees of the Fourteenth Amendment," *id*. at 816); *Lopez-Valuenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc) (holding that the blanket preclusion of bail or pretrial release for undocumented aliens arrested on any of a broad range of felony charges, without regard to whether the individual alien's release would involve a risk of flight or other danger, violates due process); *Jauch v. Choctaw County*, 874 F.3d 425, 427 (5th Cir. 2017) ("Jessica Jauch was indicted by a grand jury, arrested, and put in jail – where she waited for 96 days to be brought before a judge and was effectively denied bail. The district court found this constitutionally permissible. It is not. A pre-trial detainee denied access to the judicial system for a prolonged period has been

denied basic procedural due process . . . ."); *Hoffman v. Knoebel*, 894 F.3d 836*,* 840-41 (7th Cir. 2018) (dictum) ("We have said in the past that prolonged detention before receiving a hearing violates the Due Process Clause's substantive component. . . . But this case is simpler. The plaintiffs were not being held pending a hearing because the ostensible hearing already occurred. The problem was that the hearing itself was constitutionally deficient. . . . ¶ . . . [T]his is enough to show that the plaintiffs were deprived of a liberty interest without due process of law."); *Geness v. Cox*, 902 F.3d 344, 363-64 (3d Cir. 2018); *Crittindon v. LeBlanc*, 37 F.4th 177, 188 (5th Cir. 2022) ("it is without question that holding without legal notice a prisoner for a month beyond the expiration of his sentence constitutes a denial of due process"), and cases cited; *cf. Matzell v. Annucci*, 64 F.4th 425, 437 (2d Cir. 2023) (allegations that prison official denied an inmate entry into an early-release program in violation of the terms of his sentence stated a due process claim: "'[t]he general liberty interest in freedom from detention is perhaps the most fundamental interest that the Due Process Clause protects'"); *Armstrong v. Daily,* 786 F.3d 529, 551-52 (7th Cir. 2015) ("The constitutional violation that Armstrong asserts is the deprivation of his liberty without due process of law, as the result of the destruction of evidence by a state actor. . . . ¶ Armstrong's claim therefore has two essential elements: (1) the defendant destroyed exculpatory evidence in bad faith or engaged in other misconduct (2) that caused a deprivation of the plaintiff's liberty. . . . Taking Armstrong's allegations as true, and giving him the benefit of favorable inferences, we must assume that Daily and Campbell's actions caused Armstrong to suffer a loss of liberty as he languished in prison for three more years after Daily said he was excluded by the earlier DNA tests and after the last sample had been destroyed in the Y–STR test of the newly discovered stain."); *Parada v. Anoka County*, 54 F.4th 1016, 1020 (8th Cir. 2022) (holding that Parada's four-hour detention constituted discrimination on the basis of national origin and violated the Equal Protection Clause when based upon a county's "'unwritten policy requiring its employees to contact ICE [Immigration and Customs Enforcement] every time a foreign-born individual is detained, *irrespective* of whether the person is a U.S. citizen.' . . . The way it works is simple: 'If the individual [says] they were born abroad, the jail will send ICE a notification' and 'attempt[ ] to wait to start release procedures . . . until [it] hear[s] back,' which 'could take between 20 minutes and 6 hours.'"); *Kong v. United States*, 62 F.4th 608 (1st Cir. 2023).

§ 4.28(b) Statutory Requirements

Several States have enacted statutes requiring a probable-cause hearing in any case in which the respondent is detained pending trial. *See, e.g.,* D.C. CODE § 16-2312(e)-(f) (2023); ILL. COMP. STAT. ANN. ch. 705, § 405/5-501 (2023); ME. REV. STAT. ANN. tit. 15, §§ 3203-A(4-A), 3203-A(5)(C) (2023); N.Y. FAM. CT. ACT §§ 325.1-325.3 (2023); PA. CONS. STAT. ANN. tit. 42, § 6332(a) (2023). Some states even provide by statute or court rule for a probable-cause hearing in cases in which the child is not detained. *See, e.g., J.T. v. O'Rourke,* 651 P.2d 407 (Colo. 1982) (preliminary hearing must be granted "[i]n cases where the juvenile is charged with the commission of an act which if committed by an adult, would be a felony or class 1 misdemeanor," *id.* at 412).

