Chapter 14

Guilty Pleas

Part A. Introduction

§ 14.01 GUILTY PLEAS IN JUVENILE COURT

In all jurisdictions a juvenile respondent can enter a guilty plea in a delinquency case, just as an adult defendant can in a criminal case. Many of the standards and procedures for entry of a guilty plea in juvenile court are identical to those followed in adult criminal court. But there are some significant differences, which will be highlighted in this introductory section and then discussed in greater detail in the sections that follow.

The major difference between guilty pleas in adult court and guilty pleas in juvenile court is that one primary form of adult court plea bargaining – pleading to a lesser offense in order to reduce the maximum possible sentence to which the adult defendant is exposed – is inapplicable in the juvenile courts of most jurisdictions. The most common juvenile court statutory scheme empowers a judge at sentencing (or "disposition") to impose the same indeterminate sentence regardless of the nature or severity of the offense for which the respondent has been convicted (or to which the respondent has pled guilty). See § 38.03(c) *infra.* With what is perhaps the greatest single incentive for guilty pleas in adult court withdrawn, defense attorneys in juvenile court must consider and evaluate other potential advantages of guilty pleas. These include, for example, prosecutorial commitments to support a particular sentence. See § 14.06 *infra.*

Another significant difference between guilty pleas in adult and juvenile courts stems from the involvement of the parent in juvenile court pleas. It is clear in juvenile court, as it is in adult court, that the ultimate decision whether to plead guilty must be left to the client and that a defense attorney cannot plead a client guilty, or not guilty, against the client's will. *Cooke v. State*, 977 A.2d 803 (Del. 2009). *See McCoy v. Louisiana*, 138 S. Ct. 1500 (2018)*; Jones v. Barnes,* 463 U.S. 745, 751, 753 n.6 (1983) (dictum); *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013). Under this same logic the juvenile client's right to decide whether to plead guilty cannot be abrogated in favor of the client's parent. *Cf. Smith v. State,* 484 So.2d 560, 561 (Ala. Crim. App. 1986) (in *Miranda* context, court explains that just as attorney cannot waive client's rights against self-incrimination, parent cannot waive rights of his or her child); *In re S.W.T.,* 277 N.W.2d 507, 512-13 (Minn. 1979) (parent cannot waive *Miranda* rights of child); *In the Matter of Butts*, 157 N.C. App. 609, 614, 582 S.E.2d 279, 283 (2003) (a statute establishing procedures for police interrogation of juveniles "protects the rights of the juvenile, which his parent cannot waive on his behalf"). Indeed, the parent's interests or goals may often be antagonistic to those of the child (see § 4.04 *supra*), and thus the parent would be a highly suspect guardian of the child's right to choose between pleading guilty and contesting the case at trial. In some jurisdictions, however, a judge who accepts a plea from a juvenile must ensure that the child's parent is aware of the plea and acquiesces in the child's decision to forgo

the constitutional right to trial. See §§ 14.24, 14.26(a) *infra.*

§ 14.02 ORGANIZATION OF THE CHAPTER; TERMINOLOGY

This chapter will begin by examining the factors affecting the choice to plead guilty (§§ 14.03-14.12 *infra*) and will then discuss plea negotiations with the prosecutor (§§ 14.13-14.18 *infra*), counseling the client (and parent) on the decision whether to plead guilty (§§ 14.19-14.24 *infra*), procedures at the plea hearing (§§ 14.25-14.28), and procedures for subsequently withdrawing or challenging the validity of a guilty plea (§§ 14.29-14.31). Under a strictly chronological organization the topic of plea negotiations, of course, would precede a discussion of the criteria for assessing the plea offer that has been extracted through the negotiations. But since a cost-benefit analysis of the value of a plea must inform each step of counsel's work in this area, including preparation for the plea negotiation session, the cost-benefit analysis will be taken up first.

In many jurisdictions the term "admission" is employed in juvenile court as a euphemism for the term "guilty plea." This terminology reflects the notion that a juvenile cannot be found "guilty" of a "crime," and therefore can merely "admit" to the status of being a "juvenile delinquent." The term "guilty plea" nevertheless will be used in this chapter and throughout this book, since it provides the most accurate description of the actual process and consequences involved in a juvenile's entry of an "admission." The term "guilty plea" also avoids the confusion engendered by the use of the term "admission" for both confessions to the police and guilty pleas.

In several jurisdictions the term "disposition" is often used in both juvenile court and adult court as a substitute for the term "guilty plea." In order to avoid confusion with the "disposition" (sentencing) phase of a juvenile case, the term "disposition" will not be used in connection with guilty pleas and will be used solely to refer to a juvenile sentence.

Part B. The Decision Whether To Plead Guilty or Go to Trial: Factors To Consider in Developing and Evaluating a Potential Plea Bargain

§ 14.03 OVERVIEW OF THE COST-BENEFIT ANALYSIS INVOLVED IN DECIDING WHETHER TO PLEAD GUILTY OR GO TO TRIAL

The determination of the advisability of a guilty plea usually requires a complex cost-benefit analysis that takes into account: (i) the likelihood of winning the case at trial; (ii) the chances that the judge, in the event of conviction, would penalize the respondent at sentencing for going to trial and – in the judge's opinion – wasting the court's time and (if the respondent testifies) perjuring himself or herself on the witness stand; and (iii) a number of specific advantages that, in any particular case, could be gained through a guilty plea. For example, even a very likely victory at trial might be bartered away for the invaluable sentencing advantage, available in many jurisdictions, of probation without verdict (with the eventual outcome of dismissal of the case and expungement of arrest records). On the other hand, a juvenile

respondent could reasonably opt for trial even in the face of overwhelming prosecution evidence when a guilty plea is unlikely to produce any sentencing advantages or other benefits.

§ 14.04 ASSESSING THE LIKELIHOOD OF WINNING AT TRIAL

The threshold determination of the chances of acquittal at trial will require far more than a simple weighing of the relative strengths of the prosecution's and defense's theories of the case and supporting evidence. Counsel's calculus will have to incorporate a host of variables that are difficult to predict, such as the probable resolution of debatable issues of admissibility of specific evidentiary items, the odds of a prosecution or defense witness being unavailable at the time of trial, and the effect of the judge's application of a variety of presumptions and other legal doctrines.

§ 14.04(a) The Strength of the Case for the Prosecution

The first step is to analyze the strength of the prosecution's case from a dual perspective:

(a) How likely is the prosecution to establish a *prima facie* case (that is, to survive a defense motion to dismiss at the conclusion of the prosecutor's case-in-chief (see § 32.01 *infra*))?

and

(b) How likely is the prosecution to persuade the trier of fact to return a guilty verdict at the conclusion of the trial?

These two questions need independent consideration because the first is usually easier to answer than the second (judges being more predictable in their assessment of the sufficiency of evidence than in their assessment of its weight, and juries being less predictable than judges) and because, if the prosecution is unlikely to establish a *prima facie* case, all potential problems and uncertainties relating to defense evidence fall out of the calculus.

Counsel should begin by examining the Petition and listing all of the elements that the prosecution will need to prove in order to sustain each of the counts. Then, on the basis of the information that counsel has learned through discovery and investigation, counsel should analyze the prosecutor's ability to prove each of these factual elements with the witnesses, documents, and exhibits believed to be available to the prosecutor.

If counsel has learned through investigation that a prosecution witness will be out of town or otherwise unavailable on the trial date, counsel will need to predict whether the prosecutor will be able to obtain a continuance in order to secure the witness's presence, or whether the judge is likely to grant a defense motion to dismiss the case for want of prosecution. See § 15.03

infra. If counsel has learned through investigation that a prosecution witness is reluctant to come to court, counsel will need to predict whether the prosecutor will be able to compel the witness's attendance by successfully serving and enforcing a subpoena. Similarly, if counsel can predict that certain documents the prosecution needs will go missing – for example, in some jurisdictions, tape recordings of 911 calls, which the prosecution must turn over to the defense, are routinely erased before the time when the prosecutor gets around to requesting them from the police – counsel will have to evaluate whether the loss or destruction of those documents will cause the judge to grant a defense motion for sanctions such as dismissal of the case or preclusion of the testimony of prosecution witnesses about matters that would have been reflected in the lost document. See § 27.12(a) *infra.*

In analyzing the strength of the prosecution's case, counsel will need to consider both doctrinal rules relating to presumptions and permissive inferences, and the realistic likelihood that a trier of fact will find them persuasive. For example, on a charge of criminal possession of stolen property, the prosecutor may be able to survive a motion for a directed verdict by relying on the formal doctrine that a person who is in possession of recently stolen goods is presumed to know that the goods were stolen; but triers of fact are often unwilling to convict if nothing more than that is proven. See § 35.06(d) *infra.*

Analysis of the strength of the prosecution's case must also take account of factors that could discredit its witnesses or evidence. For example, when a prosecution witness has made statements to the police (recorded in police reports) or in pretrial hearings (the preliminary examination or a suppression hearing) or to the defense investigator (either an oral statement or, preferably, a written, signed statement), counsel will be able to use these statements to impeach the witness's inconsistent testimony at trial. See § 31.11 *infra*. If a prosecution witness has prior convictions, counsel may be able to impeach the witness's credibility with those. See § 31.12 *infra.* Or counsel may be able to undercut a prosecution based on forensic-science evidence by criticizing the methodology or competence of the prosecution's experts or debunking their purported field of specialization as fundamentally unreliable. See § 31.09 *infra*.

In addition to measuring the prosecution's probable case against the applicable burdens of proof – the *prima-facie*-evidence standard for surviving a motion to dismiss (see § 32.01 *infra*) and the beyond-a-reasonable-doubt standard for conviction (see §§ 35.03, 36.04 *infra*) – counsel needs to consider other evidentiary doctrines that can undercut that case. These include the missing-witness doctrine (see § 10.08 *infra*) and the rules relating to accomplice testimony (see §§ 35.04, 36.04 *infra*), and uncorroborated confessions (see §§ 35.04, 36.06 *infra*).

Counsel will not be in a position to conduct this kind of thorough evaluation of the prosecution's case until s/he has completed all or most of the defense investigation (see Chapter 8 *supra*) and the formal discovery process (see Chapter 9 *supra*). Counsel's analysis of the prosecution's theory of the case and of the persuasiveness of the evidence available to the prosecutor will be heavily dependent on counsel's study of police reports and witness statements. These documents usually set the upper boundary of what the prosecutor will be able to prove

convincingly at trial, because they can be used to impeach prosecution testimony that goes beyond them. They may also contain inconsistent statements that could turn the tide in favor of the defense at trial. Also, information about prior convictions of prosecution witnesses has to be obtained through defense investigation and discovery before counsel can make a sufficiently confident assessment of the prosecution's trial evidence to support the serious consideration of a guilty plea.

§ 14.04(b) The Strength of the Case for the Defense

In much the same way that counsel evaluates the prosecution's case, counsel will need to assess the strengths and weaknesses of the respondent's. After identifying all viable defense theories of the case (see Chapter 6), counsel should itemize the facts that must be proven to sustain each theory, the witnesses and exhibits available to prove each of these facts, their persuasiveness, and their vulnerabilities.

In analyzing the prosecution's charges, counsel will have already drawn up a list of the elements that the prosecution has to prove in order to make out a *prima facie* case. If counsel can successfully attack the prosecutor's proof on one or more of these elements, a motion for a directed verdict of acquittal at the close of the prosecution's evidence will be a central feature of the defense. Assuming contingently that the judge denies the defense motion, counsel will need to consider whether any of the loopholes in the prosecution's case can be widened to the point of acquittal through the presentation of defense witnesses. For example, a tenuous prosecution case on *mens rea* might be successfully undermined by the respondent's testimony that s/he did not possess the requisite mental state. Conversely, counsel's assessment of the odds of acquittal will need to weigh the danger that the presentation of defense evidence could strengthen an otherwise weak prosecution case. If the prosecution's case was doubtful in regard to both the identity and criminal *mens* of the perpetrator, the respondent's testimony disputing only the *mens* will foreclose a mistaken-identity defense in the endgame. See § 33.01 *infra.*

In addition to potential attacks on the prosecution's proof of the elements of the offenses it has charged (and their lesser included offenses, see § 36.05 *infra*), counsel will need to consider the availability of defenses such as alibi and self-defense. (For discussion of the differing burdens of proof that apply to defense theories, depending upon whether they are labeled "affirmative defenses," see § 35.05 *infra.*) In some cases, counsel will also need to consider mental defenses such as incompetency, insanity, and infancy. See §§ 12.19, 12.23 *supra* and § 17.04(b) *infra.* Assessing each possible theory of defense requires an analysis that is essentially a mirror-image of the one used to evaluate the prosecution's case: Counsel must itemize the elements of the defense, enumerate the facts necessary to establish each of these elements, identify the witnesses and exhibits necessary to prove each of the facts, and then assess their persuasiveness.

Here, too, counsel will have to take account of practical contingencies, such as the likelihood that defense witnesses will fail to show up for court. If counsel anticipates that a

defense witness may be out of town on the trial date or may be reluctant to testify, counsel will need to gauge the likelihood that the problem can be alleviated by securing a continuance or judicial enforcement of a subpoena.

Counsel also must consider whether any defense witnesses can be impeached with prior inconsistent statements or a prior record or other discrediting material. In this regard, counsel will need to be particularly concerned about the question of how the defense case will look if the respondent has priors and does – or, alternatively, does not – testify. If s/he takes the stand, state law usually allows the prosecutor to impeach him or her with prior convictions, prior bad acts, or both. See § 30.07(b) *infra.* If s/he does not take the stand, the trier of fact is supposed to obey the legal rule that no adverse inferences can be drawn from the respondent's failure to testify. The reality, however, is that fact-finders – not only juries but even judges in a bench trial – may well believe that the respondent's refusal to testify indicates guilt or at least the existence of detrimental information that the respondent is trying to conceal. In a bench trial, counsel must also consider the possibility that the judge may already know about, or will learn about, the respondent's prior record even if s/he does not take the stand, as a result of: (1) the judge's having presided over a prior hearing in the case or a prior case of the respondent's; (2) sloppy administrative procedures that counsel will not be able to correct (such as court jackets that indicate the docket numbers of the respondent's other cases); or (3) courthouse leaks (such as a bailiff mentioning the repeated court appearances of the respondent).

§ 14.04(c) Circumstances That Will May Prejudice the Trier of Fact Against the Respondent

In comparing the strengths of the competing cases for the prosecution and for the defense, counsel will need to factor in numerous variables that may undermine the objectivity of the trier of fact.

The most significant of these factors is the risk that jurors or the judge conducting a bench trial may feel distaste for, or outrage over, a particularly violent or repugnant crime. Hard drug offenses, violent sex crimes, and crimes involving gruesome injuries to the victim are likely to be viewed by fact-finders as peculiarly abhorrent. While many fact-finders have the capacity to appraise a respondent's case objectively even in the face of graphic, grisly evidence, there are others whose objectivity and ability to apply a reasonable-doubt standard will be overwhelmed by sheer disgust or by the fear of setting free a probable perpetrator of atrocities s/he may repeat.

The fact-finder's objectivity will frequently also be compromised in cases involving a particularly vulnerable victim, such as a young child or a senior citizen. The courtroom demeanor, behavior, and physical characteristics of the victim, the respondent, and potential prosecution and defense witnesses may well sway the fact-finder's judgment. And counsel's calculus must include the additional biases that may arise in cases involving interracial crimes.

The problem of the prejudice that is likely to attach to a respondent with a prior record

was mentioned in the preceding subsection. It is sufficiently important to require further discussion here. Local evidence rules may limit the impeachment of a testifying respondent to admission of a documentary record setting out the name[s] of the previous crime[s] of which s/he has been convicted, or they may authorize more or less detailed factual information about the prior[s]. Counsel must consider the probable impact of the name[s] or admissible facts of the crime[s] not only upon the trier's assessment of the respondent's credibility but upon the trier's impression of the respondent as a criminal *type* deserving less than the benefit of the doubt. (Sometimes the name of the crime is worse than the facts. When unscrupulous medical clinics staged automobile accidents to set up exaggerated insurance claims, the individuals to whom they paid a few dollars for crowding into the back seats of rear-ended vehicles were subsequently convicted of the crime of federal "health care fraud.")

In a bench trial, counsel also must consider whether the judge has prior knowledge of inadmissible evidence as a result of having presided over a pretrial suppression hearing or other pretrial proceeding. If, for example, a judge has suppressed a confession or tangible evidence in a pretrial hearing but then refuses to recuse himself or herself (see §§ 20.04-20.07 *infra*), s/he may be unable to put the illegal but incriminating evidence wholly out of mind.

The potential prejudicial impact of media reports of a crime is an additional factor for consideration. Newspaper, television and social-media accounts may have informed the fact-finder of damaging information that would be inadmissible in evidence at the trial on a not-guilty plea. Counsel cannot rely on theoretical rights to exclude biased jurors (see §§ 20.03(b), 21.03(a), 28.03(a) *infra*) and to recuse biased judges as fully effective protection against these dangers. In a bench trial, counsel also must bear in mind that many judges are highly sensitive to criticism in the media and are more likely to convict when an acquittal could expose them to adverse publicity.

Another danger that present legal rules signally fail to avert is that complainants and their supporters may pack the courtroom with manifestly grieving or outraged countenances. *See*, *e.g.*, *Carey v. Musladin*, 549 U.S. 70 (2006). Pervasive enactment of "victim's rights" legislation (*see, e.g.*, Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005); Anna Roberts, *Victims, Right?,* 42 CARDOZO L. REV. 1449 (2021)) has intensified this problem. *But see League of Women Voters of Pennsylvania v. DeGraffenreid*, 265 A.3d 207 (Pa. 2021) (invalidating a typical victim's rights package embodied in a constitutional amendment on the ground that it violated the state constitutional requirement that an amendment submitted to voters for a single vote be restricted to matters that are sufficiently interrelated to be viewed as a single subject).

To inform an assessment of the probable effects of these factors, counsel should gather as much information as is practicable about the views and biases of local judges and juries. If the respondent's case is not eligible for jury trial or if counsel is considering advising the respondent to elect a bench trial (see § 21.02(b) *infra*), counsel should try to get a sense of individual judges' proclivities and attitudes by talking with attorneys who have previously appeared before those

judges. (How early in the pretrial process the identity of the trial judge will be ascertainable depends on local court structures and practices. In some circumstances, counsel may be able to steer the trial to a favorable judge or away from an unfavorable one. See § 20.07 *infra;* see also § 14.09 *infra.*) When jury trial is an option, counsel should not only search media sources for whatever coverage they may have given to counsel's individual case but for what they may reveal about local attitudes toward similar crimes and respondents; and counsel should talk with experienced defense attorneys about what to expect from the relevant jury pool.

§ 14.04(d) Superior (or Inferior) Ability, Experience, or Personableness on the Part of the Prosecutor Who Will Try the Case

Counsel's assessment of the fact-finder's likely reactions to the evidence at trial also has to take into account the relative abilities, experience, and personableness of the prosecutor and counsel himself or herself. Factors such as these may have a considerable effect on whether counsel will be able to exclude prejudicial prosecution evidence or persuade the judge to admit favorable defense evidence; how the jurors will react to the lawyers' opening statements and closing arguments; and how the jurors perceive and evaluate each side's witnesses and the case as a whole.

§ 14.04(e) The Presence or Absence of Debatable or Dubious Legal Points Relating to Substantive or Evidentiary Matters on Which the Judge Might Commit Reversible Error in a Pretrial Ruling or in the Course of a Trial

The prospect of appellate reversal for trial-court errors plays a much smaller role in juvenile court practice than it does in adult criminal practice. Since the typical term of incarceration for a juvenile in most jurisdictions is no longer than 18 months, a juvenile who is sentenced to incarceration usually will have completed the period of imprisonment prior to issuance of an appellate opinion reversing the conviction. However, a trial judge's fear of error and appellate reversal may nevertheless work to the benefit of a juvenile respondent at trial. In the vast majority of jurisdictions the judge sits as both finder of fact and arbiter of legal issues. When a juvenile court judge is forced to rule on a novel question of law and resolves that question against the respondent, the judge's fear of appellate reversal may subtly affect the judge's determination on the ultimate issue of guilt or innocence.

§ 14.04(f) The Possibility of a Divided Jury

In jurisdictions that afford jury trials in juvenile delinquency cases, counsel will need to consider whether the nature of the evidence or the law or the character of the parties to the alleged offense is sufficiently controversial to set a jury at loggerheads, with the result that the jury may deadlock or bring in a compromise verdict of guilty on a lesser included charge. A hung jury is ordinarily a defense victory: Even if the prosecutor is disposed to invest resources in a retrial, the defense bargaining position becomes considerably stronger after a first jury has failed to find the prosecution's case persuasive.

§ 14.05 ASSESSING THE LIKELIHOOD THAT THE JUDGE WILL PENALIZE THE RESPONDENT AT SENTENCING BECAUSE THE RESPONDENT OPTED IN FAVOR OF A TRIAL INSTEAD OF A GUILTY PLEA

There are various factors that may cause a judge at sentencing consciously or unconsciously to penalize a respondent for having opted in favor of a trial instead of a guilty plea.

The judge may be irritated that the respondent has (in the judge's opinion) wasted the court's time by demanding a trial. This is especially true when the prosecution's evidence of guilt is overwhelming and/or the respondent lacks a viable theory of the defense. Conversely, if the respondent does present a viable albeit ultimately unsuccessful defense, many (although not all) judges will be tolerant of the respondent's insistence on a trial.)

The judge is particularly likely covertly to punish the respondent for insisting on a trial if the respondent takes the witness stand at trial and tells a story that the judge believes is perjurious. (In most situations in which the respondent testifies to an exonerating version of the events relating to the offense charged, the jury (or the judge in a bench trial) will have to find the respondent's testimony incredible in order to convict. So, in such cases, there is always at least some risk that the judge will conclude at sentencing that an enhanced penalty is appropriate. Even when the respondent does not take the stand, the defense presentation of testimony by friends or relatives of the respondent may cause the judge covertly to penalize the respondent at sentencing for having committed what the judge views as subornation of perjury.

Most judges make it a practice to encourage the attorneys to conduct a final round of plea negotiations immediately before trial. Some judges go even further, inquiring about the precise terms of the plea bargains that have been offered or asking in a general way whether the lawyers for each side have made a plea offer that they regard as reasonable. If the judge believes that the prosecutor's plea offer was reasonable, s/he is likely to feel even more strongly that the respondent has wasted the court's time by insisting on a trial. Conversely, when prosecutor's best plea offer seems unreasonable, the judge is likely to direct his or her irritation at the prosecutor rather than the respondent. In these cases, defense counsel should consider bringing the prosecutor's obstinacy to the attention of a judge who has prompted negotiations but not has not explicitly inquired why they are stalling. However, this strategy can backfire and should ordinarily not be used unless the respondent is prepared to accept an offer that the judge is likely to believe *is* reasonable. For if the judge pressures the prosecutor into offering a more favorable plea which the respondent then refuses to accept, the judge will be doubly irritated at the respondent's apparent disingenuousness and lack of gratitude for the judge's intervention on his or her behalf.

The extent to which judges participate directly in plea negotiations between the prosecution and defense counsel varies widely from jurisdiction to jurisdiction and from locality to locality. Some jurisdictions prohibit or radically restrict judicial involvement in plea

bargaining. *See*, *e.g.*, FED. RULE CRIM. PRO. 11(c)(1), *discussed in United States v. Davila*, 569 U.S. 597 (2013); *United States v. Rankins*, 675 Fed. Appx. 231, 234 (4th Cir. 2017) (the trial court violated FED. RULE CRIM. PRO. 11(c)(1), which "prohibits judicial involvement in plea discussions," by making "statements likely to induce Rankins to enter into a plea agreement"); *State v. Buckalew*, 561 P.2d 289 (Alaska 1977); *State v. Anyanwu*, 681 N.W.2d 411 (Minn. App. 2004). Others recognize its legitimacy in varying degrees. *See*, *e.g.*, *State v. McMahon*, 94 So.3d 468 (Fla. 2012); *State v. Davis*, 155 Vt. 417, 584 A.2d 1146 (1990); *State v. Jabbaar*, 2013-Ohio-1655, 991 N.E.2d 290 (Ohio App. 2013); N.Y. Advisory Committee on Judicial Ethics, Opinion 17-110 (October 19, 2017), N.Y. LAW J., December 18, 2017, at 3, col. 1, *available at* http://www.nycourts.gov/legacyhtm/ip/judicialethics/opinions/17-110.htm. Counsel should ascertain the local rules and practices in this regard and should ask experienced defense attorneys about:

(a) particular presiding judges' attitudes toward brokering negotiations, and

(b) each available judge's predilections regarding what constitutes an appropriate disposition in cases like the respondent's,

before deciding whether, when, and how to engage a judge in counsel's dealings with the prosecutor.

