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CHILDREN ARE CONSTITUTIONALLY DIFFERENT: NEUROSCIENCE DEVELOPMENTS BRING SMART CHANGES

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Are children in the justice system merely small adults who should be treated based on their behavior without regard to their cognitive and emotional capacities? Do children criminals act with deliberation and full knowledge of the consequences of their decision making? Or are kids different from adults in profound ways?

Scientific Evidence: Children are Different

The facts are stubbornly straightforward. Children are different from adults developmentally and morally. Children often do not think things through. They behave impulsively. They do not have the same capacity as adults to comprehend the consequences of their actions. And, in general, the younger the child, the greater the incapacity.

Young juveniles are less competent to assist their attorneys in preparing a defense. In particular, studies show that children under the age of 16 are considerably less competent to assist defense counsel than those 16 or older.¹

Competency for juveniles is often more complex than for adults because of “three broad reasons underlying incompetence when it is encountered in juvenile cases: mental illness, intellectual disability, and developmental immaturity.”²

As children reach adolescence, they may understand the justice system, but they still lack an adult’s capacity to evaluate risk and resist the impulse to act. The brain, especially the frontal lobes, where reflection and reasoning

take place, is not fully developed in teenagers and even those in their early twenties. The American Academy of Child and Adolescent Psychiatry has noted that, based on the stage of brain development “adolescents are more likely to: act on impulse, misread or misinterpret social cues and emotions, get into accidents of all kinds, get involved in fights, [and] engage in dangerous or risky behavior.”³ Similarly, “[a]dolescents are less likely to: think before they act, pause to consider the potential consequences of their actions, [or] modify their dangerous or inappropriate behaviors.”⁴ These youth “mature intellectually before they mature socially or emotionally, a fact that helps explain why teenagers who are so smart in some respects sometimes do surprisingly dumb things.”⁵

Substantial research demonstrates that neuropsychological development continues into the mid-20s.⁶

The law should reflect these neuroscience facts. It doesn’t always do so though. Very young delinquent offenders (i.e., children under 12) who commit offenses, even very serious offenses, often have significant developmental issues that require prompt intervention. Responses traditionally employed by the juvenile justice system, such as detention, are often ineffective and may even increase recidivism.⁷

Case Law: Courts’ View of Children

The law does treat children differently, and the age of a person legally defined as a child continues to increase due to growing awareness of the science of the brain.

Under common law, children younger than seven were considered incapable of forming criminal intent. It was presumed that children aged seven to 14 could not form intent, but that presumption could be rebutted, resulting in the prosecution of some very young children in the adult criminal justice system. The distinction between adults and children seven and over began to evolve at the end of the 19th century.

In 1967, the U.S. Supreme Court in *In re Gault* provided some historical underpinnings for an enlightened approach.

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." The child—essentially good, as they saw it—was to be made "to feel that he is the object of (the state's) care and solicitude," not that he was under arrest or on trial.⁸

Tribunals using this progressive approach, however, too often ignored procedural fairness. This had the result of inaccurate findings and arbitrary consequences for children.

In re Gault made a constitutional correction to the benevolent-absence-of-procedure-juvenile system that had as its ultimate consequence the taking of a child's liberty. Finding that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure,"⁹ the Supreme Court held that a juvenile was entitled to notice of the charges, counsel, right to confrontation and cross-examination, privilege against self-incrimination, right to a transcript of the proceedings, and appellate review. All of these changes were based on the belief that a fair process is essential to valid outcomes, greater acceptance by the juvenile, and an increased chance for rehabilitation.¹⁰

Over the last decade the Court made additional corrections in the application of the law based on neuroscience. In 2005, the Supreme Court in *Roper v. Simmons* found that the Eighth and 14th Amendments prohibited sentencing juveniles to death because of their "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and their characters are "not as well formed."¹¹

In 2010, *Graham v. Florida* held that the Eighth Amendment prohibited sentences of life without parole for juveniles under the age of 18 at the time of their crime who did not commit a homicide because that sentence was grossly disproportionate in view of the fact that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."¹²

In 2012, in *Miller v. Alabama*, the Court held that a mandatory life sentence for those under 18 could not be imposed as it was disproportionate under the Eighth Amendment, violating the prohibition on "cruel and unusual punishments."¹³ "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences."¹⁴ Life without parole is excessive for all but "the rare juvenile offender whose crime reflects irreparable corruption."¹⁵

This series of "decisions rested not only on common sense — on what 'any parent knows' — but on science and social science as well"¹⁶ and made clear that "children are constitutionally different from adults for purposes of sentencing."¹⁷ The Court readily accounted for the findings of neuroscience: "transient rashness, proclivity for risk, and inability to assess consequences — both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"¹⁸

Together, "these three opinions craft a compelling argument. They insist that the justice system acknowledge that children differ from adults in ways that bear directly on the question of their culpability and their capacity for change."¹⁹

In 2016, the Court decided in *Montgomery v. Louisiana* that *Miller* was retroactive because it "announced a substantive rule of constitutional law."²⁰ It was not merely a procedural ruling. "Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence."²¹ The Court concluded that it was up to the states to determine the mechanisms for remedying unconstitutional sentences of juveniles. A state may comply with *Miller* by permitting defendants to relitigate sentences or convictions or by providing juvenile defendants the opportunity to be considered for parole to demonstrate the transience of their immaturity and subsequent maturation.²²

States have begun to apply these changes in the law. For instance, two years after being convicted of murder and rape and being sentenced to life without parole for crimes committed when he was 17½ years old, Robert Veal requested a new sentencing hearing on the basis that his sentence was unconstitutional under *Miller*. The trial judge denied his claim as untimely and having no merit. On March 21, 2016, the Georgia Supreme Court in *Veal v. State*, reversed the trial judge and decided that Veal is entitled to challenge his life without parole sentence under *Montgomery* even though the claim was procedurally defaulted because it is a substantive rule of constitutional law that such sentences are disproportionate under the Eighth Amendment for the

vast majority of juveniles.²³ Veal explained that *Montgomery* determined that a constitutional life without parole sentence would be “exceptionally rare” and requires a finding that the juvenile is “irreparably corrupt.”²⁴ Merely considering the juvenile’s age, associated characteristics and facts of the crime are not sufficient. The case was remanded so that Veal could show that he was not “irreparably corrupt or permanently incorrigible” and was not in the “narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by *Montgomery*.”²⁵

The law requires more than that parole is a possibility at some time in the future. On May 26, 2016, the Florida Supreme Court determined that a 16 year old who in 1990 was sentenced to life with the possibility for parole after 25 years but who had a parole eligibility date well beyond 25 years had a sentence that is the functional equivalent of a mandatory life sentence that required individualized *Miller-Montgomery* resentencing.²⁶

The Iowa Supreme Court determined that the sentence of a 17 year old commuted to a life sentence with the possibility of parole after 60 years was unconstitutional since it was the “practical equivalent to life without parole.”²⁷ *State v. Ragland*, 836 N.W.2d 107, 110-111 (Iowa 2013). “The spirit of the constitutional mandates of *Miller* and *Graham* instruct that much more is at stake in the sentencing of juveniles than merely making sure that parole is possible.”²⁸ Iowa has also applied this reasoning to a “lengthy term-of-years,” sentence.²⁹

Iowa also found that “juvenile offenders cannot be mandatorily sentenced under a mandatory minimum sentencing scheme” under its state constitution.³⁰ Andre Lyle was 17 and convicted of second degree robbery and sentenced to a term not to exceed 10 years with a requirement to serve at least 70% before parole eligibility. The Court said that all “mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional under the cruel and unusual punishment clause in article I, section 17 of our constitution. Mandatory minimum sentences for juveniles are simply too punitive for what we know about juveniles.”³¹

Proceedings in which juveniles face the harshest penalties must now have a process ensuring that the sentencer considers all evidence relevant to the developmental level of the child, any factors that would render the juvenile less culpable, and evidence that the crime does not “reflect irreparable corruption.”³² Defense counsel must now conduct mitigation investigation in the same manner as is done in death penalty litigation to make sure that the sentencer has the evidence now constitutionally relevant to the sentencing decision.³³

Developments in the Law

Sentencing Reforms

The MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice’s study of the actual and perceived culpability (the criminal responsibility or blameworthiness) of adolescents accused of illegal activity led to the following conclusions: the minimum age of delinquency jurisdiction should be no lower than 12, and the minimum age of criminal court jurisdiction should be no lower than 14.³⁴

Beyond minimum ages, though, some jurisdictions have created a young adult category of criminal sentencing in addition to that for juveniles and adults. This change more accurately reflects what science is revealing about the limited capacities of persons up to 25 years of age.

Several states have revised their sentencing procedures. Georgia has a youthful offender category for a person who is 17 but less than 25.³⁵

Colorado defines a young adult offender as a “person who is at least 18 years of age but under 20 years of age when the crime is committed and under 21 years of age at the time of sentencing.”³⁶

To account for the advances of neuroscience, a Wisconsin prosecutor is calling for

a change in sentencing options that primarily targets offenders between the ages of 17 and 24. People in this age range fall into a gap between Wisconsin’s juvenile justice policy, which focuses on accountability and rehabilitation, and Wisconsin’s truth-in-sentencing statute, which refuses any consideration of rehabilitation in enforcing its strict requirements for serving 100 percent of ordered confinement time.³⁷

Options within these new categories include easier access to diversion than that allowed for older adult offenders; the option of keeping convictions confidential; greater leniency at sentencing with a preference for probation; confinement in facilities structured to meet the young adults need for education and vocational training with mentors and counselors; and a reduction in years of confinement with earlier consideration for parole.³⁸

Incarceration-Related Reforms

A growing body of research “demonstrates that for many juvenile offenders, lengthy out-of-home placements in secure corrections or other residential facilities fail to produce better outcomes than alternative sanctions. In certain instances, they can be counterproductive.”³⁹

“across political parties, regions, and age, gender, and racial-ethnic groups.”⁴³

Because the public sees juveniles as “fundamentally different from adults,” people “want policymakers to invest in programs that help prevent youth from re-offending.”⁴⁴ They want low-level offenders rehabilitated rather than incarcerated. Some 89 percent surveyed said that “[s]chools should be expected to address offenses that occur at school, such as damaging property or acting out, and only involve the juvenile justice system in extreme cases.”⁴⁵

The Decline of Violent Juvenile Crime Rate and Juvenile Incarceration

As the law has evolved due to a growing awareness of neuroscience and what works to change behavior, the juvenile arrest rate for violent crimes and the commitment rate continue to decline.

