Chapter 39

Appeal and Post-Disposition Proceedings

§ 39.01 SCOPE OF THE CHAPTER

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

§ 39.02 APPELLATE REVIEW

§ 39.02(a) The Right To Appeal

Juvenile court statutes typically give the respondent a right to appeal an adjudication of delinquency. *See, e.g.,* COLO. REV. STAT. § 19-2-903(1) (2016); IND. CODE ANN. § 31-32-15-1 (2016); TEX. FAM. CODE ANN. § 56.01 (2016). *See also In the Interest of A.K.*, 825 N.W.2d 46, 49-52 (Iowa 2013) (notwithstanding the state legislature's revision of the juvenile code to eliminate the requirement that "delinquency proceedings . . . be tried in equity," which had been the basis for appellate review of delinquency adjudications "de novo, as in all equity cases," the Iowa Supreme Court rejects the state's argument for uniform standards of appellate review in juvenile and adult criminal cases, and instead preserves "our de novo standard of review of the sufficiency of the evidence for juvenile adjudications" because this higher standard for juvenile appeals appropriately recognizes the differences between juvenile and adult proceedings, including the lack of a jury trial right in juvenile delinquency cases). If a State allows appeals of criminal convictions, a juvenile respondent who is not given a statutory right to appeal may be able to contend that this disparate treatment violates the equal protection of the laws. *See, e.g., In re Brown,* 439 F.2d 47 (3d Cir. 1971); *In the Matter of Arthur N.,* 36 Cal. App. 3d 935, 112 Cal. Rptr. 89 (1974).

The scope of appellate review encompasses, generally, all properly preserved claims of error in the pretrial and trial rulings of the judge, "plain" or fundamental errors even though not properly preserved (*see*, *e.g.*, *Henderson v. United States*, 133 S. Ct. 1121 (2013)), and the sufficiency of the evidence to support an adjudication of delinquency, within the normal restrictions of appellate evidentiary review (*see generally* JONATHAN H. PURVER & LAWRENCE TAYLOR, HANDLING CRIMINAL APPEALS (1980 & Supp.)).

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

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

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

Some statutes explicitly provide for the preparation of a free transcript of the trial for use on appeal when the respondent is indigent. *See, e.g.,* CAL. WELF. & INST. CODE § 800(d) (2016). Even when this is not provided by statute, the Fourteenth Amendment requires that a State provide indigent criminal defendants and juvenile respondents with free transcripts on both direct and collateral criminal appeals (*e.g.*, *Draper v. Washington*, 372 U.S. 487 (1963); *Long v. District Court*, 385 U.S. 192 (1966); *Gardner v. California*, 393 U.S. 367 (1969); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Mayer v. City of Chicago*, 404 U.S. 189 (1971); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 107, 110-12 (1996) (discussing the *Griffin-Mayer* line of precedent); *compare United States v. MacCollom*, 426 U.S. 317 (1976)), and that filing fees be waived in both appeals and collateral-attack proceedings (*Burns v. Ohio*, 360 U.S. 252 (1959); *Smith v. Bennett*, 365 U.S. 708 (1961); *see also Halbert v. Michigan*, 545 U.S. at 610-11; *M.L.B. v. S.L.J.*, 519 U.S. at 111 & n.4).

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

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

Counsel should arrange to obtain the trial transcript for use on appeal. If local practice does not provide for the filing of the transcript as a matter of course and if the respondent is indigent, counsel should move the trial court to order the transcript prepared at public expense. See § 39.02(b) *supra.* Upon receiving the transcript, counsel should check it for accuracy. Ordinarily court rules allow several days after filing of the transcript with the clerk of court for counsel to file proposed amendments to it or exceptions to its accuracy. Prodigious trial notes by counsel are a valuable aid in having the transcript corrected. There are often inadvertent errors in transcripts; there may even be intentional errors or omissions, since some judges' stenographers take down what they know their judge meant to say rather than what the judge actually said, or they omit remarks made by the judge that they know the judge would not want in the record.