A number of juvenile court judges believe that "the first step to rehabilitation" is the admission of one's misdeeds and the demonstration of remorse. Judges who subscribe to this view may consciously or unconsciously penalize the respondent for contesting the charges rather than admitting his or her sins and immediately expressing remorse.

If a respondent opts for trial and is convicted, and if it appears at or before disposition that the judge is inclined to penalize the respondent for exercising his or her constitutional right to go to trial rather than plead guilty – and especially if the judge has made any statements on the record that manifest such a mindset – counsel should consider whether to raise the issue and seek recusal or some other sort of relief. *See, e.g.*, *People v. Hodge*, 154 A.D.3d 963, 965-66, 63 N.Y.S.3d 448, 450-51 (N.Y. App. Div., 2d Dep't 2017) (even though the "defendant failed to preserve for appellate review his contention that the sentencing court penalized him for exercising his right to a jury trial," the appellate court reaches the issue "in the interest of justice," rules for the defendant, and reduces the sentence; in concluding that the sentence imposed by the trial court "raises the inference that the defendant was penalized for exercising his right to a jury trial," the appellate court cites the lower sentence offered the defendant as part of a plea agreement, the disparity between the defendant's sentence and that of a co-defendant who pled guilty, and the "sentencing court['s] [having] admonished the defendant for putting the elderly complaining witness through the 'ordeal' of a trial even though the defendant was caught 'red-handed'"); *State v. Nakamitsu*, 140 Hawai'i 157, 166-67, 398 P.3d 746, 755-56 (2017) (dictum) (comments that the judge made at sentencing to "Nakamitsu and his counsel regarding Nakamitsu's decision to proceed with trial" indicate that "the sentence was 'likely to have been

improperly influenced by the defendant's persistence in his innocence'"; "[i]f the district court erroneously relied on Nakamitsu's refusal to admit guilt in imposing its sentence, that reliance would have violated Nakamitsu's constitutional right to due process and his right against self-incrimination"). *See also People v. Wesley*, 428 Mich. 708, 711, 411 N.W.2d 159, 161 (1987) (affirming the general principle that "a sentencing court cannot, in whole or in part, base its sentence on a defendant's refusal to admit guilt," but finding that "[h]ere, the trial court made clear when stating its reasons for exceeding the sentencing guidelines that defendant's assertion of innocence was not the reason for imposing the harsh sentence"). In considering such a strategy, counsel needs to carefully assess whether raising the issue could backfire by angering the judge and causing him or her to impose a severe sentence while saying things on the record to justify the sentence's severity and to ostensibly refute any improper motivation on the judge's part. See § 20.07 *infra* (discussing tactical considerations in deciding whether to seek recusal of the judge and in framing a recusal request).

§ 14.06 ASSESSING WHETHER A GUILTY PLEA WOULD PRODUCE ANY SIGNIFICANT ADVANTAGES AT SENTENCING

§ 14.06(a) Introduction: The Analytical Process Involved in Gauging Potential Sentencing Advantages of a Guilty Plea

In assessing whether a guilty plea is likely to lead to significant advantages at sentencing, counsel must consider what are essentially four separate questions: (i) What is the maximum sentence the respondent could receive if s/he went to trial and were convicted of all of the offenses charged? (ii) What sentence, short of the maximum, is the judge likely to impose if the respondent were convicted at trial of the charges that the prosecutor will probably prove beyond a reasonable doubt? (iii) If the respondent were to plead guilty to the charging document, without any additional concessions from the prosecutor, what sentence would the judge be likely to impose? and (iv) Factoring in whatever additional concessions can be extracted (or have been extracted) from the prosecutor as a part of a plea bargain, what sentence is the judge likely to impose? If counsel can answer these questions to his or her satisfaction, s/he can construct the baselines for gauging the precise extent to which a guilty plea could aid the respondent at sentencing.

In developing the answers to these four questions, counsel's first step naturally must be to research the local law establishing the periods of incarceration and fines that can be imposed upon a juvenile for the commission of the offense(s) charged. This research will need to examine: (1) the maximum length of incarceration and maximum extent of fines that could be imposed for each of the charges; (2) whether the juvenile court statutes of the jurisdiction permit consecutive sentences for conviction of multiple offenses; (3) whether the length of the sentence can be enhanced as a result of statutes that provide for higher sentences for recidivists or for certain types of offenders (such as individuals who committed an enumerated serious felony or committed a crime while armed with an operable firearm); and (4) whether local statutes establish any potentially applicable mandatory minimum penalties for the offense charged.

As explained in § 14.01 *supra,* the classic form of sentencing advantage available as a result of a guilty plea in adult court is inapplicable to juvenile court sentencings in most jurisdictions. This form of plea in adult court is one in which the defendant pleads guilty to a lesser offense included within the present charge and thereby obtains a guaranteed reduction of the statutory maximum sentence to the lesser sentence attached to the lesser charge. By contrast, in the vast majority of jurisdictions, the juvenile court statutes permit the imposition of the same indeterminate sentence without regard for the nature or severity of the offense. See § 38.03(c) *infra.*

Another common form of sentencing advantage of guilty pleas in adult court – the dismissal of several counts of a multi-count indictment in exchange for a plea, thereby precluding cumulative terms of incarceration for each of the counts that were dismissed – also is usually unavailable in juvenile court. In virtually all jurisdictions, sentences in juvenile court cannot be cumulative. Accordingly, regardless of whether the respondent has been convicted of a single crime or a number of crimes, the harshest possible sentence that can be meted out is a single indeterminate period of incarceration.

Since bargained guilty pleas in juvenile court cannot automatically curtail the length of incarceration as they can in adult court, the value of a guilty plea in juvenile court depends upon its producing other types of sentencing advantages. Section 14.06(b) *infra* examines the various alternative sentencing advantages that may be available and then looks also at the sentencing advantages available in the handful of jurisdictions whose juvenile court statutes do provide for some degree of differential sentencing based on the nature of the offense. Section 14.06(c) describes the variety of mechanisms for using a guilty plea to obtain one or more of these sentencing advantages. Obviously, any meaningful consideration of the value of a plea must take into account not only the theoretical availability of a sentencing advantage but also the practical feasibility of using one of these mechanisms to obtain the desired sentence.

§ 14.06(b) The Concrete Sentencing Advantages Available in Juvenile Court

An understanding of the sentencing advantages that may attend a guilty plea in juvenile court naturally requires familiarity with the unique indeterminate sentencing structure of juvenile court. That structure is described in detail in § 38.03(c) *infra.* For present purposes it is sufficient to conceptualize the range of juvenile court sentences as divided into three tiers, which are, in order of increasing severity: diversion, probation, and incarceration. As the following discussion will explain, the sentencing value of a guilty plea depends upon whether it will move a respondent down the three-tiered sentencing ladder to a sentencing option that is more lenient than the sentence that the respondent otherwise would be likely to receive.

"Diversion" (sometimes called by other names such as "adjournment in contemplation of dismissal," "stetting," or deferred entry of judgment") diverts the juvenile out of the court system by expunging the conviction and arrest records upon the juvenile's completion of a set period of time without being rearrested. See § 19.01 *infra*. See also § 38.93(c) *infra*. Diversion is usually

reserved for first or second offenders and can typically be obtained only in cases involving relatively minor offenses. The characteristics of the diversion vary among jurisdictions. Usually the juvenile is required, as conditions of the diversion, to remain crime-free and attend school regularly during the period of diversion. In many jurisdictions, it is commonplace for additional conditions to be imposed, including participation in a community-based treatment program (which, depending on the respondent's needs, might be a program for counseling or substance abuse treatment), periodic meetings with a probation officer or other agency official, community service, and/or restitution. In some jurisdictions, diversion is available in a delinquency case not only prior to trial but also after a respondent has been convicted (either at trial or by means of a guilty plea). See § 19.01 *infra*. Depending on the jurisdiction, post-conviction diversion may require a guilty plea, either because the applicable statute or rule makes this a precondition (*see, e.g.*, CAL. WELF. & INST. CODE §§ 790 - 794 (2022)) or because, as a practical matter, the prosecutor's support is required and the only way to secure such support is as part of a plea bargain (see § 14.06(c) *infra*).

For more serious offenders and recidivists, who will be deemed ineligible for diversion, the central question in gauging the value of a guilty plea is whether the respondent faces a risk of incarceration in the event that he or she is convicted. If there is a substantial risk of incarceration, then the respondent may benefit greatly from a plea agreement in which the prosecutor (or ideally the judge) agrees to a sentence of probation.

If the nature of the offense or the respondent's prior record is so egregious that even probation is out of the question, and the inevitable effect of conviction (whether as a result of a trial or a guilty plea) is a sentence of incarceration, then a guilty plea usually offers no sentencing advantages. This is so because in most jurisdictions the sentencing judge cannot control the length of the period of incarceration. In virtually all jurisdictions a sentence of incarceration (called "commitment" in some jurisdictions and "placement" in others) is an indeterminate sentence that, in theory, can extend to the minor's age of majority. (In some jurisdictions the sentence imposed upon the child is an indeterminate sentence that extends to the child's age of majority; in other jurisdictions it is an indeterminate sentence of up to 18 or 24 months, which in theory can be extended annually until the child's age of majority.) Once the court has imposed the indeterminate sentence, custody of the child is transferred to the state agency that administers the juvenile placement facilities. The agency thereafter determines the release date on the basis of the child's behavior within the institution. Thus the judge has no power over the length of sentence that the child actually will serve and cannot reward a guilty plea by imposing a shorter period of incarceration than would be imposed after trial. (As a practical matter almost all incarcerated juveniles are released by the incarcerating agency within 12 to 18 months.)

A few jurisdictions deviate from the usual indeterminate sentencing pattern and either provide for the automatic imposition of heavier sentences for more severe offenses or give the judge the authority to vary the sentence depending upon the nature of the offense. For example, in some jurisdictions, the indeterminate sentence imposed for a felony is greater than the indeterminate sentence imposed for a misdemeanor. In other jurisdictions the judge can impose

indeterminate sentences of varying lengths depending upon the seriousness of the offense and upon the respondent's character and prior record. And, in still other jurisdictions, a juvenile sentencing judge can override the typical indeterminate sentencing pattern by specifying a fixed term of incarceration or by reserving a veto power over the agency's decision to release a particular respondent prior to the expiration of his or her indeterminate sentence. In jurisdictions of these types a juvenile respondent who is facing a strong likelihood of incarceration in the event of conviction may wish to consider a guilty plea if the plea can be used to limit the length of that incarceration.

In some jurisdictions the sentencing judge can exercise some control over the facility in which the respondent is incarcerated. Usually, the range of juvenile detention facilities includes a maximum security facility, one or more medium security facilities that are oriented towards treatment rather than security, and one or more community-based group homes. In jurisdictions that permit the sentencing judge to select the place of incarceration, the respondent may wish to consider a guilty plea that will maximize the respondent's chances for the least secure facility or the facility that provides the most meaningful rehabilitative services.

§ 14.06(c) Mechanisms for Using a Guilty Plea To Obtain One of the Sentencing Advantages Available in Juvenile Court

The most common mechanism for using a plea to engineer a reduction in sentence is to trade the plea for an agreement by the prosecutor that s/he will support (or not object to) a specific sentence desired by the defense. This option, and its various permutations and ramifications, is discussed in § 14.06(c)(1) *infra.* Section 14.06(c)(2) then examines the primary defect of this kind of prosecutorial agreement – the lack of any binding effect upon the sentencing judge – and describes the methods available in some jurisdictions for obtaining a judicial commitment to impose a specific sentence. Finally, § 14.06(c)(3) looks at other forms of prosecutorial aid that may be obtainable at the sentencing stage to affect the nature of the sentence.

§ 14.06(c)(1) Prosecutorial Commitments To Support (or Not Object to) a Specific Sentence

There are essentially three ways in which a prosecutor can commit himself or herself, as part of a plea agreement, to aid the defense in obtaining a particular desirable sentence. The most advantageous from the defense perspective is a commitment by the prosecutor to tell the judge at sentencing that s/he supports the sentence that is being requested by the defense and joins the defense in seeking that sentence. Some prosecutors may not be willing to affirmatively recommend a specific sentence in this manner, either because they feel that the concession is unwarranted on the facts of the case or because their view of the prosecutorial role does not encompass such active support of the defense at sentencing. Such prosecutors may be willing to adopt the less active stance of announcing that they have no objection to the defense's sentencing request. Many judges view declarations of non-objection as virtually tantamount to an expression of outright support. Finally, prosecutors who are unwilling to express or even imply support may

be willing to agree, as part of a plea bargain, to remain mute at sentencing. This commitment, although far less advantageous to the defense, nevertheless can prove helpful. By silencing the prosecutor, it increases the likelihood that the judge will be swayed by the unrebutted arguments of the defense. Moreover, many judges perceive a prosecutor's silence as an indication that there are no unduly aggravating facts in the case or in the respondent's prior record.

Clearly, these three types of prosecutorial commitments differ in the degree to which they benefit the respondent. However, the actual effect of such commitments cannot be gauged without a full understanding of the nature and effect of the pre-sentence report. As the following discussion will explain, all three forms of prosecutorial support may decisively shape the sentencing determination if the prosecutor agrees in addition to waive a pre-sentence report. Conversely, when a pre-sentence report is ordered by the judge and turns out to be unfavorable to the respondent, none of the forms of prosecutorial support may suffice to produce the sentence desired by the defense.

The pre-sentence report, which is discussed further in § 38.04(a) *infra,* is a report on the background of the respondent prepared by the probation department. Typically, such reports include descriptions of the facts of the present offense, the respondent's prior record, the respondent's attendance and behavior at school, the respondent's conduct at home as described by the parent, the respondent's use of alcohol or drugs, the probation officer's assessment of whether the respondent is remorseful about committing the crime, and the probation officer's diagnosis of the appropriate sentence for the respondent. As one might expect, the pre-sentence report plays a major role in shaping the judge's view of what sentence should be imposed.

In many jurisdictions the judge will be willing to dispense with the preparation of the pre-sentence report and instead proceed immediately to sentencing if the prosecution and defense jointly request such a procedure. (This practice is often followed even in jurisdictions whose statutes mandate the preparation of a pre-sentence report.) If the defense has succeeded in obtaining a prosecutorial commitment to support (or not object to) a specific disposition, it is strongly in the respondent's interest to waive the preparation of a pre-sentence report and to seek a similar waiver by the prosecution as part of the plea agreement. Since the judge's only sources of information about a respondent are the parties and the pre-sentence report, the elimination of the pre-sentence report deprives the judge of any factual basis for overriding the parties' unanimous request for a specific sentence. Accordingly, as a general matter, if the defense can procure a prosecutorial commitment to waive the pre-sentence report and if the judge presiding over the case tends to follow the parties' wishes to waive a pre-sentence investigation, counsel can usually feel confident that a prosecutorial commitment to support (or not object to) a specific sentence will prove adequate to produce the desired sentence. This is also true, albeit to a somewhat lesser extent, of prosecutorial commitments to remain mute at sentencing. With the pre-sentence report waived and the prosecution remaining mute, the judge will have little reason to reject defense counsel's argument concerning the appropriate sentence.

Frequently, prosecutors are unwilling to ask for immediate sentencing and will insist

upon the preparation of a pre-sentence report. These prosecutors may be perfectly willing to adopt one of the forms of support for a defense recommendation – express support for the specific sentence, declaration of the lack of any objection to the sentence, or remaining mute – but they insist that the judge should be given the pre-sentence information necessary to make an independent judgment concerning the appropriate sentence. Any plea agreements of this sort, permitting the preparation of a pre-sentence report, are risky propositions. An unfavorable pre-sentence report may lead a judge to reject even a defense sentencing request affirmatively supported by the prosecution. In gauging the value of prosecutorial support of this type, defense counsel will need to gather information bearing on two questions:

(A) How likely is it that the pre-sentence report will turn out to be favorable to the respondent? The evaluation of this factor will require investigation into the respondent's prior record, attendance and behavior at school, and conduct at home. Counsel cannot stop with the information furnished by the respondent and his or her parent about these matters; they will naturally be prone to exaggerate the positives and minimize the negatives. Defense counsel will need to verify the information independently by checking court records and obtaining the respondent's school records. Counsel must also obtain and evaluate the police version of the offense and the attitudes of the investigating officers about the offense and the respondent that will probably be conveyed to the probation officer who writes the pre-sentence report. In addition, counsel will need to familiarize himself or herself with local probation department policies and practices, in order to predict the likely recommendations of the report writer.

(B) How likely is it that prosecutorial support at sentencing will cause the judge to adopt the desired sentence even in the face of an unfavorable pre-sentence report? Counsel will need to speak to other juvenile defense attorneys who have conducted sentencings before the particular judge, in order to ascertain the degree of deference the judge pays to sentencing agreements between the defense and prosecution and also the kinds of aggravating facts that are most likely to sway the judge.

If defense counsel can feel confident that the pre-sentence report will be favorable (or, at least, not extremely detrimental) or that the judge is likely to defer to the parties' agreed-upon sentence even in the face of an unfavorable pre-sentence report, then the respondent may be well advised to accept a guilty plea that promises prosecutorial support at sentencing even in the absence of a prosecutorial commitment to waive the pre-sentence report.

Occasionally, prosecutors who insist upon the preparation of a pre-sentence report are also adamant in refusing to make any commitments regarding the sentence until after they have viewed the pre-sentence report. In such instances most prosecutors will be amenable to entering into a contingent agreement that conditions their actions at sentencing (support for a specific sentence, declaration of the absence of any objection, or remaining mute) upon the pre-sentence

report turning out to be favorable to the respondent. Such contingent agreements may be worthwhile from the defense perspective, as long as:

(A) Defense counsel has already checked on the respondent's prior record and conduct at school and at home and therefore knows that the pre-sentence report will, in fact, be favorable to the respondent.

(B) Defense counsel succeeds in securing a concrete agreement about the precise criteria that the respondent must satisfy in order to earn the agreed-upon sentence. A concrete identification of criteria is essential to ensure that the prosecutor (or judge) cannot later declare that an apparently favorable pre-sentence report is not commendatory enough to trigger the prosecutor's (or judge's) corresponding obligations. Concrete criteria might include: a pattern of regular attendance at school (perhaps specifying the number of absences that will be tolerated); no suspensions or expulsions from school since the initiation of the court case; no prior convictions; no serious misbehavior at home; and no evidence of use of alcohol or drugs.

§ 14.06(c)(2) Obtaining Judicial Ratification of the Parties' Agreement to a Specific Sentence

As earlier explained, all of the prosecutorial commitments that have been described are somewhat risky because a prosecutorial recommendation cannot tie the judge's hands. Some judges invariably go along with the recommendation; some never do; some do or do not, depending on the case. Negotiating for a sentencing recommendation is effective only if defense counsel has sufficient information about the judge who will be – or about all of the judges who may be – the sentencing judge. In some cases it may be possible to meet with the judge in chambers, in a formal or informal pretrial conference, to sound out his or her reaction to a proposed sentencing recommendation by the prosecutor. Defense counsel may wish to suggest such a conference when the judge's attitude toward sentencing recommendations is uncertain. *See*, *e.g.*, *State v. Warner*, 762 So.2d 507 (Fla. 2000).

In some localities a formal or informal practice of "conditional" plea bargaining has developed. Under this practice the prosecution and defense negotiate (i) the terms of the sentence that the respondent will receive if s/he pleads guilty (for example, diversion, probation, or a specific short period of incarceration) or (ii) the rules that will be followed in sentencing the respondent if s/he pleads guilty (for example, that there will or will not be a pre-sentence report; that the sentence will be probation in the event that the pre-sentence report shows that the respondent has no prior convictions and is regularly attending school (or, in appropriate cases, in the event that the prosecution informs the court that the respondent is cooperating with the authorities by giving information or testifying against co-perpetrators)). The parties' agreement is then submitted to the sentencing judge for approval. If the judge agrees (i) to impose the bargained sentence or (ii) to observe the bargained sentencing rules, the respondent pleads guilty

and the judge performs as agreed. If the judge does not agree, then the deal is off, and the case goes to trial (or to renegotiation). *See, e.g.*, *People v. Clancey*, 56 Cal. 4th 562, 570, 572-77, 299 P.3d 131, 135, 137-40, 155 Cal. Rptr. 3d 485, 490, 492-95 (2013). If this procedure is customary in counsel's jurisdiction, counsel should ordinarily follow it. If it is not, counsel should consider suggesting it to the prosecutor and the judge for use on an *ad hoc* basis.

§ 14.06(c)(3) Prosecutorial Commitments To Aid the Defense at Sentencing in Ways Other than Supporting (or Not Objecting to) a Specific Sentence

In addition to the previously described forms of prosecutorial aid at sentencing, there are a variety of ways in which the prosecutor can indirectly aid the defense with respect to sentencing. Depending upon the facts of the case and the inclinations of the prosecutor handling the case, it may be possible to obtain these indirect advantages either alone or in addition to prosecutorial commitments to support (or not object to) a specific sentence.

In some jurisdictions the timing of a guilty plea can be used to steer cases before a particular judge for sentencing, and the prosecution's assistance may be instrumental in controlling the timing of the plea. See § 14.09 *infra.* Since the sentencing practices of the judge will often determine whether the defense succeeds in obtaining a favorable sentence, a prosecutor's willingness to commit himself or herself, as part of a plea agreement, to aid the defense in steering the case before a particularly desirable judge may render the plea worthwhile. Obviously, in assessing the value of such a plea, the defense will need to investigate the sentencing practices and attitudes of all of the judges to whom the case could be shifted through the use of procedures that the prosecutor and defense counsel can implement and to compare them to the practices and attitudes of the judge who is currently presiding over the case.

Sometimes, prosecutors are willing to include, in a plea agreement, commitments regarding their description of the facts of the offense at sentencing. Obviously the prosecutor has great leeway in shaping his or her sentencing allocution, and s/he can choose to describe the facts of the offense in a brief and colorless manner or in an extensive and graphic manner. Frequently, prosecutors are willing to negotiate a commitment to refrain from mentioning (or at least, from belaboring) damaging facts, such as the extent of victim's injury or terror. This is especially true when the respondent has pled to a lesser count that is not based on the aggravating evidence. For example, when the respondent has pled guilty to possession of a gun, it may be possible to secure a prosecutorial commitment not to mention at sentencing that the respondent also allegedly fired that gun. Limitations upon the aggravating facts heard by the judge can prove instrumental in securing a desired sentence. However, defense counsel must be cautious in using negotiated limitations of the facts in any cases in which the judge has ordered a pre-sentence report. Since pre-sentence report writers usually check the documents in the court file (and, in some jurisdictions, even speak with the victim in order to prepare a "victim impact statement"), the probation officer may learn of the excluded aggravating facts and may decide to include them in the pre-sentence report. When defense counsel predicts that there is a realistic possibility of the probation officer's learning of the excluded information (such as, for example, in a case in which

the documents in the court file contain the information, or in a jurisdiction in which probation officers routinely speak with the complainant), defense counsel will need to raise the issue with the probation officer and attempt to convince him or her to respect the terms of counsel's arrangement with the prosecutor.

Another type of prosecutorial concession that can indirectly affect the outcome of the sentencing is a prosecutorial agreement to support the release, pending sentencing, of a respondent who was detained before trial. Many judges are willing to release a detained respondent, upon his or her entry of a guilty plea, if the prosecutor supports such a measure. (The rationale for this apparently paradoxical practice of detaining the respondent during the pretrial period of presumed innocence and then releasing him or her when s/he concedes guilt is somewhat murky. The explanation often given is that the respondent's acknowledgment of guilt constitutes his or her first step toward rehabilitation, and the release has been ordered to facilitate further progress toward that goal. More realistically, the process can be viewed as a systemic accommodation to plea bargaining: If judges fail to give effect to any of the terms of a plea bargain, the system of plea bargaining will soon fall apart and the courts will be overloaded with trials; and, on the spectrum of possible plea bargain conditions, the condition of pre-sentencing release is an easy one for a judge to accept, since a respondent's violation of the terms of the release will very shortly thereafter result in a sentence of incarceration.) In any event, whatever the rationale, pre-sentencing release of the respondent can prove instrumental to securing a favorable sentence. If the respondent can remain crime-free and demonstrate good behavior at school and at home during the weeks pending sentencing, defense counsel can use that record of good behavior to argue forcefully at sentencing that the respondent does not need to be incarcerated.

