



# DETENTION ADVOCACY OUTLINE

**PRIMARY CORE PRINCIPLE:** If a client is in custody, a juvenile defense attorney must work promptly and persistently for release of the child to the least-restrictive alternative community placement consistent with the client's expressed wishes.

**THE DETENTION HEARING:** A hearing to determine whether it is appropriate to detain a juvenile pending trial after a determination that there is probable cause to believe the juvenile committed an offense.

## **CRITERIA FOR TAKING A JUVENILE INTO CUSTODY:**

- Wis. Stats. § 938.19(1) and (1m):
  - Warrant.
  - Capias.
  - A court order showing the welfare of the child demands that the juvenile be immediately removed from present custody.
  - Law enforcement officer believes warrant or capias has been issued or the juvenile is a fugitive from justice.
  - A capias or warrant for the juveniles apprehension has been issued from another state.
  - The juvenile is committing or has committed an act which is a violation of state or federal criminal law.
  - The juvenile has runaway from parents, guardian or legal/physical custodian.
  - The juvenile is suffering from illness or injury or in immediate danger from surroundings and removal is necessary.
  - The juvenile has violated a condition of court ordered supervision or aftercare supervision.

- The juvenile has violated a conditions or release by an intake worker or a nonsecure order.
- Truancy.
- Wis. Stats. § 938.19(2):
  - The person taking the juvenile into custody must immediately attempt to notify the parents, guardian, legal custodian or Indian custodian. These attempts must continue until notification or juvenile is delivered to intake worker. Intake worker must continue to notify.
  - Taking a juvenile into custody is not an arrest except for determining whether the taking into custody is lawful and the legality of obtaining evidence.

**RELEASE OR DELIVERY FROM CUSTODY:**

- Wis. Stats. § 938.20:
  - A person taking a juvenile into custody must make every effort to release the juvenile immediately to the juveniles' parent, guardian or legal custodian or Indian custodian.
  - Juvenile may be released to a responsible adult if parent, guardian, legal custodian or Indian custodian is not available.
  - Juvenile 15 years of age or older may be released without immediate adult supervision.
  - Juvenile who violated aftercare may be released to either the department of corrections or county department.
  - Juvenile may be released to a runaway home.
  - A truant juvenile may be release to a youth service center or to school administrator.
  - If not released: Must be taken to an intake worker accompanied by a written statement of the reasons for custody. A copy of this statement must be given to any juvenile 10 years or older.
  - May be diverted to a hospital, physician, Ch. 51 proceedings, or detoxification facility.
  - Duties of intake worker if not released: Inform the juvenile of right to counsel and right to remain silent.

- Notify the parents of the location of the juvenile, time and place of custody hearing, possible consequences of hearing, right to present witnesses and cross examine witnesses.

#### **CRITERIA FOR HOLDING A JUVENILE IN PHYSICAL CUSTODY:**

- Wis. Stats. § 938.205:
  - Intake worker determines that there is probable cause to believe the juvenile is within the jurisdiction of the court and probable cause to believe that:
    - The juvenile will commit injury to the person or property of others if not held.
    - The parent, guardian or legal custodian is neglecting refusing unable or unavailable to provide adequate supervision and care and services to ensure juvenile's safety and wellbeing are not available.
    - The juvenile will run away or be taken away so as to be unavailable for proceedings.

#### **PLACES WHERE A JUVENILE MAY BE HELD IN NONSECURE CUSTODY:**

- Wis. Stats. § 938.207:
- Home of parent or guardian
- Home of a relative, licensed foster home, group home, nonsecure facility, public or private shelter care facility, home of a nonrelative not to exceed 30 days, hospital, approved public treatment facility
- Indian juvenile in compliance with Wis. Stats. §938.028.