If the respondent has been ordered incarcerated, counsel should give consideration to the possibility of seeking his or her release pending appeal. In most jurisdictions the trial court has discretion to order a respondent released pending appeal, *see, e.g.,* CAL. WELF. & INST. CODE § 800(a) (2016); and in jurisdictions that permit bail for juveniles, the trial court usually has the option of allowing either release or bond pending appeal, *see, e.g.,* TEX. FAM. CODE ANN. § 56.01(g) (2016); WASH. REV. CODE ANN. § 13.40.230(5) (2016). A judge may be particularly amenable to releasing the respondent pending appeal in a case in which the conviction turned upon the resolution of a novel legal issue and the judge is uncertain about the validity of that resolution.

If counsel does not intend to represent an adjudicated respondent in appellate proceedings, counsel should promptly inform the respondent and his or her parent of (1) the respondent's right to appellate review (including the right to proceed at state expense if the respondent cannot afford to pay filing fees, costs, or the price of a transcript (see § 39.02(b)); (2) the time within which any actions necessary to obtain appellate review must be taken and what those actions are; (3) the realistic likelihood of success in appellate review proceedings, as counsel sees it; (4) the fact that counsel will not be representing the respondent in appellate review proceedings; (5) the fact that other counsel can be retained by the respondent to represent him or her on appeal; (6) the fact that if the respondent cannot afford to retain other counsel, a lawyer will be appointed by the court to represent him or her in at least the first appellate review

proceeding as of right (see *id*.); and (7) the actions that the client needs to take to obtain appointment of new counsel. Unless the respondent does not want to appeal or is able to obtain other representation immediately, counsel should take the steps necessary to perfect appellate jurisdiction within the required times. *See Roe v. Flores-Ortega*, 528 U.S. 470, 478-81 (2000) (defense counsel's failure to consult with the client about the decision whether to appeal constitutes ineffective assistance of counsel whenever there are nonfrivolous grounds for appeal or the client has indicated any interest in taking an appeal); *id*. at 479 (recognizing that state law may "impose[ ] on trial counsel a *per se* duty to consult with defendants about the possibility of an appeal"); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-9.1(a)-(c) (4th ed. 2015). Counsel's advice to the respondent and any action taken on the respondent's behalf, together with the respondent's expressed intention to appeal, not to appeal, or to seek other representation, should be memorialized in detail in a letter to the respondent. Counsel should keep a file copy of this letter, together with any explanatory notes or memoranda that are necessary to preserve a record of counsel's judgments and reasoning in regard to an appeal.

§ 39.03 COLLATERAL REVIEW

§ 39.03(a) State Postconviction Remedies

Most States have established some form of procedure by which adult criminal convictions may be attacked following affirmance on direct review or expiration of the time for direct review. The procedure may involve the use of one of the traditional writs, such as *habeas corpus* or *coram nobis,* in common-law or statutory form, or it may involve a modern postconviction hearing procedure prescribed by statute or rule of court.

The vast majority of state courts have recognized that these adult collateral-review procedures are equally available to juveniles in delinquency cases. *See, e.g., Sult v. Weber,* 210 So. 2d 739, 749 (Fla. App. 1968) ("[t]he motion for relief in the nature of coram nobis is available in the juvenile courts of this state . . . [even] without a declaratory rule authorizing it"); *E.C. v. Virginia Dep't of Juvenile Justice*, 283 Va. 522, 529-30, 536-37, 722 S.E.2d 827, 830-31, 835 (2012) (lower court erred in dismissing the adjudicated delinquent's petition for a writ of habeas corpus: the court had jurisdiction because "the petitioner was detained for purposes of habeas corpus when the petition was filed," and "[t]hat jurisdiction did not end because E.C. was released from detention during the course of the proceeding"; E.C.'s release from confinement also did not render the state postconviction petition moot because he continues to be subject to collateral consequences of the adjudication, including a sex offender registration requirement, the risk of the adjudication's serving as a predicate for enhanced sentencing in a future case, and limitations on future ownership and transportation of a firearm). *Compare A.S. v. State*, 923 N.E.2d 486, 489-90 (Ind. App. 2010) ("[p]ost-conviction procedures are not available to challenge a juvenile delinquency adjudication, which is civil in nature," but the juvenile could proceed instead under a court rule that provides a mechanism for seeking "relief from judgment").