The statutes commonly require that the court make a two-pronged determination that: (i) there is probable-cause to believe that an offense took place; and (ii) there is probable-cause to believe that the respondent was the perpetrator. *See, e.g.,* N.Y. FAM. CT. ACT § 325.3(1)(a)-(b) (2023). If the court finds that the prosecution has not made the requisite showing of probable-cause on either of these prongs, the respondent must be released. *See, e.g.,* D.C. CODE § 16-2312(f) (2023). In cases in which the court concludes that probable-cause is lacking, some jurisdictions also require dismissal of the Petition, permitting its reinstatement only if the prosecutor can show newly discovered evidence. *See, e.g.*, ILL. COMP. STAT. ANN. ch. 705, § 405/5-501(1) (2023). Other jurisdictions do not explicitly provide by statute that the Petition must be dismissed. *See, e.g.,* N.Y. FAM. CT. ACT § 325.3(4) (2023) (if court finds that probable-cause is lacking, "the case shall be adjourned and the respondent released from detention"). However, the practical result will usually be dismissal, since most prosecutors will exercise their discretion to dismiss a case rather than going to trial on evidence that is so flimsy that it could not support even a determination of probable-cause.

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

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

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

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

The first of these is discovery. By hearing the prosecution's witnesses and cross-examining them, defense counsel can learn a good deal about what s/he is going to have to meet at trial. This opportunity for discovery is particularly important because, in most jurisdictions, other opportunities and procedures for discovery are rather limited. (See Chapter 9.) Although the discovery function of the probable-cause hearing is not formally recognized as legitimate by state statutes or most state courts – and, indeed, many judges sustain objections to defense cross-examination questions that appear to be motivated by the desire for discovery – there is caselaw

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

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

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

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

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

The statutory right to a probable-cause hearing can be waived by the respondent, just like any other right, as long as the waiver is made knowingly, intelligently, and voluntarily. Because the hearing provides opportunities to realize the substantial benefits described in § 4.29 *supra* –

avoidance of detention, dismissal of the Petition, discovery, creation of valuable transcript material for use at trial, and establishment of rapport with the client – waiver is ordinarily highly inadvisable. There are, however, a few instances in which defense counsel should consider advising the client to waive the probable-cause hearing.

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

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

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

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

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

§ 4.31(a) Nature of the Proceedings

The probable-cause hearing is in most respects conducted like a trial. The rules of evidence are ordinarily enforced, although several jurisdictions permit the introduction of hearsay evidence. *See, e.g.,* CONN. GEN. STAT. ANN. § 46b-133(e) (2023); ME. REV. STAT. ANN. tit. 15, § 3203-A(4-A) (2023); *contra*, N.Y. FAM. CT. ACT § 325.2(3) (2023) (requiring "non-hearsay evidence"). The prosecution must make a showing of probable-cause of every element of the offense and of the respondent's identity as its perpetrator. The *corpus delicti* must ordinarily be proved before any admissions by the respondent may be received in evidence, but the judge has some discretion to allow variance from this order of proof. Compare § 24.21 *infra.* Witnesses are questioned in the ordinary fashion, and real evidence is admitted as exhibits. Cross-examination of witnesses is permitted, although some judges tend to limit its scope to a narrower compass than would be allowed at trial. See § 4.33 *infra.* Sequestration of witnesses is allowed within the sound discretion of the judge. There is modification of these rules in varying degrees in some jurisdictions, and local practice must be consulted.