#### **CRITERIA FOR HOLDING A JUVENILE IN DETENTION FACILITY:**

- Wis. Stats. § 938.208
- Probable cause the juvenile has committed a delinquent act and presents either a substantial risk of physical harm to another person or substantial risk of running away so as to be unavailable for court hearing.
- Probable cause that juvenile committed a delinquent act that would be a particular felony if committed by an adult. Probable cause exists to believe that the juvenile has used or threatened to use a handgun, or short barreled shotgun while committing an act that would be a felony if committed by an adult Probable cause exists to believe that the juvenile has possessed or gone armed with a short-barreled rifle, short-barreled shotgun, or a handgun.

- Probable cause exists to believe that juvenile is a fugitive from another state or secure custody and there has been no reasonable opportunity to return the juvenile.
- Juvenile consents in writing to be held to protect from an imminent physical threat.
- Probable cause exists to believe that juvenile is a runaway from nonsecure custody or has committed a delinquent act while on a nonsecure custody order and no other suitable alternative exists.
- Probable cause exists to believe that juvenile either alleged or adjudicated in another county and is runaway and would run away from nonsecure custody pending return. Limit of 24 hour hold with an extension of 24 hours.
- Probable cause exists to believe that the juvenile is under 15 and subject to adult criminal court jurisdiction.

**HEARING FOR A JUVENILE IN CUSTODY:**

- Wis. Stats. § 938.21:
  - Shall be conducted within 24 hours after the end of the day on which the decision to hold the juvenile was made, excluding Saturdays, Sundays and legal holidays.
  - Petition must be filed or for runaway from another state a written statement of the reasons for holding the juvenile shall be submitted.
  - If no hearing or petition filed, the juvenile shall be released.
  - Note: If no petition at time of hearing the juvenile may be held for an additional 48 hours if the court determines that probable cause exists to believe that the juvenile is an imminent danger to himself/herself or others or if the court determines that probable cause exists to believe that the parent, guardian, or legal custodian or other responsible adult is neglecting, refusing, unable or unavailable to provide adequate supervision and care.
  - A juvenile may be required to give a DNA sample if taken into custody for a violent felony under Wis. Stats. §165.76. The court shall inform the juvenile that they may seek expungement.
  - A juvenile held in nonsecure custody may waive in writing the right to a hearing.
  - A copy of the petition or request shall be given to the juvenile at or prior to the time of the hearing.
  - Prior notice of the hearing shall be given to the juvenile's parent, guardian or legal custodian.

- The court shall inform the juvenile of the allegations that have been made, the nature and the possible consequences of this hearing as compared to possible future hearings, possibility of waiver, the right to counsel, the right to remain silent, the fact the silence may not be adversely considered by the court the right to confront and cross examine witnesses and the right to present witnesses.
- Parent shall be requested to provide the names and other identifying information of 3 relatives the parents request the court to consider as placements.
- Orders to Continue in custody may include:
  - Parent, guardian or legal custodian or other responsible person, options under 938.207 or 938.208, electronic monitoring. The court may place reasonable restrictions on the juvenile’s travel, association with other persons, or places, subject the juvenile to the supervision of an agency.
  - Reasonable restrictions may be placed upon the conduct of the parent, guardian, legal custodian or other responsible person with may be necessary to ensure the safety of the juvenile.
  - Order must be in writing.
- Court must make specific findings regarding reasonable efforts to prevent removal from home and reasonable efforts by intake worker to make it possible for the juvenile to return home safely.
- Finding must be specific to the juvenile an order to hold a juvenile in custody remains in effect until a dispositional order is granted, a consent decree entered, a petition is dismissed or the order is modified or terminated by the further order of the court.
- Wis. Stats. § 938.21(7):
  - Deferred prosecution: If the court determines that the best interests of the juvenile and the public are served, the court may enter a consent decree or dismiss the petition and refer the matter back to the intake worker for deferred prosecution.
  - An order for a deferred prosecution does not require district attorney consent. *State v. Lindsey A.F.* 2002 WI APP 22.

**CHANGES IN PLACEMENT: JUVENILE HELD IN CUSTODY:**

- Wis. Stats. § 938.217:
  - An intake worker, agency providing temporary services, or the district attorney may request a change in placement.

