

CHAPTER 38

RIGHTS OF JUVENILES IN PRISON*

A. Introduction

1. Goals of this Chapter

This chapter discusses the rights and treatment of young people in state and federal prison or juvenile detention facilities.

First, this Chapter will discuss the different ways that juveniles are categorized and convicted of crimes. It will then talk about the rules the government must follow when it tries to convict young people accused of crimes and what you should do if the government did not follow those rules.

Second, this Chapter will tell you about your rights while you are in prison. When the government puts you in prison, it has to obey certain rules to make sure that your rights are protected. If these rules are not being followed, you can file a special complaint (a type of lawsuit): either a Section 1983 claim when filed against a state government,¹ or a *Bivens* claim when filed against the federal government.² If you convince a court that you are not being treated properly, the court may issue an “injunction,” which is an order that will force your caretakers to provide you with better treatment.

2. Are you a juvenile?

The first thing you need to know is whether you were tried as a juvenile. Majority age (the age when you legally become an adult) will depend on the specific rules of the state in which you were convicted. In many states, the law says you are an adult when you are seventeen or eighteen. If you were accused of committing a crime before you reached majority age, then you were likely tried as a juvenile. Even if you were tried as an adult, the law may give you certain juvenile protections, such as placement in a juvenile facility. This Chapter will provide you with information about the specific legal protections that you have.

If you were accused of breaking a federal law before you turned eighteen, then you were likely tried as a juvenile. However, there are a few exceptions to this rule, which this Chapter will discuss below.

If you were accused of breaking a state law, then you need to know the particular laws of your state on juveniles. In some states, you may be considered an adult before you reach eighteen, depending on the type of offense and your age. For example, in New York and North Carolina, you are considered an adult if you commit a crime when you are sixteen or older. Similarly, you are considered an adult if you commit a crime when you are seventeen or older in Georgia, Louisiana,³ Michigan, Missouri, South Carolina, Texas, and Wisconsin.⁴ In all other states, you are generally considered a juvenile for crimes you committed before you turned eighteen, unless you are

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1. For a detailed description of a § 1983 claim, see *JLM*, Chapter 16, “Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief From Violations of Federal Law.”

2. The *Bivens* cause of action, which generally has the same standards as a § 1983 claim, was established by the Supreme Court in *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397, 91 S. Ct. 1999, 2005, 29 L. Ed. 2d 619, 627 (1971).

3. As of July 2018, 17-year-olds charged with nonviolent offenses will be tried as juveniles, and as of 2020, 17-year-olds charged with any offense will be tried as juveniles. *See* 2016 La. Act 501, Louisiana Forty-Second Regular Session.

4. Based on information contained in U.S. Dept. of Justice, Office of Justice Programs, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Report*, Chapter 4, 93, *available at* <https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf> (last visited December 7, 2016). You should also note that for status offenses, abuse, neglect, and dependency matters, you may be tried as a juvenile in many states.

transferred to adult court for a special reason. This Chapter will discuss some of these special reasons below.

3. Why are juveniles treated differently than adults?

Laws treat juveniles differently from adults for a few reasons. First, because juveniles are not considered to be as mature as adults, juveniles cannot understand why their actions were wrong the same way adults can. Also, juveniles may be more influenced by peer pressure. Second, people think juveniles are less dangerous to the public than adults. Third, people think it is easier to teach juveniles to follow the law in the future. Finally, the government thinks that juveniles can be taught why the crimes they committed are wrong. Therefore, the goals of the juvenile justice system are to hold you responsible for your actions and provide you with treatment and education.⁵

4. Differences between the Adult Criminal System and Juvenile Delinquency System

First, the adult criminal justice system is punitive, which means it focuses on punishing people for breaking the law. People are put in prison as punishment for their actions and to protect the community. The juvenile delinquency system is usually “rehabilitative,” which means that it focuses on teaching juvenile offenders to follow the law. This means the juvenile system focuses on fixing criminal behavior and improving a young person’s life.⁶ Some states, however, also include punishment as an additional goal.

Second, the adult criminal justice system focuses on the crime, not the offender. For example, in adult criminal cases, the only question is whether you committed the crime. If a jury finds that you committed the crime, then you will be punished. The juvenile system, however, places greater emphasis on the offender. The court is interested in whether you committed the crime, why you committed the crime, and what can be done to prevent you from committing a crime in the future.

Third, juveniles sometimes have different constitutional rights than adults. Defendants in the adult criminal system have certain constitutional rights, such as a right to a jury trial and to a lawyer. Juveniles do not have all of the same constitutional rights as adults.⁷ For example, juveniles do not always have the rights to a speedy trial⁸ or to a jury trial.⁹

Fourth, in the adult criminal system, all proceedings are open to the public unless the judge orders that they are closed for some special reason. A proceeding is an appearance in court in which you, the judge, and lawyers are all present. The proceedings include the trial and events before the

5. See *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 1196, 161 L. Ed. 2d 1, 21 (2005) (discussing general differences between juvenile and adult offenders, that, when taken together, demonstrate that juvenile offenders cannot reliably be classified as among the worst offenders). See also *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 2698, 101 L. Ed. 2d 702, 718 (1988) (holding that the differences between juvenile and adult offenders indicate that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult). But see, e.g., *Mendez-Alcaraz v. Gonzales*, 464 F.3d 842, 843 (9th Cir. 2006) (declining to consider the defendant’s age at the time of the offense in determining his status under a federal law requiring deportation for the commission of certain offenses).

6. See *Kent v. United States*, 383 U.S. 541, 554, 86 S. Ct. 1045, 1054, 16 L. Ed. 2d 84, 94 (1966) (describing the role of the Juvenile Court); see also Enrico Pagnanelli, Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 Am. Crim. L. Rev. 175, 175 (2005).

7. See *In Re Gault*, 387 U.S. 1, 14, 31–58, 87 S. Ct. 1428, 1436, 1445–1461, 18 L. Ed. 2d 527, 538, 548–563 (1967) (discussing the basic due process rights juveniles have in court); *O’Brien v. Marshall*, 453 F.3d 13, 17–18 (1st Cir. 2006) (holding that the Fifth Amendment is not applicable in juvenile court transfer hearings);

8. *Sadler v. Sullivan*, 748 F.2d 820, 827 (3d Cir. 1984) (holding that a juvenile does not have a constitutional right to a speedy trial until he loses the protections of the juvenile court system and becomes subject to penalties faced by adults); *United States v. Hill*, 538 F.2d 1072, 1077 (4th Cir. 1976) (juveniles do not have a Sixth Amendment claim for right to speedy trial).

9. See *United States v. Torres*, 500 F.2d 944, 948 (2d Cir. 1974) (finding no constitutional right to jury trial); *Cotton v. United States*, 446 F.2d 107, 110 (8th Cir. 1971) (finding no constitutional right to jury trial); *United States v. King*, 482 F.2d 454, 455–456 (6th Cir. 1973) (finding no constitutional right to jury trial); *United States v. James*, 464 F.2d 1228, 1230 (9th Cir. 1972) (finding no constitutional right to jury trial).

trial. However, in most states' juvenile delinquent systems, proceedings are confidential. This means the courtrooms are not open to the public and the full names of accused juveniles are kept private. Also, the judge may order a juvenile record to be sealed. This means that once you are an adult, your juvenile offenses will not be part of a permanent criminal record.¹⁰

Fifth, when you are found guilty as an adult in the adult criminal system, your sentence is based on your crime and criminal record. You cannot be forced to serve more time than the maximum punishment decided by the judge unless you commit another crime.

However, when you are found guilty as a juvenile in the delinquency system, you are given a "disposition" instead. A disposition is the time you must serve at a facility or in a program for the crime. A disposition is based on many things, including the reasons you committed the crime, how serious the crime was, and whether you have committed crimes before. Dispositions are "indeterminate" because the exact amount of time you have to serve may not be decided all at once and is not based on the specific crime for which you are convicted. Instead, it depends on your "rate of rehabilitation," which means the amount of time the court thinks you need to correct your behavior. The court can extend the amount of time if the judge thinks that you have not been rehabilitated at the end of your disposition.

Juveniles are not always sent to detention facilities. There are other programs often run by juvenile courts, called "alternatives to incarceration" or "ATIs," as well as community- and residential-based programs, where juveniles may be sent. You will learn more about these later in this Chapter.

When you are charged with a crime, there are rules that the government and its lawyers (the prosecutors) must follow. These rules create rights for people who have been accused of crimes (the defendants). If the government breaks these rules and violates your rights, then you can file an appeal and ask a higher court to review your conviction based on the specific mistake the government made. Part B of this Chapter explains the rules that the government must follow when it accuses you of breaking a federal law. Part C of this Chapter explains the rules that the government must follow when it accuses you of breaking a New York State law.

B. The Federal System

1. Procedure in the Federal System

The federal government must follow the rules in the Juvenile Justice and Delinquency Prevention Act (or "JJJPA"), which you can find in Section 18 of the United States Code, Sections 5031–5042 (2006). If you are a juvenile and the government prosecutor did not follow one of the rules below in your case, you may be able to appeal your conviction. If your appeal succeeds, you may have your conviction vacated (reversed).¹¹ Read the rules below and think about whether the government followed them in your case. If you think the government broke any of the rules below, you should tell your lawyer.

As defined in the JJJPA, a juvenile is:

- (1) Anyone who is not yet eighteen years old; or

10. However, it may be possible for juvenile records to be accessed for future use under limited circumstances. *See, e.g.*, *United States v. Washington*, 706 F.3d 1215, 1219 (10th Cir. 2012) (holding that under state law, prior juvenile adjudications may be used for sentencing and other purposes); *United States v. Carney*, 106 F.3d 315, 318 (10th Cir. 1997) (holding that under state law, a federal court can use a defendant's sealed juvenile records when sentencing him as an adult for manslaughter). Moreover, in New York, family court proceedings are open to the public and you must make a motion to seal court records after a finding of delinquency if you want your records to be sealed. N.Y. Fam. Ct. §375.2 (McKinney 2011).

11. *United States v. Juvenile Male*, 595 F.3d 885, 907 (9th Cir. 2010), (instructing district court to vacate defendant's convictions if a violation of JJJPA procedure was found); *United States v. Chambers*, 944 F.2d 1253, 1260–61 (6th Cir. 1991), *superseded by statute on other grounds*, (vacating defendants' convictions where the Attorney General did not complete the JJJPA procedures until after defendants were convicted).

- (2) Anyone who is not yet twenty-one and who is accused of committing an act of juvenile delinquency before he was eighteen.¹²

If you fit one of these two definitions of a juvenile, then the JJDPa probably applies to your case. The JJDPa does contain some complicated exceptions if you are in New York, which are explained in Part C(2)(b) below.

The JJDPa contains two sets of rules the government must follow. The first covers the “certification” of your case. The second covers “determining the status” of your case.

The first thing the federal government must do when prosecuting a juvenile is to “certify” the case. This means that the prosecutor representing the government must provide a document¹³ to the court that states that:

- (1) There is a substantial “federal interest” in the case; and
- (2) The state where the crime happened does not have or refuses to exercise jurisdiction; or
- (3) The state with jurisdiction does not have adequate programs or services for juveniles; or
- (4) The offense charged is a violent felony, a drug trafficking or importation offense, or a firearms offense.¹⁴

If you live in New York and are on trial in a federal court for a federal crime, the first thing the government must do is explain why there is a “federal interest” in your case. This means it must explain why your crime is dangerous to people in your home state and to people in other states, too. If you were accused of selling drugs in New York, for example, the government would probably say that there is a federal interest in prosecuting your case because the drugs you sold might end up in another state, where they could hurt other people. It is not always clear why some things are considered federal interests and others are not.

Next, the government must explain why the federal court should hear your case instead of the state court. The government can do this in a few different ways: it can say that the state court does not want to hear your case, that the state does not offer the programs and services you will need if you are convicted (like a juvenile detention center), or that your crime involved violence, drugs, or guns. The federal government does not need to do much to establish a federal interest in your case as long as it meets these minimal requirements of the JJDPa.