§ 14.06(c)(4) The Additional Intangible Effects of a Guilty Plea in Securing the "Good Will" of the Sentencing Judge

The foregoing analysis has been predicated upon the assumption that counsel can, at the time of the entry of the plea, obtain some type of commitment from either the prosecutor or judge concerning the sentence that will be imposed. In many cases it will be impossible to extract a commitment concerning sentencing from either prosecutor or judge. However, the mere entry of a guilty plea, without reciprocal commitments, may enable the respondent to reap one of the sentencing advantages described in § 14.06(b) *supra.* Judges tend generally to give lighter sentences to juvenile respondents who plead guilty, either because the judge regards the plea as a sign of contrition and a first step toward rehabilitation or because the judge wants, consciously or unconsciously, to express appreciation for the respondent's contribution to alleviating the problem of docket congestion. In determining the likelihood that the judge will "give consideration" for a plea, even in the absence of a commitment, it is of course essential for counsel to check with other attorneys about the particular judge's sentencing policies as evidenced in prior cases.

§ 14.07 ASSESSING WHETHER THE RESPONDENT WILL SUFFER ANY

COLLATERAL CONSEQUENCES AS A RESULT OF EITHER A GUILTY PLEA OR A CONVICTION AT TRIAL

In analyzing the advisability of a guilty plea, it is necessary to consider not only potential sentencing consequences but also certain collateral consequences that may attach to a conviction. These may sometimes be so devastating that a plea is not a viable option, even if the direct sentencing consequences of conviction can be brought within acceptable limits by negotiation. The most common and most important of these collateral consequences is the potential for revocation of the respondent's probation or parole (called "aftercare" in many jurisdictions). It frequently happens that a juvenile is arrested for a crime at a time when s/he is already on probation or parole for a prior conviction. In virtually all jurisdictions, if the respondent is convicted of the new crime, that conviction can serve as a basis for revoking the respondent's probation or parole and imposing a period of incarceration. (For discussion of the standards for revocation and the length of the term of incarceration that can be imposed upon revocation, see §§ 39.04-39.05 *infra*.) Accordingly, when a respondent is already on probation or parole, the entry of a guilty plea may be tantamount to acquiescing in a period of incarceration. This prospect may be sufficiently unattractive to the respondent that s/he will reasonably decide s/he has nothing to lose by going to trial, even with a weak defense that offers nothing more than the faintest hope of an acquittal. On the other hand, if defense counsel can persuade the prosecutor to include in the plea agreement a commitment to support an extension of the period of probation or parole instead of revocation, then a guilty plea may become a very attractive option.

Another potential collateral consequence of conviction is the risk that the conviction can serve as a basis for exposing the respondent to enhanced penalties for future offenses. There are various ways in which such a risk can arise. Under the laws of some jurisdictions, a juvenile adjudication can result in a respondent's facing a higher sentence as a recidivist if s/he is charged with and convicted of a new offense in juvenile court in the future. *See, e.g.*, N.Y. FAM. CT. ACT § 301.2(8)(v)-(vi), 353.5 (2022). In some States, a youth who has been convicted in juvenile court and is thereafter arrested for a new offense faces an enhanced risk of transfer to adult court on the new charge as a result of the prior adjudication. *See, e.g.*, OR. REV. STAT. § 419C.349(2)(b)(E) (2022). In some States, the adult criminal court sentencing laws permit the use of a prior juvenile adjudication as a predicate for a more serious criminal charge and/or as a basis for aggravated sentencing (*see, e.g.*, *United States v. Woodard*, 694 F.3d 950, 952-55 (8th Cir. 2012); *State v. McFee*, 721 N.W.2d 607 (Minn. 2006); *but cf. United States v. McGhee*, 651 F.3d 153, 157-58 (1st Cir. 2011) (district court erred in classifying the defendant's prior Massachusetts youthful offender adjudication as a predicate for "career offender status" under the federal sentencing guidelines: the guidelines require that the court consider "whether the conviction is 'classified' as an adult offense 'under the laws of the jurisdiction' of conviction, . . . undermining any presumption in favor of a federal standard that disregards state labels," and "Massachusetts' nomenclature clearly distinguishes between youthful offenders and adults"); *United States v. Sellers*, 784 F.3d 876, 879 (2d Cir. 2015) ("a drug conviction under New York law that was replaced by a YO [Youthful Offender] adjudication is not a qualifying predicate conviction under the ACCA because it has been 'set aside' within the meaning of 18 U.S.C.

§ 921(a)(20) and New York law"); *United States v. Howard*, 773 F.3d 519, 531-32 (4th Cir. 2014) ("district court abused its discretion [when sentencing an adult defendant] by focusing too heavily on Howard's juvenile criminal history in its evaluation of whether it was appropriate to treat Howard as a career offender": "The Supreme Court has recognized, in the sentencing context, the diminished culpability of juvenile offenders, given their lack of maturity, vulnerability to social pressures, and malleable identities.")), and therefore a youth who is convicted in juvenile court faces the risk of harsher penalties in adult criminal court if s/he is arrested for a new offense while still a juvenile and is transferred for prosecution to adult court or if s/he is arrested for a new crime after reaching the age at which individuals are automatically prosecuted in adult court. In any case in which a juvenile court adjudication can give rise to collateral consequences of this sort and in which there is at least some risk that the client may be rearrested for a new offense in the future, these risks must be factored into the assessment of whether to accept a guilty plea or instead to go to trial in the hope of averting a conviction and thereby avoiding any such collateral consequences. Accordingly, in evaluating the wisdom of a guilty plea and in working out the terms of any plea bargain with the prosecutor, counsel must always thoroughly research the jurisdiction's statutes, rules, and practices governing transfer and recidivist sentencing in juvenile and adult court, realistically assess the client's prognosis for staying out of trouble in the future, and discuss these subjects bluntly with the client.

In any jurisdiction in which juveniles are subject to sex offender registration requirements, counsel must be very wary of advising a client to plead to an offense that requires registration as a sex offender. The same is true if there is any risk that the client may move to a State that requires registration for such an offense even if the client's current State of residence does not. *Cf. A.W. by and through Doe v. State*, 865 F.3d 1014 (8th Cir. 2017) (differences between sex offender registration requirements in Minnesota and Nebraska worked to the child's benefit when he moved from Minnesota, which requires sex offender registration for adjudicated juvenile delinquents, to Nebraska, which does not). In a State that requires sex offender registration for juveniles, pleading to even a minor offense like urinating in public may result in the youth's placement on a sex offender registry, with devastating – often lifelong – consequences for numerous aspects of the young person's life, including access to education, employment, and housing. Editorial, *Punishment that Doesn't Fit the Crime*, N.Y. TIMES, July 31, 2016, *available at* http://www.nytimes.com/2016/07/31/opinion/sunday/punishment-that-doesnt-fit-the-crime.html?ref=todayspaper. *See generally* Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Juvenile Sex Offender Registration and SORNA* (September 2016), *available at* https://www.smart.gov/pdfs/juvenile-dispatch-final-2016.pdf. *Cf. State in the Interest of C.K.*, 233 N.J. 44, 47-48, 182 A.3d 917, 918-19 (2018) (applying the state constitution's due process clause to strike down the portion of New Jersey's Megan's Law that provided that "[j]uveniles adjudicated delinquent of certain sex offenses are barred for life from seeking relief from the registration and community notification provisions of Megan's Law," and that this "categorical lifetime bar cannot be lifted, even when the juvenile becomes an adult and poses no public safety risk, is fully rehabilitated, and is a fully productive member of society"; but, even with this

judicial relief from the most onerous portion of the statute, youths who were previously subject to the provision nonetheless are prohibited for fifteen years from seeking "release[ ] from . . . registration and notification requirements" and, even at that point, must show they have been "offense-free" for the "fifteen-year look-back period" and are "not likely [to] pose a societal risk."); *People in the Interest of T.B.*, 489 P.3d 752, 755-56 (Colo. 2021) ("Mandatory lifetime sex offender registration brands juveniles as irredeemably depraved based on acts committed before reaching adulthood. But a wealth of social science and jurisprudence confirms what common sense suggests: Juveniles are different. Minors have a tremendous capacity to change and reform. As such, mandating lifetime sex offender registration for juveniles without providing a mechanism for individualized assessment or an opportunity to deregister upon a showing of rehabilitation is excessive and violates the Eighth Amendment."). Even in those States that exempt juvenile delinquency adjudications from sex offender registration requirements, counsel must take into account the risk that a juvenile's guilty plea to a sex offense may later harm the client if s/he is convicted of a sex offense in adult court and the juvenile adjudication can be considered in determining whether to classify the adult conviction as a registration-eligible crime. *See, e.g.*, *People v. Shaffer*, 129 A.D.3d 54, 7 N.Y.S.3d 708 (N.Y. App. Div. 3d Dep't 2015). Before advising a juvenile client to plead guilty to an offense that could result – either at the present time or later in life – in the client's being placed on a sex offender registry, counsel should scrupulously explore all possible alternatives. For example, if counsel helps the prosecutor to acquire a better understanding of the data about juveniles and sex offender registration, the prosecutor may be willing to agree to a guilty plea to an offense that carries no risk of sex offender registration. *See, e.g.*, *N.Y. Times* editorial, *supra* (citing a "senior lawyer in the juvenile division of the Kent County district attorney's office in Michigan" who has responded to the data about juvenile sex offender registration by "push[ing] for pleas that keep youths off registries," and reporting that "[o]ther prosecutors are following suit"). In discussing this subject with prosecutors, it will often be useful to point out that empirical research shows that "[o]nly 1 percent to 7 percent of children who commit sexual offenses will do it again – much lower than the 13 percent recidivism for adult sexual offenders." *Id*. *See also In re J.B.*, 630 Pa. 408, 435, 438, 107 A.3d 1, 17, 19-20 (2014) ("application of Pennsylvania SORNA's [Sex Offender Registration and Notification Act's] current lifetime [sex offender] registration requirements upon adjudication of specified offenses violates juvenile offenders' due process rights by utilizing an irrebuttable presumption" that "sexual offenders pose a high risk of recidivating, [which] is not universally true when applied to juvenile offenders . . . , the vast majority of [whom] . . . are unlikely to recidivate"). If counsel ultimately determines, however, that there is just no alternative to pleading to a registration-eligible offense, and if the risks of going to trial would be significantly worse, then counsel must make sure, when counseling the client about the plea offer, that the client fully comprehends the long-term impact that registration could have on his or her life.

Another factor to consider in the case of a respondent who is not a citizen of the United States is whether a guilty plea – or a conviction at trial – could have detrimental consequences for the respondent's immigration status. A noncitizen who is convicted of a crime in adult court may be subject to an order of removal (a euphemism for deportation) if the conviction is for any

one of a range of types of crimes, including those classified by the Immigration and Nationality Act as "aggravated felonies"; "crimes involving moral turpitude"; certain types of controlled substance offenses; certain types of firearm offenses; and certain crimes of domestic violence, stalking crimes against children, or violations of protection orders. *See generally Barton v. Barr*, 140 S. Ct. 1442 (2020); MANUEL D. VARGAS, REPRESENTING IMMIGRANT CRIMINAL DEFENDANTS IN NEW YORK STATE (5th ed. 2011); Manuel D. Vargas, *Immigration Consequences of Guilty Pleas or Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 701 (2006). *See also, e.g.*, FED. RULE CRIM. PRO. 11(b)(1)(o) (2022) (amended, effective Dec. 1, 2013, to require that the plea colloquy in federal criminal cases include a judicial warning to defendants who are "not a United States citizen" that a conviction may result in the defendant's being "removed from the United States, denied citizenship, and denied admission to the United States in the future"); *People v. Peque*, 22 N.Y.3d 168, 176, 3 N.E.3d 617, 621, 980 N.Y.S.2d 280, 284 (2013) ("deportation is a plea consequence of such tremendous importance, grave impact and frequent occurrence that . . . due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony"). The Board of Immigration Appeals thus far has consistently ruled that a juvenile court adjudication of delinquency does not qualify as a conviction of a "crime" and therefore cannot result in immigration consequences (*see, e.g.*, *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000, INS motion for reconsideration denied 2001); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 137 (BIA 1981); *In the Matter of F-*, 2 I.&N Dec. 517, 518 (Central Office 1946; adopted by BIA 1946 (*see id*. at 524)), but "an act of juvenile delinquency could be considered an adverse factor in any application for a discretionary benefit under the immigration laws, and could trigger automatic ineligibility . . . under the Family Unity program." VARGAS, *supra*, § 4.1.A, at 66. Immigration laws are in a state of flux and there is always the risk that statutory amendments, regulation changes, or agency interpretations or policies could result in greater consequences flowing from a delinquency adjudication. Accordingly, if counsel's client is a noncitizen, it is essential that counsel research the possible immigration consequences of a delinquency adjudication and consider whether a guilty plea might entail, increase, avoid or reduce the risk of any such consequences. *See Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) ("The[ ] changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important."); *Rodriguez-Penton v. United States,* 905 F.3d 481, 487 (6th Cir. 2018) ("Counsel has an obligation to 'advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.'. . . This obligation is not met if counsel either fails to mention the risk of deportation or specifically discounts such a risk."); *Lee v. United States*, 137 U.S. 1958 (2017) ("Everyone agrees that Lee received objectively unreasonable representation" from his defense attorney, who "assured . . . [Lee that] the Government would not deport him if he pleaded guilty [to a "count of possessing ecstasy with intent to distribute"] when in fact "[t]he conviction meant that Lee [who is "a lawful permanent resident" and "not a United States citizen"] was subject to mandatory deportation from this country." (*id*. at 1962); the Court concludes that counsel's erroneous advice, which led to Lee's pleading guilty, was prejudicial even though Lee "had no real defense to the charge," and thus conviction and deportation were likely if Lee opted for trial, and even though the guilty plea

"carried a lesser prison sentence than he would have faced at trial" (*id*.); the Court explains that "common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. . . . When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." (*id*. at 1966); "But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the 'determinative issue' for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading [guilty], as in this case, that 'almost' could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. . . . Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so." (*id*. at 1968-69)). *See also, e.g.*, *United States v. Rodriguez-Vega*, 797 F.3d 781, 786-88 (9th Cir. 2015) (counsel inadequately advised the defendant about the plea offer, thereby denying her of effective assistance of counsel, by informing her that she faced the "'potential' of removal" rather than advising her "that her conviction rendered her removal virtually certain, or words to that effect"; although the defendant "received notice that she might be removed [*i.e.*, deported] from a provision in the plea agreement and the court's plea colloquy under Federal Rule of Criminal Procedure 11[,] . . . [t]he government's performance in including provisions in the plea agreement, and the court's performance at the plea colloquy, are simply irrelevant to the question whether *counsel's* performance fell below an objective standard of reasonableness"); *Kovacs v. United States*, 744 F.3d 44, 48, 50 (2d Cir. 2014) (counsel "rendered ineffective assistance by giving erroneous advice concerning the deportation consequences of pleading guilty . . ., with the result that [Kovacs] is at risk of detention and deportation if he reenters the United States"); *United States v. Akinsade*, 686 F.3d 248, 251, 255-56 (4th Cir. 2012) (counsel committed ineffective assistance by misinforming the client that the charge to which the client was pleading was not a deportable offense); *Hernandez v. State*, 124 So.3d 757, 762-63 (Fla. 2013) (even if the accused was warned by the judge during the plea colloquy of the risk of deportation and the accused explicitly affirmed his understanding, defense counsel nonetheless can be found to be ineffective under *Padilla v. Kentucky* for "failing to warn [the accused] . . . of the clear immigration consequences of his plea": "an equivocal warning from the trial court is less than what is required from counsel and therefore cannot, by itself, remove prejudice resulting from counsel's deficiency"); *Commonwealth v. DeJesus*, 468 Mass. 174, 174-75, 9 N.E.3d 789, 791 (2014) (counsel committed ineffective assistance by advising his noncitizen client that a guilty plea to possession with intent to distribute cocaine would make him "'eligible for deportation'" when in fact "applicable immigration law . . . makes deportation or removal [for this crime] . . . automatic or 'presumptively mandatory'"); *State v. Nunez-Diaz*, 247 Ariz. 1, 444 P.3d 250 (2019) (applying *Padilla and Lee* to the case of an undocumented immigrant). *Cf. United States v. Juarez*, 672 F.3d 381, 384, 385-90 (5th Cir. 2012) (counsel, who advised the client to plead guilty to lying about United States citizenship and illegal re-entry after deportation following a conviction of an aggravated felony, committed ineffective assistance because counsel "failed to independently research and investigate the derivative citizenship

defense" which "is a defense to the alienage element of both crimes to which Juarez pled guilty").

There are a number of other civil disabilities that may flow from the respondent's acquisition of a criminal record, even if that record is a juvenile record. *See, e.g.*, *United States v. Juvenile Male*, 564 U.S. 932, 934, 936 (2011) (per curiam) (15-year-old who pleaded "true" to a sexual offense in a federal delinquency prosecution was subject to a state law requirement to register as a sex offender). *See generally* NATIONAL REENTRY RESOURCE CENTER, NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, *available at:* https://niccc.csgjusticecenter.org/database/results/?jurisdiction=&consequence_category=&narrow_category=&triggtrigg_offense_category=&consequence_type=&duration_category=&page_num_ber=1; Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111 (2006). *See also* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520 (2004). *But cf. In re M.A.*, 2014 IL App. 132540, 12 N.E.3d 805, 808, 822-23, 382 Ill. Dec. 526, 529, 543-44 (2014) ("Illinois Murderer and Violent Offender Against Youth Registration Act," which "automatically requires juveniles adjudicated delinquent for certain offenses to register as violent offenders against youth for a minimum of 10 years following adjudication" violates due process by failing "to provide any means by which a juvenile offender can petition to be taken off the registry," and also violates equal protection by treating "juvenile violent offenders against youth differently and much more harshly than similarly situated juvenile sex offenders" who are "relieved of the obligation to register as adults on turning 17" and can "petition to be taken off the registry after five years"). Although all jurisdictions supposedly guarantee confidentiality of juvenile records and most provide for some form of "sealing" of the records upon the juvenile's attainment of adulthood, the reality is that juvenile convictions are often discovered by the ex-offender's prospective employers, as well as by state and federal licensing agencies. Depending upon the effectiveness of the local jurisdiction's sealing laws and procedures, a juvenile conviction may interfere with the juvenile's later attempts to: (i) enter an educational institution or obtain a professional license (such as a license to practice law or medicine); (ii) enter the military (including National Guard service, which is, in turn, the precondition for certain employments); (iii) obtain an occupational license (hack license, license to operate a bar, license to carry a firearm as a security guard, and so forth); (iv) obtain public office or employment (particularly in law enforcement or corrections careers); and (v) in cases in which the juvenile's conviction was for a traffic offense, obtain a driver's license or acquire car insurance at affordable rates.

Finally, a conviction may have the collateral consequence of enabling the state to permanently retain any property that was seized from the respondent at the time of arrest. Such property could include, for example, sums of money that the respondent was carrying (seized as proceeds of the crime) or the family automobile that the respondent was driving (seized as an implement of the crime). In many jurisdictions forfeiture statutes provide for the State's retention of such property whenever the respondent has been convicted at trial or has pled guilty. When the personal property that will be forfeited is very valuable to the respondent and when a trial could

result in acquittal and the return of the property but would not pose the risk of incarceration in the event of conviction, a respondent could reasonably opt for the chance of winning the trial and regaining his or her property. It may be obvious to counsel that such a venture would *not* be worthwhile when going to trial *could* enhance the chance of incarceration, but counsel will often need to discuss this situation and explain its risks thoroughly to a juvenile client because many young children are more concerned with the concrete loss of the property than with the intangible possibility of future incarceration.

In each of these situations of potential collateral consequences, counsel must research fully both the legal basis for any collateral criminal or civil liability and the practical likelihood that the collateral consequence will actually take place.

§ 14.08 ASSESSING WHETHER A TRIAL WOULD BE DETRIMENTAL IN THAT IT WOULD EXPOSE THE JUDGE TO PARTICULARLY EGREGIOUS FACTS OR A HIGHLY SYMPATHETIC COMPLAINANT AND THEREBY CAUSE THE JUDGE TO IMPOSE A HARSHER SENTENCE IN THE EVENT OF CONVICTION

Our earlier discussion of factors to consider in analyzing the likelihood of winning at trial mentioned that particularly egregious facts or an especially sympathetic victim may cause a judge to lean unconsciously toward conviction. See § 14.04(c) *supra.* In the event that the respondent is convicted, egregious facts or a highly sympathetic victim may also cause the judge to impose a particularly harsh sentence. In this respect, the respondent may be significantly prejudiced by opting for a trial instead of a guilty plea. Although the judge in a plea colloquy does hear the egregious facts, see § 14.26(c) *infra,* the summary and dispassionate rendition of the facts that are characteristic of plea colloquies usually will not make an overwhelming impression on the judge. In sharp contrast, when a judge observes a vulnerable victim (such as a young child or senior citizen) testify at trial or hears any victim testify about the horrid physical injury or psychological trauma that s/he suffered, the judge inevitably will sympathize with the victim and, in the event of conviction, may increase the punishment meted out to the respondent. Of course, this is not to say that a plea offer should be accepted in every case in which the facts are egregious or the victim is sympathetic. However, these factors must be taken into consideration in the cost-benefit analysis of whether to plead guilty or go to trial.

In assessing whether the egregious nature of the offense should tip the balance in favor of a plea, the first factor to consider is whether the facts of the offense are substantially more egregious than those in other cases heard by the judge. Counsel will have to find out the range of cases heard by the particular judge and assess where this specific crime falls on the spectrum. (For example, a judge who regularly presides over homicides and other major felonies will view an armed robbery in a very different light than would a judge who deals primarily with minor felonies and misdemeanors.) Counsel should additionally inquire of attorneys who have frequently appeared before the judge whether his or her previous sentencings reflect a particular sympathy for the type of victim involved in this respondent's case. In analyzing the judge's prior sentences in cases involving sympathetic victims or particularly egregious facts, counsel should

also compare the length of sentences in cases in which the respondent went to trial with those in which the respondent pled guilty.

Another major factor to consider is the degree to which the judge has leeway to increase the sentence even if s/he wishes to do so. In § 14.06(a) *supra,* it was noted that the range of sentences that can be imposed in juvenile court is quite limited. Usually, the sole choice is between probation and a uniform indeterminate sentence. If that is the case and if the respondent's prior record is such that any new conviction will inevitably result in incarceration, then there is nothing the judge can do to further penalize the respondent even if the judge should be so inclined as a result of hearing the trial testimony. As a result, egregious facts or a sympathetic victim should militate for a guilty plea only when: (i) by pleading guilty and minimizing the impact of those facts, the respondent might realistically be able to avoid incarceration and obtain a sentence of probation; or (ii) even assuming that incarceration is virtually certain in the event of a guilty plea, the judge has the power to give the respondent the benefit of incarceration in a particularly desirable facility; or (iii) the jurisdiction is one that does provide a range of sentences for juveniles, so that the judge could aggravate the sentence as a result of hearing prejudicial trial testimony.

The third and final factor to consider in assessing the significance of egregious facts is whether the impact of those facts will actually be lessened by pleading guilty rather than going to trial. Although it is true that the brief, second-hand description of the offense that is given during a guilty plea (and is usually repeated in the pre-sentence report) will usually not be as devastating as live testimony at trial, there are some crimes (such as murder, rape, kidnapping) that are so egregious that the mere mention of the crime will be sufficient to predispose the judge in favor of a sentence of incarceration. In cases of this type, a guilty plea usually will not make a difference, and the respondent has nothing to lose by going to trial.

In determining whether a guilty plea will serve to avoid or blunt the influence of devastating facts upon the judge, defense counsel should also consider the availability of strategies, such as those described in § 14.06(c)(1) and (3) *supra,* for limiting the factual information that will be put before the sentencing judge in the event of a plea. Clearly, in a case in which the respondent has a chance for probation, a plea agreement that ensures that the judge will never hear certain aggravating facts can spell the difference between probation and incarceration.

Having assessed the degree of damage that could be caused by the judge's hearing the live testimony at trial and the extent to which that damage could be limited by the mechanism of a guilty plea, counsel is finally ready to include these considerations in the general cost-benefit analysis of the advisability of a plea. If the respondent has a strong chance of prevailing at trial, that prospect should not ordinarily be traded away even for the benefits that might accrue from limiting the facts. On the other hand, if the respondent is likely to be convicted and a limitation upon the facts could give the respondent a good chance for probation instead of incarceration, then the respondent may be well advised to accept a plea offer.

Thus far, the discussion has considered only cases in which the facts that would emerge at trial are detrimental to the respondent. Counsel will also occasionally encounter situations in which a trial – even a trial that the respondent would surely lose – could be beneficial because the judge would hear and later remember powerful mitigating evidence in the form of extenuating or sympathetic circumstances surrounding the commission of the offense. For example, in a homicide case, the respondent may have only a slim chance of winning on a self-defense claim, but a trial may provide the opportunity for presenting the judge with persuasive evidence of provocation by the victim, which can be cited later at sentencing as a basis for mitigation of the sentence. In such cases, even the promise of prosecutorial support at sentencing may be insufficient to outweigh the benefits of going to trial and presenting the mitigating facts in the most forceful manner.

