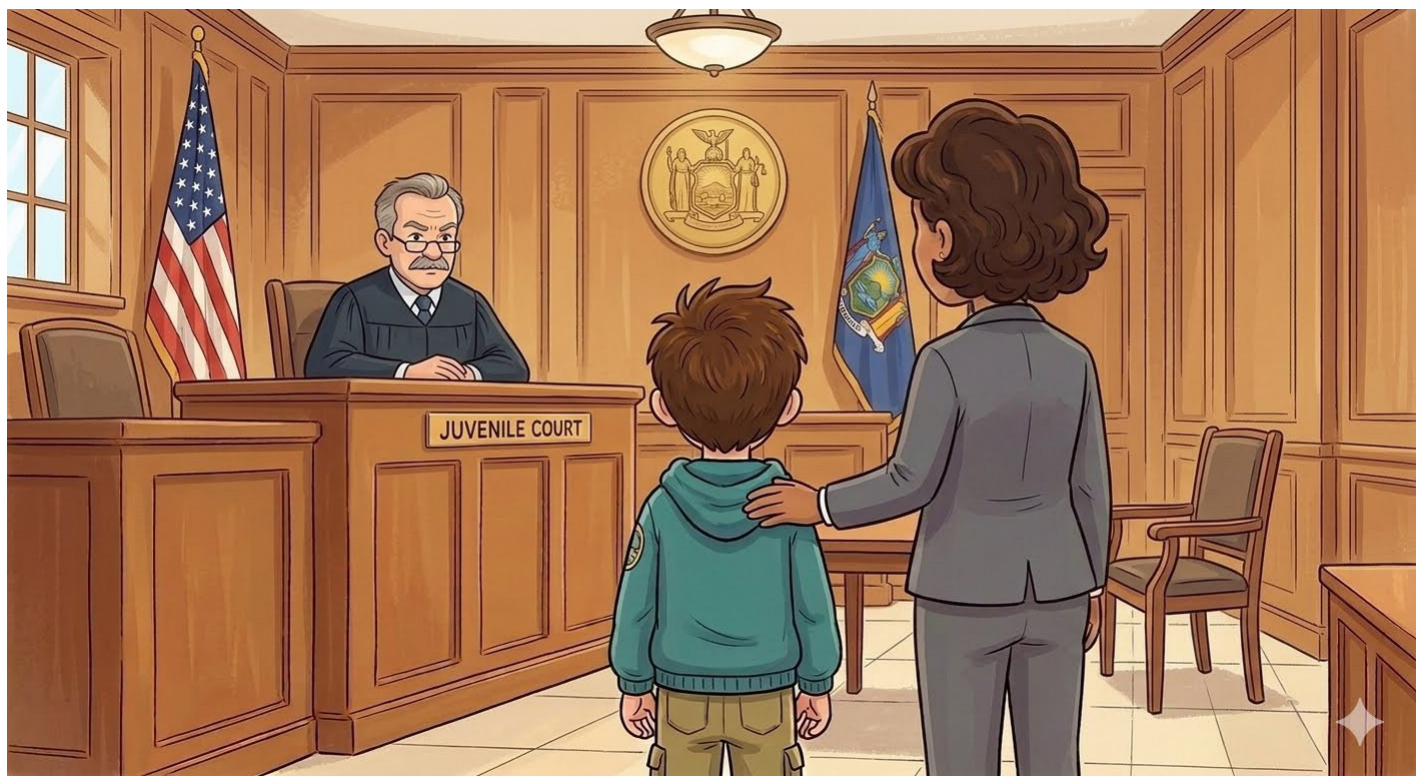

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DEFENDING CHILDREN

A Handbook for Youth Advocacy



Commonwealth of Kentucky
Department of Public Advocacy
Damon Preston, Public Advocate

INTRODUCING THE DEFENDING CHILDREN MANUAL

Letter to Public Defenders Representing Children

Kids are different. Every parent knows. The U.S. Supreme Court knows. Everyone who has been a child knows their adult self and their child self to be different. Every human child experiences growth and the potential to be a unique being on this Earth.

What does it mean to defend a child in our criminal legal system?

We have the opportunity to allow another human to grow fully into themselves despite the crushing weight of the criminal legal system. Youth defenders fight racism and ableism, fight to bring truth to light, fight to protect children from the terrible power of the government, and connect our child client's families to resources and hope.

Youth defense broadly embraces all defense team members, including attorneys, investigators, social workers, experts, and advocates all contributing to the legal representation of young people facing arrest and prosecution.

Youth defense is hard. It can hurt. Terrible things happen to our clients and often we cannot protect them from all of the harm their brief lives have already endured. We must manage specialized skills and knowledge of juvenile court codes and rules while maintaining wellness, treating our own secondary trauma, and keeping ourselves sharp for the field of battle.

Statistics show that the more contact a child has with the court system, and especially with detention, the more likely it becomes that they will be involved with the court system as an adult. Children's likelihood of recidivism increases about 1% for every day they are detained pretrial. Children's risk of death by gun homicide increases based on their length of stay in detention. Detention for children is not just harmful; it can be deadly.

Everyone else in the courtroom will act as though they are trying to help the child. In some cases, that can be true. However, every child is different and not every child needs the interference or assistance of the court. There's a saying about a hammer for every nail. The court has detention as a tool and a default response. Our role, whether through pretrial litigation, investigation, trial advocacy, or alternative sentencing, is to stop the court from beating on kids with a hammer.

We spend time discussing adolescent brain development both in training and in this manual. Diminished capacity does not require abandoning express interests. Even though they are children, they get to make their own decisions on their case. They face the consequences, and we work for them.

Children face different barriers than our adult clients. A child lacks the ability to extricate themselves from their environment. The first is the child's family and living situation. You will have many children that live with a family member, friend, or are in foster care. You will have many children who are being or have previously been abused. You will have many children who have a long history of Cabinet intervention. You will frequently have children whose parents are incarcerated. You will frequently have children who we represent almost all members of their family. Some children will have limited school support or limited medical care providers in their county. We cannot change their history. Instead, we must work against the inertia of incarceration, navigate within the bounds of an unfair system, and advocate so our child-clients can make their own choices and escape the system.

The purpose of Juvenile Court is given in KRS 600.010. The history of the juvenile court is another book though. We must reckon with the racist patriarchal structures of the current juvenile system and push the caring people in the room to protect the human potential of our child-clients.

It is imperative to remember these are all children. We are all in this together, reach out to your fellow defenders, use this manual and the other tools, teams, and technologies available to you to enhance your practice and guide your efforts for each child's case.



Laura Karem

Department of Public Advocacy's
Manual on Defending Children
2026 Edition

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I. DEFENDING CHILDREN: FUNDAMENTALS

In order to effectively represent a child, it is important to understand the basics of juvenile representation. First, juvenile court is frequently less formal than adult court. This is largely due to the original purpose of the juvenile justice system to correct and rehabilitate youthful behavior. This informality can both help and hurt the child. For example, there are plenty of judges that believe everyone in the courtroom is working together to help the child. The role of the advocate is to advocate for what the child's stated interest. All clients, both adult and juvenile, have a fundamental right to make choices regarding their representation, whether we agree with those decisions or not. Your role as a public advocate is to advise the child of the process, any rights they may have, and all of their options including any potential consequences and penalties they may face. After consultation, the child then decides based on that information how they would like to proceed. You can, and should, advise the child of the likelihood of success of their choices and discuss a backup plan with them. For example, a child may tell you that their parents are doing drugs in the home but despite that, still wants to return home. You must determine the best argument for the court while maintaining confidentiality of that information and try to get the child home. *See NJDS 2.1-2.* If that argument is not successful, it is important to discuss alternative plans for placement that the child agrees to. Representing clients in Juvenile Court is about empowering the child to make choices based upon legal consultation and advice and then advocating for those choices before the court.

Ethics in Juvenile Court

The National Juvenile Defender Standards consist of almost 200 pages worth of content. It would be impossible to recreate that type of content in this manual. Therefore, it is imperative for counsel to read and understand the ethical duties and suggestions made in these Standards. If you do not have a physical copy, you can review it for free on the the Gault Center's (formerly the National Juvenile Defender Center) website found at <https://defendyouthrights.org>

Your Role

Every child defender has the duty to understand the special rules and law related to juvenile court practice. Further, your role is that of an expressed-interest attorney. You are **not** a GAL (guardian ad litem); thus, you must zealously advocate for your child's position. This does not include the position of the child's family or that of anyone else, no matter how well intentioned. Our ethical obligation is to zealously advocate for the expressed interest of the children. Though, with permission, we could receive input from family members, treatment providers, and others who care about the child, we must always be focused on the wishes of the child.

As the child's advocate, you will be representing the child's interest from the onset of the case all the way through the resolution and termination. This is unlike representing adult clients where representation may not necessarily end at the dispositional hearing. Juvenile court requires continued representation for reviews, probation revocations, or possible contempt hearings. The best practice is for the same attorney to provide continuity of this representation from beginning to end. *See NJDS 1.1, 1.2, 1.3., & 1.4.*

PRACTICE TIP: If a child is the subject of a D/N/A (dependency, neglect, and abuse) action, they will have a GAL appointed. You must inform the child that the role of a GAL is vastly different than that of their lawyer; the GAL is not ethically obligated to keep confidential what the child says, and their role is to argue for the best interest of the child, not what the child wants.

Confidentiality

It is imperative to maintain confidentiality with your client to preserve open communication. The basic tenet of confidentiality is that all communication remains confidential unless the child must give permission for you to disclose what you have learned about the case. It is important to get that permission before you speak with other people such as the child's family, case worker, or treatment providers about the case. Parents and others may not understand that the information is protected; however, you should speak with the child privately and ask the child what, if any, information they want disclosed or not. As the child's advocate you may have to explain to the parents/guardians that your ethical duty requires you to maintain confidentiality and they cannot be a part of meetings or discussions you have with your client. Some children will want their parents/guardians in the meetings, and some will not. *See NJDS 2.1-2.*

PRACTICE TIP: Get comfortable telling a parent politely but firmly about your ethical duty of confidentiality. The initial contact with the child is likely to occur while in court. However, it is preferable that the first meeting with the child be at the office, so it is easier to control who else is in the room during the initial interview. Having the child come to your office with you while the parents wait in the lobby is imperative to maintain confidentiality. It is at that point that you ask the child what kind of contact they want you to have with their parents and get express permission as to the scope and extent of what can be disclosed to parents, schools, and others.

Glossary of Terms Used in Juvenile Court

See KRS 600.020 where applicable.

18 (18.5) Year Old Hearing: When a Youthful Offender (YO) goes before the judge after their final sentencing. *See* KRS 640.030.

Section 504 of the Rehabilitation Act of 1973: The Federal statute providing for educational services based on physical or mental disability; similar to IDEA (Individuals with Disabilities Education Act). Youth subject to this Act often have a “504 rehabilitation plan,” whereby federally-mandated services addressing the learning needs of a student with a disability are detailed and resources for those services are identified and laid out.

Adjudication: A specific finding by a court that a juvenile committed an act which, if committed by an adult, would be punishable as a crime. Adjudication is often used as a comparison to a conviction in adult court, *e.g.*, “the child was adjudicated as a public offender.” The term “conviction” is never used in Juvenile Court. *See* KRS 635.040.

Admission: Because juvenile court is different than adult court in that the fundamental purpose is to correct behavior, a child will either admit or deny the allegations. Admitting guilt to the allegations is similar to a plea of guilty in adult court.

A-School: Alternative School; check your local school district’s handbook for more specific info but typically an alternative classroom setting where a child is able to work independently either for credit recovery purposes, due to a behavioral concern in the classroom setting, or pending charges (usually violent or school related).

ATD: Alternative to Detention; a non-secure placement authorized by the court as an alternative to secure pretrial detention. Courts aim to give the child a less-restrictive, community-based alternative to detention. *E.g.*, home incarceration program (HIP)/ an electronic monitor, home supervision program (HSP)/ tracking, placement in group homes, foster care, private childcare (PCC), community programs such as mentoring, evening reporting centers, release to a treatment center, or in-home wrap-around programs.

BD: Behavioral Disability

Best-Interest Standard: Legal and ethical principles requiring decision-makers to prioritize the well-being and holistic needs of individuals who cannot make decisions for themselves (contrast with Stated Interest).

BIP: A Behavior Intervention Plan (BIP) is a formal, written document designed to proactively manage and reduce a student’s challenging classroom behaviors that interfere with learning. The plan provides educators with actionable, positive strategies, goals, and alternative replacement behaviors tailored specifically to the individual child. A parent or educator can request a Functional Behavioral Assessment through the student’s IEP or 504 team.

CDW: A Court Designated Worker, employed by AOC, who is responsible for making recommendations for cases to be sent to the court as well as supervising pre-court and out-of-court diversion programs and FAIR teams.

Commitment: Refers to an order of the court which places a child under the custodial control or supervision of the Cabinet for Health and Family Services, Department of Juvenile

Justice, or another facility or agency until the child reaches the age of 18, unless otherwise provided by law. KRS 600.020(13).

Complaint: The formal paperwork charging a child with an offense, similar to a citation and may, in fact, include a citation by the officer.

Contempt: A violation of a court's order, or behavior or actions in court that disrespects the court. A detention order as a result of contempt shall not exceed 30 days in detention. *See* KRS 600.060, 635.055, and JCRPP 18 for a more thorough discussion of requirements to find a child in contempt.

CPS/ CHFS: Child Protective Services but in Kentucky CPS is referred to as the Cabinet for Health and Family Services (CHFS).

DAC: The Detention Alternative Coordinator is an employee of the DJJ at the detention center who is responsible for securing alternatives to detention for youth. Such alternatives include placement for treatment in inpatient facilities or lower security facilities such as group homes, community placements or reporting centers, and/or electronic monitoring.

Day Treatment: Programs with a multitude of different formats including community-based services that are intended to be an intermediate level of placement for youth. Day Treatment could also be an alternative school or an actual day treatment school program operated by the local school district or DJJ for children with mental health needs.

D/N/A or DNA: Notation of a dependent, neglect, and abuse allegation that could result in a formal complaint filing in juvenile court. DPA generally does not represent children in D/N/A cases with the exception of allegations of truancy or chronic truancy. Private counsel is instead appointed by the court to represent the parties in D/N/A cases.

DCBS: Department for Community Based Services, sometimes known as "The Cabinet" or CHFS (Cabinet for Health and Family Services); responsible for child and adult protection, foster care and adoption, and services to enhance family self-sufficiency, including food stamps and cash assistance.

Detention: Secure placement facility for juveniles operated by the DJJ. A child can be detained prior to trial, as punishment for a public offense, or for contempt. A child accused of being a runaway can be detained up to 24 hours after being picked up by law enforcement. An ankle monitor can be considered "secure detention," just as in adult court.

Detention Hearing: A hearing to determine whether or not there is probable cause to justify an alleged offense and to examine the least restrictive means necessary to hold a juvenile charged with a public offense.

Disposition: A proceeding in which the court decides an appropriate course of action for a youth who has been adjudicated for a status or public offense; a hearing for the formal, court-ordered consequences of the adjudication. "Disposition" is used in juvenile court just as "sentencing" would be used in adult court.

Diversion: Alternative, pre-court intervention that allows youth under 18 to avoid a formal court record. Managed by Court-Designated Workers (CDWs), the program offers mandatory diversion for first-time misdemeanors and eligible felonies (excluding sex offenses and deadly weapons), requiring youth to complete agreements like community service, counseling, or restitution

NOTES

DJJ: Department of Juvenile Justice

EBT: Electronic Benefit Transfer, usually referring to government benefits like “food stamps” or SNAP (supplemental nutrition assistance program).

EBD: Emotional Behavioral Disorder

Expressed-Interest Standard: A legal and ethical framework requiring a representative to advocate for a client’s explicit directives or wishes, regardless of what the representative subjectively believes is in the client’s best interests. (Contrast with Best-Interest Standard).

FAIR Team: Family Accountability, Intervention, and Response Team. This is a team supervised by the CDW and consisting of various stakeholders in the juvenile criminal legal system, who can review and provide services for child diversion cases.

FCRPP: Family Court Rules of Procedure and Practice

GAL: A Guardian Ad Litem is appointed to interview a child in some family court cases and return to the court with a report. A GAL uses a “best interest” of the child standard (instead of “expressed interest” standard used by DPA attorneys) and makes recommendations to the court accordingly.

Graduated Sanction: A punishment less than detention for violation of court orders or DJJ probation. This includes any of a continuum of accountability measures, programs, and sanctions, ranging from least restrictive to more restrictive in nature. Graduated sanctions may include but are not limited to:

- (a) Electronic monitoring;
- (b) Drug and alcohol screening, testing, or monitoring;
- (c) Day or evening reporting centers;
- (d) Reporting requirements;
- (e) Community service; and
- (f) Rehabilitative interventions such as family counseling, substance abuse treatment, restorative justice programs, and behavioral or mental health treatment. KRS 600.200(31).

IDEA: Individuals with Disabilities Education Act

IEP: Individual Education Plan; provides specialized instruction, accommodations, and related services to guarantee a Free Appropriate Public Education (FAPE); strictly for students who meet criteria for one or more specific disability categories under the Individuals with Disabilities Education Act (IDEA). This is a legal contract that schools are required to follow with a highly formalized development process and review timeline.

ILP: Individual Learning Plan; maps out academic, behavioral, or career goals for students who are struggling but don’t qualify for special education. Informal, flexible working document developed collaboratively by students and educators. Child may have both an IEP to outline legal rights and an ILP to focus on broader, student driven career or post-graduation goals.

Individual with an Intellectual Disability: as defined by KRS 635.505, means a juvenile with a full scale intelligent quotient of seventy (70) or below.

In-Home Wrap-Around Programs: These are programs usually put in place through the Cabinet providing intensive, individualized care planning process for youth with complex behavioral or mental health challenges

JCRPP: The Kentucky Supreme Court's Juvenile Court Rules of Practice and Procedure

JSDS: Juvenile Services District Supervisor (*i.e.*, your local DJJ case worker's supervisor)

JSO: Juvenile Sex Offender; as used in this manual means an individual who was, at the time of the commission of the offense, under the age of eighteen (18) years, who is not actively psychotic or an individual with an intellectual disability and who has been adjudicated guilty of or has been convicted of or pled guilty to:

- (a) A felony under KRS Chapter 510;
- (b) Any other felony committed in conjunction with a misdemeanor described in KRS Chapter 510;
- (c) Any felony under KRS 506.010 when the crime attempted is a felony or misdemeanor described in KRS Chapter 510;
- (d) An offense under KRS 530.020;
- (e) An offense under KRS 530.064(1)(a);
- (f) An offense under KRS 531.310; or
- (g) A misdemeanor offense under KRS Chapter 510.

JSOA: Juvenile Sex Offender Assessment; an assessment of the child's adolescent social development, medical history, educational history, legal history, family history, substance abuse history, sexual history, treatment history, and recent behaviors, which shall be prepared in order to assist the courts in determining whether the child should be declared a juvenile sexual offender, and to provide information regarding the risk for reoffending and recommendations for treatment.

JSW: Juvenile Services Worker employed by DJJ (usually the worker who is the court representative for DJJ or supervising children probated to DJJ); oversees daily activities in detention or youth development centers, maintain facility safety, and assist youth with educational and vocational activities.

Least-Restrictive Alternative: Except for purposes of KRS Chapter 645, the program developed on the child's behalf is no more harsh, hazardous, or intrusive than necessary; or involves no restrictions on physical movements nor requirements for residential care except as reasonably necessary for the protection of the child from physical injury; or protection of the community, and is conducted at the suitable available facility closest to the child's place of residence to allow for appropriate family engagement. KRS 600.020(38)

NJDS: National Juvenile Defense Standards

NJDC: National Juvenile Defense Center, now called The Gault Center

ODD: Oppositional Defiant Disorder

P&A: Protection and Advocacy, an organization which works with disabled clients representing their rights under state and federal disability law and is a division of DPA.

Pick-Up Order: A warrant for a child to be arrested and detained.

NOTES

PDR: Pre-Dispositional Report, sometimes called a PDI or pre dispositional investigation; a report based on an investigation concerning the nature of the specific act complained of, and any surrounding circumstance which suggests the future care and guidance which should be given to the youth. This investigation shall be provided to the court in a written format. Reference KRS 610.100.

PO: Public Offender, *i.e.*, a child who has been adjudicated guilty of a public offense.

Pretrial Orders: For a status offense, this is a valid court order. *See* the juvenile court rules and KRS 600.020. For a public offense, the order generally has to be related to the charge or reason the child is in court. Child must have notice of the exact orders, notice of the consequences of violating those orders, and if alleged to have violated those orders, then must have the opportunity for a full evidentiary hearing. Remember: max disposition on an alleged contempt (violation of these pretrial orders) is 30 days in detention.

Public Offense: An act, other than contempt, which would be a crime if committed by an adult. Not to be confused with a status offense.

RISE Team: Responsive Interventions to Support and Empower team; means the interdisciplinary team established by a school participating in the SOAR Program – created by 26 SB 170.

SSC: Social Services Clinician, another name for a DJJ community case worker

Social Service Worker: Title for workers in several agencies, including the cabinet and DJJ. Note that the only educational requirement is an undergraduate degree.

SOTP: Sex Offender Treatment Program administered by DJJ

SORNA: Sex Offender Registry and Notification Act, generally not applicable in juvenile court, though registration requirements may be imposed on Kentucky adjudications if the child moves to another jurisdiction.

SSI: Social Security Insurance

SSDI: Social Security Disability Insurance

Status Offense: An act which would not be a crime if committed by an adult; meaning their status of being under the age of 18 makes it a crime. These are limited to habitual truancy, habitual runaway, beyond control of parent or school, possession/use of tobacco, and possession/use of alcohol. A child charged with a status offense is often referred to as an SO or a “status offender.”

SOAR Program: Supporting Opportunities for Accountability and Restoration Program is the pilot program established by 26 SB 170 by 26 SB 170.

Transfer: Transfer of a case from Juvenile Court to Adult Court; in other words, trying a child as an adult and subjecting the child to the consequences of the adult court.

VCO: Valid court order means a court order issued by a judge to a child alleged or found to be a status offender:

(a) Who was brought before the court and made subject to the order;

- (b) Whose future conduct was regulated by the order;
- (c) Who was given written and verbal warning of the consequences of the violation of the order at the time the order was issued and whose attorney or parent or legal guardian was also provided with a written notice of the consequences of violation of the order, which notification is reflected in the record of the court proceedings; and
- (d) Who received, before the issuance of the order, the full due process rights guaranteed by the Constitution of the United States; KRS 600.020 (69).

The child must have been adjudicated as a status offender before a VCO can be entered. *See M.A.M. v. Commonwealth*, 402 S.W.3d 546 (Ky. Ct. of App. 2013).

YDC: Youth Development Center, a long-term residential treatment administered by DJJ.

YO: Youthful Offender is a child who was under 18 at the time of a crime who is prosecuted as an adult.

Racial Disparity

“You are acting like a child!”

“I AM a child.”

A nine-year-old Black girl was handcuffed, thrown into the snow, and pepper sprayed by police officers. There were six police cars at the home of this little girl. She was suicidal, yet instead of providing help and understanding, the officers chose to physically escalate the situation and pepper spray the nine-year-old child. At one point, an officer yelled to her, “you are acting like child!” Her response is a rallying cry, “I AM a child.” She was in an emotional crisis and just wanted her dad. This is not a story, this is a child who will never be the same (<https://www.nytimes.com/2021/01/31/nyregion/rochester-police-pepper-spray-child.html>).

This interaction with the police illustrates one of the ways children of color are treated very differently than white children. This manual has reiterated the need for the actors in the juvenile legal system to continually remember that children are children. A fourteen-year-old is a child. A nine-year-old is a child. A seventeen-year-old is a child. The fact remains, white children will not face the same issues as Black children do in the juvenile legal system. Therefore, in this chapter, it is imperative that all actors in the juvenile legal system be reminded that a Black fourteen-year-old, is a child. A Black nine-year-old, is a child. A Black seventeen-year-old, is a child.

This chapter will identify some of the ways racism infects the criminal legal system for children in Kentucky. This is not meant to be an exhaustive list. These topics are covered extensively by experts in the field and the authors of this chapter do not pretend to be experts on racism. Therefore, the resources, links, and suggested readings will be vital to understanding and properly addressing these issues in practice.

In 2015, the Kentucky Legislature recognized the need for extraordinary juvenile law reform and passed SB 200. There is no doubt that this law has helped many children in the Commonwealth, but it still has not done enough to protect our children of color.

The Washington Post has created a Fatal Force database. It includes all fatal shootings by active police officers that they have verified (<https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>).

Well, are you sure?

As described in more detail below, statistics show racism permeates every step of the criminal legal system for children. There is no way to “explain” the numbers absent the direct influence of racism. There can be other factors that could explain a deviation or small disparity between Black and white children in all facets of the criminal legal system for children. However, there is no explanation that can even attempt to justify the massive disparity seen in the statistics.

Whether it is sexism, racism, homophobia, or some other type of discrimination, when someone recounts experiencing discrimination, a common initial reaction may be, “well, are you sure it was because of [insert chosen immutable characteristic].” As you read this chapter, you are encouraged to challenge the assumptions and internal biases you have. If you find yourself asking this question or feeling defensive about how these

topics are covered, take a moment to ask yourself what is at the root of your reaction. Challenge yourself to read the chapter with an open mind and without preconceived notions of what it looks like to defend Black children. And even more importantly, challenge your preconceived notions of what it is like to live as a Black child.

Disparity Nationwide

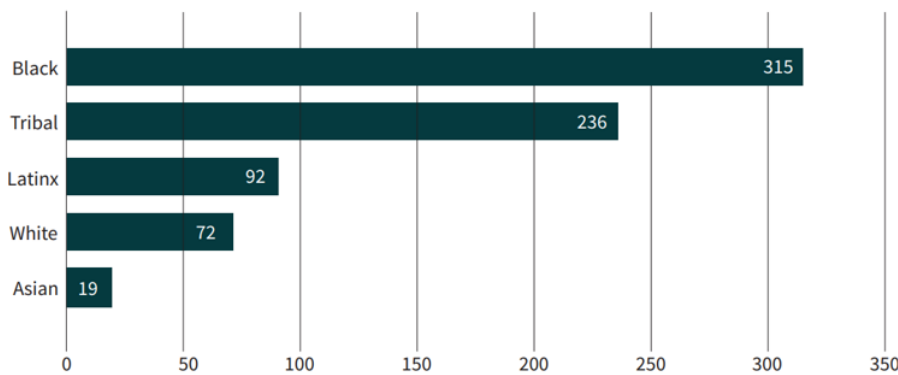
There exists larger-scale nationwide data and statistics for detained children. Nationally, only 26.3% of children detained were white (*see* chart below, “Year of Census by Race”). This chart is derived from census-type data that is collected from self-identified detention centers on a specific day. It is not cumulative data for an entire year for every single child that has stepped into a detention center, so it does have limitations. Regardless, 46.5% to 47.5% of those detained were Black children. In addition, the disproportionate rate of Black children in non-detention center placement is shown in the graph below, “Youth in residential placement by race/ethnicity.”

Year of Census by Race

Row %	White	Black	Hispanic	American Indian	Asian	Pacific Islander	Other	Total
2015	26.3%	46.5%	23.3%	1.3%	0.5%	0.2%	1.8%	100.0%
2017	27.4%	47.5%	20.7%	1.7%	0.5%	0.3%	1.8%	100.0%
2019	26.8%	47.5%	20.8%	1.8%	0.8%	0.3%	2.0%	100.0%
Total	26.8%	47.2%	21.7%	1.6%	0.6%	0.3%	1.8%	100.0%

Sickmund, M., Sladky, T.J., Puzzanchera, C., & Kang, W. (2022). “Easy Access to the Census of Juveniles in Residential Placement.” Available: <https://www.ojjdp.gov/ojstatbb/ezacjrp/>

Youth Placement Rates by Race and Ethnicity, 2019
Rate per 100,000 Youth



Source: Sickmund, M., Sladky, T.J., Puzzanchera, C., & Kang, W. (2022). *Easy access to the census of juveniles in residential placement*. Office of Juvenile Justice and Delinquency Prevention.

According to a 2019 publication, Black children are arrested at school at three times the rate of white children nationwide, and in some states the disparity increases to eight times the rate (Emily Greytak, Sarah Hinger, Susan Mizner & Jessica Cobb, Ed., *Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students* 5 (2019)). The National Center of Juvenile Justice (now the Gault Center) reported that Black children who were sent to court for a public or “delinquent” offense were more likely to have their case dismissed. Sarah Hockenberry, Charles Puzzanchera, *Juvenile Court Statistics* 2019, 55 (2019). On the other hand, the numbers also showed a higher

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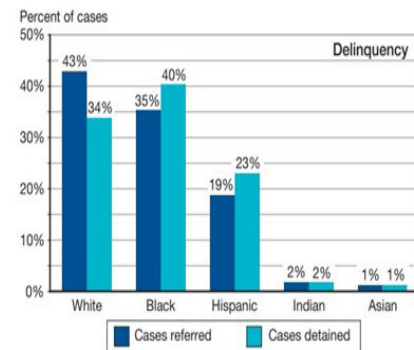
percentage of Black children being detained (*see* graph below, “Black and Hispanic youth represented a larger share of the overall detention caseload than of the overall delinquency caseload in 2019”).

Black children were more likely to be charged with more serious crimes (Emily Greytak, et al., Ed., *Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students* 36 (2019)). Even though the proportion of drug related crimes committed by white children went up, the rate of detention or waiver for drug related crimes went down. Sarah Hockenberry, et. Al., *Juvenile Court Statistics 2019*, 32-35 (2019). The proportion of formal referral to court for drug offenses also decreased. *Id.* at 35. At the same time, drug offenses “involving Black youth were more likely to be petitioned than were such cases involving any other racial group.” *Id.* at 37. For judicial waiver, or what Kentucky calls transfer or “youthful offender” referrals to adult court, the rate of waiver for drug offenses fell by a whopping 75%. *Id.* at 38. Worst of all, Black children were far more likely to be waived to adult court, *see* graph below “Person offense cases involving black youth.”

Person offense cases involving black youth were more likely than cases involving white youth to be judicially waived

Most serious offense	Percentage of petitioned cases judicially waived				
	White	Black	Hispanic	American Indian	Asian
2019					
Delinquency	0.7%	1.1%	0.6%	0.6%	0.6%
Person	1.2	2.0	1.3	1.2	1.4
Property	0.6	0.9	0.4	0.2	0.4
Drugs	0.6	0.7	0.4	0.3	0.2
Public order	0.3	0.2	0.2	0.2	0.2
2005					
Delinquency	0.7%	0.8%	0.6%	0.9%	0.5%
Person	1.0	1.4	1.5	1.5	1.2
Property	0.8	0.5	0.5	0.9	0.4
Drugs	0.8	1.2	0.5	0.6	0.2
Public order	0.3	0.2	0.2	0.4	0.3

Black and Hispanic youth represented a larger share of the overall detention caseload than of the overall delinquency caseload in 2019



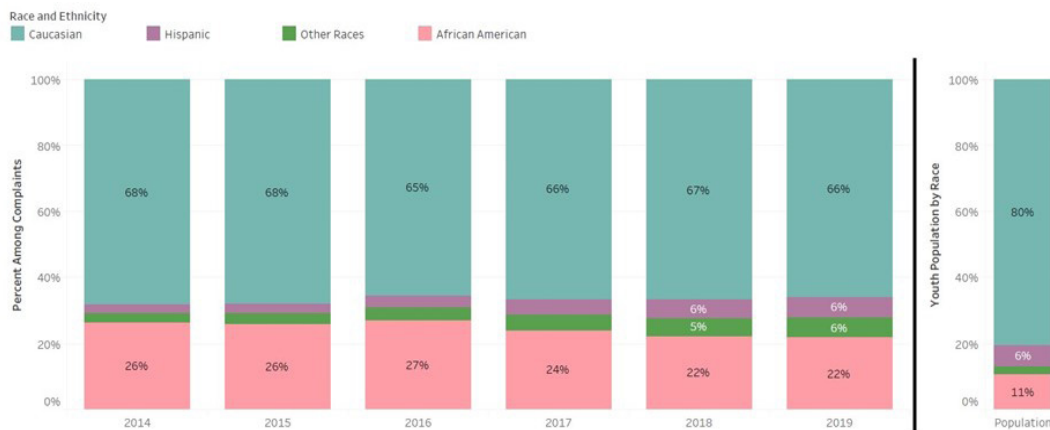
Sarah Hockenberry, Charles Puzzanchera, *Juvenile Court Statistics 2019*, 40 (2019). Emily Greytak, Sarah Hinger, Susan Mizner & Jessica Cobb, Ed., *Cops and No Counselors How the Lack of School Mental Health Staff Is Harming Students* 43 (2019)

Kentucky by the Numbers

Data from Kentucky follows the national trends. Our data comes from the Administrative Office of the Courts (AOC). This agency encompasses Kentucky’s pre-court diversion program for children, the Court-Designated-Worker (CDW) program. The information compiled has limitations and room for error such as: incorrect entry by the CDW, records not being entered, or no real ability to confirm the numbers from another agency. Although DPA does track cases to which we are appointed, we are not appointed in all cases for children. Our numbers can be entered incorrectly, and our record keeping is for an entirely different purpose and does not mirror the parameters AOC has for its entries. Thus, there can be variations or some small error rate in this data.

The first staggering statistic comes from Louisville. WFPL News Louisville and Louisville Magazine reported that between 2016-2018, AOC reported 93% of children in Jefferson County transferred to adult court were Black. However, to fully appreciate how racism permeates the criminal legal system for Black children, it is imperative to start at the beginning as there are many steps before transfer is considered. As seen in the graph below, the percentage of complaints filed against Black children (22%)

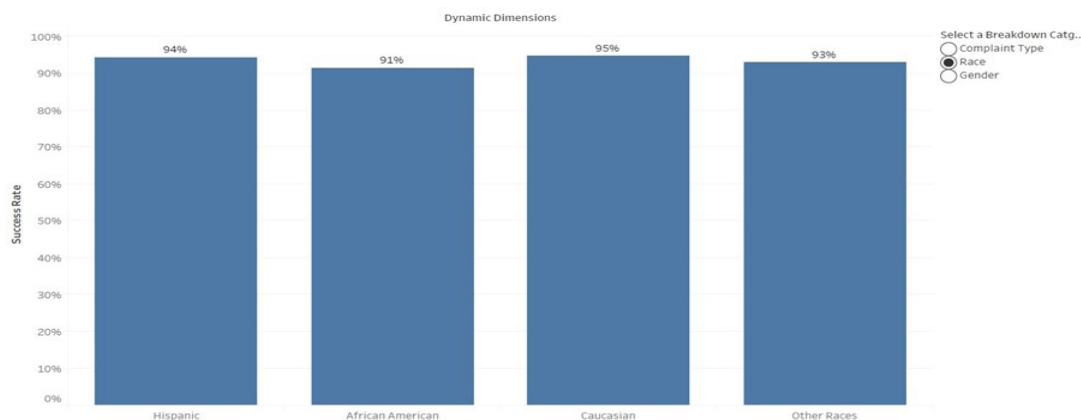
is double the population percentage of Black children in the overall population of children (11%). This higher-than-average amount of complaints filed is the foundation of the over-representation of Black children in the criminal legal system.



The Annie E. Casey Foundation provides race data for Kentucky youth on their KIDS COUNT website:
<https://datacenter.kidscount.org/data/tables/3815-child-population-estimates-by-race-and-ethnicity?loc=19&loc=59&details=2/any/false/37/133,3,1410,107/10501>

The race and ethnicity of each youth in the CDW program is self reported. For reporting purposes, the various responses are collected into four broad categories. Hispanic captures every youth of Hispanic ethnicity regardless of race. Caucasian captures youth who identified as Caucasian/White while African American captures youth who identified as African American/Black. Other Races includes youth who identified as Asian, American Indian, Other, Unknown, or Multiracial.

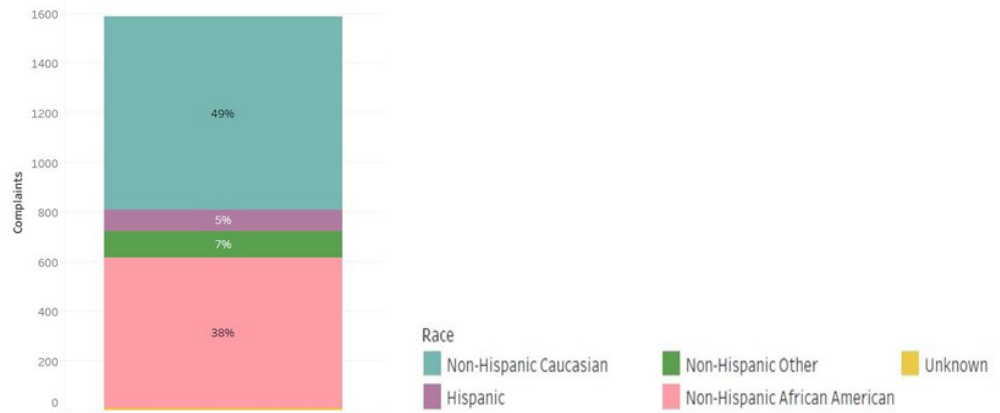
The next step to examine in Kentucky is the pre-court diversion program. Black children, when given the opportunity, complete diversion successfully in similar levels to white children, as seen in the graph below, “Diversion Success Rate of Complaints Closed in CY 2019.” This graph is broken down by race, with every group achieving over a 90% success rate.



A diversion is considered successful when the youth has completed the agreed-upon terms or has made meaningful progress and improvements in their behavior since starting diversion. Youth who don't accomplish the terms of their agreement and do not improve after a series of graduated responses can be found unsuccessful, which results in a referral to formal court.

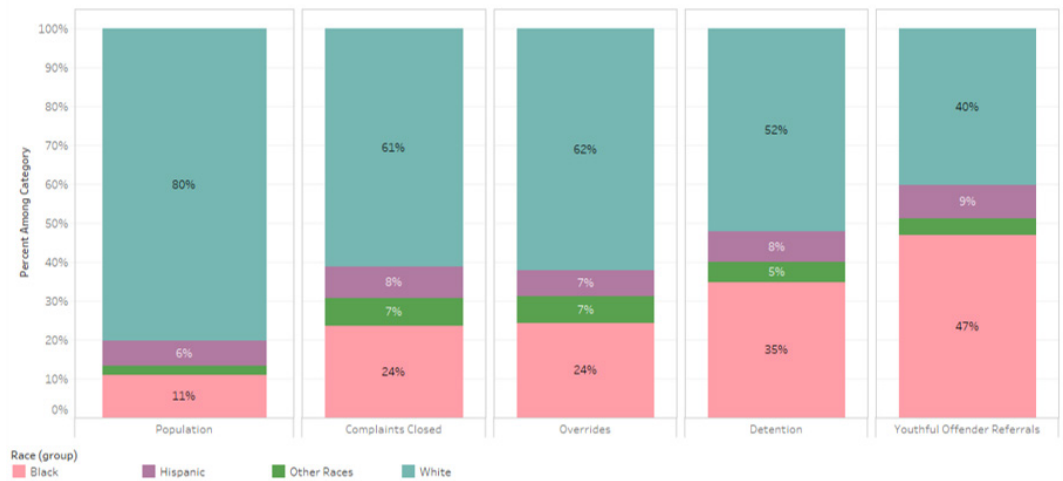
Every step of the criminal legal process increases the disparity. When a child is referred to the FAIR Team, another important step aimed at keeping children out of court, a very similar statistical disparity is present again: 18.33% to 27% of cases with Black children were referred to court in 2019 even though they only make up 11% of the population of children. Further, the proportion of successful diversion for Black children referred to the FAIR Team was consistently lower than the proportion of Black children the teams referred to court. In contrast, every single year, the proportion of successful diversions through the FAIR Team for white children was higher than the proportion of cases of white children being referred to court by the teams.