State collateral-attack procedures are ordinarily limited to "fundamental" claims (that is, for the most part, constitutional claims) or claims whose presentation in the trial and direct-review proceedings was obstructed by the courts or prosecuting authorities or by circumstances beyond defense counsel's control (such as the unavailability of the facts on which the contentions rest) or was excusably overlooked by defense counsel. The procedures typically call for an application for relief from the judgment to be made to a trial court (often the conviction court) in the first instance and allow appellate review of its disposition. Following the state appeal (or if no appellate process is available under the State's postconviction procedure), the respondent may seek review of any federal questions by the Supreme Court of the United States, ordinarily on *certiorari*. In some jurisdictions the denial of a first postconviction petition does not act as *res judicata* to bar second and subsequent petitions, although doctrines of waiver or collateral estoppel may bar particular claims.

§ 39.03(b) Federal Habeas Corpus

A juvenile respondent who is adjudicated a delinquent in a state proceeding is also entitled to invoke federal habeas corpus remedies pursuant to 28 U.S.C. § 2241(c)(3) (2016) under the same circumstances as an adult criminal defendant. *See, e.g.*, *A.M. v. Butler*, 360 F.3d 787 (7th Cir. 2004); *United States ex rel. Murray v. Owens*, 341 F. Supp. 722, 723 (S.D.N.Y. 1972), *rev'd on other grounds,* 465 F.2d 289 (2d Cir. 1972). Before resorting to federal habeas corpus, the respondent must "exhaust" all state remedies. 28 U.S.C. § 2254(b), (c) (2016). This requires that the respondent "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate process," including any discretionary appeals that are an "established part of the State's appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). As a result of statutory changes effected by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal habeas corpus petition in a non-capital case generally must be filed within one year from the date on which the judgment of conviction and sentence became final upon completion of direct review (including *certiorari* proceedings in the U.S. Supreme Court), 28 U.S.C. § 2244(d)(1) (2016), and federal habeas corpus relief generally will not be granted unless the state court's adjudication of the claim was "contrary to . . . clearly established [Supreme Court] law" or "involved an unreasonable application of clearly established [Supreme Court] law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(1), (2) (2016).

Juveniles convicted of crimes in a federal court can utilize a postconviction remedy that is largely equivalent to the federal habeas corpus remedy available to state prisoners. The federal-prisoner remedy, which is authorized by 28 U.S.C. § 2255, is initiated by a motion to "vacate, set aside, or correct" a federal sentence. These motions are subject to AEDPA's one-year statute of limitations as well as various other AEDPA provisions, but are not governed by the AEDPA standard for adjudicating the merits of a state-prisoner habeas corpus petition summarized in the last sentence of the preceding paragraph.

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

§ 39.04 REVOCATION OF PROBATION

As explained in § 38.03(c) *supra,* an order of probation ordinarily contains a series of conditions requiring, for example, that the respondent abstain from further criminal conduct, attend school regularly, and meet periodically with a probation officer. If the respondent violates one or more of these conditions, his or her probation can be revoked, and s/he can be resentenced to incarceration (for a period up to the maximum term that could have been imposed at the original dispositional hearing) or to any other disposition that was available at the original dispositional hearing. (For a description of the range of dispositional alternatives, see § 38.03(c) *supra.*)

