CHAPTER 49

JULY, 2011

Delinquency Proceedings

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§ 49.1 REFERENCES

Court rules: Juvenile proceedings in the district courts are governed by the Massachusetts Rules of Criminal Procedure. See Mass. R. Crim. P. 1(b), 3, 6, 7, 8. See also Special Rules of the District Court of Massachusetts 203–208. Rule 204 makes district court rules that apply to proceedings against adults applicable, "as far as pertinent," to proceedings against children between the ages of seven and seventeen. This implies that the District/Municipal Courts Rules of Criminal Procedure also apply to juvenile proceedings. In addition, the Juvenile Court Department promulgates rules establishing procedures in delinquency and youthful offender proceedings in the juvenile court.

Other sources: Ireland, *Massachusetts Practice*, vol. 44 (1993); *Massachusetts Juvenile Court Bench Bar Book* (Blitzman, Schelfaudt, eds., MCLE 2011).

§ 49.2 THE 1996 YOUTHFUL OFFENDER ACT

Legislation enacted in 1996 radically transformed juvenile practice. Highlights of the statute[1] include the following:

1. *Abolition of transfer hearings/ new "Youthful Offender" category*: As of October 1, 1996, transfer hearings were abolished and replaced by a "trial first" system.[2] Under the new system, the Commonwealth has the discretion to indict certain juveniles as "youthful offenders," who are tried in the juvenile court. If adjudication results, or a change of plea is offered, after a "sentencing recommendation hearing" the judge has power to impose the same state prison term as for an adult.[3] The new youthful offender jurisdiction substantially increases the number of juvenile clients who face the possibility of prison sentences or commitment to DYS until age twenty-one.[4]

2. *Elimination of trial de novo:* Trial de novo in juvenile cases was eliminated in favor of the single-trial system.[5]

3. *Jury trial:* Juveniles indicted as youthful offenders are entitled to a jury of twelve persons. However, a juvenile tried on a delinquency complaint is entitled only to a jury of six.[6]

4. *Murder cases:* Effective July 27, 1996, the juvenile court has no jurisdiction over charges of murder committed by juveniles aged fourteen to seventeen; such cases are prosecuted by indictment in the superior court.[7] Juveniles convicted of first- or second-degree murder face the mandatory adult terms if convicted. Those convicted of lesser-included offenses are sentenced pursuant to the provisions governing youthful offenders.[8]

5. *Detention:* Juveniles accused of murder who are fourteen or older, and are unable to furnish bail, must be committed to the county sheriff's custody and may be held in county jails. In other cases, the court can recommend secure detention of juveniles who are fourteen or older if certain conditions are met. The court's recommendation is not binding on DYS, but if DYS chooses not to comply, it must notify the court within two business days.[9]

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[1] An Act to Provide for the Prosecution of Violent Juvenile Offenders in the Criminal Courts of the Commonwealth, 1996, ch. 200, 1996 Mass. Adv. Legis. Service No. 8 (Law. Co-op), hereinafter referred to as "the Youthful Offender Act."

[2] St. 1996, c. 200, passim, and § 7, repealing G.L. c. 119, § 61.

[3] St. 1996, c. 200, §§ 4, 5, amending G.L. c. 119, §§ 54, 58.

[4] Prior to the enactment of the legislation, DYS spokesperson Glen Daly estimated that approximately 40 percent of DYS's current population, or about 1000 juveniles, would have qualified for youthful offender prosecution. BOSTON GLOBE, April 11, 1996. In 1997, 338 juveniles were indicted. See "Youthful Offenders Statistical Report" prepared by the Research and Planning Department, Administrative Services Division of the Commissioner of Probation, 1998.

[5] St. 1996, c. 200, § 3, replacing G.L. c. 119, § 55A.

[6] St. 1996, c. 200, § 4, amending G.L. c. 119, § 56. See infra § 49.8B(2).

[7] St. 1996, c. 200, § 15, replacing G.L. c. 119, § 74.

[8] St. 1996, c. 200, § 14, amending G.L. c. 119, § 72B.

[9] St. 1996, c. 200, § 11, amending G.L. c. 119, § 68. See infra § 49.4.

6. *Public access:* The prohibition on public access to juvenile court sessions does not apply to cases prosecuted by indictment.[10] Also, in such cases public inspection of juvenile court records is allowed to the same extent as in criminal cases. However, access is not granted to "privileged or confidential communications and information."[11]

7. *Extension of DYS commitment:* Abolished as of February 10, 2009; the Department of Youth Services can no longer ask the court to extend a juvenile's commitment to DYS for an additional three years.[12]

8. *Jurisdiction over juveniles aged nineteen to twenty-one:* Although juvenile court jurisdiction over alleged delinquents terminates at age nineteen, juveniles indicted as youthful offenders are subject to the court's jurisdiction until the age of twenty-one.[13]

9. *Superior court sentences to DYS:* Superior court judges are no longer permitted to sentence convicted juveniles to the custody of the Department of Youth Services.[14]

10. *Escape from DYS:* A new crime of escape from DYS custody exists, punishable by fine or imprisonment.[15] The department may issue an arrest warrant for an escapee, as well as for a juvenile who violates conditions of conditional liberty,[16] which is analogous to parole.

11. *Crime to coerce gang involvement:* The statute creates the new crime of assault and battery on a person under eighteen with the intent to coerce said person to participate in a criminal conspiracy in violation of c. 274, § 7. This includes a criminal street gang or other organization of (1) three or more persons (2) with a common name, identifying symbol, or sign (3) whose members engage in criminal activity.[17]

12. *Firearms offenses:* A juvenile found delinquent for committing certain firearm offenses will receive a mandatory DYS commitment for at least six months for a first violation, and at least one year for a second or subsequent violation.[18] The prohibition on suspension or reduction of this term suggests that for offenses committed prior to October 1, 1996, the sentence may be suspended.

13. *Victim photographs in court:* In a case "related" to homicide, one member of the victim's family may bring a photograph of the victim, not larger than 8" x 10", into the courtroom. The photograph may not be displayed to any juror.[19]

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[10] St. 1996, c. 200, § 9, amending G.L. c. 119, § 65.

[11] St. 1996, c. 200, § 6, amending G.L. c. 119, § 60A. See infra § 49.8A.

[12] Kenniston v. Department of Youth Services, 453 Mass. 179, 180 (2009).

[13] St. 1996, c. 200, § 13, amending G.L. c. 119, § 72. See infra § 49.4A.

[14] St. 1996, c. 200, § 16, repealing G.L. c. 119, § 83. See infra § 49.9C(1).

[15] St. 1996, c. 200, § 24, amending G.L. c. 120, § 26. In Commonwealth v. Carrion, 431 Mass. 44 (2000), the S.J.C. held that flight from a DYS employee while in handcuffs and being escorted for a hospital visit to a relative constituted an "escape". Escape from a secure facility is not a prerequisite for an adjudication.

[16] St. 1996, c. 200, § 18, amending G.L. c. 120, § 13.

[17] St. 1996, c. 200, § 36, amending G.L. c. 265, § 44.

[18] St. 1996, c. 200, § 5, amending G.L. c. 119, § 58. The mandatory term applies to violations of G.L., c. 269, 10(a), (c), & (d), or c. 269, § 10E.

[19] St. 1996, c. 200, § 34, amending G.L. c. 258B, § 3.

14. *Representation in youthful offender cases:* The Youth Advocacy Project of the CPCS Public Division is authorized to represent juveniles in youthful offender cases. Certified private counsel may also handle these cases.[20]

Effect on Defense Attorney: Of all the above-described changes, the two with the greatest impact on defense counsel's role are the abolition of trial de novo and of transfer hearings. The combined effect of these changes is to drastically raise the stakes in most juvenile cases but especially in cases subject to youthful offender indictment. The abolition of transfer hearings expands the prosecutor's power to expose large numbers of defendants to state prison and DYS commitment to age twenty-one. This increases the prosecutor's leverage in plea-bargaining at the pre-indictment and post-indictment stages. Pre-indictment, a prosecutor's willingness to proceed by delinquency complaint rather than indictment might depend on the juvenile's willingness to plead to the complaint and accept a DYS commitment. After the indictment is returned, a plea to a DYS commitment to twenty-one might be appealing in some cases compared to the specter of state prison.

§ 49.3 ROLE OF THE ATTORNEY IN JUVENILE PROCEEDINGS

Although the right to counsel applies to delinquency proceedings,[21] there has been considerable controversy in defining the role of an attorney representing a juvenile. Historically, the system was not perceived as adversarial. The various actors in the court were preoccupied with the best interest of the child. Delinquent children were not to be treated as criminals, but as children "in need of aid, encouragement and guidance." Their care, custody, and discipline were to "approximate as nearly as possible that which they would receive from their parents."[22]

In re Gault[23] significantly altered this landscape by holding that due process must be provided for persons accused of delinquent acts.[24] In fact, Massachusetts affords the same due process protections for juveniles as for adults,[25] including the

[20] St. 1996, c. 200, §§ 30–31, replacing G.L., c. 211D, § 6.

[21] In re Gault, 387 U.S. 1 (1967); Marsden v. Commonwealth, 352 Mass. 564 (1967); Mass. R. Crim. P. 8(a).

[22] These expressions of parens patriae intent appear in our state's juvenile code, which labels delinquency proceedings as "noncriminal" in nature. G.L. c. 119, § 53.

[23] 387 U.S. 1 (1967).

[24] In re Gault, 387 U.S. 1 (1967). This seminal case established that juveniles are entitled to basic due process rights such as the rights to counsel, the right against self-incrimination, notice, and the right to confront one's accusers. Justice Fortas's opinion held that with respect to the right to counsel there is no material difference between adult and juvenile proceedings in which a delinquency adjudication is sought. The court concluded that "unbridled discretion, however benevolently motivated frequently a poor substitute for principle and procedure." Gault, supra, 387 U.S. at 20 n.2. See also In re Winship, 397 U.S. 358 (1970) (delinquency adjudication requires proof beyond reasonable doubt); Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy protection applies to juveniles); and Stokes v. Commonwealth, 368 Mass. 754 (1975) (same).

[25] Mass. R. Crim. P. 1(b) governs the procedure in all criminal proceedings in the district court, the superior court, and in all delinquency proceedings. See also Mass. R. Crim. P. 2(b)(7). Similarly, Rule 204 of the Special Rules of the District Court applies the Special Rules

right to a trial by jury.[26] The emerging view, reflected in ABA standards,[27] is that if each actor zealously performs his or her role the system is best served. For the attorney this entails assertion of all available defenses, and in the dispositional context arguing for the least restrictive alternative.[28] In this view, while advising and counseling juvenile clients is appropriate and necessary, the ability to engage in such activity derives from the attorney first being a zealous advocate.

Adequate advocacy in this system requires counsel to investigate the case, file appropriate discovery motions, and develop a theory of the case as soon as possible. It also requires prompt disposition planning beginning as soon as arraignment because (1) it takes time to obtain the necessary records and evaluations; (2) prompt case investigation and disposition planning with the juvenile and his or her family enhances client trust; (3) information gained in disposition planning may be of vital use in persuading the prosecutor not to indict the client as a youthful offender; and (4) the information may be useful in preparing to defend the case and to identify issues such as competency to stand trial and/or to make a valid waiver of *Miranda* rights.[29]

Decision making by the client: The attorney represents the juvenile. This is true in cases where the client is indigent *and* in cases where the family retains the services

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to delinquency as well as adult criminal proceedings. Special Rules 203, 205, 206, 207, and 208 concern notice of rights, copy of complaint, representation of counsel and transfer hearing procedure. While the courts of the Juvenile Court Department are independent and not subject to district court rules (Commonwealth v. White, 365 Mass. 301, 305–06 (1974)), the administrative justices have adopted this due process legacy. G.L. c. 119, § 56 mandates that juvenile jury trials shall be tried "in like manner" as adult cases, and in accordance with laws governing superior court jury trials. See St. 1996, c. 200 §§ 3, 4(e), amending G.L. c. 119, §§ 55A, 56.

[26] Although McKeiver v. Pennsylvania, 403 U.S. 528 (1971), held that the right to jury trial is not constitutionally guaranteed, this state has established the right to a jury trial by statute and case law. G.L. c. 119, §§ 55A, 56; Commonwealth v. Thomas, 359 Mass. 386 (1971). Prior to the enactment of the Youthful Offender Act, any juvenile charged with delinquency based on an offense that would require an indictment if the person were an adult had the right to a 12-person jury. For offenses committed on or after October 1, 1996, juveniles charged with delinquency have the right only to a jury of six persons, while those prosecuted as youthful offenders have the right to a jury of 12. St. 1996, c. 200, § 4(e), amending G.L. c. 119, § 56.

[27] See, e.g., IJA-ABA Juvenile Justice Standards Project, Standards Relating to Counsel for Private Parties (1982), at 3 (rejecting both guardianship and amicus curiae definition of the attorney's role).

[28] See generally Committee for Public Counsel Services, PERFORMANCE GUIDELINES GOVERNING REPRESENTATION OF INDIGENT JUVENILES IN DELINQUENCY AND CRIMINAL CASES (hereinafter cited as "Juvenile Guidelines"), to be read in conjunction with the CPCS Guidelines governing representation of adults. Juvenile Guideline J1.3 requires counsel to ensure that the client is afforded due process, to assert all the client's rights as strategically appropriate, and generally comply with the standards for performance in criminal proceedings. In disposition the least restrictive alternative should be urged.

[29] See Grisso, The Competence of Adolescents as Trial Defendants, 3 PSYCHOL., PUB. POL'Y & LAW 3 (1996); Grisso, Juvenile Competence to Stand Trial: Questions in an Era of Punitive Reform, CRIM. JUST. 4 (1997).

of an attorney.[30] Fundamental decisions concerning the conduct of the case, such as proceeding to trial before a judge or jury, are to be made by the client. The attorney's counseling role plays an important part in this process.[31]

However, some juvenile clients, by virtue of age or diminished capacity, present concerns regarding decision making. The IJA-ABA standards recommend the use of a standard similar to competency to stand trial to assess decision-making capacity:[32] does the client have a factual and rational understanding of the nature, purpose, and general consequences of a given proceeding, and can the client communicate effectively with counsel? If the client is immature or incompetent, an attorney, parent, or guardian ad litem may make decisions for the client.[33] In delinquency cases, appointment of a guardian ad litem is not appropriate.[34]

Massachusetts favors the model of client directed advocacy.[35] This form of advocacy comports with the strong consensus that children are best served when lawyers complies with the traditional, ethically-dictated expectations of an attorney-client relationship.[36]

Some states employ a law guardian best interest approach. There has been a lively debate in this area in the context of child welfare matters, i.e. abuse and neglect cases or status offense cases (children in need of supervision cases, C.H.I.N.S).[37] In

[30] Mass. R. Prof. C. 1.8(f) (lawyer cannot accept fee from third party unless no interference with client-lawyer relationship). See also former S.J.C. Rule 3:07, DR5-107(B) (only client can direct attorney even if other persons have made fee arrangements).

[31] See MBA Ethics Opinion No. 93-6 (DR 7-191(A)(1)) (obligates lawyer to "seek the lawful objectives" of the client; condition of legal minority does not render client "incapable of making a considered judgment on his own behalf" under Ethical Consideration 7-12). See also Mass. R. Prof. C. 1.14 (client under disability).

[32] IJA-ABA Juvenile Justice Standards Project, Standards Relating to Counsel for Private Parties, (1982), at 3. See also Mass. R. Prof. C. 1.14 (client under disability).

[33] Id. Under CPCS Juvenile Guidelines J1.3(n), counsel may consent to appointment of a guardian ad litem in a delinquency proceeding "only when very unusual circumstances warrant such an appointment to assist in the disposition phase." MBA Ethics Opinion No. 93-6 advises the lawyer to "guard against advancing his own beliefs as to what is in the child's best interests." Rather, he should "seek to determine and advance the client's interests, as the client would define them if the client were able to make a competent judgment on the issue."

[34] In Commonwealth v. Delverde, 398 Mass. 288 (1986), the S.J.C. held that the substituted judgment approach is not compatible with the procedural requirements of criminal cases. In a substituted judgment analysis, the judge steps into the shoes of the incompetent defendant and tries to understand all the factors the defendant considered in making his decision. When a plea is being made, the judge's duty is not to understand the defendant's thinking but to question whether the waiver of defendant's rights is being made knowingly, voluntarily, and intelligently. If a judge has already engaged in the substituted judgment process, it may be hard for the judge to independently assess the plea bargain in imposing sentence.

[35] Mass. R. Prof. C. Rule 1.14

[36] Recommendations of the Conference on Ethical Issues in the Legal Representation of Children, 64 Fordham L. Rev. 1301, 1301-1302 (2996); Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham, 6 Nev.L.J.571, 578-580 (2006).

[37] Adoption of Georgette, 439 Mass. 28, 36-46 (2003) (Questions that arise include: when should a new counsel be appointed for child, should a guardian ad litem be appointed, and how can a judge provide assistance within the limited resources and budgets); See Committee

Care and Protection of Georgette, 439 Mass. 28 (2003), the S.J.C. confronted a scenario in which counsel, representing children with different articulated positions, advocated what he believed to be the children's best interest.[38] The S.J.C. used the case as a vehicle to consider the ethics of legal representation in child welfare matters and referred the issues to the Standing Committee of the Rules of Professional Responsibility.[39] The committee recommended revising the rule to comport with the language of ABA Model Rule 1.14.[40] Comment 7 of the revised rule was made specifically to address the concern raised in *Georgette*.[41] Under comment 7, an attorney may seek a guardian ad litem or advocate in opposition to child's interest only if advocating for the child's interest would "place the client at risk of substantial harm."[42]

§ 49.4 JUVENILE COURT JURISDICTION

§ 49.4A. ORIGINAL JURISDICTION

Jurisdiction is exercised in a juvenile session of the district court, or in certain venues by a court of the Juvenile Court Department.43 With the exception of juveniles who have reached the age of fourteen and are accused of murder,44 the court has

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for Public Counsel Services (CPCS) Assigned Counsel Manual, Standard 1.6 of the Performance Standards Governing the Representation of Children and Parents in Child Welfare cases; American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases; American Law Institute's Restatement (Third) of the Law Governing Lawyers § 24 (2000); Adoption 2002: The President's Initiative on Adoption and Foster Care. Guidelines for Public Policy and State Legislation Governing Performance for Children from (rev. 2001).

[38] In Adoption of Georgette, 439 Mass. 28, 33-34 (2003), child alleged that counsel provided ineffective assistance of counsel because counsel advocated in direct opposition to child's stated interest, which was to be returned to their father's custody. Although the appeals court acknowledged that counsel may have provided ineffective assistance of counsel, child failed to meet both prongs of the Saferian test and termination of Father's parental rights was affirmed because there was overwhelming evidence that Father was unfit.

[39] Adoption of Georgette, 439 Mass. 28, 45 (2003).