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FAIR Team Outcomes by Race/Ethnicity CY 2014 - 2019 Statewide

Next, there is further disparity in diversion overrides, when the county attorney or judge denies a child otherwise eligible for diversion the opportunity and requires the case proceed to court. In 2025, Black children represented 24% of the diversion overrides, Hispanic children accounted for 7%, other races of children comprised 7%, and white children amounted to 62%.

Comparison of General Population, Complaints Closed, Diversion Overrides, Detention, and Youthful Offender Referrals in CY 2025 by Race and Ethnicity



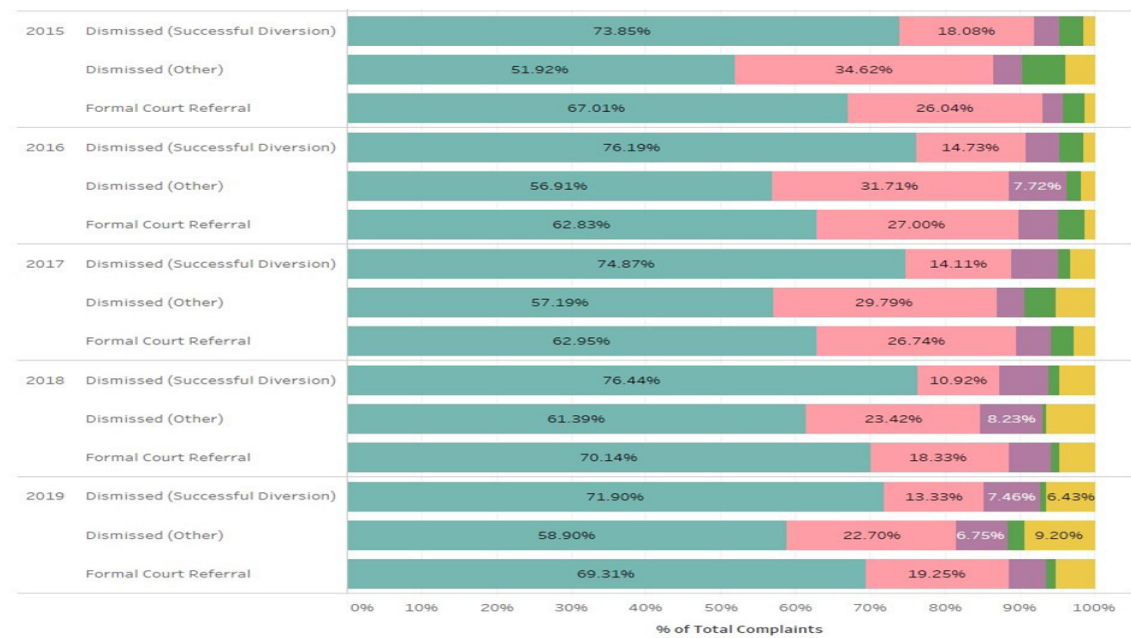
This chart follows the CDW process from the initial contact of complaint filing through a series of outcomes which includes diversion overrides, extension of detention, and youthful offender referral. Each contact point is broken down by race and ethnicity, and the racial and ethnic breakdown of the general population is also shown for ease of comparison.

When a complaint is eligible for diversion, the county attorney or the judge still have the ability to override diversion and have the child brought in for formal court. This is referred to as an override.

Juvenile justice reforms within 2014's Senate Bill 200 led to the implementation of mandatory diversion for first-time misdemeanors as well as removing the county attorney review from the process for status offenses.

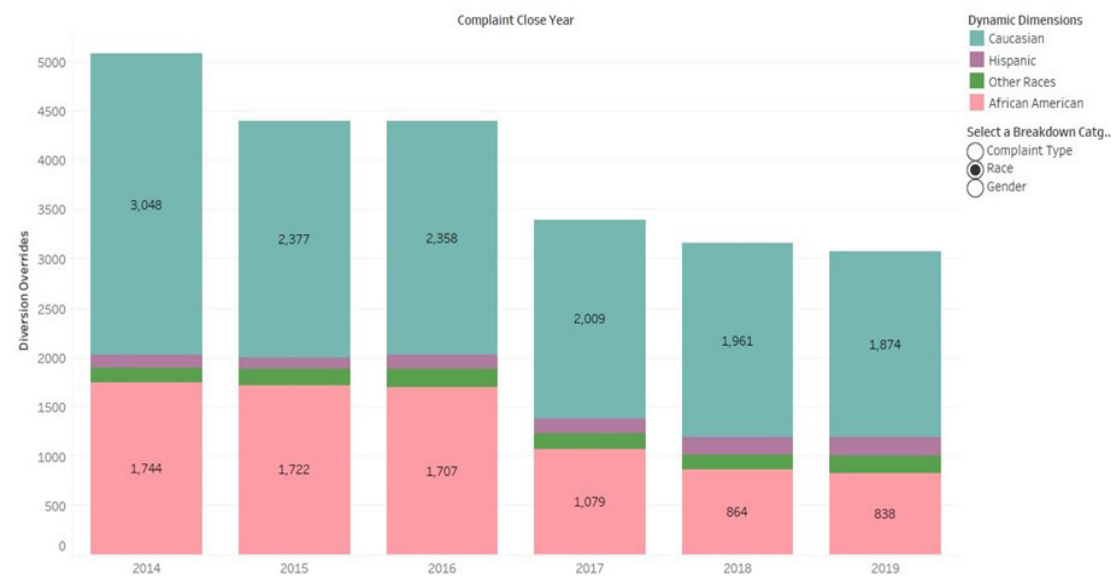
Even higher than the above disparities is the detention rate at intake for Black children, at 38%. This is more than three times the percentage of Black children living in Kentucky. Significantly more Black children are being incarcerated than white children.

*Extension of Detention Complaints by Race and Ethnicity
Detained Complaints by Race CY 2019*



The final graph shows the disparity in treatment of Black children as they progress through the pre-court process and into the criminal legal system.

Comparison of General Population, Complaints Closed, Diversion Overrides, Detention, and Youthful Offender Referrals in CY 2019 by Race and Ethnicity



What does this mean?

Whenever a subjective decision can be made, Black children lose. Whenever a person gets involved and has the ability to make a choice for a Black child, the disparity increases. Consider the very typical statements prosecutors or school officials make regarding why a child should go to court (or any other decision). Common examples

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include: “I just do not trust this family,” “she is just disrespectful,” or “I have known their whole family, they will never do better.” These vague reasons can serve to hide overt racism. It is more likely that this allows prosecutors’ and other criminal legal system actors’ internal biases to sound race-neutral.

This biased shaping of the narrative starts from the very moment the incident occurs. The officer or school considers when to report and what to charge the child with. If the school official thinks child X is a “good kid,” they may not call the police when an incident occurs. They may instead choose to discipline the child at the school and the incident ends there. If the same school official thinks child Y is “trouble,” their internal biases control how they view the behavior. It could be the exact same type of incident for both children. Assuming child X is white and child Y is Black, the numbers above show child Y is more likely to be arrested, detained, referred to court, and even potentially transferred to adult court, all for the same type of conduct. The more people that touch a case, the more likely it is that a person’s internal biases will increase the disproportionate treatment of Black children. That being said, the choices that have the most impact are ones made by the police officer or school official regarding how to charge a child.

What Do We Do Now?

In the face of the magnitude of the disparities mentioned above, it can be intimidating for a defender to identify how they can alter their practice to better serve people of color and other oppressed groups of children. Although the broader struggle to achieve equity in the effective representation of children is multifaceted and extraordinarily complex, individual defenders can take simple steps to educate themselves and learn new ways of approaching their work to ensure they are not contributing to the harm of disproportionate racial impact in the court system.

Self-Education

The first and most powerful thing a defender can do to improve their ability to serve a diverse population of children is to invest time and self-education about the circumstances of the population they serve. Self-education can take many forms, but it is never a task which is complete. A defender, like all other people, should expect that their understanding of the world and its inhabitants will grow and change over time without any particular endpoint. The goal of self-education is to reduce disparities among people of color and other oppressed children by helping professionals to identify how they contribute to those unwanted outcomes and learn how to amend their behavior. There is no one right way to begin this process, however DPA has published a list of quality resources that might be a starting point along with consideration of the ideas expressed below.

Cultural Humility

One of the foundational principles identified by researchers studying disparate impact in professional services is the concept of cultural humility. Cultural humility describes a commitment to a lifelong process of self-reflection and self-critique whereby the individual not only learns about another culture but starts an examination of his or her own belief in cultural identities. In the context of representing children, it’s significant that children generally accept the predominate culture of their family without question. This creates a need for a culturally humble defender to quickly recognize and adapt to

a child's context. Embracing the concept of cultural humility can lead to an increased ability to recognize how defenders or other professionals are contributing to racial and other disparities.

1. We move between several different cultures – often without even thinking about it. Previous attempts to describe culture risked stereotyping by attempting to identify “the culture” of certain classes of people. Cultural humility rejects the idea that there is a monolithic culture of any particular race, gender, ethnicity, religion, or other group. Instead, the focus of humility is on acknowledging that there likely multiple intersecting cultures affecting every person's behavior—some of which we may intuitively understand based on our experience, and others that we may not have yet encountered.
2. Cultural humility is distinct from cultural competency and reflexivity. The goal of cultural humility is frequently distinguished from the goal of cultural competence, wherein the professional studies and learns about the cultures of others, achieving a level of expertise in working within and across cultures. Although competence is an important goal, researchers stress that focusing on competence at the expense of humility could contribute to stereotyping that overlooks genuine cultural difference and might lead a professional farther into judgements which contribute to rather than reduce disparities in outcomes.
3. Cultural humility requires historical awareness. One's journey towards cultural humility must include education on the historic realities that contribute to cultural difference. In the context of the criminal legal system, these realities include the slow transformation in America of the institution of slavery into various diffuse forms of control including the criminal legal system. Several scholars have documented how this history has created disparities in the system, and the understanding of this history (and other similar historical realities) is essential to embracing the cultural viewpoints.

Implicit Bias

Implicit bias refers to subconscious or unintentional bias which manifests in decision making and can ultimately lead to disparate treatment and outcomes among racial and other social groups. Multiple empirical studies demonstrate this effect at a high rate, disadvantaging Black children and other people of color in their interactions with the criminal legal system. These studies find—among other similarly stark conclusions—that adults are more likely to interpret facial expressions of Black boys and girls as showing anger, Black youth have a 71.1% higher rate of rearrest than white youth (despite similar levels of reoffending) and adults perceive Black men and boys as stronger, more dangerous, and more justifiably the target of police use of force than white men and boys of similar size. The most notable feature of implicit bias is the possibility and indeed likelihood that it is present alongside sincerely held egalitarian values, the kind which defenders who seek out our work with children hold. Understanding one's own implicit biases and working to counteract them is an essential element of representing all children and children of color in particular.

Defenders engaged in representing children should learn about their own implicit biases to help combat the racially discriminatory effect of them. The Gault Center has compiled an excellent list of resources has been compiled by the Gault Center and that contains videos, worksheets, and articles to help defenders understand the problem of

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implicit bias and better explain it to other legal system participants. These resources are publicly available in the Combating Bias section of the Gault Center's Racial Justice Toolkit at <https://www.defendracialjustice.org/confronting-bias/>. In addition to learning about the nature of bias, defenders should analyze how their biases impact their work and what steps they can affirmatively take to counteract the bias of others. In addition to taking an online test to help identify bias such as the one available at <https://implicit.harvard.edu/implicit/user/agg/blindspot/indexrk.htm>, defenders can use worksheets like those collected by the Gault Center in the link above to think through their own planned responses that can interrupt bias and reduce the likelihood of implicit bias affecting children's outcomes.

There are entire books written about the empirical evidence demonstrating that implicit bias is pervasive in the criminal legal system from the earliest points of contact to final sentencing and post-sentencing considerations. Research demonstrates that defenders can better combat their biases when they intentionally engage in activities such as:

1. Stereotype replacement (replacing stereotypical responses for non-stereotypical responses);
2. Counter-stereotypic imaging (involving imagining in detail counter-stereotypic others);
3. Individuation (preventing stereotypic inferences by obtaining specific information about group members);
4. Perspective taking (taking the perspective in the first person of a member of a stereotyped group); and
5. Increasing opportunities for contact (seeking opportunities to encounter and engage in positive interactions with out-group members).

It is imperative that defenders take some of the steps recommended by research to combat their contributions to this problem and the resources listed above provide a starting place for engaging with that work.

Client Connection

Armed with some understanding about the magnitude of racial disparities among children involved in the criminal legal system, defenders can approach their work in a more client-centered manner that embraces their clients' racial and socioeconomic realities. Education, however, is not a replacement for direct investigation of the lives of the children that we serve. It is consistent with our role as counselors and advocates to maintain a curiosity about our client's experiences in order to acknowledge an important truth: We are telling their story to others in power, and we must fully understand that story if we are to tell it effectively. This curiosity should manifest itself in many forms, regardless of the race or background of the client, but it is especially important to be mindful of how our clients experiences differ from our own and from those that make decisions within the criminal legal system when we reach across cultural lines. Defenders might embrace this responsibility to learn more about their clients' experiences through the practices listed below.

Develop a Rich Client Narrative

Collecting information from child clients about their experiences and the alleged

offenses poses additional challenges beyond those presented when interviewing adult clients. Children frequently are accustomed to having their account challenged or compared to the behavior that adults expect from them. This problem is even further compounded when racial, cultural, or other observable difference creates the perception in the child's mind that their defender may not understand their point of view. This can result in an extreme dearth of information provided to defenders or an insistence on individual facts at the exclusion of other important details. To counteract this, defenders must keep asking questions and set a goal to not only learn the facts the client remembers but also their emotions and individualized experience of the events. Developing this type of a rich client narrative serves the legal purpose of preparing to advocate on behalf of the client's understanding of events, and it also demonstrates to the child that the attorney believes their opinions are important, that the attorney can be trusted with confidences, and that the attorney can represent them without blaming or shaming them for their actual or alleged conduct.

When seeking a rich client narrative, defenders can use the following guidelines to help structure their interactions:

1. **Start from a place of safety.** In any conversation with youth, it's important to acknowledge the inherent fear or concern that might be present in a child mind when speaking with their attorney. Defenders can start conversations by reviewing confidentiality, addressing their role as a defender, asking questions about client's immediate concerns, and endorsing a belief in the client's current safety in conversing with them. Depending on their experiences, some children may challenge some or all of what the defender tells them, but that challenge itself can inform a defender of possible barriers to communication with this client. Even in the most rushed interview, it's important to set an expectation that the client can be candid and that the lawyer will provide enough time and energy to the client to permit their perspective to be heard.
2. **Reject assumptions.** It is especially common for defenders to make assumptions about their child clients and their conduct. All defenders have had the experience of being children, being in school, interacting with authority figures, and being subject to the rules and expectations placed on children by our society. Defenders can feel like we understand a situation based on a bare outline of the facts by filling in the gaps with our own experience of what it means to be a child. In fact, defenders need to take the opposite course. Especially when discussing facts across a difference in race, gender, sexuality, or other cultural difference, defenders will frequently lack the full understanding of the client's perspective that they need to recount their story and advocate on their behalf. To avoid this assumption interference, the preferred course is to ask open ended questions. Instead of, "you must have been really upset at that teacher," try "how were you feeling about the teacher just then? Why?"
3. **Refrain from judgment.** Expressing judgments about your child client is the surest way to decrease their participation in the interview; however, holding back judgement can be particularly challenging when clients describe facts that seem to defy logic or otherwise run counter to our understanding of the world. In our role as counselors, we may be tempted to reflect back to the child that another participant in the legal system (such as a prosecutor or judge) may not believe the client—or we may simply feel as though we are being deceived.

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Regardless of the reason, defenders must instead be especially curious when our instincts tell us that the client's narrative is counter to our experience. We must ask for more details, ask for more context, or simply ask the client to explain their own reasoning and accept their answer. Exploration of the portions of the client narrative that seem least credible to a defender can often provide the most insight into the full experience of the child client. We simply have to stay out of judgment long enough to allow the child to fully express that experience to us.

Seek Additional Sources of Information

Fully telling our child clients' stories frequently requires more information than they are able to provide on their own. It is tempting to first turn to appropriate education, mental health, medical, and social services records that could inform defenders' understanding of their clients' stories, as described elsewhere in this manual. However, relying primarily on these records will taint a defender's understanding of their client with any implicit or explicit biases that went into the creation of those records. To be clear, obtaining these records is still an important part of representing children. Defenders simply need to resist the urge to view those purportedly neutral records as controlling of their understanding of the client's history.

Members of a client's community and family will usually be able to provide more context than records alone could hope to. When conflict occurs within the child's family, teachers, neighbors, extended family, fictive kin, and church members might be better sources of information for defenders than the client's immediate family. Those type of community members will also be able to provide important context to the purportedly neutral records that the defender encounters. If defenders need ideas for who might be a useful source of information, the client is usually an excellent place to start. Our clients, even our particularly young clients, have an intuitive sense of who their allies and enemies are. Even when they can't provide names or contact information, it is important to explain to a client and seek permission to dig deeper into their history and provide the reasons for doing so. Doing a deep search for community context to the client's narrative also has the added benefit of identifying important fact and mitigation witnesses, locating possible mental health and capacity evidence, and providing possible avenues for alternative dispositions.

Policing as Trauma

As defenders go about the challenging work of identifying the cultural context for their clients' experience, they should be mindful about the all too frequent reality of over policing among certain racial, ethnic, or socioeconomic groups. The over-policing of Black communities across the country is well documented, as is a wildly disparate police presence in communities with less financial means where property values are increasing. Studies show that white identifying Americans are more likely to view police as helpful to their goals based on their lived experience, whereas Black Americans and other racial minorities have come to believe the opposite from their negative experiences with police. The extent of these negative experiences is egregious and abhorrent. Defenders cannot ignore this cultural understanding of police interaction.

Litigating Race

Defenders must be prepared to litigate the effect that race has on a child's experience of the juvenile court system. There is no doubt that raising the issue of race can bring pushback from judges, prosecutors and other court players but faced with the data in support of wide disparities there will frequently be no better way to tell the story of the client's experience. Whole manuals have been devoted to the topic of litigating race, and a revision of DPA's Racial Justice Manual is forthcoming with more concrete suggestions. This section reviews some suggestions for raising race specifically in the context of juvenile court cases.

Local Patterns and Local Impacts

Local stories matter. Although nationwide data and urban statistics can help explain to defenders the scope of the racial disparity in the legal system, it is usually local stories which are the most persuasive to decision makers in our courtrooms. This is true primarily because of the bias among those in power to perceive their own actions as fair—despite clear evidence that they participate in a system which is unfair. When defenders can demonstrate a disparate local impact along racial lines, they outline a strong claim that local decision-makers need to reevaluate their practices. That claim serves a client's mitigation narrative, their credibility determination at trial, and may even result in withdrawal of charges.

The first step in describing local racial disparities is the hard work of locating evidence.

Frequently, the key issue worth collecting evidence on will be governed by the facts of a case, but the client may also be able to point a defender to where they experience the disparity. Evidence of disparate impact can be found in a variety of places, including:

- Police contact rates
- Charging rates
- School disciplinary rates
- Custody rates for children pre-trial
- Commitment rates (and other less favorable disposition rates)
- Transfer rates
- Open records requests to all manner of government organizations

Armed with evidence of a disparate impact, defenders can search for a legal strategy that meets their client's needs. Frequently new defenders reach for a claim of discriminatory prosecution by attempting to demonstrate that race was a primary motivating factor in a charging or prosecution decision. Although such a claim can be considered and should be attempted where it has a chance of success, the best strategy will often be to use the data to make the argument that bias—conscious or otherwise—affected the decision and that a different decision is more appropriate.

Consider for example a case set for transfer hearing. That data described at the beginning of this chapter clearly demonstrates a disparate impact on Black youth, however, it may be difficult in the face of a serious charge eligible for transfer (*i.e.*, one involving a firearm) to persuade a judge that the decision was made based on race rather than the weapon. Still, the data can be used to demonstrate to prosecutors and judges that a systemic bias prejudices your Black child client. Combined with a strong dispositional alternative, it may convince others not to pursue or grant transfer.

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Defenders should be prepared to counter the frequent objection that the system could not be biased because the total number of non-white child clients in any given county or courtroom is so low. Unfortunately, even when these numbers are low, system-wide data demonstrates that they are still disproportionately high. Knowing the racial makeup of the local population can help demonstrate this to court actors, as can use of recent state-wide data for comparison. In any event, defenders must be careful not to overly credit the small sample size of data created by children charged with crime in any one individual courtroom.

Disposition Advocacy

Effective advocacy at disposition is one of the most essential elements of representing children—both white and non-white alike. It is important to consider targeted dispositional alternatives which embrace the diverse cultural background of clients, as they can be persuasive to judges and prosecutors to consider our clients' point of view. A more thorough discussion of disposition advocacy is found in the chapter of this manual set aside for that purpose, but in the context of racial justice it is important to touch on the importance of separation-focus and creativity.

Courts want disposition options that work, yet judges frequently choose the ones that we know do not: incarceration and separation from family. When judges perceive that there is no alternative to removal from the home, they reluctantly—or otherwise—remove the children “for their own good” or “to teach them a lesson.” As defenders go about advocating against these alternatives, they should seek to use a culturally contextualized description of why their proposed alternatives will be effective. Culturally contextualized explanations might include information about how the client was raised, what their perception of their role in the community is, or who their role models are. When advocating for remaining in the home, defenders can focus on positive family or community supports, their beliefs, and the lessons they are able to impart to the child. There is no limit to the creativity that can be used here, but defenders must remember to tell the client's full story, including how race impacts their perception of the system. Even when youths experience trauma and loss, they (or their defender) can frequently articulate how they can grow from the experience.

A First Step

Racial Justice is a goal not always achievable in any individual case. Defenders must self-educate on the issues described above that will better enable them to tell their clients' stories and advocate on their behalf. As an immediate first step, defenders must be willing to ask the client, and family members, about whether and how they feel race has affected the situation. Clients of color and their families are often afraid to raise the issue, and defenders can assist.

Race and Adolescent Development

If you are representing children of color, it is important to understand how race impacts adolescent development. The overcriminalization of black youth in particular often results in worse outcomes than for similarly behaving white youth. When it comes to adolescent development, the brain development piece doesn't change. Instead, the system's perception of similar activity may be criminal for a child of color but acceptable or okay to look past for a youth who is white.

Resources include:

- Richard A. Miech et al., Monitoring the Future: National Survey Results on Drug Use, 1975-2024: Overview and Key Findings for Secondary School Students, University of Michigan Institute for Social Research (May 2025): this study aimed to (and continues to) correct misinformation that Black youth use illicit drugs more than white youth.
- High School YRBSS: United States 2023 Results, Centers for Disease Control & Prevention, https://www.cdc.gov/yrbss/index.html?utm_campaign=cdc_risk_survey&utm_medium=email&utm_source=juvjust. (last visited October 16, 2024): self-report data on various behaviors from thousands of youth in the U.S. which highlights there is often no significant difference in the number of kids engaging in risk behaviors amongst races.
- Nakoa Carey and Rebekah Levine Coley, Prevalence of Adolescent Handgun Carriage: 2002-2019, 149(5) Pediatrics e2021054472 (2022). Self-report data which shows a decrease in Black youth carrying handguns while white youth carrying handguns has increased; despite this, black youth were arrested at 3.5 times the rate of white youth for weapons charges.

Racial Trauma

Racial trauma is the mental and emotional harm caused by personal or vicarious encounters with racial bias, racial discrimination, and systemic racism. This section will focus on the effects of racism on the mental and physical health of people of color.

Race and Juvenile Justice

Racial disparities are deeply ingrained within our system and have been for centuries. For a substantial part of our country's history, black youth were treated more like adults than their white counterparts, often being subjected to cruel treatment and inadequate education or facilities suited for adults, not children. Black youth were often left out of juvenile justice reform, at points being housed in adult facilities while white juveniles were housed in Youth Detention Centers. The "superpredators" myth during the 1980s was primarily applied to brown or black youth and created fear and led to "tough on crime" policies impacting these groups more significantly. Although reforms have resulted in a decrease in incarceration rates, the disparities in the rate of incarceration between black and white youth remains significant. Understanding the traumatic impact of racism on children and adults will help guide your conversations to uncover areas where bias and/or systemic racism has impacted their case.

A Note about Counseling Your Client on Raising Race

These conversations can be difficult, especially if you and your client have very different life experiences. If you and your client are not in the same racial/ethnic group, you must create a safe space to have these conversations by building rapport and establishing trust. Acknowledging your own privilege and what you do or do not know is also important. Some children are very aware that they have been treated "differently" but may not have the right words to explain that to you or they may be weary about bringing it up at all. Approaching conversations with curiosity and without judgement is a good general principle that will create spaces where your client can freely open up to you.

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It's also helpful to discuss how raising race can be used in their particular case. Never overpromise about what could happen, because you will quickly lose trust. For example, explaining that raising race could result in evidence being thrown out (*i.e.* racial bias in police photo array could result in evidence suppression or a new trial if post disposition), but in other scenarios the effect may be less substantial. Your role as counselor is important here and you are in the best position to advise your client on the impact that raising race could have in their case.

Case Law Regarding Racial Disparities

- *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), held that law that is not discriminatory on its face but administered in a discriminatory way violates the equal protection clause
- *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), held if a state provides a school for white students it must also provide one for black students.
- *Shelley v. Kraemer*, 334 U.S. 1 (1948), held racially discriminatory housing contracts cannot be enforced.
- *Sweatt v. Painter*, 339 U.S. 629 (1950), held that if separated school facilities were not in fact equal, the school had to let black students use the white facilities.
- *Brown v. Board of Education of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954): separate educational facilities are inherently unequal.
- *Loving v. Virginia*, 388 U.S. 1 (1967): laws banning interracial marriage violated equal protection clause

Kentucky Courts and Race

These cases are included for context about how the courts have handled cases where race was a critical piece of the case.

Early History

The earliest Kentucky cases addressing race and adolescence arose in the context of mandatory school segregation under Section 187 of the Kentucky Constitution, which required "separate schools for white and colored children."

- *Mullins v. Belcher*, 142 Ky. 673 (1911), the Court of Appeals of Kentucky held that the constitutional term "colored children" was "used in their ordinary and general sense, and that they include all children wholly or in part of negro blood, or having any appreciable admixture thereof." The court further reasoned that "the question does not depend upon personal appearance. The color of the person may be one means of indicating the class to which he belongs; but the question in its final analysis depends upon whether or not the person has, or has not, an appreciable admixture of negro blood."
- *Asher v. Huffman*, 295 Ky. 312 (1943) applied this same standard three decades later when a school principal in Leslie County refused to allow Bruce Asher, a seven-year-old boy, to attend a white school. The evidence established that Bruce's grandmother had been a slave and was approximately one-fourth negro. The Court of Appeals upheld his exclusion, reaffirming that the definition of

“colored children” encompasses “all children wholly or in part of negro blood, or having any appreciable admixture thereof,” regardless of whether they show the racial characteristics of the negro.

- *Board of Educ. of Meade County v. Bunger*, 240 Ky. 155 (1931) the Court held that “the county board of education must provide equal facilities in the common school districts for the children of both races.” The court emphasized that taxes are levied on all property “irrespective of ownership” and that “provision must be made for the children of both races without discrimination.” The court further held that all legal voters— “regardless of color”—had equal rights to vote on school tax propositions. This decision addressed voting rights in tax elections and administrative obligations under existing statutes, holding that colored voters could participate in school tax elections because common school districts encompassed both races and their property was equally subject to taxation.

Kevin Stanford Case 1987-2003

The most direct Kentucky case addressing the intersection of race and adolescence in the criminal justice system is *Stanford v. Commonwealth*, 734 S.W.2d 781 (1987). Kevin Stanford, a seventeen-year-old, was convicted of murder, sodomy, and robbery in Jefferson County and sentenced to death. He challenged the juvenile court’s waiver of jurisdiction over him as racially discriminatory, presenting statistical evidence that of 56 grand jury referrals in Jefferson District Court between 1975 and 1979, 68% were Black juveniles—a group that comprised only 30% of total referrals to juvenile court. Stanford argued this meant white juveniles, who committed twice as many offenses, were referred to the grand jury at half the rate of Black juveniles.

The Kentucky Supreme Court rejected this argument, holding: “We are not at all persuaded by Stanford’s statistics and find no evidence whatsoever to convince us that Stanford or any other juvenile was directly or indirectly the victim of racial discrimination in waiver proceedings before the Jefferson District Court.” The court found the statistics legally inadequate because they failed to account for a crucial variable: the percentage of the 56 grand jury referrals comprised of repeat offenders—juveniles, like Stanford, for whom the state’s previous rehabilitation attempts had failed. The court noted the statistics could be “rationally explained” by Stanford’s own figures showing Black youths committed more than half of all homicides and robberies. The court also upheld the waiver of jurisdiction on independent grounds, finding no treatment program appropriate for Stanford existed in the juvenile system after years of intervention beginning at age ten.

This case made it to the U.S. Supreme Court in 1989, where death sentences were affirmed for 16 and 17 year olds, rejecting the idea it would violate the Eighth Amendment prohibition on cruel and unusual punishment. Following this decision, 19 juvenile offenders were executed in the United States. After Mr. Stanford exhausted his appeals, Governor Paul Patton refused to sign his death warrant. Mr. Stanford later had his death penalty sentence commuted in 2003 by Governor Patton, finding that the justice system “perpetuated an injustice” in Stanford’s case. Two years later, the U.S. Supreme Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), that all juvenile offenders are exempt from the death penalty, overruling the findings in Stanford. Mr. Stanford currently remains in prison serving life without parole. It is worth noting as

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well that significant mitigation was discovered in the case, but because it had not been presented during trial, it never made it into the record.

Equal Protection Challenges in Juvenile Transfer Proceedings

Kentucky courts have repeatedly addressed equal protection arguments raised by juvenile defendants challenging statutes that automatically transfer their cases to adult court. Kentucky's youthful offender transfer statute, KRS 635.020(4), required transfer to circuit court when a juvenile over 14 uses a firearm in the commission of a felony.

In *Perkins v. Commonwealth*, 511 S.W.3d 380 (2016), a juvenile charged with robbery and possession of a handgun challenged the automatic transfer statute on equal protection and substantive due process grounds. The Court of Appeals held that the statute did not violate substantive due process or equal protection, applying rational basis review because "juveniles do not constitute a suspect class" and there is no constitutional right to be treated as a juvenile." The court held the statute was "reasonably related" to the "obvious legitimate governmental interest in curtailing violent crimes by juveniles and protecting the public from harm." This holding draws directly from *Caldwell v. Commonwealth*, 133 S.W.3d 445 (Ky. 2004), which first definitively stated: "Juveniles are not members of a suspect class and there is no constitutional right to be treated as a juvenile."

The Kentucky Supreme Court in *Hunter v. Commonwealth*, 587 S.W.3d 298 (2019) similarly held that the transfer statute "did not implicate juvenile defendant's constitutional right to equal protection" in a murder case, reiterating that juveniles are not members of a suspect class and that the legislative decision to transfer certain juveniles to adult court after a probable cause finding "is reasonably related to the pursuit of that legitimate goal" of protecting the public from serious juvenile crime. Under these rulings, juvenile defendants cannot invoke heightened equal protection scrutiny by virtue of their age—and none of the Kentucky cases have found that race independently triggers any different analysis within the juvenile transfer framework.

Adolescent Brain Development

Courts have increasingly recognized that the science behind adolescent development is a critical piece the court must consider when it comes to court process and youth justice. This section will provide a brief background and highlight some key cases all youth defenders should be aware of or at least have a place to quickly reference. There will also be a few research article suggestions and places to go to find out more. This area is constantly evolving so be sure to sign up with the Gault Center and check their page regularly for updates!

Why Does this Matter?

Even though juveniles can legally be tried as adults in some instances, their brains lack prefrontal cortex development. This impacts their ability to delay and reflect before they act, evaluate all options rather than acting on impulse, and contemplate the risks and consequences of an action (or inaction). They also have lower social intelligence, struggling with empathy and being more susceptible to peer pressure.

There are two other brain systems that are also key to understanding the adolescent

brain. The social-emotional system develops faster than the cognitive control system and with that development teens have increased need for a sense of rewards, increased sensation seeking, more reactive emotional responses to both positive and negative emotions, and increased attentiveness to social cues. The cognitive control system takes longer to develop and provides increased impulse control, better emotional regulation, more foresight and detection of options, better planning and anticipation of outcomes, and greater resistance to stress and peer pressure. Because of this development, we see natural decreases in impulsivity, sensation seeking, and susceptibility to peer influence. We also see increases in the time spent problem solving and ability to delay gratification with age.

Practically, this may result in kids being charged at an early age then never getting in trouble again if given the right tools. As their brains mature, juvenile offenders often desist from antisocial behavior as a natural consequence of growing up. However, correctional settings, lack of resources, additional trauma, substance use, and mental illness can impact these children substantially. Understanding your client, seeking out experts, using research and case law to advocate for better outcomes, and learning how to put everything together will make for the best advocacy for your client, whether they are a child or an adult.

Developmental Research

The National Academy of Sciences released a report in 2013 that reviews advances in behavioral and neuroscience research and connects the research with the need for youth justice reform. The report calls for the implementation of reform through a developmental lens and has been critical in pushing for the incorporation of adolescent development research in the juvenile legal system. In addition, several studies have been published that examine the implications of adolescent development for young people facing juvenile court, ranging from their susceptibility to peer influences to their cognitive development in understanding waivers. A few selected articles are below but you are highly encouraged to seek out more that are relevant to your case. Most of these articles can be accessed through the Gault Center with your free account.

- An Eighth Amendment Analysis of Statutes Allowing or Mandating Transfer of Juvenile Offenders to Adult Criminal Court in Light of the Supreme Court's Recent Jurisprudence Recognizing Developmental Neuroscience, Katherine I. Puzone, Barry University
- Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders; Laurence Steinberg, Elizabeth Cauffman, and Kathryn C. Monahan; OJJDP Juvenile Justice Bulletin, March 2015.
- Studying Deterrence Among High-Risk Adolescents Thomas A. Loughran, Robert Brame, Jeffrey Fagan, Alex R. Piquero, Edward P. Mulvey, and Carol A. Schubert; OJJDP Juvenile Justice Bulletin, August 2015.
- Reforming Juvenile Justice: A Developmental Approach, Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers, and Julie Schuck, Editors; Committee on Assessing Juvenile Justice Reform; Committee on Law and Justice; Division of Behavioral and Social Sciences and Education; National Research Council
- Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational,

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Cross-Sectional Sample; Grace Icenogle, et al; Law Hum Behavior, February 2019

- De/Reconstructing Delinquency, Eduardo R. Ferrer, Georgetown University Law Center, 2025
- Immature Minds in a “Maturing Society”, Roper v. Simmons at 20, Death Penalty Information Center

Cases in which U.S. Supreme Court Recognized Developmental Research

- *In re Gault*, 387 U.S. 1 (1967): juveniles accused of crimes are entitled to the same Fourteenth Amendment Due Process protections as adults;
- *Roper v. Simmons*, 543 U.S. 551 (2005): Court’s first acknowledgement that scientific and sociological studies confirm young people have a lack of maturity and underdeveloped sense of responsibility, and they are more susceptible to peer pressure compared to adults. Developmental science behind adolescence must be used as a mitigating factor.
- *Graham v. Florida*, 130 S.Ct. 2011 (2010): life without parole for non-homicide case is cruel and unusual punishment for a juvenile and must have some “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” and each case must be evaluated individually on a “grossly disproportionate” standard
- *J.D.B. v. North Carolina*, 564 U.S. 261 (2011): established that a suspect’s age must be factored into determining whether they are “in custody” for the purpose of receiving Miranda warnings, provided their age was known to the officer or objectively apparent; recognized that children are uniquely vulnerable to coercion and pressure;
- *Miller v. Alabama*, 567 U.S. 460 (2012): “Kids are Different”; cemented constitution principle that children possess diminished culpability and a greater capacity for rehabilitate compared to adults; must consider immaturity, impulsivity, and vulnerability to peer pressure in sentencing; banned mandatory life without parole, must consider mitigating qualities of youth before handing down the harshest penalties.
- *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016): Miller must be applied retroactively since it is a substantive rule, not merely procedural; life without parole is unconstitutional for all but the “rare juvenile offender whose crimes reflect permanent incorrigibility”.

Cases in Which Kentucky Courts Recognized Developmental Research

- *Mattingly v. Commonwealth*, 188 S.W. 370, 371 (Ky.App. 1916): “The very purpose of this law, as has been declared by this court upon more occasions than one, is to provide for the protection and care of juvenile offenders in a humanitarian effort to prevent them from becoming outcasts and criminals, rather than to inflict punishment for their delinquencies.”

- *Elmore v. Commonwealth*, 138 S.W.2d 956, 960 (Ky. 1940): police cannot bypass a minor's Fourth Amendment rights by obtaining "consent" to search from parent or guardian if it occurs hours after minors arrest because that consent is obtained under implicit coercion and cannot waive the minor's constitutional rights
- *Gourley v. Commonwealth*, 37 S.W.3d 792 (Ky. Ct. App. 2001): while a youthful offender is subject to same penalty as an adult, he is eligible for the ameliorative sentencing procedure allowing for the judge to probate/conditionally discharge the juvenile, send him for additional treatment, or commit him to adult corrections at 18 years old.
- *Commonwealth v. Merriman*, 265 S.W.3d 196 (Ky. 2008): the rehabilitative purpose of the juvenile code applies to youthful offenders; also held violent offender statute did not apply in relation to probation (although HB5 made some changes since then)
- *Kentucky v. Bredhold*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, No. 14-CR-161, slip op. at 11 (Aug. 1, 2017): Kentucky Supreme Court ultimately overruled stating they could not preemptively challenge whether they were eligible for the death penalty, but there is helpful language to review throughout the decisions.

Other Significant Recognition of Developmental Research

SB 200 (2014): Driven by adolescent developmental research, this major state legislative overhaul was designed to treat children differently than adults in the legal system. Research showing that young people respond better to rewards than punitive deterrents directly informed these systemic changes.

