§ 13.01 INTRODUCTION

Every State provides that persons under a certain age who are accused of violating the penal law are eligible for prosecution as juvenile delinquents in juvenile court. However, every State also retains the power to selectively prosecute otherwise eligible juveniles in adult criminal court. When prosecuted in adult criminal court, juveniles are not referred to as delinquents, though frequently another label different from “criminal,” such as “youthful offender” or “juvenile offender,” will be used.

The decision to prosecute in adult court a person otherwise eligible for prosecution as a delinquent affects many different aspects of the process. On the credit side, the young person will be entitled to all of the constitutional and statutory rights that adults accused of crime enjoy in the State, including such rights as the right to trial by jury (a major benefit in the many jurisdictions in which there is no such right for accused delinquents), open and public proceedings, bail, and prosecution only on indictment by a grand jury. In addition, because sentencing in adult court is governed by statutory maximum terms graduated according to the severity of offenses rather than following the juvenile court model, which looks exclusively at the rehabilitative needs of the particular offender, the juvenile who is convicted only of a misdemeanor or minor felony offense may be eligible for, or actually receive, a sentence less severe than s/he would have received if prosecuted as a juvenile delinquent. On the debit side, the maximum sentence that the young person prosecuted in adult court may receive for serious offenses frequently is considerably greater than s/he could have received if adjudicated a delinquent. Not only is the maximum length of sentence for severe crimes greater, sometimes equaling the maximum available for an adult (except a sentence of death, see Roper v. Simmons, 543 U.S. 551 (2005)), but the place of confinement may be an adult correctional facility. (Many jurisdictions do provide that the part of the sentence that runs through the young person’s minority (usually 18) must be served in facilities maintained by the department that supervises the incarceration of delinquents, rather than by the adult correctional department.)


There are varied and numerous schemes for determining when and how the decision whether to prosecute as a juvenile or an adult is made. Several different schemes will be briefly
described here. Although these schemes do not exhaust the variety employed by the fifty States, they provide a useful national overview.

In most States there is a minimum age below which a juvenile cannot be prosecuted in criminal court. In some jurisdictions all juveniles above a certain age may be prosecuted as adults. In some States, regardless of age, juveniles charged with specific serious offenses may be prosecuted in either juvenile or criminal court. In still other States juveniles charged with specific serious crimes must be tried in criminal court. In most jurisdictions juveniles charged with serious offenses who are above a certain age may be prosecuted either in juvenile or adult court.

Both the reasons for waiver and the process for making the determination vary widely from jurisdiction to jurisdiction. In those jurisdictions in which all juveniles charged with certain serious offenses, regardless of age, must be tried as adults, the prosecutor effectively decides where the child will be prosecuted, either by determining what degree of charge to lodge or by deciding in which court to file the charges. In the majority of jurisdictions there is discretion beyond that inherent in the charge selected, which must be exercised by a state official before the decision is made in which court the young person is to be prosecuted. In these jurisdictions typically the juvenile court judge is empowered to decide whether to transfer and must hold a hearing before making a transfer order, or, as it is sometimes called, an order “waiving” juvenile court jurisdiction.

Needless to say, the decision to prosecute a person otherwise eligible for juvenile court jurisdiction in an adult criminal court is momentous. It should be no surprise that the first decision ever rendered by the Supreme Court of the United States on the subject of juvenile courts focused on the due process requirements that apply to this decision. In Kent v. United States, 383 U.S. 541, 556-57 (1966), the Court stated that waiver of jurisdiction is a “critically important” stage in the juvenile court process and must be attended by certain minimum safeguards of due process to satisfy the Constitution.

§ 13.02 FACTORS THAT AFFECT THE DECISION WHETHER TO OPPOSE TRANSFER TO ADULT COURT

Counsel can play an important role in defending a juvenile at this stage. What counsel does, however, depends on a number of factors. Initially, counsel must determine whether the client will be better off being prosecuted in juvenile court rather than in adult criminal court. Although this will usually be the case, counsel should not automatically assume that it is. Counsel must consider the following factors:

First, counsel should calculate the maximum sentence that the client could receive, the probable sentence that s/he would receive, and the potential places of confinement, if convicted in adult court and juvenile court respectively. Second, counsel should consider the respective probabilities of conviction by the two courts. It may be that on the facts of a particular case, as counsel foresees the case developing, the probability of acquittal by the judge who will sit as factfinder in juvenile court is close to zero. This may be, for example, because the case will turn on a question of credibility, and counsel knows from previous experience that the juvenile trial judge tends to resolve questions of credibility against the juvenile. Or the defense may turn on a contention — such as the reasonableness of the client’s response to certain provocation by an assault complainant — that, in counsel’s opinion, a jury is likely to accept but the judge very
probably will not. Third, counsel should consider the probability, duration, and conditions of pretrial detention in the juvenile and the adult courts respectively. Fourth, counsel should consider the long-term effects of the process of prosecution in adult court. Will the client, once prosecuted in adult court, be forever ineligible for juvenile court prosecution in subsequent matters (as is the practice in most jurisdictions) and, if so, how likely is it (based on the age of the client and his or her prior record) that the client will be arrested on a new charge while still chronologically eligible for juvenile court? Counsel should also consider whether the client will be fingerprinted and photographed only if prosecuted in adult court or whether these records will be made and kept regardless of which court assumes trial jurisdiction.

