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# The Efficacy of a Probable Cause Requirement in Juvenile Proceedings

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# THE EFFICACY OF A PROBABLE CAUSE REQUIREMENT IN JUVENILE PROCEEDINGS

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*The finding of probable cause is a well-established requirement in criminal proceedings, but not in juvenile proceedings. States have adopted this requirement only in varying degrees in their statutes and case law relating to juveniles. In this Article, Professor Davis examines the need for a probable cause requirement in the various stages of the juvenile process. Throughout the Article, he supplements his discussion with a review of the standards relating to the juvenile justice process developed by the Juvenile Justice Standards Project and recently approved by the American Bar Association. Professor Davis concludes that a probable cause requirement should be an integral part of the juvenile process. He feels this is necessary to protect the rights of juveniles, deter potential prosecutorial abuses, and insure that the preference for treating children as children, in juvenile courts, and not as adults, in criminal courts, is observed.*

The requirement that the prosecution establish probable cause to believe the accused committed the offense charged is a well-established requirement in criminal proceedings. This requirement has several purposes, which include establishing a basis for issuance of an arrest warrant[1] or for making an arrest without a warrant,[2] establishing a basis for return of a grand jury indictment,[3] and establishing a basis for continued detention of a person arrested without an arrest warrant.[4] In the criminal process the probable cause requirement is the essential element of a preliminary hearing, which performs a number of important functions. Among them is a screening function designed to separate cases with prosecutive merit from those that either lack a sufficient evidentiary basis for prosecution or result from malice or improvidence.[5] The required evidentiary showing also serves a discovery function, because the accused will learn a portion of the evidence against him and will be able to cross examine the prosecution's witnesses.[6]

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1. *See generally* Jaben v. United States, 381 U.S. 214 (1965); Giordenello v. United States, 357 U.S. 480 (1958).

2. *See generally* Beck v. Ohio, 379 U.S. 89 (1964); Henry v. United States, 361 U.S. 98 (1959); Draper v. United States, 358 U.S. 307 (1959).

3. *See, e.g.*, Silverthorne v. United States, 400 F.2d 627, 634 (9th Cir. 1968); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); ILL. ANN. STAT. ch. 38, § 112-4(d) (Smith-Hurd Supp. 1979); N.C. GEN. STAT. § 15A-628(a)(1) (1978).

4. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103 (1975).

5. Thies v. State, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922).

6. *See* Coleman v. Alabama, 399 U.S. 1 (1970).

In contrast, the probable cause requirement has not enjoyed the same utility in the juvenile process, except in limited circumstances. For example, some states require a finding of probable cause as a condition for waiver of juvenile court jurisdiction and transfer to criminal court,[7] or to establish a basis for filing a delinquency petition in juvenile court.[8] The Juvenile Justice Standards Project,[9] however, recommends that probable cause be a requisite finding for several purposes, including establishing the legal sufficiency of a complaint[10] or petition,[11] establishing a basis for continued detention pending a hearing,[12] and meeting the threshold conditions for waiver of jurisdiction and transfer to criminal court.[13] The purpose of this Article is to analyze the desirability of a probable cause requirement in juvenile proceedings and in criminal proceedings in which the defendant is a child (that is, a person within the age jurisdiction of the juvenile court).

Ideally, the juvenile court should be given exclusive original jurisdiction over all children charged with any offense, with the option in exceptional cases of waiving jurisdiction and transferring these cases to criminal court for criminal prosecution.[14] Occasionally, however, even though the accused is a child,[15] a case may originate in criminal court, either because certain serious

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7. *See, e.g.*, GA. CODE ANN. § 24A-2501(a)(3)(i) (1976); MASS. GEN. LAWS ANN. ch. 119, § 61 (West Supp. 1979); N.C. GEN. STAT. §§ 7A-608 to -610 (Supp. 1979); N.D. CENT. CODE § 27-20-34(1)(b)(4)(a) (Supp. 1979); OHIO REV. CODE ANN. § 2151.26(A)(2) (Baldwin 1978); VA. CODE § 16.1-269(A)(3)(a) (Supp. 1980).

8. *See, e.g.*, IND. CODE ANN. § 31-6-4-9(b) (Burns 1980); IOWA CODE ANN. § 232.28(6) (West Supp. 1980); N.C. GEN. STAT. §§ 7A-530 to -531 (Supp. 1979).

9. INSTITUTE OF JUDICIAL ADMINISTRATION AND AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT (1977) [hereinafter cited as JUVENILE JUSTICE STANDARDS]. The Juvenile Justice Standards Project was a cooperative effort of the Institute of Judicial Administration and the American Bar Association. The result of the Project's efforts was a multivolume set of standards that were intended to be to the juvenile justice process what the Standards Relating to Criminal Justice were to the criminal process. Most of these standards were approved by the ABA at its mid-year meeting in 1979. The remainder, with the exception of one volume, were approved at the ABA's mid-year meeting in 1980. All of the standards to which reference is made in this Article have been approved by the ABA.

10. JUVENILE JUSTICE STANDARDS, *supra* note 9, STANDARDS RELATING TO PROSECUTION, STANDARD 4.1; *see id.*, STANDARDS RELATING TO THE JUVENILE PROBATION FUNCTION, STANDARD 2.7.

11. *See id.*, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, STANDARD 4.1(A); *id.*, STANDARDS RELATING TO PROSECUTION, STANDARDS 4.2, 4.6; *id.*, STANDARDS RELATING TO ADJUDICATION, STANDARD 1.1(B).

12. *Id.*, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, STANDARD 4.1(B); *id.*, STANDARDS RELATING TO INTERIM STATUS, STANDARD 7.6(F); *id.*, STANDARDS RELATING TO PROSECUTION, STANDARD 4.6.

13. *Id.*, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, STANDARD 4.1(B); *id.*, STANDARDS RELATING TO TRANSFER BETWEEN COURTS, STANDARD 2.2(A)(1); *id.*, STANDARDS RELATING TO PROSECUTION, STANDARD 4.6.

14. Davis, *The Jurisdictional Dilemma of the Juvenile Court*, 51 N.C.L. REV. 195, 200-02 (1972); *see generally* Whitebread & Batey, *Transfer Between Courts: Proposals of the Juvenile Justice Standards Project*, 63 VA. L. REV. 221 (1977).

15. "Child" is used here in the sense that the accused is a person within the maximum age jurisdiction of the juvenile court, which usually is set at 18, *see e.g.*, MINN. STAT. ANN. § 260.015(2) (West 1971); N.C. GEN. STAT. §§ 7A-517(20), -524 (Cum. Supp. 1979), but occasionally is set lower, *see e.g.*, TEX. FAM. CODE ANN. § 51.02(1) (Vernon 1975) (17), or higher, *see, e.g.*, WYO. STAT. §§ 14-1-101, 14-6-201(a)(iii) (1978) (19). For a complete discussion of age as a jurisdictional element in juvenile proceedings, see S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM 2-1 (1980).

offenses are excluded from the juvenile court's jurisdiction,[16] the juvenile and criminal courts are granted concurrent jurisdiction over certain offenses,[17] the prosecutor has discretion to determine the court in which the case will be handled,[18] or certain offenses by law originate in the criminal court, which has the option to transfer appropriate cases to juvenile court.[19]

In all of the above jurisdictional settings the prosecutor exercises enormous discretion, whether such discretion is expressly granted or not. For example, if a particular offense is excluded from the jurisdiction of the juvenile court, the prosecutor may elect to charge the child with such an offense even though the evidence in the case will only support, at most, a lesser charge. Once the case originates in criminal court, jurisdiction remains in the criminal court even though the child pleads guilty to or is convicted of a lesser offense over which the juvenile court would have exercised original jurisdiction. By electing to charge the more serious offense initially, the prosecutor can avoid the necessity of a waiver hearing in juvenile court. The same result can be achieved when the criminal and juvenile courts exercise concurrent jurisdic-

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Age, however, is only one factor that determines which court will exercise jurisdiction over a child. The other factor is conduct, that is, the offense with which the child is charged. This jurisdictional element is covered in notes 16-19 and accompanying text *infra*.

16. *See, e.g.*, DEL. CODE tit. 10 §§ 921(2)(a), 938(a)(1) (1974 & Supp. 1980); (excludes first degree murder, rape, and kidnapping); LA. REV. STAT. ANN. § 13:1570(A)(5) (West Supp. 1980) (excludes murder, manslaughter, and aggravated rape committed by juvenile 15 or older, and armed robbery, aggravated burglary, and aggravated kidnapping committed by juvenile 16 or older); N.C. GEN. STAT. § 7A-608 (Cum. Supp. 1979) (excludes capital offenses committed by juvenile over 14).

17. *See, e.g.*, ARK. STAT. ANN. §§ 45-417, -418 (Supp. 1979); *id.* § 45-420 (1977); FLA. STAT. ANN. § 39.02(5)(c) (West Supp. 1979); GA. CODE ANN. § 24A-301(b) (1976); MICH. COMP. LAWS ANN. § 712A.2(d) (Supp. 1980); NEB. REV. STAT. § 43-202(3)(b)-(c) (1978); S.D. COMPILED LAWS ANN § 26-11-3 (1976); WYO. STAT. §§ 14-6-203(c), -211 (1978).