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

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

If a notice of violation is filed and revocation sought, the respondent has a due process right under *Gagnon v. Scarpelli,* 411 U.S. 778 (1973), to "two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his . . . [probation] and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision." *Id.* at 781-82. "At the preliminary hearing, a probationer . . . is entitled to notice of the alleged violations of probation . . ., an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. . . . The final hearing is a less summary one because the decision under consideration is

the ultimate decision to revoke rather than a mere determination of probable cause, but the 'minimum requirements of due process' include very similar elements: ¶ '(a) written notice of the claimed violations of [probation] . . .; (b) disclosure to the [probationer] . . . of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body . . .; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation] . . . .'" *Id.* at 786 (quoting *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972)). *See also Black v. Romano*, 471 U.S. 606, 611-12 (1985) (describing the requirements established in *Gagnon*, *supra*); *United States v. Johnson*, 710 F.3d 784, 788-89 (8th Cir. 2013) (the district court violated the defendant's due process "'right to confront and cross-examine adverse witnesses'" at a revocation hearing by relying on a police report – which contained the defendant's confession to a new crime – without requiring that the prosecution at least provide an adequate explanation for its failure to present testimony by "the arresting officer, or another officer who was present when the confession was made").

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

Although the Court's announcement of these due process requirements in *Gagnon* took place in the context of an adult probation revocation proceeding, they clearly apply to juvenile proceedings as well. *See, e.g.*, *K.W.J. v. State*, 905 So. 2d 17 (Ala. Crim. App. 2004); *B.S. v. State*, 886 So. 2d 1062 (Fla. App. 2004); *State v. Doe,* 104 N.M. 107, 717 P.2d 83 (N.M. App. 1986); *G.G.D. v. State,* 97 Wis. 2d 1, 292 N.W.2d 853 (1980); *State ex rel. E.K.C. v. Daugherty,* 298 S.E.2d 834 (W. Va. 1982). Several jurisdictions have codified the requirements in their juvenile court acts, *see, e.g.,* ILL. COMP. STAT. ANN. ch. 705, § 405/5-720 (2016); N.Y. FAM. CT. ACT § 360.3 (2016); WASH. REV. CODE ANN. § 13.40.200(2) (2016), or juvenile court rules, *see, e.g.,* D.C. SUPER. CT. JUV. RULE 32(i) (2016).

Some statutes and rules or the state cases construing them expand the panoply of safeguards required by the federal constitutional guarantee of due process. For example, while the Court in *Gagnon* treated the right to counsel as conditional and dependent upon the facts of the case, a number of jurisdictions confer an automatic entitlement to counsel at a probation revocation hearing. *See, e.g.,* D.C. SUPER. CT. JUV. RULE 32(i)(3) (2016); N.Y. FAM. CT. ACT § 360.3(4) (2016); *K.E.S. v. State,* 134 Ga. App. 843, 216 S.E.2d 670 (1975). And although some courts have held that the due process prescriptions of *Gagnon* permit revocation to be based upon

the prosecutor's proof of a violation by a mere preponderance of the evidence (*see, e.g., In the Matter of Belcher,* 143 Mich. App. 68, 371 N.W.2d 474 (1985), *appeal denied,* 424 Mich. 863 (1985); *In the Matter of Gregory M.,* 131 Misc. 2d 942, 502 N.Y.S.2d 570 (N.Y. Fam. Ct. 1986); *see also In re Eddie M.*, 31 Cal. 4th 480, 508, 73 P.3d 1115, 1132, 3 Cal. Rptr. 119, 140 (2003) (rejecting a due process challenge to a statute authorizing revocation of probation on a preponderance of the evidence for a "probation violation 'not amounting to a crime'")), several States require proof beyond a reasonable doubt (*see, e.g., People ex rel. C.B.,* 196 Colo. 362, 585 P.2d 281 (1978); *T.S.I. v. State,* 139 Ga. App. 775, 229 S.E.2d 553 (1976); *cf.* D.C. SUPER. CT. JUV. RULE 32(i)(3) (2016) (beyond-a-reasonable-doubt standard applies to revocations based on a new crime; preponderance standard applies to revocations based on technical violations)) or the intermediate standard of clear and convincing evidence (*see*, *e.g., In the Interest of C.E.E. v. Juvenile Officer,* 727 S.W.2d 451 (Mo. App. 1987); *but see C.L.B. v. Juvenile Officer*, 22 S.W.2d 233, 239 (Mo. App. 2000) (if probation revocation proceeding is used as "a forum for an adjudication of guilt of an act which would be a crime if committed by an adult, with all the collateral consequences of a conviction of that offense," then the "beyond a reasonable doubt standard" must be applied)).