[40] Constance V. Vecchoine, Representing Client with Diminished Capacity (July 2009), http://www.mass.gov/obcbbo/diminished.htm (revisions to the rule were made in September 2008)

[41] Constance V. Vecchoine, Representing Client with Diminished Capacity (July 2009), http://www.mass.gov/obcbbo/diminished.htm

[42] Mass. R. Prof. C. Rule 1.14 Comment 7; Constance V. Vecchoine, Representing Client with Diminished Capacity (July 2009), http://www.mass.gov/obcbbo/diminished.htm

[43] G.L. c. 119, § 52; G.L. c. 218, § 57. The Juvenile Court Department includes the Boston Juvenile Court, Bristol County Juvenile Court, Springfield Juvenile Court, and Worcester Juvenile Court. The Legislature has endorsed the implementation of a plan to establish a statewide juvenile court. As new statutorily designated divisions of the juvenile court as established, they will replace the district court juvenile sessions. See ch. 379 of the Acts of 1992, §§ 162, 164, 203, 227, amending G.L. c. 218, §§ 57, 58.

[44] Effective July 27, 1996, juveniles between the ages of 14 and 17 who are accused of murder are tried in the superior court and face mandatory adult sentencing if convicted. St. 1996, c. 200, §§ 14, 15. Retroactive application of this law would presumably violate federal

jurisdiction over any juvenile between the ages of fourteen and seventeen who is accused of violating any city ordinance, town bylaw, or state statute.45 (Delinquency jurisdiction also extends to a person apprehended before her eighteenth birthday for an offense committed before she was seventeen.[46]) It is important to note that if a juvenile between the ages of seven and seventeen is found to have committed the offense beyond a reasonable doubt, the juvenile is not "convicted" of a crime but rather adjudicated as either a delinquent child (on a complaint) or youthful offender (on an indictment), unless the case is continued without a finding pursuant to G.L. c. 276 sec. 18. [47] Use of the term "conviction" would implicate other statutory provisions including the sex offender registry law. For example, G.L. c.6 sec. 178(E)(F) provides that in cases where a judge does not impose a sentence of confinement, a judge may relieve a convicted or adjudicated sex offender from having to register, but may not do so if the juvenile has been "convicted" of certain offenses. The latter section's omission

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and state constitutional prohibitions against ex post facto laws. Cf. Commonwealth v. A Juvenile, 413 Mass. 148 (1992) (barring retroactive application of G.L. c. 119, § 61, as amended (1991), allowing prosecution of juvenile murder cases by indictment).

[45] G.L. c. 119, § 52. See also Commonwealth v. A Juvenile, 16 Mass. App. Ct. 251 (1983). The juvenile court maintains jurisdiction over a pending case while the juvenile is between 17 and 18 and if she turns 18 while the case is pending. G.L. c. 119, § 72. "Except as provided for youthful offenders . . . nothing herein shall authorize the commitment of a person to the person to the Department of youth services after he has attained his nineteenth birthday, or give any division of the juvenile court Department any power or authority over a person after he has attained his nineteenth birthday." Extensions of DYS commitment pursuant to G.L. c. 120, §§ 16–20 must be entered prior to defendant attaining the age of 19. See Santiago v. Commonwealth, 427 Mass. 298 (1998) (S.J.C. had reversed juvenile adjudication in jury session in murder case and ordered remand and new trial; defendant moved to dismiss because he had attained the age of 19 after trial; held: retroactive application of statute extending jurisdiction of juvenile court to offenders under age 21 who have attained 19th birthday not violative of ex post facto or due process provisions of state or federal constitutions, but absent clear expression of intent to apply St. 1996, c. 200, § 13(b) amending G.L. c. 119, § 72 retroactively, juvenile court has no jurisdiction to hear case after the age of 19; indictment dismissed; The Commonwealth appealed and prevailed. Santiago v. Commonwealth, 428 Mass. 39 (1998).

[46] The juvenile court maintains jurisdiction over children who attain their 18th birthday pending adjudication of their cases, or during continuances or probation or after their cases have been placed on file. If a child commits an offense prior to his 17th birthday and is not apprehended until between his 17th and 18th birthday, the court must deal with such child in the same manner as if he had not attained his 17th birthday. St. 1996, c. 200, § 13(a), replacing G.L. c. 119, § 72.

If a person commits an offense or violation prior to his 17th birthday, and is not apprehended until after his 18th birthday, the court after hearing must determine whether there is probable cause to support the charge. If so, the court may either order that the person be discharged if satisfied that such discharge is consistent with the protection of the public, or dismiss the delinquency complaint and order a criminal complain to be issued. St. 1996, c. 200 § 13A, replacing G.L. c. 119, § 72A. See Commonwealth v. Bousquet, 407 Mass. 854 (1990).

[47] In Commonwealth v. Conner C., 432 Mass 635 (2000), the S.J.C. held that a child who is proceeded against by either complaint or indictment and is found to have to have adjudicated the offense, i.e. charged as an alleged youthful offender or delinquent, is "adjudicated" not "convicted." In ruling that even youthful offender proceedings are not "criminal" proceedings the court cited the rehabilitative mission of G.L. c. 119, sec. 53 to provide "aid, encouragement and guidance." Id. at 642.

of the term "adjudication" confers the authority to relieve a juvenile offender from having to register.[48]

As of October 1, 1996, *the juvenile court also has jurisdiction over persons accused of being "youthful offenders."* A person is eligible for youthful offender prosecution if, while between the ages of fourteen and seventeen, she has committed an offense (other than murder) which, if she were an adult, would be punishable by imprisonment in the state prison, and if she: (1) has previously been committed to the Department of Youth Services, (2) has committed an offense involving the threat or infliction of serious bodily harm; or (3) has committed a firearm offense under G.L. c. 269, § 10(a), (c), and (d), or c. 269, § 10. In such cases, the Commonwealth has discretion either to proceed by delinquency complaint, or to indict the child and seek youthful offender adjudication. In either scenario, the proceeding occurs in juvenile sessions**.** If a child is adjudicated a youthful offender on an indictment, the court may sentence her to such punishment as is provided by law, including a state prison sentence. Sentencing is preceded by a "sentencing recommendation hearing" to determine the sentence by which the present and long-term public safety would be best protected.[49]

The Youthful Offender Act eliminates the pretrial transfer hearing for offenses committed on or after October 1, 1996. A juvenile between the ages of fourteen and seventeen accused of committing an offense before that date[50] is still subject to a transfer hearing. Such a juvenile may be transferred and prosecuted as an adult if she: (1)(a) has previously been committed to the Department of Youth Services and is charged with what would be a felony if she were an adult, or (b) is accused of an offense involving the threat or infliction of serious bodily harm; (2) presents a significant danger to the public; *and* (3) is not amenable to rehabilitation as a juvenile.[51] With regard to juveniles who have allegedly committed offenses prior to October 1, 1996, no criminal process may be initiated until after a juvenile complaint has been brought and dismissed. As exceptions, certain motor vehicles offenses against a juvenile who is sixteen,[52] and contempt cases[53] originating in another court may be

[48] In a recent S.J.C. single justice opinion it was held that D.Y.S. commitment constitutes "immediate confinement" as contemplated by G.L. c. 6, sec. 178E(f). That statute provides, in pertinent part that "In the case of a sex offender who has been adjudicated as a youthful offender or as a delinquent by reason of a sex offense, on or after December 12, 1999, and who has not been sentenced to immediate confinement, the court shall, within 14 days of sentencing, determine whether the circumstances of the offense in conjunction with the offender's criminal history indicate that the sex offender does not pose a risk of re-offense or a danger to the public. If the court so determines, the court shall relieve such sex offender of the obligation to register under sections 178C to 178F." SJC for Suffolk County SJ-2002-0239.

[49] St. 1996, c. 200, §§ 1, 2, 5, amending G.L. c. 119, §§ 52, 54, 58.

[50] For juvenile charged with murder, the effective date is July 27, 1996.

[51] G.L. c. 119, § 61 enumerates the non-inclusive list of factors to be considered. See also District Court for Northern Dist. v. Lowell Div. of Dist. Court Dep't, 402 Mass. 511 (1988) (district court criminal jurisdiction over transferred juvenile) may attach for offenses within that Department's jurisdiction).

[52] G.L. c. 119, § 74, replaced by St. 1996, c. 200, § 15.

[53] Doe v. Commonwealth, 396 Mass. 421 (1985).

prosecuted criminally. An exception also exists for juvenile murder cases prosecuted by indictment.[54]

Regarding offenses committed after October 1, 1996,[55] subject to the same exceptions, juveniles must either be prosecuted on delinquency complaints or on youthful offender indictments.

A person apprehended after age eighteen for a juvenile offense cannot be tried as a juvenile. The juvenile court is limited to conducting a hearing to determine whether probable cause exists, and if so whether the public interest requires that an adult criminal complaint should issue.[56] The latter decision will focus on such equitable factors as the reason for the delay,[57] the nature of the case and the need for public protection. *Commonwealth v. A Juvenile*[58] indicates that while all of the enumerated factors of the transfer statute[59] do not have to be considered in determining whether discharge or dismissal and the issuance of a criminal complaint serve the interest of the public, a judge shall consider: (1) the nature and circumstances and seriousness of the alleged offense; (2) the family, school, and social history of the child; (3) the success or lack of success of any past treatment efforts of the child; and (4) the adequate protection of the public.[60] The statute does not specify a burden of proof, but it can be inferred that the burden is on the Commonwealth to prove by a preponderance of the evidence that a criminal complaint should issue. The judge has the discretion to consider any information she might deem relevant to the issue.

§ 49.4B. HARASSMENT PREVENTION ORDER

Effective May 10, 2010 juvenile courts may hear requests for harassment preventions orders. The juvenile court has exclusive jurisdiction in cases where the defendant is below the age of seventeen. An individual, without legal representation, may file a complaint in court asking for protection from another individual under the harassment prevention order statute, G.L. c. 258E. If both parties

[54] See G.L. c. 119, § 61, as amended (1991), allowing the Commonwealth to return an indictment in the district court of juvenile court, construed in Charles C. v. Commonwealth, 415 Mass. 58, 63ff. (1993) (§ 61 not inconsistent with G.L. c. 119, § 72). Because the level of proof necessary for obtaining an indictment is less than that required at a probable-cause hearing, retroactive application of this amendment violates federal and state constitutional prohibitions against ex post facto laws. See Commonwealth v. A Juvenile, 413 Mass. 148 (1992). As of July 27, 1996, murder offenses committed by juveniles aged 14 or over must be prosecuted by indictment in the superior court.

[55] G.L. c. 119, § 61, as amended (1991).

[56] St. 1996, c. 200, § 13A, replacing G.L. c. 119, § 72A.

[57] In Commonwealth v. A Juvenile, 16 Mass. App. Ct. 251, rev. denied, 390 Mass. 1101 (1983), the court interpreted the statutory framework not to benefit those who default. A person who was 16 at the time of the offense at age 17, and was apprehended at age 18, could be held for adult prosecution.

[58] Commonwealth v. A Juvenile, 16 Mass. App. Ct. 251, rev. denied, 390 Mass. 1101 (1983).

[59] G.L. c. 119, § 61, repealed by St. 1996, c. 200, § 5.

[60] Commonwealth v. A Juvenile, 16 Mass. App. Ct. 251, 257 (1983); Commonwealth v. Bousquet, 407 Mass. 854, 858–59 (1990).

are under the age of seventeen, the complaint must be filed in a juvenile court.[61]A main difference between G.L. c. 258E from the abuse prevention order, G.L. c. 209A is that the complainant does not have to meet the relationship requirement sent forth in G.L. c. 209A.[62]

In order for a party to be eligible for protection under the harassment protection order statute, G.L. c. 258E, the party has the burden to show that he or she is suffering from harassment. G.L. c. 258E provides three definitions of harassment. The *first* definition requires plaintiff to meet five elements.[63] The first element is that there must have been three or more acts of harassment. Each act must have been aimed at a specific person. Each act must have been willful and malicious.[64] Each act must have been done with intent to cause fear, intimidation, abuse or property damage.[65] In addition, each act must have in fact have caused fear, intimidation, abuse or property damage.

The *second* definition of harassment is defined as when an individual either by "force, threat or duress causes another to involuntarily engage in sexual relations."[66] Only one act of this behavior must be shown for the definition to be met.[67]The *third* definition of harassment is defined as a single act that constitutes one of 12 enumerated

[61] G.L. c. 258E §2 (complaints must be filed in the court division which the complainant resides in).

[62] An abuse prevention order under G.L. c. 209A is available only to victims who a) are or were married to one another or b) are or were residing together in the same household or c) are or were related by blood or marriage or d) have a child in common regardless of whether they have ever married or lived together or e) are or have been in a substantive dating or engagement relationship. See G.L. c. 209A, § 1.

[63] G.L. c. 258E, § 1

[64] The word "willful" is not defined in statute G.L. c. 258E. In other contexts, the word "willful" has been defined in different ways. In a willful and malicious criminal harassment context, the "willful" element is met when it is shown that the actor intends the act. See G.L. c. 265 §43 A; Commonwealth v. O'Neil, 67 Mass. App. Ct. 284, 293 (2006). For a willful and malicious property damage claim, the actor has to intend both the act and the resulting harm in order for the "willful" element to be met. See G.L. c. 266, § 27; Commonwealth v. Armand, 411 Mass. 167, 170-171 (1991); Commonwealth v. Smith, 17 Mass. App. Ct. 918, 920 (1983). The statute defines "malicious" as "characterized by cruelty, hostility or revenge." See G.L. c. 258E, § 1. This is the same standard of malice used in the willful and malicious property damage statute and requires subjective ill will to be shown. See G.L. c. 265, § 43A.

[65] "Abuse" is defined as "attempting to cause or causing physical harm to another or placing another in fear of imminent serious physical harm." See G.L. c. 258E, § 1. The statute does not define "fear," "intimidation" or "property damage." Nor does the statute define what the plaintiff must fear, or what the goal of the intimidation must be. The Massachusetts Civil Rights Act has interpreted the word "intimidation" to mean, "putting in fear for the purpose of compelling or deterring conduct." See G.L. c. 12, § 11H; Planned Parenthood League, Inc. v. Blake, 417 Mass. 467, 474 (1994). In the context of the witness intimidation statute, the word "intimidation" is defined in the dictionary form. See G.L. c. 268, § 13B; Commonwealth v. Potter, 39 Mass. App. Ct. 924, 925 (1995). Commonwealth v. Gordon, 44 Mass. App. Ct. 233, 235 (1998) states that for the "intimidation" element to be proven in the context of the witness intimidation statute, an overt threat is not required nor is it required that the victim be put in fear of a specific harm.

[66] G.L. c. 258E, § 1

[67] G.L. c. 258E, § 1

crimes involving sexual assault, stalking or harassment.[68] Anyone suffering from any of the three forms of harassment as defined by the statute is able to seek a harassment protection order under G.L. c. 258E.

If the court finds that the complainant is suffering from harassment, the court may issue an order that the defendant: (i) refrain from abusing or harassing the plaintiff (ii) refrain from contacting the plaintiff (iii) refrain away from the plaintiff's household or workplace (iv) pay the plaintiff monetary compensation for the losses suffered as a direct result of the harassment; provided however that compensatory damages shall include, but shall not be limited to, loss of earnings, out-of-pocket losses for injuries sustained or property damaged, cost of replacement of locks, medical expenses, cost for obtaining an unlisted phone number and reasonable attorney's fees.[69] If an immediate danger of harassment is found, a court may issue a temporary order of any of the above stated types of relief before a formal hearing is held about the complaint.[70]

§ 49.4C. ANCILLARY JURISDICTION

The court has the inherent equitable authority to order expungement of records and destruction of police photographs and fingerprint cards.[71] This authority, however, has not been extended to records maintained by the Office of the Commissioner of Probation.[72]

In *Commonwealth v. A Juvenile,*[73] the state high court held that a juvenile who had fathered a child could be ordered pursuant to under G.L. c. 273, § 15 to provide support for a period exceeding the time during which the juvenile court would have jurisdiction over the defendant. The court concluded that when, by reason of age, juvenile jurisdiction lapses the enforcement of the order could be transferred to the appropriate district court.

§ 49.4D. JURISDICTION OVER ADULTS

The juvenile court also has jurisdiction over adults charged with the following crimes:

1. Contributing to the delinquency of a minor, G.L. c. 119, § 63. This crime is punishable by a fine of not more than five hundred dollars or by imprisonment of not more than one year or both. The divisions of the Juvenile Court Department have exclusive jurisdiction.

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[68] The 12 enumerated crimes are G.L. c. 265, §§ 13B (indecent assault and battery on a child), 13F (indecent assault and battery on a mentally retarded person), 13H (indecent assault and batter), 22 (rape), 22A (forcible rape of a child), 23 (statutory rape), 24 (assault with intent to rape), 23B (assault with intent to rape a child), 26C (enticement of a child), 43 (criminal stalking) or 43A (criminal harassment), or G.L. c. 272 § 3 (drugging for sexual intercourse).

[69] G.L. c. 258E, § 3.

[70] G.L. c. 258E, § 5.

[71] Police Comm'r v. Municipal Court, 374 Mass. 640, 665–68 (1978).

[72] See Commonwealth v. Gavin G., 437 Mass 47 (2002).

[73] 387 Mass. 678, 680–81 (1982).

2. Willful neglect or abandonment of a child, G.L. c. 273, §§ 1 & 2. The Juvenile Court Department has concurrent jurisdiction with the superior and district court departments.

3. Failure to cause school attendance, G.L. c. 76, § 2. This is punished by a maximum fine of twenty dollars. The Juvenile Court Department has jurisdiction over adults who fail to send their children to school.

§ 49.4E. JUVENILE COURT DEPARTMENT RULE-MAKING AUTHORITY

The Juvenile Court Department may provide procedural forms and promulgate general rules concerning practice and procedure in the juvenile courts and the juvenile sessions of the district court subject to Supreme Judicial Court approval.[74]

§ 49.5 ARREST AND BOOKING PROCEDURES

The standards for arrest are the same for adults and juveniles[75] except that rules restrict the use of a warrant instead of a summons to bring a juvenile before the court.[76] Once an arrest has been made the police must notify probation[77] and the parent or guardian.[78] The time and place of the arraignment is to be specified and notice of the nature of the charge provided.[79] Custodial interrogation requires not only *Miranda* warnings but also compliance with the above requirements and, if the child is under fourteen, the presence of a parent or interested adult.[80]

Police have the authority to fingerprint and photograph juveniles accused of the equivalent of a felony.[81] Where the photograph or fingerprint was the product of a

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[74] G.L. c. 218, § 60. See Juvenile Court Rules 1–12 (April 15, 1996) governing care and protection, guardianship, and adoption. See also Standing Orders of the Juvenile Court (January 15, 1997) and the Special Rules of the District Courts of Massachusetts 203–209, rules applicable to juvenile proceedings.

[75] See supra § 17.5. Felony arrests are permissible when made by an officer who has probable cause to believe that a crime has been committed. Commonwealth v. Andrews, 358 Mass. 721 (1971). A misdemeanor arrest is authorized for offenses constituting a breach of the peace and committed in the officer's presence. Other grounds are enumerated statutorily. G.L. c. 276, § 28.

[76] Children under 12 must be brought to court on a summons rather than a warrant. Mass. R. Crim. P. 6(a)(2); G.L. c. 119, § 54. Section 54 further provides that a summons should be used in all other juvenile cases unless there is reason to believe the juvenile will not appear or he has defaulted. The method of service is detailed in G.L. c. 119, § 55; Dist. Ct. Special R. 205, 206 (1967).