Department of Justice Statement of Interest in *Kenny v. Wilson*: specifically regarding the constitutionality of vague school-based offenses. In recognition of adolescent development research, the DOJ asserted "student behavior is often a natural outgrowth of children's diminished maturity and their lack of experience, perspective, and judgment." Accordingly, the DOJ called for increased protections around the disproportionate criminalization of children's developmentally appropriate behavior—essentially arguing that we need to let kids be kids.

ABA Criminal Justice Section: The ABACJS urges that governmental authorities weigh the seriousness of the crime with the criminal history of the youthful offender and advises that youthful offenders should generally be eligible for early release from incarceration at a reasonable point during their sentence and further encourages that if the youthful offender is denied release the authoritative body should reconsider the individual for early release periodically thereafter.

Interviewing and Building Rapport with Your Client

Child Client Interviewing

- While many strategies used with adult clients apply to children, youth clients present unique considerations.
- All communications with the client must be documented and shared with the attorney. Remind the child that confidentiality with you is limited, you cannot keep secrets from the defense team.
- Prepare a memo after each client interaction and upload it to Justware.
- Documentation is critical not only for current counsel, but also for future team members (e.g., appellate or post-conviction attorneys, experts).
- Children may unintentionally (or intentionally) create divisions within the defense team by sharing information selectively. This underscores the importance of internal communication.
- Hold regular team meetings to discuss:
 - o Case developments
 - o The client's relationships with team members
 - o Changes in the client's demeanor or trust over time
- Do not audio or video record child client meetings unless specifically approved by the attorney.

Child Rapport Building

Entry Points

- Child's Interests: Sports, Video Games, Influencers, Celebrities, School subjects
- These neutral topics build trust without pressure
- Gives you a baseline for age-appropriate language and communication level
- Helps assess cognitive and emotional maturity of child indirectly
 - o Narrative Reliability – can they tell a sequence of events?
 - o Emotional labeling – feelings v. just physical descriptions
 - o Abstract thinking – reflecting on motivations/relationships
 - o Suggestibility – do child's answers shift based on phrasing?
- Multiple visits are often necessary
 - o First visit – rapport and orientation
 - o Second visit – structured narrative
 - o Third visit (if needed) – clarification and sensitive topics

Common barriers to child client communication

- Active trauma (home, detention, school, foster care, etc.)
- Mental health or intellectual disorders
- Substance use issues
- Ongoing brain development
- Negative past experiences with adults

Barriers to child client access

- Detention/placement issues: scheduling, physical access, privacy limitations
- Phone coordination with facility staff
- Parental/guardian interference:

- o Some adults may restrict access to the child or insist on being present at all times
- o Remember: the child, not the parent, is your client

Parent/Guardian Interview

- Engaging with a child's parent or guardian early in the case is often critical
- Initial Contact and Rapport
 - o Speak with parent or guardian as soon as possible
 - o In many cases, they are the primary avenue for access of child outside of court
 - o Build rapport with parent or guardian to encourage cooperation and ongoing access to client
- Information Gathering
 - o Obtain details about the incident
 - * Parents are often the victims/witness, or individuals who contacted law enforcement
 - o Gather context about child's environment
 - * Home Life
 - * School experience
 - * Family dynamics
 - o Assess potential contributing factors to the incident

Background and Records

- Children may be unable to recall or fully explain significant past events
- Child may not know their medical or mental health history
- Parents/guardians can provide historical and developmental backgrounds
 - o Identify sources of records
 - o Sign releases for obtaining child's records

When a Parent/Guardian Limits Access to the Child Client

- Identifying the Barrier
 - o Parent unavailable or difficult to reach
 - o Guardian has personal or legal issues unrelated to the child that interfere with cooperation
 - o Guardian is distrustful of you or defense team
 - o Child does not have independent means of communication (e.g., no cell phone)

Strategies to Address the Barrier

- Involve another member of the defense team who may build better rapport with guardian
- Identify and work through another family member trusted by child
- Coordinate with existing professionals involved with child such as social workers, caseworkers, and school personnel
- Arrange to meet the child in alternative setting away from home, when appropriate (i.e., school, park, other neutral locations)

When to consider Court Involvement

- If all other options have been exhausted, court intervention may be necessary.

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This decision should always be made in consultation with the attorney.

- o Will Court involvement damage the relationship between the child and their parent/guardian?
- o Does the child want the issue escalated to the Court, potentially placing the parent/guardian in an adversarial position?
- o Could intervention negatively impact the child's home environment or well-being?

Child Client Interview with Guardian present

Pros

- Access is easier: especially when trust is low or child is resistant to outside contact
- Initial comfort for younger children: familiar presence can reduce anxiety.
- Context building: guardian can provide developmental history, routines, school info.
- Logistics: fewer barriers to scheduling and attendance, especially for younger children.

Cons

- Reduced candor: children often filter responses in real time.
- Loyalty: child may protect or align with guardian even if experiencing harm or conflict.
- Indirect coaching (intentional or not): subtle cues, interruptions, or corrections can shape responses.
- Power imbalance is reinforced: child may defer to guardian rather than speak freely.

Child Client Interview without Guardian present

Pros

- More accurate disclosure potential: especially around home dynamics, conflict, or distress, especially if guardian is alleged victim in the case.
- Reduced performance pressure: child may feel less monitored.
- Better for sensitive topics: mental health, fear, discipline, coercion, etc.
- More authentic rapport with interviewer

Cons

- Access barriers: if guardian is obstructive, you may never get to this step.
- Child anxiety: some children feel unsafe without caregiver nearby.
- Risk of misunderstanding intent: child may confuse defense with law enforcement
- Logistical difficulty: transportation, scheduling

Observe relationship dynamics between child and guardian

- Does child defer excessively to parent/guardian?
- Does guardian interrupt, answer for, or correct child?
- Does the child appear performative in guardian's presence?
- Is there evidence of fear or coaching?
- Is the relationship stable and supportive?

Best of Both Worlds: Start initial child client interview with parent present and then transition into private interview with only child. Explain your role to guardian and why confidential meetings with the child client are necessary.

Team-based Child Client Interviewing

- One person leads, one person observes
- Reduces missed non-verbal cues
- Helps manage note-taking accuracy
- Youth clients may feel more comfortable with certain team members (*e.g.*, based on gender). This is normal and should be acknowledged.

Using Your Whole Defense Team

Investigators

Defense counsel has an ethical duty to investigate **all** cases and “determine whether the client’s interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses.” ABA Criminal Justice Standards for the Defense Function 4-4.1(a) and (d). Furthermore, due process also requires that indigent clients be given the basic tools necessary to present a defense. KYPRAC - CRP § 5:26. Your office investigator is an invaluable member of the defense team and when representing children, you should bring the investigator into the case as early as possible.

General Considerations for Investigators in Youth Defense

Youth defense is not lower stakes; it is as complex and demanding as serious adult litigation when done properly. The investigator may have an easier time locating adults over children. This is because children don’t appear in common tracking databases such as credit-based databases. Therefore, it is imperative to get as much information you can about the child and their guardian so you can reach out to them throughout the case. As discussed below, social media searches may be a good resource to use when attempting to locate children. Always consult experienced colleagues when navigating unfamiliar issues.

Evidence Gathering

Records are critical for both factual development of the case and mitigation in youth cases. Investigators should always request fee waivers for indigent clients (especially for in-state records). Identify all relevant sources for records early in the case. Submit the proper investigation requests to your investigator and discuss realistic timelines for acquiring records, proper procedures, and the importance of the records you intend to collect.

Typical Types of Records in Youth Cases:

- Juvenile Court Records
 - ◊ Does your client have a previous criminal history or any previous competency proceedings?
- Educational records
 - ◊ IEP
 - ◊ 504 plan

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- ◇ Special education
- ◇ Disciplinary records
- ◇ Attendance
- ◇ After school programs
- Medical records
 - ◇ Head injury
 - ◇ Chronic illness
 - ◇ Specialized doctors
- Mental health records
 - ◇ Diagnoses
 - ◇ Medications
 - ◇ Hospitalizations
 - ◇ Counseling
- Social Security records
- Detention records
- Employment records
- Immigration records (See Immigration later in this manual)
 - ◇ Status
 - ◇ Overseas records

Where to Look for Records:

Dependant on the type of records, they can be found in any of the following locations (consult with your investigator to determine where the best location might be):

- Courthouses, circuit/district clerks, archives, state agencies, including Office of Vital Statistics
- County Public Schools, Independent Schools, Private Schools, Home Schools
- Local hospitals, doctor's offices, clinics, health departments, mental health and substance abuse rehabilitation facilities
- Social Security Administration
- Juvenile detention centers, youth development centers, group homes

Obtaining Records

- After determining where you should find the records, determine any required documentation that must be signed by the client:
 - ◇ Does the facility require a specific release form or can the generic DPA HIPAA form be utilized?
- Check Justware ("Investigator Forms")
 - ◇ If unavailable:
 - * Use the Investigator TEAMS chat for assistance
 - * Search the facility website
 - * Contact the facility directly and upload new forms to Justware for team use
- The investigator will often need to show proof of their identity but a copy of their DPA ID badge is suitable
- Submitting the requests for records may occur in-person, by mail, by fax, by email, or through an on-line portal. Check with the facility to determine their preferred method for record requests.

Key Considerations When Requesting Records

- Whether a court order is required (coordinate with attorney)
- Whether the child can sign independently or a guardian is required
- Whether digital signatures are accepted

Generally, youth may sign for

- Department of Juvenile Justice (DJJ) records
- Cabinet of Health and Family Services/Department of Community Based Services (CHFS/DCBS) records
- Juvenile Court records

If a guardian signature is required

- Assess cooperation and accessibility
- Consider alternatives if guardian cannot/will not sign such as a court order

InterviewingWitness Interviewing

- Identifying Witnesses
- Client's family and friends
- Individuals identified by your client and their family
- Individuals listed in discovery
- Individuals identified through prior defense witness interviews

Interview Locations

- Witness residence
- Vehicle
- DPA office
- Courthouse
- Public Place (e.g. library, park, restaurant, on the street)

Child Witness Interviewing

Many witnesses in youth cases are also children, requiring careful consideration:

General Principles

- Always clearly and truthfully identify your role as part of the defense team. This becomes especially important for younger children, who may not fully understand your position.
- Work with the attorney to determine the purpose of the interview and the anticipated role of the child witness in the case

Parental/Guardian Involvement

- Parental or guardian permission to interview a child is not always legally required, but should be carefully considered.
- All decision regarding parental involvement should be made in consultation with the attorney.

Considerations for Parental/Guardian Involvement

- Be aware of public expectations; many parents assume permission is required, even when it may not be legally required.
- Failure to notify parents can result in complaints to prosecutors, potentially

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impacting the case.

- The child's age and maturity (e.g., proximity to 18 years of age)
- Whether ongoing access to the child will be needed for the case
- Whether the child will need to testify for the defense
- Assess whether rapport-building will be more effective with or without parent present
- Consider long-term strategy
 - Involving a parent may support long-term cooperation and access to child witness
 - Excluding a parent may allow for more candid initial cooperation, but can jeopardize future cooperation
 - Consider how your approach may affect the overall case strategy and outcomes

Locating Child Witnesses

- Children may be more difficult to locate because they typically do not appear in traditional (credit-based) databases
- Common methods
 - Information from the client and their family
 - Social media platforms
 - Discovery materials
 - Other witness defense interviews

Subpoena Service to Children

- Subpoenas are court orders and must comply with Kentucky Rule of Civil Procedure 45.03.
 - Key points:
 - ◊ May be served by any adult (18+). If a child is required to appear in court, a subpoena duces tecum should be issued to the child's parent or guardian, directing them to ensure the child's presence at the proceeding
 - ◊ Must be delivered (or offered) directly to the named individual
 - ◊ Service can occur anywhere within the state
 - ◊ Proof of service must be filed with the court
 - ◊ All parties must receive copies of subpoenaed materials

Social Media

Social media is often a significant component of youth defense investigations.

- Develop a working understanding of current social media platforms and culture
 - Create separate professional accounts for investigative work
 - Always clearly identify yourself and your role when communicating with witnesses online.

Using Social Media in Youth Investigations

- Provide context to relationships and evidence in the case
- Identify and locate potential witnesses
- Locate information that may assist with defense
- Reveal inconsistencies in witness and alleged victim statements

Limitations and Risks

- Social Media content may also strengthen the prosecution's case
- Access to private accounts is often difficult
- Subpoenas for social media records are often unsuccessful
- Content may be misleading or taken out of context

Youth Culture on Social Media

- Investigators should be familiar with common norms and terminology
 - "Clout": a slang term for online popularity and influence; Often tied to views, likes, and engagement
- Common Youth behaviors may be misinterpreted
 - Participating in trends or challenges
 - Sharing popular music or mimicking artists
 - Posting content designed to attract attention or engagement
 - Emulating influencers or role models
- Content frequently misunderstood by law enforcement as gang involvement
 - Depictions of weapons
 - References to drugs or alcohol
 - Hand gestures
 - Performative or exaggerated behavior intended for entertainment or status

Alternative Sentencing Workers

The Alternative Sentencing Workers (ASWs) work collaboratively with DPA attorneys to represent clients through a referral process. The ASW will work with the attorney to identify clients who suffer from substance abuse and/or mental health issues and offer the sentencing court alternatives to incarceration laid out in an Alternative Sentencing Plan (ASP). The Alternative Sentencing Plan (ASP) that is developed by the individual and ASW is an individualized comprehensive plan that address the individual's underlying criminal behavior and facilitates rehabilitation. The ASW uses Motivational Interviewing, an evidence based practice, to enhance the value of the services and to increase the likely success of developing a client-centered plan that is tailored to the needs of the client. The use of Motivational Interviewing helps engage the individual's willingness to start the treatment process, thus improving the odds that treatment will have beneficial effects. The ASP is not a treatment program but a service more akin to case management. The primary goal of the ASW is to motivate individuals into participating actively in treatment and rehabilitation, which is of critical importance to the successful completion of the plan. While the court can mandate individuals to attend treatment sessions, it cannot control what individuals actually internalize and take away from treatment. This depends on their desire for change and acceptance of new information that ultimately results in positive changes in behavior.

Guiding Principles for ASWs

1. **Case Assignments will be made by the Directing Attorney according to the priorities below.** Aside from youthful offender cases and a small number of 202A cases, the highest priority cases should be Circuit Court cases where there is a great probability that the client may receive a punishment of incarceration. Other types of cases listed below can also be prioritized but should be

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secondary. The Defender Services Branch of DPA will provide guidance only if a case assignment falls within the limitations set. Work on cases that fall outside their Guiding Principles is not permitted without prior approval in writing by the Trial Division Director after a written specific request from the Directing Attorney.

2. **Case Types for Alternative Sentencing Workers Involvement.** The focus should be on clients who suffer from mental illness and/or substance abuse, who, but for DPA intervention, may be headed to jail, prison, or DJJ placement for their sentence. Alternative to incarceration plans should be presented in any or all of the following types of cases, in declining order of priority:
 - (a) Probation in Circuit Court where the client would likely be sentenced to prison without an alternative sentencing plan
 - (b) Probation revocation actions in Circuit Court
 - (c) Specialty court revocation actions (as a last step before clients expulsion from specialty court, not as part of the routine or regular specialty court proceedings)
 - (d) Shock probation motions in Circuit Court
 - (e) Pretrial Release in Circuit or District Court where the client has not been released through routine bond advocacy
 - (f) Juvenile Disposition Hearings if commitment is likely without an alternative sentencing plan
 - (g) Preliminary Parole hearings
 - (h) Probation or conditional discharge in District Court where the client would

Children Eligible for Transfer (Youthful Offender Cases)

Zealous team representation for youthful offenders eligible for transfer to Circuit Court is a high priority for DPA. Because of the value of ASWs as part of a defense team, an alternative sentencing worker **shall be assigned to every case** where the prosecution has given notice of an intent to transfer the child to Circuit Court. The ASW is to remain on the defense team throughout the case to assist in achieving the most favorable result possible for the client. This representation continues after transfer to adult court. Pursuant to DPA Policy, it is the responsibility of the Juvenile Post-Disposition Branch (JPBD) to represent youth at 18-year-old sentencing hearings under KRS 640.030), and at subsequent hearings if needed. The trial office ASW shall coordinate with the JPBD ASW to ensure continuity of services and effective advocacy.

ASWs and Children

ASWs should be knowledgeable about all of the community resources which might assist youthful clients represented by the DPA. If they do not currently have a placement or community resource that meets the needs of the client, they strive to find or develop a reasonable plan to best meet the needs of the client. ASWs are creative and collaborative.

There are some placements that accept every type of referral (community, CHFS, DJJ) and there are placements, just like with our adult clients, that only accept referrals from the Cabinet or DJJ. ASWs strive to have a collaborative relationship with all to aid in creating the most beneficial and creative client-centered ASP when appropriate.

Common Placements/Agencies

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Whenever placement is needed for a client it is best practice to involve the ASW because they know these agencies best and are most familiar with the referral processes. Most offer a multitude of services at various level of care:

- The Brook
- The Ridge
- Ramey Estep
- Rivendell
- Every regional comprehensive mental health care
- And many more!

II. DEFENDING CHILDREN: PRELIMINARY MATTERS

Arraignment – KRS 610.060 et al

Just as in an adult arraignment, the purpose of arraignment is to advise the child of the charges against them and their constitutional rights. However, the court must appoint counsel if the child or family does not hire an attorney. *See*, JCRPP (3), (6) (B), (12)(B).

PRACTICE TIP: If a judge appoints you as counsel but the child is not present for arraignment, then there can be no pretrial orders at that time. The child must be present and have notice. If the child is not present, then a timely objection should be made on the record.

Arraignment is vastly different in Juvenile Court. Not only must the court inform the child about the charges brought against them and their rights, but also, the court must advise the child's guardian about the charges and their rights. At arraignment, the court must appoint counsel if the parent or child does not already have counsel. The court will then almost always put the child under pretrial orders, some of which can result in being placed in detention if the hold is noncordial. Pretrial orders are where many children find their way into detention. You must advise the child that if they violate any of the pretrial orders they can be placed in detention for up to 30 days each time. The attorney representing the child should object to any orders that are not relevant to this case and this child, *e.g.*, requiring drug testing in a case where there is no allegation of drug use. There is a possible argument that rather than contempt, these are violations of the terms of pretrial release. Thus, returning to detention could be more appropriate. However, please keep in mind that this argument can hurt children and cause longer detention pretrial if there is no chance.

Forms

There are four forms you must become familiar with when representing children.

1. **JV-41** (Affidavit and Truancy Evaluation Form)
 - Must be filed in all truancy actions. It is a sworn affidavit by school personnel, usually the DPP. This form should show whether the school has performed a home visit and provided services to the child prior to

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filing the action. It should also show the child's absences to verify that the basic elements of habitual truancy have been met. If this form is not filled out correctly or does not show these basic requirements have been met, move for dismissal for lack of subject matter jurisdiction at arraignment. KRS 159.140; JCRPP (4)(A)(3)(a)

2. **JV-38.1** (Affidavit and Beyond Control of School Evaluation Form)
 - Must be filed in any beyond control of school action JCRPP (4)(A)(3)(b)
3. **JV-38 Affidavit and Beyond Control of Parent Evaluation Form**
 - Must be filed in any beyond control of parent action JCRPP (4)(A)(3)(c)
4. **JV-52** Complaint, Affidavit of Peace Officer, and Order for Emergency Protective Custody of a Child Suspected of Being a Habitual Runaway
 - filed in habitual runaway petitions (usually when child is picked up) JCRPP (4)(A)(3)(d).

Basics of Arraignment

The court *must*:

- Notify the child and their parents or guardians of the child's constitutional rights. The right to remain silent extends to the parents and guardians. KRS 610.060 (1), JCRPP (3)
- Inquire whether the child and/or guardians have hired or intend to hire counsel. Otherwise, a public defender must be appointed regardless of indigent status. The court can assess a public defender fee to the parent. JCRPP (3), (6)(B), (12)(B); KRS 610.060(4)

Permissive options

- The child may be detained pretrial and may be in custody.
- A detention hearing may have already happened or may be happening in conjunction with the arraignment. If the detention hearing already happened and the child is still detained, you should make another argument for release.

PRACTICE TIP: Get the detention center's report prior to going in front of the judge; this can be a very persuasive argument to a judge to release the child.

- The County Attorney can file or notify their intention to filing to transfer the child as a Youthful Offender. *See Transfer Hearings.*
- Guilty Pleas/Admissions
- The case can be dismissed.
 - The County Attorney can agree to dismiss and send back to the CDW, if the child is eligible for diversion. JCRPP (12)(D).
 - Court can dismiss for lack of jurisdiction for mandatory diversion. JCRPP (2)(E).
 - If the case is dismissed, the case should automatically be expunged by the clerk using the JV-29. JCRPP 2(E) and (12)(E).

Pretrial Orders

In status offenses, there can be no pretrial orders. A VCO is issued only after a child has been adjudicated as a status offender. *See M.A.M. v. Commonwealth* 402 S.W.3d 546 (Ky. Ct. App. 2013).

In public offenses, there is no requirement for a VCO. However, the basic rules apply. The child must be given notice of what the exact orders are, they cannot be vague, and they must also be given notice of the consequences if those orders are violated. For example, if a Judge appoints counsel but the child is not present for arraignment, then there can be no pretrial orders at that time. The child must be present and have notice. You must object. If the child is not present, then a timely objection should be made on the record.

Confidentiality of Juvenile Court

The purpose of the shroud of secrecy and confidentiality mandated by statute (KRS 610.320) is to protect the child through the end of the appellate process, not merely in the lower courts. *FTP v. Courier Journal*, 774 S.W.2d 444 (Ky. 1989).

Enhancements

KRS 635.040: No adjudication by a juvenile session of District Court shall be deemed a conviction, nor shall such adjudication operate to impose any of the civil disabilities ordinarily resulting from a criminal conviction, nor shall any child be found guilty or be deemed a criminal by reason of such adjudication.

Adjudications are not convictions; therefore, no offense-based enhancements apply to juvenile court petitions, but you must object. *Phelps v. Commonwealth*, 125 S.W.3d 237 (Ky. 2004). KRS 635.040. In *Phelps*, the child could not be charged with or found delinquent of Unauthorized Use of a Motor Vehicle Second Offense. There is an exception for Possession of a Handgun by a Minor. KRS 527.100, but see future JPDB newsletters for a 2nd amendment based challenge to the offense and enhancement for minors. *See also, Cummings v. Commonwealth*, 226 S.W.3d 62 (Ky. 2007).

You must especially object before any transfer hearing happens. *See Jackson v. Commonwealth*, 363 S.W.3d 11 (Ky. 2012). In *Jackson*, a firearm enhancement to Trafficking in a Controlled Substance First Degree was permissible, but a “second offense” enhancement would not have been. Unfortunately for Jackson, the enhanced TICS-firearm was a B Felony that qualified Jackson for transfer to adult court.

Detention Hearings

Detention hearings happen when a child is picked up on a new offense or on an allegation of contempt in an existing case. A detention hearing must occur within 24 hours of being detained for a status offense and within 48 hours of detention for a public offense, excluding holidays and weekends. At a detention hearing the court must find probable cause that the child committed the offense. If probable cause is found, then the court will decide whether to release the child and under what condition the child is to be released. These hearings usually occur quickly and without a lot of notice to prepare. Oftentimes, the defense counsel is allowed only a limited time to speak with the child and/or investigate the case prior to the detention hearing.

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All children aged 10 and up, charged with a violent offense, shall be initially detained, per KRS 610.265(2), so expect more detention hearings and get creative with timing and alternatives for release of youth!

PRACTICE TIP: Make sure children are not shackled in the courtroom. JCRPP 20.

Timeline

Status Offenses

Any child who is alleged to be a status offender or who is accused of being in contempt of court on an underlying finding that the child is a status offender may be detained in a nonsecure facility or a secure juvenile detention facility for a period of time not to exceed twenty-four (24) hours, exclusive of weekends and holidays, pending a detention hearing. KRS 610.265. Thus, the detention hearing must be held within 24 hours of the child being picked up. Remember if timeline is violated the child **must** be released JCRPP 2(e).

KRS 630.010 (3) states, “Status offenders shall not be detained in secure juvenile detention facilities or juvenile holding facilities after the initial detention hearing unless the child is accused of, or has an adjudication that the child has violated a valid court order, in which case the child may be securely detained for up to forty-eight (48) hours, exclusive of weekends and holidays, pending receipt of the written report required under KRS 630.080(4). Any period of secure detention prior to the detention hearing shall not exceed twenty-four (24) hours, exclusive of weekends and holidays.”

Public Offenses

Detention Hearing must be held within 48 hours of being taken into custody. KRS 610.265 (excludes holidays and weekends). If this is violated the child **must** be released. JCRPP 2(e). However, the court can pretrial detain the child on a new offense. If contempt is alleged, 30 days is the maximum disposition. If contempt and a new offense are both alleged, there could potentially be a pretrial detention AND a sanction for contempt.

- (a) There is no “substantial compliance.” The sanction for contempt must be followed exactly.
 - (i) KRS 610.265(5): “If the detention hearing is not held as provided in subsection (1) of this section, the child shall be released as provided in KRS 610.290.”
 - (ii) KRS 610.290(1): “Unless a hearing is held within the time frame established by KRS 610.265, and the necessity for detention properly established, the child shall be released to the custody of his parents, person exercising custodial control or supervision or other responsible adult pending further disposition of the case.”
 - (iii) *See also* JCRPP2(e) concerning Interstate Compact on Juveniles

Transfer Cases

If a case is eligible for transfer, your prosecutor is very likely to transfer, the judge is very likely to transfer, and the evidence seems solid, consider pleading at the detention

hearing. However, always get a second opinion from your directing attorney, juvenile specialist, and JPDB.

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Before the Detention Hearing

Gather Paperwork

The attorney should attempt to get all of the paperwork from the CDW, County Attorney, and/or Juvenile Court Clerk.

- The attorney for the child has a right to have copies of the complain, affidavit, police reports, pick up order, CDW forms, and especially the motion for contempt. You are entitled to access the child's file. KRS 610.342.
- The detention center may have a behavior report.

Confirm Your Client's History

- Confirm legal history either through your own investigation or through the CDW, including prior diversions or family history. The CDW usually has a good idea of the background on this child and their family.
- Confirming the legal history will give you the opportunity to ask for dismissal if this would be a mandatory diversion, permissible diversion, or to determine eligibility for transfer.

PRACTICE TIP: If a case is eligible for transfer and it seems likely that the prosecutor will transfer, consider pleading at the detention hearing. It is best practices to get a second opinion from your directing attorney, juvenile specialist, or JPDB, however. Advise your client of all consequences for this strategy.

Meet With Your Client

- Remember the trauma they have been through and proceed accordingly.
- Remember you are an expressed-interests attorney and should focus on the child's expressed interests, not what you believe is in their best interest.
- Do not speak to the child's family unless they give you express permission to do so.
- The point of your initial meeting is for the child to understand what is going on, you to understand their side, and for you to get all information possible (in a short amount of time) to remind the judge that this is a child that should go home and not be detained. This also allows you to building relationship building with your child, reassuring them that you are fighting for them and this will not be your only meeting together.

PRACTICE TIP: Always try to see your client in person at the Detention Center, if possible, prior to the detention hearing. If you are unable to physically go, most detention centers are very helpful in getting your client on the phone for a confidential conversation. Be sure to confirm that this conversation remains confidential. The more time you have to discuss with your client before the hearing, the more information you can gather to make the argument for release from detention.

Detention Hearing Procedure

There are two parts of the detention hearing, pursuant to KRS 610.280: (1) a probable cause determination and (2) a determination on detention. It must be two separate findings.

1. Probable cause determination:

- (a) The Court must find probable cause that the offense was committed and probable cause that the child committed the offense.
- (b) The burden of proof is on the Commonwealth to establish there is sufficient probable cause. KRS 610.280(2)(a); JCRPP 2.D.3. and KRS 610.280(2)(a); JCRPP 2.D.3.c.
- (c) Because the statute analogizes the detention hearing to a preliminary hearing in adult court, hearsay testimony is permissible. KRS 610.280(2)(a); RCr 3.14(2).
- (d) Similar to a preliminary hearing, the detention hearing can be used as a discovery tool to gather information and commit witnesses to their testimony.

2. Making a determination on detention:

- (a) The Commonwealth must prove, and Court must find, that detention is suitable for this child and this petition. KRS 610.280(2)(b).
- (b) The Court must consider the least restrictive alternative necessary to protect the community and ensure the best interests of the child. The Juvenile Code specifically states that the court shall show that all less restrictive alternatives have been attempted or are not feasible before the child can be removed from the home. KRS 600.010(2)(c). “Least restrictive alternative” is defined in KRS 600.020(37) as “no more harsh, hazardous or intrusive than necessary.”
- (c) Specific findings must be made on the record indicating that least restrict alternatives are not feasible if detention is ordered. JCRPP 2.D.3.f.
- (d) The Court can pretrial detain on public offenses. The Court must consider the factors found in KRS 610.280 (1)(b):
 - (i) Seriousness of alleged offense;
 - (ii) The possibility that the child would commit an offense dangerous to themselves or the community pending disposition of the alleged offense,
 - (iii) The child’s prior record, if any; and
 - (iv) Whether there are other charges pending against the child.

- (e) Defense counsel can and should present an argument against detention, as well as alternatives to detention. Each detention center has an Alternatives to Detention Coordinator. They typically can identify community resources available in the area. Community alternative resources may include:
 - (i) House arrest
 - (ii) Release with conditions - curfew, good behavior, etc.
 - (iii) Placement with relative, family friend or other responsible adult.
 - (iv) Placement in emergency foster home or shelter. 610.050.
- (f) Make the Court use the proper AOC form: the JV-34 form for public offenses and the JV-35 for status offenses. These forms can be found on the Forms Tab on Courtnet.
- (g) The remedy for illegal detention is by Writ of Habeas Corpus to Circuit Court. Contact JPDB for assistance if your client has been illegally detained.

Other Authority Concerning Detention Hearings

Due Process

There is no violation of due process when a court authorizes pretrial detention of “an accused juvenile delinquent based on a finding that there is a “serious risk” that the child “may before the return date commit an act which if committed by an adult would constitute a crime.” *Schall v. Martin*, 467 U.S. 253, 255, (1984).

Logistics for Detention Facilities

KRS 610.265 specifies the facilities in which detention may take place, the time frame for holding detention hearings (status offenses—24 hours exclusive of weekends and holiday; public offenses – 48 hours exclusive of weekends and holidays); and requires the release of the child if the detention hearing is not held as specified. In addition to those items contained in KRS 610.280 *infra*, the trial court must consider the nature of the offense, the child’s background and history, and other information relevant to the child’s conduct or condition. Subsection 3 of the statute limits detention of alleged status offenders in a secure detention setting to a period not to exceed 24 hours after which detention shall occur in a nonsecure setting approved by the Department of Juvenile Justice pending the child’s next court appearance. If the child is alleged to have violated a valid court order as a status offender or alleged status offender, the child may only be detained in a secure juvenile detention facility, or in a nonsecure setting approved by the Department of Juvenile Justice, for a period not to exceed 48 hours, exclusive of weekends and holidays, pending the child’s next court appearance. These limits on incarcerating children under status offense charges are to be strictly adhered to. *See* KRS 630.100.

Burden of Proof

KRS 610.280 The prosecutor has the burden of proof to establish by a standard of probable cause that the charged offense occurred and was committed by the child. The child shall be afforded an attorney and have the right to confront and cross-examine witnesses. Before ordering the child detained, the court must also consider the seriousness of the offense, the likelihood the child will re-offend in a manner dangerous to himself or the community prior to disposition, the child’s prior record if any, and any other pending charges. An order of detention must state on the record the specific reasons. Thus, counsel for the child has an obligation to present evidence on these critical areas.

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Habeas Corpus

KRS 610.290(2) Any person aggrieved by a detention hearing or the lack thereof may proceed by habeas corpus to the Circuit Court.

Standard of Proof

KRS 635.050 In public offense cases, a child shall not be detained after adjudication pending disposition except upon “a finding of the court by a preponderance of the evidence that the circumstances surrounding the child are such as to endanger his safety or welfare or that of the community.”

Contempt

KRS 635.055 “No child who is found to be in contempt of court shall be committed as a public offender as a result of such finding, nor detained because of such finding in a facility other than a secure juvenile detention facility, youth alternative center, an alternative to detention program approved by the Department of Juvenile Justice, or a nonsecure detention alternative. An order of detention for a child found in contempt shall not exceed thirty (30) days.”

Age

KRS 635.060(3)(a) The amount of time that a child may be detained as a part of a disposition is based on the age of the child. The youngest a child may be detained at disposition is 14 years of age.

This is specific as a disposition, though it can be used as a good argument that no one under the age of 14 can even be detained ever.

Pre-Petition Detention under KRS 610.200 - 610.280

A court may order pre-petition detention if it finds that detention is necessary to protect the child or the public. If the Commonwealth establishes there is probable cause, a petition shall be filed. If the Commonwealth establishes probable cause a petition may be filed; however, if the child is eligible for mandatory diversion, the court case shall be dismissed, expunged, and returned to the CDW. JCRPP 2(D)(3)(d).

Mandatory Diversion of a Misdemeanor

JCRPP 2(E) Any petition filed charging a misdemeanor when the child has no prior adjudications, and no prior diversions shall be dismissed by the court for lack of jurisdiction and the record expunged. KRS 635.010(4).

90 day limit

The Supreme Court held that the statute (currently 635.060(3)(a)) limited public offender detention of a child to 90 days regardless of the number of separate offenses charged. *Commonwealth v. W.E.B.*, 985 S.W.2d 344 (Ky. 1998).

No detention as a disposition

A person over 18 years of age at the time of disposition, but who was a child at the time of the offense, may not be ordered into adult detention as a disposition. *D.R.T. v. Commonwealth*, 111 S.W.3d 392 (Ky. App. 2003).

Person over the age of 18

A person who is over 18 at the time of disposition for an offense committed prior to age 18 may not be sentenced to time in the juvenile detention center. *Jefferson County Dept. for Human Services v. Carter*, 795 S.W.2d 59 (Ky. 1990).

Prohibited detention

Juvenile Court may not impose probated detention sentence on a thirteen-year-old child when KRS 635.060(4) (currently KRS 635.060(3)(a)) prohibits detention for children under fourteen (14). *N.T.G. v. Commonwealth*, 185 S.W.3d 218 (Ky. App. 2006).

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Dependency, Neglect, and Abuse Cases

A DNA case is against the parent or custodian of the child. The parent is charged with neglect, abuse, or dependency. The child is not a party to this case and thus, cannot be ordered to do anything. They are the subject of the action, and the court can order the custodian, whether it be the Cabinet or parent/family member, to place the child somewhere.

KRS 620.095: “A nonoffender, as defined in KRS 600.020, shall not be placed in secure or nonsecure detention.”

KRS 600.020(42): “Nonoffender” means a child alleged to be dependent, neglected, or abused and who has not been otherwise charged with a status or public offense.” One of the biggest frustrations when representing children is how a DNA case limits our ability to achieve our client’s goals. An increasingly alarming problem has arisen out of DNA cases. Children cannot be detained for a DNA case. Children can be placed in a foster home, behavioral therapy placement, substance abuse treatment, or any other place the court wishes to send the child, except detention. The family courts can often get this confused. A child is NOT a party to a DNA case, rather the Court has the jurisdiction to order the parent or the Cabinet (substitution for the parent) to place the child in a specific setting. However, if the child refuses to go, runs away from placement, or otherwise leaves, the court has no jurisdiction to hold a child in detention without a criminal charge. The child must be charged with a status offense or public offense for them to be detained. Keep in mind that all the protections such as mandatory diversion, detention hearing timelines, and restrictions on detaining status offenders still apply even if they have left a treatment center. For context, habitual runaway requires at least 3 days of being gone for the child to be charged. Until the child has been gone for three days or has runaway three times, they cannot be charged with runaway.

Contempt

The court can use the contempt power or probation revocation proceedings for violations while the child is on probation or committed. The court’s jurisdiction continues for the duration of the probation or conditional discharge period. *A.W. v. Commonwealth*, 163 S.W.3d 4 (Ky.2005).

Always confirm the exact court order the child has allegedly violated. Contempt for a status offense requires a Valid Court Order, which only occurs after adjudication. *See M.A.M. v. Commonwealth*, 402 S.W.3d 546 (Ky. App. 2013). Contempt for a public offense can happen at any time, as long as the order is issued from this court and not the DNA case. Detention from a DNA case is an illegal detention. Please contact JPDB immediately if you have a child or learn of a child being detained on these cases. There is no limitation for direct contempt in front of a judge in the courtroom, but this applies to anyone in the courtroom.

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Stated Interest v. Guardian Ad Litem (G.A.L)

It is imperative that you explain to the child the difference between your express-interest representation and the G.A.L.'s best-interest representation so your child can make their own decision on what information they give to the G.A.L. Further, you should explain your limitations when it comes to family court orders and placements. Our children frequently do not wish to go to or stay at the placement the family court or Cabinet has chosen for them. It may be helpful to contact the G.A.L. for updates about the DNA case, especially if it is in a different county or on a different docket than your case.

DPA attorneys do not have the authority to argue in a DNA case. However, there are some creative ways to negotiate this situation. First, work directly with the Cabinet worker and try to get them on your child's side. This could include, with permission, explaining the situation from your child's perspective with any details that would be persuasive. Again, you must get permission from your client to share that information. It could be finding an alternate family member the child could stay with and connecting the social worker with that family member. If the Cabinet does not want to do that family placement, you can ask the judge in your case to consider ordering the family placement out of the public offense or status offense case.

From a systemic perspective, getting to know the CDW, Detention Alternatives Coordinator, and FAIR Team members can allow you to actively find resources to keep the child in the home (or family placement) that may be persuasive to the judge. It also gives you an opportunity to give context to the child's actions to other actors in the criminal legal system that may have sway over the Cabinet worker or prosecutor. This can be especially true if your prosecutor attends FAIR Team meetings. The prosecutor may feel pressure from the other members, who may be their neighbor or, at minimum, a voter in their community. The more you advocate for children in these roles outside the courtroom, the easier it can become to have support inside the courtroom.

Challenges with Social Services Workers

A Social Services Worker may be a person in your child's case. This Social Services is different and distinct from the Alternative Sentencing Worker (ASW) that is part of a DPA office and a member of the defense team. These Social Services Workers may work in several agencies, including the Cabinet and DJJ.

While the social work may want to help your child, they can be a challenge to your child's success. Depending on the individual social worker or the jurisdiction you practice in, this social worker may be the one advocating to the judge for detention. They may because of labels that have been attributed to your child such as "bad child" or "problem child." Sometimes they advocate for detention because they do not have a placement set up and if the judge gives custody to the Cabinet, the individual social worker will have to sit with the child until a placement can be found. They frequently fight against this. No child should have to sit in detention because a social worker is unable or refuses to find a placement.