Unfortunately, it is very hard to challenge certification mistakes. The majority of federal circuit courts believe that as long as there was “substantial” good faith compliance with the certification requirements (that the prosecutor did his best to follow these rules), you may not appeal certification mistakes. This means that most courts will not review certification mistakes unless the government made no effort at all to comply with the JJDPa’s certification requirements.¹⁵

You will have the best chance of challenging certification if your case was brought in the Fourth Circuit.¹⁶ The Fourth Circuit includes all federal courts in Maryland, North Carolina, South

12. See 18 U.S.C. § 5031 (2012).

13. These documents do not have to be detailed. An example of a proper certification is a piece of paper saying: “Comes now Joseph L. Famularo, United States Attorney for the Eastern District of Kentucky, who, after investigation, and pursuant to the provisions of Title 18, United States Code, § 5032, hereby certifies to this court that the offenses for which this juvenile, [John Doe], is charged herein by information, include a crime of violence, that is a felony under the laws of the United States, and that there is a substantial federal interest in the case and the offense to warrant the exercise of federal jurisdiction.” *United States v. Doe*, 226 F.3d 672, 677 n.2 (6th Cir. 2000).

14. This fourth condition is more specific in the statute: “[T]he offense charged is a crime of violence that is a felony or an offense described in § 401 of the Controlled Substances Act (21 U.S.C. § 841 [2012]), or §§ 1002(a), 1003, 1005, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. §§ 952(a), 953, 955, 959, 960(b)(1)(2)(3) [2012]), § 922(x) . . . [or] § 924(b), (g), or (h) of [Title 18 U.S.C. (2006)], and that there is a substantial Federal interest . . . to warrant the exercise of Federal jurisdiction.” 18 U.S.C. § 5032 (2012).

15. See *United States v. Wong*, 40 F.3d 1347, 1369 (2d Cir. 1994). *But see* *Impounded (Juvenile I.H.)*, 120 F.3d 457, 461 (3d Cir. 1997) (concluding that the JJDPa mandates strict and literal compliance with the certification rules).

16. *United States v. C.A.M.*, 251 F. App’x 194, 195 (4th Cir. 2007) (order of transfer vacated and remanded); *United States v. T.M.*, 413 F.3d 420, 424 (4th Cir. 2005) (remanding for certification decision).

Carolina, Virginia, and West Virginia. Although all federal courts generally follow the same rules, the federal courts in these states are especially willing to listen to complaints from juvenile prisoners about certification. The circuit courts that cover the other regions of the United States have not and probably will not hear certification appeals.¹⁷ Therefore, if you think the government did not follow the rules in certifying your case and you are in one of the states in the Fourth Circuit, then you should immediately tell your lawyer about the mistake. If you think there was a certification error and you are not in one of those states, then you should still check with your lawyer. Just know that you probably will not be able to challenge your conviction on certification grounds unless the government did not even try to follow the requirements.

The second set of rules the federal government must follow under the JJDPa relates to “determining status.” Your “status” refers to whether you are a juvenile or an adult. Although the government will usually consider you a juvenile if you committed the crime before your eighteenth birthday, there are some complicated rules on this. “Determining your status” means applying these rules to determine whether you will be tried as a juvenile or an adult.

After the federal government has certified your case, there are four things that can happen:

- (1) You may be tried as a juvenile;
- (2) You may agree to be tried as an adult;
- (3) The law may require that you be tried as an adult; or
- (4) The judge may decide to try you as an adult, even if the law does not require it.¹⁸

You should know which of these options the government followed in your case. The rest of this Section will explain the rules the government must obey when proceeding with any of these options. As you read, if you see a rule that you think the government did not obey in your case, then you should tell your lawyer.

2. Being Tried as a Juvenile in the Federal System¹⁹

(a) Rules That Apply Before Your Hearing

Generally, juveniles must be brought to trial within thirty days and can only be held in certain types of places while waiting for trial.²⁰ This “speedy trial” rule means that your trial must begin

17. *See, e.g.*, *United States v. Female Juvenile*, A.F.S., 377 F.3d 27, 32 (1st Cir. 2004) (agreeing with other circuits that the United States Attorney’s “certification of a substantial federal interest is an act of prosecutorial discretion that is shielded from judicial review”) (citing *United States v. Smith*, 178 F.3d 22, 25 (1st Cir. 1999)); *United States v. F.S.J.*, 265 F.3d 764, 771 (9th Cir. 2001) (holding that “the United States Attorney’s certification of a ‘substantial federal interest’ under § 5032 is not subject to judicial review except for such formalities as timeliness and regularity (e.g., signed by the proper official) and for allegations of unconstitutional prosecutorial misconduct”); *United States v. Doe*, 226 F.3d 672, 678 (6th Cir. 2000) (holding that “Congress did not intend that the Attorney General’s certification of the existence of a substantial federal interest be subject to judicial review for the sufficiency of the underlying facts”); *United States v. Jarrett*, 133 F.3d 519, 538 (7th Cir. 1998) (“We agree with the Government, as well as with the majority of courts to consider this question, that we cannot substantively review the Attorney General’s certification of a substantial federal interest”); *United States v. Juvenile Male J.A.J.*, 134 F.3d 905, 909 (8th Cir. 1998) (holding that certification of a substantial federal interest is an unreviewable act of prosecutorial discretion).

18. Additionally, under some state laws, after the entry of a guilty plea a juvenile may be sentenced as either a juvenile or an adult. *See, e.g.*, *Gonzales v. Tafoya*, 515 F.3d 1097, 1107 (10th Cir. 2008) (where a 14 year old juvenile was sentenced as an adult under New Mexico state law after pleading guilty to murder).

19. For a discussion of changing views regarding juvenile delinquency and the impact this has had on the treatment of juveniles in the federal system, *see* Juan A. Arteaga, Note, *Juvenile (In) Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 Colum. L. Rev. 1051 (2002).

20. 18 U.S.C. §§ 5035, 5036 (2012) (stating that while waiting for trial, juveniles can only be detained in a juvenile facility or other appropriate place, not with adult criminals; juveniles must be tried within 30 days of detention, unless the “interest of justice” creates an exception; courts cannot use the excuse of having too many cases to hear). *See* *United States v. Female Juvenile*, A.F.S., 377 F.3d 27, 34 (1st Cir. 2004) (recognizing that the 30 day speedy trial period begins to run on the date a juvenile is taken into federal custody and continues to run, subject to certain exceptions, until the delinquent is “brought to trial.”); *United States v. Baker*, 10 F.3d

within thirty days from the date you were arrested.²¹ If you are not brought to trial within thirty days, your case might be dismissed.²²

However, the courts have limited thirty-day appeals, and it may be difficult to bring this type of claim successfully. For instance, many courts have said that if you caused the delay, or if you agreed to the delay, then you gave up your right to a speedy trial. A delay might also be okay if the court believes it is in the “interest of justice.”²³ Additionally, your case will not be dismissed if the delay was only because of the court’s busy schedule. In that situation, a judge with many cases to hear is allowed to hear your case after the thirty-day deadline. In addition, time taken for transfer hearings does not count toward the thirty days. Therefore, if the trial does not start until after thirty-five days because the transfer hearing took five days, those five days do not count and your speedy trial right has not been violated.²⁴

(b) Rules That Apply During Your Hearing

If you are tried as a juvenile, then you are given a “delinquency hearing” instead of a formal trial. In a juvenile delinquency hearing, the court must decide if you are “delinquent.” “Delinquent” is a word used to describe juveniles (someone younger than eighteen years old) who have broken a United States law, which would be a crime if committed by an adult.²⁵ Note that there are fewer due process (constitutional) protections in a delinquency hearing (described in Section A(4) of this Chapter) than in the adult system.²⁶ However, there are a number of rules that the government must follow.

First, the hearing may not be open to the public.²⁷ Second, there will not be a jury at your hearing. The judge will make the decision by himself.

1374, 1397 (9th Cir. 1993) (*overturned on other grounds*) (holding that extensions of time applied for by defendant are excluded from calculation of delay and that delay in this particular case is acceptable in the interest of justice); *see also* United States v. Juvenile Male, No. 96–1270, 1996 U.S. App. LEXIS 28663, at *6 (2d Cir. Nov. 1, 1996) (*unpublished*) (holding that the time between the government’s filing of a motion to transfer to adult status and the court’s ruling on the motion is excluded from the 30 day requirement); United States v. Romulus, 949 F.2d 713, 716 (4th Cir. 1991) (finding that delay caused by defendant’s misrepresentation of age does not violate speedy trial requirement).

21. *See, e.g.*, United States v. Female Juvenile, A.F.S., 377 F.3d 27, 38 (1st Cir. 2004); United States v. Wong, 40 F.3d 1347, 1371 (2d Cir. 1994). *See also* United States v. Romulus, 949 F.2d 713, 716 (4th Cir. 1991) (quoting 18 U.S.C. § 5036 (1985) to illustrate the 30 day requirement).

22. 18 U.S.C. § 5036 (2012).

23. *See* United States v. Doe, 49 F.3d 859, 865–66 (2d Cir. 1995) (acknowledging that if a miscarriage of justice would result, the district judge may decline to follow the 30 day requirement and that this decision would be reviewable on appeal only for an abuse of discretion) (citing United States v. Marrero, 705 F.2d 652, 656 n.6 (2d Cir. 1983)); United States v. Juvenile Male, 595 F.3d 885, 896 (9th Cir. 2010). *See also* United States v. Doe, 571 F. App’x 656, 659 (10th Cir. 2014).

24. *See, e.g.*, United States v. Wong, 40 F.3d 1347, 1371 (2d Cir. 1994) (holding that the speedy trial rule was not violated when the government filed a motion on the 30th day of detention); United States v. Romulus, 949 F.2d 713, 716 (4th Cir. 1991) (finding that the delay between the government’s filing of a motion to transfer and the court’s approval of the motion was properly excluded from the speedy trial rule in the interest of justice).

25. 18 U.S.C. § 5031 (2012).

26. There are fewer ways for a juvenile to claim that the procedure of a juvenile court violates his constitutional rights, but there are certain due process rights that apply even in juvenile court. For a discussion of the basic due process rights that juveniles have in court, *see In Re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

27. However, in some instances the district court has been granted discretion to permit public access to delinquency hearings on a case-by-case basis. *See* United States v. A.D., 28 F.3d 1353, 1361 (3d Cir. 1994); *In re Washington Post Motion to Open Juvenile Detention Hearing*, 247 F.Supp.2d 761 (D. Md. 2003).

(c) At the End of Your Hearing

After deciding whether you are delinquent (whether you broke the law), the judge gives the “disposition,” which means the final status of the case. The judge has three choices: (1) give you probation, which is a period of release outside of prison supervised by a probation officer; (2) order you to be placed in a correctional facility, which may also include an order of a period of supervision after detention; or (3) suspend the findings of juvenile delinquency (decide not to impose any punishment). The judge may also order you to pay money to the victim to make up for the crime.²⁸

Dispositions may be different depending on your age. If you are under eighteen years old, then you may be given probation or put in a facility until you are twenty-one years old. If you are between eighteen and twenty-one years old, then you may get probation for up to three years or get put in prison for up to five years.²⁹

(d) After Your Hearing

First, no matter what happened, the government must seal all records after your hearing.³⁰ This means that people who were not involved in your case will not be able to see the records.³¹

Second, if the government did not follow any of the above rules at your hearing, then you have the right to appeal in two ways. The first way you can appeal is to use the government’s mistake to appeal your entire conviction. If your appeal works, then you may have your conviction overturned or erased. The second way you can appeal is to challenge the mistake in order to get better living conditions. You can complain that you are not being treated fairly based on the rules that the government must follow for juveniles. If this challenge works, you may be able to switch to better living conditions or get into a new incarceration program. This challenge is described in detail in Part C below. If possible, try to get a lawyer or an adult to assist you with any legal papers. You should talk to your lawyer about your options and the type of appeal that would be most likely to help you.

28. 18 U.S.C. § 5037(a) (2012).

29. 18 U.S.C. § 5037(b) (2012).