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

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

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

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

As noted in § 38.03(c) subdivision (3) *supra*, probation revocation for failure of a respondent to pay a fine or restitution is subject to the restriction imposed by *Bearden v. Georgia,* 461 U.S. 660, 672-73 (1983), which requires that the "sentencing court . . . inquire into the reasons for the failure to pay. . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment." *See also, e.g., People in the Interest of C.J.W.,* 727 P.2d 870 (Colo. App. 1986); *M.L. v. State*, 838 N.E.2d 525, 529-30 (Ind. App. 2005); WASH. REV. CODE ANN. § 13.40.200(2) (2016); *and see In re Timothy N.*, 216 Cal. App. 4th 725, 736-38, 157 Cal. Rptr. 3d 78, 86-88 (2014).

§ 39.05 REVOCATION OF PAROLE

A respondent who completes a period of incarceration and is then released on parole (called "aftercare" in some jurisdictions) is subject to the revocation of parole for violation of the conditions set by the administrative agency that oversees parole. (In various jurisdictions this agency may be named the "Division for Youth," the "Youth Authority," the "Department of Human Services," and so forth.) If parole is revoked, the respondent is returned to incarceration for a term that differs among the jurisdictions.

In some jurisdictions a statute or court rule specifies a maximum term. In other jurisdictions the respondent can be incarcerated for an indeterminate period, and the agency

determines when release is appropriate. Technically, the indeterminate period of incarceration is limited by the date that the judge originally set at disposition as the end of the period of "commitment" or "placement," but many jurisdictions allow the agency to petition the court for an extension of the original term. See § 39.06 *infra.* Moreover, in some jurisdictions, the original term of commitment or placement automatically extends until the youth has turned 18 or 21.

The procedural due process requirements that govern juvenile probation revocation hearings (see § 39.04 *supra*) also govern juvenile parole revocation hearings. *Morrissey v. Brewer,* 408 U.S. 471 (1972); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 989-93 (9th Cir. 2010). *See, e.g.,* WASH. REV. CODE ANN. § 13.40.210(4)(a) (2016); *L.H. v. Schwarzenegger*, 519 F. Supp. 2d 1072, 1081-85 (E.D. Cal. 2007); *In re Kimble*, 114 Ohio App. 3d 136, 142, 682 N.E.2d 1066, 1069 (1996); *State ex rel. J.R. v. MacQueen,* 163 W. Va. 620, 259 S.E.2d 420 (1979); *State ex rel. R.R. v. Schmidt,* 63 Wis. 2d 82, 216 N.W.2d 18 (1974). *See also Young v. Harper*, 520 U.S. 143, 144-45, 147-48, 152-53 (1997) (applying *Morrissey*'s protections to a pre-parole program which releases prisoners to relieve overcrowding, and which is therefore "a kind of parole as we understood parole in *Morrissey*").