In 2012 less than one-fifth of 1 percent of all juveniles ages 10 to 17 living in the country was arrested for a violent crime.⁴⁷ This is less than half of what it was in the mid-1990s, when fears of “super-predators” dominated the discussion of juvenile law.

The Department of Justice’s Office of Juvenile Justice and Delinquency Prevention reports that from 2001 to 2013, the U.S. juvenile commitment rate declined 53 percent.⁴⁸

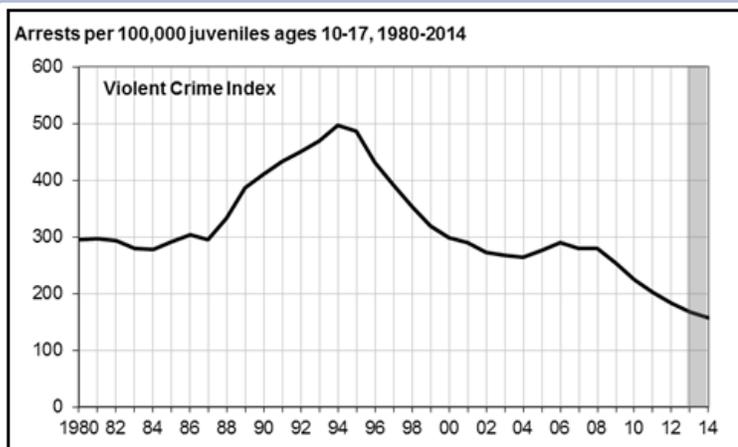
Remarkably, over half of the states in this same time period experienced a decline in juvenile incarceration of 50 percent or more, and the decline was nationwide across 49 states. “The nationwide reduction reflects a 42 percent drop in juvenile violent-crime arrest rates from 2001 to 2012 and comes as a growing number of states are adopting policies that prioritize costly space in residential facilities for higher-risk youth adjudicated for serious crimes.”⁴⁹

Conclusion

Increasingly what we know — that kids are different — is being further confirmed by science and practical, evidenced-based interventions. It is therefore reasonable to conclude that children are “constitutionally different from adults for purposes of sentencing.”⁵⁰ After all, “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”⁵¹ States are choosing the smarter, safer, less costly approach. Yes, taxpayers benefit — but, more importantly, our children are better off.

FOOTNOTES: SEE PAGE 19

Juvenile Arrest Rates for Violent Crime Index Offenses 1980-2014



Source: Office of Juvenile Justice and Delinquency Prevention
Internet Citation: OJJDP Statistical Briefing Book. Online. Available: http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05201. December 13, 2015.

Data source: Arrest estimates for 1980-2012 developed by the Bureau of Justice Statistics and disseminated through “Arrest Data Analysis Tool.” Online. Available from the BJS website.

Arrest estimates for 2013 and 2014 developed by the National Center for Juvenile Justice based on data published in the FBI’s Crime in the United States reports [Tables 29, 39, and 40]. These are preliminary estimates that will be updated upon release of final estimates on the Bureau of Justice Statistics’ Arrest Data Analysis Tool.

This research has led some states to enact reforms that “limit which youth can be committed to these facilities and moderates the length of time they can spend there. These changes prioritize the use of costly facilities and intensive programming for serious offenders who present a higher risk of reoffending, while supporting effective community-based programs for others.”⁴⁰

In recent years, many states have increased the age for transfer to adult court, reduced mandatory minimums, prohibited detaining juveniles with adults, and raised the age for mandatory transfers.⁴¹ These improvements are proving smarter with better outcomes that are more sustainable with lower costs.⁴² Taxpayers are the beneficiaries.

The Public Demand for Less Incarceration, More Rehabilitation

How do the developments taking place in the law compare to what the public wants? Support across the country for juvenile justice reform is strong. A recent national survey of the voting public indicates that people strongly support improvement of the juvenile system with 65 percent believing that juveniles should be treated differently than adults. This support is

2017 New Legislation Relevant to Criminal Defense Practice by Damon Preston



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Below is a brief synopsis of dozens of bills passed by the 2017 General Assembly that are relevant to criminal defense practice and practitioners. For more information, please contact the author at damon.preston@ky.gov.

The official Legislative Research Commission (LRC) summary and the full text of all bills are available at <http://www.lrc.ky.gov/record/17RS/record.htm>.

Unless mentioned in the summary below, all bills herein were regular legislation without an emergency clause. The

effective date of all non-emergency legislation passed during the 2017 session is June 29, 2017.

Criminal Law

CJPAC Bill (SB 120): The most significant criminal justice bill of this year was SB 120, which was the product of recommendations from Governor Bevin's Criminal Justice Policy Assessment Council. A separate article details the many provisions in that bill.

Serious Physical Injury Redefined for Child Victims (HB 524):

Serious physical injury is defined in KRS 500.080 as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." HB 524 adds a number of specific conditions to this definition for children 12 or younger, such as broken bones, burns, and injuries requiring surgery.

Felony Assault on a Service Animal Now Parallels Felony Assault on a Person (HB 93):

Assault on a Service Animal in the First Degree (KRS 525.200) is a Class D felony. HB 93 does not change the penalty, but restructures the elements to parallel Assault in the Third Degree against a human. That means there are three ways to commit the offense: 1) intentional death or serious injury to a service dog, 2) intentional injury with a deadly weapon or dangerous instrument, or 3) wanton serious physical injury with deadly weapon or dangerous instrument.

Restrictions on Drones (HB 540, enacted over the Governor's veto): Reckless drone usage creating a risk of serious physical injury to others or of property damage is now a Class A misdemeanor. A separate bill on drones (HB 291) that was

more comprehensive and that would have regulated the use of drones by law enforcement passed the House, but was not called for a vote in the Senate.

Attacks on Police May Be Hate Crimes (HB 14): Kentucky's hate crime statute (KRS 532.031) authorizes a sentencing judge to declare that an offense was a "hate crime" if that offense is one of the listed offenses (mostly violent offenses or damage to property) and the offense was committed intentionally because of the race, religion, sexual orientation, or nationality of another person. HB 14 adds a person's perceived or actual employment as a law enforcement officer to this list of factors. When a judge finds an offense to be a "hate crime," the court can deny probation or the Parole Board can deny parole on that basis. Designation of a "hate crime" does not enhance punishment or change probation or parole eligibility.

Special Orders Added As Penalties in Misdemeanor Cruelty to Horses Cases (HB 200):

If a person is convicted of Cruelty to Animals in the Second Degree, a Class A misdemeanor (KRS 525.130) and the animals in the case are horses, a sentencing court may order restitution for costs incurred by others, including feeding, sheltering and veterinary treatment of the horses. The court may also terminate or impose conditions on the ownership of the horses by the defendant.

Penalties for Fraudulent Securities Practices Now Mirror Theft Thresholds (HB 329):

Violations of the Fraudulent Securities Practices law (KRS 292.320) have been punishable as Class D felonies regardless of damage. After HB 329, violations with high damages will be subject to higher penalties, as is already the case for most thefts. If damages exceed \$10,000, the violation is a Class C felony and, if damages exceed \$1,000,000, the violation is a Class B felony.

Unlawful Attempt to Prevent Off-Duty or Retired Peace Officers from Having a Concealed Firearm (HB 417):

KRS 237.137 gives authorized off-duty peace officers and certified retired peace officers an absolute right to carry concealed weapons anywhere in the state where an on-duty peace officer could carry a gun. HB 417 gives teeth to that right by adding fines ranging from \$500 to \$2,500 against any person or establishment that tries to deny these officers the right to have a firearm.

Owner of "Vicious Dogs" Limited to Exclude Landlords (HB 112):

KRS 258.235 makes it a crime for an owner of a "vicious dog" to allow it to "run at large." HB 112 clarifies the definition of "owner" in KRS 258.095 to be limited to persons who own or lease property where a dog is kept and occupy

the property. Under the prior definition, an owner of rental property could have been civilly (and potentially criminally) liable for vicious dogs kept by renters.

New Proceedings for Involuntary Treatment of Persons with Mental Illness

Involuntary Community Mental Health Treatment (SB 91): KRS Chapter 202A authorizes the involuntary hospitalization of a person who, due to mental illness, is a danger to himself or herself or others. SB 91 creates a new process that allows a court to order involuntary community treatment when a person with a mental illness is not a danger, but the court finds by clear and convincing evidence that he or she will not be compliant with voluntary treatment and could be a danger in the future. Only those involuntarily hospitalized at least twice in the past 12 months are subject to these orders. This new system is contingent on funding, which is not yet available. DPA will be providing training on strategies and defenses in these cases.

SB 91 could lead to a significant addition to public defender caseloads. Under current law, involuntary hospitalization actions under KRS 202A are almost always brought in one of the eight counties with state mental health hospitals. The new proceedings under SB 91 could be initiated in any county. A person against whom a petition is filed has a right to a public defender throughout the duration of the case, including all review hearings, motions to modify the treatment order, and non-compliance hearings.