30. Unlike regular criminal records, which anyone can get, you can only get juvenile records with special permission or procedures. *See* 42 U.S.C. § 5676 (2012); 18 U.S.C. § 5038 (2012). In some jurisdictions, including New York, juvenile convictions can be used to calculate a later adult sentence. *See, e.g., United States v. Franklyn*, 157 F.3d 90, 99–100 (2d Cir. 1998) (considering prior juvenile convictions for putting the defendant in a higher sentence category, because his criminal history score did not show the seriousness of his criminal history since his juvenile convictions had not been counted for the score); *U.S. v. Matthews*, 205 F.3d 544 (2d Cir. 2000) (taking into account, in current sentencing, a juvenile conviction from before that had been made less serious but had not been taken out from the public record). Courts have mixed opinions about whether adult convictions or adult sentences are most important when figuring out a later sentence. Some courts have said that a juvenile must have received an adult sentence in order for that conviction to count when figuring out a later adult sentence. *See United States v. Mason*, 284 F.3d 555, 562 (4th Cir. 2002) (holding that defendant’s prior conviction led to sentencing as a juvenile and so could not be counted as a predicate felony for purposes of figuring out if he was a “career offender,” which would have led to a higher sentence). *But see United States v. Gregory* 591 F.3d 964, 967 (7th Cir. 2010) (holding that when deciding whether a conviction from before counts as a predicate felony, the most important factor is whether the defendant was convicted as an adult, not whether he was sentenced as an adult); *United States v. Jones*, 415 F.3d 256, 264 (2d Cir. 2005) (finding that when deciding career offender status, a youthful offender decision could count as an adult conviction if the defendant had pleaded guilty in an adult forum and had received and served a sentence of over a year in an adult prison); *U.S. v. Cruz* 136 Fed. Appx. 386 (2d Cir. 2005) (prior conviction from when defendant was a juvenile counts toward deciding if he was a career offender, when defendant had been convicted in an adult court and received and served an adult sentence, even though under state law, he was classified as a “youthful offender”); *U.S. v. Gregory*, 591 F.3d 964 (7th Cir. 2010) (stating that a prior conviction counted for figuring out a future sentence because the defendants’ sentences were for adult convictions even though they had served time in a juvenile, not in an adult prison).

31. State statutes (laws) may also require the sealing of juvenile records. *See Donohue v. Hoey*, 109 F. App’x 340, 365 (10th Cir. 2004) (“[c]ourts have recognized that a state statute can seal records, thus creating a legitimate privacy expectation for a juvenile”).

The most important part of your appeal is the way you describe the facts of your case. Especially in juvenile cases, judges have a lot of power and can make decisions “in the interests of justice” in ways they cannot for adults. For example, this could mean the judge may ignore any mistakes made by the government and refuse to overturn the conviction if the facts of your crime make you sound like a dangerous threat to the community. As a result, you should be very careful about how you talk about your crime and yourself and help the judge understand any circumstances or facts that might work in your favor. You should never lie to a judge because that is a crime, but you do not need to draw attention to the most serious parts of your crime either. You need to show the judge that you have “rehabilitative potential.” This means you have to show that you want to change your life and that you will not commit crimes in the future. A judge looking at your case will try to figure out which is greater: your rehabilitative potential or the seriousness of your offense.

3. Being Tried as an Adult in the Federal System

(a) Agreeing to be Tried as an Adult

You may agree to be tried as an adult as part of a “plea agreement” in order to get a shorter sentence.³² In plea agreements, you and the prosecuting attorney make a deal in which you plead guilty to a specific crime and, in return, the government recommends a lesser sentence than what you would face if you went to trial and were found guilty.

You should know, however, that you will not always get a shorter sentence by agreeing to being tried as an adult. Usually you need to have the right background. The sentencing guidelines in the federal system can sometimes be harsh for juveniles. They do not usually consider the defendant’s age as a reason for giving a shorter sentence. To be sure that you are making the right choice for yourself, speak with your lawyer.

To agree to be tried as an adult, you must go in front of the court and tell the judge that you know what you are doing and fully understand the legal results of being tried as an adult. Before you do this, you should talk to your lawyer and make sure that you really understand and that this is something you definitely want to do. If you do not understand, you should let the judge know that you are confused or need more information. The decision about whether to be tried as an adult is very important and impacts your future. Remember, being tried as an adult could affect future convictions and sentencing decisions you may face. It is your lawyer’s job to be your voice in court and to make sure that you understand what is going on so that you can make informed decisions. Do not be afraid to ask a lot of questions and speak up when you do not understand something.

In order for the government to try you as a juvenile, you must agree to that in writing. However, to be tried as an adult, you must give up your right and knowingly refuse to agree to be tried as a juvenile. In order for you to properly give up your right, the government has to meet certain requirements.³³

If you did not know that you had a right to be tried as a juvenile, then you probably did not agree to be tried as an adult.³⁴ Similarly, just because you did not agree to be tried as a juvenile does not mean there is enough evidence for the government to prove you knowingly said that you did not want to be tried as a juvenile. It also does not mean there is enough evidence to prove you gave up that right.³⁵

If you did not agree to be tried as an adult in front of a judge, or if you did not fully understand what you were doing, then you may be able to challenge your conviction for these reasons.

32. *See, e.g.,* Hernandez v. United States, 839 F. Supp. 140, 145 (E.D.N.Y. 1993) (juvenile consented to trial as an adult as part of a plea agreement).

33. 18 U.S.C. § 5032 (2012).

34. *See, e.g.,* United States v. Williams, 459 F.2d 903, 904 (2d Cir. 1972) (holding that in order to make an intelligent waiver of his right to be tried as a juvenile, the juvenile must in some manner be fully apprised of his rights and respective consequences of proceeding as an adult).

35. *See* United States v. Williams, 459 F.2d 903, 907 (2d Cir. 1972).

(b) Mandatory Transfer to Adult Status

Under the JJDPa, some juveniles in federal court must be tried as adults, whether or not they agree to it. If the crime happened after you turned sixteen, involved physical force, and you were previously convicted of certain crimes listed in the statute, then you must be tried as an adult. As one court explained it, transfer of juveniles to adult status is mandatory “for purposes of prosecution where:

- (1) a juvenile, after his sixteenth birthday, allegedly commits an offense that would be a felony if committed by an adult;
- (2) the offense involved the use, attempted use, or threatened use of physical force, or, by its very nature, involved a substantial risk that physical force would be used in committing the offense; and
- (3) the juvenile ‘has previously been found guilty of an act which if committed by an adult would have been’ one of the enumerated offenses supporting discretionary transfer.”³⁶

Convictions from your past are an important part of figuring out whether you will be transferred to adult status. If the government is arguing that you have to be transferred to adult status, the government is only allowed to bring up convictions that happened before whatever crime you are now being accused of in your trial.

If your mandatory transfer was made because of a crime you were convicted of after you committed the crime that you are now being charged with, then you can appeal your transfer for this reason.³⁷ Also, if your transfer was made without a hearing, you can use this rule to challenge your transfer.³⁸

(c) Discretionary Transfer to Adult Status in the Federal System

Even if you do not agree to being tried as an adult and the government does not have enough evidence to make your transfer mandatory, your case might still be transferred to adult court under the discretionary parts of the JJDPa.³⁹ This means that a judge can still decide to try you as an adult even though he does not have to. When the government asks the judge for a discretionary transfer, there must be a separate, “discretionary transfer hearing” to decide whether you can be transferred to adult status.⁴⁰

(i) Discretionary Transfer Hearing

At the hearing, your record will have to be certified and then the court will look at certain things. The Attorney General must certify any juvenile records that you may have. This means that if you have gone to court for crimes as a juvenile before, the Attorney General must make sure the court has a copy of those records. If this certification has not happened yet, you can challenge the transfer. After certification, the court will decide whether or not to transfer you to adult status. The court should only transfer you if it is “in the interest of justice.”⁴¹ The court will consider the following factors in order to decide:

- (1) your age and social background (for example, where you grew up, your lifestyle, whether you were in foster care, your economic status, and whether you were the victim of physical or emotional abuse);

36. *U.S. v. Juvenile Male*, 844 F.Supp.2d 333, 338 n. 5 (E.D.N.Y. 2012) (citing 18 U.S.C. § 5032 (1998)).

37. *See* 18 U.S.C. § 5032 (2012); *see also* *United States v. Doe*, 74 F. Supp. 2d 310, 314 (S.D.N.Y. 1999).

38. *United States v. Rivera*, 912 F. Supp. 70, 73–74 (S.D.N.Y. 1995) (vacating criminal proceedings and forcing the government to start over when the government did not follow the steps required by the JJDPa).

39. 18 U.S.C. § 5032 (2012).

40. *See* 18 U.S.C. § 5032 (2012). For a list of factors that a judge must consider in deciding whether to approve a discretionary transfer, *see* *United States v. Ramirez*, 297 F.3d 185, 192 (3d Cir. 2002).

41. *United States v. Male Juvenile E.L.C.*, 396 F.3d 458, 461 (1st Cir. 2005) (requiring discretionary transfers to be in the interest of justice).

- (2) the nature of the crime you were accused of (e.g., whether the crime involved violence or whether someone was killed);
- (3) your prior juvenile record (e.g., whether you have been convicted of any crimes in the past and, if so, how many);
- (4) your present intellectual development and maturity (e.g., your current school year, whether you can read, whether you have any learning disabilities, whether you suffer from a psychological condition like schizophrenia or depression, and whether you can understand your actions and the effects they have on others);
- (5) your response to past treatments and the nature of those treatments (e.g., whether you have been treated in the past for similar problems and whether such treatment has worked); and
- (6) the availability of programs to treat any “behavioral problems” (whether there are treatment programs that can help you change).⁴²

The court will analyze these factors. Then, the court will weigh how likely your “rehabilitation” (changing your ways) is against your potential danger to the community (how much of a threat you are to the people around you).⁴³ The court will look at your entire situation. One single factor will probably not determine your chances.

(ii) Trying to Keep Your Juvenile Status at the Discretionary Transfer Hearing

Before your transfer hearing, you should tell your lawyer any information about your situation that is related to these six factors. Tell your lawyer as much about yourself and your history as you can. Let your lawyer know what you were thinking and why you behaved the way you did. You may also tell your lawyer that you really do not remember why you acted a certain way. Let him know if you have any problems with drugs or alcohol, if your life at home has been very difficult, or if you have problems learning in school.

It may be a good idea to get tested for a learning disability. If you have a history of poor performance in school, the judge might think you are unlikely to change. If you show that your poor performance is due to a learning disability, this may help you keep your juvenile status. If you keep your juvenile status, you can stay out of adult criminal court.

At the hearing, the judge can also consider any crimes you committed after the offense at issue but before the transfer hearing. So, you should do your best to avoid problems with the law during that time. It will help you during the hearing if you are on your best behavior. You should try to show signs that you can improve your behavior.

(iii) Challenging Your “Discretionary Transfer”

Generally, you can have your conviction vacated if there was no discretionary transfer hearing and you were wrongly treated as an adult. You should not have been treated as an adult if you were under eighteen years old at the time of the alleged crime and under twenty-one years old when the prosecution began.⁴⁴

If there was a discretionary transfer hearing, then it may be hard to challenge the transfer. One way to challenge the transfer is to convince a court that the government did not show everything it was supposed to. The government has to prove by a “preponderance of the evidence” that the reasons for transferring you to adult status outweighed the reasons for keeping your juvenile status.⁴⁵ There

42. *United States v. Doe*, 113 F. Supp. 2d 604, 605 (S.D.N.Y. 2000) (describing the factors that a judge must consider in deciding whether to ask for a discretionary transfer).

43. *United States v. A.C.P.*, No. 04–159(PG), 2005 U.S. Dist. LEXIS 11306, at *6 (D.P.R. Apr. 28, 2005) (quoting *United States v. Male Juvenile E.L.C.*, 396 F.3d 458, 461 (1st Cir. 2005)) (“The purpose of the juvenile delinquency process is to ‘remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation.’ The court must balance these important interests against ‘the need to protect the public from violent and dangerous individuals.’”).