§ 4.31(b) Right to Counsel

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

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

In most jurisdictions, statutes, court rules, or judicial decisions give the respondent the right to cross-examine the prosecution's witnesses at the probable-cause hearing. *See, e.g., In the Matter of R.D.S.,* 359 A.2d 136, 139 (D.C. 1976); *State in the Interest of Morrison,* 406 So.2d 246, 248 (La. App. 1981). *See also Ex parte Wood*, 629 So.2d 808, 810 (Ala. Crim. 1993) ("'[a]ll jurisdictions grant the defense a right to cross-examine those witnesses presented by the prosecution at the preliminary hearing'"); *State v. Spears*, 634 So.2d 9, 10 (La. App. 1994) ("Although all of the procedural safeguards of a criminal jury trial need not be afforded at a preliminary examination, the defendant has a right to a hearing that ensures a fair and impartial determination of the issue of probable cause. The hearing is to be 'full-blown and adversary' and one in which the defendant is entitled to confront witnesses against him and to fully cross-examine the witnesses."); *Desper v. State*, 173 W. Va. 494, 501, 318 S.E.2d 437, 445 (1984) ("We . . . hold that in challenging probable cause at a preliminary examination conducted pursuant to Rule 5.1 of the West Virginia Rules of Criminal Procedure, a defendant has a right to cross-examine witnesses for the State and to introduce evidence; the preliminary examination is

not entitled during the preliminary examination to explore testimony solely for discovery purposes. The magistrate at the preliminary examination has discretion to limit such testimony to the probable cause issue, and the magistrate may properly require the defendant to explain the relevance to probable cause of the testimony the defendant seeks to elicit."); *People v. Dodge-Doak*, 2022 WL 16858783 (Mich. App. 2022) (affirming a trial court's dismissal of the charges against a defendant where the preliminary hearing judge had "refused to allow defendant to call any defense witnesses" (2022 WL 16858783 at *1), had ordered cross-examination of the prosecution's sole witness – the child allegedly abused in a sexual-abuse case – "abruptly ended without warning . . . . [and had] repeatedly interrupted the cross-examination as well" (*id*. at *2)).

The right to cross-examine at the probable-cause hearing may also be protected by the federal guarantee of confrontation incorporated in the Fourteenth Amendment, *Pointer v. Texas,* 380 U.S. 400 (1965); *Barber v. Page,* 390 U.S. 719 (1968); *Olden v. Kentucky,* 488 U.S. 227 (1988) (per curiam); *but see*, *e.g.*, *Sheriff v. Witzenburg*, 122 Nev. 1056, 145 P.3d 1002 (2006); *State v. Lopez*, 2013-NMSC-047, 314 P.3d 236 (N.M. 2013), or by the Due Process Clause (see § 4.33 *infra*).

Local law also commonly accords the defense the right to present evidence at a probable-cause hearing. *See, e.g., State in the Interest of Morrison,* 406 So.2d at 248; D.C. CODE § 16-2312(e) (2023). *See also Ex parte Lankford*, 20 So.3d 843, 846 (Ala. Crim. 2009) (granting a writ of mandamus and ordering that the court of first instance set aside its order quashing the subpoenas issued by a defendant charged with sexual assault by which he sought to have the victim and her mother testify at a preliminary examination: "[a]ccording to Alabama law, Lankford had the right to subpoena witnesses for his preliminary hearing if their testimony was relevant to a determination of whether probable cause existed"); *State v. Spears*, 634 So.2d at 10 ("[a]t the hearing, both the State and the defendant may produce witnesses, and the witnesses are subject to cross-examination"); *Beaird v. Ramey,* 456 P.2d 587 (Okla. Crim. App. 1969); *and see State v. Benedict*, 2022-NMCA-030, 511 P.3d 379, 385 (N.M. App. 2022) ("[W]e next address the State's argument that the court conducting the preliminary examination must 'view all evidence and draw all inferences in favor of the prosecution.' We disagree. ¶ Article II, Section 14 of the New Mexico Constitution requires that before a person 'shall be held to answer for a capital, felonious or infamous crime,' the prosecutor must either obtain an indictment by a grand jury or must file an information, which then must be followed by a preliminary examination before a magistrate or judge: 'No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.' . . . ¶ The procedures required for a preliminary hearing in New Mexico do not command sole reliance on the evidence offered by the state. Rather, the rules of procedure adopted by our Supreme Court allow the defendant to subpoena and call witnesses on the defendant's behalf . . . ; to cross-examine the state's witnesses . . .; and to raise objections based on the Rules of Evidence . . . . These provisions require the district court to hear both the state's evidence and the evidence submitted by the defendant and 'determine probable cause from *all* the evidence.' ¶ Drawing all inferences from the evidence in the state's favor would conflict with the defendant's right to present evidence and to have disputes of fact and questions of credibility

resolved by an impartial judge."). This right is arguably guaranteed by the federal Due Process Clause as well. *Cf. Jenkins v. McKeithen,* 395 U.S. 411, 429 (1969).