The standard of proof in the new procedure established by SB 91 is clear and convincing evidence. This is not consistent with *Denton v. Commonwealth*, 383 S.W.2d 681, 682-83 (Ky. 1964), where the Court held that the loss of liberty in an involuntary commitment case mandates the existence of procedural protections and a burden of proof equal to a criminal case.

Is Preventive Outpatient Commitment Effective?

“...preventive outpatient commitment raises serious legal problems and potential antitherapeutic consequences that may outweigh its claimed therapeutic value. As a result, alternatives are proposed, including wider availability of community treatment and outreach and case management services, assertive community treatment, police and mental health court diversion programs, and creative uses of advanced directive instruments and behavioral contracting. ... Given the well-known problems with the accuracy of clinical prediction generally (Winick, 2000), should we be willing to deprive the patient of the significant liberty interest in avoiding unwanted psychotropic medication (Riggins v. Nevada, 1992; Washington v. Harper, 1990) based on the clinical prediction of these future possibilities? ...Coercion and the threat of coercion can be strongly antitherapeutic.... The danger exists that legislatures may adopt outpatient commitment without providing the necessary funding for the services that might be essential to its effectiveness (Stein & Diamond, 2000).... To the extent that preventive outpatient commitment involves court-ordered intrusive psychotropic medication, it raises serious constitutional concerns. ...Outpatient commitment without the availability of intensive treatment services has been shown to be ineffective.” Bruce J. Winick, *Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 *Psychology, Public Policy, and Law* 107 (March/June, 2003).

Kentuckians entitled to full constitutional guarantees when liberty at stake

“[W]hen a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution.... We have concluded therefore that the burden of proof under [the statute for civil commitment] and the manner of proceeding and the rules of evidence should be the same as those in any criminal or quasi criminal proceeding and the court erred in admitting the evidence of the doctors by certificate or affidavit over objection of appellant’s counsel.” *Denton v. Commonwealth*, 383 S.W.2d 681, 682-83 (1964).

Drug Laws

Increased Penalties for Heroin, Carfentanil or Fentanyl Offenses (HB 333): Passed as a reaction to the increase in opioid overdoses, HB 333 marks a return to the belief that higher criminal penalties are effective in controlling a drug problem. In a retreat from HB 463, defendants convicted of low-level heroin or fentanyl trafficking offenses now face at least a Class C felony with no possible release until service

of 50% of the sentence (KRS 218A.1412). Carfentanil and fentanyl have been added to the Importing Heroin statute (KRS 218A.1410), a Class C felony, and Aggravated Trafficking (KRS 218A.142), a Class B felony with 50% release eligibility. Trafficking in a Misrepresented Controlled Substance is a new Class D felony in KRS Chapter 218A for when a person knowingly traffics in a Schedule I controlled substance,

fentanyl, or carfentanil while misrepresenting the substance as a “legitimate pharmaceutical product.”

KASPER Report to Include Additional Information, including Drug Convictions, Emergency Room Prescription Drugs and Positive Drug Tests (HB 314 and SB 32): Kentucky’s system for reporting drug prescriptions, KASPER (KRS 218A.202), will now include all Schedule II controlled substances dispensed at a hospital and all scheduled controlled substances dispensed at an emergency room. Also included will be all felony and Class A misdemeanor drug convictions. Finally, most hospitals will be required to report positive drug tests that were performed in an emergency room to evaluate a suspected drug overdose and this information will be included on a person’s KASPER report. None of this additional information directly restricts the ability of a person to get necessary prescription medicine, but the more comprehensive KASPER report will provide more guidance to prescribers and pharmacies.

State Classification of Controlled Substances Now Directly Tied to Federal Classification (HB 158): In some circumstances in the past, the Kentucky Cabinet for Health and Family Services has classified particular drugs different from the federal government, usually because the federal government classification changed. HB 158 requires that the federal classification determine drug classifications at the state level. The Cabinet can issue a regulation classifying a drug differently from the feds, but may only reclassify up, making Kentucky law more restrictive than federal law. The five statutes in 218A that list specific drugs to be included in the Kentucky Schedules (example, KRS 218A.070) have all been repealed.

Criminal Procedure

No Shock Probation for DUI Homicides (HB 222): After HB 222, a trial court is not permitted to grant shock probation (KRS 439.265) to a defendant convicted of reckless homicide, manslaughter in the second degree, or fetal homicide in the third or fourth degree if the defendant is also convicted of DUI arising out of the same incident.

Discretionary Supervision by Department of Corrections in Misdemeanor Cases (HB 282): KRS 439.550 allows a District Court to direct Corrections to supervise misdemeanants sentenced to probation. Though not many district courts do this, some do and Corrections has to balance the needs in those cases with those responsibilities to felony probation and parole supervisees. HB 282 amends the statute to authorize the court to request supervision, but not to direct it.

Autopsy Photos or Recordings are Private, but Available When Needed (HB 67): Apparently, some websites and

individuals publish photographs and video recordings of autopsies for commercial purposes. Family members of a person’s whose death was exploited in this manner advocated for HB 67, which makes all audio or visual depictions of an autopsy confidential (New section in KRS Chapter 72, “Coroners”). The new law has many exceptions including disclosure in any civil or criminal case relating to the death.

Law Enforcement Procedure

Expansion of Arrest Powers in a Hospital (SB 42): KRS 431.005 and KRS 431.015 limit the arrest powers of an officer. Generally, a misdemeanor committed outside the presence of an officer cannot lead to an arrest. An exception has existed for fourth-degree assault allegations for conduct that occurs in the emergency room of a hospital. SB 42 removes the emergency room limitation and expands arrest powers to apply to any fourth-degree assault anywhere in the hospital, including a parking lot or structure.

Increased Accountability of Jailers without a Jail (SB 39): In response to a number of media stories on Kentucky’s jailers who do not oversee a jail, SB 39 adds transparency requirements in counties without a jail (KRS 441.245). Annually, the fiscal court has to pass a resolution detailing the duties and compensation of the jailer. Quarterly, the jailer must report a summary of the jailer’s duties, including a detailed listing of all prisoner transportation activities with mileage. This bill had an emergency clause so it was effective immediately.

Mandatory Unannounced Visits in Abuse and Neglect Cases (HB 253): When CHFS determines that an investigation into abuse or neglect is warranted and the investigation involves a visit to the child’s residence or another location, the visit shall be unannounced. Further, unannounced visits shall be incorporated into the investigation until “the welfare of the child has been safeguarded.” Finally, the bill requires schools and child-care providers to allow CHFS access to a potentially abused or neglected child without parental consent. While defenders do not handle abuse and neglect cases in juvenile court, an increase in “unannounced” visits could predictably result in an increase in criminal complaints based on the findings when the Cabinet arrives. Authorization for an unannounced visit does not create a right to infringe on a person’s constitutional rights.

Sheriffs Relieved of Mandatory Monthly Visits to Dance Halls (HB 266): A law passed in 1942 (KRS 70.160) requires that a sheriff or a deputy visit every “dance hall and roadhouse” in the county every month and report to the County Attorney all indications of illegal activity at the establishments. HB 266 repealed this law. If you see a Sheriff or deputy in a local roadhouse, now you know it is a choice, not a requirement of the job.

Laws Affecting Juveniles

Juvenile Expungement (SB 195): In a follow-up to 2016 HB 40 creating felony expungement for adults, SB 195 expands expungement for juveniles under KRS 610.330. Two years after the end of commitment or of the juvenile court's jurisdiction, a juvenile or someone on the juvenile's behalf may petition the court for expungement of any offenses other than sex crimes or violent offenses. Further, if any charge against a child results in a dismissal or acquittal, that case is expunged immediately and automatically. As with adult expungement, a person who has had a charge or adjudication expunged does not have to disclose the prior existence of that charge or adjudication on any application after the expungement.

17-Year-Old State Agency Children Are Eligible for Equivalency Diploma (HB 522): Children in the custody of CHFS or DJJ are often placed in a bind where they are too far behind to get a high school diploma, but are ineligible for an equivalency degree until they turn 18. This means that state agency children leave state care without a degree that would improve their chances to become employable and productive adults. HB 522 would allow children in agency custody to seek an equivalency diploma at age 17 or older.

Kids in CHFS Custody Can Apply for a Driver's Permit and License (HB 192): Filling a gap in existing law, HB 192 amended KRS 186.450 and 186.470 to allow the Cabinet or a Cabinet-approved foster parent to sign in place of the parent for children in its custody to receive a driver's permit or license upon becoming eligible.

"Fictive Kin" Relationship Recognized in Temporary Child Placement Arrangements (HB 180): Statutes relating to temporary placement of children by CHFS (KRS 199.462) or DJJ (KRS 605.090) refer only to relatives or legal guardians. HB 180 creates the concept of "fictive kin" to allow for placement in a trusted non-relative. It is defined as "an individual who is not related by birth, adoption, or marriage to a child, but who has an emotionally significant relationship with the child."

Criminal Justice Agencies

DPA = D of PA, not D for PA (HB 282): When any new administration takes over, a review of the statutes relating to executive branch agencies is undertaken to see if changes need to be made. As part of this process last year, the Personnel Cabinet pointed out that statutes referring to DPA are split between those that refer to the Department OF Public Advocacy and those that say Department FOR Public Advocacy. They requested that we choose one and support legislation to make all statutes consistent. We did and HB 282, sponsored by Rep. Jason Petrie, changes all FOR references to OF. We are now the Department of Public Advocacy, through and through.

Automatic Expiration of State Regulations (HB 50): Generally, adopted regulations remain in effect until repealed unless the regulation includes an explicit expiration date. HB 50 changes this and requires that all ordinary regulations expire after seven years from its creation or most recent substantive amendment, whichever is later (New Sections in KRS Chapter 13A). All regulations enacted and most recently changed prior to July 1, 2012 will expire on July 1, 2019. All agencies with regulations due to expire can submit a certification letter to keep the regulations in effect. This change will not affect criminal law directly, but will impact many agencies in the criminal justice system, including the Department of Juvenile Justice, Department of Corrections, Kentucky State Police, and the Department for Community Based Services (DCBS).