[77] Mass. R. Crim. P. 7(a)(1); G.L. c. 119, § 67.

[78] Mass. R. Crim. P. 7(a)(1); G.L. c. 119, § 67.

[79] Mass. R. Crim. P. 6(d); G.L. c. 119, § 67; In re Gault, 387 U.S. 1 (1967).

[80] Commonwealth v. A Juvenile (No. 1), 389 Mass. 128 (1983). See full discussion infra at § 49.6(C) (juvenile confessions) and supra at ch. 19 (confessions).

[81] Commonwealth v. Shipps, 399 Mass. 820, 831–33 (1987); G.L. c. 263, § 1A. Shipps also held that G.L. c. 119, § 60A did not preclude law enforcement from using such photographs for subsequent identifications.

misdemeanor arrest suppression might be warranted,[82] although rules and case law establishing due process symmetry between the rights afforded juveniles and adults mitigate against such a result.[83] Following not delinquent determinations, or dispositive motions to suppress resulting in a dismissal or nolle prosequi, counsel should consider motions to seal court records (including fingerprints and photographs) pursuant to the juvenile court's ancillary jurisdiction.[84]

Following an arrest the juvenile must be arraigned at the next juvenile session of the appropriate court. Cases arising under c. 119 have precedence over other cases.[85] This section should be invoked to insure prompt arraignment. In district courts with juvenile sessions on only one or two days of the week, unnecessary detention may be avoided by prompt arraignment.

Counsel should also be aware of the provisions of G.L. c. 218, § 35A, which authorizes a clerk's hearing on the issuance of a complaint on application by a civilian.[86]

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[82] Cf. Davis v. Mississippi, 394 U.S. 721 (1969) (fingerprint obtained through illegal arrest); Commonwealth v. Bailey, 370 Mass. 388, 397–98 (1970) (motion properly rejected as untimely).

[83] See, e.g., Mass. R. Crim. P. 1(b); Victor V. v. Commonwealth, 423 Mass. 793, 796 (1996) (pretrial detention provisions of G.L. c. 276, § 58A apply to juveniles). In Commonwealth v. Carlton C., SJ-2000-0145 (April 19, 2000), an SJC single justice opinion, it was held that the Commonwealth was entitled to a second dangerousness hearing following the issuance of a youthful offender indictment.

[84] See supra § 39.4; G.L. c. 276, §§ 100A–100C; Police Comm'r v. Municipal Court, 374 Mass. 640, 665–68 (1974); Commonwealth v. Doe, 420 Mass. 142, 648 (1995); Commonwealth v. Balboni, 419 Mass. 42, 44–45 (1994). G.L. c. 276, §§ 100A–100C concern sealing of records, which is distinct from expungement. Sealing of a record "refers to those steps taken to segregate certain records from the generality of records and to ensure their confidentiality to the extent specified in the controlling statute." Police Comm'r, supra, 374 Mass. at 648. Expungement "refers to the type of order issued [by the court] to remove and destroy records 'so that no trace of the information remains.' " Id. "While the remedies of sealing and expungement are different they serve the same purpose, ensuring the confidentiality of a person's record." Balboni, supra, 419 Mass. at 44–45. An order of expungement is appropriate "if the dropping of the charge is premised on a mistake in bringing it (for example, the defendant was misidentified or the police acquired credible information exonerating the defendant"). Doe, supra, 420 Mass. 151. Parties should "think long and hard about whether to seal a record as a sealed record conjures up in the minds of some a worse record than actually exists." Kantrowitz & Witkin, Criminal Defense Motions, 42 Mass. Practice § 18.21 (1996).

[85] G.L. c. 212, § 24.

[86] See supra § 4.4B. In Commonwealth v. Clerk of The Boston Division of the Juvenile Court Department, SJC-08096 (November 28, 2000), the practice of allowing general continuances in contemplation of dismissal as a form of dispute resolution over the objection of the complainant and Commonwealth was deemed to violate the separation of powers and the prosecutorial function. Ordinarily, parties can appeal a magistrate's decision to deny a complaint application. Bradford v. Knights, 427 Mass. 748 (1998). But in the instant case, as the case had "been held open" the complainant had no appellate remedy. A case cannot be dismissed over the Commonwealth's objection prior to trial absent a hearing with delineated appeal rights as articulated in Commonwealth v. Brandano, 359 Mass. 332 (1971) and reaffirmed in Commonwealth v. Taylor, 428 Mass. 623, 626–628 (1999).

§ 49.6 ARRAIGNMENT AND INITIAL PROCEEDINGS

§ 49.6A. RELEASE OR DETENTION

The police will not release a child until the parents and probation officer have been notified. Probation is authorized to inquire into the juvenile's custodial situation and living arrangements and to gather information necessary to assist the court in assessing indigence and eligibility for court appointed counsel. "No information provided by a party (during an indigence assessment) may be used in any criminal or civil proceeding against the party except in a prosecution for perjury or contempt committed in providing such information."[87]

Pursuant to G.L. c. 119, § 67, the juvenile shall be released by the police to a parent, guardian, or any other "reputable person" who provides written assurance that she ensure the child's presence in court.[88] A probation officer is also authorized to fulfill the rule of "reputable person.[89] A juvenile shall be released by the police to probation on written request.[90] A juvenile who has reached the age of fourteen may be held for court appearance if the court warrant so directs and the directing officer or probation officer requests the same.[91] Juveniles held awaiting arraignment or trial may not be detained in adult facilities.[92] Notwithstanding this mandate, juveniles accused of murder who are fourteen or older and are unable to furnish bail must be committed to the county sheriff's custody, and may be held in county jails.[93]

When a juvenile over fourteen is detained, the court may recommend that DYS hold her in secure detention.[94]

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[87] S.J.C. rule 3:20, § 9. A recent single justice opinion held that an indigence review may implicate Fifth Amendment and art. 12 rights to be free from compelled testimony or compelled production of evidence despite the protection of the rule. Commonwealth v. Romero, SJ-97-372 (Marshall, J., 8/22/97) (superior court should determine (1) if the privilege against self-incrimination applies to the information sought by the Probation Department; (2) if so, whether the proposed state action infringes on any privilege claimed by the defendant; and (3) whether the protections afforded by S.J.C. Rule 3:10, § 9 are adequate to meet the requirements of Kastigar v. United States, 406 U.S. 441 (1972) (grant of use and derivative use immunity does not violate privilege against self-incrimination), or Blaisdell v. Commonwealth, 372 Mass. 753, 758 (1977).

[88] Compare Reno v. Flores, 507 U.S. 292 (1993) (upholding constitutionality of federal INS regulation largely restricting releases of alien juveniles to parents, close relatives, or legal guardians).

[89] G.L. c. 119, § 68.

[90] G.L. c. 119, § 67.

[91] G.L. c. 119, § 67.

[92] G.L. c. 119, § 67. Rambert v. Commonwealth, 389 Mass. 771 (1983). The Juvenile Justice Delinquency Prevention Act (enacted in 1974) prohibits secure detention of CHINS offenders (G.L. c. 119, § 39H) in police facilities for any period of time and detention of alleged delinquents for more than six hours. 42 U.S.C. § 5633 (a)(12), (14).

[93] St. 1996, c. 200, § 11, amending G.L. c. 119, § 68.

[94] St. 1996, c. 200, § 11, replacing G.L. c. 119, § 68, concerns commitment of children held for examination or trial. This section provides that the court "may recommend that a child who has attained the age of fourteen and who is committed to the care of the Department shall be held in a secure detention facility if the court determines the child is (a) a fugitive from

Bail: G.L. c. 276, § 58, applies to juvenile proceedings,[95] as do the pretrial detention provisions of § 58A.[96] The SJC has held that it is permissible to place juveniles on conditions of pre-trial release, provided they assent and are supervised by probation, pursuant to G.L. c. 276, sec. 87. These conditions have included following curfew, cooperating with social services agencies (e.g. DSS) and school attendance.[97] Such conditions may only be imposed where the juvenile is released on bail or personal recognizance while simultaneously, with his consent, being placed on pre-trial probation. Juvenile can also be placed on pre-trial probation in contemplation of dismissal of the case. Recent case law suggests that such a disposition of the case requires the consent of the Commonwealth.[98]

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another jurisdiction on a delinquency petition; or (b) is charged with an offense for which the Commonwealth may proceed by indictment . . . .; AND if the child (i) is already detained or on conditional release in conjunction with another delinquency proceeding, or (ii) has a recent record of willful default, or (iii) has a recent record of violent conduct resulting in physical injury to others. Such recommendation shall not be binding upon the Department, but if the Department chooses not to comply with such recommendation, the Department shall inform the court within two business days."

[95] See supra ch. 7 (pretrial release and bail). The presumption of pretrial release is also adopted by the IJA-ABA Standards 3.1 (presumption of pretrial release). See also Standard 3.4 (when custody is appropriate least restrictive alternative should be used). The bail statute, G.L. c. 276, § 58, does not expressly reference juveniles but G.L. c. 119, § 67, which governs post-arrest detention of a juvenile states that "nothing in this section shall prevent the admitting of such child to bail in accordance with the law." This language necessarily implicates c. 276, § 58. See also Mass R. Crim. P. 1(b).

[96] Victor V. v. Commonwealth, 424 Mass. 793, 796 (1996). An S.J.C. single justice opinion also indicates that the Commonwealth can request a second dangerousness hearing after the juvenile has been indicted. Commonwealth v. Carlton C., SJ-2000-0145. In Commonwealth v. Murchison 428 Mass. 303 (1998) the court had previously held that a defendant is entitled to another dangerousness hearing post-indictment.

[97] In Jake v. Commonwealth, 433 Mass. 70 (2000), the juvenile defendant challenged the propriety of placing conditions of pre-trial release on a juvenile in the absence of clear statutory authorization. The juvenile defendant also raised the issue of the pre-trial procedure to be followed in the case of the alleged violation. In the instant case $250.00 cash bail had been posted and a juvenile had been given a warning, acknowledged in court, that he was being released with an order that he was to "attend school daily on time and obey all rules." The juvenile and his mother signed a preprinted form entitled "Conditions of Release." On April 10, 1999, following an alleged violation of the condition to obey all school rules, the Commonwealth moved to revoke bail pursuant to G.L. c. 276, sec. 58B. The court accepted school reports submitted by probation, revoked the defendant's bail and placed him in DYS custody until the next court date, May 10, 1999. In the absence of a statutorily prescribed alternative the court validated the juvenile court's action given the signed condition of release form as a manifestation of the family's entering voluntarily into the pre-trial probation agreement and the parens patriae language of G.L. c. 119, sec. 53. The rationale of the case supports an argument that if the defendant were released on conditions, violations of a condition constitutes changed circumstances and forms the basis for re-visiting the question of a bail pursuant to G.L. 276, sec. 87, as opposed to revocation of any bail.

[98] Commonwealth Tim T., 437 Mass 592 (2002). S.J.C. confronted a youthful offender case in which the defendant was seeking pre-trial probation over the Commonwealth's objection in circumstances involving allegations of sexual assault pursuant to G.L. c. 265, sec. 13B and 23 (which precludes the possibility of a continuance without a finding, see G.L. c. 276,

Although juveniles have the same right to bail as adults, difficulties arise in practice. *First*, many juveniles do not have the ability to post bail and have parents who cannot or will not assist them in this respect. *Second*, prior to the creation of the state wide juvenile court system, some district courts held juvenile sessions only one or two days a week.[99] *Third*, some juveniles, such as runaways with mental health problems, may appear to be a great risk on the street, and courts will be tempted to hold them for protective purposes and/or to secure services. As previously discussed this jurisdiction now has formally adopted pretrial detention for adults and juveniles.[100] Restrictive bail terms, such as "one dollar cash, mother only," may have the same effect as pretrial detention. This occurs in situations where the parent is unable, or unwilling, to take her child home. It is always important to remember the "reputable person" alternative of G.L. c. 119, § 67. Most judges want to release a juvenile to a responsible custodian. It is also quite common for juveniles to be placed on pre-trial conditions of release such as maintaining an appropriate curfew, following home rules and attending school without incident in lieu of bail or in addition to bail if same is posted. There is no provision for conditions of pre-trial release in the bail statute, G.L. c. 276, § 58, but the S.J.C. has upheld such action as authorized under G.L. c. 276, § 87, the pre-trial probation statute, and *Commonwealth v. Dodge*, 428 Mass. 860, 864–865 (1999).[101]

Issues arise when pre-trial conditions arguably criminalize status offense conduct. In the context of a juvenile curfew ordinance the S.J.C. has held that criminalizing what was deemed to be essentially status offense behavior was unconstitutional.[102] In terms of reasonable penalties for violations of curfew ordinances, civil penalties such as a monetary fine have were deemed to be reasonable and narrowly tailored to meet the governmental interest of protecting minors and

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sec 18). In seeking said relief the defendant relied in part upon Commonwealth v. Brandano, 359 Mass. 232 (1971). The court concluded that the reported questions implicated a probationary term amounting to the period of a year and held that a continuance of such duration over the Commonwealth's objection might irreparably affect the ability to prosecute the case at the end of the supervisory period. See also Commonwealth v. Clerk of the Boston Juvenile Court proscribing a clerk magistrate from generally continuing complaints without making a finding of probable cause over the Commonwealth's objection.

[99] G.L. c. 212, § 24, giving juvenile proceedings precedence, provided support to argue that a defendant's arraignment should be held immediately. In practice, however, in the overwhelming majority of cases, juvenile defendants are indigent and counsel is not appointed until the day of the arraignment.

[100] G.L. c. 276, § 58A permits preventive detention in certain circumstances on the ground of dangerousness. Although the statute does not explicitly authorize preventive detention of alleged delinquents, the S.J.C. has ruled that the section applies to juvenile proceedings. Victor V. v. Commonwealth, 423 Mass. 793, 796 (1996). In Schall v. Martin, 467 U.S. 253 (1984), Justice Rehnquist wrote for the majority that a N.Y. juvenile preventive detention statute served the parens patriae purpose. That statute, however, like § 58A, was based on predictions of dangerousness.

[101] In Jake J. v. Commonwealth, 433 Mass. 70 (2000), the S.J.C. held that with the juvenile's consent, she may be released subject to pretrial probation conditions pursuant to G.L. c. 276 § 87; that failure to abide by the conditions allows revocation of bail and placement in the custody of DYS; and that such revocation may follow the procedures specified in ch. 276 § 58B even though that statute does not specifically apply. In reaching this conclusion, the S.J.C. relied in part on traditional parens patriae language and the equitable powers of the court.

[102] Commonwealth v. Weston W. 455 Mass. 24, 26 (2009).

promoting parental supervision and authority over minors.[103] The primary purpose of bail is to ensure court appearance. Should conditions, no matter how well intended, be imposed that do not further that goal? These concerns are exacerbated by the reality that there are less intrusive alternatives to address status offense treatment (e.g. addressing truancy via status offense filings or school intervention).

Attorneys should also be prepared to appeal the propriety of restrictive bail limitations. G.L. c. 119, § 67, pertaining to the notice of arrest of a child, provides that "nothing contained in this section shall prevent the admitting of such child to bail in accordance with law." Given the applicability of the bail statute to juvenile proceedings, it would appear that the only authority for imposing what amounts to pretrial detention is found in G.L. c. 276, § 58A. "Agency only" bail terms, for example, "DSS only," may be problematic given the reality that no agency will bail a detained youth. This is especially so in the context of a "DYS only" bail order, which would be analogous to limiting the right to bail to the county sheriff. While a juvenile court judge may feel that such an order is within her equitable jurisdiction[104] to protect the child, and serves a legitimate parens patriae function, counsel has an ethical obligation to her client and, can appeal the bail to the superior court. An alternative to an "agency only" bail order might be one requiring that if bail is posted, the appropriate agency is to be notified. This would place an affirmative responsibility on DYS.

A fourth practical difficulty may arise in the setting of bail: the court may be interested in having the juvenile undergo an in-patient or out-patient diagnostic evaluation by DYS DMH, or the court clinic. This requires parental consent unless the juvenile has defaulted. In-patient diagnostic evaluations may be authorized for a thirty-day period.[105] Counsel should urge the court to use this provision for its avowed purpose and not for detention purposes. In appropriate circumstances an attorney may decide that given the Fifth Amendment privilege a pre-adjudicatory forensic or diagnostic evaluation is inappropriate in the absence of a protective order prohibiting the use of statements for adjudicatory purposes.[106]

If bail is imposed it is prudent to have the bail petition signed and to obtain the judge's statement of reasons for setting bail before leaving court. Do not expect a holding facility or detention site to have bail petitions. If there is a DYS court liaison she should be notified of the client's intent to appeal bail. Counsel might also contact the DYS regional or area office to ensure that the client will be transported to the next session of the superior court in the county. Counsel might also be able to influence the decision as to the detention site.

If the juvenile is detained, the case cannot be continued for more than fifteen days unless the client through counsel agrees to waive the limitation.[107] In advising the client to do so, however, an attorney must be aware of compromising potential speedy trial claims.

For juveniles who are not detained, Mass. R. Crim. P. 6(a)(1) and (2) indicate that a juvenile not in custody is ordinarily to be notified of the proceedings by summons.

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[103] Commonwealth v. Weston W. 455 Mass. 24, 37 (2009).

[104] See G.L. c. 119, § 53.

[105] G.L. c. 119, § 68A.

[106] See Mass. R. Crim. P. 14(B)(2)(B); infra § 49.7.

[107] G.L. c. 119, § 68.

§ 49.6B COURT-ORDERED EVALUATIONS

At arraignment the court may decide for a variety of reasons to have a juvenile evaluated.[108] The law concerning evaluations of competency to stand trial and of criminal responsibility is the same for juveniles or adults.[109] Although Massachusetts has not adopted a sliding scale to consider juvenile competency, a literal reading of the competency criteria articulated in *Dusky v. United States* and adopted in *Commonwealth v. Vailes* [110] suggests that courts can considered immaturity and developmental issues in this context. In determining whether an individual is competent the court must decide "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational understanding of the proceedings against him."[111] Given the complexity of juvenile proceedings, including youthful offender prosecutions, and the collateral consequences of adjudication, such as school suspension and expulsion,[112] sex offender registration,[113] and the possibility of DNA database registration,[114] counsel should consider addressing competency and capacity issues at the trial and, if a plea is offered, the dispositional phase of the proceedings. Competency to stand trial is a due process

[108] See, e.g., G.L. c. 123, § 15 (competency and criminal responsibility evaluations); G.L. c. 123, § 12 (assessments of dangerousness to self and others). Section 15(a) permits a court to have a clinician perform a competency evaluation to determine if in-patient assessment is necessary. Section 12(a) fulfills a similar function in order for the court to determine if an order of hospitalization pursuant to § 12(e) is appropriate. See also G.L. c. 233, § 20B(b), excluding as privileged communications statements to psychotherapists during court ordered evaluations provided that the patient has been informed that the communications would not be privileged: ". . . such communications shall be admissible only on issues involving the patient's mental or emotional condition but not as a confession or admission of guilt."