§ 14.09 ASSESSING WHETHER THE DECISION TO PLEAD GUILTY CAN BE USED TO STEER THE CASE BEFORE A FAVORABLE SENTENCING JUDGE

Despite systemic attempts to achieve some uniformity in sentencing, individual judges continue to differ enormously in their sentencing patterns and attitudes. As this section will explain, if counsel is practicing in an urban jurisdiction with several juvenile court judges, counsel can significantly affect the client's sentence by ensuring that the sentence is imposed by the right judge or is not imposed by the wrong judge. Of course, these considerations will be inapplicable in the smaller or rural jurisdictions, where there is only one juvenile court judge.

If practicing in a multijudge jurisdiction, counsel should investigate the sentencing practices of all of the judges before whom the case could be steered. Such information can be gleaned by discussing the topic with other juvenile court lawyers and with the prosecutor (assuming s/he is cooperative and trustworthy).

If the juvenile court judges in the jurisdiction periodically rotate assignments, counsel can control the identity of the judge by accelerating or delaying the case. If counsel is aware of an upcoming rotation and concludes that the present judge is more desirable than the incoming judge, counsel obviously wants to advance the case and hold the plea hearing before the current judge. Conversely, if counsel determines that the incoming judge will be a more favorable sentencer, the plea should be delayed until after the rotation has taken place. In some cases the prosecutor's assistance may be crucial in advancing or delaying the plea hearing, and it may be necessary to secure the prosecutor's assistance as an express or implicit condition of a plea agreement. See § 14.06(c)(3).

In a rare case the respondent may enter a guilty plea at arraignment in order to assure the assignment of the case to a particularly lenient judge who happens to be conducting arraignments that day. Such an occurrence should be extremely rare because defense counsel at arraignment usually will not yet have conducted enough discovery and investigation to be able to gauge the advisability of a guilty plea.

In some jurisdictions judges only retain jurisdiction over sentencing in cases in which a trial was held, and all guilty plea cases are sent to a single judge for sentencing regardless of which judge accepted the plea. In such jurisdictions if the judge who conducts sentencings in plea cases is a more lenient sentencer than the judge who would conduct the trial, then this disparity will be a powerful argument in favor of a guilty plea (assuming that there is a significant chance that the respondent would be found guilty at trial). On the other hand, if the judge to whom the case is assigned for trial is a more lenient sentencer than the judge who conducts sentencings in plea cases, then it may be in the respondent's interest to go to trial even in a case in which conviction is inevitable, solely for the purpose of guaranteeing that the lenient trial judge will retain the case for purposes of sentencing.

§ 14.10 ASSESSING WHETHER A GUILTY PLEA WOULD PREJUDICE THE RESPONDENT BY PRECLUDING APPELLATE REVIEW OF AN ADVERSE TRIAL COURT RULING ON A SUPPRESSION ISSUE OR OTHER ISSUE LITIGATED BEFORE TRIAL

In many jurisdictions the entry of a guilty plea waives all rights to appellate review of errors committed in judicial proceedings prior to the plea. Accordingly, in jurisdictions of this sort, if the defense litigates and loses a viable motion to suppress a confession, tangible evidence, or identification evidence, and the respondent thereafter enters a guilty plea, the defense forfeits the right to appeal the adverse suppression rulings. In cases in which the suppression arguments are strong, counsel must weigh the loss of the opportunities for their appellate vindication against the benefits of the plea. Similarly, a guilty plea waives – and counsel who is advising a respondent concerning the advantages and disadvantages of a plea must factor in the loss of – appellate review of other pretrial rulings, such as rulings on motions for a change of venue, for recusal of the judge, and so forth.

In most jurisdictions a strictly limited number of contentions may be raised on appeal or by *certiorari* or on collateral attack (see § 39.03 *infra*) following a guilty plea (*see Garza v. Idaho*, 139 S. Ct. 738, 748 (2019)): the facial constitutionality of the criminal statute charged; the jurisdiction of the court (including, in a few States, a statute-of-limitations bar (see § 17.07 *infra*); the question whether the charging paper charges an offense (§ 17.03 *infra*). Even these contentions may be extinguished if, in addition to pleading guilty, the respondent expressly waives the rights to challenge the ensuing conviction by appeal or collateral attack. *Compare Portis v. United States*, 33 F.4th 331 (6th Cir. 2022), *with Garza v. Idaho*, 139 S. Ct. 738, 748 (2019), *and United States v. Yung*, 2022 WL 2112794 (3d Cir. June 13, 2022). In some jurisdictions, a statute or court decision also authorizes the appeal of pre-plea rulings on suppression motions, notwithstanding a guilty plea. *See, e.g.*, N.Y. FAM. CT. ACT § 330.2(6) (2022); *Mahaffy v. State*, 486 P.3d 170 (Wyo. 2021). But counsel should make very sure that post-plea review is expressly authorized by statute or authoritative judicial decision in the particular jurisdiction before s/he advises a guilty plea in the expectation that any ground of legal defense will survive it. The Supreme Court of the United States has gone very far in according finality to guilty pleas and in holding them effective waivers of all defense claims. *Brady v.*

United States, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); *North Carolina v. Alford*, 400 U.S. 25 (1970); *Tollett v. Henderson*, 411 U.S. 258 (1973); *see also Corbitt v. New Jersey*, 439 U.S. 212, 218-25 (1978); *United States v. Goodwin*, 457 U.S. 368, 377-80 & n.10 (1982); *Mabry v. Johnson*, 467 U.S. 504, 508-09 (1984); *and see United States v. Chavez-Diaz*, 949 F.3d 1202 (9th Cir. 2020); *United States v. Dominguez*, 998 F.3d 1094 (10th Cir. 2021); *United States v. Williams*, 29 F.4th 1306 (11th Cir. 2022). Essentially, these decisions hold that a voluntary and understanding guilty plea entered by an adequately counseled defendant or respondent is conclusive upon the issue of guilt unless the applicable state law provides otherwise (*see Lefkowitz v. Newsome*, 420 U.S. 283 (1975); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 324-25 (1979); *Shea v. Louisiana*, 470 U.S. 51, 53 (1985); *cf. Berkemer v. McCarty*, 468 U.S. 420, 424-25 & n.2 (1984)).

In jurisdictions that prohibit appellate review of preplea rulings, it may be possible to preserve appellate remedies by securing prosecutorial and judicial agreement to a "stipulated trial" procedure. Under this procedure the respondent consents to the submission of the case to the court for adjudication upon a stipulated statement by the parties of the evidence that would have been presented at a trial, and it is understood beforehand that the judge will thereupon convict and proceed to sentencing as though the respondent had pleaded guilty. Because this process conserves the prosecutor's time, the prosecutor may be willing to grant the same types of concessions that are normally granted in plea agreements. And, since there would be a trial in form, appellate review of pretrial rulings would be preserved. However, defense counsel must be fully confident of the viability of this procedure in the jurisdiction in which counsel is practicing before urging a client to use it.

§ 14.11 ASSESSING THE IMPACT OF THE ADDITIONAL CONSIDERATIONS THAT ARISE IN CASES IN WHICH THE RESPONDENT IS DETAINED BEFORE TRIAL

When the respondent is detained pending trial, it may be possible to include in the plea agreement a prosecutorial commitment to support post-plea release of the respondent pending sentencing. Such an arrangement not only speeds up the client's release from galling pretrial confinement but gives him or her the chance to demonstrate good behavior in the community during the presentencing period and thereby "earn" a sentence of probation. See § 14.06(c)(3) *supra.*

Even when a guilty plea will not serve to secure the respondent's liberty pending sentencing, a respondent who is detained before trial may nevertheless have an interest in pleading guilty in order to cut down on the period of detention prior to sentencing. This will obviously be the case when a sentence of probation is expected; and it *may* also be the case even when an incarcerative sentence is likely because, in many jurisdictions, pretrial detention in juvenile cases is not credited against the length of sentences. Accordingly, when the respondent will probably be detained for a few months prior to trial, s/he may wish to plead guilty in order to accelerate the commencement of the service of sentence.

Although reducing the duration of incarceration in this way is a valid consideration, counsel who discusses it with the client will want to be sure that the discomfort of being in detention does not overwhelm the client's judgment and push him or her into a hasty decision to forgo a trial in which s/he may have a winning defense.

§ 14.12 ASSESSING THE IMPACT OF OTHER FACTORS THAT MILITATE IN FAVOR OF EITHER A GUILTY PLEA OR A TRIAL

In addition to the factors previously listed, there are several other factors that may, in particular cases, affect the determination of the advisability of a guilty plea. Although the list of fact-specific variables is too lengthy to cover in its entirety, some of the most typical considerations are highlighted next.

§ 14.12(a) The Potential Advantages of a Guilty Plea in a Case in which the Prosecutor Has Under-Charged the Respondent

Occasionally, counsel will encounter a case in which the charges filed by the prosecution are significantly less serious than those that counsel's independent interviewing and investigation reveal could be proved at a trial. If the client pleads not guilty and thereby puts the case on the prosecution's trial-preparation agenda, s/he could end up facing graver charges. Under these circumstances, a quick plea of guilty may be advisable in order to bar the subsequent filing of aggravated charges. The constitutional prohibition against double jeopardy (see § 17.08 *infra*) bars a respondent's prosecution upon greater charges following his or her conviction of a lesser included offense, *e.g.*, *United States v. Dixon*, 509 U.S. 688 (1993); *Heath v. Alabama*, 474 U.S. 82, 87-88 (1985) (dictum), except (a) "where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence," *Brown v. Ohio,* 432 U.S. 161, 169 n.7 (1977); *Illinois v. Vitale,* 447 U.S. 410, 419-21 & n.8 (1980); *compare Garrett v. United States,* 471 U.S. 773, 789-92 (1985); or (b) the state files the more serious charge at the outset, but the respondent elects to seek adjudication of the lesser charge first and succeeds in obtaining such an adjudication over the prosecutor's objection, *see Ohio v. Johnson,* 467 U.S. 493 (1984); *cf. Jeffers v. United States,* 432 U.S. 137, 151-54 (1977) (plurality opinion); or (c) the adjudication of the lesser charges is effected pursuant to a plea bargain that the respondent later breaches, *see Ricketts v. Adamson,* 483 U.S. 1 (1987).

§ 14.12(b) Cases in Which a Client Manifests Strong Discomfort With One or the Other of the Options of Entering a Guilty Plea or Going to Trial

Another factor to consider is whether the respondent does not "feel" guilty and is agreeing to a guilty plea only with considerable reluctance. Given the fact that the decision is the client's to make and that it is the client who will have to live with the sentencing consequences of that decision, the comfort of the client should be a major factor. Moreover, if the client is unhappy with the plea, his or her unhappiness may be sufficiently apparent to the judge during

the plea colloquy that the judge will not accept the plea. As indicated in § 14.26(c) *infra,* the judge may interrogate the respondent extensively in the course of accepting the guilty plea. (Problems of the latter sort may be avoided or ameliorated in jurisdictions that allow an "*Alford* plea." See § 14.22(a) *infra*.)

Conversely, the client may have concerns that make him or her uncomfortable with the prospect of undergoing a trial, regardless of its outcome. Some respondents may have psychological or emotional problems that render them unable to cope with the nervous stress that attends a trial, particularly a lengthy trial. Some respondents may fear their parents' reactions to hearing the testimony at trial, particularly when the offense is a sex offense or involves extreme violence. In jurisdictions that permit the media to attend the trial, counsel will also need to consider the respondent's reactions to the bad publicity that a trial may generate. In all such situations, counsel will need to play the role of a dispassionate but not uncompassionate adviser, helping the client to examine his or her feelings with a measure of objectivity but not underrating their importance.

Part C. Plea Negotiations

§ 14.13 DEFENSE COUNSEL'S OBLIGATIONS IN PLEA NEGOTIATIONS

"Plea bargaining" and "bargain justice" conjure up shabby images in many minds, ranging from a sluggardly or exploitative defense practice to politicking and graft. Undoubtedly, there are some corruptions of plea bargaining. But the negotiated resolution of criminal matters is no more to be scorned for that reason than are all contracts because some contracts are fraudulent. There is absolutely nothing wrong with defense counsel's settling a criminal or juvenile delinquency case with authorization from the client and after fair dealings with the prosecutor.

What is involved in settlement, and in the antecedent negotiation, is an attempt to come to agreement on a disposition that serves and reconciles, as far as possible, the legitimate interests of the prosecution and the defendant or juvenile respondent, without the wasted effort and needless vagaries of trial. In criminal and juvenile matters, as in civil matters, negotiation is the essence of lawyering. Experienced criminal lawyers know that one of defense counsel's most important functions, perhaps the most important, is working out with the prosecutor the best possible disposition of a client's case in situations in which there is no realistic prospect of acquittal. Not only may the lawyer properly do this, but s/he violates the obligation of competent representation if s/he fails to pursue plea-bargaining opportunities that could produce a better outcome for the client than a trial (*see* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, DEFENSE FUNCTION (4th ed. 2017), Standard 4-6.1, *Duty to Explore Disposition Without Trial* ("(a) Defense counsel should be open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition. Counsel should be knowledgeable about possible dispositions that are alternatives to trial or imprisonment,

including diversion from the criminal process. ¶ (b) In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences."); *id*., Standard 4-6.2, *Negotiated Disposition Discussions* ("(a) As early as practicable, and preferably before engaging in disposition discussions with the prosecutor, defense counsel should discuss with and advise the client about possible disposition options."); *Missouri v. Frye*, 566 U.S. 133, 143-46 (2012); *Williams v. Jones* 571 F.3d 1086, 1090-91 (10th Cir. 2009); *Johnson v. Uribe*, 682 F.3d 1238 (9th Cir. 2012), *as amended on denial of rehearing in* 700 F.3d 413 (9th Cir. 2012); *Ebron v. Commissioner of Correction*, 307 Conn. 342, 53 A.3d 983 (2012)) or fails to conduct an adequate investigation of the possibility of a favorable plea bargain (*see United States v. Jenks*, 2022 WL 1252366, at *2, *3 (10th Cir. April 28, 2022) (requiring a hearing on a postconviction claim of ineffective assistance of counsel based upon allegations that "without consulting a DNA expert to perform any tests or interpret the government's DNA test results, Petitioner's trial counsel told Petitioner that the government's evidence was weak, that he would win at trial, and that he should reject every offer to enter a plea agreement": "We can think of no reasonable professional judgment that would justify failing to accurately discover and convey to the defendant the results of DNA testing, which are likely to be critical to the prosecution's case.")).

§ 14.14 OPENING DISCUSSIONS WITH THE PROSECUTOR

From the outset of proceedings, counsel will have been discussing the case with the prosecutor. See §§ 4.11, 9.06 *supra.* Initial discussions should have focused principally on learning what the prosecutor was willing to disclose about the prosecution's case. But counsel should also have learned something about the prosecutor's attitude; counsel should have tried to affect that attitude in favor of the client; and in the course of urging a favorable exercise of the prosecutor's broad charging discretion, counsel should have asked specifically and ascertained what the prosecutor regards as a satisfactory disposition of the case. Counsel can ordinarily do this much without making any offer to plead the client guilty or even intimating that the client might be receptive to a plea agreement. Counsel can, therefore, proceed this far without explicit authorization by the client.

§ 14.15 WHEN NEGOTIATION SHOULD BEGIN

Exactly when negotiation in a stricter sense should begin – that is, when defense counsel should begin to raise the possibility of a guilty plea if some mutually satisfactory terms of settlement can be agreed upon – depends on a variety of circumstances.

Obviously, the paramount consideration is whether the respondent will derive any specific benefits as a result of pleading early in the process. One common example of a situation in which an early plea is often essential is when the crime was committed by a group of

perpetrators. If all of the perpetrators have been arrested, the one who first cooperates to "break" the case and implicate the others will very likely receive the most consideration from the prosecution. (This is true both in cases involving a group of juvenile perpetrators and in cases involving a mixed group of juvenile and adult perpetrators (when the respondent's testimony may be used by either or both of the prosecutors of the juvenile and adult court cases)). If some members of the group have not yet been identified, or have not yet been apprehended, the respondent who seeks to win governmental consideration by dislosing their names and/or whereabouts also will need to move quickly in order to provide that information before the police acquire it through independent investigation.

The defense may also gain collateral advantages from prompt commencement of plea negotiations with the prosecutor. Plea negotiation is one of the most profitable methods of informal discovery. Most prosecutors will disclose their case to some extent in order to persuade defense counsel that a guilty plea is advised. Indeed, some prosecutors will disclose facts about their case *only* if a guilty plea is being discussed. And counsel wants to begin discovery as early as possible. See Chapters 6 and 9.

Conversely, there may be reasons for delaying plea negotiations. One of the most important reasons for delay exists when counsel knows that the respondent is being sought for other crimes for which s/he has not yet been arrested. If counsel delays the negotiation and the respondent does end up being arrested for the other crimes, then counsel can negotiate for a plea that covers both the current case and the new cases. If counsel had gone ahead and worked out a plea bargain to cover only the current case, the prosecutor might insist on a second plea agreement (and often a far less favorable overall deal) when the new cases enter the system.

Moreover, even in cases in which an early plea might be beneficial, counsel is frequently in no position to negotiate at the outset of the case. Adequate factual investigation and legal research are the necessary preconditions for intelligent negotiation. And negotiation involves offering something, even if the something is only a possibility. Offering something *does* require authorization from the client. Counsel frequently will have nothing to offer at an early stage.

The client's attitude should play a major part in determining whether counsel initiates plea negotiations early in the process. Some clients will expect their attorney to begin promptly to discuss a plea with the prosecutor. The police, in their immediate post-arrest interrogation of a respondent, often stress the value of cooperation, in order to obtain a confession of the offense for which the arrest was made, to encourage the respondent to confess to – and hence to "clear" – other unsolved crimes, and to persuade the respondent to finger any accomplices or help "break" other crimes. These suggestions by the police set a tone that may make the respondent quite anxious to clinch a quick deal; and, particularly if s/he is system-savvy, s/he will expect counsel to jump into bargaining with both feet.

On the other hand, many clients persist long after arrest in vigorously protesting innocence and expounding plausible tales (some true, some not), which, if true, render the

suggestion of a guilty plea inconceivable. Counsel cannot broach the subject of a possible guilty plea to such clients, for the purpose of obtaining their authority to negotiate, without appearing to call the client a liar. At this early stage in the process, counsel has not yet established the rapport needed to probe the client's position tactfully yet skeptically to see whether the client will stick to it in the face of all of the hard questions and hard facts that counsel will eventually have to put to the client. See §§ 5.06, 5.12 *supra.*

Accordingly, the best approach in gauging how early to initiate plea negotiation is ordinarily to be guided by the client's outlook in the initial interview. If the client admits guilt and feels that s/he has been caught red-handed, counsel may raise the question of a possible guilty plea and suggest that – if the client wishes – counsel will explore the prosecutor's attitude toward some sort of a plea bargain at the same time that counsel looks further into the facts of the case. Counsel should explain that:

1. Of course, counsel will make no commitments and will not indicate to the prosecutor that the client has any interest in pleading guilty.

2. Counsel does not as yet have any idea of the prosecutor's position. But counsel will undertake to find out what the prosecutor might be willing to accept in the way of a reduced sentence.

3. After counsel learns what the prosecutor is offering, counsel will relay that offer to the client so that the client can evaluate whether the offer is even worth considering. Counsel will at that point give the client his or her advice, but the final decision will be the client's.

4. Even if the client authorizes counsel to initiate discussions with the prosecutor, counsel intends to investigate the facts thoroughly in order to determine whether the prosecution's case is strong or weak. Counsel will not even consider a plea, or advise the client to consider a plea, unless counsel's investigation shows that the prosecutor's case is strong and likely to result in conviction at trial.

5. Counsel is starting out with the attitude that "if this case can be fought, we are going to fight it." Counsel's only reason for bringing up the possibility of a plea is that s/he does not want to overlook any opportunity for getting the most favorable deal for the client if the client later decides that s/he would do better with a plea than with a trial.

Even with a client who acknowledges guilt, counsel is wise not to seem too attracted by a possible plea disposition at the outset, lest the client get the impression that counsel is anxious to sell out the client in order to save counsel work. But if counsel's mention of talking to the prosecutor elicits a positive reaction from the client, counsel might as well start talking early.

On the other hand, if the client denies involvement in the offense or speaks of contesting guilt and if there appear no pressing reasons to begin negotiation, counsel can let the matter go until defense investigation and research have given counsel a thorough, detailed grasp of the case. After counsel has investigated the facts and had a chance to study and make some tentative evaluation of the matters discussed in §§ 14.03-14.12 *supra,* s/he should raise with the client the question of a possible guilty plea. At this stage counsel is not yet prepared to tell the client with any certainty what the advantages of a guilty plea will be, but s/he is in a position to suggest that there may be some advantages, depending on the prosecutor's attitude toward negotiation. Even though counsel may have come to the unilateral conclusion that the case is plainly one for a not-guilty plea and trial, s/he owes it to the client to give the client the option of having negotiation with the prosecutor explored as an alternative. Of course, if counsel and the client are agreed at this stage that the case should be fought out on the guilt issue, no matter what sort of disposition the prosecutor might agree to – or if the client is adamant against any thought of a guilty plea notwithstanding counsel's belief that negotiations looking to a plea might profitably be considered – the matter is ended. There remains nothing for counsel to do but prepare for trial and perhaps raise the issue with the client again later in light of subsequent developments.

§ 14.16 THE CONDITIONS PRECEDENT OF EFFECTIVE DEFENSE NEGOTIATION – THINGS TO KNOW ABOUT THE LAW, THE CASE, AND THE MOTIVATIONS OF THE PROSECUTOR

Thorough investigation must precede any serious negotiation. Counsel must know enough about the prosecutive and defensive cases – that is, about the facts, their likely provability in court, and the likely responses of a judge (or, in some jurisdictions, a jury) – to make, at least provisionally, the sort of evaluation suggested in § 14.04 *supra.*

Counsel also must be thoroughly familiar with the statutory scheme for sentencing of juveniles, the general sentencing practices of the juvenile court in which counsel is appearing, and the sentencing practices of the individual judge who is presiding over the case. In particular, counsel will need to know whether there are any specific sentencing advantages that can be gained by pleading guilty or whether the unique sentencing structure applicable to juvenile court will cause the sentence to be identical regardless of whether the respondent pleads guilty or goes to trial. See § 14.06(b) *supra.* In addition, counsel must thoroughly familiarize himself or herself with the possible mechanisms for using a guilty plea to obtain one of the sentencing advantages available under a juvenile sentencing scheme. See § 14.06(c) *supra.*

Defense counsel also will need to be thoroughly familiar with the facts of the case and the respondent's background, in order to make effective arguments in favor of the client and overcome the prosecutor's reluctance to offer a favorable plea agreement. For example, having thoroughly investigated the case, defense counsel can, if appropriate, mention flaws in the prosecution's case that might lead the prosecutor to be more amenable to the plea agreement sought by the defense. (Such a strategy must, of course, be employed with caution so as to avoid tipping the prosecutor off to flaws that the prosecutor can remedy prior to a trial.) Similarly,

having thoroughly investigated the respondent's social history, defense counsel can affirmatively use favorable aspects of: the respondent's prior record of convictions and arrests; school records showing the respondent's attendance and performance at school; the parent's descriptions of the respondent's conduct at home; reports by employers of the respondent in present or prior part-time jobs or summer jobs; reports of psychiatrists, psychologists, or social workers who have examined the respondent; and reports by coaches at school or counselors who have worked with the respondent in community centers or other types of programs. Thorough investigation of the respondent's prior court records, school records, and conduct at home is also essential, of course, so that counsel can meaningfully assess contingent plea offers in which prosecutorial support for a certain sentence is conditioned upon the pre-sentence report showing that the respondent is well-behaved at school and at home. See § 14.06(c)(1) *supra.*

It is also crucial for counsel to familiarize himself or herself with any formal or informal policies of the prosecutor's office bearing on the sort of case involved. Frequently, prosecutors hide behind "office policies" that allegedly prevent the prosecutor's acquiescence in the type of plea agreement that defense counsel is proposing. Defense counsel can rebut this claim if s/he is prepared to cite previous similar cases in which the present prosecutor or other prosecutors in the office accepted the result presently sought by defense counsel.