44. *United States v. Rivera*, 912 F. Supp. 70, 73–74 (S.D.N.Y. 1995) (vacating criminal proceedings and forcing the government to start over when the government did not follow the steps required by the JJDPFA).

45. *Rosado v. Corr.*, 109 F.3d 62, 63 (1st Cir. 1997) (adopting a preponderance of evidence standard for

is a statutory presumption in favor of treatment as a juvenile (meaning the court will begin the process assuming you will be tried as a juvenile).⁴⁶

Although you must convince the judge that your rehabilitation is “likely,”⁴⁷ the government must still make its case. This means that the government must show that you are a bad candidate for rehabilitation. They may do this by showing, for example, that you are not likely to change even after help. The government may use this to argue that you should be charged as an adult because the rehabilitation services you need are not available to juveniles. The government must demonstrate “that it has investigated various options but it is still unable to find a suitable and available program” for your behavior problem.⁴⁸ This means that the government must have tried many times to find a program but could not find one that was good for you. If the government did not show this in your transfer hearing, you can appeal the transfer.

Courts do not usually overturn transfer decisions. Higher courts usually trust the lower courts’ decisions, and will only overturn decisions where there was an “abuse of discretion,” meaning the decision was completely unreasonable and obviously wrong. Because this is a very difficult standard to meet, higher courts generally do not overturn lower court decisions.

(d) Making Sure You Get JJDPAs if You Are Eligible

In the federal system, if you committed a crime before your eighteenth birthday and you are under twenty-one years old, you are a juvenile. Once you turn twenty-one, you are not a juvenile and the JJDPAs do not protect you.

If you are currently older than eighteen and you are accused of committing a crime sometime after your eighteenth birthday, then you are not a juvenile. The JJDPAs do not apply to you. However, if you are between eighteen and twenty-one years old and are being charged for a crime you did when you were younger than eighteen years old, then you are a juvenile for the purposes of the JJDPAs.

After your twenty-first birthday, the JJDPAs will no longer apply to you, even if the crime you allegedly committed happened before your eighteenth birthday.⁴⁹ For this reason, prosecutors may

transfer to adult status in agreement with the 2d, 6th, and 11th circuits); *United States v. Doe*, 113 F. Supp. 2d, 604, 605 (S.D.N.Y. 2000) (“Juvenile adjudication is presumed appropriate unless the government establishes by a preponderance of the evidence that prosecution as an adult is warranted.”); Preponderance of the evidence here means that the government’s reasons for transferring you to adult status must be more likely true and convincing than not true. In other words, more than 50% of their evidence must support their case. This standard is lower than standards of evidence used in other contexts, including “clear and convincing” evidence and “beyond a reasonable doubt.”

46. *United States v. A.F.F.*, 144 F. Supp. 2d 797, 801 (E.D. Mich. 2001) (“[t]here is a statutory presumption in favor of treating the offender as a juvenile”). A court should deny a motion to transfer “where, all things considered, the juvenile has a realistic chance of rehabilitative potential in available treatment facilities during the period of his minority.” However, a “realistic chance” involves more than a futile or empty gesture toward rehabilitation. *United States v. E.K.*, 471 F. Supp. 924, 932 (D. Ore. 1979).

47. *United States v. Ramirez*, 297 F.3d 185, 193, (2d Cir. 2002) (determining that when a crime is especially serious, this may be given greater weight by the court than the other transfer factors); *United States v. L.M.*, 425 F. Supp. 2d 948, 954 (N.D. Iowa 2006) (recognizing that under the JJDPAs, a court may consider in transfer proceedings the juvenile’s background, intellectual development, and emotional maturity as they relate to the possibility of rehabilitation).

48. *United States v. Nelson*, 68 F.3d 583, 591 (2d Cir. 1995); *see also United States v. Doe*, 113 F. Supp. 2d 604, 609 (S.D.N.Y. 2000) (stating that the government must do more than “merely assert the unavailability of an appropriate juvenile rehabilitation program . . . to carry its burden of persuading the court that no such programs exist.”).

49. *United States v. Wright*, 540 F.3d 833, 839 (8th Cir. 2008) (stating that a defendant accused of committing a crime before his 18th birthday may not claim the protections of the JJDPAs if criminal proceedings begin after the defendant reaches the age of 21); *United States v. Ramirez*, 297 F.3d 185, 191 (2d Cir. 2002) (observing that “courts have uniformly concluded that the applicability of the JJDPAs is determined by the defendant’s age at the time of filing the [charges for crimes of juvenile delinquency]”); *United States v. Araiza-Valdez*, 713 F.2d 430, 432–33 (9th Cir. 1980) (finding that filing the complaint is not sufficient to begin

try to delay your trial until after your twenty-first birthday.⁵⁰ The JJDPa does not always require that prosecution of acts of juvenile delinquency must be brought before your twenty-first birthday.⁵¹ In other words, if you are charged after your twenty-first birthday, you do not have an absolute right to the procedural protections of the JJDPa.⁵² The judge might decide to try you as an adult if the delay is your fault—for example, if you skipped bail or ran away.⁵³

You may be able to challenge this delay. Some courts may consider the delay to be a violation of your due process rights. To bring this challenge, you can show that the delay was due to “unjustifiable government conduct” or to “illegitimate prosecutorial motives” (when the prosecutor illegally wants to make things more difficult for you).⁵⁴ However, it is hard to prove this type of behavior on the part of the prosecutor, called “prosecutorial misconduct.” Sometimes ongoing investigations delay prosecutions, and courts will usually accept this as a reason for bringing the case late.⁵⁵

To challenge delays on the basis of prosecutorial misconduct, you must prove that:

proceedings under the JJDPa); *United States v. Doe*, 631 F.2d 110, 112–13 (9th Cir. 1980) (allows treating defendant over 21 years old as a juvenile where both charges and indictment were filed before defendant’s 21st birthday); *United States v. Hoo*, 825 F.2d 667, 669–70 (2d Cir. 1987) (explaining that defendant who is alleged to have committed a crime before his 18th birthday may not invoke the protection of the JJDPa if criminal proceedings begin after the defendant reaches the age of 21); *In re Martin*, 788 F.2d 696, 697–98 (11th Cir. 1986) (date of the indictment, not the complaint, determines the start date of criminal proceedings for the purpose of calculating age and application of JJDPa).

50. *United States v. Smith*, 851 F.2d 706, 709–10 (4th Cir. 1988) (saying that once a defendant is proceeded against as a juvenile delinquent, he may still be tried as a juvenile at the age of 21 if there are delays caused by the government, even if the delays are not in bad faith); *United States v. Doe*, 631 F.2d 110, 113 (9th Cir. 1980) (saying that intentional government delay of bringing charges until suspect may be 21 years old is unconstitutional).

51. *United States v. Wong*, 40 F.3d 1347, 1367 (2d Cir. 1994); *In re Martin*, 788 F.2d 696, 697–98 (11th Cir. 1986); *United States v. Araiza-Valdez*, 713 F.2d 430, 432–33 (9th Cir. 1980); *United States v. Doe*, 631 F.2d 110, 112–13 (9th Cir. 1980).

52. *United States v. Ramirez*, 297 F.3d 185, 192 (2d Cir. 2002) (explaining that the JJDPa doesn’t apply to persons indicted after they turned 21); *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987) (defendant charged two weeks after 21st birthday was not entitled to protection of JJDPa for offenses committed prior to 18th birthday, even though delay was through no fault of his own); *United States v. Wai Ho Tsang*, 632 F. Supp. 1336, 1339 (S.D.N.Y. 1986) (no guarantee of JJDPa treatment and no automatic presumption against delays resulting in changed status).

53. *United States v. Araiza-Valdez*, 713 F.2d 430, 432–33 (9th Cir. 1980) (explaining that through voluntary actions and ignoring the proceedings, the defendant had “outgrown” his status under JJDPa).

54. *See United States v. Scala*, 388 F.Supp.2d 396, 399 (S.D.N.Y. 2005) (stating that in order for due process concerns to exist, there must have been (1) substantial prejudice to the defendant, and (2) delay was used intentionally as a tactical device); *United States v. Gross*, 165 F.Supp.2d 372, 377–378 (E.D.N.Y. 2001) (explaining that dismissal is proper in situations where allowing the trial to proceed would be so unfair as to violate “fundamental conceptions of justice”); *United States v. Wai Ho Tsang*, 632 F. Supp. 1336, 1339 (S.D.N.Y. 1986) (holding that delay could violate the Due Process Clause if delay was due to “unjustifiable Government conduct” or illegitimate prosecutorial motives); *see also United States v. Davilla*, 911 F. Supp. 127, 130 (S.D.N.Y. 1996) (stating that plaintiff could not simply allege improper delay, but must make some affirmative showing of an improper prosecutorial motive in the delay).

55. *See, e.g., United States v. Persico*, 2012 U.S. Dist. LEXIS 67881 at *23-25 (E.D.N.Y. 2012) (no violation of due process where defendant fails to meet “heavy burden” of proving improper motive for the delay); *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987) (due process clause does not require that decisions to prosecute be subjected to pre-indictment judicial inquiry simply because the timing of the decision affects the availability of juvenile procedures without showing of improper prosecutorial motive); *Lovasco v. United States*, 431 U.S. 783, 791, 97 S. Ct. 2044, 2049 (1977) (affirming prosecutorial discretion in timing the indictment). *But see United States v. DeCologero*, 530 F.3d 36, 78 (1st Cir. 2008) (citing *United States v. Soto-Beniquez*, 356 F.3d 1, 25 (1st Cir. 2003) (acknowledging that generally the statute of limitations provides the primary protection of a defendant’s due process rights in the context of delay)).

- (1) The prosecutor delayed bringing your case on purpose. He did this to gain an unfair advantage or to serve an unlawful purpose;⁵⁶
- (2) Your case was hurt or “prejudiced” by this delay;⁵⁷ and
- (3) The delay was the prosecutor’s fault. The prosecutor cannot show that the delay was due to your actions or the actions of your attorney.⁵⁸

If you are under eighteen and tried as an adult, you are still protected by the JJDP A until you turn eighteen. When you turn eighteen, the JJDP A protections no longer apply to you. For example, once you turn eighteen, you can be held in a cell with other adults.

If you are under the age of majority and you are not transferred to adult status, you can only be convicted of juvenile delinquency. You cannot be convicted of any other crime. That means that the JJDP A protections will extend to you until you are twenty-one years old. This means that if you are prosecuted as a juvenile, you will still be separated from the adult prisoners⁵⁹ until your twenty-first birthday. Even if you turn twenty-one during the prosecution of your case, you are still protected by the JJDP A.⁶⁰

C. Procedure in New York State⁶¹

1. Who is considered a juvenile in New York State?

The rules in New York State courts are not as clear as federal court rules. New York criminal law has three different groups: (1) “adults,” (2) “juveniles,” and (3) “juvenile offenders.” A “juvenile” is not the same as a “juvenile offender.”

If you were sixteen years old or older when you committed a crime, then you are considered an adult. New York State will charge you with crimes and punish you as an adult in adult court. If you were fifteen years old or younger when the crime happened, you will be tried as a juvenile in Family Court as long as you are not a juvenile offender. This is true even if you are now sixteen or older. Your age at the time the crime was committed is the one that determines how you will be tried.

You are considered a juvenile offender, or “JO,” if you committed a “serious” crime when you were thirteen, fourteen, or fifteen and you will be prosecuted in adult court. More specifically, you will be prosecuted in adult court as a JO if you are charged with second degree murder and were at least thirteen years old when the alleged crime took place. You will also be prosecuted as a JO if you were fourteen or fifteen years old when the alleged crime took place and you are charged with any of these crimes:

56. See *United States v. Scala*, 388 F.Supp.2d 396, 399 (S.D.N.Y. 2005); *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987).