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

There is disagreement among the state courts as to whether the disclosure rights assured to defendants at the trial stage by *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny (discussed in § 9.09(a) *infra*)) apply at a probable-cause hearing. For a holding that they do and for reference to the conflicting authorities, *see People v. Gutierrez*, 214 Cal. App. 4th 343, 153 Cal. Rptr. 3d 832 (2013). *See also Bridgeforth v. Superior Court*, 214 Cal. App. 4th 1074, 1077, 154 Cal. Rptr. 3d 528, 530 (2013) (dictum) ("due process requires the prosecution to disclose, prior to the preliminary hearing, evidence in its possession that is both favorable to the defense and material to the probable cause determination to be made at the preliminary hearing"). State law in some jurisdictions may give defendants a right to pre-preliminary-hearing discovery that extends beyond *Brady* material. *Compare People v. Kingsley*, 187 Colo. 258, 530 P.2d 501 (1975) (authorizing discovery of the names and prior statements of witnesses whom the prosecution will call at the preliminary hearing), *and Stafford v. District Court of Oklahoma County*, 595 P.2d 797 (1979) (authorizing discovery of the criminal records of witnesses whom the prosecution will call at the preliminary hearing) *with State v. Schaefer,* 308 Wis. 2d 279, 746 N.W.2d 457 (2008), *and Derby v. State*, 557 S.W.3d 355 (Mo. App. 2018) (foreclosing pre-preliminary hearing discovery).

Although *Gerstein v. Pugh,* 420 U.S. 103 (1975), holds that the rights discussed in this section are not necessary incidents of the probable-cause determination required by the Fourth Amendment, *Gerstein* does not deny that they may be constitutionally obligatory in the "full preliminary hearing . . . procedure used in many States." *Id.* at 119. Rather, *Gerstein* says that "[w]hen the hearing takes this form, adversary procedures are customarily employed" and "[t]he importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination." *Id*. at 120. Analogously, *Gerstein* recognizes no constitutional right to counsel at a Fourth Amendment probable-cause hearing, *id.* at 122-23, but asserts that if the State chooses to conduct a full preliminary examination in lieu of a minimal probable-cause hearing, then "appointment of counsel for indigent defendants" is required. *Id.* at 120. In *Routhier v. Sheriff, Clark County*, 93 Nev. 149, 151-52, 560 P.2d 1371, 1372 (1977), the Nevada Supreme Court relied on Sixth Amendment precedent as well as state law to hold that a defendant had a right to a continuance of a preliminary hearing in order to locate, call, and cross-examine an informant whose identity was first disclosed at the hearing and

who was involved in setting up the drug transaction for which the defendant was arrested.

§ 4.31(d) Right to Transcription of the Proceedings

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

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

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

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

If counsel is retained or appointed after the probable-cause hearing stage, s/he should immediately ascertain from the client, the prosecutor, or court records whether a probable-cause hearing was, in fact, held. (Since the client is unlikely to know what a "probable-cause hearing" is and may confuse it with the non-evidentiary detention hearing, the best question to ask the client is whether there was a hearing at which people took the witness stand and testified.) If any part of a probable-cause hearing was held, ordinarily counsel should have the stenographic notes transcribed or, if the client is an indigent, move for their transcription at state expense. See § 4.37 *infra.* If the transcript shows defects in the hearing that counsel wishes to challenge or if there has been no hearing and no valid waiver or if there is no transcript of the hearing and no valid waiver

of a transcript, counsel should decide whether s/he wants a probable-cause hearing at this time. See § 4.30 *supra.* If so, then s/he should move the judge who is presently presiding over the case (in other words, the judge to whom the case has been assigned for trial) to hold proceedings in abeyance and to transfer the case back to the judge who presided over the Initial Hearing so that a procedurally correct probable-cause hearing can be held. Counsel should point out that the transfer back to the earlier judge is necessary to avoid the trial judge hearing potentially prejudicial information that is relevant solely to the detention and probable-cause determinations and would not be admissible at trial. *See, e.g.,* D.C. CODE § 16-2312(j) (2023). If the trial judge refuses to order a hearing or refuses to transfer the case or if the Initial Hearing judge, upon receiving the case, refuses to convene a hearing, the appropriate form of relief in most jurisdictions will be, again, prohibition or mandamus.