You may be able to negotiate this situation outside the courtroom. You can speak directly with the social worker and address the concerns for this detention. You can

set up a meeting with the social worker, their supervisor, and your office/supervisor and discuss the problems you're having as a team. There is also an Ombudsman Division for complaints against the Cabinet and you can make complaints there as well. Remember, if the complaint is based on a client's specific case, you must get permission from the client prior to divulging details. It is a good idea to discuss all of this with your supervisor prior to making complaints so that you can make a plan together.

If the social worker is still resistant to helping your child, you can advocate to the County Attorney who can sometimes be an ally to your child against this social worker's recommendation of detention. Ultimately, the judge has discretion to order many things even if the Cabinet does not want them to. You can also work with the Detention Alternatives Coordinator at the detention center. They can and should be helping to find placement for the child even when the Cabinet will not. The judge can order this placement over the objection of the Cabinet. Ultimately, defending children frequently requires us to do a lot of negotiation and strategizing outside the courtroom to achieve the child's goals. Presenting appropriate alternatives and plans directly to the judge in court can make the Cabinet seem unreasonable for arguing against them. Getting the judge on your side is very important. This requires mitigation work from the beginning of the case, often the detention hearing. See *Detention Hearings*.

DPA Alternative Sentencing Workers are fantastic resources. They can help with placement plans, finding placements, assisting in mitigation, and giving you background on what and/or why the social worker is behaving a certain way.

Working the Program

One of the best things our clients can do is work the program. Often times, children will be unhappy in a program. You can advise the judge every time the case is in court about the issues with the program. The judge may not be persuaded to change placement the first time they hear the complaint, but they may be persuaded the second or third time. During that time, if the child is compliant in the program, the Judge is more likely to believe what they are saying and consider their wishes as to placement. You can also create goals with your client and a plan to achieve them. For example, the child hates the placement they are in and wants to go live with their aunt. You request this from the judge and it is denied. Advise the client to work the program well, have no discipline issues, and work on school while you get more information about the aunt. That way, you can say to the Court the child has been working the program, has no write-ups, the aunt has a house here, she would enroll the child in school here, and she has no criminal record. Having your investigator pull the background on the aunt will also help. In this scenario, the child feels a better sense of control over their life and sees you fighting for what they want. This is usually what a child needs to succeed.

Competency, Capacity, and Experts

Guiding Principles

Like adults, juveniles must be competent before they can be held legally accountable for their actions. Children can vary widely in physical and cognitive development, which can effect their competency. See **Adolescent Brain Development**. Not every child will be legally competent: that is, able to understand what is going on in court, assist

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with their defense, and control themselves through the court process. Additionally, not every child will have had the legal capacity to know right from wrong or to control their actions in order to conform with the law at the time of the incident charged. Often our child clients and their families come to us with generational histories of mental illness and intellectual disability. In some cases, the child, mother, and grandparents can readily list off their diagnoses and histories of treatment. Mental health experts should be involved in those cases where challenging competency and capacity/mens rea is necessary. However, that is not the greatest challenge when representing children. The challenge is identifying the red flags that signal undisclosed or un/underdiagnosed mental illness issues for a child.

Mental illness and behavioral health diagnoses are not the only conditions which might point to a lack of competency or capacity. Sometimes simply being only 8, 9, 10 or 11 years old is enough of a reason to suspect diminished capacity or competency. Children as young as 5 years old have appeared in district courts; Kentucky has no minimum age for charges. Some cases may involve a highly intelligent 17-year-old who is also autistic or suffering from the first symptoms of schizophrenia. Other clients may present themselves with a quiet demeanor, saying “yes” to all of the suggestions made by adults, and may actually be operating at a first-grade level and masking intellectual disability with compliance. Both are examples of the need to involve an expert to determine the client’s level of functioning. Conducting a thorough investigation of a child’s background and education will help determine and identify any potential competency/capacity issues that need to be resolved prior to proceeding forward in the process.

Raised Flags

You should be looking for red flags which may signal that an expert should be added to your defense team. Although this list is not exhaustive, some of raised flags include:

- Child cannot sit still in the hallway before court or in front of judge
- Child had IEP in school
- Child is failing every subject in school
- Child confessed without prompting to officers/authority figures
- Child is 13 years old or younger
- Child is homeschooled, in home hospital, or unschooled completely
- Child is coming to court from a hospital or inpatient placement
- Child is coming to court from a private childcare placement
- Child has had head trauma or traumatic brain injury (such as from a car wreck)
- Child has been diagnosed with an autism spectrum disorder or may be suspected of having an autism spectrum disorder
- Child’s parent speaks for them even whenever others are speaking to the child
- Child has mostly younger friends
- Child describes fun or leisure activities that seem more appropriate for younger children

PRACTICE TIP: These flags may not be apparent during your first few meetings or conversations with your client. It is important to make note of any red flags and share these insights with other team members. Investigators and ASWs are great resources not only to collect necessary documents such as school records or hospital records, but also, finding and vetting the right experts that can assist with this case.

Experts

The use of experts to identify possible capacity and competency issues is critical because lawyers and judges are not usually licensed mental professionals. But using experts in your child's case is not limited to mental health experts. Experts in sexual trauma, adolescent brain development, co-occurring mental illness and addiction, racial disparities within the criminal legal system, are invaluable to your client's case. Because children are different, remember that you should focus on experts that have worked with children. Be creative and think outside the box when it comes to finding and using experts!

Chapter 31 Motions for Expert Funding are filed *ex parte* with the court. While these motions should be filed as soon as possible in a case, you and your team must first determine:

1. The type of expert you may need (*i.e.*, forensic psychiatrist, psychologist, neurologists, sexual trauma experts, false confessions experts)
2. The role this expert will play as part of the defense team:
 - a. **Consulting Expert:** An expert may be a consulting expert that helps to educate you and your team on a particular diagnosis, help determine if a competency assessment is necessary, or assist in planning appropriate treatment
 - b. **Evaluating Expert:** An expert may assist in completing an evaluation of your client through a competency or capacity assessment, evaluate your client for sexually reactive or abusive behavior and/or treatment, assess for traumatic brain injury through MRI.

There are experts in many areas that may be used creatively in negotiation, adjudication, or disposition. For example, an expert on Russian adoptions can help to explain the client's seeming lack of attachment or remorse. An expert on chronic trauma or PTSD may explain the child's reaction to having a school resource officer grab his arm.

Records

The child's background must be investigated. The attorney for the child is entitled to any records the attorney feels are necessary to represent their client. KRS 610.342. To understand the client, screen for conditions or behaviors that may impact competency or capacity, strengthen the defense, or build mitigation. This is a great opportunity to rely on other team members, especially investigators, to locate and request all necessary records. The following records, if applicable, should be requested as soon as possible:

1. Child's school records, especially any Individual Education Plan (IEP)
2. School, counseling, and medical records can be obtained with a HIPPA

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release signed by the child and/or their guardian.

3. CHFS records can be obtained through an Open Records Request.
4. Other Court Records such as domestic violence petitions, family court, DNA court.
5. Treatment records from specific placements (such as Rivendell, The Ridge, or Our Lady of Peace). These institutions may require their own release form to be filled out.
6. Any above records that may be from out of state

Be mindful that records can take weeks or months to obtain, and some courts want to have a hearing immediately. It is important to document record requests, letters sent, and faxes. If the investigator or other team member is tracking record requests, make sure that phone calls, emails, and any follow ups are documented in one location. This documentation of all attempts at record requests as well as corresponding dates are necessary when filing for a continuance or motion to compel.

Sometimes it is necessary to obtain a court order under KRS 610.342 for records that would normally be accessible with a HIPPA release. Alternatively, a subpoena for an in camera review of the records by the court may be necessary, but of course, there is inherent risk with this option; while you may get a copy it also means that the judge may read or learn about unfavorable facts as well. Sometimes the child's signature and attorney's explanation of unavailable parent or child in state custody will get around the normal release procedures for records holders.

Case Law

You should rely on the following notable case law when preparing for and drafting motions concerning competency, capacity, and requesting expert funding. It is good practice to print physical copies of cases that you will be using in your argument so that judge and prosecutor can have easy reference.

1. Determination of Competency before Transfer Hearing: *Commonwealth v. B.H.*, 548 S.W.3d 238 (Ky. 2018).

- (a) A transfer hearing is a critical stage of the proceedings, so the child is entitled to be evaluated for competency before for transfer hearing. This includes access to evaluation by an expert.
- (b) The right to competency at transfer was further codified by rule in JCRPP 17.B.:

“If, upon arraignment or during the proceedings, there are reasonable grounds to believe the child lacks the capacity to appreciate the nature and consequences of the proceedings against him or her or to participate rationally in his or her defense, all proceedings shall be stayed until the issue of competency is determined. The district court shall immediately appoint at least one psychologist or psychiatrist to examine, treat, and report on the child's mental condition and conduct a competency hearing prior to conducting a hearing to determine if the child's case should be transferred to circuit court.” See KRS 504.100, KRS 645.070(1), RCr 8.06, and *Commonwealth v. B.H.*, 548 S.W.3d 238, 248

(Ky. 2018). “Commentary: Courts should act in good faith when balancing the need for expedience in competency determinations against the parties’ need to adequately investigate and prepare for a hearing to ensure that children whose competency is at issue do not languish in detention.”

2. Your client is entitled to a mental health expert in their case: *Conley v. Commonwealth*, 599 S.W.3d 756 (Ky. 2019)

- (a) The trial court’s denial of indigent defendant’s initial request for funding for a mental health expert violated her constitutional right to the appointment of an independent mental health professional.
- (b) In that case, the Court discussed expert funding in the context of mental health defenses, the use of KCPC by both sides, the turning over of reports to the Commonwealth, admissibility of statement made to examiners, and much more. Ultimately, the Court concluded that the trial court erred when it denied the defense request for expert funds for a criminal responsibility examination, and instead sent Ms. Conley to KCPC. The Court also found fault with Dr. Trivette’s “side switching” as she had been appointed to evaluate Ms. Conley for the defense, then later served as the Commonwealth’s rebuttal expert. “In cases such as this, where a strong indication exists that the defendant may be suffering from mental issues compelling the appointment of a mental health expert under *Ake*, for practical reasons KCPC should not be designated as the indigent defendant’s mental health expert. First, as reflected in the KCPC letter in this case, KCPC unambiguously disclaims the authority of its staff members to act in such a capacity. Therefore, under these circumstances the trial court should invoke its duties under *Ake* and allot funds to the defendant so that he or she may defend himself or herself pursuant to the constitutional standards described in that decision.” *Id.* at 768-769.

3. Your client is entitled to an independent defense expert: *Ake. v. Oklahoma*, 470 U.S. 68 (1985).

- (a) The court found that an independent defense expert who can function as part of a defense team is required. The fact that counsel also had a volunteer psychologist who gave a measure of episodic assistance is not sufficient. An indigent defendant (child or adult) is entitled to assistance by a necessary independent defense expert at every stage of the proceeding wherein such assistance is critical to defense counsel’s ability to prepare a defense (whether pre-trial, trial or disposition/sentencing). *Ake* requires more than just an examination. It requires that the State provide the defense with “access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense.” *Ake, supra* at 470 U.S., at 83, 105 S.Ct. 1087.; *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017). See also **the DPA Trial Law Notebook** on defense experts at <https://dpa.ky.gov/kentucky-department-of-public-advocacy/defenders/manuals/>

4. Other Authority:

- (a) Competency

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- (i) The test of a defendant's competency to stand trial is whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has rational as well as factual understanding of proceeding against him, and it is not enough that he is oriented to time and place and has some recollection of events. *Dusky v. United States*, 362 U.S. 402 (Ky. 1960).
- (ii) If a child is competent at the time of adjudication, but at the time of disposition, there is reasonable cause to believe the child is incompetent to stand trial, the court cannot continue with the disposition until such a time as it can be found that the child is again competent to stand trial. This case applies the principle requiring competency at sentencing in an adult prosecution, that can be raised by analogy on behalf of a child. *Moody v. Commonwealth*, 698 S.W.2d 530 (Ky. App. 1985).
- (iii) A child's attorney must call to the court's attention any belief of reasonable grounds to suspect the child is not competent to stand trial unless it is so plainly obvious that the trial judge cannot fail to be aware of those beliefs. *Lear v. Commonwealth*, 884 S.W.2d 657 (Ky. 1994). See RCr 8.06.
- (iv) "A criminal defendant may not be tried or convicted while legally incompetent, and the Supreme Court of the United States has held that due process requires an evidentiary hearing whenever there is sufficient doubt of competency as to require further inquiry on the question. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)." A child's constitutionally protected due process rights require the same hearing.

PRACTICE TIP: When in doubt, get an independent expert to review your case and evaluate your client. Get the independent expert first.

(b) Competency to Testify as a Witness

- (i) The court held that a 4-year-old witness was not competent to testify because she shook her head "no" when asked if she understood what telling the truth meant or "what being honest is and telling exactly what happens" meant, and because she did not understand the concept or consequences of lying. Further, the Court overruled the determination in *Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986) that out-of-court statements were admissible even though testimonial incompetence was found. Rather, the Court chose to view testimonial incompetence as an obstacle in admitting those statements. *B.B. v. Commonwealth*, 226 S.W.3d 47, 49 (Ky. 2007).

PRACTICE TIP: If a complaining witness in the case is young, file a motion to have that child evaluated for competency to testify.

(c) Experts

- (i) In the interest of the child's right to participate in the prosecution's examination, a child's attorney may need to have the defense expert observe while the prosecution's expert interviews the child. Applying the same rationale in the case of an adult prosecution, the Kentucky Supreme Court has held that the Commonwealth is required to pay for the time of the defense expert in a case where DPA has been appointed to represent a needy person, because the defense had a right to participate in the state's examination. *McCracken County Fiscal Court v. Graves*, 885 S.W.2d 307 (Ky. 1994).
- (ii) The Commonwealth is not permitted to have its own expert on questions of competency. *Bishop v. Caudill*, 118 S.W.3d 159 (Ky. 2003).
- (iii) A defendant is not entitled to a second state-funded, independent competency expert to assist defense counsel if the first defense expert makes findings that are not favorable to his defense. *Crawford v. Commonwealth*, 824 S.W.2d 847 (Ky. 1992).
- (iv) A psychiatrist must be appointed to provide the accused assistance, to help evaluate the strength of the defense, to offer his own expert diagnosis at trial, and to identify weaknesses in the prosecution's case by testifying and/or preparing counsel to cross-examine opposing experts. Examination by a neutral expert is not sufficient. *Binion v. Commonwealth*, 891 S.W.2d 383 (Ky. 1995).
- (v) A school official is not qualified to testify as an expert, under KRE 702, as to the results of a drug test taken by the child. However, the court here found that, while the trial court abused its discretion in permitting the official to testify, it was "harmless error." *K.A.C. v. Commonwealth*, 2006 WL 2034300 (Ky. App. 2006) *unpublished*.

(d) Forced Medication

- (i) If a child's competency to stand trial can be attained through medication, the court can order the administration of that medication. Such medication can then be forcibly administered if necessary in order to attain competency for trial. The standard applied is only that there must be a reasonable medical probability that taking the medication would achieve that result and does not have to reach beyond a reasonable doubt standard. *Turner v. Commonwealth*, 860 S.W.2d 772 (Ky. 1993).

II. DEFENDING CHILDREN: JURISDICTION & PROCEDURE

Jurisdiction

Family Court Jurisdiction

The family court has jurisdiction over status offenses. JCRPP (2)(D)(1); KRS 23A.100(2)(d). In judicial districts with no family court, the district court has jurisdiction over status offenses. KRS 610.010(2). However, the family court loses jurisdiction over a status case once the child turns 18. KRS 610.120(3). The family court does not have subject matter jurisdiction if the school does not follow the law prior to bringing a truancy action. KRS 159.140; JCRPP (4)(A)(3)(a).

PRACTICE TIP: Thoroughly review the JV-41 form, as it must be filed in all truancy actions.

District Court Jurisdiction

1. The District Court has jurisdiction over public offenses. KRS 610.010; JCRPP (2)(2).
2. If a public offense and status offense are both charged, the status offense shall be transferred to the district court. JCRPP (2)(D)(1).
3. The District Court has authority over youthful offenders prior to indictment and has the authority to set bail. JCRPP (2)(2)(d).
4. If a court does not have jurisdiction, such as subject matter jurisdiction, the court cannot hold a child in contempt for violations of the court's orders. *Cunningham v. Commonwealth*, 2012 WL 1142937 (Ky. App. 2012), *unpublished*. See also *A.C. v. Commonwealth*, 314 S.W.3d 319 Ky. App. 2010).
5. Motor Vehicle Offenses involving children ages 16 or older are not public offenses and will be tried as if the child were an adult. This does not include the offense of stealing or converting a motor vehicle, operating a vehicle without the owner's consent, nor any offense which constitutes a felony. KRS 610.010(1).

PRACTICE TIP: Driving under the influence cases are to be dealt with by the adult session of the District Court. *Christy v. Commonwealth*, 2008 WL 682601 (Ky. App. 2008), *unpublished*.

Other Authority

1. After transferring a case to district court, a family court does not have jurisdiction to later hold a child in contempt for violation of orders entered by the district court. *Cunningham v. Commonwealth*, 2012 WL 1142937 (Ky. App. 2012), *unpublished*. A juvenile court does not have jurisdiction in a beyond control of parent case to enter educational orders that extend to age 21. *A.H. v. Commonwealth*, 2011 WL 1085639 (Ky. App. 2011), *unpublished*.

Although the court stated that its opinion was limited to beyond control of parent charges, the court states in the same opinion: “KRS 610.120(3) makes clear that proceedings that begin when an alleged status offender was still a child must be terminated when the child reaches his eighteenth birthday unless otherwise provided in the Juvenile Code.”

3. A family court lacks jurisdiction when the Director of Pupil Personnel (DPP) does not perform all the required tasks prior to filing a habitual truancy complaint. Accordingly, “KRS 630.060(2) requires that the duties of the DPP, or an assistant, set forth in KRS 159.140(1), be performed prior to filing a Complaint or Petition alleging habitual truancy. These requirements are a matter of subject matter jurisdiction.” *J.L.C. v. Commonwealth*, 491 S.W.3d 519 (Ky. App. 2016).
4. In a truancy case, KRS 159.140(1)(c), (d), and (f) requires that the Director of Pupil Personnel acquaint school personnel with the child’s home environment, attempt to visit the child’s home and ascertain the reason for missed school. The DPP in this case testified that he did not perform any home visits prior to filing the petition alleging habitual truancy. He testified that his assistant did perform some home visits but did not state what his assistant’s findings were. The school documentation had scant information. The director’s assistant did not testify. No documentation was entered into evidence to show that a home visit was made prior to filing the petition, what was found during such a visit, or that contact with Child’s parents was attempted. The Court of Appeals found that these findings must be made before the CDW or the court can accept subject matter jurisdiction on a charge of truancy. *S.B. v. Commonwealth*, 396 S.W.3d 928 (Ky. App. 2013)
5. Even though the Commonwealth failed to introduce evidence that a pre-petition conference was held by the court-designated worker pursuant to KRS 630.050, in a status offense case, the trial court still had jurisdiction to consider the beyond control petition. *B.K. v. Commonwealth*, 2008 WL 2780298 (Ky. App. 2008) *unpublished*.

PRACTICE TIP: Make sure to move to dismiss this charge in the trial court on jurisdictional ground as *B.K.* also held that the trial court could have dismissed the petition had this issue been timely litigated.

6. A family court lacks jurisdiction to hold a child in contempt after a prior status offense has expired. *A.C. v. Commonwealth*, 314 S.W.3d 319 (Ky. App. 2010). The court loses jurisdiction over status offenders after age 18. *J.K.B. v. Commonwealth*, 336 S.W.3d 917 (Ky. App. 2011).

Diversion

Basics

1. A child is allowed three diversions for non-felony charges and one felony diversion.
2. The first diversion, if it is a misdemeanor (KRS 635.010(4)), status offense, or violation, is mandatory. This means the prosecutor cannot object. JCRPP (2)

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(E) and KRS 610.030. The other two diversions are considered discretionary, which means that the prosecutor can raise objections to them.

3. The child can also request the discretionary diversion matter be brought to court.
4. All diversions of felonies can be objected to by the county attorney and brought to court without first considering diversion options.

PRACTICE TIP: Always check when a child is detained if the case is eligible for mandatory diversion. If it is, you must ask for dismissal based on lack of subject matter jurisdiction. It is often overlooked if a child has been detained. Detention is not an exception to mandatory diversion.

5. *C.C. v. Mehling*, 2020 WL 1966535 (Ky. Ct. of App. 2020) *unpublished*, found that in habitual runaway cases the statute required the CDW to file a petition and start a case. However, the Supreme Court of Kentucky decided that it was moot.

Statutory Authority

KRS 610.030: Every child is entitled to have their case evaluated to determine if they qualify for diversion. If the child qualifies, it is their choice to pursue diversion or have the case go to court. If the case is diverted, the child will have no juvenile court record since the case will not proceed to the petition phase.

KRS 630.050: The Court Designated Worker is to ensure that in every status offense s/he considers if the child should be referred to private or public agencies for assistance rather than to court or should enter into a diversionary agreement.

KRS 605.020(7): The Court Designated Worker is required to use graduated sanctions in diversion.

FAIR Team

The Family Accountability, Intervention, and Response (FAIR) team accepts cases referred by the CDW to provide case management. The team evaluates the child's needs and barriers to success then refers specific services to address them. KRS 605.035 and JCRPP (4)(D).

PRACTICE TIP: Please attend each FAIR team meeting, or have someone from your office attend, such as your ASW, investigator, or admin. The participant does not have to be an attorney. It is an additional way to advocate for children and attempt to keep children out of court and jail.

Basics

1. The FAIR team shall include:
 - (a) A court-designated worker in that judicial circuit or district;
 - (b) 1 or more members, 1 of whom shall be a representative of the community mental health center, of the regional interagency council specified in

KRS 200.509(1)(a) to (d) and (g), or corresponding members of the local interagency council if one exists;

- (c) A representative from the cabinet knowledgeable about services available through the cabinet and authorized to facilitate access to services;
 - (d) A representative from the office of a county attorney within the judicial district;
 - (e) A representative from the Department of Public Advocacy;
 - (f) A representative from a local public school within the judicial district;
 - (g) A representative of law enforcement; and
 - (h) Other persons interested in juvenile justice issues, as identified by the family accountability, intervention, and response team, who are necessary for a complete representation of resources within each judicial circuit or district.
2. The FAIR team can:
- (a) Provide specific services and follow the progress;
 - (b) Refer the child back to the Court Designated Worker; and
 - (c) Advise the county attorney to refer the case to court.

Pre-Complaint Process

1. The Complaint is a sworn document taken by the CDW that describes the alleged offense which brings the child into the judicial process. KRS 600.020(15). The petition is the initiating document for a juvenile court case. KRS 600.020(48). Until a complaint is turned into a petition, there is no case in court. KRS 610.040.
2. Upon receipt of a status offense complaint, the CDW shall:
 - (a) Determine if the complaint is complete. If the complaint is incomplete, it is to be returned to the complainant. JCRPP (4)(B). Remember the required forms. If a JV-41 is not sufficiently filled out, the complaint should be returned until it is sufficient.
 - (b) The CDW is required to complete a preliminary intake inquiry, including a validated risk and needs assessment, for each youth. Depending on the results of the assessment and other considerations, the CDW may:
 - (i) Do nothing and refer the matter to the FAIR team to approve. JCRPP (4)(C)(1)
 - (ii) If eligible for diversion, conduct a formal conference with the youth and enter into a diversion agreement JCRPP (4)(C)(2); or
 - (iii) If the child does not qualify for diversion, the CDW shall meet with the complaining witness to determine if there is any way to resolve the complaint short of a petition, unless they have inquired at the time the complaint was taken. KRS 630.050
 - (iv) If the child denies the charges and demands a formal court hearing or does not qualify for diversion, the CDW shall refer the matter to the county attorney to file a petition or dismiss the case. JCRPP (4)(D)(2).
 - (v) If the child declines the agreement or refuses to appear, the CDW shall

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refer the matter to the FAIR team. JCRPP (4)(D)(1).

(vi) In cases in which the child has not denied the charges and is eligible for diversion, a petition cannot be filed without the approval of the FAIR team. JCRPP (4)(D)(3).

3. Upon receipt of a public offense complaint, the CDW shall:
 - (a) Refer the matter to the CDW for a “reasonable cause review” to determine if there is probable cause to proceed. Even if the county attorney finds reasonable cause, they are permitted to dismiss the case at any time. JCRPP (10)(C)(1).
 - (b) If the county attorney determines there is probable cause, the CDW must conduct a preliminary intake inquiry. The CDW must make one of the following recommendations to the county attorney:
 - (i) Mandatory diversion for a first offense misdemeanor. KRS 635.010(4).
 - (ii) Discretionary diversion for any offenses that are eligible. JCRPP (10)(C)(3)
 - (iii) Except in mandatory diversion cases, the county attorney shall determine whether to permit the diversion or file a petition and initiate formal proceedings.
 - (iv) If diversion occurs, the procedure is the same as that described above for status offenders, except the county attorney may file a petition without the approval of the FAIR team, so long as there is not a currently active diversion agreement or diversion has not been successfully completed.
4. Upon successful completion of diversion, the case is closed and cannot be reopened.

Arrest Process

1. Upon taking a child into custody on a charge, the police must immediately inform the child of his or her constitutional rights and also notify the child’s parents/guardian/person exercising custodial care of the child. KRS 610.200 (1).
2. The police must release the child to the parents/guardians, unless the child is a runaway, subject to trial as an adult, or the nature of the offense or other circumstances require continued custody. KRS 610.200 (3).
3. However, release to parents does not preclude the police from later charging the child with an offense. KRS 610.200 (5).
4. If the child is not released, the police must contact the CDW. Pursuant to 610.200 (6) to parent or guardian:
 - (a) Release to parents or other person or organization is authorized by law. Release may be with or without stated conditions. KRS 610.200 (6)(a-c)
 - (b) The police are permitted to retain custody of the child for up to an additional twelve (12) hours to transport to juvenile detention/holding facility or a nonsecure facility. In such cases, CDW must notify the child’s parents, guardian, or other person exercising custodial control. KRS 610.200 (6)(d)

5. Children under 10 years old may not be detained unless charged with a capital offense or an A or B felony. KRS 610.200 (7)(a-b).
6. If the child is taken into protective custody on suspicion of being a runaway, then the peace officer may:
 - (a) Release the child to his parent or guardian, after the filing of a habitual runaway petition. KRS 610.200(2)(d).
 - (b) If the child is from out of state, contact the CDW and secure an order of secure detention pending return to the child's home state. KRS 615.010.
 - (c) Secure placement with the child through the Cabinet under KRS Ch. 620 if the child is not a habitual runaway. The cabinet may seek an ex parte order authorizing emergency custody under KRS Ch. 620.

Status Offenses

Status Offense: An act which would not be a crime if committed by an adult; meaning their status of being under the age of 18 makes it an offense.

Basics

1. Status offenses are limited to habitual truancy, habitual runaway, beyond control of parent or school, and possession/use of alcohol. KRS 630.020
2. Jurisdiction over a status offense ends automatically when the child turns 18. KRS 600.010(2) This would include any allegation of contempt. Consider *B.H. v. Com.*, 329 S.W.3d 360, 368 (Ky. Ct. App. 2010), in which the court did not have subject matter jurisdiction and thus could not hold the child in contempt. Further, D.R.T. forbids adult detention as a disposition for a child. The same concept would apply to contempt alleged prior to turning 18 but brought to the court after age 18.
3. A child adjudicated as a status offender cannot be held in detention, except for an allegation of contempt or violation of probation. KRS 630.010, 630.080, and 630.100. Also see Detention Hearings chapter.

PRACTICE TIP: Remember to argue *M.A.M. v. Commonwealth*, 402 S.W.3d 546 (Ky. Ct. of App. 2013) against pretrial orders and contempt alleged thereof. For example, if the child is charged and arraigned on a beyond control of school offense but before adjudication the child has another write-up at school, *M.A.M.* says this cannot be contempt.

4. Human Trafficking is a complete defense to any status offense if the conduct alleged arises from the child being a victim of human trafficking. KRS 630.125. "Human Trafficking" refers to criminal activity whereby one (1) or more persons are subjected to engaging in: (a) forced labor or services or (b) commercial sexual activity through the use of force, fraud, or coercion, except that if the trafficked person is under the age of eighteen (18), the commercial sexual activity need not involve force, fraud, or coercion. KRS 529.010(7).

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Tuancy

“Habitual truant” means any child who has been found by the court to have been reported as a truant as defined in KRS 159.150(1) two (2) or more times during a one (1) year period. KRS 600.020(33). A child with at least 6 unexcused tardies or 6 unexcused absences within a one-year period can be a habitual truant. Before a complaint can be made, the school must follow KRS 159.140.

Requirements

1. The DPP of the school must conduct a home visit to assess the barriers to attendance and causes of truancy. KRS 159.140
2. The school must provide services to address the barriers to attendance and causes of truancy identified through a home visit.
3. They must swear out an affidavit on the JV-41, and it must detail the information from the home visit, absences, and services the school has attempted to provide to overcome the barriers.
4. A child alleged to be habitually truant must be afforded protection under the procedures set forth in KRS 159.140, which the court-designated worker must follow in order for the court to have jurisdiction. If these procedures have not been followed, the court lacks jurisdiction to handle the case. *T.D. v. Commonwealth*, 165 S.W.3d 480 (Ky. App. 2005).
5. A defective truancy complaint should not be accepted by the court-designated worker; an admission to habitual truancy must be entered by the student, not by counsel; and a family court is required to inform the student of his Boykin rights at the time it accepts the admission of habitual truancy. *N.K. v. Commonwealth*, 324 S.W.3d 438 (Ky. App. 2010).
6. When the school district’s DPP does not sufficiently investigate the causes of a student’s truancy as mandated by KRS 159.140 before bringing the student before the court as a truant, the court lacks jurisdiction to hear the case. *C.F.C. v. Commonwealth*, 2010 WL 4026099 (Ky. App. 2010) *unpublished*.
7. The Juvenile Code permits “review” of dispositional orders pursuant KRS 610.010(13) but does not vest the trial court with the power to unilaterally change the terms of its previously entered disposition in a subsequent proceeding at which both the child and counsel were not present. *J.E. v. Commonwealth*, 2004 WL 2260499 (Ky. App. 2004) *unpublished*.

Jurisdiction for Truancy Proceedings

1. A court lacks subject matter jurisdiction in a truancy case when the description of home barriers required by statute is too ambiguous, many areas of the required form are left blank, and the court cannot show with certainty the required procedures had taken place to assist the student and family. *J.L.C. v. Commonwealth*, 491 S.W.3d 519 (Ky. App. 2016).
2. A family court lacks jurisdiction to entertain a status offense petition alleging that a child is a status offender because he is a habitual truant where the Commonwealth fails to comply with statutory prerequisites of having parties meet with a court-designated worker for determination of how to proceed

with matter. *B.H. v. Commonwealth*, 329 S.W.3d 360 (Ky. App. 2010).

NOTE: Due to the fact that child cases are designated by initials, there are numerous cases with the initials B.H. including the very important 2018 case of “*Commonwealth v. B.H.*, 548 S.W.3d 238 (Ky. 2018), which establishes that a child is entitled to address the issue of competency prior to addressing the issue of the child’s potential transfer to Circuit Court. Do not confuse yourself with the other two *B.H.* cases.

3. A family court loses jurisdiction over a habitual truant offender once she turns 18. Here, the child turned 18 during the pendency of the appeal and the appeal was dismissed as moot. *J.T. v. Commonwealth*, 2011 WL 5105475 (Ky. App. 2011) *unpublished*.

Right to Counsel

1. A case must be remanded to court for determination of whether KRS 159.140(1) requirements were met before a truancy petition is filed. Here, the court also stated that due process was violated when the defense counsel was not given sufficient time to prepare for the truancy adjudication hearing. *Boykin* was not complied with since the child did not even enter an admission, and the court should not have held a contempt hearing with no prosecutor. *M.G. v. Commonwealth*, 2008 WL 4683239 (Ky. App. 2008), *unpublished*.

Beyond Control

Under KRS 159.140 (2025 update), there is mandatory prosecution for a minor in grade 6 through 12 who is a habitual truant as defined in KRS 600.020 and has been absent without excuse for fifteen (15) or more days during a school year, DPP shall report the matter to the county attorney.

Beyond Control of Parent

1. “Beyond the control of parents” refers to a child who has repeatedly failed to follow the reasonable directives of his or her parents, legal guardian, or person exercising custodial control or supervision other than a state agency, in which the behavior results in danger to the child or others and does not constitute behavior that would warrant the filing of a DNA petition. KRS 600.020(4).
2. The Court of Appeals found that the following conduct was sufficient for a finder of fact to determine that a child was beyond the control of his or her parents: “Testimony that appellant left home without permission on at least three occasions; used profane and crude language and gestures toward his parents when they attempted to discipline him; and was physically abusive with his sister causing red marks. The problems with appellant’s sister had escalated to the point that the parents testified that they were afraid to leave them alone together. Also relevant to the question of parental control, was evidence of appellant’s fighting and stealing at school, which resulted in a substantial number of suspensions.” *M.M. v. Commonwealth*, 2004 WL 2071216 (Ky. App. 2004) *unpublished*.
3. A juvenile court does not have jurisdiction in a beyond control of parent case to enter educational orders that extended to age twenty-one (21). The court here specifically limited its holding to the beyond control of parent charge. *A.H. v.*

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Commonwealth, 2011 WL 1085639 (Ky. App. 2011) *unpublished*.

NOTE: Although this opinion states that it is limited to beyond control of parent charges, the court also said in the same opinion: “KRS 610.120(3) makes clear that proceedings that begin when an alleged status offender was still a child must be terminated when the child reaches his eighteenth birthday unless otherwise provided in the Juvenile Code.” *A.H.* at 7. See also KRS 610.010(14) which states that the court’s jurisdiction over a child ends when that child turns 18.

Beyond Control of School

1. “Beyond the control of school” means any child who has been found by the court to have repeatedly violated the lawful regulations for the government of the school as provided in KRS 158.150 and as documented in writing by the school as a part of the school’s petition or as an attachment to the school’s petition. The petition or attachment shall describe the student’s behavior and all intervention strategies attempted by the school. KRS 600.020(5).
2. A Family Court’s finding that the child was beyond control of school was proper because the school sufficiently documented interventions, as required by KRS 600.020(4). Counsel’s objection to the report and testimony of school personnel as hearsay should have been made at the time of their testimony. This case reminds us of the need to investigate and put on evidence concerning bad motive of school actors or failure of school to implement proper interventions. *E.M. v. Commonwealth*, 2012 WL 3629022 (Ky. App. 2012) *unpublished*.
3. Child was in front of court for review hearing on charge of Habitual Truancy. Without charging or notice of any kind, the Family Court adjudicated A.S. to be beyond control of school. Deprived of notice of such charges, A.S. was not prepared to present or cross examine witnesses. The Commonwealth was permitted to call a DCBS worker who testified about A.S.’s medical status despite lacking notice or expertise. Then the Family Court permitted the Commonwealth to present a summarization of other evidence, without witnesses. The appellate court found all of this impermissible hearsay and that A.S. was patently denied the right to present a defense or to challenge the Commonwealth’s case. The appellate court also found that the child’s medical records were released without her consent or opportunity to challenge the Commonwealth’s unilateral access. The prosecution’s efforts to secure the records by a subpoena to its offices violated the law. *A.S. v. Commonwealth*, 474 S.W.3d 555 (Ky. App. 2015).
4. A child ordered by family court to follow a prevention plan in response to a beyond control of school charge was properly allowed her due process rights even though she claimed the informal procedures were not first exhausted. A.J.’s trial counsel waived the objection when he refused to call the CDW, though the trial court granted trial counsel a week’s continuance and the opportunity to subpoena the CDW. Trial counsel failed to act, giving up his client’s right to challenge the court’s jurisdiction. On appeal, A.J. also challenged the qualifications of the assistant principal and the evidence he put forth concerning A.J.’s attendance and behavior. Again, trial counsel failed to preserve this issue for appeal as he made no objection at trial to the witness’s qualifications.

Evidence that school personnel visited the home and tried to contact A.J.'s father were adequate to meet the statutory requirements. KRS 600.020(5) does not demand an exhaustive psychological analysis of the student, nor does it demand that the intervention strategies described be wide-ranging or effective. A disciplinary report will suffice. Had trial counsel objected vigorously at trial and cross examined the Commonwealth's witness, we would likely see a different result on appeal. *A.J. v. Commonwealth*, 2009 WL 3321373 (Ky. App. 2009), *unpublished*.

Runaway

1. "Habitual runaway" refers to a child who has been found by the court to have been absent from his or her place of lawful residence without the permission of his or her custodian for at least three (3) days during a one (1) year period. KRS 600.020(32).
2. Release to parent/guardian or CHFS are **only** options at detention hearing. KRS 610.012.
3. Human Trafficking is a complete defense to Habitual Runaway. KRS 630.125
4. "Day" is not defined in the juvenile code. Consider challenging this if the amount of time is less than 72 total hours.

Alcohol or Tobacco Status Offenses

The Juvenile Code no longer defines possession or use of tobacco product as a "status offense" as defined in KRS 610.010(2) and (4). This makes KRS 630.120(7) all the more confusing, as it mentions "tobacco offense," but a child cannot actually be proceeded against as a status offender for tobacco offenses anyways. In fact, KRS 438.311 specifically states that the punishment for the receipt or purchase, or attempted receipt or purchase of a tobacco product is confiscation of said product by law enforcement or Department of Alcoholic Beverage Control employees. "Notwithstanding any provision of law to the contrary, no other penalty shall apply to a person under the age of the twenty-one (21) for a violation of this section." *Id.*

1. A child may not:
 - (a) Enter the premises to buy/be served alcohol. KRS 244.085 (1)
 - (b) Purchase or possess alcohol for themselves or others. KRS 244.085 (2)
 - (c) Misrepresent their age to buy or gain access to alcohol. KRS 244.085 (3)
 - (d) Use a fake identification to buy or gain access to alcohol. KRS 244.085(4)
2. No child adjudicated guilty of an alcohol offense under KRS 244.085 or a tobacco offense under KRS 438.305 to 438.340 shall be committed [to the Cabinet] as a result of that adjudication. KRS 630.120 (7).

