

Invited Testimony/Written Statement
Proposed Amendments to United States Sentencing Guidelines
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Introduction

I am grateful for the opportunity to provide input on these proposed amendments to the United States Sentencing Guidelines. As a psychologist specializing in research and scholarship on the psychological aspects of crime and violence, and practice involving juvenile adjudication, transfer and decertification, and criminal sentencing of youthful offenders, my interests overlap to some extent with the substance of the proposed amendments. I offer relevant information and impressions accordingly.

Balancing culpability against risk in youthful offenders (generally meaning between the ages of 15-17 but transferred into criminal system; it may also refer to individuals up to about 25) is challenging. My focus is more on cognitive and psychosocial maturity rather than on the specifics of brain development, given my training and areas of specialization. My comments focus primarily on risk of violence and reoffending, a topic that has been studied extensively in behavioral science in the last three decades. I focus to a lesser extent on culpability, as that is not a construct that can be studied scientifically as easily. It is harder to operationalize and is, moreover, something that courts decide based on enumerated considerations that can affect blameworthiness but are also influenced by values and morality—components about which science cannot inform us.

I also cite recent science and scholarship on the potential use of risk assessment in sentencing decisions. To the extent that the priority in sentencing is punishment/retribution, then prison incarceration addresses that—as well as providing incapacitation and promoting general and specific deterrence. However, when the goal of rehabilitation is prioritized more highly, and if that rehabilitation is successful, then risk of future reoffending is reduced and public safety and specific deterrence goals are also met.

Youthful offenders (between 15-25) are in a stage of human development in which greater change is observed *and* life skills essential for responsible living in the community are developing. Changes in family, peer influence, education, and job acquisition are necessary during this age period. Limiting the opportunity to develop these skills has more impact on youthful individuals than it does with older individuals, consequently.

Balancing diminished culpability against higher risk also involves considering individual differences in both culpability and risk, as well as the group-based differences in these areas related to youthful age. Risk of violence and other reoffending can be informed through specialized risk assessment measures such as the Structured Assessment of Violence Risk in

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Youth, the Youth Level of Service/Case Management Inventory and the Level of Service/Case Management Inventory (see Douglas & Otto, 2021). Using such measures to appraise risk, identify rehabilitation targets, and gauge responsivity to interventions is an approach that has been used increasingly over three decades (see Andrews et al., 1990), has important implications for rehabilitation, and allows discretionary consideration of individual differences. Not all youthful offenders are high risk; this is best appraised through consideration of risk informed by a specialized measure. The usefulness of such measures in the criminal justice system has been more limited than it could have been—and may be improved with more attention to implementation (Viljoen & Vincent, 2020).

The culpability of youthful offenders can be informed by detailed consideration of their lives, including risk factors over which they have little or no choice. Risk of future offending can be informed by use of specialized risk assessment measures that also have implications for addressing needs in a way that maximizes responsivity. An approach to legal reform called “preventive justice” (Slobogin, 2021, 2023) that prioritizes the use of risk assessment and public safety over punishment and retribution has the potential for maximizing the use of scientific knowledge and resources in sentencing and promoting rehabilitation.

Summary of Major Points to be Offered in Testimony

1. There is good consensus in scientific literature on two points
 - a. Youthful offenders are within the cohort of highest risk (ages 15-24) for violence and other criminal offending
 - b. Youthful offenders are also within the cohort of more limited culpability due to developmental immaturity, with characteristics such as impulsivity, greater risk-taking, poorer time perspective, and greater influence by peers (Steinberg, 2009)
 - c. No additional science, to my knowledge, is available that would modify those conclusions
2. However, risk and developmental immaturity also vary within this age cohort
 - a. Risk is affected by a variety of risk and protective factors, some personal and some situational, that are
 - i. Identified in the scientific literature
 - ii. Appraised with reasonable accuracy by well-validated risk assessment measures such as SAVRY and Level of Service family measures
 - iii. Subject to being lowered through rehabilitative intervention with appraisal of accurate risk and needs, and availability of right programming
 - iv. The biggest scientific limitation is in the area of responsivity (likely favorable response) to relevant risk-reducing interventions. This is unfortunate, because this is a question of great interest to sentencing judges focusing on risk and rehabilitation.
 - b. Developmental maturity