Just as it is important to be familiar with office policies, it is equally important to familiarize oneself with the specific practices and motivations of the prosecutor handling the case. The prosecutor's calculus may be affected by a host of considerations, including: (i) considerations of justice; (ii) concern for the rehabilitative needs of the juvenile respondent; (iii) the obligation to satisfy superiors in the prosecutor's office and the wish to avoid their viewing the prosecutor as unduly lenient; (iv) the desire to avoid antagonizing the investigating police officers, whose cooperation and good will may be needed by the prosecutor in future cases, and who may feel chagrin at the prospect of the prosecutor dismissing or compromising a case which they did a good job of investigating; (v) the desire to make the complainant feel like his or her interests have been vindicated; (vi) in jurisdictions that permit media access to juvenile proceedings, the need to be able to justify to the public any "deal" that is made; and (vii) the desire to rid himself or herself of a case, and thereby reduce his or her caseload. If counsel learns the precise motivations of the prosecutor in the particular case, then counsel can highlight the considerations most likely to sway the prosecutor. If the prosecutor is most concerned with imposing some type of punishment upon the respondent in order to satisfy his or her superiors, the complainant, and the police officers, then s/he may be amenable to probation or even diversion as long as defense counsel can come up with a plan for restitution or community service by the respondent. If, on the other hand, the prosecutor is truly committed to the rehabilitative ideal of the juvenile justice system, s/he will usually be receptive to arguments that a certain community-based program can serve the respondent's educational or psychological needs better than incarceration would. And prosecutors who are overwhelmed with caseload pressures will be particularly susceptible to defense proposals that will simultaneously resolve several cases of the respondent or several co-respondents' cases, or both.

When dealing with prosecutors who are concerned with the feelings of the investigating police officers or the complainant, counsel can, in an appropriate case, attempt to lobby these individuals in advance, possibly mentioning facts such as the minimal prior record of the respondent and the likelihood that the rehabilitative programs that will be ordered as a result of the plea will "straighten out" the respondent. However, counsel must be extremely cautious in deciding whether to lobby police officers or complainants and in selecting the arguments to use in lobbying them. All too often, such lobbying efforts can backfire, inciting the officer or complainant to call the prosecutor and voice their desire for a harsh sentence, or causing the prosecutor to feel resentful about defense counsel's attempt to "line up" individuals whom the prosecutor may erroneously view as witnesses that "belong" to the prosecution, or both.

After investigating the law, facts, and prosecutorial motivations, counsel should draft a blueprint for plea negotiations that encompasses:

A. What defense counsel can offer to the prosecutor, including:

1. A plea of guilty to one or another offense.

2. Voluntary submission to treatment programs, changes of residence (for example, moving out of a certain neighborhood or moving out of the jurisdiction), and other matters that could not be compelled by law.

3. Voluntary financial restitution or submission to community service.

4. Cooperation to incriminate or convict other persons.

5. Cooperation to clear uncleared crimes.

B. What relatively favorable dispositions can be extracted from the prosecutor, including one or more of the following:

1. The respondent's plea of guilty to a lesser offense included within the present charge.

2. The respondent's plea of guilty to less than all of the offenses charged, with dismissal of the others on a *nolle prosequi.*

3. The respondent's plea of guilty to the offense charged or to a lesser offense, on the prosecutor's promise to support (or not object to) a specific sentence, or to remain mute at sentencing, or to provide one of the other forms of aid at sentencing that are described in § 14.06(c) *supra.*

4. The respondent's plea of guilty to the offense charged or to a lesser

offense, on the prosecutor's agreement to secure the dropping of other charges against the respondent in other jurisdictions, federal or state. The prosecutor may or may not be able to deliver on this agreement. Counsel should ordinarily get personal assurances from the other prosecutors involved. S/he should also be familiar with prosecutorial policies, or s/he may be making a bad deal. The federal government very infrequently prosecutes for a federal offense following state conviction on a charge based upon the same incident; the agreement to have federal charges dropped is therefore often worth little.

5. Interim benefits such as release pending disposition or acceleration of the date when the case will be brought on for disposition (a matter of significance to a respondent who has been detained before trial).

§ 14.17 TECHNIQUES OF PLEA NEGOTIATION

The process of negotiation with a prosecutor is in many ways like negotiation aimed at settling a civil case. Ordinarily, the prosecutor must be impressed with the discrepancy between what s/he wants and what s/he is likely to get or with the inconvenience involved in getting what s/he wants before s/he will settle for less than what s/he wants. The major difference in criminal and juvenile delinquency negotiation is that it is the prosecutor alone, not a client, who decides what the prosecutor wants. The prosecutor's personal sense of justice may affect this calculus, and the prosecutor's prediction of a judge or jury's likely reaction to the evidence almost always constitutes a major factor in determining what s/he will regard as an acceptable negotiated outcome. *See* BRUCE FREDERICK & DON STEMEN, THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING (Vera Institute 2012); Anna Offit, *Prosecuting in the Shadow of the Jury,* 113 NW. U. L. REV. 1071 (2019). In negotiating with the prosecutor, defense counsel must also bear in mind that criminal and delinquency cases, more than most civil cases, tend to attract media coverage, so the prosecutor could be concerned about justifying any "deals" to the public. Counsel often does well to suggest a face-saving rationale that the prosecutor can articulate to defend an agreed-upon disposition. An additional problem is that prosecutors rely heavily on the police and need their cooperation. When the police feel that they have done a good job in building a case, they may be chagrined to see the prosecutor dismiss or compromise it. This latter consideration may suggest the desirability of counsel's doing a bit of lobbying with the investigating officer after counsel has begun plea negotiations with the prosecutor. Conversely, where the police have engaged in demonstrable misconduct – using excessive force in making the client's arrest or in conducting a search or seizure, the prosecutor may be motivated to offer a favorable plea bargain in order to avoid litigation airing these abuses. In a case in which the complainant's wishes are likely to be significant to the prosecutor, a discussion with the complainant also may be advised. In both cases, of course, extreme caution must be observed in counsel's decision to involve these parties in the affair. Often the prosecutor will not consult them, and their involvement may stir up trouble for the defense.

Some prosecutors will request – and some of them may insist – that, as a part of the negotiation process, the respondent submit to a "proffer interview" in which the respondent puts on record the factual information that will be treated as established for the purposes of supporting the plea and consequent sentencing. (The proffer interview usually is recorded and filed for the record if a plea bargain is reached. If not, the proffer interview and the facts elicited by it and otherwise not provable by the prosecution are inadmissible against the respondent except in a prosecution for perjury when the statement was made under oath. *See*, *e.g.*, FED. RULE EVID. 410; *United States v. La Luz-Jimenez*, 226 F. Supp. 3d 79 (D. Puerto Rico 2017); *United States v. Deantoni*, 171 F. Supp. 3d 477 (E.D. Va. 2016); *cf. State v. McGee*, 282 Neb. 387, 395-96, 803 N.W.2d 497, 505 (2011).) Defense counsel should ordinarily not agree to this procedure if they can avoid it. Under questioning, the respondent may make damaging factual statements or a bad impression that will jeopardize the chances for a favorable plea bargain. It is safer for negotiation to proceed on the basis of either (1) counsel's representations to the prosecutor of the defense version of the facts, or (2) a written statement of the relevant facts prepared by counsel for the respondent's signature (which may be notarized if the prosecutor wishes). If the prosecutor adamantly will not bargain without a proffer interview and if defense counsel and the respondent are of the view that a guilty plea is likely to produce a better outcome than a trial, counsel should prepare the respondent for the interview with the same care with which s/he would prepare the respondent to testify in court. See § 10.10 *supra*.

Like any negotiation, plea negotiation involves the art of agreeing with the other side's position on all points that are not essential to counsel as a means of getting the other side to agree with counsel's position on essential points. This means, analytically, that counsel must figure out what the prosecutor really wants and how to give the prosecutor what s/he wants without sacrificing what counsel wants. For example, a prosecutor who says that s/he thinks "this juvenile respondent ought to be taken off the streets" does not necessarily want incarceration; s/he may be saying that s/he wants the respondent out of the community so as not to give the complainant, the police, and this prosecutor any further trouble. S/he may be quite satisfied with a suspended sentence and probation if the respondent will live with relatives in a different neighborhood or county and probationary supervision can be shifted to that jurisdiction.

The multitude of possible offenses that could be charged in any factual situation (including offenses of which the respondent is not technically guilty) and the large range of kinds of assistance that the prosecutor can lend at sentencing (see § 14.06 *supra*) ordinarily give counsel plenty of possibilities for effective compromise if s/he reviews them thoroughly and uses imagination. Similarly, the range of informal accommodations must be viewed with imagination. A prosecutor who adamantly refuses to make a formal sentencing recommendation to the court, for instance, may be willing to make an informal recommendation to the probation officer who is writing up the pre-sentence report on the case – and the latter recommendation may be just as valuable to the defense as the former.

At the personal level, it is important to minimize the extent of counsel's disagreements with the prosecutor without giving in to the prosecutor on substantive matters. It is particularly

important for counsel to appear not to be standing in personal opposition to the prosecutor, even when counsel's position is opposed to the prosecutor's position. (Bruce Green has suggested in a provocative article that every criminal defendant should have two lawyers – a trial lawyer and a settlement lawyer – with the aim, *inter alia,* of reducing the adversarial animosity that impedes effective plea negotiation. Bruce Green, *The Right to* Two *Criminal Defense Lawyers*, 69 MERCER L. REV. 675, 687-688 (2018). Because this isn't about to happen soon for any but the wealthiest of defendants, an attorney representing those less affluent has to work hard at *being* both of those two lawyers.) One way for defense counsel to avoid a clash of personalities with the prosecutor is for counsel to establish a personal posture that is not completely identified with counsel's bargaining position, by associating the bargaining position with the client and appearing to play the role of an honest broker between the client's interests and the prosecutor's. Thus, the "I-really-see-the-case-the-way-you-do-because-any-sensible-lawyer-would-know-that-what-you-say-makes-sense-but-you've-got-to-help-me-to-sell-it-to-my-client-by-giving-me-something-more-to-take-to-the-client-that-s/he-can-live-with" approach is frequently productive. This use of the absent client as a third force in negotiation allows defense counsel to hold firm to his or her position while establishing a broad base of personal and professional agreement with the prosecutor. It also avoids arousing any instincts that the prosecutor may have toward combative gamesmanship – that is, the game of "beating" defense counsel in flea-market haggling. However, when possible, counsel should never say that the client *does not* or *will not* accept the prosecutor's position, since this may simply redirect the prosecutor's combativeness toward the client. The better formulation is a "What-worries-my-client-is- . . ." or an "I-just-don't-think-I-can-sell-that-to-my-client-unless- . . ." approach or their equivalents.

Keeping on the prosecutor's good side and avoiding clashes that may arouse the prosecutor's ire at either the respondent or defense counsel is indispensable because, as a practical matter, the prosecutor ordinarily has the upper hand in the bargaining process. Although defense counsel may be able to appeal to some judges to lean on a prosecutor who stands adamant on an outrageous bargaining position (see § 14.05 *supra*), the prosecutor can usually get away with either stonewalling or playing very rough at the bargaining table. *See, e.g., Weatherford v. Bursey,* 429 U.S. 545, 561 (1977) ("there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial"); *Ricketts v. Adamson,* 483 U.S. 1, 9 n.5 (1987), citing *Mabry v. Johnson,* 467 U.S. 504 (1984) (same); *Bordenkircher v. Hayes,* 434 U.S. 357 (1978) (finding no constitutional objection to a prosecutor's filing a recidivist charge, carrying a mandatory life sentence, for the admitted purpose of inducing the defendant to accept the prosecutor's offer of a plea bargain involving a five-year sentencing recommendation); *United States v. Goodwin,* 457 U.S. 368, 377-80 (1982) (reaffirming *Bordenkircher*); *Alabama v. Smith,* 490 U.S. 794, 802 (1989) (same). The prosecutor is under heavy pressure to settle most cases in order to reduce the prosecution's trial docket to manageable proportions, and that pressure is defense counsel's greatest asset as long as counsel does nothing to give the prosecutor the impression that this case deserves "special treatment." But if the prosecutor gets riled, s/he usually has sufficient resources to make any particular case unpleasantly "special" for the respondent.

§ 14.18 THE PLEA AGREEMENT WITH THE PROSECUTOR

In some jurisdictions, agreements between defense counsel and the prosecutor are not reduced to writing. The reputation and integrity of each attorney are the only guarantees that each will keep his or her word. In theory, of course, a guilty plea entered in consideration of an oral prosecutorial promise that is not fulfilled must be set aside. *E.g., Santobello v. New York,* 404 U.S. 257 (1971); *Blackledge v. Allison,* 431 U.S. 63 (1977). But proof of the facts necessary to bring the theory into play is not easy; postconviction litigation over broken plea bargains can consume years; and the relief, if any, that the client ultimately gets may be nothing more than the right to stand trial. Therefore, if counsel does not know the particular prosecutor, s/he should check out the prosecutor's reputation by inquiry among knowledgeable members of the bar *before* a plea is entered. And unless local practice strongly disfavors written plea agreements or the prosecutor adamantly refuses to consider one, counsel should press to reduce any plea bargain to writing.

Some States and localities have developed a practice under which the terms of plea bargains are set out in writing and filed with the court. *See, e.g., People v. West,* 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970). (This practice is often but not always incidental to the "conditional" plea bargaining procedure described in § 14.06(c)(2) *supra.*) Such a procedure for memorializing the plea agreement should ordinarily be followed if the prosecutor and the court can be persuaded to accept it. Defense counsel should always offer to draft the written instrument for the prosecutor's review rather than *vice versa,* since the drafter of a document has the advantages of initiative, inertia, and a working familiarity with the draft during any negotiations that may be required to secure its approval or arrange for its revision into final form. The courts ordinarily "treat plea agreements like contracts . . . [,] use 'traditional principles of contract law' to interpret them, and . . . enforce them according to their literal terms" (*United States v. Warren*, 8 F.4th 444, 448 (6th Cir. 2021), summarized in § 14.29(b) *supra*). *See also*, *e.g.*, *United States v. Wilson*, 920 F.3d 155 (2d Cir. 2019) ("[w]e review interpretations of plea agreements *de novo* and in accordance with principles of contract law"); *United States v. Martin*, 25 F.3d 211, 216-17 (4th Cir. 1994) ("[a]lthough plea agreements between the government and a defendant are unique and call for special due process considerations, the judicial interpretation of plea agreements is largely governed by the law of contracts"); *State v. Beres*, 943 N.W.2d 575, 577 (Iowa 2020) ("[t]his case gives us the opportunity to reaffirm once more that plea agreements are contracts, and accordingly, they are subject to general principles of contract law"); *State v. King*, 218 N.C. App. 384, 388, 721 S.E.2d 327, 330 (2012) (a "plea agreement is 'in essence a contract[,]' and thus the law of contracts governs judicial interpretation of plea agreements")). So the drafter's ability to shape the terms of the agreement, make initial choices about the terms to be included, and craft specific implementing language is an invaluable advantage.

A plea agreement contemplating that the respondent will serve as an informer or a witness against accomplices or will otherwise assist the prosecution in any way other than the mere entry of a plea of guilty should be detailed and unambiguous regarding (1) the specific actions that the respondent is to take, (2) the investigations or cases in which (or the persons

against whom) s/he is to take those actions, (3) the circumstances under which s/he is to take the actions, and (4) the duration of the respondent's obligations to act. If s/he is to testify against accomplices, the agreement should specify precisely the proceedings in which s/he is required to testify, and should not leave unclear the scope of the respondent's duties in the event that proceedings against an accomplice later take varying twists (for example, prosecution of the accomplice on multiple charges involving separate trials; reprosecution of the accomplice following a mistrial or the appellate reversal of an initial conviction). Unclarity about the respondent's responsibilities in these eventualities must be avoided, since a respondent who subsequently disagrees with the prosecutor's interpretation of his or her responsibilities does so at the risk that the entire plea bargain will be set aside and s/he will then be prosecuted for the most serious offenses originally charged, if the courts should happen to prefer the prosecutor's interpretation to the respondent's. *Ricketts v. Adamson,* 483 U.S. 1 (1987).

When writing up a plea agreement, counsel will also need to take particular care regarding another aspect of any commitment made by the respondent to divulge factual information that could incriminate him or her in either the present offense or other offenses. Almost invariably, in cases in which the respondent has agreed to divulge information or to testify against accomplices, the prosecution will want to delay the respondent's sentencing until after the information has been provided or the testimony has been given. By holding the sentencing over the respondent's head, the prosecutor guarantees compliance on the part of the respondent. See § 14.25 *infra.* Defense counsel must be concerned, however, with ensuring that the information or testimony will not be used against the respondent subsequently if, for any reason, the plea agreement falls apart. In theory, in many jurisdictions incriminating statements made by the accused or defense counsel to the prosecutor during plea negotiations are inadmissible as prosecution evidence if the negotiation fails. *See*, *e.g.*, FED. RULE EVID. 410; MINN. RULE EVID. 410; § 21.6 *infra*. But slip-ups can occur that remove some statements from the protection of this rule, so counsel should include explicit inadmissibility provisions in any plea agreement. And counsel should be careful to advise the client not to communicate personally with the prosecutor or the court during the course of the negotiations. *See United States v. Bauz*ó*-Santiago,* 867 F.3d 13 (1st Cir. 2017).

Language such as the following should be included in the written agreement:

> The parties hereby agree that any statements, testimony, evidence, information, or leads of any sort that:
>
> (a) are capable of incriminating the respondent in the present offense or any other offense; and that
>
> (b) have been or are now or hereafter given by the respondent or the respondent's attorney to any of the following entities or individuals during the negotiation of this plea agreement or following its negotiation but before the agreement is fully executed by the respondent's sentencing:

(i) the prosecutor or any other prosecuting authority of any jurisdiction;
(ii) any police or criminal investigating authority of any jurisdiction;
(iii) any law enforcement authority of any jurisdiction;
(iv) any court of any jurisdiction;
(v) any probation department or other agency of any such court;
(vi) any agent or successor of any entity designated in items (i) through (v),

are expressly understood to have been given in consideration of this agreement and shall not be used against the respondent in any way, directly or derivatively, by or before any entity or individual designated in items (i) through (vi), except:

(1) with the respondent's express consent, in the course of proceedings undertaken to secure the respondent's conviction and sentencing pursuant to this plea agreement; or

(2) for the sole purpose of upholding and enforcing that conviction and sentencing after they have been obtained according to the terms of this plea agreement and so long as neither of them has been vacated.

In no event shall any such statements, testimony, evidence, information, or leads be used against the respondent in connection with any delinquency or criminal charge other than the charge[s] to which the respondent is presently agreeing to plead guilty.

Unless an agreement of this sort has been made with the prosecutor, counsel ordinarily should not divulge, or permit the respondent to divulge, any incriminating information to anyone during, or after, plea bargaining. *See Hutto v. Ross,* 429 U.S. 28 (1976) (per curiam).

If counsel is unable to obtain such an agreement but counsel and the client conclude that a guilty plea with a cooperation condition is nonetheless necessary or advisable, and if counsel is worried that the prosecutor may not live up to his or her end of the bargain after the respondent's testimony against accomplices has been given, then counsel should try to talk the prosecutor into going ahead with sentencing promptly after the guilty plea rather than delaying the sentencing until the respondent has testified. Counsel may urge that the respondent has no love for the accomplices and can be counted on to testify against them without the coercion applied by keeping the respondent's own sentencing pending. Counsel may point out that the respondent will be more impeachable as a prosecution witness if those charges are still pending than if they have already been disposed of; and that even after sentencing, the sentence and the plea bargain are subject to rescission at the prosecutor's option if the respondent reneges on his or her promise to testify. *See Ricketts v. Adamson,* 483 U.S. at 8-12. If the prosecutor is adamant about delaying the sentencing, counsel should suggest alternative means of ameliorating the prejudice to the respondent. For example, if the respondent is in custody, counsel can suggest that the prosecutor

join in a motion to release the respondent pending the delayed sentencing.

Plea agreements may include a provision by which the respondent waives certain appeal rights. The effect of the waiver depends largely upon the specific language used; some claims on appeal may be extinguished while others are preserved; any waiver provision should be carefully drafted with a recognition that after conviction and sentence new facts may emerge and/or the client may have second thoughts about forgoing appellate review. *See Garza v. Idaho*, 139 S. Ct. 738, 744 (2019) ("an appeal waiver does not bar claims outside its scope[;] . . . '[a]lthough the analogy may not hold in all respects, plea bargains are essentially contracts'" whose exact wording determines their effects). *See also People v. Bisono*, 36 N.Y.3d 1013, 1017-18, 164 N.E.3d 239, 241, 140 N.Y.S.3d 433, 435 (2020) ("The waivers of the right to appeal were invalid and unenforceable . . . . It is well-settled that 'a waiver of the right to appeal is not an absolute bar to the taking of a first-tier direct appeal' . . . . [I]n each case, among other infirmities, the rights encompassed by an appeal waiver were mischaracterized during the oral colloquy and in written forms executed by defendants, which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and, in the Queens and Orleans Counties cases, advised that the waiver encompassed 'collateral relief on certain nonwaivable issues in both state and federal courts' . . . . Viewing these deficiencies in the context of the record in each case and considering the totality of the circumstances, including in several cases defendants' significant mental health issues . . . , we cannot say that 'defendants comprehended the nature [and consequences] of the waiver of appellate rights'").

In some cases there may be reasons why it would be beneficial to a respondent to have the record of his or her plea agreement sealed: for example, when it contains a commitment to provide confidential information against persons from whom the respondent fears recrimination. In these cases, counsel should include in the plea negotiation a request that prosecutor cooperate in filing a joint motion for sealing. Conversely, there are cases in which the respondent's interests are best served by having the plea agreement accessible for his or her use: for example, when the agreement does *not* include a commitment to testify or to provide confidential information against others who might suspect that it does. Here, counsel can invoke the right of public access to court records as a ground for requesting that the agreement not be sealed. *See United States v. Bacon*, 950 F.3d 1286 (10th Cir. 2020). *Cf. In re Leopold to Unseal Certain Applications for Electronic Surveillance Applications and Orders*, 964 F.3d 1121 (D.C. Cir. 2020); *Application of Los Angeles Times Communications LLC to Unseal Court Records*, 28 F.4th 292, 296 (D.C. Cir. 2022) ("[t]he common law right of access attaches to 'judicial records,' which this court has characterized as documents intended to 'influence a judge's decisionmaking . . .'"); *Emess Capital LLC v. Rothstein*, 841 F. Supp. 2d 1251 (S.D. Fla. 2012), and cases cited; *A.B. v. Wal-mart Stores, Inc.*, 2015 WL 1526671 (S.D. Ind. 2015), and cases cited.

If a memorandum reciting the terms of the plea agreement is not filed with the court, counsel should make such a memorandum for his or her own files. A contemporaneous, detailed memo will enhance counsel's credibility if it ever becomes necessary for counsel to establish what was and was not agreed upon as the basis for the plea.

Part D. Counseling the Client

§ 14.19 ADVISING THE CLIENT WHETHER TO PLEAD GUILTY

In advising a client whether to accept or reject a plea bargain, counsel should ordinarily begin by explaining that the final decision is entirely the client's and that counsel's job is merely to give the client advice on the basis of counsel's legal knowledge and experience in delinquency practice [and/or with the local juvenile court – and the particular judge who is handling the case – if counsel has such experience]. See §§ 2.03, 14.01 *supra*. (The narrower and more specific the basis upon which counsel can claim specialized insight the better. Clients may resent claims which make it sound as though what counsel is saying is simply that his or her judgment or analytic capability is superior to the client's.) Counsel should note that although the client may wish to discuss the decision with his or her parents, the ultimate decision is up to the client to make on the basis of his or her own independent judgment. Since children, especially those who are incarcerated, tend to seek advice from peers, it is probably wise to add that no one other than the client himself or herself can assess his or her best interests, and that the client should be wary about taking advice from others who do not have the same interests that the client does and will not have to live with the client's decision.

Counsel should then explain to the client all of the factors that militate for and against a plea, covering each of the considerations listed in §§ 14.04-14.12 *supra* that is relevant. Essentially, counsel will need to explain to the client:

1. The realistic probability of winning a favorable outcome at trial, with a full explanation of the comparative strengths of the cases for the prosecution and the defense, as well as extraneous factors that might influence the result. (See § 14.04 *supra*.)

2. Any realistic probability that the judge might penalize the respondent at sentencing because the respondent opted in favor of a trial instead of a guilty plea. (See § 14.05 *supra.*)

3. The sentencing advantages that counsel expects or predicts the respondent will obtain through a guilty plea, including the specific terms of any agreement that counsel has reached with the prosecutor. Counsel should inform the client of the maximum sentence that s/he can receive (a) if s/he pleads guilty and if, alternatively, (b) s/he is convicted after a trial, and should give the client counsel's best estimate of the sentence that the client will actually receive on each hypothesis, making clear the limits of counsel's ability to predict what the judge will do. (See § 14.06 *supra.*)

4. The risks of collateral consequences that might flow from a guilty plea and, alternatively, from conviction after a trial. (See § 14.07 *supra.*)

5. If the case involves particularly egregious facts or a highly sympathetic complainant, the risk that the judge's hearing those facts or seeing that complainant at trial would prejudice the judge against the respondent at sentencing. (See § 14.08 *supra.*)

6. In jurisdictions that have more than one juvenile court judge, the prospects of using a guilty plea to steer the case before a favorable judge for sentencing. (See § 14.09 *supra.*)

7. Any other special aspects of the case or the respondent that might cause a guilty plea to be particularly advantageous or detrimental. (See §§ 14.10-14.12 *supra.*)

In discussing all of these complex matters, counsel must take pains to phrase the explanations in language that will be comprehensible to the client. Counsel should periodically check with the client to make sure that the client is, in fact, understanding counsel's explanations.