Status Checklist

Runaway as a Status Offense

- ☐ “Habitual runaway” under KRS 610.012 means any child who has been found by the court to have been:
 - Absent
 - From their lawful residence (not grandma or step-parent’s if no physical custody order, for example)
 - Without permission of custodian
 - At least 3 days in a calendar year = this may be interpreted as 72 hours over the year by the petitioner or CDW but “day” is in the definition. KRS 600.020(32).
- ☐ **Read KRS 610.012 which controls in runaway detention proceedings**
- ☐ **Determine how the complaint was filed**
 - Was a complaint filed with the CDW, an emergency protective custody order due to suspicion of being a runaway, or an actual habitual runaway petition?
 - The emergency custody order can be *ex parte*.
- ☐ **Determine if the client is still detained.**
 - If detained, was the detention hearing held within 24 hours (excluding holidays and weekends) of being detained, or within 72 hours if held in a nonsecure facility?
 - If not detained, the child should be released. (There is no substantial compliance, only exact compliance.)
 - The statute allows release to parent and filing of habitual runaway with CDW or Release to cabinet and proceedings under KRS 620. There is no remain in detention option!
- ☐ **Determine if your client is classified as an Interstate compact youth.**
 - Interstate compact youth (runaway or “absconder” from another state) are subject to different timelines under KRS 615 and the interstate compact for juveniles.
- ☐ **Was the child a victim of human trafficking?** If so, this is a complete defense to status any offense. KRS 630.125
- ☐ **Gather all paperwork from the CDW, County Attorney, and/or Clerk.**

Habitual Truant Checklist

- ☐ Is there a petition?
 - Is there an affidavit from the DPP on an AOC JV-41
 - Are attendance, grades, behavior, and FRYSC reports attached?
 - Is the affidavit filled out/complete?
 - Are the answers in the affidavit responsive?
 - Are there 15+ unexcused absences alleged and child was in 6th grade or higher? (HB 611)
- ☐ Was child given an opportunity for diversion?
 - Attended first preliminary inquiry meeting?
 - Referred to FAIR team?
 - What issues were noted if child went thru diversion and FAIR team?
 - Did child “fail” by having 4+ unexcused absences while on diversion? (HB 611)
- ☐ Definitions:
 - KRS 600.020 (33) reported as a “truant” as defined in KRS 159.150(1) two (2) or more times during a one (1) year period;
 - KRS 159.150 (1) “Any student who has attained the age of six (6) years, but has not reached his or her eighteenth birthday, who has been absent from school without valid excuse for three (3) or more days, or tardy without valid excuse on three (3) or more days, is a truant.”
 - KRS 159.150(3) “Any student who has been reported as a truant two (2) or more times is an habitual truant.”
- ☐ Elements:
 - 6 unexcused events: absences or tardies
 - In one year – per juvenile code, treated as calendar year
 - ◊ in one school year, per KRS 159.150(4) – for KDE purposes (use if helpful to client)
 - ◊ Yes, 6 unexcused events could total less than 7 minutes of missed instruction
 - ◊ Each school district may choose to code suspended days as unexcused events **or as something else**, per KDE.
- ☐ Defenses:
 - No jurisdiction: insufficient petition, affidavit, DPP contact, diversion agreement, FAIR team evaluation, etc.
 - Not unexcused, missing paperwork
 - Not unexcused, should have been in home hospital/home school/other district
 - Not unexcused because suspended and legally impossible to attend.
 - Not unexcused, IEP was violated.

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- Not unexcused child has (or should have) a 504 plan and ADA accommodations due to disability, including additional absences without medical note or similar attendance related accommodation.
 - Unexcused but less than 6
 - Unexcused but not in a calendar year or school year
 - Unexcused but excuses exist and school would not accept [equal protection/indigency arguments]
 - Not truancy at all but educational neglect
 - Not truancy at all due to bullying
 - Not truancy at all due to constructive expulsion/suspension. [this is, for example: chld has an IEP and school calls parent every day after lunch to take child home, not counting as suspended so they don't convene an ARC, but then counting as unexcused when parent notes run out]
- ☐ No secure detention for a youth adjudicated as habitually truant
 - ☐ **Human trafficking** is a complete defense. KRS 630.125
 - ☐ Dismissal and filing of the appropriate d/n/a petition is also reasonable.
 - ☐ Disposition can include entry of a Valid Court Order, community service, writing assignments, counseling, up to monitoring by CHFS and/or commitment to the Cabinet (CHFS) as a status offender.
 - ☐ Commitment to the cabinet should be time-limited and consistent with similar public offense timelines.

Defenses: Victim of Human Trafficking

1. Treat human trafficking screener emails like a field sobriety test; these are red flags worth following up on with your client. No one else in court may know or raise this unless you take this chance to dig deeper with your child-client. If your child did not “pop up” on the human trafficking screener from DJJ, that does not mean they are not human trafficking survivors. You can engage with screening independently of DJJ.
2. Engage an expert, there are experts on Human Trafficking, one local resource is through Louisville Catholic Charities: <https://cclou.org/bakhita-empowerment-initiative/>
3. Training and prevention is offered to youth: CCLOU offers “My Life My Choice,” a ten-session, nationally-acclaimed and evidence-informed prevention and support group curriculum that is used to educate and empower female identifying youth ages 11-18.
 - (a) CCLOU offers the same group for male-identifying youth, following “I Am Building a Healthy Identity,” by Stefania Agliano and Bryan Hall.
 - (b) Both of these programs are dedicated to educating and empowering adolescents to recognize and defend themselves against inappropriate demands and to work towards a society that does not tolerate buying and selling children.

- (c) Contact Tamar Israel for more information at tisrael@archlou.org.
 - (d) Contact the JPDB Supervisor who is DJJ's point of contact to provide notice as required by statute.
4. **What is the screener?** This is a human trafficking screener used by DJJ to determine if there is "reasonable cause" to believe that a child has been a victim of human trafficking.
 5. **What does it mean to be a victim of human trafficking?** Per KRS 529.010(5), "Human trafficking" refers to criminal activity whereby one (1) or more persons are subjected to engaging in:
 - (a) Forced labor or services; or
 - (b) Commercial sexual activity through the use of force, fraud, or coercion, except that if the trafficked person is under the age of eighteen (18), the commercial sexual activity need not involve force, fraud, or coercion."
 6. Human trafficking has been singled out as a significant problem recently based on evidence that many more youth than previously thought have been victimized in the commercial sex trade or as black market labor (think organized criminal activities as well). The victimization these youth suffer can have a negative influence on the rest of their life, especially when they are not properly treated. Since many of these children are forced into criminal acts, our justice system has a tendency to re-victimize them, and the statutes which have been adopted are an effort to avoid that where possible.
 7. **So I got this screener, does this mean that my client is a victim of human trafficking?** Possibly, but not necessarily. DJJ considers the child a possible victim if they answered yes to any question on the attached screening tool. However, the questions on the screening tool are very broad, so many youth will answer "yes" to at least one without being victims of human trafficking. We recommend you review the screener in the context of what you already know about the child, and determine whether you believe there is "reasonable cause" to believe that the child is a victim.
 8. **If I believe there is "reasonable cause" to believe the child is a victim, then what?** If your client is a status offender, then the charges against them should be dismissed unless it is determined that the child was not a victim of human trafficking at the time of the offense. KRS 630.125.
 - (a) If your client is a public offender, if the offense was related to human trafficking it is possible that they have a legal defense, such as duress, to the crime. In addition, under KRS 529.170 states that being a victim of human trafficking is an affirmative defense to any KRS Chapter 529 offense (such as prostitution) or to any non-violent offense. (In theory, all behavior post-trafficking, like PTSD behaviors, traces back to the trafficking and the nexus is not required to be in the causal chain of events. Think broadly when raising this defense.)
 9. If the child is committed to DJJ and not deemed a security risk, DJJ is required to petition the court to transfer custody of a victim of human trafficking to the cabinet. KRS 15A.068. If the child is awaiting disposition when you learn of this, it would be a reasonable basis to seek commitment to the cabinet instead

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of DJJ (if commitment was the likely disposition). If the child is already committed to DJJ, and DJJ does not petition the court on their own within a reasonable time (see next question for more on that), then you can petition the court yourself for the transfer. Under the terms of the statute, all that is required is “reasonable cause to believe that the child is a victim of human trafficking as defined in KRS 529.010,” and that the child “does not pose a threat to public safety.”

10. **My client is committed to DJJ and there is reasonable cause to believe s/he is a victim of human trafficking. Does DJJ file that motion, or do I?** DJJ is supposed to file the motion. It would be wise to check with DJJ to see if they intend to file a motion before proceeding. The only reason for DJJ not to file the motion is that they believe the child is a risk to public safety, and if they do that they are supposed to be providing treatment for that issue themselves. If DJJ refuses to file the motion and you think their reasons are debatable, that is when the motion should be filed. The motion needs to argue that placement with the cabinet would not be a risk to public safety, and one can probably argue (if the facts bear this out) that DJJ is not really providing the treatment that the child needs to address these victimization issues.
11. **If I file this motion, will I meet resistance from anybody?** If you file a motion seeking to move custody to the cabinet, you are likely to encounter resistance from the cabinet, who defines human trafficking very narrowly and who may argue that they have investigated the case and determined that the child is not a victim of human trafficking. The statute only requires “reasonable cause,” and if DJJ is on board with that point the judge may resolve that issue in your favor. That is what has happened in the few cases like this so far.
12. **Does JPDB handle this, or do I?** JPDB only sees those youth who are committed to DJJ and placed in a youth development center. We do not frequently see youth in detention or in group homes and have no involvement with probated youth or youth awaiting disposition. Even those youth in YDC’s who have seen the DPA attorney there are not required to sign up as clients, so we do not represent 100% of youth in YDC’s. If your client has a JPDB attorney, then that attorney is probably already working on this issue, and we will handle it. If we are not involved in the case, we are happy to help upon request.
13. **What if I do not believe that there is “reasonable cause” to believe the child is a victim of human trafficking?** Obviously, it is important to carefully evaluate the information available to you to determine whether your child is likely to be a victim of human trafficking. If after due investigation you believe that this child is not a victim of human trafficking – and most children probably will not be – then you do not have to do anything.
14. **My client is a victim of human trafficking but is charged with a violent offense, what do I do?** Use the HTS and expert assistance for mitigation. Argue for a non-violent offense. Use related legal theories like duress and justification or self-defense. Even a child committed to DJJ may later be offered services through CHFS or in the community. Many survivors have runaway histories, substance abuse, or co-occurring disorders that may make

placement difficult, but identifying their involvement with human trafficking can help to access related resources. For example, <https://refugeforwomen.org/kentucky/> is a faith-based program that some youth aging out of DJJ have been able to use for transition to adulthood assistance (this is a resource for adult survivors of human trafficking, too).

15. **Who do I call if I have questions?** Feel free to call the Post Trials Division Director or JPDB if you have any questions, and we will be happy to help.

Search, Seizure, and The Reasonable Child Standard

When raising suppression issues use the “reasonable child” standard over the “reasonable person” standard. While not yet established law, a compilation of controlling cases point to the benefits to this proper standard. Under *Roper v. Simmons*, children are “more vulnerable or susceptible to negative influences and outside pressures.” *In Re Gault*: youth confessions require “special caution.” Stansbury requires courts to consider how the circumstances “would have affected a reasonable person [emphasis added] [and how they] would perceive his or her freedom to leave.” Thus, we must push the courts to consider how a reasonable child would perceive these actions by state actors.

In addition, there is a growing body of published works related to adding additional elements when considering the status of “child,” such as the Reasonable Black Child by Kris Henning. Or consider the Reasonable Latinx Child. Children of color look through a different lens of life experience when interacting with law enforcement and other authority figures. Non-compliance with any authority can lead to terrible consequences, including death. Consider the death by police of Tamir Rice. Many 12-year-old white children in Kentucky have handled real guns, shot them with their parents, and may even regularly go hunting. Compare this fairly typical Kentucky (white) experience to a 12-year-old playing in the park with a fake gun being immediately killed by a fully-grown adult (white) police officer. Black and other children of color experience the world differently. These experiences should be considered by judges when determining what a reasonable child of color would perceive. There are many factors to consider when arguing on behalf each individual child. Do the research and try to be creative.

There are numerous potential ways to attack this evidence, the most common are the following: Miranda, Involuntary or Coerced Confessions, physical searches of the child, and searches of the child’s spaces at school and at home. These are talked about in more detail in this chapter. However, that should not be seen as limiting any idea you might have.

Searches of Children

All search and seizure laws apply to children. The Constitution applies to them as must as adults. See **the DPA Suppression Manual** for more information on challenging searches and seizures at <https://dpa.ky.gov/kentucky-department-of-public-advocacy/defenders/manuals/#suppression-manual>

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Basics

Children have some expectation of privacy, even while on school grounds, and a search by school personnel must be: (1) reasonable at its inception and (2) must be reasonably related to the circumstances that initially justified the interference. *T.L.O. v. New Jersey*, 469 U.S. 325 (1985).

There are three factors the courts will look at to determine if school searches are reasonable: (1) the student's legitimate expectation of privacy; (2) the intrusiveness of the search; and (3) the school system's needs that are met by the search. *Lamb v. Holmes*, 162 S.W.3d 902 (Ky. 2005). Consider *Safford v. Redding*, 557 U.S. 364 (2009), where principal's suspicion that student was distributing drugs did not warrant a strip search.

The analysis in many of these cases focuses initially on the fact that the government is requiring the search. These cases would also seem to find unconstitutional the indiscriminate drug testing of children by the Court. But see also, *Board v. Earls*, 536 U.S. 822 (2002): drug testing for extracurriculars is reasonable.

There are many high school programs that require drugchildr testing of students. It is important to look at the exact facts of the situation. This could include a program the school is requiring the student to attend as a punishment for some type of behavior. This usually is in the form of a marijuana program or other school-based drug program. This program can be mandated by the school as discipline for a myriad of things by the child or can be ordered by the court if the child is legally involved. It can also be required by the CDW as a condition of the child's diversion. If drug testing is being required by the school, look at the exact reasons why. They cannot just indiscriminately test whomever they like. If this is becoming a problem, consider getting outside help from the Children's Law Center or other types of civil child defender organizations.

Miranda

Custody and interrogation are the two basic requirements to trigger Miranda warnings. In addition to the regular case law, custody should be considered based on the factors related to the reasonable child standard, and whether a child of the same age and general maturity would consider themselves free to leave. See **the DPA Suppression Manual** for more information on *Miranda* at <https://dpa.ky.gov/kentucky-department-of-public-advocacy/defenders/manuals/#suppression-manual>

1. **Custody:** A child does not have to be at a police station being interviewed by a police officer for the "custody" element of *Miranda* to apply because children are "categorically different," *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011), and require "special caution." *In Re Gault*. Some factors the Court may consider include:
 - (a) Age: When determining whether a child is in custody for Miranda purposes, age is not the only factor, just a consideration. *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011). Age is a factor when the officer knows or it should be objectively apparent to a reasonable officer. *Id.* Note: this is NOT a subjective standard.

- (b) Location: Some locations can be perceived to be more custodial than others. For example, a school setting can be inherently coercive. “The fact is a school is where compliance with adult authority is required and where such compliance is compelled almost exclusively by the force of authority.” *Commonwealth v. Bell*, 365 S.W.3d 216, 224-225 (Ky. App. 2012). See also *N.C. v. Commonwealth*, 396 S.W.3d 853 (Ky. 2013). *Miranda* is not always required where the child is told they are free to leave at any time and does not have to answer questions from the officers. *C.W.C.S. v. Commonwealth*, 282 S.W.3d 818 (Ky. App. 2009). Mandatory sex offender treatment program is custody for *Miranda* purposes. During a necessary part of a juvenile sex offender treatment program, the child disclosed several uncharged acts of sexual misconduct. *Welch v. Commonwealth*, 149 S.W.3d 407 (Ky. 2004). The court also found that the program’s counselors were state actors, for *Miranda* and the child’s subsequent incriminating statements to police were fruit of the poisonous tree. *Id.*
- (c) Interrogation: In addition to the factors above related to custody, the courts will consider who is asking questions and the types of things that were said for purposes of determining whether *Miranda* is triggered.
- (d) State Actors: It is important to distinguish who is asking the questions. For example, in *Rhode Island v. Innis*, state actors asking questions or making statements they reasonably know are likely to elicit incriminating responses were considered to be interrogative, thus necessitating that *Miranda* warnings be issued. Social workers and school officials can be state actors for purposes of custody and interrogation. [Social Workers] *Commonwealth v. M.G.*, 75 S.W.3d 714 (Ky. App. 2002). Juvenile sex offender treatment counselors can be state actors. *Welch v. Commonwealth*, 149 S.W.3d 407 (Ky. 2004).
2. Waiver must be voluntary: It is important to remember to separate *Miranda* requirements from coercion and involuntariness. *Miranda* is required to give the child, and any other person in custody being interrogated, the knowledge of their rights so that they can voluntarily, intelligently, and knowingly waive those rights to give admissible statements. The actual interrogation and other factors after *Miranda* can affect whether those rights were waived voluntarily and thus whether the statement was given voluntarily. A statement can be coerced even if the state actor gave the child *Miranda* warnings. In most instances, defense counsel should argue both that *Miranda* was required and that the resulting statement was involuntarily given. However, the distinction is important and must be made clear to the Judge.
- NOTE:** If a *Miranda* warning is not given, ask if it was waived voluntarily. It must have been a free and deliberate choice while being fully aware of the rights and consequences of the waiver. *Matthews v. Com.*, 168 S.W.3d 14, 21-22 (Ky. 2005). The
3. Prosecutor must prove by preponderance of evidence that the waiver was knowing, intelligent, and voluntary. *Id.* Regardless of whether *Miranda* was waived, still ask whether the statement was coerced or involuntary and remember that *Miranda* is required for any person in custody being interrogated.

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4. Invocation of Rights: The invocation of the juvenile's rights must be unambiguous. *Baril v. Commonwealth*, 612 S.W.2d 739 (Ky. 1981). *Edwards v. Arizona*, 451 U.S. 477 (1981), and must be scrupulously honored. *Michigan v. Mosley*, 423 U.S. 96, 104, (1975) (citing *Miranda*, 384 U.S. at 474). *Carlisle v. Commonwealth*, 316 S.W.3d 892, 896 (Ky. App. 2010). See also *Buster v. Commonwealth*, 364 S.W.3d 157 (Ky. 2012) [where social worker was state actor and convinced the Defendant to make statements after she invoked her rights]. To test for this the courts will examine:
- (a) Whether the defendant was advised of his Miranda rights prior to the initial interrogation;
 - (b) Whether the detective conducting the interrogation "immediately ceased questioning [the suspect] after he invoked his right to remain silent and did not resume questioning or try to persuade [him] to reconsider his decision;"
 - (c) If there were multiple instances of interrogation, the difference between the circumstances of the original and any subsequent interrogation, e.g., whether the later questioning was about a different offense, after significant time had passed, in a different location, and/or conducted by a different officer; and
 - (d) Whether the suspect was re-read the Miranda warnings prior to the subsequent interrogation. *Mills v. Commonwealth*, 996 S.W.2d 473, 482–83 (Ky.1999). In many jurisdictions, the juvenile will be required to sign a Miranda waiver. It's critical that defense counsel delves into whether the client actually understood what he or she was signing. If not then the waiver was not valid.

Children are entitled to *Miranda* warnings before being questioned by a school official in the presence of a law enforcement officer when they may be subject to criminal charges or adult felony charges. The Court outlines the two-step threshold required of the Miranda procedure: (1) questioning by law enforcement and (2) being held in custody. *N.C. v. Commonwealth*, 396 S.W.3d 852 (Ky. 2013).

A child's age properly informs the *Miranda* custody analysis, so long as the child's age is known to the officer at the time of police questioning or should be objectively apparent to a reasonable officer. Though the Supreme Court noted that "[t]his is not to say that a child's age will be a determinative, or even a significant, factor in every case," the Court also recognized that children are "categorically different." *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011).

In *Commonwealth v. Bell*, a child's confession to detectives who interviewed him at school is not voluntary when, though having been read his Miranda rights, he is forced into a room by school officials who feign superior knowledge and when one detective states that the child could not leave until the detective found out something. Further, the detectives repeatedly demanded answers that the child would feel compelled to provide in order for the child to be considered an obedient child. *Commonwealth v. Bell*, 365 S.W.3d 216 (Ky. App. 2012).

Miranda warnings were not required when a 14-year-old child was not in police custody, was told he did not have to speak to officers, and was made aware he was free to return

to class when questioned by police officers at school about alleged sexual misconduct. *C.W.C.S. v. Commonwealth*, 282 S.W.3d 818 (Ky. App. 2009).

A child who reasonably believes he is in police custody and not free to leave is deemed to be in custody. Further, if a child who, even in an unsophisticated manner, invokes his 5th Amendment rights, any further statements made during interrogation must be suppressed. *A.K.M. v. Commonwealth*, 2014 WL 3887910 (Ky. App. 2014) *unpublished*. (See CR 76.28(4) before citing.)

A social worker must give a child a Miranda warning if the social worker is acting as an agent of law enforcement. *Commonwealth v. M.G.*, 75 S.W.3d 714 (Ky. App. 2002). *Miranda* rights do not preclude admission of statements a child makes to a social worker admitting drug use when there is no allegation that the child is either in custody or under interrogation. *K.M. v. Commonwealth*, 2006 WL 1719752 (Ky. App. 2006) *unpublished*. (See CR 76.28(4) before citing.)

Voluntariness of Confession

1. The prosecution has the burden to prove by preponderance of the evidence that the confession was voluntary.
 - (a) The burden was on the Commonwealth to prove to the district court, by a preponderance of the evidence, that the defendant's statements were voluntary. *Stanton v. Commonwealth*, 349 S.W.3d 914, 917 (Ky.2011).; *Tabor v. Commonwealth*, 613 S.W.2d 133 (1981).
 - (b) On a motion to suppress, the prosecution must affirmatively establish the voluntariness of a confession by a preponderance of the evidence.
 - (c) Police officers present when the confession was given should be called to testify at the hearing, or their absences accounted for.
2. The test for voluntariness of a confession from a child is the totality of the circumstances.
 - (a) "The Commonwealth was required to show, based on the totality of the circumstances, that the investigating detectives did nothing to break or override [the child's] will, *Chambers v. Florida*, 309 U.S. 227, 240, (1940), and that his statements were "the product of a rational intellect and a free will." *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)." *Com. v. Bell; T.C.*, 365 S.W.3d 216, 223 (Ky. App. 2012).
 - (b) Interrogation must be viewed "through the lens of this [13-year-old child] student, under these circumstances." *Commonwealth v. Bell*, 365 S.W.3d 216, 255 (Ky. App. 2012).
 - (c) The three questions used to determine the voluntariness of a confession are outlined in *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 2000) (citing to *Morgan v. Commonwealth*, 809 S.W.2d 704, 707 (Ky. 1991), (adopting federal due process standards of *McCall v. Dutton*, 863 F.2d 454 (6th Cir. 1988)). The questions are:
 - (i) Whether the police activity was objectively coercive. *Id.*
 - (ii) Whether the coercion overbore the will of the defendant. *Id.* See also

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Chambers v. Florida, 309 U.S. 227, 240, (1940).

(iii) Whether the defendant showed that the coercive police activity was the crucial motivating factor behind the defendant's confession. *Henson* at 469. See also *Bailey*; *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). See also *Taylor v. Commonwealth*, 276 S.W.3d 800 (Ky. 2008) and *Tabor v. Commonwealth*, 613 S.W.2d 133 (Ky. 1981).

3. Factors to consider include:

- (a) Age/Maturity/Experience with criminal legal system. *Haley v. Ohio*, 332 U.S. 596, 599 (1948).; *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004).; *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).
- (b) Location (remember this is a separate consideration from whether the child was in custody for *Miranda* purposes).
- (c) School-inherently coercive, See *Commonwealth v. Bell*, 365 S.W.3d 216 (Ky. App. 2012).

4. Length of interrogation

Special Note: This is different than it would be for an adult. Five hours may not be a drop in the bucket for an adult interrogation. For a child, it is different. See *Commonwealth v. Bell*, 365 S.W.3d 216 (Ky. App. 2012), where interrogation was only 32 minutes, but statement was still coerced; and *Shepherd v. Commonwealth*, 251 S.W.3d 309, 320 (Ky. 2008).

5. Applicable Time Statutes:

- (a) KRS 610.220(2): a child should not be held by the police longer than 2 hours (with some exceptions)
- (b) KRS 610.200(1) and KRS 610.200(2)(a)(1): a peace officer shall notify the parent or guardian immediately when a child is taken into custody
- (c) KRS 610.200(2)(c): Officer should only hold the child for 2 hours while trying to locate a parent or guardian
- (d) However, noncompliance with these timelines does not automatically require suppression of the statement. Rather, it is a factor for the court to consider.
 - (i) *Shepherd v. Commonwealth*, 251 S.W.3d 309 (Ky. 2008); *Murphy v. Commonwealth*, 50 S.W.3d 173 (Ky. 2001);
 - (ii) Where the police did not adhere to the notification of parent requirement, the Court held it is an important factor in the overall analysis of voluntariness. *Taylor v. Commonwealth*, 276 S.W.3d 800 (Ky. 2008).

PRACTICE TIP: Remember to consider how to argue to the court to include other factors for this child, such as the child's race. Black, Latinx, and other children of color experience the world differently. They may reasonably believe that they must comply with any officer or other state actor more so than a white child would.

Miranda Checklist

- **Is the child in custody for *Miranda* purposes?**
 - Reasonable child would believe they are not free to leave (objective test; *JDB v. North Carolina*, 564 U.S. 261 (2011): age is a factor in objective analysis.
- **Is the child being interrogated?**
 - Any words or actions on the part of police that they know are reasonably likely to elicit an incriminating response.
 - *Rhode Island v. Innis*, 446 U.S. 291 (1980): not just questioning, but statements too.
- **Is the custodial interrogation being conducted by a state actor?**
 - SRO: *N.C. v. Commonwealth*, 396 S.W.3d 852 (Ky. 2013): officer and principal working in tandem requires Miranda warnings.
 - Agent of the Police/Indistinguishable from role of police officer
 - ◇ *Welch v. Commonwealth*, 149 S.W.3d 407, 411 (Ky. 2004): DJJ counselor = police.
 - ◇ *Commonwealth v. M.G.*, 75 S.W.3d 714, 723 (Ky. App. 2002): statement to DJJ mental health assessor = possibly police based on facts in this case.
 - ◇ *Mathis v. United States*, 391 U.S. 1, 4, 88 S.Ct. 1503 (1968): IRS agent = police.
- **Did the client waive their right to remain silent?**
 - **Must be Knowing, intelligent, voluntary**
 - ◇ *Matthews v. Commonwealth*, 168 S.W.3d 14 (Ky. 2005) Must be proven by Commonwealth by preponderance of the evidence. Must be act of free will instead of coercion AND must be made knowing the nature of the right abandoned and the consequences of abandonment.
- **Did the client invoke their right to have an attorney present?**
 - **Right to attorney: must be unequivocal**
 - ◇ *Baril v. Commonwealth*, 612 S.W.2d 739 (Ky. 1981)
 - ◇ *Fare v. Michael C.*, 422 U.S. 707 (1979): request for probation officer not an invocation of right to an attorney.
 - ◇ *Bradley v. Com.*, 327 S.W.3d 512, 515 (Ky. 2010) “I need a lawyer or something” is unequivocal.
 - ◇ But see *Williams v. Commonwealth*, 2014 WL 5410263, at *7 (Ky. Oct. 23, 2014) “I would have to get me a lawyer [to decide if I want to negotiate]” not a clear invocation of right. *unpublished*
 - Right to remain silent: invocation must be “scrupulously honored”
 - ◇ *Carlisle v. Commonwealth*, 316 S.W.3d 892, 896 (Ky. App. 2010) Failing to honor a request to remain silent voids subsequent waiver of right to remain silent.
 - ◇ *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1991)

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- ◇ But see *Michigan v. Mosley*, 423 U.S. 96, 106, (1975) Invocation of right can be case specific depending on language of the invocation (i.e., I don't want to talk about the robberies).
- **Was the confession voluntary?**
 - **totality of circumstances test**
 - ◇ *Taylor v. Commonwealth*, 276 S.W.3d 800, 807 (Ky. 2008)
 - ◇ *Tabor v. Commonwealth*, 613 S.W.2d 133 (Ky. 1981): was the statement voluntary?
 - ◇ *Henson v. Commonwealth*, 20 S.W. 3d 466, 469 (1999): did police actions overbear the D's will?
 - ◇ *Miller v. Fenton*, 474 U.S. 104 (1985): police actions fundamentally fair?
 - **Commonwealth's burden to prove statement voluntary by preponderance**
 - ◇ *Tabor v. Commonwealth*, 613 S.W.2d 133, 134 (Ky.1981).
 - ◇ From *Com. v. Bell; T.C.*, 365 S.W.3d 216, 223 (Ky. Ct. App. 2012): "The burden was on the Commonwealth to prove to the district court, by a preponderance of the evidence, that the defendant's statements were voluntary. *Stanton v. Commonwealth*, 349 S.W.3d 914, 917 (Ky. 2011).
 - ◇ The Commonwealth was required to show, based on the totality of the circumstances, that the investigating detectives did nothing to break or override T.C.'s will, *Chambers v. Florida*, 309 U.S. 227, 240, (1940), and that his statements were "the product of a rational intellect and a free will," *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). The district court assessed the Commonwealth's claim of voluntariness by considering the totality of the surrounding circumstances, including the details of the interrogation and the characteristics of the defendant, T.C., and by asking whether the confession resulted from overreaching by the interrogators or from T.C.'s own properly elicited choice. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)."
 - **Factors**
 - ◇ **Age/maturity/experience**
 - » *Haley v. Ohio*, 332 U.S. 596, 599 (1948).
 - » *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004)
 - » *Fare v. Michael C.*, 442 U.S. 707, 725, (1979).
 - » *In Re Gault*, 387 U.S. 1, 52 (1967): kids' confessions require special caution because "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children."
 - ◇ **Location- School**
 - » *Commonwealth v. Bell*, 365 S.W.3d 216 (Ky. App. 2012): school is an inherently coercive environment

- » But see *C.W.C.S. v. Commonwealth*, 282 S.W.3d 818 (Ky. App. 2009)
- ◇ **Length of interrogation**
 - » *Haley v. Ohio*, 332 U.S. 596, 599, 68 S.Ct. 302, 303 - 304 (1948) (questioned midnight to 5am)
 - » *Spano v. New York*, 360 U.S. 315 (1959) (adult interrogated 8 hours) *Shepherd v. Commonwealth*, 251 S.W.3d 309, 320 (Ky. 2008): compliance with juvenile code's restriction on 2 hour police custody is an "important" factor in totality of circumstances.
 - » *Commonwealth v. Bell*, 365 S.W.3d 216 (Ky. App. 2012): 32 minute interrogation at school declared involuntary in that setting with other contributing factors (13 year old child).
- ◇ **Police compliance with parent notification is a factor**
 - » *Murphy v. Commonwealth*, 50 S.W.3d 173, 187 (Ky. 2001)
 - » *Davidson v. Commonwealth*, 613 S.W.2d 431, 435 (Ky. App. 1981)
- ◇ **Absence of parent or friendly/supportive adult**
 - » *Commonwealth v. Bell*; T.C, 365 S.W.3d 216 (Ky. App. 2012)
- ◇ **Implied threats/promises**
 - » *Bram v. United States*, 168 U.S. 532, 542-43, (1897); *U.S. v. Johnson*, 351 F.3d 254, 261 (6th Cir. 2003); *Williams v. Withrow*, 944 F.2d 284, 289 (6th Cir. 1991) (modified on other grounds, 507 U.S. 680 (1993))

Child Confession Suppression Hearings Quick Guide

Five Commandments of Child Suppression Hearings

1. The devil is in the details!
 - (a) have a thorough timeline from your client
 - (b) don't forget length of custody- max 2 hours. KRS 610.220
 - (c) be able to paint a picture of the location of interrogation/search, etc.
 - (d) know who was there and what their role was
 - (e) was parent contacted? what did they say? did they understand what was going on? Did they have an interest in having their child charged? KRS 610.200
 - (f) transcribe recorded audio of confession, if have one- enter into evidence?
2. Use Documents on Cross!
 - (a) Statute:
 - (i) KRS 610.200: notify parent implied right for them to be there?
 - (ii) KRS 610.220 2 hour cap on "custody"
 - (b) Caselaw:
 - (i) *A.G. v. Commonwealth*: improper notification & custody over 2 hours = coercion

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- (ii) *Com. v. Bell*; T.C.: school interrogations inherently coercive, age, absence of parent
- (iii) *JDB*: age a factor in whether in custody and thus whether to give Miranda
- (iv) *Haley v. Ohio*: keeping child from parent, long interrogation, & child's age = coercive
- (c) *Gault*: review child's confessions with special care; they are highly suspect!
- (d) *Roper, Graham, Miller, Jackson* = kids are different!!!
- (e) Scholarly articles:
 - (i) children 14 and under are MUCH more susceptible to interrogation techniques
 - (ii) even older teens have trouble understanding their Miranda rights
- 3. Hang them with their own rules!
 - (a) Police procedures
 - (i) procedure to give written Miranda
 - (ii) procedure to contact parent
 - (b) Police training
 - (i) trained to interview children?
 - (ii) contrast to interview technique when used when interviewing children as abuse victims (i.e., open ended questions) and why trained that way (because kids very susceptible to suggestion! want to please adults!)
 - (c) Creators of Reid have publicly cautioned the technique's use on children
 - (d) Creators of Kinesic also caution use on children
- 4. Call witnesses!
 - (a) client
 - (i) to create/contradict timeline
 - (ii) to explain how felt (i.e. scared, tired, high as a kite)
 - (iii) BUT prep them fully!! judge and commonwealth will try to get them to say stuff!
 - (b) parent
 - (i) to create/contradict timeline
 - (ii) to testify what told or not told by officer
 - (iii) to testify as to child's functioning, ability to understand, grade level, special education, etc. etc.
 - (c) expert
 - (i) talk about child's disability, IQ or just adolescent brain development
- 5. Brief your specific facts

III. DEFENDING CHILDREN: ADVANCED PROCEEDINGS

ADJUDICATION

Pre-Adjudication

When representing a child, prior to adjudication is when the majority of the casework is done. This section is comprised of typical issues that arise in juvenile court as well as any special rules or law related to it (*i.e.*, how findings of contempt can be different in juvenile court). It is important to note that not all of these things will occur, or should occur, with every child. Further, there will be cross references to other sections in this manual for expanded explanations. See the next chapter for the reasonable child standard and suppression issues.

Pretrial Conferences

The purpose of a pretrial conference in juvenile court is very similar to pretrial conferences in adult court and each jurisdiction will conduct them differently. Pretrial conferences allow the parties an opportunity to talk about the specifics of the case and put necessary items or challenges on the record. However, unique to juvenile court, pretrial conferences give the prosecutor, social worker, parent, or even the judge, an opportunity to further investigate issues that impact the child and address any current behaviors or needs of that child.

Be sure to discuss with your client what is going on at home, school, and anywhere else they have been. Be prepared to either explain any issues or to set a contempt hearing for violations of pretrial orders.

During the Pretrial Conference

1. The court shall schedule a pretrial conference upon the request of a party, or on their own motion. JCRPP 7, 16
2. Motions: Motions in Limine, Motions to Suppress, and other motions generally are to be heard pretrial. RCR 8.20, 8.27; KRE 103(d).
3. Recusal of judge: The judge is also the only trier of fact and counsel should consider whether to seek recusal in cases where explosive evidence is excluded prior to trial.
4. Unofficial Diversion: if a child is not eligible for a CDW diversion, but your prosecutor is willing to do an unofficial diversion, make certain the expectations are clear on the record. Many courts will bring a child in for pretrial conferences and/or status reviews during this unofficial diversion period.
5. Informal Adjustment: Informal adjustment is similar to a diversion, except the court has jurisdiction on the case and will review as necessary. The expectations and time limit should be very clear on the record and the JV-53 form (informal adjustment AOC form) should be utilized.

CONTEMPT

Juvenile courts repeatedly use their contempt powers to incarcerate children.

PRACTICE TIP: It is vital to understand the basics and treat contempt as a mini-trial. Keep detailed records of any time contempt is alleged on a case, what the allegations are, and the eventual outcomes.

Definitions Used in Contempt Proceedings

1. Contempt: “willful disobedience of—or open disrespect for—the rules or orders of a court.” *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky.1996).
2. Direct Contempt: behavior or action directly in front of the judge
3. Indirect Contempt: behavior or action that happens outside the judge’s view and that the judge must hear from someone else to prove the behavior or action
4. Criminal Contempt: the court is punishing prior behavior, “If the court’s purpose is to punish, the sanction is criminal contempt.” *Burge*, at 808.
5. Civil Contempt: the court is using its coercion powers to force a person to follow the court’s order and the person has the ability to “purge” the contempt. [remember: the contemnor (the judge) holds the keys to their jail cell]. Civil contempt “consists of the failure of one to do something under order of court, generally for the benefit of a party litigant.” *Burge*, at 808.

Basics of Contempt Actions

Just as in the circumstances of *In Re Gault*, a child’s liberty interest is at stake in a contempt hearing. Thus, it is considered an adversarial proceeding requiring the same due process considerations provided for adults. *In Re Gault*, 387 U.S. 1 (1967).

Juvenile court jurisdiction over adults is specifically limited to enforcement of its orders concerning a child under its jurisdiction, and any such authority is ancillary to the court’s jurisdiction over the child. *Wilson v. West*, 709 S.W.2d 468 (Ky. App. 1986).

Pre-adjudication orders entered on a child’s case are not valid court orders when the child’s plea acknowledging his alleged behavior cannot be proven to have been made knowingly, intelligently, and voluntarily. Consequently, a child cannot be held in contempt for violating such an order. *M.A.M. v. Commonwealth*, 402 S.W.3d 546 (Ky. App. 2013).

Direct contempt is committed within the presence of the court and will presumably be dealt with immediately in a summary fashion. It does not require any fact-finding function because all of the elements of contempt are within the personal knowledge of the court. Therefore, a finding of direct contempt does not require any due process considerations. Further, the rules of evidence do not apply to summary findings of direct contempt. KRE 1101(d)(4). *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996). For example, where a child curses at a judge or refuses to be silent in the courtroom if ordered to be silent by the court.

Indirect contempt, on the other hand, occurs outside of the presence of the court so the court does not have the same first-hand knowledge of the facts. Therefore, due process

must be satisfied prior to any finding of contempt for such things as violation of a court order. At a minimum, this would require a hearing with evidence presented and an opportunity to defend against that evidence. *Taylor v. Hayes*, 418 U.S. 488 (1974).

Criminal contempt, either direct or indirect, is conduct “which amounts to an obstruction of justice and which tends to bring the court into disrepute.” It seeks to punish conduct that has already occurred rather than to compel a course of action. The sanction is intended to be a punishment and is usually of a determinate period. Generally, in the juvenile setting, a contempt finding will be of this type since the contempt is usually for violating a court order. *Gordon v. Commonwealth*, 133 S.W. 206, 208 (1911).

NOTE: In reality, it may be as important to look at what kind of sentence the judge can or does impose as it is to look at the conduct of the client in determining whether the contempt is classified as civil or criminal.