- i. Youthful age and developmental immaturity are risk factors for criminal offending, but there are others measured by formal risk assessment (e.g., family, peers, criminal thinking, antisocial conduct, criminal history, substance abuse, leisure time)
 - ii. Hard to research regarding culpability, which is an outcome that varies by judges and individual cases rather than being clearly quantifiable (as is risk, where the outcome is violent or other criminal behavior)
 - iii. Developmental immaturity is one aspect of adolescence, but the pace and nature of maturation may be impeded by
 1. Intellectual functioning
 2. Behavioral health
 3. Learning disabilities
 3. One approach to using science more effectively to inform sentencing would encourage courts to seek information on risk assessment (risk, needs, and responsivity) using scientifically-validated measures
 - a. Level of risk
 - b. Needs relevant to risk that are intervention targets
 - c. Would involve increasing the focus on prevention and decreasing the focus on retribution in the cohort of youthful offenders

Regarding Computing Criminal History for Offenses Committed Prior to Age Eighteen

1. The Commentary indicates that “attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records,” and thus only certain offenses committed prior to age eighteen are counted.
2. Among the offenses that are “never counted” for purposes of criminal history score are “juvenile status offenses and truancy.”
3. Seeking to balance various considerations related to sentencing youth, including
 - a. Difficulties in obtaining supporting documentation for juvenile adjudications
 - b. Difficulties in assessing “confinement”
 - c. Recent brain development research
 - d. Demographic disparities
 - e. Higher rearrest rates for younger individuals
 - f. Public protection
4. Three options described for considering sentences prior to age 18
 - a. Option 1: exclude juvenile sentences from receiving two criminal history points
 - b. Option 2: exclude all juvenile sentences from being considered in calculation of criminal history score
 - c. Option 3: exclude all juvenile sentences from being considered in calculation of criminal history score but providing that such sentences may be considered for purposes of upward departure

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Response: *I would favor Option 1 or Option 3. Neither attach the same weight to juvenile sentences (as is appropriate considering reduced culpability in youth) but both allow this information to be used for other purposes. One such purpose is the calculation of a criminal history score. A related purpose would involve a more comprehensive risk assessment which includes (but is not limited to) criminal history. From a risk assessment perspective, it is relevant to know the age at first juvenile sentence, the number of such sentences, and the seriousness of the offenses for which the individual was sentenced. For defendants who are 30+ years old, the consideration of this kind of juvenile information at sentencing can help inform the court whether the individual displays a pattern of life-course persistent offending.*

Additional Issues for Comment (p. 36)

1. The Commission seeks general comment on juvenile court systems and sentencing of youthful individuals. In particular, the Commission requests input on: (a) how different jurisdictions sentence younger individuals (*e.g.*, youthful rehabilitation statutes); (b) how judges make decisions regarding residential placement or confinement upon an adjudication of guilt; (c) the factors that influence transfer to adult court for offenses committed prior to age eighteen; (d) racial disparities; and (e) practices related to expungement and sealing of records in different jurisdictions. For example, are there particular research studies, experts, or practitioners that the Commission should consult?