One of the most difficult decisions for a defense attorney to make is whether to employ the lawyer's considerable persuasive powers to influence the client's choice between a guilty plea and a trial. This is a particularly sensitive issue in handling juvenile cases, since juveniles are unlikely to have either the knowledge about the legal system or the strength of will to resist the lawyer's persuasion. Counsel also should take into account that social scientific studies suggest that adolescents are more likely than adults to agree to plead guilty in cases in which the accused is actually innocent. *See* Rebecca K. Helm, Valerie F. Reyna, Allison A. Franz & Rachel Z. Novick, *Too Young to Plead? Risk, Rationality, and Plea Bargaining's Innocence Problem in Adolescents*, 24:2 PSYCHOLOGY, PUBLIC POLICY, AND LAW 180 (2018). The best rule of thumb is to use persuasion only when the cost-benefit analysis clearly and unequivocally points to a certain result, and otherwise to restrict one's role to furnishing the client with the information (including counsel's objective predictions of alternative outcomes) necessary for the client to make a fully informed, independent decision.

The client should be given adequate time to think about the decision. For this reason it is often advisable to meet with the client to discuss the plea several days before the decision must be conveyed to the prosecutor.

§ 14.20 DISCUSSING THE GUILTY PLEA WITH THE CLIENT'S PARENT

It is almost always advisable for counsel to discuss the guilty plea with the client's parent as well as with the client. In some jurisdictions such a discussion with the parent is required if the child is going to plead guilty, because the statutes call for a judicial colloquy with the parent to ensure that the parent approves of the child's entry of a guilty plea. Even in jurisdictions that do not have a statutory requirement of parental involvement, consultation with the parent is advisable because parents usually will exert some influence over the child's decision.

It is crucial that counsel first meet with the client alone, to ensure that the client can make a tentative initial decision apart from his or her parent. Conversely, it is extremely important that counsel's session with the parent be attended by the client, so that the attorney's rapport with the client is not undermined by the client's fears that the attorney has relayed secret information to the parent. Maintenance of rapport with the client also calls for an explanation to the client, prior to the meeting with the parent, of why it is necessary to explain the plea to the parent, as well as an assurance that anything the client told counsel in confidence will not be repeated to the parent.

In explaining the guilty plea option to the parent, counsel should repeat the analysis of considerations that counsel covered in the discussion with the client. See § 14.19 *supra.* Counsel should stress to the parent that the criminal justice system demands that the ultimate decision be made by the client and not by the parent.

§ 14.21 MAKING A RECORD OF THE ADVICE GIVEN TO THE CLIENT AND THE PARENT

It is one of the unhappy realities of criminal practice that defense attorneys need to take certain precautions to guard against later accusations of ineffectiveness or misconduct. Adult criminal defendants, faced with lengthy prison sentences occasionally resort to unwarranted accusations of ineffectiveness or misconduct on the part of their lawyers as a last-ditch effort to overturn their convictions. These problems arise far less frequently in juvenile court than in adult court, in part because juvenile sentences are much shorter than adult sentences and in part because juveniles usually lack the sophistication to dream up such ploys.

Among the most common claims of ineffectiveness or misconduct of defense counsel are allegations that counsel coerced the client to plead guilty or gave the client inadequate advice concerning the significance and consequences of the plea or concerning the client's rights. If counsel wishes to guard against the risk of these attacks, counsel should make file notes of all conversations with the client and the client's parent leading up to the client's decision to plead guilty. This record should reflect that counsel gave the client and the parent all of the explanations and advice described in §§ 14.19-14.20 *supra.* The file record should also reflect when it was that the client communicated his or her decision to counsel, what that decision was, and that counsel immediately inquired whether the client clearly understood that the decision had to be the client's own and not the lawyer's or the parent's.

§ 14.22 SPECIAL PROBLEMS IN COUNSELING THE CLIENT WHETHER TO PLEAD GUILTY

§ 14.22(a) The Guilty Plea and the "Innocent" Client

Views differ on whether a lawyer may properly advise (or even permit) a guilty plea by a client who protests his or her innocence. Fortunately, the moral problem arises infrequently. If the case is such that a guilty plea is advised, the client probably (although not invariably) is

guilty; and if counsel discusses the evidence critically with the client and subjects the client to the sort of cross-examination that in every case will be necessary to prepare adequately for trial (see §§ 5.12, 10.09(c)-(d), 10.10 *supra*), the client will usually admit guilt.

Should the client continue to assert innocence, counsel should consider the feasibility and desirability of a plea entered in accordance with *North Carolina v. Alford,* 400 U.S. 25 (1970), known in many jurisdictions as an *"Alford* plea." In *Alford,* the Court held that "an express admission of guilt . . . is not a constitutional requisite to the imposition of criminal penalty [sic]" *id.* at 37, and therefore that a plea of guilty may constitutionally be accepted from a defendant who protests his or her innocence, as long as (i) the "defendant intelligently concludes that his interests require entry of a guilty plea" and (ii) "the record before the judge contains strong evidence of actual guilt." *Id.* In the wake of *Alford,* several jurisdictions have adopted procedures permitting adult defendants and juvenile respondents to plead guilty without an admission of guilt, provided that the defendant/respondent concedes on the record that the prosecution's evidence is sufficient to support a guilty verdict and that the defendant/respondent is therefore entering a plea of guilty as a tactical choice. *See, e.g.*, *In re Alonzo J.*, 58 Cal. 4th 924, 927, 931-34, 939, 320 P.3d 1127, 1128, 1131-33, 1136, 169 Cal. Rptr. 3d 661, 662, 665-68, 672 (2014) ("no contest" plea can be entered in a delinquency proceeding "'subject to the approval of the court,'" and will "establish[ ] the truth of the petition's allegations" and "thereby dispens[e] with the need for a contested jurisdictional hearing," just as would an admission; a "no contest" plea, like an admission, requires "the consent of the child's attorney"). However, *Alford* pleas are not accepted in all jurisdictions, and, even in jurisdictions that permit such pleas, some judges will not accept a guilty plea without an admission of guilt. *But cf. State v. Beasley*, 2018-Ohio-16, 152 Ohio St. 3d 470, 472-73, 97 N.E.3d 474, 476-77 (2018) (although local rules give trial judges the "discretion to accept or reject a no-contest plea," the trial court in this case abused its discretion by employing "a blanket policy of not accepting no-contest pleas"). *See generally* Peg Schultz, Note, *The Alford Plea in Juvenile Court*, 32 OHIO N.U. L. REV. 187 (2006).

If *Alford* pleas are permitted in counsel's jurisdiction and are accepted by the judge presiding over the case, then counsel will need to make two final decisions before advising the client to enter an *Alford* plea. The first of these is a tactical decision whether the nature or tone of an *Alford* plea would vitiate whatever benefits counsel hopes to gain for the client through the entry of a guilty plea. Judges who view a full confession of guilt as "the first step toward rehabilitation" are unlikely to give substantial credit for an *Alford* plea. Moreover, whatever sentence-related benefits the client would receive from the plea may ultimately be diminished or even lost altogether if admission of the crime and an expression of remorse are necessary in order to qualify for a community treatment program that is a condition of probation (*e.g.*, a sex offender treatment program that requires an admission of guilt as a prerequisite for participation) or in order to eventually qualify for release from placement in a juvenile correctional facility. *See Carroll v. Commonwealth*, 54 Va. App. 730, 733, 742-49, 682 S.E.2d 92, 93, 98-101 (2009) (upholding the trial court's finding that the defendant, who had pled guilty with an *Alford* plea, "violated the conditions of his probation by refusing to admit that he committed the crime charged during court-ordered sex offender treatment"); *In the Matter of Silmon v. Travis*, 95

N.Y.2d 470, 474, 477, 741 N.E.2d 501, 503, 505, 718 N.Y.S.2d 704, 706, 708 (2000) (rejecting a challenge to the Parole Board's denial of parole to a defendant, whose conviction was by means of an *Alford* plea, on the ground that he has never "accept[ed] responsibility for the crime"). *See also McKune v. Lile*, 536 U.S. 24, 29, 31, 43-45 (2002) (holding that the adverse consequences that a state prisoner suffered – denial of visitation rights and other privileges, and transfer to a maximum-security unit – as a result of refusing to participate in a sex offender treatment program, which required that he "admit having committed the crime for which he is being treated," were not so severe as to violate the Fifth Amendment privilege against self-incrimination); *People v. Garcia*, 2 Cal. 5th 792, 798-99, 391 P.3d 1153, 1156, 216 Cal. Rptr. 3d 75, 78-79 (2017) (rejecting the defendant's Fifth Amendment challenge to a state statute that "requires a convicted sex offender, as a condition of probation, to waive 'any privilege against self-incrimination' and to participate 'in polygraph examinations, which shall be part of the sex offender management program'"; the court states that "neither the fact that . . . [the defendant] was compelled to respond nor the fact that his responses were being monitored by a polygraph offends the Fifth Amendment" because "we deem his responses compelled within the meaning of the Fifth Amendment" and therefore "they cannot lawfully be used against him in a criminal proceeding" and "pose no risk of incrimination"). See also §§ 19.06, 38.05(a), 38.16(b), 38.26 *infra*.

The second decision facing counsel is a question of conscience: whether to take advantage of the *Alford* procedure and urge the client to enter a guilty plea notwithstanding the client's emphatic protestations of innocence. The fact that the *Alford* procedure is not unconstitutional does not mean that counsel is morally free to press it on a client. A defense attorney can reasonably adopt the position that s/he should urge a client to follow the *Alford* procedure only if the client's guilt is clear – that is, if counsel concludes that the client's denials, however fervid, are face-saving or self-deluded – and if the tactical advantages of the plea are equally clear.

§ 14.22(b) Clients Who Are Unrealistic About the Chances of Winning at Trial

Counsel will sometimes encounter a client who unrealistically believes that s/he will win at trial notwithstanding counsel's best explanation of the reasons why conviction is a virtual certainty. The first step in convincing the client of the realities of the situation should be to review with the client all of the written statements that counsel or counsel's investigator has taken from prosecution witnesses (see § 8.12 *supra*) and all of the other prosecution evidence known to counsel, in its most convincing form (graphic photos, highlighted lab reports, and so forth). If this fails to convince the client, then counsel should consider conducting a moot court version of the trial, including the respondent's direct and cross-examination, to show the respondent the precise manner in which the evidence would emerge at trial. See §§ 5.12, 10.09, 10.10 *supra*.

§ 14.23 PREPARING THE CLIENT FOR THE PLEA COLLOQUY

The client who is pleading guilty must be informed in advance, and in considerable detail, what to expect in court at the hearing in which the client will enter the plea. (Hereafter, this proceeding will be referred to as the "plea hearing," and the interchange between the judge and parties at the hearing will be referred to as the ''plea colloquy.") This preparation has three functions. First, it helps to set the client at ease, so that s/he will be less traumatized by the experience and will make a better impression in court. Second, it helps to reduce the likelihood that the client will say something that precludes the judge from finding that all of the criteria for a "knowing, intelligent, and voluntary" plea have been satisfied. Finally, it guards against the client's mentioning aggravating facts about the offense that need not be stated.

The jurisdictions vary substantially in regard to the formality of the plea colloquy and the extent to which judges insist upon documenting that the constitutional requirements for a voluntary plea (set forth in § 14.26(c) *infra*) are satisfied. As juvenile court becomes increasingly formalized, the judges are more commonly adhering to the ritual used in taking guilty pleas in adult criminal court. The following sections on preparing the client and his or her parent for the colloquy are predicated on the assumption that the judge will follow this ritual. If, however, counsel is practicing in a jurisdiction that still follows informal plea procedures, counsel will need to familiarize himself or herself with those procedures and prepare the client and his or her parent accordingly.

§ 14.23(a) Preparing the Client for the Colloquy on Waivers of Rights and Comprehension of Potential Sentences

In conducting the colloquy in which the respondent is questioned about his or her waiver of the right to trial and ancillary rights, judges almost invariably employ legal terminology that is far too complex to be understood by young, poorly educated juvenile respondents. For this reason, it is crucial that counsel, in a preparatory session with the client, both recite the questions in the form in which they will be asked in court and explain the meaning of each of the terms that will be used by the judge.

Although the language used in accepting guilty pleas varies among jurisdictions and among judges within the same jurisdiction, some or all of the following explanations may prove useful in preparing clients for the entry of a guilty plea:

> The first thing that's going to happen in the hearing is that I will explain to the judge what exactly you're pleading guilty to, and what deals the prosecutor has agreed to. It's important that you listen carefully to what I say in court, because the judge will ask you if you heard what I said and if you agree that what I said is correct. The judge may also ask you to repeat to him/her what the charge is that you're pleading guilty to. If s/he does, what will you say?
>
> Then, the judge is going to turn to you and ask you many questions to make sure that you understand what a trial is and what a plea of guilty is. What the judge is trying to

make sure of is that you understand what a trial is and that you understand that by pleading guilty, you're giving up your chance to have a trial.

Do you know what a trial is? [If the client says yes, ask the client to describe a trial, so that counsel can ensure that the client is not merely acquiescing in order to avoid seeming ignorant or uncooperative; if the client says no, ask the client if s/he has ever seen a trial on television or in the movies, referring to specific court-related programs, and then use the programs to explain the nature of trials.]

The judge is going to ask you if you understand that by pleading guilty, you're waiving your right to a trial. The word "waive" means to "give up." So what the judge is asking is whether you understand that you have a choice of either having a trial or pleading guilty; if you want to plead guilty, you give up your chance to have a trial. Are you sure that's what you want to do? So, what will you say when the judge asks you "Do you understand that by pleading guilty, you are waiving your right to a trial?"

The next thing the judge is going to do is to make sure that you know all the things that are part of a trial. That's again to make sure that you understand what it is that you're giving up when you give up a trial and plead guilty instead.

So, the judge will ask you first if you understand that in a trial, the prosecutor has the burden of proving you guilty beyond a reasonable doubt. What that means is that in a trial, the prosecutor would have to put on very strong evidence in order to prove that you're guilty of the crime they have charged you with. The prosecutor would have to put on enough convincing evidence to show the judge that there is no reason for doubting that you're guilty of the crime. If the prosecutor did not put on enough evidence to convince the judge that you committed the crime, then the judge would find you "not guilty."

Then the judge will ask you whether you understand that in a trial, the prosecutor would present witnesses to prove your guilt, and that your lawyer would have an opportunity to cross-examine those witnesses. What this means is that in a trial, the prosecutor would bring in witnesses to tell their side of the story. [Use the actual witnesses' names and facts of the case to illustrate.] I, as your lawyer, could ask the witnesses questions and quiz the witnesses in order to show that you did not do what they are saying you did. I could try to show, for example, that the witness was confused about what happened or that the witness is not telling the truth.

The judge will ask you if you understand that in a trial, you can present witnesses on your behalf as well. That means that in a trial, we could bring in witnesses for your side to tell what happened.

Then the judge will ask you whether you understand that in a trial, you would have the opportunity to take the witness stand but that no adverse inferences could be

drawn from your failure to testify. What all of this means is that in a trial, you could get on the witness stand, just like any other witness, and tell what happened, but that nobody could force you to get up on the stand and talk about what happened. If you decided not to take the stand, a judge could not hold that against you. A judge would not be allowed to decide that because you kept quiet, you must be guilty.

The judge will also ask you if you understand that by pleading guilty, you are waiving the right to appeal the decision of the trial court, except in the event of an illegal disposition. When people have trials, if the judge makes a mistake during the trial, then the lawyer who's defending the juvenile can go to a more powerful court and ask those judges to correct the mistake. If the judges in that higher court decide that the judge in the trial did make a mistake, then they can arrange for a new trial. But by giving up the right to trial and pleading guilty instead, you're also giving up your right to appeal any mistakes that might have happened in the trial. Of course, you can still appeal if the judge makes a mistake in the way s/he takes the plea or in the way s/he sentences you.

Now, all of those things that I just explained to you are the things that are part of a trial. By pleading guilty, you're saying that you don't want a trial and so you don't want any of those things that go along with a trial. Do you understand that?

The judge is also going to ask you whether you understand the maximum sentence you could receive for the charge that you're pleading guilty to. "Maximum sentence" means the most you could get as the punishment for this crime that you're pleading guilty to. The maximum sentence is _____. That doesn't mean that that's the sentence that you *will* get. It's just that the judge has to make sure that you know the most you could get. Now, if the judge asks you to tell him/her what the maximum sentence you could get is, what will you tell him/her?

After the judge has explained all that to you, s/he will ask you if anyone has promised you anything to get you to plead guilty. Now, as you know, the prosecutor has promised that s/he will _____, and I'm going to tell the judge that. The judge will then ask you whether "any other promises" have been made. What the judge is really asking is whether anyone promised you that the judge would give you a light sentence. You might have noticed that I've never promised you what sentence the judge will give you. That's because I'm not allowed to make any promises about what the judge will do. [If the prosecutor agreed, as part of the plea, to support a certain sentence: "The prosecutor has said that s/he would help us try to get the judge to give you a sentence of _____; but the prosecutor also isn't allowed to make any promises about what the judge will do."] So, when the judge asks you if "any promises have been made," the judge is trying to make sure that neither I nor the prosecutor nor anyone else made any *promises* about what the judge is going to do. What will you say when the judge asks you if any promises have been made to get you to plead guilty?

Then, the judge will ask you whether any threats have been made to get you to plead guilty. What the judge is asking is whether I or anybody else threatened you in order to force you to plead guilty. What will you say when the judge asks you about that?

The judge also will ask you whether you talked with your lawyer, me, about what you're doing today. What the judge is asking is whether we talked about the guilty plea, and whether I explained the things that I'm explaining to you right now. The judge is just trying to make sure that I did explain all these things to you. So, if the judge asks you if you talked with your lawyer about the guilty plea, what will you say?

[In jurisdictions that require the judge to engage in a colloquy with the parent of the respondent, or in cases in which the judge presiding over the plea has a practice of consulting the parent: "The judge also may ask you if you talked with your parent(s) about the plea. The judge always asks a juvenile's parent(s) whether she/he/they think that this guilty plea is a good idea. For that reason, I'm going to have to talk to your parent(s) about it. When I do talk to them about it, I'd like you to be there so that you can hear everything I tell them, unless you don't feel comfortable being there when I talk to them. Also, if you would rather talk to her/him/them about it first, that's fine. Do you want to talk to your parent(s) about it alone before I do?"]

If there is any significant possibility that the parent may not be present at the plea hearing, additional preparation of the respondent for that contingency may be required. See § 14.26(a) *infra.*

§ 14.23(b) Preparing the Client for the Admission of Guilt

There are some clients who will admit guilt to their lawyers and will agree to a plea of guilty when speaking with their lawyers but who never really accept the notion of their guilt as anything but a highly private affair – a secret between themselves and counsel – not for public announcement. Thus when the judge questions them about their version of the offense, they deny guilt. This, of course, will prove embarrassing to all concerned, and it may well cause the judge to refuse to take the guilty plea. Avoidance of the situation is possible if counsel advises the client before the plea hearing that a public admission of guilt in court will be required.

Judges vary substantially in the language that they use in asking the client to admit or deny guilt. It is extremely useful to learn the formulations used by the specific judge who will be presiding at the plea colloquy, so that the client can be prepped with the right code-words.

Some judges turn to the client and ask a question like: "Tell me what it is that you did on [date of the crime]." Quite obviously, a client who has not been adequately prepared would be at a loss to know what to say in response to this request. Counsel should explain to the client that the judge is seeking a brief recitation of facts that contains each of the specific details that the prosecutor would have to prove in order to convict the client of the charge to which the

respondent is pleading guilty. Counsel should then listen to the client's recitation to ensure that it does, in fact, cover each of the requisite elements of the crime.

Some clients believe that their answers must be restricted to the precise questions asked by the judge and that they are therefore precluded from making any additional statements about their remorse for committing the crime. It is important to correct that misconception, since, in fact, judges seem to be particularly interested in hearing children who admit guilt also express their contrition. Accordingly, counsel should inform the respondent that if s/he wishes to say that s/he is sorry or that s/he has learned a lesson, it is entirely appropriate to do so.

Some judges, rather than eliciting the facts from the respondent, ask the prosecutor to state the facts for the record, and then turn to the respondent and ask him or her whether those facts are correct. The respondent should be prepped to listen carefully to the prosecutor's recitation. In addition, counsel should advise the respondent that if the prosecutor goes beyond the facts essential for the elements of the charge to which the respondent is pleading and states additional aggravating circumstances of the offense, counsel will inform the judge that those acts are not acts which the respondent will be admitting.

§ 14.23(c) Advising the Client of the Risk of Detention Pending Sentencing

Upon the entry of a guilty plea, the judge typically has the option of either conducting the disposition hearing immediately or continuing the hearing to another date and ordering the probation department to prepare a pre-sentence report to aid the judge at disposition. See § 38.04(a) *infra* for discussion of the pre-sentence report. In most jurisdictions, if the judge decides to continue the hearing, the judge has the prerogative of reconsidering the respondent's detention status pending disposition. The respondent's pretrial detention status was, after all, set at arraignment, at a time when the judge had to presume the respondent's innocence. After the plea, however, the judge is free to consider the respondent's conceded guilt as a factor affecting his or her detention status pending disposition. In most jurisdictions the usual practice in cases in which the client has been released before trial is simply to maintain that release status pending disposition. However, in jurisdictions in which judges do give serious consideration to remanding a respondent following the entry of a plea, defense counsel will have to prepare the client for that possibility. Counseling the client on this issue requires that the attorney tread a fine line. It is necessary to warn the client of the hazard (in part because the law dictates that the client must be informed of all of the possible consequences of a guilty plea and in part as a courtesy so that the client will not be taken unawares), but counsel also wants to avoid frightening the client unnecessarily and causing him or her undue anxiety. In warning the client of the risk, counsel should accurately describe the probability of detention, based on counsel's knowledge of the judge and the facts of the case. Counsel ought to inform the client of the maximum duration of the detention period, should detention be ordered. (In most jurisdictions the juvenile court statute or local practice establishes a limit, such as two weeks, for detention pending disposition. See § 37.01 *infra.*) Counsel should also indicate the actual length of time that the respondent is likely to spend in detention prior to the disposition hearing, if that is less than the maximum and is

reasonably predictable.

§ 14.23(d) Counseling the Client About Appearance and Demeanor at a Plea Hearing

One of the most important aspects of the process of preparing a client for the plea hearing is counseling the client about appearance and demeanor at the hearing. The judge's sentencing determination and also the intermediate decision whether to detain the respondent pending disposition will turn in large part on the judge's assessment of the respondent's character, and that assessment can be significantly affected by the respondent's appearance and demeanor. The respondent should be advised to dress well. When giving this advice, counsel should avoid seeming unduly fastidious (an inevitable risk when an adult advises an adolescent to dress nicely) by explaining precisely why appearance is important and drawing on counsel's experiences to describe the impact that the respondent's appearance can have on the judge.

With respect to demeanor, counsel should explain to the client that it is important to speak loudly and clearly and to seem forthright. In addition, assuming that the client is remorseful, s/he should be advised to appear apologetic and not truculent.

If the prosecutor has not agreed to waive the preparation of a pre-sentence report or if the judge may order one despite the prosecutor's waiver (see § 14.06(c)(1) *supra*), counsel must also prepare the client for interviewing by the probation officer who will write the report. This important preparation is discussed in § 38.05(a) *infra.* It had best be postponed until after the plea hearing if that is practicable in the light of the practices of the probation office with regard to the time when it begins its pre-sentence workups and in the light of the respondent's detention status and counsel's own calendar. Before the plea hearing there will be too much for the client to absorb and remember in preparation for the hearing itself. But if there is any real prospect that the client's pre-sentence interviewing by the probation office will begin too soon after the plea hearing for counsel to prepare the client thoroughly for the interviewing in the wake of the hearing, then it must be done before the hearing.

§ 14.24 PREPARING THE PARENT FOR THE PLEA HEARING

In jurisdictions in which the judge must obtain the parent's consent to the entry of the plea (or where, despite the absence of any statutory requirement, judges make it a practice to obtain parental consent), counsel must of course prepare the parent for the questions that will be asked of him or her in the plea colloquy. The parent may be asked some or all of the following questions:

1. Did you have an opportunity to consult with your child concerning his/her decision to enter the plea of guilty?

2. Did you have an opportunity to consult with your child's attorney concerning the decision to enter the plea of guilty?