The Kentucky Claims Commission replaces the Crime Victims Compensation Board (HB 453): Confirming actions already in place through a Governor Bevin Executive Order, HB 453 creates (in a new KRS Chapter 49) a new 3-person Kentucky Claims Commission with authority to investigate and hear disputes involving claims against the state. The Crime Victims Compensation Board, Kentucky Board of Tax Appeals, and the Board of Claims are all abolished with their duties reassigned to the new Commission.

Daviess Family Court is Now Official (HB 502): Although funding has already been provided, a Family Court judge already elected, and the Family Court operational since January of this year, the list in KRS 23A.045 of circuits with three (3) circuit judges did not include the Sixth Circuit (Daviess County) until HB 502 was passed.

Restrictions on and Consequences for Prior Offenders

No Sex Offenders at Public Playgrounds (HB 38): HB 38 added public playgrounds to the list of locations registered sex offenders may not go without advance permission (KRS 17.545). An offender may seek and receive permission from a city or county to go a public playground.

Background Checks for "Child-Serving Professionals" (HB 374) and Youth Camp Workers (SB 236): Complying with a new federal requirement, any person who applies for a "position which involves care and supervision of a minor as a child-serving professional" must submit to a background check (KRS 17.165). No one may be employed in such a position or at a publicly-funded youth camp if he or she has a conviction for a sex or violent offense or a serious offense against a minor (offenses specified in KRS 17.500). Any school, child-care program, or any individual employing someone to provide care to a minor child may request a background check from CHFS relating to prior substantiated claims of child abuse or neglect.

Expanded Civil Actions by Victims of Sexual Offenses (SB 224): KRS 413.249 sets limitations on civil lawsuits filed by victims of childhood sexual abuse or assault. SB 224 expands the statute of limitations from five (5) years to ten (10) years after the latter of the date of the last act, the date the victim knew of the act, the victim's 18th birthday, or the offender's conviction for the acts. It also creates a new section in KRS 413 for civil actions by adult victims of sexual assault. For these lawsuits, the statute of limitations is set at five (5) years from the latter of the date of the last act, the date the victim knew of the act, the date the identity of the offender was determined, or the offender's conviction for the acts. For lawsuits under either statute, no criminal conviction is required to bring a civil action.

Domestic Violence Cases

Residential Protections for Domestic Violence Victims (HB 309): HB 309 creates new sections in KRS Chapter 383 ("Landlord and Tenant") to prohibit termination of a lease or other adverse actions against a tenant because of circumstances relating to a protective order, allow early termination by a victim if related to the violence, and to create other protections for a domestic violence victim in rental property. The respondent/defendant in a domestic violence case is deemed civilly liable for all economic losses suffered by a landlord. If protective orders are present in both directions, making both people a victim and a defendant, none of the new protections apply.

Driver's Licenses and Identification Cards

Voluntary "RealID" Bill (HB 410): Effective January 1, 2019, Kentucky will issue driver's licenses and personal identification cards that comply with the requirements in the federal RealID law. If HB 410 had not passed, a Kentucky

driver's license would not have been sufficient to board an airplane or visit a federal facility (like a military base) in the future. To address concerns from some privacy advocates, a person will be able to opt out of the new enhanced procedures if he or she wishes, but the granted license will not meet the federal requirements necessary for travel or security approval. Included in the bill is a requirement that state and federal prisons facilitate the acquisition of a RealID-compliant personal identification card by all inmates being released.

Autocycles Defined (SB 73): KRS 186.010 now includes a definition of autocycle. An autocycle generally is a 3-wheel vehicle with a regular seat (not a seat that is straddled), a steering wheel, and pedals, and that is designed to operate at speeds greater than 40 miles per hour. An autocycle is considered a motorcycle for title and registration purposes, but an operator of an autocycle is not required to wear protective headgear or have a motorcycle operator's license. An autocycle is a motor vehicle and an operator under the influence is subject to DUI laws in KRS Chapter 218A.

Public Service Attorneys, including Public Defenders

End of Best in Law Program (HB 312): In 2009, the "Best in Law for Public Service Attorneys" program was created to provide loan assistance to public defenders, prosecutors, and legal aid attorneys. After federal programs, including the John R. Justice Act and income-based repayment (IBR), provided greater benefits for student borrowers, use and funding of the Best in Law program dwindled. HB 312 officially ends the program, as well as the "Best in Class" and "Best in Care" programs, as of June 30, 2018. Borrowers who remain in the program will be given information on other alternatives.

Senate Bill 120: Criminal Justice Reform, Part I (we hope) by Damon Preston

In 2016, Governor Matt Bevin formed the Criminal Justice Policy Assessment Council (CJPAC) to recommend reforms in criminal justice laws and policies to improve the efficiency and effectiveness of the penal system, reduce state correctional expenses, and reduce recidivism. In December, subcommittees of the CJPAC made several recommendations to accomplish the Governor's objectives and, in January 2017, most of those recommendations were drafted into a proposed bill for the 2017 General Assembly. That proposal evolved into Senate Bill 120, sponsored by Sen. Whitney Westerfield, which Governor Bevin signed into law on April 10, 2017.

During the three months between the proposal and the final bill, the evolution of SB 120 unfortunately involved the removal of many of the CJPAC recommendations, including

all proposed changes to Kentucky's penal code. Surviving in SB 120 were a number of positive changes to the justice and correctional systems, but major reforms were left for future consideration. Included in this article are the provisions in SB 120 that are now law followed by a description of the proposals included in earlier versions that were scrapped during the 2017 session.

COURT COSTS REFORM

Intention #1* – A person should not be jailed because he or she cannot afford to pay court costs.

Intention #2 – A nonpayment case should lead to definitive resolution, not a perpetual cycle of court appearances and contempt that requires ongoing county, court, prosecutor, and defender resources.

Definition of “Poor Person” (KRS 453.190): The prior definition of a “poor person” required a subjective finding by a court that a person is unable to pay the costs without depriving himself or herself or his or her family of the “necessities of life.” The new definition includes an objective determination that the person has an income at or below an indigency level established by the Kentucky Supreme Court.

Payment Schedule for Court Costs, Fines and Fees (KRS 534.020): SB 120 creates a structure for installment payments of court costs, fees, or fines. A defendant who is subject to an installment plan must be given the plan in writing and must be informed that he or she shall appear in court if a payment cannot be made. All costs, fees, and fines shall be paid within one year of sentencing, but restitution is not subject to this limitation.

Contempt for Nonpayment (KRS 534.020): A person may be held in contempt for nonpayment of costs, fees, or fines, but only upon a finding that the nonpayment was “willful and not due to an inability to pay.” A defendant may also be jailed for failure to appear at a show cause hearing for nonpayment, but a warrant issued for this person must include notice to the jailer that a defendant jailed pursuant to the warrant must be released upon payment of the costs, fees, or fine or upon accrual of sufficient daily service credit (see below).

Daily Service Credit (KRS 534.070): SB 120 clarified that all jail sentences imposed for nonpayment of court costs, fines, or fees or for a failure to appear in court at a show cause hearing for nonpayment of costs, fines or fees are subject to the \$50 (or \$100 if working in a community service program) daily service credit in KRS 534.070. The change also made release from jail mandatory upon service of sufficient credit, as calculated by the jailer. A court does not have to order release and does not have authority to order continued detention for nonpayment if the defendant is not held under any other orders. Once an inmate has accrued sufficient credit for release, the costs, fees, or fines are considered paid.

Repeal of Specific Incarceration Limits (KRS 534.060): Under prior law, separate (and inconsistent) statutes existed to inform courts of how to respond to nonpayment of fines. While KRS 534.070 provided a \$50 daily credit to allow a defendant to satisfy a fine through service of sufficient jail time, KRS 534.060 authorized a sentence of up to 4 months for nonpayment of a fine in a Class A misdemeanor case or up to 10 days for nonpayment of a fine in a violation case. This inconsistency resulted in some courts ignoring the daily credit altogether and imposing sentences under the authority of KRS 534.060. Many of these courts also held that this statute did not excuse the original fines and still required

payment after release from the jail sentence (often starting a new cycle of nonpayment and jail). SB 120 repealed all of the language in KRS 534.060 that would authorize a sentence for nonpayment that would not be subject to the daily service credit.

Defense Tips

1. When representing a defendant charged with contempt for nonpayment of a fine, court costs, or fees, the court must make a finding that the nonpayment was willful and not due to an inability to pay. If the defendant does not have an ability to pay, he is not in contempt.
2. Daily service credit is mandatory and does not require approval (or even action) by a court. A defendant arrested on a Friday and arraigned on Monday for nonpayment already has a \$200 credit (4 days at \$50 per day). If he or she owes less than \$200, he or she is entitled to release. (NOTE: The new law does not refer to a guilt finding or imposition of a sentence. Release is required even if the defendant has not yet admitted to contempt of court (see KRS 534.020(3)).)
3. Appellate litigation in this area is strongly encouraged. Some trial courts may routinely jail indigent defendants for nonpayment of costs or fees. Such decisions should be challenged with appeals to Circuit Court and beyond. Because of the application of mandatory service credits, defendants have nothing to risk by appealing a finding of contempt once they have served sufficient days to cover the unpaid amount.

The law on fines and fees

For further discussion of the law on fines and fees, see Glenn McClister, COSTS, FEES, FINES AND RESTITUTION: A PRACTITIONERS GUIDE, The Advocate (December 2015).

http://dpa.ky.gov/Public_Defender_Resources/Documents/Advocate%20Newsletter%20Dec2015%20%28color%2012-22-15%29.pdf

PROBATION AND PAROLE CHANGES

Intention #1 – A person under supervision after a conviction should be given incentives to comply with the conditions of supervision.