§ 4.31(f) Restrictions on Prosecution Evidence

In some jurisdictions, the prosecution's evidence at a probable-cause hearing is subject to the same general rules of admissibility that govern its evidence at trial (*see*, *e.g.*, N.M. DIST. CT. RULE CRIM. PRO. 5(B)(5); *State v. Sherry*, 233 Kan. 920, 929, 667 P.2d 367, 375 (1983)); in others, the trial rules apply with the exception that hearsay is admissible (*see*, *e.g.*, PA. RULE CRIM. PRO. 542(E); *but see Commonwealth v. McClellan*, 660 Pa. 81, 233 A.3d 717 (2020) (a bindover cannot be based solely on hearsay)) – or that some kinds of hearsay are admissible (*see*, *e.g.*, UTAH RULE EVID. 1102 (reliable hearsay); CAL. PENAL CODE § 872(b), *and Whitman v. Superior Court*, 54 Cal. 3d 1063, 820 P.2d 262, 2 Cal. Rptr. 2d 160 (1991); *People v. Olney*, 333 Mich. App. 575, 963 N.W.2d 383 (2020)); in still others, the magistrate may receive and base a bindover on any evidence s/he deems reliable (*State v. Brown*, 967 N.W.2d 797 (N.D. 2021)).

The jurisdictions also differ in regard to the admissibility of illegally obtained evidence. Some jurisdictions allow such evidence to be presented at a probable-cause hearing. *See*, *e.g.*, FED. RULE CRIM. PRO. 5.1(e); *State v. Moats*, 156 Wis. 2d 74, 457 N.W.2d 299 (1990); *State v. Ayon*, 503 P.3d 405, 406, 2022-NMCA-003 (N.M. App. 2021), *cert. granted*, 2022-NMCERT-001 (case # S-1-SC-38937, January 11, 2022) ("the district court's authority at a preliminary hearing does not include the authority to determine the illegality of evidence"); *cf. State v. Lohnes*, 432 N.W.2d 77, 82 (S.D. 1988) ("In *State v. Reggio*, 84 S.D. 687, 176 N.W.2d 62 (1970), this court indicated that a probable cause determination at a preliminary hearing, based solely on illegally obtained evidence, would render the charge invalid. However, the *Reggio* court went on to assert that if there is other evidence to establish probable cause the charge will be upheld."). Other jurisdictions preclude it. *See*, *e.g.*, *Grace v. Eighth Judicial District Court*, 132 Nev. 511, 513, 375 P.3d 1017, 1018 (2016) ("justice courts have express and limited inherent authority to suppress illegally obtained evidence during preliminary hearings"); *State v. Wilson*, 55 Hawai'i 314, 317, 519 P.2d 228, 230 (1974) ("We are of the opinion that in a . . . [preliminary hearing], the district court, a court of record, must adhere to the general rules of evidence which include objections to the admissibility of unconstitutionally seized evidence. Thus, the district court was correct in . . . excluding the unconstitutionally seized evidence although . . . [it lacked] authority [to entertain a motion to suppress as such]. To hold otherwise