3. Did you hear me explain to your child the rights that s/he is waiving as a result of this guilty plea? Do you understand that s/he is waiving those rights?

4. Did you hear me explain to your child the maximum sentence that s/he could receive as a result of this plea? Do you understand that s/he could receive that sentence?

5. Do you agree with your child's decision to enter the guilty plea?

In addition to reviewing these questions and appropriate answers with the parent, counsel should verify that the parent is willing to have the child remain in the home pending sentencing. Some judges will ask, at the conclusion of the hearing, whether the parent is willing to keep the child at home.

Finally, since some judges question the parent about the child's conduct at home, counsel will need to discuss the child's behavior with the parent. Counsel needs to be forewarned of any problems that might lead the judge to consider detaining the child pending sentencing.

Part E. The Plea Hearing

§ 14.25 SCHEDULING THE PLEA HEARING

As explained in § 14.09 *supra,* in jurisdictions with more than one juvenile court judge, it may be possible to use the scheduling of the plea hearing to steer the case before a judge who will be lenient at sentencing. Quite obviously, counsel should take advantage of such opportunities since the identity of the sentencing judge frequently will control the severity of the sentence.

Even in cases in which the timing of the plea hearing will not affect the identity of the sentencing judge, counsel may need to give careful consideration to the scheduling of the hearing. In cases in which the respondent was released at arraignment, counsel will usually wish to delay the plea as long as possible in order to give the respondent more time to amass a record of doing well in the community. Delay is also advisable whenever counsel knows that an arrest for another charge is imminent, so that counsel can dispose of the upcoming charge in the same plea hearing. See § 14.15 *supra.* On the other hand, if the respondent has been detained pending trial, counsel will want to expedite the plea hearing (and possibly also the sentencing): in the event of post-plea diversion, dismissal, release pending disposition, or a disposition of probation, this effectuates the respondent's release from detention as quickly as possible; and in many jurisdictions where pre-adjudication or pre-sentence detention is not credited toward the service of a sentence, this enables a respondent who receives a sentence of incarceration to begin serving that sentence as soon as possible. See § 14.11 *supra.* Finally, there may be other reasons that the respondent may want an expedited plea hearing: For example, the respondent may be suffering considerable anxiety about the charge hanging over his or her head and may wish to get it over

with; or the respondent's entry into a certain desirable program or into the military may be awaiting the resolution of the pending charge.

Finally, there will be scheduling issues whenever the plea agreement includes a commitment by the respondent to testify as a prosecution witness against a juvenile co-respondent or adult co-perpetrator. As mentioned in § 14.18 *supra,* prosecutors typically will wish to schedule the plea in such a case prior to the respondent's testifying for the state and will wish to delay sentencing until after the testimony has been completed. If this procedure does not prejudice the respondent, there is no reason to oppose its use. Depending upon the facts of the case, however, delay of this sort could conceivably prejudice the respondent. If, for example, the respondent is detained and his or her release cannot be effected until the sentencing, then obviously a delay of the sentencing is very prejudicial. Similarly, if the end product of the plea and sentencing will be an outright dismissal of the charges, the respondent has a definite interest in advancing the sentencing date. Delay can also be detrimental in cases in which defense counsel fears that the prosecutor will not live up to his or her end of the bargain after the respondent's testimony against accomplices has been given; written plea agreements such as the one described in § 14.18 *supra* will provide some security against this risk but are not always obtainable. In situations such as these, defense counsel is sometimes able to persuade the prosecutor that the respondent has no love for the accomplices and can be counted on to testify against them without the coercion applied by keeping the respondent's own sentencing pending. Counsel can point out that the respondent will be more impeachable as a prosecution witness if those charges are still pending than if they have already been disposed of; and that even after sentencing, the sentence and the plea bargain are subject to rescission at the prosecutor's option if the respondent reneges on his or her promise to testify. *See Ricketts v. Adamson,* 483 U.S. 1 (1987). If the prosecutor is adamant about delaying the disposition, counsel should suggest alternative means of ameliorating the prejudice to the respondent. For example, if the respondent is in detention, counsel can suggest that the prosecutor join in a motion to release the respondent pending the delayed disposition. Or if the respondent is awaiting dismissal of the charge in order to enter a program such as the Job Corps that requires resolution of all pending charges prior to entry, counsel can suggest a dismissal in the interests of justice (see Chapter 19) with a stipulation that the defense will not oppose reinstatement of the charge in the event that the respondent fails to fulfill the requirement of testifying for the prosecution.

§ 14.26 PROCEDURE AT THE PLEA HEARING

§ 14.26(a) Essential Parties

Obviously, the respondent and defense counsel must be present for the plea. In most jurisdictions the prosecutor also must be present to confirm the accuracy of defense counsel's recitation of the terms of the plea agreement and to represent the State's interests at the plea hearing. In some jurisdictions, however, judges have adopted a practice of accepting pleas even in the absence of the prosecutor, in cases in which the respondent will clearly be released pending sentencing or in which the prosecution has waived argument on the respondent's

detention status pending sentencing.

An important issue is whether the parent must be present in order for the guilty plea to be valid. In some jurisdictions the courts have held that the respondent has an absolute right to have a parent present, and absent the respondent's knowing and intelligent waiver of that right, the plea may be invalid. *See, e.g., In re Kim F.*, 109 A.D.2d 706, 487 N.Y.S.2d 31 (N.Y. App. Div., 1st Dep't 1985) (vacating a juvenile's guilty plea in part because court failed to make reasonable efforts to arrange for the parent's presence at the plea hearing and accordingly failed to comply with the obligation of advising the parent of the rights waived as a result of the guilty plea). In jurisdictions of this sort, defense counsel will need to deal with a parent's failure to appear by preparing the respondent to engage in a colloquy waiving the parent's presence on the record. In some jurisdictions – or in cases of very young children (9- or 10-year-olds) in other jurisdictions – the judge may be unwilling to accept the child's waiver and inclined to continue the case to another date in order to secure the presence of the parent. In this situation if the defense has a need to move expeditiously (for example, if the respondent is detained, or if the respondent's entry into a certain program is contingent upon the resolution of the charges), defense counsel should consider requesting that the court appoint a guardian *ad litem* to substitute for the parent at the plea hearing.

§ 14.26(b) Defense Counsel's Preliminary Recitation; Putting the Plea Agreement on the Record

The judge will usually begin the plea hearing by asking defense counsel to declare whether or not the respondent intends to enter a guilty plea. This request is merely for the record in most instances; by now, the judge ordinarily will have been informed by the courtroom clerk that the case is being called for the purpose of entry of a guilty plea. The formulation used by judges to initiate the plea hearing varies among jurisdictions. In many jurisdictions, the standard formulation is a question, directed at defense counsel, asking whether the respondent has a "motion" or "application" s/he wishes to make. Defense counsel then is expected to reply: "The respondent wishes to withdraw his/her earlier denial of the Petition and enter an admission to [the count or counts to which the respondent is pleading guilty, with the statutory name of the offense charged in each count and a statement whether each count charges a misdemeanor or felony]."

It is ordinarily advisable for defense counsel, at this juncture, to state on the record the precise terms of the plea agreement with the prosecutor. In the event that the prosecutor later fails to fulfill one of the conditions of the agreement, a motion to vacate the plea will be greatly facilitated if the record reflects the complete terms of the agreement. (It is sufficient for purposes of the record if the prosecutor merely acquiesces silently in defense counsel's recitation of the terms of the agreement. However, in many jurisdictions, judges take the precautionary measure of asking the prosecutor on the record whether defense counsel has accurately recited the terms of the agreement.)

In deciding whether to put the agreement on the record, it is once again essential to know the practices of the individual judge presiding at the hearing. Some judges, particularly older judges, adhere to the once-dominant view that plea bargaining should be "a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges." *Blackledge v. Allison,* 431 U.S. 63, 76 (1977). These judges will be loth to hear the terms of the plea agreement, and an attorney's decision to forge ahead with a recitation of its terms runs the risk of incurring the judge's anger against both counsel and the client. When appearing before such judges, counsel is well advised to obtain a written plea agreement from the prosecutor (see § 14.18 *supra*) but to retain it in counsel's records rather than filing it with the court. Counsel can then rely on that document, in lieu of a recitation on the record, in the event that a disagreement about the terms of the plea bargain develops subsequently.

Similarly, in cases in which counsel has negotiated terms with the prosecutor that cannot be placed on the record, counsel should rely on a written plea agreement. For example, if counsel and the prosecutor have agreed to limit the facts of the offense that will be presented to the judge (see § 14.06(c)(3) *supra*), this agreement should be embodied in a written document signed by the prosecutor and preserved in counsel's files.

In some jurisdictions a respondent cannot enter a plea of guilty to any offense that is not expressly charged in the Petition. Thus the respondent cannot plead guilty to a lesser included offense subsumed within one of the charges in the Petition unless the Petition is amended to include the lesser offense. In these jurisdictions counsel merely needs to arrange with the prosecutor to amend the Petition: One of the preliminary matters in the plea hearing will then be a motion by the prosecutor for leave to amend the Petition to include the count to which the respondent will plead guilty.

In many jurisdictions defense counsel will be expected to include in his or her preliminary recitation a declaration that s/he has advised the respondent of his or her rights. Depending on local practice, counsel may also be required to enumerate all of the rights s/he described to the respondent. Thereafter, even if counsel has fully related his or her discussions with the respondent and the respondent's statements of willingness to waive each right, the judge must engage in a colloquy with the respondent and elicit waivers from the respondent on the record.

§ 14.26(c) The Plea Colloquy

Under *Boykin v. Alabama,* 395 U.S. 238 (1969), and *Brady v. United States,* 397 U.S. 742 (1970), the acceptance of a guilty plea in a criminal or delinquency case requires a preliminary judicial inquiry into whether the defendant/respondent is knowingly, intelligently, and voluntarily waiving the right to trial, entering the guilty plea, and accepting the possible consequences that could stem from conviction on the plea. The judge must question the respondent in order to determine that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement. "The plea must be voluntary and knowing and if it was induced by

promises, the essence of those promises must . . . in some way be made known." *Santobello v. New York,* 404 U.S. 257, 261-62 (1971).

In a number of jurisdictions the precise factors that must be covered in such a judicial inquiry are specified in the controlling statute, court rules, or caselaw. Generally, these factors include: the respondent's comprehension of, and voluntary waiver of, the right to trial and all attendant rights, such as the presumption of innocence, the requirement of proof beyond a reasonable doubt, the right to confront and cross-examine adverse witnesses, the right to present a defense, the right to testify in one's own behalf, and the right to appeal erroneous rulings at trial; the respondent's comprehension of the possible sentencing consequences, including the maximum sentence that could be imposed, and any collateral consequences, such as revocation of the respondent's current probation or parole; the existence of any promises or threats that might affect the voluntariness of the respondent's decision to enter the guilty plea; and the adequacy of the respondent's consultations with defense counsel regarding the plea. In some jurisdictions, the applicable statute, court rule, or caselaw requires that judges exercise particular caution to ensure that a juvenile comprehends the nature and possible consequences of a guilty plea. *See, e.g.*, *In the Matter of T.E.F.*, 359 N.C. 570, 575-76, 614 S.E.2d 296, 299 (2005) ("increased care must be taken to ensure complete understanding by juveniles regarding the consequences of admitting their guilt": "Our courts have consistently recognized that '[t]he [S]tate has a greater duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution.'").

In some jurisdictions the statute, court rule, or caselaw mandates that the judge must also inquire of the parent. Inquiries of the parent are usually directed at: whether the parent has consulted with his or her child concerning the plea that the child is entering; whether the parent has adequately consulted with defense counsel concerning the plea; whether the parent understands the rights that the child is waiving as a result of the plea and the possible consequences of the plea; and whether the parent believes that the plea is in the child's best interest. In jurisdictions that call for such an inquiry of the parent, judges will usually add to the colloquy with the child a question about whether the child has adequately consulted with his or her parent.

Once the judge has established the requisite record of the respondent's comprehension of his or her rights and voluntary waiver of those rights, the judge then will seek the respondent's admission on the record that s/he committed the criminal acts to which s/he is pleading. In some jurisdictions the judge will ask the respondent to state the facts documenting all of the elements of the charge. See § 14.23(b) *supra.* Many judges will ask the prosecutor, and some judges will also ask defense counsel, at the conclusion of the respondent's factual recitation, whether the attorney views the respondent's factual recitation as demonstrating every element of the offense. Some judges use the somewhat different practice of asking the prosecutor to recite the facts and then inquiring of the respondent whether those facts are correct.

In cases involving "*Alford* pleas," the judge will seek a statement from the respondent

conceding that the prosecution's evidence is sufficient to produce a guilty verdict. See § 14.22(a) *supra.* Judges taking an *Alford* plea will often ask the prosecutor and defense counsel whether they believe that the requirements for a valid *Alford* plea have been satisfied.

As explained in § 14.23 *supra,* juvenile court judges in several jurisdictions still follow the informal procedures tolerated prior to *Boykin v. Alabama*, 395 U.S. 238 (1969). Notwithstanding the host of constitutional and statutory requirements of careful questioning of the respondent, these judges direct only a few perfunctory questions at the respondent and rely almost exclusively on defense counsel's representations. In jurisdictions of this sort counsel must familiarize himself or herself with the idiosyncratic practices of the particular judge presiding over the case. In the event that the client subsequently wishes to mount appellate or collateral attacks on the validity of the plea (see §§ 14.30-14.31 *infra*), the *Boykin* violations usually will suffice to void it.

§ 14.26(d) Judicial Determination Whether To Proceed Directly to Disposition; Determination of the Respondent's Detention Status Pending a Delayed Disposition

Upon the completion of the plea colloquy and the judge's acceptance of the plea, the judge can either proceed directly to disposition or continue the disposition for a period of time to enable the probation department to prepare a pre-sentence report. In cases in which defense counsel has secured, as part of the plea agreement, a prosecutorial commitment to support a particular sentence, it is, of course, in the client's interest to proceed directly to disposition. See § 14.06(c)(1) *supra.*

In cases in which the judge elects to continue the disposition for the purpose of obtaining a pre-sentence report, the judge must determine the detention status of the respondent pending disposition. As explained earlier, in most jurisdictions the judge will routinely allow a respondent already on release status to remain free pending disposition. See § 14.23(c) *supra.* However, the judge does have the power to detain a previously released respondent for the period of time pending disposition. See *id.* In addition, a judge can release a previously detained respondent upon the respondent's entry of a guilty plea. See §§ 14.06(c)(3), 14.11 *supra*.

If the case is one in which the respondent was granted release status at arraignment and the jurisdiction is one in which judges give serious consideration to detaining previously released respondents pending disposition after a plea, the judge will usually turn to the prosecutor and ask whether s/he is seeking detention pending disposition. In cases of this sort it is obviously crucial for defense counsel to secure, as part of the plea agreement, a prosecutorial commitment to support continued release pending disposition or at least to remain mute on the issue of detention pending disposition. See § 14.06(c)(3) *supra.*

If the case is one in which the respondent was detained at arraignment, defense counsel should be prepared to argue for the respondent's release pending disposition. The likelihood of

prevailing on this argument will be improved immeasurably if counsel has secured prosecutorial support of pre-disposition release as part of the plea agreement. In addition, counsel's position will be greatly strengthened if, prior to the plea hearing, counsel has managed to arrange for the respondent's admission to an appropriate community-based program, so that counsel can argue that: (i) the respondent would be adequately supervised if released; and (ii) release for the period pending disposition would provide a good test of the respondent's ability to do well with the aid of the community-based program and would thereby inform the court whether a community-based alternative is an appropriate disposition.

§ 14.27 COPING WITH A PLEA THAT BREAKS DOWN

In criminal and juvenile court parlance a plea that "breaks down" is a plea in which the answers of the adult defendant or juvenile respondent fail to satisfy the judge, and, as a result, the judge rejects the plea and sets the case down for trial. A plea can break down either because the respondent does not correctly answer the questions concerning his or her waivers of rights (for example, because the respondent manifests an inability to understand certain rights or says that s/he is unaware of the maximum sentence) or because the respondent's recitation of facts fails to satisfy all of the elements of the offense (for example, because the respondent admits stabbing the complainant but asserts that the stabbing was in self-defense).

Most judges are tolerant of a juvenile respondent's failure to understand a question in the plea colloquy and will give defense counsel every reasonable opportunity to correct a misunderstanding. For example, if defense counsel requests a moment to confer briefly with the respondent in court, or even a brief recess to confer with the respondent outside the courtroom, the request will ordinarily be granted. Usually, in a consultation of this sort, counsel will succeed in clearing up the client's misunderstanding, and the plea colloquy can then continue. If, on the other hand, counsel is unable to clear up the misunderstanding and the respondent is adamant about the answer which s/he has given, then defense counsel has no choice but to terminate the plea hearing and set a trial date. In the event that the respondent subsequently changes his or her mind and wishes to plead guilty after all, counsel may be able to re-negotiate the original plea agreement with the prosecutor.

If a plea does break down irrevocably, counsel must take pains to ensure that the judge does not blame the respondent for wasting the court's time on a plea hearing that turned out to be a fruitless endeavor. In most cases in which a plea breaks down, it is the result of defense counsel's failure to prepare the client adequately by rehearsing every stage of the plea colloquy. If the problems can truthfully be attributed to defense counsel, counsel should let the judge know that it is counsel's fault and not the client's.

§ 14.28 PROCEDURE IN CASES IN WHICH THE PLEA WAS ACCEPTED AND THE CASE WAS ADJOURNED FOR A PRE-SENTENCE REPORT: PREPARING THE CLIENT AND THE PARENT FOR THE PROBATION INTERVIEW

If the judge adjourns the case to a new date for disposition and orders a pre-sentence report, then counsel will need to prepare the client and his or her parent for their meetings with the probation officer. The probation interview process and the steps counsel should take in preparing the client and parent for the interviews are discussed in § 38.05 *infra.*

Part F. Post-Conviction, Appellate, and Collateral Challenges to the Validity of the Guilty Plea

§ 14.29 MOTIONS TO WITHDRAW OR VACATE THE GUILTY PLEA

§ 14.29(a) Motion for Leave To Withdraw a Valid Guilty Plea

If the plea colloquy satisfied constitutional and state-law standards and the guilty plea was valid, it may subsequently be withdrawn only by leave of court, in the court's discretion, usually for good cause shown. *See, e.g., United States v. De Leon*, 915 F.3d 386 (5th Cir. 2019); *Dodge v. State*, 2020 ND 100, 942 N.W.2d 478, 483-84 (N.D. 2020); *Commonwealth v. Carrasquillo*, 631 Pa. 692, 115 A.3d 1284 (2015); *cf. State v. Anthony D., Sr.*, 320 Conn. 842, 134 A.3d 219 (2016). Judges differ considerably in their willingness to permit guilty pleas to be withdrawn. In multi-judge courts in which the judges rotate assignments from time to time, defense counsel should inquire of experienced criminal lawyers concerning the respective judges' attitudes, obtain the assignment schedule, and time the motion accordingly. Of course, the motion should not, for this purpose, be delayed beyond any deadline set by local rules for a motion to withdraw. Some jurisdictions, for example, disallow withdrawal after the end of the term of court in which the defendant was sentenced on the plea. *E.g.*, *Brooks v. State*, 301 Ga. 748, 751-52, 804 S.E.2d 1, 3-4 (2017). For obvious reasons, leave is granted more freely prior to sentencing than after sentencing, whether or not the applicable rules explicitly so provide. *See State v. Pedro*, 149 Hawai'i 256, 270, 488 P.3d 1235, 1249 (2021) ("[HAWAI'I RULE PENAL PRO.] 32(d) governs plea withdrawals. It specifies that sentenced defendants who move for plea withdrawal within ten days after the imposition of sentence are entitled to withdraw guilty or no contest pleas to 'correct manifest injustice.' It also provides that at any later time, a defendant seeking to withdraw a plea may do so only by petition pursuant to HRPP Rule 40. But HRPP Rule 32(d) omits a standard controlling plea withdrawal *before* sentencing. We introduced such a standard in [*State v.*] *Jim*, [58 Hawai'i 574, 574 P.2d 521 (1978)], explaining that courts evaluating pre-sentence requests for plea withdrawals should take a 'liberal approach' and grant them 'if the defendant has presented *a fair and just reason for [the] request and the State has not relied upon the guilty plea to its substantial prejudice'. . . (emphasis added).*"); *State v. Slater*, 198 N.J. 145, 156, 966 A.2d 461, 467 (2009) ("[T]he court rules set forth two standards that are dependent on the time a plea withdrawal motion is made. Motions filed at or before the time of sentencing will be granted in the 'interests of justice,' R. 3:9–3I; post-sentencing motions must meet a higher standard of 'manifest injustice' to succeed, R. 3:21–1; *Dodge v. State*, *supra*, 942 N.W.2d at 483 (discussing N.D. RULE CRIM. PRO. 11 (d)(1)(b)(ii) and 11(d)(2); "'After a court has accepted a guilty plea and imposed a sentence, a defendant cannot withdraw a plea unless withdrawal is necessary to correct a manifest injustice.'"). And if the probation department has invested time in

preparing a pre-disposition report in a guilty-plea case, that alone may make the judge testy and unsympathetic to allowing the respondent to change his or her plea. All told, absent strong reasons for delaying a motion to withdraw, counsel is ordinarily well advised to make it as soon as possible after the respondent indicates that s/he wants to take the case to trial.

The argument that an accused should be routinely permitted to withdraw a guilty plea before sentence, at least when neither the prosecutor nor the court has relied upon it to their disadvantage, has so far failed to command a majority of the Supreme Court of the United States (*see Neely v. Pennsylvania,* 411 U.S. 954 (1973) (opinion of Justice Douglas, dissenting from denial of *certiorari*); *Dukes v. Warden,* 406 U.S. 250 (1972)), and has been rejected by a substantial number of state high courts. *See, e.g.*, *Osborn v.State*, 672 P.2d 777, 788 (Wyo. 1983) ("There is a general consensus that the withdrawal of a plea of guilty is not an absolute right and the right to do so is within the sound discretion of the trial court. . . . A presentencing withdrawal motion is measured by whether it would be fair and just to allow it. . . . The burden is on the defendant to establish good grounds for withdrawing his plea. . . . Most of the foregoing cited authority also set out the policy to be that withdrawal of a plea of guilty before sentencing should be freely allowed but, as also indicated, that policy is frequently qualified. It has been considered an abuse of discretion to not hold a hearing whereby a defendant may develop support of his reasons for wanting to change his guilty plea."). Nevertheless, the argument is worth making as a matter of state and federal constitutional due process. "Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See also §§ 11.03(a), 13.06(a) *supra*. "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. . . . Second, is the right to trial by jury. . . . Third, is the right to confront one's accusers." *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Unless *some* state interest is served by holding a respondent to a waiver of these basic rights, due process should forbid a state to insist on doing so.

In any event, a trial court's refusal to permit a respondent to withdraw a guilty plea on timely motion before sentencing is assailable on appeal for abuse of discretion. *See*, *e.g.*, *Commonwealth v. McCall*, 320 Pa. Super. 473, 467 A.2d 631 (1983); *United States v. Gardner*, 5 F.4th 110 (1st Cir. 2021) (a plea agreement provided that if it was not accepted by the court it would be null and void and the defendant could withdraw it; the court initially accepted it but later granted the government's motion to withdraw from the agreement on the ground that the defendant had violated one of its provisions by committing an assault while in custody awaiting sentence; the defendant then moved to withdraw his guilty plea; his motion was denied; the court of appeals holds this denial an abuse of discretion because the terms of the agreement specifically

assured the defendant an opportunity to withdraw his plea if the agreement was not accepted – terminology which the appellate court reads as meaning if the plea agreement was not implemented by imposing the agreed-upon sentence.). And if a respondent can demonstrate that trial judges have been exercising their discretion in an inexplicable pattern, denying leave to withdraw in some cases while granting it in others that present indistinguishable circumstances, the argument for finding an abuse of discretion will be a strong one. *See Williams v. Georgia*, 349 U.S. 375, 388-90 (1955).

A factor often considered by courts in determining whether to exercise their discretion in favor of permitting withdrawal of the plea is whether the respondent puts forth a credible assertion of innocence. Such an assertion of innocence will be treated as particularly compelling in cases in which the plea was an *Alford* plea (see § 14.22(a) *supra*), and the respondent therefore has never admitted guilt.

§ 14.29(b) Motion To Vacate an Invalid Guilty Plea

The preceding subsection assumed the validity of the plea. If the plea was arguably invalid, counsel can file a motion to vacate it. The motion can be filed either prior to or following sentencing. In some jurisdictions appellate review of defects in a guilty plea cannot be obtained without prior exhaustion of trial-level remedies, such as a motion to vacate the plea.