18. *See, e.g.*, ARK. STAT. ANN. § 45-418 (Supp. 1979); NEB. REV. STAT. § 43-202.01 (1978); WYO. STAT. §§ 14-6-203(c), -211 (1978). In the District of Columbia the prosecutor in effect has discretion to treat certain cases as either juvenile or criminal matters. If he elects to "charge" the child with one of certain enumerated offenses, the child is no longer a "child" within the meaning of the juvenile court code and is prosecuted as an adult. D.C. CODE ANN. § 16-2301(3)(A) (1973); Pendergrast v. United States, 332 A.2d 919 (D.C. 1975). Similarly, in Florida, if a child is alleged to have committed an offense punishable by death or life imprisonment, the prosecutor can elect to prosecute the case in criminal court by seeking an indictment. FLA. STAT. ANN. § 39.02(5)(c) (West Supp. 1979).

19. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 3-804(d)(1), (4) (1980); MD. ANN. CODE art. 27, § 594A (Supp. 1980) (transfer to juvenile court allowed for child 14 or older charged with offense punishable by death or life imprisonment, or 16 or older charged with robbery with a deadly weapon or attempted robbery with a deadly weapon); MISS. CODE ANN. §§ 43-21.105(j), 43-21-159(3) (Supp. 1980) (transfer to juvenile court allowed for child charged with offense punishable by death or life imprisonment); N.Y. FAM. CT. ACT § 712(a)(ii) (McKinney Supp. 1980); N.Y. PENAL LAW §§ 10(18), 30 (McKinney Supp. 1980); N.Y. CRIM. PROC. LAW §§ 180.75, 190.71, 210.43, 220.10(5)(g) (McKinney Supp. 1980) (transfer to juvenile court allowed for child 13 or older but less than 16 charged with second degree murder, or child 14 or older but less than 16 charged with one of certain enumerated offenses); OKLA. STAT. ANN. tit. 10, § 1104.2 (West Supp. 1980) (transfer to juvenile court allowed for child 16 or older charged with one of certain enumerated offenses); 42 PA. CONS. STAT. ANN. §§ 6302, 6322(a) (Purdon 1980) (transfer to juvenile court allowed for child charged with murder); VT. STAT. ANN. tit. 33, §§ 632(a)(1), 635(b) (Supp. 1980) (maximum age for original juvenile court jurisdiction over delinquent children is 16; criminal court has discretion to transfer to juvenile court a person over 16 but under 18 years of age at the time the offense allegedly was committed).

tion over certain offenses or when certain cases, because of the seriousness of the offense or the age of the child, must originate in criminal court.

Even if a case originates in juvenile court the prosecutor exercises considerable discretion. He can, for example, charge a more serious offense than is warranted by the evidence for the purpose of persuading the child to enter an admission (guilty plea) to a lesser offense in juvenile court or for the purpose of qualifying the case for waiver of jurisdiction, when one of the conditions for waiver is that the child is alleged to have committed a serious offense, for example, a felony. In the latter instance, if the case is transferred to criminal court, it will be handled as a criminal matter even though the child may plead guilty to or be convicted of a less serious offense over which the juvenile court could not have waived its jurisdiction.

A waiver hearing in juvenile court, at least if a required condition is that the prosecutor establish probable cause to believe the child has committed the offense charged, is an adequate safeguard against prosecutorial abuse. But in most of the other hypothetical settings mentioned above, no safeguards against abuse presently exist in most states. The problem is serious because if abuse does occur in the manner mentioned, it operates to overcome policies of preference that are inherent in the juvenile court concept, including the preference that a child be treated as a child rather than as an adult, and the preference that a child be released to the custody of a parent or guardian pending a hearing rather than be detained. A required probable cause finding—in criminal court and in juvenile court—can minimize the incidence of abuse and help assure that discretionary decision making takes place at a level of high visibility.

## I. PROBABLE CAUSE AS A BASIS FOR FILING A PETITION

An action against a child or in a child's interests, whether based on conditions of neglect or abandonment or conduct indicating delinquency or a need for supervision, is commenced in juvenile court by the filing of a petition.[20] Typically, statutes provide that when the court or appropriate agency receives a complaint or report that a child has committed an offense or for whatever reason is within the jurisdiction of the juvenile court, a preliminary inquiry is conducted. On completion of the preliminary inquiry the court or agency may authorize a petition to be filed.[21] Generally, however, all that need be established by the preliminary inquiry is that the interests of the child or the public

20. *See, e.g.*, ALASKA STAT. § 47.10.020 (1979); IND. CODE ANN. §§ 31-6-4-9, 31-6-4-10 (Burns 1980); IOWA CODE ANN. §§ 232.35(1), 232.87(1) (West Supp. 1980); KY. REV. STAT. § 208.070 (1980); LA. CODE JUV. PROC. art. 45 (West 1980); MICH. COMP. LAWS ANN. § 712A.11 (1968); MINN. STAT. ANN. § 260.131 (West 1971 & Supp. 1980); MISS. CODE ANN. § 43-21-451 (Supp. 1980); MONT. CODE ANN. § 41-5-501 (1979); N.M. STAT. ANN. § 32-1-14 (1978); N.C. GEN. STAT. § 7A-531 (Supp. 1979); OR. REV. STAT. § 419.482 (1979).

21. *See, e.g.*, ALASKA STAT. § 47.10.020(a) (1979); IOWA CODE ANN. §§ 232.28(1), (2), 232.35(2) (West Supp. 1980); KY. REV. STAT. § 208.070(1) (1977); MICH. COMP. LAWS ANN. § 712A.11 (1968); MISS. CODE ANN. §§ 43-21-351, 43-21-357(1), (2) (Supp. 1980); MONT. CODE ANN. § 41-5-301(1), (5)(c) (1979); N.M. STAT. ANN. §§ 32-1-14(A), (C) (1978); N.C. GEN. STAT. § 7A-531 (Supp. 1979); OR. REV. STAT. § 419.482(2) (1979).

require that a petition be filed.[22]

For a child alleged to be delinquent, some statutes require a finding of probable cause to believe the child committed the delinquent act before filing of a petition is authorized.[23] At least one court has held, however, that a finding of probable cause is not required by due process of law or equal protection of the laws.[24] In so holding, the court found the complaint in juvenile proceedings comparable to a complaint in the criminal process and the petition comparable to an information or indictment.[25]

The Juvenile Justice Standards contain a number of provisions related to the requirement that a petition have a legally sufficient basis. In typical fashion, the Standards provide that formal proceedings are commenced by the filing of a petition.[26] Before a petition is authorized to be filed, however, the intake officer, upon receipt of a complaint, must determine whether the complaint is legally sufficient to warrant filing a petition. This decision is reached after reviewing the contents of the complaint and conducting a preliminary investigation to determine whether the complaint is legally sufficient to establish the court's jurisdiction and whether the competent and credible evidence is legally sufficient to support the charge against the child. The intake officer is authorized to dismiss the complaint if its lacks legal sufficiency on either of these bases. If the intake officer is uncertain of the legal sufficiency of the complaint, he should refer it to the prosecutor for a determination of legal sufficiency.[27]

If the intake officer determines that the complaint is legally sufficient, a report requesting that a petition be filed is submitted to the prosecutor, who makes the decision whether or not to file a petition. In the event the prosecutor elects not to file a petition, the decision is final and not appealable. If the intake officer initially determines that a petition should not be filed, the decision and reasons therefor are reported to the complainant. The complainant may request review of the decision by the prosecutor, who may decide that a petition should be filed. Because the final decision on whether a petition should be filed belongs to the prosecutor, he may elect to file a petition even in the absence of a request for review by the complainant.[28]

Following the filing of a petition, the prosecutor may determine upon a review of the evidence that the evidence is insufficient under applicable rules to establish the legal sufficiency of the petition. In this event the Standards

22. *See, e.g.*, ALASKA STAT. § 47.10.020(a) (1979); KY. REV. STAT. § 208.070(1) (1980); MICH. COMP. LAWS ANN. § 712A.11 (1968); MISS. CODE ANN. § 43-21-357(1) (Supp. 1980); MONT. CODE ANN. § 41-5-301(4)(b)(1) (1979); N.M. STAT. ANN. § 32-1-14(A) (1978); OR. REV. STAT. § 419.482(2) (1979).

23. *See, e.g.*, IND. CODE ANN. § 31-6-4-9(b) (Burns 1980); IOWA CODE ANN. §§ 232.28(6), 232.35(2) (West Supp. 1980). *Cf.* N.C. GEN. STAT. § 7A-531 (Supp. 1979) (reasonable grounds).

24. *In re* Maricopa County, 122 Ariz. 252, 255-56, 594 P.2d 506, 509-10 (1979).

25. *Id.* at 254, 594 P.2d at 508.

26. JUVENILE JUSTICE STANDARDS, *supra* note 9, STANDARDS RELATING TO ADJUDICATION, STANDARD 1.1(A).

27. *Id.* STANDARDS RELATING TO THE JUVENILE PROBATION FUNCTION, STANDARD 2.7.