Many of the defense arguments and strategies suggested in § 39.04 for use in probation revocation hearings also apply to parole revocation hearings. In localities where parole revocation hearings are conventionally held before a judge of the juvenile court rather than before the agency, there may be a statutory basis for arguing that only the agency has jurisdiction to conduct the hearing. *See, e.g., In the Matter of J.M.W.,* 411 A.2d 345 (D.C. 1980). Of course, this argument should not be made unless counsel is confident that the respondent's chances for avoiding parole revocation are better with an agency decisionmaker than with the judge. Generally, the respondent will fare better before a judge because the agency is likely to respect the parole officer's recommendation of revocation. However, if the juvenile correctional facility is overcrowded, the respondent's chances of escaping reincarceration may be better with an agency decisionmaker; the agencies are often more responsive to "bed pressure" than is the judiciary.

§ 39.06 EXTENSION OF A TERM OF INCARCERATION

In some jurisdictions a respondent who has been committed for a period of incarceration can be subjected to annual extensions of the commitment until the respondent turns 18 (or, in some jurisdictions, 21) on the grounds of additional need for rehabilitation or continuing need to protect the public. *See, e.g.,* D.C. CODE ANN. § 16-2322(c) (2016); N.Y. FAM. CT. ACT § 355.3 (2016). *Cf. Kenniston v. Department of Youth Services*, 453 Mass. 179, 180, 185, 187 & n.13, 900 N.E.2d 852, 855, 858, 860 & n.13 (2009) (statute authorizing "the continued commitment of a youth in the [Department of Youth Services'] custody for an additional three years after the youth's eighteenth birthday if the department determines that the youth 'would be physically dangerous to the public'" violates substantive due process because the statute "permits extended detention based solely on dangerousness, without any link to a mental condition or defect or an inability to control one's behavior"; moreover, "the statutory requirement that a juvenile be found

'physically dangerous' is unconstitutionally vague" because the "language contains no indication of the nature and degree of dangerousness that would justify continued commitment, and offers the department no guidance on how to make such a determination," which can be affected by "the differences in adolescent and adult decision-making and thought processes, and the additional difficulty these differences create for testing tools designed to assess an adolescent's risk of future dangerousness"); *In the Matter of Michael J.*, 180 Misc. 2d 538, 540-41, 691 N.Y.S.2d 277, 278-79 (N.Y. Fam. Ct., Monroe Cty. 1999) (a respondent who is the subject of a proceeding for an extension of placement "retains certain due process protections, including the right to notice of the hearing" – and accordingly is entitled to a "clear statement[ ] as to the bases for the request to continue his placement" – and the rights to "be present with counsel and have an opportunity to refute the petition"); *State in the Interest of J.J.*, 427 N.J. Super. 541, 557, 49 A.3d 877, 888 (2012) (when the State seeks to invoke a state statutory procedure for transferring an incarcerated juvenile over the age of 16 from a juvenile facility to an adult correctional facility based on a "'threat[ ] [to] the public safety'" or other "security" needs, due process requires, "[a]t a minimum," "written notice of the proposed transfer and the supporting factual basis, an impartial decision maker, an opportunity to be heard and to present opposition, some form of representation, . . . and written findings of fact supporting a decision to proceed with the transfer"); *and see Foucha v. Louisiana*, 504 U.S. 71 (1992); *Kansas v. Crane*, 534 U.S. 407 (2002). Practice differs widely among the jurisdictions with regard to how frequently the extension process is actually invoked. In some jurisdictions it is routinely used to extend the terms of large numbers of delinquents who are thought to need further rehabilitation. In other jurisdictions the authorities have reacted to chronic overcrowding in juvenile facilities by reserving the extension option for children who appear to be most severely in need of continued treatment or whose crime or behavior in the institution leads to their being branded as unusually dangerous.