Intention #2 – The limited resources of the Department of Corrections (both in prisons and Probation and Parole) should be focused on high risk and non-compliant inmates, not low-risk compliant ones.

Compliance Credits (KRS 439.345): A new system of compliance credits is created for eligible parolees who

* “Intentions” are included here as the author’s interpretation of the General Assembly’s intention in making the changes in SB 120 and are not a representation of actual legislative history.

comply with the terms of their release, pay any restitution that is owed, and remain out of trouble. Eligibility is limited to Class D felons who are not convicted of a violent offense, sex offense, or Assault in the Third Degree and Class C felons who are not convicted of a sex offense, violent offense, trafficking offense, or PFO. Thirty (30) days of credit towards the person's sentence are given for every full calendar month that the parolee is in compliance. For Class D felons, the credits are not applied until the parolee has been on parole for at least one year. For Class C felons, the credits are not applied for two years.

Increase in Discretionary Detention Limits (KRS 439.3108):

Probation or parole officers may now place offenders who violate the terms of their supervision directly in jail for longer periods without going back to court or to the Parole Board. For probationers, the limit for a single occasion remains at ten (10) days, but the annual cap is increased to sixty (60) days (from thirty (30) days). For parolees, the one-time cap goes from ten (10) to thirty (30) days and the annual limit is raised from thirty (30) to sixty (60) days. A new exception allows a probation or parole officer to hold any supervised person in jail for longer than the caps when the person is awaiting admission to a residential drug or alcohol treatment program. While these limits will result in additional incarceration in some cases, the intent is to provide more flexibility in addressing the needs of offenders on supervision rather than have full revocation of a probated or paroled sentence as the only alternative.

Limitations on Mandatory Reentry Supervision (MRS)(KRS 439.3406):

At a meeting of the CJ PAC, the chair of the Parole Board described a problem they have in supervising parolees nearing the end of their sentence. Because MRS release is mandatory under KRS 439.3406, parolees would become noncompliant knowing that, at worst, revocation of parole would mean a brief return to prison followed very quickly by mandatory release on MRS. To address this disincentive for compliance, SB 120 amended the MRS law to require service of at least six months after a revocation before release on MRS. It also added a limit that no one can be released on MRS more than twice.

IMPROVEMENT OF REENTRY SERVICES

Intention – Because parole revocations are a significant driver of the prison population, more services should be provided to parolees to increase the likelihood of success and decrease the likelihood of a return to prison.

Reentry Drug Supervision Pilot Program (New Sections of Chapter 439): Eight sections of SB 120 create a pilot program for Reentry Drug Supervision. This program will be similar to drug court and will provide support and services for a

limited number of inmates and parolees with substance use disorders. Here are some important features of this new program:

- The program will be implemented by the Department of Corrections by March 2018;
- A "Reentry Team" will run the program. The team will include a hearing officer (employed by DOC), a parole officer, a reentry liaison (from Probation and Parole), a social worker, a public defender or representative (who could be a DPA alternative sentencing worker), and a representative from a community mental health center providing treatment to the participants;
- The reentry team will be empowered to provide incentives, including compliance credits or decreased supervision, and to impose sanctions, including detention, community service, or termination from the program;
- Admission to the program will be decided by the Parole Board from referrals of current inmates from DOC and of parolees from hearing officers after a preliminary revocation hearing;
- Current inmates are eligible if they a) were not convicted of violent offense, sex offense, or an offense that resulted in death or serious physical injury; b) were either convicted of a Class C or Class D felony that was a drug offense or an offense arising from a drug addiction or previously probated or paroled and subsequently revoked due to or with a history of drug abuse; and c) have not previously participated in the program;
- The Parole Board's consideration of a referral must consider a substance abuse assessment, the person's criminal history and other relevant information, and any statements from victims, who are notified once a referral is made to the Board;
- If the Board determines to place an eligible inmate into the program, the Board can immediately parole the inmate even if he or she is not yet eligible under other laws;
- Termination from the program will result in revocation of sentence with the Reentry Team deciding whether the participant receives compliance credits for time spent in the program.

REDUCTION OF BARRIERS FOR EX-OFFENDERS

Intention – Those who have served their sentence for criminal activity and reformed their behavior should not have their economic opportunities limited because of a long ago criminal conviction.

Effect of Criminal Record on Application for Public Employment or Occupational Licenses (KRS 335B.020 and 335B.030 and fifty-one (51) separate specific licensing

laws): Applicants for employment with a public agency or for an occupational license may no longer be disqualified based solely on a criminal conviction. Instead, the conviction must be directly related to the position or license being sought to serve as grounds for disqualification. A person denied a position or license because of a conviction has a right to a hearing on the question of whether the conviction is directly related to the position or occupation.

In the legislative process, two specific exceptions were added to the general rules enacted in SB 120. First, a conviction for a Class A felony, Class B felony, or a sex offense creates a rebuttable presumption that it is connected to an occupational license (but not public employment). Second, the protections granted by SB 120 for persons with criminal records do not supersede laws to the contrary in the hiring of law enforcement personnel or when federal law applies.

TREATMENT, NOT PROSECUTION, FOR ADDICTS SEEKING HELP

Intention – A person with a drug addiction should be able to turn to a law enforcement agency and ask for help without worrying that they might be arrested for their drug possession and use.

Angel Initiative Program (New Section of Chapter 15, the “Department of Law” chapter): This new law provides a structure for an Angel Initiative program that already exists in Louisville and in various cities around the country. If a law enforcement agency creates a program under the law, a person can ask for drug treatment assistance from the law enforcement agency without fear of arrest or prosecution. The agency then provides a volunteer mentor to assist the person and a referral to a local treatment facility. There are exceptions for persons with outstanding arrest warrants and those with three or more prior drug convictions.

PREPARATION AND TRAINING OF INMATES FOR LIFE AFTER PRISON

Intention – More than 95% of prison inmates will eventually be released. One of the biggest predictors of whether a released inmate will reoffend and return to prison is whether he or she has steady employment within a few weeks of returning to their community. Investments in job training and providing real-world work experience for inmates improve the chances that an inmate will not reoffend when released, thus making Kentucky safer.

Prison Industry Enhancement Certification Program (PIECP) (New Sections of Chapter 197, “Penitentiaries”): This new program will allow private industry to operate manufacturing facilities inside Kentucky prisons using inmate labor. While

the companies selected to participate will benefit from income generated by the businesses and Kentucky’s budget will benefit from additional tax revenue and payments for incarceration costs (see below), inmates will benefit from work experience, job training, and compensation from their work. Rather than serving out a sentence from a prison cell, inmates will be working to support their families and learn the skills of a successful worker. The hope is that this program will assist in successful reentry after release and decreased recidivism.

There are many conditions on the program to protect the inmates and the state from abuses and to ensure that PIECP operations do not compete with industry outside prisons.

These conditions include:

- Only nonagricultural goods can be produced;
- An inmate’s participation must be voluntary, with written consent;
- An inmate working in the program must be paid at a comparable rate to what would be paid in a similar job outside the prison and never less than minimum wage;
- Inmate labor cannot take the place of an employed civilian worker who would be laid off or have his hours cut because of inmate labor;
- Inmate labor within the PIECP program cannot be used outside the prison or in construction.

Inmates who are employed as part of the PIECP program must agree to a number of deductions from their paycheck: a) 25% or more for child support, if the inmate is subject to a support order; b) 20% to the crime victim’s compensation fund; c) all applicable taxes, including social security; and d) reasonable room and board fees established by DOC regulation. The total deductions may not exceed 80% of the inmate’s gross pay.

Expansion of Work Release (KRS 532.100): Eligible Class D felons serving a sentence in a local jail may be permitted by the jailer (with approval from the Department of Corrections) to work in a community work program or in private employment under terms of work release. The jail may charge the inmate a fee not in excess of the lesser of \$55.00 or 20% of the prisoner’s weekly net pay from the employment.

Creation of Day Reporting Centers (new section of KRS Chapter 533) and Reentry Centers (new section of KRS Chapter 441): Two new types of facilities are created as alternative placements for some inmates who are sentenced to jail or prison. A day reporting center would be operated by a local jail and would provide “enhanced community supervision” to eligible defendants convicted of misdemeanors, Class D felonies, or contempt of court. A reentry center would also be run by a local jail, but would be used to house Class D,

Class C, or low-risk Class B felons with less than twelve (12) months remaining on their sentence. Every reentry center must provide vocational training and other evidence-based programs and require residents to maintain employment in the community and participate in family outreach and community involvement. The Department of Corrections shall evaluate the effectiveness of each reentry center in reducing recidivism and engaging residents in employment and the community.

OTHER REFORMS

Attorney Access to Court Records under Chapter 202A (KRS 202A.121): Involuntary mental health proceedings (sometimes called mental inquest cases) are required to be confidential. This requirement has been so strictly enforced that even an attorney for a person at risk of involuntary hospitalization has not been able to access records relating to his or her client. SB 120 included a specific authorization for a person's attorney, whether appointed or retained, to be given access to the court records in a case.

Persons with Out-of-state Juvenile Adjudications for Sex Offenses Have the Same Registration Requirements as In-State Offenders (KRS 17.510): Under Kentucky law, a juvenile adjudicated of a sex offense does not have a duty to register as a sex offender. In a few states, the law is different and juvenile adjudications do require registration. In *Murphy v. Commonwealth*, 500 S.W.3d 827 (Ky. 2016), the Kentucky Supreme Court faced the question of whether a person adjudicated as a juvenile sex offender in another state had to register in Kentucky under the requirement that someone's duty to register in another state automatically created a similar duty here. The Supreme Court held that the person did have to register in Kentucky even though his actions would not have required registration if they occurred here. SB 120 fixed this inconsistency by creating an exception for juvenile adjudications in other jurisdictions that would not have created a duty to register if the adjudication had occurred in the Commonwealth.