28. *Id.* STANDARDS RELATING TO PROSECUTION, STANDARD 4.1.

call for the prosecutor to move to withdraw the petition.[29] The Standards further provide that, absent the consent of the prosecutor, a petition should not be dismissed once it has been filed, except by the court on its own motion in the interests of justice.[30] This latter exception admits of a broad judicial review of the sufficiency of the petition. Moreover, the Standards specifically provide that if the legal sufficiency of the petition is challenged, the court should rule on the sufficiency challenge before receiving the child's plea.[31] Furthermore, the Standards provide for a judicial determination of probable cause by requiring the prosecutor to present evidence sufficient to establish probable cause at the child's first appearance in court.[32]

Thus, while most current statutes do not require that the petition be supported by evidence establishing probable cause to believe the child committed the acts alleged in the petition,[33] the Juvenile Justice Standards contain numerous safeguards at different stages of the proceedings to assure that the petition has a legally sufficient basis. These requirements assure that only those cases with prosecutive merit reach the formal adjudicative stage of the proceedings. If an intake officer were allowed to make the final determination to file a petition, such a determination might be nothing more than a therapeutic decision that the child is in need of services, without regard to whether the child committed the alleged act. A prosecutor is more likely to be concerned with the legal sufficiency of the evidence to establish probable cause; therefore the prosecutor is authorized to make the final determination of whether or not to file a petition.[34]

Although it might be said that a prosecutorial determination of legal sufficiency of a petition does not constitute an unbiased review, the Standards clearly provide for final determination of probable cause by the court. Aside from providing for a judicial determination of probable cause at the child's first appearance in court,[35] the Standards state that a child has a right to a judicial determination of probable cause if an adjudicatory hearing is not held within five days from the filing of a petition when the child remains in custody, or within fifteen days when the child is not in detention.[36] Unless a probable cause determination has been made in connection with an earlier preliminary hearing or appearance, ordinarily detention or transfer hearings should commence with consideration of the probable cause issue.[37]

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29. *Id.* STANDARD 4.2.

30. *Id.* STANDARD 4.5(A).

31. *Id.* STANDARDS RELATING TO ADJUDICATION, STANDARD 1.1(B).

32. *Id.* STANDARDS RELATING TO PROSECUTION, STANDARD 4.6.

33. *See* statutes cited note 22 *supra*.

34. JUVENILE JUSTICE STANDARDS, *supra* note 9, STANDARDS RELATING TO PROSECUTION, STANDARD 4.1, Commentary, at 53-54.

35. *Id.* STANDARDS RELATING TO ADJUDICATION, STANDARD 1.1(B); *id.* STANDARDS RELATING TO PROSECUTION, STANDARD 4.6.

36. *Id.* STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, STANDARD 4.1.

37. *Id.*

## II. PROBABLE CAUSE AS A BASIS FOR CONTINUED DETENTION

A number of states grant children in juvenile proceedings the same right to bail accorded adults in criminal proceedings,[38] or at least authorize release on bail in the discretion of the court before which the child is brought.[39] Other states, however, mostly as a result of judicial decision, have determined that children do not have a right to release on bail.[40] The expanding role of the Constitution in juvenile proceedings may require that juveniles be afforded the right to release on bail to the extent it is enjoyed by adults. Arguably, however, bail should not be accorded to a child as a matter of right, not because of a characterization of juvenile proceedings as civil rather than criminal in nature,[41] but because the child may be in need of care, supervision, or protection that might be denied him without proper inquiry into the conditions and environment into which he will be released. For example, if released on bail as a matter of right, the child might be returned to the very same environment that caused his referral to juvenile court in the first place.[42]

Because due process does not necessarily entitle children to *all* rights accorded adults in criminal proceedings,[43] a separate system of release for children in juvenile proceedings, with sufficient safeguards, might be viewed as not only an adequate but a preferable alternative to release on bail, consistent with due process of law. Moreover, an alternative system of release for children arguably is free of equal protection objections because of the demonstra-

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38. *See, e.g.*, COLO. REV. STAT. § 19-2-103(7) (1978); GA. CODE ANN. § 24A-1402(d) (Supp. 1980); MASS. GEN. LAWS ANN. ch. 119, § 67 (West Supp. 1981); OKLA. STAT. ANN. tit. 10, § 1112(c) (West Supp. 1979-80); S.D. CODIFIED LAWS ANN. § 26-8-21 (1976); W. VA. CODE § 49-5-1(b) (1980); State v. Franklin, 202 La. 439, 12 So. 2d 211 (1943). At least one federal court has agreed. Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960).

39. *See, e.g.*, MINN. STAT. ANN. § 260.171(1) (West Supp. 1980); NEB. REV. STAT. § 43-205.03 (1974); TENN. CODE ANN. § 37-217(e) (Supp. 1980); VT. STAT. ANN. tit. 33, § 641(c) (Supp. 1980).

40. *See, e.g.*, Cinque v. Boyd, 99 Conn. 70, 121 A. 678 (1923) (current statute, however, appears to grant discretionary authority to release on bail, CONN. GEN. STAT. ANN. § 46b-131 (West Supp. 1980)); A.N.E. v. State, 156 So. 2d 525 (Fla. Ct. App. 1963); Pauley v. Gross, 1 Kan. App. 2d 736, 574 P.2d 234 (1977); *In re* Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970); State *ex rel.* Peaks v. Allaman, 51 Ohio Op. 321, 115 N.E.2d 849 (Ohio Ct. App. 1952); *Ex parte* Espinosa, 144 Tex. 121, 188 S.W.2d 576 (1945); Estes v. Hopp, 73 Wash. 2d 263, 438 P.2d 205 (1968) (despite statutory provision that implies availability of bail to juveniles, WASH. REV. CODE ANN. § 13.04.115 (1962)); HAWAII REV. STAT. § 571-32(h) (Supp. 1980); OR. REV. STAT. § 419.583 (1979); *see also* People *ex rel.* Wayburn v. Schupf, 47 App. Div. 2d 79, 365 N.Y.S.2d 235 (1975) (Family Court is without power to fix bail for juveniles because Family Court Act does not mention bail for juveniles and in lieu thereof provides for alternative system of release). *Cf. Ex parte* Newkosky, 94 N.J.L. 314, 116 A. 716 (N.J. 1920) (requirements of indictment by grand jury and trial by jury not applicable to juvenile proceedings). Most of these cases were decided prior to *In re* Gault, 387 U.S. 1 (1967), in which the Supreme Court held juveniles entitled to the due process protections of adequate notice of charges against them, *id.* at 33-34, right to counsel, *id.* at 41, confrontation and cross-examination of witnesses, and the privilege against self-incrimination, *id.* at 55-56, in juvenile proceedings. *Gault* and its progeny cause one to question the continued validity of these cases.

41. This distinction was drawn by many courts in pre-*Gault* cases as a basis for denying the right to bail to children in juvenile proceedings. The *Gault* Court, however, refused to make this distinction, noting that incarceration against one's will is the same whether the proceedings leading to it are classified as "civil" or "criminal." *In re* Gault, 387 U.S. 1, 50 (1967).

42. *See* Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 552 (1957).

43. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

ble differences between children and adults in terms of age, maturity, responsibility, and self-restraint, and because of the overriding interest of the state in protecting children.[44]

As an alternative system of release, most states provide for notification of parents when a child is taken into custody and release of the child into parental custody upon the parent's promise to produce the child in court at the appointed time.[45] This release usually is stated as a preference, and if the child is to be detained pending a hearing, detention is authorized only in special cases, such as when it is necessary to protect the person or property of the child or others, when there is a likelihood that the child will flee if released, or when the child has no parent or guardian in whose custody he could be released.[46]

An example might suffice to illustrate the protective features that an alternative system of release for children should possess. In *In re William M.*,[47] the California Supreme Court discussed the subject of release of children and, without reaching the right to bail issue, concluded that the liberal release provisions of the state's juvenile court act, when properly administered, offer an adequate system of release from custody.[48] One of the provisions to which the court referred indicates a preference that a child be released rather than detained, following his being taken into custody.[49] Another indicates that if the child is not released immediately following his being taken into custody, a petition must be filed against him, and a detention hearing must be held within one judicial day following filing of the petition.[50] A third provision states the responsibility of the court at the detention hearing:

> The court will examine such minor, his parent, guardian, or other person having relevant knowledge, hear such relevant evidence as the minor, his parent or guardian or their counsel desires to present, and, unless it appears that such minor has violated an order of the juvenile court or has escaped from the commitment of the juvenile court or that it is a matter of immediate and urgent necessity for the protection of such minor or reasonably necessary for the protection of the person or property of another that he be detained or that such minor is likely to flee to avoid the jurisdiction of the court, the court

44. *See* People *ex rel.* Wayburn v. Schupf, 39 N.Y.2d 682, 350 N.E.2d 906, 385 N.Y.S.2d 518 (1976).

45. *See, e.g.*, ILL. ANN. STAT. ch. 37, § 703-2-4 (Smith-Hurd Supp. 1980); MINN. STAT. ANN. § 260.171 (West Supp. 1980); N.Y. FAM. CT. ACT § 724 (McKinney 1975 & Supp. 1980); N.C. GEN. STAT. §§ 7A-572(1)-(2), -577(e)(1) (Supp. 1979); WIS. STAT. ANN. §§ 48.19(2), 48.20 (West Supp. 1980).

46. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 3-815(b) (1980); N.M. STAT. ANN. § 32-1-24 (1978); N.C. GEN. STAT. § 7A-574 (Supp. 1979); WIS. STAT. ANN. § 48.205(1) (West 1979 & Supp. 1980); UNIFORM JUVENILE COURT ACT § 14 (1968).

47. 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970).

48. *Id.* at 26 n.17, 473 P.2d at 744 n.17, 89 Cal. Rptr. at 40 n.17.

49. CAL. WELF. & INST. CODE § 626 (West Supp. 1980).

50. *Id.* § 632. For a child taken into custody without a warrant for a misdemeanor violation, the detention hearing must be held before the expiration of the next judicial day or within 48 hours of the time the child is taken into custody, whichever is later, following filing of a petition. *Id.*

shall make its order releasing such minor from custody.[51]

The child in *William M.*, who was taken into custody for an alleged sale of marijuana, was not initally released into the custody of his parents, so a detention hearing was held. At the hearing the child's counsel offered evidence favoring his release, but the court refused to hear the evidence, stating that it was the policy of the court automatically to detain all children charged with a drug-related offense. The court stated, "The Legislature must have thought it was serious, it is five years to life if he were an adult," to which counsel replied, "If he were an adult, he would be out on bail at this very moment." The court's response to this observation was, "If you want to have him handled as an adult, I will certify him to adult court and you can bail him out. . . ."[52]

The California Supreme Court strongly disapproved of this abuse of the procedures set up for release of children. The court indicated that detention should be the exception rather than the rule and that in cases in which the child is not released initially by the police officer or probation officer and a detention hearing is thereafter held, the probation officer bears the burden of presenting sufficient evidence to warrant continued detention.[53] In order to demonstrate the "immediate and urgent necessity" for detention required by the statute, the officer must present a prima facie case that the alleged offense was committed by the child.[54]

The California provisions outlined above set forth sufficient safeguards to protect the rights of a child if, as the court pointed out, they are properly administered. The police officer who first takes the child into custody may release the child on his own or release him to his parents.[55] His only alternative is to refer the child immediately to a probation officer.[56] The probation officer in turn is authorized to release the child into the custody of his parents.[57] It is expected that by this point most children will have been released. If the probation officer feels detention is required, however, a detention hearing must be held within one judicial day, and the child should be released unless good cause is shown to indicate otherwise.[58] The probation officer bears the responsibility of demonstrating that the child falls within the special circumstances in which continued detention is authorized.[59]

The California court's decision is exceptional in requiring as part of an ordinary detention hearing a prima facie showing that the child committed the offense alleged. The decision may have been prophetic, however, because to-

51. *Id.* § 635.
52. 3 Cal. 3d at 21-22, 473 P.2d at 740, 89 Cal. Rptr. at 36.
53. *Id.* at 28, 473 P.2d at 745, 89 Cal. Rptr. at 41.
54. *Id.* at 26-28 & n.20, 473 P.2d at 744-46 & n.20, 89 Cal. Rptr. at 40-42 & n.20.
55. CAL. WELF. & INST. CODE § 626 (West Supp. 1980).
56. *Id.*
57. *Id.* § 628.
58. *Id.* §§ 632, 635.
59. 3 Cal. 3d at 28, 473 P.2d at 745, 89 Cal. Rptr. at 41. *See also* TEX. FAM. CODE ANN. tit. 3, § 54.01 (Vernon 1975 & Supp. 1980); People *ex rel.* Wayburn v. Schupf, 47 A.D.2d 79, 365 N.Y.S.2d 235 (1975).

day an additional safeguard applicable to children is the constitutional requirement of a probable cause hearing if a child remains in custody pending an adjudicatory hearing. In *Moss v. Weaver*[60] the Fifth Circuit held that, in light of the Supreme Court's decision in *Gerstein v. Pugh*,[61] the preadjudicatory detention of a child without a finding of probable cause is a violation of the fourth amendment.[62] In *Gerstein v. Pugh* the Court held that a person arrested without a warrant or against whom no indictment has been returned may not be detained constitutionally prior to trial without a hearing to determine if there is probable cause to believe the person committed the crime charged.[63] The Fifth Circuit's decision applied the same fourth amendment safeguard to children, although it held, consistent with *Gerstein v. Pugh*, that the required hearing does not have to be an adversary proceeding with the full panoply of rights.[64]

Other courts likewise have held that in juvenile proceedings children are constitutionally entitled to a probable cause hearing in any situation in which an adult would be entitled to one.[65] Although in two of these cases the children had detention hearings, both courts held that more was required.[66] An ordinary detention hearing simply determines whether reasons such as protection of the public or the child himself require that he remain in detention pending an adjudicatory hearing. A probable cause hearing requires that sufficient facts and circumstances be shown to indicate the probability that the child committed the offense charged. Of course, a single hearing combining both purposes could be held, but the probable cause finding would appear to be a threshold requirement.[67]

A probable cause finding, aside from often being required by the fourth amendment, is sometimes required by statute, usually in conjunction with a detention hearing.[68] The Juvenile Justice Standards express a strong preference that a child be released rather than detained[69] and further provide that if a child is not released initially, a petition for a detention hearing should be filed within twenty-four hours of the time the child is taken into custody,[70] and a detention hearing should be held within twenty-four hours of the filing of

60. 525 F.2d 1258 (5th Cir. 1976).

61. 420 U.S. 103 (1975).

62. 525 F.2d at 1260.

63. 420 U.S. at 114.

64. 525 F.2d at 1260-61.

65. *See, e.g.*, Bell v. Superior Court, 117 Ariz. 551, 554, 574 P.2d 39, 42 (Ct. App. 1977); State *ex rel.* Joshua, 327 So. 2d 429, 429 (La. Ct. App.), *cert. denied*, 329 So. 2d 450, 456 (La. 1976).

66. Moss v. Weaver, 525 F.2d 1258, 1260 (5th Cir. 1976); State *ex rel.* Joshua, 327 So. 2d 429, 429 (La. Ct. App.), *cert. denied*, 329 So. 2d 450, 456 (La. 1976).

67. *See, e.g.*, IOWA CODE ANN. § 232.22(1) (West Supp. 1980); ME. REV. STAT. ANN. tit. 15, § 3203(5)(D) (1980); N.C. GEN. STAT. § 7A-609 (Supp. 1979).

68. *See* IOWA CODE ANN. § 232.22(1) (West Supp. 1980); ME. REV. STAT. ANN. tit. 15, § 3203(5)(D) (1980); N.C. GEN. STAT. § 7A-609 (Supp. 1979).

69. JUVENILE JUSTICE STANDARDS, *supra* note 9, STANDARDS RELATING TO INTERIM STATUS, STANDARDS 3.1, 5.1. The Standards express various preferences and criteria for release or detention depending upon who—the police, the intake officer, or the court—is making the decision to release or detain the child. *Id.* STANDARDS 1.2, 3.2, 3.3, 3.4, 5.6, 6.6, 7.7.

70. *Id.* STANDARD 6.5(D)(2).

such petition.[71] A probable cause inquiry must be conducted as part of the detention hearing,[72] and the Standards provide that if probable cause has not been judicially determined prior to the detention hearing, the hearing should commence with consideration of that issue.[73]

## III. PROBABLE CAUSE AS A CONDITION FOR WAIVER OF JURISDICTION

The purpose of a waiver hearing is twofold: to determine whether there is probable cause to believe the child has committed the alleged act, and, if so, whether the child is amenable to treatment within the juvenile process.[74] All states, however, do not require a probable cause finding as a condition for waiver.[75] Such a finding is desirable and should be required for at least two reasons. First, the waiver decision represents a critical stage of the proceedings in juvenile court because it will determine whether the child, as preferred, will be treated as a child in juvenile court, or will be prosecuted as an adult in criminal court.[76] The preference that a child be treated in juvenile court rather than criminal court should only be overcome by substantial evidence that the child has committed the act alleged and that he is not amenable to treatment as a juvenile.[77]

Second, a required probable cause finding is an essential safeguard against prosecutorial overreaching. For example, the prosecutor might charge a serious offense solely to qualify the case for transfer to criminal court, either because of his desire to handle the case in criminal court or as an attempt to intimidate the child into entering an admission to the offense charged, or to a lesser offense, in juvenile court.[78] The probable cause requirement assures that the child's admission in juvenile court will not be accepted without a finding of probable cause[79] and that jurisdiction will not be waived unless the court finds probable cause to believe the child committed the serious offense charged. Without such a safeguard, in the latter instance a child's case might

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71. *Id.* STANDARD 7.6(A).

72. *Id.* STANDARD 7.6(F).

73. *Id.* STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, STANDARD 4.1.

74. *See id.* STANDARDS RELATING TO TRANSFER BETWEEN COURTS, STANDARD 2.2(A).