[109] G.L. c. 123, § 15F. Regarding competency see Commonwealth v. Vailes, 360 Mass. 522, 524 (1971); Dusky v. United States, 362 U.S. 402 (1960); Commonwealth v. Simpson, 44 Mass. App. Ct. 154 (1998). See also supra ch. 10 (competency to stand trial).

[110] Dusky v. United States, 362 U.S. 402 (1960); Commonwealth v. Vailes, 360 Mass. 522, 524 (1971).

[111] Dusky v. United States, 362 U.S. 402 (1960); Commonwealth v. Vailes, 360 Mass. 522, 524 (1971). The MacArthur Foundation Adolescent Research Network sponsored a study of children in the juvenile justice system which resulted in a provocative work assessing issues related to adolescent capacity and culpability. Grisso, Thomas and Schwartz, Robert G., editors, Youth on Trial, a Developmental Perspective on Juvenile Justice (University of Chicago Press 2000).

[112] G.L. c. 71, §§ 37H, 37H½. See also Commonwealth v. Albert A., 49 Mass. App. Ct. 269 (2000), discussing aspects of the sex offender registry legislation, and holding that juveniles need not be informed of collateral consequences (in this case, public disclosure) as a matter of law in order for a plea to be voluntary.

[113] G.L. c. 265, § 13H. See G.L. c. 6, § 178C, as adopted by St. 1996, c. 239. Collateral consequences may include an obligation to register with the Sex Offender Registry, see G.L. c. 6, secs. 178C et seq and school expulsion pursuant to G.L. c. 37 and 37 ½. In Commonwealth v/ Albert A., 432 Mass. 1104 (2000) the S.J.C. held that the failure of a judge to inform a juvenile of the collateral consequences of a please during the colloquy does not require a finding that a plea was not made voluntarily.

[114] G.L. c. 22F, § 3; St. 1997, G.L. c. 106, §§ 1, 2.

right.[115] Failure to raise competency as an issue may result in an ineffectiveness of counsel claim and must be explored if there is a substantial question.[116] Witnesses may also be examined for their competency to testify under G.L. c. 123 § 19.[117]

Different issues are raised by court-ordered evaluations pursuant to G.L. c. 119, § 68A, as amended by St. 1996, c. 200, § 12, or to court rules.[118] These evaluations are ordered to obtain diagnostic information for children held pending trial, for the formulation of dispositional plans after adjudications. They are also ordered in transfer hearings to assess dangerousness and amenability to rehabilitation,[119] and in youthful offender proceedings to help the court determine which sentence best protects the present and long-term public safety. These in-patient or out-patient diagnostic evaluations require parental consent unless the juvenile has defaulted.[120] Because evaluations of this nature invariably involve discussion of the allegations in order to analyze state of mind, emotional conflict, impulsivity, remorse, or dangerousness,

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[115] Pate v. Robinson, 383 U.S. 375 (1966); Commonwealth v. Hill, 375 Mass. 50 (1978) (court recognizes that competency is due process right under art. 12).

[116] Commonwealth v. Hill, 375 Mass. 50 (1978); Commonwealth v. Vailes, 360 Mass. 522, 524 (1971) (court should act on own initiative and conduct evidentiary hearing if relevant information available to judge both before and during the trial is sufficient to raise substantial doubt as to defendant's competence); Commonwealth v. Simpson, 44 Mass. App. Ct. 154 (1988) ("If the events during the trial raise a substantial question of possible doubt [of competence], the court must revisit the issue of competence, even at the cost of interrupting the trial with a hearing into the question") (quoting Drope v. Missouri, 420 U.S. 162 (1975)).

[117] See discussion supra at § 48.3 (competence of child witnesses) and § 32.7 (competence to testify generally).

[118] See Rule 207 of the Special Rules of the District Courts (1992), authorizing a court to "require psychological and psychiatric examination whenever expedient." The S.J.C. relied, in part, on Rule 207 in Commonwealth v. Wayne W., 414 Mass. 218, 233 (1993) (upholding court's power, subject to constitutional constraints, to compel juvenile to submit to psychiatric examination by Commonwealth's expert).

[119] Effective October 1, 1996, the pretrial transfer hearing system was abolished (St. 1996, c. 200, § 7) and replaced by a "trial first" system. See infra § 49.10. This will obviate forensic issues arising from court-ordered evaluations to assess dangerousness and amenability to rehabilitation. However, evaluations relative to the sentencing recommendation hearing might raise similar issues.

In Commonwealth v. Wayne W., 414 Mass. 218 (1993) the S.J.C. dealt with forensic testimony and evaluations in transfer hearings. The Court adopted the rule of Blaisdell v. Commonwealth, 372 Mass. 753 (1977), employed in criminal responsibility cases. See supra § 16.7B(2). Under Blaisdell, unless the defendant waives her privilege against self-incrimination by indicating that she will introduce expert testimony relying on her statements, the court cannot order an evaluation. Wayne W., supra, also held that statements made to forensic experts in the context of transfer proceedings could not be used at the adjudicatory stage.

[120] Some § 68A evaluations have been conducted even without parental consent. The issue has yet to be litigated. Some courts have ordered clinical evaluations pursuant to G.L. c. 119, § 61, the transfer hearing statute, although there is no express statutory authority to do so. Such evaluations raise issues concerning the scope of the inquiry and the Fifth Amendment privilege.

important questions come into play.[121] Counsel can opt to instruct her client not to discuss the alleged offense but this might compromise the quality of the evaluation and the clinician's ability to assess the issues enumerated in the relevant statute.[122] Alternatively, counsel should ask for protective orders limiting areas of inquiry, or for the sealing of expert reports containing inculpatory statements under *Blaisdell*[123] and *Commonwealth v. Harvey.*[124] Counsel should also analogize to *Wayne W.*[125] and *Blaisdell,*[126] in filing motions requesting that the Commonwealth be precluded from using client statements made to court appointed or independently retained forensic examiners at trial.

Attorneys may seek independent evaluations pursuant to G.L. c. 261, §§ 27A–27D. The request for funds may be made ex parte,[127] and the identity of your expert does not have to be provided until such time as you decide to use the expert at trial and notice of same is provided to the Commonwealth.[128]

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[121] Counsel confronted by court-ordered diagnostic referrals at the pretrial stage must consider the wisdom of allowing the client to waive her rights and submit to evaluations which will include discussion of alleged delinquent behavior and related issues. See Department of Youth Servs. v. A Juvenile, 398 Mass. 516 (1986); Commonwealth v. Lamb, 365 Mass. 265 (1974). Evaluations conducted after adjudication, for purposes of the sentencing recommendation hearing, might also require protective orders against use of the client's statements to incriminate her in offenses other than the offense adjudicated at trial. In this context be aware that the youthful offender statute allows for defendant capped pleas.

[122] G.L. c. 119, § 61 (transfer statute); G.L. c. 119, § 58 (youthful offender sentencing recommendation hearing).

[123] 372 Mass. 753 (1977).

[124] 397 Mass. 803 (1986). See also Commonwealth v. Wayne W., 414 Mass. 218, 233 (1993) (subject to specified constitutional constraints, juvenile court can compel juvenile who intends at transfer hearing to present expert psychiatric evidence that includes the juvenile's own statements, to submit to psychiatric examination by Commonwealth experts). Blaisdell and Harvey provide guidelines concerning access to statements of defendant obtained through court-ordered evaluations. See also Mass. R. Crim. P. 14(b)(2).

[125] 414 Mass. 218 (1993).

[126] 372 Mass. 753 (1977).

[127] Commonwealth v. Dotson, 402 Mass. 185 (1988). Whether at the stage of arraignment or after adjudication, counsel should consider advising her client to invoke privilege if the court orders an evaluation to be conducted under the auspices of DYS, instead of providing the defense with funds for an independent evaluation. G.L. c. 119, § 68A, allowing for diagnostic evaluation, does not define or specify what type of clinician should conduct the evaluation. DYS contracts out for clinical services and, given limited resources, § 68A evaluations are being done, except in the most serious cases, by clinicians in DYS detention facilities. Rarely will a trained child psychologist be involved, and the evaluation protocol will not include objective or projective testing except in extraordinary circumstances. With adequate funds, a more qualified independent expert can be retained. If counsel encourages the client to waive the privilege without first ascertaining the identity and qualifications of the clinician, counsel might achieve only the prolonged confinement of the client. Post-adjudication court clinic evaluations avoid such concerns.

[128] Commonwealth v. Haggerty, 400 Mass. 437, 441 (1987).

§ 49.7 MOTION TO DISMISS THE COMPLAINT OR INDICTMENT

Juvenile delinquency proceedings are initiated either by complaint or, where the case is eligible for youthful offender prosecution and the Commonwealth pursues that route, by indictment.[129] If an indictment issues, the juvenile court retains jurisdiction and may proceed with trial of the juvenile as a youthful offender. If the grand jury does not return an indictment, the Commonwealth may proceed by complaint alleging delinquency,[130]unless the prosecution had filled a nolle prosequi at the time of youthful offender arraignment.

Motions to dismiss challenging the sufficiency of a complaint issued by the clerk magistrate may be filed and heard in the juvenile court.[131] A juvenile indicted as a youthful offender may also challenge the indictment on several grounds. One is to challenge the adequacy and sufficiency of grand jury proceedings. A motion to dismiss is appropriate when counsel believes that the grand jury has not heard sufficient evidence to establish the identity of the accused and/or facts supporting probable cause to arrest. [132] Although a court will not ordinarily review the competency of the evidence presented to the grand jury, such review is appropriate when a claim questions the integrity of the grand jury process. [133] There is no bright line defining this point, but the integrity of the grand jury is impaired when: (1) false or deceptive evidence was knowingly presented (2) with the purpose of obtaining an indictment and (3) the false or deceptive evidence probably influenced the return of the indictment.[134] The burden of proof is on the defendant. [135] A second ground to dismiss the indictment is that the juvenile does not qualify for youthful offender prosecution. To be subject to indictment, the juvenile must be between the ages of fourteen and seventeen and currently charged with a felony and (1) have a previous DYS commitment, (2) be charged with a felony involving the infliction or threat or serious bodily harm, or (3) be charged with a firearms offense in violation of paragraphs (a), (c), or (d) of § 10 or 10E of G.L. c. 269.[126] The Supreme Judicial Court has held that the juvenile court has the authority to determine whether the facts of the indicted felony support a conclusion that

[129] G.L. c. 119 sec. 54 provides that a juvenile between 14 and 17 may be indicted as a "youthful offender" in certain circumstances detailed infra at Section 49.4(A).

[130] Commonwealth v. Dale D., 431 Mass. 757, 760 (2000).

[131] Commonwealth v. DiBennadetto, 436 Mass. 310 (2002) allows for motions to dismiss challenging the issuance of process. Cases, however, may not be remanded for show cause hearings pursuant to G.L. c. 218, sec. 35A.

[132] Commonwealth v. McCarthy, 385 Mass. 160, 162–63 (1982); Commonwealth v. O'Dell, 392 Mass. 445, 466 (1984) (indictment should be dismissed if grand jury minutes fail to show sufficient evidence of defendant's criminal activity). See generally supra ch. 5 (grand jury issues).

[133] See Commonwealth v. Freeman, 407 Mass. 279, 282 (1990).

[134] See Commonwealth v. Pond, 24 Mass. App. Ct. 546, 550 (1987).

[135] See Commonwealth v. O'Brien, 19 Mass. App. Ct. 914, 915 (1984).

[126] St. 1996, c. 200, § 1, amending G.L., c. 119, § 52, defining a youthful offender and St. 1996, c. 200, § 2, amending G.L., c. 119, 54, describing the indictment process.

the charged offense "threatens or results in the infliction of serious bodily harm"[127] but there is no requirement that such threat or infliction be an element of the crime.[128]

The S.J.C. has also held that it is improper to indict a juvenile on a misdemeanor arising out of the same facts as the felony which is the predicate for youthful offender prosecution. However, the youthful offender law contemplates joinder of misdemeanor complaints and youthful offender indictments arising from the same facts. [129] Such joinder permits pleas or adjudication on the misdemeanor and/or indictment; and if a juvenile is adjudicated only on so much of the indictment as alleges a misdemeanor or an offense which is not eligible for youthful offender status, he can at most be found to be delinquent and sentenced accordingly.[130]

Because a motion to dismiss an indictment affects the court's jurisdiction to hear the case it can be raised at any time prior to trial.

§ 49.8 THE ADJUDICATORY PHASE

§ 49.8A. IN GENERAL

The Commonwealth must prove each element of its allegation beyond a reasonable doubt.[136] Although juvenile hearings are "closed"[137] and deemed

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[127] In Commonwealth v. Quincy Q., 434 Mass. 859 (2001), the SJC ruled that eligibility for youthful offender prosecution can be raised in a pre-trial motion to dismiss the indictment. The grand jury must find that the felony is one which results in or threatens the infliction of serious bodily harm, in addition to determining that there is probable cause for the indictment to issue. See also Commonwealth v. Clint C., 430 Mass. 219 (1999).

The phrase "youthful offender" refers not to a status necessary before an indictment may be brought, but to a status that is an outcome of indictment and adjudication. Commonwealth v. Golden, S.J.C. for Suffolk County, Docket No. SJ-97-0405 (Single Justice Marshall opinion). Note that if a McCarthy motion to dismiss has been allowed the Commonwealth may still proceed, in some circumstances, on the underlying complaint. Commonwealth v. Dale D., 431 Mass 757 (2000).

[128] Commonwealth v. Clint C., 430 Mass. 219 (1999). The court also indicated that the adequacy of grand jury presentations could be challenged based on an error of law, which would include McCarthy and O'Dell challenges. In Commonwealth v. Dale D., 431 Mass. 757 (2000), the S.J.C. ruled that in the circumstances of that case it was permissible for the government to proceed to trial on a delinquency complaint where the case had been "no billed" in the grand jury.

[129] St. 1996, c. 200, § 2, amending G.L., c. 119, § 54, provides, in pertinent part, that "Complaint and indictments brought against persons for such offenses, and for other criminal offenses properly joined under Massachusetts Rules of Criminal Proceedings 9 (a)(1) shall be brought in accordance with the usual course and manner of criminal proceedings." See also Commonwealth v. Ulysses H., 752 Mass. App. Ct. 497 (2001); Commonwealth v. Quincy Q., 434 Mass. 859 (2001).

[130] See Commonwealth v. Lamont L., 54 Mass. App. Ct. 748 (2002), Commonwealth v. Quincy Q., 434 Mass 859 (2001). The maximum sentence upon a delinquency finding is commitment to DYS until age 18.

[136] G.L. c. 119, § 58; In re Winship, 397 U.S. 358 (1970).

[137] See G.L. c. 119, § 65 (general public excluded); Commonwealth v. Marshall, 432, 434–35 (1969) (persons with direct interest may attend). Before its replacement by St. 1996, c.

"noncriminal,"[138] all other procedural safeguards afforded adults apply to an adjudicatory delinquency proceeding, including the right to a jury trial.[139] Most juvenile sessions have tape-recording systems, but a stenographer is permitted.[140] Given the quality of electronic recording systems, counsel should ask for a stenographer's services in every youthful offender case. In general, public access to judicial proceedings may not be abridged absent an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.[141] In *Care and Protection of Edith*,[142] the Supreme Judicial Court reiterated the rule that "any attempt to restrain speech must be justified by a compelling state interest to protect against a serious threat of harm." A recent single justice opinion affirmed a juvenile court judge's order restricting public access to the trial of two adults charged with contributing to the delinquency of a minor and selling or delivering alcohol to a minor.[143]

Motion practice is also similar in practice in the adult system,[144] although for offenses committed prior to October 1, 1996,[145] the probable cause component of a

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200, § 4, effective October 1, 1996, G.L. c. 119, § 46 required that juvenile de novo appeal sessions be conducted separately from adult sessions. See also United States v. Three Juveniles, 61 F.3d 86 (1st Cir. 1995) (in light of long tradition of confidentiality, closure of juvenile delinquency proceedings is not subject to analysis under Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) test; see supra § 26.3N). G.L. c. 119, § 65 has been amended to permit the general public to attend juvenile proceedings where the Commonwealth has proceeded by indictment, i.e., in youthful offender proceedings. St. 1996, c. 200, § 9. See generally Boston Herald, Inc. v. Superior Court Dep't of Trial Court, 421 Mass. 502, 506 (1995); Care & Protection of Edith, 421 Mass. 627 (1996); News Group Boston Inc. v. Commonwealth, 409 Mass. 627 (1991).

Under G.L. c. 119, § 60A, as amended by St. 1996, c. 200, § 6, records of juvenile delinquency cases may not, without court order, be released except to the juvenile, parents, and counsel. However, the records of youthful offender proceedings are open to public inspection "in the same manner and to the same extent as adult criminal records . . . provided that nothing herein shall be construed to provide access to privileged or confidential communications and information." The statute specifically extends the confidentiality protection to "information and communications entered at the indictment,' but does not further identify this category.

[138] G.L. c. 119, § 53.

[139] See Mass. R. Crim. P. 1(b); G.L. c. 119, §§ 55A, 56.

[140] For juvenile court offenses committed on or after October 1, 1996, the Youthful Offender Act abolished trial de novo in favor of a single-trial system. See St. 1996, c. 200, §§ 3, 4, replacing G.L. c. 119, §§ 55A, 56, and creating G.L. c. 119, § 55B. Under G.L. c. 119, §§ 55A, 56, as amended, requests for stenographers should be made pursuant to G.L. c. 261, §§ 27A–27G. See also supra § 3.7.

[141] Commonwealth v. Martin, 417 Mass. 187 (1994); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

[142] 421 Mass. 703, 705 (1996).

[143] George W. Prescott Publishing Company vs. Stoughton Division of the District Court Dept of the Trial Court, 428 Mass. 309 (1998) (Ireland, J.,) (trial court allowed public access to the proceedings and records, but prohibited publication of the names, addresses, or photographs of juvenile witnesses. Juvenile court order did not violate the Edith test, supra, because the court identified a compelling interest in maintaining confidentiality in juvenile proceedings, consistent with G.L. c. 119, § 65, overriding rights of press to access).

[144] See St. 1996, c. 200, § 3, replacing G.L. c. 119, § 55A, providing for mandatory and reciprocal discovery.

transfer hearing presents unique considerations. Because jeopardy does not attach in a transfer hearing,[146] motions may not be dispositive where probable cause is found and transfer to adult court ensues. However, because for offenses committed prior to October 1, 1996, juveniles cannot be directly indicted, a successful motion to suppress, where there is no other basis to find probable cause, might resolve a case.

§ 49.8B. REPLACEMENT OF TRIAL DE NOVO WITH SINGLE-TRIAL SYSTEM

The Massachusetts juvenile justice system has been transformed by the passage of the Youthful Offender Act. Effective October 1, 1996 the two-tiered trial de novo system was eliminated[147] in favor of a single-trial system similar to that adopted for criminal offenses in the district court.[148] Although the Act does not specifically address the handling of cases pending as of October 1, 1996, the practice has been that juveniles charged with offenses committed prior to that date are still entitled to trial de novo.[149]

1. Juvenile Court Trial and Appeal Under the Abolished De Novo System (Offenses Committed Prior to October 1, 1996)

The juvenile de novo system was in general parallel to the former adult system, which was replaced by a single-trial system for cases commencing on or after January 1, 1994. Under this system, the juvenile could obtain a first-instance jury trial, or elect to waive it in favor of a bench trial with a de novo appeal to a jury. The law of the former de novo system, which applies only to cases in which the offense occurred prior to October 1, 1996, is covered in the prior edition of this book.