would allow the finding of probable cause that a felony had been committed upon illegally obtained evidence, a practice which violates the sanctions of the exclusionary rule. The district judge was bound by oath of office to uphold the Constitutions of the United States and the State of Hawaii. In our opinion the exclusionary rule is a sanction essential to upholding federal and state constitutional safeguards against unreasonable searches and seizures."); TENN. RULE CRIM. PRO. 5.1(a)(1), *and State v. Dixon*, 880 S.W.2d 696, 699 (Tenn. 1992) ("[A] general sessions court can suppress evidence incident to a preliminary hearing, but it cannot return the property suppressed if the district attorney general objects. . . . [A] ruling of the general sessions court cannot bar the State from submitting the evidence to the grand jury when it seeks an indictment for the same offense. . . . [T]he ruling of the general sessions court is not binding upon the criminal or circuit court if the grand jury returns an indictment against the accused. In other words, the criminal or circuit court must decide the admissibility of the evidence anew."); *cf. Massey v. Mullin*, 117 R.I. 272, 274, 366 A.2d 1144, 1145 (1976) ("We must now determine whether . . . a confession [taken in violation of *Miranda v. Arizona*] may be relied upon in determining that the 'proof of guilt is evident or the presumption great' and whether defendant is thus not entitled to bail as a matter of right. . . . [W]e hold that the denial of bail cannot be based on such a confession.") In still other jurisdictions, illegally obtained evidence must be excluded if, but only if, its illegality is not contestable. *Badillo v. Superior Court in and for City and County of San Francisco*, 46 Cal. 2d 269, 271-72, 294 P.2d 23, 24-25 (1956) ("In *Rogers v. Superior Court*, 46 Cal. 2d 3, 291 P.2d 929, 931, we held that a 'defendant has been held to answer without reasonable or probable cause if his commitment is based entirely on incompetent evidence', and accordingly, in such a case the trial court should grant a motion to set aside the information . . . , and if it does not do so, a peremptory writ of prohibition will issue to prohibit further proceedings. No problem is presented in applying this rule in cases involving searches and seizures in which the facts bearing on the legality of the search or seizure are undisputed and establish as a matter of law that the evidence is or is not admissible. In many cases, however, the evidence before the magistrate bearing on this issue may be in conflict or susceptible of conflicting inferences or consist only of the testimony of prosecution witnesses, and under these circumstances the court in ruling on a motion to set aside the information will frequently not be in a position to make a final determination as to the admissibility of the evidence. ¶ Accordingly, the information should not be set aside on the ground that essential evidence was illegally obtained if there is any substantial evidence or applicable presumption to support a contrary conclusion, and in such cases the ultimate decision on admissibility can be made at the trial on the basis of all of the evidence bearing on the issue.") *and People v. Butler*, 64 Cal. 2d 842, 415 P.2d 819, 52 Cal. Rptr. 4 (1966); *substantially in accord*, *State v. Mitchell*, 42 Ohio St. 2d 447, 450-51, 329 N.E.2d 682, 684 (1975) ("[I]n exercising the discretion inherent in a determination of probable cause, magistrates are aware that, at the trial level, questionable evidence will be tested. Therefore, evidence introduced at a preliminary hearing which is clearly excludable 'under the rules of evidence prevailing in criminal trials generally,' should, upon appropriate objection, be excluded by the magistrate in determining whether there is probable cause to believe that a crime has been committed by the accused. Evidence of doubtful constitutional validity may be accorded lesser weight in reaching such determination. But in neither event may such evidence be suppressed.").

Analytically, the first of these positions is assailable on constitutional grounds (federal or state, whichever of these constitutions renders the evidence illegally obtained) because it defies rationality to hold that evidence which cannot be used even to support a subsequent warrantless arrest or search (see § 23.40 *infra*) or a search warrant (see § 23.17(d) *infra*) can be used to support a bindover – which characteristically entails a longer period of detention than an initial warrantless arrest. As Justice Holmes put it in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920): "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." In jurisdictions in which the recognized functions of the probable-cause hearing include the weeding-out of prosecutions in which the evidence is too weak to justify a trial, it is also assailable as inconsistent with this function. A process that permits the case to go forward on evidence inadmissible at trial obviously fails to screen prosecutions in which there is no possibility of a sustainable conviction.

Where local rules or practice authorize the suppression or exclusion of illegally obtained evidence at probable-cause hearings, pre-hearing discovery of materials needed to support claims of illegality should be available. *See Magallan v. Superior Court*, 192 Cal. App. 4th 1444, 121 Cal. Rptr.3d 841 (2011), summarized in § 9.07(c) *infra*.

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

As explained in § 4.29 *supra,* defense counsel has three principal goals at the probable-cause hearing: (1) to show that the prosecution has not met its burden of proof and thereby to prevent detention of the respondent and, in some jurisdictions, also secure dismissal of the charges against the respondent; (2) to put the testimony of the prosecution witnesses on record in a way that makes them most impeachable at trial; and (3) to discover as much of the prosecutor's case as possible.