75. The reporters for the Juvenile Justice Standards indicate that only half of the states that have waiver statutes require a finding of probable cause as a condition of waiver. *Id.* STANDARDS RELATING TO TRANSFER BETWEEN COURTS, STANDARD 2.2, Commentary at 35. For examples of statutes requiring such a finding, see GA. CODE ANN. § 24A-2501(a)(3)(i) (1976); MASS. GEN. LAWS ANN. ch. 119, § 61 (West Supp. 1981); N.C. GEN. STAT. §§ 7A-608 (Supp. 1979); N.D. CENT. CODE § 27-20-34(1)(b)(4)(a) (Supp. 1979); OHIO REV. CODE ANN. § 2151.26(A)(2) (Page 1976); VA. CODE § 16.1-269(A)(3)(a) (Supp. 1979). In the absence of such a statutory requirement, at least one court has held that a juvenile is not constitutionally entitled to a probable cause determination in a waiver hearing. *See In re* Doe, 617 P.2d 830 (Hawaii App. 1980).

76. Kent v. United States, 383 U.S. 541, 556-57 (1966).

77. JUVENILE JUSTICE STANDARDS, *supra* note 9, STANDARDS RELATING TO TRANSFER BETWEEN COURTS, STANDARD 2.2, Commentary at 35.

78. *Id.* A probable cause requirement as a means of controlling prosecutorial abuse is discussed in Part V of this Article.

79. *See, e.g., id.* STANDARDS RELATING TO ADJUDICATION, STANDARDS, 1.1(B), 3.5; *see also id.* STANDARDS RELATING TO PROSECUTION, STANDARD 5.3. The role of a probable cause requirement in connection with plea discussions and acceptance of pleas is discussed in Part IV of this Article.

be transferred to criminal court where he might plead guilty to or be convicted of a lesser offense over which the juvenile court would have had original, nonwaivable jurisdiction.[80]

Requiring a finding of probable cause as a condition for waiver of jurisdiction gives rise to consideration of two other issues: namely, the kind and amount of evidence required to establish probable cause and the effect of a probable cause finding on subsequent proceedings. With respect to the former, some courts have described the waiver hearing as dispositional rather than adjudicatory in nature and have compared it to the preliminary hearing in the criminal process.[81] This view of the nature of a waiver hearing has several procedural consequences. For example, the beyond-a-reasonable-doubt standard applicable to a delinquency adjudication is not required in a waiver hearing. The standard of proof is generally a lesser standard, such as preponderance of the evidence,[82] clear and convincing evidence,[83] or substantial evidence.[84] Similarly, the rules of evidence in a waiver hearing generally are relaxed in comparison to the applicable rules in an adjudicatory hearing.[85] For example, a number of courts have held that hearsay or other incompetent evidence is admissible in a waiver hearing.[86] A waiver hearing, however, is dispositional in nature only with respect to one of the determinations that have to be made—whether the child is amenable to treatment as a juvenile. In determining the amenability issue it is common for courts to consider psychological and social history reports that sometimes contain hearsay, just as such evidence is considered at dispositional hearings following adjudication. Hearsay or other incompetent evidence, however, should not be admissible to support a finding of probable cause. Some states so provide by statute.[87] In others, courts have held that while hearsay is admissible in a probable cause hearing, due process of law demands that a probable cause finding not be based solely on hearsay.[88]

Perhaps because the waiver decision is a critical stage of the proceedings in juvenile court[89] and because the probable cause determination is an essen-

80. *See, e.g.*, LA. REV. STAT. ANN. § 13:1570(A)(5) (West Supp. 1980) (criminal court retains jurisdiction over a case even if the child pleads guilty to or is convicted of a lesser offense over which the juvenile court would have exercised original jurisdiction).

81. *See, e.g.*, Vincent v. State, 349 So. 2d 1145, 1146 (Ala. 1977); People v. Taylor, 76 Ill. 2d 289, 302-04, 391 N.E.2d 366, 372-73 (1979); *In re* M.W.N, 590 P.2d 692, 694 (Okla. Crim. App. 1979).

82. *See, e.g.*, *In re* F.S., 586 P.2d 607, 611-12 (Alaska 1978).

83. *See, e.g.*, MASS. GEN. ANN. LAWS ch. 119, § 61 (West Supp. 1981).

84. *See, e.g.*, *In re* G.L.W., 580 P.2d 998, 1002 (Okla. Crim. App. 1978).

85. *See, e.g.*, ILL. ANN. STAT. ch. 37, § 702-7(3)(a) (Smith-Hurd Supp. 1979); *id.* § 705-1(1) (Smith-Hurd 1972); *see generally* People v. Taylor, 76 Ill. 2d 289, 301-02, 391 N.E.2d 366, 371-72 (1979).

86. *See, e.g.*, People v. Taylor, 76 Ill. 2d 289, 301-02, 391 N.E.2d 366, 371-72 (1979) (hearsay); Marvin v. State, 603 P.2d 1056, 1060 (Nev. 1979) (illegally obtained evidence).

87. *See, e.g.*, N.C. GEN. STAT. § 7A-609(c) (Supp. 1979).

88. *See, e.g.*, People *ex rel.* Guggenheim v. Mucci, 77 Misc. 2d 41, 44, 352 N.Y.S.2d 561, 565 (Sup. Ct. Kings Co.), *aff'd*, 46 A.D.2d 683, 360 N.Y.S.2d 71 (1974).

89. Kent v. United States, 383 U.S. 541, 556 (1966).

tial part of the waiver decision,[90] the Juvenile Justice Standards take the position that only evidence that would be admissible in an adjudicatory hearing is admissible to support a finding of probable cause in a waiver hearing.[91] In contrast, the Standards provide that, on the issue of whether the child is amenable to treatment as a juvenile, evidence is admissible that would be admissible at a dispositional hearing.[92] This position is sound because it encourages both reliable fact finding and judicial economy. Use of evidence that would not be admissible in a subsequent delinquency hearing or criminal trial would be a waste of time and effort.[93] A number of states, for example, provide that the applicable rules of evidence in delinquency proceedings are those that would be applicable in criminal proceedings,[94] or they provide that evidence in order to be admissible must be competent, relevant, and material.[95] Courts when called upon to decide the issue generally have held that the rules of evidence, particularly the hearsay rule, are applicable to juvenile proceedings.[96] Thus, if an adjudicatory hearing subsequently is held or the case is transferred to criminal court for trial, and the evidence there consists wholely or in substantial part of hearsay, adjudication or conviction cannot occur, or if entered, cannot be sustained.[97]

A case should not proceed to the adjudicatory stage or to the criminal docket if probable cause, based on reliable evidence, has not been previously established. Of course, hearsay is admissible if it falls within a recognized exception to the hearsay rule, but such evidence would be admissible in the subsequent adjudicatory hearing or criminal trial as well.[98] Moreover, reliable hearsay might be admissible in a waiver hearing to establish certain elements on which no serious contest is presented,[99] although if this reliable hearsay is the only evidence that will be offered at trial with respect to the particular element, it should not be admitted at the waiver hearing, for the reasons stated above.

Assuming that a probable cause finding is required as a condition of waiver, what is the effect of such a finding on subsequent criminal proceed-

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90. *See* JUVENILE JUSTICE STANDARDS, *supra* note 9, STANDARDS RELATING TO TRANSFER BETWEEN COURTS, STANDARD 2.2(A)(1).

91. *Id.* STANDARD 2.2(B).

92. *Id.* STANDARD 2.2(C).

93. *Id.* STANDARD 2.2(B), Commentary at 35-36.

94. *See, e.g.*, CAL. WELF. & INST. CODE § 701 (West Supp. 1980); FLA. STAT. ANN. § 39.09(1)(b) (West Supp. 1979); ILL. ANN. STAT. ch. 37, § 704-6 (Smith-Hurd 1972); IOWA CODE ANN. § 232.47(5) (West Supp. 1980); N.C. GEN. STAT. § 7A-634(a)-(b) (Supp. 1979) (criminal rules of evidence used unless issue is abuse, neglect, or dependency).

95. *See, e.g.*, D.C. CODE § 16-2316(b) (1973); N.Y. FAM. CT. ACT. § 744(a) (McKinney 1975); WYO. STAT. § 14-6-226(b) (1978).

96. *See, e.g., In re* Contreras, 109 Cal. App. 2d 787, 791, 241 P.2d 631, 634 (1952); *In re* M.L.H., 399 A.2d 556, 558 (D.C. 1979); *In re* Johnson, 214 Kan. 780, 784, 522 P.2d 330, 334 (1974); *In re* Ross, 45 Wash. 2d 654, 655-56, 277 P.2d 335, 336-37 (1954); *see also* Garner v. Wood, 188 Ga. 463, 4 S.E.2d 137, 140 (1939); *In re* Kevin G., 80 Misc. 2d 517, 520, 363 N.Y.S.2d 999, 1001 (Fam. Ct., N.Y. Co. 1975).

97. *See, e.g., In re* M.L.H., 399 A.2d 556 (D.C. 1979).

98. *See, e.g., In re* Kevin G., 80 Misc. 2d 517, 363 N.Y.S.2d 999 (Fam. Ct., N.Y. Co. 1975).