2. Juvenile Court Trial under the Single-Trial System

Under the current system, effective for offenses committed from October 1, 1996 on, juvenile trials must be heard by a jury unless the child files a written waiver and consent to be tried without a jury. No waiver may be received unless the child is

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[145] Except that murder offenses may be prosecuted by indictment. See infra § 49.10.

[146] Breed v. Jones, 421 U.S. 519 (1975); Commonwealth v. Scala, 380 Mass. 500 (1980).

[147] St. 1996, c. 200, §§ 3, 4, modifying G.L. c. 119, § 55A, and replacing G.L. 119, § 56.

[148] The Juvenile Court Department is expected to promulgate rules establishing procedures in delinquency and youthful offender proceedings in the juvenile court. See supra § 49.4E.

[149] But see Stafford v. Commonwealth, 419 Mass. 1012 (1995) (criminal defendant not entitled under due process principles to proceed under adult trial de novo system where offense allegedly occurred before effective date of statute abolishing the system, but complaint issued afterward; nor did change violate protections against ex post facto laws). See also Patrick P. v. Commonwealth, 421 Mass. 186, 194 (1995) (1990 amendments affecting prosecution of juvenile murder cases did not abolish trial de novo).

represented by counsel or has filed, through his parent or guardian, a written waiver of counsel.[150]

A judge's failure to conduct a colloquy with the juvenile defendant regarding his waiver of a jury trial constitutes reversible error.[151] In addition to giving a colloquy, which "should be fashioned to include questions concerning the defendant's understanding of the information conveyed to him by defense counsel regarding the difference between jury and jury-waived trials,"[152] a properly executed and signed jury waiver form must be filed.[153] No decision on jury waiver may be received until after the completion of pretrial motions.[154] Because juvenile sessions have pretrial conference systems, it is logical to expect that election dates will be requested at that juncture or soon thereafter.[155]

Just as in district courts under the single-trial system, the new legislation provides for defense-capped pleas in both delinquency and youthful offender prosecutions.[156] But the new law does not indicate at what stage the court may accept such a plea. Because the court's acceptance of a defense-capped plea[157] early in the proceedings (for example, at arraignment) would cut off the prosecutor's option to obtain a youthful offender indictment, the timing question is crucial. In some counties prosecutors indicate at arraignment that defendants are being screened for youthful offender prosecution. This may be done orally or by filing notices of intent or eligibility.[158] In practice, courts will not accept a plea to the complaint unless it can be shown that the Commonwealth has been dilatory in the grand jury presentment. An alternative remedy in such circumstances would be to revisit the question of bail.

Juvenile court jury trials under the single-trial system are governed by the laws that apply to jury trials in the superior court.[159] However, except in cases where the Commonwealth has proceeded by indictment, the juvenile is entitled only to a jury of six persons and two preemptory challenges. In indictment cases, the number is twelve with four preemptory challenges.[160] Defendants that face multiple indictments or

[150] See St. 1996, c. 200, § 3, replacing G.L. c. 119, § 55A.

[151] Commonwealth v. Fritz F., Appeals Court, Rule 1:28, 97-P-1691 (May 27, 1998); G.L. c. 119, § 55A; Ciumi v. Commonwealth, 378 Mass. 504, 509–11 (1979); Commonwealth v. Pavao, 423 Mass. 798, 801–03 (1996) (failure to conduct colloquy is not harmless error).

[152] Commonwealth v. Hernandez, 42 Mass. App. Ct. 780, 785–86 (1997).

[153] Commonwealth v. Fritz F., Appeals Court, Rule 1:28, 97-P-1691 (May 27, 1998); Standing Order 1-96 of the Juvenile Court Department entitled "Delinquency/Youthful Offender Procedure Applicable to Cases Governed by One-Trial Procedures Under St. 1996, c. 200."

[154] St. 1996, c. 200, § 3, G.L. c. 119, § 55A.

[155] The Juvenile Court Department is currently developing an implementation plan to address the issues arising from the elimination of de novo, including the establishment of jury sessions.

[156] St. 1996, c. 200, § 3, creating G.L. c. 119, § 55B. See supra §§ 37.2, 37.5A.

[157] G.L. c. 119, § 55B.

[158] Notices of eligibility are filed in Middlesex County.

[159] St. 1996, c. 200, § 4(e), replacing G.L. c. 119, § 56. See Mass. R. Crim. P. 20(c).

[160] St. 1996, c. 200, § 4(e), replacing G.L. c. 119, § 56.

complaints shall have only the amount of peremptory challenges that he or she would have if he were to only face one indictment or complaint at trial.[161]

The abolition of trial de novo requires counsel to aggressively investigate and prepare their cases, and to engage in thorough pretrial motion practice.[162] Once a youthful offender indictment is returned, the ante is raised considerably. Adjudications in such cases may result in adult prison sentences, a commitment to DYS until age twenty-one (as opposed to age eighteen in delinquency matters), or in a DYS commitment combined with a suspended adult sentence.[163]

§ 49.8C. MOTIONS TO SUPPRESS STATEMENTS

This section concerns the law of incriminating statements as applied to juveniles. For the law of this issue generally, see Ch. 19, *Confessions*.

1. Inadmissibility of custodial statements taken without Miranda warnings

This state has held that failure to provide *Miranda*[164] warnings renders a custodial statement inadmissible against a juvenile.[165] In assessing if a waiver is valid, the United States Supreme Court has held that the juvenile suspect's age is a factor that must be considered in the calculus.[166] Massachusetts requires that if a child is under fourteen years of age it must be also proved that the warnings were given in the presence of an "interested adult" who understood them, and had the opportunity to explain their protections to the youth. The Commonwealth does not have to prove the juvenile and interested adult had a meaningful consultation, but there must be a showing that there was an opportunity for such consultation.[167] If an accused is over fourteen, such consultation is preferred, but waiver may be found to be valid without it if the state proves that the juvenile possesses a high degree of sophistication and intelligence.[168]

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[161] Mass.R.Crim.P. 20(c)(1).

[162] See St. 1996, c. 200, § 3 (providing for mandatory and reciprocal discovery and regulating time for motions relative to jury trial waivers), replacing G.L. c. 119, § 55A, and creating 55B.

[163] St. 1996, c. 200, § 5, replacing G.L. c. 119, § 58.

[164] Miranda v. Arizona, 384 U.S. 436 (1966).

[165] Commonwealth v. Cain, 361 Mass. 224 (1972); Commonwealth v. A Juvenile, 389 Mass. 128 (1983); Commonwealth v. A Juvenile, 402 Mass. 275 (1988); Commonwealth v. Bryant, 399 Mass. 729, 737 (1984) (custodial interrogation is questioning by law enforcement officers after a person has been taken into custody or otherwise deprived of her freedom in any significant way). The definition of "custody" is discussed supra at § 19.4D(1)(b).

[166] J.D.B. v. North Carolina, 564 U.S. __, __ (2011) (slip op., at 14). In Yarborough v. Alvarado, 541 U.S. 652 (2004) the court had held that the age of the defendant was not a consideration in determining whether he was in a custodial situation.

[167] Commonwealth v. Phillip S., 414 Mass 804, 811 (1993).

[168] Commonwealth v. A Juvenile, 389 Mass. 128, 134 (1983). The gravity of the Commonwealth's burden was underlined in Commonwealth v. Alfonso A., 53 Mass. App. Ct. 279 (2001), in which the denial of a juvenile defendant's motion to suppress was reversed by the Appeals Court. In that case a juvenile defendant with a prior record who had been detained

The above formulation raises special concerns. *First*, there may be a question as to the youth's capacity to make a knowing, intelligent, and voluntary *Miranda* waiver. Such a waiver must be proved beyond a reasonable doubt.[169] The burden of proving waiver in cases of juveniles over the age of fourteen who do not consult an interested adult is a heavy one.[170] In an appropriate case counsel might move pursuant to statute[171] for funds to retain an expert to ascertain the client's ability to make a waiver.[172] Issues of capacity, including developmental factors, can be explored.

Second, the "interested adult" standard raises concerns. *Commonwealth v. Philip S.*[173] articulated the legal standard for determining whether the "interested adult" standard is met. If from the objective perspective of the police it should have been reasonably apparent that the adult lacked the capacity to appreciate the juvenile's situation and to give advice, or was actually antagonistic to the juvenile, then a finding would be warranted that the juvenile was not assisted by an interested adult, thereby depriving the defendant of the opportunity for meaningful consultation.[174]

Although an "interested adult's" presence may be required, many parents or other parties lack the sophistication or common sense to adequately protect the interests of the child they purpose to advise. In some situations, they will urge cooperation where an attorney would not.[175] Counsel should consider whether to have the adult

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for almost two hours waived his rights and made inculpatory statements in circumstances where there was no attempt to contact his guardian or parent despite opportunity to do so. Reviewing the Appeals Court opinion, the SJC remanded the case to Juvenile Court for further findings on whether the juvenile possessed the requisite sophistication to waive the presence of an interested adult. Commonwealth v. Alfonso A., 438 Mass. 372 (2003).

[169] Commonwealth v. Day, 387 Mass. 915, 920–21 (1985).

[170] A Juvenile v. Commonwealth, 389 Mass. 128 (1983); Commonwealth v. Cain, 361 Mass. 224, 228–29 (1972). It is worth noting that the earliest cases involving the juvenile due process revolution concerned confessions. In Haley v. Ohio, 332 U.S. 596 (1948), and Gallegos v. Colorado, 370 U.S. 49 (1962), the confessions of a 15- and 14-year-old respectively were invalidated. Age in conjunction with other circumstances, including police misconduct and access to an attorney or adult, were factors. In Haley, supra, 332 U.S. at 601, Justice Douglas noted, "age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity." "Every reasonable presumption against a waiver of constitutional rights will be made" (Commonwealth v. Hooks, 375 Mass. 284 (1978). "Courts must proceed with "special caution" when reviewing purported waivers of constitutional rights by juveniles." Commonwealth v. Philip S., 414 Mass. 804, 808–09 (1993) (quoting Commonwealth v. Berry, 410 Mass. 31, 34 (1991)); Commonwealth v. McCra, III, S.J.C. No. 07441 (June 3, 1998).

[171] G.L. c. 261, §§ 27A–27D.

[172] The literature suggests that in some cases challenges to capacity to make the requisite waiver would be appropriate. See, e.g., GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (New York: Plenum 1981); Grisso, Juvenile Competence to Stand Trial: Questions in an Era of Punitive Reform, CRIM. JUST. 4 (1997); Grisso, Forensic Evaluation of Juveniles (Sarasota, Professional Resource Press 1998).

[173] 414 Mass. 804 (1993).

[174] See also Commonwealth v. Berry, 410 Mass. 31 (1991) (discussing when parent might be "disabled" and unable to fulfill role of interested adult).

[175] See Commonwealth v. Philip S., 414 Mass. 804, 809–10 & n.4 (1993) (mother who did not seek legal counsel and advised juvenile to tell truth was still "interested adult"). Robert

assessed as to her ability to understand and communicate what transpired, and to thoroughly investigate her understanding of the importance of the *Miranda* warnings. If it can be shown that the parent did not understand the warnings she cannot have fulfilled her role as an "interested adult." The child would then have been deprived of an opportunity for meaningful consultation. In circumstance where the parent speaks little or no English these concerns are also prevalent.[176] It should be emphasized that DYS staff do not satisfy the "interested adult" requirement.[177]

Finally, many juveniles cooperate with investigating officers and probation officers or other personnel. Frequently their relationships with these persons are more meaningful than their relationship with a court-appointed attorney. Communications with these individuals are not privileged.[178] Therefore, the client must be continually advised as to the importance of not speaking to anyone about the allegations during the pendency of the case, and to request counsel if any interrogation occurs.

Statements about the facts of cases made to probation officers during preparation of pre-sentencing investigation reports for youthful offender proceedings are not privileged. Practice among staff who handle juvenile cases in the district courts and juvenile court department appears to vary. Some probation officers preface interviews with a *Lamb* type of warning, while some probation officers do not discuss the offense. The scope and enforceability of protective order limiting the use of the statements made to a probation officer are unclear. *Commonwealth v. Wayne W.*[179] governs pretrial forensic evaluation in the context of transfer hearings but requests for protective orders in other contexts, analogizing to this case, have not been litigated.

E. Shepard Jr. and Adrienne Volenik argue that no statement should be admissible unless counsel is present: Out of the Mouths of Babes: Handling Juvenile Confession, CRIM. JUST. (Summer 1987). They conclude, "The only reasonably sure protection for the juvenile's right against self incrimination would be a rule requiring the unwaivable presence and advice of counsel prior to interrogation." Id. at 29. The case law requires the opportunity for meaningful consultation wit an interested adult. Commonwealth v. MacNeill, 399 Mass. 71, 78 (1987). MacNeill held that the law requires "a realistic opportunity to get helpful advice" while noting, "it is the juvenile's opportunity to consult that is critical, and not whether he avails himself of it." See generally supra § 19.4D(2)(d) (waiver by juveniles).

[176] In Commonwealth v. Leon L., 52 Mass. App. Ct. 823 (2002), a juvenile court's decision to allow a motion to suppress where the mother's primary language was Spanish. The court found that statements made by juvenile co-defendants were not made voluntarily. See also Commonwealth v. Vuthy Seng, 436 Mass. 537 (2002) cf. In Vuthy the issue of English as a second language is exacerbated in circumstances where a police officer who acts as an intermediary may not be qualified to act as an interpreter and/or the Miranda card as translated may be inaccurate. Denial of a motion to suppress was reversed by SJC due, in part, to questions regarding the interpretation of a Cambodian police officer's rendition to an adult defendant whose first language was Khmer. Questions concerning the accuracy of the Miranda card's translation into Khmer are also implicitly raised by the case.

[177] Commonwealth v. A Juvenile, 402 Mass. 275 (1988). See Commonwealth v. McCra, 427 Mass. 564 (1998) (aunt of defendant accused of killing his father, mother, and sister could act as "interested adult" despite her close relationship to the victims; no showing that aunt was "actually antagonistic" toward defendant (citing Commonwealth v. Philip S., 414 Mass. 804, 809 (1993)).

[178] See, e.g., Fare v. Michael, 442 U.S. 707 (1979) (juvenile's statement to probation officer held not confidential).

[179] Commonwealth v. Wayne W., 414 Mass. 218 (1993).

Any discussion of juvenile statements necessarily involves consideration of interaction with school officials. Our courts have held that "there is no authority requiring a school administrator not acting on behalf of law enforcement officials to furnish *Miranda* warnings."[180] A principal and assistant principal are not ordinarily law enforcement officers. "The *Miranda* rules does not apply to a private citizen or school administrator who is acting neither as an instrument of the police nor as an agent of the police pursuant to a scheme to elicit statements . . . by coercion or guilt."[181]

In analyzing whether a client understood her *Miranda* rights, counsel should inquire whether investigating officers discussed the possibility of juvenile or adult prosecution[182] as part of the totality of circumstances of the interrogation. Counsel should also ascertain whether the statements attributed to their client were contemporaneously recorded. While in *Commonwealth v. Diaz*[183] the Supreme Judicial Court declined to adopt a per se rule that would require custodial statements to be electronically recorded, it noted that "counsel may argue to a jury and to a judge as factfinder that the failure to record electronically . . . should be considered in deciding the voluntariness of any statement, whether the defendant was properly advised of his rights, and whether any statement attributed to the defendant was made."[184] In *Commonwealth v. DiGiambattista*[185] the court held that a defendant was entitled to a cautionary instruction if a statement was not recorded. The court stated that if the prosecution introduces evidence of a confession or statement that was the product of a custodial interrogation conducted at a place of detention and there is not at least an audiotape of the session that the jury should be cautioned that they should weigh the evidence with great caution and care.

Wisconsin requires that all custodial statements of juveniles be recorded where feasible. If a juvenile is in a place of detention the statement must be recorded.[186] In 2004, the American Bar Association unanimously adopted a resolution urging all states to enact laws or rules "requiring videotaping of the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers and other places

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[180] Commonwealth v. Snyder, 413 Mass. 521, 530 (1992).

[181] Commonwealth v. Snyder, 413 Mass. 521 (1992).; See supra § 19.4B; Commonwealth v. Ira I., 439 Mass. 805 (2003) (an assistant principal is not an agent of the police; an interview in a principal's office does not constitute as custodial interrogation and statements made are not excluded per se as not being given voluntarily.)

[182] State v. Benoit, 409 A.2d 295, 303 (N.H. 1985) (in determining validity of waiver, court should consider whether child informed that she could be tried as adult; lack of awareness of adult prosecution might lead youths to confess to crimes without considering consequences of cooperation). No Massachusetts cases address the issue of informing youths of the consequences of confessing to crimes which allow for prosecution as an adult. Rhode Island and Connecticut have declined to follow the New Hampshire court in Benoit, deeming the totality-of-circumstances test sufficient to protect juvenile's rights. State v. Campbell, 691 A.2d 564, 567 (1997); State v. Perez, 591 A.2d 119, 124–25 (1991).

[183] 422 Mass. 269 (1996).

[184] Commonwealth v. Diaz, 422 Mass. 269, 271 (1996). The Diaz court also indicated that at some time a rule requiring electronic recording in places of detention may become appropriate. Diaz, supra, 422 Mass. at 272–273. See also Commonwealth v. Fernandes, 427 Mass. 90, 98 (1998).

[185] 442 Mass, 423 (2004).

[186] State v. Jerrell C.J., 699 N.W. 2d 110, 113 (Wis. 2005).

where suspects are held for questioning, or where videotaping is impractical, to require the audio taping of such custodial interrogations."[187]

In addition to making a finding as to whether a *Miranda* waiver was made knowingly, intelligently, and voluntarily, the court must also consider the "humane practice" rule at trial. The rule provides that "when statements amounting to a confession are offered in evidence, the question of whether they are voluntary is to be decided at a preliminary hearing in the absence of the jury."[188] Statements must also be voluntary. It is not enough for the prosecution to show that there has been a valid waiver of *Miranda* rights by the juvenile and interested adult. As noted it must also be shown that any statement was made voluntarily. Statements must be the product of a "rational intellect" and not the product of physical or psychological coercion and voluntariness must be proved beyond a reasonable doubt.[189] Voluntariness involves analysis of the totality of the circumstances.[190]

In addressing voluntariness in the context of juvenile interrogation the case of *Roper v. Simmons*[191] is important. In that case the United States Supreme Court held that the death penalty for youth below the age of eighteen was unconstitutional. The case relied, in part, on the seminal work of the MacArthur Foundation's adolescent research network and brain imaging studies that supported the conclusion that juveniles are less culpable that adults in certain circumstances. *Roper* is cited in *Graham v. Florida*[192], the case in which the Supreme Court struck down juvenile life without parole in non-capital cases. *Roper* was also cited in the 2011 North Carolina Supreme

[187] See ABA Approved Innocence Resolutions, 2004-2005, as cited in CHILDREN AND THE LAW- DOCTRINE, POLICY AND PRACTICE, Douglas E. Abrams, Sarah H. Ramsey (West Law, Thomson Reuters 2010); at 1048.