Reorganization of the Criminal Justice Council: Created many years ago, the Criminal Justice Council was envisioned as a body where criminal justice issues would be openly discussed with all stakeholders at the table. Unfortunately, its only role for the past several years has been to meet annually to discuss 2011 House Bill 463. SB 120 changes the membership and seeks to reboot the work of the Council, which will not be required to meet at least quarterly. Changes to the membership are:

1. The co-chairs of the Council will be the chairs of the House and Senate Judiciary Committees rather than the Justice and Public Safety Secretary;

2. The Commissioner of the Department for Behavioral Health, Developmental and Intellectual Disabilities has been added;
3. The Deputy Secretary of the Justice and Public Safety Cabinet and the Commissioner of the Department of Criminal Justice Training have been removed; and
4. Two judges (one circuit and one district), a law enforcement representative (in addition to the Kentucky State Police Commissioner), and a representative of community-based organizations with experience in substance abuse or mental health treatment have been added.

Remaining on the Council are the Public Advocate, President of the Kentucky Association of Criminal Defense Lawyers, the Attorney General, the Director of the Administrative Office of the Courts, the Commissioners of the Kentucky State Police, the Department of Corrections and the Department of Juvenile Justice, and representatives from the County Attorneys' Association and the Commonwealth Attorneys' Association.

PROPOSED CRIMINAL JUSTICE REFORMS THAT WERE NOT IN THE FINAL BILL

The CJPAC proposed a number of substantial changes to the criminal justice system that were not in the final version of SB 120. Passage of these proposals would have established Kentucky as the national leader in criminal justice reform, a goal set by Governor Bevin. While each was omitted from SB 120 for various reasons in this short 30-day legislative session, our hope is that all these ideas will be considered and adopted in the 2018 session of the General Assembly.

Higher Thresholds for Theft and Financial Crimes: The amount of monetary damage required to make an offense a felony is lower in Kentucky than almost any other state. This results in prison sentences for thefts as low as \$500 (a cell phone, perhaps) or benefits fraud as low as \$100. A drug addict who forges a family member's check to get cash is guilty of a felony even if the check is as low as \$10. Someone who falls behind on child support by only \$1,000 could be sentenced to five years in prison (at a cost of more than \$20,000 per year).

These felony thresholds should be increased to a consistent level that recognizes that felony prosecutions should be reserved for the most serious offenses and that misdemeanor sentences of up to a year in jail are a significant and adequate sanction for lower level financial crimes. An earlier version of the CJPAC bill would have set theft, fraud, and forgery felony levels at \$2,000 across the board and nonpayment of child support at \$5,000.

“No Money” Bail Reform: The concept of bail in a criminal case is centuries old. In the traditional sense, it has referred to the security that is posted to ensure that a charged person returns to court and stays out of trouble. Over time, bail has become in Kentucky a vehicle by which a poor person charged with a crime stays in jail despite being presumed innocent. Ask a member of the general public whether someone’s bank account should determine whether they are jailed for a crime and almost no one would agree that this should occur, yet that is the system we have in Kentucky. Poor people who are not a danger stay in jail while wealthier people who are a danger get out of jail.

The proposal considered in 2017 was to eliminate money bail in most cases. Instead, courts would have two choices, detain or release. Most defendants would be released without payment of money on conditions of staying out of trouble and showing up for court. Since 2011, this has been happening in some jurisdictions and studies have shown that the compliance rate has stayed the same or even improved. Courts would have the ability to detain defendants deemed a high risk of committing a crime or failing to return to court, but there would be clear standards for defendants who challenge a court’s detention decision.

If a criminal justice system was going to be created from scratch, the current system of money bail would never be the answer for how to treat persons that are charged but presumed innocent of an offense. Unless the person represents a clear danger to the public, he or she should be able to defend his or her case without being jailed in advance of conviction. Once that person is convicted, he or she can be rightfully sentenced to jail as a punishment when appropriate. In any event, the person’s access to money should play no role in whether he or she goes to or remains in jail.

Penal Code Reform: Class D Versions of Assault and Robbery: One of the stated goals of the CJPAC is to consider major changes to the penal code to make it more consistent and predictable. While a complete rewrite of the penal code is not yet underway, a proposal considered this year was to amend the assault and robbery statutes to create a predictable and sensible “ladder” of escalating seriousness.

Under current law, assault against someone who is not a peace officer (or other specified protected victim) is either a Class A misdemeanor or a Class C or B felony. There is no Class D felony for regular non-law-enforcement assaults. Similarly, robbery (theft using force) is currently only a Class B or Class C felony. This causes charging problems when a person commits misdemeanor non-forceful shoplifting, but then uses minor force when trying to get away. To those involved, this is more serious than the misdemeanor shoplifting alone, but is less serious than a robbery where force was intended

from the start. Creation of a Class D version of robbery would fill the gap that exists in current law.

Consistency in Age of Consent: An anomaly in current law is that a person could have consensual sex with a person who is 16 years old and not be guilty of a crime, but if that same person asked that same 16-year-old to pose for an indecent picture, he could be guilty of a felony and required to register as a sex offender. An attempt was made in an early version of SB 120 to resolve this inconsistency, but the effort ended in the face of concerns that child pornography laws might be weakened. These concerns could likely be addressed while still eliminating the inconsistency.

Sex Offender Registration Reform: While additional offenses and restrictions have been added regularly in recent years, Kentucky’s sexual offender registration system has not been comprehensively reviewed in decades. Kentucky needs a system to protect the public from proven predatory sex offenders, but the current system imposes significant restrictions on an overly broad swath of offenders for decades. The result is many of those who are a danger live in hiding or deception, evading the protective system in place, and many of those who are not a danger are unable to maintain housing and employment because of the rules that limit their choices. The public at large faces a list of thousands of people deemed “sex offenders,” but no real way to tell which ones present an evidence-based threat and which ones do not. A comprehensive review of the entire system is necessary.

Courtroom Manual Series

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Kentucky Department of Public Advocacy

PROCLAMATION IN SUPPORT OF OBJECTIVE PRETRIAL RELEASE ASSESSMENTS

May 8, 2017

The Kentucky General Assembly has determined that evidence-based practices and objective, statistically valid pretrial risk assessments shall be considered when judges make decisions regarding bail, KRS 431.066 and 446.010(35); and

The Kentucky Administrative Office of the Courts, Pretrial Division, has used an objective, statistically valid pretrial risk assessment since at least 2010, including an assessment improved and developed by the Laura and John Arnold Foundation (LJAF); and

The rates of those released pretrial have increased since the usage of the objective, statistically valid pretrial risk assessments; and

Studies of the data of 100% of those released pretrial, which track the performance of those released, show that persons classified as “low risk” come back to court and do not commit new criminal offenses while on release approximately 94% of the time, and that persons classified as “moderate risk” come back to court and do not commit new criminal offenses while on release approximately 88% of the time; and

The Kentucky Supreme Court issued Order 17-01 (February 14, 2017), Authorization for the Non-Financial Uniform Schedule of Bail Administrative Release Program. This Order is mandatory statewide, and relies upon the classification system in the objective, statistically valid pretrial risk assessment, to provide for “own recognizance” release in non-violent, non-sexual, non-aggravated/multiple offense DUI misdemeanors for persons who are “low risk” or in the bottom half of those classified as “moderate risk;” and

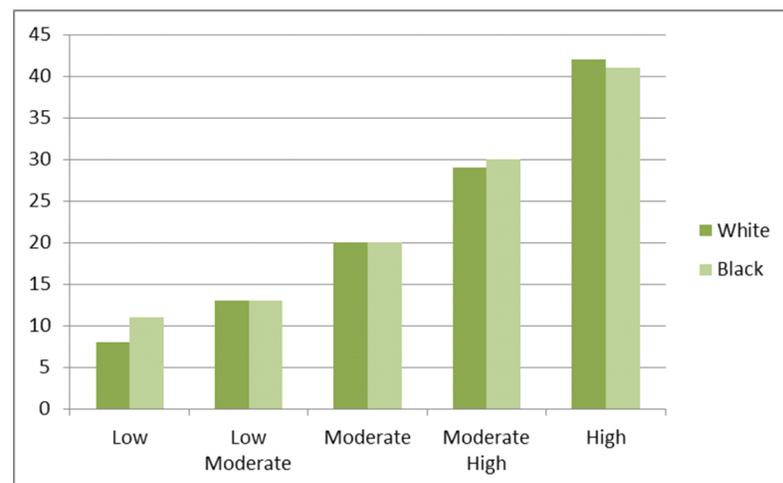
Based upon the experience of Kentucky in using the LJAF pretrial risk assessment tool and the documented success it has demonstrated in terms of the return to court rate and the minimal occurrence of new offenses by those released from pretrial custody, various other states and jurisdictions are exploring ways to adopt the LJAF tool and adapt it into their pretrial release decision-making processes; and

Notwithstanding Kentucky’s success and the interest and emulation of other states and jurisdictions, there continues to be some opposition to using objective, pretrial risk assessment tools by certain persons, groups and organizations, the primary claims being that such instruments are not race neutral, or worse, are race-biased against minorities;

The Kentucky Department of Public Advocacy (DPA), the statewide public defender program whose mission in Kentucky is to competently, diligently and effectively represent the indigent accused in all cases in which jail is a potential penalty, disputes such claims and objections based upon the experience it has had with the risk assessment tool in the thousands of cases in which its clients have been affected. DPA believes such claims are unfounded and refuted by the comprehensive, reliable data that has been collected.