99. *See, e.g.*, N.C. GEN. STAT. § 7A-609(c)(2) (Supp. 1979).

ings? Some states specifically provide that a finding of probable cause in a juvenile waiver hearing is sufficient to establish probable cause for purposes of the resulting criminal prosecution.[100] The better view, however, is that a probable cause finding in a juvenile proceeding should not be substituted for a probable cause finding in a subsequent criminal proceeding. The Juvenile Justice Standards, for example, provide:

> A finding of probable cause to believe that a juvenile has committed a class one juvenile offense may be substituted for a probable cause determination relating to that offense (or a lesser included offense) required in any subsequent juvenile court proceeding. Such a finding should not be substituted for any finding of probable cause required in any subsequent criminal proceeding.[101]

There are several reasons why this approach is desirable. First, a preliminary hearing in criminal court is a useful discovery device, and a child should not be denied this additional opportunity to learn the nature of the evidence against him. Second, the child may have conceded the finding of probable cause in the waiver hearing in order to focus on the nonamenability condition for waiver.[102] Third, because of the strong preference that a child be treated within the juvenile justice system and the consequent critical importance of the waiver determination, a child should be given every possible opportunity to show that he should not be tried as an adult. For example, under Texas statutes a child has three stages at which his status is reviewed. First, if his case qualifies for waiver consideration, he is entitled to a waiver hearing in juvenile court. Second, if jurisdiction is waived and the case is transferred to criminal court, he is entitled to an "examining trial" (preliminary hearing) for the purpose of determining whether the criminal court should retain jurisdiction or transfer the case back to juvenile court. Third, if the criminal court as a result of the examining trial binds the case over for action by the grand jury and the grand jury fails to indict the child, the criminal court so certifies and transfers the case back to juvenile court.[103]

Under this procedure a child enjoys rights greater than those of adults. In Texas a criminal defendant is entitled to an examining trial, but if an indictment is returned prior to an examining trial, the indictment terminates the right to an examining trial.[104] For a juvenile, however, the right to an examining trial following transfer from juvenile court appears to be absolute. Texas courts have held void indictments returned against a child before his examining trial has been held in criminal court.[105] Moreover, the courts have held that when the criminal court, as a result of the examining trial, finds the evi-

100. *See, e.g.*, IND. CODE ANN. § 31-6-2-4(g) (Burns 1980).

101. JUVENILE JUSTICE STANDARDS, *supra* note 9, STANDARDS RELATING TO TRANSFER BETWEEN COURTS, STANDARD 2.2(D).

102. *Id.* Commentary at 42.

103. *See* TEX. FAM. CODE ANN. tit. 3, § 54.02 (Vernon 1975 & Supp. 1980); Menefee v. State, 561 S.W.2d 822 (Tex. Crim. App. 1977).

104. White v. State, 576 S.W.2d 843, 844 (Tex. Crim. App. 1979).

105. *See, e.g., id.* at 845.

dence insufficient to establish probable cause and dismisses the complaint, a subsequent indictment by the grand jury is void.[106]

This Texas scheme should serve as a model. The desirability of a probable cause requirement as a condition of waiver and the reasons therefor already have been stated. If the decision is made to transfer the case to criminal court, a second probable cause hearing should be held in criminal court. The criminal court should not be bound by the probable cause finding entered in the juvenile court's transfer order but rather should conduct a de novo probable cause hearing. If as a result of this hearing the court determines that probable cause is lacking, the case should be dismissed. If the court determines that the evidence is insufficient to support the serious charge qualifying the case for waiver, but is sufficient to support a lesser offense over which the juvenile court would have original jurisdiction, the case should be transferred back to the juvenile court for adjudication. Even if the court determines that probable cause to support the serious offense is established and binds the case over to the grand jury, the grand jury should not be bound by any of the previous probable cause findings. The grand jury should be free to return a finding of no probable cause.[107]

One final matter is worthy of note. If a waiver hearing is held and the court determines that probable cause has not been established and dismisses the proceeding, no reason appears why a subsequent waiver hearing cannot be held with respect to the same offense, if additional evidence to support probable cause has been obtained. Giving approval to such a procedure, the Supreme Judicial Court of Massachusetts added as a precaution that the court should exercise care in determining whether fairness precludes a subsequent probable cause hearing when a substantial lapse of time has occurred between the times of the respective hearings.[108]

## IV. Probable Cause as a Condition for Acceptance of Guilty Pleas or Admissions

The principal concern in this and in the immediately following section is the possibility of prosecutorial abuse and how best to avoid or minimize it. The specific problems discussed here are: (1) the possibility that the prosecutor might charge a serious offense that will qualify the case for transfer to criminal court, solely for the purpose of obtaining a child's admission (guilty plea) to a lesser offense that will be handled in juvenile court, and (2) the possibility that the prosecutor might charge a serious offense that is excluded from the juvenile court's jurisdiction, solely for the purpose of having the child prosecuted as an adult, and, in that event, the propriety of the criminal court's acceptance of a guilty plea to a lesser offense over which the juvenile court

106. *See, e.g., Ex parte* Spencer, 579 S.W.2d 242, 244 (Tex. Crim. App. 1979).

107. If the grand jury chooses to return an indictment after the criminal court has determined that the evidence is insufficient to support probable cause, the indictment is void under Texas procedure. *Id.*

108. A Juvenile v. Commonwealth, 374 N.E.2d 1351, 1354 (Mass. 1978).

would have had original jurisdiction. Of course, in the latter example, the prosecutor might act in good faith in charging the serious offense, although the problem of the criminal court's acceptance of the guilty plea remains.

One response to the first problem might be to prohibit plea bargaining in juvenile proceedings altogether, as some states have done.[109] Another response might be to allow plea bargaining, but only under carefully controlled circumstances. This approach seems to offer the most hope of controlling or minimizing the possibility of abuse. In Iowa, for example, plea agreements are allowed,[110] but the statute sets forth numerous safeguards. The plea can consist, on the state's part, of charge concessions or sentence (disposition) concessions in the sense that a particular disposition will be recommended.[111] The statute requires the court to address the child personally to determine whether the plea is freely and voluntarily made and whether the child understands the consequences of the plea.[112] If the court learns through inquiry that the plea is made pursuant to a plea agreement, the terms must be disclosed in court.[113] If the terms consist of an agreement to recommend that certain charges be dismissed or that a certain disposition be ordered, the court must indicate whether or not it will concur in the recommendation.[114] If the court indicates that it will not concur in the recommendation for dismissal or disposition, or if it defers judgment on a recommended disposition until review of a predisposition report, it must so inform the child, and state that it is not bound by the plea agreement and that disposition of the case may be less favorable than that contemplated by the plea agreement.[115] The child then is given an opportunity to withdraw the plea.[116] Finally, before acceptance of the plea the court must determine whether there is a factual basis for the plea.[117]

The requirement that there be a factual basis for a plea is crucial to controlling the possibility of abuse. The Juvenile Justice Standards, for example, also allow plea agreements,[118] but they provide that the prosecutor should not enter into or continue discussions if he is aware of a claim of factual innocence

109. *See, e.g.*, MISS. CODE ANN. § 43-21-555 (Supp. 1980).

110. IOWA CODE ANN. § 232.43 (West Supp. 1980).

111. *Id.* § 232.43(2).

112. *Id.* § 232.43(3); *accord*, N.C. GEN. STAT. § 7A-633(a)-(b) (Cum. Supp. 1979). The Iowa and North Carolina statutory requirements are very similar to those set forth by the Supreme Court in Boykin v. Alabama, 395 U.S. 238 (1969), for acceptance of guilty pleas in criminal proceedings. A number of state courts have applied the requirements of *Boykin* to juvenile proceedings in connection with the court's acceptance of a child's admission of the allegations of the petition. *See, e.g., In re* Maricopa County Juvenile Action No. J-86715, 122 Ariz. 300, 594 P.2d 554 (Ct. App. 1979); *In re* James K., 47 A.D. 2d 946, 367 N.Y.S.2d 312 (1975) (per curiam); *In re* Chavis, 31 N.C. App. 579, 230 S.E.2d 198 (1976), *cert. denied*, 291 N.C. 711, 232 S.E.2d 203 (1977).

113. IOWA CODE ANN. § 232.43(4) (West Supp. 1980); *accord*, N.C. GEN. STAT. § 7A-633(b) (Cum. Supp. 1979).

114. IOWA CODE ANN. § 232.43(4) (West Supp. 1980).

115. *Id.*

116. *Id. See* N.C. GEN. STAT. § 7A-633(a)-(b) (Cum. Supp. 1979).

117. IOWA CODE ANN. § 232.43(5)(a) (West Supp. 1980). The statute thus rejects the premise of North Carolina v. Alford, 400 U.S. 25, 31-39 (1970), that a guilty plea may be accepted even when accompanied by a claim of innocence. *See* N.C. GEN. STAT. § 7A-633(c) (Cum. Supp. 1979).

118. JUVENILE JUSTICE STANDARDS, *supra* note 9, STANDARDS RELATING TO PROSECUTION,

by the child.[119] The Standards go further, however, and require that sufficient evidence, independent of the child's plea, be presented in the record to show that the plea is accurate, that is, that the child committed the act or acts alleged in the petition.[120] More importantly, the Standards require the prosecutor to present sufficient evidence to establish probable cause that the child committed the act or acts alleged in the petition, at the child's first appearance in court, whether such appearance is a detention hearing, a waiver hearing, or some other preliminary hearing.[121]

The required showing of probable cause is the greatest deterrent to prosecutorial abuse. If the prosecutor is aware that he will have to show by reliable evidence that the child probably has committed an act at least as serious as the act alleged in the petition, he will be discouraged from alleging a more serious offense than the evidence will support, for the purpose of obtaining the child's admission to a lesser offense, or for whatever purpose.