[188] Commonwealth v. Tavares, 385 Mass. 140, 149–50 (1982) (if judge decides that confession was voluntary it will be admitted into evidence; court then instructs jury not to consider confession if, on consideration of all evidence in case, jury finds that confession was not voluntary). The Commonwealth must prove voluntariness beyond a reasonable doubt Taveres, supra. See Commonwealth v. Hooper, 42 Mass. App. Ct. 730, 732–34 (1997) (if voluntariness is not live issue at trial, instruction need not be given); Commonwealth v. Watkins, 425 Mass. 830, 835 (1997) (jury does not have to be unanimous in its belief that statement was voluntary; S.J.C. upholds instruction that each juror individually should determine whether defendant's statement was given to police voluntarily). See generally supra § 19.3D.

[189] Commonwealth v. Allen, 395 Mass. 448 (1985).

[190] See e.g. Commonwealth v. Leon L., 52 Mass. App. Ct. 823 (2002)(statements of co-defendants suppressed as involuntary: police officer spoke to Leon, 14, in loud voice while banging on table, making Leon's mother cry; juvenile denies involvement; police indicates that someone implicated Leon and co-defendant; Leon confessed but motion judge upheld in finding that Leon was intimidated and upset, exacerbating second language issue problem; neither juvenile was deemed capable of withstanding the pressure to confess.)

[191] 543 U.S. 551 (2005).. See Tamar R. Birkhead, The Age of The Child: Interrogating Juveniles After Roper v. Simmons, 65 WASH. & LEE L. REV. 385 (2008), examining the developmental differences between juvenile and adults, including susceptibility to interrogation techniques.

[192] Graham v. Florida, 560 U.S. ____, 2026-2027 (2010).

Court case holding that the age of the juvenile, thirteen, was a factor that should be considered in analyzing the validity of *Miranda* waiver.[193]

2. Fruit of the poisonous tree

Statements that were made during an improper search and seizure may be suppressed under the fruit of the poisonous tree doctrine.[194] When examining whether statements should be suppressed, the court should consider if there is a nexus between the time and location of the unlawful search to when the statements were made. If a casual relationship can be found between the two factors, statement(s) from the juvenile should be suppressed. Analysis entails assessment of the totality of the circumstances and facts of particular cases. For example, a juvenile residing with his mother in a shelter has an expectation of privacy and evidence obtained from an illegal search may be suppressed.[195]

3. Public Safety Exception

There is a public safety exception in *Miranda* analysis. A suspect who is in what would ordinarily be perceived to be a custodial situation does not have to advised of his rights if the threat to public safety outweighs the need for protecting an individual's privilege against self-incrimination. This rule has been applied to juvenile cases, even when a juvenile is in a private residence.[196]

§ 49.8D. MENTAL HEALTH ISSUES

Mental health issues are addressed elsewhere.[197] However, counsel should be especially sensitive to scrutinize these issues in a juvenile case.[198] For example, significant numbers of juveniles may have developmental deficits or alcohol and drug problems. Moreover, Robert Shepard and Adrienne Volenik have noted that "conservative estimates show that as many as one third of adjudicated delinquents are learning disabled and a significant additional number may be mentally retarded or

[193] J.D.B. v. North Carolina, Id.

[194] Commonwealth v. Porter P., 456 Mass. 254, 275 (2010).

[195] Commonweatlh v. Porter P., 456 Mass. 254, 275 (2010); See Commonwealth v. Conway, 2 Mass. App. Ct. 547 (1974).

[196] New York v. Quarles, 467 U.S. 649 (1984); rape victim told police the defendant had entered a supermarket with a gun; Commonwealth v. Alan A., 47 Mass. App. Ct. 271 (1999); When police questioned the juvenile they did not know if gun was in the house or had been disposed of in a public area; Commonwealth v. Dillon D., 448 Mass. 793 (2007); The court found it was unnecessary to provide warnings when juvenile allegedly seen at the middle school with a clear plastic bag containing voer 50 bullets; Commonwealth v. Guthrie G., 66 Mass. App. Ct. 414 (2006), aff. 449 Mass. 1028 (2007); The father of the 14 year old juvenile told the police his sun might be in possession of a gun (father believed it was a B.B. gun) and the item was in the juvenile's house.

[197] See supra ch. 10 (competency to stand trial) and § 49.7 (court-ordered evaluations).

[198] See generally Barnum & Grisso, Competency to Stand Trial in Juvenile Court in Massachusetts, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 321 (1994).

emotionally disturbed."[199] Such infirmities may raise questions regarding the ability to form specific intent,[200] or capacity to waive legal protections.

The Court may arraign and conduct bail and dangerousness hearings even if a juvenile is found to be incompetent.[201] In deciding whether an incompetent juvenile's due process rights are being violated, the court should consider three factors when deciding whether to proceed in a pretrial hearing.[202]These three factors are the juvenile's interest that will be affected by the pretrial proceeding, the Commonwealth's interest in the outcome of the proceeding, and the risk that the defendant's or juvenile's incompetence during the proceeding will erroneously deprive him or her of his liberty.[203]

§ 49.8E. DECISION TO HAVE THE DEFENDANT TESTIFY

This decision merits thorough consideration by both counsel and client.[204] Juveniles frequently have difficulty as witnesses. The judgment is based on the nature of the proceeding (e.g., is it a bench trial in the old de novo system for discovery purposes), the client's degree of sophistication, and whether an affirmative defense can be presented without calling the defendant. It is usually prudent not to have the defendant testify during pretrial motions unless counsel is relatively certain the client will not testify at the jury trial.

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[199] Out of the Mouths of Babes: Handling Juvenile Confessions, CRIM. JUST. (Summer 1987)., at 29 (citing "The Handicapped Offenders" (U.S. Department of Justice 1981)).

[200] Commonwealth v. Henson, 394 Mass. 584 (1985) (alcohol or drug defense to specific intent); Commonwealth v. Cunnen, 389 Mass. 216 (1983) (mental retardation defense to element of extreme atrocity and cruelty in first-degree murder). Technically there is no diminished capacity defense (in Massachusetts), "although evidence of mental impairment is relevant to the issues of intent, knowledge and where a crime was committed with extreme atrocity or cruelty." Commonwealth v. Baldwin, 426 Mass. 105, 106 n.1 (1997) (citing Commonwealth v. Grey, 399 Mass. 469, 470 n.1 (1987) and Henson, supra). In Baldwin, the S.J.C. held that "it is within a judge's discretion to require an electronic recordings of the Blaisdell interview or to permit counsel to be present at the interview." Baldwin, supra, 426 Mass. at 113. See Commonwealth v. Stockwell, 426 Mass. 17, 20 (1997).

[201] Commonwealth v. Abbott A, 458 Mass. 24, 33 (2010) (it is not a per se violation of a juvenile's due process to hold a dangerousness hearing under §58A even if the juvenile is found to be incompetent); Commonwealth v. Torres, 441 Mass. 499, 502 (2004) (a bail hearing may be held for an incompetent juvenile) In cases where lack of competence results in prolonged pre-trial detention the court is required to re-visit the issue at ninety day intervals. If the juvenile is unlikely to ever attain competence a motion to dismiss might be appropriate. The Commonwealth has the right to request periodic review as long as the court as jurisdiction of the juvenile.

[202] Commonwealth v. Abbott A, 458 Mass. 24, 27 (2010); Commonwealth v. Torres, 441 Mass. 449, 502-503 (2004).

[203] Commonwealth v. Abbott A, 458 Mass. 24, 27 (2010); Commonwealth v. Torres, 441 Mass. 449, 502-503 (2004).

[204] This is a client's decision; the function of the attorney's role is to advise. ABA Standards for Criminal Justice: the Defense Function 2-5.2 (2d ed. 1980).

§ 49.8F. USE OF JUVENILE RECORDS [205]

Prior to 1992, juvenile records could be used against a juvenile defendant only in limited circumstances.[206] After legislative amendment, however, such records are generally admissible in subsequent delinquency or criminal proceedings against the same person.[207] In addition, a juvenile or adult witness in any delinquency or criminal proceeding may be impeached by proof of counseled prior adjudications of delinquency.[208]

§ 49.9G. SCHOOL-BASED MISCONDUCT

In the aftermath of the shootings at Columbine High School in Colorado many school districts promulgated zero tolerance conduct codes and began to use police as school resource officers. These developments have raised an array of legal issues related whether law enforcement is directly involved in a school based interrogation or search. Jurists and practitioners should familiarize themselves with the rulings and the interpretations of the First and Fourth Amendment to the United States Constitution in addition to art. 12 of the Massachusetts Constitution.[209] If a police officer is involved in a school-based search it is quite arguable that instead of reasonable suspicion to conduct a search that probable cause standard should be employed, and that if an officer is involved in an interrogation in a principal's office that Miranda is implicated.

Counsel should be aware that the communication of a threat does not have to be towards a potential target of a crime but does have to be towards an individual other than the co-conspirators of the crime.[210]In addition, Counsel should be aware that a juvenile can be found delinquent for threatening a crime based on non-verbal acts such as creating a drawing.[211]

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[205] Regarding public access to records, see supra § 49.8A.

[206] Previously, except for impeachment use, a juvenile record could be used against a juvenile defendant only in setting bail in delinquency or criminal proceedings, in criminal sentencing proceedings, and in hearings on S.D.P. status. G.L., c. 119, § 60, as amended (1991); Commonwealth v. Rodriguez, 376 Mass. 632 (1978).

[207] G.L. c. 119, § 60, as amended by c. 398 of the Acts of 1992.

[208] G.L. c. 119, § 60, as amended by c. 398 of the Acts of 1992. Formerly, such impeachment was permissible only when bias was an issue. Davis v. Alaska, 415 U.S. 308 (1974) (confrontation right to impeach for bias juvenile subject to probation, despite juvenile confidentiality statute); Commonwealth v. Carty, 8 Mass. App. Ct. 793 (1979); Commonwealth v. Ferrara, 368 Mass. 182 (1975); G.L. c. 119, § 60 (delinquency record could not be used). See also Commonwealth v. Young, 72 Mass. App. Ct. 237, 239–41 (1986) (transferred juvenile tried as an adult but given juvenile disposition deemed, as of that date, not to have criminal record and generally could not have been impeached with delinquency finding).

[209] Commonwealth v. Milo M., A Juvenile, 433 Mass. 149 (2001); Commonwealth v. Kerns, 449 Mass. 641 (2007); Commonwealth v. Lawrence, 439 Mass. 817 (2003).

[210] Commonwealth v. Kerns, 449 Mass. 641, 652 (2007); G.L. c. 269 §14(b)(1).

[211] In Commonwealth v. Milo, a juvenile was found delinquent for threatening a crime through a drawing that he had given his teacher. In the drawing, the juvenile was seen pointing a gun towards a female character labeled as his teacher. The female character seems to have urinated herself and directly over the female character were the words "Pissy Pants." Commonwealth v. Milo M., A Juvenile, 433 Mass. 149, 155 (2001).

Schools are ordinarily permitted to conduct warrantless searches based on reasonable suspicions; a public school official is not considered to be an agent of the police department and therefore does not need to have a search warrant in order to conduct a search and seizure.[212] The argument has been advanced that an agreement between school officials and the district attorney regarding searches requires that the higher standard of probable cause be employed, but the court has rejected that argument unless it can be shown that law enforcement had direct involvement in the execution of the search.[213]

§ 49.9 DISPOSITION

§ 49.9A. IN GENERAL

Although *Gault*[214] did not speak to the dispositional phase of delinquency proceedings, it has been held that the Sixth Amendment right to counsel includes effective representation at sentencing.[215] This includes representation at the disposition hearing, where counsel may call and examine witnesses, including experts; after sentencing, where a Rule 29 motion to revoke and revise may foster accountability and assure periodic review; and at the pretrial stage, where successful advocacy may require the preparation of a creative dispositional alternative. In this context counsel finds guidance in the rehabilitative purpose of the juvenile code[216] and standards advising that the least restrictive alternative should be pursued.[217]

However, recent cases involving the threat or infliction of serious bodily harm have made it clear that public safety is also an important consideration in the sentencing calculus. In *Commonwealth v. Wayne W*, the Supreme Judicial Court noted "we do not minimize the defendant's interest in remaining within the juvenile system. The Commonwealth, however, has an equally compelling interest in seeing the public protected from the early release of a dangerous and uncontrollable youth . . . and the imposition of adult penalties on violent and vary dangerous offenders."[218] Recent

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[212] Commonwealth v. Lawrence, 439 Mass. 817, 823 (2003)

[213] In Commonwealth v. Lawrence, 439 Mass. 817, 823 (2003), police werenot directly involved in the search. Counsel argued that under Art. 14 the higher standard of probable cause should be used. The court did not alter the reasonable suspicion standard but noted that the vice-principal's smelling odor of marijuana would have established probable cause. See also New Jersey v. T.L.O. 469 U.S. 325, 355 (1985) (reasonable suspicion being defined as "that there is reason to believe that a crime has been committed and that evidence of the crime will be found in the place to be searched").

[214] In re Gault, 387 U.S. 1 (1967).

[215] See, e.g., Strickland v. Washington, 466 U.S. 668 (1982).

[216] G.L. c. 119, § 53 provides that the code is to be liberally construed, "so that the care, custody and discipline of children brought before the court should approximate as nearly as possible that which they would receive from their parents."

[217] See IJA-ABA Standards Relating to Disposition 2.1; ABA Standards for Criminal Justice: Sentencing Alternative and Procedures 18-2.2, 18-6.3 (2d ed. 1980); CPCS Performance Guidelines, indicating that pursuit of the least restrictive alternative is a major responsibility.

[218] Commonwealth v. Wayne W., 414 Mass. 218, 224–25 (1993).

developments, such as the removal of murder cases from juvenile court jurisdiction, the creation of youthful offender jurisdiction, and the provision for the extension of DYS jurisdiction to age twenty-one and for sentencing of juveniles to adult correctional institutions, reflect the balancing of parens patriae and public safety considerations that occurs in the juvenile court.[219] The United States Supreme Court cases of *Roper v. Simmons*,[220] and *Graham v. Florida*[221] held that the death penalty and life without parole in non-capital cases for juveniles under the age of eighteen constituted cruel and unusual punishment. These cases held that given developmental differences, juveniles are not as culpable as adults for comparable conduct and may change the landscape of juvenile practice given possibilities for broader application.

Preparation for disposition requires counsel to understand the role of probation. Pursuant to G.L. c. 119 § 57, probation will provide the court with a complete report concerning the juvenile's history and school record. Meaningful consultation with probation is essential given the fact that many judges rely on these sentencing reports. This is especially so in the context of the youthful offender sentencing recommendation hearing. The amended statute[222] precludes disposition in a youthful case unless probation has prepared a pre-sentence investigation.

Additionally, the court may order psychological or psychiatric evaluation[223] or, with parental consent, a diagnostic evaluation by DYS, DMH, or the court clinic.[224]

Dispositional alternatives range from diversion to pretrial probation to the sentencing alternatives of G.L. c. 199, § 58. Section 58 sentencing options include cwof, either after admission or trial[225] (except in youthful offender prosecutions[226]),

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[219] See generally "An Act to Provide for the Prosecution of Violent Juvenile Offenders In the Criminal Courts of the Commonwealth," St. 1996, c. 200. In Commonwealth v. Connor, 432 Mass. 635 (2000), the S.J.C. ruled that an adjudication of delinquency satisfies the requirement of a predicate firearm offense for purposes of G.L. c. 269 § 10(d) (second and subsequent offenses for youthful offender indictment). The court concluded that while an adjudication of delinquency is not a conviction, it constitutes a "violation" of the law and justifies second and subsequent offense prosecution via indictment. However, the S.J.C. also stated that youthful offender proceedings are not criminal proceedings (see however, Justice Ireland's dissent in Commonwealth v. Clint C., 430 Mass. 219 (1999) and that the general rehabilitative goal of G.L. c. 119 § 53 is still valid.

[220] 543 U.S. 551 (2005).

[221] 2010 WL 1946731 (2010).

[222] G.L. c. 119, § 58, as amended by St. 1996, c. 200, § 5, states that no youthful offender sentence "shall be imposed until a pre-sentence investigation report has been filed by the probation department and made available to the parties no less than seven days prior to sentencing."

[223] Dist. Ct. Special R. 207.

[224] G.L. c. 119, § 68A, as amended by St. 1996, c. 200, § 12. The evaluations will be forwarded to the court. Be aware that parental consent is required for this referral unless the defendant is on default. Counsel should consider moving for funds to obtain an independent evaluation. See generally supra § 12.2E and infra § 49.10C. See also supra § 49.7.

[225] Commonwealth v. Norell, 423 Mass. 725 (1996), prohibits a judge in a criminal session from continuing a case without a finding after a jury waived trial over the Commonwealth's objection. In the juvenile context, however, G.L. c. 119, § 58 states that after adjudication beyond a reasonable doubt a defendant "may be adjudged a delinquent child, or in lieu thereof, the court may continue the case without a finding." Section 58 provides for other

probation, a suspended sentence, or commitment to DYS. A recent single-justice opinion precludes "stayed" DYS commitments[227] unless the same is ordered pending the resolution of an appeal. A "stayed" sentence is to be construed, subject to the court's sentencing intent, as a suspended sentence or a DYS commitment. As of October 1, 1996, juvenile courts can sentence persons indicted and adjudicated as youthful offenders to adult sentences, or to DYS until age twenty-one with or without suspended adult sentences.[228] Courts can also impose court costs and restitution orders as conditions of probation.[229] In motor vehicle cases only, a fine may be imposed.[230]

Since deinstitutionalization this state has employed a purchase-of-service system. Private providers sell services to state agencies, ranging from detention facilities to residential and secure treatment programs. It is essential to familiarize yourself with the system to understand what it can and cannot provide.

The plea colloquy: "A judge must determine by means of an adequate colloquy that the plea tendered is both intelligently and voluntarily made."[231] There must be an adequate record that the defendant has knowledge of the elements of the charges, that there is sufficient basis in fact to enter a finding, and that the defendant is knowingly surrendering basis constitutional rights. Parties should expect the colloquies will include examination of important collateral consequences of delinquency and youthful offender adjudications to ensure that waivers and admissions are made knowingly and voluntarily, without duress, and with an appreciation of the effects of the plea. However, informing the defendant of the collateral consequences of a change of plea is not required in order for a plea to be voluntary.[232] Juvenile court practitioners should be aware as well of the court's affirmative responsibility to inform the parties that pleas are subject to the defendant capped plea system articulated in G.L. c. 119, sec. 55B, which allows a defendant to "take back" or withdraw his plea and proceed to trial if the court adopts a recommendation which exceeds what his counsel has advocated.

Collateral Consequences: It may be argued that the collateral consequences that a juvenile faces can be more profound and far reaching than the adjudication itself. A noninclusive list of the possible collateral consequences that a juvenile may face include:

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dispositions without a finding including filing a case with juvenile and parental/guardian consent, filing with a finding, supervised probation and community service, suspended sentences, and DYS commitment.