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

Frequently counsel may find that s/he is working at cross-purposes in seeking to discover and to lay a foundation for impeachment simultaneously. S/he will obviously have to accommodate these objectives in particular situations with an eye to which objective is more important in dealing with an individual prosecution witness. If counsel vigorously cross-examines the witness, in an effort to get a contradiction or concession on record, the witness will normally dig in and give a minimum of information in an effort to save his or her testimonial position; and, more than likely, s/he will be uncooperative if counsel thereafter attempts to interview the witness prior to trial. On the other hand, if counsel engages the witness in routine

examination, amiable and ranging, counsel may be able to pick up many clues for investigation and for planning of the defense. Of course, some witnesses resent any kind of cross-examination. If counsel thinks that this type of witness is lying or confused, counsel may wish to pin the witness down. Under no circumstances, however, should counsel educate the witness about the weaknesses of his or her testimony. To avoid mutual education by prosecution witnesses, the rule on witnesses should ordinarily be invoked. See § 27.11 *infra.*

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

§ 4.33 RESISTING LIMITATIONS ON CROSS-EXAMINATION

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

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

Most judges, however, like to push the hearing along and will often not be persuaded by these theories. Counsel should continue to attempt to cross-examine, as long as s/he can decently do so, in order to make clear for the record the extent of the limitations imposed on cross-examination. S/he should then respectfully ask the judge whether all cross-examination is going to be disallowed and, if not, what areas the judge is precluding. If the judge says that s/he cannot

tell until counsel asks the questions, counsel should resume attempts to cross-examine. Eventually the judge will shut counsel off altogether. Counsel should then object to the denial of cross-examination on the grounds of the client's statutory right to a probable-cause hearing (§ 4.28(b) *supra*) and the statutory and constitutional rights to cross-examination and to confrontation (§ 4.31(c) *supra*), effective representation by counsel (see § 9.09(b)(1) *infra*), and a fair hearing, as well as on the ground that the statute giving respondents a right to present testimony (see § 4.31(c) *supra*) envisions that the judge will hear both sides of the case. The record should be clear that this objection has been overruled if it has. Counsel is now in a position to pursue the type of prerogative writ proceeding described in § 4.31(e) *supra.*

An unfortunate *dictum* in a plurality opinion of the Supreme Court appears to accept, without federal constitutional quarrel, a state law practice permitting the magistrate "to terminate the preliminary hearing once probable cause is established*." Adams v. Illinois,* 405 U.S. 278, 282 (1972). This language may be seized upon by lower courts as giving the judge virtually unlimited power to curtail defensive cross-examination. But the Supreme Court did not, in fact, have before it in the *Adams* case any instance of curtailment of the defensive conduct of a preliminary hearing. The plurality opinion was merely noting, as relevant to the question of the retroactivity of the constitutional requirement of appointed counsel at preliminary hearing (see § 4.03 *supra*), that "because of limitations upon the use of the preliminary hearing for discovery and impeachment purposes, counsel cannot be as effectual as at trial." 405 U.S. at 282. So it is fair to urge that the *Adams dictum* must be read narrowly: as allowing judicial discretion to curb cross-examination pursued "for discovery and impeachment purposes" only, "once probable-cause is established," *id.,* but not as authorizing the restriction of cross-examination designed to test the foundation of the probable-cause showing itself, even if the cross-examination does also provide some discovery. For it seems plain that if, with one exception not presently relevant, a *parolee* has a right "to confrontation and cross-examination" at a preliminary parole-revocation hearing, *Morrissey v. Brewer,* 408 U.S. 471, 487 (1972), juvenile respondents have rights that are at least as ample at a probable-cause hearing, which is "part of a criminal prosecution," *id.* at 480. *See also Gagnon v. Scarpelli,* 411 U.S. 778, 781-82, 788-90 (1973). (*Gerstein v. Pugh,* 420 U.S. 103 (1975), does not hold to the contrary. See § 4.31(c) *supra*.)