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

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

As explained in §§ 38.24 and 38.29 *supra,* counsel should ordinarily request that a disposition order placing a respondent in an institutional facility specify the educational, vocational, and other rehabilitative services that the facility must provide the respondent. After the respondent is in the institution, counsel should keep in touch with him or her and ascertain

whether s/he is receiving the specified services. If s/he is not, counsel can usually correct the situation by telephoning the administrator of the facility, explaining the problem, and advising the administrator that counsel will seek judicial enforcement of the disposition order unless the services it calls for are initiated promptly. If this does not produce a satisfactory outcome, counsel can file a motion for an order to show cause why the agency should not be held in contempt for failing to honor the court's disposition order.

When the reason for the failure to provide a respondent with the required services is that the facility lacks adequate resources (for example, in the case of a facility that cannot comply with an order for special education services because its teachers are not certified to teach special education or because it is understaffed), counsel may be able to persuade the court that the respondent should be released from incarceration. In many jurisdictions the juvenile code provides for modification or termination of a disposition of commitment, *see, e.g.,* CAL. WELF. & INST. CODE § 778 (2016); D.C. CODE ANN. § 16-2324(a) (2016); N.Y. FAM. CT. ACT § 355.1(1)(b) (2016), and counsel can argue that this relief is appropriate when the facility is unable to provide the services that the judge found were needed and that the respondent's commitment to the facility was intended to procure. The motion should assert that the respondent has a due process right to treatment and, where applicable, a statutory right to treatment under the state's juvenile code. *See, e.g., Nelson v. Heyne,* 491 F.2d 352 (7th Cir. 1974); *Alexander S. By and Through Bowers v. Boyd*, 876 F. Supp. 773 (D. S.C. 1995); *Pena v. New York State Division for Youth,* 419 F. Supp. 203 (S.D.N.Y. 1976), *approved in* 708 F.2d 877 (2d Cir. 1983); *but see Santana v. Collazo,* 714 F.2d 1172 (1st Cir. 1983). *See generally* Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791 (1995). If state law makes no provision for the modification or termination of commitment or if relief is not likely to be obtained through those procedures, counsel can file a petition for habeas corpus seeking the release of the respondent on the ground that the institution is violating his or her constitutional right to treatment. *See Creek v. Stone,* 379 F.2d 106, 109 (D.C. Cir. 1967) (recognizing that a juvenile respondent can petition for habeas relief on the ground that the conditions in the detention facility "vitiate the justification for confinement").

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

§ 39.08 SEALING AND EXPUNGEMENT OF CONVICTION RECORDS

Several States provide for "sealing" the records of a juvenile conviction after the respondent has attained the age of majority or after the respondent, although still a juvenile, has

remained crime-free for a specified period of time. *See, e.g.,* CAL. WELF. & INST. CODE § 781 (2016); D.C. CODE ANN. § 16-2335 (2016); OHIO REV. CODE ANN. § 2151.358 (2016). *See generally* RIYA SAHA SHAH, LAUREN FINE & JAMIE GULLEN, JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT (Juvenile Law Center 2014). Some States also provide for expungement of conviction records after a certain length of time or upon the respondent's attaining the age of majority. *See, e.g.,* CAL. WELF. & INST. CODE §§ 826-826.5 (2016); CONN. GEN. STAT. ANN. § 46b-146 (2016); *In the Matter of the Petition of C.B.*, 122 P.3d 1065 (Colo. App. 2005); *Nelson v. State*, 120 Wash. App. 470, 85 P.3d 912 (2003). *See generally* SHAH, FINE & GULLEN, *supra*. Expungement is also an available remedy after a conviction has been vacated in collateral-review proceedings, including federal *habeas. See, e.g., Gall v. Scroggy*, 603 F.3d 346 (6th Cir. 2010). ("Expungement" ordinarily entails the physical destruction of the records. "Sealed" records continue to be maintained but are placed in a separate file area rendered inaccessible except under specified extraordinary circumstances.) The sealing and expungement mechanisms may be automatic, or counsel may have to file a motion for a court order activating them. (See also § 37.03 *supra,* dealing with procedures for expunging court and police records in cases in which the respondent was acquitted at trial or in which the charges were dismissed without a trial.)