Therefore, DPA proclaims support of objective pretrial release risk assessments, and declares:

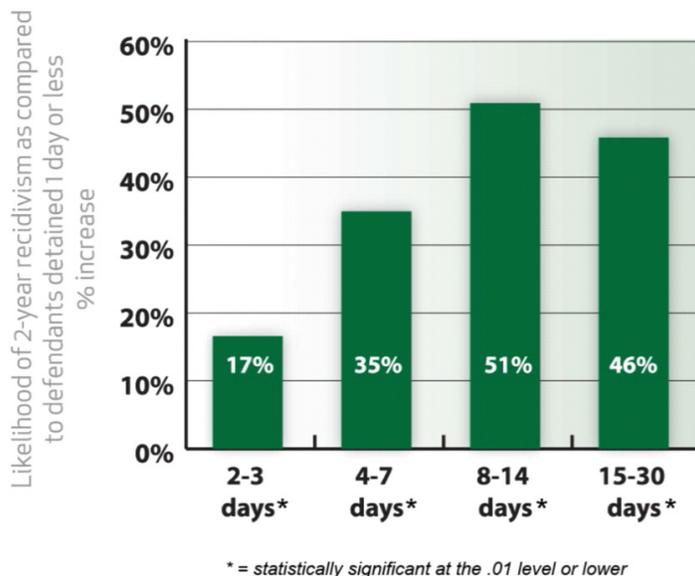
- The pretrial release data studied after implementation of the LJAF tool currently in use by Kentucky shows that, once an arrestee has been classified into one of five risk categories (low, low-moderate, moderate, moderate-high, and high), the persons classified by risk level and released succeed or fail at virtually the same rate, regardless of race, in terms of coming back to court and not engaging in new criminal activity. LJAF reports that “black and white defendants at each risk level fail at virtually indistinguishable rates, which demonstrates that the [pretrial risk assessment tool] is assessing risk equally well for both whites and blacks, and is not discriminating on the basis of race.” LJAF has issued a graph to illustrate this point:



Source: “Results from the First Six Month of the Public Safety Assessment – CourtTM in Kentucky,” LJAF, July 2014, located at www.arnoldfoundation.org

As can be seen, those who are classified as being in the “low risk” category for either failing to appear or committing a new crime, fail by a difference of only 4%, whereas the failure rate in all other categories differs by either 1% or 0%.

- Currently, there is no data tracking the percentage of black arrestees and white arrestees in each classification category. While the United States Census Bureau’s most recent data suggests that Kentucky’s African-American population is approximately 8.3%, there is no data published which shows whether persons are classified into each risk category in relative accordance with that race’s representation within Kentucky. It has been suggested by some persons, groups and organizations that objective pretrial risk assessments classify black arrestees as “high risk” at a percentage that is disproportionate to the African-American population as a whole and, therefore, it is discriminatory. DPA has no way of knowing, without looking at specific data, whether it is true that black arrestees are being classified as “high risk” disproportionately to their population as a whole. That said, if it is true, then the pretrial risk assessment tool (which is based primarily upon the criminal records of the persons assessed) is EXPOSING prior discriminatory practices in arrest, prosecution, conviction and sentencing, which practices pre-dated the use of the pretrial risk assessment tool. Rather than being discriminatory, the LJAF tool IDENTIFIES where potential discrimination or, at least, disproportional prosecution and sentencing has occurred or is occurring.
- DPA strongly believes, however, that one of the ways to decrease racially disproportionate practices and/or discrimination is to reduce the recidivism that results from over-incarceration of pretrial arrestees who are presumed innocent. An LJAF study of 66,014 cases over a 2-year period of time showed that, generally, the longer a person is incarcerated pretrial, the more likely it is that the person commits a new crime when compared to a similarly charged counterpart who is released within 24 hours of arrest. The results are contained in the graph below:



Source: “Pretrial Criminal Justice Research”
LJAF, November, 2013,
located at www.arnoldfoundation.org

For any arrestee, black or white, there is significantly less chance that person will commit a new crime if released pretrial within 24 hours. Over time, DPA believes that this will help reduce the racial disparities in arrest rates, as arrest rates in all racial demographics will decline.

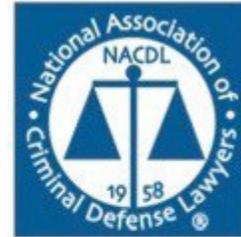
DPA calls for opponents of risk assessments whose objections are based upon claims of racial disparity to finance or conduct an independent study comparing the pretrial detention rates of all persons, and all races, for a statistically significant period of time prior to and after the implementation of a risk assessment tool like that of LJAF.

DPA believes strongly that the pretrial release rate of all races will increase after use of the tool, both as a percentage of arrestees, and in terms of the raw numbers of persons actually released. And public safety will not be adversely affected; indeed, it will improve as recidivism declines.

If you believe our experience and analysis is incorrect, prove us wrong.

Edward C. Monahan

Edward C. Monahan
Public Advocate



NLADA | American Council of Chief Defenders

JOINT STATEMENT IN SUPPORT OF THE USE OF PRETRIAL RISK ASSESSMENT INSTRUMENTS

MAY 10, 2017

The United States and all fifty states prohibit excessive bail; forty-eight states have a constitutional or statutory presumption in favor of releasing all but a specified few people before trial.¹ The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” “There is no discretion to refuse to reduce excessive bail...” *Stack v. Boyle*, 342 U.S. 1, 6 (1951). “In our society, liberty is the norm and detention prior to trial or without trial is the carefully limited exception.” *Salerno v. United States*, 481 U.S. 739, 755 (1987).

Yet, despite the existence of the Excessive Bail, Due Process, and Equal Protection clauses, the current system of pretrial detention and release unfairly and disproportionately affects African-American and Hispanic people:

- Statistically, African-Americans are less likely to be released on recognizance than whites.²
- Historically, the rate of detention for African-Americans has been five times higher than whites and three times higher than Hispanics.³
- African-Americans have money bail imposed at higher amounts than whites.⁴

While there are concerns that the use of pretrial risk assessment instruments fails to address existing racial bias in the criminal justice system, those **concerns should not be used to deter the use of pretrial risk assessment, but should instead be used to guide protocols** for implementation, data collection and analysis; to identify points in the system which may require amelioration; and to act as the basis for ongoing monitoring by advocates and community groups external to the system. Validated pretrial risk assessment instruments have been shown to **increase rates of pretrial release, including people of color**, while maintaining high rates of court appearance and public safety. For example:

- In Washington, DC, where no one accused of a crime is detained due to inability to pay and 80% of arrestees are African-American⁵, 90% of arrestees are released pretrial without using a financial bond.⁶
- In New Jersey, the recent introduction of a statewide pretrial risk assessment instrument has resulted in pretrial release in 90% of cases, and detention hearings resulting in only 10% of people being held until trial. While the exact impact on African-Americans and Hispanics is not yet known, these populations made up 71% of the jail population before the use of the pretrial risk assessment instrument.⁷
- In 2012, Colorado introduced a pretrial risk assessment instrument into their existing county pretrial services programs for those arrested and booked into jails. In counties that conducted analyses, participation in the pretrial services programs (utilizing pretrial risk assessment) by African-Americans increased the dismissal rate to 34% (compared to 21% for African-Americans with no pretrial services). African-Americans who received pretrial services were more than 1.6 times as likely to have their cases dismissed compared to African-Americans not receiving those services.⁸
- After the introduction of the validated pretrial risk assessment instrument in Multnomah County, Oregon, the new-offense rate for African-American youths dropped from 23 to 13 percent; the African-American release rate at initial screening rose from 44 to 51 percent; and the release rate at preliminary hearings rose from 24 to 33 percent.⁹ Before the employment of the pretrial risk assessment instrument, African-American youth were more likely to be detained, and less likely to be diverted than white youths.

The process of validating pretrial risk assessments requires analyzing data and outcomes to ensure that the instrument accurately predicts failure-to-appear rates and new arrests while on pretrial status, with no predictive bias due to race or gender. The pretrial release data studied after implementation of the Laura and John Arnold Foundation's Public Safety Assessment-Court tool used statewide in Kentucky shows that once an arrestee has been classified into one of five categories (low, low-moderate, moderate, moderate-high, and high), the person classified performs at virtually the same percentage, regardless of race, in the areas of making court dates and not committing new criminal activity. The Arnold Foundation reports that "black and white defendants at each risk level fail at virtually indistinguishable rates, which demonstrates that the [pretrial risk assessment tool] is assessing risk equally well for both whites and blacks, and is not discriminating on the basis of race."¹⁰ Likewise, the Virginia Pretrial Risk Assessment Instrument-Revised has also been confirmed as race and gender neutral.

Therefore, the NLADA/ACCD, NACDL, NAPD and Gideon's Promise strongly endorse and call for the use of validated pretrial risk assessment in all jurisdictions, as a necessary component of a fair pretrial release system that reduces unnecessary detention and eliminates racial bias, along with the following checks and balances:

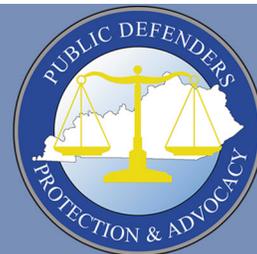
- Data used in the development of pretrial risk assessments must be reviewed for accuracy and reliability;
- Data collection must include a transparent and periodic examination of release rates, release conditions, technical violations or revocations and performance outcomes by race to monitor for disparate impact within the system;
- Data collection should avoid interview-dependent factors (such as employment, drug use, residence, family situation, mental health) and consist solely of non-interview dependent factors (such as prior convictions, prior failures to appear) as intensive studies have shown that when sufficient objective, non-interview factors were present, none of the interview-based factors improve the predictive analytics of the pretrial risk assessment, but significantly increase the time it takes to complete the pretrial risk assessment;¹¹
- Defense counsel must be included in the process of selecting a pretrial risk assessment tool for their jurisdiction;
- Pretrial risk assessments should be used as part of a deliberative, adversarial hearing that must involve defense counsel and prosecutors before a judicial officer;
- Defense counsel must have the time, training, and resources to learn important information about the client's circumstances that may not be captured in a pretrial risk assessment tool and adequate opportunity to present that information to the court;
- Requests for preventive detention by the state must require an additional hearing where the government proves by clear and convincing evidence that no condition or combination of conditions will reasonably assure the person's appearance in court or protect the safety of the community; and,
- The system must provide expedited appellate review of any detention decision.