57. See *United States v. Marion*, 404 U.S. 307, 324, 92 S. Ct. 455, 465, 30 L. Ed. 2d 468, 481 (1971) (holding that the Due Process Clause requires the dismissal of an indictment because of pre-indictment delay in this case only when the delay causes “substantial prejudice to appellees’ rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”). *But see Lovasco v. United States*, 431 U.S. 783, 789, 97 S. Ct. 2044, 2048–2049, 52 L. Ed. 2d 752 (1977) (holding that a good faith investigative delay in prosecution, even if it prejudices the defendant, does not necessarily violate due process rights); *United States v. DeCologero*, 530 F.3d 36, 78 (1st Cir. 2008) (holding that “substantial prejudice” requires more than mere inconvenience to the defendant and must involve a demonstration of actual prejudice, where the unavailability of witnesses or evidence may not be sufficient).

58. See *United States v. Doe*, 49 F.3d 859, 866 (2d Cir. 1995) (excusing the government’s delay because of the defendant’s own lies about his age and other bad conduct); *United States v. Chambers*, 944 F.2d 1253, 1260 (6th Cir. 1991), *superseded by statute on other grounds*, (excusing the delay because the defense was at fault for failing to raise the issue of juvenile status).

59. If you are either younger than 18 or were treated as a juvenile and are younger than 21, and you have not been separated from the adult prisoners, you can bring a § 1983 motion in court to enforce your rights. For more information, see Part D of this Chapter.

60. *United States v. Ramirez*, 297 F.3d 185, 191 (2d Cir. 2002); *United States v. Leon H.*, 365 F.3d 750, 753 (9th Cir. 2004) (citing *United States v. Doe*, 631 F.2d 110, 112–113 (9th Cir. 1980)).

61. For a history of the development of the New York State system, see Michael A. Corriero, *Juvenile Sentencing: The New York Youth Part as a Model*, 11 Fed. Sent. R. 278 (1999).

- (1) Second degree murder,
- (2) First degree kidnapping,
- (3) First or second degree arson,
- (4) First degree assault,
- (5) First degree manslaughter,
- (6) First degree rape,
- (7) First degree criminal sexual act,
- (8) First degree aggravated sexual abuse,
- (9) First or second degree burglary,
- (10) First or second degree robbery,
- (11) Attempted second degree murder,
- (12) Attempted first degree kidnapping, or
- (13) Possession of a firearm on school property.

In addition, you will be prosecuted in adult court as a JO if you were thirteen, fourteen, or fifteen years old when the crime happened and you are charged with a “sexually motivated felony.” That means you committed the offense for your own “direct sexual gratification.”⁶² The State may charge you as a JO in adult court with a sexually motivated felony if you committed any of these crimes for your personal sexual pleasure:

- (1) First or second degree murder;
- (2) Aggravated murder;
- (3) First or second degree manslaughter;
- (4) First degree assault;
- (5) First or second degree gang assault;
- (6) First degree stalking;
- (7) First or second degree strangulation;
- (8) First or second degree kidnapping;
- (9) First, second, or third degree burglary;
- (10) First or second degree arson;
- (11) First, second, or third degree robbery;
- (12) First or second degree promoting prostitution;
- (13) Compelling prostitution;
- (14) First degree disseminating indecent material to minors;
- (15) Use of a child in a sexual performance;
- (16) Promoting an obscene sexual performance by a child;
- (17) Promoting a sexual performance by a child;
- (18) Felony attempt of any of these offenses;
- (19) Conspiracy to commit any of these offenses.

If you were sixteen or older when the crime took place, then you will be treated as an adult and the rest of this Section will not apply to you. But if you were younger than sixteen when the crime happened, you need to figure out whether you are a juvenile or a JO. If your trial was in Family Court, you were tried as a juvenile. If your trial was in any other court, such as a criminal court, you were tried as a JO. If you are being detained and will be treated as a JO, there are ways for your case to be transferred from adult court to Family Court. You should talk to your defense attorney about requesting this “removal.”⁶³

62. In New York, a person commits a sexual motivated felony when he “commits a specified offense for the purpose, in whole or substantial part, of his or her own direct sexual gratification.” N.Y. Penal Law §130.91(1) (McKinney 2011).

63. N.Y. Crim. Proc. Law § 210.43 (McKinney 2011); N.Y. Crim. Proc. Law § 180.75 (McKinney 2011). *See* People v. Roe, 74 N.Y.2d 20, 28, 544 N.Y.S.2d 297, 301, 542 N.E.2d 610, 614 (N.Y. 1989) (acknowledging that if a juvenile tried as an adult is convicted of only a lesser offense for which he is not criminally responsible by reason of infancy, that conviction is vacated and replaced by a juvenile delinquency fact determination and the matter removed to Family Court).

If you are being treated as a juvenile, then you are being treated under the delinquency procedures. These can be more favorable to you than adult criminal procedures. The rest of this Section will not apply to you. If you are being treated as a JO, then the government must follow some rules.

The rest of this Section explains New York's rules that cover procedures for JOs. If you think that the government did not follow any of these rules in your case, you should consult your lawyer. You may have a reason to appeal.

2. Being Tried as a Juvenile Offender (JO)

(a) Transferring to Family Court

There are several advantages to transferring your case from criminal court to Family Court. If you are transferred to Family Court, you will probably have better facilities available to you while you are detained and, if you are convicted, a wider range of sentences the judge can apply to you. Also, you will not have a criminal conviction on your permanent record. Family Court records are automatically sealed if you win your case. If you lose your case, then you will have to file an application to obtain a court order to have the court records sealed.

If you are being treated as a JO, there are three ways to have your case transferred to Family Court: (1) the district attorney asks for your case to be transferred, (2) you make a motion to transfer your case, or (3) the court believes that there is "reasonable cause" that you do not fit in the JO category.

The district attorney can always ask that your case be transferred to family court if doing so would be in the interests of justice.⁶⁴ You should talk to your lawyer to see if the prosecutor in your case is willing to do this for you.

If you did not waive your felony hearing and the hearing has not yet started, you can also make a motion to transfer your case to Family Court in the interests of justice.⁶⁵ Talk to your lawyer if you do not know whether you waived your hearing or if it has started.

After receiving your motion, the court will look at what you are charged with and will examine:

- (1) The seriousness and circumstances of the offense;
- (2) How much harm the crime caused;
- (3) The evidence of guilt against you, even if it will not be admitted in trial;
- (4) Your history, character, and condition;
- (5) The sentence the court can impose on you for the offense;
- (6) Whether removing your case to Family Court will hurt the safety or welfare of the community;
- (7) Whether removing your case to Family Court will hurt the public's trust in the criminal justice system;
- (8) The way the victim feels about removing your case to Family Court; and
- (9) Any other relevant fact that might mean that convicting you in criminal court would serve no useful purpose.

You must convince the court that you are open to rehabilitation and are not a threat to the community. Talk to your lawyer about how to best convince them.

It might be more difficult to have your case transferred to Family Court if you were charged with a "serious offense." If you are charged with second degree murder, first degree rape, a first degree criminal sexual act, or an armed felony, you can argue that you should be transferred to Family Court because it is in the interests of justice. However, the district attorney must consent, and you also have to convince the court that one of the following three reasons applies to your case:

- (1) There are "mitigating circumstances," which means that something unique to you or to your case suggests that you should be treated less harshly;

64. N.Y. Crim. Proc. Law § 180.75(4) (Matthew Bender 2012).

65. N.Y. Crim. Proc. Law § 180.75(5) (McKinney 2011); N.Y. Crim. Proc. Law § 210.43 (McKinney 2011).

- (2) Other people were involved in the crime and your participation was minor (although not so minor that you should not have been charged in the first place); or
- (3) There is not enough evidence or there is something wrong with the evidence being used to prove that you committed the crime.⁶⁶

If you waived your felony hearing or if your hearing has already started, then you cannot make a motion to remove your case to Family Court. However, if after the hearing the court finds that there is reasonable cause to believe that you are a “juvenile delinquent,” and not a JO, the court will remove your case to Family Court anyway.⁶⁷ A juvenile delinquent is a child between seven and sixteen years old who committed an act that would be criminal if an adult committed it but is not able to be charged because of their age.

If you are younger than sixteen and are charged with both JO and non-JO crimes (charges that would have been heard in Family Court without the JO charges), and you are only found guilty of non-JO crimes, then you have to be sentenced in Family Court. This is true even if your case was heard in criminal court.⁶⁸ If this happens and you are in detention, the Family Court has ten days to make its disposition unless you agree to give the court more time.⁶⁹

You also will be sentenced in Family Court if you reach a plea agreement on a non-JO offense if you were in County Court, not Supreme Court, before being removed.⁷⁰ If you were sentenced for a non-JO crime in criminal court, you can appeal your sentence and have it vacated.

After your case is in Family Court, problems with juvenile delinquency petitions may influence your disposition and punishment.⁷¹ However, New York courts may not allow you to move back into adult criminal court.⁷² Nevertheless, if you are tried in adult court, you may still be able to get yourself declared a “youthful offender” even after entering a plea or after a jury finds you guilty (see (g) below).

(b) Sentencing for JOs

Under New York’s Juvenile Offender Law, if you have been convicted of a JO crime, then you have a criminal record and can receive a range of sentences.⁷³ The sentence that you receive depends on how your crime is classified. For a Class A Felony of murder in the first degree, the maximum sentence is life imprisonment.⁷⁴ For other Class A Felonies of arson or kidnapping in the first degree, the

66. N.Y. Crim. Proc. Law § 180.75(4) (McKinney 2012).

67. N.Y. Crim. Proc. Law § 180.75(3)(b) (McKinney 2011).

68. *See, e.g., In re Williams*, 120 Misc. 2d 257, 258, 465 N.Y.S.2d 949, 950 (Fam. Ct. Onondaga County 1983) (removing a case to Family Court).

69. N.Y. Fam. Ct. Act § 350.1 (McKinney 2008 & Supp. 2011). *See, e.g., In re Julu LL*, 217 A.D.2d 749, 751, 629 N.Y.S.2d 507, 508 (3d Dept. 1995) (dismissing proceeding for failing to hold a dispositional hearing within 10 days).

70. *See People v. Statton*, 156 Misc. 2d 778, 781, 594 N.Y.S.2d 580, 582 (Nassau Cnty. Ct. 1992) (“The removal to Family Court is mandated after a juvenile pleads to a crime for which he is not criminally responsible”).

71. *In re Michael M.*, 3 N.Y.3d 441, 448, 821 N.E.2d 537, 542, 788 N.Y.S.2d 299, 304 (2004) (observing that the N.Y. Court of Appeals has “consistently viewed petitions failing to satisfy Family Court Act § 311.2(3) as exhibiting a nonwaivable jurisdictional defect”). A jurisdictional defect means that some element is missing and the court does not have the power to rule on your case.

72. *See Rodriguez v. Myerson*, 69 A.D.2d 162, 170–71, 418 N.Y.S.2d 936, 941 (App. Div. 2d Dep’t. 1979) (finding that a criminal indictment by a grand jury will not justify removal back to criminal court); *People v. Gregory C.*, 158 Misc. 2d 872, 602 N.Y.S.2d 492 (Sup. Ct. Erie County 1993) (removing a case to Family Court after a grand jury indictment).

73. N.Y. Penal Law §§ 60.10, 70.05 (McKinney 2009).

74. N.Y. Penal Law § 70.05(2)(a) (McKinney 2009).

sentence is twelve to fifteen years.⁷⁵ For a Class B Felony the longest sentence is ten years, for a Class C Felony the longest is seven years, and for a Class D Felony the longest is four years.⁷⁶

If you were convicted as a JO and received a sentence longer than those listed, you may be able appeal your sentence. You should tell your lawyer that you think your sentence is too harsh.