Similar considerations apply to the second problem—the possibility that the prosecutor might charge a serious offense that is excluded from the juvenile court's jurisdiction solely for the purpose of having the case handled in criminal court. The immediate solution is that no offenses should be excluded from the juvenile court's jurisdiction. Rather, if a case is to be handled as a criminal case, the decision should be made by the juvenile court through the normal waiver process. Nevertheless, a number of states do exclude certain offenses from the jurisdiction of the juvenile court.[122] In these states adequate safeguards against prosecutorial abuse will have to be present in the criminal process, as the case will never be presented in juvenile court at all. A similar probable cause requirement should be imposed on the prosecutor in the criminal court. Before the criminal court can assume jurisdiction over the serious offense alleged, the prosecutor should have to establish probable cause to believe that the child has committed an offense at least as serious as the one charged. If the evidence, rather than showing probable cause to support the serious charge, shows probable cause to believe the child has committed a lesser offense over which the juvenile court would have had original jurisdiction, the criminal court should transfer the case to juvenile court for handling.

A jurisdictional problem is presented, however. May the criminal court retain jurisdiction over the lesser offense to accept the child's plea of guilty or to go to trial on the lesser offense? In Louisiana, for example, statutory law provides that if a serious criminal charge excluded from the jurisdiction of the juvenile court is filed in criminal court, the criminal court can retain jurisdiction in the case, even if the child pleads guilty to or is convicted of a lesser

STANDARD 5.1. The Standards provide, however, that the prosecutor cannot promise to recommend a particular disposition as part of a plea agreement. *Id.* STANDARD 5.1(A).

119. *Id.* STANDARD 5.2.

120. *Id.* STANDARD 5.3.

121. *Id.* STANDARD 4.6.

122. *See, e.g.*, COLO. REV. STAT. § 19-1-103(9)(b) (1978); DEL. CODE tit. 10, §§ 921(2)(a), 938(a)(1) (1974 & Supp. 1980); LA. REV. STAT. ANN. § 13.1570(A)(5) (West Supp. 1980); N.C. GEN. STAT. § 7A-608 (Cum. Supp. 1979).

offense over which the juvenile court would have had original jurisdiction.[123] This type of statute presents a clear potential for abuse. If the child has to be over a certain age *and* be charged with a serious offense, the prosecutor could delay filing the charge until the child reaches the necessary age.[124] If certain offenses are excluded from the juvenile court's jurisdiction without regard to the age of the child, the prosecutor could charge such an offense even though the evidence will show at most commission of a lesser offense.

Although these deliberate decisions by the prosecutor, made solely to avoid the jurisdiction of the juvenile court, might constitute a denial of due process of law, they can be controlled to a large extent by statutory provisions existing in most states. In an Oregon case, for example, in which the prosecutor deliberately delayed seeking an indictment until after defendant reached eighteen years of age solely to avoid a waiver hearing in juvenile court, the court held that such a practice was in violation of statutes allocating jurisdiction between the criminal and juvenile courts and remanded the case to the criminal court to transfer the case to juvenile court for a waiver hearing.[125]

At the very least, these practices frustrate the intent of the juvenile court jurisdictional statutes. If the legislature has made the judgment that in certain kinds of cases the preference for treatment of a child in juvenile court is overcome by other considerations, such as the seriousness of the offense or the age of the child or both, such judgment should be given effect. Whether an offense is excluded from the jurisdiction of the juvenile court or simply qualifies a case for waiver of jurisdiction, if it appears for any reason that the child has committed a lesser offense, giving effect to legislative intent would seem to require that the case be handled initially as a juvenile matter.[126] Thus, a required probable cause hearing in criminal court would serve as a screening device to determine which cases properly should result in criminal prosecution and which properly should be transferred to juvenile court for adjudication.

## V. PROBABLE CAUSE AS AN ELEMENT IN DETERMINING PROPER JURISDICTION

Except in states where the juvenile court has exclusive jurisdiction over all offenses committed by children, when a child is taken into custody for or otherwise formally charged with commission of a delinquent act, an initial decision to be reached is whether the child's case should be handled in juvenile court or treated as a criminal matter. Prosecutors often have enormous discretion to determine the court—juvenile or criminal—in which a child's case will be handled. Such prosecutorial discretion occurs in many forms.

123. LA. REV. STAT. ANN. § 13:1570(A)(5) (West Supp. 1980). Under the statute, children who are charged with murder, manslaughter, or aggravated rape after reaching 15 years of age or armed robbery, aggravated burglary, or aggravated kidnapping after reaching 16 years of age are not subject to the juvenile court's jurisdiction. *Id.*

124. The Louisiana statute is ambiguous as to whether the child must have been 15 at the time of commission of the alleged act or at the time he is charged with the offense. *See id.*

125. State v. Scurlock, 286 Or. 277, 283, 593 P.2d 1159, 1162 (1979).

126. *See id.*

First, some states by statute expressly authorize the prosecutor to make this jurisdictional decision, either with respect to all children charged with an offense[127] or only those who are in an older age group or charged with a serious offense.[128] Second, some states exclude certain offenses from the juvenile court's jurisdiction,[129] and the prosecutor can elect to handle a case as a criminal matter by charging such an offense. Third, some states grant the criminal court original jurisdiction over certain offenses with authorization to transfer appropriate cases to the juvenile court for handling.[130] By charging such an offense, the prosecutor can elect to have the case treated initially as a criminal matter. Finally, some states provide for concurrent jurisdiction between the juvenile and criminal courts over certain offenses,[131] and the prosecutor can opt in favor of criminal prosecution by filing a charge in criminal court or by seeking an indictment.

The preferable solution is to permit none of these options but rather to grant the juvenile court original jurisdiction over all offenses committed by children, with the option of waiving jurisdiction and transferring certain cases to the criminal court. A system of judicial waiver places decision-making responsibility in the agency best equipped to make such dispositional decisions.[132] More importantly, because of the requirement of a waiver hearing attendant with certain rights as announced in *Kent v. United States*,[133] the decision will be made at a level of high visibility. In contrast, if the prosecutor in his sole discretion decides whether the case is to be handled as a juvenile or an adult matter, the decision is made at a level of low visibility with great potential for abuse.

Given the fact of prosecutorial discretion, however, the issue becomes one

127. *See, e.g.*, WYO. STAT. §§ 14-6-203(c), 14-6-211 (1978).

128. *See, e.g.*, ARK. STAT. ANN. § 45-418 (Supp. 1979) (children 15 or older arrested without a warrant); NEB. REV. STAT. § 43-202.01 (1978) (children alleged to have committed an offense over which the juvenile and criminal courts exercise concurrent jurisdiction).

129. *See* statutes cited in note 122 *supra*.

130. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 3-804(d)(1), (4) (1980); MD. ANN. CODE art. 27, § 594A (Supp. 1980); MISS. CODE ANN. §§ 43-21-105(j), 43-21-159(3) (Supp. 1980); N.Y. FAM. CT. ACT. § 712(a)(ii) (McKinney Supp. 1980); N.Y. PENAL LAW §§ 10(18), 30 (McKinney Supp. 1980); N.Y. CRIM. PROC. LAW §§ 180.75, 190.71, 210.43, 220.10(5)(g) (McKinney Supp. 1980); OKLA. STAT. ANN. tit. 10, § 1104.2 (West Supp. 1980); 42 PA. CONS. STAT. ANN. §§ 6302, 6322(a) (Purdon 1980); VT. STAT. ANN. tit. 33, § 632(a)(1) (Supp. 1980).

131. *See, e.g.*, ARK. STAT. ANN. §§ 45-417, 45-418, 45-420 (1977 & Supp. 1979); FLA. STAT. ANN. § 39.02(5)(c) (West Supp. 1980); GA. CODE ANN. § 24A-301(b) (1976); MICH. COMP. LAWS ANN. § 712A.2(d) (Supp. 1980); NEB. REV. STAT. § 43-202(3)(b)-(c) (1978); S.D. COMPILED LAWS ANN. § 26-11-3 (1976); WYO. STAT. §§ 14-6-203(c), 14-6-211 (1978).

132. The juvenile court, rather than any other court, has the superior resources, the procedural mechanism (the waiver hearing), and the experience in dealing with children and their problems to make such decisions. *See generally* Whitebread & Batey, *Transfer Between Courts: Proposals of the Juvenile Justice Standards Project*, 63 VA. L. REV. 221 (1977). Allowing the juvenile court, rather than another court, to make the jurisdictional decision also gives effect to the preference that cases involving children should be handled as juvenile matters and only the exceptional cases treated as criminal matters. *See* N.C. GEN. STAT. §§ 7A-523, -524 (Supp 1979); JUVENILE JUSTICE STANDARDS, *supra* note 9, STANDARDS RELATING TO TRANSFER BETWEEN COURTS, STANDARDS 1.1(C), 2.2(B), Commentary at 17-19, 35.