The grounds for vacating a guilty plea as invalid include:

1. The plea was involuntary. *See, e.g., Machibroda v. United States,* 368 U.S. 487 (1962); *Fontaine v. United States,* 411 U.S. 213 (1973); *Godinez v. Moran*, 509 U.S. 389, 400 (1993) (dictum).

2. The plea was not effective as a knowing and intelligent waiver of the right to trial because the respondent lacked a full understanding of the charge, *e.g.*, *Bradshaw v. Stumpf*, 545 U.S. 175, 182-83 (2005) (dictum); *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (dictum); *Marshall v. Lonberger,* 459 U.S. 422, 436 (1983) (dictum); *Smith v. United States,* 309 F.2d 165 (9th Cir. 1962), including all of the critical elements of the offense, *see Henderson v. Morgan,* 426 U.S. 637, 647 n.18 (1976); *State in the Interests of K.M.*, 173 P.3d 1279, 1285 (Utah 2007) ("Without an adequate communication of the nature and elements of the offense that is the subject of the admission, the admission is presumptively not knowing and voluntary."), and the possible penalty, *Marvel v. United States,* 380 U.S. 262 (1965); *United States v. Johnson*, 850 F.3d 515, 518, 522-23 (2d Cir. 2017); *Chapin v. United States,* 341 F.2d 900 (10th Cir. 1965); *In the Matter of Melvin A.*, 216 A.D.2d 227, 227-28, 628 N.Y.S.2d 698, 699 (N.Y. App. Div., 1st Dep't 1995) (guilty plea colloquy was defective because, *inter alia*, the judge failed to advise the respondent of the possibility that a period of placement can be extended); *cf. Lane v. Williams,* 455 U.S. 624, 630 & n.9 (1982) (reserving the

question whether and under what circumstances a failure to inform a defendant of a mandatory parole term will invalidate a guilty plea); *Hill v. Lockhart,* 474 U.S. 52 (1985) (stating in dictum that a failure to inform a defendant that his eligibility for parole is restricted because of a prior conviction would not invalidate a guilty plea); *United States v. Ruiz,* 536 U.S. at 630 ("this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor"); *Libretti v. United States*, 516 U.S. 29 (1995); *United States v. Fisher*, 711 F.3d 460, 462, 469-70 (4th Cir. 2013) (granting the defendant's motion to vacate his guilty plea on the ground that "the law enforcement officer responsible for the investigation . . . [subsequently] admitted to having lied in his sworn affidavit that underpinned the search warrant for the defendant's residence and vehicle, where evidence forming the basis of the charge to which the defendant pled guilty was found": "the officer's affirmative misrepresentation, which informed the defendant's decision to plead guilty and tinged the entire proceeding, rendered the defendant's plea involuntary and violated his due process rights").

3. The judge who presided over the entry of the plea did not conduct an adequate inquiry into voluntariness and understanding on the record prior to accepting the plea. *See McCarthy v. United States,* 394 U.S. 459 (1969); *Boykin v. Alabama,* 395 U.S. 238 (1969); *United States v. Tien*, 720 F.3d 464, 470 (2d Cir. 2013); *United States v. Fuentes-Galvez*, 969 F.3d 912 (9th Cir. 2020); *United States v. McIntosh*, 29 F.4th 648 (10th Cir. 2022); *United States v. Lockhart*, 947 F.3d 187 (4th Cir. 2020) (en banc) (the defendant's guilty plea is vacated on direct appeal because the trial court's failure to advise him that he was subject to a mandatory minimum sentence of 15 years imprisonment violated Rule 11 and constituted plain error; the prosecutor, during a plea colloquy, had stated that conviction on the offense charged carried a maximum penalty of ten years, and the defendant had reason to believe that he would be sentenced to less than that maximum); *United States v. Murphy*, 942 F.3d 73 (2d Cir. 2019) (the trial court's acceptance of a guilty plea is vacated when it appears from the record that the prosecutor, judge and defense counsel were all of the erroneous view that the crime charged was a strict-liability offense; the defendant's ignorance that *scienter* was an element of the offense renders the plea invalid); *United States v. Jawher*, 950 F.3d 576 (8th Cir. 2020) (the trial court's acceptance of a guilty plea is vacated when the plea colloquy discloses that the judge, in inquiring whether the defendant admitted each element of the offense, omitted the *mens rea* element and thus left the defendant unaware of that element); *United States v. Pierre*, 2022 WL 1198222, at *2 (5th Cir. April 22, 2022) ("Pierre argues that his plea was not knowing and voluntary and thus should be vacated because, among other things, it

was conditioned on the government agreeing not to pursue a sentencing enhancement under a provision that could not apply to him. We agree with Pierre and hold that that the district court plainly erred by accepting his plea under these circumstances."); *Lejeune v. McLaughlin*, 99 Ga. 546, 546-47, 789 S.E.2d 191, 192-93 (2016) ("This Court has, for many years now, held that for a plea to be constitutionally valid, a pleading defendant must be informed of his three '*Boykin* rights.' . . . And, in . . . [2014] this Court [further] held that for a plea to be knowingly and voluntarily entered, a pleading defendant was required to know of his 'essential constitutional protections,' including his right against self-incrimination."); *State v. Brinkman*, 2021-OHIO-2473, 165 Ohio St. 3d 523, 527, 530, 180 N.E.3d 1074, 1078, 1081 (2021) (reversing a conviction based on a guilty plea because, in the colloquy preceding the plea, the presiding judge failed to advise the defendant "that by pleading guilty he was waiving his constitutional rights to confront the witnesses against him and to have the state prove his guilt beyond a reasonable doubt"; "the trial court's failure to strictly comply with Crim. R. 11(C)(2)(c) before accepting Brinkman's guilty plea renders his plea invalid."); *People v. Johnson*, 160 A.D.3d 516, 518, 76 N.Y.S.3d 18 (N.Y. App. Div., 1st Dep't 2018) (vacating the defendant's guilty plea because the judge advised the defendant that "she faced an adult sentencing range of 5 to 25 years in State prison when, as a 15-year-old juvenile offender, she in fact faced a minimum sentence of one to three years and a maximum sentence of 3⅓ to 10 years in the custody of the Office of Children and Family Services"; "Defendant's belief that she was avoiding a much greater risk than she actually was casts doubt on a finding that she had a clear understanding of her guilty plea."); *Bautista v. State*, 163 N.E.3d 892 (Ind. App. 2021).

4. The plea hearing was inadequate in some other respect, such as, for example, in jurisdictions in which the child has an absolute right to have a parent present at the plea, the parent was not present at the hearing, and the respondent did not effectively waive the parent's presence. *See* § 14.26(a) *supra*.

5. The prosecutor failed to comply with promises made to the respondent as part of the plea agreement – or, in cases in which the judge participated in "conditional plea bargaining," see § 14.06(c)(2) *supra,* the judge failed to comply with terms of the agreement. *See Santobello v. New York,* 404 U.S. 257 (1971); *Blackledge v. Allison,* 431 U.S. 63 (1977); *United States v. Wilson*, 920 F.3d 155 (2d Cir. 2019); *United States v. King-Gore*, 875 F.3d 1141 (D.C. Cir. 2017); *United States v. Warren*, 8 F.4th 444 (6th Cir. 2021) (holding that the prosecutor's comments to the sentencing judge that the Government did not know certain aggravating features of the defendant's priors at the time when it entered into a plea agreement and that it likely would have made a different recommendation if it had known about those features violated the terms of the agreement stipulating that neither party would suggest in any way that a departure or variance from a specified

sentencing range was appropriate); *compare United States v. Benchimol*, 471 U.S. 453 (1985) (per curiam));

6. The respondent lacked the requisite mental competency to enter a plea of guilty. *See, e.g.*, *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993) (dictum); *Taylor v. United States,* 282 F.2d 16 (8th Cir. 1960). *See also In re Matthew N.*, 216 Cal. App. 4th 1412, 1414-15, 1420-22, 157 Cal. Rptr. 3d 233, 235, 239-40 (2013) (granting the juvenile's motion to withdraw his guilty plea on grounds of "*developmental* [in]competence" because of "the minor's unusual immaturity for his age (as his mother and both psychologists attested) and his inability to comprehend the legal concepts involved in the trial process . . . (as both trial counsel and the competency report attested)").

7. The respondent pleaded guilty without counsel and without an effective waiver of the right to counsel (*see*, *e.g.*, *Osbey v. State*, 425 S.C. 615, 825 S.E.2d 48 (2019)) or was inadequately represented by counsel in connection with the plea, *see Tollett v. Henderson,* 411 U.S. 258 (1973); *Hill v. Lockhart,* 474 U.S. 52 (1985) (dictum); *Arvelo v. Secretary, Florida Department of Corrections*, 788 F.3d 1345, 1348 (11th Cir. 2015) ("[T]he Supreme Court has expressly held that a defendant does not waive an ineffective assistance of counsel claim simply by entering a plea. Instead, because 'voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases,' courts must continue to apply the familiar two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984) . . . . Therefore, we decide (1) whether counsel's representation fell below an objective level of reasonableness, and (2) if so, whether a defendant suffered prejudice as a result. . . . ¶ In cases like this one, where a petitioner faults his lawyer for failing to pursue a motion to suppress prior to entering a plea, both the deficient performance and prejudice prongs of *Strickland* turn on the viability of the motion to suppress."); *Brock-Miller v. United States*, 887 F.3d 298, 308 (7th Cir. 2018) ("In the plea bargaining context, a reasonably competent lawyer must attempt to learn all of the relevant facts of the case, make an estimate of the likely sentence, and communicate the results of that analysis to the client before allowing the client to plead guilty"); *Day v. United States*, 962 F.3d 987, 992-93 (7th Cir. 2020) (the defendant was advised by a federal public defender to accept a favorable plea deal offered by the Government; the defendant subsequently substituted retained counsel who ignorantly advised him not to accept the offered deal, who prepared for trial belatedly, and who then, after realizing the strength of the Government's case, advised him to plead guilty without any deal and throw himself on the mercy of the court; the Seventh Circuit finds private counsel incompetent and remands for a hearing on the issue of prejudice: "To prove *Strickland* prejudice in the plea-bargaining context, the defendant must show a reasonable probability that he would have accepted the government's plea offer but for the ineffective advice of

his attorneys and that the court would have accepted the agreement and imposed a less severe sentence." The District Court's postconviction finding of no prejudice "because the plea agreement would not bind the court to a particular sentence" was erroneous: "[T]he proper inquiry is not whether the sentencing court is bound by a plea agreement, but whether it is reasonably probable that the court 'would have accepted its terms,' and the resulting sentence 'would have been less severe' than the one that was actually imposed. . . . ¶ . . . Few court observers would contend that the government's views as reflected in its plea stipulations and Guidelines recommendations have no influence on a judge's real-world sentencing decisions."); *United States v. Galanis*, 759 Fed. Appx. 88, 91 (2d Cir. 2019) ("In the context of plea offers, counsel performs deficiently when he fails to (1) 'communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused,'. . . or (2) 'inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed'"); *United States v. Thomas*, 999 F.3d 723 (D.C. Cir. 2021) ("We remand the case to the district court so it may consider . . . [the] claims that . . . [Thomas] received ineffective assistance of counsel due to counsel's failure to (1) argue for or present facts supporting a Smith variance [that is, "'a downward departure . . . where the defendant's status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence. . .'" (*id*. at 736)] or object to the district court's reasons for rejecting one, (2) raise mitigating facts contained in the Government's sentencing exhibits, (3) review the sentencing exhibits with Thomas, and (4) submit character letters Thomas's family and friends had written" (*id*. at 739)); *Mahrt v. Beard*, 849 F.3d 1164, 1170-71 (9th Cir. 2017) (dictum) (the rule of *Tollett v. Henderson*, *supra*, which allows a defendant to "'attack the voluntary and intelligent character of the guilty plea' based on pre-plea ineffective assistance of counsel," applies not only to "ineffective assistance rendered [by a lawyer] when providing incompetent advice concerning the guilty plea itself" but also to "pre-plea ineffective assistance of counsel . . . [that] prevent[ed] . . . [the defendant] from making an informed choice whether to plead," including "pre-plea ineffective assistance by failing to file a motion to suppress"); *United States v. Gardner*, 15 F.4th 382 (5th Cir. 2021) (the defendant is entitled to a hearing on his motion to withdraw a guilty plea based on allegations that he received ineffective assistance of counsel when his lawyer advised him to enter an unconditional guilty plea without moving to suppress evidence although there were viable grounds for a suppression motion and the defendant had instructed the lawyer to file one: "A defendant may withdraw a guilty plea after the court accepts the plea, but before it imposes a sentence, if he 'can show a fair and just reason for requesting the withdrawal.' In determining whether a defendant has shown a 'fair and just' reason for withdrawal, the district court must examine the totality of the circumstances, informed by the [these] factors . . . : (1) whether the defendant asserted actual innocence; (2) whether withdrawal of the plea would prejudice the government;

(3) the extent of the defendant's delay, if any, in filing the motion to withdraw; (4) whether withdrawal would substantially inconvenience the court; (5) whether the defendant was benefitted by the close assistance of counsel; (6) whether the guilty plea was knowing and voluntary; and (7) the extent to which withdrawal would waste judicial resources." *Id*. at 385-86. "'Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.'" *Id*. at 386.); *accord*, *Sunseri v. State*, 137 Nev. Adv. Op. 58, 495 P.3d 127 (Nev. 2021); *Johnson v. Uribe*, 682 F.3d 1238 (9th Cir. 2012), *as amended on denial of rehearing in* 700 F.3d 413 (9th Cir. 2012); *Anderson v. United States*, 981 F.3d 565 (7th Cir. 2020); *see also People v. Dodson*, 30 N.Y.3d 1041, 1042, 89 N.E.3d 1254, 1254-55, 67 N.Y.S.3d 574, 574 (2017) (when the defendant, "[a]t a sentencing hearing following his guilty plea, . . . asked for a new attorney to advise him on whether to move to withdraw his plea before sentence was imposed" and supported the request with "specific allegations regarding counsel's [inadequate] performance[,] . . . the [trial] court had a duty to inquire into defendant's request for new counsel before it proceeded to sentence defendant"; because the trial court failed to do so, the Court of Appeals reverses and remands the case so that the defendant can be "afforded the opportunity to decide whether to make a motion to withdraw his guilty plea upon the advice of counsel"); *Davis v. Commissioner of Correction*, 319 Conn. 548, 549, 568, 126 A.3d 538, 540, 550 (2015) (defense counsel deprived his client of effective assistance at sentencing, and prejudice must be presumed, because "defense counsel agreed with the prosecutor's [sentencing] recommendation that the trial court should impose the maximum sentence allowed under a plea agreement even though that agreement contained a provision entitling defense counsel to advocate for a lesser sentence"), or, in cases in which the respondent waived counsel, the waiver of counsel was not effective, *see Williams v. Kaiser,* 323 U.S. 471 (1945); *Rice v. Olson*, 324 U.S. 786 (1945); *Uveges v. Commonwealth of Pennsylvania*, 335 U.S. 437 (1948); *Commonwealth of Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 (1956); *United States v. Johnson*, 24 F.4th 590 (6th Cir. 2022) (the defendant's election to proceed *pro se* after a defective *Faretta* colloquy (see § 4.05 *supra*) was not an effective waiver of the right to counsel); *United States ex rel. Durocher v. LaVallee,* 330 F.2d 303 (2d Cir. 1964); *compare Iowa v. Tovar*, 541 U.S. 77 (2004). *See People v. Mitchell*, 21 N.Y.3d 964, 967, 993 N.E.2d 405, 407, 970 N.Y.S.2d 919, 921 (2013) (if a motion to withdraw a guilty plea is based on an allegation of ineffectiveness of counsel and if the defense attorney whose conduct has been challenged takes "a position contrary to the one taken by his client on the motion," "a conflict of interest arises, and the court must assign a new attorney to represent the defendant on the motion").

8. The court did not have subject-matter jurisdiction of the offense. *See*, *e.g.*, *People*

v. Thiam, 34 N.Y.3d 1040, 139 N.E.3d 366, 115 N.Y.S.3d 745 (Mem) (2019); *Ashwell v. State*, 226 So.3d 69, 72 (Miss. 2017) ("It is well settled that '[a] plea of guilty does not waive (1) the failure of the indictment to charge a criminal offense or, more specifically, to charge an essential element of a criminal offense, and a plea of guilty does not waive (2) subject matter jurisdiction.'"); *Johnson v. State*, quoted in subdivision (9) *infra*).

9. The statute proscribing the offense to which the respondent pleaded guilty is unconstitutional. *See, e.g., Haynes v. United States*, 390 U.S. 85, 87 n.2 (1968); *State v. Albano*, 67 Hawai'i 398, 688 P.2d 1152 (1984); *State v. Small*, 2005-Ohio-3813, 162 Ohio App.3d 375, 833 N.E.2d 774 (2005); *McKenzie v. State*, 103 So.3d 84 (Ala. Crim. App. 2010); *Class v. United States*, 138 S. Ct. 798, 803-05 (2018); *Johnson v. State*, 916 N.W.2d 674, 680 (Minn. 2018) ("Johnson argues that he was convicted under a statute that is unconstitutional as applied to him. Johnson's argument therefore attacks the subject-matter jurisdiction of the district court. And, by pleading guilty, Johnson did not forfeit his right to make this jurisdictional argument."); *Armijo v. State*, 678 P.2d 864, 866, 867 (Wyo. 1984) (the defendant's pre-plea "Motion to Preserve All Constitutional Questions and . . . Motion to Dismiss . . .[a] Count . . . of the Information" charging him with violating a statute that he contended was unconstitutional sufficed to sustain his right to challenge the statute's constitutionality on appeal despite his guilty plea: "Little purpose would be served by requiring a defendant to insist upon a trial in order to preserve his opportunity to challenge the constitutionality of the statute, and we do not insist upon that."); *but see*, *e.g.*, *State v. Norris*, 2007 UT 5, 152 P.3d 305, 306 (Utah 2007) ("an unconditional guilty plea does waive a defendant's right to challenge the constitutionality of a statute").

10. The charging paper fails to allege facts that constitute the criminal offense to which the plea is entered. *See*, *e.g.*, *People v. Hightower*, 18 N.Y.3d 249, 961 N.E.2d 1111, 938 N.Y.S.2d 500 (2011); *People v. Dreyden*, 15 N.Y.3d 100, 931 N.E.2d 526, 905 N.Y.S.2d 542 (2010); *Ashwell v. State*, quoted in subdivision (f) *supra*); *State v. Blount*, 209 N.C. App. 340, 343, 703 S.E.2d 921, 924 (2011) ("it is well established that a defendant may challenge the sufficiency of the indictment despite having knowingly and voluntarily pled guilty to the charge"); *Barker v. State*, 342 Ga. App. 505, 506, 803 S.E.2d 792, 794 (2017) ("Barker did not challenge the indictment, and '[g]iven that [Barker] pled guilty to the crime charged, his only possible challenge to the indictment would be the sufficiency thereof'"); *compare State v. Jones*, 140 Idaho 755, 758-59, 101 P.3d 699, 702-03 (2004) ("Jones argues the information filed against him failed to expressly allege the element of 'willfulness' . . . .Willfulness is a necessary element of felony injury to a child because it is named in the statute and without willful intent the information would describe a non-crime. . . . ¶ Although the failure of an

information to charge an offense is never waived, defects 'which are tardily challenged are liberally construed in favor of validity.'. . . When an objection to the information was not timely raised before trial – as in the instant case [where the defendant pleaded guilty pursuant to a plea bargain] – the sufficiency of the charging document will 'be upheld unless it is so defective that it does not, by any fair or reasonable construction, charge an offense for which the defendant is convicted.'"); *accord*, *United States v. Ruelas*, 106 F.3d 1416, 1419 (9th Cir. 1997) ("[a]lthough Ruelas may raise a defective indictment claim at any time, we liberally construe the indictment in this case because he did not object to it before he pleaded guilty").

11. Some basic procedural precondition for the entry of a guilty plea, such as the respondent's appearance in court in person, was disregarded. *See, e.g., United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018) (granting the defendant's request to vacate a guilty plea which he made "via videoconference" due to "his health issues and limited mobility," because "the plain language of [Federal] Rule [of Criminal Procedure] 43 requires all parties to be present for a defendant's plea and . . . [therefore] a defendant cannot consent to a plea via videoconference. ¶ Our decision is supported by the unique benefits of physical presence. . . . ¶ . . . 'Without th[e] personal interaction between the judge and the defendant – which videoconferencing cannot fully replicate – the force of the other rights guaranteed' by Rule 43 is diminished.").

12. Some constitutional right precluded the respondent's *prosecution* for the offense to which s/he pleaded guilty (as distinguished from the procedures used in the prosecution or in the investigation of the offense underlying it). *See Blackledge v. Perry,* 417 U.S. 21 (1974); *Menna v. New York,* 423 U.S. 61 (1975) (per curiam); *Haring v. Prosise,* 462 U.S. 306, 320 (1983) (dictum).

13. In jurisdictions that require that a factual basis for a guilty plea must be established on the record before the plea is accepted, that the record fails to show the requisite basis. *See, e.g., United States v. Bain*, 925 F.3d 1172 (9th Cir. 2019); *United States v. Prado*, 933 F.3d 121 (2d Cir. 2019); *United States v. Murphy*, 942 F.3d 73 (2d Cir. 2019).

14. There are issues relating to the sentence imposed pursuant to the plea, such as that the sentence exceeds the statutory maximum or the sentencing procedure failed to comport with constitutional, statutory, or common-law requirements.

§ 14.29(c) The Prohibition Against Evidentiary Use of a Withdrawn or Vacated Guilty Plea in a Subsequent Trial

In the event that a guilty plea is vacated or withdrawn by leave of the court, it may not be

used against the respondent as evidence of guilt at a subsequent trial on the charge to which the respondent initially pleaded guilty. This proposition was settled in federal practice by *Kercheval v. United States,* 274 U.S. 220 (1927); *see also* FED. RULE CRIM. PRO. 11(f) (2022); FED. RULE EVID. 410 (2022); *but cf. United States v. Mezzanatto*, 513 U.S. 196 (1995); and the *Kercheval* rule appears to have been constitutionalized by a dictum in *Hutto v. Ross,* 429 U.S. 28, 30 n.3 (1976) (per curiam).

§ 14.30 APPELLATE REVIEW IN GUILTY PLEA CASES

A guilty plea ordinarily forecloses appellate review of any claim that error was committed in judicial proceedings prior to the entry of the plea. As discussed in § 14.10 *supra,* some jurisdictions make special provision, by statute, court rule, or caselaw, for appellate review of pretrial suppression rulings even after the entry of a guilty plea.

Appellate remedies are, of course, available to review the invalidity of the plea itself. Thus any of the claims described in § 14.29(b) could be raised on appeal. However, appellate courts in some jurisdictions will not entertain attacks on a guilty plea unless trial-level remedies, such as a motion to withdraw or vacate the plea, have first been exhausted. *See, e.g.*, *State v. Dortch*, 317 So.3d 1074 (Fla. 2021); *State v. Lavy*, 121 Idaho 842, 828 P.2d 871 (1992).

Finally, appeal is always available to challenge a sentence imposed pursuant to a guilty plea on the grounds that the sentence exceeds the statutory maximum or that the sentencing procedure violated constitutional, statutory, or common-law commands.

§ 14.31 COLLATERAL REVIEW IN GUILTY PLEA CASES

In the majority of jurisdictions state court collateral review is available for constitutional claims or claims that could not have been raised on direct review. See § 39.03(a) *infra.* Federal constitutional claims can be raised in federal habeas corpus proceedings. See § 39.03(b) *infra.* Accordingly, constitutional defects in the validity of the plea or in the conduct of the plea hearing or sentencing proceedings can be challenged in state and federal collateral proceedings.

As a practical matter juvenile sentences usually are of such limited duration that a juvenile will have served his or her entire sentence prior to the time when direct appellate review is completed, and thus there may appear to be no reason to pursue collateral remedies. However, even after the sentence has been served, a conviction may have ancillary consequences. For example, it might preclude the youth from ever entering the military, or it might serve as a predicate for enhanced juvenile sentencing or harsher adult court sentencing. Accordingly, there will be many situations in which counsel should pursue collateral remedies for an invalid guilty plea, even after the juvenile has completed serving his or her sentence. In most circumstances, federal *habeas corpus* remains available after a respondent's release from confinement as a forum for invalidating unconstitutional convictions that have damaging collateral consequences, *see*, *e.g.*, *Jones v. Cunningham*, 371 U.S. 236 (1963); *Carafas v. LaVallee*, 391 U.S. 234 (1968);

Hensley v. Municipal Court, 411 U.S. 345 (1973); and some state courts similarly extend their habeas remedy to reach such cases. Alternative state-court procedures may include *coram nobis*; proceedings under "PCRA" (postconviction relief act) statutes or rules; or a motion to vacate the judgment of conviction.