(c) Youthful Offender Treatment

(i) Qualifying as a Youthful Offender

If you were tried as a JO, the 1971 Youthful Offender Law says that you may be eligible for “youthful offender” status. A youthful offender is the term for a sixteen to eighteen year old “adult” in adult court.⁷⁷ As a youthful offender (“YO”), you may be able to receive special protections. For example, protections may lessen the length of your sentence or seal your criminal record.⁷⁸

To qualify for YO status, you must: (1) have been under nineteen years old when the alleged crime was committed, (2) meet the eligibility requirements, (3) pose no threat to the community; *and* (4) show commitment to rehabilitation. The seriousness of the crime is the most important thing that the court will look at.⁷⁹

If you meet the requirements, you can qualify as a YO unless one of the following conditions applies to your case. First, you will not be considered a YO if your conviction was for one of the following: (i) a Class A-I or Class A-II felony, (ii) an armed felony involving violence, including possessing or displaying a firearm, or (iii) rape in the first degree, criminal sexual act in the first degree, or aggravated sexual abuse. Second, you cannot be considered a YO if you have been convicted of a felony in the past. Finally, you will not be considered a YO in your current case if the court decides that you were a YO for an earlier felony conviction. Also, you will not be considered a YO if the court determines that you were a juvenile delinquent who was found guilty of a designated felony act on or after September 1, 1978, as defined in the Family Court Act.⁸⁰ If none of the above conditions apply in your case, then you may be eligible for YO status.

There is a way to become eligible for YO treatment even if you have been convicted of an armed felony or one of the other felonies listed above.⁸¹ Your felony must involve mitigating circumstances. Mitigating circumstances are special factors that provide reasons for your conduct and make your conduct more understandable,⁸² or show that your role was small (for example, if you were a look-out or follower instead of a main actor in a crime).⁸³

75. N.Y. Penal Law § 70.05(2)(b) (McKinney 2009).

76. N.Y. Penal Law § 70.05(2)(c)-(e) (McKinney 2009).

77. N.Y. Crim. Proc. Law § 720.10 (McKinney 2011); *see also* People v. Drayton, 39 N.Y.2d 580, 584, 350 N.E.2d 377, 379, 385 N.Y.S.2d 1, 3 (1976) (“The youthful offender provisions of the Criminal Procedure Law emanate from a legislative desire not to stigmatize youths between the ages of 16 and 19 with criminal records triggered by hasty or thoughtless acts which, although crimes, may not have been the serious deeds of hardened criminals.”).

78. N.Y. Crim. Proc. Law § 720.20 (McKinney 2011); *see also* People v. Drayton, 39 N.Y.2d 580, 584, 350 N.E.2d 377, 379, 385 N.Y.S.2d 1, 3 (1976).

79. People v. Drayton, 39 N.Y.2d 580, 584, 350 N.E.2d 377, 379, 385 N.Y.S.2d 1, 3 (1976).

80. N.Y. Crim. Proc. Law § 720.10(2) (McKinney 2011).

81. Essentially, this includes rape in the first degree, criminal sexual acts in the first degree, aggravated sexual abuse or any armed felony.

82. *See, e.g.*, People v. Cruickshank, 105 A.D.2d 325, 334, 484 N.Y.S.2d 328, 337 (App. Div. 3d Dep’t. 1985), *aff’d sub. nom.* People v. Dawn Maria C., 67 N.Y.2d 625, 499 N.Y.S.2d 663, 490 N.E.2d 530 (1986) (giving youthful offender treatment to a defendant who had shot her father because of the mitigating circumstance that she had been abused); People v. Victor J., 187 Misc. 2d 749, 760, 720 N.Y.S.2d 304, 312 (Sup. Ct. New York County 2000) (finding that a defendant, who had been sexually abused as a child, had a mitigating circumstance in his conviction for sexual abuse *See also* People v. Shrubsall, 167 A.D.2d 929, 931, 562 N.Y.S.2d 290, 292 (4th Dept. 1990) (granting defendant a new sentence of a shorter length after the court determined parental abuse of the defendant was the driving force behind the crime the defendant committed).

83. *See, e.g.*, People v Marquis A., 2016 N.Y. App. Div. LEXIS 6950, 11 (lack of injury to others and willingness to cooperate with the police warranted treating defendant as a youthful offender, despite his

Your attorney will usually speak with the judge and/or the prosecutor to decide on your YO status. You do not receive YO status until after you are prosecuted and found guilty in the adult system.⁸⁴ Once found guilty, the sentencing court must consider whether to sentence you as a youthful offender.⁸⁵ The court must consider this regardless of whether or not you request to be considered a youthful offender.

If the sentencing court does not consider whether you should receive youthful offender treatment, you might be able to appeal the decision to deny you youthful offender treatment.⁸⁶ This is true even if you did not request that the court consider you a youthful offender and even if you waived your right to appeal generally as part of your plea agreement.⁸⁷

Even if your attorney did not raise your eligible status at sentencing, courts can still determine that you should have been granted YO status. Therefore, the court may change your sentence later.⁸⁸ For example, one court changed a sentence after both the court and defense lawyer made a mistake and did not realize that the defendant was eligible for YO status until after sentencing.⁸⁹

(ii) Consequences of Youthful Offender Treatment

First, if you are declared a youthful offender, your conviction in adult court is replaced by a “youthful offender finding.” As a result, no conviction for that offense should appear on your criminal record.⁹⁰

Second, there are different penalties for YOs than for people convicted in adult court. For example, YOs who have committed felonies are sentenced like adults convicted of an E-class felony, which is the lowest form of felony, with one exception: courts cannot impose a sentence of conditional discharge if the YO is convicted of a felony relating to the possession, sale, or use of controlled substances.⁹¹ Under E-class felonies, sentencing terms are usually shorter and probation is an

conviction of armed robbery in the first degree); *People v. John “B.”*, 93 A.D.2d 957, 957, 463 N.Y.S.2d 275, 276 (App. Div. 3d Dep’t. 1983) (finding mitigating circumstances included the facts that the defendant was not a ringleader of the crime, defendant did not carry a gun, and defendant was pressured by older participants to take part in the crime). *People v. Thomas R.O.*, 136 A.D.3d 1400, 1402, 25 N.Y.S.3d 766, 768 (App. Div. 4d Dep’t. 2016) (finding mental illness to be a mitigating circumstance for purposes of youthful offender determination).

84. N.Y. Crim. Proc. Law § 720.20(1)(McKinney 2011).

85. *People v. Rudolph*, 21 N.Y.3d 497, 974 N.Y.S.2d 885, 997 N.E.2d 457 (2013).

86. *People v. Rudolph*, 21 N.Y.3d 497, 974 N.Y.S.2d 885, 997 N.E.2d 457 (2013).

87. *People v. Pacherille*, 25 N.Y.3d 1021, 32 N.E.3d 393, 10 N.Y.S.3d 178 (2015).

88. *See, e.g., People v. Griffin*, 17 A.D.3d 927, 927, 793 N.Y.S.2d 649, 650 (3d Dept. 2005); *People v. Harrington*, 281 A.D.2d 748, 748–49, 721 N.Y.S.2d. 709, 710 (3d Dept. 2001) (holding that, though a defendant’s waiver of the right to appeal normally eliminates his challenge to a denied request for YO treatment, defendant’s challenge survives when the Court fails to consider YO treatment at all because YO consideration is mandated by statute).

89. *People v. Torres*, 238 A.D.2d 933, 661 N.Y.S.2d 153 (4th Dept. 1997).

90. N.Y. Crim. Proc. Law § 720.35 (McKinney 2011); *see, e.g., People v. Cruz*, 38 A.D.3d 740, 740, 833 N.Y.S.2d 527, 528 (2d Dept. 2007) (holding that “[o]nce the defendant was adjudicated a youthful offender, his conviction was deemed vacated and replaced by a youthful offender finding, and thus, it may not later be used as a prior felony conviction for a sex crime”). There are a number of other benefits to having a youthful offender finding instead of a criminal conviction. *See, e.g., People v. Gray*, 84 N.Y.2d 709, 712, 646 N.E.2d 444, 445, 622 N.Y.S.2d 223, 224 (1995) (noting that a YO finding cannot be used to impeach a defendant’s credibility on cross-examination because a YO finding is not considered a criminal conviction); *State Farm Fire and Cas. Co. v. Bongiorno*, 237 A.D.2d 31, 35–36, 667 N.Y.S.2d 378, 381 (2d Dept. 1997) (holding that a YO finding can be kept confidential from an insurance company forced to indemnify the YO in a civil suit); *Nielson v. United Parcel Serv. Inc.*, 210 A.D.2d 641, 642, 619 N.Y.S.2d 844, 845 (3d Dept. 1994) (acknowledging a probation department’s finding that it was not improper for the plaintiff, who claimed he had been denied a promotion based on his YO status, to deny having a criminal record on his application). However, there are some circumstances where your YO finding will not remain confidential. *See, e.g., N.Y. Crim. Proc. Law § 720.35* (McKinney 2011); *In re Dillon*, 171 Misc. 2d 665, 671, 655 N.Y.S.2d 322, 326 (Nassau Cnty. 1997) (holding that YO records could be unsealed where prosecutor demonstrated compelling need for use of records in criminal prosecution of YO’s attorney).

91. N.Y. Penal Law § 60.02 (McKinney 2016).

available option. The highest court in New York has found that once you are considered a YO, that determination cannot be taken away from you without your consent. The court has also found that if the sentence you received in adult court is longer than what you would have received as a YO, the sentence must be overturned.⁹²

Third, YOs may have to pay money to a victim for what the victim lost in the crime (“restitution”) and other fees required under the Crime Victim Assistance Act. One example of a required fee is a DNA databank fee.⁹³

Fourth, as a YO, if you are convicted of a second felony in the future, you will not be considered a “predicate felon,” which is a felon who has a prior felony conviction and thus receives much harsher sentences.⁹⁴ However, if you are convicted of a felony in another state that does not grant YO status, or another state court had the option to grant you YO status but decided not to, your prior conviction may be used for future sentencing purposes.⁹⁵ This is important if you have been convicted in other places. A court can use those convictions to find out if you are a repeat felony offender.

(iii) Alternatives to Incarceration Programs

Instead of deciding your YO status before sentencing, a court can issue a deferred sentence. As part of a deferred sentence, the court will order you to participate in an Alternative To Incarceration (“ATI”) program for a period of time. If you complete the program successfully, then you will be granted YO status.

A court can order you to participate in an ATI program in any criminal sentencing in New York.⁹⁶ However, an ATI order is especially likely if you are seeking YO status. Because the determination must be made before sentencing, participation in the ATI is not officially part of your sentence. Instead, your sentence is finalized after a progress report from the ATI program.

D. Prison Conditions

There are special rules when the government puts juveniles in prison. The government has to keep you away from adults even if you are in an adult prison. If you are disabled, the government has to give you education. This section explains how these rules work. This section explains federal law in Part C(1) and explains New York State law in Part C(2).

1. Federal Laws About Conditions of Incarceration

(a) Separation from Adults Required by the JJDP

First, the JJDP keeps juveniles in a federal prison away from adults.⁹⁷ This law applies everywhere in the federal system. It also applies to any person treated as a juvenile in a state

92. *People v. Calderon*, 79 N.Y.2d 61, 65–66, 588 N.E.2d 61, 63–64, 580 N.Y.S.2d 163, 165–66 (1992) (finding that where a youthful offender finding has been properly made, the court is “statutorily required to sentence defendant pursuant to the mandates of the youthful offender law” and has no authority to revoke its finding that defendant is youthful offender).

93. N.Y. Penal Law § 60.35 (McKinney 2016).

94. *People v. Elliott*, 99 Misc.2d 794, 795, 417 N.Y.S.2d 191, 192 (1979) (finding that “a youthful offender adjudication cannot be used as the basis for a finding that a defendant is a predicate felon”).

95. *See People v. Coolbaugh*, 259 A.D.2d 781, 782, 687 N.Y.S.2d 737, 738 (3d Dept. 1999) (quoting *People v. Arroyo*, 179 A.D.2d 393, 394, 577 N.Y.S.2d 843, 844 (1st Dept. 1992)) (holding that “[w]here youthful offender treatment is not accorded in a foreign jurisdiction, the fact that the defendant would have been eligible for youthful offender treatment had the offense been committed in New York does not preclude the use of such conviction in New York as a predicate felon for enhanced sentencing”); *People v. Meckwood*, 86 A.D.3d 865, 866, 927 N.Y.S.2d 729, 730–731 (3d Dept. 2011) (holding that defendant’s prior felony conviction in another state qualified defendant as a predicate felon even though that felony would have made him a youthful offender in New York State).