1. <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx>
2. Estimates based on population statistics from Table 1 in Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, "Overview of Race and Hispanic Origin: 2010," 2010 Census Briefs, March 2011, www.census.gov/prod/cen2010/briefs/c2010br-02.pdf and jail population statistics from Table 6 in Todd Minton, 2012, p. 6.
3. Ibid.
4. Ibid.
5. Washington Lawyers' Committee on Civil Rights and Urban Affairs, Racial Disparities in Arrests in the District of Columbia, 2009-2011 (2013). https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf
6. Pretrial Services Agency for the District of Columbia, 2016 (FY) Release Rates for DC Pretrial Defendants (March 2017). psa.gov/sites/default/files/2016%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf
7. Marie VanNostrand, Luminosity in conjunction with the Drug Policy Alliance, New Jersey Jail Population Analysis: Identifying Opportunities to Safely and Responsibly Reduce the Jail Population (March 2013). www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf
8. Jessica Eaglin and Danyelle Solomon, Brennan Center for Justice, Reducing Racial and Ethnic Disparities In Jails: Recommendations for Local Practice (2015). www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf See also Isami Arifuku & Judy Wallen, Public Welfare Found., Racial Disparities at Pretrial and Sentencing and the Effect of Pretrial Services Programs 23, 29, A1 (2012).
9. The Sentencing Project, Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers (2008).
10. Laura and John Arnold Foundation, Results from the First Six Months of the Public Safety Assessment – Court™ in Kentucky, p. 4 (July 2014). www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf
11. See, "Developing a National Model for Pretrial Risk Assessment," LJAF Research Summary, Nov. 2013, www.arnoldfoundation.org.

FOOTNOTES: CHILDREN ARE CONSTITUTIONALLY DIFFERENT: NEUROSCIENCE DEVELOPMENTS BRING SMART CHANGES:

1. Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci, and Robert Schwartz, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 *Law and Human Behavior*, 333, 356 (August 2003). ("Our results indicate that juveniles aged 15 and younger are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants in a criminal proceeding."), available at http://stopyouthviolence.ucr.edu/pubs_by_topic/5.Juveniles%20competence%20to%20stand%20trial.pdf
2. Kimberly Larson, Ph.D., J.D., Thomas Grisso, Ph.D., *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers* (2011), p. 10.
3. *Am. Acad. of Child & Adolescent Psychiatry, The Teen Brain: Behavior, Problem Solving, and Decision Making, 95 FACTS FOR FAMILIES GUIDE* (Dec. 2011), www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/The-Teen-Brain-Behavior-Problem-Solving-and-Decision-Making-095.aspx.
4. *Id.*
5. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?* 28 *Issues in Sci. & Tech.*, (Spring 2012), <http://issues.org/28-3/steinberg/>.
6. See NAT'L INST. OF MENTAL HEALTH, *THE TEEN BRAIN: STILL UNDER CONSTRUCTION* (2011), available at www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/index.shtml.
7. See ROLF LOEBER & DAVID P. FARRINGTON, *CHILD DELINQUENTS: DEVELOPMENT, INTERVENTION, AND SERVICE* P. xxvii (SAGE, 2001)
 "There is no evidence to date that incarceration of serious child delinquents results in a substantial reduction in recidivism or the prevention of serious or violent offending behavior. Also, there are concerns that correctional placement of child delinquencies usually leads to exposure to and victimization by older serious delinquent offenders and further fuels criminogenic propensities in child delinquents."
8. 387 U.S. 1, 15 (1967) (internal citations omitted).
9. *Id.* at 18.
10. "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel." *Id.* at 26.
11. 543 U.S. 551, 553, 569-70 (2005).
12. 560 U.S. 48, 68 (2010).
13. 132 S. Ct. 2455 (2012).
14. *Id.* at 2468.
15. *Id.* at 2469.
16. *Id.* at 2464.
17. *Id.*
18. *Id.* at 2464-65 (internal citations omitted).
19. Kim Taylor-Thompson, *Minority Rule: Redefining The Age of Criminality*, 38 *N.Y.U. REV. L. & SOC. CHANGE* 101, 120 (2014).
20. 136 S. Ct. 718, 734 (2016).
21. *Id.* at 732-33.
22. *Id.* at 736. The incarcerated "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736-37.
23. *Veal v. State*, 784 S.E.2d 403, 410-12 (2016).
24. *Id.* at 411.
25. *Id.* at 412.
26. *Atwell v. State*, 197 So.3d 1040, 1050 (Florida 2016).
27. *State v. Ragland*, 836 S.W.2d 107, 110-111 (Iowa 2013).
28. *Id.* at 121.
29. *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (eligibility for parole at 52.5 years of 75 year sentence for second-degree murder and first-degree robbery).
30. *State v. Lyle*, 854 N.W.2d 378, 381, 401 (Iowa 2014).
31. *Id.* at 401.
32. *Montgomery*, 136 S. Ct. at 736. .
33. See Betsy Wilson & Amanda Myers, *Accepting Miller's Invitation: Conducting a Capital-Style Mitigation Investigation in Juvenile-Life-Without-Parole Cases*, *CHAMPION*, Apr. 2014, at 18.
34. See MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV., *DEVELOPMENT AND CRIMINAL BLAMEWORTHINESS* 48, www.adjj.org/downloads/3030PPT-%20Adolescent%20Development%20and%20Criminal%20Blameworthiness.pdf (last visited May 3, 2016).
35. GA. CODE ANN. § 42-7-2(7) (2013).
36. COLO. REV. STAT. ANN. § 18-1.3-407(2)(a)(III)(B) (2013).
37. Kenneth M. Streit & John T. Chisholm, *Expand Sentencing Options for Young Adults*, 86 *Wisconsin Lawyer* 38 (May 2013).
38. Rebecca Ballard DiLoreto, *Shared Responsibility: The Young Adult Offender*, 41 *N.K.Y.L.REV.* 253, 254 (2014).
39. PEW CHARITABLE TRUSTS, *RE-EXAMINING JUVENILE INCARCERATION: HIGH COST, POOR OUTCOMES SPARK SHIFT TO ALTERNATIVES* (Apr. 20, 2015), available at www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/04/reexamining-juvenile-incarceration; see also Edmund F. McGarrell, *Restorative Justice Conferences As an Early Response to Young Offenders*, *OJJDP JUV. JUST. BULL. (NCJ 187769)* (Aug. 2001), available at www.ncjrs.gov/pdffiles1/ojjdp/187769.pdf; EDWARD P. MULVEY, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, *HIGHLIGHTS FROM PATHWAYS TO DESISTANCE: A LONGITUDINAL STUDY OF SERIOUS ADOLESCENT OFFENDERS* 3 (Mar. 2011) ("Longer stays in juvenile facilities did not reduce reoffending; institutional placement even raised offending levels in those with the lowest level of offending."), available at www.pathwaysstudy.pitt.edu/documents/OJJDP%20Fact%20Sheet_Pathways.pdf.
40. PEW CHARITABLE TRUSTS, *supra* note 33.
41. Taylor-Thompson, *supra* note 19, at 157-58:
 In the past eight years, twenty-three states have made substantive legislative changes to reduce the prosecution of youth in adult court and to halt the practice of housing adolescents in adult correctional facilities. Twelve states (Arizona, Colorado, Connecticut, Delaware, Illinois, Indiana, Maryland, Nevada, Ohio, Utah, Virginia, and Washington) changed their transfer laws making it more likely that youth will remain in the juvenile justice system. Eight states (California, Colorado, Georgia, Indiana, Texas, Missouri, Ohio, and Washington) have revised their mandatory minimum sentencing laws to take developmental differences into account. Four states (Connecticut, Illinois, Mississippi, and Massachusetts) have extended their juvenile court jurisdiction, raising the age at which a state can automatically try a teenager as an adult in criminal court. And eleven states (Colorado, Idaho, Indiana, Maine, Nevada, Hawaii, Virginia, Pennsylvania, Texas, Oregon, and Ohio) have enacted laws limiting the ability of their state corrections to house youth in adult jails and prisons. Mandating a minority rule against adult prosecution for offenders under seventeen years of age is the next logical step.
42. See also COUNCIL OF STATE GOV'TS, *50 STATE TEAMS GATHER TO DEVELOP PLANS FOR IMPROVING YOUTH OUTCOMES IN EACH STATE JUVENILE JUSTICE SYSTEM* (Nov. 10, 2015), <https://csgjusticecenter.org/youth/posts/juvenile-justice-forum>.
43. PEW CHARITABLE TRUSTS, *PUBLIC OPINION ON JUVENILE JUSTICE IN AMERICA* 1 (Nov. 2014), available at www.pewtrusts.org/~media/assets/2015/08/pspp_juvenile_poll_web.pdf?la=en.
44. *Id.*
45. *Id.* at 10.
46. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *STATISTICAL BRIEFING BOOK*, www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05201 (last visited May 3, 2016). The Violent Crime Index includes the offenses of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault..
47. *Id.*
48. PEW CHARITABLE TRUSTS, *JUVENILE COMMITMENT RATE DROPS 53 PERCENT* (Nov. 9, 2015), www.pewtrusts.org/en/multimedia/data-visualizations/2015/juvenile-commitment-rate-drops-53-percent .
49. *Id.*
50. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).
51. *Roper v. Simmons*, 543 U.S. 551, 570 (2005). 2017 New Legislation Relevant to Criminal Defense Practice

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Joint Statement in Support of the Use of Pretrial Risk Assessment Instruments