Notice Requirements

Notice of a contempt charge is required in order “for any defendant to prepare and defend against” such a charge. This notice must include factual allegations concerning what wrongdoing is alleged, witnesses to be used against the child, the date and time of the hearing, and sufficient clarity of the violations such that child and lawyer can prepare a defense. *K.F. v. Commonwealth*, 274 S.W.3d 457, 459 (Ky. App. 2008).

The Contempt Proceeding

In a contempt proceeding, regardless of whether it is a status offense or public offenses case, the child must have had notice of:

- (a) the court’s orders,
- (b) notice of the consequences for violations of those orders, and
- (c) notice of the allegations of contempt.

See K.F. v Commonwealth, 274 S.W457 (Ky. App. 2008).

The child must have an opportunity to be heard and is entitled to a hearing. *See In Re Gault*, 387 U.S. 1 (1967) and *Taylor v. Hayes*, 418 U.S. 488 (1974).

If the court is punishing a prior action, instead of coercing future action, the burden of proof is beyond a reasonable doubt. Criminal contempt to the court must be identified. *See Burge, supra*.

For Status Offenses, contempt is an allegation that the child violated a VCO, a court order issued by a judge to a child alleged or found to be a status offender, such as in the following scenarios:

- (a) who was brought before the court and made subject to the order;
- (b) whose future conduct was regulated by the order;
- (c) who was given written and verbal warning of the consequences of the violation of the order at the time the order was issued and whose attorney or parent or legal guardian was also provided with a written notice of the consequences of violation of the order, which notification is reflected in the record of the court proceedings; and

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- (d) who received, before the issuance of the order, the full Due Process rights guaranteed by the Constitution of the United States; KRS 600.020(69).

See M.A.M. v. Commonwealth, 402 S.W.3d 546 (Ky. App. 2013). Full due process rights require contempt can only be found and enforced after a child has pled or been adjudicated as guilty of the status offense. Only with a post-adjudication VCO can the child be held in contempt for court orders.

If the child is found to be in contempt, the court MUST:

- (a) Impose graduated sanctions and
- (b) Consider the least restrictive alternative. Quote the rule!
 - (i) JCRPP 18(C)(1)(b) for status offenses
 - (ii) JCRPP 18(E)(1)(b) for public offenses

Contempt for Status Offense Checklist

1. Does the court have jurisdiction?
 - (a) Family Court (if there is one) has jurisdiction over status offenses.
 - (b) District Court has jurisdiction over public offenses or when both are alleged.
 - (c) Has the child turned 18 since being brought to court? If so, the court lacks jurisdiction on status offense.
2. A child cannot be held in contempt when the court lacks jurisdiction. Review the underlying petition for use of FAIR team, affidavit of probable cause, technical issues, *see Status Checklists*.
3. Confirm the exact court order the child has allegedly violated.
4. Confirm the court order is valid per KRS 600.020(69):
 - (a) The child is before the court;
 - (b) The order regulates future conduct;
 - (c) The child was given written and verbal warning of the consequences of violation at the time the order was issued;
 - (d) The child's attorney or parents or legal guardian was provided with written notice of the consequences of violation of the order; and
 - (e) The child was given full due process rights guaranteed by the Constitution of the United States (*i.e.*, pre-adjudication orders have not incorporated the full due process rights, *see M.A.M. v. Commonwealth*, 402 SW3d 546 (Ky. App. 2013)).
5. Confirm that the contempt violation is from the same court, not a DNA case.
 - (a) If the contempt is from a DNA case, object & contact JPDB immediately.
6. Was the child a victim of human trafficking?
 - (a) If so, this is a complete defense to any status offense. KRS 630.125
 - (b) Gather all paperwork from the CDW, County Attorney, and/or Clerk.

7. If detained, was the detention hearing held within 24 hours (excluding holidays and weekends) of being detained?
 - (a) If not, the child should be released (there is no substantial compliance, only exact compliance).
8. Is there a motion for contempt? If not, OBJECT & move to dismiss
9. Was it served on the child? Counsel? If not, OBJECT & move to dismiss
10. Does the motion state the specific allegations for “willful violation of a court order”? If not, object, move to dismiss contempt until a satisfactory motion is filed.
11. DEFEND by investigating the contempt motion:
 - (a) What is specifically alleged in the motion?
 - (b) Can the child defend the allegation?
 - (c) Was conduct “willful” or were conditions impossible?
 - (d) If county attorney (or DPP and other bystanders) adds new information or argues violations that were not noticed at the hearing object and appeal.
12. Did child previously admit contempt on the same order or in this instance? This might be disposition or a purge hearing, proceed accordingly.
13. Court should hold an adjudication hearing and disposition hearing separately! *K.F. v Commonwealth*, 274 S.W457 (Ky. App. 2008).
 - (a) Consider client needs: waiver of separate hearings may benefit the client or may be an express request of the client.
14. If a child is found or admits contempt and disposition is imposed – the child may **appeal**. Explain the right to appeal and that this right is owned by the child.

Contempt for Public Offense Checklist

1. If the child is detained for this contempt: Was the detention hearing held within 48 hours (excluding holidays and weekends) of being detained?
 - (a) If not, the child should be released. Contact JPDB about the timeline habeas issues.
2. Does the court have jurisdiction?
 - (a) Family Court has jurisdiction over status offenses (if Family Court exists in jurisdiction).
 - (b) District Court has jurisdiction over public offenses, or when both are alleged.
 - (c) A child cannot be held in contempt when the court lacks jurisdiction.
 - (i) 1st offense misdemeanors require diversion opportunity,
 - (ii) 2nd or 3rd misdemeanor/violation, 1st felony may be diversion

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eligible.

(iii) Review underlying petition: was there a disposition -> probation sanctions are more appropriate than contempt for youth under terms of probation (*Nicely v Commonwealth*).

3. Is this a review? => OBJECT
4. Confirm the exact court order the child has allegedly violated.
5. Confirm that there was **notice** of the court order (child left with a paper copy, was present in person for entry of order, had counsel, was told of potential consequences of violations including detention).
6. Confirm that the contempt violation is from the same court, not a DNA or status case.
 - (a) If the contempt is from a DNA case, contact JPDB immediately.
7. Is there a **motion** for contempt? If not, OBJECT and move to dismiss.
8. Was it **served** on the child? Counsel? If not, OBJECT and move to dismiss.
9. Does the motion state the specific allegations for “willful violation of a court order”? If not, object and move to dismiss contempt until a satisfactory motion is filed.
10. DEFEND by investigating the contempt motion:
 - (a) What is specifically alleged in the motion?
 - (b) Can the child defend the allegation?
 - (c) Was conduct “willful” or were conditions impossible?
 - (d) If county attorney (or DPP or bystanders) adds new information or argues violations that were not noticed at the hearing-> object and appeal.
11. Did the child previously admit contempt on the same order or in this instance? => this might be disposition or a purge hearing, proceed accordingly.
12. Court should hold an adjudication hearing and disposition hearing separately!
 - (a) But careful, waiver of separate hearings may benefit the client or may be an express request of the child-client.
13. If child is found or admits contempt and disposition is imposed – the child may appeal. Explain the right to appeal is owned by the child.

IEP Defense to Contempt

Preparing for the IEP Defense

Because contempt is the “**willful** disobedience of—or open disrespect for—the rules or orders of a court.” *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky.1996), emphasis added, you should argue against the “willfulness” element of contempt.

Actions to take in preparation include:

- Request the IEP and other school records from the child’s school. If a court order is needed, cite KRS 610.342, which allows you access to “any other

record, public or private, relating to that child which the attorney believes is necessary to the representation of that child.”

- Contact any possible witnesses (school counselor, special education teacher but especially the person that completed evaluations/made diagnosis when possible).
- Review the entire incident step by step with the child, specifically his or her senses and feelings at every important moment.
- Investigate and cross school witnesses on their knowledge of and adherence to IEP and any behavior plan.
- Use the ASW to find specific alternatives to jail that would help this specific child with these specific issues as well as identify the specific harm of jail time to this child based on their identified disabilities.
- Ask special education teacher or whomever is close with the child what interventions from school would work best and ask the court to require the school to do these.
 - (a) It could also mean the parent needs a push from the judge.
 - (b) Ask for an Admissions and Release Committee (ARC) meeting to be held.
 - (c) Help find resources for child/parent for the ARC meeting. Speak with your directing attorney before going to an ARC meeting for the child.
 - (d) Use an IEP to create a plan to get the child, court, and school all on the same page to avoid future contempt in general, but also to avoid detention time when contempt issues arise. Be creative.
 - (e) Consider: What is important to the child? *e.g.* Getting out of alternative school, playing a sport, getting a job.
 - (f) Then: Incentivize the child. Convince the Judge and you can force the school to follow the plan and get the child a positive outcome. Giving the child a sense of control will help them move forward.
- If you lose guilt/innocence phase, use IEP as *mitigation*.

Discovery for Adjudications

The same discovery rules which apply in adult cases also apply in defending juveniles and thus, will not be repeated here. *See the Trial Law Notebook* which can be found at www.dpa.ky.gov for rules, authority, and challenges to discovery.

The one area in which discovery rules will affect children differently than adults are in relation to transfer hearings. Because the majority of transfer cases are discretionary, discovery is not always guaranteed. Defense counsel should argue that every child is entitled to discovery prior to the transfer hearing.

Discovery Basics

Defense counsel be given discovery prior to a transfer hearing in order to prepare for such hearing. *Kent v. U.S.*, 383 U.S. 541 (1966). *Commonwealth v. DeWeese*, 141 S.W.3d 372 (Ky. App. 2003), denying a right to discovery in transfer cases, applied to mandatory transfer. Mandatory transfer was repealed June 29, 2021. Counsel must investigate the facts before the transfer hearing. *Commonwealth v. Robertson*, 431 S.W.3d 430, 439 (Ky. Ct. App. 2013) *citing United States v. Cronin*, 466 U.S. at 659, 104 S.Ct. at 2047 (U.S. 1984), where “failing to obtain the legal and factual knowledge

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necessary to effectively cross-examine the Commonwealth's witnesses, trial counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" which resulted in reversal due to a structurally flawed transfer hearing.

The Kentucky Court of Appeals has interpreted KRS 610.342, allowing child's attorney access to all records pertaining to the child, as not a discovery statute. *Commonwealth v. DeWeese*, 141 S.W.3d 372 (Ky. App. 2003). However, the U.S. Supreme Court made it clear in the 1960's that counsel for the child is constitutionally entitled to the necessary records to defend a child on the charges brought against the child in a status, public or youthful offender setting. *See In Re Gault*, 387 U.S. 1 (1967) (prior to adjudication hearing in order to prepare for such hearing); *See Also Kent v. U.S.*, 383 U.S. 541 (1966) (prior to transfer hearing in order to prepare for such hearing).

Enhancement

Adjudications are not convictions; therefore all "enhancements" must be objected to. Most enhancement issues come up in transfer cases. *Phelps v. Commonwealth*, 125 S.W.3d 237 (Ky. 2004). KRS 635.040. *Cummings v. Commonwealth*, 226 S.W.3d 62 (Ky. 2007). The *Jackson* case below, shows very clearly that all attorneys must object to any and all enhancements as soon as they are charged.

1. Adjudications are not "convictions" for the purposes of any offense under the penal code, so a youthful offender cannot be charged with being a "second or subsequent offender" or a "felon in possession of a firearm" on the basis of the child's prior juvenile court record. *Phelps v. Commonwealth*, 125 S.W.3d 237 (Ky. 2004).
2. KRS 635.040: No adjudication by a juvenile session of District Court shall be deemed a conviction, nor shall such adjudication operate to impose any of the civil disabilities ordinarily resulting from a criminal conviction, nor shall any child be found guilty or be deemed a criminal by reason of such adjudication.
3. A firearm enhancement statute can be used to elevate a charge of drug trafficking to a Class B felony as to authorize a child's transfer to circuit court as a youthful offender even if the enhancement statute would have no effect unless the child is convicted. Here, a child's trafficking offense was charged as an enhanced offense. There was no objection by counsel prior to transfer, so the charge was classified as a higher-level offense at time of the transfer proceeding, which satisfied the transfer statute's requirements. *Jackson v. Commonwealth*, 363 S.W.3d 11 (Ky. 2012).
4. Object to any and all enhancements charged in juvenile court at arraignment.

Prior Adjudications

Any challenge to the unconstitutionality of a prior conviction must be made pretrial or it is waived. *Commonwealth v. Gadd*, 665 S.W.2d 915 (Ky. 1984). An adjudication is not a "conviction" for the purpose of the rule of evidence permitting impeachment by prior "convictions." The adult Truth-in-Sentencing statute, KRS 532.055, permits children's records to be used at sentencing, and their use to impeach during the guilt and innocence phase is an unconstitutional violation of the separation of powers. *Manns v. Commonwealth*, 80 S.W.3d 439 (Ky. 2002).

Notice

In general, the same notice requirements exist for representing juveniles as for representing adults, see the Trial Law Notebook. However, there are a few cases that are directly about notice to juveniles. These cases mainly deal with notice about pretrial orders, contempt, and probation violations.

1. The child is entitled to written notice of probation violation allegations.
 - (a) Due process requires that a child be provided with written notice of the grounds that constitute an alleged probation violation before the court can act to revoke probation and commit the child to DJJ. *Q.C. v. Commonwealth*, 164 S.W.3d 515 (Ky. App. 2005).
 - (b) When a child is missing and has not been provided notice of a family court's intent to revoke probation, the court's subsequent revocation of probation is held to be invalid. *D.S. v. Commonwealth*, 2009 WL 2633194 (Ky. App. 2009) *unpublished*.
2. The child is entitled to written notice of contempt allegations and an opportunity for a hearing.
3. It is a violation of due process to hold a status offender in contempt during the course of separate abuse and neglect proceedings without providing the child proper notice. *A.C. v. Commonwealth*, 314 S.W.3d 319 (Ky. App. 2010).
4. The child is entitled to notice of the specific pretrial orders a court is ordering. A pretrial order must be specific and not so vague that a child does not understand what behavior is prohibited or required.
5. In *J.R.*, failure to provide adequate notice to a child of an Order to attend summer school so tainted later contempt proceedings held the following month that the court's contempt order was rendered unenforceable. *J.R. v. Commonwealth*, 2011 WL 944368 (Ky. App. 2011) *unpublished*.

Admissions

Admissions are pleas of guilt in the juvenile court. Therefore, be careful with admissions. Many prosecutors want children to admit without any benefit in return. Admitting to the charges in order to secure a release from detention or in other words "pleading to daylight," is a systemic issue and should not be viewed as an offer that benefits the child long term. Any discussion should address whether the child will realistically be pretrial detained. There should be some benefit to an admission for the child. Before any admission, the child's record must be confirmed specifically so that the consequences of the admission are fully understood. Further, the Supreme Court of Kentucky currently allows juvenile court records to be used during a sentencing phase as an adult. *Manns v. Commonwealth*, 80 S.W.3d 439 (Ky. 2002). The child must be advised of this consequence, as well.

Prior to admission, defense counsel should advise the juvenile of all collateral consequences, constitutional rights, likelihood of winning at trial, future penalties including contempt powers of court, possible sentences, and benefit of admission. The best practice is to use the proper AOC form for admissions. AOC-JV-50 and AOC-JV-51.

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PRACTICE TIP: Probation as a sentence may seem like a good idea. However, many children end up on probation to the court which can lead to an eventual detention sentence if he or she is found to be noncompliant in probation. The court has many other community based alternatives such as, community service, writing letters/papers, and more. Consider each child specifically before advising them on a probation offer. Again, any admission should have some benefit to the child. Examples include: a lesser charge (misdemeanor instead of felony), really bad facts that would only come out a trial, a non-sex offense if a sex offense is charged.

Other Authority

- For an individual's admission of guilt and waiver of his constitutional rights to be valid, the court must make a finding that the individual "knowingly and voluntarily" waived his rights when choosing to enter an admission. *Boykin v Alabama*, 395 U.S. 238 (1969).
- No child can waive counsel without first consulting with counsel. Further, the holding of *Boykin* is extended to juvenile courts. Any admission entered without assistance of counsel or without a proper *Boykin* colloquy is subject to challenge, which must be made pretrial. *D.R. v. Commonwealth*, 64 S.W.3d. 292 (Ky. App. 2001).
- A child's admission of guilt for truancy was not valid because she did not enter into the stipulation of truancy knowingly or intelligently. The child was 13 years old at the time of the hearing and had never made a court appearance. The court did not explain to the child or her mother their respective rights or the potential benefits of representation by counsel. At no time did the court advise her of the constitutional rights that she was waiving by entering her admission. *A.B. v. Commonwealth*, 2010 WL 4740319 (Ky. App. 2010) *unpublished*.
- This Georgia case recognizes that Alford pleas are allowed in juvenile court. Generally, courts in KY recognize the right to an Alford plea. *In the Interest of B.C., a child*, 777 S.E.2d 52 (Ga. Ct. App. 2015).
- A child must be appointed counsel before choosing to waive counsel. Reaffirming *D.R.*, the court was statutorily obligated to appoint counsel for the child. *L.A.S. v. Commonwealth*, 2010 WL 2329102 (Ky. App. 2010) *unpublished*.
- An admission to habitual truancy must be entered by child, not counsel. Here, since counsel entered admission, the prior orders were vacated. *N.K. v. Commonwealth*, 324 S.W.3d 438 (Ky. App. 2010).
- The *Boykin* standard for admission was not complied with since the child did not even enter an admission, and the court should not have held a contempt hearing with no prosecutor present. *M.G. v. Commonwealth*, 2008 WL 4683239 (Ky. App. 2008) *unpublished*.
- The Family Court's failure to properly advise the child of her *Boykin* rights

when she pled guilty to a beyond control charge caused the court's contempt finding, rendered much later, to be invalid. *N.W. v. Commonwealth*, 2012 WL 1383212 (Ky. App. 2012) *unpublished*.

- The trial court did not properly advise the child of her *Boykin* rights when she entered her plea. Accordingly, that plea could not form the basis for a later contempt charge. The fact that the child was subsequently advised of her *Boykin* rights before pleading guilty to the contempt charge did not cure the earlier failure to advise of her *Boykin* rights in the original beyond control proceedings. *T.C. v. Commonwealth*, 2012 WL 1383215 (Ky. App. 2012) *unpublished*.
- Where a judge conducted no *Boykin* colloquy and did not even advise the child that he had the option of pleading not guilty, the child's guilty plea must be vacated. *D.G. v. Commonwealth*, 355 S.W.3d 476 (Ky. App. 2011).
- Admission is not entered voluntarily, intelligently, and knowingly: (1) when there is no inquiry at the time of the admission as to the veracity of the charges, (2) when there is no inquiry as to whether any stipulation was voluntary or coerced, or (3) when the court does not inform the child before accepting his plea of what the possible consequences and range of punishments would be if he admitted his guilt. *M.A.M. v. Commonwealth*, 402 S.W.3d 546 (Ky. App. 2013).
- A child must be informed of the constitutional rights he waives by admitting guilt and of the range of possible punishments, and the court must question accused to determine he has a full understanding of what the plea connotes and of its consequences. This determination should become part of record. Here, a 15-year-old appellant with no previous experience in the court system was not informed of a single consequence of his decision to enter an admission of guilt. The appellant's admission of guilt was not made knowingly and intelligently. *D.R. v Commonwealth*, 64 S.W.3d 292 (Ky. App. 2001).
- *Boykin* applies in juvenile proceedings even when a child is represented by counsel and the court has read him his KRS 610.060 "arraignment rights." *J.D. v. Commonwealth*, 211 S.W.3d 60 (Ky. App. 2006) (clarifying holding in *D.R. v. Commonwealth*, 64 S.W.3d 292 (Ky. App. 2001)).
- A defendant's waiver of counsel without first being appointed counsel is ineffectual and contrary to KRS 610.060(1), which mandates the trial court to initially appoint counsel. Only after the appointment and consultation with counsel can the child waive the right to counsel. *D.R. v. Commonwealth*, 64 S.W.3d 292 (Ky. App. 2001).

Adjudication

The purpose of adjudication is to determine truth or falsity of petition - can be resolved either via hearing or guilty plea. KRS 610.080(1). It should be treated with all the formality of a bench trial in adult court. The Judge is the fact finder and ultimately determines guilt. A guilty verdict does not create a "conviction" as children are adjudicated not convicted. This is an important designation in regards to offenses. An adjudication cannot be used to enhance a future charge in adult court, such as a "second offense" crime nor can it create a "felon" designation in regards to owning a

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firearm, or voting. This section of the manual only refers to the rules or law that differ for “trials” for children than adult trials. In all juvenile adjudications, please refer to the Department of Public Advocacy’s **Trial Law Notebook**. Again, an adjudication is a procedure akin to trial where the court determines whether the evidence supports a finding that the child is guilty of what is alleged in the complaint/petition and should be treated as such.

Basics

1. All hearings should be speedy. KRS 610.070(1). If the case is in a jurisdiction where the judge consistently sets endless “reviews,” never actually adjudicating a child, or uses “contempt” to throw the child in detention, insist on a speedy adjudication.
2. Criminal rules apply upon motion by child. KRS 610.080(2).
3. Burden of proof is on the state to show guilt beyond reasonable doubt. KRS 610.080(2).
4. Counsel should strive for total formality and strict adherence to formal rules of evidence. KRS 610.070(2).
5. CDWs cannot testify against child without child’s consent. 630.060(1).
6. All family members, custodians and guardians share absolute right not to incriminate the child. Invoke whenever possible. KRS 610.060(1)(b).
7. There is no directed verdict in juvenile court. Rather, ask for an Involuntary Dismissal, CR 41.02. See also, *R.S. v. Commonwealth*, 423 S.W.3d 178 (Ky. 2014).
8. This is a much better standard of proof. Unlike directed verdict, the Court must weigh the evidence equally, not in the favor of either party. See CR 41.02(2).

PRACTICE TIP: The *R.S. v. Commonwealth*, 423 S.W.3d 178, 184 (Ky. 2014) opinion held that a motion for directed verdict is not proper procedure in juvenile court adjudications. The Court in *R.S.* held: “A directed verdict is clearly improper in a juvenile adjudication action tried by a court without a jury; instead, the appropriate procedural mechanism for early dismissal is found in the rule governing involuntary dismissal. CR 41.02(2).” *Id.* at 184. Under the rule governing involuntary dismissal in a juvenile adjudication, the trial court must “weigh and evaluate the evidence rather than, with regard to directed verdict, indulge every inference in the Commonwealth’s favor. Finally, if the trial court rules on the merits in favor of the defendant, factual findings must be made on the record. CR 41.02(2)...On appellate review of a ruling on a defendant’s CR 41.02 motion, we will overturn the trial court only for an abuse of discretion. An abuse of discretion will be found when the trial court’s decision is ‘arbitrary, unreasonable, unfair, or unsupported by sound legal principles.’ For a bench trial, we find this procedure to be more precise than a motion for a directed verdict, which addresses itself to a jury trial setting.” *R.S. v. Commonwealth*, 423 S.W.3d 178, 184 (Ky. 2014). Internal citations omitted.

Other Authority

NOTES

1. Appointment of Counsel

- (a) A child may waive the right to counsel only if he is first appointed counsel and consults with counsel concerning waiver. This rule applies in both status and public offense cases. *D.R. v. Commonwealth*, 64 S.W.3d 292 (Ky. App. 2001). (statute amended following *D.R.*)

2. Avowal

- (a) All allegations of error regarding excluded evidence must be preserved by requesting the court to enter the evidence into the record by avowal or by counsel making a proffer of the evidence (See KRE 103). Without an avowal, a reviewing court has no mechanism for assessing the evidence submitted to determine whether exclusion was prejudicial. *Hart v. Commonwealth*, 116 S.W. 3d 481 (Ky. 2003). See also, *Jones v. Commonwealth*, 623 S.W.2d 226 (1981). This rule applies in cases where a child is tried in Circuit Court as an adult. See *Caldwell v. Commonwealth*, 133 S.W.3d 445 (Ky. 2004).
- (b) Children transferred to adult court as youthful offenders are entitled to avowals in a sentencing hearing taking place after the child reaches majority and after a conviction in circuit court so long as the child can show he was denied a meaningful opportunity to controvert the evidence against him at his sentencing hearing and needed to establish the denial of that right by using an avowal. *Commonwealth v. Jeffries*, 95 S.W.3d 60 (Ky. 2002).

3. Beyond a Reasonable Doubt Standard of Proof

- (a) The standard of proof in an adjudication hearing is “beyond a reasonable doubt.” The U.S. Supreme Court held that the “beyond a reasonable doubt” standard applied in both criminal and juvenile proceedings. *In Re Winship*, 397 U.S. 362 (1970).

4. Bifurcation

- (a) Children are statutorily entitled to separate adjudication and disposition hearings. Thus, the Commonwealth has no authority to waive the right to bifurcated hearings, which is a right belonging to the accused child. A lack of notice to the child required vacation of commitment. *K.F. v. Commonwealth*, 274 S.W.3d 457 (Ky. App. 2008).

5. In Absentia

- (a) An adjudication hearing may be conducted only if the child defendant is voluntarily in absentia. *B.J. v. Commonwealth*, 241 S.W.3d 324 (Ky. 2007). The child must be the one who voluntarily wishes to proceed in absentia, not the lawyer.

6. Exclusion of the Press and Others

- (a) The legislature intended that trials of children are not publicized in the news media, as publicity would potentially deprive the child of a fair trial and would likely diminish his or her prospects for rehabilitation. Further, to exclude the press at the district level but to admit them at the appellate level would tend to nullify the original intent and purpose of the general assembly. Therefore, the press can be excluded from access to juvenile court, juvenile court records and appellate hearings on a child's

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constitutional challenge to the transfer statute. *F.T.P. v. Courier-Journal and Louisville Times Co.*, 774 S.W.2d 444 (Ky. 1989); Also see, *Kentucky Press Association, Inc., v. Commonwealth of KY*, 454 F. 3d 505 (6th Cir., 2006).

If a child is transferred to Circuit Court those proceedings are NOT closed nor confidential. Warn the child that there could be television cameras, especially if it is a high-profile case.

7. Right to Jury

- (a) A jury trial is not a constitutionally guaranteed right in a juvenile proceeding. *Dryden v. Commonwealth*, 435 S.W.2d 457 (Ky. 1968).
- (b) The U.S. Supreme Court held that jury trials were not a due process requirement in juvenile adjudications, but stated: “There is, of course, nothing to prevent the juvenile court judge, in a particular case where he feels the need, or when the need is demonstrated, from using an advisory jury.” *McKeiver v. Pennsylvania*, 403 U.S. 528, 548 (1971).

PRACTICE TIP: Request an advisory jury anytime you have reason to believe the judge may be unduly influenced by knowledge a jury would never know such as suppressed evidence or earlier trailers.

Disposition

The goal of disposition is to create the least restrictive set of orders possible in order to bring about the treatment goals or changes the child needs to make in order to avoid future court contact. Sanctions at disposition can be categorized. The least drastic category of sanctions is “nominal”, followed by “conditional”, and then “custodial”, which is the most restrictive penalty available for the judge to mete out. “Nominal” sanctions should be considered and found to be inappropriate by the judge before “conditional” and, finally, “custodial” sanctions are considered and/or imposed. There is an affirmative obligation on the judge to consider and reject lesser restrictive sanctions before imposing more severe ones. Maximum sentences are to be imposed only if warranted by statute, seriousness, culpability, age, and record.

Disposition Basics

1. It is important to understand the options that DJJ can present to the court in order to zealously advocate for a client. The DJJ classification manual is publicly available and explains the steps DJJ takes to assess placement and commitment/probation recommendations. Violations, misdemeanors, and D felonies are subject to significant limits on when a child may be committed and the length of commitment or probation. Therefore, pleading to a higher-level offense is generally not advisable except to avoid transfer.
2. Child is entitled to a separate dispositional hearing, with a dispositional report to be prepared by DJJ, CHFS, or other appropriate agency, and presented to the court. KRS 610.080, 610.100(1)
 - (a) Only the child may waive the right to a separate dispositional hearing. No one may waive this right on behalf of the child, not even the child’s attorney. KRS 610.080. See also *K.F. v. Commonwealth*, 274 S.W.3d 457

- (Ky. App. 2008).
- (b) The waiver is not valid if the disposition is commitment, unless DJJ or the cabinet consents.
 - (c) Counsel entitled to review the report 3 days before hearing. 610.100(1).
Note: The Cabinet does the report if it is a status offense.
3. At the dispositional hearing, the court must use the least restrictive alternative. The presumption of the Juvenile Code is to keep the child in the home and to avoid out of home placements, except for high-risk offenders. KRS 600.010, 630.120(3); JCRPP 1. Commitment to DJJ or CHFS is to be an option of last resort.
 4. Dispositional alternatives for status offenders can include:
 - (a) Informal Adjustment. KRS 610.105; JCRPP 19.
 - (b) Family counseling and/or other community-based treatment. KRS 630.120(2).
 - (c) Informal probation with or without treatment. KRS 630.120(2).
 - (d) Community service work program. KRS 635.080(2).
 - (e) Commitment to CHFS for:
 - (i) Supervised home placement. KRS 605.090(1)(b)
 - (ii) Residential treatment in non-secure public or private residential facility. KRS 630.120(6)
 - (iii) Foster care. KRS 630.120(6) or 605.090(1)(b)
 5. In public offense cases, the Court is required to review the results of a “validated risk assessment” prior to rendering disposition. KRS 635.060. However, according to DJJ, there is currently no validated risk assessment. DJJ uses a Risk and Criminogenic Needs Assessment (RCNA) that has never been validated. The juvenile court rules prohibit waiver of the RCNA. JCRPP 17.D. If waiver of the RCNA is needed to complete a favorable agreement for the child, object to this rule.
 6. Dispositional alternatives for public offenders – any combination of the following:
 - (a) Informal adjustment. KRS 610.105; JCRPP 19.
 - (b) Restitution. KRS 635.060(1).
 - (c) The court may impose a fine in lieu of commitment if the court finds the child able to pay and a fine is in the child’s best interest. KRS 635.085.
 - (d) Probation commitment: see Cheat Sheet at the end of this document or details on when the court can probate or commit, and for how long.
 - (e) Combinations: While the court can combine dispositions (e.g., ordering both detention and restitution), commitment cannot be probated unless
 - (i) the child was eligible for commitment on that charge in the first place,
 - (ii) the fact that commitment is probated is explained to the child on the record in open court, and
 - (iii) the suspended commitment is contained in a written order.
 7. Detention is a potential disposition for public offenses only.

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- (a) Maximum 45 days of detention for 14 and 15 year-olds. KRS 635.060(3)(a)(1).
 - (b) Maximum 90 days of detention for 16+. KRS 635.060(3)(a)(2).
Note: There is no detention as a disposition for anyone under the age of 14. *N.T.G. v. Commonwealth*, 185 S.W.3d 218 (Ky. App. 2006). However, pretrial detention is only specific in the statute that no child under 10 may be placed in a DJJ facility unless charged with Capital offense or Class A or B felony. KRS 605.090(2). Argue to the Court that the legislature intended children under 14 to not go to jail. But be aware of this hole in the statute.
 - (c) Detention sentences cannot be “stacked” or aggregated. See *W.E.B. v. Commonwealth*, 985 S.W.2d 344 (Ky. 1998).
 - (d) A child under the age of 18 cannot be ordered to an adult jail. KRS 635.060(2)-(3) expressly envisioned situations beyond the eighteenth birthday, it is clear that the only authorized dispositions for the children were either placement on probation, home incarceration, or supervision for a period not to exceed one year. Sentencing children to adult detenti
8. What does a program look like?
- (a) Awareness level (14-21 days)
 - (b) Development level (35-42 days)
 - (c) Demonstration level:
 - (i) Misdemeanor: 14-21 days
 - (ii) Felonies: 63-98 days

Commitment

An order of the court which places a child under the custodial control or supervision of the Cabinet for Health and Family Services, Department of Juvenile Justice, or another facility or agency until the child attains the age of eighteen (18) unless otherwise provided by law. KRS 600.020(13).

Treatment

1. Court can order commitment but cannot specifically order the type of treatment DJJ will require of the child. *Commonwealth v. Partin*, 702 S.W.2d 51 (Ky. App. 1986).
 - (a) Once commitment is ordered, the Judge has no authority as to treatment, placement, or other conditions DJJ may impose. The court may impose a no contact order as condition of release, even where that condition burdens the public school. However, the court may not continue that no contact order after commitment to the Department of Juvenile Justice. DJJ’s authority with respect to treatment and placement may not be overruled by the court. *I.K. v. Foellger*, 2003 WL 22271357 (Ky. App. 2003) – *unpublished*.
 - (b) The local DJJ worker usually listens to what types of treatment the court wants the child to do. If DJJ has consistently ignored the Judges request regarding treatment, this would be a good argument to make to the Judge to not commit the child and instead probate to the Court.

Disposition Report

A trial counsel's submission of an alternative disposition report gives proper notice to the family court that counsel is objecting to the court's adoption of the recommendations of the dispositional report prepared by the Cabinet. Here, accordingly, the issue was properly preserved as to whether or not the court's decision to commit the child to the Cabinet for Health and Family Services was in violation of the "least restrictive alternative" requirement of the Juvenile Code. However, the court ultimately held that the lower court's decision to commit was not clear error in this case. *A.M. v. Commonwealth*, 2009 WL 4882821 (Ky. App. 2009) *unpublished*.

Least-Restrictive Alternative

A trial court is required to state its reasons for placing a child in the custody of the DJJ rather than in a less restrictive placement. *X.B. v. Commonwealth*, 105 S.W.3d 459 (Ky. App. 2003).

Guided by KRS 600.010(2)(c) and KRS 600.020(35), a family court's decision to commit a child to the Cabinet must be supported by a finding based on substantial evidence that either: "(1) all less restrictive alternatives were attempted or (2) no feasible alternative to commitment existed." *J.S. v. Commonwealth*, 304 S.W.3d 67, 70 (Ky. App. 2009).

Before a child is committed to the custody of the DJJ, the juvenile court must demonstrate compliance with KRS 600.010(2)(c) by showing that other less restrictive alternatives are either not feasible or have already been attempted in order to make certain children are not removed from families unless absolutely necessary. *N.L. v. Commonwealth*, 323 S.W.3d 732 (Ky. App. 2009).

In *T.M.W. v. Commonwealth*, the court remanded case to Family court to make findings regarding whether all least restrictive alternatives had been exhausted prior to committing two sixteen-year-old twins, to the Cabinet for Health and Family services on charges of habitual truancy. Subsequent to the filing of the truancy petition, the girls had been withdrawn from school by their mother, who cited health concerns of the girls as the reason for doing so. Court found that the legislature intended that the courts and the Commonwealth utilize the option of removing a child from her family only as a last resort. Prior to taking that step, however, the court must demonstrate that less restrictive alternatives were either attempted and failed, or not viable. Indeed, KRS 630.120(6) is clear that the court may only commit a child status offender to the Cabinet when "all appropriate resources have been reviewed and considered insufficient to adequately address the needs of the child and the child's family." *T.M.W. v. Commonwealth*, 2011 WL 832491 (Ky. App. 2011) *unpublished*.

In *A.M. v. Commonwealth*, trial counsel's submission of an alternative disposition report provides notice of objection to the court's adoption of recommendations of the dispositional report prepared by the Cabinet and properly preserves the issue of potential violation of the "least restrictive alternative" required by the Juvenile Code. Here, however, the court ultimately held that the lower court's decision to commit was not clear error in this case. *A.M. v. Commonwealth*, 2009 WL 4882821 (Ky. App. 2009) *unpublished*.

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Interstate Compact Cases

Interstate Compact refers to the law and agreement states have with each other to enforce a warrant or pickup order for a child from another state. DJJ handles interstate compact requirements for Kentucky. You can find the information on each rule and comprehensive information at <https://www.juvenilecompact.org>. Generally, interstate compacts deal with children who have run away and those picked up for probation/parole violations. A child accused of, but not yet adjudicated or found guilty of, runaway or other status offense can be released to a parent/guardian or custodial agency (like the Cabinet) within the first 24 hours of detention unless there are allegations of abuse/neglect at the guardian's home or the child is a danger to themselves or others. Children who have an active warrant or pickup order for criminal offenses, not status, probation/parole violations, or escape must be held until the requesting state can retrieve the child. The child can agree to the return and must be picked up by the requesting state within 5 days of their receipt of the waiver. If the child does not wish to return voluntarily, they can be held a maximum of 90 days, and the process is much longer.

Interstate Compact Placement agreements cover the state-to-state moves of children under DJJ supervision. For a youth probated or released from DJJ custody to a residence in another state, DJJ will use their Interstate Compact Coordinator to speak to the other state's coordinator and approve the placement. Interstate placement applies only to youth with a disposition. Courts are not allowed to transfer an adjudicated youth to another state for entry of disposition. Courts are allowed to transfer an adjudicated youth to another county for disposition.

Immigration

This section is meant to be a reference point for attorneys to comply with their ethical obligations to advise clients about immigration consequences. Prior to the Laken Riley Act (LRA), a finding in juvenile court was not considered a conviction under immigration law, regardless of the nature of the offense. Now, attorneys are encouraged to exercise caution and try to avoid pleas to specific offenses. For example, burglary, theft, larceny, shoplifting, assault on law enforcement, or any crime resulting in serious injury or death to another person mandates detention when the person is charged. However, a felony vandalism charge or a trespassing charge would not result in mandatory detention under the LRA. When in doubt, reach out to a specialist in immigration law. This area is constantly evolving and there are many wonderful attorneys trying challenge the Laken Riley Act and narrow its interpretation, but for our purposes, we will discuss more broadly what the worst-case scenario would be and how to fight.

Important to note, the LRA mandatory detention provisions may be triggered prior to conviction, meaning it is possible that removal proceedings or even deportation may occur before the criminal proceedings have concluded. This can be especially problematic if they have been moved to ICE custody because they will not usually be brought to state court. Additionally, the charge will likely result in an immigration detainer automatically being placed on the client. This creates a complication with release, especially in less serious cases, since the client would then be taken into ICE custody, likely without the chance to even consult with an attorney.