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

§ 4.34 CALLING ADVERSE WITNESSES

Because the prosecution needs do nothing more than make a *prima facie* case at the

probable-cause hearing, the prosecution will frequently call only some of the witnesses whom it plans to use at trial. When persons whom defense counsel has identified as potential prosecution witnesses refuse to be interviewed by the defense, counsel may want to serve them with defense subpoenas for the slated date of the probable-cause hearing, approach them before court, and offer them the opportunity to talk with counsel – or with counsel's investigator – outside of the courtroom instead of having to appear in court. This cage-rattling technique can produce useful discovery. Similarly, issuing subpoenas *duces tecum* for the production of records, other documents and physical objects can provide a means for prying these materials out of the hands of uncooperative custodians at an earlier stage than the formal discovery process discussed in Chapter 9.

However, two cautions need to be observed here – one simple and obvious, the other more complex.

First, counsel should not subpoena any person or material that the prosecutor is otherwise unlikely to identify as a potential source of relevant information.

Second, counsel will seldom be advised to actually put an adverse witness on the stand, as distinguished from releasing him or her from the defense subpoena after out-of-court questioning. Most jurisdictions continue to follow the traditional rules of witness examination that prohibit a direct examiner from asking leading questions or impeaching his or her own witness, and most jurisdictions apply the same restrictions at probable-cause hearings as at trials. Under these conditions, calling an unfriendly witness is a bad gamble: Counsel will be handicapped against extracting any useful testimony, and anything useful that s/he does extract will be exposed to deconstruction or reconstruction by the prosecutor's use of leading questions and impeachment on cross. Consequently, counsel should ordinarily refrain from putting any adverse witness on the stand unless (a) the evidence rules applicable to probable-cause hearings in counsel's jurisdiction do *not* forbid direct examiners to lead and impeach their own witnesses, or (b) the presiding judge is known to be liberal in granting defense requests to declare witnesses hostile (see § 33.25 *infra*). (Counsel's best chances for getting witnesses declared hostile are (i) situations in which a witness has publicly demonstrated strong personal animosity toward the respondent apart from the events giving rise to the delinquency charge, and (ii) situations in which other prosecution witnesses have recounted incriminating hearsay declarations of the witness. In the latter situations, counsel can invoke the respondent's state-law right to contest the prosecutor's *prima facie* case and can also make some mileage out of the constitutional rights of confrontation and Due Process (see § 4.31(c) *supra*; §§ 9.09(b)(3), 9.09(b)(4) *infra*). Nevertheless, most judges will almost always exercise their discretion to refuse to allow defense counsel to use hostile-witnesses questioning techniques at a probable-cause hearing.)

§ 4.35 CALLING FAVORABLE DEFENSE WITNESSES

Presentation of defense witnesses – particularly the respondent – at the probable-cause hearing will have damaging and probably irreversible consequences for the respondent's chances

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

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

§ 4.36 OBJECTING TO INADMISSIBLE EVIDENCE

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

The tactic of nonobjection can sometimes turn out to be a two-edged sword, enabling the prosecutor, as well as defense counsel, to learn previously unknown facts. This consideration will weigh more or less heavily against defense counsel's use of the tactic, depending upon how careless or careful the prosecutor is known to be in his or her investigation and preparation both before and after the probable-cause hearing.

§ 4.37 OBTAINING A TRANSCRIPT

Many of the tactical suggestions made in the preceding sections have assumed that there will be a reporter or stenographer transcribing the testimony. Whether a court reporter routinely attends probable-cause hearings depends on local practice. Counsel should not assume that a reporter will be in attendance but should inquire. If local practice does not provide for a court reporter, the expense of a stenographer should be considered by the defense. Alternatively, the judge can be asked to allow counsel to operate a recording device at the defense table. Either a court reporter's transcript or a defense recording will usually serve as an invaluable aid in counsel's preparation for cross-examination at trial. The added advantage of a transcript is its greater utility at trial to impeach a witness who alters his or her testimony. A defense-made recording of the witness's probable-cause hearing testimony will be subject to prosecutorial quibbles about accuracy and intelligibility when offered for impeachment purposes at trial.

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

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

§ 4.38 CONTINUANCES

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

The defense itself may want a brief continuance to investigate prior to cross-examining the prosecution's witnesses. In addition, a continuance may provide a useful opportunity to try to persuade the prosecutor to divert the case. See Chapter 19 *infra*. A defense request for a

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