- Change from in home to out of home governed by Wis. Stats. §938.21(6).
- Notice is required including name and address of new placement and a statement describing why the new placement is preferable. A hearing may be obtained by filing an objection with the court within 10 days after the notice is sent. If not objection within 10 days, new order with new placement is entered. Placement may be changed on an emergency basis with notice of new placement within 48 hours.
- Hearing may be demanded.
- Request by others including the juvenile to change placement may be made.

**PETITION: FORM AND CONTENT:**

- Wis. Stats. § 938.255: If violation of a criminal statute, the citation to the appropriate law as well as facts sufficient to establish probable cause that an offense has been committed and that the juvenile named in the petition committed the offense.
- A complaint, including documents that are made a part of it by reference, is a self-contained charge, and it alone may be considered in determining probable cause. *State ex rel. Cullen v. Ceci* (1970), 45 Wis. 2d 432, 173 N.W.2d 175. Within the four corners of the document must appear facts that would lead a reasonable man to conclude that probably a crime had been committed and that the defendant named in the complaint was probably the culpable party. *State v. Haugen*, 52 Wis. 2d 791 (1971).

**TIME LIMITS:**

- Wis. Stats. § 938.30: If a juvenile is continued in detention, the plea hearing must be scheduled within 10 days of the detention hearing, if a juvenile is not in secure custody, the plea hearing must be scheduled within 30 days of the detention hearing.
- Wis. Stats. § 938.315: If the court does not act within the time period specified in this chapter, the court may grant a continuance, dismiss the petition with or without prejudice, release the juvenile from secure or nonsecure custody or from the terms of a custody order, or grant any other relief that the court considers appropriate.
- Failure to object to a time limit violation waives any challenge to the court's competency to proceed.

**DE NOVO HEARING/REHEARINGS:**

- Wis. Stats. § 757.69: Any decision of a circuit court commission shall be reviewed by the judge of the branch of the court to which the case has been assigned, upon motion of any party.

- Wis. Stats. § 938.21(1) (a): The court shall grant a rehearing upon request of a parent not present at the hearing for good cause shown.
- Wis. Stats. §938.21(1) (d): If juvenile is not represented by counsel and the juvenile is continued in custody, the juvenile may request a rehearing. The hearing shall take place as soon as possible. A hearing to hold a juvenile in custody shall be reheard for good cause whether or not counsel was present.

**VENUE:**

- Wis. Stats. §938.185: Venue is in the county where the juvenile resides, the county where the juvenile is present, the county where the violation occurred. Special considerations if an Indian juvenile.

**WHY IS RELEASE FROM SECURE CUSTODY IMPORTANT:**

- Critical in establishing attorney/client relationship.
- Critical to the client’s ability to prepare for trial.
- Detention may be crowded and dangerous.
- Studies show that time spent in detention increases the likelihood that a child will recidivate, in part because the child is likely to make negative peer connections.

**DETENTION HEARINGS:**

- Need to be as well prepared as possible in short order.
- Need to present a social history: Look to parents, intake workers, relatives, non relatives, school, coaches etc.
- Need to present an individualized release plan.

**FACTORS TO CONSIDER:**

- Prior record, runaway history.
- School: Attendance, grades, suspensions, IEP, sports, clubs.
- Community ties.
- Behavior at home: Curfew, parental and sibling relationships.
- Family willingness to cooperate with court orders.
- Substance use.
- Risk assessment score.

- Other affirmative evidence to demonstrate positive social factors that support release to the community.

#### **WONDER HOW YOU ARE DOING?**

- Checklist for Youth Justice Defense Counsel
- Ten Principles for Providing Effective Defense Advocacy at Juvenile Detention Hearings
- Achieving Excellence in Detention Advocacy: A checklist to evaluate defense representation at detention hearings
- Achieving Excellence in Detention Advocacy: Guidelines for Juvenile Defenders to provide zealous advocacy at initial detention hearings.



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