96. *See, e.g., United States v. Flowers*, 983 F. Supp. 159, 170, 173 (E.D.N.Y. 1997) (applying Alternative To Incarceration for drug trafficking conviction).

97. 42 U.S.C. § 5633(a)(13) (2012).

system. The JJDDPA protects you if the state is treating you as a juvenile and not as an adult.⁹⁸ But the JJDDPA does not apply to juveniles who are treated as adults within a state system.⁹⁹

The JJDDPA says there has to be “sight and sound” separation between younger prisoners and adult prisoners in the federal system. That means prisoners who are eighteen years old or younger have to be kept away from those who are older than eighteen years old.¹⁰⁰ No sight contact means adult prisoners and juvenile prisoner should not be able to see each other. No sound contact means juveniles and adult prisoners should not be able to speak directly to one another in the prison.

The building you are in has to keep adult prisoners away from JOs in all secure areas. This includes admissions, sleeping quarters, and shower and toilet areas. Other areas might be included too. Contact that happens for a short time by accident does not always break the law. But that is only true when you are in a place that is not just for JOs and is nonresidential. That includes areas for hallways and dining, recreation, education, training for a job, health care, or entry areas. In an area of the prison that is only for juveniles, any contact between juveniles and adult prisoners breaks the law and you can report it.¹⁰¹

If you are not being kept away from adults, you could have a federal claim under the JJDDPA.¹⁰² You may also be able to file a Section 1983 claim of violation of your rights under either the Fourteenth Amendment or the Eighth Amendment to the Constitution.¹⁰³ You should talk to your lawyer about these options.

Although juveniles in adult prisons must be kept away from adult prisoners, this does not mean that prison officials can isolate you or keep you out of programs. If they do, that might be a violation of your civil rights. If you think you have been unfairly kept out of adult prison programs, you should speak with your lawyer.

(b) Juveniles with Disabilities

(i) Before Incarceration

If you have a disability, you may be eligible for some protections under the Individuals with Disabilities Education Act (IDEA).¹⁰⁴ The disability can be a physical, emotional, or learning disability.¹⁰⁵ Sometimes a court will consider disabilities when deciding if they will send your case to

98. These rules governing prison conditions are different from the rules discussed earlier in the Chapter, which discussed how the government must follow different rules depending on whether you were convicted under federal or state law. *See* Part B of this Chapter.

99. Bureau of Justice Assistance, Dept. of Justice, Publ’n. No. NCJ 182503, *Juveniles in Adult Prisons and Jails: A National Assessment 14* (2000), *available at* www.ncjrs.gov/pdffiles1/bja/182503.pdf (last visited Dec. 7, 2016).

100. 42 U.S.C. § 5633(a)(13) (2012); 28 C.F.R. § 31.303(d)(1)(i) (2016)

101. 28 C.F.R. § 31.303(d)(i) (2016).

102. *See* Horn by Parks v. Madison Cnty. Fiscal Court, 22 F.3d 653, 658 (6th Cir. 1994) (holding that a violation of the JJDDPA creates a § 1983 action for rights protected under the JJDDPA); James v. Jones, 148 F.R.D. 196, 199 (W.D. Ky. 1993) (holding that the JJDDPA extends enforceable federal rights to juveniles); Grenier v. Kennebec County, 748 F. Supp. 908, 913 (D. Me. 1990) (holding that a juvenile could use § 1983 to seek relief for alleged infringement of his rights under JJDDPA).

103. For a detailed description of a § 1983 claim, see *JLM*, Chapter 16, “Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief From Violations of Federal Law.” *See also* Doe v. Borough of Clifton Heights, 719 F. Supp. 382, 384 (E.D. Pa. 1989), *aff’d*, 902 F.2d 1558 (3d Cir. 1990) (requiring showing of deliberate indifference to establish an Eighth Amendment challenge); *see also* Baker v. Hamilton, 345 F. Supp. 345, 352 (W.D. Ky. 1972) (concluding that punitively treating juveniles as adults and not according them due process violates the Fourteenth Amendment).

104. 20 U.S.C. §§ 1400–1482 (2012).

105. 20 U.S.C. § 1401(26)(A) (2012). IDEA requires that the school develop an Individualized Education Plan (IEP) every year for children with disabilities to make sure that the child is receiving a free, appropriate public education. IDEA describes how an IEP is designed and who must be involved in creating it (parents, teachers, etc.). The IEP can include a range of services, from vocational training, transition services and psychological counseling to special tutoring which will assist the student in overcoming learning problems.

Family Court. If your parent or guardian asks, you can get tested for a disability under IDEA and your home school district has to pay for the test. You can use the information from the test to argue for being treated as a juvenile in court. Talk to your lawyer to find out how this is done, because different jurisdictions have different ways for asking for a test.

If you are evaluated and found to have a disability, it is important to let the court know. Some studies say that as many as seventy percent of incarcerated youth suffer from a disability. Some disabilities, unlike the need for a wheelchair or cane, are invisible. For example, learning or emotional disabilities often lead to problems with other people. Proper evaluation and treatment of these problems can make rehabilitation easier to achieve, and can also help make education and other programs more helpful.

If you have already been diagnosed with a disability but your previous Individualized Education Program (“IEP”) was not followed while you attended school, you should tell your lawyer. For instance, if you were diagnosed with a learning disability and your IEP required you to have a tutor to help you with your studies, but your school never gave you a tutor, the school system’s failure to follow the IEP could help you explain to the judge why you may have had trouble with rehabilitation programs before. If your lawyer can convince the judge that this is true, you may receive a lighter sentence.

(ii) Special Education While You are Incarcerated

The IDEA says the government has to give you free special education if you have a disability until you are twenty-one years old.¹⁰⁶ Anyone in a correctional facility who would have to get special education services outside of prison still has to get them in prison.¹⁰⁷ The IDEA applies to almost all the people who would get special education services outside prison.¹⁰⁸ However, there are three exceptions:

IDEA lists a number of disabilities that allow students to obtain special services. This list includes: mental retardation, hearing impairment, speech or language impairment, visual impairment, emotional disturbance, orthopedic impairment, and specific learning disabilities. A “specific learning disability” is defined as a “disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written,” and may show itself in an “imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” 20 U.S.C. § 1401(30)(A) (2012); 34 C.F.R. § 300.8(c)(10)(i) (2016). This may include conditions such as perceptual disabilities (disabilities in seeing, hearing, feeling, or in other ways sensing things), brain injury, minimal brain dysfunction, dyslexia and developmental aphasia, but does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of environmental, cultural, or economic disadvantage. 20 U.S.C. § 1401(30)(B)–(C) (2012); 34 C.F.R. § 300.8(c)(10)(i)–(ii) (2016).

For general information about IDEA rights during incarceration, see Special Education and the Juvenile Justice System, Juvenile Justice Bull. No. NCJ 179359 (Office Of Juvenile Justice & Delinquency Prevention, Dept. of Justice), (Jul. 2000), *available at* <http://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf> (last visited Dec. 7, 2016).

106. See Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2012). However, some courts are more willing than others to find that incarcerated juveniles have a constitutional right to education and treatment. *Compare* Santana v. Collazo, 714 F.2d 1172, 1176–77 (1st Cir. 1983) (holding that rehabilitative training is desirable but institutionalized juveniles have no constitutional right to such treatment); Morales v. Turman, 562 F.2d 993, 998 (5th Cir. 1977) (distinguishing between the commitment of the mentally ill and the confinement of juvenile offenders and rejecting the argument that juvenile offenders have a comparable constitutional right to treatment) *with* Nelson v. Heyne, 491 F.2d 352, 360 (7th Cir. 1974) (holding that incarcerated juveniles have a constitutional right to treatment which includes the right to individualized care); Alexander S. v. Boyd, 876 F. Supp. 773, 798, 98, Ed. Law. Rep. 72 (D.S.C. 1995) (recognizing the right of juveniles to minimally adequate training, including special education for incarnated juveniles).

107. This claim is somewhat complicated because various states have constitutions or statutes giving their residents a right to an education even if they are not disabled, but there is no federal right to a general education. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35, 93 S. Ct. 1278, 1297, 36 L. Ed. 2d 16, 44 (1973) (holding that education is not afforded explicit constitutional protection).

108. 20 U.S.C. § 1412(a)(1)(A) (2012); 34 C.F.R. § 300.102(a)(2) (2016).

- (1) In some states, the government does not have to provide public education to children who are between three and five years old or between eighteen and twenty-one years old. In those states, the prison is not required to provide special education services to incarcerated juveniles who are between three and five or between eighteen and twenty-one;¹⁰⁹
- (2) In some states, if you are ages eighteen to twenty-one and were not identified as disabled before going to prison or if you did not receive a personal education program at your old school, the prison does not have to provide you special education services;¹¹⁰ or
- (3) If a state gives early intervention services to a child with disabilities, then the state does not have to give free special education to that child.¹¹¹

Unless one of the exceptions above applies to you, you are entitled to a free appropriate public education (“FAPE”), even while you are incarcerated. You can request a review if your IEP is not being followed. If your IEP is not being followed or you are not getting FAPE, then you first must try to resolve your problem through administrative methods (contact the state Department of Education to find out more about administrative remedies) and, if that fails, through state court. You can sue in federal court only after administrative and state remedies have failed. The only reason your FAPE can be denied is for prison security. Students and parents also have the right to challenge any changes made to an IEP.

2. New York State Laws Regarding Conditions of Incarceration

Similar to the federal laws explained above, New York state laws keep juveniles separate from adults and provide for the education of juveniles in New York state prisons.

(a) Juveniles and Adults Must be Separated

The federal law JJDPA also applies to New York state prisons. The JJDPA requires that all states must have sight and sound separation between adults and juveniles in jails and prisons.¹¹²

However, New York law does not exactly follow the JJDPA. In New York, adulthood begins at age sixteen for the purposes of prosecution, and the JJDPA does not apply if you are a juvenile but were tried as an adult by the state. As a result, JJDPA sight and sound protections do not apply in New York if you were tried as an adult, even if you were only sixteen.¹¹³

If you were tried as a juvenile and are not being separated from the adults in your prison or lock-up, you can sue under Section 1983.¹¹⁴ If you bring a lawsuit, you must direct it against the state or local agency rather than the police or corrections officers.

There are some special protections for Juvenile Offenders (JOs) in New York. Remember, JOs are technically classified as different from juveniles. JOs are kept in juvenile facilities until they reach age 16.¹¹⁵ Under New York law, these separate facilities should have services more appropriate for juveniles than the services in adult prisons.¹¹⁶

109. 20 U.S.C. § 1412(a)(1)(B)(i) (2012); 34 C.F.R. § 300.102(a)(1) (2016).

110. 20 U.S.C. § 1412(a)(1)(B)(ii) (2012); 34 C.F.R. § 300.102(a)(2)(i) (2016).

111. 20 U.S.C. § 1412(a)(1)(C) (2012); 34 C.F.R. § 300.122(a)(4) (2016).

112. 28 C.F.R. § 31.303(d) (2016).

113. N.Y. Correct. Law § 500-b (Consol., Lexis Advance through 2016 released chapters 1-442) requires individuals aged 16–18 to be separated from those 19 and older in county correctional facilities. State regulation, N.Y. Comp. Codes R. & Regs. tit. 9, § 7013.4 requires separate housing for individuals in this age range.

114. For a detailed description of a § 1983 claim, see *JLM*, Chapter 16, “Using 42 U.S.C. 1983 and 28 U.S.C. 1331 to Obtain Relief From Violations of Federal Law.”

115. N.Y. Crim. Proc. Law § 510.15 (McKinney 2016). *See also* 83 N.Y. Jur. 2d § 42 (McKinney 2012) (“The Office of Children and Family Services (OCFS) must maintain secure facilities for the care and confinement of juvenile offenders The [OCFS] may apply to the sentencing court for permission to transfer youth between 16 and 18 years old to the Department of Correctional Services . . .”).