Client Falls under LRA

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1. Identify noncitizen clients who might fall within the LRA's grounds
2. Identify if the noncitizen client falls within the enumerated inadmissibility grounds. If your client has an immigration attorney, speak with them about this. If not, reach out to someone who can help evaluate whether this applies to your client.
 - a. If there is no clear indication in client's immigration documents, counsel will need to screen for the method of entry into the US. Keep in mind these conversations need to be confidential and the information obtained should be protected at all costs.
 - i. Clients who crossed the U.S. border unlawfully (without inspection/between ports of entry) are assumed to fall under the LRA's inadmissibility grounds
 - ii. If the client can demonstrate they were "admitted" to the US (like a stamped Form I-94 Arrival/Departure record) on a visa or with documentation of refugee or lawful permanent resident status, they may be excepted from the LRA
 - iii. Some clients may have gained legal protection such as deferred action or Temporary Protected Status may still be subject to LRA inadmissibility grounds since the grant of legal protection is not considered an "admission"
3. Counsel your client about the LRA and the limited options that are available if they fall under this act
 - a. Explain the mandatory detention provision, what DHS is required to do, and the possible impact on removal
 - b. If client does not fall under inadmissibility or criminal grounds, counsel can try to contact DHS to advocate for lifting the ICE detainer (this isn't super likely to be successful in the current climate, but worth a try)
 - c. If a client is in pre-trial criminal custody, they will not be in immigration custody, meaning they may be able to resolve their criminal proceedings in a more favorable manner which would result in more options for immigration counsel to contest mandatory detention under the LRA and potential substantive defenses to removal.
 - i. The client may choose to not post bail, seek a personal recognizance release, or challenge probable cause for the arrest in order to remain in criminal custody
 - d. If client is taken into DHS custody, counsel could contact DHS to advocate for a bond or even release the client from custody. This is usually done by demonstrating that the client doesn't fall into the criminal or inadmissibility grounds of the LRA
 - e. Client should be counseled as to potential effect of the LRA on their criminal case. If a client is released from criminal custody and taken into ICE custody, the client will likely not be able to proceed with an resolve their criminal case since ICE usually won't bring them to state court. Counsel should advise this may result in a bench warrant for failure to appear on the open charges, which means if the client is removed and re-enters the United States, any interaction with law enforcement will likely lead to arrest. Defense counsel for the criminal case may

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be able to persuade the prosecution or the court that the case should be dismissed or set for a later review. Some courts may be more willing to dismiss with evidence of deportation.

Resolving Criminal Cases

Below is a general step by step guide for evaluating and advising clients about immigration consequences as it relates to criminal convictions. As a note, juvenile delinquency has not typically been considered a conviction under immigration law, regardless of the nature of the offense.

Step 1: Determine Status

- Request proof or documentation of status
- Types: Lawful Permanent Resident, Lawful non-immigrant visa holders, refugees, asylees, DACA, temporary protected status, parolees, undocumented or out of status
- Look for clues like who helped them get her (Kentucky Refugee Center, Catholic Charities) or where their country of birth was

Step 2: Apply relevant grounds

- Inadmissibility under INA 212(a): applies to noncitizens who entered without inspection, who were paroled into the US, who arrived at a port of entry or border, who are applying for visa or adjustment of status or other benefits
 - Crimes involving moral turpitude, controlled substances offenses, two or more offenses with an aggregate sentence of five years or more, prostitution, money laundering, human trafficking
 - CIMT: no statutory definition; case law suggests conduct which is inherently base, vile, or depraved and contrary to accepted rules of morality and the duties owed between persons or to society in general
 - Most common: TBUT, RSP, Burglary, CPFI, murder, assault with deadly weapon, leaving scene of accident, dui and driving on suspended
 - Even without conviction, a client is inadmissible if factual basis they are a drug addict, formally admitted elements of offense while not in criminal court, DHS has “reason to believe” that they are a drug trafficker (admission or credible report of the incident)
- Exception to inadmissibility grounds
 - Petty offense exception: single CIMT and max penalty is less than 365 days
 - Not applicable to more than one CIMT
 - Doesn’t include controlled substances or other criminal grounds of inadmissibility such as human trafficking
- Deportability under INA 237(a): applies to noncitizens who were “inspected and admitted”
 - CIMT, controlled substance offense, firearms violations, firearms violations, sex trafficking, DV/stalking/protective order violations/child abuse, aggravated felonies
 - Client is deportable if convicted of a CIMT if possible sentence is over 365 days or more AND conviction occurs within 5 years of admission

- Client is deportable if convicted of two or more CIMTs that occurred at any time after admission if they didn't arise out of a single scheme of conduct
- A single offense of POM (30gs or less) is not a deportable offense; drug abusers and addicts; conviction of drug trafficking is not only a ground of deportability but also a bar to most forms of immigration relief
- Crimes of DV means any crime of violence defined in 18 USC 16 against former spouse/parent of their child/putative spouse/any protected person under state or federal government
- Aggravated felony: ransom demand, RICO, theft over one year, failure to appear in certain situations, conspiracy will trigger too
 - https://www.ilrc.org/sites/default/files/resources/n.6-aggravated_felonies_0.pdf
 - Doesn't have to be a state felony; if elements correspond to elements of a federal felony your client could still fall into the aggravated felony
 - Crimes of violence: any offense that has element of use/attempted use/threatened use of force against person or property of another

Step 3: Advise client of consequences

If it is clear it will result of deportation, you must tell them; if less clear, must still advise of risk and maybe recommend discussing with immigration attorney

Step 4: Plea negotiations

- Avoid a final conviction
- Keep case in juvenile court
- Petty offense exception
- Avoid CIMTs
- Avoid 365 day sentence on all misdemeanors out of an abundance of caution

Step 5: Allow your client to determine the goal of negotiations

- Is it to avoid immigration consequences at all costs?
- Is it to minimize jail/prison time?

How to Identify ICE officer

Usually plain clothes, no badges, come to courthouse in groups of 2-4 or more. ICE officers may refuse to identify themselves or answer questions

Does ICE carry judicial warrants?

Unlikely they will have one; more likely to have an administrative warrant signed by an ICE supervisor, not a judge. Under federal law, this allows the officers to detain the person upon confirmation that he/she is the named individual in the document in public spaces

Who could be targeted?

ICE sets the policies of who they target, but right now they are expected to detain and deport anyone in the U.S. unlawfully. Definitely focusing on criminal records; if your client is not a citizen, connect them with resources to speak with immigration

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attorney to advise about consequences. Provide clients at risk with a Know Your Rights information around ICE arrests so they are familiar with their rights and ICE tactics

What should you do if ICE is waiting for your client?

- Invoke your client's rights; identify as their lawyer; tell ICE not to question your client; remind them not to sign anything and remind them of the right to remain silent; answering questions will only help ICE deport
- Determine whether ICE has a judicial warrant
- Get info from ICE; ask officer's name, badge info, basis for arrest, copy of judicial warrant; ask where they are taking your client because it can be difficult to find them
- Document what happened and report the arrest, even if you didn't witness it; include where the arrest took place, the number of officers, how they were dressed and how they identified themselves; how they responded to questions; whether any court staff seemed to be involved or was aware of ICE presence; if you didn't witness it directly make sure to get witness contact information
- Probation and Parole seems to think they can invite ICE to interactions so clients are showing up to report and getting arrested

Protect your client's rights

- Notify prosecutor in writing and on the record
- Object to any warrant being issued because they are in ICE custody
- Get on the record. Request to call or recall when client is present, put ICE on notice to produce your client for the next court date
- What if my client doesn't know their status?
- You can run a request through US Citizenship and Immigration, do not need number, but can take 30-60 days
- Check with family members, especially if working with children who may not be aware

Where to go for more info or resources

- The Gault Center has prepared an immigration resource page and an immigration tip sheet with very helpful info all in one place. Covers topics like client interviewing, directories and legal resources, know your rights materials (including red cards for clients), and other litigation tools to help in your practice.
- The Immigration Defense Project has lots of good information <https://www.immigrantdefenseproject.org/defender-resources/>
- Know Your Rights with ICE info sheet <https://www.immigrantdefenseproject.org/know-your-rights-with-ice/>
- Shareable Infographics: <https://www.immigrantdefenseproject.org/infographics/#0-know-your-rights>
- If looking for information about eligibility for health coverage in Kentucky based on immigration status, Kynect has released a quick reference guide that can be found here: <https://khbe.ky.gov/Agents-kynectors/Documents/Understanding-Immigration-and-Eligibility-QRG.pdf>
- Kentucky Department of Education Guidance on Responding to Immigration Issues in School <https://www.education.ky.gov/federal/progs/eng/Documents/>

KDE%20Guidance%20on%20Responding%20to%20Immigration%20Issues%20in%20Schools.pdf

- Locate a Detainee: <https://locator.ice.gov/odls/#/search>
- Print Red Cards: <https://www.ilrc.org/red-cards-tarjetas-rojas#item-4477>

Juvenile Sex Offenders

The juvenile code treats juvenile sex offenses and the children that are adjudicated of them differently than other children charged with public offenses.. In part this is due to treatment needs of children with problematic or abusive sexual behavior, but more broadly, as society more harshly punishes adult sex offenders, the separate and determinate placement of Juvenile Sex Offenders (JSO) both mirrors the adult punitive system and protects children from it. When children are acting out due to mental illness (actively psychotic), intellectual disability, or immaturity (under 13) they may commit a juvenile sex offense but not be designated as a JSO. Non-designation does not mean they are not subjected to regular public offense dispositions. It is possible, for example, for a youth of 12 to be probated to DJJ with suspended commitment for a C felony sex offense and in theory grow up on supervision for over five years, until turning 18.

JSO commitment and treatment for a designated JSO shall not exceed 3 years. A fourth year can be requested by DJJ motion to the court. In any event, JSO commitment will expire when a youth turns 21.

The JSO declaration is not mandatory for a misdemeanor sex offense, rather is permissive and in the discretion of the Court. *B.H. v. Commonwealth*, 494 S.W.3d 467 (Ky. 2016).

A child's age at the time of the offense, governs whether or not the various provisions of KRS 635.505 apply to that child. KRS 635.510.

A child's commitment to DJJ as a public offender is proper despite the fact that a child could not be declared a juvenile sex offender under KRS 635.505(2) and (4). It should be noted that the court also held that the juvenile court did not abuse its discretion regarding commitment being the least-restrictive alternative. *T.R. v. Commonwealth*, 2011 WL 6412081 (Ky. App. 2011) *unpublished*.

Registration

Effective June 29, 2017, KRS 17.510, the sexual offender registration statute, was amended to specify that juvenile sex offenders who may have had to register under the laws of another state, will not have to also register in Kentucky if having originally been adjudicated in Kentucky would not have triggered the obligation. *Abrogating Murphy v. Commonwealth*, 500 S.W.3d 827 (Ky. 2016).

A youthful offender convicted of first degree sexual abuse based on victims under the age of 12 was exempt from lifetime sex offender registration pursuant to KRS 17.500(3) (a) since the definition of the crime was based on age of victims and not on forcible compulsion. *Dever v. Commonwealth*, 300 S.W. 3d 198 (Ky. App. 2009).

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Juvenile Sex Offender Assessment

1. A juvenile court may not order a juvenile sex offender assessment for any offense which is not an offense allowing a child to be declared a juvenile sex offender. *S.M. v. Commonwealth*, 2008 WL 2696896 (Ky. App. 2008) *unpublished*.
2. The DJJ must provide a sex offender assessment to the court and counsel prior to disposition. *I.B. v. Commonwealth*, 2008 WL 162891 (Ky. App. 2008) *unpublished*.
 - (a) Always challenge any negative findings of the DJJ sex offense assessment and hire an expert to assess a child. There is a great amount of variance in the training of some staff. Look to the policies and procedures of the assessor to make sure the child was assessed accurately. For example, the creator of the ERASOR now calls that assessment outdated invalid and has replaced his model instrument with PROFESOR, *See* profesor.ca.
 - (b) The child is entitled to retain an expert to make this challenge. *N.L. v. Commonwealth*, 323 S.W.3d 732 (Ky. App. 2009).

IQ under 70

Commitment is allowed for children with an IQ under 70 but not the designation of JSO. *R.B. v. Commonwealth*, 2013 WL 1091270 (Ky. App. 2013) *unpublished*.; *T.R. v. Commonwealth*, 2011 WL 6412081 (Ky. App. 2011) *unpublished*.

PRACTICE TIP: Always investigate a child's mental state in sex offense cases and request a hearing even if the IQ score comes out above the 70 threshold.

Committing a child found guilty of a sex offense with an IQ under 70 is not cruel and unusual punishment and is permitted under the statute concerning disposition as a public offender. While commitment is allowed, they are not designated as a JSO. *R.B. v. Commonwealth*, 2013 WL 1091270 (Ky. App. 2013) *unpublished*.

The enactment of the Juvenile Code extinguished common law presumption of incapacity. *W.D.B. v. Com.*, 246 S.W.3d 448 (Ky. 2007).

If defense counsel does not investigate and ask for a hearing, there likely will be no relief for the child. *C.I. v. Commonwealth*, 2003 WL 22461730 (Ky. App. 2003), *unpublished*.

Where no evidentiary hearing is requested, and thus, not conducted, to determine if a child was intellectually disabled, the court does not err in declaring the child to be a juvenile sexual offender and committing the child to the Department of Juvenile Justice. *C.I. v. Commonwealth*, 2003 WL 22461730 (Ky. App. 2003) *unpublished*.

Evaluation by an Expert

A child is entitled to continuance so that he can retain an expert to conduct an independent sexual offender evaluation in an effort to challenge the DJJ's findings.

N.L. v. Commonwealth, 323 S.W.3d 732 (Ky. App. 2009).

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Misdemeanor Sex Offenses

Even though juvenile sexual offender status is not mandatory for misdemeanor sexual offenses, the trial court nevertheless retains discretion to classify the child as a juvenile sexual offender which requires treatment if it is in the child's best interest. Here, the trial court ordered a sex offender evaluation of the defendant, as required by KRS 635.510(3), and, after reviewing the report, found that sexual offender treatment was in the defendant's best interest. He was removed from his home and placed with DJJ for the duration of the treatment program. *B.H. v. Commonwealth*, 494 S.W.3d 467 (Ky. 2016).

JSO – Youthful Offenders may be subject to restrictions on probation. See *Taylor v. Com.* and *Bloyer v. Com.* (Currently under review by SCOKY)

Checklist for Juvenile Sex Offenses

☐ Determine if your client can commit this crime.

- Statutory Definitions:
 - ◇ Youth cannot be charged with Second and Third Degree offenses under KRS Chapter 510 for conduct based on the age of the victim. See KRS 510.050, 510.060, 510.080, 510.090, 510.120, 510.130.
 - ◇ Youth can be charged with First Degree offenses under KRS Chapter 510 for conduct based on the child being under 12 years of age. Youth can also be charged with sexual misconduct, regardless of the age of the victim and defendant, when victim was below age of consent. However, where Defendant is also under the age of consent. then argue that they are excluded from prosecution. *Motion to challenge enhancement based on age of victim as unconstitutional as applied is available - contact JPDB*

☐ Determine Legal Incapacity

- There is at common law rebuttable presumption that a child under 14 is incapable of committing a criminal act. But see *W.D.B. v. Com.* (Ky. 2007) 246 S.W.3d 448

☐ Determine Physical Incapacity

- Is your child too young to physically commit the act he is charged with? (Chicago Innocents)
- Sodomy and Sexual Abuse charges require that the act be done “for the purpose of sexual gratification.” KRS 510.010(1)&(7). Is your client physically and psychologically capable of experiencing sexual gratification?

☐ Did your client commit this crime?

- Sexual Offenses a frequent source of wrongful prosecution, so investigate carefully

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- If “coaching” is suspected, ask for a witness competency hearing (NOT a “taint” hearing)
- Insist on right to jury trial, and right to confrontation
- Aggressive litigation is key

□ **Determine possible outcomes for guilt**

- “Juvenile Sexual Offender” vs. Public Offender
 - ◇ Sexual offenders are public offenders, so they can be treated in as public offenders for their delinquent behavior, even if the treatment isn’t authorized for sexual offenders.
 - ◇ Commitment to DJJ may be mandatory for sexual offender, whereas it is always discretionary for a public offender. KRS 635.515(1).
 - ◇ Sexual offender commitment limits sexual offender treatment to 3 years, but also authorizes that treatment to continue well past age 18, up to 21, when necessary. (KRS 635.515(1)).
 - ◇ If DJJ concludes that client requires institutionalization, s/he will usually be required to complete an approximately 1 year long course of residential treatment, followed by a period in a group home or other “step down.” Note that residential treatment options are limited, which might further slow down a child’s progress.
 - ◇ Sexual offenders may be held in contempt if they fail to participate fully in treatment. KRS 635.515(6)
 - ◇ Sexual offenders are to have their progress tracked for a period of 15 years after. completion of the program. K.RS 635.545

□ **Who qualifies to be a Juvenile Sexual Offender? To be a juvenile sexual offender, one must be:**

- Under 18 at time of offense
- NOT actively psychotic (KRS 635.505(2)),
- NOT an individual with an intellectual disability [FSIQ 70 or below] (KRS 635.505(2)).
- Have been adjudicated guilty of, or have admitted to a sexual offense.

□ **Basic Rule for Distinguishing Mandatory vs. Discretionary Sexual Offender Commitment: Mandatory commitment for 13 year olds found guilty of a felony, discretionary commitment for all others. Specifics are as follows:**

- Under KRS 635.510(1), a person, 13 years of age or older, meeting all the qualifications above, MUST be committed to DJJ as a juvenile sexual offender if they are found guilty of one of the following offenses:
 - ◇ Any of Chapter 510 felony offenses- rape (any degree), sodomy (first, second, or third degree), or sexual abuse first degree.
 - ◇ Any other felony committed in conjunction with a misdemeanor described in Chapter 510;
 - ◇ Criminal attempt of Chapter 510 offenses, where the attempt charge is a felony; Incest;
 - ◇ Unlawful transaction with a minor first degree;
 - ◇ Use of minor in sexual performance.
- A person, 13 years of age or older, meeting all the qualifications above,

- MAY be committed to DJJ as a juvenile sexual offender if they are found guilty of a misdemeanor offense under KRS Chapter 510 (i.e., indecent exposure or sexual misconduct). KRS 635.510(2)(b).
- A person, 12 years of age or younger, meeting all the qualifications above, MAY still be committed as a juvenile sexual offender at the discretion of the court. KRS 635.515(2)(a).
- Juvenile Sexual Offender Assessments:
 - Must be done by a “qualified professional approved by the program”
 - ◇ Generally includes those covered by “Qualified Mental Health Professional” under KRS 600.020(47).
 - ◇ Basic qualification appears to be a certificate of completion of a two week course on juvenile sexual offenders
 - Required to include an assessment of the child’s:
 - ◇ adolescent social development
 - ◇ personal history (including medical, educational, family, substance abuse, sexual, and treatment histories)
 - ◇ recent behaviors
 - ◇ rarely includes assessment of present psychological condition, but should.
 - Child’s silence to examiners about his/her current offense or past offenses cannot be used against him/her in the assessment. *M.G. v. Commonwealth*, Ky.App., 75 S.W.3d 714 (2002).
- Statements in the Treatment Program: KRS 635.527 creates a limited privilege for statements in the sex offender treatment program. The privilege does not apply to statements made in group counseling, and does not apply to statements concerning murder, or statements concerning conduct in which the client was not personally involved. DJJ is supposed to inform the clients in writing about the limitations of the privilege.

Transfer Hearings

To determine if child should be treated as “public offender” in juvenile (district) court or “youthful offender” in adult (circuit) court. KRS 635.020.

Technical Requirements

1. Prior to seeking transfer, the County Attorney must first consult with the Commonwealth Attorney. KRS 640.010(2). (This issue can be raised as objection.)
2. A motion must be made by the prosecutor to transfer the case.
3. The case must be “eligible” for transfer.
 - (a) To determine eligibility the court will look at whether:
 - (i) The child is currently charged with a felony; and
 - (ii) The offense is Capital, Class A, or Class B felony, and the child is 14 or older. 635.020(2); or
 - (iii) The offense is Class C or Class D felony, and the child is 16 or older and has one prior, separate felony adjudication. 635.020(3); or
 - (iv) The child was previously convicted as Youthful Offender. 635.020(5);

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or

(v) The child committed current felony offense prior to 18th birthday and child is now 18 or older. 635.020(7).

Note: All offenses arising out of the same course of conduct shall be tried with the felony (whether in juvenile court or circuit court, no charge gets left behind). KRS 635.020(6, 8).

(b) Or the child is 14 or older and a firearm is used by the child in the commission of the offense, 635.020(4)(a).

(c) Or the child is 15 or older and used a firearm to commit an A/B/C felony offense, in which case the court needs PC and proof of age, NO 10 FACTORS and INELIGIBLE for probation! KRS 635.020(4)(b).

4. The court must first find probable cause exists regarding the required age, prior convictions (if necessary), that an offense was committed, and that child committed the offense. The court must then conduct an analysis to determine if the transfer of the case is in the child's best interest. The court may consider the ten factors including:

(a) The seriousness of the alleged offense.

(b) Whether crime was against persons or property, with greater weight being given to offenses against persons.

(c) Maturity of child as measured by environment.

(d) Child's prior record.

(e) Best interest of child and community.

(f) Prospect of adequate protection of public.

(g) Likelihood of rehabilitation through criminal legal system for children.

(h) Evidence of child's participation in a gang.

(i) Whether the child is a defendant with a serious intellectual disability in accordance with KRS 532.130; and

(j) Whether the child used a firearm in the commission of the offense.

(i) The firearm must be used, not just possessed. *Darden v. Commonwealth*, 52 S.W.3d 574 (Ky. 2001).

(ii) The child charged must have used the firearm.

Note: "Use by the child" means complicity, attempt, solicitation, and facilitation offenses are excluded from discretionary and automatic firearm transfer.

5. If two or more of the ten factors "favor" transfer, the court "may" transfer the child's case to Circuit court. KRS 640.010(2)(c). Note the word "may". The court never HAS TO transfer the child even if ALL ten factors "favor" transfer. The statute says the court "may" transfer if it so chooses. Findings of fact regarding the ten factors are required or the transfer is not valid. KRS 640.010(2)(c).

6. The decision to transfer must be supported by substantial evidence. *Stout v. Commonwealth*, 44 S.W.3d 781 (Ky. Ct. App. 2001).

7. Motion to Give Proportionate Weight to each of the Ten Factors: Especially in

cases where the mitigating evidence on the ten factors is overwhelmingly good (example: child with little to no prior record, strong community support from school/religious group/sports team, etc.), it is important to stress that the fact that a firearm was used must NOT be given disproportionate weight. It helps to remind the court that they must consider all 10 factors.

Factors and Findings

- A court must consider and weigh ten determinative factors when making the critical decision of whether to transfer a child from juvenile court to adult court. Note that KRS 640.010(2)(b) categorizes these 10 factors slightly differently than what the Court here used to determine transfer in a case in the *District of Columbia*. *Kent v. United States*, 383 U.S. 541 (1966).
- A transfer order, its accompanying statement, or the juvenile court record must include: (1) a showing that the child was granted a hearing at which he was represented by counsel, and (2) a statement concerning the reasons for the transfer that is specific enough to allow meaningful review regarding compliance with the juvenile transfer statute. *Kent v. United States*, 383 U.S. 541 (1966).
- A waiver [transfer] order, an accompanying statement, or the juvenile court record must include a showing that the child had a hearing and made findings in compliance with *Kent*. *Hubbs v. Commonwealth*, 511 S.W.2d 664, 666 (Ky. 1974).
- An order waiving juvenile court jurisdiction is invalid absent a statement of reasons for transfer specific enough to permit meaningful review. *Richardson v. Commonwealth*, 550 S.W.2d 538 (Ky. 1977).
- If the court does not make adequate findings, then the transfer is invalid. *Schooley v. Commonwealth*, 556 S.W.2d 912 (Ky. App. 1977).
- A trial court's checking off of two of the eight factors on an AOC form, and its making oral findings on the record regarding the factors, satisfies the requirements of the Juvenile Code regarding discretionary transfer. A trial court must consider the eight factors, but it does not have to make "detailed findings" regarding each one. *Bean v. Commonwealth*, 2013 WL 375494 (Ky. App. 2013) *unpublished*.
- A trial court's failure to consider all of the discretionary factors of KRS 640.010(2)(b) renders the transfer of a child to circuit court invalid. *Harden v. Commonwealth*, 885 S.W.2d 323 (Ky. App. 1994).

Discovery in Transfer Hearing

- You are entitled to discovery prior to a transfer hearing, *Kent v. U.S.*, 383 U.S. 541 (1966) (prior to transfer hearing in order to prepare for such hearing).

A previous case declined to follow this for mandatory transfer cases ("gun transfers"). *Commonwealth v. DeWeese*, Ky. App., 141 S.W.3d 372 (2003). DO NOT LET THE PROSECUTOR USE THIS CASE TO DENY DISCOVERY; *Deweese* was limited to mandatory transfers in existence in 2003. As of June 29th, 2021, there were no mandatory transfers in the state of Kentucky and

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Deweese was overruled by statute [no longer existing]. However, as of July 1, 2024, there will be automatic or “mandatory” transfer procedures in effect for youth 15 and up charged with class C+ firearm-felonies.

- Time: The Court may try to rush these “new” discretionary hearings. In the past, an “automatic” hearing did not require any discretion. Courts that want to keep “business as usual” will try to schedule hearings without allowing adequate time to get discovery, secure experts, and prepare mitigation evidence on the 10 factors, etc. It’s important to push back against this pressure.

Capacity

The child must be competent. *See, Commonwealth v. B.H.*, 548 S.W.3d 238 (Ky. 2018). See also, Getting to Know Your Child, Competency, Capacity, and Experts. Note: There are a number of cases with the initials, “B.H.,” so be sure that you cite them correctly and do not confuse them.

Grand Jury

- If court decides the child’s case should be transferred, the case proceeds as an adult felony case, and goes before grand jury. The child defendant may provide information to the Grand Jury helpful to the defense under RCr. 5.08.
- If the grand jury returns an Indictment on the charge that was transferred, or on other charges that would also be transferrable, then child remains in Circuit Court.
- However, if the grand jury returns a no true bill or an indictment on charges that would not be eligible for transfer, but would still constitute a public offense, the child’s case shall be dismissed or returned to juvenile court and be handled under the provisions of KRS 635. KRS 640.010(3). JCRPP 20.E.

Bail/ Pretrial Release

If the court decides to transfer the child, the district court must set bail in accordance with KRS Chapter 431 and the Kentucky Rules of Criminal Procedure. KRS 640.020(1). If the child cannot make bail and is under 18, child shall be housed in a juvenile detention center, if over 18, shall be lodged as an adult. KRS 640.020 (1), (2); JCRPP 20.B-D.

Jurisdiction

- The juvenile court has exclusive jurisdiction over the child unless he is properly transferred to Circuit Court and indicted. *Harden v. Comm.*, 885 S.W.2d 323 (Ky. App. 1994). Therefore, after indictment, the child can ask the Circuit Court to dismiss the indictment and remand the case back to district court on the basis of any defects in the transfer process.
- Once in circuit court, if the child is convicted of offenses for which they would not be eligible for transfer, they shall be sentenced in circuit court as a child. KRS 640.040(4). So, for example, a 15-year-old child transferred on the basis of a robbery first charge who is convicted at trial of facilitation [no firearm], cannot be sentenced as an adult but must be sentenced in the circuit court as a public offender. This provision can be waived, on the record, for the purpose of accomplishing a plea. *Kozak v. Comm.*, 279 S.W.3d 129 (Ky. 2008).

- If the youthful offender is convicted of offenses that could have resulted in transfer, then the youthful offender is considered a youthful offender.
- Motion To Remand: Once the case is in Circuit Court. You argued that the child should not go to Circuit Court. Now, you can argue to the Circuit Court that it should go back by way of a Motion to Remand. This is a jurisdictional challenge. You will need to establish facts that the district court's transfer decision was not merely unfair, but that the court in some way failed to make a legally proper transfer (for example, failing to make factual findings on the 10 factors), and that therefore the Circuit Court does not properly have jurisdiction of the case.

Writs

A writ is one other possible option to use in seeking to keep the transfer from moving forward. However, the C.E.H. case dealt with the Commonwealth appealing a Court's decision to NOT transfer a case.

C.E.H. v. Com., 619 S.W.2d 725, 726 (Ky. App. 1981). It remains a gray area of law as to whether remedy via writ is actually the proper avenue for relief when the child is the one arguing against transfer. See, for example, *S.S. v. Commonwealth*, 515 S.W.3d 201 (Ky. Ct. App. 2016)–*infra*.

At Trial

****Litigate all issues reminding the Court, Jury, and Prosecutor that your client is a child****

Our juvenile clients who get transferred to adult court very often have done very adult looking things that scare jurors and courts. It is our job to re-characterize their behavior and explain it through the lens of adolescent brain development. If we do this successfully, juries are willing to return good verdicts for our clients.

How will the trial look?

1. KRE 615 Separation of Witnesses vs. KRS 610.060(3) Right for parents to be present during hearings
2. Pace of the Trial – KRS 610.060 requires circuit court to explain very carefully all rights to the child
 - (a) Compare to interpreter cases that take extra long at trial, you will need to be interpreting everything for your client, A CHILD, who will not understand this adult court proceeding
3. Jury Selection
 - (a) How will you refer to your client?
 - (b) How will the court refer to your client?
 - (c) How will the prosecutor refer to your client?
 - (d) Litigate “child” vs. “defendant”
 - (e) Make the fact that your client is a child a major theme of your voir dire
 - (i) Can you impose the sentencing range for a child? Teenager?
 - (ii) Child/teenager decision making skills

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(iii) If your client did something very childlike as part of the fact narrative, start talking about that in voir dire and characterize it as such immediately

4. Defense Case in Chief

- (a) Teaching expert on child brain development?
- (b) Make the fact that your client is a child, a teenager a theme of your opening and closing
- (c) Do you call any of your 10 factor witnesses for Merits phase or Sentencing phase?

5. Jury Instructions

- (a) Consider asking for special instructions that use the Miller factors
- (b) Consider an Adolescent Brain Development instruction

Rules of Evidence

Because rules of evidence do not apply in a transfer hearing, a co-defendant's statement, which was inadmissible at trial, is admissible at a transfer hearing for the purpose of establishing probable cause. *Barth v. Commonwealth*, 80 S.W.3d 390 (Ky. 2001).

Youthful Offender Sentencing

All other sentencing procedures, including parole eligibility, shock probation, post-incarceration supervision, sex offender registration, etc., are identical to those applicable to an identically situated adult.

1. A youthful offender shall be subject to the same sentencing procedures as an adult defendant, except:
 - (a) If the youthful offender is under 18 at the time of sentencing, then the youthful offender shall be placed in the custody of Department of Juvenile Justice. If the youthful offender is between 18 years-old and 18 years and 5 months, the youthful offender may be placed with DJJ.
 - (b) If the youthful offender is older than 18 and five months at the time of sentencing, then they are eligible for probation at the original sentencing hearing, even if convicted of or pled to, violent offenses. *See Thomas v. Commonwealth*, 605 S.W.3d 545, 560 (Ky. 2020), abrogated by *Abbott, Inc. v. Guirguis*, 626 S.W.3d 475 (Ky. 2021).
 - (c) If the youthful offender is still in DJJ custody at the age of 18, the court shall have a hearing and order one of the following:
 - (i) Recommit the youthful offender to DJJ until 18 years and 5 months (often called the 18.5 hearing)
 - (ii) Probate the youthful offender
 - (iii) Commit the youthful offender to The Department of Corrections.
2. If the youthful offender is still in DJJ custody at 18 years and 5 months, the court shall have a hearing to order one of the following:
 - (a) Probate the youthful offender; or
 - (b) Commit the youthful offender to DOC.
 - (c) A youthful offender is not eligible for the death penalty. Prohibition based

on Eighth and Fourteenth Amendments. *Roper v. Simmons*, 543 U.S. 551 (2005).

- (d) A youthful offender is not eligible for a sentence of life without parole. KRS 640.040(1); *Miller v. Alabama*, 567 U.S. 460, 474 (2012); *Shepherd v. Com.*, 251 S.W. 3d 309 (Ky. 2008), as modified on denial of reh'g (May 22, 2008); *Phon v. Com.*, 545 S.W.3d 284 (Ky. 2018); *Graham v. Florida*, 560 U.S. 48 (2010); A sentence of life without parole for 25 years is ok though, “not unconstitutionally excessive” for youthful offenders. *Campbell v. Commonwealth*, 2011 WL 1642028 (Ky. 2011) *unpublished*.
3. If the youthful offender is committed to DOC, DOC and DJJ can agree to placement up to the age of 21. This placement is unusual, and generally limited to kids who have something to gain from DJJ placement and a reasonable chance for release prior to 21. If placed in this manner, the court can consider probation again when the placement ends. KRS 640.075.
4. A youthful offender transferred under the FIREARM provision of KRS 635.020(4)(b) is NOT eligible for probation (hearing still required).
5. A youthful offender in DJJ custody may be transferred to DOC custody at any time, if they meet certain statutory criterion. KRS 640.070.

Miller and Extension

A sentence of life without parole for a child convicted of capital murder is unconstitutional. In *Miller v. Alabama*, the Court outlined the “foundational principle” of *Graham* and *Roper* that the “imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.” The Court clarified that its ruling did not categorically bar a particular penalty for a particular class of offender or type of crime but that it did outline a certain process be followed by courts in sentencing. *Miller v. Alabama*, 567 U.S. 460, 474 (2012).

The Supreme Court held that *Miller v. Alabama* announced a new substantive constitutional rule that is retroactive on state collateral review. The Supreme Court reiterated the holding in *Miller* that sentencing a child to mandatory life without parole is an unconstitutional penalty for “a class of defendants because of their status”—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. In *Miller*, the decision “d[id] not categorically bar a penalty for a class of offenders or type of crime.” *Miller*, 132 S.Ct. at 2471. Rather, “it mandate[d] only that a sentencer follow a certain process . . . before imposing a particular penalty.” *Id.* The Court also noted that the “decision flow[ed] straightforwardly from our precedents . . . that youth matters for purposes of meting out the law’s most serious punishments.” *Montgomery v. Louisiana*, 136 S.Ct. 718, 734 (2016).

Age at Time of Offense

- A Writ of Prohibition will not result in a successful challenge to KRS 635.020(7) on the grounds that (a) the child was not 14 at the time of the offense; nor (b) on the grounds that it violates due process to transfer a case twenty years after the alleged occurrence of the crime wherein the accused is not able to adequately challenge competency to stand trial nor capacity to commit the offense. Instead, such challenges need to be made at the transfer hearing with

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the presentation of evidence about why the transfer decision would be wrong and cross examination of the Commonwealth's case. *S.S. v Commonwealth*, 515 S.W.3d 201 (Ky App. 2016).

- A child who does not challenge whether he met the minimum criterion for transfer to circuit court for trial as an adult in either the circuit or district court waives his right to make that challenge on appeal. *Commonwealth v. Davis*, 80 S.W.3d 759 (Ky. 2002).
- An order of a district court transferring a case to circuit court is interlocutory and, therefore, not final and appealable. In the case of an improper transfer, the remedy is to challenge the jurisdiction of the circuit court. *C.E.H. v. Commonwealth*, 619 S.W.2d 725 (Ky. App. 1981).

NOTE: This case makes very clear that there is no remedy by appeal of a transfer to the circuit court. Thus, it is possible a writ would be an appropriate remedy as the child will be harmed by publicity and other issues after the case is transferred to the circuit court.

Confidentiality

The confidentiality requirement extends until indictment. If the grand jury fails to indict, or the indictment is for a different offense from the one for which the child was transferred, the case returns to juvenile court. *Canter v. Commonwealth*, 843 S.W.2d 330 (Ky. 1992).

Enhancement

- Adjudications are not “convictions” for the purposes of any offense under the penal code, so a youthful offender cannot be charged with being a “second or subsequent offender” or a “felon in possession of a firearm” on the basis of the offender’s prior juvenile court record. *Phelps v. Commonwealth*, 125 S.W.3d 237 (Ky. 2004).

Firearm Enhancement

- A firearm enhancement statute can be used to increase a charge of drug trafficking from a class C to a Class B felony as to authorize a child’s transfer to circuit court as a youthful offender even if the enhancement statute would have no effect unless the child is convicted. In *Jackson v. Commonwealth* the firearm statute was used to enhance the child’s trafficking offense so that the matter could be transferred. There was no objection by counsel prior to transfer, so the charge was classified as a higher-level offense at time of the transfer proceeding, which satisfied the transfer statute’s requirements. *Jackson v. Commonwealth*, 363 S.W.3d 11 (Ky. 2012). Object to any and all enhancements charged in juvenile court at arraignment.

Possession Enhancement

- Possession of a Handgun by a Minor, KRS 527.100: This specific statute allows an enhanced penalty for a second offense, charge, and conviction. The statute can and should be challenged on constitutional grounds using an equal protection argument. There may be other constitutional grounds to make a challenge such as separation of powers. Be creative and do not forget to reach out to JPDB for help.

Other Charges Not Transferred

Children transferred to adult court that are found guilty of crimes that would not be transfer eligible must be sentenced (disposition) as a child and through the juvenile code. *Canter v. Commonwealth*, 843 S.W.2d 330 (Ky. 1992).

- Negotiated pleas for YOs in circuit court may explicitly waive the right to be sentenced in juvenile court but must be part of the judge's inquiry and explanation of the plea to the child prior to acceptance of the guilty plea. *Kozak v. Commonwealth*, 279 S.W.3d 129 (Ky. 2008).
- Program Timeframes: for youth committed to DJJ
- A or B Misdemeanor: max 4 months of out-of-home placement
- D Felony: max 8 months of out-of-home placement
- A, B, C, felony or weapon involved: no time limit! treatment program initially will include misdemeanor or felony track level systems.

The fact that a burglary charge is omitted from an order transferring a child to circuit court for trial as an adult on robbery and murder charges does not deprive the circuit court of jurisdiction over the burglary count. KRS 640.010 provides the process for transferring a child, not the charge, and indictment can vary from the transfer order so long as the child is eligible for transfer on the indicted offenses. *Osborne v. Commonwealth*, 43 S.W.3d 234 (Ky. 2001).

When a murder charge arises out of the same "course of conduct" as burglary and robbery charges that cause a district court to transfer the case to circuit court, the circuit court has subject matter jurisdiction over the murder charge as well. *Pardue v. Commonwealth*, 2010 WL 1253166 (Ky. App. 2010). *unpublished*.

A child may be indicted for other offenses stemming from the same course of conduct from which arose the offense for which the child was transferred to circuit court. *Osborne v. Commonwealth*, 43 S.W.3d 234 (Ky. 2001).

NOTE: Be sure that any charge added by the grand jury did arise out of the same incident as the other charges transferred by the juvenile court.

- Acts or actions are not required to involve the same victim to be connected in such a way as to be deemed arising from the same course of conduct. For example, if a child goes on a crime spree, even if she is only transferred for one part of the spree, she can be indicted on the others without additional transfer proceedings. *Pollini v. Commonwealth*, 172 S.W.3d 418 (Ky. 2005).

Parole

- A youthful offender may not be sentenced to life without parole for a capital offense. Youthful offender sentencing provisions govern to the extent that they conflict with adult penalty provisions. *Anderson v. Commonwealth*, 2008 WL 4691702 (Ky. 2008) *unpublished*.
- Youthful offenders who are sentenced in adult court for a capital offense or a Class A or Class B felony offense are subject to the parole-eligibility restrictions imposed by the violent-offender statute. In *Edward v. Harrod*, the Court held that the basic holding in *Merriman* did not extend to parole eligibility. *Edwards v. Harrod*, 391 S.W.3d 755 (Ky. 2013).