Response: *Risk and treatment amenability are important considerations in transfer and reverse transfer decisions. Some youthful offenders in the criminal system would have been in the juvenile system but for the decision to transfer (or deny the motion for reverse transfer). But given the evidence for racial disparities and potential bias (Franklin & Henry, 2020; Perillo et al., 2023) and my anecdotal observation that youth with very serious charges are rarely retained in the juvenile system, I find it particularly important that these revisions prioritize risk and rehabilitation—two criteria that should be applied to a youthful cohort particularly, even when they are in the criminal system.*

2. The Commission seeks comment on whether it should make any of the changes set forth in Part A of the proposed amendment with respect to juvenile sentences and sentences for offenses committed prior to age eighteen for purposes of Chapter Four, Part A (Criminal History). Should the Commission limit any of the options based on: (a) the type of crime involved in the offense committed prior to age eighteen; (b) the age of the individual at the time of the offense committed prior to age eighteen; or (c) any other factor? Should the Commission consider an alternative approach in accounting for offenses committed prior to age eighteen, such as a downward departure?

Response: *Addressed in my earlier comments.*

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3. If the Commission were to promulgate Option 2 (exclude juvenile sentences) or Option 3 (exclude all sentences for offenses committed prior to age eighteen) in Part A of the proposed amendment, should the Commission provide that any such sentence may be considered for purposes of an upward departure under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) as provided in the bracketed language? If so, should the Commission limit the consideration of such departures to certain offenses?

Response: *If an upward departure is considered based on Option 3, I would urge that this be limited to the most serious offenses (homicide), and further limited to those offenses in which aggravating circumstances outweigh diminished culpability.*

4. Option 3 would amend subsection (d) of §4A1.2 (Definitions and Instructions for Computing Criminal History) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score. This change would impact the use of predicate offenses in multiple guidelines, including §§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition,; Prohibited Transactions Involving Firearms or Ammunition), 2L1.2 (Unlawfully Entering or Remaining in the United States), and 4B1.2 (Definitions of Terms Used in Section 4B1.1). Some of these guideline provisions were promulgated in response to directives, such as 28 U.S.C. § 994(h). The Commission invites comment on whether Option 3 exceeds the Commission's authority under 28 U.S.C. § 994 (h) or any other congressional directives.

Response: *I have no particular expertise on which to base a response.*

5. If the Commission were to promulgate any of the options in part A of the proposed amendment and amend subsection (d) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), should the Commission make any changes to §3B1.4 (Using a Minor to Commit a Crime)? If so, what changes should the Commission make? For example, should the Commission expand the scope of application or increase the magnitude of the adjustment? If so, how?

Response: *I have no particular expertise on which to base a response.*

Regarding Age (p. 38)

Part B of the proposed amendment would amend the first sentence in §5H1.1 to delete "(including youth)" and "if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines." Thus, the first sentence in §5H1.1 would provide

solely that “[a]ge may be relevant in determining whether a departure is warranted.” It would also add language specifically providing for a downward departure for cases in which the defendant was youthful at the time of the offense and set forth considerations for the court in determining whether a departure based on youth is warranted.

Responses:

1. The policy as written notes that “Age may be a reason to department downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.”
 - a. *This might also be cited as a justification for the downward departure in sentencing youth, when “home confinement might be equally efficient and less costly than incarceration.”*
 - i. *Rehabilitation of serious and violent youthful offenders in the community generally is comparably effective, or more effective, than incarceration, according to the scientific literature on community-based interventions for youth in the juvenile system (Heilbrun et al., 2016)*
 - ii. *Family is an important context for rehabilitating youth*
 1. *When dysfunctional, family is an important risk factor for offending*
 2. *Used as context for empirically-supported tx of youth*
 - a. *Multi-Systemic Therapy*
 - b. *Treatment Foster Care Oregon*
 - c. *Functional Family Therapy*
 3. *Harder to involve family for youth who are incarcerated, particularly for longer sentences*
2. The policy as written indicates “Scientific studies on brain development showing that psychosocial maturity, which involves impulse control, risk assessment, decision-making, and resistance to peer pressure, is generally not developed until the mid-20s.”
 - a. *It's not fully developed. Most adolescents avoid justice involvement despite psychosocial maturity that is still developing.*
 - b. *It's also differentially developed for individuals depending upon*
 - i. *situation*
 1. *educational*
 2. *family*
 3. *housing*
 4. *neighborhood*
 5. *social support*
 - ii. *personal characteristics*
 1. *intellectual functioning*
 2. *academic skills*