[226] G.L. c. 119, § 58, as amended by St. 1996, § 5, provides that adjudicated youthful offenders receive (1) a sentence provided by law, (2) a combination sentence of a commitment to DYS to age 21 and an adult suspended sentence to the house of correction or state prison, or (3) commitment to DYS until age 21.

[227] See Commonwealth v. A Juvenile, SJ-97-0011 (January 16, 1997, Lynch, J.).

[228] St. 1996, c. 200, amending G.L. c. 119, § 58.

[229] G.L. c. 119, § 62.

[230] G.L. c. 119, § 58B.

[231] Commonwealth v. Correa, 43 Mass. App. Ct. 213 (1997).

[232] See Mass R. Crim. P. 12. See generally supra ch. 37 (plea bargaining and guilty pleas). See also Commonwealth v. Albert A., 49 Mass. App. Ct. 269 (2000), which held that failure to inform the defendant of the collateral consequence of public disclosure via the sex offender registry did not render his plea involuntary.

1. Possible deportation, denial of citizenship or denial of admission to the United States. Under G.L. c. 278, §29D, warning of this possible consequence must always be given to the juvenile.

2. School suspension and expulsion. A school may *suspend* a student after the issuance of a felony criminal complaint or a felony delinquency complaint. A school may *expel* a student if student is convicted, adjudicated, or admits guilt of a felony. School districts are not required to provide educational services to students who are expelled for such reasons.[233]

3. Sex offender registration. Generally there is a presumption that sex offers must register with the sex offender registry board.[234] However, juveniles who are not sentenced to immediate confinement and does not pose a risk of re-offense or a danger to the public *may* be excused from registering with the board.[235]

4. DNA database registration. G.L. c. 22E, § 3 requires that "any person adjudicated a youthful offender by reason of an offense that would be punishable by imprisonment in the state prison if committed by an adult shall submit a DNA sample to the department within 1 year of such a conviction or adjudication."

5. Public benefits and privileges. An arrest or adjudication may result in juvenile's family being evicted from public housing.

§ 49.9B. FINDING SENTENCING ALTERNATIVES

A list of alternative sentencing programs may be found *supra* at Chapter 38. In juvenile cases the fiscal reality is that DYS is forced to spend over two-thirds of its budget on detention and security. A disproportionate amount of money is thereby allotted to a relatively small segment of the Department's population. For committed and non-committed youth who need care, the search for treatment necessarily includes identification of a funding source. Frequently children who appear before the court may have been involved with DSS (through CHINS or care and protection cases) or DMH (as a result of mental health commitment or prior hospitalization and history), or may have undergone CORE evaluations for special educational needs via c. 766. Interagency cost sharing to underwrite placement is difficult to achieve in an era of limited resources. Since the abolition of the interagency team of the former Office for Children in 1996 there is no institutional mechanism at the executive level to address issues related to cost sharing. The state is developing regional CAP (child assessment program) programs that enable DSS and DMH to share the cost of residential placement, but neither the school nor other agencies are involved. In general, multi-agency cases present difficult issues. Consistent with the obligation to pursue the least restrictive alternative, counsel must be wary of accepting DYS commitment simply because no other agency can, or will, fund an appropriate placement. As noted below, DYS may also provide services without a commitment. On occasion it is appropriate to ask the court to summon agency representatives to explain the agency's policy and encourage cooperation.

Right-to-treatment advocates would argue that "if the institutions and programs in which juveniles are placed do not provide appropriate treatment for the purposes for

[233] G.L. c. 71, §§ 37 H, 37H1/2.

[234] G.L. c. 6, §§ 178C-178P; Commonwealth v. Ronald R., 450 Mass. 262, 264 (2007).

[235] G.L. c. 6, § 178E(f); Commonwealth v. Ronald R., 450 Mass. 262, 265-266 (2007).

which the dispositions were rendered, the juveniles are being deprived of this constitutional right under the fourteenth amendment."[236] A right to treatment arguably emerges from the mandates of G.L. c. 119, § 53, G.L. c. 18A, § 2 (authorizing DYS services for non-committed youth), and the inherent equitable power of the court. This argument has greater validity in child welfare cases when children are involuntarily removed from parents because of allegations of abuse and neglect (see, G.L., c.l19 §§ 51A, 51B). In the delinquency context the S.J.C. has held that right to be treated as a juvenile can be statutorily conferred or abrogated. See *Commonwealth v. Wayne W.*, 313 Mass. 21B (1993). Unacceptable conditions of confinement and detention, however, can be challenged. Each agency involved with serving children operates under an analogue to G.L. c. 18A, § 2, which reinforces arguments for creative cost sharing.[237]

To reiterate, counsel should always consider whether there is a less restrictive alternative. If it can be demonstrated that a juvenile does not require supervision or treatment, perhaps there is no need for court intervention. If the court has the choice of a delinquency prosecution and adjudication or a DSS placement, counsel should argue for the latter. It is axiomatic that dispositional advocacy requires counsel to discuss the case with the prosecution, provided that such efforts do not compromise a viable defense if the matter goes to trial. Counsel should also be aware of G.L. c. 111E, § 13A, authorizing court referral for drug treatment and rehabilitation by the Department of Mental Health.[238] However, placement through this process is exceedingly difficult owing to the lack of programs.

§ 49.9C. DEPARTMENT OF YOUTH SERVICES

DYS may provide services to a juvenile with or without a court commitment.[239]

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[236] See Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association, Standards for Juvenile Justice: A Summary and Analysis, (2d ed. 1982), at 36, discussing such cases as Morales v. Turman, 535 F.2d 864 (5th Cir. 1976), and Martarella v. Kelly, 349 F. Supp. 575 (S.D.N.Y. 1972), which address minimum standards institutions must meet to qualify as proper environments in which to detain or confine a juvenile. In this state, litigation over conditions at the Connolly Youth Center (Roslindale) resulted in a consent decree mandating the proper number of "inmates" and the quality of care. Inmates v. Dukakis, No. 75-1786c (D. Mass.). During the last several years, however, DYS has resorted to using gym space to house detainees, e.g., in Boston and Worcester.

[237] However, it is important to note the distinction between the right to adequate care for those who are committed to DYS as opposed to any right to be treated as a juvenile. "There is no [Federal] constitutional right to any preferred treatment as a juvenile offender . . . the legislature could have lawfully chosen to abolish Juvenile Court jurisdiction over certain violent crimes without infringing on a juvenile's constitutional rights." Commonwealth v. Wayne W., 414 Mass. 218, 222–23 (1993) (upholding constitutionality of G.L. c. 119, §§ 61, 72, as amended by St. 1991, c. 488). The right to be treated as juvenile can be legislatively conferred or abrogated.

[238] Referrals for committed youth can be made by DYS.

[239] G.L. c. 18A, § 2 (delinquent children committed or referred by the courts). For example DYS has opened a diversion program in Lowell, the Elliot Center, which accepts court referrals through probation. This offers an alternative to commitment, based on the day

A committed juvenile may be placed in a residential setting including a foster or group home, or in security. If the juvenile has been committed to DYS, G.L. c. 120, § 5(a) and (b), require the department to conduct a staffing in order to produce a treatment plan. The juvenile's attorney can and should participate. Remember that the timely filing of a Rule 29 motion to revise and revoke provides a vehicle for court consideration if an appropriate plan is not developed or implemented. Counsel will have to argue that such a motion is appropriate to effectuate the court's sentencing intent. This is so because postdispositional performance while in placement does not legally justify sentencing reconsideration.[240]

1. Length of Commitment

In most cases, a juvenile committed to DYS remains in the custody of the agency until age eighteen unless discharged earlier.[241] But, after "get tough" legislation enacted in 1990, 1991, and 1996, a juvenile can be involved with DYS beyond age eighteen in several circumstances. *First,* a person prosecuted as a juvenile who turns eighteen before her case is disposed of may, prior to her nineteenth birthday, be committed to DYS.[242] *Second,* a person found delinquent by reason of murder or manslaughter, for offenses committed prior to July 27, 1996, and October 1, 1996, respectively, must be committed to age twenty-one.[243]

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reporting system. See also G.L. c. 119, § 68A, as amended by St. 1996, c. 200, § 12 (diagnostic evaluation).

[240] Mass. R. Crim. P. 29 enables the judge to reconsider sentence based on the facts existing at the time sentence was imposed. Commonwealth v. Barclay, 424 Mass. 377, 380 (1997) (court can only "reconsider the sentence he has imposed and determine, in light of the facts as they existed at the time of the sentencing, whether the sentence is just)"; Commonwealth v. Layne, 386 Mass. 291 (1982).

[241] G.L. c. 120, §§ 16–20, as amended by St. 1996, c. 267, § 6 and St. 1996, c. 200, § 7.

[242] G.L. c. 119, § 58, as amended (1990). It does not matter whose fault caused the delay. See also Commonwealth v. A Juvenile, 406 Mass. 31, 35 (1989); Johnson v. Commonwealth, 409 Mass. 712 (1991) (pre-amendment cases upholding dismissal of complaints in this situation, and inviting legislative action).

[243] G.L. c. 119, § 72 (as amended by c. 488 of the Acts of 1991 and c. 398 of the Acts of 1992). Under § 72, committed persons adjudicated for murder or manslaughter must be kept in secure facilities. A person committed to BYS by reason of first-degree murder is to be held until age 21 and then transferred to DOC. The term of confinement is 20 years from the date of commitment and the juvenile is not eligible for parole for 15 years. For second-degree murder the term is 15 years, 10 years before parole eligibility. A manslaughter commitment is until age 21. In murder commitments, DYS may request transfer to DOC at age 18.

The above-described murder sentences apply only to adjudicated juveniles who are age 14 or over and do not apply retroactively to crimes occurring prior to the effective date of the legislation. Commonwealth v. Fuller, 421 Mass. 400 (1995). Juvenile murder sentences may not be suspended or reduced by statutory or earned good time. The court has discretion to award jail credit for time spent awaiting trial. The involvement of DOC raises questions about whether prosecution must be by grand jury indictment. See infra § 49.10A. But for murders allegedly committed on or after July 27, 1996, by juveniles who have reached the age of 14, that issue is moot: They must be prosecuted by indictment in the superior court. St. 1996, c. 200, § 15, G.L. c. 119, § 72B.

As of February 10, 2009, the Department of Youth Services can no longer ask the court to extend a juvenile's commitment to DYS for an additional three years.[244] Under *Kenniston v. Department of Youth Services*, the Supreme Judicial Court found that the statute G.L. c. 120 §17-19 that allowed a juvenile's commitment to DYS to be extended was written in a manner that does not comport with the substantive due process rights that a juvenile is entitled to.453 Mass. 179, 180 (2009).[245]

Before the replacement of transfer hearings with youthful offender prosecution in the "trial first" system,[246] superior court judges had the authority (except in murder cases) to sentence a convicted, transferred person under eighteen as a juvenile. Thus, the judge could order DYS commitment until the age of twenty-one.[247] Under the Youthful Offender Act, juveniles adjudicated as youthful offenders may be committed to DYS custody until age twenty-one.[248]

2. DYS Classification System

DYS has adopted determinate sentencing for designated offenses. In 1981, in response to concerns about the violent offenders, a classification system was instituted.[249] This system entails referrals of offenders for specified periods of secure and residential treatment based on severity of the offense resulting in commitment. With the advent of the system the number of juveniles transferred for prosecution as adults declined.[250] Presumably some judges thought the period of juvenile incarceration with treatment might approximate adult prison terms.

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[244] Pursuant to G.L. c. 120, a committing court formerly extend a juvenile's commitment for three years, providing that the Commonwealth proves beyond a reasonable doubt that the juvenile is dangerous to the public. The Commonwealth could meet its burden of showing the juvenile's potential dangerousness by submitting a written statement of facts along with the extended commitment order. If the court grants the extension order and the juvenile do not agree with it, the juvenile has a right to contest it by a jury trial of six persons. See G.L. c. 120, §17-19; Kenniston v. Department of Youth Services, 453 Mass. 179, 180 (2009).

[245] A juvenile's extension of time in the department's custody was granted based solely on the factual finding of the juvenile's "dangerousness" to the community and not on the original delinquency proceeding. See G.L. c. 120. In Kenniston v. Department of Youth Services, the S.J.C. found that the statute's requirement of a finding of dangerousness with no link to a mental illness or abnormality that causes the individual to have "serious difficulty" in controlling his or her behavior deprived juveniles their substantive due process rights. 453 Mass. 179, 186-187 (2009).

[246] See supra § 49.4A.

[247] See St. 1996, c. 200, § 16, which repealed G.L. c. 119, § 83, depriving superior court judges of the power to sentence juveniles to DYS.

[248] St. 1996, c. 200, § 5, amending G.L. c. 119, § 58.

[249] 109 C.M.R. 4.00 (classification of juveniles committed to department of youth services). The classification "grid" was modified in 1993 and 1997.

[250] The transfer numbers statewide as supplied by DYS are as follows: 1981 — 36 juveniles transferred for adult trial; 1982 — 28 (first full year of the new system); 1983 — 27; 1984 — 14; 1985 — 12; 1986 — 15; 1987 — 14; 1988 — 19. Between 1989 and 1991, 11 juveniles were transferred each year, and 10 in 1992. In 1995, the last full year of the transfer era, 11 were transferred.

Sentences for individual juveniles are determined by a Classification Panel, composed of the Director of Classification and two persons designated by the Deputy Commissioner. This panel reviews all commitments referred to it by the DYS area directors. A non-inclusive list of offenses enumerated in the DYS classification "grid" of March 9, 2000 follows:

Level 6: Voluntary manslaughter, manslaughter involving explosives, armed assault in a dwelling, assault to rape (subsequent offense), armed burglary (assault on occupants), armed burglary (subsequent offense), cocaine and heroin trafficking (over 200 grams), carrying a dangerous weapon (G.L. c. 269, § 10(d)- fourth offense), armed robbery (display of gun), armed robbery (masked- display of gun), perjury in capital case (G.L. c., 268, sec. 1), treason, aggravated rape, rape of a child with force — twenty-four to thirty-six months.

Level 5: Rape, mayhem, involuntary manslaughter, motor vehicle homicide, rape and abuse of a child under sixteen (statutory, subsequent offense), assault and battery with a dangerous weapon on a person over 60, assault to murder on a person over 60, assault to rob on a person over 60, assault to murder, cocaine trafficking (100–200 grams), heroin trafficking (14–28 grams), explosives (malicious — G.L. c., 266, § 101), Explosives (detonating or possessing with intent to injure — G.L. c. 266 § 102), carrying firearm without license (third offense), Indecent assault and battery on a retarded person, kidnapping for extortion, marijuana trafficking (10,000 lbs.), attempted murder, attempted poisoning, armed robbery — twelve to twenty-four months.

Level 4: Assault and battery on person over 60 or person who is disabled (causing significant injury), assault to murder or maim, assault to rob person over 60, indecent assault and battery on a child under fourteen (subsequent offense), assault with intent to murder/maim/rape/rob while armed, kidnapping, carjacking, interfering with bus driver, carrying firearm without license, carrying firearm without license (second offense), assault and battery with a dangerous weapon (with significant injury), possession with intent to distribute cocaine, cocaine trafficking (28 to 100 grams, arson of a dwelling, civil rights violation causing harm, or with intent to do bodily harm — eight to twelve.

Level 3: Assault and battery on a child with injury, assault and battery on a correction officer, assault and battery on a person over 60 or disabled person with injury, assault and battery on a retarded person, assault and battery to intimidate for race, religion causing bodily injury, assault and battery to collect loan, assault and battery with a dangerous weapon with moderate injury, assault to commit a felony, assault to rob (unarmed), attempt to burn public building, attempted arson of dwelling, breaking and entering dwelling (day time, night time), false bomb threat, burglary (unarmed), burning building or motor vehicle to defraud, cocaine — distribution or possession with intent, drug paraphernalia selling to minor, drug violation near school/park G.L. c., 94C § 34J, drug, distribution of class A, B, and C drugs, carrying a firearm (first offense), civil rights violation — five to seven months, escape from penal institution — prison or house of correction, extortion or attempt, felony for hire, firearm — used in felony, indecent assault and battery on child under 14, juror or witness intimidation or retaliation, kidnapping and endangerment or incompetent person or child by relative, larceny from person, leaving the scene after causing injury to person or property, larceny of motor vehicle or receiving stolen property with malicious injury, operating under the influence of alcohol or drugs causing serious

injury, perjury, suborning perjury, prostitution-deriving support , stalking, unnatural act with child, usury. Five to eight months

Level 2: Assault, Assault and battery, assault and battery on public employee, assault and battery to intimidate, unarmed robbery, unarmed burglary, a/b/d/w with no or minor injury, escape, from DYS (G.L. c. 120, § 26), and from municipal lockup or police officer, violation of abuse prevention order, accosting/annoying person of opposite sex, animal, keeping to fight or promote same, cruelty to animals, assault, assault dangerous weapon, attempt to burn boat, motor vehicle or personalty, burning boat, motor vehicle or personalty, burning woods, check cashing violation — forgery, contempt, criminal, contributing to the delinquency of a minor, crime report, false, dangerous weapon or firearm on school grounds, destruction of property — wanton or malicious, disorderly conduct on public conveyance, possession of bombs or explosives distribution of class D and E drugs, drug possession — class A, B, C, D, fetal death, concealment out of wedlock, false fire alarm, fire on land, setting, possession of a firearm , firearm, larceny of, fireworks — unlawful sale, hazing, heroin, in presence, larceny over, under, open and gross lewdness, negligent motor vehicle operation, operating under the influence, poisoning mammal or bird, interfering with police officer, receiving stolen property — under $250.00, recognizance or bail, failure to appear, resisting arrest, inciting riot, disturbing school or public assembly, second offense, sexual conduct, pay for services, shoplifting, third offense, unnatural act, use without authority, witness, failure to testify after immunized — three to five months.

Level 1: use without authority, boat, curfew violation, disorderly conduct, disturbing peace, drug possession, class E, explosives/inflammables — improper storage, fire in open setting, discharge of firearm, fornication, fugitive — fail to bring before court, indecent exposure, lewd/wanton lascivious conduct, common nightwalker, obscene matter — distribution, failing to assist police officer, disturbing school assembly, possession of liquor in school, making annoying or obscene telephone calls, trespass, witness — failure to appear — thirty to one hundred twenty days.

Once a juvenile is accepted for secure treatment, the Classification Panel determines the time period for and the facility to which the juvenile is committed. However, if the child is assigned to the Butler Center, a program for emotionally disturbed youth, no time period will be set.[251] Juveniles detained in a holding unit awaiting placement in a secure facility are eligible for waiting time credit.[252]

Appeals may be brought by the child or attorney, the referring area director or the Assistant Commissioner of Facility Operations Appeals. Appeals must be in writing and sent to the Deputy Commissioner within seven days of the panel's decision.

On rare occasions the panel has, on court request, heard cases involving non-committed youth following a finding of probable cause in transfer hearings. This was for the purpose of ascertaining the projected treatment if jurisdiction was retained. This practice, however, was disfavored by DYS, which believed it compromised the

[251] Placements to the Butler Center are open-ended, with conferences convened every six months to review the juvenile's progress. Mass. Dep't of Youth Services, Classification Policy Guidelines Governing Entrance into Secure Treatment Facilities, at 6.