116. N.Y. Exec. Law § 508 (McKinney 2011).

(i) Rules for Transferring from a Juvenile Offender to Adult Facility

There are some circumstances where you can be transferred to adult Department of Corrections (“DOCS”) facilities if you are a juvenile offender between the ages of sixteen and twenty-one years old.¹¹⁷ First, you may be transferred if there is no substantial likelihood that you will benefit from the programs offered by juvenile offender facilities.¹¹⁸ Second, you may be transferred if it is unlikely that you will learn from the services offered in the juvenile system, change your behavior, or become better in the eyes of the court. There are rules called “transfer guidelines” that provide possible reasons that you may be transferred to an adult facility. For example, you may be transferred if you are a danger to yourself or others, if you refuse to participate in programs, if you are in possession of any contraband (things you are not allowed to have in prison), or if you violate parole.¹¹⁹

There are three rules that New York must follow in deciding whether to transfer you to a DOCS facility. First, if you are older than twenty-one, you must be transferred to a DOCS facility.

Second, if you are older than eighteen but younger than twenty-one, you can be transferred to a DOCS facility by the Office of Children and Family Services Commissioner (“OCFS”). OCFS is required to explain its reasons for transfer, and the director of the division must review these reasons and issue a “certification,” or authorization, to DOCS. However, if it is “necessary to ensure the health and safety of [other] individuals” in your facility and if you are a juvenile offender eighteen years of age or older, you can be transferred to DOCS facilities with only a verbal certification.¹²⁰ In this situation, OCFS is not required to provide a written certification, but it must submit written confirmation and reasons for the quicker transfer within one business day after the transfer occurs.¹²¹ You can ask for a copy of your transfer documents any time within seven days after you are transferred, and you have the right to appeal in writing within thirty days after you are transferred.¹²² The director of the division must issue a decision on your written appeal within ten days of receiving your appeal.¹²³ You can also ask a court to review these decisions through filing an Article 78 petition.¹²⁴

Third, sixteen and seventeen year-olds can be transferred to a DOCS facility when it is unlikely that the juvenile will benefit from the Division of Youth’s services.¹²⁵ If you are sixteen or seventeen, you can only be transferred to a DOCS facility after both the deputy director for residential services and the director of the division have reviewed the reasons given for the need for transfer, and the director has determined that you should be transferred.¹²⁶ The director must decide whether to transfer you within five business days after receiving the documents about your transfer, and you must be told within seven days of the decision.¹²⁷

The OCFS oversees all detention facilities for juveniles in New York State.¹²⁸ In New York City, the Department of Juvenile Justice runs juvenile pre-trial facilities.¹²⁹ You can use the OCFS and Department of Juvenile Justice websites (provided in the footnotes below) to find the addresses, visiting hours, and regulations of detention centers, as well as annual reports and other information.

117. N.Y. Comp. Codes R. & Regs. tit. 9, § 175-4.2.

118. N.Y. Comp. Codes R. & Regs. tit. 9, § 175-4.2.

119. N.Y. Comp. Codes R. & Regs. tit. 9, § 175-4.3.

120. N.Y. Comp. Codes R. & Regs. tit. 9, § 175-4.5.

121. N.Y. Comp. Codes R. & Regs. tit. 9, § 175-4.5.

122. N.Y. Comp. Codes R. & Regs. tit. 9, § 175-4.7.

123. N.Y. Comp. Codes R. & Regs. tit. 9, § 175-4.7.

124. See *JLM*, Chapter 22, for more information about Article 78 proceedings.

125. N.Y. Comp. Codes R. & Regs. tit. 9, § 175-4.2.

126. N.Y. Comp. Codes R. & Regs. tit. 9, § 175-4.6 (a)-(c).

129. N.Y. Comp. Codes R. & Regs. tit. 9, § 175-4.6 (c)-(e).

128. Information about the OCFS (for New York State) is available online at <http://www.ocfs.state.ny.us/main/>.

129. Information about the Department of Juvenile Justice for New York City is available online at <https://www1.nyc.gov/site/acs/jjustice/jjuvenile-justice.page>

(b) Your Right to an Education under New York State Law

Incarcerated juveniles in New York have rights to education in addition to those provided by IDEA under federal law. First, the New York Constitution guarantees all of its citizens an education.¹³⁰ This means that you have a right to an education until your twenty-first birthday, both in prison and pre-trial detention, until you earn a high school diploma or an equivalent degree (such as a GED).¹³¹ This applies whether or not you have a disability. Second, DOCS has a policy goal that all prisoners receive a high school diploma or its equivalent.¹³²

All incarcerated juveniles should be offered at least three hours of daily instruction, five days per week, by qualified teachers, in an environment that facilitates learning.¹³³

If you are not receiving the kind of education described above, you may request it.¹³⁴ In New York City, prisoners' rights to special education have been specifically upheld by the court.¹³⁵ If you request an evaluation for special education in New York, the evaluation must be made within ten school days following receipt of your request.¹³⁶ Recommendations for your education must be made within twenty days of receiving your request.¹³⁷ However, this only applies if you have not been evaluated within the last three years.¹³⁸ If you have been evaluated within this time period, that evaluation can be used instead of a new one.¹³⁹

E. Conclusion

If you are a juvenile, juvenile offender, or youthful offender, federal laws and New York state laws give you various rights and protections with respect to the legal process and the conditions of

130. N.Y. Const. art. XI, § 1. *See Mitchell C. v. Bd. of Ed. of City Sch. Dist. of City of N.Y.*, 67 A.D.2d 284, 288, 414 N.Y.S.2d 923 (1979) (“Where a State or subdivision thereof undertakes to provide free education for all its students, it must recognize an individual student’s legitimate entitlement to a public education as a property interest protected under the due process clause.”).

131. N.Y. Educ. Law § 3202 (Consol., Lexis Advance through 2016 released chapters 1-442) (“A person over five and under 21 years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition.”); *see also* N.Y. Comp. Codes R. & Regs. tit. 9, § 7070.2; *C. v. Bd. of Educ.*, 67 A.D.2d 284, 414 N.Y.S.2d 923 (App. Div. 1979).

132. State of N.Y., Department of Corrections and Community Supervision, Directive No. 4804, Academic Education Program Policies (2015), *available at* <http://www.doccs.ny.gov/Directives/4804.pdf> (last visited Mar. 19, 2017). In addition, prisoners can be sanctioned if they have not obtained a diploma or its equivalent and have reading or math skills below a 9.0 level. According to the directive, prisoners can be denied good behavior allowances under N.Y. Correct. Law § 803 (McKinney 2011).

133. The regulations in New York require: (1) instruction on the same days it is available in the local school district; (2) not less than three hours a day of schooling; and (3) that the instruction shall begin within eleven days of the district’s receipt of your request for educational services. N.Y. Comp. Codes R. & Regs. tit. 8, § 118.4; *see also* N.Y. Comp. Codes R. & Regs. tit. 9, § 7070.6.

134. N.Y. Comp. Codes R. & Regs. tit. 9, § 7070.4; N.Y. Comp. Codes R. & Regs. tit. 8, § 118. (“Within 10 days after admission ... youth shall be apprised ... of the availability of educational services. If the youth requests, the correctional facility shall submit a request for such educational services to the school district in which the facility is located, which request shall include, but need not be limited to, the following information: a) the youth’s name; b) the name and location of the facility; c) the last school grade completed by the youth as indicated by the youth; d) the anticipated duration of the incarceration; and e) the address of the last known residence of the youth at the time of the child’s commitment to custody.”).

135. 92 F. Supp. 2d 244, 245–49 (finding prisoners ages 16–21 without high school degrees were denied special education services in violation of IDEA and general education services in violation of New York law, and ordering DOCS to find a way to make sure that prisoners’ rights are respected and that they receive the education they deserve) (judgment limited, in part, where it was based on state law, excessively burdensome, violated the parental consent provision of the IDEA and where it makes little sense within the context of prison regulation, *see* 446 F.3d 335, 356).

136. N.Y. Comp. Codes R. & Regs. tit. 8, § 118.3(a).

137. N.Y. Comp. Codes R. & Regs. tit. 8, § 118.3(a).

138. N.Y. Comp. Codes R. & Regs. tit. 8, § 118.39(b).

139. N.Y. Comp. Codes R. & Regs. tit. 8, § 118.39(b).

your incarceration. To receive these protections, you must first make sure you fit the eligibility requirements described above. Then, speak with your lawyer about the next steps to take, including a possible appeal of your case or bringing a separate lawsuit if your rights have been violated.

APPENDIX A

GLOSSARY OF LEGAL TERMS¹⁴⁰

Appeal: When a person asks a higher court to review the decision made in his case by a lower court with the hope that the higher court will find mistakes and overturn that decision.

Arraignment: When someone who has been accused of a crime is brought before the court for the first time. This is when the court (i) tells you what crime you are being accused of having committed and (ii) asks you to enter an initial or first plea of “guilty,” “not guilty,” or “no contest.”

Burden of proof: The level of proof the prosecutor must reach for a person to be convicted or found delinquent. In a criminal case, the burden of proof is “beyond a reasonable doubt,” which means that no juror or judge should have any reasonable doubt that the person being tried is in fact guilty. If the jury has a reason to believe the defendant did not commit the crime, then it must find him not guilty.

Defense Attorney: The person who defends you in court is called a defense attorney. You are entitled to have a defense attorney in a criminal trial where you are at risk of going to jail or being committed to an institution.¹⁴¹ If your family is unable or refuses to hire an attorney to defend you, the court will assign you an attorney, often known as a public defender or “legal aid.” When the court assigns you a lawyer, make sure you write down his name, telephone number, and license number so you can contact him when you need him or her.

District Attorney: The lawyer who represents the Government in criminal trials; see “prosecutor.”

Guardian ad litem: Depending on the type of case, a guardian ad litem can mean different things. Usually in the criminal and delinquency courts, if you do not have parents or guardians that can help you, or if your parents’ interests are different from yours, the court will choose someone to be your guardian for the purpose of your trial and/or proceedings. This is especially true in the federal system.¹⁴² This person will usually be a lawyer, but if you are in foster care, it might be your social worker or someone else who is very familiar with your case.

Incarcerate: To order that a person be placed in a prison or other lock-down facility for a period of time. If you are “incarcerated,” it means that you are in prison.

Indictment: A formal document written by a grand jury accusing someone of a crime. It is presented to the court as the reason for prosecuting someone.

Jurisdiction: Jurisdiction has two separate definitions. First, it is the power of a court to decide a case. If a court has the power to decide your case, we say the court has “jurisdiction.” Second, it is a geographic area in which a court may exercise its power to decide a case. For example, New York and New Jersey are different “jurisdictions” because New York courts only have authority to decide cases brought in New York.

Plea bargain: When the accused person makes an agreement with the prosecutor to plead guilty to a lesser crime in exchange for the possibility of a lower sentence. When you accept a plea bargain, you give up your right to a trial.

Prosecutor: The attorney who works for the state or federal government who is in charge of preparing the case against you. Prosecutors usually work for the District Attorney in the state system or the U.S. Attorney in the federal system. Your lawyer and/or parent/guardian should be with you whenever you speak to the prosecutor. You have a right to have your lawyer present to help you with any questions that the prosecutor may ask. If your lawyer is not present for a meeting, you have the right to ask for your lawyer and to not speak to the prosecutor until your lawyer arrives.

140. All definitions are adapted from those listed in *Black’s Law Dictionary* (7th ed. 1999).

141. The Supreme Court has said: “We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.” *In re Gault*, 387 U.S. 1, 41 (1967).

142. 18 U.S.C.S. § 5034 (LexisNexis, Lexis Advance through PL 114-248, approved 11/28/16).

Transfer: When your case is moved to a different court. In order to be tried as an adult, your case must be transferred to criminal court and must meet the rules or requirements for transfer.

Trial: When the court formally examines the evidence and legal claims brought by the prosecutor against the accused person.

“Waive your right”: When you waive a legal right it means you voluntarily give it up. Some rights are not waivable. To waive a right, you must know the facts and intend to give up the right. Otherwise the waiver will not be valid.

Vacate: When a court of appeals cancels a decision that was made by a lower court. Once the court vacates a decision, it might make its own decision or send the case back to the lower court to review the case again. Sending the case back to the lower court is called “remanding.”