3. *behavioral health symptoms*
 4. *substance abuse*
 5. *trauma*
 - iii. *Disproportionately high percentage of youthful offenders have behavioral health diagnosis, relative to peers in general population (McGarvey, 2012) and experience of traumatic events is also disproportionately high (Keels, 2024)*
 - c. *Can lower risk through changing situational and/or personal variables*
 - d. *It's important to distinguish between cognitive maturation (executive functioning, logical reasoning, perspective-taking), which in normative adolescents generally occurs around age 16, and psychosocial maturation (self-regulation, impulse control) which continues into early to mid-20s (Steinberg & Icenogle, 2019).*
3. The written policy indicates "Research showing a correlation between age and rearrest rates, with younger individuals rearrested at higher rates and sooner after release than older individuals."
 - a. *This is well-supported empirically (US Sentencing Commission Report, 2021)*
 - b. *However, age is only one risk factor for reoffending (US Sentencing Commission, 2017)*
 - c. *Risk can be meaningfully distinguished among youthful offenders through formal risk assessment (Douglas & Otto, 2021) although bias influenced by stigma associated with extreme behavior and other forms of cognitive bias, including racial disparities (Franklin & Henry, 2020; Perillo et al., 2023), can be problematic in more subjective risk appraisal (Casey et al., 2022).*
 - d. *A "preventive justice" approach (Slobogin, 2021, 2023) would rely in part upon risk assessment to distinguish youth at high risk from those at lower risk*
 - i. *Culpability/blameworthiness is core to considering incarceration for purpose of punishment/retribution. (From a rehabilitative perspective, generally speaking, punishment is effective in suppressing certain behavior in the short term, but less effective in the long run than building alternative skills and motivation to behave in a different way.)*
 - ii. *Risk assessment is core to considering who can be rehabilitated under what conditions. But community-based rehabilitation depends in part on the availability of MST or other empirically-supported approaches to treating youthful offenders. Also depends on using specialized risk assessment measures and addressing challenges to their use through implementation science.*
 - e. *Consider also desistance vs. life-course persistence, with the great majority of youthful offenders (even serious) desisting by early to mid-20s (Mulvey et al., 2010). Once goal of rehabilitation is to "speed up" desistance. Another goal is to provide needed skills and opportunities for individuals who can use them*

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effectively in the community when they return (e.g., job, attitudes, decision-making, family, substance abuse avoidance)

Additional Issues for Comment (p. 38)

1. The Commission seeks general comment on sentencing of younger individuals, including how to balance brain development research suggesting potentially lower culpability with research on higher rearrest rates and potential dangerousness. The Commission further seeks comment on any relevant developments in legal or scientific literature relating to the impact of brain development and age on youthful criminal behavior. For example, are there particular research studies, experts, or practitioners that the Commission should consult?

Response: *Please see my earlier comments.*

2. The commission seeks comment on whether it should amend §5H1.1 (Age Policy Statement) as set forth in Part B of the proposed amendment or otherwise change the provision in any other way with respect to youthful individuals. Should the Commission include additional or different factors for courts to consider in determining whether a downward departure based on youth may be warranted.

Response: *My comments up to this point have been fairly specific. I will now offer a final comment incorporating a broader overview. Youthful offenders are at a critical stage of life. Most will desist from offending with some combination of life influences and targeted interventions. A smaller sub-group will persist in offending through the life course. As clinical science advances, we should see fewer and fewer life-course offenders. At present, the principles of proportionality, accountability for misconduct and responsibility to the larger society should require youthful offenders to work to develop the skills necessary to live responsible, productive lives—but should also provide them the opportunity to do so.*

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