[252] This credit against the minimum time assignment is determined jointly by the appropriate facility administrator and regional or area director. One may appeal this determination by submitting a request to the Assistant Commissioner of Community Services within seven working days of the notice of credit. Mass. Dep't of Youth Services, Classification Policy Guidelines Governing Entrance into Secure Treatment Facilities, at 10–11.

presumption of innocence. With the abolition of the transfer hearing system, counsel must be familiar with the classification grid as well as with adult sentencing guidelines. Any expert who is retained should be familiar with services available within the DYS system.

Juveniles adjudicated delinquent by reason of firearms violations pursuant to G.L. c. 269, § 10(a), (c), or (d) are committed for a minimum of six months. Subsequent offenses require a minimum commitment of one year. These terms may not be suspended or reduced.[253]

§ 49.9D. YOUTHFUL OFFENDER SENTENCING [254]

Persons who are adjudicated as youthful offenders may be sentenced to:

1. A *sentence provided by law*, defined as any sentence that might be imposed on an adult by a district court or superior court judge;[255]

2. A *combination sentence*, defined as a commitment to the DYS until age twenty-one, and an adult sentence, "as is provided by law for the offense," to a house of correction of state prison. The adult sentence will be suspended pending successful completion of a term of probation "which shall include, but not be limited to, the successful completion" of the DYS commitment. "Any juvenile receiving a combination sentence shall be under the sole custody and control of the department of youth services unless or until discharged by the department or until the age or twenty-one, whichever occurs first, and thereafter under the supervision of the juvenile court probation department until the age of twenty-one and thereafter by the adult probation department; provided however, that in no event shall the aggregate sentence imposed on the combination sentence exceed the maximum adult sentence provided by law."[256]

3. A commitment to DYS until age twenty-one.

A compelling argument can be made that a DYS commitment may be suspended. As noted above, G.L. c. 119, § 58 specifically provides that enumerated firearms offenses, as of October 1, 1996, may not be suspended or reduced. The failure to include such language in G.L. c. 119, § 58(c) supports the legality of suspended sentences. So too does the unambiguous language of G.L. c. 279, § 2, which states, in pertinent part, that "[i]n all cases the execution of orders of commitment to any training school or reformatory, however named, the department of youth services, or the department of public welfare may be suspended."

§ 49.10 ABOLITION OF TRANSFER HEARINGS: TRIAL FIRST SYSTEM AND YOUTHFUL OFFENDER SENTENCING

Prior to the enactment of the Youthful Offender Act, a transfer hearing could be held in juvenile sessions to determine whether a child would be tried in juvenile court

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[253] G.L. c. 119, § 58, effective October 1, 1996.

[254] The sentencing scheme is set out in St. 1996, c. 200, § 5, amending G.L. c. 119, § 58.

[255] St. 1996, c. 200, § 1, amending G.L. c. 119, § 52.

[256] St. 1996, c. 200, § 5, replacing G.L. c. 119, § 58.

as an alleged delinquent, or prosecuted criminally in superior or district court. Transfer hearings consisted of two parts: Part A, to determine the existence of probable cause, and Part B, to explore the juvenile's amenability to rehabilitation.[257] The law governing the former system is detailed in the margin.[258]

The Youthful Offender Act abolished transfer hearings for offenses committed on or after October 1, 1996, and adopted a trial first system in which all juveniles except those charged with murder are tried in juvenile court. The prosecutor may indict eligible juveniles as youthful offenders.[259] The changes effected by the Youthful Offender Act are summarized *supra* at § 49.2. An important consequence of replacing transfer hearings with the trial first system is to increase prosecutorial discretion to select cases for possible indictment.[260] The Act contains no time limit on the prosecutor's decision to indict. In the transfer "era" Dist. Ct. Special R. 208 required the Commonwealth to give seven days notice of a request to initiate transfer proceedings.

Youthful offender sentencing recommendation hearing: If a juvenile is indicted and adjudicated as a youthful offender, the court may impose any of three sentencing options; (1) adult sentence; (2) combination juvenile commitment and adult suspended sentence; or (3) commitment to DYS until age twenty-one.[261] The court is required to conduct a sentencing recommendation hearing to determine the sentence by which "present and long term public safety would be best protected."[262] At least seven days prior to the hearing, the probation department must file a pre-sentence investigation

[257] G.L. c. 119, § 61.

[258] The Commonwealth had the burden of proving that a juvenile between the ages of fourteen and seventeen presented a significant danger to the public and was not amenable to rehabilitation within the juvenile justice system. If the offense alleged was murder in the first or second degree, manslaughter, or a violation of c. 265, § 18, 22, 22A, or 26, or c. 266, § 14, a rebuttable presumption of dangerousness and non-amenability to rehabilitation existed after a finding of probable cause. The Commonwealth's burden of persuasion in such cases was by a preponderance of the evidence. In all other cases the standard was clear and convincing evidence. G.L. c. 119, § 61. In making the transfer decision, judges were required to consider a non-inclusive list of factors: (1) the nature, circumstances, and seriousness of the alleged offense; (2) the child's court and delinquency record; (3) the child's age and maturity; (4) the family, school, and social history of the child; (5) the success or lack of success of any past treatment efforts of the child; (6) the nature of services available through the juvenile justice system; (7) the adequate protection of the public; and (8) the likelihood of rehabilitation of the child.

[259] "Eligibility" is determined by the definition in G.L. c. 119, § 52, as amended by St. 1996, c. 200, §§ 1, 2. See supra § 49.4A. Single-justice opinions have upheld the constitutionality of the youthful offender statute. See Commonwealth v. Stubblefield, SJC-97-0421 (further appellate relief requested); Commonwealth v. Golden, SJC, SJ-97-0405 (1997), Commonwealth v. Shelton, S.J.C., SJ-97-0406 (1997).

[260] G.L. 263, § 4 requires an indictment prior to the imposition of a state prison sentence. This has been the practice in charging juveniles with homicide since the enactment of the juvenile-adult split sentencing provisions. Commonwealth v. Charles C., 415 Mass. 58 (1993). Under the Youthful Offender Act, juvenile indictments must be filed directly in the superior court.

[261] St. 1996, c. 200, § 5, replacing G.L. c. 229, § 58. The sentencing options for youthful offenders are described supra at § 49.9D.

[262] St. 1996, c. 200, § 5, replacing G.L. c. 119, § 58.

report and make it available to the parties.[263] The court must support its sentence by written findings in support of the sentence.[264] There is no statutory right of appeal for either party. However, the requirement that the court make written findings in support of the sentence provides a potential ground for appeal. In order to preserve this possibility, counsel should ensure that a complete and accurate record is made of sentencing proceedings. Stenographers should be obtained in appropriate cases, pertinent reports docketed, and all relevant evidence introduced.

At the hearing the court must consider the following factors, and may consider any other factor it deems relevant:

1. The nature, circumstances, and seriousness of the offense;
2. Victim impact statement;
3. A report by a probation officer concerning the history of the youthful offender;
4. The youthful offender's court and delinquency records;
5. The success or lack of success of any past treatment or delinquency dispositions;
6. The nature of services available through the juvenile justice system;
7. The youthful offender's age and maturity; and
8. The likelihood of avoiding future criminal conduct.

This non-exhaustive list of statutory factors is remarkably similar to the factors made applicable to transfer hearings by the now repealed G.L. c. 119, § 61. Thus, the sentencing recommendation hearing can be perceived as the functional equivalent of the Part B component of the transfer hearing. With the deletion of the probable-cause component of the transfer hearing protocol and the abolition of de novo, cases proceed directly to plea or trial. This should afford the court the necessary time to obtain the information necessary to make an informed decision as to whether a juvenile or adult sentence is appropriate. Counsel should adapt favorable case law on transfer hearing issues to fit the exigencies of the new system. Drawing on the transfer hearing model may help counsel convince the court that youthful offender sentences entailing DYS commitment to age twenty-one and/or combined DYS and suspended adult terms are consistent with the "present and long term public safety."[265] Under the transfer hearing system, the courts considered the limits of the time available for treatment within the juvenile system.[266] Counsel should argue that the Youthful Offender Act extending DYS jurisdiction to age twenty-one creates a more significant treatment window and addresses public safety concerns.

Important issues that may arise in youthful offender sentencing include:

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[263] St. 1996, c. 200, § 5, replacing G.L. c. 119, § 58. The actual statutory wording, which requires notice and filing of the report seven days prior to "sentencing" presumably refers to the sentencing hearing.

[264] St. 1996, c. 200, § 5, replacing G.L. c. 119, § 58.

[265] See, e.g., Commonwealth v. Clifford C., 415 Mass. 38 (1993) (court entitled to consider DOC portion of split murder sentence provision as ameliorating factor).

[266] See, e.g., Commonwealth v. O'Brien, 423 Mass. 841 (1996) (court looks to age of majority as time frame for response to treatment to determine amenability to rehabilitation). But note, Commonwealth v. Clifford C., 415 Mass. 38 (1993). See also Ward v. Commonwealth, 407 Mass. 434 (1990) (successful rehabilitation required treatment beyond juvenile's 18th birthday; transfer upheld).

1. *Pre-hearing evaluation:* Counsel has the option of moving for funds for an independent expert evaluation of the child's prospects for rehabilitation in DYS custody. While the word *rehabilitation* has been removed from the statute, a child's projected response to DYS treatment designed to attenuate danger factors by age twenty-one will be scrutinized during the sentencing hearing. As in the context of Part B transfer hearings, counsel should advise the client not to waive the privilege against self-incrimination until and unless counsel has decided to introduce independent forensic testimony.[267] Juvenile probation plays a key role in sentencing given the requirement that a pre-sentence investigation (PSI) report be filed within seven days of the hearing.[268] Counsel must ascertain whether the probation officer assigned to prepare the PSI will question the juvenile defendant regarding the facts and circumstances of the offense. Difficult tactical decisions must be made which are exacerbated by the right of the defendant to offer a defense-capped plea.[269] Although Mass. R. Crim. 12(6)(f) provides that evidence of a guilty plea later withdrawn or statements made in connection with, and related to, the plea cannot be used in any civil or criminal proceedings against the person who made the plea or offer, absent a judicial order and/or agreement with the prosecution, it appears that inculpatory statements made to probation officers during the PSI are not treated similarly.

2. *Burden of proof:* In contrast with the Commonwealth's burden in transfer hearings to prove dangerousness and non-amenability to rehabilitation, c. 200 of the Acts of 1996 does not require the Commonwealth to prove either. Nor does the Act explicitly require defense counsel to prove that public safety would be best protected by a DYS commitment, but some judges might take that view. Prior to the imposition of sentence, counsel is obligated to avail herself of the "opportunity to speak on behalf of the defendant and to present any information in mitigation of punishment."[270] Counsel should argue that the traditional presumption favoring rehabilitative treatment still exists, and that the Commonwealth has the burden to prove otherwise in any particular case. After all, G.L. c. 119, § 53 has not been repealed. Relevant standards proposed by the IJA-ABA Juvenile Justice Project should also be discussed.[271] The availability of DYS jurisdiction until age twenty-one, which increases the time for rehabilitative

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[267] See supra § 49.75; Commonwealth v. Wayne W., 414 Mass. 218 (1993).

[268] G.L. c. 119, § 58(c), amended by St. 1996, c. 200, § 5.

[269] G.L. c. 119, § 55B: "If a plea, with an agreed upon recommendation or with a disposition request by the child, is tendered, the court shall inform the child that it will not impose a disposition that exceeds the terms of the agreed upon recommendation or the disposition request of the child, whichever is applicable, without giving the child the right to withdraw the plea." See Commonwealth v. Pyles, 423 Mass. 717 (1996) (G.L. c. 278, § 18, which provides that defendant may tender guilty plea with request for specific disposition, is valid exercise of legislative authority and does not improperly infringe on executive power of district attorney).

[270] Mass. R. Crim. P. 28(b).

[271] IJA-ABA Juvenile Justice Standards Project, Standards Relating to Counsel for Private Parties, Transfer Between Courts, 2, 6, 7, 11 (1982). "The stakes are high. The adult accused of murder, rape or armed robbery can be punished with life imprisonment in most jurisdictions, in some with death. . . . Only extraordinary juveniles in extraordinary factual situations should be transferred to the criminal court and then only in accordance with precise and exacting behavioral standards." Id. at 2.

treatment, should enhance these arguments.[272] Transfer hearing law is relevant. In *A Juvenile v. Commonwealth*, the court stressed that non-criminal treatment is favored and transfer is warranted only by exceptional circumstances, and that transfer should not be predicated only on the seriousness of the charge and/or dangerousness.[273] The Supreme Judicial Court, has noted that "we do not minimize the defendant's interest in remaining within the juvenile system. . . . The Commonwealth, however, has an equally compelling interest in seeing the public protected from the early release of a dangerous and uncontrollable youth."[274] While it is not appropriate to base decisions to treat juveniles as adults on the seriousness of the offense alone, the nature of the offense is a significance factor in assessing rehabilitative potential.[275]

3. *Evidentiary hearing:* As discussed *supra*, the Youthful Offender Act does not allocate the burden of proof to either party. Some courts might interpret the law to require no more elaborate a procedure than typically occurs in criminal cases pursuant to Mass. R. Crim. P. 28(b): a PSI report, arguments by counsel, and the imposition of sentence. In asserting a right to a full evidentiary hearing, analogous to a Part B transfer proceeding, it is important to invoke the language of Rule 28(b) affording counsel an opportunity to speak on behalf of the defendant *and to present any information in mitigation of punishment.* In addition, the Act contemplates a hearing.[276] This is the opportunity for the defendant and the Commonwealth to present testimonial and documentary evidence. Hearsay evidence is admissible unless it is fundamentally unfair to admit it because it is untrustworthy or prejudicial.[277]

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[272] Cf. Commonwealth v. Clifford C., 415 Mass. 38 (1993); Commonwealth v. Perry P., 36 Mass. App. Ct. 914 (1994), S. C. 418 Mass. 808 (1994) (assumption, supporting finding of amenability to rehabilitation within juvenile system, that correctional system will respond to new statute by developing therapeutic programs, now lacking, for older juveniles).

[273] A Juvenile v. Commonwealth, 370 Mass. 272, 282 (1976). See also A Juvenile v. Commonwealth, 380 Mass. 552, 561 (1980), implying that first-time offenders should not be transferred. Later legislation created a rebuttable presumption of dangerousness and non-amenability to rehabilitation in cases involving murder, manslaughter, assault with intent to rob or murder while being armed, rape by force or threat, rape of a child under 16, armed burglary and kidnapping. G.L. c. 119, § 61 (as amended by c. 267 of the Acts of 1990 and c. 488 of the Acts of 1991). The standard of proof in those cases was reduced from clear and convincing evidence (the normal standard in a transfer hearing) to preponderance of the evidence. See Commonwealth v. Wayne W., 414 Mass. 218, 222–26 (1993) (rejecting federal and state constitutional due process and equal protection challenges to both rebuttable presumption and preponderance standard in murder cases; juvenile treatment for violent juvenile offenders is legislatively conferred; there is no inherent right to be tried as juvenile, but principles of fairness must be applied in juvenile proceedings). Even in hearings subject to the rebuttable presumption of dangerousness and nonamenability to rehabilitation the burden of proof remained on the Commonwealth. See Commonwealth v. O'Brien, 423 Mass. 841 (1996).

[274] Commonwealth v. Wayne W., 414 Mass. 218, 224–25 (1993).

[275] Commonwealth v. Costello, 392 Mass. 393 (1984); Ward v. Commonwealth, 407 Mass. 434 (1990).

[276] St. 1996, c. 200, § 5, replacing G.L. c. 119, § 58, requires the PSI to be filed within seven days of the hearing.

[277] Commonwealth v. Watson, 388 Mass. 536, 540 (1983) (test for admissibility is fundamental fairness, "and not the application of rules of evidence concerning the admission of hearsay"), cited approvingly in Commonwealth v. Spencer, Appeals Court No. 96-P-0669 (June

4. *Adequate opportunity to prepare for hearing:* Although elimination of the time-consuming pretrial transfer hearing and the abolition of trial de novo should serve to streamline the system, counsel has to obtain sufficient resources to participate fully and effectively in the sentencing recommendation hearing. This requires adequate preparation time and access to funds. Counsel should start preparing for the contingency of a sentencing hearing at arraignment. The language of St. 1996, c. 200, § 5 requiring advance notice to the parties of the PSI report, suggests the importance of preparing for the hearing. As discussed previously, counsel may employ G.L. c. 261, §§ 27A–27D (independent forensic assessments).

Preparation also requires obtaining releases at arraignment in order to access client and family records from schools, agencies, and treatment providers. Preparation for trial and disposition should be conducted contemporaneously. This includes aggressive investigation, exploring potential forensic issues, and engaging in motion practice. The unprepared attorney, fearing indictment and the increased "exposure" that entails, may compromise the interests of clients by prematurely counseling them to accept deals and offer changes of plea.

To protect the confidentiality of all parties involved in such hearings, all hearings conducted under G.L. c. 119, § 1-37 are closed to the general public.[278] To maintain this confidentiality, no names of the persons before the court in such hearings shall be published.[279] All case records and reports are to remain confidential and as property of the court.[280] The only exception occurs in the context of DNR requests (do not resuscitate hearings). In the concurring opinion of In Re Care and Protection of Sharlene, 455 Mass. 756 (2006), Judge Spina with Judge Cowin joining in opinion raised the issue of whether a judicial hearing on a petition to withdraw life support systems from a child should be closed to the public simply because it was in the context of a care and protection hearing. The concurring Judges found that although the Commonwealth has a legitimate interest in protecting children from the stigma that may be associated with having parents that are accused to be unfit, a DNR hearing does not address nor carry that stigma.[281] The main issue in a DNR hearing is whether the Commonwealth should remove life support by way of substituted judgment.[282] Given that the judicial branch of government is given the authority to decide whether it is in the best interest of the child to remove life support, assurance must be sought.[283] By opening a DNR hearing to the public, the public can seek assurance that termination of life is being sought because it is in the best interest of Child and concealment of foul

5, 1998) (admission at transfer hearing of hearsay evidence regarding another case upheld). See also Commonwealth v. O'Brien, 423 Mass. 841 (1996).

[278] G.L. c. 119, § 38.

[279] G.L. c. 119, § 38.

[280] G.L. c. 119, § 38.

[281] In Re Care and Protection of Sharlene, 455 Mass. 756, 774-775 (2006) (Spina, J., concurring),

[282] In Re Care and Protection of Sharlene, 455 Mass. 756, 774 (2006) (Spina, J., concurring)

[283] In Re Care and Protection of Sharlene, 455 Mass. 756, 775 (2006) (Spina, J., concurring)

play or saving expenses is not the cause of asking for termination.[284] Based on this concurring opinion, G.L. c. 119, § 38 was amended in 2008, allowing for DNR hearings in the context of a care and protection case to be open the public.[285]

Trial first and open courtrooms carry certain imperatives for defense counsel, prosecutors, and judges. Hopefully, these innovations will enhance public awareness of the complexities of the cases heard in juvenile court and will raise the level of practice in juvenile sessions.

[284] In Re Care and Protection of Sharlene, 455 Mass. 756, 775 (2006) (Spina, J., concurring)

[285] St. 2008, c. 176, § 89.