Counsel's investigation of these factors will frequently require speaking with experienced attorneys in both juvenile and criminal court. After s/he has investigated and considered them, s/he should meet with the client for a lengthy counseling session. It is the client's right to decide what to do and to instruct the lawyer accordingly. See § 2.03 supra. But it is the lawyer's responsibility to counsel the client and to share with the client information that the client cannot possibly have. This includes the lawyer's best professional judgment on all of the subjects described in the preceding paragraph, however uncertain the lawyer may be about them. One of the most difficult — and common — tasks in which any lawyer must engage is making predictions or professional judgments about probable outcomes that are subject to uncertainty. To acknowledge that this cannot be done with scientific accuracy is not to conclude that it should not be attempted in the first place. Lawyers are compelled to predict.

§ 13.03 MEETING WITH THE PROSECUTOR

As indicated in § 13.01 supra, there are many different procedures for making the decision whether a juvenile will be prosecuted as an adult. In some jurisdictions the prosecutor does not have the power to choose the court, but unless the prosecutor requests transfer, the juvenile automatically will be prosecuted in juvenile court. In other jurisdictions the prosecutor's recommendation is heavily relied upon by the court. Depending upon the jurisdiction and the stage at which counsel enters the case (see Chapter 3), it may be possible to meet with the prosecutor before formal charges have been lodged. Such a meeting can be enormously beneficial, especially in jurisdictions in which the prosecutor has the power to choose in which court to prosecute, either directly (by filing charges in juvenile or criminal court as the prosecutor sees fit) or indirectly (by deciding what degree of charge to lodge in juvenile court, thereby making the client eligible or ineligible for adult court jurisdiction). Counsel should prepare for this meeting with the prosecutor by obtaining information about the client, his or her past juvenile record, and social history, including family, school, and community circumstances.

In the event counsel has determined that the client's interests are likely to be best served by prosecution in juvenile court, counsel will want to persuade the prosecutor to reduce the charges or otherwise assure or recommend that the case be kept in juvenile court. Often, however, it will not be possible to decide where the client's interests lie without investigating the charges themselves and conducting the analysis described in § 13.02 supra. Thus, at this first meeting, counsel may request that the prosecutor furnish him or her with information about the charges and grant him or her a brief period, of perhaps one or two days, to conduct an investigation into the charges. This is especially important since prosecutors frequently are unwilling to consider charging less than the maximum charge for which they believe that probable cause
can be sustained unless the client is willing to plead guilty to a specified charge and avoid the need for any formal or drawn-out proceeding. Prior to conducting an investigation, counsel is in no position to accede to this request or to advise the client about it. (The very real possibility that the prosecutor will seek a guilty plea early on may be a reason not to hold this meeting in the first place. But counsel’s choices are quite limited. If counsel does not intervene by seeking this meeting, the prosecutor will make his or her decision without any input from the defense. Thus, unless it appears that counsel’s intervention is likely to increase the probability that the prosecutor will choose to prosecute in criminal court, there is not much to lose from setting up the meeting.)

§ 13.04 THE RIGHT TO A HEARING AND OTHER HEARING-RELATED RIGHTS

Except when the prosecutor unilaterally makes the choice of court or when the gravity of the offense charged automatically determines the court in which it must be prosecuted, the decision is made by a judge — usually the juvenile court judge, more rarely the criminal court judge.

Most jurisdictions provide by statute that juveniles are entitled to a hearing before the final transfer decision. See, e.g., Ga. Code Ann. § 15-11-30.2(a)(1), (b)(1) (2005). If there is no statutory right to a hearing, such a right may be conferred by the due process clause of the state or federal constitution. Determining whether a hearing is constitutionally required before a juvenile may be transferred involves careful study of the statutory scheme for transfer. When the scheme demands that certain facts be found before the juvenile may be transferred, the juvenile indisputably enjoys a constitutional right to a hearing preceding the decision to transfer. Because, under state law, the juvenile is entitled to be prosecuted in juvenile court unless certain facts are found that justify prosecution as an adult, this entitlement constitutes a “liberty” interest protected by due process.

The Supreme Court has held that “[a] liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty . . . ,’ or it may arise from an expectation or interest created by state laws or policies.” Wilkinson v. Austin, 545 U.S. 209, 221 (2005). See also Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Board of Pardons v. Allen, 482 U.S. 369 (1987); Meachum v. Fano, 427 U.S. 215, 223-27 (1976) (dictum). Once state law specifies a “set of facts which, if shown, mandate a decision favorable to the individual,” the procedure for determining the facts must comport with due process, Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 10 (1979), and a hearing must be held if the facts are contested. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 430-31 (1982); Vitek v. Jones, 445 U.S. 480, 488-91 (1980).

This is the rule even when the state laws that give rise to the liberty interest fail to provide for the procedural right to a hearing. “The categories of substance and procedure are distinct.” Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985). Whether or not a statute provides for a hearing, due process defines the minimum procedural protections that a State must afford before depriving an individual of a state-created liberty interest. E.g., Goss v. Lopez, 419 U.S. 565 (1975).

As previously indicated, in the majority of jurisdictions, judges decide in which court the juvenile is to be prosecuted. So long as this decision depends upon the determination of issues of fact or the application of a legal standard to particular cases, the judge may not