133. 383 U.S. 541, 552-53 (1966) (right to counsel, access to social records and probation reports and reasons for juvenile court's decision).

of what safeguards, if any, can be utilized to minimize the risk of abuse. The experience in the courts has been discouraging. For example, under Florida law, jurisdiction over all persons under eighteen accused of crimes is generally vested in the juvenile court; however, if a child is alleged to have committed an offense punishable by death or life imprisonment, jurisdiction is vested in the criminal court if the child is indicted for such offense by the grand jury.[134] In effect, this gives the prosecutor discretion to determine the court in which the child will be handled. The constitutionality of the Florida statute was challenged by a child who claimed his conviction was invalid because he was subjected to criminal prosecution as an adult without the benefit of a waiver hearing in juvenile court, as required by due process of law under *Kent*. The Fifth Circuit rejected this claim on the ground that the requirements of *Kent*, particularly the hearing requirement, apply only to the judicial decision-making process and not to discretionary prosecutorial decisions to proceed against a child as an adult by presenting a case to the grand jury.[135]

Under former Illinois law the prosecutor made the decision whether to handle a case in juvenile court or bring a criminal prosecution against the child. Because the former statute did not require a hearing, the Illinois courts held that a hearing was not required by *Kent* because a decision under the old law did not involve a matter of judicial determination.[136] For identical reasons, the Fourth Circuit held that under the Federal Juvenile Delinquency Act, which formerly gave the Attorney General discretion to prosecute a case as a criminal matter, no hearing was required.[137] In light of these decisions, it is interesting to note that the Illinois and federal acts have since been amended to abrogate prosecutorial discretion in favor of a judicial waiver hearing as the exclusive means of determining which cases are appropriate for criminal prosecution.[138]

Under New York law the criminal court is given original jurisdiction over children over a certain age charged with certain serious enumerated offenses, although this criminal jurisdiction can be waived and any such case transferred to juvenile court for adjudication.[139] This scheme employs a kind of reverse waiver, placing in the criminal court decision-making responsibility as to whether a case is to be treated as a juvenile matter or a criminal matter. The prosecutor shares in this decision-making power, as he elects whether to charge a child with one of the enumerated offenses and because, in most instances, removal to juvenile court can be ordered only with his consent. The New York scheme was upheld against a claim, based on statutory and due

134. FLA. STAT. ANN. § 39.02(5)(c) (West Supp. 1979).

135. Woodard v. Wainwright, 556 F.2d 781, 786 (5th Cir. 1977); *accord*, Russell v. Parratt, 543 F.2d 1214 (8th Cir. 1976); United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1973), rejecting similar claims made against the Nebraska and District of Columbia statutory procedures, respectively.

136. People v. Sprinkle, 56 Ill. 2d 257, 263, 307 N.E.2d 161, 164 (1974).

137. Cox v. United States, 473 F.2d 334, 335-36 (4th Cir. 1973).

138. See 18 U.S.C. § 5032 (1976); ILL. ANN. STAT. ch. 37, § 702-7(3) (Smith-Hurd Supp. 1980).

139. N.Y. FAM. CT. ACT § 712(a)(ii) (McKinney Supp. 1980); N.Y. PENAL LAW §§ 10(18), 30 (McKinney Supp. 1980); N.Y. CRIM. PROC. LAW §§ 180.75, 190.71, 210.43, 220.10(5)(g) (McKinney Supp. 1980).

process grounds, that the criminal court's exercise of jurisdiction was improper when no hearing was held to determine whether the case should have been transferred to juvenile court, in *Vega v. Bell*.[140] The court pointed out that in only one instance, when a child is arrested and arraigned before the criminal court prior to grand jury action, is he entitled to a hearing, and the hearing is one to determine probable cause pending action by the grand jury.[141]

There seems to be little support under decisional law for the view that the same kinds of procedural safeguards required by due process in connection with a waiver hearing are applicable to discretionary decisions of a prosecutor. Policy, however, favors the creation of certain safeguards. An underlying premise of the juvenile court is that children as a rule ought to be treated differently from adults and that as a rule they ought to be handled in the juvenile court rather than the criminal court. Only the exceptional cases should be processed in the criminal court.[142]

The Supreme Court recognized in *Kent* that a judicial waiver decision is of critical importance in proceedings against a child because it determines whether he will forego treatment as a child and instead be subjected to the more punitive processes of a criminal prosecution.[143] For this reason the decision-making process must be attended by certain procedural safeguards. The underlying importance of the decision is not diminished simply because, rather than being judicial in nature, it is made by the prosecutor. Yet, when the prosecutor makes such a decision his discretion is largely unfettered in the absence of some kind of procedural safeguard.

As discussed in the preceding section, at the very least the criminal court should be required to hold a hearing at which the prosecutor must establish probable cause to believe the child has committed the offense charged in criminal court. Under New York procedure, for example, if a child charged with an offense over which the criminal court has original jurisdiction is arraigned prior to grand jury action, he is entitled to a probable cause hearing.[144] If probable cause supporting the serious offense is shown, the case is bound over for grand jury action.[145] If probable cause to support a lesser offense over which the juvenile court would have exercised original jurisdiction is shown, the case is transferred to the juvenile court.[146] If no probable cause is found,

140. 47 N.Y.2d 543, 550, 393 N.E.2d 450, 454, 419 N.Y.S.2d 454, 459 (1979). *But cf.* State *ex rel.* Coats v. Johnson, 597 P.2d 328, 330 (Okla. Crim. App. 1979) (Cornish, P.J., concurring) (in addition to unconstitutional vagueness ground, statutes granting criminal court original jurisdiction over certain offenses with discretion to transfer to juvenile court are invalid on ground they create a constitutionally impermissible presumption of competency to commit crime).

141. 47 N.Y.2d at 552, 393 N.E.2d at 455, 419 N.Y.S.2d at 460. *See* N.Y. CRIM. PROC. LAW § 180.75(3) (McKinney Supp. 1980).

142. *See* JUVENILE JUSTICE STANDARDS, *supra* note 9, STANDARDS RELATING TO TRANSFER BETWEEN COURTS, STANDARD 1.1, Commentary at 13-19; *see generally* State v. Scurlock, 286 Or. 277, 593 P.2d 1159 (1979).

143. 383 U.S. at 556-57.

144. N.Y. CRIM. PROC. LAW §§ 180.75(1)-(3) (McKinney Supp. 1980).

145. *Id.* § 180.75(3).

146. *Id.*

the case is dismissed.[147] As a minimal safeguard, this kind of procedure should be followed in all cases in which a child is brought before a criminal court as a result of prosecutorial discretion or as a result of the criminal court having exclusive, original, or concurrent jurisdiction over the offense charged.

Furthermore, in states granting original jurisdiction to the criminal court over certain kinds of offenses, with authority to transfer exceptional cases to the juvenile court, more should be required. These "reverse waiver" procedures should be attended by the same procedural safeguards required in a judicial waiver determination in juvenile court. Specifically, a waiver hearing should be required, and the child should have the same rights in this hearing that *Kent* guarantees in juvenile waiver proceedings.

The importance of the decision to the child is the same. In a juvenile waiver proceeding the juvenile court cannot arbitrarily determine which cases are exceptional and ought to be handled in criminal court. Likewise, the criminal court should not be allowed arbitrarily to determine which cases are exceptional and ought to be handled in juvenile court. In each case the presumption as to how children should be treated is reversed, but the result of the decision-making process is the same—some children are treated as juveniles and some are subjected to criminal prosecution. Such a decision, regardless of the court in which it is made, should be subject to the procedural safeguards required by *Kent*. Indeed, a reverse waiver procedure in the absence of sufficient safeguards may create a constitutionally impermissible presumption of competency to commit crime.[148]

## VI. CONCLUSION

A probable cause requirement performs desirable, and often necessary, functions at different stages of proceedings against children in both juvenile and criminal court. In juvenile court it has a role to play during the initial stages in determination of whether a petition should be filed, and, ultimately, in the determination of the legal sufficiency of the petition itself, a determination that is made by the court. When special provisions dealing with release are applicable, probable cause also has a role to play in determining whether a child can be lawfully detained pending an adjudicatory hearing. Additionally, the probable cause requirement is an essential limitation on prosecutorial discretion and is a safeguard against potential abuse. It can operate to discourage overcharging designed to persuade the child to enter an admission to a lesser offense in juvenile court or to qualify the case for transfer to criminal court or, indeed, to have the case originate in criminal court or fall within the exclusive jurisdiction of the criminal court.

The Juvenile Justice Standards in particular emphasize the importance of the probable cause inquiry for a number of purposes, and by providing for its

147. *Id.*

148. *See* State *ex rel.* Coats v. Johnson, 597 P.2d 328, 330 (Okla. Crim. App. 1979) (Cornish, P.J., concurring).

use at various stages of the proceedings the Standards encourage judicial determination of probable cause at the earliest stage possible. Because the Standards are concerned only with procedures applicable in the juvenile justice process, however, more is needed to protect the jurisdictional integrity of the juvenile court and the rights of children generally against potential abuse. Specifically, when under applicable law cases in which certain offenses are charged originate in criminal court or are within the exclusive jurisdiction of the criminal court, a probable cause inquiry in the criminal proceedings should be employed to assure that the case is properly before the criminal court in the first instance. Only then can the underlying premise of the Standards—that children are entitled to treatment in juvenile court, unless substantial evidence indicates otherwise—be effectuated.