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Probation

- The violent offender probation prohibitions of KRS 439.3401(3) do not apply to youthful offenders. The Juvenile Code provision allowing probation at the 18-year-old hearing takes precedence. *Commonwealth v. Merriman*, 265 S.W.3d 196 (Ky. 2008).
- A youthful offender is eligible for shock probation if he is denied probation at his 18-year-old hearing under KRS 640.030(2). *Rees. v. Ottman*, 2008 WL 3551151 (Ky. App. 2008) *unpublished*.
- A child is entitled to a meaningful opportunity to be heard at his 18-year-old hearing. This right was denied when the trial court denied Jeffries the right to present evidence in mitigation and to controvert the contents of a report submitted by the Commonwealth. *Commonwealth v. Jeffries*, 95 S.W.3d 60 (2002).

Sentencing Jurisdiction

- In *Chipman v. Commonwealth* child's rights were violated by sentencing her as a youthful offender. In that case the defendant was 17 at the time of the offense and transferred under KRS 635.020(4) but she pled guilty to robbery second degree. Though the Commonwealth's theory of the case was that Chipman knew her accomplice had a gun, that theory was not introduced as evidence. The child's statement at the entry of the plea that her accomplice had a gun was not adequate to prove her use of the gun in the commission of the offense or her knowledge of her accomplice's use. The defendant, age 17, was improperly sentenced for second degree robbery as an adult and instead should have had a dispositional hearing in accord with what is described in KRS 635.060. *Chipman v. Commonwealth*, 313 S.W.3d 95 (Ky. 2010).
- A case in which a child pleads to misdemeanors in circuit court is required to be remanded in order for the child to be re-sentenced as a public offender pursuant to KRS 635.060. *Masengale v. Commonwealth*, 2009 WL 2971788 (Ky. App. 2009) *unpublished*.
- Under *Chipman*, a 17-year-old child is exempt from youthful offender sentencing when convicted pursuant to a conditional plea of a non-transferrable offense. *Chipman v. Commonwealth*, 313 S.W.3d 95 (Ky. 2010).
- KRS 640.030(3) gives courts the discretion of sending youthful offenders over 18 to DJJ but does not require that course of action. In *Gourley*, the court also held that the youthful offender was entitled to have PSI done by the Department of Juvenile Justice, rather than Probation and Parole, and that the trial court's order directing Probation and Parole to do the PSI was prejudicial and reversible. *Gourley v. Commonwealth*, 37 S.W.3d 792 (Ky. App. 2001).
- A child's discharge of a firearm during flight from police constituted "use of a firearm," and, therefore, he was not entitled to be sentenced as a child according to the provisions of KRS 640.040(4). *Brown v. Commonwealth*, 2012 WL 876748 (Ky. App. 2012) *unpublished*.

NOTE: This is when transfer was mandatory when a firearm was used by the child.

Waiver

A child may voluntarily waive a transfer hearing, but a waiver form is not sufficient to determine if a waiver was knowingly and voluntarily made. Here, the court held that the infirm waiver was not cured by the colloquy between the district court and *Humphrey*. *Humphrey v. Commonwealth*, 153 S.W.3d 854 (Ky. App. 2004).

Firearm Transfer

Special Note: All of the cases below were decided when “mandatory firearm transfer” was still in effect. Currently, one of the 10 factors is whether a firearm was used or not, as well as one of the prongs of eligibility for transfer. Additionally, changes in 2024 SB 20 reinstated a form of “automatic firearm transfer,” so these cases are still relevant. Therefore, view the following cases as potentially applicable to firearm transfer and consider them for possible new arguments to be made for discretionary transfers.

1. Firearm Transfer – Sentencing as an Adult

- (a) A 17-year-old child convicted of first-degree manslaughter, but mentally ill, qualifies as an adult offender when he commits a felony with a firearm and is subject to the same penalties as an adult pursuant to RCr 3.07. Thus, the protection KRS 640.040(3) offers youthful offenders against the limitation on probation is withdrawn by KRS 635.020(4). *Mullins v. Commonwealth*, 956 S.W.2d 222 (Ky. App. 1997). Overruled by *Britt*, *Merriman*, *infra*.

2. The criteria in KRS 635.020(4) for transferring from juvenile court to circuit court on probable cause of a child at least 14-years-old committing a felony with a firearm do not require the trial court to sentence a child as an adult offender. *Britt v. Commonwealth*, 965 S.W.2d 147 (Ky. 1998).

3. Firearm Transfer – Automatic Transfer as Unconstitutional Sentencing Enhancement

- (a) Certain sentencing enhancement factors must be found beyond a reasonable doubt by a jury. *Jones vs. United States*, 526 U.S. 227 (1999). *Apprendi vs. New Jersey*, 530 U.S. 466 (2000).
- (b) *Apprendi* does not apply to automatic transfer hearings, because a child transfer proceeding does not involve sentencing, nor does it provide a determination of guilt or innocence. Here, KRS 635.020(4) was deemed constitutional and did not violate the equal protection clause because there was a rational basis for the statutory classification, and the statute did not violate the fair hearing requirement of case law and due process. Thus, the court rejected the defendant’s claim to the contrary, given that a preliminary hearing was held after which the trial court found probable cause to believe that the defendant was 14 years of age when the defendant committed a felony while using a firearm. *Caldwell v. Commonwealth*, 133 S.W.3d 445 (Ky. 2004). REAFFIRMED IN *HUNTER*

NOTE: However, two U.S. Supreme Court cases that were decided after *Caldwell*. *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), strongly support the argument that *Caldwell* was wrongly decided and should be reconsidered.

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- (c) The “statutory maximum,” for *Apprendi* purposes, is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, not the maximum sentence a judge may impose after finding additional facts. *Blakely v. Washington*, 542 U.S. 296 (2004).
- (d) Any fact, other than a prior conviction, which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. [In other words, the use of a mere probable cause standard as outlined in the “automatic transfer” statute is not adequate. Transfer takes the case out of juvenile court, subjecting the child to higher penalties. Therefore, the facts supporting such factors must be established beyond a reasonable doubt.] *United States v. Booker*, 543 U.S. 220 (2005).
- (e) In *Ruark*, The Kentucky Court of Appeals declined to hold that *Booker* and *Blakely* supported a constitutional challenge to the automatic transfer statute. This *unpublished* case did not however rule out any “as applied” challenges to the statute. *Ruark v. Commonwealth*, 2007 WL 2284788 (Ky. App. 2007) (MDR denied 2008) *unpublished*.
- (f) In *Perkins* the court found that neither substantive due process nor equal protection rights are violated, when a statute providing for automatic transfer of charges against a child from juvenile court to circuit court so long as the district court found probable cause that the child was over age 14 when he used a firearm in the commission of a felony. Likewise, due process and equal protection rights are not violated even if the court exposes children to longer statutory maximum sentences than they would face as children. *Perkins v. Commonwealth*, 511 S.W.3d 380 (Ky. App. 2016).

NOTE: For a full motion that fleshes out these concepts, contact the Juvenile Post Disposition Branch (JPDB).

Firearm Transfer – Use

1. When a defendant found guilty of complicity to commit murder is denied probation because the offense “involved the use of a weapon,” the court does not err even though that defendant was not the individual using the weapon. *Pruitt v. Commonwealth*, 700 S.W.2d 68 (Ky. 1985). [Implicitly overruled; BUT SEE *Merriman*.]

Special Note: Keep this separate from the other case law that requires the firearm to be used by the child for them to be eligible for transfer.

2. A child’s unlawful possession of a firearm on school property does not constitute “use” of that firearm in commission of the offense of possession for purposes of transfer statute. Here, the Court noted that the statutory terms “possession of a weapon” and “use of a weapon” were two entirely different concepts, and interpreting them as identical would have been counter to legislative intent and would have resulted in extremely harsh and disproportionate results in trying child cases. *Darden v. Commonwealth*, 52 S.W.3d 574 (Ky. 2001).
3. When an adult defendant’s probation relies on interpreting statutory language

(“use of a firearm”) and that language is ambiguous with regard to the fact pattern, the individual is entitled to the benefit of the ambiguity. *Haymon v. Commonwealth*, 657 S.W.2d 239 (Ky. 1983).

4. Firearm Transfer – Deadly Weapon

- (a) For purposes of the Robbery 1st Degree statute, KRS 515.020, the phrase “armed with a deadly weapon,” as defined in KRS 500.080(4)(b), should be taken to mean any weapon which is properly a member of the class of weapons “from which a shot, readily capable of producing death or other serious physical injury, may be discharged.” Toy or fake guns, or a “finger in the pocket,” do not qualify as members of this class. If the weapon is a proper member of the class of dischargeable weapons, though, the actual operability of the specific weapon in question (not loaded, broken firing pin, etc.) is not relevant. *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010).

After Transfer

Remember that no motion or idea is a bad one. Most changes in the law have been brought about by a trial attorney with a unique and creative idea in a motion that lost at the trial level. Every motion you file and lose is an issue for an appellate attorney to use to help your client. So just because there is nothing on point or no favorable case law out there, if you have an argument you want to make, give it a try!

1. Motion to Reconsider (yes, these have worked)
2. Motion to protect confidentiality KRS 610.015, 610.340
 - (a) Make sure that the entire juvenile file does NOT go to Commonwealth
3. Grand Jury
 - (a) File Motion under RCr 5.02 and KRS 640.010
 - (i) Grand jurors have a right to know can send child back to juvenile court
 - (b) Motion to present evidence to Grand Jury
 - (i) Any evidence used during 10 factors hearing
 - (ii) Any mental health/culpability evidence
4. Arraignment in Circuit Court
 - (a) Refuse to enter a plea – Juvenile court messed up hearing, so Circuit Court does not have jurisdiction over client – RCr 8.08
 - (b) Refile any Constitutional Challenges – remedy is to remand to Juvenile court
 - (c) Remember notice to Attorney General within 10 days before hearing date. To serve such notice electronically, you must attach a PDF copy of the filing and all exhibits. Emails should clearly indicate that the purpose is to challenge the constitutionality of a Kentucky statute by using the subject line, “Service of notice of constitutional challenge to KRS [insert number].” ServetheCommonwealth@ky.gov
 - (d) File motion challenging Transfer hearing and jurisdiction**
5. Adversarial Bond Hearing RCr 4.40

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6. Plea Negotiations
 - (a) Fight about Use, *Chipman* and *Darden*
 - (i) If nothing on record about child's use of firearm, sentenced as child
 - (b) Try for lesser – any lesser: *Canter* (with possible waiver under *Kozak*)
 - (i) If offense plead to is not an offense that the child could have been transferred to adult court for, sentenced as child
7. Legal Issues – The Circuit court will not be familiar with these Juvenile Standards and you will need to educate the judge with case law.
 - (a) Statements
 - (i) KRS 610.200: police must advise child of their rights and notify the child's parent or other appropriate adult
 - (ii) KRS 610.220: police can only hold a child for 2 hours unless granted an extension by judge, trial commissioner or CDW
 - (b) Miranda Waiver Standard different for children than adults
 - (i) *JDB v. North Carolina*, 564 U.S. 261 (2009): U.S. Supreme Court held a child's age properly informs the Miranda custody analysis, so long as the age of the child was known to the officer at the time of questioning or would have been objectively apparent to the officer.
 - (ii) Also look at *Commonwealth v. Bell*, 365 S.W.3d 216 (Ky. App. 2012) talking about statements that are obtained at school.
 - (c) School searches standard different
 - (i) *T.L.O. v. New Jersey*, 469 U.S. 325 (1985).
 - (ii) *Lamb v. Holmes*, 162 S.W.3d 902 (Ky. 2005).
 - (d) Control the language – CHILD
 - (e) Sex offenses – read the statutes very carefully – age matters!!!!
 - (i) If your client is charged with something that happened years ago, check the statutes from the year the event occurred – if the charge would be less serious (a D Felony instead of a C Felony for example) or if it would not have been a crime at the time your client gets the benefit of the old statute.
 - (ii) If the law is better for your client now than it was at the time the event allegedly occurred (unlikely) then your client gets the benefit of the new statute.
 - (iii) Ex Post Facto is the principle.
8. U.S. Supreme Court Decisions
 - (a) *Roper v. Simmons*, 543 U.S. 551 (2005)
 - (b) *Graham v. Florida*, 560 U.S. 48 (2010)
 - (c) *Miller v. Alabama*, 567 U.S. 460 (2012)
 - (d) *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016)
 - (e) Language from *Miller* quoting *Roper* and *Graham*: *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, “they are less deserving of the most severe punishments.” *Graham*, 560 U.S., at 68, 130 S.Ct., at

2026. Those cases relied on three significant gaps between juveniles and adults. First, children have a “ ‘lack of maturity and an underdeveloped sense of responsibility,’ ” leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S., at 569, 125 S.Ct. 1183. Second, children “are more vulnerable ... to negative influences and outside pressures,” including from their family and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child’s character is not as “ well formed” as an adult’s; his traits are “less fixed” and his actions less likely to be “evidence of irretrievabl[e] deprav[ity].” *Id.*, at 570, 125 S.Ct. 1183.

9. Sentencing

- (a) Intitial Sentencing – PSI done by DJJ [if not done by DJJ, object, *Gourley v. Commonwealth*]
 - (i) Probation or Commitment or Prison if over 18
 - (ii) *Layw Thomas v. Com*, 605 S.W.3d 545, (Ky. 2020), abrogated on other grounds. – Youthful Offender also deemed a violent offender is still entitled to consideration of probation on violent offense even though he was well over 18 at the time of sentencing. Cert was denied.
- (b) 18 year old hearing
 - (i) Probation or Commitment for 5 more months or Prison
- (c) 18 and 5 month hearing
 - (i) Probation or Prison
- (d) Shock Motion
- (e) *Merriman v. Commonwealth*, 265 S.W.3d 196 (Ky. 2008)
 - (i) ALWAYS eligible for probation and shock probation no matter what the charges or plea is
 - (ii) NEVER waive this right
- (f) *Edwards v. Harrod*, 391 S.W.3d 755 (Ky. 2013) Parole Eligibility not affected by KRS 640. Youthful offenders still have to do 85% for violent offenses if not probated or shock probated or if probation violated
- (g) Special Note about aggravated penalties: No child defendant is eligible for the death penalty. *Roper v. Simmons*; No child is eligible for LWOP in Kentucky, see KRS 640.040, *Shepherd v. Com* (2008) and *Phon v. Com* (2018)
- (h) Special Note about Youthful Offenders who are also Sex offenders: review any offer with at least one other experienced defender and/or reach out to Appeal/JPDB. There are some exceptions to registration for some YO-JSO outcomes. There are sometimes questions about whether a YO-JSO can be probated under KRS 532.045
 - (i) *Taylor v. Com* seems to bar JSO-YO sibling offender from probation. *Bloyer v. Com* is still pending MDR to the SCOKY. Arguing *Merriam* and KRS 640.030 require the court to consider probation notwithstanding any other restrictions on probation.

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I Have a Youthful Offender Case, Now What? Checklist**In Juvenile Court (Pre-Transfer)**

1. Have a detention hearing if first appearance in court
 - (a) Nail down facts, make sure your client hears what police are saying
2. Try to plea
 - (a) Even if pleading as charged, it prevents transfer
 - (b) Even if your client has a defense, it is important to talk about pleading at this point so your client understand options and serious consequences of transfer
3. Even consider an open plea
4. Look at County's notice – what type of hearing are they trying to have?
 - (a) Make sure the County is filing notice
 - (b) Have they complied with the statute requiring consultation with the Commonwealth Attorney before filing for transfer KRS 635.020
 - (c) Make sure hearing falls under statute County Using
 - (i) Prosecutor must elect which transfer theory for the 10 Factors
 - (d) Multiple prongs?
 - (i) File objection using Double Jeopardy
 - (e) Ask for discovery
 - (i) Should get for 10 factors hearing
 - (f) Competency
 - (i) Similar to discovery – should be able to raise in 10 factor hearings
 - (ii) *Commonwealth v. B.H.*, 548 S.W.3d 238, 249 (Ky., 2018) youthful offenders have the right to a competency hearing in juvenile court before a transfer hearing that is based on use of a firearm
 - (A) Effective assistance requires counsel to move for a hearing if and when a defendant's competency may be at issue. This is so because inherent in effective representation is a client who can also assist in the preparation of a defense. A child, and *B.H.* herein, has the right to present testimony and cross-examine witnesses at a preliminary hearing. See KRS 645.070(3) and (4). Had the district court not considered the issue of competency, it would have infringed on *B.H.*'s right to effective assistance of counsel."
 - (B) "It is this advancement in the law that persuades this Court to determine the General Assembly intended children to remain under the jurisdiction of the district courts, except in the most extreme circumstances." *Commonwealth v. B.H.*, 548 S.W.3d 238, 247 (Ky., 2018)
 - (iii) Client over 18 now
 - (A) Motion to dismiss Stale Complaint
 - (B) Fight about whether or not Commonwealth or police purposefully

delayed in an effort to be able to transfer. See *Harris v. Com.*, 338 S.W.3d222, 229 (Ky. 2011).

(iv) Sex Case (usually 10 factors or over 18)

(A) Equal Protection Challenge

(B) Boy and girl both under age of consent, only boy charged for consensual act

(C) Felony Level Enhancements when all parties are under age of consent or under 18

(D) Ex parte funds motion for Sex Offender Evaluation

(E) Use good evaluation to argue child can be treated in community

5. 10 factors

(a) Can your ASW help? Start working on an ASP

(b) Ex parte funds motion for Expert for factors

(i) If overruled in chambers, ask to be heard on the record ex parte to preserve for appeal

(c) Constitutional Challenge based on Evolving standards of decency

(i) *Roper, Graham, Miller*

(ii) Find lay witnesses to testify about factors – NAACP, Pastor, mentor, youth groups, coaches, any community member

6. How to Win

(a) Control the language – CHILD

(b) It is NEVER in a child's best interest to be transferred to adult court

(c) Have a plan if the case does not get transferred

(i) Maximum jail time – 90 days

(ii) Probation

(iii) Commitment [minimum 6 months, see KRS 635.090]

(iv) Counseling

(d) If weak factual case, fight fight fight

7. Bond

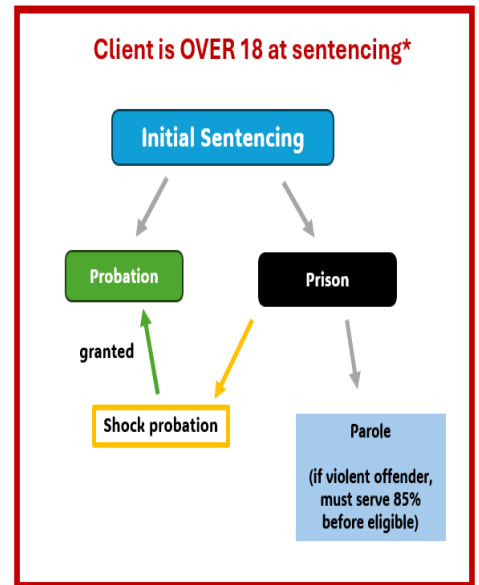
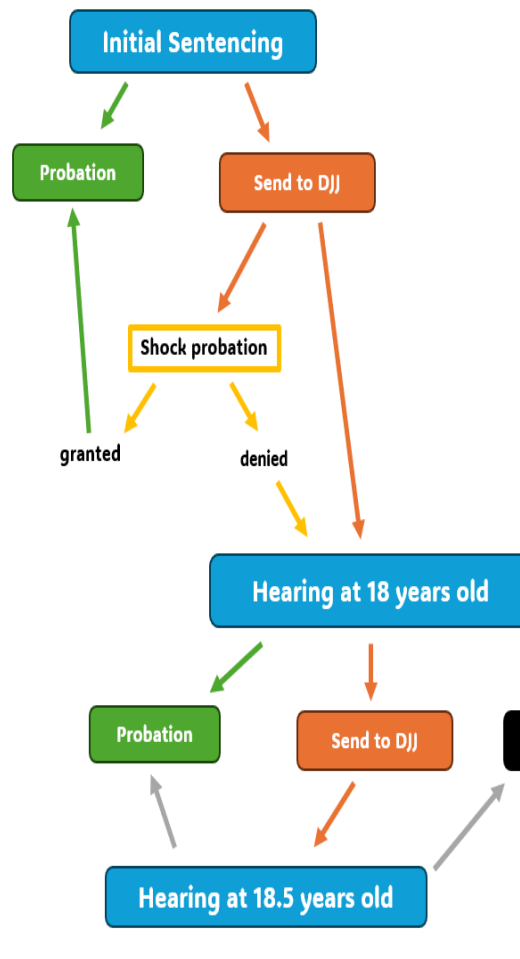
(a) Entitled to pretrial interview and all bond advocacy an adult would be immediately after transfer hearing in juvenile court

8. Motion to reconsider (transfer decision) – this can delay indictment, or in the alternative create an avenue to dismissal of the indictment if the grand jury indicts before the motion is decided upon.

Youthful Offender Cheat Sheets

Sentencing Options and Limits for Youthful Offender

Client is UNDER 18 at sentencing*



*If sentenced as a kid, see KRS 635.060 for dispositional options

KRS 640.040 Sentences never available to YO:

- Death Penalty
- LWOP
- PFO

Youthful Offender Cheat Sheet

Transfer Eligibility

STATUTES	OFFENSE AT THE TIME CHARGED	AGE AT THE TIME OF THE OFFENSE	COUNTY ATTORNEY MUST CONSULT WITH CW ATTORNEY?	TRANSFER HEARING TYPE
KRS 635.020(2) KRS 640.010	Class A or B Felony	14 and over	yes	Discretionary probable cause & 10 factor
KRS 635.020(3) KRS 640.010	Class C or D felony PLUS a prior felony adjudication	16 and over	yes	Discretionary probable cause & 10 factors
KRS 635.020(4)	Any felony PLUS firearm used by the child in commission of offense	14 and over	yes	Discretionary probable cause & 10 factor
KRS 635.020(5)	Any felony PLUS prior YO conviction	Under 18	yes	Discretionary probable cause & 10 factor
KRS 635.020(7)	Any felony PLUS currently over the age of 18	Under 18	yes	Discretionary probable cause & 10 factors
KRS 635.020 (4)(b)	Class A, B, C felony PLUS firearm used by the child	15 and over	yes	PC + age “automatic”

Checklist of Motions to File Before a Transfer Hearing

MOTION	LEGAL AUTHORITY / ARGUMENT
Motion for release from detention	KRS 610.265, KRS 610.280
Motion for discovery	RCr. 7.24, KRS 610.080(2), Due Process, <i>Kent v. United States</i> , 383 U.S. 541 (1966)
Motion for competency evaluation	KRS 504.100, 6 th Amendment Right to Counsel, Due Process, <i>B.H. v. Commonwealth</i> & JCRPP 17
Motion to exclude evidence that would be suppressed at trial	Due Process, <i>In re Gault</i> , 387 U.S. 1 (1966), <i>Crisp v. Mayabb</i> , 668 F.2d 1127 (10 th Cir. 1981)
Motion for mitigation expert/gang expert/ etc.	Due process – relate to transfer factors
Motion to declare transfer statute unconstitutional	Due process, Equal Protection
Motion to dismiss/deny transfer based on selective prosecution	Due process, Equal Protection
Motion to dismiss because stale complaint (charged after 18)	Due process, fundamental fairness, Equal Protection
Motion for bifurcated hearing	KRS 664.010
Motion to close courtroom/exclude press	KRS 610.070, KRS 610.340, <i>FTP v. Courier Journal</i> , 774 S.W.2d 444 (Ky. 1989), <i>Johnson v. Simpson</i> , 433 S.W.2d 644 (Ky. 1968)

Checklist of Motions to Make/File after Client is Transferred

DISCRETIONARY TRANSFER	LEGAL AUTHORITY
Notice to GJ that can send case back to juvenile court	RCr. 5.08
Motion for bond/bond reduction	KRS 610.015(1), KRS 640.020, KRS 431.520, JCRPP 20
Motion to dismiss for lack of SMJ because insufficient findings/ unconstitutional	<i>Harden v. Commonwealth</i> , 885 S.W.2d 323 (Ky. App. 1994)
Motion to exclude juvenile record	<i>Manns v. Commonwealth</i> , 80 S.W.3d 439 (Ky. 2002)
Motion for mitigation expert for sentencing	KRS 31.185, <i>Hodge v. Commonwealth</i> , 68 S.W.3d 339 (Ky. 2001)
Motion to sentence as a juvenile	<i>Chipman v. Commonwealth</i> , 313 S.W.3d 95 (Ky. 2010)
Jury instructions on use of firearm	<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)
Jury instructions on mitigating factors of youth	<i>Miller v. Alabama</i> , 567 U.S. 460 (2012)
Jury instruction: no mandatory minimum for youth	Experimental <i>Miller</i> , <i>Montgomery</i> , <i>Jones</i> , <i>Graham</i> , <i>Roper</i> , 8 th Amendment
Jury instructions: no 85% parole eligibility for youth	Experimental, incorporating <i>Graham</i> , <i>Miller</i> etc. 8 th Amendment

POST-DISPOSITION

Appeals

Children are entitled to appeal as matter of right from an adjudication and order of disposition. That includes disposition of a status, public, or juvenile sexual offense appealed to circuit court (or from family court to the Court of Appeals). Any contested or disappointing disposition is subject to appeal; at minimum there may be a least restrictive alternative argument. Any contempt adjudication/disposition may be appealed. Probation revocations may also be appealed. Supervised placement revocations can be challenged administratively, by declaratory action, or writ against DJJ. Other post disposition challenges include motions to terminate commitment under KRS 610.120 and motions to vacate or set aside a disposition related 11.42 or 60.02 grounds as well as motions for conversion to commitment to CHFS for survivors of human trafficking.

Defense counsel should appeal any case in which the child pleaded and the disposition was different from what they bargained for, unless the judge's decision was justifiable on the facts, and there were no significant procedural errors at disposition.

Appeals Basics

Children have a right to appeal, among other Constitutional rights. Though the U.S. Supreme Court did not grant right to transcript on appeal in this landmark 1967 case, Kentucky law provides for a right to have a record of all court proceedings. Furthermore, Gault holds that if the trial court fails to make a transcript, the appellant is entitled to subpoena the trial judge (and presumably the prosecutor or other court personnel) to establish the record on appeal. *In Re Gault*, 387 U.S. 1 (1967).

Setting up for Success

1. Make the record
2. Motion - written or oral
3. get a ruling
4. if hearing is denied- supplement the record
5. appeal every case

Preserve issues by motion, including all possible grounds for relief. Request a hearing and if denied, request an offer of proof. If refused each of these, object on the record. If there is no time to make the motions in writing, make them orally. If a ground for relief in a written motion is omitted, supplement orally on the record. Be as specific as possible so that relief can be possible through an appeal. In cases with confessions, voluntariness must be addressed. Challenges have to be supported by evidence and specific argument to the trial court to win on appeal.

Any case where a trial was held and the child was adjudicated for the offense should be appealed.

NOTE: An adjudication of lesser offense is acquittal of greater, so cannot do worse on appeal in that situation. Generally, though, the court cannot impose harsher disposition on retrial without a change in circumstances, so cannot do worse there either.

No appeal challenging the transfer of jurisdiction from juvenile to circuit court can be pursued prior to conclusion of the case in circuit court because a waiver or transfer order does not, in itself, deny a child his liberty or punish him in any manner. Once the case is disposed of by plea or trial in circuit court, the issues preserved to challenge the transfer can be raised on appeal. However, if the child pleads guilty, counsel must ensure it is a conditional guilty plea to permit a challenge to the transfer of the case to Circuit Court. *Buchanan v. Commonwealth*, 652 S.W.2d 87 (Ky. 1980)

Issues from the transfer to circuit court should be properly preserved. If those issues are not properly preserved, there will be no relief from the appellate courts. (See Transfer Hearings Chapter.)

The first court of review in juvenile cases originating in district court is the circuit court. If the circuit court denies an appeal that presents a substantial factual issue or a question of law, its action is reviewable by the Court of Appeals. *Dryden v. Commonwealth*, 435 S.W.2d 457 (Ky. 1968).

Defense counsel should file for a stay of the disposition in the trial court first. Granting a motion to stay proceedings is in the discretion of the trial court. RCr. 12.04(4)

Appeal must be filed within 30 days of disposition order.

JPDB will handle the appeal if timely notice of it is given. (Don't count on the clerk to do that).

Informal Adjustment

The Supreme Court of Kentucky held that, by the plain language of the Juvenile Code (KRS 610.130 and KRS 600.020(28)) [now KRS 600.020(36) and KRS 610.130], an informal adjustment was not a final or appealable order adjudicating all the rights of all the parties in an action or proceeding. At no point was there a final action by the District Court; there was, rather, a decision not to act. In this particular case, the Commonwealth was the party trying to appeal. *Commonwealth v. C.J.*, 156 S.W.3d 296 (Ky. 2005).

However, if the Informal Adjustment process is being used illegally against a child, an appeal can be brought to challenge the enforcement of terms. *Commonwealth v. Q.M.*, 459 S.W.3d 360 (2015).

Right to Confront Only Waivable by Express Decision of Child

The right to confrontation is personal and can only be waived by defendants. At two separate trials, consolidated on appeal, facts established that the trial court had excluded everyone from the courtroom except a bailiff, the prosecutor, and defense counsel, and questioned the alleged victims (who were very young) outside the presence of the defendants, who had not waived this right. While a child witness can testify outside the presence of the accused under certain circumstance, pursuant to KRS 421.350, the Commonwealth did not establish the prerequisites for applying this statute. Though defense counsel failed to object in both cases, the violation of the defendants' constitutional rights was not harmless error, as the alleged victims were the only eyewitnesses. *Commonwealth v. M.G.*, 75 S.W.3d 714 (Ky. Ct. App. 2002).

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Stays Pending Appeal

Stays pending appeal are discretionary in juvenile dispositions (see RCr. 12.04(4)). The child must at least ask the appellate court to grant the stay, and if the appellate court refuses, there is some potential relief through an extraordinary writ of mandamus. *M.M. v. Williams*, 113 S.W.3d 82 (Ky. 2003).

PRACTICE TIP: When appealing a case, a stay must first be filed in the trial court and then a stay can be filed in the appellate court.

Waiver of Right to Appeal

Even though the appellate court found the transfer of a child's case to circuit court to be invalid, the Supreme Court of Kentucky held that the child had failed to raise any claim of error in the transfer in the lower court. Therefore, the child waived any claim of error in the transfer. *Commonwealth v. Davis*, 80 S.W.3d 759 (Ky. 2002). See *Commonwealth v. Thompson*, 697 S.W.2d 143, 144 (Ky. 1985), which held that "the utter failure to preserve any inadequacies of the juvenile procedure is fatal to the question on appellate review."

A defendant's failure to challenge the factual prerequisites to the circuit court's jurisdiction in a youthful offender case at the district and circuit courts is ordinarily a waiver. *Jackson v. Commonwealth*, 363 S.W.3d 11 (Ky. 2012). See *Commonwealth v. Davis*, 80 S.W.3d 759, 760–61 (Ky. 2002); As a result, except in certain circumstances, these "issue[s] cannot be raised on appellate review." *Davis*, 80 S.W.3d at 760; see also *Thompson*, 697 S.W.2d at 14. Wherever the line between these two types of jurisdictions falls in juvenile cases, what is clear in *Davis* and *Thompson* is that the waiver rule does not apply when the transfer order is facially insufficient.

A child can waive his right to appeal from a public offense adjudication by entering an admission under KRS 610.080 unconditionally and by indicating that he does so knowingly, intelligently, and voluntarily with his attorney present and encouraging his plea. Although a child does not enter a guilty plea, his admission to allegations in the petition has much the same effect as such a plea, including barring any appeal other than one claiming no offense had been charged or one upon which the admission was conditioned on that appeal's preservation. If not preserved by a conditional plea and stated reservation of the issue, the contested issue is waived for purposes of direct appellate review even if trial counsel made an earlier objection. *B.H. v. Commonwealth*, 494 S.W.3d 467 (Ky. 2016).

Once a waiver of right to appeal is established to be knowing and intelligent, the waiver may not be held unenforceable because a district court erroneously states that the defendant has the right to appeal in a subsequent proceeding, such as sentencing. *United States v. One Male Juvenile*, 117 F.3d 1415 (4th Cir. 1997) (not mandatory, but persuasive because several other circuits follow this general rule).

Writs

Extraordinary writs of mandamus or prohibition are available in two classes of cases: (1) upon a showing that the lower court is acting without jurisdiction and no remedy is available from an intermediate court and (2) upon a showing that no adequate remedy

by appeal is available and that great and irreparable injury would occur. Only the first of these is mandatory. *K.R. v. Commonwealth*, 360 S.W.3d 179 (Ky. 2012).

A writ of prohibition may not be available when the court is acting within its jurisdiction because contempt is considered a discretionary act of the court. *Eaton v. Commonwealth*, 562 S.W.2d 637 (1978).

A writ of mandamus is the appropriate remedy when the district court fails to transfer a child's case to circuit court as required by the mandatory transfer statute. Note that, here, the court held that due to the interlocutory nature of a transfer order, there was no remedy by appeal, so the Commonwealth had to proceed via writ. The reverse should also be true. If the child is transferred, a writ to the Court of Appeals is the avenue for relief. *K.N. v. Commonwealth*, 375 S.W.3d 816 (Ky. App. 2012).

Writ of prohibition is the appropriate remedy for a child's claim that the circuit court lacked jurisdiction to try her as an adult for robbery. However, prohibition is not an appropriate remedy for claims that the statute governing transfers to circuit court is unconstitutional, where a child would have adequate remedy for those claims on appeal.

Hooten v. Jennings, 2005 WL 1412486 (Ky. 2005) *unpublished*.

NOTE: There is still an argument that a writ would be appropriate for a transfer hearing that was either outside the court's jurisdiction or with arguments of why appeal is not an appropriate remedy such as loss of confidentiality, etc.

A child must at least ask the appellate court to grant a stay pending appeal, and if the appellate court refuses, some potential relief is available through an extraordinary writ of mandamus, rather than through habeas corpus. *M.M. v. Williams*, 113 S.W.3d 82 (Ky. 2003).

Probation Revocation

Basics

1. The Court can proceed by contempt for violation of the court's orders or probation revocation proceedings.
 - (a) Children cannot be committed as a result of a probation revocation unless commitment was probated at disposition, the child and charges were eligible for commitment, AND the probated commitment and consequences of violation were explained to the child at disposition.
2. Children are to be afforded the same rights as adults regarding the revocation of probation or parole. *Morrissey v. Brewer*, 408 U.S. 471 (1972). Morrissey also requires that the case be heard by a "neutral and detached" body. If the hearing officer is a DJJ employee, including if he or she is under contract to DJJ as a hearing officer, such officer cannot fit the neutral and detached requirement. *Id.*
3. Commonwealth must serve written notice of specific alleged probation violations in juvenile cases. *Q.C. v. Commonwealth*, 164 S.W.3d 515 (Ky. App. 2005).
 - (a) A review cannot legally be transformed into a probation revocation hearing

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without prior written notice to the client of violations.

- (b) A court does not have jurisdiction to detain a child when that child is not provided written notice of the specific grounds that constituted the alleged probation violation before that child appeared in court. Here, the court additionally erred when it heard arguments from the Cabinet, the County Attorney, and others without the child's counsel being present. *A.C. v. Commonwealth*, 314 S.W.3d 319 (Ky. App. 2010).
- (c) Use this and Burge to argue that the same notice requirements should be present for a contempt hearing. See also, Contempt Chapter.

Restitution

A juvenile session of district court retains jurisdiction over a child, who has since turned 18, having been accused of committing a public offense before turning 18 in order to conduct adjudication and disposition hearings. Additionally, the court may order and enforce orders of restitution with contempt powers. *Commonwealth v. S.K.*, 253 S.W.3d 486 (Ky. 2008).

A child's failure to appear at a restitution hearing constitutes a waiver of the right to challenge the restitution amount, and a juvenile court's order for the amount supported by evidence provided by the Commonwealth is proper. In *J.D.N. v. Commonwealth*, additionally, the court also noted that the juvenile court has continuing jurisdiction over an individual past the age of 18 to set or enforce a restitution obligation. This includes situations where the child has had a disposition prior to 18 but where a restitution hearing was not held until after 18. *J.D.N. v. Commonwealth*, 2012 WL 1447989 (Ky. App. 2012) *unpublished*.

A trial court is expressly authorized by the Juvenile Code to order a child to pay restitution, and joint and several liability can be applied to criminal cases even though it has been outlawed in tort cases in Kentucky. In *K.B. v. Commonwealth*, however, the court also said: "We echo the comments of the Franklin Circuit Court when it cautioned that joint and several liability in a juvenile restitution order is not appropriate in all cases and must only be ordered if rehabilitative in nature and to promote the child's best interest." *K.B. v. Commonwealth*, 2012 WL 28679 (Ky. App. 2012) *unpublished*.

A trial court has discretion to find a child that acted in complicity with others to commit second degree criminal mischief to be solely responsible for restitution because of the language of KRS 635.060 granting that discretion. *R.S. v Commonwealth*, 423 S.W.3d 178 (Ky. 2014).

NOTE: As of July 1, 2014, the court's jurisdiction ends when a child completes a disposition pursuant to KRS 635.060. The court cannot reopen a case when the child has completed the required disposition. KRS 610.010(14).

Resources

NOTES

This is not an exhaustive list, rather some helpful studies, books, and other resources that can assist in defending children. * denotes it is publicly available through NJDC/The Gault Center.

Race Justice

The Rage of Innocence: How America Criminalizes Black Youth by Kris Henning
Pushout by Monique W. Morris

Brain Science and/or Culpability

Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 *Developmental Psychol.* 625 (2005).

O'Brien et al., *Adolescents Prefer More Immediate Rewards when in the Presence of Their Peers*, 21 *J. Res. On Adolescence*, 747 (2011).

Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 *Developmental Sci.* F1 (2011).

Laurence Steinberg & Katherine Monahan, *Age Differences in Resistance to Peer Influence*, 43 *Developmental Psych.* 1531 (2007).

Laurence Steinberg et al., *Age Differences in Sensation-Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 *Developmental Psychol.* 1764 (2008).

Elizabeth P. Shulman & Elizabeth Cauffman, *Reward-Biased Risk Appraisal and Its Relation to Juvenile Versus Adult Crime*, 37 *Law & Hum. Behav.* 412 (2013).

Michael Dreyfuss et al., *Teens Impulsively React rather than Retreat from Threat*, 36 *Developmental Neuroscience* 220 (2014).

Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 *Child Dev.* 28 (2009).

Jodi Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29 *Law & Hum. Behav.* 723 (2005).

Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 *Law & Hum. Behav.* 333 (2003).

S.P. Becker & P.K. Kerig, *Post-traumatic Stress Disorder Symptoms are Associated with the Frequency and Severity of Delinquency Among Detained Boys*, 40 *J. of Clinical Child & Adolescent Psychol.* 765 (2011).

Addressing the Intersections of Juvenile Justice Involvement and Youth Homelessness: Principles for Change by Coalition for Juvenile Justice <http://www.juvjustice.org/sites/default/files/ckfinder/files/FINAL%20Principles%20-%20ns%20final.pdf>



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